

Case No. 14-1631

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DIETGOAL INNOVATIONS LLC,

Plaintiff-Appellant,

v.

**BRAVO MEDIA LLC (DIVISION OF NBC
UNIVERSAL MEDIA, LLC),**

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of New York
In Case No. 1:13-cv-08391-PAE, Judge Paul A. Engelmayer

**BRIEF OF AMICI CURIAE APPLICATION DEVELOPERS ALLIANCE,
COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION,
ELECTRONIC FRONTIER FOUNDATION, ENGINE ADVOCACY,
NATIONAL RESTAURANT ASSOCIATION, AND PUBLIC
KNOWLEDGE IN SUPPORT OF DEFENDANT-APPELLEE BRAVO
MEDIA, LLC**

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November 24, 2014

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *Amici Curiae* certifies that:

1. The full name of the amici represented by me is:

Application Developers Alliance

Computer and Communications Industry Association

Electronic Frontier Foundation

Engine Advocacy

National Restaurant Association

Public Knowledge

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amici curiae* represented by me are:

None.

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4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or are expected to appear in this Court is: Daniel K. Nazer, Vera Ranieri, Electronic Frontier Foundation, San Francisco, California, and Charles Duan, Public Knowledge, Washington, D.C.

November 24, 2014

/s/ Vera Ranieri

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Application Developers Alliance, Computer and Communications Industry Association, Electronic Frontier Foundation, Engine Advocacy, National Restaurant Association, and Public Knowledge

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INTEREST OF *AMICI CURIAE*

The Application Developers Alliance (“Alliance”) is a global association of more than 35,000 individual software developers and hundreds of companies who design and build apps for use on mobile devices like smartphones and tablets. Apps run on software platforms, including Google’s Android, Apple’s iOS, and Facebook, and are sold or distributed through virtual stores like Apple’s App Store, Google’s Play Store, Amazon.com, and Handango. The Alliance was formed to promote continued growth and innovation in the rapidly growing app industry, and routinely speaks as the industry’s voice to legislators and policy-makers.¹

The Computer & Communications Industry Association (“CCIA”) represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services—companies that collectively generate more than \$465 billion in annual revenues.²

The Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 22,000

¹ Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Furthermore, no person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

² A list of CCIA members is available at <http://www.ccianet.org/members>.

dues-paying members have a strong interest in helping the courts and policy-makers strike the appropriate balance between intellectual property and the public interest.

Engine Advocacy is a non-profit organization that supports the growth of technology entrepreneurship through economic research, policy analysis, and advocacy on local and national issues. As part of its advocacy efforts, Engine has built a coalition of more than 500 high-growth businesses and associations, pioneers, innovators, investors, and technologists from all over the country, committed to engaging on the policy issues that affect the way they run their businesses. With the burden of litigation by patent assertion entities resting unfairly on the smallest—and most productive—businesses in the economy, Engine Advocacy, as the voice of startups in government, has a vested interest in leveling this litigation playing field.

The National Restaurant Association (“NRA”) is the largest trade association in the United States representing the restaurant and foodservice industry, which employs over 13.1 million people at some 980,000 locations. NRA membership consists of nearly 500,000 restaurant and foodservice locations, many of which use mobile and other web applications to facilitate marketing, ordering, and sales of their products and services to their customers.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public’s access to knowledge; promoting creativity through balanced intellectual property rights; and upholding and protecting the rights of consumers to use innovative technology lawfully. As part

of this mission, Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

Amici have served as *amicus* in key patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) (“*Alice*”), *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), *Bilski v. Kappos*, 561 U.S. 593 (2010); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

INTRODUCTION

Under the *Alice* standard some patents, like the '516 patent asserted by DietGoal, are so clearly ineligible subject matter that formal claim construction is unnecessary to make the invalidity determination. As DietGoal's opening brief demonstrates, there are no questions of fact and no material claim construction issues in this case. The District Court correctly and efficiently disposed of DietGoal's invalid patent. Even though it fails to present a single plausible argument for eligibility of its patent under 35 U.S.C. § 101, DietGoal demands that the case be remanded to spend resources on discovery and claim construction. This Court should reject DietGoal's attempt to bog down the system. It should allow the courts to apply *Alice* efficiently where appropriate, as Judge Engelmayer did in this case.

DietGoal's arguments in this case are identical to those recently rejected in *Ultramercial, Inc. v. Hulu, LLC*, No. 10-CV-1544, 2014 WL 5904902 (Fed. Cir.

Nov. 14, 2014) (“*Ultramercial*”). The patentee in *Ultramercial* insisted that its patent could not be found invalid under § 101 on a motion to dismiss. On remand from the Supreme Court, this Court applied *Alice* and upheld the lower court’s dismissal. *Ultramercial* and numerous other cases show that early application of *Alice* works well in practice and is essential if the Supreme Court’s decision is to provide a meaningful benefit for those accused of infringing invalid abstract patents.

ARGUMENT

I. This court should encourage efficient resolution of eligibility questions implicating section 101.

A. *Efficient resolution of patent cases is crucial to deterring coercive litigation practices.*

The Court should approve of early and efficient resolution of § 101 issues, as occurred in the district court here, because it alleviates a substantial problem of coercive and costly litigation by patent assertion entities (“PAEs”). PAEs such as DietGoal have flourished in recent years. For example, it is estimated that over two-thirds of all new patent litigations filed in 2013 were brought by PAEs. *See* PwC, Ed., *2014 Patent Litigation Study*, July 2014, at 2.³ For defendants hit with patent infringement suits filed by PAEs, costs of litigation quickly mount. *See* Am. Intellectual Property Law Ass’n, *Report of the Economic Survey, 2013*, at 35 (estimating the costs through discovery for a patent defendant sued by a PAE to

³ Available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf.

range between \$300,000 and \$2,500,000, depending on the amount of damages in controversy).

Because the cost of litigating to a merits decision are so high, defendants are often pressured, whether explicitly or implicitly, to settle with the PAE for less than the cost of challenging even clearly invalid or noninfringed patents. *See, e.g., Eon-Net LP v. Flagstar Bancorp.*, 653 F.3d 1314 (Fed. Cir. 2011) (noting that discovery costs, often primarily borne by the accused infringer, “increas[e] the nuisance value that an accused infringer would be willing to settle for in a patent infringement case.”); *Lumen View Tech., LLC v. Findthebest.com, Inc.*, No. 13-CV-3599, 2014 WL 2440867 (S.D.N.Y. May 30, 2014) (“*Lumen View I*”) (finding that “[the patentee’s] motivation in this litigation was to extract a nuisance settlement from [the defendant] FTB on the theory that FTB would rather pay an unjustified license fee than bear the costs of the threatened expensive litigation.”).⁴

This is a particularly acute problem for the largest target of PAE lawsuits: small businesses. *See* Colleen Chien, *Startups and Patent Trolls*, 17 *Stan. Tech. L. Rev.* 461, 471 (2014) (noting that more than half of all defendants involved in cases brought by PAEs were against those with annual revenues of \$10 million or less). Indeed, small businesses face challenges beyond the costs of defense.

⁴ FindtheBest.com was recently awarded attorneys’ fees in the amount of \$148,592 as well as a doubling as a deterrence factor, for a total of \$297,184. *See Lumen View Tech. LLC v. Findthebest.com, Inc.*, No. 13-CV-3599, 2014 WL 5389215 (S.D.N.Y. Oct. 23, 2014). The amount recognized before doubling is almost twice the amount originally requested as a settlement amount by the patentee. *See Lumen View I*, 2014 WL 2440867, at *3 (patentee’s original settlement demand was \$85,000).

Frivolous patent lawsuits also take key management and engineers away from their day-to-day duties. *See id.* at 472.⁵

One crucial way to stem abuse by PAEs that use the cost and vexation of litigation to coerce settlement is to create incentives for those facing litigation (or litigation threats) to pursue meritorious defenses of noninfringement and invalidity as early as possible. *See* Brian T. Yeh, Cong. Research Serv., R42668, *An Overview of the “Patent Trolls” Debate* at 5 (2012)⁶ (citing John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO L. J. 677, 694 (2011)) (“Studies suggest that PAEs rarely prevail on the merits. Their win rate in cases decided on the merits is just 8 percent, versus 40 percent for other entities But they persist with litigation nonetheless, apparently supported by the licensing fees obtained by posing a credible threat of *extended* litigation.”) (emphasis added).⁷

Indeed, the most troubling aspect of the PAE business model—using the cost of defense as leverage to pressure settlement even where the litigation lacks merit—is necessarily discouraged by additional opportunities to dispose of cases at early stages of litigation. *See Ultramercial*, 2014 WL 5904902, at *8 (Mayer, J.,

⁵ Available at <https://journals.law.stanford.edu/sites/default/files/stanford-technology-law-review/online/startupsandpatenttrolls.pdf>.

⁶ Available at https://www.eff.org/files/r42668_0.pdf.

⁷ The study by Allison, Lemley, and Walker considered the win rate of the most litigious PAEs, defined as those who have sued eight or more times on the same patents. Data on overall win rates shows a 26% and 38% success rate on the merits for PAEs and other entities, respectively. *See* PwC, Ed., *2014 Patent Litigation Study*, July 2014, at 11.

concurring) (“resolving subject matter eligibility at the outset provides a bulwark against vexatious infringement suits”). Defendants who might otherwise choose to settle will be incentivized to challenge nuisance claims if they might be able to see the case disposed of efficiently.

B. *Claim construction should not impose an unnecessary barrier to efficient resolution of matters.*

“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.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). “[D]istrict courts are not (and should not be) required to construe every limitation present in a patent’s asserted claims.” *O2 Micro Intern. Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008). Indeed, courts are not required to construe *any* claim if the construction is not disputed or would have no effect on the outcome of a motion. *See, e.g., Perfect Web Techs. v. InfoUSA Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009) (“[A] district court need not construe *undisputed* claim terms prior to issuing a summary judgment of invalidity.”) (emphasis added and internal quotation marks omitted); *U.S. Surgical Corp.*, 103 F.3d at 1568 (“Although claim construction may occasionally be necessary in obviousness determinations, when the meaning or scope of technical terms and words of art is unclear and in dispute and requires resolution in order to determine obviousness, in this case none of these rejected instructions was directed to, or has been shown reasonably to affect, the determination of obviousness.”).

And this Court has made clear that district courts have the inherent ability to control their dockets, including when and to what extent it engages in claim construction. *See, e.g., Vivid Techs., Inc. v. Am. Science*, 200 F.3d 795, 803 (Fed. Cir. 2000). Given that claim construction is often a costly and time-consuming procedure⁸, district courts should be encouraged to formally construe claims only where construction is material to the resolution of the dispute.

Notably, the patentee in *Ultramercial* presented an identical argument to that of DietGoal in this case. After that appeal was remanded for the second time by the Supreme Court, Ultramercial argued that the case must be sent back to the district court for claim construction and further fact finding. *See* Supplemental Brief of Plaintiffs-Appellants at 12-14, *Ultramercial, Inc. v. Hulu, LLC*, No. 2010-1544 (Fed. Cir. Aug. 27, 2014) (insisting that the court could not find the patent claims abstract “without the benefit of any claim construction or factual record”). This Court rejected that argument and upheld the district court’s decision to find the claims invalid under § 101 without formal claim construction. *Ultramercial*, 2014 WL 5904902, at *9, 13.

Furthermore, DietGoal’s complaint about lack of claim construction should be rejected because DietGoal failed to present any construction that would have changed the district court’s outcome. It is well established that an argument not

⁸ *See generally* Claude M. Stern, *Wilson Sporting Goods and Lava Trading: Has the Federal Circuit Mandated A More Complicated, Expensive but Comprehensive Markman Proceeding?*, 19 *Intell. Prop. & Tech. L.J.* 1, 1 (2007) (“the discovery process associated with the Markman hearing [is] becoming more complicated and expensive”).

fully presented on appeal is deemed waived. *E.g.*, *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1341 (Fed. Cir. 2006); *Pentax Corp. v. Lewellyn Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) (“[T]his court will not address issues raised for the first time on appeal or issues not presented on appeal”); *see also Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 582 F.3d 1288, 1296 (Fed. Cir. 2009) (“If a party . . . presents only a skeletal or undeveloped argument to the trial court, we may deem that argument waived on appeal”).

Here, DietGoal contends that the district court erred when it “failed to conduct any construction of any of the terms of the 62 claims contained in the ’516 Patent.” Appellant Br. 28. But to support this, DietGoal presents no alternate claim construction that would have led the district court to a different conclusion. Primarily, DietGoal merely parrots back the claim language that the district court had already read and considered. *Compare id.* at 29 (“Rather, the claims require that the user be able to select a meal from the Picture Menu, which displays meals from the Database”), *with DietGoal Innovations, LLC v. Bravo Media, LLC*, No. 13-CV-8391, 2014 WL 3582914, at *2 (S.D.N.Y. July 8, 2014) (reciting claim 12 of the ’516 patent) (“allowing a user to choose meals from one or more Picture Menu, which display . . . meals . . . from the Database”). Recitation of the claims does not amount to a proposal of a claim construction at all, much less a proposal of a claim construction that would have changed the district court’s outcome.

DietGoal does cite claim constructions in the related *Kellan* and *Time* cases⁹, but again fails to explain how the constructions differ from the district court’s analysis or how the outcome would have differed had DietGoal’s proposed constructions been adopted. For example, DietGoal cites a construction of “Customized eating goals” as “computer implemented, user-specific dietary objectives,” which it contends differs from the district court’s interpretation of the same term to mean “food preferences.” Appellant Br. 30. But the district court did consider the “computer implemented” aspect of the claim thoroughly, *see DietGoal Innovations*, 2014 WL 3582914, at *11-14, and it is apparent neither from Appellant’s brief nor from the plain meaning of words why “user-specific dietary objectives” differs from “food preferences.”¹⁰ Thus, DietGoal has failed to fully develop its argument for the necessity of claim construction in this case, and accordingly its argument must fail.

C. *Patents implicated by Alice are amenable to early resolution by motions.*

There can be no doubt that, in the wake of the Supreme Court’s decision in *Alice*, motions arguing a lack of patent-eligible subject matter might resolve litigation. Since the Supreme Court issued its decision, at least 14 cases have had

⁹ *See DietGoal Innovations, LLC v. Time, Inc.*, No. 13-CV-8381, 2014 WL 2990237 (S.D.N.Y. June 30, 2014); *DietGoal Innovations, LLC v. Kellan Rest. Mgmt. Corp.*, No. 12-CV-761, 2014 WL 582994 (E.D. Tex. Feb. 13, 2014).

¹⁰ DietGoal does present a colorable claim construction argument as to the term “Picture Menus” (Appellant Br. 30), but that argument fails for other reasons, *see infra* Section II.B.

claims declared invalid by this Court or a district court as a direct result of *Alice*.¹¹ In some of these cases, the parties had already incurred significant time and expense litigating before the court invalidated the claims at issue. *See, e.g., Walker Digital, LLC v. Google, Inc.*, No. 11-CV-318, 2014 WL 4365245 (D. Del. Sept. 3, 2014) (invalidating claims under § 101; case originally filed Apr. 11, 2011).

In contrast, several cases have been properly resolved on § 101 issues at an early stage. These include this Court's recent decision in *Ultramercial* as well as numerous other cases deciding § 101 by summary judgment or on a motion to dismiss. *See, e.g., Ultramercial*, 2014 WL 5904902; *Bancorp Servs., LLC v. Sun Life Assurance Co.*, 687 F.3d 1266, 1273-74 (Fed. Cir. 2012); *OIP Techs., Inc. v. Amazon.com, Inc.*, No. 12-CV-1233, 2012 WL 3985118 (N.D. Cal. Sept. 11, 2012); *Uniloc USA, Inc. v. Rackspace Hosting, Inc.*, No. 12-CV-375 (E.D. Tex.

¹¹ These cases include: *Ultramercial*, 2014 WL 5904902; *Comcast IP Holdings I, LLC v. Sprint Commc'ns Co. L.P.*, ___ F. Supp. 2d ___, 2014 WL 3542055 (D. Del. July 16, 2014); *Digitech Image Techs., LLC v. Elecs. for Imaging, Inc.*, 758 F.3d 1344 (Fed. Cir. 2014); *Planet Bingo, LLC v. VKGS, LLC*, 576 Fed. Appx. 1005, 2014 WL 4195188 (Fed. Cir. Aug. 26, 2014) (non precedential); *CMG Fin. Servs., Inc. v. Pac. Trust Bank, F.S.B.*, No. 11-CV-10344, 2014 WL 4922349 (C.D. Cal. Aug. 29, 2014); *Loyalty Conversion Sys. Corp. v. Am. Airlines, Inc.*, No. 13-CV-655, 2014 WL 3736514 (E.D. Tex. July 29, 2014); *Walker Digital, LLC v. Google, Inc.*, 2014 WL 4365245 (D. Del. Sept. 3, 2014); *Tuxis Techs., LLC v. Amazon.com, Inc.*, No. 13-CV-1771, 2014 WL 4382446 (D. Del. Sept. 3, 2014); *McRO, Inc. v. Activision Pub., Inc.*, No. 14-CV-336, 2014 WL 4759953 (C.D. Cal. Sept. 22, 2014); *buySAFE, Inc. v. Google, Inc.*, 765 F.3d 1350 (Fed. Cir. 2014); *Eclipse IP, LLC v. McKinley Equip. Corp.*, No. 14-CV-154, 2014 WL 4407592 (C.D. Cal. Sept. 4, 2014); *Every Penny Counts, Inc. v. Wells Fargo Bank, N.A.*, ___ F. Supp. 2d ___, 2014 WL 869092 (M.D. Fla. Mar. 5, 2014); *Peter Wolf v. Capstone Photography, Inc.*, Order, No. 13-CV-09573, Doc. 49 (C.D. Cal. Oct. 28, 2014).

March 27, 2013); *Cyberfone Sys., LLC v. Cellco P'ship, et al.*, 995 F. Supp. 2d 710 (D. Del., 2012); *Glory Licensing, L.L.C. v. Toys "R" Us, Inc.*, No. 09-CV-4252, 2011 WL 1870591 (D.N.J. May 16, 2011). As recognized by Judge Mayer, “[p]atent eligibility issues can often be resolved without lengthy claim construction, and an early determination that the subject matter of asserted claims is patent ineligible can spare both litigants and courts years of needless litigation.” *I/P Engine, Inc. v. AOL Inc.*, 576 Fed. Appx. 982, 996, 2014 WL 3973501 (Fed. Cir. Aug. 15, 2014) (nonprecedential) (Mayer, J., concurring). This Court should encourage resolution of ineligibility questions early, as an early determination of invalidity would spare the courts and parties possibly unneeded time and expense.

II. The District Court correctly held the patent ineligible under section 101.

DietGoal raises two principle objections to the District Court’s ruling. Both are wrong. First, DietGoal improperly attempts to import the *evidentiary* burden relating to invalidity into the *legal* standard for claim construction. This leads it to misstate the summary judgment standard. Second, DietGoal misapplies *Alice* itself. Indeed, by insisting that its patent is eligible because it is directed to a “configured” computer, DietGoal merely reargues the losing position in *Alice*.

A. DietGoal misstates the standard for summary judgment of ineligibility under section 101.

In its opening brief, DietGoal argues that in order for Bravo to successfully invalidate DietGoal’s patent under § 101, Bravo is required to establish that “the only plausible reading of the patent must be that there is clear and convincing

evidence of ineligibility.” Appellant Br. at 27. This standard is legally incorrect, and this Court should reject it.

The burden of proving invalidity by clear and convincing evidence attaches only to *questions of fact*, and does not require a defendant to prove that the only plausible reading is that the claim is invalid. Only where disputed material issues of fact remain or the law does not support the movant would it be improper to enter summary judgment of invalidity.

1. *Burdens on summary judgment track the burdens at trial.*

It has long been the law that courts should grant summary judgment if the movant shows two things: (1) “that there is no genuine dispute as to any material fact” and (2) that “the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Importantly, the Supreme Court made clear in *Anderson v. Liberty Lobby, Inc.* that “the determination of whether a given *factual dispute* requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.” 477 U.S. 242, 255 (1986) (emphasis added). Thus, it would be improper to apply a lesser evidentiary burden than that imposed at trial, or conversely, to impose a heightened evidentiary burden that does not otherwise exist. *See id.* It would also be improper to impose a burden as to *legal* issues, as evidentiary burdens play no role in the determination of legal issues. *See id.*

Of course, “[t]he movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.” *Id.* at 256. Thus, once a defendant has made a *prima facie* case of invalidity, the burden of

production shifts to the patentee to show any material disputes of fact that a reasonable jury may find render the claims valid. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts”). A patentee cannot rely on “mere allegation or denials of his pleading.” *See Anderson*, 477 U.S. at 256. Consequently, where the “clear and convincing” evidence requirement applies, the trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.” *Id.* at 255.

2. *Bravo’s burden to prove facts by clear and convincing evidence does not apply to claim construction or the ultimate question of validity.*

Claim construction is a matter of law, “exclusively within the province of the court.” *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996); *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1303 (Fed. Cir. 2014) (en banc). The Court “treat[s] interpretive issues as purely legal.” *Markman*, 517 U.S. at 391. Consequently, it is the Court, not a jury, that must decide the meaning of the claim terms. *Id.* at 372.¹²

¹² The Supreme Court recently granted certiorari on the issue of the standard of review for appellate courts when reviewing district court claim constructions. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 82 U.S.L.W. 3469 (U.S. Mar. 31, 2014) (No. 13-854). However, regardless of the outcome of *Teva*, it is unlikely to alter the *Markman* holding that claim construction issues are to be determined by a judge, and thus amenable to decision on summary judgment.

More importantly, as a legal matter, no party has any particular “burden” when presenting facts supporting any particular claim construction. *See Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1578 (Fed. Cir. 1995) (“Claim interpretation, as a question of pure law, is amenable to summary judgment and disagreement over the meaning of a term within a claim does not necessarily create a genuine issue of material fact”); *cf. Vivid Techs.*, 200 F.3d at 806 (“The court’s construction of the claims may lead to summary disposition of the issue of infringement when no material facts remain in dispute, or when the nonmovant can not prevail on its view of the facts.”) (citing *Voice Techs. Group, Inc. v. VMC Sys., Inc.*, 164 F.3d 605, 612 (Fed. Cir. 1999)). It is the court that is tasked with construing the claims after evaluating the relative strengths of the arguments presented by the parties, according no more deference to one proposed construction over the other.

Indeed, if a defendant presents a reasonable interpretation of the claims and shows why that interpretation renders the claims invalid, the plaintiff must show why that claim construction should not be adopted.¹³ *See Perfect Web Techs.*, 587 F.3d at 1332 (affirming grant of summary judgment of invalidity as patentee “identifies no construction that would change [invalidity analysis]”). DietGoal’s proposed standard improperly attaches a heightened burden to questions of law by

¹³ Of course, the plaintiff is not required to offer an alternative claim construction, should the plaintiff choose to oppose summary judgment on a different basis.

requiring the defendant to prove “the only plausible reading of the patent” is that it is invalid.¹⁴

Similarly, whether a patent claims unpatentable subject matter contrary to § 101 is also a legal question, although it may contain subsidiary factual issues. *See Accenture Global Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340-41 (Fed. Cir. 2013). “Where the ultimate question of patent validity turns on the correct answer to legal questions—what these subsidiary legal standards mean or how they apply to the facts as given—[the “clear and convincing”] strict standard of proof has no application.” *Microsoft Corp. v. i4i Ltd. P’ship.*, 564 U.S. ___, 131 S. Ct. 2238, 2253 (2011) (Breyer, J. concurring).

DietGoal’s standard ignores longstanding Supreme Court precedent regarding summary judgment burdens, and more recent Supreme Court statements regarding patent law requirements. *See Anderson*, 477 U.S. at 250; *Nautilus. v. Biosig Instruments, Inc.*, 134 S. Ct. at 2130 n.10 (2014) (cautioning that the presumption of validity does not alter the legal requirements of Title 35). Thus,

¹⁴ The Supreme Court recently clarified that the definiteness standard of 35 U.S.C. § 112 requires that claim terms must “inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus*, 134 S. Ct. at 2129. A requirement that a *defendant* must show that the only plausible construction of the claims renders them invalid would appear to run contrary to this pronouncement as it places the burden on the *defendant* to prove claim constructions with reasonable certainty, rather than the patentee.

incorporating a heightened burden of “only plausible construction” into summary judgment is improper.¹⁵

3. *Unless there are genuine disputes of material fact, it is appropriate to determine validity at summary judgment.*

To the extent there exists only a *legal* dispute between the parties, such as the proper scope of claim terms or how the law applies to undisputed facts, summary judgment is proper. The Court can construe the terms to the extent necessary to resolve the motion, if necessitated by the arguments put forth by the parties. *See* Section I.B, *supra*; *see also Vivid Techs.*, 200 F.3d at 803 (“It is routine case management to require litigants to identify the aspects of their case that are material to the dispute.”). Furthermore, the court can apply the law as described in *Alice* to any facts, incorporating the summary judgment standard that the facts must be viewed in the light most favorable to the nonmovant. To be clear, however, if there is no genuine dispute of material fact and the claim construction

¹⁵ In addition to being legally incorrect, DietGoal’s approach would lead to absurd results. Claim construction is relevant to *both* invalidity and non-infringement. Yet these questions raise different burdens of proof and place those burdens on different parties. *Compare Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1314 (Fed. Cir. 2011) (the “patentee bears the burden of proving infringement by a preponderance of the evidence”) (citing *SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1123 (Fed. Cir. 1985)), *with Microsoft*, 131 S. Ct. 2238 at 2240 (accused infringer must establish invalidity by clear and convincing evidence). If courts were to follow DietGoal’s suggestion and import the underlying evidentiary burden into claim construction, then courts would be forced to consider claim construction under two different and potentially contradictory standards.

that the court adopts cannot save the claims from ineligibility, the motion should be granted.

B. *DietGoal’s claims are ineligible under Alice.*

On the merits of the § 101 determination in this case, *amici* raise two points. First, DietGoal’s argument primarily repeats unsuccessful arguments raised by the petitioner in *Alice*. The Supreme Court’s ruling forecloses these arguments. Second, DietGoal’s insistence that the computer implementation of its claims is not “conventional” is belied by its own patent. The ’516 patent describes no new hardware and does not contain a single line of software code. Thus, the computer implementation is no more helpful to patent eligibility than the computer hardware cited in *Alice*.

1. *DietGoal attempts to reargue the merits of Alice.*

DietGoal argues that both the system and method claims of the ’516 patent require “a specific configuration of computer hardware and software, with specified functions.” Appellant Br. at 15; *see also id.* at 34. According to DietGoal, this means that its patent is not drawn to abstract subject matter.

But this is not consistent with *Alice*. Like DietGoal, Alice Corporation urged that its patent required the “specific configuration” of a computer:

[T]he claims recite a specific series of steps, a specific configuration of computer hardware, or a specific computer program product, for establishing electronic shadow accounts held by a supervisory institution

Brief for Petitioner at 44, *Alice*, 134 S. Ct. 2347 (Jan. 21, 2014), 2014 WL 262088.

Alice then argued that “a computer-implemented invention necessarily has a

physical embodiment, and cannot be an abstract idea.” *Id.* at 35. The Supreme Court roundly rejected this argument.

In *Alice*, the Supreme Court concluded that the patent at issue claimed the abstract idea of “intermediated settlement.” *Alice*, 134 S. Ct. at 2355. It reached this conclusion even though the claims at issue included a number of specific steps, such as creating and adjusting shadow credit records for stakeholders. *See id.* at 2352 n.2. The Supreme Court accepted that Alice’s system claims would require computer hardware such as a “data processing system” and a “data storage unit.” *Id.* at 2360. But the Court held that such “generic computer components” do *not* become patent eligible simply upon being “configured” to perform “specific computerized functions.” *Id.*

The same reasoning dooms DietGoal’s patent. Shown below is claim 1 of the ’516 patent with DietGoal’s own proposed claim constructions:

A system of computerized meal planning, comprising:
a [software through which a user sends commands and views displayed results];
a Database of food objects organizable into meals; and
at least one [visual display of at least one image of a meal that a user can select a meal from], which displays on the [software...] meals from the Database that a user can select from to meet [computer implemented, user-specific dietary objectives].

Just like the system claims in *Alice*'s patent, claim 1 of the '516 patent describes an abstract idea broken down to specific steps.¹⁶ In both cases generic computer hardware is “configured” to perform the specified functions.

DietGoal fails to appreciate a key aspect of the Supreme Court's holding: the preemption inquiry under *Alice* is not merely whether a patent would “claim all practical applications” of an abstract idea. Appellant Br. 15. Rather, the inquiry, pursuant to step 2 of the *Mayo*¹⁷ framework laid out by *Alice*, is whether additional features beyond the abstract idea are *sufficiently substantial* to ensure that the claim is “more than a drafting effort designed to monopolize the abstract idea.” *Alice*, 134 S. Ct. at 2357 (quoting *Mayo*, 132 S. Ct. at 1297) (alterations omitted).

While DietGoal attempts to cabin *Alice*'s step 2 inquiry to a “limited” test overcome by anything more than a mere instruction to use a computer, *see* Appellant Br. 42-43, *Alice* is emphatically not so limited. *Alice* reasoned that, “[g]iven the ubiquity of computers . . . , wholly generic computer implementation” will not confer patent eligibility on an otherwise abstract idea, *Alice*, 134 S. Ct. at 2358, suggesting that “ubiquity” and genericness are key considerations for what will not overcome the *Mayo* step 2 test. This accords with *Mayo* itself, which held that “conventional steps, specified at a high level of generality,” cannot imbue an abstract idea with patentability. *Mayo*, 132 S. Ct. at 1300. Furthermore, the Federal Circuit just last month recognized that *Alice* was not limited to generic computers,

¹⁶ Notably, DietGoal did not include the full claim language anywhere in its brief.

¹⁷ *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. ___, 132 S. Ct. 1289 (2012) (“*Mayo*”).

when holding that “[g]iven the prevalence of the Internet, implementation of an abstract idea on the Internet” will not suffice under *Mayo* step 2. *Ultramercial*, 2014 WL 5904902, at *5 (using nearly the exact same wording as *Alice*, 134 S. Ct. at 2358). Under *Alice*, a claim directed to an abstract idea must not only recite substantially more than the abstract idea tied to a generic computer, but substantially more than the abstract idea tied to generic, conventional, ubiquitous technologies.

2. *DietGoal’s own patent establishes that any computer implementation is conventional.*

DietGoal argues that “the District Court does not cite to any evidence that the functionality performed by the claimed ‘Picture Menus’ or ‘Meal Builder’ constitutes generic computer implementation or performs merely ‘basic computer functions.’” Appellant Br. 42. Using a claim construction from parallel litigation, DietGoal argued that the term “Picture Menus” meant “a visual display of at least one image of a meal.” Appellant Br. 30. DietGoals’s conclusion is that this renders the claim eligible as it “requir[es] a specific configuration of computer hardware and software, with specified functions.” *Id.* at 34. But the “specific configuration of computer hardware and software” of which DietGoal speaks amounts to nothing new. Not a single line of the ’516 patent recites any computer hardware, and even DietGoal’s proposed construction of “Picture Menus” covers an ordinary computer monitor showing a picture of food—quintessentially “generic” technology found in “ubiquity.” See *DietGoal Innovations*, 2014 WL 3582914, at *14 (finding steps of ’516 patent “far more ‘routine’ and ‘conventional’ than the computerized

applications of the economic concepts invalidated in *Bilski v. Kappos*, 561 U.S. 593 (2010) and *Alice*”); see also *DietGoal Innovations LLC v. Chipotle Mexican Grill, Inc.*, No. 12-CV-764, 2014 WL 4961992, at *5 (E.D. Tex. Oct. 3, 2014) (Bryson, Circuit Judge) (the ’516 patent “is a very simple and straightforward patent that uses commonplace language and concepts, as the Bravo court noted.”).

The only evidence the district court needed was the patent itself. Because the patent does not include new hardware (or even an explanation of how to implement the software), the patentee has presumably relied on what was known to a person of ordinary skill in the art for filling in these details to meet the enablement standard. Cf. *N. Telecom, Inc. v. Datapoint Corp.*, 908 F.2d 931, 941 (Fed. Cir. 1990) (“The amount of disclosure that will enable practice of an invention that utilizes a computer program may vary according to the nature of the invention”); *Robotic Vision Sys., Inc. v. View Eng’g, Inc.*, 112 F.3d 1163, 1166 (Fed. Cir. 1997) (“when disclosure of software is required, it is generally sufficient if the functions of the software are disclosed, it usually being the case that creation of the specific source code is within the skill of the art”). Consequently, DietGoal cannot argue that the technology in its patent is anything but conventional and well-known. This Court should follow the proper reading of *Mayo*, *Alice*, and *Ultramercial*, all holding that generic, conventional technologies will not render an abstract idea eligible for patenting, and accordingly find DietGoal’s claims ineligible under § 101.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below and find the '516 patent invalid under 35 U.S.C. § 101.

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Respectfully submitted,

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I hereby certify as follows:

1. The foregoing Brief of *Amici Curiae* Application Developers Alliance, Computer and Communications Industry Association, Electronic Frontier Foundation, Engine Advocacy, National Restaurant Association, and Public Knowledge complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 5,956 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2011 in 14-point Times New Roman font.

November 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2014, I caused copies of the foregoing Brief of *Amici Curiae* Application Developers Alliance, Computer and Communications Industry Association, Electronic Frontier Foundation, Engine Advocacy, National Restaurant Association and Public Knowledge to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

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