June 14, 2019

VIA ELECTRONIC FILING

Honorable Thomas S. Hixson
U.S. District Court, Northern District of California
San Francisco Courthouse
Courtroom A – 15th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Joint Discovery Statement
               Finjan, Inc. v. Juniper Networks Inc., Case No. 3:17-cv-05659-WHA-TSH

Dear Magistrate Judge Hixson:

       Pursuant to Judge Alsup's Order referring any discovery disputes to this Court (Dkt. No. 437), the parties submit the following joint statement regarding Plaintiff Finjan, Inc.'s ("Finjan") motion to compel Defendant Juniper Networks, Inc. ("Juniper") to download CLOC and Cygwin onto the source code review computers. The parties attest that they met and conferred by telephone on this issue on June 6 and 7, 2019.[1]

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Respectfully submitted,

*/s/ Kristopher Kastens*_____
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*/s/ Joshua Glucoft*____
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[1] Counsel for Juniper is located outside of the Bay Area.

<u>Finjan's Position</u>

The Court should compel Juniper to install certain standard tools used for searching and analyzing source code on its source code review computer that Finjan requested on May 29, 2019. These tools will greatly streamline Finjan's source code review in time for expert reports and allow it to perform a detailed analysis of the code that is otherwise impossible. Specifically, Finjan requested Juniper to install CLOC (https://github.com/AlDanial/cloc) and certain functionality provided in the Cygwin package (https://www.cygwin.com/) onto the source code computer. CLOC allows for the lines of code to be counted (as indicated by its name, "**C**ount **L**ines **O**f **C**ode"), and Cygwin is a collection of open source tools that simply provide a means to run Linux commands on a Windows operating system. Importantly, Cygwin has a variety of advanced searching functionalities, a subset of which Finjan requests to be installed so that its experts can conduct source code review (Find, Sort, Uniq, Join, Xargs, Cat, WC, SED, and SHA1SUM).[2] Together, these tools will allow for Finjan to provide a precise counting of source code lines that relate to the infringing technology, including locating the relevant source code, identifying instances where the same source code is used in multiple products, and eliminating blank lines and developer comments. Both Cygwin and CLOC are free to download, easy to install, and have been used by Finjan for source code reviews in other litigations without any issues.

Finjan requests these tools so that its expert will be able to quantify the lines of unique source code relating to the infringing technology. Given the voluminous amount of source code and directories, the use of these programs will allow Finjan to efficiently analyze the source code by searching through the code quickly, and identifying developer comments and code that is not relevant to the accused functionality. The analysis that is proposed by Finjan is relevant to damages because the lines of code may be used to determine the cost of developing the technology at issue, which is a factor relevant to damages in this case. Additionally, this analysis is relevant to rebut Juniper's recently articulated position that certain modifications can be made to their products to design-around the patents. *See* Ex. A, Juniper's first supplemental response to Interrogatory No. 9 (identifying how the accused products could be theoretically redesigned with various alternative architectures that would circumvent the claim language).

The analysis by these tools are also important to Finjan's ability to address Juniper's interrogatory recently served on May 28, 2019, asking Finjan why each of Juniper's non-infringing alternatives would not be viable, because it would allow Finjan to more easily quantify the extent that the source code would need to be rewritten for Juniper's proposed non-infringing alternatives. *See* Ex. B, Juniper's Interrogatory No. 14. Finjan should be allowed to use the proper tools to test these allegations and conduct its own analysis of the source code, so that its experts can opine on the feasibility and viability of any alleged design-arounds and/or non-infringing alternatives, to the extent appropriate. Due to the sheer volume of Juniper's source code and the rapidly approaching deadline for opening expert report, Finjan's analysis will be hindered, and will be grossly inefficient and expensive because Finjan would be forced to perform the manual analysis of counting and searching through millions of lines of code, which will be significantly more time consuming without these tools.

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[2] These are all search tools and are unrelated to compiling source code.

Juniper tries to justify its refusal to install these standard analysis tools on the grounds that Cygwin and CLOC are not specifically mentioned in the Protective Order. However, while the Protective Order identifies that certain tools must be installed, it does not prohibit the installation of additional tools, nor does it say that these were the only tools that can be installed. *See* Dkt. 149 at 13 ("The Producing Party will provide UltraEdit, NotePad++, Vim, Emacs, and Grep for the review and searching of the source code on the secured computer."). In other words, the Protective Order sets the floor, not the ceiling. It requires Juniper to provide at least the tools enumerated, but remains silent on whether other additional tools can be provided. Finjan did not raise these additional tools when negotiating the protective order because it understood that they could be requested later if a need arose, as it has. The Protective Order intentionally captures this flexibility in that it does not explicitly limit the tools that can be installed by Juniper. If Juniper wanted a more rigid Protective Order that only permitted certain specifically enumerated tools or expressly excluded anything, then Juniper could have insisted on the inclusion of such a provision during negotiations.

Juniper's argument with respect to CLOC is dubious, as all the program does is count code in an automated manner. Juniper does not address this head on, but instead states that it would need to do a thorough security review of the program before it could be installed on the source code review computer. Juniper provides no explanation for why this would be required before Finjan could use the program to review a copy of Juniper's source code on a standalone computer that is not even connected to the Internet, and therefore has no security risks. Furthermore, Finjan requested CLOC weeks ago, providing Juniper time to complete any review that it believed was required.

The rationale behind Juniper's objection to Cygwin, that certain functionalities could possibly be used to compile the source code, is also disingenuous. First, Finjan is not asking for any compiler functionality to be installed. Rather, Finjan has only requested that a few of its specific search tools be installed—namely Find, Sort, Uniq, Join, Xargs, Cat, WC, SED, and SHA1SUM – all of which are functions used for searching source code in an automated manner, which is particularly important given the millions of pages of source code that Juniper has provided. Second, the Protective Order does not prohibit the producing party from installing review tools that also have the ability to compile source code, but states that the receiving party cannot use any compiler functionality. Dkt. 149 at 13 ("The Receiving Party may not download anything onto the secured computer, and may not *use* any compilers, interpreters, or simulators in connections with the Producing Party's source code.")(emphasis added). Finjan will fully comply with the express terms of the Protective Order and will not compile the source code even if Juniper installed tools that could compile. Finjan merely requests that certain searching and counting tools be provided.

The Protective Order also provides other means for protecting Juniper's source code. First the code is provided on a standalone computer that has no network connection and is only a copy of Juniper's source code. Finjan is also prohibited from bringing electronics into the secured room. *Id*. ("The Receiving Party may not bring any electronics into the secured room."). Also, Finjan is prohibited from copying, removing, or otherwise transferring the source code onto another device and Juniper is permitted, to a limited extent, to visually monitor Finjan's activities for the purpose of ensuring that no such unauthorized activity is occurring. *Id*. ("The

Producing Party may visually monitor the activities of the Receiving Party's representatives during any source code review, but only to ensure that there is no unauthorized recording, copying, or transmission of the source code."). Juniper's source code is sufficiently protected by the express terms of the Protective Order and Juniper's attempt to read in an additional restrictions is unwarranted. There is no harm to Juniper in providing tools that would permit Finjan to search and count source code in an automated manner. Juniper's objections instead seem to be geared towards hampering Finjan's ability to fully review Juniper's source code in a timely manner and run out the trial clock.

For these reasons, Finjan respectfully requests the Court to compel Juniper to promptly download and install both CLOC and the identified subset of Cygwin tools on the source code computer. If it helps the Court's analysis, Finjan can submit an expert declaration explaining: (1) why having CLOC and these Cygwin tools on the source code review computers is important for the analysis, (2) that these are standard analysis tools; and (3) that they will not be used to compile or otherwise modify the source code.

Juniper's Position

Finjan is asking this Court to unilaterally impose changes to a highly negotiated compromise agreement between the parties that was entered by the Court just under one year ago. *See* Dkt. No. 149 (Protective Order). Finjan's request should be denied.

Because the lifeblood of Juniper's business is its highly confidential source code, Juniper must be extremely selective about who can view the source code and what tools can be used to analyze it. Juniper's customers, including the U.S. military, depend on the security of Juniper's systems and may require Juniper to make representations about the type of access Juniper has allowed to its code. Juniper also recognizes, however, that in litigation it must provide access to its source code. To walk the tightrope between security and litigation access, Juniper is especially careful about the type of access it allows to its code, so Juniper carefully negotiates provisions regarding that access in its stipulated protective orders. As Juniper has been the subject of a number of lawsuits over the years, it is now fairly familiar with the types of tools plaintiffs need to analyze its source code for purposes of litigation, so it has been able to successfully negotiate protective orders in virtually every litigation it has been a party to—including this one—that allow plaintiffs access to the information they need without providing tools that are overly invasive.

During the spring and summer of 2018, Finjan and Juniper extensively negotiated which tools Finjan could use to access Juniper's source code in this case. The parties were able to successfully agree on a set of tools for Finjan to use, and these tools were memorialized in the Stipulated Protective Order in this case, which Judge Alsup entered on July 6, 2018. *See* Dkt. No. 149 at 13. The purpose of expressly setting forth a list of source code tools in the Protective Order was to avoid any potential future disputes about whether Finjan had sufficient access to the source code or whether Juniper had sufficient security protections. Notably, the parties did not agree to, and the Protective Order does not provide, any means to add source code review tools because, contrary to Finjan's argument, the parties' agreement was intended to be final (*i.e.*, the ceiling, not the floor). With this motion, Finjan is just seeking to impose new requirements on Juniper—including ones that Juniper expressly rejected during the parties' negotiations.

When Juniper was preparing to produce its source code in March 2018, Finjan requested a number of review tools, including Cygwin. Ex. 1 at 1-2. Juniper agreed to provide the vast majority of tools Finjan requested, excluding only those tools that Juniper believed could pose a security risk. As Juniper explained to Finjan on March 15, 2018:

> As for review tools, we will provide NotePad++, Vim, Emacs, and Grep, as you have requested. We will also provide UltraEdit, which includes substantial searching capabilities. These tools will allow you to reasonably review and search the entire codebase. We are not, however, going to provide tools that could compromise the integrity of the code by facilitating writing to the code, changing file permissions, or connecting the secured computer to a network. For that reason, we are not going to provide Cygwin….

Ex. 1 at 1. In view of Juniper's concern, Finjan and Juniper agreed to a specific set of tools—*specifically excluding Cygwin*—and the parties memorialized their agreement in the Protective Order approved by the Court in this matter. Dkt. No. 149 at 13 ("The Producing Party will provide UltraEdit, NotePad++, Vim, Emacs, and Grep for the review and searching of the source code on the secured computer."). Finjan did not even suggest that CLOC was necessary for its source code review at that time—and had Finjan done so, Juniper would have rejected installation of that program as well.

Juniper produced the source code in March of 2018, and Finjan has reviewed it dozens of times over the last year without any complaint that it needed Cygwin or CLOC to adequately perform its review. Finjan was able to file and oppose multiple rounds of summary judgments, prepare multiple technical expert reports (and have its experts deposed), and even go to trial based on the code it successfully reviewed with the tools the parties had agreed upon.

Despite Finjan's ability to fully analyze Juniper's source code, on May 29, 2019, Finjan suddenly demanded the installation of Cygwin and CLOC, the latter of which had never even been mentioned before Finjan's demand that day. With respect to Cygwin, the same security concerns that Juniper raised more than a year ago remain today, and Finjan has not adequately addressed those security concerns; rather, Finjan merely argues without evidence that the specific Cygwin tools it desires are safe. Juniper cannot verify the safety of the requested tools because Finjan has not even identified the specific Cygwin packages it desires; among the large suite of packages available from Cygwin, there are no packages matching the names of almost any of the tools identified by Finjan—i.e., Find, Sort, Uniq, Join, Xargs, Cat, WC, and SHA1SUM). *See* https://cygwin.com/packages/package_list.html. It therefore appears that the tools requested by Finjan are actually subsumed into larger Cygwin packages with additional features. Before allowing any such packages to be downloaded onto the source code computer, Juniper would have to conduct a new security analysis—which includes both an analysis of all features in the relevant packages (*i.e.*, both the features expressly identified by Finjan and any other features with which they are packaged), and also potential security vulnerabilities in that software—in order to ensure that the representations it makes to its customers about access to the code are accurate.

In any event, Juniper already agreed to a host of tools with the advanced searching functionalities that Finjan suggests can only be provided by Cygwin. For example, as Juniper

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