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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.	§	

REPLY IN SUPPORT OF COMCAST'S MOTION TO STRIKE CERTAIN OPINIONS OF DR. KEVIN ALMEROTH

[redacted]

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TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
Ex. 8	January 8, 2024 Email thread between counsel of record

[redacted]

Nothing in Touchstream's Response excuses the undisclosed, untimely, and unfairly prejudicial opinions referenced in Dr. Almeroth's reports.[1]

I. The Court Should Strike Dr. Almeroth's Improper References to and Incorporation of Opinions Offered in the *Google* Litigation

Touchstream provides no justification for deviating from the Court's Standing MIL No. 13, which prohibits "evidence, testimony, or argument regarding either party's other litigations or arbitrations." Standing Order on MILs at 3. Touchstream cites no case in which a prior verdict was permitted to support secondary considerations,[2] and Dr. Almeroth's opinions are nothing more than an "invit[ation to] the jury . . . to defer to the [prior] jury's verdict," *Maxell, Ltd. v. Apple Inc.*, 2021 WL 3021253, at *7 (E.D. Tex. Feb. 26, 2021).

The *Google* Litigation is irrelevant to the issues in this case because it involved "different parties, accused products, witnesses, [] prior art," two additional patents not asserted here, and the judgment is not final. *Id.* Moreover, the *Google* verdict does not establish the requisite nexus for secondary considerations—the jury returned only a general verdict of infringement, not a specific finding that any commercial success, industry praise, or industry reception was due to

[1] This brief refers to Comcast's Motion to Strike Certain Opinions of Dr. Kevin Almeroth (Dkt. 84) as the "Motion" or "Mot."; Touchstream's Opposition to the Motion (Dkt. 117) as "Opp."; exhibits to the Declaration of Ryan D. Dykal as "Opp. Ex."; and exhibits to the Reply Declaration of Alena Farber as "Reply Ex." All other terms carry the same meaning as in Comcast's Motion.

[2] *Sprint Commc'ns Co., L.P. v. Time Warner Cable, Inc.*, 760 F. App'x 977 (Fed. Cir. 2019) and *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 435 F.3d 1356 (Fed. Cir. 2006) concerned damages and willfulness. *Sprint Commc'ns Co., L.P.*, 760 F. App'x at 980-81; *Applied Med. Res. Corp.*, 435 F.3d at 1366. The courts in those cases found that the parties would have known about the prior litigation, which involved the same accused technology, at the time of the hypothetical negotiation. *Sprint Commc'ns Co., L.P.*, 760 F. App'x at 980-81; *Applied Med. Res. Corp.*, 435 F.3d at 1358 (prior litigation was between the ***same parties*** involving the ***same patent***). Here, the *Google* verdict postdates the filing of this lawsuit, let alone the hypothetical negotiation, and concerned Google's Chromecast devices, which are fundamentally differently than Comcast's accused mobile application. The verdict thus has no relevance to damages or willfulness in this case and, contrary to Touchstream's assertion, is not admissible for those purposes either. *See* Opp. at 5 n.2.

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