

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

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

8 Robert Courtney (CA SBN 248392) courtney@fr.com
FISH & RICHARDSON P.C.
9 3200 RBC Plaza
60 South Sixth Street
10 Minneapolis, MN 55402
Phone: (612) 335-5070 / Fax: (612) 288-9696

11 Attorneys for Plaintiff
12 FINJAN LLC

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 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

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 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

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

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.