

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. IPR2016-01261
U.S. Patent No. 8,457,113 B2

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) the Declaration of Regis J. “Bud” Bates in support of Patent Owner’s Motion to Amend Reply (Exhibit 2070); (2) 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”); (3) Exhibit 2041; and (4) 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 32; Paper 44.

I. MR. BATES’S DECLARATION (EXHIBIT 2070) SHOULD BE EXCLUDED

Mr. Bates is Patent Owner’s preferred expert and his Declaration in support of Patent Owner’s Motion to Amend Reply (Exhibit 2070) includes opinions regarding the state of the art and how a person of ordinary skill would understand the prior art and the scope of substitute claim 183 of U.S. Patent No. 8,456,113.

Mr. Bates’s opinions, however, are premised on the wrong legal standard such that they cannot be accepted as reliable. Moreover, Exhibit 2070 includes untimely statements and opinions of Mr. Bates that could have been included in Mr. Bates’s Declaration (Exhibit 2040) in support of Patent Owner’s Motion to Amend (Paper 31) but were not. Accordingly, as discussed below, Exhibit 2070 should be excluded at least under Federal Rules of Evidence (“F.R.E.”) 702, 703, 37 C.F.R. §§ 42.20(c), 42.23(b), Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012), and the standards in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Nike v. Adidas AG*, 812 F.3d 1326, 1333-34 (Fed. Cir. 2016); Paper 44.

A. Legal Standard for the Admissibility of Expert Opinions

Patent Owner, as the proponent of Mr. Bates’s declaration (Exhibit 2070) and the other exhibits that are the subject of this Motion, has the burden of establishing admissibility by a preponderance of the evidence. *See* Fed. R. Evid. 104(a); *Bourjaily v. United States*, 483 U.S. 171 (1987).

The admissibility of expert testimony is governed by the Federal Rules of Evidence and the principles laid out in *Daubert. Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014). The F.R.E., as applied in *Daubert*, do apply to IPRs. 37 C.F.R. § 42.62(a). Under F.R.E. 702 and *Daubert*, judges play a “gatekeeping role” and should exclude evidence if it is based upon “unreliable

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