STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 9995

INTERSAL, INC.,
Plaintiff,

v.

D. REID WILSON, Secretary, North Carolina Department of Natural and Cultural Resources; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; THE STATE OF NORTH CAROLINA; and FRIENDS OF QUEEN ANNE'S REVENGE, a Non-Profit Corporation,

Defendants.

ORDER AND OPINION ON DEFENDANTS' MOTION IN LIMINE TO EXCLUDE THE OPINION TESTIMONY OF JEFFREY SEDLIK

1. **THIS MATTER** is before the Court on Defendants' Motion in Limine to Exclude the Opinion Testimony of Jeffrey Sedlik (the "Motion"), (ECF No. 204).

2. Having considered the Motion, the related briefing, and the arguments of counsel at a hearing on the Motion, the Motion is hereby **GRANTED in part** and **DENIED in part**, as provided below.

Kilpatrick Townsend & Stockton, LLP, by Dustin T. Greene, Richard J. Keshian, Elizabeth Winters, and Kyleigh E. Feehs, for Plaintiff Intersal, Inc.

North Carolina Department of Justice, by Michael Bulleri, Amar Majmundar, Brian D. Rabinovitz, Orlando L. Rodriguez, and Charles G. Whitehead, for Defendants D. Reid Wilson, et al.

Earp, Judge.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. The facts surrounding this case have been recounted at length in the Court's previous orders. *See, e.g.*, *Intersal, Inc. v. Wilson*, 2023 NCBC LEXIS 29, at **2-21 (N.C. Super. Ct. Feb. 23, 2023).

4. Relevant to the Motion, Plaintiff seeks damages for Defendants' alleged breaches of Section 16(b) of the 2013 Agreement.[1] In support of their position, Plaintiff intends to offer the expert testimony of Jeffrey Sedlik, a professor of licensing practices and the application of copyright law in the visual arts, and an internationally-recognized professional photographer who, among other achievements, has served in high-level positions for trade associations and standard-setting bodies in the photography, advertising, product marketing, technology, and design industries. (*See* Expert Report of Professor Jeffery Sedlik ["2020 Sedlik Report"] 2-5, ECF No. 219.2.)

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[1] Section 16(b) states in part:

> 1) All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or D[N]CR, as well as a link to D[N]CR, Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.
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> 2) D[N]CR agrees to display non-commercial digital media only on D[N]CR's website.

(2013 Settlement Agreement, Section 16(b), ECF No. 106, Ex. 1.)

5. Professor Sedlik uses a "hypothetical licensing model" to calculate Plaintiff's damages at an estimated $5.2 million before he applies multipliers for both image scarcity and competitive use. With the multipliers, Professor Sedlik estimates Plaintiff's damages at between approximately $15.6 million and $259.3 million. (Supp. Report of Jeffrey Sedlik 3, ECF No. 219.4.)

6. After full briefing, the Court held a hearing on the Motion on 12 January 2024. (Not. of H'rg, ECF No. 248.) The Motion is now ripe for consideration.

II. LEGAL STANDARD

7. The Court's determination is controlled by Rule 702(a) of the North Carolina Rules of Evidence.[2] "Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides pursuant to Rule 104(a)." *State v. McGrady*, 368 N.C. 880, 892 (2016). The trial court's focus "'must be solely . . .[the] principles and methodology' used by the expert,'" rather than "'the

[2] Rule 702(a) provides in pertinent part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
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> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. R. Evid. 702(a).

conclusions that they generate.'" *Wallace v. Maxwell*, 270 N.C. App. 639, at *12 (2020) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993)).

8. North Carolina's Rule 702 "is now virtually identical to its federal counterpart and follows the *Daubert* standard for admitting expert testimony." *Safety Test & Equip. Co. v. Am. Safety Util. Corp.*, 2016 NCBC LEXIS 100, at **5 (N.C. Super. Ct. Dec. 16, 2016) (citing *McGrady*, 368 N.C. at 884). In applying this standard, North Carolina courts may seek guidance from the federal courts. *McGrady*, 368 N.C. at 888.

9. Determining admissibility involves a "three-step framework—namely, evaluating qualifications, relevance, and reliability." *Id.* at 892. Each of the three requirements must be satisfied in order for the expert's testimony to be admissible. *Id.* at 889. Moreover, "[t]he burden of satisfying Rule 702(a) rests on the proponent of the evidence[.]" *State v. Gray*, 259 N.C. App. 351, 355 (2018).

10. Defendants do not challenge Professor Sedlik's qualifications or the relevance of his testimony. Their objections center on the reliability of his opinions. To be reliable, the testimony must be (1) "based upon sufficient facts or data," (2) "the product of reliable principles and methods," and (3) the expert must have "applied the principles and methods reliably to the facts of the case." Rule 702(a)(1)-(3). This reliability analysis will necessarily vary from case to case, and "the trial court has

discretion in determining how to address the three prongs of the reliability test." *McGrady,* 368 N.C. at 890 (citation omitted).[3]

11. An expert's testimony is not helpful to the jury and, therefore, is inadmissible, when the expert does not use specialized knowledge to help the jury understand the evidence or determine a fact in issue. *See Braswell v. Braswell*, 330 N.C. 363, 377 (1991) ("When the jury is in as good a position as the expert to determine an issue . . . [the expert's testimony] is not helpful to the jury."). *See also State v. Wilkerson*, 295 N.C. 559, 569 (1978) (framing admissibility as a question of "whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.").

12. In addition, an expert may not testify as to "whether legal conclusions should be drawn or whether legal standards are satisfied." *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 587 (1991). The expert may testify to "the underlying factual premise, which the fact finder must consider in determining the legal conclusion to be drawn therefrom, but may not be offered as to whether the legal conclusion *should* be drawn." *Norris v. Zambito*, 135 N.C. App. 288, 292 (1994) (emphasis in original).

13. Experts, however, may explain technical terms used in a contract "to explain the meaning of such terms as an aid in interpreting the instrument." *Smith v. Childs*, 112 N.C. App. 672, 681 (1993).

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[3] Because North Carolina Rule of Evidence 702 adopts "virtually the same language from" Federal Rule of Evidence 702, federal case law is instructive, but not controlling, on these issues. *State v. McGrady*, 368 N.C. 880, 888 (2016).

14. Ultimately, "[t]he decision to either grant or deny a motion *in limine* is within the sound discretion of the trial court." *State v. Fristsch*, 351 N.C. 373, 383 (2000). *See also LaVecchia v. N. Carolina Joint Stock Land Bank of Durham*, 218 N.C. 35, 41 (1940) ("The competency of a witness to testify as an expert is a question primarily addressed to the sound discretion of the court[.]").

III. ANALYSIS

15. Defendants first contend that Professor Sedlik's hypothetical licensing model is inapplicable because this is not a copyright infringement case. Further, they argue that even if the hypothetical licensing model could be used, Professor Sedlik failed to properly apply it because (1) his valuation improperly assumed all images were equal in value to his benchmark images, failing to account for the specific composition of each image; (2) he based his calculations on the asking prices provided on stock photography websites rather than on the prices at which the images actually sold; (3) he ignored the fact that Intersal does not own the copyrights for the images; and (4) he did not take into account that some images were available for free as public records; and (5) his use of scarcity and competitive use multipliers was arbitrary and speculative. (Defs.' Br. Supp. Mot. in Limine Exclude Testimony Jeffrey Sedlik ["Defs.' Br."] 4-18, ECF No. 205.)

16. Plaintiff disagrees, arguing that the hypothetical licensing fee methodology is appropriate because the alleged breaches in this case are analogous to cases involving breach of a licensing or use agreement. Moreover, Plaintiff maintains that Professor Sedlik's application of this methodology is reliable because (1) he did view

each of the images at issue; (2) he only considered the objective aspects of each usage at issue and identified appropriate benchmarks based on those objective criteria; (4) copyright ownership is irrelevant; and (5) the scarcity and competitive use multipliers have been widely accepted by different courts. (Pl.'s Resp. Defs.' Mot. in Limine Exclude Op. Testimony Jeffrey Sedlik ["Pl.'s Resp."] 3-12, ECF No. 237.)

17. After close review, the Court concludes that Plaintiff has satisfied the requirements of Rule 702(a) with respect to Professor Sedlik's damages testimony. All the parties agree that this is not a copyright infringement case. Nevertheless, it is a case in which Plaintiff asserts that Defendants have improperly used (or allowed others to improperly use) images in violation of Plaintiff's legal rights. (*See* Third Am. Compl. ¶¶ 35, 63-67, ECF No. 106.) The source of those legal rights – contract vs. copyright law – does not determine whether analogizing to a lost licensing fee is a reliable way to measure damages. Indeed, no party points the Court to a case stating that Professor Sedlik's approach is unreliable when used outside of the copyright context.

18. While the 2013 Agreement did not give Intersal "an ownership right in DNCR's digital media," the Agreement did place restrictions and limitations on Defendants' use of that media so that there was the potential for Intersal to profit. Thus, the damages resulting from Defendants' alleged breaches of these access and use limitations are analogous to damages that result from breach of media licensing or use agreements. Indeed, Defendants' expert agreed that paragraph 16(b) of the

2013 Agreement "seems like" a limit on DNCR's use of digital media, like a photography use agreement. (Dep. of Brian Buss 73:23-76:4, ECF 173.12.)

19. Courts have recognized that expert opinions based on the hypothetical licensing model are admissible in cases involving breach of licensing or use agreements. *See, e.g.*, *Fair Isaac Corp. v. Fed. Ins. Co.*, 447 F. Supp. 3d 857, 875 (D. Minn. 2020) (applying New York law) (holding that a hypothetical license fee was a reasonable measure of damages because "[w]hen 'a breach of contract causes a plaintiff to lose an income-producing asset and that asset has a determinable market value, a plaintiff may seek to recover that value.'" (quoting *Safka Holdings, LLC v. iPlay, Inc.,* 42 F. Supp. 3d 488, 493 (S.D.N.Y. 2013))); *Artifex Software, Inc. v. Hancom, Inc.*, No. 16-cv-06982-JSC, 2017 U.S. Dist. LEXIS 147637, at *7 (N.D. Cal. Sept. 12, 2017) (holding that "the jury can use the value of the commercial license [for software] as a basis for any damages determination," in case involving use of software that was beyond the use permitted by the parties' licensing agreement); *Neva, Inc. v. Christian Duplications Int'l, Inc.*, 743 F. Supp. 1533, 1550-51 (M.D. Fla. 1990) (determining that jury properly awarded damages for breach of contract based on a "reasonable royalty to which Plaintiffs would have been entitled if the [defendant] had properly negotiated a license to commercialize the narrations with Plaintiffs."); *cf. Blue Ocean Labs., Inc. v. Tempur Sealy Int'l, Inc.*, No. 1:15CV331, 2015 U.S. Dist. LEXIS 173487, at *16 (M.D.N.C. Dec. 31, 2015) (holding that "the proper measure of damages for [use of plaintiff's confidential information beyond the terms of the

contract] is the license fee that the defendant would have paid had it not breached the contract.").

20. Other courts have embraced the hypothetical licensing model as a reliable theory of damages. *See, e.g.*, *Davis v. The Gap, Inc.*, 246 F.3d 152, 166-72 (2d Cir. 2001) (concluding that the hypothetical licensing model was appropriate as a measure of damages); *Leonard v. Stemtech Health Sci.*, No. 08-067-LPS-CJB, 2013 U.S. Dist. LEXIS 138446, at *17-20 (D. Del. Sept. 23, 2013), *aff'd*, 834 F.3d 376 (3d Cir. 2016) (finding Sedlik's methodology reliable because of its objective calculation of the fair market value of images and the fact that it has been accepted by courts in copyright infringement cases); *Under a Foot Plant, Co. v. Exterior Design, Inc.*, No. BPG-15-871, 2017 U.S. Dist. LEXIS 132998, at *11-12 (D. Md. Aug. 18, 2017) (holding that Sedlik's testimony was reliable because he fully explained and defended his methodology); *Navarro v. P&G*, No. 1:17-cv-406, 2021 U.S. Dist. LEXIS 43140, at *12-20 (S.D. Ohio Mar. 8, 2021) (admitting Sedlik's lost licensing theory of damages*). But see Brittney Gobble Photography, LLC v. Sinclair Broad. Grp., Inc.*, No. SAG-18-03403, 2021 U.S. Dist. LEXIS 222009, at * 17-18 (D. Md. Nov. 17, 2021) (excluding Sedlik's testimony because it was unsupported by the specific facts of the case).

21. Regarding Sedlik's use of scarcity and competitive use multipliers, the Court recognizes that several federal courts have held that while multipliers are impermissible under the Copyright Act as penalties, they may be used to calculate an image's fair market value. *See e.g., Leonard v. Stemtech Int'l, Inc.*, 834 F.3d 376, 392-94 (3d Cir. 2016) (holding that multipliers may be used to calculate images' fair

market value); *D'Pergo Custom Guitars, Inc. v. Sweetwater Sound, Inc.*, No. 17-cv-747-LM, 2020 U.S. Dist. LEXIS 1359, at *20-21 (D. N.H. Jan. 6, 2020) (admitting Sedlik's calculations using competitive use and scarcity multipliers and emphasizing that cross-examination was the proper mechanism to challenge their use). Defendants are free to cross-examine Sedlik on his use of multipliers. It will be up to the jury to decide whether to accept their use.

22. Defendants contend that certain of Sedlik's opinions are, in reality, legal conclusions that improperly invade the province of the jury. Specifically, they maintain that Sedlik should not be permitted to (1) characterize Nautilus's $15,000 settlement payment as a retroactive license fee for five images; (2) provide definitions of commonly-used terms that appear in the 2013 Agreement; (3) interpret the language of the 2013 Agreement; or (4) opine on Defendants' culpability with respect to alleged breaches of the 2013 Agreement. (Defs.' Br. 18-19.)

23. In contrast, Plaintiff asserts that Sedlik's use of the Nautilus $15,000 settlement payment and his definitions of technical terms used in the 2013 Agreement are appropriate. Intersal concedes, however, that Sedlik may not opine on Defendants' state of mind or culpability with respect to alleged breaches of the 2013 Agreement. (Pl.'s Resp. 12-14.)

24. As for Sedlik's use of Defendants' settlement payment to Nautilus, the Court concludes that Sedlik may reference the payment as a factual matter for whatever weight the jury wishes to assign it. The Court reserves a ruling with respect to Rule 403 should the testimony stray into that which may confuse or mislead the jury.

25. Defendants contest the admissibility of Sedlik's definitions of the terms and phrases "non-commercial," "digital media," "regardless of the producing entity," "shall bear a time code stamp," "shall bear . . . a watermark (or bug) of Nautilus and/or DCR," "shall bear . . . a link to D[N]CR, Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed," "display non-commercial digital media only on D[N]CR's website," and "Promotion Opportunities." (2020 Sedlik Report 22-23.) Experts may define "terms of art, or language peculiar to certain trades, business, etc." *See Stewart v. Raleigh & Augusta Air Line R.R. Co.*, 141 N.C. 253, 263 (1906). However, offering definitions of words and phrases used in ordinary parlance does not assist the jury. Accordingly, terms peculiar to the production or use of visual images, such as "digital media," "time code stamp," and "watermark (or bug)," are technical terms that Professor Sedlik will be permitted to explain to a jury. However, terms such as "non-commercial," "producing entity," "[website] link," and "promotion opportunities" are not unique to the industry and are commonly used. Professor Sedlik's view of what these terms mean would not assist the jury and is inadmissible.

26. Moreover, in no event may Professor Sedlik offer his interpretation of the 2013 Agreement. It is up to the Court to interpret unambiguous contract provisions and to the jury to interpret ambiguous ones. *See Smith*, 112 N.C. App. at 681 ("A contract which is plain and unambiguous on its face will be interpreted by the court as a matter of law; however, if the contract is ambiguous, interpretation of the contract is a question for the jury."). In Section D of his September 2020

Report, Sedlik discusses the "meaning and effect" of various provisions of the 2013 Agreement. (2020 Report 21-24.) To the extent Professor Sedlik's testimony veers into the realm of legal conclusions regarding DNCR's obligations under Section 16(b) of the 2013 Agreement, those conclusions would not assist the jury and are inadmissible. *See e.g., Norris*, 135 N.C. App. at 292 (prohibiting an expert from testifying on whether law enforcement's conduct was grossly negligent or showed reckless disregard for others' safety); *Navarro v. P&G*, 2021 U.S. Dist. LEXIS 43140, at *32 (excluding several of Sedlik's "opinions that were actually poorly disguised legal conclusions.").

27. The Court has reviewed the balance of Defendants' challenges and find that they go to the weight of Sedlik's testimony, rather than to its admissibility. Improper assumptions or misunderstandings of the facts can be explored on cross-examination. *See Leonard*, 834 F.3d at 390 ("Stemtech's disagreement with the calculation methodology and the underlying assumptions Sedlik made about which images and uses were similar to those in this case goes to the weight given to his testimony, rather than admissibility."). *See also Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("Normally, failure to include variables will affect the analysis' probativeness, not its admissibility."); *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 374 (2015) ("[the] Court does not examine whether the facts obtained by the witness are themselves reliable" – that "is a question of the *weight* to be given the opinion, not the *admissibility* of the opinion." (emphasis in original) (quoting *United States v. Crabbe*, 556 F. Supp. 2d 1217, 1223 (D. Colo. 2008))); *Insight Health Corp. v. Marquis*

Diagnostic Imaging of N.C., LLC, 2017 NCBC LEXIS 14, at *48-49 (N.C. Super. Ct. Feb. 24, 2017) (emphasizing that a challenge to the expert's understanding of the facts goes to the testimony's weight rather than its reliability).

28. **WHEREFORE**, the Court, in its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion. Professor Sedlik will be permitted to offer his expert opinion regarding any damages Intersal incurred as a result of Defendants' alleged breaches of paragraph 16 of the 2013 Agreement. He will also be permitted to offer definitions of technical terms or terms of art used in the production and publication of images. On the other hand, Professor Sedlik will not be permitted to offer definitions of commonly used words or phrases, and he may not offer his interpretations of the 2013 Settlement Agreement or legal conclusions regarding Defendants' liability.

IT IS SO ORDERED, this the 2nd of February, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases