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8 FORTINET, INC.

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 FORTINET, INC., a Delaware corporation,	)	CASE NO.: CV 08-05371 MMC
	)	
13 Plaintiff,	)	<b>FIRST AMENDED COMPLAINT</b>
	)	<b>FOR DECLARATORY JUDGMENT</b>
14 v.	)	<b>OF NO CONTRACTUAL</b>
	)	<b>OBLIGATION TO PAY</b>
15 TREND MICRO INCORPORATED, a	)	<b>ROYALTIES IN VIEW OF PATENT</b>
16 California corporation,	)	<b>INVALIDITY AND/OR</b>
	)	<b>UNENFORCEABILITY, WALKER</b>
17 Defendant.	)	<b>PROCESS FRAUD, AND UNFAIR</b>
	)	<b>COMPETITION</b>
	)	
	)	
	)	<b>DEMAND FOR JURY TRIAL</b>
	)	

20  
21 Fortinet, Inc. ("Fortinet") hereby alleges for its First Amended Complaint against  
22 Defendant Trend Micro Incorporated ("Trend Micro"), on personal knowledge as to its own  
23 activities and on information and belief as to the activities of others, as follows:

24 **THE PARTIES**

25 1. Plaintiff Fortinet is a Delaware corporation with its principal place of business in  
26 Sunnyvale, California. Fortinet was founded in 2000 and offers an array of multi-threat network  
27 security solutions that help businesses of all sizes meet their security challenges and enable a  
28 safe and clean communication environment, including antivirus systems.

1           2.       Trend Micro is a California corporation having its principal place of business in  
2 the United States in Cupertino, California. Trend Micro is in the business of designing,  
3 developing, manufacturing, and selling network security appliances, including antivirus systems.

#### 4                               **JURISDICTION AND VENUE**

5           3.       This Court has subject matter jurisdiction over the First and Second Causes of  
6 Action asserted here pursuant to 28 U.S.C. §§ 1331 and 1338(a), because those claims arise  
7 under the patent laws of the United States, 35 U.S.C. §§ 101, *et seq.*, and under the Federal  
8 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

9           4.       This Court has subject matter jurisdiction over the Third Cause of Action asserted  
10 here pursuant to 28 U.S.C. §§ 1331 and 1337, because this claim arises under Section 2 of the  
11 Sherman Act, 15 U.S.C. § 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15(a).

12           5.       This Court has supplemental subject matter jurisdiction over the Fourth Cause of  
13 Action asserted here pursuant to 28 U.S.C. § 1367, because this claim is so related to claims in  
14 the action within the Court's original jurisdiction that it forms a part of the same case or  
15 controversy.

16           6.       Personal jurisdiction and venue are proper in this Court pursuant to 28 U.S.C. §§  
17 1391(b)-(c) and/or 1400(b) because, *inter alia*, a substantial part of the events giving rise to the  
18 claims occurred here, and both Fortinet and Trend Micro reside in this judicial district.

#### 19                               **INTRADISTRICT ASSIGNMENT**

20           7.       Pursuant to Civil Local Rule 3-2(c), this is an Intellectual Property Action to be  
21 assigned on a district-wide basis.

#### 22                               **FACTUAL ALLEGATIONS**

##### 23                   **The '600 patent**

24           8.       Trend Micro is listed as the assignee on United States Patent No. 5,623,600 ("the  
25 '600 patent") entitled "Virus Detection and Removal Apparatus for Computer Networks." A  
26 true and correct copy of the '600 patent is attached as Exhibit A.

27           9.       Trend Micro knows now, and should have known for over a decade, that the '600  
28 patent is invalid and unenforceable. Prior to applying for the '600 patent, Eva Chen, Trend

1 Micro's CEO and one of two named inventors on the '600 patent, worked on the Intel LANDesk  
 2 and Intel LANProtect products, which disclosed the subject matter of the claims of the '600  
 3 patent.<sup>1</sup> Ms. Chen's work at Intel Corporation ("Intel") predated the filing of the application  
 4 which resulted in the '600 patent by more than one year. Ms. Chen failed to disclose her work  
 5 on the Intel products to the patent examiner during the prosecution of the '600 patent. Moreover,  
 6 the patent's file history confirms that nothing regarding the Intel products was disclosed to the  
 7 patent examiner.

8 10. The prior art Intel products were more relevant to the patentability of the subject  
 9 matter of the '600 patent than any art before the examiner in the patent file history. For example,  
 10 none of the references cited on the face of the '600 patent disclose the step of claim 4 of the '600  
 11 patent requiring "determining whether the data is of a type that is likely to contain a virus," but  
 12 the Intel LANProtect and LANDesk products performed this step.<sup>2</sup> Ms. Chen's omission was  
 13 highly material to the decision of the United States Patent and Trademark Office to issue the  
 14 '600 patent, and, but for the omission, the patent examiner would have rejected the application  
 15 which matured into the '600 patent, and the '600 patent would not have issued.

16 11. In addition, according to Ms. Chen, the '600 patent was merely a combination of  
 17 two previously known concepts. Specifically, Ms. Chen recently admitted:

18 In the patent, we are not claiming that we invented the antivirus scanner. We are  
 19 not claiming that we invented the proxy server. But the concept of using these two  
 20 together so that you can stop the virus during the transition is new.

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21  
 22 <sup>1</sup> In *Trend Micro: History of the Global #1 Internet Security Company*, Eva Chen's  
 23 sister-in-law, Jenny Chang, writes "One Saturday afternoon, Eva came to Los Angeles with Bell  
 24 Hsieh, Charlie Lee, and Cliff to discuss the LanProtect project with us. We stayed at home for  
 25 what seemed like an endless meeting. Cliff seemed to be taking forever to write the LanProtect  
 26 program. Kuang-hsiung's PC-cillin often mistook the TSR tool program for a virus. Wei-chung  
 could not finish the research for viruses because there were so many to catch. Eva was busy  
 coordinating their jobs. Everyone was in a bad mood." Jenny Chang & Steve Chang, *Trend*  
*Micro: History of the Global #1 Internet Security Company* 118 (Trend Micro 2002).

27 <sup>2</sup> For example, publicly available Intel documents from 1992 explain that extension  
 28 names to be scanned can be selected from an extension list, including, for example, BIN, COM,  
 and EXE.

1 Robert McMillan, *Trend Micro: Barracuda Suit Not About Open Source*, PC World, PCW  
2 Business Center, June 13, 2008. The PC World article quoting Ms. Chen is attached hereto as  
3 Exhibit B.

4 12. As Ms. Chen admits, the '600 patent claims nothing more than the combination of  
5 a prior art antivirus scanner and a prior art gateway. Further, the combination itself was driven  
6 by market forces, such as the rise of the Internet, and therefore widely suggested in the prior art.

7 13. For example, William R. Cheswick & Steven M. Bellovin, *Firewalls and Internet*  
8 *Security: Repelling the Wily Hacker* (Addison Wesley 1994) ("Cheswick"), an authoritative book  
9 on firewalls and gateways explains on page 75-76 that "a location with many PC users might  
10 wish to scan incoming files for viruses" at the "application-level gateway." Relevant excerpts  
11 from Cheswick are attached hereto as Exhibit C.

12 14. By way of further example, Robin Layland, *A Gateway to Internet Health and*  
13 *Happiness*, Data Communications, September 21, 1994 ("Layland") describes the features and  
14 desirability of an "Internet gateway" that would intercept and process data, including email  
15 messages, going between a corporate network and the Internet. With regard to the threat of virus  
16 attacks, Layland explains:

17 The Internet gateway would subject all incoming files to a virus scan, with any  
18 suspect file immediately discarded. The gateway would also keep a log detailing  
any incidence of corrupted files and the sources of those files.

19 Layland also recognized that pieces of the described "Internet gateway" already existed at the  
20 time and expressed confidence that they would be combined into a commercial product. The  
21 Layland article is attached hereto as Exhibit D.

22 15. There are numerous prior art gateway products including, for example, the  
23 Norman Firewall (which was found to invalidate claims 1 and 3 of the '600 patent), Intel's  
24 LANProtect and LANDesk (upon which Ms. Chen worked), and the TIS Firewall.

25 16. Further, there are numerous prior art virus scanners including, for example,  
26 McAfee's VirusScan, IBM's VIRSCAN, and Dr Solomon's virus scanner.

27 17. One example of a prior art gateway that scanned email messages for viruses is the  
28 TFS Gateway. The TFS Gateway was able to invoke a commercially available antivirus scanner

1 to scan emails for viruses at the Internet gateway. The TFS Gateway was sold in the United  
2 States according to a press release by the developer of the TFS Gateway, TenFour Systems, and  
3 its partner MCI. The press release announcing the joint marketing program between TenFour  
4 and MCI is attached as Exhibit E. A user guide for the TFS Gateway is attached hereto as  
5 Exhibit F. The user guide discusses virus scanning at page 73.

6 18. Despite the compelling evidence of unenforceability and invalidity, since the '600  
7 patent issued on April 22, 1997, Trend Micro has engaged in a pattern of asserting the patent in  
8 litigation against its competitors in the antivirus ("AV") systems market. That pattern continues  
9 today.

10 **Trend Micro's History of Anticompetitive Litigation**

11 19. On May 13, 1997, Trend Micro sued McAfee, Inc. (previously known as Network  
12 Associate, Inc. ("NAI")) and Symantec Corporation ("Symantec") in the United States District  
13 Court for the Northern District of California, Case No. 97-CV-20438-RMW, alleging  
14 infringement of the '600 patent. Symantec was dismissed from the case on April 29, 1998, after  
15 entering into a license agreement with Trend Micro. NAI was dismissed on July 13, 2000, after  
16 entering into a license agreement with Trend Micro. The merits of the case were never  
17 adjudicated.

18 20. On June 13, 1997, Integralis, Inc. ("Integralis") filed a complaint for declaratory  
19 judgment and unfair competition against Trend Micro in the United States District Court for the  
20 Western District of Washington, Case No. 97-CV-00991-BJR. On July 7, 1997, Trend Micro  
21 filed an answer and counterclaim alleging, among other things, infringement of the '600 patent.  
22 The case was dismissed on February 12, 1998, pursuant to a settlement and patent license  
23 agreement. The merits of the case were never adjudicated.

24 21. By July 8, 1997, industry commentators had already begun to note Trend Micro's  
25 anticompetitive conduct. For example, CNET News published an article entitled "Trend Micro  
26 wages patent war." That article noted that "Trend Micro is on the war path again, alleging that  
27 yet another competitor is violating its antivirus software patent." It says that Integralis charged  
28 Trend Micro with "unfair business practices because it alleges that Trend Micro approached

1 Integralis's business partners and suggested that they might be infringing on Trend Micro's  
2 patent just by using the competitors products." Integralis's president said that his "company's  
3 antivirus product MimeSweeper was shipping in Europe before Trend Micro even applied for the  
4 patent." The author further writes that "[t]his is not Trend Micro's first patent action. In May,  
5 the company sued its two largest competitors, antivirus leaders McAfee (MCAF) and Symantec  
6 (SYMC), for alleged patent infringement of its computer virus detection techniques." One  
7 Symantec employee noted that "Trend Micro's patent is so broad that it is invalid." She  
8 continued, "it is like having patent on driving a car." Lastly, the article quotes Trend Micro's  
9 then-general counsel Bob Lowe saying Trend Micro is "not just in it for the royalty." Rather,  
10 he said, "[o]ur main goal is having the products be prevented from being sold." The CNET  
11 article is attached hereto as Exhibit G.

12 22. On January 23, 1998, Sybari, Inc. ("Sybari") filed a complaint in the United  
13 States District Court for the Eastern District of New York against Trend Micro, Case No. 98-CV-  
14 00436-JM. The case was dismissed on October 7, 1998, pursuant to a settlement and patent  
15 license agreement. The merits of the case were never adjudicated.

16 23. On March 29, 2007, Barracuda Networks, Inc. ("Barracuda") filed a complaint for  
17 declaratory judgment against Trend Micro for noninfringement and invalidity of the '600 patent  
18 in the United States District Court for the Northern District of California, Case No. 07-CV-  
19 01806-MHP (the "Barracuda District Court Action"). On November 21, 2007, Trend Micro filed  
20 a complaint in the ITC alleging infringement by Barracuda of the '600 patent. On December 31,  
21 2007, the ITC instituted *In re Certain Systems for Detecting and Removing Viruses or Worms,*  
22 *Components Thereof, and Products Containing Same*, Inv. No. 337-TA-624 ("the 624  
23 Investigation"). Collectively, the Barracuda District Court Action and the 624 Investigation are  
24 called the "Barracuda litigation." The Barracuda District Court Action was dismissed on  
25 October 17, 2008. The parties filed a joint motion to terminate the 624 Investigation on October  
26 15, 2008. The public version of the motion to terminate the 624 Investigation says that the  
27 motion is made "in light of a cross-license between the parties." The merits of the cases were  
28 never adjudicated.

24. According to a January 30, 2008, article in Information Week, during the Barracuda litigation, Trend Micro expanded its anticompetitive activity to threaten the open source community and the open source ClamAV software. Barracuda's CEO was quoted saying "Trend Micro appears to be seeking an interpretation of its '600 patent such that it would have exclusive control of gateway antivirus scanning. Scanning for viruses at the gateway is an obvious and common technique that is utilized by most businesses worldwide. So this interpretation would mean that anyone, including the owners of the more than one million active ClamAV installations, could potentially be sued by Trend Micro." The Information Week article entitled *Barracuda Networks Enlists Open Source Community In Trend Micro Patent Fight* is attached hereto as Exhibit H.

25. According to an article by LinuxWorld, Barracuda turned to the open source community for assistance locating prior art to the '600 patent. This article can be viewed at <http://www.linuxworld.com/news/2008/012908-barracuda.html>. As a result of this appeal, highly relevant prior art, including the TFS Gateway, was uncovered by Barracuda.

26. According to a June 23, 2008 article on Linux.com, Goran Fransson, the technology lead at TenFour Sweden, the company that developed the TFS Gateway, said that "[a]fter hearing from Barracuda's legal representatives, [he] started searching his basement for old records." He continues that he "found the source code for the product from January '95, an original manual, and even the packaging box and diskettes." He says he "was able to install the product, and it actually still worked." Further, he was "able to enable virus scanning and all the things that Patent '600 is claiming that Trend Micro was doing first." In addition, according to Linux.com, Fransson explained that 380 American companies were using the TFS Gateway before 26 September 1995, the date on which Trend Micro applied for its patent. The Linux.com article discussing Mr. Fransson and the TFS Gateway is attached hereto as Exhibit I.

#### **History of Litigation between Trend Micro and Fortinet**

27. On May 5, 2004, Trend Micro sued Fortinet in the United States District Court for the Northern District of California ("Prior Fortinet Northern District Action"), Case No. 04-CV-01785-RMW, alleging infringement of the '600 patent. Trend Micro also filed a complaint with



1 the United States International Trade Commission (“ITC”) against Fortinet alleging infringement  
2 of the ‘600 patent. On June 8, 2004, based upon Trend Micro’s complaint, the ITC instituted an  
3 investigation entitled *In the Matter of Certain Systems for Detecting and Removing Viruses or*  
4 *Worms, Components Thereof and Products Containing Same*, Inv. No. 337-TA-510 (“the 510  
5 Investigation”). The Prior Fortinet Northern District Action was stayed during the 510  
6 Investigation. The Prior Fortinet Northern District Action and the 510 Investigation are  
7 collectively referred to as the “Prior Fortinet litigation.”

8         28. On information and belief, despite the fact that Trend Micro has known about the  
9 TFS Gateway since at least September 1997, Trend Micro did not disclose the TFS Gateway  
10 during discovery in the 510 Investigation. Specifically, an article entitled “Tenfour Announces  
11 TFS Gateway Release 3—The Next Generation of E-mail Gateways” dated June 12, 1997, was  
12 cited on the face of Trend Micro’s United States Patent No. 5,889,943, a continuation-in-part of  
13 the application that became the ‘600 patent. Fortinet submitted multiple discovery requests that  
14 should have elicited disclosure of the TFS Gateway, but, on information and belief, it was not  
15 disclosed. Accordingly, it was not adjudicated by the Administrative Law Judge (“ALJ”) in the  
16 510 Investigation.

17         29. In the 510 Investigation, the ITC found claims 1 and 3 of the ‘600 patent invalid  
18 in view of the Norman Firewall prior art reference. The ITC found the remaining claims valid  
19 and infringed and issued a limited exclusion order on August 9, 2005. On October 14, 2005,  
20 Trend Micro commenced an enforcement proceeding against Fortinet alleging violation of the  
21 exclusion order by virtue of Fortinet’s continued sale of products, including products newly  
22 redesigned to avoid practicing the ‘600 patent following the guidance of the ITC opinion.

23         30. In addition to redesigning its products per the direction of the ITC opinion, during  
24 the enforcement proceedings, Fortinet also obtained a sublicense to the ‘600 patent from  
25 Clearswift Ltd. (the “Clearswift OEM Agreement”), successor in interest to Integralis, a former  
26 Trend Micro litigation target and licensee of the ‘600 patent. Fortinet’s good faith redesign  
27 and/or Fortinet’s sublicense to the ‘600 patent should have concluded the Prior Fortinet  
28 litigation, but Trend Micro repeatedly and belligerently insisted that no possible redesign could



1 avoid the coverage of the '600 patent, and that the OEM Agreement was invalid as a sublicense,  
2 and therefore Fortinet needed a license to the '600 patent directly from Trend Micro.

3 31. Trend Micro continued to pursue Fortinet, and threatened to pursue Clearswift  
4 independently, asserting in correspondence to Clearswift that it did not have a valid license.  
5 Trend Micro attempted to terminate its license with Clearswift and claimed that Clearswift was  
6 in material breach. Trend Micro complained in correspondence attached hereto as Exhibit J that  
7 "based on recent discussions between Trend Micro and Fortinet, Inc., Trend Micro believes that  
8 Clearswift may also be in breach of the agreement for ... violating its obligations to provide  
9 assistance to Trend Micro against infringers of the '600 patent."

10 32. Succumbing to pressure from Trend Micro and facing a hearing in the  
11 enforcement proceeding, Fortinet entered into a Settlement and Patent License Agreement  
12 ("License Agreement") with Trend Micro on January 27, 2006. The License Agreement  
13 included a license to the '600 patent directly from Trend Micro to Fortinet.

14 33. There was no determination on the merits in the Prior Fortinet District Court  
15 Action. Fortinet has never made any admission regarding the validity or infringement of the  
16 patents at issue in this declaratory relief action. And there is no contractual obligation barring  
17 Fortinet from challenging the validity of the patents at issue in this declaratory relief action.  
18 Further, there is no contractual obligation barring Fortinet's claims for affirmative relief resulting  
19 from Trend Micro's on-going pattern of misconduct. Finally, there is no contractual obligation  
20 barring Fortinet from seeking a declaration that it has no contractual obligation to pay royalties  
21 to Trend Micro.

22 34. On information and belief, upon entering into the License Agreement with  
23 Fortinet (and securing 100% of the royalty for itself), Trend Micro ceased to threaten Clearswift  
24 and has been receiving and depositing royalty payments from Clearswift ever since.

25 35. Fortinet incurred significant expenses in defending against Trend Micro's  
26 infringement lawsuit. On information and belief, the other competitors against whom Trend  
27 Micro asserted the '600 patent in litigation also incurred significant expenses in defending  
28 against those claims.

1           36. Fortinet has paid royalties pursuant to the License Agreement. Fortinet continues  
2 to pay royalties under protest and with reservation of rights. The payments have and will  
3 continue to raise Fortinet's costs for producing AV systems.

4           37. On information and belief, a real and substantive dispute exists between Fortinet  
5 and Trend Micro regarding whether the '600 patent and U.S. Patent No. 5,889,943 ("the '943  
6 patent") (collectively, the '600 patent and the '943 patent are the "Licensed Patents" or the  
7 "patents at issue") are invalid and unenforceable and, therefore, whether Fortinet has no  
8 obligation to pay royalties pursuant to the License Agreement.

9           38. Fortinet approached Trend Micro regarding its belief that it should have no on-  
10 going royalty obligation under the License Agreement because the Licensed Patents are invalid  
11 and/or unenforceable. In response, Trend Micro repeatedly and consistently maintained that  
12 Fortinet must continue making royalty payments.

13           39. On December 5, 2008, Trend Micro sent Fortinet a letter providing "formal notice  
14 that Fortinet is in material breach of the Settlement Agreement," for, among other things, failing  
15 to pay its quarterly royalties. That letter is attached hereto as Exhibit L. Trend Micro's notice of  
16 breach confirms that Trend Micro believes it is entitled to on-going royalty payments from  
17 Fortinet and that the parties have definite and concrete adverse legal interests.

18           40. Fortinet is informed and believes that absent its making quarterly royalty  
19 payments, Trend Micro would bring suit against it seeking treble damages for infringement and  
20 injunctive relief. As such, Fortinet has continued to pay royalties under protest, and with  
21 reservation of rights, pending resolution of the current dispute.

22           41. In addition to Trend Micro's direct and current threats to Fortinet, Trend Micro's  
23 long history of aggressively litigating to pursue royalties under the '600 patent against Fortinet  
24 and others contributes to Fortinet's belief that there exists a real and substantial controversy  
25 between the parties requiring a judicial determination.

26           42. Despite Fortinet's efforts, Trend Micro has made no good faith effort to resolve  
27 this dispute with Fortinet, and, thus, Fortinet requires specific relief from the Court in the form of  
28

1 a declaration that because the Licensed Patents are invalid and/or unenforceable, Fortinet has no  
2 contractual obligation to continue to pay royalties pursuant to the License Agreement.

3 43. In sum, Fortinet believes that Trend Micro continues to assert that the '600 patent  
4 is valid and enforceable and that Fortinet has an on-going obligation to make royalty payments.  
5 In contrast, Fortinet believes that the Licensed Patents are invalid and/or unenforceable and, as  
6 such, Fortinet has no contractual obligation to make royalty payments. The Declaration of John  
7 L. Whittle Regarding Actual Controversy ("Whittle Declaration") is attached hereto as Exhibit  
8 M. The Whittle Declaration describes the circumstances that give rise to definite and concrete  
9 adverse legal interests between Fortinet and Trend Micro.

10 44. On information and belief, the other competitors whom have entered into licenses  
11 to the '600 patent with Trend Micro and made payments under those licenses have also had their  
12 costs raised for producing AV systems.

13 45. On information and belief, the '943 patent entitled "Apparatus and Method for  
14 Electronic Mail Virus Detection and Elimination" is a continuation-in-part of the application that  
15 eventually became the '600 patent. Trend Micro is listed as the assignee of the '943 patent. For  
16 at least the reasons that the '600 patent is invalid and/or unenforceable, the '943 patent is also  
17 invalid and/or unenforceable. A true and correct copy of the '943 patent is attached as Exhibit  
18 K.

### 19 **FIRST CAUSE OF ACTION**

20 (Declaratory Judgment of No Contractual Obligation to Pay Royalties in View of Invalidity  
21 and/or Unenforceability of U.S. Patent No. 5,623,600)

22 46. Fortinet repeats and realleges each and every allegation set forth in Paragraphs 1  
23 through 45 inclusive, and incorporates them by reference herein.

24 47. Fortinet contends that the '600 patent is invalid because it fails to satisfy the  
25 conditions and requirements for patentability as set forth, *inter alia*, in Sections 101, 102, 103,  
26 and/or 112 of Title 35 of the United States Code.

48. Fortinet also contends that the ‘600 patent is unenforceable as a result of applicant’s intentional failure to make the United States Patent and Trademark Office aware of certain highly material prior art and information.

49. Fortinet is informed and believes, and on that basis avers, that Trend Micro contends that the ‘600 patent is valid and enforceable and contends that Fortinet has an on-going obligation to pay royalties under the License Agreement.

50. Accordingly, a valid and justiciable controversy has arisen and exists between Fortinet and Trend Micro. Fortinet desires a judicial determination and declaration of the parties' respective rights of the duties. Such a determination and a declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties, including whether Fortinet has no contractual obligation to pay royalties under the License Agreement because the '600 patent is invalid and/or unenforceable.

## **SECOND CAUSE OF ACTION**

(Declaratory Judgment of No Contractual Obligation to Pay Royalties in View of Invalidity  
and/or Unenforceability of U.S. Patent No. 5,889,943)

51. Fortinet repeats and realleges each and every allegation set forth in Paragraphs 1 through 50 inclusive, and incorporates them by reference herein.

52. Fortinet contends that the ‘943 patent is invalid because it fails to satisfy the conditions and requirements for patentability as set forth, *inter alia*, in Sections 101, 102, 103, and/or 112 of Title 35 of the United States Code.

53. Fortinet also contends that the ‘943 patent is unenforceable as a result of applicant’s failure to make the United States Patent and Trademark Office aware of certain highly material prior art and information during the prosecution of the ‘600 patent, of which the ‘943 is a continuation-in-part.

54. Fortinet is informed and believes, and on that basis avers, that Trend Micro contends that the ‘943 patent is valid and enforceable and contends that Fortinet has an on-going obligation to pay royalties under the License Agreement.

55. Accordingly, a valid and justiciable controversy has arisen and exists between Fortinet and Trend Micro. Fortinet desires a judicial determination and declaration of the parties' respective rights of the duties. Such a determination and a declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties, including whether Fortinet has no contractual obligation to pay royalties under the License Agreement because the '943 patent is invalid and/or unenforceable.

### **THIRD CAUSE OF ACTION**

(Attempt to Monopolize: *Walker Process* Fraud Pursuant to Sherman Act § 2)

56. Fortinet repeats and realleges each and every allegation set forth in Paragraphs 1 through 55 inclusive, and incorporates them by reference herein.

57. On information and belief, Trend Micro has attempted to monopolize the relevant market during the relevant time period, in violation of Section 2 of the Sherman Act. On information and belief, Trend Micro's acts of attempted monopolization have included procuring the '600 patent by knowing and willful fraud and asserting that patent against Fortinet and other competitors with the knowledge that it is invalid and/or unenforceable. On information and belief, this pattern of anticompetitive litigation continues today with Trend Micro's continued assertion of its purported patent rights against Fortinet.

58. Trend Micro's current claim of entitlement to continue receiving royalty payments from Fortinet, and long history of anticompetitive litigation, lays bare Trend Micro's specific anticompetitive purpose and intent of attempting to monopolize trade and commerce in the United States in the relevant market, all in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Fortinet seeks relief under 15 U.S.C. §§ 15(a) and 26 for injury resulting from Trend Micro's on-going pattern of misconduct.

### **The Relevant Market**

59. For purposes of this antitrust claim, the relevant product market is AV systems, which are antivirus solutions that include hardware and software elements. On information and belief, consumers do not view other products as substitutes for AV systems, AV systems have demand and pricing that is distinct from other products, and there are no substitutes to which

1 consumers would switch in response to a small but significant and nontransitory increase in price  
2 above prevailing or likely future levels.

3 60. The relevant geographic market is the world. Trend Micro, Fortinet, and other  
4 firms compete globally to sell AV systems.

5 61. Trend Micro and Fortinet compete in selling AV systems. On information and  
6 belief, Trend Micro is also a competitor of each of the other companies against whom it has  
7 asserted the '600 patent in litigation.

8 62. Trend Micro is engaged in interstate and foreign commerce, and the vast majority  
9 of its past, present, and future sales in the relevant market will occur in such commerce.

10 **Trend Micro's Fraudulent Procurement of the '600 patent**

11 63. As described above, Trend Micro and Eva Chen, CEO of Trend Micro and one of  
12 two named inventors on the '600 patent, obtained the '600 patent by engaging in knowing and  
13 willful fraudulent acts. Specifically, Ms. Chen was aware of highly material information through  
14 her work on the Intel LANDesk and Intel LANProtect products which disclosed the subject  
15 matter of the claims of the '600 patent. Ms. Chen's work with Intel predated the filing of the  
16 application which resulted in the '600 patent by more than one year. But Ms. Chen failed to  
17 disclose her work on the Intel LANProtect and/or LANDesk products to the patent examiner  
18 during the prosecution of the '600 patent. Moreover, the patent's file history confirms that  
19 nothing regarding the Intel products was disclosed to the patent examiner.

20 64. The prior art Intel LANProtect and LANDesk products, and the literature  
21 discussing the same, were more relevant to the patentability of the subject matter of the '600  
22 patent than any art before the examiner in the patent file history. For example, none of the  
23 references cited on the face of the '600 patent disclose the step of claim 4 of the '600 patent  
24 requiring "determining whether the data is of a type that is likely to contain a virus," but the Intel  
25 LANProtect and LANDesk products performed this step. Accordingly, Ms. Chen's omission  
26 was material to the decision of the United States Patent and Trademark Office to issue the '600  
27 patent, and, but for the omission, the patent examiner would have rejected the application which  
28 matured into the '600 patent, and the '600 patent would not have issued.

1           65.     In addition, according to Ms. Chen, the '600 patent was merely a combination of  
2 two previously known concepts. Specifically, Ms. Chen admitted:

3           In the patent, we are not claiming that we invented the antivirus scanner. We are  
4 not claiming that we invented the proxy server. But the concept of using these two  
together so that you can stop the virus during the transition is new.

5 Robert McMillan, *Trend Micro: Barracuda Suit Not About Open Source*, PC World, PCW  
6 Business Center, June 13, 2008 (Exhibit B).

7           66.     On information and belief, in withholding material information from the USPTO,  
8 Ms. Chen intended to deceive the Patent Office and intended, by such fraud and deception, to  
9 obtain a patent to which she was not otherwise entitled. In the alternative, on information and  
10 belief, Ms. Chen intentionally disregarded her obligations to the Patent Office with a state of  
11 mind so reckless with respect to the consequences of her conduct that it was the legal equivalent  
12 of expressly fraudulent intent.

13           67.     On information and belief, Trend Micro's pattern of suppressing material prior art  
14 may not have ended upon issuance of the '600 patent. To the contrary, on information and  
15 belief, Trend Micro has known about the highly material TFS Gateway since September 1997,  
16 but Trend Micro did not disclose the TFS Gateway during discovery in the 510 Investigation,  
17 and, therefore, it was not considered by the ALJ in his determination that certain claims of the  
18 '600 patent were valid.

19 **Trend Micro's Assertion of the Fraudulently Obtained Patent**

20           68.     On information and belief, Trend Micro was aware each time a lawsuit was filed  
21 concerning the '600 patent, and remains aware today as it asserts its alleged continued right to  
22 receive royalty payments from Fortinet, that the '600 patent was procured through the fraudulent  
23 omissions described above by the named inventor.

24           69.     Trend Micro has engaged in anticompetitive conduct prohibited by the antitrust  
25 laws by procuring the '600 patent through the fraudulent omissions described above and by  
26 attempting to enforce the '600 patent even though Trend Micro knew that the '600 patent was  
27 fraudulently obtained.  
28



1 **Specific Intent to Monopolize**

2 70. Trend Micro knowingly engaged in this anticompetitive conduct with the specific  
3 intent to monopolize the relevant market. Trend Micro's specific intent is reflected in the  
4 fraudulent procurement of the '600 patent and its subsequent repeated attempts to enforce this  
5 fraudulently procured patent.

6 71. In addition, Trend Micro demonstrated its anticompetitive intent in its  
7 negotiations of the License Agreement with Fortinet. As set forth above, on information and  
8 belief, Fortinet became a licensee of the '600 patent vis-à-vis the Clearswift OEM Agreement.  
9 The Clearswift OEM Agreement should have concluded the litigation between Fortinet and  
10 Trend Micro, but Trend Micro repeatedly insisted that the Clearswift OEM Agreement was  
11 invalid, and Fortinet needed a license to the '600 patent directly from Trend Micro.

12 72. Trend Micro continued to pursue Fortinet, and threatened to pursue Clearswift  
13 independently, asserting in correspondence to Clearswift that it did not have a valid license.  
14 Trend Micro attempted to terminate its license with Clearswift and claimed that Clearswift was  
15 in material breach. Trend Micro complained in correspondence attached hereto as Exhibit J that  
16 "based on recent discussions between Trend Micro and Fortinet, Inc., Trend Micro believes that  
17 Clearswift may also be in breach of the agreement for ... violating its obligations to provide  
18 assistance to Trend Micro against infringers of the '600 patent."

19 73. After Fortinet succumbed to the pressure and entered into the License Agreement  
20 with Trend Micro, and, therefore, Trend Micro had secured 100% of the royalty for itself, on  
21 information and belief, Trend Micro ceased to threaten Clearswift and has been receiving and  
22 depositing royalty payments from Clearswift ever since.

23 **Reasonable Probability of Success**

24 74. On information and belief, Trend Micro's share of the relevant market has been  
25 increasing since it began to assert the '600 patent against its competitors. Trend Micro's share of  
26 the relevant market will continue to increase if Trend Micro is successful in continuing to  
27 enforce the fraudulently obtained '600 patent, and Trend Micro already controls a substantial  
28

1 share of the relevant market. Trend Micro and its licensees presently sell approximately 50% of  
2 all AV systems purchased worldwide.

3 75. On information and belief, barriers to entry to the relevant market include  
4 intellectual property rights, such as Trend Micro's alleged right to enforce the '600 patent.

5 76. If Fortinet is required to continue making royalty payments, competition in the  
6 relevant market will be further unreasonably restrained and reduced, and it is reasonably  
7 predictable that Trend Micro will continue to attempt to systematically restrain, restrict, and limit  
8 competition in the relevant market.

9 77. On information and belief, Trend Micro's attempts to monopolize the relevant  
10 market, as alleged herein, have had and now have a dangerous probability of success.

#### 11 **Harm to Fortinet and to Competition**

12 78. Fortinet has been injured in its business and property by reason of Trend Micro's  
13 violation of the antitrust laws in an amount that has yet to be determined but will be established  
14 at trial. Such damages include the significant attorneys fees and other legal expenses, royalty  
15 payments made pursuant to the License Agreement, the expenses associated with bringing the  
16 present suit, the distraction to its business, and damage in such other ways as the proofs may  
17 show.

18 79. On information and belief, if successful, Trend Micro's anticompetitive conduct  
19 as alleged herein would harm competition in the relevant market by depriving consumers of the  
20 increased output, broader choice, and lower prices that would result from competition on the  
21 merits.

22 80. For at least the reasons described above, Trend Micro's anticompetitive tactics, if  
23 successful, would lessen or destroy competition in the relevant market for AV systems and  
24 thereby allow Trend Micro to obtain a monopoly, in violation of 15 U.S.C. § 2.

#### 25 **FOURTH CAUSE OF ACTION**

26 (Unfair Competition – Cal. Bus. & Prof. Code § 17200 *et seq.*)

27 81. Fortinet repeats and realleges each and every allegation set forth in Paragraphs 1  
28 through 80 inclusive, and incorporates them by reference herein.

82. Trend Micro has represented to Fortinet that it is still entitled to receive royalty payments pursuant to the License Agreement. On information and belief, Trend Micro is fully aware of the invalidity and/or unenforceability of the '600 patent, especially with respect to the TFS Gateway and the fraudulent procurement of the '600 patent. Trend Micro's continued belief that it is entitled to receive royalties for the '600 patent is without basis in law or fact.

83. Upon information and belief, Trend Micro's insistence on royalty payments is an attempt to unlawfully interfere directly with Fortinet's ability to compete in the market for AV systems and constitutes unlawful, unfair, or fraudulent business acts or practices under Cal. Bus. & Prof. Code § 17200 *et seq.* Trend Micro's insistence on receiving royalty payments from Fortinet causes actual harm to Fortinet.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff Fortinet requests entry of judgment in its favor and against defendant Trend Micro as follows:

a. Declaring that Fortinet has no contractual obligation to pay royalties to Trend Micro under the License Agreement in view of the fact that the '600 patent and '943 patent are invalid and/or unenforceable;

b. Declaring that Trend Micro has violated § 2 of the Sherman Act, 15 U.S.C. §2 by its pattern of on-going anticompetitive activities, including continuing to enforce the '600 patent in an attempt to monopolize the relevant market;

c. Awarding Fortinet damages pursuant to Sherman Act § 2, subject to proof at trial, which shall be trebled by the Court;

d. Enjoining Trend Micro, its officers, partners, employees, agents, parents, subsidiaries, attorneys, and anyone acting in concert or participation with any of them from enforcing the '600 patent and/or the '943 patent against Fortinet;

e. Awarding all remedies available pursuant to California Business and Professions Code Sections 17200 *et seq.*, including injunctive relief, restitution, and disgorgement of profits;

f. Awarding Fortinet interest on any damages;

g. Awarding Fortinet its costs of suit, including reasonable attorneys' fees; and

1           h.       Granting such other and further relief as this Court may deem just and  
2 appropriate.

3 Dated: February 3, 2009

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

5  
6 By: /s/ Michael A. Ladra  
Michael A. Ladra

7 Attorneys for Plaintiff  
8 FORTINET, INC.  
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**DEMAND FOR JURY TRIAL**

Pursuant to Federal Rule of Civil Procedure 38 and Civil Local Rule 3-6(a), Fortinet hereby demands a jury trial of all issues triable by a jury.

Dated: February 3, 2009

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: /s/ Michael A. Ladra  
Michael A. Ladra

Attorneys for Plaintiff  
FORTINET, INC.