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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FINJAN, INC., a Delaware corporation,

No. C 17-05659 WHA

Plaintiff,

v.

JUNIPER NETWORK, INC., a Delaware corporation,

**ORDER GRANTING  
MOTION FOR LEAVE TO  
FILE SECOND AMENDED  
COMPLAINT**

Defendant.

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**INTRODUCTION**

In this patent infringement action, plaintiff moves for leave to amend a second amended complaint. For the reasons stated below, plaintiff’s motion is **GRANTED**.

**STATEMENT**

Plaintiff Finjan, Inc., accuses defendant Juniper Networks, Inc., of infringing patents pertaining to malware-detection technology. Finjan’s allegations have been summarized in a prior order dated February 14, which dismissed Finjan’s claims of willfulness and induced infringement but allowed Finjan to move for leave to amend by February 22 (Dkt. No. 30 at 8). Finjan decided not to seek leave to amend to cure the deficiencies in those claims (*see* Dkt. No. 31 at 2). A case management order dated February 23 then provided, among other things, that leave to amend pleadings must be sought by May 31 (Dkt. No. 35 at 1). The case management order also set forth a procedure whereby each side were scheduled to move for early summary judgment on one claim by June 7 (*id.* at 4).

1 On May 11, Finjan’s motion for leave to file a first amended complaint, which Juniper  
2 did not oppose, was granted in part and denied in part (Dkt. No. 85). That order granted  
3 Finjan’s leave to amend to add another accused product (ATP appliance) on the conditions that  
4 (1) Finjan remove its dismissed “willfulness” allegations and (2) ATP Appliance remain  
5 excluded from the first round of the early summary judgment procedure.

6 Finjan now moves again for leave to amend its complaint to add an additional patent  
7 (U.S. Patent No. 7,418,731). Finjan filed the instant motion on May 31 — the last day it may  
8 amend its complaint pursuant to the case management order (Dkt. No. 91). Juniper opposes on  
9 the grounds of prejudice, undue delay, and dilatory motive (Dkt. No. 113).

## 10 ANALYSIS

### 11 1. LEGAL STANDARD.

12 Under FRCP 15, leave to amend should be given when justice so requires. The  
13 underlying purpose of FRCP 15 is to facilitate decisions on the merits, rather than on the  
14 pleadings or technicalities. *U.S. v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). In the absence of  
15 an apparent reason — such as undue delay, bad faith, undue prejudice, or futility of amendment  
16 — leave should be “freely given.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “This policy is  
17 ‘to be applied with extreme liberality.’ ” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
18 1048, 1051 (9th Cir. 2003) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,  
19 712 (9th Cir. 2001)). In assessing these factors, all inferences should be made in favor of  
20 granting the motion. *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir.1999).

### 21 2. PREJUDICE.

22 Prejudice is the “touchstone of the inquiry under” FRCP 15(a). *Eminence Capital*, 316  
23 F.3d at 1052 (quoting *Lone Star Ladies Inv. Club v. Schlotzsky’s Inc.*, 238 F.3d 363, 368 (5th  
24 Cir. 2001)). In general, “[t]he party opposing amendment bears the burden of showing  
25 prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Our court of  
26 appeals has affirmed the denial of leave to amend when new allegations “would totally alter the  
27 basis of the action.” *M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1492  
28 (9th Cir. 1983). Here, Juniper did not make a sufficient showing of prejudice.

1           First, Juniper argues it would be prejudiced by the addition of the '731 patent because it  
2 has already engaged in significant discovery leading up to the showdown procedure, which  
3 scheduled early summary motions for June 7 (Dkt. No. 113 at 4–5). This point is unpersuasive.  
4 Finjan does not (and cannot, given early summary judgment motions have already been filed)  
5 intend to include the '731 patent in the early summary judgment procedure (Dkt. No. 91 at 2).  
6 Moreover, there are still nine months left for fact discovery and trial is a year away. Overall,  
7 the case management schedule will be largely unaffected by the amendment.

8           Second, Juniper contends that the addition of the '731 patent at this stage would be  
9 prejudicial because, essentially, it would require additional work. For example, under PLR 4-3,  
10 the parties are required to jointly identify the ten most important claim terms from all asserted  
11 claims by June 22 (and they have already filed a joint claim construction statement). Juniper  
12 argues adding the '731 patent at this stage would require it to reassess the claim terms and re-  
13 strategize (Dkt. No. 113 at 5). Moreover, Juniper argues, prejudice is compounded by the fact  
14 that the extra work overlaps with the expedited schedule imposed by the early summary  
15 judgment procedure. While the addition of the '731 patent (and its two asserted claims) would  
16 certainly impose inconvenience and affect the claim construction schedule to an extent, it would  
17 not “greatly alter[] the nature of the litigation.” *Morongo Band of Mission Indians v. Rose*, 893  
18 F.2d 1074, 1079 (9th Cir. 1990). Thus the amendment’s impact does not amount to prejudice as  
19 contemplated under FRCP 15.

20           Juniper’s reliance on *Alibaba.com Hong Kong Limited v. P.S. Products, Inc.*, 2012 WL  
21 13060303, at \*2 (N.D. Cal. Mar. 19, 2012) is unavailing. The accused infringers in  
22 *Alibaba.com* sought leave to file a second amended complaint more than eight months after the  
23 deadline for seeking leave to amend. *Ibid.* At that point in *Alibaba.com*, FRCP 16(b)’s more  
24 strict “good cause” standard, rather than FRCP 15(a)’s liberal standard, governed. *Alzheimer’s*  
25 *Institute of America v. Elan Corporation PLC*, 274 F.R.D. 272, 276–77 (N.D. Cal. 2011) (Judge  
26 Elizabeth Laporte) is also distinguishable. *Alzheimer’s* dealt with additional concerns over  
27 public interest (potentially chilling mice research on Alzheimer’s disease) and the defendant’s  
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1 inability to coordinate with its co-defendants in claim construction strategy. No such  
2 prejudicial concerns are pertinent here. As such, this factor favors the amendment.

3 **3. UNDUE DELAY AND DILATORY MOTIVE.**

4 In assessing timeliness, courts inquire “whether the moving party knew or should have  
5 known the facts and theories raised by the amendment in the original pleading.” *Jackson v.*  
6 *Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir.1990). Here, Juniper has not sufficiently shown  
7 that Finjan’s instant motion is unduly delayed.

8 Finjan alleges this instant motion was prompted by “new information” revealed during a  
9 recent deposition that led it to believe Juniper’s accused product Sky ATP infringes the ’731  
10 patent (Dkt. No. 91 at 2). It claims it did not unduly delay its request to amend its complaint  
11 because it moved to amend two days after meeting and conferring with Juniper, two weeks after  
12 the deposition, and “after only two months of reviewing the millions of pages of Juniper’s  
13 source code” for the accused products (Dkt. No. 91 at 6).

14 Juniper rebuts by arguing that Finjan sat on its ’731 patent infringement allegations for  
15 roughly two years, as allegedly shown by Finjan’s ’731 patent claim charts (which were created  
16 in October 2015 and directed to SRX Gateways only for licensing purposes) (Dkt. Nos. 113 at  
17 6, 133 at 4). Juniper counters Finjan’s alleged lack of knowledge of how Juniper’s products  
18 stored and indexed files (as relevant to the ’731 patent), arguing that Juniper produced source  
19 code several months ago and that Juniper’s publicly-available Sky ATP administration guide  
20 disclosed the relevant information. As such, Juniper contends that Finjan should have asserted  
21 the ’731 patent at least in its first motion to amend. Instead, Juniper argues, Finjan did not  
22 disclose the ’731 patent until now. Finjan acted with dilatory motive, so Juniper seems to  
23 argue, by “concealing its intentions” about the ’731 patent (Dkt. No. 113 at 6).

24 Juniper cites *Slot Speaker Technologies, Inc. v. Apple, Inc.*, No. C 13–01161, 2017 WL  
25 4354999 (N.D. Cal. Sept. 29, 2017) (Judge Haywood Gilliam, Jr.) in arguing that leave to  
26 amend should be denied where the plaintiff had known the facts and legal theories giving rise to  
27 its amendments. *Slot Speaker* is distinguishable. There, the plaintiff sought to add a willful  
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1 infringement claim over three years after filing its first amended complaint and despite have  
2 multiple opportunities to add the claim before finally moving to amend. *Id.* at \*1.

3 True, Finjan feasibly could have sought to add the '731 patent at least in its first leave to  
4 amend had it been more diligent. But that by itself is not sufficient evidence showing that  
5 Finjan acted with dilatory motive. Though arguably belated, Finjan sought leave to amend  
6 within a couple of months of receiving Juniper's source code and met and conferred with  
7 Juniper soon after the deposition that allegedly triggered the instant motion. Moreover, Finjan  
8 brought this instant motion within the case management deadline for seeking amendments (even  
9 if just barely). Finjan's delay in revealing the '731 patent to Juniper, which ultimately does not  
10 prejudice Juniper, is not the same as a delay in seeking the instant motion. Ultimately, this  
11 factor also favors the amendment.

#### 12 CONCLUSION

13 For the foregoing reasons, Finjan's motion for leave to file a second amended complaint  
14 is **GRANTED**. Finjan shall file its second amended complaint as a separate docket entry by  
15 **JULY 27 AT NOON**.

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17 **IT IS SO ORDERED.**

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19 Dated: July 19, 2018.

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22 WILLIAM ALSUP  
23 UNITED STATES DISTRICT JUDGE  
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