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FINJAN LLC

12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
(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 DR.  
MCDUFF'S METHOD NO. 1 (MOTION IN  
LIMINE NO. 2) [DKT. 361]**

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

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

**TABLE OF REFERENCED EXHIBITS<sup>1</sup>**

<b>Description</b>	<b>Exhibit</b>
Expert Report of DeForest McDuff, Ph.D. dated September 4, 2020	A
Expert Report of Dr. Eric Cole Regarding Technology Tutorial and Infringement by SonicWall, Inc. of Patent Nos. 6,154,844; 7,058,822; 7,647,633; and 8,677,494 dated September 3, 2020	B
Expert Report of Michael Mitzenmacher, Ph.D. Regarding Infringement by SonicWall, Inc. of Patent Nos. 6,804,780; 6,965,968 and 7,613,926 dated September 3, 2020	C
Expert Report of Dr. Nenad Medvidovic Regarding Infringement by SonicWall, Inc. of Patent Nos. 8,225,408; 7,975,305 and 8,141,154 dated September 3, 2020	D
Deposition Transcript of DeForest McDuff, Ph.D. taken November 2, 2020	E

<sup>1</sup> All exhibits are attached to the Omnibus Declaration of Robert Courtney.

1 **I. INTRODUCTION<sup>2</sup>**

2 SonicWall’s motion is overbroad and presents fact disputes in the guise of a pretrial  
 3 motion. The parties’ agreement as to ’968 (see note) narrows the disputed issues, but for what  
 4 remains SonicWall fails to establish a case for preclusion, as to either Dr. McDuff’s royalty base,  
 5 or the licenses he relied on to determine the royalty rate. The Court should deny the motion.

6 **II. BACKGROUND**

7 Economist DeForest McDuff, Ph.D.’s report describes that the most appropriate royalty  
 8 structure here is based on a reasonable royalty calculated by applying a royalty rate (derived from,  
 9 inter alia, evidence of licensing history) to an apportioned royalty base (derived from accused  
 10 revenues). *E.g.*, Exh. A at ¶ 161. SonicWall calls this Dr. McDuff’s “Method 1,” and attacks its  
 11 royalty base (as to dates of infringement) and its royalty rate (as to the licensing history).

12 **Royalty base.** As is typical for damages, Dr. McDuff assumed Finjan will prove liability,  
 13 on the lines set forth by technical experts. Dr. McDuff’s report states assumptions, based on  
 14 expected expert testimony. This included assumptions about the start of damages, and about the  
 15 infringing products. *See* Exh. A at ¶¶ 100, 106 (dates). For convenience, these are:

16 '844 patent	Start [REDACTED] End Jan. 29, 2017	(1) Gateway products; (2) Capture ATP products; (3) Gateway products + Capture ATP (Exh. B ¶¶ 19–20)
18 '494 patent	Start [REDACTED] End Jan. 29, 2017	(1) Capture ATP products ( <i>id.</i> ¶¶ 21–22)
20 '780 patent	Start [REDACTED] End Nov. 6, 2017	(1) Capture ATP products; (2) Email Security + Capture ATP (Exh. C ¶¶ 15–16)

24 <sup>2</sup> The parties have agreed to dismissal of claims under the ’968 patent, with each party bearing its

own fees and costs. Because any ’968 disputes are moot, no such issues are discussed herein.

'408 patent	Start [REDACTED] End Nov. 6, 2017	(1) Capture ATP products (Exh. D ¶¶ 22–23)
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Dr. McDuff computed an apportioned revenue base using SonicWall’s revenues for accused products, assuming that all products within the date period above infringed. Exh. A at ¶¶ 117–18; *see also id.* Att. D-8. After apportioning, Dr. McDuff applied an appropriate royalty rate (discussed below) to the apportioned revenue base, thus reaching his damages estimate.

**Royalty rate.** Dr. McDuff’s report describes his computation of the most economically reasonable royalty rate in detail, and a full summary is beyond this response. *See id.* ¶¶ 37–51, 120–28. Briefly, Dr. McDuff demonstrated how the evidence indicates a royalty rate from the hypothetical negotiation of [REDACTED]. *Id.* ¶ 128. These rates had support throughout the record, but Dr. McDuff relied particularly on three Finjan licenses that based on the evidence, are most relevant to this case: a 2012 license to [REDACTED], a 2017 license to [REDACTED], and a 2018 license to [REDACTED]. *Id.* ¶¶ 45, 51, 127–28. For each, Mr. McDuff described how the evidence indicated observed rates of [REDACTED] and in each infringement and validity had been established. *Id.* Dr. McDuff’s model adopted the observed [REDACTED] rates, applying them to the apportioned revenue base to compute damages. *Id.* ¶¶ 139, 159–163.

### III. ARGUMENT

SonicWall’s motion substitutes assertion for evidence and seeks to supplant the jury’s role. No part of it supports precluding that Dr. McDuff’s “Method 1” at trial.

#### A. Dr. McDuff’s Royalty Base is Backed By the Record

SonicWall errs when it contends that any part of the royalty base, whether regarding the “combination” infringement theories, or the revenue period, warrants preclusion.

As to SonicWall’s “combination” assertion (Mot. 3), for every asserted patent save one Finjan’s technical experts have tendered *single-product* opinions of infringement, *i.e.*, opinions

1 such as “Capture ATP,” or SonicWall’s “Gateways.” Dr. McDuff’s report computes apportioned  
2 revenue bases for each such product. *E.g.*, Exh. A, Att. D-8. Those single-product bases are  
3 wholly unaffected by SonicWall’s “combination” assertions, and SonicWall’s motion alleges no  
4 defect there—yet seeks preclusion anyway, which is a basis for denial.

5 Two experts also describe infringement when one SonicWall product is combined with  
6 another. Should the jury find infringement only by combination, Dr. McDuff’s report supports the  
7 computation of damages. The McDuff report supports mechanically adjusting the apportioned  
8 royalty base for the relevant patent based on the number of infringing units for the less-sold  
9 product in the combination. *See, e.g., id.* Att. I-3 (describing computation of infringing unit sales).  
10 With such an adjustment, Dr. McDuff’s apportioned royalty base would comprise the apportioned  
11 revenue from (1) all of the less-sold (on a unit basis) product in the combination, and (2) a  
12 matching number of units from the more-sold product.

13 SonicWall’s criticism that Dr. McDuff’s report “lists dozens of products without noting  
14 whether Finjan’s experts allege infringement by a combination” is off point. It is for technical  
15 experts, not economic experts, to describe the theories of infringement. Dr. McDuff’s report  
16 properly provides evidence and opinions useful to the jury to compute damages. No preclusion as  
17 to the “combinations” is warranted and, even should the Court find otherwise, preclusion would  
18 not extend to any single-product royalty bases.

19 **As to SonicWall’s “revenue period” assertion (Mot. 4)**, it is part-mooted by the Court’s  
20 determination that [REDACTED] products were not sold until [REDACTED]. D.I. 381  
21 at 15. Dr. McDuff’s report readily permits recomputation of damages to accommodate that  
22 determination by removing from the royalty base sales of ES products before that date. SonicWall  
23 does not contend otherwise. As to the remainder of the motion, SonicWall attempts to have a fact  
24 issue improperly resolved via MIL. The parties dispute when infringement began for “Capture

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