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9 FINJAN, INC.

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

13 FINJAN, INC., a Delaware Corporation,

14 Plaintiff,

15 v.

16 BLUE COAT SYSTEMS, LLC, a Delaware  
17 Corporation,

18 Defendant.  
19

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

**PLAINTIFF FINJAN, INC.'S  
SUPPLEMENTAL BRIEF ON COPYING**

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21  
22 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**  
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1 Substantial evidence will be presented at trial to prove that Blue Coat Systems, LLC’s (“Blue  
2 Coat”) copied Finjan, Inc.’s patented technology to support of Finjan’s willfulness, nonobviousness,  
3 and damages claims. As such, Finjan should be permitted to use the word “copy,” “copied” and  
4 “copying” at trial which is the most appropriate word to describe Blue Coat’s reckless actions.

5 **I. Finjan Should be Permitted to Introduce Evidence of Blue Coat Copying Finjan’s**  
6 **Product to Support Willfulness**

7 Blue Coat’s copying of Finjan’s Vital Security product is evidence that Blue Coat acted  
8 subjectively reckless, as required for willfulness. *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 96  
9 F.3d 1409, 1414 (Fed. Cir. 1996) (willfulness inquiry can rest on whether “infringer ‘intentionally  
10 copied the ideas of another.’”). Finjan will present substantial evidence at trial showing that Blue Coat  
11 copied the Vital Security product, which practices asserted patents. *Wyers v. Master Lock Co.*, 616  
12 F.3d 1231, 1246 (Fed. Cir. 2010) (copying “requires evidence of efforts to replicate a specific product”  
13 shown “through internal company documents”). [REDACTED]

14 [REDACTED]  
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[REDACTED]

Courts have concluded that evidence of this type is sufficient to establish copying. For example, in *Apple Inc. v. Samsung Elecs. Co.*, the Court concluded that four documents describing the testing and benefit of Apple’s “slide-to-unlock” feature were sufficient to establish Samsung’s copying of this feature when it was subsequently included in its products. No. 12-cv-00630-LHK, 2017 WL 2720220, at \*8-9 (N.D. Cal. June 23, 2017). In *Linear Tech. Corp. v. Micrel, Inc.*, the Court concluded that evidence of employee testing the competitor’s product in making their own infringing product was sufficient to show copying. No. C-94-1633 MHP, 2006 WL 8425047, at \*58 (N.D. Cal. Jun. 9, 2006).

Finjan will also present substantial evidence at trial that the Vital Security products practice the asserted patents. Finjan intends to call Mr. Hartstein, Finjan’s CEO, who can testify about which Finjan products practice the asserted patents. Indeed, Mr. Harstein was the 30(b)(6) designee for this exact topic. In addition, Finjan intends to call Mr. Ben-Itzhak who was the former Finjan CTO and has first-hand knowledge regarding the Vital Security products, including how they were marked. Finally, Finjan intends to call Mr. Kroll at trial who was one of the inventors on the ‘494 Patent and can testify about the development of the products which led to the ‘494 Patent. Dkt. No. 289-1 (Finjan’s Witness List). These witnesses will establish how the Vital Security products operated, which patents they embody, and how Finjan marks its products with patent numbers. *Frolow v. Wilson Sporting Goods Co.*, 710 F.3d 1303, 1309 (Fed. Cir. 2013) (“[W]e do agree that the fact that Wilson marked their products with their patent numbers is a fact which supports his allegation that Wilson’s products fall

1 within the patent claims.”).

2 In addition, Finjan will present substantial evidence through its experts that Finjan’s products  
3 practice the asserted patents. For example, Dr. Cole and Dr. Medvidovic conclude in their expert  
4 reports that “Finjan’s technologies were utilized in its Vital Security line of products” and cited the  
5 deposition testimony of former Finjan employees in support of this conclusion. Ex. 9, 3/29/2017 Cole  
6 Rpt. at ¶ 57; Ex. 10, 3/29/27 Medvidovic Rpt. at ¶ 89. Finjan’s experts also discussed how the Vital  
7 Security product operated in their expert report to support this conclusion, referring to the same  
8 features discussed by Blue Coat in its testing of the Vital Security product. Ex. 9, 3/29/2017 Cole Rpt.  
9 at n.7; Ex. 10, 3/29/17 Medvidovic Rpt. at n.8. Furthermore, for the ‘844 and ‘494 Patents, Dr. Cole  
10 cites Vital Security product related documents as supporting claim elements of the ‘844 and ‘494  
11 Patents. Ex. 9, 3/29/2017 Cole Rpt. at ¶¶ 326, 491, 661 (‘844 Patent); 1234, 1399, 1596 (‘494 Patent).

12 The conclusions of Finjan’s witnesses is consistent with the discovery provided in this  
13 litigation. During discovery, Finjan responded to a number of interrogatories detailing the assertions  
14 that Blue Coat copied the Finjan products. Ex. 11, Finjan’s 2/17/17 Supp. Response to Interrog. No. 7.  
15 Furthermore, Finjan produced a number of claim charts to Blue Coat in response to an interrogatory  
16 describing how Vital Security product practices the ‘844 and ‘494 Patents. Ex. 12, Finjan’s 11/18/16  
17 Supp. Response to Interrog. No. 4, at Appendix A. This discovery provided more than sufficient  
18 notice that Finjan would be offering evidence at trial that Blue Coat copied the Finjan products and  
19 that the Finjan products practice the asserted patents.

20 The case law cited in Blue Coat MIL No. 2 is not relevant to whether copying is relevant for  
21 willfulness. Indeed, all the cases cited by Blue Coat relate exclusively to the standard used for non-  
22 obviousness rather than for willfulness. *See Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d  
23 1343, 1366 (Fed. Cir. 2001) (discussing copying for secondary considerations); *see also Wm. Wrigley*  
24 *Jr. Co. v. Cadbury Adams USA LLC*, 683 F.3d 1356, 1364 (Fed. Cir. 2012) (same); *Finjan, Inc. v. Blue*  
25 *Coat Sys., Inc.*, No. 13-cv-03999-BLF, 2015 WL 4129193, at \*7 (B.D. Cal. July 8, 2015) (same). As  
26 discussed above, Courts have allowed copying claims to go to the jury based on the exact type of  
27 evidence that Finjan intends to present. As such, Finjan should be allowed use the word “copy” at trial

28 to describe Blue Coat’s actions based on the evidence that will be presented.

Respectfully submitted,

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