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 JUNIPER NETWORKS, INC.

11 **UNITED STATES DISTRICT COURT**
 12
 13 **NORTHERN DISTRICT OF CALIFORNIA**
 14
 15 **SAN FRANCISCO DIVISION**

16 FINJAN, INC.
 17
 18 Plaintiff,
 19
 20 v.
 21 JUNIPER NETWORKS, INC.
 22
 23 Defendant.

Case No. 3:17-cv-05659-WHA
STIPULATED [PROPOSED]
PROTECTIVE ORDER [WITH]
COMPETING PROVISIONS]

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1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.
5 This Order does not confer blanket protections on all disclosures or responses to discovery and
6 the protection it affords from public disclosure and use extends only to the limited information or
7 items that are entitled to confidential treatment under the applicable legal principles. As set forth
8 in Section 14.4 below, this Protective Order does not entitle the Parties to file confidential
9 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
10 the standards that will be applied when a party seeks permission from the court to file material
11 under seal.

12 2. DEFINITIONS

13 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
14 information or items under this Order.

15 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
16 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
17 of Civil Procedure 26(c).

18 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
19 well as their support staff).

20 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
21 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

22 2.5 Designating Party: a Party or Non-Party that designates information or items that it
23 produces in disclosures or in responses to discovery as “CONFIDENTIAL,” “HIGHLY
24 CONFIDENTIAL – ATTORNEYS' EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE
25 CODE.”

26 2.6 Disclosure or Discovery Material: all items or information, regardless of the
27 medium or manner in which it is generated, stored, or maintained (including, among other things,
28 testimony, transcripts, and tangible things), that are produced or generated in disclosures or

1 responses to discovery in this matter.

2 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to
3 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or
4 as a consultant in this action, (2) is not a past or current employee of a Party [**Juniper’s proposal**
5 **as found in Patent Local Rule 2-2 Interim Model Protective Order**¹: or a Party’s
6 competitor][**Finjan’s proposal**: (3) is not a current employee of a Party’s competitor or has not
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20 ¹ **Juniper proposes** following the default Model Protective Order because Courts in this District
21 have already considered Finjan’s arguments and determined that “Former employees of a party or
22 competitor shall not serve as experts.” *Finjan, Inc. v. Bitdefender Inc.*, Case No. 4:17-cv-04790-
23 HSG, Dkt. No. 65 at p. 1 (N.D. Cal. Mar. 5, 2018); *see also Corley v. Google, Inc.*, 2016 WL
24 3421402, at *2 (N.D. Cal. Jun. 22, 2016) (finding “it would create an unnecessary risk of
25 competitive harm if the court permitted Plaintiffs to hire the former employees of Google’s
26 competitors as experts”); *TVIIM, LLC v. McAfee, Inc.*, 2014 WL 2768641, at *2 (N.D. Cal. June
27 18, 2014) (“This district **clearly requires** that an ‘expert’ under the Protective Order may not be ‘a
28 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).

1 been an employee of a Party's competitor for at least five years],² and (4) at the time of retention,
 2 is not anticipated to become an employee of a Party or of a Party's competitor.

3 2.8 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or
 4 Items: extremely sensitive "Confidential Information or Items," disclosure of which to another
 5 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by
 6 less restrictive means. If a Producing Party designates non-technical, purely financial or license
 7 information as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" the Receiving
 8 Party may challenge the non-technical portions of that Information or Items as
 9 "CONFIDENTIAL" (defined in Section 2.2) under Section 6 below.

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 12 ² **Finjan's proposal** of a 5-year limitation on past employees of a competitor is reasonable and
 13 supported by multiple Courts in this District, including, e.g. *Finjan v. SonicWall*, No. 17-cv-
 14 04467-BLF, Dkt. No. 68 at *3 (N.D. Cal. 2018); *Finjan v. Cisco*, No. 15-cv-00072-BLF, Dkt. No.
 15 97 at *2 (N.D. Cal. 2018). The Court has already addressed this issue with respect to Dr. Eric
 16 Cole in response to Finjan's letter brief (Dkt. No. 49) and allowed Dr. Cole to serve as an expert
 17 despite working at McAfee eight years ago, so long as he agrees not to return to work for McAfee
 18 for five years. However, it is Finjan's position that Juniper's proposal to bar *any* former
 19 employee of *any* competitor from becoming an expert in this case, without regard to time, is
 20 unreasonable. Juniper admitted during meet and confers on this topic that most experts in this
 21 field have worked for at least one competitor at some point in their careers. This Court has noted
 22 the risk of preempting qualified experts with industry experience from the field. *See Life Tech.*
 23 *Corp. v. Biosearch Techs., Inc.*, No. 12-00852-WHA (JCS), 2012 WL 1604710, at *9 (N.D. Cal.
 24 May 7, 2012) (noting: "this concern is especially important in high-technology patent
 25 infringement cases"). This Court has also noted the risk of using this provision in the model
 26 order to preclude experts for illegitimate purposes. *Hewlett-Packard Co. v. EMC Corp.*, 330 F.
 27 Supp. 2d 1087, 1092, 1095 (N.D. Cal. Aug. 10, 2004)) (noting parties "might be tempted to create
 28 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 Dr. Cole from participating
 in this case, 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. The cases Juniper relies on above are inapposite. In *TVIIM, LLC v. McAfee,*
Inc., No. 13-cv-04545-VC (KAW), 2014 WL 2768641, at *2 (N.D. Cal. June 18, 2014) the
 Court disqualified an expert because he was a **current** employee of a competitor. And in *Corley*
v. Google, Inc., No. 16-cv-00473-LHK (HRL), 2016 WL 3421402, at *2 (N.D. Cal. Jun. 22,
 2016) the plaintiff did not offer a reasonable 5-year compromise as Finjan does here, and the
 Court was unpersuaded by the plaintiff's argument that it was not a competitor itself, and so was
 less-likely to misuse the information. Finjan makes no such argument, but rather its objection is
 based on unreasonable prejudice to Finjan of excluding its experts and the danger of precluding
 qualified experts from the field. Finally, the protective order in *Finjan, Inc. v. Bitdefender Inc.*,
 Case No. 4:17-cv-04790-HSG, Dkt. No. 65 at p. 1 (N.D. Cal. Mar. 5, 2018) was recently entered
 over Finjan's objections, and it is at odds with numerous other cases, including those cited above.

1 2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:
2 extremely sensitive “Confidential Information or Items” representing computer code (code that is
3 compiled or interpreted) and associated comments and revision histories, disclosure of which to
4 another Party or Non-Party would create a substantial risk of serious harm that could not be
5 avoided by less restrictive means.

6 2.10 House Counsel: attorneys who are employees of a party to this action. House
7 Counsel does not include Outside Counsel of Record or any other outside counsel.

8 2.11 Non-Party: any natural person, partnership, corporation, association, or other legal
9 entity not named as a Party to this action.

10 2.12 Outside Counsel of Record: attorneys who are not employees of a party to this
11 action but are retained to represent or advise a party to this action and have appeared in this action
12 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

13 2.13 Party: any party to this action, including all of its officers, directors, employees,
14 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

15 2.14 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
16 Material in this action.

17 2.15 Professional Vendors: persons or entities that provide litigation support services
18 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
19 organizing, storing, or retrieving data in any form or medium) and their employees and
20 subcontractors.

21 2.16 Protected Material: any Disclosure or Discovery Material that is designated as
22 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or
23 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

24 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material from a
25 Producing Party.

26 3. SCOPE

27 The protections conferred by this Order cover not only Protected Material (as defined
28 above), but also (1) any information copied or extracted from Protected Material; (2) all copies,

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