IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Cherry Grove Beach Gear, LLC, Derek Calhoun, and Jacqueline Calhoun, Plaintiffs, vs. City of North Myrtle Beach, Defendant.	Case No. 4:22-cv-02198-JD **ORDER**

This is an antitrust case (among other things) arising from Defendant City of North Myrtle Beach's ("the City") ordinance authorizing it to exclusively provide rented beach chairs, umbrellas, and other amenities on its beaches. Plaintiffs Derek and Jacqueline Calhoun and Cherry Grove Beach Gear, LLC ("CGBG"), a business that provides similar services and accessories for use on beaches located within North Myrtle Beach (DE 1, ¶¶ 1–3, 20), have filed suit asserting several causes of action against the City.[1] (DE 1.) The City moves for Summary Judgment on all of Plaintiffs' remaining claims. (DE 58.) The parties have fully briefed the motion, and the Court held a hearing thereon.

After reviewing the motion and memoranda submitted, the Court grants the City summary judgment on all of Plaintiffs' federal constitutional and statutory claims and Plaintiffs' Takings

[1] The Complaint asserts seven causes of action: (1) violation of the Sherman Antitrust Act and Clayton Act, (2) regulatory taking under the Fifth Amendment and the South Carolina Constitution, (3) violation of the Privileges and Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the South Carolina Constitution, (4) violation of the Contracts Clauses of the United States and South Carolina Constitutions, (5) Federal Declaratory Judgment Act, (6) violation of the South Carolina Antitrust Act, and (7) defamation. (DE 1.) The Court dismissed Plaintiffs' fFourteenth Amendment Privileges or Immunities Clause claim with prejudice but dismissed the Defamation claim without prejudice. (DE 31.)

and Contracts Clause claims under the South Carolina Constitution. The Court declines, however, to exercise its jurisdiction over Plaintiffs' declaratory judgment claims and further declines to exercise supplemental jurisdiction over Plaintiffs' South Carolina Privileges and Immunities Clause claim as provided here.

BACKGROUND

A. Plaintiffs' Business

In 2019, Derek and Jacqueline Calhoun began operating CGBG within the City. (*See* DE 1, ¶¶ 1–3, 20.) CGBG offers beach equipment rentals, such as "[c]hairs, umbrellas, coolers, Bluetooth speakers," and other items. (DE 58-4, p. 8 at 46:6–8.) Items can be rented individually or in packages through CGBG's website. (*See* DE 58-6, p. 2; 58-7, p. 2.) Delivery and setup of rented equipment are available at an extra charge. (*See id.*; *see also* DE 58-4, p. 41 at 141:14–25.) Under CGBG's business model, delivery and setup are separate options "that the customer can choose or choose not to" purchase. (DE 58-4, p. 8 at 46:15–22.) If a customer chooses the delivery and set up option, then "that contract with that customer is not fully performed" until the rented equipment has been delivered and set up on the beach. (*See id.*, pp. 9–10 at 48:8–49:14.) Delivery and setup of the rental contract is performed on the beach. (*See id.*)

When a customer chooses the delivery and setup option, employees of CGBG deliver the items to a location on the beach, set them up, and leave them unattended until the customer arrives to use them. (*See id.*, *see also id.*, p. 56 at 268:11–15.) CGBG employees begin picking items up around 5:00 pm. (*See id.*, p. 55 at 265:8–11.) If there is a storm, items may be picked up earlier, or the setup service may be canceled. (DE 58-4, p. 55 at 265:12–21.) Plaintiffs transact business with vacationers and locals via the internet. (*See* DE 1, ¶ 27.) At some point, CGBG had annual contracts with individuals and homeowners' associations to provide beach wares, including chairs

and umbrellas.[2] (*See id.*, ¶ 26.) CGBG holds a business license issued by the City. (*See id.*, ¶ 21.) CGBG's first year of operation was 2020, during which it had sales of "less than [$]10,000." (DE 58-4, pp. 10–11 at 49:21–50:8.)

B. Authority to Regulate Public Beaches

Like other coastal South Carolina municipalities, the City's authority to regulate activities on the public beaches arises from certain municipal Home Rule statutes set forth in Title 5 of the South Carolina Code. To begin, the City has a broad power to enact ordinances "respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it, *including the authority to ... grant franchises and make charges for the use of public beaches*." S.C. Code Ann. § 5-7-30 (emphasis added). In addition, Section § 5-7-145 of the South Carolina Code empowers cities "to provide lifeguard and other safety related services on and along the public beaches" and to "enact and enforce regulations it determines necessary for the safety of all persons on the beach." S.C. Code Ann. § 5-7-145(A). Under this statute, each municipality determines for itself, at the local level, whether to provide lifeguard services "using municipal employees or by service agreement with a private beach safety company." *Id.* § 5-7-145(B).

C. The City's Lifeguard and Safety Related Services

In recent years, about two million people visit the nine miles of beach within the City's jurisdiction each year. (*See* DE 19-2, pp. 2–3.) The City has chosen under Section 5-7-30, and

[2] In response to a question by the Court about the nature of CGBG's contracts, counsel for Plaintiffs conceded that most of CGBG's customers enter into individual transactions that are paid for in advance and performed on the beach. Counsel for Plaintiffs suggested that other categories of contracts with resort associations exist or existed, but conceded such contracts are not otherwise in the summary-judgment record, save in a passing reference in a deposition. (*See* DE 61-3, p. 7 at 20:9–12).) There is no record evidence that such one-year contracts otherwise exist.

under its specific authority under Section 5-7-145, to use its employees to provide lifeguard services. (*See id.*, p. 2.) The City seasonally employs up to 100 lifeguards, who are hired, employed, trained, and supervised directly by the Department of Public Safety. (*See id.*, pp. 2–3.) The lifeguard services that the City provides include responding to "water rescue and major medical events, . . . minor medical events, . . . [and] lost children or missing person calls," and "post[ing] warnings to swimmers regarding rip current conditions and other weather or climate related matters." (*Id.*, pp. 3–4.) As for carrying out these "safety" tasks, the City "does not delegate . . . to any third parties or entities." (*Id.*, p. 3.) The City's lifeguard service is the only one in the Grand Strand certified by the United States Lifesaving Association. (DE 19-2, p. 3.)

Importantly, lifeguards do not rent beach goods such as chairs, umbrellas, or concessions. (*See id.*) These activities are conducted by Beach Services, a division of the City's Parks and Recreation Department. (*Id.*, pp. 2–3.) Nevertheless, lifeguards and Beach Services employees work in tandem to promote safety on the beach. (*See* DE 19-11, p. 4.) The City owns and maintains about 2,800 beach chairs and 1,500 beach umbrellas. (*See id.*, p. 2.) The beach chairs and umbrellas the City utilizes are made of heavy-duty construction, with wooden frames and canvas fabric. (*See* DE 19-3, pp. 2–3.) All setups of City beach chairs and umbrellas are performed, at no additional charge, by City employees trained in proper installation. (*See id.*, p. 3.) To promote safety on the beach, the City's Beach Services employees do not set up any equipment in the established emergency lanes of the beach, and they also avoid the line of sight of the City lifeguards. (*See id.*) And the attendants stay on the beach near the rented equipment and are instructed to take down and remove umbrellas and chairs in the event of such conditions. (*See id.*, pp. 3–4.)

The "first priority" for revenues earned from chair and umbrella rentals and the sale of concession items is to pay for "beach patrol officers and lifeguards" and then for "other things associated with the beach." (DE 58-3, p. 13 at 80:21–25.) Such revenues cover 100% of the City's cost for its lifeguard services and help defray the cost of beach-related services such as beach patrol and beach cleaning. (DE 19-4, ¶ 10.)

D. Prohibition of Commercial Activities on the Public Beach

The City has adopted ordinances for the protection and enjoyment of those who visit its beaches. Among other things, the City prohibits nearly all commercial activity on its public beaches:

> Upon the public beaches … no person shall sell, lease or rent any goods, wares or other property except that this provision shall not prohibit the holder of a beach franchise or license from exercising the rights and privileges granted therein …. Furthermore, this provision shall not prohibit the City of North Myrtle Beach and its authorized employees from selling and or renting goods and wares such as beach umbrellas and chairs and concession items in conjunction with the city providing lifeguard services.

(DE 58-1 at 5 (emphasis removed) ("Code 5-14").) Code 5-14 was enacted in 1981 and last amended in 2007. The City purports that it prohibits any part of a commercial transaction from occurring on the beach, from an initial solicitation—such as distributing marketing brochures for a time-share condominium—to completing a transaction—such as delivering and setting up rented beach equipment. (*See* DE 58-4, pp. 9–10 at 48:8–49:14.) Under Code 5-14, the City claims it prohibits beach equipment rental companies from delivering and setting up rented equipment, even if the rental is arranged online or at an off-beach business location. (*See* DE 58-3, pp. 6–7 at 42:20–25, 43:6–20.) In 2009, for example, then-City Manager John Smithson advised the owner of North Strand Beach Services (a competitor of CGBG):

> [T]he City has not granted you a franchise to conduct any business on the beaches of North Myrtle Beach. You are authorized to conduct business from the address indicated on your business license. The transaction for this activity as well as

> providing the items that you lease to your customers should take place at this location, or the items can be delivered to your customers at the customer's home or rental unit, *not the beach*. . . . The storage of chairs on the beach . . . for the purpose of rental is considered doing business on the beach and is prohibited under section 5-14 of the North Myrtle Beach Code.

(DE 19-5, p. 13.) Around a year later, in 2010, the City again advised North Strand Beach Services regarding Code Section 5-14:

> You have not been awarded a beach franchise therefore you . . . are not authorized to deliver your rental equipment to the beach or set up the same for your customers on the beach or use the beach for a staging area or for storing items from your business.

(*Id.*, p. 18.)

Although the City contends that on-beach delivery and setup are prohibited by Code 5-14, CGBG has offered delivery and setup services since it began operations. (*See* DE 58-4, pp. 10–11 at 49:1–50:19.) The City contends CGBG has "been able to perform every delivery and setup … that was ordered" by a customer, except instances when CGBG had insufficient staff. (*Id.*, pp. 17–18 at 76:22–77:10.)

For at least fifteen years preceding Plaintiffs' operations, other entities that rented beach equipment complied with Code 5-14 and did not provide delivery and set up on the beach. (*See* DE 58-3, pp. 3–4 at 25:22–25, 26:12–19.) In any event, when CGBG began to do so, "there was a pretty instantaneous reaction from people like McShane [owner of North Strand Beach Services] about, wait a minute. This is not what the rules are." (*Id.*, p. 4 at 26:21–23.)

E. The City's Amendment of the Ordinance Governing Obstructions on the Beach

In response to Plaintiffs' conduct, in June 2022, the City began amending its ordinances. (DE 59-3, p. 5 at 27:13–22.) The City Manager stated that the ordinance was amended "so that the rules were perfectly clear, even though everybody else understood them." (*Id.*) On June 29,

2022, the North Myrtle Beach ordinance entitled "Placing obstructions on the beach" was amended with the following italicized text:

> (a) Findings. The council of the city has made the following findings:
>
> (1) That the public beach is a public area, which is open and accessible to all persons;
>
> (2) That the public beach is maintained and subjected to reasonable regulation by the city in order to promote the health, safety, welfare and morals of all persons using the beach;
>
> (3) That the public beach provides a unique area for all persons to pursue peaceful relaxation and quiet enjoyment in a reasonable manner;
>
> (4) That the public beach has been and continues to be a unique public recreation area, different in respect to all other public areas within the municipality;
>
> (5) That it is desirable and necessary to preserve the unique nature of the public beaches and to protect all persons who utilize the beaches from harm, undue annoyance, disturbance and inconvenience.
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> (b) Hours. Except for municipal beach service equipment or equipment authorized by franchise agreement, it shall be unlawful between the hours of 7:00 p.m. and 8:00 a.m. for any person to set up and leave unoccupied or unattended any equipment or other items on the public beach including but not limited to shading devices, floats, umbrellas, beach chairs, lounge chairs, life rafts, etc. (collectively, beach wares), so as to interfere with beach cleaning and/or beach concession operations. *Regardless of the hours set forth herein and except for municipal beach service equipment or equipment authorized by franchise agreement, no person or company who for a fee or service as part of, or incidental to, its business operations for the sale, rental, lease, use or delivery of beach wares shall deliver to, place upon, set upon, or leave upon the public beach any beach wares.*

(*See* DEs 19-6 19-7, 19-8, 19-9, 19-10 ("Code 5-24").) Neither party disputes that the new language prohibits Plaintiffs' beach setup and delivery. (*See, e.g.*, DE 61, p. 19 ("By amending The City's Code 5-24," the City "ensured that no company engaged in beach rentals would be able to deliver and setup on the beach."); DE 1, ¶ 42.) Following the enactment of Code 5-24, Plaintiffs "pivot[ed] and expand[ed]" their company. (DE 58-1, p. 15; DE 61-4, pp. 48, 55–56 at 182:23–

184:8, 210:11–14, 217:2–6).) Plaintiffs established a new storefront location that sells retail items and concierge services. (DE 58-1, p. 15; DE 61-5, pp. 15–17 at 50:6–51:23, 57:2–13, 58:24–59:9).

F. Procedural History

On June 11, 2022, Plaintiffs—Derek Calhoun, Jacqueline Calhoun, and CGBG—filed a complaint against the City. (DE 1.) In the complaint, Plaintiffs asserted seven claims, including violations of South Carolina and Federal antitrust laws and certain provisions of the United States and South Carolina Constitutions. (*See id.*) One month later, on July 13, 2022, Plaintiffs moved to enjoin the City's enforcement of Codes 5-14 and 5-24. (*Id.*) Before the Court ruled on the motion, the City moved to dismiss Plaintiffs' complaint. (DE 21.) On September 2, 2022, the Court denied Plaintiffs' motion for a preliminary injunction. (DE 24.) Among other reasons, the Court noted that there was no substantial likelihood of success on the merits of any of Plaintiffs' claims. (*See id.*) On December 28, 2022, the Court granted in part and denied in part the City's 12(b)(6) motion. (DE 31.) The Court denied the motion except to the extent that it declined to address Plaintiffs' request for declaratory relief separately and dismissed one of Plaintiffs' constitutional claims and Plaintiffs' state-law defamation claims. (*Id.*, p. 2 n.3, 11–12, 14–15.)

On November 20, 2023, the City moved for summary judgment on Plaintiffs' remaining claims. (DE 58.) On December 4, 2023, Plaintiffs purported to cross-move for summary judgment in their favor on their Sherman Act claim in their response to the City's summary judgment motion.[3] (DE 61.) On July 17, 2024, the Court conducted a hearing on the motions for summary judgment and the responses and replies thereto. (DE 75.)

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[3] On July 7, 2023, this Court's "Consent First Amended Scheduling Order" provided that "[a]ll dispositive motions . . . shall be filed on or before **November 20, 2023**." (DE 47 (emphasis in original).) A summary judgment motion is a "dispositive motion." *See, e.g.*, Local Civ. R. 7.02(D) (D.S.C.); *id.* 16.02(C)(9); *cf.* Fed. R. Civ. P. 16(b)(3).

LEGAL STANDARD

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Under Rule 56(c), summary judgment is proper '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 the moving party is entitled to a judgment as a matter of law.'" *Id.* at 322. "A fact is 'material' if proof of its existence or non-existence would affect disposition of the case under applicable law. An issue of material fact is 'genuine' if the evidence offered is such that a reasonable jury might return a verdict for the non-movant." *Wai Man Tom v. Hosp. Ventures LLC*, 980 F.3d 1027, 1037 (4th Cir. 2020) (citation omitted). If the burden of proof at trial would be on the nonmoving party "a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Celotex Corp.*, 477 U.S. at 324. "[T]he

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Federal Rule 16(b)(4) permits filing outside the times set forth in a scheduling order only if "good cause" is shown. Fed. R. Civ. P. 16(b)(4). "'Good cause' requires 'the party seeking relief [to] show that the deadlines cannot reasonably be met despite the party's diligence,' and whatever other factors are also considered, 'the good-cause standard will not be satisfied if the [district] court concludes that the party seeking relief (or that party's attorney) has not acted diligently in compliance with the schedule.'" *Cook v. Howard*, 484 F. App'x 805, 815 (4th Cir. 2012) (per curiam). Here, Plaintiffs declined to request permission to move for summary judgment out-of-time. Instead, without any explanation, Plaintiffs filed their motion two weeks after the dispositive-motion deadline. As this Court has held previously,

> A cross[-]motion for summary judgment is not a responsive pleading predicated on the presence of an initial motion for summary judgment filed by the opposing party. The plaintiff's ability to file a motion for summary judgment is independent of any choice of the defendant to do so, and *it was his responsibility to seek an extension of time if he could not file it in the time allotted.*

Shaw v. Electrolux Home Prod., Inc., No. 8:08-cv-221-RBH, 2009 WL 3063009, at *13 (D.S.C. Sept. 21, 2009) (emphasis added). Therefore, the Court declines to entertain Plaintiffs' cross-motion for summary judgment.

burden on the moving party may be discharged by 'showing'— that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. "If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied . . . ." *Id.* at 332 (Brennan, J., dissenting).

Accordingly, once the movant has made this threshold demonstration, to survive the motion for summary judgment, pursuant to Rule 56(e), the nonmoving party must "go beyond the pleadings and by h[is] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324 (citation omitted). Under this standard, "the mere existence of a scintilla of evidence" in favor of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). "Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion." *Wai Man Tom*, 980 F.3d at 1037.

"Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." *Jacobs v. N.C. Admin. Office of the Cts*, 780 F.3d 562, 568 (4th Cir. 2015) (quoting 10A Charles A. Wright et al., *Federal Practice & Procedure* § 2728 (3d ed. 1998)). "The court may grant summary judgment only if it concludes that the evidence could not permit a reasonable jury to return a favorable verdict." *Sedar v. Reston Town Ctr. Prop., LLC*, 988 F.3d 756, 761 (4th Cir. 2021). "Therefore, courts must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (internal quotation marks omitted and alterations adopted). A court improperly weighs

the evidence if it fails to credit evidence that contradicts its factual conclusions or fails to draw reasonable inferences in the light most favorable to the nonmoving party. *See id.* at 659-60.

DISCUSSION

I. ANTITRUST

Plaintiffs contend that the City has violated Section 2 of the Sherman Act by "impos[ing] an unlawful monopoly on the rentals of beach chairs, beach umbrellas and related beach wares," and that the City is not entitled to antitrust immunity. (DE 1, p. 9.) The City admits it has such a monopoly. (DE 58-1, p. 23.) Nonetheless, the City moves for summary judgment in its favor because South Carolina has articulated and affirmatively expressed a policy to displace competition, thus immunizing the City from the federal antitrust laws. (*Id.*, p. 20.) This Court agrees.

A. The City's Antitrust Immunity Under the State-Action Doctrine

Section 2 of the Sherman Act "makes it unlawful to 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.'" *Parker v. Brown*, 317 U.S. 341, 350 (1943) (quoting 15 U.S.C. § 2). "And a plaintiff may bring a civil action when 'injured in his business or property by reason of anything forbidden in [Section 2].'" *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, No. 22-2168, 2024 WL 3642432, at *10 (4th Cir. Aug. 5, 2024) (quoting 15 U.S.C. § 15(a)). However, state governmental entities have limited liability exposure under the federal antitrust laws. One such limitation is that no damages can be awarded against local government defendants. *See* 15 U.S.C §§ 34–36. Another limitation flows from the juridical conclusion that Congress did not intend to derogate from "principles of federalism and state sovereignty" in crafting the Sherman Act. *City of Columbia v. Omni Outdoor Advert.*, 499 U.S. 365, 370 (1991). This latter

doctrine—so-called "state-action immunity"—can be invoked by states as well as substate entities accused of anticompetitive behavior. *W. Star Hosp. Auth. Inc. v. City of Richmond*, 986 F.3d 354, 358 (4th Cir. 2021).

"Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity . . . does not apply to them directly." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). Instead, for these entities, a showing is required that "the challenged restraint . . . [is] one clearly articulated and affirmatively expressed as state policy; [and] the policy . . . [is] actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 (1980). The Supreme Court has announced that the *Midcal* test is defendant-specific. *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 507–08 (2015). This means, for example, private-entity defendants must satisfy both prongs of *Midcal* to establish immunity. *See Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56–57 (1985). For municipalities, however, "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). In short, a municipality has a right to state-action immunity when it acts "pursuant to state policy to displace competition with regulation or monopoly," so long as the state policy is "clearly articulated and affirmatively expressed." *W. Star Hosp. Auth. Inc.*, 986 F.3d at 358.

Courts "have approached the clear-articulation inquiry . . . practically." *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229. Accordingly, a specific statutory authorization to engage in the anticompetitive conduct is not required. *Omni Outdoor Advert., Inc.*, 499 U.S. at 373 n.4. But if a statutory grant of authority clearly exists, it is sufficient that anticompetitive activity is the

"foreseeable result" of that authority. *Town of Hallie*, 471 U.S. at 42. Foreseeability boils down to an inquiry as to whether the "displacement of competition [i]s the inherent, logical, or ordinary result of the exercise of [that] authority . . . ." *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229. The application of state-action immunity is a question of law.[4] *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 843 F.3d 1225, 1248 (10th Cir. 2016); *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996); *Berger v. Cuyahoga Cnty. Bar Ass'n*, 983 F.2d 718, 721 (6th Cir. 1993); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 770 F.2d 833, 835 (9th Cir. 1985); *N. Carolina State Bd. of Dental Examiners v. Fed. Trade Comm'n*, 768 F. Supp. 2d 818, 822 (E.D.N.C. 2011).

B. The Parties' Arguments

The City's arguments turn on the foreseeability of its admitted monopoly of beach set-up and delivery under Sections 5-7-30 and 5-7-145 of the South Carolina Code. (DE 58-1, p. 21.) The City argues that "[t]he authority to grant a franchise" under Section 5-7-30 "is inherently the power to displace competition," and this statutory provision alone is sufficient for antitrust immunity. (*Id.*) In addition, the City contends that the authority to "make charges for the use of public beaches" supports their argument. (DE 63, p. 10.) The City also points to Section 5-7-145 as evidence that the South Carolina General Assembly has authorized municipalities to "retain control" over "lifeguard and other safety related services" and that a monopoly on beach set-up and delivery is a foreseeable component of the funding scheme established by the State. (DE 58-1, pp. 21–22.)

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[4] In Plaintiffs' purported cross-motion for summary judgment, they agreed that "the applicability of the state-action immunity doctrine will solely be a question of law for the Court" and, on Defendant's motion for summary judgment, contended that the "time is now" for a ruling in Plaintiffs' favor on the issue. (DE 61, pp. 1–2.)

On the other hand, Plaintiffs argue first that Section 5-7-30 cannot provide "a clearly articulated state policy to displace competition" because its broad grant of "Home Rule" authority is insufficient, under *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40 (1982) and *Phoebe Putney Health Sys., Inc.* to suggest that the City's monopolization of beach set-up and delivery is a "foreseeable anticompetitive activity" sanctioned by the South Carolina General Assembly. (DE 61, p. 8.)

Second, Plaintiffs argue that because Section 5-7-145 is a "more specific code section," as a matter of statutory interpretation, it is the relevant source of the South Carolina General Assembly's intent regarding the City's conduct. (*Id.*) But because the only "clearly articulated" anticompetitive policy comprehended by Section 5-7-145 is that a private beach safety company may obtain a monopoly following a "competitive[] procure[ment] through lawful means," the City's "funding its lifeguard services via a monopoly on delivery and setup of beach equipment" is unforeseeable—and therefore unsanctioned—as State policy. (*Id.*, pp. 9–10.)

C. South Carolina's Choice to Displace Competition in Beach Equipment Rentals

Properly understood, South Carolina's statutory scheme clarifies that the City can rent beach equipment exclusively. Accordingly, the "inherent, logical, [and] ordinary result of th[is] exercise of the authority delegated by the state legislature" is the displacement of competition in that sphere. *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229. Because the challenged Codes carry out this anti-competitive policy, the City is entitled to antitrust immunity.

1. The City's Express Authority to Exclusively Provide Beach Equipment Rentals

Though they disagree about interpretation and applicability, the parties agree that the relevant statutory provisions of the South Carolina Code to this matter are Sections 5-7-30 and 5-7-145. Taking the latter statute first, its initial subsection provides, in total, that

> (A) Each municipality bordering on the Atlantic Ocean is authorized to provide lifeguard and other safety related services on and along the public beaches within its corporate limits. A coastal municipality may enact and enforce regulations it determines necessary for the safety of all persons on the beach.

S.C. Code Ann. § 5-7-145(A). Subsection (B) states, "Lifeguard services may be provided using municipal employees or by service agreement with a private beach safety company." *Id.* § 5-7-145(B). Subsection (B) further provides, that

> [i]f the municipality elects to provide the services by an agreement with a private beach safety company, the following conditions apply:
>
> > (1) the municipality shall follow the procedures of the State Procurement Code, as found in Chapter 35 of Title 11, or the procedures of the municipal procurement code, in the awarding of contracts with private beach safety companies;
> >
> > (2) the agreement between the municipality and the private beach safety company may last no longer than seven years;
> >
> > (3) the municipality may grant the exclusive right to the beach safety company to rent only the beach equipment and to sell only the items to the public on the beach that are allowed by the municipality on the effective date of this section; provided, however, that on and after the effective date of this section there shall be no granting of the right to rent any additional tangible items, or to sell any beverages to the public on the beach, or otherwise, unless and until additional personnel are hired for the additional rentals and additional activities sufficient in number so that employees already employed on the effective date of this section will not be unduly burdened as determined by the appropriate municipal governing body . . . .

Id. § 5-7-145(B)(3). Thus, at a glance, this statute makes clear that subsection (A) grants the City authority to provide lifeguard and safety-related services and enact regulations on the public beaches. Subsection (B) of the statute makes clear that the City can choose "to provide the services"—which refers to the antecedent "lifeguard services"—by way of "an agreement with a private beach safety company" so long as the municipality adheres to certain restrictions. "Lifeguard services" is not a specifically defined term in the statute. But the context of sub-subsection (B)(3) explains that the City's authority to perform lifeguard services is tied to the

"exclusive right" to "rent . . . beach equipment . . . to the public on the beach . . . allowed by the municipality on the effective date of this section . . . ." *Id.* § 5-7-145(B)(3).

Undergirding Section 5-7-145 is Section 5-7-30, where the legislature has granted municipalities broad legislative, business, and police powers under home rule. Section 5-7-30, along with the South Carolina Constitution, "obviat[es] the requirement for further specific statutory authorization" if a City seeks to enact "necessary and proper" regulations "so long as such regulations are not inconsistent with the Constitution and general law of the state." *Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993). The Court notes that Section 5-7-30 was amended to permit franchising and the ability to "make charges for use of [the] public beach[es]" at the same time Section 5-7-145 was enacted. *See* Act of June 30, 1999, No. 113, § 21(A), 1999 S.C. Acts 1154, 1169–70.

The text and structure of Sections 5-7-145 and 5-7-30 leave no doubt as to the City's prerogative to exclusively provide on-beach setup and rentals to support lifeguard services and displace competition. To begin with, Section 5-7-145 expressly authorizes the City to provide "lifeguard and other safety related services" on public beaches "using municipal employees" without limitation on how the City may do so. S.C. Code Ann. § 5-7-145(A)–(B). The only exception is if he City "elects to provide" these services "by an agreement with a private beach safety company." *Id.* In such cases, the restrictions set forth by the General Assembly in Section 5-7-145(B)(1)–(3) apply. But beyond that, Section 5-7-145(B)(3) makes clear that the provision of "the services" includes or encompasses "the exclusive right . . . to rent" certain beach equipment. *Id.* § 5-7-145(B)(3). Though sub-subsection (B)(3) is a limitation of the legal components of an

agreement with a "beach safety company," it clearly and necessarily implies that, outside of that context, such authority belongs to the City.[5]

Thus, these subsections contain the South Carolina General Assembly's grant of authority to the City to exclusively provide lifeguard and safety-related services either by itself—in which case it necessarily must displace competition in such services—or through an agreement with a private beach safety company, in which case it *may* grant the exclusive right to rent certain beach equipment.

2. Codes 5-14 and 5-24 Are Foreseeable Implementations of the City's Authority

Plaintiffs primarily criticize the foreseeability of the City's monopoly. Plaintiffs argue that Codes 5-14 and 5-24 are *not* the logical, inherent, and ordinary result of the City's authority under Section 5-7-145. (DE 61, pp. 9–10.) Instead, Plaintiffs assert that the location of the word "exclusive" in the latter statute suggests *only* the foreseeability of a private-beach-safety-company monopoly on beach equipment rentals. (*Id.*) Thus, by Plaintiffs' reading, the City's enactment of Code 5-24 was unforeseeable.

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[5] Section 5-7-145(B)(3) authorizes a certain act—namely, that the City "may grant the exclusive right to the private beach safety company to rent . . . beach equipment." *Id.* §§ 5-7-145(A), (B)(3). Therefore, the import of Sub-subsection (B)(3) is that it "implicitly authorizes whatever is a necessary predicate of that act," namely, the City's authority to possess that same power itself. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 96–97 (2012) (discussing the "Omitted Case Canon"); *see id.* at 192 (describing the similar "Predicate-Act Canon" as "just common sense—and is one of the reasons why 'strict construction' is foolish . . . ."). And with Section 5-7-30 operating in the background—amended by the same legislation that created Section 5-7-145—there can be no doubt as to the City's authority.

Furthermore, other provisions of this Chapter that permit the City to enter contracts support this commonsense reading. *See, e.g.*, S.C. Code § 5-7-60 (providing that "[a]ny municipality may perform *any of its functions*, furnish any of its services, . . . in areas outside the corporate limits of such municipality *by contract* with any individual, corporation, state or political subdivision or agency thereof . . ." (emphasis added)). The Court may take judicial notice of South Carolina law. *S. Ry. Co. v. O'Dell*, 252 F. 540, 543 (4th Cir. 1918) ("The federal courts take judicial notice of the statutes of the states.").

Plaintiffs' reading conflicts with the plain text and structure of the statute. First, although "exclusive" appears in the context of the limitations imposed on agreements with private beach safety companies, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012). Even assuming Plaintiffs are correct that the authority granted in Section 5-7-30 does not, on its own, establish the foreseeability of the City's authority to displace competition in rentals of beach equipment,[6] the plain text of Section 5-7-145(A) gives the City authority to regulate the public beaches *and*—relevant here—the provision of lifeguard and safety-related services. Plaintiffs' reading of "exclusive" in Section 5-7-145(B)(3) thus imposes an atextual limitation on Section 5-7-145(A) and (B): namely, that although the City may regulate the public beaches and provide lifeguard and safety-related services thereon, it may *not* exclusively provide beach equipment rental. *Cf. SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 368 (2018) ("We need not and will not invent an atextual explanation . . . when the statute's own terms supply an answer.") Aside from having no basis in the text, such a limitation ignores both the structural scheme connecting beach equipment rentals to lifeguard services and the General Assembly's choice to limit the City's authority only concerning its "agreements," not the City's authority to act itself. S.C. Code Ann. § 5-7-145(B)(1)–(5).

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[6] Plaintiffs' argument that Section 5-7-30 cannot be considered with respect to foreseeability (see DE 61, p. 8) is unpersuasive in light of the statutory structure at issue here. It is true that standing alone, a grant of home-rule authority reflecting "mere neutrality respecting the municipal actions challenged as anticompetitive" is insufficient. *City of Boulder*, 455 U.S. at 55–56. But Section 5-7-30 does *not* stand alone with respect to the City's authority to provide lifeguard and safety-related services. As discussed above, it was amended at the same time Section 5-7-145 was passed. And courts ordinarily consider all applicable statutory provisions in analyzing whether state-action immunity applies. *See, e.g.*, *Uetricht v. Chicago Parking Meters, LLC*, 64 F.4th 827, 836 (7th Cir.), *cert. denied*, __ U.S. __, 144 S. Ct. 354 (2023) (noting that in context of a home-rule city, "[s]everal Illinois laws, taken together, provide the authority for the state's municipalities to regulate parking" (emphasis added)); *W. Star Hosp. Auth. Inc.*, 986 F.3d at 359; *Chamber of Com. of the United States of Am. v. City of Seattle*, 890 F.3d 769, 783 (9th Cir. 2018).

Second, if the exclusive right to rent beach equipment was *not* included in the authorization of the provision of lifeguard and safety-related services pursuant to Section 5-7-145(A), then the statutory limitation on the City's authority to contract with "a private beach safety company" in Sub-subsection (B)(3) would itself be superfluous. "We must also construe statutes to "avoid any interpretation that may render statutory terms meaningless or superfluous." *United States v. Bethea*, 841 F. App'x 544, 555 (4th Cir. 2021). Where, as here, "[t]he canon against surplusage is strongest [is] when an interpretation would render superfluous another part *of the same statute*." *Navy Fed. Credit Union v. LTD Fin. Servs.*, LP, 972 F.3d 344, 361 (4th Cir. 2020) (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013)) (alteration adopted and emphasis added). For this reason, too, Plaintiffs' reading must be rejected.[7]

Even if Code 5-14 outlaws Plaintiffs' conduct "upon the public beaches" by providing that "no person shall sell, lease or rent any goods, wares or other property on the beach"—and, as discussed below, it does—this is a foreseeable implementation of the City's authority. The parties agree that Code 5-24 outlaws Plaintiffs' contracts here. (*See, e.g.*, DE 61, p. 19 ("By amending The City's Code 5-24," the City "ensured that no company engaged in beach rentals would be able to deliver and setup on the beach."); DE 1, ¶ 42.) Therefore, by eliminating the provision of rental on the beaches by others, the City has implemented its "exclusive right to . . . rent . . . beach equipment" on the public beaches. S.C. Code Ann. § 5-7-145(B)(3); *see id.* §§ 5-7-30, 5-7-145(A). In light of Section 5-7-30 and (particularly) Section 5-7-145, it is hard to imagine a more logical, inherent, or ordinary exercise of the City's authority.

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[7] Plaintiffs' reading also cannot be squared with the text of Code 5-14 that: "this provision shall not prohibit the City of North Myrtle Beach . . . from . . . renting goods and wares such as beach umbrellas and chairs and concession items in conjunction with the city providing lifeguard services." Code 5-14.

Ultimately, state-action immunity does not require that the City "be able to point to a specific, detailed legislative authorization . . ." *Omni Outdoor Advert., Inc.*, 499 U.S. at 373 n.4 (quoting *Town of Hallie*, 471 U.S. at 39); *see Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229 ("'[n]o legislature . . . can be expected to catalog all of the anticipated effects' of a statute delegating authority to a substate governmental entity." (quoting *Town of Hallie*, 471 U.S. at 43)). Instead, it is sufficient if "the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney Health Sys., Inc.*, 568 U.S. at 229. Under this standard, the statutory text and structure of Sections 5-7-145 and 5-7-30 make clear that the City is authorized to "exclusive[ly]" provide "rent[als] . . . [of] beach equipment . . . ." *Id.* § 5-7-145(B)(3). So, Codes 5-14 and 5-24 are the inherent, logical, and ordinary result of that authority.

Because the South Carolina General Assembly has clearly articulated and affirmatively expressed a delegation of authority to displace competition, and monopolies are a foreseeable result of that delegation, the City is immune from Plaintiffs' Section 2 claim.[8] Accordingly, summary judgment on this claim is appropriate in the City's favor.[9]

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[8] This Court also rejects Plaintiffs' market participant exception to the City's state action immunity defense. The Fourth Circuit has held that "[t]he Supreme Court has never recognized such an exception; in fact, it has suggested only that it might possibly exist." *W. Star Hosp. Auth. Inc.*, 986 F.3d at 360. There is no need to speculate about whether such an exception—if it exists—applies here.

[9] Plaintiffs also allege violation of the South Carolina Antitrust Act, S.C. Code Ann. § 39-3-110, *et seq.* (DE 1, ¶¶ 104–112.) The City contends it is entitled to summary judgment on this claim because there is no private right of action under Section § 39-3-120 of the South Carolina Code, the specific statute relied on by Plaintiffs. Rather, Section 39-3-190 specifically states that "[t]he Attorney General and the solicitor of each circuit in which an offense is committed, respectively, shall enforce the provisions of this article," *i.e.* Sections 39-3-110 through 39-3-200. S.C. Code Ann. § 39-3-190; *see Trident Neuro-Imaging Lab. v. Blue Cross & Blue Shield of S.C., Inc.*, 1982 WL 1955, at *7 (D.S.C. Nov. 2, 1982). Plaintiffs did not respond. Furthermore, at the hearing, Plaintiffs' counsel conceded they lack standing to bring a claim for a violation of the South Carolina Antitrust Act. (Summ. J. Hr'g Tr. 61:25–62:6.) Accordingly, the Court finds that Plaintiffs, as private actors, "have no standing to pursue this matter under South Carolina's antitrust laws." *Id.*

II. TAKINGS

Plaintiffs allege that the amendment of Code 5-24 constitutes a regulatory taking under the framework established in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). (*See* DE 1, ¶ 61.) Plaintiffs contend that the amendment extinguished "all economically beneficial and profitable uses of Plaintiffs' business, save bare ownership," that it "jeopardizes the sustainability of Plaintiffs' businesses [sic] and the rights of Plaintiffs with respect to property ownership," and that "Plaintiffs' business cannot be economically viable in light of" the amendment.[10] (DE 1, ¶¶ 60, 67, 68.) However, the latent premise of this contention is that Plaintiffs' beach setup and delivery was lawful *before* Code 5-24 was enacted. Because Code 5-14 was in effect before Code 5-24's enactment—and the City's position on what Code 5-14 prohibits was known to Plaintiffs before then—its meaning is important. To that end, "the interpretation of a statute is a question of law." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 876 (4th Cir. 1992); *see also Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010) ("[A] question of statutory interpretation, [is] a quintessential question of law . . . ." (quoting *United States v. Joshua*, 607 F.3d 379, 382 (4th Cir. 2010))). When a "dispute ultimately turns entirely on a question of statutory interpretation, the district court . . . [may] resolve the case on summary judgment." *United States v. West Virginia*, 339 F.3d 212, 214 (4th Cir. 2003). Thus, for the Court to consider the import of Code 5-24, the Court must consider whether Code 5-14 prohibited Plaintiffs' conduct before CGBG began business.

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[10] Although Plaintiffs Derek and Jacqueline Calhoun assert this regulatory takings claim along with CGBG, at the hearing, Plaintiffs' counsel conceded that these claims can only be asserted by CGBG. (Sum. J. Hr'g Tr. 94:17–21.) Thus, as to Plaintiffs Derek and Jacqueline Calhoun, these claims must be dismissed. *See Star v. TI Oldfield Dev., LLC*, 962 F.3d 117, 131 n. 17 (4th Cir. 2020) ("Generally, a shareholding of a [limited liability] corporation has no standing to assert legal claims based on harm to the corporation. Although the shareholding is indirectly harmed by any harm to the corporation, only the corporation itself may bring an action to redress this harm." (quoting another source)).

A. Code 5-14 Prohibits Plaintiffs' Setup and Delivery on the Public Beaches

Turning first to the text of Code 5-14, it provides, in relevant part:

> Upon the public beaches . . . no person shall sell, lease or rent any goods, wares or other property except that this provision shall not prohibit the holder of a beach franchise or license from exercising the rights and privileges granted therein . . . . Furthermore, this provision shall not prohibit the City of North Myrtle Beach and its authorized employees from selling and or renting goods and wares such as beach umbrellas and chairs and concession items in conjunction with the city providing lifeguard services.

(DE 61, p. 3.) Because "the primary rule of statutory construction is to ascertain and give effect to the intent of the legislature," *Mikell v. Cnty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009), the Court must analyze the language the City Council chose to employ. Here, the ordinance was crafted unambiguously to prevent *any* "s[ale], lease, or rent[al]" transaction in "goods, wares, or other property" from occurring on the public beach.

The gravamen of Plaintiffs' claim is that "nowhere in th[e] ordinance does it state that delivery and setting up of beach equipment is prohibited." (DE 61, p. 3.) Such an interpretation would remove from coverage what Plaintiffs concede is a portion of CGBG's transaction that culminates on the public beaches.[11] Plaintiffs' construction would permit an entire rental transaction to occur on the public beach so long as CGBG's employees were paid by, or even handed a receipt to, the customer in the parking lot. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Plaintiffs' interpretation suggests this Court should construe Code 5-14 to forbid a transaction except for *parts* of it. Plaintiffs' construction is specious at best. Thus, the Court declines to reach this unreasonable result.

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[11] When pressed during the summary judgment hearing, CGBG's counsel conceded, as he must, that customers paying CGBG for set up and delivery is part of the transaction that occurs on the public beach. (Summ. J. Hr'g Tr. 81:6–12.)

Were there any doubt about the "sheer applesauce of [Plaintiffs'] statutory interpretation," *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 113 (2007) (Scalia J., dissenting), the ordinance's following sentence removes it. The City Council carved out an exception that permits the City to provide on-beach rental of umbrellas and chairs along with the provision of lifeguard services. As discussed above, statutes—as well as ordinances—should not be read to render language superfluous. This carve-out would be superfluous if Code 5-14 did not prohibit on-beach delivery and setup. Accordingly, Code 5-14 prohibits all or part of a sale, lease, or rental on the beach. This includes delivery and set up on the beach, where delivery and set up are included in a contract for the rental or purchase of beach equipment.

B. Regulatory taking under the Fifth Amendment and the South Carolina Constitution

Even if Code 5-14 did not prohibit all or part of a sale, lease, or rental on the beach, the City contends it would otherwise be entitled to summary judgment on this claim because "Plaintiffs cannot point to admissible evidence sufficient to demonstrate a triable issue of fact as to any element of the *Penn Central* test." (DE 58-1, p 24.) CGBG contends that genuine disputes of material fact remain as to "the diminution in value as to Plaintiffs' business, the lawfulness of Plaintiffs' business activities, and [Plaintiffs'] amortization period." (DE 61, p. 18.) This Court disagrees.

To begin with, the Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. CONST. amd. V; *see* S.C. CONST. Art. I § 13. "A 'taking' can be of personal or real property, and it can be effected through either a physical appropriation of the property by the Government or through a regulation that goes 'too far' in depriving the owner of her property rights." *Md. Shall Issue v. Hogan*, 963 F.3d 356, 364 (4th Cir. 2020); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992). In a challenge

to a regulation that has "go[ne] too far," courts consider the factors set forth in *Penn Central Transportation. Co.*, namely, "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Clayland Farm Enters., LLC v. Talbot Cnty.*, 987 F.3d 346, 353 (4th Cir. 2021) (internal citations omitted). In this analysis, "[t]he first two factors—economic effects and investment-backed expectations—are '[p]rimary among those factors.'" *Id.*

The threshold question is the nature of the property interest with which CGBG contends the City has interfered. *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014); *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 605, 641 S.E.2d 437, 441 (2007) (noting that in considering a taking under the South Carolina Constitution, the court "analyze[s] what property interests exist" in context of the claimed taking); *cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Valid contracts are property and may be protected by the Takings Clause. *U.S. Tr. Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). In addition, "[t]he assets of a business (including its good will) unquestionably are property . . . ." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (in the context of the Fourteenth Amendment). However, business assets must be distinguished from "mere engagement in a particular business activity," which "is not property protected by the Fifth Amendment." *Huntleigh USA Corp. v. United States*, 63 Fed. Cl. 440, 444 (2005); *cf. Coll. Sav. Bank*, 527 U.S. at 675 (noting "business in the sense of the activity of doing business, or the activity of making a profit *is not property* in the ordinary sense" (emphasis added)).

Although CGBG has entered contracts with third parties, it does not have a property interest in or the right to conduct business on public lands. *See City of Charleston v. Roberson*, 275 S.C. 285, 287, 269 S.E.2d 772, 772 (1980) ("No one has the inherent right to carry on his private

business along the public streets. Such rights can be exercised only under such terms and conditions imposed by the city authorities."); *cf. Connolly*, 475 U.S. at 223–24 (1986) ("Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.").

At any rate, assuming without deciding that CGBG has a property right in its contracts as "assets" at the enactment of Code 5-24,[12] for these reasons, CGBG *still* has not stated a claim under the Takings Clauses of the United States or South Carolina Constitutions. Under prong one of *Penn Central*, CGBG points to its evidence of a 58% diminution in value of its business "assets." (*See* DE 61-4, pp. 51–52 at 197:7–198:11). But as the Fourth Circuit Court of Appeals explained in denying an appeal of a Takings Clause challenge where a 40% diminution was alleged, courts have "found no regulatory taking when presented with diminutions in value of 75 percent and 92.5 percent." *Clayland Farm Enters.*, 987 F.3d at 354. In *Penn Central*, the Supreme Court noted diminutions of a similar magnitude failed to establish a taking. *See* 438 U.S. at 131 (citing cases requiring 75% and 87 1/2% diminutions in value). Perhaps most importantly, courts finding a taking of business assets have only so found after concluding that the challenged conduct left "no alternatives" for the owner, that "the taker fully occup[y] the owner's shoes[;]" and that the "government[] intended [to] tak[e]" the owner's "entire business." *Huntleigh*, 63 Fed. Cl. at 445–46. CGBG has made no such showing.

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[12] This is far from clear given Code 5-14's effect on the lawfulness of Plaintiffs' contracts. Under South Carolina law, laws enacted by sub-state entities "invalidate[] or render[] dead" a contract the subject of which is the legally prohibited conduct. *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 372, 601 S.E.2d 342, 345 (2004). Accordingly, whether CGBG's contracts for beach set-up and delivery were "valid" property interests under the Fifth Amendment, *see Lynch v. United States*, 292 U.S. 571, 579 (1934), is, as a question of South Carolina law, dubious.

Under *Penn Central* prong two, CGBG explains that "all economically beneficial and profitable uses of Plaintiffs' business, save bare ownership, were extinguished" by the City's enactment of Code 5-24. (DE 1, p. 11; *see* DE 29, pp. 12–13; DE 61, pp. 18–19.) CGBG points to its inability to lawfully contract to set up and deliver equipment on the public beaches. (DE 61, pp. 18–99; *see* DE 61-4, p. 14 at 48:8–25; DE 61-4, p. 33 at 123:19–124:9.) But if CGBG "lost value in all the contracts [it] performed" as a result of "continuous[] criminal[] prosecut[ion]" after enactment of Code 5-24 (DE 61, p. 19), even when "legislation disregards or destroys existing contractual rights [it] does not always transform the regulation into an illegal taking." *Connolly*, 475 U.S. at 224. And for over one hundred years, the law has been that "frustration in performance of even an existing contract is not a taking of contract rights" under the Takings Clause. *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986); *Omnia Com. Co. v. United States*, 261 U.S. 502, 508 (1923). In a moment of candor, Plaintiffs' counsel advised the Court it had not one case holding that citations incurred during the performance of purportedly illegal contracts constitutes a taking of those contracts. (Summ. J. Hr'g Tr. 71:2–5.)

To stave off summary judgment, CGBG points to the City's disputation of CGBG's projected 58% loss in future revenues from the enactment of Code 5-24 as creating a genuine dispute of material fact.[13] (DE 61, p. 18; DE 58-1, p. 26 n.6.) But such a dispute, even if genuine, is immaterial because "the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315–16 (4th Cir. 1993). Here, CGBG has made an insufficient showing under prong one of *Penn Central*, and its argument under prong two, where it does not recycle the same arguments (*see* DE 61, p. 19), merely adds that the "legality of Plaintiffs' business practices" is "for the jury." (*Id.*) But the illegality of Plaintiffs' business under

[13] The City, of course, does not suggest that *more* than 58% was taken.

Code 5-24 is undisputed. And regarding the meaning of Code 5-14—which determines the legality of Plaintiffs' pre-enactment contracts for set up and delivery on the public beaches and thus, repudiates Plaintiffs' investment-backed expectations—that is not a jury question because "a question of statutory interpretation, [is] a quintessential question of law." *United States v. Joshua*, 607 F.3d 379, 382 (4th Cir. 2010). There is thus no factual dispute, and on the facts presented, no reasonable jury could find a taking when prong one of *Penn Central* is not met, and prong two is unsupported.

Finally, if CGBG's assets lost value, Plaintiffs have "pivoted" to other business ventures. In addition, as it has always been able to do, Plaintiffs may setup and deliver beach equipment on *private* property next to the public beaches—including private beaches. *See* S.C. Code Ann. § 5-7-145(C) ("Nothing in this section enlarges, restricts, or infringes upon the existing rights of the owners of private property adjacent to the public beaches."). Even taking all facts and drawing all inferences in CGBG's favor, a reasonable jury could not find a taking of CGBG's business assets under the Takings Clauses of the United States and South Carolina Constitutions. Accordingly, summary judgment on this claim is appropriate in the City's favor.

III. CONTRACT CLAUSES

The City contends it is entitled to summary judgment on Plaintiffs' federal and state constitutional contract clause claims. Both the federal and state constitutions prohibit state law from "impairing the obligation of contracts." U.S. CONST. art. I, § 10; S.C. CONST. art. I, § 4; *see Sveen v. Melin*, 138 S. Ct. 1815, 1821 (2018) ("The Contracts Clause restricts the power of States to disrupt contractual arrangements."); *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 476 S.E.2d 481, 485 (S.C. 1996) ("follow[ing] federal precedent construing the federal Contract

Clause").[14] "To determine when such a law crosses the constitutional line, th[e Supreme] Court has long applied a two-step test": (1) "whether the state law has operated as a substantial impairment of a contractual relationship" and (2) "whether the state law is drawn in an appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1821–22 (internal quotation marks omitted).

Plaintiffs contend there is a genuine issue of material fact about whether contracts it entered were substantially impaired when the City amended Code 5–24. (DE 61, p. 16.) Plaintiffs offer evidence that CGBG had valid and existing contracts for delivery and setup with customers at North Beach Villas at the time the City amended Code 5-24 to make delivery and setup unlawful. (DE 61-4, p. 36 at 136:14–137:13.) Plaintiffs argue that they have been cited for code violations while performing the contract. (DE 61, p. 17.) Laying aside that it is equally undisputed that CGBG performed its contracts anyway (DE 61-4, p. 21 at 76:22–77:1 (noting that "[e]very delivery, every setup ordered through the company we've performed"); *see* DE 61-5, p. 22 at 79:11–81:16)), as discussed *supra*, CGBG's conduct was *already* unlawful pursuant to Code 5-14, which predated Code 5-24's amendment. Thus, the City's amendment to Code 5-24 did not "impair"—in the sense of rendering illegal—any interest of Plaintiffs that was not already so impaired, much less did it do so substantially. This being so, Plaintiffs cannot assert a Contracts Clause claim.[15] For this reason, summary judgment on this claim in the City's favor is appropriate.[16]

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[14] The same analysis applies to both aspects (federal and state) of Plaintiffs' claim. *Cf. Kirven v. Cent. States Health & Life Co.*, 409 S.C. 30, 40, 760 S.E.2d 794, 799 (2014) (conducting a single analysis of claims under the federal and state constitutions).

[15] Given the Court's ruling, the Court declines to reach the significant and legitimate public purpose prong of the test.

[16] Plaintiffs seek a declaratory judgment on all their claims, including the lawfulness of Code 5-14, pursuant to 28 U.S.C. Section 2201. (DE 1, ¶¶ 96–103.) "[A]ny court of the United States, . . . , may

IV. PRIVILEGES AND IMMUNITIES CLAUSE

The City contends it is entitled to summary judgment on Plaintiffs' Privileges and Immunities Clause claim under the South Carolina constitution. However, this Court is a court of limited subject matter jurisdiction. *See* U.S. CONST. art. III, § 2; *see also* 28 U.S.C. §§ 1331, 1332. Though this Court *may* hear a claim under its supplemental jurisdiction, it need not do so where, as here, "the district court has dismissed all claims over which it as original jurisdiction . . . ." *Id.* § 1367(c)(3). Dismissal is also appropriate when "the claim raises a novel or complex issue of State law . . . ." 28 U.S.C. § 1367(c)(1). Nonetheless, courts should consider "the values of judicial economy, convenience, fairness, and comity" when deciding to decline supplemental jurisdiction. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

First, the Court has dismissed—or declined jurisdiction over—all of Plaintiffs' federal claims. At summary judgment, courts generally "should decline to exercise jurisdiction over any remaining pendent state law claims by dismissing those claims without prejudice." *Henderson v. Harmon*, 102 F.4th 242, 251 (4th Cir. 2024) (quoting another source). Second, Plaintiffs' state-law claim is based on a constitutional provision that has not been recently interpreted by the South Carolina Supreme Court, which has described the provision's scope as "incapable of limitation by

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declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 18 U.S.C. § 2201(a). However, "[g]iven th[e] 'nonobligatory' language" of the statute, "the Supreme Court has explained that 'in the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.'" *Riley v. Dozier Internet L., PC*, 371 F. App'x 399, 401 (4th Cir. 2010) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (alteration adopted).

To that end, because the Court has already concluded that no reasonable jury could find in Plaintiffs' favor on nearly all substantive causes of action asserted, to now separately "declare the rights and other legal relations" of the parties would be, as a matter of judicial economy, duplicative. Furthermore, to the extent that Plaintiffs seek a declaration that Code 5-14 and Code 5-24 are "[u]nconstitutional" under the *South Carolina* constitution, (DE 61, p. 16), the preclusive effects of such relief on federal-state comity warrants caution. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 471 (1974). The Court declines therefore to assert jurisdiction over Plaintiffs' claim for a declaratory judgment.

exact definition." *Tillman v. Tillman*, 84 S.C. 552, 66 S.E. 1049, 1052 (1910). South Carolina courts are equally well positioned—if not better so—to contour this provision by interpreting and applying it. *See Jones v. Fitch*, 665 F.2d 586, 593 (5th Cir. 1982) (holding that declining jurisdiction "was further supported by the existence of an issue of state constitutional law not previously addressed by the state supreme court.").

The values espoused in *Carnegie-Mellon Univ.* support dismissing this claim without prejudice. In addition to reasons of comity and judicial economy set forth above, this case has not proceeded to trial. Though the parties have engaged in discovery so far, there is no reason why those materials could not be used in a subsequent state proceeding before South Carolina courts. Thus, for these reasons, the Court declines to exercise its supplemental jurisdiction under 28 U.S.C. Sections 1367(c)(1), (3). Accordingly, the Court dismisses Plaintiffs' claim under the South Carolina Privileges and Immunities Clause without prejudice.

CONCLUSION

For the reasons set forth above, the Court grants summary judgment in favor of the City on Plaintiffs': (1) Sherman Antitrust Act claim; (2) Regulatory Takings claims under the United States and South Carolina Constitutions; and (3) Contract Clause claims under the United States and South Carolina Constitutions. However, the Court declines to exercise its jurisdiction over Plaintiffs' remaining claims and dismisses them without prejudice.

IT IS SO ORDERED.

Joseph Dawson, III
United States District Judge

Florence, South Carolina
September 6, 2024