

No. SC-2023-0354

IN THE SUPREME COURT OF ALABAMA

JOHN R. COOPER, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE ALABAMA DEPARTMENT OF
TRANSPORTATION,

Appellant,

v.

THE BALDWIN COUNTY BRIDGE COMPANY, LLC,

Appellee.

ON APPEAL FROM
THE CIRCUIT COURT OF MONTGOMERY COUNTY
CIVIL ACTION NO. 03-CV-2022-901306.00

REPLY BRIEF IN SUPPORT OF THE APPELLANT

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STATEMENT OF JURISDICTION

On June 8, 2023, this Court ordered that “Appellant’s reply brief shall be due not later than seven (7) days after the filing of Appellee’s brief.” This brief is timely because Appellee BCBC amended its brief on July 7, 2023 by filing an amended certificate of service. Under this Court’s June 8, 2023 order, Appellant Cooper’s reply brief was due seven days later on July 14, 2023. Undersigned counsel verified with the clerk’s office that Appellant Cooper’s reply brief is due on July 14, 2023, the date on which this brief is filed.

This Court has jurisdiction to consider the arguments raised by Director Cooper on appeal because:

- Sovereign immunity and ripeness each implicate this Court’s subject-matter jurisdiction, *Ala. Dept. of Corrections v. Montgomery Cty. Comm’n*, 11 So. 3d 189, 193 (Ala. 2008) (“A trial court lacks subject-matter jurisdiction if the defendant is immune under the doctrine of sovereign immunity.”); *Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So. 2d 557, 562 (Ala. 2005) (“Ripeness implicates subject-matter jurisdiction.”), and “subject-matter jurisdiction may be raised at any time by any party....” *Campbell v. Taylor*, 159 So. 3d 4, 11 (Ala. 2014).¹

¹ BCBC cites *Beatty v. Carmichael*, 293 So. 3d 874 (Ala. 2019) arguing that Director Cooper’s challenges to subject-matter jurisdiction are not properly before this Court. *Beatty* concerns the waiver of a right to appeal due to failure to timely appeal. *Id.* at 876–77. It is undisputed, however, that Director Cooper timely appealed. (C.3216.) *Beatty* is not on point.

- All arguments made in Director Cooper’s Opening Brief to this Court were identified in Director Cooper’s notices of appeal and docketing statements. (C.3216–3228;3272–3285.)
- The arguments made by Director Cooper on appeal were also made in opposition to BCBC’s motion for preliminary injunction. (C.2847,2851,2868–69.) Director Cooper has appealed from the trial court’s order granting a preliminary injunction. (C.3216;3272.)
- The trial court’s order granting BCBC a preliminary injunction also denied “all other pending motions” (*e.g.*, post-hearing motions concerning sovereign immunity, failure to state/prove a claim, collateral estoppel, etc.) (C.3215), and thus an appeal from the trial court’s preliminary injunction order was also an appeal from the trial court’s denial of Director Cooper’s motions to dismiss.

REPLY

- **Sovereign Immunity:** The “sixth exception” to sovereign immunity for bad faith does not apply because Judge Pool’s injunction directly affects a contract of the State. *See infra* Arg. I.
- ***Ingle v. Adkins:*** *Ingle* concerns a substantively illegal contract that could not create a valid contract right of the State, not a construction contract. *See infra* Arg. I.A.2.
- **No Recognized Claim:** “[W]e reject the Slades’ argument that... the tort of bad faith provides a cause of action that is separate and independent of an insurance contract.” *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 318 (Ala. 1999). *See infra* Arg. I.B.
- **Invalid Injunction:** Judge Pool’s injunction fails because of sovereign immunity, BCBC’s claim is unrecognized, separation of powers, and collateral estoppel, among others. *See infra* Args. I-III.
- **Inverse Condemnation:** There is no ripe or valid inverse condemnation claim because there is no regulation and no taking of any right from BCBC, either immediately or ever. *See infra* Arg. IV.

ARGUMENT

I. Sovereign Immunity Bars BCBC’s “Bad Faith” Claim And A Stand-Alone Bad Faith Claim Is Not Legally Recognized.

A. Alabama Constitution § 14 Bars BCBC’s claim for “Bad Faith.”

The preliminary injunction must be reversed because it directly affects the State’s contractual rights for construction of the New Bridge. In *Ex parte Moulton*, this Court held that the “sixth ‘exception’ to the bar of State immunity under [Ala. Const.] § 14... [is] subject to the limitation that the action not be, in effect, one against the State.” *Id.*, 116 So. 3d 1119, 1141 (Ala. 2013). “[A]n action *is* one against the State when a favorable result for the plaintiff would directly affect a *contract* or property *right* of the State....” *Id.*, 1132 (cleaned up).

Judge Pool’s preliminary injunction order “directly affect[s] a *contract* or property *right* of the State....” 116 So. 3d at 1132. The trial court’s order enjoins “constructing the Cooper Bridge,” (C.3215)—a direct prohibition on the performance of the contract between Scott Bridge Company, Inc. and the State of Alabama:

Construction Contract for New Bridge

IN WITNESS WHEREOF, THE STATE OF ALABAMA has caused these presence to be executed by JOHN R. COOPER, TRANSPORTATION DIRECTOR and SCOTT BRIDGE COMPANY, INC., THE CONTRACTOR, has hereto sat his hand and seal this day and year above written.

STATE OF ALABAMA,

THIS CONTRACT HAS BEEN LEGALLY REVIEWED AND APPROVED AS TO FORM AND CONTENT.

By/For: William F. Patty
WILLIAM F. PATTY
Chief Counsel, Transportation Department

BY: John R. Cooper
JOHN R. COOPER, Director
Transportation Department

CONTRACTOR,
(X) Scott Bridge Company, Inc.
CONTRACTOR FIRM
(X) 5065
AL. CONTRACTOR'S LICENSE NUMBER

Signed, sealed and delivered in the presence of

(X) Cesler
WITNESS

Carol Hart
PRINT NAME

BY (X) Michael Terrel
MEMBER OF FIRM

Michael Terrel
PRINT NAME

Sr. Vice President
TITLE

The within and foregoing contract is hereby approved on this the 14th day of October, 2022

Kay Ivey
KAYVEY
GOVERNOR OF ALABAMA

(Cooper-Br.,34-35.) Alabama Const. § 14 thus bars the trial court's injunction.

BCBC does not contest that the trial court has enjoined performance of a State contract; and BCBC entirely ignores this Court's holding in *Ex parte Moulton*. Instead—When BCBC addresses sovereign

immunity at all, (BCBC-Br.,51–54)—it doubles-down on the (in this context, irrelevant) “sixth exception” to sovereign immunity and cites two inapposite cases.

1. Alabama Constitution § 23’s inverse-condemnation exception to Alabama Constitution § 14 immunity is not applicable to BCBC’s claim for injunctive relief.

First, BCBC cites the non-binding, three-judge plurality opinion in *Ex parte Ala. Dep’t of Transp.*, 143 So. 3d 730 (Ala. 2013) (plurality), for the unremarkable proposition that “[a] valid inverse-condemnation action is a clear exception” to Ala. Const. § 14. *Id.* at 739. (BCBC-Br.,51–52.) While Director agrees with that statement, (C.2855), that has no relevance here because BCBC’s “bad faith” claim for injunctive relief relies on the “sixth exception,” not on the inverse-condemnation “fifth exception.” *See Ex parte Moulton*, 116 So. 3d at 1131 (listing exceptions).

BCBC does not seek injunctive relief as part of its inverse condemnation claim. (C.35–36) (“COUNT TWO INVERSE CONDEMNATION,” seeking “compensatory damages” but not injunctive relief). And at the preliminary injunction hearing, BCBC stated it was not seeking an injunction based on its inverse condemnation claim. (R.52) (“MR. ESPY [counsel for BCBC]: Judge this [preliminary injunction]

hearing is about bad faith. This has nothing to do with inverse condemnation. We're not here to talk about inverse condemnation.... There's no issue before the Court in this hearing about inverse condemnation.”). *Ex parte ALDOT's* discussion of inverse-condemnation claims simply does not apply to the injunction in this case.²

2. *Ingle v. Adkins* is inapplicable.

Second, BCBC directs this Court to the non-binding, plurality opinion of *Ingle v. Adkins*, 256 So. 3d 62 (Ala. 2017) (plurality), to argue that the State of Alabama's contract with Scott Bridge is not the *type* of contract that is protected by Ala. Const. § 14. (BCBC-Br.,52–53.)

Unlike the construction contract at issue here, Plaintiff claimed that the superintendent was “an elected officer whose duties, term and conditions of employment are prescribed by statute.... Because Adkins' employment, including its terms and conditions, was completely provided for by state law,... the purported contract is a void document, and

² Additionally, this Court has stated that only “*valid*” inverse-condemnation actions are “exceptions” to sovereign immunity. *See, e.g., Ex parte ALDOT*, 143 So. 3d at 735 (emphasis in original) (cleaned up). BCBC has not stated a “*valid*” inverse-condemnation claim, and thus BCBC's inverse-condemnation claims is also barred by sovereign immunity. *See infra* Arg. IV.

useless.” Brief of Appellant, *Ingle v. Adkins*, 256 So. 3d 62 (Ala. 2007) (No. 1160671) 2017 WL 4569283, *22.³ See also *Ingle*, 256 So. 3d at 64 (Noting that Plaintiff claimed the alleged “contract” between the Board of Education and its superintendent was “unconstitutional, illegal, and void.”).⁴

A contract whose subject-matter is illegal is beyond the power of the State, and does not vest in the State a valid “contract right” protected by Alabama Constitution § 14. Brief of Appellant, *Ingle*, 2017 WL 4569283 at *21 (arguing the same).⁵ By contrast, the State’s construction contract for the New Bridge is not substantively illegal. The ALDOT Director and the State of Alabama plainly have the power to enter a construction contract for a bridge. See Ala. Code §§ 23-1-21, 23-1-40(a).⁶

³ See *Kennedy v. Boles Invs., Inc.*, 53 So. 3d 60, 66 n.2 (Ala. 2010) (“[T]his Court may take judicial notice of its own records in another proceeding...”); *Tolbert v. Tolbert*, 903 So. 2d 103, 112–13 (Ala. 2004) (using the record in prior cases to shed light on precedents).

⁴ See *State v. Epic Tech, LLC*, No. 1200798, 2022 WL 4588777, *14 (Ala. Sept. 30, 2022) (enjoining illegal gambling operations where State showed that the operations constituted a legal nuisance, unlike ALDOT’s building of a bridge).

⁵ See *supra* n.3.

⁶ Moreover, the appellees in *Ingle* did not argue that the appellant’s claims affected a state contract and were thus barred by Ala. Const. § 14.

Cooper v. Ziegler, 193 So. 3d 722 (Ala. 2015), is more instructive. There, the Zieglers sought an injunction against Director Cooper under the “sixth exception.” *Id.* at 729. This Court, however, concluded: “the [plaintiffs’] claim for injunctive relief, although purportedly asserted against Cooper in his official capacity, **is in actuality an indirect claim against ALDOT insofar as the claim impermissibly strips ALDOT of its property rights under the easement....**” 193 So. 3d at 733 (emphasis added). “Accordingly,” this Court held, “the [plaintiffs’] claim for injunctive relief against Cooper in his official capacity is due to be **dismissed on the ground of sovereign immunity.**” *Id.* at 733 (emphasis added). The same is true here.

BCBC contends that Director Cooper’s “argument would gut the sixth exception,” (BCBC-Br.,53), but it is BCBC’s interpretation of that exception which would swallow the Ala. Const. § 14 rule. If a State construction contract is not the type of “*contract or property right of the State,*” 116 So. 3d at 1132, that is entitled to Ala. Const. § 14 immunity, no State contract is safe. There is no claim in this case that Governor Ivey

See generally Brief of Appellee, *Ingle*, 2017 WL 4569283 (failing to raise argument that claims were “against the State”). *See supra* n.3.

acted in bad faith when she signed the contract with Scott Bridge on behalf of the State. A bridge construction contract is not substantively illegal. Ala. Code §§ 23-1-21, 23-1-40(a). And if a contractor commits a tort during the performance of a legal contract, the contractor is subject to suit for the harm. *See, e.g., McFadden v. Ten-T Corp.*, 529 So. 2d 192, 200 (Ala. 1988) (holding plaintiff could sue ALDOT contractor for negligence in performing work widening and resurfacing a road).⁷

Based on this Court's settled precedents, sovereign immunity bars BCBC's "bad faith" claim, requires the preliminary injunction to be dissolved, and the case to be dismissed.

B. BCBC's "Bad Faith" Claim Fails as a Matter of Law.

1. Alabama law does not recognize a standalone claim for "bad faith" outside the insurance context.

No Alabama appellate court has ever recognized the tort of "bad faith" outside the limited context of insurance cases. *See, e.g., State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 318 (Ala. 1999). BCBC admits that it cannot state such a claim, (BCBC-Br.,40,n.10), and this Court held

⁷ Additionally, while BCBC says that ALDOT will bear no cost of the injunction for the first 120 days (BCBC.Br.,52), Judge Pool's injunction is not limited to 120 days.

to similar effect in *Ex parte Moulton*. 116 So. 3d at 1146, n.8 (dismissing case, in part, because “[t]here is no cause of action in this State for ‘malice.’”) (emphasis added).

2. Alabama law does not recognize a standalone claim for an injunction.

BCBC now claims that it is “assert[ing] a standalone claim for injunctive relief,” which it alleges is permissible under the plurality opinion of *Ex parte ALDOT*. (*Id.*,41.) Like “bad faith” and “malice,” there is no standalone claim for injunctive relief. The Eleventh Circuit explained in *Alabama v. U.S. Army Corps of Engs.*, 424 F.3d 1117, 1127 (11th Cir.):

[A]ny motion or suit for either a preliminary or permanent **injunction must be based upon a cause of action, such as a constitutional violation, a trespass, or a nuisance. There is no such thing as a suit for a traditional injunction in the abstract... An injunction is a remedy... if the plaintiff’s rights have not been violated, he is not entitled to any relief, injunctive or otherwise.**

Id. (cleaned up) (emphases added); (Cooper-Br.,36).

An injunction is a remedy, not a claim. See *Taylor v. Troy State University*, 437 So. 2d 472, 474 (Ala. 1983) (“The State’s immunity bars suits for relief by way of mandamus or **injunction**, no less than suits for

any other **remedy.**”) (emphases added). And there is no remedy without a claim. *See, e.g., Ex parte Southern Bldg. Code Congress*, 213 So. 2d 365, 369 (Ala. 1968) (“‘Remedy’ signifies the judicial means for enforcing a right or redressing a wrong. It is distinct from a ‘cause of action,’ and is the means by which the cause of action is satisfied.”) (citations omitted). On that basis alone, BCBC’s “claim” fails.

Further, *Ex parte ALDOT* did not recognize a standalone injunctive relief “claim” based on the “sixth exception.” The plaintiff’s injunctive relief “claim” in *Ex parte ALDOT* was permitted to proceed “[b]ecause ACI stated a valid inverse-condemnation claim in its original complaint....” *Id.* at 740. Thus, “the trial court had jurisdiction to entertain ACI’s amended complaint in which it modified its claim for injunctive relief....” *Id.*

The question before the Court concerning the injunctive relief “claim” was very narrow: whether the plaintiff had sufficiently stated an inverse-condemnation claim in its original complaint such that the trial court had jurisdiction to consider the plaintiff’s amended complaint at all. *Id.* Unlike here, the parties did not raise arguments before the Court

about whether there was a standalone claim for injunctive relief⁸—and for good reason. The distinction between a “claim” and a “remedy” was largely irrelevant in *Ex parte ALDOT* because the plaintiff was plainly seeking an injunctive remedy for its underlying valid inverse-condemnation/physical intrusion/takings claims:

ALDOT... employ[ed] Hydraulic control measures with knowledge that its measures would necessarily involve **the discharge of TCE-laden water onto ACI’s property**; by failing to seek or obtain permission or consent from ACI prior to **discharging TCE-laden water onto ACI’s property**; and **by taking ACI’s property and thereby obtaining and taking a draining easement without [ALDOT’s] seeking or obtaining permission or consent from ACI.**

143 So. 3d at 740 (emphases added) (quoting “Injunctive Relief” claim).

Unlike the plaintiff in *Ex parte ALDOT*, BCBC has explicitly disclaimed any relationship between its “claim” for injunctive relief and its inverse condemnation claim. *See supra* Argument I.A.1. (R.52.)

Without an underlying claim to support the remedy of an injunction, BCBC’s Count I fails. *See, e.g., Avendano v. Shaw*, __ So. 3d

⁸ *See generally* Pet. for Writ of Mand., *Ex parte ALDOT*, 143 So. 3d 730 (No. 1101439) (Ala. 2013); Brief of Respondent, *Ex parte ALDOT*, 143 So. 3d 730 (No. 1101439) 2011 WL 7074078 (Ala. 2013); Reply Brief of Petitioner, 143 So. 3d 730 (No. 1101439), 2011 WL 7099410 (Ala. 2013). *See supra* n.3.

__, 2022 WL 3572663, *2, n.3 (Ala. Aug. 19, 2022) (plurality) (noting that Plaintiffs’ two separate standalone “bad faith” “claims” based on the “sixth exception” “are not actually claims but rather arguments related to [other] claims”).⁹ See also *Taylor*, 437 So. 2d at 474; *Ex parte Southern Bldg. Code Congress*, 213 So. 2d at 369; *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 693 (1949) (“**In a suit against an agency of the sovereign, as in any other suit, it is therefore necessary that the plaintiff claim an invasion of his recognized legal rights.”)*)* (superseded on other grounds 5 U.S.C. § 702) (emphases added).**

3. *American Radio Ass’n, AFL-CIO v. Mobile S.S. Ass’n, Inc.* is inapplicable.

Perhaps recognizing that it cannot use legal alchemy to transform an exception (*i.e.*, the “sixth exception”) to an affirmative jurisdictional

⁹ Like BCBC, the plaintiffs in *Avendano* included two claims for “bad faith” based on the “sixth exception.” Brief of Appellants, *Avendano v. Shaw*, __ So. 3d __ (No. 1210125) 2022 WL 616834, *3–4 (Ala. 2022) (“Count 1: Willful or Malicious Fraud and Bad Faith... Count VI: Willful, Malicious, Fraudulent, Bad Faith, Excess Authority or Action Under Mistaken Belief of the Law...”). The defendants argued that “**such language is not a separate cause of action but rather language contained in th[e] Court’s analysis in *Cranman*....**” Brief of Appellees, __ So. 3d __ (No. 1210125) 2022 WL 616834, *41 (Ala. 2022) (emphasis added). The Court agreed: “The complaint also lists three individual-capacity ‘counts’ (Counts I, V, and VI) that are not actually claims but rather arguments related to [other] claims....” See *supra* n.3.

defense (*i.e.*, sovereign immunity) into a cause of action, BCBC belatedly argues that it has stated a claim based on a couple out-of-context lines from *American Radio Ass’n, AFL-CIO v. Mobile S.S. Ass’n, Inc.*, 279 So. 2d 467 (Ala. 1973). But *American Radio Ass’n* is an “in-the-weeds” labor relations case concerning balancing the First Amendment rights of union picketers with the broader economic impact of keeping people from doing business in the Port of Mobile. *See generally id.*

In that context, this Court borrowed the “motive/objective test” specifically prescribed by Congress under federal law to determine when picketing is wrongful—when the purpose is to impact a secondary employer. *Id.* at 212 (quoting 51A C.J.S. Labor Relations s. 319, p. 135) (analyzing wrongful picketing under 9 U.S.C. § 158(b)(4)(A) & (B), which specifies a “motive/objective test”); *id.* (quoting *Superior Derrick Corporation v. NLRB*, 273 F.2d 891 (5th Cir. 1960) (analyzing wrongful picketing under 9 U.S.C. § 158(b)(4)(A) & (B), which specifies a “motive/objective test”). In other words, this Court did not look to amorphous rights—such as a broad, common-law cause of action related to “the right to conduct one’s business without wrongful interference,” as BCBC suggests (BCBC-Br.,43)—but instead to cases and authorities

specifically analyzing the legal regime governing union picketing. *See generally id.*

This case does not involve a labor dispute, the First Amendment rights of union picketers, or a “motive/objective test” for wrongful picketing under the National Labor Relations Act borrowed by state courts for labor disputes.¹⁰

4. BCBC has not stated a claim that ALDOT “wrongful[ly] interfer[ed]” with its business, in any case.

Further, even taking BCBC’s retooled claim at face value, none of the actions BCBC alleges that Director Cooper, ALDOT, or the State of Alabama have undertaken are legally “wrongful,” nor does it allege actual interference with a protected right. Through all of its sound and fury, BCBC alleges that Director Cooper has done one thing: build a

¹⁰ BCBC also cites *Carter v. Knapp Motor Co.*, 11 So. 2d 383 (Ala. 1943). (BCBC-Br.,43.) *Carter* concerned tortious interference, not competition. Competition is not “wrongful interference.” *See Tom’s Foods, Inc. v. Carn*, 896 So. 2d 443, 457 (Ala. 2004). Additionally, BCBC over-reads *Carter*. The *Carter* Court first found tortious interference, 11 So. 2d at 385, and then, in dicta, noted a bad motive. *Id.* Injunctive relief was granted for the defendant’s actions, not for his motives. In the context of competition, motive is irrelevant.

bridge. That action, as a matter of law, is not “wrongful” because Director Cooper is vested with the authority to do precisely what he did. *See* Ala. Code §§ 23-1-21, 23-1-40(a).

Moreover, a defendant’s actions must still interfere with BCBC’s rights. (BCBC-Br.,44.) BCBC has not sufficiently alleged what legal “right” has been interfered with. For instance, BCBC makes vague reference to “contractual rights,” (*id.*,44–45), but all rights that BCBC has are still fully intact:

BCBC’s Rights	Impaired?	
	Yes	No
Right to Possess		X
Right to Exclude Others		X
Right to Allow Public to Cross		X
Right to Charge Tolls		X
“Right” to Operate Exclusive of Any New Competing Bridge	N/A	

(*See* Cooper-Br.,40–41);(C.3305-PX39-R.68(offered&admitted)).

BCBC actually complains about the downstream effect of potential competition. (BCBC-Br.19-20.) BCBC admits in its Brief, though, that it has no contractual right to exclusivity. (BCBC-Br.,45–46.) Competition is perfectly lawful, and is not “wrongful interference.” *See, e.g., Alabama Power Co. v. Guntersville*, 177 So. 332, 340 (Ala. 1937) (holding that plaintiff had no right to be free from government “embarking upon a

competitive business with appellant, without any physical disturbance of appellant's property, or any interference with the right the appellant has to the legal and proper use of the same.”); *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 140 (1939) (same); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837) (same); *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. 296, 305 (Ala. 1835) (same). McDonald’s can’t sue Burger King for merely building a competing restaurant, and BCBC can’t sue ALDOT’s Director for merely building a competing bridge.

II. BCBC’s Novel Theory of “Bad Faith” Would Violate the Separation of Powers Provision of the Alabama Constitution.

BCBC does not respond to the Association of County Commissions of Alabama’s *amicus* brief, arguing that Judge Pool’s order violates separation of powers. (See ACCA-Amicus-Br.,9–19.)

Instead, BCBC says that several cases that mention injunctions demonstrate that there is no separation of powers issue with enjoining state officials for acting in bad faith. (BCBC-Br.,46–49.) Those cases show that a court issues an injunction on a valid claim. *See Ziegler*, 193 So. 3d at 724–25 (trial court issued injunction based on plaintiff’s land rights,

but this Court reversed because of sovereign immunity—State’s land rights) (BCBC-Br.,48); *St. Clair County v. Town of Riverside*, 128 So. 2d 333, 334 (Ala. 1961) (trial court’s injunction was based on blocking of roads, but this Court reversed based on sovereign immunity where no abuse of authority shown) (BCBC-Br.48–49).

Instead of basing his injunction on recognized legal rights like the trial judges in *Ziegler* and *Town of Riverside*, Judge Pool issued an injunction without a valid underlying claim (*i.e.*, on a bad faith motive without an underlying violation of rights). Separation of powers is violated when a court enjoins a government official’s conduct that does not impact a right of the plaintiff. In such a case, the court is acting outside its powers because it is acting on something other than a case or controversy to resolve a claim (*i.e.*, violation of a right) and is thus acting outside the limits of the judicial power. *See* Ala. Const. § 139; *Alabama Power Co. v. Citizens of Alabama*, 740 So. 2d 371, 381 (Ala.1999) (Section 139 vests “a limited **judicial power** that entails the special competence to **decide discrete cases**”) (emphases added); Ala.R.Civ.P.3(a) (**case**); Ala.R.Civ.P.8(a) (“**claim**”); *Se. Const., L.L.C. v. WAR Const., Inc.*, 159 So. 3d 1227, 1238 (Ala. 2014); Ala. Const. § 42(c); Ala. Code § 23-1-40(a)

“duty of the Department of Transportation” “to construct” “bridges of this state”); Ala. Code § 23-1-21 (“duties vested in the State Department of Transportation shall be exercised by the Director”).

III. BCBC’s “Bad Faith” Claim Is Barred By Collateral Estoppel.

BCBC’s entire bad faith case is premised on Director Cooper deciding to build the New Bridge in 2017, and engaging in post-2018 negotiations about not building the New Bridge although, BCBC says, he had already made up his mind to build the New Bridge. (C.3152–53,3169,3193.) BCBC fails to mention, though, Judge Reid’s 2018 finding that Director Cooper’s decision to build the New Bridge and thus condemn property for that project was “**without any showing of fraud, corruption, bad faith or gross abuse of discretion.**” (C.1155) (emphasis added). This pulls the rug out from under BCBC’s bad faith case.

- BCBC’s quote from the *Lewis* treatise (BCBC-Br.,56) about a lower court order being vacated was based on *Vail v. The Fall Creek Turnpike Co.*, 32 Ind. 198 (1869) (not mentioning what happened to the lower court’s judgment”, and *Wright v. Wisconsin Central Railroad Co.*, 29 Wis. 341 (1872) (lower court’s judgment expressly set aside). ALDOT’s 2018 Probate Court judgment was not expressly set aside. (C.1173.) Instead of following out-of-state cases that do not support the vacation proposition, this Court should follow *Alabama Power Co. v. Thompson*, 32 So. 2d 795, 800 (Ala. 1947) (“[I]f the appeal is dismissed, the decision appealed from is restored to full force and effect.”).

- BCBC’s argument that the “no bad faith” determination in the 2018 probate court case concerned a different claim than in this 2022 case (BCBC-Br.,57) fails because Director Cooper asserts issue preclusion, not claim preclusion. *See Caton v. Pelham*, 329 So. 3d 5, 13, 25-27 (Ala. 2020) (applying issue preclusion even though unemployment claim in earlier proceeding was different from retaliatory discharge claim in later proceeding). The issue of bad faith was determined in the 2018 probate case (C.1155–56) and should not be re-litigated in this case.
- BCBC’s argument that the bad faith issue was not actually decided by Judge Reid (BCBC-Br.,57–58) fails on the words of the judgment: “**without any showing of fraud, corruption, bad faith or gross abuse of discretion.**” (C.1155). *Cf. Ex parte Smith*, 683 So. 2d 431, 433, 436 (Ala. 1996) (applying collateral estoppel when first judgment did not mention issue, but only implicitly decided it).
- BCBC’s argument that collateral estoppel should not apply because the probate and circuit courts used different standards of proof (BCBC-Br.,58) fails on the words of the judgment finding no bad faith at all– “**without any showing of.. bad faith....**” (C.1155) (emphases added). *See State, Pers. Bd. v. Akers*, 797 So. 2d 422, 424 (Ala. 2000) (interpreting judgments by “the literal meaning of the language used”).

IV. BCBC Failed To Meet Its Burden To Obtain A Preliminary Injunction.

A. BCBC cannot demonstrate a likelihood of success on the merits.

1. BCBC's claims fail as a matter of law.

BCBC cannot show a likelihood of success on the merits because of sovereign immunity, its claim is unrecognized, separation of powers, and collateral estoppel. *See supra* Args. I-III.¹¹

2. BCBC cannot demonstrate that it has been injured.

Director Cooper has done one thing: begun construction of a bridge. BCBC has not demonstrated that this violates any of its “rights.” BCBC makes vague reference to “contractual rights,” (*id.*), but none of those rights are interfered with by building a bridge. (C.3305-PX39-R.68(offered&admitted)). *See supra* Arg. I.B.4. BCBC complains about its tolls and the value of the BEX Bridge, (BCBC-Br.,44), but BCBC remains free to set its tolls as high or as low as it wishes, and BCBC points to no

¹¹ Director Cooper made these same arguments in his post-hearing brief opposing a preliminary injunction (C.2847,2851,2868–69) and in his post-hearing JML motion. (C.2783, *et seq.*) The trial court’s order rejected Director Cooper’s arguments by granting a preliminary injunction, and denied “all other pending motions.” (C.3215.) Director Cooper appealed from that order. (C.3216;3272.) *See generally* *Caton*, 329 So. 3d at 19 (merger rule).

contractual right for any particular “value” for the BEX Bridge—much less a value guaranteed by the State. As Mack Roberts, BCBC’s “representative,”¹² testified:

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

A [BCBC’s Rep. Mack Roberts]. No.

...

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.

(R.488:18–20, 489:8–13).

Instead, BCBC is seeking to avoid the effects of competition. BCBC admits, though, that it has no contractual right to exclusivity. (R.120:24–121:8-Belitsky) (no exclusively). And competition is not “wrongful interference.” See *Guntersville*, 177 So. at 340; *TVA*, 306 U.S. at 137–40.

¹² BCBC’s counsel introduced Mr. Roberts as “our representative” during the preliminary injunction hearing. (R.26:2–8) (“MR. ESPY:... Mr. Mack Roberts... will be the representative of the plaintiff in this case.”).

3. **The New Bridge will alleviate traffic on Highway 59.**

BCBC states that the trial court found that the New Bridge will not reduce traffic congestion on Highway 59. (BCBC-Br.,19–20.) To the degree that the trial court found this, that finding is not entitled to deference because, as Director Cooper already extensively discussed, it is undisputed that the New Bridge will alleviate traffic on Highway 59.¹³ (Cooper-Br.,10–15.)

Further, despite BCBC’s claim (BCBC-Br.,20–21), it is indisputable that travelers are avoiding the BEX Toll Bridge. (Cooper-Br.,14–15.) BCBC’s entire theory of this case is that, when presented with a toll-free New Bridge, a substantial majority of drivers will elect to use the free bridge over the BEX Toll Bridge. (BCBC-Br.,19–20.) That’s toll avoidance.

Municipal and county governments have long supported the construction of a toll-free bridge in South Baldwin County to address the

¹³ The *ore tenus* presumption does not apply to documents or undisputed evidence. See *Lafayette Land Acquisitions II, LLC v. Walls*, No. SC-2022-0765, 2023 WL 3029817, at *2 (Ala. Apr. 21, 2023) (documents); *Bessemer Water Serv. v. Lake Cyrus Dev. Co.*, 959 So. 2d 643, 648 (Ala. 2006) (undisputed evidence) (Cooper Open. Br. 29).

known traffic problems on Highway 59. (Cooper-Br.,10–12.) Indeed, in this case, Gulf Shores—where the 59 Bridge is located—has reiterated its vocal support for the project both through witness testimony and as an *amicus*. (See Gulf Shores *Amicus* Brief); (R.731–802-Phelps). The Association of Counties has likewise weighed in as *amicus* in support of Director Cooper. And Baldwin County has recently passed a resolution transferring certain road maintenance rights to ALDOT in support of the New Bridge project. (Cooper-Br.,12)(C.7755-DX596-R.1827(offered&admitted)).¹⁴

By contrast, Orange Beach Mayor Tony Kennon, on whom BCBC and its *amicus* rely, has proven flexible:

¹⁴ BCBC claims that Foley “renounced” its support for the New Bridge. (BCBC-Br.,21–22). The record shows only that current Foley Mayor Hellmich had other priorities. (C.4654.) Foley Mayor Koniar—who signed the 2018 letter to Governor Ivey supporting the New Bridge project—did not renounce his support. (Cooper-Br.,11.)

Mayor Kennon’s Opinions on the New Bridge and the Toll Bridge	
2018 Opinions	New Opinions
<ul style="list-style-type: none"> • New Bridge proposal “made perfect sense.” (R.315:12–316:4-Kennon) • “And it never made sense from the beginning that one company could control access, ingress, egress into the public beaches and town. To this day, I can’t imagine what they were thinking when they negotiated this contract.” (C.7775-DX599 at 47:22–48:8-R.1871 (offered&admitted).) • BCBC’s purpose was “not to minimize traffic or to alleviate traffic problems, it [was] to maximize revenues...” (C.7775–76-DX599 at 48:23–49:3-R.1871(offered&admitted).) • “There is no need for additional studies. We’ve listened to the travelers and residents who must navigate our congested roads.... [T]here is a desperate need for infrastructure expansion to and from the cities of Gulf Shores and Orange Beach.” (C.5676–77-DX291-R.1558–59(Offered&Admitted).) 	<p>The New Bridge is a “boondoggle,” a “monstrosity”, and an “inferior product” that “defies logic.” (C.4584–86-PX628 at 22:22–23:13, 27:11–29:5-R.288 (offered&admitted).)</p>

Under BCBC’s final 2022 term sheet to ALDOT, BCBC would pay Orange Beach a lump sum of \$10 million, and \$1 million each year for the next 50 years (a total of \$60 million), if the New Bridge is not built. (R.329-Kennon); (C.7082-DX479 at 2-R.249(offered&admitted).) If the New Bridge is built, Orange Beach will receive 30 cents per car for a lot

fewer cars crossing the BEX Toll Bridge. (R.324:110-329-Kennon.) During his deposition in this 2023 case, which was put in the record, Mayor Kennon testified that “Truth has a thousand degrees.” (R.326:11–327:1-Kennon).

At the condemnation hearing in 2018, in response to questioning from BCBC’s attorney, Mayor Kennon testified as follows:

Q. You generally mean what you say, don’t you, Mayor Kennon?

A. Depends on the situation.

Q. Sometimes you don’t?

A. Yeah. Have you ever been a public servant?

(C.7773-DX 599 at 39:14–18-R.1871(offered&admitted)).

Judge Pool’s order relies heavily on Mayor Kennon’s testimony. (C.3162,3164–65,3170–71,3189.)

4. Director Cooper has not acted in bad faith.

BCBC focuses on three actions of Director Cooper that it says demonstrate “bad faith”: (1) his “demand” that BCBC give up other bridges, (2) the 40% traffic capture rate; and (3) not considering BCBC’s last offer. (BCBC-Br.25–27.) None of these demonstrates bad faith.

First, Director Cooper's request was a proposal, not a demand, to compensate the State for the millions of dollars the State had spent on roads leading to the BEX Bridge. (C.8225-DX242-R.1580–81(offered&admitted));(C.7472-7507-DX572-R.1374(offered&admitted)). The proposal was negotiable, (C.8293-DX323-R.1850–51(offered&admitted)), and Director Cooper later dropped it when American Roads indicated that it was not interested. (R.1645-Cooper.)

Second, BCBC's negotiation counsel Britton Bonner acknowledged that a traffic capture rate was a "threshold" element of any acceptable deal for ALDOT. (C.6071-DX431-R.232(offered&admitted)). At a meeting of the parties in November 2021, a representative of DIF conveyed that a 50% capture rate target was too high. (R.1599-Cooper.) Darrell Skipper, a Gulf Shores traffic consultant, proposed a capture rate of 40%. (R.1303:11-25-Skipper.) A BCBC representative stated BCBC could probably meet that. (R.1600-Cooper); (R.1307-Skipper); (C.5391-DX112-R.1344(offered&admitted)).¹⁵ BCBC's contemporaneous traffic studies

¹⁵ BCBC claims that Director Cooper provided no citation for this statement. Director Cooper's immediately prior citations made this point. (Cooper-Br.22.) (*See also* C.5391-DX112) ("7. Bridge Co stated that they felt they could meet these requirements [including 40% traffic carry

indicated that BCBC could capture up to 39% of all traffic crossing the intracoastal waterway under certain circumstances, (R.565-Bates); (*see generally* C.5089-DX31-R.810(offered&admitted)), and BCBC even made a proposal to ALDOT that included a 40% traffic carry rate provision, though it was unacceptable to ALDOT for other reasons. (C.6099-DX452-R.234(offered&admitted)).

Third, BCBC’s last proposal (i) was a rejection of ALDOT’s final “take it or leave it” offer; (ii) did not include any traffic carry rate provisions (critical to ALDOT); (iii) demanded 50 years of exclusivity; and (iv) contained no limit on tolls charged to non-Baldwin County residents. These terms were unacceptable to Director Cooper. (Cooper-Br.,60); (*see also* C.7059-DX472-R.245,46(offered&admitted)). In any event, Director Cooper did analyze BCBC’s proposal. This analysis is demonstrated by ALDOT General Counsel William Patty’s letter to Mayors Kennon and Kraft recapping recent negotiations between ALDOT and BCBC, and explaining in detail why—in keeping with the above analysis—ALDOT did not accept BCBC’s counter proposal. (C.5410-DX150-R.313–

provision] and would submit a revised proposal to ALDOT within 2 weeks.”).

14(offered&admitted)); (C.9118-DX481-R.1580(offered&admitted)).¹⁶

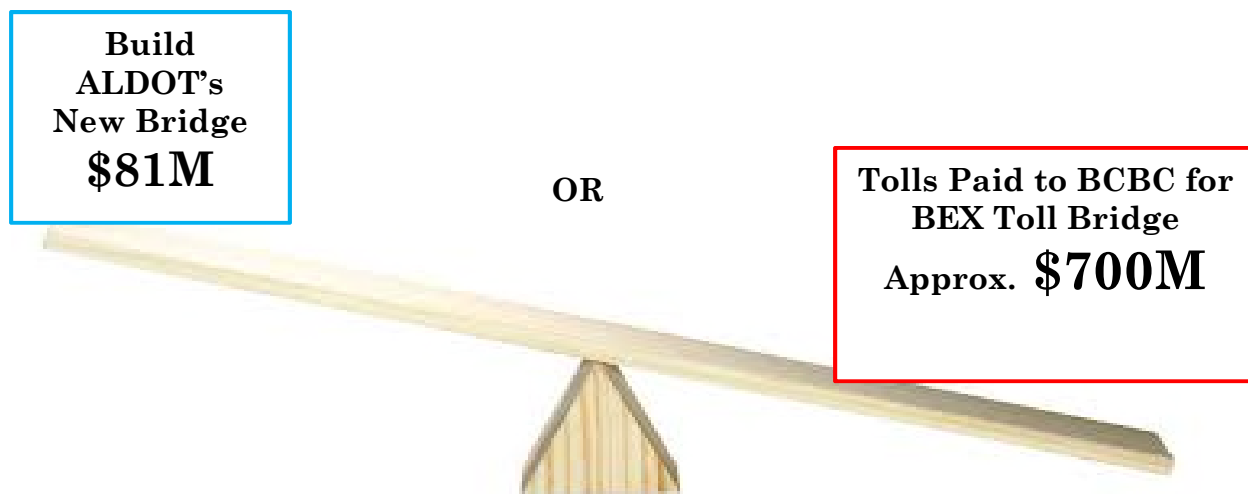
After 11 years of unfruitful negotiations and unacceptable proposals, Director Cooper had a clear choice (*see* Cooper-Br.,26):

¹⁶ BCBC also claims Director Cooper stated that he wanted to put BCBC “out of business.” (BCBC-Br.,9–10.) That was not a quote of Director Cooper, but an interpretation from a Mack Roberts memo. (C.3693-PX53-R.447(offered;R.448(admitted)); (Cooper-Br.,7.) *See* n.14.

BCBC says that ALDOT does not dispute that Director Cooper made the final decision to build the New Bridge in 2017. (BCBC-Br..16.) Director Cooper disputes this. (Cooper-Br.,58.) Director Cooper made plans to build the New Bridge in 2017, but resumed negotiations with BCBC when DIF purchased BCBC in 2018. (*Id.*)

BCBC complains that Director Cooper planned to build the New Bridge at the same time he negotiated with BCBC (BCBC-Br.,31), but this dual tracking was to protect the State and the traveling public in case the negotiations did not work out. (Cooper-Br.,21.)

**50-Year Cost to Alabama Drivers of
New Bridge (Flowing Traffic) v. Status Quo (Traffic Jams)¹⁷**



5. BCBC has acted in bad faith.

Director Cooper demonstrated that BCBC's expectations were that the New Bridge would be operational in 2022—but that BCBC could reap significant additional toll revenue for every year it delayed ALDOT's New Bridge. (Cooper-Br.,18); (C.5398-DX138-R.220(offered&admitted)).




BCBC contends that it expected to have "good faith" negotiations. (BCBC-Br.,77.) BCBC's real expectations, however, were to make money

¹⁷ Without citation the record, BCBC asserts that its \$14 million revenue figure for 2022 is not accurate and Director Cooper's lawyers "knew" it. (BCBC-Br.,29,n.8.) What Director Cooper's lawyers know is what is in the record on appeal. *See Cleveland v. Cent. Bank*, 574 So. 2d 741, 743 (Ala. 1990). Neil Belitsky, CEO of BCBC, testified under oath: "Revenue for 2022 was, off the top of my head, in the neighborhood of probably around 14 million plus or minus." (R.121:13-15-Belitsky.) BCBC offered no counter-evidence.

by delaying operation of the New Bridge, as clearly indicated by its internal documents. (*See supra.*) And it had a plan to do it—by following its “messaging and tactics” memo.¹⁸ Follow the money:

BCBC’s Messaging Points to Delay the New Bridge	
2017 Messaging Points	Judge Pool’s 2023 Order
“A new bridge isn’t needed ”(C.5398.)	“Director Cooper’s outrageous conduct in embarking on spending more than \$120 million of State funds, on a bridge that ALDOT does not need, ” (C.3139.)
“The money spent on this bridge (\$20-30 MM) would be better spent on numerous other bridges in Alabama that are in dire need of repair.... ” (<i>Id.</i>)	“In light of Director Cooper’s concessions about ALDOT’s limited resources and the need for improvements for bridges across the State of Alabama, the Court is very disturbed....” (C.3138.)
“ Governmental interference of this type in a successful public private partnership....” (<i>Id.</i>)	“BCBC has established that, absent a preliminary injunction, its “right to conduct[its] business without the wrongful interference.... ” (C.3180.)

¹⁸ BCBC disputes whether its current parent (DIF) or former parent (Syncora) authored this memo (BCBC-Br.,30,n.9.) Regardless, it is BCBC’s memo, and BCBC (while it was indirectly owned by DIF) followed that plan. (*see* C.5398-DX138.)

BCBC's Tactics to Delay the New Bridge		
Tactic		Execution
“Direct lobbying – local, state, federal” (C.5398)		DIF/BCBC hired governmental relations advisors from Squire Patton Boggs in Washington, D.C., who met with Director Cooper and Gov. Ivey’s Chief of Staff, Jo Bonner, regarding plans for ALDOT’s New Bridge and to try to make a possible deal with DIF. (R.1614:21-1615:7-Cooper.)
“Question ALDOT objectives” (<i>Id.</i>)		“Director Cooper acknowledged that his specific intent in building the Cooper Bridge is to “undo” those rights, and “put the BEX Facility out of business,” because he ‘do[es]n’t think [BCBC is] entitled to’ operate its business.” (C.2893-94(BCBC’s Proposed Order,1–2).) [This was not Director Cooper’s testimony, but he does not think BCBC is entitled to operate as a monopoly without oversight of its tolls.]
“Potential Litigation— Sponsor/Pike Pointe level.” (<i>Id.</i>)		BCBC filed its complaint against Director Cooper on October 20, 2022. (C.12.)

B. The Balance of Equities Weighs in ALDOT’s Favor, BCBC will not be irreparably harmed without an injunction, and BCBC has an adequate remedy.

BCBC’s states that a “modest delay” will cause little harm. (BCBC-Br.,67–68.) But Director Cooper has shown that the State of Alabama could suffer between **\$13-18 million** in harm from the delay. (Cooper-Br.,64–69); (*id.*,73,n.27). *See also ALDOT v. Blue Ridge Sand & Gravel,*

Inc., 718 So. 2d 27, 32 (Ala. 1998) (balancing hardships, including expense to ALDOT of an injunction). By contrast, the New Bridge will not open until 2026. (Cooper-Br.,65.) There is no irreparable harm.

BCBC also argues that Director Cooper has no authority to act in bad faith. (BCBC-Br.,68.) But Director Cooper has authority to build the New Bridge, and argues that there is no “bad faith,” and no protection from competition. (Cooper-Br.,35–36,41–44,47; Ala. Code §§ 23-1-40(a), 23-1-21); (*see also id.*,73,n.27).

BCBC argues that the injunction preserves the status quo “in which the Cooper Bridge has not yet been built.” (BCBC-Br.,68.) But the status quo involved ALDOT actively building the New Bridge. (Cooper-Br.,64.)

By contrast, BCBC fundamentally claims loss of toll revenue: money. (Cooper-Br.,62–64.) But, “[l]oss of profits does not justify the issuance of an injunction.” *Blue Ridge*, 718 So. 2d at 32 (cleaned up). To the degree its claim is “valid,” BCBC can be compensated through an inverse-condemnation claim. (Cooper-Br.,62–64.);(*id.*,73,n.27.)

V. The \$100,000 Bond Violates this Court’s Pronouncements in *DeVos* and Must Be Increased.

BCBC argues that Mr. Leverette did not have personal knowledge of how Scott Bridge prepared its delay cost estimate, but that did not

prevent the trial court from admitting the exhibits. (BCBC-Br.,69-70.) And it did not erase Mr. Leverette's undisputed years of experience of dealing with construction and personal knowledge of Scott Bridge's contract for the New Bridge. (R.1351-58;1454-57-Leverette.) Further, because BCBC failed to put on any evidence, Mr. Leverette's testimony and documentary evidence of delay costs are undisputed:

**ALDOT PROJECT RACR-002-000-015
BALDWIN COUNTY
120 INJUNCTION COST IMPACT ESTIMATE SUMMARY
2/15/2023**

DAILY COST CALCULATION		
SCOTT BRIDGE COST FOR 120 DAY INJUNCTION	Item Total	Subtotals
LABOR	\$ 1,376,780.76	
COST TO MAINTAIN PROJECT	\$ 200,000.00	
HOUSING AND MEALS (6 Rooms x \$140/Night x 86 Weeknights)	\$ 72,240.00	
EQUIPMENT (FHWA Ownership Rates)	\$ 2,209,219.79	
INFLATION IMPACT	\$ 66,422.06	
COMPANY OVERHEAD AND PROFIT (15%)	\$ 588,699.39	\$ 4,513,362.00
SUBCONTRACTOR COST FOR 120-DAY INJUNCTION		
LABOR	\$ 549,348.00	
EQUIPMENT	\$ 976,828.80	\$ 1,526,176.80
VENDOR COST FOR 120-DAY INJUNCTION		
STUPP BRIDGE COST FOR 120 DAY INJUNCTION	\$ 2,590,000.00	\$ 2,590,000.00
	Daily Cost Subtotal:	\$ 8,629,538.80

SUMMARY	
DAILY COST SUBTOTAL:	\$ 8,629,538.80
**FIXED COST-PROJECT SCHEDULING AND STARTUP TIME IMPACTS (10 DAYS):	\$ 719,128.23
TOTAL POTENTIAL COST FOR 120 INJUNCTION DELAY: \$ 9,348,667.03	

(C.Supp.22-DX582-R.1464(offered&admitted).) See supra n.14.

The trial court’s order rejecting the above evidence—the only evidence—as insufficient violates the requirement to allow “soft” number of delay costs for pre-injunction estimates. *See DeVos v. Cunningham Group, LLC*, 297 So. 3d 1176, 1185 (Ala. 2019).

BCBC tries to characterize the Scott Bridge estimate as dealing with costs that Scott Bridge would incur without an injunction if work continued. (BCBC-Br.,71.) It is not. Employees must be paid, equipment must be rented, prices continue to rise while materials are not purchased, and overhead continues to be incurred while construction is delayed. *See* (R.1467:7–11;1471–72-Leverette) (ALDOT has to “pay for idle construction equipment or labor”).¹⁹

Judge Pool erred by failing to follow *DeVos*, 297 So. 3d at 1186, when he disregarded the only delay cost estimates before the trial court showing a range between \$13 million and \$18 million, and picked

¹⁹ *See generally Allied Manatts Grp., LLC v. Qwest Corp.*, No. 3:18-CV-0020-JAJ, 2020 WL 13553318, at *5 (S.D. Iowa Jan. 2, 2020) (“[C]osts for idle or unproductive equipment are properly included in a delay claim’s cost calculation.”) (cleaned up); *Luria Bros. & Co. v. United States*, 369 F.2d 701, 709 (Ct. Cl. 1966) (awarding construction delay damages “for idle equipment, field supervision, winter protection, rehandling materials, maintaining excavations, and wage and material price increases” and “office overhead”).

\$100,000 for attorney fees (based on no evidence) for delay of a \$52 million construction project rather than an amount “more than enough to cover all possible damages.” *Id.* (cleaned up).

VI. In the Absence of Any Land Use Regulation, BCBC’s “Regulatory Taking” Necessarily Fails.

BCBC’s federal regulatory taking/inverse condemnation claim is neither ripe nor valid because BCBC has not shown the existence of a government regulatory act that will injure a constitutionally protected property right, immediately or ever. A regulatory act is “a **restriction on the use** of property that [goes] too far.” *Horne v. Dept. of Agric.*, 576 U.S. 350, 360 (2015) (cleaned up) (emphasis added). *See also Nat’l Advert. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005) (requiring “immediate danger” of injury to establish ripeness); *Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 760 & n.3 (11th Cir. 1991) (for both ripeness and standing, “a plaintiff must show he has sustained, or is in immediate danger of sustaining, a direct injury as the result of that act.”) (cleaned up).

As for a taking injury, BCBC argues that it has suffered a severe diminution in value. (BCBC-Br.,73.) But “mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.”

Concrete Pipe & Prods. of Cal., Inc., v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645 (1993).

BCBC also argues that its investment-backed expectations are being disappointed by Director Cooper's actions. (BCBC-Br.73.) First, this is false because DIF fully expected the New Bridge to be built when it bought the BEX Bridge. (Cooper-Br.,18.) Second, this argument fails because BCBC and its owners had no "reasonable" investment-backed expectation that the BEX Toll Bridge could operate exclusive of any new competing bridge. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 342 (2002) (requiring that the government regulation cause substantial interference with "**reasonable** investment-back expectations" for a taking) (emphasis added); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). BCBC's license to operate the BEX Toll Bridge does not include a right to exclude any competing bridge, and the law does not imply one. (C.3305-PX39-R.68(offered&admitted)); (R.120:24–121:8-Belitsky) (no exclusivity). *See also Charles River Bridge*, 36 U.S. at 551-52. And Director Cooper told DIF he intended to build the New Bridge before DIF purchased the BEX Bridge. (Cooper-Br.,18);(R.847:22–25-Adams.)

ALDOT's building of the New Bridge is not a regulatory act and does not restrict BCBC's rights to possess the BEX Toll Bridge, to exclude others, to allow the public to cross, or to charge tolls. *See supra* Arg. I.B.4.

At bottom, BCBC complains that drivers may choose to use the New (free) Bridge instead of the BEX Toll Bridge. It is ancient law in this country that that is not a taking. In *Tuskaloosa Bridge*, 2 Port. at 305, this Court held that the building of a new toll bridge near an existing ferry did not constitute a taking where the ferry did not have exclusive rights over the river. *See also State Highway Bd. v. Willcox*, 168 Ga. 883, 149 S.E. 182, 185 (1929); *Charles River Bridge*, 36 U.S. at 551-52.

CONCLUSION²⁰

The preliminary injunction should be vacated, and BCBC's claims dismissed.

²⁰ Every argument and authority cited in any part of this Reply Brief and the Opening Brief is incorporated to apply to every part of this Brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitations set forth in Ala. R. App. P. 27(d) (i.e., 7,000 words). According to the word-count function of Microsoft Word, this Brief contains 6,990 words. I further certify that this Brief, prepared in Century Schoolbook font using 14-point type, complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). *See* Ala. R. App. P. 32(d) (certificate of compliance).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply Brief in Support of Appellant, which was electronically filed today, will be served electronically under Rules 25(c)(1)(D) and 57(h)(5), Ala. R. App. P., by email or U.S. Mail properly addressed and postage prepaid, each as indicated below, under Rule 25(c), Ala. R. App. P., on this 14th day of July, 2023, on the following:

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