

EXHIBIT 6

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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, 2021TRANSCRIPT OF TELEPHONIC PROCEEDINGSAPPEARANCES BY TELEPHONE:

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Reported By: Jo Ann Bryce, CSR No. 3321, RMR, CRR, FCRR
Official Reporter1 Thursday - January 7, 2021 10:13 a.m.2 PROCEEDINGS

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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

5
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

6
1 troubles me and is extraordinary but the rest of it was just
2 routine patent shenanigans, patent lawyer shenanigans, and that
3 if forced to, I could find examples on the Juniper side where
4 you were unreasonable too? So what if I think it's only this
5 one thing that deserves, am I able to carve that out and say
6 "You've got to pay fees on that one bad chapter" or do I have
7 to give fees to the entire case?

8 **MR. KAGAN:** So what I would say, the way -- so I think
9 there's two conflicting -- let me answer the second question
10 first.

11 So I think there's two conflicting principles here. One
12 is that you're really supposed to just look at the whole case.
13 You're under no obligation to parse out individual parts of the
14 case, and that's fair. However, this is a discretionary
15 decision for the Court, and I do believe that it can be a
16 proper exercise of your discretion to award fees as you see
17 fit; and if you see unreasonable behavior on both sides or you
18 believe that Juniper took unreasonable positions, you know,
19 that's something that I think in your discretion you're allowed
20 to consider.

21 The case law is not so clear on this other than saying
22 it's a discretionary decision; but as an Article III judge, I
23 think those are the types of things that you would routinely
24 use to exercise discretion. So I think you have great latitude
25 on that.

7
1 **THE COURT:** All right. What is -- what if you --
2 looking at this entire record, what would you say -- just give
3 me one or two examples of where you think Finjan went way over
4 the line and it just spans out as a terrible abusive thing that
5 Finjan did.

6 **MR. KAGAN:** So one easy example is the damages case
7 for the '494 patent, which went to trial. What happened here,
8 as you may recall -- this is covered in the briefs, but I'll
9 just summarize it quickly -- what Finjan did was they had a
10 damages -- we moved for -- they moved for summary judgment on
11 the '494 patent. That was their strongest patent they said.
12 They accused certain products. We pointed out that they had
13 not -- they were not seeking damage on the SRX product as sold
14 by itself. It was only the SRX product when used in
15 combination with -- and this is their words -- the SRX used in
16 combination with Sky ATP and the Sky ATP product. That's what
17 the trial was supposed to be on.

18 Then when they submit their damages report -- and, by the
19 way, the total revenue for that was \$1.8 million. That was the
20 total revenue.

21 When they submit their damages report, though, they
22 claim \$142 million as a damages base because they now have a
23 theory, they've come up with an infringement theory where the
24 SRX when it's not used in combination with Sky ATP is an
25 infringing product.

8
1 So this is a brand new infringement theory. It's not even
2 advanced by their infringement expert. Their infringement
3 expert actually disavowed that theory. When we questioned him,
4 we said, "Are you -- have you looked at the SRX product by
5 itself?" He said, "No." This became the subject of a *Daubert*
6 motion and Your Honor excluded the theory.

7 And Finjan in their brief goes into a lot of -- they spent
8 a lot of time talking about why they believe that this theory
9 was meritorious. It doesn't matter whether or not this theory
10 was meritorious. It was an undisclosed theory, and on that
11 basis Your Honor issued a *Daubert* order and excluded the
12 expert's opinion.

13 **THE COURT:** Was that litigated in the Federal Circuit?

14 **MR. KAGAN:** Yes, it was.

15 **THE COURT:** What did the Federal Circuit say on that
16 *Daubert* ruling?

17 **MR. KAGAN:** The Federal Circuit -- it was a summary
18 affirmance. There was no opinion. It didn't even merit an
19 opinion but it was affirmed.

20 **THE COURT:** Hmm. Okay.

21 **MR. KAGAN:** So then what Finjan does is they don't
22 say -- so now they have no -- they have essentially no damages
23 case. So what they tell Your Honor is, "Well, we want the
24 opportunity to present a fact-based damages case. So you've
25 excluded our expert but allow us still to try to present a

1 fact-based damages case," and Your Honor allowed them to at
2 trial.

3 So they come to trial and they have their CEO testify, and
4 the CEO testifies -- when he testifies, he includes in his
5 royalty base the exact same information that Your Honor
6 excluded in the *Daubert*. He starts trying to talk about
7 numbers and damages that include this product by itself that
8 Your Honor said was out.

9 Then in addition what he does, is he talks about numbers
10 that he wants for a negotiation. He said, "Well, in a
11 negotiation with Juniper, this is what I want. This is what
12 I'm asking for." And, Your Honor, ultimately we objected.
13 Ultimately Your Honor excluded that testimony as well as
14 improper.

15 Some of his testimony in terms of what he was seeking had
16 actually been excluded in another case by the Federal Circuit.
17 The Federal Circuit -- he had this theory that they were
18 entitled to \$8 per stand. That was just the number they came
19 up with. And he tried using the same number in another case
20 against another defendant. The Federal Circuit actually
21 reviewed that and said, "This number is pulled out of thin air.
22 You can't use that."

23 So Your Honor ultimately in the middle of the trial
24 removed the issue of damages and struck his testimony, took
25 damages away from the jury.

1 that patent.

2 Then they also -- then there was an instance, and we cite
3 some of this in the briefing, where they said they'd given a
4 presentation to Juniper or to Cyphort, the predecessor of
5 Juniper, where they said they provided notice. And we had a
6 hearing on this, and Your Honor said, "Okay. Show me the
7 presentation. Show me where it says this product infringes the
8 '780 patent."

9 And they kept pointing to different pages, but every time
10 they could not come up with a single reference to that. They
11 talked about this patent being asserted against other people.
12 They talked about products. Not once was there any reference
13 to an accusation of infringement by Cyphort of the '780 patent.
14 We had a big hearing on that.

15 Then again on notice, they admitted -- Finjan admitted in
16 open court that notice. It was their burden under the
17 *Arctic Cat* case. Then they tried to recant that. They tried
18 to say, "Well, actually it's not our burden," again just trying
19 to walk back -- they're constantly trying to change their
20 position to suit, you know, the prevailing winds of the day.
21 Whatever the challenge is, they just take a different position
22 and it was not supported by the record.

23 And, again, I mean, Ms. Brooks -- you know, when I'm
24 talking about Finjan counsel, Ms. Brooks was not trial counsel.
25 I just want to make clear. They got rid of the counsel that

1 So, I mean, I think if you're looking for a single example
2 of the types of sort of shenanigans that were going on, that's
3 what's going on here. So we have this changing infringement
4 theory just to try to artificially boost damages, an
5 undisclosed theory that Your Honor strikes, and then they try
6 to end-run the ruling by sneaking it in a different way at
7 trial forcing Your Honor to again strike it and take the issue
8 from the jury.

9 So we had an entire trial on a patent where there was no
10 possibility of damages because of essentially the litigation
11 conduct of Finjan. Had they not tried to change their theory,
12 they could have tried to get the one -- whatever percentage of
13 the \$1.8 million of damages they wanted, but that's not what
14 they did.

15 Another example relates to the '780 patent which has to do
16 with notice. The question was: Did they provide actual or
17 constructive notice to Juniper about this patent? They
18 actually had their head of licensing lie. They signed a false
19 interrogatory response where they said in a phone conversation
20 they had expressly talked about this with a representative from
21 Juniper. We deposed the guy. That's what he said.

22 Then we were ultimately able to go find a recording of the
23 conversation; and when we played the recording of the
24 conversation, there's absolutely no reference to this
25 whatsoever. It was made up. That was on actual notice for

1 was trial so none of this is against her, but this is the
2 behavior that they engaged in at trial and before.

3 **THE COURT:** Okay.

4 All right. Let's hear from Ms. Brooks.

5 **MS. BROOKS:** Thank you very much, Your Honor. Juanita
6 Brooks on behalf of Finjan.

7 I'd like to start actually where counsel just left off
8 about the fact that we were not trial counsel, and that is
9 true, but in some ways I think that puts us in somewhat of an
10 advantage in that we weren't in the fray.

11 And as Your Honor pointed out, the nature of litigation is
12 it's adversarial. There's always a winner and there's always a
13 loser; and of course if you end up on the losing side, that
14 automatically means that you have to pay attorneys' fees, that
15 would be the end of the adversarial system that we have.

16 So we at Fish & Richardson were sort of not in the fray,
17 but we do have the record and so we can look at it and we can
18 look at it sort of in a very cold fashion rather than in a
19 passionate, heated fashion and see what is there.

20 And I'd like to start by also addressing we did,
21 Fish & Richardson, handled the appeal and counsel mentioned
22 that the appeal, quote, "didn't even merit an opinion."

23 I'd like to point Your Honor to a case that just came out
24 of the Federal Circuit two days ago, and it is the -- so we
25 don't have an actual Fed. Circuit cite yet, but it's

1 *Innovation Sciences LLC -- Virginia Innovation Sciences, Inc.*,¹³
 2 *vs. Amazon*, and the number is 2020-1639 decided on January 5th,
 3 2021. Now, it is nonprecedential but it is very informative of
 4 this issue as to the merits of the appeal.

5 This was an attorney fee issue, and what the court -- the
 6 Federal Circuit went out of its way to say is that, and I'm
 7 quoting now from page 6 of the opinion (reading):

8 "To the extent that the argument attempts to tie the
 9 fact of an earlier Rule 36 affirmance without opinion to
 10 the later imposition of sanctions by the district court,
 11 we hasten to urge caution. We categorically reject the
 12 implication of Amazon's argument that an affirmance by
 13 this court under Federal Circuit Rule 36 provides any
 14 information about whether a case was close, frivolous, or
 15 noncontroversial."

16 So in saying that the appeal didn't even merit an opinion,
 17 this court just two days ago, the Federal Circuit, cautioned
 18 that that says nothing as to the merits of the case or the
 19 opinion.

20 So now let's go back and talk about what happened in
 21 district court. Your Honor asked if you believe that there is
 22 a part of the case that is above and beyond I think what you
 23 characterized as the shenanigans that go on in patent cases,
 24 which what is it, and counsel first went to the damages. So
 25 I'd like to address that first, Your Honor.

1 have been 1.8. I think it was the revenue on which you would¹⁵
 2 have calculated a smaller amount for damages. It turned out to
 3 be vastly smaller than Finjan had hoped for, and that was when
 4 we got a brand new infringement theory.

5 Now, you'll never convince me that it was -- it was not
 6 disclosed, it was new, and that's why I threw it out. So
 7 you'll never convince me that Finjan didn't make a -- what's
 8 the word on the football field when you completely go in the
 9 opposite direction? And that's what I believed then, that's
 10 what I believe now, and you're just arguing against something
 11 that I lived through. So I believe you're wrong on that. I
 12 believe that Finjan did flip-flop and come up with a different
 13 theory so that it could take advantage of a bigger revenue
 14 base.

15 Okay. Go ahead. I interrupted you, but go ahead.

16 **MS. BROOKS:** Oh, no. Thank you, Your Honor. And of
 17 course I welcome the Court's input.

18 And so certainly I'm not here trying to persuade
 19 Your Honor that Your Honor was wrong. I am simply, though,
 20 trying to cite to the record as we got it on appeal and what we
 21 saw in there, and what we saw in there was Dr. Cole's expert
 22 report where he talked about only SRX models that were capable
 23 of interacting with Sky ATP, that that's all he considered.
 24 And then the damages expert, Mr. Arst, took that opinion and
 25 applied it only then to models that were capable of interacting

1 And, again, I think we are at an advantage -- "we,"¹⁴
 2 Fish -- of not having been involved in the lower court case in
 3 that -- or the district court case in that I think what
 4 happened here is, to quote the movie that I like quite a bit,
 5 we had a failure to communicate.

6 What Juniper counsel keeps saying is that Finjan changed
 7 its damages model after realizing there was only going to be
 8 \$1.8 million in damages if they stuck with their original
 9 model. Unfortunately, Finjan failed to adequately articulate
 10 to Your Honor that, no, there had been no change. The model
 11 was the model from the beginning.

12 From the beginning the technical expert, Dr. Cole, at
 13 Docket 238-6, specifically said that he was only looking at SRX
 14 models that are, quote, "capable of interacting with Sky ATP,"
 15 unquote. So this whole idea that somehow Finjan reverted to an
 16 SRX-only damages theory, never happened. It was always only
 17 the SRX models capable of interacting with Sky ATP. So that
 18 was the technical expert.

19 **THE COURT:** Wait a minute.

20 **MS. BROOKS:** Yes, Your Honor.

21 **THE COURT:** I've got to interrupt you here.

22 I remember -- I don't remember every detail now, but I do
 23 remember this much, and that is when it came time for the
 24 damages analysis, it turned out that the revenue -- I believe
 25 you misspoke a minute ago. You said that the damages would

1 with Sky ATP, and that's at Docket 228-7 and specifically his¹⁶
 2 supplemental Exhibit 1.5.

3 Now, I know that I -- I know when I'm fighting an uphill
 4 battle and this is not a hill that I want to die on so let me
 5 just also answer Your Honor's other question, which is if you
 6 find, for example, that you cannot be persuaded, that you
 7 believe that Finjan absolutely changed its damages theory and
 8 you think that that fact would cause this case to stand out on
 9 that issue, you do have the discretion to simply carve out that
 10 issue and ask Juniper to supply the Court with the numbers
 11 that -- the fees that they ran up to defend on that particular
 12 issue stand-alone. And so Your Honor certainly has the
 13 discretion to do that.

14 I would submit, however, Your Honor, that, once again,
 15 because Finjan had a good faith belief that it wasn't changing
 16 its damages theory, it was relying on Dr. Cole's report that
 17 had always said what it said about Sky ATP -- SRX plus Sky ATP
 18 and Mr. Arst's report that it always said SRX plus Sky ATP;
 19 and, therefore, that doesn't make this case exceptional or even
 20 that issue exceptional.

21 And I'll stop, Your Honor, and see if you have any
 22 questions.

23 **THE COURT:** Well, I'm going to come back. I want you
 24 to continue, but I want Mr. Kagan to respond to what I just
 25 heard because it's important to me. I want to make sure I get

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