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

Marlboro Electric Cooperative, Inc., Plaintiff, v. Central Electric Power Cooperative, Inc., Defendant.	C/A No. 4:20-cv-04386-SAL **ORDER**

Before the court is a Motion for Summary Judgment ("Motion") filed by Defendant Central Electric Power Cooperative, Inc. ("Central"). [ECF No. 67.] For the reasons outlined herein, the Motion is granted.

BACKGROUND & PROCEDURAL HISTORY

This action involves a dispute between two companies, both cooperatives. On one side of the dispute is Plaintiff Marlboro Electric Cooperative, Inc. ("Marlboro"), a purchaser of electricity and member of a cooperative. On the other side is Central, the seller of electricity and cooperative of which Marlboro is a member. Two agreements govern the relationship between Marlboro and Central. First, the agreement to sell and purchase electricity is memorialized in a contract—the Wholesale Power Contract ("WPC"). Second, the cooperative relationship between the two entities is governed by Central's Bylaws (the "Bylaws"). The dispute arises because Marlboro no longer wants to be a member of the cooperative or purchase electricity from Central, despite its contractual obligations to do so for the next 30+ years.

The disagreement came to a head on November 18, 2020, when Marlboro filed a complaint against Central in the Court of Common Pleas for Marlboro County, South Carolina. [ECF No. 1-1, Compl.] The complaint asserts three causes of action—two declaratory judgment claims and

one claim for breach of contract. The first declaratory judgment claim asks for three declarations: (1) Central materially breached the Bylaws and the WPC by refusing to provide equitable terms and conditions for Marlboro's withdrawal from membership in the cooperative; (2) Central materially breached the Bylaws and the WPC by refusing to seek or obtain Santee Cooper's consent to the termination of the WPC; and (3) as a result of the breaches, Marlboro is excused from further contractual performance. *Id.* at ¶¶ 44–60. The second declaratory judgment claim asks for two declarations: (1) the Bylaws require Central to provide Marlboro with equitable terms and conditions for withdrawal and (2) Marlboro has a legal right to withdraw from Central pursuant to the South Carolina Nonprofit Corporation Act. *Id.* at ¶¶ 61–70. And the breach of contract action submits that the WPC and Bylaws are enforceable contracts that were breached by Central when it refused to provide equitable terms to Marlboro for its withdrawal and by refusing to allow Marlboro to withdraw on equitable and fair terms. *Id.* at ¶¶ 71–81. All three claims pertain to whether Central was required by contract to provide Marlboro with equitable terms and conditions to withdraw from its cooperative membership and terminate the WPC.

On December 18, 2020, Central removed the case to this court. [ECF No. 1.] Central answered the complaint and later amended the answer to include a counterclaim for breach of the WPC. [ECF Nos. 6, 13, Ans.] Marlboro answered the counterclaim on February 8, 2021. [ECF No. 21.]

On June 30, 2021, Central moved for summary judgment on all of Marlboro's claims. [ECF No. 67.] Marlboro filed its response in opposition on August 4, 2021, and Central replied on August 11, 2021. [ECF Nos. 74, 76.] The court heard argument from the parties during a hearing on October 22, 2021, and the matter is now ripe for resolution by the court. [ECF No. 87.]

UNDISPUTED FACTS & CONTRACTS AT ISSUE

The relevant facts are not in dispute:

- Central is a not-for-profit electric generation and transmission cooperative owned by 20 member-distribution cooperatives. Compl. at ¶ 9; Ans. at ¶ 8.
- Marlboro is one of the 20 member-owners. Compl. at ¶ 16; Ans. at ¶ 11.
- The cooperative relationship between Central and Marlboro is governed by Central's Bylaws. Compl. at ¶¶ 17, 18; Ans. at ¶¶ 12, 13.
- The purchase of electricity is governed by the WPC, and the current version of the WPC was signed by both parties in 2013. Compl. at ¶ 20; Ans. at ¶ 15.
- Marlboro agreed to purchase electricity from Central through December 31, 2058. *Id.*
- Marlboro no longer wishes to purchase electricity from Central, *i.e.*, it wishes to terminate the WPC.
- Marlboro no longer wishes to serve as a member-owner of the cooperative, *i.e.*, it wishes to withdraw from membership.

On May 6, 2019, Marlboro asked Central for "a fair and equitable fee for terminating the WPC and withdrawing from Central." [ECF No. 74-14, Fleming Decl. at ¶ 8.] On May 9, 2019, Central responded that the WPC "remains in effect until December 31, 2058," and though the parties "may mutually agree to an earlier termination date for the contract, [] there is no requirement for such an agreement to be reached." *Id.* This lawsuit followed.

The main issue before court on summary judgment is a question of law; namely, are certain contracts—the WPC and Bylaws—between the parties ambiguous? If the contracts are unambiguous and the lack of ambiguity is dispositive of the claim, the court may apply the plain

terms and resolve the dispute. Naturally, the court turns to the language of the contracts at issue: (1) the WPC and (2) the Bylaws.[1] The operative terms of both contracts are outlined below.

A. The WPC: Termination of Contract to Purchase Electricity

As noted above, Marlboro no longer wishes to purchase electricity from Central, but there is a contract in place—the WPC—governing its contractual obligations. The WPC specifically requires Marlboro to "purchase and receive from [Central] all electric power and energy which [Marlboro] shall require to the extent that [Central] shall have such power and energy available[.]" Compl. Ex. 2 (WPC) at Sec. 1, p.2. The provision at issue in this case is Section 15, which provides the term of the agreement. It states:

> Section 15. Term. Subject to Section 16, this Agreement shall become effective as of the Effective Date, and shall continue in effect through December 31, 2058, and shall not be terminated before December 31, 2058, except by mutual agreement of the Parties.
>
> This Agreement shall remain in effect until terminated by either Party giving to the other not less than 84 months written notice of its desire to terminate. The date of termination shall be stated in the notice, but such date shall not be prior to December 31, 2058.

Id. at Sec. 15, p.9. Thus, pursuant to Section 15, the WPC "become[s] effective as of the Effective Date,"[2] and "continue[s] in effect through December 31, 2058[.]" *Id.* As to termination, the WPC states that it "shall not be terminated before December 31, 2058, *except by* mutual agreement of the Parties." *Id.* (emphasis added).

[1] There is a third contract, the Coordination Agreement between Central and third-party Santee Cooper that is tangentially related to the issues before this court. The parties agree that the Coordination Agreement requires Central to obtain Santee Cooper's consent before terminating a WPC with a member-owner.

[2] The Effective Date is May 20, 2018. Compl. Ex. 2 at p.1.

The WPC "remain[s] in effect until terminated by either Party giving to the other not less than 84 months written notice of its desire to terminate. The date of termination shall be stated in the notice, but such date shall not be prior to December 31, 2058." *Id.*

B. The Bylaws: Withdrawal from Membership

Marlboro no longer wishes to purchase electricity from Central, but it also wants to withdraw from membership in the cooperative. Marlboro's membership in the cooperative is governed by the Bylaws. Compl. Ex. 1 (Bylaws). Article II, Section 5 governs termination of membership. The relevant portion of Article II, Section 5 states:

> A Member may withdraw from membership upon compliance with such equitable terms and conditions as the Board may prescribe, provided, however, that no Member shall be permitted to withdraw until such Member has met all contractual obligations to the Corporation.
> . . .

Id. at Art. II, Sec. 5.

On summary judgment, Central argues the WPC and the Bylaws are unambiguous. Its argument is as follows: Marlboro is contractually obligated to purchase electricity through 2058 absent mutual agreement. There is no mutual agreement. Without mutual agreement, Marlboro has not met all contractual obligations to Central, and therefore, Marlboro is not permitted to unilaterally withdraw from cooperative membership. Marlboro opposes summary judgment. It takes the position that both agreements are ambiguous and that Central's refusal to provide equitable terms and conditions for membership withdrawal releases it from its remaining contractual obligations.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if a party "shows that there is no genuine dispute as to any material fact" and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

"In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities in favor of the nonmoving party." *HealthSouth Rehab. Hosp. v. American Nat'l Red Cross*, 101 F.3d 1005, 1008 (4th Cir. 1996). The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party makes this threshold demonstration, the non-moving party may not rest upon mere allegations or denials averred in the pleading, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56; *see also Celotex Corp*., 477 U.S. at 323.

A party asserting that a fact is genuinely disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). A litigant is unable to "create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *Teamsters Joint Council No. 83 v. Centra, Inc*., 947 F.2d 115, 119 (4th Cir. 1996).

ANALYSIS & DISCUSSION

Marlboro frames this case as a "request to withdraw as a member-owner of Central [] on fair and equitable terms." [ECF No. 74 at 1.] It wants out of the cooperative and out of its obligation to continue to purchase electricity from Central. In that regard, Marlboro's position is that Central

must provide it with fair and equitable terms for withdrawal. Marlboro contends that Central's failure to provide it with fair and equitable terms is a breach of the WPC and Bylaws—a breach that allows it to discontinue its contractual obligations. The two declaratory claims and one breach of contract claim stem from this same basic contention: The refusal to provide fair and equitable terms is a breach of the WPC and the Bylaws.

Central's argument on summary judgment is a simple one. It submits that the plain and unambiguous language of the WPC and the Bylaws does not require it to provide fair and equitable terms for Marlboro's withdrawal as a member-owner of the cooperative. And because the unambiguous terms of the contract do not require it to act in the manner Marlboro suggests, it is entitled to judgment as a matter of law on all claims. If Central is correct, it is entitled to summary judgment and this case ends. The key issue for the court then is whether the relevant terms of the WPC and Bylaws are ambiguous. The court begins there.

I. Contract Interpretation: Standard to Determine Contract Ambiguity

In matters of contract interpretation, "[o]nly an unambiguous writing justifies summary judgment without resort to extrinsic evidence." *Monsanto Co. v. ARE-108 Alexander Road, LLC*, 632 F. App'x 733, 736 (4th Cir. 2015) (citing *World-Wide Rts. Ltd. P'ship v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1992)). When a court is asked to grant summary judgment based on contract interpretation, the first step is to "determine whether, as a matter of law, the contract is ambiguous or unambiguous on its face." *Id.* If it is unambiguous on the dispositive issue, the court "may [] properly interpret the contract as a matter of law and grant summary judgment because no interpretive facts are in genuine issue." *Id.*

South Carolina contract interpretation principles dictate that contracts "be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condo. II*

Horizontal Prop. Regime, 494 S.E.2d 465, 468 (S.C. Ct. App. 1997) (citing 17A Am. Jur. 2d *Contracts* § 385 (1991)). "In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument." *Silver v. Aabstract Pools & Spas, Inc*., 658 S.E.2d 539, 542 (S.C. Ct. App. 2008) (quoting *McPherson v. J.E. Sirrine & Co.*, 204 S.E.2d 501, 509 (1945)). "[A]ll the language used should be given a reasonable meaning." *Mears Grp., Inc. v. Kiawah Island Util., Inc.*, 372 F. Supp. 3d 363, 373 (D.S.C. 2019) (citing *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 772 S.E.2d 882, 890 (S.C. Ct. App. 2015)).

Under South Carolina law, "[a] contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 550 S.E.2d 299, 302 (S.C. 2001). "In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: '[O]ne may not, by pointing out a single sentence or clause, create an ambiguity.'" *Silver*, 658 S.E.2d at 542 (citing *Yarborough v. Phoenix Mut. Life Ins. Co*., 225 S.E.2d 344, 348 (S.C. 1976)). An ambiguity exists when considering multiple provisions of a contract together leads to multiple reasonable interpretations. *See Hardy v. Aiken*, 631 S.E.2d 539, 541–42 (S.C. 2006).

If a contract is unambiguous, a court must enforce it "according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. Dep't of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 667 S.E.2d 7, 13 (S.C. Ct. App. 2008). With these principles in mind, the court turns to the parties' arguments.

II. Standard Applied: Are the Terms of the WPC and Bylaws Ambiguous?

This court's analysis starts and ends with the first question: Are the terms of the WPC and the Bylaws ambiguous? Central argues that all of Marlboro's claims fail because it was not required to provide Marlboro with equitable terms and conditions for withdrawal from the cooperative or to terminate the WPC. [ECF No. 67-1 at 5–18.] Central submits there are specific provisions governing termination of the WPC and withdrawal from the cooperative, with the latter appearing in the Bylaws. Relatedly, Central argues that it was not required to seek or obtain Santee Cooper's consent to the termination of the WPC. According to Central, the applicable provisions in the WPC and the Bylaws are unambiguous—neither provide for a unilateral early buyout right and neither require Central to obtain Santee Cooper's consent to terminate under the undisputed facts in the record. *Id.* at 6–16. Finally, Central argues it does not have an implied duty to provide the equitable terms and conditions requested by Marlboro. *Id.* at 17–18.

Marlboro counters that the WPC and the Bylaws are ambiguous, extrinsic evidence establishes that it should be allowed to withdraw from the cooperative at any time, and summary judgment is premature.

Having reviewed the WPC and the Bylaws, the court agrees with Central that the contracts are unambiguous regarding what is necessary for Marlboro to terminate the WPC and withdrawal from membership in the cooperative. Application of the plain terms of the two agreements is dispositive of Marlboro's claims.

A. Early Termination of the WPC

The court begins with the WPC. The WPC's termination provision states that the agreement "shall continue in effect through December 31, 2058, and shall not be terminated before December 31, 2058, *except by mutual agreement* of the Parties." WPC at Sec. 15 (emphasis added). This

language is unambiguous. The court can think of no clearer way to express exactly what is expressed in Section 15: The WPC cannot be terminated before December 31, 2018, with one exception. That exception being "mutual agreement of the Parties." *Id.*

In this case, it is undisputed that Marlboro was seeking to terminate the WPC beginning on May 6, 2019. Fleming Decl. at ¶ 8. May 6, 2019 is "*before* December 31, 2058," so the "shall not" language in the term is triggered. WPC at Sec. 15 (emphasis added). The only way Marlboro could terminate in May 2019 was through the exception. Marlboro had to obtain "mutual agreement" on termination before December 31, 2058. *Id.* Of course, the undisputed facts in the record establish that there was no "mutual agreement" between Marlboro and Central regarding termination of the WPC before December 31, 2058. Without mutual agreement, Section 15 unambiguously provides that Marlboro cannot terminate the WPC early.

Marlboro's arguments in opposition to summary judgment do not change the result. Marlboro's response in opposition points to another term of the WPC that allows for early termination in certain situations (Section 20) and South Carolina's duty of good faith and fair dealing. Marlboro submits that considering the separate term and the duty of good faith and fair dealing, the WPC "reasonably may be interpreted as providing Marlboro the right to terminate the WPC and withdraw from Central at any time, including that Central is obligated to provide Marlboro with the terms and conditions for termination and withdrawal." [ECF No. 74 at 11.] The court disagrees.

1. Section 20: When Read with Section 15, is there an Ambiguity?

Marlboro first points to Section 20[3] of the WPC, noting it "allows for termination of the WPC at any time before 2058." *Id.* at 12; *see also id.* at n.3 ("Section 20 shows the WPC specifically envisions termination *before* 2058." (emphasis in original)). Central does not disagree with this general proposition. [ECF No. 76 at 3–4 ("Indeed, those are circumstances in which the WPC can be terminated prior to 2058.").] Section 20 *does* allow for early termination of the WPC. But Marlboro has two problems. First, it did not seek early termination of the WPC pursuant to Section 20. And second, it is undisputed that Marlboro has not met Section 20's conditions for early termination. If Marlboro has not sought termination pursuant to Section 20 and cannot meet the conditions for early termination pursuant to Section 20, the only termination provision applicable to Marlboro is Section 15.

The court is unable to see how Section 20's allowance for early termination in situations admittedly not present here creates an ambiguity in Section 15—the provision that *is* at issue here. Section 20 addresses termination in specific scenarios and when those scenarios are not at issue, Section 15's general standard governing termination applies. Section 20 following Section 15 is the logical flow of a contract moving from general to specific, not an ambiguity. *See Sill v. AVSX Techs., LLC*, 243 F. Supp. 3d 664, 672 (D.S.C. 2017) ("The contract should be read as a whole, not in piecemeal fashion, to avoid reading ambiguity into the contract.").

2. Duty of Good Faith and Fair Dealing: Does it Create an Ambiguity?

Marlboro also points to South Carolina's implied duty of good faith and fair dealing that exists in every contract as support for its position that Section 15 is ambiguous. [ECF No. 74 at 13–16.]

[3] Section 20 governs "Limitations on Certain Member Actions." WPC at Sec. 20, pp.11–12. It addresses requirements the member must meet if there is reorganization, liquidation, dissolution, consolidation, merger, etc., *i.e.*, "restricted transactions." *Id.*

This argument is tied to Section 20, as well. According to Marlboro, there is a genuine dispute over whether Central breached the implied duty when it refused to give Marlboro fair and equitable terms for withdrawal. Marlboro argues that "[a] jury could reasonably conclude that granting Central unfettered discretion to preclude termination conflicts with the specific provision that the WPC may be terminated at any time by mutual agreement or with the separate provision of the WPC that *requires* early termination under certain specified conditions." *Id.* at 13 (emphasis in original). The court sees three fatal flaws in Marlboro's argument.

The first flaw was addressed in the last section. The fact that Section 20 addresses early termination in circumstances not present here does not render Section 15's more general statement regarding termination ambiguous. Second, despite Marlboro's argument to the contrary, there is no conflict between Sections 15 and 20. Section 15 states the term of the WPC and that termination before 2058 must be by mutual agreement. Section 20 then outlines certain limited circumstances in which early termination is permitted and/or required. Notably, because both sides signed the WPC, Section 20's limited circumstances for early termination is "mutual agreement." Section 15 and Section 20 are easily read together.

The third flaw in Marlboro's argument is its conflation of the WPC's termination requirements with the Bylaws' withdrawal requirements and then its overlay of the implied duty of good faith and fair dealing onto both. For starters, Section 15 of the WPC does not mention fair and equitable terms for termination of the contract. That "equitable terms" language comes from the Bylaws' cooperative withdrawal provision. *See* Bylaws at Art. II, Sec. 5 ("A Member may withdraw from membership [in the cooperative] upon compliance with such equitable terms and conditions as the Board may prescribe, provided, however, that no Member shall be permitted to withdraw until such Member has met all contractual obligations to the Corporation.").

Moreover, nothing in Section 15 of the WPC *requires* Central to propose early termination terms to Marlboro. Both parties are bound by the unambiguous requirements of Section 15. The WPC "shall not be terminated before December 31, 2058, except by mutual agreement of the Parties." WPC at Sec. 15. Let's break it down. If Central wants to terminate the WPC before 2058, it needs to obtain Marlboro's agreement. If Marlboro wants to terminate the WPC before 2058, it must obtain Central's agreement. Unilateral termination is not permitted. To terminate prior to 2058, there must be "mutual agreement." *Id.*

Nothing in the WPC requires Central to give Marlboro "equitable terms and conditions" to terminate the contract early, let alone upon request. Marlboro asked for terms, Central said it did not have to give terms. Its response simply quoted the language of the WPC. And Central is correct. Nothing in the WPC requires it to set forth terms for early termination. *See Adams v. G.J. Creel & Sons, Inc*., 465 S.E.2d 84, 85 (S.C. 1995) ("[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do.").

For the foregoing reasons, the court finds that Section 15 of the WPC is unambiguous. Central's "refus[al] to provide equitable terms and conditions for MEC's withdrawal" and "to seek or obtain Santee Cooper's consent to the termination . . . as part of its obligation to provide equitable terms and conditions" are not material breaches of the WPC as a matter of law. Those portions of Marlboro's first declaratory judgment claim and its breach of contract claim fail, and Central is entitled to summary judgment. Compl. at ¶ 60 (requesting declaration that refusal to provide terms is material breach of WPC), ¶ 73, ¶ 75, ¶ 80 (requesting damages as a result of breach of the WPC). The court now turns to Marlboro's argument that the Bylaws are ambiguous.

B. Withdrawal from the Cooperative Pursuant to the Bylaws

Marlboro relies on the withdrawal provision in the Bylaws to support its ambiguity argument.[4] The portion on which Marlboro relies provides that "[a] Member may withdraw from membership upon compliance with such equitable terms and conditions as the Board may prescribe, provided, however, that no Member shall be permitted to withdraw until such Member has met all contractual obligations to the Corporation." Bylaws, Art. II, Sec. 5. Marlboro contends that this language, when read in conjunction with the WPC as one contract, means withdrawal is permitted before 2058 "*so long as* Marlboro met all its contractual obligations to Central through an equitable

[4] At the hearing on the Motion, Marlboro raised a new argument that did not appear in its memorandum in opposition. Specifically, it argued that the Federal Energy Regulatory Commission ("FERC") construed similar Bylaw language to allow unilateral withdrawal from a cooperative prior to the end of the WPC's term. Marlboro submits that the FERC construction is evidence of an ambiguity under South Carolina law. *See generally, Greenville Cty. v. Ins. Res. Fund*, 443 S.E.2d 552, 548 (S.C. 1994) ("That different courts have construed the language of an insurance policy differently is some indication of ambiguity."). Following the hearing, Marlboro submitted a purported notice of "supplemental" authority, relying on Rule 28(j), FRAP and attaching a copy of the FERC decision. [ECF No. 88.] Central submitted a response to the notice of supplemental authority, ECF No. 89, which prompted Marlboro to file a motion for leave to reply or, in the alternative strike Central's response, ECF No. 90.

The court declines to consider Marlboro's new argument. The issue of different courts interpreting the same contract in different ways was not raised in Marlboro's response in opposition to summary judgment. [ECF No. 74.] As a result, it is an entirely new argument raised for the first time at the hearing. "Raising [ ] new arguments for the first time at oral argument undermines the purpose of orderly briefing and risks subjecting an opponent to an unfair disadvantage." *N.C. All. for Transp. Reform, Inc. v. U.S. Dep't of Transp*., 713 F. Supp. 2d 491, 510 (M.D.N.C. 2010); *see also Brown-Thomas v. Hynie*, 441 F. Supp. 3d 180, 196 n.10 (D.S.C. 2019) ("[I]t is inappropriate for Defendant [ ] to raise important, substantive issues, that were never briefed, at oral argument because such actions significantly undermine the adversary system by putting Plaintiffs at an unfair disadvantage to counter unanticipated arguments."); *Hall v. Fam. YMCA of Greater Augusta*, No. 1:17-cv-00337, 2017 WL 3158776, at *6 n.7 (D.S.C. July 25, 2017) (declining to consider argument raised for the first time at the motion hearing). The court can't help but think that the filings that followed the hearing—ECF Nos. 88, 89, 90—are the exact type of filings that the rule against raising an argument for the first time at oral argument was designed to prevent.

termination payment[.]" [ECF No. 74 at 17 (emphasis in original).] The court disagrees with Marlboro's conclusion.

Even if the court reads the WPC and the Bylaws as one contract, nothing in the Bylaws' termination of membership provision or Section 15 of WPC states that "an equitable termination payment," *id.*, is a way to meet "all contractual obligations to the Corporation." Bylaws, Art. II, Sec. 5. Instead, the Bylaws unambiguously provide that before a member can withdraw from the cooperative, the member must (1) meet those "equitable terms and conditions" that the Board prescribes, if any, and (2) meet all contractual obligations. Here, Marlboro's contractual obligations appear in the WPC. According to the WPC, Marlboro must purchase electricity from Central through December 31, 2058, unless there is a "mutual agreement" providing otherwise. WPC at Sec. 15. It is undisputed that Central has not agreed to any "equitable termination payment" for termination of the WPC. Therefore, under the undisputed facts before this court, Marlboro has not "met all contractual obligations" to Central, and therefore, it does not have the right to withdraw from membership pursuant to the Bylaws. Bylaws, Art. II, Sec. 5.

For these reasons, the court finds Article II, Section 5 of the Bylaws unambiguous. Central's "refus[al] to provide equitable terms and conditions for [Marlboro's] withdrawal from membership" is not a prior material breach because it is undisputed that Marlboro had not met all of its contractual obligations to Central. Compl. at ¶ 60. Stated differently, the permissive "equitable terms and conditions" language is not triggered unless and until all contractual obligations are met. In this case, that would mean a "mutual agreement" to early termination. Because there is no mutual agreement to early termination, Central did not materially breach the contract. Central is entitled to judgment as a matter of law on Marlboro's three claims to the extent

they submit that the Bylaws "require" Central to provide it with equitable terms and conditions for withdrawal.

C. Breach of Contract: Was Central Obligated to Seek and Obtain Santee Cooper's Consent?

In addition to arguing that the WPC and the Bylaws require Central to provide "equitable terms and conditions" to terminate the WPC and cease the cooperative relationship, Marlboro argues Central's refusal to ask for or obtain Santee Cooper's consent to terminate the WPC is a breach of the contract between the parties. Compl. at ¶¶ 60, 77. The court again disagrees.

Marlboro's argument stems from a third contract—the Coordination Agreement between Central and Santee Cooper. According to Marlboro, the Coordination Agreement requires Central to obtain Santee Cooper's consent before it allows a member to withdraw from the cooperative. [ECF No. 74 at 20.] The court can accept Marlboro's representation on this point and it is of no consequence to the outcome of this case. Because there was no mutual agreement to terminate the WPC early, as required by the WPC, Marlboro had not met all of its contractual obligations to Central, as required by the Bylaws, and therefore, the WPC could not be terminated and Marlboro could not withdraw from the cooperative. In that scenario, there is no reason why Central would need to ask Santee Cooper for its consent.

To the extent Marlboro's claims rely on Central's alleged failure to seek or obtain Santee Cooper's consent as a "breach," the claims fails as a matter of law. Central is entitled to judgment in its favor.

III. South Carolina Nonprofit Corporation Act

There is one final piece to the contractual requirements puzzle: The relevance, if any, of the South Carolina Nonprofit Corporation Act (the "Act"). Marlboro's second cause of action alleges that in addition to a contractual right to withdraw from the cooperative, it has a "legal right pursuant

to the [Act.]" Compl. at ¶ 65. The Act includes a resignation "at any time" provision, which allows a member of a nonprofit corporation to resign "at any time." [ECF No. 67-1 at 19.]

In its Motion, Central argues that Marlboro's claim must be dismissed because it is not subject to the "resign at any time" provision in the Act. *Id.* at 18–20. S.C. Code Ann. § 33-31-1708 provides that "cooperative nonprofit membership corporations organized under or transacting business pursuant to Chapter 49 of this title . . . are not subject to the provision of this chapter[.]" Central is organized pursuant to Chapter 49, and therefore, the Act does not apply to it. Notably, Marlboro does not submit any opposition to this argument. [*See* ECF No. 74.]

Given the undisputed facts in the record regarding Central's organization pursuant to Chapter 49 and the lack of opposition by Marlboro, the court finds that Central is entitled to judgment as a matter of law on Marlboro's second cause of action to the extent it relies on the Act. *See Eady v. Veolia Transp. Servs., Inc.*, 609 F. Supp. 2d 540, 560–61 (D.S.C. 2009) ("The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action.").

IV. Final Points: Extrinsic Evidence and Rule 56(d), FRCP

So far, the court has concluded that the relevant portions of the WPC and the Bylaws are unambiguous and the Act does not apply to Central. All that remains for the court is Marlboro's arguments related to extrinsic evidence and its alleged need for discovery. These final points are discussed below.

Marlboro concedes that extrinsic evidence only comes into play if the terms of the WPC or the Bylaws are ambiguous. [ECF No. 74 at 19 ("Because the WPC and Bylaws are ambiguous, determining their meaning requires assessment of extrinsic evidence, which ultimately is a jury

question.").] They are not. Thus, the court need go no further in its analysis of Marlboro's extrinsic evidence argument.

The issue of extrinsic evidence transitions easily into the Rule 56(d) issue. Rule 56(d), FRCP provides that "[i]f a nonmovant shows by affidavit or declaration that, for the specified reasons, it cannot present facts essential to justify its opposition, the court may" deny the motion, defer consideration, allow time for discovery, or issue any other appropriate order. Fed. R. Civ. P. 56(d). In this case, Marlboro argues it needs discovery on a variety of issues, including:

- "Central's commitment to open and voluntary membership;"
- Central's "communications with other members" about Marlboro's withdrawal;
- "Central's documents and communications that refer to or relate to" its interpretation of Article II, Section 5 of the Bylaws;"
- "Central's documents and communications that refer or relate to . . . any amount that would be appropriate for Marlboro to pay to central as a withdrawal payment;"
- Central's calculation of "indicative exit fees;"
- Documents related to why the WPC was extended to 2058; and
- Documents and communications related to the withdrawal or requested withdrawal or other cooperatives.

[ECF No. 74 at 25–26.]

The court certainly understands why Marlboro *wants* this above-listed information, but the fact remains that the WPC and the Bylaws are unambiguous. Marlboro does not *need* this information to oppose Central's arguments on summary judgment. "[E]vidence of the course of dealing and [] industry custom and usage" is not admissible when the terms of the contract are unambiguous. *Volvo Constr. Equip. N.A., Inc. v. CLM Equip. Co.,* 386 F.3d 581, 598–99 (4th Cir. 2004) (applying

South Carolina law). Because the court finds the WPC and the Bylaws are unambiguous, the discovery requested by Marlboro falls into the category of "[w]hatever doesn't make any difference, doesn't matter." *Pelczynski v. Orange Lake Country Club, Inc*., No. 4:11-cv-1829, 2013 WL 504238, at n.11 (D.S.C. Feb. 8, 2013) (citing *McCall v. Finley*, 362 S.E.2d 26, 28 (S.C. Ct. App. 1987)).[5] As a result, Marlboro's Rule 56(d) request is denied.

Central cleared the final hurdle between it and summary judgment. To briefly reiterate, nothing in the unambiguous terms of the WPC or the Bylaws *requires* Central to provide equitable terms and conditions for Marlboro's withdrawal from membership in the cooperative. Central did not materially breach the Bylaws or the WPC when it refused to seek or obtain Santee Cooper's consent to the termination of the WPC in May 2019. Without a "material breach," Marlboro is not excused from performance under the WPC. The first declaratory judgment claim fails as a matter of law.

As to the second declaratory judgment claim, the court again finds that the unambiguous provision of the Bylaws do not *require* Central to provide Marlboro with equitable terms and conditions for withdrawal under the undisputed facts in this case—where Marlboro has not complied with its contractual requirements under the WPC at the time of requested withdrawal. The court further finds that the South Carolina Nonprofit Corporation Act does not apply to Central. For these reasons, the second declaratory judgment claim fails as a matter of law. The third and final claim, breach of contract, fails for all of the same reasons.

[5] For the same reasons the court is denying Marlboro's Rule 56(d) request, it denies Marlboro's Motion for Leave to Submit Exemplar Expert Reports, ECF No. 80. Without an ambiguity, the exemplar expert reports are irrelevant to the court's analysis.

CONCLUSION

For the foregoing reasons, the court finds that the WPC unambiguously requires "mutual agreement" for termination prior to December 31, 2058, and the Bylaws unambiguously require Marlboro to meet "all contractual obligations" to Central, including coming to a "mutual agreement" for early termination of the WPC, to withdraw from the cooperative. Central's Motion for Summary Judgment, ECF No. 67, is **GRANTED**. Marlboro's Motion for Leave to Submit Exemplar Expert Reports, ECF No. 80, is **DENIED** because the court need not reach extrinsic evidence.

As a result of the grant of summary judgment in favor of Central, Central's Motion to Stay Entry of Amended Scheduling Order, ECF No. 68, and Marlboro's Motion to Amend/Correct Scheduling Order, ECF No. 81, are **MOOT**. Because the court declines to consider the new argument raised at the hearing, ECF No. 90, is also **MOOT**.

IT IS SO ORDERED.

/s/ Sherri A. Lydon
United States District Judge

March 28, 2022
Florence, South Carolina