Exhibit A

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FINJAN, INC.,

Plaintiff,

v.

JUNIPER NETWORK, INC.,

Defendant.
_____/

No. C 17-05659 WHA

ORDER ON *DAUBERT* MOTIONS

INTRODUCTION

In this patent infringement action, both parties move to exclude the opposing party's damages expert reports on the eve of trial. For the reasons stated below, accused infringer's motion to exclude is **GRANTED** and patent owner's motion to exclude is **GRANTED IN PART** and **DENIED IN PART**.

STATEMENT

The background of this action related specifically to the expert reports at issue has been set forth in a prior order (Dkt. No. 189). In short, as part of the first round of motions for summary judgment, plaintiff Finjan, Inc., accused defendant Juniper Network, Inc.'s (1) SRX Gateways used in combination with Sky ATP, and (2) Sky ATP alone of infringing Claim 10 of the United States Patent No. 8,677,494 ("the '494 patent") (Dkt. No. 98 at 1–2).

Sky ATP is a cloud-based scanning system that inspects files with its "Malware Analysis Pipeline" to determine the threat level posed by the Downloadable. Juniper offers free licenses to use Sky ATP, as well as paid basic and premium licenses. SRX Gateways are

network appliances that receive incoming files and subsequently send "Downloadable" types to Sky ATP for inspection.

When Sky ATP receives a file from an SRX device, it hashes the file and determines if the file has been previously analyzed. This process takes approximately one second. If it's an unrecognized file, then it is sent through the Malware Analysis Pipeline, which includes the following processes: (1) a conventional antivirus engine (approximately five seconds); (2) static analysis (approximately 30 seconds); and (3) dynamic analysis (approximately six to seven minutes). Sky ATP determines the threat level "verdict" score once the analysis is complete, sends that score to the SRX device, and stores the score in DynamoDB or Simple Storage Services, which are storage solutions provided by Amazon Web Services ("AWS").

Claim 10 of the '494 patent involves three basic steps: (1) receive a Downloadable; (2) scan the Downloadable to generate security profile data, which includes a list of suspicious computer operations that the Downloadable may attempt to perform; and (3) store the security profile data in a database.

An order dated August 24 granted in part plaintiff Finjan, Inc.'s early motion for summary judgment on Claim 10 of the '494 patent (Dkt. No. 189). Trial is set for December 10 on the remaining Claim 10 issues. Both parties now seek to exclude each other's damages expert reports. Specifically, Juniper moves to exclude Finjan's expert report prepared by Kevin M. Arst (Dkt. No. 230) and Finjan moves to exclude Juniper's expert report prepared by Dr. Keith Ugone, both regarding the reasonable royalty for use of Claim 10 (Dkt. No. 231). This order follows full briefing and oral argument.

ANALYSIS

1. LEGAL STANDARD.

A. Expert Opinion Admissibility.

Under the Federal Rules of Evidence 702, an expert witness may provide opinion testimony "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." District courts thus "are charged with a 'gatekeeping

role,' the objective of which is to ensure that expert testimony admitted into evidence is both reliable and relevant." *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008).

B. Reasonable Royalty.

Upon a finding of infringement, a patent owner is entitled to "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer." 35 U.S.C. § 284. "A 'reasonable royalty' derives from a hypothetical negotiation between the patentee and the infringer when the infringement began." *ResQNet.com, Inc. v. Lansa, Inc*., 594 F.3d 860, 868 (Fed. Cir. 2010). Assuming the asserted patent claims are valid and infringed, the hypothetical negotiation "tries, as best as possible, to recreate the *ex ante* licensing negotiation scenario and to describe the resulting agreement." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009). In determining a reasonable royalty calculation, experts often consider one or more of the fifteen factors set forth in *Georgia–Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y.1970). *ResQNet.com, Inc*., 594 F.3d at 869.

2. PATENT OWNER'S EXPERT (KEVIN ARST).

In determining the reasonable royalty amount at issue, Finjan's damages expert Kevin Arst relies on a "cost-savings" approach as the starting point for a hypothetical negotiation. Expert Arst theorizes that Juniper's infringement of Claim 10 "allowed it to avoid present value adjusted costs of at least" $60–$70 million during the damages period (Dkt. No. 228-7 at 30; Supp. Exhs. 1.1, 1.2). After going through the *Georgia-Pacific* factors, Expert Arst argues that Juniper would have agreed to pay Finjan 100 percent of this alleged cost saving as a lump-sum reasonable royalty amount — meaning he says Juniper would have agreed to pay $60–$70 million to obtain a license to use Claim 10 for fourteen months.

Expert Arst asserts that Juniper could not have stored any verdict scores without infringing and that its best non-infringing alternative would have been to re-analyze files each time (*id*. at 31). In other words, every SRX-sent file would have had to go through the entire Malware Analysis Pipeline — including dynamic analysis — according to Expert Arst, thus

taking Sky ATP an additional six to seven minutes to complete analysis. Expert Arst then calculates the AWS costs Juniper allegedly saved by using the claimed invention based on a "U.S. Apportionment Factor" of the total worldwide volume sales of all SRX devices. He then applies that factor to Juniper's total AWS costs to derive a "U.S. apportioned Sky ATP AWS costs" totaling $182,249 over the damages period.

Expert Arst then multiplies that number by a "Cost Savings Factor" of 359 and 419, which he derives from the assertion that Juniper would have had to spend six to seven additional minutes dynamically analyzing each file and that "the number of servers that would be required to process a file for sandboxing would be 360–420 times greater (6–7 minutes * 60 seconds) than what is required to serve the file from the database of results (1 second)" (*ibid.*). Expert Arst thus concludes that the purported $182,249 cost-saving amount would have been between 359 and 419 times higher in the non-infringing alternative, resulting in an alleged $60–$70 million AWS costs saved (*ibid.*).

The parties contest a myriad of details in connection with Expert Arst's testimony. This order does not address every point of contention. Instead, this order focuses on a fundamental flaw in Expert Arst's report that renders his opinion unfit for the jury — namely, Finjan's sleight of hand to inflate the revenue base.

That Expert Arst would suggest that Juniper would have been willing to pay an eye-popping $60–$70 million as a royalty for the sake of $1.8 million in revenue is preposterous. This order therefore agrees with Juniper that Expert Arst's testimony "defies basic laws of economics" such that its unreliability renders it inadmissible under FRE 702.

Finjan disputes Juniper's $1.8 million figure (which Juniper bases on revenues from Sky ATP and SRX sales to customers with a Sky ATP license (Dkt. No. 229-6, Exh. 7)), arguing that the sales of all accused products amount to approximately $142 million in sales. It inflates the royalty base by including *all* sales of the SRX devices sold — including those *not* configured with Sky ATP. Finjan hinges this contention on its newfound belief that all SRX devices infringe the system claim because they contain code for interfacing with Sky ATP.

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