U.S. PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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CISCO SYSTEMS, INC.
Petitioner,

v.

EGENERA, INC.
Patent Owner.
_____

Appeal IPR 2017-01340
Patent 6,971,044 B2
_____

Record of Oral Hearing Held:
July 25, 2018
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Before KRISTEN L. DROESCH, CHARLES J. BOUDREAU and
MELISSA A. HAAPALA, *Administrative Patent Judges.*

APPEARANCES:

ON BEHALF OF THE PETITIONER:

 THEODORE M. FOSTER, ESQUIRE
 DAVID L. MCCOMBS, ESQUIRE
 Haynes and Boone LLP
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ON BEHALF OF THE PATENT OWNER:

 JAMES E. QUIGLEY, ESQUIRE
 JOHN B. CAMPBELL, ESQUIRE
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  The above-entitled matter came up for hearing on Wednesday, July 25, 2018, commencing at 12:59 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1	P R O C E E D I N G S
2	- - - - -
3	JUDGE DROESCH: Please be seated. Good afternoon. We're here for the
4	oral hearing for IPR 2017-01340 between Petitioner, Cisco Systems and
5	Egenera. I'm Judge Droesch. We're joined by video with Judge Haapala
6	from the Denver satellite office and Judge Boudreau from the San Jose
7	satellite office. Each party has 60 minutes total time for arguments.
8	Because Petitioner bears the burden of showing unpatentability, Petitioner
9	will open the hearing by presenting its arguments first. Petitioner may also
10	reserve some of its time for rebuttal; and following Petitioner's arguments,
11	Patent Owner will proceed; and then, if applicable, Petitioner may present its
12	rebuttal arguments.
13	Counsel for Petitioner, whenever you're ready, please state your name
14	for the record and introduce your co-counsel and anyone else in attendance
15	today; and then you may begin your arguments after the introductions.
16	MR. MCCOMBS: Good afternoon, Your Honors. I'm David
17	McCombs here on behalf of Petitioner, Cisco Systems. With me is my
18	partner, Theodore Foster, who will be making the presentation today; and
19	also, we have one of Cisco's attorneys, Peter Magic, in attendance with us.
20	Thank you.
21	JUDGE DROESCH: Thanks.
22	MR. MCCOMBS: I'll turn it over to Theo.
23	JUDGE DROESCH: Okay.
24	MR. FOSTER: Good afternoon. May it please the Board, Theo
25	Foster on behalf of Petitioner, Cisco Systems. Looking at slide 3, there are a

1   few topics that I'd like to discuss here this afternoon, and the first of those is

2   Egenera's attempt at swearing behind the Ma reference, and their failure to

3   do so. As we know, swearing behind requires both conception and

4   diligence, and Egenera's evidence fails on both counts. I think this case is

5   somewhat notable. There are declarations from two named inventors,

6   neither of them in their declarations claims to have conceived of the subject

7   matter prior to Ma's filing date; and neither of them claims to have been

8   diligent in pursuing those ideas up to the filing date of their non-provisional

9   application. So for that reason alone, the fact that the named inventors

10   themselves don't even claim to have conceived of the claimed concepts or

11   been diligent in pursing them, for that reason alone, this swear-behind

12   attempt would fail.

13   But moving on and looking at slide 4 -- and looking, specifically, at

14   some of Egenera's evidence presented on this topic -- slide 4 shows a portion

15   of the Patent Owner's Response at page 19 where they address their alleged

16   conception evidence relating to the failover logic limitation. In particular,

17   the logic to assign the virtual MAC address of the failed processor to the

18   processor that replaces the failed processor.

19   And on this point, Egenera says well, back above in the earlier

20   analysis for portion 1(c) they allege that they showed that their node

21   configuration includes a virtual MAC address; but if we move to slide 5 --

22   and slide 5 here has the Patent Owner's Response at page 11 where they

23   address what they label as limitation 1(c) -- and their evidence does not

24   support their allegation that the inventors -- the named inventors -- had

25   conceived of the virtual MAC address as being part of a node configuration.

1 Instead, what their evidence says is that a Giganet driver code will assign an

2 Ethernet 48-bit media access control, or MAC address, in place of a

3 hardware-provided MAC address; but it's not described as being part of a

4 node configuration.

5   And if we move on and look at slide 6, the evidence that Egenera

6 provided from what they labeled their corroboration documents, actually

7 shows that this idea of a MAC address being moved upon failover from

8 machine-to-machine, that it appears the named inventors had not yet

9 conceived of that idea prior to Ma's filing date. Looking at slide 6 -- and this

10 is in the middle -- there's a portion of Egenera's Exhibit 2012, from page 6,

11 where there's discussion of the format of a simulated MAC address -- and it

12 says that's to be specified; so, obviously, they were still figuring out how

13 they were going to handle MAC addresses, if at all. But it goes on and it

14 says that the simulated-MAC address "will include the node number." So,

15 the node number, the number of a node, is particular to a MAC address for

16 that node. Obviously, this implies that any simulated MAC address that they

17 were conceiving of was going to be specific to a particular node, not

18 something that could be transitioned, as the claim calls for, from one

19 computer processor to another computer processor.

20   So, the conception evidence is simply not here and, in fact, what

21 Egenera has put forward, affirmatively shows that they had not yet come

22 upon the idea of virtual MAC addresses that would be re-assignable between

23 nodes or between computer processors. Even if Egenera had evidence of

24 conception for all of the claim limitations -- and, I think, I've just

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