



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

**THE BALDWIN COUNTY BRIDGE
COMPANY, LLC,**

Plaintiff,

v.

**JOHN R. COOPER, in his official capacity
as Director of the Alabama Department of
Transportation,**

Defendant.

**CASE NO. 03-CV-2022-901306.00
ORAL ARGUMENT REQUESTED**

**DEFENDANT JOHN R. COOPER'S POST-HEARING BRIEF
IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Defendant John R. Cooper, in his official capacity as Director of the Alabama Department of Transportation ("Director Cooper" and "ALDOT", respectively), submits this brief opposing the Plaintiff's request for a preliminary injunction. *See* Ala. R. Civ. P. 52. The Court does not even need to reach the merits of Baldwin County Bridge Company, LLC's ("BCBC") motion because the suit:

- (1) is barred from the start by sovereign and statutory immunity;
- (2) fails to state a claim recognized under Alabama law on which an injunction can issue;
- (3) is barred by collateral estoppel; and
- (4) relies entirely on inadmissible evidence.

These points are each argued in more depth in Director Cooper's contemporaneously filed Renewed Motion to Dismiss, Motion for Judgment as a Matter of Law, and Renewed Motion in Limine, and those arguments are incorporated into this brief as if fully set forth herein.

But even if the Court reaches the merits of BCBC's motion, the motion is due to be denied because BCBC cannot meet **a single one** of the criteria required for the issuance of a preliminary injunction, much less **all** of the necessary criteria.

In further support of his request that the Court deny BCBC's motion for a preliminary injunction, Director Cooper states as follows:

INTRODUCTION

This case has already been decided once,¹ nearly 200 years ago, in the well-known case of *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). In that case, the Charles River toll bridge was built and operated by a private company near Boston. *Id.* at 423–24. The toll bridge company had a contract with the State of Massachusetts permitting the operation of the bridge. *Id.* Nonetheless, the State of Massachusetts decided to build the Warren Bridge – a new, toll-free bridge to be located just a short distance from the Charles River toll bridge. *Id.* at 427–28. The toll bridge company sued (and this may sound familiar) to enjoin the construction and operation of the Warren Bridge, arguing that the new toll-free bridge would divert traffic away from the toll bridge and would reduce tolls collected by the toll bridge company. *Id.* at 428–29. The Charles River toll bridge company claimed that this would improperly impair the contracts of a private company. *Id.* at 452, 522. The injunction was denied, and the U.S. Supreme Court affirmed. The Court held that it was the prerogative of the State to build or not build a new bridge *even if* it had a negative financial impact on a toll bridge. *Charles River Bridge*, 36 U.S. at 422, 477.

That was over 180 years ago. Yet BCBC and its DIF owners² now seeks to assert a re-packaged version of the exact same claims. Like the toll bridge company in *Charles River Bridge*,

¹ In truth, considering that BCBC already litigated its same “bad faith” theory against ALDOT in probate court in 2018 – and lost – this case has already been decided **twice**. That is one of the bases for Director Cooper’s contemporaneously filed Motion for Judgment as a Matter of Law, in which he argues that BCBC’s “bad faith” claim here is collaterally estopped by the 2018 probate court litigation. That motion is adopted and incorporated as if fully set forth herein.

² BCBC is a wholly-owned subsidiary of American Roads, LLC, which is ultimately owned by DIF Capital Partners, a Dutch private equity fund. (Testimony of Paul Huebener, Hr’g Trans., 200:15-21.)

BCBC complains that ALDOT's new, toll-free Intracoastal Waterway Bridge (the "ICW Bridge" or "New Bridge") will impair DIF/BCBC's ability to collect tolls, but like in the *Charles River Bridge* case, DIF/BCBC cannot demonstrate that it has any legal entitlement to operate its "Beach Express" toll bridge (the "BEX Bridge") without competition. In fact, DIF/BCBC representatives in this hearing **admitted** that DIF/BCBC has no such right. (Testimony of Neal Belitsky, Hr'g Trans., 120:19–121: 8); (Testimony of Paul Huebener, Hr'g Trans., 200:4–7).

As is the subject of Director Cooper's contemporaneously-filed Motion for Judgment as a Matter of Law, Director Cooper has argued that this case should not have proceeded to a hearing because, *inter alia*, Director Cooper is entitled to sovereign immunity, and because DIF/BCBC has sued him for an injunction on a made up "bad faith" claim. As a **standalone claim**, there simply is no such claim under Alabama law outside the context of insurance.

The basic point is made clear by both the Alabama Constitution and the Alabama Code. Alabama Constitution, Article 1, § 14 provides that "[t]he State of Alabama shall never be made a defendant in any court of law or equity." Alabama Code § 23-1-21 (emphasis added) provides that:

The chief executive officer of the State Department of Transportation shall be known as the Director of Transportation, who shall be appointed by the Governor and shall hold office at the pleasure of the Governor. **All the powers, authority, and duties vested in the State Department of Transportation shall be exercised by the Director of Transportation.**

And Alabama Code § 23-1-40(a) (emphasis added) provides that:

It shall be the duty of the Department of Transportation to **designate the roads to be constructed, repaired, and maintained and to construct, standardize, repair, and maintain roads and bridges of this state**; and it shall have authority to make contracts or agreements to construct or pave the roadway only of the street or streets which will serve to connect the state highway constructed or repaired by the department within any municipality in the State of Alabama.

Taken together, this means that DIF/BCBC cannot sue Director Cooper to enjoin the fulfillment of a **state** contract, because Director Cooper has "all the power[and] authority" to

designate the bridges to be constructed in the State, and he has immunity in the exercise of that function. As the Alabama Supreme Court has held “[t]he matter of locating, constructing and maintaining highways **is not a function of the courts**. In that matter the Highway Director exercises an administrative and quasi-legislative function which, when free from fraud or corruption, **cannot be reviewed by the courts**.” *Pruett v. Las Vegas, Inc.*, 74 So. 2d 807, 810 (1954) (citing *Bouchelle v. State Highway Comm’n*, 100 So. 884 (Ala. 1924) (emphases added).

Here, Director Cooper did precisely what those statutes empower him to do: decide to build a New Bridge. And while DIF/BCBC may not like it, may disagree with him, and may have different ideas about whether and where a new bridge should be constructed, as in *Charles River Bridge*, those beliefs and preferences give DIF/BCBC no right to enjoin the construction of a State project, and the execution of a State contract. DIF/BCBC’s complaints exist in the category of policy and politics – not law. The law is clear, and Director Cooper has the “power and authority” to designate the New Bridge for construction. A court in this State cannot enjoin the Director of the Alabama Department of Transportation from generally conducting the people’s business of locating, constructing, and maintaining the State’s highways.³

Nonetheless, ignoring the ancient wisdom of *Charles River Bridge* and the clear provisions of the Alabama Constitution and the Alabama Code, DIF/BCBC’s lawsuit challenges ALDOT Director John R. Cooper’s clear constitutional and statutory authority to determine where to build a bridge to relieve chronic traffic congestion on the way to Alabama’s beaches. BCBC asserts that Director Cooper’s plan to build the New Bridge between State Highway 59 and the BEX Bridge

³ Obviously, that does not mean ALDOT and its director can operate completely without judicial oversight. By way of example, constitutionally sanctioned actions like actions for inverse condemnation, which DIF/BCBC has also alleged in its Complaint (but which is not the subject of DIF/BCBC’s motion for preliminary injunction), are available to property owners in this State when a State transportation project unlawfully interferes with property rights.

constitutes “bad faith,” from which, DIF/BCBC argues, Director Cooper should be enjoined. (Compl., Doc. 002, at ¶¶ 121–127.)⁴

Even though DIF/BCBC’s “bad faith” claim is due to be dismissed as a matter of law for the reasons discussed above and more thoroughly fleshed-out in Director Cooper’s contemporaneously filed Motion for Judgment as a Matter of Law, which is incorporated as if fully set forth herein, the testimony and evidentiary submissions on DIF/BCBC’s motion for preliminary injunction further demonstrate that DIF/BCBC has not met its burden of demonstrating that it has a substantial likelihood of success on the merits. Nor has DIF/BCBC shown that it is in danger of suffering irreparable injury from ALDOT’s construction of a bridge to the beach, for which DIF/BCBC has no adequate remedy via monetary damages. Nor has DIF/BCBC demonstrated that the balance of hardships weigh in its favor against Director Cooper and ALDOT, given that DIF/BCBC is currently suffering no harm, but an injunction would stop ALDOT bridge construction workers in their tracks. (Testimony of Paul Huebener, Hr’g Trans., 250:21-251:1). In short, DIF/BCBC has not provided sufficient evidence to meet **a single one** of the criteria it must meet to justify a preliminary injunction – and it **must** meet **all** of them in order for an injunction to issue.

Thus, for the following reasons, DIF/BCBC’s motion should be denied.

⁴ In an amendment to its original complaint (Doc. 035), DIF/BCBC added a defendant, Scott Bridge Company, Inc. (the company with which ALDOT contracted to build the New Bridge), but did not change the substance of its complaint against Director Cooper.

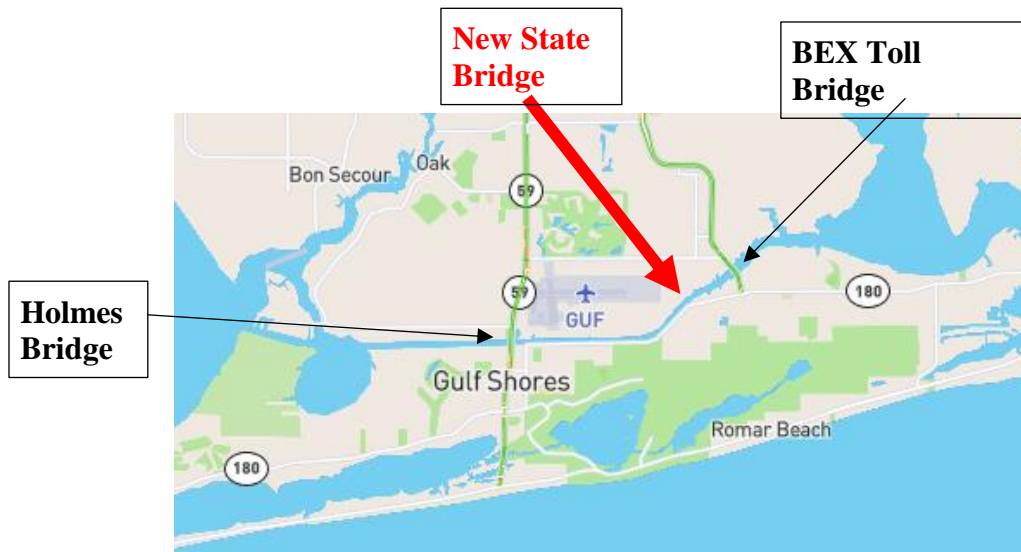
FACTUAL BACKGROUND

I. A Tale of Three Bridges – The Holmes Bridge, the BEX Bridge, & the New Bridge

One of Alabama’s prime tourist destinations is the rapidly-growing Pleasure Island in South Baldwin County. Pleasure Island is separated from the Alabama mainland by a canal known as the “Intracoastal Waterway.” There are two principal cities on the island—the City of Gulf Shores on the west side, and the City of Orange Beach on the east side.

Currently, there are only two bridges in Baldwin County to and from the north side of Pleasure Island: (1) the toll-free bridge in Gulf Shores on SR-59 (the “Holmes Bridge” or “SR-59 Bridge”), and (2) the tolled BEX Bridge. At issue in this case is ALDOT’s proposed toll-free New Bridge that is currently under construction.

A map showing the sites of the two existing and one planned bridges is below:



A. The Holmes Bridge (Public/Free)

The W. C. Holmes Bridge is the long-existing public (non-tolled) bridge that is part of Alabama State Road 59, and which carries the majority of traffic over the Intracoastal Waterway into the City of Gulf Shores. It is subject to the same traffic congestion that affects SR-59. Until

about 20 years ago, the only means of crossing the Intracoastal Waterway in Baldwin County was by using the SR-59 Bridge.

B. The BEX Bridge (Private/Toll)

In 2000, a private company, BCBC, built the BEX Bridge pursuant to a non-exclusive license issued by the Baldwin County Commission. (Testimony of Neal Belitsky, Hr’g Trans., 59:3–5.) That license allows BCBC both to charge a toll for crossing its bridge, and to set the toll at whatever amount BCBC decides, without governmental oversight. (*Id.* at 70:2–22.) Baldwin County and ALDOT built and maintain the Foley Beach Express and Baldwin Beach Express, respectively, leading to and from I-10 and the BEX Bridge. (Testimony of Mack Roberts, Hr’g Trans., 485:20–487:25.) Nothing in the license from Baldwin County or any other agreement with BCBC provides a guarantee of exclusivity, (Testimony of Neal Belitsky, Hr’g Trans., 120:24–121:2), or protection against new bridges being built across the Intracoastal Waterway in the future, (*Id.* at 121:3–8). The BEX Bridge opened for business in 2000, and tolls have been collected for crossing the BEX Bridge since that time. ALDOT is not a party to the license. (Testimony of Mack Roberts, Hr’g Trans., 468:1921.)

DIF Capital Partners, a Dutch infrastructure fund manager (Testimony of Paul Huebener, Hr’g Trans., 192:21-193:21), acquired American Roads, LLC, the parent company of BCBC, including its asset the BEX Bridge, in July 2018. (*Id.* at 144:1–6). BCBC (and DIF, its ultimate owner) has acknowledged that anyone could build a competing bridge. (*Id.* at 197:5–198:19.) DIF admitted that it bought the BEX Bridge with knowledge of ALDOT’s pending project to build a free bridge, and even assumed that ALDOT would build the New Bridge in its internal rate of return analyses when deciding whether to purchase the BEX Bridge. (*Id.* at 197:5–198:19.) DIF’s own traffic expert Phillip Bates (who as a member of the Buro Happold engineering firm,

performed traffic studies for DIF's deal team as a part of the due diligence prior to DIF's purchase of the BEX Bridge), confirmed that ALDOT's building a third bridge was a known risk to the BEX Bridge, and one that he evaluated. (Testimony of Phillip Bates, Hr'g Trans., 620:19–621:16); (DX 26, 2018 Buro Happold Report, at 21.)

C. The New Bridge (Public/Free)

In 2011, when John Cooper first became Director of ALDOT, he began work to establish ALDOT's priorities in Baldwin County through a series of meetings with officials from the area, including commissioners, mayors, legislators, and community leaders. (Testimony of Director Cooper, Hr'g Trans., 1494:6–14.) Providing relief from the congestion along SR-59 was identified as a major priority. (*Id.* at 1494:15–1495:1); (Testimony of William Adams, Hr'g Trans., 835:17–836:5). While the BEX Bridge perhaps provided some relief to SR-59 when it was first built, there has nonetheless been severe congestion on the Holmes Bridge across the Intracoastal Waterway into Gulf Shores for several years now. (Testimony of Director Cooper, Hr'g Trans., 1494:15–1495:1.) The congestion causes long traffic delays for the public, increased accidents, concerns about how emergency responders can timely act to assist the public, concerns about timely access to hospitals, and concerns about hurricane evacuation routes. (Testimony of Blake Phelps, Hr'g Trans., 739:4–740:25.) The Baldwin Beach Express and the Foley Beach Express were designed to provide express travel to the BEX Bridge, thereby relieving congestion on SR-59. Unfortunately, more people use the expressways to get near Pleasure Island than use the BEX Bridge to actually get on Pleasure Island. As a result, the BEX Bridge has not been a solution to congestion on SR-59. (DX 325, Sep. 25, 2018 letter to Gov. Ivey from Mayors, at 1.)

Consequently, beginning in 2017, ALDOT began formally considering the project to build the new public bridge to finally relieve congestion from the Highway 59 Bridge, and planning was

underway in early 2018. (Testimony of Director Cooper, Hr’g Trans., 1532:3–16; 1537:5–8); (*See, e.g.*, Testimony of William Adams, Hr’g Trans., 882:12–885:2). A public hearing in November 2018 regarding the New Bridge project demonstrated overwhelming public support for the New Bridge. (Testimony of Director Cooper, Hr’g Trans., 1590:14–1592:6.) Mayors of Gulf Shores, Foley, and Orange Beach even signed a written statement supporting construction of the New Bridge. (Testimony of Director Cooper, Hr’g Trans., 1593:17–1594:8); (DX 341, Nov. 15, 2018, Public Hearing Waterways Blvd. Connector).

In light of this – and after years of extensive negotiations with BCBC that ultimately resulted in nothing more than BCBC’s continued collection of tolls from the people of the State of Alabama while SR-59 became, year by year, more congested – ALDOT eventually let the contract to build the New Bridge on September 30, 2022. (Testimony of Director Cooper, Hr’g Trans., 1638:8–1639:17); (Testimony of Matt Leverette, Hr’g Trans., 1356:25–1357:12). Scott Bridge Company was awarded the contract, which was signed in October 2022. (Testimony of Matthew Leverette, Hr’g Trans., 1359:14–17; 1361:25–1362:3). On October 17, 2022, ALDOT issued a notice to proceed with the bridge project. On October 20, 2022 BCBC filed this lawsuit. (Doc. 002).

II. Negotiations between ALDOT and BCBC

Before deciding to move forward with the New Bridge, Director Cooper tried hard through confidential negotiations to reach an acceptable agreement with BCBC. (Testimony of Director Cooper, Hr’g Trans., 1519:5–13; 1638:8–21).

Despite the need and public support for a new bridge, BCBC, owner of the BEX Bridge, whose toll revenue may be reduced by a competing free bridge, has delayed the project as long as possible. From 2018 to 2022, there were ongoing communications and meetings with BCBC, its

corporate owner (DIF), Orange Beach and Gulf Shores, as well as other Baldwin County officials to determine if there was an alternative to the New Bridge, including the possibility of BCBC adding an additional, tolled, bridge span. (Testimony of Director Cooper, Hr’g Trans., *passim*.) As a result of these conversations, “letting” the contract to build the New Bridge was removed twice from the letting/bidding schedule in 2021. (Testimony of Wade Henry, Hr’g Trans., 372:8–13); (Testimony of Director Cooper, Hr’g Trans., 1615:24–1616:5; 1630:22–1631:9.)

Those negotiations were wide-ranging and involved attempts to reach a deal from a variety of different angles. Generally, they involved BCBC’s agreeing to expand the BEX Bridge in exchange for certain assurances that ALDOT would not build a new bridge across the Intracoastal Waterway for some number of years. (Testimony of Director Cooper, Hr’g Trans., 1589:16–1590:10.) At present BCBC has no exclusivity rights for its existing toll bridge—the BEX Bridge. (Testimony of Neil Belitsky, Hr’g Trans., 120:24–121:8.) During the negotiations, however, BCBC demanded 50 years or more of exclusivity, which was a difficult term for ALDOT to agree to in light of existing and projected growth of beach traffic in the area and potential legal barriers to such an agreement. (*See e.g.*, Testimony of Director Cooper, Hr’g Trans., 1634:9–23; 1637:16–1638:2.)

ALDOT, conversely, wanted BCBC to agree to meet certain performance goals, such as carrying a certain percentage of traffic across the BEX Bridge, up to 40% of total traffic crossing the Intracoastal Waterway. (Testimony of Darrell Skipper, Hr’g Trans., 1302:10–1303:25; 1306:25–1307:23); (Testimony of Paul Huebener, Hr’g Trans., 213:22–216:2); (Testimony of Director Cooper, Hr’g Trans., 1648:22–1649:25; 1849:15–1850:2). Although certain witnesses say BCBC agreed to this term, (Testimony of Darrell Skipper, Hr’g Trans., 1306:25–1307:23); (DX 112, Dec. 15, 2021 e-mail); (Testimony of Paul Huebener, Hr’g Trans., 236:3–17), BCBC

ultimately balked at this term, (Testimony of Director Cooper, Hr’g Trans., 1637:16–1638:21). In the end, the negotiations broke down, no agreement was reached, and ALDOT moved forward with its plans to build the New Bridge – a risk that DIF was fully apprised of and thoroughly considered before it made its decision to purchase the BEX Bridge in 2018. (Testimony of Paul Huebener, Hr’g Trans., 197:5–198:19); (DX 288, April 6, 2018 Investment Committee Proposal, at 5); (Testimony of Phil Bates, Hr’g Trans., 618:24–621:19); (DX 26, Mar. 6, 2018 Buro Happold Report, at 21). This litigation followed.

III. Current Litigation

Three days after ALDOT issued a notice for Scott Bridge to proceed with the New Bridge project, BCBC filed this case alleging that Director Cooper acted in “bad faith” by moving forward with the New Bridge project. (Doc. 002.)

As noted above, though, there is no statute, regulation, ordinance, deed, or agreement between BCBC and the State of Alabama, ALDOT, Director Cooper or otherwise that provides a guarantee of exclusivity, or that no other bridges will be built across the Intracoastal Waterway in the future. (Testimony of Neil Belitsky, Hr’g Trans. 120:24–121:8.) BCBC requested such a term (*i.e.*, a promise that no additional bridges would be built across the Intracoastal Waterway for 50 years) in negotiations with ALDOT, but never received it. (*See, e.g.*, Testimony of Director Cooper, Hr’g, Trans., 1634:9–23; 1637:16–1638:2.)

Count I of BCBC’s Complaint is a nebulous claim for “bad faith and request for injunctive relief,” alleging that Cooper’s negotiations with BCBC were “nothing more than a subterfuge to take BCBC’s bridge and to ‘undo’ the deal [with Baldwin County and Orange Beach];” and (2) that the New Bridge project “does not address Cooper’s purported congestion concerns and will result not only in the illegal taking of BCBC’s bridge, but will irreparably harm BCBC.” (Compl.,

Doc. 002, ¶ 126). Count II is a claim for inverse condemnation. (*Id.* ¶¶ 126, 133). Recognizing that it has no case for inverse condemnation because current Alabama case law requires a “physical intrusion” to assert an inverse condemnation claim (Doc. 317 at 20) – which BCBC cannot meet – BCBC has since attempted to convert its inverse condemnation claim into one for a regulatory “taking” under the U.S. Constitution. However, BCBC’s inverse condemnation/takings claim is not at issue for purposes of its preliminary injunction claim, which is based purely on BCBC’s contrived “bad faith” claim.

At bottom, BCBC’s request for a preliminary injunction is meritless, as BCBC’s invented “bad faith” claim does not allege (nor can it) that any underlying right of BCBC’s has been violated. BCBC cannot as a matter of law therefore, demonstrate any likelihood of success on the merits of a claim that does not exist in Alabama law. Furthermore, even assuming *arguendo* that BCBC’s bad faith claim was cognizable, BCBC has still failed to meet the burden of showing it is entitled to a preliminary injunction based on that claim.

STANDARD OF REVIEW

When reviewing a request for a preliminary injunction, this Court must consider whether the evidence in the record supports the issuance of the preliminary injunction. “Before entering a preliminary injunction, the trial court must be satisfied: (1) that without the injunction the plaintiff will suffer immediate and irreparable injury; (2) that the plaintiff has no adequate remedy at law; (3) that the plaintiff is likely to succeed on the merits of the case; and (4) that the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff.” *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122, 144 (Ala. 2019) (quoting *Blount Recycling, LLC v. City of Cullman*, 884 So. 2d 850, 853 (Ala. 2003)) (quoting in turn *Blaylock v. Cary*, 709 So. 2d 1128,

1130 (Ala. 1997)) (citation omitted). “If the party seeking the injunction fails to establish each of these prerequisites, then a preliminary injunction should not be entered.” *Id.*

If the trial court enters a preliminary injunction when one or more of these prerequisites have not been met, the trial court's order must be dissolved and the case remanded. *See id.*; *see also Capmark Bank v. RGR, LLC*, 81 So. 3d 1258, 1267 (Ala. 2011) (“Because it is incumbent on the movant to demonstrate all four factors, the failure to demonstrate any one of the four requirements is sufficient for the Court to deny issuance of an injunction.”). “Injunctions ... will not be granted merely to allay apprehension of injury; the injury must be both imminent and irreparable in a court of law.” *Martin v. First Fed. Sav. & Loan Ass’n of Andalusia*, 559 So. 2d 1075, 1079 (Ala. 1990). Furthermore, and crucially here, the plaintiff bears the burden of producing evidence sufficient to support the issuance of a preliminary injunction. *Ormco Corp. v. Johns*, 869 So. 2d 1109, 1113 (Ala. 2003).

ARGUMENT

The core of BCBC’s request for an injunction is that BCBC will lose market share (and hence, toll revenue) to ALDOT’s yet-to-be completed toll-free State-owned bridge. BCBC is seeking, in essence, an injunction based on its anticipated lost profits, the type of claim that axiomatically is not suitable for equitable relief.

BCBC is asking this Court to decide whether the New Bridge should or should not be built, and requests the Court to (1) weigh and evaluate the offers of parties, expert opinions regarding traffic studies, and design of the road system in Baldwin County, and (2) decide if BCBC’s offers were better than ALDOT’s offer, or if ALDOT’s offers asked for too much – classic policy decisions. More importantly, BCBC asks the Court to infringe on the Executive Branch, specifically the Alabama Department of Transportation, by stripping its mandate to locate,

construct, and maintain State roads. BCBC does not articulate what it wants other than stopping the public bridge. If successful, the congestion problems on SR-59 and the Holmes Bridge will continue and worsen, and the Court will have judicially granted BCBC *a de facto* exclusive license over the Intracoastal Waterway, violating the principles of separation of powers, and granting BCBC by judicial fiat what it never had nor could achieve by contract, deed, statute, regulation, or ordinance. DIF did not pay for such a monopoly, and should not be granted one by the Court.

The Alabama Supreme Court couldn't have made it clearer: “[l]oss of profits **does not justify the issuance of an injunction.**” *Alabama Dep’t of Transp. v. Blue Ridge Sand & Gravel, Inc.*, 718 So. 2d 27, 32 (Ala. 1998) (quoting *State Dep’t of Public Safety v. Scotch Lumber Co.*, 302 So. 2d 844, 846 (Ala. 1974)) (emphasis added). As the Supreme Court has explained, “[o]ne does not have an unfettered right to be free of competition in this country.” *Calhoun v. Brendle, Inc.*, 502 So. 2d 689, 693 (Ala. 1986) (reversing grant of injunction based on unenforceable covenant not to compete).

It bears repeating, as stated above, “[t]he matter of locating, constructing and maintaining highways **is not a function of the courts.** In that matter the Highway Director exercises an administrative and quasi-legislative function which, when free from fraud or corruption, **cannot be reviewed by the courts.**” *Pruett*, 74 So. 2d at (emphases added)). “A court of equity is without jurisdiction to determine the question of the public need for a highway.”” *Id.*

Put succinctly, BCBC has failed to meet its burden of demonstrating every element of its request for a preliminary injunction. In fact, it hasn't met its burden on **any** element.

I. BCBC Has Not Shown It Will Suffer Irreparable Harm for Which It Has No Adequate Remedy at Law Because the Loss of Toll Money can be Compensated by Money Damages.

Taking the first and second elements together (*i.e.*, “irreparable harm” and “no adequate legal remedy”), BCBC’s motion is a textbook example of a claim that is not entitled to equitable relief. BCBC has not shown (and cannot show) that it will suffer irreparable harm if an injunction is not issued for at least three independent reasons: (a) BCBC’s claims are about alleged loss of money; (b) BCBC’s claims are about future loss of money; and (c) BCBC has brought a separate damages claim (*i.e.*, inverse condemnation) for the recovery of its alleged future losses of money.

a. BCBC’s alleged losses are compensable by damages.

The Alabama Supreme Court has held that “a plaintiff who can recover damages has an adequate remedy at law and is not entitled to an injunction.” *Water Works & Sewer Bd. of City of Birmingham v. Inland Lake Investments, LLC*, 31 So. 3d 686, 692 (Ala. 2009); *see Woodward v. Roberson*, 789 So. 2d 853, 856 (Ala. 2001); *SouthTrust Bank of Alabama, N.A. v. Webb–Stiles Co.*, 931 So. 2d 706, 709 (Ala. 2005). As stated recently by the Alabama Supreme Court, “[i]rreparable injury’ is an injury that is **not redressable in a court of law through an award of money damages.**” *State ex rel. Marshall v. TY Green’s Massage Therapy, Inc.*, 332 So. 3d 413, 326 (Ala. 2021) (cleaned up) (emphasis added). Put slightly differently, if a claim is about money, then the claimant definitionally cannot show “irreparable harm,” and a preliminary injunction cannot issue. *See, e.g., Perley for Benefit of Tapscan, Inc. v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994) (“In order for a trial court to grant a preliminary injunction, the plaintiff must show *all* of the [elements].”) (emphasis in original).

In this case, “money” is precisely what BCBC’s claim is for – and future loss of money, at that. BCBC has asserted that the construction of the New Bridge will cause it to suffer loss of

business income and a reduction of the value of its property. (*See, e.g.*, Compl., Doc. 002 at ¶ 17) (“... building a wholly unnecessary bridge approximately a mile away to ‘**bankrupt**’ BCBC ...”) (emphasis added); (*id.* at ¶ 18) (“... destroy and substantially undermine **the value** of the BEX Bridge ...”; “... entitles BCBC **to compensation** ...”) (emphasis added); *id.* at ¶ 119 (“... BCBC has and will suffer a loss amounting to hundreds of millions of **dollars** in the form of the destruction of **the value** of the BEX Bridge, or at the very least, the substantial reduction in BCBC’s reasonable and distinct **investment-backed expectations** as to **the value** of the BEX Bridge and the **tolls** generated therefrom . . .”) (emphasis added); *id.* at ¶ 120 (“... **the value** of the BEX Bridge will be completely destroyed, BCBC will be forced into **bankruptcy**, and BCBC will be forced to relinquish its sole **revenue-generating** asset.”) (emphasis added). Indeed, even in the Counts themselves, BCBC openly seeks “**damages** in an amount to be determined,” (Doc. 002 at ¶ 127.b.) (Count One) (emphasis added), and “[c]ompensatory damages.” (*Id.* at ¶ 138.a.) (emphasis added).⁵ Neil Belitsky, President and CEO of American Roads, LLC (BCBC’s immediate parent company) (Testimony of Neal Belitsky, Hr’g. Trans., 57:2–23), reiterated precisely this during his direct examination:

Q [Plaintiff Counsel, Clint Morrison]. **What impact would a new free bridge a mile away from the Beach Express Bridge have on BCBC?**

A [American Roads CEO, Neil Belitsky]. You got to keep in mind that BCBC only has one revenue generating asset, and that's the Foley Beach Express Bridge. And so if there was a free bridge, there would be folks that would be using it. **And so revenues -- our revenues would go down an amount we don't know, but they would definitely go down.**

(*Id.* at 92:14–22) (emphasis added).

⁵ BCBC has since stated that it “expressly disclaims” the money damages it seeks in its Complaint under its “bad faith” count, (Doc. 317 at 12, n.3), but has to amend its Complaint to reflect that.

That’s all BCBC’s entire Complaint concerns: money. And to the degree BCBC has any valid legal claim (it doesn’t), it’s easily compensated for by damages. An injunction is thus unnecessary and improper. “Loss of profits **does not justify the issuance of an injunction.**” *Alabama Dep’t of Transp.*, 718 So. 2d at 32 (emphasis added).

b. BCBC’s claims are for future damages.

More than that, though, BCBC’s claim concerns the potential **future** loss of money, not current losses. Again, as Neil Belitsky testified, BCBC is concerned that if the New Bridge opens, BCBC’s “revenues **would** go down” (Testimony of Neal Belitsky, Hr’g Trans., 92:20–21) (emphasis added). BCBC’s Rule 30(b)(6) representative, Mack Roberts, admitted that BCBC “**would** assess at that point in time [*i.e.*, when the New Bridge is in operation]” what effect the New Bridge had on traffic volume (and hence on toll revenue). (Testimony of Mack Roberts, Hr’g Trans., 450:1–13). Put differently, BCBC is not being harmed by the **construction** of the New Bridge, but would only (potentially and allegedly) be harmed by the **operation** of the New Bridge. The New Bridge is not scheduled to be completed until January 1, 2026, though. (DX 172, Construction Contract, at 8) (“[Scott Bridge] agrees to complete the entire project by January 1, 2026.”); (Testimony of Matt Leverette, Hr’g Trans., 1458:24–1459:9). BCBC is not suffering any harm today, it merely alleges that it may suffer some economic harm in the future. That is not the “imminent and irreparable harm” needed for an injunction. *Martin v. City of Linden*, 667 So. 2d 732, 736 (Ala. 1995) (“[C]ourts will not use the extraordinary power of injunctive relief merely to allay **an apprehension of a possible injury**; the injury must be **imminent and irreparable** in a court at law.”) (emphasis added); *Ormco Corp. v. Johns*, 869 So. 2d 1109, 1114 (Ala. 2003) (“**a mere possibility of irreparable harm** is insufficient to justify the drastic remedy of a preliminary injunction”) (emphasis added) (*quoting Borey v. National Union Fire Ins. Co. of Pittsburgh*, 934

F. 2d 30, 34 (2d Cir. 1991)). *See also Water Works & Sewer Bd.*, 31 So. 3d at 692 (“To say that the injury is irreparable means that the methods of repair (remedies at law) are inadequate.”). The best BCBC can show is the mere apprehension of injury, which as the Alabama Supreme Court has held time and again, is patently insufficient to meet the plaintiff’s burden. *State ex rel. Marshall*, 332 So. 3d at 426 (collecting cases).

c. BCBC has brought a claim for inverse condemnation and damages.

Further, BCBC has also brought a claim for damages as part of its inverse condemnation claim in Count II. (Doc. 002, ¶¶ 127.b. & 138.a.)⁶ Importantly, the existence of this claim, with the potential for recovery of damages for the injury BCBC claims will be caused by the existence of the New Bridge within a mile of BCBC’s BEX Bridge, means that BCBC clearly has “an adequate remedy at law.” To the degree that it has any valid legal claim, BCBC can be fully compensated by money damages through that claim, making the extraordinary equitable relief of an injunction improper.

Indeed, other jurisdictions have held that the remedy of a preliminary injunction is not available in cases in which a plaintiff claims that a proposed public works project would reduce the value of its property or its business conducted thereupon, and then seeks to enjoin construction of the project while also seeking damages for inverse condemnation. This is because the property owner has an adequate remedy for damages through an inverse condemnation action. *See Oliver v. University of Mississippi*, No. 3:04-CV-38-D-A, 2004 WL 1778415 (N.D. Miss. June 14, 2004) (preliminary injunctive relief to stay construction and implementation of airport expansion was inappropriate because, in the context of inverse condemnation and eminent domain matters, monetary damages are an adequate remedy); *Board of County Com’rs of Reno County v. Asset*

⁶ *See supra* n. 5.

Management and Marketing LLC, 18 P.3d 286 (2001) (inverse condemnation action against county was an adequate remedy at law for subdivision landowners regarding county's proposed construction of water tower in the subdivision, thus precluding injunctive relief, even though burden and expense of filing an inverse condemnation action might not make such an action the most expedient remedy); *Indiana Dept. of Transp. v. Southern Bells, Inc.*, 723 N.E.2d 432 (Ind. Ct. App. 1999) (business owners who sought preliminary injunction against Indiana Department of Transportation to stop road improvements that would prevent traffic from turning onto access road to reach owners' establishments had adequate remedy at law in form of inverse condemnation action and were therefore precluded from obtaining injunctive relief).

And, given BCBC's revised claim for a regulatory taking under the 5th Amendment, (*see* Doc. 317 at 20-25), as the United States Supreme Court has importantly recognized “**[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.**” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (emphasis added).

Thus, BCBC's claims – to the degree they are even valid – are fully compensable by money damages, and BCBC fails on multiple levels to demonstrate that it is in “imminent” danger of suffering irreparable harm for which there is no adequate legal remedy. BCBC's claims are about alleged loss of money; they are about alleged future loss of money; and BCBC has brought a damages claim (*i.e.*, inverse condemnation) for the recovery of its alleged future losses of money. Each of those reasons independently demonstrates that BCBC is not being irreparably injured and has an adequate legal remedy, and thus BCBC's motion for preliminary injunction is due to be denied without further inquiry. *See, e.g., Tapscan, Inc.*, 646 So. 2d at 587 (Ala. 1994) (“In order

for a trial court to grant a preliminary injunction, the plaintiff must show *all* of the [elements].” (emphasis in original).

II. BCBC’s Claims Fail on Both the Law and the Facts, and So BCBC Cannot Show a Likelihood of Success on the Merits, and BCBC’s Claims Should Be Dismissed.

The Alabama Supreme Court recently held “[c]hief among the factors to be considered in issuing a preliminary injunction is the demonstration of a reasonable probability of success on the merits.” *Bethel v. Franklin*, No. SC-2022-0787, 2023 WL 2196589, at *3 (Ala. Feb. 24, 2023). Further, in *Capmark Bank*, 81 So. 3d 1258, *supra*, the Court stated that when the party seeking a preliminary injunction fails to show a likelihood of success on the merits of its underlying case, it is not entitled to a preliminary injunction. *Capmark Bank*, 81 So. 3d at 1272.

More recently, the Supreme Court held to the same effect in *Facebook, Inc. v. K.G.S.*, 294 So. 3d 122, 146 (Ala. 2019) (where plaintiff’s allegations of invasion of privacy showed that the element of “privacy” was lacking, plaintiff was not entitled to a preliminary injunction because she “has not demonstrated a likelihood of success on the merits . . .”). *See also State ex rel. Marshall v. TY Green’s Massage Therapy, Inc.*, 332 So. 3d 413, 429 (Ala. 2021) (“The success-on-the-merits element protects a defendant from being enjoined from conduct that has not been shown to be probably wrongful. Hence, this element asks whether it is likely that the plaintiff will prove at trial that the harm is real and is legally wrongful.”) (emphases in original).

Here, the Court does not even need to reach the merits of BCBC’s claims because they are clearly barred at the outset as a matter of law. Even if the Court reaches the merits, though, BCBC cannot show a likelihood of success necessary for a preliminary injunction.

- a. **As argued in Director Cooper’s contemporaneously filed motion for judgment as a matter of law, BCBC’s claims should be dismissed for lack of subject-matter jurisdiction and because BCBC’s “bad faith” claim is not a valid, standalone claim.**

While Director Cooper will not harp on the point here – and instead refers again to its contemporaneously filed Motion for Judgment as a Matter of Law, which he incorporates as if fully set forth herein – it is impossible to discuss the merits of BCBC claim without mentioning that its standalone “bad faith” claim simply does not exist under Alabama law. This is because any discussion of “likelihood of success on the merits” must necessarily entail a discussion of what facts and elements BCBC must show in order to prevail on a valid legal claim. *See, e.g., Eubanks v. Hale*, 752 So. 2d 1113, 1143 (Ala. 1999) (“We are required to apply the law to the facts and to enter a judgment as the law demands.”). Here, it is impossible to say what elements and facts BCBC must show to sustain a standalone claim for “bad faith” because no such standalone claim has ever been recognized or delineated in Alabama. How would BCBC even prove such a claim? What elements apply? BCBC is silent – likely because the law is silent.

Every single case that Director Cooper is aware of that mentions the “bad faith” exception to sovereign immunity fails to mention what the elements for a standalone version of that claim would be – **because every single one of those cases entails the violation of a clear, recognized, delineated, underlying right**. *See, e.g., Wallace v. Bd. of Ed. of Montgomery Cnty.*, 197 So. 2d 428, 431 (Ala. 1967) (“ . . . bad faith . . . **injurious to the rights of others.**”) (emphases added) (cleaned up); *Southall v. Stricos Corp.*, 153 So. 2d 234, 235 (Ala. 1963) (“ . . . bad faith . . . **injurious to the rights of others.**”) (emphases added) (cleaned up); *Finnell v. Pitts*, 132 So. 2, 4 (Ala. 1930) (“ . . . **illegal trespass or tort on the rights of an individual . . .**”) (emphasis added); *Pruett v. Las Vegas, Inc.*, 74 So. 2d 807, 801-11 (Ala. 1954) (injunction denied because no

underlying right violated); *Ex parte Ala. Dep't of Trans.*, 143 So. 3d 730, 740-41 (Ala. 2013) (involving underlying trespass and property rights).

Here, by contrast, BCBC does not assert the violation of any underlying right:

Q [ALDOT Counsel, Dorman Walker]. Okay. **Are you aware of any rights of BCBC's that ALDOT has violated?**

A [BCBC ARCP 30(b)(6) Corp. Rep., Mack Roberts]. **No.**

(Testimony of Mack Roberts, Hr'g Trans., 488:18–20) (emphasis added). Further, the only recognized underlying, standalone claim that BCBC brings is a claim for inverse condemnation, (Compl., Doc. 002 at ¶¶ 128–138), but BCBC's own corporate representative has essentially disclaimed that claim (*see id.*):

Q. Would you agree that ALDOT's project will not diminish public access to BCBC's toll bridge?

A. Yes.

Q. **And would you agree that ALDOT has not taken possession of BCBC's personal or real property?**

A. **Yes.**

(Testimony of Mack Roberts, Hr'g Trans., 489:8–13) (emphasis added). And BCBC has, at the very least, dramatically narrowed that claim in its own briefing. (*See* Doc. 317 at 20–25.)

As such, BCBC cannot demonstrate a likelihood of success on the merits, because it cannot even tell this Court what its legal claim is. Director Cooper has gone through months of discovery, briefing, and now seven days of testimony, and he still has no idea. BCBC's Motion for Preliminary Injunction should be denied on that basis.

- b. BCBC cannot demonstrate that Director Cooper acted in “bad faith” in negotiating with BCBC/DIF, because DIF knew that Director Cooper intended to build the New Bridge before it bought BCBC.**

With that said, even if DIF/BCBC’s undefined “bad faith” claim is taken seriously, DIF/BCBC cannot demonstrate that Director Cooper negotiated in bad faith. DIF/BCBC’s claim is particularly ironic given that DIF had full knowledge that ALDOT intended to build the New Bridge across the Intracoastal Waterway **before** DIF purchased the BEX Bridge. For instance, Paul Huebener testified that DIF engaged in early 2018 significant due diligence prior to purchasing BCBC and the BEX Bridge. (*See* Testimony of Paul Huebener, Hr’g Trans., 193:22–200:11.) As part of that due diligence, DIF was told that ALDOT was considering building a New Bridge:

Q [Defense Counsel, Dorman Walker]. **At the time of the acquisition, you were aware from Syncora that ALDOT was considering building a bridge?**

A [Paul Huebner]. **Correct.**

(*Id.* at 197:1-4) (emphasis added). More than that, DIF went so far as to meet with Director Cooper about ALDOT’s plans for the New Bridge in June 2018 – prior to purchasing the BEX Bridge. (*Id.* at 197:5-21); (Testimony of William Adams Hr’g Trans., 845:16–847:25); (Testimony of Director Cooper, Hr’g Trans., 1583:6–19; 1586:22–1587:22.) As William Adams, who was present at the meeting, testified, Director Cooper told DIF: “do not buy this bridge [BEX Bridge] thinking that I’m not going to build that one [New Bridge]. You need to go into this agreement with your eyes wide open.” (Testimony of William Adams, Hr’g Trans., 847:22–25.) DIF also asked its traffic consultant Phil Bates, who was then with Buro Happold, to examine the purchase of the BEX Bridge as part of DIF’s due diligence, and the construction of the New Bridge was a key factor in his analysis. (Testimony of Phil Bates, Hr’g Trans., 618:24–621:19); (DX 26, Mar. 6, 2018 Buro Happold Report, at 21).

Additionally, DIF closed on the purchase of the BEX Bridge in July 2018, (Testimony of Paul Huebener, Hr’g Trans., 143:23–25), several months after the condemnation proceeding in which ALDOT had indicated that it planned to move ahead with the New Bridge, and in which BCBC (then owned by Syncora, Inc., from whom DIF acquired BCBC) had first tried out its “bad faith” theory. (DX 288, April 6, 2018 Investment Committee Proposal, at 37–38) (Discussing the condemnation lawsuit between ALDOT and Syncora/BCBC in early 2018 under the “BEX Key Risks” section of DIF’s investment proposal memorandum). Indeed – despite DIF’s efforts during this proceeding to create distance between themselves and former American Roads owner, Syncora (*see, e.g.*, Objection of Plaintiff Counsel, Hr’g Trans., 1586:15–18) – current American Roads President and CEO, Neil Belitsky, who testified during the preliminary injunction hearing before this Court, also testified before the probate court in 2018, (Testimony of Director Cooper, Hr’g Trans., 1551:6–17); (DX 599, Hr’g Trans., at 56); BCBC was represented in that proceeding by Clint Morrison and Cliff Brady, who are also representing BCBC in this proceeding, (*id.* at 3); and current Vice-President of American Roads, LLC (the direct corporate parent of BCBC) and BCBC’s corporate representative, Mack Roberts, was serving in that same capacity at the time of the condemnation suit. (Testimony of Mack Roberts, Hr’g Trans., 424:21–425:1); (Opening Statement, Hr’g Trans., 26:5–8.) In other words, DIF did, in fact, purchase BCBC and the BEX Bridge with its “eyes wide open.” (Testimony of William Adams, Hr’g Trans., 847:25.)

Further, DIF/BCBC has pointed to a couple of e-mails throughout the hearing to suggest that the “final decision” to build the New Bridge was made in 2017. (*See, e.g.*, Opening Statement, Hr’g Trans., 33:5–11; Testimony of William Adams, Hr’g Trans., 878:16–880:11). While ALDOT contests this timeline – the final decision to build the New Bridge was not made until Governor Ivey signed the State of Alabama’s contract with Scott Bridge in on October. 14, 2022 (DX 172,

Construction Contract, at 58) – even if DIF/BCBC was right, that would only underscore that DIF knew and should have known precisely what it was getting itself into when it purchased the BEX Bridge.

And, in fact, DIF’s own documents show definitively that it **did** know what it was getting into – and it planned accordingly. On April 6, 2018 – over three months before DIF closed on the purchase of the BEX Bridge – DIF’s investment committee sent a detailed proposal and internal memo to DIF’s management as part of DIF’s due diligence prior to purchasing the BEX Bridge from Syncora. (DX 288, April 6, 2018 Investment Committee Proposal). In that memorandum – where DIF is evaluating whether and how to move forward with the purchase of the BEX Bridge and other assets in the American Roads portfolio – DIF stated, as a part of its baseline assumptions, that:

“DIF has assumed the Free Bridge will be constructed and open to traffic in 2022 in its base investment case.”

(*Id.* at 5) (emphasis added).

Notably, though, DIF also evaluated what would happen to its base investment case for every year DIF was successful in delaying the opening of the New Bridge:

13 Due Diligence and Risk Analysis

13.1 Scenario Analysis (detailed inputs are outlined in Sections 10, 11, and 12).

Scenario Analysis	Min DSCR	Avg DSCR	IRR
1. Base Case	1.50x	1.63x	11.00%
BEX			
2. BEX Call Option Exercised in 2033	1.50x	1.63x	10.40%
3. Delay Free Alternative One Year	1.50x	1.65x	12.00%

(*Id.* at 33) (highlighting added). In other words, prior to purchasing the BEX Bridge, DIF expressly evaluated how much more money it could make if all it succeeded in doing was, not cutting a deal with ALDOT, but simply gumming up the works of government and delaying ALDOT’s plans to

build a New Bridge. DIF believed that, for every past 2022 that the New Bridge was not open (its base case), DIF would receive an additional 1% IRR (internal rate of return): **hundreds of thousands of dollars**. (*Id.* at 1) (describing DIF’s base IRR expectations).

Director Cooper, ALDOT, and the People of the State of Alabama have gained precisely nothing from their lengthy negotiations with DIF beyond headaches and higher costs of materials and labor. (Testimony of Director Cooper, Hr’g Trans., 1638:8–1639:17); (Testimony of Mack Roberts, Hr’g Trans., 466:23–467:18). DIF, on the other hand, has benefited from the negotiations to the tune of millions. DIF’s base case assumed the New Bridge would open in 2022. (DX 288, April 6, 2018 Investment Committee Proposal, at 5.) It’s now 2023, and the New Bridge is not scheduled to open until January 2026. (DX 172, Construction Contract, at 8.) DIF has been highly successful in executing a clear strategy that it had before it ever purchased the BEX Bridge – tie up the work of government in negotiation, and rake in the (millions of dollars) rewards of delay. So much for Director Cooper’s “bad faith” and DIF’s “investment backed expectations.” (Compl., Doc. 002 at ¶ 119.)

c. BCBC cannot demonstrate that Director Cooper acted in “bad faith” in negotiating with BCBC/DIF, because the New Bridge has wide support.

Additionally, as a centerpiece of DIF/BCBC’s nebulous “bad faith” theory, DIF/BCBC tried to insinuate during the hearing and in its Complaint that Director Cooper has made a determination to the build the New Bridge without any support – in essence, that he has gone “rogue.” (*See* Opening Statement, Hr’g Trans., 33:5–23); (Compl., Doc. 002 at ¶¶ 5, 6, 64, 67–69, 91, 105, 109) (Repeatedly alleging that ALDOT had conducted no traffic studies to assess its New Bridge project). First, even if that were true (and it is not), DIF/BCBC still cannot explain how that would amount to a legal claim, given that the Director of ALDOT is vested with the authority to determine when and where roads should be constructed in Alabama. *See* Ala. Code §§ 23-1-21,

23-1-40(a). Second, DIF/BCBC's insinuation is factually false, and grossly mischaracterizes or simply ignores the overwhelming contrary evidence and significant support for the New Bridge. (*See, e.g.*, Testimony of William Adams, Hr'g Trans., 882:12–885:2) (Noting, for instance, that DIF/BCBC mischaracterized the same document used in DIF/BCBC's opening statement).

On November 15, 2018, for instance, ALDOT held public hearing and information meeting in Gulf Shores, Alabama to discuss and receive feedback from the public regarding ALDOT's plans to build the New Bridge. (DX 341, Nov. 15, 2018 Public Hearing Waterways Blvd. Connector.) That meeting revealed very significant public support for ALDOT's New Bridge project:

96 Comments Sheets Returned.	
<u>69</u> Returned at meeting	
<u>27</u> Received after meeting	
<i>Are you in favor of the project as presented?</i>	
YES <u>67</u>	NO <u>25</u>
<i>Do you think this project would be in the best overall public interest?</i>	
YES <u>71</u>	NO <u>17</u>

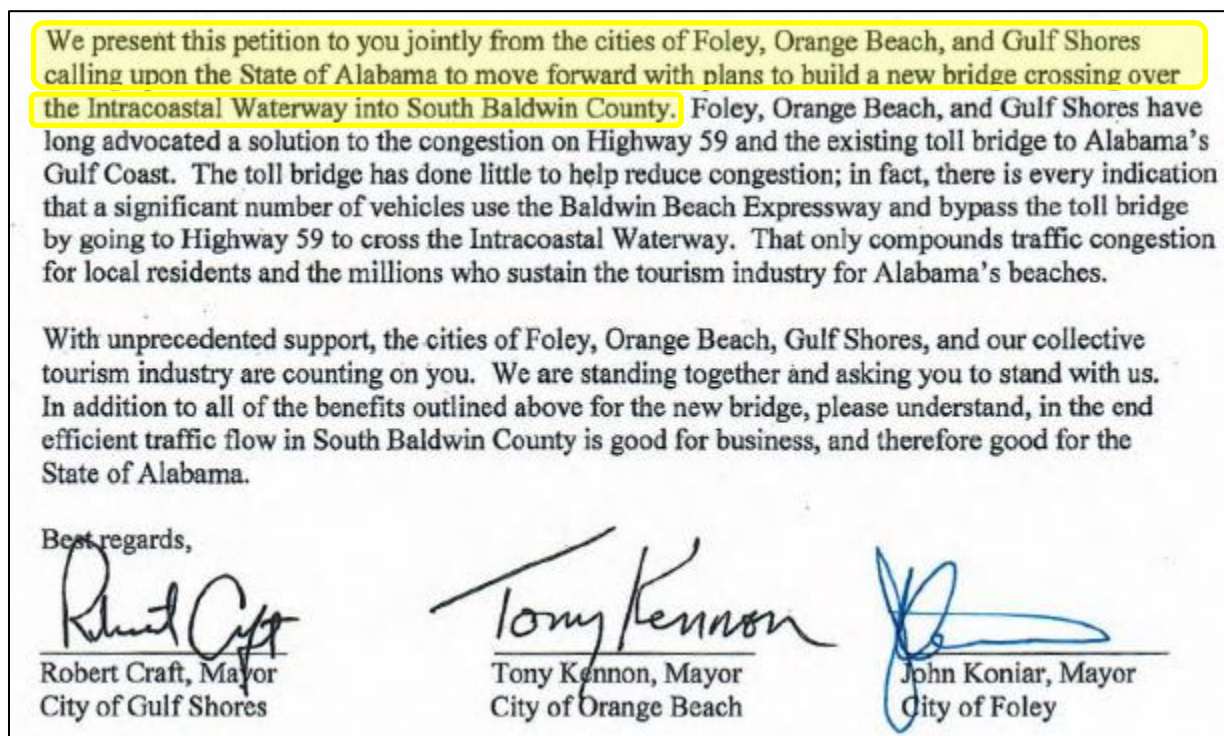
(*Id.* at ALDOT-023886). This ultimately led the Southwest Regional section of ALDOT to recommend proceeding with the New Bridge project:

<u>SECTION 4</u>
<u>RECOMMENDATION</u>
Based on the response of the Public Hearing, the SW Region of the Alabama Department of Transportation recommends proceeding with the roadway and bridge projects to connect Waterways Boulevard from the Foley Beach Express to the Canal Road (SR-180) across the intracoastal waterway.

(*Id.* at ALDOT-023887.)

Further, the Cities of Gulf Shores, Foley, and Orange Beach have all consistently echoed the need for additional lanes across the Intracoastal Waterway, and in September 2018 the mayors

of all three of those cities wrote a joint letter to Governor Ivey specifically supporting ALDOT's New Bridge project:



(DX 325, Sep. 25, 2018 letter to Gov. Ivey from Mayors, at 1) (highlighting added); (*see also* Testimony of Neal Belitsky, Hr'g Trans., 111:12–115:21.) In May 2018, the Mayors of Gulf Shores and Orange Beach jointly penned an op-ed in support of ALDOT's New Bridge project. (DX 291, May 16, 2018 Op-ed.)

Gulf Shores, for its part, vocally supports ALDOT's New Bridge project. In addition to the above-mentioned letter and op-ed, Gulf Shores has consistently and repeatedly supporting ALDOT building a New Bridge across the Intracoastal Waterway. (*See, e.g.*, Testimony of Blake Phelps, Hr'g Trans., 767:1–768:4) (discussing op-ed supporting New Bridge); (DX 577, Sep. 2, 2022 statement from Mayor Kraft); (Testimony of Blake Phelps, Hr'g Trans., 768:19–769:7) (Stating that he believes the New Bridge will provide greatest impact to Gulf Shores and Pleasure Island, and that he believes Gulf Shores Mayor Craft shares that opinion). Gulf Shores has identified the

New Bridge project as its #1 road priority. (DX 209, Oct. 14, 2019 Letter from Darrell Skipper to Mayor Craft, at 1); (DX 389, 2020 Gulf Shores Major Street Plan, ALDOT 29016); (Testimony of Blake Phelps, Hr’g Trans., 768:5–14) (Noting that New Bridge was key priority for Gulf Shores). Gulf Shores is actively working on supporting projects to improve the effectiveness of the New Bridge, such as improvements to Canal Road. (Testimony of Blake Phelps, Hr’g Trans., 743:2–745:11); (DX 209, Oct. 14, 2019 Letter from Darrell Skipper to Mayor Craft, at 2); (Testimony of Darrell Skipper, Hr’g Trans., 1288:17–1292:25) (Discussing Gulf Shores Canal Road project). And Gulf Shores actively opposed making a deal with BCBC that would grant BCBC long-term exclusivity over any new bridge construction over the Intracoastal Waterway. (Testimony of Blake Phelps, Hr’g Trans., 761:5–62:8; 762:18–763:9; 765:6–766:25.) As Blake Phelps testified:⁷

Q [Defense Counsel, Kaasha Griffin]. And what was one of the primary concerns or issues that the City had with the proposal that you received?

A [Gulf Shores Economic Development Coordinator, Blake Phelps]. The primary concern was a 50-year restriction on any new bridge, public non-tolled bridge, being built between I believe it was Highway 59 and Highway 161 and Orange Beach that would cross the Intracoastal Waterway.

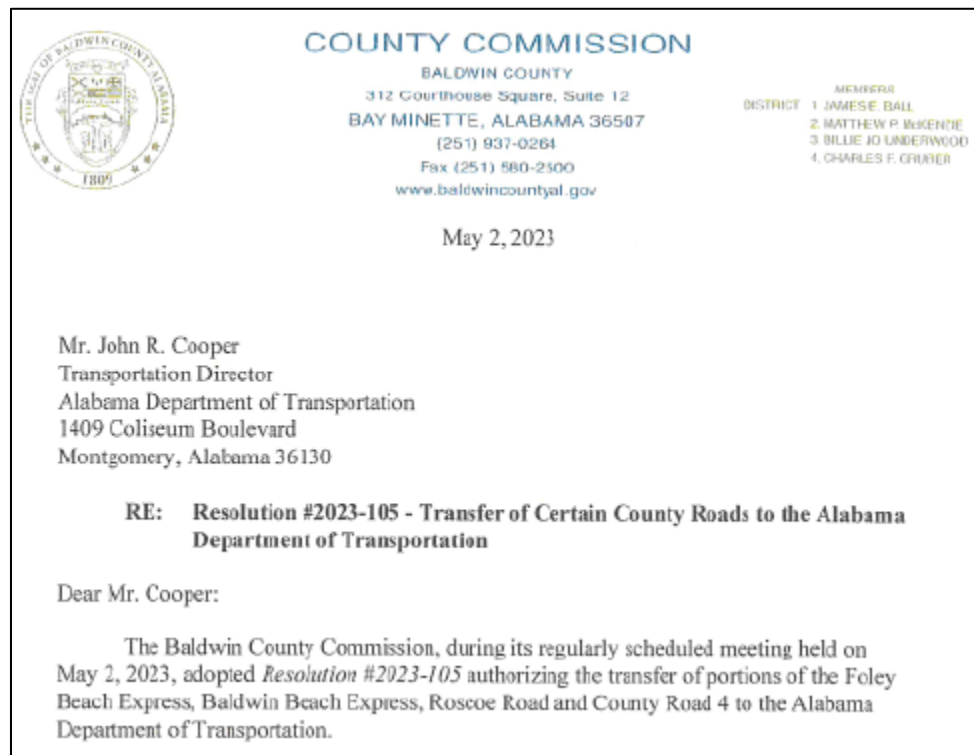
Q. Was this the bridge company's proposal?

A. Yes, it was.

(Testimony of Blake Phelps, Hr’g Trans., 766:7–16).

⁷ Mayor Craft was unable to testify during the preliminary injunction hearing due for health reasons. (Testimony of Blake Phelps, Hr’g Trans., 768:15–18) (“[U]nfortunately, Mayor Craft is in Birmingham undergoing radiation for a brain tumor that has been found; otherwise, I know that he would be here in person today.”). Blake Phelps, who is the 8-year Economic Development Coordinator for the City of Gulf Shores, and has been personally involved in discussions surrounding the New Bridge with Mayor Craft and others, instead testified as to his personal knowledge. (*Id.* at 736:11–738:5.)

And finally, just recently, the Baldwin County Commission has passed a resolution transferring the Baldwin County Express, Roscoe Road, and certain related roadways and maintenance to ALDOT in support of this project:



(DX 593, Baldwin County Commission Resolution and Cover Letter, at 1). This, in turn, will allow ALDOT to make necessary improvements to Roscoe Road to improve the flow of traffic between the Foley Beach Express and the New Bridge, (Testimony of Director Cooper, Hr’g Trans., 1829:17–1833:4) – a key criticism that BCBC leveled against the New Bridge project. (Testimony of Wade Henry, Hr’g Trans., 385:6–386:4.)

All told, the evidence is overwhelming: this is not merely Director Cooper’s “rogue” project, as DIF/BCBC attempts to portray it. This is a long term ALDOT project, with lots of

public support, with municipal and county support, and in which other local governments have and continue to invest time, money, and effort. It has also involved all the apparatus of ALDOT.⁸

d. BCBC cannot demonstrate that Director Cooper acted in “bad faith” in negotiating with BCBC/DIF, because all experts in this case agree that ALDOT’s New Bridge will alleviate traffic congestion on Highway 59.

DIF/BCBC also claimed repeatedly in its Complaint that ALDOT had “no studies” to support the need or effectiveness of the New Bridge. (Doc. 002 at ¶¶ 5, 6, 64, 67-69, 91, 105, 109) (Repeatedly alleging that ALDOT had conducted no traffic studies to assess its New Bridge project). Again, it’s unclear why this would matter legally. *See* Ala. Code §§ 23-1-21, 23-1-40(a). Nonetheless – in the face of numerous ALDOT and Gulf Shores traffic studies (to which ALDOT was often privy) and how much work has gone into the New Bridge – DIF/BCBC has notably abandoned this major position from its Complaint, and instead has shifted tack. At the preliminary injunction hearing, DIF/BCBC stopped claiming that ALDOT didn’t have studies, and instead seemed to argue that DIF/BCBC simply doesn’t like the ones ALDOT has.

Why this matters legally is again unclear, but it’s a red herring, regardless, because **all experts in this case agree that building the New Bridge will alleviate traffic congestion on Highway 59**. ALDOT’s expert traffic engineers, Richard Caudle and Darrell Skipper, agree with that. DIF/BCBC’s expert, Phil Bates, agrees with this. In fact, in a report comparing BCBC’s best possible proposals in the light most favorable to BCBC,⁹ Mr. Bates flatly concluded that “[t]he

⁸ Indeed, BCBC was upset that Director Cooper did not bring additional ALDOT employees to testify, demonstrating (contrary to BCBC’s insinuations) just how many ALDOT employees have touched the New Bridge project. (Testimony of Wade Henry, Hr’g Trans., 388:14–390:11); (Testimony of Director Cooper, Hr’g Trans., 1698:2–1704:9).

⁹ Mr. Bates’ report analyzed a proposal for BCBC to construct a new tolled bridge span, implement significant operational improvement, and aid the improvement of roadway networks south of the Intracoastal Waterway during peak hour conditions. (DX 31, Oct. 2021 Vivid Economics Report, at 3, second bullet point.)

proposed free bridge . . . could result in a similar SR-59 traffic relief to that achieved by the measures [proposed to be undertaken by BCBC]” (DX 031, Oct. 2021 Vivid Economics Report, at 3) (emphasis added). Mr. Bates re-affirmed this conclusion during his testimony. (Testimony of Phillip Bates, Hr’g Trans., 642:13–643:25). In fact, the guts of Mr. Bates’ report show that the New Bridge will be slightly **more** effective than the DIF/BCBC proposals at alleviating traffic congestion on Highway 59. (Cf. DX 31, Oct. 2021 Vivid Economics Report, at 7 *with id.* at 8.) In other words, DIF/BCBC’s **own expert** does not believe that DIF/BCBC’s proposal is more effective than ALDOT’s New Bridge.

ALDOT’s traffic engineering experts, who produced several traffic reports for ALDOT and Gulf Shores between 2017 and 2022 related to the New Bridge project, have also consistently concluded that ALDOT’s New Bridge will effectively help relieve traffic congestion on Highway 59. (*See* DX 18; DX 19; DX 20; DX 22; DX 54; DX 90; DX 98; DX 109; DX 204; DX 208; DX 229; DX 389) (Studies conducted by Skipper Consulting for ALDOT and the City of Gulf Shores related to the New Bridge project). Both Richard Caudle and Darrell Skipper re-affirmed during their testimony at the preliminary injunction hearing that, in their professional engineering opinions, the New Bridge would be effective at relieving traffic congestion on Highway 59. (Testimony of Darrell Skipper, Hr’g, Trans., 1272:23–1273:6; 1307:24–1308:3); (Testimony of Richard Caudle, Hr’g, Trans., 961:25–962:5; 975:1–7; 1240:12–17). In fact, Darrell Skipper concluded that the New Bridge project was the most important road project for Pleasure Island:

Q [Defense counsel, Michael Taunton]. And you state that the findings of these studies [*i.e.*, prior studies by Darrell Skipper and Richard Caudle] indicate **the most important roadway project for the City of Gulf Shores and the Alabama Gulf Coast** is the proposed . . . [New Bridge]?

...

A. Yes, sir, I did.

...

Q. Do you still agree with that opinion?

A. Yes, I do.

(Testimony of Darrell Skipper, Hr’g, Trans., 1279:18–1280:13) (emphasis added).

As such, while there is some difference in the fine details, there is no difference in expert opinion on the major point: ALDOT’s New Bridge will accomplish the goal for which it is being built, relief of traffic congestion on Highway 59.

e. BCBC cannot demonstrate that Director Cooper acted in “bad faith” in negotiating with BCBC/DIF, because DIF/BCBC had no right to negotiate with Director Cooper and no right to a particular outcome in those negotiations.

Finally, despite the fact that DIF/BCBC has endlessly directed this Court to the course of negotiations between ALDOT and BCBC, DIF/BCBC cannot prove its vague “bad faith” claim here, either. **First, DIF/BCBC had no legal right to enter into negotiations with ALDOT in the first place.** That simple fact of law should be dispositive here. DIF/BCBC certainly wasn’t injured by the fact that the negotiations occurred; far from it, DIF/BCBC has benefited from the delay in the New Bridge project occasioned by the lengthy negotiations with ALDOT to the tune of millions of dollars in tolls. (*See, e.g.*, DX 288 April 6, 2018 Investment Committee Proposal, at 33.)

Second, though, DIF/BCBC had no right to a particular outcome in its negotiations with ALDOT. In fact, even setting aside for a moment the myriad of other legal problems with DIF/BCBC’s Complaint, that one legal fact remains a key problem with DIF/BCBC’s entire case. What, precisely, does BCBC believe it is entitled to? Seemingly, DIF/BCBC would ask this Court to **force** Director Cooper to accept one of its proposals. Which proposal, exactly, is unclear, but the absurdity of forcing the Director of the Alabama Department of Transportation – the public official vested with “[a]ll the powers, authority, and duties vested in the State Department of

Transportation,” Ala. Code § 23-1-21, by the People of the State of Alabama acting through their elected Legislature – makes the question irrelevant.

Despite the fact that he had no obligation to negotiate with DIF/BCBC, though, Director Cooper did so. He wanted to reach a deal with DIF/BCBC:

Q [Defense Counsel, Dorman Walker]. Let's be clear about something. Did you want to reach an agreement with the bridge company that avoided the necessity for the state building the new bridge?

A [Director Cooper]. I did.

Q. And has that been your goal throughout all your conversations with the bridge company from 2011 to 2022?

A. Yes, sir. It is my goal, was my goal. I would not have spent 11 years of my time and the State's effort if that had not been my goal.

(Testimony of Director Cooper, Hr’g, Trans., 1519:20–1520:5); (*See also id.* at 1594:18–25) (“Q. Was it your goal during that period [2019-August 2022] . . . to reach an agreement with BCBC that would forestall the need of ALDOT to build a new bridge? A. It was.”). Other parties involved in those negotiations knew that that was Director Cooper’s desire. (Testimony of Blake Phelps, Hr’g, Trans., 756:2–11; 762:9–17; 764:11–765:5) (Noting that Director Cooper actively pursued a deal with DIF/BCBC). And despite the fact that DIF/BCBC had clear incentives to delay the New Bridge project, Director Cooper nonetheless negotiated with DIF/BCBC for years in an effort to find a workable arrangement with DIF/BCBC:

[Director Cooper’s] purpose [in continual negotiations with DIF/BCBC], based on what he told us [officials with the City of Gulf Shores], was he felt an obligation to explore all options that might solve the issues on Highway 59 and try to make the best decision that was in the best interest of solving that problem but also in the best interest of the State.

(Testimony of Blake Phelps, Hr’g, Trans., 764:14–19.)

Indeed, Director Cooper and ALDOT pulled the scheduled letting of the contract for the construction of the New Bridge not once, but twice – and delayed the project far more times than that – all for the sole purpose of continuing negotiations with DIF/BCBC. (Testimony of Wade Henry, Hr’g, Trans., 372:8–13). The first time the New Bridge was pulled from accepting public bids was in June 2019. ALDOT intended to accept bids on the New Bridge project beginning on June 28, 2019, which BCBC knew. (Testimony of Paul Huebener, Hr’g, Trans., 170:22–171:4.) The project was not let at DIF/BCBC’s urging, though, so that ALDOT and BCBC could continue negotiations. Additionally, after negotiations between ALDOT and DIF/BCBC reached an impasse in early 2021, ALDOT scheduled the New Bridge for letting in July 2021. (*See* Testimony of Darrell Skipper, Hr’g, Trans., 1305:21–1306:24); (Testimony of Director Cooper, Hr’g, Trans., 1614:21–1617:8.) DIF/BCBC then hired national lobbyists to petition the Governor’s Office to halt the letting so that DIF/BCBC could present additional proposals. (*Id.*) At DIF/BCBC’s urging, Director Cooper and ALDOT did so, to give DIF/BCBC one more chance to present a proposal that was acceptable. (*Id.*). Originally, ALDOT still intended to let the New Bridge project in November 2021, but felt that negotiations with DIF/BCBC had been fruitful enough between July and November that ALDOT again delayed the letting in order to continue negotiations. (Testimony of Director Cooper, Hr’g, Trans., 1627:3–8.)

This is simple, clear, objective evidence that Director Cooper was negotiating in good faith to reach a deal with BCBC. As noted above, Director Cooper, ALDOT, and the People of the State of Alabama gained precisely nothing from these delays in order to negotiate with DIF/BCBC beyond headaches and higher costs of materials and labor. (Testimony of Director Cooper, Hr’g, Trans., 1638:8–1639:17); (Testimony of Mack Roberts, Hr’g, Trans., 466:23–467:18). The only incentive Director Cooper or ALDOT had to delay the letting of the New Bridge contract was their

hope that a deal might ultimately be reached with DIF/BCBC. (Testimony of Director Cooper, Hr’g, Trans., 1594:18–25.) DIF, on the other hand, had significant incentive to delay the letting of the New Bridge project. (*See* DX 288, April 6, 2018 Investment Committee Proposal, at 5, 33.)

Ultimately, in spite of Director Cooper’s efforts to find a satisfactory arrangement with DIF/BCBC, no accord could be reached.

. . . I believed the [final] offer from BCBC – which they reduced not to an agreement, but a term sheet, and which was very inadequate in its terms – indicated to me that after 11 years of negotiation and after more than a year of negotiation, after the Squire Patton Boggs meeting, **we just remained too far apart to ever agree.**

(Testimony of Director Cooper, Hr’g Trans., 1638:14–21) (emphasis added). The devil, as it were, is in the details, and after years of negotiating, the Parties simply couldn’t bridge the gap in their positions. That isn’t bad faith, it’s business. Every day negotiations are undertaken that never result in a deal. DIF/BCBC’s apparent contrary claim lacks any basis in law.

DIF/BCBC’s position also papers over the fine print of its own offers. While most of DIF/BCBC’s offers undoubtedly had some high points and beneficial provisions for ALDOT and the People of the State of Alabama, DIF/BCBC was also resistant to Director Cooper’s efforts to include effective, measurable accountability provisions that would ensure that the BEX Bridge was carrying an effective amount of total traffic across the Intracoastal Waterway; and DIF/BCBC almost continually demanded lengthy time period – frequently 50 years – during which DIF/BCBC would have exclusive control over any new bridges being built across the Intracoastal Waterway. In fact, despite knowing that effective accountability provisions were a key term for ALDOT, and that exclusivity was a major sticking point for ALDOT, BCBC’s final proposal to Director Cooper: (a) did not include **any** accountability provisions; and (b) included a **perpetual** exclusivity provision:

Q [Defense Counsel, Dorman Walker]. And does -- instead of responding in the affirmative or not to the proposal from ALDOT, did BCBC make its own counteroffer?

A [Director Cooper]. I guess that's what you would call this, a counteroffer.

Q. Well, they termed it a traffic management term sheet?

A. Yes.

Q. And did it have essential terms that they said they would -- they would want to see in any agreement?

A. It had the terms they said they would want to see. And it said to us if we could not agree to those terms, there was no point in us talking further.

...

Q. Okay. Now, they've acknowledged in two letters that traffic capture was an essential provision from ALDOT, we saw. What was their traffic capture provision in this final offer that they gave to ALDOT?

A. They had none.

Q. And turn to the next page. Did they also have a competing bridge provision in there?

A. Yes.

Q. And that would -- it allowed them to terminate the agreement and require ALDOT to pay penalties if a competing bridge were built?

A. Yes.

(Testimony of Director Cooper, Hr'g, Trans., 1634:9–23; 1637:16–1638:2); (*see also* DX 479,

August 2022 BCBC Term Sheet Proposal).

Director Cooper and ALDOT weren't the only ones who believed that making a deal with DIF/BCBC that included terms like this was inadvisable:

Q [Defense Counsel, Kaasha Griffin]. And what was one of the primary concerns or issues that the City had with the [DIF/BCBC] proposal that you received?

A [Gulf Shores Economic Development Coordinator, Blake Phelps]. The primary concern was a 50-year restriction on any new bridge, public non-tolled bridge,

being built between I believe it was Highway 59 and Highway 161 and Orange Beach that would cross the Intracoastal Waterway.

Q. Was this the bridge company's proposal?

A. Yes, it was.

Q. And you just testified to what was in the proposal, but what was lacking from the proposal that the City felt was a necessary term?

A. There were no required capture targets and accountability for capturing a specific amount of traffic.

Q. And was it your understanding that was a term that was required by ALDOT?

A. Yes.

(Testimony of Blake Phelps, Hr'g, Trans., 766:7–25.)

DIF/BCBC simply ignores these clear “poison pill” terms, though, and asks this Court, on a made up claim, to substitute its judgment for that of the Director. Director Cooper was not required to simply accept the terms that DIF/BCBC thought best, though – and given the fine print, he was right not to. That’s not “bad faith” – that’s both his prerogative and his duty.

III. BCBC Has Failed to Demonstrate that the Harm It Would Suffer Without a Preliminary Injunction Outweighs the Injury to ALDOT if an Injunction is Issued. Because It is Not Currently Suffering Injury and an Injunction Would Stop ALDOT Construction Crews in Their Tracks, BCBC Cannot Do So.

As to the balance of hardships requirement for the issuance of a preliminary injunction, the Court must engage in a balancing test to ensure that the hardship imposed on the enjoined defendant does not unreasonably outweigh the benefit to the plaintiff. As explained by the Alabama Supreme Court, the trial court should “consider and weigh the relative hardships that each party may suffer against the benefits that may flow from the grant of the preliminary injunction.” *Plantation Manor, Inc. v. Lee*, 647 So.2d 728, 730 (Ala. 1994). Furthermore, the

purpose of preliminary injunctive relief is to maintain the status quo pending the resolution of the action on its merits. *Irwin v. Jefferson Cnty. Pers. Bd.*, 263 So. 3d 698, 702–03 (Ala. 2018).

When purchasing the toll bridge, DIF was fully aware that a competing bridge would probably be built. (Testimony of Paul Huebener, Hr’g, Trans., 197:1–4); (Testimony of William Adams, Hr’g, Trans., 847:22–25) (Testifying that Director Cooper told DIF representatives, “do not buy this bridge [BEX Bridge] thinking that I’m not going to build that one [New Bridge]. You need to go into this agreement with your eyes wide open.”). Indeed, DIF presumed that the New Bridge would be built as part of its base investment case. (DX 288 April 6, 2018 Investment Committee Proposal, at 5.)

BCBC’s ownership also testified openly that they took the potential construction of a state-owned bridge into account when they purchased BCBC. (Testimony of Paul Huebener, Hr’g Trans., 193:22–200:11.) DIF’s traffic consultant Phil Bates, who was then with Buro Happold, examined the purchase of the BEX Bridge for DIF as part of DIF’s due diligence, and the construction of the New Bridge was a key factor in his analysis. (Testimony of Phil Bates, Hr’g Trans., 618:24–621:19); (DX 26, Mar. 6, 2018 Buro Happold Report, at 21). DIF knew that there would be a reduction in traffic due to the building of the New Bridge. (Testimony of Paul Huebener, Hr’g. Trans., 199:15–18); (DX 26, Mar. 6, 2018 Buro Happold Report, at 89) (evaluating what would happen to BEX Bridge traffic and revenue if New Bridge opened). And DIF never had a guarantee with ALDOT that ALDOT would not build a New Bridge. (Testimony of Paul Huebener, Hr’g Trans., 197:1–4.) In fact, DIF also met with Director Cooper in 2018 prior to purchasing the BEX Bridge, and Director Cooper told DIF that he intended to build a New Bridge. (Testimony of William Adams Hr’g Trans., 845:16–847:25); (Testimony of Director Cooper, Hr’g Trans., 1583:6–19; 1586:22–1587:22.) As such, DIF purchased the BEX Bridge with

its eyes wide open. The fact that the New Bridge is merely the fulfillment of an expectation that BCBC's owners had when they purchased the BEX Bridge, (*see, e.g.*, DX 288, April 6, 2018 Investment Committee Proposal, at 5), not a true and unexpected hardship. Quite the contrary, DIF has actually succeeded in delaying the construction of the New Bridge for (in all likelihood) three years longer than DIF originally anticipated. (*Cf. id.* at 33 *with* DX 172, Construction Contract, at 8); (*see also* Testimony of Director Cooper, Hr'g Trans., 1653:5–1654:8).

Further, when balancing the relative hardships that the parties would endure if a preliminary injunction were entered, the Court should consider that BCBC is not currently being harmed at all. DIF and BCBC's alleged expected harm is based on the operation of a New Bridge across the Intracoastal Waterway, not its construction. Thus, if this Court does not enter an injunction, BCBC will continue to suffer no alleged harm until the New Bridge opens – currently projected to be January 1, 2026. (DX 172, Construction Contract, at 8) (“[Scott Bridge] agrees to complete the entire project by January 1, 2026.”) As such, at this stage, BCBC cannot show any harm or hardship that should be placed on its side of the scale.

By contrast, engineers and bulldozers working on behalf of ALDOT and the people of Alabama would be literally stopped in their tracks were the Court to issue an injunction. (Testimony of Matthew Leverette, Hr'g, Trans., 1378:4–1384:19); (Testimony of Director Cooper, Hr'g, Trans., 1826:12–1827:6). Traffic on Highway 59 would continue to worsen, to the detriment of the People of the State of Alabama. (Testimony of Director Cooper, Hr'g Trans., 1639:9–17.) And the potential injunction would also frustrate Director Cooper's duty and responsibility of locating, constructing, and maintaining highways, and would continue to do nothing to alleviate the massive congestion on Highway 59. *See Pruett*, 74 So. 2d at 810. Issuing BCBC's requested preliminary injunction would eviscerate the legislated responsibilities of Director Cooper to

determine where roads and bridges will be built in the State of Alabama. To enjoin Director Cooper would be to stop the government from operating. The harm to the State (and its citizens) vastly outweighs that of BCBC, whose negotiation delay tactics have already cost taxpayer money in rising labor and material costs.

These factors demonstrate that the balance of hardships simply do not weigh in favor of granting BCBC the extraordinary relief sought. The Court is duty bound to “balance the **probable resulting damages** to the respective parties” when considering whether to issue a preliminary injunction. *Blue Ridge Sand & Gravel, Inc.*, 718 So. 2d at 32 (citing *Woodstock Operating Corp. v. Quinn*, 79 So. 253, 254 (Ala. 1918); *Martin*, 559 So.2d at 1079 (emphasis added)). The Alabama Supreme Court has disclaimed this exact type of intrusion on ALDOT’s authority to manage the State’s highways based on asserted lost profits.

In *Blue Ridge Sand & Gravel, Inc.*, 718 So. 2d at 32, the Alabama Supreme Court dissolved an injunction issued against ALDOT based on a gravel supply company’s claim that ALDOT’s implementation of certain specifications would result in lost profits “from selling chert to highway contractors for use in the construction of state roads and bridges.” *Id.* The Alabama Supreme Court weighed that asserted harm against that asserted by ALDOT, which would have required ALDOT to accept for highway and bridge construction “a material that it has determined causes premature failure.” *Id.* The court stated that the injunction “**may result in excessive costs in the repair or replacement of defective roads and bridges and in the loss of federal highway money. Balancing the hardship the injunction imposes on the Department against the injury to the plaintiffs if the injunction is denied, we conclude that the balance of equities favors the defendants [ALDOT].**” 718 So.2d at 32-33 (emphasis added).

Similarly, the hardship to ALDOT outweighs the potential benefit to BCBC here. As explained by Director Cooper, the potential for BCBC to experience a future loss in profits due to reduced toll revenue from the competing New Bridge in 2026 does not outweigh the detriment to the people of the State of Alabama from enjoining the construction of the New Bridge.

CONCLUSION

Sometimes, when discussing preliminary injunctions, “public interest” or “public policy” is mentioned as a final factor to be considered in the context of “balancing of the equities.” This is often a nebulous and unknown factor – but not in this case. Set aside for a minute all of the clear facts, evidence, and law supporting the New Bridge and assuming *arguendo* that the issue BCBC seeks to create was truly ambiguous. In other words, what would happen if it really *was* unclear whether the New Bridge would help alleviate traffic congestion on Highway 59 (it isn’t), or that it was difficult to determine whether ALDOT’s New Bridge or one of BCBC’s proposals (which one?) would be more effective? Even in that “grey world” scenario – the scenario that BCBC tries so hard to convince this Court is reality – “public policy” is absolutely clear.

In fact, it would just demonstrate precisely why decisions of this nature are left to the discretion of the Director of the Alabama Department of Transportation, with all his “powers and authority.” Ala. Code § 23-1-21. In truth, BCBC simply wants this Court to disagree with the Director’s policy judgment, and issue an injunction on that basis. But that policy judgment has already been exercised by the People of the State of Alabama through their legislators. And the Alabama Legislature has vested the Executive Branch – in this case, Director Cooper – with authority, as a matter of his policy judgment, to weigh and determine “close calls” like the scenario BCBC tries to create.

That is not the basis for an injunction. If disagreeing with the Director’s policy judgment

were a basis for a legal claim against the Director, any roadway project in this State could be tied up for a couple hundred bucks and the cost of filing a Complaint. In fact, DIF/BCBC is threatening other government actors (*i.e.*, the Baldwin County Commission) with just that eventuality. (DX 594, May 1, 2023 Letter of Peter Tomlinson to Baldwin County Commission.)

This isn't actually a "close call," though. Director Cooper moved forward with the New Bridge Project because he spent:

- **11 years;**
- Negotiating with **2 different companies;**
- Enduring **1 lawsuit (now 2);**
- Having countless meetings; and
- Evaluating countless proposals.

Only to receive **nothing**. (Testimony of Director Cooper, Hr'g Trans., 1638:8–1639:17); (Testimony of Mack Roberts, Hr'g Trans., 466:23–467:18). Director Cooper decided it that 11 years was enough time wasted trying to reach an agreement. (Testimony of Director Cooper, Hr'g, Trans., 1519:20–1520:5.) And he decided, in his policy judgment, to move forward. That's his responsibility, and this Court should respect the separation of those powers and deny BCBC's Motion for Preliminary Injunction.

In conclusion, BCBC has not met its burden of demonstrating its entitlement to a preliminary injunction. BCBC has not demonstrated a substantial likelihood of success on the merits of its (non-existent) legal claim (nor, logically, can it do so). BCBC has not shown that it will suffer irreparable injury for which it has no other potential legal remedy for damages, as quite obviously BCBC is bringing a regulatory takings claim for compensation against the State of Alabama for the alleged lost toll revenues BCBC alleges it will experience due to the construction

of the New Bridge. Based on governing precedent, the balance of hardships weighs conclusively in Director Cooper's favor, as private claims for pecuniary harms do not outweigh Director Cooper (and ALDOT's) authority to direct transportation policy for the people of the State of Alabama. And finally, BCBC has failed to show that it will suffer imminent injury through the construction of the New Bridge, as the New Bridge was a fully anticipated eventuality when BCBC's current owners purchased BCBC.

Therefore, based on the foregoing argument and authority, Director Cooper requests that this Court deny BCBC's motion for a preliminary injunction.

Respectfully submitted this 15th day of May, 2023.

s/ James A. Bradford

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the Alafile system and service will be perfected upon the following Alafile participant(s) electronically on this the 15th day of May, 2023:

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