IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TOUCHSTREAM TECHNOLOGIES, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Case No. 6:21-cv-569-ADA
	§	
GOOGLE LLC,	§	JURY TRIAL DEMANDED
	§	
Defendant.	§	
	§	

GOOGLE LLC'S REPLY IN SUPPORT OF ITS
RULE 50(b) RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

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TABLE OF ABBREVIATIONS

Abbreviation	Definition
Touchstream	Touchstream Technologies, Inc.
Google	Google LLC
’251 patent	U.S. Patent No. 8,356,251 (PTX-865)
’528 patent	U.S. Patent No. 8,782,528 (PTX-885)
’289 patent	U.S. Patent No. 8,904,289 (PTX-883)
API	application programming interface
asserted patents	the ’251 patent, the ’528 patent, and the ’289 patent
asserted claims	claims 1 and 8 of the ’251 patent, claims 1 and 14 of the ’528 patent, and claims 1 and 2 of the ’289 patent
GTS	YouTube Remote and Leanback with Google TV System (JTX-1; JTX-3; JTX-21; JTX-51; JTX-63; DTX-118A; DTX-120; DTX-632; Tr. 892:19-904:3 (Levai))
SDK	software development kit
Tr.	Trial Transcript, located at: Dkt. 259 (Day 1, pp. 1-244); Dkt. 260 (Day 2, pp. 245-647); Dkt. 262 (Day 3, pp. 648-1028); Dkt. 264 (Day 4, pp. 1029-1310); and Dkt. 266 (Day 5, pp. 1311-1376). Certain portions of the Trial Transcript are and remain under seal.

All emphasis added unless otherwise noted.

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TABLE OF EXHIBITS

Trial Exhibit	Description
JTX-1	*Control YouTube on the Desktop, or the TV ... with the YouTube Remote App for Your Phone*, YouTube Official Blog (Nov. 9, 2010)
JTX-3	*How to Control Google TV or YouTube Leanback with YouTube Remote*, YouTube (Nov. 14, 2010)
JTX-21	U.S. Patent No. 9,490,998
JTX-51	*Features*, Google TV (Oct. 5, 2010)
JTX-63	YouTube Remote API Server Documentation
PTX-863	’289 patent
PTX-865	’251 patent
PTX-885	’528 patent
DTX-118A	*How to Control Google TV or YouTube Leanback with YouTube Remote*, YouTube (Nov. 14, 2010) (video file)
DTX-120	Declaration of Janos Levai
DTX-632	GTS Source Code Printouts

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During trial, Touchstream repeatedly sidestepped indisputable facts and rested on a superficial and legally inadequate infringement theory. Touchstream does the same now. It repeatedly misconstrues the testimony of Google witnesses, mischaracterizing their testimony or falsely claiming they changed positions. The record is clear, and no reasonable jury could have found infringement or no invalidity. Indeed, Touchstream now concedes that the "server system" limitation must be at least digitally separate from the "content presentation device" / "display device," and that is reason alone to grant JMOL of noninfringement.

I. NO REASONABLE JURY COULD HAVE FOUND INFRINGEMENT

A. Touchstream Failed To Prove The Accused Devices Have The Claimed "Server System" As Properly Construed

Touchstream's infringement theory conflated the claimed "server system" with the claimed "content presentation device," contrary to the intrinsic record showing these components must be separate. *See* Dkt. 275 ("Mot.") at 2-7. The lack of a construction put no guardrails on Touchstream's case, allowing Touchstream to sidestep this issue at trial. In these circumstances, an authoritative post-trial construction is necessary. *See id.* Contrary to Touchstream's characterization, the Court did not "reject[ ] Google's proposed construction" or "determine[ ] that physical separation was unnecessary." *See* Dkt. 284 ("Opp.") at 2, 5. The Court's ruling was "to go with plain and ordinary meaning on the claim term 'server system and display device.'" Dkt. 225 at 50:17-19. That improperly left the parties' claim-construction dispute for the jury, rather than this Court, to resolve. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) ("By failing to construe this term, the district court left the jury free to consider these arguments," which was legal error).

Google's motion explained why the intrinsic record compels its construction. Mot. at 2-5. The claims and specification both overwhelmingly show that the claimed "server system" and

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"content presentation device" must be separate from each other. Touchstream contends the specification supports the server system "including different server components running on different machines," Opp. at 3-4, but those passages do not describe the relationship *between the server system and the content presentation device*. The specification consistently reinforces that these two components are distinct from each other: they are connected to each other and communicate over a network. *See* Mot. at 4. Touchstream ignores the wealth of case law requiring separation of components in both hardware and software claims. *See, e.g.*, *Luminati Networks Ltd. v. Code200, UAB*, 2021 WL 425101, at *7-8 (E.D. Tex. Feb. 8, 2021); *Huawei Techs. Co. v. Verizon Commc'ns, Inc.*, 2021 WL 150442, at *9 (E.D. Tex. Jan. 15, 2021); *MiTile, Ltd. v. Hasbro, Inc.*, 2013 WL 5876979, at *5-6 (E.D. Va. Oct. 30, 2013); Dkt. 184 at 8-10.

The prosecution history confirms that the server system must be separate from the content presentation device. *See* Mot. at 5. Touchstream's argument regarding the amendment made during prosecution, Opp. at 4, misunderstands the examiner's objection. The reason the examiner did not have "issues with the 'server system,'" *id.*, is that the examiner was relying on prior art where the server system and content presentation device were separate. *See* Dkt. 159-4 at 5.

Citing *Intellectual Ventures I LLC v. Symantec Corp.*, 2016 WL 948879 (D. Del. Mar. 10, 2016) ("*IV I*"), Touchstream contends that, in hardware and software claims, only digital (logical) separation is required. Opp. at 3. As an initial matter, Touchstream never presented to the jury a purported plain-and-ordinary meaning requiring digital separation, so it cannot defend the verdict on that basis. *See Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 694 (Fed. Cir. 2008) (rejecting proposed construction of claim term "raised for the first time after the jury verdict"). And in *IV I*, the "claims involve[d] digital, rather than physical separation" because, unlike here, the claims and the specification expressly recited the components as "digitally connected." 2016 WL 948879,

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at *3. The Federal Circuit has also explained that the separate description of claimed components means "they logically cannot be one and the same." *Engel Indus., Inc. v. Lockformer Co.*, 96 F.3d 1398, 1405 (Fed. Cir. 1996). Touchstream's "digital" and "physical" distinction is manufactured to support its flawed infringement theory. But even setting that aside, even a digital-separation construction precludes infringement here, because the accused server system and content presentation device are *not* digitally separate from each other. *See infra* Part I.B.

Finally, Touchstream's assertion that Dr. Almeroth "was not engaged in claim construction analysis" when he relied on a dictionary definition at trial (Opp. at 4) is no more tenable than saying "up is down" or "right is left." Dr. Almeroth undeniably used extrinsic evidence to construe the claims. *See id*. at 4-5. "The risk of confusing the jury is high when experts opine on claim construction before the jury even when, as here, the district court makes it clear to the jury that the district court's claim constructions control." *CytoLogix Corp. v. Ventana Med. Sys., Inc.*, 424 F.3d 1168, 1172 (Fed. Cir. 2005). That is why the Federal Circuit "has held that allowing a witness to testify before the jury on claim construction would be improper." *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1364 n.6 (Fed. Cir. 2008). To make matters worse, Dr. Almeroth's extrinsic evidence was off-point because it was untethered to the intrinsic record. *See* Mot. at 5-6; *Grace Instrument Indus., LLC v. Chandler Instruments Co.*, 57 F.4th 1001, 1010 (Fed. Cir. 2023) (error to rely "on extrinsic evidence—i.e., dictionary definitions—that contradict the scope and meaning of" term "that a skilled artisan would ascertain by reading the intrinsic record").

B. Touchstream Failed To Show Infringement Even Under Its Construction

It is undisputed that no reasonable jury could find infringement under Google's construction. But Touchstream also did not show infringement under (1) its current construction requiring digital separation or (2) the dictionary definition of "server" it presented at trial.

Digital Separation. Touchstream repeatedly pointed to components of the accused server

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system and content presentation device that are *not* digitally separate. Touchstream accused the "Cast Service" and "Receiver SDK" as the purported "server system" (Opp. at 5-6), and it accused the entire cast-enabled device as the purported "content presentation device." *See* Opp., Ex. A at 54. The accused "server system" components are thus located within the accused "content presentation device" and share digital components. *See id.* Moreover, the receiver SDK is also part of the accused media player (the receiver application), *see* Tr. 849:7-25; 955:4-956:20, and the accused media player is loaded by and executed within the accused content presentation device. *See, e.g.*, '528 patent, claim 1. There is no *digital* separation of the "server system" from the content presentation device—or even any separation from the media player.

Dictionary Definition. Contrary to Touchstream's dictionary definition of "server"—"respond[ing] to commands from a client" or "run[ning] administrative software that controls access to the network and its resources"—the accused products indisputably communicate via peer-to-peer communication without a server. Mot. at 7. At trial, Dr. Almeroth did not explain how either the Cast Service or the receiver SDK meets his definitions. *See* Tr. 550:2-23 (conclusory testimony that each drawn box is a "server"). In insisting that a peer-to-peer architecture can satisfy its claims, Touchstream relies on labels and obfuscation of the record that fail, as a matter of law, to show the accused products meet the claims. *See* Opp. at 6-7.

First, regarding the receiver SDK, Dr. Almeroth testified only "that it acts as glue between the cast service and the cast browser." *See* Tr. 537:6-15. He did not explain how acting as such "glue" could satisfy Touchstream's definition of "server." There was no evidence the receiver SDK itself satisfies either aspect of Dr. Almeroth's dictionary definition. *See* Mot. at 7-8, 13-14.

Second, regarding the "Cast Service," Touchstream conflates "service" with "server," broadening "server system" even further beyond its claim scope to include "services." *See* Opp.

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at 6. Touchstream contends Mr. Van Der Staay testified that "Google's 'service' modules constitute 'servers,'" *id.*, but that was not his testimony. He explained the differences between services and servers, Google internal documents' use of the term "services," and how cloud servers can provide services such as the Cast Service in the cloud. Tr. 884:14-886:8. He did not testify that Cast Service on the device *is or uses a server*. He described it as a "system *service*," not a server. *Id.* In closing, Touchstream nonetheless encouraged the jury to adopt its factually unsupported redefinition of "servers" as "services." Tr. 1325:13-1326:5.

Third, Mr. Van Der Staay's general testimony about "servers creating a peer-to-peer communication" between a personal computing device and Chromecast likewise cannot support Touchstream's verdict. *See* Opp. at 6-7. The claimed "server system" does not merely create a connection between the phone and the content presentation device. Rather, the claimed "server system" *receives* messages, identifies programming code based on information in the message, and then transmits information to the content presentation device. The accused products work differently: the messages are transmitted between and received by the two peer devices without an intermediary server. Mr. Van Der Staay's testimony was fully consistent with Google's position that the accused products communicate peer-to-peer.

Finally, Touchstream's concession that it repeatedly mentioned irrelevant components (e.g., mDNS, DIAL) underscores its obfuscation. *See* Opp. at 7. Touchstream continuously focused on components it now admits did not perform *any* claim limitation. *See* Mot. at 8 (citing testimony). Indeed, in closing, Touchstream took great pains to direct the jury to irrelevant components to find infringement, emphasizing "there's an mDNS server running on [the Chromecast] dongle. This is a little computer. There's a WebSocket server running on this dongle. [Dr. Mayer-Patel] admitted it. *There are servers on here. They receive messages*." Tr.

[redacted]

1326:11:16; *see also* Tr. 1325:13-19 (suggesting infringement could be found because "there's an mDNS server and a WebSocket server"). But, as Touchstream now admits, these components are irrelevant to infringement. The only relevant components are those accused of performing the claimed functionality, and as a matter of law they are not a "server system." *See* Mot. at 7-8.[1]

C. Touchstream Failed To Prove Divided Infringement

Touchstream principally argues the asserted claims do not require proof of divided infringement. Opp. at 7. That is wrong because its infringement theory requires performance by third parties. And because Touchstream presented no evidence from which the jury could find Google directed or controlled those third parties, Google is entitled to JMOL of noninfringement.

1. Third Parties Provide The Accused "Media Player"

Touchstream's assertion that third parties provide no components is false. *See* Opp. at 8-10. Touchstream emphasizes the "identify[]" and "execute" "programming code" steps, arguing that they are performed by the receiver SDK. *See* Opp. at 8. But the receiver SDK is part of the purported media player (the receiver applications), which third parties indisputably provide. *See* Tr. 849:7-25; 955:4-956:20. Attempting to dodge its evidentiary failure, Touchstream again misconstrues Mr. Van Der Staay's testimony. *See* Opp. at 9. Mr. Van Der Staay consistently testified that, while third parties must use the SDK to some extent, they have the option to pick and choose what to use. *See* Mot. at 10 (citing testimony).

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[1] Regarding MDX/Orbit, while it suggests otherwise (*see* Opp. at 7), Touchstream relied on components on the cast-enabled device for the relevant "server system" limitations. *See, e.g.*, Tr. 461:3-462:23, 464:10-18 (Dr. Almeroth referring back to the "device" for MDX).

[redacted] Given Touchstream's lack of any evidence for all necessary "programming code," and its failure to show Google controlled third parties' code, no reasonable jury could find proof of divided infringement.

2. Third Parties Provide The Accused "Messages" And "Signals"

Touchstream does not contend that it presented evidence of Google direction or control over users. Its sole response is that "[t]he claims do not contain any user-performed tasks" and "only require that the messages are received in the server system." Opp. at 11. But Touchstream ignores that users control the accused products and the content of the messages sent to the accused products that are necessary for practicing the claims. *See* Mot. 11-12. Because users control the products and provide those messages, Touchstream's failure to prove direction and control for these claim limitations precludes infringement as a matter of law. *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1221-22 (Fed. Cir. 2014) (no direct infringement if steps are performed by equipment controlled by the user and not automatically performed).

3. Third Parties Make Certain Chromecast-Enabled Devices

Touchstream concedes it presented no evidence of Google direction or control over third-party manufacturers. Its sole response is to say the jury could rely on "how Google's software, acting on all accused hardware devices, controls casting." Opp. at 12. But Touchstream ignores that the claims expressly require a "content presentation device," which third parties make and

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provide. Touchstream otherwise resigns itself to attacking Google's argument as "devoid" of citation. *See id.* That is the point: *Touchstream* bore the burden of proof and failed to put forward any evidence to prove that Google directs or controls third-party manufacturers.

D. No Reasonable Jury Could Have Found Infringement For Other Reasons

No proof of a "server system" under Touchstream's construction for an additional reason. The "server system" requires specific functionality. Mot. at 13-14. [redacted] *See* Tr. 455:9-457:17; *supra* I.C.1. Control of multiple media players was critical to Touchstream's validity case (Mot. at 20), yet it failed to provide evidence from these media players. Touchstream's lack of proof precludes infringement on this additional ground.

No proof of "receiving" "messages" that "identify a location" ('289 and '528 patents). The critical facts were undisputed. The phone sends a Cast App ID (a number) to the cast-enabled device. Mot. at 15. The cast-enabled device then uses that ID, among other things, to identify the receiver application and the URL that represents the location *of the requested application* in order to locate and download the application. *Id.* Google's witnesses were consistent in describing this operation; Touchstream fabricates a credibility determination. *See* Opp. at 13. Touchstream itself acknowledges Mr. Van Der Staay testified during deposition that *the cast-enabled device* is what identifies the location of the application using the ID. *See id.* He was consistent at trial. *See* Mot. at 14-15 & Opp. at 13 (citing testimony). A reasonable jury could only find that the mobile device does not identify the location of the purported media player.

Dr. Mayer-Patel similarly was consistent and was not "impeached." *See* Opp. at 13 (citing Tr. 1041:1-1043:15). He testified that the Cast App ID can be used to look up the URL for the

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receiver application. But he did not testify, either at deposition or at trial, that the ID itself identifies the location of the application. Dr. Almeroth agreed that even with the Cast App ID, additional steps are required before the cast-enabled device can identify the URL for the requested receiver application. *See* Tr. 527:2-528:5 (the Cast App ID "provides the location lookup").

No proof of the "storing" limitation ('251 patent). Touchstream presented no evidence that the claimed "programming code" is stored on the phone. Touchstream relies solely on deposition testimony from Mr. Van Der Staay that the mobile device stores the "session" in memory on the mobile device. Opp. at 15-16 (citing testimony). But Touchstream did not ask Mr. Van Der Staay during deposition, and Dr. Almeroth did not explain, what this "session" information included. Mr. Van Der Staay also did not testify that the information is sent to the cast-enabled device, as required by the claims. He also did not testify that the "entire" session (whatever that might include) is stored on the phone. *See* Opp. at 16.

At trial, Mr. Van Der Staay made clear what is stored on the phone: a session identifier that can be used to resume the session with the cast device. Mot. at 16-17. No witness, including Dr. Almeroth, testified that the claimed "programming code" was stored on the phone for sending to the cast-enabled device. Indeed, in neither the patent nor the accused products' operations does the phone have knowledge of the programming code, let alone the capability to store it. The claimed *server system* is what converts the universal command to the programming code. And the accused programming code does not reside on the phone, which requires converting the universal command to the purported programming code.

II. NO REASONABLE JURY COULD HAVE FOUND THE CLAIMS NOT INVALID

A. Google Is Entitled To JMOL On The Priority Dispute

As a matter of law, Touchstream cannot corroborate its claimed priority date with solely Mr. Strober's own testimony and documentation. *See* Mot. at 18. "[A]n inventor's own

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unwitnessed documentation does not corroborate an inventor's testimony about inventive facts." *Brown v. Barbacid*, 276 F.3d 1327, 1335 (Fed. Cir. 2002). Touchstream's own cases say this. *See Stamps.com Inc. v. Endicia, Inc.*, 437 F. App'x 897, 908 (Fed. Cir. 2011) ("an inventor … claiming prior conception must proffer evidence corroborating his testimony"); *Medtronic, Inc. v. Teleflex Innovations S.A.R.L*, 68 F.4th 1298, 1306 (Fed. Cir. 2023) (finding sufficient corroboration of inventor testimony on the basis of *non*-inventor testimony and documentation). Yet Touchstream offered no other evidence, including none from Dr. Almeroth, who promised a step-by-step analysis of the documentation but failed to provide any analysis at all. *See* Mot. at 19; Opp. at 18.

B. Google Is Entitled To JMOL That The Asserted Claims Are Obvious

Touchstream's brief highlights the obviousness of the asserted claims. Dr. Almeroth conceded the GTS system could control one media player; he opined only that it lacked the ability to control multiple players. Mot. at 20. That is dispositive here—no reasonable jury could find it non-obvious to control multiple players and, contrary to Touchstream's claim, Dr. Almeroth did not offer "numerous" other elements supposedly "missing." Opp. at 17.

Touchstream's remaining arguments are easily dispensed with. Regarding GTS's status as prior art, Mr. Levai's 30(b)(6) testimony, contemporaneous web pages describing the launch, and third-party YouTube videos made clear that GTS was prior art. *See, e.g.*, Tr. 894, 970-974; *see also* JTX-3; JTX-1; DTX-118A. The evidence also established GTS as a coherent system that operated according to the asserted claims, not "cobbled together," Opp. at 17. YouTube Remote functioned in 2010 by communicating with YouTube Leanback, an app on Google TV. *See, e.g.*, *id.* Finally, Touchstream's argument regarding GTS "confidential operations" (Opp. at 16) also fails. Google showed GTS's public use and knowledge. Mot. at 19-20 & n.6.

III. CONCLUSION

The Court should grant JMOL of no infringement and invalidity.

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Dated: November 15, 2023

Respectfully submitted,

By: */s/ T. Greg Lanier, with permission by Michael E. Jones*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via electronic mail on November 15, 2023. I also hereby certify that all counsel of record who have consented to electronic service are being served with a notice of filing of this document, under seal, pursuant to L.R. CV-5.2(e).

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