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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. 4 TO EXCLUDE EVIDENCE  
REGARDING USAGE DATA**

Pretrial: October 5, 2017

Time: 1:30 p.m.

Place: Courtroom 3, 5th Floor

Judge: Honorable Beth Labson Freeman

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1 **TABLE OF ABBREVIATIONS**

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Plaintiff Finjan, Inc.	Finjan or Plaintiff
Defendant Blue Coat Systems LLC	Blue Coat or Defendant
U.S. Patent No. 6,154,844	'844 patent
U.S. Patent No. 8,079,086	'086 patent
U.S. Patent No. 8,677,494	'494 patent
Security Analytics	SA
Malware Analysis Appliance	MAA
Advanced Secure Gateway	ASG
Plaintiff Finjan, Inc.'s Motion <i>in Limine</i> No. 4, Dkt. No. 293	Br.
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.
Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in <i>Limine</i> , Dkt. No. 307	Brewer Decl. <sup>1</sup>
Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Oppositions to Motions in <i>Limine</i>	Brewer Opp. Decl. <sup>2</sup>

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

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

1 Finjan's motion is based upon an assertion that Blue Coat failed to provide certain  
2 apportionment data upon which Mr. Thomas relies in its discovery responses. But Finjan did not  
3 request the information, and Blue Coat could not have provided it. Finjan changed its  
4 infringement theory relating to SA in its expert reports. *See, e.g.*, Dkt. No. 203 at \*8-9. The  
5 complained-about information responds to that late theory and could not have been provided  
6 earlier. As the Court heard in connection with Blue Coat's motion to strike, in its infringement  
7 contentions, Finjan accused SA in combination with ASG of infringing and alleged that *MAA*  
8 *sends a report to SA*. *See, e.g.*, Dkt. No. 203 at \*8-9. In its expert reports, Finjan changed its  
9 theory to accuse SA in combination with MAA and allege for the first time that *SA sends files to*  
10 *MAA for sandboxing*. *Id.*

11 In the Order on Blue Coat's motion to strike, this Court agreed that Finjan had not  
12 adequately disclosed its infringement theories relating to the combination of SA and MAA for the  
13 '086 and '844 patents. Dkt. No. 277, at \*7-9. With respect to the '494 patent, for which the  
14 Court found sufficient disclosure, Finjan never previously alleged that SA sent files to MAA for  
15 sandboxing. *Compare* Dkt No. 205-8, Ex. C (infringement contentions) at 44, 57 ("the Security  
16 Analytics Products act as a receiver") *with* Dkt. No. 205-14, Ex. G (Finjan's expert report) at ¶  
17 1290 ("SA . . . feed[s] downloaded web content into a MAA for analysis and processing.").

18 Consistent with its theories at the time, Finjan's interrogatories requested, *inter alia*,  
19 identification of the number of files scanned, threats received, and threats detected. Lee Decl.,  
20 Ex. 17 (Interrogatory No. 8). Finjan further requested identification of "the number of files,  
21 threats or malware that are detected through sandboxing or dynamic malware analysis." Lee  
22 Decl., Ex. 16 (Interrogatory No. 23). Blue Coat provided a fulsome response based on Finjan's  
23 theories at the time, which required *MAA to send a report to SA*. *See* Lee Decl., Ex. 17. Blue  
24 Coat does not have [REDACTED] and Blue Coat does not have information about  
25 the traffic sent by *MAA to SA*. *Id.* In contrast, Blue Coat does have information regarding traffic  
26 sent from *SA to MAA*. It is that information upon which Mr. Thomas relied and about which  
27 Finjan complains. Prior to expert reports, Blue Coat had no notice that this information was  
28 relevant. Once Finjan introduced a theory that made it relevant, Blue Coat adequately disclosed

1 the information in its expert report. The timing of the disclosure is justified and harmless, and  
2 Finjan's motion should be denied.

### 3 **I. LEGAL STANDARD**

4 Rule 37 permits a court to exclude untimely disclosed information unless the failure to  
5 supplement was substantially justified or harmless. Fed. R. Civ. P. 37(c)(1). "Among the factors  
6 that may properly guide a district court in determining whether a violation of a discovery deadline  
7 is justified or harmless are: (1) prejudice or surprise to the party against whom the evidence is  
8 offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the  
9 trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Lanard*  
10 *Toys, Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010). Courts may also consider  
11 the importance of the evidence. *See, e.g., San Francisco Baykeeper v. West Bay Sanitary*  
12 *District*, 791 F. Supp. 2d 719, 733 (N.D. Cal. 2011).

### 13 **II. SA APPORTIONMENT INFORMATION SHOULD NOT BE EXCLUDED**

#### 14 **A. Mr. Thomas's SA Apportionment Is Consistent with Blue Coat's Discovery** 15 **Responses.**

16 Finjan's interrogatories requested, *inter alia*, identification of the number of files scanned,  
17 the number of threats received, and the number of threats detected. Lee Decl., Ex. 17  
18 (Interrogatory No. 8). Finjan further requested identification of "the number of files, threats or  
19 malware that are detected through sandboxing or dynamic malware analysis." Lee Decl., Ex. 16  
20 (Interrogatory No. 23). Blue Coat provided a fulsome and accurate response based upon Finjan's  
21 infringement theories at the time. Lee Decl., Ex. 17. Regarding SA specifically, Finjan alleged  
22 in its infringement contentions that SA infringed in combination with ASG and that *MAA sends a*  
23 *report that would be stored on SA*. *See, e.g.,* Dkt No. 205-8 at 44, 57. Prior to its expert reports,  
24 Finjan never alleged infringement because *SA sends files to MAA for sandboxing*. *Id.*; *see also*  
25 Dkt. No. 205-14, Ex. G at ¶ 1290.

26 Based on the infringement theories disclosed before the close of discovery, Blue Coat had  
27 no responsive information relating to SA. Specifically, as stated in response to Finjan's  
28 interrogatories, Blue Coat does not receive [REDACTED] and does not

1 have information about the SA usage requested in the interrogatories. Lee Decl., Ex. 17.  
2 Similarly, Blue Coat does not have information about the number of reports received by SA from  
3 MAA. *Id.* In response to Finjan's new infringement theory relating to files sent from SA to  
4 MAA, there is usage data available. Blue Coat disclosed that information at its first opportunity.  
5 Specifically, Mr. Thomas's report discloses his apportionment theory which relies on a broad  
6 range of average traffic for SA [REDACTED] and the maximum throughput  
7 from SA to MAA [REDACTED] Ex. D at ¶ 164. This data was not responsive to Finjan's  
8 discovery requests for two reasons: (1) this traffic flow was not accused; and (2) it does not  
9 constitute the requested number of files scanned, threats received, or threats detected. Instead, it  
10 is maximum throughput, a conservative measure. Mr. Thomas took the lowest part of the traffic  
11 range for SA [REDACTED] and the maximum throughput for MAA [REDACTED] to  
12 calculate the *maximum possible usage of MAA by SA*, not actual usage. *Id.* He then used this  
13 maximum measure to determine a reasonable apportionment for SA revenue. *Id.*

14 Blue Coat's responses to Finjan's interrogatories are truthful, accurate, and consistent with  
15 the information relied on by Mr. Thomas. The timing and manner of disclosure results from (1)  
16 the questions asked by Finjan, and (2) Finjan's evolving infringement theories. Finjan's  
17 accusations of "fabrication" and "sandbagging" are not well-taken. Its motion should be denied.

18 **B. Disclosure of SA Apportionment Data Was Timely, Justified, and Harmless.**

19 Blue Coat's apportionment information for SA may only be excluded if its disclosure was  
20 untimely and the failure to disclose it sooner was not substantially justified or harmless. Fed. R.  
21 Civ. P. 37(c)(1). First, Blue Coat's disclosure was timely under the circumstances. Second,  
22 under all factors, the timing of the disclosure was substantially justified and harmless.

23 *Blue Coat's Disclosure was Timely.* As discussed above, in its infringement contentions,  
24 Finjan identified SA in combination with ASG and further alleged that *MAA sends a report that*  
25 *could be stored on SA.* See, e.g., Dkt. No. 203 at \*8-9. Finjan, however, changed its  
26 infringement theory in its expert reports and accused the SA in combination with MAA and  
27 alleged for the first time that *SA sends files to MAA for sandboxing.* *Id.* The Court agreed that  
28 Finjan had not adequately disclosed its infringement theories relating to the combination of SA

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