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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 REPLY IN  
SUPPORT OF ITS MOTION TO AMEND  
THE COMPLAINT**

Date: May 9, 2018

Time: 8:00 am

Judge: Honorable William Alsup

Dept.: Courtroom 12, 19<sup>th</sup> Floor

1 **I. INTRODUCTION**

2 Finjan's Motion to Amend its Complaint ("Motion") should be granted because Juniper agrees  
3 that the ATP Appliance can be properly brought into the case and has no complaints that Finjan has  
4 dropped an entire line of accused products and two asserted patents from the case. Rather than oppose  
5 Finjan's request for leave to amend, Juniper dedicated the majority of its opposition brief to Finjan's  
6 Motion to arguing for relief that is not appropriately raised in Juniper's Opposition to Finjan's Motion  
7 for Leave to Amend its Complaint. Specifically, Juniper seeks to have the Court to amend the Court's  
8 Amended Case Management Order ("CM Order") to delay discovery of the ATP Appliance and  
9 exclude the ATP Appliance from the early summary judgment process. Dkt. No. 35. To the extent  
10 Juniper is seeking relief from the current case schedule, Juniper is required to file a separate motion to  
11 either modify the current Case Management Order case or some other motion for relief.

12 The only other issue raised in Juniper's opposition is willfulness. Finjan has notified the Court  
13 and Juniper that it is not asserting willful infringement in the case. *See* Dkt. No. 67 ("Motion") at 2 n.1;  
14 Dkt. No. 72. Finjan has maintained its allegations for an exceptional case and enhanced damages in the  
15 case. *See* Dkt. No. 67-20 at ¶¶ 65, 79, 94, 109, 123, 140. Thus, the allegations that Juniper equates are  
16 for a claim for willful infringement are allegations that are directed toward seeking an exceptional case  
17 and enhanced damages.

18 **II. ARGUMENT**

19 **A. Juniper's Opposition is an Improper Request for Relief**

20 Finjan made a motion in compliance with the Court's schedule to Amend its Complaint to  
21 include the ATP Appliance. In response, Juniper concedes that it would allow the ATP Appliance to  
22 be in the case but it did not want it in early summary judgment. *Opp.* at 1, 8; *see also* Ex. 1 attached  
23 hereto, 4/17/18 Hearing Tr. at 5. Truly, there can be no dispute that Finjan has demonstrated the  
24 necessary diligence required under the law to amend its complaint to include the ATP Appliance, as  
25 Juniper concedes that it can be brought into the case and does not address any of Finjan's case law  
26 showing that much greater delays in seeking to amend were still found to be diligent.

1           Instead, Juniper asks to exclude the ATP Appliance from discovery and from early summary  
2 judgment. However, once Finjan's amended complaint is entered, then the ATP Appliance is in the  
3 case. Juniper does not dispute that the ATP Appliance was accused of infringing claims selected for  
4 early summary judgment in Finjan's Infringement Contentions, which make it subject to the early  
5 summary judgment procedure under the CM Order set forth by the Court. Additionally, requesting a  
6 delay of discovery and that the ATP Appliance be excluded from early summary judgment is not a  
7 basis to oppose Finjan's Motion to Amend its Complaint and is something that Juniper needs to request  
8 in a separate motion. As Juniper opposition relies on an improper request for relief from the Court, it  
9 should be denied outright.

10                           **B. There is no Prejudice to Juniper**

11           Juniper will not be prejudice by the inclusion of the ATP Appliance. First, Finjan dropped an  
12 entire product line and two asserted patents from the case which significantly reduced the case from  
13 the outset. Second, Finjan disclosed the ATP Appliance with its infringement contentions. Thus,  
14 Juniper has been aware of Finjan's infringement case for the ATP Appliance for the same amount of  
15 time as the other accused products at issue in the early summary judgment. In this two month period,  
16 Juniper has had sufficient time to review Finjan's contentions with respect to the ATP Appliance.  
17 Juniper's claims of prejudice, therefore, ring hollow, as Finjan put Juniper on notice of the details of  
18 such infringement when Finjan served its specific infringement contentions on March 8, 2018. Dkt.  
19 No. 77 ("Opp.") at 2, n.1.<sup>1</sup>

20           Juniper's argument that it will be burdened by producing discovery on the ATP Appliance for  
21 early summary judgment is also misplaced because Juniper is in possession of all the relevant  
22 documents. Opp. at 5-6. Juniper should be able to make the ATP Appliance's source code available in  
23 only a few days and Juniper's counsel has demonstrated that it is capable of producing technical  
24 documents on the ATP Appliance in a timely manner. Indeed, Juniper claims it is possible to produce  
25 source code on three accused products "a mere 11 days after Finjan served infringement contentions"

26 \_\_\_\_\_  
27 <sup>1</sup> Juniper's claim that Finjan's discovery requests did not put it on notice is specious. Juniper offers no  
28 support for this position and admits that the February 23 requests specifically named the ATP  
29 Appliance as an accused product. Opp. at 2.

1 and produced “more than 160,000 pages of technical documents related to these products” just thirteen  
2 days after the parties learned of the Court’s early summary judgment procedure. Dkt. No. 77-1  
3 (“Glucoft Decl.”) at ¶ 8; Opp. at 5. As such, Juniper cannot claim an actual inability to produce these  
4 documents quickly, only that it would be burdensome to require it to do so. Opp. at 6. Juniper’s  
5 argument is hollow, because by its own admission, it will have to review and produce these documents  
6 eventually, whether the ATP Appliance is added now or later, so reviewing those documents now will  
7 impose no additional cost. Thus, Juniper fails to show any actual prejudice it would suffer if the ATP  
8 Appliance is litigated in early summary judgment.

9 Juniper also ignores the purpose of early summary judgment – to clarify the issues and increase  
10 judicial efficiency – claiming instead that Finjan “would be free to pursue those claims at a later stage  
11 in this case.” *Id.* Thus, Juniper fails to refute that Finjan should be permitted to include the ATP  
12 Appliance in early summary judgment.

### 13 **C. Juniper’s Arguments Regarding Willfulness Are A Red-Herring**

14 Juniper’s argument that Finjan is attempting to reallege willfulness is a red herring, as Finjan  
15 expressly affirmed that it no longer seeks to assert willfulness or indirect infringement in the  
16 Complaint, in accordance with the Court’s order striking those claims. Motion at 2, n.1. Furthermore,  
17 the Court has specifically stated that willfulness under 35 U.S.C. § 284 is no longer in the case, and  
18 Finjan does not seek to change this order, nor could it do so without specifically asking for leave of the  
19 Court. Dkt. No. 30. Finjan has been explicit that it was not asserting willfulness. Dkt. 67-3, Kastens  
20 Decl., Ex. 1 at 59.

21 In fact, Finjan was surprised when Juniper alleged in its Opposition to Finjan’s Motion to  
22 Shorten Time that Finjan was re-raising willfulness, and Finjan promptly filed a request for judicial  
23 notice highlighting the fact that it was doing no such thing. Dkt. No. 72. Despite these assurances,  
24 Juniper’s Opposition leads with the baseless accusation that Finjan’s Motion to Amend is a “Trojan  
25 Horse” intended to “revive” a claim for willfulness after the Court struck those allegations. Opp. at 1,  
26 3-4. This argument is designed to distract from the real reason Juniper opposes this Motion — that the  
27  
28

1 ATP Appliance should be in early summary judgment as Finjan has clearly stated it does not allege  
2 willfulness.

3 The crux of Juniper's argument is that Finjan's Amended Complaint includes the word  
4 "willfully" and "35 U.S.C. § 284" in its amended complaint. However, this relates to Finjan's request  
5 for enhanced damages under 35 U.S.C. § 284 and for an exceptional case, which relates to a wide  
6 range of facts. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826 (Fed. Cir. 1992). Thus, Finjan only used  
7 "willfully" as a factual term describing Juniper's conduct, which is relevant to Finjan's current claim  
8 of "enhanced damages," which can be based on a party litigating in subjective bad faith. *See, e.g.*,  
9 *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1754-59 (2014) (holding  
10 willfulness can be a factor in fee-shifting for an exceptional case under § 285, which is separate from  
11 egregiousness under § 284 and can be based on "subjective bad faith"). Furthermore, this language is  
12 related to a request for shifting attorneys' fees under the common-law to show that Juniper has acted in  
13 "bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 1758 (quoting *Alyeska Pipeline*  
14 *Service Co. v. Wilderness Society*, 421 U.S. 240, 258-259 (1975)). These allegations are appropriate  
15 because Juniper's Motion to Dismiss Finjan's willfulness claims was based solely on striking Finjan's  
16 claim for treble damages for willful *infringement* under 35 U.S.C. § 284, which Finjan no longer  
17 alleges. *See* Dkt. No. 23 at 1 and 6-11 (discussing only willful patent infringement and egregious  
18 conduct); Dkt. No. 25 at 9-10 (arguing willfulness should be struck because Finjan did not plead  
19 "egregious conduct").

#### 20 **D. Finjan Did Not Delay in Seeking to Amend**

21 While ultimately irrelevant, as Juniper concedes that it would allow the ATP Appliance in this  
22 case, Juniper still accuses Finjan of delaying in seeking to amend its complaint. However, the  
23 undisputed facts show that Finjan did not delay, and that the parties simply disagreed on whether the  
24 ATP Appliance was accused by the Complaint. Motion at 3-5; Opp. at 1-3. Once Juniper definitively  
25 refused to provide discovery into the ATP Appliance, Finjan promptly requested a meet and confer (as  
26 required by this Court's Standing Supplemental Order at ¶ 34) and moved to compel discovery *three*  
27 *days* after that meet and confer. Opp. at 3; Glucoft Decl. at ¶ 10; Dkt. 48. Then, once the Court ruled

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