THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. **SUPERIOR COURT**
NORTHERN DISTRICT

Rye Harbor Lobster, LLC, et al.

v.

Pease Development Authority, et al.

Docket No. 217-2025-CV-00039

ORDER ON MOTIONS TO DISMISS

The plaintiffs, Rye Harbor Lobster, LLC, Rye Harbor Lobster Pound, LLC (the "Lobster Pound"), Sylvia Cheever, and Nathan Hanscom, bring eleven common law, statutory, and state and federal constitutional claims against the defendants, Pease Development Authority (the "PDA"), the New Hampshire Port Authority (the "Port Authority"),[1] Paul Brean, and Geno Marconi. (*See* Compl. (Doc. 1)). The defendants move to dismiss all claims. (*See* Marconi Mot. (Doc. 10); Marconi Mem. (Doc. 11); PDA, Port Authority, and Brean Mot. (Doc. 13)). The plaintiffs object. (Pls.' Obj. to Marconi Mot. (Doc. 20); Pls.' Obj. to PDA, Port Authority, and Brean Mot. (Doc. 19)). After consideration of the thorough pleadings and the parties' arguments at a hearing on September 5, 2025, the motions to dismiss are GRANTED, and the plaintiffs shall have thirty days from the date of the clerk's notice of decision on this order in which to amend their complaint if they desire.

Standard of Review

When ruling on a motion to dismiss, the Court "consider[s] whether the allegations in the

[1] As the Office of the Attorney General points out, there is no longer a distinct entity called the "New Hampshire Port Authority." (Doc. 13 at 1, n.1). The correct legal name is the Division of Ports and Harbors, which is part of the PDA. (*Id.*). The complaint contains no claims against the PDA that aren't also asserted against the Port Authority. In this order, the Court, therefore, will refer to them collectively as the PDA and will refer to them separately only if necessary for factual specificity.

pleadings are reasonably susceptible of a construction that would permit recovery." *Doe v. N.H. Att'y Gen.*, 176 N.H. 806, 812 (2024). The Court "assume[s] the pleadings to be true and construe[s] all reasonable inferences in the light most favorable to the plaintiff[]." *Id*.

"New Hampshire is a notice pleading jurisdiction, and, as such, [courts] take a liberal approach to the technical requirements of pleadings." *Toy v. City of Rochester*, 172 N.H. 443, 448 (2019). That is not to say, however, that the Court must "accept allegations in the writ that are merely conclusions of law." *Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) (quotation omitted). "The court will not ... assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." *ERG, Inc. v. Barnes,* 137 N.H. 186, 190 (1993). In evaluating a motion to dismiss, the Court "engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law." *Doe*, 176 N.H. at 812. The Court "may also consider documents attached to the plaintiff's pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint." *Gascard v. Hall*, 175 N.H. 462, 465 (2022). The Court will grant the motion "if the facts pled do not constitute a basis for legal relief." *Id*.

Background

The Court draws the following facts from the plaintiffs' complaint and assumes them true for purposes of this motion. *Doe*, 176 N.H. at 812.

The plaintiffs operate a business known as the Lobster Pound located within the Rye Harbor State Marina (the "Marina"). The Lobster Pound sells live shellfish as well as chowder, lobster rolls and other prepared food. (Doc. 1 ¶¶ 19, 20). The Lobster Pound operates seasonally during the summer months. (*Id.* ¶ 20).

The PDA has jurisdiction over activities within the Marina, among other locations. As part of its jurisdiction, the PDA controls the terms pursuant to which businesses can operate at the Marina or at other locations within its jurisdiction. The PDA enters into so-called Right of Entry ("RoE") Agreements with businesses operating within its jurisdiction, which set forth the terms that govern those businesses' operations. The PDA has used RoEs in this fashion for decades. (*Id.* ¶ 21, 23).

At all relevant times, Brean served as the Executive Director of the PDA and Marconi as the director of the Port Authority. (*Id.* ¶¶ 9, 11). Marconi and Brean have set the terms of each of the Lobster Pound's RoEs since at least 2001. (*Id.*). Between 1996 and 2020, the PDA, through annual RoEs, allowed the Lobster Pound to operate out of the buildings at the Marina in exchange for a $1,000 per year rental fee and a $5 customer parking fee. (*Id.* ¶¶ 25–26). The RoEs also authorized use of designated thirty-minute free parking spaces for Lobster Pound customers and regularly included a Concession Agreement which sets forth additional terms specific to the sale of food and beverages. (*Id.* ¶¶ 27-28).

In 2020, due to the COVID-19 pandemic, the Lobster Pound saw an uptick in business because it offers takeout food (in addition to its unprocessed shellfish) and could, therefore, continue to operate when other restaurants could not. (*Id.* ¶ 30). The PDA, directed by Marconi and with the support of Brean, responded with an increased regulatory presence, implementing measures the plaintiffs claim negatively impacted and interfered with the Lobster Pound's business operations. (*Id.* ¶ 31). The PDA did so, the plaintiffs suggest, because, during the same time period, Marconi undertook efforts to expand his family's seafood restaurant, which operated in the Portsmouth, New Hampshire area, to include a mobile fish market that peddled, among other things, chowder. (*Id.* ¶ 32). The plaintiffs allege that the PDA's and Port Authority's

actions "were driven by Marconi's desire to harm a competitor to his family business and in retaliation against the [p]laintiffs who were not part of Marconi's network of allied businesses and individuals who worked for or were otherwise connected with the Port Authority." (*Id.* ¶ 33). The plaintiffs do not provide any factual allegations supporting that broad conclusion of fact, including allegations as to how and to what extent the Lobster Pound competes with or is otherwise affected by Marconi's family's business, the two entities' relevant markets, and the like.

The situation escalated in February of 2021, when Marconi sent the Lobster Pound a letter from the Port Authority, announcing that the Lobster Pound could no longer serve "ready to eat" prepared food items such as chowders and lobster rolls because the Lobster Pound's RoE did not permit that activity, and because the Lobster Pound's activity resulted in overcrowding at the Marina. (*Id.* ¶¶ 34–35). Later, for the same reasons, the PDA refused to enter into a Concession Agreement with the Lobster Pound for 2021. (*Id.* ¶ 41).

The community's disappointment over the Lobster Pound's inability to sell chowder and other prepared foods resounded from Rye to Concord, where then-Governor Sununu, in response to community agitation, issued the Lobster Pound a waiver that allowed it to operate for the 2021 season without a Concession Agreement. (*Id.* ¶¶ 42–43). The Governor, however, left discretion over the conditions of the waiver within the PDA and Port Authority, who, according to the plaintiff, laid down onerous requirements such as implementation of crowd and trash management programs and the submission of monthly logs of Lobster Pound lobster sales. The PDA also required the Lobster Pound to disclose the identity of their lobster suppliers. (*Id.* ¶¶ 44–46).

The plaintiffs contend that this latter requirement proved particularly damaging, as the local lobstermen who supplied the Lobster Pound during the 2021 season refused to supply the Lobster Pound in 2022. The plaintiffs believe that pressure from the Port Authority and Marconi caused their lobster suppliers to discontinue business with the Lobster Pound. (*Id.* ¶¶ 48–49). This alleged, informal boycott required the plaintiffs to purchase lobster elsewhere at a higher cost. (*Id.* ¶ 48).

The plaintiffs also contend that the PDA, at the request of Brean and Marconi, eliminated the free thirty-minute parking areas adjacent to the Lobster Pound and implemented a $5 all-day parking fee for every parking space that the Lobster Pound's customers used. The plaintiffs contend that the new parking arrangement cost them customers, and that, in some instances, the Lobster Pound resorted to reimbursing customers for their parking expenses in order to mitigate the customer suppressing effect of the PDA's elimination of free parking. (*Id.* ¶¶ 52-55).

Citing no progress in its efforts to combat traffic congestion, the Port Authority began camera and in-person surveillance of the Lobster Pound's operations, including by creating a daily log of the Lobster Pound's activities and counting the vehicles that visited the restaurant. (*Id.* ¶¶ 58–59). The PDA also commissioned a parking study, which led to the elimination of some parking spaces by repurposing them into a fire lane, over the plaintiffs' objections. (*Id.* ¶¶ 64–67, 69–70). According to the plaintiffs, parking attendants enforcing the new parking rules acted with hostility to the Lobster Pound's customers, including by refusing them parking and demanding receipts. (*Id.* ¶¶ 71–72). The plaintiffs also contend that, during this time, The Lobster Pound invested in a second store at a location outside of the jurisdiction of the PDA and Port Authority. (*Id.* ¶¶ 60–).

In March of 2022, the Port Authority, through Marconi, submitted a report to the PDA Board recommending that the PDA enforce the Lobster Pound's RoE and restrict the Lobster Pound from selling restaurant-style food items. (*Id.* ¶ 73). The PDA Board, however, approved a second waiver to allow the Lobster Pound to operate for the 2022 season, but required, in part, that the Lobster Pound fund security personnel for the area. (*Id.* ¶¶ 83–85, 88–89). In 2022, no other business subject to a RoE in the Marina or Hampton Harbor (which the PDA and Port Authority also oversee) labored under the requirement to pay for a security detail as a condition of operating. (*Id.* ¶ 92). The plaintiffs contend that they caught Port Authority security personnel sleeping on the job and displaying hostility toward prospective Lobster Pound customers. (*Id.* ¶¶ 90–91). A month later, the Port Authority severed a waterline and required the Lobster Pound to pay for its repair, which delayed the Lobster Pound's opening for the 2022 season. (*Id.* ¶¶ 75–82).

In June 2023, the PDA issued a new RoE and Concession Agreement to the plaintiffs. (*Id.* ¶ 96). The new agreement required the Lobster Pound to pay the Port Authority a "concession fee" of 10% of its monthly gross revenue. (*Id.* ¶ 100). The PDA required no other business operating under a Concession Agreement to remit this 10% concession fee. (*Id.* at 2; ¶ 112). The PDA and Port Authority also included an additional term that restricted the Lobster Pound's storage space and threatened its ability to operate. (*Id.* ¶¶ 114–22, 138). The PDA brooked no negotiations: it issued the new agreements on a take it or leave it basis, and the plaintiffs, facing the loss of permission to operate in the Marina, capitulated and executed the RoE and Concession Agreements for the 2023 and 2024 seasons. (*Id.* ¶¶ 100–06, 110-112).

The plaintiffs assert violations of the New Hampshire Administrative Procedures Act (Count I); equal protection clauses of the Fourteenth Amendment to the United States

Constitution (Count II) and New Hampshire Constitution (Count III); RSA 356 (Count IV); Part I, Art. 8 of the New Hampshire Constitution (Count V); conversion (Count VI); intentional and negligent infliction of emotion distress (Counts VII and VIII); civil conspiracy (Count XI)[2], as well as claims for declaratory and injunctive relief (Counts IX and X). The defendants move to dismiss all counts.

Analysis

I. Individual Capacity Claims - Brean

The parties dispute whether the complaint includes an individual capacity claim along with the official capacity claim against Brean.[3] The PDA and Brean[4] observe that the complaint expressly describes Brean as the "Executive Director of the Pease Development Authority" and lists the PDA's address as his. (Doc. 29 at 1–2). The plaintiffs, perhaps conceding that the complaint fails to expressly assert an individual capacity claim against Brean, ask this Court to imply one through a doctrine known as the "course of proceedings" that the majority of a First Circuit panel articulated over a dissent in *Powell v. Alexander*, 391 F.3d 1, 22–24 (1st Cir. 2004). The course of proceedings doctrine allows courts to consider "the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability." (Doc. 31 at 1–2).

By way of explanation, courts employing the course of proceedings analysis in search of an individual capacity claim "examine the substance of the pleadings and the course of proceedings in order to determine whether the suit is for individual or official liability." *Powell*, 391 F.3d at 22 (quotation and citation omitted). More specifically, the doctrine directs courts to

[2] The Complaint improperly labels the plaintiffs' eleventh claim as "Count XIII." (*See* Doc. 1 at 29).
[3] Marconi does not join in this issue.
[4] The PDA, Port Authority, and Brean are all represented by the same counsel: the New Hampshire Attorney General's Office.

consider "the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity." *Id*. Courts may also consider "whether the parties are still in the early stages of litigation," and "whether amendment of the complaint may be appropriate." *Id*. The analysis looks to the totality; no single factor, therefore, disposes of, or even controls, an assessment of the course of proceedings. *Id*. "Throughout, the underlying inquiry remains whether the plaintiff's intention to hold a defendant personally liable can be ascertained fairly." *Id*. at 23.

While, in some instances, the New Hampshire Supreme Court looks to federal courts and, in particular, the First Circuit for guidance, those instances tend to involve the interpretation of a state constitutional provision that may align with a United States Constitution analog, or a state statute prompted by the same legislative concerns and containing similar language as its federal counterpart. *See, e.g.*, State v. Ball, 124 N.H. 226 (1983) ("[W]hen this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we rely on those precedents merely for guidance and do not consider our results bound by those decisions."); *State v. Fay*, 173 N.H. 740, 752 (2020) (considering First Circuit's commentary on Fourth Amendment's "reasonableness" requirement when interpreting State Constitution); *Kenneth E. Curran, Inc. v. Auclair Transp., Inc.*, 128 N.H. 743, 748 (1986) (Court may look to federal law for guidance when interpreting a state statute with a federal analog); *see also* RSA 356:14 ("[C]ourts may be guided by interpretations of the United States' antitrust laws."). Our supreme court has not adopted the course of proceedings test, and, on garden variety common law issues such as sufficiency of complaint allegations, has seen no need to look to federal decisional law. This Court finds it unlikely, therefore, that the New Hampshire

Supreme Court would adopt the course of dealings approach to determine whether the plaintiffs state an individual capacity claim against Brean, but need not make that ultimate determination because, under either the course of dealing analysis or New Hampshire's traditional pleading standards, the plaintiffs do not state an individual capacity claim against Brean.

The allegations relating to Brean are summed up as follows: Brean serves as the "Executive Director of the Pease Development Authority," a role he has held "at all times relevant to this Complaint;" Brean's address, while "[i]n *this* capacity," is also the PDA's address. (*See id.* ¶¶ 6, 9 (emphasis added)); and nearly every factual allegation that mentions Brean places him alongside a reference to a PDA or Port Authority action. (*See* Doc. 1 ¶¶ 24, 31, 52, 58, 63, 71, 73, 83, 97, 98, 116, 136, 137). The Court can identify no allegation of Brean conduct separate and apart from PDA or Port Authority conduct throughout the complaint, and the plaintiffs allege no independent Brean conduct that could support an inference that he acted outside of the scope of his authority. Even construing the allegations liberally, nothing in the complaint suggests allegations or claims against Brean individually.

If the course of proceedings analysis applied, it would not change the outcome. The nature of the proceedings element aligns with the liberal pleading standards analysis above. *See Powell*, 391 F.3d at 24 (requiring courts to consider the course of proceedings "as a whole"). And "the nature of . . . defenses [Brean] raised in response to the complaint," *Powell*, 391 F.3d at 22, further suggests the absence of an individual capacity claim: counsel for Brean, the PDA, and the Port Authority invoked qualified immunity only *after* the plaintiffs asserted, in their objection to the motions to dismiss, that they seek to sue Brean in his individual capacity. *See Powell*, 391 F.3d at 22; (Doc. 19 at 5 (plaintiffs describing suit against Brean as being against him in both his individual and official capacity); Doc. 29 at 3–4 (Brean invoking qualified

immunity in his reply)). As "the parties are still in the early stages of litigation," *Powell*, 391 F.3d at 22, an amendment to the complaint could readily remedy this ambiguity.

To be sure, the plaintiffs request compensatory damages, which the course of proceedings approach appears to recognize as a harbinger of an individual capacity claim. *Id.* (describing a plaintiff's request for compensatory damages as a factor for courts to consider under the course of proceeding approach). But the complaint does not specify against which defendant it seeks compensatory damages. Given the plaintiffs' own description of Brean along with the absence of allegations of individual conduct, the non-specific compensatory damages request cannot support a reasonable inference of an individual capacity claim against him.

"[T]he plaintiff's intention to hold [Brean] personally liable can[not] be ascertained fairly," meaning that the course of proceedings analysis returns the same result as the liberal pleading standards analysis. *Id*. at 23. The Court concludes that the complaint claims against Brean in his official capacity only.

II. The Plaintiffs' Federal and State Constitution Claims

a. Violation of Due Process – New Hampshire Administrative Procedures Act Against the PDA and Port Authority

The plaintiffs contend that, through the RoEs, the PDA has promulgated an administrative rule without having undertaken the statutory rule making process.

New Hampshire's Administrative Procedures Act ("APA") defines a "rule" as a "regulation, standard or other statement of *general applicability* adopted by an agency to . . . prescribe or interpret an agency policy, procedure or practice requirement binding on persons outside the agency." RSA 541-A:1, XV (emphasis added). Agencies may not issue rules on an *ad hoc* basis; instead, their promulgation must result from an elaborate statutory process. *See*

RSA 541-A:3. Failure to properly promulgate a rule brings consequences that can include invalidation and even fines. *See* RSA 541-A:23, :24.

Our supreme court's decisional law offers limited but helpful guidance as to when a "regulation, standard or other statement" becomes one of "general applicability" pursuant to the APA. In *Maxi Drug N., Inc. v. Comm'r, N.H. Dep't of Health & Hum. Servs.*, 154 N.H. 102 (2006), the supreme court considered a New Hampshire Department of Health and Human Services ("DHHS") letter, issued to all pharmacy providers in the state, that instituted a "temporary rate change" for all pharmacy providers in the state. The court held that the letter amounted to a "rule" as defined by RSA 541-A:1, XV, because the letter instituted a temporary rate change "applicable to all pharmacy providers seeking reimbursement pursuant to the state plan." *Id.* In somewhat conclusory terms, the court concluded that the letter was "plainly a 'statement of general applicability adopted by an agency.'" *Id.* (quoting RSA 541-A:1, XV); *see Bel Air Assocs. v. New Hampshire Dep't of Health & Hum. Servs.*, 154 N.H. 228, 233 (2006) (finding DHHS changes to Medicaid reimbursement rates applying to all participating nursing homes a "rule" under the APA); *see also Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 835 P.2d 1030, 1034–35 (Wash. 1992) (concluding Department of Ecology's numeric water quality standard for the discharge of dioxin, which was "uniformly applie[d]" to "all entities which discharge dioxin into the state's waters, regardless of which entity or water body is at issue," constituted a rule of general applicability under Washington's APA). And it was: the letter applied a uniform rate to all pharmacies in the state. It would be hard to view the DHHS letter in *Maxi Drug* as anything other than a statement of general applicability adopted by an agency.

The RoEs in this case, as the plaintiffs describe them in the complaint, diverge significantly from the DHHS letter in *Maxi Drug*. On the one hand, and supporting the

statement-of-general-applicability claim, the plaintiffs allege that: (1) "businesses must enter into a [RoE] to access and operate in the [Marina] and other ports and harbors under their jurisdiction throughout the state;" (2) "Granite State Whale Watch operates in Rye Harbor and is subject to an RoE;" and (3) the terms of the agreements, generally, "resembled a typical commercial lease agreement" and were non-negotiable. (Doc. 1 ¶¶ 21, 24, 25, 38, 96–98, 101–02). From there, however, the plaintiffs allege that the RoE terms varied among the businesses subjected to them. (*Id*. ¶ 92) ("*No other business subject to a RoE* on [the Marina] or Hampton Harbor (which is also overseen by the PDA-Port Authority) was required to pay for a security detail as a condition of operating in 2022" (emphasis added)); *id.* ¶ 103 ("*[O]nly one other business* operating at [the Marina], a business called Rye Harborside, was required to enter into a Concession Agreement." (emphasis added)); *id*. ¶ 106 ("Granite State Whale Watch *is not subject to a separate Concession Agreement* for prepared food and beverage items that it sells on its whale watch tours." (emphasis added)); *id*. ¶ 112 ("*[N]o other business* was subject to a concessions agreement which required [the] payment of so-called concessions fees during this time period." (emphasis added)); *id.* ¶ 114 (alleging "land use rule" added into Lobster Pound's 2023 RoE that limited the storage space behind the buildings on the Marina as "impact[ing] *no other business* in [the Marina]" (emphasis added)). Much of the complaint, in short, identifies substantive differences between the plaintiffs' RoEs and Concession Agreements and those of others subject to PDA's jurisdiction.

If, similar to the DHHS letter in *Maxi Drug*, the plaintiffs alleged that the PDA issued the same RoE to each entity within its jurisdiction, or even the same RoE by category of business within its jurisdiction, they could possibly prevail on a claim that the PDA disguised a rule – a statement of general applicability – within the contracts it required of those businesses operating

within its jurisdiction. But the plaintiffs themselves highlight a myriad of differences and distinctions between different RoEs. Those differences foreclose an inference that the PDA imposed the same RoE terms upon all businesses within its jurisdiction, or even upon all businesses categorically similar to the Lobster Pound. *Simpson*, 835 P.2d at 1035; *Maxi*, 154 N.H. at 105.

By the allegations in the complaint, the PDA subjected the businesses in its jurisdiction to varying standards and regulations. Those varying standards and regulations take these allegations outside of the *Maxi Drug* realm and reveal the RoEs as something less than improperly promulgated administrative rules. The Court GRANTS the defendants' motion to dismiss Count I.[5]

b. Equal Protection Claims Against All Defendants

In Counts II and III of the complaint, the plaintiffs allege a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 (Count III); and a violation of its state analog, Part I, Article 15 of the New Hampshire Constitution (Count III). [6]

Most commonly, equal protection claims spring from a legislative classification – a statute, ordinance or regulation that draws a distinction between classes of people or entities. In

[5] The Court notes that, because it finds the plaintiffs have failed to plead that the PDA engaged in rulemaking, it need not determine the hypothetical availability of remedies or whether certain APA rulemaking exceptions apply.

[6] The plaintiffs refer to Part I, Article 15 of the New Hampshire Constitution as the basis for their State Constitution equal protection claims. (*See* Doc. 1 at 22). But the New Hampshire Supreme Court has traditionally recognized Part I, Article 15 as providing due process protections for criminal defendants, not the "[e]quality of rights under the law," which Part I, Article 2 guarantees. *See, e.g.*, *State v. Williams*, 133 N.H. 631, 633 (1990) ("[P]art I, article 15 of the New Hampshire Constitution[] guarantee[s] every criminal defendant the right to a jury trial."); *State v. Chaisson*, 123 N.H. 17, 29 (1983) (describing the "right to confront witnesses" as a protection guaranteed under Part I, Article 15 of the New Hampshire Constitution); *State v. Richards*, 129 N.H. 669, 673 (1987) (noting defendant's right under Part I, Article 15 of the New Hampshire Constitution "to produce all proofs that may be favorable to himself"); *but see Appeal of The Mortg. Specialists, Inc.*, No. 2013-0807, 2014 WL 11485821, at *3 (N.H. Oct. 10, 2014) (simultaneously analyzing petitioner's claims under Part I, Articles 2 and 15 of the New Hampshire Constitution and Fourteenth Amendment of the Federal Constitution). That said, as all parties appear to root their analysis in Part I, Article 2 of the New Hampshire Constitution and the Fourteenth Amendment of the Federal Constitution, the Court follows suit.

that situation, a plaintiff claims that it belongs to a class of people or entities whom the classification treats differently than others similarly situated, in violation of equal protection. *See* *In re Sandra H.*, 150 N.H. 634, 637 (2004) ("In considering an equal protection challenge under our State Constitution, we must first determine the appropriate standard of review by *examining the purpose and scope of the State-created classification and the individual rights affected*." (emphasis added)); *see also Taylor v. Town of Plaistow*, 152 N.H. 142, 146 (2005) (Town ordinance requiring 1,000-foot buffer zone between vehicle dealerships, but not requiring such buffer zones between other types of businesses, did not violate equal protection); *Verizon New England, Inc. v. City of Rochester [Rochester III]*, 156 N.H. 624, 631 (2007) (Verizon's equal protection rights violated where, without a rational basis, the City singled out Verizon by not imposing the same tax on other utilities using the City right of way).

The plaintiffs do not point to a legislative classification. Instead, they claim that the defendants treated them differently by imposing different (and onerous) conditions of operation than similarly situated entities operating within PDA jurisdiction. This claim, known as a "class of one" equal protection claim, requires the plaintiffs to allege that the government intentionally treated them differently than others similarly situated without any rational basis for the treatment disparity.[7] *Every v. Town of Littleton, New Hampshire*, No. 18-CV-43-SM, 2018 WL 4344998, at *8 (D.N.H. Sept. 11, 2018) (citing *Najas Realty, LLC v. Seekonk Water Dist.*, 821 F.3d 134, 144 (1st Cir. 2016)). "[P]roof of a similarly situated, but differently treated, comparator is essential." *Appeal of The Mortg. Specialists, Inc.*, 2014 WL 11485821, at *3.

[7] The plaintiffs' class-of-one equal protection arguments are identical under the United States and New Hampshire constitutions. (*See* Doc. 19 at 13–16; Doc. 20 at 9–12). The Court, therefore, addresses the plaintiffs' arguments under the State Constitution first, relying upon federal law only to aid in its analysis. *Ball*, 124 N.H. at 231–33.

The plaintiffs amply plead intentional treatment lacking rational basis, but, for purposes of the motions to dismiss, the analysis hangs up on the paucity of allegations that would establish the necessary similarity between the plaintiffs and the entities to which they compare themselves. The First Circuit emphasizes that class of one plaintiffs "must show an *extremely high degree of similarity* between themselves and the persons to whom they compare themselves." *Id.* (quoting *Cordi-Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir. 2007) (emphasis added)). That high degree of similarity must manifest itself, in the first instance, within the allegations in the complaint, and, as a first step in the analysis, courts must determine whether the plaintiffs have adequately identified "similarly situated" entities as comparators. *Every*, 2018 WL 4344998, at *8; *see In re Sandra H.,* 150 N.H. at 637 ("[T]he equal protection guarantee is essentially a direction that all persons *similarly situated* should be treated alike." (quotation and citation omitted) (emphasis added)).

The plaintiffs compare themselves to two entities that also operate within the PDA's jurisdiction within Rye Harbor: Granite State Whale Watch and Rye Harborside. (Doc. 1 ¶¶ 38, 103–06, 109). With respect to the Granite State Whale Watch, the plaintiffs allege only that: (1) it is another business operating in Rye Harbor; (2) it operates pursuant to a RoE; and (3) it operates whale watching tours. (*Id.* ¶¶ 38, 106). With respect to Rye Harborside, the plaintiffs allege only that (1) it is owned by Granite State Whale Watch and (2) it is the "only . . . other business operating at [the Marina]" whom the PDA and Port Authority "required to enter into a Concession Agreement" and that paid concession fees. (*Id*. ¶¶ 103–05, 112). Pared to their essence, two businesses subject to a RoE comprise the sole similarities the plaintiffs allege to Granite State Whale Watch, and two businesses subject to Concession Agreements comprise the sole similarities the plaintiffs allege to Rye Harborside.

Even mindful of New Hampshire's liberal pleading standards, the complaint lacks the type of detailed allegations that would allow for even an inference of the "extremely high degree of similarity" between the Lobster Pound and either the Granite State Whale Watch or Rye Harborside to proceed on their class of one claim. *Appeal of The Mortg. Specialists, Inc.*, 2014 WL 11485821, at *3. The Lobster Pound, for example, does not allege how the Granite State Whale Watch's boat tours or Rye Harborside's business operations resemble the Lobster Pound in any way aside from their mere existence as being other businesses located within the Marina and subject to the PDA's jurisdiction. *See id.* (requiring, under class-of-one claim, for plaintiff to show that their comparators "engaged in the same activity . . . without such distinguishing or mitigating circumstances as would render the comparison inutile"); *see also Every*, 2018 WL 4344998, at *9 (dismissing class-of-one claim where the plaintiff's complaint "merely note[d]" that other businesses existed and were located near the property at issue); *Freeman v. Town of Hudson*, 714 F.3d 29, 38 (1st Cir. 2013) (dismissing class-of-one claim in land-use context where only similarity was that "the properties of all three [landowners] abut the same protected area"). The plaintiffs do not demonstrate similarity of business size or services, or any other manner in which they closely compare to the two businesses they identify.

The plaintiffs' failure to clear the "similarly situated" hurdle fatally undermines their state equal protection as to all defendants. *See Freeman*, 714 F.3d at 38 ("The complaint fails to meet the 'similarly situated' test, obviating any discussion of the rational basis requirement."). And, as "the Federal Constitution offers the [plaintiffs] no greater protection than does the State Constitution with regard to their equal protection argument," the Court reaches the same result

under both constitutions. *See In re Sandra H.,* 150 N.H. at 637. The Court GRANTS the defendants' motions to dismiss Counts II and III of the complaint.[8]

c. Part I, Article 8 Claims Against All Defendants

In Count V of the complaint, the plaintiffs allege that the defendants' actions violated their rights to "an open, accessible, accountable, and responsive government" and an "orderly, lawful, and accountable government" which the New Hampshire Constitution guarantees through Part I, Article 8. (Doc. 1 at 24–25).

Part I, Article 8 provides, in relevant part:

> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted. The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State, shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.

N.H. CONST. pt. I, art. 8. To be sure, the framers painted the provision in broad strokes. Whether they painted broadly enough to include a remedy for alleged governmental corruption sets the parties' battle lines as to Count V.

The Court has found no authority, and the plaintiffs advance none, for the proposition that Part I, Article 8 provides a private right of action and remedy for corrupt governmental conduct. To date, the New Hampshire Supreme Court has recognized two specific manifestations of "rights" that derive from Part I, Article 8: (1) taxpayer standing to challenge

[8] Given this finding, the Court need not address the parties' arguments concerning which types of damages would be available to the plaintiffs should they prevail on these Counts, as this exercise would be merely hypothetical at this stage. For similar reasons, and because it would not change the outcome of the Court's finding above, the Court declines to engage in a full qualified-immunity analysis. *See Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 42–43 (2005) (requiring, as a threshold matter, for a plaintiff to "establish[] a constitutional violation" to overcome a public official's qualified immunity).

the legality of a State spending decision and (2) the public's right of access to governmental proceedings, such as in courts, the legislature, and administrative agencies. *See Carrigan v. N.H. Dep't of Health and Human Servs.*, 174 N.H. 362, 370 (2021) ("[A] plaintiff with standing under Part I, Article 8 can call on the courts to determine whether a specific act or approval of spending conforms with the law."); *Hughes v. Speaker of the N.H. House of Representatives*, 152 N.H. 276, 289–90 (2005) (analyzing Article 8 in the context of New Hampshire's right-to-know law and describing it as "a constitutional provision that explicitly protects the public's right of access and/or the right to know"); *Petition of Keene Sentinel*, 136 N.H. 121, 128 (1992) ("Under part I, article 8, the public has a right of access to court proceedings and to court records which cannot be 'unreasonably restricted.') The plaintiffs would tuck their constitutional right to challenge alleged corrupt governmental conduct within the second of the two specific rights, but provide little analysis to justify what would amount to an exceedingly broad expansion of Part I, Article 8 rights, other than that the provision's express language is capable on its face of capturing more than what our supreme court has recognized to date. The divination of a constitutional expansion of this magnitude lies squarely within the province of the New Hampshire Supreme Court, who has not yet construed Part I, Article 8 as the plaintiffs suggest. While the supreme court could someday recognize broader Part I, Article 8 rights, the current state of the supreme court's jurisprudence does not. As the plaintiffs fail to state a claim upon which relief may be granted pursuant to Part I, Article 8, the Court GRANTS the motion to dismiss Count V.

III. The Plaintiffs' RSA 356 Claim

In Count IV of the complaint, the plaintiffs allege that the PDA, Port Authority, and Marconi violated New Hampshire's antitrust laws by "combining to refuse to deal with [the Lobster Pound] by refusing to discuss [the Lobster Pound's] concerns at public meetings,

conspiring with each other to engage in actions designed to put [the Lobster Pound] out of business, and otherwise restricting [the Lobster Pound's] business operations"; "requiring that [the Lobster Pound] enter into Concession Agreements"; and by agreeing together to "implement and enforce illegally promulgated rules against [the Lobster Pound]." (Doc. 1 ¶¶ 173–75).

a. Sovereign Immunity – PDA And Port Authority

"Sovereign immunity protects the State itself from suit in its own courts without its consent and shields it from liability for torts committed by its officers and employees." *Conrad v. N.H. Dep't of Safety*, 167 N.H. 59, 69 (2014). Practically speaking, therefore, State agencies are "immune from suit in New Hampshire courts unless there is an applicable statute waiving that immunity." *XTL-NH, Inc. v. N.H. State Liquor Comm'n*, 170 N.H. 653, 656 (2018) (citation and quotation marks omitted). "Any statutory waiver is limited to that which is articulated by the legislature; thus, New Hampshire courts lack subject matter jurisdiction over an action against the State unless the legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Id*. (citation and quotation marks omitted). The New Hampshire Supreme Court instructs trial courts to construe waivers of sovereign immunity strictly. *Chase Home for Children v. N.H. Div. for Children, Youth & Families*, 162 N.H. 720, 730 (2011). Any waiver of sovereign immunity "must evidence a clear intent to grant a right to sue the State." *Id.* (emphasis added).

RSA 356:2 prohibits contracts, combinations, and conspiracies in restraint of trade, including by "[r]efusing to deal, or coercing, persuading or inducing any person to refuse to deal, with another person." RSA 356:2, II(d). RSA 356:11 creates a private right of action through which a party may seek a remedy against one who violates the statute:

> I. Any person threatened with injury or damage to his business or property by reason of a violation of this chapter may institute an action or proceeding for

> injunctive relief when and under the same conditions and principles as injunctive relief is granted in other cases.
>
> II. Any person injured in his business or property by reason of a violation of this chapter may recover the actual damages sustained, and as determined by the court, the costs of the suit and reasonable attorney's fees regardless of whether that person dealt directly or indirectly with the defendant. If the trier of facts finds that the violation is willful or flagrant, they may increase damages to an amount not in excess of 3 times the actual damages sustained.

RSA 356:11. The statute defines the term "person" broadly, "includ[ing], where applicable, natural persons, trusts, government entities, corporations, partnerships, limited partnerships, proprietorships, incorporated or unincorporated associations, and any other legal entity." RSA 356:1, III. The statute defines the term "government entity" to include "the state of New Hampshire and its political subdivisions." RSA 356:1, II. (Doc. 19 at 16–18).

A review of several well-worn statutory construction precepts frames the analysis of whether this provision, as the plaintiffs suggest, waives sovereign immunity so as to allow for private statutory antitrust actions against the State. The Court is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole" and "in the context of the overall statutory scheme." *Santos v. Metro. Prop. & Cas. Ins. Co.*, 171 N.H. 682, 689 (2019). The Court "accord[s] statutory language its plain and ordinary meaning, and . . . will not add words the legislature did not see fit to include." *See In re Town of Seabrook*, 163 N.H. 635, 653 (2012). The Court "construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." *Clearview Realty Ventures, LLC v. City of Laconia*, 175 N.H. 671, 675 (2023). "When the language of a statute is plain and unambiguous, [the Court] need not look beyond the statute itself for further evidence of legislative intent." *New England Backflow, Inc. v. Gagne*, 172 N.H. 655, 661 (2019).

RSA 356:11, as mentioned, creates the private right of action to remedy antitrust violations. And, as the plaintiffs observe, the legislature has included governmental entities among those who can invoke the private right of action, by its use of the term "person," a term that broadly includes "governmental entities." The statute, in short, is clear that the State can seek remedies for statutory antitrust violations.

But RSA 356:11 concerns only who can sue, and does not concern who can be sued. The statute does not expressly consent to suits against the State. As a matter of logic, moreover, giving the State the right to sue does not equate with giving any other entity the right to sue the State. To the contrary, the legislature could have had any number of reasons to allow the State to pursue private antitrust actions but still have desired the State to enjoy immunity from them. The plaintiffs' argument requires this Court to contravene a basic statutory construction canon, namely, that courts shall not add language to a statute that the legislature did not see fit to include. *Seabrook*, 163 N.H. at 653.

An additional bulwark for this construction comes from the legislature's definition of who can be sued: while RSA 356:11, II states that a "person" may bring an action under the statute, it does not say that a "person" may bring an action against another "person." Instead, the statute allows a person to sue a "defendant," a term the statute does not define to include a governmental entity. Whatever the term "defendant" may capture, it cannot be reasonably stretched to reflect "a clear intent to grant a right to sue" the State. *Chase Home* 162 N.H. at 730.

Considering the statute as a whole further buttresses the Court's construction. Elsewhere in the statute, the legislature expressly granted a right to the State without imposing a corresponding remedy against the State. RSA 356:4-a, for example, provides for "civil remedies

and enforcement" and includes explicit mention of the State, specifically its ability to sue, who it may sue, and how it may sue. *See* RSA 356:4-a ("The attorney general may bring an action in the name of the state for injunctive relief and civil penalties for violations of any provision of this chapter."). But RSA 356:4-a does not include a corresponding remedy against the State. Not only does this demonstrate that the legislature knew it could have included mention of the State in RSA 356:11 and chose not to, but also that the legislature, throughout the statute, refers to the State (directly or indirectly through "person") in the granting of rights but not in subjecting it to private actions. *See State v. Njogu,* 156 N.H. 551, 554 (2007) ("[T]he legislature is presumed to know the meaning of the words it chooses and to use those words advisedly.").

Guided by our supreme court's admonition to construe waivers of sovereign immunity "strictly," *Chase*, 162 N.H. at 730, the Court cannot find that mere reference to the term "person" in a provision providing governmental entities a right of action evidences "a clear intent to grant a right to sue the State." *id.* The Court Grants the PDA's and Port Authority's motions to dismiss Count IV.

b. Failure To State A Claim - Marconi

In his individual capacity, Marconi cannot cloak himself in sovereign immunity. He challenges Count IV on more substantive grounds, namely, that it fails to state a claim against him upon which relief may be granted.

As an overview, and to reiterate in part, RSA 356:2 serves as New Hampshire's state analog to the federal Sherman Act. *See Kenneth E. Curran, Inc.*, 128 N.H. at 748. The statute expressly directs New Hampshire state courts to look to federal law when evaluating whether a plaintiff has stated a claim under RSA 356:2. *See* RSA 356:14 ("[C]ourts may be guided by interpretations of the United States' antitrust laws.").

Importantly, plaintiffs claiming an antitrust violation must prove that the anticompetitive conduct they allege caused "a reduction of competition in the market in general and not mere injury to their own position as competitors in the market." *Wheeler v. Mobil Chem. Co.*, No. CIV. 94-228-B, 1994 WL 730404, at *2 (D.N.H. Nov. 17, 1994). A plaintiff must also "allege that the challenged action caused injury to competition in the relevant market." *Id*. "In other words, the challenged action must have an anti-competitive effect." *Id.* This necessarily includes defining the relevant market.

As injury to the market, the complaint alleges that the defendants required prepared food and beverage businesses within PDA jurisdiction to enter into RoE agreements and, in some instances, Concession Agreements that required those businesses to pay a concession fee. (Doc. 1 ¶¶ 95, 97, 100, 103, 112, 174). To the extent those allegations, if true, would establish harm, the complaint falls short of alleging "that the challenged action caused injury to competition in the *relevant market*." *Wheeler*, 1994 WL 730404, at *2 (emphasis added). The complaint does not define a "relevant market" or allege how the defendants' actions led to "an anti-competitive effect" in that market. *Id*. The complaint alleges only that other businesses existed within the PDA and Port Authority's jurisdiction, some of whom had to pay extra concession fees.

The plaintiffs' allegations, moreover, relate only to the harm that they claim to have experienced from the defendants' conduct. The complaint alleges, for example, that, while all businesses selling restaurant-style food were subject to RoEs, *only* the plaintiffs were subject to the 10% concession fee. (Doc. 1 at 2) (emphasis added). Reasonably construed, these allegations articulate "mere injury to *their own position* as competitors in the market"; they do not articulate "a reduction of competition in the *market in general*." *Wheeler*, 1994 WL 730404, at *2 (emphasis added) ("Wheeler fails to even allege that Mobil's actions will have an anti-

competitive effect. Instead, he claims only that Mobil's actions will injure him by depriving him of his ability to sell the product Mobil now controls. Even if Wheeler's claim were true, it would not establish that Mobil's actions will have an anti-competitive effect." (emphasis removed)); *see Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (explaining that, under federal antitrust statutes, "the factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstration of the restraint's anticompetitive effects within those markets" or "proof of actual detrimental competitive effects such as output decreases or price increases" (citation omitted)). Count IV fails to state a claim against Marconi upon which relief may be granted; his motion to dismiss Count IV is GRANTED.[9]

IV. The Plaintiffs' Tort Claims

a. Conversion Claim Against the PDA and Port Authority

Count VI of the complaint claims that the PDA and Port Authority committed conversion when they "exercised dominion over [the Lobster Pound's] property by unlawfully requiring [the Lobster Pound] to pay ten percent of its gross revenue to the PDA and Port Authority under a Concession Agreement." (Doc. 1 at 25). The PDA and Port Authority move to dismiss, arguing they are protected from suit by sovereign immunity and the economic loss doctrine, and that the plaintiffs have otherwise failed to state a conversion claim. (Doc. 13 at 17–18).

The defendants' economic loss doctrine argument disposes of the claim. The economic loss doctrine is a "judicially-created remedies principle that operates generally to preclude contracting parties from pursuing economic or commercial losses associated with the contract relationship." *Plourde Sand & Gravel Co. v. JGI Eastern, Inc.*, 154 N.H. 791, 794 (2007). The

[9] The Court declines to address whether the intracorporate conspiracy doctrine provides separate grounds for dismissal.

economic loss doctrine "is based on an understanding that contract law . . . is better suited than tort law for dealing with purely economic loss in the commercial arena." *Id*. (quotation omitted). Therefore, "where a plaintiff may recover economic loss under a contract, generally a cause of action in tort for purely economic loss will not lie." *Id.*

The plaintiffs allege that: (1) they entered into a Concessions Agreement – a contract – with the PDA and Port Authority to operate in the Marina; (2) through the contract, the defendants extracted a 10% concessions fee; and (3) this fee resulted in "lost revenue." (*See* Doc. 1 ¶¶ 100, 186, 187). These allegations fit squarely into the economic loss doctrine, as they assert purely "economic or commercial losses associated with the contract relationship" between the plaintiffs, the PDA, and the Port Authority. *See Plourde*, 154 N.H. at 794; *cf. The Cuneo Law Group, P.C. v. Joseph*, 669 F.Supp.2d 99, 123 (D.D.C. 2009) ("[A] claim for conversion of money may not be maintained to enforce a contractual obligation for payment of money."); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986) ("When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract alone."). As the economic loss doctrine bars the conversion claim, the Court GRANTS the PDA and Port Authority's motion to dismiss Count VI of the complaint.[10]

b. Emotional Distress Claims - All Defendants

In Counts VII and VIII of the complaint, the plaintiffs allege intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") against all of the defendants. (Doc. 1 at 25–26).

i. Sovereign Immunity And Economic Loss Doctrine - PDA and Port Authority

[10] Because the economic loss doctrine is dispositive, the Court does not determine whether sovereign immunity provides separate grounds for dismissal.

The sovereign immunity analysis begins with RSA 541-B, which waives sovereign immunity for certain types of claims brought against state agencies. The statute defines "claim," in relevant part, as "any request for monetary relief for . . . [b]odily injury, personal injury, death or property damages[.]" RSA 541-B:1, II-a(a). Both IIED and NIED seek relief for emotional distress, a personal injury. In light of RSA 541-B:1's waiver, sovereign immunity does not bar either IIED or NIED claims against the PDA and the Port Authority. *See Opinion of the Justices*, 126 N.H. 554, 562 (1985) (declaring unconstitutional a proposed version of RSA 541-B:1, II-a, that did not include term "personal injury," because it "den[ied] recovery for otherwise actionable injuries, *including emotional distress*" (emphasis added)); *see also* 8 NHPS: *Personal Injury: Tort and Ins. Practice* § 3.21 (2025) (discussing IIED and NIED in the context of "personal injury").

The economic loss doctrine similarly does not foreclose the plaintiffs' IIED and NIED claims. To recapitulate, the economic loss doctrine functions to prevent parties from "pursuing economic or commercial losses associated with the contract relationship." *Plourde*, 154 N.H. at 794. The New Hampshire Supreme Court explains that the economic loss doctrine serves to bar claims for economic loss that relate to the performance of the contract itself, not to bar "claims that are entirely separate and distinct from the material terms of the agreement." *Wyle v. Lees*, 162 N.H. 406, 411 (2011). In *Wyle*, the supreme court applied this principle and held that the economic loss doctrine did not bar a plaintiff's negligent misrepresentation claims where the plaintiff "alleged independent, affirmative misrepresentations unrelated to the performance of the contract." *Id.* (quotations omitted).

Unlike the plaintiffs' conversion claim, the plaintiffs premise the IIED and NIED claims on conduct unrelated to mere performance of any contract. The plaintiffs allege that the

defendants' collective actions—including through various security, safety, storage, and surveillance measures as well as through their conduct during contract negotiations—resulted in severe emotional distress to the plaintiffs. (*See* Doc. 1 ¶¶ 189–98). The plaintiffs base the IIED and NIED claims on conduct "that [is] entirely separate and distinct from the material terms" of any contractual agreement with the PDA or Port Authority, as a result of which the economic loss doctrine does not shield either state entity from tort liability. *Wyle*, 162 N.H. at 411.

ii. Immunity - Marconi

Marconi asserts official immunity and immunity pursuant to RSA 541-B:19(b) and (c). (Doc. 11 at 7–9). "Official immunity shields against lawsuits alleging common law torts, such as negligence." *Conrad*, 167 N.H. at 69 (quotation and citation omitted). Official Immunity protects government officials from personal liability for those decisions, acts, or omissions that are: "(1) made within the scope of their official duties while in the course of their employment; (2) discretionary rather than ministerial; and (3) not made in a wanton or reckless manner." *Frost v. Delaney*, 168 N.H. 353, 364 (2015). RSA 541-B:19 serves a similar purpose, granting sovereign immunity for tort claims against state agencies and officials based upon: (1) "an act or omission of [a state official] when such [state official] is exercising due care in the execution of any statute or any rule of a state agency" and (2) "the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty on the part of [a state official] acting within the scope of his office or employment." RSA 541-B:19(b), (c).

The plaintiffs' allegations overcome Marconi's immunity claim. The plaintiffs allege that Marconi—driven by a desire to "harm a competitor to his family business" and "in retaliation" against the plaintiffs—directed the PDA and Port Authority to monitor the plaintiffs, caused lobstermen to stop doing business with the plaintiffs, and forced the plaintiffs to hire

security personnel. (Doc. 1 ¶¶ 33, 39, 48–50, 58, 85–92). The plaintiffs allege, in short, that Marconi intentionally weaponized his authority to the plaintiffs' detriment. Even if, as he contends, PDA rules allowed Marconi to execute contracts and "foster and stimulate commerce" with the plaintiffs, those rules do not authorize him to misuse his power for his family business's benefit. The Court cannot reasonably construe such allegations as "exercising due care" or acting within the scope of Marconi's official duties or employment. To the contrary, such allegations connote "wanton or reckless" conduct. *Frost*, 168 N.H. at 364. The Court concludes that Marconi cannot shield himself with immunity.

c. Failure To State A Claim – All Defendants

The unavailability of the threshold immunity and economic loss doctrine defenses necessarily brings the analysis to all defendants' substantive challenge, that the IIED and NIED counts fail to state a claim upon which relief may be granted.

i. IIED

To state a claim for IIED, a plaintiff must allege that a defendant "by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another." *Tessier v. Rockefeller*, 162 N.H. 324, 341 (2011). "In determining whether conduct is extreme and outrageous, it is not enough that a person has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice." *Id*. (citing *Mikell v. Sch. Admin. Unit #33*, 158 N.H. 723, 729 (2009)). Instead, "liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

Although the New Hampshire Supreme Court has not (and likely could not) articulated a

bright-line rule through which to determine when conduct rises to the level of "extreme and outrageous," two decisions, *Mikell* and *Tessier*, flesh out what "extreme and outrageous" means and the level of conduct that our supreme court requires to sustain an IIED claim in at least somewhat analogous situations. *Mikell* involved a middle school teacher who hoped to see a particular student expelled and who made a false report of misconduct to that end. 158 N.H. at 729. Although the supreme court called the teacher's actions "reprehensible," it held that they did not exceed "all possible bounds of decency." *Id*. at 730. The court acknowledged that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position . . . which gives him actual or apparent authority over the other, or power to affect his interests," but concluded that something as reprehensible as a false claim of student misconduct by someone in a position of authority over the student, did not rise to the level of extreme and outrageous that IIED requires. *Id*. at 729 (alterations in original) (quoting *Restatement (Second) of Torts* § 46 cmt. e (1965)). Notably, as part of its analysis, the supreme court reviewed several decisions from other jurisdictions, including one in which "a continuous campaign of harassment and false accusations to manufacture a case" against the victim failed as a matter of law to constitute outrageous behavior. *Id*. at 730 (citing *Woods v. St. Charles Parish Sch. Bd.*, 790 So. 2d 696, 698 (La. Ct. App. 2001); *see also Reardon v. Allegheny Coll.*, 926 A.2d 477, 488 (Pa. Super. Ct. 2007) (allegations that a professor and two other students had "intentionally and wrongly targeted and accused [the plaintiff] of violations of the college's honor code, despite their knowledge of the falsity of these allegations" failed to establish extreme and outrageous behavior).

Tessier concerned an attorney who on numerous occasions threatened another attorney with criminal proceedings and potential professional disciplinary action while demanding

repayment for the misappropriation of assets. 162 N.H. at 328. In response, and under duress, the plaintiff felt forced to execute a reverse mortgage and otherwise suffered the loss of all of his tangible assets. *Id.* Our supreme court held that the plaintiff failed as a matter of law to establish the requisite extreme and outrageous conduct and underscored that "[l]iability for intentional infliction of emotional distress clearly does not extend to mere threats." *Id.* at 341 (internal citation omitted).

In this complaint, the plaintiffs marshal the following allegations in support of their claim for "extreme and outrageous" conduct:

- Imposing an unauthorized and illegal tax, framed as a "concessions fee" of 10% on Rye Harbor Lobster Pound's gross sales, a fee not applied to other similar businesses.
- Interfering with Rye Harbor Lobster Pound's relationships with local fishermen.
- Removing parking spots used by Rye Harbor Lobster Pound's customers.
- Cutting the restaurant's water line and then obstructing its efforts to install a new one.
- Requiring Rye Harbor Lobster Pound to fund a security detail, a requirement not imposed on other similar businesses.
- Implementing an unauthorized land-use rule that limits storage space and force Rye Harbor Lobster Pound to incur significant expenses to comply.
- Creating a toxic and hostile environment around Plaintiffs' business, including by harassing and interfering with Rye Harbor Lobster Pound customers.

(Doc. 1 at 2). Additionally, the plaintiffs allege that the defendants "refused to negotiate a RoE or Concession Agreement with [them]," and that Marconi acted out of spite for the plaintiffs' business (this latter allegation being of a conclusory nature). (*Id*. ¶¶ 33, 192). To be sure, if accepted as true, these allegations are fairly characterized as "reprehensible," *Mikell*, 158 N.H. at 729, "characterized by malice," *Tessier*, 162 N.H. at 341, and forced on the plaintiffs while "under duress," *id*. at 328. But they cannot be construed to have gone "beyond all possible bounds of decency" so as "to be regarded as atrocious, and utterly intolerable in a civilized

community." *Id.* The plaintiffs allege the type of "continuous campaign of harassment" which, in *Woods*, did not rise, as a matter of law, to a level necessary to sustain an IIED claim. 790 So. 2d at 698. Even construing the defendants' conduct as "intentionally and wrongly target[ing]" the plaintiffs "despite [the defendants'] knowledge of the falsity" of their actions, the aggregated conduct does not rise to the level of "extreme and outrageous" as our supreme and other courts have defined it. *Reardon*, 926 A.2d at 488; *Konefal v. Hollis/Brookline Co-op. Sch. Dist.*, 143 N.H. 256, 260 (1998) (stating that IIED requires a "great deal more" than "illegal and reprehensible" conduct).

Further hampering the IIED claim is the absence of allegations supporting the necessary element of severe emotional harm. The New Hampshire Supreme Court emphasizes that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it." *Morancy v. Morancy*, 134 N.H. 493, 496 (1991). "Because some degree of transient and trivial emotional distress is a part of the price of living among people, the bar to establish intentional infliction of emotional distress is unquestionably very high." *Doe v. W. Alton Marina, LLC*, 646 F.Supp.3d 315, 322 (D.N.H. 2022) (quotations and citations omitted). In support of the severe emotional distress element, the plaintiffs allege that "Ms. Cheever and Hanscom have suffered severe emotional distress and have had significant health issues as a direct result of the Defendants' actions." (*Id.* ¶¶ 189–94). But courts do not accept conclusory allegations as true for purposes of a motion to dismiss. *See Libertarian Party N.H. v. State*, 154 N.H. 376, 389 (2006) ("Conclusory allegations . . . are [not] sufficient to survive a motion to dismiss, as a court considering such a motion 'need not accept statements in the complaint which are merely conclusions of law.'" (citation omitted).); *Melendez v. Univ. of New Hampshire*, No. 23-CV-00172-SM-TSM, 2024 WL 3522177, at *10 (D.N.H. July 2, 2024), *report and*

recommendation adopted, No. 23-CV-172-SM-TSM, 2024 WL 3519809 (D.N.H. July 24, 2024) (dismissing IIED claim where plaintiff failed to allege "any specific facts to demonstrate that his distress was so significant and of such a nature 'that no reasonable man could be expected to endure it.'" (quoting *Morancy*, 134 N.H. at 496)); *DeLima v. Google, Inc.*, 561 F.Supp.3d 123, 136 (D.N.H. 2021) (same, where plaintiff failed "to allege facts to establish . . . how the distress is 'severe'").

The Court GRANTS the defendants' motions to dismiss Count VII for failure to state an IIED claim.

ii. NIED

A plaintiff claiming NIED must prove: "(1) causal negligence of the defendant; (2) foreseeability; and (3) serious mental and emotional harm accompanied by objective physical symptoms." *Tessier*, 162 N.H. at 342. As with the severe emotional distress element in the IIED claim, the plaintiffs fail to plead any facts to allow even an inference that Ms. Cheever and Mr. Hanscom suffered "serious mental and emotional harm accompanied by objective physical symptoms." *Id.* Instead, as mentioned, the plaintiffs make only the conclusory allegation that "Ms. Cheever and Mr. Hanscom have suffered severe emotional distress" and significant health issues, but do not allege any "objective physical symptoms." *Tessier*, 162 N.H. at 342 (plaintiff stated an NIED claim where she alleged that she "suffered a deterioration of her physical and mental well being, requiring her to seek medical care and hospitalization for potentially life threatening conditions"). The Court GRANTS the defendants' motions to dismiss Count VIII for failure to state an NIED claim.

iii. Civil Conspiracy Claim Against All Defendants

In the final Count of the complaint, the plaintiffs allege a civil conspiracy claim against the defendants. (Doc. 1 at 29). Specifically, the plaintiffs allege that the defendants' combined conduct "is the product of overt agreements among and between the Defendants, acting in concert, unlawfully, and inflicted injury on Rye Harbor Lobster Pound, Ms. Cheever, and Mr. Hanscom[.]" (*Id*. ¶¶ 217–19). All defendants move to dismiss, arguing primarily that, because the plaintiffs have failed to establish underlying tortious conduct, the civil conspiracy claim must fail. (Doc. 13 at 20; Doc. 11 at 18–19).

"A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose, or to accomplish some purpose not in itself unlawful by unlawful means." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 47 (1987) (quoting 15A C.J.S. *Conspiracy* § 1(1), at 596 (1967)). Civil conspiracy requires: "(1) two or more persons (including corporations); (2) an object to be accomplished (i.e. an unlawful object to be achieved by lawful or unlawful means or a lawful object to be achieved by unlawful means); (3) an agreement on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *Id.* (emphasis removed). "There is no such thing in New Hampshire, however, as a civil action based upon conspiracy alone." *Univ. Sys. of New Hampshire v. U.S. Gypsum Co.*, 756 F.Supp. 640, 652 (D.N.H. 1991). "For a civil conspiracy to exist, there must be an underlying tort which the alleged conspirators agreed to commit." *Id.* "Conspiracy, then, serves as a device through which vicarious liability for the underlying tort may be imposed on all who commonly plan, take part in, further by cooperation, lend aid to, or encourage the wrongdoers' acts." *Id.*

As explained above, the plaintiffs' tort claims fail to state a claim upon which relief may be granted, which means that no "underlying tort" exists to support a civil conspiracy claim. *Id.* The Court GRANTS the defendants' motions to dismiss Count XI.

Conclusion

For all of these reasons, defendants' motions to dismiss are GRANTED. The plaintiffs have thirty days from the date of the clerk's notice of decision on this order in which to file an amended complaint, and the defendants may move to dismiss the amended complaint, if filed, in the ordinary course. *See ERG, Inc. v. Barnes*, 137 N.H. 186, 189 (1993) (stating that a "plaintiff must be given leave to amend the writ to correct perceived deficiencies before an adverse judgment has preclusive effect" (citations omitted)). Two claims, however, may not be saved by amending the complaint: Count IV as to the PDA and Port Authority (barred by sovereign immunity), and Count V as to all defendants (not a recognized cause of action in New Hampshire).

So Ordered.

Date: December 12, 2025

Hon. Daniel E. Will

Clerk's Notice of Decision
Document Sent to Parties
on 12/12/2025