

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

FINJAN LLC, a Delaware Limited Liability  
Company,

Plaintiff,

v.

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

Defendants.

C.A. No. 18-1519-MN

  
REDACTED

**FINJAN LLC'S OPENING BRIEF SUPPORTING ITS  
PARTIAL DAUBERT MOTION TO PRECLUDE TRIAL TESTIMONY BY  
RAPID7'S EXPERTS KEVIN ALMEROOTH, PH.D.,  
PATRICK MCDANIEL, PH.D., AND SOMESH JHA, PH.D., CONCERNING  
SUFFICIENCY OF WRITTEN DESCRIPTION FOR THE PATENTS-IN-SUIT**

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

**ATTORNEYS FOR  
PLAINTIFF FINJAN LLC**

**TABLE OF CONTENTS**

	<b>Page</b>
I. NATURE AND STAGE OF THE PROCEEDINGS .....	1
II. SUMMARY OF ARGUMENT .....	1
III. STATEMENT OF FACTS .....	2
A. The Written Description Opinions of Rapid7’s Experts are Based on Alternative Claim Constructions Purportedly Drawn From Finjan’s Infringement Allegations .....	2
B. At Deposition, Rapid7’s Experts Confirmed Their Reliance on Alternative Claim Constructions Derived From Infringement Allegations .....	5
IV. ARGUMENT .....	6
A. Legal Standards.....	7
B. The Opinions’ Methodology of Comparing the Patents’ Disclosures to Alternative Claim Constructions Derived From Infringement Allegations is Improper Under <i>Daubert</i> and Rule 702 .....	9
C. The Opinions Are Additionally Inadmissible Under Rule 403 Because They are Non-Probative and Would Promote Confusion About the Claim Constructions the Jury Must Apply During Fact-Finding .....	12
V. CONCLUSION & RELIEF SOUGHT .....	13

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Ariad Pharms., Inc. v. Eli Lilly &amp; Co.</i> , 598 F.3d 1336 (Fed. Cir. 2010) (en banc).....	8, 9
<i>Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.</i> , 334 F.3d 1294 (Fed. Cir. 2003).....	10
<i>Coleman v. Home Depot, Inc.</i> , 306 F.3d 1333 (3d Cir. 2002).....	7
<i>CytoLogix Corp. v. Ventana Medical Sys., Inc.</i> , 424 F.3d 1168 (Fed. Cir. 2005).....	11, 12
<i>Energy Trans. Grp. v. William Demant Holding A/S</i> , 697 F.3d 1342 (Fed. Cir. 2012).....	8
<i>Every Penny Counts, Inc. v. American Express Co.</i> , 563 F.3d 1378 (Fed. Cir. 2009).....	8, 11, 12
<i>Karlo v. Pittsburgh Glass Works, LLC</i> , 849 F.3d 61 (3d Cir. 2017).....	7
<i>Koninklijke Philips Elecs. N.V. v. Cardiac Sci. Operating Co.</i> , 590 F.3d 1326 (Fed. Cir. 2010).....	9
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996).....	8, 13
<i>O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.</i> , 521 F.3d 1351 (Fed. Cir. 2008).....	12
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....	8, 9, 10
<i>SRI Int'l v. Matsushita Elec. Corp. of Am.</i> , 775 F.2d 1107 (Fed. Cir. 1985) (en banc).....	10
<i>Summit 6, LLC v. Samsung Elecs. Co.</i> , 802 F.3d 1283 (Fed. Cir. 2015).....	7
<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2011).....	7

**Statutes**

35 U.S.C. § 112.....1, 8

**Other Authorities**

Fed. R. Evid. 403 .....2, 7, 13

Fed. R. Evid. 702 .....1, 2, 7, 9

Fed. R. Evid. 703 .....7

## I. NATURE AND STAGE OF THE PROCEEDINGS

This is a patent case. Plaintiff Finjan LLC accuses Defendants Rapid7, Inc. and Rapid7 LLC (together, “Rapid7”) of infringing seven Finjan patents. Discovery 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. In expert reports, Rapid7’s three technical experts (Dr. Almeroth, Dr. McDaniel, and Dr. Jha) submitted opinions that the asserted patent claims are unsupported by sufficient written description. If proved, insufficient written description is grounds for invalidity under 35 U.S.C. § 112, ¶ 1. The Rapid7 experts’ opinions on this issue, however, are based on alternative claim constructions that the Rapid7 experts purported to derive from Finjan’s infringement allegations. Rapid7’s experts do not view the alternative claim constructions as correct, so they use different constructions to defend against the infringement allegations. In Finjan’s view, such opinions are inadmissible due to their reliance on alternative claim constructions not endorsed by the Court, on for at least two reasons.

2. First, the opinions are inadmissible under Rule 702 and *Daubert* because they apply an improper and fundamentally unreliable methodology. The law surrounding the written description requirement is clear: written description review requires comparison of the claims, as construed by the court, with the specification. There is no provision for assessing written description based on alternative claim constructions, and particularly no provision for using claim constructions derived from infringement allegations rather than from traditional claim construction evidence (i.e., the specification, the prosecution history). The written description requirement is measured against the properly construed claims to specification—not the accused products or alternative claim constructions. Because the Rapid7 experts’ opinions are based on a

# 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.