

1 Juanita R. Brooks (CA SBN 75934) brooks@fr.com
Roger A. Denning (CA SBN 228998) denning@fr.com
2 Jason W. Wolff (CA SBN 215819) wolff@fr.com
John-Paul Fryckman (CA SBN 317591) fryckman@fr.com
3 K. Nicole Williams (CA291900) nwilliams@fr.com
FISH & RICHARDSON P.C.
4 12860 El Camino Real, Suite 400
San Diego, CA 92130
5 Telephone: (858) 678-5070 / Fax: (858) 678-5099

6 Proshanto Mukherji (*Pro Hac Vice*) mukherji@fr.com
FISH & RICHARDSON P.C.
7 One Marina Park Drive
Boston, MA 02210
8 Phone: (617) 542-5070/ Fax: (617) 542-5906

9 Robert Courtney (CA SNB 248392) courtney@fr.com
FISH & RICHARDSON P.C.
10 3200 RBC Plaza
60 South Sixth Street
11 Minneapolis, MN 55402
Phone: (612) 335-5070 / Fax: (612) 288-9696
12

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
25

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

**PLAINTIFF FINJAN LLC'S MOTION TO
PRECLUDE TRIAL TESTIMONY FROM
STEPHEN BECKER, PH.D.**

Date: June 24, 2021

Time: 9:00 a.m.

Judge: Hon. Beth Labson Freeman

Dept: Courtroom 3, Fifth Floor

26 **REDACTED VERSION OF DOCUMENT FILED**
27 **UNDER SEAL**
28

TABLE OF CONTENTS

1

2 I. NOTICE OF MOTION 1

3 II. STATEMENT OF RELIEF BEING SOUGHT AND THE ISSUE TO BE

4 DECIDED 1

5 III. STATEMENT OF THE RELEVANT FACTS 1

6 A. Nature and Stage of the Case 1

7 B. The Damages Period for Each Asserted Patent Begins No Earlier

8 Than September 2014, and Ends as Late as December 2025 1

9 C. SonicWall’s Damages Expert Computed Damages Based Primarily

10 on Pre-Notice Revenues, While Excluding Years of Later

11 Infringement..... 2

12 IV. ARGUMENT..... 4

13 A. Legal Standards 5

14 B. Because It Bases Damages on Pre-Notice Acts for All Asserted

15 Patents, Dr. Becker’s Model Contravenes the Patent Act and Clear

16 Appellate Authority 6

17 C. Because It Accords Zero Value to Late-Term Infringement for the

18 ’780, ’968, ’305, ’408, and ’154 Patents, Dr. Becker’s Model is

19 Doubly Improper 8

20 D. No Part of *Georgia-Pacific* Justifies Dr. Becker Including Pre-

21 Notice Revenues in, and Excluding Later Revenues From, the

22 Royalty Base 9

23 E. Because Dr. Becker’s Damages Computations Contravene Damages

24 Law , the Court Should Preclude Testimony Thereon10

25 V. CONCLUSION.....10

26

27

28

TABLE OF AUTHORITIES**Page(s)****Cases**

1		
2		
3	Cases	
4	<i>Arctic Cat Inc. v. Bombardier Recreational Products Inc.</i> ,	
5	876 F.3d 1350 (Fed. Cir. 2017).....	5
6	<i>AstraZeneca AB v. Apotex Corp.</i> ,	
7	782 F.3d 1324 (Fed. Cir. 2015).....	6, 7
8	<i>Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.</i> ,	
9	809 F.3d 1294 (Fed. Cir. 2015).....	5
10	<i>Daubert v. Merrell Dow Pharm., Inc.</i> ,	
11	509 U.S. 579 (1993).....	5
12	<i>Dow Chem. Co. v. Mee Indus., Inc.</i> ,	
13	341 F.3d 1370 (Fed. Cir. 2003).....	8
14	<i>Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp.</i> ,	
15	879 F.3d 1332 (Fed. Cir. 2018).....	5
16	<i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> ,	
17	No. 13-cv-03999-BLF, 2015 WL 427280 (N.D. Cal. July 14, 2015)	7, 8
18	<i>Fromson v. W. Litho Plate & Supply Co.</i> ,	
19	853 F.2d 1568 (Fed. Cir. 1988), <i>overruled on other grounds by Knorr-Bremse</i>	
20	<i>Systeme fuer Nutzfahrzeuge GmbH v. Dana Corp.</i> , 383 F.3d 1337 (Fed. Cir.	
21	2004).....	10
22	<i>Kumho Tire Co. v. Carmichael</i> ,	
23	526 U.S. 137 (1999).....	5
24	<i>Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.</i> ,	
25	895 F.2d 1403 (Fed. Cir. 1990).....	5, 9
26	<i>Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.</i> ,	
27	711 F.3d 1348 (Fed. Cir. 2013).....	9
28	<i>VirnetX, Inc. v. Cisco Sys., Inc.</i> ,	
	767 F.3d 1308 (Fed. Cir. 2014).....	5
	Statutes	
	35 U.S.C. § 284.....	6, 7, 8, 9
	35 U.S.C. § 287(a).....	5, 6, 7

1 **Other Authorities**

2 Fed. R. Evid. 702.....5

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. NOTICE OF MOTION**

2 **NOTICE IS HEREBY GIVEN** that on June 24, 2021, at 9:00 a.m. or as soon as counsel
3 may be heard by the Honorable Beth Labson Freeman, Plaintiff Finjan, LLC will and hereby does
4 move for an order precluding certain testimony from Stephen Becker, Ph.D.

5 **II. STATEMENT OF RELIEF BEING SOUGHT AND THE ISSUE TO BE DECIDED**

6 Finjan seeks an order precluding Dr. Becker from presenting at trial any computation of
7 damages for this case. The issue to be decided is whether Dr. Becker's damages model comports
8 with controlling law requiring that an infringement award must include redress for infringement
9 during the damages period, and must not include redress for acts outside the damages period.

10 **III. STATEMENT OF THE RELEVANT FACTS**

11 **A. Nature and Stage of the Case**

12 This is a patent case. Plaintiff Finjan LLC accuses Defendant SonicWall Inc. with
13 infringing eight Finjan patents. Discovery in this case closed in September 2020, and the Court
14 has scheduled trial to begin on May 3, 2021.

15 **B. The Damages Period for Each Asserted Patent Begins No Earlier Than**
16 **September 2014, and Ends as Late as December 2025**

17 At trial, Finjan plans to present the damages opinions of economist DeForest McDuff,
18 Ph.D. In September 2020 Finjan served a report by Dr. McDuff, containing his opinions. *See*
19 *generally* Exh. D.¹ The McDuff Report included, among other things, recitations of the
20 "appropriate damages start date" and "end date" for each asserted patent, as follows:

Patent No.	Start of Damages	End of Damages
USPN 6,804,780 ("the '780 patent")	September 2014	November 6, 2017
USPN 6,154,844 ("the '844 patent")	November 25, 2014	January 29, 2017
USPN 8,677,494 ("the '494 patent")	June 2016	January 29, 2017
USPN 7,613,926 ("the '926 patent")	June 10, 2014	January 29, 2017

26
27 ¹ Exhibits ("Exh") are attached to the Declaration of Robert Courtney in support of Finjan, LLC's
28

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.