

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

JOINT STATUS REPORT

Plaintiffs e-Numerate Solutions, Inc. and e-Numerate, LLC and Defendant the United States of America (the “Government”) respectfully submit this Joint Status Report pursuant to the Court’s Order of February 29, 2024. ECF 116, page 55 – 56. Per the Court’s request, the parties have followed the general format of the Joint Preliminary Status Report filed on November 19, 2020. ECF-35. The parties have removed the sections from the prior submission that are not germane to the current procedural posture of the case.

As set forth in more detail below, the parties are broadly in agreement that the fact discovery period should commence later this month and run for a period of 18 months. However, the parties are in disagreement regarding the timing of certain milestones within that schedule. Per the Court’s request, the parties have proposed a schedule using Judge Albright’s Standing Order governing proceedings in patent cases. ECF 116, page 56. In addition, there are certain disputes between the parties that will require Court involvement at the Scheduling Conference or at a time and in a manner set forth by the Court..

(a) Should trial of liability and damages be bifurcated and, if so, why?

e-Numerate maintains that a trial of liability and damages should not be bifurcated. The

Government agrees that discovery need not be bifurcated but submits that a determination as to whether separate trials or evidentiary hearings be held on specific issues can be made at a later date after these issues are further developed.

- (b) Will additional parties be joined? If so, the parties shall provide a statement describing such parties, their relationship to the case, the efforts to effect joinder, and the schedule proposed to effect joinder.**

The parties do not anticipate at this time that any additional parties will be joined in this action.

e-Numerate's Additional Position

e-Numerate believes that the Government has improperly limited its search for core technical documents to systems explicitly set forth in the Second Amended Complaint (ECF 53) and/or e-Numerate's infringement contentions. The great weight of authority holds that such a limitation is inappropriate and that the Government must produce documents relating to all systems in its possession, custody and control that operate in the same manner as the specifically accused systems. *See, e.g., Epicrealm, Licensing, LLC v. Autoflex Leasing, Inc.*, No. 2:05-CV-163, 2007 WL 2580969, at *2-3 (E.D. Tex. Aug. 27, 2007); *LKQ Corp. v. Kia Motors Am., Inc.*, No. 21 C 3166, 2023 U.S. Dist. LEXIS 84551, 2023 WL 3455315, at *3-4 (N.D. Ill. May 15, 2023) (collecting cases); *Invensas Corp. v. Renesas Elecs. Corp.*, 287 F.R.D. 273, 279-83 & n.9 (D. Del. 2012) (same). e-Numerate further believes that the Government has withheld production of documents related to the SEC analytical systems specifically accused of infringement in the Second Amended Complaint. *See, e.g.,* D.I. 53 at Count II, pars. 73 -74 & Ex. G. As set forth below, these two issues need to be addressed at the Scheduling Conference or in a time or manner set forth by the Court. e-Numerate did not pursue this issue against the Government previously because of the Court's expressed desire to address all claim construction issues in the case first.

If the Government produces additional documents implicating additional agencies of the

United States, e-Numerate may amend the Complaint to name them and their products/systems. Because all of the agencies are part of the United States (the named defendant), e-Numerate does not believe that additional “parties” will be added to the Complaint. e-Numerate has proposed dates further out in the schedule to amend the Complaint and/or add additional agencies to account for these issues.

The Government’s Additional Position

The Government objects to e-Numerate’s inclusion of a recitation of purported document production deficiencies in a Joint Status Report directed to scheduling issues, particularly when e-Numerate first raised this issue with the Government in a correspondence provided on the afternoon of March 12, 2024. The Government diligently collected and produced core technical documents totaling at least hundreds of thousands of pages in 2021 and 2022, before the deadline for production of core technical documents on August 17, 2022. Dkt. No. 87. e-Numerate delayed raising this issue for more than a year and a half. The Government will respond in due course with respect to any document production issues but they should not impact the default scheduling provided in Judge Albright’s Standing Order.

(c) Does either party intend to file a motion pursuant to RCFC 12(b), 12(c), or 56 and, if so, what is the schedule for the intended filing?

e-Numerate’s Position:

e-Numerate does not anticipate filing a summary judgment motion until the date set forth in the Scheduling Order entered in this matter. However, e-Numerate believes that the Court should include the following provision relating to summary judgment briefing in this matter based on Judge Albright’s Standing Order:

8. The Court does not limit the number of motions for summary judgment (MSJs) or Daubert motions party may file. However, absent leave of Court, the cumulative page limit for opening briefs for all MSJs is 40 pages per side, for all Daubert motions is 40 pages per side, and for all MILs is 15 pages per side. Each responsive

MSJ, Daubert, and MIL brief is limited to the pages utilized in the opening brief or by the local rules, whichever is greater; and the cumulative pages for responsive briefs shall be no more than cumulative pages utilized in the opening briefs. Reply brief page limits shall be governed by the local rules, but in no event shall the cumulative pages of reply briefs exceed 20 pages per side for all MSJs, 20 pages per side for all Daubert motions, and 10 pages for all MILs.

See Judge Albright Standing Order of January 23, 2024 at page 10, par. 8. This provision is intended to focus the parties on a subset of potential summary judgment motions that may have merit under Fed. R. Civ. P. Rule 56. Conversely, this provision discourages filing multiple summary judgment briefs that independently are allowed the page limit under the local rules. e-Numerate's counsel has found this provision effective in focusing the parties' resources on issues that are "summary judgment worthy" under Fed. R. Civ. P. Rule 56 in other cases it has litigated. Contrary to the Government's argument below, Judge Albright's Order does not limit the number of summary judgment motions that can be filed. Rather, it limits the amount of briefing on the summary judgment motions.

The Government's Further Position

The Government does not anticipate filing a summary judgment motion until the date set forth in the Scheduling Order entered in this matter. However, the Court of Federal Claims does not limit the number of dispositive motions that can be filed by either party. See e.g., *Return Mail, Inc. v. United States*, No. 11-CV-130 (Fed. Cl. 2011), ECF No. 169 (Defendant's Motion for Summary Judgment Under 35 U.S.C. § 101), ECF No. 171 (Defendant's Motion for Summary Judgment Under 35 U.S.C. §§ 305 and 102), ECF No. 172 (Plaintiff's Motion for Partial Summary Judgment as to Defendant's Section 101 Affirmative Defense), ECF No. 173 (Plaintiff's Motion for Partial Summary Judgment on Defendant's Section 305 Affirmative Defense). Moreover, the page limits in the Rules of the Court of Federal Claims are on a per-motion basis as opposed to a cumulative limit as e-Numerate proposes. In any case, setting such

a limitation is premature given that dispositive motions will not be filed for years.

(d) What is the likelihood of settlement? Is alternative dispute resolution contemplated?

Counsel for the parties have held several informal discussions including a discussion after the Court's first *Markman* ruling. Counsel are scheduled to talk via telephone during the week of March 18 in light of the Court's second *Markman* ruling. E-Numerate is amenable to a settlement mediation with the Government. The Government believes that some form of alternative dispute resolution ("ADR") may be useful later in the case.

(e) Do the parties anticipate proceeding to trial? Does either party, or do the parties jointly, request expedited trial scheduling and, if so, why? A request for expedited trial scheduling is generally appropriate when the parties anticipate that discovery, if any, can be completed within a 90-day trial period, the case can be tried within 3 days, no dispositive motion is anticipated, and a bench ruling is sought. The requested place of trial shall be stated. Before such a request is made, the parties shall confer specifically on this subject.

The parties do not request an expedited trial schedule. The parties request that the trial, if any, be held at the U.S. Court of Federal Claims Courthouse in Washington, D.C.

e-Numerate's Further Position:

At this time, e-Numerate anticipates proceeding to trial if the case cannot be resolved amicably. E-Numerate respectfully requests that the Court provide guidance to the parties about how many patents/claims it will allow the parties to take to trial as well as how many invalidity theories it will allow the Government to raise per asserted claim and the process the Court will use in making that determination. This guidance will inform the parties about the scope of narrowing that must take place during the two meet and confer dates set forth in Judge Albright's schedule. *See, e.g., VLSI Tech. LLC v. Intel Corp.*, 2020 U.S. Dist. LEXIS 137485 (D. Del. August 3, 2020).

The Government's proposal to employ the Model Order in this case is contrary to Judge

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