STATE OF MAINE
WALDO, ss.

SUPERIOR COURT
DKT. NO. RE-19-18

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| JEFFREY R. MABEE and JUDITH B. GRACE,<br><br>Plaintiffs,<br><br>v.<br><br>NORDIC AQUAFARMS, INC., et al.,<br><br>Defendants. | ) | **ORDER ON NAF'S SPECIAL MOTION TO DISMISS** |

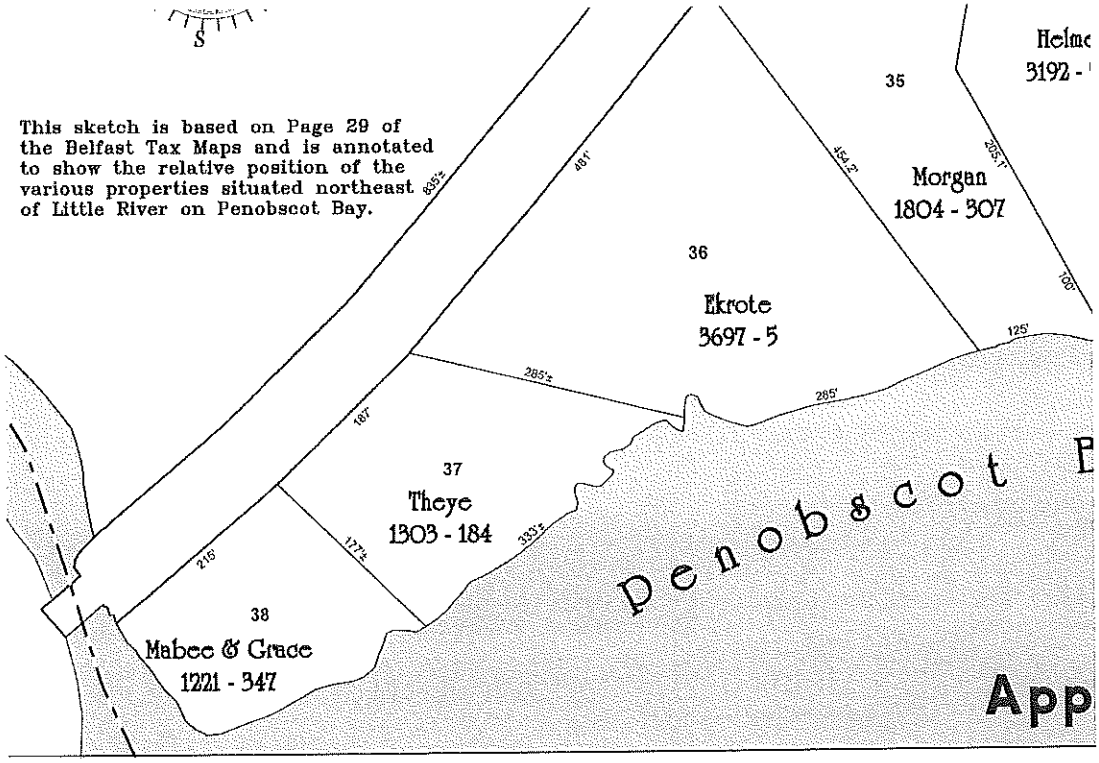
Nordic Aquafarms, Inc. (NAF) filed a motion to dismiss pursuant to Maine's anti-SLAPP statute (14 M.R.S. § 556).[1] The Court has reviewed the parties' briefs and supporting exhibits, and it issues the following decision.

## BACKGROUND

Plaintiffs Jeffrey Mabee and Judith Grace are fee simple owners as joint tenants of a parcel of land in Belfast that can be found on Belfast Tax Map Page 29, Lot 38, and described in the Waldo County Registry of Deeds at Book 1221, Page 347. (Amnd. Compl. ¶ 2.) Mabee and Grace trace their title to Harriet and Arthur Hartley, who originally owned a larger parcel of land encompassing the

[1] NAF also moved to dismiss on other bases, but the Legislature mandated that courts give priority to anti-SLAPP motions. Accordingly, the Court will address the anti-SLAPP motion in this order and will issue a separate order addressing NAF's other arguments for dismissal. Additionally, the Ekrote defendants joined NAF's motion to dismiss, purportedly on all bases, including the anti-SLAPP portion. In their September 11 reply to the Plaintiffs' opposition to their joinder, the Ekrotes appear to imply—without stating it outright—that they engaged in petitioning activity-adjacent (for lack of a better term) by granting NAF an option that forms the basis of NAF's alleged petitioning activity. The Ekrotes did not supply any evidence of their own, instead choosing to adopt the evidence submitted by NAF. They failed to point to any portions of NAF's evidence that would establish that they *themselves* engaged in any petitioning activity within the meaning of the anti-SLAPP statute for which the Plaintiffs seek ostensibly to punish them. *See* 14 M.R.S. § 556. As an ostensible moving party in an anti-SLAPP motion it was their initial burden to establish petitioning activity, which they did not set out to do. Therefore, this order deals only with NAF's alleged petitioning activity, to the extent it forms a basis of Mabee and Grace's complaint. As noted, the additional bases for dismissal asserted by NAF (and joined by the Ekrotes) will be addressed separately.

upland Lots 34, 35, 36, 37, and 38 on Belfast Tax Map 29, as well as the intertidal area[2] associated with those upland lots. (Amnd. Compl. ¶¶ 24-25.) For grounding purposes only, the Court includes the following illustration of the area in question that Mabee and Grace supplied in their complaint:




Over the years, the Hartleys subdivided and conveyed Lots 34, 35, 36, and 37, but retained ownership of Lot 38 (to which Plaintiffs trace their title). (Amnd. Compl. ¶ 26.) As illustrated above, the Ekrotes own Lot 36. (*See also* Amnd. Compl. ¶ 4.) There is a dispute regarding whether the deeds in the chains of title conveying these various parcels severed the upland parcels from the adjoining intertidal area for some or all of these lots—including the Ekrotes—thereby causing ownership of the intertidal area to be retained by Plaintiffs predecessors in interest, the Hartleys. (Amnd. Compl. ¶¶ 4, 26-28, 30-31,

[2] The Law Court's recent decision in *Almeder v. Town of Kennebunkport* provides a summary of the definitional terms regarding upland parcels and their relation to tidal bodies of water. 2019 ME 151, ¶ 8, ___A.3d___. Here, the parties have generally referred to the area at issue as the "intertidal land." While there can be a functional difference between the extent of the "beach"/"shore" and the "intertidal" area, *see id.*, the Court will refer to it as the "intertidal area" for the simplicity of this order.

34, 40(a)-(d).)

Defendant NAF is a wholly owned subsidiary of Nordic Aquafarms, and Nordic Aquafarms is a land-based seafood producer with operating facilities in Norway and Denmark. (Heim Aff. ¶¶ 3-4.) NAF was incorporated in Delaware in 2017 as the legal entity for the U.S.-based business operations of Nordic Aquafarms. (Heim Aff. ¶ 6.) NAF seeks to build and operate a $500 million land-based salmon aquaculture facility in Belfast. (Heim Aff. ¶ 7.) This facility will require access to the Penobscot Bay for three seawater pipes (two 30" intake pipes and one 36" outfall/discharge pipe). (Heim Aff. ¶ 8.) In order to facilitate these seawater pipes, NAF engaged in discussions with waterfront landowners along the Penobscot Bay, including Plaintiffs and the Ekrotes. (Heim Aff. ¶ 15.) Eventually, NAF obtained an option to purchase an easement from the Ekrotes to place the intake and outfall pipes to access Penobscot Bay. (Heim Aff. ¶ 16.) It is necessary for the intake pipes to run underground through the intertidal area beyond the Ekrotes' upland property. (Amnd. Compl. ¶ 3; Heim Aff. ¶ 9.) The central issue in this case is Mabee and Grace's contention that they own the intertidal land which abuts the Ekrotes' upland lot. (Amnd. Compl. ¶¶ 8, 24-28, 72(a)-(b).)

The anti-SLAPP issue has arisen because NAF is in the process of obtaining the necessary relevant permits and leases, including from the Bureau of Parks and Lands, the Department of Environmental Protection and the Board of Environmental Protection, and the City of Belfast. (Heim Aff. ¶¶ 20, 23-24.) Plaintiffs, who have voiced their concerns during the administrative process, are seeking as part of their complaint to prevent NAF from making any claim in the administrative process that it has sufficient title, right, or interest in the intertidal area abutting the Ekrotes' upland parcel in order to access the Penobscot Bay with the intake and outfall pipes. (Amnd. Compl. ¶¶ 9, 72(e)-(f), 77-86.) Notwithstanding their attempt to halt NAF from claiming it has sufficient title, right, or interest in the pertinent intertidal area during administrative proceedings, Mabee and Grace also ask this Court to enter a declaratory judgment stating that they own the intertidal area in front of Lots 35,

36, 37, and 38, and they separately seek to quiet title to that intertidal area. (Amnd. Compl. ¶ 72(a), 73-76.)

## DISCUSSION

1. Maine's Anti-SLAPP Statute.

Maine's anti-SLAPP statute "provides a procedure for the expedited dismissal of lawsuits that are brought not to redress a legitimate wrong suffered by the plaintiff, but instead solely for the purpose of dissuading a defendant from exercising his First Amendment right to petition the government or punishing him for doing so." *Desjardins v. Reynolds*, 2017 ME 99, ¶ 6, 162 A.3d 228. The statute requires the Court to

> grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

14 M.R.S. § 556 (2016). The Court must balance and protect both a defendant's First Amendment right to petition the government against a plaintiff's right to seek redress in the courts for injury as a result of a defendant's exercise of its right of petition. *Gaudette v. Davis*, 2017 ME 86, ¶ 6, 160 A.3d 1190. The statute broadly defines "a party's exercise of its right to petition" to include

> any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

14 M.R.S. § 556. The determination of whether or not conduct qualifies as petitioning activity "is purely a question of law for the court's decision." *Gaudette*, 2017 ME 86, ¶ 16, 160 A.3d 1190.

"Although the statute is silent with regard to how a moving party must show that the opponent's claim is based on this right of petition, [the Law Court has] implicitly accepted the approach that the moving party must show that the claims at issue are based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 12, 103 A.3d 547 (quotation marks omitted).

A motion to dismiss pursuant to Maine's anti-SLAPP Statute

> imposes a burden-shifting procedure between the moving and nonmoving parties. First, in a motion with accompanying affidavits, the moving party (usually the defendant) must demonstrate, as a matter of law, that the anti-SLAPP statute applies to the conduct that is the subject of the plaintiff's complaint by establishing that the suit was based on some activity that would qualify as an exercise of the defendant's First Amendment right to petition the government. If the defendant fails to meet his initial burden, the special motion to dismiss must be denied.
>
> If the defendant satisfies this initial burden, the burden then shifts to the nonmoving party (usually the plaintiff) to offer prima facie evidence that the defendant's exercise of his right to petition (1) was devoid of any reasonable factual support or any arguable basis in law and (2) caused actual injury to the plaintiff. If the plaintiff fails to meet this prima facie burden for all of the petitioning activities at issue—either by the absence of the minimum amount of evidence on either element or based on some other legal insufficiency—the special motion must be granted and the case dismissed.

*Desjardins*, 2017 ME 99, ¶¶ 8-9, 162 A.3d 228 (citations and quotations omitted). If the nonmoving party is unable to meet the necessary burden, "the claims *specifically based* on the moving party's petitioning activity are properly considered for dismissal." *Camden Nat. Bank v. Weintraub*, 2016 ME 101, ¶ 9, 143 A.3d 788 (emphasis added). The motion is not "an 'all or nothing' proposition; rather, discrete claims within a single action may be individually dismissed . . . ." *Id.*

2. The Anti-SLAPP Statute Applied to this Case.

NAF's activities and statements during the administrative processes amount to petitioning

activity within the expansive definition supplied by 14 M.R.S. § 556.[3] NAF's attempts to obtain the necessary administrative approvals to move forward, and its representatives' statements about its title, right, or interest in the land to be implicated in the aquaculture facility's proposed operation, amount to either "written or oral statement[s] made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding," "written or oral statement[s] made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding," or "statement[s] reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding . . . ." *Id.* Accordingly, NAF met its initial burden on the anti-SLAPP motion. As outlined above in the synopsis of the law, the burden then shifts to Mabee and Grace.

Regardless of whether Plaintiffs demonstrated that NAF's petitioning activity "was devoid of any reasonable factual support or any arguable basis in law," *id.*, they clearly did not provide evidence of actual injury. Instead, they stated vaguely that NAF's "actions and claims have damaged and injured the Plaintiffs by clouding their title, diminishing the value and marketability of their property, and by causing Plaintiffs to incur significant litigation costs to defend their property," but failed to provide any affirmative evidence of the foregoing. (Pl.s' Opp. 31.) This is insufficient because the statute states that an opposing party's failure on either basis—"either by the absence of the minimum amount

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[3] Plaintiffs attempted to show that NAF's activities at issue here do not constitute petitioning activity within the meaning of the statute because "the typical mischief that [section 556] intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 7, 847 A.2d 1169 (quotation marks omitted); *see also Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 13, 103 A.3d 547 (detailing that "many of the classic anti-SLAPP cases . . . generally occurred when citizens who publically [sic] oppose development projects are sued by companies or other citizens"). As Plaintiffs point out, the anti-SLAPP statute is being used for the opposite here: a corporation seeking to develop a land-based aquaculture facility is utilizing the anti-SLAPP statute against individual citizens of comparably modest means. Nonetheless, even if the intention arguably may have been as the Plaintiffs contend regarding which types of parties might be entitled to use the anti-SLAPP statute, the Legislature did not specifically enact that formulation. *Cf. Schelling v. Lindell*, 2008 ME 59, ¶ 12, 942 A.2d 1226 ("As is clear from the language of section 556, the Legislature intended to define in very broad terms those statements that are covered by the statute.").

of evidence on either element or based on some other legal insufficiency"—is fatal, 14 M.R.S. § 556, and "the Legislature imposed the requirements of section 556 understanding that they would require plaintiffs to produce affirmative evidence of an injury." *Maietta Constr., Inc. v. Wainwright*, 2004 ME 53, ¶ 10, 847 A.2d 1169. "Accordingly, the party opposing the special motion to dismiss must show a reasonably certain monetary valuation of the injury she has suffered." *Schelling v. Lindell*, 2008 ME 59, ¶ 17, 942 A.2d 1226. Because Plaintiffs did not meet their burden at the second stage, NAF is entitled to dismissal of "the claims specifically based on [its] petitioning activity . . . ." *Weintraub*, 2016 ME 101, ¶ 9, 143 A.3d 788. The more precise issue is determining which claims are specifically based on NAF's petitioning activity.

As the Court sees it, there are two interrelated issues at play here. First, there is the more discrete issue of NAF seeking to obtain the necessary permits and approvals in order to move forward with its proposed land-based aquaculture facility. Then, there is the broader issue regarding actual ownership of the intertidal area based on the legal interpretation of deeds dating back to the mid-twentieth century. Mabee and Grace's claims against NAF that seek to directly impact the administrative proceedings—namely, those seeking to prevent NAF from pursuing the necessary approvals based on claims of sufficient title, right, or interest[4] in the relevant intertidal area—are undoubtedly based on NAF's petitioning activities before those administrative decisionmakers. The claims in Plaintiffs' complaint that fit this description must be dismissed through the anti-SLAPP motion. Specifically, the portions of Count I that seek to prevent NAF from making any statements

[4] Whether a permit applicant has sufficient standing to seek administrative approval and whether that permit applicant—or the party through whom that permit applicant is basing its administrative standing upon—has *actual* ownership of the subject land are different issues. *See Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995) ("We fully acknowledge that it is possible that Cormier may not prevail in his adverse possession claim to the Southridge property. Should this happen, his permit might be revoked. This possibility, however, neither deprives Cormier and those he represents of their current interest in the land nor their administrative standing.").

regarding title, right, or interest, or seeking or using permits or leases from any administrative decisionmakers are **dismissed**. Further, Count III seeking injunctive relief to the extent it is pleaded against NAF and seeks to prevent NAF from proceeding with the administrative process is **dismissed** for the same reasons.

However, Mabee and Grace's claims regarding ownership of the subject intertidal area (the remainder of Count I and all of Count II), enforcement of a purported restrictive covenant (to the extent it is pleaded in the complaint as it is not set forth as a standalone claim, though if it were a legally enforceable restrictive covenant it seemingly would be enforceable against the Ekrotes only), and enforcement of a purported conservation easement (Count V) are fundamentally of a different nature than NAF's efforts to seek pertinent administrative approvals.[5] The difficulty in the case is present because one could tangentially tie each claim to the overarching attempt to build the aquaculture facility (which contains as a subset NAF's statements and efforts during the administrative proceedings). Nonetheless, each of these claims could exist absent any petitioning activity by NAF.

A claim for legal interpretation over the deeds doled out by the Hartleys as it pertains to the subject intertidal area is not based on petitioning activity; it is based on interpretation of deeds that existed long before NAF ever sought to build the aquaculture facility in Belfast. Such a dispute could hypothetically have arisen between Plaintiffs and the Ekrotes notwithstanding the existence of NAF. It is not specifically based on NAF's petitioning activity. For the same reason, a claim regarding enforcement of a purported restrictive covenant contained in one of those old deeds is not specifically

[5] The parties should not read any aspects of this order to be making or hinting at conclusions regarding the merits of Mabee and Grace's claims to ownership of the intertidal area, enforcement of the purported restrictive covenant, or enforcement of the purported conservation easement over the disputed land. This order addresses only the question of whether the claims are based on NAF's petitioning activity or not; the issues in this case will be taken one step at a time. The Court has made no such conclusions because whether the merits will be reached depends on the Court's as of yet unconducted but forthcoming analysis of NAF's (and the Ekrotes') other arguments for dismissal. Should any or all claims survive beyond the motion to dismiss stage that the proceeding is at, the parties have already filed motions aimed at merits. It remains to be seen whether any or all of these motions become moot.

based upon NAF's petitioning activity. Such a dispute could have arisen between Plaintiffs and the Ekrotes notwithstanding NAF's petitioning activity. Lastly, a dispute over enforcement of a purported conservation easement on the intertidal land in question could have arisen notwithstanding NAF's petitioning activity. These claims are not subject to dismissal based on the anti-SLAPP statute.

The Court is cognizant of the fact that there is a temporal connection between NAF's entry into the Belfast community with its plan to develop the aquaculture facility and the assertion of these claims. However, the Court concludes that NAF has not "show[n] that the [remaining] claims at issue are based on the petitioning activities alone and have no substantial basis other than or in addition to the petitioning activities." *Cayer*, 2014 ME 121, ¶ 12, 103 A.3d 547 (quotation marks omitted). Therefore, the remaining claims are not dismissed.

## CONCLUSION

Based on the foregoing analysis, NAF's anti-SLAPP motion is granted in part and denied in part, as detaileda herein. The portions of Count I and Count III (only to the extent those claims are asserted against NAF) that seek to prevent NAF from proceeding administratively are dismissed. The remaining claims are still pending.

The entry is:

1. Defendant NAF's motion pursuant to 14 M.R.S. § 556 is **GRANTED IN PART** and **DENIED IN PART**.
2. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: 12/20/14

The Hon. Robert E. Murray
Justice, Maine Superior Court