

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Bright House Networks, LLC,
WideOpenWest Finance, LLC,
Knology of Florida, Inc.
Birch Communications, Inc.
Petitioners

v.

Focal IP, LLC,
Patent Owner

Case No. IPR2016-01259
U.S. Patent No. 8,155,298

PETITIONERS' MOTION TO EXCLUDE

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Pursuant to 37 C.F.R. § 42.64(c), Petitioners Bright House Networks, LLC, WideOpenWest Finance, LLC, Knology of Florida, Inc., and Birch Communications, Inc. (collectively “Petitioners”) hereby move to exclude: (1) an opening claim construction expert declaration of Dr. Eric Burger filed by Bright House Networks, LLC, WideOpenWest Finance, LLC, Knology of Florida, Inc., Birch Communications, Inc., and T3 Communications, Inc., in district court litigation Case Nos. 3:15- cv-742-J-32MCR, 3:15-cv-743-J-32MCR, 3:15-cv-746-J-32MCR, 3:15-cv-747-J-32MCR (Exhibit 2011, “Burger Litigation Declaration”); and (2) Exhibits 2021, 2024, 2025, 2027-2030, and 2065.

Petitioners have complied with the requirements of 37 C.F.R. § 42.64(c). Specifically, Petitioners timely objected to each of these exhibits and, for each exhibit, identified and explained the particular evidentiary grounds for their objections. Paper 34.

I. EXHIBIT 2011 SHOULD BE EXCLUDED

Petitioners move to exclude Exhibit 2011 because this exhibit is irrelevant, confuses the issues, wastes time, and is prejudicial. Paper 34, 3. Exhibit 2011 is an opening claim construction expert declaration of Dr. Eric Burger filed by Bright House Networks, LLC, WideOpenWest Finance, LLC, Knology of Florida, Inc., Birch Communications, Inc., and T3 Communications, Inc., in district court

litigation Case Nos. 3:15-cv-742-J-32MCR, 3:15-cv-743-J-32MCR, 3:15-cv-746-J-32MCR, 3:15-cv-747-J-32MCR.

This declaration should be excluded based on Federal Rules of Evidence (“F.R.E.”) 402 because it is not relevant to any issue in this IPR proceeding, and based on F.R.E. 403 because it confuses the issues in this IPR, wastes time, and is prejudicial to Petitioners. Patent Owner does not rely on this declaration in its Response and thus any attempt to rely on it at the oral hearing is impermissible. *See* Paper 30 (“Response”); Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012); 37 C.F.R. § 42.123. Even if Patent Owner had relied on this declaration in its Response, Mr. Burger is not a witness nor declarant in the present proceeding, and his declaration was filed in a different forum with a different claim construction standard than the broadest reasonable interpretation standard applicable to this IPR proceeding. *Cuozzo Speed Technologies, LLC v. Lee*, 579 U.S. 136 (2016).

Thus, Exhibit 2011 should be excluded.

II. EXHIBITS 2021, 2024, 2025, 2027-2030, AND 2065 SHOULD BE EXCLUDED

Petitioners move to exclude Exhibits 2021, 2024, 2025, 2027-2030, and 2065, and any reference to or reliance thereon by Patent Owner, because these exhibits are incomplete transcripts and submissions of witnesses who have not submitted declarations or any direct testimony in the present case, and entities who

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