EXHIBIT 1



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Volume 2

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP, JUDGE

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FINJAN, INC.,
             Plaintiff,
                                           No. C 17-5659 WHA
  VS.
JUNIPER NETWORKS, INC.,
             Defendant.
                                           San Francisco, California
Tuesday, December 11, 2018
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TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

KRAMER, LEVIN, NAFTALIS & FRANKEL LLP 990 Marsh Road Menlo Park, California 94025 BY: PAUL J. ANDRE, ESQ. LISA KOBIALKA, ESQ. JAMES HANNAH, ESQ.

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(Appearances continued on next page)

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APPEARANCES (CONTINUED):

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

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

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MR. ANDRE: Your Honor, he'll be for most likely

your convenience when you want to call him.

We didn't think they were going to bring in prior art because validity is not in the case.

THE COURT: Well, then how do you get around that? MR. HEINRICH: Well, we made multiple disclosures in this case, Your Honor.

THE COURT: Did you do it within 30 days? MR. HEINRICH: Absolutely. We did invalidity

contentions in this case.

THE COURT: No. I mean, earlier than 30 days.

MR. HEINRICH: Yes. Earlier than 30 days we did invalidity contentions back in April. We did an opening expert report in September.

THE COURT: Did you disclose the specific prior art? MR. HEINRICH: Absolutely.

15 **THE COURT:** Well, then, Mr. Andre, what are you talking about? 16

MR. ANDRE: Your Honor, under 35 U.S.C. 282, giving discovery responses is not enough. You have to go in and give very specific disclosures. When I do defense work, this is something on my calendar every single time.

Now, we didn't think they would be using any prior art or state of the art because that's not in the case; but yesterday they disclosed a bunch of prior art exhibits, and so --

THE COURT: All right. Is this coming up for their

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1 MR. ANDRE: Their case.

2 **THE COURT:** I've got a little bit of time on this

3 then. 4

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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.

It's 790 Fed. 2d 874 from the Federal Circuit. And that case

says that the purpose of this is to avoid unfair surprise. 11

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?

MR. HEINRICH: Well, it was much -- they did much less in that case, Your Honor. They --16

17 **THE COURT:** All right. Stop. What's the name of that 18 decision?

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

case. We cited the case in our letter we sent to you, a

Federal Circuit case, that said just the opposite. So I'd have

to go back and look at Eaton. They didn't give us that case

last night



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SO ---

THE COURT: Well, okay. You need by 5:00 p.m. today -- look at all these lawyers. By 5:00 p.m. today, one of these lawyers will submit a three-page brief on this subject, both sides, by 5:00 p.m. today.

Next. I want to go over this. I sent out something that I'm concerned about this issue of apportionment. How does it -- I understand the Blue Coat decision, I think, but how does it work?

It does make some statement. I'll read you the statement. This is the Federal Circuit talking (reading):

"In such cases" -- this is a quote now. "In such cases the patentee must," quote, "give evidence tending to separate or apportion the infringer's profits and the patentee's damages between the patented features and the unpatented features and such evidence must be reliable and 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 can find something that old. That's good. That's good. I 21

22 wish we could go back to those simpler days, but here we are. 23 They got it.

24 Okay. (reading)

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25 "Finjan as the" -- this is your -- it was against you. "Finjan as the present patent holder had the burden of proving damages by a preponderance of the evidence."

Now, I haven't had this -- I've thought about this problem in the past but it's been a few months or years. Who has the burden of showing what the unpatented features are of an accused device?

MR. ANDRE: Your Honor, I think that would be the patentee's burden. I think it's our burden, and what we're doing is --

THE COURT: You haven't done that.

11 **MR. ANDRE:** Well, we haven't -- we're just presenting our damages case and we're going to put a fact-based case on. 12 And what we have -- and I'll just take a step back. 13

14 I actually argued the Finjan/Blue Coat case at the

15 Federal Circuit so I got --

> **THE COURT:** You got your head handed to you. MR. ANDRE: Just on that issue. I won everything

else.

19 THE COURT: Okay. Okay, yeah. Sorry. Good lawyers 20 win some and they lose some, otherwise they wouldn't be any good because they can't bat 1,000. 21

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 --

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THE COURT: Don't tell me about that case. I'll never get it. Just tell me, do you have the burden to show the unpatented features and then show the patented features and then apportion between them?

MR. ANDRE: Yes. And so what we're doing in this case is we're doing that.

THE COURT: How are you going to do that without an expert?

MR. ANDRE: Well, we have their corporate representative.

THE COURT: Who?

MR. ANDRE: The corporate representative, 30(b)(6)

13 witness --

THE COURT: Yeah.

MR. ANDRE: -- who went in and said that all the files that come into Sky ATP, only 40 percent of them get processed through the infringing components. So only 40 percent of all files.

So we've already apportioned down to the -- what the Federal Circuit says the infringing and noninfringing uses. So the 60 percent is noninfringing. They do other things. They 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

tact and said only 10 narrant of the files coming into Clay ATD

PROCEEDINGS

is the infringing use, the one that gets scanned and stored in the database.

2 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.

THE COURT: It didn't say "functions." It says

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 (indicating). It's right up here (indicating). It starts with 16

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."

(Pause in proceedings.)

22 **THE COURT:** All right. I see the word "functions" in 23 that paragraph. Hold that thought.

All right. What does the other side say about what I just



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MS. MARTINEZ: Correct, Your Honor. We have office documents as well that do show the markings. So this is just, you know, afther — further victione. TITLE COURT: No. You're not going to be allowed to use something for substantive proof that you drive face something that should have pend it in your initial disclosures. You should have pent it in your initial disclosures. You should have pent in your initial disclosures. You should have pent it in your initial disclosures. You should have pent in your initial disclosures. You should have pent in your initial disclosures. You first in your initial disclosures. You should have pent in your initial disclosures. You should have pent it in your initial disclosures. You should have pent it in your initial disclosures. You first in your initial disclosures. You should have pent it in your initial disclosures. You should have pent it in your initial disclosures. You should have pent in your initial disclosures. You should have pent in your in the your should have pent in the your should have been attached to the report. Mr. ANDR: That's You, Your Honor. TITLE COURT: What's Mark Nove. Your Honor. THE COURT: What's Measures are all this was not disclosed with expert reports. We in the your should have pend and the pent in the your should have been attached to the report. The demonstrative should have been attached to the report. The COURT: What's What's near? THE COURT: What's Measures are should have pend and the should have		Case 3:17-cyn05650-WHA Document 4	32-2	Filed 04/11/19 PROCEEDINGS of 45
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TILE COLRT: I'm gaing to exclude it because it should not use to something for substantive proof that you didn't disclose it is something for substantive proof that you didn't disclose it is response to their – well, you should have put it in your improvement to their own should have put it in your improvement to the proof. TILE COLRT: Did they? MS. CARSON: We did and also in an interrogatory. TILE COLRT: Did they? MS. CARSON: We did and also in an interrogatory. TILE COLRT: Did they. MS. CARSON: They did, Your Honor. THE COLRT: Well, then, you should have produced this document in response and you did not. Now, I'm sure they are guilty of this too. So before the tails is over, youll get to say, 'Remember, Judge, you excluded this document.' And then they will be coming up with lame excusses trying to figure out a way around that. MS. CARSON: Therefore, Judge, you developed the six power and the mere will be common that one. Okay, The Jumpire people win on that one. MS. CARSON: Therefore more as well. It's a demonstrative to their experts its stimony, also Demonstrative and elimitedy stay. MS. CARSON: Therefore more as well. It's a demonstrative to their experts its stimony, also Demonstrative and elimitedy stay. MS. CARSON: Therefore more as well. It's a demonstrative to their experts its stimony, also Demonstrative and elimitedy stay. MR. ANDRE: Yes, sin. THE COURT: All right. Well the corporate reports. We representative and elimitedy stay. THE COURT: All right. Well the corporate representative and elimitedy stay. THE COURT: What should not be in the courtroom—MR. ANDRE: Yeah. We usually agree the experts can stay and one corporate representative, yes, Your Honor. MR. ANDRE: Yeah. We usually agree the experts can stay and one corporate representative, yes, Your Honor. MR. ANDRE: Yeah. We usually agree the experts on the very outset of the plaintiffs case. So we've pure the very outset of the plaintiffs case. So we've pure gings to be a finet witness. THE COURT: All right. Experts can sta				
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