

2012-1018

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

BRILLIANT INSTRUMENTS, INC.

Plaintiff-Appellee,

v.

GUIDETECH, LLC,

Defendants-Appellants

Appeal From the United States District Court for the
Northern District of California in Case No. 09-CV-5517,
Judge Claudia Wilken

MOTION FOR SUMMARY AFFIRMANCE

Plaintiff-Appellee Brilliant Instruments, Inc. ("Brilliant") respectfully moves for summary affirmance of the district court's decision granting Brilliant summary judgment of noninfringement. Summary affirmance "is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists." *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Here, GuideTech, LLC ("GuideTech") has filed an appeal brief with an argument section that is

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a verbatim copy of the argument advanced in a reconsideration brief GuideTech previously filed in district court. The narrow reconsideration brief raised two issues of no merit. Summary affirmance is appropriate to conserve the time, effort, and resources of this Court and of Brilliant.

BACKGROUND

1. Brilliant filed this action seeking a declaration that its products—time interval analyzers used for testing integrated circuits—do not infringe seven patents owned by GuideTech.¹ Time interval analyzers are instruments used in the semiconductor industry to detect timing errors in integrated circuits. Addendum (“Add”) 2. The errors can show up as anomalies in signal amplitude, phase, or pulse-width created by an integrated circuit. Add. 2. Although certain other testing instruments (*e.g.*, counters or oscilloscopes) can detect a timing error, time interval analyzers “monitor frequency changes and frequency

¹ The patents are U.S. patent Nos. 6,091,671 (the “671 patent”); 6,181,649 (the “649 patent”); 6,226,231 (the “231 patent”); 6,456,959 (the “959 patent”); 6,621,767 (the “767 patent”); 6,999,382 (the “382 patent”); and 7,203,610 (the “610 patent”).

deviation over time.” Add. 2 (internal quotation marks and citation omitted). This helps a user detect the source of the timing error. Add. 2.

Shalom Kattan is the owner of Brilliant, a small company with a single full-time employee (Kattan) that averages about \$300,000 in annual revenues. Although Kattan is the named inventor on five of the seven patents, all of the patents are now owned by GuideTech.² Ronen Sigura claims ownership of GuideTech. After GuideTech, represented by Kilpatrick Townsend & Stockton LLP (“Kilpatrick Townsend”), counterclaimed for patent infringement, Brilliant added Sigura as a defendant, charging him with intentional interference with prospective economic advantage and other state-law torts. *See* Add. 3.

2. The district court granted Brilliant’s motion for summary judgment of noninfringement. Add. 31–32. Before resolving the summary judgment motion, the district court construed certain claim terms.

² The patents were originally assigned to a prior Kattan company, Guide Technology, Inc., and Guide Technology Inc. later sold the patents to GuideTech.

The court agreed with Brilliant that the phrase “defined within a signal channel,” *see, e.g.*, Add. 6–7 (claim 1 of the ’231 patent), means a “component of only one signal channel.” Add. 7. The court found that the Brilliant construction “captures the notion that measurement circuits are contained within a particular signal channel.” Add. 7. “This understanding is supported by the claim language and Figure 1, which shows that measurement circuits, comprised of a comparator, multiplexer and interpolator, are located within a given signal channel.” Add. 7. The court construed the phrase to mean “contained within a signal channel.” Add. 8.

The court agreed with GuideTech that the phrase “operatively disposed in parallel” means “as arranged in a manner capable of forming alternative paths of current such that current can flow across one or the other path.” Add. 11.

Relying on these two claim constructions, the district court granted Brilliant’s motion for summary judgment of noninfringement. *See* Add. 15–19.

First, the court ruled that the accused products do not infringe the ’231 patent because the products do not have a plurality of

measurement circuits within each signal channel. Add. 15–16.

GuideTech had emphasized that the products can perform a “one-channel-two-edge” function that requires use of two “timetagging” measurement circuits. *See* Add. 16. In effect, GuideTech argued that because a channel at times used the measurement circuit of a second channel, the channel contained two measurement circuits. *See* Add. 16. The court rejected that argument. Even if the products use two measurement circuits, the court explained that “it does not follow that both measurement circuits are contained within a single channel.” Add. 16.³ The court rejected GuideTech’s invocation of the doctrine of equivalents because doing so “would vitiate entirely the limitation that measurement circuits be contained within a single channel.” Add. 17.

Second, the court ruled that the accused products do not infringe the ’671 patent because the products do not include a shunt and a capacitor “operatively disposed in parallel with respect to said first

³ The court noted that GuideTech’s expert, Dr. West, described the BI200 product as having at least two measurement circuits “within either signal channel.” Add. 16. GuideTech’s expert, however, “does not contend that the measurement circuits are contained within a given channel.” Add. 16.

current circuit.” Add. 17. The court noted that “GuideTech does not dispute that [Dr.] West indicated that, in the [accused product], the capacitor is *part of* the first current circuit.” Add. 17 (emphasis added). “[Dr.] West’s testimony that the capacitor is part of the first current circuit precludes a finding of infringement, either literally or under the doctrine of equivalents.” Add. 18.

As to the remaining five patents, the court noted that for four (the ’959, ’767, ’382, and ’610), GuideTech did not oppose dismissal, Add. 14, and as to one (’649), the reasoning of the ’671 patent applied, Add. 18. By agreement of the parties, Brilliant’s state law claims were dismissed so that they could be consolidated with a state court action brought by GuideTech.

3. GuideTech filed a motion “for leave to file a motion for reconsideration of order granting summary judgment of noninfringement” (hereinafter “Motion for Reconsideration” or “Motion”). *See generally* Add. 20–29. GuideTech cited Civil Local Rule 7-9(b)(3), *see, e.g.*, Add. 20–21, which provides for reconsideration if there is “[a] manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court”

GuideTech argued that the court had “overlooked evidence in the record that shows that Dr. West did in fact contend that two measurement circuits are contained within a given signal channel.” Add. 21. The Motion also argued that “nothing in the claims or the Court’s claim construction prevents the measurement capacitor from being both part of the first current circuit and operatively disposed in parallel with the shunt with respect to the first current circuit.” Add. 24.

The court denied GuideTech’s Motion, explaining that “[t]he portions of Dr. Burnell G. West’s report and the BI200 Datasheet cited by Defendants were considered by the Court when it ruled on Brilliant’s motion for summary judgment.” Add. 30.

4. Kilpatrick Townsend initially represented GuideTech on appeal. Mr. Herhold and Mr. Artuz, both of Kilpatrick Townsend, filed entries of appearances on behalf of GuideTech. Mr. Chin, also of Kilpatrick Townsend, wrote Brilliant a letter complying with Fed. Cir. Rule 30(b)(2), indicating that the issues on appeal were “whether the district court correctly construed the asserted claims,” “whether the district court correctly applied these constructions to the accused products,” and “whether the district court correctly granted summary

judgment of noninfringement.” Add. 33.

GuideTech subsequently moved to withdraw Kilpatrick Townsend as counsel of record. Motion to Withdraw, *Brilliant Instruments v. GuideTech*, 2012-1018 (Fed. Cir. Nov. 21, 2011), ECF No. 14. The motion to withdraw was granted. Order, *Brilliant Instruments v. GuideTech*, 2012-1018 (Fed. Cir. Dec. 7, 2011), ECF No. 17. Einav Cohen, from the Law Offices of Einav Cohen, entered an appearance as counsel of record for GuideTech. GuideTech’s brief is signed only by Ms. Cohen. As explained below, the argument section of GuideTech’s opening appeal brief is a verbatim copy of the Motion for Reconsideration filed by Kilpatrick Townsend.

ARGUMENT

Summary affirmance “is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.” *Joshua*, 17 F.3d at 380 (discussing Fed. R. App. P. 2 (“expediting decision”) and collecting cases from other circuits). This Court will grant summary affirmance motions in patent cases. *See, e.g., Hemphill v. Kimberly-Clark Corp.*, 335 Fed. App’x. 964 (Fed. Cir. 2008); *see generally*

Handbook of Practice and Internal Procedures United States Court of Appeals for the D.C. Circuit, at 28 (“Parties are particularly encouraged to file dispositive motions where a sound basis exists for summary disposition. The result can be a major savings of time, effort, and resources for the parties, counsel, and the Court.”).

There is no substantial question regarding the outcome of this appeal. By refiling its district court Motion for Reconsideration as its opening brief, GuideTech waived all issues except for the two narrow issues raised on reconsideration. As explained below, the district court properly rejected that Motion because the two issues lack merit. To conserve the resources of this Court and of Brilliant, summary affirmance is warranted.

**I. SUMMARY AFFIRMANCE IS APPROPRIATE
BECAUSE GUIDETECH’S APPEAL BRIEF ONLY
REITERATES TWO MERITLESS RECONSIDERATION
ARGUMENTS**

**A. GuideTech’s Opening Brief Waives All But Two
Reconsideration Arguments**

The argument section of GuideTech’s opening brief to this Court is an exact duplication of the brief GuideTech filed in district court at the reconsideration stage. More precisely, the entire argument section of the appeal brief, Br. 10–19, repeats verbatim the legal argument

contained in the Motion for Reconsideration, Add. 21–27. Indeed, the pages contain the same two argument headings, the same blocks of quotes, the same images, and the same text. Simply put, the appeal brief is a “copy and paste” of GuideTech’s district court pleading.

As a result, the appeal brief is limited to two narrow issues. At the reconsideration stage, GuideTech was constrained to argue that the district court manifestly overlooked material facts or dispositive legal arguments. *See* Civ. L. R. 7-9(b)(3). Accordingly, the Motion for Reconsideration focused on showing that the district court failed to consider material facts and dispositive legal arguments (discussed below). The Motion did not, and could not, urge any other errors, such as errors in claim construction. *See generally* Add. 20–27.

By resubmitting its reconsideration pleading, GuideTech has elected not to advance any arguments beyond those narrow arguments appropriate at the reconsideration stage. Under settled Federal Circuit law, GuideTech waived all issues other than the reconsideration issues it briefed. *See, e.g., Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 607 F.3d 817, 833 (Fed. Cir. 2010) (“This court has consistently held that a party waives an argument not raised in its opening brief.”);

SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1319 (Fed. Cir. 2006) (“Our law is well established that arguments not raised in the opening brief are waived.”); *Optivus Tech., Inc. v. Ion Beam Applications S.A.*, 469 F.3d 978, 989 (Fed. Cir. 2006) (“[W]e consider [an] argument waived [if] it was not raised in [appellant]’s opening brief.”) (citing *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990)). That GuideTech elected to repurpose an earlier trial court pleading prepared by a different law firm is no ground for avoiding waiver. *Cf. Lavergne v. Concrete Sw., Inc.*, 899 F.2d 1228 (Fed. Cir. 1990) (rejecting effort to avoid waiver based on “change in counsel”).

B. The Two Reconsideration Arguments Are Meritless

In view of the manifest waiver, GuideTech can avoid summary affirmance only by showing that a substantial question exists concerning the two issues raised on reconsideration. It cannot. The two issues are meritless.

GuideTech’s first argument on appeal is that the district court failed to consider certain evidence in granting Brilliant summary judgment of noninfringement of the ’231 patent. On summary

judgment, Brilliant maintained that its products could not infringe the '231 patent because its products, *inter alia*, have only one measurement circuit within each signal channel, and thus did not fall within the limitation of the '231 patent for time interval analyzers with “a plurality of measurement circuits ***defined within a signal channel.***” See Add. 15 (quoting the '231 patent) (emphasis added). GuideTech never “offer[ed] evidence that each signal contains more than one measurement circuit,” maintaining only that Brilliant’s products nevertheless fell within the limitation of the '231 patent because the products “can perform a ‘one-channel-two-edge’ function, which requires [the] use of two ‘timetagging’ circuits.” Add. 16. The court found GuideTech’s arguments “unavailing.” Add. 16.

In considering GuideTech’s arguments and evidence on summary judgment—including the BI200 data sheet and report of its infringement expert, Dr. West—the district court held that even if the one-channel-two-edge function involves the use of two measurement circuits, “it does not follow that both measurement circuits are ***contained within a single channel.***” Add. 16 (emphasis added).

On appeal, GuideTech maintains, Br. 10–14, that the district court “overlooked” that the “one-channel-two-edge mode” meets the “defined within . . . said channel” limitation, citing Dr. West’s report and the BI200 datasheet. Specifically, GuideTech maintains, Br. 10–11—as it did in its Motion for Reconsideration, Add. 21–22—that the district court missed certain pages of Dr. West’s expert report indicating that the two measurement circuits are contained within a single signal channel when Brilliant’s products are operating with the one-channel-two-edge function. *See* Br. 10–11; Add. 21–22. But, on reconsideration, the district court explained that it had “considered” these very items. Add. 30 (“The portions of Dr. Burnell G. West’s report and the BI200 Datasheet cited by Defendants [in the Motion for Reconsideration] were considered by the Court when it ruled on Brilliant’s motion for summary judgment.”). Nothing in the appeal brief suggests otherwise. Written before the district court explained its ruling, GuideTech’s appeal brief provides no discussion of the district court’s sound rejection of its first reconsideration argument.

Moreover, the district court properly concluded that Brilliant’s products do not include a plurality of measurement circuits in a single

channel. Brilliant's products may at times use measurement circuits of a nearby signal channel. But, as the district court properly explained, borrowing of circuitry does not render the circuit "within" the same channel. *See* Add. 16.

GuideTech's second argument is that the district court did not consider certain evidence in granting Brilliant summary judgment of noninfringement of the '671 and '649 patent. This argument also is meritless.

On summary judgment, Brilliant maintained that its products did not infringe the '671 and '649 patents because its capacitor does not practice the patent claims of being "operatively disposed in parallel with respect to [the] first current circuit." Add. 17 (quoting the '671 patent); *see also* Add. 18 (discussing the '649 patent). The district court construed "operatively disposed in parallel" to mean "arranged in a manner capable of forming alternative paths of current such that current can flow across one or the other path." *See* Br. 14; Add. 9–11.⁴

⁴ Brilliant showed that its capacitor did not meet the limitation of the '671 and '649 patent for a capacitor "operatively disposed in parallel

Brilliant pointed out that the BI200 schematic shows the capacitor as part of what Dr. West identified as the first current circuit. Add. 17.

The district court noted that Dr. West “annotated” the BI200 schematic during his deposition and conceded that “the capacitor is part of the first current circuit.” Add. 17. As a result, the district court ruled that the capacitor is part of the first current circuit and thus cannot be on an alternative path on which the current flows from the first current circuit. Add. 17–18. Accordingly, the court held there could be no infringement by Brilliant. Add. 17–18.

On appeal, GuideTech merely repeats, verbatim, the argument it raised on reconsideration—that “nothing in the claims or the Court’s claim construction” “prevents” the capacitor “from being both” part of the first current circuit and “operatively disposed in parallel with the shunt with respect to the first current circuit,” and that the court “overlooked” evidence in Dr. West’s expert report opining on the same. *See* Br. 14–15; Add. 24. But that is not so. As explained above, the

with respect to [the] first current circuit.” Add. 17 (quoting the ’671 patent).

district court expressly recognized in its order denying reconsideration that it had considered all of “[t]he portions of Dr. Burnell G. West’s report and the BI200 Datasheet cited by Defendants” when the court granted Brilliant summary judgment of noninfringement. *See* Add. 30. What is more, the district court’s claim construction (not disputed here) forbids the capacitor from even having dual roles: the court explained that the capacitor could not be on an alternative path from the first circuit because it is part of the first circuit. Add. 17–18.


CONCLUSION

Summary affirmance is appropriate to conserve the time, effort, and resources of this Court and of Brilliant. GuideTech cannot prevail on this appeal. GuideTech has waived all arguments except for two arguments made at the reconsideration stage, and both of those arguments lack merit. Where an appellant files a brief that copies its district court reconsideration brief and in doing so reiterates two meritless issues, the full appellate briefing procedures are not appropriate. The judgment of the district court should be affirmed, and this appeal should be summarily dismissed.

Pursuant to Fed. Cir. R. 27(a)(5), undersigned counsel for Brilliant has discussed this motion with counsel for GuideTech. GuideTech opposes this motion and plans to file a response.

Dated: February 28, 2012

Respectfully submitted,



Mark S. Davies

Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 339-8400
Fax: (202) 339-8500
mark.davies@orrick.com

*Attorney for Appellee
Brilliant Instruments, Inc.*

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for
Appellee Brilliant Instruments, Inc., certifies the following:

1. The full name of the party represented by counsel of record is Brilliant Instruments, Inc.
2. The Entity identified above is the real party in interest.
3. No parent corporation or any publicly held company owns 10 percent or more of the stock of Brilliant.
4. The names of all law firms and the partners and associates that appeared for appellees in the trial court or are expected to appear in this Court are:

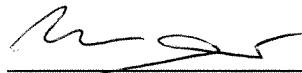
Thomas W. Lathram
Arthur J. Behil
Steve P. Hassid
Silicon Edge Law Group LLP
6601 Koll Center Parkway
Suite 245
Pleasanton, CA 94566

Mark S. Davies
Orrick, Herrington &
Sutcliffe LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005-1706

Mark Guidotti
P.O. Box 999
Saratoga, California 95071-0999

Date: February 28, 2012

By



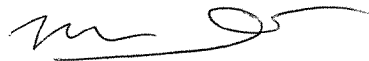
Mark S. Davies
*Attorney for Appellee
Brilliant Instruments, Inc.*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 28th day of February, 2012, two bound copies of the foregoing Appellee's Motion for Summary Affirmance were served by FedEx to the following:

Einav Cohen
Law Offices of Einav Cohen
1481 Falcon Court
Sunnyvale, California 94087
(408) 394-1648

Respectfully submitted,



Mark S. Davies

Orrick, Herrington & Sutcliffe LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 339-8400
Fax: (202) 339-8500
mark.davies@orrick.com

*Attorney for Appellee
Brilliant Instruments, Inc.*

ADDENDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRILLIANT INSTRUMENTS, INC.,
Plaintiff,
v.
GUIDETECH, INC., and RONEN SIGURA,
Defendants.

AND ALL RELATED COUNTERCLAIMS

No. C 09-5517 CW

ORDER ON CLAIM
CONSTRUCTION,
GRANTING BRILLIANT'S
MOTION FOR SUMMARY
JUDGMENT OF NON-
INFRINGEMENT AND
DENYING AS MOOT
GUIDETECH'S MOTION
FOR SUMMARY
ADJUDICATION ON THE
ISSUE OF ASSIGNOR
ESTOPPEL
(Docket Nos. 108 and
119)

Plaintiff and Counterclaim-Defendant Brilliant Instruments, Inc., and Defendant and Counter-Claimant GuideTech, Inc., seek construction of terms and phrases used in GuideTech's U.S. Patent Nos. 6,091,671 ('671 patent); 6,181,649 ('649 patent); and 6,226,231 ('231 patent) (collectively, Asserted Patents). In addition, Brilliant moves for summary judgment of non-infringement of the Asserted Patents and GuideTech's United States Patent Nos. 6,456,959 ('959 patent); 6,621,767 ('767 patent); 6,999,382 ('382 patent); and 7,203,610 ('610 patent). GuideTech opposes Brilliant's motion in part and cross-moves for summary adjudication that Brilliant is precluded, based on the doctrine of assignor estoppel, from asserting that the Asserted Patents are invalid. The matters were heard on June 2, 2011. Having considered oral argument and the papers submitted by the parties, the Court construes the terms and phrases as set forth below. In addition, the Court GRANTS Brilliant's motion for summary judgment of non-

1 infringement. Because the products at issue in this case do not
2 infringe the Asserted Patents, Brilliant lacks standing to bring
3 invalidity counterclaims and they are dismissed for lack of subject
4 matter jurisdiction. GuideTech's cross-motion for summary
5 adjudication on the issue of assignor estoppel is DENIED as moot.

6 BACKGROUND

7 According to their specifications, the patents-in-suit concern
8 time interval analyzers (TIAs), which are testing instruments used
9 in the semiconductor industry to detect timing errors in integrated
10 circuits. These timing errors can present as anomalies in the
11 amplitude, phase or pulsewidth of signals produced by the
12 integrated circuit. Some testing instruments, such as counters or
13 oscilloscopes, only detect timing errors. TIAs, however, "can
14 monitor frequency changes and frequency deviation over time." See,
15 e.g., '671 patent, 2:17-18. In this way, TIAs can assist a user in
16 detecting a timing error and determining its source.

17 In 1998, Shalom Kattan founded Guide Technology, Inc., which
18 is not the same entity as GuideTech. He invented the technology
19 claimed by the patents-in-suit, which he assigned to Guide. In
20 2004, Kattan left his employment with Guide, but remained on its
21 board of directors. That same year, Kattan established Brilliant.
22 In 2005, Kattan left his position on Guide's board. On May 23,
23 2008, Guide sold its assets, which included the patents-in-suit, to
24 Ronen Sigura, who allegedly founded GuideTech.

25 Brilliant initiated this lawsuit on November 20, 2009, seeking
26 declarations that its products (hereinafter, Accused Products),
27 such as the BI200 and BI220, do not infringe the Asserted Patents
28 or the '671, '699 and '231 patents. GuideTech counterclaimed,

1 asserting that Brilliant's products infringe the Asserted Patents.
2 In response, Brilliant counterclaimed for a judgment that the
3 Asserted Patents are invalid. On June 3, 2010, Brilliant amended
4 its complaint to add Sigura as a Defendant, charging him with
5 intentional interference with prospective economic advantage,
6 intentional interference with contractual relations and violation
7 of California's Unfair Competition Law (UCL), Cal. Bus. Code
8 §§ 17200, et seq.

DISCUSSION

I. Claim Construction

A. Legal Standard

9 The construction of a patent is a matter of law for the Court.
10 Markman v. Westview Instruments, Inc., 517 U.S. 370, 372 (1996).
11 "It is a 'bedrock principle' of patent law that 'the claims of a
12 patent define the invention to which the patentee is entitled the
13 right to exclude.'" Phillips v. AWH Corp., 415 F.3d 1303, 1312
14 (Fed. Cir. 2005) (en banc) (quoting Innova/Pure Water, Inc. v.
15 Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1115 (Fed. Cir.
16 2004)). Accordingly, in construing disputed terms, the Court first
17 looks to the words of the claims. Vitronics Corp. v. Conceptronic,
18 Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996). Generally, the Court
19 ascribes the words of a claim their ordinary and customary meaning.
20 Id. The Federal Circuit instructs that "the ordinary and customary
21 meaning of a claim term is the meaning that the term would have to
22 a person of ordinary skill in the art in question at the time of
23 the invention, i.e., as of the effective filing date of the patent
24 application." Phillips, 415 F.3d at 1313. Other claims of the
25 patent in question can also assist in determining the meaning of a

1 claim term. Id. at 1314. "Because claim terms are normally used
2 consistently throughout the patent, the usage of a term in one
3 claim can often illuminate the meaning of the same term in other
4 claims." Id.

5 The Federal Circuit also instructs that claims "must be read
6 in view of the specification, of which they are a part." Id. at
7 1315 (quoting Markman v. Westview Instruments, Inc., 52 F.3d 967,
8 979 (Fed. Cir. 1995) (en banc)). The specification must contain a
9 description of the invention that is clear and complete enough to
10 enable those of ordinary skill in the art to make and use it, and
11 thus the specification is "always highly relevant" to the Court's
12 claim construction analysis. Vitronics, 90 F.3d at 1582.
13 "Usually, [the specification] is dispositive; it is the single best
14 guide to the meaning of a disputed term." Id. In some cases, the
15 specification may reveal that the patentee has given a special
16 definition to a claim term that differs from its ordinary meaning;
17 in such cases, "the inventor's lexicography controls." Phillips,
18 415 F.3d at 1316. The specification also may reveal the patentee's
19 intentional disclaimer or disavowal of claim scope. "In that
20 instance as well, the inventor has dictated the correct claim
21 scope, and the inventor's intention, as expressed in the
22 specification, is regarded as dispositive." Id. However, claims
23 are not limited to the preferred embodiment described in the
24 specification. See SRI Int'l v. Matsushita Elec. Corp. of Am., 775
25 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc, plurality opinion).

26 While emphasizing the importance of intrinsic evidence in
27 claim construction, the Federal Circuit has authorized courts to
28 rely on extrinsic evidence, which consists of "all evidence

1 external to the patent and prosecution history, including expert
2 and inventor testimony, dictionaries, and learned treatises."
3 Phillips, 415 F.3d at 1317 (quoting Markman, 52 F.3d at 980).
4 While extrinsic evidence may be useful to the Court, it is less
5 significant than intrinsic evidence in determining the legally
6 operative meaning of claim language. Phillips, 415 F.3d at 1317-
7 18; see also C.R. Bard, Inc. v. U.S. Surgical Corp., 388 F.3d 858,
8 862 (Fed. Cir. 2004). Furthermore, extrinsic evidence is unlikely
9 to lead to a reliable interpretation of claim language unless
10 considered in the context of the intrinsic evidence. Phillips, 415
11 F.3d at 1319.

12 B. Analysis

13 Brilliant and GuideTech agree that certain terms should be
14 construed as follows: "current boost circuit" as "a circuit that
15 increases current flow to or from an electrical component,"
16 "measurement circuit" as "a circuit that performs a measurement,"
17 "processor circuit" as "a circuit that can perform logical
18 arithmetic operations," "shunt" as "a current switch," and "current
19 sink" as "a current source that draws an electrical current."¹
20 Brilliant and GuideTech also agree that "time interval analyzer" is
21 not a claim limitation. Based on the parties' agreement, the Court
22 adopts Brilliant and GuideTech's proposed constructions.

23 Brilliant and GuideTech dispute the meaning of five terms and
24 phrases.

27 ¹ Brilliant and GuideTech initially disputed the meaning of
28 "current sink." However, in its claim construction brief,
GuideTech agreed with Brilliant's proposed construction.

1 1. "signal channel"

2 The term "signal channel" appears in the '231 patent. There,
3 in claim 1, the term is used in the following context: "A time
4 interval analyzer for measuring time intervals between signal
5 events, said analyzer comprising: a signal channel that receives an
6 input signal;" '231 patent, 16:30-33. Although the term
7 does not appear in the '671 or '649 patents, Brilliant and
8 GuideTech agree that elements 12 and 14 in Figure 1 of both of
9 these patents are signal channels.

10 Brilliant defines a signal channel to be "a physical
11 collection of related components capable of acting independently to
12 perform a useful function on a signal." GuideTech defines it to be
13 "an electrical circuit that includes a signal path for transmitting
14 electrical signals and includes one or more parallel measurement
15 circuits."

16 Based on the parties' representations and concessions at the
17 claim construction hearing, the Court construes a signal channel to
18 be "an electrical circuit that includes a signal path for
19 transmitting electrical signals."

20 2. "defined within a signal channel"

21 The phrase "defined within a signal channel" does not appear
22 in any of the Asserted Patents. However, the abstract of the '231
23 patent states, "A time interval analyzer includes a signal channel
24 that receives an input signal. A plurality of measurement circuits
25 are defined within the signal channel in parallel with each other."
26 '231 patent, Abstract. Claim 1 of the '231 patent discloses, "A
27 time interval analyzer for measuring time intervals between signal
28 events, said analyzer comprising: a signal channel that receives an

1 input signal; a plurality of measurement circuits defined within
2 said signal channel in parallel with each other" Id.
3 16:30-35.

4 Brilliant proposes the following construction: "a component of
5 only one signal channel." GuideTech contends that the Court need
6 not construe this phrase. In the alternative, GuideTech argues,
7 the phrase should be defined to mean "present in a signal channel."

8 The Court finds that the phrase must be construed and that
9 Brilliant's construction is more accurate because it captures the
10 notion that measurement circuits are contained within a particular
11 signal channel. This understanding is supported by the claim
12 language and Figure 1, which shows that measurement circuits,
13 comprised of a comparator, multiplexer and interpolator, are
14 located within a given signal channel.

15 GuideTech contends that Brilliant's construction contradicts
16 the specification, which describes certain embodiments that have a
17 measurement circuit that relies on a continuous time counter and a
18 continuous event counter used by other measurement circuits. See
19 '231 patent, 3:54-59. However, that a measurement circuit may rely
20 on common counters does not mean that the circuit is not contained
21 within a particular signal channel. GuideTech also points to one
22 embodiment in which signals might cross channels so that certain
23 measurements can be made. This cross-channel function, however, is
24 not inconsistent with a measurement circuit being contained within
25 a particular signal channel.

26 GuideTech's definition is too broad and reads out the "defined
27 within" limitation. The phrase "present in" captures an embodiment
28 that has a measurement circuit that is present in more than one

1 channel, which is not supported by the claim language, the
2 specification or Figure 1.

3 Brilliant's proposed construction is not an adjectival phrase,
4 like the phrase at issue. Accordingly, the Court construes this
5 phrase to mean "contained within a signal channel."

6 3. "current source"

7 The term "current source" appears in the context of the
8 interpolator element claimed by the Asserted Patents. Brilliant
9 contends that a current source should be defined to be "an active
10 circuit that provides an electrical current that is independent of
11 the voltage across the circuit." GuideTech proposes the following
12 definition: "an electrical component that provides electrical
13 current."

14 Brilliant offers no evidence to support the additional
15 limitation of voltage independence. It is true that extrinsic
16 evidence indicates that current sources are not voltage sources and
17 that theoretical, "perfect" current sources provide a constant
18 current, irrespective of the voltage across a circuit. See, e.g.,
19 Behiel Decl., Ex. O, at 9 ("A perfect current source is a two-
20 terminal black box that maintains a constant current through the
21 external circuit, regardless of load resistance or applied
22 voltage."). However, the same evidence states that, in practice,
23 "current sources . . . have a limit to the voltage they can provide
24 . . . , and in addition they do not provide absolutely constant
25 output current." Id. Thus, while a current source will provide
26 current, regardless of the voltage across the circuit, the current
27 may be affected by the voltage, contrary to what Brilliant's
28 construction suggests. Nothing in the Asserted Patents indicates

1 that a current source provides current at a constant rate.

2 Brilliant contends that GuideTech's proposed definition is
3 inaccurate because it permits a battery, which is a voltage source,
4 to be regarded as a current source. This is incorrect. Under
5 GuideTech's construction, a current source provides current. A
6 battery provides voltage, which produces current. Providing
7 current and producing current are not the same concepts.

8 Accordingly, the Court adopts GuideTech's definition and
9 construes "current source" to refer to "an electrical component
10 that provides electrical current."

11 4. "operatively disposed in parallel"

12 Like "current source," the phrase "operatively disposed in
13 parallel" is used in the context of the interpolators claimed by
14 the Asserted Patents. The pertinent claim language discloses an
15 interpolator that is comprised of, among other things, "a
16 capacitor; a shunt; wherein said shunt and said capacitor are
17 operatively disposed in parallel with respect to said first current
18 circuit." '231 patent, 18:41-45.

19 Brilliant and GuideTech agree that the phrase discloses
20 alternative paths for current. They dispute, however, whether the
21 phrase requires a common destination and whether a change in
22 voltage affects voltage in the various paths. Brilliant advances
23 the following construction: "forming alternative signal paths
24 between the same source and destination, wherein the same voltage
25 change occurs across both paths." Brilliant points to the ordinary
26 meaning of "parallel" in the field of the Asserted Patents, which
27 is "an arrangement of the components, as resistances, of a circuit
28 in such a way that all positive terminals are connected to one

1 point and all negative terminals are connected to a second point,
2 the same voltage being applied to each component." Webster's
3 Encyclopedic Unabridged Dictionary 1407 (2001). GuideTech's
4 proposal omits any discussion of a common destination or voltage,
5 arguing that the phrase should be construed to mean "arranged in a
6 manner capable of forming alternative paths of current such that
7 current can flow across one or the other path." GuideTech notes
8 that the modifier "operatively" indicates that the shunt and
9 capacitor are not actually "disposed in parallel," but rather
10 "operate as though they are parallel." GuideTech's Cl. Constr. Br.
11 at 12:10. See Innova/Pure Water, 381 F.3d at 1118 ("In the absence
12 of modifiers, general descriptive terms are typically construed as
13 having their full meaning.").

14 Figure 4 and the specification do not support Brilliant's
15 additional limitation that requires the paths to terminate at the
16 same destination. Nor do Figure 4 and the specification indicate
17 that the "same voltage change occurs across both paths." Figure 4
18 shows the shunt and capacitor to be on alternate paths of current.
19 However, these alternate paths do not terminate at the same
20 destination, nor do they have the same voltage running across them.
21 See Kaliski Decl., Ex. B ¶ 103 (Brilliant's infringement expert
22 stating that "the voltage across the shunt is not necessarily the
23 same as the voltage across capacitor"). Nevertheless, Brilliant
24 insists that any "change in voltage across one path will be
25 experienced by each element." Brilliant's Cl. Constr. Br. at
26 13:17. No evidence supports this view. Brilliant points to
27 language in the specification indicating that, as the capacitor
28 discharges, "the voltage level at pin 2 of diode bridge 124 drops."

1 '649 patent, 9:51-52. However, there is no evidence that pin 2 of
2 the diode bridge is "operatively disposed in parallel" in the same
3 manner as the shunt and capacitor.²

4 Brilliant contends that GuideTech's construction, which does
5 not mention voltage level changes, fails to account for the
6 "parallel" limitation in the claim language. This is incorrect.
7 GuideTech's proposal accounts for "parallel" by disclosing
8 alternative paths for current and indicating the location of the
9 shunt and capacitor.

10 Accordingly, the Court construes the phrase "operatively
11 disposed in parallel" as "arranged in a manner capable of forming
12 alternative paths of current such that current can flow across one
13 or the other path."

14 5. "parallel outputs"

15 Brilliant and GuideTech's dispute over defining this term
16 arises from their disagreement over how to construe "parallel."
17 Brilliant argues that this term should be defined to mean
18 "alternative output signal paths to a common destination, wherein
19 the same voltage changes occur across both paths." GuideTech
20 proposes the following definition: "outputs that are arranged such
21 that a current path divides between the outputs."

22 For the reasons stated above, the Court adopts GuideTech's
23 definition. Accordingly, "parallel outputs" is construed to mean
24 "outputs that are arranged such that a current path divides between
25 the outputs."

26

27

28 ² Indeed, Figure 4 shows that pin 2 is located before the
alternate paths leading to the shunt and capacitor branch off.

II. Motions for Summary Judgment and Summary Adjudication

A. Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods. Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000).

1 The moving party may produce evidence negating an
2 essential element of the nonmoving party's case, or,
3 after suitable discovery, the moving party may show that
4 the nonmoving party does not have enough evidence of an
5 essential element of its claim or defense to carry its
6 ultimate burden of persuasion at trial.

7 Id.

8 If the moving party discharges its burden by showing an
9 absence of evidence to support an essential element of a claim or
10 defense, it is not required to produce evidence showing the absence
11 of a material fact on such issues, or to support its motion with
12 evidence negating the non-moving party's claim. Id.; see also
13 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
14 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
15 moving party shows an absence of evidence to support the non-moving
16 party's case, the burden then shifts to the non-moving party to
17 produce "specific evidence, through affidavits or admissible
18 discovery material, to show that the dispute exists." Bhan, 929
19 F.2d at 1409.

20 If the moving party discharges its burden by negating an
21 essential element of the non-moving party's claim or defense, it
22 must produce affirmative evidence of such negation. Nissan, 210
23 F.3d at 1105. If the moving party produces such evidence, the
24 burden then shifts to the non-moving party to produce specific
25 evidence to show that a dispute of material fact exists. Id.

26 If the moving party does not meet its initial burden of
27 production by either method, the non-moving party is under no
28 obligation to offer any evidence in support of its opposition. Id.
This is true even though the non-moving party bears the ultimate
burden of persuasion at trial. Id. at 1107.

1 Where the moving party bears the burden of proof on an issue
2 at trial, it must, in order to discharge its burden of showing that
3 no genuine issue of material fact remains, make a prima facie
4 showing in support of its position on that issue. UA Local 343 v.
5 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
6 is, the moving party must present evidence that, if uncontroverted
7 at trial, would entitle it to prevail on that issue. Id.; see also
8 Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th
9 Cir. 1991). Once it has done so, the non-moving party must set
10 forth specific facts controverting the moving party's prima facie
11 case. UA Local 343, 48 F.3d at 1471. The non-moving party's
12 "burden of contradicting [the moving party's] evidence is not
13 negligible." Id. This standard does not change merely because
14 resolution of the relevant issue is "highly fact specific." Id.

15 B. Brilliant's Motion for Summary Judgment of Non-
16 Infringement

17 Brilliant seeks summary judgment that the Accused Products do
18 not infringe the patents-in-suit. GuideTech opposes Brilliant's
19 motion only insofar as it concerns the Asserted Patents. GuideTech
20 does not oppose Brilliant's motion to the extent it is directed at
21 the '959, '767, '382 and '610 patents. Accordingly, Brilliant's
22 motion is granted as to these patents.

23 With respect to the Asserted Patents, Brilliant asserts that
24 GuideTech cannot prove literal infringement or infringement under
25 the doctrine of equivalents. "To establish literal infringement,
26 'every limitation set forth in a claim must be found in an accused
27 product, exactly.'" Becton, Dickinson & Co. v. Tyco Healthcare
28 Group, LP, 616 F.3d 1249, 1253 (Fed. Cir. 2010) (quoting Southwall

1 Techs., Inc. v. Cardinal IG Co., 54 F.3d 1570, 1575 (Fed. Cir.
2 1995)). "Thus, if any claim limitation is absent from the accused
3 device, there is no literal infringement as a matter of law."
4 Becton, 616 F.3d at 1253 (citation and editing and internal
5 quotation marks omitted).

6 An accused product may also infringe under the doctrine of
7 equivalents. Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339
8 U.S. 605, 608 (1950). The doctrine generally applies where the
9 differences between an element of the accused product and the
10 asserted claim limitation are "insubstantial to one of ordinary
11 skill in the art." Searfoss v. Pioneer Consol. Corp., 374 F.3d
12 1142, 1150 (Fed. Cir. 2004) (citation and internal quotation marks
13 omitted). However, the doctrine may not be invoked, and summary
14 judgment of non-infringement is appropriate, where the theory of
15 equivalents "would entirely vitiate a particular claim element."
16 Id. at 1150-51 (internal citations omitted).

17 1. '231 Patent

18 Brilliant contends that the Accused Products cannot infringe
19 the '231 patent because they are not TIAs with "a plurality of
20 measurement circuits defined within [a] signal channel," '231
21 patent, 16:33-34, or with "a processor circuit . . . configured to
22 receive and compare . . . time signals from said measurement
23 circuits to each other to determine a time interval," id., 40-48.
24 Because Brilliant's first argument is dispositive, the Court need
25 not consider its second.

26 Brilliant proffers evidence that the Accused Products have
27 only one measurement circuit contained within each signal channel
28 and, as a result, do not satisfy this limitation. See, e.g.,

1 Kaliski Reply Decl., Ex. A ¶ 18.

2 GuideTech does not offer evidence that each signal channel
3 contains more than one measurement circuit. Instead, GuideTech
4 notes that the Accused Products can perform a "one-channel-two-
5 edge" function, which requires use of two "timetagging" circuits.
6 GuideTech considers these circuits to be measurement circuits.
7 Chin Decl., Ex. 10, at BI000858. GuideTech insists that a signal
8 channel with only one measurement circuit would be useless because
9 two measurements are required to determine an interval. West Decl.
10 ¶ 10. These arguments are unavailing. Although the one-channel-
11 two-edge function requires use of the Accused Products' two
12 measurement circuits, it does not follow that both measurement
13 circuits are contained within a single channel. Indeed, Dr.
14 Burnell G. West, GuideTech's infringement expert, states that the
15 BI200 has "at least two measurement circuits," which "are within
16 either signal channel A or signal channel B as shown in Figure 2"
17 of the BI200 Datasheet.³ West Decl., Ex. 1, App'x D, at A2. He
18 does not contend that the measurement circuits are contained within
19 a given channel. Thus, there is not a genuine issue of material
20 fact as to whether the Accused Products literally meet this
21 limitation.

22 Nor is there a triable issue concerning infringement under the
23 doctrine of equivalents. West contends that the "physical
24 placement of accused measurement circuits is equivalent to being of
25 only one signal channel because such placement performs
26 substantially the same function . . . in substantially the same way

27
28 ³ West represents that the BI220 has a "substantially similar"
configuration. West Decl., Ex. 1, App'x D, at A2.

1 . . . to achieve the same result." West Decl., Ex. 2 ¶ 13.

2 Although this might be true, accepting this theory of equivalency
3 would vitiate entirely the limitation that measurement circuits be
4 contained within a single channel.

5 Accordingly, as a matter of law, the Accused Products do not
6 infringe the '231 patent, either literally or under the doctrine of
7 equivalents. Brilliant is entitled to summary judgment of non-
8 infringement as to the '231 patent.

9 2. '671 Patent

10 Brilliant maintains that the Accused Products do not infringe
11 the '671 patent because they do not practice a "first current
12 circuit having a constant current source," '671 patent, 16:53, or a
13 shunt and capacitor "operatively disposed in parallel with respect
14 to said first current circuit," *id.*, 16:62-63. Because Brilliant's
15 second argument is dispositive, the Court need not consider the
16 first.

17 Brilliant points to a schematic of the BI200 that West
18 annotated during his deposition, which Brilliant contends shows the
19 accused capacitor to be a part of the first current circuit. Thus,
20 Brilliant argues, the capacitor cannot be "operatively disposed in
21 parallel with respect to the first current circuit" because it is a
22 part of that circuit. GuideTech does not dispute that West
23 indicated that, in the BI200, the capacitor is part of the first
24 current circuit.

25 As explained above, the Court construes "operatively disposed
26 in parallel" to mean "arranged in a manner capable of forming
27 alternative paths of current such that current can flow across one
28 or the other path." West's representation that the capacitor is

1 part of the first current circuit indicates that the capacitor is
2 not on an alternative path on which current flows from the first
3 current circuit. Indeed, GuideTech's expert on Brilliant's
4 invalidity contentions, Sassan Tabatabaei, confirms that the
5 capacitor that the '671 patent claims is not part of the first
6 current circuit, but rather on an "alternative path[]" of current
7 from the first current circuit." Tabatabaei Decl. ¶ 18.

8 West's testimony that the capacitor is part of the first
9 current circuit precludes a finding of infringement, either
10 literally or under the doctrine of equivalents. Accordingly,
11 Brilliant is entitled to summary judgment of non-infringement of
12 the '671 patent.

13 3. '649 Patent

14 Like the '671 patent, the '649 patent discloses an
15 interpolator with a shunt and capacitor "operatively disposed in
16 parallel with respect to said first current circuit." Thus, for
17 the reasons stated above, Brilliant is entitled to summary judgment
18 of non-infringement of the '649 patent.

19 CONCLUSION

20 For the foregoing reasons, the Court construes the disputed
21 claim language in the manner explained above and GRANTS Brilliant's
22 motion for summary judgment of non-infringement (Docket No. 108).
23 Because Brilliant's Accused Products do not infringe the Asserted
24 Patents, it lacks standing to bring invalidity counterclaims and
25 they are therefore dismissed for lack of subject matter
26 jurisdiction. Accordingly, GuideTech's motion for summary
27 adjudication on the issue of assignor estoppel is DENIED as moot
28 (Docket No. 119). Brilliant's evidentiary objections are OVERRULED

as moot.

In their June 29, 2011 stipulation, the parties agreed that, if the Court were to grant Brilliant's motion for summary judgment of non-infringement, Brilliant would seek leave to dismiss its state law claims in this action so that they could be consolidated with GuideTech's claims in state court. In accordance with their agreement, within three days of the date of this Order, the parties shall file a stipulation seeking the dismissal without prejudice of Brilliant's remaining state law claims. See Fed. R. Civ. P. 41(a)(1)(A)(ii). Thereafter, judgment will enter accordingly, and the Clerk will be directed to close the file.

IT IS SO ORDERED.

Dated: 8/11/2011


CLAUDIA WILKEN
United States District Judge

KILPATRICK TOWNSEND & STOCKTON LLP
THEODORE T. HERHOLD (State Bar No. 122895)
ROBERT J. ARTUZ (State Bar No. 227789)
BYRON R. CHIN (State Bar No. 259846)
1080 Marsh Road
Menlo Park, CA 94025
Tel: (650) 326-2400
Fax: (650) 326-2422
Email: therhold@kilpatricktownsend.com
rartuz@kilpatricktownsend.com
bchin@kilpatricktownsend.com

Attorneys for Defendant and Couterclaimant,
GUIDETECH LLC, and Defendant,
RONEN SIGURA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

BRILLIANT INSTRUMENTS, INC.,

Plaintiff,

v.

GUIDETECH, INC. and RONEN SIGURA,

Defendants

Case No. C09-05517 (CW)

**GUIDETECH LLC AND RONEN
SIGURA'S MOTION FOR LEAVE TO
FILE A MOTION FOR
RECONSIDERATION OF ORDER
GRANTING SUMMARY JUDGMENT OF
NONINFRINGEMENT**

AND RELATED COUNTERCLAIMS

I. INTRODUCTION

Pursuant to Civil Local Rule 7-9, Defendant and Counterclaimant GuideTech LLC and Defendant Ronen Sigura (jointly "GuideTech") respectfully request that the Court grant leave to file a motion for reconsideration of the Court's August 11, 2011 Order on Claim Construction, Granting Brilliant's Motion for Summary Judgment of Non-Infringement and Denying As Moot GuideTech's Motion for Summary Adjudication on the Issue of Assignor Estoppel ("Order")(Dkt. 137). As set forth below, GuideTech believes that there was a manifest failure by the Court to consider material facts and dispositive legal arguments with respect to whether there were disputed issues of material fact precluding summary judgment of noninfringement by Plaintiff and

Counterdefendant Brilliant Instruments, Inc.'s ("Brilliant") of U.S. Patent Nos. 6,226,231 ("the '231 patent"), 6,091,671 ("the '671 patent") and 6,181,649 ("the '649 patent"). Civ. L.R. 7-9(b)(3).

II. LEGAL ARGUMENT

A. The Court Failed to Consider Material Facts and Dispositive Legal Arguments in Granting Summary Judgment of Noninfringement of the '231 Patent

The asserted claims of the '231 patent require a "plurality of measurement circuits *defined within said signal channel* in parallel with each other." See, e.g., '231 patent, claim 1 (emphasis added). In its claim construction order, the Court construed "defined within" to mean "contained within a signal channel." Dkt. 137 at 8:4-5. In finding that Brilliant's accused products do not meet this claim limitation, the Court held:

Although the one-channel-two-edge function requires use of the Accused Products' two measurement circuits, it does not follow that both measurement circuits are contained within a single channel. Indeed, Dr. Burnell G. West, GuideTech's infringement expert, states that the BI200 has "at least two measurement circuits," which 'are within either signal channel A or signal channel B as shown in Figure 2' of the BI200 Datasheet. West Decl., Ex. 1, App'x D, at A2. ***He does not contend that the measurement circuits are contained within a given channel.***

Dkt. 137 at 16:10-19 (emphasis added). The Court, however, overlooked evidence in the record that shows that Dr. West did in fact contend that two measurement circuits are contained within a given signal channel. Particularly, in the pages following the section that includes the above-quoted text from Dr. West's expert report, Dr. West makes clear that two measurement circuits are in fact contained within a single signal channel when the accused products are operating in the one-channel-two-edge mode:

Schematics for the BI200 and BI220 also disclose a plurality of measurement circuits defined within the signal channel in parallel with each other, each said measurement circuit being configured to receive said input signal, measure an occurrence of a first event of said input signal with respect to a predetermined time reference and output a time signal corresponding to the measurement of said occurrence. For the BI200, for example, BI000005 and BI000006 each disclose a measurement circuit defined at least in part by "Interpolator X" and "Interpolator Y." Both measurement circuits are defined within either of the signal channels described above. See, e.g., Exhibit 1 (when Channel A is used; Channel B can be used in the same fashion). For example, when channel A is used in the one-channel-two-edge mode, ***both measurement circuits (i.e., both interpolator circuits) are used to timetag events occurring on the same input signal transmitted on the same channel A (e.g., JP1). In other words, both***

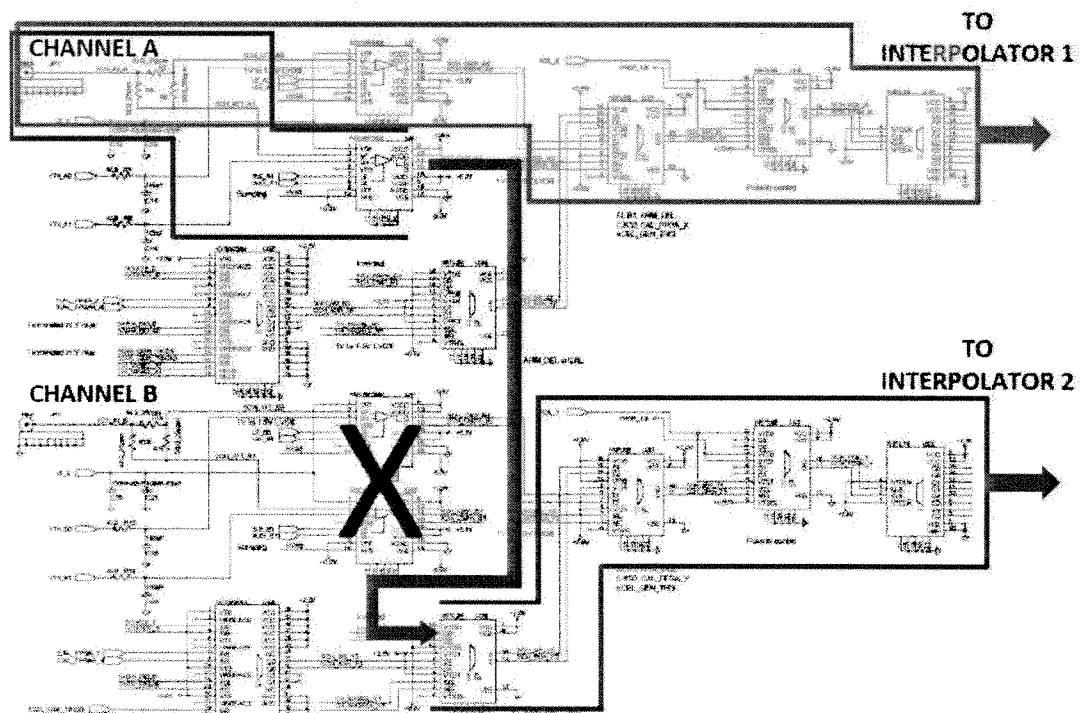
measurement circuits are defined within the same channel A. Similarly, when channel B is used in the one-channel-two-edge mode, both measurement circuits (*i.e.*, both interpolator circuits) are used to timetag events occurring on the same input signal transmitted on the same channel B (*e.g.*, JP2).

Declaration of Burnell G. West ("West Decl."), Ex. 1, App'x D at A4 (Dkt. 124-1, p. XX) (emphasis added); *see also* West Decl. at ¶ 9 ("As discussed in my attached expert report, when the Brilliant accused products operate in a one-channel-two-edge mode, the two measurement circuits of the accused products are components of *only* a single channel because such measurements require the use of *both* timetagging circuits."). In opposing Brilliant's motion for summary judgment, GuideTech relied on these specific sections of Dr. West's expert report and declaration. Dkt. 119 at pp. 14:27-15:1.

When the Brilliant accused products are operating in the one-channel-two-edge mode, both measurement circuits are clearly contained with a single signal channel. Whether that signal channel is channel A or channel B simply depends on the product's configuration. In the example of when channel A is selected, Dr. West provided a diagram illustrating how Channel A contains two measurement circuits including Interpolator 1 and Interpolator 2:

THE ACCUSED BI200 CIRCUIT (*partial*)

Exhibit 1



West Decl., Ex. 1, App'x G at Ex. 1 (Dkt. 124-1, p. 72). Because Channel B is not used in this configuration, the accused products' circuitry is multiplexed such that the signal coming in on Channel A is routed to both measurement circuits. In other words, in this configuration, Channel A contains at least two measurement circuits – i.e., there are at least two measurement circuits ***contained within a signal channel***. Dr. West further elaborated on his opinion in his Supplemental Expert Report:

[W]hen Brilliant's accused products are used, for example, in a manner such that two measurement circuits are performing measurements corresponding to separate events on an input signal transmitted on a single signal channel (e.g., Brilliant's One-Channel-Two-Edge Function), ***the measurement circuits are each a component of a single signal channel according to Brilliant's proposed claim construction. This is because in that operational configuration the accused measurements circuits are operating on one and only one signal channel.***

West Decl., Ex. 2 at p. 5 (Dkt. 124-2, p. 6) (emphasis added).

Dr. West's opinions are fully supported by Brilliant's own admissions. Indeed, the BI200 Datasheet on which Dr. West relied specifically states that in the "One-Channel-Two-Edge" mode, the product operates using a "single channel (either A or B) and use[s] both timetagging circuits" (i.e., measurement circuits):

One-Channel-Two-Edge Functions

The 1C2E functions (one-channel-two-edge) operate on a single channel (either A or B) and use both timetagging circuits. That is, each timetag contains two edge times and one event count. The recovery time of 250ns is the minimum time between the stop timetag and the next start timetag. For all these functions the result is the difference in time from the start to the stop. The associated event count is for the start event. The arming that the user specifies is for the Start Arm, while the Stop Arm is dictated by the function.

Declaration of Byron R. Chin ("Chin Decl."), Ex. 10 at BI000858 (Dkt. 120-10, p. 4).

In summary, the Court's finding that Dr. West somehow did not contend that the measurement circuits are literally contained within a signal channel is clearly erroneous, and the Court overlooked key evidence in the record that demonstrates to the contrary. Additionally, in view of this evidence, the Court's finding with respect to the doctrine of equivalents is also erroneous. The Court found that Dr. West's theory of equivalency "would vitiate entirely the

1 limitation that measurement circuits be contained within a single channel.” Dkt. 137 at p. 17:2-4.
 2 In view of the above evidence, however, Dr. West’s theory cannot, as a matter of law, vitiate the
 3 “contained with a single channel” limitation because Dr. West has clearly shown that the accused
 4 products do operate in a configuration where two measurement circuits are contained within a
 5 single channel. At a minimum, Dr. West’s sworn testimony raises genuine issues of material fact
 6 with respect to both literal infringement and infringement under the doctrine of equivalents,
 7 precluding summary judgment.

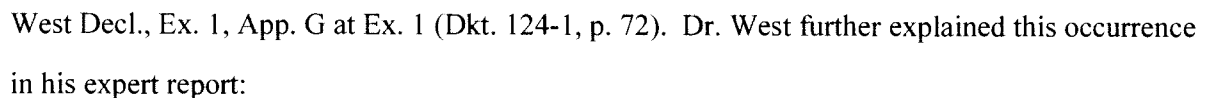
8 **B. The Court Failed to Consider Material Facts and Dispositive Legal Arguments**
 9 **in Granting Summary Judgment of Noninfringement of the ’671 and ’649**
 10 **Patents**

10 The asserted claims of the ’671 and ’649 patents require a shunt and a capacitor
 11 “operatively disposed in parallel with respect to said first current circuit.” *See, e.g.*, ’671 patent,
 12 claim 1. The Court construed “operatively disposed in parallel” to mean “arranged in a manner
 13 capable of forming alternative paths of current such that current can flow across one or the other
 14 path.” In finding that Brilliant’s accused products do not meet this limitation, the Court held:

15 West’s representation that the capacitor is part of the first current circuit indicates
 16 that the capacitor is not on an alternative path on which current flows from the
 17 first current circuit. Indeed, GuideTech’s expert on Brilliant’s invalidity
 18 contentions, Sassan Tabatabaei, confirms that the capacitor that the ’671 patent
 19 claims is not part of the first current circuit, but rather on an ‘alternative path[] of
 20 current from the first current circuit.’ Tabatabaei Decl. ¶ 18.

19 Dkt. 137 at pp. 17:28-18:3. The Court, however, overlooked evidence in the record that
 20 demonstrates that Brilliant’s accused products meet the “operatively disposed in parallel”
 21 limitation. Particularly, nothing in the claims or the Court’s claim construction prevents the
 22 measurement capacitor from being both part of the first current circuit and operatively disposed in
 23 parallel with the shunt with respect to the first current circuit.

24 Dr. West opined that the voltage source (VREF_3.0B) and resistor (R243) are part of the
 25 first current circuit (see top middle of below diagram). West Decl., Ex. 1, App’x D at A22 (Dkt.
 26 124-1, p. 53) and Ex. 2 at p. 6 (Dkt. 124-2, p. 7). As shown in the diagram below from Dr. West’s
 27 expert report, current flows from these two components (*e.g.*, 0.05 mA) to the measurement
 28 capacitors (C336 and C334; see middle right of below diagram) when the shunt (*i.e.*, the current



Id., Ex. 1 at p. 13 (Dkt. 124-1, p. 14) (emphasis added).

- 6 -

1 flowing from R243 to the shunt. There is nothing in the asserted claims or the Court's claim
2 construction that precludes a path of current that originates in one region of the first current circuit
3 and flows to another region of that same circuit.

4 At a minimum, it is not apparent that the Court considered evidence in the record
5 demonstrating that the accused products meet this limitation under the doctrine of equivalents. In
6 his expert report, Dr. West opined that even if the this limitation was not literally met, it was
7 certainly met by the doctrine of equivalents:

8 Alternatively, the electrical disposition of the shunt and the capacitor with respect
9 to the first current circuit of the BI200 and BI220 is equivalent to the electrical
10 disposition of the shunt and the capacitor with respect to the first current circuit of
11 this claim limitation because it performs substantially the same function (allowing
12 the shunt to control the path of current flowing to or from the first current circuit)
13 in substantially the same way (wherein an electrical path from the first current
14 circuit can be traced to either the capacitor or the shunt) to achieve substantially
15 the same result (providing an electrical relationship wherein, e.g., the shunt can
16 direct current to flow from the first current circuit to the second current circuit or
17 from the first current circuit to the capacitor). Similarly, these electrical
18 components are insubstantially different from the capacitor of this claim
19 limitation. These properties are demonstrated by the testing results produced at
20 Exhibits 3-7 of Appendix G and GTL002089-95.

21 West Decl., Ex. 1 at p. A25 (Dkt. 124-1, p. 54). Under the doctrine of equivalents, the
22 measurement capacitor(s) and the shunt are not required to be literally disposed in parallel with
23 respect to the entire first current circuit. Even if the shunt and the capacitor(s) are not literally
24 operatively disposed in parallel with respect to the first current circuit, there is clearly a genuine
25 issue of material fact as to whether their disposition is equivalent to what is claimed. Brilliant
26 even admitted that the language "operatively disposed in parallel" merely requires that the
27 components operate "as though they are in parallel" and not as if they are actually in parallel. Dkt.
28 119 at p. 20:22-24.

According to Dr. West, the purpose of the parallel disposition of the measurement
capacitor(s) and the shunt is to provide a means for switching the flow of current such that it will
flow from the current source to the capacitor in one state and from the current source to the second
current circuit (through the shunt) in a second state. *See id.* The fact that the accused products are
designed such that the capacitor may be part of the current circuit that includes the current source
is, at a minimum, an insubstantial difference. *Primos, Inc. v. Hunter's Specialties, Inc.*, 451 F.3d

841, 850 (Fed. Cir. 2006), citing *Freedom Seating Co. v. Am. Seating Co.*, 420 F.3d 1350, 1359 (Fed. Cir. 2005) (“courts must consider the totality of circumstances of each case and determine whether the alleged equivalent can be fairly characterized as an insubstantial change from the claimed subject matter without rendering the pertinent limitation meaningless”).¹ This is because after the shunt is closed, the accused circuits’ configuration still performs substantially the same function, in substantially the same way, to achieve substantially the same result. In other words, regardless of whether the capacitor is part of the first current circuit, when the shunt is closed an alternative path of current is still formed between resistor R243 (a source of constant current) and the capacitor, and this results in the circuit supplying current to the capacitor.

At a minimum, Dr. West’s sworn testimony raises genuine issues of material fact with respect to literal infringement and infringement under the doctrine of equivalents, precluding summary judgment.

III. CONCLUSION

For the foregoing reasons, GuideTech respectfully requests that the Court grant leave to file a motion for reconsideration of the Order, as set forth herein.

Dated: August 17, 2011

Respectfully submitted,

KILPATRICK TOWNSEND & STOCKTON LLP

By: 
THEODORE T. HERHOLD

Attorneys for Defendant and Counterclaimant,
GUIDETECH, LLC, and Defendant RONEN
SIGURA

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¹ There were no narrowing amendments which would require application of prosecution history estoppel.



KILPATRICK TOWNSEND & STOCKTON LLP
THEODORE T. HERHOLD (State Bar No. 122895)
ROBERT J. ARTUZ (State Bar No. 227789)
BYRON R. CHIN (State Bar No. 259846)
1080 Marsh Road
Menlo Park, CA 94025
Tel: (650) 326-2400
Fax: (650) 326-2422
Email: therhold@kilpatricktownsend.com
rartuz@kilpatricktownsend.com
bchin@kilpatricktownsend.com

Attorneys for Defendant and Couterclaimant,
GUIDETECH LLC, and Defendant,
RONEN SIGURA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

BRILLIANT INSTRUMENTS, INC.,

Plaintiff,

v.

GUIDETECH, INC. and RONEN SIGURA,

Defendants

Case No. C09-05517 (CW)

**[PROPOSED] ORDER GRANTING
GUIDETECH LLC AND RONEN
SIGURA'S MOTION FOR LEAVE TO
FILE A MOTION FOR
RECONSIDERATION OF ORDER
GRANTING SUMMARY JUDGMENT OF
NONINFRINGEMENT**

AND RELATED COUNTERCLAIMS

On August 11, 2011 the Court granted Brilliant's Motion for Summary Judgment of Non-Infringement and Denying As Moot GuideTech's Motion for Summary Adjudication on the Issue of Assignor Estoppel. GuideTech moves under Civil L.R. 7-9 for leave to file a motion for reconsideration of the Court's August 11th Order.

OR GOOD CAUSE SHOWN, the Court GRANTS GuideTech's motion for leave to file a motion for reconsideration. GuideTech shall file its motion and supporting papers on or before _____. Brilliant's opposition is due _____, and GuideTech's reply,

1 if any, is due _____. The hearing on GuideTech's motion for reconsideration will
2 be on _____ at _____.

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4 **IT IS SO ORDERED.**
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRILLIANT INSTRUMENTS, INC.,

Plaintiff,

v.

GUIDETECH, INC. and RONEN SIGURA,

Defendants.

No. C 09-05517 CW

ORDER DENYING
DEFENDANTS' MOTION
FOR LEAVE TO FILE
A MOTION FOR
RECONSIDERATION
(Docket No. 140)

AND ALL RELATED COUNTERCLAIMS

Defendants GuideTech LLC and Ronen Sigura move for leave to file a motion for reconsideration of the Court's August 11, 2011 Order on Claim Construction, Granting Brilliant's Motion for Summary Judgment of Non-Infringement and Denying as Moot GuideTech's Motion for Summary Adjudication on the Issue of Assignor Estoppel. Defendants contend that there was a manifest failure by the Court to consider material facts and dispositive legal arguments in its August 11 Order. See Civ. L.R. 7-9(3).

Having considered Defendants' papers, the Court DENIES their motion for leave. (Docket No. 140.) The portions of Dr. Burnell G. West's report and the BI200 Datasheet cited by Defendants were considered by the Court when it ruled on Brilliant's motion for summary judgment.

The Clerk shall enter judgment forthwith and close the file.

IT IS SO ORDERED.

Dated: 9/6/2011


CLAUDIA WILKEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRILLIANT INSTRUMENTS, INC.,
Plaintiff,
v.
GUIDETECH, INC., and RONEN SIGURA,
Defendants.

No. C 09-5517 CW
JUDGMENT

AND ALL RELATED COUNTERCLAIMS

For the reasons set forth in the Court's Order on Claim Construction, Granting Brilliant's Motion for Summary Judgment of Non-Infringement and Denying as Moot GuideTech's Motion for Summary Adjudication on the Issue of Assignor Estoppel,

IT IS ORDERED AND ADJUDGED

That summary judgment be entered in favor of Brilliant Instruments, Inc., on its claims for declarations of non-infringement concerning GuideTech, Inc.'s U.S. Patent Nos. 6,091,671 ('671 patent); 6,181,649 ('649 patent); 6,226,231 ('231 patent); 6,456,959 ('959 patent); 6,621,767 ('767 patent); 6,999,382 ('382 patent); and 7,203,610 ('610 patent);

That summary judgment be entered against GuideTech on its counterclaims for infringement of the '671, '649 and '231 patents;

That Brilliant's invalidity counterclaims be dismissed for lack of subject matter jurisdiction; and

That Brilliant's state law claims against Ronen Sigura for intentional interference with prospective economic advantage,

1 intentional interference with contractual relations and unfair
2 competition be dismissed without prejudice to refiling in state
3 court, pursuant to the parties' stipulations.

4 Brilliant shall recover costs from GuideTech.

5 Dated at Oakland, California, this 6th day of September, 2011.

6 RICHARD W. WIEKING
7 Clerk of Court

8
9 By: _____

10 Deputy Clerk

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United States District Court
For the Northern District of California

October 26, 2011

Via E-Mail (tom@siliconedgelaw.com; art@siliconedgelaw.com)

Thomas W. Lathram
Arthur J. Behiel
Silicon Edge Law Group, LLP
6601 Koll Center Parkway, Suite 245
Pleasanton, CA 94566

Re: ***Brilliant Instruments, Inc. v. GuideTech, LLC. et al.***
No. 2012-1018 (Fed. Cir.)

Dear Tom:

I am writing regarding the contents of the Joint Appendix for the above-captioned appeal.

Pursuant to Federal Circuit Rule 30(b)(2), the issues to be presented on appeal are whether the district court correctly construed the asserted claims of U.S. Patent Nos. 6,226,231, 6,091,671 and 6,181,649 ("the Asserted Patents"), whether the district court correctly applied these constructions to the accused products, and whether the district court correctly granted summary judgment of noninfringement of the Asserted Patents and entered judgment in favor of Brilliant Instruments, Inc. accordingly.

Also pursuant to Federal Circuit Rule 30(b)(2), we designate the following list as identifying the set of materials from which the Joint Appendix will be prepared:

- Docket Sheet, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.);
- U.S. Patent No. 6,226,231;
- U.S. Patent No. 6,091,671;
- U.S. Patent No. 6,181,649;

- August 11, 2011 Order, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 137);
- September 6, 2011 Judgment, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 142);
- April 4, 2011 Brilliant Instruments, Inc.'s Corrected Opening Claim Construction Brief and Motion for Summary Judgment of Noninfringement, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 108);
- April 1, 2011 Declaration of Martin E. Kaliski, Ph.D. in Support of Brilliant Instruments, Inc.'s Opening Claim Construction Brief and Motion for Summary Judgment of Noninfringement, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 103);
- April 1, 2011 Declaration of Arthur Behiel in Support of Brilliant Instruments, Inc.'s Opening Claim Construction Brief and Motion for Summary Judgment of Noninfringement, and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 104-107);
- April 22, 2011 GuideTech LLC's Opening Claim Construction Brief, Motion for Summary Judgment, and Opposition to Motion for Summary Judgment of Non-Infringement, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 119);
- April 22, 2011 Declaration of Byron R. Chin in Support of GuideTech LLC's Opening Claim Construction Brief, Motion for Summary Judgment, and Opposition to Motion for Summary Judgment of Non-Infringement and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 120-122);
- April 22, 2011 Declaration of Sassan Tabatabaei in Support of GuideTech LLC's Opening Claim Construction Brief, Motion for Summary Judgment, and Opposition to Motion for Summary Judgment of Non-Infringement and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 123);
- April 22, 2011 Declaration of Burnell G. West in Support of GuideTech LLC's Opening Claim Construction Brief, Motion for Summary Judgment, and Opposition to Motion for Summary Judgment of Non-Infringement and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 124);
- May 6, 2011 Brilliant Instruments, Inc.'s Reply re Motion for Summary Judgment of Noninfringement and Opposition to GuideTech's Motion for Summary

Judgment on the Issue of Assignor Estoppel, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 126);

- May 6, 2011 Declaration of Arthur J. Behiel in Support of Brilliant's Reply re Motion for Summary Judgment of Noninfringement and Opposition to GuideTech's Motion for Summary Judgment on the Issue of Assignor Estoppel and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 127);
- May 6, 2011 Declaration of Martin E. Kaliski, Ph.D. in Support of Brilliant's Reply re Motion for Summary Judgment of Noninfringement and Opposition to GuideTech's Motion for Summary Judgment on the Issue of Assignor Estoppel and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 128);
- May 13, 2011 GuideTech LLC's Reply re Motion for Summary for Sumamry Judgment on the Issue of Assignor Estoppel and Objection and Response to Brilliant's Claim Construction Brief, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 129);
- May 13, 2011 Declaration of Byron R. Chin in Support of GuideTech LLC's Reply re Motion for Summary for Sumamry Judgment on the Issue of Assignor Estoppel and Objection and Response to Brilliant's Claim Construction Brief and accompanying exhibits, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 130);
- Transcript of Proceedings held on June 2, 2011 before Judge Claudia Wilken, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 168);
- August 17, 2011 GuideTech LLC's Motion for Leave to File a Motion for Reconsideration of Order Granting Summary Judgment of Noninfringement, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 140);
- September 6, 2011 Order Denying Defendants' Motion for Leave to File a Motion for Reconsideration, *Brilliant Instruments, Inc. v. GuideTech, LLC*, No. 4:09-cv-05517-CW (N.D. Cal.) (Dkt. 141).

In preparing the attached list, we have endeavored to be over-inclusive, because under Rule 30(a)(2)(B), only material that is actually cited in the parties' briefing will be included in the Joint Appendix. Of course, if you believe that the attached list should be modified in any way, we would be happy to try to come to agreement. To that end, please let us know as soon as possible if you believe any changes should be made to the attached list.

October 26, 2011
Page 4

Very truly yours,

A handwritten signature in black ink, appearing to read 'Byron R. Chin', with a stylized flourish at the end.

Byron R. Chin

BRC:l1t
Encl.

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