

United States District Court  
For the Northern District of California

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**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

GUZIK TECHNICAL ENTERPRISES, INC.,	)	Case No. 5:11-cv-03786-PSG
Plaintiff and Counterclaim Defendant,	)	
v.	)	<b>OMNIBUS ORDER RE: MOTIONS IN LIMINE</b>
WESTERN DIGITAL CORPORATION, et al.,	)	
Defendants and Counterclaim Plaintiffs, and	)	<b>(Re: Docket Nos. 311, 316-4, 328, 329, 331, 332, 333, 334, 335, 336, 338, 339, 340, 341, 343, 344, 345, 347, 349, 350, 352, 356, 371-4, 371-6, 371-8, 373, and 373-1)</b>
WESTERN DIGITAL (THAILAND) COMPANY LIMITED AND WESTERN DIGITAL (MALAYSIA) SDN. BHD,	)	
Defendants.	)	

Plaintiff Guzik Technical Enterprises (“GTE”) and Defendants Western Digital Corp., et al. (collectively, “Western Digital”) have each filed various motions in limine (“MIL”). Yesterday, the parties appeared for a hearing. In the interest of expediency the court presumes familiarity with the background of this case<sup>1</sup> and turns directly to the motions before it.

<sup>1</sup> Unfamiliar readers are directed to three of the court’s recent summary judgment orders. See Docket Nos. 442, 443, and 445.

1       **A.       GTE’s MIL No. 1**

2               GTE moves to preclude (1) Western Digital from calling David Rauch as a witness and  
3 (2) James Pampinella from supporting his damages analysis by suggesting the DBT Tester was a  
4 non-infringing alternative based on testimony from David Rauch and/or conversation with  
5 Tahir Ali.<sup>2</sup> GTE’s motion refashions arguments presented in its motion to strike, except this time  
6 GTE targets Mr. Rauch – a witness GTE acknowledges was identified by GTE “in its initial  
7 disclosures” as “knowledgeable” about Western Digital’s testers.<sup>3</sup> Nonetheless, GTE argues that  
8 Western Digital’s boilerplate disclosure that it might rely on all persons identified in plaintiff’s  
9 initial disclosures was insufficient to give GTE notice that “Mr. Rauch would have information  
10 regarding the late-identified purportedly non-infringing DBT.”<sup>4</sup> Because GTE was not on notice  
11 that Mr. Rauch possessed information relevant to Western Digital’s theory that the DBT was a  
12 non-infringing alternative, Western Digital should not be able to rely on David Rauch’s testimony  
13 at trial.  
14

15               GTE also argues that Mr. Pampinella may not rely on his conversation with Mr. Ali that he  
16 had an “informed guess” about the development of the DBT and from whom he could get details  
17 about the development of the DBT.<sup>5</sup> GTE points out Mr. Ali was not involved in the development  
18 of the tester. Thus, Mr. Pampinella should not be permitted to base his expert opinion on his  
19 discussions with Mr. Ali.  
20

21               Pursuant to Fed. R. Civ. P. 26(a)(2)(B)(i) – GTE continues – Mr. Pampinella’s expert report  
22 was required to include “a complete statement of all opinions” he “will express and the basis and  
23 reasons for them.” Because Mr. Pampinella never identified “Mr. Rauch as providing the basis for  
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25       <sup>2</sup> See Docket No. 371-4 (GTE’s MIL No. 1).

26       <sup>3</sup> *Id.* at 3.

27       <sup>4</sup> *Id.* at 3-4.

28       <sup>5</sup> *Id.* at 4.

1 any of his opinions,” Mr. Pampinella “should therefore not be allowed to rely on Mr. Rauch’s trial  
2 testimony to provide an opinion to the jury at trial.”<sup>6</sup> GTE concludes that if the court excludes “the  
3 testimony of Mr. Rauch, as well as Messrs. Eaton, Farren, Cain, and Lin” and similarly determines  
4 that “Mr. Pampinella cannot rely on his conversation with Mr. Ali, then there are no facts in the  
5 case supporting the assertion that the DBT tester ‘could have been available’ as early as 2007. As  
6 a result, Mr. Pampinella should be precluded from offering any opinions or testimony premised on  
7 the availability in 2007 of the DBT tester as a non-infringing alternative.”<sup>7</sup>

8  
9 Western Digital responds that GTE’s motion “to exclude Western Digital from calling  
10 David Rauch to testify at trial and to exclude Western Digital’s expert, James Pampinella, from  
11 relying on the 2007 availability date of the DBT tester is nothing more than a regurgitation of  
12 arguments previously laid out” in its motion to strike.<sup>8</sup> Those arguments are without merit,  
13 because GTE “has known about Mr. Rauch, and Western Digital’s potential reliance on him,”  
14 including the “general subject matter of his testimony since 2011.”<sup>9</sup> GTE “failed to depose  
15 Mr. Rauch, and now seeks to benefit from this failure by speculating as to a supposedly improper  
16 basis for his hypothetical testimony about one particular topic, and excluding Mr. Rauch’s  
17 testimony in its entirety on that basis.”<sup>10</sup> Pursuant to Rule 26, a party need only supplement its  
18 disclosures if the identity of the witness “has not otherwise been made known to the parties during  
19 the discovery process.” Here, Mr. Rauch was a custodian “from whom it sought email  
20 communications in its First Set of Requests for Production of Email on October 23, 2012.”<sup>11</sup> It is  
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23 <sup>6</sup> *Id.*

24 <sup>7</sup> *Id.*

25 <sup>8</sup> Docket No. 404 at 1 (WD’s Opposition to GTE’s MIL No. 1).

26 <sup>9</sup> *Id.*

27 <sup>10</sup> *Id.*

28 <sup>11</sup> *Id.* at 2.

1 therefore disingenuous for GTE to complain that “it did not know about Mr. Rauch or the  
2 information he has in his possession.”<sup>12</sup> It was GTE’s own dilatory conduct that is the cause and  
3 related election to forego deposition testimony that self-inflicted any prejudice it now faces.  
4 GTE’s request to exclude Mr. Rauch’s testimony is also overbroad, because its “arguments  
5 regarding the subject matter of Mr. Rauch’s testimony are based on nothing more than conjecture.  
6 There are multiple non-infringing alternatives, including the Xyratex and Hitachi testers, in  
7 addition to the DBT tester” that Mr. Rauch might testify to.<sup>13</sup>

8  
9 As to Mr. Pampinella’s reliance on information from Mr. Ali, Western Digital claims GTE  
10 mischaracterizes Mr. Pampinella’s testimony. “Mr. Pampinella stated that ‘there were some  
11 questions that we had in our meeting about the DBT’ for which Mr. Ali stated he could provide an  
12 ‘informed guess,’ and for those questions he referred Mr. Pampinella to Mr. Farren and Mr.  
13 Eaton.”<sup>14</sup> GTE “has no basis to believe that these are the same topics in Mr. Pampinella’s expert  
14 report for which he relies on Mr. Ali.”<sup>15</sup>

15  
16 As a preliminary matter, the court’s denial of Western Digital’s motion to strike limits the  
17 scope of Western Digital’s MIL No. 1.<sup>16</sup> Mr. Rauch and Mr. Ali will be permitted to testify as to  
18 what they know that is relevant to this case. Because Mr. Rauch has yet to be deposed, GTE may  
19 take a three-hour deposition to mitigate any prejudice. GTE’s MIL No. 1 otherwise is DENIED.  
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24 <sup>12</sup> *Id.*

25 <sup>13</sup> *Id.* at 3.

26 <sup>14</sup> *Id.* at 4 (quoting Docket No. 337, Ex. 8 at 138:14-25).

27 <sup>15</sup> *Id.* at 4.

28 <sup>16</sup> *See* Docket No. 436.

1 **B. GTE’s MIL No. 2**

2 GTE requests the court preclude the introduction of evidence pertaining to Mr. Guzik’s  
3 temperament at trial because it is irrelevant under Rule 401 and unfairly prejudicial under  
4 Rule 403.<sup>17</sup> GTE argues evidence of “Mr. Guzik’s temperament is unrelated to his ‘character for  
5 truthfulness’” and therefore the evidence is inadmissible under Rule 608.<sup>18</sup>

6 Western Digital responds that Mr. Guzik’s “past acts are relevant” because “they impacted  
7 the state of mind of those dealing with him.”<sup>19</sup> Western Digital argues because GTE put  
8 Western Digital’s employees’ state of mind at issue in this case, it opened the door to evidence of  
9 Mr. Guizk’s past acts. In particular, Western Digital argues those acts are relevant to: (1) whether  
10 Western Digital’s patent infringement was willful and (2) whether “Western Digital employees hid  
11 their development of the Accused Products from Mr. Guizk because they ‘knew [they were]  
12 violating GTE’s rights.’”<sup>20</sup>

13  
14 The court finds that the probative value of evidence pertaining to Mr. Guizk’s past acts is  
15 substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading  
16 the jury. The relevance of Mr. Guzik’s temperament is dampened by the court’s order that  
17 willfulness will not be submitted to the jury. GTE’s MIL No. 2 is GRANTED. The witnesses may  
18 speak about their own state of mind, but may not speak about Mr. Guizk’s alleged bad acts.

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20 **C. GTE’s MIL No. 3**

21 GTE requests that Western Digital be precluded from offering new invalidity theories – or  
22 details that were required to be provided during expert discovery but were not provided – through  
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24  
25 <sup>17</sup> See Docket No. 349 (GTE’s MIL No. 2).

26 <sup>18</sup> *Id.* at 2 (quoting Fed. R. Evid. 608).

27 <sup>19</sup> Docket No. 405 at 1.

28 <sup>20</sup> *Id.* (quoting Docket No. 237 at 13) (alteration in original).

1 Dr. Messner’s testimony at trial.<sup>21</sup> GTE argues that Dr. Messner, Western Digital’s invalidity  
2 expert, offered only an unsupported obviousness opinion in his invalidity expert report and only  
3 supplemented his expert report through a supporting declaration<sup>22</sup> bolstering its opposition to  
4 GTE’s motion for summary judgment that the ’145 patent is not anticipated or obvious. That  
5 declaration came late – indeed, after the close of expert discovery – and should be excluded  
6 pursuant to Rule 26.

7  
8 GTE characterizes Dr. Messner’s declaration as suggesting that the prior art inherently  
9 discloses positioning at an offset. GTE claims “Western Digital never disclosed these theories in  
10 its invalidity contentions, discovery responses, expert reports, or at any other time during fact or  
11 expert discovery. As a result, GTE had no reason to rebut these theories” with its own evidence  
12 and opinions or “to question Dr. Messner regarding them.”<sup>23</sup> Similarly, Dr. Messner’s expert  
13 report on invalidity “provided no opinion on the purported invalidity of claim 10 of the ’145 patent  
14 based on 35 U.S.C. § 112.”<sup>24</sup> Nonetheless, Western Digital’s opposition to GTE’s motion for  
15 summary judgment of validity raised indefiniteness arguments for the first time. Because GTE had  
16 no reason to rebut or explore these theories during fact or expert discovery, Western Digital should  
17 be precluded from raising them at trial.

18  
19 Western Digital responds that it was GTE’s late amended infringement contentions that  
20 necessitated its updated 35 U.S.C. §§ 103 and 112 arguments. If GTE is now permitted to allege  
21 “infringement based on the mere capability” to position a head at an offset then Western Digital  
22 should be permitted to “allege obviousness on the same grounds” and Dr. Messner “should be able  
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25 <sup>21</sup> See Docket No. 328 at 1 (GTE’s MIL No. 3).

26 <sup>22</sup> See Docket No. 259-5.

27 <sup>23</sup> Docket No. 328 at 3 (GTE’s MIL No. 3).

28 <sup>24</sup> *Id.* (citing Ex. 12).

1 to testify consistent with his expert report and August 2013 declaration.”<sup>25</sup> Western Digital  
2 characterizes GTE’s suggestion in its motion for summary judgment regarding validity that the  
3 preamble to claim 10 of the ’145 patent is limiting as an “eleventh hour claim construction  
4 argument” that certainly “gives rise to an additional invalidity argument under 35 U.S.C. § 112.”<sup>26</sup>

5 The court agrees with Western Digital that GTE knew how it might amend its infringement  
6 contentions and GTE is without clean hands with respect to its late adopted constructions.

7 Nevertheless, because Western Digital submitted its supplemental expert report after Dr. Messner’s  
8 deposition, GTE may take an additional four-hours deposition of Dr. Messner. GTE’s MIL No. 3  
9 otherwise is DENIED.

10  
11 **D. GTE’s MIL No. 4**

12 GTE asks the court to preclude Western Digital from arguing that Western Digital’s testers  
13 do not contain five GTE design features or that those features were not copied from GTE’s testers  
14 or were independently developed.<sup>27</sup> GTE makes this request because Western Digital’s rebuttal  
15 expert reports do not affirmatively state that it developed the tester features independently and did  
16 not copy them from GTE. All those reports claim is that GTE’s expert “fails to show that  
17 Western Digital did not independently develop” the five GTE design features.<sup>28</sup> Thus, Dr. Talke  
18 effectively admits those design features are present, because Western Digital’s expert failed to  
19 show – and did not affirmatively state – Western Digital independently developed its testers.

20  
21 Western Digital responds that GTE’s motion is premature and unnecessary, because GTE  
22 “cites no basis for its speculation that Western Digital’s expert may testify beyond the scope of  
23

24  
25 <sup>25</sup> Docket No. 413 at 5 (WD’s Opposition to GTE’s MIL No. 3).

26 <sup>26</sup> *Id.* at 6.

27 <sup>27</sup> *See* Docket No. 371-6 (GTE’s MIL No. 4).

28 <sup>28</sup> *Id.* at 3 (quoting Docket No. 353-1 at ¶ 26, Ex. 24 (Talke Rebuttal Report) at ¶¶ 361-83).

1 their expert reports.”<sup>29</sup> If the court concludes that a “prophylactic order prohibiting  
2 Western Digital’s experts from denying actual copying or asserting that the five features were  
3 independently developed, the order should apply equally to GTE’s expert Dr. Klopp.”<sup>30</sup>  
4 “Dr. Klopp admitted that he has no direct evidence of copying, despite having full access to  
5 Western Digital’s testers, source code, and thousands of pages of design and other technical  
6 documents.”<sup>31</sup>

7  
8 With the understanding that the experts are required to testify only as to arguments and  
9 theories disclosed in their expert reports, GTE’s MIL No. 4 is DENIED.

10 **E. GTE’s MIL No. 5**

11 GTE requests the court preclude the expert opinion of Mr. Jestice.<sup>32</sup> “Because  
12 Western Digital’s claims regarding ’089 and ’116 Patents have been dismissed, the opinions that  
13 were disclosed by Mr. Jestice regarding GTE’s source code and software that are no longer  
14 relevant to any issue remaining in this case, and any new testimony regarding Western Digital  
15 source code, the software for the Accused Testers, and opinions based thereon of Mr. Jestice have  
16 never been disclosed and, if offered now, would be untimely.”<sup>33</sup>

17  
18 Western Digital does not facially oppose GTE’s motion. Western Digital does, however,  
19 attempt to reserve “the right to introduce testimony of Mr. Jestice to the extent Guzik offers  
20 opinions on source code beyond the scope of the May 21, 2013 infringement report by its expert,  
21 Dr. Joshua W. Phinney.”<sup>34</sup>

22  
23 <sup>29</sup> Docket No. 414 at 4 (WD’s Opposition to GTE’s MIL No. 4)

24 <sup>30</sup> *Id.* at 5.

25 <sup>31</sup> *Id.*

26 <sup>32</sup> *See* Docket No. 329 (GTE’s MIL No. 5).

27 <sup>33</sup> Docket No. 329 at 2-3.

28 <sup>34</sup> Docket No. 415 at 1.



1 GTE's MIL No. 5 is GRANTED. The court DENIES Western Digital's requested  
2 reservation of rights. Mr. Jestice's testimony is excluded.

3 **F. GTE's MIL No. 6**

4 GTE requests the court preclude Western Digital from eliciting testimony from Dr. Messner  
5 regarding the source code and software-related functionality of Western Digital's EH-300 and  
6 DCT-400 testers, because Dr. Messner – admittedly – did not perform any review of the source  
7 code or software of the accused testers.<sup>35</sup> Moreover, Western Digital has not supplemented  
8 Dr. Messner's expert reports to disclose his review of the software or source code for the accused  
9 testers. At bottom, GTE would like to limit Dr. Messner to theories disclosed in his report.  
10

11 Western Digital responds that GTE's request is too vague and does not adequately lay out  
12 what it means by "source code and software-related functionality."<sup>36</sup> Western Digital concedes  
13 that Dr. Messner will not testify about source code.  
14

15 Dr. Messner's testimony will be limited to the theories and arguments disclosed in his  
16 expert report, but a vague preclusion order is not warranted at this point. GTE's MIL No. 6 is  
17 DENIED.

18 **G. GTE's MIL No. 7**

19 GTE requests the court preclude Western Digital from relying on Dr. Messner's untimely  
20 supplemented invalidity expert report that relies on references that were known – or should have  
21 been known – to Western Digital for at least a year.<sup>37</sup> Western Digital cannot meet its burden to  
22 provide substantial justification for its failure to timely disclose the opinions in Dr. Messner's  
23 supplemented expert report.  
24

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26 <sup>35</sup> See Docket No. 350 (GTE's MIL No. 6).

27 <sup>36</sup> *Id.* at 2.

28 <sup>37</sup> See Docket No. 331 (MIL No. 7).

1 Western Digital responds that because “Dr. Messner’s supplemental expert report (and the  
2 references cited therein) is both substantially justified and harmless” exclusion of the supplemented  
3 invalidity report is not warranted.<sup>38</sup> Western Digital’s supplemental report was necessitated by  
4 GTE’s own wrongdoing and “Western Digital should not be penalized for merely catching up to  
5 Guizk’s shifting theories.”<sup>39</sup> Because GTE “never properly amended its contentions, Dr. Messner  
6 was forced to opine on infringement in the dark.”<sup>40</sup> “Western Digital did not and could not foresee  
7 GTE’s last minute change in theories, it was unable to address these alleged limitations in  
8 Dr. Messner’s Invalidation Report.”<sup>41</sup>

9  
10 Dr. Messner’s supplemented invalidity expert report will not be precluded. As outlined  
11 above in response to GTE’s MIL No. 3, the court will permit Dr. Messner to rely on his  
12 supplemental report, but the court also will allow GTE to take an additional four hours of  
13 deposition from Dr. Messner. GTE’s MIL No. 7 is DENIED.

14 **H. GTE’s MIL No. 8**

15 GTE requests that Western Digital be precluded from arguing that: “(1) Western Digital or  
16 Read-Rite first conceived of the idea underlying the invention of the ’145 Patent, and  
17 (2) the ’145 Patent is invalid over an internal Western Digital use.”<sup>42</sup> Because evidence of prior  
18 conception and prior use are invalidity arguments, Western Digital was obligated to include these  
19 arguments in their invalidity contentions and expert reports.<sup>43</sup> GTE did not. GTE therefore claims  
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23 <sup>38</sup> Docket No. 417 at 1 (WD’s Opposition to GTE’s MIL No. 7).

24 <sup>39</sup> *Id.* at 2.

25 <sup>40</sup> *Id.*

26 <sup>41</sup> *Id.*

27 <sup>42</sup> Docket No. 371-8 at 1 (GTE’s MIL No. 8).

28 <sup>43</sup> *See* Docket No. 371-8 at 4 (GTE’s MIL No. 8) (“Whether someone other than the named  
inventors conceived of the invention has not been properly preserved through invalidity

1 this evidence is irrelevant under Rule 401 and unfairly prejudicial under Rule 403 and should be  
2 excluded.

3 Western Digital attempts to refocus the court's attention solely on Western Digital's  
4 presentation to GTE on January 14, 2011, where it presented several reasons why the '145 patent is  
5 invalid. Western Digital concedes it will not use the presentation to argue invalidity, but instead  
6 suggests it "will rely on the Brown prior art patent itself and Dr. Messner's analysis of it in its  
7 invalidity case-in-chief."<sup>44</sup> Western Digital points out that its subjective state of mind regarding  
8 the validity of the '145 patent is relevant to perceived willfulness.  
9

10 The court agrees with Western Digital that the validity of the '145 patent is relevant to  
11 willfulness, but willfulness is no longer at issue. The relevance of the document for other purposes  
12 is substantially outweighed by the risk of unfair prejudice, confusion of the issues, misleading the  
13 jury, or waste of time. GTE's MIL No. 8 is GRANTED.

14 **I. GTE's MIL No. 9**

15 GTE requests the court preclude any references not included in the Western Digital's  
16 expert's invalidity report.<sup>45</sup> This includes: (1) references listed on Western Digital's invalidity  
17 contentions, (2) Western Digital's supplemented contentions on October 21, 2013, and  
18 (3) Western Digital's 35 U.S.C. § 282 notice of November 1, 2013. GTE objects to these  
19 references as not preserved in expert discovery or untimely disclosed in contravention of the  
20 court's scheduling orders and the Patent L.R. GTE argues that 35 U.S.C. § 282 provides a  
21 "statutory outer limit" for the disclosure of prior art that may be relied upon by an accused  
22 infringer at trial, but urges that "Section 282 does not eliminate a defendant's obligations under the  
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24

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25 contentions and expert reports, and therefore, is not a fact of consequence regarding whether  
26 Western Digital's Accused Testers infringe the '145 Patent or whether the patent is invalid.").

27 <sup>44</sup> Docket No. 418 at 1 (WD's Opposition to GTE's MIL No. 8).

28 <sup>45</sup> See Docket No. 356 (GTE's MIL No. 9).

1 Federal Rules of Civil Procedure” and “to the contrary, the statute and the rules are intended to  
2 coexist.”<sup>46</sup> “Western Digital’s invalidity contentions should have established the outer boundary of  
3 its prior art references, with expert discovery further narrowing the scope as the parties progressed”  
4 towards trial.<sup>47</sup> GTE urges the exclusion of the late-added references is an appropriate sanction in  
5 this case.

6 Western Digital responds that “every reference listed in Western Digital’s Section 282  
7 Statement (except for three references) were disclosed in Western Digital’s Invalidity Contentions  
8 on April 13, 2012 and Guzik has known about these references for 19 months. Any claim by  
9 Guzik of unfair surprise is therefore meritless and the case law cited by Guzik is inapposite.”<sup>48</sup>  
10 One of the three undisclosed references, “United States Patent No. 6,140,815 was cited by  
11 Dr. Messner in his opening expert report as ‘prior art’ to one of Guzik’s” trade secrets and  
12 therefore “was not required to be in Western Digital’s Invalidity Contentions.”<sup>49</sup> As to the other  
13 two, it was GTE’s belated infringement theories that necessitated the supplemental Messner  
14 invalidity report. Western Digital further argues it is only following its statutory obligation  
15 pursuant to 35 U.S.C. § 282 to disclose art that it may rely on to show “the state of the art” or that  
16 its witnesses may introduce through fact witnesses or cross-examination.  
17  
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19 GTE’s MIL No. 9 is GRANTED. Dr. Messner is limited to the reports discussed in his  
20 expert report or at his deposition.  
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24 <sup>46</sup> *Id.* at 7 (quoting *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1280  
25 (Fed. Cir. 2012)); *see also* *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 551 (Fed. Cir. 1998)  
26 (“The purpose of § 282, like that of the Federal Rules, is to prevent unfair and prejudicial surprise,  
27 not to facilitate last-minute production of evidence.”).

28 <sup>47</sup> Docket No. 356 at 8 (GTE’s MIL No. 9).

<sup>48</sup> Docket No. 419 at 1 (WD’s Opposition to MIL No. 9).

<sup>49</sup> *Id.* at 2.

1 **J. GTE’s MIL No. 10**

2 GTE requests the court preclude reference to Mr. Guizk’s prior, unrelated litigation.<sup>50</sup>

3 Based on testimony elicited during Mr. Guzik’s deposition GTE believes that Western Digital will  
4 attempt to introduce evidence of Mr. Guzik’s prior unrelated litigation to paint him as aggressive  
5 and litigious in contravention of Fed. R. Civ. P. 401 and 403.

6 Western Digital responds “evidence of Guzik’s prior lawsuits is directly relevant to rebut  
7 allegations that Western Digital employees hid their tester development because they knew it was  
8 somehow wrong. In fact, Western Digital’s employees were often cautious about what they  
9 disclosed to Guzik because they knew about the company’s, and its founder’s, litigation history.  
10 Thus, Western Digital witnesses will likely need to at least mention prior lawsuits by Guzik to  
11 truthfully respond to Guzik’s accusations.”<sup>51</sup>

12  
13 The court finds that the probative value of evidence pertaining to Mr. Guizk’s prior  
14 litigation is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and  
15 misleading the jury. GTE’s MIL No. 10 is GRANTED. Western Digital may elicit testimony as to  
16 its employees’ subjective fear of litigation, but may not present evidence of Mr. Guizk’s prior  
17 litigation.  
18

19 **K. GTE’s Daubert to Exclude Expert Testimony of James Pampinella**

20 In light of the parties’ representations, neither expert should improperly characterize  
21 *Panduit* Factor No. 1 either in their affirmative testimony or in their criticism of the opposing  
22 damage’s expert. GTE’s motion is GRANTED-IN-PART.  
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27 <sup>50</sup> See Docket No. 352 (GTE’s MIL. No. 10).

28 <sup>51</sup> Docket No. 420 (WD’s Opposition to GTE’s MIL No. 10).

1 **L. GTE’s Daubert to Exclude Certain Testimony of Dr. Messner**

2 GTE requests the court preclude certain testimony of Dr. Messner, because it lacks  
3 “legitimate” support.<sup>52</sup> GTE argues that some of Dr. Messner’s opinions are “based on insufficient  
4 or improper data,” rendering them “irrelevant and unreliable” under *Daubert* and Rule 702.<sup>53</sup> GTE  
5 specifically asks the court to order Dr. Messner not to testify “in any way about the source code for  
6 the Accused Testers and opinions about source code-driven functions that have no basis” in  
7 sufficient facts or reliable methods.<sup>54</sup> Western Digital specifically seeks to keep out opinions like  
8 those “in ¶¶ 89-90 of his Rebuttal Report, [in which] Dr. Messner opines that (1) Dr. Phinney failed  
9 to provide any evidence that the Accused Testers position magnetic heads at an offset from a track  
10 centerline and, furthermore, that (2) the Accused Testers do not position magnetic heads at an  
11 offset during testing.”<sup>55</sup> Such opinions do not rely on a review of the source code – that is essential  
12 – and substitute in reliance on bare, uninformed testimony from Western Digital’s lay witnesses.

14 Western Digital responds that GTE’s Daubert motion relies on the “false premise” that  
15 “testers are wholly based on” source code-driven functionality.<sup>56</sup> In turn, GTE’s premise relies on  
16 “three other incorrect assumptions: (1) that Dr. Phinney’s analysis is the complete and only way to  
17 analyze infringement; (2) that Dr. Messner’s opinions regarding non-infringement of the offset  
18 limitation can only be reached by reference to source code; and (3) that the closed-loop positioner  
19 limitation is software driven such that any analysis other than that of the source code must be  
20 wholly ignored.”<sup>57</sup> Western Digital believes Dr. Messner’s reliance on “witnesses who designed

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23 <sup>52</sup> Docket No. 311 at 1 (Messner Daubert).

24 <sup>53</sup> *Id.*

25 <sup>54</sup> *Id.* at 2.

26 <sup>55</sup> *Id.* at 5 (citing Docket No. 311-7, Ex. F at ¶¶ 89-90).

27 <sup>56</sup> Docket No. 366 at 1 (Opposition to Messner Daubert).

28 <sup>57</sup> *Id.*

1 and developed the accused products” was appropriate in light of their deep and relevant experience  
2 with the testers.<sup>58</sup> GTE’s denigration of these Western Digital employees as lay witnesses was  
3 therefore unwarranted. It was also unnecessary to pore over thousands of lines of source code as  
4 GTE’s expert did, because his expert opinion does not rely on that source code.

5 The court finds that the vague preclusion order sought by GTE in this case is not warranted.  
6 A vigorous cross-examination could point out many of the flaws GTE believes present in  
7 Dr. Messner’s report. GTE’s motion is DENIED.

8 **M. Western Digital’s MIL No. 1**

9 Western Digital requests the court preclude “presenting evidence or argument regarding:  
10 (1) infringement theories inconsistent with its Infringement Contentions; and (2) infringement  
11 theories undisclosed in Dr. Phinney’s report.”<sup>59</sup> The court has discretion to craft “appropriate  
12 sanctions for failing to timely assert an infringement theory” and Western Digital urges the court to  
13 exercise that discretion, because Dr. Phinney’s infringement expert report “is replete with opinions  
14 that were not disclosed in Guzik’s Infringement Contentions and should accordingly be stricken.”<sup>60</sup>  
15 Western Digital incorporates by reference the arguments from its related summary judgment  
16 motion and specifically moves to exclude GTE’s structural equivalents arguments with respect to  
17 claim 1(d) (the stepper motor) and 1(e) (the optical encoder). GTE’s “boilerplate” reservation of  
18 rights was insufficient.<sup>61</sup> Western Digital cites a recent opinion from this court that noted the  
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24

25 <sup>58</sup> *Id.* at 4.

26 <sup>59</sup> Docket No. 332 at 1 (WD’s MIL No. 1).

27 <sup>60</sup> *Id.*

28 <sup>61</sup> *Id.* at 3.

1 “doctrine of equivalents exists to prevent a fraud on the patent and not to give a patentee a second  
2 shot at proving infringement if it is not literally present.”<sup>62</sup>

3 GTE responds that because Dr. Phinney’s expert report demonstrates structural equivalents  
4 in the accused products, Western Digital cannot argue that GTE has not complied with  
5 Fed. R. Civ. P. 26(a)(2). Western Digital’s motion goes astray – GTE continues – because it does  
6 not recognize the distinction that “literal infringement of limitations governed by  
7 35 U.S.C. § 112(6) statutorily includes ‘structural equivalents.’”<sup>63</sup>

8  
9 Although the court notes that GTE’s infringement contentions might well fall short of the  
10 Patent Local Rules’ expectations, the court is not convinced that the broad preclusion order  
11 requested by Western Digital is warranted. Western Digital’s MIL No. 1 is DENIED.

12 **N. Western Digital’s MIL No. 2**

13 Western Digital requests the court preclude GTE “from introducing evidence and argument  
14 regarding infringement under 35 U.S.C. § 271(g)” because GTE “failed to preserve the theory  
15 because its Infringement Contentions and responses to Western Digital’s contention interrogatories  
16 are wholly conclusory and lack the requisite evidentiary support. Moreover, Guzik’s § 271(g)  
17 theory depends entirely on its flawed contention that testing disk drive heads is somehow the same  
18 as making those heads under 271(g) despite the fact that the heads were already manufactured—  
19 and indeed had to have been pre-made—before the testing can be conducted.”<sup>64</sup> GTE “did not  
20 include any evidence in its infringement expert’s report that would support that hard drives or hard  
21  
22  
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24  
25

26 <sup>62</sup> See *Creagri, Inc. v. Pinnaclife Inc.*, Case No. 5:11-cv-06635-LHK-PSG,  
2012 U.S. Dist. LEXIS 158540, at \*17 (N.D. Cal. Nov. 2, 2012).

27 <sup>63</sup> Docket No. 394 at 1 (GTE’s Opposition to WD’s MIL No. 1).

28 <sup>64</sup> Docket No. 333 at 1 (WD’s MIL No. 2).



1 drive heads are ‘made by’ Western Digital’s testing equipment, which only tests the heads to  
2 produce information about those heads.”<sup>65</sup>

3 GTE responds that its complaint asserted infringement under Section 271(g) and “never  
4 abandoned” this theory of infringement.<sup>66</sup> Despite this, Western Digital now (inappropriately)  
5 brings a motion for summary judgment that it has “disguised” as a motion in limine to “effectively  
6 bar” GTE from raising this cause of action at trial.<sup>67</sup> As to the making versus testing distinction,  
7 GTE cites a district court decision from Utah where that court “rejected the argument that testing is  
8 categorically separate from the manufacturing process.”<sup>68</sup>  
9

10 The court agrees with GTE that this motion is little more than a thinly-veiled dispositive  
11 one. Pursuant to the court’s scheduling order the last day for dispositive motions in this case to be  
12 heard was August 27, 2013 and motions were required to be noticed in compliance with Civil L.R.  
13 7-2(a).<sup>69</sup> On that basis Western Digital’s MIL No. 2 is DENIED.

14 **O. Western Digital’s MIL No. 3**

15 Western Digital MIL No. 3 requests “the subjective requirement of willful infringement  
16 reach the jury only if the Court first determines the objective requirement is satisfied.

17 Western Digital requests a hearing prior to any willfulness evidence or argument being presented to  
18 the jury to establish that there is no willfulness, as a matter of law. To the extent the Court is  
19

20 \_\_\_\_\_  
21 <sup>65</sup> *Id.* at 3.

22 <sup>66</sup> Docket No. 378 at 1 (GTE’s Opposition to WD’s MIL No. 2).

23 <sup>67</sup> *Id.*

24 <sup>68</sup> *Id.* at 5 (citing *Phillip M. Adams & Associates, LLC v. Dell Inc.*, Case No. 1:05-cv-64-TS,  
25 2009 WL 562587, at \*2 (D. Utah Mar. 3, 2009) (“It appears there are both issues of fact and issues  
26 of claim interpretation to be resolved before Winbond’s argument of no liability as a matter of law  
27 can be addressed. For example, if the testing is performed as part of the manufacture of Winbond’s  
28 non-defective FDCs, under Plaintiff’s interpretation of the claim terms, the resulting product might  
be made by the patented process even if the process is not ultimately part of the physical product,  
namely a computer with data corruption-free FDC chips.”).

<sup>69</sup> *See* Docket No. 141; Docket No. 57 at 3 (“Any such motions must be noticed in compliance with  
Civil Local Rule 7-2(a).”).

1 unable to determine this issue after the hearing, Western Digital believes that the Court should  
2 construct interrogatories for the jury that get at any remaining issues.”<sup>70</sup> Western Digital requests  
3 these structured proceedings to determine willfulness because this court cannot “unring the bell on  
4 willfulness evidence or arguments” if the court decides that GTE’s willfulness claims are  
5 meritless.<sup>71</sup> Western Digital points the court to a Delaware district court case, *Tarkus Imaging, Inc*  
6 *v. Adobe Systems, Inc.*, where that court considered on summary judgment whether the court  
7 should first resolve the objective prong of willfulness in the accused infringer’s favor and preclude  
8 sending the subjective willfulness prong to the jury.<sup>72</sup> That court determined that given the  
9 accused infringer’s “credible, reasonable non-infringement theories” it need not submit the  
10 subjective prong of the willfulness inquiry to the jury.  
11

12 GTE responds that, yet again, Western Digital has filed a summary judgment motion  
13 disguised as a motion in limine.<sup>73</sup> If Western Digital wanted to move for summary judgment on  
14 willfulness it should have done so at the appropriate time in this case. It did not and cannot do so  
15 now. Moreover, any potential efficiency benefits by addressing willfulness pretrial are illusory,  
16 because the jury will hear related evidence in other contexts during trial.  
17

18 The court notes that its order denying summary judgment that the ’145 patent is not  
19 anticipated and nonobvious held that there are triable 35 U.S.C. §§ 102 and 103 issues. Because a  
20 reasonable jury could find that the ’145 patent could be found invalid on multiple grounds, a  
21 finding of willfulness is precluded. It would be unfairly prejudicial to instruct the jury on  
22 willfulness where that issue is not properly before the jury.  
23

24 Western Digital’s MIL No. 3 is DENIED.

25 <sup>70</sup> Docket No. 334 at 1 (WD’s MIL No. 3).

26 <sup>71</sup> *Id.*

27 <sup>72</sup> 867 F. Supp. 2d 534 (D. Del. 2012).

28 <sup>73</sup> *See* Docket No. 395 (GTE’s Opposition to WD’s MIL No. 3).

1 **P. Western Digital’s MIL No. 4**

2 Western Digital requests the court exclude GTE “from presenting evidence or argument”  
3 that “Guzik’s V2002 tester practices the ’145 patent beyond claims 1, 3-4, and 6-7 of the  
4 ’145 patent and to further preclude Guzik from presenting evidence or argument that any other  
5 Guzik tester practices the ’145 patent.”<sup>74</sup> GTE failed to substantively respond to  
6 Interrogatory No. 12 – which sought a claim chart identifying where each limitation of each  
7 asserted claim is found within each of GTE’s covered products – and also has not presented any  
8 evidence in either its expert reports or its interrogatory responses demonstrating how any product  
9 other than the V2002 practices the ’145 patent. GTE’s shortcomings warrant precluding GTE from  
10 presenting undisclosed evidence or argument at this point in the case.  
11

12 GTE responds that as threshold matters “nothing in the relevant law requires that a patentee  
13 show that its products practice any asserted claims of a given patent—much less all of them.”<sup>75</sup>  
14 Moreover, “Western Digital refers to Fed. R. Civ. P. 26, 33, 37(c) almost as an afterthought in the  
15 last line of its Motion. Nowhere within the body of Western Digital’s Motion does it offer any  
16 actual analysis of how any of these rules should preclude the evidence.”<sup>76</sup> As to the V2002,  
17 Dr. Phinney’s expert report stated that the V2002 “practices claims beyond the exemplary claims  
18 identified here.”<sup>77</sup> Similarly Dr. Phinney’s expert opinion was not limited to the V2002: “It is my  
19 opinion that GTE’s testers, including testers based on V2002, DTR3000, RWA-2000 Series, and  
20 RWA-3000 Series, practice claims 1, 3-7, 10-13, and 15-19 of the ’145 patent.”<sup>78</sup> Moreover, GTE  
21 objected to Western Digital’s Interrogatory No. 12, in part, because “Western Digital prematurely  
22  
23

24 <sup>74</sup> Docket No. 335 at (WD’s MIL No. 4).

25 <sup>75</sup> Docket No. 380 at 1 (GTE’s Opposition to WD’s MIL No. 4).

26 <sup>76</sup> *Id.*

27 <sup>77</sup> Docket No. 380-2, Ex. 1 at 1.

28 <sup>78</sup> *Id.* at ¶ 105.

1 sought expert opinion outside of the expert disclosure schedule set by this Court.”<sup>79</sup> And, Western  
2 Digital has not moved to compel, “presumably because it received the information it sought in Dr.  
3 Phinney’s Infringement Report, consistent with the schedule in the case.”<sup>80</sup>

4 GTE’s failure to submit a claim chart in response to Interrogatory No. 12 unfairly  
5 prejudices Western Digital’s ability to substantively prepare for trial and warrants exclusion of  
6 late-added infringement theories at trial. The preclusion order Western Digital is seeking is  
7 warranted in light of the parties’ arguments. Western Digital’s MIL No. 4 is GRANTED.

8  
9 **Q. Western Digital’s MIL No. 5**

10 Western Digital requests the court exclude “new allegations of breach of contract at trial  
11 that were not previously disclosed in its interrogatory responses.”<sup>81</sup> Specifically, even though GTE  
12 amended its interrogatory responses three times as to the basis of its breach of its contract claim it  
13 abandoned its disclosed theories and staked out new positions in its opposition to Western Digital’s  
14 motion for summary judgment on the breach of contract claim.

15 GTE responds that its interrogatory responses identified “five exemplary design features”  
16 that Western Digital copied and twenty-one documents providing “other examples of  
17 Western Digital’s breaches of its contracts with GTE.” This disclosure was sufficient pursuant to  
18 Rule 26.<sup>82</sup> Moreover, “Western Digital has cited no case law supporting its argument that GTE  
19 was required to detail with exacting specificity its ‘theories of breach.’”<sup>83</sup>

20  
21  
22 <sup>79</sup> Docket No. 380 at 2 (GTE’s Opposition to WD’s MIL No. 4) (citing Docket No. 380 at 1  
23 (GTE’s Opposition to WD’s MIL No. 4)).

24 <sup>80</sup> *Id.*

25 <sup>81</sup> Docket No. 336 at 1 (WD’s MIL No. 5).

26 <sup>82</sup> GTE also points out that it was Western Digital who first “proposed that the parties only identify  
27 documents ‘sufficient to show’ their theories, not every relevant document.” Docket No. 399 at 3  
(GTE’s Opposition to WD’s MIL No. 5) (citing Docket No. 399-2, Ex 1; Docket No. 399-3,  
28 Ex. 2.).

<sup>83</sup> *Id.* at 2.

1 The agreement between the parties appears to permit the parties to rely on example  
2 documents to support other documents, not other breach of contract theories. For example, GTE  
3 did not tell Western Digital explicitly that servo copying was one theory of breach of contract. At  
4 the hearing GTE conceded that it did not write out that Western Digital had breached the contract  
5 by copying the servo in its interrogatory responses. Instead, GTE identified the sections of the  
6 agreement it believed had been breached, as well as relevant witnesses and documents.

7  
8 Western Digital's has the better of this argument. The court did not impose the agreement  
9 on the parties, but it will enforce it. Western Digital's MIL No. 5 is GRANTED.

10 **R. Western Digital's MIL No. 6**

11 Western Digital represented at the hearing that it was withdrawing MIL No. 6<sup>84</sup> in light of  
12 the court's breach of contract summary judgment order.<sup>85</sup> Western Digital's MIL No. 6 is  
13 therefore DENIED-AS-MOOT.

14 **S. Western Digital's MIL No. 7**

15 Western Digital requests the court preclude GTE's infringement expert,  
16 Dr. Joshua Phinney, from presenting testimony on Western Digital's alleged copying of GTE's  
17 tester technology and GTE's breach of contract claims.

18  
19 GTE conceded at the hearing that Dr. Phinney does not take any position in his report about  
20 the impact of the similarity of the testers on GTE's breach of contract claim. Therefore, Dr.  
21 Phinney may not testify at trial that the copying is evidence of breach. Dr. Phinney may speak  
22 about copying, but may not offer an opinion as to whether there was a breach of contract – he will  
23 be limited to the opinion disclosed in his expert report.

24  
25 Western Digital's MIL No. 7 is GRANTED.

26  
27 <sup>84</sup> See Docket No. 338.

28 <sup>85</sup> See Docket No. 442.

1 **T. Western Digital’s MIL No. 8**

2 Western Digital requests the court preclude “any argument or evidence at trial of secondary  
3 indicia of nonobviousness, including but not limited to: (1) commercial success, (2) long-felt but  
4 unmet need and failure by others, (3) praise by others, and (4) copying.”<sup>86</sup> This is because without  
5 “the legally required nexus, this evidence is irrelevant and will only confuse the jury and unfairly  
6 prejudice Western Digital.”<sup>87</sup>

7  
8 GTE responds that a blanket preclusion order is not warranted, because the cumulative  
9 weight of the evidence could establish a nexus at trial. GTE urges the court to address evidence of  
10 secondary considerations where a nexus may not have been established on a case-by-case basis.

11 Although the court has doubts about whether the evidence has the legally required nexus to  
12 nonobviousness, the court is unwilling to issue a blanket order at this time. Western Digital’s  
13 MI No. 8 is DENIED. The court expects to see the legally required nexus established at trial and  
14 will entertain relevant objections where appropriate.

15 **U. Western Digital’s MIL No. 9**

16 Western Digital requests the court exclude unsupported allegations of copying pursuant to  
17 Rule 403.<sup>88</sup> For example, a reference to servo code was identified in a cited document, but servo  
18 code was not disclosed as a copied feature.

19  
20 The court notes that the motion is a close call, but will address whether GTE’s expert strays  
21 beyond the bounds of his expert report as necessary at trial. Western Digital’s MIL No. 9 is  
22 DENIED.

23 **V. Western Digital’s MIL No. 10**

24 Western Digital moves to prevent GTE’s damages expert, Michael Wagner, from  
25

26 <sup>86</sup> Docket No. 340 at 1 (WD’s MIL No. 8).

27 <sup>87</sup> *Id.*

28 <sup>88</sup> *See* Docket No. 341 (WD’s MIL No. 9).

1 presenting opinions not included in his report, including a reasonable royalty opinion.<sup>89</sup>

2 Western Digital's MIL No. 10 is GRANTED as unopposed.

3 **W. Western Digital's MIL No. 11**

4 Western Digital moves to preclude GTE from introducing evidence of Western Digital's  
5 size, wealth, or overall revenue – including Western Digital's Form 10-Ks.<sup>90</sup> GTE responds that  
6 there are many uses for Form 10-Ks including the disclosure of Western Digital's apparent need  
7 for testers. Because the Form 10-K may be used for many flagrantly prejudicial reasons, Western  
8 Digital's MIL No. 11 is DENIED. GTE nevertheless is ordered that it is not to submit facts and  
9 figures to inflame the jury or that are otherwise untethered or relevant to a particular point that a  
10 witness is making. The court will address particular testimony in context as it arises during trial.  
11 The court will entertain requests for redactions of Western Digital's Form 10-Ks and orders the  
12 parties to meet-and-confer on this issue if the document is submitted as an exhibit during trial.

13 **X. Western Digital's MIL No. 12**

14 Western Digital moves to preclude the introduction of “evidence regarding or making  
15 reference to any prior lawsuit against Western Digital or against Read-Rite” Corporation  
16 (“Read-Rite”).<sup>91</sup> Because the court is wary of introducing satellite issues that will distract the jury,  
17 the court GRANTS Western Digital's MIL No. 12 on Rule 403 grounds.

18 **Y. Western Digital's MIL No. 13**

19 Western Digital requests the court preclude evidence of charitable donations made by  
20 Mr. Guzik or GTE on Rule 401 and 403 bases.<sup>92</sup> Because evidence of Mr. Guizk's temperament  
21 and prior litigation where GTE and Mr. Guizk was a party may not be marshaled at trial, there will  
22

23  
24  
25 <sup>89</sup> See Docket No. 343 (WD's MIL No. 10).

26 <sup>90</sup> See Docket No. 344 (WD's MIL No. 11).

27 <sup>91</sup> Docket No. 345 at 1 (WD's MIL No. 12).

28 <sup>92</sup> See Docket No. 346 (WD's MIL No. 13).

1 be no need for GTE to repair the company, or its namesake's – reputation. The court agrees.

2 Western Digital's MIL No. 13 is GRANTED.

3 **Z. Western Digital's MIL No. 14**

4 Western Digital requests the court preclude evidence of industry awards received by GTE  
5 on Rule 401 and 403 bases.<sup>93</sup> Although ““praise by others” may be evidence of secondary  
6 considerations of non-obviousness, the alleged praise must be tied to the claims of the patents in  
7 suit.”<sup>94</sup>

8 Although the court has doubts about whether the evidence has the legally required nexus to  
9 nonobviousness, the court is unwilling to preclude industry awards at this time. Western Digital's  
10 MIL No. 14 is DENIED. The court expects to see the legally required nexus established at trial  
11 and will entertain relevant objections where appropriate.

12 **AA. Western Digital's MIL No. 15**

13 Western Digital seeks leave of the court to file its MIL No. 15 to preclude GTE from  
14 raising an alleged breach of the implied covenant of good-faith and fair dealing at trial.<sup>95</sup> The court  
15 GRANTS Western Digital leave and will consider the motion. Western Digital bewails the  
16 prejudice it faces from GTE's late disclosure of this cause of action. Western Digital “could not  
17 and did not seek any discovery” on this cause of action and it did not receive “evidence regarding  
18 any breach of the implied covenant cause of action in its interrogatory responses, or in its expert  
19 reports.”<sup>96</sup>

20  
21  
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23  
24 <sup>93</sup> See Docket No. 347 (WD's MIL No. 14).

25 <sup>94</sup> *Id.* at 1.

26 <sup>95</sup> Western Digital filed the motion late, because the “first time Western Digital learned of Guzik's  
27 intention to rely on this cause of action was the morning of Tuesday, November 5th, after  
28 reviewing Guzik's trial brief and proposed verdict form, filed and served after midnight on  
Tuesday, November 5th.” Docket No. 371-1 at ¶ 2.

<sup>96</sup> Docket No. 371-1, Ex. 1 at 1 (WD's MIL No. 15).



1 GTE responds that it “is well-established in California law that there is a covenant of good  
2 faith and fair dealing implied” in every contract and “a breach of the covenant of good faith and  
3 fair dealing is not required to be a separate cause of action from a breach of contract claim.”<sup>97</sup>  
4 Indeed, “California courts have held that, while a claim for breach of the covenant of good faith  
5 and fair dealing is sometimes pleaded as a separate count, it is necessarily a type of breach of  
6 contract, and need not be pleaded separately.”

7  
8 The court notes that GTE conceded that it did not explicitly call out the implied covenant  
9 theory in its interrogatory responses. Because the theory was not in GTE’s interrogatory responses,  
10 it will not be presented to the jury at trial. Western Digital’s MIL No. 15 is GRANTED.

11 **BB. Western Digital’s Daubert to Exclude the Expert Testimony of Michael Wagner**

12 Western Digital moves to exclude the expert opinion of Mr. Wagner.<sup>98</sup> Although an order  
13 will issue separately laying out the court’s reasoning, Western Digital’s motion is DENIED.  
14

15  
16 **IT IS SO ORDERED.**

17 Dated: November 20, 2013

18 

19 PAUL S. GREWAL  
20 United States Magistrate Judge  
21  
22  
23  
24

25  
26 <sup>97</sup> See Docket No. 384 at 1 (GTE’s Opposition to WD’s MIL No. 15) (citing *Digerati Holdings, LLC v. Young Money Entertainment, LLC*, 194 Cal.App.4th 873, 885 (2011) (“Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.”)).  
27

28 <sup>98</sup> See Docket No. 316-4.