

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

FINJAN, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 17-05659 WHA
)	
JUNIPER NETWORK, INC.,)	
)	
Defendant.)	
_____)	

San Francisco, California
Thursday, January 7, 2021

TRANSCRIPT OF TELEPHONIC PROCEEDINGS

APPEARANCES BY TELEPHONE:

For Plaintiff:

FISH & RICHARDSON PC
12860 El Camino Real - Suite 400
San Diego, California 92130
BY: JUANITA R. BROOKS, ATTORNEY AT LAW

For Defendant:

IRELL & MANELLA LLP
1800 Avenue of the Stars - Suite 900
Los Angeles, California 90067
BY: JONATHAN S. KAGAN, ATTORNEY AT LAW

Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter

1 Thursday - January 7, 2021

10:13 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Calling Civil matter 17-5659, Finjan,
5 Incorporated, vs. Juniper Network, Incorporated.

6 Starting with plaintiffs, will counsel please state your
7 appearances.

8 **MS. BROOKS:** Good morning, Your Honor. Juanita Brooks
9 from Fish & Richardson on behalf of Finjan.

10 **THE COURT:** Welcome.

11 **MR. KAGAN:** Good morning, Your Honor. Jonathan Kagan
12 of Irell & Manella on behalf of Juniper Networks.

13 **THE COURT:** Welcome.

14 This is a motion for attorneys fees by Juniper. So I'm
15 familiar with everything in here, but take up to ten minutes to
16 make your argument. Juniper goes first.

17 **MR. KAGAN:** Okay. So, Your Honor, the standard for
18 attorneys' fees that we're dealing with, I just want to make
19 clear because there was a lot of cases cited, comes from the
20 2014 *Octane Fitness* case; and the test is does this case stand
21 out from others with respect to the strength of the case and
22 was it litigated in an unreasonable manner. These are not --
23 you do not need to meet both of these standards. It can be
24 under either of these standards is how a case can be
25 extraordinary, and in this case we feel there's evidence to

1 support both.

2 The other just legal issue to put on the table is the
3 Court does not need to conduct an issue-by-issue analysis of
4 the extraordinary nature of the case. It's an overall
5 evaluation that the Court does to determine whether it's
6 extraordinary. So it doesn't need to say "This patent is
7 extraordinary. This patent is not."

8 There's two exceptions to that rule, neither of which
9 applies here, which is, one, if there is a partial victory, so
10 if we won on -- if we prevailed on some patents but not others,
11 it could allocate; or if the extraordinary nature of the case
12 is based solely on misconduct, which is not what -- we have a
13 lot of evidence showing that this case stands out from others
14 for reasons other than misconduct.

15 So the question is: Does this case stand out or not?
16 That's the threshold question. So this was a patent case
17 involving nine patents that Finjan asserted. Only one of those
18 patents was able to make it to trial. So eight of the nine
19 patents did not even make it to trial; and for the one patent
20 that made it to trial, by the time it got to the jury, there
21 was no possibility of any remedy for Finjan because the patents
22 had expired so there's no injunction possible and the Court had
23 ruled that Finjan was not entitled to damages even if they got
24 a jury verdict. Obviously the jury verdict went in Juniper's
25 favor.

1 So of the nine patents that Finjan asserted, they were
2 unable to get relief on any one of them even before reaching a
3 jury. So the question is: Does that stand out from other
4 cases?

5 It's difficult to imagine how you can argue it doesn't
6 stand out. Finjan is a professional plaintiff in patent cases.
7 Virtually all of their revenue comes from licensing patents and
8 litigating. If you look at their brief, they list all of their
9 accomplishments they've had in litigation. They've had
10 wonderful results.

11 This case has to stand out because if this case is the
12 norm for them, they cannot exist as a professional patent
13 plaintiff. If when they assert nine patents, they're not --
14 they can't get relief on even one even before getting to a
15 jury, they're out of business. So this is clearly a case that
16 stands out with regard to their litigation and, frankly, I
17 think most likely the litigation that this Court sees.

18 **THE COURT:** May I ask a question?

19 **MR. KAGAN:** Yes.

20 **THE COURT:** You say they were zero for nine. Were the
21 other -- how many of those were actually litigated and what
22 became of the ones that were not litigated? I remember the
23 ones that were litigated, but I know it wasn't all nine so tell
24 me what happened to the lineup of the patents.

25 **MR. KAGAN:** So there were several -- there were two

1 that were the subject of a summary judgment motion. Well,
2 there were two claims that were the subject of a summary
3 judgment motion. There was the '154 patent and the '780 patent
4 where Juniper prevailed on summary judgment. There was the
5 '494 patent that went to trial that was the subject of a trial;
6 and then Finjan in order to focus its appeal, voluntarily
7 dismissed with prejudice all of the other patents in order to
8 pursue its appeal on the patents that were litigated: The
9 '154, the '780, and the '494.

10 **THE COURT:** Okay. That comes back to me now. So
11 there were three that were litigated before me and that I made
12 rulings on, and then the other six were dismissed with
13 prejudice.

14 **MR. KAGAN:** Yes.

15 **THE COURT:** All right.

16 **MR. KAGAN:** And this was --

17 **THE COURT:** You know, I have this question for you,
18 though. In every case there's going to be a loser and a
19 winner, and are you saying that, "Okay. So Finjan gave it its
20 best college try and they lost"? But surely that can't be
21 enough to -- just because you lost doesn't mean that you --
22 it's an extraordinary case and you should pay the other side's
23 fees.

24 So help me -- and also I've got a related question. What
25 if I think there's only one aspect of the whole case that

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