STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 9995
INTERSAL, INC., Plaintiff, v. D. REID WILSON, Secretary, North Carolina Department of Natural and Cultural Resources; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; and THE STATE OF NORTH CAROLINA, Defendants.	**ORDER AND OPINION ON DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT**

1. **THIS MATTER** is before the Court on Defendants' Renewed Motion for Summary Judgment (the "Motion"), (ECF No. 318).

2. After review of the Motion, the parties' briefs, the arguments of counsel at a hearing, and other relevant matters of record, the Court **GRANTS in part** and **DENIES in part** the Motion.

Kilpatrick Townsend & Stockton, LLP, by Dustin T. Greene, Richard J. Keshian, Elizabeth Winters, Kyleigh E. Feehs, Whitney R. Pakalka, and Mark Boynton, for Plaintiff Intersal, Inc.

North Carolina Department of Justice, by Michael Bulleri, Amar Majmundar, Brian D. Rabinovitz, Orlando L. Rodriguez, and Charles G. Whitehead, for Defendants D. Reid Wilson, et al.

Earp, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

3. The Court does not make findings of fact when ruling on motions for summary judgment, but instead "summarizes the relevant evidence of record, noting both the facts that are disputed and those that are uncontested, to provide context for the claims and the Motions." *Aym Techs., LLC v. Rodgers*, 2019 NCBC LEXIS 64, at *2 (N.C. Super. Ct. Oct. 16, 2019) (citing *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975)).

4. This dispute arises from the parties' differing interpretations of language in a settlement agreement dated 15 October 2013 between Intersal, Inc. ("Intersal" or "Plaintiff") and the North Carolina Department of Natural and Cultural Resources ("DNCR") (the "2013 Agreement").[2] (*See* Third Am. Compl. ¶ 24, Ex. 1, ["2013 Agreement"], ECF No. 106.)

5. The 2013 Agreement resulted from a mediation between the parties regarding disputes involving a previous agreement between the parties and a non-party, the Maritime Research Institute ("MRI").[3] (the "1998 Agreement," ECF No. 106.) In the 1998 Agreement, Intersal relinquished its right to receive 75% of the coins and precious metals recovered from the *QAR* in exchange for certain media

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[1] Additional factual background can be found in *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at **2-21 (N.C. Super. Ct. Feb. 23, 2023).

[2] The Department of Natural and Cultural Resources was previously titled the Department of Cultural Resources. The Court refers to the Department as "DNCR" throughout this opinion.

[3] MRI is a non-profit corporation formed to work on the *QAR* project in cooperation with State archaeologists and DNCR historians. (2013 Agreement Recitals, ECF No. 106.)

rights and other commercial opportunities arising from the *QAR* Project. (1998 Agreement 1.) The recitals in the 2013 Agreement reference that exchange. (2013 Agreement 1.)

6. At issue in this Motion is whether the language of Section 16 of the 2013 Agreement supports Intersal's damage arguments. Section 16(a) requires DNCR to "establish and maintain access to a website for the issuance of Media and Access Passes to QAR-project[4] related artifacts and activities" and to include on the website "[a]n Intersal terms of use ["Terms of Service"] agreement, to be electronically submitted[,]" among other things. (2013 Agreement § 16(a)(1), § 16(a)(3)(a).) Section 16(a) also provides that "Intersal shall bear the sole responsibility for managing and enforcing its [Terms of Service.]" (2013 Agreement § 16(a)(5).)

7. Section 16(b) of the 2013 Agreement speaks to marks and other information required to be placed on "non-commercial media." Section 16(b) provides:

> 1) All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus[5] and/or D[N]CR, as well as a link to D[N]CR, Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.
>
> 2) D[N]CR agrees to display non-commercial digital media only on D[N]CR's website.
>
> 3) Termination. This Media and Access Pass section shall terminate after the 5th anniversary of the signing of this Agreement. After five

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[4] The *QAR* Project encompasses location, excavation, salvage and conservation activities. (Permit, ECF 337.9.)

[5] Nautilus is an underwater video production company and is identified in the 2013 Agreement as Plaintiff's "video-designee." (2013 Agreement ¶ 14.)

> (5) years, D[N]CR and Intersal may agree to extend this provision by mutual written consent.

(2013 Agreement § 16(b).)

8. In addition, Defendants move to preclude Intersal from seeking damages for DNCR's alleged failure to collaborate in making a large commercial ("blockbuster") tour based on the *QAR* Project. Section 15 of the 2013 Agreement reads in pertinent part:

> **Other Commercial Narrative.** D[N]CR and Intersal agree to collaborate in making other commercial narrative *such as, but not limited to* books and e-books, mini- and full-length documentaries, and video games. Any profit-sharing agreements shall be based on the amount of work contributed by each entity.

(2013 Agreement § 15 (emphasis added).) Plaintiff contends that such a tour is included in the definition of "commercial narrative" and that Defendants have instead chosen to conduct their own tour at numerous venues in North Carolina without collaborating with Intersal. (Third Am. Compl. ¶ 35(J).)

9. In a previous order, the Court held that whether the parties intended for the term "commercial narrative" in Section 15 of the 2013 Agreement to include a blockbuster tour and, if so, whether Defendants collaborated with Intersal in making such a tour were issues of fact for a jury to decide. *See Intersal, Inc.*, 2023 NCBC LEXIS 29, at **42-47.

10. Since the Court's ruling, Intersal discovered and produced previously undisclosed images and audio recordings from a 3 February 2014 meeting involving representatives from Intersal, DNCR, and Nautilus. During the meeting, the attendees discussed various topics including their interpretations of the 2013

Agreement with respect to a tour and media rights. The discovery of the recordings and images from the meeting led to a continuance of the trial date so that the import of this additional information could be evaluated by the parties. (Order on Pl.'s Mot. Admit Evidence, Defs.' Mot. Sanctions and Reconsider Summ. J. Ruling and Pl.'s Mot. Continue Trial ["Continuance Order"], ECF No. 294.)

11. In the Continuance Order, the Court afforded the parties an opportunity to conduct limited discovery with respect to (1) the substance of the 3 February 2014 meeting; (2) recordings and documents made and/or presented at the 3 February 2014 meeting; (3) any images/usages responsive to prior discovery requests that have not been previously produced; (4) any recordings of meetings or calls responsive to prior discovery requests that have not been previously produced; and (5) the meaning of DCR's website as stated in Paragraph 16(b)(2) of the 2013 Settlement Agreement. The Court also amended the case management order to permit the parties to file motions resulting from this discovery. (Am. Case Mgmt. Order ¶¶ 2-3, ECF No. 298.)

12. Pursuant to the terms of the Amended Case Management Order, Defendants filed the instant Motion on 31 May 2024, (ECF No. 318). Plaintiff filed its response on 24 June 2024, (ECF No. 336).[6] Defendants filed their reply on 1 July 2024, (ECF No. 343).

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[6] The Third Amended Case Management Order gave Plaintiff until 21 June 2024 to file its response. Prior to this deadline, however, Plaintiff notified the Court of Defendants' objection to Plaintiff's citation to portions of the transcript of the 3 February 2014 meeting in its response brief to the Motion, and it requested a status conference with the Court. Following the status conference, (ECF No. 329), the parties came to an agreement regarding citation to the transcript, which was memorialized via a stipulation. (Joint Stip. Regarding Use of Tr. from 3 Feb. 2014 Meeting, ECF No. 338.) Plaintiff then requested an extension of time to respond to the Motion, which the Court granted. (Order Extending Time, ECF No. 330.)

13. On 8 July 2024, the Court held a hearing on the Motion during which counsel for all parties participated. (Not. H'rg, ECF No. 344.) The Motion is now ripe for resolution.

II. LEGAL STANDARD

14. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that [the movant] is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c).

15. Genuine issues of material fact are those "which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534 (1971). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and means more than a scintilla or a permissible inference." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 187 (2019) (citation and internal quotation marks omitted).

16. In reviewing a motion for summary judgment, the Court must consider all evidence in the light most favorable to the non-moving party. *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022). Parties moving for summary judgment have the burden of establishing the lack of any triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. 488, 491 (1985).

17. A movant may satisfy its burden by proving that "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing

party cannot produce evidence to support an essential element of [the] claim." *Dobson v. Harris,* 352 N.C. 77, 83 (2000) (citations omitted). Should the movant satisfy its burden, "then the burden shifts to the non-moving party to 'set forth specific facts showing that there is a genuine issue for trial.'" *Lowe v. Bradford,* 305 N.C. 366, 369-70 (1982) (quoting N.C. R. Civ. P. 56(e)).

18. When ruling on a motion for summary judgment, the Court does not resolve issues of fact and must deny the motion if there is any genuine issue of material fact. *Singleton v. Stewart,* 280 N.C. 460, 464 (1972).

III. ANALYSIS

A. The February 2014 Meeting Transcripts

19. Defendants contend that transcripts of the recordings made of the 3 February 2014 meeting conclusively establish that the parties did not intend for Section 15's reference to "commercial narrative" to include a commercial tour. (Defs.' Br. Supp. Renewed Mot. Summ. J. ["Defs.' Br."] 9-13, ECF No. 319.) After a thorough review of the transcripts, the Court observes that there was much discussion of a tour. Defendants appear to rely on language in the 1998 Agreement providing that DNCR and MRI jointly had the "exclusive right to nationally and internationally tour and exhibit" the *QAR*'s artifacts. (1998 Agreement ¶ 21.) Intersal points to the absence of the same provision in the 2013 Agreement as evidence that the concept of a tour was no longer separate from other commercial narratives. (Br. Opp. Defs.' Renewed Mot. Summ. J. ["Pl.'s Br."] 4, ECF No. 336.)

20. The Court concludes that a material issue of fact exists on this point. It will be for the jury to decide what the parties meant by their statements during the 3 February 2014 meeting, and whether those statements help to elucidate the parties' intentions with respect to Section 15 of the 2013 Agreement. *See, e.g., Whirlpool Corp. v. Dailey Constr., Inc.*, 110 N.C. App. 468, 471 (1993) ("[I[f the terms of the contract are ambiguous then resort to extrinsic evidence is necessary and the question is one for the jury." (citing *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 156-57 (1983))).

21. Defendants' Motion on this basis is **DENIED**.

B. Timeliness of Defendants' Remaining Arguments

22. Plaintiff asserts that Defendants should not be permitted to raise its remaining arguments because they violate the Amended Case Management Order's restriction on motions that were permitted to be heard at this stage. (Am. Case Mgmt. Order ¶ 3d.) According to Plaintiff, the arguments do not result from a review of the February 2014 meeting materials and were available to Defendants when they initially filed their summary judgment motion. In addition, Plaintiff contends that, to the extent Defendants continue to challenge the enforceability of the 2013 Agreement, their argument is barred by judicial estoppel and the law of the case doctrine. (Pl.'s Br. 6-9.)

23. Defendants respond that their Motion arises from the 3 February 2014 meeting because, during that meeting, the parties discussed their intent with respect to Sections 15 and 16 of the 2013 Agreement. Citing *Carl v. State*, 192 N.C. App. 544

(2008), Defendants further argue that interpreting these provisions the way Intersal does would mean that DNCR acted beyond its authority, making the provisions illegal and unenforceable as a matter of law. (Defs.' Reply Supp. Renewed Mot. Summ. J. ["Defs.' Reply"] 3, ECF No. 343.)

24. The Court agrees that Defendants' Motion is timely given the topics discussed during the 3 February 2014 meeting. The Court further agrees that Defendants would be estopped if they were challenging the enforceability of the 2013 Agreement as a whole, but they are not. Defendants contend that Intersal should not be able to argue that the parties' intended *particular interpretations* of certain language in the 2013 Agreement because illegal interpretations are unenforceable as a matter of law. This argument has not been addressed *per se*, and Defendants are not estopped from pursuing it.

i. The Emoluments Clause

25. Defendants next contend that interpreting Section 16(a) of the 2013 Agreement to require Defendants to "facilitate [Intersal's] scheme" to deny access to "anything *QAR* related" to anyone not willing either to pay for Nautilus' video footage, (which, in turn, resulted in payment to Intersal), or to pay Intersal for the right to have access to the *QAR* Project to take their own images (a use or access fee) is unreasonable because it would violate the Emoluments Clause of the North Carolina Constitution. According to Defendants, such an interpretation would result in an unconstitutional grant of an individual right to benefit from the *QAR* that would

serve only a private purpose rather than promote the general welfare. (Defs.' Br. 14-18; Defs.' Reply 5-12.)

26. Plaintiff responds first that the State's characterization of Intersal's interpretation is an overstatement of its position in this litigation. It maintains that Section 16(a) was only intended to restrict third party use of *QAR* Project images for commercial purposes. According to Intersal, "[t]he public remains free to film and photograph QAR-related items and activities that are open to the public for their own personal use." (Pl.'s Br. 13, n. 3.)

27. Additionally, the language of Intersal's claimed breaches belies the State's characterization. In the Third Amended Complaint Intersal alleges that Defendants breached Section 16(a) of the 2013 Agreement in the following ways:

> (a) "[D]enying Intersal an opportunity to submit the "Terms of Service" called for by the *QAR* Settlement Agreement detailing permitted uses for digital images of *QAR* Project activities gathered by press," and that DNCR "fail[ed] to advise invited press of the existence of new *QAR* Project media policies[.]" (Third Am. Compl. ¶ 35A.)
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> (b) "Starting June 2014, in violation of para. 16.a, Defendants begin ongoing and continuing refusal to implement and/or post online Intersal's submitted *QAR* Project Terms of Service, despite fact that its language is identical to the language and policy previously vetted and in use by NC Department of Commerce[.]" (Third Am. Compl. ¶ 35C.)
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> (c) "On September 9 and September 15, 2015 . . . Defendants continued their failure to implement the *QAR* Settlement Agreement media policy, by allowing Friends of the Queen Ann's Revenge ("FoQAR") to bring Raeford Brown and crew (from the talk radio show "Live and Local with Raeford and Friends") to dive the *QAR* shipwreck and collect footage aboard the 2015 *QAR* recovery vessel, upon information and belief, without advising said Press representatives of changes to the *QAR* media policy[.]" (Third Am. Compl. ¶ 35G.)

> (d) "On September 14, 2015 . . . Defendants continued their failure to implement specific mandates of the *QAR* Settlement Agreement, including changes to *QAR* Project media policy (para. 16.a); leading to Defendants' allowing FoQAR to film *QAR* recovery operations via independent media company Zion Consulting Group, upon information and belief, without requiring completion of existing *QAR* commercial narrative request form . . . or enforcing the new *QAR* media policy[.]" (Third Am. Compl. ¶ 35H.)

28. The Terms of Service submitted by Intersal to Defendants provided that the press and news media organizations that applied to DNCR for access to the QAR Project "agree to limit their use of all QAR Project video and digital media images . . . to the authorized uses described [in the Terms of Service]."[7] (Queen Anne's Revenge Project Press / New Media Access Application and Terms of Service ["Terms of Service"], ECF No. 159.11.) The authorized uses specified that digital media shown on air or on the web had to include the watermark and/or bug of the news organization and be restricted to three minutes running time on the news organization's platform or website. In addition, if displayed on the news organization's website, links to the QAR and Intersal websites had to appear on the webpage. If printed, the image had to include the watermark and/or bug of the news organization and the cut line "Courtesy of NC DCR and Intersal, Inc." Duplication, re-edit, re-license and/or resale (or other use) of any of the media gathered or posted (including media posted to public access websites such as You Tube) was forbidden without the express written permission of Intersal. Taking underwater video or

[7] "QAR Project video and digital media images" is defined in the Terms of Service to include "all video and digital media images of QAR Project recovery operations (including but not limited to all shipboard activities, at dock, on the water, and at the QAR site), QAR Lab and Lab operations, and of all QAR artifacts, regardless of location or disposition." (Terms of Service 2.)

images was also prohibited without the express written permission of Nautilus, as well as Intersal. (Terms of Service 1-2.)

29. The Terms of Service were "intended to assist D[N]CR in the safe maintenance and control of access to the QAR Project and sites; and to help protect, discourage infringement of, and enable enforcement of certain QAR Project media rights held by Intersal, Inc., and its QAR video designee Nautilus Productions[.]" (Terms of Service 1.) When it came to enforcement, however, Section 16(a) of the 2013 Agreement made it clear that Intersal was solely responsible. (2013 Agreement § 16(a)(5) ("Intersal shall bear the sole responsibility for managing and enforcing its Terms of Service[.]").)

30. In this action, Intersal seeks damages for Defendants' alleged failure to post Intersal's Terms of Service and their failure otherwise to advise those seeking access to "QAR-project related artifacts and activities" of the existence of Intersal's Terms of Service before granting access to the *QAR* Project for the purpose of recording video or taking images. As a result, Intersal alleges, the press and news organizations posted unmarked videos and images on the internet and became a source of those images for commercial use.

31. Given the above, the Court concludes that Defendants' characterization of Intersal's Section 16(a) claim as being one for damages resulting from Defendants' refusal to deny access to the *QAR* Project to anyone not willing to pay Intersal a use fee is overstated. However, to the extent Intersal contends that Defendants were

obligated to *enforce* their Terms of Service, (*see e.g.*, Third Am. Compl. ¶ 35H), such an interpretation would run afoul of the plain language of Section 16(a)(5).

32. Addressing the Emoluments Clause, Intersal argues that its interpretation of Section 16(a) is not unconstitutional because DNCR agreed to the provision in order to benefit the public and promote the general welfare of North Carolina's citizens. Specifically, Intersal maintains that the public–at–large benefits because Section 16(a): (i) is part of the consideration exchanged for resolving Intersal's legal dispute with DNCR arising from the 1998 Agreement (in which Intersal relinquished its rights to certain QAR artifacts so that all QAR artifacts remain with the State as one intact collection) and (ii) because the interpretation operates to continue the parties' mutual efforts to promote the history of Blackbeard the pirate and continue the recovery and conservation of the QAR. (Pl.'s Br. 13.)

33. The Emoluments Clause in the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. An emolument is "the profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites." *Crump v. Snead*, 134 N.C. App. 353, 356 (1999) (quoting Black's Law Dictionary 524 (6th ed. 1990)). Thus, with certain exceptions, the Emoluments Clause prevents the State from granting a benefit to an individual or group that is not available to the public. *Blinson v. State,* 186 N.C. App. 328, 342 (2007). In short, the Emoluments Clause, along with other

clauses at the beginning of the Constitution's Declaration of Rights, was intended to "ensure that the people of North Carolina can compete equally for political and economic advantage." Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 8 (2022) (internal quotation marks omitted).[8]

34. But "not every classification which favors a particular group of persons is an exclusive or separate emolument or privilege[.]" *Emerald Isle v. State*, 320 N.C. 640, 652 (1987) (internal citation and quotation marks omitted). "[I]n determining whether a benefit has been afforded in violation of [the Emoluments Clause], a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group." *Peacock v. Shinn*, 139 N.C. App. 487, 496 (2000). When making this determination, courts examine whether "(1) the exemption or benefit is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the [State] to conclude that the granting of the . . . benefit serves the public interest." *Id.* at 495-96 (citing *Crump*, 134 N.C. App. at. 357).

35. Further, to be constitutional, the test requires only that activities "*primarily* benefit the public and not a private party[.]" *Id.* at 493. Even if incidental benefits to private parties result, the benefit will generally be upheld as long as "[i]t

[8] Judge Dietz explains that a shift in this State's jurisprudence with respect to the Exclusive Emoluments clause began in the late 1960's with *State v. Knight*, 152 S.E. 2d 179 (1984) and use of the rational basis test with respect to these claims. "Unsurprisingly, *Knight* marked the end of successful Exclusive Emoluments Clause challenges." Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 8 (2022).

results from the . . . government's efforts to better serve the interests of its people." *Id.* at 494 (quoting *Maready v. City of Winston-Salem*, 342 N.C. 708, 725 (1996)) (internal quotation marks omitted); *see also Emerald Isle*, 320 N.C. at 655 (determining that the fact that some property owners benefitted more than others from State action did not create an exclusive emolument because the ultimate benefit was for the public at large.).

36. Here, the permit issued to Intersal awarded it the right to 75% of the coins and precious metals recovered from the *QAR*. (Permit, ECF No. 337.9.) However, "in order that all QAR artifacts remain as one intact collection, and in order to permit [DNCR] to determine ultimate disposition of the artifacts[,]" the parties agreed to swap Intersal's right to 75% of the coins and precious metals for the rights provided in the 1998 Agreement. (1998 Agreement 2.) This exchange continued to be reflected in the 2013 Agreement. (2013 Agreement 1.) Accordingly, the rights Intersal ultimately derived from the 2013 Agreement were premised on its agreement to relinquish specific *QAR* artifacts (coins and precious metals) to the State for the public good.

37. Further, the negotiation of an agreement to resolve Intersal's dispute with Defendants aligns with North Carolina's public policy of settling disputed claims. *See* N.C.G.S. § 150B-22(a) ("It is the policy of this State that any dispute between an agency and another person . . . should be settled through informal

procedures."). Avoiding protracted litigation is clearly in the best interests of the citizenry.[9]

38. Accordingly, the Court concludes that Plaintiff's claimed breaches of Section 16a do not implicate the Emoluments Clause of the North Carolina Constitution. Defendants' Motion on this basis is **DENIED**.

ii. Section 143-162.2

39. Section 143-162.2 of the North Carolina General Statutes prohibits the State from charging a production company to film on the State's real property (except for that amount necessary to reimburse the State for actual costs incurred and revenues lost). Because the State cannot charge such a fee, Defendants argue that they could not agree to any provision that would have afforded Intersal the ability to charge such a fee or otherwise to profit from images of the *QAR* Project. Therefore, Defendants contend that Intersal cannot interpret the 2013 Agreement to require DNCR to deny a production company access to State historic property for purposes of filming unless the production company first agrees to pay Intersal. (Defs.' Br. 18-21.) They contend that this interpretation was discussed in the 2014 meeting and captured by the recording, and that Mr. Masters, on behalf of Intersal, argued that the law had been broken in the past. (Defs.' Br. 19.)

40. In response, Plaintiff asserts that although the State is limited in what it can charge a production company to film on its real property, nothing in Section 143-162.2 requires a State agency to make its real property available for filming.

[9] That the 2013 Agreement has, in fact, resulted in protracted litigation is both ironic and unfortunate.

Furthermore, Intersal contends that it has never taken the position that everyone must pay it to access the *QAR* Project for the purpose of taking images, only those seeking to create commercial narratives. (Pl.'s Br. 16-17.)

41. Section 143-162.2 of the North Carolina General Statutes provides that "[i]f a State agency makes real property available to a production company . . . it shall not charge any fee other than reimbursement of actual costs incurred and actual revenues lost by the agency . . . . This section does not require a State agency to make real property available to a production company for a production." N.C.G.S. § 143-162.2.

42. Intersal does not appear to interpret Section 16(a) of the 2013 Agreement to require the State, which oversees public real property, to charge production companies an access fee on its behalf, and the plain language of 2013 Agreement would not support such an argument.[10]

43. There is also no discussion of an access fee payable to Intersal in the Terms of Service referenced in Section 16(a) of the 2013 Agreement. Rather, the Terms of Service require press and news media organizations to agree to mark their images and use them in a limited manner. And, to the extent *Intersal* contemplates charging a third party a fee for the ability to remove the marks and use the images commercially, that fee, payable to Intersal, would result from the commercial use of

[10] Section 15 of the 2013 Agreement states that "D[N]CR and Intersal agree to collaborate in making other commercial narrative[.]" This language presupposes that DNCR has a role in *making* the commercial narrative, not just in managing access to QAR Project real property that others use to make the commercial narrative. Profit-sharing pursuant to that provision is by agreement.

the images, not merely from being afforded access to the State's *QAR* Project site to take them.

44. Accordingly, the Court concludes that Plaintiff's claimed breaches of Section 16(a) do not implicate Section 143-162.2 of the North Carolina General Statutes. Defendants' Motion on this basis is **DENIED**.

iii. Monopolies Clause

45. Defendants next argue that their characterization of Plaintiff's interpretation of its media rights, "either you pay Intersal or you do not make *QAR* commercial narratives," is unenforceable because the State cannot grant Intersal the right to an unlawful monopoly (in *QAR* commercial narratives) in violation of the North Carolina Constitution. (N.C. Const. art. I, Section 34 [the "Monopolies Clause"].) Defendants argue that nothing in the law restricts application of the Monopolies Clause to common goods and services rather than "unique historic artifacts," and that "[m]aking documentaries, publishing news stories, and generally creating content around historic artifacts is a right commonly held by the people." (Defs.' Reply Br. 14.) Therefore, Defendants contend, Intersal may not seek damages if DNCR allowed third parties to have access to the *QAR* Project to create commercial narratives without first compensating Intersal. (Defs.' Reply 12-14.)

46. Plaintiff observes that there is little case law interpreting the Monopolies Clause in our State's Constitution. Still, it quotes *American Motors Sales Corp. v. Peters* for the proposition that "not every restraint of trade leads to a monopoly in a particular market." 311 N.C. 311, 316 (1984). (Pl.'s Br. 18.) Intersal

contends that the right to use images of the QAR Project commercially to create documentaries, publish photos or videos, or create a tour is not a common right that can be monopolized. Instead, the fact that the artifacts themselves are each one-of-a-kind necessarily results in a level of exclusivity. As Intersal puts it, "[t]he QAR materials and activities at issue here are *sui generis*." (Pl.'s Br. 18.)

47. To underscore its position, Plaintiff argues that Section 121-25 of the North Carolina General Statutes specifically permits DNCR to pay Intersal a monetary fee or allow Intersal to retain (or sell) a portion of the relics found. (Pl.'s Br. 20.) It argues that "Defendants offer no explanation for how Intersal's existing contractual rights could be an illegal monopoly when the General Assembly expressly allows for companies such as Intersal to be the sole private source for commercial sale of artifacts from a particular shipwreck." (Pl.'s Br. 20.)

48. Further, Intersal argues that nothing in the law Defendants cite supports "a finding that Defendants could not permissibly grant Intersal a temporary, *exclusive* right to pursue revenue-generating activity in connection with artifacts that it discovered and then granted to the State in exchange for the rights at issue here." (Pl.'s Br. 18 (emphasis added).) At the same time, it points out that, in general, the right to benefit from commercial narratives using *QAR* artifacts was not exclusive to it. Rather, Intersal interprets the 2013 Agreement to entitle it only

to a portion of any profit, or some fee, for commercial narratives made by others.[11] (Pl.'s Br. 19.)

49. In reply, Defendants maintain that Section 121-25 of the North Carolina General Statutes, which allows DNCR to grant a permit under such conditions as it deems to be in the "best interest of the State" (to include payment of a fee set by the Department or division of artifacts between the licensee and the Department, among others), is inapplicable because it does not expressly grant DNCR the power to confer a monopoly, and it contemplates that the applicant for a permit *pay* the fee, not that it receive one. (Defs.' Br. 21-22; Defs.' Reply 12-14.)

50. North Carolina's Monopolies Clause provides that "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed." N.C. Const. art. I, § 34. The Monopolies Clause was originally included in North Carolina's Constitution to prohibit "a grant by the sovereign of an exclusive privilege to do something which had theretofore been a matter of common right." *State v. Harris*, 216 N.C. 746, 761 (1940); *see also* Dietz, *supra* ¶ 33, at 13 (stating that the Monopolies Clause was a response to the "crippling effects of English mercantilism on the colonists."). "Under our system of government, all rights and privileges are primarily of common right, unless their restraint becomes necessary for the public good[.]" *Thrift v. Elizabeth City*, 122 N.C. 31, 37 (1898).

[11] The Court observes that Section 14 of the 2013 Agreement purports to provide Intersal with the "*exclusive* right to produce a documentary film about the QAR project for licensing and sale."

51. A monopoly exists when an entity or organization possesses "ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues." *Dicesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 97 (2020) (citing *Am. Motor Sales Corp.*, 311 N.C. at 315). A prerequisite to assessing a hypothetical monopolist's control over prices is determining the relevant market. *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2016 NCBC LEIXS 82, at *17 (N.C. Super. Ct. Oct. 25, 2016) ("[A]ntitrust claims often rise or fall on the definition of the relevant market."); *see also Sykes v. Health Network Sols., Inc.*, 2017 NCBC LEXIS 73, at *18 (N.C. Super. Ct. Aug. 18, 2017) ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning." (quoting *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995)).[12] The party alleging an unreasonable restraint on trade bears the burden of defining the relevant market. *Window World*, 2016 NCBC LEXIS 82, at *16.

52. "[A] relevant market has both a product and a geographic dimension[.]" *Id.* at *17 (citation and quotation marks omitted). "A relevant product market must focus on the range of products or services that actually compete in the disputed market, and turns on the concepts of reasonable interchangeability and cross-

[12] Case law interpreting the Monopolies Clause is limited. Some of the cases cited herein involve application of analogous concepts in federal antitrust law. Our Supreme Court has cited federal antitrust law when interpreting the Monopolies Clause. *See State v. Atlantic Ice & Coal Co.*, 210 N.C. 742 (1936); *cf. Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655 (1973) (recognizing that the body of law applying the Sherman Act, although not binding, is nevertheless instructive in determining the full reach of Chapter 75-1, which, like the Monopolies Clause prohibits combinations in restraint of trade.).

elasticity." *Sykes*, 2017 NCBC LEXIS 73, at *19; *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or cross-elasticity of demand between the product itself and substitutes for it.").

53. If products are reasonably interchangeable, it means that consumers view "one product [as] roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively." *Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 206 (3d Cir. 1994). Factors for assessing reasonable interchangeability include the products' prices, uses and qualities. *See United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (stating that reasonable interchangeability is a factor of the price, use and qualities of the products considered); *cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) ("A fundamental tenant of antitrust law [is] that the relevant market definition must encompass the realities of competition.").

54. Cross-elasticity of demand is an economic term "describing the responsiveness of sales of one product to price changes in another." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984). "A high cross-elasticity of demand indicates that products are substitutes; a low cross-elasticity of demand indicates that the products are not substitutes and, as a result, do not compete in the same market. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1120 (10th Cir. 2014).

55. The Court first observes that Defendants have failed to define the relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand. This failure is a sufficient basis alone to deny Defendants' Motion. *Cf. Window World,* 2016 NCBC LEXIS 82, at *16 ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.") (quoting *Queen City Pizza v. Domino's Pizza*, 124 F.3d 430, 436 (3d Cir. 1997)).

56. To the extent Defendants do attempt to define the relevant product market, they do so in their reply brief,[13] and their definition is too narrow. Defendants define the relevant market as one for commercial narratives making use of *QAR* artifacts. (Defs.' Reply 12.) But a market must reflect commercial reality and be defined to include "the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989). "Monopolization of a single brand is not an antitrust violation." *Int'l Logistics Grp., Ltd. v. Chrysler Corp.*, 884 F.2d 904, 908 (6th Cir. 1989).[14]

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[13] Business Court Rule 7.7 warns that the Court "may decline to consider issues or arguments raised by the moving party for the first time in a reply brief."

[14] Although courts on occasion have defined a market by a single brand, these cases have centered on products that are uniquely attractive to consumers such that there are no reasonable substitutes. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of*

57. Defendants' definition of the market is limited to commercial narratives of only one type of historical artifact: those sourced from shipwrecks. It is further limited to one "brand" of shipwreck artifacts, those sourced from the *QAR*. Sellers of commercial narratives using *QAR* Project images and artifacts at the very least compete for sales with sellers of narratives involving other shipwrecks, historical artifacts, or even pirates or piracy in general. Accordingly, Defendants' definition of the market for purposes of determining whether a monopoly exists does not take into account the range of products or services that actually compete in the disputed market. *Sykes*, 2017 NCBC LEXIS 73, at *19.[15]

58. In addition, once a relevant market is identified, the Court must determine whether Intersal, by virtue of its rights under the 2013 Agreement, would exercise so much control over that market that other sellers would not be able to compete, and commerce would be stifled. *Am. Motors Sales Corp.*, 311 N.C. at 317. The record is devoid of evidence that any properly defined market would be impacted in this way. *Cf. Dicesare*, 376 N.C. at 98-99 ("[G]iven that plaintiffs have failed to allege that the [defendant] has the ability to actually control prices in that market, we are not persuaded that the allegations contained in the third amended complaint

Okla., 468 U.S. 85, 111 (1984) (defining the relevant market as college football broadcasts because college football "generate[s] an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.").

[15] Defendants' definition of the market appears to be driven by the language of the 2013 Agreement. "[C]ourts should not confuse true market power in a properly defined relevant market with mere 'contract power' that a defendant may have . . . as a result of contract restrictions voluntarily entered into between the parties." William C. Holmes & Melissa H. Mangiaracina, *Antitrust Law Handbook* § 3:4 (Thomson Reuters, 2023-2024 ed. 2023).

suffice to show that the [defendant] possesses 'so large a portion' of that market that it risks causing the sort of harm to the public that N.C. Const. art. I, § 34, is designed to prevent.").[16]

59. Accordingly, the Court concludes that Defendants have failed to establish that rights afforded to Intersal by the 2013 Agreement violate the Monopolies Clause. Defendants' Motion on this basis is **DENIED**.

iv. Umstead Act

60. Turning back to Intersal's contention that the term "commercial narrative" in Section 15 of the 2013 Agreement (a) includes the concept of a blockbuster tour, and (b) that they were required to collaborate with Intersal in making such a tour, Defendants argue that the Umstead Act, N.C.G.S. § 66-58, prohibits such an interpretation. Defendants point out that the Umstead Act restricts the ability of the State to compete with private enterprise. Consequently, they argue that "commercial narrative" could only refer to items that the Umstead Act permits DNCR to sell, such as food, books, crafts, gifts, and other tourism-related items at State parks, museums and historic sites operated by the Department. (Defs.' Br. 22-25.)

61. Plaintiff responds that the Umstead Act does not bar Defendants from honoring their commitment to collaborate with Intersal in making a blockbuster tour

[16] As was true with the Exclusive Emoluments Clause, courts examining constitutional challenges based on the Monopolies Clause utilize the rational basis test. Under this test, any conceivable legitimate purpose is sufficient, and the act is not arbitrary so long as it bears a "rational . . . relation to the public health, morals, order, or safety, of the general welfare." *G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 210 (1962) (cleaned up). "The challenging legal question is defining what [a monopoly] is." *See* Dietz, *supra* ¶ 33, at 13.

because that Act affords the Department the ability to generate revenue from public and private special events, provided the resulting profits are used to support operation of the historic site or museum administered by DNCR. (Pl.'s Br. 21.) Defendants point out, however, that the language of the statute contemplates that these events occur *at* the historic site or museum, and Intersal's concept of a blockbuster tour is not so limited. (Defs.' Reply Br. 15.)

62. Plaintiff also argues that the Umstead Act is inapplicable because touring the *QAR* artifacts is not an activity in which the public is ordinarily and customarily engaged. Therefore, there is no risk that DNCR would be competing with private enterprise. Instead, Plaintiff asserts that promoting tourism and fundraising to support the QAR Project are legitimate functions of DNCR, and the Umstead Act should not be interpreted to prevent Defendants from honoring contractual provisions that support DNCR's legitimate functions. (Pl.'s Br. 23.)

63. Defendants reply that Plaintiff, itself, contends that private tour promoters engage in activity such as that contemplated by Intersal; therefore, if the State were to engage in the same activities as a tour promoter, it would necessarily be in competition. (Defs.' Reply 15-16.)

64. "The rule in North Carolina is that it is not the function of government to engage in private business." *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 156 (1968). This rule is codified in the Umstead Act, which prohibits:

> any unit, department, or agency of the State government . . . or any individual employee or employees of the unit, department, or agency . . . to engage directly or indirectly in the sale of goods, wares, or merchandise in competition with citizens of the State . . . or to maintain

> service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises . . . or to contract with any person, firm, or corporation for the operation or rendering of the businesses or services . . . or to purchase for or sell to any person, firm, or corporation any article of merchandise in competition with private enterprise.

N.C.G.S. § 66-58(a). Subsection (b)(9b) of the Umstead Act provides specific exceptions for DNCR including:

> the sale of food pursuant to [N.C.]G.S. 111-47.2 and the sale of books, crafts, gifts, and other tourism-related items and revenues from public and private special events, activities, and programming at State parks, State aquariums, historic sites and museums administered by [DNCR], provided that the resulting profits are used to support the operation of those sites.

N.C.G.S. § 66-58(b)(9b).

65. In Section 15 of the 2013 Agreement, DNCR agreed "to collaborate in making other commercial narrative such as, but not limited to, books and e-books, mini- and full-length documentaries, and video games." When it comes to who would profit from such activity, Section 15 says, "[a]ny profit-sharing agreements shall be based on the amount of work contributed by each entity." There is no requirement that DNCR participate in or conduct a commercial narrative, only that it *collaborate* with Intersal in making one. Nor is there a requirement that it enter into any profit-sharing agreement with respect to a commercial narrative.

66. The Court has already held that whether the parties intended for the term "commercial narrative" to include a blockbuster tour, and what they meant when they agreed to "collaborate in making" commercial narratives, are matters for the jury to decide. *See Intersal*, 2023 NCBC LEXIS 29, at **43-44. A jury could well determine that the term "commercial narrative" in Section 15 of the 2013 Agreement

includes a blockbuster tour of the type contemplated by Intersal. Such an interpretation would not violate the Umstead Act to the extent the jury also interprets the requirement that DNCR "collaborate [with Intersal] in making" such a tour not to require DNCR to (a) engage in the sale of goods in competition with citizens of the State or (b) maintain service establishments to render services to the public ordinarily and customarily rendered by private enterprises.

67. Therefore, Defendants' Motion is **DENIED** to the extent it is based on the Umstead Act.

v. Section 121-7.3

68. Finally, Plaintiff does not contest Defendants' contention that Section 121-7.3 of the North Carolina General Statutes prohibits Defendants from sharing with Intersal a portion of the admission fees charged by the state-run museums that have hosted a *QAR* Project exhibit. (Defs.' Br. 22-25.) Accordingly, the State is entitled to summary judgment to the extent Plaintiff alleges that it has suffered damage in the form of these lost admission fees. (See Third Am. Compl. ¶ 35J.)

IV. CONCLUSION

69. **WHEREFORE**, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

a. Defendants' Motion is **GRANTED** to the extent Intersal contends that Defendants were obligated to enforce the Terms of Service, (Third Am. Compl. ¶ 35H).

b. Defendants' Motion pursuant to G.S. 121-7.3 with respect to Plaintiff's claim that it is entitled to a portion of the admission fees charged by state-run museums is **GRANTED**.

c. In all other respects, the Motion is **DENIED**.

SO ORDERED, this the 30th day of August, 2024.

/s/ Julianna Theall Earp
Julianna Theall Earp
Superior Court Judge
for Complex Business Court Cases