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

MOTION TO COMPEL ADDITIONAL DISCOVERY
ON COMCAST'S SUPPLEMENTAL DISCLOSURES

About one month before a scheduled trial on patent infringement, Comcast sought to benefit itself by serving new, incomplete supplemental discovery claiming it has now discontinued the accused Xfinity TV Remote app ("accused app") due to lack of consumer demand. Now that it has come to light (last week) that Comcast in fact immediately ***re-instated*** the accused app, apparently due to consumer outrage over that app's discontinuation, Touchstream seeks follow-up discovery to complete this important record. Comcast refuses to provide the complete story.

Touchstream thus respectfully requests the following relief from the Court:

1. Order Comcast to supplement its selective production of engineering documents on these decisions with its communications with customers and relevant internal communications during this limited period;

2. Order Comcast to supplement its selective witness testimony from an engineer on these decisions with a witness who can speak for the company on these decisions and these new documents;

3. Grant Touchstream leave to present these new documents and testimony at trial, with its experts providing short supplemental reports on them.

Touchstream requested all this from Comcast over a week ago. Comcast, despite unilaterally re-opening discovery on this issue, has provided no excuse at all for why the representations in its new interrogatory response proved false, for why its witness on these issues was unprepared, and for why its production on this issue was demonstrably one-sided and incomplete. As this discovery focuses on a narrow issue and a limited timeframe, Touchstream does not anticipate any need to move trial, set for March 3, 2025 at the earliest. Touchstream stands ready to argue this issue either live or telephonically at the Court's convenience.

I. FACTUAL BACKGROUND

Comcast's fact and expert witnesses have long claimed in this case that the accused Xfinity Remote app is unpopular, rarely used, and that Comcast is considering discontinuing it, with Comcast's damages expert opining that the "usage and popularity of the accused TV Remote App

has been declining steadily since at least 2020, to the point that Comcast has considered eliminating the app."[1] On December 11, approximately six months after the close of fact discovery and one month before then-scheduled trial, Comcast unilaterally re-opened discovery to supplement an interrogatory response with a self-serving narrative saying Comcast decided to discontinue the accused app in part because it was unpopular and only used by a "small number of Comcast customers."[2] Comcast also unequivocally stated that the "Xfinity TV Remote mobile application will…no longer be operable by December 31, 2024." *Id.* Comcast also produced 19 engineering documents and offered up Comcast engineer Evan Cohen for a deposition on January 7, 2025 on this topic, less than a week before the then-applicable January 13 trial setting. Comcast unsuccessfully attempted to add one of those 19 documents to its exhibit list for trial.[3]

After trial was continued from January 13, the deposition occurred by agreement of the parties on January 28, 2025. During the deposition Mr. Cohen explained that Comcast disabled the accused app for current users in December 2024, but then re-instated functionality that same month for those users based in part on a request from Comcast's customer care team, which allegedly needed more time to complete "documentation."[4] Thus, contrary to Comcast's representations, the accused app ***was*** operable past December 31 and well into January 2025. Mr. Cohen could not speak to who outside his engineering department was involved in the decision to

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[1] 7/15/2024 Report of Stephen L. Becker, Ph.D., Dkt. 91-1, ¶ 255. *See also* Depo. Tr. of Scott Manning, Dkt. 83-9, at 70:10-71:02 ("Well, there's been a lot of talk about deprecating the app.").
[2] Ex. 1, Comcast's December 11, 2024 Supp. Resp. to Touchstream's Interrog. No. 10, at 8.
[3] Dkt. 289, 1/23/2025 Pretrial Conf., Tr. 43:20-44:20 (noting the document's unreliability).
[4] Ex. 2, 1/28/25, Cohen Tr. 33:17-36:10.

discontinue the accused product, or what that broader conversation within Comcast entailed.[5]

After that deposition first disclosed the involvement of Customer Care, a quick internet search by Touchstream uncovered 45 documents (which Touchstream produced that same day) evidencing public outcry over Comcast's cancellation of the app, and Comcast's public response thereto.[6] Comcast's supplemental productions bore no trace of these exchanges or how they might have factored into Comcast's decision to deactivate and then reinstate the accused product. Touchstream immediately confronted Comcast with its inaccurate interrogatory response and incomplete productions and demanded fulsome discovery.[7] Comcast initially wholesale refused, including because Comcast ***no longer*** intends to bring up at trial the discontinuation of the accused product.[8] Comcast then agreed to search for and produce certain categories of (clearly relevant and existing) documents on Customer Care's talks with subscribers and the involvement of Customer Care in these decisions, but only as part of a "take-it-or-leave it" offer that exempted Comcast from producing emails and limited any deposition to thirty minutes. *Id*. When Touchstream pushed back on aspects of this proposal, Comcast stated that the parties were at an impasse. *Id.* Comcast agrees to file a five-page response in one week, due February 13, 2025, with no reply.

II. STATEMENT OF LAW

"The rules of discovery are accorded a broad and liberal application to affect their purpose of adequately informing litigants in civil trials." *Weatherford Tech. Holdings, LLC v. Tesco Corp*.,

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[5] Ex. 2, 1/28/25 Cohen Tr. 30:7-18 (naming person "for our team" who made the decision to sunset the app but could not "speak to other parts of the organization"); 31:17-32:4 (testifying a Ms. Gupta "would have been the primary person to make the decision *as far as I can tell*") (emphasis added); 32:5-33:4 (admitting he does not know who else was involved in the decision); 44:15-45:22 (Mr. Cohen "not aware of" what role this litigation played in the decision).
[6] *See* Ex. 3, 1/29/2025 P. Eckert Letter, at 2, n. 4.
[7] Ex. 3, 1/29/2025 P. Eckert Letter.
[8] Ex. 4, 2/5/2025 J. Park Email.

No. 2:17-CV-00456-JRG, 2018 WL 4620634, at *1 (E.D. Tex. Apr. 27, 2018). "[A] scheduling order 'may be modified only for good cause and with the judge's consent.'" *Lampkin v. UBS Fin. Servs., Inc.*, 925 F.3d 727, 733 (5th Cir. 2019) (quoting FED. R. CIV. P. 16(b)(4)). This Court requires parties to, "[w]ithout awaiting a discovery request," produce documents "relevant to the pleaded claims or defenses involved in the action." Dkt. 72 at 3-4.

III. ARGUMENT

Comcast has already re-opened discovery on the issue of its alleged discontinuation of the accused feature, and good cause exists to compel Comcast to provide the full story on this issue as it should have done in December. *See Weatherford Tech. Holdings, LLC v. Tesco Corp.*, No. 2:17-CV-00456-JRG, 2018 WL 4620634, at *2 (E.D. Tex. Apr. 27, 2018) ("While the Court recognizes that there is a duty to supplement discovery responses that necessitates ongoing searches, the duty to supplement is not an excuse for delay as to initiating searches, as has occurred here."); *Fractus, S.A. v. ADT LLC*, No. 2:22-CV-00412-JRG, 2024 WL 1913126, at *4 (E.D. Tex. May 1, 2024) ("ADT does not deny that documents pertaining to the benefits of cellular connectivity are relevant. Accordingly, to the extent that such documents exist, they should be produced.")

Touchstream has acted diligently after Comcast's supplementation. Touchstream made clear long ago that customer complaints and business decisions on the accused app are relevant, including by letter on June 20, 2023. Ex. 3, at 2. And Touchstream moved quickly after receiving new information in Mr. Cohen's deposition, including by (1) the next day notifying counsel by letter, (2) two days later meeting and conferring, and (3) filing this motion the following week.

This information is highly important to this case because Comcast relies on the alleged unpopularity and low usage of its application as a central feature of its damages case. Further, the circumstances around Comcast's extraordinary decision to discontinue and then reinstate the

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