

# Exhibit N

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12 SOPHOS INC.

13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO DIVISION

16 FINJAN, INC.,  
17 Plaintiff,  
18 v.  
19 SOPHOS INC.,  
20 Defendant.

CASE NO. 3:14-cv-01197-WHO

**DEFENDANT SOPHOS INC.'S DAUBERT  
MOTION TO EXCLUDE CERTAIN  
OPINIONS OF FINJAN'S EXPERT  
WITNESSES AND MOTIONS *IN LIMINE***

Date: August 8, 2016  
Time: 2 p.m.  
Dept.: Courtroom 12, 19th Floor  
Judge: William H. Orrick

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1 For example, for his analysis of this limitation in claim 9, Dr. Mitzenmacher explains how  
2 the accused products “perform a hashing function” as required, but says nothing about whether  
3 and how the accused products “fetch[]” or even retrieve. Mitzenmacher Report at ¶¶ 220-225  
4 (UTM products); ¶¶ 226-232 (“Sophos Live Cloud Service”). Dr. Mitzenmacher’s opinion for  
5 claim 18 is similarly devoid of any analysis regarding this “fetching” requirement. *Id.* at ¶¶ 274-  
6 277 (UTM products); ¶¶ 278-283 (“Sophos Live Cloud Service”).

7 Dr. Cole’s opinion for claim 1 of the ’580 patent is insufficient in the same way. To  
8 infringe that claim, a “second security computer” must “generate[]” and “communicate[]” a  
9 “reply message” that contains “attributes of a server computer’s signed certificate” to the “first  
10 security computer.” Dkt. No. 128-10, ’580 patent, cl. 1. However, Dr. Cole never explains how  
11 the component he calls the “second security computer” (UTM 2) generates or communicates a  
12 reply message that has attributes of a server computer’s signed certificate within it to the  
13 component he calls the “first security computer” (UTM 1).

14 While Dr. Cole opines that UTM 2 creates certificates, including the claimed “proxy  
15 signed certificate from the received attributes,” he never explains how it generates and  
16 communicates any reply message to UTM 1 that contains the required attributes “of a server  
17 computer’s signed certificate.” Cole Report at ¶¶ 600, 624-27. Indeed, Dr. Cole’s view that  
18 UTM 2 can “receive a reply from the destination web server” does not address this claim  
19 requirement, as it is UTM 1 in Dr. Cole’s theory that must receive the reply message, not UTM 2.  
20 *Id.* at ¶ 626. Likewise, Dr. Cole’s view that UTM 2 “add[s] the server certificate attributes to the  
21 header reply message” assumes the generation of a reply message and is silent about its  
22 communication to UTM 1. *Id.* at ¶ 637.

23 Because Dr. Mitzenmacher ignored the “fetching” limitation of the asserted claims of the  
24 ’780 patent, and Dr. Cole ignored the “reply message” limitation of the asserted claim of the ’580  
25 patent, their infringement opinions are the product of a legally incorrect and insufficient analysis.  
26 Finjan’s infringement experts were required to compare every limitation of an asserted claim to  
27 the accused products, not just some limitations, and failing to do so renders their opinions on  
28 these patents inadmissible. Standing Civil Pretrial Order 8(c); *see also Laitram*, 939 F. 2d at

1 1535; *see also Am. Med. Sys., Inc. v. Laser Peripherals, LLC*, 712 F. Supp. 2d 885, 900-901 (D.  
2 Minn. 2010) (granting motion to exclude technical expert’s invalidity opinion because “[d]espite  
3 correctly stating [the] legal standards in his expert report, [he] failed to properly apply them to the  
4 facts of this case.”).

## 5 **II. SOPHOS’S MOTIONS *IN LIMINE***

### 6 **A. Finjan Should Be Precluded From Presenting Evidence Or Argument About** 7 **Post-Grant Proceedings Before The United States Patent & Trademark** 8 **Office.**

9 The asserted patents were the subject of several *inter partes* review (“IPR”) petitions that  
10 were denied. In addition, the ’844 patent was the subject of an *ex parte* reexamination. Many of  
11 the IPR petitions were filed by parties other than Sophos, two were denied on procedural grounds,  
12 and importantly, none of the IPRs or the reexamination involved the SWEEP-InterCheck prior art  
13 that Sophos will present at trial. Furthermore, the reexamination confirmed only two claims of  
14 the ’844 patent, neither of which are asserted in this case. Therefore, the Court should preclude  
15 Finjan from presenting evidence or argument about these irrelevant post-grant proceedings.

16 Furthermore, unlike a prior jury trial, these post-grant proceedings are based on different  
17 standards and different evidence. The PTAB only authorizes institution of IPR if “there is a  
18 reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims  
19 challenged in the petition.” 35 U.S.C. § 314. A determination by the Patent Office to deny  
20 review or rehearing is not “a decision on the merits,” nor is it based on a full presentation of  
21 evidence or argument. *InterDigital Commc’ns, Inc. v. Nokia Corp.*, No. 13-10, 2014 WL  
22 8104167, at \*1 (D. Del. Sept. 19, 2014). In denying a petition, the PTAB makes “no explicit, or  
23 even implicit, decision on the validity of the patent ... .” *Wisconsin Alumni Research Found. v.*  
24 *Apple, Inc.*, 135 F. Supp. 3d 865, 875 (W.D. Wis. 2015) (“WARF”). Moreover, IPR proceedings  
25 are subject to “different standards, purposes and outcomes” than the proceedings in district court.  
26 *Id.* at 874-75. Thus, on balance, the minimal probative value of the PTAB’s rulings is  
27 “substantially outweighed by the risk of unfair prejudice, as well as the risk of jury confusion” if  
28 the plaintiff were permitted to tell the jury about the PTAB’s rulings. *Id.*

1 Having a trial-within-a-trial about these post-grant proceedings would confuse the jury  
2 and invite them to displace their own judgment for that of the Patent Office. The denied IPRs are  
3 not relevant to this case and any probative value is outweighed by the risk of unfair prejudice to  
4 Sophos. The unfair prejudice of the IPR denials is heightened for those proceedings to which  
5 Sophos was not a party. *InterDigital Commc'ns, Inc. v. Nokia Corp.*, No. 13-10-RGA, slip-op at  
6 3 (D. Del. Aug. 28, 2014) (“A PTO non-merits decision not involving Defendants has little or no  
7 probative value, and would require a lot of explanation for the jury to be able to understand.”).  
8 Furthermore, the IPRs were based on different prior art references than the references Sophos will  
9 present to the jury. The fact that the PTAB declined to institute IPRs on different prior art is not  
10 relevant to this case. This is why courts often exclude evidence of non-institution of IPRs. *See,*  
11 *e.g., WARF*, 135 F. Supp. at 874-75; *InterDigital*, 2014 WL 8104167 at \*1; *Ziilabs Inc., Ltd. v.*  
12 *Samsung Elecs. Co. Ltd., et al.*, No. 2:14-cv-203-JRG-RSP, slip-op at 6-7 (E.D. Tex. Oct. 28,  
13 2015); *Rembrandt Wireless Techs., LP v. Samsung Elecs. Co., Ltd., et al.*, No. 2:13-cv-213, 2015  
14 WL 627430, at \*5 (E.D. Tex. Jan. 30, 2015).

15 Likewise, the Patent Office’s decision in the reexamination to confirm two unasserted  
16 claims of the ’844 patent is equally irrelevant. The reexamination involved a different claim  
17 construction standard, a different standard of proof, different prior art, and was not subject to the  
18 adversarial process. *In Re Swanson*, 540 F.3d 1368, 1377-78 (Fed. Cir. 2008). Furthermore, the  
19 asserted claims of the ’844 patent were neither involved in nor depend from claims involved in  
20 the reexamination. *National Steel Car, Ltd. v. Canadian Pacific Ry., Ltd.*, 357 F.3d 1319, 1334  
21 (Fed. Cir. 2004) (“A validity analysis must be conducted on a claim-by-claim basis.”). The Court  
22 should therefore exclude evidence of the reexamination of the ’844 patent too. *Belden Techs. Inc.*  
23 *v. Superior Essex Commc'ns LP*, 802 F. Supp. 2d 555, 569 (D. Del. 2011) (“Admitting evidence  
24 about the ’503 patent’s reexamination, the outcome of which is not binding on the court, would  
25 have only served to confuse the jury and was ultimately far more prejudicial than probative.”);  
26 *Masimo Corp. v. Philips Elec. N. Am. Corp.*, No. CV 09-80, 2014 WL 4246579, at \*2 (D. Del.  
27 Aug. 27, 2014).

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