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 BLUE COAT SYSTEMS LLC

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 SAN JOSE DIVISION

21 FINJAN, INC., a Delaware Corporation,

22 Plaintiff,

23 v.

24 BLUE COAT SYSTEMS LLC, a Delaware
 25 Corporation,

26 Defendant.

Case No.: 15-cv-03295-BLF-SVK

**DEFENDANT BLUE COAT SYSTEMS
 LLC'S MOTION IN LIMINE NO. 1
 REGARDING DAUBERT OF DR.
 CHRISTINE MEYER**

Pretrial: October 5, 2017
 Time: 1:30 p.m.
 Place: Courtroom 3, 5th Floor
 Judge: Honorable Beth Labson Freeman

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BLUE COAT'S MOTION IN LIMINE NO. 1

TABLE OF ABBREVIATIONS

1		
2	Plaintiff Finjan, Inc.	Finjan or Plaintiff
3	Defendant Blue Coat Systems LLC	Blue Coat or Defendant
4	Expert Report of Christine Meyer	Ex. 1
5	Deposition Transcript of Dr. Christine Meyer	Ex. 2
6	U.S. Patent No. 6,154,844	'844 patent
7	U.S. Patent No. 6,965,968	'968 patent
8	U.S. Patent No. 7,418,731	'731 patent
9	U.S. Patent No. 8,079,086	'086 patent
10	U.S. Patent No. 8,225,408	'408 patent
11	U.S. Patent No. 8,677,494	'494 patent
12	U.S. Patent No. 9,189,621	'621 patent
13	U.S. Patent No. 9,219,755	'755 patent
14	'844, '968, '731, '086, '408, '494, '621, and '755 patents, collectively	asserted patents
15	Dynamic Real Time Rating	DRTR
16	Global Intelligence Network	GIN
17	Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in Limine	Brewer Decl. ¹
18	<i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , No. 5:13-cv-03999-BLF (N.D. Cal.)	<i>Blue Coat I</i>
19	<i>Finjan, Inc. v. Sophos, Inc.</i> , No. 14-cv-01197-WHO (N.D. Cal.)	<i>Sophos</i>
20	<i>Finjan Software Ltd. v. Secure Computing Corp.</i> , No. 6-cv-00369-GMS (D. Del.)	<i>Secure Computing</i>
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¹ Unless otherwise specified, all exhibits refer to those attached to the Brewer Decl.

1 Blue Coat does not challenge Dr. Meyer’s use of a feature-based apportionment method in
2 this case. Blue Coat does challenge Dr. Meyer’s inflation of the royalty base by double-counting
3 features, estimating revenue when actual revenue was available, and including foreign sales;
4 unreliable royalty rate; and unsupported kickers and “checks.” Pursuant to Federal Rules of
5 Evidence 702 and 703, Blue Coat moves this Court for an order excluding WebPulse revenue or,
6 in the alternative, adjusting WebPulse revenue to remove inflation; the 8% and 16% royalty rates;
7 the kicker for the Symantec acquisition; and the reasonableness check and bargaining range.

8 I. LEGAL STANDARD

9 Admissibility of expert testimony is governed by *Daubert v. Merrell Dow Pharms., Inc.*,
10 509 U.S. 579 (1993) and Federal Rules of Evidence 702 and 703. The party offering the testimony
11 bears the burden of proving admissibility by a preponderance of evidence. *Id.* at 592, n.10.
12 District courts “are charged with a ‘gatekeeping role,’ the objective of which is to ensure that
13 expert testimony admitted into evidence is both reliable and relevant.” *Sundance, Inc. v. De Monte*
14 *Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008). “An expert witness may provide opinion
15 testimony if: (1) the testimony is based upon sufficient facts or data; (2) the testimony is the
16 product of reliable principles and methods; and (3) the expert has reliably applied the principles
17 and methods to the facts of the case.” *GPNE Corp v. Apple, Inc.*, No. 12-cv-02885-LHK, 2014
18 WL 1494247, at *2 (N.D. Cal. Apr. 16, 2014).

19 II. INFLATION OF ROYALTY BASE

20 **Double-Counting of Features:** When two patents cover the same feature, the value
21 associated with that feature may only be included in the royalty base once. *See Finjan, Inc. v.*
22 *Sophos, Inc.*, No. 14-cv-01197-WHO, 2016 WL 4268659, at *3 (N.D. Cal. Aug. 15, 2016)
23 (involving similar patents and damages methodology). *Id.* The Court explained (using the ’844
24 and ’494 patents as examples) that, where Finjan’s expert opined that both patents covered the
25 “threat engine” feature, “what is not possible, as a matter of law and logic, is that the ’844 and
26 ’494 patents combined add more value to the threat engine feature than its total value.” *Id.* at *3-4.
27 As Finjan’s expert counted certain features multiple times when those features were covered by
28 multiple patents, the Court found the “calculation results in an inflated damage calculation that is

1 likely to mislead the jury” and the methodology is unreliable. *Id.*

2 In this case, Dr. Meyer recognizes the need to avoid double-counting features and to
 3 account for damages awarded in *Blue Coat I*, but nonetheless still double-counts features from
 4 *Blue Coat I*. See e.g., Ex. 1 ¶ 148 (“If any single feature is related to more than one Finjan patent,
 5 such a feature is counted only once . . .”); *Id.* ¶ 149 (“[M]y damages analysis ensures that there is
 6 no overlap of damages for patents that were already accounted for in the first case and no double-
 7 counting.”). To properly account for *Blue Coat I*, Dr. Meyer testified it would be necessary to
 8 analyze any overlapping features between the two cases, but Dr. Meyer was under the mistaken
 9 impression that there was no such overlap. See Ex. 2 at 208:25-209:15 (“I was careful . . . to make
 10 sure that to the extent that there are products and patents that are at issue in this case and that were
 11 at issue in a previous case, that the damages that I’m calculating relate to different features or
 12 functionality that I believe . . . were not considered in that case.”).

13 Dr. Meyer’s report nevertheless demonstrates that there is complete overlap of features
 14 between this case and *Blue Coat I* relating to WebPulse. In *Blue Coat I*, Finjan was awarded
 15 damages for WebPulse on the ’844 patent. *Blue Coat I*, Dkt. No. 438. It is not enough to remove
 16 WebPulse from the count on the ’844 patent in this case, Dr. Meyer must remove the features for
 17 which Finjan has already been compensated from the damages calculation across all patents.
 18 *Sophos*, at *4 (explaining that “[i]f Finjan’s patented technologies are truly overlapping then it can
 19 in fact only recover damages as if one patent is in suit.”). In this case, WebPulse is accused of
 20 infringing the ’408, ’494, ’621, and ’086 patents. Dr. Meyer identifies the features of WebPulse
 21 that relate to the asserted patents in this case, as well as to the ’844 patent, as summarized below.
 22 Ex. 1 ¶ 143, n. 433. The chart shows the complete overlap between the ’844 patent in *Blue Coat I*
 23 (blue) and the asserted patents (green).

Feature Count / Name		Blue Coat II				Blue Coat I
		'408	'494	'621	'086	'844
1	[REDACTED]	X	X		X	X
2	[REDACTED]	X	X	X	X	X
3	[REDACTED]		X			X
4	[REDACTED]	X	X	X	X	X
5	[REDACTED]	X	X		X	X

	Feature Count / Name	Blue Coat II				Blue Coat I
6	[REDACTED]	x	x		x	x
7	[REDACTED]	x	x	x	x	x
8	[REDACTED]	x	x		x	x
9	[REDACTED]		x		x	x
10	[REDACTED]		x			x
11	[REDACTED]		x	x		x

Damages in *Blue Coat I* already account for the total value of all WebPulse features in this case. Accordingly, Finjan is not entitled to recover damages on WebPulse again. Dr. Meyer's failure to fully account for the damages award in *Blue Coat I* under her own methodology renders her opinion on damages for WebPulse unreliable. All WebPulse revenue should be excluded.²

Inflation of WebPulse Revenue: Blue Coat maintains that all WebPulse revenue should be excluded as double-counted. If any is allowed, it must be adjusted to remove Dr. Meyer's [REDACTED] of inflation resulting from unsupported estimates and [REDACTED] of inflation for improper counting for foreign sales.

Despite having actual revenue, Dr. Meyer relies on estimated WebPulse revenue. All admitted expert testimony or evidence must be reliable and based on sufficient facts or data. *Daubert*, 509 U.S. at 589; Fed. R. Evid. 702. Here, Dr. Meyer's inflated estimates are contradicted by the actual data. In estimating WebPulse revenue, Dr. Meyer relies on a single presentation that identifies 2016 bookings for GIN. Ex. 1 at ¶ 134; Ex. 3. The presentation defines GIN as Blue Coat WebFilter and Intelligence Services. Ex. 3 at BC2-1888583. Blue Coat provided actual revenue for WebFilter³ and Intelligence Services⁴ that should have been used. Instead, Dr. Meyer uses the presentation's 2016 bookings for GIN and year-to-year growth figures to estimate past and future revenue. Ex. 1 at ¶ 134. Dr. Meyer's only justification for using an approximation when the actual numbers were available is that no other document was labeled GIN. Ex. 2 at

² The same problem likely exists relating to the '731 and '968 patents, but Dr. Meyer did not identify features for ProxySG on those patents.

³ The parties agreed in *Blue Coat I* to use WebFilter revenues as a proxy for WebPulse. *Blue Coat I*, Dkt No. 273-4 at 10.

⁴ Intelligence Services is a subscription service not independently implicated in this case. It is, therefore, a conservative measure of WebPulse revenue to say that Finjan should have used actual revenue for WebFilter and Intelligence Services. That conservative measure is still [REDACTED] less than Dr. Meyer's estimate.

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