

1 STEFANI E. SHANBERG (State Bar No. 206717)
sshanberg@mofo.com

2 JENNIFER J. SCHMIDT (State Bar No. 295579)
jschmidt@mofo.com

3 NATHAN B. SABRI (State Bar No. 252216)
nsabri@mofo.com

4 ROBIN L. BREWER (State Bar No. 253686)
rbrewer@mofo.com

5 EUGENE MARDER (State Bar No. 275762)
emarder@mofo.com

6 MADELEINE E. GREENE (State Bar No. 263120)
mgreene@mofo.com

7 MICHAEL J. GUO (State Bar No. 284917)
mguo@mofo.com

8 MORRISON & FOERSTER LLP
425 Market Street

9 San Francisco, California 94105
Telephone: (415) 268-7000

10 Facsimile: (415) 268-7522

11 DAVID A. NELSON (*Pro Hac Vice*)
davenelson@quinnemanuel.com

12 NATHAN A. HAMSTRA (*Pro Hac Vice*)
nathanhamstra@quinnemanuel.com

13 QUINN EMANUEL URQUHART & SULLIVAN LLP
500 W. Madison Street, Suite 2450

14 Chicago, Illinois 60661
Telephone: (312) 705-7400

15 Facsimile: (312) 707-7401

16 Attorneys for Defendant
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 OPPOSITION TO PLAINTIFF
FINJAN, INC.'S MOTION IN LIMINE
NO. 2 TO PRECLUDE EVIDENCE OF
PURPORTED GOVERNMENT SALES**

Pretrial: October 5, 2017

Time: 1:30 p.m.

Place: Courtroom 3, 5th Floor

Judge: Honorable Beth Labson Freeman

28

1 **TABLE OF ABBREVIATIONS**

2

Plaintiff Finjan, Inc.	Finjan or Plaintiff
3 Defendant Blue Coat Systems LLC	Blue Coat or Defendant
4 Plaintiff Finjan, Inc.'s Motion <i>in Limine</i> No. 2 to Preclude Evidence of Purported Government Sales, Dkt. No. 291	Br.
5 Declaration of Hannah Lee in Support of Plaintiff Finjan Inc.'s Motions <i>in Limine</i> Nos. 1-4 and <i>Daubert</i> Motion, Dkt. No. 304	Lee Decl.
6 Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in Limine, Dkt. No. 307	Brewer Decl. ¹
7 Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Oppositions to Motions in Limine	Brewer Opp. Decl. ²

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

27 ¹ Unless otherwise specified, all numeric exhibits refer to those attached to the Brewer Decl.

28 ² Unless otherwise specified, all alphabetic exhibits refer to those attached to the Brewer Opp. Decl.

1 Finjan asks the Court to decide now that Blue Coat has identified insufficient evidence in
2 support of its affirmative defense relating to sales to the Federal government.³ Blue Coat
3 disclosed more than sufficient information—including detailed spreadsheets identifying specific
4 Federal government entities that have purchased Blue Coat’s products and channel partner
5 agreements that demonstrate these purchases have been authorized by the Federal government—
6 for the issue to go to the jury. Finjan’s motion should be denied.

7 **I. LEGAL STANDARD**

8 Section 1498 provides that whenever a patented invention is “used or manufactured by or
9 for the United States without license of the owner thereof or lawful right to use or manufacture
10 the same, the owner’s remedy shall be by action against the United States in the United States
11 Court of Federal Claims for the recovery of his reasonable and entire compensation for such use
12 and manufacture.” 28 U.S.C. § 1498; *see also Finjan, Inc. v. Secure Computing, Inc.*, 626 F.3d
13 1197, 1209 (Fed. Cir. 2010) (“Finjan concedes that Parr incorrectly considered sales to the
14 government. *See* Transcript at 669:20-21 (‘Q: You also included sales to the federal government?
15 A: Absolutely, yes.’). This was impermissible because a patentee can recover damages only from
16 the government for patented ‘use or manufacture for the United States.’ 28 U.S.C. § 1498(a).”).
17 Use or manufacture “by a contractor, a subcontractor, or any person, firm, or corporation for the
18 Government and with the authorization or consent of the Government, shall be construed as use
19 or manufacture for the United States.” *Id.* The Federal Circuit has further held that authorization
20 may be implied. *See TVI Energy Corp. v. Blane*, 806 F.2d 1057, 1060 (Fed. Cir. 1986).

21 **II. BLUE COAT’S GOVERNMENT SALES DEFENSE IS ADEQUATELY 22 DISCLOSED**

23 A detailed spreadsheet identifying sales to specific government departments and agencies
24 suffices to present an issue of fact under § 1498 for the jury to decide. *See, e.g., Open Text S.A.,*
25 *v. Box, Inc.*, No. 13-cv-04910, 2015 WL 428345, at *2 (N.D. Cal. Jan. 30, 2015) (finding detailed

26 ³ Finjan requests the Court decide the merits of Blue Coat’s affirmative defense, which is an
27 improper summary judgment motion. *See Tyco Thermal Controls, LLC v. Redwood Industrials,*
28 *LLC*, No. 06-cv-07164-SBA, 2012 WL 2792435, at *2 (N.D. Cal. July 9, 2012) (“Tyco’s
arguments relate to the substantive merit of Tyco’s claim for damages against Rowe, which is
outside the purview of a motion in limine.”).

1 spreadsheets showing sales to the Federal government sufficient to create a question of fact for
2 the jury under § 1498); *TecSec, Inc. v. IBM Corp.*, No. 10-cv-115, 2011 U.S. Dist. LEXIS 159356
3 at *6-10 (E.D. Va. 2011) (same). Finjan does not dispute that Blue Coat sells products to the
4 Federal government or that Blue Coat produced detailed spreadsheets showing the same. Br. at 2.
5 For example, in its interrogatory responses, Blue Coat identified spreadsheets extracted from Blue
6 Coat's ERP system identifying end users, including government agencies, at BC2-1888571, BC2-
7 1888578, BC2-1895235. Lee Decl., Ex. 6 at 6; *see also* Ex. E at 68:13-20, 87:1-13. Finjan
8 ignores these facts and mischaracterizes the record.

9 As an initial matter, it is disingenuous for Finjan to claim that it had insufficient notice of
10 Blue Coat's government sales defense. Finjan's claim that it had insufficient notice of the
11 support for Blue Coat's defense is similarly flawed in view of Blue Coat's disclosures. The
12 spreadsheets produced by Blue Coat sufficiently disclose its government sales and are highly
13 relevant to Blue Coat's affirmative defense. *See, e.g., Open Text*, 2015 WL 428345, at *2. They
14 include detailed sales information by product, identify the distributors and resellers who sold the
15 product, and identify the end customer for the product, such as [REDACTED]
16 [REDACTED], among others. *See,*
17 *e.g., Ex. G.* These spreadsheets demonstrate that over the damages period, Blue Coat made [REDACTED]
18 [REDACTED], to more than 30 different Federal government
19 agencies. Ex. H. As these spreadsheets clearly identify Federal government agencies that
20 purchased Blue Coat products, they alone justify denying Finjan's motion. *See, e.g., Open Text*,
21 2015 WL 428345, at *2.

22 Blue Coat also produced and identified agreements with its channel partners. As is typical
23 for a network security company, Blue Coat sells its products through a distributor network. Ex. F
24 at 38:7-9. Blue Coat contracts with its channel partners, and its channel partners contract with the
25 Federal government. *Id.* at 38:10-39:12. [REDACTED]
26 [REDACTED] *Id.* at 46:19-47:25. The documents identified in Blue Coat's
27 supplemental interrogatory response include letters further supporting Blue Coat's defense that
28 these sales were authorized by the Federal government, such as copyright release letters for

1 government use and [REDACTED]

2 [REDACTED] *See, e.g.*, Ex. I, Ex. J.

3 Blue Coat's use of Rule 33(d) was also appropriate, given the number of channel partners
4 implicated, the nature of the documents responsive to Finjan's request (e.g., spreadsheets,
5 agreements, and letters), and the burden of determining the precise response to Finjan's
6 interrogatory, which would have been substantially the same for either party. Fed. R. Civ. P.
7 33(d) (permitting reference to business records "if the burden of deriving or ascertaining the
8 answer will be substantially the same for either party."); *Finjan, Inc. v. Proofpoint, Inc.*, No. 13-
9 cv-05808-HSG, 2015 WL 6178165, at *2 (N.D. Cal. Oct. 21, 2015). For example, the produced
10 spreadsheets—which constitute a good summary—demonstrate that at least 10 distributors and 67
11 resellers make sales to the Federal government.

12 The cases cited by Finjan are inapposite. *See, e.g., Wyatt Tech. Corp. v. Malvern*
13 *Instruments, Inc.*, No. 07-cv-08298, 2010 WL 11505684, at *20 (C.D. Cal. Jan. 25, 2010);
14 *Lawman v. City & Cty. of San Francisco*, 159 F.Supp.3d 1130, 1140-41 (N.D. Cal. 2016). In
15 *Wyatt*, the Court excluded evidence based on responses that did not actually address the
16 interrogatories at issue. 2010 WL 11505684, at *20. In *Lawman*, the Court found that documents
17 cited pursuant to 33(d) failed to put the other party on notice of a theory where the documents
18 contained no facts about the theory at issue. 159 F.Supp.3d at 1140-41. In contrast, here, the
19 documents identified are responsive to Finjan's interrogatory and provide sufficient notice of
20 Blue Coat's voluminous support for its affirmative defense.

21 Finjan also mischaracterizes the testimony of Blue Coat's 30(b)(6) witness. *See* Br. at 2
22 Finjan never asked Blue Coat's witness to identify **Federal** government sales. Ex. F at 69:22-
23 70:16. Rather, Finjan asked generally about government sales, [REDACTED]
24 [REDACTED] *Id.* Blue Coat's witness did not identify how a sale
25 qualifies as a Federal government sale because that question was never asked. Finjan also heard
26 deposition testimony, which it ignores, explaining that Blue Coat gives presentations to the
27 Federal government. Ex. K at 130:5-131:3, 137:2-6, 181:23-182:1, 184:24-185:1.

28 Finally, this evidence should go before the jury because the probative value far outweighs

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.