IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

FINJAN LLC, a Delaware Corporation,

Plaintiff,

v.

RAPID7, INC., a Delaware Corporation and RAPID7 LLC, a Delaware Limited Liability Company,

Defendants.

C. A. No. 18-1519-MN

[redacted]

REDACTED

LETTER TO HONORABLE MARYELLEN NOREIKA FROM SUSAN E. MORRISON REGARDING OPPOSITION TO RAPID7'S REQUEST TO FILE MOTIONS FOR SUMMARY JUDGMENT

Susan E. Morrison (#4690)
Fish & Richardson P.C.
222 Delaware Avenue, 17th Floor
Wilmington, DE 19801
(302) 652-5070
morrison@fr.com

Attorneys for plaintiff, Finjan LLC

Dated: October 9, 2020

cc: All Counsel of Record (via Electronic Mail)

FISH.
FISH & RICHARDSON

October 9, 2020

Fish & Richardson P.C.
222 Delaware Avenue
17th Floor
P.O. Box 1114
Wilmington, DE 19899-1114

302 652 5070 main
302 652 0607 fax

Susan E. Morrison
Principal
morrison@fr.com
302 778 8434 direct

VIA CM/ECF & HAND DELIVERY – [redacted]

The Honorable Maryellen Noreika
United States District Court
for the District of Delaware
844 N. King Street
Wilmington, DE 19801

Re: *Finjan, LLC v. Rapid7, Inc. and Rapid7 LLC*
D. Del., C.A. No. 18-1519-MN

Dear Judge Noreika:

Finjan opposes Rapid7's request to file a motion for partial summary judgment. Rapid7 proposes to raise more than a dozen contested fact disputes as part of its multiple proposed summary-judgment motions. But to prevail, a movant must show that "there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) "[T]he district court must view the evidence in a light most favorable to the nonmovant and draw all reasonable inferences in its favor ….." *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985) (en banc). Here, Rapid7's proposed motions require the court to resolve genuine factual disputes about how multiple limitations of the asserted claims of all seven asserted patents apply to six different accused products.

Rapid7's proposed motions all suffer from the same fundamental flaw: they ask the court to resolve whether a skilled artisan would or would not conclude that the contested claim limitations (or the court's constructions thereof) apply to the accused products. But that is a classic fact question for the jury: The "determination as to whether the claims, properly construed, read on the accused device is a question of fact," *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1406 (Fed. Cir. 2004). This is especially true where, as here, these factual questions are all fiercely disputed by the parties' opposing experts. When "experts disagree on the ultimate issue[] whether the limitation is met[,] [t]hese disagreements are proper fodder for a jury." *Intellectual Ventures I, LLC v. Canon Inc.*, 143 F. Supp. 3d 143, 155 (D. Del. 2015) (denying summary judgment). Moreover, Rapid7 is in many instances seeking to resurrect arguments that it raised and lost at claim construction, which is discussed below.

Finjan submits that for these reasons, explained below, the interests of justice and the Court and party resources are not served by the myriad motions proposed.

The '305, '408, '494, '086 Patents (Nexpose, AppSpider, and Metasploit)

Summary judgment on this point is inappropriate. Rapid7's letter raises no claim construction disputes that is resolvable as a matter of law, instead raising disputes of fact involving the application of the construed claims to the accused products. Indeed, it does not assert that any additional terms require construction, let alone what constructions it believes should apply. The

claim terms identified by Rapid7 in connection with its argument have either not been proposed for construction, or have already been construed.

Rapid7's argument, in essence, is that its expert's application of the claims to the accused products is right and Finjan's expert's application is wrong. Specifically, the experts disagree whether the potentially malicious or suspicious code detected by the accused products that are identified by Finjan's expert can satisfy the claims. In particular, Rapid7 argues that "Nexpose, AppSpider and Metasploit do not detect malicious code or potentially hostile operations that an incoming executable application program can perform" and thus cannot satisfy the claims. Br. at 2. But the experts strenuously disagree on that point. For example, Finjan's experts have opined that the accused products detect hostile operations. *See, e.g.*, [redacted].

The heart of Rapid7's argument appears to be the following syllogism: (1) those of skill in the art make a categorical distinction between "vulnerabilities" and "potentially malicious" or "suspicious" code; and (2) Finjan's experts have identified only the former and not the latter. Both premises are issues of fact, both are disputed, and Finjan's position on both is well supported. For one thing, the experts disagree whether such a categorical distinction exists in the art, *see, e.g.*, [redacted] and Finjan has much the better of this factual argument. For example, what Rapid7 calls a "vulnerability" ***is*** potentially malicious and suspicious because it behaves in malicious ways when presented with a triggering input—that is why it is vulnerable, and that is why it is a problem.

Furthermore, and separately, Finjan's experts identified operations that count as suspicious or potentially malicious in any case, including many that track the patents' examples of suspicious computer operations. For example, the '305 patent discloses "[p]ortions of code that are malicious are referred to as exploits" and offers examples of "such exploits us[ing] JavaScript." Dkt. 1-1, '305 Patent at 5:66-6:2; 6:3-67 (disclosing example exploit using JavaScript and sample code). Finjan's expert includes the same examples of the accused products identifying potential exploits in his report. *See, e.g.*, Ex. 1 [redacted]

[redacted] As another example, the '086 patent discloses that "[m]alicious operations can for example include, in a Windows environment: file operations (e.g. reading, writing, deleting or renaming a file), network operations (e.g. listen on or connect to a socket, send/receive data or view intranet) . . . etc." Dkt. 1-1, '494 Patent at 18:62-19:2. Finjan's expert includes the same examples of the accused products identifying potentially malicious operations in his report. *See, e.g.*, Ex. 1 [redacted]. Many other examples exist.

Finally, Rapid7's proposed summary judgment motion also fails because it does not even address Finjan's alternative infringement arguments under the doctrine of equivalents. Infringement under the doctrine of equivalents is also a question of fact. *Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 469 F.3d 1005, 1013 (Fed. Cir. 2006).

The '494 and '086 Patent (InsightIDR)

Summary judgment on the '494 and '086 patents is also inappropriate. To begin with, Rapid7 does not allege that claim construction issues are involved. Br. at 3. This motion therefore goes only to the fact question of how the claims apply to the accused product: specifically, whether InsightIDR meets the "security profile" and Downloadable limitations.

On the first point, Rapid7 is attempting to rehash arguments the Court rejected. Rapid7 asserts that the information identified by InsightIDR is not a list of suspicious operations that "may be attempted" because the relevant process is already running at the time when the list is derived. In other words, Rapid7 reads in the nonexistent temporal limitation "may be attempted ***for the first time in the future***." The court rejected such a temporal requirement during claim construction stating that the "information about the operations a Downloadable may perform may come from other attributes, ***such as whether they were previously received***," and therefore previously attempted. Dkt. 123 at 9. Accordingly, nothing in the claim constructions imposes this temporal limitation, and Rapid7's attempt to insert it is improper. Under the Court's *Markman* order, "the list must only be derived from data in the Downloadable" and include operations that "are deemed hostile or potentially hostile." Dkt. 123 at 8-9. Rapid7 does not dispute that InsightIDR possesses this functionality; indeed, as Rapid7 admits in its letter brief, "InsightIDR has the ability to identify behaviors or activity occurring on a customer's network that are potentially malicious." In short, the fact that a process was already attempted supports that it is indeed an attemptable operation and, therefore, ***may be*** attempted again.

The "incoming Downloadable" question presents a disputed factual issue. [redacted] The received content may [redacted]. Rapid7 disputes this, and the jury should decide this contested issue of fact.

Furthermore, Rapid7's motion also fails because it does not even attempt to challenge multiple other ways in which Finjan contends InsightIDR satisfies these claim limitations, including for example how InsightIDR receives incoming Downloadables by [redacted]. And once again, Rapid7 fails to address infringement under the doctrine of equivalents.

The '154 Patent (All Accused Products)

Again, Rapid7 seeks here to rehash an argument it lost at claim construction. The gravamen of its complaint for Nexpose and Appspider is that Finjan's infringement theory "fails as a matter of law" because "the 'second function' that is invoked is 'the *same as the first function*." Br. at 4 (emphasis in original). Rapid7 proposed this construction and the Court rejected it, saying: "[t]o be clear, I do not construe it to require that the first and second functions be different" because "***[t]here is nothing in the claims of the '154 Patent that requires the two functions to be different - or precludes the two from using the same function***." Dkt. 123 at 11.

Rapid7 makes no mention of this holding but seeks silently to contradict it. It argues now that the claim language "invoking the second function . . . only if a security computer indicates" it is safe does preclude the first and second functions from being the same. Br. at 4. That is the same meritless argument Rapid7 raised in its responsive claim construction briefing, which the court later rejected. *See* Dkt. 76 at 23; *see also* Dkt. 123 at 11. When the first and second functions are the same, as the court's construction allows, it is because [redacted]. Nexpose and AppSpider operate exactly this way when the first and second functions are the same. Nothing in Rapid7's brief even asserts otherwise, *see* Br. at 4, and summary judgment would be inappropriate in any case on such disputed factual questions. Moreover, Rapid7's letter does not address other ways in which the accused products are accused of infringing, such as by [redacted] and under the doctrine of equivalents, *id.* ¶¶ 378-82.

Finally, Rapid7's special argument for InsightIDR alone also involves deeply disputed factual questions. Here it asserts that because a [redacted]

DOCKET ALARM

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.