

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 MOTION 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 impermissible 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

101 analysis. Thus, even if the Board finds Exhibit 2016 admissible under Rule 402, its minimal probative value is far outweighed by the unfair prejudice against U.S. Bancorp due to the highly negative nature of the article, rendering the article inadmissible under Rule 403.

Exhibit 2016 should also be excluded because it is inadmissible hearsay.² The article is a statement made outside of the current proceeding and is offered by RCAMC to prove the truth of the matter asserted in the article, that is, that the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation decided to “crack down” on “big bank” payday loans. *See Resp.* at 28. Even if such matters were relevant, a newspaper article authored by a third-party based on other hearsay statements allegedly made by “people briefed on the matter” is not the proper vehicle to introduce such evidence. *See Stollings v. Ryobi Technologies, Inc.*, 725 F.3d 753, 761 (7th Cir. 2013) (finding newspaper article

² In its Objections filed on November 27, 2013, U.S. Bancorp objected to Exhibit 2016 on hearsay grounds and because Exhibit 2016 was not properly authenticated under FRE 901. *See Paper No. 20*, at 5. In response, RCAMC submitted a declaration by its counsel attesting that Exhibit 2016 is a true and correct copy of the article as it was published. *See Paper No. 22*. While, the declaration submitted by RCAMC’s counsel may address the authentication objection, it does nothing to cure the hearsay objection.

was inadmissible hearsay when offered as proof of the article's contents). In addition, none of the hearsay exceptions articulated in FRE 803 applies to Exhibit 2016. Exhibit 2016 therefore should be excluded as hearsay.

III. CONCLUSION

For the reasons set forth above, U.S. Bancorp respectfully requests that the Board exclude Exhibits 2015 and 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing PETITIONER U.S. BANCORP'S MOTON TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c) was served on February 24, 2014 by email to counsel for patent owner at the following email addresses:

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