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FINJAN, INC.

10
11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 FINJAN, INC., a Delaware Corporation,
15 Plaintiff,
16 v.
17 BLUE COAT SYSTEMS LLC, a Delaware
18 Corporation,
19 Defendant.

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

**PLAINTIFF'S FINJAN INC.'S
OPPOSITION TO BLUE COAT SYSTEM
LLC'S MOTION *IN LIMINE* NO. 2 TO
EXCLUDE EVIDENCE AND
ARGUMENT CONCERNING ALLEGED
COPYING**

Date: October 5, 2017
Time: 1:30 pm
Place: Courtroom 3, 5th Floor
Judge: Hon. Beth Labson Freeman

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24 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
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1 Focusing only on evidence presented in the prior litigation (“Blue Coat I”), Blue Coat ignores
2 Finjan’s substantial new evidence of Blue Coat’s copying that did not exist in *Blue Coat I*, which is
3 evidence that Finjan could not have relied upon in the prior litigation. Further, to support its motion,
4 Blue Coat cites to Finjan’s experts who address (i) Blue Coat’s development of its products which is
5 relevant to damages as well as Blue Coat’s willfulness, and (ii) Finjan’s rebuttal validity experts
6 addressing copying as an objective indicia of nonobviousness. No single expert’s testimony is
7 directed to just “infringement,” as Blue Coat implies. Motion at 1-2, 5. Given the foregoing, Blue
8 Coat has not established any unfair prejudice contemplated by Fed. R. Evid. 403 to support its motion.

9 **I. ARGUMENT**

10 **A. Finjan Will Introduce New Evidence On Copying That Did Not Exist at the Time**
11 **of *Blue Coat I***

12 The mountain of newly-existing facts pointing to Blue Coat’s copying that did not exist when
13 Blue Coat I went to trial undermines Blue Coat’s attempt to paint Finjan’s copying case as “ancient
14 history.” Motion at 1. And while Blue Coat points to *some* similar documents presented in *Blue Coat*
15 *I* (Mot. at 2-3), it ignores that those same documents, in connection with the new evidence here,
16 evidence copying and not mere competition. Such evidence falls into three categories: (1) Blue
17 Coat’s implementation of Finjan’s patented technology into different products and newer versions of
18 existing products, despite Blue Coat’s knowledge of the ‘844, ‘968, and ‘731 Patents from *Blue Coat I*
19 that are asserted here which resulted in a finding of infringement, (2) Blue Coat’s production of new
20 documents [REDACTED] which were not produced in the first
21 litigation, that go to the heart of Finjan’s willfulness allegations, and (3) Finjan’s assertion for the first
22 time of the ‘086, ‘408, ‘494 and ‘621, and ‘755 Patents, which Blue Coat has known about since *Blue*
23 *Coat I*. Thus, the copying evidence Finjan will present is different and new from that presented in
24 *Blue Coat I* and is unlike the first case given different facts support Finjan’s willfulness claim. *Wyers*
25 *v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (copying “requires evidence of efforts to
26 replicate a specific product,” which can be demonstrated in a number of ways, including “through
27 internal company documents,” or “access to the patented product combined with substantial similarity
28 to the patented product.”)(citations omitted); *Intermedics Stryker Corp. v. Osteonics Corp.*, 96 F.3d

1 1409, 1414 (Fed. Cir. 1996) (patentee is not required to show “slavish copying.”).

2 With respect to the first category of new evidence, despite being aware of the ‘844, ‘968, and
3 ‘731 Patents since 2013 when *Blue Coat I* was filed, Finjan has evidence that Blue Coat decided to
4 implement Finjan’s patented technology into different products and newer versions of old products
5 that were not at issue and could not have been at issue in *Blue Coat I*. To that end, Finjan will show
6 that Blue Coat quickly developed new versions of the same products both during and after *Blue Coat I*
7 verdict, and despite a finding of infringement. *See, e.g.* Dkt. No. 106-4 at 3-7 (identifying Finjan’s
8 accused products in relation to Blue Coat’s products accused in *Blue Coat I*). And further evidence of
9 copying can be inferred from the fact that Blue Coat has not taken steps to modify its product line,
10 even after the infringement verdict in *Blue Coat I*. *See, e.g.*, Declaration of Hannah Lee (“Lee Opp.
11 Decl.”) filed herewith, Ex. 17, Schoenfeld 2/28/17 Depo. Tr. at 13:11-17 [REDACTED]

12 [REDACTED]
13 [REDACTED]
14 Regarding the second category of new evidence, Blue Coat produced new relevant documents
15 pertaining to its copying in this case that, despite being available at the time of *Blue Coat I*, were not
16 produced for some reason in *Blue Coat I*. These documents include [REDACTED]

17 [REDACTED]
18 [REDACTED] Such evidence goes to the heart of
19 whether Blue Coat *copied* Finjan’s technology, and not just mere ordinary business competition. *Cf.*
20 *e.g.*, Lee Opp. Decl., Ex. 18, Clare 1/15/15 Depo. Tr. at 107:17-23 (Mr. Clare testifying: [REDACTED]
21 [REDACTED]
22 [REDACTED]; *id.*, Ex. 19, BC2-1585678-82 at 79 [REDACTED]
23 [REDACTED]; *cf. id.*, Ex. 20, Schoenfeld
24 10/30/14 Depo. Tr. at 33:14-16 (Mr. Schoenfeld testifying: [REDACTED]

25 [REDACTED] and Ex. 21, BC2-1324465-80 [REDACTED]
26 [REDACTED]

27 Regarding the third category of new evidence, Blue Coat also ignores that Finjan is asserting
28

1 the '086, '408, '494 and '621, and '755 Patents here that were not asserted in the *Blue Coat I*, and
2 Blue Coat's internal documents and communications [REDACTED]
3 [REDACTED] Thus, the Court's rulings do not apply because they involve different patents
4 and factual issues. Finjan also has evidence, showing the nexus between the evidence and these new
5 patents—this evidence shows that despite being aware of the newly asserted patents since *Blue Coat I*,
6 Blue Coat chose not to design around them. This is undisputed as Blue Coat stipulated in the Pretrial
7 Order that it had knowledge during *Blue Coat I* of the '494, '086, and '408 Patents. *See* Dkt. No. 289
8 at 7, II(A)(36); *see also* Dkt. No. 27 at App. B (identifying litigations and IPRs involving Finjan).

9 Rather than address any of the new copying evidence discussed above, Blue Coat instead
10 dedicates most of its brief to arguing that Finjan intends to rely on an OEM Agreement and the Vital
11 Security program to show copying. Yet, Blue Coat misses the point that the OEM Agreement and
12 Vital Security are but two aspects of Blue Coat's copying. Even then, Finjan's experts cite to the
13 OEM agreement in the context of the background analysis of Blue Coat and Finjan. *See, e.g.*, Dkt.
14 No. 305-9, Declaration of Robin L. Brewer ("Brewer Decl."), Ex 56, Cole Rpt., ¶ 82. And the Vital
15 Security documents show that Finjan marked its product with patents that Blue Coat was found to
16 infringe in *Blue Coat I*, and that Blue Coat implemented the technology of those patents while *Blue*
17 *Coat I* was pending and thereafter, all of which evidences Blue Coat's copying. *Id.*, Ex. 53, Finjan's
18 Interrog. Resp. No. 4 at 9 and App. A at 1 (noting that the Vital Security appliance is marked with the
19 '844 patent, which Blue Coat was found to infringe in the prior litigation). Blue Coat's argument that
20 Finjan "failed to disclose any nexus between the alleged copying of Vital Security" and the '844, '968
21 and '731 Patents is mere attorney argument (*e.g.*, stating that Dr. Cole's expert report "opin[es]
22 without support that Vital Security incorporated Finjan's technologies."), and is without merit because
23 Dr. Cole specifically identifies documents linking Blue Coat's knowledge of Finjan's patents to its
24 access to Finjan's Vital Security appliance. Motion at 4; Brewer Decl., Ex. 56, Cole Rpt., ¶ 93. Thus,
25 Finjan has substantial new evidence for copying and for willful infringement than in *Blue Coat I*.

26 **B. Finjan's Relevant, Non-Prejudicial Copying Evidence Pertains to**
27 **Nonobviousness, Willful Infringement and Damages**

28 Blue Coat's motion is merely an attempt to exclude key evidence that Finjan has regarding

1 issues of nonobviousness, damages, Blue Coat's development of its infringing technology and willful
2 infringement. Blue Coat's motion cites to the Brewer Decl. ¶ 107, which references a laundry-list of
3 paragraphs in Finjan's expert's reports and the corresponding exhibits cited therein (containing new
4 documents not disclosed in *Blue Coat I* nor cited in Blue Coat's brief) that Blue Coat is attempting to
5 exclude as opining on "copying." Motion at 5 n.2. These paragraphs contain Finjan's experts'
6 opinions, based upon an evaluation of the evidence (and more) outlined above, pertaining to Blue
7 Coat's development of its technology, relevant support for damages, such as Dr. Meyer's opinion
8 related to relevant information regarding the parties' positions at the hypothetical negotiation, Drs.
9 Goodrich, Jaeger, and Lyon's testimony regarding objective indicia of nonobviousness, and Drs. Cole,
10 Mitzenmacher and Medvidovic's testimony regarding Blue Coat's development of the technology, the
11 technological benefits of the patented technology and willfulness. Brewer Decl., ¶ 107.

12 For example, Finjan's expert, Dr. Cole, opined on Blue Coat's development of its technology
13 and willfulness, explaining that Blue Coat [REDACTED]
14 found to infringe in *Blue Coat I*. *Id.*, Ex. 56, Cole Rpt., ¶ 97 [REDACTED]
15 [REDACTED]
16 [REDACTED]; *see also id.*,
17 Ex. 57, Medvidovic Rpt., ¶ 100 [REDACTED]
18 [REDACTED] Finjan's experts also explained the
19 technical internal communications evidencing [REDACTED]
20 because it is relevant objective indicia of nonobviousness. *See id.*, Ex. 61, Jaeger Rpt., ¶¶ 248-264 (in
21 analyzing objective indicia of nonobviousness, Blue Coat's internal technical documents show that [REDACTED]
22 [REDACTED]; *see also*
23 *id.*, Ex. 62, Lyon Rpt., ¶¶ 277-288; *id.*, Ex. 60, Goodrich Rpt., ¶¶ 425-441. Dr. Meyer, Finjan's
24 damages expert, opined about the parties' relative positions and concerns that exist during the
25 hypothetical negotiation, which includes consideration of the internal communications identified
26 above. *Id.*, Ex. 1, Meyer Rpt., ¶¶ 140-142 (opining on *Georgia-Pacific* Factor 11, [REDACTED]
27 [REDACTED]. Introduction of such
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