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11 Attorneys for Plaintiff
FINJAN LLC

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 (SAN JOSE DIVISION)

15 FINJAN LLC, a Delaware Limited Liability
16 Company,
17 Plaintiff,
18 v.
19 SONICWALL, INC., a Delaware Corporation,
20 Defendant.

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

**PLAINTIFF FINJAN LLC'S OPPOSITION
TO DEFENDANT SONICWALL INC.'S
MOTION *IN LIMINE* TO EXCLUDE THE
TESTIMONY OF DR. MCDUFF'S PRICE
PER SCAN OPINIONS (METHOD NO. 3)
(MOTION *IN LIMINE* NO. 4) [DKT. 363]**

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

21
22
23 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
24

TABLE OF REFERENCED EXHIBITS¹

Description	Exhibit
Expert Report of DeForest McDuff, Ph.D. dated September 4, 2020	A
Deposition Transcript of DeForest McDuff, Ph.D. taken November 2, 2020	E
2018 SonicWall Cyber Threat Report (McDuff Depo Ex. 4) FINJAN-SW 433167-433191	H
2019 SonicWall Cyber Threat Report, FINJAN-SW 433192-433226	I

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1 **I. INTRODUCTION**

2 SonicWall's Motion *in Limine* No. 4 is an improper attempt to take the role of fact-finder
3 from the jury and place it upon the Court without any showing of prejudice. Though SonicWall
4 tries to frame its criticism of Dr. McDuff's opinion as one of methodology, it asks the Court to
5 evaluate disputed facts and decide upon the correctness those opinions. SonicWall may test each
6 of its criticisms through cross-examination, not through exclusion. Accordingly, the Court should
7 deny SonicWall's Motion *in Limine* No. 4.

8 **II. LEGAL STANDARD**

9 The trial court's inquiry into the admissibility of an expert's opinion is "a flexible one," in
10 which even "[s]haky but admissible evidence is to be attacked by cross examination, contrary
11 evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook*, 598 F.3d 558,
12 564 (9th Cir. 2010) (citing *Daubert v. Merrill Dow*, 509 U.S. 579, 596 (1993)). "Under *Daubert*,
13 the district judge is a 'gatekeeper, not a fact finder.'" *Id.* (quoting *United States v. Sandoval-*
14 *Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)).

15 **III. ARGUMENT**

16 **A. Dr. McDuff's Per Scan Royalty Rate Properly Results from a Range of Inputs**

17 Dr. McDuff's opinion considers multiple factors to arrive at the [REDACTED] per scan royalty rate,
18 none of which requires that SonicWall and Finjan purchased [REDACTED]. These
19 factors include (1) [REDACTED]
20 [REDACTED]
21 [REDACTED]" (2) "[REDACTED]
22 [REDACTED]
23 [REDACTED]" (3) discussions with technical experts in this case who confirm the comparability of the
24 patents and technologies licensed to [REDACTED] and other entities, (4) evidence of pricing for scans in

1 A (McDuff Rep) at ¶ 154 (emphasis added). SonicWall’s Motion implies that Dr. McDuff’s [REDACTED]
2 per scan royalty rate is based only on Dr. Striegel’s analysis of [REDACTED], and that
3 such analysis is relevant to damages only if Finjan and SonicWall purchased [REDACTED]
4 [REDACTED]. (Motion at 1.) That is wrong, and the correct venue for such an argument is trial.

5 SonicWall’s Motion *in Limine* No. 4 is an improper attempt to argue the correctness of
6 Dr. McDuff’s calculation of a per scan royalty rate to the Court, rather than to the jury. *See, e.g.,*
7 *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 854 (Fed. Cir. 2010) *aff’d*, 131 S.Ct. 2238
8 (2011) (“*Daubert* and Rule 702 are safeguards against unreliable or irrelevant opinions, not
9 guarantees of correctness.”). “The Federal Circuit has recognized that questions regarding which
10 facts are most relevant or reliable to calculating a reasonable royalty are for the jury.” *Emblaze*
11 *Ltd. v. Apple Inc.*, 52 F. Supp. 3d 949, 954 (N.D.Cal. 2014) (citation omitted); *see also Micro*
12 *Chem., Inc. v. Lextron, Inc.*, 317 F.3d 1387, 1392 (Fed. Cir. 2003) (“When, as here, the parties’
13 experts rely on conflicting sets of facts, it is not the role of the trial court to evaluate the
14 correctness of facts underlying one expert’s testimony.”). Dr. McDuff’s use of a range of prices
15 for comparable scans is sufficiently related to the per scan royalty for the accused products, and
16 therefore any dispute regarding the accuracy of that opinion goes to the weight of his testimony,
17 not its admissibility. *See i4i*, 598 F.3d at 852 (“When the methodology is sound, and the evidence
18 relied upon is sufficiently related to the case at hand, disputes about the degree of relevance or
19 accuracy (above this minimum threshold) may go to the testimony’s weight, but not its
20 admissibility.”).

21 Whether Finjan or SonicWall ever paid for [REDACTED] as opposed to
22 [REDACTED] is a factual issue, and just one potential input within Dr. McDuff’s analysis. In
23 deposition, Dr. McDuff explained that his opinion uses “[REDACTED]
24 [REDACTED].” Exh. E (McDuff Dep.) at 148:4-6.

1 SonicWall or Finjan paid for [REDACTED]. As Dr. McDuff further explained, the
2 evidence in his report [REDACTED]
3 [REDACTED].” Exh.
4 E (McDuff Dep.) at 149:14-19. The [REDACTED] rate is included in this range
5 [REDACTED]
6 [REDACTED].” Exh. E (McDuff Dep.) at 152:15-22; *see also id.*
7 at 154:17-155:6. Whether or not SonicWall or Finjan paid for [REDACTED], the offer of
8 [REDACTED] is an input to Dr. McDuff’s analysis because it demonstrates a market rate
9 for technology that, according to Finjan’s technical expert, is comparable to the technology at
10 issue. SonicWall questioned whether Dr. McDuff’s [REDACTED]
11 [REDACTED].” Exh. E (McDuff Dep.) at
12 154:1-7. Dr. McDuff responded, “[REDACTED]
13 [REDACTED]
14 [REDACTED]” *Id.* SonicWall may cross-examine Dr. McDuff on the relevance of the [REDACTED]
15 [REDACTED] rate as compared with other inputs into his analysis, but it has identified no error in
16 his methodology.

17 SonicWall’s Motion *in Limine* No. 4 also improperly asks the Court to set aside
18 Dr. McDuff’s other factual inputs for the [REDACTED] per scan royalty rate, stating “none could possibly
19 provide a methodologically sound basis for use of this royalty rate here.” Motion at 3. For
20 example, SonicWall misinterprets deposition testimony from Ms. Mar-Spinola that supports
21 Dr. McDuff’s analysis. Ms. Mar-Spinola’s testimony that Finjan does not have standard pricing
22 underscores the reason Dr. McDuff looked to a market-based approach for technology comparable
23 to SonicWall’s infringing product. *See* Exh. E (McDuff Dep.) at 170:20-171:12. SonicWall argues
24 that Dr. McDuff’s discussions with Mr. Hartstein and Ms. Mar-Spinola are “undocumented,” yet

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