

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX, INC.,
Petitioner,

v.

AVAGO TECHNOLOGIES INTERNATIONAL SALES PTE. LIMITED,
Patent Owner.

Inter Partes Review No. IPR2021-00303

U.S. Patent No. 8,270,992 B2

PATENT OWNER'S SUR-REPLY

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LIST OF EXHIBITS

1001	U.S. Patent No. 8,270,992 ("the '992 Patent")
1002	Prosecution File History for the '992 Patent ("File Hist.")
1003	Declaration of Harley R. Myler, Ph.D., P.E. ("Myler Decl.")
1004	U.S. Patent Publication No. 2003/0065805 A1 to Barnes ("Barnes")
1005	U.S. Patent No. 7,299,291 to Shaw ("Shaw")
1006	Schulzrinne et al., Real Time Streaming Protocol (RTSP), RFC2326, IETF April 1998; http://www.ietf.org/rfc/rfc2326.txt
1007	<i>Broadcom Corp. v. Netflix, Inc.</i> , Case No. 3:20-cv-04677-JD, DI 90 (N.D. Cal.) (Sept. 24, 2020) ("Broadcom Opposition")
1008	U.S. Patent Publication No. 2001/0025378 A1 to Sakamoto et al. ("Sakamoto")
1009	PCT Appl. Pub. No. WO 00/16550 to Gomez et al.
1010	Transcript from Deposition of Ghassan AlRegib ("AlRegib Dep. Tr.")
1011	Reply Declaration of Harley R. Myler, Ph.D. ("Myler Reply Decl.")
2001	Harry Newton, Newton's Telecom Dictionary; CMP Books (20 th ed. Mar. 2004) ("Newton's Telecom Dictionary")
2002	Declaration of Dr. Ghassan AlRegib ("AlRegib Decl.")
2003	Deposition Transcript of Dr. Harley Myler ("Myler Dep. Tr.")
2004	<i>Broadcom Corp. v. Netflix, Inc.</i> , Case No. 3:20-cv-04677-JD, DI 160 (N.D. Cal.) (Sept. 14, 2021) ("Order Re Netflix Motion to Dismiss")

I. INTRODUCTION

Petitioner's Reply ("Reply") utterly fails to address the arguments in Patent Owner's Response ("POR"). The Reply begins with incredible arguments about PO's alleged inconsistent positions and provides no more persuasive arguments on the substance of POR. The Reply misunderstands PO's arguments and disregards Petitioner's own expert testimony. With regard to the teachings of Shaw, the Reply repeatedly accuses POR of citing mere "examples" from Shaw without actually demonstrating that Shaw teaches anything in addition to these "examples." Instead, the Reply relies entirely on its expert's (and its own) speculation, about which the best Petitioner can argue is that Shaw does not strictly rule out such speculation. That speculation, however, cannot bear Petitioner's burden to prove that the Challenged Claims are invalid. The Reply thus fails to remedy the Petition's failure to establish that any Challenged Claim is invalid.

II. PO'S POSITIONS ARE CONSISTENT

An overarching theme of the Reply is that Patent Owner ("PO") somehow has taken positions in this IPR that are inconsistent with positions taken in the District Court. *E.g.*, Reply 6-7. These arguments are both unpersuasive and immaterial, and they underscore the infirmity of the Reply in general. For example, Petitioner makes much of an alleged "inconsistency" in PO's respective positions regarding the preambles of Challenged Claims: "[d]espite arguing to the district court that the

'portable device' recited by the claim preamble is material to the patentability of the '992 patent, Avago 'does not concede' here that the 'portable device' is a claim limitation." *Id.*, 7 (citing POR, 38). As Petitioner must admit, however, the statement quoted above was part of a brief on the issue of subject matter under 35 U.S.C. § 101, arguing that the recitation of a "portable device" renders the claim patentable subject matter. EX-1007, 14. As an initial matter, this argument has nothing to do with the scope of any claim with respect to any reference cited in the Petition. Petitioner does not explain how this alleged inconsistency might possibly be material.

Moreover, while Petitioner quotes PO's refusal to "concede" Petitioner's (narrowing) construction of the preambles, Petitioner omits the next sentence, which states, "Petitioner's position is not material to the arguments before the Board and, therefore, does not need to be addressed as part of this Response." *Compare* Reply, 6-7, *with* POR, 38. PO's position is neither inconsistent nor material to any issue in this IPR. Petitioner's attempt to force PO to narrow the scope of the claims in an IPR appears to be gamesmanship, likely to support some theory pursued by Petitioner in the courts.

Petitioner's next allegation of "inconsistency" is no more credible. Petitioner argues:

Avago seeks to downplay the importance of selecting a source of digital media content based on bandwidth by arguing here that "[w]hile the Challenged Claims unquestionably require 'a network connection' in providing the 'digital media service,' this network connection must only have 'a communication bandwidth that is high enough' . . . to obtain/receive the digital media content at the higher quality level."

Reply, 7 (quoting POR, 16) (modifications in original). Petitioner for some reason argues that this is "a changing position." Reply, 7. Nothing in the Reply, however, identifies any position of PO that has changed. Instead of addressing POR's arguments on the merits, Petitioner claims, without any evidence, that these arguments are a change in position. This argument is wholly without merit. As noted below, the Reply's other arguments have no more merit.

III. THE REPLY MISUNDERSTANDS "QUALITY LEVEL" IN THE '992 PATENT

Apart from any argument on the limitations of the Challenged Claims, the Reply argues that "Avago incorrectly interprets 'quality level.'" *Id.*, 8. The Reply's argument rebuts itself, however. The claims recite "digital media content having a current quality level" and "digital media content . . . at a quality level higher than the current quality level." *E.g.*, EX-1001, 26:31-36.

Petitioner argues that PO's interpretation, "where quality does not refer to the quality of the digital media content being delivered, provided, or obtained, but rather *only* refers to the quality of the digital media content 'itself'" is incorrect. Reply, 8 (emphasis in original). This argument makes no sense. The media quality is what it is. It is not readily apparent why this interpretation should be controversial, nor why it should require any construction. This interpretation is merely the plain meaning of the "quality level" of digital media, which itself has nothing to do with the quality of the network on which the digital media is delivered.

Dr. AlRegib explains this distinction clearly: "the quality level of the media content, as those terms are used in the Challenged Claims, is independent of delivery considerations, such as network quality." EX-2002, ¶ 82. This is treated in depth in POR, which explains that the claims (and disclosure) of the '992 Patent distinguish between the concepts of "digital media service quality" and "digital media content quality"; the digital media content quality is one aspect of digital media service quality, along with the quality of the network connection. POR, 40-49. In fact, as POR demonstrates, the '992 Patent teaches that there are several factors that determine the overall quality of the media service; those factors pertain either to access (*i.e.*, quality of network connection) or quality of the information (*i.e.*, digital media quality). *Id.*, 46. Nothing in the Reply demonstrates that this is incorrect.

Moreover, while Petitioner nitpicks the portions of the specification that support Dr. AlRegib's opinion, Petitioner never explains why Dr. AlRegib's opinion is inconsistent with the disclosure or claims of the '992 Patent. *See* Reply, 8-9. Nor does Petitioner identify any record evidence, let alone any testimony from either expert, that would rebut Dr. AlRegib's opinion. *See id.* Attorney argument alone cannot carry Petitioner's burden of proof at this stage.

Tellingly, the Reply completely ignores the prosecution history of the '992 Patent. As POR explains, the Applicant specifically amended the claims to distinguish between the concept of quality of media service, generally, and quality of media content, specifically. Indeed, the Applicant amended the Challenged Claims to make this very distinction to overcome a reference that conflated link quality (*i.e.*, network quality) with the quality of the content (*i.e.*, media content quality):

38. (Currently Amended) In a portable system, a method for providing a digital media service to a user, the method comprising:

~~providing a~~ delivering digital media content having a current quality level ~~service~~
to a user ~~at a current quality level~~;

determining that a network connection with a second system is available and is characterized by a communication bandwidth that is high enough to provide the digital media ~~service~~ content to the user at a quality level higher than the current quality level; and

~~in response to at least said determining, utilizing the network connection to provide the digital media service to the user at a quality level higher than the current quality level.~~

using the network connection to obtain the digital media content at the higher quality level from the second system; and

delivering the digital media content at the higher quality level to the user instead of the digital media content at the current quality level.

EX-1002, 43 (removing several references to digital media "**service**" in the pending claims and replacing these references with digital media "**content having a current quality level**") (emphasis added); *see also* POR, 15-18. Dr. Myler agreed that the Applicant based its argument on the difference between network quality and media content quality. *Id.*, 18 (quoting EX-2003, 230:16-231:3). This argument, in fact, resulted in allowance of the '992 Patent. *Id.*, 17. Nowhere does the Reply address either the prosecution history or Dr. Myler's testimony concerning the prosecution history. Unsurprisingly, given Petitioner's disregard for the prosecution history, its

argument, which might apply to the original claims, is deeply mistaken regarding the claims as amended (and granted).

Hence, POR's argument that the prosecution history supports PO's position on the meaning of media quality level remains unrebutted. As such, the two leading arguments in the Reply are wholly unpersuasive. For these reasons alone, the Reply fails to add materially to the arguments of the Petition and should be disregarded by the Board. As explained below, the remaining arguments are no more credible.

IV. THE REPLY FAILS TO PROVE ANY CHALLENGED CLAIM IS INVALID

As noted in POR, the Petition failed to establish that no combination of Shaw and Barnes collectively teaches the determining limitation [1c], the using limitation [1d], or the second delivering limitation [1d]. POR, 49-56. The Reply fails to rebut these arguments.

A. Petitioner Does Not Demonstrate That Shaw Teaches Limitations [1c] and [6c]

The Reply attempts three arguments to explain why Shaw teaches the determining limitations (limitations [1c] and [6c]): the "thinning argument" (Reply, 11-13), the "switching argument" (*id.*, 16-18), and the "other teachings argument" (*id.*, 18-19). None is persuasive.

1. Petitioner Does Not Establish That Thinning Teaches Any Aspect of the Challenged Claims

Petitioner first argues that Shaw's discussion of "thinning" teaches limitation [1c], which requires "determining that a network connection with a second system is available and is characterized by a communication bandwidth that is high enough to provide the digital media content to the user at a quality level higher than the current quality level," and the corresponding limitation [6c]. EX-1001, 26:33-37; *see also* Reply, 10-13. This argument is not credible.

First, Petitioner argues, again, about POR's "incorrect interpretation of 'quality,'" which is without merit, for the reasons explained above. That argument needs no further response.

Second, according to Petitioner, "Avago ignores that, when a server is thinning a stream, the quality of the digital media content being delivered, provided, or obtained is *reduced* before the digital media content is placed on the network." Reply, 11 (emphasis in original). For this argument, Petitioner relies primarily on its expert's Reply Declaration. *Id.* (citing EX-1011, ¶¶ 5, 7-10). This testimony provides nothing but conclusory statements, however, and while Dr. Myler quotes Dr. AlRegib, the quotation does not support Dr. Myler's proposition. EX-1011, ¶ 9 (quoting EX-1010, 160:16-161:15). The very next paragraph of Dr. Myler's Reply Declaration admits as much: Dr. Myler emphasizes Dr. AlRegib's deposition testimony that a thinned file, if stored on a client, would be a smaller file, but

Dr. AlRegib's testimony, as characterized by Dr. Myler, is that "thinning a stream does not lower the quality of the digital media content." EX-1011, ¶ 10; *see also id.*, ¶ 9.

While Dr. Myler purports to disagree with Dr. AlRegib, his deposition testimony confirms that there is no disagreement between the experts. Dr. Myler's stated opinion in his reply declaration is conclusory and is largely dependent on Petitioner's misunderstanding about the quality of the media, as discussed above. *See id.*, ¶¶ 9-10. But his deposition testimony tells a different story: Dr. Myler admits that thinning means, "**there's an insufficient communication bandwidth between the server and the client**," and thus is a network condition, not an aspect of the digital media quality itself. POR, 32 (quoting EX-2003, 115:3-14) (emphasis in original); *see generally* POR, 31-33. Further, in discussing the seven quality of service factors disclosed in the '992 Patent, Dr. Myler acknowledged that "thinning" relates to the rate at which information can be accessed (*i.e.*, network conditions), not the quality of information that can be accessed (*i.e.*, content quality level). *Id.*, 46-49. The Reply fails to address, let alone rebut, this important concession by Dr. Myler.

Thus, Petitioner's "thinning" argument collapses with its misunderstanding of the term "media content quality," discussed above. *See supra* § III. Consequently,

neither the Reply nor the Petition bears Petitioner's burden to establish that Shaw's discussion of "thinning" has anything to do with the quality of the media itself.

2. Shaw Never Discloses Different Quality Levels of the Same Content

Petitioner argues that Shaw teaches transmission of data at different quality levels based on a disclosure in Shaw discussing different encoding rates. Reply, 14 (quoting EX-1005, 1:47-58). The quoted material, however, is found in the background of Shaw and has nothing to do with Shaw's invention, which, as POR correctly argues, is directed to a system in which the same copy of a media stream is replicated to several different source servers. POR, 25-37. The Reply identifies nothing in Shaw that teaches anything different. Specifically, other than this bare mention of encoding, Petitioner identifies no suggestion in Shaw that different encoding rates might be used for the same content distributed by Shaw's system. Reply, 13-16. Instead, Shaw repeatedly teaches that the same content, at the same quality level, is copied throughout Shaw's network. POR, 27. Petitioner (1) identifies that a CDN can distribute different streams from different providers, which has nothing to do with encoding the same content at different rates and (2) argues that a CDN could possibly store different encodings of the same stream (*i.e.*, the same content). Reply, 14-15. This falls far short of establishing that Shaw teaches or suggests anything of the sort.

To buttress this conclusory argument, the Reply merely provides a quotation of Dr. AlRegib, who acknowledged that a CDN could have different encoding rates, but emphasized that the invention was "to bring servers closer to the viewers," which has nothing to do with different encoding rates. *Id.*, 15-16 (quoting EX-1010, 163:14-165:4). This does not support Petitioner's argument.

Nor does Dr. Myler's new testimony, which attempts to explain why Shaw's clear teaching that "a single object in the content delivery network is replicated efficiently using a tree-based distribution methodology," and Shaw's "example of how one stream is replicated across the content delivery network's servers," somehow **do not rule out** providing the same content at different quality levels. EX-1011, ¶¶ 13-14; Reply, 14-15. Rather than identifying any actual teaching in Shaw, Dr. Myler merely provides conclusory testimony about what Shaw's clear teachings, cited by POR, allegedly do not mean. *Id.* This again falls far short of establishing that Shaw teaches anything about providing the same content at different quality levels – the mere fact that Shaw does not clearly rule out this possibility does not mean that Shaw actually teaches or suggests it.

Thus, the Reply provides no credible argument to support the Petition or rebut POR regarding Shaw's failure to teach or suggest providing the same content at different quality levels through its disclosed CDN.

3. Shaw's Switching Teachings Are Not Helpful to Petitioner

The Reply further argues, "Avago mischaracterizes Shaw's switching teachings." Reply, 16. In reality, the Reply mischaracterizes POR's argument. As POR argues, and as noted above, Shaw focuses entirely on the network, not the quality of the media itself. POR, 25-37, 49-52. Petitioner accuses PO of "play[ing] a shell game by not citing to any portions of Shaw" Reply, 16. This is simply incorrect. Regarding the switching teachings, POR cites § II.C.2 of the POR, which includes twelve pages of discussion of Shaw with extensive citations to Shaw in support of PO's position. *See* POR, 49-50; *see also id.*, 25-37 (§ II.C.2). Moreover, Petitioner has the burden of showing that Shaw discloses the limitations of the Challenged Claims, and the Reply reverts again to arguing merely that Shaw's disclosure does not rule out Petitioner's argument. *See* Reply, 16-18. To argue only that Shaw does not explicitly foreclose Petitioner's speculation falls far short of bearing Petitioner's burden of proof.

For example, with regard to the disclosure cited in POR, Petitioner argues, "Shaw makes clear that this is only one example" *Id.*, 16 (referring to POR, 50, and citing EX-1005, 10:1-3). The Reply, however, does not identify any actual teaching in Shaw that might supplement this "one example" in any way material to the Challenged Claims. The best Petitioner can argue is "Shaw gives another example of a switching technique for voice streams where the stream is modified by

inserting minute bits of silence between words." *Id.*, 16-17 (citing EX-1005, 9:66-10:1). Petitioner does not even attempt to explain how this additional "example" is relevant to the Challenged Claims, because it is not. No matter how many "examples" Petitioner cites, none of them teaches or suggests limitation [1c].

Petitioner finally resorts to arguing that "Shaw makes clear that the purpose of switching includes *enhancing* the quality of service." *Id.*, 17. There is no dispute about this. However, as POR explains at length, the Challenged Claims (and the '992 Patent, generally) clearly distinguish between the quality of the service generally and the quality of the media itself:

In the end, Shaw teaches a process to improve the quality of the media service as a whole through switching to a better network connection.

This teaching, however, does nothing to improve the quality of the media content itself and, therefore, falls far short of invalidating any of the Challenged Claims.

POR, 37 (emphasis added); *see also id.*, 3-19. Thus, the Reply's argument about "quality of service" not only fails to rebut POR's argument, but it supports POR's argument. Reply, 17.

Shaw clearly teaches that switching servers merely provides the same content at the same quality level, but from a server with a better network connection. POR, 25-37. Dr. Myler acknowledged this multiple times. *Id.*, 27 (quoting Dr. Myler acknowledging that "identical copies" of the same content are distributed throughout

the network) (emphasis omitted); *id.*, 28 (quoting Dr. Myler acknowledging that Shaw's switching process "would switch from watching the copy on Server A to watching the same copy on Server B") (emphasis in original); *id.*, 33-34 (acknowledging that Fig. 3 of Shaw teaches switching servers "to get the same stream from a different server that has a better network connection") (emphasis in original).

Nowhere in the Reply (or anywhere else) does Petitioner even allege that Shaw discloses re-encoding the "same content" at different servers to provide different quality levels, because Shaw never suggests any such thing. Instead, as Dr. Myler conceded multiple times, Shaw merely distributes the same file (*i.e.*, the same content with the same encoding) to each of the servers to which the client might "switch." Thus, both the Petitioner and the Reply fail to identify any disclosure in Shaw's "switching" disclosure that might teach or suggest limitations [1c] and [6c], and therefore, Petitioner rebuts nothing in POR.

4. Shaw's "Other Teachings" Are Not Material

Petitioner finally argues that "Avago ignores Shaw's other teachings relating to the determining limitation." Reply, 18. To the contrary, each of the other "teachings" are part and parcel with the "thinning" and "switching" disclosures discussed above. Like everything else in Shaw, the "other teachings" relate to Shaw's desired to find a best "source" for the same exact media content. Moreover,

regarding Shaw's "other teachings," the Reply cites nothing in the Petition that pertains to limitations [1c] and [6c] except the anodyne proposition that, "Shaw teaches that the purpose of performing the test [process] is to determine whether there is a 'better' source for the current stream" and "Shaw teaches that the communication bandwidth between the client and stream source affects stream quality." *Id.*, 18 (quoting Pet., 36) (modifications in original). This passage has nothing to do with the quality level of content (rather than quality of service, as discussed *supra*) and fails to show that POR ignores anything material in Shaw.

The remaining citations in the Reply all refer to sections of the Petition that provide background on Shaw or pertain to limitations other than [1c] and [6c]. Reply, 18-19 (citing Pet., 14-15 (background on Shaw), 32-33 (discussing limitations [1b] and [6b])). To the extent that Petitioner now attempts to argue that these portions of the Petition are relevant to limitations [1c] and [6c] (which they are not), this is a new argument and should not be recognized by the Board. Notwithstanding the novelty of this argument, it is wholly unpersuasive, merely asserting (again) that Shaw might not rule out Dr. Myler's unfounded expectation, but failing to identify any affirmative teaching in Shaw that might be relevant. Reply, 18-19.

The only other material cited in this section of the Reply consists of a few lines from the background of Shaw, which mention the topic of encoding (and which

have already been discussed above) and an acknowledgment from Dr. AlRegib that encoding rates can relate to content quality, which is not in dispute. *Id.* This does not disguise Shaw's failure to teach, or even suggest, the use of different encodings for the same content distributed throughout Shaw's network, let alone switching from one content level to another. Once again, Shaw merely discloses switching from one server to another, with the same content and the same quality level, to find a "better" network. *Supra* § IV.A.3.

None of the arguments in the Reply (the "thinning" argument, the "switching" argument, and the "other disclosures" argument) provides any persuasive evidence to rebut POR's demonstration that Shaw does not teach limitations [1c] and [6c]. For at least this reason, the Board should dismiss the Petition.

B. Petitioner Does Not Demonstrate That the Combination of Shaw and Barnes Teaches Limitations [1d] and [6d]

The limitations that Petitioner refers to as [1d] (and the corresponding limitations of Claim 6) are actually two limitations, as explained in POR and admitted by Dr. Myler. POR, 52-56; *see also* EX-1001, 26:38-43. As POR argued,

[B]ecause the systems taught by Barnes and Shaw do not teach anything related to obtaining digital media content at a higher quality level from another source, these references do not teach determining whether the portable system can **deliver** the digital media content at a higher quality level to the user. Because of this clear shortcoming of Barnes and Shaw, the Petitioner attempts to conflate the Second Delivering

Limitation with the Using Limitation – something the Board should disregard by upholding the validity of the Challenged Claims.

POR, 56 (emphasis in original) (citations omitted). The Reply does not address this argument, arguing only, "[w]hile the Petition and Dr. Myler addressed what Avago refers to as the using limitation and the second delivery limitation together under one heading in the Petition and declaration, the Petition and Dr. Myler addressed both limitations, providing evidence and explanation for each limitation." Reply, 19-20 (citations omitted). As explained in POR, even a cursory review of the Petition refutes this argument. The Reply admits that the Petition proffers a scant three pages to argue both of these limitations collectively. *Id.*, 20 (citing Pet., 39-42). In these three pages, the term "deliver" is used but twice, in both cases as part of the phrase "continue [to] deliver[y of] the media content." *See* Pet., 41-42.

Specifically, the Petition argues the following regarding Shaw:

Based on Shaw's teachings above, a POSITA would have found it obvious that the purpose of the seamless switch is to use the new and better stream source to continue delivery of the digital media content to the user at the higher quality level without any break or interruption. Therefore, Shaw's teachings render the Using Limitation obvious.

Id., 41 (citing EX-1003, ¶ 82) (emphasis added). The Petition then argues:

A POSITA would have found it obvious that a client device that is rendering digital media content to a user but switches from a first network to a second available network due to changed network

conditions would then use the second network to obtain media content after the switch and continue to deliver media content to the user.

Id., 42 (citing EX-1003, ¶ 83) (emphasis added).

As shown by the quotations above, the only two sentences that even mention "deliver" in the context of the Second Delivering Limitation are directed to the Using Limitation, and neither sentence cites any evidence other than Dr. Myler's Declaration. The Declaration, for its part, cites no evidence whatsoever, merely parroting the language of the Petition. EX-1003, ¶¶ 82-83. This is not credible evidence. See *Kinetic Techs., Inc. v. Skyworks Sol'ns, Inc.*, IPR2014-00529, Paper 8 at 15 (PTAB Sept. 23, 2014) ("Merely repeating an argument from the Petition in the declaration of a proposed expert does not give that argument enhanced probative value."). The Reply's argument that "the Petition and Dr. Myler addressed both limitations, providing evidence and explanation for each limitation," is plainly incorrect. Reply, 20. Moreover, the Reply itself continues to conflate those limitations. *Id.*, 19-22 (considering the two limitations collectively other than a single paragraph on page 20).

Thus, POR's argument that the Petition failed to address both the Using Limitation and the Second Delivering Limitation stands unrebutted. Moreover, the Reply fails to show that the combination of Shaw and Barnes discloses either of the limitations individually.

1. The Using Limitation

As noted in POR, the Petition fails to establish that the combination of Shaw and Barnes discloses the Using Limitation, at least because neither reference teaches identifying content at a higher quality level (or even the concept of different levels of content quality), the combination cannot teach using the network to obtain (nonexistent) content at a higher quality level. POR, 52. The Reply addresses this limitation only by arguing that Shaw uses the network to "obtain the digital media content at the higher quality level from the second system." Reply, 20 (quoting EX-1003, ¶¶ 79-81; Pet., 39-41). This argument is merely a rehash of Petitioner's argument on limitations [1c] and [6c], which fails for the reasons stated *supra* § IV.A.

2. The Second Delivering Limitation

As noted in POR, the Petition fails, for several reasons, to demonstrate that the combination of Barnes and Shaw discloses or suggests the Second Delivering Limitation. POR, 52-56. While the argument in the Reply continues to confuse the Using Limitation and the Second Delivering Limitation (*see supra* § V.B), the only argument in the Reply that appears to be directed to the Second Delivering Limitation itself is the complaint that "Avago's remaining arguments lack merit because they are premised on convoluted leaps of logic to narrowly interpret

limitation [1d] to non-limiting examples from the specification." Reply, 20-21 (citations omitted).

POR, however, provides full context for Dr. Myler's testimony, which establishes that, without knowledge of a device's processing capabilities, it would be impossible to deliver higher quality content to the user. POR, 53-54 (quoting EX-2003, 181:24-183:2). As Dr. Myler himself stated, when questioned **about substantially the same language** as the Second Delivering Limitation in Claim 1, "Well, delivering – I think I talked about that in my report. Delivering business – **delivering means that you are providing that content in a form that the user can use.**" POR, 53 (quoting EX-2003, 225:19-24) (emphasis in original) (emphasis added). This is a far cry from "non-limiting examples from the specification." As Dr. Myler concedes, without determining whether the user can use the content at a higher level, there can be no delivering of the content **to the user** (which the structure of the claims require). See POR, 55-56 (citing *id.*, §§ II.B.1, V.A.2a). Nothing in the Reply rebuts POR's argument about the Second Delivering Limitation.

The Reply thus fails, for multiple reasons, to rebut POR's argument that Shaw and Barnes cannot teach both the Using Limitation and the Second Delivering Limitation, and the Board should dismiss the Petition for this additional reason.

C. Petitioner Does Not Demonstrate That Shaw and Barnes Can Be Combined

POR amply demonstrates why Shaw and Barnes cannot be combined. POR, 58-63. This argument is based, in large part, on Dr. Myler's own testimony, as well as the testimony of Dr. AlRegib. *Id.* The only real argument in the Reply on this issue essentially argues that the Petition notes that both references mention the RealPlayer application, and that the Board found this persuasive (on an undeveloped record). Reply, 22-23. The Reply then argues that Dr. Myler's testimony should be discounted because PO somehow did not ask Dr. Myler the correct questions. *Id.*, 23-24. This rebuts nothing in POR, and Dr. Myler's testimony speaks for itself. Moreover, other than a subject heading arguing that "the combination would invalidate Challenged Claims" (*id.*, 22), the Reply completely disregards POR's demonstration that even if combined, Shaw and Barnes would not disclose the Challenged Claims. *See* POR, 62-63. This half-effort cannot rebut the arguments of POR with regard to the combinability of Shaw and Barnes.

The Board should dismiss the Petition for this additional reason.

D. The Reply Does Not Address Claims 11 and 16

Nowhere does the Reply even mention Claims 11 and 16. While those claims are similar in scope to Claims 1 and 6, the Reply leaves POR's arguments on Claims 11 and 16 untouched.

E. The Reply Does Not Address Claims 14 and 19

As noted in POR, the Petition fails to allege properly that Claims 14 and 19 are invalid. *Id.*, 58. The Reply likewise neglects to address this argument and fails even to mention Claims 14 and 19 at all. Accordingly, the arguments in POR stand un rebutted, and the Board should dismiss the Petition with regard to these claims for this additional reason.

V. CONCLUSION

For the reasons described above, the Reply fails to remedy the deficiencies of the Petition and cannot establish that any Challenged Claim is invalid.

VI. CERTIFICATION PURSUANT TO 37 C.F.R. § 42.24(d)

Pursuant to 37 C.F.R. § 42.24(d), Patent Owner certifies that based on the "word count" feature of Microsoft Word, this Patent Owner's Sur-Reply includes 4,859 words.

Respectfully submitted,

Dated: February 7, 2022

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned hereby certifies that a copy of the foregoing **PATENT OWNER'S SUR-REPLY** was filed through the Patent Trial and Appeal Board End to End (PTAB E2E) electronic filing system on February 7, 2022 with a confirmation copy served via electronic mail, on the following counsel of record for Petitioner:

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