

EXHIBIT D



U.S. Department of Justice

Civil Division

SH
154-19-859

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Washington, DC 20530

January 29, 2021

VIA E-MAIL

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Re: e-Numerate Solutions, Inc. et al., v. United States,
Court of Federal Claims No. 1:19-cv-859

Dear Counsel,

I write in response to both e-Numerate Solutions, Inc. and e-Numerate, LLC's (collectively, Plaintiffs or "E-Numerate") infringement contentions dated December 15, 2020 (preliminary infringement contentions or "PICs") and Mr. O'Rourke's related correspondence of January 5, 2021. As detailed below, these contentions do not meet the notice requirement necessary under the Court's rules and case law. Additionally, your letter purporting to add seven additional agencies is procedurally improper.

1. E-Numerate's Infringement Contentions Do Not Identify a Single Infringing Act

As a preliminary matter, under Rule 4 of the Patent Rules of the Court of Federal Claims ("PRCFC"), e-Numerate was required to provide "a chart identifying where each element of each asserted claim is found within each accused product, process, or method." The Federal Circuit has explained that the purpose of such rules is for parties to provide "early notice of their infringement and invalidity contentions, and to proceed with diligence in amending those contentions when new information comes to light in the course of discovery. The rules thus seek to balance the right to develop new information in discovery with the need for certainty as to the legal theories." *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (discussing similar rules adopted by the Northern District of California); *see also*

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CANVS Corp. v. United States, 107 Fed. Cl. 100, 102 (2012) (noting that the special procedures order was based on Northern District of California's local patent rules).

Notably, all of E-Numerate's contentions fail to identify *a single act* of infringement based on compliance with the XBRL 2.1 format. At most, the PICs demonstrate that the XBRL 2.1 data format includes functionality that *could* be used to commit infringing acts, but do not establish that infringing features are necessary for a product to be XBRL 2.1 compliant. Using an industry standard to establish infringement may be sufficient if the standard requires that the relevant feature be implemented, *see Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1327-28 (Fed. Cir. 2010), but E-Numerate has not made such an assertion, and nor could it.

Additionally, E-Numerate's PICs fail to establish a single act of infringement by any of the accused SEC systems or activities, including but not limited to the EDGAR Viewer, EDGAR Renderer, Arelle, and/or Inline XBRL Viewer. PICs at 2, 4. In a similar case where the patentee provided infringement contentions that "fail[ed] to identify a single accused device" and instead "merely refer[ed] to large technology categories" the court granted a motion for summary judgment of noninfringement and denied a motion to amend the contentions as moot. *Demodulation, Inc. v. United States*, 126 Fed. Cl. 499, 510 (2016).

This deficiency is especially concerning because the SEC's publicly available EDGAR Filer Manual¹ details the requirements for filings including the content, format, and form of XBRL submissions. Additionally, E-Numerate's infringement contentions identify a source code repository available online for the EDGAR Renderer² yet inexplicably fail to chart any of this code. *See, e.g.*, PICs Ex. G at 3. Moreover, while E-Numerate refers to a product by third-party Toppan Merrill Bridge, it failed to provide any screen shots displaying the accused operation of the product or cited to any product manual or literature, as is typically done in these cases.

The Court of Federal Claims has held that "where the information that a plaintiff relies upon to support amendment was publicly available prior to the time for filing plaintiff's infringement contentions, a court should be reluctant to permit amendment." *CANVS Corp.*, 107 Fed. Cl. at 107 (citing *Global Sessions LP v. Travelocity.com LP*, No. 6:10cv671 LED-JDL, 2012 WL 1903903, at *4 (E.D. Tex. May 25, 2012) (unpublished) (denying leave to amend infringement contentions to include information that was publicly available at the time that the original infringement contentions were due); *SmartPhone Techs., LLC v. HTC Corp.*, No. 6:10cv580 LED-JDL, 2012 WL 1424173, at *3 (E.D. Tex. Mar. 16, 2012) (unpublished) (finding a lack of diligence and therefore no good cause to amend where a party omitted from its initial infringement contentions three accused devices that were publicly available at the time that infringement

¹ *See, e.g.*, <https://www.sec.gov/edgar/filer-information/current-edgar-filer-manual>

² https://github.com/Arelle/EdgarRenderer/blob/3.3.0.814/change_log.md.

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contentions were due); *cf.* Patent L.R. 3–6(b) (noting that one circumstance that would support a finding of good cause is the “recent discovery of *nonpublic* information about the Accused Instrumentality which was not discovered, despite diligent efforts, before the service of the Infringement Contentions”)).

E-Numerate’s PICs also state that the “the Merrill Bridge product is representative of software and services provided by various service providers to assist their customers with SEC filings for which the United States has assumed liability” and that “the Mattress Firm SEC filing is representative of filings made by SEC filers for which the United States has assumed liability.” PICs at 2. Previously, in the Joint Preliminary Status Report, Plaintiffs requested that “any limitation on claim construction involving representative claims should be held in conjunction with the Government having to stipulate to representative third party products for liability purposes.” Dkt. No. 35 at *2. At the corresponding November scheduling hearing, the Government explained that E-Numerate would have to first identify the universe of relevant third-party software before any representative stipulation could be negotiated. These boilerplate statements in the PICs fail to provide the requisite notice of the identity of third-party software providers or filers.³

Further, we have identified numerous failures to chart specific claim elements on a patent-by-patent basis and have provided tables summarizing that analysis in Exhibit A to this letter.

In light of the foregoing, please provide amended infringement contentions in which you allege actual infringement based on an analysis of the relevant source code, EDGAR manual, and third-party software rather than merely the XBRL specification. Additionally, these amended contentions should provide notice as to the missing claim elements identified in Exhibit A, as this is affecting the Government’s ability to provide responsive invalidity contentions. Accordingly, please confirm by February 5, 2021 that E-Numerate will be providing these updated contentions, provide a date certain by which it will do so, and agree to a modification to the case schedule in which the Government’s deadline for its invalidity contentions under PRCFC 6 is extended in a commensurate manner. If you do not agree, please provide a time to meet-and-confer.

2. The SEC’s Accused Internal Systems

In its infringement contentions, E-Numerate stated that it believes that internal SEC systems, which it refers to as a validator program, a compliance reviewer, and an anti-fraud detector, infringe the ‘842 Patent. PICs at 2. We have attempted to identify these systems to determine if there is a plausible infringement allegation, and if so, to locate responsive documents.

³ To date, we have not received any notice of third-party subpoenas despite E-Numerate’s request to initiate such discovery ahead of schedule. *See* Dkt. No. 35 at *8; RCFC 45(a)(4) (requiring notice of a subpoena to other parties before the subpoena is served).

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We understand the “validator program” to correspond to the open source “EDGAR Filer Manual” (EFM) validation plug-in that implements all validations documented in EDGAR Filer Manual sections 5.2.5 and section 6. This is published and maintained by Arelle and therefore E-Numerate should have already provided detailed contentions with respect to this software.

We understand the “compliance reviewer” to correspond to an internal application that permits users to view, through any Inline XBRL document, the content of previous and/or related XBRL filings that have been loaded into the Interactive Data Analysis Platform (IDAP). The IDAP is a non-public data repository. We understand the “anti-fraud detector” to correspond to an internal application that uses data that has been downloaded into IDAP.

Neither the compliance reviewer, the anti-fraud detector, nor IDAP perform XBRL validation. Rather, IDAP itself uses the output of EDGAR Validation and the compliance reviewer and anti-fraud detector use IDAP. Given that the systems corresponding to the “compliance reviewer” and “anti-fraud detector” are downstream from any software that performs XBRL validation, E-Numerate has not provided any infringement allegation to implicate these systems. Accordingly, we will not be producing documents relating to these systems in our forthcoming document production pursuant PRCFC 7(A).⁴

3. New Allegations against Other Government Agencies

In your letter of January 5, 2021 you purport to advance infringement allegations against seven other agencies or bodies besides the SEC, FDIC, and FFIEC based on unidentified references to XBRL within the US Federal Register. Given the hundreds of references you state are listed there, if E-Numerate had performed its diligence prior to filing its (original or even amended) complaint, it would have made these allegations long ago. After performing your due diligence to ensure that E-Numerate can credibly make these allegations, you must amend your complaint to assert infringement against these entities. Since you will need leave to amend your pleading again, we request that you meet-and-confer with us within three weeks of receipt of this letter, February 19, 2021, with a draft of the proposed amended complaint to discuss whether your request would be opposed and how your request may affect the discovery schedule.

Additionally, the Government presently intends to make a document production pursuant to PRCFC 7 with respect to the SEC. Indeed, the rules provide a timing mechanism in which parties have time to identify, collect and produce required documents, but this assumes that a defendant was put on notice of the relevant allegation in the complaint. Accordingly, if you file another amended complaint, we expect that E-Numerate will provide detailed contentions as to

⁴ We also note that documents relating to the compliance reviewer and anti-fraud detector are extremely sensitive and confidential.

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