TENTATIVE RULING

<u>Finjan v. Check Point, 18-cv-02621</u>

Below are my tentative rulings on the issues presented regarding the Second Amended Infringement Contentions. I hope this will focus the parties' arguments. Each side will have 30 minutes to address any issues of concern: Finjan will start. **Please note my order at the end of this document.**

<u>ISSUE (1)</u>: Does Finjan continue to accuse products and theories that were previously struck with prejudice in the AIC Order because Finjan:

      (a) did not cite any source code citations for those products;

      (b) contentions were incomplete because Finjan provided source code citations for some elements of an asserted claim but not others;

      (c) accused a marketing term and not a product?

<u>TENTATIVE (1)</u>: Yes. To the extent that Finjan's SAICs continue to not provide any source code or fail to explain why source code for one product shows infringement in a wholly different product, those contentions are stuck with prejudice. However, to the extent the SAICs accuse the marketing term CloudGuard, it is understood that Finjan is referring to the product CloudGuard SaaS. More details below:

      (a) Yes. In the AIC round, Check Point provided an Appendix that showed 30 of the 52 instrumentalities did not include any source code citations at all. Finjan did not respond to this argument in the AIC Round, which I noted in the last hearing. Now Finjan is contesting the accuracy of that Appendix. But Check Point is correct in showing examples that even if Finjan did give some source code citations to those 30 products, it was for wholly irrelevant code related to other products. Finjan does not explain why the code for X product is relevant to infringement contentions about Y product.

      (b) Yes. Other than the 30 instrumentalities struck because no source code was cited

(or irrelevant source code was cited), there were other contentions that were also struck because Finjan did not give pinpoint citations to all elements of the claim. Finjan again contests the accuracy of the Appendix. But Check Point's examples shows that even if some code was cited, it was code from a wholly different product. Finjan had access to the source code directory for each product (Interrogatory No. 9), so it does not have an excuse to pin cite irrelevant source code without an explanation.

(c) No. The AIC Order did not address CloudGuard as a marketing term; the marketing term addressed was ThreatCloud, which was then struck with prejudice. Finjan previously included contentions against "CloudGuard" marketing term, which Check Point argued that it understood to be "CloudGuard SaaS" product. Check Point recognized that Finjan's AIC charts were purporting to describe infringement theories for a list of actual products, which included "CloudGuard: CloudGuard Saas." *See* Defendants' Motion to Strike Amended Infringement Contentions [Dkt. No. 125-4].

ISSUE (2): Does Finjan include new accusations including:

     (a) new products and patents;

     (b) new claims;

     (c) new combinations?

TENTATIVE (2): Yes. To the extent Finjan includes new products or adds that existing products infringe on other patents that were not previously asserted, those contentions are struck with prejudice. Finjan's new combination contentions in its SAICs that were not previously included are also struck with prejudice. More details below:

     (a) Yes. Finjan attempts to argue that it accused these products in its AICs by pointing to wholly different charts, within a contention for something else entirely. Check Point claims that all of Finjan's "rebuttals" in this section have

the same flaw.

(b) Yes. Check Point argues that Finjan has taken products that up to this point had only been accused of infringing a claim *in combination* with other products, and now in the SAICs adds that these products also infringe the claim on its own. Finjan does not respond to this argument. It only shows that previous IC charts showed the combinations, which misses the point.

(c) Yes. Finjan attempts to argue that it accused these product combinations in its AICs by pointing to code cites that appear in the middle of claim charts for entirely different products.

ISSUE (3): Does Finjan fail to adequately identify and explain the accused combinations? Specifically, does Finjan fail to:

(a) identify and explain how SmartEvent or Forensics infringe the '494 and '086 in combination with other accused instrumentalities;

(b) assert that Network Firewall practices any limits of the '968 '154 and '731 Patents;

(c) identify whether Anti-Bot or Anti-Virus practice limitations of the '154 claims for show how they work together?

TENTATIVE (3): Yes. Finjan does not specify which instrumentalities are combined, and even if it does, it does not describe how that combination infringes. More details below:

(a) Yes. Finjan does not identify which instrumentalities can combine with SmartEvent or Forensics to infringe '494 and '086 in combination. Instead, it contains generic combination language that states that these two products can be combined with "any other Endpoint Security Instrumentality." Finjan argues that specifying the combination any further would have required it to make an additional 2,000 charts. But the way it is charted now would allow it to have enormous leeway on how it could allege the combinations at trial.

(b) Yes. Finjan's statement for Firewall + Threat Emulation is virtually identical to the statement for Threat Emulation alone, which means that it does not show specifically how Firewall is used in combination with Threat Emulation.

(c) Yes. Finjan only shows that the Anti-Bot instrumentality and Anti-Virus instrumentality operate together using a shared ThreatSpect engine, but that still does not sufficiently explain how the instrumentalities from the combination satisfy a specific claim element.

ISSUE (4): Does Finjan include long open-ended citations to entire source code directories in an effort to preserve its ability to expand/change its theories later in the case?

TENTATIVE (4): No, as long as Finjan's disclaimer is clear. Check Point accuses Finjan of including block source code cites after each of its pin cites. Finjan quotes Judge Hixson's recent order in *Finjan, Inc. v. Bitdefender, Inc., et. al.*, where he understood that as a functional matter, you can't operate just the infringing code – it won't work, and therefore in a technical sense won't "infringe" unless it is used with other code to make it operable. Finjan argues that it added disclaimers before its block citations that clarifies that these citations are not to show infringement but to provide context of the operability of its pinpoint source code citations in those charts. Finjan says it will not rely on block citations to show infringement at trial, just to show how the pinpoint citations operate.

ISSUE (5): Has Finjan failed to provide pinpoint source code citations for numerous contentions?

TENTATIVE (5): Yes. Checkpoint provides a table that shows missing or deficient source code citations and Finjan does not adequately rebut it. First, Finjan attempts to fill in those gaps by directing attention to cites from *other* claim elements. Second, its argument that some dependent claims don't need cites fails because it does not incorporate citations in the independent claims by reference. Third, its attempt to provide a "corrected" chart in its opposition will not be

tolerated; Finjan has had multiple shots at this already. Fourth, it attempts to argue that the AICs included pinpoint cites, but that is irrelevant now because the SAICs don't include those pinpoint cites. The SAICs are what is operable now.

ISSUE (6): Does Finjan fail to specify *how* the cited source code shows that the accused products infringe Finjan's patents? Specifically, do:

> (a) Finjan's source code citations remain largely unexplained and untethered to the language of the asserted claims;
>
> (b) Finjan's SAICs repeat the same code for disparate limitations with no explanation as to why it applies?

TENTATIVE (6): Yes. All contentions where Finjan fails to actually explain how the cited source code relates to each limitation, and all instances where Finjan cites the same code for different limitations without providing an explanation, are struck with prejudice. More details below:

> (a) Yes as to the IPS example; maybe for all instances. Appendix A to Check Point's motion is a table illustrating that Finjan fails to explain how the cited source code shows that the accused products meet the requirements of the asserted claims for at least one claim limitation in every allegation in the SAICs. The parties use Network IPS blade for limitation 1b of the '731 Patent as an example; I previously addressed this example in the IC Order. To the extent that the IPS example is illustrative, Finjan has failed to actually explain how the cited source code relates to each limitation. I do not intend to cross check every allegation, but I will strike the examples provided in Check Point's Appendix A (a table illustrating that Finjan fails to explain how the cited source code shows the accused products meet the requirements of the asserted claims for at least one claim limitation in every allegation in the SAICs).
>
> (b) Yes. Finjan continues to cite the same source code for different limitations,

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