

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

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'S EXPEDITED MOTION TO CONTINUE
THE MARCH 3, 2025, TRIAL DATE

Charter respectfully requests that its March 3, 2025, trial date be continued to a subsequent trial setting, potentially as early as April 7, 2025 (*i.e.*, a 31-day continuance).¹

As Charter explained in its February 7, 2025, Notice of Trial Conflicts (Dkt. 313), Charter's damages expert, Mr. Bakewell, will be testifying as the damages expert for the defendant Anker Innovations Ltd at a week-long trial in the District Court for the District of Delaware on March 3-7. *See Fundamental Innovation Systems International LLC v. Anker Innovations Ltd.*, No. 1:21-cv-00339-RGA, (D. Del.); Dkt. 313-1, ¶4. Charter did not file a motion to continue before today because Charter became aware that, on February 11, 2025, the *Fundamental Innovation* Court granted a Daubert motion against the plaintiff's damages expert² and that there was some question about whether that case would proceed to trial. Earlier today, however, on February 21, 2025, there was a pretrial conference in the *Fundamental Innovation* matter, and Charter understands that District Judge Richard Andrews confirmed that the *Fundamental Innovation* matter *will* be proceeding to trial on March 3 as scheduled.

Because Mr. Bakewell is representing *the defendants* in both the *Fundamental Innovation* and *Touchstream* weeklong trials, he will be called the latter half of the week in both trials, and may well be required to testify on the same day. Simply put, Mr. Bakewell cannot be in two places at once. Accordingly, absent a continuance of the March 3, 2025, trial date, Charter will be forced to try this case without a damages expert, which would be highly prejudicial, particularly given that Touchstream is seeking nearly \$1.2 billion in damages. There is good cause to continue the trial because Charter will be fundamentally prejudiced by the March 3, 2025, trial date, while the Court and Touchstream will not be prejudiced if the Charter trial is continued to a later date.

¹ Touchstream does not oppose Charter's request to expedite briefing on this motion, and will file its opposition by 5 p.m. CT on Monday, February 24, 2025.

² *Fundamental Innovation*, No. 1:21-cv-00339-RGA (D. Del), Dkts. 261 and 262.

I. BACKGROUND

This case was previously set for trial on January 13, January 27, and February 7, 2025. Charter, Mr. Bakewell, and all other Charter witnesses were free of conflicts and ready to go for each of these dates. On February 5, 2025, Charter was informed by the Court that it would not proceed to trial on February 7, 2025. On February 7, 2025, Charter filed a Notice of Trial Conflicts (Dkt. 313), attaching a declaration from Mr. Bakewell regarding his conflict with the March 3, 2025, trial setting (Dkt. 313-1). On February 14, 2025, Charter was informed that its case was set for trial on March 3, 2025, and that it was first in the order of trials. On February 21, 2025, Charter learned that the *Fundamental Innovation* matter will be proceeding to trial, despite the aforementioned Daubert issue in that matter.

II. THERE IS GOOD CAUSE TO CONTINUE THE TRIAL

Pursuant to Rule 16, a “schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). In determining whether good cause exists, courts consider a four-part test: (1) the explanation for the failure to [meet the schedule]; (2) the importance of the [modification of the schedule]; (3) potential prejudice in allowing the [modification]; and (4) the availability of a continuance to cure such prejudice. *Reliance Ins. Co. v. The Louisiana Land & Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997). All four factors support a continuance.

A. Charter’s Unavailability For The March 3, 2025, Trial Date Is Not Charter’s Fault

Mr. Bakewell’s March 3-7, 2025 trial in the *Fundamental Innovation* case was scheduled in October of 2024. *Fundamental Innovation*, No. 1:21-cv-00339-RGA (D. Del.), Dkt. 231. Charter, of course, has no control over the docket or scheduling in the *Fundamental Innovation* matter. The fact that one of Charter’s witnesses, Mr. Bakewell, has one week of unavailability due to a conflicting trial is reasonable and understandable, particularly where Mr. Bakewell and

the rest of Charter's witnesses have been ready for trial and free of conflicts on the previously set dates of January 13, January 27, and February 7, 2025.

B. Charter Will Be Highly Prejudiced By The March 3, 2025, Trial Date

Charter will be fundamentally prejudiced if it must defend itself at trial without a damages expert.

As described above, Charter's damages expert Mr. Bakewell is not available the week of March 3-7, 2025, because he is testifying as an expert in another case in Delaware that week. Damages experts are typically called as the final witness for each side because their testimony is predicated on all of the prior evidence and testimony that comes before them. Indeed, this is why damages experts typically sit through the entire trial, and explain to the jury that they have done so. Because Mr. Bakewell is testifying as an expert for the defendant in the *Fundamental Innovation* matter, and for the defendant Charter in this matter, he will be called to testify in the latter half of both of these weeklong trials, perhaps on the same day. Of course, Mr. Bakewell cannot be in Marshall and Wilmington on the same day.

Even assuming that schedules could be coordinated so that Mr. Bakewell could testify in one trial and then travel to testify in the other (a dubious proposition given that he is testifying for the defense in both cases), Mr. Bakewell cannot sit through the presentation of evidence in both trials at once, and reading the transcript for the trial that he is not sitting through is not an adequate substitute for actually being in the Courtroom and being able to explain to the jury that he was there to watch every witness's testimony. Nor, as a practical matter, would he have the time to read all the daily transcripts in one trial while he is participating in a different trial.

For similar reasons, a trial preservation deposition of Mr. Bakewell in this case would not cure the prejudice to Charter, because it would force Mr. Bakewell to testify without having had the opportunity to hear the testimony of Touchstream's fact and expert witnesses, and would

further prejudice Charter because it's expert would testify by video, while Touchstream's expert would testify live.

The prejudice to Charter is even more extreme given that Touchstream is seeking nearly \$1.2 billion in damages. Specifically, Touchstream's damages expert Dr. Mangum presents two damages models, one for nearly \$1.2 billion and another for more than \$400 million. As set forth in his expert reports, Mr. Bakewell responds to Dr. Mangum's analyses and concludes that the appropriate royalty when usage of the asserted method claims is accounted for is approximately \$5 million.

Accordingly, Charter will be prejudiced if it is forced to try this case on March 3-7, 2025 without its damages expert.

C. The Court And Touchstream Will Not Be Prejudiced If The Charter Trial Is Continued To A Later Date

If the Charter trial is continued to a later date, the Court and Touchstream can still proceed with the *Touchstream Technologies v. Comcast Cable Communications et al.* (Case No. 2:23-cv-00062) matter on March 3, 2025, which is currently set as second in the order of trials for March 3, 2025. Neither Touchstream nor Comcast have identified any conflicts with this trial date. Thus, the Court, Touchstream, and the jury can proceed to trial on March 3, 2025, regardless of Charter's requested trial continuance. Touchstream would not experience any delay in getting to trial whatsoever—it would simply proceed with the Comcast case.

Charter and all of its witnesses, including Mr. Bakewell, are available to try this case the week of April 7, 2025 (or the previous Friday, April 4), which would amount to a 31-day continuance (or slightly shorter).

III. CONCLUSION

In light of Mr. Bakewell's trial conflict on March 3, 2025, Charter respectfully requests that the *Touchstream v. Charter* matter be continued from this trial setting and be calendared for

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