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## I. INTRODUCTION

Touchstream's technical expert could not be more clear that "[i]t is my opinion that any 'XFINITY X1 STB,' that is, capable of receiving remote tune requests from another device, infringes the Asserted Claims of the Touchstream Patents." Ex. 2 ¶ 59. Touchstream's Opposition now disavows that opinion and acknowledges that it is incorrect as a matter of law. However, Touchstream's damages expert continues to rely on that now-disavowed opinion as the basis for his reasonable-royalty calculation. The Court should therefore grant partial summary judgment that any Comcast X1 STB that has not received an accused remote-tune request from another device does not infringe.<sup>1</sup>

## II. STATEMENT OF UNDISPUTED MATERIAL FACTS

The controlling facts that warrant a grant of partial summary judgment are now undisputed. Touchstream's Opposition does not dispute that each Asserted Claim is a method claim and requires receiving a message sent from a mobile phone or similar device. Opp. at 3; Mot. at 2. The Opposition also does not dispute that Touchstream's technical expert, Dr. Kevin Almeroth, opines that "Comcast supports remote control sessions through the XFINITY TV Remote Application *installed on* a personal computing device . . . ." Ex. 2 (Almeroth Infringement Rpt.) ¶ 129 (emphasis added); see Opp. at 3; Mot. at 2. And it does not dispute that many Comcast X1 subscribers have not downloaded and used the accused Xfinity TV Remote Application. See Ex. 7 (Mangum Rpt.) ¶ 29; Ex. 6 (Almeroth Dep. Tr.) at 39:20-45:23; see Opp. at 3; Mot. at 3.

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<sup>1</sup> Defined terms carry the same meaning as in Comcast's Motion (Dkt. No. 85), and "Ex. \_\_\_" refers to the exhibits attached to that Motion unless otherwise specified.

Although Touchstream's Opposition emphasizes that Dr. Almeroth provides more detail in the rest of his report, it does not (and cannot) dispute that Dr. Almeroth opines unambiguously that, "[i]t is my opinion that any 'XFINITY X1 STB,' that is, *capable* of receiving remote tune requests from another device, infringes the Asserted Claims of the Touchstream Patents." Ex. 2 ¶ 59 (emphasis added); *see* Opp. at 3; Mot. at 3. Nor does the Opposition dispute Dr. Almeroth's opinion that X1 STBs receive the remote-tune requests necessary for infringement from the Xfinity TV Remote Application. *See* Ex. 2 ¶ 167; *see* Opp. at 3; Mot. at 3. Finally, the Opposition does not dispute that Touchstream's damages expert, Dr. Russell Mangum, relies on Dr. Almeroth to opine that "[t]he applicable set top boxes are those that are *capable* of performing the accused methods and that are in the households of subscribers with access to Defendant's application accused of playing a role in those methods." Ex. 7 ¶ 10 (emphasis added); *see* Opp. at 3-4; Mot. at 3. Dr. Mangum thus includes in his royalty base *every single* X1 STB deployed each month, irrespective of whether it actually received the remote-tune request needed to infringe. Ex. 2 ¶ 10.

### III. ARGUMENT

Touchstream's Opposition renounces Dr. Almeroth's opinion that "any 'XFINITY X1 STB,' that is capable of receiving remote tune requests from another device, infringes the Asserted Claims of the Touchstream Patents." Opp. at 3. Instead, the Opposition now asserts that Comcast's X1 STBs infringe the Asserted Claims only when they perform the claimed methods. *See id.* at 2-4. Thus, there is no longer a genuine dispute of material fact that any X1 STB that has *not* received an accused remote-tune request from another device does *not* infringe.

Although the Opposition claims that Comcast's Motion is now moot, it ignores that Dr. Mangum continues to base his damages opinions on the infringement theory that

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