

EXHIBIT 4

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JUNIPER NETWORKS, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

FINJAN, INC., a Delaware Corporation,

Plaintiff,

vs.

JUNIPER NETWORKS, INC., a Delaware Corporation,

Defendant.

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

)
) **JUNIPER NETWORKS, INC.'S REPLY**
) **TO OUTSTANDING ISSUES IN FINJAN'S**
) **BRIEF REGARDING FEES**

) Submitted to the Special Master

_____)

INTRODUCTION

As discussed during the hearing on May 14, Juniper is submitting this brief to address the outstanding issues Finjan raised in its April 12, 2021, response to the declaration on fees and expenses Juniper submitted on March 22, 2021 (“Finjan’s Response”).

Juniper believes that the majority of Finjan’s objections have already been addressed in submissions and hearings before the Special Master. Specifically, while the thesis of Finjan’s Response is that “Juniper spent excessive hours, by its highest-billing rate lawyers, on issues that could have been addressed in fewer hours by lawyers with lower rates,” the series of submissions by the parties paints a very different picture. In fact, almost uniformly Juniper made greater use of junior associates than Finjan did, and, when Juniper used its most senior attorneys, those attorneys were highly efficient. These facts may explain why, though Finjan’s (now admittedly incomplete) billing records demonstrate that it incurred over 7,800 hours for the relevant projects (Finjan’s Response, Ex. 2), Juniper is seeking recovery for well under 7,500 hours. Finjan’s statement that it “invested fewer attorney-hours” overall (Finjan’s Response at 2) is simply false.

Given the extensive information already provided to the Special Master, Juniper believes the only issues that require further briefing by Juniper are: (1) certain outstanding “allocation” issues; and (2) Finjan’s objections to expert fees and expenses.

1. Outstanding Allocation Issues

The Special Master provided some guidance to the parties on certain allocation issues (those identified in Section B of Juniper’s April 27, 2021, response to allocation arguments), and asked the parties to attempt to agree on a methodology for the remaining “Section B” items. Juniper provided a revised allocation schedule to Finjan last week, but the parties have not yet come to agreement on these issues, nor have they reached an impasse. The parties will advise the Special Master—one way or the other—about the outcome of this issue.

The primary sticking point between the parties appears to be how to account for discovery that Juniper undertook in connection with the '494 and '780 Patents that could have been used—had the litigation continued—with other patents. This discovery generally occurred before the '494 Patent trial. In general, Juniper discounted this time by roughly 10-15% to account for the (relatively low) use of this discovery with other patents and the possibility of further use, had the litigation continued. (For discovery projects after trial, Juniper either sought no recovery or allocated 10-15% if the discovery involved outstanding issues relating to the '494 Patent, except for a few specific projects that dealt with '494 or '780-specific issues).

Juniper believes that its 10-15% discount is conservative both in fact (as little of the pre-trial discovery was ever used with other patents), but also in light of Judge Alsup's Fees Order. Judge Alsup's January 9, 2021 Order Re Attorney's Fees And Costs And Appointment Of Special Master ("Referral Order") recognizes that within each project there could be time allocated both to the recoverable patents and to other patents. (Referral Order at ¶ 4) But Judge Alsup did not order that all billing entries that could potentially relate to both recoverable and non-recoverable patents should be excluded. Rather, he only asked the Special Master to identify "each requested item that bears little or no relation to the conduct found exceptional herein, that being the assertion of the '494 and '780 patents." (Referral Order at ¶ 11). Under this standard, as virtually all of the pre-trial discovery (and much of the post-trial discovery) bears at least some relation to the '494 or '780 patents. Juniper's allocations are thus highly conservative when evaluated under the only standard set forth by Judge Alsup.

2. Juniper Is Entitled To Recover Its Expert Fees and Expenses

Finjan argues that Juniper is not entitled to “expert fees and other expenses,” claiming that (1) there is no “legal justification” for Juniper’s request, and (2) Juniper purportedly failed to seek such fees. Finjan Opp. at 4, 21–22. Finjan’s arguments are baseless.

First, Finjan’s argument ignores that the District Court already held that Juniper could recover expert fees and expenses, stating in its Referral Order that Juniper “shall provide the special master with an itemized accounting for unreimbursed expenses listed as ‘Travel’ and ‘Expert Witness Fees.’” (Referral Order ¶ 2). The Order also states that Juniper “may include additional categories” of costs, and that Juniper could include “professional fees . . . such as the fee paid to an expert to produce an expert report.” *Id.* To the extent Finjan now argues that the District Court’s express reference to expert fees and expenses did not actually award such expenses, that challenge can only be resolved by the District Court. The Special Master should follow the Court’s instruction to determine a “reasonable amount” of expert fees and expenses, and then leave it to Judge Alsup to resolve any dispute about whether his orders encompass such fees.

Second, Finjan is incorrect that there is no “legal justification” for awarding expert fees and expenses. As Finjan concedes, a district court “may invoke its inherent power to impose sanctions in the form of reasonable expert fees” where “the non-prevailing party acted in bad faith or fraudulently.” *Thermolife Int’l, LLC v. Myogenix Corp.*, 2018 WL 325025, at *13 (S.D. Cal. Jan. 8, 2018); *see also In re Personalweb Techs., LLC Patent Litig.*, 2021 WL 796356, at *14 (N.D. Cal. Mar. 2, 2021) (awarding expert fees related to “fraud or bad faith”); *Qualcomm Inc. v. Broadcom Corp.*, 2007 WL 9677112, at *7 (S.D. Cal. Oct. 29, 2007) (“it is within the Court’s inherent authority to award expert witness fees as sanctions upon a finding of fraud or abuse of the

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