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6   UNITED STATES DISTRICT COURT

7   SOUTHERN DISTRICT OF CALIFORNIA

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9   FINJAN, INC.,   Case No.: 17CV183 CAB (BGS)

10   Plaintiff,
                                            ORDER DENYING FINJAN'S
11   v.   **MOTION TO COMPEL ESET TO**
                                            SUPPLEMENT THEIR RESPONSE
12   ESET, LLC and ESET SPOL. S.R.O.,   **TO INTERROGATORY NO. 7**

13   Defendants.

14   [ECF 231]

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17   Finjan, Inc. moves to compel ESET to supplement its response to Finjan's

18   Interrogatory No. 7, (ECF 231), which asks ESET to identify the directories and

19   subdirectories of ESET's produced source code corresponding to each of ESET's accused

20   products. (Motion to Compel ESET to Supplement Their Response to Interrogatory No.

21   7 ("Mot.") at 2.) ESET opposes providing any further response, arguing it has already

22   provided a sufficient explanation how to obtain this information in its initial and amended

23   interrogatory responses. (Opposition to Finjan's Motion to Compel ("Opp'n") [ECF

24   235].) For the reasons set forth below, Finjan's motion is **DENIED**.

25   **LEGAL STANDARDS**

26   In general, the Federal Rules of Civil Procedure provide that "parties may obtain

27   discovery regarding any non-privileged matter that is relevant to any party's claim or

28   defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). District

1 courts have broad discretion in permitting or denying discovery. *Hallett v. Morgan*, 296

2 F.3d 732, 751 (9th Cir. 2002); *see also Facedouble, Inc. v. Face.com*, No. 12cv1584

3 DMS (MDD), 2014 WL 585868, at *1 (S.D. Cal. Feb. 13, 2014).

4   Federal Rule of Civil Procedure 33 authorizes the use of interrogatories. "An

5 interrogatory may relate to any matter that may be inquired into under Rule 26(b)." Fed.

6 R. Civ. P. 33(a)(2). Furthermore, "[e]ach interrogatory must, to the extent it is not

7 objected to, be answered separately and fully in writing under oath." Rule 33(b)(3).

8   **DISCUSSION**

9 **I.   Parties' Arguments**

10 Finjan's Interrogatory No. 7 states:

11
        For the source code that You produced or made available for inspection or
12   will produce and make available for inspection, *identify* the products that
          correspond to the source code including the name and version number of
13   each product, *the directories and subdirectories of the source code*
          corresponding to each of the products, the last date the source code was
14   modified for each of the products, and which portion, if any, of the code You
15   contend is prior art to the Asserted Patents. (Mot. at 2 (emphasis added by
          Finjan))
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17   Finjan believes ESET should be required to produce a table identifying which of

18 the subdirectories[1] located on the source code computers under three named directories

19 correspond[2] to each of the accused products. Finjan characterizes ESET's current

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22 [1] There are many subdirectories under three directories that are at issue in this motion. A
23 fourth directory is apparently not at issue because ESET has already identified which
    subdirectories in that directory correspond to the accused products. (Mot. at 4, n. 1.)
24 [2] The Court notes that what Finjan means by "correspond" in asking for "the directories
25 and subdirectories of the source code *corresponding* to each of the products" is vague and
    unclear. Arguably, explaining that all of the products use a common set of modules in
26 the modules subdirectory and all products are capable of running them tells Finjan that all
27 those subdirectories "correspond" to each of the products. ESET's answer, seemingly
    understanding what Finjan is actually seeking, attempts to explain under what
28 circumstances the modules will actually run.

1   responses as evasive and incomplete. More specifically, Finjan argues ESET's

2   instructions on how to determine which subdirectories correspond to each product are

3   vague because they require Finjan to identify the major version number and then compare

4   it to a non-exhaustive list of exceptions and account for certain carve outs under which

5   portions of a module may be skipped. Finjan also takes issue with the vagueness of

6   ESET's statement that "just because a module is loaded by a product does not mean the

7   module will ever be executed." Additionally, Finjan argues that ESET's direction that

8   "for any specific product, the exact list of modules the product loads can be determined

9   by searching for files whose filenames are 'emxxx.dat' or 'emxxx.dll' where the xxx is a

10 three-digit number" is insufficient because it is not clear how this information relates to

11 prior instructions and ESET's response does not indicate what three-digit number should

12 be used to perform this search.[3]

13   ESET argues it has sufficiently responded to Interrogatory No. 7 by providing an

14 explanation how and when its modules are loaded by different accused products.[4] In

15 short, ESET explains in its brief that it does not makes sense to identify what modules

16 correspond to products in a table because its modules are plug-and-play components used

17 in multiple accused products that run under certain circumstances, *i.e.* version number,

18 version of the Accused Instrumentality, platform. ESET argues its responses to

19 Interrogatory No. 7 provide a narrative explaining how to map each module with the

20 Accused Instrumentalities accounting for these factors. More specifically, ESET

21 emphasizes that its response explains that all the modules in a specified subdirectory are

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24 [3] Finjan additionally argues that even if it had the three-digit number, it could not perform
    the search because the source code had not been fully indexed. Regardless of whose fault
25 that is, ESET's Opposition indicates it is now fully indexed. (Opp'n at 9.)

26 [4] ESET provided both a First Response and Amended Response. (Mot., Ex. A (first); Ex.
    B (amended).) The First Response provided the instructions or mapping discussed in the
27 parties' arguments and the Amended Response adds a table consisting of the Accused
    Instrumentalities in one column and a corresponding Directory on Source Code
28 Computer in a second column.

1 capable of running with all versions of the Accused Instrumentalities with a major

2 version number greater than 3. ESET's brief also expands on what a major version

3 number is and how to search for it. As to Finjan's complaint that it is not clear what is

4 meant in stating that some portions of modules will be skipped, ESET notes that its

5 response explains that "some modules, as shown in the source code for those modules,

6 have certain functionality that may be skipped unless the product meets a certain required

7 minimum version number." Again, in its brief, ESET expands upon this to explain that

8 when new functionality is added to newer versions of modules, only newer versions of

9 the Accused Instrumentalities can take advantage of the new functionality. As to the next

10 exception Finjan criticizes — "just because a module is loaded by a product does not

11 mean the module will ever be executed" — ESET provides, as an example when a

12 module might not be executed, when the end user chooses to disable a feature of the

13 Accused Instrumentality. And, as to the exceptions listed as to numerous modules, ESET

14 argues Finjan should be able to understand that certain modules only load with version

15 numbers at a certain number or higher and on certain platforms and follow that

16 explanation to determine when the modules are loaded by the Accused Instrumentalities.

17 ESET also argues that its instruction regarding searching for 'emxxx.dat' or 'emxxx.dll'

18 files where the xxx is a three-digit number is a specific way for Finjan to confirm which

19 modules were loaded in any specific version of the Accused Instrumentalities. And, the

20 three digit number can be found in the source code. Finally, as to LiveGrid, ESET

21 explains that it features are separate and apart from any Accused Instrumentalities and it

22 is not possible for ESET, or anyone, to map it to the Accused Instrumentalities.

23   As to the burden on each party in following ESET's road map, Finjan wants ESET

24 to do the work and create a table. Finjan argues that this should impose very little burden

25 on ESET because it has unfettered access to its source code and would be a great burden

26 on Finjan because it is only allowed to manually take notes when reviewing ESET's

27 source code. ESET argues that it would take ESET as much time as Finjan to follow

28 ESET's instructions to generate the mapping Finjan seeks and would require ESET to

1   divert its engineers from their real work for ESET, essentially functioning as Finjan's

2   experts. Additionally, ESET explains that the table that Finjan demands would not be

3   accurate or even makes sense to create because only certain portions of modules may be

4   executed with certain versions of the Accused Instrumentalities and the same module

5   may have segments of code that are restricted to different versions of Accused

6   Instrumentalities. And, finally, ESET argues there is no basis for Finjan to rely on

7   protective order restrictions — manually taking notes when reviewing source code — to

8   argue the burden on it is greater than it would be for ESET.

9   **II.   Analysis**

10   The only case either party relies on in their briefing is *Facedouble, Inc. v.*

11   *Face.com*. 2014 WL 585868. The *Facedouble* court required a defendant to "provide a

12   guide or road map to its source code" to the plaintiff in response to an interrogatory

13   asking the defendant to describe the steps of its technology. *Id.* at *2. The defendant's

14   initial response relied on Rule 33(d) and only provided its source code. *Id.*

15   Finjan relies on *Facedouble* to argue ESET must identify the source code

16   corresponding to the accused products to provide a road map to the source code. (Mot. at

17   3.) ESET argues it has already done what the *Facedouble* court required by providing

18   instructions for mapping the Accused Instrumentalities to specific directories and

19   explaining how the code is structured. (Opp'n at 6-7.) This, ESET argues, allows Finjan

20   to identify which modules correspond with the Accused Instrumentalities. (*Id.* at 7.)

21   The Court agrees that *Facedouble* is not exactly on point because Interrogatory No.

22   7 is not seeking an explanation how ESET's products work or operate, but rather a table

23   mapping subdirectories to particular products. 2014 WL 585868, *2 ("interrogatory asks

24   Defendant to describe, in narrative form, the steps by which the accused technology

25   provides facial recognition"); *see also Audatex N. Am. Inc. v. Mitchell Int'l, Inc.*, No.

26   13CV1523 BEN (BLM), 2014 WL 4961437, at *6 (interrogatory requested identification

27   "of documents, including relevant source code excerpts, that describe the operation of

28   certain identified features and functionalities of the accused products.") However, as

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