

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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U.S. BANCORP  
Petitioner  
v.

RETIREMENT CAPITAL ACCESS MANAGEMENT COMPANY LLC  
Patent Owner

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

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**PETITIONER U.S. BANCORP'S REPLY BRIEF IN SUPPORT OF ITS  
MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)**

In its Opposition (Paper 28, hereinafter “Opp.”) to Petitioner U.S. Bancorp’s Motion to Exclude Exhibit 2016 (Paper 25), Patent Owner Retirement Capital Access Management Company LLC (“RCAMC”) continues to rely on the false premise that non-infringement arguments are relevant to the patent-eligibility determination under 35 U.S.C. § 101. RCAMC’s argument that a non-infringement defense asserted in district court precludes a § 101 patentability challenge contradicts controlling Federal Circuit precedent, as explained below and in U.S. Bancorp’s motion. Because RCAMC’s sole argument for the relevance of Exhibit 2016 is legally erroneous, the exhibit can and should be summarily excluded as irrelevant, and the Board need not reach the other issues set forth in U.S. Bancorp’s motion.

Nonetheless, RCAMC has failed to rebut the other bases for excluding Exhibit 2016. RCAMC purports to rely on Exhibit 2016 as evidence of an alleged “non-infringing alternative to the ‘582 Patent’s particular implementation of the abstract concept of advancing funds based on future retirement payments.” Opp. at 3. Aside from grossly mischaracterizing U.S. Bancorp’s non-infringement positions in the underlying district court litigation, RCAMC’s opposition confirms the irrelevance of Exhibit 2016. There is no dispute that an “actual service” is accused of infringement. *Id.* RCAMC does not need to rely on a *New York Times* article discussing banking regulations to prove that point. Exhibit 2016 thus has no

evidentiary value and should be excluded as irrelevant, so not to confuse issues of patent-eligibility, further waste the time of the Board and the parties, and prejudice U.S. Bancorp.

Likewise, RCAMC has not rebutted that Exhibit 2016 is impermissible hearsay. RCAMC now contends that Exhibit 2016 was submitted merely to show that news outlets were reporting proposed federal regulations, not the fact that the regulations were being proposed. However, in its Response (Paper 19; hereinafter “Resp.”) to U.S. Bancorp’s Petition, RCAMC relies on the article to show that U.S. Bancorp’s accused Checking Account Advance (“CAA”) service is so important to U.S. Bancorp that “it is willing to risk subjecting itself to a ‘crack down’ on ‘big bank’ pay day loans” by federal regulators.” Resp. at 28. RCAMC’s argument, albeit irrelevant, depends on the truth of the matter asserted in the article – that the accused CAA service may be subject to proposed regulations – not that the article was published reporting the proposed regulations. The article is therefore hearsay and should be excluded.

## **I. EXHIBIT 2016 IS IRRELEVANT**

Exhibit 2016 is irrelevant because whether or not the accused CAA service infringes has no bearing on the patent eligibility of the ‘582 patent claims.

RCAMC submits Exhibit 2016 to support its argument that U.S. Bancorp cannot argue that the ‘582 patent claims preempt “the field of providing access to future

funds” while also arguing that the CAA service is a non-infringing application of the abstract idea. Opp. at 3. RCAMC’s argument is legally and factually incorrect.

First, RCAMC ignores Federal Circuit precedent finding that a defendant’s “alternative assertion of non-infringement does not detract from its affirmative defense of invalidity under § 101.” *Bancorp Services, L.L.C. v. SunLife Assurance Co. of Canada*, 687 F.3d 1266, 1280 (Fed. Cir. 2012). RCAMC’s reliance on Exhibit 2016 to show that U.S. Bancorp’s non-infringement arguments preclude its § 101 challenge is improper and irrelevant, such that Exhibit 2016 should be excluded under Federal Rule of Evidence 402.

Second, RCAMC incorrectly states that U.S. Bancorp has taken the position that the CAA service “is a non-infringing alternative to the ‘582 Patent’s particular implementation of the abstract concept of advancing funds based on future retirement payments.” Opp. at 3. U.S. Bancorp’s actual position is that the CAA service is “a short-term loan whose limits are based on *past* checking account deposits.” Paper 23 at 2 (emphasis added). Therefore, even though U.S. Bancorp’s non-infringement contentions are not relevant to the § 101 inquiry, the ‘582 patent claims can preempt all applications of the abstract idea of providing funds based on *future* retirement payments, while the CAA service does not infringe because it provides funds based on *past* deposits. RCAMC’s reliance on

Exhibit 2016 is factually and legally misplaced, and Exhibit 2016 should be excluded as irrelevant.

## **II. EXHIBIT 2016 IS PREJUDICIAL AND CONFUSES ISSUES BEFORE THE BOARD**

RCAMC does not substantively dispute the Rule 403 objections to Exhibit 2016, but instead argues that the Board will be able to properly weigh any probative value of the article and avoid any improper inferences. Opp. at 4-5. As an initial matter, the Board should not even reach the question of whether Exhibit 2016 is confusing, cumulative, or unfairly prejudicial because Exhibit 2016 is not relevant. But even if the Board finds that Exhibit 2016 has some relevance and is thus potentially admissible under Rule 402, it should be excluded under Rule 403 because this *New York Times* article is a waste of time – its minimal probative value is substantially outweighed by the risk of confusion of the issues.

Contrary to RCAMC's argument that "in a bench trial, relevant evidence should not be excluded under Rule 403" (Opp. at 4), Rule 403 can be used to exclude evidence in the circumstances present here. "Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power." *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981) ("but excluding relevant evidence on the basis of 'unfair prejudice' is a useless procedure" in a bench trial). Exhibit 2016 only serves to confuse the sole issue of patent eligibility with other irrelevant issues

such as non-infringement, and wastes the time of the parties and the Board considering an article that has minimal, if any, probative value. *See 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.”).

### **III. EXHIBIT 2016 IS HEARSAY BECAUSE IT IS OFFERED FOR THE TRUTH OF ITS CONTENT**

In its Opposition, RCAMC attempts to recast its argument with respect to Exhibit 2016 to avoid U.S. Bancorp’s hearsay objection. In its Response to U.S. Bancorp’s Petition, RCAMC relied on Exhibit 2016 to argue that U.S. Bancorp offered the accused CAA service despite a proposed “crack down” on “big bank” payday loans by federal regulators. Resp. at 28. In other words, RCAMC used Exhibit 2016 to substantiate its claim that U.S. Bancorp’s CAA service was facing proposed regulations. RCAMC now argues that Exhibit 2016 was offered to show merely that news outlets were reporting the proposed regulations. Opp. at 6. However, the reporting of the proposed “crack down” is inapposite to RCAMC’s argument that U.S. Bancorp offered the CAA service despite the proposed regulations. It is the proposed regulations themselves, not a news outlet’s reporting of the regulations, that allegedly support RCAMC’s argument.

Therefore, Exhibit 2016 was indeed offered for the truth of the matter asserted in the article – that federal regulators were proposing a “crack down” on “big “bank” payday loans – and should thus be excluded as hearsay under Rule 802.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing PETITIONER U.S. BANCORP'S  
REPLY BRIEF IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE  
PURSUANT TO 37 C.F.R. § 42.64(c) was served on March 17, 2014 by email to  
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