

1 PAUL J. ANDRE (SBN 196585)
2 pandre@kramerlevin.com
3 LISA KOBIALKA (SBN 191404)
4 lkobialka@kramerlevin.com
5 JAMES HANNAH (SBN 237978)
6 jhannah@kramerlevin.com
7 KRISTOPHER KASTENS (SBN 254797)
8 kkastens@kramerlevin.com
9 KRAMER LEVIN NAFTALIS
10 & FRANKEL LLP
11 990 Marsh Road
12 Menlo Park, CA 94025
13 Telephone: (650) 752-1700
14 Facsimile: (650) 752-1800
15 *Attorneys for Plaintiff*
16 FINJAN, INC.

11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 FINJAN, INC., a Delaware Corporation,
16 Plaintiff,
17 v.
18 JUNIPER NETWORKS, INC., a Delaware
19 Corporation,
20 Defendant.

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

**PLAINTIFF FINJAN, INC.'S RESPONSE
TO DEFENDANT JUNIPER NETWORKS,
INC.'S MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL ORDER
OF MAGISTRATE JUDGE**

21
22
23 **REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED**
24
25
26
27
28

1 The Court should deny Juniper's motion to modify or set aside Judge Hixson's Order (Dkt. 510)
 2 because it is neither clearly erroneous according the standing order in this case nor contrary to law and is
 3 therefore, entitled to deference. Instead of articulating a standard and explaining why this Court must
 4 modify or set aside the order, Juniper's motion sets forth illogical arguments and disingenuous concerns,
 5 and should therefore, be denied. Furthermore, Judge Hixson's Order sets a reasonable standard for the
 6 number of depositions in this and other cases, and will not lead to any of the fears expressed by Juniper.

7 **I. The District Judge Should Defer to the Magistrate Judge's Order**

8 Judge Alsup's Standing Order (Supplemental Order to Order Setting Initial Case Management
 9 Conference in Civil Cases) is not ambiguous with respect to 30(b)(6) depositions, as Juniper proclaims.
 10 To the contrary, Paragraph 32 of the Standing Order articulates two very clear limitations through (a)
 11 limiting the number of topics, and (b) counting any deposition that meets a certain time threshold as a
 12 single deposition against the default set by the Federal Rules.¹ In its discovery letter (Dkt. 504) Juniper
 13 argued, without any support, that depositions under a half day could be combined to meet the single day
 14 threshold. Specifically, Juniper tried to argue, without explaining why, that the 30(b)(6) depositions of
 15 Alex Icasiano and Khurram Islah, each designee covering completely different topics, could be
 16 combined, and thus, Finjan did not have a full deposition day remaining. However, the Court rejected
 17 this argument outright. Magistrate Judge Hixson determined that the Icasiano and Islah depositions were
 18 each under the half day threshold, and that neither counted as a single deposition under Judge Alsup's
 19 Standing Order. Not only did Judge Hixson refuse to combine the depositions to count as a single
 20 deposition against Finjan, he further clarified that "Juniper's concern that this could allow for large
 21 numbers of short 30(b)(6) depositions is not correct because the preceding paragraph of the Standing
 22 Order limits a party to ten subjects for the entire case." Dkt. 518 at 2. Judge Hixson's order is wholly
 23 consistent with Judge Alsup's Standing Order.

24
 25 ¹ Standing Order, ¶ 32(a) ("Without a prior order increasing the limit, a party may seek F.R.C.P.
 26 30(b)(6) depositions from another party on **up to a total of ten subject matters** (for the entire case)
 27 described with 'reasonable particularity.'") (emphasis added); *Id.* at ¶ 32(b) ("**Each witness-designee**
 28 **deposed for one half-day or more in a FRCP 30(b)(6) deposition shall count as a single deposition**
 29 for the purposes of the deposition limit under FRCP 26 or under any case management order setting a
 30 limit on the number of depositions.") (emphasis added).

This Court may only set aside or modify Judge Hixson's discovery order upon a showing that it is either clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); *see Perry v. Schwarzenegger*, 268 F.R.D. 344, 348 (N.D. Cal. 2010) ("The magistrate's factual determinations are reviewed for clear error, and the magistrate's legal conclusions are reviewed to determine whether they are contrary to law."). Since Juniper has shown neither, this Court should deny Juniper's motion and defer to Judge Hixson's judgment on the matter.² *See Campbell v. City of Milpitas*, No. 13-CV-03817-BLF, 2014 WL 5077135, at *1 (N.D. Cal. Oct. 9, 2014) ("This standard is highly deferential – the district judge may not simply substitute his or her judgment for that of the magistrate judge.") (citing *Grimes v. City and Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991)).

II. Juniper's Argument is Illogical and its Concerns are Disingenuous

Juniper's arbitrary summing of 30(b)(6) depositions is illogical and its concerns are not founded. Juniper does not explain exactly what language from the Standing Order permits parties to add 30(b)(6) depositions together to count it as a single deposition.³ If that were the case then it seems more likely that the Standing Order would limit 30(b)(6) depositions by the total number of hours (for example, up to 70 hours), rather than by topics. Juniper's understanding cannot be correct because it would render the limitation on the number of topics superfluous. It would also be unfair to combine depositions of designees that do not have at least three and a half hours of information to give. Under Juniper's flawed logic, it could exhaust Finjan's depositions by continuously designating bad witnesses. These depositions should not be counted against the deposing party, and the Standing Order incentivizes Juniper to provide sufficient 30(b)(6) witnesses.

Juniper's concerns that Finjan will take an excessive number of additional small 30(b)(6) depositions is disingenuous for several practical reasons. For one thing, it assumes both that each witness will be designated on a single topic and that each deposition will be less than half a day. Indeed, Juniper has already designated multiple topics for its employee, Frank Jas. See Ex. 1. When Finjan

² Juniper does not acknowledge or apply any legal standard for the Court to consider its motion.

³ The only depositions that can be combined under the Standing Order is when the same witness is deposed as a 30(b)(6) witness and then subsequently deposed in a personal capacity. In that situation, both sessions together count as a single deposition. *See* Standing Order, ¶ 32(b).

1 requested to take a 30(b)(1) deposition of Frank Jas, Juniper took that as an opportunity to designate him
2 on five 30(b)(6) topics as well.⁴ As such, Finjan will have 7 hours to depose Mr. Jas in his personal
3 capacity and also on these five 30(b)(6) topics. Therefore, in one stroke, Juniper consolidated half of the
4 topics permitted under the Standing Order into a single deposition, which, in turn, will likely cut into Mr.
5 Jas's time in his personal capacity. This would be the same in all cases, where a single witness would be
6 put up for multiple topics. Furthermore, Juniper's interpretation is the one that is ripe for abuse, because
7 if a party puts numerous people on their initial disclosures, thereby requiring the other party to depose
8 them as fact witness, there will be no depositions left over for 30(b)(6) witnesses. That is exactly what
9 happened here, where Juniper put ten people on their initial disclosures, which under Juniper's
10 interpretation would leave Finjan no chance to take 30(b)(6) depositions. In fact, Juniper's motion
11 appears to be no more than a tactic concocted to waste time and run out the discovery clock in order to
12 stymie Finjan's discovery efforts as we come down the home stretch.

13 As a practical matter in this case, the discovery deadline is quickly approaching and Juniper's
14 concern that Finjan will attempt to take an excessive number of small 30(b)(6) depositions is not
15 realistic, especially given Juniper's refusal to designate a witness for an important damages related topic
16 that was requested by Finjan back in February.⁵ In particular, Juniper agreed to provide a designee and a

17 ⁴ See Ex. 1, Juniper's designation of Frank Jas on the following 30(b)(6) topics: (1) Juniper's acquisition
18 of Cyphort Inc., including reasoning for the acquisition and the terms of the acquisition; (2) the nature of
19 any alleged non-infringing alternatives or design-arounds to the inventions of the Asserted Patents,
20 including the cost of implementing such alternatives or design-arounds and how such costs were
21 calculated; (3) any technology license agreements (including hardware or software) or patent license
22 agreements Juniper is aware of related to any component or technology of the Accused
23 Instrumentalities, including the dates of such agreements, the length of the negotiations of the
24 agreements, the terms of the agreements, the subject product(s) or technolog(ies) of the agreements, how
25 any license fee or royalties were determined or calculated, whether alternate license fee or payment
26 structures were considered during negotiations, and names and titles of the individuals who were
27 involved in negotiating the agreements; [REDACTED]

28 ⁵ See Ex. 2 (Finjan's February 11, 2019 email to Juniper requesting a meet and confer regarding a
29 deposition for the following 30(b)(6) topic: Identification of the quantity and any associated revenues for
30 all Accused Instrumentalities sold, made, used or offered for sale, including an identification of the
number users associated with each Sky ATP service level (free, basic or premium), identification of any
SRX units used in connection with each such service level, the source(s) and method(s) Juniper used to

1 date for this 30(b)(6) deposition right before it abruptly changed its position. *See* Ex. 3 (May 15, 2019
 2 email from Juniper's counsel: "Additionally, we are looking into deposition dates in June for Mr. Jas and
 3 the Rule 30(b)(6) deposition that Finjan requested, and should be able to provide those shortly.")).
 4 Juniper's current positions, which is a change from what it previously stated throughout discovery,
 5 appears to be a tactic to deny Finjan from taking this long requested deposition after it had repeatedly
 6 stated it would provide a witness on this topic.

7 For these reasons, Juniper's motion should be denied.

8
 9 Respectfully submitted,

10 Dated: June 25, 2019

11 By: /s/ Kristopher Kastens

12 Paul J. Andre (State Bar No. 196585)
 13 Lisa Kobialka (State Bar No. 191404)
 14 James Hannah (State Bar No. 237978)
 15 Kristopher Kastens (State Bar No. 254797)
 16 KRAMER LEVIN NAFTALIS
 17 & FRANKEL LLP
 18 990 Marsh Road
 19 Menlo Park, CA 94025
 20 Telephone: (650) 752-1700
 21 Facsimile: (650) 752-1800
 22 pandre@kramerlevin.com
 23 lkobialka@kramerlevin.com
 24 jhannah@kramerlevin.com
 25 kkastens@kramerlevin.com

26 *Attorneys for Plaintiff*
 27 FINJAN, INC.

28
 29
 30 create the summary financials, and an identification of the stock keeping units (SKU's) associated with
 each Accused Instrumentality.