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 14 FINJAN, INC.

15 **IN THE UNITED STATES DISTRICT COURT**
 16 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**
 17 **SAN DIEGO DIVISION**

18 FINJAN, INC., a Delaware Corporation,

19 Plaintiff,

20 v.

21 ESET, LLC, a California Limited
 22 Liability Corporation, and ESET SPOL.
 23 S.R.O., a Slovak Republic Corporation,

24 Defendants.

25 ESET, LLC, a California Limited
 26 Liability Corporation, and ESET SPOL.
 27 S.R.O., a Slovak Republic Corporation,

28 Counterclaim-Plaintiffs,

29 v.

30 FINJAN, INC., a Delaware Corporation,

Counterclaim-Defendant.

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

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 PLAINTIFF FINJAN, INC.’S
 OPPOSITION TO DEFENDANT’S
 RENEWED MOTION FOR
 SUMMARY JUDGMENT OF
 INVALIDITY BASED ON
 INDEFINITENESS OF THE TERM
 “DOWNLOADABLE”**

Judge: Hon. Cathy Ann Bencivengo

PER CHAMBERS RULES, NO ORAL
 ARGUMENT UNLESS ORDERED BY
 THE COURT

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I. INTRODUCTION

Defendants' Eset, LLC and Eset SPOL. S.R.O. (collectively "Defendants" or "Eset") Renewed Motion for Summary Judgment of Invalidity Based on Indefiniteness of the Term "Downloadable" ("Eset's Motion") should be denied because Eset cannot establish by clear and convincing evidence the term cannot be applied with a reasonable level of certainty.

First, the evidence shows that both Finjan and Eset, and their respective experts are able to understand and apply the phrase "Downloadable," including where the term was construed to include the word "small" with at least a "reasonable certainty," which is all that is required under the law. Finjan's expert Dr. Cole testified during March 2020 mistrial in a manner confirming the definiteness of this term, explaining that a small executable is one that does not require installation. Eset's own expert Dr. Spafford never opined that Downloadable is indefinite, and instead applied the term for his analysis. As such, Eset does not have any expert testimony supporting its position that the term cannot be applied as construed. Eset also undercuts its position in its invalidity contentions, where Eset applied the term as construed and includes no claim that Downloadable is indefinite.

Second, Downloadable should not be found to be indefinite because claims should be construed to preserve their validity when amenable to more than one construction. *Ruckus Wireless, Inc. v. Innovative Wireless Solutions, LLC*, 824 F.3d 999, 1004 (Fed. Cir. 2016) (a claim should be construed to preserve its validity). As multiple other Courts have construed the term "Downloadable" without including the term "small," this shows that the term is amenable to interpretations without the inclusion of this term. Therefore, if inclusion of "small" raises an indefiniteness issue, it should be construed in a manner consistent with these other courts' constructions.

Third, at a minimum, the Court should not rule on this Motion without a complete trial record, which it indicated it stated it wanted to see before reaching a decision. Eset

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