IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

FINJAN LLC, a Delaware Limited Liability Company,

Plaintiff,

v.

C.A. No. 18-1519-MN

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

REDACTED

Defendants.

FINJAN LLC'S OPENING BRIEF SUPPORTING ITS MOTION TO PRECLUDE TRIAL TESTIMONY OF RAPID7'S DAMAGES EXPERT STEPHEN BECKER

Proshanto Mukherji Fish & Richardson P.C. One Marina Park Drive Boston, MA 02210 (617) 542-5070 mukherji@fr.com

Lawrence Jarvis Fish & Richardson P.C. 1180 Peachtree Street NE, 21st Floor Atlanta, GA 30309 (404) 892-5005 jarvis@fr.com FISH & RICHARDSON P.C. Susan E. Morrison (#4690) 222 Delaware Avenue, 17th Floor Wilmington, DE 19801 (302) 652-5070 morrison@fr.com

Juanita R. Brooks Roger Denning Jason W. Wolff 12860 El Camino Real, Suite 400 San Diego, CA 92130 (858) 678-5070 brooks@fr.com denning@fr.com wolff@fr.com

Dated: October 23, 2020

DOCKET

ATTORNEYS FOR PLAINTIFF FINJAN LLC

TABLE OF CONTENTS

Page

I.	NATURE AND STAGE OF THE PROCEEDINGS 1
II.	SUMMARY OF ARGUMENT 1
III.	STATEMENT OF FACTS
A	A. Dr. Becker's Arbitrary Exclusion of Comparable Licenses
E	B. Dr. Becker's Calculation of "Effective" Royalty Rates
IV. ARGUMENT	
A	A. Legal Standards
E	3. Dr. Becker's Analysis Is Arbitrary and Speculative, and Should Be Excluded 10
V.	CONCLUSION & RELIEF SOUGHT

TABLE OF AUTHORITIES

Page(s)

Cases

Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc., 809 F.3d 1295 (Fed. Cir. 2015)	9
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)	1, 9
Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp, LLC, 879 F.3d 1332 (Fed. Cir. 2018)	10
Finjan, Inc. v. Cisco Systems, Inc., C.A. No. 5:17-cv-00072-BLF	7, 12
<i>Kumho Tire Co., Ltd. v. Carmichael,</i> 526 U.S. 137 (1999)	9
Power Integrations, Inc. v. Fairchild Semiconductor Int'l., Inc., 711 F.3d 1348 (Fed. Cir. 2013)	0, 11, 12
Uniloc USA, Inc. v. Microsoft Corp., 632 F.3d 1292 (Fed. Cir. 2011)	9, 10
Other Authorities	
Federal Rule of Evidence 702	1, 9

I. NATURE AND STAGE OF THE PROCEEDINGS

This is a patent case. Plaintiff Finjan LLC accuses Defendants Rapid7, Inc. and Rapid7 LLC with infringing seven Finjan patents. Discovery in this case closed on September 24, 2020, and the Court has scheduled a 6-day jury trial to begin on February 22, 2021.

II. SUMMARY OF ARGUMENT

1. Rapid7's expert Dr. Stephen Becker engages in a damages analysis that is based on unreliable data and speculation, and therefore he should not be permitted to offer testimony on it at trial. After discussing twenty-two licenses between Finjan and various third parties,

for his continued analysis. Dr. Becker makes that selection even though he acknowledged that licenses he excluded from his analysis had similar characteristics to those he included.

Dr. Becker arbitrarily selects only eight

2. Dr. Becker then compounds that error by engaging in speculation regarding an "effective" royalty rate in the eight licenses he selects.

And Dr. Becker is forced to make further assumptions and calculations based on , leading to an unreliable and speculative revenue base, and thus an unreliable and speculative "effective" royalty rate. Dr. Becker's analysis is therefore improper under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and should be excluded.

III. STATEMENT OF FACTS

On July 31, 2020, Rapid7's counsel served Finjan with the Expert Report of Stephen L. Becker, Ph.D., on Behalf of Defendants. In that report, Dr. Becker purports to calculate the damages owed to Finjan by Rapid7 in this case for Rapid7's infringement of the seven patentsin-suit. Dr. Becker's analysis, however, excludes over a dozen comparable license agreements in his calculation of an appropriate royalty rate for this matter. Exacerbating that error, for the eight license agreements he does rely upon, Dr. Becker uses unreliable and unconfirmed data to calculate "effective" royalty rates for those licenses. It is those selective, unreliable, "effective" royalty rates that Dr. Becker uses to calculate the damages Rapid7 should pay here.

A. Dr. Becker's Arbitrary Exclusion of Comparable Licenses

Dr. Becker begins his analysis by describing the details of twenty-two Finjan licenses, each of which license the patents-in-suit or related patents. (*See* Exh. G^1 at ¶18 ("

id. at ¶¶ 120-287.) Those licenses contain a wide variety of terms, and Dr.

Becker discusses each of them in his report. (Id. at ¶ 120-287.) Among other things, and as Dr.

Becker explains in his report,

(*Id.*; *see also id.* at ¶ 291

).) At the end of that extensive discussion, Dr. Becker concludes that the twenty-two Finjan licenses he discusses are relevant evidence to the discussion of the hypothetical negotiation,

¹ Exhibits cited herein are attached to the Declaration of Susan E. Morrison in Support of Finjan LLC's Motions to Preclude Trial Testimony, filed contemporaneously herewith.

DOCKET A L A R M



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.