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BLUE COAT SYSTEMS LLC

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 SAN JOSE DIVISION

20
21 FINJAN, INC., a Delaware Corporation,

22 Plaintiff,

23 v.

24 BLUE COAT SYSTEMS LLC, a Delaware
Corporation,

25 Defendant.

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

**DEFENDANT BLUE COAT SYSTEMS
LLC'S OPPOSITION TO PLAINTIFF
FINJAN, INC.'S MOTION IN LIMINE
NO. 3 TO PRECLUDE REFERENCE
TO PENDING LITIGATIONS AND
PTO PROCEEDINGS**

Pretrial: October 5, 2017

Time: 1:30 p.m.

Place: Courtroom 3, 5th Floor

Judge: Honorable Beth Labson Freeman

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 Vince Thomas | Thomas Rpt. |
| 5 | Plaintiff Finjan, Inc.'s Motion <i>in Limine</i> No. 3 to Preclude Reference to Pending Litigations and PTO Proceedings, Dkt. No. 292 | Br. |
| 6 | 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. |
| 7 | Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in Limine, Dkt. No. 307 | Brewer Decl. ¹ |
| 8 | | |
| 9 | Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Oppositions to Motions in Limine | Brewer Opp. Decl. ² |
| 10 | U.S. Patent and Trademark Office | PTO |
| 11 | <i>Inter partes</i> review | IPR |
| 12 | <i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , No. 5:13-cv-03999-BLF (N.D. Cal.) | <i>Blue Coat I</i> |
| 13 | <i>Finjan, Inc. v. Sophos, Inc.</i> , No. 14-cv-01197-WHO (N.D. Cal.) | <i>Sophos</i> |
| 14 | <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 numeric exhibits refer to those attached to the Brewer Decl.

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

1 Blue Coat agrees that irrelevant proceedings should be excluded. Blue Coat moved to
2 exclude results of the concluded *Blue Coat I*, *Secure Computing*, *Sophos*, and PTO proceedings in
3 its Motion in Limine No. 3. *See* Dkt. No. 297. Finjan’s Motion in Limine No. 3 makes a self-
4 serving, but baseless, distinction between pending and concluded proceedings, seeking to exclude
5 pending proceedings while introducing those in which Finjan has obtained a favorable outcome.
6 Blue Coat will not seek to introduce the results of any irrelevant proceeding, whether favorable or
7 unfavorable. Nor will Blue Coat seek to introduce IPR results, whether interim or final.

8 Consistent with this Court’s prior rulings against Finjan on this issue, however, Blue Coat
9 should be permitted to introduce evidence regarding Finjan’s litigation and licensing practices:
10 “Plaintiff’s litigation practices—in particular, its past and current practices in enforcing patent
11 rights and licensing those rights—are relevant to the determination of a reasonable royalty under
12 the *Georgia-Pacific* factors and that any prejudice can be mitigated by a limiting instruction.”
13 *Finjan, Inc. v. Blue Coat Sys.*, No. 13-cv-03999-BLF, 2015 U.S. Dist. LEXIS 88760, at *3 (N.D.
14 Cal. July 8, 2015) (denying Finjan’s motion in limine); *Finjan, Inc. v. Sophos Inc.*, No.14-cv-
15 01197-WHO, 2016 U.S. Dist. LEXIS 189272, at *27-28 (N.D. Cal. Aug. 22, 2016) (same).

16 Finjan’s motion should be denied as to pending litigation. Blue Coat maintains that
17 neither party should be allowed to discuss IPR results, whether interim or final.

18 **I. THE EXISTENCE OF OTHER LITIGATION IS RELEVANT**

19 Finjan seeks to “preclude Blue Coat from presenting any argument or evidence regarding
20 co-pending lawsuits involving Finjan, except to the extent any litigation has reached a jury
21 verdict.” Br. at 2. In *Blue Coat I*, this Court permitted evidence and argument regarding Finjan’s
22 “litigation practices—in particular, its past and current practices in enforcing patent rights and
23 licensing those rights” as relevant to damages. *Finjan, Inc.*, 2015 U.S. Dist. LEXIS 88760, at *3.
24 Finjan’s same request was also rejected in *Sophos*, with the Court finding Finjan’s pending
25 litigation relevant to the *Georgia-Pacific* factors. *Finjan*, 2016 U.S. Dist. LEXIS 189272, at *27-
26 28. Nothing has changed: Finjan’s litigation practices are still relevant. *See e.g.*, Ex. D at ¶¶
27 136-142 (discussing Finjan’s licensing efforts in context of *Georgia-Pacific*). Blue Coat
28 contemplates making general statements regarding Finjan’s business, including its litigation and

1 licensing efforts, consistent with the Court’s prior ruling. This is also consistent with the parties’
2 agreement that they “may make neutral, factual statements concerning each other’s business.”
3 *See* Dkt. No. 289 at 13.

4 Finjan makes an unsupportable distinction between pending litigation and “litigation [that]
5 has reached a jury verdict.” *See* Br. at 2. The potential for prejudice greatly outweighs any
6 potential probative value of verdicts and judgments. *See Enquist v. Or. Dept. of Agric.*, 478 F.3d
7 985, 1010 (9th Cir. 2007) (finding “substantial risk that the jury would import the whole verdict
8 of liability from the prior proceeding”); Dkt. No. 297 at 1-3. The *Secure Computing* verdict,
9 which Finjan apparently seeks to introduce, is irrelevant due to involving different patents, a
10 different defendant, different accused products, and different damages law.³ *See* Dkt. No. 297 at
11 3-4. The *Sophos* verdict is irrelevant because it is impossible to discern the basis for the jury’s
12 damages calculation. *See id.* at 4.

13 Accordingly, aside from general statements regarding Finjan’s litigation and licensing
14 efforts, the Court should exclude irrelevant proceedings. Finjan’s request to treat cases that have
15 reached jury verdicts and judgments differently should be denied.

16 **II. BLUE COAT AGREES THAT IPR RESULTS—INTERIM OR FINAL—SHOULD** 17 **BE EXCLUDED**

18 “Finjan . . . seeks to exclude evidence or argument regarding any pending PTO *inter*
19 *partes* review (‘IPR’) proceedings where no final written decision or denial of institution of trial
20 has been rendered.” Br. at 3. But Blue Coat does not seek to introduce any such evidence or
21 argument and listed no IPR institution decision on its exhibit list.⁴ *See* Dkt. No. 289-5 (listing no
22 documents from pending IPR proceedings in Blue Coat’s exhibit list). Finjan’s argument is

23 ³ In *Blue Coat I*, this Court allowed limited use of *Secure Computing* for damages since “the jury
24 verdict in that case . . . involved two of the six patents-in-suit.” *See Blue Coat I*, Dkt. No. 367 at
25 12-13. Here, *none* of the asserted patents overlaps with those in *Secure Computing*. *See* Ex. 68
(PTX-761); Ex. 69 (PTX-762).

26 ⁴ Finjan may be concerned about the PTAB’s September 5, 2017, institution decision on Blue
27 Coat’s IPR of the ’621 patent finding a reasonable likelihood that claims 1 and 6-10 are
28 unpatentable as obvious and the PTAB’s July 18, 2017, institution decision granting Blue Coat’s
request for rehearing and finding a reasonable likelihood that claims 1, 4-6, 9, 12-14, 17, 24, 35,
37, and 42 of the ’086 patent are unpatentable as obvious. To be clear, Blue Coat does not intend
to introduce these, or any other, institution decisions.

1 predicated on a single case cite that supports the exclusion of *all* IPR decisions, as Blue Coat has
2 requested. *See* Br. at 3 (citing *Wis. Alumni Research Found.*, 135 F. Supp. 3d at 873-75
3 (excluding PTO’s denial of institution since “it would be difficult for a jury to understand, much
4 less apply, the nuanced differences between the various proceedings” and because “there is a
5 great risk that the jury would conclude, incorrectly, that the Patent Office has twice held the . . .
6 patent is nonobvious over prior art”)); *see also* Dkt. No. 297 at 4-5 (citing *Sophos*, Dkt. No. 262
7 at 25 (excluding evidence of PTO proceedings); *Interdigital Commc’ns Inv. v. Nokia Corp.*, No.
8 13-10-RGA, 2014 WL 8104167, at *1 (D. Del. Sept. 19, 2014) (holding that IPR denial was “of
9 marginal relevance, and the probative value is greatly outweighed by the expenditure of time that
10 would be required to give the jury the full context necessary to fairly evaluate the evidence”).

11 Finjan provides no support for its attempt to treat differently IPR decisions. Blue Coat
12 requests that the Court exclude evidence or argument regarding IPR results, whether interim or
13 final.

14 **III. CONCLUSION**

15 The parties agree that irrelevant proceedings should be excluded. Finjan should not be
16 able to except from that exclusion the highly prejudicial results of irrelevant proceedings.
17 Accordingly, aside from general statements regarding Finjan’s litigation and licensing efforts, the
18 Court should exclude results of irrelevant proceedings, whether at the district court or the PTO
19 and whether pending or final.

20
21 Dated: September 28, 2017

MORRISON & FOERSTER LLP

22
23 By: /s/ Stefani E. Shanberg
24 Stefani E. Shanberg

25 Attorneys for Defendant
26 BLUE COAT SYSTEMS LLC
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