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

TOUCHSTREAM TECHNOLOGIES, INC., *Plaintiff*, *v.* **CHARTER COMMUNICATIONS, INC. et al.,** *Defendants*.	Lead Case No. 2:23-cv-00059-JRG **Member Case No. 2:23-cv-00062-JRG**
TOUCHSTREAM TECHNOLOGIES, INC., *Plaintiff*, *v.* **COMCAST CABLE COMMUNICATIONS, LLC, D/B/A XFINITY, et al.,** *Defendants*.	

MOTION TO STRIKE THE OPINIONS OF
KEVIN JEFFAY, PH.D.

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I. INTRODUCTION

Plaintiff Touchstream commenced this Action on February 16, 2023 against Defendant Comcast, alleging infringement of three patents: U.S. Patent Nos. 8,356,251, 11,048,751, and 11,086,934 ("the Asserted Patents). (*See* Dkts. 1, 30). Touchstream accuses Comcast of infringing certain claims of each of these Asserted Patents ("the Asserted Claims").

On June 24, 2024, Comcast's technical expert, Dr. Kevin Jeffay, served an expert report in this case opining on the alleged invalidity of the Asserted Claims of the Asserted Patents. ("Jeffay Invalidity Report"). In his Invalidity Report, Dr. Jeffay opines that the Asserted Claims are either anticipated or rendered obvious by numerous prior art references and combinations, including an alleged prior art Comcast Xfinity TV Remote app "system" ("Xfinity System").

The Court should exclude Dr. Jeffay's invalidity opinions involving the Xfinity System for improperly cobbling together dozens of references on disparate products, developed over many months by different teams, each possessing distinct features and functionalities, and calling them a single "system" reference. Dr. Jeffay's opinions improperly treat these distinct projects as a single prior art "system" reference for purposes of invalidity. But these projects are separate and discrete; treating them as anything but fails as a matter of law and demonstrates the unreliability of Dr. Jeffay's opinions.

Because Dr. Jeffay's opinions suffer from fundamental deficiencies under FRE 702 and 403, Touchstream respectfully requests the Court to exclude them from the jury trial.

II. LEGAL STANDARD

An expert witness may provide opinion testimony if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product

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of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

Federal Rule of Evidence 702 requires a district court to make a preliminary determination, when requested, as to whether the rule requirements are satisfied with a particular expert's proposed testimony. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993). District courts are given broad discretion in making Rule 702 determinations of admissibility. *Kumho Tire*, 526 U.S. at 152. Although there are various factors that the district court may consider in determining admissibility, the ultimate inquiry is whether the expert's testimony is sufficiently reliable and relevant to be helpful to the finder of fact and thus to warrant admission at trial. *United States v. Valencia*, 600 F.3d 389, 424 (5th Cir. 2010).

III. ARGUMENT

Dr. Jeffay's invalidity opinions regarding Xfinity System are unreliable for treating distinct projects as a single prior art system. "[I]n order to anticipate a claim [under § 102], 'a *single* prior art reference must expressly or inherently disclose each claim limitation.'" *See Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008) (emphasis added). Also, while multiple prior art references may be used as part of a § 103 obviousness analysis, Dr. Jeffay has not set forth any such § 103 combination where he treats references within the Xfinity System as multiple instrumentalities, such as by separately mapping them against the limitations of the Asserted Claims with separate discussions of why a POSITA would be motivated to combine these different systems. Rather, Dr. Jeffay mixes and matches various documents created over many months that describe different prototypes and different versions of commercial products (including some that are obviously irrelevant as post-dating the critical date) with distinct features and

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functionalities, claiming without support that they represent a single "system" reference. They do not, and as such, Dr. Jeffay's invalidity opinions involving the Xfinity System should be excluded.

For multiple references to qualify as a single prior art reference, they must all describe the exact same thing, *i.e.*, be embodied in a "coherent whole document [or product] that can be assigned a single prior art date of creation." *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). For example, one master's thesis project embodying all claim elements is a single prior art reference, even if the description is split between the student's thesis paper and his supervisor's paper. *IP Innovation L.L.C. v. Red Hat, Inc.*, 2:07–cv–447, 2010 WL 9501469, at *4 (E.D. Tex. Oct. 13, 2010). Likewise, software sold and shipped with an accompanying user guide describing that software may qualify as a single system reference. *See Kove IO, Inc. v. Amazon Web Servs., Inc.*, 18-c-8175, 2024 WL 450028, at *22 (N.D. Ill. Feb. 6, 2024) (analyzing *Stamps.com Inc. v. Endicia, Inc.*, 437 F. App'x 897 (Fed. Cir. 2011)). In these cases, the additional references "confirm the contents of the allegedly anticipating reference." *Kove*, 2024 WL 450028, at *22.

In contrast, references describing distinct prototypes and distinct versions of products do not qualify as a single system reference, even if they are tied together in pursuit of the same goal. For example, in *Kyocera*, the defendant argued "a comprehensive set of specifications for a second generation ('2G') mobile network" were a single prior art system reference because the specifications were "released as consistent sets" and part of a single standard, the "GSM standard." *Kyocera*, 545 F.3d at 1350. But the Federal Circuit disagreed, finding that the GSM standard did not qualify as a single prior art system reference because its components "were authored by different subsets of authors at different times," "[e]ach specification . . . stands as a separate document in its own right," internal references to the "greater GSM standard" and the other

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specifications were insufficiently specific for incorporation by reference, and defendants' own witness "testified that she had not read the entire standard and did not know of any person who had read the entire standard." *Id.* at 1351–52; *see also Kove*, 2024 WL 450028, at *22 (relying on *Kyocera* to find references describing different versions of Domain Name System and published at different times by different authors could not be combined as a single prior art "system").

Like in *Kyocera*, the Xfinity System set forth in various invalidity combinations in Dr. Jeffay's Invalidity Report cannot be considered a single prior art system reference. The alleged single system includes a May 2010 prototype developed by a Comcast Innovations Lab team in Denver and a November 2010 commercial app developed by an entirely different product team in Philadelphia. Comcast's prior art witness, Anadhan Subbiah, who worked on the Philadelphia team, testified that his team had very few, if any, discussions with the May 2010 prototype team in Denver, and further stated, "I do not recall using the source code or anything from the [May 2010] prototype to build the [November 2010] app that we built." (Ex. 2, Subbiah Dep. Tr. at 19:20-20:12, 21:11-17). Likewise, Comcast's prior art witness, Joshua Seiden, who worked in Denver on the May 2010 prototype, had never heard of the "Hoss" database that features prominently in the documents identified by Dr. Jeffay purportedly describing the November 2010 commercial release. (Ex. 3, Seiden Dep. Tr. at 61:20-62:3; Ex. 4, Jeffay Invalidity Report pp. 202, 212-213, 230-233, 235, 256, 260, Ex. 9 pp. 26, 27, 45, 46, 61, 62, 106, 109, 115, 128, 160, 161). Mr. Subbiah further testified that he had never even heard of Mr. Seiden or several of the other Colorado team members. (Ex. 2, Subbiah Dep. Tr. at 143:17-144:12).

Moreover, the single "system" that Dr. Jeffay points to is described in forty-five unique documents, many of which are undated and others that were created over the course of many months, without explanation as to why this patchwork of many disparate documents counts as a

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