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 OBJECTIONS TO EVIDENCE PURSUANT TO 37 C.F.R. § 42.64

Pursuant to 37 C.F.R. § 42.64(b)(1), Petitioner U.S. Bancorp hereby submits the following objections to Exhibits 2015 and 2016 attached to Patent Owner Retirement Capital Access Management Company LLC's ("Patent Owner" or "RCAMC") Response. *See* CBM2013-00014, Paper 19 (and exhibits thereto). Pursuant to 37 C.F.R. § 42.62, U.S. Bancorp's objections below apply the Federal Rules of Evidence ("F.R.E.").

I. Objections to Exhibit 2015 and Any Reference to or Reliance Thereon

U.S. Bancorp hereby objects to Exhibit 2015, an excerpt from U.S. Bancorp's First Supplemental Responses to Plaintiff Benefit Funding Systems LLC's First Set of Interrogatories provided in the parallel district court litigation between U.S. Bancorp and RCAMC (C.A. No. 12-803-LPS (D. Del.)). The excerpt submitted as Exhibit 2015 contains U.S. Bancorp's interrogatory responses providing U.S. Bancorp's contentions regarding why the accused Checking Account Advance ("CAA") service does not infringe the asserted claims of U.S. Patent No. 6,625,582 ("the '582 patent").

As explained in more detail below, the grounds for objection are as follows: F.R.E. 402 (Relevance, *i.e.*, "[i]rrelevant evidence is not admissible"), and F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons, *i.e.*, "[t]he court may exclude relevant evidence if its probative

value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues. . . .").

U.S. Bancorp's non-infringement contentions included in Exhibit 2015 are not relevant to the Board's Section 101 analysis of the '582 patent because "patent infringement and invalidity are separate and distinct issues." *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1371 (Fed. Cir. 2013). RCAMC argues that because U.S. Bancorp has identified particular claim limitations that the accused product does not practice, U.S. Bancorp is somehow precluded from simultaneously asserting that the claims are invalid under Section 101. *See* Paper 19 ("Resp."), at 26-29. However, that argument fails for two reasons.

First, the differing claim construction standards used by the PTO and district courts further confirm that U.S. Bancorp's non-infringement contentions are irrelevant to the invalidity analysis. *See* MPEP § 2111.01 ("The USPTO uses a different standard for construing claims than that used by district courts; during examination the USPTO must give claims their broadest reasonable interpretation in light of the specification."). U.S. Bancorp's non-infringement contentions were provided in part under the district court's narrower claim construction standard, and are therefore not relevant to the Board's analysis, which employs the broader claim construction standard.

Second, the non-infringement contentions are submitted under the legal fallacy that if a patent is not infringed it cannot be invalid at the same time. The fact that the accused CAA service is not practicing each element of the abstract idea claimed by the '582 patent does not mean that the '582 patent is not directed to an abstract idea. For this reason, preliminary contentions submitted by U.S. Bancorp regarding non-infringement have no relevance to invalidity under Section 101.

RCAMC's conflation of infringement and invalidity is an apparent attempt to confuse the sole issue before the Board -- patent eligibility under Section 101 – and to lob inflammatory accusations at U.S. Bancorp rather than address issues. *See, e.g.,* Response at 28. For these additional reasons, Exhibit 2015 should also be excluded on the basis that reference to, or reliance on, this exhibit is confusing and unduly prejudicial to U.S. Bancorp.

II. Objections to Exhibit 2016 and Any Reference to or Reliance Thereon

U.S. Bancorp hereby objects to Exhibit 2016, which purports to be an April 23, 2013 article by Jessica Silver-Greenberg entitled, "Regulators to Restrict Big Banks' Payday Lending" ("Greenberg Article").

Grounds for objection: F.R.E. 402 (Relevance), F.R.E. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons), F.R.E. 801, 802 (Impermissible Hearsay), and F.R.E. 901 (Authentication).

A. Exhibit 2016 is Irrelevant

The Greenberg Article is completely irrelevant to the Section 101 issue before the Board, and is a blatant attempt to create prejudice against U.S. Bancorp. In addition to arguing that U.S. Bancorp's non-infringement contentions preclude its Section 101 invalidity challenge, RCAMC further argues that the non-infringing service is not merely hypothetical, but an actual service offered by U.S. Bancorp "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." Response at 28. RCAMC cites the Greenberg Article to substantiate its claim that these federal agencies are "cracking down" on U.S. Bancorp.

As discussed above, U.S. Bancorp's non-infringement arguments are irrelevant to whether the challenged claims are patent-eligible under Section 101. Moreover, even if the commercial availability of the non-infringing service was relevant, the service's relative importance to U.S. Bancorp and any investigation of the service by federal regulators is plainly irrelevant to the Section 101 analysis.

B. Exhibit 2016 is Prejudicial

Even if the Board were to find that the Greenberg Article is somehow relevant to the Section 101 issue, any minimal probative value is far outweighed by the unfair prejudice against U.S. Bancorp. RCAMC's citation to the Greenberg Article is a transparent attempt to smear U.S. Bancorp by alleging that its accused service is predatory and unethical. *See* Response at 28. The Greenberg Article serves no purpose other than to portray U.S. Bancorp in a negative light and is therefore both prejudicial and irrelevant to any issue in this proceeding (F.R.E. 402; 37 C.F.R. § 42.61; F.R.E. 403).

C. Exhibit 2016 is Inadmissible Hearsay and has Not Been Authenticated

In addition, the assertions regarding the accused CAA service in the Greenberg Article are out of court statements offered for the truth of the matter asserted therein, and therefore constitute impermissible hearsay not subject to any hearsay exceptions (F.R.E. 801, 802). Moreover, RCAMC fails to provide any basis for concluding that the Greenberg Article is a true and correct copy as it existed at the time of publication (F.R.E. 901).

III. Conclusion

For at least these reasons, U.S. Bancorp objects to Exhibits 2015 and 2016 attached to RCAMC's Response and the citations in the Response to Exhibits 2015 and 2016.

Respectfully submitted,

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By: /Anthony H. Son/

Anthony H. Son (Lead Counsel)
Reg. No. 46,133
Brian H. Pandya (Back-up Counsel)
Reg. No. 60,991
Ryan M. Corbett (Back-up Counsel)
Reg. No. 63,724
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner U.S. Bancorp

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing PETITIONER U.S. BANCORP'S OBJECTIONS TO EVIDENCE PURSUANT TO 37 C.F.R. § 42.64 was served on November 27, 2013 by email to counsel for patent owner at the following email addresses:

Casey Griffith (casey.griffith@kk-llp.com)
Shital Desai (sita.desai@kk-llp.com)

/Ryan M. Corbett/
Anthony H. Son (Lead Counsel)
Reg. No. 46,133
Brian H. Pandya (Back-up Counsel)
Reg. No. 60,991
Ryan M. Corbett (Back-up Counsel)
Reg. No. 63,724
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner U.S. Bancorp