

# EXHIBIT 2

1  
2  
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

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

FINJAN, INC.,  
Plaintiff,  
v.  
CISCO SYSTEMS INC.,  
Defendant.

Case No. [17-cv-00072-BLF](#)

**ORDER ON DAUBERT MOTIONS**  
[Re: ECF 421, 423, 425, 427, 429, 431]

United States District Court  
Northern District of California

Plaintiff Finjan, Inc. (“Finjan”) brings this patent infringement lawsuit against Defendant Cisco Systems, Inc. (“Cisco”), alleging infringement of five of Finjan’s patents directed to computer and network security: U.S. Patent Nos. 6,154,844; 6,804,780; 7,647,633; 8,141,154; and 8,677,494.

Before the Court are the parties’ motions to exclude certain opinions of each party’s experts under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Cisco brings five motions to exclude opinions of: (1) Finjan’s technical experts Drs. Cole, Mitzenmacher, and Medvidovic at ECF 421; (2) Finjan’s corporate governance expert Dr. James Tompkins at ECF 423; (3) Finjan’s cost expert Dr. Ricardo Valerdi at ECF 427; (4) Finjan’s damages expert Dr. Layne-Farrar at ECF 429; and (5) Finjan’s source code expert Dr. Goodrich at ECF 431. Finjan brings one motion to exclude opinions of (1) Cisco’s source code expert Mr. Overby and (2) Cisco’s damages expert Dr. Becker. ECF 425. The Court heard oral arguments on March 26, 2020 (the “Hearing”).

**I. LEGAL STANDARD**

Federal Rule of Evidence 702 provides that a qualified expert may testify if “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the

1 testimony is the product of reliable principles and methods; and (d) the expert has reliably applied  
 2 the principles and methods to the facts of the case.” Fed. R. Evid. 702. In *Daubert v. Merrell Dow*  
 3 *Pharmaceuticals, Inc.*, the Supreme Court held that Rule 702 requires the district court to act as a  
 4 gatekeeper to “ensure that any and all scientific testimony or evidence admitted is not only relevant,  
 5 but reliable.” 509 U.S. at 589. In *Kumho Tire Co., Ltd. v. Carmichael*, the Supreme Court clarified  
 6 that the “basic gatekeeping obligation” articulated in *Daubert* applies not only to scientific testimony  
 7 but to all expert testimony. 526 U.S. 137, 147 (1999). The Supreme Court also made clear that the  
 8 reliability inquiry is a flexible one, and “whether *Daubert*’s specific factors are, or are not,  
 9 reasonable measures of reliability in a particular case is a matter that the law grants the trial judge  
 10 broad latitude to determine.” *Id.* at 153; *see also Micro Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387,  
 11 1391 (Fed. Cir. 2003).

12 “*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not  
 13 guarantees of correctness.” *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010)  
 14 *aff’d*, 131 S. Ct. 2238 (2011). So long as an expert’s methodology is sound and his opinions satisfy  
 15 the requirements of Rule 702, underlying factual disputes and how much weight to accord the  
 16 expert’s opinion are questions for the jury. *Micro Chem.*, 317 F.3d at 1392; *Primiano v. Cook*, 598  
 17 F.3d 558, 565 (9th Cir. 2010).

## 18 II. DISCUSSION

19 The parties have each moved to exclude opinions rendered by the other party’s technical and  
 20 economics experts. The Court addresses the dispute about each expert in turn.

### 21 A. Cisco’s Motions to Exclude

#### 22 1. Drs. Cole, Mitzenmacher, and Medvidovic

23 Cisco moves to exclude the opinions and proposed testimony of Finjan’s technical experts,  
 24 Drs. Cole, Mitzenmacher, and Medvidovic on two areas: (1) Cisco’s alleged prior knowledge of  
 25 Finjan’s technology and patents and (2) the incorporation of the general descriptions of Cisco’s  
 26 accused products in the opinion regarding infringement of each claim element.

##### 27 a. Cisco’s alleged prior knowledge of Finjan’s technology and patents

28 In addition to the infringement issue, Finjan’s technical experts address each of their reports

1 includes a section related to Cisco’s prior knowledge of Finjan’s technology and patents. *See* Cole  
 2 Report ¶¶ 84-98, ECF 420-3; Mitzenmacher Report ¶¶ 69-81, ECF 420-4; Medvidovic Report ¶¶  
 3 79-91, ECF 420-5. Cisco argues that each expert “cites the same documents (including  
 4 presentations, magazine articles, and email correspondence between the parties), and concludes that  
 5 ‘Cisco knew or should have known that it was infringing one or more of Finjan’s patents.’” Cisco’s  
 6 Motion to Exclude the Testimony of Finjan’s Experts (Cole, Mitzenmacher, Medvidovic) (“Cisco’s  
 7 Motion Re Technical Experts”) at 1-2, ECF 421 (citing Cole Report ¶¶ 84-98; Mitzenmacher Report  
 8 ¶¶ 69-81; Medvidovic Report, ¶¶ 79-91). According to Cisco, these opinions “are not based on any  
 9 scientific, technical, or other specialized knowledge, but are thinly disguised ‘willfulness’  
 10 opinions.” Cisco’s Motion Re Technical Experts at 1.

11 Finjan responds that its technical experts “do not testify that Cisco knew it was willfully  
 12 infringing” but rather “they provide an explanation of the complex technology and patents that  
 13 Finjan disclosed to Cisco’s engineers.” Finjan’s Opposition to Cisco’s Motion Re Technical Experts  
 14 (“Opp’n Re Technical Experts”) at 1, ECF 458. Finjan claims that the experts “explained how the  
 15 2006-2009 presentations discuss the technology of Finjan’s products, its competitors’ products, and  
 16 its patents” and that these explanations would “assist the jury in understanding these technical  
 17 disclosures.” *Id.*

18 The Court disagrees with Finjan’s characterization of its technical experts’ opinions  
 19 regarding Cisco’s knowledge of Finjan’s patents and technology. Had the experts actually provided  
 20 an explanation of technical documents as suggested by Finjan, such opinions might have assisted  
 21 the jury; but they did not. The experts appear to merely set forth a high-level timeline of the  
 22 relationship and communications between the parties and cite to documents produced in this  
 23 litigation. Moreover, Finjan’s experts explicitly opine that “Cisco knew or should have known that  
 24 it was infringing one or more of Finjan’s patents[.]” Cole Report ¶ 98; Mitzenmacher Report ¶ 81;  
 25 Medvidovic Report ¶ 91. Such speculative testimony regarding Cisco’s knowledge is impermissible  
 26 and not within the purview of technical experts. *See Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-cv-  
 27 03999-BLF, 2015 WL 4272870, at \*3 (N.D. Cal. July 14, 2015) (excluding Drs. Cole and  
 28 Medvidovic from testifying on “Defendant’s subjective beliefs”).

1           Accordingly, Cisco’s motion to exclude the opinions of Drs. Cole, Mitzenmacher, and  
2 Medvidovic on Cisco’s knowledge of Finjan’s patents and technology and the chronology of the  
3 parties’ relationship and communications is GRANTED. To the extent Finjan believes its technical  
4 experts explained the technical contents of certain documents, Finjan will have some leeway at trial  
5 to offer such testimony *only if* (1) the testimony is related to how an engineer would have understood  
6 the documents without any reference to Cisco’s state of mind and (2) the testimony can be tied back  
7 to the experts’ disclosures in their reports.

8                           b. Incorporation of “overview” of accused products in the element-by-element  
9 infringement analysis

10           Each of Finjan’s technical expert reports contains a lengthy section where the expert  
11 provides an “overview” of the accused technologies. *See e.g.*, Cole Report ¶¶ 400-484 (describing  
12 Talos), ECF 459-8; Mitzenmacher Report ¶¶ 144-198 (describing Cisco’s AMP for Meraki MX),  
13 ECF 459-10; Medvidovic Report ¶¶ 585-779 (describing Cisco’s ThreatGrid technology). The  
14 experts then provide an element-by-element infringement analysis of the asserted claims, in which  
15 they incorporate the “overview” sections. *See e.g.*, Cole Report ¶ 800 (“I incorporate my Overview  
16 of the Accused Products and Accused Technologies herein, and in particular the discussions of the  
17 accused technologies and functionalities identified below in my analysis and discussion of source  
18 code, and in my Overview of Infringement above.”). Cisco seeks to exclude the incorporation of  
19 the “overview” section into the element-by-element analysis because such “blanket statements”  
20 would “leave the door open for Finjan to amend, enlarge, and adapt its infringement read in the  
21 future which is highly prejudicial because it provides no notice on Finjan’s specific infringement  
22 theories prior to trial.” Motion Re Technical Experts at 3. Finjan responds that its experts “provided  
23 fulsome analyses based on the expert reports in their entirety.” Opp’n Re Technical Experts at 3.

24           While the Court is mindful of Cisco’s concerns regarding the potential for shifting  
25 infringement theories at trial, the Court is not persuaded that Cisco’s over-inclusive request to  
26 exclude all incorporated paragraphs is necessary or proper. Thus, the Court DENIES as overbroad  
27 Cisco’s motion to exclude the opinions of Drs. Cole, Mitzenmacher, and Medvidovic regarding the  
28 incorporation of the “overview” sections. That said, the Court will hear specific objections at trial

# 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.