IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

DAEDALUS BLUE LLC, *Plaintiff*	§	
	§	**W-20-CV-00073-ADA**
-VS-	§	
SZ DJI TECHNOLOGY CO., LTD., DJI EUROPE B.V., *Defendants*	§	

MEMORANDUM OPINION AND ORDER

Before the Court is SZ DJI Technology Co., Ltd and DJI Europe B.V.'s (collectively "DJI" or "Defendants") Motion to Strike the Supplemental Expert Report of Plaintiff Daedalus Blue LLC's Damages Expert Michael Pellegrino and Defendant's related Motion to Exclude Pellegrino's Opinions and Testimony. ECF No. 98; ECF No. 101. After considering the parties' briefing, oral arguments, and applicable law, the Court **GRANTS** both motions.

I. BACKGROUND

Both motions before the Court turn on whether a second expert report submitted to the Court by Daedalus was a timely filed supplemental report. The relevant scheduling order established that opening expert reports were due on August 2, 2021, and that rebuttal expert reports were due August 31, 2021. ECF No. 89. The scheduling order also closed expert discovery on September 10, 2021 and required all dispositive and *Daubert* motions to be filed by September 14, 2021. *Id.* Trial was scheduled for roughly three months after that on December 6, 2021. *Id.*

On August 2, 2021, Daedalus timely served DJI with the initial damages report from its expert, Michael Pellegrino. ECF No. 98-1. In his initial report, Mr. Pellegrino offered his

conclusions and opinions concerning what would have taken place at a hypothetical negotiation between the parties. *Id*. Unfortunately for Daedalus, however, Pellegrino conducted his hypothetical negotiation analysis with the wrong parties. *See id*. at 99–102. Rather than considering a hypothetical negotiation between DJI and IBM, the owner of the patents-in-suit at the time of the hypothetical negotiation, Pellegrino's report contemplates a hypothetical negotiation between DJI and Daedalus. *Id*.

A few weeks later, DJI timely served Daedalus with a rebuttal report from its damages expert, W. Christopher Bakewell. *See* ECF No. 98-3. Unsurprisingly, Bakewell's report keyed in on Pellegrino's mix-up. *See id*. ¶¶ 282–83. Along with a variety of other challenges to Pellegrino's methodology, Bakewell pointed to Pellegrino's error with the parties as "further evidence of the unreliable nature of Mr. Pellegrino's work." *Id*.

On September 9th—the day before Pellegrino's deposition and the close of expert discovery—Daedalus served a second expert report from Pellegrino. *See* ECF No. 98-5. In the second report, Pellegrino stated that he "reconsidered the entirety of [his] opinions with respect to those factors that might change based on a change of the party to the hypothetical negotiation." *Id*. ¶ 12. Specifically, he re-analyzed *Georgia-Pacific* factors 1, 3, 4, 5, 12, and 15 with IBM as the party at the hypothetical negotiation table rather than Daedalus Blue. *Id*. Yet, despite his reconsideration of six of the fifteen *Georgia-Pacific* factors, Pellegrino's damages totals remained unchanged from his First Report.

A day after the second report was served, Pellegrino was deposed. DJI refused to examine Pellegrino on the contents of the second report. Instead, on September 14th, DJI moved to strike the second report and exclude Pellegrino's testimony under *Daubert*. For the reasons stated below, the Court **GRANTS** both motions.

II. LEGAL STANDARD

A. Motion to Strike for Failure to Disclose

Federal Rule of Civil Procedure 26(a) requires the production of certain initial disclosures. Rule 26(e) then imposes a duty to supplement Rule 26(a) disclosures when it states:

> (e) Supplementing Disclosures and Responses.
>
> > (1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:
> >
> > > (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
> > >
> > > (B) as ordered by the court.
> >
> > (2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

FED. R. CIV. P. 26(e). Parties must make these expert-witness disclosures within the deadlines set by the Court's Scheduling Order. *State Auto. Mut. Ins. Co. v. Freehold Mgmt., Inc.*, 2019 WL 1436659, at *21 (N.D. Tex. Mar. 31, 2019) (citing FED. R. CIV. P. 26(a)(2)(D)). Per Rule 26(a)(2), parties "must supplement these disclosures when required under Rule 26(e)." FED. R. CIV. P. 26(a)(2). For expert witnesses, this means that "[a]ny additions or changes [to an expert's report or the information given during an expert's deposition] must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due." FED. R. CIV. P. 26(e)(2). Pretrial

disclosures must be made at least 30 days prior to trial "unless the Court orders otherwise." FED. R. CIV. P. 26(a)(3)(B).

But Rule 26(e) is not a vehicle to permit a party to serve a deficient opening report and then remedy the deficiency through a "supplemental" report. *In re Bear Stearns Companies, Inc. Securities, Derivative, and ERISA Litig.*, 263 F. Supp. 3d 446, 451 (S.D.N.Y. 2017). Supplemental disclosures are only permissible as a means of "correcting inaccuracies or filling the interstices of an incomplete report based on information *that was not available at the time of the initial disclosure*." *Diaz v. Con-Way Truckload, Inc.*, 279 F.R.D. 412, 421 (S.D. Tex. 2012) (citing *Cook v. Rockwell Int'l Corp.*, 580 F. Supp. 2d 1071, 1169 (D. Colo. 2006)) (emphasis in original). If the analysis and opinions in the second report are largely new rather than supplementary, the report is plainly not supplementary. *See In re Complaint of C.F. Bean L.L.C.*, 841 F.3d 365, 372 (5th Cir. 2016). And a non-supplementary expert report that is filed after the Court's deadline for the submission of expert reports is untimely. *See, e.g., Harmon v. Georgia Gulf Lake Charles L.L.C.*, 476 Fed. Appx. 31, 36 (5th Cir. 2012) (noting that supplemental disclosures are not intended to provide an extension of the expert designation and report production deadline.").

If a party fails to timely provide information as required by FRCP 26, the party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." FRCP 37(c)(1). Whether a failure is substantially justified or harmless is based on four factors:

> (1) the importance of the witness's testimony;
>
> (2) the prejudice to the opposing party of allowing the witness to testify;
>
> (3) the possibility of curing such prejudice by granting a continuance; and

(4) the explanation, if any, for the party's failure to comply with the discovery order.

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d 546, 571–72; *see also Reliance Ins. Co. v. Louisiana Land & Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997). Moreover, the party facing sanctions under Rule 37(c) has the burden of demonstrating that a violation of Rule 26 was substantially justified or harmless. *See, e.g., Maguregui v. ADP, LLC*, No. EP-16-CV-121-PRM, 2017 WL 5473484, at *2 (W.D. Tex. Apr. 10, 2017) (excluding witnesses because of "Defendant's violation of Rule 26(a) and its failure to demonstrate that the violation was harmless or substantially justified.")

B. Motion to Exclude under *Daubert*

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides:

> [I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts and data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles reliably to the facts of the case.

FED. R. EVID. 702. This rule requires a proffered expert's testimony be both scientifically reliable and relevant to a disputed issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 579 (1993). Regarding the former, the reasoning or methodology underlying the testimony must be scientifically valid. *Curtis v. M & S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999). The expert at issue must also be qualified to apply the reasoning or methodology reliably. *Daubert*, 509 U.S. at 592–93; *Donald Palmer Co., Inc. v. C.I.R.*, 84 F.3d 431, 431 (5th Cir. 1996) (per curiam). Regarding the latter, the reasoning or methodology must be applicable to the specific facts of the case. *Daubert*, 509 U.S. at 592–93. The burden of establishing the admissibility and

relevance of the expert testimony is on the party offering the testimony. *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 388 (5th Cir. 2009).

The Supreme Court identified several factors for expert reliability, including: (1) whether the expert's theory can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of a technique or theory when applied; and (4) whether the theory or method has been generally accepted by the scientific community. *Id*. at 593–94. These factors are far from a "definitive checklist[ ]" and instead must be flexibly applied. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). In patent cases, experts' opinions on damages, like any expert testimony, must be based on sound economic principles and reliable data. *See Uniloc USA, Inc. v. Microsoft Corp*., 632 F.3d 1292, 1315 (Fed. Cir. 2011).

III. ANALYSIS

A. Motion to Strike

DJI argues that Pellegrino's second report was untimely because it was filed over a month after this Court's deadline for the submission of expert reports. ECF No. 98 at 1. DJI further argues that this Court should strike the second report because Daedalus's untimely disclosure is not substantially justified or harmless. *Id*. at 7. Daedalus responds that that the second report was timely filed because the second report qualifies as a supplemental report under FRCP 26(e), and thus was timely when it was filed. ECF No. 115 at 3. Daedalus goes on to argue that even if this Court finds that the second report was untimely, its failure to comply with the proper deadlines was substantially justified or harmless. *Id*. at 4. As more fully explained below, the Court sides with DJI on both points and strikes the second report.

1. Pellegrino's Second Report is Not "Supplemental."

Pellegrino's second report cannot be said to be a supplemental report within the meaning of FRCP 26(e). Pellegrino authored his second report with the express purpose of re-doing his original hypothetical negotiation analysis to look to the parties he should have analyzed in the first place. *See* ECF No. 98-5 ¶ 12. Daedalus does not dispute that Pellegrino had the information available to him prior to the deadline for expert disclosures such that he could have analyzed the proper parties in his first report. ECF No. 115. Moreover, DJI correctly notes that Pellegrino's second report is clearly meant to supersede, rather than supplement, his first report. ECF No. 123 at 1.

Courts routinely reject untimely "supplemental" expert testimony where the opinions are based upon information available prior to the deadline for expert disclosures. *See e.g., Sierra Club* 73 F.3d at 571 (purpose of supplemental expert report is to supplement—not to extend the expert disclosure deadline); *Avance v. Kerr–McGee Chem. LLC*, 2006 WL 3484246, *7 (E.D. Tex. 2006) (excluding late-filed report where plaintiffs failed to demonstrate "substantial justification" why the revisions and new affidavits were filed after the expert deadline); *Robinson v. Ethicon Inc.*, No. CV H- 20-3760, 2021 WL 4034131, at *5 (S.D. Tex. Sept. 2, 2021) (rejecting supplemental reports after determining that they were not based on new information); *Cleave v. Renal Care Grp., Inc.*, No. CIV.A. 2:04CV161-P-A, 2005 WL 1629750, at *1 (N.D. Miss. July 11, 2005) (excluding supplemental expert affidavit produced in response to summary judgment motion where plaintiff failed to identify new information which would prompt new opinions); *Salgado v. Gen'l Motors Corp.*, 150 F.3d 735, 741–43 (7th Cir. 1998) (affirming exclusion of "supplemental" expert testimony based on untimely disclosure because opinions were based on information available prior to the deadline for service of initial reports). Additionally, when an expert's supplemental report "effectively replace[s] the earlier report," it is

not a supplemental report within the meaning of Rule 26(e) of the Federal Rules of Civil Procedure. *Matter of Ensco Offshore Co.*, CV H-09-2838, 2013 WL 12384726, at *2 (S.D. Tex. July 9, 2013) (citing *Brennan's, Inc. v. Dickie Brennan & Co., Inc.*, 376 F.3d 356, 374–75 (5th Cir. 2004)).

As Daedalus conceded at oral argument, it was Bakewell's rebuttal report that prompted the filing of Pellegrino's second report. *See* ECF No. 161, *Transcript of Oral Argument* at 18 ("once we got Mr. Bakewell's report and considered that criticism of IBM being the party to the negotiation and not the plaintiff being party to the negotiation, Mr. Pellegrino took that into consideration and he filed the supplemental report"). The second report was also clearly meant to supersede the first. *See* ECF No. 98-5 ¶ 12 ("I reconsidered the entirety of my options with respect to those factors that might change based on a change of the party to the hypothetical negotiation."). As the Court also noted at the pretrial hearing:

> Everything he said in his rebuttal report is different than what he had in his initial report, other than numbers, which surprisingly don't change when you change the parties. I have no idea how anyone could make this mistake, and I have no idea how you can argue that it can be fixable in a rebuttal report.

See Transcript of Oral Argument at 18–19. The Court also highlighted the practical problems of cross-examining a witness with an effectively superseded report at the hearing on the motion to strike. *Id*. at 18, (imploring Daedalus to explain how a jury could even understand Pellegrino being crossed on two separate reports). Thus, the Court finds that the use of different parties to the hypothetical negotiation in the second report renders the second report an untimely new opinion under FRCP 26.

2. The Untimely Report Is Neither Substantially Justified nor Harmless

Daedalus cannot show that the untimely report was substantially justified or harmless. As noted above, this Court determines whether an untimely disclosure was substantially justified or

harmless based on the four *Sierra Club* factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to comply with the discovery order.

Daedalus argues that each of the first three factors weigh against exclusion, while the fourth "good cause" factor is "at worst, neutral". ECF No. 115 at 4–8. To the first factor, Daedalus emphasizes that Pellegrino is its only damages expert. *Id*. at 6. To the second, Daedalus claims that DJI would have expended the same time and expense to prepare Bakewell's rebuttal report regardless of its mishap with the Pellegrino's first report. *Id*. at 7. To the third, Daedalus contends that trial is three months away, that a hypothetical negotiation involving IBM would not be unfamiliar to DJI, and that Pellegrino is willing to submit to a second deposition on his second report. *Id*. at 6. Finally, Daedalus argues that the fourth factor is at worst neutral, because Pellegrino's error was an innocent mistake. *Id*. at 7–8.

Conversely, DJI argues the importance of Pellegrino's opinions is outweighed by the prejudice to DJI, the inability to cure that prejudice by granting a continuance, and Daedalus's lack of a real justification for offering a new report after the expert report deadline. ECF No. 98 at 15. To support its claim of prejudice, DJI cites the substantial time and expense expended in preparing Bakewell's rebuttal report. *Id*. at 8. DJI also stresses that the second report was filed on the eve of Pellegrino's deposition and the close of expert discovery, and that Pellegrino's misunderstanding of the governing law is not a justification for filing an untimely report. *Id*. at 9. Finally, DJI contends that because expert testimony is not statutorily required in patent cases, Pellegrino's testimony is not required for the plaintiff to recover a reasonable royalty under damages law. ECF No. 123 at 3.

i. The Importance of the Testimony.

Pellegrino's testimony is important, but not critical to Daedalus's claims. Daedalus argues that striking Pellegrino's report "could leave the plaintiff without a meaningful remedy." ECF No. 115 at 6. But DJI is correct that a patent plaintiff is not required to present expert testimony to recover damages under the Patent Act. *See Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370 (Fed. Cir. 2003) ("Section 284 is clear that expert testimony is not necessary to the award of damages" (citing 35 U.S.C. § 284)). Thus, while this factor weighs in Daedalus's favor, its import is less than it would be in a case where expert testimony was required for a plaintiff to recover.

ii. The Prejudice to DJI

The prejudice to DJI that would ensue if this Court were to allow Pellegrino's second report weighs strongly in favor of striking the second report. The second report contains new opinions and conclusions, namely a new analysis of a hypothetical negotiation involving IBM. DJI correctly contends that it was entitled to receive these opinions at the time of the initial expert disclosures, not the night before both the close of expert discovery and Pellegrino's deposition. The Court finds that Daedalus's delay seriously prejudices DJI in multiple ways.

First, DJI expended considerable resources responding to Pellegrino's initial opinions. Bakewell, DJI's rebuttal expert, estimated in his deposition that he personally spent [redacted] preparing his rebuttal report. ECF No. 98-4 at 8:20-23. He testified that his firm invoiced DJI [redacted]. *Id.* at 7:8-8:15. Allowing Pellegrino to effectively amend his initial report to address flaws pointed out in Bakewell's rebuttal report will

undoubtedly require Bakewell and DJI to expend significantly more time and money addressing Pellegrino's new opinions.

The actual timing of the filing of the second report also severely prejudices DJI. *See Kumar v. Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 471 (E.D. Tex. 2020) ("[C]ourts within the Fifth Circuit recognize that making untimely, substantive changes to expert reports presents real prejudice to the other side."). Daedalus served the second report on the eve of Pellegrino's deposition, and a mere five days before this Court's *Daubert* deadline. DJI was given no time to digest and address the contents of Pellegrino's second report before his deposition the following morning. Permitting Daedalus to use a "supplemental" report in this manner would have left DJI scrambling to counter Pellegrino's new and materially different opinions the night before his deposition. Daedalus's suggestion that DJI could have deposed Pellegrino the day after the second report was filed is contrary to common sense. And had DJI elected to question Pellegrino on the substance of his second report, Daedalus would almost certainly be before this Court citing those questions as evidence of a lack of prejudice in its arguments as to why the second report should not be struck.

Even more, the second report addressed deficiencies in the first report that Daedalus knew DJI was challenging with a *Daubert* motion. If this Court had accepted the second report, DJI would have been left with just days to respond to Pellegrino's new opinions contained therein. For these reasons, the second factor weighs strongly in favor of striking the second report.

iii. The Possibility of a Continuance

As an initial matter, the Court recognizes that it vacated the previously-scheduled trial date to receive briefing on whether a trial should be had at all. ECF No. 169. But at this stage of

the proceedings, further delay to reopen expert discovery is simply not a viable option.

Just because a court can conceptually grant a continuance in any case does not mean that a court must choose to continue rather than strike in every case. The Fifth Circuit has been clear that district judges have the power to control their dockets by refusing to give ineffective litigants a second chance to develop their case. *See Reliance*, 110 F.3d at 257 (denying plaintiff seeking to supplement "because the deposition of its expert witness did not go well); *Sierra Club*, 73 F.3d at 573 (concluding that while a continuance was possible, such a measure would neither punish nor deter similar behavior in the future); *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 884 (5th Cir. 2004) ("Because of a trial court's need to control its docket, a party's violation of the court's scheduling order should not routinely justify a continuance.").

Moreover, allowing parties to use continuances forced by untimely expert reports to sidestep *Daubert* challenges would throw a wrench in the otherwise orderly pretrial process. *See Beller ex rel. Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003) ("To rule otherwise would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports"); *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) ("To construe supplementation to apply whenever a party wants to bolster expert opinions would [wreak] havoc [on] docket control and amount to unlimited expert opinion preparation.").

Here, the Court heard argument on the present motions a mere one week before trial was set to begin. A continuance stemming from Pellegrino's late-filed second report would flout the Court's scheduling order, require the re-opening of expert discovery, and further delay the resolution of this case. *See Lampe Berger USA, Inc. v. Scentier, Inc.*, CIV.A. 04-354-C-M2, 2008 WL 3386716, at *4 (M.D. La. Aug. 8, 2008) ("This Court has an inherent power to control its

docket and to prevent undue delays in the disposition of pending cases, which it chooses to exercise herein."). Accordingly, this factor also weighs in favor of striking the second report.

iv. The Explanation

Daedalus and Pellegrino freely admit that the second report was filed to respond to Bakewell's rebuttal report. As previously discussed, the federal rules allow experts to supplement expert reports to account for otherwise incomplete reports. But supplemental reports are not vehicles by which experts can rework their initial reports to respond to problems that their adversaries aptly address. *See CEATS, Inc. v. TicketNetwork, Inc.*, No. 2:15-CV-01470-JRG-RSP, 2018 WL 453732, at *4 (E.D. Tex. Jan. 17, 2018) ("Most significantly, however, CEATS has no good explanation for its delay in proffering this new information, which was available well before the deadline for its initial expert reports."); *Kumar*, 476 F. Supp. 3d at 469; FED. R. CIV. P. 26(e)(2). Just as was the case with the expert in *Kumar*, the supplement in this case was only needed because Pellegrino was unaware of law that existed prior to the filing of his initial report. *See id.* ("[I]t is apparent that [the expert] was not attempting to correct an inaccuracy nor complete an outstanding issue in his report...[but] instead taking a second crack at his report utilizing information available at the time of his initial disclosure."). Thus, this factor also weighs against the untimely filing.

Because three of the four Sierra Club factors weigh against allowing Daedalus to file its untimely expert report, the second report is **HEREBY STRICKEN**.

B. Motion to Exclude

Daedalus does not meaningfully dispute that because Pellegrino's First Report analyzed the wrong parties, it cannot stand on its own. Daedalus's entire response to DJI's motion to exclude based on its failure to use the proper parties reads:

> Mr. Pellegrino's opinion concerning the proper parties to the hypothetical negotiation has been addressed in his timely-submitted supplemental report as explained further in response to Defendants' motion to strike that report (filed contemporaneously herewith). Plaintiff's responses to DJI's argument here regarding proper parties as well as the appropriateness of the filing of a supplemental report are addressed in response to that motion.

ECF No. 113 at 3. As discussed above, the Court has stricken the second report. Consequently, the Court now excludes Pellegrino as his first report cannot withstand DJI's *Daubert* challenge.

The "hypothetical negotiation" approach seeks to determine "the value of the patented technology to the parties in the marketplace when infringement began." *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 76 (Fed. Cir. 2012); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009). Despite this clear mandate, each *Georgia-Pacific* factor is analyzed with respect to Daedalus rather than IBM in Pellegrino's first report. ECF No. 98-1 at 35–104. Ironically, that very report acknowledges that "IBM's bargaining position is not the same as Daedalus Blue's for several reasons." *Id.* at 100. The Court agrees with DJI that exclusion "is appropriate on this basis alone." *Opticurrent, LLC v. Power Integrations, Inc.*, No. 17-cv-3597, 2018 WL 6727826, at *9 (N.D. Cal. Dec. 21, 2018); *Warsaw Orthopedic, Inc. v. Nuvasive, Inc.*, No. 08-cv-1512-CAB- MDD, 2016 WL 4536740, at *5 (S.D. Cal. June 15, 2016) (same).

The single case that Daedalus cites in a footnote to refute this proposition is a far cry from the present case. *See Sealant Sys. Intl., Inc. v. TEK Glob. S.R.L.*, No. 5:11-CV-00774-PSG, 2014 WL 1008183 (N.D. Cal. Mar. 7, 2014), *rev'd on other grounds*, 616 F. App'x 987, 989 (Fed. Cir. 2015). In *Sealant Systems*, the dispute was whether it was permissible to consider a third party along with the two parties that were properly at the seat of the hypothetical table. *Id.* at *33. And in rejecting the JMOL challenge on sufficiency grounds, the *Sealant Systems* court

found that the third party was actually "*properly seated at the negotiation table"* in light of Federal Circuit caselaw. *Id*. In contrast, Pellegrino's initial report in this case analyzed a negotiation that involved the wrong parties entirely.

IV. CONCLUSION

Having considered Defendants SZ DJI Technology Co., Ltd. and DJI Europe B.V.'s Motion to Strike the Supplemental Expert Report of Michael Pellegrino, and any response thereto, and for good cause thereon, said Motion is **GRANTED**.

Accordingly, the Supplemental Expert Report of Michael Pellegrino dated September 9, 2021, is **HEREBY STRICKEN**.

Having considered Defendants SZ DJI Technology Co., Ltd. and DJI Europe B.V.'s Motion to Exclude Opinions and Testimony of Plaintiff's Expert Michael Pellegrino, and any response thereto, and for good cause thereon, said Motion is **GRANTED**.

Accordingly, the Opinions and Testimony of Plaintiff's Expert Michael Pellegrino are **HEREBY EXCLUDED**.

IT IS FURTHER ORDERED that, pursuant to this Court's orders in the status conference held on November 23, 2021, the parties meet and confer to set deadlines for the prospective motion(s) regarding proving damages at trial.

SIGNED this 24th day of February, 2022.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE