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BLUE COAT SYSTEMS LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FINJAN, INC., a Delaware Corporation,

Plaintiff,

v.

BLUE COAT SYSTEMS LLC, a Delaware Corporation,

Defendant.

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

DEFENDANT BLUE COAT SYSTEMS LLC'S MOTION IN LIMINE NO. 5 TO EXCLUDE IRRELEVANT FINANCIAL INFORMATION AND CERTAIN DAMAGES ARGUMENTS

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

TABLE OF ABBREVIATIONS

Plaintiff Finjan, Inc.	Finjan or Plaintiff
Defendant Blue Coat Systems LLC	Blue Coat or Defendant
Expert Report of Christine Meyer	Ex. 1
Deposition Transcript of Dr. Christine Meyer	Ex. 2
Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in Limine	Brewer Decl.[1]
Finjan, Inc. v. Blue Coat Systems, Inc., No. 5:13-cv-03999-BLF (N.D. Cal.)	*Blue Coat I*
Finjan, Inc. v. Sophos, Inc., No. 14-cv-01197-WHO (N.D. Cal.)	*Sophos*

[1] Unless otherwise specified, all exhibits refer to those attached to the Brewer Decl.

Finjan has identified approximately 1,200 trial exhibits, 8 expert witnesses, and 27 fact witnesses, rendering it largely impossible for Blue Coat to know what Finjan intends to present at trial. But Finjan has developed a track record that is a harbinger of things to come, and there are indications that Finjan intends to follow its playbook here. By this motion, Blue Coat seeks to proactively address anticipated issues to avoid the presentation of improper material to the jury.

Specifically, Finjan has a track record of advancing what it calls a "fact-based theory" of damages—which means that Finjan ***plans in advance*** to present ***new*** damages theories at trial. In each of its last two trials, Finjan has used attorney argument to introduce undisclosed damages theories. Finjan's arguments are predicated on its misapprehension that a reasonable royalty—the measure of damages Finjan disclosed—is the "floor" or a "bare minimum" and that Finjan is entitled to more. Finjan has yet to disclose that it intends to seek more than a reasonable royalty in this case, but Blue Coat has every reason to believe that it is coming.[2] Finjan also seeks to introduce highly prejudicial and irrelevant financial information, such as Blue Coat's total revenues and the price paid by Symantec to acquire Blue Coat. Pursuant to Federal Rule of Evidence 403 and Federal Rule of Civil Procedure 37, Blue Coat moves to preclude Finjan from arguing that it is entitled to more than a reasonable royalty and from introducing prejudicial financial documents not tied to the accused products.

I. LEGAL STANDARDS

Damages arguments may be excluded. Motions in limine arise from "the district court's inherent authority to manage the course of trials." *Luce v. U.S.*, 469 U.S. 38, 41 n.4 (1984). Motions in limine may be used to limit the scope of damages arguments. *Kassim v. City of Schenactady*, 415 F.3d 246, 250 (2nd Cir. 2005). Motions in limine may also be used as a means of excluding evidence and arguments not properly disclosed in accordance with Rule 37. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-06 (9th Cir. 2001).

[2] Both parties' experts opined that the appropriate measure of damages is a lump sum reasonable royalty, but Finjan edited the jury materials to suggest that there is more than one way to calculate lump sum damages and the jury could apply a "price per user" calculation. Ex. 100. Finjan removed language from the verdict form that damages would be limited to patents found infringed and to the life of the patents. Ex. 101. While Blue Coat can see that new damages theories are coming, they have not been adequately disclosed leaving Blue Coat to speculate based on Finjan's track record regarding exactly what they will be.

Damages theories must be disclosed. A patentee is required to disclose "a computation of each category of damages claimed." Fed. R. Civ. P. 26(a)(1)(A)(iii). Undisclosed theories are excluded unless the failure to disclose was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1). Courts preclude parties from introducing undisclosed damages theories during trial. *See, e.g., MicroStrategy, Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1356 (Fed. Cir. 2010) ("The district court also acted within its discretion in excluding MicroStrategy's non-expert damages theories"); Ex. 102, *Radware, Ltd. v. F5 Networks, Inc.*, No. 13-cv-02024-RMW, Dkt. No. 547, slip op. at *1 (N.D. Cal. March 10, 2016) ("Radware indicated that it intends to present damages theories in its closing argument seeking more than twice the damages that its retained expert on damages computed. . . . Radware will not be allowed to do so."); *see also, Sophos*, Ex. 103 at 1735-37 (Following an objection during closing arguments, counsel for Finjan responded that it was allowed to develop a "fact-based theory" and that it should not be "limited to what the damages expert said" to which the Court responded: "I'm not going to allow you to do this.").

Damages arguments must be not be speculative. Evidence in support of damages "must be reliable and tangible, and not conjectural or speculative." *Garretson v. Clark*, 111 U.S. 120, 121 (1884); *see also LaserDynamics, Inc. v. Quanta Comp., Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012). A damages theory must be based on sound economic and factual predicates. *LaserDynamics*, 694 F.3d at 67; *see also Oiness v. Walgreen Co.*, 88 F.3d 1025, 1033 (Fed. Cir. 1996) ("Without credible economic testimony, this court cannot permit a jury to base its award on speculation."). Damages must be proven with concrete and reliable evidence. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014).

A reasonable royalty is not the "floor" for Finjan. There are two types of damages—lost profits and reasonable royalties. *See, e.g., Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078 (Fed. Cir. 1983) ("There are two methods by which damages may be calculated under [§ 284]. If the record permits the determination of actual damages, namely, the profits the patentee lost from the infringement, that determination accurately measures the patentee's loss. If actual damages cannot be ascertained, then a reasonable royalty must be determined."). When 35 U.S.C. § 284 says, upon a finding of infringement, "the court shall award the claimant damages

adequate to compensate for the infringement, but in no event less than a reasonable royalty," it means that when lost profits are unavailable or inadequate to compensate the patent owner, a reasonable royalty should be calculated either instead of lost profits or to make up the difference. *See State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1577 (Fed. Cir. 1989) ("[T]he award may be split between lost profits as actual damages to the extent they are proven and a reasonable royalty for the remainder."); *Panduit Corp. v. Stahlin Bros. Fibre Works*, 575 F.2d 1152, 1157 (6th Cir. 1978) ("When actual damages, e.g., lost profits, cannot be proved, the patent owner is entitled to a reasonable royalty."). Finjan did not and could not advance a lost profits theory and, as such, Finjan is limited to a reasonable royalty. *See, e.g., Hanson*, 718 F.2d at 1078.

II. FINJAN SHOULD NOT BE PERMITTED TO ASK THE JURY FOR MORE THAN ITS DISCLOSED REASONABLE ROYALTY

The Federal Rules prevent Finjan from using trial to advance an undisclosed damages theory. *See* Fed. R. Civ. P. 26(a)(1)(A)(iii); Fed. R. Civ. P. 37(c)(1). Finjan responded to an interrogatory requesting identification of Finjan's reasonable royalty theory as follows:

[redacted]

Ex. 12 Response to Interrogatory No. 11 at 38-39 (emphasis added). Other approaches may have been "considered," but the only "details of the amount and basis for such reasonable royalty … found in Finjan's forthcoming expert report" are reasonable royalties based upon feature apportionment.[3] Ex. 1. Finjan provided no additional detail in response to an interrogatory

[3] Dr. Meyer did present "a reasonableness check" based on a per user fee. Ex. 1 at ¶¶ 170-74. It is among the subjects of Blue Coat's *Daubert* motion, in part, because it is for a single product, is not specific to any patent, is not the basis for a reasonable royalty calculation, has no evidentiary

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