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### *The Precedent: Federal Circuit Confirms Claim Construction Issues Are Waivable If Not Properly Preserved in Egenera, Inc.*

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In this edition of *The Precedent*, we outline the decision in *Egenera, Inc. v. Cisco Systems, Inc.*

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#### Overview

The Federal Circuit affirmed a grant of partial summary judgment based on the plain meaning of a term when the litigants failed to request claim construction of that term below. The jury's decision on the remaining claims was also affirmed because substantial evidence was presented to the jury on at least one of three alternative grounds supporting a finding of noninfringement.

#### Issues

1. Whether the district court properly entered summary judgment involving the phrase "emulates Ethernet functionality" when the litigants did not seek claim construction of that phrase.
2. Whether a general verdict of noninfringement is proper when substantial evidence was presented to the jury on at least one of three alternative grounds for rejecting the contentions of infringement.

#### Holdings

1. If it becomes clear on appeal that a motion for summary judgment turns on an unresolved issue of claim construction, the Federal Circuit will not address that claim construction issue for the first time when the appellant has failed to preserve that issue in the district court and has also failed to adequately present it for decision on appeal.
2. A general jury verdict will be upheld if there was sufficient evidence to support any of the prevailing party's alternative factual theories, because the appellate court will assume that the jury considered all

the evidence and applied the appropriate burden of proof to all factual theories presented.

## Background and Reasoning

Egenera, Inc. holds U.S. Patent No. 7,231,430 (the “’430 Patent”), which specifies the use of a large pool of processors from which a subset can be selected and configured through software commands to form a virtualized network of computers that is referred to as a “virtualized processing area network.” Egenera alleged that Cisco Systems’ “Unified Computing System,” which virtualizes server management by connecting multiple servers and using software to group and deploy servers for specific processing needs, infringed certain claims of the ’430 Patent. At the district court, the parties requested claim construction of terms including “computer processor/processor” and “emulate Ethernet functionality over the internal communication network.” With respect to the second term, the district court addressed in its claim construction order only whether “emulate” implies absence from the internal communication network and the parties did not request a construction of the entire term “emulate Ethernet functionality.”

After claim construction, Cisco moved for summary judgment of noninfringement on all asserted claims. The district court granted summary judgment to Cisco on half of the claims. The remaining claims went to trial, and the jury found that Egenera failed to prove infringement. Egenera moved for (1) judgment as a matter of law (“JMOL”) concerning infringement; or (2) a new trial. The district court rejected both requests, finding that there was “ample basis” to support the jury’s findings.

On appeal, the Federal Circuit first reviewed the trial court’s grant of summary judgment and noted that what the parties characterized as a factual dispute was actually an unresolved issue of claim construction. It noted that an “appellant waives the ability to argue for an alternative claim construction where, as here, it merely alludes to the possibility that the district court’s construction was wrong, does not raise the issue in the Statement of the Issues, cites no legal support for its claim construction arguments and does not even recite the legal standard of review for claim construction.” Because Egenera asked neither the district court nor the Federal Circuit to determine what it meant to “emulate Ethernet functionality,” the Federal Circuit concluded that Egenera had waived the claim construction issue and, as a result, affirmed the grant of summary judgment to Cisco.

The Federal Circuit next turned to the JMOL. The Federal Circuit noted that Cisco presented three grounds for rejecting Egenera’s arguments for infringement that the jury could have relied on and that it must uphold the judgment of noninfringement unless Egenera could show that the jury lacked substantial evidence with respect to all three of those grounds. The Federal Circuit then determined that the record contained substantial evidence on at least one of the three grounds, requiring it to affirm the denial of Egenera’s motion for JMOL.