IN THE UNITED STATES COURT OF FEDERAL CLAIMS

E-NUMERATE SOLUTIONS, INC. and E-NUMERATE, LLC, Plaintiffs, v. THE UNITED STATES, Defendant.	No. 19-859 C Judge Ryan T. Holte

DEFENDANT'S SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF ON INDEFINITENESS

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Pursuant to the Court's Order (ECF 109) Defendant, the United States, respectfully submits this Supplemental Claim Construction Brief on Indefiniteness.

I. INTRODUCTION

At the conclusion of the first day of the Court's claim construction hearing, Defendant identified three claim terms from Claim 1 of U.S. Patent 9,262,383 (the "'383 Patent") for which it sought an indefiniteness ruling. *See* Nov. 16, 2022 Hr. Tr. at 218:8-11. The Court agreed to supplemental briefing and a supplemental expert report directed to those terms. *See* ECF 109 at *95. The first three limitations of Claim 1 of the '383 Patent recite "code for" performing certain functionality. Each of these terms invoke 35 U.S.C. § 112, ¶ 6, as they are directed to means-plus-function claiming. Despite not reciting "means for" language, these terms should still be construed under the same framework because a person having ordinary skill in the art ("PHOSITA") would understand that they recite black-box functionality and are not directed to known software or code from the time of the filing of the '383 Patent. For each of these terms, the specification fails to disclose sufficient structure in the form of an algorithm, and therefore each of these terms provides an independent reason for invalidating Claim 1 of the '383 Patent. Finally, Defendant's expert provides a supplemental report directed to these terms, the understanding of a PHOSITA, and an explanation of how technical portions of the specification fail to provide an algorithm. The Court should find each of these "code for" terms indefinite under 35 U.S.C. § 112, ¶ 6.

II. ARGUMENT

A. Supplemental Term 1: "code for identifying . . . unit of measure" ('383 Patent, Claim 1)

The first clause following the preamble of Claim 1 of the '383 Patent recites:

> code for identifying a first markup document including first numerical values and first tags reflecting first characteristics of the first numerical values associated

> with a first unit of measure, and a second markup document including second numerical values and second tags reflecting second characteristics of the second numerical values associated with a second unit of measure, wherein the first tags and the second tags each include computer-readable semantic tags that describe a semantic meaning of a corresponding one of at least one of the first numerical values or the second numerical values, via a computer-readable tagging association therebetween, where the first characteristics of the first numerical values associated with the first unit of measure are different from the second characteristics of the second numerical values associated with the second unit of measure;

This term is indefinite under 35 U.S.C. § 112, ¶ 6 because it claims a function but the specification fails to disclose definite structure for performing the claimed function.

This term invokes means-plus-function language. Although a claim term that does not use the words "means for" presumptively does not invoke § 112, ¶ 6, the presumption is not strong and is rebuttable. *See Williamson v. Citrix Online, LLC*, 792 F.3d 1339, 1349 (Fed Cir. 2015) (en banc) (expressly overruling prior decisions characterizing the presumption as "strong"). "The standard is whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure." *Id.* When a claim term lacks the word "means," the presumption can be overcome and § 112, ¶ 6 will apply if the challenger demonstrates that the claim term fails to recite sufficiently definite structure or else recites a function without reciting sufficient structure for performing that function. *Id.*; *see also, Cellcast Tech., LLC v. United States*, 150 Fed. Cl. 353, 379-380 (2020).

Here, this term uses the black-box term "code for." Notably, the patentee drafted this limitation in the same format as a traditional means-plus-function. *Compare* '383 Patent at

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