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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 FINJAN, LLC.,

12 Plaintiff,

13 v.

14 ESET, LLC and ESET SPOL. SR.O.,

15 Defendant.  
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Case No.: 17CV183 CAB (BGS)

**ORDER ISSUING TENTATIVE  
DECISION ON DISPUTE  
REGARDING EXTENSION OF  
EXPERT DISCOVERY AND  
REQUIRING PARTIES TO MEET  
AND CONFER**

[ECF 860]

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20 On March 9, 2021, counsel for the parties jointly contacted Judge Skomal's  
21 Chambers to raise a dispute regarding amendment of the Scheduling Order. ESET seeks  
22 to extend the expert discovery deadlines<sup>1</sup> to allow its expert to review third-party source  
23 code. Finjan is opposed.

24 ESET's counsel explained that its updated invalidity contentions identified these  
25 products, and that the expert needs to review this source code in support of an invalidity  
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28 <sup>1</sup> Expert reports are due March 25, 2021. Rebuttal expert reports are due April 12, 2021.  
Expert discovery closes April 30, 2021. (ECF 852.)

1 defense as to the '305 Patent. The expert has not been able to travel as a result of  
2 COVID-19, but will be able to do so by mid-April. Counsel for ESET represented that  
3 the source code must be reviewed on-site and in coordination with the third party. ESET  
4 argues this is expert discovery because the expert is reviewing the source code and they  
5 are only seeking a brief extension of the deadlines to accommodate the review.

6 Finjan opposes extension of the Scheduling Order. Finjan argues that this request  
7 is actually a request to reopen fact discovery because the review ESET seeks to do is fact  
8 discovery. Finjan's counsel asserted that the third-party source code review, while being  
9 done by an expert, is actually fact discovery that should have been completed by the '305  
10 fact discovery cut off of February 22, 2021. Finjan also argues the extended deadlines  
11 proposed by ESET do not work with Finjan's schedule.

12 Having considered the parties' arguments, the Court tentatively rules that the  
13 Scheduling Order may be amended to allow ESET's expert to review the third-party  
14 source code. The Court is inclined to limit any extension of the remaining deadlines to  
15 30 days, however, if minimal further extension is necessary to accommodate Finjan, the  
16 Court would consider it.

17 Tentatively, as an extension of expert discovery, the expert avoiding travel based  
18 on COVID-19 at this time and based on his particular circumstances would likely  
19 constitute good cause for an extension. And even if the Court assumed this is a request to  
20 reopen fact discovery as Finjan argues, *i.e.* that the expert's review of third-party source  
21 code is fact discovery rather than expert, it would likely be granted for this limited  
22 purpose. Based on the information obtained during the call and the Court's own  
23 knowledge of the record in this case, some factors the Court must weigh in considering  
24 whether to reopen discovery favor allowing it, others may weigh against it, and one is  
25 neutral. "When ruling on a motion to amend a Rule 16 scheduling order to reopen  
26 discovery, [the Ninth Circuit] instructs" courts to consider:

- 27 1) whether trial is imminent, 2) whether the request is opposed, 3)  
28 whether the non-moving party would be prejudiced, 4) whether the  
moving party was diligent in obtaining discovery within the guidelines

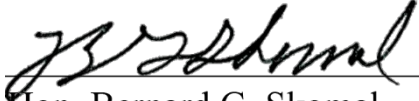
1 established by the court, 5) the foreseeability of the need for additional  
2 discovery in light of the time allowed for discovery by the district court,  
3 and 6) the likelihood that the discovery will lead to relevant evidence.

4 *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1066 (9th Cir. 2017)  
5 (quoting *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1526 (9th  
6 Cir. 1995) *vacated on other grounds*, 520 U.S. 939 (1997)). Whether the request is  
7 opposed obviously weighs against reopening because it is. Additionally, although not  
8 squarely falling within ESET's diligence in obtaining the discovery under the existing  
9 schedule and the foreseeability of the need for it, the Court is concerned that ESET  
10 waited this long to seek this extension. ESET has likely known for some time that its  
11 expert was not able to travel, but it is unclear why ESET waited until now to seek an  
12 extension for him to review this source code that ESET was aware of no later than  
13 December 2020. However, the Court finds the lack of prejudice to Finjan, presuming any  
14 extension accommodates Finjan, and the likelihood the discovery will lead to relevant  
15 evidence both weigh in favor of allowing it. Additionally, although the imminence of  
16 trial is largely neutral, the brevity of the extension requested and its lack of impact on  
17 existing deadlines also weighs in favor of allowing the discovery.

18 Regardless of whether the parties accept or reject the tentative, they must meet and  
19 confer regarding a possible schedule that would accommodate the review and both parties  
20 by **March 18, 2020**. If either party rejects the Court's tentative, they must also notify the  
21 Court by email to [efile\\_skomal@casd.uscourts.gov](mailto:efile_skomal@casd.uscourts.gov) by **March 18, 2021** and the Court  
22 will either issue a briefing schedule or set a Discovery Conference.

23 **IT IS SO ORDERED.**

24 Dated: March 16, 2021

25   
26 Hon. Bernard G. Skomal  
27 United States Magistrate Judge  
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