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FINJAN LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(OAKLAND DIVISION)

FINJAN LLC, a Delaware Limited Liability Company,	Case No. 4:18-cv-07229-YGR (TSH)
Plaintiff,	**FINJAN LLC'S OPPOSITION TO QUALYS INC'S RENEWED MOTION TO STRIKE PORTIONS OF PLAINTIFF FINJAN LLC'S INFRINGEMENT EXPERT REPORTS**
v.	
QUALYS INC., a Delaware Corporation,	
Defendant.	**[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]**
	DATE: June 8, 2021
	TIME: 2:00 PM
	JUDGE: Hon. Yvonne Gonzalez Rogers
	PLACE: Zoom Teleconference

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I.   INTRODUCTION

Qualys's renewed motion is flawed procedurally and substantively. In its "renewed" motion, Qualys expands the reach of the Court's Order and piles in additional portions of Dr. Medvidovic's report, raising issues beyond the Court left open for renewal. And for those issues the Court denied without prejudice, it fails to address the issue identified by the Court's Order: whether the "receiving" limitation occurred "based" on requests from a client device.

To reframe the issue from Qualys's original motion to strike, at issue was whether Dr. Medvidovic's infringement theory exceeded the scope of Finjan's infringement contentions for the "receiving . . ." limitation. The relevant limitation requires "receiving, by a computer, an incoming stream of program code." There is no limitation that specifies what requested the incoming stream, though obviously a stream would not be received unless something requested it. Dr. Medvidovic's infringement theory and Finjan's infringement contentions are in alignment: both refer to the same component (e.g., a scanner) performing the same function (receiving data from a client device), and Qualys raises no issues concerning the identity of what receives the incoming stream of program code.

Instead, Qualys's renewed motion turns on whether Dr. Medvidovic's infringement report expressly discusses, as part of his infringement analysis, whether infringement depends on superfluous language in the contentions (that received data is "based" on a request by a client device). Although Qualys faults Dr. Medvidovic's report for not importing limitations into the claims, he had no reason to provide an opinion on whether an unclaimed step was required. Notably, Qualys's expert did not provide any infringement opinions regarding whether vulnerability scanning is "based" on requests for content by a client device either. *See* Exh. A (Rubin Reb. Rpt.) at ¶¶ 169-179.

But what is critically ignored in Qualys's motion is that Qualys has not "demonstrate[d] that vulnerability scanning is not 'based' on requests for content by the client device," which was a prerequisite for renewal. ECF No. 188 at 7. Qualys identifies no evidence that suggests the receiving limitation does not follow a request for content by a client device. Qualys cannot because vulnerability scanning is based on requests for content from a client device. Qualys's

1   own documentation states that its vulnerability scanning "by default" evaluates "*all* traffic" on a

2   network. *See* Exh. B (QUALYS00453094) at 107 (emphasis added). And network traffic

3   necessarily involves requests by client devices.

4   For these and the reasons that follow, the Court should deny Qualys's motion.

5   **II.   BACKGROUND**

6   Qualys previously filed a motion to strike Dr. Medvidovic's report for at least seven

7   different reasons. *See* ECF No. 156-4. One of Qualys's arguments was that Dr. Medvidovic's

8   infringement theory for limitation 1(a) ("receiving, by a computer, an incoming stream of program

9   code") was not properly disclosed in Finjan's infringement contentions. *Id.* at 12-13. After

10   considering Finjan's infringement contentions, the Court concluded that (1) Finjan's infringement

11   contentions refer to the receipt of content based on a request from a client device; and (2) Finjan's

12   expert espoused a theory where the accused products may receive content from a client device:

13   Finjan's contentions state that the accused products receive content "based on a client

14   device requesting the content from a source computer, such as the Internet" and

15   "when a particular client device requests content provided by a source computer."

16   (Contentions at 2-4.) Dr. Medvidovic, however, opines that the accused

17   "Vulnerability Features" perform their network scans to detect vulnerabilities and

18   policy compliance regardless of content requests and may receive data from client

19   devices on the same network. (*See* Medvidovic Report ¶¶ 184-97.)

20   ECF No. 188 at 7:8-13.

21   The Court then stated, after reviewing the cited portions of Dr. Medvidovic's report, it

22   "cannot determine that they present a new theory." *Id.* at 7:14-15. The Court denied Qualys's

23   motion, but left open one specific issue: whether the accused vulnerability scanning is "based" on

24   requests for content by a client device. *Id.* at 7:18-20.

25   While Qualys's motion is purportedly a "renewal" of its motion to strike, it seeks to

26   expand its mandate, adding new grieves and new portions of Dr. Medvidovic's report it did not

27   originally move on, namely ¶¶ 184, 186, 188-194, which were not at issue in its prior motion.

28

III.   LEGAL STANDARD

The Court is familiar with the legal standards for a motion to strike infringement contentions, which are set forth in Finjan's opposition to Qualys's original motion and incorporated by reference herein. *See* ECF No. 163-3. For the issue underlying this motion, Qualys does not cite a single case where a court has struck an infringement report because the report failed to expressly opine on unclaimed features mentioned in the party's PLR contentions

IV.   ARGUMENT

A.   Qualys's New Motion is Not a Renewal of its Prior Motion

Qualys's prior motion sought to strike *six paragraphs* (¶¶ 185, 187, 195-197 and 214) of Dr. Medvidovic's Report relating to the "receiving . . ." limitation. ECF No. 156 at 12:4-5. The Court denied Qualys' motion to strike "without prejudice to renewal should Qualys demonstrate that vulnerability scanning is not 'based' on requests for content by the client device." ECF No. 188. Under the guise of a "renewed" motion, Qualys's new motion seeks to strike *thirteen paragraphs* from Dr. Medvidovic's report for the "receiving . . ." limitation—*only four* of which were included in Qualys's original motion: ¶¶ 185, 187, 195, 196. ECF No. 194 at 5:21-24. This is not a "renewal" of Qualys's prior motion—it is a new motion as to the paragraphs not cited in the original motion (¶¶ 184, 186, 188-194). And for the paragraphs that Qualys now seeks to strike referring to Cloud Agents (some or all of ¶¶ 185, 187, 195-196), Qualys's basis for seeking to strike those paragraphs was that Finjan did not accuse Cloud Agents *at all.* ECF No. 156 at 5 ("Finjan's infringement contentions for the '408 Patent do not accuse the Cloud Agent of practicing any limitation of any asserted claim of the '408 Patent."). The Court rejected that argument already, and Qualys should not be allowed a "do over"—the issue was already resolved.

Thus, Qualys's motion as to paragraphs ¶¶ 184, 186, 188-196 should be denied for improperly expanding the scope of the original underlying motion. As to the portions of ¶¶ 185, 187, 195-196 that refer to Cloud Agents, Qualys's motion should be denied as beyond the scope of the Court's Order on an issue where Qualys was already heard.

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