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Attorneys for Defendant
JUNIPER NETWORKS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FINJAN, INC., a Delaware Corporation,	) Case No. 3:17-cv-05659-WHA
)
Plaintiff,	) DEFENDANT JUNIPER NETWORKS,
	) INC.'S OPPOSITION TO PLAINTIFF
vs.	) FINJAN INC.'S MOTION <i>IN LIMINE</i>
	) NO. 1 TO PRECLUDE THE LATE
JUNIPER NETWORKS, INC., a Delaware	) DISCLOSURE AND RELIANCE ON
Corporation,	) DOCUMENTS, WITNESSES OR
	) THEORIES/OPINIONS NOT TIMELY
Defendant.	) DISCLOSED
)
	) Date: December 4, 2018
	) Time: 9:00 a.m.
	) Courtroom: Courtroom 12, 19th Floor
	) Before: Hon. William Alsup

1 Finjan failed to fulfill its burden to ascertain and seek the evidence it needed to prove
2 damages in this case. Faced with the potential exclusion of its damages expert, Finjan now accuses
3 Juniper of violating its discovery obligations and seeks exclusion of various relevant evidence that
4 undermines its damages theory. Given that fact discovery does not close until March 2019, and
5 given that Finjan's broad discovery requests apply to all of its claims (not just the ones at issue in
6 this early trial), Juniper focused its efforts on the categories that Finjan told Juniper to prioritize.
7 Juniper should not be penalized for failing to read Finjan's mind about the information it needed in
8 advance of trial; Juniper had no way to anticipate Finjan's far-fetched damages theory.

9 **I. JUNIPER DISCLOSED ALL WITNESSES IN A TIMELY MANNER**

10 Finjan first argues that Juniper witnesses Shelly Gupta and Alex Icasiano should not be
11 allowed to testify at trial because they "were not disclosed in a timely manner." MIL1 at 1. Finjan's
12 argument mischaracterizes the factual record and fails to establish any alleged prejudice.

13 **Shelly Gupta**: Under Rule 26(e), a party is required to supplement a disclosure or response
14 "in a timely manner if the party learns that in some material respect the disclosure or response is
15 incomplete or incorrect." Fed. R. Civ. P. 26(e)(1); *see also Gomo v. NetApp, Inc.*, 2018 WL
16 6002322, at *2 (N.D. Cal. Nov. 15, 2018). Juniper served its initial disclosures on February 28,
17 2018, and identified Anthony Pham as its financial witness. Mr. Pham left Juniper in August 2018.
18 *See* Ex. 1 (Pham LinkedIn). Upon his departure, Juniper promptly amended its disclosures to
19 substitute Shelly Gupta as its financial witness. Ex. 2 (9/10/18 Amended Disclosures). Thus, there
20 is no basis for Finjan's allegation that Juniper's disclosure of Ms. Gupta was untimely.

21 Moreover, Finjan's claim that it was prejudiced because it could not take Ms. Gupta's
22 deposition is not true. Prior to serving its expert report, Finjan never requested a Rule 30(b)(6)
23 deposition on financial topics; nor did it seek to depose Mr. Pham in his personal capacity.
24 Moreover, Finjan did not even request Ms. Gupta's deposition until October 24, 2018—over a
25 month after Juniper served the amended disclosures. Juniper promptly produced her for deposition
26 on November 16, 2018. Accordingly, Finjan suffered no prejudice from the timing of Juniper's
27 amended disclosure and there is no legitimate basis to exclude Ms. Gupta.

28

1 **Alex Icassiano:** Mr. Icasiano is a Juniper employee who is familiar with the operational
2 details of Sky ATP, including low-level details of Sky ATP's use of Amazon Web Services
3 ("AWS") and [REDACTED]. Prior to serving its damages expert report on September 11, 2018, Finjan did
4 not provide Juniper with any indication that this information would be relevant to the case. For
5 example, Finjan did not serve any interrogatories requesting information about the percentage of
6 samples that are subjected to dynamic analysis, nor did it request details on the content and scope
7 of Juniper's Amazon invoices. Moreover, Finjan did not request a Rule 30(b)(6) deposition notice
8 on these issues until October 16, 2018, which was over a month after it served its expert report.

9 Upon receiving Finjan's expert report—which contains a far-fetched "cost savings" theory
10 that Juniper could not have anticipated—as well as Finjan's Rule 30(b)(6) notice on October 16,
11 Juniper investigated to determine the person at Juniper who is most knowledgeable about these
12 issues. Juniper then promptly amended its Rule 26 disclosures to add Mr. Icasiano, and offered dates
13 for Mr. Icasiano's deposition. Ex. 3 (Second Amended Disclosures); Ex. 4 (Email regarding Rule
14 30(b)(6) deposition). Prior to this time, Juniper had no reason to believe that Mr. Icasiano had
15 relevant information that was not cumulative of the other witnesses on Juniper's Rule 26 disclosure.
16 The role Mr. Icassiano plays in Juniper's rebuttal damages expert reports (highlighted in Finjan's
17 motion) serves as evidence of this very fact. In view of this record, it is disingenuous for Finjan to
18 claim prejudice.

19 **II. JUNIPER COMPLIED WITH ITS DISCOVERY OBLIGATIONS TO PRODUCE**
20 **RESPONSIVE DOCUMENTS AND FINJAN FAILED TO SEEK THE**
21 **INFORMATION NEEDED TO SUPPORT ITS EXPERTS**

22 Finjan next argues that Juniper should be precluded from "relying on confidential internal
23 Juniper documents that were not produced at least a month before Finjan submitted its opening
24 expert reports." Finjan's arbitrary one-month deadline makes no sense.

25 Finjan served broad discovery requests that pertain to all of its claims—not just those at issue
26 in the early summary judgment proceedings—in March 2018. To accommodate the early summary
27 judgment proceedings, the parties specifically identified categories of discovery that should be
28 prioritized. Juniper made diligent efforts to accommodate all such requests from Finjan. Finjan
elected to focus on technical discovery, and did not make any specific requests for Juniper to

1 prioritize its production of damages-related documents pertaining to cost and financial information
2 before the summary judgment hearing. Nor did Finjan follow up with any requests for Juniper to
3 prioritize the production of the specific evidence Finjan believed it needed to support its damages
4 case in advance of serving its expert report. Juniper did not and could not have predicted the
5 nonsensical damages theory Finjan now advances and was thus not aware of Finjan's need for the
6 documents it claims were produced too late.

7 Specifically, Finjan made no attempt to seek additional information concerning Juniper's
8 AWS or [REDACTED]. Juniper made clear in its discovery responses that dynamic analysis is
9 hosted on [REDACTED]. *See* Ex. 5 (Juniper's Resp. To Interrogatory No. 11). To the extent Finjan desired
10 to present a damages theory revolving around costs incurred by additional dynamic analysis, Finjan
11 should have sought the discovery it needed—at minimum, by raising this issue with Juniper. Instead,
12 Finjan remained silent and chose to serve an ill-informed damages report. Further, Finjan cannot
13 credibly claim any prejudice resulting from the timing of Juniper's production of its [REDACTED]
14 given that its expert who opined that Juniper's AWS invoices reflect cost savings did not review the
15 produced AWS invoices. *See* Ex. 6 (Cole Dep) at 149:3-8 ("Q. Did you review Juniper's AWS
16 invoices? A. I believe they were discussed on the phone call. Q. ***Did you personally review them?***
17 A. I would have to check, ***but I do not think that I did.***")(emphasis added). There is no reason to
18 believe Dr. Cole would have changed course and reviewed the [REDACTED] had they been
19 provided in advance of his report.

20 Additionally, as Finjan concedes, on September 7, 2018, Juniper produced a financial
21 spreadsheet evidencing revenues resulting from sales of SRX devices which were enabled with a
22 free Sky ATP licenses. Accordingly, this information was provided *before* Finjan's damages report
23 was due.¹ Again, Finjan failed to request a deposition concerning the produced spreadsheet or serve
24 additional interrogatories until well after service of its expert report. Thus, the record shows that
25 Finjan was the one that was not diligent, not Juniper.

26
27 ¹ Juniper offered Finjan with an extension for its damages expert report in exchange for an
28 extension for Juniper's rebuttal damages report but Finjan decided to forge ahead and serve its
expert report without the evidence needed to support its chosen theories. *See* Ex. 7.

1 Finjan did not voice any complaint about the adequacy of Juniper's discovery responses until
2 November 7, 2018—well after serving its expert's damages report. Upon first complaint Juniper
3 offered to meet and confer with Finjan should it feel the need to supplement its expert report. *See*
4 Ex. 4. Finjan never followed up on Juniper's offer. Further, Finjan issued a series of additional
5 discovery requests in mid-October—undercutting any argument that Juniper should have completed
6 fact discovery pertaining to the December trial prior to Finjan's expert reports.

7 Finjan's lack of diligence in discovery cannot excuse Finjan's decision to serve a speculative
8 damages opinion that is inconsistent with the factual record. Northern District case law provides
9 helpful guidance.

10 In *Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 476 F. Supp. 2d 1143, 1155 (N.D. Cal.
11 2007), *clarified on denial of reconsideration*, 2007 WL 1108615 (N.D. Cal. Apr. 11, 2007), the
12 court granted the defendant's motion for summary judgment on the ground that plaintiff had failed
13 to prove damages. The court rejected the plaintiff's argument that it was unable to properly calculate
14 damages due to the defendant's failure to produce evidence allowing for a more precise calculation.
15 *Id.* The court reasoned that "the patent holder bears the burden of proving its damages" and if the
16 defendant "refused to produce information that [plaintiff's damages expert] required to determine
17 the reasonable royalty, then [plaintiff] needed to get that information, if necessary through a motion
18 to compel." *Id.* Further, "[plaintiff] fails to show any effort it took to get all the information
19 necessary for its expert to provide a reasonable royalty calculation that does not rely on unreasonable
20 inferences or speculation." *Id.*

21 Similarly, in *Microsoft Corp. v. Corel Corp.*, 2017 WL 6492468, at *1-*3 (N.D. Cal. 2017),
22 the court excluded portions of the patentee's damages expert's opinion that were based on the
23 patentee's version of the cost to design around the patent. The court found that the expert was unable
24 to explain why the defendant would rationally pay more than its own design-around costs. *Id.* at *2.
25 The court rejected the expert's argument that she had "no choice but to rely on [the irrelevant
26 evidence] because [defendant's] witnesses could not provide a comparable estimate." *Id.* The court
27 found that if the patentee "believed that [defendant's] provided insufficient information about
28 [defendant's] design-around time estimates, [defendant] could have conducted discovery on that

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