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' SUR-REPLY CLAIM CONSTRUCTION BRIEF ON INDEFINITENESS

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Respectfully submitted,

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I. INTRODUCTION

Pursuant to the Court's Scheduling Order (D.I. 87), Plaintiffs e-Numerate Solutions, Inc. and e-Numerate, LLC's (collectively, "e-Numerate") submit this brief in response to the Government's sur-reply brief on indefiniteness. Because the parties have already thoroughly briefed the issues over four prior briefs, e-Numerate will limit this reply to the core indefiniteness issues in dispute.

II. ARGUMENT

The claims involving the disputed terms are addressed in order.

'355 Patent – Claims 15 and 42 ("the step of receiving") – Term 6

The Government's position is that it is merely *plausible* that the "step of receiving" in claims 15 and 42 *could* refer to the step of receiving the macro. To reach this dubious conclusion, the Government argues that the independent claims at issue specify that the macro contains meta-data and that "tags" can be viewed as a type of meta-data. Therefore (or so the argument goes), the "tag" limitations in the dependent claim *could* be read as referring to the step of receiving the macro. The issue is not how claims *could* be read, but rather how they *would* be read from the perspective of a person of ordinary skill in the art. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005)("The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation.") As set forth previously, e-Numerate's position is clear, logical, and fully in accord with the claim language. The Government's claim construction is not.

The Government criticizes e-Numerate for giving short shrift to the Government's citations to the '355 patent at col. 50, line 35, and the '748 patent at cols. 97 -106 and 107-112. As admitted by the Government, these disclosures are merely directed to an RMML Document Type Definition (cols. 97 – 106) and a sample RMML Document (col. 107 – 112). None of these disclosures show practice of the inventions claimed in claims 15 and 42 of the '355 patent (or their respective independent claims). As a result, the disclosures do not support the Government's interpretation.

The Government's argument also ignores the fact that independent claims 1 and 28 *already* contain a further limitation on the step of receiving the macro. Specifically: "the step of receiving the macro comprises receiving the macro including interpreted code, meta-data, and error handling instructions." If the Government were correct (and it is not) in its interpretation that the dependent claims refer to the step of receiving the macro, then, in order to comply with proper patent parlance, the dependent claims should read "wherein the step of receiving ***further comprises*** receiving tags indicating characteristics selected from the group consisting of: (1) value, (2) semantics, (3) format, (4) measurement, (5) structure, and (6) provenance." However, that language is not found in the dependent claims. In short, the Government's construction is both illogical and contrary to standard patent practice.

In contrast, e-Numerate's construction is consistent with the natural and logical reading of the claim language. e-Numerate's construction reads the claim from the perspective of a person of ordinary skill in the art as required by *Phillips*. The Government's construction does not (and is contrary to standard patent practice).

The Court should adopt e-Numerate's construction and reject the Government's indefiniteness challenge.

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