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

3 VERVAIN, LLC *
* July 12, 2023
4 VS. *
*
5 WESTERN DIGITAL * CIVIL ACTION NO. W-21-CV-488
CORPORATION, ET AL
6

BEFORE THE HONORABLE ALAN D ALBRIGHT
7 PRETRIAL CONFERENCE

8 APPEARANCES:

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4 Proceedings recorded by mechanical stenography,

5 transcript produced by computer-aided transcription.

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01:29 1 (Hearing begins.)
01:29 2 THE BAILIFF: All rise.
01:29 3 (Call to Order of the Court.)
01:29 4 DEPUTY CLERK: A civil action in Case
01:29 5 6:21-CV-488, Vervain, LLC versus Western Digital
01:29 6 Corporation, et al. Case called for a pretrial
01:29 7 conference.
01:29 8 THE COURT: Announcements from counsel,
01:29 9 please.
01:29 10 MR. WHITEHURST: Yes. Good afternoon,
01:29 11 Your Honor. It's great to be here in person. Alan
01:29 12 Whitehurst from McKool Smith for the plaintiff Vervain.
01:29 13 And would you like for me to do
01:29 14 introductions at this time?
01:29 15 THE COURT: Well, when I walked out, I
01:30 16 was a little worried with all these people that I had a
01:30 17 sentencing this afternoon and I'd forgotten about it.
01:30 18 I don't usually have the privilege of having this many
01:30 19 people show up.
01:30 20 MR. WHITEHURST: We do have some special
01:30 21 guests today, Your Honor.
01:30 22 THE COURT: I would appreciate you
01:30 23 introducing all of them. I'd love to meet them.
01:30 24 MR. WHITEHURST: Terrific. Well, I'm
01:30 25 going to start with my left to your right.

01:30 1 My colleague, Jennifer Truelove.
2 MS. TRUELOVE: Good afternoon.
3 MR. WHITEHURST: And also Mr. James
01:30 4 Quigley. Also speaking today, we're going to have
01:30 5 Chris McNett and Elizabeth Bernard, all from McKool
01:30 6 Smith.
01:30 7 But we have a truly special guest today.
01:30 8 In the front row, we have Dr. Mohan Rao. Dr. Rao is
01:30 9 the inventor of the patent at issue in this case and
01:30 10 one of the cofounders of Vervain.
01:30 11 And then in the rows behind him, we have
01:30 12 a group of our summers from our Austin and Dallas
01:30 13 office that --
01:30 14 THE COURT: Well, it's nice that you made
01:30 15 them wear ties, but that wasn't really necessary in
01:30 16 the -- the judge I clerked for in 1984, I think, was
01:31 17 the first judge in America to have a summer rule so
01:31 18 that in the courtroom, if someone was attending, they
01:31 19 didn't have to have a tie on.
01:31 20 MR. WHITEHURST: Well, I did share with
01:31 21 them the joke about not wearing yellow ties, but...
01:31 22 THE COURT: I said that this -- I gave a
01:31 23 lawyer a hard time this morning about that right before
01:31 24 I sentenced him.
01:31 25 (Laughter.)

01:31 1 THE COURT: So I appreciate all of them
01:31 2 taking the time to be here. It's great.
01:31 3 MR. WHITEHURST: They're glad to be here.
01:31 4 Thank you.
01:31 5 THE COURT: Mr. Jones, it's been almost,
01:31 6 what, a day or two since we've been together?
01:31 7 MR. JONES: Yes, Your Honor.
01:31 8 THE COURT: Good to have you back.
01:31 9 MR. JONES: And I appreciate your
01:31 10 indulgence. Thank you so much for having me.
01:31 11 Mike Jones and Shaun Hassett for Western
01:31 12 Digital, together with Doug Lumish, Rick Frenkel,
01:31 13 Patricia Young and Gabriel Gross.
01:31 14 And we're ready to proceed, Your Honor.
01:31 15 THE COURT: Well, pleasure to have you
01:31 16 all as well.
01:31 17 Okay. Let me find my cheat sheet of what
01:32 18 we're going to take up.
01:32 19 Okay. What I have first is plaintiff's
01:32 20 motion for partial summary judgment, and I'll take that
01:32 21 up.
01:32 22 This has to do with no invalidity as to
01:32 23 Western Digital's 32, I guess, nanometer X3 NAND
01:32 24 products.
01:32 25 MR. WHITEHURST: That's correct, Your

01:32 1 Honor. We've actually moved on three grounds.
01:32 2 If we could go to the next slide, please.
01:32 3 And I assume you're going to want to hear
01:32 4 argument on the first one before we move to the second
01:32 5 one.
01:32 6 THE COURT: I can do -- I'll let --
01:32 7 whatever makes the most -- I have that there are three.
01:32 8 If you all think it'd be better to ping-pong it and go
01:32 9 one issue at a time, I'm happy. If you'd like to take
01:32 10 up all three, I can do it that way. I'm happy to do it
01:32 11 whatever. So y'all --
01:32 12 MR. WHITEHURST: Do you have a
01:32 13 preference, Counsel?
01:33 14 MR. LUMISH: I would love to ping-pong,
01:33 15 Your Honor, so you can hear our opposition.
01:33 16 THE COURT: I think that's fine.
01:33 17 MR. WHITEHURST: And that's fine with us
01:33 18 as well, Your Honor.
01:33 19 THE COURT: Great.
01:33 20 MR. WHITEHURST: So Vervain has moved for
01:33 21 partial summary judgment on three points. All three of
01:33 22 these points have to do with Western Digital's
01:33 23 invalidity defenses, defenses where they have the
01:33 24 burden of clear and convincing evidence.
01:33 25 The first one, which we're going to

01:33 1 ping-pong on first, has to do with the 2010 memory
01:33 2 cards that you previously mentioned.
01:33 3 Now, as I will explain, there's no
01:33 4 written corroboration for the testimony of Western
01:33 5 Digital's employee Mr. Gorobets.
01:33 6 And then the next issue that we've moved
01:33 7 on has to do with another invalidity defense by Western
01:33 8 Digital where, again, they have the burden of clear and
01:33 9 convincing evidence, but this time it's a Gorobets '
01:33 10 '912 plus Sprouse combination.
01:33 11 And the problem is they've effectively
01:33 12 taken a two-reference combination and turned it into a
01:34 13 four-reference combination.
01:34 14 And then the third one that we will
01:34 15 discuss has to do with the Dusija-Sutardja combination,
01:34 16 and there we have a claim construction dispute.
01:34 17 Western Digital is using the wrong claim construction
01:34 18 for the claim term "blocks," and we think that this is
01:34 19 something the Court should address before the trial.
01:34 20 THE COURT: And I'll -- we can take it up
01:34 21 more fully when we get to the third one. But is the
01:34 22 fight over something that I construed or did I -- that
01:34 23 I didn't construe, or is it something I construed as
01:34 24 plain and ordinary meaning and there's a difference
01:34 25 over what that is?

01:34 1 MR. WHITEHURST: We don't believe the
01:34 2 Court has ever addressed the claim term "blocks."
01:34 3 There were two claim terms, No. 7 and 8, in the Court's
01:34 4 Markman order -- they were rather long, they're lengthy
01:34 5 paragraphs -- where the word "blocks" does appear in
01:34 6 those paragraphs, but there was no argument about the
01:34 7 claim term "blocks," per se.
01:34 8 THE COURT: Okay.
01:34 9 MR. WHITEHURST: So we believe that this
01:35 10 is an issue that's not been addressed by the Court.
01:35 11 THE COURT: Okay.
01:35 12 MR. WHITEHURST: Now, with that I will
01:35 13 turn to the first ground, which is the 2010 memory
01:35 14 cards.
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01:41 21 Now, I want to make -- I want to go back
01:41 22 through the case law, the Federal Circuit decision in
01:41 23 Lacks Industry and show how close and similar the facts
01:41 24 were in that case to this case and why Western Digital
01:41 25 is even in a worse position than the defendants

01:41 1 McKechnie Vehicle were in that case.

01:42 2 Lacks Industries is an interesting case

01:42 3 because it involved fancy new wheels for F-150 trucks.

01:42 4 The plaintiff in that case, Lacks

01:42 5 Industry, sued two defendants, McKechnie and Hayes, for

01:42 6 patent infringement. And the defendants in those cases

01:42 7 presented an on-sale bar defense that was based on

01:42 8 these Hayes F-150 prototype wheels. And in that case,

01:42 9 the special master granted summary judgment that there

01:42 10 was insufficient corroboration.

01:42 11 Now, in that case, there was no dispute

01:42 12 that a wheel assembly was sold before the critical

01:42 13 date, but there was a dispute about how it was made.

01:42 14 [redacted]

01:42 15 [redacted]

01:42 16 But the Federal Circuit made it clear,

01:42 17 and they talk about the Supreme Court decision in

01:42 18 Barbed Wire in 1882, they talk about a more recent

01:42 19 Union Carbide in 2002, and they were applying the rule

01:43 20 of reason here in Lacks Industry. They said the rule

01:43 21 of reason does not get rid of this requirement that

01:43 22 there be written corroboration. And in this -- for

01:43 23 this very reason, they said that summary judgment was

01:43 24 rightly granted.

01:43 25 Now, it wasn't just testimony in Lacks

01:43 1 testimony -- in Lacks Industry. There was testimony
01:43 2 and then there were also documents. And you can see
01:43 3 here on Slide 14, highlighted in yellow, we had minutes
01:43 4 of a 1993 meeting; we had these Hayes memorandums from
01:43 5 '93 and '94; and we also had these Hayes patents. And
01:43 6 the defendants, McKechnie and Hayes, were relying on
01:43 7 these documents to supposedly corroborate the testimony
01:43 8 of their employees. And the Federal Circuit said, No,
01:43 9 that's not enough.
01:43 10 And why was it not enough? Because they
01:43 11 said -- and this is the key point on Slide 15 -- among
01:43 12 other things, there was: No connection between the
01:44 13 project being discussed and the unmentioned Hayes F-150
01:44 14 prototype wheels.
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01:53 2 There's nothing to provide written

01:53 3 corroboration for Mr. Gorobets' testimony, and under

01:53 4 Lacks Industry, Barbed Wire, and well-established

01:53 5 Federal Circuit precedent, that's insufficient for them

01:53 6 to meet their burden of clear and convincing evidence.

01:54 7 THE COURT: Yes, sir.

01:54 8 MR. LUMISH: Good afternoon, Your Honor.

01:54 9 Doug Lumish, Latham & Watkins for Western Digital.

01:54 10 Let me start by answering your question,

01:54 11 if I might. You asked where in Dr. Sechen's report,

01:54 12 our invalidity expert, you can find him mapping all of

01:54 13 these documents to these prior art products. That's at

01:54 14 Paragraphs 135 through 153. And if my memory serves, I

01:54 15 think he is Exhibit 1 to our papers in opposition.

01:54 16 THE COURT: Why don't you give me an

01:54 17 example in those pages of the documentary evidence you

01:54 18 have?

01:54 19 MR. LUMISH: I don't have it on a slide,

01:54 20 Your Honor. I can show you the documentary evidence.

01:54 21 I don't have him --

01:54 22 THE COURT: That's fine. As long --

01:54 23 assuming that what you're showing me is his report,

01:54 24 that --

01:54 25 MR. LUMISH: Every one of them.

01:55 1 Everything I'll show you is all in his report, Your
01:55 2 Honor.
3 THE COURT: Okay.
01:55 4 MR. LUMISH: And I think that's correct.
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02:01 12 That invalidates their patent. They know
02:01 13 it. They're hoping Your Honor will keep it from the
02:01 14 jury, and we're begging you today not to do that.
02:01 15 I think I answered your question, Your
02:01 16 Honor. But if there's further questions you have, I'd
02:01 17 be happy to address them.
02:01 18 THE COURT: Anything else?
02:01 19 MR. LUMISH: Not from me, Your Honor.
02:01 20 THE COURT: Yes, sir.
02:01 21 MR. WHITEHURST: Yes, Your Honor. If we
02:02 22 could keep Western Digital's slides up.
02:02 23 [redacted]
02:02 24 [redacted]
02:02 25 [redacted]

02:02 1 [redacted]
02:02 2 [redacted]
02:02 3 [redacted]
02:02 4 [redacted]
02:02 5 [redacted]
02:02 6 [redacted]
02:02 7 [redacted]
02:02 8 [redacted]
02:02 9 [redacted]
02:02 10 [redacted]
02:02 11 [redacted]
02:02 12 [redacted]
02:02 13 [redacted]
02:03 14 [redacted]
02:03 15 [redacted]
02:03 16 [redacted]
02:03 17 [redacted]
02:03 18 [redacted]
02:03 19 [redacted]
02:03 20 [redacted]
02:03 21 [redacted]
02:03 22 [redacted]
02:03 23 [redacted]
02:03 24 [redacted]
02:03 25 [redacted]

02:03 1 [redacted]
02:03 2 [redacted]
02:03 3 [redacted]
02:03 4 [redacted]
02:03 5 [redacted]
02:03 6 [redacted]
02:03 7 [redacted]
02:03 8 [redacted]
02:03 9 [redacted]
02:03 10 [redacted]
02:04 11 [redacted]
02:04 12 [redacted]
02:04 13 [redacted]
02:04 14 [redacted]
02:04 15 So if you look at the slide that
02:04 16 Mr. Lumish was pointing to as sufficient corroboration,
02:04 17 I've already addressed all of these exhibits. He
02:04 18 didn't tell you about anything new that I haven't
02:04 19 already addressed.
02:04 20 Exhibit 2 is just the glossary of the
02:04 21 alphabetical listing of the acronyms and the
02:04 22 definitions and the terms. There's nowhere in there --
02:04 23 THE COURT: I've got your point.
02:04 24 So anything else you'd like to say in
02:04 25 rebuttal?

02:04 1 MR. LUMISH: I'd be repeating myself,
02:04 2 Your Honor. No.
02:04 3 THE COURT: Let's move then to Issue 2.
02:04 4 MR. WHITEHURST: Yes, Your Honor.
02:04 5 We can go to Slide 28, please.
02:05 6 Now, once again, Western Digital has the
02:05 7 burden of clear and convincing evidence, but now we're
02:05 8 talking about a different situation. We're no longer
02:05 9 talking about the 2010 memory cards. We're talking
02:05 10 about this so-called prior art combination of Gorobets
02:05 11 '912 and the Sprouse patent.
02:05 12 But the problem is here what they've done
02:05 13 is they've taken a two-reference combination and
02:05 14 effectively turned it into a four-reference combination
02:05 15 under the guise of using ordinary -- common knowledge
02:05 16 of a person of ordinary skill in the art.
02:05 17 But the Federal Circuit has said that's
02:05 18 not permitted. You can only look to common knowledge
02:06 19 of a person of ordinary skill in the art if you're
02:06 20 looking to maybe combine a couple references or if
02:06 21 you're filling in the holes for something that's
02:06 22 unusually simple and the technology is particularly
02:06 23 straightforward, which is not the case here.
02:06 24 So even the most cursory review of
02:06 25 Dr. Sechen's invalidity report reveals that this

02:06 1 Gorobets '912 and Sprouse combination is missing
02:06 2 numerous limitations.
02:06 3 And when they get to those elements of
02:06 4 the claim where they can't find it in Gorobets '912 or
02:06 5 Sprouse, they then cite to Gorobets '852 and ' '845.
02:06 6 Now, you may be asking, why didn't they
02:06 7 just use a four-reference combination?
02:06 8 Well, that's a decision they made.
02:06 9 That's a decision they have to live with. They elected
02:06 10 a two-reference combination, and they've never shown
02:06 11 motivation to combine Gorobets '912 and Sprouse with
02:06 12 these two other references, '852 and '845.
02:07 13 You know, the best way to put it is
02:07 14 they're out either way. Either you look at Gorobets
02:07 15 '912 plus Sprouse alone and they don't meet every
02:07 16 limitation, or you bring in these two other references
02:07 17 but they haven't shown motivation to combine.
02:07 18 So they don't have the evidence that they
02:07 19 need to prove and meet their burden of clear and
02:07 20 convincing evidence.
02:07 21 Now, on the next slide, you'll see over
02:07 22 here on the left the two references that are in this
02:07 23 combination, Gorobets '912 and Sprouse. And on the
02:07 24 right, you have these two additional patents.
02:07 25 It's not like these patents were

02:07 1 incorporated by reference. They are not related
02:07 2 patents. They happen to have the same name, Gorobets.
02:07 3 They were the same first-named inventor, but that's not
02:07 4 sufficient. They've never shown any motivation to
02:07 5 combine these Gorobets '852 and '845 patents with the
02:08 6 patents on the left.
02:08 7 Now, if you look at Dr. Sechen's report,
02:08 8 that's where we got to start this analysis, you'll see
02:08 9 on Page 106 for -- he's making this invalidity argument
02:08 10 based on Gorobets '912 and Sprouse. But as he's doing
02:08 11 his introduction, look what he does three pages later
02:08 12 on Page 109.
02:08 13 And he's saying: A person of ordinary
02:08 14 skill in the art would consider particular references
02:08 15 disclosing particular techniques, such as read scrub
02:08 16 and wear leveling, for use in combination...
02:08 17 And that's exactly what he's doing. He's
02:08 18 combining or trying to combine '852 and '845 with these
02:08 19 two other references.
02:08 20 And he goes on to explain that Gorobets
02:08 21 '852 describes read scrub, '845 describes wear
02:08 22 leveling, but these are details that were not in
02:08 23 Gorobets '912. They were not Sprouse. And what he's
02:08 24 doing is not permitted under Federal Circuit law such
02:09 25 as Arendi.

02:09 1 And Arendi is a very well-written
02:09 2 decision. It goes through in detail and explains
02:09 3 exactly this -- the fact scenario that we have here.
02:09 4 And they explain while we do consider
02:09 5 common sense, common wisdom and common knowledge,
02:09 6 there's certain caveats. And the first of which is
02:09 7 they are -- you typically look to knowledge of one of
02:09 8 ordinary skill in the art to provide a motivation to
02:09 9 combine and, as they said, not to supply a missing
02:09 10 limitation.
02:09 11 That's exactly what Western Digital is
02:09 12 here. And then they said, you know, in those rare,
02:09 13 rare cases where it is used to supply a missing
02:09 14 limitation, the limitation in question was unusually
02:09 15 simple and the technology particularly straightforward.
02:09 16 That's not the case here. I'm going to show you the
02:09 17 claim limitation, and you'll see with your own eyes it
02:09 18 was not unusually simple and it was not technology that
02:09 19 was particularly straightforward. So it's not meeting
02:10 20 the exception to the rule that the Federal Circuit is
02:10 21 describing here in Arendi.
02:10 22 Now, in Arendi, the Federal Circuit
02:10 23 looked at the only case that the appellees had -- that
02:10 24 had won at the district court stage could cite in their
02:10 25 brief on this point. And in that Perfect Web case, the

02:10 1 missing claim limitation which was Step D, of Steps A
02:10 2 through D, was nothing more than an instruction to
02:10 3 repeat. Kind of like rinse and repeat at steps -- the
02:10 4 steps that had been previously done until a particular
02:10 5 quantity of e-mail was sent. So in that one case cited
02:10 6 by the appellees in the Arendi case we were talking
02:10 7 about an unusually simple limitation. Certainly not
02:10 8 the case here.
02:10 9 So if you look at Dr. Sechen's expert
02:10 10 report, I'm starting here with Page 132. You'll -- and
02:11 11 I'm going to have several examples, I'm going to try to
02:11 12 go through these quickly, but just to show you how much
02:11 13 they violated this rule. If you look here, we're
02:11 14 talking about Limitation [1.F], and they're talking
02:11 15 about certain things that the controller does. And the
02:11 16 controller has to maintain a count of the number of
02:11 17 times of each one of the blocks is accessed.
02:11 18 Well, you would think Dr. Sechen would at
02:11 19 least point to something in Gorobets '912, or Sprouse,
02:11 20 for the count's limitation, but he can't. He couldn't
02:11 21 find it in there. So what does he do? If -- you'll
02:11 22 see there, you've got Paragraph 330 -- -72, if you go
02:11 23 down, what does he do? He cites to Gorobets '845 for
02:11 24 the count limitation.
02:11 25 But we're not talking about just an

02:11 1 unusually simple limitation like rinse and repeat,
02:11 2 we're talking about maintaining a count of the number
02:11 3 of times each one of the blocks is accessed in order to
02:11 4 do a wear leveling, or moving data from MLC to SLC.
02:12 5 We're talking about a very complex technical limitation
02:12 6 here.
02:12 7 And you can see on Pages 133, and if we
02:12 8 go to the next page, 144, it's all '845 -- actually,
02:12 9 they had a typo, "945," where they meant '845, but
02:12 10 they're citing to Gorobets '845. And then when we get
02:12 11 to Page 135, they start citing the Gorobets '852. Not
02:12 12 a single cite here for this limitation of Gorobets '912
02:12 13 and Sprouse.
02:12 14 Not only is this a violation of the
02:12 15 Federal Circuit law, but it's also a violation of your
02:12 16 OGP and your encouragement for case narrowing. When
02:12 17 they did their prior art election, they elected
02:12 18 Gorobets '912 and Sprouse. They never mentioned
02:12 19 Gorobets '845 and '852. What they're effectively
02:12 20 trying to do here is not only skirt Federal Circuit
02:12 21 precedent, but they're trying to make an end run about
02:13 22 the case narrowing in this case and the parties'
02:13 23 agreement by roping in two additional references into a
02:13 24 supposed two-reference combination.
02:13 25 And you'll see here, I'm looking now at

02:13 1 Pages 119 through 125 -- excuse me -- 121 of
02:13 2 Dr. Sechen's. He's now talking about read scrub and
02:13 3 error correction. And what does he do? He relies on
02:13 4 specific implementation details from Gorobets '852.
02:13 5 When discussing this read scrub and error correction
02:13 6 technique that he has here on these pages, he couldn't
02:13 7 find it in the base references, Gorobets '912 and
02:13 8 Sprouse. He had to cite to Gorobets '852 over and over
02:13 9 again.
02:13 10 And you see how it continues on to
02:13 11 Pages 122 and 123, cite after cite after cite, to
02:13 12 Gorobets '852. No mention of Gorobets '912 and
02:13 13 Sprouse. And if we go to the next page where he's now
02:14 14 talking about his wear leveling theory, same thing.
02:14 15 But now he switches to Gorobets '845. He couldn't find
02:14 16 these details in the base references so he cites over
02:14 17 and over again to Gorobets '845, '845; and no mention
02:14 18 of '912 and Sprouse.
02:14 19 Now, I mentioned earlier the prior art
02:14 20 election. You'll see that in this case they elected as
02:14 21 Ground No. 2 Gorobets '912 and Sprouse. They did put
02:14 22 "in view of knowledge of a person of ordinary skill in
02:14 23 the art"; but when you look at ordinary skill in the
02:14 24 art, you're only looking to see whether there was
02:14 25 motivation to combine or whether there was a simple

02:14 1 limitation. You can't just go out and find two new
02:14 2 references that have a count or that provides specific
02:14 3 implementation details and pull them in. It violates
02:14 4 Federal Circuit precedent, and it also was an end run
02:15 5 around the case narrowing by using nonelected prior
02:15 6 art.
02:15 7 Unless you have any questions --
02:15 8 THE COURT: I'm good.
02:15 9 MR. WHITEHURST: -- I will yield the
02:15 10 podium.
02:15 11 MR. LUMISH: The argument you just heard
02:16 12 was that the expert on our side, Dr. Sechen, never
02:16 13 actually discloses where each of the limitations is
02:16 14 found for the combination of the '912, the Gorobets
02:16 15 '912, and the Sprouse references; and that's
02:16 16 fundamentally wrong, and I'll show you.
02:16 17 So I'm on Slide 12 from our deck, Your
02:16 18 Honor. And I won't go through every limitation, but
02:16 19 the ones that were contested in their brief start with
02:16 20 read scrub and error correction techniques, which are
02:16 21 one of the things they've accused of infringement. You
02:16 22 have Paragraph 342 of Dr. Sechen's report here where he
02:16 23 maps those directly to the Gorobets '912 and Sprouse
02:16 24 references.
02:16 25 On the next slide, Slide 13, in

02:16 1 Paragraph 361 of Dr. Sechen's report, he maps the
02:16 2 claims to garbage collection, which is another thing
02:16 3 they accused as performing these functions of the
02:16 4 claims. And he shows where those are found in the
02:16 5 Gorobets '912 and the Sprouse reference.
02:16 6 On Slide 14, we get to wear leveling.
02:17 7 And this one is a two-step argument for me, Your Honor,
02:17 8 in that wear leveling itself is something that -- and
02:17 9 I'll show it to you in the patent at the very end of my
02:17 10 comments now -- is something that itself fundamentally
02:17 11 is a count. What you do with wear leveling is you take
02:17 12 a count of something, erases or other. And you just
02:17 13 make decisions based on where data goes and how it's
02:17 14 treated based on those counts.
02:17 15 And so when Dr. Sechen talks about wear
02:17 16 leveling, he is talking about counts. And so the two
02:17 17 go together. Here's Paragraph 93, where he explains
02:17 18 what wear leveling is and how it works. And in the
02:17 19 underscoring three lines from the bottom out, the way
02:17 20 you do wear leveling is to keep track of addresses that
02:17 21 have been, in this instance, written to the fewest
02:17 22 number of times. So wear leveling and counts go hand
02:17 23 in hand.
02:17 24 If you go to the next slide, this is
02:17 25 Slide 15. Paragraph 351 of Dr. Sechen's report shows

02:17 1 where that wear leveling is found in the Gorobets '912.
02:17 2 So those are the counts -- that's the
02:18 3 wear leveling that counsel just told you he never
02:18 4 mapped.
02:18 5 You go the Paragraph 363, I'm on Slide 16
02:18 6 now, and you see where he maps caching. This is what
02:18 7 they've accused as the movement of memory from MLC to
02:18 8 SLC. They accused this caching process. And
02:18 9 Dr. Sechen shows in Paragraph 363, including the
02:18 10 figure -- including the text below it, where that same
02:18 11 functionality is in the Gorobets '912 and the Sprouse
02:18 12 references.
02:18 13 One slide I didn't make, I wish I had now
02:18 14 in hindsight, Your Honor, is Paragraph 374 of
02:18 15 Dr. Sechen's report. I think counsel pointed you to
02:18 16 Element [1.F] and said there's no mapping there. There
02:18 17 is. It's an incorporation by reference in the very
02:18 18 first paragraph.
02:18 19 It's an enormous report. Dr. Sechen did
02:18 20 what he could to try to avoid some duplication.
02:18 21 Paragraph 374 starts with: See all -- everything I
02:18 22 said about wear leveling.
02:18 23 And so all this notion about counts and
02:19 24 things that counsel just told you were never to be
02:19 25 found, 374 says, I've already told y'all this, it's in

02:19 1 my wear leveling section.

02:19 2 Now, what Dr. Sechen then does do is also

02:19 3 map the limitations to what he believes is just common

02:19 4 knowledge in the field. And instead of asking for the

02:19 5 jury or Your Honor to take his word for it, he cites

02:19 6 references to show that it's not just in Gorobets '912

02:19 7 and Sprouse, but was commonly known; it's in other

02:19 8 references, it's in other projects. And he cites to

02:19 9 other references for that.

02:19 10 One thing I'm -- we did not have the

02:19 11 benefit of Your Honor's Motion in Limine 4, or order on

02:19 12 Motion in Limine 4 sua sponte. I'm not sure Your

02:19 13 Honor's going to permit us to do this, but even if you

02:19 14 don't, Gorobets '912 and Sprouse should absolutely go

02:19 15 to the jury because Dr. Sechen has mapped every

02:19 16 limitation of the claims to those two references.

02:19 17 What he then does here that I was

02:19 18 referencing for MIL 4 is say, Okay, and in addition to

02:19 19 that, people of ordinary skill in the art knew this

02:20 20 stuff. This is old. It's conventional. It's

02:20 21 well-known.

02:20 22 Paragraph 343 is an example of that,

02:20 23 where he says: A person of ordinary skill would know

02:20 24 how to perform read scrub and other...management

02:20 25 techniques.

02:20 1 And then he cites the '912 and the
02:20 2 Sprouse reference, and then he cites an additional
02:20 3 Gorobets '852 reference.
02:20 4 On Slide 18, you see the same idea. He
02:20 5 says a person of ordinary skill in the art would
02:20 6 already know how to perform wear leveling techniques,
02:20 7 which are the fundamental thing that they claim to have
02:20 8 invented in their patents in this case, Your Honor.
02:20 9 And Gorobets has already taught that in the '845
02:20 10 patent, he also points out where he showed it in the
02:20 11 '912 and Sprouse before that.
02:20 12 And my last slide on this point, Your
02:20 13 Honor, is -- it kind of goes to the Arendi argument a
02:20 14 little bit, but also just goes to the big picture,
02:20 15 which is this notion that wear leveling was something
02:20 16 that -- it was unique or hard to find. Their patent
02:20 17 actually discloses it as prior art.
02:20 18 I have on the screen some excerpts from
02:21 19 the background of the disclosure. It's really Columns
02:21 20 2:59 through 63, and Column 3, Lines 6 through 13, are
02:21 21 the two major excerpts there. And these are Dr. Rao
02:21 22 telling the world what had already been done before he
02:21 23 claimed to have invented anything in this sphere, and
02:21 24 he's describing these same wear leveling algorithms
02:21 25 that they say we haven't proven up well enough.

02:21 1 So long story short on this, Your Honor,
02:21 2 is Dr. Sechen shows where everything in the claims is
02:21 3 mapped to the Sprouse '912 and the -- excuse me -- the
02:21 4 Gorobets '912 and Sprouse references. That combination
02:21 5 absolutely should go to the jury, and whether or not
02:21 6 the additional belt and suspenders that he does to say
02:21 7 and these things were commonly known.
02:21 8 I actually would appreciate some guidance
02:21 9 from Your Honor related to your order on MIL 4 whether
02:21 10 that's even permissible. If Your Honor permits it,
02:21 11 we'd have him do it; and if you don't, we, of course,
02:21 12 would comply with it.
02:21 13 THE COURT: Maybe you talked about it and
02:21 14 I didn't hear you talk about it, but the thrust of the
02:22 15 argument I heard was that you all were sneaking in a
02:22 16 couple of extra pieces of art, or you were adding to
02:22 17 this. And number one, that's inappropriate; number
02:22 18 two, not in your invalidity contentions. I didn't -- I
02:22 19 don't think I heard you address that.
02:22 20 MR. LUMISH: That's exactly what I'm
02:22 21 trying to get at, Your Honor. I apologize if I wasn't
02:22 22 clear on it, which is what they say we sneak is
02:22 23 references beyond the Gorobets '912 and Sprouse. And
02:22 24 we're absolutely not trying to do that. We couldn't
02:22 25 have been more explicit. Dr. Sechen maps every

02:22 1 limitation to Gorobets '912 and Sprouse.
02:22 2 So the first principle is there's no
02:22 3 sneaking anywhere or needed. Those references are
02:22 4 mapped, they're throughout his report. I can give you
02:22 5 the paragraphs if you want them. He's listed them in
02:22 6 painstaking detail, sometimes incorporates by reference
02:22 7 back to wear leveling so he doesn't have to explain it
02:22 8 again, but he has mapped them in each instance.
02:23 9 He then also says, And this was
02:23 10 well-known, and here's evidence of that so you're not
02:23 11 just taking my word for it.
02:23 12 That's not trying to sneak it, he was
02:23 13 very direct about it. Those are references that go
02:23 14 beyond the two. This is where my question about your
02:23 15 order on MIL 4 comes in. We don't -- he can -- he can
02:23 16 testify on Gorobets '912 and Sprouse just on their own,
02:23 17 or, with Your Honor's permission, he can do it the way
02:23 18 he's done it in his report, which is to testify on the
02:23 19 their own and then also tell the jury, And this stuff
02:23 20 was old and known, and here's some more evidence that
02:23 21 shows you that these were not new ideas, even in
02:23 22 Gorobets '912 and Sprouse.
02:23 23 THE COURT: Okay.
02:23 24 MR. LUMISH: That answer your question,
02:23 25 Your Honor?

02:23 1 THE COURT: Yes.
02:23 2 MR. LUMISH: Thank you, Your Honor.
02:23 3 THE COURT: A response?
02:23 4 MR. WHITEHURST: Your Honor, Dr. Sechen's
02:23 5 report speaks for itself. I don't know whether we
02:23 6 should characterize this as sneaking in or something
02:23 7 else. I don't know what the right words are to
02:24 8 describe what he's doing.
02:24 9 But when he talks about the combination
02:24 10 '912 and Sprouse, one thing is clear, that he's
02:24 11 attempting to use these two additional references,
02:24 12 Gorobets '845 and '852. And that's where the foul
02:24 13 arises. You can't just reach out and use two other
02:24 14 references.
02:24 15 But if we could please go back to
02:24 16 Slide 14.
02:24 17 I heard counsel say this is where the
02:24 18 wear leveling and counts is. Well, I heard wear
02:24 19 leveling, but I never saw counts. And that's why
02:24 20 summary judgment is appropriate on this combination,
02:24 21 Gorobets '912 and Sprouse, is because Dr. Sechen, here
02:24 22 in the very paragraphs identified by counsel, has never
02:24 23 identified where the counts are in Gorobets '912 and
02:24 24 Sprouse.
02:24 25 This is the paragraph that he just

02:24 1 stood -- counsel just stood up here and told you has
02:25 2 wear leveling and counts. But if you look at the first
02:25 3 line of Paragraph 93, you see the words "wear
02:25 4 leveling." You don't see the word "count."
02:25 5 You can drop down, been written to the
02:25 6 fewest number of times, but he still doesn't say that
02:25 7 you're using the counts to do wear leveling.
02:25 8 Dr. Rao came up with a very important
02:25 9 invention. It was how to do wear leveling in a
02:25 10 particular way. It was how to look at the data in
02:25 11 the -- in the memory modules and determine whether they
02:25 12 should be moved, for example, from MLC to SLC.
02:25 13 He's not just doing wear leveling, he's
02:25 14 doing it in a particular way. And in order for
02:25 15 Dr. Sechen to try to make invalidity arguments about
02:25 16 Dr. Rao's invention, he couldn't find it in just '912
02:25 17 and Sprouse. He had to go out to '842 and '845.
02:25 18 And if we could go to the next slide --
02:25 19 well, actually, if we could just stay there on
02:25 20 Slide 14.
02:25 21 When you look here at the bottom of the
02:26 22 paragraph, this is to a '152 patent, a "You" patent.
02:26 23 It's not even citing to Gorobets '912 and Sprouse.
02:26 24 And if we could go to the next slide,
02:26 25 Slide 15, please.

02:26 1 You'll see here that they're talking
02:26 2 about wear leveling, but as I just mentioned, whether
02:26 3 it's Paragraph 350 or 351, it's not just enough to
02:26 4 point to wear leveling and saying, aha, there's the
02:26 5 counts. Because you'll see the wear leveling, but
02:26 6 you're still not seeing the counts. And that's the
02:26 7 problem with the combination that Dr. Sechen is relying
02:26 8 on.
02:26 9 And if we could go back to Slide 12,
02:26 10 please.
02:26 11 You'll see here that counsel has said,
02:26 12 well, Gorobets '912 and Sprouse, they did some
02:26 13 background or housekeeping operations such as read
02:26 14 scrub and error correction.
02:27 15 They're not talking about doing read
02:27 16 scrub and error correction like Dr. Rao did. They just
02:27 17 said here background or housekeeping operation. And
02:27 18 look what they did. They're now looping in read scrub
02:27 19 and error correction.
02:27 20 And then what do they do next?
02:27 21 As soon as they mention read scrub and
02:27 22 error correction, they're now looping in Gorobets '852
02:27 23 and '845.
02:27 24 So when you look at this paragraph here,
02:27 25 you're still not seeing where Dr. Sechen has told you

02:27 1 that these things were in Gorobets '912 and Sprouse.
02:27 2 I -- you know, if they were in Gorobets
02:27 3 '912 and Sprouse, why did he have to go out and rely on
02:27 4 Gorobets '845 and '852 in the way that he did?
02:27 5 And if you go to the next slide, Slide
02:27 6 13.
02:27 7 You see the same thing. They're talking
02:27 8 about performing garbage collection. But are they
02:27 9 doing garbage collection as claimed in the claim, where
02:27 10 they're moving data from MLC to SLC or whether they're
02:28 11 doing it using counts?
02:28 12 No. And that's why when they make their
02:28 13 invalidity arguments, Gorobets '912 and Sprouse
02:28 14 performing garbage collection wasn't enough because the
02:28 15 claims require garbage collection in a particular way.
02:28 16 And in order to try to invalidate that particular way,
02:28 17 they had to sneak in or whatever you want to call it
02:28 18 two additional references that are not here in the base
02:28 19 references.
02:28 20 THE COURT: Anything else?
02:28 21 MR. LUMISH: And I will risk repeating
02:28 22 myself just briefly, Your Honor.
02:28 23 Oh, I'm sorry. Can you go back a few?
02:28 24 Just to say it again, Your Honor, this
02:28 25 Paragraph 93 from Dr. Sechen's report is describing

02:28 1 wear leveling and how it works. This is not limited to
02:28 2 the "You" patent or anything else. He's explaining in
02:29 3 this section of his report what wear leveling is.
02:29 4 And he of course is describing it as
02:29 5 counts, just like the Vervain patents do, because
02:29 6 that's what wear leveling is. You have to know the
02:29 7 level. That level is a count. You're taking a level
02:29 8 of the number of something.
02:29 9 And so here he's describing wear leveling
02:29 10 as tracking the address that's been written to the
02:29 11 fewest number of times. Counsel said I didn't show you
02:29 12 where there's a count. I underscored it in red.
02:29 13 So I'll point it out to you for a second
02:29 14 time here on Slide 14, and I'll show you again in their
02:29 15 patent at Slide 19 where they describe wear leveling
02:29 16 algorithms as prior art that's based on a count.
02:29 17 That's just what wear leveling is, Your Honor.
02:29 18 So if their big argument is there's not
02:29 19 enough from Dr. Sechen on counts, it's -- what we
02:29 20 submit that's not even close to right.
02:29 21 Thank you.
02:29 22 THE COURT: Let's move on to the next
02:29 23 issue, please.
02:29 24 MR. WHITEHURST: If you go to Slide 40,
02:30 25 please.

02:30 1 Your Honor, this is our third and final
02:30 2 point that we've moved for summary judgment on. And
02:30 3 the problem here is Dr. Sechen is using the wrong
02:30 4 construction of the claim term "block." As I'll show
02:30 5 you, the correct construction has two parts to it:
02:30 6 One, that the block is in a nonvolatile memory and,
02:30 7 two, it's a physical group of memory cells that must be
02:30 8 erased together.
02:30 9 Now, you're going to see that this is
02:30 10 right on the face of the claim. We're almost reading
02:30 11 back verbatim what the claim itself says.
02:30 12 And then the antecedent basis confirms
02:30 13 that what the claim says right out at the outset,
02:30 14 that's how the term "blocks" is used throughout the
02:30 15 remainder of the claim.
02:31 16 Now, if the face of the claim and the
02:31 17 antecedent basis isn't enough, the specification
02:31 18 confirms and says the exact same thing that we see on
02:31 19 the face of the claim.
02:31 20 Now, the problem here is Dr. Sechen's
02:31 21 invalidity arguments are based on blocks that are not
02:31 22 in a nonvolatile memory.
02:31 23 Here's something else. They involve
02:31 24 logical addresses. And his construction that he uses
02:31 25 in his invalidity arguments is at odds with the claim

02:31 1 language in the specification.

02:31 2 Now, you asked me at the beginning of my

02:31 3 presentation today whether the Court has not construed

02:31 4 the term "blocks." I'll show you that there were two

02:31 5 terms that involved the term "blocks," but the parties

02:31 6 have not submitted this issue to the Court and there's

02:31 7 no waiver on this point.

02:31 8 And I'll show you the Federal Circuit has

02:31 9 actually affirmed and encouraged even constructions

02:31 10 that were made during mid trial.

02:31 11 But we would hope that the Court would

02:32 12 resolve this issue before it goes to the jury. It will

02:32 13 help streamline the case. I think it'll be very

02:32 14 confusing for the jury to hear one expert saying blocks

02:32 15 means this, another expert --

02:32 16 THE COURT: And that's not going to

02:32 17 happen.

02:32 18 MR. WHITEHURST: Thank you.

02:32 19 Going to the claim, I just want to show

02:32 20 you why our claim construction is correct.

02:32 21 If you look at Claim 1 -- this is a

02:32 22 representative Claim 1 from the '298 patent -- you'll

02:32 23 see two things right there at the beginning. We're

02:32 24 talking about a system for storing data. And it

02:32 25 comprises a MLC nonvolatile memory.

02:32 1 Now, the nonvolatile memory module, what
02:32 2 does the claim tell us about next? It tells us that
02:32 3 that memory module comprises a plurality of
02:32 4 individually erasable blocks.
02:32 5 So we believe this is a simple claim
02:32 6 construction issue for Your Honor. Right there on the
02:33 7 face of the claim in the first three lines, it's
02:33 8 telling you that a block is in a nonvolatile memory.
02:33 9 If you look at the surrounding language
02:33 10 there, it tells you one other thing, that it's a
02:33 11 plurality of individual erasable. This is telling you
02:33 12 that this block, which is in the nonvolatile memory, is
02:33 13 a physical group of memory cells that must be erased
02:33 14 together.
02:33 15 This is how the term "blocks" is
02:33 16 consistently used in the art when you're talking about
02:33 17 a block in a nonvolatile memory module, that block is a
02:33 18 physical group of memory cells that must be erased
02:33 19 together. And that's exactly what the claim is telling
02:33 20 you right here when they say a plurality of individual
02:33 21 erasable blocks.
02:33 22 Now, I'm going to march through the rest
02:33 23 of the claim. I'm going to show you how the antecedent
02:33 24 basis, everything else in the claim supports what we
02:33 25 just saw.

02:33 1 When we drop down, you'll see that blocks
02:33 2 is then used -- one, two, three -- four additional
02:34 3 times. It's used a total of six.
02:34 4 We saw right up at the outset that blocks
02:34 5 is in the module and it's individually erasable. And
02:34 6 when you get to Subpart C, you'll see it says determine
02:34 7 which of, doesn't say any blocks, it says the blocks.
02:34 8 And the reason why is this antecedent basis is
02:34 9 referring back to the first instance.
02:34 10 So it tells you at the beginning it's in
02:34 11 the memory. And every time it's used in the claim
02:34 12 thereafter it's reaffirming that it is in the memory.
02:34 13 So this antecedent "the" that you see there in Subpart
02:34 14 C, where it says the blocks and then it continues on,
02:34 15 the plurality of the blocks, drops down again, "the
02:34 16 blocks." And then finally, in Subpart D, it says
02:34 17 "those blocks."
02:34 18 Every time the claim is referring to
02:34 19 blocks, it's referring back to those blocks that are in
02:34 20 the memory.
02:34 21 Now, just to drive this point home, the
02:35 22 claim says that the controller is doing these actions.
02:35 23 And how does the controller do these actions that we
02:35 24 see in Subpart C and Subpart D?
02:35 25 It does these actions by doing what's in

02:35 1 the red underlined language. You can see the
02:35 2 controller is maintaining an address map. That's
02:35 3 Subpart A.
02:35 4 And then if we drop down to the
02:35 5 underlining, it says: Each entry in the list of
02:35 6 logical address ranges maps to a similar range of
02:35 7 physical addresses.
02:35 8 You take these logical address ranges,
02:35 9 you convert them to the physical addresses and that's
02:35 10 how you do the Subparts B, the Subpart D -- Subpart C,
02:35 11 the Subpart D using these physical addresses.
02:35 12 Now, if -- in case there's any doubt, if
02:35 13 we go back and look at the specification, you'll see
02:35 14 exactly how this is consistently explained throughout
02:36 15 the specification.
02:36 16 We see here in Figure 1 the device
02:36 17 controller 14. That's what we just saw in the claim
02:36 18 that's doing each of these actions. The controller
02:36 19 operates on the flash memories, which are highlighted
02:36 20 in blue, the MLC flash 26 and the SLC flash 28, by
02:36 21 converting the logical addresses to the physical
02:36 22 addresses. That's how a controller works.
02:36 23 The processors, which is up on the top,
02:36 24 is what's sending the logical addresses to the device
02:36 25 controller. It's within that yellow box that the

02:36 1 logical addresses are converted to the physical
02:36 2 addresses.
02:36 3 So that's how we know when we look at the
02:36 4 claim that we're talking about, one, something that's
02:36 5 in these blue nonvolatile memories and, two, we're
02:36 6 talking about something that's being erased by the
02:36 7 controller. That's what controllers do. They erase
02:36 8 blocks.
02:36 9 And how do they erase blocks? They do it
02:37 10 by using the physical addresses.
02:37 11 If we go to the next slide.
02:37 12 Figure 2B drives this point home again.
02:37 13 You'll see that in Figure 2B, we have these two
02:37 14 columns. On the left-hand side, we have the logical
02:37 15 address ranges. And then over on the right, we have
02:37 16 the physical address ranges.
02:37 17 The physical address ranges are what the
02:37 18 controller's operating on. And you'll see that when --
02:37 19 in the column where the physical address ranges are,
02:37 20 that's where it uses the term Block 0, Block 1. The
02:37 21 blocks are these physical address ranges, not the
02:37 22 logical address ranges that we see on the left.
02:37 23 Now, you've heard a lot today about, you
02:37 24 know, wear leveling and other things, but you'll see
02:37 25 that Dr. Rao, when he invented a better way to do wear

02:37 1 leveling, it's using these physical address ranges and
02:38 2 the blocks. And he talks about here in his
02:38 3 specification that the logical address ranges are
02:38 4 translated to blocks. These are the physical address
02:38 5 ranges.
02:38 6 And if you look, he says -- I mean, this
02:38 7 is the dagger in the heart here. He says: The
02:38 8 controller's wear leveling algorithm -- what we saw in
02:38 9 the claim -- determines which physical block to use.
02:38 10 He's talking about something that's
02:38 11 physical in the nonvolatile memory modules. Not some
02:38 12 logical address that's coming from a processor before
02:38 13 it actually gets to the controller.
02:38 14 And as I mentioned, "blocks" is a term of
02:38 15 art. And blocks is consistently used in the art to
02:38 16 mean something that's erased in their entirety, and
02:38 17 it's describing here in Column 2, Lines 43 through 45,
02:38 18 that: Blocks can only be erased in their entirety,
02:38 19 and, when erased, are usually written to '1' bits.
02:39 20 Now, Western Digital makes certain
02:39 21 arguments in its brief that -- one of the arguments
02:39 22 they make is that the claim language about allocating
02:39 23 to those blocks must mean logical. It's not true.
02:39 24 When you look at (d), where they make this argument, it
02:39 25 actually supports Vervain, not Western Digital.

02:39 1 When the claim is talking about what the
02:39 2 controller does and how it's allocating those blocks
02:39 3 that receive the most frequent writes, how does it do
02:39 4 this? It does it by transferring the respective
02:39 5 contents of those blocks. So it doesn't just move the
02:39 6 blocks. It looks at the physical address range that
02:39 7 corresponds to that block. It looks to see what's in
02:39 8 that physical address range and then it transfers the
02:39 9 contents. And that's exactly what Dr. Rao described in
02:40 10 his specification, what he invented, and what's claimed
02:40 11 here.
02:40 12 Now, as I mentioned, Dr. Sechen uses a
02:40 13 very different construction. His invalidity arguments
02:40 14 are based on blocks that are not in a nonvolatile
02:40 15 memory. His blocks are grouped to logical addresses,
02:40 16 not physical addresses. These logical addresses are
02:40 17 something that are used in the world outside the
02:40 18 controller, outside the nonvolatile memories. Once it
02:40 19 gets to the controller, the controller is converting
02:40 20 these logical addresses into physical addresses. Those
02:40 21 are what the blocks are and that's what the controller
02:40 22 is operating are.
02:40 23 So you can see, this is just one example,
02:40 24 but when you look at his invalidity report, he's
02:40 25 always -- he's focusing here on logical addresses, not

02:40 1 physical addresses. His construction is at odds with
02:40 2 the claim language in the specification. The claim
02:40 3 requires that the blocks be in the MLC and SLC modules.
02:41 4 We know that the controller is performing the
02:41 5 functionality recited in Claim 1.
02:41 6 It's converting the logical addresses
02:41 7 into physical addresses. And then the controller is
02:41 8 operating on the physical addresses; not what
02:41 9 Dr. Sechen is pointing to, it's operating on the
02:41 10 physical addresses, not the logical addresses. And
02:41 11 then it transfers the contents of these physical
02:41 12 addresses.
02:41 13 As I mentioned before -- I know it's a
02:41 14 little hard to see, but this is Pages 5 to 6 of your
02:41 15 claim construction order, Docket 41. You'll see that
02:41 16 defendants took a lot of language. You know, I think
02:41 17 we may have put a footnote complaining about how much
02:41 18 language they took, but you can see they had this long
02:41 19 "wherein" clause.
02:41 20 They argue that it was indefinite; the
02:41 21 Court found otherwise. 8, you can see that they made
02:41 22 indefinite argument; the Court rejected that indefinite
02:42 23 argument. So what was at issue here was whether this
02:42 24 was definite or not.
02:42 25 The Court -- the parties never proposed

02:42 1 any claim constructions for the term "blocks." While
02:42 2 it may have -- you know, while it was part of the
02:42 3 longer wherein clause, the term "blocks" itself has
02:42 4 never been construed. And I don't think I need to tell
02:42 5 the Court about 02 Micro, but we've cited here numerous
02:42 6 cases where, you know, terms were construed late in the
02:42 7 case, which is -- but the ultimate thing is to get it
02:42 8 right. The most important thing is to get it right
02:42 9 before it goes to the jury.
02:42 10 Thank you, Your Honor.
02:42 11 THE COURT: A response?
02:42 12 MR. LUMISH: Thank you, Your Honor.
02:42 13 I just want to take a brief moment to
02:42 14 talk about how we got here. It is quite late in the
02:43 15 case, and leaving aside whether it's been waived, I
02:43 16 heard Your Honor loud and clear, when asked what their
02:43 17 proposed constructions were, Vervain actually called
02:43 18 out blocks and said it's plain and ordinary meaning.
02:43 19 And so that meaning is a very, very broad
02:43 20 one. Everybody in the field -- and you'll see it as
02:43 21 I'll show you the evidence -- knows, blocks include
02:43 22 logical and physical blocks. They're both well-known.
02:43 23 The notion of blocks is a broad one, and that's what
02:43 24 they claimed. It's only when they were confronted
02:43 25 with --

02:43 1 THE COURT: If I were to go with -- and I
02:43 2 want you to listen carefully because it's not exactly
02:43 3 what either side proposed. But if I were to go with,
02:43 4 in a nonvolatile memory, a physical group of memory
02:43 5 cells, what would your objection be to that?
02:43 6 MR. LUMISH: That it -- that it unduly
02:43 7 narrows the claims, and it reads in physical when
02:43 8 physical should not be added to the claims.
02:43 9 THE COURT: Okay. Why don't you focus
02:43 10 just on that?
02:43 11 MR. LUMISH: Yes, sir.
02:43 12 So here's the claim language. They
02:44 13 picked their language. They and their lawyers sat down
02:44 14 and decided how they wanted to claim these inventions.
02:44 15 And they used the words "blocks" in its broadest sense.
02:44 16 When they wanted to limit things to logical or
02:44 17 physical, they knew how to do it and they did it right
02:44 18 here in the claims.
02:44 19 I've highlighted in green and blue, using
02:44 20 the '298 Claim 1 as an example, multiple places where
02:44 21 Dr. Rao and his lawyers refer to the logical addresses
02:44 22 of these blocks and the physical addresses of these
02:44 23 blocks. I think there's two reasons why that should be
02:44 24 sufficient to deny the request to construe these blocks
02:44 25 to be only physical.

02:44 1 One is for what I already said: If they
02:44 2 meant physical blocks, they should have said so. They
02:44 3 could have said so. They knew how to do it and they
02:44 4 knew there was a difference. And they chose not to.
02:44 5 They chose to use the broadest possible language in
02:44 6 their claims. That's the notice they gave to the
02:44 7 public, and they should have to live with it.
02:44 8 The second is it makes no sense to limit
02:44 9 the claims to physical blocks when the controller that
02:45 10 counsel just spent all that time on is operating on
02:45 11 both the logical addresses and the physical addresses
02:45 12 for both types of blocks.
02:45 13 Counsel showed you how the processor
02:45 14 sends the logical addresses to the controller and the
02:45 15 controller also has notion of the physical addresses
02:45 16 and the physical blocks. And it makes a map and it
02:45 17 uses both together.
02:45 18 This claim requires both, Your Honor.
02:45 19 It's physical and logical blocks. If they meant to
02:45 20 limit it only to physical blocks, they should have said
02:45 21 so.
02:45 22 Specification is similar. So here's --
02:45 23 I'm sorry. This is for the claim language. Excuse me.
02:45 24 I'm on Slide 25.
02:45 25 When you talk about allocating blocks,

02:45 1 that's not something you do with physical blocks. They
02:45 2 are physically oriented on the disk drive or on the
02:45 3 solid-state drive. You don't move them around. There
02:45 4 are some other claims that talk about segregating them.
02:45 5 You don't do that on physical blocks, you do that on
02:45 6 logical blocks.
02:45 7 So this claim language is further
02:45 8 evidence that Dr. Rao and his lawyers meant to capture
02:46 9 in their claims blocks in general; logical and
02:46 10 physical, both.
02:46 11 Dr. Khatri, Vervain's expert, at Page 104
02:46 12 of his deposition acknowledged that physical blocks
02:46 13 aren't moved. They don't get moved around, but what
02:46 14 happens is the pointer changes. Well, that pointer
02:46 15 comes from that logical map, Your Honor. And so when
02:46 16 you're talking about allocating and segregating, you're
02:46 17 talking about moving pointers, which means moving
02:46 18 logical blocks. That's exactly what these claims are
02:46 19 trying to capture when they talk about allocating
02:46 20 blocks from SLC to MLC or otherwise.
02:46 21 Further claim language. This is the
02:46 22 address map language in the claim. I'm on Slide 27.
02:46 23 Talks about maintaining an address map with a list of
02:46 24 logical address ranges and mapping it to a list of
02:46 25 physical addresses. Again, that's something you would

02:46 1 do only if you had both logical and physical blocks.
02:46 2 That's not something you would do if you were limited
02:46 3 only to physical blocks in the way counsel just asked
02:47 4 you to just do.
02:47 5 There was this argument about the
02:47 6 preamble, not -- pardon me, not the preamble.
02:47 7 Antecedent basis. And the notion is, well, it says
02:47 8 blocks, and those have to be only physical and so
02:47 9 everything else has to be only physical even though
02:47 10 they don't say only physical. And the reason they
02:47 11 argue that is, well, because they're erasable, those
02:47 12 first references to blocks must be only physical.
02:47 13 But the testimony on the screen, Your
02:47 14 Honor, from Dr. Khatri's deposition, again, Vervain's
02:47 15 expert, at Page 169 of his deposition shows that as
02:47 16 he's looking at other prior art, he acknowledges that,
02:47 17 no, you can erase logical blocks too. People of
02:47 18 ordinary skill in the art do talk about erasing logical
02:47 19 blocks.
02:47 20 So there's just nothing in the claim
02:47 21 language that would permit the injection of physical
02:47 22 into the claims. And then if you go the specification,
02:47 23 Your Honor, you'll see they did the same thing.
02:47 24 Dr. Rao and his lawyers did the same thing. They had
02:47 25 the notion of blocks in the broadest sense, and I have

02:47 1 an example of that here at Column 6, Lines 23 through
02:48 2 35.
02:48 3 And then when they meant to talk about
02:48 4 narrower versions of blocks, logical blocks or physical
02:48 5 blocks, they knew how to say it. They called it out
02:48 6 specifically. Logical here, and the example of that is
02:48 7 from Column 2, beginning at Line 13; and for physical
02:48 8 blocks, beginning in Column 3, Line 1. When they
02:48 9 wanted to say physical blocks, they said it; when they
02:48 10 wanted to say logical blocks, they said it.
02:48 11 The claim language they chose was
02:48 12 deliberately broad, was deliberately encompassing both
02:48 13 physical and logical blocks. And, Your Honor, we would
02:48 14 submit it would be both very prejudicial to the case at
02:48 15 this point, but also a misconstruction of the term in
02:48 16 the claim language if you were to go to physical at
02:48 17 this point.
02:48 18 Unless Your Honor has questions. Thank
02:48 19 you.
02:48 20 THE COURT: The only thing I need a
02:48 21 response on is what was close to the last point, or
02:48 22 last point that was just made where -- in fact, it's
02:49 23 up. If we can just leave it up.
02:49 24 If you can take up where counsel noted
02:49 25 that the drafter of the patent referred to both logical

02:49 1 blocks and physical blocks and here we're thinking of
02:49 2 describing blocks as a physical group of memory cells.
02:49 3 That's the only point I need you to respond to.
02:49 4 MR. WHITEHURST: I think we've talking
02:49 5 about two completely different things. He was talking
02:49 6 about the specification and how the specification
02:49 7 mentions logical blocks and physical blocks. But the
02:49 8 point that was missed is that logical blocks are erased
02:49 9 by the host or the processor. When you talk about
02:49 10 physical blocks, these are what the controller is
02:49 11 erasing.
02:49 12 So when the claim was written, what you
02:49 13 see on Slide 24, they weren't just going broad. They
02:49 14 weren't claiming any type of blocks. They were
02:49 15 claiming a particular type of block that's in the
02:50 16 nonvolatile memory module, number one, and, number two,
02:50 17 that's erased by the controller. It's not erased by
02:50 18 the processor, not erased by something else. It's
02:50 19 erased by the controller.
02:50 20 So when you look at this claim and you
02:50 21 see how it's talking about a block, it's in the
02:50 22 nonvolatile memory module. That's how we know that
02:50 23 we're talking about something physical, not something
02:50 24 logical.
02:50 25 When you see the controller is doing the

02:50 1 erasing, not the host or something else, that's how we
02:50 2 know it's physical, not logical.
02:50 3 When you look at how the claim is
02:50 4 written, how you're mapping the logical addresses to
02:50 5 the physical addresses, that confirms it's physical.
02:50 6 And when you get down to D, when it says
02:50 7 allocate those blocks, when it tells you exactly how
02:50 8 you're doing the allocation by transferring the
02:50 9 respective contents of those blocks, that tells you
02:50 10 once again why it's physical, because you need that
02:51 11 physical address range to know the contents of those
02:51 12 blocks in order to transfer it.
02:51 13 So you're seeing it right from the
02:51 14 beginning throughout the claim. It wasn't as if
02:51 15 applicant tried to go broad. It's the opposite. They
02:51 16 were claiming a particular type of blocks.
02:51 17 And the fact that the specification
02:51 18 happens to mention logical blocks and physical blocks
02:51 19 is irrelevant because what matters here is the claim
02:51 20 itself. And when you look at the face of the claim,
02:51 21 it's telling you over and over again that we're talking
02:51 22 about something that's in the nonvolatile module and
02:51 23 we're talking about the physical address range.
02:51 24 And your claim construction, we have no
02:51 25 objection to it. It would be acceptable to us.

02:51 1 THE COURT: A response to anything he
02:51 2 just said?
02:51 3 I get the distinction between the claims
02:51 4 and the spec. Anything else?
02:51 5 MR. LUMISH: Just that there's been no
02:51 6 answer for the fact that they chose the word "blocks"
02:51 7 instead of physical and logical blocks when they used
02:51 8 that phrase in the specification and they use physical
02:52 9 and logical throughout the claim language.
02:52 10 If they meant to limit it to physical,
02:52 11 they would have done it.
02:52 12 That's all I have, Your Honor.
02:52 13 THE COURT: Explain that to me. I get
02:52 14 what you're saying, but I'm -- but with respect to just
02:52 15 the claims, why would they be required to do that?
02:52 16 MR. LUMISH: Not required necessarily,
02:52 17 Your Honor, but what they're asking you to do is inject
02:52 18 into the word "block" physical and to exclude all
02:52 19 logical blocks.
02:52 20 And the argument I'm making to Your Honor
02:52 21 is if they meant to do that in the first instance
02:52 22 instead of now after they've seen the prior art and
02:52 23 want to avoid it, they would have done it in the claim
02:52 24 language in the first instance.
02:52 25 Because the notion -- the difference

02:52 1 between logical and physical blocks is one you see here
02:52 2 in the specification, Column 2 and Column 3 -- this is
02:52 3 Slide 30 -- and the notion of logical and physical you
02:52 4 see in the claim language. So back to Slide 24, you
02:52 5 see the logical and physical addresses.
02:52 6 And so I think the only rational
02:52 7 explanation for why they chose the word "blocks" and
02:53 8 not "physical blocks" isn't because, well, erasable was
02:53 9 good enough to tell the whole world that they meant
02:53 10 physical blocks, but because they didn't mean physical
02:53 11 blocks.
02:53 12 They wanted to cast a net as broad as
02:53 13 they could. They wanted to cover physical and logical
02:53 14 blocks. And now that they've seen the prior art and
02:53 15 realize that causes trouble for them, they'd like to
02:53 16 rewrite their claims. And it's the wrong time, and
02:53 17 there's not sufficient support for it.
02:53 18 THE COURT: Well, all these young people
02:53 19 who are sitting out to the back will have gotten the
02:53 20 experience for the first time since I've been on the
02:53 21 bench in five years where a defendant is arguing
02:53 22 vigorously for me to not construe a claim term.
02:53 23 You haven't mentioned 02 Micro, which is,
02:53 24 you know, I'm just -- so this is a -- kind of a
02:53 25 red-letter day to see anything can happen.

02:53 1 MR. LUMISH: I was going to raise the
02:53 2 irony, Your Honor, but I figured you'd know it on your
02:53 3 own.
02:53 4 THE COURT: When -- I shouldn't say this,
02:53 5 but I will. I was -- had the great honor a couple of
02:54 6 months ago of being invited to teach a class of other
02:54 7 district judges and magistrate judges how to handle
02:54 8 these type of cases. Great panel. It was with Judge
02:54 9 Stark and Chief Judge Gilstrap and -- let's see -- Colm
02:54 10 Connolly from Delaware and Beth Freeman from
02:54 11 California. So I was clearly the litter of the runt.
02:54 12 But when the other judges asked how to do
02:54 13 a Markman, I said it's really pretty simple. Whatever
02:54 14 the defendant tells you they want keeps them from
02:54 15 infringing, and whatever the plaintiff tells you they
02:54 16 want for plain and ordinary meaning pretty much helps
02:54 17 them show infringement. So just -- that's writ large
02:54 18 how to think of these things.
02:54 19 But you all did a great job of arguing
02:54 20 these. I'm going to go in the back for a few seconds
02:54 21 and chat with the clerk, and I'll come out and I'll
02:54 22 rule on these issues. And then we'll take up the next
02:55 23 issue. So we'll be in recess for about ten minutes.
02:55 24 THE BAILIFF: All rises.
02:55 25 (Recess taken.)

03:07 1 THE BAILIFF: All rise.
03:07 2 THE COURT: Thank you. You may be
03:07 3 seated.
03:07 4 Before I say what I'm going to do, just
03:07 5 because it may -- I know it throws at least you all's
03:07 6 technical people off, if not the lawyers. The next
03:07 7 motion I'm going to take up is the motion to strike
03:07 8 certain opinions of Dr. Sunil Khatri. If that means
03:07 9 anyone has to do anything on their technology stuff to
03:07 10 get ready for that.
03:07 11 Okay. With regard to the first motion,
03:07 12 the Court is going to grant it.
03:07 13 With regard to the second motion, the
03:07 14 Court is going to grant it.
03:07 15 And with regard to the third portion of
03:07 16 the motion, the Court is going to grant it. And the
03:07 17 Court is going to construe the term "block" to mean: A
03:07 18 nonvolatile memory, a physical group of memory cells.
03:07 19 Next up we have the motion to strike
03:08 20 certain opinions of Dr. Sunil Khatri, and then we'll
03:08 21 take up the partial summary judgment motion for
03:08 22 noninfringement and invalidity.
03:08 23 MR. FRENKEL: Thank you, Your Honor.
03:08 24 THE COURT: Yes, sir.
03:08 25 MR. FRENKEL: Rick Frenkel for Western

03:08 1 Digital. I'm going to be brief so that we can get to
03:08 2 our summary judgment motion.
03:08 3 Here, what we're faced with is a theory
03:08 4 by Dr. Khatri that we think came for the first time in
03:08 5 his expert report. We didn't see it in the -- in any
03:08 6 of the infringement contentions.
03:08 7 And this was an issue because it affects
03:08 8 the -- sorry.
03:08 9 THE COURT: I'm -- I don't usually -- I
03:08 10 think I've got your argument.
03:08 11 MR. FRENKEL: Okay.
03:08 12 THE COURT: Let me hear the response to
03:08 13 it, and then listen if you feel -- I'll give you
03:08 14 whatever time you want to rebut it.
03:08 15 MR. FRENKEL: Okay.
03:08 16 THE COURT: But I don't think you can add
03:08 17 much to what you had in your brief, and I think I
03:08 18 understand it.
03:08 19 MR. FRENKEL: Okay.
03:09 20 THE COURT: And that's just because we've
03:09 21 gone long on the other ones. I want to make sure we
03:09 22 get to everything today.
03:09 23 Yes, sir.
03:09 24 MR. MCNETT: Thank you, Your Honor. This
03:09 25 is Chris McNett with McKool Smith for plaintiff

03:09 1 Vervain, LLC.

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03:18 18 Finally, they served their invalidity
03:18 19 report on the same day that they claimed to have been
03:18 20 surprised by our infringement report. But even in that
03:18 21 report they talked a little bit about Kang's invalid
03:18 22 page count. Right? That Kang selects the logical
03:18 23 memory block that the system has determined to have the
03:18 24 greatest amount of invalid pages.
03:18 25 So they were -- you know, they were

03:18 1 thinking about this and they were able to build a
03:18 2 response. Now, ultimately, they didn't -- you know,
03:18 3 they can't develop this theory in their opening report.
03:18 4 I'm not sure why. They had plenty of opportunity to do
03:18 5 so. But they didn't -- they didn't even say, Oh, in
03:19 6 our rebuttal report we'll put -- we'll put our -- you
03:19 7 know, we'll put in a theory to respond to this.
03:19 8 Even though they said, two months later
03:19 9 in this motion, that they thought it was new, they did
03:19 10 not do anything to try to actually supplement their
03:19 11 expert opinions until last week, 18 days before trial,
03:19 12 when they served a provisional supplemental report, I
03:19 13 believe they called it. And, you know, we'll get
03:19 14 that -- there's a separate motion to strike that
03:19 15 report. We'll get there.
03:19 16 But, ultimately, our theories were
03:19 17 clearly disclosed in our contentions. They responded
03:19 18 to them, and there's no reason that such a critical
03:19 19 part of our infringement case should be stricken based
03:19 20 on -- based on alleged inadequate disclosure.
03:19 21 THE COURT: Is that it?
03:19 22 MR. MCNETT: Yeah. Thank you.
03:20 23 THE COURT: If you'll give me just one
03:20 24 second.
03:20 25 (Off-the-record bench conference.)

03:20 1 THE COURT: I don't need a response. I'm
03:20 2 going to grant the motion.
03:20 3 Next up I have defendant's motion for
03:20 4 partial summary judgment of noninfringement and
03:20 5 invalidity. And I'll take -- I'll hear from defendant.
03:20 6 Yes, sir.
03:20 7 MR. LUMISH: Thank you, Your Honor.
03:20 8 THE COURT: At least that's what my
03:20 9 clerks tell me is next. If that's now what you
03:20 10 think -- is that what you have as well?
03:20 11 MR. LUMISH: The -- our partial motion
03:20 12 for summary judgment? I was hoping you'd do that next,
03:20 13 Your Honor.
03:20 14 THE COURT: Okay. Very good.
03:20 15 MR. LUMISH: There we go.
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03:34 1 THE COURT: I think that's what I just
03:34 2 dealt with.
03:34 3 MR. LUMISH: That's what I understood
03:34 4 too.
03:34 5 THE COURT: That was my understanding.
03:34 6 MR. LUMISH: Thank you, Your Honor.
03:35 7 THE COURT: Yes, sir.
03:35 8 MR. MCNETT: Thank you, Your Honor.
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03:38 14 THE COURT: A response?
03:38 15 MR. LUMISH: Can you just leave that
03:38 16 slide up for me, please?
03:38 17 MR. MCNETT: Sure.
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03:39 1 Thank you.
03:39 2 (Off-the-record bench conference.)
03:39 3 THE COURT: The Court is going to deny
03:39 4 the motion. But as counsel noted, to the extent the
03:39 5 motion is -- I don't know how to say it granted or it's
03:39 6 become moot because of the ruling I made earlier with
03:39 7 [redacted]
03:39 8 granting the motion as much as I'm -- it would just be
03:39 9 consistent with my ruling there, if that makes sense to
03:39 10 you all.
03:39 11 So next up I have the motion to exclude
03:39 12 Dr. Sunil Khatri's overprovisioning model and
03:40 13 Ms. Schenk's damages opinions.
03:40 14 Let me ask you all this. This is another
03:40 15 one where there are subparts. Does it make sense to
03:40 16 take them up one subpart at a time, or would it be --
03:40 17 how would you all like to do it? I'm agnostic.
03:40 18 MS. YOUNG: So, Your Honor, I would like
03:40 19 to present it continuously because it is a model that
03:40 20 builds upon itself.
03:40 21 THE COURT: Essentially what we're going
03:40 22 to -- you're ultimately going to tell me is, I reject
03:40 23 Ms. Schenk's damage opinion because of issues with
03:40 24 Dr. Khatri's overprovisioning model?
03:40 25 MS. YOUNG: Correct.

03:40 1 THE COURT: I'm okay with that if you
03:40 2 are, or whoever is on --
03:40 3 MS. BERNARD: Yes, Your Honor.
4 THE COURT: I'm sorry. Yes. Okay.
03:40 5 Very good. Yes, ma'am.
03:40 6 MS. YOUNG: Your Honor, Ms. Young for
7 Western Digital.
03:41 8 So Dr. Khatri's overprovisioning model
03:41 9 and Ms. Schenk's related opinions should not survive
03:41 10 Daubert. These opinions are not reliable. Simply put,
03:41 11 contrary to case law, these opinions are not the
03:41 12 product of reliable methods and principles. And, in
03:41 13 fact, Dr. Khatri nor Ms. Schenk applied any principles
03:41 14 and methods to the facts of the case. So here, it is
03:41 15 not a credibility issue, as Vervain would like to
03:41 16 argue; but, rather, a -- clearly a methodology issue.
03:41 17 And I'll walk through the method here in a little bit.
03:41 18 But first as a little bit of background,
03:41 19 what Dr. Khatri does in this case is he opines that the
03:41 20 invention allows one to save on overprovisioning, and
03:41 21 what overprovisioning is, is basically where you
03:41 22 provide more memory cells in an actual piece of flash
03:41 23 memory than advertised because it saves performance
03:41 24 reasons. And in theory, if you save overprovisioning,
03:41 25 then you can decrease costs.

03:42 1 So then, as you alluded to, Ms. Schenk
03:42 2 then relies on Dr. Khatri's overprovisioning model and
03:42 3 opinions as a basis of her analysis of cost savings.
03:42 4 But even putting aside whether there is an actual
03:42 5 benefit to the alleged invention where there's a
03:42 6 savings of overprovisioning -- we're going to assume
03:42 7 that that is the case for this motion, but even
03:42 8 assuming that, the entire model is unreliable.
03:42 9 So the reason for that is: What does
03:42 10 Dr. Khatri do? In order to build his model, Dr. Khatri
03:42 11 attempts to apportion. And as an initial step,
03:42 12 Dr. Khatri develops a flawed apportionment model. He
03:42 13 does not use a prior proxy product that actually is
03:42 14 reliable model for the invention. He also does not use
03:42 15 a reliable baseline product to model the next best
03:42 16 available noninfringing alternative.
03:42 17 That's a mouthful.
03:42 18 And then after arriving at the technical
03:43 19 model, what Dr. Khatri effectively does is come up
03:43 20 with, I'll call it an equation, to calculate the
03:43 21 alleged benefit of overprovisioning of decrease in
03:43 22 overprovisioning. But in order to do that calculation,
03:43 23 he does not use all of Western Digital's accused
03:43 24 products, he uses a sample. And he gets that sample
03:43 25 from Ms. Schenk.

03:43 1 And I will get to this later, but
03:43 2 there's -- Ms. Schenk's sample is also not
03:43 3 representative. So then he uses a flawed sample. The
03:43 4 last input into his model are other -- specific numbers
03:43 5 and assumptions. And effectively what he has to do is
03:43 6 input various inputs into his equation that he came up
03:43 7 with to calculate the alleged decrease in
03:43 8 overprovisioning.
03:43 9 But some of the inputs he uses are also
03:43 10 unreliable, and so then that leads to an unreliable
03:43 11 overprovisioning model, which Ms. Schenk then bases her
03:43 12 damages cost savings on; and, therefore, her model is
03:43 13 also unreliable.
03:43 14 So I'm going to take each one of these in
03:44 15 turn. So first, Dr. Khatri's flawed apportionment
03:44 16 model. And where that starts is apportionment.
03:44 17 Apportionment is a key foundation for
03:44 18 damages. And I'm on Slide 6. As we know from Grain
03:44 19 Processing, you -- only by comparing the patented
03:44 20 invention to its next best available alternative can
03:44 21 you discern the market value of a patent owner's
03:44 22 exclusive right. And it is only if the patent -- it is
03:44 23 only the patented technology that is taken from the
03:44 24 owner. So therefore the only value that you can get
03:44 25 from damages is the value that the infringing product

03:44 1 features contribute to the value of the accused
03:44 2 products.
03:44 3 So how does Dr. Khatri come up with his
03:44 4 model?
03:44 5 So the way to do it properly is to take a
03:44 6 proxy for the invention and subtract the next best
03:44 7 available noninfringing alternative and there you come
03:44 8 up with an incremental benefit of the patent. And so
03:44 9 this methodology is an acceptable methodology. But it
03:45 10 only works and it's only reliable if you actually
03:45 11 follow the method in a reliable way. And here
03:45 12 Dr. Khatri does not.
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04:01 9 So finally, the last part of this model
04:01 10 and where it leads to the next unreliable opinion is
04:02 11 that Dr. Khatri output a number of alleged
04:02 12 overprovisioning savings for the Western Digital
04:02 13 products, and then Ms. Schenk, as she's stated in her
04:02 14 report, she relied on that simulation model prepared by
04:02 15 Dr. Khatri to come to her cost-savings opinions.
04:02 16 And so for all the above reasons, we
04:02 17 respectfully request that the Court exclude
04:02 18 Dr. Khatri's overprovisioning model and Ms. Schenk's
04:02 19 related opinions relating to cost savings that rely on
04:02 20 that model.
04:02 21 Thank you.
04:02 22 THE COURT: Thank you.
04:02 23 I don't need a response. I'm going to
04:02 24 deny the motion.
04:02 25 Next up I have Vervain's motion to strike

04:02 1 the supplemental. I'll take that up.
04:03 2 MR. FRENKEL: Your Honor, our report
04:03 3 was -- supplemental report was contingent on the -- on
04:03 4 the -- our own motion to strike being denied. And
04:03 5 since it was granted, we'll withdraw that report.
04:03 6 THE COURT: No. I want to hear it
04:03 7 anyway.
04:03 8 MR. FRENKEL: Okay.
04:03 9 THE COURT: I'm kidding. Okay. Very
04:03 10 good.
04:03 11 Now I need to find the motions in limine.
04:03 12 Oh, I also -- I think they have -- let me see.
04:03 13 Okay. Here we go.
04:03 14 My clerks are getting so much better,
04:03 15 even though I'm about to lose all of them. They've
04:03 16 actually prepared a little script for me to give you of
04:03 17 things I like and things I don't.
04:03 18 So the parties will have 12 hours per
04:03 19 side. That does not include the 30 minutes for opening
04:03 20 and 30 minutes for closing.
04:03 21 Generally speaking, I'm not -- I'm not --
04:04 22 I am setting a timer. I don't cut people off at 30 --
04:04 23 I would love to talk to Mr. Jones when he's drunk and
04:04 24 find out how much I'm saying now is actually the way I
04:04 25 do it, because he's been here in trial so much, but I

04:04 1 think everything I'm saying he's heard and is correct.
04:04 2 So I'm not going to cut you off at
04:04 3 exactly 30 minutes because I just -- but if you hit 35
04:04 4 or 40 and I say it's time to wrap up, I'm being polite.
04:04 5 I'm saying you need to sit down. I don't say that, but
04:04 6 when I say it's time to wrap up, I don't want a "I got
04:04 7 it" and you keep going. I'm telling you you need to
04:04 8 sit down to be fair to the other side, because they'll
04:04 9 only have had 30 minutes.
04:04 10 So you'll have a seven-person jury.
04:04 11 You'll have four strikes per side. I believe that
04:04 12 Judge Gilliland is picking the jury Monday morning.
04:04 13 So at the beginning of the trial -- and
04:04 14 this has happened in most trials, it's been okay. If
04:05 15 you all have to approach the bench occasionally, that's
04:05 16 not -- that's -- time isn't counted against you.
04:05 17 But I've had one or two trials where
04:05 18 they've spent more time upfront than they did, and then
04:05 19 I'm not -- then it's not going to be on me. It's going
04:05 20 to be on you. So I -- you are welcome to approach the
04:05 21 bench.
04:05 22 And so Judge Gilliland, as I understand
04:05 23 it, because he's much nicer than I am, will do a very
04:05 24 thorough voir dire. And then he'll give you all an
04:05 25 opportunity to ask follow-up questions.

04:05 1 This Friday, the tech time is July 21st
04:05 2 at 3:00 p.m.
04:05 3 Does that mean they can all come in, or
04:05 4 does that mean -- yeah.
04:05 5 So as of 3:00 p.m., Friday, you all are
04:05 6 welcome to come here. Jen or Nolan or whoever can get
04:06 7 you, if you don't have it, the number of Blake and our
04:06 8 technical people in case you have any issues. They'll
04:06 9 be available to you.
04:06 10 I will assure you juries do not like
04:06 11 technical stuff that doesn't work. So that's why
04:06 12 you'll have as much time Friday as you need to do that.
04:06 13 For our exhibit system, we have JERS,
04:06 14 J-E-R-S. You will use Box.com to upload files for
04:06 15 JERS. Do not include any special characters in your
04:06 16 file names. Do not upload all of your files at once or
04:06 17 you'll find out when the jury's about to depart that
04:06 18 you didn't upload anything. And you have not
04:06 19 successfully uploaded until you receive a success
04:06 20 message on the Box.com site.
04:06 21 There are no physical exhibits. And
04:06 22 so -- and so what I do with source code is --
04:07 23 Will there be source code in this case?
04:07 24 Okay. So I'm going to submit -- let's
04:07 25 say Mr. Whitehurst wants to put in -- has an expert on

04:07 1 and he wants to talk about source code. To the extent
04:07 2 the witness talk -- and the person proffering -- the
04:07 3 person asking questions needs to make very clear which
04:07 4 portions of the source code is being used, because that
04:07 5 portion will go back under seal to the jury. It's
04:07 6 going to go back. Y'all will have to figure out a way
04:07 7 to do it. I don't know if they've been using PDFs or
04:07 8 what they've been doing, but the jury gets whatever
04:07 9 source code the expert directly talked about. And not
04:07 10 like all of it, just the tiny portion they talked
04:07 11 about.
04:07 12 Your final JERS list must be signed off
04:07 13 on before the trial on the due date. E-file the final
04:07 14 exhibit list, if you've not done so. Any changes
04:07 15 between the Box.com due date and the start of trial
04:08 16 will have a separate Box link provided by our wonderful
04:08 17 courtroom deputy, the greatest in the world, Jen.
04:08 18 Any exhibits changed after 8:00 a.m. on
04:08 19 the day of trial must be in the form of a motion. The
04:08 20 JERS approval list for each day of trial is by
04:08 21 8:00 a.m. the next day.
04:08 22 So with regard to your opening arguments
04:08 23 and the use of PowerPoints during trial, you exchange
04:08 24 those in the normal manner that -- you know, night
04:08 25 before, whatever is sufficient. But -- or whatever you

04:08 1 agree to, that's fine. Closing arguments, there's no
04:08 2 exchange of trial slides.
04:08 3 I'm going to say this: You all are going
04:08 4 to ignore it, she's going to get angry, but I'm going
04:08 5 to say it so she doesn't get angry at me. Every time
04:08 6 you stand up and start talking to me, turn your
04:08 7 microphone on or Kristie can't hear you. And if she
04:08 8 doesn't -- can't hear you, she will be certain to let
04:08 9 you know.
04:09 10 Also, anything that you're going to use
04:09 11 in -- during the trial, whether it's slides,
04:09 12 demonstratives, whatever you're going to use, you have
04:09 13 to e-mail her a copy of it so that she has it in
04:09 14 advance of it being used.
04:09 15 Now, you all suffer from the fact that
04:09 16 you're the first trial after the last trial I had so
04:09 17 whatever I was unhappy about in the last trial -- which
04:09 18 I -- was a mistrial. In that trial, which was a sexual
04:09 19 harassment case where the plaintiff had a physical
04:09 20 object that he showed to the witness before he asked if
04:09 21 it could be admitted and which he had never shown to
04:09 22 the other side, and which wasn't a trial exhibit.
04:09 23 That's not the way it works.
04:09 24 We don't show things to the jury
04:09 25 without -- now, let me say, if Mr. Jones tells the

04:09 1 other side in advance -- you know, so it's easier. He
04:10 2 says, Hey, during this we're going to be showing this.
04:10 3 You know, obviously if you've told the other side ahead
04:10 4 of time, We're going to do this, and it's not a
04:10 5 surprise, y'all are welcome to do whatever you want in
04:10 6 that regard. But if one side shows something to the
04:10 7 jury and the other side says, We didn't know they were
04:10 8 going to show it and we've never seen it, then I'll be
04:10 9 equally unhappy in this trial.
04:10 10 MR. LUMISH: May I ask a question, Your
04:10 11 Honor?
04:10 12 THE COURT: Sure.
04:10 13 MR. LUMISH: Does that go to cross as
04:10 14 well as direct?
04:10 15 THE COURT: So you -- no. But you can't
04:10 16 show it to the jury on cross before -- you know, we
04:10 17 have -- that's why there are monitors. You don't have
04:10 18 to show them anything.
04:10 19 I'm saying you get around the "it can't
04:10 20 be shown until it's admitted" if the other side knows
04:10 21 it was coming and they say good on you. That -- you
04:10 22 know, like, if you want to show -- I don't know if
04:10 23 plaintiffs will want to show an actual copy of the
04:10 24 patent. We'll probably put a copy in as the exhibit,
04:11 25 but I'm -- if you will tell the other side -- I'm sure

04:11 1 the other side's seen the patent, and if you'll just
04:11 2 let them know, We'd like to show the jury the patent, I
04:11 3 doubt there's -- that's absolutely fine.
04:11 4 It's something that neither side -- that
04:11 5 one side hasn't seen. I don't want surprises because
04:11 6 then I don't know how to fix them once the jury has
04:11 7 seen them.
04:11 8 Let's see.
04:11 9 Oh, this is very important. And it
04:11 10 drives me crazy. And it's mainly -- it's both sides'
04:11 11 fault, but it's mainly to protect the defendant. I'll
04:11 12 pick on Mr. Whitehurst. Mr. Whitehurst is on direct of
04:11 13 his expert, and he says, We need to go on the
04:11 14 confidential record because we're going to put some of
04:11 15 the defendant's stuff on there. And then we wake up an
04:11 16 hour later and we're still on the confidential record
04:11 17 because no one has remembered --
04:11 18 Now, I've given this lecture, Mr. Jones
04:11 19 can tell you, 100 times; and every time it seems to get
04:11 20 worse where no one pays attention. And I've thought,
04:12 21 well, then I just won't let people go on the
04:12 22 confidential record, but that's not fair to the
04:12 23 defendant. Mostly it will be your stuff that -- that's
04:12 24 not fair.
04:12 25 So if I have to keep reminding one side

04:12 1 or the other to -- that we -- to go back on the public
04:12 2 record -- people are listening to these trials. I
04:12 3 think they -- we need to be transparent, people need to
04:12 4 get to hear them. If it becomes a pattern -- I think
04:12 5 it's a pattern where you are forgetting to go back on
04:12 6 the public record, the only tool I have is to reduce
04:12 7 the amount of time you have. And that's what I will
04:12 8 do.
04:12 9 You'll each have 90 lawyers. One of
04:12 10 them, their task needs to be -- because I don't know
04:12 11 when it's, you know, y'all -- and I'm not telling you,
04:12 12 you can't be on the -- you know, Mr. Whitehurst can
04:12 13 say, Now, Judge, it may not seem it, we're still on the
04:12 14 confidential record because I'm getting into this.
04:12 15 I'm not telling you you can't do it, I'm
04:12 16 just saying I have repeatedly had problems. This is
04:13 17 probably the issue I've had the biggest problem with.
04:13 18 Discovery issues do not come up in front
04:13 19 of the jury, and here's what I mean by that, is -- I
04:13 20 don't know which side to pick on, but I'll pick on,
04:13 21 again, Mr. Jones. You know, he doesn't get to ask the
04:13 22 witness, Well, you didn't give us that during
04:13 23 discovery, you know, if you have that, you didn't give
04:13 24 us -- now, there may be issues you have where someone
04:13 25 didn't get something during discovery, and I'll -- I'm

04:13 1 happy to take them up at the bench, and if there's
04:13 2 something we need to do, I'll take care of it.
04:13 3 But the issue of what was produced and
04:13 4 not produced during discovery is not something -- now,
04:13 5 again, last trial where they were handing a very
04:13 6 offensive object to the witness and the other side has
04:13 7 to say, Judge, we've never seen it before, there's
04:13 8 really no way around that. You know, it's not good.
04:13 9 But by and large, the jury doesn't know
04:13 10 about discovery battles. You can address them with me
04:13 11 and I will deal with them.
04:14 12 I'm going to tell you, only because I
04:14 13 went and watched Judge Gilliland's trial yesterday, you
04:14 14 need to know how to impeach a witness using a
04:14 15 deposition. I can tell you as recently as yesterday, I
04:14 16 saw a lawyer do a five-hour cross. I was only there
04:14 17 for about five minutes of it because I couldn't take
04:14 18 it. But I don't think he'd ever been to a school where
04:14 19 they taught how to use a deposition. And Judge
04:14 20 Gilliland's nice and he didn't say anything.
04:14 21 I'm not nice, and I will say something,
04:14 22 so just know how to use a deposition to impeach. I'm
04:14 23 sure there's something on Google that can tell you how,
04:14 24 or YouTube, if you don't know.
04:14 25 Generally speaking, whenever we start,

04:14 1 we -- like on Tuesday, we'll probably start at 8:30.
04:14 2 I'll be here 15 minutes, 20 minutes early and I'll take
04:14 3 up whatever issues outside the presence of the jury if
04:14 4 we need to.
04:15 5 What time did you tell them to have the
04:15 6 jury charge to us? Have you said?
04:15 7 So I'd like to have your jury charge,
04:15 8 proposed jury charge to us by the end of this workweek.
04:15 9 Y'all are in trial Monday, right?
10 MR. LUMISH: No.
04:15 11 THE COURT: Oh, is that --
04:15 12 MR. LUMISH: The following Monday.
04:15 13 THE COURT: Following Monday. Okay. A
04:15 14 week -- sorry.
04:15 15 A week from Friday. I've got a trial
04:15 16 next week too, so -- a week from Friday at 5 o'clock.
04:15 17 And I'll tell you, I'll stop if you all know how to do
04:15 18 it, with the red and blue. If you don't -- if you've
04:15 19 done it before, I won't go into it; if you haven't, I
04:15 20 will.
04:15 21 So I'll go ahead and tell you. Here's
04:15 22 what I expect you to submit. Now, number one, I think
04:15 23 we've had at least two dozen patent trials. If someone
04:15 24 tries to persuade me I need to give a different
04:15 25 instruction on what validity is, it's not going to

04:15 1 work. So what I expect you to do is to take one of any
04:16 2 of the number of charges I've done, and if there's
04:16 3 something special in this case, there's an issue that
04:16 4 is unique to this case, if there's, you know, something
04:16 5 with regard to, you know, filing date or something -- I
04:16 6 mean, something unique, then -- the plaintiffs are red,
04:16 7 defendants are blue.
04:16 8 If the plaintiff wants something in there
04:16 9 the defendant doesn't agree to, they put it in red. If
04:16 10 the defendant wants something in there the plaintiff
04:16 11 won't agree to, they put it in blue. There's no reason
04:16 12 why after we get it y'all can't continue to negotiate
04:16 13 and narrow the issues.
04:16 14 But when we get together at the jury
04:16 15 charge, I'm going to turn to whichever pages have color
04:16 16 on them and ask -- in this case if there's something
04:16 17 red, I'll ask the defendant, Why don't you want it?
04:16 18 And then I'll decide whether it's in or out. And also,
04:17 19 you know, occasionally things change during trial. You
04:17 20 know, claims are dropped or validity's dropped or
04:17 21 something.
04:17 22 And so keep in mind that, that by the
04:17 23 time I get to the jury charge, if something is
04:17 24 substantively changed that changes the charge, you
04:17 25 know, come prepared at the jury charge conference.

04:17 1 I only need the people who need to be
04:17 2 there for the jury charge. I don't need an army of
04:17 3 lawyers. Anyone's welcome, but, you know, if -- I'm
04:17 4 going to schedule it whenever I schedule it. So
04:17 5 Mr. Whitehurst, for example, doesn't need to be there
04:17 6 because he's the -- one of -- I think the lead trial
04:17 7 lawyer, but I'm saying he doesn't need to be there for
04:17 8 that. You're welcome. But if you're getting ready for
04:17 9 your next witness, you -- that's fine with me too.
04:17 10 I think that's everything I can think of.
04:17 11 We usually go till at least 5:30, and we go a little
04:18 12 bit longer.
04:18 13 My rules on communicating with witnesses
04:18 14 is -- with one exception per side, which I'll get to in
04:18 15 a second -- as long as the witness is on direct, you
04:18 16 can speak to them if we're at break. If cross has
04:18 17 begun, you cannot speak to them.
04:18 18 With one exception: Each side will have
04:18 19 a corporate representative, and whoever that corporate
04:18 20 rep -- you only get one and it doesn't get to change,
04:18 21 but whoever -- your corporate representative is the
04:18 22 person who you have to speak to during the trial
04:18 23 because that's kind of the role that that person plays.
04:18 24 I don't care where we're at in the trial. I'm not
04:18 25 going to interfere with your ability as a lawyer to

04:18 1 speak to your client.
04:18 2 So you'll have one person. Sometimes it
04:18 3 matters and that person happens to be on the stand.
04:18 4 Most times it doesn't, but they're -- that one person,
04:18 5 the rule about not speaking to them on cross doesn't
04:18 6 apply. You can speak to that person any time during
04:19 7 the trial.
04:19 8 Okay. Now, any questions about how I do
04:19 9 things before I get to the motions in limine?
04:19 10 MR. WHITEHURST: No, Your Honor.
04:19 11 THE COURT: Okay. Plaintiff's Motion in
04:19 12 Limine No. 1: Preclude any argument, evidence,
04:19 13 et cetera, regarding IPLC's, Vervain's, or
04:19 14 Greenthread's efforts to monetize the asserted patents
04:19 15 that did not result in an executed agreement.
04:19 16 Generally speaking, I'm going to grant
04:19 17 that. However, I don't know what either side's damages
04:19 18 expert is going to say. I don't know why it would
04:19 19 be -- something like that would be admissible if it's
04:19 20 not a license that was executed, but...
04:19 21 So No. 2: To preclude any evidence of
04:19 22 unelected prior art, including reference to WD or
04:19 23 third...
04:20 24 So other than what we have discussed
04:20 25 already at this hearing, I'm denying this particular

04:20 1 motion in limine because it is superceded on both sides
04:20 2 by my rule concerning the -- what's in an expert
04:20 3 report. So it's too late for me now, if we haven't
04:20 4 done it yet, to figure out what was in either side's
04:20 5 preliminary contentions and whether you all are
04:20 6 sticking to those.
04:20 7 But with regard to when the plaintiff
04:20 8 puts on their technical expert, for example, I'll
04:20 9 pretend Mr. Whitehurst is doing it. Mr. Whitehurst
04:20 10 puts on the infringement expert and asks him a
04:20 11 question. If there's an objection from the other side
04:20 12 that's outside the scope, I will have -- I will expect
04:20 13 Mr. Whitehurst to be able to say, Judge, that's not
04:20 14 right. Because he will have a key next to the question
04:20 15 where he says -- where he has written down it comes
04:21 16 from Page 321, Paragraph 8.
04:21 17 Now, it doesn't have to be a quote. It
04:21 18 just -- you have to -- Mr. Whitehurst will have to be
04:21 19 able to persuade me that what's on that page gave the
04:21 20 other side notice that the witness was going to give
04:21 21 this information to the jury.
04:21 22 Now, what happens pretty routinely is
04:21 23 Mr. Whitehurst is a good lawyer, but the lawyer on the
04:21 24 other side is also a good lawyer. So that person will
04:21 25 cross the expert and not necessarily feel limited to

04:21 1 what's in their expert report. He'll just ask him
04:21 2 questions.
04:21 3 And then Mr. Whitehurst will get back up
04:21 4 and say to the expert, on cross, you were asked this.
04:21 5 And the other side will say, Judge, it's not in his
04:21 6 report.
04:21 7 Well, that doesn't work. If on cross,
04:21 8 you ask an expert about something that's not in their
04:21 9 report, well, then you've opened the door on that issue
04:21 10 to the expert being allowed to explain his answer.
04:22 11 You don't get to beat someone up and then
04:22 12 say it's not in their report. So remember that.
04:22 13 Okay. Motion in Limine No. 3, preclude
04:22 14 any improper reference noninfringing alternatives,
04:22 15 including undisclosed...
04:22 16 Okay. Again, I'm denying this, but it's
04:22 17 superceded by whatever is in the report. And if
04:22 18 something hasn't been raised already that would fall in
04:22 19 this bucket, it's too late now. But the -- certainly
04:22 20 nothing will come in that's not in a report.
04:22 21 No. 4, to preclude any argument,
04:22 22 evidence, et cetera, that Vervain had an obligation to
04:22 23 contact or notify Western Digital prior to filing suit.
04:22 24 The way that's phrased, I am going to
04:22 25 grant it. There was -- now, the fact -- I don't know

04:22 1 whether they did or not. The fact that they didn't,
04:23 2 for example, is a fact and that's okay.
04:23 3 But the fact whether or not -- but they
04:23 4 didn't have an obligation, and it shouldn't be
04:23 5 insinuated that they did. But anything that's a fact
04:23 6 is a fact, and you can certainly bring that up.
04:23 7 MIL No. 5. Okay. Preclude expert
04:23 8 testimony from any lay witness, including WD employees.
04:23 9 Again, the way I see it is all of the
04:23 10 fact witnesses are fact witnesses. If the defendant in
04:23 11 this case, for example, wants to put an engineer on who
04:23 12 is going to explain the functionality of the product,
04:23 13 because they're an engineer and they wrote the code or
04:23 14 they know how it works, they get to do that.
04:23 15 They don't get to answer questions like,
04:23 16 you know, do we infringe or do we not infringe or stuff
04:23 17 like that. They don't get to give expert opinions.
04:23 18 Exclude any golden rule argument or...
04:24 19 I've not heard this motion in limine, so -- oh, this
04:24 20 is -- this is Western Digital's motion. Okay. Exclude
04:24 21 any golden rule arguments or suggestions the jurors
04:24 22 should put themselves in Dr. Rao's or Vervain's
04:24 23 position and do unto them as they would have done unto
04:24 24 themselves.
04:24 25 I have never heard that before. I don't

04:24 1 think it would be -- I don't think it would be well
04:24 2 received by me, though, if someone did that. And so
04:24 3 I'm going to grant that.
04:24 4 So No. 2, exclude any evidence, argument,
04:24 5 et cetera, that Dr. Rao's decade's old work with Jack
04:24 6 Kilby and work at Smithsonian...
04:24 7 I'm going to deny that. Dr. Rao gets to
04:24 8 talk about whatever he did that's relevant, and the
04:24 9 folks at Western Digital get to talk about whatever
04:24 10 they've done in terms of creating their own technology
04:25 11 and all that stuff.
04:25 12 So now, there's a point, you know, under
04:25 13 Rule 402 where if someone said -- I think, you know,
04:25 14 three hours of that seems like a lot. But I think each
04:25 15 side should -- their witnesses should get to give a
04:25 16 background. I've given you time limits.
04:25 17 And so, No. 3, exclude any evidence,
04:25 18 argument, et cetera, that Western Digital had pre-suit
04:25 19 notice of the asserted patents.
04:25 20 Does the plaintiff plan to suggest they
04:25 21 had pre-suit notice?
04:25 22 MR. QUIGLEY: Plaintiff plans to --
04:25 23 sorry, Your Honor. James Quigley of McKool Smith for
04:25 24 plaintiff Vervain.
04:25 25 Not planning to raise the issue, you

04:25 1 know, in terms of having notice, but do plan to raise
04:25 2 the issue that Western Digital's patents cited
04:26 3 Vervain's, for instance --
04:26 4 THE COURT: That's not going to come in.
04:26 5 MR. QUIGLEY: Thank you, Your Honor.
04:26 6 THE COURT: Okay. That's -- you know, if
04:26 7 you have an inventor from Western Digital who said he
04:26 8 knew of your patent, that'd be something. But, you
04:26 9 know, who knows who included that patent in any patent
04:26 10 application that they had.
04:26 11 So that won't come in. So I'm going to
04:26 12 grant that motion.
04:26 13 Next up, exclude any evidence or
04:26 14 suggestion regarding alleged copying.
04:26 15 Is there going to be any evidence of
04:26 16 copying in this case?
04:26 17 Hard to imagine if they were unaware of
04:26 18 the patent, but...
04:26 19 MR. QUIGLEY: No, Your Honor.
04:26 20 THE COURT: Okay. That will be granted.
04:26 21 Next up, evidence, et cetera, that
04:26 22 Western District (sic) manufactures the accused
04:26 23 products outside of the United States.
04:26 24 I'm not sure why that that'd be relevant.
04:26 25 I'm not sure why it would be prejudicial. I'm not sure

04:26 1 why anyone cares.

04:27 2 Yes, ma'am.

04:27 3 MS. TRUELOVE: Good afternoon, Your

04:27 4 Honor. Jennifer Truelove with McKool Smith for

04:27 5 plaintiff.

04:27 6 The fact that these products are imported

04:27 7 into the United States is part of infringement. We

04:27 8 should be able to testify. We have the burden of that

04:27 9 proof. And --

04:27 10 THE COURT: Do you -- let me -- is the

04:27 11 defendant going to argue in some way that they

04:27 12 aren't -- I mean, is there an issue that we're fighting

04:27 13 over here?

14 MR. GROSS: Yes, Your Honor. I think

15 there is.

04:27 16 Good afternoon. Gabe Gross for Western

04:27 17 Digital.

04:27 18 THE COURT: Mr. Gross, it's been a long

04:27 19 time since I've seen you. It's good to see you again.

04:27 20 MR. GROSS: Nice to see you too, Your

04:27 21 Honor. Thank you.

04:27 22 The theory we just heard about proving

04:27 23 infringement up through importation was never

04:27 24 disclosed. It's not in the infringement contentions.

04:27 25 The expert witnesses, in particular

04:27 1 Ms. Schenk, the plaintiff's damages expert witness,
04:27 2 conceded at her deposition that she's only considered
04:27 3 U.S. sales. They have the information they need to
04:27 4 prove U.S. sales.
04:27 5 What we're concerned about here and I
04:27 6 think other courts have expressed concern about is that
04:28 7 pointing to specific foreign Asian countries as sources
04:28 8 of manufacturing when that's not relevant to the
04:28 9 infringement theory would be prejudicial.
04:28 10 THE COURT: I can't imagine why it would
04:28 11 be relevant. And I'm missing -- they're not -- I don't
04:28 12 hear them saying that -- I mean, you're not going to
04:28 13 argue that -- you gave them the number on U.S. sales,
04:28 14 right?
04:28 15 MR. GROSS: Yes, Your Honor.
04:28 16 THE COURT: And is there a difference
04:28 17 between U.S. sales and something you need to prove?
04:28 18 MS. TRUELOVE: No. I think this goes
04:28 19 under what Your Honor said earlier, is it's a fact.
04:28 20 You know, it's a fact, a fact. That that's --
04:28 21 THE COURT: But why does it matter?
04:28 22 MS. TRUELOVE: Because those products are
04:28 23 made and then sold in the United States.
04:28 24 THE COURT: But they're sold in the
04:28 25 United States, so they infringe. And they're not

04:28 1 fighting that they're sold. So I don't understand
04:28 2 what -- why you care whether they're imported or not.
04:28 3 It's not an issue -- it doesn't go to --
04:28 4 it doesn't go to infringement, because if they're sold
04:28 5 here, then they infringe. And that's the quantum that
04:28 6 you have.
04:28 7 MS. TRUELOVE: Understood, Your Honor.
04:29 8 THE COURT: Okay. Thank you.
04:29 9 MR. GROSS: Thank you, Your Honor.
04:29 10 THE COURT: Now, let me say again -- and
04:29 11 I won't remember this by the time we are at trial, but
04:29 12 if -- y'all will. But if it were to come up -- if
04:29 13 suddenly during trial Western Digital -- I'm just
04:29 14 making this up, but Western Digital said, oh, Judge,
04:29 15 they haven't put on -- directed verdict. They didn't
04:29 16 put on evidence they weren't imported. That might be a
04:29 17 problem.
04:29 18 My understanding is that Western
04:29 19 Digital's not contesting that -- assuming there's
04:29 20 infringement and assuming there's no invalidity, that
04:29 21 the number of units that they are claiming damages on
04:29 22 are all infringing.
04:29 23 I'm assuming -- I'm not saying they're
04:29 24 infringing, but you're not fighting whether or not they
04:29 25 should be subject to the damage model, right?

04:29 1 MR. GROSS: Your Honor, if I understand
04:29 2 the Court's question, I think the U.S. sales that the
04:30 3 experts --
04:30 4 THE COURT: That's what I'm saying.
04:30 5 MR. GROSS: -- have done their damages
04:30 6 analysis on are facts that they've both been able to
04:30 7 rely on. And that's my understanding of both sides'
04:30 8 damages model. So I don't expect an issue about
04:30 9 foreign sales or --
04:30 10 THE COURT: No, no. There will be
04:30 11 nothing about foreign sales, and there's nothing about
04:30 12 importation.
04:30 13 MR. GROSS: That's my understanding, Your
04:30 14 Honor.
04:30 15 THE COURT: Because the sale is
04:30 16 sufficient to get liability.
04:30 17 MR. GROSS: All right. Thank you, Your
04:30 18 Honor.
04:30 19 THE COURT: I got that.
04:30 20 Okay. Next up I have No. 5, evidence,
04:30 21 et cetera, that the accessed -- I'm sorry -- accessed
04:30 22 most frequently and frequent write limitation, blah,
04:30 23 blah, blah.
04:30 24 I already took this up in the earlier
04:30 25 motions, did I not?

04:30 1 I mean -- well, let me start over. When
04:30 2 I read this, this is a Daubert motion and I'm going to
04:30 3 deny it.
04:30 4 So I know y'all run out of -- I know you
04:30 5 run out of room on your Dauberts, but...
04:30 6 Next, agreed upon motions -- oh, these
04:30 7 are all agreed upon?
04:31 8 Then they are all granted.
04:31 9 MR. LUMISH: Your Honor, we --
10 THE COURT: Yes, sir.
11 MR. LUMISH: Sorry. Thank you.
04:31 12 One point of clarification, Your Honor.
04:31 13 I heard what you said about engineering -- this is on
04:31 14 Vervain's Motion in Limine 5.
04:31 15 THE COURT: Okay.
04:31 16 MR. LUMISH: Your Honor said that
04:31 17 engineers can explain the functionality of a product.
04:31 18 They can't testify that they don't infringe as an
04:31 19 example. I didn't hear if Your Honor said you were
04:31 20 granting or denying the motion --
04:31 21 THE COURT: I'm denying their motion.
04:31 22 MR. LUMISH: Thank you, Your Honor.
04:31 23 MR. QUIGLEY: Your Honor --
04:31 24 THE COURT: Because -- well, I'm --
04:31 25 actually, I'm granting. They cannot give expert

04:31 1 testimony.
04:31 2 MR. LUMISH: Okay.
04:31 3 THE COURT: The way it's framed, I'm
04:31 4 granting it. They cannot give expert testimony, but
04:31 5 they can certainly give technical testimony that we --
04:31 6 in their purview as engineers, for example.
04:31 7 MR. LUMISH: Understood, Your Honor.
04:31 8 THE COURT: And I will not consider that
04:31 9 to be expert testimony.
04:31 10 MR. LUMISH: Thank you very much.
04:31 11 Appreciate the clarification.
04:31 12 THE COURT: No. Thank you for asking.
04:31 13 Yes, sir.
04:31 14 MR. QUIGLEY: Can we get clarification on
04:31 15 Vervain's Motion in Limine No. 1?
04:31 16 Your Honor granted it as to IPLC, but you
04:32 17 referenced, you know, maybe the experts talk about it.
04:32 18 Western Digital's expert Mr. Bakewell has
04:32 19 one paragraph in his background on Vervain where he
04:32 20 mentions IPLC. He doesn't use it as part of his
04:32 21 Georgia-Pacific analysis. It's not, you know, a
04:32 22 quantitative issue.
04:32 23 You know, we would ask that, you know,
04:32 24 just --
04:32 25 THE COURT: So generally speaking, it's

04:32 1 granted. I'm just going to grant it. If the defendant
04:32 2 wants to talk about something that's in that for some
04:32 3 reason, just approach the bench and I'll deal with it.
04:32 4 MR. GROSS: Yes, Your Honor.
04:32 5 THE COURT: I'll deal with it when I'm
04:32 6 here.
04:32 7 And so I was just -- there are
04:32 8 occasionally motions in limine where they're pretty
04:32 9 broad motions and there may be something in a damages
04:32 10 report, for example, that would not run afoul.
04:32 11 But the motion's granted and they can
04:32 12 approach the bench and I'll take it up when I hear on
04:32 13 whatever I hear at the bench.
04:32 14 I think that -- I think that's all we
04:32 15 have, but I'll start with plaintiff.
04:32 16 Is there anything else that you want to
04:33 17 ask about how I do things or that I didn't take up?
04:33 18 MR. WHITEHURST: No, Your Honor. This
04:33 19 has been very helpful. And we have no additional
04:33 20 issues to raise at this time.
04:33 21 MR. LUMISH: Nothing for defendant, Your
04:33 22 Honor.
04:33 23 THE COURT: Thank you all for being here.
04:33 24 I look forward to seeing you in a week.
04:33 25 (Hearing adjourned.)

UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 13th day of July 2023.

/s/ Kristie M. Davis
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04:33