

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

EOLAS TECHNOLOGIES	§	Civil Action No. 6:09-CV-446-LED
INCORPORATED,	§	
	§	
PLAINTIFF,	§	
	§	JURY TRIAL DEMANDED
v.	§	
	§	
ADOBE SYSTEMS INC., et al.,	§	
	§	
DEFENDANTS.	§	
	§	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF EOLAS’ MOTION TO
RECONSIDER CONSTRUCTION OF “EXECUTABLE APPLICATION” IN
MEMORANDUM OPINION AND ORDER (DKT. NO. 914)
OR, IN THE ALTERNATIVE, TO CERTIFY THE QUESTION FOR
INTERLOCUTORY APPEAL**

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I. INTRODUCTION

This Court’s construction of “executable application” was based on full briefing and argument, and is supported by detailed and thoughtful analysis. Eolas’ Motion To Reconsider that Order should be denied for at least three independent grounds. First, Eolas’ Motion ignores this Court’s ruling that “motions to reconsider should not be used to re-urge matters a party has already advanced.” Eolas’ arguments were recycled from its previous arguments made in briefing and at the *Markman* hearing. Second, Eolas misapplies *stare decisis*, as best illustrated by the very cases upon which Eolas’ Motion most heavily relies. Eolas’ *stare decisis* argument also overlooks that two reexaminations of the ‘906 patent post-dated the *Microsoft* claim construction, precluding that ruling from freezing the meaning of the claims. Third, Eolas’ recycled “merits-based” arguments do not even address, let alone overcome, this Court’s considered analysis of the evidence relevant to the meaning of “executable application.”

Eolas fares no better with its alternative argument that the Court’s construction of “executable application” should be certified for interlocutory appeal. Such an appeal is particularly ill-suited for a claim construction dispute, such as the one proposed by Eolas here, relating only to *some* of Eolas’ infringement contentions. It is thus unsurprising that none of the statutory requirements for interlocutory appeal certification is satisfied here.

For all of these reasons, Eolas’ Motion should be denied in its entirety.

II. ARGUMENT

A. EOLAS’ MOTION IGNORES THAT “MOTIONS TO RECONSIDER SHOULD NOT BE USED TO RE-URGE MATTERS A PARTY HAS ALREADY ADVANCED”

This Court has held that “[m]otions to reconsider should not be used to re-urge matters a party has already advanced.”¹ Yet Eolas’ Motion does just that. In its Motion, Eolas asserts that

¹ *Litepanels, LLC v. Gekko Technology, Ltd.*, No. 2:06-CV-167, 2006 U.S. Dist. LEXIS 84110, at *2 (E.D. Tex. Nov. 20, 2006) (Davis, J.) (denying motion to reconsider); *see also, e.g., State of La. v. Sprint Comm’ns Co.*, 899 F.

(1) the construction of “executable application” as “a compiled program that is in native machine code” is in conflict with the Federal Circuit’s decision in *Eolas v. Microsoft*, (2) this Court is required to apply the construction affirmed in *Microsoft*, and (3) this Court’s construction of “executable application” is not supported by intrinsic or extrinsic evidence. These arguments have all been previously advanced by Eolas, during claim construction briefing² and oral argument,³ and all were rejected by this Court. Eolas’ re-urging of those arguments via reconsideration is improper. Eolas’ Motion should be denied for that reason alone.

B. EOLAS’ “*STARE DECISIS*” ARGUMENT IS MISPLACED, PARTICULARLY GIVEN THE DIFFERENT DISPUTED ISSUES IN THE *MICROSOFT* CASE, AND THE CHANGED INTRINSIC RECORD

Eolas’ Motion seeks to expand the doctrine of *stare decisis* beyond recognition. *Stare decisis* is of course the simple concept that prior precedent should be respected. But rather than treating the *Microsoft* decision as a prior precedent controlling as to the *same* issue and the *same*

Supp. 282, 284 (M.D. La. 1995) (“[L]itigants are expected to present their strongest case when the matter is first considered. *Fernandez v. Bankers Nat’l Life Ins. Co.*, 906 F.2d 559 (11th Cir. 1990). A motion to reconsider based on recycled arguments only serves to waste the resources of the court.”) (denying two motions to reconsider).

² See, e.g., 12/23/2010 Opening Claim Construction Brief of Plaintiff Eolas Techs., Inc. (D.N. 537) at 1 (“Of these many terms, one has been construed in a previous litigation, and that construction was affirmed on appeal. Defendants nevertheless propose a new and different construction for this term, importing limitations not present in the construction affirmed by the Federal Circuit.”), 8 (“As noted above, the term ‘executable application’ was construed in Eolas’ prior litigation with Microsoft to mean ‘any computer program code, that is not the operating system or a utility, that is launched to enable an end-user to directly interact with data.’ *Eolas Techs.*, 399 F.3d at 1336. The Federal Circuit affirmed this construction on appeal, holding that ‘the district court correctly gleaned the proper definition of the term from the intrinsic evidence including the patent claims and prosecution history.’ *Id.* Eolas’ proposal tracks the construction affirmed by the Federal Circuit, and should be adopted for that reason. See *id.* at 1336, 1338. Defendants’ proposal, on the other hand, improperly imports narrowing limitations constraining the term to be, inter alia, ‘a compiled native binary program.’ This language is found nowhere in the patents’ claims or specification.”); 2/18/2011 Reply Claim Construction Brief of Plaintiff Eolas Technologies, Inc. (D.N. 581) at 2 (“The Federal Circuit has confirmed that Eolas’ proposal for this term reflects its ‘proper definition.’ *Eolas Techs., Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1332, 1336 (Fed. Cir. 2005). This definition was gleaned through an application of the intrinsic-evidence approach outlined in the *Markman* and *Vitronics* cases, that is, the very approach ‘reaffirm[ed]’ in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc).” (citations to exhibits omitted).

³ See, e.g., 3/3/2011 Markman Hearing Tr. (D.N. 649) 7:20-25 (“[T]he Federal Circuit considered and issued an opinion affirming the construction of the term ‘executable application,’ the one we propose here today.”), 11:11-17 (discussing Federal Circuit affirmance of Eolas’ proposed construction), 12:8-13:5 (discussing district court and Federal Circuit reliance on intrinsic evidence), 15:19-25 (arguing that defendants’ proposal improperly adds a “native binary program” limitation to the Federal Circuit’s construction), 18:11-16 (arguing that “binary” limitation is not supported by the intrinsic evidence and that the construction affirmed by the Federal Circuit should be entered), 26:1-27:18, 28:14-29:2 (arguing that stare decisis compels application of the construction affirmed by the Federal Circuit), 30:12-31:8 (arguing that change during prosecution from “controllable application” to “executable application” did not indicate limitation of “executable application”).

record, Eolas attempts to use that decision as a blunt instrument without any meaningful consideration of the differences between the issues and the record presented in *Microsoft* versus this case. This Court has already explained the differences between the issues presented here and in the *Microsoft* case. As shown below, this Court had it right and need not reverse itself.

Eolas appears to take the extreme position that once a claim construction dispute between two parties is resolved, there can be no other claim construction disputes by anyone else about that same claim language. This makes no sense. It would require that courts, already required to construe only those claim terms actually in dispute and only to the extent necessary to resolve that dispute, do so knowing they would be precluding any future consideration of different legal questions regarding that claim language.⁴ Eolas' misapplication of *stare decisis* also would preclude a court from considering new intrinsic evidence, such as reexamination file histories that arose after a prior construction of a single aspect of a claim term. That conflicts with established precedent. For these separate and independent reasons, Eolas' *stare decisis* argument must fail.

1. “*Stare Decisis*” Is Inapposite Because This Case Involves A Different Dispute About The Meaning Of “Executable Application”

As this Court recognized in its claim construction order, “[t]he dispute regarding ‘executable application’ in *Microsoft* centered around whether the application was limited to ‘standalone programs.’”⁵ Accordingly, both the district court and the Federal Circuit analyzed the term “executable application” in that context.⁶ This Court correctly decided that “Plaintiff’s *stare decisis* argument is misplaced,” given the different disputed issues in this case.

Eolas contends that *stare decisis* requires that this Court adopt a previously-affirmed

⁴ Alternatively, this would require courts to pronounce advisory claim construction opinions about all aspects of a claim term, including those not yet in dispute and so not properly before that court.

⁵ 8/22/2011 Memorandum Opinion and Order (“Markman Order”) (D.N. 914) at 6.

⁶ Markman Order at 6-7.

construction of one aspect of “executable application” as the final word on every aspect of that term. But the prior construction answered a very different legal question (is “executable application” limited to standalone programs?) than that presented here (is “executable application” limited to native binary?). As the Court explained, the issue there was “whether [‘executable application’] included components that were not standalone,” for example, a spell check component of a word processing program.⁷ The issue before this Court is “whether the program is limited to native binary—a compiled program that is in machine code—as opposed to an interpretable program that is in, for example, bytecode (e.g. scripts).”⁸ Applying only the language of the prior construction would expand *stare decisis* past its legal and logical limits.

Although Eolas’ Motion relies heavily on the *Phonometrics* cases, those cases vindicate this Court’s *Markman* ruling, and undercut Eolas’ overbroad *stare decisis* argument. For example, Eolas repeatedly quotes the *Phonometrics v. Westin* case as supporting the point that a single Federal Circuit panel affirmation forecloses future claim construction:

The choice should be clear, as “under principles of *stare decisis*,” future Federal Circuit panels “will follow the claim construction set forth by” ***an earlier panel***.⁹

In short, the panel asked to construe “executable application” in this case will be bound—under principles of *stare decisis*—to “follow the claim construction set forth by” ***the earlier panel***.¹⁰

Yet Eolas fails to mention the key point that, prior to this decision, ***two separate Federal Circuit panels*** considering appeals from two separate prior *Phonometrics* litigations involving different defendants, ***had already construed different aspects of the claimed “call cost register means” at issue there***. As here, different disputes about different aspects of claim language required different constructions.

⁷ Markman Order at 7.

⁸ Markman Order at 7.

⁹ 9/6/2011 Plaintiff Eolas’ Motion To Reconsider (D.N. 965) (hereinafter “Eolas Motion”) at 5 (emphasis added).

¹⁰ Eolas Motion at 5 (emphasis added).

The first of the *Phonometrics* panels considered the 1992 case of *Intellicall, Inc. v. Phonometrics, Inc.* (hereinafter *Phonometrics I*), a declaratory judgment action against patentee Phonometrics. The patent involved “an apparatus for automatically computing and recording the cost of a long-distance telephone call.”¹¹ The *Phonometrics I* Court explained that the disputed issue was the requirements for the claimed “call cost register means, including a digital display for providing a substantially instantaneous display of cumulative call cost in dollars and cents.”¹² The accused products did not provide a visual display of call costs, but instead either provided no visual display at all, or visually displayed only time, not cost. The question was whether providing machine-readable information about a call’s cost, following termination of the call, satisfied the “display” and “instantaneous display” requirements of the “call cost register means.” The Federal Circuit affirmed the district court’s claim construction, holding that

[t]he district court properly focused on the evidence of what the words, as used in the context of the patent, would mean to one of skill in the art and found no support for a construction of “digital display” which would encompass either machine readable or human readable devices, nor for a construction that an “instantaneous [digital] display” includes information given to a computer for later access. We agree.¹³

The Court concluded, “The district court correctly interpreted the scope of the ‘463 claims.”¹⁴

Based on Eolas’ arguments, the *Phonometrics I* decision would preclude subsequent *Markman* proceedings to construe the claims of the ‘463 patent. At a minimum, *Phonometrics I* would preclude any further construction of the “call cost register means,” including “display” and “instantaneous display,” even in the face of new, different disputes about those terms. Yet *Phonometrics I* had no such effect. Indeed, six years later, on appeal in a subsequent litigation about the same claim limitation, the Federal Circuit affirmed a district court’s new, different

¹¹ See *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1382, 1385 (Fed. Cir. 1992).

¹² See *Intellicall (Phonometrics I)*, 952 F.2d at 1386-87 (“The present appeal centers around the functions required for the ‘call cost register means’ of the claim. The district court held that this means must provide an instantaneous visual display of cumulative call cost in dollars and cents . . .”).

¹³ See *Intellicall (Phonometrics I)*, 952 F.2d at 1388.

¹⁴ See *Intellicall (Phonometrics I)*, 952 F.2d at 1388. The Court then affirmed the district court’s holding of no infringement. See *id.* at 1388-89.

construction of the “call cost register means.”¹⁵ In *Phonometrics v. N. Telecom* (hereinafter *Phonometrics II*), the dispute centered on whether “substantially instantaneous” display required display of call cost during calls.¹⁶ This dispute involved a different aspect of the previously-construed “call cost register means” than was disputed in *Phonometrics I*.¹⁷ Neither the district court nor the Federal Circuit refused to consider the meaning of “call cost register means” in light of this new, different dispute. Indeed, in *Phonometrics II*, the Federal Circuit affirmed the district court’s construction that the “call cost register means” must display cost during calls.¹⁸

If the law were as Eolas posits, this result could not have occurred, and the panel in *Phonometrics II* would have been bound, due to *stare decisis*, to blindly adopt the construction of “call cost register means,” affirmed in *Phonometrics I*, which did not include this limitation.¹⁹ Yet this did not occur, nor should it have, given that the two cases involved very different disputes about what the claimed “call cost register means” required. Thus, the Federal Circuit in *Phonometrics II* rejected an argument by patentee, who contended, just as Eolas contends here, that the *Phonometrics II* panel was “bound” by the *Phonometrics I* construction.²⁰

Indeed, even after that argument was rejected in *Phonometrics II*, patentee argued in later cases, just as Eolas argues here, that the construction affirmed in *Phonometrics II* was “in conflict” with the Federal Circuit’s earlier affirmation of the construction in *Phonometrics I*.²¹

¹⁵ See *Phonometrics, Inc. v. N. Telecom, Inc. (Phonometrics II)*, 133 F.3d 1459, 1464 (Fed. Cir. 1998) (“Because we can dispose of this appeal by construing only the ‘call cost register means,’ we need not and do not construe other, unrelated clauses . . .”).

¹⁶ See *N. Telecom (Phonometrics II)*, 133 F.3d at 1464-65.

¹⁷ There, the dispute centered on the visual nature of “display” and “instantaneous display” and whether those requirements could be satisfied by instantaneously providing information to machine memory, rather than providing a visual display. See *Intellicall (Phonometrics I)*, 952 F.2d at 1387 (rejecting patentee’s argument that “‘instantaneous display’ requires only that a ‘digital display’ be instantaneously provided to the memory of a machine.”); 1388 (affirming district court’s construction).

¹⁸ See *N. Telecom (Phonometrics II)*, 133 F.3d at 1464-65, 1467 (“We hold that claim 1 of the ‘463 patent requires a call cost register means which functions both to provide accurate cost information while the call progresses as well as total cost information once the call has ended.”).

¹⁹ See Eolas Motion at 5.

²⁰ See *N. Telecom (Phonometrics II)*, 133 F.3d at 1464.

²¹ See, e.g., *Phonometrics, Inc. v. Westin Hotel Co. (Phonometrics IV)*, 319 F.3d 1328, 1331 (Fed. Cir. 2003).

For example, in a post-*Phonometrics II* case, patentee argued that *Phonometrics II* had improperly limited the claim to require display “to the caller” despite what it contended was contrary language in *Phonometrics I*.²² The Federal Circuit disagreed: “even if the [*Phonometrics I*] panel had believed that the claim did not include a ‘to the caller’ limitation, any expression of that belief was, as the [*Phonometrics II*] opinion states, dictum, as it was not essential to the holding in that case.”²³ It was in post- *Phonometrics II* cases—**involving subsequent litigations with identical disputes** as in *Phonometrics II*—where the Federal Circuit refused to revisit the prior construction on *stare decisis* grounds.²⁴ In contrast, as the Federal Circuit recognized, the *Phonometrics II* construction, as it dealt with a different dispute about a different aspect of the claim language, was not legally in conflict with *Phonometrics I*.

The *Phonometrics* cases support this Court’s construction and highlight Eolas’ misapplication of *stare decisis*. As this Court recognized, at issue in *Microsoft* was whether “executable application” was limited to standalone programs, not whether “executable application” was limited to native binary. Eolas’ argument that the prior construction decided,

²² See, e.g., *Westin I (Phonometrics IV)*, 319 F.3d at 1331 (“[F]ootnote 1 of *Intellicall [Phonometrics I]* correctly held that the phrase ‘to the caller’ cannot be part of the construction of the relevant claim limitation, whereas *Northern Telecom [Phonometrics II]* impermissibly imported that limitation into the claim.”).

²³ See *Westin I (Phonometrics IV)*, 319 F.3d at 1332 (emphasis, naming added); see also *Phonometrics, Inc. v. Economy Inns of Am. (Phonometrics V)*, 349 F.3d 1356, 1364 n.4 (Fed. Cir. 2003); *Phonometrics, Inc. v. Westin Hotel Co. (Phonometrics VI)*, 350 F.3d 1242, 1247 n.4 (Fed. Cir. 2003).

²⁴ Post-*Phonometrics II*, the patentee continued to argue that its “cost call register means” could read on devices that did not display cost during calls, in direct contravention of the construction affirmed in *Phonometrics II*. See, e.g., *Phonometrics, Inc. v. Choice Hotels Int’l, Inc. (Phonometrics III)*, 21 Fed. Appx. 910, 911 (Fed. Cir. 2001) (“Because **we have already held that claim 1 of the ‘463 patent does indeed claim a device that gives callers cost information both during and after a long-distance call** has ended, see *Phonometrics, Inc. v. Northern Telecom Inc. [Phonometrics II]*, 133 F.3d 1459, 1465 (Fed. Cir.1998), and because *Phonometrics* has not even attempted to show that the features of the accused device meet this limitation, we affirm the trial court’s ruling.” (emphasis, naming added)); *Westin I (Phonometrics IV)*, 319 F.3d at 1330 (“Also wholly lacking in merit is *Phonometrics*’ suggestion that the claim phrase ‘substantially instantaneous’ does not mean ‘during the call.’ **We clearly held that the phrase is to be construed as referring to the time during the call and at the termination of the call.** We held so expressly not just once, *N. Telecom [Phonometrics II]*, 133 F.3d at 1467, 45 USPQ2d at 1428, but twice, *Choice Hotels [Phonometrics III]*, 21 Fed. Appx. at 911.” (emphasis, naming added)); *Economy Inns (Phonometrics V)*, 349 F.3d 1356, 1365 (Fed. Cir. 2003) (“[e]ach such decision conveyed the same message”); *Westin II (Phonometrics VI)*, 350 F.3d 1242, 1246 (Fed. Cir. 2003) (“our decision in *Northern Telecom [Phonometrics II]* established, as a matter of law, that ‘infringement of the ‘463 patent could only be possible if [Westin’s] hotels provided real-time visual displays showing the costs of the call to the caller **during the call**’” (emphasis, naming added)).

for all time and for all circumstances, a dispute that was not before the district court or Federal Circuit, is the same type of argument advanced and rejected in the *Phonometrics* cases. Further, such a read cuts against the Federal Circuit’s own guidance that “only those terms need be construed that are in controversy, and *only to the extent necessary to resolve the controversy.*”²⁵

Eolas’ contention that this Court’s construction conflicts with the *Microsoft* construction is similarly misplaced. The *Microsoft* construction cannot control as to an aspect of claim language that was not in dispute or before the district court or Federal Circuit. Eolas’ contends today that it presented broad arguments not limited to the dispute regarding standalone program code.²⁶ Yet broad, generic arguments could not have injected into *Microsoft* the native binary issue disputed here but not there. This Court’s construction thus cannot be in conflict with the *Microsoft* construction—the two constructions address different dimensions of the claim language, and the native binary issue could not have been resolved in *Microsoft*.

Unlike the post-*Phonometrics II* litigations relied upon by Eolas, this case does not present an identical dispute to *Microsoft*. Instead, just like *Phonometrics II* as to *Phonometrics I*, this case presents a different dispute than that covered by the previously-affirmed *Microsoft* claim construction, as this Court recognized in its Order.²⁷ Affirmance of the district court’s decision in *Microsoft* does not and should not preclude consideration of the separate legal question of whether “executable application” is limited to native binary, as this Court held. The first affirmed construction does not decide, for all time and all circumstances, the legal bounds of

²⁵ See *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (emphasis added) (“It is **routine case management to require litigants to identify the aspects of their case that are material to the dispute.** In the case at bar the parties and the court knew with reasonable certainty **which claim terms were at issue with respect to infringement**; discovery was not needed for this purpose.” (emphasis added) (citation omitted)); see also, e.g., *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997) (“Claim construction is a matter of **resolution of disputed meanings** and technical scope, to clarify and when necessary to explain what the patentee covered by the claims, **for use in the determination of infringement. It is not an obligatory exercise in redundancy.**” (emphasis added)).

²⁶ See, e.g., Eolas Motion at 2.

²⁷ Markman Order at 6.

claim language aspects not then in dispute and so not properly considered. For this independent reason, Eolas' misguided *stare decisis* argument should be rejected.

2. The Intrinsic Evidence Supports The Court's Construction

Similarly, the changed intrinsic record highlights Eolas' misapplication of *stare decisis*. The cases cited by Eolas do not involve situations where, as here, a reexamination occurred after the prior claim construction decision, thereby expanding the set of intrinsic evidence relevant to the meaning of the claims. As the Federal Circuit recognized in *Phillips*, the intrinsic evidence is both the most reliable and the most important evidence for claim construction.²⁸ A patent's prosecution history, of which reexamination is a part, "provides evidence of how the PTO and the inventor understood the patent."²⁹ As Eolas recognized in its Motion, in *Microsoft* "the Federal Circuit held that 'the district court correctly gleaned the proper definition of the term *from the intrinsic evidence including* the patent claims and *the prosecution history.*'"³⁰ Yet the intrinsic evidence has since expanded via two reexaminations of the '906 patent. As one example, during the first reexamination, the Examiner stated that

*[t]o be "executable" the contents of the memory location pointed to by the program counter must contain an instruction in binary form that is a member of the native instruction set of the microprocessor (i.e., a binary machine language instruction).*³¹

Applicant never responded or disagreed with that statement, a fact that the Federal Circuit has held relevant to claim construction.³² That and other relevant evidence was not part of the intrinsic record and could not have been considered during the prior determination, making *stare*

²⁸ See, e.g., *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315-19 (Fed. Cir. 2005) (en banc).

²⁹ See *Phillips*, 415 F.3d at 1317.

³⁰ Eolas Motion at 4 (quoting *Eolas Techs. Inc. v. Microsoft Corp.*, 399 F.3d 1325, 1338 (Fed. Cir. 2005)) (emphasis added).

³¹ See 9/13/2011 Declaration of Lauren N. Robinson In Support Of Defendants' Opposition To Plaintiff Eolas' Motion To Reconsider ("Robinson Decl."), Ex. A (9/27/2005 Notice of Intent to Issue a Reexamination Certificate) at 55 [PH_001_0000785963] (emphasis added).

³² See, e.g., *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 979 (Fed. Cir. 1999) (considering Examiner's Reasons for Allowance and applicant's lack of response); see also, e.g., *Springs Window Fashions L.P. v. Novo Industries, L.P.*, 323 F.3d 989, 995 (Fed. Cir. 2003) (if statements were mistaken "then the applicant should have amended the file to reflect the error, as the applicant is the party in the best position to do so").

decisis inappropriate and inapplicable for this additional, independent reason.

C. EOLAS' ATTACKS ON THE COURT'S CLAIM CONSTRUCTION ARE MERITLESS

As a fallback to its *stare decisis* argument, Eolas' Motion re-urges three of its previously asserted "merits-based" arguments. None has merit.

1. The Intrinsic Evidence Supports The Court's Construction

First, Eolas re-hashes its old argument that the intrinsic evidence does not justify the limitation that an "executable application" be "a compiled program that is in native code."³³ Eolas' argument is conclusory. It fails to address, let alone refute, the Court's detailed analysis of both prosecution history and specification passages that do, indeed, justify that limitation.³⁴

2. The Court's Construction Is Consistent With The Doctrine Of Claim Differentiation

Eolas next criticizes the Court for attributing meaning to applicant's decision, during prosecution, to replace the claim term "controllable application" with the different term "executable application." As the Court correctly explains, after the prosecution history revealed the originally-claimed term "controllable application" was construed by the Examiner to encompass both "executable" code and "interpretable" code, applicant redirected the claims to cover an "executable application," rather than an interpretable script.³⁵

In attacking the Court's analysis, Eolas again resorts to a false premise—that all examples of a term recited in a dependent claim must be subsets of a broader term in the corresponding independent claim. Specifically, Eolas posits that, because the term "controllable application" is recited in dependent Claim 2, and independent Claim 1 contains the term "executable application," all "controllable applications" must be "executable applications."³⁶

Eolas' argument ignores that a dependent claim can be narrower in scope than its

³³ See Eolas Motion at 8-9.

³⁴ See Markman Order at 6-11.

³⁵ See Markman Order at 8-10.

³⁶ See Eolas Motion at 9-10.

independent claim by reciting subject matter that intersects with that of the independent claim partially, but is not a complete subset. An example may be useful. Consider a patent in which Claim 1 covers “a transportation apparatus with a motor and wheels,” and dependent Claim 2 covers “the apparatus of claim 1 in which the apparatus is an aircraft.” Under the purported logic of Eolas’s argument, the term “aircraft” would need to be construed as an apparatus having both a motor and wheels. But that would be incorrect both factually and legally. Some aircraft (like glider planes) lack motors; and other aircraft (like some sea planes) lack wheels. Yet these example claims makes sense, and are consistent with the doctrine of claim differentiation, because Claim 2 claims the intersection consisting of aircraft that have both a motor and wheels, and that intersection is narrower than the scope of Claim 1.

The same is true here. Although some “controllable applications”—like scripts—are not “executable applications,” other “controllable applications”—like the spreadsheet and word processor programs referenced by the Court—are “executable applications.” Claim 2 of the ‘906 patent therefore appropriately claims the intersection of “executable applications” and “controllable applications.” Because it claims only that intersection, Claim 2’s scope is narrower than Claim 1’s, consistent with the doctrine of claim differentiation.³⁷

3. The Court Correctly Interpreted The Dictionary Definition Of “Executable Program”

The Court also correctly interpreted the dictionary definition of “executable program.” As the Court correctly noted, that definition reveals that the term “executable program” (1) is primarily used to designate a compiled program in machine code that can be loaded into memory

³⁷ In any event, the doctrine of claims differentiation creates a mere rebuttable presumption, which is overcome when the specification or prosecution history clarifies the meaning of the claim term at issue. *See, e.g., Kraft Foods, Inc. v. Int’l Trading Co.*, 203 F.3d 1362, 1368 (Fed. Cir. 2000) (The doctrine of claim differentiation “only creates a presumption that each claim in a patent has a different scope; it is ‘not a hard and fast rule of construction.’” (quoting *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998))); *O.I. Corp. v. Tekmar Co., Inc.*, 115 F.3d 1576, 1582 (Fed. Cir. 1997) (“Although the doctrine of claim differentiation may at times be controlling, construction of claims is not based solely upon the language of other claims; the doctrine cannot alter a definition that is otherwise clear from the claim language, description, and prosecution history.”).

and run, but (2) “can” also reference source code when used in the context of interpretable programs.³⁸ As noted above, Eolas’ Motion does not even address, and certainly does not refute, the Court’s detailed analysis of both prosecution history and specification passages clarifying that, in the patents-in-suit, the term “executable application” was accorded that term’s primary meaning: a compiled program in machine code that can be loaded into memory and run.³⁹

For these reasons, Eolas’ re-urged “merits” arguments should be rejected.

D. AN INTERLOCUTORY APPEAL WOULD DISRUPT THE ORDERLY CONCLUSION OF THIS LITIGATION AND EOLAS HAS NOT SATISFIED THE STEEP STANDARD OF SECTION 1292(b)

The final judgment rule is “an historic characteristic of federal appellate procedure.”⁴⁰ It requires that “a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits.”⁴¹ Because interlocutory appeals can be disruptive, Section 1292(b) is a limited exception to the final judgment rule. Indeed, it is limited such that *both* the district court and appeal court must agree that an interlocutory appeal is warranted in their *unreviewable* discretion. An interlocutory appeal under Section 1292(b) is only permissible where (1) the “order involves a controlling issue of law”; (2) “as to which there is a substantial ground for difference of opinion”; and (3) where an “immediate appeal from the order may materially advance the ultimate termination of the litigation.”⁴² Each of these requirements must be met for certification to be appropriate.⁴³ As the Federal Circuit has repeatedly explained, the “court does not encourage interlocutory appeals from claim construction decisions.”⁴⁴ Particularly ill-suited

³⁸ See Markman Order at 9-11.

³⁹ See Markman Order at 6-11.

⁴⁰ *Flanagan v. United States*, 465 U.S. 259, 263 (1984).

⁴¹ *Id.* (internal citation omitted).

⁴² 28 U.S.C. § 1292(b).

⁴³ *Monroe v. Cessna Aircraft Co.*, No. 2:05-CV-250, 2006 WL 1305116, at *1 (E.D. Tex. May 9, 2006) (Davis, J.).

⁴⁴ *Canon, Inc. v. GCC Intern. Ltd.*, 263 Fed. Appx. 57, 61 (Fed. Cir. 2008); see also, e.g., *Portney v. CIBA Vision Corp.*, 401 Fed. Appx. 526, 529 (Fed. Cir. 2010) (“This court has generally refrained from granting § 1292(b) petitions to resolve claim construction disputes, instead, leaving such matters to be determined after entry of final judgment.”). Eolas’s reliance on *Shire LLC v. Sandoz, Inc.*, 345 Fed. Appx. 535, 2009 WL 330235 (Fed. Cir. 2009) is unavailing. This case does not present the certified question that confronted the Federal Circuit in *Shire*, where a

for interlocutory appeal is a claim construction dispute, such as the one proposed by Eolas here, that admittedly relates only to *some* of the infringement contentions in the case. A piecemeal interlocutory appeal has no promise of resolving the case generally and thus would augur mass delay in an inevitable trial on the theories which are unaffected by the supposed error in this Court's construction. It is thus unsurprising that none of the statutory requirements is satisfied.

1. Eolas Fails To Establish That Its Putative Challenge To An Aspect of This Court's "Executable Application" Construction Involves A "Controlling" Issue Of Law

Eolas argues that its proposed appellate challenge to this Court's "executable application" construction is a "controlling issue of law."⁴⁵ Proving that the disputed order is "controlling" is a key requirement.⁴⁶ The gist of Eolas' proposed interlocutory appeal is that this Court failed to adhere to precedent in construing "executable application," supposedly in conflict with *Eolas Technologies Inc. v. Microsoft Corp.*⁴⁷ The Federal Circuit has made clear that fact-specific rulings are not well-suited to a Section 1292(b) certification.⁴⁸ Eolas thus ignores the addition of two reexaminations to the intrinsic evidence, requiring appellate review of a complex new record

district court expressly declined to give issue preclusive effect to a prior district court's claim construction that it acknowledged could be dispositive as to infringement of one of the patents-in-suit. *See id.* In *Shire*, the Federal Circuit accepted the petition simply to determine whether "a patentee who settles an earlier infringement case after a *Markman* ruling has issued is precluded under the doctrine of collateral estoppel from relitigating *claim-construction issues determined in the prior case.*" *Id.* at *1 (emphasis added). By contrast, the construction of "executable application" from the prior Microsoft litigation simply did not address the issues raised by the parties' claim construction dispute in this action regarding that term and Eolas does not contend it would finally resolve the case.

⁴⁵ Eolas Motion at 11.

⁴⁶ *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642 (Fed. Cir.1991) (failure to prove that the disputed order is controlling warrants denial of a 1292(b) application).

⁴⁷ 399 F.3d 1325, 1338-41 (Fed.Cir. 2005).

⁴⁸ *See Raber v. Pittway Corp.*, Misc. No. 388, 1994 WL 18499, at *2 (Fed. Cir. Jan 13, 1994) ("The certified order here concerns the law as applied to the specific facts of this case. There is no new question of law that would be of general interest or that would be applicable to a wide range of cases. Given the limited applicability of the question and its connection with the facts of this case, we do not consider this order appropriate for immediate review[.]"); *Portney*, 401 Fed. Appx. at 529 (noting that the Federal Circuit has only once accepted certification of a claim construction issue, in the unique circumstance where the Federal Circuit already had pending before it a prior appeal in the same case requiring review of claim construction issues in the context of denial of a motion for preliminary injunction, where acceptance of the later-certified question enabled the court to consider the district court's claim construction on a more complete record) (citing *Regents of Univ., Cal. v. Dako North America*, 477 F.3d 1335 (Fed. Cir. 2007)).

relevant to claim construction. To side-step its fact-specific challenge, Eolas tries to cast its attack as a pure *stare decisis* question. Indeed, Eolas suggests that an interlocutory appeal could be conducted “without making an intensive inquiry into the record.”⁴⁹ This contention ignores the different disputes, technology, and record between this case and *Microsoft*.

Moreover, Eolas never argues that its proposed interlocutory appeal is controlling of *this case*. Eolas does *not* argue that the putative interlocutory appeal will affect its infringement assertions for all accused features. Instead, Eolas maintains that it has valid infringement claims worthy of a trial under this Court’s claim construction order and in fact sought the resetting of the trial in this case for February.⁵⁰ Eolas has steadfastly refused to acknowledge that this Court’s construction of “executable application” eliminates any of its infringement claims.⁵¹

Thus, Eolas is seeking an interlocutory appeal without even contending that such an appeal might control the disposition of the case generally.⁵² A fractional complaint about this Court’s ruling is clearly unworthy of a 1292(b) certification for an interlocutory appeal. Eolas’ studied failure in its motion to address, or even mention, how much effect this Court’s “executable application” construction would have on its many different infringement allegations demonstrates that this is not the extraordinary case where an interlocutory appeal is warranted.

2. Eolas’ Argument That This Court’s Claim Construction Order Violates *Stare Decisis* Is Meritless

Eolas’ application for a 1292(b) certification is premised on the assumption that this Court’s claim construction order violates *stare decisis*. As explained in II.B above, Eolas’ misapplies the doctrine of *stare decisis*. Such an argument is not worthy of 1292(b) certification.

⁴⁹ Eolas Motion at 11.

⁵⁰ 8/31/2001 Joint Motion to Vacate the Schedule (D.N. 957) at 2-3.

⁵¹ Robinson Decl., Ex B (email chain between E. Reines and J. Budwin).

⁵² Defendants disagree and believe this Court’s construction at least eliminates Eolas’ infringement allegations against the script features.

3. An Interlocutory Appeal Would Not Advance The Ultimate Termination Of The Litigation

Necessary to any 1292(b) certification is convincing proof that an interlocutory appeal would advance the ultimate termination of the litigation. Eolas proposes that the trial the Court recently set for February 2012 be put on hold so that it can pursue an appeal that will most likely be resolved sometime in 2013, placing trial of this action in 2014, if not 2015.⁵³ As this Court explained in denying 1292(b) certification in *Monroe v. Cessna Aircraft Co.*, because trial was seven months away, an interlocutory appeal would not advance resolution, and the “case might not get to trial for up two years or longer.”⁵⁴ Further, once “the case was finally tried, appealable issues might still exist, which could lead to another appeal and remand.”⁵⁵

Here, interlocutory appeal makes even less sense, especially given that Eolas does not even argue that this claim construction dispute is dispositive, as explained above. Eolas’ infringement allegations must ultimately be adjudicated. Further, the February trial could resolve this matter via other avenues, including, for example, a judgment of invalidity. Eolas’ attempt to expedite its challenge to this Court’s “executable application” construction is a recipe for needless and meritless delay of the resolution of all the claims in this case.

III. CONCLUSION

For the foregoing reasons, this Court should deny Eolas’ Motion in its entirety.

⁵³ Robinson Decl., Ex. B, U.S. Court of Appeals for the Federal Circuit, Median Time to Disposition in Cases Terminated After Hearing or Submission, http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Median_Dispositon_Time_for_Cases_Terminated_after_Hearing_or_Submission_Detailed_Table_of_Data_2001-2010.pdf (11.0 months as the median time from docketing to disposition for district court cases in 2010, the latest year reported).

⁵⁴ *Monroe v. Cessna Aircraft Co.*, No. 2:05-CV-250, 2006 WL 1305116 at *2-3 (E.D. Tex. May 9, 2006).

⁵⁵ *Id.*

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