

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FINJAN, INC.,
Plaintiff,
v.
CHECK POINT SOFTWARE
TECHNOLOGIES, INC., et al.,
Defendants.

Case No. [18-cv-02621-WHO](#)

**ORDER APPOINTING SPECIAL
MASTER**

Pursuant to Federal Rule of Civil Procedure 53, Honorable Elizabeth D. Laporte, United States District Court Magistrate Judge (Retired), is hereby appointed as Special Master to assist in this litigation (hereinafter “Judge Laporte” or “Special Master”).

I. BASIS FOR APPOINTMENT UNDER RULE 53(A) AND RULE 53(B)(1)

1. Basis for Appointment. The Special Master is hereby appointed pursuant to Rule 53(a)(1)(C) to address matters that I cannot timely addresses. Given the scope of this litigation and the way it is being litigated, as the Order Granting In Part Motion to Strike Second Amended Infringement Contentions (“SAIC Order”) makes plain, I have determined that it is fair to impose the likely expenses on the parties. *See* Dkt. No. 247.
2. No Grounds for Disqualification. Pursuant to Rule 53(a)(2) and 53(b)(3), the Special Master has filed an affidavit in this case that states that she has no relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455. *See* Dkt. No. 260. During the course of these proceedings, the Special Master and the parties shall notify the court immediately if they become aware of any

United States District Court
Northern District of California

1 3. Fairness Considerations. Pursuant to Rule 53(a)(3), I have determined that it is fair to
 2 impose the likely expenses on the parties. The appointment and use of the Special
 3 Master will promote the speediest adjudication of this matter.

4 4. Proper Notice Given to All Parties. Pursuant to Rule 53(b)(1), I gave the plaintiff
 5 Finjan, Inc. (“Finjan”) and defendants Check Point Software Technologies, Inc. and
 6 Check Point Software Technologies Ltd. (collectively “Check Point”) notice of my
 7 intent to appoint a special master and an opportunity to be heard with respect to such
 8 appointment before issuing this Order. *See* Dkt. No. 248. No party has objected.

9 **II. SPECIAL MASTER’S DUTIES, AUTHORITY, AND COMPENSATION**

10 5. Diligence. Pursuant to Rule 53(b)(2), the Special Master is directed to proceed with all
 11 reasonable diligence to complete the tasks assigned by this Order.

12 6. Scope of Special Master’s Duties. Pursuant to Rule 53(b)(2)(A), the Special Master
 13 shall assist in the following ways and issue findings and recommendations accordingly.
 14 The Special Master shall determine if Finjan’s infringement contentions follow the
 15 provisions of this District’s Patent Local Rules and my previous orders. Specifically,
 16 the Special Master shall determine:

17 a. If the other 69 combination charts identified by Check Point should be struck
 18 for failure to adequately identify and explain combinations, as argued in
 19 Check Point’s Appendix C [Dkt. No. 213-3] and Finjan’s Rebuttal Appendix
 20 C [Dkt. No. 223-9]. *See* SAIC Order at 22-26 (discussing Issue 3).

21 b. If the entirety of the SAICs should be struck (a) due to inadequate source
 22 code explanations and/or (b) because the same source code is cited for
 23 different limitations, different patents, and different products without
 24 explaining why the same source code applies in these different cases, as
 25 argued in Check Point’s Appendix A [Dkt. No. 212-5], Finjan’s Rebuttal
 26 Appendix A [Dkt. No. 223-9], and Check Point’s Reply Appendix [Dkt. No.
 27 234-5]. *See* SAIC Order at 29-37 (discussing Issue 6).

1 the Special Master.

2 7. Scope of Special Master's Authority. The Special Master shall have the authority
3 provided in Rule 53(c) and 53(d). The Special Master shall have the sole discretion to
4 determine the appropriate procedures for resolution of all assigned matters and shall
5 have the authority to take all appropriate measures to perform the assigned duties. The
6 parties must cooperate with the Special Master. The Special Master may by order
7 impose upon a party any sanction other than contempt and may recommend a contempt
8 sanction against a party and contempt or any other sanction against a non-party.

9 8. Ex Parte Communications. Pursuant to Rule 53(b)(2)(B), the Special Master may
10 communicate ex parte with the court at any time. Generally, the Special Master shall
11 not communicate ex parte with any party without first providing notice to, and
12 receiving consent from, the other party. However, without providing notice or
13 obtaining consent, the Special Master may communicate ex parte with a party for the
14 limited purposes of administrative matters such as scheduling hearings, telephone calls
15 or briefing.

16 9. Preservation of Materials and Preparation of Record. Pursuant to Rule 53(b)(2)(C), the
17 Special Master shall maintain orderly files consisting of all documents submitted to her
18 by the parties and any of her written findings and/or recommendations. Pursuant to
19 Rule 53(e), the Special Master shall file any written findings, and/or recommendations
20 with the court via the court's Electronic Case Filing ("ECF"). Such filing shall fulfil
21 the Special Master's duty to serve her order on the parties. Any records of the Special
22 Master's activities other than her written findings, and/or recommendations shall be
23 filed in accordance with paragraph 13 herein.

24 10. Compensation. Pursuant to Rule 53(b)(2)(E) and Rule 53(g), the Special Master shall
25 be paid \$700 per hour for work done pursuant to this Order, and shall be reimbursed
26 for all reasonable expenses incurred. To further protect against unreasonable expense
27 or delay, the Special Master shall have the discretion to use the services of a law clerk,

28 billed at \$200 per hour. The fees associated with processing the case through the Public

1 Access to Court Electronic Records (“PACER”) shall be waived for the Special
2 Master. Finjan shall pay the Special Master’s fees and costs. The Special Master shall
3 have the power to recommend reallocating some or all of the fees to Check Point, and
4 also to award attorneys’ fees to the prevailing party for the proceedings before her as a
5 discovery sanction.

6 **III. ACTION ON SPECIAL MASTER’S ORDERS, REPORTS, OR**
7 **RECOMMENDATIONS**

- 8 11. Scope of Section. Pursuant to Rule 53(b)(2)(D) and 53(g), the procedures described
9 below shall govern any action of the Special Master’s orders, reports, and/or
10 recommendations.
- 11 12. Time Limits for Review. Any party wishing to file objections to or a motion to adopt
12 or modify the Special Master’s reports and/or recommendations must file such
13 objections or motion with the court within fourteen (14) days from the day the Special
14 Master filed the report and/or recommendation via ECF. Failure to timely object shall
15 be deemed as a waiver of any objection, such that they are deemed approved, accepted,
16 and ordered by the court.
- 17 13. Filing the Record for Review. The party filing the objection or motion shall submit
18 with such objection or motion any record necessary for me to review the Special
19 Master’s order, report, and/or recommendation, including any transcripts of
20 proceedings before the Special Master and any documents submitted by the parties in
21 connection with the Special Master’s order, report, and/or recommendation. Failure to
22 provide the record shall constitute grounds for me to overrule the objection or deny the
23 motion.
- 24 14. Standard for Court’s Review. I shall review findings of fact made or recommended by
25 the Special Master for clear error. I shall review de novo any conclusions of law made
26 or recommended by the Special Master. I will set aside the Special Master’s ruling on
27 a procedural matter only for an abuse of discretion.
- 28 15. Court’s Actions on Master’s Orders. Pursuant to Rule 53(g)(1), in acting on an order,

1 report, or recommendation of the Special Master, I shall afford each party an
2 opportunity to be heard and, in my discretion, may review evidence, and may adopt or
3 affirm; modify; wholly or partly reject or reverse; resubmit to the Special Master with
4 instructions; or make any further orders I deem appropriate.

5 **IT IS SO ORDERED.**

6 Dated: February 14, 2020

7
8 

9 William H. Orrick
10 United States District Judge

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
United States District Court
Northern District of California