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

Page 1 of 10 PageID #:

COMCAST'S OPPOSITION TO TOUCHSTREAM'S MOTION TO COMPEL ADDITIONAL DISCOVERY ON COMCAST'S SUPPLEMENTAL DISCLOSURES



Comcast has discontinued the accused mobile application, and the accused functionalities are no longer available through that application or in any other form. Pursuant to its discovery obligations, Comcast promptly supplemented its relevant interrogatory response to alert Touchstream to the change on December 11, 2024. Comcast also produced the then-existing documents relating to this issue and offered a deposition in the first week of January 2025, which Touchstream took on January 28.

Touchstream now seeks broad categories of *additional* discovery on the eve of trial without any basis. Its assertions that Comcast's interrogatory response was "false" and that the accused application has been "re-instated" are simply not true. But regardless, Touchstream has already had the opportunity to investigate its allegations. Comcast's witness testified about the reasons for, and process of, discontinuing the application, and Touchstream had access to the documents on which its Motion now rests in advance of that deposition. Indeed, Touchstream's Motion nowhere explains why it did not conduct its "quick Internet search" before the deposition and ask Comcast's witness about the results.

The parties are likely going to trial on March 3. Comcast complied with its duty to supplement and Touchstream had a full opportunity to investigate. Now, discovery must end. Comcast is happy to proceed to trial either with both parties agreeing not to mention the discontinuance or with the record regarding the discontinuance that has been developed. But continued fact and expert discovery would be both impractical and prejudicial. Touchstream's Motion should therefore be denied.

I. BACKGROUND



the product team decided to discontinue the application. *See id.* at 9:25-10:12. Comcast removed the application from Google and Apple app stores on or around December 10, 2024, and it has been unavailable for installation on customer devices since that time. *See* Mot. Ex. 2 at 30:7-18, 31:17-32:19, 33:17-34:13; *see also* Ex. 1 at 49:10-24. Comcast also began the process of disabling the backend services that supported versions of the TV Remote App already on customer devices. *See* Mot. Ex. 2 at 34:20-35:9. However, during that process, Comcast's customer-care team realized that it needed to update the information it uses to help support customers. *See id.* at 34:20-35:9, 36:1-10; *see also* Ex. 1 at 47:11-49:6. The care team asked the product team for more time to update its documentation, which led Comcast to temporarily pause the backend decommission. *See* Ex. 1 at 46:9-47:10. The backend was scheduled to be decommissioned on February 11, 2025. As of that date, no one is able to use any version of the TV Remote App. *See id.* Comcast does not intend to reintroduce the application or make the accused functionalities available in any other form.

On December 11, 2024, Comcast provided a supplemental interrogatory response regarding the application's discontinuation, Mot. Ex. 1 at 8, produced the relevant documents that existed at the time, and offered Evan Cohen, who leads the engineering team responsible for the TV Remote App (and is thus a may-call trial witness), for a deposition on January 7, 2025. Ex. 2 at 8. Touchstream did nothing for several weeks. Then, on January 7 (the date of the offered deposition), Touchstream said it would "follow up regarding the date of Mr. Cohen's deposition after the Charter trial." Ex. 2 at 7-8. After Comcast explained that it was unclear

¹ "Ex. __" cites refer to the exhibits attached to this Response. "Mot. Ex. __" cites refer to the exhibits attached to Touchstream's Motion, Dkt. No. 312.



when the Charter trial would occur, the parties set Mr. Cohen's deposition for January 28. *Id.* at 1-7. At no point before or during the deposition did Touchstream raise any purported deficiencies with Comcast's supplemental disclosures. During his deposition, Mr. Cohen testified about the discontinuation of the TV Remote App, as discussed above. See supra 1-2.

Only after Mr. Cohen's deposition did Touchstream demand additional fact and expert discovery in light of a small number of publicly available customer communications that it uncovered through a "quick internet search." Mot. at 3; Mot. Ex. 3 at 1-2. Comcast explained that it would be willing to proceed to trial without either party mentioning the discontinuance of the TV Remote App, and, to avoid burdening the Court, offered a compromise in which it would produce any additional customer inquiries and non-email documents created since its initial supplement and make Mr. Cohen available for yet another short deposition.² Mot. Ex. 4 at 3. Touchstream refused any compromise, so its motion followed. *Id.* at 2.

II. **ARGUMENT**

Good cause for supplemental discovery requires consideration of whether the supplement is important; whether the movant has explained its failure to timely move; and whether there is potential prejudice in allowing the supplement. See Reliance Ins. Co. v. Louisiana Land & Expl. Co., 110 F.3d 253, 257 (5th Cir. 1997) (affirming denial of supplemental expert report where movant "offered no justification for its delay" and it would "disrupt the trial date").³ Touchstream's Motion fails on each factor.

³ Touchstream's cited cases concern motions to compel before the close of fact discovery and are therefore irrelevant. See Weatherford Tech. Holdings, LLC v. Tesco Corp., No. 2:17-cv-00456-JRG, 2018 WL 4620634, at *1-2 (E.D. Tex. Apr. 27, 2018); Fractus, S.A. v. ADT LLC, No. 2:22-cv-00412-JRG, 2024 WL 1913126, at *1, 4 (E.D. Tex. May 1, 2024).



² Any email correspondence falls outside the Order Regarding E-Discovery governing this case. Touchstream Techs., Inc. v. Altice USA, Inc., No. 2:23-cv-00060-JRG, Dkt. No. 119 (Oct. 20, 2023), ¶ 7 (providing parameters for email production requests).

First, Touchstream has already explored the facts concerning the discontinuance of the application and there is no need for yet another round of fact discovery, let alone reopening expert discovery. While Touchstream claims that Comcast has "re-instated" the TV Remote App due to customer complaints, that is not true. See supra Section I. But regardless, Touchstream already had the opportunity to explore its theory. It had access to the purported customer complaints on which its story rests before Mr. Cohen's deposition and could have asked him about them. In any event, during the deposition, Mr. Cohen fully explained the process of discontinuance, including the removal from the app stores in December and the need to update the customer-care documentation before severing access to all versions on user devices. *Id.*⁴ Further fact discovery on these points will be duplicative and is not important to the trial, especially in light of Comcast's representation that it will not refer to the discontinuance unless Touchstream is permitted to raise the issue.

Document 336

14291

There is certainly no need to reopen expert discovery at this late juncture. The way the accused application operates has not changed—it simply no longer exists—and no other Comcast application has changed in any relevant way, rendering further infringement opinions unnecessary and improper. For his part, Touchstream's damages expert seeks a running royalty based on an unrelated software license agreement that simply ends upon the application's shutdown. His current calculations run through 2023, and nothing more than an update of his numbers through the shutdown would be appropriate. Because nothing has changed beyond the

⁴ Touchstream also asked Mr. Cohen about Comcast's purportedly "inaccurate" interrogatory response. Ex. 1 at 49:10-52:14. He denied it was inaccurate and explained the underlying facts. Id. Indeed, if Touchstream's story that Comcast had "reinstated" the TV Remote App because of its purported value were true, then Comcast would not have completed the decommissioning process, which it has now done.



DOCKET

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.

