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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

FINJAN, LLC, a Delaware Corporation,  
  
Plaintiff,  
  
vs.  
  
SONICWALL INC., a Delaware  
Corporation  
  
Defendant.

Case No. 5:17-cv-04467-BLF-VKD  
**SONICWALL, INC.’S MOTION TO  
STRIKE NEW THEORIES IN FINJAN,  
LLC’S EXPERT REPORTS**

Date: March 11, 2021  
Time: 9:00 a.m.  
Dept: Courtroom 3, Fifth Floor  
Judge: Hon. Beth Labson Freeman

**REDACTED**

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

3 PLEASE TAKE NOTICE that on March 11, 2021, at 9:00 a.m. or as soon thereafter as this matter  
4 may be heard, in the courtroom of the Honorable Beth Labson Freeman, at 280 S. 1st St, San Jose,  
5 CA 95113, Defendant SonicWall Inc. (“SonicWall”) will and hereby does move for an order striking  
6 certain theories in Plaintiff Finjan, LLC’s (“Finjan”) expert reports.

7 This motion is based on this notice of motion and motion, the supporting memorandum of  
8 points and authorities set forth below, the accompanying declaration of David Dotson (“Dotson  
9 Decl.”), the pleadings and papers on file with the Court and all other matters properly before this  
10 Court.

11 **STATEMENT OF RELIEF SOUGHT**

12 SonicWall seeks an Order from the Court striking certain theories from Finjan’s Experts  
13 Reports that are not disclosed in Finjan’s Operative Infringement Contentions.

14 **STATEMENT OF THE ISSUE TO BE DECIDED**

15 Whether Finjan’s expert reports contain theories that are not disclosed in the Operative  
16 Infringement Contentions or violate the Court’s November 20, 2019 Order (Dkt. No. 210).

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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Finjan's expert reports on infringement contain a number of theories that were either not disclosed in Finjan's Third Supplemental Infringement Contentions (the "Operative Contentions") or are in direct violation of this Court's November 20, 2019 Order striking certain infringement theories ("November 20 Order") (Dkt. No. 210). Despite meeting and conferring to address each of these theories, Finjan has refused to withdraw the theories addressed herein.

**II. LEGAL STANDARD**

This Court set forth the standard for a motion to strike based on new theories in a case:

The dispositive inquiry in a motion to strike is thus whether the allegedly undisclosed "theory" is in fact a new theory or new element of the accused product alleged to practice a particular claim that was not previously identified in the plaintiff's contentions, or whether the "theory" is instead the identification of additional evidentiary proof showing that the accused element did in fact practice the limitation. . . . If the theory is new, prejudice is "inherent in the assertion of a new theory after discovery has closed."

*Finjan, Inc. v. Blue Coat Sys., LLC*, No. 15-cv-03295, 2017 U.S. Dist. LEXIS 220192, \*13 (N.D. Cal. July 28, 2017) (citations omitted).

**III. THE COURT SHOULD STRIKE FINJAN'S PREVIOUSLY UNDISCLOSED INFRINGEMENT THEORIES****A. New Infringement Theories Concerning the '305 Patent****1. The Network Traffic Probe Limitation**

The asserted claims of the '305 Patent all recite "a network traffic probe . . . for selectively diverting incoming content from its intended destination to said rule-based content scanner" ("the Traffic Probe Limitation"). In his expert report on infringement, Dr. Medvidovic offers the following new theories for this limitation that were not identified in Finjan's Operative Contentions: (i) Capture ATP's "controller server or its Capture Engine" is the "network traffic probe"; and (ii) the "endpoint client computer" is the "intended destination."

1 In its Operative Contentions, Finjan offered a single theory for how all three accused  
2 products satisfy the Traffic Probe limitation:

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 Finjan’s Third Supplemental Contentions, Appendices G-2 (Ex. A) at 16, 30; G-3 (Ex. B) at 15, 28;  
11 and G-4 (Ex. C), at 14, 28; (“ [REDACTED]

12 [REDACTED]  
13 As shown, Finjan’s Operative Contentions failed to identify a specific component that  
14 constitutes the claimed network traffic probe, and it identified only the “[REDACTED]  
15 [REDACTED]” as the destination computer. In contrast, paragraphs 217 and 218  
16 of Dr. Medvidovic’s report identifies “Capture ATP’s controller server or its Capture Engine” as the  
17 claimed network traffic probe and the “endpoint client computer” (in addition to the virtual  
18 machines) as the claimed destination computer.

19 Notably, after notifying Finjan of this issue, Finjan was unable to identify anywhere in its  
20 Operative Contentions that it identified Capture ATP’s controller server or its Capture Engine as the  
21 claimed network traffic probe. Rather, it asserted only that SonicWall had sufficient notice from  
22 Finjan’s conclusory assertions that Capture ATP had a network traffic probe. Ex. D, 10.2.20 Email  
23 from J. Wolff. Similarly, Finjan could not identify anywhere in its Operative Contentions that it  
24 identified the “endpoint client computer” as the destination computer in connection with asserted  
25 claims 11 and 12. Instead, it pointed to the Contention’s analysis of claim 13 (no longer asserted  
26 because it was rendered invalid), where the Contentions identified the client computer as the  
27 destination computer. *Id.* However, unlike asserted claims 11 and 12, claim 13 does not limit the  
28 “destination computer” to being the same computer that receives and selectively diverts incoming

1 content. Compare claim 13 (“receiving, at the computer, incoming content from the Internet *on its*  
 2 *destination to an Internet application*”) with claims 11 and 12 (“a computer, comprising: a network  
 3 interface, housed within a computer, for receiving incoming content from the Internet on its  
 4 destination to an Internet application *running on the computer*.”). Thus, Finjan could identify a  
 5 different destination computer for claim 13 than for claims 11 and 12. As such, identifying the  
 6 endpoint client computer as the destination computer for claim 13 did not place SonicWall on notice  
 7 of Finjan’s theory that the endpoint computer is the destination computer of claims 11 and 12.

8 Because Finjan’s Operative Contentions did not place SonicWall on notice of either theory,  
 9 the Court should strike these theories from paragraphs 217 and 218 of Dr. Medvidovic’s report.

## 10 2. The Update Manger Limitation

11 Asserted claims 11 and 12 also recite “a rule update manager . . . for updating said database  
 12 of parser and analyzer rules periodically” (“the Rule Update Limitation”). In Paragraph 224 of his  
 13 report, Dr. Medvidovic offers the new theory that Capture ATP’s “controller (or Capture Engine) or  
 14 an update server” is the rule update manager of the Rule Update Limitation.

15 Finjan’s Operative Contentions offered a single theory that the claimed update manager is  
 16 Capture ATP’s “[REDACTED]”: “[REDACTED]  
 17 [REDACTED]  
 18 [REDACTED].” Finjan’s Third Supplemental  
 19 Contentions, Appendices G-2 (Ex. A) at 19; G-3 (Ex. B) at 18; G-4 (Ex. C) at 17. Dr. Medvidovic’s  
 20 report likewise identifies the “[REDACTED]” as the rule update manager. Ex. E,  
 21 Medvidovic Rep., ¶ 225 (“[REDACTED]  
 22 [REDACTED].”). Paragraph 224 of Dr. Medvidovic’s report, however, additionally  
 23 offers the new theory that “[REDACTED]  
 24 [REDACTED]” *Id.* ¶ 224.

25 Upon being notified of this issue, Finjan asserted only that the Operative Contentions  
 26 identified [REDACTED] as the rule update manager, which is not the dispute at issue,  
 27 and that its *initial* infringement contentions indicate the “rule update engine included in the  
 28 SonicWall Gateway that is run on a server.” Ex. D, 10.2.20 Email from J. Wolff. Finjan’s initial

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