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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

**FINJAN'S RESPONSE TO BLUE COAT'S
NOVEMBER 2, 2017 OBJECTIONS
REGARDING INFRINGEMENT UNDER
§ 271(A) BY ITS MANUFACTURE AND
USE OF GIN**

1 Finjan has substantial evidence that Blue Coat infringes under 35 U.S.C. § 271(a) through its
2 **making** and **using** the Global Intelligence Network (“GIN”) within the United States. Blue Coat
3 improperly conflates different concepts of the law of infringement to allege that Finjan must show that
4 GIN is made, used, **and** sold in the U.S. to prove infringement under §271(a), when in fact, Finjan can
5 establish infringement through any one of these actions. *Carnegie Mellon Univ. v. Marvell Tech. Grp.,*
6 *Ltd.*, 807 F.3d 1283, 1306–07 (Fed. Cir. 2015), reh’g en banc denied in part, 805 F.3d 1382 (Fed. Cir.
7 2015) (“§ 271(a)...states a clear definition of what conduct Congress intended to reach—making *or*
8 using *or* selling in the United States *or* importing into the United States, even if one or more of those
9 activities also occur abroad.”) (emphasis in original). As proven at trial, GIN and each of its
10 components, infringes Finjan’s asserted patents under § 271(a) because it is made and used in the U.S.
11 Thus, infringement under § 271(a) can be proven by a preponderance of the evidence without a
12 showing that GIN is sold in the U.S.

13 **A. Blue Coat is Estopped from Arguing that WebPulse is Made Outside the U.S.**

14 Blue Coat is estopped from arguing that “WebPulse” (a component of GIN) is not made in the
15 U.S., because Blue Coat attempt to make this argument in the first case in its post-trial motion for
16 judgment as a matter of law (“JMOL”) and failed to prevail. Blue Coat I, Dkt. No. 543 at 9-10. In that
17 case, this Court held that Blue Coat infringed by making WebPulse in Draper, Utah and that “Blue
18 Coat did not contest Finjan’s evidence that WebPulse was made and pushed out of Utah . . . there was
19 substantial evidence for the jury to conclude that WebPulse was made in the United States.” *Id.* at 10.
20 Blue Coat did not appeal the JMOL Order to the Federal Circuit, and it is now collaterally estopped
21 from arguing that WebPulse is not made in the U.S. Dkt. No. 276 at 22-23 (collaterally estopping Blue
22 Coat from re-litigating the “identical” issues); *see also Roche Palo Alto LLC v. Apotex, Inc.*, 526 F.
23 Supp. 2d 985, 995 (N.D. Cal. 2007), *aff’d*, 531 F.3d 1372 (Fed. Cir. 2008) (finding that issue
24 preclusion (collateral estoppel) prevented accused infringer from re-litigating issues it previously
25 raised and lost). Blue Coat cannot argue that there are any new circumstances from the previous case,
26 as neither Finjan nor Blue Coat dispute now that WebPulse is still made and updated from the U.S. for
27
28

1 all its users worldwide. Trial Tr. at 889:9-23 (admissions that WebPulse developed in the U.S. and
2 updates pushed from the U.S.).

3 **B. GIN is Made in the U.S.**

4 Every component of GIN is made in the U.S. This has already been, and will be further
5 established at trial with substantial evidence through admitted trial exhibits, expert testimony, fact
6 testimony, and Blue Coat's admissions. Software is made when the source code is compiled into a
7 program. *CNET Networks, Inc. v. Etilize, Inc.*, 528 F. Supp. 2d 985, 994 (N.D. Cal. 2007). The
8 evidence at trial has shown that all of GIN's source code is maintained in the U.S., it is compiled in the
9 U.S., and all updates of GIN are made in the U.S. and are pushed out to all of its data centers.
10 Accordingly, every version of GIN running on any of Blue Coat's worldwide data centers are made in
11 the U.S. This is true for every component of GIN involved in this case – WebPulse and FRS
12 (including GIN sandboxing with MAA).

13 *Microsoft Corp. v. AT&T Corp.*, 127 S.Ct. 1746 (2007), is not relevant to § 271(a)¹ here,
14 because this is not a case where the parties agree that infringement only occurs when software is
15 installed abroad. To the contrary, in this case GIN is undisputedly made (compiled) in the U.S and
16 GIN itself infringes without the need for any additional components to be installed outside of the U.S.
17 Under § 271(a), “[w]hen [the accused infringer] made the [accused products] in this country, it
18 infringed [the claim at issue] ... [and] [w]hether those [accused products] were sold in the U.S. or
19 elsewhere is therefore irrelevant” *See Card-Monroe Corp. v. Tuftco Corp.*, No. 1:14-cv-292,
20 2017 WL 3841878, at *43–45 (E.D. Tenn. Sept. 1, 2017) (quoting *Railroad Dynamics, Inc. v. A. Stuki*
21 *Co.*, 727 F.2d 1506, 1519 (Fed. Cir. 1984) (holding that a royalty award could reach units made in the
22 U.S.—valued at their sale price—regardless of whether they were sold abroad)); *see also Goulds' Mfg.*
23 *Co. v. Cowing*, 105 U.S. 253, 256 (1881) (approving an award based on defendant's profits, reaching
24 units made in the U.S. where some were to be used only abroad).

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27 ¹ *Microsoft* involves infringement for a combination of components abroad under § 271(f), and not
infringement under § 271(a) for making or using an infringing component in the U.S.

1 **1. Evidence Proves Blue Coat Makes GIN in the U.S.**

2 Blue Coat argues that Finjan’s expert, Dr. Meyer, is not entitled to use worldwide users as part
3 of her user-based damages opinions “until substantial evidence supporting infringement under § 271(a)
4 is proffered.” Blue Coat’s November 2, 2017 Objections, Dkt. No. 403 at 1. Even before the close of
5 evidence, Finjan has already established with substantial evidence that all of GIN is made in the U.S.
6 First, Finjan’s experts have already testified, based on an internal Blue Coat document and Blue Coat
7 depositions, that all development of GIN is done in the U.S., and that all versions of GIN are pushed
8 out of the U.S. Trial Tr. at 495:7-496:21 (Cole testimony that all GIN development is in the U.S.);
9 764:17-765:22 (Mitzenmacher testimony that all GIN development is in U.S. and updates are pushed
10 from the U.S.); PTX-216 at BC2-0776971. Finjan also submitted the deposition testimony of Patrik
11 Runald, the head of the Global Intelligence Network, who unequivocally stated that (1) “[t]here’s no
12 development for GIN done outside of Draper,” (2) the source code for GIN is maintained in the U.S.,
13 and (3) WebPulse is developed “[o]nly in Draper.” Trial Tr. at 535:12-536:16; PTX-1275 at 233:21-
14 234:18. Finjan also entered Blue Coat’s own admissions to Finjan’s discovery requests into evidence,
15 which further confirmed that GIN and its components, WebPulse and DRTR, are made in the U.S.
16 Trial Tr. at 889:9-23 (reading Blue Coat’s RFA responses into the record). As such, to date, Finjan has
17 presented substantial evidence that Blue Coat makes GIN in the U.S.

18 **C. Blue Coat Uses GIN in the U.S.**

19 In addition to the undisputed fact that GIN is made in the U.S., it is also used in the U.S. Finjan
20 anticipates that Blue Coat may attempt to allege that certain components of GIN are made and used
21 outside the U.S. As such, Finjan also provided substantial evidence for the alternative infringement
22 theory that Blue Coat uses GIN in the U.S. because the GIN components used abroad are controlled by
23 Blue Coat in the U.S. and Blue Coat gains the benefit from those GIN components in the U.S. As
24 Finjan only asserted *system* claims against GIN, any component Blue Coat alleges was used outside
25 the U.S. still infringes because the system as a whole is controlled by Blue Coat in the U.S. and Blue
26 Coat obtains the benefit from those GIN components in the U.S. *NTP, Inc. v. Research In Motion,*
27 *Ltd.*, 418 F.3d 1282, 1316-17 (Fed. Cir. 2005).

1 **1. Evidence Proves Blue Coat Uses GIN in the U.S.**

2 Finjan can reasonably support its user based damages model based on worldwide users because
3 the evidence provided at trial supports that worldwide use of GIN is controlled by Blue Coat in the
4 U.S. for its own benefit. Finjan presented substantial evidence that the GIN system as a whole is
5 controlled in the U.S. and that the benefit of GIN is for Blue Coat in the U.S. Specifically, both Drs.
6 Cole and Mitzenmacher testified that any GIN component located abroad was not only made in the
7 U.S., but also that Blue Coat in the U.S. exercised control of every component of the system and
8 received the benefit from every component in the U.S. Trial Tr. at 496:5-21, 513:16-515:3, 530:7-
9 532:18, 535:12-536:16 (Dr. Cole testifying about Blue Coat’s controlling and benefiting from GIN in
10 the U.S.); Trial Tr. at 828:2-829:20, 830:6-13 (Dr. Mitzenmacher testifying about Blue Coat’s
11 controlling and benefiting from GIN in the U.S.). Blue Coat’s documents also confirmed the control
12 and benefit aspect of GIN. See JTX-3043 at BC2-0031075 (every Blue Coat product is reliant on GIN,
13 stating that “[e]very Blue Coat thing uses some kind of data from GIN . . . Most things also contribute
14 some kind of data to GIN.”); PTX-105 at 2 (GIN provides [Blue Coat] valuable data to feed [their]
15 analytics engines; PTX-49 at FINJAN-BLCT 011588 (“The Blue Coat Global Intelligence Network
16 contains web and threat data gained from our partnership with over 15,000 of the largest global
17 enterprises”). Even Blue Coat’s own engineers confirmed that the U.S. is where control of the GIN
18 system is exercised and beneficial use of the GIN system is obtained. Trial Tr. at 531:15-532:18 (Mr.
19 Runald deposition testimony that MAAs operated for benefit of FRS in GIN); 513:3-514:3 (Mr. C.
20 Larsen deposition testimony that Blue Coat runs MAAs for benefit of GIN); 535:12-536:16 (Mr.
21 Runald’s deposition testimony that GIN is controlled in the U.S.). As such, Finjan presented
22 substantial evidence that GIN worldwide use is infringement under § 271(a) based on the worldwide
23 user base of GIN.

24 **D. Blue Coat Misapplies the Relevant Case Law**

25 Blue Coat misapplies the case law in attempting to exclude evidence of GIN’s worldwide user
26 base. Dkt. No. 403 at 1. First, Blue Coat misapplies *Microsoft Corp. v. AT&T Corp.* to argue that GIN
27 is not “made” in the U.S., when that case relates to 35 U.S.C. § 271(f) on exporting a component to be
28

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