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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 FINJAN INC.'S  
OPPOSITION TO DEFENDANT'S  
MOTION *IN LIMINE* NO. 5 TO  
EXCLUDE IRRELEVANT  
FINANCIAL DAMAGES  
ARGUMENTS**

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

1 Blue Coat raises in this Motion *in Limine* No. 5 the same failed arguments this Court  
2 previously rejected regarding Finjan’s presentation of trial evidence. *First*, there is no merit to Blue  
3 Coat’s intentional mischaracterization of Finjan’s presentation of both fact and expert evidence  
4 presented at trial as a “new” damages theory. Blue Coat misrepresents the trial record in *Blue Coat I*  
5 and *Sophos*, and the law stands that that a reasonable royalty is the *minimum* measure of damages for  
6 patent infringement. *Second*, Blue Coat’s attempt to exclude more than fifteen exhibits concerning  
7 Blue Coat’s acquisition and revenues without any analysis whatsoever of their content or relevance to  
8 establishing a reasonable royalty should be rejected outright. This information is highly relevant to  
9 determining damages and properly considered under a *Georgia-Pacific* analysis. At most, Blue  
10 Coat’s dispute goes to the weight of the evidence and can be dealt with by cross-examination or  
11 objection at trial, not through exclusion under a motion *in limine*.

12 **A. A Reasonable Royalty is the Floor to Patent Infringement Damages**

13 A Reasonable Royalty is the Minimum Award for Patent Infringement: 35 U.S.C. § 284  
14 expressly states that a reasonable royalty is the minimum damages amount for patent infringement:  
15 “Upon finding for the claimant the court shall award the claimant damages adequate to compensate  
16 for the infringement, *but in no event less than a reasonable royalty* for the use made of the invention  
17 by the infringer . . .” (emphasis added). The Federal Circuit has repeatedly confirmed that a  
18 reasonable royalty is “merely the floor below which damages shall not fall.” *Lucent Techs., Inc. v.*  
19 *Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009) (quotation omitted); *ResQNet.com, Inc. v. Lansa,*  
20 *Inc.*, 594 F.3d 860, 880 (Fed. Cir. 2010) (§ 284 provides that a reasonable royalty “is the minimum,  
21 not the maximum.”) (citation omitted). Indeed, the Federal Circuit held that a “jury is entitled to  
22 award compensatory damages *in addition to a reasonable royalty* because a reasonable royalty is  
23 ‘*merely the floor below which damages shall not fall.*’” *Whitserve, LLC v. Computer Packages, Inc.*,  
24 694 F.3d 10, 33 (Fed. Cir. 2012) (emphasis added). Blue Coat’s rejection of this statutory language  
25 and unequivocal precedent has no legal support. *See State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883  
26 F.2d 1573, 1577 (Fed. Cir. 1989) (Federal Circuit stating: “*the floor for a damage award is no less*  
27 *than a reasonable royalty*”) (emphasis added). Blue Coat’s cites to other cases that simply state  
28

1 there are different damages approaches, such as lost profits or cost savings (Motion at 2-3), but these  
2 cases do nothing to dispute the statutory mandate that a reasonable royalty is the minimum for  
3 damages. *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1544 (Fed. Cir. 1995) (the purpose of the  
4 alternative methods in § 284 “is not to direct the form of compensation, but to set a floor below which  
5 damage awards may not fall.”).

6 Finjan May Properly Summarize the Trial Evidence Regarding a Reasonable Royalty. Blue  
7 Coat mischaracterizes Finjan’s presentation of evidence presented at trial that is relevant to damages.  
8 Finjan fully disclosed its theories of damages to Blue Coat in its interrogatory response and its initial  
9 disclosures. Dkt. No. 305-9, Declaration of Robin L. Brewer (“Brewer Decl.”), Ex. 12 at 12-19, 38-  
10 40 (citing licensing practices, per subscription or per user fee, costs savings, use of infringing  
11 technology, and Finjan’s damages expert report); Declaration of Hannah Lee (“Lee Opp. Decl.”) filed  
12 herewith, Ex. 30, Finjan’s Corrected Second Supp. Initial Disclosures at 7-12 (same). As this Court  
13 ruled in *Blue Coat I*, Finjan is not restricted to expert testimony to prove damages and is entitled to  
14 summarize to the jury the totality of evidence presented at trial as it relates to determining a  
15 reasonable royalty. Specifically, in *Blue Coat I*, this Court upheld the jury’s award of damages for  
16 infringement of a patent for which Finjan’s expert did not present a damages calculation based on the  
17 Court’s review of the evidence that Finjan presented at trial through fact witnesses. *Blue Coat I*, Dkt.  
18 No. 543 at 9. A jury may rely on all the record evidence to determine damages, regardless of whether  
19 it comes through an expert. *See Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1330 (Fed. Cir. 2014)  
20 (expert evidence not necessary for determining a reasonable royalty); *see also Dow Chem. Co. v. Mee*  
21 *Indus., Inc.*, 341 F.3d 1370, 1382 (Fed. Cir. 2003) (“[§] 284 is clear that expert testimony is not  
22 necessary to the award of damages, but rather ‘may [be] receive[d]...as an aid’”); *Golden Bridge*  
23 *Tech. v. Apple Inc.*, No. 5:12-cv-04882-PSG, 2014 WL 4057187, at \*2 (N.D. Cal. June 1, 2014)  
24 (excluding expert but plaintiff “free to offer evidence of its damages from other, fact witnesses”);  
25 *CPG Prods. Corp. v. Pegasus Luggage, Inc.*, 776 F.2d 1007, 1010-11 (Fed. Cir. 1985) (trial evidence  
26 sufficient to rule on royalty rate).

27 Blue Coat mischaracterizes portions of the trial transcript in both *Blue Coat I* and *Sophos*  
28

1 where Finjan’s counsel properly argued in its closing argument, consistent with the aforementioned  
2 precedent, that a reasonable royalty is the floor and the jury may award damages in an amount higher  
3 than that based on the record evidence. In both cases, the Court permitted Finjan to summarize the  
4 trial evidence to provide context for the hypothetical negotiation, although in *Sophos* the Court  
5 precluded Finjan from presenting a specific computation to the extent it went “beyond what the  
6 damages expert[] and . . . other witnesses in this trial have testified to.” Brewer Decl., Ex. 103,  
7 *Sophos Trial Tr.* at 1737:13-17. In addition, Blue Coat’s disclosure arguments are a red-herring  
8 because Finjan disclosed at the outset of this case (including in its interrogatory response) its damages  
9 theory premised on facts. That Finjan will summarize this evidence after it is presented to the jury  
10 does not mean Finjan is presenting a “new” damages theory. Blue Coat also misrepresents Finjan’s  
11 edits to the proposed pretrial materials. Finjan revised the proposed jury instruction regarding a  
12 reasonable royalty to make it nearly *identical* to the instruction given in *Blue Coat I*. Compare  
13 Brewer Decl., Ex. 100 at 57-58 with Lee Opp. Decl., Ex. 31, *Blue Coat I*, Dkt. No. 437 at 46.<sup>1</sup> Finjan  
14 revised the verdict form to reflect that the jury may award damages in a form different from that  
15 adopted by the parties’ experts based on the trial evidence. Brewer Decl., Ex. 100.

16 **B. Finjan May Introduce Acquisition and Total Revenue Evidence**

17 Evidence Regarding Blue Coat’s Acquisition: Blue Coat provides no legal justification for  
18 excluding information relating to its acquisition by Symantec. Information regarding company  
19 acquisitions is properly considered in determining a reasonable royalty. *Function Media, LLC v.*  
20 *Google, Inc.*, No. 2:07-CV-279-CE, 2010 WL 272409, at \*2-3 (E.D. Tex. Jan 15, 2010) (expert  
21 properly relied on acquisition of companies to determine reasonable royalty); *Fresenius Med. Care*  
22 *Holding Inc. v. Baxter Int’l, Inc.*, 224 F.R.D. 644, 653 (N.D. Cal. 2004) (amount paid to acquire a  
23 company with desired patents is relevant to a reasonable royalty analysis) (citation omitted).

24 Blue Coat, however, seeks to exclude fifteen exhibits without providing any analysis  
25

26 \_\_\_\_\_  
27 <sup>1</sup> Blue Coat concedes that Finjan’s damages expert in this case has disclosed a price per user opinion.  
28 See Brewer Decl., Ex. 1, Meyer Rpt. at ¶¶ 170-174.

1 whatsoever of their content or relevance to a damages analysis under *Georgia-Pacific*.<sup>2</sup> These  
2 exhibits, described below, provide highly relevant information regarding the Blue Coat acquisition,  
3 including the implications and results of the integration of Blue Coat's product offerings:

- 4       ▪ Brewer Decl., Ex. 112 at 2-4, 7 is an industry publication that includes a page  
5       dedicated to "Blue Coat acquisition benefits," including reference to specific Blue Coat  
6       product markets and the effect on the ability to compete, product margins and market  
7       growth, as well as "key product integrations" between Blue Coat and Symantec.
- 8       ▪ Brewer Decl., Exs. 110, 114 are industry publications discussing the actual and  
9       expected effects of the acquisition on the companies' enterprise market growth and  
10       competition, and include an "Investment Thesis" identifying Blue Coat product  
11       offerings that made the acquisition a "wise decision."
- 12       ▪ Brewer Decl., Exs. 115-117 at 1, 2 are industry publications that discuss the reasons  
13       for the acquisition, the expected effects of the acquisition on competition with other  
14       market players, and how the industry expected the acquisition to affect growth and  
15       revenues of the companies' enterprise segment.
- 16       ▪ Brewer Decl., Ex. 107 is a Symantec and Blue Coat marketing document providing  
17       statistics regarding the combined company, including the expected number of e-mails  
18       scanned per day, web requests categorized per day, previously unseen threats per day,  
19       and the number of customers, cloud applications, data centers and endpoints protected  
20       by the integrated product offerings.
- 21       ▪ Brewer Decl., Exs. 108, 109 are Symantec press releases regarding the acquisition of  
22       Blue Coat and describing the interaction of specific Blue Coat and Symantec products  
23       that resulted in increased protection through the sharing or threat telemetry, as well as  
24       the goals the acquisition will further, including the capabilities Blue Coat's product  
25       offerings allow.
- 26       ▪ Brewer Decl., Exs. 104-106, 111, 113 are industry publications and a Symantec  
27       document that discuss the results and expectations of the Blue Coat acquisition,  
28       including revenue contributions.

29 This information is highly relevant to at least the following *Georgia-Pacific* factors: the rates  
30 paid for use of other comparable technology (factor 2), utility and advantages of the patented  
31 technology (factor 9), the nature and benefits of the patented invention (factor 10), the extent to which  
32 Blue Coat has made use of the invention (factor 11), the portion or profit or selling price allowed for  
33 use of the invention (factor 12), and the amount of the hypothetical negotiation (factor 15). Blue Coat  
34 also ignores the manner in which Finjan's damages expert, Dr. Christine Meyer, relies on the Blue

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36  
37 <sup>2</sup> "*Georgia-Pacific*" refers to *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp.  
38 1116 (S.D.N.Y. 1970), mod. and aff'd, 446 F.2d 295 (2d Cir. 1971), cert. denied, 404 U.S. 870 (1971).

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