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16 JUNIPER NETWORKS, INC.

17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN FRANCISCO DIVISION**

20 FINJAN, INC., a Delaware Corporation,) Case No. 3:17-cv-05659-WHA
21)
Plaintiff,) **DEFENDANT JUNIPER NETWORKS,**
22) **INC.’S REPLY IN SUPPORT OF**
vs.) **JUNIPER NETWORK’S MOTION TO**
23) **EXCLUDE THE TESTIMONY OF**
JUNIPER NETWORKS, INC., a Delaware) **MR. KEVIN M. ARST**
24 Corporation,)
25 Defendant.) Date: November 29, 2018
Time: 8:00 a.m.
26) Courtroom: Courtroom 12, 19th Floor
Before: Hon. William Alsup
27)
28)

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1 Mr. Arst’s proposed \$60-\$70 million “reasonable royalty” on accused revenues of less than
2 \$1.8 million is economically nonsensical. Rather than attempt to defend Mr. Arst’s absurd math,
3 Finjan’s Opposition seeks to inflate the amount of accused revenues to [REDACTED] by expanding
4 the scope of its infringement claim to encompass SRX devices alone. But while Finjan accused
5 “Sky ATP alone,” it only accused SRX devices “used in combination with Sky ATP.” Dkt. 98
6 (Finjan’s MSJ) at 1-2. For good reason. Despite Finjan’s misleading argument in its Opposition,
7 Finjan’s own technical expert admitted that SRX devices alone [REDACTED]
8 [REDACTED] even under Finjan’s infringement theory—something Juniper could have
9 easily demonstrated during summary judgment had Finjan accused the SRX alone of infringement.

10 Finjan does not dispute that the revenues from the “Accused Products” as Finjan itself
11 defined them—“Sky ATP alone” and SRX devices “used in combination with Sky ATP,” *id*—
12 were less than \$1.8 million. Nor does Finjan challenge the fact that only [REDACTED] SRX devices could
13 have been used with Sky ATP during the damages period. Given these facts, Mr. Arst’s opinion
14 clearly flunks the requirements of *Daubert* for at least the following reasons:

- 15 • It would have been economically irrational for Juniper to pay a royalty of \$60-\$70 million
16 dollars on accused revenues of \$1.8 million.
- 17 • Mr. Arst’s proposed royalty, which amounts to an effective royalty of almost 4,000%, is
18 orders of magnitude more than the rates at which Finjan itself *begins* negotiations (8% for
19 hardware, 16% for software) under its own licensing policy.
- 20 • Mr. Arst did not apply a proper “cost savings” analysis, which requires consideration of
21 the defendant’s next best alternative. Even Finjan’s own technical expert did not consider
22 the alternative Mr. Arst used (“sandboxing” every file) to be commercially viable.
- 23 • Mr. Arst does not account at all for Juniper’s alternative of waiting 14 months until the
24 ’494 Patent expired before releasing Sky ATP. No economically rational actor would have
25 done otherwise if the alternative would have been to incur an additional \$60-\$70 million in
26 costs (or pay the identical amount to Finjan) to generate \$1.8 million in revenue.
- 27 • Mr. Arst’s calculation of Juniper’s alleged “cost savings” by multiplying Juniper’s
28 Amazon Web Services (“AWS”) costs by 359-419 is arbitrary and unreliable.

1 Finjan cannot rescue Mr. Arst’s damages theory by changing the scope of its infringement
2 claim. Mr. Arst’s damages opinion is unsupported by the facts, and should be excluded.

3 **I. FINJAN CANNOT DEFEND MR. ARST’S OPINION UNDER THE CORRECT**
4 **DAMAGES BASE**

5 In its Opposition, Finjan fails to acknowledge that it expressly defined “Accused Products”
6 as “(1) Juniper’s SRX Gateways used in combination with Sky ATP, and (2) Sky ATP alone
7 (‘Accused Products’).” Dkt. 98 (Finjan’s MSJ) at 1-2. These Accused Products generated less than
8 \$1.8 million in revenues during the damages period. Finjan does not even attempt to defend
9 Mr. Arst’s \$60-\$70 million damages opinion in light of the actual damages base at issue.

10 Instead, throughout its Opposition, Finjan attempts to sneak into its infringement claim a
11 new, third category of products—SRX devices alone.¹ *See, e.g.*, Opp. at 3 (“accused SRX
12 products”), *id.* at 11 (“accused SRX gateways”). Based on this new infringement theory, Finjan
13 claims that the damages base is actually around [REDACTED] Opp. at 1. This is Finjan’s only
14 response to Juniper’s argument that Mr. Arst’s opinion should be excluded because it defies basic
15 economics. Opp. § III.A. Finjan’s new infringement theory fails for at least two reasons.

16 First, Finjan’s new theory is untimely. While Finjan accused “Sky ATP alone” of
17 infringing Claim 10, Finjan never accused SRX devices alone. Dkt. 98 (Finjan MSJ) at 1-2. Finjan
18 cannot change course now, after expert discovery and on the eve of trial.

19 Second, Finjan has no colorable infringement claim against SRX devices alone. The only
20 argument Finjan advances is its contention that [REDACTED]
21 [REDACTED] Opp. at 12-14, n.14. This is misleading, if not completely false. [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] as Finjan’s own technical expert admitted. [REDACTED]
25 [REDACTED]

26
27 ¹ Contrary to Finjan’s suggestion, the Court explicitly limited its summary judgment
28 holding to “SRX Gateways *used in combination with Sky ATP*” and held that the issue of “the
extent of damages” would be decided at trial. *See* Dkt. 189 at 3, 21 (emphasis added).

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