[redacted]

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.	§	

COMCAST'S SUR-REPLY IN OPPOSITION TO TOUCHSTREAM'S MOTION TO STRIKE THE OPINIONS OF DR. STEPHEN BECKER

[redacted]

TABLE OF AUTHORITIES

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Cases

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TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
Ex. H	Rebuttal Expert Report of Dr. Kevin Jeffay Regarding Non-Infringement of U.S. Patent Nos. 8,356,251, 11,048,751, and 11,086,934
Ex. I	Expert Report of Dr. Kevin C. Almeroth Regarding Infringement of U.S. Patent Nos. 8,356,251, 11,048,751, & 11,086,934

[redacted]

Touchstream's Reply abandons any pretense that it is improper for Comcast's damages expert, Dr. Becker, to rely on Comcast's prior-art McMahon Patent for purposes of apportionment. Instead, the Reply now claims that the underlying opinions of Comcast's ***technical*** expert, Dr. Jeffay, are unfairly prejudicial but misreads his report in doing so. Touchstream's Motion should therefore be denied.[1]

Touchstream's Reply does not (and cannot) dispute that it is appropriate, if not required, for a damages expert to consider features of the accused product on which the defendant had obtained a patent for purposes of apportionment. Courts thus routinely find that such analysis is admissible, including as it pertains to *Georgia Pacific* factor 13. *See, e.g.*, *Retractable Techs. Inc. v. Becton, Dickinson & Co.*, 2009 WL 8725107, at *7-8 (E.D. Tex. Oct. 8, 2009). And that is precisely the analysis that Dr. Becker provided in his report as to the McMahon Patent that continues to be practiced by the accused Xfinity TV Remote App. *See* Ex. E (Becker Rpt.) ¶ 315. Touchstream's Reply does not cite any authority to the contrary or otherwise attempt to address these principles. Indeed, the Reply does not even mention "apportionment."

Having conceded its original critique of Dr. Becker's opinions, the Reply pivots to challenging ***Dr. Jeffay's*** underlying opinions as consisting of improper "non-infringement analysis." Reply at 1. As a threshold matter, Touchstream has not made this challenge in its separate motion to strike certain of Dr. Jeffay's opinions. *See* Dkt. No. 91. Thus, as the Reply itself acknowledges, it was appropriate for Dr. Becker to rely on Dr. Jeffay's technical opinions for purposes of his apportionment analysis. *See* Reply at 2 ("[Dr. Becker] relies, ***as he must***, on the technical opinion of Dr. Jeffay that the accused product practices [the McMahon Patent]."

[1] Defined terms carry the same meaning as in Comcast's Opposition (Dkt. No. 116), and "Ex. __" refers to the exhibits attached to that Opposition unless otherwise specified.

(emphasis added)). The Reply also ignores that Dr. Becker is not himself trying to sponsor any of Dr. Jeffay's technical opinions. It is therefore entirely irrelevant whether Comcast would "try to present" ***Dr. Jeffay's*** analysis for purposes of this Motion, which is directed solely to Dr. Becker's opinions. *See* Reply at 1 n.2.

In any event, the Reply misreads Dr. Jeffay's opinions because Dr. Jeffay does not mix his opinions regarding the McMahon Patent with his non-infringement analysis. Dr. Jeffay's report includes separate sections for (1) a description of how Comcast's system operates, (2) an analysis of why that system does not infringe, and then (3) "other topics," including his conclusion that the system practices the McMahon Patent. *See* Ex. H to the Sur-Reply Declaration of James Y. Park (Jeffay Rebuttal Rpt.) at i, ii, iv. In his analysis of how Comcast's system practices the McMahon Patent, Dr. Becker ***only*** cross-references subsections of his report from the section describing how the system operates. *See* Ex. G (Jeffay Rebuttal Rpt.) ¶ 194 (citing Subsections VI.A, VI.B.1, VI.B.2, VI.C, VI.E, VI.F, VI.G, VI.H). ***None*** of the subsections to which he cites analyzes non-infringement, which is the subject of the separate Section VII. *Compare* Ex. G ¶ 35 (start of Section VI), *with id.* ¶ 105 (start of Section VII).[2]

Touchstream's Reply (again, in support of its Motion to Strike ***Dr. Becker's*** opinions) also challenges the sufficiency of ***Dr. Jeffay's*** analysis of McMahon Claim 18. *See* Reply at 2-3. If Touchstream had wanted to challenge that opinion, it should have done so directly. But, regardless, Touchstream again overlooks key details in Dr. Jeffay's opinion. In his report, Dr. Jeffay maps each limitation of Claim 18 of the McMahon Patent to the relevant aspects of

[2] Touchstream's Reply also claims that Dr. Jeffay provides no reliable analysis tying the McMahon Patent to the 2010 Xfinity TV App System, but it ignores that Dr. Jeffay's ***invalidity*** report does just that. *See* Reply at 3 n.4; Ex. B (Jeffay Opening Rpt.) ¶¶ 484-92 (at pages 255-61). Accordingly, Dr. Becker's opinions on the costs associated with developing the 2010 Xfinity TV App System apply to the McMahon Patent as well. *See* Opp. at 7-8.

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