

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

Focal IP, LLC,  
Patent Owner

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Case No. IPR2016-01261  
U.S. Patent No. 8,457,113

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**PETITIONERS' SECOND SET OF OBJECTIONS TO PATENT OWNER'S  
EVIDENCE PURSUANT TO 37 C.F.R. 42.6**

Pursuant to 37 C.F.R. § 42.64(b)(1), Petitioners Bright House Networks, LLC, WideOpenWest Finance, LLC, Knology of Florida, Inc., and Birch Communications, Inc. (collectively “Petitioners”) hereby submit the following objections to Patent Owner Focal IP, LLC’s (“Patent Owner”) Exhibit 2070 and any reference to/reliance on the foregoing, in Patent Owner’s Reply in Support of Patent Owner’s Contingent Motion to Amend Claim 1 in the above-captioned *inter partes* review (“Motion to Amend Reply”). As required by 37 C.F.R. § 42.62, Petitioners’ objections below apply the Federal Rules of Evidence (“F.R.E.”).

Petitioners’ objections are timely under 37 C.F.R. § 42.64(b)(1) because they are being filed and served within five (5) business days of the filing of Patent Owner’s Motion to Amend Reply on July 31, 2017. Petitioners’ objections provide notice to Patent Owner that Petitioners may move to exclude this exhibit under 37 C.F.R. § 42.64(c).

**I. OBJECTIONS TO EXHIBIT 2070 AND ANY REFERENCE TO/RELIANCE THEREON**

Evidence objected to: Exhibit 2070 and any reference to or reliance thereon. Exhibit 2070 is a Declaration of Regis J. “Bud” Bates in support of Patent Owner’s Motion to Amend Reply.

Grounds for objection:

Petitioners object to Exhibit 2070, and Patent Owner’s reference to or reliance thereon, as being inadmissible under F.R.E. 702, 703 (expert testimony),

and 37 C.F.R. § 42.20(c) because Mr. Bates's opinions are premised on Petitioners bearing the burden of proving patentability of proposed substitute claim 183 which is the wrong legal standard. *See, e.g.*, Exhibit 2070, ¶¶32, 44, 50, 54-55; Motion to Amend Reply, 1 (“PO believes Petitioner bears the burden of proving that the Substitute Claim is not patentable.”); *cf. Nike v. Adidas AG*, 812 F.3d 1326, 1333-34 (Fed. Cir. 2016) (“[T]he burden of proving patentability of a proposed substitute claim [is] on the movant: the patent owner.”); *MasterImage 3D v. RealD*, IPR2015-00040, 2015 WL 4383224 (PTAB July 15, 2015) (“The burden is not on the petitioner to show unpatentability, but on the patent owner to show patentable distinction over the prior art of record and also prior art known to the patent owner.”) Petitioners further object to Exhibit 2070, and Patent Owner's reference to or reliance thereon, as being inadmissible under F.R.E. 702, 703, and 37 C.F.R. § 42.20(c) because Mr. Bates fails to address combinations of the prior art of record and prior art known to the patent owner.

Petitioners further object to Exhibit 2070, and Patent Owner's reference to or reliance thereon, as being inadmissible under F.R.E. 702, 703, 403 (confusing, waste of time, unfair prejudice), 37 C.F.R. § 42.23(b) and Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012), because Exhibit 2070 contains opinions and statements outside the proper scope of a Reply Declaration including, for example, untimely opinions and statements attempting

to attribute patentability to claim limitations other than the two limitations argued in the Motion to Amend and/or opinions and statements that could have been included in Mr. Bates's declaration in support of such Motion. *See, e.g.*, Exhibit 2070, ¶¶42, 44-45, 47, 50-51, 54; *cf.* Exhibit 2040, ¶¶116-145, 152.

Dated: August 7, 2017

DUANE MORRIS LLP  
ATTN: Patrick McPherson  
505 9<sup>th</sup> Street, NW, Suite 1000  
Washington, DC 20004  
Tel: 202-776-5214  
Fax: 202-776-7801

Respectfully submitted,  
**DUANE MORRIS LLP**

By: /s/ Patrick D. McPherson  
Patrick D. McPherson  
Reg. No. 46,255  
Lead Counsel

## CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.53, the undersigned certifies that on August 7, 2017, a complete and entire electronic copy of **Petitioners' Second Set of Objections to Patent Owner's Evidence Pursuant to 37 C.F.R. § 42.6** were provided via the Patent Trial and Appeal Board End to End (PTAB E2E) System as well as delivering a copy electronically via email on the following:

Brent N. Bumgardner  
brent@nelbum.com  
PAL-IPR@nelbum.com

John Murphy  
murphy@nelbum.com

NELSON BUMGARDNER, P.C.  
3131 W. 7th Street, Suite 300  
Fort Worth, Texas 76107

Victor Siber  
vsiber@siberlaw.com

Hanna Madbak  
hmadbak@siberlaw.com

By: /s/ Christopher J. Tyson  
Christopher J. Tyson  
Reg. No. 63,850  
Back-up Counsel