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16 *Attorneys for Defendant*
 17 QUALYS INC.

18 **IN THE UNITED STATES DISTRICT COURT**
 19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 20 **OAKLAND DIVISION**

21 FINJAN LLC	)	CASE NO.: 4:18-cv-07229-YGR (TSH)
)	
22 Plaintiff,	)	REPLY IN SUPPORT OF
	)	DEFENDANT QUALYS INC.'S
23 v.	)	RENEWED MOTION TO STRIKE
	)	PORTIONS OF PLAINTIFF FINJAN
24 QUALYS INC.,	)	LLC'S INFRINGEMENT EXPERT
	)	REPORTS
25 Defendant.)	
	)	Judge: Hon. Yvonne Gonzalez
	)	Rogers
)	
	)	Date: Tuesday, June 8, 2021
	)	Time: 2:00pm
	)	Location: Zoom Teleconference¹

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

1 **I. INTRODUCTION**

2 Finjan's Opposition says very little about Medvidovic's Report and the actual opinions
3 contained therein. Finjan certainly fails to show how Medvidovic's opinions disclose a theory of
4 infringement involving vulnerability scanning based on client devices' computer requests. Instead,
5 Finjan attempts to distract from Medvidovic's failure to remain consistent with Finjan's
6 infringement contentions by discussing Qualys's experts and citing technical documents (none of
7 which, of course, appear anywhere in Medvidovic's Report or Finjan's infringement contentions).

8 Setting these distractions aside, the question for the Court is clear: Do Medvidovic's
9 opinions about the '408 Patent's "receiving" limitation exceed the scope of Finjan's infringement
10 contentions? The answer is yes. Finjan's contentions conditioned infringement upon a claimed
11 computer receiving content based on a client device's request for that content. But even Finjan
12 concedes (Opposition at 5) that Medvidovic's report offers no opinion conditioning infringement
13 on a client device requesting content. Rather, what Medvidovic calls the claimed "computer" is
14 nowhere shown to perform vulnerability scans "based on" a client device's request for content but
15 instead simply based on customer-configurations directing an automatic process that is
16 independent of any end-user devices. For these reasons, discussed more fully below, Qualys's
17 motion should be granted.

18 **II. ARGUMENT**

19 As an initial point, Finjan nowhere disputes Qualys's discussion of what a "client device"
20 is in the pertinent field, particularly in the context of the Court's Claim Construction Order in this
21 case. *Compare* Motion at 2-3 *with* Opposition at 5, fn. 2. Finjan merely argues that because the
22 term "client device" does not appear in the claims, the Court should ignore Qualys's arguments.
23 But, of course, it was Finjan who placed the meaning of "client device" at issue by conditioning
24 infringement of the '408 Patent on a client device requesting content. *See* Exhibit 5, D.I. 158-6,
25 at 2-4. In any event, Finjan does not dispute that a client device refers to an end-user's device that
26 requests content.

27

28

1 **A. This Motion Seeks to Strike Only Those Paragraphs of the Medvidovic**
2 **Report Pertaining to His New Theory for the “Receiving” Limitation.**

3 Finjan takes issue with the fact that the instant motion identifies additional paragraphs of
4 Medvidovic’s report from Qualys’s previous motion. But Qualys seeks to strike those
5 paragraphs—and *only* those paragraphs—that pertain to Medvidovic’s “receiving” limitation for
6 the Vulnerability Management line of products. *See* Exhibit 13, D.I. 194-2, at ¶¶184-196. Qualys
7 has correctly identified, based on the Court’s Order, those paragraphs where Medvidovic renders
8 opinions about infringement of the “receiving” limitation that are not based on a client device’s
9 request for content (and therefore exceed the scope of Finjan’s infringement contentions). *See* D.I.
10 188 at 7. Therefore, these paragraphs each fall within the scope of the Court’s Order and are
11 properly the subject of this Renewed Motion.

12 **B. Finjan’s Infringement Contentions Do Not Disclose Medvidovic’s Theory for**
13 **the “Receiving” Limitation.**

14 The parties agree that Medvidovic’s theory of infringement is that Qualys scanners receive
15 content. Where the parties disagree is that Medvidovic’s opinions do not premise the receipt of
16 that content on a *client device’s* request. Finjan argues that both its infringement contentions and
17 Medvidovic’s report identify Qualys’s scanners as being part of the claimed “computer.” But that
18 straw man argument fails to address the core issue: Finjan’s infringement contentions specifically
19 state that the claimed computer receives content “based on a client device requesting the content
20 from a source computer.” Exhibit 5, D.I. 158-6, at 2-3. Meanwhile, Finjan concedes that
21 Medvidovic “did not expressly opine that a client device must request content for there to be
22 infringement.” Opposition at 5. Medvidovic’s opinions no longer require any client device
23 whatsoever, and thus jettison a foundational condition for infringement disclosed in Finjan’s
24 infringement contentions. Medvidovic’s opinions are thus necessarily broader than the scope of
25 the contentions and should be struck.

26 **C. Finjan and Medvidovic Fail to Show that Vulnerability Scanning is Based on**
27 **Client Device’s Requests for Content.**

28 Finjan argues that Qualys’s motion should be denied because Qualys cannot prove that
Vulnerability Scanning is not based on Requests from a client device. This argument is incorrect:
as discussed in its opening brief, Medvidovic’s report shows that vulnerability scanning occurs

1 based on customer configurations as to when and where scans will occur. *See* Motion at 3-5. Any
2 content requests come from Qualys’s scanners, not an end-user device. *See id.* at 4. Finjan does
3 not dispute these facts. Moreover, Finjan improperly shifts the burden of infringement and the
4 local rules – Finjan bears the burden of disclosing its infringement theories and ensuring that its
5 experts’ opinions on infringement are consistent with those disclosures, not Qualys. And, of
6 course, it is Finjan that bears the ultimate burden of proving infringement. Finjan’s argument that
7 Qualys cannot prove a negative—*i.e.*, that vulnerability scanning is not based on requests from a
8 client device—merely obfuscates the fact that Finjan cannot point to a portion of Medvidovic’s
9 report opining that vulnerability scans are based on a client device’s request for content.

10 Finjan also argues that the claims do not require vulnerability scans to be based on a client
11 device requesting content. But that argument is legally immaterial, because this motion pertains
12 to Finjan’s disclosed infringement theory and whether Medvidovic’s opinions are consistent with
13 that theory. Specifically, what matters here is that (a) *Finjan’s* infringement theory required a
14 computer to receive content based on a client device’s content request, and (b) Medvidovic’s
15 opinions are inconsistent with the original theory because his infringement opinions no longer
16 involve client devices requesting content, let alone such a request being the basis of a vulnerability
17 scan. *See* Exhibit 5, D.I. 158-6, at 2-3; Opposition at 5 (conceding point). Put another way,
18 because Medvidovic opines that infringement can occur even if no client device requests content,
19 his opinions go beyond the scope of Finjan’s contentions and should be struck.

20 Finjan next argues that Qualys’s products necessarily include a “client device,” citing
21 portions of Qualys’s expert’s report as well as several technical documents. There are two
22 problems with this argument. First, Finjan makes no attempt to show that these materials (or the
23 information disclosed therein) appear anywhere in either its infringement contentions or were ever
24 considered or discussed in Medvidovic’s report. The issue here is the scope of Medvidovic’s
25 opinions, not how Finjan’s attorneys may interpret documents appearing nowhere in Medvidovic’s
26 report. Such extrinsic materials are not probative of whether Medvidovic’s opinions are consistent
27 with Finjan’s infringement contentions.

28

1 Second, Finjan now suggests that devices like the Qualys Cloud Platform and the Qualys
2 scanners are “client devices” that request content. To be clear, there is no dispute that Qualys’s
3 scanners can make content requests. *See* Motion at 4-5 (*citing* Exhibit 13, D.I. 194-2 at ¶¶ 186,
4 188, and 190). But Medvidovic did not opine that these scanners or the Cloud Platform are the
5 “client devices.” Rather, Medvidovic specifically opined that these components *were the claimed*
6 *“computer” that receives content*. *See* Motion at 4-5; Exhibit 13, D.I. 194-2 at ¶¶ 185 (“At a high
7 level, the Qualys Cloud Platform relies on different techniques for scanning content that results in
8 the receipt, by a computer (the scanner engine of Qualys Cloud Platform used by the Vulnerability
9 Features, the WAS scanner of the Qualys Cloud Platform, or the Qualys Cloud Platform working
10 with a Cloud Agent”) and 196 (“Thus, in this example of the Vulnerability Features, the Qualys
11 Cloud Platform includes a ‘computer,’ such as the scanner engine, and the collected data by that
12 scanner engine...”). Thus, Finjan’s argument is not probative because it is unconnected to the
13 scope of Medvidovic’s opinions. Indeed, given Medvidovic’s opinion that the scanners and Cloud
14 Platform are the “computer” of the ‘408 Patent’s claims, the materials Finjan cites actually support
15 *Qualys’s* point that Medvidovic opined that the claimed computer—not a client device—requests
16 content.

17 **D. Finjan’s Cloud Agent Arguments Miss the Point**

18 Finjan finally argues that some of the challenged paragraphs contain opinions about the
19 “Cloud Agent” and should therefore be excluded. This, again, misses the point. Although the
20 Court determined that Finjan sufficiently disclosed Cloud Agents as an accused product in its
21 infringement contentions for the ‘408 Patent, the Court did not find that Medvidovic opined about
22 the Cloud Agents in a manner consistent with Finjan’s infringement contentions. Similar to
23 Medvidovic’s opinions involving scanners, Medvidovic’s Cloud Agent opinions do not discuss or
24 involve any vulnerability scans being based on a client device requesting content. *See* Motion at
25 4-5.

26 Finjan’s argument that “Qualys does not dispute the client devices request content, which
27 is the relevant inquiry” is also flawed. Opposition at 8. Both parties agree that Cloud Agents are
28 software installed on end-user computers. *See* D.I 194 at 4-5. Medvidovic nowhere opines that

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