EXHIBIT 9

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FINJAN, INC.,

Plaintiff,

v.

CISCO SYSTEMS INC.,

Defendant.

Case No. 17-cv-00072-BLF

ORDER ON MOTIONS *IN LIMINE*

[Re: ECF 527; 528; 539; 531; 534; 535; 536; 537]

Plaintiff Finjan, Inc. ("Finjan") brings this patent infringement lawsuit against Defendant Cisco Systems, Inc. ("Cisco"), alleging infringement of five of Finjan's patents directed to computer and network security: U.S. Patent Nos. 6,154,844 (the '844 Patent); 6,804,780 (the '780 Patent); 7,647,633 (the '633 Patent); 8,141,154 (the '154 Patent); and 8,677,494 (the '494 Patent) (collectively, "Asserted Patents").

In preparation for trial, the parties submitted eight motions *in limine*. The Court held a final pretrial conference on April 30, 2020 (the "Conference"). With respect to each side's motions *in limine* ("MILs"), for the reasons set forth below and stated on the record at the Conference the Court rules as follows:

I. FINJAN'S MOTIONS *IN LIMINE*

A. Finjan's Motion *in Limine* No. 1 to Preclude Reference to Pending and Unrelated Litigation and PTO Proceedings (ECF 527)

In its Motion *in Limine* No. 1, Finjan seeks to exclude discussions of (1) all pending proceedings involving Finjan in other courts or before the United States Patent and Trademark Office ("PTO") and (2) lawsuits involving Finjan and patents that are not asserted in this case. Finjan's MIL No. 1, ECF 527.

1. Pending Proceedings Involving Finjan

Finjan contends Cisco should be precluded from presenting any arguments or evidence regarding pending litigation or PTO proceedings because (1) there is no final decision on the merits and thus the mere existence of these proceedings has no bearing or relevance on the issues here and (2) introducing evidence of pending proceedings carries a substantial risk the jury will be confused as to the specifics of Finjan's claims against Cisco and its accused products, or that the jury will perceive Finjan negatively because it is involved in other litigations. *See* Finjan's MIL No. 1 at 1-3.

Cisco agrees that pending proceedings before the PTO should be excluded. *See* Cisco's Opp'n to Finjan's MIL No. 1 at 4-5, ECF 566-4 (redacted version available at ECF 607), Transcript of the Conference ("Hr'g Tr.") at 31:22-23, ECF 613. Regarding pending court proceedings, however, Cisco argues that it should be permitted to probe Finjan's expert witnesses' bias by cross examining the experts about the compensation they receive from Finjan for their work on Finjan's lawsuits.

Per the parties' agreement, the Court GRANTS Finjan's motion to exclude evidence of pending PTO proceedings. The Court agrees with Cisco, however, that the experts' potential bias is highly probative of their credibility. Accordingly, The Court DENIES Finjan's motion to exclude evidence of pending litigation, but Cisco is limited to cross examination of Finjan's experts on their work and associated compensation for Finjan in other pending lawsuits. The Court also excludes any characterization of Finjan as litigious by discussing details of Finjan's ongoing lawsuits because the limited probative value of such evidence is substantially outweighed by danger of prejudice to Finjan and "wasting time." *See* Fed. R. Evid. 403.

2. Concluded Proceedings Involving Finjan's Patents Not Asserted in this Case

Finjan argues that evidence regarding proceedings involving Finjan's patents that are not asserted against Cisco in this case – which Finjan dubs as "Irrelevant Proceedings" – should be excluded because (1) invalidity of patents not asserted in this case and (2) infringement of products not accused in this case are irrelevant. *See* Finjan's MIL No. 1 at 3-4. Further, Finjan argues that the introduction of these proceedings "will risk confusing the jury, requiring them to parse the

differences between patent claims that are at issue in this case and patent claims that are not." *Id.* at 3. According to Finjan, "the jury may be tempted to improperly substitute decisions made in other cases for its own judgment." *Id.* at 4. Finjan recognizes that "license agreements that resulted from prior litigations involving patents not at issue in this case may be relevant to damages," but it nevertheless argues that "going into irrelevant details of the cases" would allow Cisco "to paint Finjan as particularly litigious." *Id.* at 1 n. 1.

Cisco responds that Finjan's prior concluded lawsuits are relevant to issues of damages and willfulness. Cisco's Opp'n to Finjan MIL No. 1 at 1-4. Specifically, Cisco argues that prior communications between the parties – even if in the context of other proceedings – are relevant to Cisco's state of mind. *Id.* at 1. Cisco further argues that Finjan's damages expert, Dr. Layne-Farrar, relies on licenses executed against the backdrop of litigation to support her opinions and therefore, the jury should be able to evaluate the circumstances of those lawsuits. *Id.* at 3.

The Court finds that documents establishing the communications between Finjan and Cisco are relevant to the issue of willfulness in this case, even if those communications were exchanged in the context of – or mention – other proceedings that do not involve the Asserted Patents. Moreover, the context and circumstances of lawsuits which resulted in or precipitated settlement agreements that the parties' damages experts rely on to support their opinions are highly probative. Accordingly, the Court DENIES Finjan's motion as to evidence of concluded lawsuits involving non-asserted patents but this ruling is limited to (1) all otherwise admissible communication between Finjan and Cisco and (2) evidence of otherwise relevant circumstances of the lawsuits that led to the settlement agreements the damages experts (Finjan's or Cisco's) rely on to support their opinions. All other objections regarding the relevancy of concluded lawsuits involving Finjan's non-asserted patents are DEFERRED to trial.

B. Finjan's Motion *in Limine* No. 2 to Preclude Derogatory and Misleading Characterization of Finjan's Business (ECF 528)

Finjan's Motion *in Limine* No. 2 seeks to exclude Cisco from "making any false, derogatory, or misleading characterizations of Finjan or its business at trial." Finjan's MIL No. 2, ECF 530-4 (redacted version available at ECF 528). Specifically, Finjan seeks to exclude testimony (1)

referring to Finjan using terms such as "patent troll," "patent assertion entity," "PAE," "non-practicing entity," or "NPE" and (2) relating to "things like how many employees Finjan has and whether it has used other corporate names, all in an attempt to paint Finjan as a sham company in the eyes of the jury." *Id.* at 1. Finjan argues that "Cisco's mischaracterization of Finjan as a patent shell company with no business or real operations" is irrelevant and not supported by the record. *Id.* at 2. And even if true, Finjan contends that these characterizations, would result in unfair prejudice and confuse the jury. *Id.* at 3. Further, Finjan argues that "Cisco's references to FI Delaware [a corporate name Finjan used for a few years], Finjan's employee count, and arguments regarding Finjan's lack of revenue from security products also lack any relevance to the present infringement suit." *Id.* at 2.

Cisco agrees not to use the term "troll" outside the narrow context of an email – which Cisco claims is relevant to describing the relationship between Cisco and Finjan – using that term. Cisco's Opp'n to Finjan's MIL No. 2 at 1; 2-3, ECF 566-6 (redacted version available at ECF 608). Cisco also agrees not to use "patent assertion entity." *Id.* Cisco describes the term "non-practicing entity," however, as "a benign phrase specifically designed to substitute for more inflammatory language and passes muster under Rule 403." *Id.* [1] With respect to Finjan's name change and "lack of revenue from Finjan's current security product," Cisco argues that "Finjan cannot state, argue, or imply that the company in its current form is essentially the same company as the company that was formed in 1996, without Cisco being allowed to correct this fallacy." *Id.* at 3-4.

The Court GRANTS Finjan's motion as to the use of the terms "patent troll," "patent assertion entity," "PAE," "non-practicing entity," and "NPE." The Court recognizes that it allowed the use of the term "non-practicing entity" to describe Finjan in a prior case. *See Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 13-CV-03999-BLF, 2015 WL 4129193, at *2 n. 1 (N.D. Cal. July 8, 2015). But the Court is now of the opinion that such projective labels are irrelevant, unhelpful to the jury, and in some instances carry negative connotations. That said, to the extent that any of these terms

[1] Although not subject to Finjan's Motion *in Limine* No. 2, Cisco notes that the primary term it intends to use for Finjan's current business model is "IP Company." Cisco's Opp'n to Finjan's MIL No. 2 at 1. At the Conference, Finjan noted that it does not object the use of the term "IP Company."

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