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 and TERRENCE GRAY, IN HIS CAPACITY AS THE DIRECTOR OF THE RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED VERIFIED COMPLAINT

TABLE OF CONTENTS

I. INTRODUCTION

Now come, Defendants State of Rhode Island Department of Environmental Management ("RIDEM"), Terrence Gray, in his capacity as the director of the Rhode Island Department of Environmental Management (the "Director") and the State of Rhode Island (collectively, the "Defendants" or the "State"), before this Honorable Court and hereby provide the following in support of Defendants' Motion to Dismiss Plaintiff Soscia Holdings, LLC's ("Soscia" or "Plaintiff") Amended Verified Complaint ("Complaint") in the above-captioned matter in its entirety.

The Complaint contains six counts. *See generally*, Complaint ("*Compl.*"). Counts I – III bring claims of violations of the United States Constitution under 42 U.S.C. § 1983. *Id*. Counts IV and V bring claims against the state alleging interference with contractual relations and/or rights. *Id*. Count VI seeks declaratory relief for violation of the Rhode Island State Constitution. *Id.*

First, the majority of the relief sought in Claims I-III is barred under the Eleventh Amendment to the United States Constitution. Moreover, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) requires dismissal of those same claims, as the Defendants are not "persons" under 42 USC § 1983. Additionally, this Court lacks jurisdiction to decide Count VI 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. Finally, this Court should dismiss or stay this matter under numerous abstention principles.

Moreover, even if the Court were to exercise jurisdiction over the claims, Soscia has failed to plead facts sufficient to establish the elements of its claims, and therefore the Complaint should

be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Lastly, that State is protected from liability for any of its alleged actions, as the actions as set forth in the complaint were justifiable acts in furtherance of the agency's governmental duties.

II. STATEMENT OF ALLEGED FACTS

According to the Complaint, Soscia purchased the Flat River Reservoir Dam in Coventry, RI, along with certain land and water rights commonly known as Johnson's Pond ("Johnson's Pond") from the Quidnick Reservoir Company ("Quidnick") in March 2020. Compl. ¶¶ 6-8. The Plaintiff received a quitclaim deed for certain property and assets, but did not purchase Quidnick Reservoir Company itself. Compl. ¶ 6, Exhibit 2. As a result of the sale, Soscia also became successor lessor to a lease dated January 1, 2009 between the Town of Coventry and Quidnick regarding the Flat River Reservoir Dam (the "Lease"). Compl. ¶¶ 24-25. The State is not party to the Lease. *Id*. The Lease includes certain provisions with respect to water levels and minimum stream flows. Compl. ¶ 24.

On or about June 27, 2022, a bill, which is set forth in R.I. Gen. Laws § 46-19.1-1 (the "Dam Permitting Act"), was enacted by the Rhode Island General Assembly and signed into law by the Governor for the State of Rhode Island. The subject act requires that any dam that "has the capacity to store greater than one thousand four hundred (1,400) normal storage acre feet of water shall apply to the director of the department of environmental management for a permit to raise or lower the water level behind the dam." R.I. Gen. Laws § 46-19.1-1. Until such a permit is granted, "the owner or operator shall operate the dam in a manner that is consistent with historic use as determined by the director." *Id*. On or about July 11 and 13, 2022, RIDEM sent communications to the Plaintiff outlining the director's determination of historic use at the Flat River Reservoir Dam and outlining the Plaintiff's need to comply with R.I. Gen. Laws § 46-19.1-1 as owner of a

dam falling under the law's jurisdiction. *See*, Compl. Exhibits 7-8. Plaintiff does not allege that it altered its action in response to either letter, nor was the Plaintiff fined or otherwise sanctioned. *See generally*, Compl. While Plaintiff has alleged that the Dam Permitting Act and letters, in some inchoate way "interferes" with Soscia's alleged "ability to determine the amount of water, if any, to be placed upon its submerged real property," Compl. ¶ 28, Soscia has not alleged that the Dam Permitting Act has frustrated any actual legal use of the Flat River Reservoir Dam from which Plaintiff could derive any plausible economic advantage. *Id*.

III. STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction. *See, U.S.I. Properties Corp. v. M.D. Const. Co.*, 230 F.3d 489, 499 (1st Cir. 2000). Thus, should the Court lack either subject matter jurisdiction or personal jurisdiction over the claims presented by the Plaintiff, those claims are properly dismissed. Fed. R. Civ. P. 12(b)(1),(2). Moreover, where all federal claims have been dismissed at the pleadings stage, it is appropriate for the Court to decline supplemental jurisdiction over state law claims. *See*, *Devaney v. Kilmartin*, 88 F. Supp. 3d 34, 59 (D.R.I. 2015)(where federal questions are disposed of at the pleading stage "principles of comity auger strongly in favor of dismissal [of state claims] without prejudice")(citing *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 6 at fn. 12 (1st Cir. 2010)).

Additionally, pursuant to Fed. R. Civ. P. 12(b)(6), a claim should be dismissed where the plaintiff has failed to state a claim upon which relief can be granted. Thus:

> [U]nder the current pleading regime, when a court considers a dismissal motion, three sequential steps must be taken: first, it must take note of the elements the plaintiff must plead to state a claim. Next, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. Lastly, when there are well-pleaded factual allegations, the court should assume their veracity and then determine whether they

plausibly give rise to an entitlement to relief.

CBA Env't Servs., Inc. v. Toll Bros. Inc., 403 F. Supp. 3d 403, 410 (D.N.J. 2019) (internal quotes and citations omitted). Further, the United State Supreme Court has held that when faced with a motion to dismiss, a complaint must allege facts that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955 (2007) (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004)). This necessitates "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)(citing *Twombly* at 556, 127 S.Ct. 1955). Moreover, Rule 12(b)(6) "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citations omitted).

IV. ARGUMENT

First and foremost, Plaintiff's Section 1983 claims are not properly before this Court and must be dismissed. The State is not a "person" for purposes of Section 1983 claims such that this Court could exercise jurisdiction. Moreover, to the extent Soscia has included Declaratory Judgment Act claims in these counts, the State has sovereign immunity with respect to such claims and they must be dismissed to the extent Soscia seeks declarations that would require retrospective or monetary relief. This leaves only state law claims which also should not be before this Court. Additionally, multiple abstention principles evidence that this Court should dismiss the Plaintiff's claims or, at the least, stay this action while the Plaintiff's claims concerning the State's actions giving rise to the Plaintiff's state law claims are decided by Rhode Island's state court system.

In addition, the Complaint fails to provide the required level of specificity and merely relies on speculation and a recitation of the elements of the Plaintiff's claims. As such, the Complaint should be dismissed. Finally, the Plaintiff's final count seeks a broad speculative declaratory judgment beyond the appropriate bounds of the Uniform Declaratory Judgments Act. The claims in the Complaint improperly attempt to obstruct the State from performing its essential safety and environmental protection functions.

A. SOVEREIGN IMMUNITY AND RELATED DOCTRINES REQUIRE DISMISSAL OF THE COMPLAINT

1) Rhode Island Has Not Waived its Eleventh Amendment Immunity from the Types of Claims Soscia Raises.

"Generally, States are immune from suit under the terms of the Eleventh Amendment and the doctrine of sovereign immunity." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021). There are two main exceptions to this doctrine: (1) "Congress may abrogate a state's sovereign immunity through 'appropriate legislation,'" *Davidson v. Howe*, 749 F.3d 21, 28 (1st Cir. 2014) (quoting *Va. Office for Prot. & Advocacy v. Stewart,* 563 U.S. 247, 254 (2011)); (2)"'a State may waive its sovereign immunity by consenting to suit," *id.* (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999)). In addition, under *Ex Parte Young*, 209 U.S. 123 (1908), courts may entertain suits against state officials if they "allege[] an ongoing violation of federal law and seek[] relief properly characterized as prospective." *Doe v. Shibinette*, 16 F.4th 894, 903 (1st Cir. 2021) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002)).

Rhode Island has broadly waived its Eleventh Amendment immunity for tort claims under Rhode Island General Law, § 9–31–1. *Laird v. Chrysler Corp.,* 460 A.2d 425, 429 (R.I.1983). The federal district courts have extended this waiver to include actions analogous to private torts arising

under 42 U.S.C. § 1983. *Pride Chrysler Plymouth, Inc. v. Rhode Island Motor Vehicle Dealers License Comm'n.,* 721 F.Supp. 17, 22 (D.R.I. 1989).

But waiver under Rhode Island General Laws, § 9–31–1 is confined to actions which are "traditionally tortious." *Allendale Leasing, Inc. v. Stone,* 614 F.Supp. 1440, 1451 (D.R.I.1985), *judgment aff'd* 788 F.2d 830 (1st Cir.1986). Importantly, Rhode Island has not "relinquished its Eleventh Amendment protection from liability for 'the discretionary administrative acts and omissions of the state's departments, commissions, boards, or the officials thereof, acting in their representative capacities.'" *Bergemann v. State of R.I.*, 958 F. Supp. 61, 68 (D.R.I. 1997) (quoting *Healey v. Bendick,* 628 F.Supp. 681, 694–96 (D.R.I.1986)). As a threshold matter, to the extent Soscia has pleaded causes of action under the Declaratory Judgment Act, there has been no "express waiver of sovereign immunity" by Congress in that Act. *Muirhead v. Mecham*, 427 F.3d 14, 18 n.1 (1st Cir. 2005). Similarly, there is no available tort against private defendants to seek declaratory judgment about whether a defendant's actions comport with law. A declaratory judgment is plainly not a tort, and is therefore not covered under the § 9–31–1 waiver. *C.f. Kenyon v. Sullivan,* 761 F.Supp. 951, 958 (D.R.I.1991) (no waiver of immunity for traditional governmental activities, including provision of welfare benefits); *Healey v. Bendick,* 628 F.Supp. 681, 694–96 (D.R.I.1986) (immune from challenge to state shellfish regulations); *New England Multi–Unit Hous. Laundry Ass'n v. Rhode Island Hous. and Mortg. Fin. Corp.,* 893 F.Supp. 1180, 1188–89 n. 11 (D.R.I. 1995) (violations of state Administrative Procedures Act).

Moreover, with respect to Soscia's asserted Section 1983 claims, Counts I-III, essentially only contend that RIDEM and its officials have enforced a duly enacted law of the General Assembly related to the regulation of water usage by dam owners. There is no equivalent of such a claim in private tort. Regardless of the statutory vehicle for bringing these claims, they strike at

the heart of Rhode Island's sovereign interests and discretionary exercise of police powers. *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"). Challenges to state officials' discretionary enforcement of legislation governing the operation of dams on waterways of the state are in no way analogous to the types of "conditions and circumstances" of government action that might "give rise to 'traditionally tortious' causes of actions" like "sexual harassment and discrimination, age or race discrimination, negligence, wrongful discharge." *Bergemann*, 958 F.Supp. at 69. Soscia's "attempt to parlay [its] claims into 'torts'" should, like the *Bergemann* plaintiffs' attempts with respect to claims arising out of collective bargaining, fail. *Id.* No matter how phrased, the claims articulated in Counts I, II, and III of the Amended Complaint do not fall within Rhode Island's statutory waiver of sovereign immunity.

2) Recent Developments in Takings Clause Jurisprudence Do Not Create a Federal Forum for Regulatory Takings Claims Against States That Could Result in The Award of Money Damages or Retroactive Relief.

In *Knick v. Township of Scott, Pennsylvania*, the Supreme Court overruled decades of Takings Clause jurisprudence by holding that a Takings Clause claim is ripe when the government taking is complete, not after state inverse condemnation proceedings have concluded, allowing a Section 1983 claim based on the Takings Clause to proceed in the first instance in federal court. 139 S. Ct. 2162, 2177 (2019). Prior to *Knick*, the rule was generally understood to be that available state remedy proceedings must be pursued to conclusion before a Takings Clause claim was ripe for adjudication. *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195, 105 S. Ct. 3108, 3121, 87 L. Ed. 2d 126 (1985), *overruled by Knick*, 139 S. Ct.

2162; *see also*, *e.g.*, *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 147 (1st Cir. 2002) (Takings Clause claim unripe where state inverse condemnation proceeding was potentially applicable and had not been pursued). *Knick* changed this landscape and claimants may now pursue their claims in federal court in the first instance. However, while *Knick* established that a Section 1983 claim seeking remedy for a Takings Clause violation could be brought against a *municipality* without first exhausting available remedies, every Court of Appeals to consider the issue post-*Knick* has held that a Section 1983 claim based on the Takings Clause may not be brought against a *state*.[1] *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 286–88 (4th Cir. 2021); *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 1390 (2021); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019), cert. denied, —— U.S. ——, 140 S. Ct. 2566, 206 L.Ed.2d 497 (2020).

This uniform result is a function of the fact that most claims arising out of the Takings Clause against states will either be excluded by *Will* or not fall within the *Ex parte Young* exception to Eleventh Amendment immunity. *See, Will,* 491 U.S. 58 and *Ex Parte Young*, 209 U.S. 123. 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*

[1] The result in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2070 (2021), is not to the contrary. There, plaintiffs brought the original claim as a declaratory judgment action against the officials charged with enforcing the regulation, not a § 1983 claim. *Cedar Point Nursery v. Gould*, No. 116CV00185LJOBAM, 2016 WL 1559271, at *2 (E.D. Cal. Apr. 18, 2016). Eleventh Amendment immunity was not raised in *Cedar Point Nursery*, in any event, and the case may stand as an example of litigation-specific immunity waiver.

Parte Young, 209 U.S. 123.) And sometimes the remedy sought in a Takings Clause claim is a remedy that cannot be rendered—no federal court can order an injunction against a state official to restore title that has been transferred to the state, for example. *See, Pavlock v. Holcomb*, 35 F.4th 581, 588–90 (7th Cir. 2022). The only relief that may be sought under *Ex parte Young*'s exception to sovereign immunity is restraint of "an ongoing violation of federal law" when the relief sought may be "properly characterized as prospective." *Verizon Md. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002).

As applied here, this constraint means that the only available relief, if a claim can be stated (it cannot), is an injunction to restrain enforcement of the Dam Permitting Act. No declaration that the particular enforcement action violated the Takings Clause may be made,[2] and no monetary damages may be assessed, without stepping outside the boundary of the *Ex parte Young* exception, because any such relief would be tantamount to a requirement that the state pay money from its treasury. "Where the court may not award monetary damages, summary dismissal is appropriate for that portion of the complaint." *Ortiz De Arroyo v. Barcelo*, 765 F.2d 275, 280 (1st Cir. 1985). Therefore, the portions of the complaint requesting monetary relief, or injunctive relief that would amount to a requirement that an inverse condemnation proceeding be instituted in state court, must be dismissed.

3) *Will* Requires Dismissal Claims I-III.

"[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. 58. Soscia named the State of Rhode Island, the State of Rhode Island Department of Environmental Management, and "Terrence Gray, in his capacity as the Director

[2] Rhode Island has adequate remedy procedures to address inverse condemnation claims in state court. *E.g. Downing/Salt Pond Partners, L.P. v. Rhode Island & Providence Plantations*, 643 F.3d 16, 24 (1st Cir. 2011).

of the Rhode Island Department of Environmental Management." Compl., 1. No official is named in his or her individual capacity, nor are there any specific allegations of the actions of any state official in the Complaint. Putting aside questions of Eleventh Amendment immunity, therefore, Counts I-III, which are expressly based on 42 U.S.C. § 1983, must be dismissed because the state and its officials are not persons for purposes of § 1983.

4) *Pennhurst* Requires Dismissal of Count VI.

Soscia also raises a claim for declaratory relief based on a provision of the Rhode Island Constitution. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Therefore, [t]he Eleventh Amendment bars the federal courts from exercising jurisdiction in cases where a state is sued under state law." *New England Multi-Unit Hous. Laundry Ass'n v. Rhode Island Hous. & Mortg. Fin. Corp.*, 893 F. Supp. 1180, 1188 (D.R.I. 1995). This bar extends to "'any intervention by a federal court to conform state officials' conduct to the rigors of a state statute on purely state law grounds.'" *Id.* (quoting *Healey v. Bendick,* 628 F.Supp. 681, 695 (D.R.I. 1986)). Count VI must therefore be dismissed in its entirety.

The remaining counts, IV and V, are based on state common law torts. With no viable federal cause of action, the court has no remaining jurisdiction over these pendant claims and they must also be dismissed. *See, Univ. of Rhode Island v. A.W. Chesterton Co.*, 2 F.3d 1200, 1202 (1st Cir. 1993) ("A State cannot be a "citizen" of itself for purposes of diversity jurisdiction.[]" (quoting *Moor v. County of Alameda,* 411 U.S. 693, 717 (1973))).

B. THIS MATTER SHOULD BE DISMISSED OR STAYED UNDER MULTIPLE APPLICABLE ABSTENTION PRINCIPLES.

As a threshold matter, this court should dismiss the case in its entirety, or in the alternative retain jurisdiction but stay all proceedings, as a matter of application of *Burford* and *Pullman* abstention. While it is the case that federal courts should retain jurisdiction over cases in all but the most extraordinary circumstances, those circumstances are present here. Soscia has abandoned in-process state court proceedings involving identical claims and identical facts in favor of seeking federal court relief that would involve the interpretation of a brand-new state statute which is being enforced by a state agency for the first time. Moreover, Soscia's claims are, according to Soscia, partially based on its theory that a statute enacted for the benefit of investors in industrial activity and operators of dams for the purposes of serving mills. R.I.G.L. § 46-18-2. Whether the Milldam Act has any continued application to modern water rights holders who have not made any industrial use of the flowage from their dams would require this court to address an unsettled issue of state land use law, which, as explained above, tend to intrude on state sovereign interest as articulated in *Coeur d'Alene.* Finally, Soscia's conduct with regards to the water levels in Johnson's Pond implicate additional aspects of state environmental law. All of these considerations are important to the public policy of Rhode Island, where abandoned dams formerly useful to manufacturing but currently imperiling the health of Rhode Island ponds and streams are common.

1) This Court Should Abstain Under *Burford*.

Burford abstention seeks to prevent exercise of federal jurisdiction where the case "presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the" present case or if the case's adjudication in the federal court "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Forty Six Hundred LLC v. Cadence Educ., LLC*, 15 F.4th

70, 75 (1st Cir. 2021) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 715 (1996)). "*Burford* abstention is limited to 'narrowly circumscribed situations'" involving "'determination of complex, policy-laden, state-law issues'" that implicate "'a significant local interest'" *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 30 (1st Cir. 2011) (quoting *Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir.1993)). Although such instances are rarely presented in federal court, that is exactly the gravamen of the Plaintiff's Complaint here.

Soscia has set forth a complaint that involves ongoing RIDEM enforcement action arising out of a recently enacted law applicable to dam owners on waterbodies throughout the state that meet certain characteristics. The law's foremost requirement is that any such dam owners obtain a permit from RIDEM should they seek to vary their use from their historical use. A central question of the present controversy is what historic use *is.* This is a hyperlocal matter and "federal review risks having the district court become the 'regulatory decision-making center.'" *Chico Serv. Station*, 633 F.3d at 30.

The First Circuit has established three requirements for applying *Burford* abstention, all of which are met here: (1) availability of timely and adequate state court review; (2) potential for interference with state policymaking; and (3) whether the federal court can avoid conflict with the state proceedings through careful management. *Chico Serv. Station*, 633 F.3d at 32. First, timely and adequate state court review is available. Soscia had filed a tort claim against the State alleging overlapping claims. *Soscia v. RIDEM*, P.C.-2021-07254. That court action was proceeding apace, the Rhode Island Superior Court has plenary jurisdiction to decide tort claims, including constitutional torts, and there is no indication that the Rhode Island Courts would unreasonably delay decision. *Contrast, Chico Serv. Station*, 633 F.3d at 32. Second, there is great potential for interference with Rhode Island's policymaking discretion in an important area of traditional state

police power, land use. *E.g., Palazzolo v. Rhode Island,* 533 U.S. 606 (U.S.R.I., 2001). The Plaintiff has raised arguments that hinge on the continued application of a 19th century law meant to protect an industry that no longer exists in advocating its right to unfettered use of certain water rights, while the Rhode Island General Assembly has just spoken and asked RIDEM to create a new regulatory regime to protect historic water levels of historic impoundments like Johnson's Pond. *C.f. Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (state's interest at an apex where plaintiff seeks to "eliminate altogether the State's regulatory power over the submerged lands at issue"). These questions involve complex issues of what historic water usage in the milldams are, 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. At the same time, RIDEM has been involved in enforcement of the new statute because, due to Soscia's choices in setting the water levels behind the dam and the continued drought conditions, the habitat of threatened and rare species of freshwater mussels are at risk and historic use must be maintained in order to mitigate the threat. *See, Immediate Compliance Order*, attached hereto as **Exhibit A** (attachments omitted). Interference in ongoing state policymaking is guaranteed in any adjudication of the Complaint. Third, careful management cannot cure the defects here; any progress in this case will impede Rhode Island's ongoing enforcement efforts and cut short the Rhode Island judiciary's opportunity to review those efforts.

Soscia has therefore presented the rare case where *Burford* abstention is necessary to allow the state administrative process to play out to avoid federal intervention in the development of a new area of water regulation under Rhode Island law—the intersection between private and public interests in defunct mill impoundments.

2) This Court Should Abstain Under the Principles Articulated in *Pullman.*

Abstention is also warranted in this case under the doctrine articulated in *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). "Among those cases that call most insistently for abstention are those in which the federal constitutional challenge turns on a state statute, the meaning of which is unclear under state law." *Harris County Comm'rs Court v. Moore,* 420 U.S. 77, 84 (1974). The First Circuit considers two factors when determining whether to apply *Pullman* abstention: "(1) whether there is substantial uncertainty over the meaning of the state law at issue; and (2) whether a state court's clarification of the law would obviate the need for a federal constitutional ruling." *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67, 71 (1st Cir. 2001).

Here, Soscia has challenged Rhode Island Gen. Laws § 46-19.1-1, which was first effective June 27, 2022, only about two months ago. Section 46-19.1-1 requires a dam owner or operator of certain dams who do not possess a permit "operate the dam in a manner that is consistent with historic use as determined by the director." What historic use means in the context of this enactment is not set out with any particularity in the statute, and RIDEM has not yet had the opportunity to promulgate the regulations contemplated by § 46-19.1-1. The meaning of "historic use" remains substantially uncertain; hence, this litigation. The statute has never been interpreted in Rhode Island state courts—although Soscia originally brought its claims in state court, which would have resulted in such an adjudication, it voluntarily dismissed those claims in favor of pursuing this litigation. Therefore, "[w]e do not know, of course, how far [Rhode Island] courts will go in interpreting the requirements of the state [Act] in light of the . . . constraints of the United States Constitution." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 512 (1972). Clarifying the exact contours of historic use would obviate the need for a federal constitutional ruling because

the answer to that question could make clear that the statute is consistent with the water rights as the Plaintiff purchased them from Quidnick, resolving any controversy between the parties. This case therefore again presents a rare instance where abstention is appropriate.

C. THE PLAINTIFF'S 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

Assuming, *arguendo*, that Plaintiff's Takings Clause claim is properly before this Court, which again, it is not, the State is entitled to dismissal of Count II of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), as the Complaint fails to plead sufficient facts to satisfy the elements of a governmental taking.

"When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). However, "[w]hen the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies." *Cedar Point*, 141 S.Ct. 2071.

"To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as[:]

> [(1)] the economic impact of the regulation [;]
> [(2)] its interference with reasonable investment-backed expectations [;] and
> [(3)] the character of the government action."

Cedar Point, 141 S.Ct. 2072 (discussing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (U.S.N.Y.,1978)). When it is determined that the action rises to the functional equivalent of a physical taking, it is commonly called a "regulatory taking." *See, id.* "Regulatory taking claims

that allege less than a 100% loss in use or value of the property are reviewed under the case-by-case, factual inquiry set out in *Penn Central*." *Id.*

Here, in Claim II, Plaintiff contends that "[RI]DEM did interfere with Soscia's rights to lower the water in Johnson's Pond to a level preventing Soscia from creating dry land[,] which land was formerly submerged[,] and which dry land could be used by Soscia to its economic advantage." Compl. ¶ 37(b). Further, Plaintiff alleges that "the actions of the Director require Soscia to keep its submerged land under water[,] which actions completely deprive Soscia of all economically beneficial use of its property." Compl. ¶ 37(c). Other than these and other similarly conclusory statements, the Complaint provides no further viable support, factually, legally, or otherwise, that RIDEM's actions here effect a taking under the *Penn Central* balancing factors.

1) Plaintiff failed to show that the economic effect of the regulation rises to level of a taking.

The focus of the economic effect factor is typically on the change in fair market value of the subject property caused by the regulatory burden. In other words, the court must compare the value that has been taken from the property with the value that remains in the property. *See generally, Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (Fed. Cl. 2003).

According to Plaintiff, the "the water rights granted to Quidnick and sold to Soscia as set forth in [the Lease and Quitclaim Deed] insure solely to the benefit, economic or otherwise, of Soscia," and that "[t]he Reservoir[,] commonly known as Johnson's Pond[,] stores the water of the Pawtuxet River[,] upon real property interests owned by Soscia[,] and is released by Soscia[,] and the water levels in Johnson's Pond are controlled by Soscia[,] to its sole economic advantage[,] pursuant to the rights granted to Quidnick by the Rhode Island General Assembly." Compl. ⁋⁋ 21-23. What Defendants can glean from these perplexing assertions is that Soscia understands the Lease and the Quitclaim Deed to

somehow provide a *private* company, the overarching authority to operate the dam in any way it deems to be economically beneficial. *See, id.* Indeed, Plaintiff seems to imply that the threat of enforcement, alone and seemingly in any manner, is enough to tip the economic effect *Penn Central* factor in its favor. *See,* Compl. ⁋ 36 ("Rhode Island General Laws§ 42-17.6-1 et. Seq. and§ 46-19.1-1 authorizes the Director to assess a penalty on any private corporation which fails to comply with any order of the Director in an amount of $1,000.00 per day that the non-compliance with the cease and desist order . . . continues."); *see also*, Mot. for Preliminary Injunction at pg. 12 ("Faced with the prospect of severe fines without having any input, Soscia commenced the above-entitled action.") Missing from the Complaint is any assertion of the value pre- and post-regulation, or even a plausible claim for diminution in economic value—the one use the Plaintiff asserts is foreclosed is a speculative new development on dry land that does not currently exist. *See,* Compl. ⁋ 37.

Further, Plaintiff attempts to assert some sort of rare *Lucas*-based categorical taking when it states that "the actions of the Director require Soscia to keep its submerged land under water[,] which actions completely deprive Soscia of all economically beneficial use of its property." Compl. ¶ 37. *See*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (U.S.S.C.,1992) (finding "categorical treatment [is] appropriate []where [a] regulation denies all economically beneficial or productive use of land."). However, *Lucas* describes that categorical takings only occur in "extraordinary circumstance[s] when no productive or economically beneficial use of land is permitted, [as] it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage' to everyone concerned*." Id.* at 1017-18 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 158, 415 (1922)).

However, when evaluating the economic realities at play here, the State's actions certainly do not take away "all economically beneficial use of its property," as the State's actions only

require consistency with historic water levels, the exact expectation laid out within the Lease and Quitclaim Deed which gave Soscia any authority over the water levels in the first place (to be described in more detail below). Evidence of economic impact cannot be too speculative, and here, Plaintiff has failed to show how the State's actions here are anything more than the State implementing its regulatory police powers and "adjusting the 'benefits and burdens of economic life' . . . in a manner that secures an 'average reciprocity of advantage.'" *See*, *Maine Educ. Ass'n Benefits Tr. v. Cioppa*, 695 F.3d 145 (1st Cir. 2012) (holding that economic impact evidence was too conjectural in nature); *Pennsylvania Coal*, 260 U.S., at 415.

2) Plaintiff failed to adequately show the extent to which the regulation has interfered with distinct investment-backed expectations enough to rise to the level of a taking.

The investment-backed expectations prong requires an objective, fact-specific inquiry into what, under all the circumstances, the landowner should have anticipated when investing in the property. Courts only protect a claimant's objectively reasonable expectations, and a party's subjective expectation is irrelevant to whether that expectation is reasonable. *Penn Central*, 438 US at 122. Here, Plaintiff asserts that its "dry land could be used by Soscia to its economic advantage" and that the State's actions would require them to keep the lands submerged – thereby eliminating any economic value of the property. Compl. ¶ 37. However, *Penn Central* itself rejected a similar notion when it found that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development[,] is quite simply untenable." *Penn Central*, 438 US at 130. "The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." *Palazzolo*, 533 U.S. 606 (citing *Pennsylvania Coal Co.*, 260 U.S., at 413 ("Government 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")).

Here, as a result of the March 2, 2020 sale, the Plaintiff was assigned interest as lessor in the Lease between the Quidnick Reservoir Company and the Town of Coventry. The Lease entitles Soscia to collect rent in exchange for use of and public access to Johnson's Pond, but provided requirements that Soscia "endeavor to maintain the water level elevation at Johnson's Pond" as described in the Lease. Compl. Exhibit 4, Section 7(A). Most important to the issues herein, the Lease specifically provides that between June 1st and September 30th, "lessor will use its best efforts to maintain water level elevation at spillway level." *Id.* Further, the Lease explicitly provides that "the primary purpose of Johnson's Pond is to provide a controlled flow of water into the Pawtuxet River and its branches[.]" *Id.* Accordingly, it is nonsensical that Soscia would argue that it has the right to dry this land for its sole economic advantage – as water levels need to be maintained according to the Lease and to achieve the dam's primary purpose. Moreover, even without the Lease, Soscia has failed to identify any other plausible economic use of its assets that would require flow that differed from historic use. Any such use would not be in keeping with historic restriction of the land-use in relation to milldams, as described in more detail below, and would therefore not be a viable development opportunity in any event.

3) The character of the government action itself does not rise to the level of a taking.

In a wide variety of contexts, the United States Supreme Court has upheld the government's ability to execute laws or programs that adversely affect recognized economic values. RIDEM is an administrative agency charged with the duty "[t]o supervise and control the protection, development, planning and utilization of the natural resources of the state, such resources,

including, but not limited to: water[.]" R.I. Gen Laws § 42-17.1-2(1). As the allegations in the Complaint demonstrate, RIDEM has sought to ensure that historic water levels are maintained so that the ecosystem and surrounding resources are not negatively impacted. The State's actions do not alter what Soscia could have plausibly expected it would be able to do when it purchased Quidnick, and therefore it cannot rise to the level of a taking so as to require just compensation.

D. THE PLAINTIFF'S DUE PROCESS 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

Soscia's claim for violation of substantive and procedural due process is similarly subject to dismissal. In the Complaint, Soscia bases this claim on allegations related to letters sent on July 11, 2022 and July 13, 2022. Compl. Exhibits 7-8. Notably, neither letter does anything more than discuss the "historic use" of Soscia's dam and require conformance with that historic use. *Id.* Soscia does not allege that the water levels requested by RIDEM are inconsistent with historic use of the dam. *See,* Compl. ¶¶ 27-28. Soscia instead complains that it should have been afforded process to establish the meaning of historic use—again, without making substantive allegations that RIDEM got it wrong. *See*, Compl. Count III. These vague and general allegations "stop[] short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

Soscia has failed to adequately allege has that it 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)). The Constitution itself is not a source of protectable property interests;

claimants must identify "'existing rules or understandings that stem from an independent source such as state law.'" *Loudermill*, 470 U.S. at 538 (quoting *Roth*, 408 U.S. at 577).

Soscia has not carried this threshold burden of alleging it possesses a protected property interest. As discussed in more detail in Section E below, the Complaint alleges only that any property right Soscia possesses in use of the water flowing over the dam are derivative of those held by the Quidnick, which was incorporated by Act of the General Assembly in 1846 to "build dams and reservoirs … for the purpose of accommodating [ ] factories and mills along the Pawtuxet River." Compl. ¶11. Nowhere in the Complaint does Soscia adequately allege that it was somehow granted an unfettered right to manipulate the Patuxet's flow in a manner inconsistent with historic use that would allow Soscia to raise and lower the water levels in the Flat River Reservoir on a whim, even to "create[e] dry land." Compl. ¶37(b). Soscia's contention that somehow its usage right extends beyond the confines of use necessary to accommodate factories and mills appears from the Complaint to be tied to Soscia's interpretation of the Mill Dam Act, R.I. Gen. Laws § 46-18-1 et seq. Compl. ¶ 54. But longstanding Rhode Island law is clear that benefits afforded to milldam owners do not extend once the mill purpose has been abandoned. *Mowry v. Sheldon*, 2 R.I. 369, 372-73, 376 (1852). Soscia nowhere contends it operates a mill, or even mill's industrial successor, the hydroelectric plant. *See generally*, Compl. Soscia has failed to adequately allege that RIDEM's letter asking it to cease and desist from actions inconsistent with historic use of its dam, and its due process claim must fail.

Moreover, Soscia's claim ignores that RIDEM issued the subject communications at a time when "the water levels at Flat River Reservoir are . . . at historic lows for this time of year . . . pos[ing] a threat to the wetlands surrounding the pond[, and] the habitat, flora, and fauna of the pond." Compl. Exhibit 8, 3. Authorization for agencies to take emergency action "are widespread

in this country." *San Geronimo Caribe Project, Inc. v. Acevedo-Vila*, 687 F.3d 465, 482 (1st Cir. 2012). "'The Court has often acknowledged ... that summary administrative action may be justified in emergency situations.'" *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)). Pre-deprivation process is not necessary in such situations where "[t]he need for speed" requires swift action. *Id.* Section 42-17.1-2(21)(ii)(A) of the Rhode Island General Laws gives such authority to RIDEM in the instance where enforcement of a law or regulation under its jurisdiction "requires immediate action to protect the environment." This specification is similar to the statute at issue in *Hodel*, which authorized emergency action when there is a condition that "is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources . . . ." *Hodel*, 452 U.S. at 298. "By their nature, emergency situations require an immediate response." *S. Commons*, 775 F.3d at 86. Even if the Complaint could be read to state that RIDEM had erred in its determination of an emergency (it cannot), negligent and even intentional mistakes by state officials in determining an emergency do not constitute deprivations of due process. *Herwins v. City of Revere*, 163 F.3d 15, 19 (1st Cir. 1998). Otherwise "federal suits might be brought for countless local mistakes by officials in administering the endless array of state laws and local ordinances." *Id.* Here, Soscia has recourse in that the immediate compliance order is limited in time to forty-five (45) days under RIGL § 42-17.1-2(21)(ii)(B), and is not self-executing under RIGL § 42-17.1-2(21)(vi), and therefore, any process that is due is provided in the available *state* judicial proceedings. Whether Soscia may have voluntarily complied with the July 13, 2022 letter, or any subsequent immediate compliance order issued by RIDEM, is of no moment—Soscia had available post-deprivation recourse in the state courts of Rhode Island.

E. THE PLAINTIFF'S CLAIMS SOUNDING IN CONTRACT (I, IV AND V) 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

1) Count I of the Complaint fails to show interference with federal contracts law.

A state law that impairs a contract between private parties is constitutional if the impairment (a) is insubstantial or affects only remedies, *or* (b) affects only private parties, is addressed to legitimate public ends, and is reasonable in light of unforeseen circumstances. *See, Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). The Supreme Court has also indicated that states do not have the power to make "*violent* alteration in [the] essential terms" of contracts. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 651 (1819) (emphasis added).

"The economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Home Bldg*, 290 U.S. at 437. "In *Manigault v. Springs,* riparian owners in South Carolina had made a contract for a clear passage through a creek by the removal of existing obstructions." *Id.* (citing *Manigault v. Springs* 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274). "Later, the Legislature of the state, by virtue of its broad authority to make public improvements, and in order to increase the taxable value of the lowlands which would be drained, authorized the construction of a dam across the creek." *Id.* "The Court sustained the statute upon the ground that the private interests were subservient to the public right." *Id.* Specifically, the Court concluded that:

> 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and

> general welfare of the people, and is paramount to any rights under contracts between individuals.

Id. at 238.

Here, as will be described in more detail in Section E below, the State has preexisting regulatory obligations to ensure that the resources of the State are not improperly impacted by private entities, regardless of the existence of a contract. Further, Plaintiff fails to provide any evidence that the State's action actually interfered with any of Soscia's contractual relations. Accordingly, Count I should be dismissed.

2) Count IV of the Complaint fails to establish intentional interference with contractual relations and should be dismissed.

The State is entitled to dismissal of Count IV of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), as the Complaint fails to plead sufficient facts to satisfy the elements of intentional interference with contractual relations under Rhode Island law. To prevail on a claim alleging tortious interference with contract, a plaintiff must show "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [her, or its] intentional interference; and (4) damages resulting therefrom." *Belliveau Building Corp. v. O'Coin,* 763 A.2d 622, 627 (R.I.2000)(quoting *Smith Development Corp. v. Bilow Enterprises, Inc.,* 112 R.I. 203, 211 (1973)). Soscia has plead the existence of a contract, the Lease, and that RIDEM knew of the Lease. Compl. ¶¶ 24-25, 45-46. However, Soscia has failed to sufficiently articulate the other two requirements for establishing its claim.

First, the Complaint fails to show "intentional interference." The Complaint contains a general statement that RIDEM "repeatedly inserted itself into [a] private lawsuit [between the Plaintiff and the Town of Coventry] which insertions were undertaken intentionally and improperly to influence Soscia." Compl. ¶ 48. Notably, Count IV lacks any detail sufficient to determine what actions might be considered 'insertion' into a lawsuit overseen by a Rhode Island

Superior Court Judge in a lawsuit where RIDEM is not a party. *See generally*, Compl. Count IV. Similarly, the Plaintiff fails to assert that any identifiable actions taken by the State actually interfered with the parties' ability to perform under the Lease. There is no allegation that the Lease was ever breached or that RIDEM caused the Town of Coventry and/or Soscia to fail to perform in accordance with the Lease.

Even assuming arguendo that RIDEM did make insertions into the state litigation, the same does not rise to the level of interference with the Lease. *New England Multi-Unit Housing Laundry Ass'n v. Rhode Island Housing and Mortg. Finance Corp.*, 893 F. Supp. 1180, 1192 (D.R.I.,1995). In *New England Multi-Unit Housing Laundry Ass'n*, the District Court, applying Rhode Island law, found that the Rhode Island Housing and Mortgage Finance Corporation did not tortiously interfere with contractual relations despite having "exerted economic pressure to induce [the parties] to renegotiate [their leases]," as the parties were "free to stand firm on their contractual rights[.]" *Id.* No participation in state litigation aimed at "influencing" the Plaintiff could be sufficient to establish any actual interference with the Lease.

Similarly, Soscia has failed to establish the final prong of its claim, namely, damages. Aside from a broad conclusory statement that the "Plaintiff has suffered harm and caused [sic] to incur damages as a result of Defendant's actions in interference with Soscia's contract with the Town" by requiring "increased engineering, legal and consulting fees[,]" there is no articulation of how damages were caused by any alleged interference with the contractual relationship between the Plaintiff and the Town of Coventry. Compl. ¶ 50. The Plaintiff is seeking clarity concerning the Lease obligations of itself and the Town of Coventry in a separate state lawsuit to which RIDEM is not a party. Compl. ¶ 47. It appears that any alleged increased fees are related to a need to respond to issues raised in that separate lawsuit while compiling evidence and/or mounting a

defense to counterclaims from the Town. No alleged actions by RIDEM have altered the facts surrounding compliance with the Lease in any way, nor is there more than a speculative connection to any damages. As such, Count IV does not sufficiently plead intentional interference with contractual relations and should be dismissed.

3) Count V of the Complaint fails to establish intentional interference with franchise/contractual rights and should be dismissed.

As with Count IV, the facts alleged in Count V of the Complaint must be taken as set forth in the Complaint for the purposes of a 12(b)(6) Motion to Dismiss. Again, RIDEM is entitled to dismissal of Count II, as the Complaint fails to plead sufficient facts to support Plaintiff's claim. Although Rhode Island law does not appear to define "intentional interference with franchise/contractual right"; this claim argues a second theory of interference with contract by attempting to define an act incorporating the Quidnick Reservoir Company ("Quidnick") in 1846, as amended in 1867, 1975, and 1982, as a contract between the State of Rhode Island and Soscia. *See generally*, Compl. at Count V.

As with Count IV, Count V requires a showing of "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [her, or its] intentional interference; and (4) damages resulting therefrom." *Belliveau Building Corp. v. O'Coin,* 763 A.2d 622, 627 (R.I.2000) (quoting *Smith Development Corp. v. Bilow Enterprises, Inc.*, 112 R.I. 203, 211 (1973)).

a) The Complaint fails to establish a contract or any franchise/contractual rights.

Count V is different from Count IV in that it is difficult to ascertain what contract or franchise is allegedly interfered with. The Complaint sets forth several legal conclusions in attempting to establish the contractual rights at issue. *See generally*, Compl. at Count V. As such,

it is important to again note that mere speculation is not sufficient to escape dismissal pursuant to pursuant Rule 12(b)(6).

Here, the Plaintiff claims that the State of Rhode Island is party to a "franchise contract" with the Plaintiff as a result of the Plaintiff having purchased a dam and certain water flowage rights formerly owned by a corporation created by an act of the Legislature. Compl. ¶ 52. As an initial matter, the alleged contract itself is not supported beyond a mere legal conclusion that enactments of statute "constitute a franchise contract." *Id*. Assuming that this were sufficient to constitute a "contract," the Plaintiff fails to show how the contract was transferred such that the State remains obligated to the Plaintiff as the result of its purchase of certain assets held by the former owner, Quidnick. The Plaintiff appears to assert that the transfer of assets alone can create a contractual relationship with the State of Rhode Island whereby a new party remains beyond the reach of the law without providing the original public benefit contemplated under the prior ownership. But there is no allegation of novation, assignment, or legislative act to which the State of Rhode Island is a party.

Pursuant to Rhode Island law, "[i]t is well established that a valid contract requires 'competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.'" *DeAngelis v. DeAngelis*, 923 A.2d 1274, 1279 (R.I. 2007)(citing *Rhode Island Five v. Medical Assoc. of Bristol Cty., Inc.*, 668 A.2d 1250, 1253 (R.I.1996) (quoting Black's Law Dictionary 322 (6th ed.1990))). Here, the Complaint fails to establish several of these requirements in attempting to define the subject contract.

According to the Complaint, Quidnick was incorporated by Act of the General Assembly in 1846 that authorized *Quidnick Reservoir Company* to "build dams and reservoirs … *for the purpose of accommodating [ ] factories and mills* along the Pawtuxet River." Compl. ¶ 11.

(emphasis added). The Complaint further states that "[t]he Rhode Island General Assembly in 1846 Act [sic] did grant Quidnick an exclusive franchise to utilize the water rights of the Pawtuxet River for its purposes for the sole benefit of Quidnick's members." Compl. ¶ 14. Thus, the referenced Act is alleged to have provided *Quidnick* with certain franchise rights to exercise for the sole benefits of *Quidnick's members*.

The Plaintiff does not allege to have purchased Quidnick itself and is not a corporate successor to that entity. *See generally*, Compl. Despite this, the Plaintiff claims that certain franchise rights transferred from Quidnick via a real estate conveyance and quitclaim deed, including the right to determine "the amount of water, *if any*, to be placed upon its submerged real property." Compl. ¶ 28. The Complaint alleges that Soscia's contract rights were contained within the 1846 "Act to Incorporate the Quidnick Reservoir Company" as amended. Compl. ¶ 53.

The operative 1846 Act gave Quidnick certain authorities to operate as a corporation in order to further a public interest. This was done without any exchange or consideration from or to either party. What is more, any contractual relationship that may have existed between the State and Quidnick would not benefit the Plaintiff, who is not mentioned in the Legislation and who was not contemplated in any legislative grant. The State of Rhode Island did not agree to be bound to a contract with Soscia. Moreover, Soscia does not have a mill, nor does it allege that it intends to construct a mill consistent with the purposes of Quidnick as set forth in 1846. *See generally*, Compl. The Plaintiff was not a party to any agreement in 1846 between Quidnick and the State of Rhode Island, it gave the State no consideration in exchange for its supposed franchise right, there is no legislative enactment mentioning Plaintiff or providing authorization for transfer of Quidneck's franchise rights, and it did not remain obliged to operate mills as contemplated in the subject Act.

Additionally, "[i]n grants by the public, nothing passes by implication." *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 48, 97 S. Ct. 1505, 1530, 52 L. Ed. 2d 92 (1977) (quoting *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 546, 9 L.Ed. 773 (1837)). "Every reasonable doubt is to be resolved adversely (to the private party claiming under the contract). Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare." *Id*. (quoting *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 666, 24 L.Ed. 1036 (1878)). Thus, there are no plead facts sufficient to support the argument that any franchise granted to Quidnick 175 years ago and most recently amended 40 years ago (and 38 years before Soscia's Quitclaim Deed) constituted a transferable, saleable, and enforceable contract with the State of Rhode Island, which also granted protection from the applicability of any subsequent laws, such as the Dam Permitting Act. Moreover, the 1982 amendment to the 1846 Act, which replaced the original act in its entirety, makes no mention of any franchise or contract with the State of Rhode Island.

Thus, the Plaintiff has not plead sufficient facts to show that a contract has been established between the State of Rhode Island and Soscia. There was no consideration, mutual agreement, or mutual obligation between the Plaintiff and the State of Rhode Island. RIDEM cannot be shown to have interfered with any contractual rights flowing from a nonexistent contract, and Count V should be dismissed. Moreover, this same argument would apply to the Director, who is not named in Count V.[3]

[3] The State of Rhode Island is also unnamed in Count V, and is alleged to be party to the subject contract. As interference with contractual relations is a third-party claim, the same cannot be brought against the State of Rhode Island. Instead, any actions involving the non-existent franchise contract Soscia alleges by the State of Rhode Island would need to be brought in a breach of contract action, which Soscia has not (for good reason, being that there is no contract) pursued.

b) The Milldam Act is inapplicable and does not afford the Plaintiff any special rights that could give rise to its claims.

Even if the Complaint established the contractual/franchise rights referenced in Count V (it does not), Soscia also argues that its contract rights are protected under the Milldam Act as set forth in R.I. Gen. Laws sec. 46-18-1 et seq. Compl. ¶ 54. However, the Milldam Act is inapplicable to Soscia. When a dam is owned for the purpose of servicing mills along a waterway, the Milldam Act creates certain protections sometimes referred to as the "mill privilege." *See,* R.I. Gen. Laws § 46-18-1. However, it has long been established that the benefits afforded to milldam owners do not extend once the mill purpose has been abandoned. *Mowry v. Sheldon*, 2 R.I. 369, 372-73, 376 (1852).

The days of a booming mill industry on the Pawtuxet are long over. The Complaint does not contend that the Plaintiff has a mill or hydroelectric business, or that any mills are served by the subject dam (because none are). *See generally,* Compl. Nor is the Plaintiff claiming that it intends to construct or operate mills in the future. Rather, Soscia is claiming that it and, presumably, any subsequent purchaser of lands once bought by Quidnick for the purpose of supplying power to 19th century mills, enjoys a "right to retain [the waters of the Pawtuxet River] for any lawful purpose including, all economic benefits stemming from the retention of said waters" and should be allowed to operate outside of any subsequent State regulation, in perpetuity. Compl. ¶¶ 15, 22-23. Thus, while legislative schemes such as the Milldam Act are claimed applicable when advantageous to Soscia, the Plaintiff alleges that any legislative efforts contrary to their preferences may be disregarded. This includes any environmental regulations such as the Dam Permitting Act. In reality, even if the Milldam Act were applicable to the subject dam (it is not), the Milldam Act would not provide immunity from the environmental laws or related regulations enacted by the State. The Plaintiff cannot rely on misstatements of law to overcome a

12(b)(6) Motion to Dismiss. Accordingly, the Complaint again fails to establish a franchise right with which RIDEM could have interfered, and Count V should be dismissed.

c) The Complaint fails to establish interference or damages and therefore should be dismissed.

Assuming even that the Plaintiff could establish a contract, the applicability of the Milldam Act, and immunity from environmental enforcement (all of which the State contends it cannot), Count V is still insufficient. Count V of the Complaint, much like Count IV, does not provide any clarity as to what interference may have occurred, and therefore a claim for interference with contractual/franchise rights cannot be established. As outlined in detail above, the Complaint does not articulate any way in which RIDEM frustrated the Plaintiff's efforts as a milldam owner. Again, speculative broad statements of unspecified actions that "were taken intentionally and improperly and with malice" do not rise above even the low initial bar required of the Plaintiff to establish a claim against RIDEM. *See,* Compl. ¶ 55.

Additionally, Soscia has again failed to establish damages, a necessary element to Count V. Aside from a broad conclusory statement that the Plaintiff "has suffered harm and has been caused to incur damages as a result of Defendant's action in interference with Plaintiff's contractual and legislatively granted rights[,]" there is no articulation of any damages whatsoever. Compl. ¶ 56. The Plaintiff fails to claim that any actions allegedly taken by RIDEM have altered Soscia's intended actions or its ability to act in any way.

d) Even if the Complaint were sufficient on its face to establish the Plaintiff's alleged interferences, which it is not, all actions by RIDEM are justifiable actions taken in furtherance of its duties as a state agency and therefore Plaintiff's action cannot succeed as to those counts.

Pursuant to Rhode Island law, after a plaintiff establishes the prima facie elements of a claim for intentional interference with contractual relations, the defendant has the burden of

proving sufficient justification for the alleged interference. *Belliveau,* 763 A.2d at 627. To demonstrate intentional interference, the plaintiff must show the defendant acted with legal malice, which is defined as "an intent to do harm without justification." *Jolicoeur Furniture Co. v. Baldelli,* 653 A.2d 740, 753 (R.I. 1995). *See also, Mesolella v. City of Providence,* 508 A.2d 661, 669–70 (R.I.1986). Even if the factual allegations in the Complaint were specific enough to pass muster with respect to Sup. Ct. R. Civ. P. 12(b)(6), any actions by the State are clearly justified within the charge of RIDEM and the role of the legislature and cannot give rise to a claim for intentional interference with contractual relations or interference with contractual/franchise rights.

Thus, in order to prevail with respect to its claims, Soscia must prove that the State acted "without justification" or for an "improper" purpose. *Belliveau,* 763 A.2d at 628 (citing W. Page Keeton et. al., *Prosser & Keeton on the Law of Torts* ch. 24, § 129 at 978–79 (5th ed.1984)). To evaluate whether an alleged interference with a contract occurred without justification or was otherwise improper, the court should evaluate the nature of the actor's conduct, the interests of the party with whom the actor's conduct interferes, and the relations between the parties. Restatement (Second) *Torts* § 767 (1979). So long as a defendant acts in good faith at the time it asserts its interest, based on all information available to it at that time, the assertion of such interest is protected—even if it is later determined that the basis for the defendant's action was invalid. *Belliveau,* 763 A.2d at 630.

RIDEM is an administrative agency charged with the duty "[t]o supervise and control the protection, development, planning and utilization of the natural resources of the state, such resources, including, but not limited to: water[.]" R.I. Gen Laws § 42-17.1-2(1). As the allegations in the Complaint demonstrate, all actions alleged to have been taken by RIDEM fall squarely

within its governmental functions and regulatory oversight of dam safety and water flow. Pursuant to RI Gen Laws § 46-19-4(a):

> The director of the department of environmental management, on application made to him or her in writing *by any person owning or representing property liable to injury* or destruction by the breaking of any dam or reservoir, *or on an application made by any mayor or city council of any city, or by the town council of any town*, on account of danger of loss of life or of injury to any highway or bridge therein, from the breaking of any dam or reservoir, *or, without the complaint, whenever he or she shall have cause to apprehend that any dam or reservoir is unsafe*, shall forthwith view and thoroughly examine the dam or reservoir, or cause the dam or reservoir to be viewed and examined.

(emphasis added). Additionally, the Dam Permitting Act authorizes the Director to determine historic use of dams subject to the statute and to enforce compliance. RIDEM enjoys a certain level of discretion in performing its governmental functions and should be allowed to perform its duties without the threat of suit. Similarly, the State of Rhode Island and its legislature is tasked with the passage of laws, such as the recently enacted Dam Permitting Act, to further public safety and to protect the environment.

Even if this Court were to assume Plaintiff's allegations concerning the State were true and that the actions of the State somehow interfered with contractual rights, the actions alleged to have been taken by the State do not support or demonstrate that the State took unjustified actions for the purpose of interfering with the Lease or any purported contractual/franchise rights.

F. COUNT VI IMPROPERLY SEEKS DECLARATORY RELIEF AND THEREFORE SHOULD BE DISMISSED.

As noted above, Count VI should be dismissed pursuant to *Pennhurst*. However, even if that were not the case, Count VI of the Complaint is inadequate to establish a justiciable claim. The Count consists of only three substantive paragraphs. The first states that:

> By enactment of the [Dam Permitting Act] and the issuance of the July 13, 2022, cease and desist order Defendants have substantially

> impaired Soscia's contract rights it owns and possesses with respect to the State of Rhode Island and the obligations owed by the State of Rhode Island to Soscia.

Compl. ¶ 58. The second contends that the enactment of the Dam Permitting Act constitutes "unreasonable and unnecessary regulation of the State of Rhode Island with respect to the contract rights owned by Soscia and the obligations of the State of Rhode Island[.]" Compl. ¶ 59. The third claims that the Dam Permitting Act "is unconstitutional due to the fact that it violated the prohibitions with respect to the impairment of contract rights contained within Article 1 § 12 of the Rhode Island Constitution." Compl. ¶ 60. All three of these paragraphs are clear legal conclusions and broad claims of undefined contractual obligations of the State of Rhode Island such that they are insufficient to support the Plaintiff's claim and survive a motion to dismiss for failure to state a claim.

In order to succeed in a declaratory judgment action, a Plaintiff must present an actual controversy. *See e.g., Providence Tchrs. Union v. Napolitano*, 690 A.2d 855, 856 (R.I. 1997). "A declaratory-judgment action may not be used 'for the 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)). Moreover, an action seeking a declaratory judgment does not "'license litigants to fish in judicial ponds for legal advice.'" *Id.* (quoting *Goodyear Loan Co. v. Little*, 107 R.I. 629, 631 (1970)).

"When confronted with a request for declaratory relief, the first order of business for the trial justice is to determine whether a party has standing to sue." *Bowen v. Mollis*, 945 A.2d 314, 317 (R.I. 2008). The inquiry into standing will focus "on the party who is advancing the claim rather than on the issue the party seeks to have adjudicated." *Id.* (internal citations and quotation marks omitted). The Plaintiff lacks standing to bring this claim for two reasons. First, the Plaintiff

has not suffered an injury in fact. Second, even assuming *arguendo* that Plaintiff has demonstrated a harm sufficient to confer standing, its claim is nonjusticiable because any harm suffered is speculative and not traceable to the challenged actions and could not be redressed by this Court.

To have standing, "the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 535 (R.I. 2013) (internal citations and quotations marks omitted). If a particular plaintiff lacks standing for these reasons, it cannot bring suit and its claim must be dismissed. *See, H.V. Collins Co. v. Williams*, 990 A.2d 845, 847 (R.I. 2010) (quoting *N & M Properties, LLC v. Town of West Warwick*, 964 A.2d 1141, 1145 (R.I. 2009)). Even if a plaintiff demonstrates injury for standing purposes, it must also show that the case is justiciable. *See, Mruk*, 82 A.3d at 535. To do so, under Rhode Island law a plaintiff bears the burden of establishing "a causal connection between the injury and the conduct complained of." *Mruk*, 82 A.3d at 535. The Rhode Island Supreme Court has held "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Additionally, the injury must be redressable through the present action. *See id.,* at 535 (it "must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'") (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. at 561).

Here, the Plaintiff has asked for a sweeping judgment applicable to numerous hypothetical future scenarios. The Dam Permitting Act requires owners of dams, such as the Flat River Reservoir Dam, to apply for a permit to alter water levels as they determine necessary. The Plaintiff has not been denied any such permit and has not alleged any non-speculative

particularized harm resulting from having to maintain consistency with historic use of its dam. *See generally*, Compl. Thus, this issue is not specific enough to establish a controversy as required for consideration of a declaratory judgment action, and there is no justiciable controversy. Count VI fails to point to a specific controversy and is precisely the type of future-minded abstraction that fails to create standing to maintain a declaratory judgment action.

V. CONCLUSION

It is clear that the Plaintiff would not be entitled to relief from the Defendants under any set of facts that could be proven in support of its claims. For the reasons stated above, the Defendants hereby requests that this Honorable Court dismiss the Amended Verified Complaint as to all counts, with prejudice.

Respectfully submitted,

DEFENDANTS,
State of Rhode Island, State of Rhode Island Department of Environmental Management and Terrence Gray, in his capacity as the Director of the Rhode Island Department of Environmental Management

By:
PETER F. NERONHA
ATTORNEY GENERAL

/s/ Nicholas M. Vaz

Nicholas M. Vaz, Esq. #9501
Special Assistant Attorney General
150 South Main Street
Providence, RI 02903
Tel. (401) 274-4400 ext. 2297
Fax (401) 222-3016
nvaz@riag.ri.gov

CERTIFICATE OF SERVICE

I hereby certify that I filed and served the within Motion to Dismiss through the ECF filing system on this 29th day of August 2022 and that it is available for viewing and downloading.

/s/ Nicholas M. Vaz