

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  
3 John-Paul Fryckman (CA 317591) fryckman@fr.com  
K. Nicole Williams (CA291900) nwilliams@fr.com  
4 FISH & RICHARDSON P.C.  
12860 El Camino Real, Ste. 400  
5 San Diego, CA 92130  
Telephone: (858) 678-5070 / Fax: (858) 678-5099  
6

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

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

13 Attorneys for Plaintiff  
14 FINJAN LLC

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

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 *IN LIMINE* NO. 3 TO PRECLUDE ARGUMENT THAT SONICWALL IS NOT SUCCESSOR-IN-INTEREST TO DELL**

Date: March 18, 2021  
Time: 1:30 PM  
Hon. Beth Labson Freeman  
Ctrm: 3, 5<sup>th</sup> Floor

26 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**  
27  
28

1 **I. INTRODUCTION**

2 Pursuant to Federal Rules of Evidence 401, 402, 403, and 611, Finjan LLC (“Finjan”)  
3 respectfully requests that the Court exclude from presentation to the jury at trial any argument by  
4 SonicWall, or evidence purporting to relate thereto, that actual notice of Finjan’s infringement  
5 claims, conveyed to SonicWall’s prior owner Dell, does not relate to SonicWall.

6 **II. ARGUMENT**

7 In pre-trial correspondence, SonicWall attempted to unveil a new defense, never before  
8 presented—or preserved—in any part of the case to date. SonicWall suddenly argued that  
9 Finjan’s pre-suit notice of infringement, conveyed to SonicWall’s then-parent Dell, did not apply  
10 to SonicWall. This argument appears in neither SonicWall’s damages contentions, nor in its  
11 interrogatory responses specifically addressing notice. It is forfeit. It is also meritless.

12 **A. SonicWall’s Statements in its Answer, Written Discovery, and Damages**  
13 **Contentions Forfeit Argument That SonicWall Did Not Inherit Notice**

14 At the start of the period for which Finjan seeks damages, SonicWall was owned by Dell.  
15 It is undisputed that Finjan and Dell communicated about SonicWall, and how its activities related  
16 to Finjan’s patents, during the period of Dell’s ownership, starting no later than 2014. In 2016,  
17 Dell divested SonicWall in 2016 to a private equity firm, but nothing about that transaction  
18 suggests that it transformed SonicWall from being on notice of infringement (via its parent Dell)  
19 into one suddenly unaware of Finjan’s claims.

20 For most of this case, even SonicWall did not make such a contention. Its Amended  
21 Answer, specifically discussing the correspondence between Finjan and Dell relating to  
22 SonicWall’s infringement, repeatedly called Dell SonicWall’s “predecessor-in-interest,” and far  
23 from claiming ignorance, discussed the content of the Finjan-Dell interactions in detail. D.I. 103  
24 at ¶¶ 39. Nowhere did the Amended Answer allege, or even suggest, that SonicWall might not

1 SonicWall also did not suggest it was not Dell’s successor for notice purposes when  
2 responding to written discovery specifically directed to the issue. Finjan’s very first interrogatory  
3 to SonicWall, served nearly three years ago, sought the details of SonicWall’s first awareness of  
4 Finjan’s patents. Exh. 13 at 3 (Interrogatory No. 1 (“Describe in detail when and under what  
5 circumstances You first became aware of the existence of the Asserted Patents . . .”).) Far from  
6 contending that SonicWall would not have patent-related interactions with Dell imputed to it,  
7 SonicWall’s response (supplemented several times) specifically *invoked* the negotiations between  
8 Finjan and Dell, and identified Dell as SonicWall’s “predecessor-in-interest.” Exh. 13 at 4.  
9 SonicWall’s interrogatory response went on to describe how Finjan communicated with Dell  
10 about its patents and infringement theories, including concerning SonicWall. In general,  
11 SonicWall’s interrogatory response (like its other discovery responses) treated Finjan-Dell  
12 correspondence relating to SonicWall as imputed to SonicWall. *Id.* at 4–5. In a supplemental  
13 response, SonicWall went further, describing awareness by Dell of other Finjan-filed lawsuits as  
14 bearing on SonicWall’s awareness of the patents. *Id.* at 5. And in a second supplemental  
15 response, SonicWall identified a Dell employee as a knowledgeable person about the subject  
16 matter of the interrogatory. At no point in this or any other interrogatory response did SonicWall  
17 suggest that it did not inherit Dell’s awareness of Finjan’s patents and claims.

18 A similar story is in the parties’ damages contentions. Finjan’s damages contentions  
19 alleged damages during the period of SonicWall’s ownership by Dell. Exh. 14 at 4. Further, the  
20 contentions directed SonicWall to Finjan-Dell correspondence as reflecting “prior correspondence  
21 between the parties” relevant to damages. *Id.* at 10. SonicWall’s responsive contentions did not  
22 mention, in any way whatsoever, any theory that notice of infringement to Dell might not be  
23 imputed to SonicWall. Exh. 15. To the contrary, SonicWall’s contentions referred to pre-suit  
24 correspondence about the patents as “pre-suit communications between Finjan *and SonicWall*,”

1 only mention of Dell at all was to note that some Dell-Finjan exchanges were marked under Rule  
2 408 (irrelevant to the notice issue). *Id.* at 13.

3 Still further, when Finjan argued during summary judgment that SonicWall “does not  
4 dispute—because it cannot—that Finjan expressly brought [its] patents to the attention of  
5 SonicWall’s predecessor Dell in mid-2014,” D.I. 326 at 21, SonicWall did not dispute the issue. It  
6 certainly did not dispute that Dell was SonicWall’s “predecessor,” or that notice to Dell would be  
7 imputed to it. *See* D.I. 335-3 at 13 *et seq.*

8 The only hint, during literal years of discovery, of SonicWall disputing inherited notice  
9 was when SonicWall unaccountably refused Requests for Admission on the subject. But even  
10 then, SonicWall’s refusal was conclusory and unaccompanied by any cognizable evidence. *See*  
11 *generally* D.I. 276. While Magistrate Judge DeMarchi denied Finjan’s request to impose an  
12 admission on SonicWall, in no sense did she endorse the idea that SonicWall, by corporate  
13 restructuring, divested itself of § 287 notice. *See* D.I. 281. No evidence of SonicWall avoiding  
14 inheriting notice was tendered to her, or to Finjan, at any point then, or since.

15 **B. SonicWall Has Forfeited Argument That It Is Not Dell’s Successor for Notice**

16 In this Court and others, it is well established that failure to timely raise an issue before  
17 trial forfeits the issue at trial. *E.g., GPNE Corp. v. Apple, Inc.*, No. 12-CV-02885-LHK, 2014 WL  
18 3870256, at \*5 (N.D. Cal. Aug. 6, 2014) (finding waiver where argument raised only extremely  
19 late). Here, though specifically called by Finjan to address notice under the patents-in-suit several  
20 times, SonicWall never contended, in any sense, that it would not inherit whatever notice had been  
21 given to Dell. Crucially, this included SonicWall’s total failure to raise the issue in damages  
22 contentions, despite Finjan plainly indicating that its damages theory would revolve, in part, on  
23 notice conveyed to Dell. *Cf. Finjan, Inc. v. Cisco Systems, Inc.*, No. 17-cv-00072-BLF, 2019 WL  
24 6174936, at \*5 (N.D. Cal. Nov. 20, 2019) (noting that attempts to make arguments not in damages

1 to raise this issue in its Amended Answer, or in its interrogatory responses, nor even to dispute it  
2 when raised by Finjan in summary judgment briefing, it would be profoundly unfair for SonicWall  
3 to inject this new defense into the case during the immediate run-up to trial.

4 The prejudice to Finjan is plain. During pleadings SonicWall specifically admitted that  
5 Dell was its “predecessor-in-interest.” It failed to dispute inherited notice in damages contentions,  
6 or in interrogatory responses. Additionally, injection of this issue before the jury would have no  
7 practical value except to engender confusion and wastage.

8 Finally, even had SonicWall not forfeited dispute that it inherited Finjan’s § 287 notice to  
9 Dell, and even were SonicWall permitted to evade its discovery responses confirming Dell as its  
10 “predecessor” for notice purposes, the dispute is meritless. At the time of notice, SonicWall was  
11 wholly controlled Dell and bound by Dell’s negotiation with Finjan, including for notice purposes,  
12 both as an aspect of Dell’s ownership and under the doctrine of apparent agency. This alone  
13 would be sufficient for Finjan’s § 287 notice to relate to SonicWall. Still further, the record shows  
14 that Dell, when it spun SonicWall out, specifically [REDACTED] as part of  
15 the deal. *See* Exh. 16 at 102 (disclosing, in detail, exchanges between Finjan and Dell).  
16 Additionally, John Gmuender, SonicWall’s CTO during its ownership by Dell and still its CTO  
17 today, [REDACTED]. Exh. 17 at 240:1–18. And more,  
18 when Finjan asked Mr. Gmuender if he had evaluated Finjan’s claims before the spin-out, Mr.  
19 Gmuender refused to answer after a privilege instruction from SonicWall’s counsel. *Id.* at 241:2–  
20 22. It would be inappropriate and unfair for SonicWall, after specifically blocking inquiry into its  
21 top technology executive’s knowledge of Finjan’s claims, to now be permitted to contend  
22 SonicWall lacked actual notice.

23 It is unfair and prejudicial for SonicWall to litigate for three years referring to Dell as its  
24 “predecessor-in-direction,” then flip direction after discovery is closed and attempt to tell the jury

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