

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

CASE NO. 9:18-cv-80118-DMM-DLB

FLORIDA POWER & LIGHT COMPANY,
NEXTERA ENERGY DUANE ARNOLD,
LLC, NEXTERA ENERGY POINT BEACH,
LLC, AND NEXTERA ENERGY
SEABROOK, LLC,

Plaintiffs,

v.

NUCLEAR ENERGY INSTITUTE, INC.,

Defendant.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiffs Florida Power & Light Company, NextEra Energy Duane Arnold, LLC, NextEra Energy Point Beach, LLC, and NextEra Energy Seabrook, LLC (collectively, “NextEra” or “Plaintiffs”), by their undersigned counsel, respectfully submit this memorandum of law in support of their motion, pursuant to Fed. R. Civ. P. 56(a), for partial summary judgment on their claims for breach of contract and unjust enrichment.

PRELIMINARY STATEMENT

NextEra, along with its affiliates, is a world leader in the renewable energy field, providing wind, solar and other renewable energy; NextEra also generates electricity for millions of customers through eight commercial nuclear power units in the United States. Prior to January 4, 2018, NextEra was a member of Defendant Nuclear Energy Institute, Inc. (“NEI”), a trade association for the nuclear energy industry. Members of NEI pay annual membership fees, and NextEra’s membership fee in 2017 was approximately \$3 million.

Nuclear Regulatory Commission (“NRC”) regulations mandate that nuclear licensees vet personnel for unescorted access at nuclear facilities and limit access to individuals who meet prescribed qualifications. The Personal Access Data System (“PADS”) is a centralized industry database that streamlines data sharing for purposes of complying with these regulations. Each nuclear licensee inputs critical data into PADS regarding the background (including any criminal history and psychological background) and fitness for duty of temporary workers who apply for unescorted access to nuclear facilities throughout the country in order to perform maintenance activities during periodic facility shut-downs (called “outages”) mandated under applicable NRC regulations.

NEI concedes that having each nuclear licensee contribute data to PADS is vital for the smooth and efficient operation of the nuclear industry as a whole. It also is undisputed that NextEra, along with all of the other nuclear power plant licensees in the United States, is a signatory to the contract governing PADS on which this lawsuit is premised, which is Amendment 4 to the original agreement (the “PADS Agreement”).

On January 4, 2018, NextEra informed NEI that it would not renew its NEI membership, in large part due to NEI's aggressive public lobbying and advocacy efforts denigrating the solar and renewable energy sectors in which NextEra is heavily invested. However, NextEra made clear to NEI that it intended to continue participation in PADS. NextEra informed NEI that it paid its \$170,000 annual PADS assessment for 2018—which is completely separate and apart from the annual NEI membership fee—and NextEra would continue to pay the PADS assessment on an annual basis going forward.

Nevertheless, on February 4, 2018, NEI terminated NextEra's access to PADS on the grounds that such access is limited to NEI members; and as NextEra had withdrawn from its NEI membership, it was no longer permitted to participate in PADS unless it agreed to continue paying the approximately \$3 million annual membership fee. This, notwithstanding the undisputed facts that NextEra (i) fully paid its PADS dues; (ii) complied with all of its contractual obligations under the PADS Agreement; and (iii) had not committed any of the acts identified in the termination section of the PADS Agreement that set forth the *exclusive* basis for terminating a signatory's access to PADS. NEI's *sole* basis for terminating NextEra's access to PADS was a *single* sentence in the PADS Agreement, wrenched out of context, stating that "Participation in PADS is limited to NEI members which hold licenses for commercial nuclear facilities . . . or contractors/vendors which meet the eligibility requirements set forth in this section." (Agrmt. at 3.)¹

Discovery is now complete, and the undisputed evidentiary record firmly establishes that NEI's position cannot withstand scrutiny. First, the record conclusively demonstrates that NEI's termination of NextEra's access to PADS violated the fundamental purpose of establishing PADS in the first place, which was to provide access to this critical information to all nuclear

¹ Exhibit 18 to Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Partial Summary Judgment, dated January 16, 2018 (exhibits cited as "Ex. __," and paragraphs therein cited as "SUF ¶ __").

facility licensees, regardless of whether they belong to the nuclear industry trade association. As NEI's internal documents show, the genesis of the PADS initiative was the desire "to promote a consistent administrative process *industrywide* for addressing the personnel data requirements in individual access authorization programs and to facilitate the sharing of data needed by *each licensee* to promptly grant unescorted access authorization to previously cleared individuals."² As NEI's Rule 30(b)(6) corporate representative on the purpose and intent of PADS testified, "the creation of PADS" codified "*each [nuclear] licensee's agree[ment]* to standardize the approach for in-processing of nuclear plant workers through the establishment of a computer-based national personnel data system, a central records repository for access authorization records for transient workers, standardized plant access training programs and shared contractor vendor access authorization, audit functions and results."³

The PADS Agreement, on its face, confirms this historical intent. Specifically, its WHEREAS clause confirms the creation of PADS for the avowed purpose of "providing a consistent *industry-wide* approach to collecting, maintaining, transferring and evaluating information necessary for processing applications for plant access"; and specifically mandates that "such information will be available to *all signatories to this Agreement* to facilitate their processing." (Agrmt. at 2 (emphasis added).) It is undisputed that NextEra is a signatory to the PADS Agreement. It bears emphasis that NEI's Rule 30(b)(6) corporate witness regarding the original purpose and intent of the PADS Agreement confirmed that this WHEREAS clause was intended as a "summary of the document"; and that the above-quoted language "accurately reflects what PADS is intended to do."⁴ Furthermore, when asked why the PADS Agreement mandates that PADS be available to "*all signatories*" if its intent was to limit PADS access only

² (Ex. 12 at NEI00003753 (emphasis added).)

³ (*Id.* at NEI00003754; Ex. 2 at 60:15-61:12 (Rich Dep.).)

⁴ (Ex. 2 at 188:24-189:11.)

to “NEI members,” as NEI now claims was the case, NEI’s designated witness on this precise topic admitted that she does not know.⁵

Given (i) the animating purpose of PADS as confirmed by NEI’s own internal documents; (ii) the unambiguous language of the WHEREAS clause, which NEI’s designated spokesperson characterized as a “summary of the document”; and (iii) NEI’s utter inability to explain away the crystal clear provision that PADS be made available to “all signatories” to the PADS Agreement, it is not surprising that NEI’s Rule 30(b)(6) witness concerning the operation of PADS conceded that NEI’s termination of NextEra’s access to PADS conferred no benefit to current PADS participants,⁶ makes the information exchange process across the nuclear industry more cumbersome and expensive,⁷ and *was antithetical to the purpose of PADS*.⁸ He agreed that the PADS system was designed to share information, and that excluding a nuclear licensee from the database is “of course” antithetical to its purpose.⁹

As set forth below, applying well-recognized rules of contract construction to the undisputed factual record here leads to the ineluctable conclusion that NEI’s termination of NextEra’s access to PADS constituted a breach of the PADS Agreement as a matter of law.

First, NEI’s entire litigation position rests on a contrived interpretation of the PADS Agreement that completely ignores and renders meaningless the explicit language making PADS available to “all signatories,” and is inimical to the intent of PADS to make the information available to all “nuclear licensees.” NEI’s position runs squarely afoul of the fundamental concept that courts are to interpret contracts so as to give meaning and effect to all of their provisions, and to effectuate the parties’ contractual intent. *See Wash. Metro. Area Transit Auth.*

⁵ (*Id.* at 189:12-191:1.)

⁶ (Ex. 7 at 140:16-25 (Kelm Dep.))

⁷ (*Id.*)

⁸ (*Id.* at 296:19-297:3.)

⁹ (*Id.*)

v. Georgetown Univ., 347 F.3d 941, 945-46 (D.C. Cir. 2003) (“Under District of Columbia law, ‘. . . contracts[] are “construed in accordance with the intention of the parties insofar as it can be discerned from the text of the instrument.””); *D.C. v. Young*, 39 A.3d 36, 40 (D.C. 2012) (court “must strive to give ‘reasonable effect to all . . . parts [of contract]’ and eschew an interpretation that would render part of it meaningless or incompatible with the contract as a whole”).

Second, where, as here, a contract contains a termination provision, the stated grounds for termination are exclusive. *See Lamoureux v. MPSC, Inc.*, 849 F.3d 737, 740 (8th Cir. 2017) (contractual termination provision that “lists . . . termination events” demonstrates that the parties “intended for the express termination events to serve as the exclusive means of contract termination”); *see also* 5-24 Corbin on Contracts § 24.28. As it is undisputed that NextEra did not commit any of the actions specified in the termination provision, NEI’s termination of its access to PADS constituted a breach of the PADS Agreement as a matter of law.

For the reasons explained more fully below, this Court should grant NextEra’s motion for partial summary judgment.

REQUEST FOR HEARING

NextEra respectfully requests oral argument on its motion for partial summary judgment pursuant to Southern District of Florida Local Rule 7.1(b)(2). NextEra submits that a hearing is appropriate because the motion could significantly narrow the issues in the case, and oral argument would offer the Court and the parties an opportunity to fully explore the legal and factual issues involved. NextEra estimates that one hour is required for argument.

STATEMENT OF FACTS

A. The Parties. --- NextEra is one of the largest electric power and energy infrastructure companies in North America and a leader in the renewable energy industry. (*See* SUF ¶ 1.) NextEra operates eight commercial nuclear power units and is also the world’s largest operator of wind and solar projects. (*Id.* ¶¶ 1-3.) NEI is a trade organization that advocates for policies that promote the use of nuclear energy and technologies. (*See id.* ¶ 4.)

B. The PADS Agreement. --- NEI and certain “signatory participants,” including all Plaintiffs, entered into the PADS Agreement, which states that the PADS database was created to “provide a consistent industry-wide approach” for making plant access determinations across the nuclear energy industry compliant with NRC regulations applicable to all “commercial nuclear facility licensee[s].” (Agrmt. at 1-2.) The PADS Agreement explicitly provides that PADS “will be available to all signatories to this Agreement,” without qualification to NEI membership. (Agrmt. at 2.) The PADS Agreement similarly provides, in several sections, that it is intended to create a binding agreement between NEI and “signatories,” (*id.* at 2, 9), and “parties,” (*id.* at 10), also without reference to NEI membership. All participants in PADS hold an “equal interest in PADS as tenants-in-common without the right of partition.” (*Id.* at 4.)

The PADS Agreement requires each nuclear licensee to pay an annual PADS assessment for “the ongoing costs of developing, maintaining, operating, and managing [PADS].” (*Id.* at 4.) These assessments are separate from NEI membership fees dues. (*See* SUF ¶ 41.) PADS assessments cover all expenses associated with operating and maintaining the database, (*see id.* ¶ 42), as well as expenses associated with other functions that are partially, but not entirely, related to PADS, including (i) administering an Advisory Task Force, comprised of staff from nuclear licensees, to discuss issues related to unescorted access authorization determinations; (ii) organizing an annual “PADS Workshop” and conducting training programs for unescorted access personnel at licensee staff; and (iii) interfacing with representatives of the NRC regarding access-related regulations. (*See id.* ¶¶ 42-47.)

The PADS Agreement includes a detailed “Termination of Membership” section that sets forth the exclusive grounds under which NEI may terminate “participation.” (*See* Agrmt. at 6-7.) In particular, NEI may terminate a party only where it demonstrates that the party failed to meet its “PADS obligations” or to pay PADS dues. (*See id.*) The PADS Agreement makes clear that “PADS obligations” relate solely to inputting and maintaining data, including: (i) “collecting, verifying and accurately entering data into PADS in a timely manner”; (ii) complying “with the data collection, evaluation, verification, retention and transfer methods contained in the industry

standard documents”; and (iii) retaining copies of “radiation protection records.” (*Id.* at 3-4; *see also* DE 1 ¶ 61.) With respect to PADS fees, the PADS Agreement provides:

In the event that any PADS participant fails to pay any portion of any assessment levied pursuant to this Agreement within 90 days following notice of such assessment, that participant will be considered in default and its rights to use PADS may be revoked thereafter by NEI.

(Agrmt. at 6.) The PADS Agreement contains no analogous provision allowing for termination where a party fails to pay NEI membership fees. Nor does the PADS Agreement provide for termination where a party withdraws from NEI. On the contrary, the PADS Agreement limits NEI’s right to revoke access to PADS only “[s]hould a PADS participant fail to meet its obligations *under this Agreement.*” (*Id.*)

C. NextEra Withdraws as a Member of NEI. --- On January 4, 2018, NextEra provided NEI notice of its intention to withdraw as a member of NEI. (*See* SUF ¶ 53.) NextEra concluded that NEI membership was harmful to its interests, including the interests of its customers in a well-planned, reliable and cost effective electric system. (*See* DE 1 ¶¶ 51-56.) NextEra did not at any time give notice of termination or renounce its rights under the PADS Agreement. (*See* SUF ¶ 55.) Rather, NextEra paid its PADS assessment of approximately \$170,000 and expressed its intention to remain a PADS user. (*Id.* ¶ 56.)

D. NEI Retaliates by Revoking NextEra’s Access to PADS. --- On January 30, 2018, NEI notified NextEra that it would unilaterally terminate NextEra’s rights under the PADS Agreement effective February 4, 2018. (*See id.* ¶¶ 59-60.) This termination did not comply with the terms of the PADS Agreement. Far from conducting an audit proving that NextEra failed to meet its “PADS obligations,” NEI did not even attempt to make a showing of default. (*See id.* ¶ 61.) In fact, NextEra has at all times remained in compliance with the PADS Agreement. (*Id.* ¶¶ 48-50, 52.) Moreover, NEI did not provide the mandated three months’ notice. (*See id.* ¶¶ 59, 61, 63.) NEI also purported to strip NextEra of its rights as a tenant-in-common in PADS. (*See id.* ¶ 29.) NEI’s letter stated that NEI would restore NextEra’s access to PADS through March 2018 *only* if NextEra paid its NEI membership dues. (*See id.* ¶ 62.)

E. This Action. --- On February 2, 2018, NextEra filed this lawsuit asserting breach of contract, tortious interference, unjust enrichment and other tort claims. (DE 1.) On February 26, 2018, NEI moved to dismiss all claims. (DE 12.) In its motion, NEI argued that it was permitted to revoke NextEra's access to PADS because NextEra withdrew from NEI membership. NEI based this theory on this one sentence in the 10-page PADS Agreement: "Participation in PADS is limited to NEI members which hold licenses for commercial nuclear facilities . . . or contractors/vendors which meet the eligibility requirements set forth in this section." (Agrmt. at 3.) On May 10, 2018, the Court issued an order denying NEI's motion to dismiss NextEra's claims for breach of contract, tortious interference and unjust enrichment and otherwise granting the motion. (DE 26.)

F. The Impact of NEI's Termination of NextEra's Access to PADS. --- As NEI's witnesses have explained, terminating NextEra from PADS led to a "loss of efficiency" and caused financial burden on the remaining users, who now must undertake a more "cumbersome" information transfer process. (Ex. 7 at 140:22-24 (Kelm); Ex. 5 at 131:8-132:16, 300:6-301:5, 303:2-305:4 (Pitesa); Ex. 3 at 138:24-139:3, 151:13-18, 254:3-22 (Pollock).) In terms of quantifying this financial burden, an internal NEI memorandum estimated that, as a result of excluding NextEra and Entergy from the database, "[t]he cost of refueling outages" at other NEI member sites "could increase by hundreds of thousands [of] dollars due to the delay in processing of visitors." (Ex. 13 at NEI00010844.) All nuclear power plants across the industry must conduct these routine "refueling outages" every 18 to 24 months. (SUF ¶ 7.)

G. NEI Amends the PADS Agreement After This Lawsuit Is Filed in an Attempt To Eliminate Access to PADS for Non-NEI Members. --- On June 25, 2018, more than four months after NextEra commenced this lawsuit, NEI distributed Amendment 5 to the PADS Agreement. (See Ex. 27.) NEI's transmittal letter stated that NEI was exercising its purported unilateral right to amend under the PADS Agreement. (See *id.*) Amendment 5 fundamentally changes the provision on which NEI based its motion to dismiss (and the defenses previewed in NEI's

Answer). The amendments also modified the termination and “tenancy in common” provisions of the PADS Agreement.

Specifically, NEI added to the provision describing “[p]articipation in PADS” the following:

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 (though NEI, at its sole discretion, may grant limited, read-only PADS access to non-members that are not commercial nuclear facility licensees). Accordingly, an entity that ceases being an NEI member ceases, at the same time, being a participant in PADS.

(*Id.* at 4.)

NEI also added to the tenancy-in-common provision the following language: “For the avoidance of doubt, only NEI and participants (which are necessarily NEI members) hold an interest in PADS; former participants hold no interest in PADS.” (*Id.* at 5.)

Lastly, NEI appended to the termination provision the following: “For the avoidance of doubt, these termination provisions apply only to participants. They do not apply to an entity that is no longer a PADS participant because it ceased to be an NEI member.” (*Id.* at 8.)

ARGUMENT

Summary judgment is warranted where “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). The party moving for summary judgment need only identify evidence “which . . . demonstrate[s] the absence of a genuine issue of material fact.” *BellSouth Telecomms., LLC v. Flatel, Inc.*, No. 13-80766-CIV, 2014 WL 11638584, at *2 (S.D. Fla. May 13, 2014) (Middlebrooks, J.) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party makes this threshold showing, “the burden shifts to the nonmoving party to establish that there is a genuine issue of material fact.” *Id.* “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Id.* (quoting *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990)).

Summary judgment is appropriate when, as here, a contract is unambiguous, *see Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409 (11th Cir. 1986) (“construction and legal effect of [a] contract are a determination that may be appropriately made by summary judgment” where “contract is unambiguous”); or when a contract is deemed ambiguous and the undisputed extrinsic evidence reveals that there is no genuine issue of material fact as to the intent of the parties. *See* 10B Fed. Prac. & Proc. Civ. § 2730.1 (4th ed. 2016) (“[S]ummary judgment will be granted if the documents supporting the Rule 56 motion are undisputed and reveal that there is no question as to intent.”).

I. NEXTERA IS ENTITLED TO SUMMARY JUDGMENT ON ITS BREACH OF CONTRACT CLAIM (COUNT I)

A. NEI Breached the Termination Provision in the PADS Agreement

As a matter of law, a contractual termination provision that “lists . . . termination events” demonstrates that the parties “intended for the express termination events to serve as the *exclusive* means of contract termination.” *Lamoureux*, 849 F.3d at 740 (emphasis added); *see also Payroll Express Corp. v. Aetna Cas. & Sur. Co.*, 659 F.2d 285, 291-92 (2d Cir. 1981) (holding that contract “provid[ing] for termination or cancellation upon the occurrence of a specified event” precluded termination on other grounds); *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651, 670-72 (Md. 2009) (termination for convenience provision precluded at-will termination);¹⁰ 5-24 Corbin on Contracts § 24.28 (“If the parties . . . have specifically named one item or if they have specifically enumerated several items . . . a reasonable inference is that they did not intend to include other, similar items not listed.”).

Here, the “Termination of Membership” section of the PADS Agreement provides that NEI may terminate a party *only* where NEI demonstrates that the party fails to pay PADS assessments or fails to meet its “PADS obligations,” which relate solely to inputting and

¹⁰ Where there is no D.C. law on point, District of Columbia courts “look to Maryland law” because “the District of Columbia derives its common law from that state.” *Conesco Indus., Ltd. v. Conforti & Eisele, Inc.*, 627 F.2d 312, 315 (D.C. Cir. 1980).

maintaining data. (See SUF ¶¶ 30-33; see also Agrmt. at 3-4, 6-7.) Nowhere does the termination provision authorize NEI to terminate a signatory's access to PADS based on withdrawal of NEI membership, or failure to pay NEI membership dues, which are entirely separate from PADS assessments. (See SUF ¶ 33.) The termination provision further establishes that termination of PADS access is permitted only after NEI conducts an audit showing that the party has not "satisf[ied] . . . its PADS obligations" except in the case of "failure to pay or . . . willful misconduct or gross negligence." (Agrmt. at 7.)

It is undisputed that NEI did not conduct an audit to prove a default, and that NextEra made all requisite PADS assessments and complied with all other "PADS obligations." (See SUF ¶¶ 48-50, 56, 61.) NEI therefore breached the termination provision by revoking NextEra's access to PADS. (See *id.*)

NEI's construction of the PADS Agreement (*see infra* Part B) fails as a matter of law because it impermissibly reads into the termination provision an additional basis for termination that nowhere appears in the PADS Agreement (*i.e.*, for withdrawal from NEI membership). See *Hart v. Vt. Inv. Ltd. P'ship*, 667 A.2d 578, 584 (D.C. 1995) ("[W]e know of no legal authority permitting the court to rewrite the contract by inserting a [term] which does not appear therein."); see also *Armenian Assembly of Am., Inc. v. Cafesjian*, 758 F.3d 265, 280 (D.C. Cir. 2014) ("[N]o sense of buyer's remorse can empower us to rewrite the plain terms of the contract.").

B. NextEra Did Not Relinquish Its Rights by Withdrawing As a Member of NEI

NEI contends that NextEra's decision to withdraw from NEI membership stripped NextEra of any rights under the PADS Agreement and therefore allowed NEI to terminate NextEra's access to PADS. (See DE 28 ¶¶ 16-19.) NEI hinges this argument entirely on the following sentence of the 10-page PADS Agreement:

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.

(Agrmt. at 3; see DE 12 at 8-9.)

NEI's strained interpretation elides the context in which PADS (and the PADS Agreement) came into existence. *See Bazarian Int'l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 21 (D.D.C. 2016) (“[P]laintiff’s interpretation appears particularly reasonable in light of the context for the [Agreement].”). At the inception of the database, all signatories to the PADS Agreement were also “NEI members which hold licenses for commercial nuclear license facilities.” (*See* SUF ¶ 19.) The phrase “NEI member” was therefore used interchangeably with “signatory” and “party” to the PADS Agreement, as well as “utility participant,” (Ex. 17 at NEI00073369). As NEI’s witnesses explained, “prior to 2018, [NEI] always referred to the industry and NEI being synonymous,” (Ex. 3 at 47:25-48:1 (Pollock)), and never contemplated distinguishing between its membership and the industry, (SUF ¶ 36). Analyzing the language of the PADS Agreement on which NEI relies now—in circumstances under which not all signatory licensees are NEI members—it is apparent that this provision is not intended to limit PADS “participation” to NEI members.

Indeed, as set forth below, NEI’s myopic interpretation is fatally flawed because it conflicts with numerous other provisions of the PADS Agreement as well as the expressed intent of the parties.

1. The PADS Agreement confers rights on “signatories” and “parties,” irrespective of NEI membership.

The PADS Agreement expressly provides that “PADS . . . *will be available to all signatories to this Agreement* to facilitate their processing of applications for plant access.” (Agrmt. at 2 (emphasis added).) This provision says nothing about NEI membership. (*Id.*) Other provisions of the PADS Agreement likewise demonstrate an intent to create a binding contract—and mutual obligations—between NEI and “the signatory participants,” (*id.* at 1), referred to interchangeably as “signatories,” (*id.* at 2, 9), and “parties hereto,” (*id.* at 10), again without reference to continuing NEI membership.

NEI does not, and cannot, dispute that NextEra is a “signatory” or “party” to the PADS Agreement. (*See* SUF ¶ 17); *see also* Signatory, *Black’s Law Dictionary* (10th ed. 2014)

(defining “signatory” as “[a] person or entity that signs a document . . . and thereby becomes a party to an agreement”). Nor can NEI square these provisions conferring rights on all “signatories” and “parties” with its position that signatories who are not NEI members cannot “participate” in the database: When asked why the PADS Agreement provided that the database would be available to all “signatories” if the parties really intended to limit PADS access to NEI members, NEI’s corporate designee with respect to the interpretation of the contract—which NEI itself drafted—candidly answered, “I don’t know.” (Ex. 2 at 189:12-191:1; *see also* SUF ¶ 18 (NEI drafted PADS Agreement).)

2. PADS is funded entirely through a PADS assessment separate from NEI membership fees.

The record establishes that PADS is funded entirely by annual PADS assessments, not NEI membership dues. (*See* Agrmt. at 4, 6-7.) As the PADS Agreement makes clear—and as NEI’s own witnesses have uniformly testified—these PADS assessments cover *all* costs associated with “developing, maintaining, operating, and managing the PADS System,” (Agrmt. at 6), including, among other things, hardware (*e.g.*, servers); software development and updates; maintenance (routine and non-routine) and upgrades of the central server and systems at all licensee sites; a help-line manned 15 hours a day; telecommunications expenses; licensee staff training; and all compensation and expenses incurred by the contractors retained to administer the database. (*See* SUF ¶¶ 41-42; Ex. 3 at 101:11-103:4; Ex. 7 at 55:17-56:9, 84:21-92:21; Ex. 16 (2018 PADS Budget).) The separate assessments for PADS and fees for NEI membership further confirms the parties’ intent that access to PADS be distinct and severable from NEI membership.¹¹

¹¹ NEI appears to contend that it serves an “intangible project management” function with respect to PADS separate and apart from these comprehensive operation and maintenance functions covered by PADS assessments. (*See* Ex. 2 at 151:22-152:14 (Rich Dep.)). But NEI is unable to identify any costs associated with these functions, (*see id.*), and has admitted that not a single NEI employee would be rendered redundant if PADS were no longer under NEI’s purview, (*see* Ex. 3 at 95:22-96:12 (Pollock Dep.)).

(*cont’d*)

3. The parties intended to create a database for information sharing across the entire nuclear industry, not just among NEI members.

The PADS Agreement expressly provides in the WHEREAS clause that PADS “is intended to provide a consistent industry-wide approach” for making plant access determinations in accordance with NRC regulations applicable to all “commercial nuclear facility licensee[s].” (Agrmt. at 1-2.) Courts have observed that “‘whereas’ clauses may provide definitive evidence of the intent of the parties.” *Am. Nat’l Bank of Jacksonville v. Fed. Deposit Ins. Corp.*, 710 F.2d 1528, 1534 (11th Cir. 1983); *see also Smith Steel Workers, DALU 19806, AFL-CIO v. A. O. Smith Corp.*, 626 F.2d 596, 598 (7th Cir. 1980) (confirming arbitral award where arbitrator “credited the preamble of that agreement as an indicia of the parties’ intent”); *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 927 (D.C. 1992) (ascertaining intent of parties based on stated intent in agreement); 17A C.J.S. *Contracts* § 403 (updated June 2018) (“[R]ecitals may be considered in determining the proper construction of the contract and the parties’ intention.”).

The undisputed extrinsic evidence confirms this unequivocally stated intent. Phyllis Rich, NEI’s Chief Financial Officer and designated representative with respect to the

(cont’d from previous page)

Joseph Pollock, NEI’s corporate designee with respect to NEI’s non-financial contributions to PADS, testified that NEI is the “maintainer of the PADS contract,” “administer[s] the regulatory interfaces that take place,” and “coordinate[s] the task force meetings . . . for questions, best practices, resolutions of issues.” (*Id.* at 58:8-15.) Although it is unclear what effort goes into maintaining a contract, one thing is certain: NEI did not amend or modify the Agreement at any time between 2011 and the commencement of this lawsuit, and has amended the contract only five times in the past 23 years. (*See* SUF ¶¶ 34-35.) As for NEI’s “regulatory interface” with the NRC, these communications are handled by Robert R. Kelm, Sr., whose contract is funded entirely through PADS assessments, not NEI membership dues. (*See id.* ¶¶ 42-47; Ex. 2 at 83:18-84:14, 104:7-18 (Rich Dep.); Ex 7 at 55:2-14, 65:6-67:10, 189:21-191:3 (Kelm Dep.)) The same is true of the Advisory Task Force meetings, which are organized and led by Mr. Kelm, not NEI. (SUF ¶¶ 45-47.) Indeed, the agenda from a recent Advisory Task Force meeting reflects that NEI staff presented for less than an hour of the 16 hour, two day program—virtually all of which was devoted to discussing NEI’s termination of NextEra and Entergy. (*See id.* ¶ 47; Ex. 7 at 314:4-322:10 (Kelm Dep.); Ex. 30 at NEI00050003-11 (Feb. 7-8, 2018 Advisory Task Force Meeting Agenda).) In any event, as Mr. Kelm testified, the Advisory Task Force covers many topics that, while related to unescorted access authorization and fitness for duty programs, do not touch on PADS. (*See* SUF ¶¶ 46-47; Ex. 7 at 95:6-96:13.)

interpretation of the PADS Agreement, testified that this WHEREAS clause accurately conveys the purpose of the contract. (*See* Ex. 2 at 188:15-189:11.) Mr. Pollock likewise testified that the purpose of PADS was “[t]o have . . . centralized capabilities to input information required to grant access to personnel *by licensees*,” without any reference to NEI membership. (*See* Ex. 3 at 45:11-18.)

Moreover, Robert Kelm, the third party contractor retained by NEI to manage and administer PADS since its inception, testified that the sole reason licensees transitioned from the predecessor database, known as the Integrated Nuclear Data Exchange (“INDEX”), to PADS, was to ensure participation *by all nuclear licensees*. Mr. Kelm explained that certain licensees refused to join INDEX because they had promoted an alternative access database known as NEDS, which ultimately was unsuccessful, and therefore had an “ax to grind” with INDEX. (Ex. 7 at 265:7-269:6.) PADS was thus created to resolve the rift between INDEX and NEDS users and ensure that *all* licensees got “behind one product” and “move[d] forward,” including the INDEX holdouts. (*See id.* at 265:7-270:17 (emphasis added).) Mr. Kelm was very clear: “Everybody needed to be in [PADS].” (*Id.* at 255:24.) Indeed, Mr. Kelm conceded that excluding non-NEI members—*i.e.*, treating PADS as a member “benefit”—is antithetical to the purpose of PADS because it would “make[] it more difficult . . . to share information” among licensees. (*Id.* at 296:16-297:4 (“Q: So [excluding nuclear licensees from the database] is contrary to the purpose of PADS[?]” A: Oh, of course.”).) Mr. Kelm’s testimony is especially probative as he is NEI’s designated expert on this subject. (*See* Ex. 19.)

NextEra witnesses echoed this concept, affirming that the overarching purpose of PADS was to create a database for use industry-wide to streamline unescorted access determinations across all nuclear licensee sites. (*See* SUF ¶¶ 14-15, 20-24.)

Documents pre-dating or contemporaneous with the creation of PADS likewise confirm that PADS was intended for use by *all* nuclear energy industry participants, not solely NEI members. For example, a March 14, 1994 record from the Nuclear Utility Management Council (“NUMARC”)—the predecessor to NEI—described the “initiative” that became PADS as an

agreement by “[*e*]ach licensee . . . to standardize the approach for in-processing of nuclear plant workers through the establishment of a computer-based national personnel data system,” irrespective of NUMARC membership. (Ex. 12 at NEI00003754 (emphasis added); *see* Ex. 3 at 230:24-231-15 (Pollock Dep.)) The same document explains that the purpose of the database is:

to promote a consistent administrative process *industrywide* for addressing the personnel data requirements in individual access authorization programs and to facilitate the sharing of data needed by *each licensee* to promptly grant unescorted access authorization to previously cleared individuals.

(Ex. 12 at NEI00003753.) Similarly, a letter dated February 23, 1995, from NEI to the INDEX Executive Committee reflected “the industry’s intent” to create “an *industry-wide system* (referred to as . . . PADS)” for “in-processing of personnel requiring unescorted access to nuclear power plants.” (*See* Ex. 36 (emphasis added).)

The undisputed evidence also illustrates *why* the parties to the PADS Agreement intended for all members of the industry to “participate” in PADS: Excluding even one or two licensees could lead to serious commercial and regulatory implications for all other users. As an internal NEI document pre-dating NextEra’s termination of its membership concedes, in great detail:

The impact from [blocking NextEra from] the PADS will affect [existing NEI] members since it is the only automated method to meet the requirements of NRC regulations. The impacts are both commercial and regulatory. The commercial aspects would be the loss of efficiency and require a manual method of calling /transmitting to and from the exiting companies to verify access denial for every visitor granted access to a licensee facility. *The cost of refueling outages could increase by hundreds of thousands dollars due to the delay in processing of visitors.* The regulatory impact would be if every visitor was not verified at all licensees the potential of granting access to an individual who should be denied. This would lead to a violation for the licensee that granted the access.

(Ex. 13 at NEI00010844) (emphasis added).) These risks, in fact, materialized. As NEI’s witnesses consistently testified, all remaining PADS users are now dealing with financial burdens associated with a more cumbersome access information transfer protocol resulting from NEI’s decision to terminate NextEra from the database. (*See* SUF ¶ 65; Ex. 7 at 140:22-25 (“Q. In fact, excluding [NextEra and Entergy] from the database makes the information exchange process more cumbersome for the existing PADS users. A. Yes.”); Ex. 5 at 131:8-132:16

(excluding NextEra has resulted in “loss of efficiency” to licensees which has translated into additional expense); *id.* at 227:12-228:6 (noting that contractors are “challenged” by exclusion of NextEra and they “lost” some of the “efficiencies that PADS provided”); *id.* at 300:6-301:11 (confirming it could take up to five more days to process contract workers); Ex. 3 at 138:22-139:3 (“[I]t was going to be less efficient than it was previously . . . because all information won’t be transferred from all licensees any longer.”).) What is more, Mr. Kelm admitted that, in his view, excluding NextEra conferred no benefit whatsoever on existing users. (*See* Ex. 7 at 140:16-21.)

Finally, NEI’s action in the middle of this pending litigation speaks volumes. On June 25, 2018, NEI issued a unilateral amendment to the PADS Agreement ostensibly to “affirm” the original intent of the parties. (*See* Ex. 27.) Among other self-serving revisions, this amendment appends to the “participation” paragraph on which NEI bases its defense (*see supra* Part B) the following proviso: “For the avoidance of doubt, entities that are not NEI members have no rights in, or right to participate in, PADS.” (Ex. 27 at 4.) This amendment is a tacit admission that the PADS Agreement itself did *not* limit “participation” to *current* NEI members; if it did, no amendment would have been required.

In light of the expressly-stated intent of the parties to create an industry-wide database, and the overwhelming and undisputed evidence demonstrating that PADS was developed and intended for use by all nuclear licensees, the PADS Agreement should be interpreted as permitting “participation” by licensees who are nonetheless no longer NEI members. *See Stinson v. N.Y. Life Ins. Co.*, 167 F.2d 233, 235 (D.C. Cir. 1948) (“In attempting to judicially determine the probable intent of the parties, consideration is directed to the purpose of the contract and the circumstances surrounding its execution.”).

4. NextEra’s interpretation harmonizes all terms of the PADS Agreement.

NEI contends that an interpretation of “participant” that includes non-members would “excise from the Agreement” the provision that “[p]articipation in PADS is limited to NEI members.” (*See* DE 12 at 8; Agrmt. at 3.) Not so. This provision itself establishes that non-

member contractor/vendors may “participate” in PADS. (Agrmt. at 3.) And NEI has admitted that certain NEI non-member contractors/vendors do, in fact, have access to PADS, as do representatives of the NRC and the Institute of Nuclear Power Operations, neither of which are NEI members. (Agrmt. at 3; SUF ¶ 37; Ex. 25 (NEI’s Interrog. Responses); Ex. 7 at 210:5-211:9 (Kelm Dep.).)

In any event, to the extent “participants” were at any time limited to NEI members, that limitation existed *only at the time the parties entered into the PADS Agreement*. See *District of Columbia v. C.J. Langenfelder & Son, Inc.*, 558 A.2d 1155, 1156 (D.C. 1989) (“contract terms must be construed according to . . . usage at the time when the parties executed the contract”); *Merrick v. Giddings*, 12 D.C. (1 Mackey) 394, 415 (D.C. 1882) (same). In other words, only licensees for commercial nuclear facilities or those licensed to construct nuclear power plants who were, *at the time they entered into the PADS Agreement*, NEI members, could become participants. This limitation provides a valuable gating mechanism, ensuring that any new PADS user is, in fact, a member of the nuclear energy industry warranting access for a legitimate purpose. Once a party signs the PADS Agreement, and hence becomes a PADS “participant,” the termination provisions detailed in the contract apply to it, regardless of continuing NEI membership.¹²

This interpretation harmonizes the “limited to NEI members” language with the (i) express intent to create an agreement between NEI and “signatories” and “parties” without qualification to NEI membership; (ii) termination provision; and (iii) purpose of the PADS Agreement and expressed intent of the parties, and is thus preferred to NEI’s construction. See *Shulman v. Voyou, L.L.C.*, 251 F. Supp. 2d 166, 169 (D.D.C. 2003) (“[C]ourt should construe . . . all clauses and provisions of a contract so as to harmonize with one another.”).

¹² For this reason, NEI’s tack-on sentence in its Amendment 5, distributed on June 25, 2018, to provide that “these termination provisions apply only to participants,” (Ex. 27 (redline at 10)), is irrelevant: A signatory is a participant, and a participant cannot be excluded unless NEI establishes a specified basis for termination.

C. NEI Breached the Notice Provision in the PADS Agreement.

NEI's notice of termination breached the PADS Agreement for the separate and independent reason that it did not comply with the three-month notice provision. (*See* SUF ¶¶ 32, 59-64.) It is undisputed that NEI provided NextEra with a mere five days' notice of its intent to revoke NextEra's PADS membership, (*see id.* ¶¶ 59, 63), in plain breach of the notice requirement. *See Xenophon Strategies, Inc. v. Jernigan Copeland & Anderson, PLLC*, 268 F. Supp. 3d 61, 72 (D.D.C. 2017) (plaintiff entitled to damages for breach of two-month notice of termination provision); 13-68 Corbin on Contracts § 68.9 ("If a party who has a power of termination by notice fails to give the notice in the form and at the time required by the agreement, it is ineffective as a termination.").

D. NEI Breached the Ownership Provision of the PADS Agreement.

NEI also breached the ownership provision of the PADS Agreement by purporting to deprive NextEra of its rights as a PADS tenant-in-common. The PADS Agreement provides that "[a]ll participants . . . hold an equal interest in PADS as tenants-in-common without the right of partition." (Agrmt. at 4.) NextEra is therefore an "owner" of PADS, and cannot be barred from accessing the database. *See Second Realty Corp. v. Krogmann*, 235 F.2d 510, 512 (D.C. Cir. 1956) (the "essential characteristic" of a tenancy-in-common is that "each tenant is entitled to possess the whole property").

II. IN THE ALTERNATIVE, NEXTERA IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR UNJUST ENRICHMENT (COUNT V)

Alternatively, NextEra is entitled to summary judgment on its unjust enrichment claim. *See Prose Fin. Servs., LLC v. Welding Techs., Inc.*, No. 1:06-CV-501-ODE, 2007 WL 9701670, at *9 (N.D. Ga. Aug. 3, 2007) (granting motion for summary judgment on unjust enrichment claim in alternative to contract claim).

To recover for unjust enrichment, a plaintiff need only show that: "(1) the plaintiff conferred a benefit on the defendant; (2) the defendant retains the benefit; and (3) under the circumstances, the defendant's retention of the benefit is unjust." *Aspire Channel, LLC v.*

Penngood, LLC, 139 F. Supp. 3d 382, 388-89 (D.D.C. 2015) (quoting *New World Commc'ns, Inc. v. Thompsen*, 878 A.2d 1218, 1222 (D.C. 2005)).

First, NextEra undisputedly has conferred a benefit on NEI. Over the last two decades, NextEra paid approximately \$2 million to NEI in PADS assessments. (*See* SUF ¶ 50.) The contractors retained to maintain the database and paid through PADS assessments, including Mr. Kelm and Canberra Industries/Mirion Technologies, Inc., in turn used NextEra's payments to develop, upgrade and maintain the database, to acquire the software underlying PADS and to purchase all necessary hardware and equipment. (*See* Ex. 7 at 280:8-281:17 (Kelm Dep.)) During that same time period, NextEra also contributed substantial data to PADS. (*See* SUF ¶¶ 48-49.)

Second, NEI undisputedly has retained these benefits. As Mr. Kelm testified, NEI claims to own all of the software and hardware that comprise PADS. (*See* Ex. 7 at 280:8-281:17.) Notably, NEI has endeavored to "leverage" these assets to its advantage in negotiations with its members. (Ex. 21.) For instance, NEI used access to the database as a bargaining chip in an ultimately unsuccessful bid to induce NextEra and Entergy rejoin NEI. (*See id.*; SUF ¶ 62.) Similarly, NEI has admitted that it is using PADS as a handcuffing mechanism to retain current members (and ensure their payment of millions of dollars in annual NEI dues) on pain of termination from the database if those members withdraw. (*See* Ex. 8 at 109:25-111:17 (Korsnick Dep.) (aware of risk members would leave NEI if they could only pay for PADS access); Ex. 34 (referring to PADS as a "needed service").) NEI has also contemplated using PADS assessments from non-members to subsidize NEI's other, member-only operations. (*See* SUF ¶¶ 38-39; Ex. 35 (detailed draft of "non-member approach").)

Lastly, now that NEI has terminated NextEra's access to PADS, it would be unjust for NEI to retain the benefits NextEra has conferred on NEI, particularly in a manner that is used as "leverage" against NextEra and harmful to all nuclear licensees. (*See supra* Part I.B.3.)

CONCLUSION

For the foregoing reasons, NextEra respectfully requests that the Court grant NextEra's motion for summary judgment that NEI breached the PADS Agreement or, in the alternative, that NEI is unjustly enriched by retaining the benefits NextEra has conferred in connection with PADS.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2018, I filed the foregoing document with the Clerk of the Court via CM/ECF and a true and correct copy of the foregoing was served on all counsel or parties of record on the attached Service List by the method indicated.

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