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13 Attorneys for Plaintiff
FINJAN LLC

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 (SAN JOSE DIVISION)
17

18 FINJAN LLC, a Delaware Limited Liability
19 Company,
20 Plaintiff,
21 v.
22 SONICWALL INC., a Delaware Corporation,
23 Defendant.
24

Case No. 5:17-cv-04467-BLF (VKD)

**FINJAN LLC'S OPPOSITION TO
SONICWALL INC.'S MOTION TO
STRIKE NEW THEORIES IN FINJAN
LLC'S EXPERT REPORTS**

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

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26 **REDACTED VERSION**
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Rewrite Engine, WIKIPEDIA, https://en.wikipedia.org/wiki/Rewrite_engine
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1 Finjan provided ample notice of its theories in its initial and supplemental infringement
2 contentions. Finjan’s expert reports marshal the evidence to provide a complete statement of their
3 opinions, consistent with the contentions and the Court’s November 20, 2019 Order. Dkt. 210.
4 SonicWall’s request would effectively require parties to identify infringement theories *and* all
5 supporting evidence during fact discovery, eliminating the need for expert reports. That is not the
6 law. Infringement contentions must identify infringement theories, not marshal all evidence
7 collected during discovery. Finjan’s contentions disclose its theories—and more. Accordingly,
8 SonicWall’s Motion to Strike Finjan’s Expert Reports (Dkt. 299-3) should be denied.

9 I. STATEMENT OF FACTS

10 Finjan served its initial infringement contentions on April 10, 2018 pursuant to Patent
11 Local Rule 3-1. *See, e.g.*, Declaration of Jason Wolff (“Wolff Decl.”) at ¶ 2. Finjan supplemented
12 its Contentions three times, on November 9, 2018, May 31, 2019, and December 11, 2019. *See id.*
13 at ¶¶ 5–12. Finjan updated certain infringement charts following the Court’s November 2019
14 Order. *See, e.g.*, Dkts. 299-16, 299-17 (Appxs. H-2 and H-4, 7/2/2020). After Finjan’s service of
15 infringement expert reports on September 3, 2020, SonicWall alleged Finjan’s reports contained
16 new theories. Dkt. 299-8 (Sept. 21, 2020 Email fr. J. Gunther). The parties conferred and Finjan
17 responded with a detailed explanation with pincites for each issue raised. *See* Dkt. 299-8 (Oct. 2,
18 2020 Email fr. J. Wolff). Finjan maintains these theories were properly and timely disclosed.

19 II. LEGAL STANDARD

20 Patent L.R. 3-1 “require[s] parties to crystallize their theories of the case early in the
21 litigation.” *Digital Reg of Texas, LLC v. Adobe Sys. Inc.*, No. CV 12-01971-CW (KAW), 2014
22 WL 1653131, at *2 (N.D. Cal. Apr. 24, 2014) (citation omitted). “The threshold question in
23 deciding whether to strike an expert report is whether the expert has permissibly specified the
24 application of a disclosed theory or impermissibly substituted a new theory altogether.” *Id.* The
25 operative word “theories” does not mean marshalling all evidence or citing minutia. *Id.* (quoting
26 *Apple Inc. v. Samsung Elecs. Co.*, 5:12-CV-0630-LHK-PSG, 2014 WL 12917334, at *1 (N.D. Cal.
27 Jan. 9, 2014) (“Contentions need not disclose specific evidence. . . .”).

1 **III. ARGUMENT**

2 **A. Finjan's Infringement Theories Were Disclosed In Its Contentions**

3 **1. The '305 Patent**

4 **a. Network Traffic Probe And Destination Computer Limitations**

5 Finjan's infringement contentions disclosed the "network traffic probe" theories described
6 in ¶¶ 217-218 of Dr. Medvidovic's report. Finjan has always alleged that Capture ATP infringes
7 the '305 claims by providing a network traffic probe that scans and diverts incoming content from
8 its intended destination. *See* Exh. A (Appx. G-2, to Finjan's 4/10/18 Infr. Contentions) at 10-11.
9 SonicWall does not dispute that Finjan accused Capture ATP of infringement and described how a
10 functionality satisfies the network traffic probe limitation. Instead, SonicWall argues that Finjan
11 "failed to identify a specific component that constitutes the claimed network traffic probe, and it
12 identified only the [REDACTED] as the
13 destination computer." Mot. at 2. SonicWall's dispute is not whether Finjan's *theory* was
14 disclosed, but instead whether Finjan's contentions should have presented more evidence in
15 support. It is proper for expert reports to present evidence and analysis to support theories
16 disclosed in contentions. *See Digital Reg of Texas*, 2014 WL 1653131, at *5 ("[E]xpert reports are
17 expected to provide more information than is contained in infringement contentions.").

18 First, SonicWall cannot dispute that Finjan's contentions described how CaptureATP
19 satisfies the network traffic probe limitation and Finjan's expert reports do not deviate from those
20 contentions. Finjan's contentions stated, [REDACTED]
21 [REDACTED] Exh. B (Appx. G-2, 12/11/19) at 16.
22 Finjan's expert report consistently states that the network [REDACTED]
23 [REDACTED]
24 [REDACTED] Exh. C
25 (Medvidovic Rep.) at ¶ 217. Finjan's contentions further identified the Capture ATP source code
26 demonstrating that the network traffic probe performs the infringing functionality. Exh. B at 17
27 [REDACTED]

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