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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.

Case No. 3:17-cv-0183-CAB-BGS

**ORDER GRANTING JOINT
MOTION FOR ENTRY OF
STIPULATED PROTECTIVE
ORDER**

The parties Joint Motion for Entry of Stipulated Protective Order is **GRANTED**
as follows:

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation may be
5 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter
6 the following Stipulated Protective Order. The parties acknowledge that this Order does
7 not confer blanket protections on all disclosures or responses to discovery and that the
8 protection it affords from public disclosure and use extends only to the limited
9 information or items that are entitled to confidential treatment under the applicable legal
10 principles. The parties further acknowledge, as set forth in Section 14.4, below, that this
11 Stipulated Protective Order does not entitle them to file confidential information under
12 seal; Federal Rule of Civil Procedure 26(c), Civil Local Rule 79.2, Patent Local Rule
13 2.2 and Electronic Case Filing Administrative Policies and Procedures Section 2.j set
14 forth the procedures that must be followed and the standards that will be applied when a
15 party seeks permission from the court to file material under seal. The parties further
16 acknowledge that without separate court order, this Stipulated Protective Order does not
17 change, amend, or circumvent any court rule or local rule.

18 2. DEFINITIONS

19 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
20 information or items under this Order.

21 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how
22 it is generated, stored or maintained) or tangible things that qualify for protection under
23 Federal Rule of Civil Procedure 26(c).

24 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel
25 (as well as their support staff).

26 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY
27 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

1 2.5 Designating Party: a Party or Non-Party that designates information or
2 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL”
3 or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY
4 CONFIDENTIAL – SOURCE CODE”.

5 2.6 Disclosure or Discovery Material: all items or information, regardless of
6 the medium or manner in which it is generated, stored, or maintained (including, among
7 other things, testimony, transcripts, and tangible things), that are produced or generated
8 in disclosures or responses to discovery in this matter.

9 2.7 Expert: a person with specialized knowledge or experience in a matter
10 pertinent to the litigation who (1) has been retained by a Party or its counsel to serve as
11 an expert witness or as a consultant in this action, (2) is not a past or current employee
12 of a Party or of a Party’s competitor, and (3) at the time of retention, is not anticipated
13 to become an employee of a Party or of a Party’s competitor.

14 2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
15 Information or Items: extremely sensitive “Confidential Information or Items,”
16 disclosure of which to another Party or Non-Party would create a substantial risk of
17 serious harm that could not be avoided by less restrictive means.

18 2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items:
19 extremely sensitive “Confidential Information or Items” representing computer code
20 and associated comments and revision histories, formulas, engineering specifications, or
21 schematics that define or otherwise describe in detail the algorithms or structure of
22 software or hardware designs, disclosure of which to another Party or Non-Party would
23 create a substantial risk of serious harm that could not be avoided by less restrictive
24 means.

25 2.10 House Counsel: attorneys who are employees of a party to this action.
26 House Counsel does not include Outside Counsel of Record or any other outside
27 counsel.
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1 2.11 Non-Party: any natural person, partnership, corporation, association, or
2 other legal entity not named as a Party to this action.

3 2.12 Outside Counsel of Record: attorneys who are not employees of a party to
4 this action but are retained to represent or advise a party to this action and have
5 appeared in this action on behalf of that party or are affiliated with a law firm which has
6 appeared on behalf of that party.

7 2.13 Party: any party to this action, including all of its officers, directors,
8 employees, consultants, retained experts, House Counsel and Outside Counsel of
9 Record (and their support staffs).

10 2.14 Producing Party: a Party or Non-Party that produces Disclosure or
11 Discovery Material in this action.

12 2.15 Professional Vendors: persons or entities that provide litigation support
13 services (e.g., photocopying, videotaping, translating, preparing exhibits or
14 demonstrations, and organizing, storing, or retrieving data in any form or medium) and
15 their employees and subcontractors.

16 2.16 Protected Material: any Disclosure or Discovery Material that is designated
17 as “CONFIDENTIAL,” as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
18 ONLY” or as “HIGHLY CONFIDENTIAL – SOURCE CODE.”

19 2.17 Receiving Party: a Party that receives Disclosure or Discovery Material
20 from a Producing Party.

21 3. SCOPE

22 The protections conferred by this Stipulation and Order cover not only Protected
23 Material (as defined above), but also (1) any information copied or extracted from
24 Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected
25 Material; and (3) any testimony, conversations, or presentations by Parties or their
26 Counsel that might reveal Protected Material. However, the protections conferred by
27 this Stipulation and Order do not cover the following information: (a) any information
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1 that is in the public domain at the time of disclosure to a Receiving Party or becomes
2 part of the public domain after its disclosure to a Receiving Party as a result of
3 publication not involving a violation of this Order, including becoming part of the
4 public record through trial or otherwise; and (b) any information known to the
5 Receiving Party prior to the disclosure or obtained by the Receiving Party after the
6 disclosure from a source who obtained the information lawfully and under no obligation
7 of confidentiality to the Designating Party. Any use of Protected Material at trial shall
8 be governed by a separate agreement or order.

9 4. DURATION

10 Even after final disposition of this litigation, the confidentiality obligations
11 imposed by this Order shall remain in effect until a Designating Party agrees otherwise
12 in writing or a court order otherwise directs. Final disposition shall be deemed to be the
13 later of (1) dismissal of all claims and defenses in this action, with or without prejudice;
14 and (2) final judgment herein after the completion and exhaustion of all appeals,
15 rehearings, remands, trials, or reviews of this action, including the time limits for filing
16 any motions or applications for extension of time pursuant to applicable law.

17 5. DESIGNATING PROTECTED MATERIAL

18 5.1 Exercise of Restraint and Care in Designating Material for Protection.

19 Each Party or Non-Party that designates information or items for protection under this
20 Order must take care to limit any such designation to specific material that qualifies
21 under the appropriate standards. To the extent it is practical to do so, the Designating
22 Party must designate for protection only those parts of material, documents, items, or
23 oral or written communications that qualify – so that other portions of the material,
24 documents, items, or communications for which protection is not warranted are not
25 swept unjustifiably within the ambit of this Order.

26 Mass, indiscriminate, or routinized designations are prohibited. Designations that
27 are shown to be clearly unjustified or that have been made for an improper purpose
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1 (e.g., to unnecessarily encumber or retard the case development process or to impose
2 unnecessary expenses and burdens on other parties) expose the Designating Party to
3 sanctions.

4 If it comes to a Designating Party's attention that information or items that it
5 designated for protection do not qualify for protection at all or do not qualify for the
6 level of protection initially asserted, that Designating Party must promptly notify all
7 other parties that it is withdrawing the mistaken designation.

8 5.2 Manner and Timing of Designations. Except as otherwise provided in this
9 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or
10 ordered, Disclosure or Discovery

11 Material that qualifies for protection under this Order must be clearly so
12 designated before the material is disclosed or produced.

13 Designation in conformity with this Order requires:

14 (a) for information in documentary form (e.g., paper or electronic
15 documents, but excluding transcripts of depositions or other pretrial or trial
16 proceedings), that the Producing Party affix the legend "CONFIDENTIAL" or
17 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
18 CONFIDENTIAL – SOURCE CODE" to each page that contains protected material. If
19 only a portion or portions of the material on a page qualifies for protection, the
20 Producing Party also must clearly identify the protected portion(s) (e.g., by making
21 appropriate markings in the margins) and must specify, for each portion, the level of
22 protection being asserted.

23 A Party or Non-Party that makes original documents or materials available for
24 inspection need not designate them for protection until after the inspecting Party has
25 indicated which material it would like copied and produced. During the inspection and
26 before the designation, all of the material made available for inspection shall be deemed
27 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." After the inspecting
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1 Party has identified the documents it wants copied and produced, the Producing Party
2 must determine which documents, or portions thereof, qualify for protection under this
3 Order. Then, before producing the specified documents, the Producing Party must affix
4 the appropriate legend (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
5 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE) to
6 each page that contains Protected Material. If only a portion or portions of the material
7 on a page qualifies for protection, the Producing Party also must clearly identify the
8 protected portion(s) (e.g., by making appropriate markings in the margins) and must
9 specify, for each portion, the level of protection being asserted.

10 (b) for testimony given in deposition or in other pretrial or trial
11 proceedings, that the Designating Party identify on the record, before the close of the
12 deposition, hearing, or other proceeding, all protected testimony and specify the level of
13 protection being asserted. When it is impractical to identify separately each portion of
14 testimony that is entitled to protection and it appears that substantial portions of the
15 testimony may qualify for protection, the Designating Party may invoke on the record
16 (before the deposition, hearing, or other proceeding is concluded) a right to have up to
17 21 days to identify the specific portions of the testimony as to which protection is
18 sought and to specify the level of protection being asserted. Only those portions of the
19 testimony that are appropriately designated for protection within the 21 days shall be
20 covered by the provisions of this Stipulated Protective Order. Alternatively, a
21 Designating Party may specify, at the deposition or up to 21 days afterwards if that
22 period is properly invoked, that the entire transcript shall be treated as
23 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

24 Parties shall give the other parties notice if they reasonably expect a deposition,
25 hearing or other proceeding to include Protected Material so that the other parties can
26 ensure that only authorized individuals who have signed the “Acknowledgment and
27 Agreement to Be Bound” (Exhibit A) are present at those proceedings. The use of a
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1 document as an exhibit at a deposition shall not in any way affect its designation as
2 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

3 Transcripts containing Protected Material shall have an obvious legend on the
4 title page that the transcript contains Protected Material, and the title page shall be
5 followed by a list of all pages (including line numbers as appropriate) that have been
6 designated as Protected Material and the level of protection being asserted by the
7 Designating Party. The Designating Party shall inform the court reporter of these
8 requirements. Any transcript that is prepared before the expiration of a 21-day period
9 for designation shall be treated during that period as if it had been designated “HIGHLY
10 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise
11 agreed. After the expiration of that period, the transcript shall be treated only as
12 actually designated.

13 (c) for information produced in some form other than documentary and for
14 any other tangible items, that the Producing Party affix in a prominent place on the
15 exterior of the container or containers in which the information or item is stored the
16 legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
17 ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE”. If only a portion or
18 portions of the information or item warrant protection, the Producing Party, to the extent
19 practicable, shall identify the protected portion(s) and specify the level of protection
20 being asserted.

21 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
22 failure to designate qualified information or items does not, standing alone, waive the
23 Designating Party’s right to secure protection under this Order for such material. Upon
24 timely correction of a designation, the Receiving Party must make reasonable efforts to
25 assure that the material is treated in accordance with the provisions of this Order.

1 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

2 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
3 designation of confidentiality at any time. Unless a prompt challenge to a Designating
4 Party's confidentiality designation is necessary to avoid foreseeable, substantial
5 unfairness, unnecessary economic burdens, or a significant disruption or delay of the
6 litigation, a Party does not waive its right to challenge a confidentiality designation by
7 electing not to mount a challenge promptly after the original designation is disclosed.

8 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
9 resolution process by providing written notice of each designation it is challenging and
10 describing the basis for each challenge. To avoid ambiguity as to whether a challenge
11 has been made, the written notice must recite that the challenge to confidentiality is
12 being made in accordance with this specific paragraph of the Protective Order. The
13 parties shall attempt to resolve each challenge in good faith and must begin the process
14 by conferring directly (in voice to voice dialogue; other forms of communication are not
15 sufficient) within 14 days of the date of service of notice. In conferring, the
16 Challenging Party must explain the basis for its belief that the confidentiality
17 designation was not proper and must give the Designating Party an opportunity to
18 review the designated material, to reconsider the circumstances, and, if no change in
19 designation is offered, to explain the basis for the chosen designation. A Challenging
20 Party may proceed to the next stage of the challenge process only if it has engaged in
21 this meet and confer process first or establishes that the Designating Party is unwilling
22 to participate in the meet and confer process in a timely manner.

23 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without
24 court intervention, the parties shall raise the issue with the court within 21 days of the
25 initial notice of challenge or within 14 days of the parties agreeing that the meet and
26 confer process will not resolve their dispute, whichever is earlier. In doing so, the
27 parties must comply with the requirements of Local Civil Rule 26.1 and the Chambers'
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1 Rules of this court governing discovery disputes. The burden of persuasion in any such
2 challenge proceeding shall be on the Designating Party. Frivolous challenges and those
3 made for an improper purpose (e.g., to harass or impose unnecessary expenses and
4 burdens on other parties) may expose the Challenging Party to sanctions. All parties
5 shall continue to afford the material in question the level of protection to which it is
6 entitled under the Producing Party’s designation until the court rules on the challenge.

7 7. ACCESS TO AND USE OF PROTECTED MATERIAL

8 7.1 Basic Principles. A Receiving Party may use Protected Material that is
9 disclosed or produced by another Party or by a Non-Party in connection with this case
10 only for prosecuting, defending, or attempting to settle this litigation. Such Protected
11 Material may be disclosed only to the categories of persons and under the conditions
12 described in this Order. When the litigation has been terminated, a Receiving Party
13 must comply with the provisions of section 15 below (FINAL DISPOSITION).

14 Protected Material must be stored and maintained by a Receiving Party at a
15 location and in a secure manner that ensures that access is limited to the persons
16 authorized under this Order.

17 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise
18 ordered by the court or permitted in writing by the Designating Party, a Receiving Party
19 may disclose any information or item designated “CONFIDENTIAL” only to:

20 (a) the Receiving Party’s Outside Counsel of Record in this action, as well
21 as employees of said Outside Counsel of Record to whom it is reasonably necessary to
22 disclose the information for this litigation and who have signed the “Acknowledgment
23 and Agreement to Be Bound” that is attached hereto as Exhibit A;

24 (b) the officers, directors, and employees (including House Counsel) of the
25 Receiving Party to whom disclosure is reasonably necessary for this litigation and who
26 have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

1 (c) Experts (as defined in this Order) of the Receiving Party to whom
2 disclosure is reasonably necessary for this litigation and who have signed the
3 “Acknowledgment and Agreement to Be Bound” (Exhibit A);

4 (d) the court and its personnel;

5 (e) court reporters and their staff, professional jury or trial consultants, and
6 Professional Vendors to whom disclosure is reasonably necessary for this litigation and
7 who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

8 (f) during their depositions, witnesses in the action to whom disclosure is
9 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be
10 Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the
11 court. Pages of transcribed deposition testimony or exhibits to depositions that reveal
12 Protected Material must be separately bound by the court reporter and may not be
13 disclosed to anyone except as permitted under this Stipulated Protective Order.

14 (g) the author or recipient of a document containing the information or a
15 custodian or other person who otherwise possessed or knew the information.

16 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
17 ONLY” and “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items.

18 Unless otherwise ordered by the court or permitted in writing by the Designating Party,
19 a Receiving Party may disclose any information or item designated “HIGHLY
20 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –
21 SOURCE CODE” only to:

22 (a) the Receiving Party’s Outside Counsel of Record in this action, as well
23 as employees of said Outside Counsel of Record to whom it is reasonably necessary to
24 disclose the information for this litigation and who have signed the “Acknowledgment
25 and Agreement to Be Bound” that is attached hereto as Exhibit A;

26 (b) Designated House Counsel of the Receiving Party (1) who has no
27 involvement in competitive decision-making, (2) to whom disclosure is reasonably
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1 necessary for this litigation, (3) who has signed the “Acknowledgment and Agreement
2 to Be Bound” (Exhibit A), and (4) as to whom the procedures set forth in paragraph
3 7.4(a)(1), below, have been followed;

4 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably
5 necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement
6 to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph
7 7.4(a)(2), below, have been followed;

8 (d) the court and its personnel;

9 (e) court reporters and their staff, professional jury or trial consultants,¹
10 and Professional Vendors to whom disclosure is reasonably necessary for this litigation
11 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);
12 and

13 (f) the author or recipient of a document containing the information or a
14 custodian or other person who otherwise possessed or knew the information.

15 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY
16 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –
17 SOURCE CODE” Information or Items to Designated House Counsel or Experts.

18 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the
19 Designating Party, a Party that seeks to disclose to Designated House Counsel any
20 information or item that has been designated “HIGHLY CONFIDENTIAL –
21 ATTORNEYS’ EYES ONLY” pursuant to paragraph 7.3(b) first must make a written
22 request to the Designating Party that (1) sets forth the full name of the Designated
23 House Counsel and the city and state of his or her residence, and (2) describes the
24 Designated House Counsel’s current and reasonably foreseeable future primary job

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26 ¹ The parties may wish to allow disclosure of information not only to professional jury
27 or trial consultants, but also to mock jurors, to further trial preparation. In that situation,
28 the parties may wish to draft a simplified, precisely tailored Undertaking for mock
jurors to sign.

1 duties and responsibilities in sufficient detail to determine if House Counsel is involved,
2 or may become involved, in any competitive decision-making.

3 (a)(2) Unless otherwise ordered by the court or agreed to in writing by the
4 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order)
5 any information or item that has been designated “HIGHLY CONFIDENTIAL –
6 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE”
7 pursuant to paragraph 7.3(c) first must make a written request to the Designating Party
8 that (1) identifies the general categories of “HIGHLY CONFIDENTIAL –
9 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE”
10 information that the Receiving Party seeks permission to disclose to the Expert, (2) sets
11 forth the full name of the Expert and the city and state of his or her primary residence,
12 (3) attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current
13 employer(s), (5) identifies each person or entity from whom the Expert has received
14 compensation or funding for work in his or her areas of expertise or to whom the expert
15 has provided professional services, including in connection with a litigation, at any time
16 during the preceding five years,² and (6) identifies (by name and number of the case,
17 filing date, and location of court) any litigation in connection with which the Expert has
18 offered expert testimony, including through a declaration, report, or testimony at a
19 deposition or trial, during the preceding five years.

20 (b) A Party that makes a request and provides the information specified in
21 the preceding respective paragraphs may disclose the subject Protected Material to the
22 identified Designated House Counsel or Expert unless, within 14 days of delivering the
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25 ² If the Expert believes any of this information is subject to a confidentiality obligation
26 to a third-party, then the Expert should provide whatever information the Expert
27 believes can be disclosed without violating any confidentiality agreements, and the
28 Party seeking to disclose to the Expert shall be available to meet and confer with the
Designating Party regarding any such engagement.

1 request, the Party receives a written objection from the Designating Party. Any such
2 objection must set forth in detail the grounds on which it is based.

3 (c) A Party that receives a timely written objection must meet and confer
4 with the Designating Party (through direct voice to voice dialogue) to try to resolve the
5 matter by agreement within seven days of the written objection. If no agreement is
6 reached, the parties shall raise the issue with the court. In doing so, the parties must
7 comply with the requirements of Local Civil Rule 26.1 and the Chambers' Rules of this
8 court governing discovery disputes. To the extent the court advises the parties to file a
9 motion, the party seeking to make the disclosure to Designated House Counsel or the
10 Expert must describe the circumstances with specificity, set forth in detail the reasons
11 why the disclosure to Designated House Counsel or the Expert is reasonably necessary,
12 assess the risk of harm that the disclosure would entail, and suggest any additional
13 means that could be used to reduce that risk. In addition, any such motion must be
14 accompanied by a competent declaration describing the parties' efforts to resolve the
15 matter by agreement (i.e., the extent and the content of the meet and confer discussions)
16 and setting forth the reasons advanced by the Designating Party for its refusal to
17 approve the disclosure.

18 In any such proceeding, the Party opposing disclosure to Designated House
19 Counsel or the Expert shall bear the burden of proving that the risk of harm that the
20 disclosure would entail (under the safeguards proposed) outweighs the Receiving
21 Party's need to disclose the Protected Material to its Designated House Counsel or
22 Expert.

23 8. PROSECUTION BAR

24 Absent written consent from the Producing Party, any individual who receives
25 access to "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY
26 CONFIDENTIAL – SOURCE CODE" information shall not be involved in the
27 prosecution of patents or patent applications relating to anti-virus software and malware
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1 detection, including without limitation the patents asserted in this action and any patent
2 or application claiming priority to or otherwise related to the patents asserted in this
3 action, before any foreign or domestic agency, including the United States Patent and
4 Trademark Office (“the Patent Office”). For purposes of this paragraph, “prosecution”
5 includes directly or indirectly drafting, amending, advising, or otherwise affecting the
6 scope or maintenance of patent claims.³ To avoid any doubt, “prosecution” as used in
7 this paragraph does not include representing a party challenging a patent before a
8 domestic or foreign agency (including, but not limited to, a reissue protest, ex parte
9 reexamination or inter partes review). Nor does “prosecution” as used in this paragraph
10 include participation by Finjan, Inc.’s litigation counsel participating in the nine,
11 ongoing inter partes review proceedings involving patents of Finjan, Inc. as of the date
12 of this Order from representing Finjan in a reissue protest, ex parte reexamination, inter
13 partes review or other post-grant proceeding filed by a Non-Party, so long as such
14 activity is limited to defending the validity of the patent and the individual has no
15 involvement in and does not advise regarding drafting, editing, approving or amending
16 claim language.

17 This Prosecution Bar shall begin when access to “HIGHLY CONFIDENTIAL –
18 ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE”
19 information is first received by the affected individual and shall end two (2) years after
20 final termination of this action.⁴

23 ³ Prosecution includes, for example, original prosecution, reissue and reexamination
24 proceedings.

25 ⁴ The Prosecution Bar applies only to individuals who receive access to another party’s
26 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” technical or source code
27 information pursuant to this Order, and is not triggered by access to non-technical
28 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information, such as
financial disclosures.

1 9. SOURCE CODE

2 (a) To the extent production of source code becomes necessary in this
3 case, a Producing Party may designate source code as “HIGHLY CONFIDENTIAL -
4 SOURCE CODE” if it comprises or includes confidential, proprietary or trade secret
5 source code.

6 (b) Protected Material designated as “HIGHLY CONFIDENTIAL –
7 SOURCE CODE” shall be subject to all of the protections afforded to “HIGHLY
8 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information including the
9 Prosecution Bar set forth in Paragraph 8, and may be disclosed only to the individuals to
10 whom “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information may
11 be disclosed, as set forth in Paragraphs 7.3 and 7.4, with the exception of Designated
12 House Counsel.⁵

13 (c) Any source code produced in discovery shall be made available for
14 inspection, in a format allowing it to be reasonably reviewed and searched, during
15 normal business hours or at other mutually agreeable times, at an office of the
16 Producing Party’s counsel or another mutually agreed upon location. The source code
17 shall be made available for inspection on a secured computer in a secured room without
18 Internet access or network access to other computers, and the Receiving Party shall not
19 copy, remove, or otherwise transfer any portion of the source code onto any recordable
20 media or recordable device. The Producing Party may visually monitor the activities of
21 the Receiving Party’s representatives during any source code review, but only to ensure
22 that there is no unauthorized recording, copying, or transmission of the source code.

23 (d) The Receiving Party may request paper copies of limited portions of
24 source code that are reasonably necessary for the preparation of court filings, pleadings,
25 expert reports, or other papers, or for deposition or trial, but shall not request paper

26 _____
27 ⁵ House Counsel may access derivative materials including “HIGHLY
28 CONFIDENTIAL - SOURCE CODE” information, such as exhibits to motions or
expert reports.

1 copies for the purposes of reviewing the source code other than electronically as set
2 forth in paragraph (c) in the first instance. The Producing Party shall provide all such
3 source code in paper form including bates numbers and the label “HIGHLY
4 CONFIDENTIAL - SOURCE CODE.” The Producing Party may challenge the amount
5 of source code requested in hard copy form pursuant to the dispute resolution procedure
6 and timeframes set forth in Paragraph 6 whereby the Producing Party is the
7 “Challenging Party” and the Receiving Party is the “Designating Party” for purposes of
8 dispute resolution.

9 (e) The Receiving Party shall maintain a record of any individual who
10 has inspected any portion of the source code in electronic or paper form. The Receiving
11 Party shall maintain all paper copies of any printed portions of the source code in a
12 secured, locked area. The Receiving Party shall not create any electronic or other
13 images of the paper copies and shall not convert any of the information contained in the
14 paper copies into any electronic format. The Receiving Party shall only make additional
15 paper copies if such additional copies are (1) necessary to prepare court filings,
16 pleadings, or other papers (including a testifying expert’s expert report), (2) necessary
17 for deposition, or (3) otherwise necessary for the preparation of its case. Any paper
18 copies used during a deposition shall be retrieved by the Producing Party at the end of
19 each day and must not be given to or left with a court reporter or any other unauthorized
20 individual.

21 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
22 OTHER LITIGATION

23 If a Party is served with a subpoena or a court order issued in other litigation that
24 compels disclosure of any information or items designated in this action as
25 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
26 or “HIGHLY CONFIDENTIAL – SOURCE CODE” that Party must:
27
28

1 (a) promptly notify in writing the Designating Party. Such notification
2 shall include a copy of the subpoena or court order;

3 (b) promptly notify in writing the party who caused the subpoena or order
4 to issue in the other litigation that some or all of the material covered by the subpoena or
5 order is subject to this Protective Order. Such notification shall include a copy of this
6 Stipulated Protective Order; and

7 (c) cooperate with respect to all reasonable procedures sought to be
8 pursued by the Designating Party whose Protected Material may be affected.⁶

9 If the Designating Party timely seeks a protective order, the Party served with the
10 subpoena or court order shall not produce any information designated in this action as
11 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
12 or “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the
13 court from which the subpoena or order issued, unless the Party has obtained the
14 Designating Party’s permission. The Designating Party shall bear the burden and
15 expense of seeking protection in that court of its confidential material – and nothing in
16 these provisions should be construed as authorizing or encouraging a Receiving Party in
17 this action to disobey a lawful directive from another court.

18 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED
19 IN THIS LITIGATION

20 (a) The terms of this Order are applicable to information produced by a
21 Non-Party in this action and designated as “CONFIDENTIAL” or “HIGHLY
22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –
23 SOURCE CODE”. Such information produced by Non-Parties in connection with this
24 litigation is protected by the remedies and relief provided by this Order. Nothing in

25 _____
26 ⁶ The purpose of imposing these duties is to alert the interested parties to the existence
27 of this Protective Order and to afford the Designating Party in this case an opportunity
28 to try to protect its confidentiality interests in the court from which the subpoena or
order issued.

1 these provisions should be construed as prohibiting a Non-Party from seeking additional
2 protections.

3 (b) In the event that a Party is required, by a valid discovery request, to
4 produce a Non-Party's confidential information in its possession, and the Party is
5 subject to an agreement with the Non-Party not to produce the Non-Party's confidential
6 information, then the Party shall:

7 1. promptly notify in writing the Requesting Party and the Non-Party
8 that some or all of the information requested is subject to a confidentiality agreement
9 with a Non-Party;

10 2. promptly provide the Non-Party with a copy of the Stipulated
11 Protective Order in this litigation, the relevant discovery request(s), and a reasonably
12 specific description of the information requested; and

13 3. make the information requested available for inspection by the Non-
14 Party.

15 (c) If the Non-Party fails to object or seek a protective order from this
16 court within 14 days of receiving the notice and accompanying information, the
17 Receiving Party may produce the Non-Party's confidential information responsive to
18 the discovery request. If the Non-Party timely seeks a protective order, the Receiving
19 Party shall not produce any information in its possession or control that is subject to the
20 confidentiality agreement with the Non-Party before a determination by the court.⁷
21 Absent a court order to the contrary, the Non-Party shall bear the burden and expense of
22 seeking protection in this court of its Protected Material.

23 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

24 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
25 Protected Material to any person or in any circumstance not authorized under this

26 ⁷ The purpose of this provision is to alert the interested parties to the existence of
27 confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to
28 protect its confidentiality interests in this court.

1 Stipulated Protective Order, the Receiving Party must immediately (a) notify in writing
2 the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve
3 all unauthorized copies of the Protected Material, (c) inform the person or persons to
4 whom unauthorized disclosures were made of all the terms of this Order, and (d) request
5 such person or persons to execute the “Acknowledgment and Agreement to Be Bound”
6 that is attached hereto as Exhibit A.

7 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
8 PROTECTED MATERIAL

9 When a Producing Party gives notice to Receiving Parties that certain
10 inadvertently produced material is subject to a claim of privilege or other protection, the
11 obligations of the Receiving Parties are those set forth in Federal Rule of Civil
12 Procedure 26(b)(5)(B). This provision is not intended to modify whatever procedure
13 may be established in an e-discovery order that provides for production without prior
14 privilege review. Pursuant to Federal Rule of Evidence 502(d) and (e), insofar as the
15 parties reach an agreement on the effect of disclosure of a communication or
16 information covered by the attorney-client privilege or work product protection, the
17 parties may incorporate their agreement in the stipulated protective order submitted to
18 the court.

19 14. MISCELLANEOUS

20 14.1 Modification and Right to Further Relief. Nothing in this Order abridges
21 the right of any person to seek its modification by the court in the future. The Court
22 may modify the terms and conditions of this Stipulated Protective Order for good cause,
23 or in the interest of justice, or on its own order at any time in these proceedings.

24 14.2 Right to Assert Other Objections. By stipulating to the entry of this
25 Protective Order no Party waives any right it otherwise would have to object to
26 disclosing or producing any information or item on any ground not addressed in this
27
28

1 Stipulated Protective Order. Similarly, no Party waives any right to object on any
2 ground to use in evidence of any of the material covered by this Protective Order.

3 14.3 Export Control. Disclosure of Protected Material shall be subject to all
4 applicable laws and regulations relating to the export of technical data contained in such
5 Protected Material, including the release of such technical data to foreign persons or
6 nationals in the United States or elsewhere. The Producing Party shall be responsible
7 for identifying any such controlled technical data, and the Receiving Party shall take
8 measures necessary to ensure compliance.

9 14.4 Filing Protected Material. Without written permission from the
10 Designating Party or a court order secured after appropriate notice to all interested
11 persons, a Party may not file in the public record in this action any Protected Material.
12 No document shall be filed under seal unless counsel secures a court order allowing the
13 filing of a document under seal. An application to file a document under seal shall be
14 served on opposing counsel, and on the person or entity that has custody and control of
15 the document, if different from opposing counsel. If opposing counsel, or the person or
16 entity who has custody and control of the document, wishes to oppose the application,
17 he/she must contact the chambers of the judge who will rule on the application, to notify
18 the judge's staff that an opposition to the application will be filed.

19 15. FINAL DISPOSITION

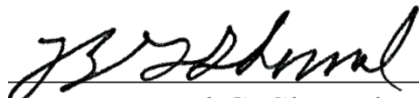
20 Within 60 days after the final disposition of this action, as defined in paragraph 4,
21 each Receiving Party must return all Protected Material to the Producing Party or
22 destroy such material. As used in this subdivision, "all Protected Material" includes all
23 copies, abstracts, compilations, summaries, and any other format reproducing or
24 capturing any of the Protected Material. Whether the Protected Material is returned or
25 destroyed, the Receiving Party must submit a written certification to the Producing
26 Party (and, if not the same person or entity, to the Designating Party) by the 60-day
27 deadline that (1) identifies (by category, where appropriate) all the Protected Material
28

1 that was returned or destroyed and (2) affirms that the Receiving Party has not retained
2 any copies, abstracts, compilations, summaries or any other format reproducing or
3 capturing any of the Protected Material. Notwithstanding this provision, Counsel are
4 entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and
5 hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits,
6 expert reports, attorney work product, and consultant and expert work product, even if
7 such materials contain Protected Material. Any such archival copies that contain or
8 constitute Protected Material remain subject to this Protective Order as set forth in
9 Section 4 (DURATION).

10 Within 60 days after the final disposition of this action, as defined in paragraph 4,
11 the Court shall return all Protected Material to the Producing Party or destroy such
12 material. Any action by this Court must be preceded by an ex parte motion for an order
13 authorizing the return of all Protected Material to the party that produced the
14 information or the destruction thereof.

15
16 **IT IS SO ORDERED.**

17
18 Dated: March 28, 2017

19 
20 Hon. Bernard G. Skomal
21 United States Magistrate Judge
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1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____ [print or type full name], of
4 _____ [print or type full address], declare
5 under penalty of perjury that I have read in its entirety and understand the Stipulated
6 Protective Order that was issued by the United States District Court for the Southern
7 District of California on _____ [date] in the case of Finjan, Inc. v. ESET, LLC and
8 ESET spol. S.R.O., Case No. 3:17-cv-183-CAB-BGS. I agree to comply with and to be
9 bound by all the terms of this Stipulated Protective Order and I understand and
10 acknowledge that failure to so comply could expose me to sanctions and punishment in
11 the nature of contempt. I solemnly promise that I will not disclose in any manner any
12 information or item that is subject to this Stipulated Protective Order to any person or
13 entity except in strict compliance with the provisions of this Order.

14 I further agree to submit to the jurisdiction of the United States District
15 Court for the Southern District of California for the purpose of enforcing the terms of
16 this Stipulated Protective Order, even if such enforcement proceedings occur after
17 termination of this action.

18 I hereby appoint _____ [print or type full name]
19 of _____ [print or type full address and
20 telephone number] as my California agent for service of process in connection with this
21 action or any proceedings related to enforcement of this Stipulated Protective Order.

22 Date: _____

23 City and State where sworn and signed: _____

24 Printed name: _____

25 [printed name]

26 Signature: _____

27 [signature]