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JUNIPER NETWORKS, INC.

12  
13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN FRANCISCO DIVISION**

16 FINJAN, INC., a Delaware Corporation, )  
17 Plaintiff, )  
18 vs. )  
19 JUNIPER NETWORKS, INC., a Delaware )  
Corporation, )  
20 Defendant. )

Case No. 3:17-cv-05659-WHA  
**DEFENDANT JUNIPER NETWORKS,  
INC.'S OPPOSITION TO FINJAN, INC'S  
MOTION FOR LEAVE TO AMEND ITS  
COMPLAINT**

Date: May 9, 2018  
Time: 8:00 a.m.  
Judge: Honorable William Alsup  
Courtroom: 12 – 19th Floor

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1 **I. INTRODUCTION**

2 As Juniper explained to Finjan on April 3, 2018, Juniper is not opposed to Finjan amending  
3 its complaint if the sole purpose of that amendment is to add the ATP Appliance to the list of accused  
4 products in this case—the ostensible purpose of Finjan’s amendment. Unfortunately, however,  
5 Finjan’s proposed amended complaint is a Trojan Horse; rather than simply adding a new accused  
6 product to the case, Finjan is attempting to both: (1) revive its dismissed willfulness allegations  
7 (despite its claim that it would not do so) and (2) modify the list of products that are subject to the  
8 early summary judgment procedure, for which motions are due in less than four weeks. Juniper will  
9 be severely prejudiced if it is suddenly forced, all in less than a month, to collect and produce  
10 discovery and file and respond to motions on a product that Juniper did not even create. If Finjan is  
11 willing to correct these defects with its proposed amended complaint, Juniper will withdraw its  
12 objections to it. To date, however, Finjan has refused to do so. For that reason, Juniper opposes  
13 allowing Finjan to amend its complaint in its current form.

14 **II. BACKGROUND**

15 **A. Finjan’s Knowledge of Cyphort Products.**

16 Finjan was aware Juniper was acquiring Cyphort before it filed its original Complaint on  
17 September 29, 2017. *See* Ex. A. Yet Finjan’s original Complaint neither includes Cyphort as a  
18 defendant, nor identifies any Cyphort products. Finjan also concedes that Juniper publicly  
19 announced the completion of the Cyphort acquisition on November 7, 2017, Dkt. No. 67 at 3, and  
20 that Juniper began advertising Cyphort products—specifically including the ATP Appliance—by  
21 December 14, 2017. *Id.* at 4.

22 Despite its knowledge of the Cyphort products—including specifically the ATP Appliance—  
23 Finjan elected not to amend its complaint, even as the parties engaged in discovery for the early  
24 summary judgment process, despite multiple opportunities to do so. For example, on February 14,  
25 2018 this Court dismissed Plaintiff’s claims of willfulness and induced infringement from the original  
26 Complaint. Dkt. No. 30 at 8. The Court held that Finjan “may move for leave to file an amended  
27 complaint, subject to the conditions stated herein, by February 22 at noon.” *Id.* The Court also found  
28 that Juniper “may promptly take depositions in advance of Finjan’s motion for leave in order to test

1 the validity of any new allegations added ” *Id.* On February 12, 2018, Finjan informed Juniper that it  
2 was not going to seek leave to amend its complaint related to willfulness, and Finjan did not even  
3 mention the possibility of adding new products at this time. *See* Ex. E. Again, at the Initial Case  
4 Management Conference on February 22, 2018, where the Court notified the parties of the early  
5 summary judgment procedure that would be employed in this case, Finjan did not even suggest that it  
6 would seek leave to amend its complaint to add new products, much less try to include them in this  
7 procedure.

8 The first time Finjan accused the ATP Appliance was on March 8, 2018, when it included  
9 them in its infringement contentions.<sup>1</sup> Yet at that time, Finjan still did not chose to amend its  
10 complaint even though Juniper specifically informed Finjan that it would need to do so if it wanted to  
11 accuse the ATP Appliance in this case. Specifically, on March 15, 2018, counsel for Juniper emailed  
12 counsel for Finjan, citing this Court’s ruling in *Richtek Tech. Corp. v. uPi Semiconductor Corp.*:

13 “the filing of a complaint sets the cut-off date for the scope of a case, subject to the possibility  
14 of supplementation. Nevertheless, for some time, patent owners have made open-ended  
15 allegations in their complaint that do not specifically identify the accused products and used  
16 amendments to their infringement contentions to expand the scope of the case to encompass  
products . . . without the need to file a supplemental complaint—essentially sneaking new  
products into the case through the back door of infringement contentions.”

17 2016 WL 1718135, at \*2 (N.D. Cal. Apr. 29, 2016) (Alsup, J.).

18 On March 22, 2018, two weeks after Finjan served its infringement contentions, the parties  
19 identified the claims they were selecting for early summary judgment, and Finjan still had not even  
20 moved for leave to add claims against the ATP Appliance to this case.

21 On March 26, 2018, Juniper objected to Finjan’s discovery requests served on February 23,  
22 2018, again notifying Finjan that discovery into ATP Appliance was improper unless and until the  
23 operative complaint was amended. Dkt. No. 67 at 5. During the parties’ meet and confer over  
24 discovery on April 3, 2018, Juniper stated that it was improper for Finjan to seek discovery on the  
25

26 <sup>1</sup> Finjan argues that it notified Juniper in its February 23, 2018 discovery requests that ATP  
27 Appliance was accused. Dkt. No. 67 at 4. To the contrary, Finjan merely defined in its discovery  
28 requests “Accused Instrumentalities” to include ATP Appliance without describing what such  
instrumentalities are even accused of (i.e., no patent numbers nor specific accused functionality).  
Such superficial mention of the ATP Appliance does not put Juniper on notice. *See* Dkt. No. 48-1 at  
¶ 6.

1 ATP Appliance until and unless Finjan amended its Complaint. Declaration of Joshua Glucoft  
2 (“Glucoft Decl.”) ¶ 10. Juniper also informed Finjan during this meet and confer that Juniper was  
3 willing to stipulate to allow Finjan to amend its Complaint if Finjan agreed to exclude the ATP  
4 Appliance from early summary judgment. *Id.*

5       Following the April 3, 2018 meet and confer, Finjan rejected Juniper’s offer to stipulate to  
6 allow Finjan to amend its Complaint, but Finjan still did not seek leave to amend. Instead, Finjan  
7 filed a motion to compel production on April 6, 2018, seeking discovery on the ATP Appliance. *See*  
8 Dkt. No. 48. At the hearing on this motion, this Court held that it was “not just going to hand over  
9 the documents” relating to the ATP Appliance until Finjan decided to “replead” and “put [the ATP  
10 Appliance] in the complaint as an accused product and explain[] which claims the product infringes.”  
11 *See Ex. C at 7-8.* This Court expressly held that unless the ATP Appliance was accused in the  
12 Complaint, Finjan could not obtain discovery on the product. *Id.*

### 13 **III. ARGUMENT**

#### 14 **A. Plaintiff Should Not Be Allowed to File an Amended Complaint Containing the** 15 **Same Willfulness Allegations this Court Previously Dismissed**

16       On February 14, 2018 this Court dismissed Plaintiff’s claims of willfulness and induced  
17 infringement from the original Complaint. Dkt. No. 30 at 8. The Court also held that Juniper “may  
18 promptly take depositions in advance of Finjan’s motion for leave in order to test the validity of any  
19 new allegations.” *Id.*

20       Although Finjan asserts it “is no longer asserting willfulness,” Dkt. No. 67 at 2 n.1, its  
21 proposed amended complaint contains the very same willfulness allegations the Court previously  
22 dismissed. *See, e.g.,* Dkt. No. 67, Ex. 1 at ¶¶ 63-65. On April 24, 2018, Juniper emailed Finjan  
23 asking Finjan to withdraw its current motion and file a new motion for leave to amend with a  
24 proposed complaint that does not actually assert willfulness. *See Ex. D; Glucoft Decl. ¶ 11.* Juniper  
25 did not receive any response from Finjan, and to date, Finjan *still* has not offered to substitute its  
26 proposed amended complaint to omit the renewed allegations of willfulness. Glucoft Decl. ¶ 11. As  
27 Juniper argued in its motion to dismiss—and as the Court held in its Order on that motion—Finjan’s  
28 willfulness allegations are inadequate because, among other things, Finjan does not adequately allege

1 pre-suit knowledge. Dkt. No. 30 at 4-5. Finjan has not added any allegations to cure these  
2 deficiencies. As such, if Finjan is granted leave to file its proposed complaint, it will be subject to  
3 another motion to dismiss.

4 Even if Finjan had tried to resolve the issues with its willfulness claims—which it did not—  
5 such an amendment would violate this Court’s prior order. This Court ordered Finjan to cure the  
6 defects in its willfulness allegations by February 22, 2018. *Id.* at 8. That deadline has long passed,  
7 and any attempt by Finjan to revive its willfulness claims is tardy. *See Thomas v. Fedex Freight,*  
8 *Inc.*, 627 F. App’x. 635, 636 (9th Cir. 2015) (affirming district court’s denial of leave to amend on  
9 the basis that Plaintiff failed to amend the complaint by the court-ordered deadline and failed to  
10 establish good cause for its tardiness). Moreover, this Court ordered that Finjan should not be  
11 allowed to move to amend its Complaint as to willfulness until Juniper has had an opportunity to  
12 depose Finjan’s witnesses on those allegations. *Id.* at 8. To the extent Finjan is seeking to amend its  
13 willfulness allegations now, Juniper must first be afforded an opportunity to depose the relevant  
14 Finjan witnesses.

15 Finjan should not be granted leave to file its proposed amended complaint because it  
16 continues to assert willfulness allegations that have already been dismissed by this Court, and  
17 because Finjan has not allowed Juniper the chance to depose its witnesses on the willfulness  
18 allegations. *See Bonin v. Calderon*, 59 F.3d 915, 845 (9th Cir. 1995) (“Futility of amendment can, by  
19 itself, justify the denial of a motion for leave to amend.”); *Bivolarevic v. U.S. CIA*, 2010 WL 890147,  
20 at \*3 (N.D. Cal. Mar. 8, 2010) (denying Plaintiff’s request to file an amended complaint upon finding  
21 that leave to amend would be futile); *Advanced Micro Devices, Inc. v. LG Elecs., Inc.*, 2017 WL  
22 2774339 (N.D. Cal. June 26, 2017) (same).

### 23 **B. The ATP Appliance Should Be Excluded From Early Summary Judgment**

24 In this Court’s order on Finjan’s motion to shorten time, it cautioned that “[n]either side  
25 should assume . . . that any amendment will justify expanding the universe of claims included in early  
26 summary judgment.” Dkt. No. 73 at 1. Even if the Court decides to grant Finjan leave to amend, the  
27 Court should order that Finjan is not allowed to seek discovery on ATP Appliance until after the early  
28 summary judgment motions are filed on June 7, 2018, to prevent significant prejudice to Juniper.

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