UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

U.S. BANCORP
Petitioner
v.

RETIREMENT CAPITAL ACCESS MANAGEMENT COMPANY LLC
Patent Owner

Case CBM2013-00014
Patent No. 6,625,582

PETITIONER U.S. BANCORP'S MOTON TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)

Petitioner U.S. Bancorp ("Petitioner" or "U.S. Bancorp") respectfully moves pursuant to 37 C.F.R. § 42.64(c) and the Scheduling Order (Paper 13) to exclude Patent Owner Retirement Capital Access Management Company LLC's ("RCAMC") Exhibit 2016. Exhibit 2016 is a *New York Times* article containing hearsay discussions of proposals to regulate the service accused of infringement in the underlying district court litigation. The article was submitted with RCAMC's Response (Paper 19) to U.S. Bancorp's Petition. As set forth below, Exhibit 2016 is inadmissible for three separate reasons: (1) the exhibit is irrelevant to the issues before the Board, (2) admitting the exhibit would confuse the issues and unduly prejudice U.S. Bancorp, and (3) the exhibit contains impressible hearsay.[1]

First, proposed banking regulations are irrelevant to whether the challenged claims of U.S. Patent No. 6,625,582 ("the '582 Patent," Ex. 1003) are patent-eligible. Exhibit 2016 is thus inadmissible under Federal Rule of Evidence 402.

Second, even if the exhibit is deemed to have some probative value, admitting this exhibit will conflate issues, confuse the record, and distract the parties and the Board from the Section 101 patentability issues set forth in the Petition, as the exhibit makes no mention of the '582 Patent. To underscore its irrelevance,

[1] U.S. Bancorp's objections to this exhibit and several other exhibits were previously set forth in U.S. Bancorp's Objections to Evidence Pursuant to 37 C.F.R. § 42.64, filed on November 27, 2013 (Paper 20).

Exhibit 2016 appears to have only been submitted by RCAMC to incite biases against U.S. Bancorp by highlighting the recent regulatory scrutiny given to banks and lenders. Thus, this exhibit should also be excluded under Federal Rule of Evidence 403.

Third, Exhibit 2016 should be excluded on hearsay grounds. The article discusses proposed regulations, which based on conversations the author had with "several people briefed on the matter," could impose "more stringent requirements" on loans such as the accused infringing service. *See* Exh. 2016. Thus, the article is also inadmissible under Federal Rule of Evidence 802.

I. LEGAL STANDARDS

Federal Rules of Evidence 402 and 403 govern the admissibility of evidence in this proceeding based on relevancy grounds. 37 C.F.R. § 42.62. Under Rule 402, irrelevant evidence is not admissible. Rule 401 defines "relevant" evidence as evidence that "has any tendency to make a fact more or less probable that it would be without the evidence," where "the fact is of consequence in determining the action." Fed. R. Evid. 401. Even if a piece of evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, undue delay, wasting time, or needlessly presenting cumulative evidence. Fed. R. Evid. 403.

Hearsay is also inadmissible under Federal Rule of Evidence 802. Rule 801 defines hearsay as a statement not made "while testifying at the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801. More specifically, "newspaper articles are 'classic, inadmissible hearsay.'" *Hicks v. Charles Pfizer & Co. Inc.*, 466 F. Supp. 2d 799, 804 (E.D. Tex. 2005) (citing *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005)).

II. EXHIBIT 2016 SHOULD BE EXCLUDED AS IRRELEVANT, PREJUDICIAL, AND HEARSAY

Exhibit 2016 should be excluded under Federal Rules of Evidence 402, 403, and 802. Any one of these rules is sufficient basis to exclude the exhibit from these proceedings.

Exhibit 2016 is an article by Jessica Silver-Greenberg of *The New York Times*, dated April 23, 2013, based on hearsay discussions with "several people briefed on the matter," discussing some potential new regulations imposing "more stringent requirements" on loans, such as U.S. Bancorp's Checking Account Advance ("CAA") service that is accused of infringement in the parallel district court litigation. *See* C.A. No. 12-803-LPS (D. Del.). The article refers to these services as "predatory" and generally portrays them in a negative light.

RCAMC uses Exhibit 2016 to assert that U.S. Bancorp's non-infringement contention is not based on a "mere theoretical non-infringing alternative," but "an

actual service offered by U.S. Bancorp – one that is so important to U.S. Bancorp that it is willing to risk subjecting itself to a 'crack down' on 'big bank' payday loans by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation." Resp. at 28. RCAMC cites to the article to substantiate its claim that these federal agencies are "crack[ing] down" on U.S. Bancorp. *Id*.

The commercial availability of an accused infringing service has no bearing on whether the challenged claims recite patent-eligible subject matter. Indeed, the Federal Circuit has found that a defendant's "alternative assertion of non-infringement does not detract from its affirmative defense of invalidity under § 101." *See Bancorp Services, L.L.C. v. SunLife Assurance Co. of Canada*, 687 F.3d 1266, 1280 (Fed. Cir. 2012). *See also Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1371 (Fed. Cir. 2013) ("[P]atent infringement and invalidity are separate and distinct issues."). Because the exhibit is wholly irrelevant to the patent-eligibility determination before the Board, it should be excluded as irrelevant under Rule 402.

RCAMC's reliance on Exhibit 2016 is a thinly-veiled attempt to incite bias against U.S. Bancorp, based on an article that is irrelevant to the Board's Section 101 analysis. Even if the commercial availability of the accused CAA service was somehow relevant, issues such as the service's alleged importance to U.S. Bancorp and potential new regulations on the service are plainly irrelevant to the Section

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.