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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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FINJAN, INC.,

Plaintiff,

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v.

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CHECK POINT SOFTWARE
TECHNOLOGIES, INC., et al.,

11

Defendants.

Case No. 18-cv-02621-WHO

**ORDER GRANTING IN PART
MOTION TO STRIKE SECOND
AMENDED CONTENTIONS;
GRANTING IN PART MOTIONS TO
SEAL**

Re: Dkt. Nos. 212, 213, 223, 229, 231, 234,

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I began the hearing on defendants Check Point Software Technologies, Inc. and Check

Point Software Technologies Ltd. (collectively "Check Point") motion to strike plaintiff Finjan,

Inc.'s ("Finjan") infringement contentions for the third time by hoisting onto the bench the six

bankers' boxes of documents that had been filed to litigate the motion.   *See* Defendants' Motion

to Enforce Court Order and Strike Second Amended Infringement Contentions ("MTS SAIC")

[Dkt. No. 213]. Finjan's second amended infringement contentions ("SAICs") amount to 5,135

charts, totaling to over 185,000 pages. This remarkably unreasonable filing hardly clarified

Finjan's infringement theories.

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I could not have resolved the propriety of the infringement contentions if I spent a month

doing nothing else. The absurdity of the Finjan's SAICs was underscored by its response to the

tentative ruling I posted one day prior to the hearing. After issuing two detailed orders striking

Finjan's contentions and spending weeks to unravel the parties' positions as expressed in the

briefing, my tentative was almost totally against Finjan. At the start of the hearing, Finjan

abandoned its positions in response to much of the tentative. That may have been strategic, but it

left me wondering why it made the abandoned contentions in the first place.

1   Locating the basis that Finjan asserts is contained for the infringement contentions is akin

2   to going on an unsatisfying treasure hunt—you start with an appendix, move to a chart, and then

3   look to pages in the chart that are supposed to contain the treasure, but instead refer to a totally

4   different product. As explained below, I am ruling against Finjan on most of the remaining issues

5   that were briefed.

6   In normal litigation, that would be that. I would issue an order resolving the issues and the

7   parties would move to the next stage in the case. But this is abnormal. I do not pretend that I

8   reviewed all of Finjan's 5,135 charts. Nor do I intend to waste more time parsing through this

9   mess contention by contention without briefing. I will not assume that none of the unbriefed

10   contentions pass muster, even though Finjan's two strongest contentions failed (I asked Finjan in

11   the tentative to identify its two strongest contentions that clearly specify how the cited source code

12   shows that the accused products infringe a particular patent, and I will discuss in this Order why

13   even those lacked merit).

14   Check Point argues that the SAICs should be struck for six reasons (hereinafter "Issues 1-

15   6"). For the reasons provided below, I strike with prejudice all contentions identified by Check

16   Point under Issues 1, 2, 3, and 5. I will appoint a master pursuant to Federal Rule of Civil

17   Procedure 53 to determine if the other 69 combination charts should also be struck for failure to

18   adequately identify and explain combinations, as argued in Check Point's Appendix C and

19   Finjan's Rebuttal Appendix C. *See infra* Section I.C (discussing Issue 3). The master shall also

20   determine if the entirety of the SAICs should be struck for inadequate source code citation

21   explanations, as argued in Check Point's Appendix A, Finjan's Rebuttal Appendix A, and Check

22   Point's Reply Appendix. *See infra* Section I.F (discussing Issue 6).[1]

23   Finjan shall pay the master's fees and costs. The master shall have the power to

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26   [1] As a general matter, just because a contention crosses one of the issue hurdles, it does not
      necessarily mean that it is sufficiently alleged because it could fail to cross another issue hurdle. I
      emphasize this because Finjan repeatedly argues that providing source code citations is enough to

27   amount to a sufficiently alleged infringement contention. That is just one hurdle; whether that
      source code citation is then adequately explained and connected to the claim limitation is another
      hurdle that it must cross as well.

1   recommend reallocating some or all of the fees to Check Point, and also to award attorney's fees

2   to the prevailing party for the proceedings before her as a discovery sanction. While I suspect that

3   Finjan would be well advised to substantially reduce the size of its SAICs before the master

4   commences her review, I have not analyzed the issues not addressed in this Order and defer to the

5   master's review of the issues before her.[2]

6   **BACKGROUND**

7   **I.   FACTUAL BACKGROUND**

8   **A.   Narrowing Order**

9   In September 2018, I received briefing from the parties on how to manage this litigation in

10   compliance with Federal Rule of Civil Procedure 1's mandate of a "just, speedy, and inexpensive

11   determination of this action[.]" Order Re Case Narrowing and Infringement Contentions (the

12   "Narrowing Order") [Dkt. No. 29]. I then ordered Finjan to serve its infringement contentions

13   under specifications that largely follow the provisions of this District's Patent Local Rules as well

14   as the guidance provided in the since withdrawn 2013 Model Order from the Federal Circuit. *See*

15   Narrowing Order. Finjan was instructed to "include pinpoint source code citations . . .

16   accompanied by the document production required by Patent Local Rule 3-2" and to also:

17   (i) avoid open-ended citations to "exemplary" products and use of the
                          terms "such as" and "for example"; (ii) set forth any infringement
18   theories based on the doctrine of equivalents with limitation-by-
                          limitation analyses; and (iii) for any indirect theories of infringement,
19   identify the alleged direct infringement, the alleged acts of
                          inducement or contribution to that infringement, and the relationship
20   between them.

21   *Id.* at 2.

22   **B.   Order on Infringement Contentions**

23   On November 2, 2018, Finjan served its infringement contentions on Check Point, which

24   then moved to strike the infringement contentions, arguing that they violated my Narrowing Order

25   and the Patent Local Rules. *See* Check Point's Motion to Enforce Court Order and Strike

26   _____

27   [2] At the end of this Order I rule on the motions to seal. I will give the parties five days to review
     this Order before issuing it publicly to ensure that I have redacted the appropriate information in it.
     If there is any other portion that should be redacted, the parties should file a declaration in five

1   Infringement Contentions [Dkt. No. 55] 1-3, 15-24. I largely agreed that Finjan's infringement

2   contentions failed to comply, and made several rulings that I summarize below. *See* Order

3   Granting Motion to Strike in Part; Granting Motions to Seal; Granting Motion to Amend Claim

4   Construction Schedule (the "IC Order") [Dkt. No. 84].

5   **1.   Grouping**

6   First, I required Finjan to organize its infringement contentions by the underlying

7   instrumentalities rather than into five groups of products, because that would assist both the parties

8   and me in determining precisely how Check Point's products do or do not infringe Finjan's patents

9   as well as to aid Finjan's efforts to provide specific source code citations. IC Order at 7. I ordered

10   that Finjan specify any combinations of the underlying instrumentalities that it believed were

11   infringing. *Id.* Although it might be true that Check Point sells its products to consumers in

12   bundles, I reasoned that separating out infringement contentions by the underlying

13   instrumentalities would be consistent with the purpose of Patent Local Rules because it would

14   make the litigation process more efficient and discovery more streamlined. *Id.*

15   **2.   Pinpoint Source Code Citations**

16   Second, I ordered Finjan to provide pinpoint source code citations that show "where and

17   how each limitation of each asserted claim is found within each Accused Instrumentality" as

18   required by the Patent Local Rules. IC Order at 12. In doing so, I rejected Finjan's arguments

19   that its infringement contentions were sufficient to disclose its infringement theories because they

20   provided an overall infringement analysis that included both source code citations and public

21   information. *Id.* at 7-12. I noted that many of the same sets of source code within the same

22   product category were cited across different claims of different patents. *Id.*

23   **3.   Open-Ended Contentions**

24   Third, I held that Finjan's infringement contentions impermissibly contained open-ended

25   citations to exemplary products in violation of the Narrowing Order. IC Order at 13-14. I found

26   that Finjan's citation to numerous releases of Check Point's products were ambiguous and that it

27   was unclear which releases applied to which products in the voluminous list cited by Finjan. *Id.*

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1   **4.   New Instrumentalities**

2   Fourth, I found that Finjan failed to show good cause to accuse 16 new instrumentalities

3   not previously identified pursuant to the Narrowing Order. IC Order at 14. However, I permitted

4   Finjan to add these 16 new instrumentalities to its next set of contentions so long as it did so

5   "consistent with the order's guidance." *Id.* I granted Check Point's motion to strike in part and

6   ordered Finjan to serve amended infringement contentions that were in accordance with my IC

7   Order, Narrowing Order, and the Patent Local Rules. *Id.* at 15.

8   **C.   Order on Amended Infringement Contentions**

9   Finjan then served its amended infringement contentions ("AICs") and Check Point moved

10   to strike the AICs, arguing that they were deficient in largely the same ways as before. *See*

11   Defendants' Motion to Strike Amended Infringement Contentions ("MTS AIC") [Dkt. No. 126]. I

12   agreed and made several rulings that I summarize below.[3] *See* Order Granting Motion to Strike

13   Infringement Contentions in Part (the "AIC Order") [Dkt. No. 192].

14   **1.   Grouping**

15   First, Check Point argued that Finjan violated the directives in the IC Order by renaming

16   its "groups" of products as the instrumentalities themselves and then referring to the actual

17   products in the groups as "features." MTS AIC at 15-18. It identified Finjan's charts as

18   purporting to describe infringement theories on the following actual products:

19   - <u>Network Security Products</u>: IPS, Anti-Bot, Anti-Virus, Threat Emulation, Threat

20   Extraction.

21   - <u>Endpoint Security</u>: Threat Emulation, Threat Extraction, AntiPhishing (zero

22   phishing), Anti-Ransomware, Anti-Bot, Forensics, Anti-Exploit, Anti-Virus, Anti-

23   Malware, SmartEvent.

24   - <u>ZoneAlarm</u>: Advanced Firewall, OSFirewall, Threat Emulation, Browser

25   Protection.

26   - <u>ThreatCloud</u>: Threat Emulation.

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[3] I did deny Check Point's motion to strike to the extent that it argued that Finjan's doctrine of

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