



No. 6,757,907 (“the ’7,907 patent”); and U.S. Patent No. 7,559,077 (“the ’077 patent”) (collectively, the “patents in suit”).<sup>2</sup> After initial motions practice including a motion to transfer, Sprint filed an amended complaint,<sup>3</sup> and in December 2018, the matter was transferred to this Court and assigned to Judge Andrews.<sup>4</sup>

Once discovery was underway, the parties briefed claim construction and in May 2020, Judge Andrews held a *Markman* hearing.<sup>5</sup> The following month, Judge Andrews issued a memorandum opinion<sup>6</sup> and a claim construction order.<sup>7</sup> In August 2020, the parties proposed, and Judge Andrews granted, an amended case schedule, including early summary judgment motions.<sup>8</sup>

## **B. Motion and Referral**

On October 14, 2020, Charter moved for summary judgment that the Charter Accused Services<sup>9</sup> (the “Accused Services”) do not infringe claims 1, 5, 6, 7, 10, and 16 of the ’4,907 patent and claims 1, 16, 18, 21, 22, 23, 25, 34, 36, and 38 of the ’7,907 patent.<sup>10</sup> Sprint opposes the motion.<sup>11</sup> The motion was fully briefed on November 24,

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<sup>2</sup> D.I. 1; D.I. 34 at ¶¶ 129–158.

<sup>3</sup> D.I. 34.

<sup>4</sup> D.I. 54, 55, 56.

<sup>5</sup> D.I. 163.

<sup>6</sup> D.I. 164.

<sup>7</sup> D.I. 168.

<sup>8</sup> D.I. 185.

<sup>9</sup> D.I. 190 at 8 (“Sprint accuses the ‘Send-to-TV’ feature for two different classes of customers depending on the type of STB those customers utilize: (1) STBs utilizing the Spectrum Guide for legacy Charter markets, and (2) STBs utilizing the Spectrum Guide for legacy TWC/BHN markets.”).

<sup>10</sup> D.I. 188, 189, 190. This is an early motion without the benefit of expert reports.

<sup>11</sup> D.I. 197.

2020.<sup>12</sup> On March 11, 2021, pursuant to 28 U.S.C. § 636(b), Judge Andrews referred Charter’s Motion for Summary Judgment, to this judge.<sup>13</sup>

Thereafter, on April 27, 2021, the parties moved jointly to stay all deadlines.<sup>14</sup> Judge Andrews granted the stay<sup>15</sup> and extended it several times.<sup>16</sup> On August 18, 2021, Judge Andrews partially lifted the stay and reactivated the referral of the summary judgment motion to this judge.<sup>17</sup>

### **III. LEGAL STANDARD**

#### **A. Summary Judgment**

Under Federal Rule of Civil Procedure 56, “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>18</sup> The moving party has the initial burden of proving the absence of a genuinely disputed material fact relative to the claims in question.<sup>19</sup> Material facts are those “that could affect the outcome” of the proceeding, and “a dispute about a material fact is ‘genuine’ if the evidence is sufficient to permit a reasonable jury to return a verdict for the nonmoving party.”<sup>20</sup> The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence supporting the non-moving party’s case.<sup>21</sup>

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<sup>12</sup> D.I. 200.

<sup>13</sup> See March 11, 2021 Oral Order.

<sup>14</sup> D.I. 204.

<sup>15</sup> D.I. 205.

<sup>16</sup> D.I. 206, 207, 208, 209, 211.

<sup>17</sup> D.I. 214.

<sup>18</sup> Fed. R. Civ. P. 56(a).

<sup>19</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

<sup>20</sup> *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

<sup>21</sup> *Celotex*, 477 U.S. at 323.

The burden then shifts to the non-movant to demonstrate the existence of a genuine issue for trial.<sup>22</sup> A non-moving party asserting that a fact is genuinely disputed must support such an assertion by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials[.]”<sup>23</sup> Alternatively, the non-moving party may show “that the materials cited [by the moving party] do not establish the absence or presence of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact.”<sup>24</sup> The trial court must view all “[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court . . . in the light most favorable to the party opposing the motion.”<sup>25</sup>

## **B. Noninfringement**

When an accused infringer moves for summary judgment of noninfringement, such relief may be granted only if at least one limitation of the claim in question does not read on an element of the accused product, either literally or under the doctrine of equivalents.<sup>26</sup> Thus, summary judgment of noninfringement can only be granted if, after viewing the facts in the light most favorable to the nonmoving party, there is no genuine

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<sup>22</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 460–61 (3d Cir. 1989).

<sup>23</sup> Fed. R. Civ. P. 56(c)(1).

<sup>24</sup> *Id.*

<sup>25</sup> *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976).

<sup>26</sup> *Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1376 (Fed. Cir. 2005); see also *TechSearch, L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1369 (Fed. Cir. 2002) (citation omitted) (“Summary judgment of noninfringement is [] appropriate where the patent owner’s proof is deficient in meeting an essential part of the legal standard for infringement, because such failure will render all other facts immaterial.”).

issue as to whether, under the Court's construction of the relevant limitations, the accused product is covered by the claims.<sup>27</sup>

#### IV. DISCUSSION

In the case at bar, Charter argues on numerous occasions that there is no genuine issue of material fact, but these statements are mixed questions of law and fact.<sup>28</sup> It is nonetheless plain that there is no dispute over the facts contained in Charter's verified interrogatory responses.<sup>29</sup> And yet, Charter's arguments are based on a constantly-shifting set of disputed facts concerning the operation of the Accused Services.<sup>30</sup> The facts address the components of the systems that deliver the Accused Services as well as the origin, destination and content of signals and messages between these components, including the [REDACTED] and [REDACTED] messages discussed herein. These facts are material, because the extensive argument in the briefing suggests that these facts could affect the outcome of the case.

By citation checking and comparing the factual statements in the briefing, facts related to the [REDACTED] and [REDACTED] messages stated in the Statement of Facts in Charter's opening brief differ from those in Charter's (undisputed) verified interrogatory responses.<sup>31</sup>

The presence of differences between various factual averments in the briefing and the statements in Charter's verified interrogatory responses are significant for at

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<sup>27</sup> *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1304 (Fed. Cir. 1999).

<sup>28</sup> *E.g.*, D.I. 190 at 11–14 (stating the lack of a genuine issue using the Court's "use" and "involvement" claim construction terms).

<sup>29</sup> *See generally* D.I. 197.

<sup>30</sup> *See* Section IV.B.2(b), below.

<sup>31</sup> *See* Section IV.B.2(b), below. In addition, some of the facts pertaining to [REDACTED] [REDACTED] stated in Charter's reply brief differ from both the Statement of Facts in Charter's opening brief as well as Charter's undisputed, verified interrogatory responses. *Id.*

least two reasons. First, Charter relies on the undisputed nature of its verified interrogatory responses to establish the absence of a genuine issue as to the operation of the Accused Services.<sup>32</sup> However, as is discussed herein, Charter does not account for factual disputes over the differences between its discovery responses and the facts stated in its briefing. Therefore, Charter has not met its burden under Rule 56 to show that there is no dispute as to any material fact.

Second, the inconsistent facts themselves make for an unsound record on which to address summary judgment.<sup>33</sup> This is especially relevant to the legal questions of infringement, including those that invoke the claim construction.<sup>34</sup> For the reasons discussed below, Charter essentially asks this judge to speculate as to *which facts* it relies upon in its briefing. This request is declined.

Before addressing the factual record, a summary of the dispute and the parties' positions provides context.

## **A. The nature of the dispute**

### **1. Relevant claim limitations**

The central issue in claim construction and in the briefing on the instant motion is that various claim terms have been construed to have a negative limitation. For example, claim 1 of the '4,907 patent and claim 1 of the '7,907 patent both claim “[a] video-on demand system,”<sup>35</sup> which has been construed as “a video-on-demand system **without a set-top box for remote control of the video-on-demand system**[.]”<sup>36</sup> Similarly, claim 10 of the '4,907 patent and claim 21 of the '7,907 patent are to “[a]

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<sup>32</sup> D.I. 190 at 8 (“The operation of the Accused Charter Services is undisputed, as Sprint does not contest Charter’s discovery responses that set forth this information.”).

<sup>33</sup> See Section IV.B, below.

<sup>34</sup> D.I. 190 at 14–16; D.I. 200 at 2–7.

<sup>35</sup> '4,907 patent, 6:28; '7,907 patent, 6:42.

<sup>36</sup> D.I. 168 at 2 (emphasis added).

method of operating a video-on-demand system,”<sup>37</sup> which has been construed as “operating a video-on-demand system **without the use of a set-top box for remote control of the video-on-demand system**[.]”<sup>38</sup> In addition, the term “video control signal”<sup>39</sup> in claims 1 and 10 of the ’4,907 patent is construed as “a video control signal generated and processed **without the involvement of a set-top box for remote control of the video-on-demand system**[:]”<sup>40</sup> and the “viewer control signal”<sup>41</sup> term found in claims 1, 21, and 23 of the ’7,907 patent is construed as “a viewer control signal generated and processed **without the involvement of a set-top box for remote control of the video-on-demand system**.”<sup>42</sup>

## 2. The parties’ positions as to the operation of the Accused Services

Charter argues that there is no genuine issue of material fact that the Accused Services use or involve the set-top box (STB) for remote control.<sup>43</sup> Charter avers that the Accused Services do not infringe the aforementioned claims, because the elements of those products and services are not covered by the corresponding limitations. Essentially, Charter contends, the set-top box remotely controls the video-on-demand (VOD) system.

Charter’s argument focuses on the [REDACTED] message sent by the STB.<sup>44</sup> As stated in Charter’s verified interrogatory responses, after the user presses “Play” on the

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<sup>37</sup> ’4,907 patent, 7:6; ’7,907 patent, 7:58.

<sup>38</sup> D.I. 168 at 2 (emphasis added).

<sup>39</sup> ’4,907 patent, 6:34–35, 7:10.

<sup>40</sup> D.I. 168 at 3 (emphasis added).

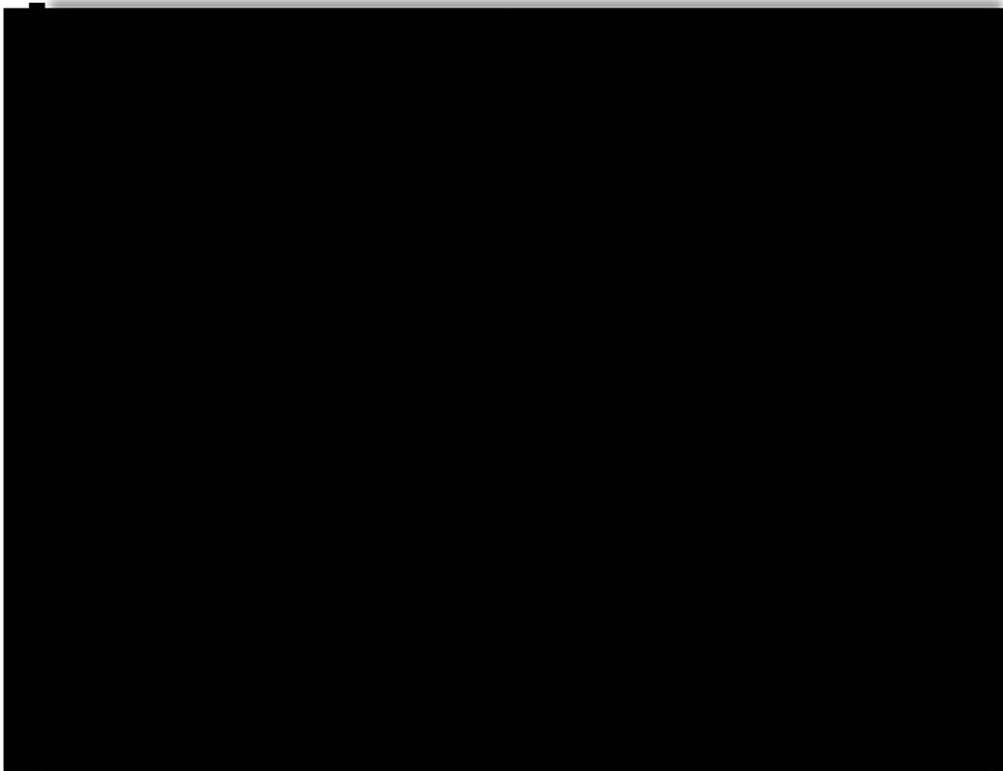
<sup>41</sup> ’7,907 patent, 6:52, 7:62, 8:7–8.

<sup>42</sup> D.I. 168 at 3 (emphasis added).

<sup>43</sup> D.I. 190 at 11.

<sup>44</sup> *Id.* at 11, 16 n.4.

[REDACTED] on the STB (identified in the charts as [REDACTED], the STB sends a [REDACTED] message to the [REDACTED]<sup>45</sup>



The significance of that message, however, is in dispute. Charter argues that this message is critical to the operation of the Accused Services, because “[i]t is in response to this request from the STB, not the customer’s [prior] selection of the “Send-to-TV” feature, that the VOD system transfers the selected video content to the STB for playback.”<sup>46</sup> Charter makes several supporting arguments, including that the Accused Services “use the same signals between the STB and VOD system as Charter’s

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<sup>45</sup> D.I. 189-2, Ex. 4 (annotation added). As is discussed herein, Charter contends in its Statement of Facts, that this message does not go to the [REDACTED] but rather that “the STB sends a [REDACTED]” D.I. 190 at 8–9.

<sup>46</sup> D.I. 190 at 11; see *also id.* at 16 n.4 (“Under the principles of collateral estoppel, the *Comcast* court’s ruling that the start session message constitutes ‘remote control’ under the court’s constructions also requires a finding here that [REDACTED] sent from the STB to the VOD system in the Spectrum Guide systems is also “remote control” under the court’s constructions.”).

conventional VOD system”<sup>47</sup> and that “once the customer selects the ‘Send to TV’ feature, the STB thereafter handles *all* communications (upstream and downstream) with the VOD system.”<sup>48</sup>

Sprint disagrees and points out that Charter’s verified interrogatory responses indicate that “the selection and ordering of content by the user does not involve a set-top box[.]”<sup>49</sup> Specifically, Sprint argues that the [REDACTED], not to the VOD system, and the VOD system is never aware that [REDACTED] was sent in the first place, so this does not represent remote control of the VOD system.<sup>50</sup> Moreover, according to Sprint, “the [REDACTED] [REDACTED], as the *Comcast* court found critical in determining Comcast’s ‘start session’ message was involved in remotely controlling the VOD server.”<sup>51</sup> Thus, Sprint avers, [REDACTED] [REDACTED] [REDACTED]<sup>52</sup> Sprint annotates Exhibits 4 and 5 from Charter’s

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<sup>47</sup> *Id.* at 11. Apparently, Charter’s conventional VOD system is not accused in the case at bar, which, drawing all reasonable inferences in favor of the nonmoving party, has no bearing on the present motion. D.I. 197 at 13 n.2.

<sup>48</sup> *Id.* at 12 (emphasis in original).

<sup>49</sup> D.I. 197 at 13–14 (citing D.I. 189-2, Exs. 4, 5, D.I. 189-1, Ex. 2 at 8, D.I. 189-2, Ex. 3 at 30).

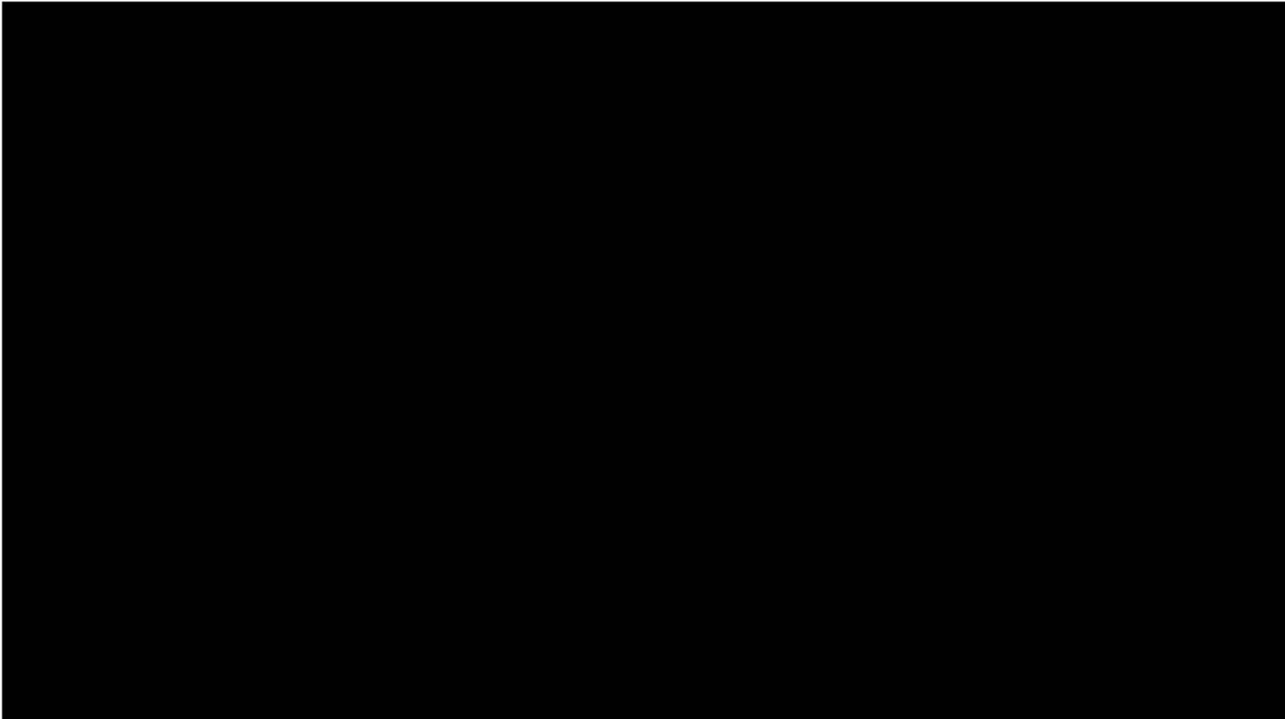
<sup>50</sup> *Id.* at 14–15.

<sup>51</sup> *Id.* at 15 (citing *Comcast Cable Commc’ns, LLC v. Sprint Commc’ns Co., LP*, 203 F. Supp. 3d 499 (E.D. Pa. 2016)).

<sup>52</sup> *Id.* (citations omitted). In the relevant portion of Charter’s interrogatory response: “When a user selects an asset to play through his or her STB . . . [REDACTED]

[REDACTED] D.I. 189-2, Ex. 3 at 30.

verified interrogatory responses showing this process step described in the text of those responses:<sup>53</sup>



According to Sprint, the information, [REDACTED]

[REDACTED]

Sprint argues “[t]his fact alone should end the inquiry since it plainly comports with this Court’s construction that no set-top box is used in the remote control of Charter’s VOD system.”<sup>54</sup>

In its reply brief, Charter focuses primarily on legal questions such as claim construction.<sup>55</sup> As to the facts, Charter avers that there is no “genuine issue of material fact that Charter’s Accused Services require the *use and involvement* of a STB to transmit and display the selected video content on the customer’s portable device or

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<sup>53</sup> D.I. 197 at 14 (annotations in original).

<sup>54</sup> *Id.*; see also *id.* at 14–18.

<sup>55</sup> D.I. 200 at 2–7.

television.”<sup>56</sup> Although Charter labels this as a statement of undisputed fact, Charter’s emphasis on the Court’s “use” and “involvement” claim construction language obviously implicates a mixed question of fact and law over which the parties disagree.

### 3. Material facts

In the *Comcast* case,<sup>57</sup> Sprint alleged that Comcast infringed the same ’4,907 and ’7,907 patents at issue in the case at bar. In that matter, the Court made a factual finding that the set-top box in Comcast’s Remote Tune system sent a “start session message” that included an identification of “the video content selected by the user.”<sup>58</sup> The inclusion of this information in the start session message was ultimately dispositive of infringement.<sup>59</sup>

Based upon this holding in *Comcast* and the briefing on the instant motion, there are several material factual questions about the operation of the Accused Services, including: (1) the existence of messages between components of the Accused Services; (2) the sources and destinations of the messages; (3) the content of the messages; and (4) the sequence of individual messages in relation to other messages.

Here, on the same set of allegedly undisputed facts, the parties disagree as to when the video content selected by the user is identified to the video-on-demand system. In its opening brief, Charter argues that this happens *after* the STB sends the

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<sup>56</sup> *Id.* at 3 (emphasis in original).

<sup>57</sup> *Comcast Cable Commc’ns, LLC v. Sprint Commc’ns Co., LP*, 203 F. Supp. 3d 499 (E.D. Pa. 2016).

<sup>58</sup> *Comcast*, 203 F. Supp. 3d at 553–54 (“In Comcast’s Remote Tune system, it is undisputed that before any video content is sent by the VOD system, the set-top box sends a start session message to the VOD system. That message includes, among other things, the video content selected by the user. Without the communications sent by the set-top box to the VOD system, the VOD system does not send video content to the television and nothing happens. Thus, the set-top box is involved in remote control of the VOD system in order for Comcast’s Remote Tune system to function.”).

<sup>59</sup> *Id.*

[REDACTED]<sup>60</sup> Sprint responds that this information is sent earlier in the process when [REDACTED]

[REDACTED]<sup>62</sup> By the reply brief, however, Charter explains that its factual averments are cast within a legal argument implicating additional claim construction.<sup>63</sup> These later arguments are based at least in part on Charter’s Statement of Facts, another version of the facts surrounding [REDACTED],<sup>64</sup> and to subsequent annotations to the charts included in the verified interrogatory responses.<sup>65</sup>

The factual statements related to the operation of the Accused Services, including statements related to the [REDACTED] are material to the question of infringement.

**B. The factual record**

The task is to recommend whether to grant or deny summary judgment predicated on the questions of whether “the movant shows that there is no genuine dispute as to any material fact and [whether] the movant is entitled to judgment as a

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<sup>60</sup> D.I. 190 at 11–13.

<sup>61</sup> D.I. 197 at 15–16.

<sup>62</sup> D.I. 189-2, Ex. 3 at 30.

<sup>63</sup> D.I. 200 at 2–7; *see id.* at 5 (emphasis in original) (citing D.I. 190 at 11–13, 15–16) (“Charter only contends that the Court’s construction precludes *upstream* signals from the STB to the VOD system *before* the VOD system sends video to the STB or television necessary to cause the VOD system to send video for display on the television.”).

<sup>64</sup> See Section IV.B.2(b), below.

<sup>65</sup> D.I. 200 at 5 (citing D.I. 190 at 11–13).

matter of law.”<sup>66</sup> To make the recommendation, the court “should state on the record the reasons for granting or denying the motion.”<sup>67</sup>

Generally speaking, a dispute over material facts would preclude summary judgment. And yet, for the purposes of making a recommendation to the district court, the court is unable to ascertain whether a factual dispute does, or does not, exist. This is not because Sprint disputes the facts in the record—in fact, Sprint does not dispute Charter’s discovery responses.<sup>68</sup> Rather, the factual record before the court is unclear, because Charter presents multiple versions of its own facts and does not explain how these facts cannot be genuinely disputed.

Under Rule 56(c), “[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]”<sup>69</sup> Here, Charter relies in its briefing on its “verified interrogatory responses” as showing facts that cannot be genuinely disputed.<sup>70</sup> Charter attaches these verified interrogatory responses to its opening brief.<sup>71</sup> These interrogatory responses include a set of charts depicting the

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<sup>66</sup> Fed. R. Civ. P. 56(a).

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g., D.I. 197 at 1 (emphasis added) (citations omitted) (“Charter’s **own evidence**, however, supports the opposite conclusion and establishes that Charter’s set-top boxes never send messages to the VOD system that are used ‘to direct and initiate the transfer of VOD content to the television.’ . . . According to Charter’s own **interrogatory responses**, [REDACTED]

<sup>69</sup> Fed. R. Civ. P. 56(c).

<sup>70</sup> D.I. 190 at 11–14. Although Charter includes Sprint’s infringement contentions in its Appendix, it does not discuss these materials in relation to the absence of a genuine issue. *Id.* at 7, 14.

<sup>71</sup> D.I. 189-2, Exs. 3, 4, 5.

operation of various Accused Services, including “the signals and process flows sent and received”<sup>72</sup> between various system components.<sup>73</sup>

In its opening brief, Charter includes a “Statement of Facts” section.<sup>74</sup> The Statement of Facts cites to Charter’s verified interrogatory responses and re-states the facts in those discovery responses. Much of Charter’s argument is based on its “Statement of Facts” section and not its verified interrogatory responses. Other argument in Charter’s reply brief introduces facts that differ from both its Statement of Facts and discovery responses.

Additionally, Charter attaches, as Exhibits 9 and 10 to its opening brief, annotated versions of the charts included in Exhibits 4 and 5, describing the process and signal flow of the Accused Services.<sup>75</sup> These exhibits are cited as the sole support for at least two factual arguments Charter makes as to the operation of the Accused Services.<sup>76</sup>

### **1. Charter’s Verified Interrogatory Responses**

Charter attaches portions of its interrogatory responses to its opening brief.<sup>77</sup> These interrogatory responses have been verified by a Technical Fellow at Charter.<sup>78</sup> Charter argues that its verified interrogatory responses are undisputed, because Sprint

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<sup>72</sup> *Id.*, Ex. 3 at 28.

<sup>73</sup> See, e.g., *Id.*, Ex. 4 [REDACTED] It is unclear whether these are internal Charter engineering documents or if these charts were prepared specifically for the purpose of responding to the interrogatories. However, Sprint is well-versed in these charts and cites them extensively in its statement of facts. D.I. 197 at 5–8. Thus, there is not a genuine issue as to the information in these charts.

<sup>74</sup> D.I. 190 at 7–10.

<sup>75</sup> D.I. 189-2, Exs. 9, 10.

<sup>76</sup> D.I. 190 at 12–13 (citing D.I. 189-2, Exs. 9, 10).

<sup>77</sup> E.g., D.I. 189-2, Ex. 3.

<sup>78</sup> *Id.* at PageID #4053.

does not contest them.<sup>79</sup> Based on Sprint's infringement contentions<sup>80</sup> and answering brief,<sup>81</sup> there is no dispute as to Charter's verified interrogatory responses.

## 2. Charter's Statement of Facts in its opening brief

Charter's "Statement of Facts" includes a section entitled "Charter Accused Services." This section cites to, and re-states Charter's verified interrogatory responses. These restated facts differ from the undisputed, verified interrogatory responses. Charter offers no explanation for the differences discussed below and, specifically, does not explain how these differing facts cannot be genuinely disputed.

### (a) The [REDACTED]

The first set of facts that Charter presents in its Statement of Facts that differ substantially from Charter's verified interrogatory responses relate to [REDACTED]. When describing the operation of the "Send-to-TV" feature for legacy Charter market customers utilizing Spectrum Guide STBs,<sup>82</sup> Charter states in its verified interrogatory response:

1) When a user selects an asset to play through his or her STB using the Legacy Charter TV App or Spectrum TV App, as described above, the app sends [REDACTED]

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<sup>79</sup> D.I. 190 at 8. The court declines to address the question of whether not contesting a discovery response is sufficient to establish the absence of a genuine issue.

<sup>80</sup> D.I. 189-1, Ex. 2; 189-2, Ex. 2.

<sup>81</sup> See generally D.I. 197.

<sup>82</sup> The disparities discussed herein are similar to the disparities between Charter's interrogatory responses related to the Spectrum Guide for Legacy TWC/BHN Markets, D.I 189-2, Ex. 3 at 35–39, Ex. 4, and Charter's Statement of Facts related to these services in its opening brief, D.I. 190 at 9–10.

2) [REDACTED]

Thus, in the verified interrogatory response, [REDACTED]

[REDACTED]<sup>84</sup> This message contains information, [REDACTED]

[REDACTED]<sup>85</sup> The [REDACTED]

[REDACTED]

[REDACTED]<sup>86</sup> It is unclear from these materials what a

[REDACTED]” is.

Nonetheless, when describing this same process in its Statement of Facts, Charter cites solely to its verified interrogatory responses and states as follows:

When a customer selects video content to play through the STB using the Legacy Charter TV App or Spectrum TV App,

[REDACTED]

This restatement of the verified interrogatory responses omits key details of the system components involved in passing [REDACTED]

[REDACTED]<sup>88</sup> The Statement of Facts also adds detail not present in

<sup>83</sup> D.I. 189-2, Ex. 3 at 30 (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* As discussed above, the inclusion of this information in the “start session” message sent by the STB in the *Comcast* case was dispositive of infringement of the ’4,907 and ’7,907 patents. See *supra* note 58.

<sup>86</sup> *Id.*

<sup>87</sup> D.I. 190 at 8 (emphasis added) (citing D.I. 189-2, Ex. 3 at 28–30, Ex. 5).

<sup>88</sup> *Id.*

the verified interrogatory responses, namely that the [REDACTED] sent to the STB is [REDACTED] [REDACTED]<sup>89</sup> Charter's Statement of Facts suggests that the STB is the intended recipient of the [REDACTED] and that it processes that message in some manner.

Charter's verified interrogatory responses are undisputed. Charter relies on the undisputed nature of its interrogatory responses to support its assertion that there is no genuine issue as to the "operation of the Accused Charter Services."<sup>90</sup> This statement in Charter's Statement of Facts differs from its prior discovery responses. Charter does not address the differences. Also, Charter does not explain why those differences cannot be genuinely disputed. Therefore, Charter has failed to support its assertion that there is no genuine issue of material fact relating to [REDACTED]

**(b) The [REDACTED] and associated messages**

In a sequence of events described in Charter's verified interrogatory responses, the [REDACTED] " to the television connected to the STB. This page has a "Watch" button on it. The user presses the "Watch" button on the screen using the STB remote, and the [REDACTED]

[REDACTED]  
[REDACTED]<sup>91</sup>

In its Statement of Facts, Charter omits all references to the [REDACTED] [REDACTED]. In its reply brief, Charter acknowledges that [REDACTED] and concedes a version of operation similar (but not identical) to the verified interrogatory responses. Elsewhere in the reply brief, Charter

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 8.

<sup>91</sup> D.I. 189-2, Ex. 3 at 30–31.

re-states its facts and further changes the meaning. For much of the reply brief, the court is unable to ascertain *which* version of the facts surrounding [REDACTED] Charter refers to.

- (i) **Charter’s verified interrogatory responses state that the [REDACTED] but Charter’s Statement of Facts does not include the [REDACTED]**

Beginning at step 4 in the process employed by the Accused Services, Charter’s verified interrogatory responses identify “the Spectrum Guide platform, which performs the set-top box functionality and includes the following components for the accused ‘Send-to-TV’ functionality: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>92</sup> The [REDACTED] features prominently in the charts, such as Exhibit 4:<sup>93</sup>

[REDACTED]

Charter’s verified interrogatory responses also state that [REDACTED]  
[REDACTED]  
[REDACTED]<sup>94</sup>

Charter’s Statement of Facts does not identify the [REDACTED].<sup>95</sup> In addition, Charter does not discuss the [REDACTED], or that Charter’s platform [REDACTED]

<sup>92</sup> *Id.* at 9 (emphasis omitted).

<sup>93</sup> *Id.*, Ex. 4.

<sup>94</sup> *Id.*, Ex. 3 at 9 (emphasis omitted).

<sup>95</sup> D.I. 190 at 7–10.



information stated in its Statement of Facts does not explain the differences between these two statements.

Charter relies on the undisputed nature of its interrogatory responses to support its assertion that there is no genuine issue as to the “operation of the Accused Charter Services.”<sup>100</sup> The statement above differs from those discovery responses, which Charter fails to address. Therefore, Charter fails to support its argument that this statement related to the [REDACTED] is not genuinely disputed.

**(iii) Charter’s Statement of Facts indicate that the STB sends the [REDACTED] when its verified interrogatory responses state that the [REDACTED]**

Charter’s verified interrogatory responses state that the [REDACTED]

[REDACTED]

5) [REDACTED]

In its Statement of Facts, Charter again omits [REDACTED] from the process description and states that, in response to this same user input:

[REDACTED]

<sup>100</sup> *Id.*

<sup>101</sup> D.I. 189-2, Ex. 3 at 30–31 (emphasis added) (citations omitted).

[REDACTED]

Again, the change in the subject of the sentence from [REDACTED] to the STB—as to which component sends [REDACTED]—obviously changes the meaning. Moreover, Charter’s Statement of Facts adds new information not found in the text of Charter’s verified interrogatory responses, including that: (1) the “signal confirming the remote control command” is [REDACTED],<sup>102</sup> (2) [REDACTED] [REDACTED]”<sup>104</sup> and (3) the [REDACTED] [REDACTED]

In its reply brief, Charter acknowledges the existence of [REDACTED] and argues for additional versions of these same facts, namely that [REDACTED] [REDACTED] [REDACTED]

[REDACTED]<sup>105</sup> Despite discussing [REDACTED], Charter’s reply brief is silent as to which component of the system (*i.e.*, [REDACTED] or the STB) displays [REDACTED]

[REDACTED]”<sup>106</sup> Elsewhere in its reply brief, Charter restates this information again, arguing that “the transmission of [REDACTED]

<sup>102</sup> D.I. 190 at 8–9 (emphasis added) (citing D.I. 189-2, Ex. 3 at 28–30, Ex. 5).

<sup>103</sup> This fact is not disputed and is found in the charts. D.I. 189-2, Exs. 4, 5. Sprint also states this fact in its answering brief. D.I. 197 at 5 (citing D.I. 189-2, Ex. 3 at 30–31, Exs. 4, 5) (“When the user confirms the order from the portable device by clicking the ‘Watch’ button, using a television remote, [REDACTED]”).

<sup>104</sup> Again, this fact was dispositive in the *Comcast* case. See *supra* note 58.

<sup>105</sup> D.I. 200 at 1–2 (citations omitted).

<sup>106</sup> *Id.*



Services.<sup>113</sup> And yet, for at least two factual statements in the “Argument” section of its opening brief, Charter relies on these annotated charts as its sole support.<sup>114</sup> It is unclear whether the highlighted areas support Charter’s conclusions,<sup>115</sup> and the annotations are attorney argument.<sup>116</sup> Because Charter offers no explanation as to how or why the associated statements are undisputed, Charter has failed to support its claim that there is no genuine issue in dispute.

## V. CONCLUSION

Under Rule 56, a party asserting that a fact cannot be or is genuinely disputed must support its argument by citing to the record or other materials.<sup>117</sup> Here, there is no dispute as to the facts as stated in Charter’s verified interrogatory responses. Charter relies on its interrogatory responses as support that there is no genuine issue of fact as to the operation of the Accused Services.<sup>118</sup> However, Charter’s Statement of Facts and other factual averments in its briefing differ from the verified interrogatory responses, and Charter offers no explanation for these differences.

Through its briefing, Charter has introduced new facts that it must now show to be undisputed. Because it has not shown these facts to be undisputed, Charter has

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<sup>113</sup> *Id.*, Ex. 9, 10.

<sup>114</sup> D.I. 190 at 12 (emphasis in original) (citing D.I. 189-2, Ex. 9, 10) (“[O]nce the customer selects the ‘Send to TV’ feature, the STB thereafter handles *all* communications (upstream and downstream) with the VOD system.”); *id.* at 12–13 (citing D.I. 189-2, Ex. 9, 10) (“There is no scenario in which the selected VOD content in the Charter Accused Services is transmitted to a customer’s television without the STB first sending a series of messages to the VOD system to direct and initiate the transfer of VOD content to the television and, separately, requiring the customer to confirm the selected VOD content by using his or her STB remote control.”).

<sup>115</sup> To find such support would require the court to draw numerous inferences in favor of the moving party, which is not appropriate at summary judgment. *See supra* note 25.

<sup>116</sup> *See, e.g.*, D.I. 197 at 14–16 (annotating portions of D.I. 189-2, Ex. 4, 5 in the “Argument” section of Sprint’s brief).

<sup>117</sup> Fed. R. Civ. P. 56(c).

<sup>118</sup> D.I. 190 at 8.

