UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LIBERTY MUTUAL INSURANCE CO.
Petitioner

v.

PROGRESSIVE CASUALTY INSURANCE CO.
Patent Owner

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Case CBM2012-00010
Patent 7,124,088

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Before the Honorable JAMESON LEE, JONI Y. CHANG, and MICHAEL R. ZECHER, *Administrative Patent Judges.*

**PETITIONER LIBERTY MUTUAL INSURANCE CO.'S CORRECTED REPLY TO PATENT OWNER PROGRESSIVE CASUALTY INSURANCE CO.'S RESPONSE
(AUTHORIZED BY THE BOARD IN ITS AUGUST 27, 2013 ORDER (DKT. 39))**

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In initiating this trial the Board correctly found that, unless rebutted by Progressive, the disclosures of NAIC (EX1007)—with those of Lockwood (EX1008)—invalidate every claim. Progressive's distorted reading of NAIC, misstatements of the state of the art, and "expert" opinions lacking any foundation, cannot rebut the actual evidence. The notion that in 1998[1] the National Association of Insurance Commissioners—the trade association for all state regulators—would need 18 months of research simply to address how to regulate the Internet *as an email system* is simply not credible. NAIC plainly discloses insurers increasingly using "sophisticated, interactive Web sites" (not merely email) to transact the business of insurance—*e.g.*, to sell, service, and modify existing policies. RX1024 (Klausner Rebuttal Dec.) ¶¶ 7-8; EX1007 at 1, 7-8, 9, 13-14, 17; *see* EX1009 (Klausner Dec.) ¶¶ 26-28. As the Board found, the evidence showed that a POSITA "would have understood that NAIC teaches the claimed 'insurance policy adjustment module' feature and corresponding 'real-time' adjustment." Institution Decision ("ID," Dkt. 16) 23.

I. NAIC DISCLOSES USING TECHNOLOGY EXISTING IN 1998 TO ADJUST INSURANCE POLICY PARAMETERS IN REAL-TIME

Progressive's "experts"—Ms. Cacchione and Dr. Jeffay[2]—declare NAIC does not disclose adjusting parameters for existing insurance policies in real-time,

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[1] Progressive's witnesses opine as of 1998, but the '088 patent's application was filed July 30, 1999, and Progressive offers no evidence of any earlier priority date.

[2] *See infra* nn. 10, 11 (both witnesses fail the requirements for expert testimony).

suggesting such processing was *not known or possible* at the '088 patent's filing date. Opp. 18-19 (real-time "prevent[ed]" by "underwriting...via 'traditional channels'"), 25, 27, 49; EX2204 (Cacchione Dec.) ¶¶ 26-31, 38-56; EX2202 (Jeffay Dec.) ¶¶ 10, 19-26. But in numerous passages ignored or distorted by these witnesses, NAIC discloses *actual real-time adjustment in 1998* of existing policy parameters, confirming the Board's analysis. *E.g.,* ID 23-24. For example, while Dr. Jeffay wrongly disparages NAIC as "a series of aspirational statements...with no descriptions of any working examples" (EX2202 ¶ 34; *see also* Opp. 48),[3] a passage he skips confirms the contrary:

> **Consumers already have the ability from at least one company** to review their account status to determine when and how much they need to pay **to maintain their existing policy**. After checking how much is due, they can **make a payment to the company online**.… **Online payment** could potentially **prevent cancellations** as **this can be done at any hour of the day and any day of the week without the delay** of a traditional non-electronic means of mailing.

EX1007 at 14; *see also, e.g.,* EX1016 (O'Neil Dec.) ¶ 29; Pet. 14. NAIC shows insurers *were* making real-time policy adjustments in 1998: extending the period or "term" of coverage adjusts a fundamental policy parameter.[4] To any POSITA[5] in 1998 this

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[3] *See, e.g., In re Antor Media*, 689 F.3d 1282, 1289-90 (Fed. Cir. 2012) ("mere use of forward looking language" does not determine whether a disclosure is enabling).

[4] *See, e.g.*, EX1018 at 34, 35, 42-43, 45, 52, 54 (premium and other policy variations based on policy period/"term"); EX1016 ¶ 25.

text discloses "mak[ing] a payment to the company online" (a well-known concept) immediately, outside normal hours while offices are closed ("at any hour of the day and any day of the week") "to maintain [a consumer's] existing policy" and thus "prevent cancellations" without delay or human intervention. *E.g.*, EX1009[6] ¶¶ 24, 26-28. This passage, like others skirted by Progressive, shows adjusting parameters

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[5] Progressive now argues the relevant field should *exclude* issuance of new policies (EX2204 ¶ 21; *cf.* Opp. 54-55), but ignores that issuing new policies and adjusting existing policies involve many identical functions. *E.g.*, EX1016 ¶¶ 19, 40.

[6] With 40+ years of relevant experience, David Klausner clearly qualifies as an expert. EX1009 ¶¶ 12-13; EX1010 (CV) at 1-4; RX1024 ¶¶ 16-17. Progressive's attempt to limit the field to the "Internet" is improper (only a few dependent claims mention the "Internet"). He had relevant Internet experience both before the 1993 commercialization date urged by Progressive (*e.g.*, designing a commercial on-line system for Intel from 1991-93, *see* EX1010 at 2, RX1024 ¶¶ 16-17) and after 1993, as he has continually been involved in Internet-related matters. *See* EX1010 at 5-8, 10-12, 15; RX1024 ¶¶ 16-17. Progressive's suggestion he intentionally "falsifi[ed]" is offensive and unfounded: Mr. Klausner discloses in his CV (as required) all matters for which he was engaged, and he himself identified 2 of 194 examples in which he was engaged to begin a matter (with initial discussions/research prior to engagement) but did not thereafter do work he billed for. *See* EX2201 at 24:15-25:12; RX1024 ¶ 18.

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during an Internet "session"[7] was known and done by insurers in 1998.

NAIC also contradicts Ms. Cacchione's assertions that automated underwriting was not (or could not be) done in 1998 (EX2204 ¶¶ 26-31, 41-42), showing insurers in 1998 *were* using web sites to underwrite automatically, determining parameters like premiums *and completing the entire transaction of obtaining insurance* on-line in real time "after hours" (*i.e.*, without human intervention). For example, NAIC's "Insurance Sales **and Service** Over the Internet" discussion, ignored by Progressive, discloses:

> The Internet increases the opportunities for **consumers** to shop [for insurance] **after hours** and, in most cases, a **quote can be received within minutes** or the next day at the latest …. In addition to obtaining quotes, **consumers currently have the ability from at least one auto insurer to complete the entire transaction on-line**.

EX1007 at 13; *see also, e.g.*, Pet. 35. NAIC again shows *completing the entire on-line trans-*

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[7] Having said no construction is needed, Pr. Resp. (Dkt. 13) 18-19, Progressive improperly tries to import "Internet session" into the Board's "real-time" construction without any support from the specification. *E.g.*, Opp. 4-6; EX2202 ¶¶ 11-14. Progressive limits the construction of "insurance policy parameter" with an unsupported "materiality" requirement, transforming basic examples in the specification into limitations. Opp. 6-7. Progressive identifies no particular claim language as requiring automated underwriting. *Cf.* Opp. 18-19. Regardless, NAIC and Lockwood invalidate under any of these constructions.

action "within minutes" "after hours" via an insurer's 1998 website—a passage that cannot be read to mean sending email and waiting "several days" for traditional manual underwriting.[8]   *See, e.g.,* RX1024 ¶ 13; *cf.* Opp. 14; EX2204 ¶ 31; EX2202 ¶¶ 20-21.

NAIC, here and elsewhere, belies Dr. Jeffay's assertion that it requires yet-to-be-developed technology (EX2202 ¶ 29)—indeed, his opinion never points out *any necessary technology* to be developed, because the technology for electronic commerce was well known in 1998, including in insurance.   *See* EX1009 ¶¶ 22, 24, 26-28; EX1007 at 20 ("Web…presents the best opportunities for electronic commerce on the Internet. …[M]usic distributors sell more then 25,000 [CDs daily] via the Internet.…10 percent report using the Internet to shop for goods and services…[and] travel and financial services industries have recently begun using the…Web to transact business"); EX1015 (Amazon.com timeline).   From the outset NAIC's "Internet Commerce" discussion (at 3), ignored by Progressive, shows financial companies actively using e-commerce, while insurers had not yet as fully "embraced" this existing technology:

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[8]   *See, e.g.*, EX1007 at 9 ("Many companies…**are beginning to service customers on-line**"), 20 ("A service **in its infancy**, but expected to grow rapidly, is the **availability of policy change notices and loss notices at the insurers Web site**"), App. B at 2 ("**Receiving and recording** an insured's request concerning any additions or deletions to an existing policy **and preparing the appropriate endorsements or processing the appropriate changes through an automated system**").

> "Electronic commerce"…[includes] **sale of goods over the Internet**. …With the Internet, companies can be **accessible** to customers…**24 hours a day, 365 days a year.** The **securities and banking industries utilize the Internet for electronic commerce** based upon self regulatory standards. The insurance industry has not embraced the use of the Internet for electronic commerce **to the same degree.**

Contrary to Progressive's suggestion that such technology did not exist, banks and securities firms already had websites in 1998 enabling automated transactions during an Internet session—such as modifying account parameters like payees—at all hours using automated forms. RX1024 ¶¶ 10-13; RX1032 (SFNB) at 5. NAIC expressly pointed POSITAs to this known technology which, while in *wider* use elsewhere, was *also used* for insurance in 1998. And NAIC is filled with similar disclosures that:

> increasing numbers of [insurance] producers are developing **sophisticated, interactive Web sites** . . . . Producers, **like their [insurance] company counterparts**, **are beginning to offer consumers enhanced customer support and service**. . . . [and] benefit by . . . **enhanced interfacing and information exchange**, and the **ability to conduct instant transactions** and communications.

EX1007 at 8. NAIC thus discloses that insurers *already had* the technology in 1998 to conduct instant transactions with consumers to service existing policies. RX1024 ¶¶ 10-13.

Progressive tries to excise "transactions" from "instant *transactions and communications*"—first ignoring it, Opp. 27 (arguing this "refer[s] to…efficiencies [from] instantaneous nature of *communications*"), and then claiming "transactions" are only com-

munications, *id.* ("NAIC *referred to these communications generically as 'transactions'*"); EX2204 ¶ 45; EX2202 ¶ 29. This is belied by common sense and NAIC's text, which separately enumerates "*transactions* and *communications*" and confirms "Elements of an Insurance Transaction" include not only communicating desired coverage, but also underwriting risk, paying premiums, and delivering the contract. EX1007 at 9-10.

Indeed, NAIC (at 17) reported insurers' increasing use of this technology: "Automation vendors are currently designing Web sites that are integrated with agency management systems. This will permit policyholders to access their…**insurer electronically to**…**make [policy] changes**…**24 hours a day**." Contrary to Progressive's vague suggestions that something was missing (EX2204 ¶¶ 49-52; EX2202 ¶¶ 27, 34; Opp. 34), NAIC discloses use of *existing* technology. RX1024 ¶¶ 10-13.

II. Insurance Computer Systems in 1998 Had Progressed Far Beyond an Internet Email Front-End to Traditional Manual Processing

A. NAIC Teaches Using the Internet for Transactions, Not Just Email

Progressive claims NAIC limits the Internet to a pipeline for *emailing* requests to an insurer—using a traditional interface or a single-field "natural language" box on a "home page."[9] EX2202 ¶¶ 17-19, 21; EX2204 ¶¶ 39-42; Opp. 11-12, 31 ("NAIC

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[9] NAIC's mention (at 4) of "[e]-mail and home page capabilities" refers to the Internet generally: "*[n]ot only* can *the Internet* reduce 'phone tag,' it can help provide *instantaneous confirmations that consumers' instructions have been complied with*." *See also* EX1007, App. E at 2 ("home page" allows navigation "to other pages on the site").

uses… 'Internet' to describe e-mail"). Progressive argues that (rather than what NAIC *says*) sending "***instantaneous confirmations*** that consumers' instructions ***have been complied with***" instead means emailing either to confirm a consumer's request has been *received* (to be complied with offline days later, with manual intervention), or to confirm *after* this much-delayed action has been taken (regardless of when the consumer's instructions were sent). Opp. 9-25; EX2204 ¶¶ 26-31, 38-42; EX2202 ¶¶ 17-27. This is nonsense. Progressive's reading contradicts both NAIC's actual words and the stated purpose of its authors, who had no need in 1998 for an 18-month study of the Internet to address regulating email (which was well known many years before 1998, and did not require the Internet). *See* RX1024 ¶¶ 6-8. From page one NAIC makes clear the Internet is both "an effective means of mass communication" *and* "a new channel through which **insurance products can be** marketed, **sold and serviced**": "This paper sets forth a detailed discussion of the Internet as it relates to the **transaction of insurance**…." NAIC identifies no technological barrier to instant Internet transactions, but instead discusses "regulatory monitoring of unlicensed [Internet] activity," concluding "sufficient safeguards currently exist [for] any potential problems that may arise out of ***on-line insurance transactions***." EX1007 at 1, 16.

As the passages above and in the Petition confirm, a POSITA would have recognized NAIC as disclosing far more than email uses of the Internet, including real-time automated processing and completing transactions. RX1024 ¶¶ 6-8, 10-13;

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ID at 23-24; *see also* EX1007 App. A ("*[T]ransmitting an email* is analogous to sending a letter...*On the other hand, a consumer 'pulls' web pages to his or her personal computer*"), App. E (defining terms for applications *other than* email, *e.g.*, "FTP (File Transfer Protocol)" "Home Page…from which hyperlinks are made to other pages," "HTTP (Hypertext Transfer Protocol)," etc.).   While Progressive attempts to reduce the "Internet" to "email" by arguing such transactions were impossible, this is simply false.

Indeed, Ms. Cacchione and Dr. Jeffay take this position by ignoring known art: neither was personally familiar with computerized insurance processing in 1998 and neither conducted any research to supplement their knowledge.   Progressive failed its burden to qualify Dr. Jeffay—an academic with no disclosed insurance or commercial programming experience—to testify about a POSITA's knowledge to begin with;[10] he then further limits what knowledge he *does* have on technical subjects by relying on Ms. Cacchione's palpable *lack* of knowledge of the state of the art and automation in insurance processing in 1998.[11]   *E.g.*, EX2202 ¶¶ 10, 19, 20, 26.   On this

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[10] A POSITA has "2 years of commercial experience," EX1009 ¶ 12; EX1012 at 2-3 (highlighting need for commercial experience), which Dr. Jeffay lacks (EX2202 ¶¶ 1-4; EX2203 (Jeffay CV) at 1; RX1024 ¶ 19).   His opinions should be disregarded.

[11] Ms. Cacchione and Dr. Jeffay intertwined their testimony (*e.g.*, EX2204 ¶ 29; EX2202 ¶¶ 10, 19, 20, 26) and together lack the necessary "specialized knowledge." F.R.E. 702(a).   Their declarations (i) lack sufficient knowledge about computers for

basis Dr. Jeffay equates "Internet" in NAIC with an email front-end to manual processing, with consumer messages received and processed manually by a human (*id.* ¶¶ 19-21): he effectively uses Ms. Cacchione's *pre-Internet* insurance experience (a decade before the '088 filing date) to assert that NAIC discloses only unsophisticated Internet uses, such as email functions existing *pre-Internet*. RX1024 ¶¶ 6-7, 12-13.

This denial of the Internet's known use for automated, interactive data flows is transparently false, and Dr. Jeffay's own writings confirm Internet traffic by 1998 was dominated by web usage *other than email.* See, *e.g.*, RX1025 at 1 ("web traffic has become the single largest consumer of Internet resources"; citing, *e.g.*, *The Nature of the Beast: Recent Traffic Measurements from an Internet Backbone*, 1998 (RX1026)), 2 ("'web email'" was "*novel* use[]" of Internet); RX1026 at 9, Fig. 4 (TCP, the greatest volume of traffic protocols, was dominated by "www" requests; tiny relative volume for SMTP); Ex. 1007 App. E at 3 (SMTP is "basic programming language behind the Internet's e-mail functions"); RX1024 ¶ 6. A host of examples (*e.g.*, EX1007 at 1, 3-4, 6-8 13-14, Apps. A, E) confirm a POSITA in 1998 would understand data entered in an insurer's web page form was used for automated policy changes—not merely

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insurance processing in 1998, and sufficient commercial experience in on-line computer systems for insurance processing in 1998, and (ii) provide insufficient underlying facts or data. The Board should give their testimony no weight. *E.g., Sata GmbH & Co. KG v. Anest Iwata Corp.*, IPR2013-00111, Paper 17 (6/25/2013).

entered in one form and then sent to another person to re-enter the same data in another form on another computer. *Cf.* EX2204 ¶¶ 28-29; Opp. 13.

B. NAIC Discloses Automated Processing

NAIC clearly discloses automated processing of instant insurance transactions using the Internet—not merely relaying email requests for traditional, pre-Internet processing with "multiple people, generally at multiple locations, and [taking] several days to complete." *Cf.* Opp. 14; EX2204 ¶ 31. But while a POSITA is presumed to *know* of *all* relevant prior art, *Standard Oil Co. v. Am. Cyanamid Co.,* 774 F.2d 448, 454 (Fed. Cir. 1985), Ms. Cacchione *ignores* all prior art relevant to on-line insurance processing. Thus, while Ms. Cacchione argues automated underwriting was not used in 1998, she *ignores*, *e.g.*: the 1986 Lockwood patent cited by Petitioner (EX1008), which Progressive admits "discloses a system for **automatically dispensing insurance quotations and policies**" (Opp. 53); the Peterson reference cited by Dr. Jeffay (EX2202 ¶ 35), and found during reexamination and by the Board to disclose automated on-line processing in scheduled batches[12] (CBM2012-00011, Decision, Paper 12 (2/25/2013)) at 30-32; EX1003 ('088 Reexam FH) at 9); or the Luchs, Walker, Pescitelli, and "Electric Insurance" art cited during the '088 prosecution, which taught automated insurance processing systems the PTO deemed relevant (and three of

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[12] Peterson's purported batch processing (Opp. 23-25; EX2202 ¶¶ 35-36) is irrelevant because NAIC makes no reference to "scheduled" transmissions.

which Progressive described as "[o]nline insurance rating and purchasing systems")
(EX1002 ('088 FH) at 74, 199, 228-29, 264). *See* EX2204 ¶ 16.[13] While Ms. Cac-

chione claims the *only* way of underwriting or endorsing policies in 1998 was off-line

with manual intervention (EX2204 ¶¶ 26-31), this is based solely on her own lack of

qualification and knowledge, and her active misreading of NAIC. In ignoring Lock-

wood,[14] for example, Ms. Cacchione conspicuously avoids an automated system for

real-time application, payment, and issuance of a *new* policy—the same technology

needed to perform the same automated functions for an *existing* policy, which any

POSITA would have known and found elementary to employ with NAIC. *See*

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[13] *Compare* EX2202 ¶ 34; Opp. 48-52 *with Antor Media*, 689 F.3d at 1287-89 (prior art

presumed enabling). NAIC discloses servers with software "modules" providing an

"interactive conversation between [an] on-line insurance policy service system and…

policyholder," with users "accessing various web pages, entering information, and

making menu selections" (*cf.* EX2202 ¶¶ 13, 34). *E.g.*, EX1009 ¶¶ 26-28; EX1007

App. A ("*online quotes are being generated on* a third party's, *insurer's* or agent's *server and*, at

his or her election, *'pulled' to the consumer's computer.*"), 22, App. E ("Browser" is

"software program used to access…material. . . by 'pointing' at *information located on a*

Web server"; "Client/server"), 6 ("Combined with…HTTP…users can also navigate

the…Web by clicking"), 7 ("on-line requests for quotation (RFQ) forms").

[14] Dr. Jeffay does not discuss Lockwood. *Compare* EX2207 (reviewed) *with* EX2202.

EX1016 ¶ 40.

Ms. Cacchione last worked directly in underwriting in 1989, years before the first commercial Internet web browser. EX2204 ¶¶ 7-8; EX2205 (CV) at 3. She then worked in human resources, was in law school and the law department, and became a regulatory consultant. EX2204 ¶¶ 8-12. Rather than experience or research, Progressive asks the Board to rely on her memories from at least 15 years ago about the state of the art in 1998, when she was *already nine years removed* from doing any work in rating, underwriting, policy adjustments or similar functions.[15] *Id.*; EX2205 at 3-4.

Ms. Cacchione attempts to limit all of NAIC's disclosures by misreading a single passage on pages 20-21. This passage is not, however, about consumers interacting with insurers on the Web, but rather about insurance producers—"any **agent or intermediary** involved in the sale and/or the administration of an insurer's product" (EX1007 at 3 n.1)—*advertising their ability to locate coverage* in the marketplace, not to service existing policies:

> Many insurance **producers** are **advertising** their services on-line…to **assist consumers with locating the desired coverage**.…**If coverage is located, the consumer is contacted and underwriting usually**

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[15] Ms. Cacchione was on the subcommittee developing NAIC, but offers no factual interpretation based on that role. EX2204 ¶¶ 33-36. Progressive makes *no mention* of the participation of named co-inventor, Toby Alfred, in the NAIC paper. Pet. 2.

proceeds via traditional channels.

This reference to the "usual[]" use of "traditional channels" when an intermediary is locating coverage does not limit NAIC's disclosures of *direct, automated connections between a consumer and an insurer* that require *no middle-man at all. See, e.g.*, EX1007 at 4, 8, 9, 13-14. These direct connections in NAIC explicitly *eliminate* the multi-person, multi-day process Ms. Cacchione mistakenly suggests (from her pre-Internet knowledge) was inevitable.[16] *See* EX1016 ¶ 30 ("NAIC explains that part of the benefit of using the Internet for insurance services is to 'eliminate[] the need to personally interact' with insurance personnel in completing an insurance transaction on-line"). *Cf.* Opp. at 14; EX2204 ¶¶ 27-31.

Ms. Cacchione further argues NAIC's teachings of submitting policy changes to an insurer on Internet web pages are somehow negated because NAIC mentions insurance forms originally created by the Association for Cooperative Operations Research and Development ("ACORD"). EX2204 ¶¶ 26-31, 53-56; Opp. 13. While Ms. Cacchione acknowledges ACORD had already made forms "available" on the Internet by at least 1998 (EX1007 at 19; EX2204 ¶ 54), she argues policyholders in 1998 were not yet "able to fill out the ACORD forms on the website and immed-iately submit them" (*id.* ¶ 55), omitting that ACORD forms were *already being demon-*

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[16] Ms. Cacchione's conspicuously hedges her testimony with words like "typically" (EX2204 ¶¶ 29, 31, 51), "likely" (*id.* ¶ 28), and "may" (*id.*).

strated publicly in 1998 in on-line Internet automated transactions and servicing of insurance policies. RX1024 ¶ 14 & n.8; RX1033 at 1; RX1034 at 1-2. For example, an October 20, 1998 press release describes use of "Windows DNAfs architecture" ("Windows **D**istributed inter**N**et **A**pplications architecture for **F**inancial **S**ervices") by "Applied, Microsoft Corp., Travelers, ACORD and Symmetry [who] recently showcased this technology with a real-time demonstration of a policy submission undergoing rating, edits and issuance right at the point of sale." *Id.* (RX1024 and RX1033 (bold original)). And an October 29, 1998 *National Underwriter P&C* article contrasts "traditional" underwriting practices ("entering customer data and re-keying all information to the carrier via a proprietary system") with this DNAfs system in which "'agents will be able to enter data once into the Applied Systems agency management system and seamlessly interface with [the insurer] on a real-time basis.' As a result, a process that once took 24 hours and double data-entry will now take minutes….[T]he benefits of this new system will include maximum workflow efficiency, real-time communication between agency systems and carrier policy processing engines, and elimination of redundant data entry." RX1034 at 2; RX1024 ¶ 14. Thus, Ms. Cacchione's incomplete testimony regarding ACORD omits key evidence of automated use of forms on the Internet for real-time policy servicing—information POSITAs would have known in 1998. *See also* EX2202 ¶ 19 (conceding existence of web pages with "fillable forms"); Opp. 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is certified that a copy of **PETITIONER LIBERTY MUTUAL INSURANCE CO.'S CORRECTED REPLY TO PATENT OWNER PROGRESSIVE CASAULTY INSURANCE CO.'S RESPONSE** has been served in its entirety on the Patent Owner as provided in 37 CFR § 42.6.

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