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

15 FINJAN, INC., a Delaware Corporation,
16

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
FILE SECOND AMENDED COMPLAINT**

Date: July 5, 2018

Time: 8:00 am

Judge: Honorable William Alsup

Dept.: Courtroom 12, 19th Floor

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24 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 NOTICE IS HEREBY GIVEN that on July 5, 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 for Leave to File Second Amended Complaint
7 ("Motion").

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

12 **STATEMENT OF RELIEF REQUESTED**

13 Finjan seeks leave to amend its Complaint to assert Claims 1 and 17 of U.S. Patent No.
14 7,418,731 (the "'731 Patent") against products already named in the complaint: SRX Gateways
15 and Sky Advanced Threat Protection ("Sky ATP"). A copy of the Second Amended Complaint
16 that Finjan seeks leave to file is attached as Exhibit 1 to the Declaration of Kristopher Kastens,
17 filed in support of this Motion to Amend ("Kastens Decl."). A redline copy of the Amended
18 Complaint showing a comparison of the First Amended Complaint and the Second Amended
19 Complaint is attached as Exhibit 5 to the Kastens Declaration.

20 **STATEMENT OF ISSUES TO BE DECIDED**

21 Whether the Court should grant Finjan's Motion for Leave to Amend the Complaint to include
22 the '731 Patent based on (1) the recent deposition of Juniper's employee during which confidential
23 information relating to Sky ATP was revealed and (2) a review of source code of the Accused
24 Instrumentalities.

1 **I. INTRODUCTION**

2 Finjan's motion for leave to amend the complaint to assert Claims 1 and 17 of the '731
3 Patent (the "Motion") should be granted because leave to amend is freely granted, particularly
4 where there are no issues of undue delay, bad faith, or futility of the proposed amendments, and
5 when requested according to the Court's schedule. Finjan's requested amendments are based on
6 new information that was revealed during the recent deposition of Juniper's employee, Ms. Yuly
7 Tenorio, who was the first witness deposed in this case. In that deposition, Finjan discovered
8 information relating to the internal design of Sky ATP and the relevance of Sky ATP in
9 combination with SRX Gateways as infringing the '731 Patent. A few weeks after the deposition
10 of Juniper's witness, Finjan reached out to Juniper's counsel to amend its complaint to add the
11 '731 Patent, and brought this Motion shortly thereafter.

12 Finjan's amendments will cause no prejudice to Juniper given the early status of the case
13 and because Finjan seeks to assert only two claims from the '731 Patent against products that are
14 already accused in this case—namely, the SRX gateway and Sky ATP.¹ Accordingly, any
15 additional discovery Finjan may need will be minimal at best. Any underlying evidence will be
16 based on Juniper's information or facts under Juniper's control. Furthermore, Finjan agrees to
17 limit the total number of claims in the case to 16, so the total number of claims in the case will not
18 increase. Finjan also agrees to alleviate any delay by promptly serving its infringement
19 contentions for the '731 Patent within three days of the Court issuing an order granting Finjan
20 leave to amend to assert the '731 Patent. As there is over nine months of fact discovery remaining
21 in the case, Juniper will have ample time to investigate Finjan's claims and there will be no
22 prejudice to Juniper. The proposed amendments will also not be futile. Finjan's amendments
23 with the '731 Patent are consistent with its pleadings of infringement for the patents asserted in its
24 complaint. There, Finjan sets forth how the SRX Gateway and Sky ATP meet the claim
25 limitations.

26 Therefore, the Court should grant Finjan's motion to amend its complaint.

27
28 ¹ Finjan does not seek to include the '731 Patent as part of the early summary judgment proceedings.

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 U.S. Patent Nos. 6,154,844; 6,804,780; 7,613,926; 7,647,633; 7,975,305; 8,141,154; 8,225,408; 8,677,494 ("Original Asserted Patents"). On April 19, 2018, Finjan filed motion for leave to amend its complaint to include the newly released ATP Appliance (Dkt. No. 67), which the Court granted on May 11, 2018 (Dkt. No. 85).² Finjan filed its First Amended Complaint on May 18, 2018. Finjan's amendment included dropping an accused product and two of the asserted patents, narrowing the case. Dkt. No. 88. Finjan took the deposition of the first Juniper witness on May 9, 2018. *See* Declaration of Kristopher Kastens in Support of Finjan's Motion for Leave to File Second Amended Complaint ("Kastens Decl."), Ex. 2. Non-expert discovery does not close until March 29, 2019 and trial is not until July 8, 2019. Dkt. No. 35 at 1, 5.

A. Recent Events are the Basis for Finjan's Motion.

A series of recent events in the last month led to Finjan's basis for this motion. Juniper first produced internal design and development documents related to Sky ATP on April 30, 2018. On May 9, 2018, Finjan took the deposition of Ms. Yuly Tenorio, who confirmed the relevance of the '731 Patent to this case because she described [REDACTED]. Kastens Decl., Ex. 2 (Tenorio Tr.) at 226:16–227:4 ([REDACTED]). Finjan conducted its source code review from May 15, 22–25, 2018, to confirm the described operation in the source code. Kastens Decl., ¶8.

Based on these events, Finjan now brings its proposed amendments for direct infringement of the '731 Patent. Kastens Decl., Ex. 3 (the "'731 Patent"). Finjan accuses the same products of infringing the '731 Patent as those accused in its complaint filed on September 29, 2017, *i.e.*, Sky ATP and the SRX Gateways. *Compare* Kastens Decl., Ex. 5 (Second Amended Complaint) at

² Finjan's First Amended Complaint also removed allegations of willfulness, indirect infringement, and two patents in the original Complaint (the '305 Patent and '408 Patent).

¶130 (identifying products infringing the ‘731 Patent) *with* Original Complaint, Dkt. No. 1 at ¶¶43–50 (identifying products infringing other Asserted Patents). The ‘731 Patent is substantively different from the currently asserted claims because it includes claims directed at new components, such as policy and file caches. *See* ‘731 Patent, Claims 1 and 17.

B. This Case is in its Early Stages and Trial is Over a Year Away.

This case is still in its relatively early stages. Trial for this case is not scheduled for over another year from now, on July 8, 2019. Dkt. No. 35 at 5. Non-expert discovery closes on March 29, 2019, and opening expert reports are to be served at that time. *Id.* at 1. Dispositive motions are not due until April 11, 2019. *Id.* at 4.

Under the Court’s Scheduling Order (Dkt. No. 35), Finjan may seek to amend its complaint until May 31, 2018. On May 25, 2018, in a good faith effort to avoid unnecessary motion practice, Finjan contacted Juniper asking if it would stipulate to Finjan amending its complaint to include the ‘731 Patent. Kastens Decl., Ex. 4. The parties met and conferred on May 29, 2018, during which Juniper indicated it would consider Finjan’s amendment if Finjan agreed to allow additional deposition time for the only Finjan witness who had been deposed. Finjan confirmed the following day that it would agree to allow Juniper two additional hours with the Finjan witness if Juniper stipulated to the amendment. Kastens Decl., ¶¶9–10. On the date of Finjan bringing this Motion, Finjan provided Juniper with its proposed Second Amended Complaint and requested that Juniper indicate by 2:00 p.m. whether it would stipulate to the amendment given that it was the last day for the parties to seek leave to amend the pleadings. *Id.*, ¶12. Juniper did not provide Finjan with an affirmative response by that time.

III. ARGUMENT

Leave to amend is freely given under Federal Rule of Civil Procedure 15(a), and Finjan seeks this amendment diligently and in good faith in order to assert the ‘731 Patent against products that are already accused in the Complaint. Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (finding that refusal to grant leave without reason is inconsistent with the spirit of the Federal Rules). The determination of whether to grant leave to amend according to



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