

EXHIBIT 3

Volume 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

FINJAN, INC.,)	
Plaintiff,)	
VS.)	No. C 17-5659 WHA
JUNIPER NETWORKS, INC.,)	
Defendant.)	

San Francisco, California
Monday, December 10, 2018

TRANSCRIPT OF PROCEEDINGS

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PROCEEDINGS

4

1 Monday - December 10, 2018 7:32 a.m.

2 **PROCEEDINGS**

3 **—000—**

4 **THE COURT:** Good morning. We're here for trial.

5 We'll get started.

6 **THE CLERK:** Calling Civil Case Number 17-5659, Finjan,

7 Inc. versus Juniper Networks.

8 Will counsel please step forward and state your

9 appearances for the record.

10 **MR. ANDRE:** Good morning, Your Honor. Paul Andre

11 Andre for Finjan. And with me today is Lisa Kobialka, James

12 Hannah, and Cristina Martinez.

13 **THE COURT:** Welcome to all of you.

14 **MR. KAGAN:** Good morning, Your Honor. Jonathan Kagan,

15 of Irell & Manella, for defendant Juniper Networks. With me at

16 counsel table today are Rebecca Carson.

17 **MS. CARSON:** Good morning.

18 **MR. KAGAN:** Alan Heinrich.

19 **MR. HEINRICH:** Good morning.

20 **MR. KAGAN:** Josh Glucoft, and Casey Curran.

21 **MS. CURRAN:** Good morning.

22 **THE COURT:** Okay. I guess with all the lawyers here

23 this case must be worth millions of dollars. That's the way a

24 jury is going to see it. Always works that way.

25 All right. We're here for trial. We're going to call the

1 jury in in 30 minutes, get started. I want you to know, the
 2 way I run the courtroom, we don't dawdle.
 3 So what issues do you want to take up before we bring in
 4 the potential jury?
 5 **MR. KAGAN:** Your Honor, the first issue that the
 6 defendant would like to raise regards to insufficiency or lack
 7 of sufficiency of the offer of proof that Your Honor ordered to
 8 be served at 5 o'clock on Friday.
 9 The offer of proof was -- Mr. Heinrich can go into more
 10 detail on this, but the offer of proof, which was on damages,
 11 failed to include certain items such as the amount of damages
 12 that Finjan is seeking in this case.
 13 And, in addition, it included reference to evidence that
 14 they were going to introduce to support its damages claim that
 15 this Court expressly ordered excluded by the *Daubert* motion.
 16 So, for example, they are seeking, as evidence to support
 17 their damages claim, revenues for the SRX device by itself,
 18 which this Court has already ordered is not an accused product
 19 in this case.
 20 So what they've done is continued to advance a defunct
 21 theory to support damages. And they're still trying to hide
 22 the ball in terms of what damages they're actually seeking and
 23 what the basis is for the damages claim, which is why we
 24 requested the offer of proof in the first place.
 25 **THE COURT:** Okay. What do you say?

1 **MR. ANDRE:** Your Honor, we're not asking for damages
 2 based on SRX alone. Just the opposite. We actually -- at the
 3 pretrial conference you ordered the defendants to produce a
 4 witness on the late-disclosed spreadsheet, the 17,000-page
 5 spreadsheet. And they represented they were just adding one
 6 column to their spreadsheet they produced back in April, you'll
 7 recall.
 8 Turns out that one column, or maybe two columns, had
 9 60,000 rows that we found out as we took the deposition on
 10 Friday afternoon.
 11 **THE COURT:** Wait. Wait. You're saying in addition
 12 to -- in addition to one new column, which was previously
 13 blank, they added 60,000 new rows?
 14 **MR. ANDRE:** Yeah. The original spreadsheet had
 15 30,000 --
 16 **THE COURT:** Is that true?
 17 **MR. HEINRICH:** No, Your Honor.
 18 **THE COURT:** He said it's not true.
 19 **MR. ANDRE:** Well, we asked at deposition -- the
 20 original deposition spreadsheet had 30,000 rows; the new one
 21 had 90,000. Now, my math --
 22 **THE COURT:** What do you say to that?
 23 **MR. HEINRICH:** So, it's not correct --
 24 **THE COURT:** Anytime a lawyer starts with "so," that
 25 means they are in trouble.

1 **MR. HEINRICH:** No, Your Honor.
 2 **THE COURT:** I've learned that the hard way. That
 3 means they don't want to give you a direct answer.
 4 Give me a direct answer. Is it true that there are more
 5 rows or not?
 6 **MR. HEINRICH:** No.
 7 **THE COURT:** He says no.
 8 All right. What else do you want to say?
 9 **MR. ANDRE:** We then talked to their witness and said,
 10 Tell us the revenues for the SRX and Sky ATP combined, both the
 11 ones you give away for free and ones you charge a license for.
 12 And she created two spreadsheets. One was the price of
 13 \$15.9 million for those two combined. The other was
 14 7.2 million.
 15 The 7.2 was when they went back and tried to recalculate
 16 the free versions of the Sky ATP with SRX, the sales of SRX for
 17 7.2 million. So roughly over \$23 million in revenue of
 18 spreadsheets that their witness created. They say that that is
 19 SRX by itself.
 20 We have the spreadsheets. We have the exhibits. And it
 21 says "Sky ATP and SRX." And that's the best that she could do.
 22 They said, well, she couldn't verify the accuracy of that
 23 information on their own spreadsheets. I'm like, well, she's a
 24 30(b)(6) witness. I don't know what else to do here.
 25 We found out that they have been advancing a total revenue

1 number of 1.8 million. And no one knows how they got to
 2 1.8 million. And we figured it out at this deposition.
 3 They had their expert write a piece of software, some
 4 script, to run a program to gin up this \$1.8 million revenue
 5 based on average cost and expectation and whatnot.
 6 We've never been provided that piece of software or script
 7 to test it on our own and see even what it was about. But
 8 their witnesses or fact witnesses could not re-create that
 9 number.
 10 So not only do we have a lot of additional information on
 11 the spreadsheet that was produced very late in the case, then
 12 they used that spreadsheet, without us having access to it, to
 13 write a piece of software to gin up a number of \$1.8 million,
 14 to sandbag us with our damages expert.
 15 We went in --
 16 **THE COURT:** Well, but even if it was 7.2, your number
 17 was 70 million. You still came up with an astronomical number.
 18 So how would the 7.2 even get you close to 70 million?
 19 **MR. ANDRE:** It wouldn't, Your Honor. We're not saying
 20 that. The 7.2 and the 15.9, the 23 million total, it would
 21 be -- still our number would be high. But the numbers we had
 22 in the original spreadsheets, you couldn't even decipher the
 23 23 million. The number we had in the original spreadsheet was
 24 several-hundred million. So our 60 to 70 million wasn't
 25 outrageous when you looked at the several hundred million

1 But we're not arguing that now. We're arguing this offer
2 of proof. And this offer of proof is we took the deposition on
3 Friday. Their witness came up with a couple of spreadsheets.
4 They're objecting to the spreadsheet, saying she could not test
5 the authenticity -- couldn't say that she was -- it was
6 accurate numbers. She just couldn't tell. So that was their
7 30(b)(6) witness.

8 That's what they are saying that we are now offering SRX
9 by itself.

10 **THE COURT:** What do you say to this?

11 **MR. HEINRICH:** So many inaccuracies.

12 I'm going to start with the 7.2 million. So we provided a
13 wealth of information in that spreadsheet. We were able to
14 determine that there were only 120 SRX devices that were used
15 in combination with Sky ATP during the damages period.

16 So what we did is we used the Juniper financial
17 information to determine the price and the net sales of those
18 120 --

19 **THE COURT:** How do you know if it was used or not?

20 **MR. HEINRICH:** Well, because that information is in
21 the Cloud. We're able to determine which devices actually --
22 it's called bootstrap to Sky ATP.

23 So our fact -- our engineers were able to write a script
24 that derived that information, what were the devices actually
25 bootstrapping to Sky ATP. And we used the serial number for

1 those devices, and we extracted financial information.

2 And what we included in that financial information was
3 information on the shipments that those units that were
4 actually used in combination with Sky ATP were included in.
5 So, for example, the customer orders 200 SRX devices. We're
6 able to determine that only one of those devices was ever used
7 in combination with Sky ATP.

8 What they did is they included the entire revenues from
9 those 200 devices to come up with their 7.2 million. They were
10 manipulating the spreadsheet in a way that ignored the 120
11 units that were actually used and, instead, included the
12 revenues for all of the SRXs included together in the same
13 shipment.

14 And that's exactly the problem that -- I mean, it's the
15 same problem that the Court resolved in the *Daubert* ruling,
16 which is that they can't include revenues for SRX devices alone
17 that were never used in combination with Sky ATP.

18 That's just one example. The fundamental problem here is
19 that their offer of proof confirms that they don't have a
20 legally viable damages opinion. They say, oh, well, we can put
21 on evidence of an \$8 per user license.

22 That's -- they already floated that theory in another
23 trial. The Federal Circuit vacated the jury verdict because
24 the Federal Circuit said they just plucked that out of thin
25 air.

PROCEEDINGS

PROCEEDINGS

1 **THE COURT:** Which trial was that?

2 **MR. HEINRICH:** That was the *Finjan v. Blue Coat* trial.

3 **THE COURT:** That verdict got reversed

4 **MR. HEINRICH:** That's correct. Now they say they want
5 to do the same \$8 per user license model again. They're also
6 saying a 32-cent-per-scan license, where they've never actually
7 done a per-scan license at all. It's just another number that
8 was plucked out of thin air as well. It fails under *Finjan v.*
9 *Blue Coat*.

10 Evidence -- they have a starting point license of
11 8 percent for hardware. But now they say they want to apply
12 that to the revenues for the entire security division of
13 Juniper, which not only includes SRX devices alone, but it also
14 includes the site for ATP appliance, that the Court excluded,
15 but they cite for revenues in their offer of proof as the basis
16 for a damages claim. They're flouting the Court's orders.
17 They're ignoring and flouting the Federal Circuit's rulings.

18 And the problem here is that in a few moments we're going
19 to have folks coming in here, taking time away from work, away
20 from their family, and their offer of proof confirms that they
21 don't have a damages case that would withstand a Rule 50(a)
22 motion. That's the problem.

23 **THE COURT:** Well, there are other issues to try.

24 **MR. HEINRICH:** If they --

25 **THE COURT:** There's infringement to try

1 **MR. HEINRICH:** If they don't have damages, then this
2 whole case is moot. The patent is expired.

3 **THE COURT:** Now that we have gotten this far, I'm not
4 going to dismiss the jury.

5 Look, I'm going to deny your motion. I'm going to explain
6 why.

7 It's not -- I want to tell Mr. Andre first, I have grave
8 doubt that you're going to have a damages case after I hear it
9 all. And I may have to direct a verdict against you on the
10 issue of damages. I want to be very clear about that.

11 Let's just start with one word: apportionment. All right.
12 That right there may be a deal killer for you.

13 But here's the problem: This is coming up to me out of
14 left field by the defendant, and it's a problem that you caused
15 by coming up with this last-minute spreadsheet that you
16 yourself injected into it. So I allowed a deposition to try to
17 cure your default with a last-minute disclosure.

18 And then on Friday night -- this is Monday. I'm talking
19 to the Court of Appeals now. This is Monday morning, at
20 7:45 a.m. And -- on Friday -- is it Friday night? I think it
21 was Friday night, Juniper filed this massive motion to knock
22 out the entire damages case.

23 I've done the best I can to assess it. I think there are
24 a lot of good points in that motion. But is it good enough to
25 say that they -- that I can cut them off at the knees now? No

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