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16 FINJAN, INC.

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN FRANCISCO DIVISION**

15 FINJAN, INC., a Delaware Corporation,

17 Plaintiff,

18 v.

19 JUNIPER NETWORKS, INC., a Delaware
20 Corporation,

21 Defendant.

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

**PLAINTIFF FINJAN, INC.'S NOTICE OF
MOTION AND MOTION FOR LEAVE TO
AMEND ITS COMPLAINT**

Date: May 3, 2018

Time: 8:00 am

Judge: Honorable William Alsup

Dept.: Courtroom 12, 19th Floor

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 NOTICE IS HEREBY GIVEN that on May 3, 2018, at 8:00 a.m., or as soon thereafter as
4 counsel may be heard by the Honorable William Alsup in Courtroom 12, 19th Floor, located at 450
5 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Finjan, Inc. ("Finjan") will and hereby does
6 move the Court for an order granting Finjan's Motion to Amend its Complaint ("Motion to Amend").

7 This Motion is based on this Notice of Motion, the following Memorandum of Points and
8 Authorities, the proposed order submitted herewith, the pleadings and papers on file in this action, any
9 evidence and argument presented to the Court at or before the hearing on this motion, and all matters
10 of which the Court may take judicial notice.

11 **STATEMENT OF RELIEF REQUESTED**

12 Finjan seeks leave to amend its Complaint to update the claims to reflect the current status
13 of the case, and to include the Advanced Threat Prevention Appliance ("ATP Appliance") as an
14 accused product. A copy of the Amended Complaint that Finjan seeks leave to file is attached as
15 Exhibit 1 to the Declaration of Kristopher Kastens, filed in support of this Motion to Amend
16 ("Kastens Decl."). A redline copy of the Amended Complaint showing a comparison of the
17 original Complaint and the Amended Complaint is attached as Exhibit 18 to the Kastens
18 Declaration.

19 **STATEMENT OF ISSUES TO BE DECIDED**

20 Whether the Court should grant Finjan's Motion for Leave to Amend the Complaint to include
21 Juniper Networks Inc.'s ("Juniper") ATP Appliance, which was not publicly known as a Juniper
22 product until well after Finjan filed its Complaint but includes the same type of technology as Juniper's
23 Sky Advanced Threat Prevention service ("Sky ATP") that was named in the Complaint.

I. INTRODUCTION

Finjan seeks leave to amend the Complaint to specifically name the ATP Appliance as an accused product in this case, because otherwise Finjan would be required to waste resources by bring a separate lawsuit regarding this product.¹ Finjan's motion should be granted because leave to amend is freely given and does not require a showing of good cause when done according the schedule set by the Court. There is no reason to deny Finjan's motion to amend, as Finjan promptly notified Juniper and brought this motion, and Juniper will not be prejudiced because of Finjan's prompt notification.

Finjan could not have originally raised the ATP Appliance in its Complaint because Juniper's completion of the acquisition of Cyphort Inc. ("Cyphort"), who originally sold the ATP Appliance, was first publicly announced in November 2017, over a month after Finjan filed its Complaint on September 29, 2017. Furthermore, Finjan did not originally see Juniper's announcement of the acquisition because it was buried 29 pages into a 10-Q filing of Juniper. There was also little public information disclosed for Finjan to see, as Juniper did not include any mention of the ATP Appliance on its website until December 14, 2017. Finjan did not discover that Juniper had completed its acquisition of Cyphort and was selling the ATP Appliance until early February 2018, which was just before its infringement contentions were due and served on March 8, 2018. At the time of this discovery, Finjan did not believe it was necessary to amend its Complaint because the Complaint already named Juniper's Sky ATP service, which included substantially the same accused technology as the ATP Appliance and is part of the same ATP product line. To avoid unnecessary motion practice, Finjan requested during meet and confers that Juniper stipulate to allow Finjan to amend its Complaint. Juniper agreed, but only if Finjan would agree that the ATP Appliance was not part of the early summary judgment process. Finjan could not agree to this request because it undercut the purpose of early summary judgment – to provide clarity and increase judicial economy.

¹ As a matter of housekeeping, Finjan has also amended the Complaint to reflect the current case status, including that Finjan is no longer asserting willfulness, indirect infringement, and two patents in the original Complaint.

At the hearing on April 17, 2018, the Court stated Finjan must amend its pleadings to explicitly name the ATP Appliance. Thus, Finjan diligently brings this Motion to Amend, two days later, and respectfully requests that the Court grant it leave to amend the Complaint.

II. BACKGROUND

Finjan filed its Complaint on September 29, 2017. Dkt. No. 1. The Complaint alleged that a number of Juniper's products and services infringed the Asserted Patents, including *inter alia* Juniper's Sky ATP service, which offers malware detection features such as static analysis and dynamic analysis with sandboxing. *Id.* at ¶¶ 45-50. On February 22, 2018, the Court notified the parties that they would be involved in its "showdown" procedure involving early summary judgment on a single claim, with opening summary judgment briefs to be filed June 7, 2018. On February 23, 2018, the Court issued a scheduling order that specifically contemplated the early summary judgment schedule while giving the parties until May 31, 2018 to seek leave to amend their pleadings. Dkt. No. 35.

A. Juniper's Purchase of Cyphort

Juniper recently purchased Cyphort, a company that had been in negotiation with Finjan for a license to its patent portfolio since approximately February 2015 and that offered and sold its own advanced threat protection product. While Juniper had announced its intent to purchase Cyphort by August 30, 2018, Juniper did not publicly announced that it had completed its acquisition of Cyphort until page 29 of Juniper's 10-Q that was publicly released on November 7, 2017. Kastens Decl., Ex. 2 at 29. In that November 2017 10-Q, Juniper stated on page 29 that the acquisition of Cyphort was complete and its technology *would be incorporated into Juniper's existing Sky ATP service*:

We also completed the acquisition of Cyphort Inc., a software company that provides security analytics for advanced threat defense. This acquisition is **expected to strengthen the capabilities of our cloud-based threat prevention service, Sky Advanced Threat Prevention, or Sky ATP**, by increasing efficiency and performance and providing additional threat detection functionalities and analytics.

Id. at 29 (emphasis added).

1 While Juniper concluded its purchase of Cyphort on September 14, 2017, and identified
2 that it had completed this acquisition deep in a November 10-Q filing, it was not until December
3 14, 2017, that Juniper first publicly advertised the ATP Appliance on its website, nearly three
4 months after Finjan had filed its Complaint. Kastens Decl., Ex. 3. Furthermore, it was not
5 immediately clear that this product was acquired from Cyphort, and it was only by looking closely
6 at images on the website that anyone could have ascertained that fact based on the inclusion of the
7 Cyphort logo. Indeed, Juniper has only recently ramped up issuing press releases, displaying at
8 conferences, and releasing promotional videos for the ATP Appliance. Kastens Decl., Ex. 4
9 (screenshot of first known Juniper video showing ATP Appliance released April 2, 2018,
10 available at <https://youtu.be/LCM1PRdK0Tg>); *id.*, Ex. 5 (Juniper announcing showing ATP
11 Appliance at RSA 2018).

12 **B. Finjan's Discovery of the ATP Appliance and Diligence Seeking to Amend.**

13 In February 2018, Finjan was finalizing its infringement contentions in this case, which
14 included revisiting Juniper's website and public documents for updated information on Juniper's
15 products. Kastens Decl., ¶ 8. During this time, Finjan discovered that Juniper was offering the
16 ATP Appliance as a new addition to its ATP suite of products, which previously only included the
17 Sky ATP service. *Id.* On further review, Finjan discovered that the ATP Appliance operated in a
18 similar manner as the Sky ATP service, including through the use of static analysis and dynamic
19 analysis in a sandbox, identical to the functionality that was included in Sky ATP. *Compare*
20 Kastens Decl., Ex. 6 (Sky ATP Datasheet) *with* Ex. 7 (ATP Appliance Datasheet). Because the
21 new ATP Appliance included substantially the same accused technologies as the Sky ATP service
22 that Finjan accused in its Complaint, Finjan believed the new ATP Products were covered by the
23 existing allegations in the Complaint.

24 On February 23, 2018, Finjan served its first set of Requests for Production of Documents
25 ("RFPs") and Interrogatories, both of which identified the ATP Appliance as an accused product.
26 Kastens Decl., Ex. 8 at 3, ¶ 6; *id.*, Ex. 9 at 2, ¶ 6. On March 8, 2018, Finjan served its
27 infringement contentions in this case, which again identified the ATP Appliance as an accused
28

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