1   PAUL J. ANDRE (State Bar No. 196585)
    pandre@kramerlevin.com
2   LISA KOBIALKA (State Bar No. 191404)
    lkobialka@kramerlevin.com
3   JAMES HANNAH (State Bar No. 237978)
    jhannah@kramerlevin.com
4   KRISTOPHER KASTENS (State Bar No. 254797)
    kkastens@kramerlevin.com
5   KRAMER LEVIN NAFTALIS & FRANKEL LLP
6   990 Marsh Road
    Menlo Park, CA 94025
7   Telephone: (650) 752-1700
    Facsimile: (650) 752-1800
8

9   *Attorneys for Plaintiff*
    FINJAN, INC.
10

11   IN THE UNITED STATES DISTRICT COURT

12   FOR THE NORTHERN DISTRICT OF CALIFORNIA

13   SAN FRANCISCO DIVISION

14

15

16 FINJAN, INC., a Delaware Corporation,   Case No.: 3:17-cv-05659-WHA

17   Plaintiff,   **PLAINTIFF FINJAN, INC.'S LETTER
                                                 BRIEF REGARDING DR. ERIC COLE**
18   v.

19 JUNIPER NETWORKS, INC., a Delaware
    Corporation,
20
                Defendant.
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1 Dear Judge William Alsup,

2   Plaintiff Finjan Inc. ("Finjan") requests an order overruling Juniper Networks Inc.'s ("Juniper")

3 objection to Dr. Eric Cole and thereby permitting Dr. Cole to view Juniper's confidential information

4 in this case because he poses no risk to Juniper's confidential information, has agreed to be bound by

5 the protective order in this case, is well qualified, and was timely disclosed. Juniper's only objection

6 to Dr. Cole is irrational and unsupported in fact, namely that he is untrustworthy because eight years

7 ago he spent one year working for McAfee Inc., an unrelated third-party security company. Juniper's

8 objection is unreasonable because Dr. Cole has no plans to work again at McAfee, or any another

9 security company, and Dr. Cole's work at McAfee was long ago and had no relationship to Juniper.

10 *See* Ex. 1 (Dr. Cole's CV). Furthermore, Dr. Cole is not in contact with anyone from his time at

11 McAfee. Juniper's objection is particular confounding because this issue is time sensitive, as Finjan

12 intends to use Dr. Cole during the expedited summary judgment proceeding in just two months, on

13 June 7, 2018, which requires him to access confidential material. *See* Patent Local Rule 2-2 Interim

14 Model Protective Order ("Model Protective Order") at 12.

15   Finjan disclosed Dr. Cole on March 6, 2018 under the Model Protective Order, which currently

16 governs the disclosure of expert witnesses in this case. The parties met and conferred by telephone on

17 March 20th and again on April 5th on all issues in this letter. During the calls, Juniper alleged that

18 McAfee is a competitor of Juniper and the Model Protective Order does not allow experts that have

19 previously worked for a competitor. *See* Model Protective Order at 2 (defining the term "expert").

20   This Court has established that the standard for objecting to an expert is based on

21 disqualification, which requires Juniper to bear the burden of proving that the harm to Juniper of Dr.

22 Cole reviewing its confidential material substantially outweighs the prejudice to Finjan of

23 disqualifying Dr. Cole. *See Finisar Corp. v. Nistica*, No. 13-cv-3345-BLF, Dkt. No. 244, slip op. at

24 *10-12 (N.D. Cal. July 21, 2015) (overruling an objection and applying the disqualification test in

25 *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092, 1095 (N.D. Cal. Aug. 10, 2004))

26 (relevant portions attached hereto as Ex. 2); Model Protective Order at 12 (the party seeking to exclude

27 an expert from access to confidential information bears the burden of showing why the expert should

1   not view that information). This Court has recognized that "disqualification [of an expert] is a drastic

2   measure that courts should impose only hesitantly, reluctantly, and rarely." Ex. 1, *Finisar*, slip. op. at

3   *12 (citing *Hewlett-Packard*, 330 F. Supp. 2d at 1092) (internal citations omitted). As such, Juniper

4   must prove that "the interest in disqualification ***must substantially outweigh*** the interest in

5   nondisclosure." *Hewlett-Packard*, 330 F. Supp. 2d at 1095 (citation omitted) (emphasis added). Here,

6   Juniper has no rational basis for why Dr. Cole cannot be trusted with its confidential material.

7   Juniper's only stated basis for prejudice is an unfounded fear that Dr. Cole may improperly use its

8   information because he worked at McAfee. When pressed during the meet and confers on how this

9   past work experience could increase the chance that Dr. Cole would impermissibly disclose Juniper's

10 confidential information, Juniper's only stated argument is that Dr. Cole may still have "friends" from

11 his time at McAfee and that he may feel pressured to provide them information. This is baseless, as

12 Dr. Cole has no intent to return to work at a security company, does not keep in contact with anyone

13 from his time at McAfee, and his work at McAfee is unrelated to this case, as the timeframe at issue

14 for infringement all comes after Dr. Cole had already left McAfee.

15   Instead of articulating a basis to disqualify Dr. Cole, Juniper instead states that the Model

16 Protective Order excludes Dr. Cole because of his prior work at McAfee and because Juniper considers

17 McAfee a "competitor." *See* Model Protective Order at 2 (defining the term "expert"). However, the

18 Model Protective Order does not overrule the established legal principal that disqualification of an

19 expert requires Juniper to show that it will be harmed by Dr. Cole viewing their confidential

20 documents, and that this harm substantially outweighs the prejudice to Finjan.   *Hewlett-Packard*, 330

21 F. Supp. 2d at 1092, 1095; *Life Tech. Corp. v. Biosearch Techs., Inc.*, No. 12–00852-WHA (JCS),

22 2012 WL 1604710, at *9 (N.D. Cal. May 7, 2012). Furthermore, Finjan has offered to compromise

23 with Juniper, stating that it will not use any experts that have worked for a competitor in the last five

24 years, a standard that Dr. Cole can easily meet and should address Juniper's concerns given that the

25 technology at issue in this case evolves rapidly. Juniper rejected this offer.

26   Dr. Cole's trustworthiness is demonstrated by his previous positions and conduct. Dr. Cole

27 holds Top-Secret security clearances at the CIA, NSA, and DOD, he served as commissioner of cyber-

security to President Obama, and he is bound by the confidentiality provisions of Exhibit A to the Model Protective Order, which he already signed. *See* Ex. 3. Further establishing the baselessness of Juniper's concerns, Dr. Cole has been a witness in several other litigations, and has viewed the source code and technical documents in other cases without incident.

Disqualifying Dr. Cole would greatly prejudice Finjan. Dr. Cole is already familiar with the '494 Patent and how it is applied to technology. If Dr. Cole is disqualified, Finjan will incur substantial time and costs to find and work with a new expert. This prejudice is especially burdensome given that early summary judgment on the '494 Patent is in two months. As such, the Court should overrule Juniper's objection to Dr. Cole because the prejudice to Finjan of being forced to substitute in another expert for the '494 Patent far outweighs any potential risk to Juniper.

The issues of fundamental fairness and public policy both weigh in favor of overruling Juniper's objection. Finjan has an interest in "successfully litigating this action" with the expert of its choosing. *Hewlett-Packard*, 330 F. Supp. 2d at 1097. Juniper admitted during the March 20th meet and confer that "people move around in [the security] industry all the time." But if Juniper's position is accepted, there is a high risk of preempting qualified experts from this field. The Court expressed this very concern in *Hewlett-Packard* and later in *Life Tech.*: "[I]f [an expert] can be disqualified in this case, parties in other cases might be tempted to create a purported conflict for the sole purpose of preventing their adversaries from hiring particular experts." 2012 WL 1604710, at *9 (also noting: "this concern is especially important in high-technology patent infringement cases" (quoting *Hewlett-Packard*, 330 F. Supp. 2d at 1098)). Here, Juniper is attempting to unfairly stop Finjan from using its expert of choice, one that is already familiar with the relevant patent and technology.

As such, Juniper's objection should be overruled and Dr. Cole should be accepted as an expert.

1   Respectfully submitted,

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3 Dated: April 9, 2018   By: */s/ Kristopher Kastens*
                Paul J. Andre

4   Lisa Kobialka
              James Hannah

5   Kristopher Kastens
              KRAMER LEVIN NAFTALIS

6   & FRANKEL LLP
              990 Marsh Road

7   Menlo Park, CA 94025
              Telephone: (650) 752-1700

8   Facsimile: (650) 752-1800
              pandre@kramerlevin.com

9   lkobialka@kramerlevin.com
              jhannah@kramerlevin.com

10   kkastens@kramerlevin.com

11   *Counsel for Plaintiff*
              FINJAN, INC.

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