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10 FINJAN, INC.

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

14 FINJAN, INC., a Delaware Corporation,

15 Plaintiff,

16 v.

17 JUNIPER NETWORKS, INC., a Delaware
18 Corporation,

19 Defendant.

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

**PLAINTIFF FINJAN, INC.'S
OFFER OF PROOF**

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21 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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1 Finjan Inc. (“Finjan”) submits the following offer of proof in support of its damages claim
2 against Juniper Networks, Inc. (“Juniper”) pursuant to the Court’s Final Pretrial Order, Dkt. No. 301, ¶
3 10. Juniper is steadfast that Finjan cannot present a damages case without a paid expert witness –
4 Juniper is wrong. Finjan has an abundance of *factual* evidence, demonstrating its entitlement to
5 “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty
6 for the user of the invention by the infringer . . .”. 35 U.S.C. § 284. Under 35 U.S.C. § 284, a finding
7 of infringement “establishes the fact of damage because the patentee’s right to exclude has been
8 violated.” *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1406 (Fed.
9 Cir. 1990). “The statute is unequivocal that the district court must award damages in an amount no
10 less than a reasonable royalty” when infringement is found. *Dow Chem. Co. v. Mee Indus., Inc.*, 341
11 F.3d 1370, 1381 (Fed. Cir. 2003).¹

12 Finjan will offer at trial extensive evidence for the jury to consider and to support Finjan’s
13 reasonable royalty damages as a result of Juniper’s infringement of Finjan’s U.S. Patent No. 8,677,494
14 (the “494 Patent”). This evidence includes the testimony of Finjan and Juniper’s witnesses, Finjan
15 and Juniper documents, and the opinions of Finjan’s technical experts.

16 Not insignificantly, since the *Daubert* hearing on November 29, 2018, evidence has been
17 discovered that Juniper has misrepresented the relevant revenues (or royalty base at issue). Based on
18 the deposition of Ms. Gupta on December 7, 2018, which the Court ordered at the December 4, 2018
19 Pretrial Conference regarding the 17,000 page excel spreadsheets that were untimely produced, Finjan

20
21 ¹ See also, *Interwoven, Inc. v. Vertical Computer Sys.*, No. CV 10-04645 RS, 2014 WL 490996, at *5
22 (N.D. Cal. Feb. 4, 2014)(“‘The statute is unequivocal that the district court must award damages in an
23 amount no less than a reasonable royalty,’ even in the absence of expert testimony.”) (citing *Dow*
24 *Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1381–82 (Fed. Cir. 2003)); *SiOnyx, LLC v. Hamamatsu*
25 *Photonics K.K.*, 330 F. Supp. 3d 574, 598 (D. Mass. 2018) (“[E]ven if there were no expert testimony
26 on damages, the court would still be obligated to evaluate what evidence there was to come up with a
27 reasonable royalty.”); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1327 (Fed. Cir. 2014), *overruled*
28 *on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015)(“Because no
29 less than a reasonable royalty is required, the fact finder must determine what royalty is supported by
the record.”); *Deckers Outdoor Corp. v. Romeo & Juliette, Inc.*, No. 215CV02812ODWPLA, 2017
WL 5634993, at *7-8 (C.D. Cal. Oct. 6, 2017)(denying a motion *in limine* to preclude reasonable
royalty testimony from any witness at trial because expert testimony is not required and the record
contained ample evidence to support a reasonable royalty award through the *Georgia-Pacific* factors.).

1 learned the following:

2 (1) between January 2016 and January 2017, Juniper's customers in the Americas with the
3 "freemium" Sky ATP service purchased at least [REDACTED] devices. The revenues associated with
4 these [REDACTED] was approximately [REDACTED];²

5 (2) Juniper's calculation of [REDACTED] in revenues for the accused products does not account
6 for any revenues for Juniper's infringement in 2015; and

7 (3) Juniper's belated production did not summarize the specific customers who purchased
8 specific SRX devices with a Sky ATP premium service, such that Juniper never meaningfully
9 disclosed the total revenues of the SRX devices sold to a customer that purchased the premium Sky
10 ATP service.

11 **A. Factual Background Related to the Hypothetical Negotiation**

12 Finjan will present evidence regarding its approach to licensing that will support its entitlement
13 to a reasonable royalty. This evidence will include testimony and other evidence from Finjan's fact
14 witnesses, including Philip Hartstein and John Garland, regarding Finjan's licensing practices and
15 approaches to licensing, including the factors Finjan considers when licensing the Patents-in-Suit (i.e.,
16 scope of use, how the patented technology is being used, potential future use, and benefits derived
17 from the use of the claimed invention), the information Finjan had regarding Juniper when it
18 approached Juniper for a license, and how these factors applied to Juniper.

19 Finjan will also provide witness testimony and evidence that when approaching a licensing
20 negotiation to the Asserted Patent, Finjan has used a royalty rate of 8 percent on hardware and a
21 royalty rate of 16 percent on software in the past on the products' total gross revenues or the gross
22 revenues of a company's relevant division, i.e., security division, as well as other approaches Finjan
23 has used in licensing negotiations based on utilization a \$8 per user rate and 32 cents per scan rate.

24 Finjan will also present testimony and other evidence, including comparable licensing
25 information and data points, which supports Finjan's approaches to licensing to identify a potential
26 licensee's realized value for use of Finjan's patented technology. Finjan will present testimony

27 _____
28 ² Juniper only counted [REDACTED] devices for its deflated [REDACTED] revenue figure.

1 regarding its extensive licensing history, as well as its current product business, to support the
2 significance and value of the '494 Patent. Finjan will also present testimony and other evidence of
3 Finjan's efforts to license the '494 Patent to Juniper. Trial Exhibits 256, 257, 342.

4 **B. Technical Advantages**

5 In addition, Finjan will present testimony and other evidence that establishes the significant
6 technical benefits that the '494 Patent provides, such as by increasing the speed and efficiency of
7 Juniper's infringing systems. More specifically, the '494 Patent allows for the reuse and subsequent
8 analysis of downloadable security profile data, and the proactive blocking of security threats. Finjan
9 will present evidence, including the expert opinion of Dr. Cole, as well as the testimony of Juniper's
10 witnesses and other evidence. *See e.g.* Cole Rpt. at ¶¶ 26-37. Finjan will present evidence of the value
11 of the patented invention to Juniper from its use of the patented technology and ability to offer for sale
12 such patented technology, which Juniper has represented publicly. Trial Exhibits 91, 382, Deposition
13 of Juniper's Senior Director of Intellectual Property Litigation and Strategy; Deposition of Juniper's
14 Senior Director in Juniper's Security Business Group.

15 **C. Juniper's Infringement Based on Use and Offer for Sale**

16 Finjan will present factual evidence regarding Juniper's extensive use³ of its patented
17 technology, including: 1) the number of users of the accused products; 2) the volume of data processed
18 by the accused products; 3) the volume of data processed for the average user of the accused products;
19 4) the number of scans performed by the accused products; 5) the nature and amount of costs (e.g.,
20 data processing costs, cloud costs, energy costs, hardware costs, engineering costs, coding costs)
21 incurred by Juniper in connection with scans performed by the accused products; 6) Juniper's cost per
22 scan for the accused products; 7) Juniper's cost per user for the accused products; 8) the volume of
23 data that would be processed by Juniper under a non-infringing alternative design; 9) the nature and
24 amount of costs (e.g., data processing costs, cloud costs, energy costs, hardware costs, engineering
25

26 ³ Finjan is entitled to a reasonable royalty on for Juniper's "use" of the accused products if those
27 products are found to infringe Claim 10 of the '494 Patent. 35 U.S.C. § 271 ("whoever without
28 authority makes, uses, offers to sell, or sells any patent invention within the United States ... any
patented invention during the term of the patent therefor, infringe the patent.") (underlining added).

1 costs, coding costs) that would be incurred by Juniper under a non-infringing alternative design, such
2 as the cost of developing non-infringing software code and expanding its use of servers (e.g., Amazon
3 Web Services); 10) Juniper's cost per scan for its non-infringing alternative design; 11) Juniper's cost
4 per user for its non-infringing alternative design; 12) the number of samples Juniper has in each of its
5 databases; 13) the number of databases Juniper has; and 14) the type and number of servers (e.g.,
6 Amazon Web Services) that Juniper employs for the accused products. Juniper's cost savings may be
7 expressed in a variety of forms, such as on a per-user, per-scan, or lump-sum basis. Finjan will
8 provide evidence regarding how Juniper markets its ability to offer zero-day threat protection from the
9 cloud, highlighting the tremendous value Juniper reaps as a result from its infringement and ability to
10 offer Sky ATP for sale, the commercial value it adds to Juniper's SRX devices, and how it benefits
11 Juniper itself. Trial Exhibit 91.

12 Finjan will present evidence that Juniper uses Claim 10 of the '494 Patent every time that its
13 Sky ATP system, which is used by Juniper, analyzes a file in its malware analysis pipeline using static
14 and/or dynamic analysis components, and then stores the results in its Results DB database. Dkt. No.
15 189 at 3 ("Finjan now moves for summary judgment of direct infringement of Claims 10 based on (1)
16 Juniper's SRX Gateway used in combination with Sky ATP; and (2) Sky ATP alone []"), at 14
17 ("Finjan argues that Juniper's SRX Gateways with Sky ATP, and Sky ATP alone — which includes
18 the Malware Analysis Pipeline involving both static and dynamic analyzers — constitute a
19 Downloadable "scanner" (Dkt. No. 98 at 20). The evidence shows that the Malware Analysis Pipeline
20 indeed generates a threat level 'verdict' by searching a received Downloadable's code to identify
21 suspicious operations or patterns (Cole Decl. ¶ 35; Dkt. No. 154, Exh. 5 at 121:11-22)"). Finjan is
22 entitled to a reasonable royalty based on this extensive use. Finjan will present evidence including the
23 testimony of its expert, Dr. Cole, as outlined in his expert report at Pars. 38-106, as well as the
24 testimony of Juniper's engineers and witnesses, including Chandra Nagarajan and Raju Manthena and
25 other evidence such as Trial Exhibits 1, 15, 52, 53, 57, 65, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 87,
26 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 382, 399, 430, 431, and 438.

27 Finjan will present evidence related to Juniper's use of Claim 10 of the '494 Patent by Sky

28 ATP by itself and Sky ATP with SRX in the form of documents and deposition testimony including

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