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10 FINJAN, INC.

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

15 FINJAN, INC., a Delaware Corporation,

16 Plaintiff,

17 v.

18 JUNIPER NETWORKS, INC., a Delaware
19 Corporation,

20 Defendant.

Case No.: 3:17-cv-05659-WHA

**PLAINTIFF FINJAN, INC.'S MOTION
FOR LEAVE TO SUPPLEMENT ITS
INFRINGEMENT CONTENTIONS**

Date: August 22, 2019

Time: 8:00 a.m.

Judge: Hon. William H. Alsup

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1 **NOTICE OF MOTION**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 NOTICE IS HEREBY GIVEN that on August 22, 2019 at 8:00 a.m., or as soon thereafter as
4 counsel may be heard by the Honorable William Alsup in Courtroom 12, 19th Floor, United States
5 District Court, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Finjan, Inc. (“Finjan”) will
6 and hereby does move the court for an order granting Finjan leave to supplement its infringement
7 contentions which were provided to Defendant Juniper Networks, Inc. (“Juniper”) on June 25, 2019.
8 This motion is based on this Notice of Motion, the following Memorandum of Points and Authorities,
9 the Declaration of Kristopher Kastens (“Kastens Decl.”), the proposed order submitted herewith, the
10 pleadings and papers on file in this action, any evidence and argument presented to the Court at or
11 before the hearing on this motion, and all matters of which the Court may take judicial notice.

12 **STATEMENT OF ISSUES**

13 Whether Finjan should be granted leave to supplement its Infringement Contentions for the ’154
14 Patent based on the Court’s claim construction.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 The Court should grant Finjan’s leave to supplement its Infringement Contentions for the U.S.
18 Patent No. 8,141,154 (the “’154 Patent”) pursuant to Local Patent Rule 3-6, based on the Court’s recent
19 construction of the phrase “a content processor” that was different from the construction put forward by
20 Finjan. Finjan’s proposed supplemental infringement contentions is attached hereto as Ex. A, where
21 Finjan has added only a single paragraph to its contention for each accused product and an update to
22 Finjan’s Doctrine of Equivalents (“DOE”) theory to address the new construction of “content processor”
23 at issue in the Court’s Claim Construction Order. *See* Ex. A¹ (Appendix E-1) at 10-12, Ex. A (Appendix
24 E-2) at 7-9, Ex. A (Appendix E-3) at 9-11. Patent Local Rule 3-6 specifically provides that Finjan has
25 good cause for such a supplementation because the Court entered a claim construction “different from
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27 ¹ Unless otherwise noted, all exhibits to this motion are attached to Declaration of Kristopher Kastens,
28 filed herewith.

1 that proposed by the party seeking amendment.” Additionally, Finjan has good cause to supplement its
2 infringement contentions because Finjan could not have addressed the construction earlier, as the
3 construction issued by the Court was not proposed by either party during claim construction in this case,
4 but was first adopted by Juniper in its Opposition to its Motion for Summary Judgment. Juniper’s delay
5 in arguing this construction establishes that Finjan was not previously on notice that the Court’s
6 construction was a possibility, and now has good cause to supplement based on this new construction.

7 Finjan has been diligent in seeking the amendment after the Court’s claim construction (Dkt. No.
8 459) and notifying the Court and Juniper in Finjan’s response (Dkt. No. 474 at 10-11) to the Court’s
9 order to show cause that it would seek leave to amend its infringement contentions after the Court ruled
10 on its Order to Show Cause, which would determine if Claim 1 of the ‘154 Patent was still in the case.
11 While the Court has not ruled on its Order to Show Cause, Finjan brings this Motion out of the
12 abundance of caution to request a supplementation of Finjan’s Infringement Contentions in view of the
13 Court’s new construction of the content processor term. Finjan’s supplementation will not prejudice
14 Juniper because it only clarifies Finjan’s infringement contentions based on the court’s new claim
15 construction. Furthermore, Juniper will not be prejudiced because it has been aware of Finjan’s
16 positions since Finjan attached a declaration from Dr. Mitzenmacher, which included the substance of
17 the supplement that Finjan requests, establishing that there is no surprise to Juniper of Finjan’s position.
18 Dkt. Nos. 469-6, 474. Finally, Finjan’s supplementation will not disrupt the case schedule as there will
19 be no additional discovery taken a result of the supplementation, as Juniper has been aware of Finjan’s
20 position at least since Finjan’s response to the Court’s order to show cause (Dkt. Nos. 470, 474). As
21 such, Finjan should be provided leave to supplement its infringement contentions to address the Court’s
22 new claim construction.

23 **II. FACTUAL BACKGROUND**

24 Pursuant to the Court’s second showdown procedure (Dkt. No. 219), Finjan filed a summary
25 judgment of infringement on the ‘154 Patent (Dkt. No. 369) on Juniper’s SRX Gateways, Sky ATP,
26 and ATP Appliances products. Prior to the summary judgment, Finjan has proposed the term “content
27 processor” to be accorded its plain and ordinary meaning, namely a component that processes content
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1 downloaded across a network. Dkt. No. 176 (Finjan’s Opening Claim Construction Brief) at 17-18.
2 Juniper, on the other hand, has proposed a number of different constructions for “content processor” in
3 various different briefings in this Court and also in an IPR petition. However, none of the constructions
4 proposed by Juniper required “content processor” to process “modified content.” See Dkt. No. 115 at 4;
5 Dkt. No. 182 at 20; *Juniper Networks, Inc. v. Finjan, Inc.*, Case No. IPR2019-00031, Paper 2 (Petition)
6 at 14-15 (P.T.A.B. Oct. 3, 2018).

7 For the first time, in Juniper’s opposition to Finjan’s summary judgment, Juniper inserted the
8 limitation that a content processor must process “modified” content. The Court then adopted a version
9 of Juniper’s new claim construction to require the content processor to process modified content, after
10 Finjan already put forth its infringement case based on Juniper’s previous claim construction. Dkt. No.
11 459 at 11. With its issuance of this claim construction order, the Court simultaneously ordered that
12 Finjan show cause for why Juniper’s products still infringe under the Court’s claim construction. See
13 Dkt. Nos. 470, 474 (“Resp. Order to Show Cause”). In response to this Order to Show Cause, Finjan
14 submitted a declaration of its technical expert, Dr. Mitzenmacher, which included several bases for
15 Juniper’s infringement of Claim 1 of the ’154 Patent under this construction. In particular, Finjan
16 established that the content processors in the accused products process content that has been modified.
17 See, e.g., Dkt. No. 469-6 (Mitzenmacher Decl.) at ¶¶ 36-76. In this same response to the Order to Show
18 Cause, Finjan also stated that it would supplement its infringement contentions to account for the
19 Court’s claim construction when the Court rules on its order to Show Cause, because if the Court ruled
20 against Finjan the issue would be mooted. Dkt. No. 474 at 10-11.

21 On June 7th, as the Court had not yet issued an order on its Order to Show Cause, Finjan reached
22 out to Juniper about whether it would stipulate to Finjan’s supplementing its infringement contentions
23 in response to the Court’s new claim construction Order. Ex. B at 3. In response, Juniper’s counsel
24 stated that they would consider stipulating to Finjan serving a supplementation, but that they wanted to
25 see the exact proposed supplementation. *Id.* at 2. Finjan provided Juniper’s counsel with Finjan’s
26 supplemental infringement contentions on June 25, which updated Finjan’s infringement contentions to
27 address the Court’s claim construction Order. *Id.*; see also Ex. A (proposed supplemental infringement
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1 contentions). Finjan’s proposed supplementations were narrow in nature, and specifically addressed the
2 new construction provided by the Court. Ex. A, (Appendix E-1) at 10-12, Ex. A (Appendix E-2) at 7-9,
3 Ex. A (Appendix E-3) at 9-11 (the word version of these charts were attached to Ex. B, June 25th
4 Attachments to Email to Glucoft). On June 27th, Juniper stated that there was no good cause to amend
5 because: (1) Finjan should have known that Juniper would adopt a new construction it had never
6 previously adopted because the construction was included in PTAB decision and (2) because Juniper
7 believed the supplementation were futile. *See* Ex. B at 1. Finjan requested a meet and confer on July
8 3rd, and the parties have not been able to meet and confer. *Id.*; Kastens Decl. at ¶ 4. Thus, Finjan is left
9 with no choice but to bring this Motion as the close of fact discovery is fast approaching.

10 **III. ARGUMENT**

11 Under the Patent Local Rule, a party may amend its Infringement Contentions “by order of the
12 Court upon a timely showing of good cause.” Patent L.R. 3-6. “The good cause inquiry is two-fold: (1)
13 whether the moving party was diligent in amending its contentions; and (2) whether the non-moving
14 party would suffer prejudice if the motion to amend were granted.” *24/7 Customer, Inc., v. Liveperson,*
15 *Inc.*, No. 3:15-cv-02897-JST-KAW, 2016 WL 6673983, at *2 (N. D. Cal. Nov. 14, 2016) (citation
16 omitted). The Patent Local Rules specifically set forward as an example of good cause being a claim
17 construction of a term that is “different from that proposed by the party seeking amendment.” Patent
18 L.R. 3-6(a).

19 **1. Finjan Has Good Cause to Supplement**

20 Finjan has good cause to supplement its Infringement Contentions because the claim
21 construction adopted by the Court is different from the construction proposed by Finjan during claim
22 construction, namely, that a “content processor” must process “modified content.” *See* Dkt. No. 459 at
23 6 (listing Finjan’s construction followed the plain and ordinary meaning of “content processor” and not
24 requiring it to process modified content). The Patent Local Rules are clear that good cause is found
25 where, as was done here, “a claim construction by the Court [is] different from that proposed by the
26 party seeking amendment.” Patent L.R. 3-6(a); *see also MyMedicalRecords, Inc. v. Quest Diagnostics,*
27 *Inc.*, No. 2:13-cv-02538-ODW (SHX), 2014 WL 5810363, at *3 (C.D. Cal. Nov. 6, 2014) (holding that

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