UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

FLORIDA POWER & LIGHT COMPANY, NEXTERA ENERGY DUANE ARNOLD, LLC, NEXTERA ENERGY POINT BEACH, LLC, and NEXTERA ENERGY SEABROOK, LLC,	)	
Plaintiffs,	)	Case No. 9:18-CV-80118-DMM
v.	)	
NUCLEAR ENERGY INSTITUTE, INC.,	)	
Defendant.	)	

NUCLEAR ENERGY INSTITUTE'S
MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

INTRODUCTION **1**
BACKGROUND **2**
A. The Creation and Operation of PADS 2
B. Plaintiffs' Withdrawal From NEI 4
LEGAL STANDARD **5**
ARGUMENT 6
I. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT I (BREACH OF CONTRACT) 6
A. The Participation Provision Expressly States That Only NEI Members May Participate in PADS 6
B. NEI's Interpretation of the Participation Provision is Consistent With the Agreement's Other Terms 7
C. Plaintiffs Ignore the Plain Meaning of the Participation Provision and Misinterpret Other Sections of the Agreement 10
II. PLAINTIFFS' ALLEGED DAMAGES (IF ANY) ARE LIMITED BY THE AGREEMENT'S NOTICE PROVISION AND AMENDMENT 5 TO THE PADS AGREEMENT 11
III. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT III (TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS) 14
A. Plaintiffs Have Not Lost Any Business Relationships 14
B. NEI Did Not Discourage Its Members from Sharing Information with Plaintiffs 14
C. NEI Disconnected Plaintiffs from PADS to Exercise a Contractual Right, Not to Interfere With Plaintiffs' Business Relationships 15
D. Plaintiffs' Alleged Damages, If Any, Flow From Their Disconnection from PADS, Not From Third Party Relationships 17
IV. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT V (UNJUST ENRICHMENT) 17
CONCLUSION **19**

TABLE OF AUTHORITIES

Page

CASES

1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.,
485 A.2d 199 (D.C. 1984) 7

ADT & ADT US Holdings, Inc. v. Alarm Prot. LLC,
2017 WL 2212541 (S.D. Fla. May 17, 2017) 11

All States Serv. Station v. Standard Oil Co. of N.J.,
120 F.2d 714 (D.C. Cir. 1941) 12

Am. Bldg. Maint. Co. v. L'Enfant Plaza Props., Inc.,
655 A.2d 858 (D.C. 1995) 6

Angulo v. Gochnauer,
772 A.2d 830 (D.C. 2001) 6

Auto. Club of S. Cal. v. Mellon Bank (DE) Nat'l Assoc.,
17 F. App'x 593 (9th Cir. 2001) 11

Bennett Enters. v. Domino's Pizza, Inc.,
45 F.3d 493 (D.C. Cir. 1995) 13, 15, 17

BSA 77 P St. LLC v. Hawkins,
983 A.2d 988 (D.C. 2009) 7

CapitalKeys, LLC v. CIBER, Inc.,
875 F. Supp. 2d 59 (D.D.C. 2012) 18

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 5

Columbia Hosp. for Women & Lying-In Asylum v. U.S. Fid. & Guar. Co.,
188 F.2d 654 (D.C. Cir. 1951) 10

Conant v. Wells Fargo Bank, N.A.,
60 F. Supp. 3d 99 (D.D.C. 2014) 11

Deutsche Bank Nat'l Trust Co. v. F.D.I.C.,
109 F. Supp. 3d 179 (D.D.C. 2015) 6

Emerine v. Yancey,
680 A.2d 1380 (D.C. 1996) 17

Fireman's Fund Ins. Co. v. Seaboard Marine Ltd.,
2011 WL 5325464 (S.D. Fla. Nov. 3, 2011)....................11

Genetic Sys. Corp., v. Abbott Labs.,
691 F. Supp. 407 (D.D.C. 1988)....................16

Goesele v. Bimeler,
10 F. Cas. 528 (Cir. Ct., D. Ohio 1851)....................8, 9

Grandison v. Wackenhut Servs., Inc.,
585 F. Supp. 2d 72 (D.D.C. 2008)....................14

Green v. Obergfell,
121 F.2d 46 (D.C. Cir. 1941), *cert. denied,* 314 U.S. 637 (1941) 6

Hickson Corp. v. N. Crossarm Co., Inc.,
357 F.3d 1256 (11th Cir. 2004) 5

Indep. Cas. & Sur. Co. v. Select Int'l, Inc.,
2010 WL 11504973 (S.D. Fla. June 2, 2010)....................11

Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.,
870 A.2d 58 (D.C. 2005) 19

Langer v. George Washington Univ.,
498 F. Supp. 2d 196 (D.D.C. 2007)....................14

Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC,
2008 WL 3931323 (E.D. Ark. Aug. 22, 2008) 12

Logan v. LaSalle Bank Nat'l Ass'n,
80 A.3d 1014 (D.C. 2013) 6

McNamara v. Picken,
866 F. Supp. 2d 10 (D.D.C. 2012)....................17

Minebea Co. v. Papst,
444 F. Supp. 2d 68 (D.D.C. 2006)....................19

Nationwide Airlines (PTY) Ltd. v. African Glob., Ltd.,
2007 WL 521155 (D. Conn. Feb. 14, 2007), *amended on denial of reconsideration*, 2007 WL 1201765 (D. Conn. Apr. 23, 2007)....12

Nest & Totah Venture, LLC v. Deutsch,
31 A.3d 1211 (D.C. 2011)....6

Ng v Wells Fargo, Foothill, LC,
2016 WL 6661339 (C.D. Cal. Mar. 28, 2016)....16

Onyeoziri v. Spivok,
44 A.3d 279 (D.C. 2012)....16

Prof. Food Equip. Ltd. v. Hobart Corp.,
1999 WL 1044231 (M.D. Fla. 1999)....16

Sagalyn v. Found. for Pres. of Historic Georgetown,
691 A.2d 107 (D.C. 1997)....10

Schiff v. American Ass'n of Retired Persons,
697 A.2d 1193 (D.C. 1997)....17

Sheppard v. Dickstein, Shapiro, Morin & Oshinsky,
59 F. Supp. 2d 27 (D.D.C. 1999)....15

Silver v. Am. Safety Indem. Co.,
31 F. Supp. 3d 140 (D.D.C. 2014)....10

United States v. Sci. Applications Int'l Corp.,
555 F. Supp. 2d 40 (D.D.C. 2008)....18

Valinote v. Ballis,
295 F.3d 666 (7th Cir. 2002)....10

Vereen v. Clayborne,
623 A.2d 1190 (D.C. 1993)....19

OTHER AUTHORITIES

10 C.F.R. § 73.56....3, 4, 5

25 C.J.S. Damages § 166....13

Fed. R. Civ. P. 56(a)....1, 5

Pursuant to Federal Rule of Civil Procedure 56, Defendant Nuclear Energy Institute, Inc. ("NEI") moves for summary judgment on all remaining Counts of the Complaint.

INTRODUCTION

NEI is the trade association for the nuclear industry whose membership, until this year, included every utility that owned and operated a nuclear power plant in the United States ("nuclear licensees").[1] NEI provides a number of benefits to its nuclear licensee members, including the ability to participate in the Personnel Access Data System ("PADS"). PADS involves a computer database of personnel data that NEI members use to efficiently screen people for unescorted access to their nuclear plants. Plaintiffs are nuclear licensees that voluntarily terminated their NEI membership in January of this year. They subsequently filed this lawsuit claiming they are still entitled to participate in PADS even though they are no longer NEI members. Plaintiffs are wrong and, consequently, NEI is entitled to summary judgment.

The fatal flaw in Plaintiffs' case is that it ignores the crystal clear language in the Agreement of Participation in the Personnel Access Data System ("Agreement") that only NEI members can participate in PADS:

> Participation in the Personnel Access Data System
>
> Participation in PADS is limited to NEI members which hold licenses for commercial nuclear facilities (whether or not authorized to operate the facility) or licenses to construct nuclear power plants, or contractors/vendors which meet the eligibility requirements set forth in this section.

— *Agreement, Compl. Ex. B at 3 (emphasis added).*[2]

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[1] A "nuclear licensee" is a nuclear power plant operator that holds a license issued by the Nuclear Regulatory Commission ("NRC").

[2] References herein to "Agreement," unless otherwise specified, are to Amendment 4 to the Agreement of Participation in the Personnel Access Data System dated October 6, 2011, which was the operative version of the Agreement at the time Plaintiffs filed their lawsuit.

Because the right to participate in PADS is limited to NEI members, Plaintiffs voluntarily relinquished that right when they terminated their NEI membership. As a result, NEI did not breach (*and could not breach*) the Agreement by recognizing and enforcing the end of Plaintiffs' PADS participation because it was Plaintiffs themselves who relinquished the status essential to participate in PADS—their status as NEI members.

Plaintiffs' theory of the case would write out of the Agreement the unequivocal condition that "[p]articipation in PADS is limited to NEI members." NEI's reading of the Agreement, by contrast, is both reasonable and gives effect to all of the Agreement's terms. For these reasons, NEI is entitled to summary judgment on Plaintiffs' breach of contract claim. As for Plaintiffs' other claims (tortious interference and unjust enrichment), they fail because the Agreement is valid and NEI has not breached it. Further, Plaintiffs have no evidence that NEI interfered with any of their business relationships. Likewise, NEI was not unjustly enriched by Plaintiffs having contributed data to PADS back when they were NEI members, during which time Plaintiffs received the full benefit of all the data other nuclear licensees contributed to PADS. Thus, the Court should grant NEI's motion for summary judgment.

BACKGROUND

Since the mid-1990s, NEI has served as the trade association for the U.S. nuclear industry. *See* Statement of Material Facts ("SOMF") ¶¶ 1, 16-17. Currently, NEI has several hundred members, including a core set of nuclear licensees and suppliers that service those licensees. *Id.* ¶ 1. From the time of its creation until January 4, 2018, all nuclear licensees, including Plaintiffs, were NEI members. *Id.* ¶ 25.

A. The Creation and Operation of PADS.

In 1995, NEI implemented PADS after acquiring a legacy database previously utilized by certain NEI member utilities. *Id.* ¶¶ 8, 16. That same year, NEI and a number of its members

entered into the original Agreement governing participation in PADS. *Id.* ¶¶ 4, 16. Other than NEI, all of the Agreement's signatories (which included all U.S. nuclear licensees) were NEI members. *Id.* ¶¶ 4, 17. The Agreement has since been amended five times. *Id.* ¶ 20. Significantly, the original Agreement and each of its five amendments all contain the unequivocal eligibility requirement that "[p]articipation in PADS is *limited to NEI members*." *Id.* ¶ 24 (emphasis added).

PADS is one of many benefits NEI provides for its members. *Id.* ¶ 34. It is maintained and administered by NEI, and it contains information provided by PADS participants concerning individuals who request access to a commercial nuclear facility, a nuclear power plant under construction, or NRC Safeguards Information. *Id.* ¶¶ 7, 10. While the underlying records from which the data is obtained (such as background checks or testing results) remain with the nuclear licensees that input the data, PADS contains dates for when an individual was granted or denied access to a nuclear plant, as well as summary data concerning (among other things) an individual's training and radiation dosage. *Id.* ¶¶ 6, 48-49. A PADS participant is required under the Agreement to routinely input such data that it collected into PADS, and in exchange receives access to the personnel data collected and input by all other PADS participants. *Id.* ¶ 13-15. This information helps a PADS participant screen personnel who recently worked at a plant operated by another PADS participant. *Id.* ¶¶ 5, 13, 49

As the NRC has made clear, its regulations do not require nuclear licensees to use or have access to PADS. *Id.* ¶¶ 10-12. However, PADS does provide NEI members with an efficient way to comply with NRC regulations that require utilities to certify "unescorted access authorization" or grant "unescorted access" to individuals who work at nuclear plants. *Id.* ¶¶ 5, 10, 48-49; *see generally* 10 C.F.R. § 73.56. PADS also allows members to easily share information about individuals who were denied access or had their access terminated, as required by NRC regulations.

SOMF ¶ 48. Since Plaintiffs left NEI and are no longer PADS participants, NEI members, through coordination by NEI, continue to share information with Plaintiffs that is required by the NRC to be shared among all nuclear licensees. *Id.* ¶¶ 48, 51.

B. <u>Plaintiffs' Withdrawal From NEI.</u>

On January 4, 2018, Plaintiffs informed NEI that they would not renew their NEI membership. *Id.* ¶ 26.[3] These departures represented the first time since NEI's creation that a nuclear licensee would not be an NEI member. *Id.* ¶ 31. As a result, NEI took time to analyze the ramifications of Plaintiffs' decision on NEI and its members, particularly because there have never been any non-member nuclear licensees participating in PADS. *Id.* ¶ 33. In the interim, NEI allowed Plaintiffs to continue to participate in PADS while the parties engaged in discussions surrounding Plaintiffs' decision to withdraw from NEI. *Id.* ¶ 32. On January 30, 2018, however, NEI's Executive Committee, affirmatively and unanimously voted to enforce the Agreement's limitation on PADS participation to NEI members and to retain PADS as an NEI members-only benefit. *Id.* ¶ 34. The NEI Executive Committee includes the Presidents and Chief Executive Officers of several NEI member licensees (and hence, PADS participants too). *Id.* ¶ 35.

Acting on the Executive Committee's decision, NEI's CEO Maria Korsnick sent a letter to Plaintiffs on January 30, 2018 to inform them that, having given up their NEI membership, they were not entitled to participate in PADS and other NEI member-only programs. *Id.* ¶ 36. As a result, their participation in PADS would expire on February 4, 2018. *Id.* However, the letter also offered Plaintiffs an opportunity to reinstate their NEI membership for the first quarter of 2018, which would include participation in PADS and other NEI member-only programs. *Id.* ¶ 37. The

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[3] Around this same time, Entergy Corporation (which is not a party to this litigation) also informed NEI that it would not renew its NEI membership. *Id.* ¶ 27.

cost of this temporary reinstatement would be one quarter of Plaintiffs' annual membership dues and assessments. *Id.* ¶ 37.

When the CEO of Plaintiffs' parent corporation learned of Ms. Korsnick's letter, within 15 minutes he decided to sue NEI, resulting in the instant lawsuit. *Id.* ¶ 38. He made this decision without reading the Agreement, and despite the fact that the cost of Plaintiffs' NEI membership was *millions of dollars less per year* than the additional costs Plaintiffs now claim they incur for conducting access authorization screenings without PADS. *Id.* ¶ 40.

<u>LEGAL STANDARD</u>

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A moving party "may discharge [its] 'initial responsibility' by showing that there is an absence of evidence to support the nonmoving party's case or by showing that the nonmoving party will be unable to prove its case at trial." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (citation omitted).

Once the movant satisfies its initial burden, summary judgment must be granted if the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Ultimately, "[the] court must decide 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hickson Corp.*, 357 F.3d at 1260 (citation omitted).

ARGUMENT

I. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT I (BREACH OF CONTRACT).

The proper interpretation of a contract is a legal question for the Court. *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1219 (D.C. 2011).[4] "'[T]he cardinal rule of interpretation [of contracts] is to ascertain, if possible from the instrument itself, the intention of the parties, and to give effect to that intention.'" *Am. Bldg. Maint. Co. v. L'Enfant Plaza Props., Inc.,* 655 A.2d 858, 861 (D.C. 1995) (quoting *Green v. Obergfell,* 121 F.2d 46, 59 n.39 (D.C. Cir.), *cert. denied,* 314 U.S. 637 (1941)). "[S]ummary judgment is appropriate where a contract is unambiguous since, absent such ambiguity, a written contract duly signed and executed speaks for itself and binds the parties without the necessity of extrinsic evidence." *Id.* (quoting *Angulo v. Gochnauer,* 772 A.2d 830, 834 (D.C. 2001)).[5] That is precisely the case here.

A. <u>The Participation Provision Expressly States That Only NEI Members May Participate in PADS.</u>

While the Court allowed Plaintiffs' contract claim to proceed beyond NEI's motion to dismiss because it was "inappropriate to engage in contract interpretation at [that] stage," Order on Def.'s Mot. to Dismiss at 6, the Court can now resolve the parties' dispute over the contract's interpretation with respect to *who* is entitled to participate in PADS. The answer to that question is found squarely in the Agreement's participation provision, which sets forth the parties' clear

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[4] Under D.C. law, Plaintiffs must prove four elements of a breach of contract claim: "(1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a breach of that duty; and (4) damages caused by breach." *Logan v. LaSalle Bank Nat'l Ass'n*, 80 A.3d 1014, 1023 (D.C. 2013).

[5] Whether an agreement is clear or ambiguous is a question of law. *Deutsche Bank Nat'l Tr. Co. v. FDIC*, 109 F. Supp. 3d 179, 198 (D.D.C. 2015).

and direct intent that "[p]articipation in PADS *is limited to NEI members* …." Agmt. at 3 (emphasis added).

To contend, as Plaintiffs have, that non-NEI members have a right to participate in PADS would render the Agreement's limitation on participation rights meaningless. This is contrary to well-settled law holding that a "contract 'must be interpreted as a whole, giving a reasonable, lawful, and effective meaning to all its terms.'" *BSA 77 P St. LLC v. Hawkins,* 983 A.2d 988, 993 (D.C. 2009) (quoting *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 205 (D.C. 1984)). For this reason alone, Plaintiffs' interpretation should be rejected, and summary judgment should be granted in favor of NEI on Plaintiffs' contract claim.

Stated simply, the Agreement mandates that "[p]articipation in PADS is limited to NEI members …." Agmt. at 3. Accordingly, when Plaintiffs chose to end their NEI membership, they relinquished their eligibility to participate in PADS. It was Plaintiffs who gave up their right to participate in PADS. NEI merely enforced the Agreement's clear terms.

B. NEI's Interpretation of the Participation Provision is Consistent With the Agreement's Other Terms.

Reading the Agreement in its proper order, from beginning to end, proves that NEI's interpretation reasonably gives effective meaning to all of the Agreement's terms.

Following a list of recitals ("Whereas" clauses), the Agreement's operative terms begin on page 2 after the phrase "the signatories to this Agreement mutually agree as follows[.]" The first operative term, titled "Purpose of the Agreement," states that the purpose is "to set forth the services provided by PADS and the mutual, rights, obligations and responsibilities of the participants in PADS." Agmt. at 2. The Agreement proceeds to state its effective date, describe what PADS is, and address how NEI is responsible for managing PADS. *Id*. at 2-3. The operative terms then turn to "Participation in the Personal Access Data System". Here, the Agreement sets

forth *who* is entitled to "participate" in PADS in clear and unequivocal terms: "[p]articipation in PADS *is limited to NEI members* which hold licenses for commercial nuclear facilities … or licenses to construct nuclear power plants, or contractors/vendors which meet the eligibility requirements set forth in this section." *Id.* at 3 (emphasis added). This language defines the term "participant" or "PADS participant" for the remainder of the Agreement.

The provision limiting PADS "participation" to "NEI members" leads to a clear and unambiguous reading of the Agreement's other provisions consistent with NEI's interpretation. After describing the responsibilities of a PADS participant, the Agreement has a section under the heading "PADS Funding" that states: "All participants … hold an equal interest in PADS as tenants-in-common without the right of partition." Agmt. at 4. This provision merely states that "participants" *(NEI members)* have equal interests in PADS, and that no member can seek to partition the database. There is no logical way to read this provision as applying to anyone other than a "participant"—*i.e.,* an NEI member. The provision goes on to say that if PADS as a whole is terminated, any "unexpended funds for PADS will be refunded on a pro-rata basis to those participants in PADS at the time of the program's termination." *Id.* This language reinforces the fact that only current "participants" (*i.e.*, NEI member-participants) share this equal interest in PADS. *Cf. Goesele v. Bimeler*, 10 F. Cas. 528, 531 (C.C.D. Ohio 1851)(No. 5,503) ("This common right was limited to the members of the association; consequently those who left it, or were expelled, forfeited such right.").

The Agreement proceeds to discuss the assessment of fees from PADS participants and the rights and responsibilities of "participants" with respect to their access to PADS. Agmt. at 4 Specifically, it states that: "Each participant and NEI shall be entitled to full access to PADS and to the information contained therein, subject to the *limitations in this Agreement* and in such

standard practices, manuals, instructions, and guides as are adopted for use in PADS." *Id.* (emphasis added). One such limitation, of course, is that "[p]articipation in PADS is *limited* to NEI members …." *Id.* at 3 (emphasis added).

After the provisions on PADS access, the Agreement includes a non-exclusive list of permissive termination provisions. They provide how a "PADS participant *may* terminate its membership" (*i.e.*, how a participating NEI member can opt out of PADS) and how "NEI *may* revoke" the right of a "non-complying participant to use PADS[.]" Agmt. at 6 (emphasis added). Again, given the earlier provision requiring PADS participants to be "NEI members," these subsequent provisions are only applicable to NEI members. This includes the 3-month notice provision for NEI to revoke privileges to "PADS participants that fail to meet their obligations under [the] Agreement[.]" *Id.* at 7. The notice provision only applies to "PADS participants," which are necessarily limited to "NEI members."

As further proof that the termination provisions applicable to "PADS participants" were intended to be non-exclusive, the very next section titled "Successors and Assigns" contains another termination provision – namely, that attempting to assign one's rights to the PADS Agreement without NEI's consent "shall be cause for termination of the participant's rights under this Agreement." *Id.* The Agreement goes on to provide that it "may be amended by the President of NEI" with notice to each signatory. Agmt. at 9. This provision provides an additional means to terminate a participant's rights in PADS. Similarly, the Agreement contemplates the termination of PADS as a system, resulting in a pro-rata distribution of unexpended funds to current PADS participants. Agmt. at 4. Finally, by expressly limiting participation in PADS to "NEI members," the Agreement makes clear that if a company terminated its NEI membership, it

would no longer be eligible to participate in PADS because it would no longer be an NEI member. That is precisely what Plaintiffs did here.

C. <u>Plaintiffs Ignore the Plain Meaning of the Participation Provision and Misinterpret Other Sections of the Agreement.</u>

Plaintiffs insist that the Agreement grants them a continuing right to participate in PADS despite the fact that they are no longer NEI members. As discussed in Part I(A) *supra*, this flies in the face of the clear contract language that "participation in PADS *is limited to NEI members* …." Agmt. at 3 (emphasis added). Hoping to avoid this unambiguous language, Plaintiffs first try to ignore its existence. This is the only explanation for the allegations in their Complaint that the Agreement "grants [Plaintiffs] access to PADS regardless of whether [Plaintiffs] remain NEI members," Compl. ¶ 6, and "does not require PADS participants to be NEI members," *id*. at ¶ 40. That is not what the Agreement says, and Plaintiffs cannot rewrite the Agreement in their pleadings. Nor can they prevail on an interpretation that would have the effect of rewriting the contract. *See Columbia Hosp. for Women & Lying-In Asylum v. U.S. Fid. & Guar. Co.*, 188 F.2d 654, 659 (D.C. Cir. 1951) ("[W]here the language is clear, in the absence of misrepresentation, the courts are not free to rewrite a commercial contract entered into at arm's length by fully competent parties.").

Next, Plaintiffs have argued that the term "NEI member" includes both current and former members. This ignores plain English. An NEI member is one who *is*, not *once was*, a member of NEI. There is no need to modify the term with the superfluous adjective "current." *See Silver v. Am. Safety Indem. Co.*, 31 F. Supp. 3d 140, 143, 147 (D.D.C. 2014) (where policy defined "Insured Member" as "[a]ny full or part time civilian federal employee," this "unambiguously includes current, not former, federal employees"); *Valinote v. Ballis*, 295 F.3d 666, 670 (7th Cir. 2002) ("Like the district court … we think it best to read "member" to mean current member and exclude former member. This is the most natural reading…."); *Sagalyn v. Found. for Pres. of Historic*

Georgetown, 691 A.2d 107, 111 (D.C. 1997) (words must be given their "ordinary and usual meaning.").

Plaintiffs also have argued that the Agreement's termination provisions apply to them, and that NEI breached the Agreement by failing to comply with these provisions, including the 3-month notice provision. As noted above, however, all of those provisions expressly use the term "PADS participant," which necessarily is limited to NEI members. None of these provisions applies to entities such as Plaintiffs that are no longer members of NEI. Furthermore, as explained above, the termination provisions are permissive and non-exclusive, as other provisions in the Agreement demonstrate. *See, e.g.*, Agmt. at 7 (assignment without NEI consent "shall be cause for termination"); *cf. Auto. Club of S. Cal. v. Mellon Bank (DE) Nat'l Assoc*., 17 F. App'x 593, 596 (9th Cir. 2001) (termination provision using "may" was permissive, not exclusive); *Conant v. Wells Fargo Bank, N.A.*, 60 F. Supp. 3d 99, 117-18 (D.D.C. 2014) ("[U]nder ordinary principles of contract interpretation, use of the word 'may' does not impose a mandatory obligation."). The express provision "limit[ing]" participation in PADS "to NEI members," not the permissive termination provisions, operates to prohibit Plaintiffs from participating in PADS. When Plaintiffs ended their NEI membership, they ceased to satisfy the condition required to be a PADS participant.

II. PLAINTIFFS' ALLEGED DAMAGES (IF ANY) ARE LIMITED BY THE AGREEMENT'S NOTICE PROVISION AND AMENDMENT 5 TO THE PADS AGREEMENT.

For the reasons already stated, NEI is entitled to summary judgment on Plaintiffs' breach of contract claim. Yet in the event the Court were to disagree, NEI is entitled to partial summary judgment on Plaintiffs' damages for breach of contract.[6] Plaintiffs' alleged damages are a function

[6] This court may resolve damages issues on a motion for summary judgment. *See, e.g.*, *ADT & ADT US Holdings, Inc. v. Alarm Prot. LLC*, 2017 WL 2212541, at *2, n.2 (S.D. Fla. May 17, 2017); *see also Fireman's Fund Ins. Co. v. Seaboard Marine Ltd.*, 2011 WL 5325464, at *4 (S.D. Fla. Nov. 3, 2011) (granting partial summary judgment limiting potential damages); *Indep. Cas.*

of cost over time, and consist of additional costs Plaintiffs estimate will be incurred for access authorization screenings over the next two years because they can no longer participate in PADS. The applicable timeframe for such damages, however, should be dramatically reduced under two independent theories.

First, one of Plaintiffs' breach of contract theories is based on the allegation that NEI failed to give them 3 months' notice prior to ending their participation in PADS. The fatal flaw in this theory is discussed *supra* at Pt I(C). But if this theory were to prevail, a notice provision specifying the number of days a terminating party must provide establishes a cap on damages because the damages flowing from that breach are limited to the period of time ending on the last day of the notice period. *See, e.g.*, *Larry Hobbs Farm Equip., Inc. v. CNH Am., LLC*, 2008 WL 3931323, at *3 (E.D. Ark. Aug. 22, 2008) ("[E]ven if [defendant] breached the thirty-day notice requirement of the [] Agreement, it is undisputed that [defendant] gave [plaintiff] written notice of the termination at least seventeen days in advance. Had [defendant] fully performed under the contract, it would have given [plaintiff] notice that it was terminating the [] Agreement as of September 13, 2007. Therefore, [plaintiff] would only be entitled to recover the damages that it suffered during the thirteen-day period beginning September 1, 2007."); *Nationwide Airlines (PTY) Ltd. v. African Glob., Ltd.*, 2007 WL 521155, at *20–21 (D. Conn. Feb. 14, 2007), *amended on denial of reconsideration*, 2007 WL 1201765 (D. Conn. Apr. 23, 2007) (rejecting plaintiff's argument that defendant's wrongful termination entitled plaintiff to damages beyond 30-day notice period and limiting damages plaintiff could recover); *All States Serv. Station v. Standard Oil Co. of N.J.*, 120 F.2d 714, 716, n.9 (D.C. Cir. 1941) (collecting cases holding that terminating party "is only liable

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& Sur. Co. v. Select Int'l, Inc., 2010 WL 11504973, at *3 (S.D. Fla. June 2, 2010) (granting partial summary judgment limiting potential damages).

for the damages over the period the notice would have had to run"); 25 C.J.S. Damages § 166 ("[w]here a contract provides for its termination by either party on notice of a specified number of days, profits may be recovered for only that length of time."). Accordingly, under this theory, Plaintiffs could recover damages only during the 3-month notice period—which ended April 30, 2018—and NEI would be entitled to partial summary judgment for any alleged damages occurring beyond that timeframe.[7]

Second, on June 25, 2018, NEI executed Amendment 5 of the Agreement pursuant to the NEI President's authority to amend the Agreement. Agmt. at 9. Amendment 5 was executed "in light of [this] litigation," to "*affirm[] the meaning and intent of the Agreement as reflected in prior versions of the Agreement*," and to preclude any argument that a former NEI member can participate in PADS. Amendment 5 at 2 (emphasis added).[8] Specifically, Amendment 5 provides:

> Participation in PADS is limited to NEI members … *For the avoidance of doubt*, entities that are not NEI members have no rights in, or right to participate in, PADS. Only NEI members can participate in PADS … Accordingly, *an entity that ceases being an NEI member ceases, at the same time, being a participant in PADS.*

Id. at 3 (emphases added).

Regardless of how the Court interprets Amendment 4 of the Agreement, Plaintiffs do not have a right to participate in PADS under Amendment 5. Thus, if Plaintiffs could prove NEI breached Amendment 4 (which they cannot, as stated *infra*), any participation rights ended no later than the effective date of Amendment 5. It logically follows that Plaintiffs could not suffer

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[7] Plaintiffs also claim alleged damages for their cost of creating a system to replace PADS. Since this system would be used for access determinations after the 3-month notice period, these alleged damages also would not be recoverable.

[8] While Amendment 5 is directly relevant to Plaintiffs' damages claim, the Court may not consider Amendment 5 as evidence that Amendment 4 was somehow ambiguous. *See Bennett Enters. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995) (trial court "erroneously admitted into evidence subsequent forms of [defendant's] standard franchise agreement" because version of agreement at issue in litigation was unambiguous).

damages due to a lack of PADS access after the effective date of Amendment 5, and NEI would be entitled to partial summary judgment on these grounds.

III. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT III (TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS).

A tortious interference claim under D.C. law requires Plaintiffs to prove four elements: "(1) the existence of a valid business relationship or expectancy, (2) knowledge of that relationship or expectancy, (3) intentional interference causing a breach or termination of that relationship or expectancy, and (4) resulting damages." *Langer v. George Washington Univ.*, 498 F. Supp. 2d 196, 201-202 (D.D.C. 2007).

A. Plaintiffs Have Not Lost Any Business Relationships.

More than five months after the alleged date of NEI's interference, Plaintiffs have failed to identify a single lost relationship: Plaintiffs' corporate representative witness could not identify a single individual or a single company that breached or terminated its relationship with Plaintiffs because of any action taken by NEI. SOMF ¶¶ 44-46 & n.2. The same was true for all of Plaintiffs' other witnesses who were deposed. *Id.* ¶¶ 44-46.

Because there is no proof that the claimed interference "caus[ed] a breach or termination of [a] relationship or expectancy"—a required element of a tortious interference claim—summary judgment is proper. *Langer*, 498 F. Supp. 2d at 201-202; *Grandison v. Wackenhut Servs.*, 585 F. Supp. 2d 72, 76 (D.D.C. 2008) (granting summary judgment for defendant on tortious interference claim where "the undisputed evidence show[ed] that [third party] ha[d] not actually breached" its contract with plaintiff).

B. NEI Did Not Discourage Its Members from Sharing Information with Plaintiffs.

The Complaint identifies—albeit, without specificity—four groups of Plaintiffs' business relationships with which NEI possibly could have interfered: "various customers, employees,

contractors, and local residents." Compl. ¶ 94. Plaintiffs tried to move the target for their tortious interference claim by (improperly) espousing a new theory in their interrogatory responses: that NEI, "on information and belief," interfered with Plaintiffs' relationships with other nuclear utilities by "prohibit[ing] or discourag[ing] its members from sharing information with Plaintiffs." Pls.' Verified Supp. Resps. to Def.' First Set of Interrogs. at 10, 16. Aside from the fact that these allegations appear nowhere in the Complaint, they also are unsupported by any evidence adduced during discovery. None of Plaintiffs' witnesses had any personal knowledge that NEI either prohibited or even discouraged its members from information-sharing with Plaintiffs. SOMF ¶ 50. If anything, the evidence demonstrates the opposite: NEI encouraged its members to share information with Plaintiffs following their disconnection from PADS in accordance with NRC regulations. *Id.* ¶¶ 48, 51. For example, NEI facilitated Plaintiffs' transition from participants to non-participants by circulating two bulletins reminding PADS participants that they had continuing regulatory obligations to share certain information with Plaintiffs and establishing new processes to effect a daily coordination with Plaintiffs to share such information. *Id.* ¶ 48.

C. NEI Disconnected Plaintiffs from PADS to Exercise a Contractual Right, Not to Interfere With Plaintiffs' Business Relationships.

"As its name would suggest, *intentional* interference requires an element of intent." *Bennett Enters.*, 45 F.3d at 499 (emphasis in original). A "general intent to interfere" with business relationships is insufficient; a plaintiff "cannot establish liability without a strong showing of intent to disrupt ongoing business relationships." *Id.* (internal quotation omitted). The conduct "must be more egregious, for example, it must involve libel, slander, physical coercion, fraud, misrepresentation, or disparagement." *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F.

Supp. 2d 27, 34 (D.D.C. 1999) (quoting *Genetic Sys. Corp., v. Abbott Labs.*, 691 F. Supp. 407, 423 (D.D.C. 1988)).

Plaintiffs fall woefully short of meeting this standard. The conduct at the core of their tortious interference claim is NEI's decision to cut off Plaintiffs' access to PADS. *See* Compl. ¶ 96 ("NEI intentionally interfered with [Plaintiffs'] business relations unlawfully and without justification by barring [Plaintiffs] from the PADS database."). As set forth in Part I *supra*, this decision was authorized by the express language of the Agreement and is a direct consequence of Plaintiffs' decision to withdraw from NEI membership. NEI did not engage in tortious conduct, let alone "egregious" conduct – it simply exercised a contractual right. Courts across the country are in accord that the lawful exercise of a contractual right does not give rise to a claim of tortious interference.[9] *See, e.g.*, *Ng v. Wells Fargo, Foothill, LC*, 2016 WL 6661339, at *2 (C.D. Cal. Mar. 28, 2016) ("The lawful exercise of a non-party's contractual right under their own contract cannot be the basis for inducing a breach of another contract"); *Prof. Food Equip. Ltd. v. Hobart Corp.*, 1999 WL 1044231, at *5 (M.D. Fla. 1999) ("Since Defendant's exercise of its clear contractual right to terminate the Agreement is unquestionably a lawful act, as a matter of law that act cannot give rise to a claim for tortious interference with business relationships."). Like the defendant in

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[9] This is true whether the Court views NEI's exercise of a contractual right as defeating an element of Plaintiffs' prima facie case or as an affirmative defense. Plaintiffs cannot prove the third element of their claim (that NEI intentionally interfered with their business relationships) when the undisputed evidence shows that NEI intended only to enforce the Agreement. Alternatively, Plaintiffs cannot prevail where NEI's conduct was justified or privileged. *See Onyeoziri v. Spivok*, 44 A.3d 279, 286–87 (D.C. 2012) (defendant "may avoid liability if he can establish that his conduct was legally justified or privileged, for example, in order to protect a present, existing economic interest") (internal quotations and citations omitted). By Plaintiffs' own admission, "NEI's purpose in revoking [their] access to PADS and rights under the Agreement was to extract a payment from [Plaintiffs] for membership in NEI." Compl. ¶ 98. To the extent NEI revoked Plaintiffs' access to PADS, NEI's Executive Committee made this decision in furtherance of NEI's existing economic interest (to retain Plaintiffs as members and prevent a free-rider problem) pursuant to a valid contractual right. SOMF ¶ 34.

Bennett Enterprises, 45 F.3d at 499, "nothing in the evidence supports more than the rankest speculation that [NEI] or anyone acting on its behalf harbored any ill motive or intent to disrupt" Plaintiffs' business relationships. Indeed, to the contrary, as explained above, NEI actually has assisted Plaintiffs after they ended their NEI membership to smooth their transition away from using PADS. SOMF ¶¶ 48, 51.

D. Plaintiffs' Alleged Damages, If Any, Flow From Their Disconnection from PADS, Not From Third Party Relationships.

Because Plaintiffs have not identified a single lost business relationship, it is unsurprising that they fail to identify any damages associated with such relationships. In their interrogatory responses, Plaintiffs could not identify a single dollar of value they assigned to any "contract, relationship or expected relationship that [they] did not obtain, earn or receive" as a result of NEI's supposed tortious interference. SOMF ¶ 47. Moreover, to the extent Plaintiffs contend that they have been "damaged" because their unescorted access authorization process is less efficient now than when they were participating in PADS, inconvenience alone does not give rise to recoverable damages on a tortious interference claim. *See McNamara v. Picken*, 866 F. Supp. 2d 10, 15–16 (D.D.C. 2012) (plaintiff failed to allege actual damages arising from alleged interference where defendant's employees refused to share his phone number with patients, his efforts to obtain patient records were "frustrated," and his name was removed from a physician directory).

IV. NEI IS ENTITLED TO SUMMARY JUDGMENT ON COMPLAINT COUNT V (UNJUST ENRICHMENT).

In its motion to dismiss Order, the Court noted well-settled D.C. law holding that "there can be no claim for unjust enrichment when an express contract exists between the parties." Order at 11 (quoting *Schiff v. AARP*, 697 A.2d 1193, 1194 (D.C. 1997)); *see also Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996) ("[W]here the parties have a contract governing an aspect of the relation between themselves, a court will not displace the terms of that contract and impose some

other duties not chosen by the parties."). Nonetheless, the Court held, at that early stage in the pleadings, that Plaintiffs could plead unjust enrichment as an alternative theory to breach of contract. *Id*. at 12. This case is no longer in its early stages, and the issue is ripe for resolution on summary judgment. Indeed, D.C. courts routinely dispose of unjust enrichment claims at the summary judgment stage where a valid contract exists between the parties. *See, e.g.*, *United States v. Sci. Applications Int'l Corp.*, 555 F. Supp. 2d 40, 59–60 (D.D.C. 2008) (granting summary judgment where the "case is clearly well beyond the 'motion-to-dismiss stage'—discovery has closed and a summary judgment motion is pending—and both parties acknowledge the existence of an express contract"); *CapitalKeys, LLC v. CIBER, Inc*., 875 F. Supp. 2d 59, 65 (D.D.C. 2012) (granting summary judgment where "express contract existed covering all services [plaintiff] provided to [defendant]" and plaintiff therefore was only "entitled to recovery as far as the contract provides and may not recover under a theory of unjust enrichment").

Plaintiffs claim that NEI was unjustly enriched because PADS contains personnel access-related data that they contributed while they were participants in PADS. It is undisputed that the Agreement at issue governs all of "the mutual rights, obligations and responsibilities of the participants in PADS," Agmt. 2, including as to data contributions, *id*. at 3. Hence, Plaintiffs can have no separate equitable claim as to their data contributions.

Moreover, the Agreement reflects the benefit a PADS participant receives in return for contributing data to PADS—namely, "full access to PADS and the information contained therein" that was provided by the other PADS participants. *Id*. at 4; *see also* SOMF ¶¶ 13-15. The Agreement does not allow any other compensation to PADS participants for their input data. Rather, the Agreement is clear that "former participants remain responsible for maintaining records to support PADS data [they] previously entered" even after they have withdrawn from

participating in, and having access to, PADS. *Id*. at 6. The Agreement also provides that if PADS were terminated, any unexpended funds paid to operate PADS would be distributed only to "participants in PADS at the time of the program's termination." *Id*. at 4.

When Plaintiffs were participants in PADS, they received the benefit of receiving other NEI members' personnel access-related data contributions to PADS in exchange for inputting their own personnel access-related data into PADS. Because they received consideration for any benefit they conferred, their unjust enrichment claim necessarily fails. *See, e.g.*, *Minebea Co. v. Papst*, 444 F. Supp. 2d 68, 187 (D.D.C. 2006); *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 65-66 & n.7 (D.C. 2005). Moreover, to the extent Plaintiffs conferred a benefit by inputting data into PADS, it was not a benefit conferred on NEI, but on the other PADS participants that used the data to assist with making their unescorted access determinations (just as Plaintiffs used the data from these others to assist in making their own unescorted access determinations). Plaintiffs cannot recover from NEI for supposedly unjustly enriching someone other than NEI. *See Vereen v. Clayborne*, 623 A.2d 1190, 1194 (D.C. 1993).

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in NEI's favor on the remaining counts in the Complaint (Counts I, III, and V).

July 16, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 16, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record for the parties.

/s/ Christopher R.J. Pace
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