UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TYLER DIVISION

Eolas Technologies Incorporated, *Plaintiff*, vs. Adobe Systems Inc.; Amazon.com, Inc.; Apple Inc.; CDW Corp.; Citigroup Inc.; eBay Inc.; Frito-Lay, Inc.; The Go Daddy Group, Inc.; Google Inc.; J.C. Penney Corporation, Inc.; JPMorgan Chase & Co.; New Frontier Media, Inc.; Office Depot, Inc.; Perot Systems Corp.; Playboy Enterprises International, Inc.; Rent-A-Center, Inc.; Staples, Inc.; Sun Microsystems, Inc.; Texas Instruments Inc.; Yahoo! Inc.; and YouTube, LLC, *Defendants*.	No. 6:09-cv-00446-LED (filed Oct. 6, 2009)
Adobe Systems Inc.; Amazon.com, Inc.; Apple Inc.; CDW LLC; eBay Inc.; Frito-Lay, Inc.; The Go Daddy Group, Inc.; Google Inc.; J.C. Penney Corporation, Inc.; JPMorgan Chase & Co.; New Frontier Media, Inc.; Office Depot, Inc.; Perot Systems Corp.; Playboy Enterprises International, Inc.; Rent-A-Center, Inc.; Staples, Inc.; Oracle America, Inc. f/k/a Sun Microsystems, Inc.; Texas Instruments Inc.; Yahoo! Inc.; and YouTube, LLC, *Counterclaimants*, vs. Eolas Technologies Incorporated, *Counterdefendant*.	

DEFENDANTS' REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT OF INTERVENING RIGHTS [DOCKET NO. 567]

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Ex. O: Claim Construction Order, *Eolas Techs Inc. v. Microsoft Corp.*, No. 99-C-626 (N.D. Ill. Dec. 28, 2000)

Ex. P: Microsoft's opening brief on appeal to the Federal Circuit (June 3, 2004)

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[1] Exhibits A to M were attached to Defendants' opening brief (Feb. 4, 2011) [Docket No. 567].

REPLY

Defendants' motion for partial summary judgment that the reexamined claims of the '906 patent are not "legally identical" to any original claim of the '906 patent should be granted. The only reason the asserted claims were allowed during reexamination is because they were amended to overcome a rejection based on the Cohen prior art, and according to the Federal Circuit "it is difficult to conceive of many situations in which the scope of a rejected claim that became allowable when amended is not ***substantively changed*** by the amendment." *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1348 (Fed. Cir. 1998) ("*Laitram IV*").[2]

A. *Laitram IV* confirms that the issues raised by Defendants' motion are ripe for summary judgment

Eolas repeatedly suggests there are questions of fact precluding summary judgment. *See* Opp'n at 1, 3–4, 6. To the contrary, whether reexamined claims are "identical"[3] — like claim construction — is a matter exclusively for the Court and thus is routinely decided by summary judgment. *See* Mot. at 7 (citing cases). The case cited by Eolas is no longer good law to the extent it suggests there could be questions of fact that would preclude summary judgment. *See* Opp'n at 6 (citing *Laitram Corp. v. NEC Corp.*, 952 F.2d 1357 (Fed. Cir. 1991) ("*Laitram I*")). In *Laitram I*, the Federal Circuit reversed and remanded a summary judgment in favor of the defendant because there were "disputed issues of fact." *See Laitram I*, 952 F.2d at 1364. On remand, the jury agreed with the plaintiff that the reexamined claim was "identical" to an original claim. *See Laitram IV*, 163 F.3d at 1345. However, after the jury verdict, the Supreme

[2] Unless stated otherwise, all emphasis in quotes throughout this brief has been added.

[3] Eolas repeatedly suggests that the current version of 35 U.S.C. § 252 (which says "substantially identical") should apply, *see* Opp'n at 1, 5–6 & nn.1–2, but neither of the cases cited by Eolas considered the effective date for the amendment to § 252, which makes clear that the amendment does not apply in this case, *see* Mot. at 6 n.2 (citing Pub. L. No. 106-113, § 4508, 113 Stat. at 1501A-566 to -567). Thus the pre-1999 version of § 252 (which said "identical") must apply, and the question is "whether the *scope* of the claims are identical," *Laitram IV*, 163 F.3d at 1346, ***not*** whether the claims use "synonymous" phrases, as incorrectly proposed by Eolas, *see* Opp'n at 1 ("synonymous," "similar-sounding"), 2 ("synonymous"), 7 ("synonymous"), 8 n.3 ("synonymous"). Even if the new version of § 252 were to apply, Eolas admits that the amendment to § 252 was not intended to change the standard found in preexisting cases, *see* Opp'n at 6 & n.2, and thus *Laitram IV* governs either way.

Court held in *Markman* that claim construction is a matter exclusively for the judge to decide. Thus on appeal in *Laitram IV*, the Federal Circuit held that whether a reexamined claim is "identical" is a question of law, *see id.* at 1346–47, and the Federal Circuit ***overturned*** the jury verdict and held ***as a matter of law*** that the reexamined claim was ***not*** "identical" — directly contrary to the result of *Laitram I*. *See Laitram IV*, 163 F.3d at 1347–49. In short, it is now clear that whether reexamined claims are "identical" is a question ripe for summary judgment.

B. Claims 1–3, 6–8, and 11–14 of the '906 patent were narrowed during the second reexamination to overcome the Cohen prior art

Eolas admits that the claims were amended during reexamination to overcome the Cohen prior art, but Eolas argues that its amendment did not change the scope of the claims because it "took this new language word-for-word from a construction of these claims affirmed by the Federal Circuit." Opp'n at 6. There are several problems with this argument.

First, the premise of the argument is that "the Federal Circuit was right about the scope of the claims in the '906 patent," Opp'n at 7, in particular that an "executable application" ***must*** "enable an end-user to directly interact with data." But the Federal Circuit never decided that question. Indeed, neither party included the phrase "enable an end-user to directly interact with data" in their proposed construction for "executable application," *see* Ex. N; the district court provided no explanation for including this phrase in its construction, *see* Ex. O at 26, 36; neither party addressed this phrase on appeal, *see* Ex. P at 51–56, Ex. Q at 42–50, Ex. R at 19–26; and the Federal Circuit provided no substantive discussion of this phrase in its opinion, *see* Ex. S at 1336–38. Thus it cannot be said that the Federal Circuit was "right" on this issue; the Federal Circuit never decided the issue because neither party raised it.

Second, the Patent Office rejected this argument. *See* Fact Nos. 3–4 (citing Exs. E–F). Eolas argued to the Patent Office that in light of the claim constructions affirmed by the Federal Circuit, the claims did not need to be amended to overcome the prior-art rejection based on

Cohen. *See* Ex. E at 12. The Patent Office disagreed[4] and issued a final rejection. *See* Fact No. 4 (citing Ex. F at 6). At this point, Eolas had a choice: it could either narrow the claims to overcome the final rejection, or it could refuse to amend the claims and instead appeal the final rejection to the BPAI, *see* 35 U.S.C. § 134(b), and if necessary appeal the BPAI's decision to the Federal Circuit, *see* 35 U.S.C. § 141. Eolas chose to narrow the claims to overcome the final rejection. *See* Fact Nos. 5, 9 (citing Exs. G–H). It does not matter that Eolas accompanied its amendment with a self-serving statement that "this language does not change the scope of claims 1 and 6," Ex. G at 11, because the Supreme Court has held that "[a patentee's] decision to forgo an appeal and submit an amended claim is taken as a ***concession*** that the invention as patented ***does not*** reach as far as the original claim." *Festo*, 535 U.S. at 734.

Third, the Federal Circuit has repeatedly held that amending a claim to overcome the prior art — as happened in this case — substantively changes the scope of the claim. *See Laitram IV*, 163 F.3d at 1347–49; *Bloom Eng'g Co. v. N. Am. Mfg. Co.*, 129 F.3d 1247, 1250–51 (Fed. Cir. 1997). In *Bloom*, for example, the patentee argued that the original claim was "identical" in scope to the amended claim because the original claims, when "correctly construed, were implicitly limited in the way that was made explicit by this amendment." *Id.* at 1250. The patentee in *Bloom* — like Eolas here — complained that "it was compelled to add these words to the claims because the reexamination examiner gave . . . an unduly broad construction, in accordance with examination practices that have been approved by this court, thereby obliging [the patentee] to amend the claims." *Id.* The Federal Circuit rejected these arguments: "This change was necessary in order to distinguish [the claimed invention] from [the prior art] British patent. The British patent was newly cited prior art, and the claims were

[4] The Patent Office was entitled to reject the Federal Circuit's claim construction because the Patent Office — like Defendants in this case — was not a party to the prior litigation. "We have never applied issue preclusion *against* a non-party to the first action." *In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007) (affirming new claim construction used during reexamination that differed from previous construction given by a district court); *see also St. Clair Intellectual Prop. Consultants, Inc. v. Canon Inc.*, No. 2009-1052, 2011 WL 66166, at *5–*7 (Fed. Cir. Jan. 10, 2011) (unpublished) (adopting new claim construction after reexamination that differed from previous construction given by a district court).

narrowed and limited in view of that patent." *Id.* at 1251. The same is true in this case.

In *Laitram IV*, the Federal Circuit reached the same result and stated that "it is difficult to conceive of many situations in which the scope of a rejected claim that became allowable when amended is not substantively changed by the amendment." 163 F.3d at 1348. Eolas's brief cites *Laitram I* for the contrary proposition, *see* Opp'n at 7, but as explained above *Laitram IV* represents the current state of the law, not *Laitram I*. *See supra* p. 1. The other cases cited by Eolas (*Tennant*, *Kaufman*, and *Key*) were also decided before *Laitram IV* and thus are distinguishable for at least the same reason. Those cases were also decided before the Supreme Court's decision in *Festo*, which reinforced the logic behind *Laitram IV*: an amendment made to overcome the prior art is a concession that the scope of the claim was narrowed.

C. Claims 13–14 of the '906 patent were changed during the second reexamination to correct errors that made the claims invalid

Eolas admits that claims 13–14 were amended to replace a method limitation with an apparatus limitation, but Eolas argues that the amended claims are nevertheless "identical" to the original claims because 35 U.S.C. § 255 "provides that typographical and other similar errors may be corrected without fear of triggering intervening rights." Opp'n at 9. There are two problems with this argument. First, Eolas did ***not*** seek a "Certificate of Correction" under § 255. Second, "under sections 254 and 255, a 'certificate of correction is only effective for causes of action arising ***after*** it was issued.'" *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1356 (Fed. Cir. 2003). Thus even if § 255 applied, claims 13–14 would only be enforceable ***after*** February 3, 2009, which is exactly the point of Defendants' motion.

Eolas's reliance on *Slimfold* is misplaced, because that case was decided before *Laitram IV* and before the Supreme Court's decision in *Festo*, which held that even a § 112 amendment gives rise to a ***presumption*** that the claim was narrowed, *see* 535 U.S. at 735–37, 740. Eolas has not rebutted that presumption; to the contrary, it admits there was an error in the claims. "[I]t does not seem to us to be asking too much to expect a patentee to check a patent ***when it is issued*** in order to determine whether it contains any errors that require issuance of a certificate of correction." *Southwest Software, Inc. v. Harlequin Inc.*, 226 F.3d 1280, 1296 (Fed. Cir. 2000).

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SIGNATURE ATTESTATION

I hereby certify that concurrence in the service of this document has been obtained from each of the other signatories shown above.

/s/ Shubham Mukherjee
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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on February 24, 2011.

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