



Nview Health, Inc. v. Sheehan

2022 | Cited 0 times | M.D. Florida | November 14, 2022

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION NVIEW HEALTH, INC., Plaintiff, v. Case No. 8:21-cv-385-VMC-TGW DAVID V. SHEEHAN, M.D., Defendants. _____/

ORDER This matter comes before the Court upon consideration of Plaintiff Daubert Motion to exclude the expert

(Doc. # 122), Defendant Dr. Motion for Summary Judgment (Doc. # 124), and Dr. Sheehan Daubert Motion to limit the testimony of two of (Doc. # 123), all filed on July 21, 2022. Dr. Sheehan has responded to both of Motions (Doc. ## 125; 127), and Nview has replied to its Motion for Summary Judgment, (Doc. # 129). Nview has responded to both of Dr. Sheehan Motions (Doc. # 126; 128), and Dr. Sheehan replied to his Motion for Summary Judgment. (Doc. # 130). For the reasons that follow, Motion for Summary Judgment is granted to the extent stated

herein, Daubert Motion for Summary Judgment is granted to the extent stated

herein, and Dr. Sheehan Daubert Motion is denied. I. Background

A. The Contract Dispute Dr. Sheehan is a doctor, Harvard-trained neuropsychiatrist, and Distinguished University Health Professor Emeritus at the University of South Florida Morsani College of Medicine. (Doc. # 124 at 2). He created the technology at issue in this case. (Id.). The technology

instruments, including the Mini International Neuropsychiatric Interview (M.I.N.I.), which helps researchers and physicians diagnose a wide array of the most Id.). Dr. Sheehan granted Nview an exclusive license to his technology on February 15, 2016. (Id. at 4).

Nview is a software company that distributes versions of in several different formats. (Id. at 3- 4). From February 2016 to September 2019, David Schuster was

at 3). Chief Scientific Officer. (Doc. # 121 at 4).

Nview and Dr. Sheehan entered into a License Agreement (Doc. # 121-2). The February Agreement includes the following provisions:



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healthcare technology specifically in any format. This includes all commercial and research applications for these technologies. 2.1.1. Sheehan hereby grants to Nview a worldwide, transferable, exclusive license, with the right to sublicense in multiple tiers, to develop, make, have made, use, sell, offer to sell, import, reproduce, distribute, modify, display and otherwise commercialize products utilizing the Sheehan Technology [as defined] in the Field. 2.1.3. Sheehan shall retain the right to continue to use and bill for the use of the Sheehan Technology in paper format[.] (Id. at 2, 4) (emphasis added). The February Agreement also

Sheehan Technology in the Field of Use or authorize any party to use the Sheehan Technology in the Field of Use, except in paper format for all of his structured diagnostic interviews Id. at 4).

The February Agreement also contains a provision that

Sheehan nor Nview shall have any liability to the other party for any indirect, special, consequential or punitive damages, including loss of profits . . . incurred by any party, whether

in an action in contract (including breach of warranty), tort -2 at 7).

Dr. Sheehan represented that he reviewed the February Agreement with his attorney, and it was in line with what the parties discussed. (Doc. # 121 at 3). The February Agreement contains an integration clause which states that it

with respect to the terms and conditions set forth in this Agreement and supersedes all previous written or oral agreements and representations and may be modified only in writing that expressly references this Agreement and is 121-2 at 7-8).

corporate formation documents, effective as of

Unanimous

124 at 6). Dr. Sheehan had previously raised with Mr. Schuster and Dr. Young concerns that the February Agreement did not allow him to retain exclusive rights to his technology in paper and PDF formats. (Doc. # 124 at 4). Mr. Schuster and Dr. Young told Dr. Sheehan that the License Agreement would be updated to include the language Dr. Sheehan was seeking.

(Id. at 5).

expressly directed Mr. Schuster to execute a license with Dr. of a term sheet attached as an exhibit to the Unanimous Consent. (Id.). One provision in the August 2016 Term Sheet states that Dr.

ll retain the exclusive copyrights, ownership of and all



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Id. at 7).

In August 2016, t Stock Purchase Agreement for each of the three cofounders and

directors of Nview as part of the Unanimous Consent. (Id. at

incorporated four exhibits, including a new License Agreement. (Id.). The August Agreement includes the following provisions:

nd Healthcare Technology specifically in any electronic or mobile format. applications, copyrights, trade secrets, inventions, know-how, trademarks and other intellectual property rights of Dr. Sheehan to the extent and only when any of these are used specifically in any electronic or mobile format. 2.1.3 Dr. Sheehan shall retain the right to continue to use and bill for the use of his Technology in paper and

pdf format for all of his structured diagnostic interviews and rating Scales and shall retain the exclusive copyrights, ownership of and all rights to all his scales, and structured diagnostic interviews and record tracking systems in these formats. (Doc. # 121-9 at 9) (emphasis added). Both the February and August Agreements contain a

any press releases relating to this Agreement without the prior ap Id.; Doc. # 121-2 at 9).

The parties executed an amendment to the License Agreement on April 3, 2019. (Doc. # 121-6). The April Amendment includes the following provisions:

in any format, including behavioral healthcare, healthcare technology and commercial research applications. 2.1.1 Dr. Sheehan hereby grants to Nview and its affiliates a worldwide, perpetual (subject to the termination provisions set forth herein), royalty free, fully paid, transferable, exclusive license, with the right to sublicense in multiple tiers, to develop, make, have made, use, sell, offer to sell, import, reproduce, distribute, modify, display and otherwise commercialize products utilizing the Sheehan Technology in the Field. (Id. at 2) (emphasis added). The April Amendment states that it of February 15, 2016, [February License] Agreement, as amended, all agreement referenced therein and all exhibits thereto represent the

entire agreement of the parties with respect to the subject Id. at 3). The April Amendment removed milestones that were contained in the February Agreement. (Id. at 2). On June 24, 2019, Nview and Dr. Sheehan entered into a consulting agreement. (Doc. # 121-7). The Consulting

Exhibit B shall have the meaning provided in that certain License Agreement between the Company and Dr. Sheehan dated Id. at 13). In the June 23, 2019, email providing the Consulting Agreement, Dr. Young



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your property and you have exclusive rights to the paper -10 at 583). Dr. Y is now in two places the licensing agreement we previously (Id.).

In September 2019, BIP Capital, Inc., a venture capital firm, invested \$4.65 million in Nview and installed James Szyperski as the new CEO. (Doc. # 124 at 11). In 2019, Nview

(Id.).

February 2022, Nview did not turn on a profit on its digital platform on an annual basis. (Id. at 11-12).

Prior to around 2019, Nview referred customers to Dr.

Id. at 10). In March 2020, a third party approached Nview about licensing the technology in paper format. (Id. at 12). Dr. Young wrote

Id.). Another potential customer also approached Nview about licensing the technology in paper format in March 2020. (Id.). Dr. Young

where the rubber meets the road. Do we send this to Sheehan Id.). In depositions, neither Dr. Young nor Mr. Szyperski clarified what Dr. Young -10 at 402:24 403:25; 124- 11 at 196:21 197:14).

Nview sold paper versions of the technology covered by the License Agreement to approximately five companies. (Doc. # 124-15 at 40:13 22, 47:11 48:13). Nview did not tell Dr. Sheehan that it had begun selling paper versions of the technology. (Doc. # 124-4 at ¶ 14).

On June 30, 2022, a representative of AbbVie, a potential

with the copyright owner of the instrument we have been informed the MINI is only allowed to be administered by -20). Mr. Szyperski confirmed that Nview stopped selling paper versions of the technology in early 2022. (Doc. # 121-11 at 108:19 22; 76:20 77:12; 197:6 12). He acknowledged that the reason Nview stopped selling paper Id. at 77:8 10).

B. False Advertising Nview published a press release in September 2019

124-12 at 70). The MINI has never been endorsed by the NIH or the WHO. (Doc. # 124-5 at 24-25). Nview also claimed that the 214-17 at 108). The MINI has never been certified by the FDA

or the WHO, which do not certify diagnostic instruments like the MINI. (Doc. # 124-5 at 24-25; Doc. # 124-18 at 97:3 16).

-11 at 153).



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Mr. Szyperski admitted that this claim was incorrect: the MINI was not approved by the FDA. (Id. at 42:9 43:19).

Dr. Sheehan and his colleague Jennifer Giddens both registered their concerns about the certification claims on -3 at 292:22-293:11; Doc. # 124- 11 at 156). Ms. Giddens other misleading information. (Doc. # 121 at 9). Other than Dr. Sheehan and Ms. Giddens, Dr. Sheehan has not identified anyone else who was confused or misled by the website. (Id. at 9-10).

Nview has also claimed that its version of the MINI is in marketing materials. (Doc. # 124-11 at 70).

property rights. (Doc. ## 47-8; 124- 6 at 74:4 78:4).

Dr. Sheehan alleges that his reputation has been harmed

reputation. (Doc. # 124-3 at 299:5-6). When asked what basis he had for claiming that his reputation was harmed, he stated, -- I mean, there is fantastic amount of -- I mean, false advertising has ramifications all over the place, I Id. at 298:23-24). One of his expert witnesses,

(Doc. # 124-18 at 98:20-22). Northwell Health

explained that Northwell experienced technical problems while using the MINI

the MINI -10 at 51:7-53:5, 63:25-14, 67:15-25).

C. Procedural History Nview initiated this action against Dr. Sheehan on February 18, 2021, alleging breach of the License Agreement and Amendment (Count I), breach of the Consulting Agreement (Count II), breach of the implied covenant of good faith (Count III), defamation (Count IV), tortious interference with contract (Count V), tortious interference with prospective economic advantage (Count VI), deceptive and unfair trade practices (Counts VII and VIII), and unfair competition (Count IX). (Doc. # 45 at 13-21). Nview also requests injunctive relief, asking the Court to prohibit Dr. ustomers, potential customers, business partners,

Id. at 21). Finally, Nview requests

XII). (Id. at 21-23).

Dr. Sheehan counterclaimed, alleging breach of the License Agreement (Count 1), false advertising in violation of the Lanham Act (Count 2), promissory estoppel (Count 3), and unjust enrichment (Count 4). (Doc. # 47 at 60-74).

The parties now both seek entry of summary judgment in their favor. (Doc. ## 121, 124). Nview seeks



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summary judgment

counterclaims for breach of contract, false advertising, promissory estoppel, and unjust enrichment. (Doc. # 121 at 1). Nview also sought summary judgment on its claims for breach of implied covenant of good faith, defamation, tortious interference with prospective economic advantage, and injunctive relief. (Id.). However, in its reply, Nview noted that it was withdrawing its motion for summary judgment as to its claims for breach of implied covenant, defamation, tortious interference, and injunctive relief. (Doc. # 129 at 3). As such, those issues are not discussed in this Order.

Dr. Sheehan seeks summary judgment as to (1) whether Dr. Sheehan has exclusive ownership of and rights to paper and PDF versions of his intellectual property, and Nview infringed on those rights; (2) whether Nview seeks damages that are contractually barred; and (3) whether Nview made certain literally false commercial representations, establishing the falsity element of his Lanham Act claim. (Doc. # 124 at 1).

Each party has responded (Doc. ## 127, 128) and replied. (Doc. ## 129, 130). The Motions for Summary Judgment are now ripe for review.

D. The Expert Testimony Additionally, Nview filed a Daubert motion to exclude the expert report and testimony witnesses, Maura Norden. (Doc. # 122). Dr. Sheehan filed a Daubert motion to limit the testimony of Grace Powers and Jon D. Elhai, Ph.D. (Doc. # 123).

Dr. Sheehan offers the testimony of Maura Norden as to

and Cosmetic Act and whether Nview complied with applicable FDA regulatory requirements. (Doc. # 122-1 at 3). Ms. Norden

matters concerning FDA regulation of devices with a

particular focus on FDA regulation of digital health technol Id.). She spent fifteen years advising a variety of clients first as a lawyer and then as a consultant Id.). In her report, Ms. Norden reached the following conclusions:

(1) uestion whether the

Nview software is subject to FDA jurisdiction and whether it complies with any applicable (2)
-quality internal

documentation explaining its rationale for determining that its software is outside FDA jurisdiction prior to going to market [is]



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(Id. at 3-4).

conclusion about whether the FDA has statutory jurisdiction to regulate the software and whether it is subject to the FDA because she was Nview software as it existed before (Id. at 10). But she believed the software -2 at 35:10-24).

Nview offers the testimony of Ms. Powers and Dr. Elhai as rebuttal witnesses. Ms. Powers was retained to opine on

123-7 at 2).

in medical devices and mid-size medical (Id.). Dr. Elhai was retained to rebut opinions by two of Dr.

Mr. Brodey and Michael B.

(Doc. # 124-19 at 189). Dr. Elhai holds a Ph.D. in clinical

assessment, psychometric and diagnostic research questions in [his] published scientific research for approximately 25 Id. at 190).

exp (Doc. ## 123-7 at 10; 124-19 at 192). In relevant part, Ms. Powers reached the following conclusion in her report:

(1)

regulated by the FDA pursuant to the Support Software Draft Guidance for Industry and Food and Drug Administration Staff -

(Doc. # 123-7 at 2). Ms. Powers also states that the MINI is (Id. at 18).

Both parties have responded to the Daubert Motions. (Doc. ## 125, 126). The Motions are now ripe for review.

II. Legal Standard

A. Daubert Motion Federal Rule of Evidence 702 states: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.



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Implementing Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), requires district courts to ensure that any and all scientific testimony or evidence admitted is both relevant and reliable. See *Id.* at 589 90. The *Daubert* analysis also applies to non-scientific expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). District courts must conduct this gatekeeping

testimony does not reach the jury under the mantle of

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291

-part

i *Hendrix v. Evenflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010).

The district court must assess whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Id.* The proponent of the expert testimony bears the burden of showing, by a preponderance of the evidence, that the testimony satisfies each of these requirements. *Id.*

B. Summary Judgment that there is no genuine dispute as to any material fact and

R. Civ. P. 56(a). A factual dispute alone is not enough to defeat a properly pled motion for summary judgment; only the existence of a genuine issue of material fact will preclude a grant of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 48 (1986).

An issue is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742

(11th Cir. 1996) (citing *Co.*, 9 F.3d 913, 918 (11th Cir. 1993)). A fact is material if

it may affect the outcome of the suit under the governing law. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing the court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S.

burden, the non-pleadin

designate specific facts showing that there is a genuine issue *Jeffery v. Sarasota White Sox, Inc.*, 64



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F.3d 590, 593 94 (11th Cir. 1995) (quoting Celotex, 477 U.S. at 324).

or evidence, the non- be true and all reasonable inferences must be drawn in the non- Shotz v. City of Plantation, 344 F.3d 1161, 1164 (11th Cir. 2003). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine

issue of material fact, the court should not grant summary judgment. Samples ex rel. Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). But, if the non-

proper, but required. Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981).

Finally, the filing of cross-motions for summary judgment does not give rise to any presumption that no genuine -motions must be considered separately, as each movant bears the burden of establishing that no genuine issue of material fact exists Shaw , 395 F.3d 533, 538- 39 (5th Cir. 2004); see also United States v. Oakley, 744 F.2d 1553, 1555 (11th Cir. -motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not

III. Analysis

The Court will address Nview Daubert Motion first, followed by Daubert Motion, N Motion for Summary Judgment, and finally Dr. Sheehan Summary Judgment.

A. Nview seeks to exclude the expert testimony of Ms. Norden on the grounds that it fails to meet the reliability or helpfulness requirements of Rule 702. (Doc. # 122 at 5). Nview also argues that testimony is irrelevant under Rule 402. (Id.).

1. Relevance and Helpfulness Again, to be admissible, expert testimony must assist

expert testimony is admissible if it concerns matters that are United States v. Frazier, 387 F.3d 1244, 1262 (11th Cir. 2004)

... i.e., that it logically advances a material aspect of Allison v. McGhan, 184 F.3d 1300, 1312 (11th Cir. 1999) (citation omitted).

Daubert, 509 U.S. at 587, ...[,] if an

Boca Raton Cmty. Hosp., Inc. v. Tenet Health Care Corp., 582 F.3d 1227, 1232 (11th Cir. 2009) roffered expert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing Frazier, 387 F.3d at 1262 63 (citation omitted).



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Because her report does not

reach a firm conclusion regarding whether the MINI is a

rest on a reliable foundation and is irrelevant. (Id.).

not be excluded as irrelevant. He states that her testimony

that Dr. Sheehan acted in bad faith by questioning whether e

Agreement in part based on its irresponsible approach to FDA compliance. (Doc. # 125 at 2). He states that Ms. Norden will

regulation. (Id. at 4) (quoting (Doc. # 122-2 at 35:10-24)).

Dr. Sheehan states Ms. Norden will establish that clinicians had enough of the information specified by FDA to independently evaluate the basis of a recommendation or rule out that clinicians may rely primarily Id. at 15; Doc. # 122-1 at 10 acted irresponsibly in failing to prepare a credible regulatory assessment before marketing its software to treat Doc. # 125 at 16; Doc. # 122-1 at 10-11).

requirement that it be helpful to the trier of fact. Ms.

fact understand if alleged concerns about FDA- compliance were legitimate. Whether his concerns were legitimate is relevant to whether the initial notice of default he sent to Nview was sent in bad faith an issue on which Nview seeks declaratory judgment.

2. Reliability The Court must also

evaluated may vary from case to case, but what remains

constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at Frazier, 387 F.3d 1244, 1262 (11th Cir. 2004) (citing Fed. R. Evid. 702, Advisory Committee Notes (2000)). There are four recognized, yet non-exhaustive, factors a district court may consider in evaluating reliability:

(1) whether the tested or is capable of being tested; (2) whether the technique has been subjected to peer review and publication; (3) the known and potential error rate of the methodology; and (4) whether the technique has been generally accepted in the proper scientific community. Seamon v. Remington Arms Co., 813 F.3d 983, 988 (11th Cir. 2016) (citations omitted). A district court can take other relevant factors into account as well. Id. (citations omitted).



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ying solely or primarily

witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied Frazier, 387 F.3d at 1261 (citation and

Seamon, 813 F.3d at 988 (citation omitted).

because it is not based on sufficient facts or data. (Doc. #

122 at 8). Ms. Norden states that she was not able to review

determine whether it is transparent in disclosing the bases

reach a firm conclusion about whether FDA has statutory jurisdiction to regulate the software and whether it is Id. at 9). Nview argues that Ms. Norden Id.). Nview states that Ms. Norden never reviewed any version of the software, despite the fact that the changes made to the

the software can independently review regarding the basis for Id.).

testimony. (Doc. # 125 at 6). He also argues that her testimony is reliable because she relied on (1) her experience, (2) the deposition testimony of nonparties who

struggled to make sense of its algorithms, (Id. at 14), and

(3 time to evaluate the algorithms. (Id. at 18-19).

Ms. Norden used her fifteen years of experience as an FDA regulatory consultant

subject to FDA compliance. methodology should be addressed during cross examination. See Maiz v. Virani cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [debatable] but admissible

Daubert Motion is denied. B.

testimony that on the grounds Ms. Powers is unqualified and her method is unreliable. (Doc. # 123 at 1). Second, he seeks to prevent Ms. Powers and Dr.

Id. at 2). Finally, Dr. Sheehan he extent it rests (Id.

arguments in turn.



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1. The first question under Daubert is whether Ms. Powers is qualified to testify competently regarding the matters she intends to address. *City of Tuscaloosa v. Harco Chem. Co.*, 158 F.3d 548, 563 (11th Cir. 1998). An expert may be

to examine the credentials of the proposed expert in light of *Clene Invs., Inc. v. XL Specialty Ins. Co.*, 280 F.R.D. 653, 661 (S.D. Fla. 2012) (quoting *Jack v. Glaxo Wellcome, Inc.*, 239 F. Supp. 2d 1308, 1314 16 (N.D. Ga. 2002)).

is minimally qualified, objections to the level of the

omitted). The Court is mindf

Maiz, 253 F.3d at 666 (quoting *Allison v. McGhan*, 184 F.3d 1300, 1311 (11th Cir. 1999)).

inical , therefore, not qualified to determine whether

In its response, Nview notes

regulatory affairs consultant who has more than twenty years of industry experience concerning medical devices, including It also contends software program provides a

clinician the ability to independently review the basis for Id.).

The Court agrees with Nview that Ms. Powers is qualified to state that are the same. Dr. Sheehan does not explain why Ms. Powers

of the MINI and determine whether they are identical. Ms. Powers is a biomedical engineer and regulatory affairs consultant for medical devices and products, and is minimally

qualified to opine that the two versions are the same. Dr. Daubert Motion is denied as to qualifications.

testimony is reliable. the two versions of the MINI are the same is unreliable

algorithm or any information about its design or actual or intended uses.

Id. at 7). Dr. Sheehan contends that Ms. Powers might have reached a different conclusion as to whether the MINI is a device subject to FDA regulation if she and known about the software errors. (Id. at 11).

structured interview assessment questions and the resulting



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simulated how a clinician would administer the MINI to a patient and interpret recommendations. (Doc. # 126 at 5-6; Doc. # 123-7 at 2, 8). Case 8:21-cv-00385-VMC-TGW Document 147 Filed 11/14/22 Page 28 of 68 PageID 6595 statement that the two versions are identical is irrelevant to her ultimate determination that the MINI is not a device subject to FDA regulation. (Doc. # 126 at 4-5).

The Court disagrees with Dr opinion is based on her twenty years of experience in the medical device field and her observation and personal use of paper versions of the MINI. Reliance on experience combined

with relevant evidence is sufficient to establish reliability. See Kilpatrick v. Breg, Inc., 613 F.3d 1329, 1336 (11th Cir. 2010) district court may determine the reliability prong under Daubert based primarily upon an expert s experience and . Any alleged flaws in Ms.

examination. Daubert Motion is denied as to Ms. reliability.

2.

Dr. Sheehan seeks to prevent Ms. Powers and Dr. Elhai software. In their rebuttal reports, both Ms. Powers and Dr.

Elhai criticize Dr. Shee Case 8:21-cv-00385-VMC-TGW Document 147 Filed 11/14/22 Page 29 of 68 PageID 6596 -7 at 10; Doc. # 124-19 at 196-98). Dr. Sheehan argues that Nview

preserve a prelitigation version of the software, Dr.

that Ms. Powers used for her mock interview and considered Id.) (citing (Doc. # 123-6 at 66:7-67:20)). Dr. Sheehan contends that the failure to preserve a prelitigation version of the software was ervation notice requesting immediate action to preserve relevant evidence, including

January 11, 2021 the same month Ms. Powers was conducting her first inspection of the software. (Id. at n.6).

Nv reviewed any version of the software, despite the fact that

that were made by Dr. Sheehan in the paper version of the at 8). Nview, on the basis of

regarding what a health care professional using the software can independently review regarding the basis for the

Id.). Nview contends that



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- not available for inspection now, Dr. Sheehan did nothing

Id.).

The Court

the software. Dr. Sheehan is free to explain at trial that his experts did not have a chance to review the software as it existed in and prior to Janua rebuttal experts should be able to explain the potential flaws

decision not to review any version of the software reasonably may affect the weight a jury gives to that expert testimony.

Daubert Motion is denied as to the request

failure to review the software.

3. Dr. Sheehan seeks to prevent Ms. Powers from testifying -compliant. In her original prior to the start of this litigation, Ms. Powers wrote that

-7 at 18). Ms.

basis for writing that the software was HIPAA compliant was a statement by Mr. Szyperski. (Doc. # 123 at 15; Doc. # 123- 6 at 18:14-15; 56:14 16). In its response, Nview states that not render any opinions in this matter concerning HIPAA

Daubert Motion is denied without prejudice as to the request to prevent Ms. Powers from testifying that -compliant. The Court may revisit this issue if Nview seeks to admit such testimony during trial.

C. Motion for Summary Judgment

1. Nview Count XI Declaratory Relief Nview seeks a declaration that, under the February

right to sell paper (not .pdf), and does not have the right se, distribution or other licensed rights that Nview has pursuant to the February License and [April]

for declaratory relief can be resolved as a matter of law.

According to Nview, the terms of the February Agreement and April Amendment are not ambiguous, and their plain meaning nonexclusive right to sell paper but not PDF versions.



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Dr. Sheehan responds that the August Agreement

at 9). The August Agreement, he argues, confirms that Dr. rights to the [technology Id.

at 8) (internal quotation marks omitted).

Tech. Coating Applicators, Inc. v. U.S. Fid. & Guar. Co., 157 F.3d 843, 844

has unambiguously indicated its intent . . . to adhere to the Bailey v. Netherlands Ins. Co., 615 F. Supp. 2d 1332, 1336 (M.D. Fla. 2009).

-of-law rules, it is well-settled that Florida courts are obligated to enforce choice-of-law provisions unless a showing is made that the law of the chosen forum contravenes strong public policy or that the clause is

Arndt v. Twenty-One Eighty-five, LLC, 448 F. Supp. 3d 1310, 1315 (S.D. Fla. 2020) (citing Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co., 761 So. 2d 306, 314 (Fla. 2000)). The February and August Agreements each contain the same provision specifying that the governing law is that of Delaware. (Doc. # 121-2 at 8; Doc. # 121-9 at 9) govern this Agreement without reference to D

In Delaware, the construction of contract language presents a question of law. Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co., 616 A.2d 1192, 1195 (Del. 1992). A

Leaf Invenergy Co. v. Invenergy Renewables LLC, 210 A.3d 688, 696 (Del. 2019) (internal quotations omitted). To determine what contractual parties intended, Delaware courts start with the text. Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp., 206 A.3d 836, 846 (Del. 2019). When the contract is clear and unambiguous, courts should give effect to the plain meaning of the contract s terms and provisions, without considering extrinsic evidence. Osborn v. Kemp, 991 A.2d 1153, 1159 60 (Del. 2010). To aid in the interpretation of the

contracts, i.e. a contract s construction should be that which would be understood by an objective, reasonable third Sunline, The contract must also be read as a whole, giving meaning to each term and avoiding an

Id. General terms of the contract must yield to more specific terms. Id.

Delaware enforces integration clauses. See FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842, 858 (Del. Ch. 2016) specific information on which a party has relied and foreclose , A & R Logistics Holdings, Inc. v. FdG Logistics LLC, 148 A.3d 1171 (Del. 2016).

Focus Fin. Partners, LLC v. Holsopple, 241 A.3d 784, 822 (Del. Ch. 2020) (quoting Restatement



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(Second) of Contracts § 213 (1981)).

First, the Court must determine whether the February Agreement is the operative License Agreement. Here, the April Amendment, together with the February Agreement it amends, is a fully integrated agreement that supersedes the August

Agreement. The parties quibble over whether the August Agreement was fully executed. However, regardless of whether the August Agreement was fully executed, the April Amendment supersedes it and reinstates the February Agreement as the operative License Agreement.

The relevant language in the April Amendment is clear and unambiguous. The April Amendment states that it amends

. . . represent the entire agreement of the parties with respect to the subject matter herein. (Doc. # 121-6 at 2- 3). All three documents deal with the same subject matter: technology. The April Amendment specifically references the February Agreement as the document it amends, and it makes no reference to the August Agreement. Therefore, the August Agreement is no longer operative and is not relevant to determining the rights of the parties. See Focus Financial Partners, 241 A.3d at 823

same subject matter and the subsequent agreement contains an integration clause, the prior agreement needs to be

(internal quotation omitted)).

Turning to the language of the February Agreement as amended by the April Amendment, the License Agreement gives Nview the right to sell the technology in any format,

Sheehan hereby grants to Nview . . . a[n] exclusive license, with the right to . . . make, have made, sell, [or] offer to sell . . . products utilizing the Sheehan Technology in the -6 at 2). The April Amendment defines in any format, including behavioral healthcare, healthcare technology and commercial research Id.)(emphasis added). The February

to continue to use and bill for the use of the Sheehan -2 at 4). The plain language of the License Agreement provides that Nview has a license to sell the Technology in any format, which would include paper and PDF versions, and that Dr. Sheehan retains a nonexclusive right to sell the Technology in paper format.

Because the plain language of the License Agreement supports its request, granted as to Count XI.

2. Dr. Sheehan Breach of Express and Implied



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Contractual Duties Counterclaim

clarity. He asserts that Nview breached the License Agreement by materially defaulting in various ways. (Doc. # 47 at 60- 61). In the same counterclaim, he also asserts that Nview is

unreasonable acts that threa Id. at 60). He states that Nview

his Technology. (Id. at 61). As relief for these breaches of express and implied duties, Dr. Sheehan seeks a declaratory Sheehan, heed his concerns, or exercise reasonable care in

the use of his intellectual property constitute uncured Id. at 64). Alternatively, he under judicial supervision and independent expert

supervision, to develop and execute a corrective action plan, with the aim for Nview to investigate and cure the foregoing areas of concern within (Id.).

Nview argues that Dr. Sheehan has failed to establish this claim because, Nview contends, the claim is based on the

February Agreement, which Dr. Sheehan has allegedly stated is not a valid agreement. (Doc. # 121 at 17-18). Additionally, Nview states that Dr. Sheehan is not entitled to a declaration of rights because it is improper to assert a claim for breach of contract and declaratory judgment in the same cause of action. (Id. at 18) (citing Intermec IP Corp. v. TransCore, LP, 2021 WL 4841131, at *2 (Del. Super. Oct. 18, 2021)). Nview also argues that Dr. Sheehan cannot prove that Nview breached any implied covenants. (Id. at 19). Finally, Nview contends that injunctive relief is not available to Dr. Sheehan because money damages would be an adequate remedy.

Dr. Sheehan responds that he is seeking a declaration # 121 at 23). He also argues that Nview has

violated express duties that arise under identical provisions in the February and August Agreements. (Id. at 22). Dr.

ached its implied duties to him. (Id. at 23). Finally, he contends that he can obtain

example, the Court concludes that by failing to develop Dr. e Id. at 24).

legal claim for breach of contract and breach of the implied

first counterclaim alleges two separate legal violations, the Court will address each in turn.

a. As the Court as already determined that the February Agreement and April Amendment make up



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the operative License Agreement, it will not grant summary judgment for Nview on this counterclaim based on the idea that Dr. Sheehan has tried to argue that the February Agreement is not valid. Dr. he attached to his pleading. (Doc. # 47 at 60; Doc. # 47-2).

A later statement by Dr. Sheehan during his deposition that Agreement does not change the fact that his breach of contract

counterclaim was at least alternatively based on the February Agreement. Nview has shown no legal basis for its contention otherwise.

request for declaratory relief. Here, because declaratory relief presents request for declaratory relief as arising under the federal

Declaratory Judgment Act. See *Melton v. Century Arms, Inc.*, 243 F. Supp. 3d 1290, 1307-08 (S.D. Fla. 2017) (finding that declaratory relief is a procedural issue and construing

under the federal Declaratory Judgment Act). The Declaratory Judgment Act governs procedural rights. See *Manuel v. Convergys Corp.* is little doubt . . . that the district court had to apply the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., rather . v. *Trimen Am., Inc.*, 67 F.3d

enlarge the jurisdiction of the federal courts but rather is operative only in respect to controversies which are such in the constitutional sense. . . . Thus the operation of the

controversies to be settled before they ripen into violations *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1230 (S.D. Fla. 2009) (citing 10B C. Wright & A. Miller, *Federal Practice & Procedure*, Civil 3d § 2751 (2004)). establish non-liability, or affords a party threatened with liability an opportunity for adjudication before its Id. at 1308. Federal courts *Wilton v. Seven Falls*.

Co., 515 U.S. 277, 286 (1995) to a claim for declaratory relief, courts often consider whether a declaratory judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and whether it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the See *Goodbys Creek, LLC v. Arch Ins. Co.*, No. 3:07-cv-947-PAM-JBT, 2009 WL 10671130, at *4 (M.D. Fla. Aug. 11, 2009) (quoting 10B Charles Alan Wright et al., *Federal Practice & Procedure* § 2759 (3d ed. 1998)) (internal quotation marks omitted).

persistent failures to engage with Dr. Sheehan, heed his concerns, or exercise reasonable care in the use of his intellectual property constitute uncured material defaults assert a separate claim for breach of contract. He alleges

that Nview breached the License Agreement by failing to consult with him and by making false and



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misleading claims about his technology (Id. at 61-63), then he requests declaratory and injunctive relief to rectify those breaches. (Id. at 64). Therefore, the Court does not agree with Nview that Dr. Sheeh duplicative of a separate breach of contract claim.

However, Dr. Sheehan has not properly pled a claim for declaratory relief. He has alleged breach of contract, a legal claim, and requested injunctive relief, a remedy that is not available in a declaratory judgment claim. Dr. Sheehan does

resolve differences in the interpretation of specific Sierra Equity Group, 650 F. Supp. 2d at 1231. Instead, he focuses only on alleged past breaches of the License Agreement (failing to consult and making false and misleading claims), the adjudication of which requires the Court to make various factual determinations with respect to the past conduct of the parties. See Id. regarding whether torts have been committed or a contract was adequately performed is unrelated to the purpose behind the Medmarc Cas. Ins. Co. v. Pineiro & Byrd PLLC, 783 F. Supp. 2d 1214, 1216 (S.D. Fla. 2011)

(finding that declaratory relief is inappropriate where it requires the court to make factual determinations regarding

is to clarify the legal relations at issue and to settle Id.

Summary Judgment as to this issue.

The Court, however, will not grant summary judgment on

injunctive relief. There is a genuine dispute of material fact as to whether Nview violated the License Agreement. Dr. Sheehan alleges that Nview failed to consult with him on press releases related to the License Agreement. (Doc. # 47 at 62). Dr. Sheehan provides evidence of press releases that Nview issued without consulting with him relating to the License Agreement. (Doc. # 124-12 at 70; Doc. # 124-3 at 292:22- 293:11). Nview does assertion. Because there is a genuine dispute of material fact as to whether Nview breached the License Agreement, the

breach of contract claim and request for injunctive relief.

b. should not be applied to give plaintiffs contractual

Winshall v. Viacom Int l, Inc., 55 A.3d 629, 636-37 (Del. Ch. 2011), aff d, 76 A.3d 808 (Del. 2013).

contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made Id. at 637.

The impli expectations created by autonomous expressions of the



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Intermec, 2021 WL 3620435, at *12 (Del. Super. Ct. Aug. 16, 2021) (quoting E.I. du Pont de Nemours & Co. v. Pressman, 679 A.2d 436, 443 (operates only in that narrow band of cases where the contract as a whole speaks sufficiently to suggest an obligation and point to a result, but does not speak directly enough to Id. arrow purpose, the implied covenant is only rarely invoked Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 888 (Del. Ch. 2009).

In reviewing the February Agreement and April Amendment, the Court cannot find evidence that the parties meant to

Dr. Sheehan identifies no gaps in the License Agreement that require filling, and he cites no cases discussing any such duty. The expectation that Nview act with honesty when selling Dr. Sheehan s technology

read it into the contract as an implied duty. See Id. (dismissing breach of implied covenant claim where plaintiff failed to identify a specific implied obligation tied to the contract). Dr. Sheehan offers no authority demonstrating that nsive independent research also revealed no such cases. Because Dr. breach of implied duties claim fails as a matter of law, this portion of his first counterclaim.

3. Dr. ounterclaim Nview counterclaim, false advertising in violation of the Lanham

Act. (Doc. # 47 at 64-67). It argues that Dr. Sheehan cannot eptively false or misleading or that the advertisements had any material effect

Nview also contends that Dr. Sheehan does not have standing under the Lanham Act to bring this claim because he has not established reputational injury and Id. at 25).

Dr. Sheehan argues in response that he has provided evidence of reputational injury and points to deposition testimony from Dr. Sheehan, Mr. Brodey, and Northwell corporate representative, who testified regarding . (Doc. # 127 at 19). were literally false and cites to his argument to that effect in his Motion for Summary Judgment. (Id. at 17-18).

To prevail on a false advertising claim, a plaintiff must establish that: (1) the advertisements were false or misleading; (2) they deceived, or had the capacity to deceive, consumers; (3) the deception had a material effect on purchasing decisions; (4) the misrepresented product affects interstate commerce; and (5) the plaintiff has been injured because of the false advertising. Intertape Polymer Corp. v. Inspired Techs., Inc., 725 F. Supp. 2d 1319, 1332 (M.D. Fla. 2010).

First, the Court addresses whether Dr. Sheehan has standing under the Lanham Act. extends only to plaintiffs whose interests fall within the Lexmark , 572 U.S. 118, 129 (2014) (internal quotation marks omitted). To show that he is within the zone of interests in a suit for false advertising under the Lanham Act, Dr. Sheehan must Id. at 132. Dr. Sheehan must also demonstrate that



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Nvi cause of his commercial injury. Id. In other words, Dr. directly from the deception wrought by the defendant s

advertising; and that that occurs when deception of consumers Id. at 133.

demonstrating reputational harm. Club Exploria, LLC v. Austin, No. 6:18-cv-576-JA-DCI, 2020 WL 6585802, at *9 (M.D. Fla. Nov. 10, 2020) (quoting Bischoff v. Osceola Cnty., 222 F.3d 874, 878 (11th Cir. 2000)), , No. 21-11556, 2022 WL

884317 (11th Cir. Mar. 25, 2022). Lexmark International, Inc. requires that, at the summary judgment stage, a plaintiff must provide some evidence from which a reasonable juror could conclude that its injuries were Id. (quoting Snac Lite, LLC, No. 2:14-cv-01695, 2016 WL 6778268, at *15 (N.D. Ala. Nov. 16, 2016)).

purportedly false advertising. (Doc. # 47 at 66). He points

to his own deposition testimony, along with testimony from Mr. Brodey and Northwell to

is unavailing. In the section of the deposition he cites, the closest he comes to explaining his reputational harm is when s is international staggering damage to my -3 at 299:5-6). The following exchange is the most detailed discussion of his reputational harm:

Q. And I m -- I -- I want to know what the amount of

damages are that you re seeking at trial regarding your false advertising claim? A. Well, as I said, I really haven t given that any thought.

Q. Do you know what the basis for your damages are? A. Well, there -- there -- I mean, there is fantastic

amount of -- I mean, false advertising has ramifications all over the place, I mean.

(Id. at 298:15-24). reputational harm are not enough at this stage to demonstrate the requisite commercial injury required for standing. The testimony from Mr. Brodey and Northwell representative similarly do not demonstrate reputational if somebody used the MINI and ended up getting results that were not correct,

(Doc. # 124-18 at 98:20-22) (emphasis added). A hypothetical statement does not amount to a showing of reputational injury. Finally, corporate representative, Dr. Delbert Robinson. Dr. Robinson

explained that Northwell experienced technical problems while using the MINI and stated -10 at



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51:7-53:5,

63:25-14, 67:15-25). At no point did Mr. Robinson state that his opinion of Dr. Sheehan was impacted, positively or

the MINI. This testimony does not show that Dr. Sheehan suffered reputational damage.

In short, none of the record evidence cited by Dr. Sheehan demonstrates reputational harm, and he makes no effort to quantify his damages. Thus, Dr. Sheehan cannot go forward with his claims under the Lanham Act because he has not demonstrated that he suffered reputational harm or that

advertisements. Dr. Sheehan lacks standing under the Lanham Act. See Snac Lite survive summary judgment, a plaintiff must provide

substantial evidence not just that Plaintiff suffered damages, but that those damages were caused by Defendant s

4. Next, third counterclaim for promissory estoppel. (Doc. # 47 at 67-

72). Nview argues that promissory estoppel is precluded when an existing contract governs the issue. (Doc. # 121 at 27- 28). Nview argues that the License Agreement governs Dr.

not change those rights. (Id.).

In contrast, Dr. Sheehan contends that he is seeking to

He claims that Nview promised him that he had an exclusive right to distribute paper and PDF versions of his technology. In a June 23, 2019, email, Dr. Young wrote to Dr. Sheehan that old scales or interviews all remain your property and you

have exclusive rig -10 at 583). places the licensing agreement we previously executed and Id.). Dr. Sheehan argues that

to the email. (Doc. # 124 at 24).

claim. See Doe v. Roe, No. 20-14456, 2022 WL 1447378, at *2 (11th Cir. May 9, 2022) (stating that, under Florida law,

estoppel and unjust enrichment claims as well as the breach

Under Delaware law, a plaintiff alleging promissory estoppel must show that (1) a promise was made;



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(2) the forbearance on the part of the promisee; (3) the promisee

reasonably relied on the promise and took action to his detriment; and (4) the promise is binding because enforcement is the only way to avoid injustice. *Davis v. Town of S. Bethany Beach*, No. S20C-06-018, 2022 WL 6646506, at *3 (Del. Super. Ct. Oct. 11, 2022) (citing *Lord v. Souder*, 748 A.2d 393, 399 (Del. 2000)). Promissory estoppel is a substitute for consideration where no contract or other means of enforcing the promise exists. *Lord*, 748 A.2d at 400. cannot assert a promissory estoppel claim based on promises that contradict the terms of a val *J.C. Trading Ltd. v. Wal-Mart Stores, Inc.*, 947 F. Supp. 2d 449, 457 (D. Del. 2013); see also *Weiss v. Nw. Broad. Inc.*, has determined that the Financing Agreement is a valid

contract, Weiss cannot recover under a theory of promissory ; *IGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d

however, where a fully integrated, enforceable contract governs the .

The License Agreement

technology. See (Doc. # 121-6 at 2) grants to Nview a[n] . . . exclusive license to . . .

distribute . . . products utilizing the Sheehan Technology in The License Agreement allows Nview to

technology. email was sent after the April Amendment was executed, Dr. n independent promise from the License Agreement. However, Dr. Sheehan cites no authority for this proposition, and the Court has not independently found any authority allowing a claim to proceed under a theory of promissory estoppel where there was an existing contract simply because the alleged promise was made after the parties entered the contract. The License Agreement applies to the rights to distribute therefore, any purported promises relating to the distribution of his technology could not be independent of the License Agreement. See *J.C. Trading*, 947 F. Supp. 2d at 458 (finding that any purported agreement related to the sale

agreement to sell shoes).

5. Nview seeks su fourth counterclaim for unjust enrichment, arguing that unjust enrichment is precluded when there is an existing contract between the parties on the same subject matter. (Doc. # 121 at 29). certifications to third parties for them to continue using knock-

enforce his copyrights against third-party infringers under the License Agreement. (Doc. # 124 at 25).

Delaware law governs counterclaim. See *Doe*, 2022 WL 1447378, at *2 (stating that,



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the promissory estoppel and unjust enrichment claims as well ; David v. Am. Suzuki Motor Corp., 629 F. Supp. 2d 1309, 1316 (S.D. Fla. 2009) (finding -

regarding contracts applied (citing Lanoue v. Rizk, 987 So.2d 724, 727 (Fla. 3d DCA 2008))).

Under Delaware law, a party claiming unjust enrichment impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by 1 Nemec v. Shrader, 991 A.2d 1120, 1130 (Del. 2010). -settled principle of Delaware law that a party cannot recover under a theory of unjust enrichment if a contract governs the relationship between the contesting parties that gives rise to the unjust Vichi v. Koninklijke Philips Elecs. N.V., 62 A.3d 26, 58 (Del. Ch. 2012); see also Wood v. Coastal States Gas Corp., 401 A.2d 932, 942 (Del. contract is the measure of plaintiffs right, there can be no recovery under an unjust enrichment theory independent of

parties as to matters within its scope, displacing to that extent any inquiry

In his counterclaim, Dr. Sheehan states that Nview has

enforcement authority against various third parties by extracting settlement payments, sublicense fees, certification fee 47 at 72).

His unjust enrichment claim is based on the way Nview

In their pleadings, both parties acknowledge that right to enforce its license is governed by the License

Agreement. Therefore, Dr. Sheehan cannot bring a claim for unjust enrichment based on rights. See Intermec, 2021 WL 3620435, at *17 (Del. Super.

(internal quotation marks omitted)).

to

6. Nview also twenty-one affirmative defenses. It argues that he has not shown any evidence to support his affirmative defenses of waiver, estoppel, and antecedent breach. (Doc. # 121 at 16). Nview also argues that his claimed immunity regarding matters

authority. (Id.). It also seeks summary judgment on his twenty-

barred due to its because it is not supported by any legal authority.



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Dr. Sheehan responds only affirmative defenses of waiver, estoppel, and antecedent breach. As to waiver and estoppel, Dr. Sheehan points to the fact that Nview referred paper and PDF customers to Dr. Sheehan for years. (Doc. # 127 at 21). As to antecedent breach, he states that the record demonstrates Nview breached its license in several ways prior to any alleged breach by Dr. Sheehan. (Id.).

affirmative defenses that he is immune due to his

to its The Court independently did not find any legal authority to support these affirmative defenses, and Dr. Sheehan does not provide any argument in his response as to why these defenses should survive. See *Ryder Truck Rental v. Logistics Res. Sols.*, 2022 WL failure to respond to any portion or claim in a motion

his affirmative defenses of waiver, estoppel, and antecedent breach. Nview cursorily states that Dr. Sheehan has not presented evidence in support of these defenses. (Doc. # 121 at 16). This statement alone does not prove that the nonmoving party cannot meet its burden of proof at trial. See *U.S. v. Four Parcels of Real Property in Greene and Tuscaloosa Counties in the State of Alabama*, 941 F.2d 1428, 1438 n.19 *Celotex*, it is never enough simply to state that the non-moving party cannot meet ; *Tingley Sys., Inc. v. HealthLink, Inc.*, 509 F. Supp. 2d 1209, 1219 (M.D. Fla. 2007)

; *Eli Rsch., LLC v. Must Have Info Inc.*, No. 2:13-cv-695-SPC-

instance, Plaintiffs merely state Dr. Sheehan has failed to provide evidence to support his affirmative defenses of waiver, estoppel, and antecedent breach. Based upon the Eleventh Circuit's ruling in *Four Parcels*, merely stating there is no evidence to support the affirmative defenses is .

D. Dr. Sheehan

1. Distribute Paper and PDF

Versions Dr. Sheehan seeks partial summary judgment on the issue of whether Dr. Sheehan has exclusive rights to paper and PDF versions of his technology and whether Nview infringed on his exclusive rights by selling paper and PDF versions without informing him. (Doc. # 124 at 19).

The Court has already found that the License Agreement gives Nview an exclusive license for PDF versions and a nonexclusive right to distribute paper versions of Dr. Additionally, the Court found that Dr. in which he alleges Nview made an enforceable promise that he had the exclusive right to distribute paper and PDF versions of the technology could not proceed. Therefore, the Court denies Motion as to this argument.

2. Damages Sought by Nview Dr. Sheehan seeks partial summary judgment on the issue of whether



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profits, punitive damages, and damages related to its

(Doc. # 124 at 25). He argues that the limitation on liability

provision in the License Agreement prevents Nview from seeking any of the above damages. (Id. at 25-26). Nview argues that the damages it seeks are direct damages not barred by the contract. (Doc. # 127 at 15-16). It argues that the License Agreement only limits lost profits in the form of consequential damages. (Id. at 15). Its damages, Nview

Technology, and, therefore, are not barred. (Id. at 16).

In its amended complaint, Nview seeks punitive damages in relation to its claims for breach of implied covenant of good faith, defamation, tortious interference with contract, tortious interference with prospective economic advantage, deceptive and unfair trade practices, and unfair competition. (Doc. # 45 at 24-25). In its prayer for relief, it does not claim to seek punitive damages for its breach of contract claim. (Id. at 24). Nview does seek lost profits in connection license Agreement, (Id. at 14)

customers, Id. at 13, 14, 16, 17, 21).

nor Nview shall have any liability to the other party for any

indirect, special, consequential or punitive damages, including loss of profits . . . incurred by any party, whether in an action in contract (including breach of warranty), tort -2 at 7).

the necessary and usual result of a defendant s wrongful act; *Indep. Realty Tr., Inc. v. USA Carrington Park 20, LLC*, No. N20C- 07-316, 2022 WL 625293, at *5 (Del. Super. Ct. Mar. 1, 2022).

not necessarily from the wrongful act, because they require Id. damages are a foreseeable and

damages from consequential damages. *WSFS Fin. Corp. v. Great Am. Ins. Co.*, No. CVN18C09088, 2019 WL 2323839, at *5 (Del. Super. Ct. May 31, 2019).

A contractual provision limiting consequential damages,

that is, lost profits cannot mechanically be classified as *Bonanza Rest. Co. v. Wink*, No. CIV.A. S10C-10018, 2012 WL 1415512, at *3 (Del. Super. Ct. Apr. 17, 2012), , 65 A.3d 616 (Del. 2013). Delaware courts

from with the former classified as direct damages and the latter

as consequential damages. *SLH Gen. Contractor, Inc. v. Ambience Inc.*, No. 4-19-001661, 2020 WL



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1130325, at *6 (Del. Com. Pl. Mar. 4, 2020) (citing *eCommerce Indus., Inc. v. MWA Intel., Inc.*, No. CV 7471-VCP, 2013 WL 5621678, at *47 (Del. Ch. Sept. 30, 2013)). The limitation of liability provision in the License Agreement does not bar lost profits in the form of direct damages. The provision instead bars only including loss of -2 at 7). The Court interprets this provision to mean that only lost profits in the form of consequential damages are barred. See *Arwood v. AW Site Services, LLC*, 2022 WL 973441, at *2 n.14 (Del. Ch. Mar. 31, 2022) (quoting *City of Providence v. Barr*, 954 F.3d 23, 41

generally signifies that what follows is a subset of what

The Court agrees with Dr. Sheehan. from its sublicenses to third parties are a textbook example of consequential damages. Its lost profits stem from other contracts or relationships

alleged breach of the License Agreement. Neither party disputes that the contract bars consequential damages. Therefore, Nview cannot recover consequential damages in the form of lost profits from agreements with third parties. The

extent Nview seeks consequential damages in the form of lost profits from agreements with third parties.

Turning to the punitive damages that Nview seeks, the Court is not convinced that the License Agreement fully bars recovery. Nview seeks punitive damages in connection with its claims against Dr. Sheehan for defamation, intentional interference with contract, intentional interference with prospective economic advantage, and unfair competition. (Doc. # 45 at 24-25).

by Florida law. provision - contractual claims; it does not encompass its tort claims. See *Adios Aviation, LLC v. El Holdings I, LLC*, No. 15-61218- CIV, 2015 WL 12564317, at *4 (S.D. Fla. Sept. 29, 2015) (citing *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162 (11th Cir. 2009); *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1301 (11th Cir. 2003)) (finding that a

nearly identical choice of law provision did not extend to the tort claims in the case).

Nview points to several cases in which it claims Florida courts invalidated limitation of liability provisions when the plaintiffs sought damages for intentional torts. The cases Nview cites are not on point. In none of the cases does the court invalidate a limitation of liability that only limits punitive damages. In each of the cases Nview cites, the court invalidated a provision that sought to entirely bar damages for intentional torts. See *Whitney Nat. Bank v. SDC Communities*, 2010 WL 1270266, at *4 (M.D. Fla. Apr. 1, 2010)

fraud or an intentional tort are void against public *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760

obviously unenforceable to the extent that it attempts to



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(citing Kellums v. Freight Sales Centers, Inc., 467 So. 2d 816 (Fla. 5th DCA 1985)); Goyings v. Jack and Ruth Eckerd Found. attempt by a defendant to exonerate himself from liability Burton v. Linotype Co., 556 So. 2d 1126, 1127 (Fla. 3d DCA 1989)

fraud and deceit and false advertising are not precluded by .

The Court is not convinced that these cases prove that a limitation of liability provision with respect to punitive damages for intentional torts. There is a significant distinction between a provision that limits all liability for intentional torts and one that simply prevents the plaintiff from recovering windfall damages.

The plain language of the License Agreement bars either party from seeking punitive damages in action in contract or tort. The Court grants

3. Finally, Dr. Sheehan seeks summary judgment on his second counterclaim, false advertising in violation of the Lanham Act,

The Court has already determined that Dr. Sheehan lacks standing for this claim. Therefore, the Court denies Dr.

Accordingly, it is ORDERED, ADJUDGED, and DECREED: (1) Nview Daubert Motion (Doc. # 122) is DENIED. (2) Daubert Motion (Doc. # 123) is DENIED. (3)

GRANTED as to the following claims and issues:

a. Count XI (Declaratory Relief) is

granted. b.

the implied duty of good faith and fair dealing is dismissed. c.

his first counterclaim is dismissed. d. (false

advertising in violation of the Lanham Act) is dismissed. e. (promissory

estoppel) is dismissed. f. (unjust

enrichment) is dismissed. g.

judgment), eighth (immunity due to privileged matters within the scope of professional



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duties), and twenty-first (false advertising) affirmative defenses are dismissed. (3)

DENIED as to the following:

a.

express breach of contract and requesting injunctive relief. b.

estoppel, and breach. (4) Motion for Summary Judgment (Doc. # 124)

is GRANTED as to and punitive damages barred under the License Agreement.

(5) is DENIED in all other respects.

DONE and ORDERED in Chambers in Tampa, Florida, this 14th day of November, 2022.

