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ESET, LLC and ESET SPOL. S.R.O.

11 **UNITED STATES DISTRICT COURT**

12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 FINJAN, INC.,

14 Plaintiff,

15 v.

16 ESET, LLC, et al.,

17 Defendants.

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

**ESET, LLC AND ESET SPOL. S.R.O.’S  
OPPOSITION TO PLAINTIFF FINJAN,  
INC.’S MOTION FOR  
RECONSIDERATION OF  
PRELIMINARY CLAIM  
CONSTRUCTION ORDER**

Date: November 24, 2017

Dept: 4C

Judge: Hon. Cathy Ann Bencivengo

20 AND RELATED COUNTERCLAIMS.

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

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1 **I. INTRODUCTION**

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

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

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

24 **II. FACTUAL BACKGROUND**

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

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

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

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

9 During the initial case management conference on March 20, 2017, the Court told  
10 Finjan: "any of the claims that are currently being asserted if they have been construed  
11 *to any extent*, I would like see those." Declaration of Scott A. Penner in Support of  
12 ESET's Opposition to Finjan's Motion for Reconsideration ("Penner Decl.") Ex. 1 at  
13 55:2-5 (emphasis added). In response on April 4, 2017, Finjan lodged nine different  
14 decisions with the Court. Those decisions did not include the *Proofpoint* summary  
15 judgment decision, the *Sophos* summary judgment decision, the *Sophos* post trial  
16 decision, or the *Blue Coat* trial and post-trial decisions, which Finjan now claims are  
17 relevant to this Court's claim construction.

18 On June 12, 2017, the parties filed JCCC pursuant to Patent Local Rule 4.2(b). As  
19 part of the JCCC, the parties were required to identify all "extrinsic evidence known to  
20 the party on which it intends to rely either to support its proposed construction of the  
21 claim or to oppose any party's proposed construction of the claim." Of the six decisions,  
22 Finjan only cited the *Symantec* claim construction decision in the JCCC for this term.  
23 D.I. 136-2 at 4-6. Finjan also relied on the *Symantec* decision in its opening claim  
24 construction brief for this term. D.I. 139 at 9. At the time of the JCCC, Finjan did not  
25 identify any of the other five decisions as being relevant to the term that is the subject of  
26 the present motion. Finjan did cite the *Proofpoint* claim construction decision and the  
27 *Blue Coat* claim construction decision as relevant to a different term in the JCCC. D.I.  
28 136-2 at 2 (for the term Downloadable in the same patent).

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