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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** [redacted]
TOUCHSTREAM TECHNOLOGIES, INC., *Plaintiff*, v. **COMCAST CABLE COMMUNICATIONS, LLC, D/B/A XFINITY, et al.**, *Defendants*.	Member Case No. 2:23-cv-00062-JRG

CHARTER DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS (DKT. 269) TO MAGISTRATE JUDGE PAYNE'S EVIDENTIARY RULINGS ON THE ADMISSIBILITY OF CERTAIN PLAINTIFF TRIAL EXHIBITS

[redacted]

I. INTRODUCTION

At the January 3, 2025 Pretrial Conference, the Magistrate Judge sustained Charter's objections to certain of Plaintiff's proposed exhibits as impermissible hearsay not subject to an exception. Touchstream objects under Rule 72 (Dkt. 269) without presenting any facts that were misapprehended by the Magistrate Judge or citations to legal authority that undermine his decision. With respect to the exhibits at issue (Ex. 1, PTX007; Ex. 2, PTX026; Ex. 3, PTX034; and Ex. 4, PTX038),[1] there is no reason to disturb the Magistrate Judge's ruling, which correctly found that the objected-to exhibits contain hearsay, are not business records, and do not fall under any exception to the hearsay rule.

PTX	Description	Rulings
007 026 038	Exclusively internal emails of Plaintiff Touchstream (aka Shodogg); all authors are Plaintiff witnesses.	Non business record Hearsay
034	Unsolicited email from Plaintiff Touchstream (aka Shodogg) to TWC; author is Plaintiff witness.	Non business record Hearsay

PTX 007, PTX026 and PTX038 are internal emails among Touchstream (Shodogg) employees. Every author and every recipient has a "@shodogg.com" email address, and every statement is attributable to a Touchstream employee. Emails among Touchstream personnel are hearsay, and the "Opposing Party's Statement" exception of FRE 801(d)(2) does not apply when Touchstream is trying to admit its own documents.

PTX034 is the only exhibit at issue that includes a recipient outside of Touchstream. PTX034 is an unsolicited email from Touchstream CEO Herb Mitschele to Chris Cholas at TWC. There is no statement within PTX034 that contains information ***from TWC*** or anyone speaking on

[1] Since the filing of Touchstream's objection, which was filed without a meet and confer with Charter, Charter has withdrawn its objection to PTX027 and PTX029. The parties have agreed that Touchstream will redact PTX037, which resolves and moots Charter's hearsay objection.

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behalf of TWC—it is an email to TWC with no response. Further, there is no evidence in the record that the TWC recipient ever responded. Because the only statements in PTX034 are those of Touchstream, they are hearsay and inadmissible by Touchstream.

II. ARGUMENT

Touchstream's erroneous characterization of the statements in these hearsay documents as "admissions by a party opponent" (Objection at page 2) is at odds with the exhibits themselves. Looking at the plain face of the emails of PTX007, PTX026, PTX034 and PTX038, it is clear that there is no statement, let alone any admission, by Charter or TWC. The fact that one of these emails was ***sent to*** a TWC employee (Chris Cholas, PTX034) does not convert a statement by Touchstream into an admission by Charter.

Touchstream states that the exhibits go to Charter's state of mind and are relevant to willfulness or damages, but "relevance" (assuming for the sake of argument there is relevance) is not an exception to hearsay. Moreover, the "state of mind" exception under FRE 803(3) relates to a ***declarant's*** state of mind, and the only declarants in the exhibits are Touchstream personnel. Therefore, FRE 803(3) and the state of mind exception do not apply to these documents.

In addition, the exhibits are not business records. As argued and explained by the Court during the January 3, 2025 pretrial conference,[2] all emails are not business records under FRE 803(6). Only records of a regularly conducted activity of a business constitute an exception to hearsay. Fed. R. Evid. 803(6); *Rock v. Huffco Gas & Oil Co.*, 922 F.2d 272, 279 (5th Cir. 1991)

[2] Dkt. 252 at 23:7-8 (The Court: "I mean, an email rarely qualifies as a business record."). Dkt. 252 at 24:23-24 (The Court: "[I]t is not impossible for email to be business records, but it would be very unusual."). Dkt. 252 at 40:17-23 (The Court: "[B]usiness records are not just any record that the business makes to run their business. . . . [A] business record is supposed to be something that is updated, kept contemporaneously by somebody with knowledge, and it -- frankly, it takes a declaration from the custodian. You know, there's a lot to 803(6) other than just saying this is a record that a business created.").

[redacted]

(explaining that the business record exception rests on the assumption of reliability). Even where a record meets some requirements of FRE 803(6), it still is not a business record if the "source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Fed. R. Evid. 803(6); *see Versata Software, Inc. v. Internet Brands, Inc.*, No. 2:08–cv–313–WCB, 2012 WL 2595275, at *3-8 (E.D. Tex. July 5, 2012). This is particularly true when the emails contain puffery and subjective beliefs, as here, and when Touchstream admitted it had no "[redacted]" of sending emails to accurately memorialize meetings as a regular part of their business. (Ex. 5, J. Cohen Tr. 85:19-23, 86:10-16 ("[redacted].").)

To be sure, PTX034 was collected and produced by Charter in discovery because it was sent to Charter by Touchstream, but this does not make the email a business record of either party. In *Versata*, the Court addressed this very issue:

> ***The fact that a copy of the [ ] e-mail was produced for trial purposes does not establish that such e-mails were routinely retained for consultation and use.*** Copies of electronic correspondence are frequently subject to retrieval, at least absent affirmative steps to eradicate them from a computer system. However, ***the fact that a party may be able to retrieve an electronic record, such as in connection with litigation, does not mean that the party has retained that document in a system of records that have been "kept" or "maintained" as business records for subsequent use and consultation.*** *See United States v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000); Michael H. Dore, *Forced Preservation: Electronic Evidence and the Business Records Hearsay Exception,* 11 Colum. Sci. & Tech. L. Rev. 76 (2010) ("Many electronic records . . . remain in a company's files only because the company had a duty to preserve them once it reasonably anticipated litigation or a government subpoena. The company otherwise typically would have deleted those electronically stored data in the regular operation of its business to make room on its burdened servers . . . . [S]uch presumptive deletion undermines the trustworthiness and reliability of a business record, and thus the rationale of Rule 803(6). Courts should therefore focus on the unique elements of the creation and preservation of electronic evidence, and consider whether a company truly kept the record at issue in the course of business, or simply because a duty to preserve required it.").

Versata Software, Inc., 2012 WL 2595275, at *6 n.1 (emphasis added).

Touchstream has failed to justify admitting PTX007, PTX026, PTX034 and PTX038, and the Magistrate Judge did not clearly err in sustaining Charter's objections to their admission.

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III. CONCLUSION

For the foregoing reasons, Charter respectfully requests that this Court overrule Touchstream's objections to the evidentiary rulings pertaining to PTX007, PTX026, PTX034 and PTX038 and the exhibits remain not preadmitted for trial.

Dated: January 27, 2025

Respectfully submitted,

/s/ Daniel Reisner

Daniel L. Reisner, *pro hac vice*
David Benyacar, *pro hac vice*
Melissa Brown, *pro hac vice*
Robert Stout, *pro hac vice*
Arnold & Porter Kaye Scholer LLP
250 West 55th Street
New York, NY 10019
daniel.reisner@arnoldporter.com
david.benyacar@arnoldporter.com
melissa.brown@arnoldporter.com
robert.stout@arnoldporter.com

Dina M. Hayes, *pro hac vice*
Arnold & Porter Kaye Scholer LLP
70 West Madison Street, Suite 4200
Chicago, IL 60602
dina.hayes@arnoldporter.com

Deron Dacus (State Bar No. 00790553)
THE DACUS FIRM, P.C.
821 ESE Loop 323, Suite 430
Tyler, TX 75701
Tel: (903) 705-1117
Fax: (903) 581-2543
ddacus@dacusfirm.com

Carson D. Anderson, *pro hac vice*
3000 El Camino Real, Bldg. 5, Suite 500
Palo Alto, CA 94306
carson.anderson@arnoldporter.com

Marc A. Cohn, *pro hac vice*
Stanton Jones, *pro hac vice*
Natalie Steiert, *pro hac vice*
601 Massachusetts Avenue, NW
Washington, DC 20001
marc.cohn@arnoldporter.com

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