

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

JURY TRIAL DEMANDED

**TOUCHSTREAM'S MOTION FOR LEAVE TO FILE
MOTION TO STRIKE UNELECTED PRIOR ART EXHIBITS**

Touchstream moves for leave to file a motion to strike prior art exhibits underlying prior art defenses that Charter dropped from trial. Charter elected to drop all prior-art based invalidity theories well after the first pretrial conference, eliminating the relevance of these exhibits and heightening their prejudicial nature. Because Touchstream agreed to include them on the joint exhibit list for the purpose of supporting Charter's prior art invalidity theories that Charter dropped after the time for Touchstream to object to exhibits, Touchstream respectfully requests leave to file a motion to strike these exhibits from trial.

Charter opposes Touchstream's motion, arguing that Touchstream is relitigating its motion in *limine* No. 3 and that Touchstream should have raised this issue as part of Touchstream's pretrial motions. But Touchstream's motion in *limine* No. 3 raised a separate issue of how Charter's technical expert could use unelected prior art references to discuss the state of the art in connection with Charter's obviousness defenses. That is not the issue here, where Charter has since dropped all prior art defenses but still seeks to use those very prior art references as exhibits at trial.

Moreover, by the time Charter dropped its prior art invalidity defenses, Touchstream's deadline had already passed to object to Magistrate Judge Payne's order regarding Touchstream's Motion in *limine* No. 3 and to object to these exhibits as irrelevant and unduly prejudicial given the change in Charter's invalidity defenses at trial.

Good cause exists to allow Touchstream to seek the exclusion of these exhibits at trial:

Diligence: Touchstream responded quickly to Charter's narrowing of its invalidity theories, raising the issue within a couple weeks and repeatedly attempting to resolve the issue without burdening the Court. When it became clear that Charter would not voluntarily drop these exhibits from the joint exhibit list in view of Charter dropping the prior art invalidity theories involving them, Touchstream sought to meet and confer. The parties reached an impasse during the meet-and-confer and Touchstream filed this motion the very same day.

Importance: the issue of whether Charter is able to present unelected invalidity references to the jury is critical to this trial. As Touchstream explains in its Motion to Strike, these exhibits are now irrelevant to Charter's defenses at trial, risk juror confusion on the issues, and impermissibly allow Charter to present invalidity exhibits to the jury without the proper invalidity framework or clear and convincing burden. Due to the importance of the issue, Touchstream should be permitted to raise it with the Court before trial commences.

Prejudice: Charter will not be substantially prejudiced by the filing of this Motion to Strike. Charter can still discuss this prior art for limited proper purposes such as damages, and Touchstream can object during trial if Charter seeks to discuss the references for improper purposes. Furthermore, it was Charter who chose to drop its prior art invalidity defenses after the period for objecting to exhibits and after the pretrial conference where this issue could have been taken up. *Continuance:* given the simple nature of the requested remedy, removing the exhibits

from the joint exhibit list, the relief is straightforward and will not require a continuance of trial.

Touchstream conferred with Charter counsel, who stated they oppose Touchstream's Motion for Leave but agree to an expedited briefing schedule of responding by to both the Motion for Leave and the underlying Motion to Strike Monday, February 24, 2025 at 5pm CT.

Date: February 21, 2025

Respectfully submitted,

/s/ Ryan Dykal

Lead Counsel

Ryan D. Dykal (*pro hac vice*)
Jordan T. Bergsten (*pro hac vice*)
Mark Schafer (*pro hac vice*)
Philip A. Eckert (*pro hac vice*)
Anita Liu (TX State Bar No. 24134054)
BOIES SCHILLER FLEXNER LLP
1401 New York Ave, NW
Washington, DC, DC 20005
(t) 202-274-1109
rdykal@bsfllp.com
jbergsten@bsfllp.com
mschafer@bsfllp.com
peckert@bsfllp.com
aliu@bsfllp.com

John Michael Lyons (*pro hac vice*)
Sabina Mariella (*pro hac vice*)
Sophie Roytblat (*pro hac vice*)
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards, 20th Floor
New York, NY 10001
jlyons@bsfllp.com
smariella@bsfllp.com
sroytblat@bsfllp.com

Rachel Martin (*pro hac vice*)
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
rmartin@bsfllp.com

Melissa Smith (TX State Bar No. 24001351)

GILLAM & SMITH LLP

303 S. Washington Ave.

Marshall, TX 75670

(t) 903-934-8450

melissa@gillamsmithlaw.com

Andrew Thompson ("Tom") Gorham (TX

State Bar No. 24012715)

McKellar L. Karr (TX State Bar No.

24114356)

GILLAM & SMITH LLP

Tyler, TX 75702 (t) (903) 934-8540

travis@gillamsmithlaw.com

mckellar@gillamsmithlaw.com

*Counsel for Plaintiff Touchstream
Technologies, Inc.***CERTIFICATE OF CONFERENCE**

Counsel for Touchstream has complied with the meet and confer requirement in Local Rule CV- 7(h) and confirm that this Motion is unopposed. Counsel for Touchstream, and counsel for Charter met and conferred by telephone on the subject of this Motion on February 21, 2025. Counsel for Charter confirmed that they do oppose.

Dated: February 6, 2025

/s/ Ryan Dykal

Ryan D. Dykal

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served this 21 day of February, 2025.

Dated: February 21, 2025

/s/ Ryan Dykal

Ryan D. Dykal