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October 4, 2018

Hon. William Alsup  
U.S. District Court, Northern District of California

Re: *Finjan, Inc. v. Juniper Networks, Inc.*, Case No. 3:17-cv-05659-WHA

Dear Judge Alsup:

Defendant Juniper Networks, Inc. (“Juniper”) respectfully submits this discovery letter brief requesting that the Court issue an Order amending the Stipulated Protective Order (*see* Dkt. No. 149) to allow Juniper to use confidential information produced in this case in *inter partes* review (“IPR”) proceedings, so long as the information is sealed and protected in the same manner with the Patent Trial and Appeal Board. The confidential information Juniper seeks to use in the IPR proceedings is crucial to addressing any assertions by Plaintiff Finjan, Inc. (“Finjan”) regarding secondary considerations of non-obviousness that Finjan has raised in prior IPR proceedings.

In multiple prior IPR proceedings involving other defendants, Finjan has argued that its licensing of certain patents serves as a secondary consideration of non-obviousness, and thus weighs against invalidating its patents. *See, e.g., Cisco Sys., Inc. v. Finjan, Inc.*, IPR2018-00391 (Paper 12) at 39-40 (Sept. 10, 2018) (“The commercial success of the patented inventions disclosed in the ‘633 Patent is evidenced through Finjan’s successful licensing program and the commercial success of the products covered under those licenses[.]”); *ESET, LLC et al. v. Finjan, Inc.*, IPR2017-01738 (Paper 31) at 55 (Aug. 21, 2018) (same). Moreover, Finjan has specifically faulted past petitioners for purportedly failing to address the licensing evidence that Finjan produced to those petitioners in the corresponding district court cases. For example, in its Patent Owner Response to an IPR brought by Cisco, Finjan argued:

In the active litigation between Patent Owner and Petitioner, Patent Owner has provided Petitioner with substantial evidence related to secondary considerations of nonobviousness. Thus, there is simply no excuse for Petitioner’s failure to address this critical portion of the obviousness analysis.

...

The fact that Petitioner chose to ignore this evidence, skip this important component of the obviousness analysis, and provide the

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Board with an incomplete obviousness analysis is basis alone for denying its obviousness arguments.

*See Cisco*, IPR2018-00391 (Paper 12) at 38; *see also ESET*, IPR2017-01738 (Paper 31) at 54.

On May 16, 2018, Finjan served Juniper with interrogatory responses on licensing and marking issues in this case that provide the evidence needed to fully rebut Finjan's secondary considerations argument. Finjan designated its responses as "Highly Confidential – Attorneys' Eyes Only."<sup>1</sup> In those responses, Finjan asserted that none of its licensee products need to be marked because it is not aware of any licensee products that actually practice the patents-in-suit:

Finjan is not aware of any products offered by Finjan's licensees that require marking of Finjan's patents. All of licensees that have entered into license and release agreements denied admission of liability when entering such agreements or did not agree that any of their products infringe the Patents-in-Suit. Further, these license and release agreements set forth typically in the preamble that the purpose of the agreements were "[t]o avoid the time and expense of litigation . . ."

Ex. 1 at 5. These admissions refute any allegation that Finjan's licenses evidence secondary considerations of non-obviousness because they show that there is no nexus between those licenses and the patents-in-suit. *See Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1068 (Fed. Cir. 2016), *cert. denied*, 138 S. Ct. 420, 199 L. Ed. 2d 311 (2017) (holding that the proponent of evidence of secondary considerations "bears the burden of showing that a nexus exists between the claimed features of the invention and the objective evidence offered to show non-obviousness.") (internal citations omitted). The responses are thus highly relevant to the IPR proceedings and further address Finjan's criticism of petitioners in prior IPR proceedings.

Given that these interrogatory responses are highly relevant to the issue of secondary considerations, Juniper requested that Finjan agree to allow Juniper to use them as an exhibit in the IPR petitions Juniper was planning to file. Ex. 2 at 6. Juniper also offered to file them under seal in the IPR pursuant to a protective order that offers the same protections as the protective order in this litigation. *Id.* Finjan refused. *Id.* at 3-4. Despite Juniper's repeated requests to schedule a meet and confer on this issue (both in writing and via voice message), Finjan refuses to respond to Juniper's requests for Finjan to provide times that it is available for a teleconference. *Id.* at 1-4, 6.

It is unreasonable for Finjan to block Juniper's efforts to use discovery produced under the Stipulated Protective Order in this case in the IPR proceedings Juniper has initiated. Given that Juniper has agreed to maintain the same level of confidentiality in the IPR proceedings that are in

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<sup>1</sup> Juniper has challenged Finjan's designation as being improper under the terms of the Protective Order, as the responses do not contain "extremely sensitive 'Confidential Information or Items,' disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means." *See* Dkt. No. 149 at 2 (Section 2.8). Further, the responses include "non-technical, purely financial or license information" that, according to the Protective Order, is not properly designated as "Highly Confidential – Attorneys' Eyes Only." *Id.* As of the date of this letter, Finjan has refused to meet and confer with Juniper on this issue.

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place in this litigation, Finjan can suffer no prejudice (other than having its bogus arguments rejected by the PTAB, which Juniper contends is not legitimate prejudice). For these reasons, Juniper therefore seeks an order amending the Stipulated Protective Order in this case to allow Juniper to use Finjan's confidential information in the IPR proceedings, as long as the information is sealed and protected. Juniper has attached a proposed amendment to the Stipulated Protective Order as Exhibit 3.

Respectfully submitted,

/s/ Jonathan S. Kagan

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