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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE CATHY ANN BENCIVENGO

FINJAN, INC.,)
)
Plaintiff,) CASE NO. 17CV183-CAB-BGS
)
vs.) SAN DIEGO, CALIFORNIA
)
ESET, LLC and ESET SPOL. S.R.O.,) WEDNESDAY, MARCH 11, 2020
)
Defendants.)

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1 San Diego, California; Wednesday, March 11, 2020; 8:15 a.m.

2 (Case called)

3 (Appearances stated)

4 THE COURT: All right. I got the dispute issue about
5 the demonstratives for Dr. Cole's testimony as well as the
6 exhibits, and fundamentally this comes down to the question
7 that was raised in the motions in limine as to whether or not
8 there's foundation for tests that were done, and I think there
9 is no dispute that these products are post-expiration of the
10 patent.

11 MR. ANDRE: That's correct, Your Honor. But then
12 technology was during the infringement period.

13 THE COURT: And he has an opinion that they are the
14 same as what was earlier?

15 MR. ANDRE: That's correct, Your Honor.

16 THE COURT: And was that in his report anywhere?

17 MR. ANDRE: It was, Your Honor.

18 MR. PENNER: If they can point to us where in the
19 report he provides that because we don't believe it's in the
20 report, and we also don't believe it's accurate.

21 THE COURT: Well, accurate is a different question.

22 MR. PENNER: I understand, Your Honor. But I don't
23 believe that's in his report where he says after the expiration
24 date are the same as those before.

25 MR. ANDRE: Your Honor, the testing is ThreatSense

1 Engine that was put in sometime, I think, 2010.

2 MR. PENNER: The ThreatSense engine changes every day,
3 Your Honor.

4 MR. ANDRE: No.

5 MR. PENNER: Multiple times a day.

6 THE COURT: Shh. He's talking.

7 MR. ANDRE: Thank you, Your Honor. And the cloud
8 malware protection system was put in 2013. We can give you the
9 cites in his report, but he's going to lay a foundation that he
10 ensured by looking at the source code technical documents that
11 functionality that he tested. And it's very superficial, to be
12 candid with you. We're not getting into the weeds with his
13 testing. But he did want to confirm through testing that what
14 he found in the technical documents was still in the product
15 and functioned the way he thought it was. And that's all it
16 is.

17 THE COURT: I understand that these product names have
18 existed over the course of time. I have many iPhones, but I
19 don't think if you test the presence of something in an iPhone
20 10 you could necessarily conclude it was present in an iPhone
21 6, but they're all still iPhones. So if that's their argument,
22 that he's going to need to show that he actually looked at the
23 original products that were available for sale during the
24 relevant time and can say with some certainty that these
25 features were available in these products, I mean, that's the

1 problem.

2 MR. ANDRE: What he does is look at source code for
3 the products and shows where the changes in the source code are
4 and where they changed from what we're looking at, an
5 infringing functionality. He looks at technical
6 specifications. There's nothing to show that the infringing
7 aspect has changed at all. Granted with the iPhone 11, you
8 might get a better camera but they probably didn't change some
9 of the other core components. What we're showing is those core
10 components that were in the iPhone 5 generation are still
11 there. These are core components. These are not user
12 interface. Dr. Cole will discuss that, and he confirmed
13 looking at technical documents that his testing just confirmed
14 what was there previously is still there.

15 THE COURT: I'm going to allow the testimony subject
16 to motion to strike. If he doesn't lay a proper foundation,
17 then you can move to strike it.

18 MR. PENNER: So to be clear, just so I'm
19 understanding, your Honor, and I think your iPhone analogy is
20 probably a pretty good one here. Just because the
21 functionality can still block software doesn't mean it's
22 blocking it the same way underneath. I mean, the modules have
23 changed, and there's going to be testimony that the modules
24 change every four to six hours in some cases. And as you can
25 see from our listing on our brief here, every one of the

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