

November 10, 2020

**VIA ELECTRONIC FILING**

Honorable Thomas S. Hixon  
U.S. District Court, Northern District of California  
Oakland Courthouse  
Courtroom G – 15th Floor  
450 Golden Gate Avenue  
San Francisco, CA 94102

Re: Discovery Order (Dkt. No. 138)  
*Finjan LLC v. Qualys, Inc.*, Case No. 4:18-cv-07229-YGR

Dear Magistrate Judge Hixon:

Pursuant to the Court’s November 9, 2020 Order (D138), Plaintiff Finjan LLC (“Finjan”) and Defendant Qualys, Inc. (“Qualys”) submit the following joint discovery letter brief answering the questions: (1) when on or after October 1, 2020 Finjan first requested continued access to the Qualys source code; and (2) when Qualys said no.

Respectfully submitted,

/s/ Jason W. Wolff /

Jason W. Wolff  
FISH & RICHARDSON P.C.

*Attorneys for Plaintiff*  
Finjan LLC

Respectfully submitted,

/s/ Ryan R. Smith /

Ryan R. Smith  
WILSON SONSINI GOODRICH & ROSATI

*Attorneys for Defendant*  
Qualys, Inc.

### Finjan's Position

Finjan first requested continued access to Qualys's source code review computer on October 18, 2020. *See* Ex. A (email thread concerning this dispute) at 10/18/2020 email from Jason Wolff to Christopher Mays. Qualys confirmed it would not allow any further access to the inspection computer during a meet and confer on October 29, 2020.

Finjan's initial request on October 18, 2020 was to inspect the source of a corrupted file recently produced by Qualys from a past inspection by Finjan's former counsel. *Id.* On October 19, 2020, Qualys refused to allow an inspection of the corrupted file, but, sensing a broader issue, Finjan asked for a clarification the same day and requested a meet and confer on October 20 (7:11 am). No direct response to the key question or to the request for counsel's availability to meet and confer was received from Qualys, so Finjan followed up again on October 20 (7:48 pm), and on October 25 (requesting inspection dates and a meet and confer), 26, and 28, when a meet and confer date was set. *Id.* Because Qualys indicated it was unclear what the basis for the dispute was in its response on October 27, Finjan sent its half of a letter brief on October 28. *Id.* A meet and confer was subsequently scheduled for October 29.<sup>1</sup>

On October 29, the parties met and conferred. Qualys stated that it would not provide Finjan further access to the inspection computer for any purpose. Finjan asked Qualys to provide its portion of a joint discovery letter brief by close of business on October 30, 2020. *Id.* at 10/29/2020 Email from Ryan O'Connor to Ryan Smith. Qualys did not comply with that request. Accordingly, on November 2, 2020, Finjan asked Qualys to provide its availability for a teleconference with the Court. And, on November 3, 2020, Finjan contacted Ms. Maher to schedule the teleconference.

### Qualys's Position

Qualys agrees that Finjan did not request continued access to Qualys's source code review computer until Sunday, October 18, 2020 at 2:47pm. In other words, Qualys did not make its request until more than *seventeen days* after the close of fact discovery and *ten days* after the Local Rule 37-3 deadline to file a motion to compel fact discovery. Qualys replied within hours (at 12:01am) stating:

*"...considering that fact discovery is closed, we are not willing to permit another inspection."*

Ex. A at 8 (10/19/20 Email from Smith to Wolff). Qualys has never wavered from its refusal to provide continued access to the source code computer. Finjan's counsel was not "sensing a broader issue," but was clearly informed of Qualys's position. Finjan may have sought to convince Qualys to change its position, but Finjan knew there was a dispute at that point.

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<sup>1</sup> Finjan's testifying experts were scheduled to be in San Jose for the *Finjan v. Cisco* trial before Judge Freeman, which was set to begin on November 2, so Finjan's plan was to have its experts access the computer after they testified. The *Cisco* trial was subsequently rescheduled for January. Qualys complains that Mr. Jain, a consultant, lives in San Jose, but Mr. Jain is not a testifying expert for Finjan.

Finjan incorrectly asserts that Qualys did not respond quickly enough to Finjan's correspondence. In that regard, Finjan neglects to mention that the parties were also continuing to address Finjan's ongoing violation of this Court's order directing Finjan to produce expert materials from other cases. The parties' anticipated meet and confer was intended to cover both topics and, such as, took longer to schedule. Finjan also incorrectly asserts that Qualys requested a joint letter brief regarding the dispute on October 27. In reality, Finjan initially proposed that the parties submit a joint letter brief. Qualys agreed. Finjan then provided multiple versions of its brief, which forced Qualys to repeatedly revise its portion. Finjan finally provided a "final" version of its brief on Thursday, October 29 at 2:51pm. Qualys had nearly finalized its portion of the letter brief on Monday, November 2 at 11:09am when Finjan abruptly changed course by seeking a teleconference without submitting a joint letter brief. Qualys did not object. Finjan then sought to schedule another meet and confer, but then changed course again. All the while, Finjan continued to drag its feet on complying with the Court's order requiring the production of expert report from other matters.

In summary, Finjan waited until weeks after the close of fact discovery to request continued access to Qualys' source code computer and, within hours, Qualys refused the request in accordance with the Local Rule 37-3 deadline.<sup>2</sup>

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<sup>2</sup> In a footnote, Finjan states that its "plan was to have the experts access the computer after they testified" in San Jose on November 2. Finjan neglects to mention that one of its source code review experts in this case (Andy Jian) resides in San Jose. Exhibit B (Jian CV). Mr. Jian had been to Wilson Sonsini's Palo Alto office numerous times starting in August 2019, including reviews during the pandemic in 2020. Finjan's suggestion that it failed to complete its source code review during fact discovery due to travel issues or a conflict with trial in the *Cisco* case is non-sensical.