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9 *Attorneys for Defendant*
10 QUALYS INC.

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **OAKLAND DIVISION**

14 FINJAN LLC, a Delaware Limited Liability
15 Company,

16 Plaintiff,

17 v.

18 QUALYS INC., a Delaware Corporation,

19 Defendant.

) CASE NO.: 4:18-cv-07229-YGR (TSH)

)
) **QUALYS INC.’S REPLY IN**
) **SUPPORT OF MOTION TO**
) **STRIKE FINJAN LLC’S**
) **INFRINGEMENT CONTENTIONS**

) **Judge: Hon. Yvonne Gonzalez**
) **Rogers**

) **Date: December 8, 2020**

) **Time: 2:00pm**

) **Location: Zoom Teleconference¹**

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28 ¹ Per the Court’s Notice regarding Civil Law and Motion Calendars and its Order at D.I. 48

1 **I. INTRODUCTION**

2 Qualys's Motion (Dkt. 126, "Mot.") asks the Court to strike select infringement
3 contentions—those that violate the Court's claim construction order by either: (1) failing to
4 identify hardware in the accused software products for the "receiver" and "transmitter" claim
5 limitations; or (2) failing to identify where or how the accused products process "modified
6 content".

7 As to the first category, Finjan agrees, at least for the '154, '968, and '494 patents, that the
8 Court determined the claimed "receiver" and "transmitter" limitations require *hardware*. Finjan
9 also agrees that thirteen of the fourteen accused products are *software* products. Finjan's
10 contentions, which do not identify any hardware in the accused software products for the
11 "receiver" and "transmitter" limitations in the contentions *at issue in this Motion*, violate Patent
12 L.R. 3-1(c) and should be stricken. Nothing in Finjan's opposition refutes this. Instead, Finjan
13 attempts to confuse and mislead the Court by citing to *other* contentions not at issue here and that
14 Qualys does not ask the Court to strike.

15 As to the second category, Finjan argues that its infringement contentions were not required
16 to identify "modified" content because Finjan was not collaterally estopped from advancing a
17 proposed construction that contained no such limitation. Again, Finjan's strawman argument
18 misses the point. During claim construction, this Court deferred addressing whether the "content
19 processor" of the '154 patent must process "modified" content, explaining that the Federal
20 Circuit's decision would be binding. Finjan elected to not amend its infringement contentions
21 despite knowing that the "modified" content requirement may be applicable. Now, in light of the
22 Federal Circuit's affirmance, Finjan's infringement contentions are deficient and should be
23 stricken.

24 **II. FINJAN HAS NOT IDENTIFIED HARDWARE COMPONENTS IN THE**
25 **ACCUSED SOFTWARE PRODUCTS FOR THE RECEIVER AND**
26 **TRANSMITTER CLAIM LIMITATIONS**

27 Finjan does not dispute the two key issues underlying Qualys's motion with respect to the
28 "receiver" and "transmitter" limitations. First, Qualys has argued that the Court determined the
claimed "receiver" and "transmitter" limitations require *hardware*. Mot. 6-7. Finjan agrees with

1 Qualys on this point. *See* Opp. at 4 (alleging Finjan’s contentions for the ’408, ’494, and ’968
2 patents “explicitly identify physical scanning appliances as the receivers and/or transmitters of the
3 accused products”); *id.* at 7 (alleging Finjan’s contentions for the ’154 patent “identify accused
4 hardware for the transmitter and receiver limitations”). Second, Qualys has argued that with the
5 sole exception of the Scanner Appliance product, the thirteen other accused products are *all*
6 *software products*. Mot. at 2-3. Finjan also does not dispute this.

7 As explained for each individual patent below, Finjan erects strawman arguments by
8 pointing to contentions that Qualys has not asked the Court to strike. In each instance, Qualys
9 neglects to address the contentions Qualys is actually moving on.

10 ’408 patent

11 For the ’408 patent, Qualys asks to strike the entirety of Contention 1 for ’408 patent claim
12 1b. Dkt. 126-12 at 409. Finjan’s opposition is silent as to this contention, instead focusing on
13 alternative infringement theories not at issue in this motion. Qualys also seeks to strike only a
14 portion of Contention 2 for ’408 patent claim 1b—the phrase “includes a receiver component”—
15 because Finjan has not identified a *hardware receiver* for “[e]ach of the Accused [software]
16 Products.” *Id.* at 410. Finjan provides no reason why this portion of Contention 2 should not be
17 stricken. Instead, Finjan’s Opposition reproduces an excerpt from Contention 2 and highlights
18 portions of that Contention that Qualys is *not* moving on. *See* Opp. at 5 (citing Dkt. 126-12 at p.
19 410). Finjan also misleadingly crops out the heading above the excerpt, which states “1b.
20 Contention 2” and clearly shows this excerpt is *not* from Contention 1. Dkt. 126-12 at 410.

21 ’494 patent

22 Finjan’s response regarding the ’494 patent is likewise misleading and incorrect. Qualys
23 asks to strike the entirety of Contention 1 for ’494 patent claim 10b. Dkt. 126-12 at 472. Finjan’s
24 opposition is silent as to this contention. Qualys also seeks to strike only a portion of Contention
25 2 for ’494 patent claim 10b—the word “virtual” describing the “Qualys scanner”—because Finjan
26 has not identified how a *virtual* (i.e. software) scanner is a *hardware receiver* in “[e]ach of the
27 Qualys Accused [software] Products.” *Id.* at 473. Finjan provides no reason why this portion
28 should not be stricken. Instead, Finjan’s Opposition reproduces an excerpt from Contention 2 and

1 highlights portions of that Contention that Qualys is *not* moving on. *See* Opp. at 5 (citing Dkt.
2 126-12 at p. 473). Once again, Finjan strategically crops out the heading above the excerpt, which
3 states “10b. Contention No. 2” and clearly shows this excerpt is *not* from Contention 1. Dkt. 126-
4 12 at 473.

5 '968 patent

6 Finjan takes a similar misleading approach for the '968 patent. Qualys asks to strike the
7 entirety of Contention 1 for '968 patent claims 6 and 7. Dkt. 126-12 at 132 (claim 6), 134 (claim
8 7). Finjan's opposition is silent as to these contentions. Qualys also seeks to strike only a portion
9 from Contention 2 for '968 patent claim 6—the word “virtual” describing the “Scanners”—
10 because Finjan has not identified how a *virtual* (i.e., software) scanner is a *hardware transmitter*
11 in “[e]ach of the Accused [software] Products.” *Id.* at 133. Finjan provides no reason why this
12 portion should not be stricken. Instead, Finjan's Opposition reproduces an excerpt from
13 Contention 2 and highlights portions of that Contention that Qualys does *not* seek to strike here.
14 *See* Opp. at 6 (citing Dkt. 126-12 at p. 133). Once again, Finjan strategically crops out the heading
15 above the excerpt, which states “6. Contention No. 2” and clearly shows this excerpt is *not* from
16 Contention 1. Dkt. 126-12 at 133.

17 '154 patent

18 Finjan's response for the '154 patent is perhaps the most misleading of all. Here, Qualys
19 seeks to strike Contentions 2 through 8 for '154 patent claims 1c, 1d, 2, 4c, and 4d. Dkt. 126-12
20 at 386-392 (claim 1c), 394-400 (claim 1d), 401 (claim 2), 404 (claim 4c), 405 (claim 4d).² Finjan,
21 however, does not address these specific contentions. Finjan only repeats the same conclusory
22 statement from its contentions alleging that the accused software products have transmitters
23 because they have “network interfaces.” Opp. at 7. But Finjan does not explain how any of the
24 accused *software* products could have *hardware* network interfaces or transmitters. Instead,
25 Finjan hinges its argument on an excerpt from Contention 1 for claim 1's transmitter element.

26
27 ² Qualys does not ask the Court to strike the contentions for '154 patent claim 1b or 4b based
28 on the hardware receiver and transmitter limitations argument. *See* Dkt. 126-12 at 362-363, 375-
381, 384 (claim 1b), 403 (claim 4b). Qualys's dispute for these claim limitations concerns the
“content processor” limitation, which is addressed below in the next Section of this Reply. *See*
Section III *infra*

1 Opp. at 7 (“1c. Contention 1 – The Internet Gateway is the transmitter.”). But this is not a
2 contention Qualys is moving on. Finjan does not provide a citation to the record for this excerpt
3 and, in fact, Contention 1 for claim 1c is not even part of the exhibit (Dkt. 126-12) to Qualys’s
4 Motion that identifies (with highlighting) the specific portions of the contentions Qualys is asking
5 the Court to strike. Whether an “Internet Gateway is a transmitter” for the purpose of Contention
6 1 is not relevant to whether Contentions 2-8 violate Patent L.R. 3-1(c).

7 Finjan also argues that the Qualys Cloud Platform provides the necessary hardware
8 receiver and transmitter limitations. Opp. at 7-8.³ The issue with this is that Finjan relies on both
9 “physical” appliances, which Qualys does not dispute can be hardware, as well as “virtual
10 appliances, or lightweight agents,” which are *not* hardware. Finjan has not disclaimed its theory
11 that software appliances are hardware, and this is the improper contention that Qualys is asking
12 the Court to strike. To be clear, Qualys is not asking to strike the entirety of Finjan’s infringement
13 contentions, only those contentions that violate Patent L.R. 3-1(c).

14 Finally, the remainder of Finjan’s arguments for the ’154 patent are legally incorrect.
15 Finjan argues that the gaps in its infringement theories can be filled by the knowledge of a person
16 of ordinary skill in the art. Opp. at 7-9. But Finjan points to no authority permitting it to rely on
17 a person of ordinary skill in the art to plug gaps in its contentions. To the contrary, the Patent
18 Local Rules require “a chart identifying specifically where and how each limitation of each
19 asserted claim is found within each Accused Instrumentality.” Patent L.R. 3-1(c); *see also*
20 *Theranos, Inc. v. Fuisz Pharma LLC*, No. 11-CV-05236-YGR, 2012 WL 6000798, at *2 (N.D.
21 Cal. Nov. 30, 2012) (citing *Bender v. Maxim Integrated Prods., Inc.*, No. C 09–01152 SI, 2010
22 WL 1135762, at *2 (N.D. Cal. Mar. 22, 2010)) (“The rule is also intended to require the party
23 claiming infringement to crystallize its theories of the case early in the litigation and to adhere to
24 those theories once disclosed.”) (internal quotations omitted). While Finjan’s argument lacks legal
25 merit and should be rejected, it does serve as a helpful admission by Finjan that there are in fact
26 deficiencies in the contentions and the contentions thus violate Patent L.R. 3-1(c).

27
28 ³ Qualys’s Cloud Platform is also a software program and provides a website interface through
which customers can access Qualys’s other software products.

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