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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

[redacted]

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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

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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 Commc'ns LLC v. ZTE*

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