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SONICWALL INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FINJAN, LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

SONICWALL INC., a Delaware Corporation,

Defendant.

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

SONICWALL INC.'S MOTION TO EXCLUDE DR. STRIEGEL'S TECHNICAL APPORTIONMENT OPINIONS AND DR. MCDUFF'S RELIANCE THEREON (MOTION IN LIMINE NO. 3)

Date: March 18, 2021
Time: 1:30 PM
Courtroom: 3, 5th Floor
Judge: Hon. Beth Labson Freeman

REDACTED

TABLE OF REFERENCED EXHIBITS[1]

September 4, 2020 Expert Report of DeForest McDuff, Ph.D	Ex. 1
September 3, 2020 Expert Report of Dr. Aaron Striegel	Ex. 6
November 3, 2020 Deposition Transcript of Aaron Striegel, Ph.D.	Ex. 9
Chart marked as Striegel Deposition Ex. No. 8	Ex. 19
SonicWall SonicWave and SonicPoint Series Wireless Access Points datasheet, bearing bates numbers SonicWall-Finjan_00365304 - SonicWall-Finjan_00365305 and SonicWall-Finjan_00365316 - SonicWall-Finjan_00365317, marked as Striegel Deposition Ex. No. 12	Ex. 20
SonicWall SuperMassive Series data sheet, bearing bates numbers SonicWall-Finjan_00000655 - SonicWall-Finjan_00000666, marked as Striegel Deposition Ex. No. 6	Ex. 21

[1]All exhibits are attached to the Declaration of Jarrad M. Gunther.

SonicWall moves to exclude the technical apportionment opinions of Dr. Aaron Striegel (Ex. 6, at ¶¶ 86-123), pursuant to FRE 702 and *Daubert*. These opinions follow the following framework. Ignorant of the systems that Finjan actually accuses of infringement, Dr. Striegel grouped the accused products into ten "[redacted]" (Ex. 6 ¶ 87): (1) Supermassive/TZ SOHO Appliances/Network Security Appliances ("Gateways"); (2) SonicWave; (3) Advanced Gateway Security Suite ("AGSS"); (4) Comprehensive Gateway Security Suite ("CGSS"); (5) Capture ATP; (6) Gateway Antivirus, Antispyware, Intrusion Prevention, Application Intelligence and Control software bundle ("GAV/IPS"); (7); Email Security Appliances and Software; (8) Hosted Email; (9) Capture Client; and (10) WAN Acceleration Appliance ("WXA"). For each of these 10 categories, Dr. Striegel identified "[redacted]" *Id.* He then determined which top-level functions "overlap" with a given "Asserted Patent." *Id.* at ¶ 114. Finjan's damages expert (Dr. McDuff) then accepts Striegel's opinions (Ex. 6 at App. D; *see also* Ex. 19) *in toto* and puts it into percentage form, *i.e.*, if Dr. Striegel opines that an accused product is in a "category" that has 12 top-level functions and that 5 of the functions overlap with a patent, then Dr. McDuff applies an apportionment factor of 41.7% (5/12) to the products' revenue for that patent. Ex. 1 at Attachment E-1. This is a legally insufficient apportionment methodology for the reasons described below.

I. Legal Standard

The "Supreme Court made clear that 'when a *patent is for an improvement*, … the patentee must show in what particulars his improvement has *added to the usefulness* of the machine or contrivance. He must separate its results distinctly from those of the other parts, ...' In other words, the patent holder should only be compensated for the approximate incremental benefit derived from his invention." *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233 (Fed. Cir. 2014). The Federal Circuit has thus held "[w]hen the accused technology does not make up the whole of the accused product, apportionment is required." *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309 (Fed. Cir. 2018). "This principle – apportionment – is the governing rule where multi-component products are involved. Consequently, to be admissible, all expert damages opinions must separate the value of the allegedly infringing features from the value of all other features." *Commonwealth Sci. & Indus.*

Research Organisation v. Cisco Sys., Inc., 809 F.3d 1295, 1301 (Fed. Cir. 2015) ("*CSIRO*"). The apportionment evidence "must be reliable and tangible, and not conjectural or speculative." *Garretson v. Clark*, 111 U.S. 120, 121 (1884). "[G]iven the great financial incentive parties have to exploit the inherent imprecision in patent valuation, courts must be proactive to ensure that the testimony presented … is sufficiently reliable to support a damages award." *CSIRO*, 809 F.3d at 1301.

Dr. Striegel's technical apportionment opinions cannot meet this essential requirement because they are "plagued by logical deficiencies" and use data that is "not sufficiently tied to the facts of the case." *Summit 6, LLC v. Samsung Elecs. Co., Ltd.*, 802 F.3d 1283, 1297 (Fed. Cir. 2015).

II. Dr. Striegel's Technical Apportionment Opinions Should Be Struck for Two Reasons

A. Dr. Striegel Failed to Undertake the Necessary Further Apportionment

When an initial apportionment still leaves multiple discrete functions – some of which are alleged to infringe, others not – then further apportionment is required. *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1327 (Fed. Cir. 2014) ("Where the smallest salable unit is, in fact, a multi-component product containing several non-infringing features with no relation to the patented feature … , the patentee must do more to estimate what portion of the value of that product is attributable to the patented technology."); *Blue Coat*, 879 F.3d at 1311 ("[I]f the … smallest identifiable technical component—contains non-infringing features, additional apportionment is still required.").

As noted above, Dr. Striegel opined that each of his 10 product groups consisted of various top-level functions and then determined which top-level functions overlap with the Asserted Claims of the Asserted Patents. Ex. 6 at ¶¶ 111-123. Dr. Striegel confirmed at his deposition that, in determining whether "overlap" existed, he made no attempt to determine whether the top-level function he identified *also* included substantial non-patented features that must be apportioned out, but instead only whether the function "would receive a reasonable benefit from the asserted patents." Ex. 9 at 223:17-23; *see also id.* at 54:11-21, 56:17-57:8, 57:24-58:22, 83:12-84:1, 109:16-110:1, 137:19-138:17. Indeed, rather than rigorously avoid the inclusion of substantial non-patented features, Dr. Striegel testified that he simply sought to determine whether his decision to attribute the top-level function to a benefit of the patent would "pass a sniff test," such that the overlap would not

be considered "miniscule" or "just minor or an edge case or a niche case that's almost meaningless." *Id.* at 225:12-228:4; *see also id. at* 173:23-174:12 (describing the question as whether it would be "plausible," and to confirm for himself that the overlap would be "not just small and miniscule"). This is a meaningless standard, and is neither reliable nor repeatable. Moreover, by attributing to Finjan 100% of the benefits of a top-level function merely when the alleged overlap is "not just small and miniscule," he did not conduct the further apportionment required by the law to exclude the value provided by non-accused features within the top-level function. *Blue Coat*, 879 F.3d at 1310-11; *VirnetX*, 767 F.3d at 1327.

To be clear, Dr. Striegel did not even examine the top-level features to see if non-accused or non-patented functions are present within these top-level functions, much less determine their relative significance. For example, Dr. Striegel opined that the benefits provided by the '305 and '408 Patents overlap with the top-level function of Comprehensive Wireless Security for SonicWave Access Points. Ex. 6 at App. D; Ex. 19. The same marketing document that Dr. Striegel relies on to identify this top-level function also lists **12** sub-features under this one top-level function; Dr. Striegel only points to one of those 12 sub-features of this top-level feature as overlapping with the patent (in other words, he lifts one of these 12 sub-features word-for-word, and says nothing about the other 11). Ex. 9 at 260:17-262:20; Ex. 20. Dr. Striegel admitted that he did not render any opinion as to whether any of the Patents-in-Suit have anything to do with the other 11 features. *Id.* at 265:24-267:22. But his opinions have the effect of Finjan – via Dr. McDuff's damages opinions – capturing 100% of the value of all 12 of these sub-features, even though Dr. Striegel's actual opinion is only that 1 of the 12 ($1/12^{th}$ of that top-level feature) is implicated by the patent. Likewise, for the Gateways, he concluded it was "much cleaner" for him to ignore – rather than apportion out – the scores of features listed under each of his 12 top-level functions. *Id.* at 249:5-251:13; Ex. 21. Dr. Striegel also failed to apportion numerous other non-accused features: the same datasheet that he relies on to identify 12 top-level functions for the Gateways (Ex. 9 at 147:17-149:5; Ex. 21) includes a page titled "Feature summary" that contains 12 ***different*** bolded headings with bulleted sub-features, many of which – *e.g.*, "Wireless," "VoIP," and "SSL/SSH decryption and inspection" – are clearly not accused of infringement. Dr. Striegel conceded that he made no attempt to map these non-accused features to

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