STATE OF RHODE ISLAND

SUPERIOR COURT PROVIDENCE COUNTY

WEEKAPAUG FIRE DISTRICT v. TOWN OF WESTERLY *et al.*	PM2023-06573

CAROLINE CONTRATA'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The Attorney General and the Town of Westerly have already correctly identified the slander-of-title count as an illegal SLAPP-suit. *See Mem. in Supp. Att'y Gen. Mot. to Dismiss* ("*AG Memo*") at 14-17; *Town Mem. in Supp. of Mot. to Dismiss* ("*Town Memo*") at 19-20. ("SLAPP" means Strategic Lawsuit Against Public Participation.). They rightly state that the claim violates R.I.G.L. §9-33-1 *et seq*.

But it is much worse. Weekapaug Fire District ("WFD"), a municipality fortified by the power of taxation, brings this case under the color of state law. This is an attempt to use a part of the sovereign power of the State to sue a citizen for speech. Specifically, the slander-of-title count is an attempt by a governmental entity to obtain a money judgment against an individual Rhode Islander for petitioning with regard to property rights in land held by that entity. While a typical SLAPP-suit is a private owner's suit over private land—*e.g.*, *Hometown Properties v. Fleming*, 680 A.2d 56 (R.I. 1996)—this is a governmental owner's suit over government land.

Amidst the 25 parties, the 146 allegations, the 11 prayers for relief, the 12 exhibits, and the countless deeds and plats that WFD asks to have judicially noticed, it is easy to miss the presence of Defendant Caroline Contrata, the only non-institutional natural person involved in this litigation. She is a Westerly resident who had the temerity to ask the CRMC to designate a tract that is universally

acknowledged as a roadway—and clearly shown as such on at least seven extant recorded subdivision plats—as not purely private (*i.e.*, as a public right-of-way).

For the same reasons, it is easy to miss that there is a tort count against Contrata for money damages. The charge is that Contrata slandered the local municipality's (WFD's) title to "[t]he Spring Avenue Extension ('SAE') [which] is a fifty (50) feet wide strip of land, alley, or way ... ." Compl. ¶17. She allegedly did this by asking the CRMC to recognize it as a public right-of-way to the shore.

Of course, Contrata need not show that her statements were true. The First Amendment "does not turn upon the truth, ... of the ideas ... offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). In this case, however, irony is provided by the fact that the Complaint—including its exhibits—admits the "reasonable conclusion that there was ... intent to dedicate ... the subject real estate." Ex. E at 4. This concedes that probable cause exists for Contrata's assertion that the right-of-way is public.

Thus, the First Amendment bars this suit in any event; moreover, in light of the Complaint's exhibits, the facts pled do not even suggest falsehood.

OVERVIEW

To enumerate, WFD's counts are: Count I, Quiet Title; Count II, a Declaratory Judgment count, which mirrors the quiet title count; Count III, which purports to be an administrative appeal; Count IV, Slander-of-Title; and Count V, Abuse-of-Process.

Because the Constitutional protection and the associated anti-SLAPP statutory immunity are at the heart of Contrata's defense, and because those laws are most clearly implicated by the slander-of-title count (Count IV), this brief will deviate from the organizational scheme of the Complaint and address that count first.

The Constitution, statute and common law each bar Count IV:

First, the Count violates an absolute Constitutional immunity because: *1)* it targets petitioning; *2)* petitioning falls under the State and Federal Petition Clauses; *3)* WFD is a governmental entity; *4)* WFD is Constitutionally barred from suing for defamation; and *5)* slander-of-title is a form of defamation and is likewise barred..

Second, the Count defies a conditional statutory immunity in the Anti-SLAPP Act. The Act forces plaintiffs to satisfy two tests to prevail. WFD fails both tests because, *inter alia*, the Complaint's exhibits show that Contrata had a sound basis.

Third, the common-law elements of slander-of-title are absent in any event.

With Count IV thus dispatched, the others fall by the wayside. The two quiet title counts (I & II) suffer from improper venue, multiple pleading defects, and, again, the bar of anti-SLAPP immunity. The administrative appeal count (III) is simply premature. (Count V is not brought against Contrata at all and is not briefed herein.)

NATURE OF CASE

This case is a novel three-part hybrid:—*1) in rem* suit seeking to quiet title as against the world; *2)* purported administrative appeal; and *3) in personam* tort suit.

FACTS ALLEGED

Westerly's summary of the facts alleged is incorporated. *Town Memo* at 2-3.

STANDARD OF REVIEW AND RELATED MATTERS

I. *The Standards of 12(b).*

The present motion invokes several grounds available under 12(b). Thus, four provisions of Rule 12(b) supply the standards: 12(b)(1), (3), (6), and (7). The standards of 12(b) are stated by Westerly. *See Town Memo* at 5-6. In facing these tests, however, Contrata is aided by the pleading rules discussed next.

II. *Additional Applicable Pleading Rules.*

A. The Effect of Rule 10(c).

R.I. Super. Ct. R. 10(c) looms large due to the great volume of material that WFD has incorporated into its Complaint. That section states, "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." A complaint can be undone by the exhibits attached thereto. *See Pucci v. Algiere*, 261 A.2d 1, 6-7 (R.I. 1970) (counterclaim sustained because of exhibits to complaint).

A rich vein of analogous Federal authority amplifies the point. When "exhibits contradict the ... allegations of the pleading, the exhibits govern." *Griffin Indus. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007). *Associated Builders v. Ala. Power*, 505 F.2d 97, 100 (5th Cir. 1974), held that, in considering a 12(b)(6) motion, allegations can be "contradicted by facts disclosed by a document appended to the complaint. If the appended document, to be treated as part of the complaint for all purposes under Rule 10(c), ... reveals facts which foreclose recovery ..., dismissal is appropriate."

WFD incorporates 12 exhibits and voluminous land records. Compl. at 6 n.1.

B. The Effect of Rule 9(g).

Rule 9(g) states, "When items of special damage are claimed, they shall be specifically stated." This has special force for slander-of-title claims since an element of the cause-of-action itself is the presence of special damages. *See* Part IV, *infra*.

ARGUMENT

There is an over-arching theme that infects WFD's entire Complaint against Contrata: attacking public participation in matters of public concern.

The Complaint is rife with charges of "public pressure" (*see* Compl. pp. 2, 14 (twice), 15, 24) and "political" behavior (Compl. at 2, 3, 16, 19, 24). Likewise, the

Complaint refers to Town leaders acting "to appease their constituents." Compl. at 2. But perspective matters. That which one person perceives as public pressure another person might perceive as civic engagement. What one describes as political conduct another might describe as participation in civil society. What one sees as appeasement another will see as the proper workings of representative government.

In short, whatever connotations and characterizations WFD might employ, the fact remains that WFD targets the act of petitioning government for redress of grievances. That, WFD—a municipal corporation—cannot do.

I. *Constitution, Statute and Common Law Bar the Slander-of-Title Count.*

A. The Claim Violates the Absolute Constitutional Immunity.

Constitutionally, WFD cannot bring its slander-of-title claim for five reasons: *1)* Contrata's alleged actions constitute petitioning; *2)* two Petition Clauses apply; *3)* WFD is a government actor; *4)* government cannot sue for defamation; and *5)* slander-of-title is akin to defamation. Each of these amount to a Constitutional shield.

This operates apart from the shield afforded by the Anti-SLAPP Act., *infra*.

1. WFD admits that it is targeting petitioning activity.

In keeping with the Complaint's theme, Count IV (slander-of-title) centers on the notion that "capitalizing on the growing public pressure, the RIAG Defendants and Contrata intervened in the CRMC matter in order to pursue their own personal and/or political agendas against the District." Compl. at 2. Count IV continues: "the CRMC then allowed RIAG Defendants and Contrata to join the CRMC proceeding as intervening parties." Compl. ¶93. Next comes the crux, quoted at length here:

> 109. The Town Defendants, RIAG Defendants and ***Contrata falsely claim that SAE is a public right of***

> ***way and have acted in furtherance of this claim as follows,*** including, but not limited to:
>
> a. ...
> b. ***Contrata intervened in the CRMC in support of SAE's potential designation as a public right-of-way and has publicly advocated for such designation, as has her counsel***; ... .
>
> 110. The CRMC opened a matter for the SAE's purported designation as a public right of way, ...

Compl. ¶¶109-110 (emphasis added). Whether one accepts WFD's polemics about "political pressure" or not, the gravamen of the Complaint is Contrata's petitioning activity. In sum, one need not look beyond the four corners of the pleading itself to find that this suit targets petitioning government for redress of grievances.

2. The acts alleged fall under the State and Federal Petition Clauses.

The Rhode Island Petition Clause, the strongest of all fifty states, declares:

> The citizens have a right ... to apply to those invested with the powers of government, for redress of grievances, or for other purposes, by petition, address, or remonstrance.

R.I. Const. Art. I, §21. The more familiar federal First Amendment, states:

> Congress shall make no law ... abridging the freedom ... to petition the Government for a redress of grievances.

U.S. Const., 1st Amend. Both Constitutions protect Contrata's conduct.[1]

[1] For convenience, this brief will use singular phrases such as "the Constitution," and "the First Amendment." Unless stated otherwise, these phrases are to include both clauses.

3. WFD is a public governmental entity.

WFD is a governmental actor. This conclusion is well-established in Rhode Island since at least 1898. *See Wood v. Quimby*, 40 A. 161, 163 (R.I. 1898) ("[A] fire district[ ] is simply authorized to exercise, and is exercising, a part of the sovereign power of the state, and is, therefore, a governmental or political body"). The Court then noted, in language that seems prescient in light of the current lawsuit, that the fire district "holds no property except for public purposes." *Id*.

This holding—that Rhode Island fire districts *are* governmental actors—has been re-affirmed many times. Several years before WFD was incorporated, our Court restated that the districts are "a governmental or political body which is incorporated as a convenient method of exercising a part of the sovereign power of the state." *East Providence Water Co. v. Public Util. Comm'n*, 128 A. 556, 558 (R.I. 1925). *East Providence Water* reiterated, "It holds no property except for public purposes." *Id*.

In 1952, in the *Kennelly* case, the Court used the comparative example of fire districts as the standard for determining whether an entity qualifies as municipal:

> [F]ire districts heretofore created by the legislature ... are vested with a portion of the state's taxing power and have been characterized by this court as quasi-municipal corporations.
>
> Such districts are true bodies politic ... exercising a part of the sovereign power of the state. This is one of the basic elements of a municipal corporation. ... . The distinguishing feature of a municipal or quasi-municipal corporation is that it is not only a body corporate but also a body politic ... endowed with the right to exercise ... a portion of the political power of the state.
>
> Such ... is more than a mere "public benefit corporation."

Kennelly v. Kent Cnty. Water Auth., 89 A.2d 188, 190-91 (R.I. 1952).

The Court repeated these conclusions in 1981. *Flynn v. King*, 433 A.2d 172, 175 (R.I. 1981). And the General Assembly agreed, limiting tort damages against fire districts in the exact same provision as it did so for cities and towns. *See* R.I.G.L. §9-31-3 ("[i]n any tort action against any city or town or **any fire district**, any damages ... shall not exceed ... one hundred thousand dollars") (emphasis added).

4. WFD is Constitutionally barred from suing for defamation.

It follows that, as a governmental actor, the WFD cannot maintain defamation claims against private citizens. This is particularly so where, as here, the citizen, Contrata, was exercising her First Amendment rights on a topic of public concern.

Indeed, "no court of last resort in this country has ever held, or even suggested, that [civil or criminal] prosecutions for libel on government have any place in the American system of jurisprudence." *New York Times v. Sullivan*, 376 U.S. 254, 291 (1964) (clarified)[2]; *see also Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (noting "the spectre of [civil or criminal] prosecutions for libel on government, which the Constitution does not tolerate in any form."). As a result, based on First Amendment protections, defamation claims brought by governmental actors have been summarily dismissed. *See, e.g.*, *Edgartown Police Patrolmen's Ass'n v. Johnson*, 522 F.Supp. 1149, 1152 (D.Mass. 1981) ("well-established that a governmental body may not sue for libel") (citations omitted); *see also Philadelphia v. Washington Post*, 482 F.Supp.

[2] This brief uses "(clarified)" to indicate that the writer has omitted internal quotation marks, has omitted citations, has altered punctuation, or has taken some combination of those steps with respect to the corresponding quotation and that such steps are not otherwise noted.

897, 898 (E.D.Pa. 1979) ("City cannot maintain an action for libel ...; a governmental entity is incapable of being libeled" (clarified)); *ACLU v. Tarek ibn Ziyad Academy*, 2009 WL 4823378, at *4 (D.Minn. Dec. 9, 2009) ("governmental body may not sue for defamation"). If such suits were allowed, it would yield the absurd result of stifling "[p]ublic debate ... by the threat that one who speaks out on social or political issues may be sued by the very governmental authority which he criticizes." *Edgartown Police Patrolmen's Ass'n*, 522 F.Supp. at 1152. (The footnote collects more authority.[3])

Of course, the nightmare scenario imagined by these courts—a lawsuit by a governmental actor against a private citizen who is participating in an established process regarding that government's interests—is the instant case.

5. Slander-of-title is a form of defamation and is likewise unavailable.

a. Slander-of-Title Is a Part of the Family of Falsehood-Based Torts.

This prohibition on governments bringing defamation claims extends to the WFD's slander-of-title claim. As an initial matter, slander-of-title is part of the common law tort of "injurious falsehood," which the *Restatement* describes as "obviously similar in many respects to the action for defamation. Both involve the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff." *Restatement 2d Torts*, §623A, comment g. To be sure, there were some historical differences between the torts of injurious

[3] *See also Port Arthur Ind. School Dist. v. Klein & Assoc.*, 70 S.W.3d 349, 352 (Tex.App. 2002) ("[i]f the government is permitted to use public resources to bring defamation claims against its critics, criticism of government will be silenced through ... fear of monetary loss"); *Wegener v. Cache Cnty.*, 2014 WL 8104911, **8-13 (2014) (an especially scholarly review of the topic); *Right of Governmental Entity to Maintain Action for Defamation*, 45 A.L.R.3d 1315 ("cases ... unanimously conclude[ ] that a government[ ] ... cannot maintain an action for defamation").

falsehood and defamation, namely that injurious falsehood dealt with protecting against economic losses whereas defamation dealt with reputation. *See id*. But "[t]here is no reason to accord lessened protection because the plaintiff's claim is denominated 'disparagement,' 'trade libel,' or 'injurious falsehood' rather than 'libel' or 'slander' or because the injury is to economic interests rather than to personal reputation." Robert D. Sack, *Sack on Defamation* §13.1.8.

Indeed, when faced with a slander-of-title claim, a Utah federal district court held that "slander of title claims are subject to the First Amendment[,]" just like defamation claims. *SCO Group v. Novell*, 692 F.Supp.2d 1287, 1293 (D.Utah 2010). While *SCO Group* did not involve a suit by the government, the following case did. A New Jersey federal court upheld immunity in regard to all injurious falsehood torts:

> [I]t would be anomalous to hold that the Free Speech Clause protects statements about a government or government agency against a defamation claim, but not against a trade libel or product disparagement claim concerning the services that a government or one of its agencies provides. Clearly, the alleged injurious falsehood at issue here merits no less constitutional protection than as against [a] defamation claim.

College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Bd., 919 F.Supp. 756, 763 (D.N.J. 1996). In sum, government, as plaintiff, cannot use torts based on falsehood.

So too here. The WFD's slander-of-title claim is essentially a governmental defamation claim as applied to WFD's interests in land. This is prohibited.

b. Government Slander-of-Title Suits Defy First Amendment Values.

This prohibition logically fits with principles underlying the First Amendment. The Constitution's solicitous attitude towards robust debate on matters of public

concern implicates governmental land titles as much any other aspect of governing. Deed clauses and the like can impact public policy as much as programmatic decisions, legislative enactments, personnel management or executive action.

Examples of community opposition to a city or town's plans to limit usage of its own land come to mind. In these instances (cited in the next paragraph), the objections concerned a locality's title to realty. In other words, these cases illustrate that individuals' statements regarding local governments' land titles are a necessary part of public debate. Notably, in the cited examples, the governmental entity did not use retaliatory tactics. Indeed, each of these controversies would have been unduly complicated if there had been secondary litigation alleging slander-of-title.

See Thompson v. Sullivan, 148 A.2d 130 (R.I. 1959) (taxpayers sought to void lease of city land to club); *Buckhout v. Newport*, 27 A.2d 317 (R.I. 1942) (whether neighborhood firehouse could be converted depended on deed restriction); *Newport v. Sisson*, 155 A. 576 (R.I. 1931) (neighborhood school closure depended on resolution of claim of dedication); *Cascambas v. Newport*, 121 A. 534 (R.I. 1923) (city's prerogatives with respect to beach turned on recorded indenture); *Clark v. Providence*, 15 A. 763 (R.I. 1888) (neighbors fought deeding of park based on limits in prior grant).

Citizen participation in the type of disputes underlying the cited cases—and in the dispute at hand—should be as vigorous as on any other topic.

6. The petition defense prevails apart from the Anti-SLAPP Act, *infra*.

Notably, the exception pertaining to the Anti-SLAPP Act's immunity, *infra*, does not pertain to this self-executing defense provided by the State and Federal Constitutions. Even sham petitioning, *infra*, is protected from government suits

sounding in charges of falsehood. The protection is absolute. Because attorney fees are at stake, however, Contrata asks the Court to dismiss on both grounds.

B. The Claim Violates the Conditional Statutory Immunity.

1. The activities alleged fall under the Anti-SLAPP Act.

As the conduct forms petitioning, it is within the Anti-SLAPP Act. That Act defines "a party's exercise of its right of petition" as "any ... statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern." R.I.G.L. §9-33-2(e). Notably, the veracity of the statement is irrelevant. This is reinforced by the findings which extol "robust discussion of issues of public concern before ... administrative bodies and in other public fora." R.I.G.L. §9-33-1.

2. The Act forces plaintiffs to satisfy two strict tests to impose liability.

The operative section, sets-out an immunity and a narrow two-part exception:

> **§9-33-2. Conditional immunity**
> (a) ... Such immunity will ... bar ... any civil claim ... directed at petition ..., except if ... a sham. The petition ... constitutes a sham only if it is not genuinely aimed at procuring favorable government ... outcome, regardless of ultimate motive or purpose. The petition ... will ... constitute a sham ... only if it is both:
>
> > (1) Objectively baseless in ... that no reasonable person ... could realistically expect success in procuring the ... outcome, and
> > (2) Subjectively baseless in ... that it is actually an attempt to use the ... process itself for its own direct effects. Use of outcome ... shall not constitute use of the ... process itself for its own direct effects.

R.I.G.L. §9-33-2. This sham exception has two tests. A plaintiff must show that the petition 1) lacks probable cause and 2) solely seeks to exploit procedural burdens.

3. WFD fails both prongs of the sham exception.

a. The Complaint's Exhibits Belie the Notion of Objective Baselessness.

True, the Complaint does allege that Contrata proceeded "without basis and in the face of contradicting evidence, inaccurately and falsely ... ." ¶134. But these bare conclusions are undercut and vitiated by the exhibits incorporated under Rule 10(c).

i. WFD's own exhibits support probable cause.

Support for Contrata is provided by an exhibit that is a part of the Complaint. Exhibit E is a 2008 title report, which, at the outset, candidly acknowledges,

> [W]e found **evidence in the land records** that both **supports** and challenges **the proposition that the subject real estate is a public right-of-way**.

Ex. E at 1, PDF 33[4] (emphasis added). The Report then turns to substance, starting with the note that the land at issue is untaxed. *Id.* It then introduces a certain plat:

> [T]he principal recorded event concerning this property was the filing of a 1920 Plan … . [V]irtually all relevant conveyances were made with reference to the 1920 Plan.

Id. at 2, PDF 34. The heart of the report then addresses the meaning of that plat:

> **[A] fair interpretation of the 1920 Plan could result in the reasonable conclusion that there was, in fact, intent to dedicate the road network as depicted on the plan to the public**. None of the roadways**, including the subject** real estate, are characterized as private, and the network connects without apparent interruption to the then existing public road system.

Id. at 4, PDF 36. Next, it gives the layout, equating that plat with another:

> **The northerly and southerly boundaries of the subject real estate was [*sic*, were] demarked only by**

[4] For convenience, this section of this brief cites to pages in the overall PDF digital file containing Exhibts A-L. This section does so in parallel with the pagination of the original document forming the exhibit. Thus, for illustration, the citation in text accompanying this footnote refers to page one of the Title Report, which is also page 33 of the overall PDF file.

> **their respective widths on the 1920 Plan (and the 1939 Revision), [which] contains no northerly** or southerly **lot lines**, suggesting that the parcel was not intended to be limited in its southerly extension toward the ocean and the reference in a 1937 deed to Lot 18 on the 1920 Plan ... [being an adjacent parcel] described its westerly boundary was [*sic*, as] a 50 foot road.

Id. at 4-5, PDF 36-37. This is not the stuff of which claims of baselessness are made.

ii. Plats incorporated into the Complaint support probable cause.

This Memorandum has been careful not to reference evidence outside of WFD's pleading. But Contrata reminds the Court of WFD's footnote 1:

> In an effort to avoid the attachment of numerous exhibits to the Complaint, the District respectfully requests that, for purposes of the Complaint, this Court take judicial notice of the various references to Town Land Evidence Records. For ease of reference, Plaintiff also attaches herein as Exhibit B a title report containing further information from the Town Land Evidence Records. ...

Compl. at 6 n.1. The upshot is that WFD's sprawling pleading encompasses a vast amount of recorded deeds and plats. Contrata now turns to such documents. In doing so, Contrata is not exceeding the four corners of the Complaint.

This is not the time or place for a compete exposition of the title history. Suffice it to note the presence of at least seven recorded subdivision plats, plus tax plats. *See* Ex. E, attachments (a)-(f), PDF at 40-47. Each of these depicts SAE as part of a network of streets serving the multiple lots of the subdivision. The plat is free of special language or configurations that would indicate that this particular way is to be restricted; the plattors undertook no effort to differentiate it. Indeed, the plats show SAE as a standard-width segment of street connecting with, and open to, the surrounding streets some of which were municipal. (On some of these plats, there is

a surveyor's notation of width that happens to be located at the depicted entry-way of SAE; this is not a boundary or line of closure.) The street is named—although the name is not inscribed on this segment—in the same manner as the others.

Under cases like *Newport Realty v. Lynch*, 878 A.2d 1021 (R.I. 2005) (vigorous application of dedication-by-plat), these facts form an objective basis. *See also* Michael Rubin, *Veering Off the Road? Developments in the Law of Dedication-by-Plat*, R.I. Bar J., May-June 2023, at 15 (distinguishing dedication-by-plat from weaker doctrines).

iii. The Complaint's reliance on a particular exhibit is misplaced.

Compounding WFD's misuse of the Report (*See* Compl. ¶63), is WFD's omission that the Report conceded that factors "preclude[ ] an exhaustive land records search," and that "the entire record has not been completely researched." Ex. E at 1, PDF 33.

In short, WFD fails the first prong; this alone means the immunity remains.

b. WFD Fails to Allege That Contrata Does Not Really Seek Designation.

As shown above, WFD makes some bare conclusory allegations (which its own papers then contradict) applicable to the first prong of the sham test. With regard to the second prong, however, WFD is silent. WFD does not even attempt to assert that Contrata's activities are not really aimed at designating SAE. The second test is also not met. On this ground alone, the anti-SLAPP immunity stands.

4. Slander-of-title is treated like other causes-of-action.

We have already seen that, for purposes of the direct application of the First Amendment to governmental entities, slander-of-title is treated just like defamation. The same is true under the statute against SLAPP suits. *See Sisto v. Am. Condo. Ass'n,* 68 A.3d 603, 611, 616 (R.I. 2013) ("correspondence with the CRMC clearly

satisfied the elements of that [Anti-SLAPP] statute" and, therefore, "those letters were entitled to conditional immunity from ... claims of ... slander of title" (clarified)).

A parallel case is *Jourdan River Estates v. Favre*, 278 So.3d 1135 (Miss. 2019). Neighbors, in the course of opposing a project, contested the status of a segment of road as public or private. When sued for slander-of-title, the court granted immunity; while the neighbors had been wrong, the issue was complex. *Id.* at 1152-53; *see also SCO Group v. Novell*, *supra* (slander-of-title to be treated like defamation).

5. Dismissal under Rule 12 due to anti-SLAPP immunity is apt.

This case features a pleading with far-reaching incorporation of evidentiary material. Thus, one need not await the development of further facts. The wear-and-tear of engaging in further litigation would itself violate the spirit of the anti-SLAPP Act. This case fits with the many SLAPP-suits dismissed for failure-to-state-a-claim.[5]

6. The Anti-SLAPP Act gives attorney fees to a successful defendant.

Respectfully, if this Court were to find that WFD violated the Anti-SLAPP law, a subsequent motion would be forthcoming seeking fees as required by that statute:

> If the court grants the motion asserting the immunity established by this section, ... the court shall award the prevailing party costs and reasonable attorney's fees, including those incurred for the motion ... .

R.I.G.L. §9-33-2(d). Contrata would seek fees for the time of the undersigned counsel.

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[5] *E.g.*, *Oregon Nat. Res. Council. v. Mohla*, 944 F.2d 531 (9th Cir. 1991); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980); *Stern v. U.S. Gypsum*, 547 F.2d 1329 (7th Cir. 1977); *Franchise Realty v. S.F. Jt. Exec. Bd.*, 547 F.2d 1329 (9th Cir. 1976); *Cisco Sys. v. Innovatio IP Ventures*, 921 F.Supp.2d 903 (N.D.Ill. 2013); *Mosdos Chofetz Chaim v. Vill. of Wesley Hills,* 701 F.Supp.2d 568 (S.D.N.Y. 2010); *LaJoie v. Connecticut*, 837 F.Supp. 1076 (D.Conn. 1993); *Transphase Sys. v. So. Cal. Edison*, 839 F.Supp. 311 (C.D.Cal. 1993); *Westfield Part. v. Hogan*, 740 F.Supp. 523 (N.D.Ill. 1990); *Anchorage Jt. Vent. v. Anchorage Condo.*, 670 P.2d 1249 (Colo.App. 1983); *Cordova v. Cline*, 396 P.3d 159 (N.M. 2017).

C. The Elements of Slander-of-Title Are Absent.

In addition to the above defects, WFD fails to sufficiently allege two of the three factual elements for a slander-of-title claim. The three are: "(1) that the alleged wrongdoer uttered or published a false statement, (2) that the uttering or publishing was malicious, and (3) that the plaintiff suffered a pecuniary loss as a result." *Eastern Motor Inns v. Ricci,* 565 A.2d 1265, 1273 (R.I. 1989). The latter two are missing.

1. The element of malice is insufficiently stated.

> The mere fact that a person asserts a claim to the property that is unfounded does not warrant a presumption of malice, but a plaintiff `must also show that the defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause of believing so.

Arnold Rd. Realty v. Tiogue Fire Dist., 873 A.2d 119, 126 (R.I. 2005). Thus, our Court has effectively equated the malice test for slander-of-title with the objectively baseless test in one prong of the sham exception in the Anti-SLAPP statute, *supra*.

Specifically, as demonstrated earlier: *1)* WFD's own exhibit finds the position that is adopted by Contrata to be "reasonable;" and *2)* plats show the disputed street to be open to the whole network. The upshot is that malice is impossible.

2. The element of pecuniary loss is not stated at all.

a. The Complaint Fails to Even Allege a Loss to the Value of the Land.

The fatal effect of WFD's abject failure to allege pecuniary loss is underscored by two crucial points. *First,* pecuniary loss is an essential threshold ingredient of a slander-of-title cause-of-action; as a matter of substantive law, success is impossible without the element of such loss. *See Carrozza v. Voccola*, 90 A.3d 142, 160 (R.I. 2014) ("without proof that special damages (*i.e.,* a pecuniary loss) were incurred, a *prima*

facie case of slander of title will not be made" (clarified)). *Second,* Rule 9(g) mandates that plaintiffs plead special damages with specificity. (In this context, the terms "pecuniary loss" and "special damages" are interchangeable. *See id*.)

Taken together, these requirements defeat purported claims of this nature. Such damages are never presumed no matter how harsh a defendant's tortious language might be. "The necessity of pleading ... special damages has been an integral part of the action of disparagement of property since it first developed as an extension of slander of title." *Testing Sys. v. Magnaflux*, 251 F. Supp. 286, 290 (E.D.Pa. 1966) (allegations of loss insufficiently stated). Likewise, a court, invoking 9(g), dismissed a claim of injurious falsehood (a tort closely related to slander-of-title) because there was no enumeration of monetary loss. *3M v. Boulter*, 842 F.Supp.2d 85 (D.D.C. 2012).[6]

The essence of pecuniary loss in a slander-of-title case is impairment of vendibility, *Carrozza*, 90 A.3d at 160-61, which means that the real estate is rendered less salable, leasable, or mortgageable. WFD must specify a real diminution. WFD has not done so. Indeed, WFD does not even indicate that the land is held for occupancy, sale, financing or leasing. No prospect of monetary gain is cited. (In any event—as shown by the Complaint itself—any such allegations would strain credulity; the land is an untaxed sub-standard fifty-foot-wide strip that is subject to many other easements including one encouraging an encroaching fence and wall.)

[6] *Accord Farouki v. Petra Int'l Banking*, 811 F.Supp.2d 388, 410 n.1 (D.D.C. 2011) (tort of injurious falsehood includes slander-of-title; dismissing complaint that did not specify business losses); *Isuzu Motors v. Consumers Union*, 12 F.Supp.2d 1035, 1046-47 (C.D.Cal. 1998) (even though product disparagement was severe and widespread, injurious falsehood claim dismissed as vague as to loss); *see What Constitutes Special Damages ... for Slander of Title*, 4 A.L.R.4th 532 (1981).

b. The Complaint's Mention of Attorney Fees Does Not Suffice.

Nor can this element be met by a claim of attorney fees. There are four reasons.

First, at the outset, one must differentiate between two concepts: *1)* special damages as an essential element to the existence of a claim in the first place and *2)* special damages as an ultimately recoverable item once a claim is otherwise proven. The cases of *Carrozza*, *supra*, and *Peckham v. Hirschfeld*, 570 A.2d 663 (R.I. 1990), prove that attorney fees do *not* qualify as the first type. *Carrozza* insisted that the thrust of the cause-of-action is to remedy injury to vendibility. *Peckham* appears to have allowed such fees only as an auxiliary award once pecuniary loss to vendibility (delayed sales and increased finance charges) was otherwise established.

These cases support the idea that, in slander-of-title, attorney fees do not constitute the pecuniary loss that establishes a plaintiff's claim as a threshold matter at least where, as here, the defendant made no recordation against the land.

Second, a plaintiff's attorney fees are for any title-clearing suit but not for the slander-of-title suit itself. *Peckham*, *supra*, restricts recoverable attorney fees to:

> [T]he expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.

Peckham, 570 A.2d at 669, *quoting Restatement (Second) Tort*s §633 (1977).

Turning to this matter, it is a mystery what title-clearing activities WFD is asserting. The only possibilities are the Quiet Title counts and the CRMC proceedings. Since WFD filed the former in the wrong county, and since WFD is attempting to upend the latter by this very suit, neither qualifies as "reasonably necessary."

Third, attorney's fees are "an item of special damage requiring particularized pleading ... ." Wright & Miller, *Fed. Prac. & Pro.* §1310. WFD fails this test.

Fourth, WFD's stance cannot be saved by its mention of R.I.G.L. §9-1-45. Compl. at 25. The cited statute concerns only contract cases; this is not such a case.

II. *The Quiet Title Count Is Mis-Filed and Ill-Pled.*

In the quiet title portion,[7] WFD seeks to confirm "marketable title which extinguishes all other claims of interest" (Compl. ¶¶118, 125; *see also* p. 25 ¶3) and asserts (inaccurately) that "all known and unknown persons who may claim an interest in the property" are "defendants." Compl. ¶13. WFD thus posits Count I as a fully *in rem* action against the world (distinguishing it from suits *quasi in rem*).

A. Venue Is Improper.[8]

This is ably discussed in *Town Memo* at 4-5, 10, which is hereby incorporated.

B. WFD Fails to Join Indispensable Parties.

1. Scrutiny reveals 65 easements not attributable to named parties.

The Complaint—including exhibits—lists an abundance of easement interests (apart from the public right-of-way at issue). One can count such other easements:

- 64 created by lot transfers as specifically stated in the Complaint (¶¶34-36) and in its attached Title Report (Ex. B, Part II, ¶¶1-64, pp.4-13);[9]

[7] The Complaint seemingly invokes a type of action that is under §4 of the Quiet Title statute and ensuing sections. *See* R.I.G.L. §34-16-4, *et seq*. But, at times, the Complaint mistakenly references §§1-3, which set forth a separate type of action that is irrelevant here.

[8] While academic in this case, jurisdiction is also a problem. *See Department of Nat. Res. v. Antioch Univ.*, 533 So.2d 869 (DCA Fla. 1988) (scholarly opinion that filing in the wrong county voids jurisdiction). The logic ensues. A fully *in rem* action seeks to bind both those who are known and those who are unknown. Among the latter are remote heirs and the like. They would look to docket listings and notices under the auspices of the Washington County Superior Court to be vigilant with respect to their claims. They would rely on the territorial reach of that Court. They would not suspect that other claimants would resort to an out-of-county forum. Thus, those present cannot waive the defective location for those who are not.

[9] Further, the filings suggest 11 others (but these are not added here out of caution):

- 1 utility easement; *see* Complaint ¶41; Report Ex. B, Part III, ¶2, p.14.[10]

65 is the net total of extant identified interests not attributable to a named party.

2. WFD fails to join necessary parties who are indispensable.

Contrata adopts the analysis of Westerly. *See Town Memo* at 10-14. As Justice Stern stated in the course of rectifying irregularities in prior quiet title suits:

> Parties who should be joined as defendants in a quiet title action include "all those who appear of record to have a possible claim or interest in the property or all those who may have a substantial interest in the property and who will be materially affected by the decree." 65 Am. Jur. 2d *Quieting Title* §65 .... .

Smithfield Estates v. Heirs of Hathaway, C.A. No. PC-2003-4157 (R.I. Super. Aug. 17, 2011) at 24. Beyond a bare allegation, WFD has taken none of the steps outlined.

> 23. Between 1884 and 1902, John A. Taylor sold certain portions or parcels of the land by additional deeds, each of which makes reference only to the 1884 Kenyon Plat.
>
> 24. With each of those subdivisions [deeds-out], John A. Taylor gave each of the grantees an express easement, as a private right, to the Atlantic Ocean over such roads or paths as now are or may hereafter be laid opened according to law.

This matches with the first three pages of the Title Report, detailing eleven such transfers. Ex. B, Part I at 1-3 ¶¶B-L. In context, such rights are, like the others, for use of SAE.

[10] The Complaint recites four special easements, but three are excluded from the count:

> Easement to the Spray Rock Trusts Compl. ¶43; Title Report, Ex. B, Part III, ¶4, p.14. This is excluded as the Trust is named as a defendant with respect to this interest.
>
> Easement for water and sewer lines to the Town. Compl. ¶¶39-40; Ex. B, Title Report, Part III at 13 ¶1. This is excluded since the Town is named as a defendant (although the Complaint fails to name Town with respect to this interest).
>
> Easement to the U.S. Government. Compl. ¶42. This is excluded since that easement is shown by the Report to be released. Ex. B, Title Report, Part III at 14 ¶3.

C. The Elements of Quiet Title Are Absent.

1. WFD has not pled the matters required by R.I.G.L. §34-16-5.

The Quiet Title Act expressly requires *five* pleading components in order to state a claim:

> **§ 34-16-5. Contents of complaint**
> The complaint shall contain, among other things, to the extent known to plaintiff:
> (1) A complete and accurate description of the real estate involved, and the right, title and interest of the plaintiff claimed therein and the character and source thereof;
> (2) A recital of the character and source of claims adverse, or which may become adverse, whether asserted or unasserted, and, if unasserted, then of record;
> (3) The names and last known addresses of those asserting, or who may assert, any adverse claims;
> (4) The efforts made to ascertain and determine those claimants, who, or whose names and/or addresses, are unknown to plaintiff;
> (5) The duration of ownership, occupation, possession, and enjoyment by the plaintiff, and when relevant, by his or her predecessors in title, of the estate involved, together with a recital of acts performed as a normal incident of the possession enjoyed and the title claimed.

R.I.G.L. §34-16-5. WFD has not even attempted to satisfy these five statutory requirements. It is enough to flesh-out one example.

Subsection (1) calls for a "complete and accurate description of the real estate ...." But WFD writes only a description based on assessor's plats and lots. Compl. ¶17. WFD also attaches a tax plat excerpt. *See* Ex. A. Our Supreme Court has admonished against using tax plats and lots for legal descriptions. *Raposa v. Guay*, 125 A.2d 113, 117 (R.I 1956) (purchaser "not justified in relying upon the assessors' plat"). *Accord* Compl. Ex. A ("[tax] map ... is not for legal description or conveyances").

If allowed to stand, WFD's language would find its way into published notices and judicial decrees and thereby cause confusion and uncertainty in land titles.

2. The attempt to rely on the Marketable Title Act is misplaced.

Beyond that, WFD rests its claim on the Marketable Title Act but overlooks the following exemption for municipal rights such as town public rights-of-way:

> **§34-13.1-7. Excepted interests**
> **This chapter shall not** be applied to ... **bar, extinguish or otherwise affect any interest of** the United States, of this state or **any political subdivision** thereof, ...

R.I.G.L. §34-13.1-7. If SAE is a public right-of-way, it is the Town of Westerly's.

III. ***The 1st Declaratory Relief Count (Count II) Merely Mimics Quiet Title.***

The First Circuit has dealt with the situation where a plaintiff seeks both a quiet title decree and a declaratory judgment with respect to the same interest in the same land. The panel responded, "Counts I and II of [the] complaint collapse into one another for purposes of this analysis." *Fadili v. Deutsche Bank*, 772 F.3d 951, 954 (1st Cir. 2014) (noting the two causes-of-action were "essentially" identical). In the same vein, the Nevada Supreme Court explained that "we look[ ] to the substance of the claims raised, looking beyond whether the claimant labeled them as quiet title or declaratory relief." *U.S. Bank v. Thunder Props.*, 503 P.3d 299, 310 n.4 (Nev. 2022).

Most telling is the case of *George v. Gustinger*, 350 So. 2d 574 (Fla. DCA 1977). The plaintiff filed for declaratory judgment as to rights in certain realty located in a different county. The defendant responded that venue would be proper only in the latter county in that the complaint was substantially to quiet title. The court—in accordance with the rule that actions to quiet title must be brought in the county where the land lies—agreed. The court looked to the substance, and not the form, of the complaint to decide whether the action was to be considered as one to quiet title.

WFD cannot rescue Count I by resort to Count II. Count II must be dismissed.

IV. *The 2nd Declaratory Relief Count (Count III) Flouts the APA.*

The next Declaratory Relief count, Count III, seeks to block the CRMC process.

Contrata adopts the briefing of the Administrative Procedure Act's requirement to exhaust administrative remedies (embodied in R.I.G.L. §42-35-15(a)), set forth by the Attorney General. *See AG Memo* at 5-10, citing *Bellevue-Ochre Pt. Neighborhood Assoc. v. Pres. Soc.*, 151 A.3d 1223 (R.I. 2017) (expounding the reasons behind the doctrine) and *Sartor v. CRMC*, 542 A.2d 1077 (R.I. 1988) ("CRMC is charged with ... findings regarding the existence of public rights-of-way"). S*ee also Ocean Rd. Partners v. State*, 612 A.2d 1107, 1109 (R.I. 1992) ("CRMC was the proper agency to make this decision [as to a public right of way]" (clarified)).

SUMMARY

The case is fraught with Constitutional, statutory and common-law error.

With respect to the Slander-of-Title count:

- As a government, WFD cannot sue for slander due to the First Amendment.
- WFD nowhere alleges the sham exception to Anti-SLAPP immunity.
- WFD acknowledges that Contrata's position is a "reasonable" interpretation.
- WFD's exhibits are also incompatible with the element of malice.
- An element of slander-of-title is loss to vendibility. No such loss is alleged — nor could it be as the land is a narrow strip burdened by many easements.
- Attorney fees cannot satisfy the loss element in slander-of-title.
- Attorney fees for such claims are only for title-clearing, which WFD has not done.
- The claim for attorney's fees is a plea for special damages requiring specificity.
- WFD relies on an attorney fee law that applies only to contracts.

With respect to the Quiet Title counts:

- Venue is clearly wrong. The land at issue is in Washington County.
- The Complaint—including its attached exhibits—pleads the existence (upon careful count) of at least 65 easements held by claimants who are not named.
- The Complaint lacks all of the five special pleading requirements in the statute.
- The Marketable Title Act (relied upon by WFD) exempts the claims of towns.

With respect to the Declaratory count in regard to the CRMC:

- WFD failed to exhaust administrative remedies.

CONCLUSION

Respectfully, Contrata, the Defendant, prays that the Complaint be dismissed and that this Court then allow her the opportunity to move for attorney fees.

CAROLINE CONTRATA
By and through her attorney,

/s/ Michael Rubin

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CERTIFICATION

I hereby certify that I filed the within document via the ECF system on this 14th day of February 2024, and that it is available for viewing and downloading. I have also caused a copy to be e-served and/or e-mailed to counsel of record as follows:

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