

1 PAUL ANDRE (State Bar No. 196585)
pandre@kramerlevin.com
2 LISA KOBIALKA (State Bar No. 191404)
lkobialka@kramerlevin.com
3 JAMES HANNAH (State Bar No. 237978)
jhannah@kramerlevin.com
4 KRAMER LEVIN NAFTALIS & FRANKEL LLP
5 990 Marsh Road
Menlo Park, CA 94025
6 Telephone: (650) 752-1700
7 Facsimile: (650) 752-1800
8 *Attorneys for Plaintiff*
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 FINJAN INC.'S
OPPOSITION TO DEFENDANT'S
MOTION *IN LIMINE* NO. 3 TO
EXCLUDE EVIDENCE AND
ARGUMENT CONCERNING
IRRELEVANT PROCEEDINGS**

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

1 Blue Coat's Motion *in Limine* No. 3 should be denied because it seeks to exclude relevant
2 evidence of jury verdicts and PTO decisions that this Court has previously held admissible. Jury
3 verdicts from prior litigations between the same parties or involving the same patents are probative, at
4 minimum, to issues of damages and willful infringement at trial. To be clear, Finjan does not seek to
5 introduce any verdicts from any prior cases to prove infringement or validity in this case. But the
6 probative value of the verdicts in the *Blue Coat I*, *Secure Computing*, and *Sophos*¹ cases far outweigh
7 any potential prejudice. These verdicts involve the same parties and overlapping patents, and experts on
8 both sides rely on these verdicts to calculate damages in this case. The *Blue Coat I* verdict is especially
9 probative, as it also proves that Blue Coat continued to willfully infringe Finjan's patents in spite of a
10 verdict declaring that it was infringing some of those same patents – and also this Court's post-trial
11 order finding that the evidence supported that verdict.

12 In addition, many of the PTO decisions that Blue Coat seeks to exclude are necessary at trial to
13 rebut evidence of invalidity and prior art references that Blue Coat will introduce, in an attempt to
14 invalidate the '086 and '408 Patents. These decisions, and Blue Coat's attempts to invalidate the
15 asserted patents before the PTO, are also probative on Blue Coat's willful infringement of those patents
16 and the jury should take them into consideration. Any concerns that Blue Coat has about potential
17 prejudice stemming from the three prior verdicts or these PTO decisions can be addressed with an
18 appropriate limiting instruction, similar to those that this Court has entered in the past. Thus, the
19 probative value of this evidence far outweighs any slight potential for prejudice. And to wholly exclude
20 it in lieu of a limiting order would unnecessarily prejudice Finjan's ability to present its case for
21 damages and willful infringement, and to rebut invalidity evidence using the PTO decisions, at trial.

22 **A. Final Verdicts from *Secure Computing*, *Blue Coat I*, and *Sophos* Are Admissible**

23 Consistent with Federal Circuit precedent, this Court has held that final verdicts from prior
24 litigations are probative and admissible at trial, especially where those verdicts involved the same
25 parties or patents as the case at bar. In fact, jury verdicts from prior litigations are especially
26 admissible at trial to prove damages and willful infringement. *See Applied Med. Resources Corp. v.*

27 _____
28 ¹ Finjan adopts the same abbreviations herein as defined in Blue Coat's Motion in Limine No. 3.

1 *U.S. Surgical Corp.*, 435 F.3d 1356, 1366 (Fed. Cir. 2006) (affirming the admission of a prior verdict
2 between the same parties on the same patent, as relevant to the reasonable royalty analysis, willful
3 infringement, and the Defendant’s state of mind on both of those issues); *Maxwell v. J. Baker, Inc.*, 86
4 F.3d 1098, 1109-10 (Fed. Cir. 1996) (holding “[t]he objective of the reasonable royalty calculation is
5 to determine the amount necessary to adequately compensate for an infringement” and it is proper for
6 the fact finder to consider additional factors outside of Georgia-Pacific including “[t]he fact that an
7 infringer had to be ordered by a court to pay damages, rather than agreeing to a reasonable royalty”)
8 (citations omitted). Blue Coat’s attempt to exclude this evidence, involving damages for the Asserted
9 Patents or related patents, particularly one involving the same parties, is not supported by the law.
10 *See, e.g., Applied Medical*, 435 F.3d at 1366; *Blue Coat I, infra*, Dkt. No. 367 at 12; *see also*
11 Declaration of Hannah Lee (“Lee Opp. Decl.”) filed herewith, Ex. 23, *Sophos, infra*, Dkt. No. 262 at
12 16. And contrary to Blue Coat’s assertions, Finjan has no intention of using these prior verdicts to
13 prove liability or validity; it has separate proofs for these issues. Finjan agrees that these prior
14 verdicts are not relevant to infringement or validity, but they are relevant to damages and Blue Coat’s
15 willful infringement under precedent from this Court and the Federal Circuit. *Id.*

16 In *Blue Coat I*, this Court denied Blue Coat’s motion *in limine* to exclude the *Secure*
17 *Computing* verdict, finding that the prior verdict was relevant to damages. *See Blue Coat I*, Dkt. No.
18 367 at 12 (holding the *Secure Computing* verdict was relevant, especially considering two of the six
19 patents-at-issue overlapped). Similarly, in another case in this District, *Sophos*, the Court permitted
20 evidence of prior patent litigation between the parties in the District of Delaware. Lee Opp. Decl., Ex.
21 23, *Sophos*, Dkt. No. 262 at 16 (finding that the verdict from a prior action between Finjan and
22 *Sophos* admissible because it was relevant to damages, the relationship and history between the
23 parties, the reasonable royalty rate, and proving willful infringement). Here, evidence of the *Blue*
24 *Coat I* verdict is especially relevant because the parties in these actions are the same and three of
25 Finjan’s eight Asserted Patents overlap. *See Motion* at 3:3-4. Blue Coat’s damages expert relies on
26 the verdict from *Blue Coat I* for his opinion that Blue Coat already paid damages for an accused
27 product. *See, e.g., Lee Opp. Decl., Ex. 24, Thomas Rpt. at 98 ¶ 250* (“it would appear that this
28

1 method is double counting damages for WebPulse with the jury award in *Blue Coat I*). He also
2 states the hypothetical negotiation date for certain Asserted Patents is September 22, 2015, which
3 about two months after the *Blue Coat I* verdict. *Id.* at 31-32. Therefore, according to the date set
4 forth by Blue Coat's expert, the *Blue Coat I* verdict is at least relevant to "Defendant's state of mind
5 entering the hypothetical negotiation and to the parties' relative bargaining strength" at the time of the
6 hypothetical negotiation for this case. *See id.*; *see also Blue Coat I*, Dkt. No. 367 at 12:18-22 ("As
7 Plaintiff properly notes, the jury verdict in that case occurred around the time of the hypothetical
8 negotiation in this case and involved two of the six patents-in-suit here."). Blue Coat's argument that
9 the *Blue Coat I* is irrelevant is belied by the fact that its own damages expert relies on the verdict to
10 support his opinions. Lee Opp. Decl., Ex. 24, Thomas Rpt. at 98 (discounting damages as a result of
11 the *Blue Coat I* jury award). More importantly, the *Blue Coat I* verdict is directly relevant to Finjan's
12 allegations of willful infringement because it shows that Blue Coat continued to infringe Finjan's
13 patents, including patents that it was found to infringe in *Blue Coat I*, even well after the jury's verdict
14 of infringement and the Court's post-trial order that there was substantial evidence supporting that
15 verdict. *See Lee Opp. Decl., Ex. 23, Sophos*, Dkt. No. 262 at 16 (admitting a prior verdict between
16 the parties because it was relevant to willful infringement).²

17 Similarly, the *Secure Computing* verdict is also relevant to damages in the instant matter. Blue
18 Coat does not dispute that, in *Secure Computing*, the jury awarded Finjan damages for three related
19 patents to the Asserted Patents based on a reasonable royalty of between 8-16%, which is a royalty
20 rate Finjan has used for its licensing activities, including in this action and in the prior litigation
21 between these parties. Dkt. No. 305-9, Declaration of Robin L. Brewer, Ex. 1, Meyer Rpt. at 32 ("the
22 rates used in the litigation settlements to determine the lump sum payments closely match... the
23 reasonable royalty rates set by the jury in the *Secure Computing* litigation, which were also utilized in
24 the *Blue Coat* and *Sophos* jury trials"); *id.* at 59 (discussing use of 8 to 16 percent in Finjan's

25 ² The fact that the *Blue Coat I* verdict is on appeal does not alter its relevance, and the only case Blue
26 Coat cites for this proposition is inapposite. Motion at 2:27-28. In *Applied Materials, Inc. v.*
27 *Advanced Semiconductor Materials Am., Inc.*, the Court excluded evidence of pending litigations from
28 being asserted only for the purposes of proving liability. No. C 92-20643 RMW, 1995 WL 261407, at
*7 (N.D. Cal. Apr. 25, 1995).

1 licensing negotiations). Blue Coat's arguments regarding the "25 percent rule" have nothing to do
2 with Dr. Meyer's analysis of the *Secure Computing* case, and Dr. Meyer's opinions are not based on
3 the 25 percent rule to calculate damages. *See* Motion at 4:4-9. Moreover, it was determined that the
4 jury did not rely on the 25 percent rule(also known as the "rule of thumb") when calculating damages
5 in *Secure Computing*, so there is no support for Blue Coat's argument. *Finjan, Inc. v. Sophos, Inc.*,
6 No. 14-cv-01197-WHO, 2016 WL 4268659, at *5 (N.D. Cal. Aug. 15, 2016); *Finjan, Inc. v. Secure*
7 *Computing Corp.*, 626 F.3d 1197, 1212 (Fed. Cir. 2010) (affirming damages award based on 8-16%
8 royalty rates because the jury determined a lesser amount). This Court already rejected this argument
9 made in *Blue Coat I*, finding that the outcome from the *Secure Computing* case was relevant "to the
10 jury's consideration of damages." *Blue Coat I*, Dkt. No. 367 at 12.

11 Finally, the *Sophos* verdict is relevant to the instant matter, as two of the seven Asserted
12 Patents, namely the '844 and '494 Patents, were also asserted in that case. In *Sophos*, the jury
13 awarded \$15 million for infringement of Finjan's patents, which was consistent with an 8-16% royalty
14 rate. Contrary to Blue Coat's characterization, the Court in *Sophos* did not state there was no support
15 for the damages award, but rather, the \$15 million damages award was "within the range of Finjan's
16 prior licensing agreements and jury awards" that was presented at trial. Lee Opp. Decl., Ex. 25,
17 *Sophos*, Dkt. No. 453 at 22. It is improper to ignore the most relevant licensing agreements involving
18 the Patents-In-Suit, even where those agreements arose out of litigation. There was nothing
19 speculative about the verdict in *Sophos*, which involved some of the same patents and is probative of
20 damages. *See Maxwell, supra*, 86 F.3d at 1109-10 (holding the fact finder may consider damages
21 ordered by a court); *see also Blue Coat I*, Dkt. No. 367 at 12 (admitting a prior verdict where two of
22 the six patents-at-issue overlapped); *see also* Lee Opp. Decl., Ex. 23, *Sophos*, Dkt. No. 262 at 16
23 (admitting a prior verdict involving the same parties). Therefore, the Court should deny Blue Coat's
24 motion in limine.

25 **B. Evidence Regarding Final PTO Decisions is Proper**

26 Finjan should be permitted to introduce final decisions of the PTO at trial because they are
27 probative evidence regarding validity issues and "must be considered, particularly when the
28

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