

1 KURT E. WILSON, ESQ. (121163)
 BRAD D. BOSOMWORTH, ESQ. (132985)
 2 **SWEENEY, MASON, WILSON & BOSOMWORTH**
 A Professional Law Corporation
 3 983 University Avenue, Suite 104C
 Los Gatos, CA 95032-7637
 4 Telephone: (408) 356-3000
 Facsimile: (408) 354-8839
 5 kwilson@smwb.com

6 Attorneys for Defendant
 JDS Uniphase Corporation
 7

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10 FINISAR CORPORATION, a
 Delaware Corporation,
 11
 Plaintiff,
 12
 v.
 13
 JDS UNIPHASE CORPORATION, a
 Delaware Corporation,
 14
 Defendants.
 15

CASE NO. C 08-03388 MMC
**STIPULATION AND ~~PROPOSED~~
 ORDER GRANTING LEAVE FOR
 DEFENDANT TO FILE AMENDED
 ANSWER TO FIRST AMENDED
 COMPLAINT**

17 Defendant JDS Uniphase Corporation (“JDSU”) hereby requests the Court’s leave
 18 to amend its Answer to First Amended Complaint filed herein. Plaintiff Finisar has
 19 agreed and hereby stipulates to the amendment. A copy of the Amended Answer to First
 20 Amended Complaint is attached hereto as **Exhibit A**.

21 The proposed amendment merely removes the reference to paragraphs 8.2 and 8.3
 22 of the November 2003 Agreement in the First Affirmative Defense and withdraws the
 23 estoppel defense from the Second Affirmative Defense.

24 ///
 25 ///
 26 ///
 27 ///
 28 ///

EXHIBIT A

EXHIBIT A

1 KURT E. WILSON, ESQ. (121163)
BRAD D. BOSOMWORTH, ESQ. (132985)
2 **SWEENEY, MASON, WILSON & BOSOMWORTH**
A Professional Law Corporation
3 983 University Avenue, Suite 104C
Los Gatos, CA 95032-7637
4 Telephone: (408) 356-3000
Facsimile: (408) 354-8839
5 kwilson@smwb.com

6 Attorneys for Defendant
JDS Uniphase Corporation
7

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 FINISAR CORPORATION, a
Delaware Corporation,

11 Plaintiff,

12 v.

13 JDS UNIPHASE CORPORATION, a
14 Delaware Corporation,

15 Defendants.
16

CASE NO. C 08-03388 HRL

**[PROPOSED] AMENDED ANSWER
TO FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT
AND REFUND OF ROYALTIES PAID
UNDER PROTEST**

17 Defendant JDS Uniphase Corporation (“JDSU”) hereby answers Finisar
18 Corporation’s (“Finisar”) First Amended Complaint for Declaratory Judgment and
19 Refund of Royalties Paid Under Protest (the “First Amended Complaint”) as follows:

20 **PARTIES**

21 1. Answering Paragraph 1 of the First Amended Complaint, Defendant admits
22 the allegations contained therein.

23 2. Answering Paragraph 2 of the First Amended Complaint, Defendant admits
24 the allegations contained therein.

25 **JURISDICTION AND VENUE**

26 3. Answering Paragraph 3 of the First Amended Complaint, Defendant admits
27 that Finisar’s complaint states that it seeks a declaratory judgment that Finisar does not
28 infringe patents and a refund for monies paid to JDSU. As to the remaining allegations,

1 at this time JDSU is without sufficient knowledge or information to form a belief as to
2 the truth of the remaining allegations contained in said paragraph, and on that basis
3 denies such allegations contained therein.

4 4. Answering Paragraph 4 of the First Amended Complaint, Defendant admits
5 the allegations contained therein.

6 5. Answering Paragraph 5 of the First Amended Complaint, Defendant admits
7 the allegations contained therein.

8 **INTRADISTRICT ASSIGNMENT**

9 6. Answering Paragraph 6 of the First Amended Complaint, Defendant is
10 without sufficient knowledge or information to form a belief as to the truth of the
11 allegations contained in said paragraph, and on that basis denies each and every
12 allegation contained therein.

13 **BACKGROUND**

14 7. Answering Paragraph 7 of the First Amended Complaint, Defendant is
15 without sufficient knowledge or information to form a belief as to the truth of the
16 allegations contained in said paragraph, and on that basis denies each and every
17 allegation contained therein.

18 8. Answering Paragraph 8 of the First Amended Complaint, Defendant admits
19 the allegations contained therein.

20 9. Answering Paragraph 9 of the First Amended Complaint, Defendant admits
21 the allegations contained therein.

22 10. Answering Paragraph 10 of the First Amended Complaint, Defendant
23 admits the allegations contained therein.

24 11. Answering Paragraph 11 of the First Amended Complaint, Defendant
25 admits the allegations contained therein.

26 12. Answering Paragraph 12 of the First Amended Complaint, Defendant
27 admits the allegations contained therein.

28 ///

1 13. Answering Paragraph 13 of the First Amended Complaint, Defendant
2 admits the allegations contained therein.

3 14. Answering Paragraph 14 of the First Amended Complaint, Defendant is
4 without sufficient knowledge or information to form a belief as to the truth of the
5 allegations contained in said paragraph, and on that basis denies each and every
6 allegation contained therein.

7 15. Answering Paragraph 15 of the First Amended Complaint, Defendant
8 admits the allegations contained therein.

9 16. Answering Paragraph 16 of the First Amended Complaint, Defendant is
10 without sufficient knowledge or information to form a belief as to the truth of the
11 allegations contained in said paragraph, and on that basis denies each and every
12 allegation contained therein.

13 17. Answering Paragraph 17 of the First Amended Complaint, Defendant is
14 without sufficient knowledge or information to form a belief as to the truth of the
15 allegations contained in said paragraph, and on that basis denies each and every
16 allegation contained therein.

17 18. Answering Paragraph 18 of the First Amended Complaint, Defendant is
18 without sufficient knowledge or information to form a belief as to the truth of the
19 allegations contained in said paragraph, and on that basis denies each and every
20 allegation contained therein.

21 19. Answering Paragraph 19 of the First Amended Complaint, Defendant is
22 without sufficient knowledge or information to form a belief as to the truth of the
23 allegations contained in said paragraph, and on that basis denies each and every
24 allegation contained therein.

25 20. Answering Paragraph 20 of the First Amended Complaint, Defendant
26 admits the allegations contained therein.

27 ///

28 ///

1 21. Answering Paragraph 21 of the First Amended Complaint, Defendant is
2 without sufficient knowledge or information to form a belief as to the truth of the
3 allegations contained in said paragraph, and on that basis denies each and every
4 allegation contained therein.

5 22. Answering Paragraph 22 of the First Amended Complaint, Defendant
6 admits the allegations contained therein.

7 23. Answering Paragraph 23 of the First Amended Complaint, Defendant
8 admits the allegations set forth in the first sentence therein, and denies the allegations in
9 the second sentence therein.

10 24. Answering Paragraph 24 of the First Amended Complaint, Defendant
11 admits the allegations contained therein.

12 25. Answering Paragraph 25 of the First Amended Complaint, Defendant
13 denies the allegations contained therein.

14 26. Answering Paragraph 26 of the First Amended Complaint, Defendant
15 denies the allegations contained therein.

16 27. Answering Paragraph 27 of the First Amended Complaint, Defendant
17 admits that JDSU withdrew from the negotiations.

18 28. Answering Paragraph 28 of the First Amended Complaint, Defendant
19 admits that Finisar tendered to JDSU a check in an amount that it represented to JDSU is
20 what Finisar owed to JDSU under the 2003 Agreement (assuming no prior waiver by
21 JDSU of its right to receive royalty payments under the 2003 Agreement).

22 29. Answering Paragraph 29 of the First Amended Complaint, Defendant
23 admits that Finisar tendered to JDSU a check in an amount that it represented to JDSU is
24 what Finisar owed to JDSU under the 2003 Agreement (assuming no prior waiver by
25 JDSU of its right to receive royalty payments under the 2003 Agreement).

26 ///

27 ///

28 ///

1 **FIRST CLAIM**

2 **Declaratory Judgment of No Infringement**

3 30. Answering Paragraph 30 of the First Amended Complaint, Defendant
4 incorporates is admissions and denials as stated above.

5 31. Answering Paragraph 31 of the First Amended Complaint, Defendant
6 admits that it demanded that Finisar provide it with an audit/accounting as to what it
7 owed JDSU under the 2003 Agreement and that it pay what (if anything) it owed. JDSU
8 denies that Finisar was under any “apprehension” as alleged therein.

9 32. Answering Paragraph 32 of the First Amended Complaint, Defendant does
10 not understand these allegations and on that basis denies them. Finisar has represented to
11 JDSU that it has made all royalty payments owing under the 2003 Agreement.

12 **SECOND CLAIM**

13 **Refund for Monies Paid Under the 2003 Agreement and Declaratory Judgment that**
14 **Finisar Does Not Owe Any Royalties Under the November 2003 Agreement for Sales**

15 **Made Before August 21, 2011 Because of Waiver**

16 33. Answering Paragraph 33 of the First Amended Complaint, Defendant
17 incorporates is admissions and denials as stated above.

18 34. Answering Paragraph 34 of the First Amended Complaint, Defendant
19 denies the allegations contained therein.

20 35. Answering Paragraph 35 of the First Amended Complaint, Defendant
21 denies the allegations contained therein.

22 36. Answering Paragraph 36 of the First Amended Complaint, Defendant
23 denies the allegations contained therein.

24 37. Answering Paragraph 37 of the First Amended Complaint, Defendant
25 denies the allegations contained therein.

26 ///

27 ///

28 ///

1 **THIRD CLAIM**

2 **Refund for Monies Paid Under the 2003 Agreement and Declaratory Judgment that**
3 **Finisar Does Not Owe any Royalties Under the November 2003 Agreement for Sales**
4 **made Before August 21, 2011 Because of Modification of the November 2003**
5 **Agreement**

6 38. Answering Paragraph 38 of the First Amended Complaint, Defendant
7 incorporates is admissions and denials as stated above.

8 39. Answering Paragraph 39 of the First Amended Complaint, Defendant
9 denies the allegations contained therein.

10 40. Answering Paragraph 40 of the First Amended Complaint, Defendant
11 denies the allegations contained therein.

12 **FOURTH CLAIM**

13 **Refund for Monies Paid Under the 2003 Agreement and Declaratory Judgment that**
14 **Finisar Does not Owe Any Royalties Under the November 2003 Agreement for Sales**
15 **made Before August 21, 2011 because of Estoppel**

16 41. Answering Paragraph 41 of the First Amended Complaint, Defendant
17 incorporates is admissions and denials as stated above.

18 42. Answering Paragraph 42 of the First Amended Complaint, Defendant is
19 without sufficient knowledge or information to form a belief as to the truth of the
20 allegations contained in said paragraph, and on that basis denies each and every
21 allegation contained therein.

22 43. Answering Paragraph 43 of the First Amended Complaint, Defendant is
23 without sufficient knowledge or information to form a belief as to the truth of the
24 allegations contained in said paragraph, and on that basis denies each and every
25 allegation contained therein.

26 44. Answering Paragraph 44 of the First Amended Complaint, Defendant
27 denies the allegations contained therein.

28 ///

1 45. Answering Paragraph 45 of the First Amended Complaint, Defendant is
2 without sufficient knowledge or information to form a belief as to the truth of the
3 allegations contained in said paragraph, and on that basis denies each and every
4 allegation contained therein.

5 46. Answering Paragraph 46 of the First Amended Complaint, Defendant
6 denies the allegations contained therein.

7 **FIFTH CLAIM**

8 **Declaratory Judgment that Finisar Does Not Owe any Royalties for the Period**
9 **Before January 1, 2007 Because Any Qualifying Sales Did Not Exceed the Threshold**

10 47. Answering Paragraph 47 of the First Amended Complaint, Defendant
11 incorporates is admissions and denials as stated above.

12 48. Answering Paragraph 48 of the First Amended Complaint, Defendant is
13 without sufficient knowledge or information to form a belief as to the truth of the
14 allegations contained in said paragraph, and on that basis denies each and every
15 allegation contained therein.

16 49. Answering Paragraph 49 of the First Amended Complaint, Defendant
17 denies the allegations contained therein.

18 **SIXTH CLAIM**

19 **Declaratory Judgment that JDSU Cannot Terminate the License Under Section 2.2**
20 **of the November 2003 Agreement**

21 50. Answering Paragraph 50 of the First Amended Complaint, Defendant
22 incorporates is admissions and denials as stated above. As to the second sentence,
23 Defendant denies this allegation.

24 51. Answering Paragraph 51 of the First Amended Complaint, Defendants
25 denies the allegations contained therein.

26 ///

27 ///

28 ///

1 **FIRST AFFIRMATIVE DEFENSE**

2 AS AND FOR A FIRST SEPARATE AND DISTINCT AFFIRMATIVE
3 DEFENSE, Defendant alleges that Plaintiff is barred from recovery on its claims for
4 breach of contract by operation of the statute of frauds.

5 **SECOND AFFIRMATIVE DEFENSE**

6 AS AND FOR A SECOND SEPARATE AND DISTINCT AFFIRMATIVE
7 DEFENSE, Defendant alleges that Plaintiff is barred from recovering its damages, if any
8 there are, under the principle of waiver. Indeed, paragraph 8.3 of the November 2003
9 Agreement states:

10 **Integration and Modification.** This agreement sets forth the entire
11 agreement and understanding between the Parties on the subject matter
12 hereof and merges all prior discussions and negotiations between them.
This Agreement may be modified only by a writing signed by a duly
authorized representative of each Party.

13 Paragraph 8.2 of the November 2003 Agreement states:

14 **Waiver.** No term of this Agreement shall be deemed waived, and
15 no breach excused, unless the waiver or excuse is in writing and
signed by an office of the Party claimed to have waived or excused.

16 At no time was there any writing signed by the parties modifying or waiving JDSU's
17 rights under the November 2003 Agreement. At no time did the parties agree that
18 paragraphs 8.2 and 8.3 would not be enforced or could or should be ignored.

19 Additionally, Finisar's VP, Kurt Adzema, expressly represented and acknowledged in his
20 October 25, 2007 email to JDSU that the August, 2007 negotiations between Finisar and
21 JDSU and resulting Outline were "**non-binding.**" Moreover, on August 27, 2007,
22 Finisar's lawyer, Janna Lewis, sent JDSU's lawyer, Jeremiah Chan, an email informing
23 him that she would represent Finisar as it relates to the "current negotiations for the
24 proposed agreement" with JDSU. Additionally, Finisar's Associate General Counsel by
25 email sent April 13, 2008 expressly represented to JDSU the amounts it calculated that
26 "would be due under the November 2003 Agreement." Shortly after that, Finisar
27 tendered payments to JDSU consistent with its representations to JDSU as set forth in its
28 Associate General Counsel's email. To date, Finisar has not informed JDSU to the effect

1 that its prior representations/calculations were erroneous or false, and if so, specifically
2 how/why its representations/calculations were erroneous or false. Finisar continues to
3 make royalty payments to JDSU under the November 2003 Agreement, and continues to
4 represent to JDSU that the amount of its payments comply with the terms of the
5 November 2003 Agreement.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Defendant prays for relief as follows:

- 8 1. That Plaintiff's claims be denied and it take nothing by way of relief.
9 2. For Defendant's costs of suit.
10 3. For such other relief as the Court deems appropriate.

11 Dated: December 12, 2008

**SWEENEY, MASON, WILSON
& BOSOMWORTH**

12
13
14 By: /s/
15 KURT E. WILSON, ESQ.,
16 Attorneys for Defendant
17
18
19
20
21
22
23
24
25
26
27
28

1 that its prior representations/calculations were erroneous or false, and if so, specifically
2 how/why its representations/calculations were erroneous or false. Finisar continues to
3 make royalty payments to JDSU under the November 2003 Agreement, and continues to
4 represent to JDSU that the amount of its payments comply with the terms of the
5 November 2003 Agreement.

6 **PRAYER FOR RELIEF**

7 WHEREFORE, Defendant prays for relief as follows:

- 8 1. That Plaintiff's claims be denied and it take nothing by way of relief.
- 9 2. For Defendant's costs of suit.
- 10 3. For such other relief as the Court deems appropriate.

11 Dated: December 15, 2008

**SWEENEY, MASON, WILSON
& BOSOMWORTH**

12
13
14 By: /s/
 KURT E. WILSON, ESQ.,
 Attorneys for Defendant