Exhibit “G”

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

EOLAS TECHNOLOGIES, INC.	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**CASE NO. 6:09-CV-446**
	§	**PATENT CASE**
ADOBE SYSTEMS, INC., et al	§	
	§	
Defendants.	§	

ORDER

Before the Court is Plaintiff Eolas Technologies, Inc.'s ("Eolas") Motion to Reconsider Construction of "Executable Application" In Memorandum Opinion and Order (Dkt. 914) or, In The Alternative, To Certify The Question For Interlocutory Appeal (Docket No. 965). After review of the briefing and oral arguments, the Court **GRANTS** the motion.

BACKGROUND

In October 2009, Eolas brought this suit against twenty-one Defendants alleging infringement of U.S. Patent Nos. 5,838,906 (the "'906 Patent") and 7,599,985 (the "'985 Patent"). The patents are generally directed to a software system that is operable without user activation to access an object, present it in a browser display window, and then allow a user to manipulate the object.

In December 2000, Eolas filed suit against Microsoft Corporation for infringement of the '906 Patent in the Northern District of Illinois. *Eolas v. Microsoft Corp.*, 2000 U.S. Dist. LEXIS 18886 (N.D. Ill. 2000) ("*Microsoft*"). The *Microsoft* Court construed a term that is disputed in this case, "executable application." The *Microsoft* Court construed the term 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." *Id*. at *13–15. The *Microsoft* case proceeded to trial and was appealed to the Federal Circuit. On appeal, the Federal Circuit addressed—among other things—construction of the term executable application. *Eolas v. Microsoft Corp.*, 399 F.3d 1325, 1338 (Fed. Cir. 2005). The Federal Circuit affirmed the District Court's construction. *Id*.

The dispute and analysis regarding "executable application" in the Illinois District Court and at the Federal Circuit focused on whether executable applications were limited to standalone programs. *Id*. at 1336–37. Here, the parties disagreed about whether the program was 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). After noting that the issue was not squarely addressed when the Federal Circuit affirmed the Court in *Microsoft*, this Court did an independent analysis of the claim in light of the intrinsic record and construed the term "executable application" to mean "a compiled program that is in native machine code in a format that can be loaded into memory and run." Docket No. 914, at 11.

ANALYSIS

As a preliminary matter, the Court does not take motions to reconsider lightly. A motion to reconsider should not be used to re-urge matters a party has already advanced. *Litepanels, LLC v. Gekko Tech., Ltd.*, 2006 U.S. Dist. LEXIS 84110, at *2 (E.D. Tex. 2006) (Davis, J). Here, Eolas properly raises a very important issue that—although raised initially in the claim construction briefing and at the *Markman* hearing—was not fully briefed and argued until the motion to reconsider. Eolas's motion to reconsider is appropriate.

The issue for reconsideration is a narrow one: whether the Court is bound by the principle

of *stare decisis* to adopt the Illinois District Court's construction of "executable application" as affirmed by the Federal Circuit. After a thorough analysis of the case law, the answer is yes.

In an effort to promote uniformity and predictability in the treatment of a patent, the Supreme Court in *Markman* held that claim construction is decided as a matter of law and would thus be subject to the doctrine of *stare decisis*. *Markman v. Westview Instruments*, 517 U.S. 370, 390–91 (1996) ("[T]reating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through the application of *stare decisis* . . . ."). The Federal Circuit has likewise "recognize[d] the national *stare decisis* effect that [its] decisions on claim construction have." *Key Pharm. v. Hercon Labs. Corp.*, 161 F.3d 709, 716 (Fed. Cir. 1998).

This Court struggles with the troublesome situation that arises when a plaintiff secures claim construction of a term against one defendant, and that construction is binding as to all future defendants regardless of the initial claim scope arguments raised. However, the principle of *stare decisis* would lose all meaning if a later defendant could unbind itself by merely framing the issue differently. The Supreme Court has decided that claim construction is a matter of law; thus, when the Federal Circuit construes a term, it does so as a matter of law and its holding is binding. *See Markman*, 517 U.S. at 391; *see also Amgen, Inc. v. Hoffmann-LaRoche Ltd.*, 494 F. Supp. 2d 54, 60–61 (D. Mass. 2007) (holding when the Federal Circuit has already construed claims, that Court's construction is binding and district courts may not modify its holding); *Pass & Seymour, Inc. v. Hubbell Inc*., 2011 U.S. Dist. LEXIS 1135, at *4 (N.D.N.Y. 2011) ("[D]istrict courts are bound to apply the Federal Circuit's claim constructions, even as against non-parties to the initial litigation."); *Rambus Inc. v. Hynix Semiconductor, Inc*., 569 F. Supp. 2d 946, 963–64 (N.D. Cal. 2008) ("A district court must apply the Federal Circuit's claim construction even where a non-party to the initial

litigation would like to present new arguments.").

Accordingly, the Court hereby construes the term "executable application" in the same manner as construed by the Illinois District Court and affirmed by the Federal Circuit as "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."

CONCLUSION

Plaintiff's Motion to Reconsider is **GRANTED**. The Court construes the term "executable application" as set forth above. The portion of the Court's Memorandum Opinion and Order setting forth the claim construction of "executable application" as contained in the '906 and '985 patents (Docket No. 914) is hereby withdrawn.

So ORDERED and SIGNED this 23rd day of September, 2011.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE