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14 JUNIPER NETWORKS, INC.

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,   )   **JUNIPER NETWORKS, INC.'S MOTION**
)   ***IN LIMINE* NO. 4 TO EXCLUDE**
20   vs.   )   **EVIDENCE AND ARGUMENT**
)   **ON NON-INFRINGING ALTERNATIVES**
21 JUNIPER NETWORKS, INC., a Delaware   )
Corporation,   )   Date: December 4, 2018
22   )   Time: 9:00 a.m.
            Defendant.   )   Courtroom: Courtroom 12, 19th Floor
23 _____)   Before: Hon. William Alsup

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1   Juniper respectfully moves the Court for an order *in limine* precluding Finjan from presenting

2   testimony from it technical expert, Dr. Eric Cole, on his purported "cost savings" analysis regarding

3   the non-infringing alternative of re-processing files each time they are received, instead of storing

4   security profiles. It has become clear that Dr. Cole's cost-savings "analysis" is entirely unreliable,

5   as he has now conceded that he did not actually perform a complete analysis of non-infringing

6   alternatives—he even failed to review the underlying invoices on which his entire "cost savings"

7   analysis is premised.

8   **I.   BACKGROUND**

9   Finjan's damages expert, Mr. Arst, bases his damages opinion on a "cost savings" analysis.

10   Ex. 17 (Arst Dep.) at 44:20-21.   Specifically, Mr. Arst understood that Juniper's "next best

11   alternative to infringing Claim 10" would have involved the re-processing of files, which would

12   require "increased sandboxing."   *Id.* at 106:14-107:1.   Mr. Arst further testified that "[m]y

13   understanding is that Juniper would incur incremental sandboxing costs, and Dr. Cole analyzed those

14   costs and provided me with his opinion about how much higher Juniper's cost would have been

15   absent the alleged infringement, and that's what I relied on for purposes of my opinion."   *Id.* at

16   108:2-7. Mr. Arst testified that he adopted Dr. Cole's supposed cost savings analysis wholesale as

17   an input to his analysis. *Id.*

18   The problem for Mr. Arst (and Finjan) is that Dr. Cole has now admitted that he never

19   actually evaluated whether the "re-processing" concept was Juniper's next best non-infringing

20   alternative:

21   Q. Is it your opinion that reprocessing the files would have been Juniper's next best
         alternative to infringing Claim 10 of the '494 patent?

22
         A. I would have to do additional analysis. It was just sort of asked -- and you ask
23   could I think a noninfringing alternative. And that was one, but that wasn't a direct
         task that I wrote a full report on. So ***I would have to go back and perform analysis***
24   ***of whether that was really the best***, but I know that was one of the items that I came
         up with or that was discussed.

25   Ex. 15 (Cole Dep.) at 35:24-36:10 (emphasis added); *see also id.* at 48:7-49:7.

26   Instead, it appears that Dr. Cole simply adopted a non-infringing option suggested by

27   Finjan's counsel, and purported to calculate the "cost savings" between that option and the alleged

28   infringement, without ever determining whether it was really the "next-best" alternative. Dr. Cole's

1   "cost savings" analysis is fairly simple: He opined that the extra costs associated with "increased

2   sandboxing" (*i.e.*, dynamic analysis) could be calculated by multiplying Juniper's entire Amazon

3   Web Services ("AWS") costs by 359-419 (*i.e.*, the number of extra seconds it takes to dynamically

4   process a single file as opposed to doing a hash lookup of the security profile):

5   Q. So it's your position that if you wanted to figure out how much extra Juniper
           would have to pay for this noninfringing alternative that you're proposing that
6   involves additional dynamic analysis processing, you could just take their AWS costs
           that have nothing to do with dynamic processing and multiply them by 359 [or
7   419]? That's your opinion?

           A. Once again, at the time of the report, we were only provided the Amazon Web
8   Services. So from an estimate perspective, based on what we've discussed, that
           would give a basis of estimate for the cost savings.
9

10 Ex. 15 (Cole Dep.) at 167:12-23(emphasis added); *see also id*. at 166:13-22. Dr. Cole provides no

11 rational explanation as to why multiplying Juniper's entire AWS invoices—which he admits do not

12 reflect dynamic processing costs and which include charges related to numerous products that have

13 nothing to do with Sky ATP—by the number of seconds it takes to sandbox a single file could

14 possibly reflect the costs associated with implementing the proposed non-infringing alternative.

15 **II.   ARGUMENT**

16   Dr. Cole's "cost savings" analysis for the "increased sandboxing" alternative should be

17 excluded under Rule 702, as well as Rules 402 and 403.

18   **A.   Dr. Cole's "Cost Savings" Analysis Is Unreliable.**

19   Dr. Cole admitted at his deposition that "[i]dentifying, analyzing and critiquing

20 noninfringing alternatives was not part of [his] report" and that he had not done a complete and

21 thorough analysis of the non-infringing alternatives that might have been available to Juniper.

22 Ex. 15 (Cole Dep.) at 44:19-21 and 36:22-37:9 ("Q. Is it fair to say, at the time you submitted your

23 report, you did not do a complete and thorough analysis of all noninfringing alternatives that might

24 have been available to Juniper? A. That was something that we've discussed on the phone and I

25 gave some opinions, but it wasn't a direct task, to look at every and all to come up with a complete

26 list . . . ."). In fact, Dr. Cole could not even remember if the proposed alternative of re-processing

27 files each time they are received by Sky ATP (*i.e.*, "increased sandboxing") was an idea that he came

28 up with, or if it was an idea that was suggested to him by Finjan's attorneys:

1   Q. . . .So is the concept of reprocessing files as opposed to storing results in a database, is that an alternative that you came up with?

2   A. Once again, I don't remember. I know it was discussed on the call*. **I don't remember if they asked me and I came up with that or if they suggested it and asked my opinion or if I read that in Dr. Rubin's report**.

3

4   Q. When you say "they," who are you talking about?

5   A. That would be the damages expert and ***the attorneys*** that were on that call.

6   Ex. 15 (Cole Dep.) at 32:10-21; *see also id.* at 37:7-15 (emphasis added).

7   Given that Dr. Cole admits that he did not actually do his own analysis of non-infringing

8   alternatives—and his inability to recall if he even came up with his own proposed non-infringing

9   alternative—the inescapable conclusion is that he is nothing more than a "highly qualified puppet"

10   and his opinions on non-infringing alternatives do not reflect his own reasoned views of the case.

11   *DataQuill Ltd. v. Handspring, Inc.*, 2003 WL 737785, at *4 (N.D. Ill. 2003) ("We doubt the value

12   to the trier of fact of a hired expert's opinion when the party hiring him has put words in his mouth-

13   or in this case, in his report-leaving him, in essence, a highly qualified puppet."). In such instances,

14   where "opinions expressed in an expert report are not the opinions of the expert, the expert will not

15   be able to satisfy the requirements of Fed. R. Evid. 702 and *Daubert* that the report be based on the

16   expert's own valid reasoning and methodology." *Trigon Ins. Co. v. U.S.*, 204 F.R.D. 277, 294 (E.D.

17   Va. 2001); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1365 (N.D. Cal. 1995)

18   (expert's testimony lacked objectivity and credibility where it appeared to have been crafted by

19   attorneys); *Occulto v. Adamar of N.J., Inc.*, 125 F.R.D. 611, 616 (D.N.J.1989) (expert cannot simply

20   be an alter ego of the attorney who will be trying the case). Dr. Cole should not be allowed to

21   provide any testimony on non-infringing alternatives, which he did not analyze.

22   Even if Dr. Cole had actually performed his own analysis, his estimate of the costs associated

23   with the proposed "increased sandboxing" alternative is wholly unreliable. Dr. Cole's analysis can

24   be summarized in three steps: (1) he opines that subjecting each file to sandboxing would take Sky

25   ATP 360-420 seconds; (2) he identifies Juniper's AWS invoices as being indicative of Juniper's

26   current costs incurred by sandboxing; and (3) he concludes that Juniper's AWS costs would increase

27   by a factor of 359-419 because that is the difference in the time it takes to dynamically process a file

28   (360-420 seconds) as opposed to doing a hash lookup (1 second) and thus Juniper would need 359-

1 419 times more servers in the hypothetical alternative. *See* Ex. 1 (Cole Rpt.) at ¶¶ 35-37.

2   Dr. Cole's analysis is not based in reality, much less supported by "sufficient facts or

3 evidence" or the "product of reliable methods." Dr. Cole provides no evidence as to how or why

4 the number of seconds it takes to process a single file could possibly reflect the number of extra

5 servers Juniper would need to process files in the proposed non-infringing alternative. Dr. Cole's

6 opinion contains no analysis of how much data usage is associated with one second of processing or

7 whether Juniper's servers are even operating at capacity such that additional servers would be

8 needed. Ex. 15 (Cole Dep.) at 174:23-175:20. Instead, it appears that Dr. Cole merely assumed a

9 linear relationship between processing time and data usage. *Id.* at 173:1-22. This is a textbook

10 example of impermissible *ipse dixit*. *GPNE Corp. v. Apple, Inc.*, 2014 WL 1494247, at *4 (N.D.

11 Cal. Apr. 16, 2014) ("Significantly, 'nothing in either Daubert or the Federal Rules of Evidence

12 requires a district court to admit opinion evidence that is connected to existing data only by the *ipse*

13 *dixit* of the expert. A court may conclude that there is simply too great an analytical gap between

14 the data and the opinion proffered.'").

15   Further, Dr. Cole has now admitted that he relied on the wrong invoices to do his cost savings

16 analysis. Dr. Cole concedes that Juniper ▮▮▮▮▮▮▮ not AWS servers to host sandboxing.

17 *See* Ex. 1 (Cole Rpt.) at 37; Dkt. No. 228-6 (Icasiano Decl.) ¶¶ 5-6. He further admits (as he must)

18 that Juniper's AWS invoices do not actually reflect ***any*** costs associated with sandboxing. Ex. 15

19 (Cole Dep.) at 146:4-12 ("Because the sandboxing is done by Joe Sandbox on separate servers, I

20 would not expect that the Amazon AWS invoices would reflect the Joe Sandbox dynamic analysis.").

21 Thus, any analysis of cost savings based off the AWS necessarily uses an improper methodology,

22 as the cost savings calculation is not linked to any actual costs. It is impossible for Dr. Cole to

23 calculate how much of a cost savings Juniper could achieve if he does not even look at the documents

24 showing the relevant costs.

25   Dr. Cole attempts to disguise this fatal blunder by making the conclusory assertion that

26 sandboxing costs would be the same regardless of whether they are hosted on AWS ▮▮▮▮ His

27 only support for this assumption is his vague claims of "industry experience" and the fact that only

28 the AWS invoices were made available to him. *See* Ex. 15 (Cole Dep.) at 147:14-148:12. Neither

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