EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOUGLAS BERNSTEIN, ELAINE INGULLI, TERRY HALBERT, EDWARD ROY, LOUIS PENNER, and ROSS PARKE, as personal representative of The Estate of Alison Clarke-Stewart, on behalf of themselves and others similarly situated,

Plaintiffs,

-v-

CENGAGE LEARNING, INC.,

Defendant.

CIVIL ACTION NO.: 19 Civ. 7541 (ALC) (SLC)

OPINION AND ORDER

SARAH L. CAVE, United States Magistrate Judge.

Plaintiffs Douglas Bernstein, Edward Roy, Louis Penner, and Ross Parke, as personal representative of The Estate of Alison Clarke-Stewart, on behalf of themselves and others similarly situated (collectively, "Plaintiffs") have asserted breach of contract claims against Defendant Cengage Learning, Inc. ("Cengage"), alleging that Cengage violated the terms of its publishing agreements (the "Contracts") by failing to pay authors royalties for use of their works in accordance with those Contracts. (See, e.g., ECF Nos. 1 ¶¶ 54–59; 120 ¶¶ 2, 6, 10–12). Before the Court is Cengage's motion to exclude the testimony of Plaintiffs' expert, Professor Daniel F. Spulber ("Prof. Spulber") under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). (ECF No. 188 (the "Daubert Motion")).[1]

For the reasons set forth below, the Daubert Motion is DENIED.

[1] Plaintiffs have also filed a motion for class certification and appointment of class representatives and class counsel (ECF No. 169 (the "Class Motion," with the Daubert Motion, the "Motions")), as to which the Court is simultaneously issuing a Report and Recommendation.

I. BACKGROUND

A. Factual Background

The factual background on which Plaintiffs base their claim for breach of the implied covenant of good faith and fair dealing is set forth in detail in prior decisions of the Honorable Andrew L. Carter, Jr., and the undersigned in this action, and is incorporated by reference. See Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2021 WL 4441509 (S.D.N.Y. Sept. 28, 2021) ("Bernstein IV") (granting in part and denying in part motion to amend); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2021 WL 4927033 (S.D.N.Y. Apr. 22, 2021) ("Bernstein III") (recommending granting in part and denying in part motion to amend); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2020 WL 5819862 (S.D.N.Y. Sept. 29, 2020) ("Bernstein II") (granting motion to dismiss in part as to breach of contract claims and denying motion to strike class allegations); Bernstein v. Cengage Learning, Inc., No. 19 Civ. 7541 (ALC) (SLC), 2019 WL 6324276 (S.D.N.Y. Nov. 26, 2019) ("Bernstein I") (granting motion to appoint interim class counsel).[2] This summary will focus on the facts pertinent to the Daubert Motion.

1. The Parties

Plaintiffs, authors of academic textbooks, were parties to the Contracts with Cengage, a publisher, seller, and distributor of "learning solutions," including textbooks. Bernstein II, 2020 WL 5819862, at *1. (See ECF Nos. 172-1 ¶ 2; 172-2 ¶ 2; 172-3 ¶ 2; 172-4 ¶ 2; 172-10 at 6–7). Cengage's current corporate form "is the result of mergers and acquisitions" of several publishing

[2] Unless otherwise indicated, internal citations and quotation marks are omitted from case citations.

companies, whose contractual rights and responsibilities Cengage has assumed. (ECF No. 186-2 at 11 ¶ 4).

Plaintiffs Douglas Bernstein ("Bernstein"), Louis Penner ("Penner"), and Edward Roy ("Roy"), are co-authors of and receive royalties from two books published by Cengage: Essentials of Psychology and Introduction to Psychology. (ECF Nos. 172-1 ¶ 2; 172-2 ¶ 2; 172-3 ¶ 2). Alison Clarke-Stewart ("Clarke-Stewart") was a fourth co-author of Essentials of Psychology.[3] (ECF No. 172-4 ¶ 2). Since 2017, these two textbooks have been among Cengage's lower-selling psychology textbooks. (ECF No. 186-4 at 128–29). Plaintiffs did not participate in preparing ancillary materials for Essentials of Psychology. (ECF No. 186-1 at 112, 156–57, 164–65). Clarke-Stewart's representative referred to Bernstein as his "fearless leader" in this action. (ECF No. 186-1 at 79, 302). The amount of royalties Bernstein received varied monthly since 2017, to the extent that he had "planned" to request "a reversion" of his intellectual property rights in the two textbooks. (Id. at 313; see id. at 308, 310).

2. The Contracts

At issue in this action are royalties to which Plaintiffs claim they and other authors are entitled under the Contracts relating to Cengage's digital products, MindTap and Cengage Unlimited ("CU"). Bernstein II, 2020 WL 5819862, at *1–2. The Contracts "do not follow any single template," (ECF No. 186-2 at 11 ¶ 5), but each contained a similar material term: that Cengage was obligated to pay the authors royalties by applying a royalty percentage to net

[3] Clarke-Stewart's Estate, through her former husband and personal representative, is a Plaintiff. (ECF Nos. 15 ¶ 15; 172-4 ¶ 2).

receipts or net revenue from the sales of their works. (ECF Nos. 172 ¶¶ 19–42; 172-14 – 172-37; see ECF Nos. 172-8 at 6–8; 172-10 at 12; 172-12 at 5 ¶¶ 3.1–3.2; ECF No. 172-13 at 3 ¶ 8; 172-39 at 3). Judge Carter has held that the Contracts do not require Cengage "to base royalties on total net receipts for MindTap and [CU,]" but they do obligate Cengage to act in good faith "in exercising its discretion to determine" the revenue attributable to the authors and pay royalties accordingly. Bernstein II, 2020 WL 5819862, at *4–5; see Bernstein IV, 2021 WL 4441509, at *4 (finding FAC sufficiently alleges Cengage's bad faith in implementing allocation methodology as to CU). Of the more than 12,000 Contracts that Cengage produced in discovery, approximately 4,800 have New York choice of law clauses, and 3,780 have Massachusetts choice of law clauses. (ECF No. 172 ¶ 17).

3. The DRA Framework

Beginning in 2015, for works with copyright years of 2017 and later, Cengage developed and implemented the Digital Royalty Allocation ("DRA") Framework as a set of guidelines to apply the royalty-bearing percentage—"the share of revenue attributed to the authors," Bernstein II, 2020 WL 5819862, at *2—"consistently across authors." (ECF Nos. 172-6 at 6, 35–38; see ECF Nos. 172-42 at 4 (DRA Framework intended to be "consistent and clear"); 172-43 at 2 (observing that, with DRA Framework, Cengage was "trying to be more consistent")). Cengage uses the DRA to "determine what portion of net revenue generated from the sale of a digital product is attributable to a particular author or content creator involved in creating content for that digital product, for purposes of calculating royalties on that sale." (ECF No. 186-5 at 11 ¶ 6; see ECF No. 186-2 at 14 ¶ 11)).

a. MindTap

As Judge Carter has explained, "MindTap is an electronic platform through which a student has access to an electronic version of a student textbook, along with homework, quizzes, tests, and multimedia materials[,]" as well as "feedback and analytics for instructors and students." Bernstein II, 2020 WL 5819862, at *2. (See ECF Nos. 186-2 at 12 ¶ 8 (listing examples); 186-5 at 11 ¶ 7 (same)). To calculate MindTap royalties, "Cengage allocates the revenue it receives from the sale of MindTap to the two components of MindTap: the textbook [('eTextbook')], on which it pays royalties, and the ancillary materials (tests, study guides, exercises), on which it does not typically pay royalties [(the 'Supplemental Materials')]." Bernstein II, 2020 WL 5819862, at *2.[4] The Supplemental Materials contain content related to or derived from the eTextbook, as well as content related to "the course or the discipline." (ECF No. 172-7 at 8). An eTextbook author's involvement in the creation of the Supplemental Materials varies by author and product. (ECF No. 186-2 at 13 ¶ 10; see ECF No. 186-5 at 12 ¶ 9 (Supplemental Materials are created by authors, third-parties, and/or Cengage); see also ECF Nos. 186-5 at 211 ¶ 6 (author describing third parties creating Supplemental Materials); 186-5 at 224 ¶ 5 (author describing creation of Supplemental Materials)). Cengage does not sell the Supplemental Materials separately from their corresponding eTextbook (ECF No. 172-38 at 4), and views the Supplemental Materials as "additional content that supports and surrounds, [and] is supplemental to[,] the overall product." (ECF No. 172-6 at 25). Instructors in most disciplines appear to place greater reliance on MindTap

[4] In this action, Plaintiffs are not seeking as damages any unpaid royalties as to Supplemental Materials, and only "seek royalties attributable to their textbooks." (ECF No. 195 at 11).

products' comprehensiveness, readability, and compatibility than on the availability of the Supplemental Materials. (ECF No. 172-60 at 3).

Under the DRA Framework, Cengage values the eTextbook portion of every MindTap product as 50% of the product's value, and the Supplemental Materials to represent the remaining 50%. (ECF Nos. 172-8 at 10, 12; 172-47 at 3). Cengage set the DRA as follows: (i) authors who contribute only to eTextbooks are paid royalties on 50% of net receipts; (ii) authors who provide additional content beyond the eTextbook are paid royalties on 75% of net receipts; and (iii) authors who create all the content in the MindTap product—both the eTextbook and the Supplemental Materials—are paid royalties on 100% of net receipts. (ECF Nos. 172-6 at 24–28; 172-8 at 13–15; 172-9 at 6–8; 172-42 at 5; 172-46 at 3; 186-2 at 15 ¶ 14; 186-5 at 13 ¶¶ 13–17). Cengage has maintained the DRA Framework from its inception in 2016 "through the present." (ECF No. 172-6 at 41; see id. at 14, 24, 46). Cengage conducts audits to ensure that product managers "comply" with the DRA Framework. (ECF No. 172-7 at 11; see ECF No. 172-10 at 29–31 (referring to "rais[ing] a flag" if royalty percentages changed from DRA Framework)).

Cengage developed the DRA Framework based on "a survey of customer preference and how they derive value from the [MindTap] products" (ECF No. 172-6 at 17; see id. at 30), as well as the type and amount of MindTap content, the "functionality within the MindTap," and "third-party technologies in a given MindTap." (Id. at 30–31). The survey itself did not value the eTextbook component of a MindTap product, and Cengage did not employ any other reports, surveys, or quantitative analyses to develop the percentages in the DRA Framework. (id. at 18,

33–34). Rather, "[i]mplicit factors determine[d]" the DRA Framework without "explicitly account[ing] for costs or value-add contribution." (ECF No. 172-56 at 9; see ECF No. 172-6 at 48–49). While Cengage has recognized its contractual obligations to pay authors' base royalty rate, it has also acknowledged that the DRA Framework was "[s]emi-[a]rbitrary." (ECF No. 172-57 at 4). As evidence that Cengage, by adopting and implementing the DRA Framework, intended to reduce royalties to authors, Plaintiffs point to statements that Cengage "intentionally didn't put DRA in contracts" (ECF No. 172-74 at 2) and made it "confusing for the authors" to understand the DRA. (ECF No. 172-75 at 2; see ECF No. 172-62 at 4 ("not all authors were notified of what DRA is and/or what their DRA allocation is."). Plaintiffs also point to evidence showing that some "in Cengage's leadership believed" that the lowest percentage in the DRA Framework "should be closer to 75[%.]" (ECF No. 172-11 at 10; see ECF No. 172-54 at 2). Some product managers requested permission to apply DRAs of 60% or 80% but were denied and told "NOT to deviate from the standards" in the DRA Framework. (ECF Nos. 172-44 at 2; 172-58 at 2; see ECF No. 172-59 at 2 (agreeing that, under the DRA Framework, "the options are 50, 75 and 100%."). Cengage's Director of Finance also testified that the DRA was "an initiative to lower the royalty-bearing base for digital products." (ECF No. 172-9 at 18; see ECF No. 172-11 at 7–8 (Cengage sought to "allocate more [revenue from digital products] to Cengage" and "less to authors"). As a result of implementing the DRA Framework, Plaintiffs estimate that, by 2019, Cengage had reduced its royalty payments to authors by [redacted] to [redacted]. (ECF Nos. 172-9 at 24–25; 172-61 at 3).

Cengage's product managers "were responsible for assigning DRAs to particular MindTap works[.]" (ECF No. 172-6 at 20; see ECF No. 186-5 at 13 ¶¶ 11–12). When implementing a DRA, product managers analyzed the product "and assessed the author's contributions to the overall product[,]" including the Supplemental Materials, "to determine the appropriate DRA level for that work." (ECF No. 186-2 at 15 ¶ 16; see ECF No. 186-5 at 185 ¶ 13 ("Product Managers should use their discretion and best judgment in assigning DRAs to each work[.]")). Product managers also considered the terms of the author's contract, "consulted with legal (as appropriate)," and "made all sorts of judgment calls in implementing DRAs[.]" (ECF No. 186-2 at 15 ¶¶ 16–17). In some cases, product managers considered non-content-based contributions by authors, such as marketing efforts and reputation. (ECF Nos. 186-2 at 16 ¶ 18; 186-5 at 194 ¶¶ 6–7; 186-5 at 200 ¶ 9). Although product managers had "discretion . . . to implement DRAs" (ECF No. 186-2 at 16 ¶ 17), and to grant "exceptions to the rules," (id. at 152), they were required to "stick within" the DRA Framework—50%, 75%, or 100%—and were prohibited from "creat[ing] their own DRA percentage." (ECF No. 172-7 at 12; see ECF No. 172-44 at 2 ("We absolutely are NOT to deviate from the standards AND Product Managers are not to be negotiating DRAs at all."); 172-7 at 29 (Cengage "didn't want anybody deviating from" the DRA Framework); 172-45 at 2 (instructing that "the DRA percentages should not be deviated from."); see also ECF Nos. 186-5 at 114 (explaining that "[t]here are four possible options for establishing a DRA," 0%, 50%, 75%, and 100%); 235-1 at 5 (product managers "did not have any other option but to set rates at 50 percent,

75 percent, and 100 percent"); id. at 6–7 (same)). Cengage has not produced evidence of any author who was assigned a DRA other than 50%, 75%, or 100%.[5]

The parties dispute the number of authors as to whom Cengage has assigned DRAs of 50% and 100%. Plaintiffs contend that Cengage assigned a DRA of 50% to the majority of MindTap works (ECF Nos. 172-48; 172-49) and that Cengage "rare[ly]" assigned a 100% DRA to an author "because Cengage incurs a lot of cost to create the MindTap." (ECF No. 172-50 at 2; see ECF No. 172-46 at 3). Cengage, on the other hand, contends that "nearly half of MindTap products have a DRA of 100%." (ECF No. 186 at 14 (citing ECF Nos. 186-1 at 258; 186-5 at 14-15 ¶¶ 19–26 & 1011–66); see ECF No. 245 at 19).

Plaintiffs contend that, by arbitrarily choosing and imposing DRAs of 50% and 75%, Cengage reduced the amount of royalties paid to authors by 50% or 25%, respectively, and allocated to itself that portion of revenue, rather than to the authors. (ECF No. 171 at 14–15, 17–18; see ECF Nos. 172-6 at 11–12 (lower DRA results in lower royalties to author); 172-7 at 16–18) (same). Instead, Plaintiffs contend that Cengage should be allocating 81.6% to the eTextbook portion of MindTap products and 18.4% to the Supplemental Materials, leading to Corrected DRA tiers of 81.6% (up from 50%) and 90.8% (up from 75%). (ECF No. 171 at 17 (citing ECF No. 172-5 at 64–65 ¶¶ 148–54); see ECF No. 247 at 6). Since Cengage launched MindTap and CU, however,

[5] During oral argument on the Class Motion, Cengage's counsel mentioned that a very small number of works—approximately three—were "entered into the system" with a DRA of [redacted], which one of Cengage's witnesses testified was in error and on which Cengage conceded it was not relying. (ECF No. 253 at 47; see id. at 48, 54, 63).

some authors have observed their "royalties both increase and stabilize." (ECF No. 186-5 at 215 ¶ 6; see ECF No. 186-5 at 211 ¶ 7, 220 ¶ 6, 225 ¶ 7, 238 ¶ 5).

b. CU

CU "is a subscription service for digital higher education materials," which "provides access to most of Cengage's electronic catalog," Bernstein II, 2020 WL 5819862, at *2, for a set periodic fee. (ECF No. 186-5 at 16 ¶ 29). The materials to which the CU subscription provides access include "electronic versions of all textbooks within the Unlimited platform," and subscribers have the "option of renting a paper textbook at an additional per-book fee." Bernstein II, 2020 WL 5819862, at *2.

As with MindTap, Cengage established a model to allocate revenue and calculate royalties for CU. (ECF No. 186-5 at 17 ¶ 31). The first step in this model involves "determin[ing] how much revenue to recognize in the month." (ECF No. 172-10 at 8; see ECF Nos. 172-8 at 48–49 (CU revenue "is allocated evenly over [the] subscription length."); 172-63 at 3 ("Step 1: Allocate Subscription Revenue by Month"); 186-5 at 17 ¶ 31(a) ("[O]n a monthly basis Cengage accounts for the total net revenue generated from subscription sales of [CU]."). The second step involves allocating the revenue into "three royalty pools": courseware, eTextbooks, and print rentals. (ECF No. 172-10 at 9; see ECF Nos. 172-8 at 53; 172-63 at 4; 186-5 at 17 ¶ 31(b)). Each of the three royalty pools contains both royalty-bearing and non-royalty-bearing products. (ECF No. 186-5 at 16–17 ¶ 30). At the third step, Cengage allocates revenue within each of the three royalty pools to all products—royalty-bearing and non-royalty-bearing—within that pool. (ECF Nos. 172-8 at 55; 172-10 at 10–11; 172-63 at 5; 186-5 at 17–18 ¶ 31(c)). At the fourth and final step, Cengage

multiplies the revenue for the specific product by the author's royalty rate to arrive at the royalty payment to the author. (ECF Nos. 172-64 at 3; see ECF Nos. 172-8 at 59; 172-10 at 12; 186-5 at 18 ¶ 31(d)). Where the product within CU is courseware (e.g., MindTap), Cengage applies the DRA to the CU calculation before applying the author's royalty rate. (ECF No. 172-62 at 3; see ECF No. 172-8 at 59–60). The Court refers to these four steps as the "CU Methodology."

As with MindTap, Plaintiffs allege that, in adopting and utilizing the CU Methodology, Cengage is acting in bad faith by "allocating too little revenue from CU sales to authors and too much to itself." (ECF No. 171 at 19). Plaintiffs calculate that, by applying the DRA Framework within the CU Methodology, Cengage "has not paid royalties on [redacted] in revenue," and has shifted over [redacted] in revenue to non-royalty bearing products. (id. at 19; see ECF No. 172-65 at 3). Plaintiffs contend that "[t]he purpose and effect of Cengage's CU methodology is and has been to minimize the royalties Cengage pays to authors." (ECF No. 171 at 19; see ECF Nos. 172-8 at 63 (shifting more revenue into CU courseware pool expected to result in "a lower royalty expense"); 172-10 at 24 (between 2016 and 2017, certain authors' royalty payments reduced by 2.8%, and between 2017 and 2018, by 18.1%); 172-67 at 3 (after implementing CU Methodology, Cengage saw [redacted] royalty owed reduction")). Other Cengage communications reflect the belief, however, that "[f]rom an overall financial perspective," adopting the CU Methodology was "not a win for" Cengage. (ECF No. 172-66 at 2). As with MindTap, Plaintiffs contend that they can show with common evidence "that Cengage misled authors about how it calculated CU royalties." (ECF No. 171 at 20 (citing ECF Nos. 172-68 & 172-69)). Plaintiffs will also calculate the harm to authors from Cengage's bad faith allocation of too

much revenue to non-royalty bearing products by: (1) "determining the percentage of revenue that Cengage has flowed to non[-]royalty bearing works that should instead flow to royalty[-]bearing works" and (2) "calculating the additional royalties that class members should have been paid using Cengage's own formulas." (ECF No. 171 at 20 (citing ECF No. 172-5 ¶¶ 177–93)).

4. Prof. Spulber's Opinions

In connection with the Class Motion, Plaintiffs engaged Prof. Spulber, a Professor at the Kellogg School of Management and Pritzker School of Law at Northwestern University and the University of Southern California Law School. (ECF No. 172-5 ¶ 1). Plaintiffs engaged Prof. Spulber to:

> review and analyze whether there is a class-wide method of proof to determine: (i) whether Cengage's DRA Framework is arbitrary; (ii) whether Cengage's DRA Framework systematically undervalued authors' contributions to MindTap; and (iii) whether damages for the [Proposed Classes[6]] from the underpayment of royalties from MindTap and CU can be calculated on a class-wide basis using a common methodology.

(ECF No. 172-5 at 8 ¶ 12).

[6] Plaintiffs' Class Motion proposed two classes:

- MindTap Class: Authors of works who entered into a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been sold on the MindTap platform and assigned a Digital Royalty Allocation ["DRA"] of 50 percent or 75 percent [the "Proposed MindTap Class"].
- CU Class: Authors of royalty-bearing works who entered into a publishing agreement with Cengage Learning, Inc., or one of its predecessors-in-interest, that provides that the agreement will be governed by New York or Massachusetts law, and whose works have been used on Cengage Unlimited [the "Proposed CU Class"].

(ECF No. 169 at 1 (the Proposed MindTap Class and the Proposed CU Class together, the "Proposed Classes")).

Prof. Spulber observes that "Cengage has allocated revenue from the sales of MindTap versions of authors' works between the digital textbook ('eTextbook') and the platform and accompanying supplemental materials using a common-class-wide methodology." (ECF No. 172-5 at 9 ¶ 17). Specifically, Cengage assigned all MindTap Class members "either a 50 percent or 75 percent DRA." (Id. at 8 ¶ 13).[7] From this observation, Prof. Spulber offers several opinions that he contends can be shown using class-wide factors and economic analysis:

- Cengage's DRA Framework "is arbitrary and unsupported by economic principles" insofar as "Cengage's assignment of different DRA levels to different products was not based on an analysis of authors' IP contribution to the MindTap products or the relative market value of the different MindTap components, but instead based on arbitrary heuristics that undervalue the eTextbooks in comparison to the platform and accompanying Supplemental Materials." (Id. at 9–10 ¶ 17).

- Cengage's application of 50 percent and 75 percent DRAs "did not accurately allocate revenues to the contributions of authors relative to other components of a MindTap version of the authors' work." (Id. at 10 ¶ 17).

- His analysis, which uses Open Educational Research ("OER")[8] products as a benchmark for determining the revenues attributable to each portion of the Mindtap products, "identif[ies] a corrected DRA" that allocates 81.6% of revenue from MindTap sales to the eTextbook portion of the products (the "Corrected DRA"), and 18.4% to the platform and Supplemental Materials, which "properly accounts for the relative contributions of the authors, on the one hand, and Cengage's contributions, on the other." (Id.)

[7] Authors to whom Cengage assigned a 100 percent DRA are not members of the MindTap Class. (See ECF No. 169 at 1).

[8] OER textbooks "are free learning resources" that "reside in the public domain and 'permit no-cost access, re-use, re-purpose, adaptation and redistribution by others.'" (ECF No. 172-5 at 52 ¶ 118, 52 ¶ 118 n.226). Prof. Spulber found that "the Supplemental Materials of the OER products [] are comparable to the Supplemental Materials that accompany eTextbooks in MindTap products." (Id. at 52 ¶ 118).

- He proposes a "Corrected DRA" of 81.6% for authors currently receiving a DRA of 50%, and 90.8% for authors currently receiving a DRA of 75%. (Id. at 65–66 ¶¶ 153, 156).

- Using the Corrected DRA, he has calculated the damages resulting from Cengage's application of an arbitrary DRA to the MindTap works for the period 2016 to 2021 (the "MindTap Damages") as [redacted], which represents "the underpayment of royalties as measured by comparing the royalties Cengage actually paid to those that Cengage would have paid had Cengage used a DRA that more accurately" valued the components of the MindTap works. (Id. at 10 ¶ 17, 68 ¶ 164).

- As an alternative, using an "Admission DRA"—which treats the eTextbook portion of MindTap products as 75% of the value—he calculates the MindTap Damages as [redacted]. (Id. at 68–71 ¶¶ 167–76).

- Using CU's eTextbook-only subscription option, Prof. Spulber performed a robustness check indicating that the eTextbook revenue share is 58.3%, confirming his opinion that Cengage's "arbitrary" 50% DRA measurably undervalues authors' contributions to eTextbooks. (Id. at 62 ¶ 144; see ECF No. 196-4 ¶ 155).

- He has calculated the damages resulting from Cengage's CU Methodology (the "CU Damages"), by allocating "a given percentage"—90%—"of the revenue that Cengage allocated to non-royalty bearing works on its CU platform to the royalty bearing works within CU and calculat[ing] the resulting change in royalty payments." (ECF No. 172-5 at 11 ¶ 17, 75–78 ¶¶ 185–93). Prof. Spulber did not perform his own analysis to arrive at the percentage, but rather "was asked by [Plaintiffs'] counsel to assume that 90 percent of the revenue that Cengage has allocated to non-royalty bearing productions should instead have been allocated to royalty bearing products." (Id. ¶ 185).

Plaintiffs intend to rely on Prof. Spulber's opinions as common evidence showing that the DRA Framework and CU Methodology are arbitrary and resulted in underpayment of royalties to authors, and to calculate damages for the Proposed Classes. (See ECF No. 171 at 14–20).

5. Prof. Hitt's Critiques of Prof. Spulber's Opinions

In response to Prof. Spulber, Cengage has submitted a report from Lorin Moultrie Hitt ("Prof. Hitt"), a Professor of Operations, Information and Decisions at the University of Pennsylvania, Wharton School. (ECF No. 186-1 ("Prof. Hitt's Report") at 319, 329 ¶¶ 1, 26). Prof. Hitt begins his critique of Prof. Spulber's opinions by noting that Prof. Spulber contests only (i) the percentage Cengage uses for the baseline DRA for MindTap, and (ii) the amount of revenue Cengage allocates to non-royalty-bearing CU products, and does "not contest any other aspects of Cengage's methodology for royalty allocation." (Id. at 329 ¶ 25).

Prof. Hitt finds Prof. Spulber's methodology for calculating MindTap Damages unreliable because Prof. Spulber:

- "relies on the incorrect assumption that the price of a bundle is equal to the sum of the prices of the products in that bundle if each product were sold individually";
- "does not consider differences across members of the proposed MindTap Class, and simply assumes that the same proposed DRA percentage adjustment to actual royalties can accurately measure alleged damages for each individual member of the proposed MindTap Class";
- "averag[es] prices across heterogeneous products" to arrive at the Corrected DRA;
- "estimates a 'market price' for MindTap Course Materials that is based on a comparison to products that are fundamentally different from MindTap products";
- as to the Admission DRA, relies on an arbitrary value that is based on Prof. Spulber's misinterpretation of Cengage documents and instructions from Plaintiffs' counsel, and therefore, lacks an economic basis; and
- rests "on an incomplete counterfactual argument" insofar as he failed to consider the effects of "higher baseline DRA percentages."

(ECF No. 186-1 at 330–32 ¶¶ 30(a)–(e)). Prof. Hitt also finds Prof. Spulber's estimate of CU Damages unreliable because it "is entirely based on an unsupported assumption he was given by

Plaintiffs' counsel, it is not scientific, and does not reliably determine whether the members of the Proposed CU Class were injured under the alleged theory of harm." (Id. ¶ 31). Overall, Prof. Hitt asserts that Prof. Spulber, in reaching his opinions, "assumes a set of circumstances that are untethered to the reality in which Cengage operates." (Id. ¶ 32).

6. Prof. Spulber's Rebuttal

In his rebuttal report (the "Rebuttal Report"), Prof. Spulber begins by pointing out what Prof. Hitt does not contest: (i) "that Cengage used and continues to use a class-wide methodology, its DRA Framework, for calculating royalties from MindTap revenue, and that all authors were assigned a [DRA] of 50, 75, or 100 percent"; and (ii) "that Cengage did not rely on or apply any economic or quantitative analysis in determining the levels of the different DRA tiers." (ECF No. 196-4 ¶ 8). Prof. Spulber then disputes Prof. Hitt's: (i) discussion and application of literature regarding bundling of products; (ii) suggestion that he (Prof. Spulber) "assume[d] that the price of MindTap products equals the price of their components"; (iii) assertion "that the relative contributions of the two components [eTextbooks and Supplemental Materials] differs between MindTap products"; (iv) critique of the Corrected DRA calculations as "unnecessary, unreliable, and contrary to the facts in this case"; (iv) assertion that OER cannot serve as a benchmark value of Supplemental Materials; (v) conclusion that Prof. Spulber's robustness check contradicts his other opinions; (vi) assertion that "calculating MindTap Damages requires an individualized inquiry into why some authors were bumped from the baseline 50 percent DRA to a higher 75 percent or 100 percent, or into particular authors' contributions to Supplemental Materials"; (vii) assertion that Prof. Spulber's MindTap Damages method relies on an incomplete

counterfactual argument; and (viii) assertion that CU Damages cannot be calculated on a class-wide basis using a common methodology. (ECF No. 196-4 ¶ 8).

B. Procedural Background

1. The Complaint and the MTD Order

On August 12, 2019, Plaintiffs filed the Complaint (ECF No. 1), which Cengage moved to dismiss. (ECF Nos. 39–41). On September 29, 2020, Judge Carter granted the motion as to the breach of contract claims as to both MindTap and CU, and the breach of implied covenant of good faith and fair dealing claim as to CU. Bernstein I, 2020 WL 5819862, at *4–6. Judge Carter found that Plaintiffs' breach of contract claim rested on the premise that the royalty clauses in the Contracts "plainly require Cengage to pay royalties based on total net receipts of MindTap and [CU]," but that "Plaintiffs have not adequately pleaded that Cengage is contractually obligated to base royalties on total net receipts for MindTap and [CU]." Id. at *3–4. Judge Carter pointed out that the Contracts "explicitly refer to royalties to be paid on 'the Work', which is defined as the textbook itself." Id. at *4. Judge Carter noted that "[t]he plain text of the clauses do not refer to any product Cengage might sell in addition to 'the Work.'" Id. (emphasis added). Accordingly, because "[t]he royalty clauses in the [Contracts] unambiguously define the 'Work' as the titles themselves," Judge Carter found that they "cannot bear Plaintiffs' reading that they literally commit Cengage to pay royalties on total net receipts of MindTap and [CU]." Id. Having failed to plead that the Contracts prohibited Cengage's "pricing scheme for MindTap and [CU]," Judge Carter dismissed the breach of contract claims. Id. at *5.

As to the breach of implied covenant of good faith and fair dealing claims, Judge Carter found the "decisive question" to be "whether Plaintiffs have pleaded a lack of good faith by Cengage," and concluded that Plaintiffs pled Cengage's lack of good faith as to MindTap, but not as to CU. Bernstein I, 2020 WL 5819862, at *5. Judge Carter relied on Plaintiffs' allegation that Cengage, "in exercising its discretion to determine what among net receipts from the sales of MindTap is attributable to the authors and what is attributable to Cengage-made materials, systematically undervalued authors' contributions to enrich themselves." Id. Because, if true, this allegation suggested that "Cengage has exercised its discretion with the ulterior motive of appropriating what should go to the authors to itself," Judge Carter held that Plaintiffs adequately pled bad faith. Id. In the absence of allegations suggesting that Cengage set the subscription price for CU in bad faith or was "in any way taking more of the pie than it is due," however, Judge Carter dismissed the breach of the implied covenant of good faith and fair dealing claim as to CU. Id. at *5–6.

In addition, Judge Carter denied Cengage's motion to strike Plaintiffs' class allegations, finding that the dismissal of the breach of contract claims and the CU breach of implied covenant of good faith and fair dealing claim resolved Cengage's concern "that common issues will not predominate over individual ones." Id. at *6.

2. The FAC

On December 11, 2020, Plaintiffs moved for leave to file a first amended class action complaint (the "FAC") to correct the deficiencies highlighted in Bernstein II and, with respect to CU, assert allegations based on documents that Cengage had recently produced. (ECF Nos. 61;

64 at 5). Cengage opposed the motion to amend (ECF No. 72). I recommended, and Judge Carter agreed, that Plaintiffs be denied leave to amend their breach of contract claims but be permitted to amend their claim for breach of the implied covenant of good faith and fair dealing as to CU. Bernstein III, 2021 WL 4927033, at *9, adopted by, Bernstein IV, 2021 WL 4441509, at *3–4. On October 8, 2021, Plaintiffs filed the FAC, asserting that Cengage breached the implied covenant of good faith and fair dealing in the Contracts by: (i) failing to pay authors for use of the works in accordance with the Contracts, (ii) allocating to itself royalty-bearing revenue from its use of the works, (iii) failing to pay the authors royalties on all royalty-bearing revenue from its use of the Works, (iv) selling the works with the MindTap functionalities in a manner that dilutes the revenue base attributable to the authors, and (v) excluding from royalty-bearing revenue millions of dollars of CU subscription fees. (ECF No. 120 ¶¶ 70–73).

3. The Motions

On October 14, 2022, Plaintiffs filed the Class Motion seeking certification of the Proposed Classes. (ECF Nos. 169–75). On January 31, 2023, Cengage filed the Daubert Motion (ECF Nos. 188–90), which Plaintiffs opposed. (ECF Nos. 208-11). On March 14, 2023, Cengage filed a reply in further support of the Daubert Motion. (ECF Nos. 224–25; 227–28).

On May 11, 2023, the Court heard oral argument on the Class Motion, and the parties agreed to rest on their written submissions as to the Daubert Motion. (ECF Nos. 220; 243; 251; 253 at 60; see ECF min. entry May 11, 2023).

II. DISCUSSION

A. Daubert Motion

1. Legal Standard

In determining whether to admit expert testimony, this Court follows the three-step process set forth in Federal Rules of Evidence ("FRE") 702 and 403. See Actava TV, Inc. v. Joint Stock Co. "Channel One Russia Worldwide", No. 18 Civ. 6626 (ALC), 2023 WL 2529115, at *3 (S.D.N.Y. Mar. 15, 2023). FRE 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FRE 403 permits a court to exclude relevant evidence whose "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Pursuant to these two rules, the Court must conclude that (i) the witness is "qualified as an expert;" (ii) the witness's testimony is based on reliable data and methodology; and (iii) the witness's testimony will "assist the trier of fact." Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir. 2005) (quoting FRE 702). In addition, the Court may exclude expert testimony whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Id. (quoting FRE 403). The Second Circuit has recognized the "principle that Rule 702 embodies a liberal standard of admissibility for expert opinions." Nimely,

414 F.3d at 395. The federal courts employ "a presumption of admissibility of expert evidence," such that "'the rejection of expert testimony is the exception rather than the rule.'" Oleg Cassini, Inc. v. Electrolux Home Prods., Inc., No. 11 Civ. 1237 (LGS) (JCF), 2014 WL 1468118, at *6 (S.D.N.Y. Apr. 15, 2014) (quoting FRE 702 advisory committee's note). Notwithstanding that presumption, however, "[t]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied[.]" United States v. Williams, 506 F.3d 151, 160 (2d Cir. 2007); see Daubert, 509 U.S. at 593 n.10.

The first step the Court must take in applying this standard is to determine "whether a witness is 'qualified as an expert by knowledge, skill, experience, training, or education.'" Nimely, 414 F.3d at 396 n.11 (quoting FRE 702)). This inquiry is necessary because experts are "permitted substantially more leeway than 'lay' witnesses in testifying as to opinions that are not rationally based on [their] perception." Id. Once the Court has determined that an expert is qualified under FRE 702, the Court turns to "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Williams, 506 F.3d at 160 (quoting Daubert, 509 U.S. at 597).

At the second step of "assessing reliability, 'the district court should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case.'" Williams, 506 F.3d at 160 (quoting Amorgianos v. AMTRAK, 303 F.3d 256, 265 (2d Cir. 2002)). This is not an "exhaustive" list of the criteria the Court may consider. Wills v. Amerada Hess Corp., 379 F.3d 32,

48 (2d Cir. 2004). The Court may also consider "whether a theory or technique has been or can be tested; whether the theory or technique has been subjected to peer review and publication; the technique's known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and whether a particular technique or theory has gained general acceptance in the relevant scientific community." Actava TV, Inc., 2023 WL 2529115, at *4 (citing Williams, 506 F.3d at 160); see Daubert, 509 U.S. at 593–94 (discussing "pertinent consideration[s]" to trial court's evaluation of expert opinions). Whether scientific or nonscientific, "Rule [702] as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful." FRE 702 advisory committee's note.

At the third step under FRE 702, the Court must assess whether the expert's testimony will "assist the trier of fact," i.e., whether the testimony is relevant. Nimely, 414 F.3d at 397. The Second Circuit has "consistently held . . . that expert testimony that usurps either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it . . . by definition does not aid the jury in making a decision; rather, it undertakes to tell the jury what result to reach, and thus attempts to substitute the expert's judgment for the jury's." Id.

Finally, in addition to the requirements of FRE 702, the Court must consider whether the expert's testimony satisfies FRE 403, i.e., whether "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." FRE 403; see Actava TV, Inc., 2023 WL 2529115, at *4.

In the context of a motion to exclude expert testimony, "an expert opinion requires some explanation as to how the expert came to his conclusion and what methodologies or evidence substantiate that conclusion." Karnauskas v. Columbia Sussex Corp., No. 09 Civ. 7104 (GBD), 2012 WL 234377, at *6 (S.D.N.Y. Jan. 24, 2012) (quoting Riegel v. Medtronic, Inc., 451 F.3d 104, 127 (2d Cir. 2006), aff'd on other grounds, 522 U.S. 312 (2008)). The expert may base his opinion on experience alone, provided he "'explain[s] how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliable applied to the facts.'" Henry v. Champlain Enters., Inc., 288 F. Supp. 2d 202, 220 (N.D.N.Y. 2003) (quoting FRE 702 advisory committee's note to 2000 amendments).

The district courts are "the ultimate gatekeeper[s]," Williams, 506 F.3d at 160, and "enjoy broad discretion to admit expert testimony." Actava TV, Inc., 2023 WL 2529115, at *3; see In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig., 593 F. Supp. 2d 549, 555 (S.D.N.Y. 2008) (recognizing that in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), "the Supreme Court held that Rule 702 imposed a basic gatekeeping obligation upon a trial judge when considering any expert testimony regardless of whether it involved scientific testimony"). "The [C]ourt must 'make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" Karnauskas, 2012 WL 234377, at *7 (quoting Kumho, 526 U.S. at 152). Nevertheless, the Second Circuit has recognized that a district court's inquiry under Daubert is limited, and "[a] minor flaw in an expert's reasoning or a slight modification of an otherwise reliable method will not render an expert's opinion per se inadmissible."

Amorgianos, 303 F.3d at 267. The Court "should only exclude the evidence if the flaw is large enough that the expert lacks good grounds for his or her conclusions." Id. "This limitation on when evidence should be excluded accords with the liberal admissibility standards of the federal rules and recognizes that our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony." Id. While "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence," id., "a trial court should not abandon its gatekeeping role and rely only upon cross-examination to expose any flaws in a proposed expert's testimony where the expert's methodology is untestable." Faryniarz v. Nike, Inc., No. 00 Civ. 2623 (NRB), 2002 WL 1968351, at *2 (S.D.N.Y. Aug. 23, 2002). Ultimately, under the Daubert analysis, the Court has the discretion "needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact." Amorgianos, 303 F.3d at 267.

Although "[t]he Supreme Court has not definitively ruled on the extent to which a district court must undertake a Daubert analysis at the class certification stage," the Court has "suggest[ed] that a Daubert analysis may be required at least in some circumstances." In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011)). Thus, district courts within the Second Circuit "often subject expert testimony to Daubert's rigorous standards insofar as that testimony is relevant to the Rule 23 class certification analysis." Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 55 (S.D.N.Y.

2016). A Daubert evidentiary hearing is not required where the party challenging the expert agrees to rely on its written submissions. See In re U.S. Foodservice, 729 F.3d at 130.

2. Application

a. Prof. Spulber is a Qualified Expert

Cengage does not challenge Prof. Spulber's qualifications (see generally ECF No. 190), and the Court finds that he is indeed qualified to serve as an expert in this action. Prof. Spulber holds a B.A., M.A., and Ph.D. in economics and is a professor at both the Kellogg School of Management and the Pritzker School of Law at Northwestern as well as the University of Southern California Law School. (ECF No. 172-5 ¶ 1). He has also taught at Brown University and the California Institute of Technology. (Id. ¶ 2). He has published fourteen books and numerous articles in economics journals and law reviews, and has received 37 research grants from, among others, the National Science Foundation. (Id. ¶ 3). Prof. Spulber has conducted economic research and published writings regarding calculation of damages in antitrust, intellectual property, and other technology-related actions. (Id. ¶ 4). In the last four years, he has testified as an expert in five actions involving valuation of intellectual property and technology. (Id. at 119). The Court finds that Prof. Spulber is qualified as an expert. See Actava TV, Inc., 2023 WL 2529115, at *5 (deeming expert qualified where defendants did not challenge qualifications and his academic, publication, and consulting experience demonstrated his qualification to testify as an expert concerning intellectual property damages).

b. MindTap Damages

Cengage raises four arguments challenging the reliability of Prof. Spulber's methodology for calculating MindTap Damages. (See ECF No. 190 at 11–21).[9]

First, Cengage argues that, because "MindTap is a bundled product," Prof. Spulber's approach to calculating the value of eTextbooks—subtracting the market value of one MindTap component from the price of a MindTap product (see ECF No. 172-5 ¶ 114)—"overlooks the substantial body of economic literature and many real-world examples establishing that a bundle's market price is rarely the precise sum of its components' individual prices." (ECF No. 190 at 12). Plaintiffs respond that the economic literature on which Cengage relies is not relevant because: (i) Supplemental Materials are only available through MindTap, not as standalone products; (ii) the Corrected DRA allocates revenue among inputs to the MindTap product, not the pricing of the MindTap product itself; (iii) Prof. Spulber uses the same DRA Framework as Cengage, just with different DRA percentages; and (iv) the Corrected DRA uses the sum of revenue allocations, not standalone prices. (ECF No. 208 at 16–18). Plaintiffs add that Cengage's bundling criticisms, at most, "'go to the weight, not the admissibility," of Prof. Spulber's opinions. (Id. (quoting Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 214 (2d Cir. 2009)). The Court does not address Cengage's bundling arguments individually because, at most,

[9] Cengage does not specifically challenge the relevance of Prof. Spulber's opinions regarding the MindTap Damages, nor does Cengage suggest that his opinions should be excluded under FRE 403. (See generally ECF No. 190 at 11–21). Given the absence of any "strong factors such as time or surprise favoring exclusion[]" and the federal rules' emphasis on "liberalizing expert testimony," the Court would resolve any "doubts about whether [Prof. Spulber's] testimony will be useful . . . in favor of admissibility[.]" United States v. Jakobetz, 955 F.2d 786, 797 (2d Cir. 1992).

they amount to criticism of Prof. Spulber for failing to consider additional or different variables in arriving at the Corrected DRA, which are issues that "can be addressed during cross-examination." Actava TV, Inc., 2023 WL 2529115, at *6; see BS Big V, LLC v. Phila. Indem. Ins. Co., No. 19 Civ. 4273 (GBD) (SLC), 2022 WL 4281481, at *10 (S.D.N.Y. Aug. 5, 2022) (recommending denial of motion to preclude where criticisms could be addressed on cross-examination), adopted by 2022 WL 4181823 (S.D.N.Y. Sept. 13, 2022); Boyce v. Weber, No. 19 Civ. 3825 (JMF), 2020 WL 5209526, at *1 (S.D.N.Y. Sept. 1, 2020) (denying motion to preclude expert where criticisms could be raised on cross-examination); see also Daubert, 509 U.S. at 596 (explaining that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence"); Discepolo v. Gorgone, 399 F. Supp. 2d 123, 129 (D. Conn. 2005) ("Defendant's cross-examination can effectively reveal to the jury inaccuracies, imprecisions, or fallacies in [the expert's] analysis to enable the jury to decide how much of [the expert's] testimony to credit or not credit, and what weight to give it in the context of all the evidence"). Prof. Spulber's non-consideration of bundling in his methodology thus does not render his opinions as to MindTap Damages unreliable.

Second, Cengage criticizes Prof. Spulber for not using the eTextbook pricing data that Cengage produced to calculate the average market value of eTextbooks. (ECF No. 190 at 14–15). Plaintiffs point out that Prof. Spulber explained that he did not use Cengage's pricing data due to the absence of a reliable means to match eTextbook list prices to MindTap products. (ECF No. 208 at 19–20; see ECF Nos. 172-5 ¶ 147 n.281; 196-4 ¶¶ 102–07). The Court finds that Prof. Spulber's

decision not to use Cengage's eTextbook pricing data does not render his opinions unreliable. Prof. Spulber acknowledged the existence of Cengage's pricing data, but found that he was unable to match prices exactly with eTextbook titles, "giv[ing] rise to serious reliability concerns." (ECF No. 172-5 ¶ 147 n.281). Prof. Hitt acknowledged that he, too, encountered challenges in matching pricing data from different years and observed conflicting information, although he used some of the data to critique Prof. Spulber's analysis. (ECF No. 186-1 at 351 ¶ 81, ¶81 n.135; id. at 353 nn.1, 2, 4). As Prof. Spulber pointed out, however, Prof. Hitt used eTextbook prices from October 2021 along with MindTap prices extracted from an August 2022 spreadsheet, calling into question the reliability of the data and the accuracy of Prof. Hitt's analysis. (ECF No. 196-4 ¶¶ 103–04). Ultimately, Prof. Spulber and Prof. Hitt have a difference of opinion about the quality and utility of Cengage's pricing data, which creates a credibility question for the jury to resolve and is not a basis for excluding Prof. Spulber's opinion. See Guild v. Gen'l Motors Corp., 53 F. Supp. 2d 363, 369 (W.D.N.Y. 1999) ("[T]he mere fact that a difference of opinion exists does not make plaintiffs' experts' conclusion inherently unreliable. Such differences of opinion and alleged weaknesses in the experts' methodologies will go to the weight to be given the expert testimony, not its admissibility."). Prof. Spulber's considered decision not to rely on the pricing data based on concerns about his reliability also distinguishes him from those experts who "simply did not review" or "rejected out of hand" relevant, reliable information. Faulkner v. Arista Recs. LLC, 46 F. Supp. 3d 365, 381 (S.D.N.Y. 2014); see Celebrity Cruises Inc. v. Essef Corp., 434 F. Supp. 2d 169, 182 (S.D.N.Y. 2006) (excluding report of expert who "was unaware" that relevant data was available and acknowledged that "she would have considered such information had she known

of it"). Prof. Spulber also left open the option to incorporate different or additional reliable eTextbook data were Cengage to provide it. (ECF No. 172-5 ¶ 147 n.281). Therefore, Prof. Spulber's decision not to use the Cengage pricing data does not render his MindTap Damages methodology unreliable.

Third, Cengage argues that Prof. Spulber's reliance on OER platforms—which bundle free textbooks with supplemental materials (see n.8, supra)—is an "apples and oranges" comparison that renders his analysis unreliable. (ECF No. 190 at 16–17). Cengage contends that the four OER platforms, the prices of which Prof. Spulber averaged to arrive at a value for MindTap Supplemental Materials, were "not a reasonable proxy" due to different market forces affecting the price of materials that accompany free textbooks, higher demand for Cengage's MindTap products, and price variations. (Id. at 17–18). Plaintiffs respond that Cengage's arguments about the propriety of Prof. Spulber's comparators goes to the weight of his opinions, not to their admissibility, and refer to Prof. Spulber's explanation why the OER platforms were sufficiently comparable to the MindTap Supplemental Materials to indicate their market value. (ECF No. 208 at 23–24). Plaintiffs add that Cengage has failed to specify the different market forces impacting free materials, explain why higher demand impacts comparability, or demonstrate variability of prices of the OER platforms. (Id. at 24–25). As with the pricing data, the Court finds that the experts' differences of opinion regarding the correct comparators to use in valuing the MindTap Supplemental materials does not require preclusion of Prof. Spulber's opinions. First, as Prof. Spulber has pointed out (ECF No. 196-4 ¶ 120), neither Cengage nor Prof. Hitt provide support for their assertion that the "underlying textbooks" must be comparable for the supplemental

materials to be comparable. (ECF No. 186-1 at 356 ¶ 89; see ECF No. 208 at 25). Prof. Spulber has also explained why he believes the MindTap Supplemental Materials are comparable to the supplemental materials on the OER platforms (ECF Nos. 172-5 ¶¶ 118, 123–29; 196-4 at 42–49 ¶¶ 114–35), and included only those "OER products that combined an OER eTextbook with a platform that provided Supplemental Materials that were similar to MindTap." (ECF No. 196-4 ¶ 131). Cengage is free to test this comparison on cross-examination and through Prof. Hitt's testimony. See Daubert, 509 U.S. at 596. Second, and similarly, Cengage provides no explanation for how differing levels of demand for supplemental materials associated with free eTextbooks as opposed to priced eTextbooks renders the OER platforms poor comparators. (ECF Nos. 186-1 at 356–57 ¶ 90; 190 at 17–18). Third, the OER prices range only from $10.00 to $30.00, and Prof. Spulber accounts for the range by using an average of the four platforms. (ECF No. 196-4 ¶ 145). The other differences Cengage highlights—including whether an OER platform continues to exist or their profit or non-profit status (ECF No. 190 at 17–18)—fail to persuade the Court that Prof. Spulber's use of the OER platforms as comparators renders his analysis unreliable. Ultimately, whether the OER platforms are sufficiently comparable to render Prof. Spulber's calculation of the value of the MindTap Supplemental Materials reliable "go[es] to the weight, not the admissibility," of the evidence. Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996); see Alfa Corp. v. OAO Alfa Bank, 475 F. Supp. 2d 357, 367 (S.D.N.Y. 2007) (holding that challenges to expert's choice of comparators did not warrant preclusion); Essef Corp., 434 F. Supp. 2d at 189 (explaining that criticisms of expert's selection of comparators "go more to the weight

afforded to [the expert's] analysis than to its admissibility").[10] The Court finds that Prof. Spulber's use of the OER platforms as comparators is "not so unrealistic or irrational as to suggest bad faith," and the validity of that comparison is "for the jury to evaluate." US Airways, Inc. v. Sabre Holdings Corp., No. 11 Civ. 2725 (LGS), 2016 WL 11796987, at *1 (S.D.N.Y. Aug. 3, 2016).

Fourth, Cengage contends that Prof. Spulber's robustness check (see ECF No. 172-5 ¶ 144)—which arrived at an eTextbook valuation of 58.3% as compared to his Corrected DRA of 81.6%—demonstrates that his methodology "is 'insufficiently tested' and error-ridden." (ECF No. 190 at 19 (quoting In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430, 468 (S.D.N.Y. 2018)). Plaintiffs counter that Prof. Spulber's robustness check is an "'alternative' methodology," not the application of his Corrected DRA to different data to test his analysis, and rather than producing contrary results, "confirms his opinion that Cengage has undervalued the eTextbook component of MindTap products compared to the Supplemental Materials component." (ECF No. 208 at 27 (quoting ECF No. 172-5 ¶ 142 and citing id. ¶ 144, ECF No. 196-4 ¶ 154)). The Court finds that the alternative methodology that Prof. Spulber used in his robustness check does not render his Corrected DRA methodology unreliable. As Prof. Spulber explains, his Corrected DRA is based on the more comparable OER platforms, which "better

[10] The cases on which Cengage relies and in which courts have excluded experts' opinions based on use of unreliable comparators (ECF No. 190 at 17) are factually distinguishable. See Robocast, Inc. v. Apple Inc., No. 11 Civ. 235 (RGA), 2014 WL 334183, at *3 (D. Del. Jan. 28, 2014) (excluding opinion of expert whose comparison used "[s]tatistical information in press releases and other promotional materials [that was] of doubtful reliability"); Metabyte, Inc. v. Canal+Techs., S.A., No. 02 Civ. 05509 (RMW), 2005 WL 6032845, at *3 (N.D. Cal. June 17, 2005) (excluding opinion of expert whose analysis used only a single comparator whose differences with plaintiffs' product were "so significant" as to make its use "as a guideline company unreasonable").

isolate and serve as a benchmark for the revenue share of the Supplemental Materials and in turn the eTextbook" than CU, which is a subscription service alone. (ECF No. 172-5 ¶ 145; see ECF No. 196-4 ¶ 155). His point is that, using even "a slightly less comparable market benchmark for the value of the MindTap Supplemental Materials[] showed that Cengage allocated too little to authors with its DRA floor of 50 percent." (ECF No. 196-4 ¶ 155). A key question for the jury in this case is whether Cengage undervalued authors' contribution to the eTextbook component of MindTap. See Bernstein II, 2020 WL 5819862, at *5. Prof. Spulber's opinions—no doubt aggressively cross-examined by Cengage—will help the jury answer that question and, if they answer in the affirmative, assess whether the correct percentage for the eTextbook component should be 81.6%, 58.3%, or something else. Because Prof. Spulber's robustness check confirms his opinion that Cengage has undervalued authors' contributions to the eTextbook component of MindTap, it does not undermine the reliability of his opinions.

Accordingly, none of Cengage's challenges to Prof. Spulber's methodology regarding MindTap Damages warrants excluding his opinions.

c. CU Damages

Cengage criticizes Prof. Spulber's CU Damages methodology for using as its "cornerstone . . . not economic analysis, but rather an assumption provided by Plaintiffs' counsel," (ECF No. 190 at 20), i.e., the assumption that "90 percent of the revenue that Cengage has allocated to non-royalty bearing products should instead have been allocated to royalty bearing products." (ECF No. 172-5 ¶ 185). Cengage argues that, although "[a] viable damages methodology for [CU] would have to determine whether revenue was improperly allocated and,

if so, determine the amount of the supposed misallocation," Prof. Spulber did not test that assumption, nor did he suggest how to determine what the percentage should be. (ECF No. 190 at 20–21; see ECF No. 190-1 at 38–39 (Prof. Spulber agreeing that "for purposes of [his] analysis," he "assumed . . . that some amount of royalties should be reallocated")). Plaintiffs respond that the determination whether revenue was improperly allocated "goes to liability, not damages," and "[i]t is entirely proper for a damages expert to rely on the assumption that liability is found." (ECF No. 208 at 28). They contend that Prof. Spulber has shown that, "regardless of the percentage of revenue the fact finder concludes needs to be reallocated, a common methodology for calculating damages exists." (Id. at 29).

To calculate CU Damages, Prof. Spulber: (1) "redistribute[d] 90 percent of the revenue allocated to non-royalty bearing works to royalty bearing works within each of the monthly CU Allocation Spreadsheets,"[11] (2) calculated the annual revenue allocated to each CU product, (3) calculated the annual corrected revenue allocated, (4) calculated the ratio of (2) to (3), and (5) using ratio (4) "scaled up the actual royalties Cengage paid for each product accessed in CU to determine the annual royalty each author would have received but for Cengage's withholding of revenues to royalty bearing works." (ECF No. 172-5 ¶¶ 188–89, ¶ 189 nn.317–18).

The Court finds that Prof. Spulber's CU Damages methodology should not be excluded. First, Cengage produced royalty allocation data in the monthly CU Allocation Spreadsheets, from which Prof. Spulber, using his economics expertise, extracted the information needed to calculate

[11] A set of spreadsheets Cengage produced reflecting allocation of CU revenue to author royalties. (ECF No. 172-5 ¶ 179, ¶ 188 n.316).

CU Damages. That effort will be "helpful to the jury because the average person would not ordinarily be familiar with how to make computations from large datasets of this kind of information." Campbell v. City of New York, No. 16 Civ. 8719 (AJN), 2021 WL 826899, at *3 (S.D.N.Y. Mar. 4, 2021); see United States v. Duncan, 42 F.3d 97, 102 n.3 (2d Cir. 1994) ("We have generally permitted the elicitation of testimony from expert witnesses that shed light on activities not within the common knowledge of the average juror."); McBeth v. Porges, No. 15 Civ. 2742 (JMF), 2018 WL 5997918, at *7 (S.D.N.Y. Nov. 15, 2018) (permitting expert to explain calculations based on data produced in discovery, because they were "not basic calculations, but complex ones that use[d] percentages and compounding and thus [we]re likely beyond the jury's mathematical ability").

Second, Prof. Spulber's reliance on the 90% assumption from Plaintiffs' counsel "does not render [his] testimony unreliable nor does it usurp the jury's role of applying the law to facts." Campbell, 2021 WL 826899, at *3. As Prof. Spulber notes, "[i]f the percentage were changed, only the final damages figure would be updated; the underlying methodology would remain the same." (ECF No. 172-5 ¶ 185). The question of the correct percentage is one that can await the proof at trial and, if Judge Carter deems appropriate, be posed to the jury in the verdict form, with damages then calculable by inserting that percentage into Prof. Spulber's methodology. See Fed. R. Civ. P. 49(a)(1), (b)(1); see, e.g., Lee v. Mani & Pedi Inc., No. 20 Civ. 10787 (JCM), 2022 WL 3645118, at *2 (S.D.N.Y. Aug. 24, 2022) (describing jury's completion of special interrogatories, from which parties calculated damages); Brown v. Tomcat Elec. Sec., Inc., No. 03 Civ. 5175 (TLM),

2010 WL 11603139, at *2 n.4 (E.D.N.Y. May 14, 2010) (positing potential damages calculations using jury's answers to special interrogatories).

Third, to the extent that Cengage maintains that the 90% assumption is "unfounded," that "goes to the weight of the testimony" and is "a question for the jury in this matter to decide." Pharmacy, Inc. v. Am. Pharm. Partners, Inc., 511 F. Supp. 2d 324, 333 (E.D.N.Y. 2007). Just as Cengage questioned Prof. Spulber about the 90% assumption during his deposition (ECF No. 190-1 at 38–39), it "will be able to do so again at trial." Campbell, 2021 WL 826899, at *3; see R.F.M.A.S., Inc. v. So, 748 F. Supp. 2d 244, 269 (S.D.N.Y. 2010) ("If plaintiff provided its experts with a piece of false information or withheld relevant data, defendants can cross-examine the experts on this matter, calling into question the weight that the jury should accord their testimony.").

Fourth, Prof. Spulber's multi-step methodology set forth above is distinguishable from simple arithmetic by an expert, which courts in this District have excluded. See, e.g., FPP, LLC v. Xaxis US, LLC, No. 14 Civ. 6172 (LTS) (AJP), 2017 WL 11456572, at *1 (S.D.N.Y. Feb. 13, 2017) (excluding opinions of expert who "engage[d] in arithmetic, not expert analysis"); Schwartz v. Fortune Mag., 193 F.R.D. 144, 147 (S.D.N.Y. 2000) (excluding opinion of expert whose testimony only "involved basic calculations").

Accordingly, the Court finds that Cengage's challenges do not warrant exclusion of Prof. Spulber's opinions regarding CU Damages.

III. CONCLUSION

For the reasons set forth above, the Daubert Motion is DENIED.

The Clerk of Court is respectfully directed to make this Opinion & Order available only to the case participants and the Court, and to close ECF No. 188. By **June 23, 2023**, the parties shall confer and file a proposed redacted version of this Opinion and Order for the Court's review and public filing.

Dated: New York, New York
June 9, 2023

SO ORDERED.

SARAH L. CAVE
United States Magistrate Judge