STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
Docket No. WALSC-RE-2019-018

JEFFREY R. MABEE, JUDITH B. GRACE, and FRIENDS OF THE HARRIET L. HARTLEY CONSERVATION AREA,

Plaintiffs,

v.

NORDIC AQUAFARMS, INC. and JANET ECKROTE and RICHARD ECKROTE,

Defendants,

And

UPSTREAM WATCH,

Cross-claim Defendant,

And

LYNDON W. MORGAN,

Party-in-Interest.

PLAINTIFFS' PRETRIAL BRIEF RELATED TO: DEFENDANTS' COUNTERCLAIMS UNDER VARIOUS THEORIES AND THE FACTUAL PARAMETERS AND VALIDITY OF THE 8-6-2018 EASEMENT OPTION, 7-11-2020 GROUND LEASE AND RELEASE DEEDS RECORDED BY NAF ON 9-23-2020

INTRODUCTION

Plaintiffs, Jeffrey Mabee and Judith Grace ("Mabee/Grace") and Friends of the Harriet L. Hartley Conservation Area ("Friends"), jointly submit their Trial Brief on issues to be presented during the Phase I Trial not related to deeded title. Plaintiffs adopt and incorporate the Trial Brief prepared by Upstream Watch on title issues as Plaintiffs' brief on the title-by-deed matters at issue in Phase I.

The stipulated evidence in the Trial Record, as well as anticipated additional testimony and evidence expected to be presented at trial, will prove that: (i) the Eckrotes did not obtain title to the intertidal land on which their lot fronts by adverse possession, boundary by acquiescence, or

abandonment; (ii) the Release Deeds recorded by Defendant Nordic Aquafarms, Inc. ("NAF") on September 23, 2020, are a nullity because the Grantors of those Release Deeds lacked any title, right, interest or estate in any land at issue in this matter to convey to NAF and were barred from so claiming by the prior judgment in this Court in *Ferris v. Hargrave* and by the 20-year statute of limitations in 14 M.R.S. § 801, *et seq*.; (iii) the easement option granted by the Eckrotes to NAF, dated 8-6-2018 (as amended on 12-23-2019), terminates, *by its own terms as a matter of law*, at the Eckrotes' high water mark and does not grant NAF any title, right or interest to use the intertidal land on which the Eckrotes' lot fronts; (iv) the July 11, 2020 "Ground Lease" granted by the Schweikerts to NAF, *as a matter of law*, is a legal nullity and should be voided, because the Schweikerts have no title, right or interest in the intertidal land on which their lot fronts; and (v) NAF's Affirmative Defense #15 and Counterclaim Count I should be addressed in the Phase I judgment and rejected, *as a matter of law*, because placement of industrial pipes in the intertidal zone to service a land-based fish factory is not "fishing" protected by the Colonial Ordinance of 1641-1647 and/or the public trust doctrine.

I. <u>SUMMARY OF ARGUMENT</u>

First, through Counterclaim Counts II and V and Affirmative Defense #8, the Eckrotes have asserted that they have obtained title to the intertidal land on which their lot fronts through adverse possession and/or boundary by acquiescence. Further, the Defendants have also suggested that Plaintiffs Mabee and Grace's lack of awareness of the full extent of their intertidal ownership could have resulted in their abandonment of title to the intertidal land on which the Eckrotes' lot fronts. However, because of the requirement under the Colonial Ordinance of 1641-1647 that the public may fish, fowl and navigate on the intertidal flats, and the public purpose served by encouraging private owners of the intertidal flats to allow permissive uses beyond fishing, fowling and navigation, the courts of this State have consistently rejected claims of title by abandonment, boundary by acquiescence and adverse possession when asserted by permissive users of intertidal

lands. More importantly, because of the nature of intertidal flats, it is virtually impossible for anyone to meet the requirements for establishing title by any of these theories, since it is both legally impermissible to exclude any persons from the use of the intertidal land for fishing, fowling and navigation (including the true owners by deed) and physically impossible and legally impermissible to erect structures to exclude use by others in the intertidal zone. Here, prior testimony submitted by Plaintiffs and Defendant Janet Eckrote reveals that the Eckrotes cannot satisfy any of the element of either adverse possession or boundary by acquiescence.

Second, NAF entered an option agreement with the Eckrotes on or about August 6, 2018 ("8-6-2018 Easement Agreement"), authorizing NAF to place three industrial pipes for intake and discharge of water into Penobscot Bay on a 25-foot wide strip of the Eckrotes' upland lot, if exercised. However, the factual parameters and legal validity of that easement option agreement have not been determined by a court of competent jurisdiction. That determination should be made here as an element of Phase I of this case. Upon evaluation of the plain meaning of the easement option granted by the Eckrotes to NAF, *as a matter of law*, the Court should declare that this option agreement, if closed, terminates, by its own terms, at the Eckrotes' high water mark – granting NAF no title, right or interest in the intertidal land on which the Eckrotes' lot fronts.[1]

Third, NAF has claimed some "partial interest" in the intertidal land on which the Eckrotes' lot fronts based on six release deeds drafted and obtained by NAF, in March-July of 2019, from ten out-of-state persons. On September 23, 2020, these release deeds were published and recorded by NAF in the Waldo County Registry of Deeds. Redacted versions of five of these release deeds were previously published by NAF in various local, State and federal administrative proceedings. NAF has referred to the Release Deed Grantors as "heirs of Harriet L. Hartley." However, the stipulated

[1] As discussed more fully in the Trial Brief on title issues, Plaintiffs Mabee and Grace also assert that language in the 1946 Hartley-to-Poor deed constitutes a restrictive covenant that prohibits uses other than those for "residential purposes only." Plaintiffs also assert that this restrictive covenant runs with the land for the benefit of Harriet L. Hartley's retained dominant estate and, as successors in interest to Harriet L. Hartley by deed, Plaintiffs are assigns with the right to enforce that restrictive covenant.

facts and exhibits relating to Harriet L. Hartley's Estate and the Release Deed Grantors, as well as other evidence in the Title Stipulations and exhibits and in the public record (including the Real Estate Transfer Tax forms submitted by NAF on September 23, 2020 and the Affidavits of Grantor Karen Stockunas and NAF Attorney Colleen Tucker recorded in the Waldo County Registry of Deeds),[2] demonstrate that none of the release deed Grantors are heirs or heirs-at-law of Harriet L. Hartley, nor heirs or heirs at law of Harriet L. Hartley's designated heirs at law, her sisters Genevieve Hargrave Bailey and Esther Hargrave Woods. More importantly, none of the release deed Grantors had any title, right, interest or estate in any land at issue in this matter to convey to NAF in 2019, or any other time. In addition, all of the Grantors and NAF were and are barred from making any claim of title, right, interest or estate to the intertidal land on which the Eckrotes' and Morgan lots front, based on this Court's 1970 recorded Final Decree in *Ferris v. Hargrave* (Plaintiffs' and Upstream's Joint Trial Exhibit 16; Stipulated Title Exhibit 28; WCRD Book 683, Page 283) and the 20-year statute of limitations in 14 M.R.S. § 801, et seq.

Fourth, the legal validity of the "Ground Lease" entered by NAF with the Schweikerts, [3] should be determined here as an element of Phase I of this case. This "Ground Lease" was entered, on or about July 11, 2020, by the Schweikerts and NAF, and allegedly grants NAF unspecified rights to the intertidal land on which the Schweikerts' lot fronts for a period of three years. However, the stipulated deeds in the Schweikerts' chain of title and other stipulated and publicly recorded documents demonstrate that the intertidal land on which the Schweikerts' lot fronts is owned by Plaintiffs Mabee and Grace and is held by Plaintiff Friends pursuant to the 4-29-2019 Conservation Easement (WCRD Book 3671, Page 273) and 11-4-2019 Assignment by Upstream to Friends (WCRD Book 4425, Page 344). The Court should include a determination that the July 11, 2020 Schweikert-NAF "Ground Lease" is not valid, as part of the Phase I judgment and declare this

[2] Plaintiffs' and Upstream's Joint Trial Exhibits 52-54.
[3] Plaintiffs' and Upstream's Joint Trial Exhibit 64.

"Ground Lease" null and void, because it was granted to NAF by the Schweikerts in the absence of the Schweikerts having any title, right or interest in the intertidal land on which their lot fronts.

Finally, in its 6-3-2021 affirmative defense #15 and Counterclaim Count I, NAF asserts that the placement of three industrial pipes in the intertidal land on which the Eckrotes' lot fronts constitutes "fishing" within the meaning of permissible uses under the Colonial Ordinance of 1641-1647, that is protected by the public trust doctrine. The Court should reject this assertion as a part of the Phase I judgment, *as a matter of law*, based on the controlling precedents interpreting the Colonial Ordinance and prohibit NAF from using any permits obtained from local, State or federal entities for the purpose of burying its pipes in the intertidal land owned by Plaintiffs and covered by the 4-29-2019 Conservation Easement (See, WCRD Book 3671, Page 273).

II. MEMORANDUM OF LAW AND ARGUMENT

A. ADVERSE POSSESSION

"In order to establish title by adverse possession, [a party must] . . . present evidence that [he/she] possessed the land for an uninterrupted twenty-year period, and that the possession was 'actual, open, visible, notorious, hostile, under a claim of right, continuous, and exclusive.'" See *McGeechan v. Sherwood*, 2000 ME 188, ¶ 51, 760 A.2d 1068 (quoting *Dowlev v. Morency*, 1999 ME 137, ¶ 19, 737 A.2d 1061).

The Courts of this State have been loathe to find loss of title to intertidal property through adverse possession because of the public policy served by permissive use of this intertidal land and because the uses reserved to the public in the intertidal zone by the Colonial Ordinance make satisfaction of the elements for adverse possession a virtual impossibility. One *may* obtain title to flats by adverse possession, but the circumstances under which Maine courts have found title to intertidal flats by adverse possession are rare and limited. For example, the court has variously held that: picnicking, strolling, playing, camping, the maintenance of a garden, clearing of trees and brush, the cutting of firewood, payment of taxes, use for seasonal recreational activities, seasonal

mowing, planting of rose bushes, minimal, temporary storage of supplies, pasturing cattle or sheep, placing a short flight of steps, creating a brush fence and removal of a notice posted by the record owner are not sufficient activities to support a claim of adverse possession. *Weinstein v Hurlbert*, 2012 ME 84; *Weeks v. Krysa*, 2008 ME 120; *Webber v. Barker Lumber Co.,* 121 Me. 259 (1922); *Roberts v. Richards*, 84 Me. 1 (1891).

In *Whitmore v. Brown,* 100 Maine 410, 417 (1905), the Court stated:

> One may obtain title to flats by adverse possession. If, holding under a recorded deed which includes flats as well as upland, he acquires title to the upland by adverse possession, the title will extend to the flats covered by his deed. *Bracket v. Persons Unknown*, 53 Me. 228; *Richardson v. Watts*, 94 Me. 476, 48 Atl. 180. But that is not this case. Here the plaintiffs can hold only by proof of adverse possession of the flats, and then not beyond the line of actual occupation. *Thornton v. Foss*, 26 Me. 402. The proof is insufficient. The evidence falls far short of proving adverse, exclusive, continuous, open, and notorious possession of the flats for 20 years or more.

Whitmore v. Brown, 100 Me. 410, 61 A. 985, 988 (1905).

Similarly, in *Levis v. Konitzky*, 2016 ME 167 ¶ 22, 151 A.3d 20, 29, the Maine Supreme Judicial Court expressly rejected an adverse possession claim to intertidal land, based on uses similar to those that the Eckrotes have cited to support a claim of adverse possession. In doing so the Court stated as follows:

> We recognize the long-standing doctrine in Maine that the intertidal zone, or wet sand area, is subject to a public easement for fishing, fowling, and navigation. *See Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989). Despite this recognized public easement, Levis nonetheless argues that, by "using" the mudflats in front of his upland property for clamming and tying boats, he has acquired title through adverse possession to the intertidal zone. As a matter of law, this use—even if it had not been interrupted by Konizky's use of the same area for clamming and boating—is not sufficient to establish title through adverse possession.

One need look no further than the decision in *Moody v. Heirs of Edna O. Rideout*, 2018 Me. Super. LEXIS 120; 2018 WL 3953859 (Me. Super., June 13, 2018), to see the high bar our courts apply to claims of ownership by adverse possession in the intertidal zone. In *Moody,* the Court considered a dispute centering on the ownership of a ledge located in intertidal land adjacent to separate upland parcels of land. The party claiming ownership of the ledge by adverse possession (a

commercial lobsterman) claimed that he and his family had used the intertidal land to store lobster traps, buoys, fishing nets, bait, a wooden skiff, and scallop and oyster dredges.

The *Moody* Court noted that use of the ledge to permanently store lobster traps or other fishing equipment throughout the fishing season was _not_ a fishing activity permitted by the Colonial Ordinance of 1641-47. *Moody*, *supra,* 2018 Me. Super. LEXIS 120 at *10-11; 2018 WL 3953859, at *4.[4] In *Moody*, despite the daily use of this ledge by the plaintiff, the lobsterman who stored traps on the disputed ledge for years in an open and notorious manner, and engaged in a use of the intertidal land that was not within the ambit of fishing permitted under the Colonial Ordinance of 1641-47,[5] the Court rejected the plaintiff's adverse possession claim.

As the *Moody* Court noted, to obtain title by adverse possession, the claimant must establish more than "casual, seasonal use of an undeveloped waterfront lot." *Weeks v. Krysa*, 2008 ME 120, ¶¶ 2, 13, 21, 955 A.2d 234. In *Weeks*, the Law Court held that the plaintiffs' maintenance of a garden, clearing of trees and brush, payment of taxes, and use for seasonal recreational activities were not sufficient to establish a claim for adverse possession of a vacant waterfront lot. *Id.* ¶¶ 17-21. In arriving at this conclusion, the *Weeks* Court noted that Maine has a tradition of open access to non-posted fields and woodlands. *Id.* ¶ 15.

Likewise, the *Moody* Court noted that, in *Weinstein v. Hurlbert*, 2012 ME 84, ¶¶ 11, 12, 45 A.3d 743, the Law Court also held that the seasonal mowing, planting of rose bushes, minimal gardening, a one-time temporary storage of supplies, and removal of a notice posted by the record

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[4] "While using the intertidal land to remove and replenish lobster traps from a lobster boat or to furnish the boat with crew members and fishing supplies would likely come within the ambit of the public's right to use the intertidal zone, *see Bell*, 557 A.2d at 173, plaintiff's use of the ledge to permanently store lobster traps or other fishing equipment throughout the fishing season is not a fishing activity permitted by the Colonial Ordinance of 1641-47."

Moody v. Rideout, No. RE-17-102, 2018 WL 3953859, at *4 (Me. Super., June 13, 2018)

[5] "The court concludes that the use of the intertidal land for the storage of fishing equipment is not a fishing activity permitted by the Colonial Ordinance of 1641." *Moody v. Heirs of Rideout,* 2018 Me. Super. LEXIS 120, •12.

owner was “not sufficiently hostile and notorious to put the true owner on notice” that the plaintiffs claimed title to the land. As in *Weeks*, the *Weinstein* Court noted that Maine has an open lands policy as well as a “public policy disfavoring the acquisition of land through adverse possession.” *Id.* ¶ 12. Unlike in *Weeks*, the land in question was not a “vacant shorefront lot" but was instead a "waterfront lawn of a house.” *Id.* ¶ 11.

Contrasting the details of the facts asserted in support of the plaintiff’s claim of adverse possession in *Moody* is particularly relevant to analyzing the weakness and invalidity of the Eckrotes’ adverse possession claim in Counterclaim Count II. In *Moody*, the Court assessed the factual claims as follows:

> Like the maintenance of a garden and rose bushes in *Weeks* and *Weinstein*, the seasonal storage of lobster traps on the highest point of the ledge would be insufficient to put the true owner of the disputed portion of the ledge on notice that their neighbor claimed title to the land. This is particularly true given Maine's tradition of public access to the sea for fishing purposes, a purpose for which lobster traps are aptly suited. *See Bell* [*v. Wells*], 557 A.2d [168,] at 173 [(Me. 1989)]; *Weeks*, 2008 ME 120, ¶ 15, 955 A.2d 234. Additionally, there is no indication that the plaintiff posted the property, which an owner storing valuable commercial fishing equipment on a barren ledge might do. *See Falvo v. Pejepscot Indus. Park*, 1997 ME 66, ¶ 11, 691 A.2d 1240. ¶ 8 (affirming the Trial Courts conclusion that the “plaintiffs would have had to have ‘done something unusual’ to supply the requisite notice [of antagonistic intent], such as posting the land, building a fence, or giving written notice”); *Gay v. Dube*, 2012 ME 30, ¶¶ 14-15, 39 A.3d 52 (noting that the claimant had posted no trespassing signs on the property). Accordingly, if the trier of fact found that nothing more than lobster traps were stored on the disputed portion of the ledge, those facts would be insufficient to establish title by adverse possession. Similarly, plaintiff would be unable to prevail on his adverse possession claim if the trier of fact found that his use of the ledge was not continuous.
>
> On the other hand, if plaintiff's version of the facts were found to be true and the activities were found to have continuously taken place on the disputed portion of the ledge, those facts may be sufficient to cause "a man of ordinary prudence" to believe that his neighbor was intending to establish exclusive control over the property. *See Emerson*, 560 A.2d at 2. In light of the above, a genuine issue of material fact exists concerning whether plaintiff has established facts sufficient to obtain title by adverse possession.

Moody v. Heirs of Rideout, 2018 Me. Super. LEXIS 120, *15-16.

Here, Janet Eckrotes’ prior sworn statements are the best evidence that the Eckrotes cannot satisfy the high bar required to make a claim of adverse possession of any land, let alone intertidal

land. Neither the counterclaim facts nor the prior Eckrote affidavits even allege satisfaction of the elements for adverse possession. All of the activities that Defendant Eckrote references that the Poors and Eckrotes did in the intertidal land were _seasonal_ activities, intermittently (not continuously) done during brief periods of only the summer months. Indeed, many of the activities cited in the Eckrote Affidavits are activities that any person can do in the intertidal land pursuant to the rights conveyed by the Colonial Ordinance of 1641-47, or permissive uses that the courts and public policy encourage be permitted by private landowners in the intertidal zone.[6]

The photos and Affidavits submitted by Janet Eckrote confirm that neither the Eckrotes nor Poors ever posted signs on the intertidal land attempting to assert the right of exclusive possession to this land (which would be contrary to the Colonial Ordinance of 1641-47). No fences or barriers were erected by the Poors or Eckrotes to prevent access to the intertidal land by others, including Plaintiffs Mabee and Grace; nor would such barriers have been legal under the Colonial Ordinance of 1641-47. And Janet Eckrote expressly acknowledged that no written or oral notices were given to Plaintiffs Mabee and Grace excluding them, or anyone else, from using this intertidal land – including using it in ways far beyond activities permitted by the Colonial Ordinance of 1641-47.

The evidence at trial will show that the Plaintiffs have never been excluded from using the intertidal land on which the Eckrotes' lot fronts, by the Eckrotes or their predecessors in interest the Poors. Further, neither the Eckrotes nor their predecessors in interest, have ever used their property at the beach as a fulltime residence and only occasionally use/used the property for seasonal, recreational activities.

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[6] Notably, while some of the uses listed in the Eckrote Affidavit are not protected under the Colonial Ordinance of 1641-47, *all* of the activities listed in the Eckrote Affidavit can still be done under the express permissive use policy enumerated on the welcome signs for the Harriet L. Hartley Conservation Area.

In addition, within days of learning the full extent of their ownership of the intertidal land, Plaintiffs Mabee and Grace placed this fragile estuary land under the protection of a conservation easement that was recorded in the Waldo County Registry of Deeds, with Upstream named as the holder of that conservation easement. Subsequently, Plaintiff Friends recorded a survey of the conservation area prepared by Donald Richards, P.L.S., L.F, and posted signs at several locations in the conservation area – including adjacent to the Schweikert-Eckrote property boundaries at the high water mark – identifying this intertidal land as within the boundaries of the Harriet L. Hartley Conservation Area and explaining the permissive uses allowed in the conservation area.

Finally, the evidence will show that use of the intertidal land by the Eckrotes has not been continuous and exclusive for a period of twenty years. Indeed, in a prior affidavit, Janet Eckrote expressly stated that the Eckrotes have not visited their property in Maine for the past two years extinguishing any assertion of continuous possession for a period of twenty years. Thus, none of the elements for adverse possession have been, nor could be, met by the Eckrotes (who have only owned this land for less than nine years) or their predecessors.

For the foregoing reasons, Plaintiffs are entitled as a matter of law, to judgment on the Eckrotes' Count II regarding the Eckrotes' claim of title to the intertidal land on which their lot fronts by adverse possession.

B. BOUNDARY BY ACQUIESCENCE

In Count V of the Eckrotes Counterclaims, the Eckrotes assert Boundary by Acquiescence in the intertidal land on which their lot fronts. The party relying on the establishment of a boundary by acquiescence has the burden of proving the elements of the claim. The proof of acquiescence must be clear and convincing since recognition of such a boundary has the effect of transferring ownership of the disputed property without requiring compliance with the Statute of Conveyances. *Calthorpe v. Abrahamson,* 441 A.2d at 289 (citations omitted).

The elements of boundary by acquiescence are:

(1) **possession up to a visible line marked clearly by monuments, fences or the like**; (emphasis added);
(2) actual or constructive notice to the adjoining landowner of the possession;
(3) conduct by the adjoining landowner from which recognition and acquiescence not induced by fraud or mistake may be fairly inferred; and
(4) acquiescence for a long period of years such that the policy behind the doctrine of acquiescence is well-served by recognizing the boundary.

Calthorpe v. Abrahamson, 441 A.2d at 289 (citations omitted); *Dowley v. Morency*, 1999 ME 137, ¶16, 737 A.2d 1061, 1067; *Anchorage Realty Trust v. Donavan,* 2004 ME 137, ¶ 11, 880 A.2d 1110, 1112.

The Eckrotes fail to assert facts demonstrating *any* of the elements for a claim of boundary by acquiescence in Count V of their Counterclaims or in the facts contained in Janet Eckrote's previously filed affidavits. The facts previously submitted by the parties on both sides, and expected to be presented at trial, reveal the following:

(1) **The Eckrotes never placed any visible line(s) marked clearly by monuments, fences or the like in the intertidal land** on which the Eckrotes' lot front over which the Eckrotes – who are out-of-state residents who visit their property in Maine only a couple weeks a year at most – have possession.

(2) **The Eckrotes did not place, and do not claim to have placed, Plaintiffs on actual or constructive notice of their alleged "possession" of the intertidal land on which their lot fronts** and, due to the Eckrotes' out-of-state residency, their limited seasonal use of the property, and the nature of the disputed land as intertidal zone land that Maine law guarantees the public the right to use for fishing, fowling and navigation, no such notice of "possession" by the Eckrotes (or their predecessors) would be legally sufficient to establish a boundary by acquiescence.[7]

(3) **Plaintiffs Mabee and Grace never engaged in conduct from which recognition and acquiescence not induced by fraud or mistake may be fairly inferred**. Plaintiff Mabee has publicly admitted that he did not understand the true extent of Mabee-Grace's intertidal land ownership until April and 2019, based on mistake. However, despite this mistake, Plaintiff Jeffrey Mabee routinely used this intertidal land to anchor his boat off of the Eckrotes' lot, despite his mistaken belief that his intertidal land did not include the intertidal land on which the Eckrotes' lot fronts, and both Mabee and Grace used this intertidal land in many ways that go beyond fishing,

[7] Indeed, because all members of the public have a right to use intertidal land under the Colonial Ordinance of 1641-1647, the Poors' placement of steps above the high water line on their upland lot, that facilitated the Poors' and Eckrotes' access to the intertidal land, gave the Plaintiffs no notice of any possession claim. Rather, placement of such stairs was lawful and consistent with the actions of every other property owner along this intertidal area to use the intertidal land for fishing, fowling and navigation.

fowling and navigation. Plaintiffs Mabee and Grace even walked their dog multiple times a day on a daily basis on this intertidal land for years, without any objection by the Eckrotes or Poors.

(4) **Plaintiffs Mabee and Grace never engaged in conduct that could be characterized as acquiescence for any period of years, despite not knowing the full extent of their intertidal ownership.** Indeed, within days of learning the full extent of their intertidal ownership, Plaintiffs Mabee and Grace: (a) placed all of their intertidal land under the protection of a recorded Conservation Easement, on April 29, 2019, (b) placed the Eckrotes, NAF and various local, State and federal administrative entities on notice of their ownership interests in, and conservation easement on, this intertidal land, (c) filed this litigation to protect and defend their property rights in the intertidal land, (d) served NAF and its agents with a trespass warning in October 2019, and (e) joined the holders of the conservation easement, both Upstream and Plaintiff Friends, in taking legal actions to protect the intertidal land in its natural condition, including posting signs in the intertidal area giving the public notice of the area covered by the conservation easement and participating in all administrative proceedings and this litigation.

The policy behind the doctrine of acquiescence would not be well-served by recognizing any boundary in the intertidal land that the public has a right to use pursuant to the Colonial Ordinance of 1641-47. Public policy is best served by not penalizing preservation of permissive uses by the public of all intertidal flats.

In sum, the Eckrote Defendants cannot satisfy any of the elements for a claim of boundary by acquiescence.

Furthermore, sworn statements previously submitted by Defendant Janet Eckrote demonstrate that the Eckrotes have based their claim of "boundary by acquiescence" on a profoundly flawed understanding of the location of their boundaries – particularly the northern sideline boundary and its waterside (eastern) terminus. Specifically, in several affidavits filed to support the Eckrotes' opposition to Plaintiffs' motion for partial summary judgment relating to the Eckrotes' adverse possession and boundary by acquiescence counterclaims, Janet Eckrote has identified the northern boundary of the Eckrotes' lot as bounded by the stream to the south and ***the gully to the north***. However, the current deeded northerly boundary of the Eckrotes' property, at the shore, is about 125-feet to the south from the gully referenced in the 1946 Hartley-to-Poor and is

thus entirely inconsistent with the recorded documents and surveys related to the description of their property.

The current north-eastern boundary of the Eckrotes' lot was created ***33 years ago*** when William and Phyllis Poor conveyed the north-easterly half of the waterfront in the 1946 Hartley-to-Poor deed, in exchange for road frontage along Route 1, in a conveyance to Frederick C. and Patricia B. Kelly, on March 13, 1978 (WCRD Book 752, Page 242). A pin set by Good Deeds in its August 31, 2012 survey (performed for the Eckrotes of the property then-owned by the Estate of Phyllis J. Poor) shows the *actual* northern boundary of the property owned by the Estate of Phyllis J. Poor and acquired by the Eckrotes in 2012. That Good Deeds survey was incorporated by reference in the Eckrotes' 10-15-2012 deed. Rather than being situated at a gully to the north (as Janet Eckrote has claimed in prior affidavits), this pin is situated at a rather steep incline or embankment up from the beach not at or near a gully and is located at or above the high water mark of the Eckrote lot.

The location erroneously claimed as the northern boundary by the Eckrotes in their Response in Opposition and by Ms. Eckrote in her 9-22-2020 Affidavit would include much of the shorefront of Dr. Lyndon Morgan's property. *Id.* These claims have no basis in fact or law.[8] More importantly, these claims demonstrate that there is neither a common agreement as to the location of the relevant boundaries, nor even a basic understanding by the Eckrotes of the location of the monuments referenced in their deed establishing their *upland* lot boundaries – let alone year's long agreement on the boundaries within the intertidal zone land on which the Eckrotes' lot fronts.

Accordingly, Plaintiffs are entitled to judgment, *as a matter of law*, on the Eckrotes' claim of Boundary by Acquiescence in Count V of their Counterclaims.

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[8] As noted in detail in Plaintiffs' Rule 56(h) Reply to the Eckrotes' Statement of Additional Material Facts, there are glaring errors throughout the Facts contained in Janet Eckrote's Affidavits – contradicted by uncontroverted and uncontested recorded deeds, surveys and other instruments.

C. ABANDONMENT

The Defendants have made much of the fact that prior to April 2019 Plaintiffs were not aware that the intertidal land that they have owned since 1991 by deed, includes the intertidal land on which Tax Map 29, Lots 36 and most of 35 front. However, the law in this State is clear – title to real property cannot be lost by abandonment. "'[A] perfect legal title cannot be lost by abandonment.' *Town of Sedgwick v. Butler*, 1998 ME 280, ¶ 6, 722 A.2d 357, 358 (quoting *Picken v. Richardson*, 146 Me. 29, 36, 77 A.2d 191, 194 (1950))." *Almeder v. Town of Kennebunkport, & All Persons Who Are Unascertained,* 2010 Me. Super. LEXIS 155, *14.

Here, Plaintiffs Mabee and Grace have at all times used the intertidal land on which the Eckrotes' and Morgan's lots front and beyond, including using it in ways not contemplated by the Colonial Ordinance of 1641-47. More importantly, Plaintiffs' understandable ignorance of the extent of their ownership of intertidal land – land that they have used extensively for years despite their lack of knowledge of ownership – *is relevant to nothing*.

D. THE RELEASE DEED GRANTORS ARE NOT HEIRS OR HEIRS AT LAW OF HARRIET L. HARTLEY AND LACKED ANY TITLE, RIGHT OR INTEREST IN REAL PROPERTY IN BELFAST, MAINE, OWNED AT ANY TIME BY HARRIET L. HARTLEY, TO CONVEY TO NAF

One legal principle controls the legal determination of the validity of the "Release Deeds" NAF drafted and obtained from ten out-of-state persons in 2019: "A person can convey only what is conveyed into them." *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶38, *citing, Eaton v. Town of Wells*, 2000 ME 176, ¶19, 760 A.2d 232.[9]

Here, the Stipulated facts and exhibits, documents recorded by NAF in the public records maintained by the Waldo County Register of Deeds, and Real Estate Transfer Tax forms submitted

[9] *Calthorpe v. Abrahamson*, 441 A.2d 284, 287 (Me. 1982) ("A grantor can convey effectively by deed only that real property which he owns. See *May v. Labbe*, 114 Me. 374, 96 A. 502 (1916); 6 U. Thompson, Commentaries on the Modern Law of Real Property § 2935 (1962)."); *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 448 (1890) ("One cannot convey what he does not own. One cannot convey land, nor create an easement in it unless he owns it. An attempt to do so may render him liable on the covenants in his deed; but neither the land nor the easement will pass."); *Eaton v. Town of Wells*, 2000 ME 176 ("a person can convey only what is conveyed into them."). See also, *May v. Labbe*, 114 Me. 374, 380 (1916) ("However much they may have intended to convey, they conveyed no more than the deeds properly construed conveyed.").

by NAF, demonstrate that, even if Harriet L. Hartley severed and retained title to the intertidal land on which the Fred R. Poor lot fronted in executing the Hartley-to-Butlers deed (a proposition which the Plaintiffs and Upstream flatly reject based on the unambiguous language in this deed and controlling Maine precedents): (i) none of the Grantors was an "heir"[10] or "devisee"[11] of Harriet L. Hartley or her heirs at law; and (ii) none of the ten persons who executed release deeds to NAF had any title, right or interest, by deed or inheritance, in real property located in Belfast, Maine (including intertidal land), once owned by Harriet L. Hartley pursuant to the Hargrave-to-Hartleys deed dated August 27, 1934 (WCRD Book 386, Page 453). Rather, the "Release Deeds" are a fiction, fabricated by NAF's counsel, executed by out-of-state persons with no title, right, interest or estate in land owned at any time by Harriet L. Hartley in Belfast, Maine.

1. Relevant Stipulated Facts and Exhibit References Concerning Harriet L. Hartley's Estate and the Release Deed Grantors

Specifically, the following facts and statements contained in stipulated exhibits or public documents recorded by NAF support the inescapable conclusion that the release deeds are nullities and failed to convey any title, right or interest in real property, including the intertidal land on which the Eckrotes' lot fronts, to NAF:

- Harriet L. Hartley's husband, Arthur Hartley, acquired real property in Belfast, Maine, along the Little River, in 1924 in a conveyance from Eva T. Burd and Edwin D. Burd of Winchester, MA (Title Stipulation, ¶10, Exhibit 8; WCRD Book 343, Page 497);
- The Burds-to-Hartley deed expressly excepted the "two cottages and out-buildings thereon, that are owned by Clarence Poor and by Miss Coullard" (Title Stipulation, ¶10.b, Exhibit 8);

[10] 18 M.R.S. §1-201 provides the following definition:

23. Heirs. "Heirs," except as provided in section 2-711, means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

[11] 18 M.R.S. §1-201 provides the following definition:

11. Devisee. "Devisee" means any person designated in a will to receive a devise. For the purposes of Article 3, in the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, "devisee" includes the trust or trustee but not the beneficiaries.

- Although married to Arthur Hartley at the time he acquired this real property in Belfast, Maine, Harriet L. Hartley was not a Grantee on the Burd-to-Hartley deed as a joint tenant or tenant in common (Title Stipulation ¶11, Exhibit 8);
- In a strawman transaction on August 27, 1934, Arthur Hartley transferred title to all land and buildings thereon acquired in the above-referenced 1924 conveyance to his wife's unmarried sister, Genevieve E. Hargrave, by warranty deed (Title Stipulation ¶12, Exhibit 9; WCRD Book 386, Page 452) – who then immediately transferred the property back to Arthur Hartley and Harriet L. Hartley as joint tenants, by quitclaim deed on the same day (Title Stipulation ¶14, Exhibit 10; WCRD Book 386, Page 453);
- The Hartley-to-Hargrave deed expressly excepted and reserved "the cottage and out-buildings thereon, owned by Clarence Poor" from the conveyance (Title Stipulation ¶13, Exhibit 9);
- About a month after this strawman transaction, Genevieve E. Hargrave married Walter A. Bailey on September 21, 1934 (Grantors Stipulation, ¶9);
- Arthur Hartley died on February 10, 1935, leaving Harriet L. Hartley as the sole owner of all of the property described in the Hargrave-to-Hartleys deed – consisting of land on both the eastern and western sides of Atlantic Highway (U.S. Route 1) and the adjacent intertidal land (Title Stipulation ¶15);
- Harriet L. Hartley, who had no children by birth or adoption, drafted a Will in September of 1945 that expressed the testamentary intent to bequeath all of her real property in Belfast, Maine in fee simple to her only nephew Samuel Nelson Woods, Jr. (Harriet's sister Esther's son), with a life estate in the Little River homestead portion of her Belfast, Maine property to be granted to her sister-in-law Ruth Hartley Weaver (Grantors Stipulation Exhibit 1, p. 3);
- Harriet L. Hartley's 1945 Will designated her sister Genevieve Hargrave Bailey and her sister-in-law Ruth Hartley Weaver as the co-Executrices of her estate (Grantors Stipulation, Exhibit 1, p. 4);
- Subsequent to the drafting of her Will in September 1945, Harriet L. Hartley sold all of her real property in Belfast, Maine described in the 1934 Hargrave-to-Hartleys deed in four separate transactions:
    - Hartley-to-Poor, dated 1-25-1946 (Title Stipulation ¶¶ 16-21, Exhibit 11; Book 452, Page 205);
    - Hartley-to-Cassida, dated 10-25-1946 (Title Stipulation ¶ 22 a and b; Book 438, Page 497);
    - Hartley-to-Belfast Water Management District, dated 8-25-1950 (Title Stipulation ¶23 a and b, Exhibit 13; Book 474, Page 322); and
    - Hartley-to-Butler, dated 9-22-1950 (Title Stipulation ¶24 a and b, Exhibit 14; WCRD Book 474, Page 387; Third Amended Complaint Exhibit 46; Plaintiffs and Upstream's Joint Trial Exhibit 35);[12]
- Harriet L. Hartley died on October 18, 1951 (Grantors Stipulation ¶1);

[12] NAF disputes that this last conveyance included all of Harriet L. Hartley's remaining land, as discussed more fully below and in the Plaintiffs' and Upstream's Trial Brief relating to Title issues.

- On October 25, 1951 (a week after Harriet L. Hartley's death), Ruth Hartley Weaver and Genevieve Hargrave Bailey filed and recorded Harriet L. Hartley's 1945 Will and petitioned the Philadelphia Register of Wills for appointment as the co-Executrices of Harriet L. Hartley's estate, pursuant to Harriet L. Hartley's stated intent in her 1945 Will;
- After appointment as co-Executrices of Harriet L. Hartley's estate, Ruth Hartley Weaver and Genevieve Hargrave Bailey attested under oath, in filings submitted to the Philadelphia Register of Wills, dated October 25, 1951 through April 28, 1952, that Harriet L. Hartley had sold all of her property in Maine during her life time and owned no real property in Maine at the time of her death in October of 1951 (Grantors Stipulation Exhibit 1, pp. 12, 15, 17, 18, 19);
- Because all of the real property Harriet L. Hartley owned in Belfast, Maine had been sold more than 12 months prior to her death, Harriet L. Hartley's 1945 Will was declared by the Executrices of her estate to be "ineffective" resulting in an intestacy, according to sworn statements submitted by her Executrices (Grantors Stipulation Exhibit 1, p. 18-19 (Schedule D));
- Pursuant to the intestate succession law in effect in Pennsylvania at the time of Harriet L. Hartley's death in 1951 (the 1947 Intestacy Act, Grantors Stipulations Exhibit 2), Harriet L. Hartley's two surviving sisters (Genevieve Hargrave Bailey and Esther Hargrave Woods) were named as her heirs at law and the only beneficiaries of her estate (Grantors Stipulation ¶7, Schedule D Exhibit 1, p. 18; and Exhibit 2);
- The Schedules and Inventory of Appraisement submitted under sworn statements and attestations by Harriet L. Hartley's co-Executrices state that Harriet owned no real property in the Commonwealth of Pennsylvania or out-of-state at the time of her death (Grantors Stipulation Exhibit 1, (Schedules A and D) p. 12, 15, 18);
- A handwritten notation on a copy of Harriet L. Hartley's 1945 Will in the Probate File materials submitted by the co-Executrices states in the margin next to the third and fourth paragraphs of the Will (the paragraphs that concern Harriet's intended bequest of her real property in Maine): "*Sold during life time See Note*" (Grantors Stipulation Exhibit 1, p. 19);
- The "Note" to which the handwritten margin note on the copy of Harriet L. Hartley's Will refers appears to be the note on Schedule D, which states:

  > "The will purports to devise and bequeath certain property, real and personal, ***which actually was sold by decedent during life***. The will is therefore ineffective to dispose of decedent's estate, as a result of which, there is an intestacy and decedent's two sisters, above named, take as her heirs at law. In any event, the entire clear value of the estate is taxable at the collateral value." [emphasis supplied] (Grantors Stipulation Exhibit 1, p. 18);

- A sworn statement signed by Ruth Hartley Weaver and Genevieve Hargrave Bailey, in their capacities as "Executrices" of Harriet L. Hartley's estate, signed before a Notary Public, dated December 7, 1951, states as follows:

  > **County of Philadelphia, ss.**
  >
  > Ruth Hartley Weaver and Genevieve Hargrave Bailey

> *Executrices of the Estate of* Harriet L. Hartley, *deceased, being duly* sworn *according to law, depose and say that* ***the items appearing in the following Inventory and Appraisement include all of the personal assets wherever situate*** *and all of the real estate in the Commonwealth of Pennsylvania of said decedent; that the valuation placed opposite each item of said Inventory represents its fair value as of the date of the decedent's death, based upon a just appraisement made by two or more appraisers sworn well and truly and without prejudice or partiality to appraise the assets of the estate to the best of their skill and judgment; and that* ***decedent owned no real estate outside the Commonwealth of Pennsylvania except that which appears in a memorandum at the end of this Inventory.*** [italics in original; emphasis supplied] (Grantors Stipulation Exhibit 1, p. 12).

- To confirm that out-of-state properties, if any, should be included in the Inventory, on the bottom of this same page, designated as: "Inv Book 143 Pg 395," is a Note which states:

  > Note. The memorandum of real estate outside the Commonwealth of Pennsylvania may, at the election of the personal representative, include the value of each item, but such figures should not be extended into the total of the inventory. (See Sec. 401(b) of Fiduciaries Act of 1949).

- No real estate in Belfast, Maine appears in a memorandum at the end of the Inventory (Grantors Stipulation Exhibit 1);
- Form ECRI-33-100M-3-49 contains a printed attestation by co-Executrix Ruth Hartley Weaver, sworn to on April 28, 1952, stating that the information contained in the Schedules submitted is accurate and contains all of the information described for each Schedule (Grantors Stipulation Exhibit 1, pp. 13-14).
- Form ECRI-33-100M-3-49 describes the information required to be included on "Schedule A" in relevant part as:

  > That *Schedule A* attached hereto and made part hereof sets forth and in detail **all the real property** in the Commonwealth of Pennsylvania of which decedent died seized and possessed, **or in which decedent had any right, title or interest at the time of death**. . . . (*Id.*);

- "Schedule A REAL PROPERTY" to the Affidavit signed on April 28, 1952 by Executrix Ruth Hartley Weaver states "NONE" to indicate that Harriet L. Hartley owned no real property anywhere at the time of her death (Grantors Stipulation Exhibit 1, p. 15);
- Schedule D to the Hartley Probate file identifies Genevieve Hargrave Bailey and Esther Hargrave Woods as the only two beneficiaries of the estate, receiving equal "one-half" shares of the estate assets (which totaled less than $12,000 in cash and included no real property) (Grantors Stipulation Exhibit 1, p. 18);
- Neither of Harriet L. Hartley's heirs at law (Genevieve Hargrave Bailey and Esther Hargrave Woods) received a distribution of any real property in Maine

from Harriet L. Hartley's estate according to the Philadelphia Register of Wills' recorded Probate File (Grantors Stipulations ¶7, Exhibit 1);

- Samuel Nelson Woods, Jr. and Ruth Hartley Weaver, the two intended beneficiaries of Harriet L. Hartley's 1945 Will, received nothing from her estate, neither real nor personal property (Grantors Stipulation ¶7, Exhibit 1, p. 18);
- No one, including Samuel Nelson Woods, Jr. and Ruth Hartley Weaver, contested the distribution of assets or the determination of assets by the Executrices or the Register of Wills; nor was any contest of the Will and/or the declaration that the 1945 Will was "ineffective" filed by anyone at any time (Grantors Stipulation ¶6, Exhibit 1);
- By Stipulation, all parties, including NAF, have acknowledged that:

> 8. No probate file or ancillary proceeding were ever opened by anyone in Waldo County, Maine, for Harriet L. Hartley's estate for purposes of determining her heirs or heirs at law or distributing real property allegedly owned by Harriet L. Hartley in Belfast, Maine.
>
> And
>
> 49. No probate file(s) or ancillary proceeding(s) were ever opened by anyone in Waldo County, Maine, for the estate(s) of Genevieve Hargrave Bailey; Esther Hargrave Woods; Walter A. Bailey; Frances Carey Bailey Bell Fox Mistic; Samuel Nelson Woods; Samuel Nelson Woods, Jr.; Gertrude Gausmann Woods; John T. Bell; Patricia Bell Burger; Walter Bailey Bell; Florence P. Bell; Richard Bell; or Rosemarie H. Bell, for the purposes of determining their respective heirs or heirs at law or distributing real property allegedly owned by all of any of the above-referenced persons, in Belfast, Maine.

(Grantors Stipulation pp. 2 and 6-7).

- All of the "Release Deeds" recorded by NAF on September 23, 2020 in the Waldo County Registry of Deeds, describe the property to be conveyed by reference to the August 27, 1934 Hargrave-to-Hartleys deed (Book 386, Page 453) without identifying any particular land, including intertidal land, that is allegedly being conveyed through these instruments, stating in relevant part:

> ". . . all of the Grantor's right, title and interest in and to certain lands in Belfast, Waldo County, Maine, being more particularly described in a deed from Genevieve E. Hargrave to Arthur Hartley and Harriet L. Hartley dated August 27, 1934 and recorded in the Waldo County Registry of Deeds in Book 386, Page 453. . . ."

(Grantors Stipulation Exhibits 8-13; Plaintiffs' Third Amended Complaint Exhibits 28-34);

- The only publicly recorded documents that purport to identify the real property allegedly conveyed by the six Release Deeds are the six separate Real Estate Transfer Tax ("RETT") forms drafted and filed by NAF's counsel, and those RETT forms state that all that was allegedly acquired by NAF was 0.05 acres of intertidal land adjacent to 282 Northport Avenue in Belfast Maine for which no

map exists to show the location of this 0.05 acre parcel (Plaintiffs' and Upstream's Joint Trial Exhibit 54);

- The three "Release Deeds" obtained from the Burgers[13] assert that the source of the Burger Grantors' title, right or interest in the unspecified land being conveyed to NAF is through Patricia Bell Burger "who died intestate on November 9, 1993, said Patricia Bell Burger having obtained whatever interest she may have held in the subject premises by virtue of being an heir at law of Harriet A. [sic] Hartley, who died in Philadelphia, Pennsylvania on October 18, 1951. . . ." (Grantor Stipulation Exhibits 8-10);
- Harriet L. Hartley's Probate File definitively refutes the claim that Patricia Bell Burger was an heir at law of Harriet L. Hartley, as erroneously claimed on the three "Burger" release deeds drafted by NAF counsel Colleen Tucker and executed by Robert L. Burger, Thomas Burger, and Robert L. Burger II, as the only two heirs at law and beneficiaries of Harriet L. Hartley's estate were Genevieve Hargrave Bailey and Esther Hargrave Woods (Grantor Stipulation Exhibit 1, p. 18 (Schedule D));
- Patricia Bell Burger was the grand-daughter of Genevieve Hargrave Bailey's husband Walter A. Bailey and his first wife, Sara Scull Bailey, who died in 1933 (Grantor Stipulation ¶¶13, 14, 18);
- Walter A. Bailey and his first wife Sara Scull Bailey had one daughter, Frances Carey Bailey, who was born in 1907 (Grantor Stipulation ¶13);
- Genevieve Hargrave Bailey predeceased Walter A. Bailey, who was her surviving spouse at the time of her death (Grantor Stipulation ¶11);
- Genevieve Hargrave Bailey died having had no issue and never adopted any child, including Frances Carey Bailey, who was 27 years old when Genevieve married Walter A. Bailey (Grantor Stipulation ¶¶10, 15);
- Frances Carey Bailey was married three times and had the following surnames: Bailey Bell Fox Mistic (Grantor Stipulation ¶17);
- Frances Carey Bailey Bell Fox Mistic had four children: Richard Bell, John T. Bell, Walter Bailey Bell, and Patricia Bell (Grantor Stipulation ¶18);
- Two of Frances Carey Bailey Bell Fox Mistic's children predeceased her: Richard Bell (d. 1976) and Walter Bailey Bell (d. 1967) (Grantor Stipulation ¶20);
- When Frances Carey Bailey Bell Fox Mistic died in 1983, she died intestate (Grantor Stipulation ¶¶ 19, 21, Exhibit 3);
- Probate records relating to distribution of Frances Carey Bailey Bell Fox Mistic's assets, through intestate succession in Pennsylvania, establish that the only beneficiaries of Frances' estate were her two surviving children: Patricia Bell Burger and John T. Bell (Grantor Stipulation ¶23, Exhibits 2 and 3);
- Probate records relating to distribution of Frances Carey Bailey Bell Fox Mistic's assets, through intestate succession in Pennsylvania, establish that her two

[13] Robert L. Burger (Patricia Bell Burger's surviving spouse), and Robert L. Burger II and Thomas Burger (Patricia Bell Burger's sons).

beneficiaries received no real property, including real property in Belfast, Maine, from Frances' estate (Grantor Stipulation ¶22 and Exhibit 2);

- Neither the spouse nor children of Frances' sons who predeceased Frances were beneficiaries of any portion of Frances' estate (Grantor Stipulation ¶24, Exhibit 3);
- Grantors of the sixth Release Deed recorded by NAF on September 23, 2020 (Grantor Stipulation Exhibit 13; WCRD Book 4548, Page 130) are: David Wesley Bell, Karen L. Stockunas, Constance Daily, Barbara Bell and Sandra L. Bell ("Bell Grantors");
- All of these Grantors state:

  > ". . . any and all right, title and interest we may hold in and to said lands [is] by virtue of being heirs at law of our great grandfather, Walter A. Bailey. Walter A. Bailey was the surviving spouse and sole heir of Genevieve H. Bailey, who died intestate in Langhorn, Pennsylvania on April 19, 1956. Genevieve H. Bailey was one of two sisters who were sole heirs at law of Harriet L. Hartley, who died in Philadelphia, Pennsylvania on October 18, 1951. . ." *Id.*

- The five Bell Grantors were not heirs at law of their great grandfather, Walter A. Bailey, because under the intestate succession laws in Pennsylvania no one who is more remotely related than a first cousin, including great grandchildren, is eligible to be designated as an "heir at law" for purposes of intestate succession (Grantor Stipulations Exhibit 2);
- Grantors Constance Bailey, Karen Stockunas, Barbara Bell and David W. Bell are children of Walter Bailey Bell, who predeceased his mother Frances Carey Bailey Bell Fox Mistic and was not a beneficiary of Frances' estate and inherited no real or personal property from Frances' estate (Grantor Stipulation ¶¶ 20, 23, 47);
- Grantors Marcia L. Woods (Gribble) and David Nelson Woods are the children of Samuel Nelson Woods, Jr. and Gertrude Gausmann Woods ("Woods Grantors") (Grantors Stipulations ¶40);
- In the two release deeds drafted by NAF's counsel Colleen Tucker and executed by the children of Samuel Nelson Woods, Jr., the Woods Grantors each state in their respective release deeds that:

  > ". . . all right, title and interest I may hold in and to said lands [is] by virtue of being . . . one of two children of our father, Samuel Nelson Woods, Jr., who died testate on April 23, 2003, leaving all assets to his surviving spouse, my mother Gertrude, who died intestate on February 16, 2010. My father, Samuel Nelson Woods, Jr., obtained whatever interest he may have held in the subject premises by virtue of being an heir at law of Esther Woods, a sister and devisee of Harriet A. Hartley, who died in Philadelphia, Pennsylvania on October 18, 1951. . ." (Grantors Stipulations Exhibits 11 and 12);

- Esther Woods was an heir at law of Harriet L. Hartley, not a devisee (Grantors Stipulation Exhibit 1, p. 18 (Schedule D); see also, definition of "devisee" in footnote 10);

- Esther Hargrave Woods received no distribution of real property from Harriet L. Hartley's estate and was only designated an heir at law *because* Harriet had sold all of her property in her life time, rendering her 1945 Will "ineffective" – nullifying Harriet L. Hartley's intended bequest of her real property in Maine to Samuel Nelson Woods, Jr. (Grantors Stipulations ¶7);
- The statute of limitations to file a contest to Harriet L. Hartley's Will or the distribution of assets by her estate was seven (7) years, pursuant to Section 13 of the Intestacy Act of 1947 (Grantors Stipulations Exhibit 2).
- Samuel Nelson Woods, Jr. did not contest the determination that Harriet L. Hartley had sold all of her land during her lifetime or the determination that her Will was "ineffective" within the 7-year statute of limitations or at any time thereafter (Grantors Stipulations ¶6);
- Samuel Nelson Woods, Jr. died testate in 2003, leaving all of his assets to his wife Gertrude Gausmann Woods (Grantors Stipulation ¶41));
- No real property in Belfast, Maine was listed as an asset in the probate records for Samuel Nelson Woods, Jr.'s estate and thus no real property in Belfast, Maine was distributed by the estate to nor inherited by Gertrude Gausmann Woods (Grantors Stipulations Exhibit 7);
- Gertrude Gausmann Woods died intestate and incompetent (having dementia and living in a nursing home under the care of the State of Pennsylvania's Medicaid program) (Grantors Stipulations ¶¶42-45);
- Gertrude Gausmann Woods was survived by her two children: Marcia Woods Gribble and David Nelson Woods as her heirs at law (Grantors Stipulations ¶46);
- In NAF's Answer to the Third Amended Complaint NAF admits that it had obtained a copy of Harriet L. Hartley's probate file on December 14, 2018, thus NAF had notice of all of the above-referenced facts from Harriet L. Hartley's Probate File prior to soliciting, drafting, obtaining or recording the Release Deeds (NAF's 6-3-2021 Answer to Plaintiffs' Third Amended Complaint, p. 11, ¶96).

2. Background on NAF's Release Deed Fiction

During the course of the proceedings during the past two years, Defendant NAF, Surveyors Dorksy and Richards, Plaintiffs and Upstream, all have agreed that Harriet L. Hartley, as the surviving joint tenant in the Hargrave-to-Hartleys deed (WCRD Book 386, Page 453), owned all of the intertidal land on which Belfast Tax Map 29, Lots 38, 37, 36 and 35 front, after the Hartley-to-Poor and Hartley-to-Cassida conveyances (Title Stipulations Exhibits 11 and 12; WCRD Book 452, Page 205 and Book 438, Page 497). However, NAF and Surveyor Dorsky opine that the portion of intertidal land retained by Hartley in the Hartley-to-Poor conveyance was severed from the rest of

Hartley's intertidal land, as a result of the use of an abutter's description (i.e. "Northerly by land of Fred R. Poor, Easterly by Penobscot Bay, Southerly by Little River and Westerly by Atlantic Highway, so-called") by Hartley in the Hartley-to-Butlers deed executed in September of 1950.

NAF and Surveyor Dorsky also assert that title, right and interest in this orphaned intertidal land, to which Hartley would have retained no access from any upland parcel, passed at Harriet Hartley's death in 1951 to her heirs at law. (See, e.g. Plaintiffs' Third Amended Complaint Exhibits 36-41, 44 and 45; Plaintiffs' and Upstream's Joint Trial Exhibits 3-9, 46, 65). NAF cites no case authority supporting the existence of a mechanism in Maine precedent for severing intertidal land inadvertently. Such a theory is inconsistent with the principle of interpreting deeds to achieve the intent of the parties and, the principle that, in the event of an ambiguity, the benefit goes to the Grantee in the interpretation of whether the entire parcel was conveyed.

Here, in November 2018, Surveyor Dorsky issued a survey plan that established the waterside (eastern) boundary of the Eckrotes' lot as being the Eckrotes' high water mark. This finding was consistent with the prior surveys by Good Deeds dated August 31, 2012 (prepared by Gusta Ronson, P.L.S. for the Eckrotes of the property owned by the Estate of Phyllis J. Poor) and April 2, 2018 (prepared by Clark Staples, P.L.S. for NAF).

However, in his 11-14-2018 Survey Plan, Surveyor Dorsky also indicated that the last known owner of the intertidal land on which the Eckrotes and Morgan lots front was "N/F Harriet L. Hartley." (Plaintiffs' Third Amended Complaint Exhibits 36; Plaintiffs' and Upstream's Joint Trial Exhibit 46). Surveyor Dorsky's basis for reaching the conclusion in November of 2018 that the Hartley-to-Butlers conveyance did not include all of Harriet L. Hartley's remaining land, and severed a portion of her intertidal land from the rest, is unclear. No title opinion predating or coinciding with Surveyor Dorsky's issuance of the 11-14-2018 survey plan was provided by Surveyor Dorsky supporting this conclusion when he was deposed in July of 2020 (or at any time thereafter). However, this hypothesis in contrary to the plain, unambiguous language in the Hartley-to-Butlers

deed and controlling Maine case law on the presumption of conveyance of all land, including intertidal flats, in the absence of express language to the contrary. *Almeder v. Town of Kennebunkport,* 2019 ME 151; *McLellan v. McFadden*, 114 Me. 242 (1915); *Snow v. Mt. Desert Island Real Estate*, 84 Me 14 (1891).

However, as established by the Stipulated Title Facts and exhibits referenced above and discussed more fully below, the "orphaned intertidal land" fiction -- concocted by NAF and Surveyor Dorsky -- has no basis in fact and law and should have been abandoned by NAF no later than December 14, 2018 when NAF's counsel obtained a copy of Harriet L. Hartley's probate file.

Specifically, NAF and its counsel have known Surveyor Dorsky's hypothesis that Harriet L. Hartley retained the portion of her intertidal land on which the Eckrotes and Morgan lots front was false since December 14, 2018 when NAF's counsel obtained a copy of Harriet L. Hartley's probate file that expressly stated that: (i) Harriet L. Hartley's 1945 Will was "ineffective" as a result of her sale of all property to be devised and bequeathed by it during her life time; and (ii) her heirs at law, her surviving sister Genevieve Hargrave Bailey and Esther Hargrave Woods, received no real property from her estate and only inherited equal shares of less than $12,000 in assets from the estate. (See, e.g. NAF's 6-3-2021 Answers to the Third Amended Complaint, p. 11, ¶96; Grantors Stipulations ¶7; Grantors Stipulation Exhibit 1, pp. 18-19).

While Plaintiffs believe that the Hartley-to-Butler deed is unambiguous – thus, not permitting consideration of extrinsic evidence[14] – to the extent the Court determines that the deed is

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[14] *Gillespie v. Worcester*, 322 A.2d 93 (1974). This principle of deed interpretation and construction was explained in *Gillespie* as follows*:*

> "The language used in the conveyance is clear and unambiguous. Giving to these words their general and ordinary meaning, they imply neither doubt nor obscurity. It is only when language is ambiguous that resort may be had to established rules of construction. C Company v. City of Westbrook, 269 A.2d 307 (Me. 1970). The Virginia [Supreme] Court tersely stated the rule in this language:
>
> > "It is not permissible to interpret that which has no need of interpretation. 'The province of construction lies wholly within the domain of ambiguity.' . . . If it is too plain to misunderstand, there is nothing to construe."

ambiguous allowing consideration of extrinsic evidence, the 1951-1952 Probate File is the best contemporaneous evidence of Harriet Hartley's intent in executing the September1950 Hartley-to-Butlers deed. The sworn affidavits, Schedules and statements contained in the Hartley Probate File, the contents of which all parties have stipulated, all confirm that Harriet L. Hartley intended to convey all of her remaining land in the Hartley-to-Butlers deed and, in fact, that Harriet L. Hartley did in fact sell all of her land and real property in Belfast, Maine, during her life time. This evidence was submitted, under oath, by her sister Genevieve Hargrave Bailey (the 1934 Grantor in the Hargrave-to-Hartleys deed) and her sister-in-law Ruth Hartley Weaver – an intended beneficiary of Harriet's 1945 Will.

However, in January of 2019, two state administrative agencies rejected NAF's claim of title, right or interest based on the 8-6-2018 NAF-Eckrote Easement Agreement – concluding that, *by its own terms*, Exhibit A of this easement option agreement defined the waterside boundary of the easement option to be granted as terminating at the high water mark of the Eckrotes' lot. (Plaintiffs' Third Amended Complaint, Exhibits 53 and 54; Plaintiffs' and Upstream's Joint Trial Exhibits 47 and 48). Apparently, to address this irreconcilable defect in NAF's claim of administrative standing, caused by the limits of the Eckrotes' ownership interest (a fact well-known to NAF prior to entering the 8-6-2018 Easement Agreement with the Eckrotes), NAF began to seek "release deeds" from persons NAF's agents determined had some relation, albeit tenuous relation, to Harriet L. Hartley's two sisters and heirs at law, Genevieve Hargrave Bailey and Esther Hargrave Woods.

Conner v. Hendrix, 194 Va. 17, 72 S.E.2d 259, 265 (1952); 23 Am.Jur.2d, Deeds § 159 at 208.)

See also, Perkins v. Conary, 295 A.2d 644 (Me. 1972) (The applicable principles of law are well settled. The intention of the parties, ascertained from the deed itself, ordinarily must prevail.); *Knowles v. Toothaker*, 58 Me. 172, 174-5 (1870) (In construing a deed, the first inquiry is, what was the intention of the parties? This is to be ascertained primarily from the language of the deed. If this description is so clear, unambiguous, and certain, that it may be readily traced upon the face of the earth from the monuments mentioned, it must govern).

NAF's counsel, Colleen Tucker of Drummond Woodsum, has recorded an affidavit stating that she drafted all of the release deeds (Plaintiffs' and Upstream's Joint Trial Exhibit 53). Discovery responses belatedly filed by NAF in December 2020 confirm that NAF's Attorney Colleen Tucker also drafted the affidavit of Grantor Karen Stockunas, recorded simultaneously with the Release Deeds on September 23, 2020 (Plaintiffs' and Upstream's Joint Trial Exhibits 52, 55).

The six "release deeds" NAF obtained in March through July of 2019, and recorded in September of 2020, were from ten (10) out-of-state persons who NAF and its agents identified through Ancestry.com as having some relation (most by marriage and not blood or adoption) to Harriet Hartley's two sisters and heirs at law, Genevieve Hargrave Bailey and Esther Hargrave Woods. The Release Deeds and the Stockunas Affidavit make several representations regarding the identity of Harriet L. Hartley's heirs at law and the relationship of the Release Deed Grantors to Harriet L. Hartley's actual heirs at law that are demonstrably false. For example:

- The Stockunas Affidavit claims that Genevieve Hargrave Bailey is Karen Stockunas' "great-grandmother" when Ms. Stockunas' great grandmother is Walter A. Bailey's first wife Sara Scull Bailey, who died in 1933 – Thus, the Stipulated Facts demonstrate that Genevieve Hargrave Bailey has no relation by blood or adoption to Karen Stockunas or any other of Frances Carey Bailey's issue or descendants (Compare Plaintiffs' and Upstream's Joint Trial Exhibit 52, ¶3 to Grantors Stipulations ¶¶ 10, 13, 15);
- Patricia Bell Burger was not "an heir at law of Harriet L Hartley" as asserted in all three of the Release Deeds executed by the Burgers (Grantors Stipulations Exhibits 1, and 8-10);
- Harriet L. Hartley's heirs at law, Genevieve Hargrave Bailey and Esther Hargrave Woods, did not receive a distribution of or inherit any real property in Belfast, Maine from Harriet L. Hartley's estate to pass on to any of their heirs or heirs at law (Grantors Stipulations ¶7, Exhibit 1, p. 18 (Schedule D));
- No children of Frances' children who predeceased her (i.e. Karen Stockunas, Barbara Bell, Constance Daily, David Wesley Bell) could claim to have inherited title, right or interest in real property passed from Genevieve Hargrave Bailey to Walter Bailey to Frances Carey Bailey Bell Fox Mistic, because neither Richard Bell and Walter Bailey Bell nor their respective spouses and issue were beneficiaries of Frances' estate and, more importantly, *no one* inherited any real property in Belfast, Maine from Harriet L. Hartley's estate, including Genevieve Hargrave, Walter A. Bailey, or Frances Carey Bailey Bell Fox Mistic;
- Genevieve Hargrave Bailey received and inherited no title, right or interest in real property in Maine from Harriet L. Hartley's estate to pass on to Walter A.

Bailey (Grantors Stipulations ¶7); and, therefore, Walter A. Bailey received and inherited no title, right or interest in real property in Maine from Genevieve to pass on to his daughter Frances or her descendants; and

- Esther Hargrave Woods received and inherited no title, right or interest in real property in Maine from Harriet L. Hartley's estate to pass on to her surviving spouse Samuel Nelson Woods or her son Samuel Nelson Woods, Jr.; and, therefore, Samuel Nelson Woods, Jr. received and inherited no title, right or interest in real property in Maine from Esther to pass on to his surviving spouse Gertrude Gausmann Woods or his son and daughter Marcia L. Woods and David Nelson Woods.

In sum, NAF's agents created the fiction that Harriet L. Hartley severed and retained a portion of her intertidal land when she executed the Hartley-to-Butlers deed on September 25, 1950, and then, using Ancestry.com, set about finding distant relatives of Harriet L. Hartley's sisters or their spouses to pay them to provide NAF with "Release Deeds." However, none of the Release Deed Grantors ever received a distribution of, nor inherited, real property in Belfast, Maine from Harriet L. Hartley or her heirs at law to convey to NAF.

In fabricating the release deeds, NAF and its counsel have ignored the foundational principle that "a person can convey only what is conveyed into them." *Almeder v. Town of Kennebunkport,* 2019 ME 151, ¶38, *citing, Eaton v. Town of Wells*, 2000 ME 176, ¶19, 760 A.2d 232. The Court should declare the release deeds nullities, as a matter of law based on the Stipulated Fact and Exhibits, because none of the Grantors were heirs or heirs at law of Harriet L. Hartley and none of the Grantors of the release deeds had title, right or interest in any real property once owned by Harriet L. Hartley to convey to NAF.

3. NAF Failed to Comply with Any of the Requirements in the Maine Uniform Probate Act to Determine Whether the Grantors were Heirs or Heirs at Law of Harriet L. Hartley or To Ascertain Whether the Estate of Harriet L. Hartley Retained Real Property in Belfast, Maine

At no time, prior to drafting or after obtaining the release deeds, did NAF and its counsel ever attempt to comply with the requirements in the Maine Uniform Probate Act to open a probate proceeding for Harriet L. Hartley's estate or file an ancillary proceeding to have the Grantors' status as heirs or heirs at law determined and/or to ascertain if there was/is real property in Maine

belonging to Harriet L. Hartley's estate (i.e. have the probate court (or this court) determine if there was in fact an orphaned intertidal tract that was capable of conveyance to NAF and descendants with a legal right to convey). See, e.g. 18-C M.R.S. § 3-901. (Grantors Stipulations ¶¶8 and 49).

In the Release Deeds NAF has obtained from ten out-of-state persons, described by NAF as "Hartley Heirs," NAF has continued to claim that Harriet L. Hartley died "testate."[15] However, all of the Release Deeds NAF drafted in 2019 base the Grantors' respective claims of title, right or interest on the theory that title to the allegedly orphaned intertidal land passed to Harriet L. Hartley's heirs at law (her sisters Genevieve Hargrave Bailey and Esther Hargrave Woods) at the time of Harriet's death in October 1951. This drafting decision is irreconcilable with NAF's claim that Harriet L. Hartley died "testate."

If Harriet L. Hartley retained land in Belfast, Maine at the time of her death, her 1945 Will would have been "effective" – and the only person who would have, or could have, inherited the retained intertidal land through the 1945 Will was Harriet's intended beneficiary under her Will: Samuel Nelson Woods Jr. Under no circumstances would either of Harriet L. Hartley's heirs at law ever have inherited her Belfast, Maine real property, because the only reason an intestacy was declared to exist – rendering Harriet's 1945 Will "ineffective" – was the sale during her life time of all of the real property the 1945 Will referenced and intended to bequeath. If there was land to be bequeathed under the Will, there would be no intestacy.

Consequently, the very notion that the Release Deed Grantors obtained title through either Genevieve or Esther as Harriet's heirs at law, designated as such expressly because all of Harriet's real property had been sold during her life, simply makes no sense.

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[15] In its 9-2-2020 Opposition to Plaintiffs' Motion to file the Third Amended Complaint, NAF defined the term "Hartley Heirs" as: "'Hartley Heirs' means the individuals who assigned their interest in the disputed land to Nordic via the release deeds discussed in Plaintiffs' Motion." See, NAF 9-2-2020 opposition filing, p. 2, f.n. 2. Thus, NAF defines a "Hartley Heir" solely by reference whether a person executed a release deed, without reference to the meaning of the phrase "heir" in the Maine Uniform Probate Code and seemingly devoid of any nexus or relation between the Grantor and Harriet L. Hartley, or her heirs at law: Genevieve Hargrave Bailey and Esther Hargrave Woods.

In addition, NAF's and Surveyor Dorsky's hypothesis that the distant descendants of Harriet's heirs at law (related to Harriet or her heirs at law primarily by marriage not blood or adoption) obtained title to the orphaned intertidal land adjacent to the Hartley-to-Poor conveyance, appears to be premised on the Common Law notion that "title vests in the beneficiaries [of a will or intestate succession] immediately upon the decedent's death." Under this common law principle, deeds of distribution from a personal representative have no legal effect on title interests. *Clark v. Clark*, No. ELLSC-RE-2017-00013, 2018 WL 8300157, at *2 (Me. Super., Nov. 01, 2018), *affirmed,* 2019 ME 158, ¶8. However, such an argument "discounts the impact the phrase 'subject ... to administration' [in 18-C M.R.S. § 3-101 of the Uniform Probate Code ("UPC")][16] has on the devolution" of property. *Id.*

This interpretation of UPC Section 3-101 was rejected in Maine, in *Clark v. Clark,* 2018 WL 8300157, *affirmed,* 2019 ME 158, ¶¶8-11. In *Clark v. Clark,* the Superior Court cited the explanation of Section 3-101, by the North Dakota Supreme Court in *Estate of Hogen,* 863 N.W.2d 876 (N.D. 2015), with favor, and the Law Court affirmed that interpretation of 3-101, stating that:

> As a leading treatise on the UPC has explained,
>
> Since the [personal representative] has a "power over the title" rather than "title[,"] no gap in title will result if the [personal representative] does not exercise his power during the administration. The title of the heir or devisee, however, is "subject to administration"; *hence, it remains encumbered so long as the estate is in administration or is subject to further administration*.

(emphasis supplied). Clark v. Clark, 2019 ME 158, ¶ 11, 219 A.3d 1020, 1023, *citing*, Ass'n of Continuing Legal Educ. Adm'rs, *Uniform Probate Code Practice Manual* 318 (Richard V. Wellman ed., 2d ed. 1977); *see Estate of Hogen*, 863 N.W.2d at 885.

The *Clark v. Clark* Superior Court gave further explanation of the import of the inclusion of the phrase "subject to administration" in UPC §3-101, stating:

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[16] UPC 3-101 states in relevant part: "[u]pon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will… , *subject … to administration."* 18-A M.R.S. § 3-101 (2017).

> Importantly, the North Dakota Supreme Court looked extensively at Richard Wellman's explanation of distribution in kind, including the following:
>
> > The instrument of distribution does not, in the purest sense of the words, cause the vesting in interest of the title of the devisee or heir; rather, ***it transforms the beneficiary's beneficial interest in the estate, as acquired by him at death by the operation of Section 3-101, from an equitable right to receive his due interest in the estate to regular ownership of the asset distributed****.* … The distributive acts of a PR, whether consisting of payments by check or in cash, physical delivery of possession, or execution and delivery of an instrument or distribution, are quite important. These acts reflect the PR's determination of heirs in intestacy, his interpretation of the will in a testate case, and his conclusion regarding the identity of the taker and the propriety of the distribution in the light of all of his duties as estate fiduciary. These and other determinations by the PR are given importance by the Code and are considered administrative determinations that are assumed to be correct.
>
> *3 *Id.* at ¶ 23 (emphasis added) (quoting Wellman, *supra,* at 384-85). ***This description of a deed of distribution transforming a beneficial interest in the estate from an equitable right to receive it to regular ownership seems to be quite apt.*** Indeed, the North Dakota Supreme Court concluded that "a devisee's right to a decedent's property is subject to administration by a personal representative, which may continue until … execution of an instrument or deed of distribution ...." *Id* at ¶ 25. Until such an action occurs, "a devisee's title to the decedent's property is encumbered ...." *Id* at ¶ 26.

Clark v. Clark, No. ELLSC-RE-2017-00013, 2018 WL 8300157, at *2–3 (Me. Super., Nov. 01, 2018) (emphasis supplied).

Here, in drafting and obtaining the Release Deeds seemingly out of thin air, NAF's counsel have ignored the "subject to administration" requirements in the Maine UPC §3-101 and the requirement to file ancillary proceedings in the Waldo County Probate Court (or this court) – ***prior to executing release deeds from putative "heirs."*** An ancillary proceeding is necessary, in advance of obtaining release deeds, to determine who is/was an actual heir or heir at law of Harriet L. Hartley's estate and/or whether Harriet L. Hartley retained title to any intertidal land in Maine at the time of her death. See also, 18-C M.R.S. § 3-901.

In the absence of a distribution of title to persons determined to be lawful heirs, heirs at law and/or devisees of the Harriet L. Hartley estate, the Grantors lacked regular ownership in real property and the Release Deeds conveyed no title, right or interest to NAF.

4. <u>Res Judicata Effect of the Final Decree in ***Ferris v. Hargrave***</u>

On the face of each of the Release Deeds, the Grantors acknowledge that any title, right or interest that they may have, *if any*, is based on the August 27, 1934 deed from Genevieve E. Hargrave to the Hartleys, recorded in the Waldo County Registry of Deeds at Book 386, Page 453 (the Hargrave-to-Hartleys deed; Title Stipulations Exhibit 10). Thus, all of the Grantors are making a claim of title, right or interest by, through or under Genevieve E. Hargrave. However, such claims were expressly barred by this Court in its Final Decree in *Ferris v. Hargrave*, which states in relevant part that:

> It is, after hearing, ORDERED, ADJUDGED AND DECREED THAT:
>
> 1. The defendants and every person claiming by, through or under them, be barred from all claims to any right, title interest or estate in the following described land and real estate:
>
> A certain lot or parcel of land, together with the buildings thereon, commonly known as The Little River Inn, situated in Belfast, in the County of Waldo and State of Maine, on the easterly side of the Atlantic Highway, and being bounded and described as follows, to wit:
>
> Northerly by land of Fred R. Poor; Easterly by Penobscot Bay; Southerly by Little River and Westerly by the Atlantic Highway, so called.
>
> Excepting, however, a certain lot or parcel of land, together with the buildings thereon, conveyed to Joseph Grady et ux by Ernest J. Bell and Marjorie E. Bell by deed dated May 18, 1964 and recorded in the Waldo County Registry of Deeds in Book 621 at Page 288, . . .

The Defendants in *Ferris v. Hargrave* were listed as:

> GENEVIEVE E. HARGRAVE, whereabouts unknown but whose last residence was in Philadelphia, County of Philadelphia, State of Pennsylvania, her heirs, legal representatives, devisees, assigns, trustees in bankruptcy, disseizers, creditors, lienors and grantees, and any and all other persons unascertained, not in being or unknown or out of State, and all other persons whosoever who claim or may claim and right, title, interest or estate, legal or equitable, in the within described land and real estate through or under said defendants.

Here, all of the Release Deed Grantors fall within the ambit of the Defendants that the above-referenced bar to claims applies. To the extent any of the Release Deed Grantors had a claim of title, right, interest or estate in the intertidal land on which the Eckrote or Morgan lots front prior

to June 26, 1970, that claim was extinguished by this Court's holding in *Ferris v. Hargrave,* on June 26, 1970 (Title Stipulations Exhibit 28). The Release Deed Grantors' interests were adequately represented at the time that *Ferris v. Hargrave* was considered by this Court in 1970, by the Court's appointment of a *guardian ad litem* (Roger Blake, Esq.), appointed by this Court pursuant to 14 M.R.S § 6656, and this Court ruled against such claims after a hearing at which Attorney Blake represented the interests of all such Defendants, known and unknown. Additionally, the Court approved notice by publication in the Republican Journal of successive weeks – meaning Fred R. Poor (the Eckrotes' predecessor in interest and Janet Eckrote's grandfather) also had been provided legally sufficient notice of the *Ferris v. Hargrave* quiet title proceedings and failed to challenge *Ferris'* assertion of his fee simple ownership in all land described in the Complaint.

Accordingly, the Grantors' and NAF's assertion of title, right or interest in the Release Deeds executed in March through July of 2019, were and are barred by the recorded Final Decree of this Court – which is entitled to *res judicata* effect against the Grantors and now NAF, which is also attempting to assert a "partial interest" in land that is subsumed in the description of real property to which title was quieted by the 1970 final decree in *Ferris v. Hargrave.* This Final Decree was recorded in the Waldo County Registry of Deeds at Book 683, Page 283, and thus well-known to Defendant NAF and its counsel well before they endeavored to solicit and obtain the so-called Release Deeds from persons that are expressly barred from making any claim of title, right, interest or estate in the land described in that Final Decree.

NAF attempts to evade the *res judicata* effect of the *Ferris v. Hargrave* Final Decree using the circular reasoning that the abutter's description in the *Ferris* deed and Final Decree, excludes the intertidal land on which the Fred R. Poor upland lot fronted (now owned by the Eckrotes and Morgan). NAF cites no authority to support its unusual interpretation of the plain meaning of the unambiguous Hartley-to-Butlers deed or the Final Decree in *Ferris.*

Notably, the abutter's description of the covered land is identical to the abutter's description in the Hartley-to-Butlers deed and the deed description in the deed from Heather O. Smith to Plaintiffs Mabee and Grace (Title Stipulations Exhibits 14 and 32; *see also*, Exhibits 20-27, and 29-31). Pursuant to the Final Decree of this Court in *Ferris v. Hargrave,* Plaintiffs Mabee and Grace, as successors in interest to Winston C. Ferris, are the owners in fee simple of all land covered by the description of land in the *Ferris* final decree – which is the identical description of the property conveyed to the Plaintiffs in the Smith-to-Mabee/Grace deed. And, consequently, Plaintiffs are entitled to the rights conferred by that Final Decree, including barring all persons defined as "Defendants" in that Decree -- including the Release Deed Grantors and NAF -- from claiming any right, title, interest or estate in Plaintiffs' land and real estate to which title was quieted by the *Ferris v. Hargrave* Final Decree, including the intertidal land on which the Eckrote and Morgan lots front.

5. The Grantors' Claims of Right, Title or Interest Are Barred By the 20-Year Statute of Limitations in 14 M.R.S. § 801, et seq.

All of the Release Deed Grantors' claims of right, title or interest are barred by the 20-year statute of limitations in 14 M.R.S. § 801, et seq.[17]

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[17] The relevant statutory provisions state as follows:

> **§801. Rights of entry and action barred in 20 years**
> No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within 20 years after the right to do so first accrued, or unless within 20 years after he or those under whom he claims were seized or possessed of the premises, except as provided in this subchapter.
>
> **§802. Right begins to run**
> If such right or title first accrued to an ancestor, predecessor or other person under whom the plaintiff claims, said 20 years shall be computed from the time when the right or title first accrued to such ancestor, predecessor or other person.
>
> **§803. Right deemed to accrue**
> The right of entry or of action to recover land, as used in this subchapter, first accrues at the following times:
>
> **1. When disseized**. When a person is disseized, at the time of such disseizin;
>
> **2. Heir or devisee.** When he claims as heir or devisee of one who died seized, at the time of such death, unless there is a tenancy by the curtesy or other estate intervening after the death of the ancestor or devisor; in that case, his right accrues when such intermediate estate expires, or would expire by its own limitation;

Applying these statute of limitations provisions to the three distinct categories of Release Deed Grantors here reveals the following:

1. The three Burger Grantors all base their claims of title, right or interest on Patricia Bell Burger, who they erroneously assert was an "heir at law of Harriet L. Hartley." Under this premise, the Burger Grantors' alleged right to assert a claim would have accrued on or about April 28, 1952 (when the actual heirs at law were designated and Harriet L. Hartley's Will was determined to be "ineffective").
2. The two Woods Grantors base their claims of title, right or interest on their father, Samuel Nelson Woods, Jr. being an "heir at law" of Esther Hargrave Woods, who they describe as a sister and "devisee" of Harriet L. Hartley. Under this premise, the Woods Grantors' alleged right to assert a claim would have accrued at the time of Esther Hargrave Woods' designation as an heir at law (April 28, 1952) or her death on May 1, 1957 (Grantors Stipulations ¶36).
3. The five Bell Grantors all base their claims of title, right or interest on "being heirs at law of [their] great grandfather, Walter A. Bailey . . . the surviving spouse and sole heir of Genevieve H. Bailey, who died intestate . . . on April 19, 1956." Under this premise, the Bell Grantors alleged right to assert a claim would have accrued at the time of Genevieve's death in 1956 or, Walter's death on January 5, 1962 (Grantors Stipulations ¶12).
4. Additionally, the *Ferris v. Hargrave* Final Decree was entered on June 26, 1970. (Title Stipulations Exhibit 28).

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3. Intermediate estate. When there is such an intermediate estate, and in all cases, when the party claims by force of any remainder or reversion, his right accrues when the intermediate estate would expire by its own limitation, notwithstanding any forfeiture thereof for which he might enter at an earlier time

§805. Accrual of right of entry
In all cases not otherwise provided for, the right of entry accrues when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title on which the entry or action is founded.

Based on the foregoing stipulated facts, all of the Grantors, and by extension NAF as their common Grantee, are barred from asserting any claim of title to the allegedly orphaned intertidal land by 14 M.R.S. §801, et seq. – the 20-year statute of limitations for which ran out decades ago.

D. FACTUAL AND LEGAL PARAMETERS OF THE 8-6-2018 NAF-ECKROTE EASEMENT AS AMENDED ON 12-23-2019

NAF proposes to build a large land-based salmon aquaculture facility in Belfast, Maine, which would require placing industrial accessory structures, in the form of two 30" industrial saltwater intake pipes and one 36" outfall or discharge pipe, about a mile into Penobscot Bay. To place its pipes into the Bay, NAF needs to cross Route 1 (Atlantic Highway) and one of the Residential II zoned lots on the eastern side of Route 1.

In the Spring of 2018, NAF had a survey done by Good Deeds (Clark Staples, P.L.S.) of the lots on the eastern side of Route 1 in furtherance of obtaining right, title or interest to place its pipes across one of these lots – with specific focus on the Eckrotes' lot (Belfast Tax Map 29, Lot 36). On April 2, 2018, Good Deeds issued its survey plan to NAF indicating the Eckrotes' eastern (waterside) boundary terminated at the Eckrotes' high water mark and containing the following admonition regarding the ability to obtain an easement below the high water mark of the Eckrotes' lot (Plaintiffs' and Upstream's Joint Trial Exhibit 21). This warning was printed in all caps on the face of the plan detailing defects and errors in the Eckrotes' 10-15-2012 deed description, when compared to prior deeds in the chain of title for this parcel:

> SHADED AREA DEPICTS LANDS LOCATED BELOW THE HIGH TIDE LINE. THE DEED FROM THE ESTATE OF PHYLLIS J. POOR TO RICHARD AND JANET ECKROTE DATED OCTOBER 15, 2012, AND RECORDED IN BOOK 3697. PAGE 5 CONTAINS THE LANGUAGE. "...THENCE GENERALLY SOUTHWESTERLY ALONG SAID (PENOBSCOT) BAY A DISTANCE OF FOUR HUNDRED TWENTY-FIVE (425) FEET....
> THE PREVIOUS DEED FROM WILLIAM O. AND PHYLLIS J. POOR TO PHYLLIS J. POOR DATED JULY 1, 1991, RECORDED IN BOOK 1228, PAGE 346 CONTAINS THE LANGUAGE, ...THENCE EASTERLY AND

NORTHEASTERLY ALONG HIGH-WATER MARK OF PENOBSCOT BAY FOUR HUNDRED TEN (410) FEET.... I SUGGEST A LEGAL OPINION OF THE ABILITY OF THE ESTATE OFPHYLLIS J. POOR TO GRANT AN EASEMENT BELOW THE HIGH WATER MARK.

Despite this caution, NAF first attempted to purchase the Eckrotes' lot in the Spring of 2018, and, when that effort was rejected by Janet Eckrote, NAF executed an agreement to obtain an option to buy an easement across the southern portion of the Eckrotes' upland from the Eckrotes, dated August 6, 2018 (Plaintiffs' and Upstream's Joint Trial Exhibit 37). This unrecorded option agreement grants NAF the right to purchase a 40-foot construction easement and a 25-foot permanent easement across the southern boundary of the upland property owned by Janet and Richard Eckrote. This easement area is located along the Eckrote-Schweikert boundary.

To date, NAF has based all of its claims of "sufficient" title, right or interest to obtain various local, State and federal permits on the 8-6-2018 Easement Agreement and not a claim of "title" under the so-called "Release Deeds" NAF acquired between March and July 2019 from ten out-of-State persons NAF has described as "Hartley Heirs". However, the factual parameters and legal validity of this unexercised and unrecorded Easement option Agreement, the closing date for which has been extended multiple times, have never been determined by a Court of competent jurisdiction. See, *Tomasino v. Town of Casco,* 2020 ME 96.

1. By its Own Terms, the 8-6-2018 NAF-Eckrote Easement Agreement Expressly States that the Waterside Boundary of the Easement <u>To Be Granted Terminates at the Eckrotes' High Water Mark</u>

The boundaries of the easement option granted by the Eckrotes to NAF are not described by a metes and bounds description in the 8-6-2018 Easement Agreement, but are instead defined by an image attached as Exhibit A to the 8-6-2018 Easement Agreement.

Exhibit A of the 2018 Easement Agreement indicates that the eastern (waterside) boundaries of both the 40-foot construction easement and 25-foot permanent easement that would be granted by the option from the Eckrotes in the 2018 Easement Agreement to NAF ***terminate at the high-water***

mark of the Eckrotes' lot. (*See, e.g.,* 8-6-2018 Easement Agreement at Exhibit A; Plaintiffs' and Upstream's Joint Trial Exhibit 37 at Exhibit A and Exhibit 51, 2d WHEREAS Clause). Nothing in the 8-6-2018 Easement Agreement or the 3-3-2019 Letter Agreement or the 12-23-2019 Amendment grants NAF: (a) an easement or option for an easement in, to or over the intertidal land on which the Eckrotes' lot fronts; or (b) a right to use the intertidal land on which the Eckrotes' lot fronts. *Id.*

On 12-18-2018 and 1-7-2019, Upstream and the IAMAW Maine Lobstering Union filed objections in various State permitting proceedings focused on NAF's lack of "sufficient title, right or interest" (administrative standing), stating that the easement on which NAF relied to establish a claim of "sufficient title, right or interest" in the land proposed for leasing and permitting (i.e. use and development) actually, *by its own express terms* as illustrated in Exhibit A of the 2018 Easement Agreement, ***terminated at the high water mark of the easement grantors' (the Eckrotes') upland property and granted no easement to use the intertidal land on which the Eckrotes' lot fronts***.

In response to these objections, on January 18, 2019, the Bureau of Parks and Lands ("BPL") issued a letter to NAF declaring that the 2018 Easement Agreement was ***insufficient*** to demonstrate that NAF had the requisite right, title or interest to proceed in the Bureau's lease process. The Bureau's 1-18-2019 letter also concluded that the easement option granted by the 8-6-2018 Easement Agreement terminated, ***by its own terms***, at the Eckrotes' high water mark. Specifically, in the January 18, 2019 letter from the Bureau to NAF's counsel, the Bureau rejected the August 6, 2018 Easement Purchase and Sale Agreement as sufficient proof of TRI (i.e. administrative standing), stating in relevant part that:

> This letter serves as the Bureau of Parks and Lands, Submerged Land's Program's formal request that Nordic Aquafarms provide evidence that Nordic Aquafarms had established right, title or interest in the intertidal land where the pipelines are proposed. *As the Submerged Lands Program (the SLP) communicated during our conversation with David Kallin on January 16, 2019,* ***the Easement Purchase and Sale Agreement submitted by Nordic Aquafarms defines the easement area by***

reference to an <u>Exhibit A</u> that <u>depicts the easement area as stopping at the high-water mark</u>. [emphasis supplied].

(Plaintiffs' and Upstream's Joint Trial Exhibit 47). The Bureau gave NAF until April 18, 2019 to submit additional proof of title, right or interest in all land, including the intertidal land between the high-water mark of the Eckrotes' lot and the State's submerged lands beyond the low water mark. *Id.*

On January 22, 2019, the Department of Environmental Protection issued a similar letter to NAF directing NAF to provide additional proof of its title, right or interest. The 1-22-2019 DEP Letter also determined that NAF had not demonstrated sufficient right, title or interest in the intertidal land on which the Eckrotes' lot fronts, based on the plain meaning of the Easement option Agreement on which NAF relied in claiming TRI. This determination was later reversed, although NAF had done nothing to rectify the deficiencies in the 8-6-2018 Easement Agreement nor amend the boundaries of the easement to be granted as stated in Exhibit A of that 8-6-2018 Easement Agreement.

2. The March 3, 2019 NAF-Eckrote Letter Agreement <u>Did Not Amend the Boundaries of the NAF-Eckrote Easement Option</u>

In March 2019, NAF submitted a *third* proposed route to BPL for its pipes and two letters, drafted by counsel for NAF and the Eckrotes, but signed ultimately by the President of NAF and the Eckrotes. This 3-3-2019 "Letter Agreement" allegedly was entered in response to the Bureau's request for additional proof in support of NAF's claim of "sufficient" right, title or interest, pursuant to 01-670 C.M.R. ch. 53, § 1.6(B)(1), in the January 18, 2020 Letter rejecting the 8-6-2018 Easement Agreement as sufficient proof of RTI. (Plaintiffs' and Upstream's Joint Trial Exhibits 47 and 49).

The "Letter Agreement" between NAF and the Eckrotes, dated March 3, 2019, with a signed "Acknowledgement" from the Eckrotes dated 2-28-2019, was provided to BPL on or about March 26, 2019, as additional support for NAF's assertion that the 2018 Easement Agreement included a

right to use the intertidal land on which the Eckrotes' lot fronts. However, *as a matter of law*, Plaintiffs submit that nothing in the March 3, 2019 Letter Agreement amends the boundaries of the Easement option as defined in Exhibit A of the 2018 Easement Agreement, which defined the waterside boundary of the easement option granted by the Eckrotes to NAF as terminating at the high-water mark of the Eckrotes' property. *Id.* Indeed, nothing in the March 3, 2019 Letter Agreement expressly states that the Eckrotes have, or claim to have, any ownership in or to the intertidal land on which their lot fronts. *Id.*

The March 3, 2019 Letter from Erik Heim to the Eckrotes states in relevant part as follows:

> . . . You intended a broad easement over your property, including any rights you have to US Route 1 and the intertidal zone such that Nordic Aquafarms can build and site its pipes anywhere in those areas where you have rights.
>
> * * *
>
> . . .[T]his letter clarifies that the easement area delineated in the [8-6-2018 Easement] P&S includes the entirety of your [the Eckrotes'] rights in the intertidal zone and US Route 1 and amends the Closing Date.

Plaintiffs' and Upstream's Joint Trial Exhibit 49.

Despite this apparent continuing defect in demonstrating a cognizable right to use the intertidal land on which the Eckrotes' lot fronts in the manner the permits and leases from government agencies would authorize NAF to do, various local and State agencies, including BPL and DEP, have cited the March 3, 2019 Letter Agreement as a basis for determining that NAF had demonstrated "sufficient" title, right or interest to have administrative standing and proceed in the permitting processes in those administrative entities.

Plaintiffs' and Upstream's challenges to the sufficiency of NAF's "TRI" and administrative standing to obtain permits, licenses and leases to use the intertidal land on which the Eckrotes' lot fronts were <u>not</u> and are <u>not</u> based on a determination of ownership of the intertidal land, but on the grounds that the Eckrotes-to-NAF easement option terminates, <u>*by its own unamended terms*</u>, at the Eckrotes' high water mark – *as the BPL and DEP previously determined in their respective January 2019 letters.* In making "TRI" determinations, the administrative entities have appropriately stated

that "***only a court***" can make a determination of ownership of this intertidal land. The same is true of determinations relating to the factual parameters and legal validity of the easement option granted by the 8-6-2018 NAF-Eckrote Easement Agreement, as well as the impact of the March 3, 2019 Letter Agreement and 12-23-2019 Amendment to that Agreement -- "***only a court***" can make those determinations as well. See, e.g. *Tomasino v. Town of Casco,* 2020 ME 96, ¶¶ 8, 9 and 15.

However, to date, NAF has not requested, and this Court has not yet made, any determinations by this Court regarding the factual parameters and legal validity of the 8-6-2018 Easement Agreement, as clarified or amended by the 3-3-2019 Letter Agreement and 12-23-2019 Amendment (Plaintiffs' and Upstream's Joint Trial Exhibit 51) executed by NAF and the Eckrotes. To that end, as a portion of the relief requested by Plaintiffs in this case, Plaintiffs submit that such a determination is appropriate now as part of the Court's Phase I trial and judgment.

Accordingly, based on the plain wording of the 8-6-2018 NAF-Eckrote Easement Agreement, the 3-3-2019 Letter Agreement, and the 12-23-2019 Amendment of the 8-6-2019 Easement Agreement (particularly the express language in the Second WHEREAS Clause), Plaintiffs respectfully submit that they are entitled to a declaratory judgment declaring that the 8-6-2018 Easement Agreement (as clarified and amended) terminates at the Eckrotes' high water mark and fails to grant NAF even an option to obtain an easement to use the intertidal land on which the Eckrotes' lot fronts for any purpose, including the placement of its three industrial pipes.

E. The Placement of Industrial Pipes is not "Fishing" within the Meaning of the Public Trust Rights Protected Under the Colonial Ordinance

In NAF's Affirmative Defense #15 to the Second Amended Complaint, filed February 6, 2020, NAF asserted that the placement of industrial pipes, that are accessory structures to its proposed land-based salmon growing and processing facility, was protected by the public trust doctrine. Specifically, NAF stated:

> 15. By the public trust doctrine, because crossing under the intertidal zone from an upland property to the ocean and discharge seawater for aquaculture is fishing, fowling, navigating and/or such other reasonable ocean-based activity that

may not be enjoined by any private landowner, and certainly not by anyone other than the upland owner.

2-6-2020 NAF Answer, Affirmative Defenses, Cross and Counterclaims, p. 15, ¶15.

Although NAF does not include this same express defense in the Affirmative Defenses filed on June 3, 2021, in response to Plaintiffs' Third Amended Complaint, NAF reserves the right to file additional defenses and affirmative defenses and NAF's Counterclaims Count I remains, which states in relevant part:

> 13. NAF seeks a declaratory judgment determining that Counterclaim Defendants have no property rights requiring NAF to obtain permission or a property interest from them in order to bury its seawater pipes for aquaculture under the Eckrotes' upland and under the adjacent intertidal zone.

Rejection of NAF's Counterclaim Count I and the affirmative defense that burying industrial pipes that are accessory structures servicing a land-based aquaculture facility constitutes "fishing" within the meaning of the Colonial Ordinance of 1641-1647, protected by the public trust doctrine, is a matter that should be resolved within the Phase I judgment as a matter of law.

NAF's assertion regarding the scope of the meaning of "fishing" under the Colonial Ordinance of 1641-1647 is without basis in Maine law and is contrary to prior holdings interpreting the activities protected by the Colonial Ordinance of 1641-1647. Placement of structures in the intertidal zone to catch fish is not an activity that is protected under the public trust doctrine allowing "fishing, fowling and navigation" by the public in the intertidal zone – whether those structures are fish weirs, wharfs or industrial pipes.

As noted by the Superior Court holding in *Moody v. Heirs of Edna O. Rideout,* 2018 WL 3953859, the definition of the term "fishing" is not without commonsense limits. In *Moody v. Rideout* the Superior Court (Justice Mills) explained these limits as follows:

> Despite the "sympathetically generous interpretation" of the term fishing, *Bell*, 557 A.2d at 173, this court is unaware of any instance where the Law Court has held that the public's right to fish encompasses passive activities that are not incidental to the act of fishing itself. Instead, the Law Court's statement that "fishing" should be "broadly construed" appears to indicate that courts should construe "fishing" as the attempt to harvest a variety of sea creatures and not just fish. *See Bell*, 557 A.2d at

173 (defining fishing to include digging for clams, worms and shellfish). In contrast to loading and unloading fishing equipment upon the shore, it is not necessary that such equipment be permanently stored in the intertidal zone when it is not in use and it is therefore not reasonably incidental to the act of fishing. *See id.*

> Further, the public's right to use the intertidal zone for fishing, fowling, and navigation is not absolute and the fee owner of the intertidal zone retains certain advantages over the public. *Duncan v. Sylvester*, 24 Me. 482, 486 (1844). For instance, while members of the public may fish the mudflats, they are not "entitled to place weirs, or other permanent erections, upon those flats, or to set [their] nets or seines, making them fast in the usual way by grapplings to the shore." *Id.* (internal quotation omitted). There is no apparent difference between the interference caused by the erection of a structure used for fishing and the seasonal storage of fishing equipment in the intertidal zone. The court concludes that the use of the intertidal land for the storage of fishing equipment is not a fishing activity permitted by the Colonial Ordinance of 1641.[1]

Moody v. Rideout, No. RE-17-102, 2018 WL 3953859, at *4 (Me. Super., June 13, 2018).

Accordingly, NAF's 2-6-2020 affirmative defense #15 and Counterclaim Count I should be addressed, as a matter of law, as part of Phase I judgment and expressly rejected by the Court.

CONCLUSION

For all the above reasons, Plaintiffs, Jeffrey Mabee and Judith Grace and Friends of the Harriet L. Hartley Conservation Area, and Upstream Watch respectfully request that the Court determine that: (i) the Eckrotes did not obtain title to the intertidal land on which their lot fronts by adverse possession, boundary by acquiescence, or abandonment; (ii) the Grantors of the Release Deeds recorded by Defendant Nordic Aquafarms, Inc. ("NAF") on September 23, 2020, lacked any title, right, interest or estate in any land at issue in this matter to convey to NAF and were barred from so claiming by the prior judgment in this Court in *Ferris v. Hargrave* and the 20-year statute of limitations in 14 M.R.S. §801, et seq.; (iii) the easement option granted by the Eckrotes to NAF, dated 8-6-2018 (as amended on 12-23-2019), terminates, *by its own terms*, at the Eckrotes' high water mark and does not grant NAF any title, right or interest to use the intertidal land on which the Eckrotes' lot fronts; and (iv) placing industrial pipes in the intertidal zone does not constitute

"fishing" under the Colonial Ordinance of 1641-1647 and is not protected by the public trust doctrine.

Respectfully submitted this 16th day of June, 2021.

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