

PAUL ANDRE (State Bar No. 196585)
pandre@kramerlevin.com
LISA KOBIALKA (State Bar No. 191404)
lkobialka@kramerlevin.com
JAMES HANNAH (State Bar No. 237978)
jhannah@kramerlevin.com
AUSTIN MANES (State Bar No. 284065)
amanes@kramerlevin.com
**KRAMER LEVIN NAFTALIS &
FRANKEL LLP**
990 Marsh Road
Menlo Park, CA 94025
Telephone: (650) 752-1700
Facsimile: (650) 752-1800

Attorneys for Plaintiff
FINJAN, INC.

IRELL & MANELLA LLP
Jonathan Kagan (166039)
jkagan@irell.com
Joshua Glucoft (301249)
jglucoft@irell.com
Casey Curran (305210)
ccurran@irell.com
1800 Avenue of the Stars, Suite 900
Los Angeles, CA 90067
Telephone: (650) 752-1700
Facsimile: (650) 752-1800

Rebecca Carson (254105)
rcarson@irell.com
Kevin Wang (318024)
kwang@irell.com
840 Newport Center Drive, Suite 400
Newport Beach, CA 92660
Telephone: (949) 760-0991
Facsimile: (949) 760-5200

Attorneys for Defendant
JUNIPER NETWORKS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FINJAN, INC.

Plaintiff,

v.

JUNIPER NETWORKS, INC.

Defendant.

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

**STIPULATED [PROPOSED]
PROTECTIVE ORDER [WITH
COMPETING PROVISIONS]**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. This Order does not confer blanket protections on all disclosures or responses to discovery and the protection it affords from public disclosure and use extends only to the limited information or

1 items that are entitled to confidential treatment under the applicable legal principles. As set forth
2 in Section 14.4 below, this Protective Order does not entitle the Parties to file confidential
3 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
4 the standards that will be applied when a party seeks permission from the court to file material
5 under seal.

6 2. DEFINITIONS

7 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
8 information or items under this Order.

9 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
10 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
11 of Civil Procedure 26(c).

12 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
13 well as their support staff).

14 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
15 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

16 2.5 Designating Party: a Party or Non-Party that designates information or items that it
17 produces in disclosures or in responses to discovery as “CONFIDENTIAL,” “HIGHLY
18 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
19 CODE.”

20 2.6 Disclosure or Discovery Material: all items or information, regardless of the
21 medium or manner in which it is generated, stored, or maintained (including, among other things,
22 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
23 responses to discovery in this matter.

24 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
25 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or
26 as a consultant in this action, (2) is not a past or current employee of a Party **[Juniper’s proposal**
27
28

as found in Patent Local Rule 2-2 Interim Model Protective Order¹: or a Party's competitor][**Finjan's proposal**: (3) is not a current employee of a Party's competitor or has not been an employee of a Party's competitor for at least five years],² and (4) at the time of retention, is not anticipated to become an employee of a Party or of a Party's competitor.

¹ **Juniper proposes** following the default Model Protective Order because Courts in this District have already considered Finjan's arguments and determined that "Former employees of a party or competitor shall not serve as experts." *Finjan, Inc. v. Bitdefender Inc.*, Case No. 4:17-cv-04790-HSG, Dkt. No. 65 at p. 1 (N.D. Cal. Mar. 5, 2018); *see also Corley v. Google, Inc.*, 2016 WL 3421402, at *2 (N.D. Cal. Jun. 22, 2016) (finding "it would create an unnecessary risk of competitive harm if the court permitted Plaintiffs to hire the former employees of Google's competitors as experts"); *TVIIM, LLC v. McAfee, Inc.*, 2014 WL 2768641, at *2 (N.D. Cal. June 18, 2014) ("This district **clearly requires** that an 'expert' under the Protective Order may not be 'a past or current employee of a Party or of a Party's competitor....'"). The substantial risk of potential disclosure by individuals with relationships with party competitors is why the Model Protective Order includes such a prohibition by default, and Finjan as "the party requesting to deviate from the Interim Model Protective Order bears the burden of showing the specific harm and prejudice that will result if its request is not granted." *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. C 12-05501 SI, 2013 WL 5663434, at *1 (N.D. Cal. Oct. 17, 2013); *see also Dynetix Design Solutions, Inc. v. Synopsys, Inc.*, No. C-11-05973 PSG, 2012 WL 1232105, at *2 (N.D. Cal. April 12, 2012). Juniper's position with regard to Dr. Cole will be set forth in full in its forthcoming opposition to Finjan's letter brief on the issue (*see* Dkt. Nos. 49 and 50). To be sure, however, any alleged burden to Finjan in excluding Dr. Cole from reviewing Juniper's confidential documents and source code is belied by the fact that Finjan has already disclosed, and Juniper has not objected to, three other experts, one of which has already reviewed Juniper's confidential source code. Moreover, Finjan's contention that Dr. Cole could not participate in the case is unfounded, as he can still serve as an expert on issues that do not require access to Juniper's confidential documents and source code, such and invalidity or marking.

² **Finjan's proposal** of a 5-year limitation on past employees of a competitor is reasonable and supported by multiple Courts in this District, including, e.g. *Finjan v. SonicWall*, No. 17-cv-04467-BLF, Dkt. No. 68 at *3 (N.D. Cal. 2018); *Finjan v. Cisco*, No. 15-cv-00072-BLF, Dkt. No. 97 at *2 (N.D. Cal. 2018). Barring *any* former employee of *any* competitor from becoming an expert in this case, without regard to time, is unreasonable. Juniper admitted during meet and confers on this topic that most experts in this field have worked for at least one competitor at some point in their careers. This Court has noted the risk of preempting qualified experts with industry experience from the field. *See Life Tech. Corp. v. Biosearch Techs., Inc.*, No. 12-00852-WHA (JCS), 2012 WL 1604710, at *9 (N.D. Cal. May 7, 2012) (noting: "this concern is especially important in high-technology patent infringement cases"). This Court has also noted the risk of using this provision in the model order to preclude experts for illegitimate purposes. *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092, 1095 (N.D. Cal. Aug. 10, 2004)) (noting parties "might be tempted to create a purported conflict for the sole purpose of preventing their adversaries from hiring particular experts"). Juniper is attempting to use its proposal to try and preclude Finjan from using its expert, Dr. Eric Cole, from participating in this case merely because he worked for McAfee for one year nearly a decade ago. This is despite the fact that Dr. Cole, a holder of multiple top-secret security clearances and an advisor to President Obama, has proven trustworthiness and is bound by the confidentiality terms of Exhibit A to the protective order, and disqualifying Dr. Cole would work substantial prejudice to Finjan. Finjan filed a letter brief asking the Court to overrule Juniper's objections to Dr. Cole serving as an expert on April 9, 2018 at Dkt. No. 49.

2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items: 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. If a Producing Party designates non-technical, purely financial or license information as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” the Receiving Party may challenge the non-technical portions of that Information or Items as “CONFIDENTIAL” (defined in Section 2.2) under Section 6 below.

2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items: extremely sensitive “Confidential Information or Items” representing computer code (code that is compiled or interpreted) and associated comments and revision histories, [**Juniper’s proposal as found in Patent Local Rule 2-2 Interim Model Protective Order:** formulas, engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software or hardware designs,]³⁴ 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.

³ **Juniper proposes** following the default Model Protective Order and Finjan as “the party requesting to deviate from the Interim Model Protective Order bears the burden of showing the specific harm and prejudice that will result if its request is not granted.” *Verinata Health, Inc. v. Ariosa Diagnostics, Inc.*, No. C 12-05501 SI, 2013 WL 5663434, at *1 (N.D. Cal. Oct. 17, 2013); *see also Dynetix Design Solutions, Inc. v. Synopsys, Inc.*, No. C-11-05973 PSG, 2012 WL 1232105, at *2 (N.D. Cal. April 12, 2012). Finjan’s proposal deviates from the Model Protective Order because of an unsupported and vague allegation about the potential for “abuse” without providing any concrete examples or explanation of potential prejudice other than slight logistical inconvenience to Finjan. Finjan’s complaint about printing limits is also unfounded; Finjan has not identified a single page of source code or technical documentation that it must print, and the parties have stipulated under Section 9(e) below to a procedure by which Finjan can exceed the default 750-page printing limit if necessary.

⁴ **Finjan’s Position:** Finjan’s proposal should be adopted because the definition of source code will impede the production of technical documents which do not contain any source code, but merely describe the operation of the products. Allowing such technical documents to be produced only on a stand-alone computer would severely prejudice Finjan given the accelerated nature of this case. Source code should be restricted to actual source code (code that is compiled or interpreted) and material that is typically included in the source code, such as comments or revision histories. Allowing for formulas, engineering specifications, or schematics is ripe for abuse, as these terms are not well defined and could allow standard development documents to be designated as source code, which could severely restrict the ease of accessing material that is routinely produced in patent cases involving software and regarding the design and development of the accused products. Furthermore, as design documents can be lengthy, this could potentially require additional pages of source code to be print in addition to the 750 pages currently agreed upon between the parties.

1 2.10 House Counsel: attorneys who are employees of a party to this action. House
2 Counsel does not include Outside Counsel of Record or any other outside counsel.

3 2.11 Non-Party: any natural person, partnership, corporation, association, or other legal
4 entity not named as a Party to this action.

5 2.12 Outside Counsel of Record: attorneys who are not employees of a party to this
6 action but are retained to represent or advise a party to this action and have appeared in this action
7 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

8 2.13 Party: any party to this action, including all of its officers, directors, employees,
9 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

10 2.14 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
11 Material in this action.

12 2.15 Professional Vendors: persons or entities that provide litigation support services
13 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
14 organizing, storing, or retrieving data in any form or medium) and their employees and
15 subcontractors.

16 2.16 Protected Material: any Disclosure or Discovery Material that is designated as
17 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or
18 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

19 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material from a
20 Producing Party.

21 3. SCOPE

22 The protections conferred by this Order cover not only Protected Material (as defined
23 above), but also (1) any information copied or extracted from Protected Material; (2) all copies,
24 excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations,
25 or presentations by Parties or their Counsel that might reveal Protected Material. However, the
26 protections conferred by this Order do not cover the following information: (a) any information
27 that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the
28 public domain after its disclosure to a Receiving Party as a result of publication not involving a



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