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11   **IN THE UNITED STATES DISTRICT COURT**

12   **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13   **SAN JOSE DIVISION**

14

15   FINJAN, INC., a Delaware Corporation,   Case No.: 5:17-cv-04467-BLF-VKD

16   Plaintiff,   **PLAINTIFF FINJAN, INC.'S OPPOSITION
                                                    TO DEFENDANT SONICWALL, INC.'S**
17   v.   **SECOND ADMINISTRATIVE MOTION FOR
                                                    LEAVE TO SEEK CONSTRUCTION OF**
18   SONICWALL, INC., a Delaware Corporation,   **ADDITIONAL CLAIM TERMS [Dkt. 167]**

19   Defendant.

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I. INTRODUCTION

The Court should deny SonicWall's Motion because no good cause exists for additional claim construction and any importation of claim constructions from another case without full briefing is highly prejudicial to Finjan. In its Motion, SonicWall argues that it should be allowed to import five terms and constructions from the *Cisco* case based on Finjan's supplemental infringement contentions ("SSICs"). However, as demonstrated below, Finjan's SSICs are completely consistent with its original infringement contentions with respect to all of the terms that SonicWall identifies, leaving no grounds for SonicWall to request the extraordinary relief it seeks. Moreover, SonicWall's Motion rehashes arguments this Court already rejected, adding only a few curt descriptions of five purported disputes with no attempt to show why these arguments could not have been brought before the Court during the period set for claim construction. And the record SonicWall's counsel has created between this case and the *Cisco* action demonstrates that it will manufacture endless disputes no matter how many terms the Court construes, which further proves that SonicWall's Motion should be denied.

The Motion should also be denied because counsel for SonicWall and Cisco admits to playing both cases off of each other, choosing not to select certain terms for construction here because it had already selected those terms for construction in *Cisco*. In this way, SonicWall gets multiple bites at the apple and has effectively asked for twenty-seven terms to be construed across both cases. Preventing this type of gamesmanship is precisely why the Patent Local Rules were enacted. Finally, if the Court does grant any part of this Motion, Finjan respectfully requests full briefing and a *Markman* hearing, to include new argument based on the intrinsic record that was not considered in the *Cisco* case.

II. BACKGROUND

SonicWall is represented by the same legal team ("Duane Morris") as the defendant in *Finjan, Inc. v. Cisco Systems, Inc.*, 17-cv-00072-BLF ("*Cisco*"). Finjan asserts five patents against Cisco and ten against SonicWall, but has narrowed its total asserted claims in *Cisco* to thirty-two and narrowed them even further in this case to twenty. All five patents asserted in Cisco are also asserted here.

On November 20, 2017, Cisco identified five terms whose construction was most significant. *Cisco*, Dkt. 85 at 9. Nine days later, Cisco moved this Court for leave to brief an additional ten terms.

1 asserted 32 claims. *Id.* The Court denied Cisco's motion and issued a claim construction order on July

2 23, 2018. *Cisco*, Dkt. 134.

3   On July 25, 2018, SonicWall identified five terms whose construction was most significant.

4 Dkt. 80 at 13. SonicWall's counsel admitted that it avoided selecting certain terms as significant here

5 because it had already selected those terms in the Cisco case, stating "… the five terms that SonicWall

6 identifies here are different than those identified in the *Cisco* case (and are all from the five patents that

7 are not at issue in the *Cisco* case))… the parties should adopt the briefing and arguments set forth in

8 the *Cisco* case for those eight (8) terms addressed in that case…." *Id.* at 14.

9   On September 21, 2018, Cisco moved this Court again to construe four more terms. *Cisco*,

10 Dkt. 144 at 1. Although Cisco repeated its assertion that these four disputes were "fundamental," one

11 was a term Cisco had never mentioned in its first motion to construe additional terms, and only three of

12 these terms overlapped with the ten terms Cisco previously identified as requiring construction. *Id.*

13 The Court construed these four more terms on February 5, 2019. *Cisco*, Dkt. 173.

14   On March 26, 2019, the Court issued its claim construction order in the SonicWall case. Dkt.

15 132. On April 30, 2019, SonicWall moved this Court to brief ten more terms, including seven terms

16 that were construed in *Cisco*. Dkt. 136. In that motion, SonicWall argued that the Court could easily

17 import the briefing from the *Cisco* case here. *Id.* The Court denied SonicWall's motion finding "the

18 Patent Local Rules do not contemplate additional claim construction merely because certain terms

19 were construed elsewhere," and that the "ease" of incorporating constructions from *Cisco* "is not good

20 cause." Dkt. 142 at 1-2. The Court also asked why SonicWall "did not select these terms in the

21 original construction or what has changed since that time to warrant additional construction." *Id.* at 2.

22   Undeterred, on October 3, 2019, SonicWall filed the instant Motion, arguing again that the

23 constructions from the *Cisco* case should be imported here without additional briefing. Motion at 5.

24 However, SonicWall never named any of these terms in its original selection of the five most

25 significant in this case, and one is a new term that SonicWall did not mention in its first motion for

26 additional construction. *Cf.* Dkt. 136 at 1-2 *with* Motion at 1 (now identifying terms from the '822

27 Patent). Finally, contrary to the Court's guidance that "I need better reasons than I've had in the past,"

1 which was purportedly the basis for SonicWall's request. Dkt. 155 at 33, 44.

2 **III.   ARGUMENT**

3   **A.   SonicWall Still Fails to Show Good Cause for Additional Claim Constructions**

4   Good cause does not exist because SonicWall does not identify any changes in Finjan's SSICs.

5 During a recent hearing, this Court allowed SonicWall to bring a motion for additional construction, if

6 warranted, based on Finjan's SSICs. *Id*. at 28, 33, 44. However, SonicWall did not identify a single

7 instance in which the SSICs differed from Finjan's original infringement contentions. Thus,

8 SonicWall has not identified good cause for amending the Patent Local Rules because it had every

9 opportunity to select the five terms it believed were fundamental to this dispute in its original selection.

10   The '633 Patent and '822 Patent: SonicWall identifies two constructions that should be

11 imported from *Cisco*, arguing Finjan now identifies an information-destination as a cloud service or

12 virtual machine/sandbox in its SSICs. Motion at 3. However, Finjan's original contentions were

13 consistent on this issue and the SSICs did not change that. *See* Ex. 1[1], Appx J-1 at 10. ("Capture ATP

14 contain or connects to a virtual machine/sandbox (information-destination)"). Thus, no good cause

15 exists for adding these constructions because SonicWall could have identified them beforehand.

16   The '494 Patent: SonicWall argues that the construction of "Downloadable scanner" should be

17 imported because Finjan accuses scanners that may also execute code in its SSICs. Motion at 3. But,

18 Finjan's position has been consistent on this issue. *See* Ex. 2, Appendix B-1 at 8 ("Capture ATP

19 includes a Downloadable scanner which 'executes suspicious code…'"). Thus, SonicWall does not

20 identify any good cause for not selecting this term in its original selection.

21   The Motion also references a decision relating to an IPR in which the Federal Circuit

22 confirmed the validity of these claims. SonicWall requests additional briefing in light of that decision

23 but at the same time has the "full expectation that the Court would adopt the *Cisco* case constructions."

24 Motion at 5. Regardless, the Federal Circuit decision is consistent with Finjan's infringement

25 contentions and there is no good cause to import the *Cisco* construction because Finjan's contentions

26 on this issue have stayed uniform.

27   The '780 Patent: SonicWall argues that the term "performing a hashing function…" should be

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construed because the SSICs accuse hashing multiple files. But Finjan has consistently accused

engines that have the ability to hash multiple since its original contentions. *See* Ex. 3, Appendix D-1 at

13 (accusing hashing on parent (dropper) and target (dropped) files). SonicWall should have selected

this term in its original selection and does not have good cause for adding this term to the case now.

The '154 Patent: SonicWall argues that the terms "first function" and "second function" should

be construed because the SSICs identify first functions that infringe the '154 Patent. But Finjan's

infringement contentions have been consistent on this issue and have consistent accused the same types

of functions in its original infringement contentions. *See* Ex. 4, Appendix H-1 at 2 ("Examples of the

first functions are JavaScript and iframes that can be embedded in HTTP communications"). Thus,

SonicWall does not identify any good cause for not selecting this term in its original selection.

The '844 Patent: In its Motion, SonicWall does not dispute the Court's ruling that the terms in

the '844 Patent do not require construction and that the plain and ordinary meaning should apply.

Thus, there is no reason to reopen claim construction for the '844 Patent.

Contrary to SonicWall's arguments, the summary judgement orders from Finjan's other cases

fail to demonstrate good cause because those are based on the functions of different products, which

have no application here. As the Court stated, "your construction of a claim doesn't depend on what

product you're accusing. It is what it is." Motion at 4; *Biotec Biologische Naturverpackungen GmbH*

& Co. KG v. Biocorp, Inc., 249 F.3d 1341, 1349 (Fed. Cir. 2001) (finding a purported claim

construction dispute was actually an infringement issue for the jury). In short, SonicWall identified a

list of terms that it believed were fundamental to this case and SonicWall has failed to demonstrate any

change since that original selection that would constitute good cause to depart from the Patent Local

Rules. *Sage Electrochromics, Inc. v. View, Inc.*, No. 12-cv-6441-JST, 2014 WL 1379282, at *3 n.2, 4

(N.D. Cal. Apr. 7, 2014) (parties should "explain why" the Court should construe more than ten terms).

The Motion should be denied.

B.   **SonicWall's Manipulation Prejudices Finjan and Sets a Dangerous Precedent**

In denying SonicWall's first motion on this issue, this Court said: "This request seems geared

to manipulate the Patent Local Rules where counsel in this case is simultaneously representing a

different defendant in a separate case involving the same patents. The Patent Local Rules do not

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