

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

E-NUMERATE SOLUTIONS, INC. and
E-NUMERATE, LLC,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

C.A. No. 19-859-RTH

**PLAINTIFFS' BRIEF IN OPPOSITION TO GOVERNMENT'S SUPPLEMENTAL
CLAIM CONSTRUCTION BRIEF**

Dated: April 26, 2023

Gerard M. O'Rourke
Sean T. O'Kelly
O'KELLY & O'ROURKE, LLC
824 N. Market Street, Suite 1001A
Wilmington, DE 19801
302-778-4000
gorourke@okorlaw.com
sokelly@okorlaw.com

Attorneys for Plaintiffs

Table of Contents

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 2

III. ARGUMENT 3

 A. The Federal Circuit Has Rejected Defendant’s Position 4

 B. Multiple District Courts Have Rejected Defendant’s Position 4

 C. The Doctrine of Claim Differentiation Favors Rejecting Defendant’s Position..... 5

 D. The Disclosure of the ‘383 Patent Militates Against “Means-Plus-Function Construction 8

 E. Claim 1 Is Not Indefinite Even if the Court Employs A “Means-Plus-Function” Analysis 9

IV. CONCLUSION..... 9

Table of Authorities

Cases

Blitzsafe Tex., LLC v. Subaru Corp., 2018 U.S. Dist. LEXIS 208483 at * 44 – 57 (E.D. Tex., December 11, 2018)..... 1, 5

Cypress Lake Software, Inc. v. Samsung Electronics America, Inc., 382 F. Supp. 3d 586 (E.D. Tex. 2019) 1, 4

Cypress Lake Software, Inc. v. ZTE (USA), Inc., 2018 WL 4035968 (E.D. Tex. August 23, 2018) 1, 4

Dyfan, LLC v. Target Corp., 28 F.4th 1360, 1368-69 (Fed. Cir. 2022)..... 1, 4, 6

Howmedica Osteonics Corp. v. Wright Med. Tech., Inc., 540 F.3d 1337, 1347 (Fed. Cir. 2008)... 6

Karlin Tech. Inc. v. Surgical Dynamics, Inc., 177 F.3d 968, 971–72 (Fed. Cir. 1999) 5

Kraft Foods, Inc. v. Int'l Trading Co., 203 F.3d 1362, 1365–69 (Fed. Cir. 2000) 5

Liebel–Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 910 (Fed. Cir. 2004)..... 5

Phillips v. AWH Corp., 415 F.3d 1303, 1318 (Fed. Cir. 2005) 3, 8

Security Profiling, LLC v Trend Micro America, Inc., 2018 U.S. Dist. LEXIS 163935 *2 - *8 (N.D. Tex. 2018) 1, 5

Tandon Corp. v. U.S. Int'l Trade Comm'n, 831 F.2d 1017, 1023 (Fed. Cir. 1987)..... 5

Trading Techs. Int'l, Inc. v. IBG LLC, 2019 U.S. Dist. LEXIS 209589 at *17-*22 (N.D. Ill. December 5, 2019)..... 1, 5

Zeroclick, LLC, v. Apple Inc., 891 F.3d 1003 (Fed. Cir. 2018) 1, 4

Statutes

§ 112..... 7

..

Plaintiffs e-Numerate Solutions, Inc., and e-Numerate, LLC (collectively “e-Numerate”) submit this Supplemental Claim Construction Brief on Indefiniteness in response to Defendant United States of America’s (“Defendant”) Supplemental Claim Construction Brief on Indefiniteness. (D.I. 111).

I. INTRODUCTION

The Court should not construe claim 1 of United States Patent 9,262,383 (“the ‘383 patent”) to be in “means-plus-function” format. The Federal Circuit has *never* held that “code for” is a “nonce” word invoking the means-plus-function analysis. To the contrary, the Federal Circuit’s decision in *Zeroclick, LLC, v. Apple Inc.*, 891 F.3d 1003 (Fed. Cir. 2018), held that “user interface code” is *not* in means-plus-function format and reversed a district court decision to the contrary.

Multiple district courts have recognized the controlling effect of the Federal Circuit’s ruling and have rejected the reasoning of *Cypress Lake Software, Inc. v. Samsung Electronics America, Inc.*, 382 F. Supp. 3d 586 (E.D. Tex. 2019), and *Cypress Lake Software, Inc. v. ZTE (USA), Inc.*, 2018 WL 4035968 (E.D. Tex. August 23, 2018), the primary authorities relied upon by Defendant. *See, e.g., Blitzsafe Tex., LLC v. Subaru Corp.*, 2018 U.S. Dist. LEXIS 208483 at * 44 – 57 (E.D. Tex., December 11, 2018); *Trading Techs. Int’l, Inc. v. IBG LLC*, 2019 U.S. Dist. LEXIS 209589 at *17-*22 (N.D. Ill. December 5, 2019); *Security Profiling, LLC v Trend Micro America, Inc.*, 2018 U.S. Dist. LEXIS 163935 *2 - *8 (N.D. Tex. 2018). The Federal Circuit itself also relied on *ZeroClick* in finding “code” limitations again not subject to means-plus-function analysis. *Dyfan, LLC v. Target Corp.*, 28 F.4th 1360, 1368-69 (Fed. Cir. 2022)(“The district court also erred by not following our court’s recent decision in *Zeroclick*.”).

Defendant cites none of this precedent to the Court. Instead, Defendant *begins* its analysis with the assumption that claim 1 of the ‘383 patent is in means-plus-function format. This is error.

The doctrine of claim differentiation strongly militates against construing claim 1 of the ‘383 patent in means-plus-function format. Construing claim 1 of the ‘383 patent in “means-plus-function” format renders it effectively identical in scope with claim 18 of the ‘383 patent. When e-Numerate intended to claim subject matter in “means-plus-function” format, it did so (including in the ‘383 patent itself via claim 18). That choice should be given weight.

The specification of the ‘383 patent further confirms that claim 1 should not be construed in “means-plus-function” format. In particular, the ‘383 patent provides explicit examples of programming languages that can be used to practice the claimed invention. For example, the specification teaches the use of MS Excel Visual Basic and contains actual code exemplars written in MS Excel Visual Basic and XML version 1.0-compliant RMML. *See, e.g.*, ‘383 Patent at col. 45, line 60 – col. 46, line 22 and Appendix F and G. It is undisputed that MS Excel Visual Basic was a conventional programming language known at the time of the inventions of the ‘383 patent. Disclosure of this level detail is the antithesis of mere “black box” functionality.

Finally, to the extent the Court construes claim 1 to be in “means-plus-function” format (and it manifestly should not), this claim is not indefinite for the reasons set forth in the previous briefing for claim 18 of the ‘383 patent. *See* D.I. 79, 89 and 92.

II. PROCEDURAL BACKGROUND

This brief constitutes the seventh brief filed by the parties on the indefiniteness issues. Previous briefs include D.I. 79, 83, 89, 91, 92 and 111. Prior to the *Markman* hearing in this matter, Defendant never asserted that claim 1 of the ‘383 patent was in “means-plus-function” format. *See generally* D.I. 83 and 91. Similarly, Defendant never sought permission to amend the Joint Claim Construction Chart (D.I. 103) in this matter to make such an assertion. Instead, Defendant asserted

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.