DKT. 261-3

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FINJAN, INC., a Delaware Corporation,, Plaintiff, v. JUNIPER NETWORKS, INC., a Delaware Corporation, Defendant.	Case No. 3:17-cv-05659-WHA **JUNIPER NETWORKS, INC.'S MOTION *IN LIMINE* NO. 1 TO EXCLUDE EVIDENCE AND ARGUMENT REGARDING CYPHORT AND THE ATP APPLIANCE PRODUCT** Date: December 4, 2018 Time: 9:00 a.m. Courtroom: Courtroom 12, 19th Floor Before: Hon. William Alsup

MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Juniper Networks, Inc. ("Juniper") hereby moves the Court for an order *in limine* precluding Plaintiff Finjan, Inc. ("Finjan") from presenting evidence or argument regarding Cyphort Inc. ("Cyphort") and its Advanced Threat Prevention Application ("ATP Appliance"). The grounds for relief are that such argument and evidence is irrelevant and would be prejudicial, confusing and misleading. Fed. R. Evid. 402, 403.

The Cyphort ATP Appliance is not an accused product for purposes of the upcoming trial. Indeed, this Court ***already expressly excluded it*** from the early summary judgment motion procedure that identified the issues for trial. Dkt. No. 85 (granting Finjan leave to amend its Complaint to add the ATP Appliance under the condition that "ATP Appliance remains excluded from the first round of the early summary judgment procedure"). Notwithstanding the Court's ruling, Finjan and its experts have repeatedly attempted to inject Juniper's November 2017 acquisition of Cyphort and the ATP Appliance into the upcoming trial. For example, Finjan's damages expert, Kevin Arst, and technical expert, Dr. Eric Cole, offer a variety of conclusory assertions to the effect that "Juniper made a strategic decision to purchase Cyphort," Ex. 1 at 10; Ex. 2 at 24, and that through the Cyphort acquisition Juniper purportedly "realized technical and economic benefits." Ex. 2 at 23. Such argument and evidence is inadmissible for at least the following reasons.

First, the Cyphort acquisition and ATP Appliance are inadmissible because they are irrelevant. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action"); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible."). Juniper's November 2017 acquisition of Cyphort and Cyphort's ATP Appliance have no bearing whatsoever on the issues for the upcoming trial: subject matter eligibility under 35 U.S.C. § 101, whether Juniper infringes the accused products, and any calculation of damages. Notably, Finjan's own damages expert analyzes damages based on a hypothetical negotiation "in the period leading up to October 2015," ***more than two years before*** the Cyphort acquisition. Ex. 2 at 29; *see, e.g.*, *Toshiba Corp. v. Imation Corp.*, No. 09-cv-305-slc, 2013 U.S. Dist. LEXIS 42662, at *16 (W.D.

Wis. Mar. 26, 2013) (granting motion *in limine* to exclude evidence relating to non-accused products because it is irrelevant); *Digital Reg. of Texas LLC v. Adobe Sys., Inc.*, 2014 WL 4090550, *5 (N.D. Cal. 2014) (granting motion *in limine* excluding evidence of non-accused product).

Finjan has argued that the Cyphort acquisition is relevant to the issue of notice, but that argument has no merit. According to Finjan, it provided ***Cyphort*** with notice of Finjan's belief that the ATP Appliance infringes the '494 Patent in 2015. But whether or not Finjan provided Cyphort with notice regarding the ATP Appliance is irrelevant. The ATP Appliance is not an accused product for the upcoming trial. 35 U.S.C. § 287 requires that notice be "an affirmative communication of a ***specific charge of infringement by a specific accused product or device***." *U.S. Philips Corp. v. Iwasaki Elec. Co.*, 505 F.3d 1371, 1375 (Fed. Cir. 2007) (internal citations omitted) (emphasis added). In any event, in 2015, Cyphort was an independent entity [redacted] and not part of Juniper. *See Unicolors, Inc. v. Urban Outfitters*, No. CV 14-1029, 2015 WL 12758841, at *6 (C.D. Cal. Feb. 23, 2015) (granting motion *in limine* excluding evidence related to third parties that allegedly infringed the asserted patents because "evidence concerning these third parties not involved in this lawsuit is irrelevant and prejudicial pursuant to FRE 402 and 403").

Second, even if the Cyphort acquisition and ATP Appliance had some modicum of relevance (they do not), such argument and evidence is inadmissible because it would cause unfair prejudice, unduly expend time, and confuse and mislead the jury. Fed. R. Civ. P. 403. Critically, argument and evidence regarding Finjan's assertion that the ATP Appliance infringes would place Juniper in an untenable and highly prejudicial situation where, without substantive rebuttal, the jury will likely assume that the accusation has merit. But since the ATP Appliance is not at issue, substantively rebutting the assertion that the ATP Appliance infringes would require a massive sideshow—a mini-trial on exactly the issue that this Court already ordered would ***not*** be addressed during this procedure (*see* Dkt. 85). Moreover, Juniper would be incredibly constrained in its ability to attempt to rebut the allegation of infringement, given that (because the ATP Appliance was already excluded from this phase of the case), neither of the parties' experts conducted infringement or non-infringement analyses in their reports, and this issue thus was not addressed at

expert depositions. Further, there is a significant risk the jury will conflate notice to Cyphort with notice to Juniper, or Cyphort's ATP Appliance with the similarly named "Sky ATP" that is at issue—even though the products are completely distinct. In short, Finjan's intent to introduce evidence about the Cyphort acquisition and non-accused ATP Appliance is a situation rife with prejudice and likelihood of jury confusion.

As numerous courts have recognized, the prejudicial and confusing impact of injecting non-accused products into a trial outweighs any minimal relevance. *See, e.g., Fresenius Med. Care Holdings, Inc. v. Baxter Int'l, Inc.*, No. C 03-1431 SBA, 2006 U.S. Dist. LEXIS 41749, at *10 (N.D. Cal. June 13, 2006) (granting motion *in limine* to exclude evidence and argument regarding non-accused product being sold outside the United States as unduly confusing and time-consuming); *Jumpsport, Inc. v. Hedstrom Corp.*, No. C 04-0199 PJH, 2004 WL 2203556, at *2 (N.D. Cal. Sep. 29, 2004) (granting motion *in limine* to exclude evidence of non-accused products because the products were not within the scope of the litigation); *Multimedia Patent Tr. v. Apple Inc.*, No. 10-CV-2618-H (KSC), 2012 WL 12868264, at *3 (S.D. Cal. Nov. 20, 2012) (holding that defendants are "generally precluded from presenting evidence or argument related to the unaccused products" at trial).

For the foregoing reasons, Juniper respectfully requests that the Court grant its motion *in limine* precluding Finjan from presenting evidence or argument regarding Cyphort and its ATP Appliance.

Dated: November 14, 2018

Respectfully submitted,

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