



**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE that on December 13, 2018 at the close of Plaintiff Finjan, Inc.'s ("Finjan") case-in-chief, in Courtroom 12 before the Honorable William Alsup, 450 Golden Gate Avenue, San Francisco, California, Defendant Juniper Networks, Inc. ("Juniper") moved for judgment as a matter of law pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Juniper submits this memorandum in further support of the motion.<sup>1</sup>

This Motion is made on the basis that Finjan failed to provide a legally sufficient evidentiary basis for a reasonable jury to find in favor of Finjan on notice, damages, and infringement. Specifically, the Court should grant judgment as a matter of law in favor of Juniper on the following grounds: (1) Finjan failed to provide Juniper with actual notice of Finjan's infringement claim prior to filing suit, which eliminates Finjan's ability to recover pre-suit damages under 35 U.S.C. § 287; (2) Finjan has not met its burden to establish damages; and (3) no reasonable jury could find that Juniper's Sky ATP alone and SRX devices used in combination with Sky ATP infringe claim 10 of the 494 patent.

This Motion is based on the testimony and evidence admitted at trial, the oral motion for judgment as a matter of law deemed made during trial, the Memorandum of Points and Authorities that follows, all pleadings, exhibits, and records in this action, and such other papers, evidence, and/or argument as may be submitted to the Court in connection with this Motion or that the Court may take notice or otherwise consider.

Dated: December 13, 2018

IRELL & MANELLA LLP

By: /s/ Alan Heinrich

Alan Heinrich  
Attorneys for Defendant  
JUNIPER NETWORKS, INC.

---

<sup>1</sup> The current motion is brought with respect to deficiencies in Finjan' case-in-chief, and Juniper does not waive other matters on which Juniper may be entitled to JMOL.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Juniper moves for judgment as a matter of law (“JMOL”) in its favor pursuant to Rule 50(a)  
3 of the Federal Rules of Civil Procedure. For the reasons explained below, no reasonable jury could  
4 find in Finjan’s favor on notice, damages, or infringement.

5 **ARGUMENT**

6 Judgment as a matter of law is appropriate if “a party has been fully heard on an issue and  
7 there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that  
8 issue.” Fed. R. Civ. P. 50(a). In making this determination, “the court should review all of the  
9 evidence in the record, not merely the evidence favorable to the non-moving party.” *Reeves v.*  
10 *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Rule 50 “allows the trial court to  
11 remove . . . issues from the jury’s consideration when the facts are sufficiently clear that the law  
12 requires a particular result.” *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) (internal quotations  
13 omitted). “The question is not whether there is literally no evidence supporting the unsuccessful  
14 party, but whether there is evidence upon which a reasonable jury could properly have found its  
15 verdict.” *Cordis Corp. v. Boston Sci. Corp.*, 658 F.3d 1347, 1357 (Fed. Cir. 2011).

16 **A. Damages**

17 Finjan’s damages case was an utter failure. In its case-in-chief, Finjan did not present any  
18 evidence on: (1) what the appropriate royalty base was for the accused products; (2) how that  
19 revenue base should be apportioned; and (3) what a reasonable royalty rate would be.

20 **1. No Legally Sufficient Evidence of a Royalty Base**

21 In its case-in-chief, Finjan’s only alleged evidence of a royalty base were Trial Exhibits 490  
22 and 494 and the related deposition testimony of Juniper’s Director of Finance, Ms. Gupta. These  
23 trial exhibits contain revenue information, but there is zero information in the record linking those  
24 revenues to any particular products, let alone the accused products. Finjan also designated portions  
25 of Ms. Gupta’s deposition testimony that merely consist of her reading the same revenue numbers  
26 into the record at Finjan’s counsel’s direction, without being asked to explain those numbers in any  
27 way. In Juniper’s counter-designations, Ms. Gupta makes clear that the revenue numbers Finjan’s  
28 counsel asked her to read are *not* limited to the accused products at issue in this case. Instead, they

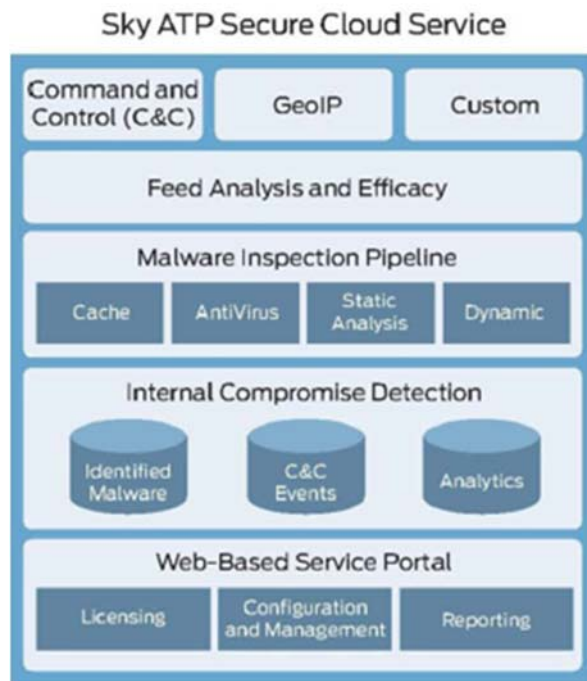
1 include substantial revenues from *SRX devices that were never configured with Sky ATP*, contrary  
2 to the Court’s *Daubert* Order. Dkt. 283 at 4–5. It would be legal error to permit the jury to use  
3 Finjan’s manufactured revenue numbers—which are untethered to the actual accused products in  
4 this case—in its damages deliberations. *Enplas Display Device Corp. v. Seoul Semiconductor Co.*,  
5 — F 3d. —, 2018 WL 6033533, at \*10 (Fed. Cir. 2018) (overturning jury’s damages award where  
6 expert testimony supporting it was “based, in part, on non-infringing sales of non-accused  
7 [products],” because “acts that do not constitute patent infringement cannot provide a proper basis  
8 for recovery of damages”); *Monolithic Power Sys., Inc. v. O2 Micro Int’l, Ltd.*, 476 F. Supp. 2d  
9 1143, 1154–56 (granting motion to exclude expert opinion where not all of the products included in  
10 the expert’s sales base practiced the accused technology); *Finjan, Inc. v. Blue Coat Sys., Inc.*, No.  
11 13–cv–03999–BLF, 2015 WL 4272870, at \*9 (N.D. Cal. July 24, 2015) (“[I]ncluding a product that  
12 does not practice the patent at issue and indisputably has an independent use would overcompensate  
13 [Finjan] for the alleged infringement . . .”). Finjan has only itself to blame for the absence of any  
14 royalty base evidence at the close of its case in chief, as it refused and continues to refuse to accept  
15 the Court’s ruling that Finjan is “stuck with the \$1.8 million base.” *Id.* at 5.

## 16 2. No Legally Sufficient Evidence of Apportionment

17 Even if Finjan could point to a proper royalty base for the accused products, that base would  
18 still have to be apportioned. “When the accused technology does not make up the whole of the  
19 accused product, apportionment is required.” *Finjan v. Blue Coat Sys.*, 879 F.3d 1299, 1311-12  
20 (Fed. Cir. 2018) (vacating jury damages award due to lack of apportionment). Here, Finjan has no  
21 evidence of apportionment.

22 Apportionment is clearly required in this case. For example, Finjan has accused SRX devices  
23 used in combination with Sky ATP and Sky ATP alone. But both include substantial non-infringing  
24 features and functionality. For example, SRX has Next Generation Firewall, AppSecure, Intrusion  
25 Prevention, Unified Threat Management, User Firewall, Adaptive Threat Intelligence, and Secure  
26 Routing. Ex. 345 at 3. SRX includes features such as antivirus, antispam, enhanced Web filtering,  
27 content filtering and “threat protection” for “advanced malware.” *Id.* at 2. These are just a small  
28 subset of SRX features and functionality that have nothing at all to do with Sky ATP. *Id.*

1 Sky ATP is a cloud-based anti-malware service that has a number of security analysis  
 2 features that have nothing to do with Claim 10 and are not accused by Finjan. Finjan only accused  
 3 certain portions of the “Malware Inspection Pipeline”—namely static and dynamic analysis—along  
 4 with an “Identified Malware” but never addressed the other components of Sky ATP as shown  
 5 below. Ex. 382 at 1.



18 But Sky ATP also includes a multitude of non-infringing features and functionality. For  
 19 example, it provides security intelligence cloud feeds such as C&C (*i.e.*, command and control),  
 20 compromised hosts, GeoIP, whitelists, and blacklists. Ex. 78 at 18. Sky ATP further includes  
 21 additional features that do not perform security analysis at all, such as its service portal (*i.e.*, Web  
 22 user interface) that acts as a graphics interface for displaying information to customers and also  
 23 provides a configuration management tool. *Id.*

24 Finjan was accordingly required to apportion out the value of these non-patented features  
 25 from its proposed royalty base, but it failed to do so. *Garretson v. Clark*, 111 U.S. 120, 121 (1884)  
 26 (The patentee “must in every case give evidence tending to separate or apportion the defendant’s  
 27 profits and the patentee’s damages between the patented feature and the unpatented features, and  
 28 such evidence must be reliable and tangible, and not conjectural or speculative.”).

# 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.