

1 PAUL ANDRE (State Bar No. 196585)  
pandre@kramerlevin.com  
2 LISA KOBIALKA (State Bar No. 191404)  
lkobialka@kramerlevin.com  
3 JAMES HANNAH (State Bar No. 237978)  
jhannah@kramerlevin.com  
4 KRISTOPHER KASTENS (State Bar No. 254797)  
kkastens@kramerlevin.com  
5 KRAMER LEVIN NAFTALIS & FRANKEL LLP  
6 990 Marsh Road  
7 Menlo Park, CA 94025  
8 Telephone: (650) 752-1700  
9 Facsimile: (650) 752-1800  
10 *Attorneys for Plaintiff*  
11 FINJAN, INC.

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

16 FINJAN, INC., a Delaware Corporation,

17 Plaintiff,

18 v.

20 JUNIPER NETWORKS, INC., a Delaware  
Corporation,

21 Defendant.

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

**PLAINTIFF'S FINJAN INC.'S MOTION  
IN LIMINE 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

## INTRODUCTION

Pursuant to Federal Rules of Evidence 401 and 403 Finjan moves to exclude from trial any argument or evidence regarding irrelevant information. Specifically, Finjan moves to exclude evidence and arguments regarding Juniper's patents, irrelevant legal proceedings, or the use of pejorative terms against Finjan.

### A. Evidence and Arguments Regarding Juniper's Patents

The Court should preclude Juniper from presenting any argument or evidence regarding any Juniper patents or patent applications, because such evidence provides zero probative value to any of the claims or defenses that will be tried in this case. *See* Fed. R. Evid. 401-403; *Conceptus, Inc. v. Hologic, Inc.*, No. C 09-02280 WHA, 2011 WL 13152795, at \*3 (N.D. Cal. Sept. 27, 2011) (Judge Alsup granting plaintiff's motion *in limine* "to exclude evidence, testimony, and argument concerning [defendant's] patents ... subject to a specific offer of proof at trial and a specific showing of relevance and probativeness."). The only patents that are relevant to this trial include the asserted '494 Patent and the patents in the licenses to be presented at trial. Juniper's own patents have no bearing on any theory of validity, infringement, or damages in this case. The fact that Juniper may have rights to other patents does not immunize its products from infringing the '494 Patent. *See Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1559 (Fed. Cir. 1996) ("[T]he existence of one's own patent does not constitute a defense to infringement of someone else's patent. It is elementary that a patent grants only the right to exclude others and confers no right on its holder to make, use, or sell.") (citation omitted).

Moreover, such evidence should be precluded because any probative value (*e.g.*, company background) would be substantially outweighed by its risk of unfair prejudice and the strong potential to mislead the jury into thinking that Juniper's products cannot infringe. *See* Fed. R. Evid. 403. For example, the jury could infer that the accused Juniper products do not infringe Finjan's '494 Patent merely because Juniper already owns patents that may touch on other aspects of the accused products. *See* Declaration of Kristopher Kastens filed herewith, Ex. 16 at 2, *Therasense, Inc. v. Noca Biomed. Corp.*, No. C 04-02123 WHA, Order *In Limine* Excluding Reference to '299 Patent (N.D. Cal. July

21, 2008) (Judge Alsup excluding all references to a patent with low probative value in order to avoid

1 the “certain confusion that would arise from its placement before the jury. . . . Members of the jury  
2 would likely think that the accused product has its *own* patent and therefore must not infringe (even if  
3 defendants do not expressly so argue), a bogus line of reasoning.”) (emphasis in original).

4 Since evidence of Juniper’s existing patent rights have no probative value and present a high  
5 risk of jury confusion, the Court should grant Finjan’s motion to exclude all reference to Juniper’s  
6 patents.

## 7 **B. Evidence and Arguments Regarding Irrelevant Proceedings**

### 8 **1. Co-Pending Lawsuits that have Not Reached a Jury Verdict.**

9 The Court should preclude Juniper from presenting any argument or evidence regarding co-  
10 pending lawsuits involving Finjan, except to the extent any litigation has reached a jury verdict.  
11 Specifically, Finjan is involved in multiple pending litigations with different defendants than Juniper  
12 and different accused products. There have been no decisions on the merits of the claims or defenses  
13 in these pending lawsuits, and fact discovery has yet to close in all but one of them. Thus, these  
14 pending lawsuits have no bearing or relevance to the issues to be tried here, *i.e.*, they do not have “any  
15 tendency to make a fact more or less probable than it would be without the evidence.” *See* Fed. R.  
16 Evid. 401; *see also, e.g., In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-MD-  
17 01819 CW, 2010 WL 10086747, at \*2 (N.D. Cal. Dec. 16, 2010) (granting motion *in limine* to  
18 exclude reference to party’s other litigation because “[s]uch evidence does not appear relevant.”).

19 Additionally, any probative value of these co-pending litigations is far outweighed by the risk  
20 of prejudice. *See* Fed R. Evid. 403. Introducing evidence of pending proceedings carries a substantial  
21 risk that the jury will be confused, react emotionally, and perceive Finjan in an unfavorable light  
22 untethered to any facts in the case. *See, e.g., In re Homestore.com, Inc.*, No. CV 01-11115 RSWL  
23 CWX, 2011 WL 291176, at \*1 (C.D. Cal. Jan. 25, 2011) (granting motion *in limine* to exclude  
24 evidence of Plaintiff’s involvement in prior lawsuits because it’s “irrelevant and carries with it a high  
25 risk of prejudice.”); *see also Outley v. City of New York*, 837 F.2d 587, 595 (2d Cir. 1988) (finding  
26 that opening up the area of other litigation “invites detailed inquiries, denials, and explanations, likely  
27 to lead to multifariousness and a confusion of the issues.”); *Seals v. Mitchell*, No. CV 04-3764 NJV,  
28 2011 WL 1200245, at \*5 (N.D. Cal. Apr. 12, 2011) (granting motion to exclude evidence of other litigation because it is “irrelevant and carries with it a high risk of prejudice.”).

1 probative value of plaintiff's litigation history "outweighed by the substantial danger of jury bias  
2 against the chronic litigant."). If such evidence is permitted at trial, Juniper would undoubtedly argue  
3 that Finjan does not have a valid business, that it only seeks monetary gain, or that its claims in this  
4 litigation are meritless. These arguments will likely distract the jury from the fact that Finjan has a  
5 lawful right to seek redress for infringement of its patents against Juniper, regardless of whether it has  
6 filed lawsuits against other companies. Accordingly, Finjan moves to preclude Juniper from  
7 introducing evidence or arguments regarding any of Finjan's pending litigations that have not yet  
8 reached a jury verdict.

9 **2. Pending PTAB Proceedings Where No Final Written Decision has been**  
10 **Issued.**

11 The Court should preclude Juniper from presenting any argument or evidence regarding any  
12 pending PTO *inter partes* review ("IPR") proceedings where no final written decision or denial of  
13 institution of trial has been rendered. An IPR proceeding is self-initiated by a third-party and the  
14 mere filing of an IPR of a patent has no legally binding effect on the validity of a patent. Thus,  
15 informing the jury that an entity has simply initiated IPR proceedings against any of Finjan's patents  
16 carries a high risk of confusing the jury into believing that these proceedings cast doubt on the validity  
17 of the asserted patents, or conclude that Finjan is not entitled to a presumption of validity. Fed R.  
18 Evid. 401-403.

19 "Several courts, including the Federal Circuit, have considered whether evidence of an  
20 ongoing reexamination or IPR proceeding is admissible, with the majority concluding that the  
21 evidence should be precluded." *Wisconsin Alumni Research Found. v. Apple, Inc.*, 135 F. Supp. 3d  
22 865, 873 (W.D. Wis. 2015); *Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1343 (Fed. Cir.  
23 2009) ("The district court did not abuse its discretion in concluding that the prejudicial nature of  
24 evidence concerning the ongoing parallel re-examination proceeding outweighed whatever marginal  
25 probative or corrective value it might have had in this case."). This Court is part of that majority. *See*  
26 *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA, 2012 WL 1189898, at \*3 (N.D. Cal. Jan. 4,  
27 2012) (Judge Alsup granting in part a motion *in limine* to exclude information regarding pending  
28 reexamination proceedings under Rule 403 because "the probative value is outweighed by the time

1 and confusion that would be involved.”). For these reasons, pending IPR proceedings should be  
2 excluded.

3 **C. Statements that Finjan is a Non-Practicing Entity or “Patent Troll”**

4 To that end, the Court should also preclude Juniper from making any references to Finjan as a  
5 non-practicing entity (“NPE”), patent assertion entity (“PAE”), “patent troll,” or any other term that  
6 has a derogatory or negative connotation at trial, as these terms readily conjure up the fact that Finjan  
7 may be involved in other pending litigation. *See Finjan, Inc. v. Sophos, Inc.*, No. 14-cv-01197-WHO,  
8 2016 WL 4560071, at \*8 (N.D. Cal. Aug. 22, 2016) (granting Finjan’s motion *in limine* in part to  
9 preclude uses of the terms “patent assertion entity” and “patent troll.”); *see also Finjan, Inc. v. Blue*  
10 *Coat Sys., Inc.*, No. 13-cv-03999-BLF, 2015 WL 4129193, at \*2 n.1 (N.D. Cal. July 8, 2015)  
11 (“Although the Court is aware that other courts have permitted use of the term “patent assertion  
12 entity,” the Court finds that this term carries negative connotations similar to the term “patent troll.”)  
13 (citation omitted). Finjan therefore moves to preclude Juniper from all references to the terms “patent  
14 troll,” “patent assertion entity,” “non-practicing entity,” or any other derogatory terms that will  
15 prejudice Finjan.

16 **CONCLUSION**

17 For the foregoing reasons, Finjan’s Motion *in Limine* No. 4 should be granted.  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.