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*.	§ § § § § § § § § § §	CIVIL ACTION NO. 2:23-CV-00059-JRG-RSP (Lead Case)

REPORT & RECOMMENDATION

Before the Court is the Comcast Defendants' Motion for Summary Judgment of Noninfringement. **Dkt. No. 85.** For the reasons discussed below, the Motion should be **DENIED**.

I. LEGAL STANDARD

A. Summary Judgment

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any evidence must be viewed in the light most favorable to the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59 (1970)). Summary judgment is proper when there is no genuine dispute of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* [dispute] of material fact." *Anderson*, 477 U.S. at 247–48 (emphasis added). The substantive law identifies the material facts, and disputes over facts that are irrelevant or unnecessary will not

defeat a motion for summary judgment. *Id.* at 248. A dispute about a material fact is "genuine" when the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party must identify the basis for granting summary judgment and evidence demonstrating the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323.

"If the moving party does not have the ultimate burden of persuasion at trial, the party 'must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.'" *Intellectual Ventures I LLC v. T Mobile USA, Inc.*, No. 2:17-CV-00577-JRG, 2018 WL 5809267, at *1 (E.D. Tex. Nov. 6, 2018) (quoting *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000)).

II. ANALYSIS

In the Motion, Comcast argues that Touchstream's damages expert, Dr. Kevin Almeroth, "opines that all Comcast X1 set top boxes ("STBs") with the mere ***capability*** of receiving remote tune requests from another device infringe the Asserted Claims." Dkt. No. 85 at 1. Comcast asserts that this is a violation of law because all the asserted claims are method claims which are only directly infringed by practicing the patented method. *Id.* at 4. Ultimately, Comcast argues that summary judgment should be granted on this issue, and the Court should require Touchstream to "carve out from any damages any X1 STB not used in conjunction with actual performance of the claimed methods." *Id.* at 6.

In Response, Touchstream agrees with Comcast's recitation of the law regarding method claims, but disputes Comcast's assertion about Dr. Almeroth's analysis purporting to accuse

products with the mere capability of performing the method steps: "Dr. Almeroth analyzed and provided opinions on Comcast's performance of those methods." Dkt. No. 122 at 7.

In Reply, Comcast focuses its argument on Dr. Mangum's report. Dkt. No. 151 at 2–3. It argues that "there is no longer a genuine dispute of material fact that any X1 STB that has ***not*** received an accused remote-tune request from another device does ***not*** infringe. *Id.* at 2. Comcast then moves to Dr. Mangum's damages opinions, arguing that he "continues to base his damages opinions on the infringement theory that Touchstream disavows." *Id.* at 2–3.

The Court finds Comcast's arguments unpersuasive. First, the Court has already denied Comcast's Motion to Strike the Opinions of Dr. Mangum based on the same line of argument. Dkt. No. 239. Next, Dr. Almeroth relies on the correct legal test. Dkt. No. 122-1 at ¶ 49 ("I understand that direct infringement of a method claim means that the defendant must perform each step of the method claim within the United States."). Further, the entirety of the quote relied on by Comcast belies its position. Dr. Almeroth says, "[i]t is my opinion that any 'XFINITY X1 STB,' that is, capable of receiving remote tune requests from another device, infringes the Asserted Claims of the Touchstream Patents, as addressed in more detail below and in the appendices to this report." *Id.* at ¶ 59. In Paragraphs 122 and 123 Dr. Almeroth does address his theory in more detail and according to the law on method claims. The Court thus sees no basis for the relief that Comcast seeks. The Motion should be **DENIED.**

III. CONCLUSION

A party's failure to file written objections to the findings, conclusions, and recommendations contained in this report within 14 days bars that party from *de novo* review by the District Judge of those findings, conclusions, and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted

and adopted by the district court. Fed. R. Civ. P. 72(b)(2); *see Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*). Any objection to this Report and Recommendation must be filed in ECF under the event "Objection to Report and Recommendations [cv, respoth]" or it may not be considered by the District Judge.

SIGNED this 13th day of February, 2025.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE