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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,)
20)
v.)
21)
JUNIPER NETWORKS, INC., a Delaware)
Corporation,)
22)
Defendant.)
23)
24)
25)
26)
27)
28)

Date: December 4, 2018
Time: 9:00 a.m.
Courtroom: Courtroom 12, 19th Floor
Before: Hon. William Alsup

1 **I. INTRODUCTION**

2 Finjan has made a number of assertions about a call that took place between the parties on
3 November 24, 2015. As an example, John Garland—one of Finjan’s [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED] Ex. 5 (Deposition Transcript of John Garland on May 24,
7 2018) at 194:13-16. Fortunately, Mr. Coonan—a North Carolina resident who was in North
8 Carolina at the time—recorded the call—and the transcript of this recording provides a more
9 reliable way to verify what was said than either party’ alleged recollections. Thus, to the extent
10 issues discussed in the substance of the call are relevant to the trial, the relevant portions of the
11 transcript should be available for the parties to discuss or introduce as evidence. Finjan has made
12 clear, however, that they want to make an additional, improper use of the call: to suggest that Mr.
13 Coonan acted illegally or unethically in making the recording. Not only is this assertion legally
14 false and inflammatory, but (given the fact that California is a two-party consent state), even the
15 suggestion that Mr. Coonan recorded the call without consent is likely to prejudice a California
16 jury against Juniper. Moreover, Finjan’s *ad hominem* attack on Mr. Coonan is irrelevant to any
17 issues in dispute in this case. While the *content* of the call could be relevant to issues in dispute,
18 the circumstances of the recording are not. Juniper therefore respectfully moves this Court to (1)
19 allow the parties to discuss and introduce portions of the transcript of the call after they have made
20 a showing of relevance to the Court; but (2) to prohibit either party from discussing the
21 circumstances of the recording (including which party made the recording), or introducing the
22 recording itself (from which the jury could discern this information). This proposal ensures that
23 any potentially relevant information from the call can be considered by the jury, while avoiding
24 any potential prejudice to Juniper.

25 Juniper presents this motion pursuant to Federal Rules of Evidence 403 and 404, as a
26 discussion of the circumstances surrounding the recording would likely prejudice Juniper, confuse
27 the issues, mislead the jury, and require an undue consumption of time.

28

1 **II. FACTS**

2 During pre-suit negotiations, representatives from both parties spoke via phone on
3 November 24, 2015—Scott Coonan, Senior Director of IP participated on behalf of Juniper and
4 John Garland, VP of Business Development participated on behalf of Finjan. Due to the tenor of
5 the negotiations, Mr. Coonan decided it best to record the conversation to memorialize any
6 information exchanged. Ex. 11 (Declaration of Scott Coonan).

7 At the time of the call, Mr. Coonan was a resident of North Carolina, and he took the call
8 from his home office in North Carolina. *Id.* Mr. Garland is a resident of New Jersey. Ex. 5
9 (Deposition Transcript of John Garland on May 24, 2018) at 13:12-13 (“ . . . my primary residence
10 right now is in Flemington, New Jersey.”).

11 Through discovery, Juniper has produced both the recording and a certified transcript of
12 the call. Because of the difference in sound quality between the speakers, it is readily apparent
13 that Mr. Coonan was the person making the recording. Both Mr. Coonan and Mr. Garland are
14 available to testify at trial as necessary.

15 **III. ARGUMENT**

16 Although it is legal in North Carolina (and New Jersey, for that matter) for a party to
17 record any phone call in which he or she is participating, California requires both parties to
18 consent to the recording. As the jury in this case will be comprised of lay-persons who are
19 probably somewhat familiar with the law in California—and not at all familiar with the law in
20 North Carolina—they are likely to have a negative reaction if they believe one party recorded a
21 call without the consent of the other, even if (as here) it was completely legal to do so. Indeed,
22 Finjan has made clear that it wants to attack Mr. Coonan for making the recording and introduce
23 the actual recording of the call. *See* Ex. 6 (Finjan’s Trial Exhibit List) at 52 (offering the audio
24 recording as Trial Exh. No. 256). Finjan has claimed, repeatedly and falsely, that Mr. Coonan
25 acted illegally and improperly in making the recording.¹ For example, Finjan has argued that Mr.

26
27 ¹ Notably, the fact that the call was recorded was brought to the Court’s attention early on
28 and was a non-issue. *See* Ex. 7 (July 5, 2018 Hearing Transcript at 7:18-24) (THE COURT: Well,
is that true? You recorded it? MS. CURRAN: Yes. An employee of Juniper Networks, Inc.,
recorded the call. THE COURT: What state was that person in? MS. CURRAN: He was in North

1 Coonan's recording was a "violation of Federal Wiretap Act 18 U.S.C. § 2511(2)(d) and Cal.
2 Penal Code § 632 (a), (b)." Ex. 8 (Dkt. 153) at 13 n. 10. Again, in its July 13, 2018 letter brief to
3 the Court, Finjan argued that Mr. Coonan acted "in violation of California and federal laws
4 prohibiting interception of communications without consent." Ex. 9 (Dkt. 155) at 3 n. 4. Finjan's
5 witnesses have further testified that they believe Mr. Coonan's actions were a "borderline" ethical
6 violation and demonstrated a lack of integrity. *See, e.g.*, Ex. 10 (Deposition of Julie Mar-Spinola,
7 VP of Legal Operations) at 127:11-128:6 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] (emphasis added). Allowing Finjan to accuse or even imply that Mr. Coonan and
12 Juniper engaged in illegal and unethical behavior in front of the jury will cause substantial
13 prejudice, confusion of the issues, misleading of the jury, and undue consumption of time, and
14 amounts to no more than inadmissible character evidence. Federal Rules of Evidence 403 and 404
15 exist to keep precisely this type of evidence and arguments away from the jury.

16 Moreover, the audio recording itself is unnecessary and cumulative in establishing any
17 potentially relevant portions of the call. Because Juniper has produced a certified transcript of the
18 call and both Mr. Coonan and Mr. Garland will be testifying at trial, the recording itself is merely
19 cumulative, and the difference in audio quality between the speakers makes it clear that Mr.
20 Coonan is the recording party. This might prejudice a California jury, even without Finjan's
21 inflammatory statements, as a California jury might think Mr. Coonan did something untoward by
22 recording the call, as jurors in California are likely aware (at some level) that California law
23 prohibits recording a call absent notice or consent by both parties. Allowing the transcript of the
24 call to be admitted (to the extent either party can establish the relevance of the portions they wish
25 to use) thus introduces a piece of cumulative evidence that carries with it a great risk of prejudice.

26
27
28 Carolina at the time; a one-party consent state for recording phone calls. THE COURT: Well, so what's the problem?).

1 Finjan’s repeated claims of illegality are both incorrect and threaten to become an
2 irrelevant side-show, consuming an undue amount of time. Presenting these issues to the jury
3 could create a “trial within a trial” over wiretapping laws that have no place in a patent litigation.
4 Moreover, Finjan’s accusations are just wrong: Mr. Coonan was within his legal right to record his
5 conversation. Federal law provides a one-party consent rule and because Mr. Coonan was a party
6 to the call, he was free to record it. *See* 18 U.S.C. § 2511(2)(d) (“It shall not be unlawful under
7 this chapter for a person not acting under color of law to intercept a wire, oral, or electronic
8 communication *where such person is a party to the communication* or *where one of the parties*
9 *to the communication has given prior consent* to such interception . . .”) (emphasis added).
10 Moreover, Mr. Coonan is a North Carolina resident and made the call there, which also has a one-
11 party consent rule. *See* N.C. Gen. Stat. § 15A-287 (it is a crime to “willfully” intercept or record
12 “any wire, oral, or electronic communication” . . . “without the consent of at least one party to the
13 communication”); *see also State v. Price*, 170 N.C. App. 57, 65–66 (2005) (“[U]nder both the law
14 of [North Carolina] and federal law, that the interception of telephone calls does not violate the
15 statutory prohibitions so long as at least one party to the communication consents.”).² Thus, Mr.
16 Coonan was within his legal right to record his conversation and arguing or even suggesting that
17 Mr. Coonan engaged in illegal wiretapping amounts to nothing more than highly prejudicial and
18 inadmissible character evidence under Fed. R. Evid. 403 and 404, especially in front of a
19 California jury that is likely unfamiliar with the one-party consent laws of North Carolina.

20 **IV. CONCLUSION**

21 For the reasons discussed above, Juniper respectfully requests that this Court enter an order
22 *in limine* under Fed. R. Evid. 403 and 404 to allow relevant portions of the transcript of the
23 parties’ November 24, 2015 call into evidence (to the extent either party can show the relevance of
24 the portions they intend to use), but preclude any reference to the circumstances of the recording
25

26 ² Mr. Garland is a New Jersey resident, which is also a one-party consent state. N.J. Stat.
27 Ann. § 2A:156A-4(d) (“It shall not be unlawful under this act for: . . . A person not acting under
28 color of law to intercept a wire, electronic or oral communication, *where such person is a party to*
the communication or *one of the parties to the communication has given prior consent* to such
interception . . .”) (emphasis added).

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