

1 PAUL J. ANDRE (State Bar No. 196585)
2 pandre@kramerlevin.com

3 LISA KOBIALKA (State Bar No. 191404)
4 lkobialka@kramerlevin.com

5 JAMES HANNAH (State Bar No. 237978)
6 jhannah@kramerlevin.com

7 HANNAH LEE (State Bar No. 253197)
8 hlee@kramerlevin.com

9 KRAMER LEVIN NAFTALIS
10 & FRANKEL LLP

11 990 Marsh Road

12 Menlo Park, CA 94025

13 Telephone: (650) 752-1700

14 Facsimile: (650) 752-1800

15 *Attorneys for Plaintiff*
16 FINJAN, INC.

17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
19 **SAN JOSE DIVISION**

20 FINJAN, INC., a Delaware Corporation,

21 Plaintiff,

22 v.

23 BLUE COAT SYSTEMS, LLC, a Delaware
24 Corporation,

25 Defendant.

Case No.: 15-cv-3295-BLF-SVK

**PLAINTIFF FINJAN, INC.'S MOTION
FOR JUDGMENT AS A MATTER OF
LAW PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 50(a)**

Date: TBD

Time: TBD

Place: Courtroom 3, 5th Floor

Before: Hon. Beth Labson Freeman

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that as soon as the matter may be heard by the Court, Finjan, Inc. (“Finjan”) will and hereby does move the Court for an order granting judgment as a matter of law. This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities, the trial record, the pleadings and papers on file, and any evidence and argument presented to the Court.

RELIEF REQUESTED

Pursuant to the Federal Rule of Civil Procedure 50(a), Finjan moves for judgment as a matter of law (“JMOL”) that Blue Coat Systems LLC (“Blue Coat”) filed to present “a legally sufficient evidentiary basis” for the following claims: (1) Blue Coat’s claim of government sales to support its affirmative defense under 28 U.S.C. § 1498; (2) Blue Coat’s claims of that Blue Coat’s Accused Products¹ do not infringe the Asserted Claims of the Asserted Patents;² (3) Blue Coat’s claim Blue Coat’s infringement of the Asserted Patents was not willful; (4) Blue Coat’s claim that Finjan is not entitled to damages; and (5) Blue Coat’s claim that has a defense to damages based on the *Finjan, Inc. v. Blue Coat Systems, Inc.*, No. 13-cv-03999-BLF (N.D. Cal.) (“*Blue Coat I*”) verdict.

I. LEGAL STANDARD

A court may grant judgment as a matter of law when “a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue” Fed. R. Civ. P. 50(a)(1); *Nichols v. City of San Jose*, No. 14-cv-03383-BLF, 2017 WL 3007072, at *1 (N.D. Cal. July 14, 2017) (a court may grant JMOL “if no reasonable juror could find in the non-moving party's favor”) (citation omitted).

¹ The Accused Products are: (1) GIN (U.S. Patent No. 6,154,844 (the “ ‘844 Patent”), Claim 15; U.S. Patent No. 8,677,494 (the “ ‘494 Patent”), Claim 10; and U.S. Patent No. 9,189,621 (the “ ‘621 Patent”), Claims 1 and 10); (2) Advanced Secure Gateway (“ASG”) with Malware Analysis Appliance (“MAA”) (U.S. Patent No. 6,965,968 (the “ ‘968 Patent”), Claim 1; U.S. Patent No. 7,418,731 (the “ ‘731 Patent”), Claim 1); and (3) Web Security Service (“WSS”) with GIN (U.S. Patent No. 8,225,408 (the “ ‘408 Patent”), Claim 22).

² The “Asserted Patents” and “Asserted Claims” are Claim 15 of the ‘844 Patent, Claim 10 of the ‘494 Patent, Claims 1 and 10 of the ‘621 Patent, Claim 1 of the ‘968 Patent”, Claim 1 of the ‘731 Patent, and Claim 22 of the ‘408 Patent.

1 **II. FINJAN IS ENTITLED TO JMOL THAT BLUE COAT FAILED TO PRESENT**
2 **EVIDENCE OF GOVERNMENT SALES**

3 Blue Coat failed to present “a legally sufficient evidentiary basis” at trial to support an
4 affirmative defense under 28 U.S.C. § 1498 (“Section 1498”). Fed. R. Civ. P. 50(a). The Section 1498
5 affirmative defense requires proof of two elements: (1) that the use or manufacture of the infringing
6 product was for the Government and (2) that the use of the infringing product was with the
7 authorization or consent of the Government that is express or implied. *Sevenson Env'tl. Servs., Inc. v.*
8 *Shaw Env'tl., Inc.*, 477 F.3d 1361, 1365-67 (Fed. Cir. 2007). Government sales, standing alone, do not
9 establish a defense under Section 1498. *Erie Eng'd Prods., Inc. v. Wayne Integrated Techs. Corp.*, No.
10 CV 03-3776, 2005 WL 6582921, at *3 (E.D.N.Y. July 29, 2005). Blue Coat failed to present evidence
11 to prove that the Government provided express or implied consent to use the infringing the Accused
12 Products.

13 First, Blue Coat failed to present substantial evidence of express consent which is typically
14 established by an explicit authorization or consent clause within a contract. *Parker Beach Restoration,*
15 *Inc. v. U.S.*, 58 Fed. Cl. 126, 132 (2003). Blue Coat offered no contracts or agreements with the U.S.
16 Government and its fact witnesses discussed products not at issue in this case (Trial Tr. at 1402:18-21),
17 referred to generalized meetings with and training provided to U.S. Government customers with no
18 indication that such trainings and meetings relates specifically to the Accused Products, (Trial Tr. at
19 1403:2-13), and testified that they did not know which products on the only two exhibits Blue Coat
20 presented JTX-3070 and DTX-2095 were relevant to this case. Trial Tr. at 1574:7-25; 1576:13-18.

21 Second, Blue Coat also failed to provide evidence of any **implied** authorization or consent by the
22 Government. Blue Coat failed to present any evidence at trial that the U.S. Government had any
23 knowledge of infringement or that the U.S. Government customers received and used any of the
24 infringing products that were first sold to the distributors—which is required to show implied consent.
25 *Larson v. U.S.*, 26 Cl. Ct. 365, 370 (1992). Blue Coat’s witness testified that “a way” to verify that the
26 end-user is using the products is when the technical support team is contacted by an end-user, but did
27 not testify that this actually occurred with respect to any U.S. Government customers. Trial Tr. at
28 1575:4-14.

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