

STATE OF NEW YORK  
SUPREME COURT

HAMILTON COUNTY

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FRIENDS OF THAYER LAKE LLC; BRANDRETH PARK  
ASSOCIATION, CATHRYN POTTER, AS TREASURER;  
AND WILLIAM L. BINGHAM, JR., INDIVIDUALLY  
AND AS A REPRESENTATIVE MEMBER OF THE  
BRANDRETH PARK ASSOCIATION,

**ANSWER**

**INDEX NO. 6803-10**

Plaintiffs,

-against-

PHIL BROWN AND JANE DOE (THE "LADY IN RED")  
AND ANY OTHER PERSON, KNOWN OR UNKNOWN,  
Defendants.

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Defendant, Phil Brown, by his attorneys, Caffry &  
Flower, for his verified answer to the complaint herein,  
alleges as follows:

1. Defendant denies knowledge or information  
sufficient to form a belief as to the truth or falsity of  
each and every allegation contained in paragraphs 1, 2, 3,  
4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20,  
21, 25, 33, 34, 35, 44, 48, 53, 69, and 73 of the  
complaint.

2. Defendant denies each and every allegation set  
forth in paragraphs 38, 39, 42, 67, 76, 84, 87, and 88 of  
the complaint.

3. Defendant admits each and every allegation set  
forth in paragraph 7 of the complaint.

4. As to paragraphs 45, 46, 52, 55, 56, 57, 58, 59, 60, 61, 62, and 63 of the complaint, Defendant states that the documents referred to therein speak for themselves, and otherwise denies each and every allegation set forth therein.

5. As to paragraphs 41, 64, 65, and 66 of the complaint, Defendant states that the laws or regulations referred to therein speak for themselves, and otherwise denies each and every allegation set forth therein.

6. As to the allegations of paragraph 22(a) of the complaint, Defendant admits that parts of Lilypad Pond are narrow and that Lilypad Pond does flow into Mud Pond, denies that Lilypad Pond lacks a navigable inlet, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof; but affirmatively states that Lilypad Pond is part of a navigable waterway.

7. As to the allegations of paragraph 22(b) of the complaint, Defendant admits that parts of Mud Pond are narrow and contain wetlands vegetation, that it is connected by surface waters to Lilypad Pond, and that it

may be shallow, admits that Lilypad Pond is located on land owned by the People of the State of New York, denies that Mud Pond lacks a navigable outlet, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof; but affirmatively states that Mud Pond is part of a navigable waterway which also includes Lilypad Pond, Shingle Shanty Brook and Lake Lila.

8. As to the allegations of paragraph 22(c) of the complaint, Defendant admits that flowing water passes over a bedrock edge at the western end of Mud Pond, denies that the so-called "Mud Pond Outlet Brook Rapids" are not navigable, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

9. As to the allegations of paragraph 22(d) of the complaint, Defendant admits that the brook described therein is winding, denies that the brook is shallow, rocky or obstructed, states that the photograph referred to therein speaks for itself, and otherwise denies

knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

10. As to the allegations of paragraph 22(e) of the complaint, Defendant admits that parts of Shingle Shanty Brook run more or less from east to west, denies that the brook is obstructed, admits that it contains curves, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

11. As to the allegations of paragraph 22(f) of the complaint, Defendant admits that some portions of the brooks described therein are lined by alder trees, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

12. As to the allegations of paragraph 23 of the complaint, Defendant admits that there are signs posted on or near some parts of the so-called "Mud Pond Waterway", states that the photograph and signs referred to therein speak for themselves, otherwise denies knowledge or

information sufficient to form a belief as to the truth or falsity of the allegations thereof; and affirmatively states that all of said signs are illegal.

13. As to the allegations of paragraph 24 of the complaint, Defendant denies that the so-called "Mud Pond Waterway" is not susceptible to any commercial use, affirmatively states that recreational paddling can sometimes be a form of commerce, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

14. As to the allegations of paragraph 26(a) of the complaint, Defendant admits that there is a camp-like structure located near the western end of Mud Pond, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

15. As to the allegations of paragraph 26(b) of the complaint, Defendant admits that there is a footbridge located near the western end of Mud Pond, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to

form a belief as to the truth or falsity of the allegations thereof.

16. As to the allegations of paragraph 26(c) of the complaint, Defendant admits that there is an upland portage trail that connects Mud Pond and Mud Pond Outlet Brook, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

17. As to the allegations of paragraph 27 of the complaint, Defendant denies that The Nature Conservancy ("TNC") possessed no rights in the so-called "Mud Pond Parcel", and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

18. As to the allegations of paragraph 28 of the complaint, Defendant denies that TNC conveyed no rights in the so-called "Mud Pond Parcel" to the People of the State of New York, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

19. As to the allegations of paragraph 29 of the complaint, Defendant states that the map referred to

therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

20. As to the allegations of paragraph 30 of the complaint, Defendant admits that part of Shingle Shanty Brook does run generally northwesterly toward Lake Lila, with many winds and turns, denies that Shingle Shanty Brook is obstructed, except for being obstructed by Plaintiffs' cable and signs, states that the map referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

21. As to the allegations of paragraphs 31, 32, and 43 of the complaint, Defendant denies that the water bodies described therein are not susceptible to use for floating logs or any other commercial use, affirmatively states that recreational paddling can sometimes be a form of commerce, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

22. As to the allegations of paragraph 36 of the complaint, Defendant admits that all or most of Lilypad

Pond is located on State Forest Preserve land, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

23. As to the allegations of paragraph 37 of the complaint, Defendant admits that the outlet of Lilypad Pond flows into Mud Pond, states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

24. As to the allegations of paragraph 40 of the complaint, Defendant denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof regarding the history of the use of Lilypad Pond, admits that Lilypad Pond is a remote Adirondack pond in the middle of the wilderness, and otherwise denies the allegations thereof.

25. As to the allegations of paragraph 47 of the complaint, Defendant states, upon information and belief, that the Lake Lila Tract was already part of the Forest Preserve prior to the acquisition of the Whitney Tract,



states that the map referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

26. As to the allegations of paragraphs 49, 50, 51, and 54 of the complaint, Defendant states that the photographs referred to therein speak for themselves, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

27. As to the allegations of paragraph 68 of the complaint, Defendant denies that the water bodies described therein are not susceptible for commercial use, trade, or travel, affirmatively states that recreational paddling can sometimes be a form of commerce, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof; but Defendant affirmatively states, upon information and belief, that the water bodies described therein have been used for navigation and travel by multiple persons, including by the Plaintiffs and their members, and their predecessors.

28. As to the allegations of paragraph 71 of the complaint, Defendant admits that he is employed as the editor of Adirondack Explorer, a newsmagazine which is owned and published by a charitable and tax exempt New York not-for-profit corporation named Getting the Word Out, Inc., which has multiple corporate purposes, and otherwise denies the allegations thereof.

29. As to the allegations of paragraph 72 of the complaint, Defendant admits that in May of 2009 he paddled and portaged his canoe from Little Tupper Lake to Lake Lila, including doing so on water bodies which are navigable in fact and some of which are part of what the complaint has defined as part of a so-called "Whitney Loop", and otherwise denies the allegations thereof.

30. As to the allegations of paragraph 74 of the complaint, Defendant admits that when undertaking the May 2009 canoe trip described above, he did not use what the complaint has defined as the so-called "Public Portage", states that the photograph referred to therein speaks for itself, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

31. As to the allegations of paragraph 75 of the complaint, Defendant admits that when undertaking the May 2009 canoe trip described above, he saw one or more signs in or near Mud Pond or Lilypad Pond, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

32. As to the allegations of the first sentence of paragraph 77 of the complaint, Defendant denies each and every allegation thereof.

33. As to the allegations of paragraph 77(a) of the complaint, Defendant admits paddling his canoe on Lilypad Pond, Mud Pond, Mud Pond Outlet Brook, and Shingle Shanty Brook on the May 2009 canoe trip described above, denies trespassing, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

34. As to the allegations of paragraph 77(b) of the complaint, Defendant admits paddling his canoe on Lilypad Pond on the May 2009 canoe trip described above, denies trespassing, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

35. As to the allegations of paragraph 77(c) of the complaint, Defendant admits paddling his canoe on Mud Pond on the May 2009 canoe trip described above, denies trespassing, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

36. As to the allegations of paragraphs 77(d) and 77(e) of the complaint, Defendant admits that while he was in the vicinity of the western end of Mud Pond and the eastern end of Mud Pond Outlet Brook during the May 2009 canoe trip described above, he did exercise his legal right to portage around a natural obstacle in a navigable waterway, denies trespassing, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

37. As to the allegations of paragraphs 77(f) and 77(g) of the complaint, Defendant admits paddling his canoe on numerous water bodies including Lilypad Pond, Mud Pond, Mud Pond Outlet Brook, and Shingle Shanty Brook during the May 2009 canoe trip described above, denies trespassing, admits enjoying said canoe trip, and otherwise denies knowledge or information sufficient to

form a belief as to the truth or falsity of the allegations thereof.

38. As to the allegations of paragraph 78 of the complaint, Defendant admits writing and causing to be published in the July 2009 edition of Adirondack Explorer an article about the May 2009 canoe trip described above, which article was illustrated with maps and photographs, states that the article referred to therein speaks for itself, otherwise denies the allegations thereof; and affirmatively states that the corporation which owns Adirondack Explorer is not a commercial entity, but is a charitable and tax exempt New York not-for-profit corporation.

39. As to the allegations of the first sentence of paragraph 79 of the complaint, Defendant admits that, on or about November 18, 2009 he posted a report on his blog on the website maintained by his employer and that he did not seek the prior consent of any court in so exercising his First Amendment rights as a journalist and an individual, states that the posting referred to therein speaks for itself, and otherwise denies the allegations thereof.

40. As to the allegations of the second sentence of paragraph 79 of the complaint, Defendant denies trespassing on the so-called "Mud Pond Parcel", admits that he has continued to exercise his First Amendment rights as a journalist and an individual to report on, and state his opinions on, the issue of whether or not the so-called "Mud Pond Waterway" is navigable in fact, otherwise denies the allegations thereof; and affirmatively states that the waterway in question is navigable in fact and that the general public does have the right to travel and navigate on it.

41. As to the allegations of paragraph 80 of the complaint, Defendant denies trespassing, and otherwise denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations thereof.

42. As to the allegations of paragraph 81 of the complaint, Defendant denies trespassing on the so-called "Mud Pond Parcel", admits that he has continued to exercise his First Amendment rights as a journalist and an individual to report on, and state his opinions on, the issue of whether or not the so-called "Mud Pond Waterway"

is navigable in fact, states that the article referred to therein speaks for itself, otherwise denies the allegations thereof; and affirmatively states that the corporation which owns Adirondack Explorer is not a commercial entity, but is a charitable and tax exempt New York not-for-profit corporation.

43. As to the allegations of paragraph 82 of the complaint, Defendant denies trespassing on the so-called "Mud Pond Parcel", admits that he has continued to exercise his First Amendment rights as a journalist and an individual to report on, and state his opinions on, the issue of whether or not the so-called "Mud Pond Waterway" is navigable in fact, states that the article referred to therein speaks for itself, denies knowledge or information about the actions and motivations of the other persons referred to therein sufficient to form a belief as to the truth or falsity of the allegations regarding their actions and motivations, otherwise denies the allegations thereof; and affirmatively states that the corporation which owns Adirondack Explorer is not a commercial entity, but is a charitable and tax exempt New York not-for-profit corporation.

44. As to the allegations of paragraph 83 of the complaint, Defendant denies having "followers", whether they be "like-minded" or otherwise, denies trespassing, otherwise denies the allegations thereof; and affirmatively states that, as a member of the public, he has the right to navigate and travel on the navigable-in-fact waterway which is at issue in this action, and further states that he has the legal right to do so again in the future.

45. As to the allegations of paragraph 86 of the complaint, Defendant denies trespassing, affirmatively states that the so-called "Mud Pond Waterway" is navigable in fact under the laws of the State of New York, and otherwise denies the allegations thereof.

46. As to paragraphs 70, 85, and 89 of the complaint, Defendant repeats and realleges each and every allegation and denial set forth above with the same force and effect as if more fully set forth herein.

47. As to the allegations of paragraph 90 of the complaint, Defendant denies sufficient knowledge or information as to what relief the Plaintiffs seek to form a belief as to the truth or falsity thereof, otherwise



denies the allegations thereof; and affirmatively states that the so-called "Mud Pond Waterway" is navigable in fact under the laws of the State of New York, so that he and other members of the public have the right to use it for navigation and travel.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

48. The complaint fails to state a cause of action.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

49. The action should be dismissed because the Plaintiffs have failed to name the State of New York as a defendant.

50. The State is a necessary party to this action by virtue of, *inter alia*:

a. being the trustee under the Public Trust Doctrine of the public's right of navigation on the waterway in question herein;

b. being the owner, on behalf of the People of the State of New York, of adjoining land in the New York State Forest Preserve that is accessed by the waterway in question herein;

c. being the owner, on behalf of the People of the State of New York, of adjoining water bodies in the New York State Forest Preserve which are part of, together with water bodies located on the lands of the Plaintiffs, a continuous navigable waterway; and

d. being the trustee, under the Public Trust Doctrine, of the public's rights in and to the Forest Preserve lands and waters adjoining said lands of the Plaintiffs, and which are accessed by said navigable waterway.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

51. The action should be dismissed because the Plaintiffs have failed to name as parties all of the members of Brandreth Park Association who claim to own certain recreational rights in the lands and waterways which are at issue in this action, and said members are necessary parties to this action.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

52. The action should be dismissed because the Plaintiffs have failed to name as a party the Brandreth

Park Association Recreational Trust, which, pursuant to allegations in paragraphs 5 and 6 of the complaint, holds certain recreational rights in the lands and waterways which are at issue in this action, so that it is a necessary party to this action.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

53. Plaintiffs lack standing to bring this action because they do not own the rights of navigation on the waterways in question herein. To the extent that they do own any exclusive recreational rights on said waterways, those rights do not include the right to navigate or recreate in boats thereon.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

54. The New York common law test of navigability in fact does not require that the waterway in question be usable for commercial purposes, be susceptible to such use, or have a history of such use, and recreational use thereof is sufficient to establish navigability in fact.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

55. Lilypad Pond, Mud Pond, Mud Pond Outlet, and Shingle Shanty Brook are navigable in fact under the common law of the State of New York, so that the public, including the Defendant, has the right of travel and navigation on these water bodies.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

56. Mud Pond, Mud Pond Outlet, and Shingle Shanty Brook are part of a navigable waterway connecting Lake Lila and Lilypad Pond, both of which are publicly owned, as well as connecting other publicly accessible waterways.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

57. Pursuant to the deed from TNC to plaintiff Friends of Thayer Lake LLC, the title of Friends of Thayer Lake LLC to the so-called "Mud Pond Parcel" is expressly subject to the public's right of navigation on the water bodies located thereon.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

58. The waterway in question herein has been determined by the State of New York to be navigable in

fact, and that the plaintiffs' attempted blockade thereof with cables and signs must be removed, so as to allow the public to utilize this navigable waterway.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

59. The complaint is not verified, and is a nullity.

WHEREFORE, Defendant Phil Brown demands judgment:

1. Dismissing the complaint;
2. Declaring that Lilypad Pond, Mud Pond, Mud Pond Outlet, and Shingle Shanty Brook are navigable in fact;
3. Awarding Defendant the costs and disbursements of this action; and
4. Granting such other and further relief as the Court may deem to be just and proper.

/s/ *John W. Caffry*

Dated: January 6, 2011

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CAFFRY & FLOWER  
Attorneys for Defendant  
John W. Caffry, Of Counsel  
100 Bay Street  
Glens Falls, New York 12801  
(518) 792-1582

TO: Dennis J. Phillips, Esq.  
McPHILLIPS, FITZGERALD & CULLUM L.L.P.  
Attorneys for Plaintiffs  
288 Glen Street, P.O. Box 299  
Glens Falls, New York 12801  
(518) 792-1174

