

**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.

TOUCHSTREAM TECHNOLOGIES, INC.,

Plaintiff,

v.

**COMCAST CABLE COMMUNICATIONS,
LLC, D/B/A XFINITY, et al.,**

Defendants.

Lead Case No. 2:23-cv-00059-JRG
Member Case No. 2:23-cv-00062-JRG

**PLAINTIFF TOUCHSTREAM TECHNOLOGIES, INC.'S SUR-REPLY IN FURTHER
OPPOSITION TO CHARTER DEFENDANTS' MOTION TO EXCLUDE AND STRIKE
DR. STEPHEN B. WICKER'S OPINIONS**



TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. The Court Should Deny Charter’s Motion to Strike Dr. Wicker’s References to the *Google* Matter. 1

 B. The Court Should Deny Dr. Wicker’s References to Dr. Almeroth’s Reports and Testimony in the *Google* Matter. 4

 C. The Court Should Deny Charter’s Motion to Strike Dr. Wicker’s References to and Reliance on the CableLabs Specifications. 4

III. CONCLUSION..... 5

TABLE OF AUTHORITIES

Cases

<i>Lone Star Tech. Innovations, LLC v. ASUSTek Computer Inc.</i> , No. 6:19-CV-00059-RWS, 2022 WL 21714403 (E.D. Tex. June 23, 2022)	3
<i>Saint Lawrence Commc'ns LLC v. ZTE Corp.</i> , No. 2:15-CV-349-JRG, 2017 WL 3476978 (E.D. Tex. May 8, 2017)	3
<i>Sprint Communications Co. v. Time Warner Cable, Inc.</i> , 760 F. App'x 977 (Fed. Cir. 2019)	3
<i>VirnetX Inc. v. Apple Inc.</i> , No. 6:12-CV-855, 2016 WL 4063802 (E.D. Tex. July 29, 2016).....	2

I. INTRODUCTION

Charter's reply in support of its motion to strike certain of Dr. Wicker's opinions largely insists that the Court rule on issues prematurely before trial. But Dr. Wicker is a rebuttal witness on those issues, and the scope of his testimony thus depends on the testimony that Charter elicits from its own expert and from Dr. Wicker.

Charter also seeks to strike Dr. Wicker's opinions adopted from, or referring to, a different technical expert who earlier opined on similar issues involving overlapping patents. But there is nothing improper about one expert adopting another expert's opinions, particularly where, as here, that expert independently analyzed those opinions and timely set them forth in his own report.

Finally, Charter concedes that Dr. Wicker's reliance on the OCAP specifications used in Charter's accused products should not be excluded and that this issue is now moot.

The Court should deny Charter's motion.

II. ARGUMENT

A. The Court Should Deny Charter's Motion to Strike Dr. Wicker's References to the *Google* Matter.

As explained in Touchstream's opposition brief, Touchstream is well aware of the Court's standing Court MIL No. 13 regarding prior litigation. Accordingly, Touchstream committed in its brief to (1) not affirmatively eliciting testimony about the *Google* Matter from Dr. Wicker unless necessary to respond to testimony elicited by Charter, (2) to raise any such anticipated testimony about the *Google* Matter with Charter and the Court in advance, and (3) to work with Charter and the Court to potentially craft a curative limiting instruction.

In its reply, Charter does not at all explain why this procedure is insufficient to address its concern that the jury would be prejudiced by hearing about Touchstream's prior verdict against Google, or why a ruling in advance of trial on this issue is at all necessary given the Court's

[REDACTED]

standing order and the probative value of these opinions if Charter opens the door. In fact, Charter does not address this procedure at all, simply reiterating that permitting Touchstream to introduce testimony relating to the *Google* verdict “will fundamentally change the trial.” (Reply at 1). That response, of course, does not explain why Touchstream’s proposed course of action is insufficient.

In the sole case Charter cites in contending that permitting Dr. Wicker to reference *Google* would be prejudicial, no such procedure was in place to mitigate any potential prejudice. In that case, two actions involving the same parties, same patents, and different versions of the same product were consolidated, and one of the cases was being retried on remand as to only certain issues. *VirnetX Inc. v. Apple Inc.*, No. 6:12-CV-855, 2016 WL 4063802, at *1 (E.D. Tex. July 29, 2016). The prior verdict “was repeatedly used as a shortcut for the infringement analysis,” “the parties went well beyond what was appropriate,” and “many statements regarding [the prior verdict] were unnecessary.” *Id.* at *2, *5. Here, there is no such risk—the Court has a Standing Order requiring Touchstream to obtain prior permission before eliciting testimony about the *Google* Matter, and Touchstream will not attempt to elicit such testimony from Dr. Wicker unless necessary to respond to testimony that Charter itself elicits. Further, in *VirnetX*, because the prior verdict involved the same parties, same patents, and different versions of the same products, the Court found that the issues were “too similar for a jury to distinguish.” *Id.* at *4–5 (“The Court’s decision to consolidate Cause Nos. 6:10-cv-417 and 6:12-cv-855 merged two cases with incredibly similar issues.”). Here, it will not be difficult for the jury to understand that the *Google* Matter involved a different defendant and different accused products with different branding.

Saint Lawrence is also inapposite. In that case, this Court denied a motion by the plaintiff to supplement its damages expert’s report to include opinion testimony about how a verdict in a related case might affect damages in the case at hand. *Saint Lawrence Comme’ns LLC v. ZTE*



Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.