Intersal, Inc. v. Wilson, 2023 NCBC 15.

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; THE STATE OF NORTH CAROLINA; and FRIENDS OF QUEEN ANNE'S REVENGE, a Non-Profit Corporation,

Defendants.

ORDER AND OPINION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

1. In 1996, after almost a decade of searching, Intersal, Inc. ("Intersal"), a marine research and recovery company, discovered the storied Queen Anne's Revenge ("*QAR*"), flagship of the notorious pirate Blackbeard, off the coast of North Carolina. The vessel reportedly sank near Beaufort Inlet in 1718, and it has been the stuff of legend since.

2. Although no treasure chests of gold were found in the debris, historical relics have been recovered from the *QAR*, and the rights to make images, replicas, and narratives about the relics have amounted to another form of treasure. Persistent disputes over the division of these rights have led to this litigation.

3. Intersal and Defendants, including the North Carolina Department of Natural and Cultural Resources ("DNCR"),[1] present their claims to the Court on cross-motions for summary judgment, (the "Motions") (ECF Nos. 153, 160). For the reasons stated below, the Court **GRANTS** in part and **DENIES** in part the Motions.

Linck Harris Law Group, PLLC, by David H. Harris Jr. and Kilpatrick Townsend & Stockton, LLP by Dustin T. Greene, Richard J. Keshian, Elizabeth Winters and Kyleigh E. Feehs for Plaintiff Intersal, Inc.

N.C. 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.

II. FACTUAL BACKGROUND

4. The Court does not make findings of fact when ruling on motions for summary judgment. "Rather, the Court 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, *2 (N.C. Super Ct. Oct. 16, 2019) (citing *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975)). The following background, describing the evidence and noting relevant disputes, is intended to provide context for the Court's analysis and ruling.

5. Intersal is a Florida corporation registered to do business in North Carolina. (Third Am. Compl. ¶ 14, ECF No. 106.)

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[1] DNCR was formerly known as the North Carolina Department of Cultural Resources ("DCR"). The two names are used interchangeably in this Order and Opinion.

6. DNCR is an executive agency of the State of North Carolina. (Third Am. Compl. ¶ 16.) Defendant Wilson is the Secretary of DNCR. (Notice of Substitution of Def., ECF No. 149.)

7. In 1994, DNCR issued Permit No. 94 BUI 585 (the "*QAR* Permit") to Intersal, authorizing Intersal to search for the *QAR*, which sank off the North Carolina coast in 1718. (Third Am. Compl. ¶ 21; Pl.'s Resp. Defs.' Mot. Dismiss, Ex. 6 ["*QAR* Permit"], ECF No. 79.)

8. Shortly thereafter, DNCR issued Permit No. 94 BUI 584 to Intersal, authorizing Intersal to search for a second ship, the *El Salvador*, which also reportedly sank near Beaufort Inlet in 1750. (Third Am. Compl. ¶ 20; Defs.' Mot. Summ. J., Ex. 25 ["*El Salvador* Permit"], ECF No. 159.25.)

9. The *QAR* Permit specified that Intersal would be entitled to 75% of "[a]ny [coins and precious metals] recovered during Phase Five [the salvage phase] of the project."[2] (*QAR* Permit, at 2.) In contrast, the *El Salvador* Permit authorized only "site assessment activities," (target relocation, limited recovery of artifacts, data analysis and reporting), as opposed to salvage activities.[3] (El Salvador Permit at 1.) In the event the *El Salvador* was located, "more extensive investigations" such as

[2] The federal Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2105(c), and State law, N.C.G.S. § 121-22, provide that a shipwreck recovered from the submerged lands of the State of North Carolina belongs to the State. However, the State is free to cede some or all of its ownership rights.

[3] The 2013 *El Salvador* Permit allowed for the recovery of artifacts or other site materials on a limited basis for commercial salvage with DNCR approval. With that exception, all materials recovered were to remain the property of the State of North Carolina. (*El Salvador* Permit, at 2-3.)

"large scale excavation and/or the recovery of an extensive number of artifacts" would require a separate agreement with the State. (*El Salvador* Permit at 4-5.)

10. The *El Salvador* Permit limited Intersal's activities to one year, but it could be renewed annually, "subject to any changes in the permit terms [DNCR] deems appropriate, providing [Intersal] has satisfactorily met all the terms and conditions of this permit." Moreover, the Permit stated that it "in no way constitute[d] a guarantee by [DNCR], as the permitting agency, that future Permits [would] be automatically granted to [Intersal]." (*El Salvador* Permit at 1-2.)

11. The *El Salvador* Permit required Intersal to demonstrate to the satisfaction of DNCR that it had "provided for facilities within the State of North Carolina, sufficient in size, security, equipment, staffing, and supplies" to perform conservation and analytical work on the artifacts before it could undertake recovery efforts. (*El Salvador* Permit at 3).

12. On 21 November 1996, operating under the authority of its permits, Intersal discovered the *QAR* near Beaufort Inlet, just over a mile off Bogue Banks, North Carolina. (Third Am. Compl. ¶ 22.)

13. On 1 September 1998, Intersal, DNCR, and a non-party, the Maritime Research Institute ("MRI"), entered into an agreement regarding the *QAR* and any resulting projects (the "1998 Agreement"). (Third Am Compl. ¶ 24, Ex. 1, pp. 11-25.) As a result of the 1998 Agreement, Intersal relinquished its right to receive 75% of the coins and precious metals recovered from the *QAR* in exchange for promotion

opportunities arising from the *QAR* "Project,"[4] as well as for assurances from DNCR that the *El Salvador* Permit would be renewed except for just cause.[5] (Third Am. Compl. ¶ 24, Ex. 1, pp. 11-25.)

The 1998 Agreement

14. The 1998 Agreement described Intersal and DNCR as partners "to research, survey, search, recover, preserve, protect, conserve, curate, and promote the [QAR artifact] collection for the life of this Agreement." (1998 Agreement at 2.) It provided in relevant part:

> 14. Subject to their rights under this Agreement, Intersal and MRI hereby assign to the Department, and the Department hereby accepts, on behalf of the People of North Carolina, the interests of Intersal and MRI in the title and ownership of QAR and its artifacts.
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> * * * *
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> 16. . . . Intersal shall have the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties[.]
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> 17. All Parties agree to cooperate in the making of a non commercial (sic) educational video and/or film documentary, or series of such documentaries . . . and there is no distribution or dissemination for sale of the said educational documentary without Intersal's written permission[.]
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> * * * *

[4] The term "Project" is defined in the 1998 Agreement to mean "all survey, documentation, recovery, preservation, conservation, interpretation and exhibition activities related to any portion of the shipwreck of QAR or its artifacts." (1998 Agreement ¶ 11.)

[5] The 1998 Agreement provided that other artifacts, such as the vessel structure, ship's fittings, weapons, personal effects, and non-precious cargo would be sent to a suitable facility, possibly in the Beaufort area, where the material could be curated for scientific study and public display. Intersal agreed to forego any right to receive the coins and precious metals recovered "in order that all QAR artifacts remain as one intact collection and in order to permit the Department to determine the ultimate disposition of the artifacts." (1998 Agreement at 2.)

> 33. Subject to the provisions of Article 3 of Chapter 121 of the General Statutes of North Carolina and subchapter .04R of Title 7 of the North Carolina Administrative Code, the Department agrees to recognize Intersal's and MRI's efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permits for . . . *El Salvador* . . . , and for the life of this Agreement, renewal of said permit[ ] cannot be denied without just cause.

(1998 Agreement ¶¶ 14, 16, 17, 33.)

15. Almost fifteen years passed. While Intersal and the State undoubtedly hoped that the 1998 Agreement would keep them anchored, their relationship went off course. Multiple disputes regarding the 1998 Agreement arose, and both sides held their ground. Consequently, on 26 July 2013, Intersal filed a Petition for a Contested Case with the Office of Administrative Hearings ("OAH"), *Intersal v. N.C. Dep't of Cultural Resources*, 13 DCR 15732 (the "Petition"). (Br. Supp. Pl's Mot. Partial Summ. J., Ex 5, ECF No. 154.5.)

16. OAH ordered mediation in the matter, which resulted in a new agreement executed by Intersal and DNCR on 24 October 2013.[6] (Third Am. Compl., Ex. 1 ["2013 Agreement"], ECF No. 159.1.)

The 2013 Agreement

17. Among other things, the 2013 Agreement required Intersal to dismiss the Petition. (2013 Agreement ¶ 25.) Additionally, the parties expressly agreed that the 2013 Agreement superseded the 1998 Agreement. (2013 Agreement ¶ 1.)

[6] Nautilus Productions, LLC ("Nautilus") and its President, Rick Allen, are also parties to the 2013 Agreement. Nautilus was Intersal's "*QAR* Video Designee" under the 1998 Agreement. (Third Am. Compl. ¶ 29.)

18. The 2013 Agreement again made clear that Intersal relinquished its right to share in any coins and precious metals recovered from the *QAR* site in exchange for a more streamlined renewal process for its *El Salvador* Permit and the rights to certain promotion opportunities with respect to the *QAR* Project. As for the latter, the 2013 Agreement contained requirements for the production and use of digital images and other media, and it established a means for Intersal to publish its terms of use to third parties before they were given access to the *QAR* Project.

19. Relevant paragraphs of the 2013 Agreement provided:

> 3. ***El Salvador* Permit**. In consideration for Intersal's significant contributions toward the discovery of the QAR and continued cooperation and participation in the recovery, conservation, and promotion of the QAR, DCR agrees to continue to issue to Intersal an exploration and recovery permit for the shipwreck *El Salvador*. . . . DCR agrees to issue the permit through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. Subject to the provisions of Article 3 of Chapter 121 of the North Carolina General Statutes entitled, "Salvage of Abandoned Shipwrecks and Other Underwater Archaeological Sites," and the North Carolina Administrative Code, DCR agrees to recognize Intersal's efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permit for the *El Salvador*[.]
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> 9. **Replicas to be Used in Exhibits, Scientific Study, or Educational Tools**. Understanding that there may be times when original artifacts cannot be used, DCR may make, or have made, molds or otherwise reproduce, or have reproduced, any QAR artifacts of its choosing for use in museums or traveling exhibits, as educational props in its exhibits, museums, or laboratories, as scientific tools, or for scientific study. These replicas shall not be sold.
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14. **Commercial Documentaries**. Intersal, through Nautilus, has documented approximately fifteen (15) years of underwater and other activities related to the QAR project. . . . Intersal shall have the exclusive right to produce a documentary film about the QAR project for licensing and sale. Intersal may partner with DCR if it chooses to do so[.]

15. **Other Commercial Narrative**. DCR 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. If DCR and Intersal cannot reach an agreement on the sharing and production of any such commercial ventures that they propose to undertake, DCR and Intersal will refer the issues to a mutually selected, neutral arbitrator for binding arbitration, with arbitration to be concluded within three (3) months of selection of the neutral arbitrator.

16. **Media and Access Passes.**

a. **Procedure**

1) DCR agrees to establish and maintain access to a website for the issuance of Media and Access Passes to QAR-project related artifacts and activities.

2) DCR shall manage the issuance of Media and Access passes after receiving access requests from third parties via the website.

3) The website shall be the primary means of access for requests, and shall include, at a minimum:

(a) An Intersal terms of use agreement, to be electronically submitted;

(b) The QAR media fact sheet; and

(c) Links to DCR, Intersal, and Nautilus Productions websites.

4) Upon electronic submission of requests and terms of use, if applicable, electronic notice shall be sent to DCR and Intersal or its designee showing acceptance or nonacceptance of the terms of use.

5) Intersal shall bear the sole responsibility for managing and enforcing its terms of use.

6) For requests for access that are not received through the website, DCR shall provide the requestor with substantially the same information contained on the website.

b. **Non-commercial Media**.

1) All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or DCR, as well as a link to DCR, 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) DCR agrees to display non-commercial digital media only on DCR's website.

c. **Termination**. This Media and Access Pass section shall terminate after the 5th anniversary of the signing of this Agreement. After five (5) years, DCR and Intersal may agree to extend this provision by mutual written consent.

17. **Public Records**. Nothing in this Agreement shall prevent DCR from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records.

18. **Records Management**. During the recovery phase of the QAR project, DCR and Intersal agree to make available to each other records created or collected in relation to the QAR project. . . . Within one (1) year after the completion of the recovery phase, Intersal shall allow DCR to accession duplicate or original records that were created or collected by Intersal during the project. . . . These materials shall become public records curated by DCR. All digital media provided by Intersal under the terms of this paragraph shall include a time code stamp and watermarks (or bugs)[.]

(2013 Agreement, ¶¶ 3, 6, 9, 14, 15, 16(a), 16(b), 17, 18.)

20. Unfortunately, any harmony achieved by the 2013 Agreement did not last, and it was not long before disagreements again arose between Intersal and DNCR. The claims in this action turn on whether Defendants have breached Intersal's rights as specified in the 2013 Agreement.

Events Giving Rise to Alleged Breaches of 2013 Agreement

21. On 28 October 2013, less than a week after the 2013 Agreement was executed, DNCR participated with the United States Coast Guard in raising five cannons from the seabed at the *QAR* site. (Third Am. Compl. ¶ 35A.) Although certain members of the media were informed of the event, Intersal alleges that it was not informed. Intersal further alleges that, as a result, it was denied an opportunity to video the event for a planned documentary film pursuant to Paragraph 14 of the 2013 Agreement, as well as the chance to collaborate with DNCR to use the footage for other "commercial narratives" pursuant to Paragraph 15 of the same agreement.

22. In addition, as discussed below, Intersal contends that because it was unaware of the event before DNCR allowed third parties to access the site, it lost the opportunity to impose a terms of use agreement that would have governed the ability of the third parties to take and use photographs and video of the site. Intersal complains that DNCR's inaction resulted in the U.S. Coast Guard taking and publishing footage of the event on the internet. (Third Am. Compl. ¶ 35A, ECF No. 107; *see also* Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 1 ["Meyer Dep."] 177:11-25, ECF No. 154.1; Coast Guard images, ECF No. 154.17.)

23. A month later, on 9 December 2013, Intersal submitted its terms of use agreement to DNCR for posting on the website the parties had agreed would be used to issue media and access passes. DNCR questioned the submission and proposed that representatives from both Intersal and DNCR meet to discuss the terms in mid-January 2014. (Pl.'s Mot. Partial Summ. J., Ex. 44, ECF No. 154.44.) On 13 January 2014, DNCR e-mailed Intersal to arrange the meeting. (Pl.'s Mot. Partial Summ. J., Ex. 45, ECF No. 154.45.) About a week later, Intersal responded, agreeing to meet and requesting that DNCR provide their proposed revisions to the terms beforehand. (Pl.'s Mot. Partial Summ. J., Ex. 45.) In reply, DNCR sent Intersal a proposed fact sheet, but it did not propose any revisions to the terms of use agreement that Intersal provided. (Pl.'s Mot. Partial. Summ. J., Ex. 46, ECF No. 154.46.)

24. When the terms of use agreement was still not in place by 9 June 2014, Intersal submitted a second version to DNCR. Intersal represented that the language of this version was taken "verbatim" from the State's Division of Tourism, Film and Sports Development website, changing only the names. (Pl.'s Mot. Partial Summ. J., Ex. 47, ECF No. 154.47.) But DNCR did not post or disseminate the terms of use agreement because it did not agree with the content. (Pl.'s Mot. Partial Summ. J., Ex. 51 ["Masters' Dep."] at 116:12-13, ECF No. 154.51; Defs.' Mot. Summ. J., Ex. 14, ECF No. 159.14.) Indeed, to date DNCR has not posted an Intersal terms of use agreement pursuant to Paragraph 16(a)(3)(a) of the 2013 Agreement.

25. In the days following the *QAR* cannon-raising event, DNCR provided media outlets a Flickr[7] link for use to access un-watermarked images of the event. (ECF No. 154.14; ECF No. 154.15; Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 7 ["Cox Dep."] 32:15-33:20, 38:2-41:21, ECF No. 154.7; Meyer Dep. 174:7-177:10.)

26. Both before and after the 2013 Agreement, Defendants posted *QAR* digital media to websites other than DNCR's own website. Much of the digital media was posted and continues to be displayed without watermarks, time code stamps, or website links. (ECF Nos. 154.21, 154.25, 154.27-.33.)

27. For example, in October 2014, DNCR provided images of the cannon raising event to then-Governor Pat McCrory's office via email, (ECF No. 154.23), and the Governor's office posted the images on its Facebook page, (ECF No. 154.22).

28. In January 2014, both the Smithsonian and National Geographic España magazines published *QAR* digital media supplied by DNCR in response to a public records request. Intersal complains that it was not afforded an opportunity to collaborate with the State on this "commercial narrative" in violation of paragraph 15 of the 1998 Agreement. (Third Am. Compl. ¶ 35B; Pl.'s Br. Supp. Mot. Summ. J. Ex. 14, ECF Nos. 154.14-15.)

29. On two days in September 2015, Defendants allowed the nonprofit Friends of the Queen Anne's Revenge ("FoQAR") and a radio show host and crew to dive the site and collect footage of the *QAR*. Because there was no agreement on Intersal's terms, however, DNCR did not provide a terms of use agreement to FoQAR

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[7] Flickr is an online photo management and sharing application. *See* www.flickr.com (last visited 23 February 2023).

or to the radio host and crew. Intersal complains that it was not invited to collaborate with DNCR on this event. (Third Am. Compl. ¶ 35G.) On 28 October 2015, FoQAR allegedly posted video footage from this dive to Facebook without watermarks, time code stamps, or website links. (Third Am. Compl. ¶ 35H.)

30. Images of the *QAR* Project, including photographs of recovered cannons, were published on YouTube on 22 January 2019, (ECF No. 154.20). The record does not indicate who produced or posted the photographs. At least two photographs of *QAR* cannons that appear to have been produced by the U.S. Coast Guard are available for the public to purchase from third parties online, without compensating either the State or Intersal. (ECF No. 154.19.)

31. Defendants have charged admission to State facilities where they have displayed a traveling exhibit of *QAR* Project artifacts. Intersal complains that Defendants have done so without collaborating or sharing profits with Intersal. (Third Am. Compl. ¶ 35J; Pl.'s Br. Resp. Defs.' Mot. Summ. J. 8-9.) Defendants respond that these exhibitions are not "commercial narratives" from which they have profited and that Intersal is not entitled to any portion of their museum admission fees. (Defs.' Answer to Pl.'s Third Am. Compl. ¶ 35J, Defs.' Br. Supp. Mot. Summ. J. 6.)

32. In 2018, authors Mark Wilde-Ramsing and Linda Carnes-McNaughton published *Blackbeard's Sunken Prize*, a book about the *QAR* that contains images of recovered *QAR* artifacts. (Pl.'s Mot. Partial Summ. J., Ex. 61, ECF No. 154.61.)

Wilde-Ramsing is the former State Deputy Archeologist for DNCR. (Pl.'s Mot. Partial Summ. J., Ex. 34 ["Wilde-Ramsing Dep."] at 8:3-5, ECF No. 154.34.)

33. The authors initially reached out to two publishing companies, but after meeting with DNCR, the authors chose UNC Press, a State entity, to publish the book. (Pl.'s Mot. Partial Summ. J., Exs. 40, 41, 62, 63, ECF Nos. 154.40, 154.41, 154.62, 154.63; Wilde-Ramsing Dep. 58:3-59:9.)

34. Wilde-Ramsing and Carnes-McNaughton received an advance to write the book, (Wilde-Ramsing Dep. at 74:6-12), and they had an agreement with the publisher to receive royalties from sales of the book, as well as a share of net proceeds from the sale or licensing of subsidiary rights. (Pl.s' Mot. Partial Summ. J., Ex. 65 at 4-5, ECF No. 154.65.)

35. Intersal observes that the book is commercially available. It contends that although Defendants collaborated with the book's authors, Defendants did not collaborate or share profits with Intersal with respect to this "commercial narrative."[8]

36. Defendants respond that they did not provide any funding for *Blackbeard's Sunken Prize*, (Wilde-Ramsing Dep. at 65:8-66:25), did not write any content for the book, (Wilde-Ramsing Dep at 59:15-59:20), and did not help pick any

[8] Intersal argues that this failure was intentional. In support of its allegation, Intersal provides evidence that Wilde-Ramsing initially proposed the book to DNCR in early 2015 and described the book as "targeted for general audiences." (Pl's Mot. Partial Summ. J., Ex. 61, ECF No. 154.61.) However, the description was later changed to "an educational book targeting the general audiences" in a proposal sent by the authors to DNCR, in anticipation of a meeting about the book that was to take place on 26 February 2015. (Pl.'s Mot. Partial Summ. J., Ex. 62, ECF No. 154.62.) The agenda for the meeting included a discussion of the "[d]efinition of 'commercial narrative' [1998 & 2013 MOA with Intersal and MRI]." (Pl's Mot. Partial Summ. J., Ex. 62.)

of the images used in the book, (Wilde-Ramsing Dep. at 60:12-60:17). However, DNCR "suggest[ed] that UNC Press might be a good publisher," (Wilde-Ramsing Dep. at 58:3-59:23), and DNCR informed Wilde-Ramsing that unwatermarked digital images of the *QAR* were available through a public records request. (Wilde-Ramsing Dep. at 59:23-60:2, 61:11-17.)

37. Finally, in June 2013, FoQAR contracted with Think Out Loud Productions (a/k/a Shark Brothers), a commercial documentary maker, to make a multi-part documentary series about the *QAR*. On the same date that it executed the agreement with Think Out Loud Productions, FoQAR also executed an agreement with DNCR assigning all rights in the documentary series to DNCR and giving DNCR the "exclusive right to broadcast and distribute" the series. (Pl.'s Mot. Partial Summ. J., Exs. 52-53, ECF Nos. 154.52, 154.53.)

38. The parties dispute how far production of the documentary series had progressed at the time the 2013 Agreement was reached, but they agree that the series had not been completed. They further agree that this series is not mentioned in the 2013 Agreement.[9] (Pl.'s Mot. Partial Summ. J., Ex. 54, ECF No. 154.54) (email from October 2014 sent to DNCR employee Claggett from Think Out Loud Productions regarding "approval for the Blackbeard and Queen Anne's Revenge documentary"); (Pl.'s Mot. Partial Summ. J., Ex. 55, ECF No. 154.55) (November 2014

[9] DNCR contends that the agreement between Think Out Loud Productions and FoQAR specifies that all filming ("field production") would be completed by June 2013, well before the 2013 Agreement was executed. (Pl.'s Mot. Partial Summ. J., Ex. 52 at 2.) DNCR contends that any activity on the project that occurred after the 2013 Agreement was limited to post-production work. (Defs.' Br. Resp. Pl.'s Mot. Partial Summ. J. 38.)

emails between Claggett and Think Out Loud Productions regarding the same); (Pl.'s Mot. Partial Summ. J., Ex. 9 ["Claggett Dep."], at 63:10-64:5, ECF No. 154.9.)

39. Moreover, the parties dispute whether the documentary series is a commercial narrative requiring DNCR to collaborate with Intersal pursuant to Paragraph 15 of the 2013 Agreement. There is some evidence that the series was intended to be used for educational purposes but that it was never used that way. (Pl.'s Mot. Partial Summ. J. at 28-29, Ex. 57 ["Morris Dep."] at 39:7-23, 57:9-58:5, ECF No. 154.57.)

40. Portions of the series containing DCR's watermark (but without time-code stamps or links to DCR, Intersal, and Nautilus websites) were later posted on YouTube rather than to DCR's own website.[10] Intersal contends that even if this content is considered "non-commercial," posting the video in this manner violated Paragraph 16(b) of the 2013 Agreement. Intersal further argues that the series constitutes a documentary film produced in violation of the exclusive right it was afforded by Paragraph 14 of the 2013 Agreement.

Renewal of the *El Salvador* Permit

41. In early November 2015, Intersal sought renewal of its *El Salvador* Permit. (Third Am. Compl. ¶ 40.) After some administrative wrangling,[11] on 1

[10] Episodes of the multi-part documentary series are still available on YouTube. See e.g., *Documentary Episode 7 of 7: Blackbeard and the Queen Anne's Revenge – Shark Brothers Multimedia*, https://www.youtube.com/watch?v=QGFsd_UvAjQ.

[11] On 3 November 2015, Intersal received a Notice of Termination of Permit. The reason given for termination was Intersal's failure to submit a request for renewal prior to expiration of the existing permit. (Third Am. Compl. ¶ 40; Br. Response Defs.' Mot. Summ. J., Ex. 13,

December 2015, Intersal received a Notice of Termination of Permit for the following reasons: (1) "Intersal failed to fulfill the requirements set forth in [the permit]; and (2) Issuance of further renewal permits is no longer deemed to be in the best interest of the State." (Defs.' Mot. Summ. J., Ex. 22, ECF No. 159.22.)

42. Intersal contends that, by denying the permit, the State breached its promise in the 2013 Agreement to waive the performance requirements associated with annual renewal. (Br. Response Defs.' Mot. Summ. J., Ex. 14 ["Claggett Dep."] at 152:14-153:3, ECF No. 173.14) (agreeing that the "real basis [for denying the permit] was [Intersal's] failure to make substantial progress towards finding the El Salvador.")

43. In addition, although the State had been aware for years that the Kingdom of Spain claimed to own the *El Salvador*, it is undisputed that in November 2015, DNCR's counsel contacted Spain to determine that country's position regarding renewal of the permit. In response, on 30 November 2015, Spain's counsel sent a letter to DNCR restating Spain's position that it claimed ownership of the *El Salvador*. (Pl.s' Br. Resp. Defs.' Mot. Summ. J., Ex. 16 ["Howell Dep."] at 20:17-23, ECF No. 173.16; Ex. 14 ["Claggett Dep."] at 170:1-7.) Intersal contends that DNCR purposefully solicited a statement from the Kingdom of Spain as a pretext to support DNCR's conclusion that renewal of Intersal's permit was not in the State's best interest. (Third Am. Compl. ¶¶ 42, 47 n.14.)

ECF No. 173.13.) However, after Intersal notified DNCR that it had submitted a request before the deadline, DCR withdrew its denial. (Pl.s' Br. Resp. Defs.' Mot. Summ. J. 23.)

44. After the *El Salvador* Permit was terminated, Intersal filed a Petition for a Contested Case with the OAH. (Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 5, ECF No. 154.5.) On 27 May 2016, Intersal's case was dismissed, and Intersal appealed to the Superior Court of Wake County. (Third Am. Compl. ¶ 49; Defs' Br. Supp. Mot. Dismiss and Mot. Strike Pl.'s Second Am. Compl., Ex. A, ECF No. 57.) On 7 November 2016, citing N.C.G.S. § 121-25(a), the Court issued a decision upholding termination of the *El Salvador* Permit because it was not in the "best interest of the State." (*Intersal, Inc. v. N.C. Dep't of Cult'l Resources*, 16 CVS 8149; Defs' Br. Supp. Mot. Dismiss and Mot. Strike Pl.'s Second Am. Compl., Ex. B.)

III. PROCEDURAL BACKGROUND

45. Intersal initiated this action on 27 July 2015. (Compl. and Mot. for Rule 65 Relief, ECF No. 1.) On 10 September 2015, the case was designated a mandatory complex business case, (Designation Order, ECF No. 5).

46. On 20 February 2017, this Court granted Intersal's Amended Motion for Leave to File Second Amended Complaint, (ECF No. 43). The Second Amended Complaint asserted breach of contract claims against Defendants under both the 1998 and 2013 Agreements. (Second Am. Compl., ECF No. 44.)

47. Thereafter, on 30 March 2017, Defendants moved to dismiss the Second Amended Complaint. (Answer, Defenses, and Mot. Dismiss Pl.'s Second Am. Compl., and Mot. Strike, ECF No. 85.) After considering the motion, on 13 October 2017, Business Court Judge Gregory P. McGuire dismissed with prejudice: (1) Intersal's breach of contract claims under the 1998 Agreement, and (2) Intersal's breach of

contract claims under the 2013 Agreement resulting from DNCR's refusal to renew the *El Salvador* Permit. The Court dismissed without prejudice Intersal's breach of contract claim for alleged violations of Intersal's digital media and promotion opportunity rights in the 2013 Agreement. *Intersal, Inc. v. Hamilton*, 2017 NCBC LEXIS 97, at *37-38 (N.C. Super. Ct. Oct. 12, 2017).

48. On 1 June 2018, Intersal filed a petition for writ of *certiorari* to the Supreme Court of North Carolina seeking review of Judge McGuire's decision.[12] The Supreme Court allowed the petition on 5 December 2019. *Intersal v. Hamilton*, 373 N.C. 89, 97 (2019).

49. Subsequently, on 1 November 2019, the Supreme Court issued a decision determining that this Court: (1) properly dismissed Intersal's breach of contract claims arising from the 1998 Agreement; (2) erred when it dismissed Intersal's breach of contract claim with respect to its digital media rights and promotion opportunities for lack of subject matter jurisdiction (failure to exhaust administrative remedies); and (3) erred by dismissing on *res judicata* grounds Intersal's breach of contract claim against the Defendants arising from Defendants' failure to renew Intersal's *El Salvador* Permit. *Id.* at 110-111. The case was remanded to this Court for further proceedings.

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[12] On 9 November 2017, Intersal filed a Notice of Appeal to the North Carolina Court of Appeals which, by statute, was the incorrect judicial body to hear the appeal. (Notice of Appeal, ECF No. 86. *See* N.C.G.S. § 7A–27(a)(2).) As a result, on 10 April 2018, Defendants filed a Motion to Dismiss Intersal's Appeal, (ECF No. 90), which this Court granted, and the original appeal was dismissed on 3 May 2018, (Order Granting Defs.' Mot. Dismiss Appeal, ECF No. 96). The Supreme Court of North Carolina heard the case after issuing a writ of *certiorari*.

50. On 31 January 2020, Intersal filed its Third Amended Complaint to reflect the Supreme Court's ruling. (Third Am. Compl., ECF No. 106.) Defendants responded with defenses challenging, among other things, the enforceability of the 2013 Agreement. (Defs.' Answer to Pl.'s Third Am. Compl., ECF No. 107.)

51. All discovery is now complete, and before the Court are the parties' cross-motions for summary judgment. Intersal has affirmatively moved for partial summary judgment, seeking (1) to establish as a matter of law that Defendants' second and ninth affirmative defenses are barred by the law of the case doctrine, judicial estoppel, and quasi-estoppel, and (2) a declaratory judgment that Defendants have breached Paragraphs 14, 15, and 16 of the 2013 Agreement ("Intersal's Motion"). (Pl.'s Mot. Partial Summ. J., ECF No. 153.) Conversely, Defendants move for summary judgment in their favor on both of Intersal's claims for breach of contract ("Defendants' Motion"; together, the "Motions"). (Defs.' Mot. Summ. J., ECF No. 160.)

52. With the benefit of full briefing and a hearing on 6 January 2022 during which all parties were heard through counsel, the cross-motions are now ripe for determination.

53. The Court, having considered the Motions, the briefs filed by the parties, the arguments of counsel, and other relevant matters of record, concludes that the Motions shall be **GRANTED** in part and **DENIED** in part as specified below.

IV. LEGAL STANDARD

54. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982).

55. In deciding a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party, taking its evidence as true and drawing inferences in its favor. *See, e.g.*, *In re Will of Jones*, 362 N.C. 569, 573 (2008).

56. Affirmative summary judgment on a party's own claims for relief carries a greater burden. *Brooks v. Mount Airy Rainbow Farms Ctr., Inc.*, 48 N.C. App. 726, 728 (1980). The moving party "must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury." *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721 (1985). Therefore, it is "rarely . . . proper to enter summary judgment in favor of the party having the burden of proof." *Blackwell v. Massey*, 69 N.C. App. 240, 243 (1984); *see Banc of Am. Merch. Servs., LLC v. Arby's Rest. Grp., Inc.*, 2021 NCBC LEXIS 61, at *10-11 (N.C. Super. Ct. June 30, 2021).

57. In any case, when ruling on a motion for summary judgment, a trial court may not resolve issues of fact but must deny the motion if there is any genuine issue of material fact. *Singleton v. Stewart*, 280 N.C. 460, 464 (1972).

V. ANALYSIS

A. Enforceability of the 2013 Agreement

58. Defendants argue that Intersal's two claims for breach of contract fail because there is no contract. Without a meeting of the minds on all material terms, Defendants contend that the 2013 Agreement is unenforceable. (Defs.' Br. Supp. Mot. Summ. J. 9, 19-23, ECF No. 161.)

59. Citing the law of the case doctrine and principles of estoppel, Intersal responds that whether the 2013 Agreement is enforceable is a question that has already been raised and answered on appeal. Intersal contends that Defendants endorsed the enforceability of the 2013 Agreement in their arguments to the Supreme Court, and that the Supreme Court, relying on that endorsement, has determined that the 2013 Agreement is valid and enforceable. Intersal contends that this issue has been finally decided and that no new evidence has been unearthed in discovery that could serve as the basis for Defendants to resurrect their enforceability challenge. (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 1-4, ECF 174.)

60. The law of the case doctrine provides that "when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case . . . in subsequent proceedings in the trial court." *Bank of Am., N.A. v. Rice,* 244 N.C. App. 358 (2015); *see Tennessee-Carolina Transp., Inc. v. Strick Corp.,* 286 N.C. 235, 239 (1974) (stating that the Supreme Court's decision in prior appeal "constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal"); *Premier, Inc. v. Peterson*,

2016 NCBC LEXIS 39, at **14 (N.C. Super. Ct. May 13, 2016) (applying law of the case doctrine to question of contract interpretation).

61. The law of the case doctrine applies to "points actually presented and necessary to the determination of the case." *Condellone v. Condellone*, 137 N.C. App. 547, 551 (2000). It requires that "[n]o judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. City of Charlotte*, 268 N.C. 720, 722 (1966). "As a result, '[o]n remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation or departure.' " *Premier, Inc.*, 2016 NCBC LEXIS 39, at **15 (quoting *Couch v. Private Diagnostic Clinic,* 146 N.C. App. 658, 667 (2001)).

62. In this case, the Supreme Court has spoken. It affirmed the trial court's determination that the 2013 Agreement was a novation of the 1998 Agreement. *Intersal*, 373 N.C. at 99. The Court held that the language of the 2013 Agreement, "clearly demonstrate[d] the parties' intent that it would function as a novation of the 1998 Agreement[.]" *Id.* It concluded: "[b]ecause the 2013 Settlement Agreement was a novation of the 1998 Agreement, plaintiff's breach of contract claims arising from the 1998 Agreement are 'extinguished.' " *Id.*

63. As the Supreme Court explained, " '[t]he essential requisites of novation are a previous valid obligation, the agreement of all parties to the new contract, the extinguishment of the old contract, *and the validity of the new contract*.' " *Intersal*, 373 N.C. at 98 (quoting *Tomberlin v. Long*, 250 N.C. 640 (1959)) (emphasis added). Therefore, in determining that the 2013 Agreement was a novation of the 1998

Agreement, the Supreme Court necessarily determined that the 2013 Agreement itself was valid.

64. Defendants protest that new developments unveiled in discovery since the Supreme Court's decision reveal that the parties never agreed on material terms. Therefore, they argue that the enforceability of the 2013 Agreement must be reconsidered. Defendants point to the deposition of Intersal's President, David Reeder, who testified that the 2013 Agreement was a "working document" and a "starting point to finally spur on our cooperation and a successful conclusion of the *QAR* project." (Defs.' Br. Supp. Mot. Summ. J. 20, Ex. 5, Reeder Dep. 30:16-23.) Reeder testified that Intersal's terms of use were not discussed "item by item" but that similar terms were used by other State departments and that the parties had agreed to the same concept. (Reeder Dep. 82:17-83:14.) He thought that some of the operational details for the Business Panel needed to be refined. (Reeder Dep. 31:3-10.) However, he "didn't feel like there was anything else left incomplete, as you call it." (Reeder Dep. 31:13-14.)

65. Reeder also testified about profit-sharing with respect to future commercial narratives and described how the parties were to calculate a split based on the division of work and their relative participation. The 2013 Agreement specifically contemplates such a formula and provides for arbitration in the event of a dispute. (Reeder Dep. 134:21-135:22; 2013 Agreement ¶ 15.) Reeder further observed that the Agreement "was binding on all parties that signed it," but, as is

typical, there was a provision that allowed for amendment if necessary. (Reeder Dep. 221:8-11.)

66. Significantly, even if Reeder's testimony were sufficient to raise doubts with respect to a meeting of the minds on the terms he mentions, Defendants concede that Reeder's testimony was *consistent* with that of their own officials who were involved in the negotiations. (Defs.' Br. Supp. Mot. Summ. J. 22.)

67. Based on the above, the Court concludes that Reeder's post-appeal testimony did not reveal facts that were unknown to Defendants at the time they argued to the Supreme Court. Consequently, the Court concludes that there have been no *new* developments that would warrant reconsideration of the enforceability of the 2013 Agreement. That issue has been finally decided for purposes of this case.[13] *See Ray v. Hill Veneer Co.*, 188 N.C. 414, 415 (1924) (holding that exception to the law of the case doctrine applies only when there is a "material difference" between the record on the prior appeal and the present record); c*f. Metts v. Piver,* 102 N.C. App. 98, 100-01 (1991) (holding even new evidence did not entitle party to a second chance at summary judgment on the same issues, otherwise "an unending series of motions for summary judgment could ensue").

68. Intersal also contends that Defendants are judicially estopped from arguing that the 2013 Agreement is invalid as a result of the position they took before

[13] Whether North Carolina recognizes a claim for breach of a duty to negotiate in good faith is unsettled. *See HD Hospitality, LLC v. Live Oak Banking Co.*, 2022-NCCOA-638 (2022). However, even if the 2013 Agreement is read as an "agreement to agree," Defendants, by arguing that it constitutes a novation, have conceded that it is sufficiently definite to be enforceable, and the Supreme Court has accepted that position.

the Supreme Court. (Pl.'s Br. Supp. Mot. Partial Summ. J. 12, ECF No. 162.) "Judicial estoppel protects the integrity of the court judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Powell v. City of Newton,* 364 N.C. 562, 568 (2010) (alteration omitted). The Court may invoke the doctrine to "prevent a party from acting in a way that is inconsistent with its earlier position before the court." *Id.* at 569.

69. "[W]hen determining whether to invoke the doctrine three aspects to consider are whether: (1) the party's subsequent position is "clearly inconsistent with its earlier position; (2) judicial acceptance of a party's position might threaten judicial integrity because a court has previously accepted that party's earlier inconsistent position; and (3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party as a result." *In re Southeastern Eye Center-Pending Matters,* 2021 NCBC LEXIS 43, at *22-23 (internal quotation marks and citations omitted).

70. In this case the Supreme Court observed, "Here, neither Intersal nor the State Defendants have argued before this Court that either the 1998 Agreement or the 2013 Agreement are invalid." *Intersal,* 373 N.C. at 99. Indeed, in Defendants' brief to the Supreme Court, Defendants stated: "[i]n this appeal, neither [Defendants] nor [Intersal] has challenged the validity of the 2013 Agreement[,]" (ECF No. 175.1 at 20), and "[i]n sum, this record offers no sound basis to predict that the 2013 Agreement *would ever be held void*[,]" (ECF No. 175.1 at 28–29, emphasis added).

71. The Supreme Court further observed that Defendants chose not to argue that the 2013 Agreement was unenforceable despite the fact that they raised unenforceability as an affirmative defense in their Answer. *Intersal,* 373 N.C. at 99 n.3. Although it is true, as Defendants argue, that the Rules of Civil Procedure allow litigants to plead alternative legal theories, the problem here is that Defendants did not preserve their ability to argue in the alternative when they represented to the Supreme Court that the 2013 Agreement was a novation. Defendants inextricably chose a path, and the Supreme Court clearly based its decision on their representation. *Cf. Whiteacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 26 (2004) ("where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to *mend his hold*.") (quoting *Ry. Co. v. McCarthy*, 96 U.S. 258, 267-68 (1877) (emphasis in original)). Under these circumstances, this Court concludes that application of the doctrine of judicial estoppel is appropriate.

72. Because the issue has been determined, this Court must conclude that the 2013 Agreement is a valid, enforceable contract. *See Collins v. Simms*, 257 N.C. 1, 8 (1962) ("[T]he courts, whose judgments and decrees are reviewed by an appellate court of errors, must be bound by and observe the judgments, decrees and orders of

the latter court, within its jurisdiction. Otherwise, the courts of error would be nugatory and a sheer mockery.").[14]

73. Therefore, Plaintiff's Motion with respect to Defendants' Second Affirmative Defense (that the 2013 Agreement is illegal and void as against public policy) and Defendants' Ninth Affirmative Defense (to the extent Defendants contend that terms of the Agreement are unenforceable) is hereby **GRANTED**.

B. Alleged Breach of Promotion Opportunities in 2013 Agreement

74. Section IV of the Agreement, governing the rights and obligations of the parties with respect to promotion opportunities, is divided into several parts. Intersal's exclusive right to produce a commercial documentary is described in Paragraph 14. The parties' duty to collaborate on commercial narratives exists in Paragraph 15. Rules regarding third party access to *QAR* Project-related artifacts and activities are in paragraph 16(a). The parties' duty to mark, and restrictions on their ability to display, non-commercial media are specified in paragraph 16(b). The parties have filed cross-motions for summary judgment with respect to Plaintiff's claim that Defendants breached each of these provisions.[15]

[14] The Court's holding that the 2013 Agreement is an enforceable contract does not, however, preclude its conclusion that some interpretations of the Agreement proffered by the parties are not reasonable because they would violate the law. *See infra*, Section V(B)(4).

[15] Plaintiff alleges that some events give rise to multiple breaches of the 2013 Agreement. By highlighting the event with respect to one of those alleged breaches in its analysis, the Court does not suggest that no other possible breaches exist with respect to the same event.

1. Paragraph 14 (Commercial Documentaries)

75. Paragraph 14 of the 2013 Agreement gives Intersal "the exclusive right to produce a documentary film about the *QAR* project for licensing and sale. Intersal may partner with DCR if it chooses to do so [.]" (2013 Agreement ¶ 14.)

The Cannon Raising

76. Intersal presents testimony that it was not notified of the cannon raising event that took place just days after the 2013 Agreement was reached. *See e.g.*, Meyer Dep. at 125:12-25 (unaware of any notice to Intersal). It argues that Defendants breached Paragraph 14 by not telling it about the event in order to prevent its video-designee, Nautilus, from filming this sentinel moment in the *QAR* recovery operations.[16] (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 7.)

77. Defendants respond with testimony that the event was publicly announced days in advance, that nothing in the agreement required them to notify Intersal of every *QAR*-related activity, and that, in any event, they believe they did inform Intersal. (Defs.' Br. Supp. Motion Summ. J. 5; Claggett Dep. 53:12-19 ("I directed Billy Ray Morris to contact them.") (*But see* Pl.s' Br. Resp. Defs.' Mot. Summ. J., Ex. 1, ECF No 173.1 [Morris Dep.] 64:15-21) (Q: Do you recall personally reaching out to either Rick Allen or Intersal about participating in that dive? A: No. Q. Do you know if anyone else from DNCR ever did? A. I don't know.").

[16] Intersal also argues that DNCR breached Paragraph 15 of the 2013 Agreement because DNCR did not "collaborate" with it in the "making" of a "commercial narrative." (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 7.) For the reasons stated below, the Court concludes that the parties' ambiguous contract language in Paragraph 15 precludes summary judgment with respect to this contention.

78. “Whenever a court is called upon to interpret a contract[,] its primary purpose is to ascertain the intention of the parties at the moment of its execution.” *Howard v. IOMAXIS, LLC*, 2020 NCBC LEXIS 57, at *15 (N.C. Super. Ct. May 1, 2020) (quotation omitted). “To do so, the Court must first look to the language of the contract and determine if it is clear and unambiguous.” *Id.* “Whether or not the language of a contract is ambiguous is a question for the court to determine.” *W & W Partners, Inc. v. Ferrell Land Co., LLC*, 2018 NCBC LEXIS 52, at *12 (N.C. Super. Ct. May 22, 2018) (quoting *Lynn v. Lynn*, 202 N.C. App. 423, 432 (2010)).

79. “If a court finds a contract ambiguous, the intent of the parties becomes a question of fact.” *Howard*, 2020 NCBC LEXIS 57, at *15 (quotation omitted); *see Robertson v. Hartman*, 90 N.C. App. 250, 252-53 (1988) (Where the language of a contract is "subject to more than one reasonable meaning," its interpretation is an issue for the jury); *Leonard v. Pugh*, 86 N.C. App. 207, 210 (1987) (“Ambiguous contracts must be interpreted by a jury[.]”).

80. “The fact that a dispute has arisen as to the parties’ interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.” *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690 (2002).

81. The record is far from clear regarding whether the parties intended for Intersal to be notified of significant events in the recovery process and, if so, whether Intersal knew or should have known of the planned cannon raising. Accordingly, the Court determines that genuine issues of material fact, evident from this record, preclude summary judgment.

The Think Out Loud Documentary Series

82. It is undisputed that in June 2013, prior to execution of the October 2013 Agreement, FoQAR arranged with Think Out Loud Productions to make a documentary series about the *QAR* Project. It is also undisputed that at the same time it reached agreement with Think Out Loud Productions, FoQAR simultaneously assigned the rights to the series to DNCR, giving DNCR the exclusive right to broadcast and distribute it. (Pl.'s Mot. Summ. J. Ex. 53; Claggett Dep. 47:15-49:14.)

83. Intersal alleges that Steve Claggett, head of the Office of State Archeology, was "well-aware" of this arrangement but did not reveal it during negotiations with Intersal for the 2013 Agreement. (Pl.'s Mot. Partial Summ. J. 26; Claggett Dep. 49:15-50:24.) Intersal argues that the 2013 Agreement does not contain an exception allowing for the continued production of this documentary series in violation of its exclusive right to produce a documentary as stated in Paragraph 14 of the 2013 Agreement.

84. Defendants argue that the OAH action resulting in the 2013 Agreement was not filed until 26 July 2013, more than a month and a half after the agreement between FoQAR and Think Out Loud Productions was signed. Consequently, Defendants contend, they had no obligation to apply the terms of the 2013 Agreement retroactively to the production of a documentary series that was already underway. (Pl.'s Mot. Partial Summ. J., Ex. 52, ECF No. 154.52; Defs.' Br. Resp. Pl.'s Mot. Partial Summ. J. 38.) Defendants point out that the agreement between FoQAR and Think Out Loud Productions required that all filming be completed by the end of June 2013.

(*See* Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 52 at ¶ 8.) Finally, Defendants note that FoQAR "was not a party to the 2013 Agreement," and they contend that Intersal cannot "impose its purported exclusive narrative rights on third parties." (Pl.'s Br. Supp. Mot. Partial Summ. J. 38-39.)

85. But, citing various emails and Claggett's testimony, Intersal disputes Defendants' implication that the filming and production of the series had been completed prior to execution of the 2013 Agreement. (Pl.'s Br. Supp. Mot. Partial Summ. J. 27, Ex. 54, ECF No. 154.54 (23 October 2014 e-mail from Think Out Loud Productions to Claggett regarding status of web series); Pl.'s Br. Supp. Mot. Partial Summ. J. 27, Ex. 55, ECF No. 154.55 (email chain between Claggett and Think Out Loud Productions discussing status of project in November 2014); Claggett Dep. 63:10-64:5 (conceding that Defendants were working with Think Out Loud Productions on the web series project during November 2014).)

86. Intersal further argues that DNCR cannot avoid liability by hiding behind FoQAR as the party that contracted with the film company when, almost simultaneously, FoQAR assigned the rights to the documentary series to DNCR. It contends that Claggett, head of the Office of State Archeology for DNCR admitted that DNCR used FoQAR as nothing more than a "pass through." (Pl.'s Br. Supp. Mot. Partial Summ. J. 26; Claggett Dep. 49:11-14.)

87. Continuing the dispute, the parties disagree regarding whether the documentary series should be analyzed as a "commercial narrative" under Paragraph 15. Intersal argues that it is, (Pl.'s Br. Supp. Mot. Partial Summ. J. 28), while DNCR

says that the project was educational in nature and, therefore, does not meet the definition of "commercial narrative." (Defs.' Br. Resp. Pl.'s Mot. Partial Summ. J. 37.) DNCR points to the fact that it contracted for the development of an accompanying "lesson plan" as evidence that the documentary series was not intended to be a commercial narrative. However, Intersal argues that the evidence proves that the lesson plans and videos were never actually used in schools. (Pl.'s Br. Supp. Mot. Partial Summ. J. 28-29; Morris Dep. at 39:17-20.)

88. Under the circumstances presented here, the Court concludes that summary judgment with respect to the Think Out Loud documentary series is not appropriate. Other than listing as examples: "books and e-books, mini- and full-length documentaries, and video games," the term "commercial narrative" is not defined either in Paragraph 15 or elsewhere in the 2013 Agreement. Whether the parties intended for the term "commercial narrative" to cover a web-based documentary series, whether the timing of this particular project causes it to fall within the parameters of the 2013 Agreement, and whether Defendants are responsible for FoQAR's action in these circumstances are all matters for the jury to decide.

2. <u>Paragraph 15 (Collaboration on "Commercial Narratives")</u>

89. Paragraph 15 of the 2013 Agreement states:

> DCR 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. If DCR and Intersal cannot reach an agreement on the sharing and production of any such commercial ventures that they propose to undertake, DCR

> and Intersal will refer the issues to a mutually selected, neutral arbitrator for binding arbitration, with arbitration to be concluded within three (3) months of selection of the neutral arbitrator.

(2013 Agreement ¶ 15.)[17]

Blackbeard's Sunken Prize

90. Intersal seeks summary judgment on the grounds that Defendants breached Paragraph 15 of the 2013 Agreement by collaborating on the book *Blackbeard's Sunken Prize* with Wilde-Ramsing and Carnes-McNaughton and not including Intersal. They contend that DNCR steered the project, and they point to the decision to recast the book as "educational" rather than "commercial," as evidence of an alleged attempt by Defendants to avoid Paragraph 15. They argue that Defendants mandated that the authors use UNC Press as the publisher, resulting in a monetary benefit for the State. Intersal further complains that DNCR collaborated with the authors by advising them to submit public records requests for unwatermarked images so that they could avoid including Intersal. (Pl.'s Br. Supp. Mot. Partial Summ. J. 23-25.)[18]

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[17] The arbitration provision was not utilized by the parties. In response to the Court's questioning during the hearing, Defendants argue that it does not apply because they have not failed to collaborate on any commercial narratives. (Tr. 27-31, ECF No. 194.) Plaintiff argues that it was up to Defendants to demand arbitration, and they have not. (Tr. 37-38.) Arbitration is a contractual right that may be waived. *See, e.g., Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.,* 312 N.C. 224, 229 (1984).

[18] The Court observes, as did Defendants, that these allegations do not appear in the Third Amended Complaint; however, Intersal sufficiently alleges that Defendants breached Paragraph 15 of the 2013 Agreement and that their action resulted in monetary damages to Intersal. (Third Am. Compl. ¶¶ 64-66.) Intersal is not required to state a breach of contract claim with particularity. *See, e.g., Poor v. Hill*, 138 N.C. App. 19, 26 (2000); *Vanguard Pai Lung, LLC v. Moody*, 2019 NCBC LEXIS 30, at *10 (N.C. Super. Ct. June 19, 2019).

91. Defendants respond that their limited interaction with Wilde-Ramsing and Carnes-McNaughton did not constitute the "making" of a commercial narrative; consequently, they contend that they had no duty to collaborate with Intersal. They argue that Paragraph 15 "confers no rights on Intersal to police the conduct of third parties, or to extract a licensing fee whenever someone creates content—commercial or otherwise—telling the story of the *QAR* discovery." (Br. Supp. Defs.' Mot. Summ. J. 4.)

92. While there is evidence that DNCR discussed the book with its authors, once again the facts are not sufficiently developed for the Court to determine whether DNCR participated in "making" it. This is a question of fact yet to be resolved. Accordingly, summary judgment is inappropriate.

Museum Exhibitions

93. Intersal alleges that Defendants have displayed a traveling exhibit of *QAR* artifacts at state-owned venues without collaborating or sharing profits with Intersal. (Third Am. Compl. ¶ 35J.) Defendants argue that they are entitled to summary judgment on this claim because the exhibitions do not meet the definition of "commercial narrative," and, in any event, the State has not profited because no additional admission fee has been charged to view the artifacts.[19] (Br. Supp. Defs.' Mot. Summ. J. 6.)

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[19] Defendants also argue that the 2013 Agreement expressly allows DNCR to use *QAR* artifacts and replicas in traveling exhibits and museums. (Defs.' Reply Supp. Mot. Summ. J. 7, ECF No. 182.) But the 2013 Agreement says only that DNCR may "make, or have made, molds or otherwise reproduce, or have reproduced, any *QAR* artifacts of its choosing for use in museums or traveling exhibits, as educational props in its exhibits, museums, or laboratories, as scientific tools, or for scientific study." It does not speak to whether, with

94. But regardless of whether a surcharge was added to the admission fee to view the traveling exhibit, there are other ways in which the State might have profited from the exhibition. Whether it did, and whether the parties intended for the term "commercial narrative" to apply to an exhibition of this nature are questions for the jury to resolve.

Blockbuster Tour

95. Relatedly, Defendants argue that they are entitled to summary judgment with respect to Intersal's contention that Defendants violated Paragraph 15 by deciding not to participate in a "blockbuster" tour[20] of the *QAR* artifacts. They argue that the term "commercial narrative" was never intended to encompass a tour like the one contemplated by Intersal. They further argue that the term "collaborate" does not mean they are required to *participate* in every idea imagined by Intersal. Therefore, they conclude, a decision not to engage with Intersal in the production of a tour of this magnitude does not constitute a breach of Paragraph 15. (Defs.' Br. Supp. Mot. Summ. J. 7.)

96. Intersal responds that summary judgment for Defendants is inappropriate because Defendants did not collaborate with it to produce, or even seriously discuss, its idea for a tour. According to Intersal, Defendants are

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respect to these exhibitions, DNCR must collaborate or share profits with Intersal. (2013 Agreement ¶ 9.)

[20] According to Intersal's expert with respect to exhibitions, Samuel S. Weiser, a "blockbuster" exhibition is one that is generally 12,000 square feet but can be scaled up or down depending on the exhibition space. (Weiser Report ¶ 36, ECF No. 159.2.)

"intentionally delay[ing]" and "slow-walk[ing] that concept until after this litigation ends so that [they] can cut [Intersal] out of the tour." (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 9-10, 11.) Had they been able to "make" this "commercial narrative," Intersal argues, a tour of this nature would have resulted in Intersal realizing more than $11.5 million in revenue, (Pl.'s Br. Resp. Defs.' Mot. Summ. J., Ex. 25 ¶¶ 35, 40, 62 ["Weiser Expert Report"], ECF No. 173.25.)

97. Once again, a determination of this claim turns on an interpretation of ambiguous language in the 2013 Agreement. Whether the parties intended for the term "commercial narrative" to include a large-scale tour, and what they meant when they agreed to "collaborate in making" commercial narratives, are matters for the jury to decide.

98. Finally, Defendants contend that Intersal's evidence that it has been damaged as a result of Defendants' alleged failure to collaborate on a "blockbuster" *QAR* exhibition is too speculative to support its claim. Defendants argue that, even if Intersal is successful in proving that the 2013 Agreement was breached, the Court should enter summary judgment in their favor on damages and peremptorily instruct the jury that no more than nominal damages may be awarded. (Br. Support Defs.' Mot. Summ. J. 23-24.)

99. Specifically, Defendants assert that Intersal cannot prove that a tour of this nature would have generated profits because of two "fundamental contingencies." (Br. Support Defs.' Mot. Summ. J. 25.) First, Intersal and DNCR would have had to reach a future agreement on the details and, according to Defendants, "Intersal has

no reasonable basis to predict that the parties would ever reach such an agreement." (Br. Support Defs.' Mot. Summ. J. 25.) Second, Defendants contend that a tour of this size would require a third-party tour promoter, and they argue that "Intersal has no reasonable basis to predict that the parties would ultimately reach an agreement with a third-party promoter." (Br. Support Defs.' Mot. Summ. J. 26.)

100. Intersal responds to the first argument by pointing to the arbitration provision in Paragraph 15, which reads: "If [DNCR] and Intersal cannot reach an agreement on the sharing and production of any such commercial ventures that they propose to undertake, [DNCR] and Intersal will refer the issues to a mutually selected, neutral arbitrator for binding arbitration, with arbitration to be concluded within three (3) months of selection of the neutral arbitrator." (2013 Agreement ¶ 15.) Intersal concludes, therefore, that failure to agree in advance on these details was a contingency adequately addressed by the language of the 2013 Agreement. (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 15.)

101. As for whether the parties would have had to reach agreement with a yet-unknown third-party tour promoter in order to produce profits, Intersal says the 2013 Agreement does not require one, and it would be up to a jury to decide both whether a tour promoter would have been necessary and whether the parties would have been able to reach agreement with one. (Pl.'s Br. Resp. Defs.' Mot. Summ. J. 15.)[21]

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[21] Defendants point again to the report of Intersal's exhibition expert, Weiser, who stated that his analysis assumed that the cost of mounting and touring the exhibition would be underwritten by a third-party partner with experience developing and touring blockbuster exhibitions. *See* Weiser Expert Report ¶¶ 38, 49. But Weiser, who includes in his work

102. "In a suit for damages for breach of contract, proof of the breach would entitle the plaintiff to nominal damages at least." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 172 (1999) (citation and quotation marks omitted). Beyond that, "[a] party claiming damages from a breach of contract must prove its losses with 'reasonable certainty.' " *Plasma Ctrs. of Am., LLC v. Talecris Plasma Res., Inc.*, 222 N.C. App. 83, 91 (2012). "While the reasonable certainty standard requires something more than 'hypothetical or speculative forecasts,' it does not require absolute certainty." *Id.* (citation and quotation marks omitted); *State Props., LLC v. Ray*, 155 N.C. App. 65, 76 (2002) ("absolute certainty" not required to prove damages).

103. The law recognizes that certain agreements "[i]nvolve[] damages which are difficult to calculate with absolute precision[,]" but the "indefiniteness . . . does not, however, by itself preclude relief[.]" *Keith v. Day*, 81 N.C. App. 186, 196 (1986). "What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages[.]" *Id.* Where evidence of damages "pushes . . . proof of damages beyond 'hypothetical or speculative forecasts of losses[,]' " there is a genuine issue to be decided at trial. *BOGNC, LLC v. Cornelius NC Self-Storage LLC*, 2013 NCBC 26, at *87 (N.C. Super. Ct. May 1, 2013).

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experience that he was formerly an executive of a "market leader in the touring exhibition business" and the company that toured Titanic exhibitions, among others, also stated that "Businesses like Premier Exhibitions, where I was CEO, and other firms would have been interested in working with the QAR parties . . . . These entities would have contributed to the project, and possibly underwritten it in full, in exchange for a significant participation in the revenues." (Weiser Expert Report ¶ 38.)

104. The Court agrees with Intersal that the 2013 Agreement's arbitration provision gave the parties a surefire mechanism to avoid stalling over a dispute regarding the production of a commercial narrative. However, whether the parties would have required a third-party promoter and, if so, whether they would have been able to agree on terms with one, remains to be determined. Weiser, who has experience in the field, provides support for the Plaintiff's position. A jury will have to decide whether a blockbuster tour was among the "commercial narratives" contemplated by the parties and, if so, whether the parties would have been successful in producing a tour that would have generated a profit.

3. Paragraph 16(a) (Terms of Use Agreement to Access Artifacts and Activities)

105. Intersal moves for entry of summary judgment on its claim that Defendants breached Paragraph 16(a) of the 2013 Agreement by refusing to post an Intersal terms of use agreement on a website DNCR agreed to establish to control third party access to *QAR* Project-related artifacts and activities. (Pl.'s Br. Supp. Mot. Partial Summ. J. 29-31.)

106. Paragraph 16(a)(3) states in relevant part:

> a. **Procedure.**
>
> 3) The website shall be the primary means of access for requests, and shall include, at a minimum:
>
> (a) An Intersal terms of use agreement, to be electronically submitted[.]

(2013 Agreement, § 16(a)(3).)

107. Intersal claims that DNCR refused to post or disseminate an Intersal terms of use agreement as required by Paragraph 16(b), "destroying [Intersal's] ability to police unauthorized use of *QAR* digital media by third parties." (Pl.'s Br. Supp. Mot. Partial Summ. J. 30-31.) Intersal contends that this refusal occurred despite Intersal's electronic submission in June 2014 of a terms of use agreement that parroted the terms used by Defendants' Division of Tourism, Film, and Sports Development website, "changing only the names." (Pl.'s Br. Supp. Mot. Partial Summ. J. 30.)[22]

108. On the other hand, Defendants contend that the 2013 Agreement did not give Intersal a unilateral right to decide what the terms of use agreement would contain, and they argue that Defendants had the right to weigh in, especially because the terms were to be posted on a government website. Defendants assert that they could not use Intersal's language because it raised First Amendment concerns, and they argue that the parties never agreed on the terms that would be posted or otherwise disseminated to third parties. (Defs.' Br. Response Pl.'s Mot. Partial Summ. J. 25-27.) As for the language copied from the Division of Tourism, Film, and Sports Development, Defendants contend that even those terms were problematic because they "would apparently grant [Defendants] a copyright in the news

[22] Intersal originally submitted its terms of use agreement in December 2013, but it was never posted by DNCR. (Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 44, ECF No. 154.44 (email from Cochran to Masters acknowledging receipt of terms)). Nevertheless, the Third Amended Complaint does not allege that a breach occurred until June 2014, when Intersal's revised terms of use agreement (copying the language used by the Division of Tourism, Film, and Sports Development) was also not posted. (Third Am. Compl. ¶ 35C.)

organization's digital images of QAR activities and artifacts," a result that is constitutionally impermissible. (Br. Supp. Defs.' Mot. Summ. J. 14.)

109. Again, the words of the 2013 Agreement fail to provide a clear answer here. Paragraph 16(a) does not speak to the process by which the language of the terms of use agreement would be decided. Indeed, even though it references the writing as the *Intersal* terms of use agreement, use of the passive voice, "to be electronically submitted," does not permit the Court to identify Intersal as the sole author. All that can be definitively discerned from the language of the 2013 Agreement is that the parties intended for access restrictions to appear on a website to be established by DNCR, and that Intersal had responsibility for "managing and enforcing" them. The contract is silent regarding whether the parties intended for the language of the terms of use agreement to be mutually acceptable. Accordingly, the question must be put to a jury. Summary judgment as to this issue is **DENIED**.

4. Paragraph 16(b) (Marking and Posting Non-Commercial Media)

110. Paragraph 16(b) of the 2013 Agreement states:

> 1) All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or DCR, as well as a link to DCR, 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) DCR agrees to display non-commercial digital media only on DCR's website.

(2013 Agreement ¶ 16(b)).

111. Intersal moves for affirmative summary judgment on the grounds that Defendants breached Paragraph 16(b) by failing to include watermarks and time code

stamps on non-commercial digital media of the *QAR* Project that it produced to third parties, whether in response to public records requests or otherwise. Intersal further alleges that Defendants themselves posted—and by doing so enabled others to post—hundreds of unmarked *QAR* images and videos. It alleges that some were posted to websites other than the DNCR website, including Facebook, Instagram, Flickr, and YouTube, all in violation of the 2013 Agreement. (Pl.'s Br. Supp. Mot. Partial Summ. J. 18-23.)

112. Intersal argues that DNCR has conceded that the 2013 Agreement required that it mark digital media and further that DNCR has admitted that it did not begin marking digital media until late 2017. (Meyer Dep. at 56:2-57:18, 74:4-10, 110:12-18, 175:14-177:5; Cox Dep. 6:7-9:24, 32:15-33:21, 38:11-43:2.) It lists as examples instances in which DNCR responded to public records requests by producing unmarked images.[23] Even after it began watermarking the digital media in 2017, Intersal argues, Defendants continued to violate Paragraph 16(b)(2) by leaving off time code stamps and required links to websites, and by posting digital media to websites other than its own. (Pl's Br. Supp. Mot. Partial Summ. J. 23.)

113. In addition, Intersal complains that DNCR provided unmarked "non-commercial" digital media to other state offices to be posted on websites other than DNCR's own. For example, Intersal points to DNCR's decision to send digital images of the cannon raising event to the Governor's office to be posted on Facebook. (Pl.'s Br. Supp. Mot. Partial Summ. J., Exs. 22-23, Facebook postings of images on

[23] It is not always clear from the record whether a particular image became a public record before or after the effective date of the 2013 Agreement.

Governor's webpage, ECF Nos. 154.22-154.23.) DNCR also sent a Flickr link of images taken during the cannon raising to numerous media outlets. (Pl.'s Br. Supp. Mot. Partial Summ. J., Ex. 14, email from Cox to media outlets forwarding Flickr link of images, ECF No. 154.14.) In neither instance were the images marked in accordance with Paragraph 16. In all, Intersal claims that Defendants posted hundreds of *QAR* images and videos to websites such as Facebook, Instagram, YouTube, Flickr, and Twitter, often without watermarks or time code stamps. (Pl.'s Br. Supp. Mot. Partial Summ. J. 20-22.)

114. Defendants respond that the marking requirements of Paragraph 16(b)(1) apply only to non-commercial digital media produced and posted to the internet by the parties (Intersal, DNCR, Rick Allen, and Nautilus Productions, LLC) after the effective date of the 2013 Agreement. (Defs.' Br. Response Pl.'s Mot. Partial Summ. J. 29.) In addition, Defendants maintain that if Paragraph 16(b)(1) extended to all digital media in their possession, Intersal's interpretation would "require Defendants to alter records provided in response to public records requests and impose restrictions on a requestor's use of public records," a result that is contrary to Paragraph 17 of the 2013 Agreement and State law. (Defs.' Br. Response Pl.'s Mot. Partial Summ. J. 31.)

115. Paragraph 17 of the 2013 Agreement provides:

> Nothing in this Agreement shall prevent [DNCR] from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records.

(2013 Agreement ¶ 17.)

116. Chapter 121 establishes that DNCR is the "official archival agency of the State of North Carolina." N.C.G.S. § 121-5. Chapter 132 provides that public records are "the property of the people." N.C.G.S. § 132-1(b). Therefore, "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost[.]" N.C.G.S. § 132-1(b).

117. The definition of a public record is broad, covering any "documentary material, regardless of physical form or characteristics, made or received pursuant to law . . . in connection with the transaction of public business by any agency of North Carolina[.] " N.C.G.S. § 132-1(a). It specifically includes photographs and films and, if there were any doubt that digital images of the *QAR* would be covered, Section 121-25(b) of the General Statutes removes it:

> All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck . . . in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes.

N.C.G.S. § 121-25(b).

118. Custodians of public records must allow the examination of public records upon request and must furnish copies of public records to any person making a request. The custodian of public records is prohibited from requiring a requestor to "disclose the purpose or motive for the [public records] request." N.C.G.S. § 132-6(b). Moreover, "[p]ersons requesting copies of public records may elect to obtain them in any and all media in which the public agency is capable of providing them." N.C.G.S. § 132-6.2.

119. Notably, it is a Class 3 misdemeanor for any person to alter, deface, mutilate or destroy a public record. N.C.G.S. § 132-3(a).

120. Defendants contend that, by its clear terms, Paragraph 17 takes precedence over any conflicting term in the Agreement, and that the referenced statutes prohibit Defendants from altering public records or restricting their use. (Defs.' Br. Resp Pl.'s Mot. Partial Summ. J. 29-32.)

121. The Court agrees that Paragraph 17 trumps any interpretation of the 2013 Agreement that would require the State to alter public records or to limit the public's right to access or use them, both violations of state law. Therefore, Paragraph 16(b) cannot be read to mean that Defendants were required to add watermarks, time code stamps and weblinks to public documents that pre-existed the 2013 Agreement. To do so would be to alter those documents, which is both contrary to public records obligations made paramount by Paragraph 17, as well as a criminal offense. *See, e.g., Duke Power Co. v. Blue Ridge Electric Membership Corp.,* 253 N.C. 596, 602 (1961) ("When called upon to interpret a contract, courts seek to ascertain and give effect to the intent of the parties *if that intent does not require the performance of an act prohibited by law*.") (emphasis added); *Security Life & Annuity Co. v. Costner*, 149 N.C. 293, 297 (1908) (rejecting party's interpretation of contract because it would have required performance of an illegal act); *Restatement 2d Contracts* § 203 ("In the absence of contrary indication, it is assumed that each term of an agreement has a reasonable rather than an unreasonable meaning, and that the agreement is intended to be lawful rather than unconscionable, fraudulent or otherwise illegal");

Cf. Carolina Water Service, Inc. of North Carolina v. Town of Pine Knoll Shores, 145 N.C. App. 686, 689 (2001) ("An agreement which cannot be performed without violation of a statute is illegal and void.").[24]

122. In addition to *when* the digital media was produced, Defendants argue that *how* it is being used is relevant when determining whether the 2013 Agreement requires it to be marked. Defendants argue that Paragraph 16(b) stands only for the proposition that if any of the parties to the 2013 Agreement desire to post non-commercial digital media on the internet, that party is first required to add a time code stamp and watermark of Nautilus and/or DCR, as well as a link to the DNCR, Intersal and Nautilus websites, and that the markings must be "clearly and visibly" displayed at the bottom of any web page on which the digital media appears. (Defs.' Br. Resp. Pl.'s Mot. Partial Summ. J. 32.)

123. Intersal responds that Defendants' interpretation of this provision creates a hole in the bottom of the sea through which hundreds of images and other digital media has escaped. It argues that the State committed to mark *all* non-commercial digital media produced regardless of who produced it and how it is being used. (Pl.'s Reply Supp. Mot. Partial Summ. J. 12.)

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[24] Likewise, Paragraph 16(b) cannot be read to mean that, when responding to public records requests, Defendants are required to add watermarks, time code stamps and weblinks to public records received from third parties, even if the records were received after the effective date of the 2013 Agreement. Again, such an interpretation would mean that the State was required to alter public records contrary to the prohibition in Chapter 132. The Court notes, however, Defendants' representation that "with only a handful of exceptions, the digital images at issue were taken by and belong to DNCR[.]" (Br. Supp. Defs.' Mot. Summ. J. 27, ECF No. 161.)

124. The Court concludes that Paragraph 16(b) could be read to support either argument. However, the difference in these two interpretations is significant. If Intersal is correct, Paragraph 16(b) has implications for the manner in which Defendants maintain the digital media pertaining to the *QAR* Project, even if they do not post it. On the other hand, if Defendants are correct and marking is only required for images Defendants post online, far fewer digital images would be subject to marking requirements, and many public records requests would net unmarked images.

125. The Court concludes that, as with other terms of the 2013 Agreement, the parties' intent with respect to marking requirements cannot be gleaned from the plain language of Paragraph 16(b). Summary judgment in these circumstances is inappropriate. However, under either reading of the provision, Intersal is entitled to summary judgment to the extent DNCR posted on the internet non-commercial digital media regarding the *QAR* Project that DNCR produced after the effective date of the 2013 Agreement without including a time code stamp and watermark (or bug) of Nautilus and/or DCR, as well as a link to the DNCR, Intersal and Nautilus websites at the bottom of the web page on which that digital media was displayed. In addition, Intersal is entitled to summary judgment for those occasions after the effective date of the 2013 Agreement on which DNCR displayed non-commercial digital media regarding the QAR Project (marked or unmarked) on websites other than its own. As to these aspects of the first breach of contract claim (Media Rights), Intersal's Motion for Partial Summary Judgment is **GRANTED.**

126. On the other hand, Defendants are entitled to summary judgment to the extent Intersal claims that a breach resulted from Defendants' failure to alter public records—regardless of their source—that predate the effective date of the 2013 Agreement prior to producing those records in response to a public records request. As to this aspect of the first breach of contract claim (Media Rights), Defendants' Motion for Summary Judgment is **GRANTED**.

127. Except as to these specific circumstances, the parties must await the jury's interpretation of the 2013 Agreement, and the cross-motions for summary judgment as to the balance of the parties' arguments with respect to the first breach of contract claim (Media Rights) are **DENIED**.[25]

C. Alleged Breach for Failure to Renew the El Salvador Permit

128. Intersal claims that Defendants breached the 2013 Agreement by refusing to renew the *El Salvador* Permit, but Defendants argue that Intersal is

[25] Defendants argue that the "hypothetical licensing model" used by Intersal's expert, Jeff Sedlik, to calculate its damages is "untethered from both the facts of this case and from the provisions of the 2013 Agreement." Defendants contend that because Intersal did not produce and does not own the images that it claims Defendants improperly handled, it would not be entitled to a licensing fee for their use. (Defs.' Br. Supp. Mot. Summ. J. 27-28.) Intersal responds that Defendants misunderstand its theory of damages. According to Intersal, Paragraph 16(b) of the 2013 Agreement required that DNCR mark *QAR* digital media, and that its failure to do so damaged the value of *QAR* digital media for Intersal's use either in its exclusive documentary or for another commercial narrative.

The Court deems Defendants' argument to be in the nature of a challenge to the admissibility of Sedlik's expert opinion, and it defers consideration of the argument pending a fully briefed motion *in limine* pursuant to Rule 702 of the North Carolina Rules of Civil Procedure and related law. *See, e.g.*, *State v. Abrams*, 248 N.C. App. 639, 649 (2016) (Hunter, Jr., R., concurring) ("[B]est practice dictates parties should challenge an expert's admissibility through motions *in limine*.").

barred by collateral estoppel from relitigating this issue because it has already been decided. (Defs.' Br. Supp. Mot. Summ. J. 30.)

129. Paragraph 3 of the 2013 Agreement provides that "[i]n consideration for Intersal's significant contributions toward the discovery of the *QAR*," DNCR agrees to continue to issue the *El Salvador* Permit to Intersal through the year in which the QAR archaeology recovery phase is declared complete[26] "so long as the requirements contained in the permit are fulfilled."[27] (2013 Agreement ¶ 3.)

130. Additional requirements for the renewal of the *El Salvador* Permit are as follows:

> D. The period of this permit shall be one year. The permit may be renewed yearly, subject to any changes in the terms [DNCR] deems appropriate, providing the Permittee has satisfactorily met all the terms and conditions of this permit.
>
> G. Issuance or renewal of this permit shall not be construed to confer in the Permittee any right, nor create in DCR or the State any duty or obligation, to defend or in any way support the Permittee against claims by third parties.
>
> H. This Permit renewal in no way constitutes a guarantee by DCR, as the permitting agency, that future Permits will be automatically granted to the Permittee. Each proposed renewal of the Permit requires a separate application *which successfully meets all requirements of NC General Statute 121, Article 3, and Title 7, subchapter .04R of the NC Administrative Code.*

(Defs.' Mot. Summ. J. Ex. 26 ["*El Salvador* Permit"] at ¶¶ D, G, H (emphasis added).)

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[26] It is undisputed that the archaeology phase has yet to be declared complete.

[27] DNCR specifically agreed that it would "recognize Intersal's efforts and participation in the *QAR* project as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permit for the El Salvador." (2013 Agreement ¶3.)

131. Chapter 121, Article 3 of the North Carolina General Statutes pertains to, among other things, the salvage of abandoned shipwrecks. Section 121-25 speaks to the permitting process and provides, in relevant part:

> If [DNCR] shall find that the granting of such permit or license is in the *best interest of the State*, it may grant such applicant a permit or license for such a period of time and under such conditions as the Department may deem to be in the best interest of the State.

N.C.G.S. § 121-25 (emphasis added).

132. It is undisputed that DNCR refused to renew the *El Salvador* Permit in 2015. Intersal filed a Petition for Contested Case Hearing with the Office of Administrative Hearings ("OAH") and an administrative law judge dismissed the matter on summary judgment. Intersal appealed to the Wake County Superior Court, which also dismissed the case, albeit for a different reason.

133. Determining that the proper issue for review was whether DNCR erred in concluding that the issuance of the permit was not "in the best interest of the State," the Honorable Paul C. Ridgeway observed that DNCR's grant of authority and discretion is broad and that it could be reversed, "only upon a showing that the decision [was] arbitrary and capricious." *Intersal, Inc. v. NC Dept of Nat'l and Cult'l Resources*, 16 CVS 8149 (Wake County, Nov. 7, 2016) (unpublished) (citing *Cates v. North Carolina Dep't of Justice,* 121 N.C. App. 243 (1996)). Recognizing that "[t]he trial court is not allowed to override a discretionary agency decision exercised in good faith and in accordance with the law," Judge Ridgeway concluded that there were no genuine issues of material fact with respect to DNCR's proper exercise of its discretion, and he entered summary judgment for DNCR. The Court wrote:

> In other words, taking all the pleadings, affidavits and submissions of the Petitioner as true, the inescapable fact remains . . . that the Kingdom of Spain has a sufficient likelihood of success in its claim of ownership of the consigned cargo of the *El Salvador*, and that a reasonably cautious and prudent steward of the State's resources, in a good faith exercise of discretion, could conclude that the issuance of the [*El Salvador* Permit] to [Intersal] was no longer in the best interest of the State.

Intersal, Inc., 16 CVS 8149. Accordingly, the Superior Court dismissed Intersal's administrative action, and there was no appeal. The judgment is final.

134. In this case, Intersal argues that the Supreme Court has already determined that "res judicata does not apply because [Intersal's] El Salvador contract claim is a separate cause of action from that decided in the administrative case on the permit denial." (Br. Supp. Defs.' Mot. Summ. J. 31-32.) Intersal is correct. The claim before this Court (breach of contract) differs from the administrative claim for denial of a permit that was before Judge Ridgeway,[28] and the breach of contract claim has not been decided. However, Defendants do not argue *claim* preclusion. They argue *issue* preclusion, also known as collateral estoppel. There is a difference between these two legal concepts.[29]

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[28] As the Supreme Court observed, Intersal did not plead the elements of a breach of contract action it its Petition for a Contested Case Hearing.

[29] The Supreme Court recognized that although *res judicata* and collateral estoppel are "historically recognized as species of a broader category of estoppel by judgment, [they] are not interchangeable. Specifically, *res judicata*, or claim preclusion, functions to bar a plaintiff's entire cause of action, whereas collateral estoppel, or issue preclusion, bars only the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim. Therefore, although the two doctrines are complimentary, they are not the same." *Intersal*, 373 N.C. at 106 n.5 (cleaned up). However, because the trial court's analysis was limited to *res judicata*, so too was the Supreme Court's analysis.

135. Calling them "companion principles," the North Carolina Supreme Court has attempted to clear the fog surrounding *res judicata* and collateral estoppel by using the words of the United States Supreme Court:

> The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

King v. Grindstaff, 284 N.C. 348, 356 (1973) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877)). And "[a]lthough the names used by courts when referring to [these] two 'effects' have varied over time, the term '*res judicata*' is frequently applied to the former and the term 'collateral estoppel,' to the latter." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428 (1986).

136. Thus, *res judicata* bars relitigating the same cause of action following the rendering of a final judgment; whereas collateral estoppel bars the retrying of an issue that was necessary to, and has already been decided in, previous litigation, even when the cause of action is different. *See King*, 284 N.C. at 355-357; *McInnis*, 318 N.C. at 427-28; Matthew Bender & Company, Inc., *2 North Carolina Civil Procedure* §§ 88-1, 88-4 (2023).

137. For collateral estoppel to apply, Defendants must show "that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [defendant] and [plaintiffs] were either parties to the earlier suit or were in privity with parties." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558-59 (2009) (quoting *McInnis*, 318 N.C. at 429). *But see Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 15 (2004) ("we have followed the modern trend in abandoning the strict 'mutuality of estoppel' requirement for defensive collateral estoppel.").

138. Here, the issue is whether DNCR breached the 2013 Agreement when it refused to renew the *El Salvador* Permit on the grounds that it was not in the best interest of the State. Because the 2013 Agreement expressly incorporates the permitting requirements of Chapter 121 which, in turn, condition permit renewal on DNCR's finding that reissuing the permit is in the best interest of the State, the issue for collateral estoppel purposes is precisely the same in this Court as it was before Judge Ridgeway. Therefore, if, as Judge Ridgeway has already determined, DNCR properly exercised its authority when it concluded that it was not in the State's best interest to continue to renew the *El Salvador* Permit, then its decision does not constitute a breach of the 2013 Agreement.

139. Because this issue has been finally decided, collateral estoppel applies and requires this Court to conclude that DNCR's decision *not* to renew the *El Salvador* Permit because it was *not* in the best interest of the State was *not* a breach of the 2013 Agreement. *See Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App.

163, 166 (2001) ("[C]ollateral estoppel precludes the subsequent adjudication of a previously determined issue even if the subsequent action is based on an entirely different claim.") (citation omitted).

140. Accordingly, Defendants' Motion for Summary Judgment with respect to Plaintiff's second claim for breach of contract (Refusal to Renew the *El Salvador* Permit) is **GRANTED**.[30]

D. Breach of the Implied Duty of Good Faith and Fair Dealing

141. Defendants argue that the Court should grant summary judgment in their favor with respect to Intersal's claim that Defendants not only breached the express terms of the 2013 Agreement but also breached the implied duty of good faith and fair dealing. Defendants contend that the implied duty claim is subject to dismissal because Intersal has already conceded that it is not "making a claim for bad faith," and because it is duplicative of Intersal's claims for breach of the express provisions in the contract that Intersal is asserting. (Br. Supp. Defs.' Mot. Summ. J. 41.)

142. The first argument is easily dispatched. Although it is true that this Court previously dismissed with prejudice any attempted bad faith breach of contract claim, (*see* Order ¶ 79, ECF No. 85), that dismissal does not preclude a claim for breach of the implied covenant of good faith and fair dealing. *See Southeast*

[30] Because the Court holds that DNCR's decision not to renew the *El Salvador* Permit was not a breach of the 2013 Agreement, it declines to address Defendants' argument that Intersal's evidence of damages pertaining its loss of the *El Salvador* Permit is so speculative that dismissal of the claim is required.

Anesthesiology Consultants, PLLC v. Rose, 2019 NCBC LEXIS 52, at *25-26 (N.C. Super. Ct. Aug. 20, 2019) (distinguishing between a bad faith breach of contract claim and one for breach of the implied covenant of good faith and fair dealing). Contrary to Defendants' argument, this claim has not been previously addressed.

143. As for the argument that the claim is subject to dismissal because it is "duplicative" of Intersal's claim for breach of the express provisions of the 2013 Agreement, the Court determines that the converse is true: to the extent Intersal's breach of contract claim survives, it includes within its ambit the implied covenant of good faith and fair dealing.

144. "North Carolina law has long recognized that a covenant of good faith and fair dealing is implied in every contract and requires the contracting parties not to "do anything which injures the rights of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228 (1985) (citation omitted). This implied covenant is a "basic principle of contract law that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement." *Maglione v. Aegis Family Health Ctrs.,* 168 N.C. App. 49, 56 (2005) (quoting *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 40 N.C. App. 743, 746 (1979)). It requires parties to avoid "arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the [contract's] fruits." *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985) (interpreting *Restatement 2d of Contracts* § 205 (1981))

145. The implied covenant of good faith and fair dealing has been called the "spirit of the contract." *Bicycle Transit Authority, Inc.*, 314 N.C. at 230 (defendant breached both the "letter and the spirit of the contract"); *accord Allen v. Allen*, 61 N.C. App. 716, 720 (1983) (party's actions were "clear violations of both the letter and spirit of the contract"). A material term, the implied covenant is the gap-filler that guides the parties in the performance of the express terms of the contract. *Howard v. IOMAXIS, LLC*, 2022 NCBC LEXIS 146, at **15 (N.C. Super. Ct. Dec. 5, 2022). "Evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance" may constitute breach of the implied covenant. *Restatement 2d of Contracts* § 205 cmt. d (1981).

146. Here, Intersal did not set out a separate claim for breach of the implied covenant of good faith and fair dealing in its Third Amended Complaint. Rather, it alleged conduct that it argues constitutes breach of both the express and the implied terms of the 2013 Agreement before pleading two breach of contract claims, one pertaining to media rights and the other pertaining to the *El Salvador* Permit. Defendants contend that Intersal's failure to identify the implied covenant by name in its pleading dooms its claim for breach of that term.

147. "Where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same acts as its claim for breach of contract," the former claim is 'part and parcel' of the latter. *Cordaro v. Harrington Bank, FSB*, 260

N.C. App. 26, 38-39 (2018). This means that the fate of an implied covenant claim rises and falls with the fate of the breach of contract claim if it is based on the same underlying facts. In other words, if the breach of contract claim fails, there can be no breach of the implied covenant. *See, e.g., Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833 (2012) ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."). However, it also means that the converse is true. Where the breach of contract claim survives, whether the implied covenant was one of the terms breached remains an issue to be determined.

148. In this case Intersal has asserted a viable claim for breach of contract and has not chosen to narrow its claim to breach of only the implied covenant of good faith and fair dealing. Instead, pursuant to Rule 8 of the North Carolina Rules of Civil Procedure, it has put Defendants on notice that it contends that Defendants breached material terms in the 2013 Agreement pertaining to its media rights and that they ignored their duty to act in good faith. (*See, e.g.*, Third Am. Compl. ¶ 54: "All actions taken by the State Defendants were taken with the clear intent to deprive Intersal of its contractual, media, property and liberty rights [.]")

149. Just as Intersal was not required to plead with particularity the express terms that were breached, the implied covenant—the spirit of the agreement—is included in its claim for breach of contract without the need to identify it specifically. Indeed, "there are no magic words for pleading [a contract claim under North

Carolina law.]" *Stellar Ins. Group, Inc. v. Cent. Cos., LLC,* 2006 U.S. Dist. LEXIS 75801, at *23 (W.D.N.C. 2006). Plaintiff need only plead the "(1) existence of a valid contract and (2) breach of the terms of that contract." *Poor*, 138 N.C. App. at 26; s*ee* *Vanguard Pai Lung, LLC*, 2019 NCBC LEXIS 39, at *11 (observing that "stating a claim for breach of contract is a relatively low bar").

150. Moreover, the fact that Intersal did not label its claim as one for breach of the implied covenant is not dispositive. *See, e.g., Gant v. NCNB Nat. Bank*, 94 N.C. App. 198, 199 (1989) (on a motion to dismiss "[t]he question before us is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.").

151. Because the Court has determined that Intersal's second breach of contract claim is barred by collateral estoppel, a claim for breach of the implied duty of good faith and fair dealing with respect to denial of the *El Salvador* Permit is also barred. To that extent, Defendants' Motion for Summary Judgment is **GRANTED**.

152. However, Intersal may pursue breach of the implied duty of good faith and fair dealing in its claim for breach of certain of its media rights, as stated herein. Accordingly, as to Intersal's first claim for breach of contract, Defendants' Motion for Summary Judgment is **DENIED**.

VI. CONCLUSION

153. WHEREFORE, the Court hereby ORDERS as follows:

a. Intersal's Motion for Partial Summary Judgment with respect to Defendants' Second and Ninth Affirmative Defenses is **GRANTED**, except that nothing herein is intended to require terms of the 2013 Agreement to be interpreted in a manner that is inconsistent with North Carolina law.

b. Intersal's Motion for Partial Summary Judgment with respect to Intersal's First Claim for Relief (Breach of Contract with respect to Media Rights) is **GRANTED** in part.

(i) The Court declares as a matter of law that, after the effective date of the 2013 Agreement, DNCR's posting on the internet of non-commercial digital media of the *QAR* Project that DNCR produced without including a time code stamp, watermark (or bug) of Nautilus and/or DNCR, as well as a link to DNCR, Intersal, and Nautilus websites, clearly and visibly displayed at the bottom of any web page on which the digital media was or is being displayed, constitutes a breach of Paragraph 16(b)(1) of the 2013 Agreement.

(ii) The Court further declares as a matter of law that, after the effective date of the 2013 Agreement, DNCR's posting of non-commercial digital media of the *QAR* Project on websites other than its own constitutes a breach of Paragraph 16(b)(2) of the 2013 Agreement.

c. In all other respects, Intersal's Motion for Partial Summary Judgment is **DENIED**.

d. Defendants' Motion for Summary Judgment with respect to Intersal's First Claim for Relief (Breach of Contract with respect to Media Rights) is **GRANTED** to the extent that Intersal asserts that Defendants breached Paragraph 16(b)(1) of the 2013 Agreement by failing to mark digital media of the *QAR* Project that predates the effective date of the 2013 Agreement prior to producing it in response to a public records request.

e. In all other respects, Defendants' Motion for Summary Judgment with respect to Intersal's First Claim for Relief is **DENIED**.

f. Defendants' Motion for Summary Judgment with respect to Intersal's Second Claim for Relief (Breach of Contract with respect to the *El Salvador* Permit) is **GRANTED**, and Intersal's Second Claim for Relief is dismissed with prejudice.

IT IS SO ORDERED, this the 23rd day of February, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases