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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 FINJAN, INC.,
14 Plaintiff,
15 v.
16 ESET, LLC, et al.,
17 Defendants.
18

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

**MOTION FOR LEAVE TO FILE
DOCUMENTS UNDER SEAL
RELATING TO FINJAN, INC.'S
UPCOMING MOTIONS *IN LIMINE***

Judge: Hon. Cathy Ann Bencivengo

19 AND RELATED COUNTERCLAIMS.
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1 Defendants and Counter-Plaintiffs ESET, LLC and ESET spol. s.r.o. (collectively
2 referred to as “ESET”), through their undersigned counsel, hereby request pursuant to
3 Civil Local Rule 79.2, Patent Local Rule 2.2, this Court’s Chambers Rule V, and the
4 Modified Protective Order (D.I. 146-4), that certain documents containing ESET
5 confidential technical and financial information, and any portion of Finjan, Inc.’s
6 (“Finjan”) forthcoming motions *in limine* citing or discussing these specific documents,
7 be filed under seal.

8 On January 28, 2020, pursuant to this Court’s Chambers Rule V(2), Finjan
9 identified certain documents containing ESET’s confidential information that Finjan may
10 rely on for Finjan’s forthcoming motions *in limine* to be filed on February 7, 2020. ESET
11 understands that, pursuant to this Court’s Chambers Rule V(2), Finjan will provide this
12 Court with a courtesy copy of this motion to seal as well as hard copies of the below
13 documents within 24 hours of the filing of this motion to seal.

14 **A. THERE IS A COMPELLING NEED TO SEAL CONFIDENTIAL**
15 **ESET TECHNIAL INFORMATION.**

16 This case involves ESET’s malware detection software. If the confidential details
17 of ESET software’s structure, design, and operation were to become public, and thus
18 known to hackers, such information could be used as a roadmap to defeat ESET’s
19 software. ESET carefully compartmentalizes responsibility and handling of its software,
20 even within company headquarters, to minimize the impact of any potential security
21 breach, thereby minimizing the risk that ESET’s software could be compromised, and to
22 protect its millions of customers. Disclosure of such information would put ESET’s
23 entire business at risk. Thus, there is a compelling need to seal ESET’s source code and
24 technical documents describing the structure, design, and operation of its software, as
25 well as other technical documents that discuss such source code or design decisions. This
26 is why, *inter alia*, “courts have found that source code presents a ‘self-evident’ risk of
27 harm from disclosure.” *Univ. of Va. Patent Found. v. Gen Elec. Co.*, No. 3:14cv51, 2015
28 U.S. Dist. LEXIS 157137, at *8 (W.D. Va. Nov. 20, 2015). *See also Telebuyer, LLC v.*

1 *Amazon.com, Inc.*, No. 13cv1677, 2014 U.S. Dist. LEXIS 147049, at *7-8 (W.D. Wash.
2 July 7, 2014). Additionally, this Court previously granted a motion to seal the below
3 documents as part of the parties' summary judgment and *Daubert* briefing in this case.
4 *See* D.I. 462, 465.

5 For at least the above reasons, ESET respectfully requests that the following
6 documents, as well as any portion of Finjan's upcoming motions *in limine* that cite or
7 discuss such documents, be filed under seal:

- 8 • February 15, 2019 Expert Report of Dr. Eugene Spafford Regarding Non-
9 Infringement (discusses at length ESET's source code and other documents
10 describing highly confidential details of the structure and operation of
11 ESET's accused products);
- 12 • November 30, 2018 Expert Report of Dr. Eugene Spafford Regarding
13 Invalidity (discusses at length ESET's source code describing highly
14 confidential details the structure and operation of ESET's accused products);
15 and
- 16 • Transcripts of the March 13 and 15, 2019 Depositions of Eugene Spafford
17 (discusses at length ESET's source code and other documents describing
18 highly confidential details of the structure and operation of ESET's accused
19 products).

20 Finjan has also indicated that because Finjan has not finalized its upcoming
21 motions, it may be the case that Finjan will rely on different or additional technical
22 documents than those identified above. However, any such documents would be of
23 similar technical detail and should thus be treated in the same manner. For the foregoing
24 reasons, ESET respectfully requests that the Court grant its motion and issue an order
25 permitting Finjan to file the above referenced documents, and any other documents that
26 contain similar technical detail, under seal.

1 **B. THERE IS A COMPELLING NEED TO SEAL CONFIDENTIAL**
2 **ESET FINANCIAL INFORMATION.**

3 ESET keeps its financial information—including its sales, revenues, costs, and
4 expenditures for specific products—confidential. ESET is a private company that does
5 not publicly disclose such financial information. Additionally, ESET does not publicly
6 disclose information that would allow third-parties to approximate such financial
7 information. Public disclosure of such financial information would permit competitors to
8 access ESET’s confidential financial information and thereby enable them to determine,
9 for example, product-specific sales information, as well as profits and profit margin
10 information, that is highly confidential and can be used by competitors to disadvantage
11 ESET, by, for example, undercutting ESET’s pricing and sales efforts. *See Apple Inc. v.*
12 *Samsung Elecs. Co.*, 727 F.3d 1214, 1223 (Fed. Cir. 2013) (district court abused its
13 discretion in ordering detailed financial information unsealed). Compelling reasons exist
14 to file such documents under seal, and courts regularly grant motions to seal confidential
15 financial information such as the information ESET intends to file under seal here. *See*
16 *Obesity Research Institute, LLC v. Fiber Research Int’l, LLC*, No. 15-cv-595-BAS-MDD,
17 2017 WL 50001287, at *6 (S.D. Cal. Nov. 2, 2017) (granting motion to seal confidential
18 financial information, including sales figures); *San Diego Comic Convention v. Dan Farr*
19 *Prods.*, No. 14-cv-1865 AJB (JMA), 2017 U.S. Dist. LEXIS 177985, at *3 (S.D. Cal.
20 Oct. 25, 2017) (“compelling reasons exist to seal the documents as they contain private
21 financial records of both parties”). Additionally, this Court previously granted a motion
22 to seal the below documents as part of the parties’ summary judgment and *Daubert*
23 briefing in this case. *See* D.I. 462, 465.

24 For at least the above reasons, ESET respectfully requests that the following
25 documents, as well as any portion of Finjan’s upcoming motions *in limine* that cite or
26 discuss such documents, be filed under seal:

- 27 • February 15, 2019 Expert Report of Thomas W. Britven (discusses ESET’s
28 confidential product-specific financial information, profitability information,

1 and licensing strategies throughout the document); and

- 2 • Transcript of the March 13, 2019 Deposition of Thomas W. Britven
3 (discusses at length ESET’s confidential product-specific financial
4 information, profitability information, and licensing strategies).

5 Finjan has also indicated that because Finjan has not finalized its upcoming
6 motions, it may be the case that Finjan will rely on different or additional financial
7 documents than those identified above. However, any such documents would be of
8 similar financial detail and should thus be treated in the same manner. For the foregoing
9 reasons, ESET respectfully requests that the Court grant its motion and issue an order
10 permitting Finjan to file the above referenced documents, and any other documents that
11 contain similar financial detail, under seal.

12 ESET separately and concurrently submits a proposed order to the Court in
13 accordance with Civ. L.R. 79.2 and Section 2(h) of the Electronic Case Filing and
14 Administrative Policies and Procedures Manual.

15 Dated: February 3, 2020

Respectfully submitted,

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/s/ Justin E. Gray

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