

# EXHIBIT 1

## Volume 2

Pages 198 - 397

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  
Tuesday, December 11, 2018

TRANSCRIPT OF PROCEEDINGSAPPEARANCES:

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(Appearances continued on next page)

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1	<u>I N D E X</u>	200
2	Tuesday, December 11, 2018 - Volume 2	
3	<u>PLAINTIFF'S WITNESSES</u>	<u>PAGE VOL.</u>
4	<u>BIMS, HARRY (RECALLED)</u>	224 2
5	(PREVIOUSLY SWORN)	225 2
6	Direct Examination resumed by Mr. Andre	239 2
7	Cross-Examination by Mr. Kagan	242 2
8	Redirect Examination by Mr. Andre	243 2
9	<u>HARTSTEIN, PHILIP</u>	244 2
10	(SWORN)	294 2
11	Direct Examination by Ms. Kobialka	324 2
12	Cross-Examination by Ms. Carson	337 2
13	Redirect Examination by Ms. Kobialka	338 2
14	<u>KROLL, DAVID</u>	347 2
15	(SWORN)	359 2
16	Direct Examination by Mr. Hannah	364 2
17	Cross-Examination by Mr. Heinrich	367 2
18	Redirect Examination by Mr. Hannah	368 2
19	<u>NAGARAJAN, CHANDRA</u>	
20	By Videotaped Deposition	
21	<u>COLE, ERIC</u>	
22	(SWORN)	
23	Direct Examination by Mr. Andre	
24		
25		

1	<u>I N D E X</u>	201
2	<u>E X H I B I T S</u>	
3	<u>TRIAL EXHIBITS</u>	<u>IDEN EVID VOL.</u>
4	1	338 2
5	22	363 2
6	23	363 2
7	57	388 2
8	74	391 2
9	91	283 2
10	342	279 2
11	372	263 2
12	382	384 2
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 **MR. ANDRE:** Your Honor, we're actually -- we got this  
 2 letter late last night as well. We're going to withdraw  
 3 Mathena.  
 4 **THE COURT:** Thank you.  
 5 **MR. ANDRE:** So we'll make that move.  
 6 **THE COURT:** Thank you.  
 7 Scott Coonan.  
 8 **MR. ANDRE:** We're not withdrawing that one.  
 9 **THE COURT:** What?  
 10 **MR. ANDRE:** We're not withdrawing that one.  
 11 **THE COURT:** No, no. I'm either going to allow it --  
 12 it's ridiculous for you to object to this. Either you bring  
 13 Mr. Coonan in so that they can put him on the stand and do it  
 14 through him, or I'm going to let him use the deposition.  
 15 You're just trying to keep out that transcript where your  
 16 guy did some bad things. No way.  
 17 **MR. KAGAN:** That's not going to happen. We are  
 18 presenting Mr. Coonan in our case-in-chief.  
 19 **THE COURT:** No. Bring him so he can present him in  
 20 his case-in-chief, or I'm going to let him use the deposition.  
 21 **MR. KAGAN:** Okay. We'll make an election.  
 22 **THE COURT:** You can use the deposition. You can use  
 23 the deposition unless they supply you today with Mr. Coonan at  
 24 your convenience when you want to call him.  
 25 **MR. ANDRE:** Your Honor, he'll be for most likely

## PROCEEDINGS

208

1 We didn't think they were going to bring in prior art  
 2 because validity is not in the case.  
 3 **THE COURT:** Well, then how do you get around that?  
 4 **MR. HEINRICH:** Well, we made multiple disclosures in  
 5 this case, Your Honor.  
 6 **THE COURT:** Did you do it within 30 days?  
 7 **MR. HEINRICH:** Absolutely. We did invalidity  
 8 contentions in this case.  
 9 **THE COURT:** No. I mean, earlier than 30 days.  
 10 **MR. HEINRICH:** Yes. Earlier than 30 days we did  
 11 invalidity contentions back in April. We did an opening expert  
 12 report in September.  
 13 **THE COURT:** Did you disclose the specific prior art?  
 14 **MR. HEINRICH:** Absolutely.  
 15 **THE COURT:** Well, then, Mr. Andre, what are you  
 16 talking about?  
 17 **MR. ANDRE:** Your Honor, under 35 U.S.C. 282, giving  
 18 discovery responses is not enough. You have to go in and give  
 19 very specific disclosures. When I do defense work, this is  
 20 something on my calendar every single time.  
 21 Now, we didn't think they would be using any prior art or  
 22 state of the art because that's not in the case; but yesterday  
 23 they disclosed a bunch of prior art exhibits, and so --  
 24 **THE COURT:** All right. Is this coming up for their  
 25 case?

1 tomorrow.  
 2 **THE COURT:** All right. Then work it out. But if they  
 3 don't bring him, you get to use the deposition.  
 4 Next. Finjan's motion to seal because of -- no. No way  
 5 we're going to do that. Those documents -- you're just  
 6 trying -- Finjan wants to seal the courtroom and keep all these  
 7 people out so that the rest of the world won't see what you're  
 8 up to. No way. No way.  
 9 **MR. ANDRE:** Your Honor, we're required to do that by  
 10 agreement with the third party.  
 11 **THE COURT:** Fine. You've tried. Denied  
 12 **MR. ANDRE:** Thank you.  
 13 **THE COURT:** The public is going to see what Finjan is  
 14 up to.  
 15 Next, three, Finjan's Objections to Juniper's Exhibits for  
 16 Late Disclosure. I don't know what this is even about. What  
 17 is that motion about?  
 18 **MR. ANDRE:** This is what is called the 282 disclosure.  
 19 **THE COURT:** Yes?  
 20 **MR. ANDRE:** They didn't make one.  
 21 **THE COURT:** What do you mean 282?  
 22 **MR. ANDRE:** 35 U.S.C. 282 requires a defendant in a  
 23 patent case to disclose any prior art or state of the art  
 24 references 30 days before trial. They just didn't make a  
 25 disclosure.

## PROCEEDINGS

209

1 **MR. ANDRE:** Their case.  
 2 **THE COURT:** I've got a little bit of time on this  
 3 then.  
 4 **MR. ANDRE:** Yes.  
 5 **THE COURT:** Is it true that the law requires a  
 6 specific disclosure?  
 7 **MR. HEINRICH:** No. In fact, the law is the opposite.  
 8 282 says it has to be in pleadings or otherwise in writing.  
 9 There's a Federal Circuit case, *Eaton v. Appliance Valves*.  
 10 It's 790 Fed. 2d 874 from the Federal Circuit. And that case  
 11 says that the purpose of this is to avoid unfair surprise.  
 12 It's not a formalistic requirement  
 13 **THE COURT:** But did that decision allow somebody to  
 14 get away with doing it the way you did it?  
 15 **MR. HEINRICH:** Well, it was much -- they did much less  
 16 in that case, Your Honor. They --  
 17 **THE COURT:** All right. Stop. What's the name of that  
 18 decision?  
 19 **MR. HEINRICH:** All right *Eaton v. Appliance Valves*.  
 20 **THE COURT:** What do you say to *Eaton*?  
 21 **MR. ANDRE:** Your Honor, I'm not familiar with that  
 22 case. We cited the case in our letter we sent to you, a  
 23 Federal Circuit case, that said just the opposite. So I'd have  
 24 to go back and look at *Eaton*. They didn't give us that case  
 25 last night.

1 It's not going to be up until tomorrow or the next day,  
 2 so --  
 3 **THE COURT:** Well, okay. You need by 5:00 p.m.  
 4 today -- look at all these lawyers. By 5:00 p.m. today, one of  
 5 these lawyers will submit a three-page brief on this subject,  
 6 both sides, by 5:00 p.m. today.  
 7 Next. I want to go over this. I sent out something that  
 8 I'm concerned about this issue of apportionment. How does  
 9 it -- I understand the *Blue Coat* decision, I think, but how  
 10 does it work?  
 11 It does make some statement. I'll read you the statement.  
 12 This is the Federal Circuit talking (reading):  
 13 "In such cases" -- this is a quote now. "In such  
 14 cases the patentee must," quote, "give evidence tending to  
 15 separate or apportion the infringer's profits and the  
 16 patentee's damages between the patented features and the  
 17 unpatented features and such evidence must be reliable and  
 18 tangible and not conjectural or speculative."  
 19 And that's citing to some case called *Garretson versus*  
 20 *Clark*, U.S. Supreme Court 1884. Now, I just love it when they  
 21 can find something that old. That's good. That's good. I  
 22 wish we could go back to those simpler days, but here we are.  
 23 They got it.  
 24 Okay. (reading)  
 25 "Finjan as the" -- this is your -- it was against you.

## PROCEEDINGS

1 **THE COURT:** Don't tell me about that case. I'll never  
 2 get it. Just tell me, do you have the burden to show the  
 3 unpatented features and then show the patented features and  
 4 then apportion between them?  
 5 **MR. ANDRE:** Yes. And so what we're doing in this case  
 6 is we're doing that.  
 7 **THE COURT:** How are you going to do that without an  
 8 expert?  
 9 **MR. ANDRE:** Well, we have their corporate  
 10 representative.  
 11 **THE COURT:** Who?  
 12 **MR. ANDRE:** The corporate representative, 30(b)(6)  
 13 witness --  
 14 **THE COURT:** Yeah.  
 15 **MR. ANDRE:** -- who went in and said that all the files  
 16 that come into Sky ATP, only 40 percent of them get processed  
 17 through the infringing components. So only 40 percent of all  
 18 files.  
 19 So we've already apportioned down to the -- what the  
 20 Federal Circuit says the infringing and noninfringing uses. So  
 21 the 60 percent is noninfringing. They do other things. They  
 22 do antivirus. They do geolocation, whatever else.  
 23 But 40 percent of the files come in. We have this  
 24 right -- they actually ran a test. The 30(b)(6) witness ran a  
 25 test and said only 40 percent of the files coming into Sky ATP

1 "Finjan as the present patent holder had the burden of  
 2 proving damages by a preponderance of the evidence."  
 3 Now, I haven't had this -- I've thought about this problem  
 4 in the past but it's been a few months or years. Who has the  
 5 burden of showing what the unpatented features are of an  
 6 accused device?  
 7 **MR. ANDRE:** Your Honor, I think that would be the  
 8 patentee's burden. I think it's our burden, and what we're  
 9 doing is --  
 10 **THE COURT:** You haven't done that.  
 11 **MR. ANDRE:** Well, we haven't -- we're just presenting  
 12 our damages case and we're going to put a fact-based case on.  
 13 And what we have -- and I'll just take a step back.  
 14 I actually argued the *Finjan/Blue Coat* case at the  
 15 Federal Circuit so I got --  
 16 **THE COURT:** You got your head handed to you.  
 17 **MR. ANDRE:** Just on that issue. I won everything  
 18 else.  
 19 **THE COURT:** Okay. Okay, yeah. Sorry. Good lawyers  
 20 win some and they lose some, otherwise they wouldn't be any  
 21 good because they can't bat 1,000.  
 22 All right. Go ahead.  
 23 **MR. ANDRE:** All right. So in that case I argued that  
 24 what they called the DRTR was the small sellable unit;  
 25 therefore, we get 100 percent of --

## PROCEEDINGS

1 is the infringing use, the one that gets scanned and stored in  
 2 the database.  
 3 So we've already apportioned down to what the  
 4 Federal Circuit says the infringing and noninfringing  
 5 functions. The noninfringing functions would be the antivirus,  
 6 for example.  
 7 **THE COURT:** It didn't say "functions." It says  
 8 "features."  
 9 **MR. ANDRE:** Yeah. Also in the next paragraph when you  
 10 talk about the DRTR after the WebPulse, it says (reading):  
 11 "DRTR, which stands for ratings as part of WebPulse,  
 12 and it performs both infringing and noninfringing  
 13 functions."  
 14 **THE COURT:** Where do you see the word "functions"?  
 15 **MR. ANDRE:** It's the paragraph right here  
 16 (indicating). It's right up here (indicating). It starts with  
 17 "DRTR, which stands for..."  
 18 **THE COURT:** Yeah.  
 19 **MR. ANDRE:** At the end of that first sentence "both  
 20 infringing and noninfringing functions."  
 21 (Pause in proceedings.)  
 22 **THE COURT:** All right. I see the word "functions" in  
 23 that paragraph. Hold that thought.  
 24 All right. What does the other side say about what I just  
 25 heard?

1 **MS. MARTINEZ:** Correct, Your Honor. We have other  
2 documents as well that do show the markings. So this is just,  
3 you know, a further -- further evidence.  
4 **THE COURT:** No. You're not going to be allowed to use  
5 something for substantive proof that you didn't disclose in  
6 response to their -- well, you should have put it in your  
7 initial disclosures. You should have --  
8 Did you ask for it in a document request?  
9 **MS. CARSON:** We did and also in an interrogatory.  
10 **THE COURT:** Did they?  
11 **MS. MARTINEZ:** They did, Your Honor.  
12 **THE COURT:** Well, then, you should have produced this  
13 document in response and you did not.  
14 Now, I'm sure they are guilty of this too. So before the  
15 trial is over, you'll get to say, "Remember, Judge, you  
16 excluded this document." And then they will be coming up with  
17 lame excuses trying to figure out a way around that.  
18 But, remember, this is going to work against you too.  
19 Okay. The Juniper people win on that one.  
20 **MS. CARSON:** There's one more as well. It's a  
21 demonstrative to their expert's testimony, also Demonstrative  
22 Number 2, and it was not disclosed with expert reports. We  
23 request that that be excluded as well.  
24 **THE COURT:** All right. What do you say to that one?  
25 **MR. ANDRE:** Your Honor, it's a video of the CNM Web

## PROCEEDINGS

1 **THE COURT:** All right. Well, the corporate  
2 representative can definitely stay.  
3 **MR. ANDRE:** Yes.  
4 **THE COURT:** But the experts, do you both want them  
5 here or not?  
6 **MR. ANDRE:** Sure.  
7 **THE COURT:** You both agree?  
8 **MR. KAGAN:** Yes, Your Honor.  
9 **THE COURT:** All right. Experts can stay. I'm talking  
10 about retained experts, you know, the kind that did a Rule 26  
11 report. I'm not talking about some software engineer who's  
12 going to happen to give something that might be opinion  
13 testimony.  
14 All right. Okay. Are we done?  
15 **MR. KAGAN:** Yes, Your Honor.  
16 **THE COURT:** Let's see if the jury is all here.  
17 (Pause in proceedings.)  
18 **THE COURT:** Where's our witness? Let's have him come  
19 up to the stand.  
20 Mr. Bims, welcome back. Please have a seat.  
21 **HARRY BIMS,**  
22 called as a witness for the Plaintiff, having been previously  
23 duly sworn, testified further as follows:  
24 (Proceedings were heard in the presence of the jury:)  
25 **THE COURT:** Welcome back, everybody, and have a seat

1 page and he talked about he would be creating these videos, and  
2 we had not created them and given to them in his report. So,  
3 once again --  
4 **THE COURT:** I'm going to exclude it because it should  
5 have been -- everyone knows the same ground rule. The  
6 demonstrative should have been attached to the report.  
7 **MR. ANDRE:** That's fine.  
8 **THE COURT:** Out. But it's going to apply to you too.  
9 **MS. CARSON:** Thank you, Your Honor.  
10 **THE COURT:** All right. What's next?  
11 **MR. ANDRE:** One last housekeeping matter. I think  
12 this was raised in the pretrial but I'm not 100 percent sure,  
13 about fact witnesses sitting in the courtroom. I think they --  
14 **THE COURT:** Who?  
15 **MR. ANDRE:** Fact witnesses.  
16 **THE COURT:** They should not be in the courtroom --  
17 **MR. ANDRE:** Yes, sir.  
18 **THE COURT:** -- unless you both agree.  
19 **MR. ANDRE:** Okay. Thank you, Your Honor.  
20 **THE COURT:** Fact witnesses should not. Is it okay if  
21 experts stay?  
22 **MR. ANDRE:** Yeah. We usually agree the experts can  
23 stay and one corporate representative, yes, Your Honor.  
24 **MR. KAGAN:** Yeah. So we have a corporate  
25 representative who is likely going to be a fact witness.

## BIMS - DIRECT / ANDRE

1 You-all over there in the jury box will remember that we  
2 just got into the evidence.  
3 And is it Dr. or Mr. Bims? I can't remember.  
4 **THE WITNESS:** Doctor.  
5 **THE COURT:** Dr. Bims had just started his testimony  
6 and Mr. Andre is asking the questions. He represents Finjan.  
7 And we're in the very outset of the plaintiff's case. So we're  
8 just going to get right into it and start.  
9 Do you-all have -- you don't have to take notes, but it's  
10 up to you. Are you ready to go?  
11 (Nodding heads.)  
12 **THE COURT:** Mr. Andre, the floor is yours.  
13 **MR. ANDRE:** Thank you, Your Honor. May it please the  
14 Court.  
15 **DIRECT EXAMINATION (resumed)**  
16 **BY MR. ANDRE:**  
17 **Q.** Good morning, Dr. Bims.  
18 **A.** Good morning.  
19 **Q.** So when we left off yesterday, we were just talking about  
20 why you're here this week, your assignment. Can you just  
21 remind the jury what you're going to be talking about the next  
22 15, 20 minutes?  
23 **A.** Sure. So it's my job here to give a high-level overview  
24 through a tutorial on the technology that's going to be  
25 discussed this week.

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