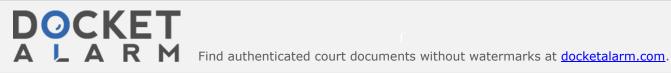


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I. <u>INTRODUCTION</u>

Finjan's Motion for Reconsideration misstates the facts and the law, while inviting the Court to consider irrelevant information from other cases and against other defendants, none of which resulted in appellate review of the contested construction. Equally important, Finjan identifies no "new or different facts and circumstances … which did not exist, or were not shown, upon such prior application." Instead, all of the information Finjan now cites in support of its construction was available to Finjan at the time of the initial briefing and *Markman* hearing.

Moreover, Finjan is wrong on the merits. This Court's preliminary construction is not, as Finjan contends, a "new" construction: it closely aligns with ESET's original proposal, which Finjan had ample opportunity to brief and argue at the *Markman* hearing. Finjan's claim that this Court's construction would depart from the "uniformity" of "six other decisions" is specious: other courts have construed the disputed term in multiple ways, with at least one court expressly rejecting "plain and ordinary" meaning. Thus, even if "uniformity" were required—and Finjan cites no case law in support of that contention—the former cases are themselves inconsistent, and provide no basis for amending this Court's construction. This Court's construction is well supported by the intrinsic record and the claim language. Indeed, many of Finjan's arguments for reconsideration here were flatly rejected by other Courts. Not only does Finjan fail to cite any case law that would support a rule effectively depriving a later litigant from having its arguments considered, but Finjan fails to note that at least one other court expressly endorsed this Court's view of the intrinsic record.

Finjan's motion should be denied as procedurally improper and meritless.

II. FACTUAL BACKGROUND

All of the "evidence" that Finjan relies on in support of its Motion for Reconsideration was well-known to Finjan at the time of the claim construction briefing, although never produced to ESET. As explained below, much of that information from other cases, against other defendants, actually supports ESET's positions and this



Court's construction. Finjan's election to hold that information in "reserve" does not justify a second bite at the apple.

A. All of Finjan's Purported "New" Evidence Is Old.

Finjan's Motion for Reconsideration relies on six decisions of other courts purportedly relating to the construction of the term at issue in this Motion. D.I. 188 ("Motion" or "Mot.") at § III.A, pp. 7-14. All six of those decisions predate the first case management conference in this case, the Joint Claim Construction Chart ("JCCC") filing, and the *Markman* hearing.

During the initial case management conference on March 20, 2017, the Court told Finjan: "any of the claims that are currently being asserted if they have been construed *to any extent*, I would like see those." Declaration of Scott A. Penner in Support of ESET's Opposition to Finjan's Motion for Reconsideration ("Penner Decl.") Ex. 1 at 55:2-5 (emphasis added). In response on April 4, 2017, Finjan lodged nine different decisions with the Court. Those decisions did not include the *Proofpoint* summary judgment decision, the *Sophos* post trial decision, or the *Blue Coat* trial and post-trial decisions, which Finjan now claims are relevant to this Court's claim construction.

On June 12, 2017, the parties filed JCCC pursuant to Patent Local Rule 4.2(b). As part of the JCCC, the parties were required to identify all "extrinsic evidence known to the party on which it intends to rely either to support its proposed construction of the claim or to oppose any party's proposed construction of the claim." Of the six decisions, Finjan only cited the *Symantec* claim construction decision in the JCCC for this term. D.I. 136-2 at 4-6. Finjan also relied on the *Symantec* decision in its opening claim construction brief for this term. D.I. 139 at 9. At the time of the JCCC, Finjan did not identify any of the other five decisions as being relevant to the term that is the subject of the present motion. Finjan did cite the *Proofpoint* claim construction decision and the *Blue Coat* claim construction decision as relevant to a different term in the JCCC. D.I. 136-2 at 2 (for the term Downloadable in the same patent).

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