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

FINJAN, LLC, a Delaware Limited Liability  
Company,

Plaintiff,

vs.

SONICWALL INC., a Delaware  
Corporation

Defendant.

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

**SONICWALL, INC.’S REPLY IN  
SUPPORT OF ITS 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 **I. New Infringement Theories Concerning the '305 Patent**

2 The Network Traffic Probe Limitation. Finjan does not deny that its contentions never  
3 identified “Capture ATP’s controller server or its Capture engine” as the claimed network traffic  
4 probe. Instead, Finjan suggests it was enough to allege that Capture ATP *has* a traffic probe and that  
5 it was not required to identify the specific component within Capture ATP that constitutes the network  
6 traffic probe. Finjan is mistaken. Patent L.R. 3-1(c) requires contentions to identify “*specifically*  
7 *where and how* each limitation of each asserted claim is found within each Accused Instrumentality.”  
8 *See also DCG Sys. v. Checkpoint Techs., LLC*, 2012 WL 1309161, at \*2 (N.D. Cal. Apr. 16, 2012).  
9 Finjan’s contentions absolutely were required to identify Finjan’s theory regarding the component of  
10 Capture ATP that constitutes the claimed network traffic probe for its expert to offer such opinion.

11 To be clear, this is not, as Finjan argues, Finjan’s expert simply providing additional evidence  
12 that Capture ATP’s controller server or Capture engine is the network traffic probe. Op. Br. at 2. This  
13 is Finjan’s expert report identifying for the first time that Capture ATP’s controller server or Capture  
14 engine is the network traffic probe. While the former is permissible, the latter is not. The Court should  
15 thus strike any reference to such assertion from Dr. Medvidovic’s report (¶ 217).

16 The Intended Destination Limitation. Finjan concedes it never identified the endpoint client  
17 computer as the “intended destination” of claims 11 and 12 (which depend from claim 1). Instead,  
18 Finjan argues SonicWall was on notice that the endpoint computer is the intended destination of claims  
19 11 and 12 because Finjan’s contentions identified the endpoint computer as the intended destination  
20 of *claim 13* (no longer asserted because it was rendered invalid in another case). Finjan is wrong.

21 There is a key difference between the “intended destination” of (invalid) claim 13 and the  
22 “intended destination” of claims 11 and 12. Specifically, claim 13 places no limitation on what the  
23 intended destination can be, allowing Finjan to identify the endpoint computer as the destination.  
24 Claims 11 and 12, on the other hand, require (via dependency on claim 1) the intended destination to  
25 be the same computer that houses the network interface. *Compare* claim 13 (“receiving, at the  
26 computer, incoming content from the Internet on its destination to an Internet application”) *with* claim  
27 1 (“a network interface, housed within a computer, for receiving incoming content from the Internet  
28 on its destination to an Internet application running on the computer.”). Since Finjan did not accuse

1 the endpoint computer of housing the claimed network interface with claims 11 and 12 (it accused  
2 only the gateways and Capture ATP), it made sense that Finjan chose *not* to identify the endpoint  
3 computer as the intended destination of claims 11 and 12. The only way Finjan’s expert can now do  
4 so is by asserting the new theory that the gateways, Capture ATP, and the client endpoint computer  
5 together form a single computer (the subject of SonicWall’s pending summary judgment motion).

6 For these reasons, asserting that the endpoint client computer is the intended destination of  
7 claim 13 did not place SonicWall on notice or preserve Finjan’s right to assert that the endpoint client  
8 computer is the intended destination of claims 11 and 12. The Court should thus strike any reference  
9 to the endpoint client computer as the intended destination of claims 11 and 12 (¶ 218).

10 The Update Manager Limitation. Finjan does not deny that its Operative Contentions (Third  
11 Supplemental Infringement Contentions) identify only [REDACTED] as  
12 the claimed update manager, and *not* [REDACTED]  
13 [REDACTED] as set forth in its expert report. Instead, Finjan argues it “has always alleged that Capture ATP  
14 infringes the ’305 Patent’s asserted claims by including a rule update engine” which constitutes the  
15 “rule update manager.” Finjan Br. at 4. This assertion is problematic for a number of reasons.

16 *First*, in asserting it has “always alleged” that the “rule update engine” is the claimed “rule  
17 update manager,” Finjan cites only to its Initial and First Supplemental Infringement Contentions, *not*  
18 to the Operative Contentions. This is critical because during the parties’ April 2, 2020 meet and confer  
19 regarding the latter, Finjan expressly represented that the Third Supplemental contentions *replaced*,  
20 as opposed to supplemented, its early contentions. Ex. 1 (4.2.2020 McGrath Email to Hannah). It did  
21 so in response to SonicWall’s stated concern that Finjan’s experts would later seek to use Finjan’s  
22 earlier contentions to support theories Finjan had dropped or amended. Gunther Decl. ¶ 2.

23 *Second*, the “rule update engine” identified in Finjan’s subsequently-replaced infringement  
24 contentions is different from [REDACTED] that  
25 its expert report now identifies. *Third*, Finjan asserts that paragraph 224 “that SonicWall seeks to  
26 strike” includes Finjan’s machine learning allegation that was in the Operative Contentions. But  
27 SonicWall is *not* seeking to strike that aspect of paragraph 224. Op. Br. at 3 [REDACTED]  
28 [REDACTED] as the rule update manager . . . is not the dispute at issue.”). Because they were not identified

1 in its Operative Contentions, the Court should strike from ¶ 224 of Dr. Medvidovic’s expert report any  
2 reference to the rule update manager being satisfied by [REDACTED]

## 3 [REDACTED]

### 4 **II. New Infringement Theories Concerning the ’408 Patent**

5 Dynamically Building a Parse Tree. Finjan admits that the first time it disclosed its theory as  
6 to *how* the machine learning module satisfies this limitation is in Dr. Medvidovic’s report (noting the  
7 report “details the process of dynamically building the parse tree”). Op. Br. at 5. Indeed, it was only  
8 through Dr. Medvidovic’s report that Finjan explained its theory that a parse tree is dynamically built  
9 because [REDACTED] “is an ongoing process that adjusts as more information is received.” There  
10 is nothing in Finjan’s Operative Contentions from which SonicWall could have gleaned this theory.

11 Again, Dr. Medvidovic did not simply provide additional evidence for a theory previously  
12 disclosed. He offered for the first time a theory as to *how* the [REDACTED] purportedly  
13 dynamically builds a parse tree. Patent L.R. 3-1(c) (requiring a plaintiff to prepare charts “identifying  
14 specifically where *and how* each limitation of each asserted claim is found within each Accused  
15 Instrumentality.”). Because it was not in Finjan’s infringement contentions, the Court should strike  
16 Dr. Medvidovic’s theory regarding this limitation from his report (¶¶ 146-149)

17 Dynamically detecting . . . potential exploits. Finjan also concedes that while its contentions  
18 mention that the [REDACTED] dynamically detects based on analyzer rules,” they offer  
19 no theory as to how it does so *while said dynamically building builds the parse tree*, as claimed. Op.  
20 Br. at 6. Finjan further concedes that it only offered its theory as to how this is done through Dr.  
21 Medvidovic’s report. *Id.* Nothing in Finjan’s Operative Contentions could possibly have placed  
22 SonicWall on notice of the theory Dr. Medvidovic’s report details regarding dynamic detection *while*  
23 *said dynamically building builds the parse tree*. Because the theory was not disclosed in Finjan’s  
24 Operative Contentions, the Court should strike the theory from Dr. Medvidovic’s report. (¶ 158).

### 25 **III. New Infringement Theories Regarding the ’780 Patent**

26 Finjan does not dispute that its Operative Contentions included no theory in which a referenced  
27 software component is fetched by extracting a file from a compressed or archive file. Op. Br. at 6-7.  
28 Instead, Finjan argues that its *initial* contentions – not its Operative Contentions – referenced

1 compressed and archive files as Downloadable types. *Id.* Yet, even the initial contentions failed to  
2 disclose any theory in which software components are fetched *via extraction*, *see, e.g.*, Dkt. No. 313-  
3 9 at 21-27. They only theorize that a software component is fetched from the Internet (by  
4 downloading) during execution of another file. *Id.* at 21-23, 25 (“Capture ATP fetchs [sic] components  
5 of a Downloadable during dynamic analysis in a sandbox received through internet traffic”).

6 After being ordered to further supplement its contentions, Finjan served second supplemental  
7 contentions eliminating all references to compressed/archive files. These second supplemental  
8 contentions likewise do not cite the source code cited in paragraph 134 in Dr. Mitzenmacher’s report  
9 in support of this undisclosed theory, *i.e.*, the [REDACTED] code. *See* Exs. 2 (Appx. D-1) at 11, 13, 15  
10 (all referencing source code files discussing dropped files); 3 (Appx. D-2) at 8 (same); 4 (Appx. D-3)  
11 at 7 (same); 5 (Appx. D-4) at 8 (same). Nor do Finjan’s Operative Contentions cite the source code  
12 Dr. Mitzenmacher cites. Exs. 6-9. Thus, the Court should strike Dr. Mitzenmacher’s infringement  
13 theory based on extracting files from a compressed/archive file.

#### 14 **IV. New Infringement Theories Regarding ’154 Patent**

15 Gateway and ESA Alone Theories. Dr. Medvidovic – Finjan’s *technical* expert – opines that  
16 Gateways and ESAs “individually” infringe. Dkt. 299-9 at ¶¶ 268, 288. Yet Finjan now concedes its  
17 Gateway and ESA “alone” theories in fact *require* Capture ATP. Op. Br. at 8 (“Finjan’s . . .  
18 infringement theory for the Gateway and ESA requires Capture ATP.” . . . “both the so-called ‘alone’  
19 theory, . . . and the ‘combination’ theory . . . are the same theory.”). Specifically, Finjan’s “alone”  
20 theories are based on Finjan’s assertion that the Gateways and ESA come with a “free trial” of Capture  
21 ATP. *Id.* Because Finjan admits its ESA and Gateway infringement theories all *require* Capture ATP,  
22 all statements in its expert report indicating that a Gateway or ESA “individually” infringe should be  
23 struck, and Dr. Medvidovic should be precluded from offering Gateway/ESA “alone” theories at trial.

24 Notably, this is not, as Finjan alleges, a “separate damages issue,” but goes to the heart of what  
25 is accused of infringement. Op. Br. at 8. Dr. Medvidovic’s report provides no explanation as to how  
26 a free trial of Capture ATP differs as a technical matter from his Gateway/ESA combined with Capture  
27 ATP theory. Dr. Medvidovic’s report likewise fails to make clear that when he claims that the  
28 Gateways/ESA “individually” infringe, he is relying on their use with Capture ATP (albeit via a free

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