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10 FINJAN, INC.

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

15 FINJAN, INC., a Delaware Corporation,

17 Plaintiff,

18 v.

19 JUNIPER NETWORKS, INC., a Delaware
20 Corporation,

21 Defendant.

Case No.: 3:17-cv-05659-WHA

**PLAINTIFF FINJAN, INC.'S REPLY IN
SUPPORT OF MOTION FOR LEAVE TO
FILE SECOND AMENDED COMPLAINT**

Date: July 5, 2018

Time: 8:00 am

Judge: Honorable William Alsup

Dept.: Courtroom 12, 19th Floor

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24
25 **REDACTED VERSION OF DOCUMENTS SOUGHT TO BE SEALED**
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1 **I. INTRODUCTION**

2 The Court should grant Plaintiff Finjan, Inc.’s (“Finjan”) motion for leave to file a second
3 amended complaint (“Motion”) because Finjan was diligent in seeking to amend and Juniper
4 Networks, Inc. (“Juniper”) will not be prejudiced by the amendment. In the absence of prejudice,
5 leave to amend is freely given. Fed. R. Civ. P. 15(a)(2).

6 Finjan was diligent in seeking to amend because it sought leave to amend within the
7 deadline set forth in the Court’s Scheduling Order, and also within a few weeks of learning new
8 information relating to the internal design of Sky ATP during a deposition, and about two months
9 after first getting access to Juniper’s source code. There is no prejudice to Juniper because Finjan
10 seeks discovery on products that are currently accused in the case. Further, there is ample time to
11 complete the discovery as fact discovery does not close for another nine months and trial is set for
12 a year away. And Finjan has already agreed to reasonable modifications to the claim construction
13 schedule to accommodate the ‘731 Patent.

14 Juniper’s arguments of prejudice and delay are without merit and illogical. First, Juniper
15 incorrectly argues that it would need to provide discovery “on a highly expedited basis” because
16 of the Court’s “showdown” procedure. This is wrong, as the ‘731 Patent is not part of the early
17 “showdown.” Next, Juniper’s argument that it would be prejudiced by modifying the claim
18 construction schedule is incorrect, as Finjan agreed to work with Juniper in providing reasonable
19 adjustments to the schedule.¹ Juniper is also mistaken in its assertion that Finjan was dilatory in
20 seeking to amend its complaint, attempting to make much of a chart that Finjan created as a
21 starting point for licensing discussions, and that applies the ‘731 Patent to SRX Gateways.
22 However, Finjan did not use this theory as it required all elements of the claims of the ‘731 Patent

23 _____
24 ¹ Juniper claims that it has been working in good faith to narrow the terms at issue before this Court,
25 while at the same time flouting this Court’s order requesting that the parties to claim construction to
26 six terms. Dkt. No. 35, ¶20. Instead Juniper has so far identified 14 terms for construction, including
27 seven terms in the Joint Claim Construction Statement (against Finjan’s objections), three terms in its
28 opening summary judgment motion on Claim 1 of the ‘780 Patent (Dkt. No. 96 at 4–10), and four
29 terms in its opposition to Finjan’s motion for summary judgment on Claim 10 of the ‘494 Patent (Dkt.
30 No. 126 at 7–13). Finjan has identified an additional three claims for construction, consistent with the
Court Order.

1 being present on the SRX Gateways, and, according to Juniper’s own engineers, the SRX
2 Gateways [REDACTED]. As such, it was not until Finjan was provided confidential
3 discovery into the inner workings of Sky ATP that Finjan was able to confirm that Sky ATP,
4 which is used in conjunction with the SRX Gateways, included the necessary indexed file cache.

5 Therefore, given that all factors weigh in favor of granting leave for Finjan to amend, the
6 Court should grant Finjan’s Motion.

7 **II. ARGUMENT**

8 **A. Finjan’s Proposed Amendments Are Not Futile and are Not in Bad Faith.**

9 Juniper does not dispute that Finjan’s proposed amendments would not be futile or brought
10 in bad faith. As such, these factors weigh in favor of granting Finjan leave to amend.

11 **B. Finjan Did Not Unduly Delay and There Is No Dilatory Motive in Seeking to Amend.**

12
13 Finjan was diligent in seeking to amend because it sought such leave (1) two weeks after
14 taking the deposition of Ms. Tenorio, (2) after only two months of reviewing the millions of pages
15 of Juniper’s source code for Sky ATP and SRX Gateways, and (3) within two days of meeting
16 and conferring with Juniper—and within the Court’s deadline to file leave to amend.² Because
17 Sky ATP is a cloud-based product, Finjan did not have access to certain aspects of the internal
18 structures that are not ascertainable from public documents, including the presence and structure
19 of a file cache. It was not until the deposition of Ms. Tenorio on May 9, 2018, that Finjan
20 confirmed [REDACTED] Dkt. No. 91-1, Declaration of Kristopher Kastens
21 in Support of Finjan’s Motion for Leave to File Second Amended Complaint (“Kastens Decl.”),
22 Ex. 2 (Tenorio Tr.) at 226:16–228:10. As Finjan stated in its Motion, the [REDACTED]
23 relates to the internal working of Sky ATP and is otherwise not publicly known. Motion at 5–6.

24 Juniper cannot credibly claim that such information was not publicly known, given that
25 Juniper submitted a declaration supporting Finjan’s motion to seal (Dkt. No. 93) information

26
27 ² Finjan filed its Motion on the deadline because it attempted to meet and confer with Juniper prior to
28 filing its Motion in order to avoid unnecessary briefing. However, when Finjan determined that the
29 parties would not reach an agreement, Finjan brought its Motion on May 31, 2018.

1 related to the operation of Sky ATP, where Juniper stated that the figures showing the file cache
2 in Sky ATP “have never been made public and contain information related to the technical
3 underpinnings and development of Juniper’s highly proprietary software—which includes much
4 information that Juniper maintains as trade secrets. *Juniper expends significant effort in*
5 *maintaining the secrecy of its software architecture and development*, including, for example,
6 implementing strict screening procedures for visitors to its engineering campus.” Dkt. No. 93 at
7 ¶5 (emphasis added). Such admissions by Juniper highlight the fact that this information is not
8 publicly disclosed, and Finjan could not have known this information prior to Juniper’s disclosure
9 of its confidential information during discovery in this case.

10 Juniper also argues that the Sky ATP Guide should have made Finjan aware of a file cache
11 in Sky ATP. Opp. at 2. However, Juniper’s own declaration supporting Finjan’s motion to seal
12 thoroughly refutes this allegation, showing that Juniper’s file cache is not publicly known
13 information. Further, the material Juniper cites describes “stor[ing] in the cloud emails with
14 attachments found to be malicious ... The recipients are then provided a link to the Sky ATP
15 quarantine portal where the email can be previewed.” Opp. at 2. But this does not demonstrate
16 that the Sky ATP caches files or indexes the stored files, as the ‘731 Patent requires. *Compare*
17 Opp. at 2 *with* ‘731 Patent, Claim 1 at Col. 11, ll. 43-45 (requiring “a file cache for storing files
18 that have been scanned by the scanner for future access, wherein each of the stored files is
19 indexed by a file identifier”); *see also id.*, Claim 17 at Col. 13, ll. 34-36 (“file cache” and
20 “indexing the retrieved file in the file cache with a file ID.”). Accordingly, contrary to Juniper’s
21 assertion, the internal structures of Sky ATP could not be determined from this information.

22 Contrary to Juniper’s allegation, Finjan could not have known of the “file cache”
23 immediately after Juniper made its source code available in mid-March. Finjan was reviewing
24 *millions of pages of source code* for the accused products, which was a time consuming process,
25 particularly given the Court’s showdown schedule. Nonetheless, even if Finjan could have
26 instantly known of every aspect of the source code the moment it was made available, Finjan still
27 brought this Motion within approximately two months of starting its review, such that this factor
28

1 should weigh in favor of granting Finjan leave to amend. *See* Motion at 7 (citing *See Sage*
2 *Electrochromics, Inc. v. View, Inc.*, No. 12-cv-6441-JST, 2014 WL 1379282, at *3 (N.D. Cal.
3 Apr. 8, 2014) (granting motion to amend even though plaintiff waited approximately three months
4 to seek the Court’s permission to add new patents to the case); *see also Oracle Am., Inc. v.*
5 *Hewlett Packard Enter. Co.*, No. 16-cv-01393-JST, 2017 WL 3149297, at *3-4 (N.D. Cal. Jul. 25,
6 2017) (granting motion to amend despite a delay of over six months between learning of the basis
7 for new pleadings and filing a motion to amend); *Finjan v. Blue Coat Sys., Inc.*, No. 13-cv-03999-
8 BLF, 2014 WL 6626227, at *2 (N.D. Cal. Nov. 20, 2014) (stating that an almost two month
9 period between receiving confidential information and filing a motion to amend pleadings based
10 on that confidential disclosure demonstrates diligence, and does not demonstrate undue delay)).

11 Further, Finjan’s creation of a chart for the ‘731 Patent in 2015 for the SRX Gateways
12 alone (the “2015 SRX Gateways Chart”) to start licensing discussions with Juniper is irrelevant,
13 because it addresses different technology, and did not include components that are only present on
14 Sky ATP, which is a necessary component in Finjan’s infringement position for the ‘731 Patent.³
15 Opp. at 2, 4–5; Dkt. No. 113-1, Declaration of Sharon Song in Support of Juniper’s Opposition
16 (“Song Decl.”), Ex. C (‘731 Patent Chart for SRX Gateways). As such, Juniper’s claim that “the
17 acts and the theory have been known” is wrong, as Finjan was not aware that Sky ATP included
18 certain internal features that the SRX Gateways do not have—namely, [REDACTED]—
19 information which Juniper holds as a closely guarded trade secret. Motion at 3, 5–6; Opp. at 4
20 (citing *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir.
21 1986); Opp. at 6 (citing *Slot Speaker Techs., Inc. v. Apple, Inc.*, No. 13-CV-01161-HSG, 2017
22 WL 4354999, at *2 (N.D. Cal. Sept. 29, 2017)). As Juniper is aware from the infringement
23 contentions that Finjan served on June 8th,⁴ Finjan alleges infringement requires Sky ATP.
24 *Compare* Song Decl., Ex. C (‘731 Patent Chart for SRX Gateways) *with* Declaration of

25 ³ Finjan did not provide Juniper with the ‘731 Patent Chart in 2015 because of Juniper’s refusal to
26 enter into a nondisclosure agreement with Finjan.

27 ⁴ Prior to the Court vacating its order granting Finjan leave to file a second amended complaint (Dkt.
28 No. 107), Finjan served Juniper its infringement contentions for the ‘731 Patent within two days.
29 Kastens Reply Decl., ¶6.

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