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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FINJAN, INC., a Delaware Corporation,)	Case No. 17-cv-05659-WHA
)	
Plaintiff,)	San Francisco, California
)	Courtroom A, 15th Floor
)	Thursday, April 25, 2019
v.)	
)	
JUNIPER NETWORKS, INC., a Delaware Corporation,)	
)	
Defendant.)	

TRANSCRIPT OF TELEPHONIC DISCOVERY HEARING
BEFORE THE HONORABLE THOMAS S. HIXSON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:	KRISTOPHER B. KASTENS, ESQ. Kramer Levin Naftalis & Frankel, LLP 990 Marsh Road Menlo Park, California 94025 (650) 752-1700
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For Defendant:	JOSHUA P. GLUCOFT, ESQ. Irell & Manella, LLP 1800 Avenue of the Stars, Suite 900 Los Angeles, California 90067-4276 (310) 277-1010
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1 SAN FRANCISCO, CALIFORNIA THURSDAY, APRIL 25, 2019 2:59 P.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: Okay, everyone. This is the Courtroom
5 Deputy again. The Judge has taken the bench, the Honorable Thomas
6 S. Hixson, presiding.

7 We are here in Civil Action 17-5659, Finjan, Inc. v. Juniper
8 Networks, Inc. Counsel, please restate your appearances for the
9 record. Let's start with the Plaintiff's counsel.

10 MR. KASTENS: Kristopher Kastens for Plaintiff Finjan,
11 Inc. from the law firm of Kramer Levin Naftalis & Frankel.

12 MR. GLUCOFT: For Defendant Juniper Networks, this is
13 Josh Glucoft from Irell & Manella.

14 THE COURT: Good afternoon, Counsel. We're here on
15 Finjan's motion to compel the production of what looks like eight
16 documents. Do you -- I think, Finjan, can you speak to the
17 argument that comes in Juniper's brief that the subject line of
18 the emails is the implied agreement to keep them confidential?
19 And they cited a couple of cases. I'm interested in hearing your
20 response.

21 MR. KASTENS: Yeah. I mean, I -- I don't believe any
22 of the cases they've cited actually, you know, say that you can
23 just put it in a subject line and that would be sufficient to do
24 an implied agreement.

25 I would also like to say that the deposition transcript of

1 their own person who has actually contributed and was a part of
2 these discussions has principally stated that their was no actual
3 -- they were not part of the joint defense group and they did not
4 participate in the joint defense group and that there was no real
5 agreement to it.

6 And I think if you actually even look at the exhibit that was
7 attached to Juniper's letter -- I apologize that Judge Alsup has
8 -- he's limited response to the number of pages we can attach to
9 a discovery dispute so we were only able to attach one page -- but
10 you can see that Mr. Coonan did not believe the discussions were
11 privileged and he talked about his discussions with Palo Alto
12 Networks counsel and what was discussed in respects to that.

13 So, I mean, I think clearly from his own opinion -- he would
14 be the one to know because he was the one involved in the
15 discussions -- he did not consider it to be -- for Juniper to be
16 part of any joint defense group or have an agreement with the
17 other parties with respect to -- for the materials.

18 THE COURT: On the subject line of the emails, where it
19 says "JDG/Subject to Common Interest," my normal interpretation of
20 JDG would be "joint defense group." Do you dispute that it likely
21 stands for that?

22 MR. KASTENS: No. I don't think we dispute that it
23 stands for "joint defense group." I think what we would dispute
24 is there has to be some sort of an agreement. I don't know who --
25 it's impossible for me to tell from what was put in the privilege

1 log who put that in, so -- but I believe you can't just have one
2 party put it in a joint -- a JDG and say that there is an implied
3 agreement between the two parties.

4 I mean, like I said, Mr. Coonan had principally stated during
5 his deposition that there was no -- there was no -- they were not
6 part of the group and there was no agreement.

7 THE COURT: Okay. Let me hear from the Defense then.
8 How do you respond to that? Is the subject line of the email
9 enough to get an implied agreement?

10 MR. GLUCOFT: Your Honor, I don't think we're relying
11 on the subject line unto itself. The subject line is evidence
12 that the parties did in fact have an understanding to have an
13 agreement. Now, what we need to do is we need to sort of mix up
14 some of what's been muddied.

15 And so Finjan's argument is that there was no agreement to
16 be part of a formal joint defense group. And that is what Mr.
17 Coonan testified to in the sense that we didn't agree to do things
18 like share prior art or coordinate on claim construction
19 strategies, all the very involved things that members of a patent
20 joint defense group might do.

21 Now, that's a separate -- entirely separate consideration
22 than whether or not there was an agreement to keep these
23 communications confidential and to coordinate for the purposes of
24 these specific discussions.

25 And there, I think the best evidence is the contemporaneous

1 standings by both sides. Both Mr. Coonan and the other members of
2 the JDG were sending these emails back and forth, that this was in
3 fact subject to a common interest. There is a contemporaneous
4 documentation saying, We understand these communications are
5 intended to be kept confidential. We understand that these
6 communications are for purposes of coordinating legal tests (ph).

7 Just because Juniper didn't subsequently sign on, a much more
8 significant obligation that would have been required to -- would
9 have been required of the joint defense group like, for example,
10 sharing prior art or coordinating on claim construction
11 strategies, that doesn't mean that there wasn't an implied
12 agreement and these agreements can in fact be implied from common
13 interest situations, and that -- that implied agreement was at
14 least manifested or evidenced by the subject line of the email.

15 THE COURT: I think I understand. I was looking at
16 Coonan's testimony and it's not quite as you summarized it in the
17 letter brief. He says he doesn't recall having any emails with I
18 guess it's with Ritter, but it sounds like he thought it was oral
19 conversations. Was his memory just mistaken about that? Because,
20 I mean, I think that these emails look like a thing he didn't
21 recall doing.

22 MR. GLUCOFT: Correct. I think his memory was
23 unfortunately mistaken at that time. But actually if you look at
24 Exhibit 2, which is Finjan's -- Finjan's brief, which are excerpts
25 of the Coonan testimony, the exchange starting -- this is on the

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