

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 SUR-REPLY CLAIM CONSTRUCTION**  
**BRIEF ON INDEFINITENESS**

BRIAN M. BOYNTON  
Principal Deputy Assistant Attorney  
General

GARY L. HAUSKEN  
Director

Of Counsel:  
SCOTT BOLDEN  
NELSON KUAN  
U.S. Department of Justice

SHAHAR HAREL  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
Department of Justice  
Washington, DC 20530  
shahar.harel@usdoj.gov  
Telephone: (202) 305-3075  
Facsimile: (202) 307-0345

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COUNSEL FOR THE DEFENDANT,  
THE UNITED STATES

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Defendant, the United States, respectfully submits this Sur-Reply Claim Construction Brief on Indefiniteness in response to Plaintiffs e-Numerate Solutions, Inc. and e-Numerate Solutions, LLC's (collectively, "e-Numerate") Reply Brief on Indefiniteness (ECF 89).

## **I. INTRODUCTION**

In an effort to avoid a finding of indefiniteness as to many means-plus-function terms, e-Numerate's Reply requests that this Court defer ruling in many cases because it has identified a potential algorithm within the relevant asserted patent and that the determination as to the adequacy of any such algorithm must be deferred until the summary judgment stage. e-Numerate relies on a single case with unique circumstances that do not apply here. This case has been pending for three years, the parties have submitted expert declarations in support of their positions, and both parties declined to examine the opposing expert. As detailed below, the disputes are ripe for resolution and any deferral will delay finalizing the parties' contentions and dispositive motions. Additionally, in rebutting Defendant's assertion of indefiniteness based on an improper antecedent basis, e-Numerate makes bald assertions as to the disclosure in the patents. As explained below, its citations do not support the assertions it makes. In light of the foregoing, the Court should find each term to be indefinite except for those limited cases where Defendant identified sufficient structure for certain "code for" terms.

## **II. ARGUMENT**

### **A. The '355 Patent**

#### **1. '355 Patent, Term 6: "the step of receiving"**

In its responsive briefing, Defendant explained how the term "the step of receiving" in claims 15 and 42 could reasonably be understood to be referring to either the limitation "receiving a series of numerical values having tags indicating characteristics of the numerical values" or "receiving a macro defined to perform an operation on the series of numerical values"

as recited in independent claims 1 and 28 by both (1) referring to the surrounding claim language within these claims and (2) citing support from the specification. ECF 83 at 8-9. In its Reply, e-Numerate simply ignores the first argument Defendant made based on the claim language and then dismisses the second argument based on citations from the specification in a conclusory manner. ECF 89 at 4. Both of Defendant’s original arguments are meritorious.

First, it is clear from the relevant independent claims’ recitation of “receiving a macro defined to perform an operation on the series of numerical values . . . and the step of receiving the macro comprises receiving the macro including interpreted code, meta-data, and error handling instructions” that receiving a macro includes receiving meta-data, which the parties agree is data about data. The relevant dependent claims require that the “step of receiving comprises receiving tags indicating characteristics selected from the group consisting of: . . . provenance.” Therefore, assuming that the antecedent basis for the “step of receiving” is “receiving a macro. . .” the relevant dependent claims merely require that the meta-data be in the form of tags indicating characteristics about provenance, or the source of an object — information typically stored as meta-data. This is a plausible interpretation. e-Numerate does not even address this argument in its Reply.

Second, Defendant buttressed this argument by providing numerous citations from the patent’s specification and appendices that disclose a sample macro document comprising attributes indicating provenance characteristics, as well as the other characteristics recited in the relevant dependent claims. ECF 82 at 8-9. Therefore, the interpretation of the dependent claims discussed above is actually disclosed in the specification, only enhancing its plausibility. e-Numerate’s only rebuttal is to assert that “these citations are not referring to receiving ‘tags’ as set forth in the claims at issue.” ECF 89 at 4. Regardless of whether these citations are directed to

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