

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

INTERNATIONAL CONSTRUCTION :  
PRODUCTS, LLC, :  
 :  
Plaintiff, :  
 :  
v. : Civil Action No. 15-108-RGA  
 :  
CATERPILLAR, INC., et al., :  
 :  
Defendants. :

**MEMORANDUM ORDER**

Plaintiff filed a Daubert motion (D.I. 606) to exclude one opinion of Mr. Murphy, Defendant’s damages expert. The motion is fully briefed. (D.I. 607, 642, 663). The opinion at issue is that the LSI-Iron Direct relationship is the best indicator of ICP’s lost profits. (Murphy Report dated August 31, 2023, ¶ 22).

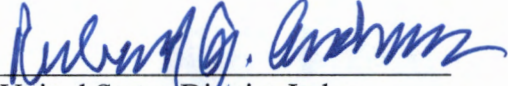
Plaintiff’s opening brief has two pages of argument, in which it cites about nine excerpts from Mr. Murphy’s deposition. (D.I. 607 at 6-7). It does not cite his expert report at all. The Daubert argument is that his opinion is “not based on any data or facts.” Defendant replied by citing extensively to Mr. Murphy’s report. Plaintiff’s reply brief is mostly a different argument from the opening brief. Essentially, Plaintiff there argues that Mr. Murphy applied no expertise and is just summarizing factual material in the record.

Mr. Murphy explained the basis for his opinion that the LSI—Iron Direct relationship was the “next best alternative.” He compared that agreement with the ICP-IronPlanet agreement. (Murphy Report, ¶¶142-149). His opinions are based on facts and data. They are not invalidated by his answers at deposition.

The arguments in the reply brief are mostly different than the arguments in the opening brief. I think as a basis for a Daubert motion, they are forfeited. “Arguments raised for the first time before a district court in a reply brief are deemed forfeited.” *In re: Niaspan Antitrust Litigation*, 67 F.4<sup>th</sup> 118, 135 (3d Cir. 2023) (cleaned up).

The Daubert motion (D.I. 606) is DENIED. I say this without prejudice to any objections at trial on the basis that Mr. Murphy is merely summarizing factual material in the record.

IT IS SO ORDERED this 3<sup>rd</sup> day of April 2024.

  
United States District Judge