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15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN FRANCISCO DIVISION**

18 FINJAN, INC.,
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 Plaintiff,
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 v.
 21
 JUNIPER NETWORKS, INC.,
 22
 Defendant.
 23

) Case No. 3:17-cv-05659-WHA
)
) **SECOND REVISED STIPULATION AND**
) ~~**PROPOSED**~~ **ORDER RE: DISCOVERY**
) **OF ELECTRONICALLY STORED**
) **INFORMATION FOR PATENT**
) **LITIGATION, UPDATED PER DKT.**
) **NO. 70**
)
) Hon. William H. Alsup

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1 Upon the stipulation of the parties, the Court ORDERS as follows:

2 1. This Order supplements all other discovery rules and orders. It streamlines
3 Electronically Stored Information (“ESI”) production to promote a “just, speedy, and inexpensive
4 determination of this action, as required by Federal Rule of Civil Procedure 1.”

5 2. This Order may be modified in the Court’s discretion or by stipulation. The parties
6 shall jointly submit any proposed modifications within 30 days after the Federal Rule of Civil
7 Procedure 16 Conference.

8 3. As in all cases, costs may be shifted for disproportionate ESI production requests
9 pursuant to Federal Rule of Civil Procedure 26. Likewise, a party’s nonresponsive or dilatory
10 discovery tactics are cost-shifting considerations.

11 4. A party’s meaningful compliance with this Order and efforts to promote efficiency
12 and reduce costs will be considered in cost-shifting determinations.

13 5. The parties are expected to comply with the District’s E-Discovery Guidelines
14 (“Guidelines”) and are encouraged to employ the District’s Model Stipulated Order Re: the
15 Discovery of Electronically Stored Information and Checklist for Rule 26(f) Meet and Confer
16 regarding Electronically Stored Information.

17 6. The production of emails and any attachments thereto and other forms of electronic
18 correspondence and any attachments thereto (collectively “email”) shall be governed by the search
19 term process outlined in paragraphs 6 through 8 of this Order, and general production requests
20 under Federal Rules of Civil Procedure 34 and 45 shall not include email. All other ESI aside
21 from email, such as flow charts, Wikis, word documents, and PowerPoints, shall still be subject to
22 the general discovery requirements of Federal Rules of Civil Procedure 26, 34, and 45.

23 **Paragraphs 6 through 8 of this stipulation are not the exclusive mode of search for email**
24 **requests and shall not supersede obligations to manually search relevant materials.**

25 7. Email production requests shall only be propounded for specific search terms (as
26 outlined below), rather than general discovery of a product or business.

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1 8. Document production responsive to discovery requests pursuant to Fed. R. Civ. P.
2 34 shall be phased to occur after Juniper has served its Invalidity Contentions.

- 3 a. Email production requests shall identify the custodian, search terms, and time
4 frame. The parties shall cooperate to identify the proper custodians, proper search
5 terms, and proper timeframe as set forth in the Guidelines.
- 6 b. Each requesting party shall limit its email production requests to a total of eight
7 custodians per producing party for all such requests. The parties may jointly agree
8 to modify this limit without the Court's leave. The Court shall consider contested
9 requests for additional custodians, upon showing a distinct need based on the size,
10 complexity, and issues of this specific case. Cost-shifting may be considered as
11 part of any such request.
- 12 c. Each requesting party shall limit its email production requests to a total of seven
13 search terms per custodian per party as set forth below, and also the other party's
14 name (*i.e.*, Finjan shall search for "Juniper" and Juniper shall search for "Finjan"
15 for the identified custodians). The parties may jointly agree to modify this limit
16 without the Court's leave. The Court shall consider contested requests for
17 additional search terms per custodian, upon showing a distinct need based on the
18 size, complexity, and issues of this specific case. The Court encourages the parties
19 to confer on a process to test the efficacy of the search terms. The search terms
20 shall be narrowly tailored to particular issues. Indiscriminate terms, such as the
21 producing company's name or its product name, are inappropriate unless combined
22 with narrowing search criteria that sufficiently reduce the risk of overproduction.
23 A conjunctive combination of multiple words or phrases (*e.g.*, "computer" and
24 "system") narrows the search and shall count as a single search term. A disjunctive
25 combination of multiple words or phrases (*e.g.*, "computer" or "system") broadens
26 the search, and thus each word or phrase shall count as a separate search term
27 unless they are variants, abbreviations, or acronyms of the same word. Use of
28 narrowing search criteria (*e.g.*, "and," "but not," "w/x") is encouraged to limit the

1 production and shall be considered when determining whether to shift costs for
2 disproportionate discovery. Should a party serve email production requests with
3 search terms beyond the limits agreed to by the parties or granted by the Court
4 pursuant to this paragraph, this shall be considered in determining whether any
5 party shall bear all reasonable costs caused by such additional discovery.

- 6 d. No later than 17 days after receiving an initial list of search terms for a custodian,
7 the producing party shall provide a hit count identifying the number of documents
8 each search term identified during the search. The requesting party may then
9 provide a modified list of search terms but may not change the identified custodian,
10 unless the hitcount for a particular custodian produces fewer than 100 total hits
11 across all terms, in which case the requesting party may change that particular
12 custodian not more than once and may not change more than 2 custodians total.
13 The producing party shall provide a hit count identifying the number of documents
14 that each modified search term identified during the search within 7 business days
15 after receiving the modified list of search terms. The receiving party shall
16 thereafter identify the final list of search terms for the custodian. The producing
17 party shall produce the identified emails in a reasonably diligent manner, but no
18 later than 21 days after the requesting party provides the final list of search terms.¹

19 9. The parties have discussed their preservation obligations and needs and agree that
20 preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the costs
21 and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

- 22 a. Each party will take reasonable steps to preserve all ESI that is relevant to the
23 claims and defenses in this litigation that was created or received on or after June
24 2014;

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27 ¹ Notwithstanding this or any other provision, the parties reserve the right to object to and
28 withhold discovery on the grounds of, *inter alia*, relevance and privilege. See *FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc.*, 15cv1879-BEN (BLM), 2016 WL 65228071, at *7-8 (S.D. Cal. Nov. 3, 2016).

- 1 b. Each party will take reasonable steps to preserve, regardless of date, all ESI
2 concerning the Patents-in-Suit, any products or services related to the conception or
3 reduction to practice of or covered by the Patents-in-Suit, and any products or
4 services accused of infringement in this action;
- 5 c. The parties will preserve ESI for a reasonable number of custodians per party; and
- 6 d. Among the sources of data the parties agree are not reasonably accessible, the
7 parties agree not to preserve the following: backup media not reasonably accessible
8 (including disaster recovery systems), digital voicemail, instant messaging, systems
9 no longer in use, and automatically saved versions of documents.

10 10. A party shall not be liable for the loss of electronically stored information that
11 should have been preserved in the anticipation or conduct of litigation, unless it is lost because the
12 party failed to take reasonable steps to preserve it and it cannot be restored or replaced through
13 additional discovery. Should the Court find prejudice to another party from the loss, the Court
14 may order measures no greater than necessary to cure the prejudice. Only where a party has acted
15 with the intent to deprive another party of the information's use in litigation may the Court
16 presume that the lost information was unfavorable to the party, instruct the jury that it may or must
17 presume that the information was unfavorable to the party, or dismiss the action or enter a default
18 judgment.

19 11. Documents will be produced in single-page TIFF format with full-text extraction
20 and database load files, with the exception that spreadsheets shall be produced in native format. If
21 there is no extractable text, the producing party shall perform Optical Character Recognition
22 ("OCR") on the document and provide the associated text file. All text files should be produced
23 as document level text files with a path to the text file included in the database load file; extracted
24 text/OCR should not be embedded in the load file itself. A party may make a reasonable request
25 to receive the document in its native format. Additionally, in the event that production of a
26 document in TIFF image file format would be impracticable, the producing party shall have the
27 option of producing such document in native format.

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