

June 14, 2019

VIA ELECTRONIC FILING

Honorable Thomas S. Hixson
U.S. District Court, Northern District of California
San Francisco Courthouse
Courtroom A – 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Joint Discovery Statement
Finjan, Inc. v. Juniper Networks Inc., Case No. 3:17-cv-05659-WHA

Dear Magistrate Judge Hixson:

Pursuant to Judge Alsup's Order referring any discovery disputes to this Court (Dkt. No. 437), the parties submit the following joint statement regarding Plaintiff Finjan, Inc.'s ("Finjan") motion to compel responses from Defendant Juniper Networks, Inc. ("Juniper") to Finjan's discovery requests related to financials and other damages-related discovery for the accused products in this case. The parties attest that they met and conferred by telephone on this issue on May 16, 2019 and March 29, 2019.¹ See Ex. 1.

Respectfully submitted,

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¹ Counsel for Juniper is located outside of the Bay Area.

Finjan's Position

Juniper has no legal basis to withhold relevant discovery regarding (1) updated sales and revenue information for its accused SRX devices and (2) sales of any products and services bundled with the accused products (“Convoyed/Derivative Sales”). Revenue information for accused products and for Convoyed/Derivative Sales are relevant because they are directly keyed to the *Georgia-Pacific* factors that are used for determining a reasonable royalty for damages. 35 U.S.C. § 284 (patentee entitled to damages of no less than a reasonable royalty); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) (non-exclusive list of factors relevant to a reasonable royalty, including profits made from infringing products and the value to the infringer of using infringing products to promote sales of other, non-patented products). Critically, Juniper *previously produced* this information and conceded that it was relevant during the first round of Judge Alsup’s patent showdown procedure, yet it inexplicably now refuses to update its production now that about one year later the parties are preparing for a second trial.

A. Juniper May Not Arbitrarily Withhold Revenues for Some Accused Products

Juniper has no grounds to refuse to update revenue information² for its accused SRX devices. Finjan accuses, *inter alia*, Juniper’s SRX devices used with Sky ATP, and the SRX devices by themselves, of infringement. During the first round of the patent showdown procedure, Juniper produced revenue information for the SRX devices that did not use Sky ATP. In doing so, Juniper conceded that these revenues are relevant—as it must, given that the SRX devices are independently accused of infringement.

Following completion of the first round of the showdown, Juniper also acknowledged the need to produce updated financial information for SRX devices with Sky ATP, since that information was produced before the parties’ first trial in early December 2018. Despite updating its production for SRX devices with Sky ATP, Juniper refuses for no reason to provide updated information for the SRX devices alone, even though it previously produced this exact information. Ex. 2 at 20-21 (Interrog. No. 16). It is baffling that Juniper seeks to force Finjan to use outdated revenue information for one of the accused products. Juniper cannot unilaterally decide what it deems to be relevant and only produce information helpful to it. *Id.* (using legal conclusions, such as the nature of the smallest salable unit, to redefine Finjan’s discovery); *compare Fresenius Med. Care Holding Inc. v. Baxter Int’l, Inc.*, 224 F.R.D. 644, 653 (N.D. Cal. 2004) (“disapprov[ing]” defendant’s attempt to unilaterally limit scope of interrogatory to what it considered relevant).

To produce the relevant information is no additional burden to Juniper, as it need only use its accounting systems to select the products for which it wishes to export revenue data. *See* Ex. 3 (Gupta 11/16/18 Dep. Tr.) at 44:24-45:8. Moreover, the amount of data needed to complete the production that Juniper already began before the December 2018 trial is marginal. Juniper has no basis to withhold revenues for an accused product that is squarely at issue in this

² Specifically, Finjan requests the dates, revenues, customer identification numbers, and invoice/purchase order numbers for sales to customers that purchased the accused products and services.

case. In fact, Juniper claims that it can produce updated revenues for the SRX devices, but will only do so after the Court's ruling on the order to show cause for the '154 Patent. However, Juniper's continued delay prejudices Finjan because Finjan needs this information well in advance of the deadline for opening expert reports, which are currently due in mid-July.

B. Juniper May Not Selectively Produce Certain Convoyed/Derivative Sales Data but Withhold the Rest

Juniper has attempted to further limit its production of revenue information in this case by only partially producing Convoyed/Derivative Sales information. *See* Ex. 4 (Request No. 31) at 105-109; Ex. 5 (Request No. 122) at 27-28 (only agreeing to produce sales data for some accused products). Convoyed/Derivative Sales fall under the *Georgia-Pacific* reasonable royalty analysis, which considers use of infringing products to promote sales of non-patented products or services. *See, e.g. Georgia-Pacific*, 318 F. Supp. at 1120 (Factor 6: effect of selling the patented invention in promoting sales of the infringer's other non-patented products and the extent of any derivative or convoyed sales); *see also Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384-86 (Fed. Cir. 2001) (affirming award of damages which factored evidence of bundled and convoyed sales into the royalty base); *see also Damages Contentions*, p. 3, 15. Juniper's claim that such information is somehow not relevant is thus contrary to law.

First, as with the revenue information cited above, Juniper *already produced* some information relating to Convoyed/Derivative Sales, and now refuses without reason to update its production. Specifically, this information, such as sales of power cords and other accessories sold in bundles with the accused products, was part of what Juniper claimed did not exist during discovery in 2018, yet suddenly produced as part of a 17,000 page spreadsheet mere days before Finjan's expert reports were due. Since Juniper withheld this information, the Court granted Finjan leave to take an expedited deposition a few days before the start of trial. *See* Dkt. No. 300, 12/4/18 Pretrial Hearing Tr. at 76:1-7. To prevent a repeat scenario, Finjan respectfully requests that Juniper be ordered to update its production for all Convoyed/Derivative Sales. Juniper falsely claims that it cannot produce this information because it does not track this data in the ordinary course of business and would need to create new documents. As mentioned above, Juniper already produced some of this data through 2017. Finjan now seeks the same revenue data for 2018 and 2019. Finjan is entitled to this updated information irrespective of whether RFP No. 31 specifically mentions revenues in the request.

Second, Juniper has selectively withheld data relating to some Convoyed/Derivative Sales which it has no basis to exclude. For example, Juniper should produce financial information reflecting sales of the customer support license which Juniper *requires* its customers purchase in order to use the "free" version of Sky ATP. Juniper has never produced such information, even though it cannot credibly claim that disseminating the free version of Sky ATP but requiring the purchase of a customer support license somehow does not promote sales of Juniper's services. *See Georgia-Pacific*, 318 F. Supp. at 1120 (Factor 6: effect of selling the patented invention in promoting sales of the infringer's other non-patented products and the extent of any derivative or convoyed sales). Finjan's RFP No. 31 is sufficiently broad to cover this financial information because it seeks all products sold or bundled with the accused products, which would include financial data. Furthermore, Finjan's RFP No. 122 specifically sought revenues for customer support licenses, which undoubtedly includes the customer support

license that must be purchased in conjunction with the “free” version of Sky ATP. Juniper’s argument that it has already provided revenues for Sky ATP licenses is misleading at best, because Juniper knows that this does not include these customer support revenue.

Further, Finjan is not making “broad demands” for irrelevant financial information, as Juniper suggests. These requests are relevant to Finjan’s damages case and are reasonably limited. As explained above, Finjan seeks updated revenue information for the products for which Juniper has previously provided. Finjan’s requests are also limited in that they only seek information from 2015 onward. For these reasons, Juniper’s reliance on *Thought* is misplaced. See *Thought, Inc. v. Oracle Corp.*, No. 12-cv-05601-WHO, 2015 WL 2357685, at *1, *5 (N.D. Cal. May 15, 2015) (overly broad request for revenue information properly denied). This is a straightforward request and is not burdensome to Juniper. As Ms. Gupta testified, Juniper need only input a selection of products into its accounting systems to be able to create a spreadsheet of the relevant data. Ex. 3 (Gupta 11/16/18 Dep. Tr.) at 44:24-45:8. Thus, Juniper should be compelled to produce revenue information for *any* product or service which is used to promote, upsell, or is otherwise bundled with Juniper’s accused products and services, because all such information is minimally burdensome to produce yet is highly relevant to the *Georgia-Pacific* reasonable royalty analysis and highlights the value of the infringing products to Juniper.

Juniper’s Position

Juniper should not be compelled to provide updated revenue data concerning the SRX because it is highly likely that the SRX will no longer even be an accused product once the Court issues its decision on its Order to Show Cause why judgment should not be entered in Juniper’s favor on the ’154 Patent. Moreover, Finjan is not entitled to revenue data concerning the alleged “convoyed sales” of *non-accused* products because such information does not fall within the scope of any Request for Production (“RFP”) identified by Finjan. Moreover, as Juniper does not track or correlate accessories or licenses to particular devices in the ordinary course of business, it simply does not maintain documents “sufficient to show” this information. Juniper cannot be forced to create new documents under the guise of a request to produce documents within Juniper’s possession, custody, or control (even ignoring the questionable relevance of the information Finjan seeks).

A. Juniper Will Produce Updated Financial Data For SRX If The Court Does Not Grant Juniper Summary Judgment On The ’154 Patent.

On June 6, Finjan filed a notice of claims to be tried at the October 2019 trial. Dkt. 516. In that notice, Finjan only identifies the standalone SRX as an accused product for the ’154 Patent. *Id.*³ When Finjan moved for summary judgment on this patent, however, the Court not only denied Finjan’s motion, but also issued an order to show cause as to why judgment should not be entered in favor of Juniper on the ’154 Patent—thus removing the standalone SRX as an accused product in this case. Dkt. 459. The parties have submitted briefs on this issue, and the Court’s decision is pending. Given that this issue has been fully briefed and argued, there is no reason to force Juniper to go through the burden of obtaining, reviewing, and providing this data

³ Juniper previously produced revenue data for the SRX alone because Finjan originally accused the SRX alone of infringing all the patents-in-suit. It has since dropped its claims against the SRX alone, other than for the ’154 Patent. Thus, it is irrelevant that Juniper previously produced SRX data.

at this time. *See Barnes and Noble, Inc. v. LSI Corp.*, 2013 WL 131073, at *2 (N.D. Cal. 2013) (denying discovery of sales information for a non-accused product). If the Court elects not to dispose of the '154 Patent, however, Juniper will provide updated financial data for the SRX within two weeks of the relevant Court Order.⁴

B. Finjan Is Not Entitled To Additional Discovery On SRX Accessories.

Finjan separately argues that it is entitled to additional financial discovery on non-patented products because that information is supposedly relevant to convoyed sales. As a hook for this requested relief, Finjan seems to be alleging that Juniper's responses to RFP Nos. 31 and 122 are insufficient. The problem for Finjan, however, is that those requests do not even seek the revenue data for non-accused products that Finjan is now demanding.

Finjan first claims Juniper should be required to provide revenue information for "power cords" and "accessories." But the only discovery request Finjan points to is RFP No. 31, which merely seeks "[d]ocuments, communications, or things sufficient to show any products or services sold, offered for sale, marketed, or bundled with each of the Accused Instrumentalities from the year 2012 to the present." *See* Ex. 4 (Request No. 31) at 105-109. Juniper has already produced data sheets and marketing literature that are sufficient to show each product and/or service that could arguably be sold, marketed, or bundled with the accused products. Finjan does not—and cannot—dispute this fact. Instead, Finjan claims that RFP No. 31 also contains a *sub silentio* request for financial data. But there is nothing in RFP No. 31 that even mentions revenue or financial data, and it is black letter law that a party is not obligated to produce or create documents that do not fall within a properly propounded discovery request. *See Genentech, Inc. v. Trustees of Univ. of Pa.*, 2011 WL 2443669, at *3 (N.D. Cal. June 16, 2011) (denying motion to compel "all" documents concerning studies or experiments where the request only sought documents "sufficient to describe" such studies or experiments).

Moreover, even if Finjan had requested this information (and it has not), courts in this District consistently hold that a patentee cannot make broad demands for financial data related to non-patented products under the guise of a purported relevance to convoyed sales. Indeed, in *Thought, Inc. v. Oracle Corp.*, No. 12-CV-05601-WHO, 2015 WL 2357685, at *1, *4 (N.D. Cal. May 15, 2015), the court denied the plaintiff's motion to compel production of financial information on non-accused products under a convoyed sales theory. The plaintiff had requested production of financial information regarding "application" and "database" software, but the patent was targeted at middleware products. *Id.* at *1. The court rejected the plaintiff's argument that the defendant should produce this information because it relates to convoyed sales. *Id.* at *5. In particular, the court noted that the plaintiff had not "articulate[d] any theory of damages that involved specific Oracle database or application products," and thus it was of "questionable relevance" that did not justify the burden on the defendant. *Id.* Here, Finjan's requests are similarly broad, in that they are not limited to specific products or components.

⁴ In a footnote, Finjan requests the "customer identification numbers, and invoice/purchase order numbers" in addition to revenue and cost data. But the interrogatory that Finjan points to does not actually seek any customer information. Ex. 2 (Interrogatory No. 16 at 17). Thus, even if Juniper were ordered to provide SRX data, it should only be required to provide the information requested in the interrogatory (i.e., revenues, costs, price, and units).

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