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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

FINJAN, INC.,

 Plaintiff,

v.

ESET, LLC, and ESET SPOL, S.R.O.,

 Defendants.

 Defendants.

Case No.: 3:17-cv-00183-CAB-BGS

**ORDER GRANTING JOINT MOTION
FOR ENTRY OF STIPULATED
ORDER REGARDING DISCOVERY
OF ELECTRONICALLY STORED
INFORMATION**

[ECF No. 97]

The parties Joint Motion for Entry of Stipulated Order Regarding Discovery of Electronically Stored Information is **GRANTED** as follows.

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1 **Purpose**

2 1. This Order will govern discovery of electronically stored information
3 (“ESI”) in this case as a supplement to the Federal Rules of Civil Procedure, the Civil
4 Local Rules, and any other applicable orders and rules. The parties’ agreement to the
5 terms of this Order should not be deemed an acknowledgement that any information
6 hereby excluded from discovery would or would not be discoverable in the absence of
7 this Order. Nothing in this Order shall waive in whole or in part any objection raised by
8 a party in its written responses to specific discovery requests served in this action.

9 **Cooperation**

10 2. The parties are aware of the importance the Court places on cooperation
11 and commit to cooperate in good faith throughout the matter.

12 **Modifications**

13 3. This Order may be modified by a Stipulated Order of the parties or by the
14 Court for good cause shown.

15 **Liaison**

16 4. The parties have identified liaisons to each other who are and will be
17 knowledgeable about and responsible for discussing their respective ESI. Finjan’s
18 liaisons include Cristina Martinez, Aakash Jariwala and Aaron Frankel. ESET’s
19 liaisons include Scott Penner and Justin Gray. Each e-discovery liaison will be, or have
20 access to those who are, knowledgeable about the technical aspects of e-discovery,
21 including the location, nature, accessibility, format, collection, search methodologies,
22 and production of ESI in this matter. The parties will rely on the liaisons, as needed, to
23 confer about ESI and to help resolve disputes without court intervention.

24 **Preservation**

25 5. The parties have discussed their preservation obligations and needs and
26 agree that preservation of potentially relevant ESI will be reasonable and proportionate.

1 To reduce the costs and burdens of preservation and to ensure proper ESI is preserved,
2 the parties agree that:

- 3 a) Each party will preserve all ESI that is relevant to the claims and defenses in this
4 litigation that was created or received on or after July 1, 2010;
- 5 b) Each party will preserve, regardless of date, all ESI concerning the Patents-in-
6 Suit, any products or services related to the conception or reduction to practice of
7 or covered by the Patents-in-Suit, any products or services accused of
8 infringement in this action and any information specifically regarding the other
9 party;
- 10 c) For the purposes of this litigation, the parties agree that ESI from the following
11 data sources will be considered not reasonably accessible because of undue
12 burden or cost pursuant to Fed. R. Civ. P. 26(b)(2)(B) and the parties agree they
13 need not preserve the following: (i) recorded voice messages; (ii) instant
14 messaging communications that are not ordinarily printed or maintained in a
15 server dedicated to instant messaging; (iii) temporary data stored in a computer's
16 random access memory (RAM), or other ephemeral data that are difficult to
17 preserve without disabling the operating system; (iv) on-line access data such as
18 temporary Internet files, history, cache, cookies, and the like; (v) device-to-device
19 (pin-to-pin) messages sent to or from mobile devices (e.g., Android, iPhone, and
20 Blackberry devices), provided that a copy of such mail is routinely saved
21 elsewhere; (vi) other electronic data stored on a mobile device, such as calendar
22 or contact data or notes, provided that a copy of such information is routinely
23 saved elsewhere; (vii) logs of calls made from mobile devices; (viii) server,
24 system or network logs; (ix) electronic data temporarily stored by laboratory
25 equipment or attached electronic equipment, provided that such data is not
26 ordinarily preserved as part of a laboratory report.

1 d) For the purposes of this litigation, the parties agree that ESI from the following
2 data sources could contain relevant information and should be preserved, but
3 under the proportionality factors need not be searched, reviewed or produced
4 absent good cause shown by the requesting party: (i) backup tapes intended for
5 disaster-recovery purposes that are not indexed, organized, or susceptible to
6 electronic searching and that are substantially duplicative of data more accessible
7 elsewhere, and (ii) deleted data remaining in fragmented form only accessible by
8 forensics. If a producing party contends that responsive ESI from any sources
9 other than (i)-(ii) above (and other than sources that need not be preserved per
10 paragraph 6(c) above) need not be searched, reviewed or produced, that party
11 shall timely identify such ESI with reasonable particularity and shall provide the
12 receiving party with the basis for declining to produce such ESI. The parties shall
13 negotiate in good faith regarding the production of any such ESI.

14 **Production Format**

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

1 **Metadata**

2 7. The following metadata shall be provided within the delimited file
3 described above for each document to the extent reasonably accessible: Extracted text,
4 Parent-Child relationships.

5 8. Additionally, for emails, the following additional metadata shall be
6 provided to the extent it exists and is reasonably accessible: To, From, CC, BCC, Date
7 Sent, Time Sent, Subject and Parent-child relationships.

8 9. Should additional metadata exist that if provided would significantly aid a
9 receiving party in understanding or using a particular document(s), if requested, the
10 producing party shall not unreasonably withhold such metadata if such metadata is
11 reasonably accessible.

12 **Email**

13 10. General ESI production requests under Federal Rules of Civil Procedure 34
14 and 45 shall not include email or other forms of electronic correspondence (collectively
15 “email”). Email production requests shall be governed by the search term process
16 outlined below.

17 11. A requesting party shall limit its email production requests to a total of five
18 custodians per producing party for all such requests. The parties may jointly agree to
19 modify this limit without the Court’s leave. The parties shall meet and confer as soon as
20 possible to identify the custodians who are most likely to have responsive or relevant
21 emails.

22 12. Each requesting party shall limit its email production requests to a total of
23 five search terms per custodian. The parties may jointly agree to modify this limit
24 without the Court’s leave. The search terms shall be narrowly tailored to particular
25 issues. Indiscriminate terms, such as the producing company’s name or its product
26 name, are inappropriate unless combined with narrowing search criteria that sufficiently
27 reduce the risk of overproduction. A conjunctive combination of multiple words or
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1 phrases (e.g., “computer” and “system”) narrows the search and shall count as a single
2 search term. A disjunctive combination of multiple words or phrases (e.g., “computer”
3 or “system”) broadens the search, and thus each word or phrase shall count as a separate
4 search term unless they are variants of the same word. A disjunctive string of patent
5 numbers that are asserted in this litigation shall only count as a single search term. Use
6 of narrowing search criteria (e.g., “and,” “but not,” “w/x”) is encouraged to limit the
7 production and shall be considered when determining whether to shift costs for
8 disproportionate discovery. If the producing party is aware that the requesting party’s
9 search parameters would fail to locate a substantial amount of responsive emails, the
10 producing party shall promptly notify the requesting party of such fact and the parties
11 shall meet and confer to identify appropriate search parameters.

12 14. If a party determines that additional custodians or search terms are required
13 and the parties are unable to reach agreement regarding the request following good faith
14 meet and confer efforts, the party requesting additional custodians and/or search terms
15 may seek relief from the Court based on a showing of good cause pursuant to the
16 procedures set forth in the Civil Local Rules and Chambers’ Rules governing discovery
17 disputes.

18 15. Nothing in this Order or the parties’ agreement to limit email using the
19 foregoing search parameters shall relieve the parties of any obligations they may have to
20 produce responsive ESI that they know about but that may not fall within the parties’
21 agreed-upon search parameters. To the extent a party is aware or made aware of a
22 substantial amount of responsive ESI that has not fallen within the parties’ agreed-upon
23 search parameters, it agrees to promptly notify the requesting party and to meet and
24 confer with the requesting party to modify the parties’ agreed-upon search parameters in
25 order to encompass such ESI.
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1 **Other ESI**

2 16. For all other ESI that must be preserved and searched, reviewed and
3 produced, and which does not qualify as email ESI as set forth above, a producing party
4 shall be subject to its general obligation to conduct a reasonable search to locate and
5 produce any responsive information (subject to its objections) pursuant to Federal Rule
6 of Civil Procedure 34. Such search may include using search terms (such as those
7 identified above and/or any other search terms necessary to retrieve documents
8 responsive to the requesting party's requests for production of documents) to search ESI
9 on central databases, servers, or individual hard drives, or producing all ESI from
10 particular electronic folders or files likely to contain responsive information, and/or any
11 other appropriate method to capture the responsive information.

12 **Privilege and Lack of Waiver**

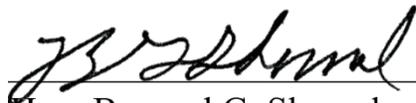
13 17. The receiving party shall not use ESI that the producing party asserts is
14 attorney-client privileged or work product protected except to challenge the privilege or
15 protection.

16 18. Pursuant to Federal Rule of Evidence 502(d), the inadvertent production of
17 privileged or work product protected ESI is not a waiver in the pending case or in any
18 other federal or state proceeding.

19 19. The mere production of ESI in a litigation as part of a mass production
20 shall not itself constitute a waiver for any purpose.

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22 **IT IS SO ORDERED.**

23 Dated: March 24, 2017

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26 Hon. Bernard G. Skomal
27 United States Magistrate Judge
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