[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*.	

TOUCHSTREAM'S SURREPLY BRIEF OPPOSING CHARTER'S MOTION TO EXCLUDE AND STRIKE DR. RUSSELL W. MANGUM III'S OPINIONS

DOCKET ALARM
Find authenticated court documents without watermarks at docketalarm.com.

[redacted]

The Federal Circuit explains that damages should track "real-world licensing negotiations," and thus has repeatedly rejected the "rigid requirement" Charter calls for, which Dr. Mangum in any event satisfies. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1334 (Fed. Cir. 2009). Here, Dr. Mangum follows *Lucent*'s guidance, finding the most comparable real-world agreement, subtracting out payments from the agreement to focus on the footprint of the patents, making the proper adjustments to this case, and explaining why no further adjustments are needed. Ex. A, Mangum Report § V.A.1.[1] He also explained how his approach accounts for expected use of the patented method. *Id.* ¶¶ 106, 141, 149-53. Charter finally acknowledges these opinions, and retreats to merely arguing Dr. Mangum elsewhere "contradicts" himself. Reply Br. at 2 n. 2. Even if true (it is not), this is a quintessential issue for cross examination. Dr. Mangum's approach is legally sound and reliable, and Charter's disagreements with its application are for cross.

Charter also continues to make plainly inaccurate statements about Dr. Mangum's opinions and Touchstream's arguments, and this alone is reason to deny Charter's full motion. Touchstream has already explained how Charter incorrectly represented to the Court that Dr. Mangum's report "does not even mention" copyright and trademark rights from the [redacted] agreement, when in fact his report discussed those exact issues at length. Opp. at 2. Charter does not even try to defend that false statement. *See generally* Reply Br. Amazingly, Charter now makes a similar inaccurate claim that "Touchstream's opposition ignores" a chart on page 11 of Charter's brief (Reply Br. at 3), when that opposition spends over a page discussing "Charter's diagram (Mot. at 11)" and how Dr. Mangum addresses everything in it. Opp. at 13-14. When Charter cannot be trusted to accurately describe basic issues like this, the Court should deny Charter's entire motion.

[1] Defined terms carry the same meaning as in Touchstream's Opposition (Dkt. 126), and "Ex. __" refers to the exhibits attached to that Opposition unless otherwise specified.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

[redacted]

A. Dr. Mangum Goes Beyond Any Legal Requirement for Addressing Actual Use

Charter's argument that Dr. Mangum fails to adequately address usage of the patented methods continues to misunderstand both what Dr. Mangum did and what the law requires.

As to what Dr. Mangum opined on, he explained that the [redacted] month rate from the [redacted] factored in how many times the parties expected [redacted] would perform the accused method for users, and he concluded the expected usage for Charter would be similar enough that no adjustment is required. Ex. A, Mangum Report ¶¶ 106, 141, 149-153. Charter appears confused by this point, but factoring expected use into a flat rate is nothing new. Insurance companies clearly base monthly premiums on an estimate of the number and cost of claims and apply that rate to every customer each month whether they make a claim or not. These monthly flat fees account for expected use of the service, they just do so in a different way that is more convenient and predictable. Dr. Mangum explained at length why Touchstream and Charter would agree to such a rate here, including because [redacted] agreed to this in similar circumstances, and because this approach aligns with Charter's need for the technology and how Charter (and its competitors) charge video customers. *Id.* ¶¶ 106-09, 114. He has also explained that if he artificially changed the base, such as by applying the [redacted] rate only to customers who actually used the technology in a given month, he would need to increase the rate, *see* Ex. C, Mangum Tr. at 68:9-69:25, as would insurance companies if they suddenly started only charging customers for months where they made a claim. This is a reliable approach, well-grounded in the facts and law.

As to applicable law, Charter's discussions are academic because, as explained above, Dr. Mangum's opinions easily meet any requirement of being "correlated, in some respect, to the extent the infringing method is used by consumers." Reply Br. at 1 (quoting *Lucent*, 580 F.3d at 1334). And the cases Charter discusses leave flexibility for a real-world approach like the one

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

[redacted]

applied by Dr. Mangum here. With *Hanson v. Alpine Valley Ski Area, Inc*., 718 F.2d 1075, 1080-81 (Fed. Cir. 1983), involving only method claims, Charter's interpretation is at odds with the Federal Circuit's decision in *Lucent*, which 26 years later favorably described *Hanson* as "approving a reasonable royalty ***not based on 'actual use*** of the snowmaking machinery' but on what a party would have paid to have the machine ***available to use***." *See* 580 F.3d at 1334 (emphasis added). Dr. Mangum's calculations, which also explain why Charter and its customers would independently value having the patented method available to use, but which nonetheless applied a rate factoring in expected use of that method, is well supported by controlling law.[2]

Nothing in the additional cases cited by Charter changes this result. Charter suggests that *Cardiac Pacemakers* and *Niazi Licensing* represent some major change in the law, but this ignores that the Federal Circuit in *Cardiac Pacemakers* took up some issues, but not this one, *en banc*. *See Cardiac Pacemakers, Inc. v. St. Jude Med., Inc*., 576 F.3d 1348, 1358-59 (Fed. Cir. 2009). This confirms that no judge on the Federal Circuit saw anything in *Hanson* that was controversial and should be overruled, which the Federal Circuit confirmed the next month when it cited *Hanson* favorably in the *Lucent* case. *Cardiac Pacemakers* and *Niazi Licensing* should thus be limited to their facts, which Touchstream distinguished in arguments that Charter only addresses in conclusory fashion as "baseless." Reply Br. at 2. This also shows that Charter is incorrect to dismiss *Sprint Commc'ns Co. v. Charter Commc'ns, Inc.*, C.A. No. 17-cv-1734, 2021 WL 982732 (D. Del. Mar. 16, 2021) as "preced[ing] *Niazi*" and "not follow[ing] Federal Circuit precedent" (Reply Br. at 2). That case fell within the controlling reasoning of *Hanson* and *Lucent* when the

[2] Charter also claims *Lucent* "goes against Touchstream[.]" Reply Br. at 1. But *Lucent* rejected the argument that "for method claims, [precedent] requires that damages be limited to the proven number of instances of actual infringing use." *See* 580 F.3d at 1323. And the language Charter cites discusses of *Georgia-Pacific* factor 11, not an independent reason for exclusion. *See id.* 1333-34.

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

court rejected defendant's argument that a flat monthly fee for method patents failed to apportion to the number of infringing calls, noting that (as here) defendants "did not refund any money to subscribers if they did not make [infringing] calls." *See Charter*, 2021 WL 982732 at *14.[3]

B. Charter's Apportionment Challenges are an Issue for Cross-Examination

Dr. Mangum's use of the [redacted] agreement, the comparability of which Charter does not appear to challenge, satisfies *Daubert* requirements. Dr. Mangum subtracted out several payments in that agreement, including "development fees" and "integration" fees (Ex. A, Mangum Report ¶ 110), and explained why the ***remaining*** [redacted] per month rate properly applies in this case once an appropriate royalty base was selected and adjusted for consistency. *Id.* ¶¶ 102-19, 161, 163.

Charter does not even try to address Touchstream's argument that "Charter employs the common, unpersuasive tactic of claiming that simply because a damages expert employs the same royalty rate from a prior agreement, the expert 'failed to apportion' that rate to the footprint of the patent." Opp. at 11. Nor does Charter attempt to distinguish this case from *Time Warner Cable* on this issue, where the Federal Circuit rejected just such an argument in affirming a $140 million award. *See* 760 F. App'x at 982-84. Indeed, Charter's argument here, that "Dr. Mangum refused to apportion so much as a penny from the [redacted]" (Reply Br. at 3), is eerily similar to the rejected argument there (by Charter's subsidiaries) that the plaintiff's damages expert "made no attempt to apportion" a past royalty rate because he used the same rate "without adjusting it even a fraction of a cent." Opp. at 11 (quoting Br. of Def.-Appellants in *Time Warner Cable*). As in *Time Warner Cable*, here Dr. Mangum acknowledges the unpatented technology in that agreement and explains why it does not make economic sense to subtract out anything more than

[3] *See also Sprint Commcn's Co. v. Time Warner Cable*, 760 F. App'x 977, 979, 982-84 (Fed. Cir. 2019) (affirming award of "$1.37 per VoIP subscriber per month" for patented "method for using a packet-switched network to transport telephone calls"), *cert. denied*, 140 S.Ct. 467 (2019).

DOCKET ALARM Find authenticated court documents without watermarks at docketalarm.com.

DOCKET ALARM

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.