

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

GESTURE TECHNOLOGY  
PARTNERS, LLC,

Plaintiff

v.

HUAWEI DEVICE CO., LTD.,  
HUAWEI DEVICE USA, INC.,

Defendants.

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CASE NO. 2:21-cv-00040-JRG  
(Lead Case)

JURY TRIAL DEMANDED

GESTURE TECHNOLOGY  
PARTNERS, LLC,

Plaintiff

v.

SAMSUNG ELECTRONICS CO., LTD.  
AND SAMSUNG ELECTRONICS  
AMERICA, INC.,

Defendants.

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CASE NO. 2:21-cv-00041-JRG  
(Member Case)

JURY TRIAL DEMANDED

**SAMSUNG DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE  
SUPPLEMENTAL EXPERT REPORTS OF PLAINTIFF'S EXPERTS DAVID KENNEDY  
AND ANDREAS GROEHN**

[REDACTED]

## I. INTRODUCTION

The pertinent facts are unrebutted: (1) GTP’s experts had included in their draft opening reports the same information GTP attempts to belatedly add in supplemental reports; (2) GTP’s experts made the tactical decision to remove this information from their opening reports in the hours before they were served; (3) only after Samsung served its rebuttal reports did GTP and its experts decide they wanted to provide supplemental reports; (4) GTP then waited nearly a full week to serve supplemental reports, five weeks after serving their opening reports on the Court ordered deadline; and (5) GTP never sought the Court’s leave to serve the supplemental reports. GTP’s claim that a “simple miscommunication” between the experts requires the supplemental reports mischaracterizes the deliberate, tactical decision made by GTP and its experts to remove the “facial recognition camera control feature” analysis from the opening reports. With expert discovery already closed for nearly a month, *Daubert* motion briefing nearly complete, and trial fast approaching, GTP provides no compelling basis for the Court to embrace GTP’s effort to reverse its deliberate, tactical decision and allow the supplementation.

## II. ARGUMENT

### A. GTP Does Not Justify its Delay in Serving the Supplemental Reports

GTP argues that in the hours before service of Mr. Kennedy’s and Dr. Groehn’s opening reports [REDACTED]

[REDACTED]

[REDACTED] prompted Mr. Kennedy and Dr. Groehn to exclude portions of their already-prepared reports on the assumption that the “facial recognition camera control features” do not infringe. Dkt. No. 160 at 4. Claiming shortness of time, however, does not excuse GTP’s five-week delay. GTP is the Plaintiff and should be expected to understand long before its opening reports were due what features it was accusing of infringement. Even if

[REDACTED]

there were a “miscommunication,” GTP’s counsel should have been aware of the contents of the infringement and damages reports. If counsel neglected to review the reports for accuracy and consistency, that should be no excuse. Further, if GTP believed it needed additional time for its experts to complete their opening reports, it could have sought another extension. GTP never did so. Samsung had already consented to, and the Court had granted, GTP’s request to extend the opening report deadline by five days. *See* Dkt. No. 96–1. Samsung has agreed to every extension GTP has requested thus far. Moreover, since the experts had allegedly already completed their analysis of the “facial recognition camera control features,” they could have left it in their opening reports and later provided notice of withdrawal, rather than blindsiding Samsung nearly a week after its rebuttal reports were served and *the night before* Dr. Groehn’s deposition.

GTP does not explain why it took over one month to discover this “miscommunication” or what—specifically—that miscommunication was. GTP thought to supplement the opening reports only after Mr. Kennedy reviewed Dr. Ugone’s November 22 rebuttal report. *See* Ex. 4 at 21:5–13

[REDACTED]  
[REDACTED] (emphasis added)).

Notably absent from GTP’s opposition is any representation as to when GTP’s counsel discovered this “miscommunication.” If counsel failed to note withdrawal of the “facial recognition camera control features” from the draft opening reports until Mr. Kennedy informed them, GTP does not explain why it should be excused for neglecting to give the opening reports even a cursory review before they were finalized or at any time over the month after they were served. The intentional decision to remove the “facial recognition camera control features” may have been a poor one in hindsight, but that is not adequate reason for the Court to allow GTP’s untimely and prejudicial supplementation.

[REDACTED]

Lastly, GTP provides no explanation for why it took almost a full week after discovering this “miscommunication” to serve supplemental reports containing the information its experts had already included in, but then deliberately removed from, their opening reports. *See* Ex. 4 at 21:15-18 (“[REDACTED]” (emphasis added)); Williams Decl. at ¶ 9 (“[REDACTED] [REDACTED].”(emphasis added)). In fact, GTP waited until less than *twelve hours* before Dr. Groehn’s deposition to serve the supplemental reports. GTP’s actions here are a prime example of a party failing to exercise reasonable diligence, and the Court should not embrace GTP’s effort to characterize the situation differently.

**B. Any Potential Importance of the Supplemental Opinions Is Outweighed by GTP’s Decision Not to Include the Information in Its Opening Reports**

GTP’s counsel supervised the work of its three experts—Mr. Occhiogrosso, Mr. Kennedy, and Dr. Groehn—in preparing their opening reports. GTP concedes Mr. Kennedy and Dr. Groehn knew their “supplemental” opinions regarding the “facial recognition camera control features” well before their opening expert reports were due; provided the opinions in drafts of their reports; then made a deliberate decision to remove the opinions from their reports before finalizing them; and five weeks later reversed course again and decided to include the exact same opinions in their supplemental reports. GTP and/or its experts made a tactical choice to remove the “facial recognition camera control feature” analysis from their opening reports. *Estech Sys., Inc. v. Target Corp.* is directly on point. As here, the party knew the supplemental information “well before opening expert reports were due and made the conscious decision not to include” those theories. No. 2:20-cv-00123-JRG-RSP, 2021 U.S. Dist. LEXIS 135438, at \*11 (E.D. Tex. July 21, 2021). As in *Estech*, any importance of GTP’s belated attempted supplementation is strongly undercut by GTP’s tactical decision to remove the “supplemental” opinions from the opening reports.

**RESTRICTED – ATTORNEYS’ EYES ONLY**

**C. Samsung Would Suffer Unfair Prejudice**

GTP makes no mention of the factors considered in *Estech* when claiming that Samsung would not suffer prejudice as a result of GTP’s belated supplementation. Like the defendant in *Estech*, however, Samsung would need to re-open expert discovery, prepare for and take further depositions of Mr. Kennedy and Dr. Groehn, prepare a supplemental rebuttal report by Dr. Ugone, potentially prepare for and defend a deposition of Dr. Ugone, and prepare and brief supplemental *Daubert* motions challenging the supplemental opinions, with the Court’s leave. *Estech*, 2021 U.S. Dist. LEXIS 135438, at \*10. These are significant, substantive tasks that Samsung should not have to undertake at this very late stage of the case.<sup>1</sup>

GTP argues that [REDACTED]

[REDACTED] Dkt. No. 160 at 5. Yet, the supplemental reports (1) introduce an additional patent not considered in Mr. Kennedy’s opening report; (2) more than double the total number of Accused Products at issue; (3) more than double the number of allegedly infringing features; and (4) claim \$25 million in additional damages (nearly a 50% increase from the previous damages estimation). The supplemental reports themselves refute GTP’s argument that they do not introduce new theories. If allowed, they will dramatically expand the scope of the case with pretrial activities underway and trial fast approaching.

GTP’s citation to *Navico* is also unavailing. As discussed *infra*, there the party properly moved to supplement the expert’s report. *Navico Inc. v. Garmin Int’l, Inc.*, No. 2:16-CV-00190-JRG-RSP, 2017 U.S. Dist. LEXIS 103113 (E.D. Tex. July 4, 2017). Further, the expert had never

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<sup>1</sup> If GTP’s supplemental reports are not struck, Samsung respectfully submits that a continuance of the March 7, 2022 trial date would be necessary and appropriate. This factor further weighs in favor of striking the supplemental reports.

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