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14
 15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN FRANCISCO DIVISION**

18	FINJAN, INC., a Delaware Corporation,)	Case No. 3:17-cv-05659-WHA
19	Plaintiff,)	
20	vs.)	DEFENDANT JUNIPER NETWORKS,
21	JUNIPER NETWORKS, INC., a Delaware)	INC.'S OPPOSITION TO FINJAN, INC'S
22	Corporation,)	MOTION FOR LEAVE TO FILE
23	Defendant.)	SECOND AMENDED COMPLAINT
)	Date: July 5, 2018
)	Time: 8:00 a.m.
)	Judge: Honorable William Alsup
)	Courtroom: 12 – 19th Floor

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1 **I. INTRODUCTION**

2 While Juniper did not oppose Finjan's first motion to file an amended complaint (filed April
3 19, 2018), Juniper does oppose Finjan's new, last-minute, second request to amend its complaint
4 ("Motion to Amend"). Juniper opposes this second motion because: (1) it would prejudice Juniper by
5 requiring it to both completely revise its claim construction strategy (well into the claim construction
6 process) and review and produce significant additional discovery on a highly expedited basis during
7 an already busy time period; and (2) it is based on a patent that Finjan knew about and charted against
8 Juniper products in 2015, but that Finjan elected not to include either in its original complaint or in its
9 first amended complaint (filed after Finjan reviewed Juniper's source code).

10 Finjan filed this case in September of 2017, accusing Juniper of infringing eight patents.
11 Although Finjan had prepared a claim chart comparing U.S. Patent No. 7,418,731 ("the '731 Patent")
12 against Juniper products in 2015, Finjan elected not to include this patent in its initial complaint. On
13 March 19, 2018, six months after Finjan filed its initial complaint, Juniper produced its source code
14 to Finjan for review. After reviewing this source code, Finjan sought leave to file a First Amended
15 Complaint, which Juniper did not oppose, and which the Court granted on May 11, 2018. Like its
16 original complaint, Finjan's First Amended Complaint did not contain any allegations involving the
17 '731 Patent.

18 Adding an entirely new patent at this point in the litigation would significantly prejudice
19 Juniper. As an initial matter, the parties have already identified the claim terms they believe are most
20 significant for claim construction (along with proposed constructions). If the '731 Patent is added to
21 this case, Juniper will be forced to quickly identify and analyze numerous new claim construction
22 issues relating to the '731 Patent on an extremely expedited schedule. Moreover, because Juniper has
23 designated the claim terms it believes are most important for a resolution of this case (pursuant to
24 Patent Local Rule 4-3), Juniper will then need to reassess these designations to evaluate the
25 significance of each of these terms against each of the terms from the '731 Patent. Juniper will also
26 need to propound (and likely produce) significant additional discovery relating to the '731 Patent
27 within the next two months, during the time when Juniper is already heavily occupied conducting
28 depositions and preparing dispositive motions and preparing for a possible trial pursuant to this

1 Court's "shootout" procedure. Adding the '731 Patent at this late date would thus prejudice Juniper.

2 **II. BACKGROUND**

3 **A. Finjan's Knowledge of its Allegations Relating to the '731 Patent.**

4 Finjan has admitted in discovery that it had prepared claim charts for the '731 Patent by
5 October of 2015, roughly two years before it filed its original complaint against Juniper. *See* Ex. B;
6 Ex. A at 5. These charts allegedly analyze each element of Claim 1 of the '731 Patent against
7 Juniper's SRX products. *See* Ex. C. Yet Finjan's original Complaint does not assert the '731 Patent.
8 On March 19, 2018, Juniper produced its source code to Finjan. Declaration of Sharon Song ("Song
9 Decl.") ¶ 10. One month later, on April 19, 2018, Finjan sought leave of Court to file a First
10 Amended Complaint. *See* Dkt. No. 67. While this complaint added new infringement allegations
11 against Juniper, it again omitted any reference to the '731 Patent. Instead, as Finjan concedes, it
12 waited until May 31, 2018 (the last day for the parties to seek leave to amend the pleadings), to seek
13 leave to add the '731 Patent to this case. *See* Motion to Amend at 4.

14 Finjan claims that it should be able to add the '731 Patent at this late juncture because it
15 supposedly learned about the manner in which files are stored and indexed by Sky ATP for the first
16 time on May 9, 2018, at the deposition of Ms. Yuly Tenorio. Motion to Amend at 3. But all details
17 about the operation of Juniper's products were known to Finjan months before, when it conducted its
18 source code review. Moreover, even if Finjan did not have access to Juniper's source code (which it
19 did), information about Sky ATP's functions related to storing and indexing files has been publicly
20 disclosed in Sky ATP's administration guide at least since September 8, 2017. *See* Ex. G at i, 51-52.
21 For example, Sky ATP's administration guide discloses that Sky ATP stores in the cloud emails with
22 attachments found to be malicious. *Id.* at 51-52. The recipients are then provided a link to the Sky
23 ATP quarantine portal where the email can be previewed. *Id.* at 51.

24 **B. This Case's Claim Construction Proceedings.**

25 On May 7, 2018, the parties exchanged their respective lists of claim terms for construction
26 for the patents asserted in the original Complaint (excluding the '731 Patent) pursuant to Patent Local
27 Rule ("PLR") 4-1. *See* Song Decl. ¶ 12.

28 On May 22, 2018, Finjan produced to Juniper the claim charts for the '731 Patent that it had

1 prepared in October 2015. *See* Ex. B; Ex. C. This was the first time Finjan disclosed the '731 Patent
2 to Juniper, and the first time Juniper learned of the existence of this patent. Three days later, on
3 May 25, 2018, Finjan informed Juniper that it intended to seek leave to amend its complaint to assert
4 the '731 Patent. *See* Ex. D at 2. On May 27, 2018, Finjan emailed Juniper proposing modifications
5 to the claim construction schedule to accommodate the '731 Patent. *See* Ex. D at 1. Finjan's
6 proposed schedule sought to require Juniper to serve invalidity contentions for the '731 Patent within
7 three weeks, in the midst of the early summary judgment briefing schedule. *Id.* Given Finjan's
8 unreasonable demand that Juniper serve within three weeks invalidity contentions for a patent that
9 Juniper had no knowledge of prior to May 2018, Juniper did not agree to Finjan's proposed claim
10 construction schedule.

11 On May 28, 2018, the parties exchanged their respective proposed constructions and
12 corresponding intrinsic and extrinsic evidence for each term identified by each party for claim
13 construction from the patents asserted in the original Complaint (excluding the '731 Patent) pursuant
14 to PLR 4-2. *See* Song Decl. ¶ 12.

15 On June 8, 2018, Finjan served Juniper its infringement contentions for the '731 Patent. *See*
16 Ex. E. Despite the Court's order requiring Finjan to limit the total number of claims in the case to 16,
17 *see* Ex. F at 9-10, Finjan's infringement contentions assert a total of 17 claims. *See* Ex. E at 1-2;
18 Motion to Amend at 2.

19 On June 22, 2018, the same day this opposition is being filed, the parties will file a Joint
20 Claim Construction and Prehearing Statement identifying the 10 terms from the patents asserted in
21 the original Complaint (excluding the '731 Patent) whose construction will be most significant to the
22 resolution of this case, pursuant to PLR 4-3. *See* Song Decl. ¶ 12. Because the Court has placed a
23 limit on the number of claims it will construe, Juniper's selection of these claims reflects its
24 evaluation of the relative importance of numerous claim terms from multiple patents.

25 C. Discovery that has already been completed

26 Discovery has already progressed substantially in this case, hastened by this Court's
27 "shootout" procedure. Juniper has produced all source code for the accused products, more than
28 560,000 technical documents, more than 2,400 financial and marketing documents totaling about

1 60,000 pages, and more than 39,000 emails and corresponding attachments from a Juniper engineer.
2 See Song Decl. ¶ 10. Juniper has also provided four witnesses for deposition and taken the
3 deposition of Finjan’s 30(b)(6) witness. *Id.* at ¶ 11. None of this discovery has focused on the ’731
4 Patent.

5 **III. ARGUMENT**

6 Leave to amend may be denied where the Court finds there is “undue delay, bad faith or
7 dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments
8 previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment,
9 futility of the amendment, etc.” *Boston Sci. Corp. v. Johnson & Johnson*, 2006 WL 3455009, at *4
10 (N.D. Cal. Nov. 29, 2006) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The Ninth Circuit
11 has also noted “that late amendments to assert new theories are not reviewed favorably when the facts
12 and the theory have been known to the party seeking amendment since the inception of the cause of
13 action.” *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986).
14 Moreover, “[t]he district court’s discretion to deny leave to amend is particularly broad where a
15 plaintiff previously has amended the complaint.” *World Wide Rush, LLC v. City of Los Angeles*, 606
16 F.3d 676, 690 (9th Cir. 2010). Nearly every one of the factors enumerated by these courts weighs
17 against allowing Finjan to file a second set of additional claims against Juniper at this late date.

18 **A. Juniper Will Be Significantly Prejudiced by the Late Addition of the ’731 Patent**

19 “Ultimately, prejudice is the critical factor in considering motions for leave to amend.”
20 *Alzheimer’s Inst. of Am. v. Elan Corp. PLC*, 274 F.R.D. 272, 276 (N.D. Cal. 2011) (emphasis added);
21 see also *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (finding that “it
22 is the consideration of prejudice to the opposing party that carries the greatest weight” for a denial of
23 leave to amend).

24 Because of this Court’s “shootout” procedure, Juniper has, for the past several months,
25 engaged in significantly high levels of litigation activity to make discovery available to Finjan on the
26 three products accused in the original Complaint on an extremely expedited schedule. For example,
27 Juniper has produced the source code for all accused products (including the late-added ATP
28 Appliance); more than 560,000 technical documents to Finjan, the majority of which were highly

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