Trials@uspto.gov
571-272-7822

Paper No. 13
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BLUE COAT SYSTEMS LLC,
Petitioner,

v.

FINJAN, INC.,
Patent Owner.

Case IPR2016-01443
Patent 8,677,494 B2

Before JAMES B. ARPIN, ZHENYU YANG, and
CHARLES J. BOUDREAU, *Administrative Patent Judges*.

BOUDREAU, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Blue Coat Systems, Inc., now known as Blue Coat Systems LLC,[1] ("Petitioner") filed a Petition (Paper 1, "Pet.") requesting *inter partes* review pursuant to 35 U.S.C. § 311 of claims 7–9 and 16–18 of U.S. Patent No. 8,677,494 B2 (Ex. 1001, "the '494 patent"). Pet. 1. Finjan, Inc. ("Patent Owner") filed a Preliminary Response. Paper 6 ("Prelim. Resp."). With leave from the Board, Petitioner subsequently filed a Reply, limited to addressing arguments in the Preliminary Response that the Petition is procedurally barred under 35 U.S.C. §§ 312, 315(e)(1), and 325(d) (Paper 7, "Reply"), and Patent Owner filed a Sur-Reply (Paper 8, "Sur-Reply") responsive to Petitioner's Reply.

Based on the particular circumstances of this case, we exercise our discretion under 37 C.F.R. § 42.108 and do not institute an *inter partes* review of the challenged claims.

II. BACKGROUND

A. The '494 Patent

The '494 patent, titled "Malicious Mobile Code Runtime Monitoring System and Methods," issued March 18, 2014, from U.S. Patent Application No. 13/290,708 ("the '708 application"), filed November 7, 2011. Ex. 1001, [21], [22], [45], [54]. On its face, the '494 patent purports to claim priority from nine earlier applications, of which the earliest-filed is U.S. Provisional Application No. 60/030,639, filed November 8, 1996 (Ex. 1002, "the '639 application"). We need not make a determination on this record whether or

[1] *See* Paper 9, 1.

not the challenged claims are entitled to the benefit of the filing dates of any of those earlier applications.

The ’494 patent describes protection systems and methods “capable of protecting a personal computer (‘PC’) or other persistently or even intermittently network accessible devices or processes from harmful, undesirable, suspicious or other ‘malicious’ operations that might otherwise be effectuated by remotely operable code.” Ex. 1001, 2:51–56. “Remotely operable code that is protectable against can include,” for example, “downloadable application programs, Trojan horses and program code groupings, as well as software ‘components’, such as Java™ applets, ActiveX™ controls, JavaScript™/Visual Basic scripts, add-ins, etc., among others.” *Id.* at 2:59–64.

B. Related Proceedings

The parties report that the ’494 patent is the subject of a district court action between the parties, *Finjan, Inc. v. Blue Coat Systems, Inc.*, No. 5:15-cv-03295 (N.D. Cal. 2015), and that the ’494 patent also has been asserted in four other district court actions, *Finjan, Inc. v. Sophos, Inc.*, No. 3:14-cv-01197 (N.D. Cal. 2014), *Finjan, Inc. v. Symantec Corp.*, No. 3:14-cv-02998 (N.D. Cal. 2014), *Finjan, Inc. v. Palo Alto Networks, Inc.*, No. 3:14-cv-04908 (N.D. Cal. 2014), and *Finjan, Inc. v. Cisco Systems Inc.*, No. 17-cv-00072 (N.D. Cal. 2017). Pet. 15; Paper 4, 1; Paper 10, 1.

The ’494 patent also is the subject of Case IPR2015-01892, in which trial was instituted with respect to claims 1, 2, 5, 6, 10, 11, 14, and 15 on a petition filed by Symantec Corporation; and Case IPR2016-00159, in which trial was been instituted with respect to claims 1–6 and 10–15 on a petition

filed by Palo Alto Networks, Inc. *Symantec Corp. v. Finjan, Inc.*, Case IPR2015-01892 (PTAB Mar. 18, 2016) (Paper 9) ("Symantec Dec. on Inst."); *Palo Alto Networks, Inc. v. Finjan, Inc.*, Case IPR2016-00159 (PTAB May 13, 2016) (Paper 8) ("PAN Dec. on Inst.").

Petitioner previously filed two additional petitions for *inter partes* review of the '494 patent, in Cases IPR2016-00890 and IPR2016-01174, accompanied by motions for joinder with the ongoing *inter partes* reviews initiated by Symantec Corporation and Palo Alto Networks, Inc. in Cases IPR2015-01892 and IPR2016-00159, respectively. *Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016-00890, Paper 2 (challenging claims 1, 2, 5, 6, 10, 11, 14, and 15), Paper 3 (requesting to join Case IPR2015-01892); *Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016-01174, Paper 2 (challenging claims 1–6 and 10–15), Paper 3 (requesting to join Case IPR2016-00159). We instituted trial on both of Petitioner's previous petitions and granted both motions for joinder. *Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016-00890 (PTAB Aug. 30, 2016) (Paper 8); *Blue Coat Sys., Inc. v. Finjan, Inc.*, Case IPR2016-01174 (PTAB Oct. 4, 2016) (Paper 8).

The '494 patent also was the subject of two other petitions, both of which were denied. *Sophos, Inc. v. Finjan, Inc.*, Case IPR2015-01022 (PTAB Sept. 24, 2015) (Paper 7); *Symantec Corp. v. Finjan, Inc.*, Case IPR2015-01897 (PTAB Feb. 26, 2016) (Paper 7).

C. Illustrative Claims

None of the challenged claims is independent; rather, each of challenged claims 7–9 depends from unchallenged independent claim 1, and each of challenged claims 16–18 depends from unchallenged independent

claim 10. Challenged claims 7–9 are illustrative and are reproduced below with unchallenged independent claim 1 also reproduced for context:

> 1. A computer-based method, comprising the steps of:
>
> receiving an incoming Downloadable;
>
> deriving security profile data for the Downloadable, including a list of suspicious computer operations that may be attempted by the Downloadable; and
>
> storing the Downloadable security profile data in a database.
>
> 7. The computer-based method of claim 1 wherein the Downloadable security profile data includes a URL from where the Downloadable originated.
>
> 8. The computer-based method of claim 1 wherein the Downloadable security profile data includes a digital certificate.
>
> 9. The computer-based method of claim 1 wherein said deriving Downloadable security profile data comprises disassembling the incoming Downloadable.

Ex. 1001, 21:19–25, 21:38–22:6. Challenged claims 16–18 recite limitations similar to claims 7–9, respectively. *Id.* at 22:31–38.

D. References Relied Upon

Petitioner relies on the following references:

Exhibit	Reference
1005	Morton Swimmer et al., *Dynamic Detection and Classification of Computer Viruses Using General Behaviour Patterns*, Virus Bull. Conf. 75 (Sept. 1995) ("Swimmer")
1006	US 5,983,348, issued Nov. 9, 1999 (filed Sept. 10, 1997) ("Ji")
1007	Luotonen et al., *World-Wide Web Proxies*, 27 Comput. Networks & ISDN Sys. 147 (1994) ("Luotonen")

Exhibit	Reference
1008	US 5,978,484, issued Nov. 2, 1999 (filed Apr. 25, 1996) ("Apperson")
1009	Lo et al., *Towards a Testbed for Malicious Code Detection* (1991) ("Lo")[2]

Pet. 18–48. Petitioner also relies on declarations of Azer Bestavros, Ph.D. (Ex. 1002) and Sylvia Hall-Ellis, Ph.D. (Ex. 1024). Patent Owner relies on a declaration of Nenad Medvidovic, Ph.D. (Ex. 2007).

E. Asserted Grounds of Unpatentability

Petitioner challenges the patentability of the challenged claims on the following grounds:

References	Basis	Claims Challenged
Swimmer and Ji	35 U.S.C. § 103(a)	7 and 16
Swimmer and Luotonen	35 U.S.C. § 103(a)	7 and 16

[2] Grounds asserted in an *inter partes* review must be based on "patents or printed publications" (35 U.S.C. § 311(b); 37 C.F.R. § 42.104(b)(2)). Although Exhibit 1009 includes the notation "CH2961-1/91/0000/0160 $01.00 © 1991 IEEE" at the bottom of its first page, apparently indicating a claim of a 1991 copyright date, we note that the exhibit does not include any publication information. The Board previously has found that a copyright notice alone may not be sufficient to establish that a reference was publicly accessible—and, thus, a "printed publication" for purposes of *inter partes* review—as of the critical date. *See, e.g.*, *TRW Auto. US LLC v. Magna Elecs. Inc.*, Case IPR2015-00960, slip op. at 18–19 (PTAB Oct. 5, 2015) (Paper 9); *ServiceNow v. Hewlett-Packard Co.*, Case IPR2015-00707, slip op. at 17 (PTAB Aug. 26, 2015) (Paper 12); *but see Ericsson, Inc. v. Intellectual Ventures I LLC*, Case IPR2014-00527, 2015 WL 2409306, at *6 (PTAB May 18, 2015). Because we deny the Petition for other reasons, we do not decide whether Petitioner has established on this record that Lo is a printed publication.

References	Basis	Claims Challenged
Swimmer and Apperson	35 U.S.C. § 103(a)	8 and 17
Swimmer and Lo	35 U.S.C. § 103(a)	9 and 18

Pet. 17.

III. DISCUSSION

Patent Owner raises four procedural bases on which it contends that we should deny the Petition, namely that (1) the Petition is moot under 35 U.S.C. § 315(e)(1) "because Petitioner will be estopped from maintaining this proceeding upon the issuance of a Final Written Decision in Case No. IPR2015-01892 or [Case No.] IPR2016-00159, . . . to which Petitioner . . . is a party" (Prelim. Resp. 6–9); (2) the Petition should be rejected under 35 U.S.C. § 325(d) for "recycl[ing] substantially the same prior art and substantially the same arguments that were already presented to the Patent Office in Cases Nos. IPR2016-00890 and IPR2016-01147 [sic]"[3] (Prelim. Resp. 9–14); (3) the Petition is barred under 35 U.S.C. § 315(b) "because a real party in interest was served with a complaint for infringement of the '494 Patent more than one year before the filing date of the Petition" (Prelim. Resp. 14–15); and (4) "[t]he Petition is incomplete and cannot be considered under 35 U.S.C. § 312(a)(3)" (Prelim. Resp. 15–16). Because we exercise our discretion under 35 U.S.C. § 325(d) to deny the Petition, we do not reach the remaining issues.

[3] Patent Owner refers here and elsewhere in the Preliminary Response to "Case No. IPR2016-01147." *See* Prelim. Resp. 1, 9, 10, 13. We understand all such references to refer instead to Case IPR2016-01174, which, as noted above, was filed by Petitioner and joined with Case IPR2016-00159.

Institution of *inter partes* review is discretionary. *See* 35 U.S.C. § 314(a); 37 C.F.R. § 42.108. Panels of the Board have considered a variety of factors in deciding whether to exercise discretion not to institute review, including, *inter alia*:

(1) the finite resources of the Board;

(2) the requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than one year after the date on which the Director notices institution of review;

(3) whether the same petitioner previously filed a petition directed to the same claims of the same patent;

(4) whether, at the time of filing of the earlier petition, the petitioner knew of the prior art asserted in the later petition or should have known of it;[4]

(5) whether, at the time of filing of the later petition, the petitioner already received the patent owner's preliminary response to the

[4] *See Conopco, Inc. v. Proctor & Gamble Co.*, Case IPR2014-00506, slip op. at 4 (PTAB Dec. 10, 2014) (Paper 25) (informative) ("*Conopco*"); *Conopco, Inc. v. Proctor & Gamble Co.*, Case IPR2014-00506, slip op. at 6 (PTAB July 7, 2014) (Paper 17); *Toyota Motor Corp. v. Cellport Sys., Inc.*, Case IPR2015-01423, slip op. at 8 (PTAB Oct. 28, 2015) (Paper 7) ("*Toyota Motor Corp.*").

earlier petition or received the Board's decision on whether to institute review in the earlier petition;[5]

(6) the length of time that elapsed between the time the petitioner learned of the prior art asserted in the later petition and the filing of the later petition;

(7) whether the petitioner provides adequate explanation for the time elapsed between the filing dates of multiple petitions directed to the same claims of the same patent; and

(8) whether the same or substantially the same prior art or arguments previously were presented to the Office.[6]

See LG Elecs. Inc. v. Core Wireless Licensing S.A.R.L., Case IPR2016-00986, slip op. at 6–7 (PTAB Aug. 22, 2016) (Paper 12) ("*LG Elecs.*"); *NVIDIA Corp. v. Samsung Elec. Co.*, Case IPR2016-00134, slip op. at 6–7 (PTAB May 4, 2016) (Paper 9); *Unified Patents, Inc. v. PersonalWeb Techs., LLC*, Case IPR2014-00702, slip op. at 7–9 (PTAB July 24, 2014) (Paper 13); *see also* Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 81 Fed. Reg. 18750, 18759 (Apr. 1, 2016) ("[T]he current rules provide sufficient flexibility to address the

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[5] *See Conopco, Inc. v. Proctor & Gamble Co.*, Case IPR2014-00628, slip op. at 11 (PTAB October 20, 2014) (Paper 21) (discouraging filing of a first petition that holds back prior art for use in later attacks against the same patent if the first petition is denied); *Toyota Motor Corp.*, slip op. at 8 ("[T]he opportunity to read Patent Owner's Preliminary Response in IPR2015-00634, prior to filing the Petition here, is unjust.").

[6] *See* 35 U.S.C. § 325(d) ("In determining whether to institute or order a proceeding under . . . chapter 31 [providing for *inter partes* review], the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.").

unique factual scenarios presented to handle efficiently and fairly related proceedings before the Office on a case-by-case basis, and that the Office will continue to take into account the interests of justice and fairness to both petitioners and patent owners where multiple proceedings involving the same patent claims are before the Office."). These factors guide our decision to exercise discretion, but not all factors need be present, and we need not give equal weight to each factor in reaching our decision.

With these factors in mind and for the reasons that follow, we exercise our discretion and do not institute a review based on the instant Petition.

As noted above, the instant Petition is the seventh petition filed against the '494 patent, and Petitioner is a party to two of the related proceedings, both of which are in an advanced stage. An oral hearing was conducted in joined Cases IPR2015-01892 and IPR2016-00890 on December 16, 2016, and an oral hearing in joined Cases IPR2016-00159 and IPR2016-01174 is scheduled for February 16, 2017. *See Symantec Corp. v. Finjan, Inc.*, Case IPR2015-01892, Paper 56 (Hearing Transcript); *Palo Alto Networks, Inc. v. Finjan, Inc.*, Case IPR2016-00159, Paper 9, 7 (Scheduling Order). Several of the factors summarized above are implicated by the relationship of this proceeding with those related proceedings.

With respect to the third factor, Petitioner contends that the claims challenged in the instant Petition (i.e., claims 7–9 and 16–18) differ from those challenged in the related proceedings (i.e., claims 1, 2, 5, 6, 10, 11, 14, and 15 in joined Cases IPR2015-01892 and IPR2016-00890; and claims 1–6 and 10–15 in joined Cases IPR2016-00159 and IPR2016-01174). *See, e.g.*, Pet. 16–17. Nevertheless, this fact alone does not weigh compellingly in favor of institution. *See Ford Motor Co. v. Paice LLC*, Case IPR2015-

00767, slip op. at 7 (PTAB Aug. 18, 2015) (Paper 14) ("[T]he express language of 35 U.S.C. § 325(d) does not mention claims as being a factor in deciding whether to institute trial. Rather, 35 U.S.C. § 325(d) is concerned only with whether a petition presents 'the same or substantially the same prior art *or arguments*.'"). Furthermore, because each of the claims challenged in the instant Petition depends from a claim challenged in each of the related proceedings, consideration of the Petition necessarily requires consideration of claims already challenged in the related proceedings. *See* Pet. 18–29 (analysis of unchallenged independent claims 1 and 10); *see generally* 37 C.F.R. § 42.15(a)(4) (fee for challenging dependent claims requires payment for "unchallenged claims from which a challenged claim depends").

Consideration of the fourth, sixth, and eighth factors is impacted by the essential similarity of the prior art used for the challenges in the instant Petition and for the challenges in the related proceedings, particularly against the underlying independent claims. The challenges to underlying independent claims 1 and 10 in the related proceedings are made under 35 U.S.C. § 103(a) over Swimmer. Symantec Dec. on Inst. 34; PAN Dec. on Inst. 34. The Petition's underlying challenges to claims 1 and 10, thus, are substantially identical. *See* Pet. 18–29. Indeed, Petitioner acknowledges that "[t]his Petition presents essentially the same disclosure and arguments for those independent claims." *Id.* at 1.

Moreover, Petitioner does not allege that the additionally cited references—Ji, Luotonen, Apperson, and Lo— previously were unknown to it. Although those references are not applied in either Case IPR2015-01892 or Case IPR2016-00159, each of Ji, Apperson, and Lo appears in the

"References Cited" section of the '494 patent. Ex. 1001, [56]. Indeed, Ji was cited twice by the Examiner as an anticipatory reference during prosecution of the challenged claims (Ex. 1004 ('494 patent file history), 814, 864), and was overcome as prior art by a declaration under 37 C.F.R. § 1.131 from co-inventor Shlomo Touboul (*id.* at 288–89);[7] and Apperson previously was cited in a petition for *inter partes* review of a related patent filed September 11, 2015, more than ten months before the instant Petition. *Symantec Corp. v. Finjan, Inc.*, Case IPR2015-01894 (Paper 1). Moreover, Luotonen is a journal article published more than twenty years ago, and Petitioner articulates no reason why it was not or should not have been known or available to Petitioner at the time of filing Cases IPR2016-00890 and IPR2016-01174. *See Conopco* at 6 (denying a petition for *inter partes* review because the petitioner "present[ed] no argument or evidence that the

[7] We acknowledge Petitioner's contention that Mr. Touboul's declaration did not address expressly certain claims, including challenged claims 7 and 16, and does not present sufficient antedating evidence with respect to any claim of the '494 patent. Pet. 6–7. Petitioner's contentions are unpersuasive with respect to the challenged claims, however. As Patent Owner points out in the Preliminary Response, the portion of Ji cited by Petitioner is directed explicitly to the very product referenced in the inventor's declaration as embodying his invention, and, thus, supports his claim of prior conception and reduction to practice of at least the limitations of claims 7 and 16 for which Petitioner relies on Ji. Prelim. Resp. 19–20; *see also* Ex. 1004, 289 (Mr. Touboul declaring that his sole invention embodied in Finjan's SurfinGate product contained a fully function implementation of the technology described and claimed in the application for the '494 patent); Pet. 30–32 (citing Ex. 1006, 2:22–25, 2:28–41, describing functionality of SurfinGate, as allegedly disclosing DSP data including the URL from which a Downloadable originated, as recited in claims 7 and 16).

several newly cited references were not known or available to it at the time of filing of the [earlier] Petition").

With respect to the fifth and seventh factors, we observe that, at the time Petitioner filed the instant Petition on July 15, 2016, Patent Owner had filed its Preliminary Responses in both Cases IPR2015-01892 and IPR2016-00159, the Board had issued its Institution Decision some months previously, and Patent Owner had filed its Patent Owner Response in Case IPR2015-01892. *See* Case IPR2015-01892, Paper 7 (Preliminary Response filed December 28, 2015), Paper 9 (Institution Decision entered March 18, 2016), Paper 27 (Patent Owner Response filed June 21, 2016); Case IPR2016-00159, Paper 6 (Preliminary Response filed February 17, 2016), Paper 8 (Institution Decision entered May 13, 2016). Indeed, even when Petitioner filed its petitions in Cases IPR2016-00890 and IPR2016-01174 on April 14, 2016, and June 10, 2016, respectively, the Board already had issued its Institution Decisions in Cases IPR2015-01892 and IPR2016-00159. Petitioner articulates insufficient reason why it did not or could not have included challenges to dependent claims 7–9 and 16–18 in those petitions or in a contemporaneously filed petition.

Petitioner contends that it "could not reasonably" have done so "because doing so would have added issues not present in [Cases IPR2015-01892 and IPR2016-00159] and jeopardized [Petitioner's] joinder requests." Pet. 16. We are not persuaded by this contention. Rather, we agree with Patent Owner that "Petitioner was not compelled to request joinder with either one of these proceedings, nor has Petitioner cited any 'governing law, rules [or] precedent' . . . indicating that addressing these grounds in its earlier petitions would have 'jeopardized [its] joinder requests.'" Prelim.

Resp. 13. Petitioner identifies no statutory or regulatory hurdle that would have prevented it from forgoing joinder with the other proceedings and instead seeking institution of *inter partes* review on the full claim set it wished to challenge. Further, on these facts, the lack of a joinder request would not have prevented the Board from consolidating related proceedings. *See* 35 U.S.C. § 315(d). Nor does Petitioner identify any basis (beyond the time limit for requesting joinder under 37 C.F.R. § 42.122(b)) that required early filing of its petitions in Cases IPR2016-00890 and IPR2016-01174, rather than at the time it was prepared to present its full challenges, including those directed at the additional dependent claims.

Petitioner's decision to limit the scope of its earlier challenges appears, instead, to have been a tactical one meant to improve its likelihood of success in joining Cases IPR2015-01892 and IPR2016-00159. Further, as Patent Owner points out (Prelim. Resp. 12), the instant Petition was filed on the one-year anniversary of the filing of Patent Owner's complaint against Petitioner in the district court on July 15, 2015—i.e., just before the raising of the bar against further challenges by Petitioner to any claims of the '494 patent. *See* 35 U.S.C. § 315(b) ("An inter partes review may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner . . . is served with a complaint alleging infringement of the patent); Ex. 2043 (Complaint, *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 5:15-cv-03295 (N.D. Cal.), dated July 15, 2015); Ex. 3001 (Proof of Service, *Finjan, Inc. v. Blue Coat Sys., Inc.*, No. 5:15-cv-03295 (N.D. Cal.), dated July 17, 2015). Thus, it is appropriate to consider the harassing impact that the resulting piecemeal challenges have on Patent Owner in defending its patent. *See ZTE Corp. v. ContentGuard Holdings,*

Inc., Case IPR2013-00454, slip op. at 5–6 (PTAB Sept. 25, 2013) (Paper 12) ("The Board is concerned about encouraging, unnecessarily, the filing of petitions which are partially inadequate."); *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, Case IPR2014-00581, slip op. at 12–13 (PTAB Oct. 14, 2014) (Paper 8) ("Allowing similar, serial challenges to the same patent, by the same petitioner, risks harassment of patent owners and frustration of Congress's intent in enacting the Leahy-Smith America Invents Act." (citing H.R. Rep. No. 112-98, pt. 1, at 48 (2011))).

These various considerations also inform our consideration of the first and second factors. "The Board's resources would be more fairly expended on *initial petitions*, rather than on *follow-on petitions*, such as the Petition in this case." *Alarm.com Inc. v. Vivint, Inc.*, Case IPR2016-01091, slip op. at 13 (PTAB Nov. 23, 2016) (Paper 11) (emphases added).

After weighing the factors identified above, we conclude that those factors weigh against instituting *inter partes* review based on the instant Petition.

IV. ORDER

Upon consideration of the record before us, it is, therefore,

ORDERED that the Petition is *denied*, and no *inter partes* review is instituted.

For PETITIONER:

Michael T. Rosato
Matthew A. Argenti
Andrew S. Brown
WILSON SONSINI GOODRICH & ROSATI
mrosato@wsgr.com
margenti@wsgr.com
asbrown@wsgr.com

For PATENT OWNER:

James Hannah
Jeffrey H. Price
Michael Lee
Shannon Hedvat
KRAMER LEVIN NAFTALIS & FRANKEL LLP
jhannah@kramerlevin.com
jprice@kramerlevin.com
mhlee@kramerlevin.com
shedvat@kramerlevin.com

Michael Kim
FINJAN, INC.
mkim@finjan.com