

June 25, 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. A.

Respectfully submitted,

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REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

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

Finjan's Position

Juniper improperly refuses to produce relevant damages-related discovery relating to (1) the extent of use of the infringing technology, such as the number of customer's using Sky ATP, total number of files processed, and the percentage of such files submitted for analysis within Sky ATP; and (2) agreements with third parties that relate to technology similar to that of Finjan's patents and/or the accused products. Juniper concedes that the complexity and the millions of dollars at issue justify broad discovery, such that its refusal to provide discovery tailored to Juniper's infringement and responsive to various *Georgia-Pacific* factors and damages analysis is unwarranted. *See* Dkt. No. 484 at 1. The discovery is proportional, and is relevant to and important for measuring the benefits, use and damages considerations for a reasonable royalty analysis. *See* Fed. R. Civ. Proc. 26(b)(1) (proportionality is measured based on, *inter alia*, relevance to a party's claim and importance of the discovery in resolving an issue). There is no basis in law or fact to deny Finjan such highly relevant discovery.

A. Juniper May Not Withhold Information It Previously Provided and Used

Juniper should be compelled to produce metrics regarding its extent of use of the accused technology because such information is considered as part of the reasonable royalty damages analysis. 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) (setting forth factors relating to reasonable royalty; Factors 10-13 relate to the benefits and value of the technology; the extent of its use; the portion of the profit or of the selling price to allow for such use; and the portion of profit credited to the invention). Juniper conceded the relevance of the extent of use data when it attempted to rely on it during the first trial in this case. The Court should grant this motion to provide Finjan with full information requested for second trial.

1. Juniper Should Identify the Number of Customers Using Sky ATP

The requested metrics regarding extent of use is relevant to show the value and benefits of the accused technology to Juniper and customer demand for such technology. Juniper claims that its multiple supplements to Interrogatory No. 4, consisting of mere 33(d) citation, provides the number of users for the free version of Sky ATP and number of SRX units. Referencing indecipherable spreadsheets with thousands of rows, where one must match up serial numbers in one sheet to another sheet for activation dates, is improper because it is far less burdensome for Juniper to interpret and extract the responsive information. Moreover, it appears that Juniper has not included instances wherein a Sky ATP premium evaluation license was used or where SkyATP was used within a bundled product offering.² Thus, the Court should compel Juniper to provide a full response to Interrogatory No. 4, including identification of the number of users for the free version, premium or basic paid version and users in a bundled product or trial evaluation.

2. Juniper Has No Basis to Withhold Metrics Quantifying Use of its Products

² *See, e.g.* https://www.juniper.net/documentation/en_US/release-independent/sky-atp/help/information-products/pathway-pages/jd0e1487.html; <https://www.exclusive-networks.com/nl/wp-content/uploads/sites/14/2017/08/emea-secure-business-promo-bulletin.pdf>.

Juniper refuses to identify updated metrics quantifying its use of the infringing technology from October 2015 to the present, including *inter alia* the number of files scanned or classified, the number of threats received, the number of threats or malware detected, and/or the number of files processed by the accused products. Ex. B (Request Nos. 119-121) at 23-27; Ex. C (Interrog. No. 5) at 13-24. Before the first trial, Juniper claimed the information did not exist, but then sandbagged Finjan in a rebuttal expert report with a limited set of this *same* information. *See, e.g.* Ex. B (Request Nos. 119-121) at 23-27; *see also* Rubin Rpt. at p. 17 [REDACTED]

[REDACTED]).
 Finjan gave Juniper over two months to pull this information, as Juniper claimed that it might produce something for an unidentified “limited time period.” *See* Ex. A at 2. It was not until after Finjan served its portion of this letter that Juniper revealed it was coincidentally planning to produce more information. However, the new information offered is deficient because Juniper again attempts to avoid giving a direct response by burying the information sought, this time within the source code computer. Juniper purports to have added a “log” of data to its source code computer but, this is not a proper response because it requires Finjan to try and extract the information, without any direction or schema to interpret the data. *See* Ex. D (Second Supplemental Response to Interrogatory No. 5) at 20-21. Finjan’s experts have reviewed the data on multiple occasions but it is simply a raw data dump that can’t be interpreted, as provided.³ A second supplement, aimed at identifying the number of samples submitted, further muddied the water by referring to data from the “Sky ATP production” and “Sky ATP deployments” but without any explanation of how those samples were determined or what they corresponded to. The response also ignores the rest of the metrics sought, namely, the number of files processed by Sky ATP (which they were able to create a program for before and relied on such results at trial) and the number of files processed by specific scanners.

Juniper concedes this is a replica of data and thus there does not appear to be a legitimate security concern or basis to classify this data as source code, particularly given the parameters set forth in the protective order. Juniper’s inclusion of this material in the source code and failure to provide any explanation or direction regarding how this log should be interpreted is an improper 33(d) response. Thus, the Court should compel Juniper to quantify the samples submitted and processed by the different accused scanners in Sky ATP, including dynamic analysis.

B. Juniper Identifies No Basis to Justify Withholding Comparable Agreements

Juniper identifies no basis for its refusal to produce agreements and related communications covering comparable patents or technologies, to those at issue here.⁴⁵ Ex. B. (RFP Nos. 107-108, 125) at 9-12, 30-32. These agreements are relevant to a damages analysis, including costs that Juniper incurs and amounts it is willing to pay for use of similar technology,

³ In its response, Juniper states that it is “willing to work with Finjan to provide any programs that are reasonably necessary to analyze the data,” but even then, it must provide some explanation.

⁴ Finjan agreed to limit its requests to communications regarding patents, technology, or know-how related to firewalls, secure routers, malware identification, Netscreen technology, and the technology disclosed in the Asserted Patents. Ex. B (Request Nos. 109-110, 112-113) at 12-17.

⁵ Finjan has clarified to Juniper that these Requests include non-ESI documents.

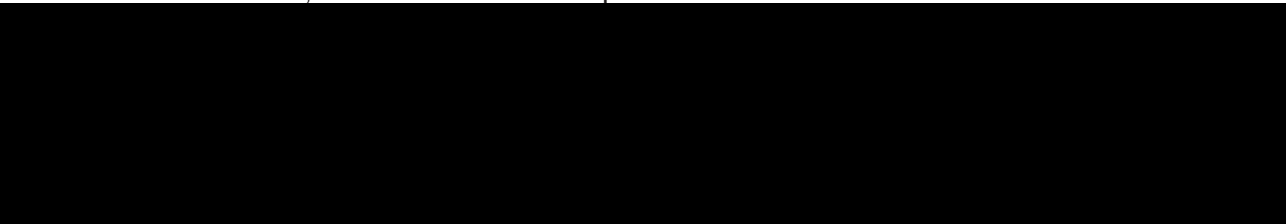
cost savings, and the *Georgia-Pacific* factors. See Damages Contentions, p. 3-5, 9-12 (identifying cost savings and royalty analysis); *Georgia-Pacific* 318 F. Supp. at 1120 (Factors 2, 15: licensee’s payments for comparable technology; amount that a licensee would be willing to pay as a royalty while making a reasonable profit). The requested information is tailored specifically to capture this information. These requests cover agreements with third parties involving the technology of the accused products or Finjan’s patented technology, which includes a 2014 settlement agreement with Palo Alto Networks dealing with next-generation firewall and network security technologies and Partner agreements, which are at a minimum related to the accused products. See, e.g., <https://www.irell.com/ourwork-recent-matters-52>. Juniper claims that its agreement with Palo Alto Networks is publicly available in SEC filings, but fails to confirm that is the complete agreement or explain why it won’t produce it in this litigation. Ex. A at 7. Juniper’s withholding on the basis that they are not comparable is inappropriate at this stage of the case. Fed. R. Civ. Proc. 26(b)(1) (admissibility irrelevant to discoverability). Juniper’s unfounded qualms are without merit. The Court should compel the production and identification of all Juniper agreements with third parties related to the accused products and/or Finjan’s patented technology, and any related communications.

Juniper’s Position

The issues raised by Finjan are largely moot because Juniper has already provided the vast majority of the information and documents sought by Finjan. The very limited information that Juniper has not agreed to produce either does not exist or involves communications and license agreements that Finjan itself has previously conceded are not relevant.

A. Juniper Has Already Identified The Number Of Sky ATP Customers.

Finjan asks the Court to compel Juniper to provide a further response to Interrogatory No. 4, which requests—among other things—that Juniper identify the number of SRX customers who use Sky ATP. It is unclear why Finjan is continuing to pursue its motion on this issue, given that Juniper recently supplemented its response to provide this very information.⁶ Finjan’s contention that the spreadsheets Juniper created to respond to the interrogatory are “indecipherable,” is nonsense. For example, the spreadsheet identifying customers who activated a free Sky ATP license—which contains just 373 rows—is self-explanatory with easy-to-understand columns, as shown in this excerpt:



Finjan’s claim that Juniper has not included premium licenses or instances where Sky ATP was used within a “bundled product offering” is also wrong. Juniper’s third supplement identifies a spreadsheet (JNPRFNJN29045_01551079) showing the number of premium licenses, and includes instances where Sky ATP was sold as part of a bundle with non-patented products.

⁶ Finjan misleadingly attaches Juniper’s response to Interrogatory No. 4 dated September 7, 2018 (Ex. C at 35) to its Motion instead of Juniper’s most recent supplement dated June 12, 2019 (see Ex. 1 at 7-13, 27).

B. Juniper Provided A Complete Response To RFP Nos. 119-121.

Finjan also moves to compel a further response to RFP Nos. 119-121, seeking documents “sufficient for the identification” of the “total number of files submitted to,” “total number of files processed by” and “total number of files processed using each adapter in” Sky ATP from October 2015 to present. Ex. B at 23-27. By way of background, Sky ATP is a cloud-based service that can be used as an add-on to an SRX. Customers who have a license to Sky ATP can submit files to Sky ATP for analysis. As Juniper has told Finjan many times, while Sky ATP maintains data about the files it analyzes in the storage solutions used in its active deployment, Juniper does not have separate documents that identify the total number of files submitted to or processed by Sky ATP or that show which adapters processed each file for the time period requested. Thus, to respond to this request, Juniper would need to write new programs to analyze the data stored in the Sky ATP deployment and create reports, which is not something Finjan can legitimately ask of Juniper. “A party . . . is not required to create a document where none exists.” *Ujhelyi v. Vilsack*, 2014 WL 4983550, at *4 (N.D. Cal. Oct. 6, 2014).

Although Juniper does not have documents or reports that lay out all the information Finjan is seeking, Juniper does have access to the raw data that could be used to generate reports of this type in the products themselves. Juniper, therefore, voluntarily agreed to extract this raw data from its active Sky ATP deployment identifying each file submitted to and processed by Sky ATP, as well as the analysis results (that show which adapters processed each file) so Finjan can prepare its own reports, if it chooses to do so. Because this data is so voluminous, Juniper has made this data available for Finjan to review on a computer at Juniper’s counsel’s office that will allow Finjan to derive whatever metrics it wants. Additionally, given that this information is a replica of the data in the Sky ATP deployment that is used to detect malware for Juniper’s customers, there are heightened security concerns similar to those that arise with source code. For example, the raw data could be used to create malware that circumvents Sky ATP’s protections because it shows the output of the inner-workings of the analysis engines. Given these concerns, Juniper cannot simply hand over this data—but it remains willing to work with Finjan to provide any programs that are reasonably necessary to analyze the data.⁷

C. Juniper Provided A Complete Response To Interrogatory No. 5.

Finjan also claims that Juniper is refusing to provide a complete response to Interrogatory No. 5, which asks Juniper to “identify the number of files scanned by the Accused Instrumentalities, the number of files classified by the Accused Instrumentalities, the number of threats received by the Accused Instrumentalities, [and] the number of threats or malware that are detected by the Accused Instrumentalities.” Ex. D at 7. Once again, Finjan is wrong. Not only did Juniper make the Sky ATP data noted above available for Finjan to review, Juniper also supplemented its response to Interrogatory No. 5 to specifically identify the number of files analyzed by Sky ATP from its release through May 2019 (19,182,710 files). *Id.* at 21. After analyzing a file, Sky ATP assigns a verdict to the file, which is an integer from 1 (low risk) to 10 (high risk), and the customer decides whether to block files according to their own tolerance for risk. In other words, Sky ATP does not make a yes/no threat determination, but instead assigns a

⁷ The raw data does not have a “schema” because the storage solutions used in Sky ATP are schema-less.

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