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10 *Attorneys for Defendant*  
11 QUALYS INC.

12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
14 **OAKLAND DIVISION**

15  
16 FINJAN LLC ) CASE NO.: 4:18-cv-07229-YGR (TSH)  
17 )  
17 Plaintiff, )  
18 )  
18 v. ) **DEFENDANT QUALYS INC.’S**  
19 ) **RENEWED MOTION TO STRIKE**  
20 QUALYS INC., ) **PORTIONS OF PLAINTIFF FINJAN**  
21 ) **LLC’S INFRINGEMENT EXPERT**  
22 ) **REPORTS**  
23 ) **Judge: Hon. Yvonne Gonzalez**  
24 ) **Rogers**  
25 ) **Date: Tuesday, June 8, 2021**  
26 ) **Time: 2:00pm**  
27 ) **Location: Zoom Teleconference<sup>1</sup>**  
28 )

<sup>1</sup> Per the Court’s Notice regarding Civil Law and Motion Calendars and its Order at D.I. 48

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on Tuesday, June 8, 2021 at 2:00pm or as soon thereafter  
3 as this matter may be heard before Judge Gonzalez Rogers of the United States District Court for  
4 the Northern District of California via Zoom video conference and/or in Courtroom 1, 4th Floor,  
5 of 1301 Clay Street in Oakland, California (per the Court’s March 12, 2020 Order (D.I. 48) and its  
6 Notice regarding Civil Law and Motion Calendars), defendant Qualys Inc. (“Qualys”) will and  
7 hereby does renew its motion to strike portions of plaintiff Finjan LLC’s (“Finjan”) expert report  
8 of Dr. Nenad Medvidovic.

9 **STATEMENT OF ISSUES AND RELIEF REQUESTED**

10 Qualys seeks an order striking portions of the “Expert Report of Nenad Medvidovic, Ph.D.”  
11 (“Medvidovic Report”) Medvidovic’s expert report proffers a theory for the ’408 Patent’s  
12 “receiving an incoming stream of program code” that is entirely different from the theory Finjan  
13 disclosed in its Local Patent Rule Contentions. This is Qualys’s second motion on this subject; on  
14 April 5, 2021, the Court issued an Order (D.I. 188) granting in part and denying in part Finjan’s  
15 motion. With respect to the issue of the “receiving” limitation, the Court denied Qualys’s motion  
16 “without prejudice to renewal should Qualys demonstrate that vulnerability scanning is not ‘based’  
17 on requests for content by the client device.” D.I. 188 at 7. Qualys now renews that part of its  
18 motion to make the showing requested by the Court.<sup>2</sup>

19 Qualys therefore requests that the Court strike Paragraphs 184-185 (to the extent discussing  
20 the vulnerability scan theory of infringement) and 186-196 of the Medvidovic Report.<sup>3</sup>

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22  
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26  
27 <sup>2</sup> Qualys incorporates by reference the parties’ prior briefing on this issue. *See* D.I. 156-4 at  
12-13; D.I. 163-3 at 12-13; and D.I. 166 at 7-8.

28 <sup>3</sup> Citations to “Ex. XX” or “Exhibit XX” refer to the exhibits to the Declaration of Christopher D.  
Mays filed concurrently with this Motion

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

In denying without prejudice Qualys’s first Motion to Strike Portions of Plaintiff Finjan LLC’s Infringement and Damages Expert Reports, D.I. 156-4 (“1st MTS”), the Court noted that Finjan’s infringement contentions disclosed a single theory for the ’408 Patent’s “receiving...” limitation. *See* D.I. 188 at 7. Namely, that receipt of an incoming stream of program code is based on a client device’s request for content. *See id.* Qualys now renews its motion to strike because the vulnerability scans accused in Dr. Medvidovic’s expert report are **not** based on client devices’ requests for content.

Finjan’s expert (Dr. Medvidovic) offers no opinion in his report that any vulnerability scan occurs based on any client device requesting content. Dr. Medvidovic’s report (and documents he cites) shows that vulnerability scans happen “constantly,” “continuously,” and “automatically.” Indeed, Dr. Medvidovic acknowledges that it is Qualys’s *scanners* (not client devices) that make content requests during a scan and that Qualys’s Cloud Agents (which are alternatives to a scanner for collecting scan data) collect and send data to the Qualys Cloud Platform for a vulnerability scan without ever being prompted to do so. Thus, there is no credible dispute that Medvidovic’s infringement theory has no relationship to any client device making a request for content. Accordingly, Qualys requests that its renewed Motion be granted.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

For the sake of brevity, Qualys incorporates the factual and procedural background from its 1st MTS. *See* D.I. 156-4 at 2-4. The 1st MTS argued, *inter alia*, that Dr. Medvidovic offered a different theory of infringement for an element of the asserted claims of the ’408 Patent (namely, the “receiving . . . an incoming stream of program code” element)<sup>4</sup> than was disclosed in Finjan’s April 19, 2019 Patent L.R. 3-1 infringement contentions. *See id.* at 12-13.

On April 5, 2021, the Court issued an Order on Qualys’s 1st MTS. *See* D.I. 188. Regarding the Receiving limitation, the Court stated that it “cannot determine that the features described by

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<sup>4</sup> Qualys will hereafter refer to this as the “Receiving” limitation

1 Dr. Medvidovic do not involve a client device requesting content from any source computer.” *Id.*  
2 at 7. The Court denied the 1st MTS on this issue but granted leave to renew the motion “should  
3 Qualys demonstrate that vulnerability scanning is not ‘based’ on requests for content by the client  
4 device.” Qualys therefore renews that portion of its 1st MTS relating to the Receiving limitation  
5 to demonstrate, as discussed below, how Dr. Medvidovic’s opinions do not involve vulnerability  
6 scans “based” on requests for content by a client device.

### 7 **III. ARGUMENT**

#### 8 **A. Client Devices are End User Devices that Request Content.**

9 Dr. Medvidovic himself provided a “technology background” explaining the meaning of  
10 “client devices” and “content requests.” *See* Ex. 13 (“Medvidovic Report”) at ¶¶ 44-72.<sup>5</sup> As he  
11 stated,

12 When users want to communicate with a website, they may run an application  
13 program, such as Google Chrome, Safari or Internet Explorer on their  
14 computing devices, which could be a laptop, desktop, smartphone, tablet, or  
15 other device.

16 Ex. 13 at ¶ 45. Dr. Medvidovic referred to a web browser as an example of a client (specifically,  
17 a “web client.”). *See id.* at ¶ 48; *see also id.* at ¶ 55 (referring to a “client computer” as the computer  
18 that “sends a request to a server computer to initiate a handshake procedure”). Dr. Medvidovic  
19 explained how a web client requests content by sending a “request” message to a server and  
20 thereafter receiving a “response” message containing that content. *See id.* at ¶¶ 45-48. He also  
21 explained that while other devices (such as gateways) may act as intermediaries that facilitate the  
22 sending and receiving of such messages/content, the client device remains the “endpoint of the  
23 communication” with the server. *See id.* at ¶ 49. Dr. Medvidovic’s discussion of “client devices”  
24 is consistent with the Court’s June 11, 2020 Claim Construction Order, which construed the term  
25 “web client” for U.S. Patent No. 6,154,844 (a related patent to the ’408 Patent) to mean “an  
26 application on the end-user’s computer that requests a downloadable from the web server.” *See*  
27 D.I. 74 at 20.

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28 <sup>5</sup> Although Qualys previously included an excerpt from Dr. Medvidovic’s Report in its 1st  
MTS, that excerpt did not include certain pages discussed in this renewed Motion. Accordingly,  
Qualys submits a new excerpt of Dr. Medvidovic’s report with all relevant pages for the Court’s  
convenience.

1 Thus, a “client device” refers to an application on some end-user’s device and a “content  
2 request” refers to a request by that client for some content on a network resource such as a server.  
3 But as shown below, vulnerability scanning in the accused products do not involve client devices  
4 making such content requests, nor does Dr. Medvidovic offer an opinion to the contrary.

5 **B. Dr. Medvidovic’s New Infringement Theories Do Not Involve Vulnerability**  
6 **Scanning Based on A Client Device’s Content Request.**

7 As articulated in its Infringement Contentions, Finjan’s theory requires that a “client  
8 device” request content from a source computer and then, based on that request, either the Qualys  
9 Cloud or the Appliance Scanners receives that content as part of an incoming stream of computer  
10 code before the content is eventually provided to the “client device.” See D.I. 158-6, Exhibit 5, at  
11 2-4; D.I. 188 at 7. However, Dr. Medvidovic offers no opinion that any of the accused products  
12 perform a vulnerability scan “based on” a client device’s request for content.

13 Rather, his infringement theory is that vulnerability scans occur *independently* from client  
14 devices. As Dr. Medvidovic explains, Qualys’s products: “*constantly collect[]*, assess[] and  
15 correlates asset and vulnerability information across customers’ cloud instances, on-premises  
16 systems and mobile endpoints...” Ex. 13 at ¶ 90 (*citing* Ex. 14, QUALYS00275578); *see also id.*  
17 at ¶ 116. Constant collection implies an automated operation, not scanning that occurs only based  
18 on a client content request. Indeed, Qualys’s documents describe how Qualys’s products gather  
19 data “automatically,” “continuously,” and (at least for Cloud Agents) without the need to  
20 “schedule” scans. Ex. 15, QUALYS00112182 at 112183; Ex. 14, QUALYS00275578 at 275585  
21 (“Our easy-to-deploy appliances and lightweight agents automatically beam up to the Qualys  
22 Cloud Platform the security and compliance data they’re constantly gathering from customers’ IT  
23 environments) and 275589 (Cloud Agents “work in real-time without the need to schedule scan  
24 windows”); Ex. 18 at 62:3-17. Thus, the product configurations Medvidovic accuses operate  
25 “automatically” and “continuously” to collect data, which is inconsistent with the original theory  
26 that scans are based on a client device’s content request.

27 Further underscoring that Dr. Medvidovic offers no opinion that any vulnerability scanning  
28 occurs based on a client device’s request for content, his report shows that vulnerability scans are  
performed based on *configurations* – such as what devices to scan, which scanners to use for the

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