

STATE OF NEW YORK  
SUPREME COURT COUNTY OF HAMILTON

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FRIENDS OF THAYER LAKE LLC., et al.

Index No. 6803-10

Plaintiffs,

RJI. No. \_\_\_\_\_

-against-

Hon. \_\_\_\_\_

PHIL BROWN, et al.,

Defendants,

ANSWER,  
AFFIRMATIVE DEFENSES  
AND VERIFIED  
COUNTERCLAIM

and

THE STATE OF NEW YORK and the  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION,

Proposed Intervenors-Defendants.

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The State of New York and the Department of Environmental Conservation of the State of New York ("DEC"), by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, answer the allegations in the correspondingly numbered paragraphs of the amended complaint as follows:

1. Admit that the "Lake Lila Tract" and the "Whitney Tract" have been re-acquired by the State of New York and that Lilypad Pond, Mud Pond, Mud Pond outlet, and Shingle Shanty Brook are shown in plaintiffs' Exhibit A, and that plaintiffs' "Exhibit A" is a portion of a publication of the DEC relating to the William C. Whitney Wilderness Area, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

2. Admit the amended complaint asserts causes of action, denies their validity.

3. Upon information and belief, admit FOTL is a limited liability company under the laws of New York, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

4. Deny having knowledge or information sufficient to form a belief as to the allegations.

5. Deny having knowledge or information sufficient to form a belief as to the allegations.

6. Deny having knowledge or information sufficient to form a belief as to the allegations.

7. Deny having knowledge or information sufficient to form a belief as to the allegations.

8. Deny having knowledge or information sufficient to form a belief as to the allegations.

9. Deny having knowledge or information sufficient to form a belief as to the allegations.

10. Admit.

11. Deny having knowledge or information sufficient to form a belief as to the allegations.

12. Deny having knowledge or information sufficient to form a belief as to the allegations.

13. Deny having knowledge or information sufficient to form a belief as to the allegations.

14. Deny having knowledge or information sufficient to form a belief as to the allegations.

15. Deny having knowledge or information sufficient to form a belief as to the allegations.

16. Deny having knowledge or information sufficient to form a belief as to the allegations.

17. Deny having knowledge or information sufficient to form a belief as to the allegations.

18. Admit.

19. Deny having knowledge or information sufficient to form a belief as to the allegations.

20. Deny having knowledge or information sufficient to form a belief as to the allegations.

21. Admit that the Mud Pond Parcel is located in the northeastern corner of township 39 and that it is bounded by Forest Preserve classified as wilderness, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

22. a. Admit that the westerly portion of Lilypad Pond straddles the northeastern boundary of the Mud Pond parcel, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

b. Admit that the easterly portion of Lilypad pond is situated on State land, that Lilypad Pond and Mud Pond are connected, and that Shingle Shanty Brook is a tributary of Lake Lila, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

c. Deny having knowledge or information sufficient to form a belief as to the allegations.

d. Deny having knowledge or information sufficient to form a belief as to the allegations.

e. Admit part of Shingle Shanty Brook flows generally in an easterly direction across Mud Pond parcel, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

f. Deny that a Mud Pond Waterway exists or is an apt reference to these waters, as Mud Pond is merely a widened area that receives waters from sources on State land before again flowing onto State land; asserts that the State will refer to this as the "Waterway on Mud Pond Parcel", or the "Waterway," otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

23. Admit the Waterway contains "No Trespassing" signs threatening prosecution and deny the remaining allegations including that the signs are "legally posted."

24. Upon information and belief, deny the Waterway never had a commercial use, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

25. Deny having knowledge or information sufficient to form a belief as to the allegations.

26. a. Admit that there is a camp structure near Mud Pond, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

b. Admit that there is a footbridge near Mud Pond, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

c. Admit that there is a portage trail in the vicinity of Mud Pond, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

27. Deny having knowledge or information sufficient to form a belief as to the allegations.

28. Admit the State owns the Lake Lila Tract, otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

29. Admit.

30. Admit the allegations concerning what is depicted on the map; otherwise deny having knowledge or information sufficient to form a belief as to the remaining allegations.

31. Deny.
32. Upon information and belief, deny the Shingle Shanty Brook never had a commercial use, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.
33. Deny having knowledge or information sufficient to form a belief as to the allegations.
34. Deny having knowledge or information sufficient to form a belief as to the allegations.
35. Admit the property was conveyed to the State, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.
36. Admit, and state that the portion of Lilypad Pond on the Mud Pond Parcel is narrower than the portion of the pond on State land.
37. Admit that Lilypad Pond outlets and flows into Mud Pond, deny having knowledge or information sufficient to form a belief as to the remaining allegations.
38. Deny.
39. Deny.
40. Deny.
41. Admit.
42. Deny.

43. Upon information and belief, deny that Lilypad Pond and the Waterway never had commercial use, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

44. Deny having knowledge or information sufficient to form a belief as to the allegations.

45. Admit, and refer the court to the exhibit for its complete text, context, meaning, and legal effect.

46. Admit.

47. Admit.

48. Admit; affirmatively state that the carry was constructed to allow public access to the area as the public right of navigability was unresolved and DEC was aware that private landowners might institute legal actions against paddlers.

49. Admit.

50. Admit.

51. Deny having knowledge or information sufficient to form a belief as to the allegations.

52. Admit.

53. Deny the allegations and affirmatively state that the public has the right to travel to Lilypad Pond from Lake Lila either by traversing the navigable waterway of the Mud Pond Parcel, or by taking the portage.

54. Admit that the portage provides a link between Shingle Shanty Brook and Lilypad Pond; admit it is lawful for the public and Boy Scout group to be on the

State land, but deny that the portage must be used to lawfully travel that  
Waterway.

55. On information and belief, admit.

56. Deny.

57. Deny.

58. Admit.

59. Deny and affirmatively state that put in and take out options also exist  
at Lows lower dam, Round Lake, and Bog River Falls.

60. Admit travel between Little Tupper Lake to Lake Lila crosses a  
watershed, otherwise deny having knowledge or information sufficient to form a  
belief as to the allegations.

61. Deny having knowledge or information sufficient to form a belief as to  
the allegations.

62. Deny having knowledge or information sufficient to form a belief as to  
the allegations.

63. Admit the Whitney Loop requires crossing the divide between the  
Black and Raquette Rivers and deny the remaining allegations.

64. Admit that 6 N.Y.C.R.R §190.8(a), not 9 N.Y.C.R.R as referenced by  
plaintiffs, has that language; refer the court to the text of 6 N.Y.C.R.R § 190.8 for its  
complete text, context, meaning, and legal effect, and affirmatively state that this  
regulation has never been interpreted as preventing Adirondack businesses,  
including stores, outfitters, and guides, from renting and selling watercraft, food, or



gear at other locations for use in those waterways or from preventing Adirondack guides from leading excursions in State Forest Preserve.

65. Admit that 6 N.Y.C.R.R § 190.24(d), not 9 N.Y.C.R.R § 190.24(d) as referenced by plaintiffs, provides that “no person shall conduct any business, buy, sell, offer or expose for sale, hire, lease or vend any article or merchandise of any kind at any boat launching site,” refer the court to the text of 6 N.Y.C.R.R § 190.24 for its complete text, context, meaning, and legal effect; affirmatively state that this regulation has never been interpreted as preventing Adirondack businesses, including stores, outfitters, and guides, from renting and selling watercraft, food, or gear at other locations for use in those waterways or from preventing Adirondack guides from leading excursions in the State Forest Preserve.

66. Deny, and affirmatively allege that the correct citation for the regulation cited therein is 6 N.Y.C.R.R § 190.33(b)(5) and (6) which refers only to the Whitney Area portion of the Whitney Loop, and refers the court to the text of 6 N.Y.C.R.R § 190.33(b)(5) and (6), for its complete text, context, meaning, and legal effect.

67. Deny.

68. Deny.

69. Deny having knowledge or information sufficient to form a belief as to the allegations.

**FIRST CAUSE OF ACTION:**  
**TRESPASS**

70. Repleads the answers to the allegations in ¶¶ 1-69 of the amended complaint.

71. Admit that the Adirondack Explorer is a periodical that states that its editor is Phil Brown, otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

72. Admit that in an article published in the Adirondack Explorer entitled *Testing the Legal Waters*, the author describes paddling this route in May 2009; deny that he described paddling the "Whitney Loop" as described in plaintiffs' Exhibit P; otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

73. Admit that any member of the public has a right lawfully to travel a portion of the Whitney Traverse either by using the Public Portage between Lilypad Pond and Shingle Shanty Brook or by paddling the navigable waterways of Lilypad Pond, Mud Pond, and its outlet to Shingle Shanty Brook; otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

74. Admit that the article *Testing the Legal Waters*, describes not taking the carry; otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

75. Admit that the article *Testing the Legal Waters*, describes what the author wrote he saw and did, otherwise denies having knowledge or information sufficient to form a belief as to the allegations.

76. Admit that the article *Testing the Legal Waters*, describes what the author wrote he saw and did; otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

77. Deny having knowledge or information sufficient to form a belief as to the allegations, deny all subparagraphs since they describe use of the easement of the public right of navigability and as such is not a trespass.

78. Admit that the article, *Testing the Legal Waters*, stated to be authored by Phil Brown, was published in the July/August 2009 issue of the "Adirondack Explorer," otherwise deny having knowledge or information sufficient to form a belief as to the allegations.

79. Deny having knowledge or information sufficient to form a belief as to the allegations.

80. Deny having knowledge or information sufficient to form a belief as to the allegations.

81. Admit that Phil Brown wrote an article in the November/December 2010 Adirondack Explorer entitled *DEC Sides With Paddlers* and deny having knowledge or information sufficient to form a belief as to the remaining allegations; deny that a trespass occurs when one travels on navigable waters.

82. Deny having knowledge or information sufficient to form a belief as to the allegations.

83. Deny having knowledge or information sufficient to form a belief as to the allegations.

84. Deny.

**SECOND CAUSE OF ACTION:**  
**DETERMINATION OF CLAIMS TO REAL PROPERTY**

85. Repleads the answers to the allegations in ¶¶ 1-84 of the amended complaint.

86. Admit that the defendant Brown claims that the Waterway is navigable-in-fact; otherwise deny.

87. Deny.

88. Deny.

**THIRD CAUSE OF ACTION:**  
**DECLARATORY JUDGMENT**

89. Repleads the answers to the allegations in ¶¶ 1- 88 of the amended complaint.

90. Deny that plaintiffs are entitled to the requested declaration.

**WHEREFORE CLAUSE AND PRAYER FOR RELIEF**

Deny that the plaintiffs are entitled to any judgment in their favor or to any relief requested.

## AFFIRMATIVE DEFENSES

1. All causes of action of the amended complaint must be dismissed for failure to state causes of action.
2. The waters in the Mud Pond Parcel, namely Lilypad Pond, Mud Pond, its outlet, and Shingle Shanty Brook are part of a navigable waterway that the public has a right to traverse for travel or trade, whether for recreational or commercial purposes; the public right of navigation includes the right to use the stream bed and banks as necessarily incident to the exercise of the right of navigation.
3. The 1851 deed by which the State of New York conveyed the Mud Pond Parcel to plaintiffs' claimed predecessor in title did not convey to the purchaser the public easement of the right to travel on navigable waterways.
4. Plaintiffs Friends of Thayer Lake, LLC, took title to the Mud Pond Parcel by deed dated December 27, 2007, which deed acknowledges and states that it is subject to the right of the public to navigate the surface waters of Lilypad Pond, Mud Pond, its outlet, and Shingle Shanty Brook, and states that the deed was subject to any and all easements whether of record or not, and the right of public navigability is such an easement.

## VERIFIED COUNTERCLAIM

Intervenors-Defendants, State of New York, and the New York State Department of Environmental Conservation ("DEC") (collectively the "State"), by Eric T. Schneiderman, Attorney General of the State of New York as and for a counterclaim, alleges as follows:

### NATURE OF THIS ACTION

1. This counterclaim is pursuant to the common law of public nuisance to address plaintiffs' interference with a public right. Specifically, the plaintiffs have prevented, discouraged and interfered with, and continue to prevent, discourage and interfere with, passage on navigable waters of the State of New York to which the public has a common law right. This counterclaim also seeks to enforce DEC's obligation to provide for care and custody of the forest preserve and assure public access to the forest preserve.

2. This counterclaim seeks a declaration that the waters which flow from Salmon Lake outlet to Lake Lila and en route flow through the Mud Pond Parcel, including Lilypad Pond, Mud Pond, its outlet, and Shingle Shanty Brook, are part of a navigable waterway, and also seeks an injunction barring defendants from interfering with the public's use of this public easement.

3. The Attorney General is authorized to bring an action concerning interference with a public right of way and to obtain injunctive relief under Executive Law § 63(1) and the common law.

## FACTS COMMON TO ALL CAUSES OF ACTION

### THE PARTIES

4. The defendant-intervenor State of New York is a sovereign entity that brings this *parens patriae* action on behalf of its citizens and residents

5. Defendant-intervenor DEC is an executive department of the State of New York charged with enforcing the Environmental Conservation Law (“ECL”) and regulations promulgated pursuant to the ECL.

6. Upon information and belief and as stated in the amended complaint, the plaintiff Friends of Thayer Lake LLC (“FOTL”) is a limited liability company organized under the laws of the State of New York, has a place of business at Brandreth Lake, Town of Long Lake, Hamilton County, New York, and to has acquired, in December 2007, fee ownership of the real property which includes the “Mud Pond Parcel” as described in the amended complaint of FOTL.

7. Upon information and belief and as stated in the amended complaint, the plaintiff Cathryn Potter is treasurer of the plaintiff Brandreth Park Association (“Brandreth”), an unincorporated association of 90 unidentified individual owners or ownerships with a place of business in Town of Long Lake, Hamilton County, New York, whose members claim rights in the Mud Pond Parcel, and brought the amended complaint as representative of all members of Brandreth.

8. Upon information and belief and as stated in the amended complaint, the plaintiff Brandreth Park Association Recreational Trust has a

place of business in the Town of Long Lake, Hamilton County, New York, and consists of an unspecified number of unidentified members who are holders of property interests in the Mud Pond Parcel; plaintiff Cathryn Potter is Trustee of the Association, and brought the amended complaint as representative of all members of the Association.

9. Upon information and belief and as stated in the amended complaint, the plaintiff William L. Bingham, Jr., is a member of the Brandreth Park Association and a holder of property interest in the Mud Pond Parcel.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction pursuant to the common law, Executive Law § 63(1); ECL §§ 3-0301, 9-0105(9); CPLR 3017; and Judiciary Law § 140-b.

11. Pursuant to CPLR §§ 503 and 507, venue lies in Hamilton County because the subject matter of the action is situated there and the judgment demanded would affect the use or enjoyment of real property there.

### **LEGAL AND FACTUAL FRAMEWORK**

#### **A. The Right of Public Navigability and Public Nuisance**

12. A waterway that is navigable-in-fact is considered a public highway notwithstanding that its banks and bed are in private hands.

13. Waters are navigable-in-fact if they have practical utility for transport, whether for trade or travel.

14. Recreational use of waters is within the traditional test of navigability.



15. Natural obstructions do not render a waterway not navigable, and a person navigating a body of water has the right to use, when necessary, the bed and banks and riparian lands to bypass obstructions.

16. A carry, also referred to as a portage, is a means of land travel during a water journey in which the traveler "carries" watercraft and gear from one portion of the water journey to another, to bypass obstructions such as waterfalls, rapids or shallows.

17. Whether a water is navigable and hence a public right of way does not impair property rights as property owners retain their full property rights subject to the long-recognized navigational servitude, which is an easement that they never owned.

18. Interference with the public right of navigation on waters that are navigable-in-fact violates the common law and constitutes a public nuisance which may be abated in an action by the Attorney General.

19. The DEC is responsible for managing State lands and preserving the resources of the Adirondack forest preserve. See ECL §§ 1-0101(2), 1-0101((3)(d), 3-0301(d), 9-0105(1).

20. The DEC is authorized to bring an action to enforce the State's interest in real property. ECL § 9-0105(9).

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**B. Navigability in the Adirondacks.**

21. The Adirondack Park contains many waterways such as rivers, streams, ponds and lakes which historically have been used as a means of travel, and for hunting and fishing.

22. The Adirondacks is a nationally recognized canoe and kayak destination. The April/May 2009 issue of *National Geographic Adventure Magazine* lists the Adirondacks' canoe waters as number 5 in its "50 Best American Adventures," a copy of which is appended hereto as Exhibit 1. That article mentions paddling the waters in this portion of the Adirondacks.

23. There are many long-recognized water routes in the Adirondacks which require carries and which cross watershed divides including, for example the water route between Old Forge and Saranac Lake or Paul Smiths, crossing two and three watersheds respectively.

24. In the 19<sup>th</sup> century, Adirondack water routes were used by year-round residents to hunt, fish, and travel and for commercial operations by Adirondack guides or hotel owners.

25. Adirondack guides transported clients by water routes to locations to camp, hunt, fish, and tour. The guides would provision the trip and attend to all camp chores – cooking, cleaning, setting up camp, etc.

26. Today, many commercial enterprises in the Adirondacks provide guiding services, gear, outfitting, supplies, information, maps and books for

persons who wish to paddle, camp, relax, and enjoy the beauty of the Adirondacks.

27. Guides also still offer full guiding services on day and overnight excursions.

**C. The William C. Whitney Wilderness Area and the Mud Pond Parcel**

28. As relevant to this case, the William C. Whitney Wilderness Area ("Whitney Area"), consists of State lands which include Lake Lila, a portion of Shingle Shanty Brook, Lilypad Pond, Little Salmon Lake, Salmon Lake outlet, Hardigan Pond, Frank Pond, Rock Pond, and Little Tupper Lake. The DEC brochure and its map for the Whitney Area are attached as Exhibit 2.

29. The waters of the Whitney Area are popular paddling destinations, visited by close to or more than two thousand persons a year, primarily in the months of May through October.

30. There is ready and easy public access to parking areas for the Whitney Area waters of Lake Lila and Little Tupper Lake via a road off State Route 30 less than 10 miles north of the Town of Long Lake and about 12 miles south of the Village of Tupper Lake.

31. The separate parking areas for Lake Lila and Little Tupper Lake are about 8 miles apart by road.

32. Both Lake Lila and Little Tupper Lake can also be reached by water routes which include carries.

33. Lake Lila, in the western part of the Whitney Area, has twenty-four designated camping areas.

34. Shingle Shanty Brook flows into Lake Lila between marked campsites 16 and 17, and is a short distance from others.

35. Shingle Shanty Brook provides access to State land and waters in the eastern portion of the Whitney Area, including Lilypad Pond, Little Salmon Lake, Salmon Lake outlet, Hardigan Pond, Frank Pond, Rock Pond, Little Tupper Lake, and Round Lake. Whitney Area map, Exhibit 2.

36. The State owned waters on both the eastern and western portions of the Whitney Area are accessible from public lands.

37. Some of the waters on the eastern part of the Whitney Area, including Frank Pond, Hardigan Pond, Salmon Lake outlet and Little Salmon Lake, flow into Lilypad Pond and then ultimately into Lake Lila.

38. The differently named bodies of water between Salmon Lake outlet and Lake Lila are hydrologically connected because the waters flow directly from one pond to another, with ponds existing only where the topography allows water to pool before continuing its flow to Lake Lila.

39. Approximately in the middle of the flow of waters from State owned Hardigan Pond to State owned Lake Lila, the waters flow through a corner of the Mud Pond Parcel, in which plaintiffs claim property interests. The relatively small distance during which these waters flow through the Mud Pond Parcel, namely from the end of Lilypad Pond through Mud Pond and into Shingle Shanty

Brook, is shown on the Whitney Area Map, Exhibit 2; on a map of the area prepared by DEC appended hereto as Exhibit 3; and on the map appended to the amended complaint as Exhibit R.

40. The waters flowing between State land boundaries through the Mud Pond Parcel are named, at various points, Lilypad Pond, Mud Pond, the outlet of Mud Pond, and Shingle Shanty Brook.

41. After flowing through the Mud Pond Parcel and re-entering State land, the waters continue their flow in Shingle Shanty Brook until they empty into Lake Lila.

42. In addition to the accessible waters on State land in the eastern portion of the Whitney Area, the DEC has designated campsites on Little Salmon Lake, Salmon Lake outlet, and Hardigan Pond. These sites are accessible by paddling from Lake Lila, up Shingle Shanty Brook, over the outlet of Mud Pond, Mud Pond, and Lilypad Pond. In doing so, the traveler passes through the Mud Pond Parcel.

43. These sites can also be reached by travel from Little Tupper Lake and Rock Pond.

#### **D. Navigability of the Waters**

44. The Mud Pond Parcel was acquired by FOTL from the Nature Conservancy by deed dated December 27, 2007, attached as Exhibit 4 (the "2007 Deed"), which acknowledges the navigability of the waters on the Parcel and

specifies that FOTL took the property subject to the right of the public to navigate the waters, stating that it was:

SUBJECT also to the right of the public to navigate the surface waters of Lilypad Pond, Mud Pond, the outlet leading from Mud Pond to its confluence with Shingle Shanty Stream, and Shingle Shanty Stream northeasterly from its confluence with the Mud Pond outlet to the property line between the lands herein conveyed and lands owned by the State of New York.

Notwithstanding the foregoing, the Grantee may place "no trespassing" signs notifying the public that the lands are privately owned and are not accessible for hunting, hiking, fishing, picknicking, camping and other public recreational purposes.

45. The 2007 deed also states that it is "SUBJECT to any and all easements . . . whether of record or not." 2007 Deed, Exhibit 4.

46. The easement of a public right of way for travel on a navigable waterway pre-existed the 2007 deed, and indeed, the 1851 deed from the State.

47. The plaintiffs' attorney filed the 2007 deed in the public record of the Hamilton County Clerk's Office, and the public was thereby on notice of the terms of the deed.

48. Apparently in recognition of the weakness of their claim that they may legally bar public navigation on the waters, plaintiffs' predecessor in title, Potter Properties Inc., purported to transfer, by Bargain and Sale deed dated December 21, 2007, the claimed *1974 Retained Recreational Rights* of "hunting and fishing and all recreation rights and privileges" to Potter Properties, LLC, defining those rights to include canoeing, kayaking, paddling, and "navigating on

the Shingle Shanty Stream or any of its tributaries in any kind of vessel including but not limited to canoes, kayaks, rafts and floats.”

49. Potter Properties Inc. never possessed the exclusive right of navigation on all tributaries of Shingle Shanty Brook because some of them originate on State land, including Lilypad Pond, Little Salmon Lake, Salmon Lake outlet, Hardigan Pond, and Frank Pond, hence its attempt to convey such rights is void, of no effect and not enforceable.

50. Potter Properties Inc. never possessed the exclusive right of navigation on the waters of Lilypad Pond, Mud Pond, the outlet of Mud Pond, and a portion of Shingle Shanty Brook because the right of the public to navigate the waterway was never possessed by Potter Properties Inc., hence its attempt to convey such rights is void, of no effect and not enforceable.

51. Plaintiff FOTL took title to the Mud Pond Parcel on full notice that the Parcel was surrounded on the east and west by the Whitney Area and that waters that originated on State land east of the Parcel flowed through the Parcel to State land on the west.

52. Waters between Salmon Lake outlet and Lake Lila are part of a waterway that is navigable-in-fact, in that they are of sufficient depth for a sufficient period of time, in their natural capacity, to have practical utility for transport, whether for trade or travel.

53. On information and belief, these waters were used for recreational travel in the 19<sup>th</sup> century and are suitable for recreational travel today.

54. On information and belief, these waters were used for commercial travel in the 19<sup>th</sup> century and are suitable for commercial travel today.

55. During the past decade, many paddlers have navigated over the waterway between Little Salmon Lake outlet and Lake Lila.

56. The defendant Phil Brown wrote an article in the Adirondack Explorer entitled *Testing the Legal Waters*, (the "article"), attached hereto as Exhibit 5, in which he described a traverse from Little Tupper Lake to Lake Lila.

57. Brown's article reported that from the time he left State land on Lilypad Pond until the time he again re-entered it, he paddled the entire time except for one brief carry of 4 minutes around an obstruction, which he stated was one of the shortest and easiest carries he had done in the Adirondacks. *Id.* at 49.

58. He reported in the article that the water was deep and wide enough for paddling and that the waterway was "obviously navigable in the everyday sense of the word." *Id.* at 49.

59. The waters that flow through the Mud Pond Parcel were inspected on June 22, 2010, by DEC Assistant Commissioner for Natural Resources, Christopher Amato and DEC Director of the Division of Lands and Forests, Robert Davies (collectively the "DEC officials"), at the invitation of the Brandreths.

60. The DEC officials twice paddled the entire water route on the Mud Pond Parcel between State land boundaries on Lilypad Pond and Shingle Shanty Brook, paddling both upstream and downstream.



61. The DEC officials found no difficulty in traversing the waterway by canoe, either upstream or downstream, observed that the water depth was far more than adequate for travel by water.

62. The DEC officials did not have to leave their watercraft at any point in the journey except for a short carry around shallow rapids at the outlet of Mud Pond.

63. The DEC officials estimated that this carry around the obstacles was about 100 yards long.

64. The DEC officials concluded that the volume and height of the water gave the water route navigable capacity and that it was part of a navigable-in-fact water route.

65. The DEC officials also concluded that since the sources of water that flowed through the Mud Pond Parcel included Frank Pond, Hardigan Pond, and Little Salmon Lake as well as other waters beyond, that the traverse was most likely not only navigable during sufficient time to make it navigable-in-fact, but that it was most likely navigable during the entire paddling season from May to October.

66. The DEC officials further concluded that this traverse could be susceptible to commercial use.

#### **E. Plaintiffs' Obstruction of the Waterway**

67. Beginning at a time not yet determined until the present, plaintiffs have and continue to interfere with the public right of navigation along this water

route by placing at their claimed property boundaries on Shingle Shanty Brook and Lilypad Pond various items that interfere with the right of public navigability, including cables across the waterways, "no trespassing" signs threatening prosecution of those who pass those points, and cameras to intimidate persons who use the public right of navigability.

68. On information and belief, almost all law-abiding paddlers traveling between Lake Lila and Lilypad Pond and the waters east of Lilypad Pond, or vice versa, do not continue their rightful journey on the navigable waterway because they are intimidated by the plaintiffs' cables across the waterway, and their "No Trespassing" signs which threaten prosecution or because they believe that the signs have a legal basis.

69. Following the site inspection by the DEC officials, the Brandreths' attorney wrote a letter demanding that DEC criminally prosecute any who paddled the waters of the Mud Pond Parcel. Letter of Dennis Phillips, Esq., to DEC, dated July 23, 2010 ("July 23 Brandreth letter"), attached hereto as Exhibit 6.

70. DEC responded with a renewed effort to achieve an accommodation which would include a trial period during which there would be access over the waterway. Letter from DEC to Phillips dated July 27, 2010 ("July 27 DEC letter"), attached hereto as Exhibit 7.

71. The Brandreths again demanded that DEC commence criminal prosecutions. Letter from Phillips to DEC dated September 3, 2010, attached hereto as Exhibit 8.

72. DEC replied that DEC had concluded that the water route was navigable-in-fact after full consideration of the case law and the facts of these waterbodies, including the findings from the DEC site visit. DEC also replied that members of the public were entitled to use the waterway for travel, and that the plaintiffs' actions interfering with navigation was illegal and that they should discontinue all efforts to interfere with, impede or prevent public navigation of those waters, including cables, "no trespassing" signs, cameras, and any other actions, as such constituted a nuisance. Letter from DEC to Phillips dated September 24, 2010 ("September 24 DEC Letter"), attached hereto as Exhibit 9.

73. On information and belief, plaintiffs have not discontinued their actions interfering with, impeding or preventing public navigation, and instead have instituted this action seeking punitive damages to further deter persons from exercising the right of public navigation.

#### **FIRST CAUSE OF ACTION:**

#### **A DECLARATORY JUDGMENT THAT THE WATER ROUTE IS NAVIGABLE**

74. The State repeats and realleges each allegation above.

75. The waters at issue in this case between Salmon Lake outlet and Lake Lila, including the waters flowing between the State's property boundary on

Lilypad Pond and its property boundary on Shingle Shanty Brook, to wit, Lilypad Pond, Mud Pond, and from the outlet of Mud Pond to Shingle Shanty Brook, and Shingle Shanty Brook until it crosses the State property boundary, are part of a water route that is navigable-in-fact.

**SECOND CAUSE OF ACTION:**

**A DECLARATORY JUDGMENT  
THAT DEFENDANTS HAVE MAINTAINED A PUBLIC NUISANCE**

76. The State repeats and realleges each allegation above.

77. The cables, signs, and cameras placed by plaintiffs at the bounds of their claimed property interest, as well as their threats of criminal and civil prosecution for trespass and demands for punitive damages, interfere with the right of the public to use this portion of a navigable-in-fact water route and constitute a public nuisance.

78. Defendants have deprived the public of its rightful use of the easement of navigability for more than a decade.

**WHEREFORE**, the State of New York and the Department of Environmental Conservation respectfully request an order and judgment:

A. Declaring that the waters consisting of Lilypad Pond, Mud Pond, the outlet of Mud Pond, and Shingle Shanty Brook that are within the bounds of the Mud Pond Parcel are part of a waterway that is navigable-in-fact, and are subject to the easement of the public to use for purpose of travel or trade; and

B. Declaring that the following constitute a public nuisance in that they constitute obstructions which interfere with the public's right of use of the easement of navigability: (i) plaintiffs' cables across the waterways; (ii) plaintiffs' cameras which photograph members of the public; (iii) plaintiffs' signs which threaten or suggest that persons who use the navigable waters could be prosecuted criminally or civilly for trespass; (iv) plaintiffs' statements or writings that assert or suggest that persons who paddle over the waters between the state boundary on Lilypad Pond to that on Shingle Shanty Brook can be subjected to criminal or civil prosecutions; and (v) any other action that indicates that members of the public may not use the easement of public navigability.


C. Enjoining plaintiffs to remove all such obstructions listed in paragraph B, above, and permanently enjoining plaintiffs from placing or maintaining any obstruction to the public's right of passage on the navigable waterways, or threatening or suggesting in any way that passage on the waters is not legal or allowed;

D. Declaring that the Bargain and Sale deed dated December 21, 2007, and recorded in the records of Hamilton County beginning on page 549 of book 243, is void and of no legal effect.

E. For such other and further relief which this Court may find to be just and equitable, together with costs and disbursements.

Dated: February 15, 2011

ERIC T. SCHNEIDERMAN  
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of the State of New York  
Attorney for New York State  
and the New York State Department  
of Environmental Conservation

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VERIFICATION OF COUNTERCLAIM

STATE OF NEW YORK )  
 ) ss.:  
COUNTY OF ALBANY )

Kenneth R. Hamm, being duly sworn, deposes and says:

I am employed as an Associate Attorney by the New York State Department of Environmental Conservation ("DEC"). I am acquainted with the facts and circumstances of this matter on the basis of my own personal knowledge, personal communications with various DEC employees and examination of the DEC's records. I have read the foregoing Counterclaim and know the contents thereof; the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief and, as to those matters, I believe them to be true.

This verification is made pursuant to the provisions of CPLR 3020(d)(2).

  
KENNETH R. HAMM  
Associate Attorney

Subscribed and sworn to before me this

15<sup>th</sup> day of February, 2011

  
NOTARY PUBLIC

SUSAN L. TAYLOR  
Notary Public, State of New York  
No. 02TA6020240  
Qualified in Rensselaer County  
Commission Expires March 1, 2011