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

20

21 FINJAN, INC., a Delaware Corporation,   Case No.:   15-cv-03295-BLF-SVK

22   Plaintiff,   **DEFENDANT BLUE COAT SYSTEMS
                                                     LLC'S OPPOSITION TO PLAINTIFF
23   v.   FINJAN, INC.'S *DAUBERT* MOTION TO
                                                     EXCLUDE TESTIMONY OF MR. VINCE
24 BLUE COAT SYSTEMS LLC, a Delaware   THOMAS**
    Corporation,
25   Pretrial: October 5, 2017
                 Defendant.   Time: 1:30 p.m.
26   Place: Courtroom 3, 5th Floor
                                                     Judge: Honorable Beth Labson Freeman
27

28

1

TABLE OF ABBREVIATIONS

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. 6,965,968	'968 patent
U.S. Patent No. 7,418,731	'731 patent
U.S. Patent No. 8,079,086	'086 patent
U.S. Patent No. 8,225,408	'408 patent
U.S. Patent No. 8,677,494	'494 patent
U.S. Patent No. 9,189,621	'621 patent
U.S. Patent No. 9,219,755	'755 patent
'844, '968, '731, '086, '408, '494, '621, and '755 patents, collectively	asserted patents
Malware Analysis Appliance	MAA
Security Analytics	SA
Dynamic Real Time Rating	DRTR
Global Intelligence Network	GIN
Content Analysis System	CAS
Advanced Secure Gateway	ASG
Web Security Service	WSS
Malware Analysis Service	MAS
United States Patent and Trademark Office	Patent Office
Plaintiff Finjan, Inc.'s *Daubert* Motion to Exclude Testimony of Mr. Vince Thomas	Br.
Declaration of Hannah Lee in Support of Plaintiff Finjan Inc.'s Motions *in Limine* Nos. 1-4 and *Daubert* Motion, Dkt. No. 304	Lee Decl.
Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Motions in Limine, Dkt. No. 307	Brewer Decl. [1]
Declaration of Robin L. Brewer in Support of Defendant Blue Coat Systems LLC's Oppositions to Motions in Limine	Brewer Opp. Decl. [2]
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 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   Mr. Thomas's opinions are well-supported by facts and data and the product of well-

2 accepted principles and methods reliably applied to the facts of this case. *See Daubert v. Merrell*

3 *Dow Pharms., Inc.*, 509 U.S. 579 (1993). Finjan's motion should be denied, and the jury should be

4 allowed to decide whether it agrees with Mr. Thomas's method of grouping related patents,

5 discounting to account for a lump sum payment, accounting for government sales, and

6 apportioning based upon usage.

7 **I.   MR. THOMAS'S GROUPING OF THE PATENTS IS RELIABLE**

8   Finjan asserts multiple related patents in every case. Here, Finjan is asserting eight patents,

9 and seven are related. Grouping patents to avoid multiple recoveries for the same invention is an

10 issue in Finjan cases. In *Sophos*, for example, the Court explained that "[i]f Finjan's patented

11 technologies are truly overlapping then it can in fact only recover damages as if one patent is in

12 suit." *See Finjan, Inc. v. Sophos, Inc.*, No. 14-cv-01197-WHO, 2016 WL 4268659, at *4 (N.D.

13 Cal. Aug. 15, 2016). In this case, Finjan recognized the need to avoid double-counting and

14 attempted to do so by counting each alleged infringing feature only once. Ex. 1 ¶ 148; *see also id.*

15 ¶ 149 ("Thus, my damages analysis ensures that there is no overlap of damages for patents that

16 were already accounted for in the first case and no double-counting."). Finjan's feature-based

17 methodology is flawed for many reasons, however, including its reliance upon a single document

18 to identify features of each product; its failure to adequately support what it means for a feature to

19 be "related" to a patent and counted; and its arbitrary assignment of equal value to all features. *Id.*

20 at ¶¶ 145-148. Dr. Meyer also fails to calculate damages on a per patent basis. Ex. L. Despite

21 these flaws, Blue Coat did not challenge Dr. Meyer's feature-based attempt to avoid double-

22 counting, because the credibility of Dr. Meyer's approach is a question for the jury.

23   The credibility of Mr. Thomas's grouping of the patents is also a question for the jury. Mr.

24 Thomas relies on terminal disclaimers indicating that certain asserted patents are "not patentably

25 distinct" from other asserted patents as a ***starting point*** for grouping overlapping patents.

26 Specifically, where the claims of a Finjan patent application were found not patentably distinct

27 from claims in another Finjan patent or patent application, Finjan filed terminal disclaimers with

28 the Patent Office to overcome double patenting rejections. *See, e.g.*, Ex. M (explaining "double

1   patenting rejection is based on a judicially created doctrine grounded in public policy … to prevent

2   the unjustified or improper timewise extension of the 'right to exclude' granted by a patent and to

3   prevent possible harassment by multiple assignees."). Terminal disclaimers limit the term of the

4   later-filed patent to that of the earlier patent, and they also restrict patent ownership. Ex. M

5   (stating that a terminally disclaimed patent "shall be enforceable only for and during such period

6   that it and the prior patent are commonly owned."). The policy behind this is "preventing

7   harassment of an alleged infringer by multiple assignees asserting essentially the same patented

8   invention," and it equally applies when the assignee is the same. *In re Hubbell*, 709 F.3d 1140,

9   1146 (Fed. Cir. 2013); *see also Simple Air, Inc. v. Google Inc.*, 204 F. Supp. 3d 908, 914 (E.D.

10   Tex. 2016) (recognizing that policy preventing multiple assignees from suing on same invention

11   applies equally to successive lawsuits from same assignee). The Court also recognized this

12   principle in *Sophos*. *See*, *Sophos*, 2016 WL 4560071, at *4. Mr. Thomas's use of terminal

13   disclaimers to group the patents is a reasonable and reliable starting point to avoid double-counting

14   damages for a single invention based upon the footprint of each patent. *See* Ex. D ¶¶ 89, 90

15   (explaining that "the goal is to identify the value of the patented invention" and compensate Finjan

16   once for use of a single invention). Finjan fails to mention that Mr. Thomas did not stop there.

17   Mr. Thomas also relied upon conversations with Blue Coat's technical expert, Dr. Nielson,

18   to group the related patents by "related technology based upon Finjan's infringement allegations."

19   Ex. D at ¶ 47. For example, the '086, '494, '786, '621, and '755 patents have the same

20   specification and are all subject to terminal disclaimers, ***and*** Mr. Thomas relied upon Dr. Neilson

21   to determine his patent grouping was appropriate because "the accused functionality and patent

22   claims are sufficiently similar for the '844, '086, and '494 patents that it is reasonable to group

23   these patents together for purposes of determining damages." *Id.* The same is true for the '621

24   and '755 patents. *Id.* Finjan fails to address this evidence supporting Mr. Thomas's grouping. *See*

25   *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321 (Fed. Cir. 2014) ("Experts routinely rely upon

26   other experts hired by the party they represent for expertise outside of their field.").

27   Finjan also fails to cite a single case finding use of terminal disclaimers in this manner

28   "contrary to law." Br. at 1-3. Finjan's two cited cases are irrelevant. *See Pharmacia Corp. v. Par*

1   *Pharms., Inc.*, 417 F.3d 1369, 1374 (Fed. Cir. 2005); *Ortho Pharms. Corp v. Smith*, 959 F.2d 936,

2   941-42 (Fed. Cir. 1992). Neither has anything to do with whether terminal disclaimers indicate

3   relatedness to avoid double-counting damages for a single invention. Rather, both are directed to

4   whether invalidity or unenforceability findings tainted a related patent. *Id.*

5   Finjan's argument that using "the same hypothetical negotiation date for a patent group is

6   factually implausible" (Br. at 2) is inconsistent with ████████████████████████████████████

7   ██

8   ██

9   ██

10   ██ It

11   is not only "factually plausible" that the parties would have negotiated a license that covered

12   related unissued applications, it is highly probable, ███████████████████████████████ Mr.

13   Thomas further explained that using the hypothetical negotiation date for the earliest of the

14   grouped patents is consistent with the goals of the hypothetical negotiation construct, which "is

15   intended to prevent hold up due to sunk costs and/or high switching costs after substantial market

16   place adoption." Ex. D at ¶ 95. This goal cannot be met if the patent owner is able to move the

17   hypothetical negotiation later upon issuance of related patents not patentably distinct from earlier

18   patents. *Id.* Mr. Thomas's grouping of the patents reflects a realistic hypothetical negotiation

19   between the parties.

20   Finally, unlike Dr. Meyer and contrary to Finjan's assertions, Mr. Thomas opined on

21   damages on a patent-by-patent basis. Mr. Thomas identifies total damages for each patent. Ex. O.

22   For grouped patents, due to their relatedness, Mr. Thomas explained that damages would be the

23   same whether one or more than one of the patents was found infringed. Ex. P at 46:16-47:5. In

24   contrast, Dr. Meyer's damages opinion separates products, not patents, rendering a jury unable to

25   assign damages on a per patent basis and obscuring issues of double-counting. Ex. L.

26   Finjan does not dispute that double-counting is to be avoided. Finjan also fails to explain

27   any actual implication of its objection to Mr. Thomas's grouping of the patents to avoid double-

28   counting. Mr. Thomas's approach is credible and reliable, and Finjan's motion should be denied.

DOCKET ALARM

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.