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11 FINJAN, INC.

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN FRANCISCO DIVISION**

15  
16 FINJAN, INC., a Delaware Corporation,

17 Plaintiff,

18 v.

19 JUNIPER NETWORKS, INC., a Delaware  
20 Corporation,

21 Defendant.

Case No.: 3:17-cv-05659-WHA

**PLAINTIFF'S FINJAN INC.'S MOTION  
TO STAY ORDER RE SEALING OF  
ORDER ON DAUBERT MOTIONS**

## INTRODUCTION

Finjan, Inc. (“Finjan”) respectfully requests the Court stay its order regarding the unsealing of its *Daubert* order so that Finjan can seek relief from the United States Court of Appeals for the Federal Circuit. This Court’s written *Daubert* order exposes nonpublic, confidential information of both Finjan and its third party licensees that are not a party to these proceedings, the disclosure of which will cause irreparable harm to all concerned. A stay of this Court’s order to publicly file its *Daubert* order is necessary for Finjan to seek meaningful appellate relief in the Federal Circuit because public disclosure of said information prior to a final order from the Federal Circuit will cause irreparable harm and render Finjan’s appeal moot.

### I. BACKGROUND

On December 3, 2018, this Court simultaneously entered both an Order on *Daubert* Motions (Dkt. No. 283) (“the *Daubert* Order”) and an Order Re Sealing of Order on *Daubert* Motions (Dkt. No. 284) (“the Nonsealing Order”) which temporarily sealed the Order on *Daubert* Motions for two weeks in order to allow the parties time to appeal the Nonsealing Order to the Federal Circuit. Because the Court issued the Nonsealing Order and the *Daubert* Order on the same day, and because the Nonsealing Order defers to the Federal Circuit, neither party in this case had an opportunity to move this Court to seal the confidential portions of the *Daubert* Order. Per the Nonsealing Order, the unredacted version of the *Daubert* Order, which contains both Finjan and third party confidential business information, is set to be filed on the public docket on December 17, 2018 in the absence of a contrary order from the Federal Circuit.

Today, Finjan will file a notice of appeal in this Court for the purpose of appealing the Nonsealing Order to the Federal Circuit. On appeal, Finjan will seek to obtain the following limited redactions to the *Daubert* Order:

Description of Content Sought to be Redacted	Location on the <i>Daubert</i> Order
confidential licensing terms proposed between Finjan and a third party licensee pursuant to	p.9, ll. 8-14

NDA and Fed. R. Evid. 408	
confidential licensing terms proposed to a third party licensee pursuant to Fed. R. Evid. 408	p. 10, ll. 7

## II. ARGUMENT

### A. The Nonsealing Order Should be Stayed Pending Final Decision by the Federal Circuit

This Court has authority to stay an order pending appeal under Fed. R. Civ. P. 62(d) and should consider the following four factors to determine whether a stay is appropriate: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *E. Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 WL 6428204, at \*14 (9th Cir. Dec. 7, 2018) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987)); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 3536800, at \*1 (N.D. Cal. Aug. 15, 2012). However, the factors need not be rigidly applied and each factor need not be given equal weight. *Apple*, 2012 WL 3536800 at \*1 (citing *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990)). Indeed, “when harm to an applicant is great enough, a court will not require a ‘strong showing’ that applicant is ‘likely to succeed on the merits.’” *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990) (citing *Hilton*, 481 U.S. at 776). Here, all the factors weigh in favor of granting the stay of the Unsealing Order pending final decision of the Federal Circuit.

#### i. Finjan and Nonparty Licensees Will be Irreparably Harmed Absent a Stay

Finjan and its third party licensees, F5 and Sophos, who are not parties to this action, will be irreparably harmed if a stay is not granted. *See* Declaration of Julie Mar-Spinola (“Mar-Spinola Decl.”), ¶¶ 2-3. The *Daubert* Order discloses information exchanged between Finjan and its third party licensees in the course of confidential licensing negotiations in settlement of pending litigations subject to Fed. R. Evid. 408. Specifically, the *Daubert* Order discloses proposed licensing fee

1 amounts and rates discussed by the parties during settlement negotiations. Dkt. No. 283 at 9:8-14;  
2 10:7. The licensing discussions with F5 were also subject to a nondisclosure agreement requiring the  
3 parties to maintain the confidentiality of exchanged information. Mar-Spinola, Decl., ¶ 3.

4 Finjan and its third party licensees have taken measures to apply an extremely high level of  
5 protection to the information above because making their private business information public will  
6 render them “irreparably damaged in a way not correctable on appeal.” *In re Electronic Arts, Inc.*,  
7 298 Fed.Appx. 568, 570, 2008 WL 4726222, at \*2 (9th Cir. 2008) (district court’s refusal to seal  
8 licensing terms and royalty rates was an abuse of discretion); *See* Mar-Spinola Decl. at ¶¶ 2-3; *see*  
9 *Apple, Inc. v. Samsung Electronics Co., et al.*, Case No. 11-cv-01846-LHK, 2012 WL 3283478 at \*7  
10 (N.D. Cal. Aug. 9, 2012) (granting the sealing of licensing agreements because disclosure would  
11 cause “significant competitive harm to the licensing parties as it would provide insight into the  
12 structure of their licensing deals, forcing them into an uneven bargaining position in future  
13 negotiations”); *see also Open Text S.A. v. Box, Inc.*, No. 13-cv-04910-JD, 2014 WL 7368594, at \*3  
14 (N.D. Cal. Dec. 26, 2014) (granting motion to seal pricing terms of license agreement).

15 In particular, disclosure of these confidential settlement discussions would cause irreparable  
16 harm when such information was exchanged between Finjan and the third party licensees subject to  
17 Fed. R. Evid. 408 to settle pending litigations. Dkt. No. 283 at 9, ll.8-14, p. 10, ll.7; Mar-Spinola  
18 Decl., ¶ 2. This confidential information, if disclosed, could be improperly used as evidence by other  
19 potential licensees in active negotiations to value their license fees. Mar-Spinola Decl., ¶ 2; *see*  
20 *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 695 F.3d 51, 77 (Fed. Cir. 2012) (“Along these lines,  
21 Federal Rule of Evidence 408 specifically prohibits the admission of settlement offers and  
22 negotiations offered to prove the amount of damages owed on a claim”); *see also France Telecom*  
23 *S.A. v. Marvell Semiconductor, Inc.*, No. 12-cv-04967-WHO, 2014 WL 12605474, at \*1 (N.D. Cal.  
24 Sept. 17, 2014) (excluding the substance of communications that were subject to Rule 408 from trial  
25 that discussed proposed terms and the parties respective positions relating to the validity or amount of  
26 plaintiff’s infringement claim); *SRI Int’l, Inc. v. Cisco Sys., Inc.*, 179 F.Supp.3d 339, 369 (D. Del.  
27 2016) (excluding settlement agreements subject to Fed. R. Evid. 408 as they are a product of litigation  
28

1 that reflect the parties' consideration of multiple factors unrelated to valuation issues). Also, if  
2 confidential licensing discussions with F5 that was subject to a non-disclosure agreement were  
3 publicly disclosed, competitors in the marketplace could use such publicly disclosed confidential  
4 information to unfairly compete by using such confidential proposed pricing and licensing terms in  
5 business dealings among others in the marketplace to undercut Finjan and its licensees. Mar-Spinola  
6 Decl., ¶ 3. Once information is disclosed there can be no remedy as an appeal would be moot. *See In*  
7 *re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once  
8 information is published, it cannot be made secret again.").

9 **ii. Finjan is Likely to Succeed on the Merits on Appeal**

10 The Unsealing Order is immediately appealable to the Federal Circuit as a collateral order.  
11 *See Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) (holding that an order  
12 unsealing confidential business information is a collateral order).<sup>1</sup> Since substantive patent law is not  
13 at issue on appeal, the Federal Circuit will apply the law of the Ninth Circuit. *Apple*, 727 F.3d. at  
14 1220. When district courts within the Ninth Circuit decide whether to seal court records, the interest  
15 of the party seeking to seal the record is balanced against that of the public. *Kamakana v. City & Cty.*  
16 *of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). While a party ordinarily must show compelling  
17 reasons for removing court records from the public domain, a party seeking to seal the record need  
18 only show good cause when the sealing relates to non-dispositive motions, such as *Daubert* motions,  
19 because the public has a much lower interest in documents that are only tangentially related to the  
20 underlying cause of action. *Id.*; *Apple*, 727 F.3d at 1222.

21 As discussed above, Finjan and its licensees will be irreparably harmed if the stay is not  
22 granted. Finjan and future licensees will be unwilling to engage in discussions to settle litigations  
23 should they not be assured that Fed. R. Evid. 408 will protect such discussions from public disclosure.  
24 *See Mar-Spinola Decl.*, at ¶ 2. The harm to Finjan greatly outweighs any minimal interest the public

25 \_\_\_\_\_  
26 <sup>1</sup> Like the collateral order appealed in *Apple*, this Court's Unsealing Order is a collateral order because  
27 it conclusively determines that confidential information will be disclosed, it presents an important issue  
28 regarding the public's access to information, and waiting for final judgement would effectively make it  
unreviewable.

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