

STATE OF NORTH CAROLINA
BUNCOMBE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 3707

VITAFORM, INC. d/b/a BODY
AFTER BABY,

Plaintiff,

v.

AEROFLOW, INC. and MOTIF
MEDICAL, LLC,

Defendants.

**AMENDED ORDER AND OPINION
ON CROSS-MOTIONS TO EXCLUDE
EXPERTS¹**

1. **THIS MATTER** is before the Court on Defendants' Motion to Exclude Expert Report of Scott Barnes ("Barnes") and Limit Plaintiff's Evidence of Damages, (ECF No. 149), and Plaintiff's Motion to Exclude Defendants' Expert Witness, (ECF No. 152) (each a "Motion" and together, the "Motions").

2. Having considered the Motions, the briefs, exhibits, and affidavits in support of and in opposition to the Motions, the arguments of counsel at the hearing on the Motions, and other appropriate matters of the record, the Court **GRANTS** Defendants' Motion and **GRANTS** Plaintiff's Motion for the reasons set forth below.

Smith DeVoss, PLLC, by Jeffrey J. Smith and John R. DeVoss, Wimer & Snider, P.C., by Jake A. Snider, and Caulk Legal, PLLC, by Taylor Caulk, for Plaintiff Vitaform, Inc. d/b/a Body After Baby.

Ward and Smith, P.A., by Joseph A. Schouten, Hayley R. Wells, and Jordan M. Spanner, for Defendants Aeroflow, Inc. and Motif Medical, LLC.

¹ The Court initially filed this order and opinion on 10 March 2023, (*see generally* Order and Op. Cross-Mots. Exclude Experts, ECF No. 164), and now files this Amended Order solely to add this footnote and footnote 42 below. This Amended Order does not otherwise alter the Court's 10 March ruling. *See, e.g., State v. Lamb*, 321 N.C. 633, 649 (1988) ("A ruling on a motion *in limine* is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary.").

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. This action arises from a dispute over products developed by Don Francisco (“Francisco”), the founder and president of Plaintiff Vitaform, Inc. d/b/a Body After Baby (“Plaintiff” or “Vitaform”). *See generally Vitaform, Inc. v. Aeroflow, Inc.*, 2022 NCBC LEXIS 128 (N.C. Super. Ct. Oct. 27, 2022) (the “October Opinion”).² Francisco developed three garments designed to address medical conditions associated with pregnancy. *Id.* at *2. Vitaform began selling these products sometime in 2012 or 2013, and eventually decided to work with a medical supply provider with national reach in 2017. *Id.* at *3.

4. On 19 July 2018, Francisco pitched Vitaform’s products to Evan Israel (“Israel”), the director of emerging markets for Aeroflow, Inc. (“Aeroflow” or “Defendant”) via telephone (the “Call”). *Id.* at *3–4. Francisco claimed that the parties reached an oral agreement on the Call concerning Aeroflow’s sale of Vitaform’s products and that Israel agreed that Defendants would maintain the confidentiality of Vitaform’s business plan in agreeing to sell Vitaform’s products. *Id.* at *4. The parties never entered into a written contract but Aeroflow did purchase and sell Vitaform’s products for a short time. *Id.* at *5. In 2019, Motif, a wholly-

² The October Opinion resolved Defendants’ Motion for Summary Judgment. (*See* ECF No. 138.) The Court draws heavily upon the October Opinion and its source citations in the Court’s discussion of the record and the factual and procedural background relevant to the Motions.

owned subsidiary of Aeroflow, began manufacturing its own maternity garments in competition with Vitaform. *Id.* at *5–6.

5. On 23 August 2019, Vitaform filed suit against Aeroflow and Motif. *Id.* at *6. The crux of this action is Vitaform’s contention that Aeroflow wrongfully revealed Vitaform’s confidential information and trade secrets to Motif, which unfairly allowed Motif to compete with Vitaform. *Id.* at *6–8. After extensive motions practice and the amendment of Vitaform’s complaint, this Court issued the October Opinion on 27 October 2022. *See generally id.*

6. In the October Opinion, the Court dismissed most of Vitaform’s claims and permitted only the following claims to proceed to trial: (1) fraudulent misrepresentation insofar as the claim is based on Aeroflow’s alleged promise during the Call to maintain the confidentiality of Vitaform’s business plan; (2) fraudulent concealment arising from the Call; (3) common law unfair competition and violation of North Carolina’s Unfair and Deceptive Trade Practices Act (the “UDTPA”) insofar as they are based on Aeroflow’s alleged promise during the Call to maintain the confidentiality of Vitaform’s business plan; and (4) unjust enrichment. *Id.* at *57–58. The Court specifically dismissed Vitaform’s claims for misappropriation of trade secrets and for breach of the covenant of good faith and fair dealing in their entirety. *Id.* at *57, *60.

7. Relevant here is Plaintiff’s identification on 6 September 2021 of three expert witnesses on damages: certified public accountant Gary Durham, BAB’s founder and principal Don Francisco, and Francisco’s wife, who also is a certified

public accountant. However, contrary to the requirements of the Court's Case Management Order, the designation included little information about the witnesses besides their identities, and did not provide their expert reports or damages calculations.³ After motions practice, the Court concluded that Plaintiff's failure had prejudiced Defendants and therefore sanctioned Plaintiff,⁴ but extended the expert discovery period to permit Plaintiff to remedy its incomplete disclosures.⁵ Thereafter, on 5 November 2021, Plaintiff filed a new expert designation, which designated Barnes as Plaintiff's lone damages expert, and which expressly "withdr[ew] all prior expert witness designations [Plaintiff] has made in this case."⁶ Plaintiff served Barnes's expert report (the "Barnes Report") that same day.⁷

³ (Defs.' Suppl. Mem Law Supp. Mot. Exclude Expert Report Scott Barnes Limit Pl.'s Evidence of Damages [hereinafter "Def. Suppl. Br."], ECF No. 160, Ex. B, Pl.'s Expert Designations [hereinafter "Pl. First Designations"], ECF No. 160.2; *see* Order Defs.' 10 Sept. 2021 BCR 10.9 Dispute Summ. Scheduling Order 2 [hereinafter "10.9 Order"], ECF No. 97 (noting that Plaintiff's designations lacked six categories of information required by the North Carolina Rules of Civil Procedure and the Case Management Order).)

⁴ (*See generally* Order and Op. Defs.' Mot. Sanctions [hereinafter "Sanctions Order"], ECF No. 116.)

⁵ (*See generally* 10.9 Order.)

⁶ (*See* Def. Suppl. Br. Ex. C, Pl.'s Expert Designation Withdrawal Prior Expert Designations [hereinafter "Barnes Designation"], ECF No. 160.3.)

⁷ (Def. Br. Supp. Ex. A, Preliminary Report of Scott A. Barnes, CPA, CFF, CGMA [hereinafter "Barnes Report"], ECF No. 150.2.)

8. Defendants thereafter retained Mickey Ferri (“Ferri”) as an expert witness to rebut Barnes’s opinions and produced his report (the “Ferri Report”) on 6 December 2021.⁸

9. Each party moved to exclude the other’s expert witness on 11 January 2023.⁹

10. The Court held a hearing on the Motions on 21 February 2023, at which all parties were represented by counsel (the “Hearing”). Following the Hearing, the Court ordered the parties to submit post-hearing supplemental briefs on the Motions by 1 March 2023.¹⁰ The parties timely filed their supplemental briefs,¹¹ and the Motions are now ripe for determination.

II.

LEGAL STANDARD

11. The Court evaluates a motion to exclude an expert’s testimony under North Carolina Rule of Evidence 702. The Supreme Court of North Carolina has held that our State’s Rule 702 incorporates the standard set by Federal Rule of Evidence 702. *State v. McGrady*, 368 N.C. 880, 888 (2016). For the most part, Federal Rule 702 incorporates the standard for expert testimony established by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See, e.g., Earnest v. Sanofi U.S. Servs.*, 26 F.4th

⁸ (Pl.’s Br. Supp. Mot. Exclude Defs.’ Expert Witness 2 [hereinafter “Pl. Br. Supp.”], ECF No. 153.)

⁹ (Def. Mot.; Pl.’s Mot. Exclude Def.’s Expert Witness [hereinafter “Pl. Mot.”], ECF No. 152.)

¹⁰ (Order For Supplemental Br., ECF No. 159.)

¹¹ (Def. Suppl. Br.; Pl.’s Suppl. Br. Supp. Mot. Exclude Defs.’ Expert Witness [hereinafter “Pl. Suppl. Br.”], ECF No. 161.)

256, 268 (5th Cir. 2022) (noting that *Daubert* is “effectively codified” in Rule 702); *United States v. Brown*, 973 F.3d 667, 704 (7th Cir. 2017) (stating that Rule 702 “largely reflects” the *Daubert* standard). In turn, *Daubert* established a three-element test for the admission of expert testimony: first, the area of proposed testimony must be based on specialized knowledge that will assist the trier of fact to understand the evidence or determine a factual issue; second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education; and third, the testimony must be reliable, through a foundation in sufficient facts or data, and the application of reliable principles and methods to the facts of the case. *See McGrady*, 368 N.C. at 889–90 (summarizing the *Daubert* standard and its application under North Carolina law).

12. Evidence that does not relate to any issue in the case is not relevant and “ergo, non-helpful” under the first element. *Daubert*, 509 U.S. at 591. The relevancy requirement under Rule 702 is more stringent than the ordinary relevance standard of Rule 401. *See, e.g., United States v. Ford*, 481 F.3d 215, 219 n.6 (3d Cir. 2007).

13. Within this framework, the disposition of a motion in limine seeking to exclude an expert witness is within the discretion of the trial court. *See Crocker v. Roethling*, 363 N.C. 140, 143 (2009).

III.

ANALYSIS

A. Defendants’ Motion

14. The Court examines Defendants' Motion first. Defendants argue that Barnes's expert opinions are both irrelevant and unreliable under the *Daubert* standard.¹² Defendants further argue that if the Court excludes Barnes's expert opinions, Plaintiff should be barred from introducing any other evidence of Plaintiff's damages.¹³

1. Exclusion of Barnes's Opinions and Testimony

15. The Court turns first to the relevance of Barnes's expert opinions. Defendants argue that Barnes's proffered testimony is irrelevant under both *Daubert* and the more forgiving standard of Rules 401 and 402.¹⁴ N.C. R. Evid. 401; N.C. R. Evid. 402.

16. The first prong of the *Daubert* standard requires expert testimony to relate to an issue in the case, and to have sufficient connections to the facts to aid the jury in deciding factual disputes. *Daubert*, 509 U.S. at 591. Expert testimony that relates solely to a non-issue is therefore inherently unhelpful and irrelevant under the *Daubert* standard. *Id.*

17. In particular, this rule excludes expert testimony addressing issues that have already been decided before trial. *See, e.g., Kenney v. Watts Regul. Co.*, 512 F. Supp. 3d 565, 579 (E.D. Pa. 2021); *Resco Prods. v. Bosai Mins. Grp.*, No. 06-235, 2015 U.S. Dist. LEXIS 124930, at *10 n.5 (W.D. Pa. Sept. 18, 2015); *Campbell v. CONRAIL*,

¹² (See Defs.' Mem. Law Supp. Mot. Exclude Expert Report of Scott Barnes Limit Pl.'s Evidence Damages 10–22 [hereinafter "Def. Br. Supp."], ECF No. 150; Def. Suppl. Br. 1–15.)

¹³ (See Def. Br. Supp. 23–24; Def. Suppl. Br. 8–15.)

¹⁴ (Def. Br. Supp. 11.)

1:05-CV-1501, 2009 U.S. Dist. LEXIS 810, at *19–20 (N.D.N.Y. Jan. 6, 2009); *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, No. 1:04-CV-1082, 2006 U.S. Dist. LEXIS 42891, at *11–18 (N.D. Ga. June 14, 2006).

18. Here, Barnes premises his analysis upon claims that have already been dismissed. In the October Opinion, the Court dismissed Plaintiff’s claims for misappropriation of trade secrets and breach of the duty of good faith and fair dealing *in their entirety*. *Vitaform*, 2022 NCBC LEXIS 128, at *57. These claims are no longer in this case, and will not be heard at trial. Yet Barnes states in the introduction to his Report that he analyzes lost profits and unjust enrichment suffered *as a result* of misappropriation of trade secrets and breach of the duty of good faith and fair dealing.¹⁵ Barnes goes on to discuss damages arising from those claims at length.¹⁶ Barnes’s opinions are thus predicated upon claims this Court has already dismissed, which are inherently irrelevant under the *Daubert* standard. *E.g., Simuro v. Shedd*, No. 2:13-cv-00030, 2016 U.S. Dist. LEXIS 194582, at *15 (D. Vt. Nov. 9, 2016).

¹⁵ Barnes begins his report by introducing his opinions “regarding the estimated lost profits incurred by [Plaintiff]” and the “unjust enrichment realized by [Defendants]” from the “alleged misappropriation of trade secrets and breach of the duty of good faith and fair dealing.” (Barnes Report ¶ 1.)

¹⁶ Barnes repeatedly emphasizes his analytical focus on the dismissed claims. In the introduction of his Report alone he discusses Plaintiff’s “lost profits on the misappropriated sales,” “Defendant’s alleged actions of misappropriating [Plaintiff’s] product designs,” and “the products subject to misappropriation[.]” (Barnes Report ¶¶ 3–4.) He goes on in the Report’s body, under a section headed “damages model under misappropriation [sic] of trade secrets & breach of duty of good faith and fair dealing[.]” to discuss “the general measure of damages in the [sic] misappropriation of trade secrets [.]” how to “measur[e] a plaintiffs [sic] lost profits from trade secrets misappropriation,” the parties’ business relationship before the “alleged misappropriation[.]” and the “authoritative literature from lost profit damages in the misappropriation of trade secrets matters [context][.]” (See Barnes Report ¶¶ 21–24.)

19. Plaintiff attempts to salvage Barnes’s opinions by arguing that even if Barnes discusses the dismissed claims extensively in his Report, he also discusses Plaintiff’s remaining claims, and that the damages calculation standard applicable to the dismissed claims and the remaining claims is the same, which renders Barnes’s opinions relevant.¹⁷

20. As a general matter, an expert should be excluded when the expert’s damages calculations do not match the theories of liability presented. *See, e.g., Potts v. KEL, LLC*, 2019 NCBC LEXIS 61, at *11 (N.C. Super. Ct. Sept. 27, 2019); *Kempner Mobile Elecs., Inc. v. Sw. Bell Mobile Sys.*, 428 F.3d 706, 712–13 (7th Cir. 2005). Here, Plaintiff pleaded its unjust enrichment claim based on the value of Plaintiff’s business plan in and of itself, not on the purported profits Defendants gained through their alleged use of Plaintiff’s plan.¹⁸ More importantly, this Court has previously concluded as a matter of law not only that the business plan did not constitute a trade secret, but that it was available in the public domain. *Vitaform*, 2022 NCBC LEXIS 128, at *29. Barnes nonetheless calculates damages assuming that the business plan was a trade secret not in the public domain which Defendants misappropriated.¹⁹

¹⁷ (*See* Pl. Br. Supp. 2–7; Pl. Suppl. Br. 2–5, 7–9.)

¹⁸ (First Am. Compl. ¶ 283, ECF No. 40 (“[t]he retention of the benefits of these services and materials that [Vitaform] provided is unfair and unjust”).)

¹⁹ *Compare* (Barnes Report ¶ 4 (“unjust enrichment based on identified sales less incremental direct costs”)), *with Next Advisor Continued, Inc. v. Lendingtree, Inc.*, 2017 NCBC LEXIS 52, at *11–13 (June 14, 2017) (“[courts] look to a defendant’s profits as the proper measure of unjust enrichment damages on a *trade secret misappropriation claim*” (emphasis added)).

21. Barnes thus analyses Plaintiff's unjust enrichment claim only insofar as it is predicated upon the plan's use as a misappropriation of trade secrets. Barnes assumes that Vitaform possessed a trade secret in the business plan, that Defendants wrongfully misappropriated that trade secret, and that the misappropriation itself unjustly enriched Defendants.²⁰ Barnes's Report contains no discussion whatsoever of the possible value of Vitaform's business plan as non-trade secret information, and Barnes admitted at his deposition that if no trade secret misappropriation occurred, Plaintiff may have suffered no damages at all.²¹ The dismissed trade secret claim therefore infects Barnes's treatment of Vitaform's unjust enrichment claim, which depends entirely on that already-dismissed claim, and Barnes offers no analysis of the value of Plaintiff's non-trade secret information and the damages, if any, which flowed from Defendants' receipt of that public information in and of itself. *Cf. Booe v. Shadrick*, 322 N.C. 567, 570 (1988) (holding that the proper damages for unjust enrichment are "the reasonable value of the goods and services to the defendant").

22. Furthermore, Barnes applies the damages calculation concept of a "head start period" to Plaintiff's unjust enrichment claim.²² But the "head start period" is a trade secret damages concept that measures "the time it would have taken the

²⁰ (Barnes Report ¶¶ 4, 21–25.)

²¹ "Q: What if [the] allegation [of trade secrets misappropriation] isn't true? A: If the jury makes that decision, then there may be no damages." (Def. Br. Supp. Ex. B, Dep. Scott Barnes, dated Dec. 8, 2021, at 71:12–25 [hereinafter "Barnes Dep."], ECF No. 150.3.)

²² Barnes states that "courts and the authoritative literature" in the misappropriation of trade secrets context "discuss a 'head start' doctrine[.]" (Barnes Report ¶¶ 23, 26.)

defendant to obtain the information by proper means” and under which “[m]onetary relief based on the defendant’s use of the information after the loss of secrecy is appropriate only to the extent necessary to remedy a *head start*[.]” See Restatement (Third) of Unfair Competition Law § 45 cmt. h (Am. L. Inst. 1995) (emphasis added).²³

23. Here, Barnes acknowledges that Plaintiff’s alleged damages would cease after its alleged trade secret became “publicly known through non-infringing activities,”²⁴ and the Court has already concluded that Vitaform’s business plan was in the public domain at the time of the Call, *Vitaform*, 2022 NCBC LEXIS 128, at *29. Taken together, Defendants’ alleged misuse of Plaintiff’s business plan cannot be found to have yielded a “head start” under Barnes’s analysis yet Barnes premises all of his damages calculations and opinions on Defendants’ gaining just such a “head start” through their alleged misconduct.²⁵

24. Finally, Barnes offers no analysis of Vitaform’s other remaining claims: fraudulent misrepresentation and concealment, and unfair competition. The Barnes Report is devoid of any discussion of fraudulent concealment or misrepresentation, and it contains only a single, cursory reference to unfair competition in the introduction to one section.²⁶ And even if Barnes’s single reference to unfair

²³ Barnes’s attempt to apply an analytical concept from Plaintiff’s dismissed claims to the surviving claims further demonstrates the degree to which the former infects his treatment of the latter.

²⁴ (Barnes Report ¶ 23.)

²⁵ (Barnes Report ¶¶ 3, 23, 24, 26; Barnes Dep. 34:15–22, 56:22–57:12.)

²⁶ This single reference states: “In certain circumstances involving unfair competition and the misappropriation of trade secrets, an accounting of the profits realized by the defendant

competition is read liberally to encompass the entire section of the Report in which it appears, Barnes still calculates Plaintiff's UDTPA damages by assuming Defendants misappropriated Plaintiff's trade secrets. In that section, Barnes discusses damages "in a misappropriation of trade secrets matter," exempts Defendants' profits unrelated to "misappropriation," and does not analyze the value of Plaintiff's business plan other than under an assumption that it constituted a trade secret and was wrongfully misappropriated.²⁷

25. Barnes's opinions thus lack a connection between the remaining theories of liability and the standard they apply. He either premises his analysis upon claims that have already been dismissed outright, or he discusses Plaintiff's surviving claims under methodologies properly applied to the already dismissed claims. Barnes's expert opinions therefore fail the relevance prong of the *Daubert* standard and are properly excluded as a result. *See, e.g., Potts*, 2019 NCBC LEXIS 61, at *11.

26. Because Barnes's opinions are excludable under the relevance prong of the *Daubert* standard, the Court will only briefly address the parties' arguments on whether his opinions satisfy the standard's reliability prong²⁸ to say that they do not. Since the Court has concluded that Defendants did not gain any "head start" advantage based on Barnes's own analysis, and that at the same time Barnes

may be used as an alternative damage measurement to the plaintiff's lost profits." (Barnes Report ¶ 25.)

²⁷ (Barnes Report ¶¶ 25–28.)

²⁸ (*See* Def. Br. Supp. 18–23; Pl. Br. Supp. 7–8.)

premises his opinions on Defendants' having obtained just such a "head start," the Court further concludes that Barnes's opinions are inherently unreliable under Rule 702. Barnes's opinions shall therefore be excluded for this additional reason. *See, e.g., Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (noting that evidence must satisfy all three elements of the *Daubert* test to be admissible).

2. Preclusion of Other Damages Evidence

27. The remaining question on Defendants' Motion for the Court's determination is whether Plaintiff should be permitted to offer an alternative theory of damages at this late stage in the litigation. The Court concludes that Plaintiff should not be permitted to do so.

28. As a general matter, a party may not introduce new evidence at trial that the party did not disclose during discovery upon proper request. *See Willoughby v. Wilkins*, 65 N.C. App. 626, 639–41 (1983) (citing federal authority approvingly for this point); *Hopkins v. MWR Mgmt. Co.*, 2017 NCBC LEXIS 92, at *8–9 (N.C. Super. Ct. Oct. 3, 2017).

29. The record reflects that Defendants served an unambiguous interrogatory upon Plaintiff seeking the disclosure of Plaintiff's theories and calculation of damages and all supporting evidence. In response, Plaintiff's only disclosed evidence for its damages is a conclusory assertion in its interrogatory response that its damages

calculations would be produced contemporaneously with its expert designations, and later the Barnes Report itself.²⁹

30. As noted above, Plaintiff initially designated three other expert witnesses on damages,³⁰ including Francisco, but it expressly “withdr[ew]” all of its previous expert designations in this action when it designated Barnes sixteen months ago.³¹ Combined with Plaintiff’s interrogatory response and lack of any other damages evidence, Plaintiff has therefore represented to Defendants for over a year that all of its damages evidence would come from Barnes alone.

31. Plaintiff argues in opposition to Defendants’ Motion that Plaintiff could prove its damages in numerous other ways, including, in particular, through Francisco’s lay testimony.³² But the question is not whether Plaintiff *could* offer

²⁹ (See Def. Br. Supp. 24–25; Def. Br. Supp. Ex. C, Pl.’s Answers and Objs. to First Set of Interrogs. ¶ 13 [hereinafter “Damages Interrogatory”], ECF No. 151.) Specifically, Plaintiff answered in full as follows:

Plaintiff objects in that this interrogatory is vague and unclear. It lacks the specificity necessary to address relevant objections. Furthermore, given that a damage expert has not yet been designated the request is premature and discovery is ongoing. Nonetheless, subject to the objection and without waiving same sources, calculations and the amount of damages will be presented contemporaneous with the expert designations.

³⁰ (Pl. First Designations.)

³¹ (See Barnes Designation.)

³² (See Pl. Br. Supp. 9; see also Pl. Suppl. Br. (arguing that Francisco should be permitted to testify as to Defendants’ profits based on Francisco’s “personal knowledge of his profit margin, Defendants’ unit production, his past sales history with Defendants among other matters and has reviewed Defendants’ purchase orders and import records”).) The Court notes that most of these subjects for Francisco’s purported testimony concern data obtained from others, (see Def. Suppl. Br. 14; Pl. Opp’n Br. Ex. B, Pl.’s Suppl. Discovery Dated Nov. 22, 2021, ECF No. 154.2), which are therefore not within his own personal knowledge and generally are not a proper topic for lay testimony. See N.C. R. Evid. 602.

other evidence of its damages, but whether Plaintiff *did so* when asked during discovery. *See Hopkins*, 2017 NCBC LEXIS 92, at *8–9; *see also, e.g., Excellent Home Care Servs. v. FGA, Inc.*, 13 CV 5390, 2017 U.S. Dist. LEXIS 228951, at *27 (E.D.N.Y. June 5, 2017); *Boyer v. Home Depot USA Inc.*, No. 08-13382, 2010 U.S. Dist. LEXIS 28992, at *9 (E.D. Mich. Mar. 26, 2010).³³ Plaintiff had approximately eighteen months between the filing of its complaint and the close of discovery to provide to Defendants any other evidence of Plaintiff's damages. Plaintiff failed to do so, and accordingly should not be permitted to introduce new theories or evidence of damages at the eleventh hour.³⁴

32. The balance of equities in this case counsels the same result. This action was originally filed in August 2019, and discovery concluded in January 2022.³⁵

³³ The Court recognizes that the text of the Federal Rules penalizes a failure to disclose or supplement with automatic exclusion, while the text of the North Carolina Rules does not. *See* Fed. R. Civ. P. 37(c)(1); N.C. R. Civ. P. 26; N.C. R. Civ. P. 37. However, the North Carolina Court of Appeals has held that a trial court may remedy a failure to disclose or supplement, including through exclusion of evidence or testimony, as a matter of the court's inherent authority. *Myers v. Myers*, 269 N.C. App. 237, 255 (2020). In addition, in similar circumstances and even before that holding, the North Carolina courts have cited the federal rule approvingly, *Wilkins*, 65 N.C. App. at 641, and applied its results as a matter of the court's discretion, *see Hopkins*, 2017 NCBC LEXIS 92, at *8–9. The Court therefore draws on federal authority which examined similar circumstances.

³⁴ Rule 26(e) does not provide Plaintiff a safe harbor. That Rule provides that a party is under no duty to supplement its responses, *if they were complete when made*, unless, as relevant here, the response related to the identity and testimony of expert witnesses. *See* N.C. R. Civ. P. 26(e). But Plaintiff's interrogatory response on damages was not complete when made; it instead effectively deferred an answer that Plaintiff tied to its expert disclosures. (*See* Damages Interrogatory.) Having represented that it would rely on its expert(s) to present its damages evidence, Plaintiff therefore had a duty to supplement its interrogatory response if it intended to also rely upon Francisco or any other lay witness to testify to Plaintiff's damages at trial.

³⁵ (Second Am. Case Management Order 3, ECF No. 99.)

Defendants have relied upon, and structured their entire litigation strategy around, Plaintiff's representation that Plaintiff would produce its damages estimates with its expert disclosures.³⁶ Trial is scheduled to begin in approximately five weeks. To permit Plaintiff to amend its damages calculations to produce an entirely new theory through evidence not disclosed during discovery would substantially prejudice Defendants and produce a trial by ambush. *See, e.g., Raju v. Murphy*, No. 3:17-CV-357, 2022 U.S. Dist. LEXIS 91484, at *4–7 (S.D. Miss. May 21, 2022); *Point Prods. A.G. v. Sony Music Entm't, Inc.*, 93 Civ. 4001, 2002 U.S. Dist. LEXIS 24450, at *7–15 (S.D.N.Y. Dec. 18, 2002).

33. On this point, the Court concludes that the reasoning of *Silicon Knights, Inc. v. Epic Games, Inc.*, No. 5:07-CV-275, 2012 U.S. Dist. LEXIS 63707 (E.D.N.C. May 7, 2012) is both apposite and persuasive. In that case, the plaintiff's only evidence of damages was an expert report which the court ultimately excluded, and the plaintiff failed to supplement its damages discovery before or after that ruling. *See id.* at *5–16. The court granted the defendant's motion to preclude the plaintiff from offering other evidence of damages at trial, which was only a week away, even though this ruling effectively limited the plaintiff's potential recovery to nominal damages. *See id.* at *21, *26–27. The court based its ruling upon the surprise and prejudice a late-developed theory would cause to the defendant, the imminence of trial, and the

³⁶ (Def. Suppl. Br. 12–13.) Indeed, in reliance on Plaintiff's representations, Defendants did not conduct further written or deposition discovery on Plaintiff's damages during the fact discovery period and, in particular, did not depose Francisco on the issue of damages. And, of course, once Francisco was withdrawn as an expert witness on damages in November 2021, Defendants could not seek to depose him as an expert on that issue.

plaintiff's failure to adequately explain its failure to supplement its damages calculations. *Id.* at *21–23.

34. Virtually all of the *Epic Games* court's logic is applicable here. Here, as there, Plaintiff's sole evidence of damages is expert opinion that the Court has excluded under applicable law, trial is imminent, and Plaintiff has offered no cogent explanation for its failure to disclose its new damages theories or to introduce any other evidence of damages.³⁷ Although Plaintiff argues, as noted above, that it *could* introduce other evidence of damages, that question is irrelevant because even if Plaintiff *could* have, it did not do so when asked in discovery.

35. Plaintiff attempts to distinguish *Silicon Knights* on grounds that trial in this action is not as imminent as the trial in that case.³⁸ But this argument merely highlights a distinction without a meaningful difference. If the Court allowed Plaintiff to introduce a new damages theory after the close of discovery and just five weeks from trial, Defendants would still be unable to meaningfully examine and prepare to defend against the new theory before trial is set to commence. *See, e.g., Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, No. 3:19-CV-00515, 2022 U.S. Dist. LEXIS 53433, at *26–28 (W.D.N.C. Mar. 24, 2022) (concluding that a damages supplementation provided fully for the first time nine days after the close of discovery

³⁷ Plaintiff argues perfunctorily that its interrogatory response was “appropriate and correct,” (*see* Pl. Br. Opp'n 11–12), but, as explained above, the Court finds this argument unconvincing in light of Plaintiff's duty to supplement under Rule 26(e) in these circumstances.

³⁸ (*See* Pl.'s Resp. Br. Defs.' Mot. Exclude Expert Report of Scott Barnes Limit Pl.'s Evidence Damages 10 [hereinafter “Pl. Br. Opp'n”], ECF No. 154.)

deprived the defendant of any “meaningful opportunity to conduct discovery on [the plaintiff’s] additional damages”).

36. Other courts have followed similar logic to preclude other evidence of damages when trial was approaching, but not as imminent as in *Silicon Knights*. See, e.g., *Raju*, 2022 U.S. Dist. LEXIS 91484, at *6 (excluding expert report with new damages theory submitted eight months before trial and two years after the pertinent discovery deadline); *SMD Software, Inc. v. EMove, Inc.*, No. 5:08-CV-403, 2013 U.S. Dist. LEXIS 146864, at *19–20 (E.D.N.C. Oct. 10, 2013) (precluding new damages theory introduced two months before trial); *Brandt Indus. v. Pitonyak Mach. Corp.*, No. 1:10-cv-0857, 2012 U.S. Dist. LEXIS 131096, at *3–8 (S.D. Ind. Sept. 12, 2012) (precluding new damages theory introduced three weeks before trial).

37. Indeed, some courts have excluded as untimely even evidence introduced shortly before the close of discovery, rather than immediately before trial, and precluded the introducing party from producing other damages evidence. See, e.g., *Local Access, LLC v. Peerless Network, Inc.*, No. 6:14-cv-399-orl, 2017 U.S. Dist. LEXIS 28490, at *11–13 (M.D. Fla. Mar. 1, 2017) (excluding evidence produced ten days before close of discovery, and precluding party from introducing other damages evidence). The Court therefore rejects Plaintiff’s protest that trial is not sufficiently imminent to justify preclusion of other damages evidence.

38. Nor will the Court continue the trial date and re-open the discovery period at this late date. This course would subject Defendants to further expense and needlessly prolong this litigation. Plaintiff had ample time to produce other evidence

of its damages before the discovery period closed in this case, and the Court has already sanctioned Plaintiff once for its failure to comply with its expert discovery obligations.³⁹ Plaintiff's failure to produce any other evidence is therefore no justification to prejudice Defendants and delay these proceedings.⁴⁰

39. Plaintiff argues vigorously in its briefing that Defendants' discovery productions have been defective, and that the balance of equities therefore weighs in Plaintiff's favor.⁴¹ But as noted above, Plaintiffs had months in which to challenge Defendants' production through the proper channels, *see* BCR 10.9; N.C. R. Civ. P. 37(a), yet Plaintiff failed to timely raise any challenge to Defendants' discovery responses. Thus, even if Plaintiff's accusations are correct, they have not been preserved and are therefore irrelevant to the questions presented by the Motions. And in any event, the alleged deficiencies do not permit Plaintiff to introduce an entirely new theory of damages through new evidence at the eleventh hour; indeed,

³⁹ (*See* 10.9 Order; Sanctions Order 7–10.)

⁴⁰ *Cf. Duke Energy Carolinas, LLC*, 2022 U.S. Dist. LEXIS 53433, at *34–36 (refusing to re-open discovery for examination of a new damages theory, but permitting a narrow extension of discovery on one issue because opposing counsel disclaimed any resultant prejudice); *Jaguar Land Rover Ltd. v. Bentley Motors Ltd.*, No. 2:18-cv-320, 2020 U.S. Dist. LEXIS 219825, at *16–19 (E.D. Va. Oct. 28, 2020) (declining to preclude new damages theory and re-opening discovery, but acknowledging that had COVID not disrupted the trial scheduling process, the court may have precluded the new evidence on grounds of irreparable harm to the other party); *Blackrock Eng'rs, Inc. v. Duke Energy Progress, LLC*, No. 7:15-CV-250, 2018 U.S. Dist. LEXIS 159561, at *8–10 (E.D.N.C. Sept. 18, 2018) (permitting a limited extension of discovery because the summary judgment deadline had not yet passed and no trial date had been set); *Mayor of Baltimore v. Unisys Corp.*, No. JKB-12-cv-614, 2013 U.S. Dist. LEXIS 126527, at *14–15 (D. Md. Sept. 5, 2013) (permitting a limited extension of discovery because discovery had not yet concluded and no trial date was set).

⁴¹ (*See* Pl. Br. Opp'n 10–13.)

to allow these accusations to weigh in Plaintiff's favor would effectively prejudge them as accurate without allowing Defendants a chance to contest them. The Court therefore declines to consider Plaintiff's charges of unrelated discovery misconduct, which were not timely raised or preserved, in rendering its decision on the Motions.

40. In sum, the Court concludes that Defendants' Motion should be granted, that Barnes should be excluded as an expert witness at trial, and that Plaintiff should be precluded from introducing other evidence of its damages at trial.⁴²

B. Plaintiff's Motion

41. Defendants designated Ferri as a rebuttal expert against Barnes.⁴³ Plaintiff attacks Ferri's opinions on several grounds, including unreliability, lack of qualifications, and unfair prejudice under North Carolina Rule of Evidence 403.⁴⁴ See N.C. R. Evid. 403.

42. Testimony from a rebuttal expert that attacks another, already-excluded expert is inherently irrelevant. See, e.g., *Thor Equities, LLC v. Factory Mut. Ins. Co.*, 20 Civ. 3380, 2022 U.S. Dist. LEXIS 164930, at *28–29 (S.D.N.Y. Sept. 13, 2022); *SEC v. Mudd*, 11 Civ. 9202, 2016 U.S. Dist. LEXIS 59273, at *24 n.14 (S.D.N.Y. May 3, 2016); *Stop Staring! Designs v. Tatyana, LLC*, CV 09-2014 DSF (AJWx), 2011 U.S.

⁴² Defendants expressly excluded nominal and punitive damages from the scope of their Motion. (See Def. Br. Supp. 2 n.1.) This Order and Opinion is therefore without prejudice to Plaintiff's right to seek, and Defendants' right to oppose, an award of nominal and punitive damages at trial.

⁴³ (See Def. Br. Supp. 6.)

⁴⁴ (See generally Pl. Br. Supp.)

Dist. LEXIS 159767, at *2–3 (C.D. Cal. Aug. 11, 2011). Indeed, Defendants concede that if Barnes is excluded, then Ferri should be excluded, too.⁴⁵ Defendants oppose Plaintiff's Motion on the merits as an alternative argument, asserted only if the Court denies Defendants' Motion and allows Barnes to testify.⁴⁶ Because the Court has decided to grant Defendants' Motion and exclude Barnes as an expert witness, the Court also grants Plaintiff's Motion and excludes Ferri's testimony as a rebuttal expert witness at trial.

IV.

CONCLUSION

43. **WHEREFORE**, for the reasons set forth above and in the exercise of its discretion, the Court hereby **ORDERS** as follows:

a. Defendants' Motion is hereby **GRANTED** and

(1) Barnes shall not be permitted to testify or to offer the opinions contained in his Report at trial; and

(2) Plaintiff shall be precluded from offering other evidence of its alleged damages at trial; and

b. Plaintiff's Motion is hereby **GRANTED** and Ferri shall not be permitted to testify or to offer the opinions contained in his report at trial.

⁴⁵ (*See* Defs.' Mem. Law Opp'n Pl.'s Mot. Exclude Defs.' Expert Witness 2, ECF No. 156 ("Accordingly, all parties agree: both experts should be excluded from testifying.").)

⁴⁶ (Def. Br. Supp. 2.)

SO ORDERED, this the 13th day of March, 2023.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge