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

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

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I. INTRODUCTION

None of the authority Rapid7 cites is applicable here, because none of it relates to an expert testifying before a jury about opinions based on claim constructions other than those adopted by the trial court. Most of the cases Rapid7 cites involved no jury at all, and do not speak to the admissibility before juries of opinions based on unadopted claim constructions.[1] Those cases do not (and cannot) overcome the Federal Circuit's repeated admonitions against confusing juries with multiple constructions of the same terms.

The Federal Circuit's admonitions are also not overcome by the Eastern District of Michigan's motion *in limine* orders from *Visteon*.[2] The *Visteon* orders did no more than carry a similar evidentiary dispute until the resolution of claim construction. They did not approve a litigant presenting claim constructions to a jury when the litigant elected not to present them to the trial court.

Rapid7's brief does not dispute that the written description opinions of its experts are not based on the Court's constructions, but on infringement contentions. Rapid7's brief also does not argue that the Court's claim constructions are incorrect or incomplete. And Rapid7's brief fails to identify any basis in law or fairness for presenting their untimely claim constructions to the jury. Abundant authority favors precluding Rapid7 from submitting such material at trial.

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[1] *See Auto. Techs. Int'l, Inc. v. BMW of N. Am., Inc.*, 501 F.3d 1275 (Fed. Cir. 2007) (appeal from summary judgment); *Rivera v. ITC*, 857 F.3d 1315 (Fed. Cir. 2017) (appeal from administrative agency); *Ware v. Abercrombie & Fitch Stores Inc.*, No. 4:07-cv-122, 2011 WL 13322747 (N.D. Ga. Oct. 17, 2011) (special master's report concerning summary judgment); *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. C 12-5501, 2014 U.S. Dist. LEXIS 57519 (N.D. Cal. Apr. 23, 2014) (granting leave to amend invalidity contentions).

[2] *Visteon Global Techs., Inc. v. Garmin Int'l, Inc.*, No. 2:10-cv-10578, 2016 U.S. Dist. LEXIS 145816 (E.D. Mich. Aug. 10, 2016) (*Visteon 2 Special Master Report*); *Visteon Global Techs., Inc. v. Garmin Int'l, Inc.*, No. 2:10-cv-10578, 2016 U.S. Dist. LEXIS 145316 (E.D. Mich. Oct. 20, 2016) (*Visteon 2*).

II. ARGUMENT

A. Rapid7 Concedes Its Plan is to Try Claim Interpretation Disputes to the Jury, Which the Law Flatly Prohibits

Rapid7 acknowledges that its experts' reports "explicitly state that [the experts] do not agree with Finjan's interpretation of the scope of the claim elements[.]" (D.I. 220 at 5.) But as Finjan's opening brief discussed, disputes over claim interpretation are issues for the Court (preferably during *Markman* proceedings), not for the jury. (D.I. 204 at 8–10); *see also Every Penny Counts, Inc. v. American Express Co.*, 563 F.3d 1378, 1383 (Fed. Cir. 2009) ("[T]he court's obligation is to ensure that questions of the scope of the patent claims are not left to the jury."). If Rapid7 believes there is a claim construction dispute germane to written description, it should have raised that issue during *Markman* proceedings. Rapid7 did not. Nor has it made any attempt to raise the issue post-claim construction, notwithstanding that Rapid7 has been in possession of Finjan's infringement reports for months, and notwithstanding Rapid7's numerous pleas for the Court's attention on other disputes of law.

In its own words, Rapid7's proposal is to make the jury, rather than the Court, the arbiter of whether Rapid7's experts "misinterpreted Finjan's infringement allegations and purported claim scope[.]" (D.I. 220 at 8); *see also id.* (proposing cross-examination on claim construction). Such a proposal improperly usurps the Court's sole authority over claim interpretation, as established by the Supreme Court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996). The Federal Circuit has expressly recognized that the submission of "conflicting expert views as to claim construction" may create "confusion" on the part of the jury, and may be reversible error on appeal. *CytoLogix Corp. v. Ventana Medical Sys., Inc.*, 424 F.3d 1168, 1173

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