

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW
YORK,

Plaintiff,

v.

NORTONLIFELOCK INC.,

Defendant.

Civil Action No. 3:13-cv-00808-MHL

**COLUMBIA'S OPPOSITION TO
NORTON'S MOTION FOR A NEW TRIAL**

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Framed as a new trial motion, Norton attempts to avoid the consequences of its chosen litigation strategies by rearguing issues the Court already decided. That is especially true with regard to damages—the focus of the motion. Despite having nearly eight years to devise a reasonable damages theory, Norton “swung for the fences” (Ex. A (“Trial Tr.”) 445:2-7, 1394:1-9) and offered a near-zero damages figure that was legally flawed and factually baseless. The Court properly exercised its gatekeeping function to prevent unsupported “expert” opinions—under FRE 402, 403, and 702—and excluded portions of Norton’s damages case: “data” that was incomplete and unreliable; opinions lacking appropriate foundation; and irrelevant evidence that was likely to confuse and mislead the jury. The parties extensively briefed and argued each issue, and the Court’s discretionary decisions to exclude this evidence were appropriate.

Contrary to Norton’s mischaracterization, the Court did not “prevent[] Norton from offering . . . any apportionment analysis,” nor did the Court leave “Norton with no opportunity to present a damages case of its own, or to meaningfully challenge Columbia’s.” (Dkt. 1245 (“Br.”) at 3-4, 22.) It was Norton’s choice not to offer, *e.g.*, the majority of Dr. Jaeger’s apportionment testimony and the most material of Mr. Hosfield’s criticisms of Columbia’s damages case, including his criticisms of Dr. Sullivan’s profit calculation and royalty structure (*i.e.*, lump sum vs running royalty). Had Norton presented that and other evidence—instead of voluntarily withdrawing all of its evidence for strategic reasons—Norton could have argued to the jury that Columbia’s damages figure was overstated and should be discounted to a number substantially below \$90 million.¹ All of that was fair game, as the Court reiterated the morning before

¹ For example, Dr. Jaeger’s second apportionment step alone would have allowed Norton to argue that Columbia’s damages figure should be discounted by more than 40%.

Columbia's first damages expert testified. (*See* Trial Tr. 1406:16-1408:8; *see also* Dkt. 739 at 19-20; Dkt. 907 at 3-4 n.2; Dkt. 910; Dkt. 1086; Ex. B ("Apr. 7, 2022 Tr.") 116:4-13, 118:9-119:5.)

Dissatisfied with the reasonable defense it was permitted to offer, Norton decided to take another run at a near-zero damages figure. Mid-trial, Norton withdrew all of Dr. Jaeger's apportionment testimony and chose not to call Mr. Hosfield. (Ex. C, Apr. 19, 2022 E-mail from D. Carr to L. Deskins; Trial Tr. 1867:2-9.) After abandoning its damages experts, Norton devised a new theory that rested entirely on the deposition testimony of a fact witness, Carey Nachenberg. Mr. Nachenberg had been asked about valuation of product features, and he testified (i) "I don't know," (ii) "[t]his is entirely speculation," and (iii) that he could only venture a "guess." (Ex. D, Nachenberg Tr. at 233:16-234:4, 234:13-17.) The rules of evidence notwithstanding, the linchpin of Norton's new theory was Mr. Nachenberg's "guess" that 4% of the value of "protection" in Norton's products came from "BASH machine learning." (*Id.* at 234:13-17.) Neither Columbia's nor Norton's damages experts relied on or endorsed Mr. Nachenberg's 4% "guess," and Norton's decision to rely on it came as a complete surprise during trial.

Columbia objected and, after the parties briefed the issue, the Court issued a written opinion concluding that Norton's latest near-zero damages theory was inappropriate for multiple reasons. (Dkt. 1155.) Against that background, Norton's new trial motion is nothing more than an attempt to blame the Court for its chosen litigation strategies, which (to state the obvious) is not an appropriate basis for a new trial. *See, e.g., Promega Corp. v. Life Techs. Corp.*, 875 F.3d 651, 666 (Fed. Cir. 2017) (affirming denial of new trial where party pursued "an all-or-nothing damages strategy" because "the judicial system should not suffer the consequences of [a party's] deliberate choice[s]"). There are several reasons that Norton's new trial motion should be denied, as summarized here and explained below.

First, the Fourth Circuit—like every other circuit—does not allow a litigant to use post-trial motions as a backdoor to reconsideration.² Norton’s motion rehashes old arguments, often repeating them verbatim or cross-referencing old briefs, and Norton makes no attempt to meet the Fourth Circuit’s high standard for reconsideration. *Second*, even if the Court were to reconsider its prior rulings, the Court’s discretionary decisions to exclude certain evidence were appropriate, and there was no error, much less one warranting a new trial. *Third*, Norton has not shown that any hypothetical error satisfies the new trial standard—a miscarriage of justice—nor does Norton address the harmless error standard under Federal Rule of Civil Procedure 61.³ As shown above, the Court did not preclude Norton from putting on a damages defense, and if anyone “decimated Norton’s damages case,” it was Norton itself. The Court cannot be blamed for Norton’s decision to “swing for the fences” with flawed near-zero damages theories both before and during trial. For these reasons, and others below, Columbia requests that Norton’s motion for a new trial be denied.

ARGUMENT

I. NORTON’S NEW TRIAL MOTION IS AN IMPROPER MOTION FOR RECONSIDERATION OF NUMEROUS DECIDED ISSUES.

“A litigant may not use Rule 59 to relitigate issues already decided by the court.” *In re Cable & Wireless, PLC*, 332 F. Supp. 2d 896, 899-900 (E.D. Va. 2004). Although this problem arises most frequently in the context of a Rule 59(e) motion,⁴ no post-trial motion—under Rule 50,

² In appeals to the Federal Circuit, regional circuit law applies to evidentiary issues unless the “district court rules, *as a matter of patent law*, that a party is precluded from introducing evidence.” *TecSec, Inc. v. Adobe Inc.*, 978 F.3d 1277-78 (Fed. Cir. 2020) (emphasis added).

³ Federal Rule of Civil Procedure 61 provides a strong default rule that errors concerning admission or exclusion of evidence do not result in a new trial “unless justice requires.” In many cases, an error in admitting or excluding evidence is deemed harmless and there is no need for a new trial.

⁴ *See, e.g., McReady v. Montgomery Cmty. Coll.*, 2021 WL 6101645, at *1 (4th Cir. Dec. 22, 2021) (affirming denial of Rule 59(e) motion that “essentially sought to relitigate previously decided matters”) (*citing Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (Rule 59(e) “may not be used to relitigate old matters”)); *Sloan v. Childress*, 2020 WL 2501442, at *3 (E.D. Va. May 14,

59(a), 59(e), or otherwise—can be used as a backdoor to reconsideration.⁵ See, e.g., *Gen. Tech. v. Conoco, Inc.*, 2000 WL 1585655, at *1 (E.D. Va. July 11, 2000), *aff'd*, 18 F. App'x 906 (Fed. Cir. 2001) (denying new trial motion that was “simply a rehash of the rulings made during the trial as to claim determinations, instructions to the jury and motions for judgment as a matter of law.”).⁶

As this court has explained (in denying a Rule 59(e) motion):

It is an improper use of the motion to reconsider to ask the Court to rethink what the Court already thought through—rightly or wrongly. The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Cable & Wireless, 332 F. Supp. 2d at 900 (citation and alterations omitted); see also Dkt.

945 at 5 (“The circumstances under which a court will reconsider a prior decision are rare.”).

Rule 54(b) governs reconsideration of interlocutory orders, such as the Court’s orders on the parties’ *Daubert* motions and motions *in limine* (“MILs”). See *Matter of Vulcan Construction*

2020) (“The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.”), *aff'd*, 827 F. App'x 348 (4th Cir. 2020), *cert. denied*, 142 S. Ct. 103 (2021); *Faro v. Iancu*, 2019 WL 10982493, at *1 (E.D. Va. Jan. 31, 2019) (“A Rule 59(e) motion is not intended to allow for reargument of the very issues that the court has previously decided. . . .”) (citations and quotations omitted); *Bay v. Clarke*, 2017 WL 253971, at *2 (E.D. Va. Jan. 20, 2017) (“It is improper to use a Rule 59(e) motion merely to relitigate issues already decided by the court.”) (quotation omitted); *Versata Dev. Grp., Inc. v. Rea*, 2013 WL 12099483, at *1 (E.D. Va. Oct. 5, 2013) (“Rule 59(e) may not be used to relitigate old matters that the court has already ruled upon.”).

⁵ A contrary rule would make civil litigation endless because a losing party could simply say that a new trial is warranted because all of the Court’s pre-trial and trial rulings were wrong and should be reconsidered—very close to what Norton attempts in the present motion.

⁶ See also *Qiydaar v. People Encouraging People, Inc.*, 2021 WL 2260286, at *6 (D. Md. June 3, 2021) (a new trial motion under “Rule 59 is not a vehicle to relitigate issues that were previously decided”); *Applera Corp. v. MJ Rsch. Inc.*, 389 F. Supp. 2d 344, 347, 352 (D. Conn. 2005) (“It is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple.”).

Materials, LLC, 433 F. Supp. 3d 816, 820 (E.D. Va. 2019). In the Fourth Circuit, reconsideration rarely is granted and only if “(1) a party produces ‘substantially different evidence,’ unavailable before the ruling; (2) ‘controlling authority has since made a contrary decision of law applicable to the issue,’ or (3) the ‘prior decision was clearly erroneous and would work manifest injustice.’” *Williams v. Big Picture Loans, LLC*, 2020 WL 7680550, at *1 (E.D. Va. June 4, 2020) (quoting *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003)).

Here, Norton fails to establish a basis for reconsideration. Norton presents neither new evidence previously unavailable nor new controlling legal authority, and although Norton apparently disagrees with almost all of the Court’s previous decisions, it makes no effort to show that they were “clearly erroneous and would work a manifest injustice.” As the Fourth Circuit has explained, that standard is met only if a previous decision strikes the court “as wrong with the force of a five-week-old, unrefrigerated dead fish. It must be dead wrong.” *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009) (citations omitted).

Norton makes no demonstration that comes close to showing that the Court’s prior rulings are “dead wrong.” Instead, Norton rehashes old and unpersuasive arguments that the Court rejected—often verbatim or with citation to its old briefs—and in the few instances where Norton adds something new, it merely refines an argument that could have been presented earlier. A motion for reconsideration is not “a vehicle for . . . iteratively refining arguments that could have reasonably been presented in the first instance,” *Biedermann Techs. GmbH & Co. KG v. K2M, Inc.*, 2022 WL 337293, at *1 (E.D. Va. Jan. 25, 2022), and thus Norton’s refinements of arguments that the Court rejected are waived. Whatever disagreement Norton might have with the Court’s previous decisions, Norton has not met the standard for reconsideration.

Motions *in Limine* and *Daubert* Motions. The majority of Norton's new trial motion focuses on the Court's rulings on Columbia's *Daubert* motions and motions *in limine*. (Br. at 2-12.) The parties extensively briefed Columbia's *Daubert* motions and motions *in limine* in 2020 (Dkts. 376-1, 376-17, 420, 425, 448-1, 448-3, 488-1, 488-2, 526, 531); the Court held a three-day *Daubert* hearing in June 2021 (Dkts. 653, 654, 655); the parties re-briefed motions *in limine* in 2022 (Dkts. 753-1; 753-2; 787, 793, 860-1; 860-2); the Court issued detailed written opinions on Columbia's *Daubert* motions and motions *in limine* (Dkts. 717, 739, 741, 891, 899, 900, 902-913); Norton sought reconsideration of several of these issues before trial, which the Court denied (Dkts. 922, 926, 945); and throughout trial, Norton sought reconsideration of many of these decided issues (*e.g.*, Trial Tr. 1521:1-1545:9). The issues that form the backbone of Norton's new trial motion have been briefed and argued exhaustively and the Court decided them—sometimes two or three times. Although Norton disagrees with those decisions, Norton's motion provides no basis for reconsideration.

Cross-Examination of Dr. Cole and Closing Arguments. During and immediately after Norton's cross-examination of Dr. Cole, Columbia objected to a new damages theory that Norton had introduced by surprise based on counsel's use of speculation and guesses. (Trial Tr. 1645:25-1646:1, 1657:13-1658:7.) The Court ordered briefing, which the parties submitted. (Trial Tr. 1658:21-25; Dkts. 1148, 1149.) The Court then adjourned the trial for a full day to issue a written opinion, in which the Court agreed with Columbia that certain demonstratives and testimony should be struck and that a curative instruction was appropriate. (Trial Tr. 1667:19-1668:3; Dkt. 1155.) The Court also placed limited restrictions on closing arguments to enforce its prior rulings. (Dkts. 1170, 1171.) These issues were thoroughly briefed and argued, and Norton provides no basis for the Court to reconsider these decisions.

Missing Witness Instruction. Before Columbia even requested a missing witness instruction with respect to Dr. Dacier, Norton filed a motion *in limine* asking the Court to find that a missing witness instruction should not be given. (Dkt. 769 at 20-23.) At Norton's insistence, the parties briefed that issue in the context of motions *in limine* (*id.*; Dkt. 801 at 19-27; Dkt. 852 at 14-18), and the Court issued a written opinion (Dkt. 889). Norton then sought reconsideration (Dkts. 928, 932), which was denied (Dkt. 945). Then, during a pre-trial conference, Norton orally requested reconsideration again, which led to extensive additional argument (Apr. 7, 2022 Tr. 43:4-103:22). This triggered additional briefing throughout the trial. (Dkts. 1088, 1089, 1102, 1103, 1123, 1124, 1126, 1127, 1139, 1143, 1144, 1147, 1148.) The parties also submitted competing versions of the missing witness instruction (Dkts. 1096, 1097), and before it was provided to the jury, made arguments about suggested modifications (Trial Tr. 2473:19-2484:21). After considering a virtual mountain of written and oral submissions, the Court concluded that a missing witness instruction was appropriate and decided what that instruction should say. (Dkt. 1167.) Norton's new trial motion provides no basis for the Court to reconsider this decision.

Sales to Customers Outside of the United States. Norton once again argues that Columbia should not have been able to claim a reasonable royalty that takes into account Norton's sales to customers outside of the United States that arose from domestic infringement. (Br. at 23-24.) The merits of that issue were briefed in the context of *Daubert* motions at Norton's insistence (Dkts. 383 at 13-18, 408-1 at 25-36, 444 at 12-21) and thoroughly argued during the *Daubert* hearing (Ex. E ("June 4, 2021 Tr.") 277:3-288:2, 336:17-350:13, 380:24-388:9). The Court then issued a detailed written opinion. (Dkt. 737 at 21-34.) Norton sought reconsideration (Dkts. 922, 926 at 24-30), which the Court denied (Dkt. 945). This issue also was thoroughly argued and decided by the Court, and Norton provides no justification for reconsideration.

Moreover, with respect to the content of the jury instruction, the parties submitted competing proposals (Dkt. 1046-1 at 77-79), submitted written objections to each other's proposal (Dkts. 1047 at 11-12, 1048-1 at 24-25), and had the opportunity to address their objections at a hearing after juror selection (Trial Tr. at 146:20-147:17). The Court ultimately did not accept Norton's proposed instruction nor did it accept Columbia's proposed instruction *in toto*. (*Compare* Trial Tr. 2841:23-2842:25 *with* Dkt. 1046-1 at 77-78.) Rather, the Court provided its own proposed instruction, and Norton's only objection to that new instruction was that no foreign sales instruction should be given at all. (Trial Tr. 147:7-15.) The Court again overruled that objection. (*Id.* 147:16-17.) This too is an issue that has been thoroughly argued and decided by the Court, and Norton identifies nothing that would warrant reconsideration.

* * *

Columbia respectfully submits that the Court and the parties should not be forced to fully re-brief, reargue, and rehash virtually every issue that the Court decided before and during trial—which is essentially what Norton's new trial motion requests. If Norton wants reconsideration, it must comply with the law of the Fourth Circuit regarding requests for reconsideration, which Norton has not done. The new trial motion should be denied as an improper and insufficiently supported motion for reconsideration—as well as on the merits. If Norton disagrees with the Court's decisions, the appropriate recourse is appeal—under a highly deferential abuse of discretion and harmless error standard.

II. THE COURT CORRECTLY DECIDED THE *DAUBERT* MOTIONS AND MOTIONS *IN LIMINE*, AND THUS THERE WAS NO ERROR.

The Court received more than 150 pages of briefing on the relevant *Daubert* motions and motions *in limine* (opening, rebuttal, and reply briefs). Norton's challenge of the Court's decisions—in a 27-page new trial motion—presents an obvious page limit problem. Columbia

does not attempt to restate all of its arguments here, and to the extent the Court decides to reconsider prior rulings, Columbia respectfully requests that the Court consider Columbia's previously-submitted briefs, which explain in detail why the Court's rulings were correct. Below, Columbia briefly addresses each of Norton's arguments and focuses on the ways in which Norton mischaracterizes the Court's decisions.

Block Count Data (Columbia's MIL 1). Norton contends that the Court's decision was based on the "conclusion that the book of wisdom doctrine applies only if the evidence *increases* the royalty."⁷ (Br. at 6.) That (characteristically) misstates the Court's ruling. Although the Court correctly noted that the book of wisdom was developed for and typically is applied in scenarios that would increase the reasonable royalty (Dkt. 903 at 5 n.1), that was not the basis for the Court's decision. Rather, the Court excluded the at-issue data for two independent reasons: (i) Norton provided "no evidence, expert or otherwise, show[ing] that the technological improvement could have been anticipated" and (ii) "the data would mislead and confuse the jury as to the hypothetical negotiation" because Norton and its experts "offered no reasoned opinion that [this data would be] appropriately considered" during the hypothetical negotiation. (Dkt. 903 at 4-6.) The Court also emphasized that "[t]he relevant years of 2009 through 2011 are omitted," the data for 2013 was an "interpolat[ion]," and thus it was "questionable whether this 'data' is reliable." (*Id.* at 4.)

Moreover, after the direct examination of Dr. Cole, Norton sought reconsideration of this decision, arguing incorrectly that Columbia's counsel had "opened the door." (Trial Tr. 1521:1-1524:9, 1525:3-1545:9.) The Court reiterated that the at-issue "data" was incomplete and unreliable, and that Norton's Dr. Jaeger had provided deposition testimony that further called into

⁷ Norton wrongly suggests that this "error" applies to all three of the MILs relating to post-hypothetical-negotiation data. It was mentioned briefly only in the MIL 1 opinion.

question the reliability and relevance of the “data” on which he relied. (*Id.* at 1540:25-1545:9.) Thus, the “data” also was excluded as incomplete, unreliable, and unfairly prejudicial and confusing (*i.e.*, FRE 402, 403, and 702), wholly apart from the book of wisdom.

“Non-Infringing Alternative” (Columbia’s MIL 2). Norton argues that the Court erred in excluding Dr. Jaeger’s testimony that complete removal of the infringing technology (SONAR/BASH) would have been a “non-infringing alternative” at the hypothetical negotiation. (Br. at 5.) Norton appears to suggest that it was inappropriate for the Court to assess the sufficiency of the foundation for Dr. Jaeger’s opinion, but that is wrong. Under FRE 702, the Court has an obligation to scrutinize expert opinion evidence and to exclude such evidence if it is unreliable.⁸ *See Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, 30 F. 4th 1339, 1356-58 (Fed. Cir. 2022) (affirming exclusion of expert’s royalty analysis because it was “legally insufficient” and unreliable); *Belville v. Ford Motor Co.*, 919 F. 3d 224, 233 (4th Cir. 2019) (district court did not abuse its discretion by excluding expert testimony where the opinions “lack[ed] [] relevance and reliability”). Here, Norton’s expert failed to provide foundation for the proposed non-infringing alternative, and the Court properly excluded it. (*See* Dkt. 753-1 at 18-22.) As the Court stated in its decision on Columbia’s MIL 2: “Norton provide[d] no evidence, expert or otherwise, that a fully developed alternative (the BPE system without SONAR/BASH) was an available substitute in 2009-2013, much less that it would have been commercially acceptable at the time.” (Dkt. 904 at 5.) It was entirely proper for the Court to assess the evidentiary foundation for Dr. Jaeger’s

⁸ As the Court likely knows, there is a strong concern that Courts disregard their obligation to scrutinize expert testimony, improperly finding that defects go to weight, not admissibility. FRE 702 will soon be amended to make clear that current law requires a Court to scrutinize expert testimony, and to exclude it unless the Court is satisfied that it is reliable. *See* Comm. on Rules of Prac. & Proc., Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, at 297 (Preliminary Draft, Aug. 2021). The Court’s scrutiny of Dr. Jaeger’s opinions was entirely appropriate.

opinion and to conclude—consistent with precedent cited in Columbia’s brief (Dkt. 753-1 at 14-22)—that a proper foundation for a purported non-infringing alternative was missing.

Decision Tree Attributes (Columbia’s MIL 3). Norton argues that the Court erred in excluding Dr. Jaeger’s testimony that 3% of the value of SONAR/BASH should be attributed to Columbia’s Asserted Patents because—according to Dr. Jaeger—only 15 of the 314 attributes in the *most recent* SONAR/BASH decision tree were function calls. (Br. at 5-6, 8.) Norton argues that the Court erred because Dr. Jaeger: (i) permissibly used post-hypothetical negotiation data, and (ii) relied on evidence that Dr. Bailey provided in his infringement opinion. With regard to the first issue, the Court properly found that Dr. Jaeger “fail[ed] to explain how *2019 technology* would be relevant to establish the total number of attributes within pre-2014 technology.” (Dkt. 905 at 3.) Dr. Jaeger did not use 2019 data *in addition to* 2009-2018 data; rather, he used 2019 data *alone* for his valuation, and did not consider comparable data in 2011 and 2013 (the time of the hypothetical negotiations) or any other year. Even under the broadest interpretation of the book of wisdom, it is impermissible to rely *solely* on data from 6-8 years after the relevant hypothetical negotiation, especially when data for the relevant time is available.

The second issue is confusing: the fact that Dr. Bailey—as part of his infringement opinion—identified examples of function calls in the most recent decision tree does not excuse the deficiencies in Dr. Jaeger’s damages opinion. As Columbia explained in its previous briefs: (i) Dr. Bailey’s opinion was that the decision trees in their entirety were models of function calls, and (ii) even if Dr. Jaeger were permitted to disregard Dr. Bailey’s infringement opinion—and he could not for purposes of his damages analysis—Dr. Bailey identified 89 function call attributes in the most recent decision tree, not 15. (Dkt. 860-1 at 16-17, Ex. F, Bailey Ex. 5.) As the Court noted in its written opinion, it was questionable whether Dr. Jaeger adhered to the requirement to

assume infringement in the damages analysis (Dkt. 905 at 2 n. 1), and that is an independently sufficient basis for exclusion. Moreover, there was a hopeless incompatibility between (i) Dr. Jaeger's opinion that SONAR/BASH would need to be completely removed to avoid infringement of Columbia's Asserted Patents, and (ii) his opinion that Columbia's Asserted Patents contributed almost no value to SONAR/BASH.⁹ Given the numerous indicia of unreliability,¹⁰ it was well within the Court's discretion to exclude Dr. Jaeger's result-oriented opinion that attributed almost no value to Columbia's Asserted Patents.

Company Matrix and Priority List (MIL 6). Norton asserts that the Court erred in excluding a "company matrix" and a "priority list," purportedly because they show that "the asserted patents were valued by Columbia as some of its least valuable patents." (Br. at 9.) Far from demonstrating error, Norton's argument shows exactly how Norton would have used this irrelevant evidence to confuse and mislead the jury. As Columbia showed in its earlier briefs (*e.g.*, Dkt. 753-2 at 7-8), the "company matrix" and "priority list" were irrelevant because they were based on an assumption that the Asserted Patents were *not* infringed—*i.e.*, exactly the opposite of the legally relevant damages question. As the Court concluded: "Norton fail[ed] to provide any evidence that these documents show, by showing their relative value, that the patents identified are among Columbia's least valuable. The evidence lacks any foundation. And Norton also materially fails to account for many other important factors that could influence the value of the numerous patents." (Dkt. 911 at 3.) The Court's discretionary ruling was correct.

⁹ Additionally, Norton jettisoned at trial its contention that SONAR/BASH decision trees did not constitute models of function calls, and Dr. Jaeger admitted "the BASH decision tree fulfills the requirements for the model of function calls part of the claim language." (Trial Tr. at 2072:21-25.) Thus, Dr. Jaeger's 3% opinion was inconsistent with Norton's own non-infringement case.

¹⁰ Even as to the 15 function calls that Dr. Jaeger acknowledged, Dr. Jaeger's math to get to his 3% number was incorrect, as both Columbia and the Court explained. (Dkts. 860-1 at 16; 905 at 2 n.2). This further supported a finding that the opinion was unreliable.

Moreover, Norton fails to provide any explanation of why this minor point would constitute a material and prejudicial error warranting a new trial. By the time Dr. Jaeger completed his apportionment analysis, Norton already had depressed the value of Columbia's Asserted Patents to a decimal approaching zero, and there was virtually no role for the "company matrix" and "priority list" to play in Mr. Hosfield's testimony. Thus, even assuming a hypothetical error, it was harmless under Federal Rule of Civil Procedure 61.¹¹

Columbia's License Offers (MIL 7). The Court's opinion excluding these documents is irrelevant to the new trial motion. The Court ruled as a matter of trial procedure that trial exhibits would be limited to the exhibits on each party's high priority list, and Norton chose not to include the license offers on that list. (Dkt. 1137 at 9-10.) Trial courts have "wide latitude" in "[t]rial management," *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 523 (Fed. Cir. 2012), and the Court's restrictions were appropriate. Thus, the Court's exclusion of these documents could not have prejudiced Norton because Norton could not have introduced the offers at trial in any event. Moreover, as with several of the other issues described above, Norton fails to explain how the exclusion of the offers—to make a point that Norton had already made through cross-examination of Mr. Herskowitz—constitutes a substantial and prejudicial error.

Columbia's Non-Comparable License Agreements (MIL 8). Norton argues that the Court erred because "the fact that a license is not perfectly analogous generally goes to the weight of the evidence, not its admissibility." (Br. at 10.) Norton again mischaracterizes the Court's

¹¹ Moreover, the Court allowed Norton to cross-examine Mr. Herskowitz on the extent of licensing of the Asserted Patents, and over Columbia's objection, the Court allowed Norton to ask about the total licensing revenue from Columbia's cybersecurity patent portfolio (Trial Tr. 497:18-498:22)—a question that Norton's counsel then failed to ask (*id.* 537:9-19). Rule 61 requires a holistic view of the trial, and much of the evidence that the Court excluded was repetitive of points that Norton was permitted to make at trial.

decision (and the law). The Court correctly stated “that appropriate comparable evidence can sometimes go to the weight and not the admissibility of the evidence, [but] *this specific testimony and these agreements* differ so significantly from that of a hypothetical negotiation between Columbia and Norton, that they cannot be considered comparable.” (Dkt. 900 at 2 (emphasis added).) The Court continued: “Norton [did] not sufficiently account[] for the differences between what would be a hypothetical negotiation between Columbia and Norton for the ’115 and ’322 Patents and these agreements.” (*Id.*) The Court correctly applied Federal Circuit law, correctly determined that Norton’s evidentiary showing was lacking, and exercised discretion to exclude this evidence.

Moreover, Norton cannot show prejudice even assuming error. When the Court addressed this issue in its *Daubert* order, the Court stated that it was taking the issue under advisement (Dkt. 741 at 15-23), effectively inviting Norton to supplement its expert disclosure and cure deficiencies. Indeed, Norton’s original counsel stated at the *Daubert* hearing that Norton would revise its expert reports in reaction to the Court’s *Daubert* orders. (June 4, 2021 Tr. at 261:18-262:6.) And as Columbia explained in its motion *in limine* briefs, Columbia met and conferred with Norton’s counsel to determine if and when Norton might seek leave to supplement, but Norton took the position that it was not going to provide supplementation to address deficiencies. (Dkt. 753-2 at 19.) Thus, any prejudice to Norton was the result of its own inaction.¹²

¹² Although there likely was nothing that Mr. Hosfield could have said to address the significant differences between the at-issue license agreements and the hypothetical negotiation in this case, it is striking that Norton did not even attempt to supplement the record after the Court provided room for Norton to do so. The Federal Circuit has been especially deferential to trial court evidentiary rulings when—as was the case here—the proponent had an opportunity to cure foundation problems. See *BASF Plant Science, LP v. CSIRO*, 28 F.4th 1247, 1275-76 (Fed. Cir. 2022) (district court did not abuse its discretion in excluding evidence where defendant failed to lay a proper foundation, despite being given opportunity and instruction on how to do so).

Prior Art, IPR, and Cancelled Claims (MILs 5 and 9). Norton’s motion provides no reason why the Court’s opinions granting Columbia’s MILs 5 and 9 were erroneous. As Norton has ascribed no error to these rulings, the argument is waived. *See, e.g., Daughety v. United States Dep’t of the Army*, 2007 WL 9754293, at *5 (D. Md. Feb. 16, 2007) (denying motion for new trial where plaintiff “cites to no specific reason for which she believes the [c]ourt’s decision to be in error”). Moreover, as with the non-comparable license agreements discussed above, when the Court addressed this issue in its *Daubert* order, the Court took it under advisement (Dkts. 717 at 7-8, 741 at 23-27), and gave Norton time to cure the deficiencies. Norton again chose not to take advantage of that opportunity and it cannot lay blame at the Court’s feet.

Additionally, although the Court decided that Norton could not bring into evidence the irrelevant fact that certain patent claims had been cancelled, the Court repeatedly made clear that Norton could cross-examine Columbia’s damages experts on whether they had accounted for the value of asserted versus non-asserted claims (*see, e.g.,* Dkts. 737 at 17-19, 739 at 19-20, 907 at 3 n.2). At least according to Norton’s original counsel, this was *the critical issue* that Norton had to explore at trial, and the Court gave Norton freedom to do so. Notably, Norton’s new counsel elected to abandon this issue at trial—not mentioning it even once—further showing that there was no prejudicial error because any prejudice was the result of Norton’s strategic decisions.

Norton’s Patent Portfolio (MIL 10). Norton contends that evidence of its own patents would have “rebutt[ed] the implication that Norton’s own technological contributions were lesser or insignificant.” (Br. at 11.) Norton already made this argument (*see* Dkt. 793 at 22) and the Court correctly rejected it (Dkt. 899 at 5). Norton’s own patent portfolio pertaining to a range of disparate technologies is irrelevant to the issues the jury was asked to decide. Moreover, Norton

does not explain how the Court's ruling on this minor point could constitute a material and prejudicial error that requires a new trial even assuming a hypothetical error.

III. THE COURT PROPERLY RESTRICTED CERTAIN OF NORTON'S CROSS-EXAMINATIONS AND CERTAIN ISSUES IN CLOSING ARGUMENTS.

A. Dr. Cole's Cross-Examination

Norton first argues that a new trial is warranted because the Court restricted its cross-examination of Dr. Cole. (Br. at 14-19.) But the Court's discretionary decision—in light of Norton's trial conduct—was appropriate. Mid-trial, Norton devised a strategy to (i) withdraw the entirety of its damages case—scrapping its damages experts—and (ii) rely on fact witness testimony from Mr. Nachenberg and “expert” “math” from counsel. In fact, the 4% at the center of counsel's “math” was a self-described “guess” that the value of BASH machine learning to the protection aspect of Norton's products was 4%. By junking the 12-14% valuation figure of its own expert (Dr. Jaeger)—which the Court allowed Norton to present to the jury (Dkts. 739 at 9-14, 905 at 2-3, 908 at 1; Trial Tr. 1406:23-1408:3)—Norton thought it had found a way to circumvent the Court's exclusion of its near-zero valuation. Using the 4% “guess”—which neither Columbia's nor Norton's experts had ever quoted, cited, or endorsed at trial—and counsel's misleading math, Norton could drive the apportioned value down as low as 0.74%, which was “regrettably close to the near-zero apportionment estimate . . . that th[e] Court excluded” as unreliable. (Dkt. 1155 at 6 n.3.)

Norton's strategy was transparent. Immediately after Norton's cross-examination of Dr. Cole, Norton informed Columbia and the Court that it likely would “forego” Dr. Jaeger's apportionment opinion (Trial Tr. 1655:7-14), which Norton confirmed in writing later that evening (Ex. C, Apr. 19, 2022 E-mail from D. Carr to L. Deskins). Norton also had decided that it would no longer be calling Mr. Hosfield as a witness. (Trial Tr. 1867:2-9.) Recognizing that its own

damages experts were a liability—Dr. Jaeger would have no choice but to reject the 4% “guess” that was very different from his own 12-14% figure—Norton scrapped its damages case in favor of the “guess” and counsel’s “math.” Columbia moved to strike the demonstratives that Norton created during Dr. Cole’s cross-examination—which were scribbles by Norton’s counsel that no witness endorsed—and Columbia moved to strike the related testimony and requested a curative instruction. (Dkt. 1150.) The Court agreed with Columbia, excluding the demonstratives and related testimony on several grounds, and giving a curative instruction.¹³ (Dkt. 1155 at 3-9.)

Norton’s new trial motion offers a flurry of complaints about the Court’s decision, but ultimately fails to address the core of the issue. The relevant question, both then and now, was whether Mr. Nachenberg’s 4% “guess” was a reliable basis for a new damages theory that Norton invented in the middle of the trial and was not supported by any expert.¹⁴ The Court correctly concluded that it was not. The Court’s opinion emphasized that (i) Mr. Nachenberg’s testimony was unreliable because it was “speculative” and a self-described “guess” (Dkt. 1155 at 4-5); (ii) Mr. Nachenberg’s “guess” was irrelevant because it “was in response to a question about the value of BASH machine learning, not the step two apportionment question for which counsel used the guess: the value of BASH in its entirety” (*id.* at 5. & n.2); (iii) Mr. Nachenberg was not

¹³ Norton argues that the Court erred in striking a demonstrative relating to product features. (Br. at 19-20.) But the Court did no such thing. The Court struck only demonstratives “DX-ZZ, DX-ZZY and DX-ZYY,” *i.e.*, the demonstratives on which Norton’s counsel performed handwritten “calculations” reflecting the new damages “theory.” (Dkt. 1155 at 2.) In addition, the Court only instructed the jury to disregard “those written on demonstratives by Norton’s counsel,” *i.e.*, DX-ZZ, DX-ZZY, and DX-ZYY. (Trial Tr. 1683:25-1684:1.)

¹⁴ It would have been well within the Court’s discretion to preclude Norton’s new theory entirely on the basis that it was a prejudicial trial surprise and not disclosed in any expert report. *See MicroStrategy, Inc. v. Business Objects, S.A.*, 429 F.3d 1344, 1357 (Fed. Cir. 2005) (excluding non-expert damages opinion where “new theories surprised [a party] on the eve of trial and prejudiced any response”).

disclosed or qualified as an expert,¹⁵ and Norton’s attempt to use him as one violated the Court’s ruling on Columbia’s MIL 11 (*id.* at 5); and (iv) neither Dr. Jaeger nor Dr. Cole had relied on—much less endorsed—Mr. Nachenberg’s 4% “guess” (*id.*), which further indicated that it was not reliable. On those bases, the Court appropriately exercised discretion to exclude an unreliable new damages theory—introduced through the “math” of Norton’s lawyer.¹⁶

Norton responds with a pithy argument: that Norton included the 4% “guess” as a counter-designation when Mr. Nachenberg’s videotaped deposition was played for the jury, and thus—according to Norton—Norton had license to use that testimony for any purpose. (Br. at 18-19 (citing Dkt. 1155 at 5).) First, Norton’s argument boils down to waiver, but courts have “broad discretion to decide on a case by case basis whether waiver is appropriate.” *See Hall v. Sullivan*,

¹⁵ Norton’s argument that the Court’s opinion was in error because a party may present a damages case even without expert testimony (Br. at 17-18) misses the point. *First*, that counsel may use a lay witness’s fact testimony to support a damages argument does not mean that a party can substitute lay witness opinion (as opposed to factual inputs based on personal knowledge) for an opinion on a reasonable royalty, which “is necessarily based on specialized knowledge.” *Acceleration Bay LLC v. Activision Blizzard Inc.*, 2018 WL 5045186, at *1-2 (D. Del. Oct. 17, 2018). This is precisely what Norton did—proffering Mr. Nachenberg’s speculation as a replacement for Dr. Cole’s apportionment opinion that was based on specialized knowledge that Mr. Nachenberg does not possess. *Second*, even if counsel uses lay witness testimony to support a damages argument, counsel cannot present evidence that would be excludable if it were presented by an expert, *e.g.*, because it is without foundation, irrelevant or unreliable. *See Limelight Networks, Inc. v. XO Communications, LLC*, 2018 WL 1460703, at *3 (E.D. Va. Mar. 23, 2018). Mr. Nachenberg’s testimony was irrelevant (it did not relate to the relevant comparison at the second step of the apportionment analysis) and without foundation and unreliable (it was a “guess”), and thus is excludable on its own.

¹⁶ Permeating Norton’s new trial motion is the suggestion that a trial court judge must sit mute throughout trial proceedings. That is entirely wrong, and “[i]t is within [the judge’s] province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence.” *Montgomery v. Gen. Acc. Ins.*, 1997 WL 314431, at *2 (4th Cir. June 10, 1997) (unpublished) (internal citations omitted). Columbia respectfully submits that Norton’s game—withdrawing all of its damages case and deploying a surprise theory—was clear, and it was appropriate for the Court to intervene, in response to Columbia’s objections, to ameliorate the prejudice as much as possible. It remains unclear whether the prejudice was ameliorated, as the jury awarded only 82% of the damages that Columbia sought despite Norton’s decision to withdraw all of its damages case.

231 F.R.D. 468, 474 (D. Md. 2005). At the time Mr. Nachenberg’s deposition video was played, Columbia had no idea that Norton had devised a new trial-surprise damages theory. Had Columbia known, it obviously would have objected (as it later did) to what seemed like an innocuous counter-designation. Norton provides no authority for the proposition that a trial court judge must apply waiver even when there is good cause for a later objection. *See Batts v. Cnty. of Santa Clara*, 2010 WL 1027990, at *1 (N.D. Cal. Mar. 18, 2010) (“[C]ourts have broad discretion to grant relief . . . from any [] waiver upon a showing of good cause.”). Moreover, even assuming waiver applied—it should not—the playing of Mr. Nachenberg’s testimony does not mean that Norton had license to use it for any purpose—*e.g.*, to improperly suggest that the 4% “guess” was endorsed by experts or equivalent to expert opinion. The Court’s decisions were proper exercises of discretion based on Norton’s inappropriate trial conduct.¹⁷

B. Dr. Sullivan’s Cross-Examination

Norton also raises two arguments about the limitations that the Court imposed on its cross-examination of Dr. Sullivan, neither of which has merit. (Br. at 20-21.) *First*, Norton argues that the Court was wrong to preclude cross-examination of Dr. Sullivan regarding the first step of Dr. Cole’s apportionment analysis—and, more specifically, the comparison between Dr. Cole’s 2014 and 2019 numbers. But the Court gave Norton freedom to explore with Dr. Sullivan whether the damages analysis had changed between 2014 and 2019—“it is fair to ask, Were you given different tasks?” (Trial Tr. 1788:24-25)—and the Court only restricted the manner in which counsel presented the issue to the jury because Norton’s proposed approach was “way too

¹⁷ Moreover, the Court’s opinion concerning Dr. Cole’s cross-examination was made in the context of Norton repeatedly crossing the line of appropriate cross-examination, despite numerous warnings from the Court, including on the morning of Dr. Cole’s cross-examination. (*See* Dkt. 1259 at 10-11.) The Court’s order concerning Dr. Cole’s cross-examination was legally correct and necessary to “control[] the proper scope of cross-examination,” for which “district court[s] enjoy[] wide discretion.” *Ferguson v. Nat’l Freight Inc.*, 692 F. App’x 756, 758 (4th Cir. 2017).

confusing” (*id.* at 1789:14-16). Perhaps most importantly, Norton provides no basis for finding substantial and prejudicial error. During the cross-examination of Dr. Cole, Norton explored at length the differences between Dr. Cole’s 2014 and 2019 reports, and questioning Dr. Sullivan on the same issue would have been confusing and repetitive. Norton had a full opportunity to make its point to the jury during Dr. Cole’s cross-examination—and did.

Second, Norton argues that the Court was wrong to preclude it from performing an alternative damages calculation with Dr. Sullivan, which would have assumed that SONAR/BASH was the smallest saleable patent practicing unit (“SSPPU”) and had the same value across all of Norton’s accused products. (Br. at 21.) The Court correctly rejected that bid because the Court already had decided that Columbia’s experts were *not* required by law to use an SSPPU.¹⁸ (Dkt. 737 at 19-20.) Importantly, the Court gave Norton freedom to explore the SSPPU issue with Dr. Sullivan—*e.g.*, what constitutes an SSPPU, whether he used it, and why or why not—and said that Norton could do its alternative calculation if it could “get Dr. Sullivan to adopt [that theory]. And if he does, then he opens the door.” (Trial Tr. 1796:10-13.) The Court correctly exercised its discretion, however, to preclude counsel from doing math based on a theory that Dr. Sullivan rejected and no other witness endorsed. (*Id.* at 1795:9-17.) Moreover, Norton cannot show prejudicial error. If Norton wanted to offer an alternative calculation based on an SSPPU theory, it should have presented its own expert to endorse that calculation. But Norton *chose* not to call Mr. Hosfield.

¹⁸ Norton persistently ignores a fatal defect in its SSPPU argument. It is uncontroverted that the main difference between Norton’s basic and premium products is the *number* of copies of infringing software (*i.e.*, one versus five installations of SONAR/BASH). (*See* Trial Tr. 1491:15-1492:15.) Norton’s obsession with “price discrimination” is irrelevant when the main difference among products shows that the SSPPU approach cannot be correct in this case.

C. Closing Arguments

Norton's contention that the Court erred in limiting its closing argument is baseless. Norton first argues, yet again, that the Court erred in precluding Norton from presenting Mr. Nachenberg's 4% "guess." (Br. at 21-22.) Norton's argument has no merit for the reasons explained above, (*see supra* at 16-19), and Norton once again provides no explanation of why this decision would constitute substantial and prejudicial error when the most significant wound to Norton's damages case was self-inflicted.

Norton also argues that the Court was wrong to preclude argument that purportedly no one else used Columbia's Asserted Patents, which Norton contends is relevant to damages. (Br. at 22.) The Court correctly rejected this argument in its MIL 7 opinion after briefing. (*See* Dkt. 891 at 4-5.) Norton complains that Columbia opened the door when Dr. Cole "testified that the technology was in high demand and widely adopted in the industry." (Br. at 22.) But Columbia did not open the door. Dr. Cole provided *no* testimony on this subject during direct examination; *Norton* raised this issue during cross-examination to set up a strawman.¹⁹ (*See* Trial Tr. at 1551:8-1554:19.)

Finally, Norton argues that "the Court ruled that Norton could not discuss any specific valuation in its closing argument." (Br. at 22.) This mischaracterizes the Court's ruling:

Norton can argue that no licenses were entered. . . . As to value, however, any argument should be constrained to the lack of licensing not the value of a license. Norton can argue that the technology might not be a game-changer because of the lack of demonstrated use, but the basis to speculate as to why that is so cannot identify a specific valuation because that is not supported by the record.

¹⁹ Norton's counsel also repeatedly mischaracterized Dr. Cole's opinion, suggesting that Dr. Cole provided an opinion that the Asserted Patents were widely adopted, despite the fact that Dr. Cole repeatedly told Norton's counsel that he was misreading the report—Dr. Cole referred to the fact that many companies adopted behavioral malware detection and he had no occasion to consider infringement of Columbia's patents. (*See* Trial Tr. at 1551:8-1554:19.)

(Dkt. 1170.) The issue addressed in the ruling was whether Norton could argue—as it had explored during Mr. Herskowitz’s cross-examination—that Columbia had not licensed the Asserted Patents to any other company, and the Court’s answer was “yes.” The fact that Norton could not go further and say that the lack of licenses supported a particular valuation number—*e.g.*, 0.0001%—stemmed from the fact that such a calculation was “not supported by the record,” and Norton makes no demonstration to the contrary. Norton’s new trial motion thus mischaracterizes the Court’s ruling—which was favorable to Norton.

IV. NORTON’S MANY COMPLAINTS DO NOT DEMONSTRATE A “MISCARRIAGE OF JUSTICE” WARRANTING A NEW TRIAL.

A court may grant a motion for a new trial on all or part of the issues if “(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice.” *Warren v. Main Indus. Inc.*, 2018 WL 10562387, at *1 (E.D. Va. June 19, 2018) (quoting *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998)). The grant or denial of a motion for a new trial is within “the sound discretion of the district court,” *Benedict v. Hankook Tire Co. Ltd.*, 2018 WL 3352952, at *9 (E.D. Va. July 9, 2018) (citing *King v. McMillan*, 594 F.3d 301, 314-15 (4th Cir. 2010)), and in considering a motion for a new trial, the district court may weigh the evidence and consider the credibility of the witnesses. *Id.* This is a “very high standard,” *Columbia Commc’ns Corp. v. EchoStar Satellite Corp.*, 2 F. App’x 360, 368 (4th Cir. 2001), and a new trial will not be granted “unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.” *Perez v. S&H Rest., Inc.*, 2016 WL 10537397, at *1 (E.D. Va. Dec. 21, 2016) (citation omitted).

Importantly, when it comes to evidentiary rulings, any error is reviewed for harmlessness under Federal Rule of Civil Procedure 61, which states:

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting

aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

In assessing harmless error, the Court “need only be able to say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error[s].” *Flame S.A. v. Freight Bulk Pte. Ltd.*, 807 F.3d 572, 586 (4th Cir. 2015) (quoting *Taylor v. Va. Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999)). In other words, an assumed error is not viewed in isolation, but as part of the totality of the trial proceedings to determine whether an error substantially swayed the outcome. Additionally, an error is harmless if there were alternative bases for excluding the evidence other than the ones specifically stated in a ruling. *Bowers v. Univ. of Va.*, 2008 WL 2346033, at *5 (W.D. Va. June 6, 2008) (finding “error [wa]s harmless because of [judge’s] decision to award [relief] on alternative grounds”).

In its new trial motion, Norton makes no effort to address this standard for each purported error and, as shown above, many of the *Daubert* and *in limine* rulings about which Norton complains could not have swayed the outcome of the trial. Rather, Norton lumps everything together and argues that the cumulative effect was that the Court “prevented Norton from offering . . . any apportionment analysis” and “decimated Norton’s damages case.” (Br. at 3-4; *see also id.* at 22 (Court’s rulings “left Norton with no opportunity to present a damages case of its own”).) As legal support, Norton cites a single First Circuit case (Br. at 2), but Norton fails to mention that is not the law of the Fourth Circuit. The Fourth Circuit “ha[s] not determined whether the cumulative error doctrine applies in civil cases.” *Gemaehlich v. Johnson*, 559 F. App’x 473, 476 n.2 (4th Cir. 2014) (quoting *Anthony v. Ward*, 336 F. App’x 311, 322 (4th Cir. 2009)); *see also Ward v. AutoZoners, LLC*, 958 F.3d 254, 273 (4th Cir. 2020) (The Fourth Circuit “ha[s] generally only applied the cumulative-error doctrine in criminal cases. A circuit split as to the doctrine’s applicability in civil cases exists, and we have not precedentially determined whether it

so applies.”). Thus, as a legal matter, Norton’s new trial motion should be denied for a simple reason: the only basis Norton provides for its requested relief is a purported “cumulative error,” and the Fourth Circuit has not adopted that theory in civil cases.

Moreover, the factual premise of Norton’s purported cumulative error is wrong. The Court did *not* prohibit Norton from putting on a damages case. As explained above (*supra* at 13-15), the Court gave Norton time to cure evidentiary deficiencies in its expert opinions through supplementation. And regardless of supplementation, the Court allowed Norton to present nearly all of Dr. Jaeger’s apportionment testimony—over Columbia’s objections, including a compelling demonstration that Dr. Jaeger was not even qualified to opine on apportionment (*see* Dkt. 376-17 at 4-13; Dkt. 452-1 at 12-21)—and also allowed Norton to present Mr. Hosfield’s criticisms of Dr. Sullivan’s calculations and opinions. (*See supra* at 1-2, 16, 19-20.) The Court also gave Norton freedom to cross-examine Dr. Cole regarding non-asserted claims in the Asserted Patents that were cancelled during *inter partes* review. Norton declined each of these opportunities.

Norton could have put on a robust damages defense, arguing—through the apportionment testimony of Dr. Jaeger, the criticisms of Mr. Hosfield, and appropriate cross-examination of Dr. Cole—that Columbia’s \$227 million damages figure should be discounted to a figure well below \$90 million. But Norton was not satisfied with any damages defense other than a near-zero one, and thus Norton decided to scrap its case and rely on the clearly inadmissible 4% “guess” and counsel’s “math.” Blame for Norton’s strategic missteps does not fall on the Court, and the consequences of a party’s “tactical choice[s]” are not grounds for a new trial. *Lucent Techs. Inc. v. Gateway, Inc.*, 509 F. Supp. 2d 912, 935 (S.D. Cal. 2007) (denying new trial motion to prevent defendant from getting a second “‘bite at the apple’ simply because it might have chosen a different strategy”), *aff’d*, 543 F.3d 710 (Fed. Cir. 2008); *see also Promega Corp.*, 875 F.3d at 666; *Apple*,

Inc. v. Samsung Elecs. Co., 920 F. Supp. 2d 1079, 1115 (N.D. Cal. 2013) (defendant “cannot now argue that its own litigation strategy created a manifest injustice that requires a new trial.”), *rev’d on other grounds*, 580 U.S. 53 (2016).

In any “harmless error” analysis the Court might perform, the relevant inquiry looks at “all that happened” at the trial, and it is impossible to ignore Norton’s voluntary decision to withdraw its damages case. Norton cannot justify its requested new trial on the basis that it chose to present no damages defense, which was Norton’s decision alone.²⁰ Thus, even if the Court were to assume hypothetical errors—there were none—Norton has not shown that the errors were substantial and prejudicial, especially in light of Norton’s own strategic choices.

V. THE JURY INSTRUCTION REGARDING SALES TO CUSTOMERS OUTSIDE OF THE UNITED STATES WAS CORRECT.

Norton also argues that it should be granted a new damages trial because of the jury instruction regarding sales to customers outside of the United States. Norton’s argument is based on substantially the same overruled objections that Norton raised before trial: (i) no instruction should have been given because such sales should not be considered in awarding a reasonable royalty, (ii) “[t]he instruction failed to inform the jury that one who makes, uses, sells, or offers to sell a claimed invention outside of the United States does not infringe,” and (iii) the instruction conflicts with *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). (See Br. at 23-24; Dkt. 926 at 24-30; Dkt. 1048-1 at 24-25.) None of these arguments has merit.²¹

²⁰ Norton likely will argue that it withdrew its entire damages case because of the Court’s rulings, but that is utterly illogical. Norton could have put on a robust damages defense—although not one that led to near-zero damages—entirely independent of the limited evidence and opinions that the Court excluded.

²¹ Norton also argues that this instruction placed “undue emphasis” on foreign sales. (Br. at 24.) This is a developing area of law, so Columbia proposed including the different bases in the instruction and verdict form so that the parties would know what the jury’s basis was if Norton decides to appeal. At trial, Columbia offered to remove the different bases if Norton would not

First, the merits already have been thoroughly briefed and decided by the Court. (*See* Dkt. 737 at 21-34; Dkt. 1048-1 at 24-25; Trial Tr. 2841:23-2842:18.) Indeed, Norton moved for reconsideration on this precise issue (Dkt. 926 at 24-30), which the Court denied, finding that Norton “raise[d] nothing material or worth reconsidering” (Dkt. 945 at 5). Norton provides no reason for the Court to reconsider its previous decision that—on the facts of this case—a royalty that considers sales to customers located outside of the United States is appropriate. If the Court decides to address the merits yet again, Columbia defers to its *Daubert* briefing (Dkt. 408-1 at 30-36) and its opposition to Norton’s Renewed Motion for Judgment as a Matter of Law (at 23-30).

Second, Norton is wrong that the jury was insufficiently informed that certain activities must occur *within* the United States to constitute infringement of a U.S. Patent. At least three times, the Court instructed the jury “[a] patent gives the owner the right to exclude others from making, using, offering to sell, or selling a claimed invention or a product made by a process according to the claimed invention *within the United States*.” (Trial Tr. 183:25-184:4 (emphasis added), *see also id.* 188:15-18, 2831:3-7.) And the objected-to instruction itself states that foreign sales should be considered only if the jury finds that the product “*was made in or distributed from the United States*.” (Trial Tr. 2842:1-7 (emphasis added).) The jury was fully informed that it could not find infringement on the basis of conduct outside of the United States, and thus Norton’s purported prejudice is baseless.

Third, the Court’s instruction did not conflict with *Microsoft v. AT&T*—which concerned *non-infringing* software shipped abroad and infringement under 35 U.S.C. § 271(f) due to export of non-infringing components. Columbia did not assert infringement under § 271(f), and this case

argue on appeal that it was unclear what the jury’s basis was for considering foreign sales in the reasonable royalty award, but Norton declined that offer. (Trial Tr. 167:12–168:6.) Thus, including these bases was a practical solution to address emerging law.

is about software that *infringed* as it sat on Norton's servers and computers in the United States and as distributed to customers abroad. *Microsoft v. AT&T* is inapposite, and there was no error.

Finally, the Federal Circuit reviews patent law jury instructions only in light of the specific modifications or objections raised by the challenging party. *See Eko Brands, LLC v. Adrian Rivera Maynez Enters., Inc.*, 946 F.3d 1367, 1379 (Fed. Cir. 2020). As shown above, Norton's objections are without merit, and Norton provided no other proposed modifications or objections to the content of the jury instruction. Indeed, the content of the jury instruction is entirely consistent with what Norton's original counsel said—on the record—were appropriate situations for inclusion of foreign sales within a reasonable royalty for U.S. patent infringement. (See June 4, 2021 Tr. at 385:7-387:19.) The at-issue instruction addresses an evolving legal issue, and it reasonably informed the jury that they should consider foreign sales in assessing the reasonable royalty only if they first found a domestic act of patent infringement with a connection to those sales. There was no error, much less a prejudicial one warranting a new trial.²²

VI. THE MOTION FOR A NEW TRIAL ON LIABILITY SHOULD BE DENIED.

A. The Missing Witness Instruction Regarding Dr. Dacier

Norton observes that courts have “ordered new trials when a missing witness instruction *was improperly given.*” (Br. at 25 (emphasis added).) Norton contends that the Court should not have given the missing witness instruction, but only cross-references its previous briefs and arguments—which the Court correctly rejected—and Norton fails to provide a basis for reconsideration. The Court correctly gave the missing witness instruction, and there was no error. *See Scott v. Watsonstown Trucking Co. Inc.*, 533 F. App'x 259, 262 (4th Cir. 2013) (affirming

²² On appeal, Norton cannot argue that the instruction should have been less specific—*e.g.*, that the jury should consider with a domestic act of infringement was a substantial and proximate cause of foreign sales—because Columbia proposed that formulation and Norton successfully objected. (See Dkt. 1048-1 at 24-25; Trial Tr. 169:12-170:8.)

denial of new trial motion where missing witness instruction was properly given); *Thompson v. Direct Impact Co.*, 63 F. Supp. 2d 721, 727-28 (E.D. Va. 1998) (same).

Moreover, Norton's purported prejudice from the missing witness instruction is imaginary. Columbia *lost* the claims to which the missing witness instruction was relevant—sole inventorship and fraudulent concealment—and Norton identifies no instance of Columbia's counsel suggesting that the missing witness instruction applied to anyone other than Dr. Dacier or any issue other than inventorship or fraudulent concealment.²³ On the patent infringement side of the case, Columbia's counsel properly pointed out that Norton did not call witnesses most knowledgeable about the relevant technology (Trial Tr. 2679:15-25), but Columbia's counsel did not once suggest that the missing witness instruction applied to any of those people or the patent infringement case. During closing argument, counsel properly used the missing witness instruction only with reference to Dr. Dacier and the inventorship and fraudulent concealment claims. (Trial Tr. 2706:17-2707:1.)²⁴ Moreover, the missing witness instruction apparently did not land with the jurors—Columbia lost on the only two claims to which the instruction was relevant—and it thus strains credibility for Norton to argue that the instruction was so potent and damning that it infected the entire case.

²³ Ironically, Norton wanted the Court to provide a generic missing witness instruction that would have the potential to create the kind of juror confusion about which Norton now complains. (Dkt. 1048-1 at 14-15.) At Columbia's urging, the missing witness instruction provided to the jury made clear that it pertained specifically to Dr. Dacier so there would be no confusion about the witness or issues to which it was relevant. (Trial Tr. 2817:11-21.)

²⁴ Months before trial, the Court invited the parties to request bifurcation, but Norton declined, despite knowing that Columbia's trial presentation relating to the '643 Patent would include damaging evidence not relevant to patent infringement. (Dkt. 716 at 2.) Norton also knew that the Court had decided to provide a missing witness instruction in March 2022, and if Norton believed it would infect the entire case, Norton should have at least requested bifurcation rather than putting the Court, jury, and parties through extraordinary expense while "holding in reserve" a meritless new trial argument that must have occurred to Norton before trial began.

B. The Curative Instruction Related to Dr. Cole's Cross-Examination

Above, Columbia addressed why the curative instruction regarding Dr. Cole's cross-examination was correct. (*See supra* at 16-19.) In addition to arguing that the curative instruction should not have been given, Norton argues more loosely that the instruction "improperly tainted Norton and its counsel in the eyes of the jury, in ways that spilled over to the remainder of the case." (Br. at 26.) This argument has no merit.

Courts have "broad discretion" in determining "whether to issue a curative instruction." *United States v. Beasley*, 824 F. App'x 154, 156 (4th Cir. 2020); *see also Manion v. Am. Airlines, Inc.*, 217 F.R.D. 276, 279 (D.D.C. 2003) (rejecting argument that curative instruction prejudiced defendant and warranted a new trial where curative instruction was properly given), *aff'd in part and rev'd in part on other grounds*, 395 F.3d 428 (D.C. Cir. 2004). Here, the Court properly exercised discretion to give a curative instruction in an attempt to ameliorate prejudice to Columbia caused by inappropriate questions and an improper trial surprise—*i.e.*, a previously undisclosed damages theory based on a "guess" repeatedly rejected by the witness. The fact that Norton's counsel might have felt "tainted" is beside the point. If Norton's counsel did not want to feel "tainted," they should have presented the reasonable portions of Norton's damages case permitted by the Court rather than again attempting a near-zero damages figure. Or, better yet, informed the Court and Columbia that Norton would be seeking to introduce a new damages theory so the issue could be addressed outside the presence of the jury.

Norton also argues that "there were no comparable instructions directed at Columbia . . . [which] left the jury with the unfair impression that it should be particularly skeptical of Norton's case and counsel." (Br. at 26.) But the reason the Court did not issue similar instructions directed at Columbia was that Columbia did not engage in misconduct that warranted a missing witness or

curative instruction. The Court was not required to make up a reason to criticize Columbia each time Norton acted improperly in order to even the scoreboard.

VII. NORTON’S CATCH-ALL REQUEST FOR A NEW TRIAL IS LEGALLY INSUFFICIENT AND SHOULD BE DENIED.

As a final “catch-all,” Norton argues that, to the extent the Court denies its Renewed Motion for Judgment as a Matter of Law (the “JMOL motion”) (Dkt. 1253), a new trial should be granted on every issue raised in that motion. (Br. at 26-27.) But Norton fails to provide any specificity to explain *why* the issues raised in its JMOL motion would meet the different standard for a new trial. A Rule 59 motion must comply with the specificity requirements of Federal Rule of Civil Procedure 7(b)(1), *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 263 F. App’x 348, 352-53 (4th Cir. 2008), and Norton’s motion falls woefully short. Columbia cannot respond to Norton’s vague assertion that a new trial is warranted on every issue, and Norton has waived its arguments. See *In re Universal Serv. Fund Tel. Billing Pracs. Litig.*, 2009 WL 435111, at *7 (D. Kan. Feb. 20, 2009) (denying “request[for] a new trial in the alternative, on the same bases argued in support of its requests for judgment as a matter of law and for remittitur” where party failed to “cite[] any particular basis for a new trial or identified any particular trial error”); *Snellman v. Ricoh Co., Ltd.*, 836 F.2d 528, 532 (Fed. Cir. 1987) (defendant waived argument for new trial on specific claim by filing a motion for new trial on “all issues”).

CONCLUSION

For the above reasons, Columbia respectfully requests that the Court deny Norton’s motion for a new trial. In the alternative, if the Court determines that a new trial is warranted, Columbia respectfully requests that the new trial be narrowly tailored to address the specific issues affected by substantial and prejudicial error—although Columbia believes there was no such error.

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Respectfully submitted,

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