ORAL ORDER: The Court, having reviewed Defendant's Daubert motion to exclude opinion and testimony related to damages for alleged infringement of the 080 patent (the "Daubert Motion"), (D.I. 515), the briefing related thereto, (D.I. 516 ; D.I. 529 ; D.I. 539), and having considered the relevant legal standards relating to Daubert motions, see Integra LifeScis. Corp. v. HyperBranch Med. Tech., Inc., Civil Action No. 15-819-LPS-CJB, 2018 WL 1785033, at *1-2 (D. Del. Apr. 4, 2018), hereby ORDERS that the Daubert Motion is GRANTED for the following reasons: (1) With the Daubert Motion, Defendant asserts that Plaintiff's damages expert Mr. Brian Napper's new damages opinion regarding the damages attributable to the 080 patent (the "080 damages opinion") is unreliable and must therefore be excluded because Mr. Napper failed to tie his analysis to infringing uses of the claimed methods. (D.I. 516 at 5-9; D.I. 539 at 1-5; see also D.I. 512 (providing background regarding Mr. Napper's revised 080 damages opinion)) The United States Court of Appeals for the Federal Circuit has explained that with respect to method claims (which are the only type of claims asserted here), "[d]amages should be apportioned to separate out non[-]infringing uses, and patentees cannot recover damages based on sales of products with the mere capability to practice the claimed method. Rather, where the only asserted claim is a method claim, the damages base should be limited to products that were actually used to perform the claimed method." Niazi Licensing Corp. v. St. Jude Med. S.C., Inc., 30 F.4th 1339, 1357 (Fed. Cir. 2022); see also Lucent Techs., Inc. v. Gateway, Inc., 580 F.3d 1301, 1334 (Fed. Cir. 2009) ("The damages award ought to be correlated, in some respect, to the extent the infringing method is used by consumers."); Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., 576 F.3d 1348, 1359 (Fed. Cir. 2009) ("[The patentee] can only receive infringement damages on those devices that actually performed the patented method during the relevant infringement period."). The Federal Circuit has also instructed district courts to exclude damages opinions that fail to account for apportionment as part of their gatekeeping function. VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1328 (Fed. Cir. 2014) ("[T]he district court should have exercised its gatekeeping authority to ensure that only theories comporting with settled principles of apportionment were allowed to reach the jury."); see also Wirtgen Am., Inc. v. Caterpillar, Inc., 715 F. Supp. 3d 587, 593 (D. Del. 2024) ("A failure to apportion goes to admissibility, not weight."); Bio-Rad Lab'ys, Inc. v. 10X Genomics, Inc., C.A. No. 15-152-RGA, 2018 WL 4691047, at *8 (D. Del. Sept. 28, 2018).; (2) The asserted claims of the 080 patent—claims 1, 3 and 10—recite methods of performing a cell-based assay that include, inter alia, "introducing cells" and "adding at least one test compound" to one or more wells. (080 patent, cols. 68:31-67, 70:10-13; D.I. 509 , ex. 1 at ¶ 11) Meanwhile, asserted claims 11 and 12 of the 752 patent require only adding "introducing cells" into at least one well (while asserted claim 14 of the 752 patent, like the asserted claims of the 080 patent, requires the addition of cells and at least one test compound). (752 patent, cols. 71:31-39, 42-52; D.I. 509 , ex. 1 at ¶ 11) Mr. Napper's new 080 damages opinion does not apply an adjustment factor or other apportionment to the damages attributable to the 080 patent. (D.I. 516 , ex. B at ¶¶ 9-13 & Schedules 5.0SS and 2.0SS) Because the 080 patent does not cover uses of the accused products that did not include a test compound (such as uses where (a) only cells were added to wells, or (b) only target cells and effector cells were added to wells), Defendant argues that Mr. Napper should have apportioned damages for the 080 patent. (D.I. 516 at 2, 7-9) To support this argument, Defendant points to the

contributory infringement opinions of Plaintiff's technical expert, Dr. Frazier, who: (a) noted that he was asked to consider whether Axion contributed to infringement for all asserted claims; (b) opined that Defendant had only contributed to infringement with respect to claims 11 and 12 of the 752 patent (i.e., those methods that only require introducing cells into a well); (c) stated that "there are no substantial non[-]infringing uses of the components of the 752 [accused products] with respect to claims 11 and 12 and that these claims recited "the most basic usage" of the accused products; and (d) did not offer such opinions for the asserted claims of the 080 patent. (See, e.g., id., ex. J at ¶¶ 25, 253, 325 (cited in D.I. 516 at 3, 7-8)) According to Defendant, Dr. Frazier's opinions in this regard amount to an implicit concession that there are substantial uses of the accused products that do not infringe the asserted claims of the 080 patent (otherwise, Dr. Frazier would have also opined that Defendant had contributed to infringement with respect to those 080 patent claims, which he was asked to assess for contributory infringement purposes). (D.I. 516 at 3, 8) Because Mr. Napper did not apportion damages for the 080 patent nor sufficiently explain why such an approach would be warranted, Defendant contends that his 080 damages opinion is inadmissible. (Id. at 8-9); (3) Plaintiff, for its part, asserts that "whether an apportionment should be applied to the 080 patent is an issue for the jury to decide" and that Defendant's arguments "boil down to its disagreements with Mr. Napper's damages calculations and underlying assumptions[,]" which are issues that go to Mr. Napper's credibility rather than admissibility. (D.I. 529 at 1, 6) Plaintiff also argues that Defendant fails to provide an explanation or any evidence as to how the typical use of the accused products would include non-infringing uses. (Id. at 6-7) And Plaintiff contends that in opining that no apportionment is necessary with respect to the 080 patent, "Mr. Napper relied on discussions with [Plaintiff representative] Dr. [] Zhao and specifically noted that he understood 'test compounds can be used in any application of impedance-based cell analysis[.]'" (Id. at 7 (citing D.I. 501 , ex. A at ¶ 41 n.71 ("Footnote 71"))); (4) Plaintiff's arguments are not convincing. As an initial matter, in criticizing Defendant for failing to point to evidence regarding the typical use of the accused products (which, incidentally, seems to ignore Defendant's reliance on Dr. Frazier's contributory infringement opinions), Plaintiff loses sight of the fact that Defendant does not carry the burden here. (D.I. 539 at 4) Rather, it is the plaintiff's burden to demonstrate by a preponderance of the evidence that its expert's opinions are reliable, see, e.g., Sec'y U.S. Dep't of Lab. v. Nursing Home Care Mgmt. Inc., 128 F.4th 146, 162 (3d Cir. 2025); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 744 (3d Cir. 1994), and that its expert's damages opinion limited damages to products that were actually used to perform the claimed method, see Lucent Techs., Inc., 580 F.3d at 1335 ("[The patentee] had the burden to prove that the extent to which the infringing method has been used supports the lump-sum damages award."). Moreover, in arguing that Mr. Napper's 080 damages opinion passes this test, Plaintiff points solely to Footnote 71—but that footnote cannot save it here. (D.I. 529 at 7 (Plaintiff citing to Footnote 71 as the apportionment-related evidence that Mr. Napper relied upon); see also D.I. 539 at 1) One problem with that argument is that Footnote 71 came in Mr. Napper's discussion of the 752 patent, not the 080 patent. (D.I. 501 , ex. A at ¶ 41 n.71) But even pretending that Mr. Napper included Footnote 71 in his discussion of the 080 patent, all that footnote states is that Mr. Napper's understanding is that "test compounds can be used in any application of impedance-based cell analysis." (Id. (emphasis added)) And so Mr. Napper is saying

nothing more here than test compounds are capable of being used in any application of the accused products. But as explained above, the Federal Circuit has made it clear that "patentees cannot recover damages based on sales of products with the mere capability to practice the claimed method." Niazi Licensing, 30 F.4th at 1357 (emphasis added); see also (D.I. 539 at 1-2). Plaintiff points to nothing in the record that speaks to the amount of accused products that were actually used to perform the method claimed in the 080 patent. (D.I. 539 at 2) The Federal Circuit has concluded that where an expert "did not address or rely on any evidence... that estimated the amount or percentage of sold devices that were actually used to infringe the claimed method[,]" that expert has not "reliably establish[ed] how often the patented method was used... to allow" for a reasonable approximation of damages. Niazi Licensing, 30 F.4th at 1357 (affirming the district court's decision to exclude a damages opinion's conclusory and legally insufficient analysis, where, inter alia, the plaintiff had asserted that the claimed method was the "predominant" method such that it was reasonable to include all sales, because such a "broad, unsupported and conclusory assertion" failed to reliably establish actual usage of the patented method). The Court must reach the same conclusion here. See, e.g., Ecolab Inc. v. Dubois Chems., Inc., Civil Action No. 21-567-RGA, 2023 WL 7019266, at *12-13 (D. Del. Oct. 25, 2023) (excluding an expert's damages opinions where all the asserted claims were method claims, and where the expert failed to apportion the royalty base to sales of the accused products that were associated with instances of infringement); Masimo Corp. v. Apple Inc., Case No. 8:20-cv-48-JVS-JDE, 2025 WL 3190897, at *12 (C.D. Cal. Oct. 17, 2025) (noting that with respect to calculating damages relating to infringing methods, "though the law does not require rigidity, evidence of actual use is not optional" and striking an expert's damages opinion for failure to apportion out non-infringing uses), reconsideration denied, 2025 WL 3190877 (C.D. Cal. Oct. 28, 2025); Eagle Harbor Holdings, LLC v. Ford Motor Co., CASE NO. C11-5503 BHS, 2015 WL 12670404, at *2 (W.D. Wash. Mar. 9, 2015) (excluding a damages expert's report because he failed to account for the fact that a method claim was at issue and failed to cite to any evidence regarding the actual usage of the relevant feature), reconsideration denied, 2015 WL 1181454 (W.D. Wash. Mar. 13, 2015).; and (5) Defendant's Motion alternatively requests that the Court strike Mr. Napper's new opinion on 080 patent damages as untimely, should the Court deny the Daubert Motion. (D.I. 516 at 9) Because the Court has granted the Daubert Motion, it DENIES this portion of the Motion as MOOT. Ordered by Judge Christopher J. Burke on 03/19/2026. (sam) (Entered: 03/19/2026)
As of March 20, 2026, PACER did not contain a publicly available document associated with this docket entry. The text of the docket entry is shown above.

Agilent Technologies, Inc. v. Axion BioSystems, Inc.
1-23-cv-00198 (DDE), 3/19/2026, docket entry 550