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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FINJAN, INC.,
Plaintiff,
v.
CHECK POINT SOFTWARE
TECHNOLOGIES, INC., et al.,
Defendants.

Case No. [18-cv-02621-WHO](#)

**ORDER DENYING MOTION TO
CERTIFY THE ORDER ENTERED AT
DKT. NO. 247 FOR INTERLOCUTORY
APPEAL**

Re: Dkt. No. 263

United States District Court
Northern District of California

In this patent infringement case, plaintiff Finjan, Inc. (“Finjan”) accuses defendant Check Point Software Technologies, Inc. and Check Point Software Technologies Ltd. (collectively “Check Point”) of infringing on several of its patents related to cyber security. There have been three rounds of infringement contentions in this case. On January 17, 2020, I granted in part Check Point’s motion to strike Finjan’s second amended infringement contentions (“SAICs”), which amounted to 5,135 charts, totaling to over 185,000 pages. *See* Order Granting in Part Motion to Strike Second Amended Infringement Contentions; Granting in Part Motions to Seal (the “SAIC Order”) [Dkt. No. 247]. Given the unmanageable size of Finjan’s SAICs, I appointed a special master to determine if other contentions should be struck in accordance with the SAIC Order. *See* Order Appointing Special Master [Dkt. No. 261].

Before me is Finjan’s request that I certify the SAIC Order for interlocutory review of whether Patent Local Rule 3 requires a party claiming patent infringement to provide pinpoint source code citations for every element of every asserted claim. It also seeks to stay the proceedings and permit it limited discovery while the appeal is pending. I conclude that Finjan has failed to identify a pure question of law over which substantial grounds for difference exists

1 and that an interlocutory appeal would further prolong this already-prolonged litigation. Finjan's
2 motion to certify the SAIC Order for interlocutory appeal is DENIED.

3 BACKGROUND¹

4 In September 2018, I received briefing from the parties on how to manage this litigation in
5 compliance with Federal Rule of Civil Procedure 1's mandate of a "just, speedy, and inexpensive
6 determination of this action[.]" Order Re Case Narrowing and Infringement Contentions (the
7 "Narrowing Order") [Dkt. No. 29]. I then ordered Finjan to serve its infringement contentions
8 under specifications that largely follow the provisions of this District's Patent Local Rules as well
9 as the guidance provided in the since withdrawn 2013 Model Order from the Federal Circuit. *See*
10 Narrowing Order. Finjan was instructed to "include pinpoint source code citations . . .
11 accompanied by the document production required by Patent Local Rule 3-2" and to also:

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

19 *Id.* at 2.

20 On February 27, 2019, I granted in part Check Point's motion to strike Finjan's
21 infringement contentions ("ICs") because they violated my Narrowing Order and the Patent Local
22 Rules. *See* Order Granting Motion to Strike in Part; Granting Motions to Seal; Granting Motion to
23 Amend Claim Construction Schedule (the "IC Order") [Dkt. No. 84]. Among other things, I
24 specifically ordered Finjan to provide pinpoint source code citations that show "where and how
25 each limitation of each asserted claim is found within each Accused Instrumentality." *Id.* at 12;
26 *see also id.* at 11 ("It is Finjan's obligation to identify the particular claim components in each
27 claim, map those components onto the features of the allegedly infringing products, and pinpoint
28 cite source code that practices that component.").

29 Finjan then served its amended infringement contentions ("AICs"). Check Point moved to

30 ¹ I summarized the facts of this case in more detail in the January 17, 2020 SAIC Order. *See*

1 strike, arguing that they were deficient in largely the same ways as before. On August 12, 2019, I
2 granted Check Point's motion in part. *See* Order Granting Motion to Strike Infringement
3 Contentions in Part (the "AIC Order") [Dkt. No. 192]. In relevant part, I found that Finjan had
4 already been directed to provide pinpoint source code citations for each limitation and held that
5 "[t]o the extent any or all of the 30 of the accused instrumentalities lack pinpoint citations, they are
6 struck with prejudice." *Id.* at 11. Where Finjan used the same source code for different things, I
7 allowed it to "amend its infringement contentions to better explain why the same source code []
8 applies to wholly different limitations." *Id.* I allowed Finjan limited leave to amend its
9 infringement contentions "one last time within fourteen days." *Id.* at 18. I cautioned that "if any
10 of its infringement contentions remain deficient, they may not form the basis for relief in this
11 action." *Id.*

12 On August 26, 2019, Finjan served its SAICs, containing 5,135 claim charts and totaling
13 more than 185,000 pages. SAIC Order at 7. Check Point moved to strike the SAICs for six
14 reasons. Before the hearing, I issued a tentative ruling on these six issues that was almost entirely
15 against Finjan; at the start of the hearing, Finjan abandoned its positions in response to most of the
16 tentative. *Id.* at 1.

17 In making my final ruling, I emphasized that "just because a contention crosses one of the
18 issue hurdles, it does not necessarily mean that it is sufficiently alleged because it could fail to
19 cross another issue hurdle." SAIC Order at 2 n.1. Ultimately, I struck with prejudice all
20 contentions identified under Issue 1 (products and theories that were previously struck with
21 prejudice), Issue 2 (new accusations), and Issue 5 (contentions without pinpoint source code
22 citations). SAIC Order at 39. I struck with prejudice all inadequately identified and explained
23 combination contentions discussed under Issue 3, and I decided to appoint a special master to
24 determine if the other accused combinations should also be struck. *Id.* Finally, I struck with
25 prejudice all examples discussed under Issue 6, and referred to the master the determination of
26 whether the other contentions should also be struck for inadequate source code explanations
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1 and/or failure to explain why the same source code applies in different cases. *Id.*²

2 On February 14, 2020, I appointed the Honorable Elizabeth D. Laporte, United States
3 District Court Magistrate Judge (Retired), as special master after neither party objected to my
4 notice of intent to appoint her. *See* Order Appointing Special Master [Dkt. No. 261]. On March
5 13, 2020, Special Master Laporte set a briefing schedule, but on the same day Finjan filed this
6 motion to certify interlocutory appeal, to stay, and to permit limited discovery. *See* Plaintiff
7 Finjan Inc.'s Notice of Motion and Motion to Certify the Court's January 17, 2020 Order (Dkt.
8 No. 247) For Interlocutory Appeal, to Stay, and to Permit Limited Discovery ("Mot.") [Dkt. No.
9 263].

10 LEGAL STANDARD

11 Appellate review before a final judgment is appropriate "only in exceptional cases where
12 decision of an interlocutory appeal might avoid protracted and expensive litigation." *U.S. Rubber*
13 *Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). For the court of appeals to have jurisdiction
14 over an interlocutory appeal, the order must involve: (i) a controlling question of law; (ii)
15 substantial grounds for difference of opinion; and (iii) a likelihood that an immediate appeal may
16 materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). Section 1292
17 "was not intended merely to provide review of difficult rulings in hard cases." *Id.* Certification is
18 at the discretion of the district court. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995).

19 A party seeking to certify an issue for interlocutory review bears the burden of showing
20 that each of the three requirements are satisfied and that a departure from long-standing policy is
21 justified. *Stiner v. Brookdale Senior Living, Inc.*, 383 F. Supp. 3d 949, 957 (N.D. Cal. 2019).
22 Even when the moving party can meet the requirements of Section 1292(b), a district court's
23 decision to grant or deny certification is entirely discretionary. *Nat'l Fair Hous. All. v. A.G.*
24 *Spanos Const. Inc.*, No. C 07-3255 SBA, 2008 WL 5273335, at *1 (N.D. Cal. Dec. 16, 2008). A
25 decision by the district court to deny certification of an issue is unreviewable. *Id.*

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29 ² I allowed Finjan to include the open-ended citations discussed under Issue 4 because it clarified
30 that these block citations will not be relied on to show infringement at trial, but to provide context

1 **DISCUSSION**

2 Finjan has not met its burden of satisfying all three requirements to justify the
3 extraordinary remedy it seeks. Interlocutory review is not appropriate because Finjan seeks
4 review of a mixed question of law and fact, it fails to show a substantial ground for a difference of
5 opinion, and an appeal would not materially advance this litigation.

6 **I. CONTROLLING QUESTION OF LAW**

7 A question of law is controlling if “resolution of the issue on appeal could materially affect
8 the outcome of the litigation.” *In re Cement Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). This
9 requirement helps ensure that section 1292(b) interlocutory appeals occur “sparingly and only in
10 exceptional cases” as Congress intended. *See id.* at 1027. A “mixed question of law and fact or
11 the application of law to a particular set of facts” by itself is not appropriate for permissive
12 interlocutory review. *Johnson v. Serenity Transportation, Inc.*, No. 15-CV-02004-JSC, 2017 WL
13 3168491, at *1 (N.D. Cal. July 26, 2017) (citation omitted); *see also Allen v. Conagra Foods, Inc.*,
14 No. 13-CV-01279-JST, 2013 WL 6000456, at *3 (N.D. Cal. Nov. 12, 2013) (denying
15 section 1292(b) certification because proposed appeal involved application of the relevant facts to
16 a regulation).

17 Finjan asserts that the SAIC Order raises the following controlling question of law:
18 “whether Patent Local Rule 3-1 requires pinpoint source code citations for every claim element,
19 particularly prior to the deposition phase of fact discovery, or if a Plaintiff may reasonably rely on
20 other evidence of infringement to provide the ‘where and how’ of infringement for certain
21 limitations.” Mot. 7-8. But contrary to Finjan’s formulation of the question, the SAIC Order did
22 not simply apply Patent Local Rule 3-1; it also applied the Narrowing Order, the IC Order and the
23 AIC Order.

24 I exercised my inherent broad discretion in supervising the pretrial phase of litigation and
25 managing my docket when I entered the Narrowing Order in this case. *See Johnson v. Mammoth*
26 *Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir.1992) (citation omitted); *Dietz v. Bouldin*, 136 S. Ct.
27 1885, 1892 (2016). At the Initial Case Management Conference, I directed the parties to submit

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