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

19 FINJAN, INC., a Delaware Corporation, 20 Plaintiff, 21 vs. 22 JUNIPER NETWORKS, INC., a Delaware Corporation, 23 Defendant. 24 25 26 27 28) Case No. 3:17-cv-05659-WHA)) DEFENDANT JUNIPER NETWORKS,) INC.’S OPPOSITION TO PLAINTIFF) FINJAN INC.’S MOTION <i>IN LIMINE</i>) NO. 4 TO PRECLUDE DISCUSSION OF) IRRELEVANT AND PREJUDICIAL) INFORMATION)) Date: December 4, 2018) Time: 9:00 a.m.) Courtroom: Courtroom 12, 19th Floor) Before: Hon. William Alsup
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1 **I. INTRODUCTION**

2 Although Finjan has violated paragraph 2(f) of the Court’s guidelines, Juniper submits this
3 opposition to each of the multiple topics included in Finjan’s Motion *in Limine* No. 4 in
4 accordance with the Court’s guidance in Docket 232: “The Court agrees with Juniper that each of
5 the motions at issue covers multiple topics in violation of paragraph 2(f). Juniper, however, shall
6 please help the Court by responding to the motions at issue in any event.” Dkt. 232.

7 **A. Evidence and Argument Regarding Other Patents**

8 Finjan’s request to exclude evidence and argument of other patents should be denied for
9 other Juniper patents (as these are relevant to the relative importance of Finjan’s sole patent in the
10 hypothetical negotiation), but references to other Finjan patents should be excluded subject to a
11 specific showing of relevance. Finjan cites cases holding that a blanket exclusion on evidence of
12 unasserted patents (such as a defendant’s patents) is inappropriate when evidence of other patents
13 is shown to be relevant and probative. *See* Finjan’s Motion *in Limine* No. 4 at 1 (citing
14 *Conceptus, Inc. v. Hologic, Inc.*, 2011 WL 13152795 at *3 (N.D. Cal. Sep. 27, 2011) (“Judge
15 Alsup granting plaintiff’s motion *in limine* ‘to exclude evidence, testimony, and argument
16 concerning [defendant’s] patents ... **subject to a specific offer of proof at trial and a specific**
17 **showing of relevance and probativeness.**”) (alterations in original) (emphasis added).

18 Here, evidence of Juniper’s own patents is relevant to the hypothetical negotiation between
19 the parties for purposes of calculating damages. Juniper’s damages expert, Dr. Keith Ugone,
20 relied on evidence of Juniper’s patents and intellectual property to help establish the relative value
21 of Finjan’s patent in a hypothetical negotiation. Dr. Ugone stated: “[a]t the hypothetical
22 negotiation, Juniper would emphasize that Juniper’s contributions and features unrelated to the
23 claimed invention drove (and drive) the commercial success of the Accused Products.” Ex. 21
24 (Ugone Report) ¶ 106. One aspect of Juniper’s contributions is that “Juniper has a strong
25 intellectual property portfolio, with over 3,300 patents worldwide as of December 31, 2017.” *Id.*
26 at ¶ 104. Dr. Ugone explains:

27 “At the hypothetical negotiation, the parties would be aware that
28 innovation is an important contributing factor to commercial success
in the security networks market. Juniper (and Finjan) would recognize
that Juniper had incurred significant R&D expenses to develop the

1 Accused Products, and likely would need to incur future R&D
2 expenses to continually enhance and improve the Accused Products.
3 These R&D expenses would be borne by Juniper alone, and represent
4 significant contributions to the commercial success of the Accused
5 Products unrelated to the claimed teachings of the '494 Patent.”

6 *Id.* at ¶ 105. Because Juniper’s damages expert relies on evidence of Juniper’s patents and
7 intellectual property portfolio—and explains that Juniper would actually discuss this during the
8 hypothetical negotiation—it is clear that the underlying data about these patents and intellectual
9 property is relevant and probative. Moreover, they underscore the unreasonableness of the
10 opinion of Finjan’s damages expert, Mr Arst—who does not account for those contributions in any

11 As such, the fact that Juniper has invested significant resources to develop its own patented
12 technology is relevant to damages and admissible. Other courts have admitted evidence of the
13 defendant’s own patents for this same reason. *Wonderland NurseryGoods Co. v. Thorley Indus.,*
14 *LLC*, No. 12-196, 2014 WL 241751, at *2 (W.D. Pa. Jan. 22, 2014) (denying patentee’s motion in
15 limine seeking to exclude evidence of defendant’s patents because they were “relevant in the
16 calculation of an appropriate reasonable royalty”); *Carnegie Mellon Univ. v. Marvell Tech. Grp.,*
17 *Ltd.*, No. CIV.A. 09-290, 2012 WL 5416440, at *1-2 (W.D. Pa. Nov. 2, 2012) (finding the size
18 and scope of an alleged infringer’s patent portfolio relevant to “calculation of alleged damages by
19 a reasonable royalty analysis”); *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, No. 07-CV-
20 250, 2009 WL 8725107, at *8 (E.D. Tex. Oct. 8, 2009) (denying motion *in limine* seeking to
21 exclude evidence of the defendant’s patents because “evidence of [d]efendant’s development
22 efforts and intellectual property, including patents, may be relevant to a reasonable royalty
23 analysis”).

24 In addition, Finjan’s claims of prejudice are fabricated. Juniper has *never* sought to argue
25 that Juniper’s products do not infringe the '494 Patent because Juniper has its own patents.
26 Indeed, Finjan fails to cite any Juniper brief, expert report, or testimony to support this absurd
27 contention.

28

1 While Juniper has made a specific showing of how Juniper's patents and intellectual
2 property portfolio are relevant, there is no reason why any of Finjan's patents that are not asserted
3 in the upcoming trial would be relevant. To the contrary, Finjan's damages expert has already
4 rejected the relevance of other patents and licenses for evaluating the hypothetical negotiation and
5 instead "concluded that the Cost Approach provides the best available indicator of the economic
6 footprint of the '494 Patent for purposes of evaluating the hypothetical negotiation in this case."
7 Ex. 16 (Arst Report) at 45.

8 But while Finjan's damages expert fails to show the relevance of Finjan's other patents and
9 portfolio, it is apparent that Finjan still attempts to introduce evidence of them for inappropriate,
10 prejudicial purposes. For example, Finjan repeatedly references its other patents and patent
11 portfolio to push a narrative that it "pioneered" behavior-based analysis to support the
12 patentability of the '494 Patent. Ex. 22 (Orso Report) at ¶¶ 48-53 (discussing various market
13 reports dated between 2003-2010 that discuss Finjan and its technology generally when the '494
14 Patent did not issue until 2014). Whether Finjan's *other* patents are innovative is irrelevant to
15 whether the recited claims in the '494 Patent are sufficiently inventive to be patent eligible. In
16 another example, Finjan seeks to introduce evidence of the '844 Patent and the Federal Circuit's
17 decision in *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018) to argue that
18 the '494 patent is inventive. Ex. 22 (Orso Report) at ¶¶ 53-54. For the same reasons explained in
19 Juniper's Motion *in Limine* No. 2, such evidence is improper under Fed. R. Evid. 403 and is
20 inadmissible hearsay under Fed. R. Evid. 801 and 802.

21 **B. Evidence and Argument Regarding Irrelevant Proceedings**

22 Finjan takes a hypocritical approach to evidence of its other litigations. On the one hand,
23 Finjan asks the Court to exclude evidence of Finjan's pending litigation that reflects negatively on
24 Finjan, while asking the Court to allow evidence of resolved litigations that were favorable to
25 Finjan. But if Finjan's co-pending litigation and PTAB proceedings are irrelevant and
26 inadmissible, then so too are the resolved outcomes of Finjan's other litigation and PTAB
27 proceedings.

28

1 Tellingly, Finjan recognizes that other litigations and proceedings involve “different
2 defendants than Juniper and different accused products” and thus “have no bearing or relevance to
3 the issues to be tried here, *i.e.*, they do not have ‘any tendency to make a fact more or less
4 probable that it would be without the evidence.’” Finjan’s Motion *in Limine* No. 4 at 2. Yet,
5 Finjan would like to carve out an exception for its *resolved* cases—presumably to introduce
6 evidence of past infringement or validity findings in attempt to mislead the jury into thinking that
7 infringement or validity is thus more likely in this case. As explained in Juniper’s Motion *in*
8 *Limine* No. 2, such evidence and argument is not only hearsay, but sleight of hand that is
9 substantially prejudicial and irrelevant. Indeed, each case involved unique facts with different
10 defendants, different products, and often entirely different patents.

11 In addition, Finjan’s motion fails to explain any legitimate distinction for why Finjan’s
12 resolved litigation and proceedings should be admissible while its co-pending litigation and
13 proceedings should not be. For example, Finjan notes that IPR proceedings “where no final
14 written decision or denial of institution of trial has been rendered” should be excluded because
15 “[a]n IPR proceeding is self-initiated by a third-party and the mere filing of an IPR of a patent has
16 no legally binding effect on the validity of a patent.” Finjan’s Motion *in Limine* No. 4 at 3.
17 Likewise, resolved IPR proceedings where the PTAB chose not to invalidate a claim as anticipated
18 or obvious under 35 U.S.C. §§ 102 and 103 have “no legally binding effect on the validity of a
19 patent.”¹ Yet, Finjan attempts to have its expert confuse the jury into thinking that because Claim
20 10 survived IPR §§ *102/103 challenges*, Claim 10 should survive Juniper’s § 101 defense as well.
21 *See* Ex. 22 (Orso Report) at ¶ 45. For the same reasons explained in Juniper’s Motion *in Limine*
22 No. 2, such evidence is inadmissible for being substantially prejudicial and irrelevant.

23
24
25 ¹ Juniper notes that the prosecution history of the ’494 Patent, including the invalidation of
26 Claim 1 (which has substantial overlap to the limitations of Claim 10) during IPR, is relevant to
27 the issues that will be litigated at trial and is thus admissible. The invalidation of a patent claim
28 during IPR is a legally binding, affirmative determination by the PTAB that a claim is not
patentable. By contrast, a failed IPR challenge does not represent an affirmative determination
that a patent claim is valid—a third party challenger simply failed to meet its burden of proving
invalidity. Thus, the invalidation of Claim 1 is relevant to the upcoming trial as a legally binding
decision impacting the ’494 Patent while failed invalidity challenges are not.

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