

1 PAUL J. ANDRE (State Bar No. 196585)
pandre@kramerlevin.com
2 LISA KOBIALKA (State Bar No. 191404)
lkobialka@kramerlevin.com
3 JAMES HANNAH (State Bar No. 237978)
jhannah@kramerlevin.com
4 KRISTOPHER KASTENS (State Bar No. 254797)
kkastens@kramerlevin.com
5 AUSTIN MANES (State Bar No. 284065)
amanes@kramerlevin.com
6 KRAMER LEVIN NAFTALIS & FRANKEL LLP
7 990 Marsh Road
8 Menlo Park, CA 94025
9 Telephone: (650) 752-1700
Facsimile: (650) 752-1800

10 *Attorneys for Plaintiff*
11 FINJAN, INC.

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

17 FINJAN, INC., a Delaware Corporation,
18 Plaintiff,
19 v.
20 JUNIPER NETWORKS, INC., a Delaware
21 Corporation,
22 Defendant.

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

**PLAINTIFF FINJAN, INC.'S NOTICE OF
MOTION AND MOTION FOR AN ORDER
SHORTENING TIME UNDER CIVIL L.R.
6-3.**

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 PLEASE TAKE NOTE that on May 3, 2018, at 8:00 a.m., or as soon thereafter as counsel may
4 be heard by the Honorable William Alsup in Courtroom 12, 19th Floor, 450 Golden Gate Avenue, San
5 Francisco, CA 94102, Plaintiff Finjan, Inc. (“Finjan”) will and hereby does move under Civil Local
6 Rule 6-3 for an order shortening the time to brief and hear Plaintiff Finjan, Inc.’s Motion to Amend the
7 Complaint (“Motion to Amend”), which is filed concurrently herewith.

8 This motion is based on: this Notice of Motion and the Memorandum of Points and Authorities;
9 the Declaration of Austin Manes; the Proposed Order; the Motion to Amend filed concurrently
10 herewith and Declaration of Kristopher Kastens filed therewith; and on such other written or oral
11 evidence or argument as may be considered by the Court.

12 **RELIEF REQUESTED**

13 Finjan respectfully requests the following briefing schedule for its Motion to Amend:

- 14 • Deadline for any Opposition to the Motion to Amend: April 25, 2018;
- 15 • Deadline for any Reply in support of the Motion to Amend: April 30, 2018;
- 16 • Hearing on Plaintiff’s Motion to Amend: May 3, 2018;
- 17 • If the Motion to Amend is granted, Juniper to complete discovery related to
18 the ATP Appliance by: May 17, 2018.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 Finjan requests an expedited briefing schedule for its Motion to Amend the Complaint in order
22 to include Juniper’s Advanced Threat Prevention Appliance (“ATP Appliance”) in the early summary
23 judgement schedule. Opening briefs for early summary judgment are due June 7, 2018. Finjan’s
24 motion is time sensitive; it directly affects the scope of early summary judgment because the ATP
25 Appliance infringes both of the early summary judgment claims. Finjan’s Motion to Amend is likely to
26 be granted, as amendments are usually freely allowed at this stage. But under a normal 35-day briefing
27 schedule Finjan will not have time to obtain discovery on the ATP Appliance for use in early summary
28

1 judgment. Finjan will be prejudiced if it is not allowed to present evidence of the ATP Appliance on
2 early summary judgment and may suffer the detrimental effects that come with losing early summary
3 judgment for the rest of the case. Precluding the ATP Appliance from early summary judgment would
4 also waste time and judicial resources, as the ATP Appliance would need to be reheard later on the
5 same claims. Thus, Finjan requests that its Motion to Amend be heard on shortened time to avoid
6 prejudice and increase efficiency.

7 **II. BACKGROUND**

8 In November 2017, two months after Finjan filed its original complaint, Juniper publicly
9 disclosed that it had acquired Cyphort, Inc. (“Cyphort”) on page 29 of its 10-Q filing. Declaration of
10 Kristopher Kastens in Support of Motion for Leave to Amend Complaint (“Kastens Decl.”), Ex. 2.
11 Juniper’s announcement stated only that Juniper would incorporate Cyphort’s advanced threat
12 protection technology into Juniper’s preexisting Sky ATP service, which Finjan had already named in
13 the Complaint. *Id.*; Dkt. No. 1. Finjan first determined that Juniper acquired Cyphort in February
14 2018, while it was finalizing its infringement contentions with updated public information. Kastens
15 Decl., ¶ 8. Finjan did not immediately move to amend its complaint because Finjan reasonably
16 believed in good faith that its original Complaint properly addressed the ATP Appliance and that no
17 amendment was necessary, as the ATP Appliance included overlapping technology with Sky ATP.
18 *Compare* Kastens Decl., Ex. 6 *with* Ex. 7. In particular, Finjan believed that the ATP Appliance was
19 properly identified in the Complaint because both it and Sky ATP were identified as infringing based
20 on their static and dynamic analysis with sandboxing technologies. When Finjan served its
21 infringement contentions on March 8, 2018, it included separate charts devoted to showing how the
22 ATP Appliance infringed Finjan’s patents.

23 On March 26, 2018, Juniper refused to provide any discovery into the ATP Appliance. Kastens
24 Decl., Ex. 15. Finjan, believing that the ATP Appliance was properly identified if not explicitly named
25 in the Complaint, asked to meet and confer with Juniper on March 27, 2018, and promptly sought to
26 compel discovery into the ATP Appliance when Juniper did not agree to provide discovery. On April
27 17, 2018, the Court held a hearing where it ruled on Finjan’s motion to compel and ordered that Finjan

1 was required to amend its complaint to specifically name the ATP Appliance in order to obtain
2 discovery on it. That same day Finjan requested that Juniper stipulate to an expedited schedule for this
3 motion, so that if Finjan's Motion to Amend is granted the ATP Appliance could be included in early
4 summary judgment. Manes Decl. in Support of Motion for An Order Shortening Time ("Manes
5 Decl.") at ¶ 12. Juniper refused, arguing that while it would not oppose Finjan amending its complaint
6 to add the ATP Appliance, it would only agree if the ATP Appliance was not part of early summary
7 judgment. *Id.* at ¶ 16. Because ATP Appliance includes overlapping concepts and evidence with the
8 other products that are already undisputedly part of early summary judgment, and to exclude it would
9 result in an incomplete verdict on early summary judgment, Finjan did not agree to Juniper's demand.

10 **III. ARGUMENT**

11 **A. Early Summary Judgment Will Be Incomplete And Finjan Will Be Harmed** 12 **if the Motion to Amend is Not Heard on Shortened Time**

13 The Court should grant this motion to ensure that the early summary judgment proceedings are
14 complete, fair, and efficient, because an order shortening time is the only way that Finjan can obtain
15 discovery on the ATP Appliance in time for those proceedings. The Court instituted early summary
16 judgment to increase judicial efficiency and economy. Kastens Decl., Ex. 17 at 5 ("it just cuts to the
17 heart of the case so quickly"). Hearing the Motion to Amend on shortened time will accomplish that
18 goal because the ATP Appliance is accused of infringing both claims selected for early summary
19 judgment.¹ Requests to change time should "be granted in the absence of bad faith or prejudice to the
20 adverse party." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010) (also noting
21 the "general purpose of seeing that cases are tried on the merits"). This is true for shortening time
22 where a particularized showing of reasons and prejudice is made, as it is here. Civil L.R. 6-3. Finjan's
23 Motion to Amend should also be granted because Finjan diligently sought to amend in good faith
24 according to the Court's schedule. *See* Motion to Amend at 6.

25 Finjan's claim against the ATP Appliance should be heard on early summary judgment because
26 it will provide clarity in those early proceedings and ensure a comprehensive determination on the two

27 ¹ Specifically, Finjan seeks discovery on the ATP Appliance in order to prove that it infringes Claim
28 10 of the '494 Patent, and rebut Juniper's argument that it does not infringe Claim 1 of the '780 Patent.

1 claims selected. Otherwise, the early summary judgment proceedings will be incomplete and the Court
2 will have to rehear arguments on the ATP Appliance for the same claims, regardless of the early
3 outcome. Finjan will also be substantially prejudiced if it is not able to obtain discovery on the ATP
4 Appliance in time for early summary judgment because it will be forced to present a limited version of
5 its infringement analysis, and noninfringement rebuttal analysis, for the selected claims. In fact, the
6 ATP Appliance comprises one third of Finjan's infringement case and is only one of three product
7 groups identified as infringing the early summary judgment claims. As the Court noted, losing early
8 summary judgment proceedings may lead to extreme consequences. Kastens Decl., Ex. 17 at 5. If
9 Finjan loses early summary judgment because of its inability to present evidence of the ATP
10 Appliance, it may be unfairly subjected to these extreme consequences.

11 **B. No Prejudice Will Result to Juniper As A Result of Shortening Time**

12 During the meet and confer, Juniper was unable to identify any prejudice that would accrue
13 from hearing Finjan's Motion to Amend on an expedited basis. Manes Decl. at ¶ 14. For example,
14 Juniper identified no scheduling conflict that would prevent it from responding on a shortened briefing
15 schedule. *Id.* Further, Juniper has been on notice that Finjan accuses the ATP Appliance since
16 February 23, 2018 (Manes Decl. at ¶ 5), has had the benefit of Finjan's infringement contentions on the
17 ATP Appliance since March 8, 2018 (*id.*, at ¶ 6) and Finjan identified its basis for seeking to amend
18 the Complaint in its Letter Brief to Compel Discovery on the ATP Appliance on April 6, 2018. *See*
19 Dkt No. 48. Juniper does not need additional time to respond and has no basis for opposing this
20 request to expedite briefing and hearing on the Motion to Amend.

21 Instead of providing reasons that it opposes expediting briefing, Juniper instead identified two
22 grounds on which it substantively opposes Finjan's Motion to Amend – both of which are aimed solely
23 at precluding the ATP Appliance from early summary judgment. *First*, Juniper complained that Finjan
24 has had more time to prepare to assert the ATP Appliance than Juniper has had to prepare for its
25 defense. Manes Decl. at ¶ 15. But this is not true. Juniper has had the benefit of Finjan's
26 infringement contentions on the ATP Appliance since March 8, 2018, while Finjan still has no
27 discovery into the product. Juniper also has unfettered access to the ATP Appliance, its source code,

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.