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15 FINJAN, INC.

16 **IN THE UNITED STATES DISTRICT COURT**
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
18 **SAN FRANCISCO DIVISION**

19 FINJAN, INC., a Delaware Corporation,

20 Plaintiff,

21 v.

22 JUNIPER NETWORKS, INC., a Delaware
23 Corporation,

24 Defendant.

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

**PLAINTIFF FINJAN, INC.'S REPLY BRIEF
IN SUPPORT OF ITS MOTION TO
EXCLUDE OPINIONS OF DAMAGES
EXPERT DR. KEITH UGONE**

Date: November 29, 2018

Time: 8:00 a.m.

Courtroom: 12 - 19th Floor

Judge: William Alsup

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

2 The Court should grant Finjan’s Motion to Exclude Opinions of Juniper’s Damages Expert Dr.
 3 Ugone (“Motion”) regarding damages because his opinions are based on unreliable information, and he
 4 failed to assume infringement. In his November 7, 2018 rebuttal expert report, Dr. Ugone performed
 5 no economic analysis of the license agreements he relies on, ignored other relevant license agreements,
 6 and did not address the similarities and differences between prior patent licenses and the hypothetical
 7 negotiation, which he is required to do under Federal Circuit precedent. Second, Dr. Ugone’s rebuttal
 8 damages opinion is not tied Finjan’s infringement assertions, but rather Juniper’s version of the case
 9 which improperly excludes revenues of accused SRX products. Third, Dr. Ugone provided no basis
 10 for using “profits” as a constraint of a reasonable royalty. Fourth, Dr. Ugone performed no
 11 independent economic analysis of non-infringing alternatives that will be useful to the jury. For at least
 12 these multiple reasons, the Court should exclude Dr. Ugone’s opinions¹.

13 II. ARGUMENT

14 A. The Court Should Exclude Dr. Ugone’s Opinions Regarding Comparable License 15 Agreements

16 1. Dr. Ugone Failed to Conduct An Analysis of the Economic Comparability of 17 Juniper’s License Agreements.

18 Juniper cannot (and, in fact, does not) dispute that Dr. Ugone failed to provide any economic
 19 analysis in his expert report of how Juniper license agreements are comparable to the hypothetical
 20 negotiation. Ugone Report², at ¶¶115-22. Instead, Juniper’s opposition admits that Dr. Ugone’s only
 21 basis for relying on four specific Juniper license agreements ([REDACTED]
 22 [REDACTED]) is the opinions of Juniper’s technical expert, Dr. Rubin, regarding their
 23 purportedly “similar” technology. Declaration of Kristopher Kastens (“Kastens Decl.”) filed herewith,
 24 Ex. 1 (Ugone Tr.) at 148:25-150:16. Notwithstanding the lack of merit to Dr. Rubin’s *technical*
 25 opinions, Dr. Ugone did not provide any *economic* analysis of those licenses. Ugone Report, at ¶¶115-

26 ¹ Juniper incorrectly alleges that Finjan exceeded the Court’s limitation on the maximum number of
 27 pages to attach to its *Daubert* motion. Opp. at 1, n.1. Excluding exhibit cover slipsheets and pages of
 28 expert reports, Finjan attached 48 pages of exhibits to its *Daubert* motion. Dkt. Nos. 229, 231.

29 ² Dr. Ugone’s Report is attached as Exhibit 1 to Finjan’s Motion to Exclude. Dkt. No. 229-6.

1 22.

2 Damages experts are required to analyze the “economic” aspect of patent licenses, which Dr.
3 Ugone ignored, and which Dr. Rubin also did not do. *See Wordtech Sys., Inc. v. Integrated Network*
4 *Solutions, Inc.*, 609 F.3d 1308, 1320 (Fed. Cir. 2010) (comparisons of past licenses should account for
5 “technological and economic differences”) (citation omitted); Ugone Report, at ¶¶115-22. Dr. Ugone
6 admitted at deposition that he did not review any negotiation documents or have any information about
7 how the license fees were calculated. Kastens Decl., Ex. 1 (Ugone Tr.) at 150:12-16. He also admitted
8 that he did not consider the number of patents at issue in the license agreements, the expiration dates of
9 the licensed patents, and whether any of the licensees were similar in negotiating position to Finjan.
10 *Id.* at 153:15-154:8, 155:7-156:8. Importantly, three of the licenses he relies on are settlement
11 agreements, and the fourth is a software license, which Dr. Ugone admitted was different from a naked
12 patent license. Ugone Report, at ¶¶ 115-22; Kastens Decl., Ex. 1 (Ugone Tr.) at 156:21-162:6.
13 Although his conclusion was that the three licenses he chose to rely on are “value indicators” and a
14 “reasonableness check” on his damages amount, Dr. Ugone fails to explain and account for any
15 differences that exist between those license agreements and the circumstances of the hypothetical
16 negotiation. *Id.*; *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011) (“there
17 must be a basis in fact to associate the royalty rates used in the prior licenses to the particular
18 hypothetical negotiation at issue in the case”). Therefore, Finjan requests the Court exclude Dr.
19 Ugone’s opinions regarding Juniper’s licenses.

20 **2. Dr. Ugone Failed to Analyze All of Finjan’s Patent License Agreements**
21 **Regarding the ‘494 Patent.**

22 Dr. Ugone improperly cherry-picked three of Finjan’s patent license agreements (██████████, F5
23 and Sophos) as “informative” of the hypothetical negotiation based on an insufficient analysis of which
24 licensees were Juniper’s “competitors” and had an “effective” royalty rate. Ugone Report, ¶ 82;
25 Kastens Decl., Ex. 1 (Ugone Tr.) at 146:13-24; 170:20-173:4. Dr. Ugone did not consider any of
26 Finjan’s patent license agreements with other Juniper competitors, and ignored Finjan’s 18 other patent
27 license agreements that specifically concern the ‘494 Patent at issue. Kastens Decl., Ex. 1 (Ugone Tr.)
28

1 at 146:19-24; Ugone Report at 62 n.209. He relied on Juniper’s 2017 10-K filing with the SEC to
2 identify Juniper’s competitors. Kastens Decl., Ex. 1 (Ugone Tr.) at 171:10-173:4. However, Juniper’s
3 2017 10-K does not provide an exhaustive list of Juniper’s competitors for the accused products, only
4 stating “there are a number of other competitors in the security network infrastructure space,
5 including....” *Id.*, Ex. 2 (2017 Juniper 10-K) at 12. Dr. Ugone admitted at deposition that he did not
6 review any industry or market reports to confirm his list of Juniper’s competitors was accurate. *Id.*,
7 Ex. 1 (Ugone Tr.) at 172:20-173:4. Thus, Dr. Ugone’s selection process and decision to point to only
8 these agreements as “informative” is arbitrary.

9 To calculate an “effective” rate in the three licenses he cherry-picked, he simply took the final
10 lump sum license fee and retroactively derived an “effective” rate using rates that were proposed
11 during negotiations, although such proposed or “effective” rates were based on the middle of Finjan’s
12 negotiations and there was never any royalty rate, much less an effective royalty rate, agreed to in the
13 final agreements. Ugone Report at ¶ 66; Kastens Decl., Ex. 1 (Ugone Tr.) at 166:15-167:1, 168:3-25.
14 Additionally, for the Sophos license, Dr. Ugone, without explanation, ignores the 8-16% rate that was
15 presented to the jury during the trial, and [REDACTED]

16 [REDACTED]
17 [REDACTED] Ugone Report, ¶ 66, Mot., Ex. 2 (Arst Rpt.) at 10; *id.*, Ex. 6 (Sophos Trial Tr.)
18 at 825:2-9, 843:14-18.

19 Furthermore, Dr. Ugone did not account for what similarities and differences exist between
20 those licensing negotiations as compared to Finjan and Juniper the time of the hypothetical negotiation.
21 Notably, Dr. Ugone did not analyze to what extent the F5 and Sophos licenses are relevant given they
22 were executed more than a year after the hypothetical negotiation date. *See e.g. Odetics, Inc. v.*
23 *Storage Tech. Corp.*, 185 F.3d 1259, 1276–77 (Fed. Cir. 1999) (agreeing with the district court that, for
24 two licenses entered into after the date of first infringement, “the age of the license agreements, in the
25 context of the changing technology and ‘financial landscape’ at issue, made those agreements
26 irrelevant for the hypothetical negotiation analysis.”). While Juniper opposition brief now argues that
27 the technological comparability of those agreements alone makes them comparable regardless of their
28

1 dates, Dr. Ugone concluded the opposite in his report where he expressly distinguished the licensed
2 Sophos and F5 products from the accused Juniper products. Ugone Report at ¶¶ 72, 80, 82(a). Thus,
3 Dr. Ugone had no basis for his opinions regarding these three licenses and Juniper's belated attempts
4 to change Dr. Ugone's opinion in its opposition should be disregarded.

5 Dr. Ugone also failed to address the "early resolution" and "acquisition provisions" of license
6 agreements that he acknowledged were important to Finjan's licensing negotiations. Ugone Report, ¶¶
7 65, 72, 76-80. Specifically, in each of the three licensees he failed to account for the following facts:
8 (1) F5 obtained a license agreement three weeks after a litigation was filed; (2) no litigation was filed
9 against [REDACTED]
10 [REDACTED]; and (3) there was a litigation against Sophos which
11 went to trial through a jury verdict and successful post-trial motions, unlike the hypothetical
12 negotiation where there was no litigation filed. Kastens Decl., Ex. 3 ([REDACTED] license) at 4-5. His
13 failure to compare these circumstances with the hypothetical negotiation in this case made his opinions
14 unreliable.

15 **B. Dr. Ugone Failed To Assume Infringement In Calculating His Royalty Base**

16 Dr. Ugone also failed to assume infringement—a well-settled legal assumption that damages
17 experts are required to do. Instead, he improperly relied on Juniper's technical expert to exclude the
18 following accused SRX device models from his royalty base: (1) certain SRX device models that
19 allegedly cannot interact with Sky ATP, and (2) SRX devices where the user did not activate a license
20 to use Sky ATP³. His entire basis is Juniper's non-infringement arguments. However, contrary to
21 Juniper's baseless assertions, Finjan has not changed its infringement contentions for Claim 10 of the
22 '494 Patent, nor did Finjan's counsel "direct" its expert to testify to a new theory at his deposition.
23 The accused products for this claim have remained the same since the beginning of the case: (1) Sky
24 ATP alone and (2) SRX devices in combination with Sky ATP. Therefore, Dr. Ugone's exclusion of

25 _____
26 ³ Juniper mischaracterizes Finjan's damages expert, Mr. Arst, to improperly suggest that Finjan's
27 corporate executive somehow "request[ed]" him to include non-accused revenues in an errata. Opp. at
28 6. Rather, Mr. Arst testified that his errata was done in order to include revenues for all the accused
29 products that Dr. Cole identified, which he inadvertently omitted from his original calculation. Opp.,
30 Ex. 6 at 58:5-61:15. The errata did not change his opinion.

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