

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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EXTREME NETWORKS, INC.,

ORDER

Plaintiff,

07-cv-229-bbc

v.

ENTERASYS NETWORKS, INC.,

Defendant.  
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The parties have responded to the court's October 26, 2011 order, dkt. #699, directing them to identify any issues of claim construction that remain unresolved. Although neither side asks for construction of a particular term, plaintiff Extreme Networks, Inc. asks for guidance on how to present to the court its argument that the term "network protocol processing information" is indefinite. Defendant Enterasys Networks, Inc. objects on the ground that plaintiff waived the issue by failing to seek summary judgment on it after the remand. I agree.

Like any other defense, indefiniteness may be waived if not pressed. Lisle Corp. v. A.J. Manufacturing Co., 398 F.3d 1306, 1317 (Fed. Cir. 2005). Plaintiff filed a motion for

summary judgment on this issue before the appeal, dkt. #124, but I denied it as moot when I concluded that the accused products did not meet the “digest” limitation of the asserted claims. Dkt. #237. After the remand, plaintiff informed the magistrate judge that it would renew its motion for summary judgment, dkt. #513, but it failed to do so for reasons it does not explain. It is well established that indefiniteness is a question of law for the court, Honeywell International, Inc. v. United States, 609 F.3d 1292, 1301 (Fed. Cir. 2010), so plaintiff has no excuse for leaving this issue until now. Allowing plaintiff to raise this invalidity defense on the eve of trial certainly would cause unfair prejudice to defendant and create yet another distraction from the issues that have been properly preserved for trial.

#### ORDER

IT IS ORDERED that plaintiff Extreme Networks, Inc.’s request to raise an indefiniteness defense is DENIED.

Entered this 28th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge