



## AlaFile E-Notice

03-CV-2022-901306.00

Judge: JIMMY B POOL

To: ESPY JOSEPH CLEODUS III  
jespy@mewlegal.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

BALDWIN COUNTY BRIDGE COMPANY, LLC V. JOHN R. COOPER  
03-CV-2022-901306.00

The following matter was FILED on 5/17/2023 1:55:15 PM

Notice Date: 5/17/2023 1:55:15 PM

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**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

BALDWIN COUNTY BRIDGE COMPANY, LLC, Plaintiff,	)	
	)	
V.	)	Case No.: CV-2022-901306.00
	)	
JOHN R. COOPER, SCOTT BRIDGE COMPANY, INC., Defendants.	)	

**CORRECTED ORDER ON PLAINTIFF BALDWIN COUNTY BRIDGE COMPANY  
LLC'S MOTION FOR PRELIMINARY INJUNCTION**

This case concerns a years’ long campaign by John Cooper, the Director of the Alabama Department of Transportation (“ALDOT”) to put out of business a private company, The Baldwin County Bridge Company, LLC (“BCBC”). Over the course of a seven-day preliminary injunction hearing before the undersigned featuring live testimony from fact and expert witnesses on both sides—including sworn testimony from Director Cooper—and dozens of exhibits reflecting his conduct, this Court had the opportunity to review the relevant evidence firsthand. That evidence overwhelmingly demonstrates that Director Cooper has acted in bad faith towards BCBC in connection with his decision to build a new bridge (the “Cooper Bridge”) along the Intracoastal Waterway just one mile away from BCBC’s Beach Express Bridge (the “BEX Bridge”).

On several occasions, Director Cooper openly and brazenly admitted that he personally dislikes the fact that BCBC has contractual rights, including the license it obtained from Baldwin County in exchange for building a bridge without using any public funds when ALDOT did not have enough funding to do so. 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. After Director Cooper unsuccessfully tried to purchase the BEX Bridge and unsuccessfully tried to force BCBC to hand over the BEX Bridge for free, he embarked on a haphazard scheme to put BCBC out of business by building a free bridge just one mile to the west. The testimony of both sides’ experts makes clear the Cooper Bridge will have the exact effect Director Cooper intends, as it will cause the BEX Bridge to lose substantially all of its traffic and will do no better in alleviating Highway 59 traffic than BCBC’s proposed solutions. That, in turn, will cause BCBC’s revenues to plummet and either force the company out of business altogether or allow it to be purchased for close to nothing.

Director Cooper’s scheme is set to cost the taxpayers of Alabama more than \$120 million in State funds. The price tag on putting BCBC out of business keeps going up, as Director Cooper caused ALDOT to take on millions more in costs relating to this project while this preliminary injunction hearing was pending. But Director Cooper never disclosed to the public his true purpose in spending taxpayer funds to destroy a private company. Instead, Director Cooper told the public that his new bridge was needed to alleviate traffic on the Highway 59 Bridge. In this proceeding, despite a mountain of evidence demonstrating otherwise, Director Cooper has doubled down on that stated rationale, testifying under oath and under penalty of perjury that alleviating traffic on Highway 59 was his true purpose in building the Cooper Bridge. The Court does not credit that testimony and does not find it to be truthful. It is clear from the record that Director Cooper misled BCBC and the people of Alabama and lied about his reason for pursuing his own bridge.

As another elected official testified, the Cooper Bridge is a “boondoggle.” Through this proceeding, it has been revealed to be a complete waste of over \$120 million in taxpayer funds

to carry out the personal vendetta of Director Cooper. Director Cooper ordered his staff at ALDOT to build the Cooper Bridge without conducting a single public meeting on the project or conducting a single traffic study showing whether there was any legitimate need for it. His dogged pursuit of what his staff internally referred to as a “HOT PROJECT” resulted in ALDOT not following standard practices and pursuing a design that, in the words of one witness, “defies logic.”

Further, while privately directing ALDOT’s staff to proceed towards construction of the Cooper Bridge, Director Cooper purported to be negotiating with BCBC over a resolution in which BCBC would build a new bridge at no cost to the taxpayers of Alabama. The hearing revealed that Director Cooper conducted those negotiations in bad faith and had no intention of ever reaching an agreement with BCBC. Even Director Cooper’s own staff insisted that Director Cooper remove the words “good faith” from a draft press release that would have referenced the “good faith negotiations” Director Cooper was engaged in with BCBC during this time period. That speaks volumes as to Director Cooper’s true motives.

Despite Director Cooper’s bad faith during the negotiations, in August 2022, BCBC made a proposal that “offered . . . everything . . . Mr. Cooper wanted out of a deal.” BCBC offered to build a new two-lane bridge across the Intracoastal Waterway alongside its existing bridge at no cost to the State, to expand the number of toll plazas at its bridge, to make over \$70 million in additional contributions to meet the infrastructure needs of ALDOT, Gulf Shores, and Orange Beach, to let Baldwin County residents use the expanded BEX Bridge as much as they wanted, year-round, for free, to build a third two-lane bridge in the future, also at no cost to the State, if necessary, and to hand over the expanded BEX Bridge to the State at the end of the term of the agreement. Even though Director Cooper’s own expert admitted that BCBC’s proposal

would improve traffic on the Highway 59 Bridge and even though it would save the taxpayers of Alabama \$120 million that could be used on other pressing infrastructure projects throughout the State of Alabama, Director Cooper did not even consider BCBC's August 2022 proposal. That refusal is a telltale sign of Director Cooper's bad faith and shows that his new bridge is not about alleviating traffic congestion on the Highway 59 Bridge.

Evidence was introduced at the hearing that many of the bridges in the State of Alabama require significant improvement. Director Cooper testified that ALDOT has limited funds to spend and numerous transportation problems to address across the State of Alabama. Director Cooper also conceded that Alabama has an aging inventory of bridges and acknowledged that "Alabama just never has enough money to go around for the bridges." 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 that Director Cooper is using over \$120 million of taxpayer dollars to build a bridge that his own experts concede would do no more to alleviate traffic on Highway 59 than the proposed bridge that BCBC offered to build at no expense to the Alabama taxpayers. Alarming, Director Cooper testified that he has never spoken with Governor Ivey about his new bridge project. He then backtracked, claiming that he mentioned his new bridge project to her once in 2017 when she first took office. He has not spoken a single word to the Governor about the Cooper Bridge in six years. When asked "how many more millions of dollars of taxpayers' money do you think you're going to spend on this project without talking to Governor Ivey?", Director Cooper responded: "I don't know."

The evidence and testimony at the preliminary injunction hearing revealed the true motive for Director Cooper's vindictive campaign against BCBC—he thinks the company makes too much money on the toll bridge. In Director Cooper's own words, he thinks BCBC is not

“entitled to that.” The revenue or profit margin of a private company is not within the purview of the Director of Transportation and should play no role in making decisions on how to spend State funds. Unfortunately, the Court concludes that is exactly what happened here.

The Court finds that Director Cooper, in directing ALDOT to proceed with the Cooper Bridge, acted in bad faith for the purpose of putting a private company out of business, and that he concealed that true purpose from the public.

Director Cooper has taken the position throughout this proceeding that his conduct cannot be second-guessed by this Court or anyone else until and unless the Governor relieves him of his duties. The Court acknowledges that the Governor has the power to remove Director Cooper from office, and that this Court does not. As the Director of Transportation, Director Cooper has broad discretion to manage the State’s transportation needs. But Director Cooper is not above the law and is not permitted to act in bad faith.

Director Cooper’s outrageous conduct in embarking on spending more than \$120 million of State funds, on a bridge that ALDOT does not need, for the purpose of putting a private company out of business shocks the conscience of the Court. As set forth below, the Court finds that BCBC has satisfied all of the elements for a preliminary injunction and therefore grants the requested preliminary injunction subject to BCBC’s filing of security under Rule 65(c) consistent with this Order.

### **PROCEDURAL BACKGROUND**

BCBC filed a complaint in this action on October 20, 2022, seeking, among other forms of relief, an injunction preventing Director Cooper from constructing a new bridge over the Intracoastal Waterway approximately one mile from the BEX Bridge. Director Cooper filed a motion (Dkt. 66) and supplemental motion (Dkt. 278) seeking to dismiss BCBC’s claims. Those

motions are addressed in a separate Order. Director Cooper did not agree to pause work on the Cooper Bridge pending the outcome of this lawsuit. Thereafter, on November 21, 2022, BCBC filed a motion for a preliminary injunction seeking to enjoin construction of the Cooper Bridge while this matter was pending before the Court. Dkt. 40.

The Court held a hearing on BCBC's preliminary injunction motion over the course of February 22-24, 2023, April 19, 2023, April 28, 2023, May 1, 2023, and May 3, 2023. Over those seven hearing days, the Court received nearly 200 exhibits, and heard testimony from 13 witnesses. The Court heard testimony from the following witnesses called by BCBC: Neal Belitsky, President and CEO of American Roads, LLC, and CEO of BCBC; Vincent Calametti, formerly, Southwest Regional Engineer for ALDOT (by prior sworn testimony); Paul Huebener, formerly, Partner and Head of Americas for DIF Capital Partners ("DIF"); Philip Bates, an expert in transportation, planning, and economics who testified as an expert witness; G. Mack Roberts, Vice President of Engineering and Development for American Roads and three-time former Director of the Alabama Highway Department; Tony Kennon, the Mayor of the City of Orange Beach (by video deposition); and Ford Handley, City Administrator and Finance Director for the City of Orange Beach. The Court heard testimony from the following witnesses called by Director Cooper: Wade Henry, a Design Engineer for ALDOT; Blake Phelps, the Economic Development Coordinator for the City of Gulf Shores, who testified solely in his personal capacity as a resident of Gulf Shores; William Adams, currently, the Senior Vice President for the East Gulf Region at Volkert, Inc. and formerly Assistant Chief Engineer for Preconstruction for ALDOT; Richard Caudle, Senior Traffic Engineer for Skipper Consulting, Inc.; Darrell Skipper, President of Skipper Consulting, Inc.; Kyle "Matt" Leverette, Assistant Chief Engineer for Preconstruction at ALDOT; and Director Cooper. In addition, after the

hearing concluded, and prior to the entry of this Order, Director Cooper offered the deposition testimony of Gulf Shores Fire Chief Mark Sealy.

The Court's findings of fact and conclusions of law set forth in this Order are based on the extensive evidence that was received over the course of the preliminary injunction hearing. The Court had the opportunity to assess the credibility of both sides' witnesses over the course of the hearing. As a general matter, the Court found BCBC's witnesses to be credible and forthright. The Court found several of Director Cooper's witnesses to be lacking in credibility as to certain material points, which are described in greater detail below. The Court found Director Cooper to be the least credible witness to testify at the hearing. The Court addresses below particular credibility findings which it has made upon hearing the evidence that was admitted over the course of the hearing.

### **FINDINGS OF FACT**

#### **A. BCBC and the BEX Bridge**

In 1996, the Baldwin County Commission determined that there was a "desperate need" for an additional route over the Intracoastal Waterway for residents of and visitors to Pleasure Island in South Baldwin County. PTX-39 at BCBC00008099. The County Commission was "advised by representatives of the Alabama Department of Transportation" that, due to insufficient funds, ALDOT was unlikely to be able to build a new bridge span over the Intracoastal Waterway beyond the existing Highway 59 Bridge. *Id.* BCBC stepped in to meet that "desperate need," and agreed to build a two-lane bridge—the Beach Express Bridge ("BEX Bridge")—across the Intracoastal Waterway, connecting the City of Foley to the north with the City of Orange Beach to the south. PTX-39 §§ 1-3. The BEX Bridge would be built for free, at no cost to Baldwin County, the State of Alabama, ALDOT, or Alabama's taxpayers. PTX-39 §



1; Prelim. Inj. Hr'g Tr. ("Tr.") 59:3-10. In exchange for making that substantial upfront investment, BCBC would receive a license to operate the BEX Bridge as a toll bridge. Tr. 70:2-18; PTX-39 §§ 1-3.

The terms of the deal between BCBC and Baldwin County were memorialized in a 1996 license, which followed a series of open public meetings and notices. PTX-39 at BCBC00008100. Under that license, Baldwin County received a free two-lane bridge over the Intracoastal Waterway, and BCBC received a perpetual license to operate the BEX Bridge as a toll bridge, and to exercise discretion in setting the amount of the toll. PTX-39 §§ 1-3. The 1996 license was subsequently amended to authorize BCBC to widen the BEX Bridge and add additional lanes without obtaining further approvals or permission from Baldwin County. PTX-42; Tr. 70:23-71:21. Both the original and amended licenses are still in place, Tr. 70:23-71:21, and neither places a date restriction on BCBC's right to set and collect tolls on the BEX Bridge. PTX-39; PTX-42; Tr. 70:19-22.

BCBC also entered into agreements with the City of Foley, Baldwin County, and the City of Orange Beach through which each of those entities (a) acknowledged BCBC's perpetual rights to operate the BEX Bridge as a toll bridge and exercise its discretion in setting tolls, and (b) agreed to follow a comprehensive traffic management plan to ensure that the expressway leading to the BEX Bridge from the north—the Foley Beach Express—remained an expressway with free flowing traffic and minimal intersections. PTX-44 BCBC00000392 (Triparty Agreement) at 3-5, 17, 18; PTX-45 at BCBC00008160.

As promised, BCBC built the BEX Bridge without using any public funds, opening it to traffic in 2000. Tr. 59:3-5. The BEX Bridge has served residents of and visitors to Pleasure Island ever since. Tr. 59:3, 66:17-21.

Unlike the nearby Highway 59 Bridge, which is serviced by a road—Highway 59—that has numerous stoplight intersections, curb cuts and countless stores, restaurants, and other attractions, and a lower speed limit, the BEX Bridge is serviced by the Foley Beach Express. The Foley Beach Express is a four-lane expressway that takes visitors to Pleasure Island directly from I-10, via the Baldwin Beach Express. PTX-1; *see also* Tr. 476:13-23.

As a result of agreements BCBC entered into with Baldwin County and the nearby cities of Orange Beach and Foley, the Foley Beach Express has remained an expressway with minimal intersections or “conflict points” so as to ensure a free flow of traffic north and south at higher speeds than on Highway 59. Tr. 689:4-690:3; PTX-44 BCBC00000392 (Triparty Agreement) at 2-4; PTX-45 at 1, 4. As a result, traffic on the Foley Beach Express is free flowing, essentially from I-10 down to the BEX Bridge. Tr. 680:19-681:1; 689:8-690:3; *see also* PTX-628, Tr. 28:14.

The Court notes that BCBC has taken several steps over the years to alleviate congestion in the area, facilitate evacuation, and otherwise be a good member of the local community. As Belitsky testified, BCBC provides free travel to emergency, medical and law enforcement vehicles, lifts the gates and allows cars to pass free of charge in times of voluntary and mandatory storm-related evacuations, allows debris removal vehicles assisting with storm clean-up to travel toll free across the bridge, and works closely with the ten-thousand-seat outdoor concert venue in Orange Beach to coordinate the lifting of the gates and allowing traffic to cross the bridge for free to avoid significant back-ups following concerts and other large gatherings. *See* Tr. 62:6-18, 63:18-64:13, 64:18-25. BCBC also provides jobs to thirty-six full-time equivalent employees, all of whom are Alabama residents, and maintains staffing at the BEX Bridge 24 hours per day, seven days per week. Tr. 60:8-25. Further, pursuant to a contractual agreement, BCBC pays the City of Orange Beach thirty cents per vehicle that crosses the BEX

Bridge. PTX-45 § 2.04.

**B. Director Cooper’s Long-Running Mission to “Undo the Deal”**

Director Cooper was appointed to his position by Governor Bentley in 2011. Tr. 67:8. Director Cooper had no prior experience in the fields of transportation, traffic management, infrastructure or government. Tr. 1473:14-1482:6, 1696:6-13. He was appointed on the recommendation of his longtime friend, and since his appointment, that friend’s construction company “has done a significant amount of business with ALDOT.” Tr.1485:4-25, 1696:14-1697:3. Director Cooper wasted no time in telling BCBC exactly what he thought of its license to own and operate the BEX Bridge and exactly what he intended to do about it.

In 2011, Director Cooper met with Neal Belitsky, the CEO of BCBC. Tr. 57:2-5, 66:25-67:9. At that initial meeting, Director Cooper stated that he thought the license BCBC had obtained from Baldwin County to operate the BEX Bridge was a “bad deal” and that Director Cooper was “going to do what he could to undo the deal.” Tr. 67:13-16, 67:23-25. Belitsky understood this to mean that Director Cooper “would take whatever steps that might be necessary to put [BCBC] out of business.” Tr. 68:4-5. In the years since, Director Cooper has pursued his ultimate goal of undoing BCBC’s deal and taking away the BEX Bridge in several different ways. The Court recounts them here.

**1. Purchasing the BEX Bridge**

Initially, Director Cooper “proposed to acquire [the] BEX [Bridge], remove the toll and make this a free facility.” PTX-63 at 1. Indeed, on several occasions, Director Cooper expressed that making the BEX Bridge a free public bridge would be a “good solution” and an “easy fix” to traffic management “problem[s]” on Pleasure Island. Tr. 795:13-796:16. He was open about his desire to purchase the BEX Bridge and operate it as a publicly owned, toll-free

bridge. *See* Tr. 797:1-5 (Cooper discussing with Gulf Shores' Economic Development Coordinator the prospect of ALDOT "purchasing" the BEX Bridge); PTX-628 at 57:16-58:2 ("Mr. Cooper felt that there was the opportunity to acquire the bridge. The State had the money and was prepared to buy the bridge."). But when BCBC's then-owner declined Director Cooper's offer to buy the bridge, Director Cooper became "very displeased." PTX-63 at BCBC00002329.

Director Cooper's initial response was to hold public funding hostage in an effort to force BCBC to reconsider selling its bridge. He admitted in a meeting with Mack Roberts that once it appeared to Director Cooper that he "could not purchase the BEX Facility from American Roads he refused to finance an interchange that connects the Foley Beach Expressway to I-10 and also withdrew funding from Baldwin County for several sections of roadway that connects the Expressway to the I-10 Interchange." PTX-63 at BCBC00002329. Director Cooper was ultimately forced to relent, but he soon found another way to harass BCBC.

## **2. Forcing a Sale Through the "Threat" of a Bridge to the West**

His purchase offer rebuffed and his holding hostage of public highway projects vetoed, Director Cooper changed course. In 2015, he set about "undo[ing]" BCBC's "deal" through alternative means: threatening to build a new toll-free bridge to the west of the BEX Bridge that would force BCBC to sell the BEX Bridge or put BCBC out of business and cause the BEX Bridge to revert to public ownership.

While ALDOT staff had previously done very preliminary work into exploring the prospect of a third bridge along the Intracoastal Waterway in between the Highway 59 Bridge and the BEX Bridge, it "had never really been a serious project." PTX-53 at BCBC00004446. Seeing an opportunity to gain leverage over BCBC in his attempt to buy the BEX Bridge,

Director Cooper caused ALDOT staff to “revers[e]” course. *Id.* at BCBC00004447. As contemporaneous notes from BCBC’s meetings with Director Cooper reflect, his express goal in pursuing a new bridge roughly a mile away from BCBC’s bridge was clear: “John Cooper, ALDOT Director has wanted to build this project for several years and ‘put the BEX Facility out of business’ or have American Roads sell BEX to the State.” PTX-53 at BCBC00004446, -447; *see* PTX-63 at BCBC00002329.

In 2015, Roberts and Belitsky met with Director Cooper to discuss Director Cooper’s intent to build a new, free bridge across the Intracoastal Waterway, about a mile to the west of the BEX Bridge. Tr. 72:10-18. During those meetings, Director Cooper told BCBC that his purpose in building a new bridge to the west of the BEX Bridge was to “relieve congestion” over the Highway 59 Bridge. Tr. 72:19-23. Director Cooper told BCBC that he believed that the Highway 59 Bridge was congested because vacationers heading to the beach on Pleasure Island were going out of their way to avoid the toll on the BEX Bridge, opting for a long detour over the Highway 59 Bridge, and then looping back through traffic eastward to the beach. Tr. 81:23-82:16, 137:6-16. Director Cooper did not provide BCBC with any studies, data or evidence showing that his contemplated detour was actually happening or that it was happening in numbers that would meaningfully impact traffic on the Highway 59 Bridge. Tr. 74:7-10, 82:17-23, 137:14-23, 138:5-139:9, 434:23-435:2, 436:14-17.

In his sworn testimony before this Court, Director Cooper referred to the prospect of a new toll-free bridge to the west of the BEX Bridge as a “pending threat[]” to BCBC’s business that would, in Director Cooper’s view, result in a “bargain purchase” price for those looking to acquire the BEX Bridge. Tr. 1579:3-9. That testimony is consistent with contemporaneous accounts of Director Cooper’s statements to BCBC representatives, which make clear that

Director “Cooper advised [BCBC representatives] that unless A[merican] R[oads] agreed to sell the [BEX] Bridge to ALDOT[,], he would build a free bridge, on a parallel route near [the BEX] Bridge and put [BCBC] out of business.” PTX-126 at BCBC00001929.

But Director Cooper’s “threat” did not have the intended effect of forcing BCBC to reconsider a sale of the BEX Bridge. Rather, BCBC took Director Cooper at his word that he believed a new bridge to be necessary and, in the Spring of 2015, offered to build the new western bridge with private funds at no cost to the State. Tr. 72:16-18; *see* PTX-63 at BCBC00002330. That bridge would have differed from the Cooper Bridge in several respects, as it would have (a) consisted of two southbound lanes, (b) taken southbound vehicles all the way down to the beach, and (c) been operated by BCBC along with a converted northbound only BEX Bridge, which would have allowed for those four combined lanes to be reversed to allow for three lanes to flow north or south at given times to facilitate the flow of traffic onto and off of Pleasure Island during peak traffic periods. *See* Tr. 77:11-78:10.

ALDOT’s then-Head Engineer for the Southwest Region (which encompassed Baldwin County), Vince Calametti, was present at the meeting when BCBC made this offer. PTX-63 at BCBC00002331. Calametti was “extremely receptive to [BCBC’s] idea” and “really liked [it] since it addressed most all the Director’s [stated] concerns.” *Id.* His bluff called, Director “Cooper placed his head in his hand and thought carefully for a few minutes” before instructing BCBC to submit a written proposal. *Id.* at BCBC00002330.

As requested, on July 8, 2015, BCBC submitted a written expression of interest to Director Cooper for a project in which BCBC would build and finance a bridge to the west of the BEX Bridge. PTX-67. As part of its due diligence, BCBC requested that Director Cooper provide “[a]ll traffic and revenue projections that have been initiated or completed to date,”

which would have included any traffic studies substantiating Director Cooper's purported belief that toll avoidance was a meaningful problem and that a new bridge over the waterway was necessary to alleviate traffic on the Highway 59 Bridge. *Id.* at BCBC00003830; Tr. 73:1-4, 73:19-74:6. Director Cooper did not provide any traffic studies in response to this request because no such studies existed. Tr. 74:7-10, 139:1-9.

On November 30, 2015, BCBC followed up, this time requesting that Director Cooper provide "all traffic and revenue studies related to South Baldwin County, whether prepared by ALDOT internally or by third-parties" and "all information and materials that provide support or rationale for . . . any new crossings of the Intracoastal Waterway." PTX-82 at BCBC00003832; Tr. 75:5-10. Because no such studies existed, Director Cooper did not provide any traffic studies in response to this request, either. Tr. 75:25-76:3, 139:1-9.

Throughout 2015, Director Cooper continued to view the threat of a new bridge to the west of the BEX Bridge as a cudgel to force BCBC to give up its bridge. For instance, as contemporaneous notes reflect, in October 2015 Director Cooper once again "stated 'A[merican] R[oads] can solve th[e traffic congestion] problem by just selling the BEX facility to the City of Orange Beach.'" PTX-79 at 1. Despite these coercive tactics, BCBC continued to work in good faith in the hopes of partnering with ALDOT and continued to conduct due diligence towards building the new bridge that Director Cooper claimed was necessary.

### **3. Forcing BCBC to Hand Over the BEX Bridge to Orange Beach**

By 2016, Director Cooper shifted course again. In April of 2016, BCBC received a letter from Orange Beach Mayor Tony Kennon noting that "[t]he Governor, John Cooper-ALDOT Director, Gulf Shores and the Baldwin County elected officials have expressed support for a twin span bridge solution (alongside the current FBX bridge), thereby eliminating the need to

pursue the western alternative.” PTX-89 at 1; Tr. 79:16-21. Under this proposal, BCBC would construct a second two-lane bridge directly alongside the existing two-lane BEX Bridge, and there would be no need for any new bridge to the west of the BEX Bridge. Tr. 80:4-22.

After receiving the letter, BCBC once again engaged in discussions with Director Cooper regarding a solution to traffic in the area, during which he “supported the position” that twin spanning “the BEX bridge was a better solution to address traffic [issues],” than a new bridge to the west would have been, and that if a twin span were added to the BEX Bridge, no new bridge to the west was needed. Tr. 80:11-81:5. BCBC accordingly made preparations to begin work on designing a twin span bridge that BCBC would finance and build at no cost to the State. Tr. 81:4-10.

Before BCBC could submit a proposal on the twin span, Director Cooper again changed course. This time, he told BCBC that “no bridge was needed,” and that “if [BCBC] reduced [its] tolls, it would solve the traffic congestion problems on” the Highway 59 Bridge. Tr. 81:11-22, 90:20-91:1, 91:20-25, 124:5-14. This proposed solution was once again based on Director Cooper’s theory of “toll avoidance,” and his belief “that passenger cars were heading south on the Foley Beach Express and then would turn off” onto one of the County Roads towards the Highway 59 Bridge before reaching the BEX Bridge, taking advantage of the Foley Beach Express, but avoiding the toll over the BEX Bridge. Tr. 81:23-82:11. Even though Director Cooper never offered any studies to support that belief, he demanded that BCBC lower its base toll to \$2.00 and claimed that a toll at that amount was needed to meaningfully reduce traffic over the Highway 59 Bridge. Tr. 83:10-23. Despite the absence of any data showing that a single car was avoiding the toll on the BEX Bridge or that a \$2.00 toll would fix that purported problem, BCBC agreed to reduce its base toll to \$2.25 and to make a series of other



improvements all in an effort to come to an agreement with Director Cooper. Tr. 83:10-84:7; PTX-126 at BCBC00001930. Director Cooper, in turn, agreed that he would finally remove the threat of a new bridge and commit that neither ALDOT nor the municipalities in the area would build a bridge to the west of the BEX Bridge. Tr. 81:15-84:7; PTX-126 at BCBC00001930. Director Cooper then offered to reduce the parties' agreement to writing. Tr. 83:24-84:7.

On March 23, 2017, BCBC received Director Cooper's draft agreement. PTX-106. BCBC was "shocked," as Director Cooper's draft contained several provisions that had not been discussed by the parties and had nothing to do with relieving congestion or moving traffic off Highway 59. Tr. 84:23-85:5, 85:24-86:10. The most egregious was Director Cooper's insertion of a "last-minute addition that drastically changed all prior concept discussions" and would have altered the terms of BCBC's agreement with Orange Beach. PTX-126 at BCBC00001930-931; Tr. 85:2-5, 86:5-16, 160:12-24; PTX-106 at p. 5, ¶ 7. Under the existing agreement between BCBC and Orange Beach, Orange Beach held an option to purchase the BEX Bridge starting in 2033 for ten (10) times the highest annual revenue for any of the three years immediately preceding the year when Orange Beach exercises its option. PTX-45 § 5.01. Based on BCBC's projections of annual revenue, by 2033, that purchase price could easily be around \$150 million. Tr. 87:15-25. Director Cooper proposed extending the option date to 2043 and changing the purchase price to the "depreciated value" of the BEX Bridge, which would have been essentially zero. PTX-106 § 7; Tr. 88:1-8.

The term requiring BCBC to sell the BEX Bridge for its depreciated value had nothing to do with Director Cooper's stated purpose of alleviating traffic on Highway 59. Tr. 85:24-86:16. To the contrary, it is powerful evidence of Director Cooper's intent to try to force BCBC to forfeit its property for nothing. When BCBC asked Director Cooper for an explanation of this

new term, Director Cooper reiterated what he had told Belitsky when he first took office in 2011: that he personally felt BCBC's license with Baldwin County to own and operate the toll bridge "was a bad deal" and that his plan was "to undo the deal." Tr. 88:22-89:14, 96:25-97:5; *see also* PTX-126 at BCBC00001931 ("Cooper said that he personally did not like the original agreement . . .").

#### **4. Director Cooper Decides to Build His New Bridge to Put BCBC Out of Business**

In June 2017, BCBC informed Director Cooper that it could not agree to his proposal because it would "come close to bankrupting [BCBC]" in light of the reduced toll amounts required and the depreciated value purchase price. Tr. 92:1-9. Director Cooper responded by stating that "discussions were over and he was going to build his [new] bridge." Tr. 92:12-13. Almost immediately afterwards, on June 27, 2017, Director Cooper ordered ALDOT staff to begin working on the Cooper Bridge, instructing as follows: "Apparently I have failed to negotiate a satisfactory agreement with American Roads with respect to the Orange Beach Toll Bridge. Accordingly, I want all efforts expended to design and build a new bridge at the location we previously decided and to connect that bridge to Canal Road and the road we agreed to build for Gulf Shores. To be clear, I want the road and bridge designed PROMPTLY and I want work started before I leave this office." PTX-122 at ALDOT-029867; *see* Tr. 130:11-20. Director Cooper's missive caused his employees to label the Cooper Bridge as a "HOT PROJECT," which was understood by ALDOT staff to mean a project of particular importance to the Director that "needs to be done quick." PTX-122 at ALDOT-029866; Tr. 881:3-13, 887:16-18.

ALDOT's internal files made clear that Director Cooper's June 27 "direct[ive]" was a "change" in "direction in the current design" of ALDOT's plans that "add[ed] a connection across the Intracoastal Waterway" that had not previously been part of ALDOT's proposed work

in the area. PTX-124 at 1. That timing reinforces the Court's finding that Director Cooper's purpose in pursuing his new bridge is to put BCBC out of business to force it to relinquish the BEX Bridge. Director Cooper changed course and ordered his new bridge to be built the very next day after BCBC refused yet another of his demands to hand over the BEX Bridge for free.

Consistent with these contemporary emails and ALDOT files, Director Cooper made clear in his sworn testimony at the preliminary injunction hearing that it was at this time in 2017 that he made the decision to build his new bridge. Tr. 1751:8-10. The Court finds this to be a critically important fact not only because it confirms that Director Cooper's purpose in building the Cooper Bridge was to harm BCBC and "undo" its license for the BEX Bridge but also because it colors Director Cooper's conduct in the ensuing time period, as he had already made up his mind to proceed with the Cooper Bridge.

#### **5. The Condemnation Hearing Reveals a Total Lack of Studies or Data Showing Any Need for the Cooper Bridge**

By early 2018, ALDOT, at Director Cooper's direction, was in the process of condemning property in connection with the Cooper Bridge and related roadway north of the Intracoastal Waterway. PTX-159; PTX-165. At that time, the plan was to funnel traffic off of the Foley Beach Express onto a roadway that would take traffic away from the BEX Bridge and onto the Cooper Bridge. *See* DX-600 at 76:5-77:6. Because part of that roadway cut through a parcel of real property BCBC owned alongside the Foley Beach Express, Director Cooper authorized ALDOT to initiate a condemnation proceeding to take, by the State's power of eminent domain, that parcel of real property in furtherance of the Cooper Bridge. *See* PTX-159; PTX-165.

BCBC resisted the State's authority to condemn that parcel of property, and a hearing was held in Probate Court in Baldwin County over April 24 and 25, 2018, to determine whether

the State would be permitted to proceed to the next phase of the condemnation process. PTX-187; DX-600. Testimony from Director Cooper and ALDOT Southwest Region Head Calametti at that hearing shed further light on Director Cooper's decision-making process. Director Cooper admitted that ALDOT did not have a single traffic study showing the need for a new bridge or a single traffic study showing that anyone was avoiding the toll on the BEX Bridge to take the Highway 59 Bridge instead as he had claimed, and that he made the decision to build his new bridge without relying on any traffic studies whatsoever. PTX-187 at 161:21-162:2, 163:16-19, 213:3-11.

Calametti agreed that although ALDOT could have conducted several types of traffic studies to substantiate Director Cooper's stated theory that a significant number of drivers heading to the beaches of Pleasure Island were taking an elaborate detour along the Highway 59 Bridge to avoid the toll on the BEX Bridge, "he was not aware of any studies to actually prove" that because ALDOT never conducted any such studies before Director Cooper decided to build his new bridge. PTX-187 at 76:14-19, 76:7-13, 77:3-22, 87:17-88:3, 132:9-25, 133:4-134:10. Calametti admitted further that the Cooper Bridge "solves nothing" with respect to congestion on the south side of the Intracoastal Waterway and would simply "dump traffic on Canal Road." PTX-187 at 85:2-8. And Calametti acknowledged that there is "not a scintilla of proof that the toll on the BEX bridge caused any traffic congestion" on the Highway 59 Bridge. Tr. 140:11-16; PTX-187 at 116:17-117:3.

While the condemnation hearing was unfolding, Director Cooper was frantically trying to push through his "HOT PROJECT." On April 24, 2018, the very same day Director Cooper testified in Baldwin County Probate Court, Adams, then ALDOT's Assistant Chief Engineer for Preconstruction, proclaimed to his staff that "[t]his project MUST let in September!!!" PTX-

186. Adams made clear at the preliminary injunction hearing that he sent that email after receiving “a strong call from [Director Cooper] to say get it done,” which Director Cooper made the very same morning he was testifying in the condemnation hearing. Tr. 886:8-887:18.

ALDOT was permitted by the Baldwin County Probate Court to proceed to the next phase of condemning BCBC’s property, DX-595, but it faced a full-blown trial in Baldwin County Circuit Court. *See* Code of Ala. §§ 18-1A-130, 18-1A-150, 18-1A-151, 18-1A-152, 18-1A-153, 18-1A-154, 18-1A-190, 18-1A-283. BCBC would have been entitled to full discovery into Director Cooper’s communications, and the Circuit Court would have decided the case *de novo*. *See id.* §§ 18-1A-130, 18-1A-283. To avoid that scenario, Director Cooper caused ALDOT to re-route the project to avoid cutting through BCBC’s property and to voluntarily dismiss the entire condemnation proceeding without prejudice, which prevented BCBC from obtaining discovery or having an opportunity to challenge his conduct in Circuit Court. Dkt. 279 (Ex. H to Def. Suppl. Motion to Dismiss); *see also* Dkt. 279 (Ex. J to Def. Suppl. Motion to Dismiss, Order Dismissing Plaintiff’s Petition).

**C. Director Cooper Negotiates with BCBC in Bad Faith While Papering Over the Record on the Cooper Bridge**

The condemnation hearing revealed that Director Cooper did not have any evidence or analysis to support his decision to construct a new bridge over the Intracoastal Waterway. It also became apparent that Director Cooper was facing intense public scrutiny over his behavior. For instance, a May 2, 2018 article in the *Alabama Political Reporter*, titled “Court records raise troubling questions about \$87 million coastal bridge project,” published excerpts from Director Cooper’s and Calametti’s testimony at the condemnation hearing, detailed “concerns” with the Cooper Bridge, and noted that “Cooper admitted under oath that Gov. Kay Ivey’s administration green-lighted the project without a full review.” PTX-372 at 2-9. Director Cooper was also the

focus of an inquiry by the State Auditor, who sent Director Cooper multiple letters in 2018 requesting documents demonstrating why ALDOT was spending tens of millions of dollars on a new bridge over the Intracoastal Waterway notwithstanding BCBC's willingness to make improvements to the BEX Bridge and notwithstanding Director Cooper's 2016 concession that no new bridge was needed. DX-341 at ALDOT-023993-997.

With pressure mounting, Director Cooper saw an opportunity to regain the upper hand. In July 2018, BCBC and its parent, American Roads, were acquired by DIF Infrastructure V, which is managed by DIF Capital Partners. Tr. 143:23-25; DX-136. DIF, which is in the business of partnering with governments on infrastructure projects, was eager to work with ALDOT to find a solution and believed there was an opportunity to reach a reasonable agreement that was beneficial to both ALDOT and BCBC. Tr. 143:5-25, 144:7-145:7. That belief was based in part on DIF's expectation that Director Cooper would negotiate in good faith. Tr. 144:7-145:7, 253:9-15. He did not do so.

Based on the evidence described in greater detail below, the Court finds that from mid-2018 through late 2022, Director Cooper negotiated with BCBC (and DIF) in bad faith, stringing them along while making outrageous, commercially unreasonable demands, moving the goal posts at the last minute, and never intending to reach an agreement. Based on the evidence presented at the hearing summarized below, the Court concludes that Director Cooper did not actually intend to reach an agreement with BCBC but rather that he used these negotiations to create the false and misleading impression for the public and the Governor's Office that he was negotiating with BCBC in good faith, while he was in fact using the time to manufacture a record to make it seem as though the Cooper Bridge was a legitimate ALDOT project needed to alleviate traffic on the Highway 59 Bridge rather than what it in fact was: a brazen effort to put

BCBC out of business motivated by Director Cooper's personal vendetta against the company and its toll bridge.

### **1. Director Cooper's Bad-Faith Negotiations From 2018-2022**

Over the course of 2018-2022, Director Cooper insisted on five different frameworks for a potential resolution. Each time, BCBC would work to satisfy Director Cooper's stated objectives and once it appeared as though an agreement was in sight, Director Cooper would insist upon a different framework, which forced BCBC to go back to the drawing board to analyze and study the data, while "doing the best job possible" to "be responsive to each and every request" from ALDOT. Tr. 150:24-151:9.

First, up until mid-2018, the framework involved no new bridge span being added over the Intracoastal Waterway with BCBC merely reconfiguring the existing BEX Bridge structure to create a third lane that could be reversible, plus lower tolls. Tr. 148:2-13. Second, from July 2018 through November 2018, the framework centered around BCBC financing and building a new toll bridge to the west of the BEX Bridge, where Director Cooper now is proceeding with the construction of his new bridge, to consist of two southbound lanes, with the BEX Bridge converted to two northbound lanes. Tr. 148:14-15, 149:8-16. Third, from November 2018 through October 2019, the framework involved BCBC financing and building a toll bridge at the western location with the added "twist" that ALDOT would have the right to set tolls for both bridges in exchange for making a guaranteed minimum annual payment to BCBC. Tr. 149:17-24. Fourth, from October 2019 into the Summer of 2021, the concept of a new bridge to the west "had gone away," and the framework centered around BCBC adding a two-lane twin span alongside the BEX Bridge, an expansion of the toll plaza, plus connection to the adjoining roads. Tr. 149:25-150:13. Fifth, from the Summer of 2021 through August 2022, the framework

centered around BCBC's twin span plus a requirement that BCBC carry a fixed "minimum percentage of traffic" across the Intracoastal Waterway. Tr. 150:14-23. The dizzying number of fundamentally different frameworks Director Cooper insisted on made it impossible for an agreement to be reached, and had Director Cooper's intended effect of buying time to manufacture a record to create the illusion that his new bridge project was a legitimate use of ALDOT's resources.

Moreover, as BCBC worked diligently to reach a resolution with Director Cooper that would address his stated goal of alleviating traffic on the Highway 59 Bridge, Director Cooper consistently injected commercially unreasonable terms that either had nothing to do with that objective or were impossible to achieve. The Court finds credible and persuasive the testimony of DIF and BCBC representative Paul Huebener in this regard. It finds Director Cooper's testimony to be neither credible nor persuasive. Huebener testified in detail about ten different instances when Director Cooper engaged in bad faith conduct during the parties' negotiations during the 2018-2022 time period, *see* Tr. 151:12-192:4, and the Court finds that each of those actions on the part of Director Cooper overwhelmingly shows that he was negotiating in bad faith. The Court briefly addresses here what it finds to be the most egregious examples of Director Cooper's bad faith conduct during those negotiations.

First, in the early stages of these 2018-2022 negotiations, Director Cooper demanded that American Roads hand over to the State three toll bridges it owns in or around Tuscaloosa, Montgomery, and Wetumpka, respectively. Tr. 152:17-153:24, 155:4-156:7; PTX-216 at BCBC00003342-343. These bridges are each one hundred miles or more away from Pleasure Island. Tr. 155:11-14. The forfeiture of these bridges had no conceivable connection to Director Cooper's stated purpose of alleviating traffic on the Highway 59 Bridge. Tr. 155:15-156:7.



Even Director Cooper was forced to concede that this request had nothing to do with his stated purpose and would not have had any impact on Highway 59 traffic in South Baldwin County. Tr. 1746:6-14. That Director Cooper would make such a demand not only shows that he was playing games with BCBC in the negotiation but also that he was out to drive BCBC and its parent company out of the State of Alabama, altogether. That is galling conduct by Director Cooper and an abuse of his authority, particularly given his sworn testimony that “tolls” are “in the best interest of the people of Alabama.” Tr. 1739:18-1740:11.

Second, after three years of negotiations, Director Cooper came up with a brand-new term that he treated as a deal-breaker: BCBC had to guarantee that its expanded BEX Bridge with a twin span would carry a minimum percentage of the total traffic across the Intracoastal Waterway. Tr. 178:24-179:9. He initially demanded that BCBC commit to capturing 50% of the traffic before landing on a 40% capture rate demand. Tr. 179:10-13. Director Cooper admitted under oath that his initial 50% capture rate was “arbitrary” but he maintained that his 40% capture rate was defensible. Tr. 1648:22-1649:18. The Court agrees with Director Cooper that the 50% capture rate was arbitrary and concludes, based on the evidence described below, that the 40% capture rate requested by Director Cooper was unachievable.

The mere fact that Director Cooper based a framework on achieving a percentage-based traffic reduction was highly unusual and inconsistent with ALDOT’s standard protocols and traffic engineering practices generally. Director Cooper witnesses Wade Henry, William Adams, and Richard Caudle confirmed that when trying to alleviate traffic congestion, ALDOT engineers and traffic engineers generally do not approach the problem by dealing in percentages of traffic moved from one roadway to another but rather try to improve the level of service of a given roadway, which is based on an “A” through “F” letter-grading system. *See* Tr. 398:14-

400:23, 401:10-17, 888:11-890:6, 972:10-15. Indeed, Henry and Adams both testified that they had never heard Director Cooper reference a traffic capture percentage concept in their tenures at ALDOT. Tr. 399:22-400:17, 888:11-890:6.

The preliminary injunction hearing made clear that Director Cooper's particular capture rate of 40% was the product of "a very quick . . . back-of-the-napkin calculation" that Director Cooper's consultant and friend, Darrell Skipper, did "on the fly" at a November 2021 meeting between representatives of ALDOT, BCBC, Orange Beach, and Gulf Shores. Tr.1016:6-1018:19, 1148:4-1149:12. To come up with that 40% figure, Skipper simply took the total number of ten planned lanes over the Intracoastal Waterway—six on an expanded Highway 59 Bridge once Gulf Shores completes its addition of a sixth lane, and four on an expanded BEX Bridge with a twin span—and observed that BCBC's four lanes would represent four-tenths or 40% of the number of lanes over the waterway. Tr. 1017:9-22. Skipper did not consult any traffic modeling or studies or conduct any analysis of any kind apart from this "back-of-the-napkin" math. *See* Tr. 1018:15-19 ("That was the numbers that were used and the math that was performed . . ."). But this is not the only evidence that Director Cooper's insistence on a 40% capture figure was arbitrary and capricious.

During the negotiations, BCBC engaged a traffic expert to analyze whether a 40% capture rate was possible. That expert "[u]ltimately" concluded that "achieving 40 percent with the road network in place was just not possible." Tr. 179:15-18. ALDOT's own experts agreed. Richard Caudle, who was the Skipper Consulting firm's "engineer of record" on its work relating to traffic on Pleasure Island made clear that in his professional opinion, it was not possible for an expanded BEX Bridge to capture 40% of traffic over an extended period of time, and that even if there were extensive "improvement of the roadway network south of the

bridges,” the “number of toll plazas” were expanded, and there were “discounts to local residents,” an expanded BEX Bridge “could reach 40% only during very specific hours of very specific days during the year.” Tr. 1148:19-1150:13, 1154:3-15. Caudle’s analysis reinforced the findings of BCBC’s traffic expert, Phil Bates, who explained at the hearing that even if all of those improvements were made, including improvements to the roadway network on the south side of the Intracoastal Waterway, an expanded BEX Bridge could carry at most 39% of traffic at only very specific hours of the day during very particular times of year. *See* PTX-356; Tr. 565:17-25, 568:10-13. Yet Director Cooper insisted that BCBC commit to achieving the impossible, making clear that his 40% capture demand was based on the existing road network and refusing BCBC’s proposal to condition traffic capture obligations on improvements to the network south of the waterway. *See* DX-467 at BCBC00003405. In doing so, Director Cooper further undermined BCBC’s ability to achieve his minimum traffic capture percentage demand.

Director Cooper would ultimately use this minimum traffic capture percentage term as an excuse to walk away from the negotiations with BCBC, claiming that BCBC’s unwillingness to agree to eventually capture 40% of waterway crossings made clear that his new bridge was the only sensible solution to the purported problem of traffic on the Highway 59 Bridge. Tr. 1637:16-21, 1845:18-1846:1. He insisted that his new bridge would hit this traffic capture percentage. Tr. 1732:7-1733:4, 1735:17-1736:1. But Director Cooper’s own expert witness testified that the Cooper Bridge would not come close to carrying 40% of traffic across the Intracoastal Waterway. Under Caudle’s analysis, conducted using Skipper Consulting’s proprietary traffic modeling data, the Cooper Bridge would carry just 27% of traffic across the Intracoastal Waterway, and just 28% when combined with the existing BEX Bridge. PTX-460 at 2; Tr. 1062:2-15. Caudle left no doubt that in his professional opinion, Director Cooper was

“wrong” to assert that his new bridge along with the existing BEX Bridge would carry 40% of the traffic across the waterway. Tr. 1076:24-1077:2.

The Court finds that Director Cooper had no rational basis to think that it was possible for the BEX Bridge to achieve a 40% capture rate, and that Director Cooper was aware of that fact when he decided to make that term a deal-breaker in the negotiations. This was another in a series of Director Cooper “demanding things that he thinks [are] just out of [BCBC’s] reach” in an effort to blow up negotiations while creating the false impression that he was operating in good faith. PTX-363 at BCBC0004460. Mayor Kennon, who has dealt extensively with traffic issues in the area as part of his professional duties for the last fifteen years, testified credibly that Director Cooper’s injecting a minimum percentage traffic capture requirement towards the end of the negotiations functioned as an “escape clause” by providing “a way to get out of” the negotiation “while saving face,” as “it was a way for him to say no to the toll bridge deal” by insisting on a term that was not possible to achieve and to which BCBC could not agree. PTX-628 at 314:15-23, 341:10-23. The Court agrees with that assessment and finds that this was precisely Director Cooper’s purpose in insisting on the minimum percentage capture requirement and using it as a justification for ending the negotiations. Indeed, Director Cooper was imposing requirements on BCBC that his own bridge could not meet.

Third, Director Cooper failed to respond to, or analyze the efficacy of, what became BCBC’s final proposal, which it provided to Director Cooper on August 19, 2022. PTX-613; PTX-614; Tr. 190:17-21, 1650:16-21. In its August 2022 proposal, which was accompanied by a detailed term sheet, BCBC offered to (1) build a 2-lane twin span bridge alongside the existing BEX Bridge at no cost to the State; (2) expand the BEX Bridge toll plaza to provide for increased traffic flow, (3) begin all construction by April 30, 2023, and complete all construction

by April 30, 2026, if not sooner; (4) make the expanded 4-lane BEX Bridge free to use for all Baldwin County citizens; (5) provide \$73 million in additional contributions to ALDOT, Gulf Shores (via ALDOT), and Orange Beach, collectively, (6) hand over the expanded 4-lane BEX Bridge to ALDOT or its designee at the end of a 50-year concession term, and (7) commit to adding two more lanes to the BEX Bridge for a total of six lanes in the event future growth in the area resulted in traffic hitting certain thresholds. PTX-613; Tr. 186:16-190:21.

BCBC's August 2022 proposal would have resulted in no State funds being spent, thus saving Alabama taxpayers over \$120 million, given Baldwin County residents free passage—including those in the beach tourism industry who cannot afford to live on Pleasure Island and take the BEX Bridge to commute to and from work each day—and would have resulted in non-Alabama residents bearing the brunt of the tolls, as over two-thirds of summer visitors to Pleasure Island come from outside of the State. Tr. 186:9-190:10, 791:4-793:1; PTX-628 at 14:4-17, PTX-629 at 6. BCBC had secured all the necessary permits for a new twin span, and was “ready, willing and able” to begin construction on the bridge. Tr. 94:21, 95:4-6, 439:10-440:4, 11-12, 17-19.

Director Cooper never even responded to BCBC's August 2022 proposal. Tr. 190:17-21, 1650:16-21. Despite having access to a team of traffic engineers at ALDOT and a team of analysts at the Skipper Consulting firm, Director Cooper did not even bother to have anyone analyze the efficacy of BCBC's August 2022 proposal. Specifically, Director Cooper never asked his in-house or outside traffic experts to analyze the impact on Highway 59 congestion of BCBC's offer to make the expanded BEX Bridge completely free for all Baldwin County citizen residents. The Court finds that his refusal to do so is the epitome of bad faith when considered alongside Director Cooper's adamant insistence that traffic on the Highway 59 Bridge was the

result of drivers avoiding the toll on the BEX Bridge, and testimony from Kennon, Handley, and Phelps that none of them had ever received a complaint from a tourist to Pleasure Island about the toll on the BEX Bridge. Tr. 701:21-23, 702:18-25, 787:11-17; PTX-628 at 37:14-38:8

If Director Cooper had genuinely believed in his toll avoidance hypothesis, and if he were genuinely motivated by addressing traffic on the Highway 59 Bridge, then he would have assessed what impact removing the toll for Baldwin County citizen residents would have had on any purported toll avoidance and any resulting congestion on the Highway 59 Bridge. His failure to do so is a telltale sign of bad faith.

Indeed, Director Cooper's own expert witness, Caudle, who was the "engineer of record" for the area from Director Cooper's go-to traffic consulting firm, testified that he "was not aware" of BCBC's proposal to offer free passage for Baldwin County citizen residents, that such a term "would only improve the performance of th[e BEX B]ridge to carry more traffic," that he "d[id] not know of a study that addresses" what "percentage of Baldwin County residents [who] travel either across the Foley Expressway bridge or the 59 bridge are Baldwin County residents," that "[n]one of [Skipper's] work ever has [assessed] what would be the impact of making the toll bridge, in essence, free for Baldwin County residents," and that he "believe[d] that would be very good data to have in assisting to make a decision" as to whether or not to proceed in building a new bridge to the west of the BEX Bridge with public funds. Tr. 1020:3-1021:7.

At the hearing, Director Cooper attempted to justify his refusal to even consider BCBC's August 2022 proposal. He called the proposal "embarrassing" because it did not contain the traffic capture percentage term that Director Cooper's own expert acknowledged was impossible for BCBC to meet, and claimed that the proposal was "as useless as a screen door on a submarine" because it was in the form of a detailed written proposal accompanied by an even

more detailed term sheet. Tr. 1630:13-21, 1802:22-1803:3. The Court rejects Director Cooper's conclusory and incredible explanation for his failure to consider BCBC's August 2022 proposal. Not a single other witness offered by either side had a remotely negative word to say about the merits of BCBC's August 2022 proposal. Orange Beach Mayor Kennon described it in glowing terms, noting that it included "essentially everything we asked for," "everything . . . Mr. Cooper wanted out of a deal," and would "absolutely" solve the problem of traffic in Orange Beach. PTX-628 at 31:9-10, 34:1-2, 34:9-14, 315:13-16. Orange Beach City Administrator Handley likewise testified that Orange Beach "much" preferred BCBC's proposal to the Cooper Bridge, noting that BCBC's proposal included toll-free passes for Baldwin County residents, improved hurricane evacuation routes, and expanded the current bridge "at no cost to the taxpayers of Alabama." Tr. 692:1-12, 694:1-10, 695:17-19. Even ALDOT employees acknowledged that the August 2022 proposal was an improvement to existing infrastructure. For example, Adams testified that BCBC's proposed expansion and toll pass for Baldwin County residents would "most definitely" help with traffic. Tr. 922:3-16. Caudle stated that the proposed "slate of improvements could help alleviate traffic on Highway 59." Tr. 989:15-22.

These illustrative examples are just the tip of the iceberg of Director Cooper's bad faith during his negotiations with BCBC. The Court notes also that in June 2019, while Director Cooper was ostensibly negotiating with BCBC over a deal in which there would be no Cooper Bridge, Director Cooper signed a no-bid contract with Volkert for \$4.3 million worth of inspection work Volkert would perform on the Cooper Bridge. Tr. 1437:2-1438:2. Director Cooper renewed that contract in 2021, again while he was supposedly negotiating with BCBC. Tr. 1440:20-25. And in July 2021, Director Cooper's staff took the phrase "good faith" out of a draft press release that referenced Director Cooper's "good faith negotiations" with BCBC

during that time period, demonstrating that even they knew that Director Cooper was not negotiating in good faith. PTX-322 at ALDOT-005136. The Court finds that Director Cooper never intended to reach a deal with BCBC, and that he negotiated in bad faith with BCBC throughout the 2018 to 2022 time period.

## **2. Director Cooper's Attempts to Fabricate a Justification for the Cooper Bridge**

While he was negotiating with BCBC in bad faith, Director Cooper was working behind the scenes in an effort to legitimize his new bridge project and create the illusion that it was a necessary and appropriate expenditure of more than \$120 million in taxpayer funds to fix congestion on the Highway 59 Bridge rather than an effort to put BCBC out of business.

Within days of the above-mentioned May 2, 2018 article in the *Alabama Political Reporter* titled “Court records raise troubling questions about \$87 million coastal bridge project,” Director Cooper called Darrell Skipper and asked him to write a “white paper” stating that “the best solution was the construction of a free bridge across the canal.” Tr. 1552:3-16. By the next day, Skipper sent a high-level five-page “white paper” advocating for the need for a new four-lane bridge over the Intracoastal Waterway. PTX-191; PTX-192; Tr. 1552:15-1553:3.

In August 2018, Director Cooper caused ALDOT to award to Skipper Consulting a contract for a comparative analysis of four different options for dealing with traffic over the Intracoastal Waterway—not one of which entailed a twin span of the BEX Bridge. Tr. 1138:14-1139:6. That analysis, which was completed on January 30, 2019, looked at the impacts from a traffic demand and capacity standpoint of (a) not adding any new spans over the waterway; (b) widening Highway 59 to six lanes between SR-182 on Pleasure Island and I-10; (c) constructing Director Cooper's new bridge, and (d) constructing a bridge to the east of the BEX Bridge known as the Wolf Bay Bridge. DX-20 at 2; Tr. 1139:13-1141:14. The Skipper 2019 study did



not analyze the impact of adding a twin span to the BEX Bridge and did not analyze whether any vehicles were avoiding the toll on the BEX Bridge to take a lengthy detour to the Highway 59 Bridge—which was the unsupported factual assertion that Director Cooper consistently made throughout the negotiations. Tr. 1141:15-1142:18. In fact, rather than supporting Director Cooper’s stated purpose, the study revealed that the Highway 59 Bridge would remain congested even if the Cooper Bridge were built, and that the Cooper Bridge would also be congested, “operat[ing] at capacity on opening day.” Tr. 1053:5-1054:20; PTX-460.

In November 2018, Director Cooper caused ALDOT to hold the first and only public meeting relating to Director Cooper’s new bridge. Tr. 1752:21-24. At the preliminary injunction hearing, Director Cooper and ALDOT witnesses suggested that this public meeting was an important step in the process of deciding to proceed with the Cooper Bridge, consistent with “the policy of the department to hold public involvement meetings” to gather “input from the public” on contemplated projects. Tr. 816:21-817:2; Tr. 368:3-12. Director Cooper even testified that “the recommendation” he received from “the Southwestern Region” ALDOT staff based on this public meaning “form[ed] part of [his] reason for continuing with the project to build the bridge” because “[i]t was important to [him] to know what they thought.” Tr. 1593:12-16. But the November 2018 public meeting was held more than a year after Director Cooper had already decided to build the Cooper Bridge, and was held in Gulf Shores rather than Orange Beach (which has since publicly denounced Director Cooper’s new bridge). *See* Tr. 1751:8-10; DX-341 at ALDOT-023807. Moreover, as Adams conceded, the bridge project that was presented at that November 2018 meeting was different than the bridge Director Cooper is pursuing now, as a “four-lane bridge” was “presented to the public” instead of the “two-lane bridge” that Director Cooper is currently attempting to construct. Tr. 859:8-16. There has “been

no public meeting since” Director Cooper made that fundamental change to the Cooper Bridge. Tr. 859:17-19. Director Cooper did not even bother to attend the November 2018 public meeting, but he caused his staff to make a detailed record of the proceedings, which he has attempted to use in this proceeding to defend his conduct. Tr. 1752:15-1753:1; DX-341. The Court finds Director Cooper’s testimony regarding the supposed importance to him of the public’s input on the Cooper Bridge to be wholly incredible, and finds that Director Cooper orchestrated the 2018 public meeting to simply check a procedural box and create the impression that his new bridge was a legitimate project that followed ALDOT protocols.

Director Cooper also worked with his ally in the region, Gulf Shores Mayor Robert Craft, to further insulate from criticism the decision Director Cooper had already made. Craft engaged a traffic engineer, Clark Bailey of the Kimley-Horn firm, to conduct “origin and destination” traffic studies in an effort to prove that Director Cooper’s toll avoidance hypothesis was correct and that a significant number of vehicles heading south were exiting the Foley Beach Express north of the BEX Bridge, turning right, taking the Highway 59 Bridge, and going all the way back eastward past the BEX Bridge into Orange Beach because they were avoiding paying the toll on the BEX Bridge. PTX-585 at 1. Bailey conducted studies in October 2021, August 2022, and December 2022, the first two of which were conducted while Director Cooper was ostensibly still negotiating with BCBC. PTX-585; PTX-586; PTX-587. Bailey’s studies all suffered from the same material methodological flaw: his purported “origin and destination” studies revealed neither the “origin” nor the “destination” of drivers in the area, and thus could not shed light on the question he was hired to answer. *See* Tr. 584:10-20. Bailey’s studies were entirely discredited by BCBC’s expert witness at the preliminary injunction hearing. *See* Tr. 585:10-588:10.

The Court finds that the purpose of these efforts behind the scenes while Director Cooper was ostensibly negotiating with BCBC was to create a false impression that ALDOT was addressing the criticisms that it faced in the wake of the abandoned 2018 condemnation proceeding. This conclusion is supported by the timing of these efforts, the contemporaneous communications about them, the inadequacy of these efforts to support Director Cooper's actions, and Director Cooper's testimony that his decision to build the Cooper Bridge had already been made in 2017. By way of example, this purpose was illustrated by two pieces of evidence. The first is a November 8, 2021 email exchange between Director Cooper's ally, Mayor Craft, and his most trusted outside traffic consultant, Skipper. That day, the day before a November 9, 2021 meeting between Director Cooper and representatives of ALDOT, Gulf Shores, Orange Beach, and BCBC, Craft emailed Skipper a copy of the above-mentioned May 2, 2018 *Alabama Political Reporter* article noting that Director Cooper's testimony at the 2018 condemnation "raise[d] troubling questions about \$87 million coastal bridge project." PTX-372 at 2. Craft wrote that his and Skipper's purpose in conducting the post-condemnation hearing analysis into Director Cooper's proposed new bridge was to "answer[] the unanswered questions from 2018," and Skipper "agreed" with that assessment. PTX-372 at 1; *see* Tr. 1311:14-17, 1312:1-8, 1318:1-4. This exchange exposes Director Cooper's post-condemnation hearing analysis as an exercise in public relations damage control.

The second comes from the testimony of Skipper at the preliminary injunction hearing. When asked whether, in its work relating to Director Cooper's proposed new bridge since 2018, Skipper Consulting "has been providing paper for Director Cooper to put in his file to back up a decision he'd already made to build a bridge," Skipper demurred. Tr. 1334:13-1335:1. Without denying this charge, he replied: "I would think that would be a question better directed to Mr.

Cooper. Not me. I am a consultant to the department. I know the questions that we were asked to answer for the department and information provided to them and when we did it, and that's what we've done. What the motive was, I have no idea." *Id.* Based on all the surrounding facts and circumstances, the Court finds that Director Cooper's "motive" in procuring these materials over the 2018-2022 time period—both directly through ALDOT and indirectly through Gulf Shores—was indeed to generate a paper trail to create the false impression that his decision to build his new bridge was a legitimate exercise of his authority to solve a legitimate traffic problem on the Highway 59 Bridge rather than what it was in reality: a brazen attempt to put a private company out of business and take over its property.

**D. Director Cooper Proceeds with the Cooper Bridge in Haphazard Fashion**

Eager to get his bridge built as soon as possible to put BCBC out of business, Director Cooper has caused ALDOT to proceed with his "HOT PROJECT" in an alarmingly haphazard fashion that emphasizes speed above all else, including prudent planning. Director Cooper's build first, ask questions later approach is further evidence of his bad faith purpose in trying to build the bridge as quickly as possible so as to harm BCBC's business and deprive BCBC of a meaningful opportunity to challenge his conduct. The result is a hodgepodge arrangement that, in the words of Mayor Kennon, is a "boondoggle" that "defies logic." PTX-628 at 23:3, 28:15.

For starters, Director Cooper has inverted the standard sequence for an infrastructure project of this type. As BCBC's expert, Bates, credibly testified, while building an infrastructure project in phases is not uncommon, the standard practice is to build the roadway network as part of the same project as the bridge portion. Tr. 677:19-678:1. Building a bridge first without the necessary roadway connections is atypical and wasteful because it results in "spen[ding] a lot of money on a bridge which you're not getting maximum benefit from." *Id.*

That principle is on full display in Director Cooper's proposed new bridge project. Because of his haste to build the bridge, Director Cooper plans to have the north side of the bridge connect to two ill-equipped local roads: Cotton Creek Drive, which would abut the north side of the bridge and runs west to Highway 59 and east and provides limited access to the northbound lanes of the Foley Beach Express, and Roscoe Road, an outdated country road which would take drivers seeking an express route to and from the beach along a bewildering series of five separate ninety degree turns to get back to the Foley Beach Express. *See* Tr. 428:19-431:3, 898:6-899:4; PTX-1; PTX-14. Witness after witness testified just how ill-suited this roadway network would be to handle the amount of traffic Director Cooper hoped to funnel towards his new bridge. Director Cooper and his expert, Caudle, agreed that Roscoe Road "is an old two-lane country road" with "limited effectiveness as a connector" absent substantial "improvements." Tr. 1107:4-1108:9. Kennon testified that Roscoe Road "is in extremely, extremely bad shape." PTX-628 at 20:16-17. Henry acknowledged that using Cotton Creek road as an access point for the Cooper Bridge risks funneling traffic right back onto Highway 59, and admitted that forcing cars to take five ninety degree turns along Roscoe Road was "not necessarily the most efficient" way to route traffic in the area. Tr. 383:7-16, 384:1-5. Adams testified that moving traffic in this manner would be "certainly less than ideal" and noted that "it may not work well, but it will work." Tr. 898:23-899:7.

Director Cooper's design presents similar issues on the south side of his proposed new bridge. Upon exiting the Cooper Bridge, traffic will be dumped onto Canal Road through a roundabout at a point at which the road is only two lanes. Tr. 381:23-382:8, 544:4-10; 775:16-21; PTX-14. The hearing raised substantial questions as to whether large vehicles, trailers or vehicles towing boats and other aquatic equipment could even navigate that roundabout. *See* Tr.

543-44, 690-91. Heading west from the Cooper Bridge on Canal Road, travelers would encounter a two-way stop and 90 degree turn, known as the “knuckle,” which “slows everybody down.” Tr. 543:19-544:17. With the Cooper Bridge in operation, travelers to Gulf Shores exiting the bridge on Canal Road will merge with travelers exiting the BEX Bridge and face even greater slowdowns around the knuckle. Tr. 546:4-549:24, 650:15-651:7.

Director Cooper’s design also creates multiple conflict points on a road that is supposed to function as an expressway, slowing traffic and generating more safety issues. PTX-628 at 26:11, 52:12-13; Tr. 679:7-681:1. It would also lead to chaos during evacuations because it dumps additional northbound traffic onto the Foley Beach Express and creates more access points for the City of Orange Beach to monitor during those times. Tr. 696:12-697:1. Indeed, as Handley, the City Administrator, testified, “the City [of Orange Beach] would almost prefer [the proposed ALDOT bridge] to be closed during an evacuation” because of the traffic it would create for evacuation purposes. Tr. 696:12-18.

Not only did the evidence show that Director Cooper’s new bridge design actually contributes to traffic in the region, it also showed that the Cooper Bridge does not meaningfully alleviate traffic on the Highway 59 Bridge. Bates credibly testified that “if the new bridge is built, the outcome will be that the 59 [Bridge] will to all intents and purposes be as congested as it is very soon after it’s constructed, and the BEX toll bridge will have virtually no traffic on it.” Tr. 610:8-13; *see* Tr. 1053:5-1054:20, PTX-435 at ALDOT-005204; PTX-460 at 2. Even Director Cooper’s own expert, Caudle, testified that the overwhelming majority of traffic on the Cooper Bridge would come from the BEX Bridge, not the Highway 59 Bridge, which would essentially re-create the two-bridge system already in place and eliminate virtually all of the BEX Bridge’s traffic. Tr. 550:22-551:4, 1223:24-1224:4.

Director Cooper's response to all of this damning evidence was essentially to dismiss it and declare that he is a "creative" person and that he and other "creative people . . . would figure out a way to use the two lanes" on the Cooper Bridge "if [he] could just get them built," and he will "somehow be creative after [the Cooper Bridge is] buil[t]." Tr. 1753:14-1754:2. He assured the Court that ALDOT would someday make improvements to Roscoe Road to make it a more suitable connector, that ALDOT would someday build a more direct north-south connector route from the Foley Beach Express to the north end of his new bridge, and that Gulf Shores would someday address the connectors on the south side of the Intracoastal Waterway. Tr. 1832:10-16. But the \$52 million contract Director Cooper signed with the Scott Bridge Company on ALDOT's behalf for the Cooper Bridge does not cover any of those improvements. Tr. 373:12-15, 894:25-895:2, 1714:15-1716:2; DX-488. Building a direct north-south connector road to the Foley Beach Express would cost another \$40 million, in addition to the over \$20 million in right of way purchases made in the area, and improving Roscoe Road would cost another \$5 million. Tr. 895:3-6. There are no contracts let for any of these contemplated additional projects. Tr. 373:19-374:23, 1433:22-1434:9. As of his February 8, 2023 deposition, Director Cooper had not even met with the Baldwin County engineer to "discuss" how contemplated improvements for Roscoe Road could be "fund[ed]," and did not "know how it would be funded in the end." Tr. 1110-11. Indeed, it is unclear whether Director Cooper has ever even spoken with Governor Ivey about this project. Director Cooper initially testified under oath that he has never spoken with the Governor about the Cooper Bridge. Tr. 1793:16-23. On cross examination, he backtracked, claiming that he mentioned his new bridge project to her once in 2017 when she first took office. Tr. 1797:14-21. Even if that is true, it is undisputed that Director Cooper has not spoken a single word to the Governor about the Cooper Bridge in six years, and has not

spoken with or met with her regarding the haphazard manner in which he is pursuing this project. Tr. 1798:3-1799:7. When asked “how many more millions of dollars of taxpayers’ money do you think you’re going to spend on this project without talking to Governor Ivey?”, Director Cooper responded: “I don’t know.” Tr. 1800:2-6. This was a remarkable admission in light of Director Cooper’s concession that Alabama has an aging inventory of bridges and that “Alabama just never has enough money to go around for the bridges.” Tr. 1785:18-1786:3.

Given Director Cooper’s testimony regarding the financial constraints facing ALDOT on a regular basis and his lack of credibility on certain material matters discussed above, the Court has substantial doubts that all of these roadway network improvements will ever be accomplished. Indeed, in explaining why he elected to pursue a two-lane bridge rather than a four-lane bridge, Director Cooper took pains to lament that he “seldom ha[s] the money to solve problems 20 years in advance,” that he “did not have the money to spend at this point in time on this problem when [he] ha[s] numerous other problems around the state of similar, close magnitude” and “it would be a luxury to build for 2038 at this point.” Tr. 1554:24-1555:10.

**E. Director Cooper Continues Work on the Cooper Bridge During the Pendency of BCBC’s Preliminary Injunction Motion**

On October 20, 2022, BCBC filed the present lawsuit seeking, among other forms of relief, and order enjoining Director Cooper’s bad faith conduct in connection with his pursuit of the Cooper Bridge. At all times since then, Director Cooper has had the absolute discretion to pause work on the Cooper Bridge to allow this case to play out and to afford the Court a meaningful opportunity to consider the merits of BCBC’s claims. PTX-466 at 57 (contract between the State and Scott Bridge) § 4; *id* at 60 (Bond for Payment). But rather than let the legal process unfold, Director Cooper caused ALDOT and Scott Bridge to continue working on the Cooper Bridge. Tr. 1380:21-1383:13; DX-491. That, in turn, forced BCBC to file the



present motion for a preliminary injunction and the Court to hear seven days' worth of evidence at an expedited preliminary injunction hearing.

Over the past several weeks and months, Scott Bridge has continued to clear trees and land on the north side of the Intracoastal Waterway at the location of the contemplated landing point of the Cooper Bridge. Tr. 1458:14-18. ALDOT staff has also continued working on the project, including its General Counsel drafting a resolution for the Baldwin County Commission in the middle of the preliminary injunction hearing to facilitate a transfer of untold millions of dollars of roadway maintenance obligations and other liabilities to the State after BCBC had exposed the haphazard nature of Director Cooper's use of Roscoe Road as a connector to his new bridge. Tr. Tr. 1716:10-1722:13; PTX-646.

No one forced Director Cooper to continue expending State funds in furtherance of the Cooper Bridge while this case or motion was pending. The Court finds that Director Cooper's refusal to pause construction on the Cooper Bridge pending this case was motivated by a desire to inflict harm on BCBC and to frustrate this or any court's ability to assess the merits of BCBC's claims.

#### **F. Director Cooper's Missing Witness Problem**

The Court notes that over the course of the preliminary injunction hearing, Director Cooper failed to call as witnesses a number of individuals within ALDOT's control that should have unique knowledge of Director Cooper's decision and plan to build the Cooper Bridge. These individuals ordinarily would have been expected to provide testimony that was favorable to Director Cooper. However, because of their absence, on the final day of the preliminary injunction hearing, BCBC noted that it would be appropriate for the Court to draw an adverse inference that those missing witnesses would have provided testimony unhelpful to Director

Cooper regarding his purpose in pursuing the Cooper Bridge and the need for such a bridge.

It is well-settled that where “a party has a witness possessing peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion against him that such better informed testimony would make against him.” *Alabama Power Co. v. Talmadge*, 93 So. 548, 557 (Ala. 1921). In such circumstances, this Court may take the absence of that witness as “some evidence that the ... witness, if brought, would have exposed facts unfavorable to the party so failing.” *Cooper v. Grubbs*, 80 So. 2d 284, 286 (Ala. 1955). The rule applies so long as the witness is not expected to be equally favorable to both parties and his or her evidence would not be cumulative. *See City of Birmingham v. Levens*, 200 So. 888, 891 (Ala. 1941).

The witnesses that Director Cooper failed to present at the hearing were Stan Biddick, the Design Bureau Chief at ALDOT, *see* PTX-442, Taylor Stoudenmire, an ALDOT traffic design engineer and primary contact for Director Cooper’s experts, *id.*; Tr. 1248:11-20; 1383:25-1384:5, Don Powell, the Operations Engineer in ALDOT’s Southwest Region, where the project is located, *see* PTX-442; Tr. 1384:23-25, Matt Ericksen, ALDOT’s Head Engineer in the Southwest Region, *see* PTX-442; Tr. 850:2-5, Don Vaughn, the former Chief Engineer of ALDOT, whom Director Cooper testified he “communicated most with” about the Cooper Bridge, *see* Tr. 1698: 2-10, Ed Austin, ALDOT’s current Chief Engineer, *see* Tr. 1698:20-1699:2, and Don Arkle, Director Cooper’s “best traffic engineer.” *See* Tr. 1702:16-1703:3. Director Cooper himself testified that these are “certainly” people with whom he would have communicated about the project. *See* Tr. 1699:22-25.

The ALDOT witnesses who testified confirmed that these uncalled individuals would

have had unique and valuable knowledge about the Cooper Bridge. Adams testified that Biddick is the ALDOT employee relied upon for “numbers and reports” to see how traffic could be moved off Highway 59. Tr. 863:5-11. Henry was unsure why he was called to testify and admitted that there are “better traffic folks” at ALDOT that have more “traffic expertise,” who could have provided testimony, including Stoudenmire. Tr. 344:16-346:18. Director Cooper’s experts testified that they communicated primarily with Stoudenmire regarding their findings, not Henry. Tr. 1248:11-20, 1383:25-1384:5. Leverette testified that he has no direct responsibility in the Southwest Region, where the Cooper Bridge is being constructed, and has not done work in Baldwin County for “a long time.” Tr. 1385:4-10.

At the end of the preliminary injunction hearing, Director Cooper stated that “there are other[] [people]” who would have provided “testimony valuable for [him],” and who would have agreed with him that BCBC’s final August 2022 proposal was “as useless as a screen door on a submarine.” Tr. 1804:1-9. But no such testimony was offered and no such witnesses were called.

The absence of a number of key ALDOT witnesses, who are in Director Cooper’s control, raises serious questions regarding the testimony those individuals would have given and leads to the conclusion that they would have undermined Director Cooper’s position with respect to his motivation for the Cooper Bridge and the justification for the Cooper Bridge had they been called. This was a theme throughout the hearing, as Director Cooper failed to call Bailey—the author of the Kimley-Horn traffic studies he attempted to rely on—and Ike Scott—a person who could have at least attempted to explain the reasonableness of ALDOT’s claimed damages flowing from an injunction. That absence is particularly damning on the subject of BCBC’s August 2022 proposal given Director Cooper’s insistence that he had a stable of uncalled witnesses at the ready who would have provided “valuable” testimony for him and who would

have agreed with his puzzling assertion that BCBC's offer was "as useless as a screen door on a submarine." Tr. 1804:1-9. *See Alabama Power Co.*, 207 Ala. at 95 (missing witness inference appropriate where testimony of uncalled witness is "supposed to be favorable to" the party who fails to call that witness).

While the Court finds that BCBC is entitled to such a missing witness inference under Alabama law, it need not impose such an inference because, as set forth below, BCBC has demonstrated its entitlement to a preliminary injunction based on the evidence at the preliminary injunction hearing and does not need the benefit of an adverse inference to obtain preliminary injunctive relief in this case.

## CONCLUSIONS OF LAW

### I. Legal Standard for a Preliminary Injunction

The purpose of a preliminary injunction is to preserve the status quo until a full trial on the merits can determine the parties' dispute. *See TFT, Inc. v. Warning Sys., Inc.*, 751 So. 2d 1238, 1242 (Ala. 1999), *overruled on other grounds by Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173 (Ala. 2008) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). *See, e.g., Almon v. Champion Int'l Corp.*, 310 So. 2d 207, 209 (Ala. 1975) (affirming grant of preliminary injunction to "preserve[] the status quo pendente lite").

In order to prevail on its motion for a preliminary injunction, BCBC "must show all of the following: (1) that without the injunction [BCBC] would suffer immediate and irreparable injury; (2) that [BCBC] has no adequate remedy at law; (3) that [BCBC] has at least a reasonable chance of success on the ultimate merits of [its] case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to [BCBC]." *Woodward v. Roberson*, 789 So. 2d 853, 856 (Ala. 2001). BCBC has established each of these

elements. The Court addresses each one below.

## **II. BCBC Will Be Irreparably Harmed by Director Cooper's Conduct and Has No Adequate Remedy at Law**

Based on the evidence submitted at the hearing on the preliminary injunction motion, the Court finds that BCBC has satisfied both the irreparable harm and inadequate remedy at law elements of the preliminary injunction analysis. Although irreparable harm and inadequate remedy at law are technically two separate elements of the preliminary injunction inquiry, the Alabama Supreme Court has made clear that they are inextricably intertwined, as a “a conclusion that the injury is irreparable *necessarily shows* that there is no adequate remedy at law.” *Water Works & Sewer Bd. of the City of Birmingham v. Inland Lake Invs., LLC*, 31 So. 3d 686, 692 (Ala. 2009) (quoting *Fleet Wholesale Supply Co. v. Remington Arms Co.*, 846 F.2d 1095, 1098 (7th Cir. 1988)) (emphasis added); see *Water Works & Sewer Bd. of the City of Birmingham*, 31 So. 3d at 692 (preliminary injunction warranted where movant demonstrates conduct giving rise to “an injury that is not redressable in a court of law through an award of money damages”) (quoting *Perley v. Tapscan*, 646 So. 2d 585, 587 (Ala. 1994)); *Jones v. Tyson*, No. CV-2010-15, 2010 WL 4970983 (Ala. Cir. Ct. Mar. 22, 2010) (“[T]he Alabama Supreme Court has found that where a petitioner establishes that he or she will suffer irreparable injury if the injunction does not issue, the petitioner does not have an adequate remedy at law.”). Thus, because BCBC has established that it has been irreparably harmed by Director Cooper's bad faith construction of the Cooper Bridge, it has necessarily established that money damages will not redress its injury. Even if these elements were considered separately, the Court would find that BCBC has satisfied each of them. As described more fully below, the Court concludes that BCBC has proven irreparable harm that is not redressable through an award of money damages.

First, BCBC has demonstrated with overwhelming evidence that it has been the victim of

egregious bad faith conduct on the part of Director Cooper, an officer of this State. The Alabama Supreme Court has made clear that a state official's "[a]ction may be enjoined if illegal, fraudulent, unauthorized, ***done in bad faith*** or under a mistaken interpretation of law." *McDowell-Purcell, Inc. v. Bass*, 370 So. 2d 942, 944 (Ala. 1979) (emphasis added); see *Unzicker v. State*, 346 So. 2d 931, 933 (Ala. 1977) (recognizing sovereign immunity exception when "officers of the State act[] fraudulently, ***in bad faith***, beyond their authority, or act[] under a mistaken interpretation of the law"). The availability of such relief is consistent with the "constitutionally protected right[]" in this State "to be free from arbitrary and unreasonable conduct on the part of the government." *Calhoun v. Doster*, 324 F. Supp. 736, 743 (M.D. Ala. 1971). Accordingly, irreparable harm is established where, absent a preliminary injunction, the party seeking injunctive relief would have no "[a]bility to compel the defendants' compliance with the law" and no means of stopping defendants from engaging in conduct in which they "have no right to engage in." *State v. Epic Tech, LLC*, No. 1200798, 2022 WL 4588777, at \*14 (Ala. Sept. 30, 2022); see *Jones*, 2010 WL 4970983 (where a state official "acts outside his powers or otherwise exceeds his authority, ***irreparable harm will have been caused***") (emphasis added). Director Cooper has "no right to engage in" bad faith conduct, and BCBC has no "ability to compel [Director Cooper's] compliance with the law," *Epic Tech, LLC*, 2022 WL 4588777, at \*14, or ability to vindicate its "constitutionally protected right[]," *Calhoun*, 324 F. Supp. at 743, if Director Cooper is allowed to proceed with the construction of his new bridge absent a preliminary injunction.

Indeed, in the analogous context of addressing whether to enjoin actions brought by state prosecutors in "bad faith," federal courts have held that once a plaintiff establishes that it has been subjected to such conduct, "[i]rreparable injury need not be independently established" to

obtain injunctive relief. *Shaw v. Garrison*, 467 F.2d 113, 120 (5th Cir. 1972). “No separate showing of irreparable injury is required when it is evident that the state [action] is in bad faith or for harassment purposes,” *Rowe v. Griffin*, 676 F.2d 524, 526 n.2 (11th Cir. 1982), “because [t]he injury threatened is both great and immediate . . . when the [state action] is initiated in bad faith or to harass the defendant,” *Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988). As these courts have held, “[a] showing of bad faith or harassment is equivalent to a showing of irreparable injury . . . , and irreparable injury independent of the bad faith prosecution need not be established.” *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir. 1981). The Court finds these federal authorities to be consistent with Alabama law and applicable to the present circumstances.

The principle running through the above-described Alabama and federal case law is that a private individual or entity that is the target of bad faith conduct by a state official necessarily suffers an irreparable injury for which there is no adequate legal remedy. As discussed more fully below, the evidence at the preliminary injunction hearing overwhelmingly established that Director Cooper has acted in bad faith towards BCBC. BCBC has therefore established an irreparable harm for which there is no adequate remedy at law.

Second, BCBC has established that, absent a preliminary injunction, its “right to conduct [its] business without the wrongful interference of others” will be irreparably harmed. *Am. Radio Ass’n, AFL-CIO v. Mobile S.S. Ass’n, Inc.*, 279 So. 2d 467, 475 (Ala. 1973), *cert. granted*, 415 U.S. 947, *aff’d*, 95 S. Ct. 409 (1974) (internal quotation marks and citations omitted). The Supreme Court of Alabama has long recognized this to be a “valuable property right which will be protected i[f] necessary, by injunctive process.” *Id.* Under Alabama law, a plaintiff suffers irreparable harm and can obtain injunctive relief where it demonstrates that the

“purpose or objective on the [defendant’s] part [is] to wrongfully interfere with the [plaintiff’s] business.” *Id.* Alabama courts have found wrongful interference, for example, where a defendant attempts to “coerc[e]” the plaintiff to take action that it “was under neither legal nor moral obligation to do.” *Carter v. Knapp Motor Co.*, 11 So. 2d 383, 384 (Ala. 1943).

Here, as detailed above and below, the Court finds that Director Cooper has wrongfully interfered with BCBC’s right to conduct business and its attendant property and contractual rights first by using the prospect of a new bridge to coerce BCBC into selling the BEX Bridge to ALDOT and then by pursuing the Cooper Bridge to force BCBC out of business altogether and cause it to relinquish its only revenue generating asset, and that absent a preliminary injunction, such wrongful interference will continue. The BEX Bridge is the property of BCBC, and BCBC holds contractual rights in the form of a license from Baldwin County to operate the BEX Bridge as a toll bridge and to set and collect tolls on that bridge. PTX-39; PTX-42; Tr. 70:19-22. Director Cooper had specific knowledge of those contractual rights and told BCBC that his goal was to “undo” them. Tr. 67:13-16, 67:23-25, 88:22-89:14, 96:25-97:5; *see also* PTX-126 at BCBC00001931. Even though BCBC was under neither legal nor moral obligation to hand over its toll bridge to the State, Director Cooper is building the Cooper Bridge to force it to do just that, by putting BCBC out of business. Director Cooper himself referred to his new bridge as a “pending threat[.]” to BCBC’s business, and contemporaneous records confirm that his specific goal in “build[ing] this project” is to “‘put the BEX Facility out of business’ or have American Roads sell BEX to the State.” Tr. 1579:3-9; PTX-53 at BCBC00004447; *see* PTX-63 at BCBC00002329. Director Cooper’s own expert witness confirmed that, absent an injunction, the Cooper Bridge will have that precise effect, as it will cause the BEX Bridge to lose substantially all of its traffic. PTX-460 at 2; PTX-370 at 1; Tr. 976:6-9, 1061:19-23. Thus, the



Court finds irreparable harm satisfied on this basis.

Third, BCBC has demonstrated that continued work on the Cooper Bridge during the pendency of this litigation absent a preliminary injunction will visit an irreparable harm upon BCBC that cannot be adequately addressed through a monetary remedy. Given the practicalities of the situation, if the Cooper Bridge is permitted to be built pending the adjudication of BCBC's claims, the ability of this Court to issue injunctive relief may be frustrated. Where, as here, "[c]onstruction is likely to begin" on a physical structure that is the subject of a motion for a preliminary injunction, "irreparable harm absent an immediate injunction" is satisfied because "[o]nce begun, such work cannot be undone." *United States vs. 27.09 Acres of Land*, 760 F. Supp. 345, 354 (S.D.N.Y. 1991); see *Colorado Wild Inc. v. US Forest Serv.*, 523 F. Supp. 2d 1213, 1220 (D. Colo. 2007) (irreparable harm satisfied where construction on challenged road project would have proceeded absent a preliminary injunction).

Director Cooper has made it abundantly clear that, absent a preliminary injunction, he will cause ALDOT to proceed full speed ahead with construction of his new bridge during the pendency of this lawsuit. Indeed, even during the preliminary injunction hearing, Director Cooper continued to take material steps to facilitate construction of the Cooper Bridge, including causing ALDOT's General Counsel to draft a resolution for the Baldwin County Commission through which ALDOT assumed millions of dollars' worth of roads and road maintenance obligations in South Baldwin County. Tr. 1716:10-1722:13; PTX-646. Rather than let this matter be decided by the Court, Director Cooper has ordered ALDOT and Scott Bridge to move forward with his new bridge in an effort to prevent BCBC from obtaining meaningful judicial review of his actions. Thus, unless there is a preliminary injunction, BCBC's suit to challenge the building of the Cooper Bridge would become moot as ALDOT proceeds with essentially

irreversible steps in the construction. As a practical matter, this would prejudice BCBC's ability to seek—and this Court's ability to grant—an effective permanent injunction after a trial on the merits.

For these separate and independent reasons, the Court finds that BCBC has satisfied the irreparable harm and inadequate remedy at law elements of the preliminary injunction analysis.

### **III. BCBC Has Demonstrated a Reasonable Chance of Success On the Merits of Its Bad Faith Claim**

To obtain a preliminary injunction, BCBC also must show that there is “at least a reasonable probability of ultimate success on the merits” of its claim to enjoin Director Cooper's bad faith conduct. *Massey v. Disc Mfg., Inc.*, 601 So. 2d 449, 454 (Ala. 1992) (quoting *Martin v. First Fed. Sav. & Loan Ass'n of Andalusia*, 559 So. 2d 1075, 1078 (Ala. 1990)). BCBC “need not show with absolute certainty that [it] will prevail on the merits; moreover, the relative degree of likelihood of success is not alone determinative.” *Bd. of Dental Examiners of Alabama v. Franks*, 507 So. 2d 517, 520 (Ala. Civ. App. 1986) (citing *Gartell v. Knight*, 546 F. Supp. 449 (N.D. Ala. 1982)). Nor does BCBC “have to prove its claim by the standard of persuasion used at trial.” *State ex rel. Marshall v. TY Green's Massage Therapy, Inc.*, 332 So. 3d 413, 429 (Ala. 2021) (Parker, C.J., concurring); see *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981) (same). Instead, BCBC simply “must show more than that success is merely plausible.” *Marshall*, 332 So. 3d at 429. “[T]he granting of a temporary injunction is proper when the court has satisfied itself . . . not that the plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right.” *Watts v. Victory*, 333 So. 2d 560, 562 (Ala. 1976) (internal quotation marks and citations omitted). BCBC has overwhelmingly demonstrated a reasonable chance of success on the merits of its bad faith claim against Director Cooper.

Under Alabama law, a plaintiff may maintain an “action[] for injunction or damages brought against State officials in their representative capacity and individually where it was alleged that they had acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law.” *Ex parte Alabama Dep’t of Transp.*, 143 So. 3d 730, 735 (Ala. 2013) (“*Ex parte ALDOT*”) (quoting *Drummond Co. v. Alabama Dep’t of Transp.*, 937 So. 2d 56, 58 (Ala. 2006)). The Court’s review of available authorities reveals three different standards for determining “bad faith” conduct on the part of a state official: (1) the standard articulated in *Ex parte ALDOT*; (2) acting with a specific intent to harm a private entity or individual; and (3) acting with a dishonest purpose or motive. BCBC has overwhelmingly demonstrated that Director Cooper has acted in bad faith under all three.

**A. Director Cooper Acted in Bad Faith Under the *Ex parte ALDOT* Standard**

The first standard for bad faith conduct comes from the Alabama Supreme Court’s decision in *Ex parte ALDOT*, 143 So. 3d 730. There, the Supreme Court allowed a claim for injunctive relief against Director Cooper in his official capacity as ALDOT Director to proceed “based on allegations that Cooper acted fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law.” *Id.* at 736. The plaintiff alleged that “ALDOT, by and through [Director Cooper] . . . acted . . . in bad faith . . . by employing Hydraulic control measures with knowledge that its measures would necessarily involve the discharge of TCE-laden water onto [the landowner’s] property . . . .” *Id.* at 740. “ALDOT had been pumping water onto [the plaintiff’s] property,” and “continued to do so” even after the plaintiff “demanded that ALDOT immediately cease doing so.” *Id.* at 741. Critically, “ALDOT and Cooper allegedly did all of this without initiating eminent-domain proceedings in order to use [the plaintiff’s] private property for public use.” *Id.* at 738.

In this case, Director Cooper is trying to do something analogous: he is attempting to orchestrate public ownership of private property—the BEX Bridge—without providing the owner, BCBC, with just compensation and due process. This conduct is tantamount to a taking of BCBC’s property. As noted above, the hearing established that Director Cooper’s ultimate purpose in building his new bridge is to force BCBC out of business and to obtain its property, the BEX Bridge, all without paying BCBC any compensation. Director Cooper has for years desired to “acquire [the] BEX [Bridge], remove the toll, and make this a free facility,” PTX-63 at 1, and has called this outcome a “good solution” and an “easy fix” to traffic management “problem[s]” on Pleasure Island. Tr. 796-97. After BCBC declined Director Cooper’s offer to purchase the BEX Bridge, Director Cooper began pursuing the Cooper Bridge and explicitly told BCBC his purpose in doing so was to “‘put the BEX Facility out of business’ or have American Roads sell BEX to the State.” PTX-53 at 5, 6. *See* PTX-63 at 1. Director Cooper testified that he considered his new bridge to be a “pending threat[]” to BCBC’s business that would, in Director Cooper’s view, result in a “bargain purchase” price for those looking to acquire the BEX Bridge. Tr. 1579:3-9. He told BCBC representatives “that unless A[merican] R[oads] agreed to sell the [BEX] Bridge to ALDOT[,] he would build a free bridge, on a parallel route near [the BEX] Bridge and put [BCBC] out of business.” PTX-126 at BCBC00001929. And his decision to order ALDOT staff to begin working on the Cooper Bridge came immediately after BCBC rejected his proposal that BCBC hand over to the City of Orange Beach the BEX Bridge for essentially nothing. Tr. 87:25-88:1; 92:1-5, 92:12-13, 130:11-20, 869:24-870:5, 876:11-12; PTX-106 at p. 5, ¶ 7; PTX-122 at 2; PTX-124 at 1. Director Cooper’s own expert witness confirmed that the Cooper Bridge will wipe out substantially all of the traffic on the BEX Bridge, and Director Cooper is fully aware that even if BCBC could stay in business with such a

precipitous drop in toll revenue, his new bridge will enable Orange Beach to purchase the bridge for essentially nothing, as that purchase price is tied to the toll revenues on the BEX Bridge. PTX-460 at 2; PTX-370 at 1; PTX-45 § 5.01; PTX-106 § 7; Tr. 976:6-9, 1061:19-23, 1746:15-19. It is clear that Director Cooper is using the Cooper Bridge as a blunt instrument to take BCBC's property—the BEX Bridge—away from BCBC and transfer it to the State or its designee, all without paying any compensation, let alone just compensation. This is the essence of the bad faith and tracks *Ex parte ALDOT* to a tee.

If Director Cooper determines that it is in the public interest to seize BCBC's property and convert the BEX Bridge into a free public bridge, there is a statutorily and constitutionally authorized procedure for him to follow: a condemnation proceeding which would result in the State paying BCBC the fair market value of the BEX Bridge in an amount that reflects its "highest and best use." See Ala. Code. § 18-1A-1, *et seq.*; *Historic Blakely Auth. v. Williams*, 675 So. 2d 350, 352 (Ala. 1995), *as modified on denial of reh'g* (Dec. 15, 1995) ("In a proceeding to determine just compensation, the landowner is entitled to have the value of the property determined based on its highest and best use."). What Director Cooper may not do is use his powers to accomplish the same objective through other means without paying just compensation. That is precisely what he has engaged in here. Such conduct is bad faith and proscribed by *Ex parte ALDOT*.

**B. Director Cooper Acted with the Specific Intent to Harm BCBC and/or Drive BCBC Out of Business**

Another articulation of bad faith is found in federal cases in which courts consider whether to an issue an injunction to stop pending state court proceedings. See *Younger v. Harris*, 401 U.S. 37 (1971). In that context, where a court "finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith," an injunction is warranted. *Moore v. Sims*,

442 U.S. 415, 424 (1979). Courts applying this standard have found bad faith where a state official acts with an “intention to put Plaintiff out of business,” *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 808 (N.D. Tex. 1991), *aff’d*, 970 F.2d 82 (5th Cir. 1992), or with the “purpose” of “injuring plaintiffs’ business,” *Black Jack Distributors, Inc. v. Beame*, 433 F. Supp. 1297, 1305-06 (S.D.N.Y. 1977); *see, e.g., Krahm v. Graham*, 461 F.2d 703, 707 (9th Cir. 1972) (enjoining “bad faith” state court prosecution where state officials’ purpose was to put a private entity “out of business”); *Sabrina Corp. v. Jones*, No. 88 CV 2189, 1988 U.S. Dist. LEXIS 15289, at \*1, 7-8, 13-14 (E.D.N.Y. Dec. 30, 1988) (town acting in “bad faith” enjoined where its purpose was “to drive plaintiff out of its current site and out of [the town],” and to “deliberately prevent[] plaintiff from using its two premises and conducting its business”). These federal authorities are consistent with Alabama law. *See generally Am. Radio Ass’n, AFL-CIO*, 279 So. 2d at 475 (recognizing “right to conduct [its] business without the wrongful interference of others”); *Calhoun*, 324 F. Supp. at 743 (recognizing “constitutionally protected right[] . . . to be free from arbitrary and unreasonable conduct on the part of the government”).

As noted above, the hearing overwhelmingly established that Director Cooper’s intent in building the Cooper Bridge is to put BCBC out of business and to eliminate the toll on the BEX Bridge. From the outset of his time in office, Director Cooper expressed his personal belief that the license BCBC had obtained from Baldwin County to own and operate the BEX Bridge was a “bad deal” and that Director Cooper was “going to do what he could to undo the deal.” Tr. 67:13-16, 67:23-25. Belitsky credibly testified that he understood Director Cooper’s “undo the deal” comment to mean that he “would take whatever steps that might be necessary to put [BCBC] out of business.” Tr. 68:4-5. And Director Cooper made that exact same comment—that he wanted to “undo the deal” BCBC had with Baldwin County to operate the BEX Bridge—

in 2017 when asked to explain why he was trying to force BCBC to give up its bridge to Orange Beach for essentially nothing and immediately before he instructed ALDOT staff to proceed in building the Cooper Bridge. *See* Tr. 88:18-89:10, 92:1-5, 92:12-13, 96:20-25, 130:11-20; PTX-122 at 2.

Director Cooper has made several other statements along those same lines. Roberts' contemporaneous notes quote Director Cooper as saying that his purpose in building the Cooper Bridge was to "put the BEX Facility out of business." PTX-53 at BCBC00004447; *see* PTX-126 at BCBC00001929 ("Cooper advised that unless A[merican] R[oads] agreed to sell the OB Bridge to ALDOT he would build a free bridge, on a parallel route near our Bridge and put us out of business."). Even Mayor Kennon observed "a tremendous amount of animus" by Director Cooper "toward the owners" of BCBC at the time Director Cooper made the decision to build his new bridge because Director Cooper "didn't feel like he was getting the . . . respect that he deserved." PTX-628 at 54:16-56:13.

Moreover, both sides' expert witnesses testified that the Cooper Bridge, absent an injunction, will indeed have the intended effect of destroying BCBC's business. Bates credibly testified that "if the new bridge is built, . . . the BEX toll bridge will have virtually no traffic on it," and offered a detailed analysis showing just that. Tr. 615:8-14; *see* PTX-356 at ALDOT-005275. And Director Cooper's own expert, Caudle, testified that once the Cooper Bridge is built, the BEX Bridge would lose 93% of its traffic, as daily traffic on the BEX Bridge would plummet from 10,000 to 11,000 vehicles per day to just 695 to 800 vehicles per day. PTX-460 at 2; PTX-370 at 1; Tr. 976:6-9, 1061:19-23. While this preliminary injunction hearing was pending, Director Cooper took additional steps to undermine BCBC's business. He caused ALDOT to draft a resolution for the Baldwin County Commission, which was approved the day

before the final day of the preliminary injunction hearing, that transferred certain rights and obligations under the contractual agreements between Baldwin County and BCBC from Baldwin County to ALDOT. PTX-646; DX-593. The transferred rights included those related to “permitted signage” on the Foley Beach Express and designation of ALDOT as the “Permitting Agency” under a roadway traffic management plan known as the Access Management Plan that is intended to keep the Foley Beach Express an expressway. DX-593 at ALDOT-052025. With these new rights, Director Cooper could attempt to install signage along the Foley Beach Express directing traffic away from the BEX Bridge and towards the Cooper Bridge. PTX-43 § 4(d). And by designating ALDOT as the Permitting Agency under the Access Management Plan, Director Cooper could seek to further change the road network in the area to physically direct traffic away from the BEX Bridge. PTX-41 at BCBC00008113, -115, -117-20.

During his testimony at the preliminary injunction hearing, Director Cooper testified at length as to his understanding of the amount of revenues BCBC realizes from operating its toll bridge and suggested that he personally believes BCBC made too much money, and that he was acting in the public interest by putting BCBC out of business because the tolls on the BEX Bridge were paid by Alabamians. *See* Tr. 1643:23-1644:10, 1653:14-1654:7, 1849:15-1851:4, 1851:16-1852:1. This testimony only reinforced the bad faith nature of Director Cooper’s decision to build the Cooper Bridge as it confirmed that he is doing so with the specific intent to put BCBC out of business. Indeed, in a telling answer at the very conclusion of his examination, Director Cooper, when asked to explain the “relevance” of BCBC’s revenues to his conduct, testified that “the relevance . . . is that the bridge company continues to collect tolls while they maintain an exclusive position and you’re here suing me trying to protect that position. ***And we don’t think they’re entitled to that.***” Tr. 1851:16-21 (emphasis added). Thus, Director Cooper



admitted that he does not believe BCBC is entitled to operate its business, and that his decision to build the Cooper Bridge was based on that belief.

Further, Director Cooper's justification for his desire to put BCBC out of business—that he is somehow saving Alabamians money even though he intends to spend over \$120 million of their tax dollars—is belied by the record. The hearing evidence established that the vast majority of traffic on Pleasure Island comes during beach season, and that during this time period over two-thirds of visitors to the area are from states other than Alabama. Tr. 791:4-793:1; PTX-629 at 6. And under BCBC's August 2022 proposal, citizen residents of Baldwin County would not have paid any tolls to use BCBC's bridge year-round. PTX-613; PTX-614.

Director Cooper also introduced evidence and testimony at the preliminary injunction hearing in an effort to show that DIF, BCBC's parent, was aware of the risk that Director Cooper might build a free bridge near the BEX Bridge when it made the decision to purchase the American Roads portfolio of assets in 2018 that included BCBC. *See* Tr. 210:1-216:8, 218:3-219:3, 221:9-222:22; DX-135; DX-136; DX-138; DX-278. The Court finds that any evidence or testimony related to DIF's subjective state of mind or expectations before, at or around the time it purchased American Roads to be irrelevant on this motion for a preliminary injunction. The relevant issue on this motion for a preliminary injunction is whether Director Cooper acted in bad faith. His intent and actions are relevant to this motion.

The Court finds that BCBC has established by overwhelming evidence that Director Cooper's pursuit of the Cooper Bridge is driven by his intention to put BCBC out of business and therefore finds bad faith satisfied under the second standard.

### **C. Director Cooper Acted with a Dishonest Purpose or Motive**

Another standard for bad faith lies in the commonly accepted ordinary meaning of the

term “bad faith,” which refers to conduct that is carried out with “[d]ishonesty of belief, purpose, or motive.” Black’s Law Dictionary (11<sup>th</sup> ed. 2019). The Court notes that in a brief to the Alabama Supreme Court unsuccessfully seeking to dismiss a complaint that sought to enjoin his bad faith conduct in another instance, Director Cooper took the position that “‘bad faith’ is defined as ‘implying or involving actual or constructive fraud, *or a design to mislead or deceive another.*’” Dkt. 318 at 16-17 (Director Cooper Brief in *Ex parte ALDOT*, No. CV-11-900423 (quoting Black’s Law Dictionary, 893 6<sup>th</sup> ed. 1990)) (emphasis added). Both of these definitions accord with how the term “bad faith” is typically interpreted under Alabama law. *See State Farm Fire & Cas. Co. v. Brechbill*, 144 So. 3d 248, 259-60 (Ala. 2013) (“bad faith” in context of insurance law “imports a dishonest purpose” by a decisionmaker). This definition is also consistent with the fact that the opposite conduct—“good faith”—means to act with “honesty in belief or purpose, . . . observance of reasonable commercial standards of fair dealing in a given trade or business, or . . . absence of intent to defraud or to seek unconscionable advantage.” Black’s Law Dictionary (11<sup>th</sup> ed. 2019).

Director Cooper has maintained both in his remarks to BCBC and the public over the years and under oath in this proceeding that his purpose in building the Cooper Bridge is to alleviate traffic on the Highway 59 Bridge. *See* Tr. 1832:10-1833:6. Based on the evidence submitted at the preliminary injunction hearing, the Court rejects Director Cooper’s testimony as untruthful and not credible and finds that he is not pursuing the Cooper Bridge for that reason, but rather, that he is pursuing the Cooper Bridge to put BCBC out of business and ultimately force the BEX Bridge into public hands. As such, Director Cooper has acted in bad faith under the third standard because he has pursued the Cooper Bridge with a “[d]ishonesty” of “purpose” and “motive” and with a “design to mislead” and “deceive” BCBC and the public.

Throughout the preliminary injunction hearing, Director Cooper attempted to introduce evidence to show that his decision was in fact motivated by a desire to alleviate traffic on the Highway 59 Bridge. He offered testimony and analyses from his expert witnesses, Skipper and Caudle, and reports from a traffic engineer at the Kimley-Horn firm named Clark Bailey in an effort to show that there is traffic congestion on the Highway 59 Bridge, and that the Cooper Bridge will alleviate that congestion. *See* Tr. 960-964, 974-975, 984, 991, 1272-1273, 1297-1300; DX-12; DX-18; DX-19; DX-20; DX-22; DX-93; DX-227; DX-229. That evidence does not help Director Cooper for three reasons.

First, Director Cooper testified under oath that he “made a decision to build this bridge in 2017,” that he “made that decision without any traffic studies,” that he “made that decision without any traffic flow studies,” and that at the time he made that decision he “had not seen any studies ... that [the] toll rate [on the BEX Bridge] was causing any traffic congestion[.]” Tr. 1751:8-23. The ALDOT employee responsible for South Baldwin County at that time, Calametti, admitted that there was “not a scintilla of proof that the toll on the BEX bridge caused any traffic congestion” on the Highway 59 Bridge, and conceded that the Cooper Bridge “solves nothing” with respect to congestion on the south side of the Intracoastal Waterway and would simply “dump traffic on Canal Road.” PTX-625 at 85:2-8, 116: 17-117, 3; Tr. 137:17-139:19, 140:11-16. None of this post-2017 evidence is capable of shedding light on Director Cooper’s “purpose” in deciding to build the Cooper Bridge, because none of it existed until after he had already made his decision.

Second, as noted above, none of this evidence demonstrates that any meaningful Highway 59 congestion is caused by the toll on the BEX Bridge, which was the purported justification Director Cooper gave when decided to build the Cooper Bridge in 2017. The

Kimley-Horn studies were not in fact “origin and destination” studies and did not assess where vehicles began their trips, where they were ultimately headed or why they elected to take the Highway 59 Bridge. Tr. 576:3-15, 584:10-20, 586:13-21. The Kimley-Horn studies were so hopelessly flawed that Director Cooper did not call their author, Bailey, to testify to even attempt to defend his work. The Skipper analyses merely looked at total traffic volumes and capacities and did not demonstrate any toll avoidance. Tr. 584:21-587:2, 591:11-24, 598:22-599:8, 603:10-604:6. As BCBC’s expert, Bates, testified there is no meaningful toll avoidance, and to the extent there is any, “only very, very small numbers of people do that . . . relative to the volumes on the [Highway] 59 [Bridge].” Tr. 559:9-19, 586:13-21, 658:10-25.

The hearing demonstrated further that Director Cooper’s new bridge will not in fact alleviate traffic on the Highway 59 Bridge. As Bates credibly testified based on his extensive analysis, “if the new bridge is built, the outcome will be that the [Highway] 59 [Bridge] will to all intents and purposes be as congested as it is very soon after it’s constructed,” because it will simply funnel traffic that currently takes the BEX Bridge onto the Cooper Bridge and relieve very little of the traffic that takes the Highway 59 Bridge. Tr. 615:08-13, 1055:2-6, 1057:8-14, 1223:24-1224:11. Indeed, if Director Cooper were truly motivated by a desire to alleviate traffic on the Highway 59 Bridge, then he would have accepted or at least responded to BCBC’s August 2022 proposal, in which BCBC agreed to add a two-lane twin span to the BEX Bridge at no cost to the State. PTX-613; PTX-614; *see* Tr. 186:16-23, 187:10-14, 190:11-15. Director Cooper’s own expert testified that adding a twin span to the BEX Bridge for a total of four lanes “most definitely” would “really help the traffic” situation, and that BCBC’s offer to permit Baldwin County citizen residents to use the toll bridge would “increase the use of the road.” Tr. 921:25-922:4. Unlike the Cooper Bridge, which would be a two-lane bridge, BCBC’s twin span

would have the advantage of allowing the four BEX Bridge lanes to be reconfigured to allow for three lanes to flow north or south with the fourth lane flowing in the opposite direction, which would allow for more vehicles to cross in a given direction during peak traffic times. Tr. 77:11-78:10. And BCBC's proposed twin span would have freed up between \$52 million and \$120 million in public funds that could have been directed towards other improvements to alleviate Highway 59 traffic, such as addressing the roadway network shortcomings on the south side of the waterway which both sides' experts agreed is a contributing factor to congestion on the Highway 59 Bridge. Tr. 184:6-16, 188:9-24. BCBC even proposed providing the State with \$13 million to improving the roadway network in addition to constructing the twin span at no cost to state and local governments. PTX-614 at 3-4.

Director Cooper has also suggested that the fact that he engaged in negotiations with BCBC over the period of 2018 to 2022 demonstrates that his stated purpose of alleviating traffic on the Highway 59 Bridge was his true purpose because, according to Director Cooper, both the fact of those negotiations and the substance of certain of his statements therein show that he was genuinely trying to find a solution that addressed congestion on the Highway 59 Bridge. The Court rejects this argument. As noted above, the Court finds that Director Cooper negotiated with BCBC in bad faith during this time period and that he never intended to reach a deal but rather was buying time in an effort to "paper . . . his file to back up a decision he'd already made to build a bridge." Tr. 1334:15-19. Again, Director Cooper's refusal to even consider BCBC's August 2022 proposal looms large. That refusal fundamentally undermines Director Cooper's position that his purpose was to alleviate traffic on the Highway 59 Bridge. The testimony of Director Cooper's own expert, Caudle, only reinforced the fact that anyone legitimately interested in alleviating traffic on the Highway 59 Bridge was obligated to study the feasibility

and impacts of BCBC's August 2022 offer, especially in light of its willingness to eliminate the toll for all Baldwin County citizen residents. Caudle opined that the impact of that term "would be very good data to have in assisting to make a decision" as to which bridge would do a better job of alleviating Highway 59 traffic and that this term "would only improve the performance of th[e BEX B]ridge to carry more traffic." Tr. 1019:16-1021:7. That Director Cooper refused to even consider this proposal and instead used his arbitrary and demonstrably unachievable minimum traffic capture requirement as an "escape clause" to end the negotiations and justify letting his new bridge is the nail in the coffin for his bad faith under this third standard.

Director Cooper has also offered evidence suggesting that the Cooper Bridge is needed for safety reasons apart from traffic, both to improve the ability to evacuate residents of and visitors to Pleasure Island off of the island during a hurricane and to facilitate first responder (i.e., fire, police, and emergency medical services) access to Pleasure Island. This evidence came principally in the form of deposition testimony from the Fire Chief Mark Sealy of the City of Gulf Shores, which Director Cooper offered into evidence on May 15, 2023, after the hearing had concluded, and testimony from Phelps, the Economic Development Coordinator of Gulf Shores who testified in his personal capacity only as a resident of Gulf Shores. The Court rejects this evidence for three reasons.

First, Director Cooper took the stand at the preliminary injunction hearing and was given the opportunity to explain to the Court his rationale and justification for spending over \$120 million dollars in state funds on a new bridge. At no point in his hearing testimony did Director Cooper reference public safety as a consideration in his decision-making process. Director Cooper cannot backfill after the conclusion of the hearing and add additional factors he claims to have considered. The only rationale offered by Director Cooper was the alleviation of traffic

congestion on the Highway 59 Bridge. Tr. 1558:15-19; 1625:17-25; 1639:9-17; 1647:3-16; 1832:22-1833:6. Further, Director Cooper admitted that he had conducted no studies to determine whether the Cooper Bridge would be an effective evacuation route, belying any suggestion that this was the reason for constructing the Cooper Bridge. Tr. 1756:14-18.

Second, the focus of BCBC's preliminary injunction motion is Director Cooper's bad faith in pursuing the Cooper Bridge. Director Cooper has testified repeatedly that his purpose in pursuing that bridge is to alleviate traffic on the Highway 59 Bridge. Tr. 1558:15-19; 1625:17-25; 1639:9-17; 1647:3-16; 1832:22-1833:6. He testified to this Court that this was *the* reason he is pursuing the new bridge. Tr. 1832:18-21. Whether or not Director Cooper can manufacture an after-the-fact justification for why his new bridge should be built is irrelevant to assessing whether or not he acted with a dishonest purpose in pursuing the Cooper Bridge for the purported purpose of alleviating traffic on the Highway 59 Bridge.

Third, the evidence Director Cooper offers fails to demonstrate any need for the Cooper Bridge for evacuation or first responder purposes, and fails to demonstrate that the Cooper Bridge would do any better in achieving those purposes than an expanded BEX Bridge, consistent with BCBC's August 2022 proposal. Sealy, who was not offered as an expert witness, offered no more than his "common sense" personal "opinion" that "more bridges is more traffic flow" to help with first responder times and evacuations. DX-524 at 48:5-9, 49:7-12, 54:7-12. But he provided no basis to say whether the Cooper Bridge specifically was needed for that purpose or that it would do a better job for either hurricane evacuation or first responder purposes than an expanded BEX Bridge. Sealy was "not aware of any studies" comparing first responder response time or evacuation efficiency using the Cooper Bridge versus an expanded BEX Bridge. *Id.* at 47:21-48:8, 54:7-12. Phelps likewise admitted that he was not aware of any

study or analysis suggesting that first responder times or hurricane evacuation efficiency would be better with the Cooper Bridge than with an expanded BEX bridge. Tr. 793:4-17.

Far more credible was the testimony of Handley, who testified on behalf of the City of Orange Beach that an expanded BEX Bridge would do a better job of hurricane evacuation than the Cooper Bridge, given that it will link directly to the Foley Beach Express with minimal conflict points and allow for more than two lanes to flow northbound to get people off of Pleasure Island. Tr. 695:17-19, 697:12-20. Further, Handley credibly explained that the Cooper Bridge will actually *create problems* during an evacuation, so much so that Orange Beach would likely attempt to close the Cooper Bridge during times of evacuation. Tr. 696:7-697:1. Additionally, as Belitsky testified, BCBC already lifts its gates to allow first responder vehicles to traverse the BEX Bridge for free, and lifts the gates to allow traffic to flow through freely during both mandatory and voluntary evacuations of the island. Tr. 63:9-64:25.

Sealy intimated that the Cooper Bridge was needed because it would be designed not to have any pilings in the waterway, and that the BEX Bridge could be struck by a barge, rendering it inoperable in times of evacuation. DX-524 at 20:13-21:16. That speculative testimony does not provide a basis to justify Director Cooper's conduct. As Belitsky testified, in its 23 years of operation, the BEX Bridge structure has never been directly struck by a water vessel. Tr. 65:1-11. Of the two occasions in those two-plus decades when a vessel has contacted the fender—a “big, very heavy fence”—that encases the bridge structure, the bridge was temporarily closed to traffic once, for just four hours to allow BCBC to promptly have the bridge inspected. Tr. 65:12-66:24. Thus, the hearing established that in 23 years of operation, the BEX Bridge has been closed for vessel-related events for just four hours. Director Cooper did not even attempt to argue that he is spending over \$120 million on his bridge on this basis, and he could not have



credibly done so.

\* \* \*

Lastly with respect to Director Cooper's bad faith, the Court notes that in his hearing testimony, Cooper identified several statutes granting him broad authority as the Director of Transportation. *See* Tr. 1486:9–1493:19 (referencing Alabama Code sections 23-1-21, 23-1-21.3, 23-1-21.4, 23-1-23, 23-1-24, and 23-1-40). These statutes vest the ALDOT Director with the authority to exercise “all the powers, authority, and duties vested in the State Department of Transportation,” Code of Ala. § 23-1-21, including the appointment of deputy directors and a Chief Engineer, *id.* §§ 23-1-21.4–23-1-24, to “determine the character and . . . supervision over the construction . . . of all the public roads, bridges, and culverts in the state,” *id.* § 23-1-40(g), and to cooperate with federal, state, and local entities to “administer any public transportation program . . . found to be in the public interest,” *id.* § 23-1-21.3.

However, these statutes do not grant Director Cooper the authority to carry out his duties in bad faith. Director Cooper acknowledged that these same statutes obligate him to try to be fair and to avoid seeking unconscionable advantage over others, and that, as a State official, he should not conduct his affairs in bad faith. Tr. 1758:11-13, 1758:18-22, 1761:13-17. And Alabama courts may enjoin state officials from acting in bad faith notwithstanding general grants of broad statutory authority. *See, e.g., Ex parte ALDOT*, 143 So. 3d at 735 (actions for injunctive relief against state officials are permitted “where it was alleged that they had acted, fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law”). Indeed, the Alabama Supreme Court made clear long ago that notwithstanding the broad powers conferred by statute upon the Highway Commission (ALDOT's predecessor organization), courts can “enjoin the Commission in the construction of [a] highway” where there is “an

allegation of fact showing bad faith.” *St. Clair County v. Town of Riverside*, 128 So. 2d 333, 339 (Ala. 1961). Thus, none of the statutes referenced by Director Cooper excuse his bad faith conduct or provide a basis to deny BCBC’s motion for a preliminary injunction.

#### **IV. The Balance of Hardships Favors BCBC**

Under the last element of the preliminary injunction analysis, this Court “may consider and weigh the relative hardships that each party may suffer against the benefits that may flow from the grant of the preliminary injunction.” *Martin v. First Fed. Sav. & Loan Ass’n of Andalusia*, 559 So. 2d 1075, 1079 (Ala. 1990). In this “final step,” the Court “balance[s] the hardships” between the parties, and “assumes that the plaintiff is likely to succeed on the merits, will suffer an irreparable injury without a preliminary injunction, and will have no adequate remedy at law.” *Marshall*, 332 So. 3d at 430 (Parker, C.J. concurring). “The element then asks: ‘Will the injunction impose a greater hardship on the defendant than it will relieve the plaintiff of?’”

*Id.* At this stage of the analysis, a preliminary injunction will be issued so long as the hardship to the defendant does “not unreasonably outweigh the benefit accruing to the plaintiff.” *Perley v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994). The Court finds that the balance of the hardships favors BCBC and supports the issuance of the requested preliminary injunction.

*First*, Director Cooper has not demonstrated any harm from a delay in the construction of the Cooper Bridge that would result from the issuance of a preliminary injunction. Any purported harm by a modest delay pending the outcome of this case in building a bridge he has been intending to build for nearly six years is insufficient under the law. *See Triple J Cattle, Inc. v. Chambers*, 551 So. 2d 280, 283 (Ala. 1989) (enjoining a foreclosure proceeding resulted in no harm to the defendant because related proceedings “had been pending for two years before”).

*Second*, neither the public nor Director Cooper has an interest in Director Cooper acting in bad faith, which constitutes an action outside of his authority. A state official is “not harmed by an order precluding him from taking unlawful actions.” *Jones*, 2010 WL 4970983; *see, e.g., Bayou Lawn & Landscape Servs. v. Sec’y of Lab.*, 713 F.3d 1080, 1085 (11th Cir. 2013) (upholding order enjoining regulatory program and reasoning that “[i]f the ‘entire regulatory program’ is *ultra vires*, then it should be called into question”). Because Director Cooper has no authority under Alabama law to act in bad faith, he cannot show that he has been harmed by a court order preventing him doing so.

*Third*, the fact that a preliminary injunction would preserve the status quo cuts in BCBC’s favor for the balancing of the hardships. A “preliminary injunction is a provisional remedy granted before a hearing on the merits, and its sole object is to preserve the subject in controversy in its then existing condition, and without determining any question of right, merely to prevent further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party.” *Ex parte Health Care Mgmt. Grp. of Camden, Inc.*, 522 So. 2d 280, 283 (Ala. 1988). So, for example, in *Ex parte Health Care Management*, the Alabama Supreme Court upheld the grant of a preliminary injunction to preserve the “status quo” in which the defendant was in “operation of the hospital” and prevent it “from converting the hospital into a substance abuse rehabilitation facility.” *Id.* Likewise, in *Ex parte Folsom*, 42 So. 3d 732, 738 (Ala. 2009), the Alabama Supreme Court enjoined the commencement of a construction project that would inevitably lead to the destruction of a property right. Here, to preserve the status quo, construction of the bridge must be enjoined, and the balance of the hardships weighs in favor of BCBC.

Lastly, the Court rejects Director Cooper's effort to manufacture a showing of harm to himself or to ALDOT based on the fact that ALDOT's contractor has performed some land clearing work on the north side of the Intracoastal Waterway in the vicinity of where the Cooper Bridge would land in Gulf Shores. Director Cooper has known since at least October 20, 2022, when BCBC filed this lawsuit that BCBC was hotly contesting his right to build the Cooper Bridge. He has known since November 21, 2022, that BCBC sought a preliminary injunction relating to the Cooper Bridge. No one forced Director Cooper to instruct ALDOT or Scott Bridge to proceed full steam ahead on the Cooper Bridge while BCBC's motion for a preliminary injunction was pending and there was a substantial risk that work on the project would be enjoined. Director Cooper could have exercised his substantial discretion as ALDOT Director to instruct his staff and the Scott Bridge Company to pause work on the Cooper Bridge pending the outcome of BCBC's motion. He declined to do so, instead forcing BCBC to file this preliminary injunction motion. The Court rejects Director Cooper's attempt to manufacture harm to ALDOT based on his own decision to cause work on the Cooper Bridge to continue while BCBC's motion has been pending.

#### **V. Rule 65(c) Security**

Having determined that BCBC is entitled to a preliminary injunction, the Court must address Rule 65(c) of the Alabama Rules of Civil Procedure, which requires the preliminary injunction to be conditioned "upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and reasonable attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Ala. R. Civ. P. 65(c).

The amount of injunction security is left "to the trial court's discretion." *Water Works &*

*Sewer Bd. of City of Birmingham*, 530 So. 2d at 198. A court may properly decide the amount of a security even in the face of testimony from “defendants . . . that they would incur damages substantially in excess of” the amount set because the trial court is best positioned to assess the credibility of witnesses and the relevant evidence. *Id.*

The Court notes that “cases involving . . . issues of overriding public concern[] warrant a requirement of no security or only nominal security.” *Water Works & Sewer Bd. of City of Birmingham*, 530 So. 2d at 198; *see Lightsey v. Kensington Mortg. & Fin. Corp.*, 294 Ala. 281, 285 (1975) (court may “require[e] only a nominal security[] . . . where . . . the issue is one of overriding public concern”). The Court is of the view that this case—which involves the expenditure of over \$120 million in taxpayer funds to carry out the personal vendetta of a State official acting in bad faith to harm a private company—involves issues of overriding public concern, and that the Court would be justified in imposing no security or only nominal security. However, the Court notes that there is minimal guidance from the Alabama Supreme Court in discerning what type of case falls in this “overriding public concern” category. Mindful of the plain language of Rule 65(c), the Court will require BCBC to provide security under Rule 65(c).

The “injunction bond amount” should be sufficient to “cover [a party’s] prospective costs, damages, and attorney fees if it is later determined that [the party] w[as] wrongfully enjoined.” *DeVos v. Cunningham Grp., LLC*, 297 So. 3d 1176, 1187 (Ala. 2019) (emphasis added). At that point, the wrongfully enjoined party is entitled “to recover costs, damages, and attorney fees that are the actual, natural, and proximate result of the wrongful injunction.” *Consol. Elec. Contractors & Eng’rs, Inc. v. Ctr. Stage/Country Crossing Project, LLC*, 175 So. 3d 642, 644 (Ala. Civ. App. 2015).

Director Cooper bears the burden of demonstrating a rational basis for the amount of

security to be provided. *See Cont'l Grp., Inc. v. KW Prop. Mgmt., LLC*, No. 09–60202–CV, 2009 WL 3644475, at \*6 (S.D. Fla. Oct. 30, 2009) (“The ‘burden is on the party seeking security to establish a rational basis for the amount of a proposed bond.’”); *Int’l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 565–66 (S.D.N.Y. 2006) (“the burden is on the party seeking security to establish a rational basis for the amount of the proposed bond”), *aff’d*, 246 F. App’x 73 (2d Cir. 2007). *See also Robert N. Brewer Family Found. v. Huggins*, No. 2:18-cv-915, 2020 WL 1486843, at \*1 (M.D. Ala. Jan. 8, 2020) (Brasher, J.) (agreeing that “to the extent [the defendant] believed security was necessary, the burden was on him both to propose an amount and to establish a rational basis for the amount proposed”); *see generally City of Birmingham v. City of Fairfield*, 396 So. 2d 692, 696 (Ala. 1981) (“We have said that since the Alabama Rules of Civil Procedure are modeled on the Federal Rules of Civil Procedure, federal decisions are highly persuasive when we are called upon to construe the Alabama Rules.”).

Director Cooper urges the Court to require BCBC to provide a security of between \$13 million and \$18 million. He bases that request exclusively on the testimony of Kyle “Matt” Leverette, an ALDOT employee who testified at the preliminary injunction hearing. Leverette provided two alternative ways to estimate future costs.

First, Leverette started with the \$52 million amount of the value of the entire Scott Bridge Company contract to build the Cooper Bridge and divided it by 38 (the number of months of work contemplated in the contract) to derive a \$1.3 to \$1.4 million monthly run rate for the project. Tr. 1391:15. He then arrived at a “low” \$13 million estimate by multiplying this monthly run rate by 10 based on an assumption, provided by counsel, that an appeal would take 8-10 months. Tr. 1391:23-25. Second, Leverette estimated potential costs resulting from an

injunction based on an assertion by Scott Bridge Company that it would incur \$9.3 million in damages for a four-month delay. Tr. 1392:1-13. In order to estimate these damages for the 8-10 month delay that counsel instructed him to assume, Leverette rounded \$9.3 million to \$9 million and doubled it to reach \$18 million, which he dubbed the “high” range of his \$13-18 million estimate. Tr. 1392:12-17.

The Court does not credit Leverette’s testimony and rejects it in all respects. It is axiomatic that fact witness testimony must be based on personal knowledge. *See* Ala. R. Evid. 603, 701. Here, the subject of Leverette’s testimony was the “costs, injuries or damages” that Director Cooper or ALDOT might suffer while enjoined. Tr. 1388:20-25. But Leverette’s only direct involvement in the Cooper Bridge was his participation in the “bid review committee” that reviewed the Scott Bridge Company proposal before it was accepted. Tr. 1395:7-12. This occurred in October 2022 and ended by October 6, 2022, when the contract was awarded. Tr. 1355:23-25, 1356:4-16, 1396:3-6. After that, Leverette had no direct involvement in the bridge project until counsel asked him to testify about the amount of security in this proceeding. Tr. 1396:19-22. Since construction began, Leverette has not actually been to the bridge site. Tr. 1435:13-15. Leverette has no role in overseeing construction of the bridge, and thus has no personal knowledge of the costs that have been incurred to date or that are reasonably expected to be incurred if there is an injunction. Tr. 1395:7-1396:22. Accordingly, Leverette lacks competence to provide fact testimony about these matters, and Director Cooper made it clear he was not offering Leverette as an expert witness who may provide opinions that are not based on personal knowledge. *See* Ala. R. Evid. 702(a).

Additionally, Leverette conducted no analysis whatsoever of the reasonableness or accuracy of Scott Bridge’s claimed damages. Director Cooper did not call Scott Bridge’s

President, Ike Scott, or any other Scott Bridge employee to substantiate and defend the reasonableness of these claimed damages. Leverette also failed to explain why any of the claimed damages by Scott Bridge or the monthly value of the Scott Bridge contract constitutes a cost that ALDOT would incur as an “actual, natural, and proximate result of the [preliminary] injunction.” *Consol. Elec. Contractors & Eng'rs, Inc.*, 175 So. 3d at 644. Indeed, Leverette acknowledged that Scott Bridge “will stop working” once a preliminary injunction is issued. Tr. 1424:21-23. And when asked whether ALDOT “would . . . continue to pay Scott [Bridge] on the contract if there were an injunction granted,” Director Cooper answered “No.” Tr. 1652:10-12.

In attempting to rehabilitate Leverette’s testimony, Director Cooper has cited to the Alabama Supreme Court’s instruction in *Devos* that “by its very nature, an injunction bond is speculative.” 297 So. 3d at 1186. While that may be so, nothing in *Devos* eliminated the baseline requirement that a party seeking Rule 65(c) security must establish a rational basis for the amount sought. The absence of such a rational basis for Leverette’s first calculation distinguishes this case from *DeVos*. There, physician defendants were enjoined from soliciting customers of their prior employer. *See* 297 So. 3d at 1179. In support of their request for a higher security, the physicians submitted evidence of the monthly revenues they had actually received from these customers before the injunction, which provided a sound foundation for estimating the revenue they would lose by being enjoined from working for those same customers. *See id.* at 1185. Here, the Scott Bridge contract does not provide revenue for ALDOT, but is a contract in which ALDOT pays Scott Bridge. Thus, enjoining construction of the bridge would actually *save* ALDOT money. This explains why Leverette’s first calculation (his estimate of monthly payments under the contract) misses the mark. There is no evidence in



the record even hinting at the reasonableness of that amount, but even if it were, it would represent savings to ALDOT, not additional costs to either Scott Bridge or ALDOT.

While Director Cooper claims that Leverette's use of a monthly estimate of payments under the Scott Bridge contract is similar to the methodology used in *Amazon Web Services Inc. v. United States*, 147 Fed. Cl. 146 (2020), his reliance on that decision is misplaced. The party seeking security in that case, Microsoft, did not base its calculation on projected monthly payments under the contract to be enjoined (there, the "JEDI" contract), as did Leverette. Instead, Microsoft based its calculation on the cost of alternative services that would be required under different contracts while the JEDI contract was unavailable. *See id.* at 159. Director Cooper has made no similar showing here. To the contrary, Leverette's first calculation assumes, contrary to his own testimony, that payments under the Scott Bridge contract would continue during a preliminary injunction.

The only costs or damages to ALDOT that could conceivably result from the Scott Bridge agreement are legal damages that ALDOT could reasonably be required to pay if construction of the Cooper Bridge is enjoined. This appears to be what Leverette attempted to show with his second calculation, which is based entirely on an estimate of damages provided by Scott Bridge. But Leverette acknowledged that he has not reviewed the Scott Bridge contract in detail (Tr. 1426:3-5), and he made no determination of whether this assertion of damages is correct (Tr. 1426:6-8) or even whether it is reasonable (Tr. 1429:25-1430:3). Thus, Leverette admitted that he does not know what Scott Bridge's damages will or will not be. Tr. 1427:14-17. And, as noted above, Director Cooper elected not to call the Scott Bridge witness who presumably could have at least attempted to defend the reasonableness of these amounts.

But in any event, Director Cooper has failed to show that any of these claimed Scott

Bridge damages would result in any damages to ALDOT. As Leverette acknowledged, ALDOT's contract with Scott Bridge Company incorporates a lengthy set of ALDOT Specifications. Tr. 1363:19-25. These Specifications expressly address and mitigate the impact of an injunction halting construction of the bridge. Tr. 1365:1-14, 1366:2-14. But Leverette admitted that he did not consider whether the Scott Bridge damages estimates are allowable under the Specifications. Tr. 1429:21-24.

An examination of the Specifications demonstrates that they provide ALDOT with powerful protections against incurring damages to Scott Bridge. To start, the Specifications provide that an injunction automatically extends the time that Scott Bridge has to complete construction, which eliminates the need for additional expense to meet the current deadlines. Ex. 455 § 108.07(b) (“Should the progress of the work be stopped by a temporary injunction . . . then such period of delay will not be charged against the contract time.”). Additionally, the Specifications provide that “[t]he State shall not be liable to the Contractor for the said legal delays of 120 calendar days or less.” *Id.* § 108.07. The only exceptions are for (1) “[w]ork actually performed,” which is “paid for at the contract unit prices,” and (2) “the loss of any work or materials already furnished under the terms of the Contract” if “directly caused” by “relief from performance of the contract or any portion thereof.” *Id.* § 108.14(b). For the second category, the contractor receives only “the actual cost of salvaging the materials or as mutually agreed to.” *Id.*

Leverette's calculation is wholly deficient as to the first 120 days of a preliminary injunction as he does not account for these provisions at all. He never explained what work would be “actually performed” during a preliminary injunction. He never explained what work or “already furnished” materials would be “los[t]” as a result of a preliminary injunction. And

he never explained what the “actual cost of salvaging” any materials would be.

Leverette’s analysis of potential damages incurred by ALDOT via Scott Bridge beyond a 120-injunction delay fares no better. Under the Specifications, after the first 120 days of such a delay, Scott Bridge can submit a claim to ALDOT to attempt to receive reimbursement for “documented added costs for a legal delay.” Ex. 455 § 108.07(b). But, critically, Director Cooper has unlimited discretion to deny such claims. The Specifications are clear that “[t]he Director’s decision in the resolution of any and all claims shall be final, non-appealable and not subject to judicial or other review,” and that “[t]he decision of the Director is binding upon all parties including, but not limited to, contractors, subcontractors, and third party beneficiaries.” *Id.* § 110.04(c). Thus, ALDOT effectively has no obligation to pay added damages for delay above and beyond the very limited payments expressly provided for during the first 120 days of a preliminary injunction. Although Leverette acknowledged that this provision is “pretty conclusive and pretty powerful” (Tr. 1433:20-22), he failed to determine that any of the \$13 million to \$18 million in purported damages would consist of payments that fit into that limited carveout under Section 108.14(b) of the Specifications.

Director Cooper testified that if an injunction lasts for more than 120 days, Scott Bridge “could submit” a claim to be paid for work stoppage (Tr. 1825:24-1826:3), and that if Scott Bridge submitted such a claim, ALDOT would make payment if Director Cooper “ultimately determined it should be paid” (Tr. 1805:5-9). But this testimony does not undermine the fact that the Specifications give Director Cooper absolute discretion to refuse to pay such a claim by Scott Bridge. While Director Cooper later testified, “I didn’t say we wouldn’t pay a claim” (Tr. 1826:22-1827:1), he never testified that ALDOT would pay so much as a penny to reimburse any delay claim filed by Scott Bridge. Director Cooper’s equivocal testimony fails to

demonstrate a rational basis for requiring security to pay a potential delay claim by Scott Bridge.

Taken together, these provisions give ALDOT an extraordinary ability to avoid incurring any costs resulting from a preliminary injunction. ALDOT apparently anticipated that work on the Cooper Bridge may be enjoined (*i.e.*, “legal delays”) and drafted strong protections from additional expense should an injunction issue. By failing to account for these contractual terms, ALDOT’s proof of the amount of security lacks a rational basis.

Accordingly, the Court declines to factor any of the purported Scott Bridge-related damages into the calculation of security and finds that Director Cooper has failed to carry his burden for a Rule 65(c) security for damages proximately caused by a wrongful injunction.

Nonetheless, because a Rule 65(c) security should also cover prospective costs and attorneys’ fees, the Court must continue its analysis. Although Director Cooper has not offered any evidence as to the amount of legal fees he will incur in challenging the preliminary injunction, public records of which this Court may take judicial notice show that ALDOT’s legal fees have a capped rate of \$195 per hour. *See* Ala. State Legislature Contract Review Committee, “Contract Review Agenda for November 3, 2022,” at 20, *available at* [https://www.legislature.state.al.us/pdf/joint/contract\\_review/Contract\\_Review\\_Agenda\\_1122.pdf](https://www.legislature.state.al.us/pdf/joint/contract_review/Contract_Review_Agenda_1122.pdf) ; *see also Johnson v. Hall*, 10 So. 3d 1031, 1034 (Ala. Civ. App. 2008) (“This court may take judicial notice of public records.”); Ala. R. Evid. 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). Using that \$195 per hour rate, and conservatively estimating that litigating an appeal of this preliminary injunction could take 500 hours in attorney time, a security of \$100,000 would cover all of Director Cooper’s legal fees

and costs associated with such an appeal. The Court therefore sets a Rule 65(c) security in the amount of \$100,000 to account for Director Cooper's legal fees and costs associated with litigating any appeal from the preliminary injunction.

## **VI. Director Cooper's First Motion *in Limine***

The Court briefly addresses here Director Cooper's first motion *in limine*, as to which the Court had not previously issued a final ruling.

Before the preliminary injunction hearing, Director Cooper moved *in limine* to exclude certain evidence related to negotiations between Director Cooper and BCBC from mid-2018 through 2022 on the grounds that communications between the parties during that period are (a) subject to a confidentiality agreement between BCBC and Director Cooper (or ALDOT) and (b) inadmissible under Alabama Rule of Evidence 408. Dkt. 92. Prior to the preliminary injunction hearing, this Court issued an interim order denying Director Cooper's motion to exclude this evidence and stating that the Court would revisit its decision at the conclusion hearing. Dkt. 364. Upon consideration of the materials originally filed by the parties in connection with Director Cooper's *in limine* motion and the record from the preliminary injunction hearing, this Court affirms its prior ruling and denies Director Cooper's motion to exclude evidence on this basis.

The confidentiality agreements do not bar the introduction of evidence related to the parties' negotiations between 2018 and 2022. Director Cooper relies on two letter agreements. The first was a May 29, 2018 letter from BCBC's prior ultimate parent, Syncora, to ALDOT, to which ALDOT responded on May 31, 2018. DX-292; DX-293. The letter provides that "Syncora agrees, *subject to the State confirming same*, these negotiations are to be held in complete confidence and will not be used in any ongoing or subsequent litigation, nor will the

matters discussed in this negotiation process be disclosed or in any way used for any public statements, press releases or otherwise.” DX-292 (emphasis added). The second was an August 27, 2018 letter from BCBC’s current ultimate parent, DIF, to ALDOT, to which ALDOT responded on September 5, 2018. DX-314; DX-318. The terms of that letter agreement were substantially the same as the agreement between Syncora and ALDOT and included the key phrase “subject to the State confirming same.” DX-314.

As a preliminary matter, the Court notes that the Syncora-ALDOT letter is irrelevant to this aspect of Director Cooper’s motion. Syncora sold the American Roads portfolio (which included BCBC) to DIF in July 2018, and thereafter no longer had the ability to bind BCBC. Tr. 143:23-25. Therefore, the Syncora letter agreement, even if effective, could only cover communications that were made over the period of May 31, 2018 to July 2018. None of the communications or documents that BCBC offered into evidence and to which Director Cooper objected on the basis of a purported confidentiality agreement are from that period. Accordingly, the Court finds that the Syncora letter agreement is irrelevant to its consideration of Director Cooper’s motion *in limine* and proceeds to address the import of the letters exchanged between DIF and ALDOT in August and September 2018. In any event, even if the Syncora letter agreement were relevant, the same analysis would apply as it contains the exact same language.

The relevant language in the DIF-ALDOT letter agreement is “clear and unambiguous” and “must be construed as it reads.” *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 325 (Ala. 1999); *Ex parte Associates Commercial Corp.*, 423 So. 2d 195, 200 (Ala. 1982) (“[N]o court can rewrite the terms of a plain and unambiguous contract.”). The inclusion of the key phrase “subject to the State confirming same” placed on BCBC an obligation to maintain the

confidentiality of the negotiations only to the extent ALDOT did the “same.” Director Cooper therefore cannot hold BCBC to the terms of this letter agreement unless he can establish that he also “perform[ed] under the contract.” *Winkleblack v. Murphy*, 811 So. 2d 521, 529 (Ala. 2001).

Director Cooper failed to prove that he complied with the confidentiality provision at issue. Neither he nor any witness offered any testimony at the preliminary injunction hearing affirming that Director Cooper and his ALDOT staff honored this obligation. Indeed, Director Cooper does not dispute that ALDOT breached the confidentiality provision he now seeks to rely upon. In his motion, Director Cooper acknowledged that “there were some leaks” of the negotiations by ALDOT. Dkt. 92 ¶ 10. Evidence presented during the preliminary injunction hearing confirmed the same. For example, on October 7, 2022, ALDOT spokesperson Tony Harris provided detailed information about the negotiations to the press, including to a reporter from *Gulf Coast Media* regarding the “negotiations” between ALDOT and BCBC. PTX-446. Harris disclosed that “[a]fter years of negotiations, the foreign-owned toll bridge company refused terms that would provide reduced traffic congestion and instead demanded a 50-year ban on building any new bridge, regardless of need,” and that in the course of negotiations, BCBC “admitted its goal is to protect their investment.” *Id.* at 1. As set forth in BCBC’s opposition to Director Cooper’s motion, Harris’ quote was used by the *Gulf Coast Media* reporter and widely disseminated in the press. Dkt. 311 at 4. As an ALDOT employee, Harris’s actions would be attributable to ALDOT and Director Cooper but the Court need not even resort to that doctrine because Director Cooper was directly involved in the leak, as Harris forwarded his email to Director Cooper the same day he sent it. PTX-446. This was just one example of Director Cooper and ALDOT breaching the confidentiality obligation by disclosing the substance of the parties’ negotiations and related communications to third parties. *See* Dkt. 311 at 4.

The only testimony Director Cooper offered on this subject was his understanding that he and ALDOT were free to breach the confidentiality provision at will while still retaining the ability to restrict BCBC's use of information exchanged between the parties. Tr. 1583-89. Director Cooper's understanding is irrelevant and may not be considered on this motion because the text of the letters is "clear and unambiguous" and "must be construed as it reads." *State Farm Fire & Cas. Co.*, 747 So. 2d at 325. But even if this Court were to find the language ambiguous and consider Director Cooper's testimony as to his understanding of the agreement, the Court would reject that testimony as incredible. Director Cooper's interpretation of the letter agreement would give him and ALDOT carte blanche to disregard any confidentiality obligations while forcing BCBC to abide by them. It would also create a bizarre situation in which material that Director Cooper leaked to the public would be common knowledge to the world and used as a cudgel by Director Cooper and ALDOT in the court of public opinion but somehow off limits to BCBC for use in a court of law. The Court finds Director Cooper's proffered interpretation of the letter agreement to be absurd and rejects it. The far more reasonable interpretation is the one that hews to the plain language of the letter and accords with DIF's understanding: "if one party ceases to follow the terms of this agreement, then th[e confidentiality] agreement no longer applies." PTX-645 at 213:12-19.

Rule 408 of the Alabama Rules of Evidence also does not provide a basis to exclude the subject evidence. Like its federal counterpart, Rule 408 cannot be used to exclude settlement negotiations where the negotiations are being offered for the purpose of establishing a party's bad faith in the negotiations. *See, e.g., Athey v. Farmers Ins. Exchange*, 234 F.3d 357, 360-62 (8th Cir. 2000) (evidence of settlement negotiations admissible because such evidence was not offered "to prove a party's liability for the underlying claim" but rather "for another purpose" of



proving the other party’s “bad faith” in negotiations); *Am. Gen. Life Ins. Co. v. James*, No. C-14-4242, 2015 WL 730010, at \*6, \*16 (N.D. Cal. Feb. 19, 2015) (“The court finds that the settlement communications . . . are not offered to prove the validity or amount of a disputed claim, but rather for another purpose, namely, as evidence of [the plaintiff’s bad faith] course of conduct.”); *Cadet Manufacturing v. Am. Ins. Co.*, No. C-04-5411, 2006 WL 8455266, at \*2 (W.D. Wash. June 28, 2006) (“[C]ourts have found that evidence of prior settlement negotiations may be admitted to show that [one party] acted in bad faith.”). The preliminary injunction hearing confirmed that the subject evidence was offered to establish Director Cooper’s bad faith in the parties’ negotiations during the 2018 to 2022 time period. *See, e.g.*, PTX-311; PTX-419; PTX-613 (all offered as evidence of Director Cooper’s “bad faith in the negotiating process”); *see also* Tr. 15-22.

Further, Rule 408(b) “does not require exclusion if the evidence is offered for purposes not prohibited by section (a),” including but not limited to “negating a contention of undue delay.” Ala. R. Evid. 408(b); *see, e.g., CSX Transp., Inc. v. Maynard*, 667 So. 2d 642, 646–47 (Ala. 1995) (affirming a trial court’s decision to allow a settlement offer to be introduced in relation to statute of limitations defense). Director Cooper testified that BCBC engaged in negotiations in order to delay the Cooper Bridge project as long as possible. Tr. 1603:13-15, 1613:9-14; *see also* Tr. 1574-75. BCBC had the right to introduce evidence of the 2018-2022 negotiations to show there was no such delay by BCBC in attempting to reach a resolution that met Director Cooper’s stated objectives.

Accordingly, the Court reaffirms its prior preliminary ruling and hereby **DENIES** Director Cooper’s motion *in limine*.

\* \* \*

Accordingly, it is hereby **ORDERED** as follows:

1. The Motion for a Preliminary Injunction filed by the Plaintiff The Baldwin County Bridge Company, LLC is **GRANTED**;
2. The preliminary injunction set forth below shall issue upon BCBC's filing of security in the amount of One Hundred Thousand (\$100,000) Dollars;
3. A preliminary injunction is entered against Defendant Director Cooper. Director Cooper is **ORDERED** to immediately cease and desist from constructing the Cooper Bridge, including by taking all efforts to ensure that any work currently being performed or contemplated for construction of the Cooper Bridge is halted and shall not proceed until such time as this injunction is dissolved. These efforts shall include instructing—or causing instructions to be relayed to—all ALDOT employees and third parties that are performing work for construction of the Cooper Bridge on ALDOT's or Director Cooper's behalf to immediately stop all such work. While this injunction remains in effect, Director Cooper is further **ORDERED** to refrain from taking any steps whether directly or indirectly, such as through employees, agents, surrogates, or third parties, to pursue construction of the Cooper Bridge.
4. Any and all other pending motions not otherwise addressed by the Court are moot and therefore **DENIED**.

**DONE this 17<sup>th</sup> day of May, 2023.**

/s/ JIMMY B POOL  
**CIRCUIT JUDGE**