UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SOSCIA HOLDINGS, LLC	:	
	:	
VS.	:	**C.A. NO. 1-22-cv-00266-LM-AKJ**
	:	
STATE OF RHODE ISLAND, STATE OF RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, TERRENCE GRAY, INDIVIDUALLY AND IN HIS CAPACITY AS THE DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, AND DAVID E. CHOPY, INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR FOR THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT OFFICE OF COMPLIANCE AND INSPECTION	:	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED VERIFIED COMPLAINT

INTRODUCTION

Now come Defendants State of Rhode Island Department of Environmental Management ("RIDEM"), Terrence Gray, individually ("Mr. Gray") and in his capacity as the director of the Rhode Island Department of Environmental Management (the "Director"), David Chopy individually ("Mr. Chopy") and in his capacity as the Administrator for the Rhode Island Department of Environmental Management Office of Compliance and Inspection (the "Administrator"), and the State of Rhode Island (collectively, the "Defendants" or the "State"), before this Honorable Court and hereby provide the following Reply to Plaintiff's Opposition to

Defendants' Motion to Dismiss Plaintiff Soscia Holdings, LLC's ("Soscia" or "Plaintiff") Second Amended Verified Complaint ("Complaint") in the above-captioned matter in its entirety.

Nothing in the Opposition rehabilitates the Complaint, which remains deficient for the reasons outlined in the Defendants' Motion to Dismiss and memorandum in support thereof (collectively, "Motion to Dismiss"). First, this Court does not have jurisdiction over many of the claims brought by Soscia. Specifically, a majority of the relief sought by Soscia in Claims I-IV is barred under the Eleventh Amendment to the United States Constitution. Additionally, as to all but Mr. Gray and Mr. Chopy (together, the "Individual Defendants"), all of Soscia's 42 USC § 1983 claims are improperly brought against parties who are not "persons" within the meaning of that statute, as outlined in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Moreover, to the extent sovereign immunity does not apply, the Individual Defendants are protected from suit by qualified immunity with respect to these claims. This Court also lacks jurisdiction to decide Count VII of the Complaint, as the subject claim seeks a declaration from this federal court, determining how state officials must conduct themselves on state law grounds. This leaves only Claims V and VI, which are state tort claims that should be dismissed given that there is no federal jurisdiction over any other of Soscia's claims.

Moreover, as apparent on the face of the Complaint and outlined in the Motion to Dismiss, none of Soscia's claims is pleaded with the specificity required to survive a motion to dismiss under Rule 12(B)(6). *See e.g. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007) (complaint must contain more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (internal citations omitted). Of particular note, Soscia has not applied for a permit or attempted to apply for a permit and has never identified an intended use for its property that would be hindered by any application of R.I. Gen. Laws § 46-19.1-1 ("Dam

Permitting Act"). The oft cited Immediate Compliance Order dated August 9, 2022 (the "ICO") has now expired, and there is no active enforcement of the Dam Permitting Act pending against Soscia. Despite this, Soscia has relied on vague assertions of harm that could befall when some hypothetical use, which remains unidentified, is thwarted by a mechanism that is similarly unidentified. *See generally*, Complaint ("Compl."). Even the introduction of new facts and theories of law in the Opposition but not contained in the Complaint (which should not be considered), do not clear the bar for stating a claim. *See*, *e.g.*, *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (when deciding 12(b)(6) motion, court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein, and facts susceptible to judicial notice).

I. TO THE EXTENT SOSCIA'S RIGHTS DERIVE FROM STATUTORY GRANT, SUBSEQUENT LEGISLATION CAN AND HAS ALTERED THOSE RIGHTS IN THE NAME OF PUBLIC HEALTH AND SAFETY.

At the very onset, it is important to point out that a large number of Soscia's assertions are fatally flawed as a result of a failure to comprehend its own rights as a property owner. In furtherance of this misunderstanding, Soscia has attempted to present improper conclusions of law as "facts." *See* Opposition ("Opp.") at 2-13 (including section entitled "History and legal effect"). Despite its claims to the contrary, Soscia's purchase of property did not remove Johnson's Pond in Coventry, RI from the reach of the State's public health and safety regulations. *See* Memorandum in Support of Motion to Dismiss ("MTD Memo") at 37-39.

A. The Milldam Act Does Not Displace Environmental Regulation.

Property rights, even if conveyed through legislative grant, do not exempt private property holders from the run mill of public health and safety regulations; "neither property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to

regulate it in the common interest.'" *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84–85 (1980) quoting *Nebbia v. New York*, 54 S.Ct. 505, 510-511 (1934)(additional citations omitted).

Moreover, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Of course, that police power is subject to some limitation, including a need to respect the Contract and Due Process Clauses of the Constitution. *See id.* But these are specific claims, with specific requirements, which Soscia does not and cannot meet. *See e.g.* MTD Memo at 20-25 (showing how Dam Permitting Act does not constitute a taking); *see also e.g. id.* at 30-31 (showing how Dam Permitting Act is a permissible state law that does not interfere with federal contracts law). A property grant, even if legislative, is no get-out-of-regulation free card to the grantee, let alone a successor interest who purchases the property over a hundred years after the original grant.

Soscia's claims that the language in the 1896 Milldam Act, which states the right of a mill owner to upkeep its dam "for his or her advantage without molestations," R.I.G.L. § 46-18-2, actually means "without molestation from the General Assembly due to the fact the Dam was originally set up as a milldam" is wrong. Opp. at 6 (rephrasing statute to include supposed exemption from all legislative action). As explained in the Motion to Dismiss, the mill privilege protected under the Milldam Act expires once the mill purposes of a dam have been abandoned. *See* MTD Memo at 27 citing *Mowry v. Sheldon*, 2 R.I. 369, 372-73, 376 (1852). Mill privilege was historically seen as a transferrable property right, and although the Rhode Island Supreme Court has acknowledged that Rhode Island's Milldam Act is not as carefully articulated as those passed in other states around the same time, the Milldam Act "should receive reasonable construction."

Slatersville Finishing Co. v. Greene, 40 R.I. 410, 101 A. 226, 228 (1917) (noting that, although the Rhode Island statute is silent, the holder of an unoccupied mill privilege cannot construct a dam that would render a dam upstream useless).

Soscia does not contend that its dam is or will be used for any existing or future mill purpose, but instead argues that simply "[a]s long as the original purpose for constructing a pond and Dam had been to provide power to a mill, the owner of such Dam and pond could continue to maintain and improve the pond to its advantage without molestation." Opp. at 56. Thus, according to Soscia, if a dam was constructed in 1897 to serve a lone mill that was abandoned the very next year, the owner of the dam (as well as any subsequent purchaser of the property) could forever avoid regulations it disagreed with by claiming that such regulations were "molestations" by the General Assembly. Such a sweeping conclusion defies logic.

Just as Soscia cannot choose to shelter behind a broad and unreasonable interpretation of the Milldam Act, Soscia cannot contort the 1982 act amending the Act Incorporating Quidnick Reservoir Company (the "1982 Act")[1] to somehow repeal all past environmental regulation and prohibit any future environmental regulation with respect to the property purchased by Soscia. Soscia claims that because there was "[n]o attempt [ ] made prior to [the passage of the 1982 Act] to regulate the Dam or Pond[,]" the statutory changes to the Act incorporating Quidnick Reservoir Company, "[i]t is clear the State recognized that the Freshwater Wetlands Act [passed in 1971] gave [RI]DEM no jurisdiction, nor was there any intent to create jurisdiction over Quidnick's Dams and reservoirs." Opp. at 7. Thus, Soscia uses unsubstantiated claims, not supported by allegations in the Complaint, of non-enforcement to support the claim that environmental laws prior to or subsequent to the 1982 Act do not apply to its recently purchased property.

[1] *See*, Compl., Exhibit 3 at Page ID # 1027- 1032 (copy of 1982 amendment).

The Freshwater Wetlands Act is also discussed at length in the Opposition; however, it is not at issue in this case. *See* Complaint (making no mention of the Freshwater Wetlands Act); *see also* MTD Memo (making no mention of the Freshwater Wetlands Act). This is not because, as Soscia posits, letters sent by RIDEM on July 11and July 13, 2022 (the "July 11 Letter" and the "July 13 Letter")[2] and the ICO[3] citing the Dam Permitting Act are "an implicit recognition by [RI]DEM that [ ] it does not have Freshwater Wetlands Act jurisdiction over the Pond." Opp. at 29. Instead, it is because RIDEM has chosen to enforce the Dam Permitting Act, which, like the Freshwater Wetland Act, protects wildlife and the environment from harm. *See* MTD Memo at 29 (outlining Dam Permitting Act's environmental purpose).

B. Soscia Must Comply with the Law When Operating its Dam.

As noted in the Complaint, Soscia purchased certain assets via quitclaim deed from the Quidnick Reservoir Company. *See* Compl. at ¶ 7. Soscia claims that those assets included certain franchise rights created in the 1982 Act. As outlined in the Motion to Dismiss, there are several problems with Soscia's theory of a transferred perpetual franchise contract that is binding on the state. *See* MTD Memo at 35-38. Even ignoring those issues, for the purposes of the argument in this section only, the 1982 Act does not mention any mill privileges, but instead sets forth certain corporate purposes; namely:

> The purpose or purposes for which the corporation is organized are: to erect and establish dams and reservoirs for the retention and preservation of the waters of the Pawtuxet River and its branches for the benefit of its members; for establishment and operation of hydro power sites for its members' uses and resale of power generated therefrom; *and any other legal purposes*.

1982 Act (emphasis added).

[2] See Compl. at Exhibits 7 and 8.
[3] See Compl. at Exhibit 9.

"It is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd., Inc.,* 432 U.S. 312, 322 (1977). Moreover, in general, 'words and clauses will not be divorced from those which precede and those which follow.'" *Griffith ex rel. Griffith v. State Farm Mut. Auto. Ins. Co.*, 472 Mich. 521, 533, (2005) (*quoting Sanchick v. State Bd. of Optometry*, 342 Mich. 555, 559, 70 N.W.2d 757 (1955)). Thus, the potential uses of Quidnick's property were properly limited to those allowed by law.

Despite Quidnick's purposes being limited to *lawful* purposes, Soscia contends that its property rights include a right to operate its dam *unlawfully*, outside of the reach of environmental law. *See* OPP at 7; 29. Soscia, in support of this argument, makes the unsubstantiated claim that "[t]he 1982 legislation recognized that the state's interest in the wildlife and vegetation in the Pond were owned by Quidnick." Opp. at 42. But Soscia points to no such language in the 1982 Statute, because there is no such language in the statute, nor in the original land grant, which grants only the "tract of land" and "right of flowage."" *See* Compl. at Exhibit 3, Page ID # 1012.

II. SOVEREIGN IMMUNITY AND RELATED PRINCIPLES BAR SOSCIA'S CLAIMS

As noted in the Motion to Dismiss, Soscia's Section 1983 claims (Claims I-IV) target the central issues surrounding Rhode Island's sovereign interests and its discretionary exercise of police powers. *See* MTD Memo at 8 citing *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33 (1st Cir. 1982) (summarizing First Circuit law that states are immune from suit in federal court over their own land use policies); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287 (1997) (immunity extends to suits implicating a state's "sovereign interest in its lands and waters"). As such, this Court should recognize the State's sovereign immunity and Dismiss Claims I-IV as to the State of Rhode Island, RIDEM, the Director, and the Administrator.

Additionally, Soscia has failed to bring more than nominal assertions against the Individual Defendants, such that sovereign immunity should also protect them. *See* MTD Memo at 8-12.

A. The Takings Claims are Barred by Sovereign Immunity.

Essentially, Soscia puts forth two separate arguments that its takings claims seeking monetary relief are not barred by sovereign immunity: (1) that sovereign immunity is not available in Takings Clause claims; and (2) that there is no ability to bring takings actions in Rhode Island's state court system whenever an environmental regulation is implicated, and therefore sovereign immunity is not available. Soscia fails to support either of these arguments.

Soscia argues that money damages are permitted, despite Eleventh Amendment immunity, because its Takings Claim is self-executing. *See* Opp. at 17. However, as noted in the Soscia's own quote from the decision in *Donnelly v. Maryland,* No. CV 20-3654 PJM, 2022 WL 1502350 (D. Md. May 12, 2022), this argument has been rejected by numerous appeals courts, including the Fourth Circuit. Opp. at 15 (quoting *Donnelly v. Maryland,* No. CV 20-3654 PJM, 2022 WL 1502350 at * 13 (D. Md. May 12, 2022)); *see also* MTD Memo at 13 (noting that every Court of Appeals to consider this issue post- *Knick v. Township of Scott, Pennsylvania* 139 S. Ct. 2162, 2177 (2019) has held that Section 1983 claims for money damages based on the Takings Clause cannot be brought in federal court against a state). And *Donnelly* did not resolve this point at all—it *deferred* ruling on the issue of the applicability of the State's sovereign immunity and stated that it was "inclined to agree" that sovereign immunity should apply. *Id.* To the extent that the court deferred ruling, it was error—Eleventh Amendment immunity is an immunity from suit and should be granted at the earliest opportunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993) ("the value to the States of their Eleventh Amendment immunity . . .is for the most part lost as litigation proceeds past motion practice.")

Soscia also relies heavily on excerpts from an opinion from the Eastern District of North Carolina in *Allen v. Cooper*, 555 F. Supp. 3d 226, 230 (E.D.N.C. 2021). But that decision does not mention or distinguish the appellate decision in *Zito v. North Carolina Coastal Resources* Commission, a Fourth Circuit opinion issued just nine (9) days prior to the *Allen* decision. In *Zito*, the Fourth Circuit upheld sovereign immunity in a takings case against a state agency, even after considering *Knick*. *See Zito v. N. Carolina Coastal Res. Comm'n*, 8 F.4th 281 (4th Cir. 2021), *cert. denied*, 211 L. Ed. 2d 283, 142 S. Ct. 465 (2021).

Allen does however mention the ultimately-upheld District Court decision in *Zito*, 449 F. Supp. 3d 567, 572 (E.D.N.C. 2020), noting that the cases are distinct because the *Zito* case (upholding sovereign immunity in a Takings Claim action) involved a taking of real property, as opposed to the intellectual property at issue in *Allen*. *See Allen v. Cooper*, 555 F. Supp. 3d at 238. Of course, the present case is far more similar to *Zito*, as Soscia alleges a taking of various real property rights transferred via quitclaim deed. *See e.g.* Compl. at ¶ 42 (claiming that "Defendants did take Soscia's property rights"). The *Allen* decision is currently being appealed to the Fourth Circuit, and *Zito* remains controlling law in the Fourth Circuit.

Moreover, Rhode Island provides adequate relief to takings claimants. *Contrast* Opp. at 19. Soscia's contention otherwise hinges on the language of Article I Section 16 of the Rhode Island Constitution, which states:

> Private property shall not be taken for public uses, without just compensation. The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.

(emphasis added). However, Soscia has misinterpreted this second sentence to mean that the State does not provide a remedy for federal Takings Claims. Opp. at 21. Rhode Island courts *do* in fact consider takings claims brought as a result of environmental regulation and land use restrictions. *See e.g. Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997) (considering inverse condemnation claim arising from RIDEM's denial of permit under Rhode Island's Freshwater Wetlands Act); *see also e.g. Serzen v. Dir. of the Dep't of Env't Mgmt.*, 692 A.2d 671 (R.I. 1997)(considering "just compensation" valuation of property following RIDEM's condemnation of plaintiff's land to improve public access to waterfront). Moreover, in *Alegria*, *supra*, the Rhode Island Supreme Court explicitly rejected Soscia's concerns related to Article I Section 16, stating: "We note that the second sentence of this section, although firmly evincing a strong Rhode Island policy favoring the preservation and the welfare of the environment, cannot be interpreted by this Court to defeat the mandates of the Federal Constitution." *Alegria v. Keeney*, 687 A.2d at 1252. Thus, inverse condemnation actions can be and are heard in Rhode Island state courts, even where the General Assembly has acted in areas concerning natural resources and the environment. Therefore, the existence of an adequate state remedy in Rhode Island is no barrier to the application of sovereign immunity to Soscia's takings claim.

B. Plaintiff's 42 USC § 1983 Claims (I, III, and IV) Are Barred Against All Defendants.

Soscia does not seriously contest that the State is subject to suit under 42 USC § 1983 or that the Eleventh Amendment does not apply to Declaratory Judgment Act claims against the State. *See generally*, Opp. Instead, the Opposition argues that "even if sovereign immunity bars monetary relief against the state, both monetary damages and prospective injunctive relief are available against the [I]ndividual Defendants." Opp. at 14. But this contention is also wrong.

Soscia relies on the United States Supreme Court's decision in *Hafer v. Melo*, 502 U.S. 21 (1991) to support its position. *See* Opp. at 30-31. However, *Hafer* does not stand for the proposition that simply naming individuals is sufficient to avoid sovereign immunity. As explained above, Soscia has failed to properly frame its claims against the State against the State's agents in their individual capacities. See MTD Memo at 8-12. Just as there are no allegations of individual conduct by the named defendants in the complaint, in the first paragraph of the Opposition, Soscia defines all of the Defendants, including the Individual Defendants, as "DEM." See Opp. at 1. Even the Complaint admits that all the actions taken by the Individual Defendants were taken on behalf of RIDEM and in furtherance of their official roles. *See id.* (outlining Complaint's assertions concerning official acts of Administrator and Director).

At the same time, pursuant to the *Ex Parte Young* doctrine; a court "may enjoin state officials to conform their future conduct to the requirements of federal law" without violating the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332, 337 (1979). However, as the Sixth Circuit highlighted in *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), cert. denied, —— U.S. —— –, 141 S. Ct. 1390 (2021), when a plaintiff brings a claim akin to a state court inverse condemnation suit under the guise of it being a federal claim, essentially seeking "an order they can use to require [the state] to pay [plaintiffs] for its alleged taking of their property," it expressly "isn't a proper workaround to the States' sovereign immunity" under *Ex parte Young*. *Ladd*, 971 F.3d at 581–82 (interpreting *Ex Parte Young*, 209 U.S. 123).

Although a discussion of *Ex Parte Young* is noticeably absent, Soscia does claim in the Opposition that it is seeking "to enjoin the prospective enforcement of the Dam Permitting Act against it prospectively by preventing the individual officials involved in enforcing its provisions against it due to the fact that it impairs its constitutional rights." Opp. at 32. This is in direct conflict

with Soscia's framing of the Dam Permitting Act as a taking that has already occurred. *See e.g.* Compl. at Claim I (seeking a ruling that Defendants have "taken Soscia's property rights" in violation of the Contract Clause); Claim II (asserting taking); Claim IV (seeking a ruling that Defendants have "taken Soscia's property rights" in violation of the Due Process and Equal Protection Clauses). While prospective injunctive relief that does not require payment for retroactive activity from the state treasury *is* available, under the *Ex Parte Young* doctrine Soscia may not disguise claims for retroactive compensation in the language of injunctive relief.

III. THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

As explained in the Motion to Dismiss, qualified immunity also shields the Individual Defendants from suit in this case. *See* MTD Memo at 11-12.

Soscia 's arguments against application of qualified immunity hinge on an assertion, absent from the complaint, that Mr. Gray and Mr. Chopy knew that they were violating Soscia's constitutional rights, because Soscia's property is exempt from the applicability of all environmental and land-use regulations. See Opp. at 35, 43, 44, 46-47, 52. But Soscia cannot even point to the language that would signify this exemption, providing no settled law that could have been known at the time to Mr. Gray and Mr. Chopy.

Soscia agrees that qualified immunity protects state officials *unless* "(1) they violated a federal statutory or constitutional right, *and* (2) the unlawfulness of their conduct was clearly established at the time." Opp. at 44 (emphasis added); see also MTD Memo at 15 citing *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018). Individual liability requires more than "error in the exercise" of a delegated power, and *specific* allegations of ultra vires action are required. *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949), *see also* MTD Memo at 11. In fact, the unlawfulness of the individuals' alleged conduct must be "beyond debate." *See* MTD Memo at 15 quoting *D.C. v. Wesby, supra* at 589.

The Individual Defendants sent the July 11 and 13 Letters and issued an ICO in their official capacities while working to enforce a newly enacted law that has not been interpreted by any court and the facts of which are not similar to any known court decision holding a similar law unconstitutional. *See* Complaint at Exhibit 7-9. This activity falls well within the normal activities of state officials protected by qualified immunity. *See* MTD Memo at 15. Accordingly, the Individual Defendants cannot be held personally liable for damages sought by Soscia.

IV. THE MATTER SHOULD ALSO BE DISMISSED UNDER MULTIPLE ABSTENTION PRINCIPLES.

This matter should be dismissed or stayed in accordance with abstention principles outlined in *Burford v. Sun Oil*, 319 U.S. 315 (1943) and *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). See MTD Memo at 16-20. Additionally, Count VII should be dismissed pursuant to *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

Soscia seeks to avoid the application of *Burford* abstention on the spurious argument that because it is a state official that is charged by the statute with determining "historic use," Opp. at 59, this court would not need to weigh in to decide the case. This is both incorrect and fails to address the other state-law issues noted in the Motion to Dismiss. *See id.* at 59-60 (discussing *Burford* but failing to address *e.g.* MTD Memo at 18 citing "complex issues of […] what water rights Quidnick possessed when it quitclaimed the water rights in favor of Soscia, whether some, none, or all of the franchise rights granted to Quidnick by the General Assembly were capable of transfer, and other intricate issues of state land use"). Soscia then shifts the focus to its alleged contention that: "any application of the historic use standard to [Soscia's] franchise rights violates its constitutional rights under the Takings Clause, Contract Clause, Procedural Due Process, and Equal Protection Clauses of the United States Constitution." *Id.* But the very nature of the franchise rights at issue are quintessentially state law issues, as are Soscia's related claims that it could dry

up the entirety of its pond regardless of any land use or environmental regulations. *See e.g.* Complaint at ¶ 42(b); Opp. at 43 (alleging that any restriction from drying up the pond is a taking).

Nor can *Soscia* avoid application of *Pullman* abstention. As is clear from the Complaint, Soscia has raised issues of interpretation within the Dam Permitting Act, which was first effective June 27, 2022, only a few months ago, and remains untested by Rhode Island Courts. *See e.g.* Compl. at Count I, II, IV (each noting ambiguity by stating "to the extent that R.I.G.L. § 46-19.1-1 authorizes Defendants to regulate the operation of the Flat River Reservoir Dam and its branches and control the level of water" … it is unconstitutional); *see also id.* at Count III (again stating "that to the extent that R.I.G.L. § 46-19.1-1 authorizes [RI]DEM to issue such a cease and desist order" it is unconstitutional). Moreover, as explained with respect to *Burford*, there remain numerous issues of state law that, if addressed in state court, would obviate the need for constitutional decision.

Finally, federal courts may not instruct state officials how to comply with state statutes on state law grounds. *See* MTD Memo citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Soscia does not, because it cannot, oppose the application of the *Pennhurst* doctrine. *See generally*, Opp.

V. THE TAKINGS CLAUSE CAUSE OF ACTION (CLAIM II) SHOULD BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Claim II of the Complaint sets forth the Soscia's Takings Clause claim. In that claim, Soscia challenges three separate actions: (1) the issuance of the July 13 Letter directing Soscia to comply with the Dam Permitting Act; (2) the ICO; and (3) any application of the Dam Permitting Act to the Soscia's property, all of which Soscia contends constitute an unconstitutional taking. *See* Complaint at Count II (alleging in request for relief that (a) July 13 Letter was a taking, (b) ICO was a taking, and (3) Dam Permitting Act is a taking to the extent it authorizes regulation of

Soscia's property).[4] But Soscia's protestations amount to nothing more than a generalized grievance that the government is unable to take any regulatory action at all with respect to the Pond, and do not amount to the showings necessary to make out a regulatory takings claim. *See e.g.* Opp. at 41 ("Soscia had the right to determine the water levels in the Pond for any reason."); *id.* ("Soscia has the right to remove the water from the Pond thereby exposing the submerged land for beneficial use by Soscia.").

As an initial matter, Soscia attempts to shoehorn its claim into the *per se* takings category. In support of its argument, Soscia relies on *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1280 (Fed. Cir. 2008). In that case, the government required the dam owner to build a fish ladder and to divert a determined water flow from its dam to that fish ladder. *See id.* at 1282. Soscia claims that *Casitas* stands for the broad proposition diverting water is a per se taking and that any diversion of water equates to taking for public use. See Opp. at 39. However, the actual language in *Casitas* is far less sweeping. The court decided only that: "the United States did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the Robles–Casitas Canal and towards the fish ladder. Where the government plays an active role and physically appropriates property, the per se taking analysis applies." *Casitas*, 543 F.3d at 1295. Thus, the *Casitas* Court was considering the literal moving of a river to a newly constructed fish ladder at the cost of lowering the power output of a private dam, which is factually dissimilar from enacting a new permitting requirement, especially where the contours of the new permit are unknown. *See* R.I. Gen. Laws § 46-19.1-1. Moreover, Plaintiff has not alleged any plan

[4] As noted above, there is no ongoing enforcement of the Dam Permitting Act against Soscia. Even prior to Soscia's filing of its Opposition, the ICO had expired and Soscia had reached compliance with historic use as determined by the Director.

to change the water levels at the pond or any harm caused by the need to apply for a permit. *See generally*, Compl.

Soscia also attempts to rely upon *Cedar Point, supra*, to stand for the proposition that there has been a per se taking. *See* Opp. at 39-40. However, this case is also factually dissimilar. The regulation at issue in *Cedar Point* allowed union meetings on the plaintiff's property for up to 3 hours a day, 120 days a year. *See* Opp. at 39. Accordingly, the right to exclude the public and certain gatherings from the property was at issue.

Soscia strains to articulate a similar fact pattern here by quoting language in the July 13 Letter noting that maintaining historically low water levels at the Flat River Reservoir posed a threat to the environment, as well as "a threat to recreational uses of the pond such as fishing, boating and swimming." *See* Opp. at 41 citing July 13 Letter. Somehow, Soscia draws the conclusion that this sentence removed Soscia's right to exclude the public from its private property and granted the public broad recreational rights. *See* Opp. at 41 (claiming that the July 13 Letter appropriated Soscia's right to exclude to some 'third parties' and was sent "to provide recreational rights to abutters.").[5] To the contrary, the sentence plainly notes a danger associated with Soscia's failure to maintain historic water levels while acknowledging known use of the pond. *See* Compl. at Exhibit 8. It is undisputed that the public did in fact have *contracted-for* rights to access the Soscia's pond, and had been doing so pursuant to a lease since long-before Soscia owned the property. *See e.g.* Compl. at Exhibit 4 (lease for recreational use of Johnson's Pond); Opp. at 6 ("prior to the 1975 enactment, the owners of some parcels of land constructed homes bordering

[5] This same confusion is noted in the MTD Memo at 30: "Moreover, it is unclear how the Dam Permitting Act provides recreational rights 'without providing just compensation,' particularly while Soscia continues to receive rents from the Town of Coventry pursuant to the Lease for, among other things, use of and access to Johnson's Pond. Compl. ¶ 52, *see also* Compl., Exhibit 4." This issue is not clarified in the Opposition.

the Pond and non-exclusively used the Pond for fishing, boating and other recreational purposes"); *see also id.* at 30 ("it is well known that the residents of the Pond were utilizing the waters therein for recreation").

Soscia also seeks to evoke *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) by claiming full loss of all economic value for its property. Opp. at 42-43. However, there is evidence of retained economic value because Soscia leases several rights in the pond through a contract that assumes continued historic use of the dam and provides rent in exchange for recreational rights to Johnson's Pond. *See* MTD Memo at 23, *see also* Compl. at Exhibit 4. Moreover, Soscia has not been denied a permit to alter water levels, nor has it claimed any non-hypothetical desire to do so. *See generally*, Compl. Therefore, the more lenient *Penn Central* test applies, which the regulation here passes, as explained in the MTD Memo at 21- 25.

VI. THE DUE PROCESS AND EQUAL PROTECTION CLAIM (CLAIM III) SHOULD ADDITIONALLY BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In the Opposition, Soscia attempts to suggest that Count III has sufficiently plead a case for violation of its procedural due process with respect to the July 13 Letter and the ICO. The Motion to Dismiss again outlines the shortcomings of Soscia's Complaint with respect to Count III. *See* MTD Memo at 25-28. Most noticeably, claims for violations of due process require an allegation that Soscia has "been deprived of a protectable liberty or property interest." *Fireside Nissan, Inc. v. Fanning*, 30 F.3d 206, 219 (1st Cir. 1994) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972)). Again, this claim is unsupported because Soscia has misunderstood its own property rights. Moreover, the July 13 Letter and the ICO, both of which no longer constitute active enforcement, were used under emergency circumstances. It has long been recognized that in such emergency circumstances, "summary administrative action may be justified." *S. Commons Condo. Ass'n v.*

Charlie Arment Trucking, Inc., 775 F.3d 82, 86 (1st Cir. 2014) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.,* 452 U.S. 264, 299–300 (1981)).

Claims that Mr. Chopy denied due process by issuing the July 13 Letter ring particularly hollow. *See* Compl. at ¶30 (claiming no opportunity "to comment and be heard on the historic use of the Dam"). As the Dam Permitting Act makes clear, and as Soscia admits, the Director of RIDEM has the unilateral power to determine historic use without input from the dam owner. *See* R.I. Gen Laws § 46-19.1-1.; *see also* Opp. at 59. Thus, Soscia was never entitled to a hearing on that issue.

Additionally, as mentioned above, the Opposition fails to address the emergent nature of the extremely low water levels it was maintaining in the subject pond prior to the issuance of the ICO. Both the July 13 Letter and the ICO outline threats to the environment and wildlife, including threats to threatened and rare freshwater mussels. *See* Compl. at Exhibits 8-9. The Motion to Dismiss outlines the authority for the ICO pursuant to Section 42-17.1-2(21)(ii)(A) of the Rhode Island General Laws. *See* MTD Memo at 27. As noted, Soscia has recourse in that the ICO is limited in time to forty-five (45) days under RIGL § 42-17.1-2(21)(ii)(B) with a single extension of an additional forty-five (45) days, and is not self-executing under RIGL § 42-17.1-2(21)(vi). Therefore, any process that is due is provided in the available state judicial proceedings. *See* MTD Memo at 28.

VII. THE EQUAL PROTECTION CLAIM (CLAIM IV) SHOULD ADDITIONALLY BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The purpose of the equal protections clause "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook*

v. Olech, 120 S.Ct. 1073, 1074–75, 528 U.S. 562, 563–65 (U.S.,2000) (internal citations and quotes omitted). "While 'all persons similarly situated should be treated alike[,]' '[t]o state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" *Lombardi v. McKee*, 529 F. Supp. 3d 1, 12 (D.R.I. 2021) (internal quotes omitted). The Motion to Dismiss highlights how Count IV fails to establish any of these elements. *See* MTD Memo at 28-30.

On its face, the Dam Permitting Act applies to "[a]ny person who owns or operates a dam that has the capacity to store greater than one thousand four hundred (1,400) normal storage acre feet of water[.]" R.I. Gen Laws § 46-19.1-1. The Complaint does not allege disparate treatment of any class as opposed to a similarly situated class. *See generally*, Compl. Instead, the Complaint draws a comparison to distinctly different persons with whom it takes issue by stating that the application of the Dam Permitting Act provided "recreational rights to abutting land on Johnson's Pond." Compl. ¶ 52. Additionally, Claim IV claims that the lack of "just compensation" as required under the Takings Clause violates the Equal Protection and Due Process Clauses, without any further explanation. *Id.*

In response, the Opposition impermissibly makes a new claim that does not appear anywhere in the Complaint. Accordingly, this new theory of a "class of one" should not be considered in testing the sufficiency of the Complaint for purposes of dismissal. *See Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011). But, in any event, Soscia cannot make out a class of one equal protection claim.

"The [*Village of Willowbrook v. Olech*, 528 U.S. 562 (2000)] class of one suit serves an important but relatively narrow function. It is not a vehicle for federalizing run-of-the-mine zoning,

environmental, and licensing decisions." *Cordi-Allen v. Conlon*, 494 F.3d 245, 255 (1st Cir. 2007). Such a claim requires adequate allegation of *intentionally* different treatment from others similarly situated without rational basis for the difference. *Id.*

Soscia alleges that the complained-of discrimination is due to a non-specified "malice" and an "intentional and willful" application of the Dam Permitting Act "for the purpose of providing recreational rights to abutting land"… "without providing just compensation." Compl. at ¶52. Not only does this assertion again wrongly assume that recreational rights are granted by the Dam Permitting Act as opposed to the *private lease* held by Soscia, but it fails to progress past "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). As such, this claim must be dismissed.

VIII. THE CLAIMS SOUNDING IN CONTRACT (CLAIMS I, V, AND VI) SHOULD ADDITIONALLY BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Soscia's contractual claims should also be dismissed for failure to state a claim upon which relief can be granted because the Complaint has failed to allege facts sufficient to establish any claim for interference with contract. *See* MTD Memo at 30-31 (explaining that even assuming the existence of a contract Soscia has failed to sufficiently allege federal claim for interference with the same by Dam Permitting Act beyond governmental authority); *id.* at 32-34 (explaining Soscia has failed to allege facts sufficient to establish state law intentional interference with the Lease); *id.* at 34-41 (explaining Soscia has failed to allege facts sufficient to establish state law intentional interference with the franchise/contract).

First, the Opposition in addressing Claim I, uses Soscia's misinterpretation of the 1982 Act to attempt to establish a contract and terms that do not exist, creating State obligations out of the

absence of terms and further claiming that Quidnick was capable of transferring these unarticulated rights to Soscia absent legislative grant. *See* Opp. at 24-25. Soscia then attempts to evoke a higher level of scrutiny for interference because the State is a party to the alleged contract. *See* Opp. at 24. However, the Complaint fails to plead either of the two factors identified by Soscia as necessary for the application of the heightened standard: (1) that the Dam Permitting Act substantially impaired Soscia's rights under its contract; and (2) that the Dam Permitting Act was not reasonable and necessary to fulfill an important public purpose. *See* Opp. at 25-37. Even assuming this heightened scrutiny was appropriate, the Complaint fails to allege any specific substantial impairment of rights held by Soscia. *See* Compl. Count I. Under the Dam Permitting Act, Soscia can still operate the dam to derive the same financial gain realized by Quidnick prior to Soscia's purchase of the subject property and since the sale. Moreover, the Complaint does not allege that the passage of the Dam Permitting Act was an unnecessary or unreasonable action to protect the environmental harms potentially caused by unapproved alterations of dammed waterways. *See id.*; *see also* MTD Memo at 41 (outlining RIDEM's duties to oversee dam safety and protect the environment). This is perhaps best evidenced by the need to use the ICO to avoid harm to threatened and rare freshwater mussels. *See* Compl. at Exhibit 9.

Soscia's remaining arguments with respect to Claims I, V, and VI seem to rest on asking this Court to revive the Complaint through "reasonable inferences."[6] However, these arguments hinge on facts not pleaded and purposes not articulated. *See* Opp. at 24-26; 52-57; *see also* Compl.

[6] There are several examples in the Opposition. *See e.g.* Opp. at 35 (claiming that discovery could show that the Defendants knew of a previously unmentioned Rhode Island Supreme Court Decision and that they intentionally ignored it to provide recreational rights to abutters at Johnson's Pond – a purpose also unmentioned in Claim I); *see also id.* at 51-52 (alleging without citation that "Soscia need only demonstrate that it has pled sufficient facts from which reasonable inferences can be drawn"); *id.* at 57 (asking the court to infer that unexplained interference by the State (which is not party to Count VI) encouraged the Town to breach the Lease (not mentioned in Count VI) causing "legal fees and costs associated with maintenance of the [d]am" (not articulated in Count VI). These are not permissible inferences, but instead new facts that were not alleged in the Complaint.

at Counts I, V, and VI. Soscia has failed to plead any facts supporting two of the four elements of these claims with any specificity, namely intentional interference (or even actual interference) with a contract, and damages. *See* MTD Memo at 31, 33, and 42.

IX. COUNT VII IMPROPERLY SEEKS DECLARATORY RELIEF AND THEREFORE SHOULD BE DISMISSED.

As noted in the Motion to Dismiss, and again stated above, Count VII should be dismissed pursuant to *Pennhurst*. However, even if it were not, Soscia's request for declaratory judgment impermissibly seeks determination of abstract questions or the rendering of advisory opinions[.]'" *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997) (quoting *Lamb v. Perry*, 101 R.I. 538, 542, 225 A.2d 521, 523 (1967)); *see also* MTD Memo at 42-44 (outlining hypothetical nature of Plaintiff's claim and lack of specificity resulting in lack of standing).

V. CONCLUSION

For the reasons stated above, as well as those outlined in the Motion to Dismiss, the Defendants hereby requests that this Honorable Court dismiss the Second Amended Verified Complaint as to all counts, with prejudice.

Respectfully submitted,

Defendants,
State of Rhode Island, State of Rhode Island Department of Environmental Management, Terrence Gray, Individually and in his capacity as the Director of the Rhode Island Department of Environmental Management and David E. Chopy, Individually and in his Capacity as Administrator of The Rhode Island Department of Environmental Management Office of Compliance and Inspection

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CERTIFICATE OF SERVICE

I hereby certify that I filed and served the within Reply through the ECF filing system on this 28th day of November 2022 and that it is available for viewing and downloading.

/s/ Nicholas M. Vaz