

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.

ORDER ON MOTIONS IN LIMINE

1. **THIS MATTER** is before the Court on Defendants' Motion in Limine to Exclude Plaintiff from Referencing Impact of Litigation on Don Francisco or Referencing "Don's Factory," ("Motion 1")¹, Defendants' Motion in Limine to Exclude Documents Related to Dismissed Claims or Plaintiff's Damages, ("Motion 2")², Defendants' Motion in Limine to Exclude Witnesses Without Personal Knowledge or Relevant Testimony ("Motion 3")³, Defendants' Motion in Limine to Exclude Certain Anticipated Inflammatory Language ("Motion 4")⁴, Defendants' Motion in Limine to Exclude Testimony Regarding Other Lawsuits Involving Either Defendant ("Motion

¹ (Defs.' Mot. Lim. Exclude Pl. Referencing Impact Litigation Don Francisco or Referencing "Don's Factory", [hereinafter "Motion 1"], ECF No. 168.)

² (Defs.' Mot. Lim. Exclude Docs. Related Dismissed Claims Pl.'s Damages [hereinafter "Motion 2"], ECF No. 172.)

³ (Defs.' Mot. Lim. Exclude Witnesses Without Personal Knowledge Relevant Test. [hereinafter "Motion 3"], ECF No. 171.)

⁴ (Defs.' Mot. Lim. Exclude Certain Anticipated Inflammatory Language [hereinafter "Motion 4"], ECF No. 170.)

5”)⁵, and Plaintiff’s Motion in Limine to Exclude *De Bene Esse* Deposition of Scott Owen (“Motion 6”)⁶ (together, the “Motions”).

2. A motion in limine seeks a “pretrial determination of the admissibility of evidence proposed to be introduced at trial,” *Evans v. Family Inns of Am., Inc.*, 141 N.C. App. 520, 523 (2000) (cleaned up), and “is customarily defined as one seeking to avoid injection into trial of matters which are irrelevant, inadmissible and prejudicial,” *State v. Fearing*, 315 N.C. 167, 168 (1985) (cleaned up). Importantly, “[r]ulings on these motions are merely preliminary and thus, subject to change during the course of trial, depending on the actual evidence offered at trial.” *Evans*, 141 N.C. App. at 523. “The decision to either grant or deny a motion in limine is within the sound discretion of the trial court.” *State v. Fritsch*, 351 N.C. 373, 383 (2000).

3. The factual and procedural background of this case is recited in detail in *Vitaform, Inc. v. Aeroflow, Inc.*, 2022 NCBC LEXIS 128 (N.C. Super. Ct. Oct. 27, 2022) (the “Summary Judgment Opinion”). The alleged facts relevant to the resolution of the Motions are set out in the Court’s discussion of each.

4. After considering the Motions, the arguments of counsel at the hearing held on the Motions on 4 April 2023 (the “Hearing”), the briefs in support of and in opposition to the Motions, and after careful review, the Court **GRANTS** Motion 1, **GRANTS in part** and **DENIES in part** Motion 2, **GRANTS in part** and **DENIES**

⁵ (Defs.’ Mot. Lim. Exclude Test. Regarding Other Lawsuits Involving Either Def. [hereinafter “Motion 5”], ECF No. 169.)

⁶ (Pl.’s Mot. Lim. Exclude *De Bene Esse* Dep. Scott Owen [hereinafter “Motion 6”], ECF No. 174.)

in part Motion 3, **GRANTS in part** and **DENIES in part** Motion 4, **GRANTS** Motion 5, and **DENIES** Motion 6.

A. Motion 1

5. The Court first addresses Motion 1, which seeks to prevent Plaintiff from referring to the impact of this litigation on Plaintiff's principal, Don Francisco ("Francisco"), or from referring to the facilities which manufactured Plaintiff's products (the "Facilities") as "Don's Factory."⁷ Defendants contend that both forms of evidence would be irrelevant under Rule 402 of the North Carolina Rules of Evidence (the "Rule(s)"), and unfairly prejudicial under Rule 403.⁸ *See* N.C. R. Evid. 402; N.C. R. Evid. 403.

6. The Court turns first to references to the impact of this litigation on Francisco. The Court concludes that references to the financial impact of this litigation on Francisco should be excluded under both rules.

7. First, Francisco and the members of his family are not parties to this action. Any effect Defendants' conduct or this lawsuit may have had on them is irrelevant to Plaintiff Vitaform, Inc.'s remaining claims against Defendants: fraudulent misrepresentation, fraudulent concealment, common law unfair competition, violations of the North Carolina Unfair and Deceptive Trade Practices Act, and unjust enrichment. *See Vitaform*, 2022 NCBC LEXIS 128, at *57. These claims are brought by the company Francisco owns and not by Francisco himself; Plaintiff has alleged

⁷ (*See generally* Motion 1.)

⁸ (*See generally* Motion 1.)

that Defendants' conduct harmed the company, not Francisco. References to the effects of Defendants' actions on Francisco are therefore irrelevant under Rule 402. *See, e.g., VSI Holdings, Inc. v. SPX Corp.*, No. 03-CV-70225, 2005 U.S. Dist. LEXIS 45979, at *22–23 (E.D. Mich. Apr. 12, 2005) (“Statements relating to [the parties’ financial health] calculated to direct the jury’s attention to the need of an injured party for compensation rather than the real issues in the case are not relevant.”).⁹

8. Even if such references were relevant, the Court concludes that Rule 403 bars them for two additional, independent reasons. Rule 403 provides for the exclusion of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, or that may “confus[e] the issues,” “mislead[] the jury,” or “waste . . . time.” N.C. R. Evid. 403.

9. First, if Plaintiff presented evidence of the impact of the litigation on Francisco, Defendants might well choose to challenge that evidence, drawing the Court, the parties, and the jury into an irrelevant sideshow on Francisco’s personal financial status, which would certainly risk confusing the issues, misleading the jury, and wasting time.

10. Second, “neither the wealth of one party or the poverty of the other should be permitted to affect the administration of the law.” *Lutz Indus., Inc. v. Dixie Home Stores*, 242 N.C. 332, 344 (1955). Courts therefore routinely bar references to one party’s financial resources, or lack thereof, on prejudice grounds. *See, e.g., Shaw v. Gee*, 2018 NCBC LEXIS 256, at *4–5 (N.C. Super. Ct. Jan 30, 2018); *Whittenburg v.*

⁹ Federal and North Carolina Rules 402 and 403 are substantially identical. *See* Fed. R. Evid. 402; Fed. R. Evid. 403; N.C. R. Evid. 402; N.C. R. Evid. 403.

Werner Enters. Inc., 561 F.3d 1122, 1130 n.1 (10th Cir. 2009); *Hoffman v. Brandt*, 65 Cal. 2d 549, 552–53 (Cal. 1966) (“appeal[ing] to . . . the economic prejudices of the jury, including [through] the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is [irrelevant]”); *SEC v. Goldstone*, No. CIV 12-0257, 2016 U.S. Dist. LEXIS 96776, at *54 (D.N.M. June 21, 2016) (“The jury need not hear about the amount of [a party’s] losses, because that would merely engender sympathy for [that party].”); *Estate of Ward v. Trans Union Corp.*, No. 4:04-cv-88, 2007 U.S. Dist. LEXIS 98169, at *2 (E.D.N.C. Aug. 30, 2007). Here, Francisco’s personal financial condition is irrelevant to any issue in this case, and Plaintiff’s reference to it can only be seen as intended to create sympathy in the jury for Plaintiff on improper grounds.

11. Accordingly, based on the above, the Court decides, in the exercise of its discretion and upon applying the balancing test of Rule 403, to grant this portion of Motion 1 on this additional ground.

12. The Court next turns to the portion of Motion 1 that seeks to exclude references to “Don’s Factory.” The Court concludes that such references should be excluded. Francisco has acknowledged at his deposition that he has no ownership or other legal interest in the Facilities.¹⁰ It is also undisputed that neither Francisco nor Plaintiff has an exclusive contract with the Facilities. Accordingly, any references to the Facilities that expressly or implicitly suggest that Francisco owned the

¹⁰ (See Motion 1 Ex. E, Dep. Don Francisco, dated May 12, 2021, at 274:16–275:3, ECF No. 168.5.)

Facilities or that he or Plaintiff had an exclusive relationship with the Facilities are inaccurate and therefore (i) without probative value as required under Rule 402 and (ii) would risk confusing the jury upon application of the balancing test required under Rule 403. Accordingly, the Court concludes, in the exercise of its discretion, that Plaintiff and its witnesses, including Francisco, shall not reference the Facilities as “Don’s Factory” or, in the instance of Francisco, “my factory.”

13. Notwithstanding the above, Plaintiff shall be permitted to reference the Facilities in a way that does not imply that Francisco owned them, or that he or Plaintiff had an exclusive relationship with them. For example, Plaintiff may reference the Facilities as “the factory BAB used in China” or similar formulations.

14. Finally, the Court has examined the materials attached as exhibits to Motion 1, and warns the parties that argumentative and compound questions of the type asked during the referenced depositions will not be permitted at trial.¹¹

B. Motion 2

15. Motion 2 seeks to exclude numerous documents which Defendants contend relate solely to Plaintiff’s dismissed claims, or solely to Plaintiff’s excluded theory of damages.¹² *See generally Vitaform*, 2022 NCBC LEXIS 128; *Vitaform, Inc. v. Aeroflow, Inc.*, 2023 NCBC LEXIS 38 (N.C. Super. Ct. Mar. 10, 2023). Motion 2 seeks

¹¹ (*See* Motion 1 Ex. A, Dep. Kristen Hollingsworth, dated May 11, 2021, at 73:6–14, 73:17–74:1, 74:10–13 [hereinafter “Hollingsworth Dep.”], ECF No. 168.1; Motion 1 Ex. C, Dep. Josh Hill, dated Oct. 5, 2021, at 39:14–16 [hereinafter “Hill Dep.”], ECF No. 168.3; Motion 1. Ex. D, Dep. Brandon Fonville, dated May 10, 2021, at 32:19–33:1, 33:3–10 [hereinafter “Fonville Dep.”], ECF No. 168.4.)

¹² (*See generally* Motion 2.)

exclusion of three large categories of documents, which are consolidated and attached to Motion 2 as Exhibits B,¹³ C,¹⁴ and D.¹⁵

16. As an initial matter, Plaintiff's remaining claims, with the exception of Plaintiff's claim for unjust enrichment, all revolve around a 19 July 2018 phone call (the "Call") between Francisco and Evan Israel ("Israel"), an employee of Defendant Aeroflow, Inc. ("Aeroflow"), and Defendants' alleged use and appropriation of Plaintiff's business plan in the aftermath of the Call. *See generally Vitaform*, 2022 NCBC LEXIS 128. The surviving claims are for: (i) fraudulent misrepresentation and (ii) fraudulent concealment to the extent those claims are based on Defendants' alleged promise during the Call to maintain the confidentiality of Plaintiff's business plan and their failure to disclose Defendants' plan to compete against Plaintiff; (iii) common-law unfair competition and violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA") based on the fraud claim; and (iv) unjust enrichment. *Id.* at *57.

¹³ (Motion 2 Ex. B, Documents Relating to Plaintiff's Dismissed Claims [hereinafter "Exhibit B"], ECF No. 172.2.) Because the documents are extremely voluminous, Exhibits B, C, and D as filed on the Court's electronic docket do not include the content of the documents. Instead, Defendants provided consolidated physical copies of the documents to the Court's chambers.

¹⁴ (Motion 2 Ex. C, Documents Attached as Exhibit A to Plaintiff's Suppl. Br. Supp. Mot. Exclude Defs.' Expert Witness (ECF 161.1) [hereinafter "Exhibit C"], ECF No. 172.3.) The documents in Exhibit C also appear as Exhibit A to Plaintiff's Supplemental Brief in Support of its Motion to Exclude Defendants' Expert Witness. (Pl.'s Suppl. Br. Supp. Mot. Exclude Defs.' Expert Witness Ex. A, Defs.' Document Production Showing All Figures Necessary for Damages Calculation [hereinafter "Exhibit C Compilation"], ECF No. 161.1.)

¹⁵ (Motion 2 Ex. D, Documents Related to Plaintiff's Excluded Damages Theory [hereinafter "Exhibit D"], ECF No. 172.4.)

17. To prove its fraud claims, Plaintiff must demonstrate under applicable law and to the satisfaction of the jury that at the time of the Call, Defendants had a plan to compete with Plaintiff and promised to keep Plaintiff's business plan confidential with intent to deceive and with no intent to comply, or that Defendants took affirmative steps to conceal a plan to use Plaintiff's business plan to design and sell a competing product. *See id.* at *37, *41. Thus, documents that demonstrate or suggest the existence and details of this alleged plan and its implementation are relevant to Plaintiff's remaining claims. Such documents may also be relevant to whether Defendants consciously accepted the benefit Plaintiff alleges it conferred through its plan in connection with Plaintiff's unjust enrichment claim.

18. After careful review of the documents listed in Exhibit B to Motion 2,¹⁶ in the exercise of its discretion, and after weighing probative value against the risk of unfair prejudice under Rule 403, the Court concludes that the documents listed in Exhibit B, with three exceptions,¹⁷ are relevant to show the existence or details of a plan by Defendants to compete with Plaintiff by misrepresentation or concealment.

¹⁶ (Motion 2 Ex. B, Documents Relating to Plaintiff's Dismissed Claims.) Because the documents are extremely voluminous, Exhibit B as filed on the Court's electronic docket does not include the content of the documents. Instead, Defendants provided a consolidated physical copy of the documents to the Court's chambers.

¹⁷ These exceptions that shall be excluded from evidence are: first, the document labelled as Document 12 in Exhibit B and bates-stamped as AEROFLOW_0000917 (*see* Exhibit B at 1, AEROFLOW_0000917); second, the document labelled as Document 65 in Exhibit B and bates-stamped as AEROFLOW_0002029 (*see* Exhibit B at 5, AEROFLOW_0002029); third, an Illinois subpoena that appears with Document 157 in Exhibit B; this document's presence in Exhibit B appears to be inadvertent, because it is not bates-stamped and does not appear in Exhibit B's table of contents. (*See* Exhibit B at 7). Out of an abundance of caution, however, the Court notes here that this subpoena shall be excluded from evidence at trial.

The Court will therefore deny Motion 2 insofar as it seeks exclusion of the documents identified in Exhibit B, except for those specifically identified for exclusion in footnote 17 of this Order.

19. The Court likewise concludes that the documents listed in Exhibit C, with some exceptions,¹⁸ are relevant to the existence or details of the plan underlying Plaintiff's fraud claims. The Court, in the exercise of its discretion, therefore denies Motion 2 insofar as it seeks to exclude the documents in Exhibit C, except for the exceptions identified in footnote 18 of this Order.

20. Finally, the Court turns to the documents listed in Exhibit D. After careful review of these documents, the Court concludes that most of these documents, with some exceptions identified in Appendix A to this Order, are relevant for the same reasons as the Exhibit B and C documents that the Court has determined are relevant. There are several other documents, also identified in Appendix A, that the Court has determined are relevant but must be redacted in particular ways if presented to the jury at trial.

21. Notwithstanding the above, the Court cautions Plaintiff that it remains precluded from introducing evidence of its actual damages by previous order of this Court (the "Damages Order"). *See generally Vitaform*, 2023 NCBC LEXIS 38. The Court therefore emphasizes that Plaintiff will not be permitted to elicit testimony

¹⁸ The following documents identified in Exhibit C shall be excluded from evidence: AEROFLOW_0004360, AEROFLOW_0004365, AEROFLOW_0004451, AEROFLOW_0004538, AEROFLOW_0004974, and AEROFLOW_0005436. In addition, the following two documents may be used, but must be redacted to remove any amounts reflected as "ext_cost": AEROFLOW_0004163 and AEROFLOW_0004238.

from witnesses or make argument upon the Exhibit B, C, or D documents to show Plaintiff's actual damages, nor will the Court permit Plaintiff to introduce these documents as exhibits in a manner that presents or suggests Plaintiff's actual damages. Plaintiff will have to lay a proper evidentiary foundation to establish a link between a given Exhibit B, C, or D document and the theories underlying Plaintiff's fraud claims. Finally, this ruling is without prejudice to Defendants' right to raise all proper objections under the North Carolina Rules of Evidence at trial in response to particular lines of questioning or argument by Plaintiff.

C. Motion 3

22. Motion 3 seeks to exclude the testimony of five witnesses Defendants contend lack personal knowledge of the events underlying the claims remaining in this action, as required by Rule 602.¹⁹ *See* N.C. R. Evid. 602. Defendants argue that five Aeroflow employees whom Plaintiff intends to call at trial, Morgan Zink ("Zink"), Kristin Hollingsworth ("Hollingsworth"), Chris Swayngim ("Swayngim"), Scott Sonnone ("Sonnone"), and Casey Hite ("Hite"), all lack personal knowledge of any of the relevant events, and are therefore barred from testifying by Rule 602.

23. First, the Court denies Motion 3 as it relates to Zink, Hollingsworth, and Swayngim. Defendants ground Motion 3 in the argument that because these three employees did not participate in the Call, they necessarily lack any relevant personal knowledge of the surrounding events.²⁰ But this argument overlooks the fact that

¹⁹ (*See generally* Motion 3.)

²⁰ (*See* Motion 3 at 4–5.)

Defendants' actions, through its employees, before or after the Call may be relevant to the remaining claims. And here, each of these employees either sent or received emails that the Court has determined, in resolving Motion 2 above, are relevant to Plaintiff's claims. The Court therefore concludes that Zink, Hollingsworth, and Swayngim may have personal knowledge of the relevant events and denies Motion 3 as it relates to them. The Court's ruling is without prejudice to Defendants' ability to renew this objection at trial, or to raise new objections to Plaintiff's examination of these witnesses at trial under the North Carolina Rules of Evidence.

24. The Court next turns to Motion 3's attempt to exclude the testimony of Sonnone.²¹ Because Sonnone is Aeroflow's CFO,²² his forecasted testimony intertwines with the Damages Order in several ways.

25. First, the Damages Order precluded Plaintiff from offering any evidence of its actual damages at trial. *See Vitaform*, 2023 NCBC LEXIS 38, at *20. Defendant argues that Plaintiff will try to elicit testimony from Sonnone, based on his position as CFO, that attests to Defendants' financial condition and therefore at least indirectly to Plaintiff's actual damages. Therefore, the Court will grant Motion 3 insofar as it seeks to prevent Plaintiff from eliciting testimony from Sonnone about Plaintiff's actual damages.

26. Next, by virtue of his position, Sonnone may have knowledge relating to Defendants' conscious acceptance of Plaintiff's business plan or the existence, details,

²¹ (*See* Motion 3 at 5–6.)

²² (*See* Motion 3 at 5.)

or implementation of Defendants' plan to compete with Plaintiff. The Court will permit his competent testimony on these issues, but will not permit Plaintiff to elicit this testimony through net profits, sales volumes presented in dollar amounts, or other metrics that will present or suggest to the jury what Plaintiff may contend are its actual damages.

27. North Carolina law allows a factfinder to consider a defendant's revenues or net worth in determining whether to award punitive damages. N.C.G.S. § 1D-35(2)(i). Because Sonnone is chief financial officer of Aeroflow, he possesses the perspective and knowledge needed to testify to Defendants' revenues and net worth. The Court will therefore permit Plaintiff to elicit testimony from Sonnone on Defendants' net worth and revenues *during Phase II only*.²³

28. Finally, Motion 3 seeks to exclude the testimony of Hite, Aeroflow's CEO. Plaintiff has offered no evidence that Hite has any knowledge of the relevant events.²⁴ Plaintiff appears to argue that Hite's knowledge and involvement with the Call

²³ By statute, North Carolina allows a defendant to move to bifurcate the trial of issues of liability and compensatory damages from the issue of punitive damages. N.C.G.S. § 1D-30. Defendants moved to bifurcate on 20 March 2023, (ECF No. 173), and Plaintiff raised such a motion at the Hearing. The Court granted each motion at the Hearing without objection or opposition from either side. Trial will therefore be split between one phase on liability and nominal damages on Plaintiff's claims and on liability and compensatory damages on Defendants' counterclaim ("Phase I"), and another on punitive damages if the jury finds liability in Phase I on one or both of Plaintiff's fraud claims, or on Defendants' counterclaim for defamation *per se* ("Phase II").

²⁴ Hite appears in only a few of Plaintiff's exhibits; in each, Hite is intervening in software problems with Defendants' online sales and inventory platforms that are unrelated to the issues of this case. (See Exhibit B at AEROFLOW_0000990, AEROFLOW_0000991, AEROFLOW_0001005, AEROFLOW_0001012, AEROFLOW_0000979, AEROFLOW_0000980, AEROFLOW_0000981.)

should be inferred through the doctrine of respondeat superior,²⁵ which extends tort liability from an employee to his or her employer in certain circumstances. *See, e.g., Vaughn v. N.C. Dep't of Human Res.*, 296 N.C. 683, 686 (1979). But the only defendants in this case are the corporate entities for which all the involved employees work, Hite is not any other employee's employer, and Plaintiff has not argued any theory of piercing the corporate veil through which Defendants' liabilities could be imputed to Hite. Because there is no evidence tying Hite to the Call or to Defendants' conduct other than the emails involving software issues identified in footnote 24, the Court will grant Motion 3 as it relates to Hite.

29. In sum, the Court (i) denies Motion 3 as it relates to Zink, Hollingsworth, and Swayngim; (ii) grants Motion 3 as it relates to Sonnone's testimony relating to Plaintiff's actual damages; (iii) denies Motion 3 as it relates to testimony from Sonnone about Defendants' conscious acceptance of Plaintiff's business plan or the existence, details, or implementation of Defendants' own plan to compete, so long as such testimony is not presented in a form to suggest what Plaintiff contends are its actual damages, (iv) denies Motion 3 as it relates to Sonnone's testimony about Defendants' net worth and revenues in Phase II only, and (v) grants Motion 3 as it relates to Hite.

²⁵ (*See Pl.'s Resp. Defs.' Mots. Lim. Exclude Witnesses Without Personal Knowledge, or Relevant Testimony, to Exclude Reference to Impact of Litigation on Don Francisco Exclude Referencing Don's Factory Exclude Testimony Regarding other Lawsuits Involving Either Def. ¶ 11, ECF No. 184.*)

D. Motion 4

30. In Motion 4, Defendants seek to preclude Plaintiff from referring to Plaintiff's business plan as secret, confidential, or proprietary, and to preclude Plaintiff from arguing at trial that Defendants copied or stole Plaintiff's plan, or that Defendants' actions were illegal, unethical, or immoral.²⁶

31. First, the Court will grant the motion insofar as it seeks to prevent Plaintiff from arguing or otherwise suggesting to the jury that Plaintiff's business plan was a trade secret, confidential, or proprietary. This Court held in its Summary Judgment Opinion that Plaintiff's business plan was *not* a trade secret, and that all of its constituent parts were in the public domain at the time of the events giving rise to this action. *See Vitaform*, 2022 NCBC LEXIS 128, at *15, *29. Referring to the plan as a trade secret or as proprietary therefore contravenes a legal conclusion of this Court, risks confusing the jury, and thus will not be permitted. Francisco may testify to what he told others about the plan, including that it was confidential or proprietary, and that Israel told him Defendants would keep the plan confidential, but Plaintiff may not suggest or argue to the jury that the plan was inherently confidential, secret, or proprietary as a general matter in contravention of the Court's prior ruling.

32. Next, the Court will grant the Motion as it relates to "stealing." Theft is not an issue in this case. Instead, Plaintiff's claims revolve around Defendants' alleged fraud, and so this evidence would have little, if any, probative value; theft is also a

²⁶ (Motion 4 at 4–5.)

crime, *see* N.C.G.S. § 14-72, and accusing Defendants of an unrelated crime in the jury's presence would be highly prejudicial. Because the scope of Plaintiff's remaining claims involves fraud but not theft or conversion, such evidence is not only irrelevant, but also unduly prejudicial under Rule 403. Therefore, in the exercise of its discretion and after applying the Rule 403 balancing test, the Court rules that Plaintiff may not state or argue that Defendants "stole" Plaintiff's business plan, but may argue that, for example, Israel falsely promised or induced Plaintiff to reveal its business plan or that Defendants misused the plan.

33. The Court will also grant Motion 4 insofar as it seeks to bar Plaintiff and its witnesses from testifying or arguing that any of Defendants' actions were illegal. To label an action as legal or illegal is a legal conclusion, and "no witness, lay or expert, may testify to a legal conclusion." *State v. Smith*, 310 N.C. 108, 114 (1984); *see also*, *e.g.*, *State v. Ledford*, 315 N.C. 599, 617 (1986).

34. The Court will deny Motion 4 insofar as it seeks to preclude Plaintiff from characterizing Defendants' actions as "copying." "Copying" is what Plaintiff alleges Defendants did as part of Defendants' alleged plan to obtain Plaintiff's business plan and design and sell their competitive products. To describe Defendants' actions as "copying" is merely a factual assertion that is not unduly inflammatory or prejudicial.²⁷

²⁷ In addition, after further consideration following the Hearing, the Court does not currently intend to give a limiting instruction in Phase I of the trial on the legality of Defendants' copying. Plaintiff's trade secrets claims have been dismissed, and so the legality of copying itself is not at issue; copying is relevant only insofar as it is part of Defendants' alleged plan and its implementation, and the jury will not be asked to pass judgment upon or consider

35. Finally, the Court addresses whether Plaintiff may describe or characterize Defendants' actions as "immoral" or "unethical." The Court concludes that Francisco himself may testify that he believed Defendants' actions were immoral or unethical, because such testimony is relevant to Francisco's state of mind and perspective, and the background of his own actions. However, the Court will not allow Plaintiff to question other witnesses about the ethics or morality of Defendants' actions; questioning on ethics and morality as a philosophical matter is outside the expertise of lay witnesses, is irrelevant to the issues the jury will have to decide, and would be unduly inflammatory and prejudicial.

36. In sum, in the exercise of its discretion, the Court (i) will grant Motion 4 as it relates to characterizing Plaintiff's business plan as a trade secret, confidential, or proprietary, (ii) will grant Motion 4 as it relates to characterizing Defendants' acts as stealing, (iii) will grant Motion 4 as it relates to characterizing Defendants' acts as illegal, (iv) will deny Motion 4 as it relates to Francisco's characterization of Defendants' actions as unethical or immoral, (v) will grant Motion 4 as it relates to other witnesses characterizing Defendants' actions as unethical or immoral, and (vi) denies Motion 4 as it relates to characterizing Defendants' actions as "copying."

E. Motion 5

37. Motion 5 seeks to prevent Plaintiff from offering evidence of any other lawsuits involving either Defendant.²⁸ At the Hearing, Plaintiff's counsel stated that

whether Defendants' copying was lawful in the absence of patent or copyright. The Court may consider such an instruction, however, in any Phase II relating to punitive damages.

²⁸ (See generally Motion 5.)

Plaintiff does not intend to introduce evidence of any other lawsuits, except potentially for impeachment purposes, and the parties have exchanged no discovery on other lawsuits involving Defendants. In the exercise of its discretion, the Court will therefore grant Motion 5.

F. Motion 6

38. Motion 6 seeks to exclude the *de bene esse* deposition of Scott Owen, a witness Defendants allege will offer testimony relevant to Defendants' counterclaim.²⁹ At the beginning of argument on Motion 6 at the hearing, however, Plaintiff's counsel conceded that Defendants' position on Motion 6 was correct, and did not argue in favor of the Motion. In the exercise of its discretion, the Court therefore denies Motion 6.

39. **WHEREFORE**, in the exercise of its discretion, the Court hereby **ORDERS** as follows:

a. Motion 1 is **GRANTED**;

b. Motion 2 is **GRANTED** as to:

i. AEROFLOW_0000917, AEROFLOW_0002029, and the Illinois subpoena that appears with Document 157 in Exhibit B;

ii. AEROFLOW_0004365, AEROFLOW_0004538,

AEROFLOW_0004974, and AEROFLOW_0005436 in Exhibit C.

In addition, AEROFLOW_0004163 and AEROFLOW_0004238

²⁹ (*See generally* Motion 6; Defs.' Mem. Law Opp'n Pl.'s Mot. Lim. Exclude De Bene Esse Dep. Scott Owen 3, ECF No. 179.)

from Exhibit C may be used, but must be redacted to remove any amounts reflected as “ext_cost”.

iii. The Exhibit D documents listed in Appendix A, but certain documents may be used subject to the redactions described therein.

iv. Motion 2 is otherwise **DENIED**;

c. Motion 3 is:

i. **DENIED** as to Zink, Hollingsworth, and Swayngim;

ii. **GRANTED** as to Sonnone’s testimony relating to Plaintiff’s actual damages;

iii. **DENIED** as to Sonnone’s testimony about Defendants’ conscious acceptance of Plaintiff’s business plan or the existence, details, or implementation of Defendants’ own plan to compete, so long as such testimony is not presented in a form to suggest what Plaintiff contends are its actual damages;

iv. **DENIED** as to Sonnone’s testimony about Defendants’ net worth and revenues in Phase II only; and

v. **GRANTED** as to Hite.

d. Motion 4 is:

i. **GRANTED** as to characterization of Plaintiff’s business plan as secret, confidential, or proprietary;

ii. **GRANTED** as to characterization of Defendants’ acts as stealing;

- iii. **GRANTED** as to characterization of Defendants' acts as illegal;
- iv. **DENIED** as to Francisco's characterization of Defendants' acts as unethical or immoral;
- v. **GRANTED** as to other witnesses' characterizations of Defendants' actions as unethical or immoral; and
- vi. **DENIED** as to characterization of Defendants' actions as "copying."

e. Motion 5 is **GRANTED** and;

f. Motion 6 is **DENIED**.

SO ORDERED, this the 6th day of April, 2023.

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

APPENDIX A

Exhibit D Table of Contents Number	Bates-Stamp Number	Qualifications upon Exclusion; "N/A" means excluded in entirety.
46	AEROFLOW_0004463	N/A
63	Numerous	May be used, but cost amounts must be redacted.
76	AEROFLOW_0002169	May be used, but "value" column amounts must be redacted.
77	AEROFLOW_0002808 and AEROFLOW_0002811	May be used, but all dollar figures must be redacted.
82	AEROFLOW_0002303 and AEROFLOW_0002314	May be used, but "ext_cost" amounts must be redacted.
100	Numerous	May be used, but "ext_cost" amounts must be redacted.
117	"Non-Bates Number Exhibit Subfolder sent on 2-17-23"	N/A
119	"Non-Bates Number Subfolder sent on 2-17-23"	N/A
137	MOTIF_0001708	N/A
139	Numerous	May be used, but "ext_cost" amounts must be redacted.
161	Numerous	May be used, but only for purposes of illustrating the alleged plan underlying Plaintiff's fraud claims and "line total" amounts must be redacted; may not be used to present evidence of actual damages.
162	Numerous	May be used only for purposes of illustrating the alleged plan

		underlying Plaintiff's fraud claims; may not be used to present evidence of actual damages.
168	"Non-Bates Subfolder sent on 2-17-23"	N/A
169	AEROFLOW_0004451 and AEROFLOW_0004458	May be used, but "AMOUNT USD" figures must be redacted
170	"Non-Bates Subfolder sent on 2-17-23"	N/A
171	"Non-Bates Subfolder sent on 2-17-23"	N/A
174	AEROFLOW_0004365 and AEROFLOW_0004394	AEROFLOW_0004394 may be used but AEROFLOW_0004365 will be excluded
175	AEROFLOW_0004360	May be used, but "AMOUNT USD" figures must be redacted
219	AEROFLOW_0004238	May be used, but "ext_cost" amounts must be redacted.
225	AEROFLOW_0004136-48, 56-58, 63	May be used, but "ext cost" figures must be redacted on AEROFLOW_0004148 and AEROFLOW_0004163
226	Numerous	N/A
230	AEROFLOW_0007285	N/A
233	See Qualifications upon Exclusion	Will be excluded in entirety <i>except</i> documents bates-stamped AEROFLOW_0005111, AEROFLOW_0005129, AEROFLOW_0002217, AEROFLOW_0002218, AEROFLOW_0002221, AEROFLOW_0002225, AEROFLOW_0002227, which may be used.

262	MOTIF_0001242 and MOTIF_0001247	May be used, but “ext_cost” amounts must be redacted.
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