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11	NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION					
12	FINJAN, INC.,	Case No. 3:17-cv-05659-WHA				
13	Plaintiff,	FINJAN'S BRIEF RESPONDING TO				
14	V.	JUNIPER'S SUBMISSION SEEKING EXPERT FEES AND TRAVEL EXPENSES				
15	JUNIPER NETWORKS, INC.,					
16		U.S. District Judge William H. Alsup				
17	Defendant.	Courtroom 12				
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Though styled as an "objection," Juniper's submission (D.I. 661) has little to do with the Special Master's report and recommendations (D.I. 658). Juniper seeks a windfall award of over \$1.4 million, mostly connected to expert witness fees but also covering travel expenses. In a footnote, Juniper concedes that such expenses are "not compensable under § 285." Juniper Br. 9 n.1 (quoting *MarcTec*, *LLC v. Johnson & Johnson*, 664 F.3d 907, 921 (Fed. Cir. 2012)). Thus Juniper's submission is at best tangential to the Court's order on exceptionality under § 285, and to the Special Master's report. Its only real connection to those items is the report's (proper) rejection of Juniper's attempt to have such non-compensable fees included in the recommended award. (*See* D.I. 658 at 20 (describing non-recoverability of travel expenses and expert fees under § 285))

Juniper also leads its motion with a problematic assertion: that "the parties agree these expenses [expert fees and travel] are awardable by the Court if its final award includes a finding of bad faith." Juniper Br. 1. That statement is severely incomplete. District courts' inherent power includes authority to award expert fees/travel expenses, but this is generally reserved for circumstances of "bad faith and fraud on the court to the extent of defiling 'the very temple of justice." *Amsted Indust., Inc. v. Buckeye Steel Castings Co.*, 23 F.3d 374, 379 (Fed. Cir. 1994) (quoting *Chambers v. NASCO*, 501 U.S. 32, 46 (1991)). Finjan strongly opposes any suggestion that there has been any bad faith, ever, in this case. That there has been bad faith to the *Amsted* standard, as Juniper suggests, lacks any support in the record at all. The Court should reject Juniper's plea for still more money, with so little record support, so late in the case.

ARGUMENT

I. The Record Includes No Indications of Fraud or Abuse of the Judicial Process

The expert fees and travel expenses sought by Juniper are only awardable under the Court's inherent powers upon a "finding of fraud or abuse of the judicial process." *Amsted*, 23 F.3d at 378. Though citing that standard, Juniper's submission fails to apply it, as none of the issues cited therein come anywhere near *Amsted*'s high standard.

Juniper cites seven incidents as purportedly supporting the award it seeks. None embodies "fraud or abuse of the judicial process."



Finjan acknowledges that the § 285 Order is binding before this Court. Finjan reserves its right

A. Juniper's Allegation of Fraud/Abuse of Process in Connection With Finjan's Decision to Proceed to Trial on the '494 Patent is Baseless

First, Juniper complains that after the *Daubert* order in December 2018, Finjan failed to "cut its losses" and "forego its baseless case regarding the '494 Patent." Juniper Br. 4–5. Juniper's suggestion that the decision to proceed to trial might show fraud or abuse of process is incorrect as to both Finjan's liability case and its damages case. As to liability, nothing in the *Daubert* order suggested that Finjan's technical allegations lacked merit. Although an adverse damages decision may limit a case's ultimate value, it does not on its own reduce a litigant's right to have triable liability claims heard by a jury. *Cf. Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1406–07 (Fed. Cir. 1990). And as to damages, the following sections describe how there was neither fraud nor abuse of process there, either.

B. Juniper's Allegation of Fraud/Abuse of Process in Connection With Finjan's Trial Presentation on '494 Damages is Baseless

Next, Juniper claims that weaknesses in Finjan's apportionment at trial amounted to fraud or abuse of process. Juniper Br. 5. Not so. Finjan believed—in error, as it turned out—that its trial case properly apportioned between patented and unpatented features. (*See* D.I. 336 at 212–13 (trial describing apportionment based on Juniper's statements that "only 40 percent of [files] get processed through the infringing components"); *also see id.* at 216 ("[THE COURT:] You have the burden to apportion in some not just rational way, something that meets the standards of the *Blue Coat* decision. MR. ANDRE: Your Honor, we will do so."))

Of course, the Court disagreed with Mr. Andre and found Finjan's presentation insufficient as a matter of law (and subsequently exceptional under § 285). But the exchanges above completely contradict Juniper's allegation of fraud/abuse of process. Until the moment the Court struck Finjan's damages presentation at trial, Finjan believed it had carried out the task set by the Court and the law: to present a triable apportionment. Finjan may have been wrong in that belief, but in no sense was it proceeding in bad faith.



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