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8 SPECIAL MASTER

9
10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 FINJAN, INC.,

13 Plaintiff,

14 v.

15 JUNIPER NETWORK, INC., et al.,

16 Defendants.

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

**REPORT AND RECOMMENDATION
RE ATTORNEY'S FEES AND
EXPENSES**

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1 Below is the Special Master's report and recommendation regarding the attorney's fees and
2 expenses that Plaintiff Finjan, Inc. should pay to Defendant Juniper Network, Inc.

3 SUMMARY OF RECOMMENDATIONS

4 This dispute over attorney's fees arises from the Court's finding that Plaintiff Finjan's
5 assertion of United States Patent Nos. 6,804,780 (the '780 Patent) and 8,677,494 (the '494 Patent)
6 was exceptional (Dkt. No. 648). Defendant Juniper seeks \$6,228,266.43 in legal fees for work that
7 culminated in winning two summary judgment motions, defeating a summary judgment motion,
8 and prevailing in a five-day jury trial. It is recommended that Juniper recover \$5,914,156.

9 Pursuant to the Court's Order re Attorney's Fees and Costs and Appointment of a Special
10 Master (Dkt. No. 649), Juniper wrote off over \$2.4 million in fees and organized its billing into 133
11 separate projects. Finjan raises objections to virtually every one. It disputes whether Juniper should
12 recover attorney's fees for all of its work on the '484 and '780 Patents, asserts that Juniper's senior
13 attorneys spent too much time on the case, contests how much of Juniper's fees should be allocated
14 to work on the two patents at issue as opposed to the other patents-in-suit, and claims that Juniper's
15 billing was otherwise excessive. Most of these objections lack merit.

16 Like the Battle of Verdun, high-stakes patent litigation can become a costly fight over
17 inches and yards. When engaging in such combat, each side can expect that its adversary will
18 respond in kind. Finjan deployed more than 15 timekeepers on this matter. From a review of both
19 sides' billing records, it appears that Juniper's defense was proportional to the intensity with which
20 Finjan prosecuted the case. It does not appear that Juniper overreached on its claimed fees, such
21 that any penalty should be assessed against it. Certain deductions from the amounts sought are
22 recommended for the reasons below.

23 PROCEDURAL HISTORY

24 On February 25, 2021, a status conference was held to establish procedures and deadlines
25 for resolving the parties' dispute. Pursuant to Finjan's request, it was allowed to submit a brief
26 addressing whether all work related to the '780 and '494 Patents was recoverable. On March 11,
27 2021, Juniper submitted its responsive brief. On March 25, 2021, the parties argued their positions.
28

1 On March 22, 2021, Juniper submitted a Declaration, reducing the \$8,656,971 in attorney's
2 fees it was seeking (Dkt. No. 634 at 23) to \$6,228,226 (Declaration of Jonathan Kagan ¶ 13).
3 Juniper's declaration divided its billing in 133 discrete projects and attached time entries for each
4 biller for each project. On April 12, 2021, Finjan submitted a responsive brief along with time
5 notes for its timekeepers (Brief re Juniper's Submission on Fees). Finjan organized its fees into
6 only nine projects, which made comparison to Juniper's 133 projects difficult (*Ibid.*).

7 Another conference was held on April 15, 2021 to address the parties' dispute over the
8 billing rates in Finjan's submission and Juniper's request that Finjan produce its engagement letter
9 with counsel.¹ Juniper's request was denied. On April 21, 2021, a conference was held to discuss
10 the parties' positions regarding the billing rates that Finjan was using to calculate its fees, and it
11 was requested that Finjan select 10 of Juniper's projects that it thought were excessive, and break
12 out Finjan's time records for comparable projects. On April 22, 2021, Finjan provided rate sheets
13 for Kramer, Levin, and the parties jointly submitted summaries of nine Juniper projects that Finjan
14 had selected.

15 On April 23, 2021, a hearing was conducted regarding the nine contested projects. On April
16 27, 2021, Juniper submitted a reply brief responding to Finjan's proposed apportionment of time to
17 the '780 and '494 Patents. On April 29, 2021, the parties jointly submitted a spreadsheet on five
18 additional projects that Finjan disputed. A hearing was held on April 30, 2021 to discuss the five
19 projects and the parties' competing proposals for time allocation. On May 5, 2021, the parties
20 submitted supplemental briefing on their proposed time allocations, and spreadsheets on two
21 additional projects that Finjan contested. Juniper submitted a reply to Finjan's May 5th brief on
22 May 6, 2021, and Finjan submitted a reply to Juniper's May 5th brief on May 7, 2021. On May 14,
23 2021, a final hearing was held to cover all remaining issues. Juniper submitted a reply regarding
24 costs on May 17, 2021, and Finjan submitted a summary of its objections on May 18, 2021.

25 _____
26 ¹ Finjan was represented by Kramer, Levin Naftalis & Frankel LLP ("Kramer, Levin") during the
27 proceedings at issue. Apparently, Finjan's agreement with Kramer, Levin was at least a partial
28 contingency fee agreement, which led to a dispute over what rates to apply to Kramer, Levin's
lawyers. Kramer, Levin also block billed and did not record all its time, which made comparisons

RECOMMENDATIONS

1
2 Juniper is entitled to recover its reasonable fees except those “bearing little or no relation”
3 to the ’494 and ’780 Patents (Dkt. No. 649 ¶ 11). Juniper appears to have staffed its case
4 reasonably and, with a few exceptions, spent a reasonable amount of time on its 133 projects. It
5 also appears that Juniper’s apportionment of fees to account for its work on patents other than the
6 ’494 and ’780 Patents is fair and accurate. Some deductions have been recommended for Juniper’s
7 claimed time for the reasons stated below.

I. SCOPE OF RECOVERABLE FEES

8
9 Finjan asserts that Juniper is entitled to fees for only a portion of the work that it did
10 defending against the ’494 and ’780 patents. This argument appears to be inconsistent with the
11 Court’s Order re Request for Fees (“Order”), which states: “This order holds as exceptional
12 Finjan’s assertion of the ’494 and ’780 patents” (Dkt. No. 648 at 5).

13 Finjan argues that the reasoning behind the Order was that Finjan should not have continued
14 to litigate the case after two “case-dooming” rulings in 2018 (Finjan Supp. Br. at 1). Such a reading
15 of the Order, however, appears to be incomplete. The Order’s finding of exceptionality is not
16 limited to the conduct after the Court’s legal rulings, but rather based on the totality of the
17 circumstances.

18 The Order holds that asserting the ’494 Patent was exceptional because there was no viable
19 damages case and ultimately no infringement (Order at 3). It further states that Finjan asserted
20 shifting litigation positions (*ibid.*) and put improper and prejudicial evidence before the jury in its
21 efforts to obtain a different result (*Ibid.*). That Finjan proved that all the claim limitations but one
22 were met (Finjan Supp. Br. at 5), which shows that Finjan came close (but failed) to establish an
23 infringement case without any damages, does not change this calculus.

24 The ’780 Patent is similar. The Order’s findings include that Finjan should have withdrawn
25 its claims after the Court rendered its construction of “performing a hashing function” (Order at 3-
26 4), that Finjan lost on notice grounds as well (*id.* at 4), that Finjan misrepresented authority to the
27 Court (*ibid.*) and attempted to relitigate its own concessions to salvage its claims related to the ’780
28

1 Patent (*Ibid.*). The Order expressly held that “Finjan’s assertion of the ’780 patent stands out as
2 exceptional as well” (*Ibid.*).

3 Under these circumstances, there is no basis for deviating from the Court’s holding that
4 “Finjan’s assertion of ’494 and ’780 patents” was exceptional.

5 **II. JUNIPER’S REASONABLE LEGAL FEES**

6 The purpose of an award of attorney’s fees under 35 U.S.C. § 285 is to make whole a party
7 injured by its adversary’s “exceptional” conduct. *Rembrandt Techs. LP Patent Litig.*, 899 F.3d
8 1254, 1278 (Fed. Cir. 2018). The Federal Circuit has determined that, while courts have broad
9 discretion in determining what attorney’s fees are compensatory, those fees must relate to the
10 exceptional conduct. *Id.* at 1278-79.

11 Juniper seeks recovery of its lodestar: the reasonable hours its counsel spent, multiplied by
12 a reasonable rate. Rate is not an issue here. Finjan has stipulated that the rates claimed by Juniper’s
13 counsel at Irell & Manella, LLP are reasonable. These rates apparently are lower than the firm’s
14 actual rates, and are based on rates that have been approved by other courts in the Northern District
15 of California and are commensurate with what lawyers charge for patent litigation in this District.

16 Finjan makes three main arguments regarding the amount of Juniper’s claimed fees.
17 Finjan’s first two arguments are that Juniper’s bills are “top heavy” because Juniper overused
18 timekeepers with high rates and that Juniper spent too much time on various projects. Finjan seeks
19 to establish these points by comparing its own billing to Juniper’s, and performing various
20 aggregate calculations (Finjan Brief re: Juniper’s Submission on Fees at 8-17). Comparisons of the
21 parties’ billing on 16 similar projects selected by Finjan, however, generally shows that Juniper
22 matched Finjan’s prosecution of the case with proportionate force.

23 Finjan’s third contention is that Juniper is seeking fees for work it did on patents other than
24 the ’494 and ’780 patents. Finjan’s methodology of generally applying a 28.6% apportionment,
25 which is based on two of the seven patents-in-suit being found exceptional,² is not a reasonable or
26

27 ² There were nine patents asserted in total because Finjan added and subtracted patents in the
28 course of the proceedings. However, Finjan asserts that a 2/7 ratio is most reflective of how many

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