[redacted]

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

CHARTER DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO STRIKE DR. MANGUM'S DAMAGES THEORIES

[redacted]

Charter respectfully replies to Touchstream's opposition (Dkt. 129,[1] "Opp.") to Charter's Motion to Exclude and Strike Dr. Russell Mangum's Improper Opinions (Dkt. 95, "Mot.").

ARGUMENT

I. DR. MANGUM DID NOT ACCOUNT FOR ACTUAL OR ESTIMATED USE OF THE CLAIMED INVENTION, WHICH IS REQUIRED BY LAW

Touchstream is wrong when it argues that damages for method claims need not be based on actual or "estimated number of times a patented method is performed." (Opp. 1.) Touchstream relies heavily on *Hanson* and chides Charter for "neglecting" to cite it, but Touchstream misrepresents that opinion, which goes directly against Touchstream. In *Hanson*, the expert accounted for "estimated cost savings resulting from Alpine's ***use*** of the infringing Hedco machines" by basing his "calculations on the ***use*** of the machines for 800 hours a year," assuming "an average season's use of snowmaking systems." *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1080-81 (Fed. Cir. 1983) (emphases added). Touchstream cites *Lucent* (which referenced *Hanson*), but that case also goes against Touchstream: "The damages award ought to be correlated, in some respect, to the extent the infringing method is ***used*** by consumers." *Lucent Techs., Inc. v. Gateway, Inc*., 580 F.3d 1301, 1334 (Fed. Cir. 2009).

Touchstream mispresents the other cases it cites. It asserts that *Trading Technologies* is a "method patent case[]" (Opp. 7), but both method and system claims were at issue. *Trading Techs. Int'l v. IBG LLC*, No. 10-cv-715, 2021 WL 5038754 (N.D. Ill. July 23, 2023), *aff'd sub. nom. Brumfeld v. IBG LLC*, 97 F.4th 845 (Fed. Cir. 2024); *Brumfeld*, 87 F.4th at 863, 864-65, 871, 877 (during *Daubert* and summary judgment, the "court treated together the method and system claims of the patents," and considered a different damages framework than at issue here, "damages based on foreign conduct," which requires a "causal connection" and must still "respect[] the

[1] Charter responds to the corrected opposition (Dkt. 129) and to the original exhibits (Dkt. 126).

[redacted]

apportionment limit that excludes values beyond that of practicing the patent."). As for *Carnegie Mellon University v. Marvell Technology Group*, the court took usage into account but permitted the plaintiff to base damages on non-infringing sales because "Marvell has also conceded that its infringing use is the but-for cause of [its] sales." 890 F. Supp. 2d 602, 609-10 (W.D. Pa. 2012). Neither Touchstream nor Dr. Mangum have asserted anywhere that the accused Send-to-TV feature is a "but-for" cause of any Charter sales or subscriptions. Lastly, Touchstream relies on *Sprint Communications Co. v. Charter Communications, Inc.*, which preceded *Niazi* and does not follow Federal Circuit precedent. No. 17-cv-1734-RGA, 2021 WL 982732 (D. Del. Mar 16, 2021).

Touchstream's effort to distinguish *Cardiac Pacemakers* and *Niazi Licensing* is baseless and ignores the core principle of both cases that "patentees cannot recover damages based on sales of products with the mere capability to practice the claimed method." *See Niazi Licensing Corp. v. St. Judge Med., S.C., Inc.*, 30 F.4th 1339, 1357 (Fed. Cir. 2022) (citing *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, 576 F.3d 1348, 1358-59 (Fed. Cir. 2009)). Dr. Mangum's royalty base consisting of all devices capable of infringing is contradicted by these controlling precedents and their progeny.

Dr. Mangum ignores this principle, stating that "a damages model based on usage of the app is inappropriate." (Mangum Op. ¶142.)[2] Dr. Mangum's royalty base covers every accused STB (based on capability), regardless of whether it has ever been used to perform the claim method, and the citations to Dr. Mangum in Touchstream's Opposition refer only to capability, not actual or estimated usage: "Touchstream would consider ***expectation and potential*** of the

[2] Dr. Mangum's assertion that "the extent of use . . . is accounted for in the royalty base" (Mangum Op. ¶141) contradicts not only his statement that "a damages model based on usage of the app is inappropriate" (¶142) but also the fact that his royalty base does not account for use at all and instead simply adds up all STBs with just the "potential" of being used.

[redacted]

counterparty's use of the technology" (Opp. Ex. A ¶106; *id.* ¶141 "the extent of use, which is factoring into subscriber counts"); *id*. ¶114 ("Defendant stands ready to perform the patented methods for each STB in a subscriber's house upon request, and should pay Touchstream per STB, per month for the right to do so.").) What is worse, Touchstream and Dr. Mangum ***had Charter's data on actual usage***, but intentionally ignored it and made no effort to explain why it should not be considered.[3] When Touchstream chose to assert only method claims, it gave up the damages it now seeks as a matter of law, and they should be stricken.

II. DR. MANGUM FAILED TO APPORTION HIS ROYALTY RATE TO ACCOUNT FOR THE ADDITIONAL ITEMS INCLUDED IN THE [redacted] LICENSE RATE

Dr. Mangum improperly applied the full [redacted] royalty rate without attempting to apportion the value of the asserted claims from the products, services, and other rights given to [redacted] This error warrants striking his royalty rate opinions. *See, e.g., Apple Inc*. v. *Wi-LAN Inc.*, 25 F.4th 960, 971-74 (Fed. Cir. 2022). Touchstream provides no basis for the Court to disregard the Federal Circuit's *CSIRO* decision which requires, for reliability under *Daubert*, that the "ultimate reasonable royalty award must be based on the incremental value that the patented invention adds to the end product." 809 F.3d 1295, 1301 (Fed. Cir. 2015). Touchstream offers no explanation why Dr. Mangum refused to apportion so much as a penny from the [redacted] rate to any non-patented components of the reasonable royalty in this case, as shown in the chart in the Motion at 11. Touchstream's opposition ignores this chart.

[3] Touchstream also says that Dr. Mangum "factor[ed] in estimates for how many times [redacted] would use the patented method" but it never discloses these estimates, which are fictitious. (Opp. 5.) Factoring in "the hotel rooms" count is not an estimate of usage because there is no data or even estimate of whether [redacted] customers used the allegedly patented features or not. Nor would such a consideration necessarily be relevant to [redacted] because the license it received purportedly included Touchstream's unasserted system claims whose infringement does not depend on use. *See, supra*, II.

[redacted]

Touchstream argues that because [redacted] agreed to a $[redacted] rate without regard to actual or estimated use, Charter would do the same. This not only ignores the law, as discussed, but it ignores the critical fact that ***the*** [redacted] ***agreement purportedly conveys rights to apparatus claims***. (*See* Ex. 18, '251 Patent, claims 11-21) These apparatus claims, unlike the method claims asserted against Charter, command royalties based on device capability, not actual usage. *Niazi*, 30 F.4th at 1357. Dr. Mangum's failure to account for this at all, as well as the other items in Charter's chart (Mot. at 11), justify striking Dr. Mangum's royalty opinions for failure to conduct a proper apportionment.

III. DR. MANGUM IMPROPERLY RELIES ON THE *GOOGLE* TRIAL AND UNPRODUCED DOCUMENTS

The Court's Standing Order on Motions *in Limine* No. 13 prohibits reference to "either party's other litigations" such as *Google*, because it is prejudicial. Touchstream argues that the Court should defer ruling on this because "Charter appears likely to open the door." (Opp. 14.) This argument is irrelevant and simply avoids the issue. Reference to the *Google* trial should be excluded at least per the Court's Standing MIL No. 13, and Charter will not open the door—if it does, then the Court can permit Touchstream to respond, as with any motion *in limine*. Even if there is some relevance of information from the *Google* trial (there is not), the resulting prejudice could not be cured by a limiting instruction. Therefore, all references to the *Google* trial in Dr. Mangum's report should be stricken.

Touchstream argues that the *Google* trial is relevant to "post-filing willfulness" or to rebut lack of commercial success. (Opp. at 14). Dr. Mangum, however, does not offer any opinions on willful infringement and is precluded from doing so by the Court's Standing Order on Motions *in Limine* No. 23. Dr. Mangum's discussion of the "commercial success" of the Google Chromecast devices (in a footnote) is not relevant because he did not show any nexus between the asserted

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