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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
)
) **JOINT RESPONSE REGARDING**
) **STIPULATED ESI DISCOVERY**
) **PROCESS**
)
)
) Hon. William H. Alsup
)
)

1 Finjan, Inc. (“Finjan”) and Juniper Networks, Inc. (“Juniper”) hereby jointly submit this
2 response regarding their stipulated ESI discovery process. *See* Dkt. Nos. 51 and 56.

3 Paragraphs 6-8 of Dkt. No. 51

4 The parties agree that the stipulated process set forth in Dkt. No. 51 at ¶¶ 6-8 shall be the
5 exclusive mode for responding to requests for production covering emails,¹ superseding all
6 obligations to manually search for additional relevant emails, except for the following:

7 **Juniper’s Position:** Juniper agrees with Finjan that emails that counsel for the parties
8 already know or already should know exist shall be exempt from the exclusive application of the
9 process set forth in Dkt. No. 51 at ¶¶ 6-8, and will be produced subject to any applicable
10 objections (including privilege). Juniper disagrees with Finjan’s position that “principal
11 employees of each party that are responsible for or materially involved in managing this action”
12 shall be exempt from the exclusive application of the process set forth in Dkt. No. 51 at ¶¶ 6-8.
13 This exception would substantially increases the potential number of custodians, and much of the
14 parties’ negotiations concerned the total number of custodians each party is to designate.

15 **Finjan’s Position:** Finjan contends that emails that principal employees of each party, who
16 are responsible for or materially involved in managing this action, already know or already should
17 know exist, should also be exempt from the process set forth in Dkt. No. 51 at ¶¶ 6-8, and those
18 emails should be produced subject to any applicable objections (including privilege). This
19 provision fosters full and complete disclosure from the parties. Contrary to Juniper’s contention,
20 it does not increase the number of custodians because no additional custodians are subject to email
21 search terms. Rather, it simply ensures that employees of a party who are heavily involved in this
22 litigation notify their counsel of any relevant emails that they are or should be aware of. Counsel
23 for the parties do not possess as much knowledge of relevant emails as the employees who are
24 managing the litigation for each party and often rely upon their clients for the production of
25 relevant email. If Juniper is aware of relevant emails, they should be produced. Juniper should not

26
27 ¹ To be clear, this paragraph applies only to emails or other forms of electronic correspondence. It
28 does not include any other electronically stored information that is not stored as attachments to an
email or as part of an email archiving system. *See* Dkt. 51 at ¶ 6.

1 be allowed to hide behind a loophole by not telling its outside counsel of the existence of relevant
2 email.

3 Paragraph 10 of Dkt. No. 51

4 The parties agree that the last sentence of Dkt. No. 51 at ¶ 10 (“No other remedies are
5 available.”) shall be stricken.

6 Paragraph 18 of Dkt. No. 51 (Privilege Logs)

7 The parties agree that paragraph 18 of the Court’s Supplemental Order to Order Setting
8 Initial Case Management Conference should apply to this case.²

9 Paragraph 20 of Dkt. No. 51 (Document Production and Depositions)

10 **Juniper’s Position:** Juniper contends that paragraph 20 of the Supplemental Order should
11 apply, subject to the following modifications:

- 12 • “If ~~any~~ objections to a request for materials ~~is~~are overruled, and the information contained
13 in such documents is material and not substantially reflected in other discovery responses,
14 and if the disputed request was due and pending at the time of a deposition, the
15 withholding party or counsel must, subject to the requirements and limitations of F.R.C.P.
16 30 and L.R. 30-1 and at the request of any other party, re-produce all deponents under its
17 control or represented by them for further deposition examination ~~as~~related only to any
18 new, materials ~~information~~ produced in response that ~~are~~is germane to that deponent and
19 must bear the expense of doing so. If a party chooses to proceed with a deposition without
20 providing search terms for the deponent’s documents at least 3 weeks prior to the
21 deposition, that party shall not have the opportunity to further depose any such deponents.”

18 Juniper believes this modification will help ensure that individuals are only subjected to
19 the burden of additional depositions when necessary in light of the significance of the new
20 information improperly withheld. Finjan’s actions in propounding discovery reveal its intent to
21 abuse paragraph 20. Specifically, Finjan has requested to depose Yuly Tenorio (a Juniper
22 employee) no later than May 9, 2018 but has refused to provide Juniper with requested search
23 terms in sufficient time to allow Juniper to complete email production prior to the deposition;
24 Finjan is engaging in such gamesmanship in hopes of securing an otherwise avoidable second
25

26 ²**Finjan’s Position:** Finjan agreed to Juniper’s request to exclude paragraph 18 of the Court’s
27 standing order from this case, and already produced certain documents that were partially redacted
28 for privilege pursuant to that agreement. Now that it appears paragraph 18 will apply, Finjan will
work diligently to comply with paragraph 18 by producing a privilege log for the documents it
already produced.

1 deposition of Yuly Tenorio. Additionally, Juniper agreed to the stipulated ESI discovery process
2 based in part on its expectation that certain provisions would be adopted. Finjan's reversal on the
3 issue now would result in a windfall to Finjan, as Juniper would have negotiated the ESI
4 stipulation differently with the knowledge that the Court was less amenable to certain
5 modifications. Finally, Finjan's contention that it needs to conduct serial depositions of Juniper's
6 witnesses because of the early summary judgment proceedings is meritless. To the extent Finjan
7 has questions for a witness about topics pertaining to claims that are not at issue in the early
8 summary judgment proceedings, there is no reason why it cannot ask those questions at the
9 upcoming depositions.

10 **Finjan's Position:** Juniper is attempting to prevent the production of important discovery.
11 Finjan sees no reason to, and does not, agree to Juniper's request to deviate from paragraph 20 of
12 this Court's standing order, which encourages timely and complete document production and
13 fosters meaningful depositions and full disclosure from both parties. By contrast, Juniper's
14 proposal introduces ambiguity (and likely unnecessary motion practice) regarding what
15 information is deemed "material" or "not substantially reflected" in other discovery responses.
16 Juniper's proposal also encourages delayed production of documents, and delayed depositions of
17 witnesses as a result, which is at odds with the early summary judgment schedule in this case.
18 Furthermore, Juniper introduces a loophole with regard to the production of email which may not
19 be subject to a motion to compel. Indeed, if Finjan is successful on a motion to compel any
20 documents, it should have the right to redepose relevant witnesses regardless of whether email
21 search terms were provided or not. Finjan is entitled to prompt and full discovery, and Juniper
22 should not be allowed to withhold such discovery with the introduction of a self-serving
23 technicality.³

25 ³ **Finjan's position:** With regard to currently noticed depositions, Juniper fails to inform the Court
26 that it has refused to produce 2 of the 3 witnesses that Finjan has noticed. Thus, Juniper's claim of
27 gamesmanship rings hollow as Juniper continues to withhold relevant discovery from Finjan.
28 **Juniper's position:** One witness that Finjan attempted to notice (without conferring) is on
paternity leave but Juniper is happy to produce him as a witness when he returns, and the other
witness that Finjan attempted to notice (again without conferring) is a sales employee located in
Europe and does not have any unique knowledge relevant to this case.

KRAMER LEVIN NAFTALIS & FRANKEL LLP

Dated: April 18, 2018

By: /s/ Paul J. Andre

Paul Andre

Attorneys for Plaintiff
FINJAN, INC.

IRELL & MANELLA LLP

Dated: April 18, 2018

By: /s/ Joshua Glucoft

Joshua Glucoft

Attorneys for Defendant
Juniper Networks, Inc.

ATTESTATION

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained by any other signatory to this document.

/s/ Paul J. Andre

Paul J. Andre