

1 IRELL & MANELLA LLP  
 Jonathan S. Kagan (SBN 166039)  
 2 jkagan@irell.com  
 Joshua Glucoft (SBN 301249)  
 3 jglucoft@irell.com  
 Casey Curran (SBN 305210)  
 4 ccurran@irell.com  
 Sharon Song (SBN 313535)  
 5 ssong@irell.com  
 1800 Avenue of the Stars, Suite 900  
 6 Los Angeles, California 90067-4276  
 Telephone: (310) 277-1010  
 7 Facsimile: (310) 203-7199

8 Rebecca Carson (SBN 254105)  
 rcarson@irell.com  
 9 Kevin Wang (SBN 318024)  
 kwang@irell.com  
 10 840 Newport Center Drive, Suite 400  
 Newport Beach, California 92660-6324  
 11 Telephone: (949) 760-0991  
 Facsimile: (949) 760-5200

12 *Attorneys for Defendant*  
 13 JUNIPER NETWORKS, INC.

14  
 15 **UNITED STATES DISTRICT COURT**  
 16 **NORTHERN DISTRICT OF CALIFORNIA**  
 17 **SAN FRANCISCO DIVISION**

18	FINJAN, INC., a Delaware Corporation,	)	Case No. 3:17-cv-05659-WHA
		)	
19	Plaintiff,	)	<b>JUNIPER NETWORKS, INC.’S MOTION</b>
		)	<b>IN LIMINE NO. 2 TO EXCLUDE</b>
20	vs.	)	<b>EVIDENCE AND ARGUMENT</b>
		)	<b>ON OUTCOMES FROM</b>
21	JUNIPER NETWORKS, INC., a Delaware	)	<b>FINJAN’S PRIOR LITIGATION</b>
	Corporation,	)	
22		)	Date: December 4, 2018
	Defendant.	)	Time: 9:00 a.m.
23	_____	)	Courtroom: Courtroom 12, 19 <sup>th</sup> Floor
		)	Before: Hon. William Alsup

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1 Defendant Juniper Networks, Inc. (“Juniper”) respectfully moves the Court for an order *in*  
 2 *limine* precluding Plaintiff Finjan, Inc. (“Finjan”) from presenting argument or evidence of verdicts  
 3 and orders from Finjan’s prior litigations, including but not limited to the following orders: *Finjan,*  
 4 *Inc. v. Blue Coat Systems, LLC*, 2016 WL 7212322 (N.D. Cal. Dec. 13, 2016) (“*Blue Coat I*”) and  
 5 *Finjan, Inc. v. Sophos*, 244 F.Supp.3d at 1016 (N.D. Cal. 2016) (“*Sophos*”), and *Finjan, Inc. v. Blue*  
 6 *Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018) (“*Blue Coat II*”). Such argument and evidence  
 7 is irrelevant, prejudicial, confusing, and misleading, and is hearsay. Fed. R. Evid. 402, 403, 802.

8 Finjan’s expert reports and demonstratives make clear that Finjan intends to improperly  
 9 introduce argument and evidence from prior litigation against other defendants, involving other  
 10 products, and in some instances involving entirely different patents. The following examples from  
 11 Finjan’s trial demonstratives are illustrative:

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Slide 13: '494 Patent - Claim 10 - Patent Eligible

Claim 10 of the '494 Patent has already been found patent eligible by two Judges in this District.

- *Blue Coat*, 2016 WL 7212322, at \*11.
- *Sophos*, 244 F. Supp. 3d at 1061.

Related claim from a Finjan Patent was patent eligible by the Federal Circuit.

- *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1304-06 (Fed. Cir. 2018).

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Slide 20: Federal Circuit Decision - Finjan "Pioneered" "Behavior-Based" Approach

The "behavior-based" approach to virus scanning was pioneered by Finjan and is disclosed in the '844 patent's specification. In contrast to traditional "code-matching" systems, which simply look for the presence of known viruses, "behavior-based" scans can analyze a downloadable's code and determine whether it performs potentially dangerous or unwanted operations—such as renaming or deleting files. Because security profiles communicate the granular information about potentially suspicious code made available by behavior-based scans, they can be used to protect against previously unknown viruses as well as "obfuscated code"—known viruses that have been cosmetically modified to avoid detection by code-matching virus scans.

*Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1305-06 (Fed. Cir. 2018)

'494 Patent - Claim 10

"a Downloadable scanner coupled with said receiver, for deriving security profile data for the Downloadable, including a list of suspicious computer operations that may be attempted by the Downloadable"

Ex. 4 (Orso Appendix C – Demonstratives) at 13, 20.

1 Similar examples permeate Finjan’s expert reports, which in addition to discussion of the  
2 *Sophos I*, *Blue Coat I*, and *Blue Coat II* orders also repeatedly reference prior verdicts and the  
3 amounts of damages paid by third parties. Ex. 3 (Orso Report) at ¶ 61 (“Finjan has had success  
4 licensing its patents for years . . . 2008 – Verdict against Secure Computing . . . 2015 – Verdict  
5 against Blue Coat . . . 2016 – Verdict against Sophos”); Ex. 2 (Arst Report) at 8 (“In June 2006,  
6 Finjan, as successor to its parent FSI, filed a patent infringement lawsuit against Secure  
7 Computing Corp. (“Secure”) and its subsidiaries in the United States District Court for the District  
8 of Delaware, resulting in a judgment of approximately \$37.3 million”).<sup>1</sup> Such argument and  
9 evidence is inadmissible, for at least three reasons:

10 **First**, orders issued in Finjan’s prior litigation involving different parties, different factual  
11 questions about different products, and in some instances different patents, are not relevant to the  
12 issues for trial. Fed. R. Evid. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact  
13 more or less probable than it would be without the evidence; and (b) the fact is of consequence in  
14 determining the action”); Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).  
15 Finjan cannot credibly contend that the outcomes of its prior litigations with other entities have  
16 any bearing on the infringement or damages issues that the jury is being asked to decide. To the  
17 contrary, Finjan’s own damages expert takes the opposite position, relying on a “Cost Approach”  
18 to damages and arguing that the fact that Finjan’s licenses arose from litigation “undermine[s] the  
19 use of Finjan’s licensing practices and historical agreements as a reliable starting point for  
20 determining a reasonable royalty. . . .” Ex. 2 (Arst Report) at 33.

21 **Second**, any tangential relevance that these prior litigation orders or verdicts may have to  
22 any issue in the case is substantially outweighed by concerns of prejudice, jury confusion, and  
23 undue consumption of time. Finjan’s tactics amount to a sleight of hand, designed to mislead the  
24 jury into thinking that validity or infringement of the ’494 Patent is more likely in this case  
25 because various Finjan patents were found to be valid or infringed (by other companies unrelated  
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28 <sup>1</sup> See also, e.g., Ex. 3 (Orso Report) at ¶¶ 53-58, 61, 67; Ex. 4 (Orso Appendix C –  
Demonstratives) at 13, 15, 20; Ex. 2 (Arst Report) at Section 6.1, 6.1.1.

1 to Juniper) in other cases, or that damages should be awarded because damages were awarded  
2 against another company in prior litigation.

3 For example, the *Blue Coat I* and *Sophos* orders that Finjan seeks to inject into the trial  
4 present a clear risk of misleading the jury into believing a court has previously decided the subject  
5 matter eligibility issue being presented to them. Not only would that be incredibly prejudicial to  
6 Juniper, it would also be entirely incorrect. Neither order decided any of the factual issues that the  
7 jury is being asked to decide. Rather, they addressed motions for summary judgment and  
8 judgment on the pleadings, where the evidence is viewed in the light most favorable to the  
9 nonmoving party (Finjan). *See Sophos*, 244 F.Supp.3d at 1060 (“While viewing the ’494 patent in  
10 the light most favorable to Finjan, the patent is innovative . . .”); *Blue Coat I*, 2016 WL 7212322  
11 at \*12 (“viewed in the light most favorable to Finjan, the Court concludes that the claims recite an  
12 inventive concept . . .”). In sharp contrast, the jury is being asked to actually resolve *factual*  
13 *disputes*. Indeed, this Court previously declined to grant Finjan’s motion for summary judgment  
14 partly because of the factual issues presented in Juniper’s Section 101 invalidity defense. *See* Dkt.  
15 No. 189 (Order Regarding ’494 Patent) at 20. As such, evidence or argument on the decisions in  
16 *Blue Coat I* and *Sophos* would result in an unwarranted, confusing, and highly burdensome side  
17 show, the result of which would almost certainly be to prejudice Juniper by leaving the jury with a  
18 misleading impression that a court had previously weighed in and found favor with Finjan’s  
19 position.

20 The same problems would be yet further magnified if Finjan is permitted to introduce  
21 argument and evidence regarding Federal Circuit’s patent eligibility decision in *Blue Coat II*,  
22 which did not even involve the patent at issue, but instead the ’844 patent. For example, Finjan  
23 intends to introduce such evidence through the testimony of its technical expert, Dr. Alessandro  
24 Orso. The essence of Finjan’s argument to be presented through Dr. Orso is that, since the Federal  
25 Circuit found the ’844 Patent eligible for patentability, the ’494 Patent is also eligible for  
26 patentability. *See* Ex. 3 (Orso Report) at ¶¶ 53-54 (arguing that claim 10 of the ’494 patent is  
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1 subject matter eligible “for the reasons described by the Federal Circuit for the ’844 Patent”).<sup>2</sup>  
2 This testimony serves no purpose other than to confuse and mislead the jury. The ’844 and ’494  
3 Patents are different inventions with different claim limitations. As one example, in upholding the  
4 validity of the ’844 Patent the Federal Circuit explained the claims “recite specific steps—  
5 generating a security profile that identifies suspicious code and *linking* it to a downloadable—that  
6 accomplish the desired result.” *Blue Coat II*, 879 F.3d at 1305-06 (emphasis added). By contrast,  
7 the ’494 Patent makes no mention of “linking.” Attempting to educate the jury about the  
8 differences between the two patents would yet further contribute to a confusing, time-consuming  
9 side show separate from the actual issues for the upcoming trial.

10 As numerous prior courts have recognized, the tactic Finjan seeks to employ presents  
11 unacceptable dangers of prejudice and jury confusion. Courts routinely exclude evidence of prior  
12 litigation outcomes, particularly where different defendants, products, or patents were involved.  
13 *See, e.g., Odetics, Inc. v. Storage Tech. Corp.*, 185 F. 3d 1259, 1276 (Fed. Cir. 1999) (“[T]he  
14 introduction of evidence of an earlier trial . . . had significant potential to confuse the jury. The  
15 district court did not abuse its discretion in excluding this evidence.”) (citations omitted);  
16 *Mendenhall v. Cedarrapids Inc.*, 5 F.3d 1557, 1575 (Fed. Cir. 1993) (“In sum, we agree with [the  
17 district court]’s assessment that the possibility of prejudice to the defendant and confusion of the  
18 jury was very high if [the prior] opinion were admitted inasmuch as *the opinion was not fact*  
19 *evidence on the myriad issues in the second case*. Moreover, prejudice is not merely in its  
20 possible improper treatment as evidence of the facts. Confusion could well have arisen by  
21 exposing the jury to another judge’s statement on the law.”) (emphasis added); *Engquist v. Oregon*  
22 *Dept. of Agriculture*, 478 F.3d 985, 1009 (9th Cir. 2007) (“most courts forbid the mention of  
23 verdicts or damage amounts obtained in former or related cases.”); *AVM Technologies LLC v. Intel*  
24 *Corporation*, 2017 WL 2938191 at \*1 (D. Del. April 19, 2017) (excluding references to decisions  
25 and outcomes in prior litigation and noting “[t]hat it is unfairly prejudicial cannot, in my opinion,  
26 be denied.”); *Datatreasury Corporation v. Wells Fargo & Company*, 2010 WL 11468934 at \*19

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28 <sup>2</sup> See also Ex. 3 (Orso Report) at ¶ 67; Ex. 4 (Orso Appendix C – Demonstratives) at 13, 15, 20; Ex. 2 (Arst Report) at 4.

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