[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*.	

PLAINTIFF TOUCHSTREAM TECHNOLOGIES, INC.'S MOTIONS *IN LIMINE*

Plaintiff Touchstream Technologies, Inc. ("Touchstream") hereby moves the Court for an order in *limine* to preclude any attorney or witness from (1) making any reference, mention, statement, suggestion, or allusion to, (2) giving any testimony concerning, or (3) introducing any exhibits before the jury or panel concerning any of the following matters.

[redacted]

MIL NO. 1 Motion to Exclude Evidence and Argument Using Marketing Materials to Define Claim Scope

Comcast should be excluded from arguing or offering into evidence any marketing materials or marketplace language used to describe Touchstream's product for purposes of defining claim scope. Any argument or evidence of this is excluded under the Court's MIL No. 18, is not relevant, and is highly prejudicial to Touchstream.

Touchstream produced a plethora of marketing materials in this case. These materials include various emails, articles, descriptions on public websites, statements made in video demonstrations, and more. Comcast included many of these documents on its exhibit list, including at least:

- COM_00105419
- TS_COMCAST_00014059
- TS_COMCAST_00092857
- TS_COMCAST_00022796
- TS_CHARTER_00065855
- TS_COMCAST_00013929
- TS_COMCAST_00065876

Additionally, Comcast has designated testimony from various fact witnesses discussing business development efforts and how the witnesses would have described Touchstream's product offerings. For example, Comcast has designated the following testimony:

- Ex. A, Lulla Dep. Tr. at 21:15-19.
- Ex. A, Lulla Dep. Tr. at 23:6-24:4.
- Ex. B, Rinzler Dep. Tr. at 41:23-42:4.

At instance, in depositions in this case, Comcast [redacted] *See, e.g.*, Ex. G, Strober Dep. Tr. at 24:19-25:7. Comcast thus appears poised to use such marketing language to try to confuse the jury into thinking it is a limitation of the patent claims that an infringing solution cannot use wires or boxes. Such argument and evidence should be excluded under FRE 403. It is clear that Comcast intends to offer these documents and

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testimony into evidence for the purpose of differentiating its Accused Products by comparing them to Touchstream's commercial embodiments and marketing statements about the same. This is improper for several reasons.

First, exclusion of evidence and argument of marketplace language is consistent with this Court's standing MIL No. 18, which states: "[t]he parties shall be precluded from introducing evidence, testimony, or argument for purposes of infringement or non-infringement comparing the accused product or method to the preferred embodiments, the specification, or any non-accused product or method." *See* 08-11-2023 Patent Standing Order on Motions *in Limine* at 3. Comcast's initial exhibit list demonstrates its intent to offer statements from Touchstream's employees and agents to describe the patented invention. But arguments comparing Comcast's Accused Functionalities with embodiments of Touchstream's technologies risks confusing the jury about the issues they must decide.

Second, it is well established under Federal Circuit law that such comparisons are irrelevant and prejudicial in a jury trial on infringement. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373, 116 S. Ct. 1384, 1388, 134 L. Ed. 2d 577 (1996) ("The claim 'define[s] the scope of a patent grant'") (citing 3 E. Lipscomb, Walker on Patents § 11:1, pp. 280 (3d ed. 1985)); *B.E. Wallace Prod. Corp. v. United States*, 26 Cl. Ct. 490, 495 (1992) ("claims are not to be construed using the patentee's commercial product") (citing *ACS Hosp. Sys., Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1578 (Fed. Cir. 1984)). Such evidence and argument are not relevant to infringement, invalidity, or damages under FED. R. EVID. 402 and are highly prejudicial to Touchstream under FED. R. EVID. 403. The jury may be misled into believing that marketing materials provide insight into Touchstream's patented technology, or that statements about non-accused Touchstream products accurately depict or somehow limit the scope of the Asserted

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Claims. Neither is true, and allowing evidence and arguments as such would misrepresent the proper evaluation for the jury to determine infringement. *See, e.g.*, *Arthrex, Inc. v. Smith & Nephew, Inc*., No. 2:15-CV-01047-RSP, 2016 WL 7049397, at *4 (E.D. Tex. Dec. 5, 2016) (denying defendant's motion for summary judgment and rejecting defendant's argument that plaintiff's "marketing efforts affect the scope of patent claims").

Nor were these statements directed to a technical audience who could be considered persons of ordinary skill in the art. For example, many of the marketing materials implicated in this Motion were created or include statements from persons such as Touchstream CEO Herb Mitschele or inventor David Strober. Neither of these individuals are, or claim to be, experts in patents; they were merely describing the technology in layman's terms to a lay audience. *See, e.g.*, Ex. G, Strober Dep. Tr. at 70:1-72:11 ("[f]or marketing purposes, this was an accurate way of explaining to nontechnical people what we do"); *id.* ("at the time when we [wrote] this, it was trying to explain technical and new ways of doing things to an audience that may not be technical and may not understand the new way of doing it"); *id.* ("the purpose of explaining this to someone that's nontechnical, I think, this was as – the best we could do to explain that at the time."); s*ee also id.*, at 74:13-75:20 (explaining that "my response would change on who I was talking to and how I responded").

Additionally, exclusion of these materials, which are irrelevant to Comcasts's claims and defenses, would not be prejudicial to Comcast. As explained in Touchstream's Motion to Strike Dr. Shamos's "Three Anys" opinions in the Charter case, Touchstream's marketing statements about its own products and non-descript "patented technology" are irrelevant to damages or any other issue. Dkt. 94.

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Touchstream requests the Court exclude the use of marketing materials and marketplace language by Comcast in this manner, and all arguments relating to the same.

MIL NO. 2 Motion to Exclude Evidence and Argument that Touchstream was Ineffective at Business, or the Like

Comcast's pretrial disclosures include evidence and argument that Touchstream was ineffective and unsuccessful in its business ventures. For example, Comcast has designated numerous lines of disparaging testimony from the deposition transcripts of various fact witnesses:

- Ex. A, Lulla Dep. Tr. at 15:7-16:5 ([redacted]).
- Ex. A, Lulla Dep. Tr. at 62:23-63:20 ([redacted]).

Comcast also included exhibits on its exhibit list such as:

- COM_00091288
- TS_COMCAST_00086487
- COM_00101614
- TS_COMCAST_00013929
- TS_COMCAST_00014059
- COM_00101606
- COM_00091331

These lines of testimony and documents appear aimed to portray Touchstream's attempts to develop business in a disparaging way. But this evidence and argument is not relevant under FRE 402 to issues of infringement or validity, nor is it helpful for damages. Further, allowing this evidence and argument in at trial would be highly prejudicial to Touchstream under FRE 403.

This Court's MIL No. 11 states, "The parties shall be precluded from introducing evidence, testimony, or argument referring to any other person or entity in disparaging ways," beyond referring to a party as a "non-practicing entity." 08-11-2023 Patent Standing Order on Motions *in Limine* at 3. Documents and testimony that Touchstream was ineffective, unsuccessful, or the like at business would disparage Touchstream and therefore be subject to this MIL. The jury may be unfairly prejudiced against Touchstream and may be persuaded that simply because a party's

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