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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 TIM BERCIO,

11 Plaintiff,

:
: Case No. 3:20-cv-04763
:

12 v.

13 FINJAN HOLDINGS, INC., DANIEL
14 CHINN, ERIC BENHAMOU, GLENN
15 DANIEL, JOHN GREENE, HARRY
16 KELLOGG, GARY MOORE, ALEX
17 ROGERS, and MICHAEL SOUTHWORTH,

: **COMPLAINT FOR VIOLATIONS OF**
: **THE FEDERAL SECURITIES LAWS**
:
: **JURY TRIAL DEMANDED**
:

18 Defendants.

19
20 Plaintiff Tim Bercio (“Plaintiff”), by and through his undersigned counsel, for his complaint
21 against defendants, alleges upon personal knowledge with respect to himself, and upon information
22 and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as
23 follows:

24 **NATURE OF THE ACTION**

25 1. Plaintiff brings this action against Finjan, Inc. (“Finjan” or the “Company”) and the
26 members of its Board of Directors (the “Board” or the “Individual Defendants”) for their violations
27 of Sections 14(e) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C.

1 §§ 78n(e), 78t(a), and to enjoin the expiration of a tender offer (the “Offer”) by affiliates of Fortress
2 Investment Group, LLC (“Fortress”), CFIP Goldfish Merger Sub, Inc. (“Merger Sub”) and CFIP
3 Goldfish Holdings, LLC (“Parent”), (the “Proposed Transaction”).

4 2. On June 10, 2020, Finjan announced that it had entered into an Agreement and Plan
5 of Merger with Fortress (the “Merger Agreement”), pursuant to which Fortress will acquire all
6 outstanding shares of Finjan common stock for \$1.55 per share in cash. The Offer is scheduled to
7 expire at 12:00 midnight, New York City time, at the end of July 22, 2020.

8 3. On June 24, 2020, in order to convince Finjan’s common stockholders to tender their
9 shares in the Offer, defendants filed a Schedule 14D-9 Solicitation/Recommendation Statement (the
10 “14D-9”) with the SEC, which omits or misrepresents material information concerning, among other
11 things: (i) Finjan management’s financial projections and the data and inputs underlying the financial
12 valuation analyses that support the fairness opinion provided by the Company’s financial advisor,
13 Atlas Technology Group, LLC (“Atlas”); (ii) the background of the Proposed Transaction; and (iii)
14 Company insiders’ potential conflicts of interest. The failure to adequately disclose such material
15 information renders the 14D-9 false and misleading.

16 4. For these reasons, and as set forth in detail herein, Plaintiff alleges that defendants
17 violated Sections 14(e) and 20(a) of the Exchange Act as Finjan’s stockholders need such information
18 in order to make a fully informed decision whether to tender their shares in support of the Proposed
19 Transaction or seek appraisal.

20 **JURISDICTION AND VENUE**

21 5. This Court has jurisdiction over the claims asserted herein for violations of Sections
22 14(e) and 20(a) of the Exchange Act pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa,
23 and 28 U.S.C. § 1331 (federal question jurisdiction).

24 6. This Court has jurisdiction over the defendants because each defendant is either a
25 corporation that conducts business in and maintains operations within this District, or is an individual
26 with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this
27 Court permissible under traditional notions of fair play and substantial justice.

1 management, over 850 asset management employees, and approximately 200 investment
2 professionals. Fortress is headquartered in New York.

3 **SUBSTANTIVE ALLEGATIONS**

4 **Background of the Company and Proposed Transaction**

5 20. Finjan is a leader in cybersecurity with a focus on three main areas: intellectual
6 property licensing and enforcement, mobile security application development, and investing in
7 cybersecurity technologies and intellectual property. Licensing and enforcement of the Company's
8 cybersecurity patent portfolio is operated by Finjan's wholly owned subsidiaries, Finjan, Inc. and
9 Finjan Blue, Inc. ("Finjan Blue"). The Company's mobile security business is operated through its
10 wholly owned subsidiary Finjan Mobile, Inc. ("Finjan Mobile").

11 21. Since Finjan, Inc. became a wholly owned subsidiary of the Company in June 2013,
12 the Company has commenced preliminary discussions with numerous potential licensees and has
13 filed a number of patent infringement lawsuits.

14 22. During the years ended December 31, 2019, 2018, and 2017, Finjan generated revenue
15 from its cybersecurity business of approximately \$13.2 million, \$82.3 million, and \$50.5 million,
16 respectively.

17 23. On May 13, 2020, Finjan announced its first quarter 2020 financial results and key
18 highlights. For the quarter, the Company reported revenue of \$3.8 million compared to no revenue
19 for the first quarter of 2019. The Company's net loss for the first quarter of 2020 was \$4.2 million,
20 or (\$0.15) per share, compared to net loss of \$6.0 million or (\$0.22) per share for the first quarter of
21 2019. Finjan ended the quarter with approximately \$32.0 million in cash.

22 24. On June 10, 2020, Finjan issued a press release announcing the Proposed Transaction
23 which states, in relevant part:

24 EAST PALO ALTO, Calif., June 10, 2020 -- Finjan Holdings, Inc. (NASDAQ: FNJN)
25 (Finjan) today announced that it has entered into a definitive agreement (the "Merger
26 Agreement") pursuant to which affiliates of Fortress Investment Group LLC
27 (collectively "Fortress") would acquire all outstanding shares of Finjan common stock
28 for \$1.55 per share in cash (the "Transaction"), representing an aggregate equity value
of approximately \$43.9 million. Finjan, a recognized pioneer in the development of
cybersecurity technologies, will maintain its brand and business model post-

1 transaction, licensing and enforcing a substantial patent portfolio that has been
2 consistently upheld by courts and patent offices.

3 Under the terms of the Merger Agreement, Fortress will commence a tender offer to
4 purchase all the outstanding shares of Finjan’s common stock for \$1.55 per share in
5 cash. The closing of the tender offer is subject to customary conditions, including the
6 tender of a majority of the outstanding shares of Finjan’s common stock. Following
7 successful completion of the tender offer, Fortress will acquire all remaining shares
8 not tendered in the offer through a merger at the same price as in the tender offer.

9 Finjan’s Board of Directors unanimously approved the Merger Agreement and
10 recommends that shareholders tender their shares. In connection with the Merger
11 Agreement, directors and officers of the Company, together with shareholders, in the
12 aggregate holding approximately 28 percent of the outstanding shares of common
13 stock of the Company, have agreed to tender their shares in the offer pursuant to
14 support agreements.

15 The Transaction is not subject to any financing condition and is expected to close in
16 the third quarter of 2020.

17 Daniel Chinn, Chairman of Finjan Holdings, stated, “The Board of Directors
18 thoroughly evaluated all of our strategic options, giving careful consideration to the
19 current unprecedented and uncertain environment, and we believe that this transaction
20 will provide the best outcome for Finjan and its stockholders. We appreciate the
21 continued patience of our investors and employees and thank them for their support.
22 We recommend all shareholders to tender their shares in the offer.”

23 Phil Hartstein, President and Chief Executive Officer of Finjan, commented, “We
24 believe that this transaction strengthens our ability to continue executing our business
25 model, particularly while facing unpredictable timelines in the court system and a
26 challenging macro-economic environment. The acquisition enables Finjan to continue
27 to pursue our licensing mission and expand our reputation and credibility on policy
28 related initiatives, while providing us greater resources and opportunities as a Fortress
portfolio company.”

Eran Zur, Managing Director and head of the Fortress IP Finance Group, commented,
“Finjan pioneered many of the technologies that underpin how companies protect their
networks from cyberattacks. Finjan had the foresight to patent its innovations and its
patent portfolio has been repeatedly upheld by courts and patent offices while being
widely licensed to industry players. Fortress and Finjan share a strong belief in the
importance of preserving a patent system that allows innovators to earn a fair return
on their investment and we look forward to supporting Finjan as it moves forward with
its licensing program.”

1 **The 14D-9 Misleads Finjan Stockholders by Omitting Material Information**

2 28. On June 24, 2020, defendants filed the materially misleading and incomplete 14D-9
3 with the SEC. Designed to convince the Company’s stockholders to tender their shares in the Offer,
4 the 14D-9 is rendered misleading by the omission of critical information concerning: (i) Finjan
5 management’s financial projections and the data and inputs underlying the financial valuation
6 analyses that support the fairness opinion provided by Atlas; (ii) the background of the Proposed
7 Transaction; and (iii) Company insiders’ potential conflicts of interest.

8 ***Material Omissions Concerning the Financial Projections and Atlas’s Financial Analyses***

9 29. The 14D-9 omits material information regarding Company management’s financial
10 projections relied upon by Atlas for its analyses.

11 30. The 14D-9 sets forth:

12 In connection with its strategic planning process and its evaluation of certain strategic
13 alternatives, the Merger and the other Transactions, however, the Company’s
14 management prepared certain financial projections regarding the Company’s
15 anticipated future operations as a standalone company. The most recent of these
16 forecasts were certain financial projections for the remainder of fiscal year ending
17 December 31, 2020, which were made as of April 25, 2020 (the “*April Projections*”)
18 and updated as of May 27, 2020 (the “*May Projections*”, and together with the April
19 Projections, the “*Management Projections*”). The Management Projections were
provided to the Board, Atlas and Fortress. The May Projections were also provided to
Atlas for its use in connection with rendering its opinion to the Board and performing
its financial analyses. The Management Projections, at the time they were made,
represented the best available estimates and good faith judgments of the Company’s
management as to the Company’s future financial performance.

20 14D-9 at 37. Yet, the 14D-9 fails to set forth Company management’s basis for updating the April
21 Projections on May 27, 2020, as well as a description or quantification of the revisions made.

22 31. In connection with Atlas’s *Discounted Cash Flow Analysis* (“DCF”), “Atlas used
23 Company Projections for the unlevered cash flows for the remainder of the year ending December
24 31, 2020.” *Id.* at 32. Yet, the 14D-9 fails to disclose the Company’s unlevered cash flows for the
25 remainder of the year ending December 31, 2020 for each of the “April Projections” and “May
26 Projections.”

1 37. The disclosure of the terms of confidentiality agreements is crucial to Finjan
2 stockholders being fully informed of whether their fiduciaries have put in place restrictive devices to
3 foreclose a topping bid for the Company.

4 38. The 14D-9 also fails to disclose the specific details contained in Party B's February 3,
5 2020 letter, indicating that Party B wished to deal directly with the Board and not the Transaction
6 Committee regarding a potential transaction with the Company.

7 39. Moreover, the 14D-9 fails to disclose the results of Company management's
8 liquidation value analysis requested by the Board on April 5, 2020 and shared with the Transaction
9 Committee.

10 40. The omission of this information renders certain portions of the 14D-9 materially
11 misleading, including, inter alia, the following section of the 14D-9: "Background of the Offer."

12 ***Material Omissions Concerning Company Insiders' Potential Conflicts of Interest***

13 41. The 14D-9 fails to disclose material information concerning the potential conflicts of
14 interest faced by the Company's insiders.

15 42. The 14D-9 fails to disclose whether any of Finjan's executive officers or directors has
16 secured employment with the Company upon completion of the Proposed Transaction. Further, the
17 14D-9 fails to set forth the details of all employment and retention-related discussions and
18 negotiations that occurred between Fortress and Finjan executive officers and directors, including
19 who participated in all such communications, when they occurred and their content. The 14D-9 also
20 fails to disclose whether any of Fortress's proposals or indications of interest mentioned management
21 retention.

22 43. Communications regarding post-transaction employment and merger-related benefits
23 during the negotiation of the underlying transaction must be disclosed to stockholders. This
24 information is necessary for Finjan's stockholders to understand potential conflicts of interest of
25 management and the Board, as that information provides illumination concerning motivations that
26 would prevent fiduciaries from acting solely in the best interests of the Company's stockholders.

1 44. The omission of this information renders certain portions of the 14D-9 materially
2 misleading, including, inter alia, the following sections of the 14D-9: “Arrangements between the
3 Company and its Executive Officers, Directors and Affiliates,” and “Background of the Offer.”

4 45. Accordingly, Plaintiff seeks injunctive and other equitable relief to prevent the
5 irreparable injury that Company stockholders will continue to suffer absent judicial intervention.

6 **CLAIMS FOR RELIEF**

7 **COUNT I**

8 **Claims Against All Defendants for Violations
of Section 14(e) of the Exchange Act**

9 46. Plaintiff repeats all previous allegations as if set forth in full.

10 47. Defendants violated Section 14(e) of the Exchange Act by issuing the 14D-9 in which
11 they made untrue statements of material facts or failed to state all material facts necessary in order to
12 make the statements made, in light of the circumstances under which they are made, not misleading,
13 or engaged in deceptive or manipulative acts or practices, in connection with the Offer commenced
14 in conjunction with the Proposed Transaction.

15 48. Defendants knew that Plaintiff would rely upon their statements in the 14D-9 in
16 determining whether to tender his shares pursuant to the Offer commenced in conjunction with the
17 Proposed Transaction.

18 49. As a direct and proximate result of these defendants’ unlawful course of conduct in
19 violation of Section 14(e) of the Exchange Act, absent injunctive relief from the Court, Plaintiff has
20 sustained and will continue to sustain irreparable injury by being denied the opportunity to make an
21 informed decision in deciding whether or not to tender his shares.

22 **COUNT II**

23 **Claims Against the Individual Defendants for
24 Violation of Section 20(a) of the Exchange Act**

25 50. Plaintiff repeats all previous allegations as if set forth in full.

26 51. The Individual Defendants acted as controlling persons of Finjan within the meaning
27 of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers or

1 directors of Finjan and participation in or awareness of the Company's operations or intimate
2 knowledge of the false statements contained in the 14D-9 filed with the SEC, they had the power to
3 influence and control and did influence and control, directly or indirectly, the decision-making of the
4 Company, including the content and dissemination of the various statements which Plaintiff contends
5 are false and misleading.

6 52. Each of the Individual Defendants was provided with or had unlimited access to copies
7 of the 14D-9 and other statements alleged by Plaintiff to be misleading prior to or shortly after these
8 statements were issued and had the ability to prevent the issuance of the statements or cause the
9 statements to be corrected.

10 53. In particular, each of the Individual Defendants had direct and supervisory
11 involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had
12 the power to control or influence the particular transactions giving rise to the securities violations as
13 alleged herein, and exercised the same. The 14D-9 at issue contains the unanimous recommendation
14 of each of the Individual Defendants to approve the Proposed Transaction. They were, thus, directly
15 involved in the making of this document.

16 54. In addition, as the 14D-9 sets forth at length, and as described herein, the Individual
17 Defendants were each involved in negotiating, reviewing, and approving the Proposed Transaction.
18 The 14D-9 purports to describe the various issues and information that they reviewed and considered
19 — descriptions which had input from the Individual Defendants.

20 55. By virtue of the foregoing, the Individual Defendants have violated section 20(a) of
21 the Exchange Act.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiff demands judgment and preliminary and permanent relief, including
24 injunctive relief, in his favor on behalf of Finjan, and against defendants, as follows:

25 A. Preliminarily and permanently enjoining defendants and all persons acting in concert
26 with them from proceeding with, consummating, or closing the Proposed Transaction;

1 B. In the event defendants consummate the Proposed Transaction, rescinding it and
2 setting it aside or awarding rescissory damages to Plaintiff;

3 C. Directing the Individual Defendants to disseminate a 14D-9 that does not contain any
4 untrue statements of material fact and that states all material facts required in it or necessary to make
5 the statements contained therein not misleading;

6 D. Awarding Plaintiff the costs of this action, including reasonable allowance for
7 Plaintiff's attorneys' and experts' fees; and

8 E. Granting such other and further relief as this Court may deem just and proper.

9 **JURY DEMAND**

10 Plaintiff demands a trial by jury on all claims and issues so triable.

11 Dated: July 16, 2020

BRAGAR EAGEL & SQUIRE, P.C.

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