

1 Dan K. Webb (*pro hac vice*)
WINSTON & STRAWN LLP
2 35 West Wacker Drive
Chicago, IL 60601
3 Telephone: (312) 558-5600
Facsimile: (312) 558-5700
4 dwebb@winston.com

5 Patrick M. Ryan (SBN: 203215)
WINSTON & STRAWN LLP
6 101 California Street
San Francisco, CA 94111-5894
7 Telephone: (415) 591-1000
Facsimile: (415) 591-1400
8 pryan@winston.com

9 Attorneys for Defendant and Counterclaimant
CISCO SYSTEMS, INC. and Counterclaimant
10 CISCO TECHNOLOGY, INC.

11 UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 MULTIVEN, INC., a Delaware corporation

16 Plaintiff,

17 v.

18 CISCO SYSTEMS, INC., a California
19 corporation

20 Defendant.

21 CISCO SYSTEMS, INC., a California
22 corporation, and CISCO TECHNOLOGY,
INC., a California corporation

23 Counterclaimants,

24 v.

25 MULTIVEN, INC., a Delaware corporation,
PINGSTA, INC., a Delaware corporation, and
26 PETER ALFRED-ADEKEYE, an individual

27 Counterdefendants.
28

Case No. 5:08-cv-05391-JW-RS

FIRST AMENDED ANSWER AND
SECOND AMENDED COUNTERCLAIMS
OF DEFENDANT CISCO SYSTEMS, INC.
AND COUNTERCLAIMS OF
COUNTERCLAIMANT CISCO
TECHNOLOGY, INC.

DEMAND FOR JURY TRIAL

1 1. Cisco admits that it is a world leader in the development of Internet Protocol (“IP”)
2 based networking technologies and that as many as 14 billion devices may be connected to the
3 Internet by 2010. Cisco admits that networking infrastructure is powered in part by routers and
4 switches that are complex computers with operating system software. Cisco admits that the
5 networking equipment industry has experienced growth in the past two decades and that it expects
6 businesses to continue to make substantial investments in network infrastructures. Cisco otherwise
7 denies the allegations of paragraph 1 of the Complaint.

8 2. Cisco admits that IBM exited the business of manufacturing router and switch
9 networking equipment manufacturing in 1999, has sold and licensed certain intellectual property to
10 Cisco, and resells certain Cisco products and services. Some of the allegations of paragraph 2 of the
11 Complaint constitute legal argument to which no response is required. To the extent a response is
12 required, Cisco denies those allegations. Cisco otherwise denies the allegations of paragraph 2 of
13 the Complaint.

14 3. Cisco admits that the hardware in Cisco routers, switches, and firewalls is integrated
15 with software that is essential to the functionality of the equipment. Cisco admits that from time to
16 time it releases new images of certain Cisco software that may include code that corrects a defect
17 present in previously-released software. Cisco also admits that from time to time it releases images
18 of software that add one or more new features not present in previously-released software. Cisco
19 otherwise denies the allegations of paragraph 3 of the Complaint.

20 4. Cisco denies the allegations of paragraph 4 of the Complaint.

21 5. Cisco admits that it offers a service called “SMARTnet.” Cisco admits that the name
22 “SMARTnet” is derived from the terms: Software Maintenance (“SM”); Advance Replacement
23 (“AR”); Technical support (“T”); and Network (“net”). Some of the allegations of paragraph 5 of
24 the Complaint constitute legal argument to which no response is required. To the extent a response
25 is required, Cisco denies those allegations. Cisco otherwise denies the allegations of paragraph 5 of
26 the Complaint.

27 6. The allegations of the first sentence of paragraph 6 of the Complaint are vague,
28 ambiguous, and constitute legal argument to which no response is required. Cisco is without

1 knowledge or information sufficient to form a belief as to the truth of the allegations or to enable it
2 to answer the allegations regarding the conduct of Microsoft, Apple, Hewlett-Packard, and the vague
3 and unspecified “many others,” and therefore denies them. Cisco otherwise denies the allegations of
4 paragraph 6 of the Complaint.

5 7. Cisco denies the allegations of paragraph 7 of the Complaint.

6 **JURISDICTION AND VENUE**

7 8. Cisco admits that the Complaint is filed and this action is instituted under Sections 4
8 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover damages allegedly caused by, and to
9 secure injunctive relief against, the named Defendant for alleged violations of Sections 1 and 2 of
10 the Sherman Act (15 U.S.C. §§ 1, 2). Cisco denies that it caused any damages recoverable by the
11 Plaintiff and denies that it violated Section 1 or 2 of the Sherman Act (15 U.S.C. §§ 1, 2). Cisco
12 otherwise denies the allegations of paragraph 8 of the Complaint.

13 9. Cisco admits that it maintains an office and transacts business within this District.
14 Cisco admits that this Court has original jurisdiction over the federal law claims alleged in the
15 Complaint. Cisco admits that this Court has supplemental jurisdiction over the state law claims
16 alleged in the Complaint. Cisco denies that it engaged in any unlawful acts, and otherwise denies
17 the allegations of paragraph 9 of the Complaint.

18 **INTERSTATE COMMERCE**

19 10. Cisco admits that it sells its products and services across state lines and that it
20 purchases goods and supplies in interstate commerce. Cisco denies that its conduct has or will
21 restrain or adversely affect interstate commerce, and otherwise denies the allegations of
22 paragraph 10 of the Complaint.

23 **THE PARTIES**

24 11. Cisco admits that it is a California corporation with its corporate headquarters located
25 in San Jose, California. Cisco admits that it was founded in 1984 and that it first sold shares to the
26 public in 1990. Cisco admits that it was one of the first companies to develop and sell commercial
27 routers to support multiple computer network protocols. Cisco admits that it has been a leader in the
28 development of IP-based networking technologies and that its IP-based networking technologies,

1 together with IP-based networking technologies developed by others, enable the transmission of
2 voice, video, and data communication across various network infrastructures worldwide. Cisco
3 admits that in the year 2000, it had a market capitalization of more than \$500 billion. Cisco admits
4 that its total revenue in 2008 was \$39.5 billion and that its net income in 2008 was over \$8 billion.
5 Cisco otherwise denies the allegations of paragraph 11 of the Complaint.

6 12. Cisco admits that Multiven, Inc. is a Delaware corporation with its principal place of
7 business located in Redwood City, California. Cisco admits that Multiven claims to provide service
8 and maintenance support for router and networking systems, including those placed in the market by
9 defendant Cisco. Cisco admits that Multiven claims to be an independent service organization for
10 networking hardware/software manufactured by various manufacturers. Cisco is otherwise without
11 knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12
12 of the Complaint, and therefore denies them.

13 **FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS**

14 13. The allegations of paragraph 13 are vague, ambiguous, and constitute legal argument
15 to which no response is required. To the extent a response is required, Cisco denies the allegations
16 of paragraph 13 of the Complaint.

17 14. Cisco admits that it was a pioneer and is now a world leader in the development of
18 IP-based networking products and services. Cisco admits that it designs its product and service
19 offerings to address a wide range of customers' business needs, including improving productivity,
20 reducing costs, and enhancing their competitiveness. Cisco admits that it offers routing and
21 switching products and services, and that it also offers advanced services. Cisco also admits that it
22 offers a service called "SMARTnet." Cisco otherwise denies the allegations of paragraph 14 of the
23 Complaint.

24 15. Cisco admits that Cisco routers, switches, and firewalls are generally integrated with
25 software that is essential to the functionality of the equipment. Cisco admits that from time to time it
26 releases new images of certain Cisco software that may include code that corrects a defect present in
27 previously-released software. Cisco also admits that from time to time it releases new images of
28 software that add one or more new features not present in previously-released software. Cisco

1 otherwise denies the allegations of paragraph 15 of the Complaint.

2 16. Cisco is without knowledge or information sufficient to form a belief as to the truth of
3 the allegations or to enable it to answer the allegations regarding Microsoft, Apple, Hewlett-Packard,
4 and the vague and unspecified “many others,” and therefore denies them. Cisco otherwise denies the
5 allegations of paragraph 16 of the Complaint.

6 **CLAIMS FOR RELIEF**

7 **FIRST CAUSE OF ACTION**

8 **(Actual Monopolization in Violation of Section 2 of the Sherman Act)**

9 17. Except as expressly admitted in response to paragraphs 1 through 16 above, Cisco
10 denies the allegations of paragraph 17 of the Complaint.

11 18. The first and last sentences of paragraph 18 of the Complaint constitute legal
12 argument to which no response is required. To the extent a response is required, Cisco denies the
13 allegations. Cisco admits that it is a pioneer in the IP-based networking industry. Plaintiff’s
14 reference to “networking equipment market” is vague and ambiguous, and therefore Cisco denies
15 that it has 70% of that market or that such market is a relevant market. Plaintiff’s references to
16 “markets” in the fourth sentence of paragraph 18 of the Complaint are vague and ambiguous, and
17 therefore Cisco denies that it views “markets” for “software and the sale and provision of
18 networking equipment maintenance” as separate from one another, or that such markets are relevant
19 markets. Cisco otherwise denies the allegations of paragraph 18 of the Complaint.

20 19. Cisco admits that customers decide for their own reasons whether to purchase Cisco
21 networking equipment, other vendors’ networking equipment, or a combination of Cisco and other
22 vendors’ networking equipment. Cisco otherwise denies the allegations of paragraph 19 of the
23 Complaint.

24 20. The allegations of paragraph 20 of the Complaint constitute legal argument to which
25 no response is required. To the extent a response is required, Cisco denies the allegations. Cisco
26 otherwise denies the allegations of paragraph 20 of the Complaint.

27 21. Cisco is without knowledge or information sufficient to form a belief as to the truth of
28 the allegations or to enable it to answer the allegations regarding Multiven or other independent

1 service organizations, and therefore denies them. Cisco otherwise denies the allegations of
2 paragraph 21 of the Complaint.

3 22. Cisco is without knowledge or information sufficient to form a belief as to the truth of
4 the allegations or to enable it to answer the allegations regarding Microsoft, Apple, Hewlett-
5 Packard, and “many customers” or “most purchasers” and therefore denies them. Cisco otherwise
6 denies the allegations of paragraph 22 of the Complaint.

7 23. Cisco denies the allegations of paragraph 23 of the Complaint.

8 24. The allegations of paragraph 24 of the Complaint contain legal conclusions, to which
9 no response is required. To the extent a response is required, Cisco denies the allegations of
10 paragraph 24 of the Complaint.

11 25. The allegations of paragraph 25 of the Complaint contain legal conclusions, to which
12 no response is required. To the extent a response is required, Cisco denies the allegations of
13 paragraph 25 of the Complaint.

14 26. Cisco admits that it has certain patents, copyrights, and other intellectual property
15 rights relating to networking products. Cisco otherwise denies the allegations of paragraph 26 of the
16 Complaint.

17 27. The allegations of paragraph 27 of the Complaint contain legal conclusions, to which
18 no response is required. To the extent a response is required, Cisco denies the allegations of
19 paragraph 27 of the Complaint.

20 28. The allegations of paragraph 28 of the Complaint contain legal conclusions, to which
21 no response is required. To the extent a response is required, Cisco denies the allegations of
22 paragraph 28 of the Complaint.

23 29. Cisco admits that in fiscal year 2008, sales of services generated more than \$6 billion
24 in revenues. The remaining allegations of paragraph 29 of the Complaint contain legal conclusions,
25 to which no response is required. To the extent a response is required, Cisco denies the remaining
26 allegations of paragraph 29 of the Complaint.

27 30. Cisco admits that it sells, markets, and distributes products and services across state
28 lines and in interstate commerce. Cisco is without knowledge or information sufficient to form a

1 belief as to the truth of the allegations or to enable it to answer the allegations regarding Multiven's
2 practices, and on that basis denies them. Cisco otherwise denies the allegations of paragraph 30 of
3 the Complaint.

4 31. The allegations of paragraph 31 of the Complaint contain legal conclusions to which
5 no response is required. To the extent a response is required, Cisco denies the allegations of
6 paragraph 31 of the Complaint.

7 32. The allegations of paragraph 32 of the Complaint contain legal conclusions to which
8 no response is required. To the extent a response is required, Cisco denies the allegations of
9 paragraph 32 of the Complaint.

10 33. The allegations of paragraph 33 of the Complaint contain legal conclusions to which
11 no response is required. To the extent a response is required, Cisco denies the allegations of
12 paragraph 33 of the Complaint.

13 **SECOND CAUSE OF ACTION**

14 **(Attempted Monopolization in Violation of**

15 **Section 2 of the Sherman Act)**

16 34. Except as expressly admitted in response to paragraphs 1 through 33 above, Cisco
17 denies the allegations of paragraph 34 of the Complaint.

18 35. The allegations of paragraph 35 of the Complaint constitute legal argument to which
19 no response is required. To the extent a response is required, Cisco denies the allegations of
20 paragraph 35 of the Complaint.

21 36. The allegations of paragraph 36 are vague, ambiguous and constitute legal argument
22 to which no response is required. To the extent a response is required, Cisco denies the allegations
23 of paragraph 36 of the Complaint.

24 37. The allegations of paragraph 37 of the Complaint constitute legal argument to which
25 no response is required. To the extent a response is required, Cisco denies the allegations of
26 paragraph 37 of the Complaint.

27 38. The allegations of paragraph 38 of the Complaint contain legal conclusions to which
28 no response is required. To the extent a response is required, Cisco denies the allegations of

1 paragraph 38 of the Complaint.

2 39. The allegations of paragraph 39 of the Complaint constitute legal argument to which
3 no response is required. To the extent a response is required, Cisco denies the allegations of
4 paragraph 39 of the Complaint.

5 40. The allegations of paragraph 40 of the Complaint constitute legal argument to which
6 no response is required. To the extent a response is required, Cisco denies the allegations of
7 paragraph 40 of the Complaint.

8 41. The allegations of paragraph 41 of the Complaint constitute legal argument to which
9 no response is required. To the extent a response is required, Cisco denies the allegations of
10 paragraph 41 of the Complaint.

11 42. The allegations of paragraph 42 of the Complaint constitute legal argument to which
12 no response is required. To the extent a response is required, Cisco denies the allegations of
13 paragraph 42 of the Complaint.

14 43. The allegations of paragraph 43 of the Complaint constitute legal argument to which
15 no response is required. To the extent a response is required, Cisco denies the allegations of
16 paragraph 43 of the Complaint.

17 44. The allegations of paragraph 44 of the Complaint constitute legal argument to which
18 no response is required. To the extent a response is required, Cisco denies the allegations of
19 paragraph 44 of the Complaint.

20 45. The allegations of paragraph 45 of the Complaint constitute legal argument to which
21 no response is required. To the extent a response is required, Cisco denies the allegations of
22 paragraph 45 of the Complaint.

23 **THIRD CAUSE OF ACTION**

24 **(Unlawful Tying Arrangement in Violation of**

25 **Section One of the Sherman Act)**

26 46. Except as expressly admitted in response to paragraphs 1 through 45 above, Cisco
27 denies the allegations of paragraph 46 of the Complaint.

28

1 47. The allegations of paragraph 47 of the Complaint constitute legal argument to which
2 no response is required. To the extent a response is required, Cisco denies the allegations of
3 paragraph 47 of the Complaint.

4 48. The allegations of paragraph 48 are vague, ambiguous, and constitute legal argument
5 to which no response is required. To the extent a response is required, Cisco denies the allegations
6 of paragraph 48 of the Complaint.

7 49. The allegations of paragraph 49 are vague, ambiguous and constitute legal argument
8 to which no response is required. To the extent a response is required, Cisco denies the allegations
9 of paragraph 49 of the Complaint.

10 50. The allegations of paragraph 50 of the Complaint constitute legal argument to which
11 no response is required. To the extent a response is required, Cisco denies the allegations of
12 paragraph 50 of the Complaint.

13 51. The allegations of paragraph 51 are vague, ambiguous and constitute legal argument
14 to which no response is required. To the extent a response is required, Cisco denies the allegations
15 of paragraph 51 of the Complaint.

16 52. Cisco admits that its operating system software is proprietary and that Cisco does not
17 make its proprietary source code publicly available. Cisco is without knowledge or information
18 sufficient to form a belief as to the truth of the allegations or to enable it to answer the allegations
19 regarding Multiven's practices or the practices of other ISOs, and on that basis denies them. Cisco
20 otherwise denies the allegations of paragraph 52 of the Complaint.

21 53. Cisco denies the allegations of paragraph 53 of the Complaint.

22 54. Cisco admits that from time to time it releases new images of certain Cisco software
23 that may include code that corrects a defect present in previously-released software. Cisco also
24 admits that from time to time it releases new images of software that add one or more new features
25 not present in previously-released software. The remaining allegations of paragraph 54 are vague,
26 ambiguous and constitute legal argument to which no response is required. To the extent a response
27 is required, Cisco denies the remaining allegations of paragraph 54 of the Complaint.

28

4 56. The allegations of paragraph 56 of the Complaint constitute legal argument to which
5 no response is required. To the extent a response is required, Cisco denies the allegations of
6 paragraph 56 of the Complaint.

7 57. The allegations of paragraph 57 are vague, ambiguous and constitute legal argument
8 to which no response is required. To the extent a response is required, Cisco denies the allegations
9 of paragraph 57 of the Complaint.

58. The allegations of paragraph 58 of the Complaint constitute legal argument to which no response is required. To the extent a response is required, Cisco denies the allegations of paragraph 58 of the Complaint.

59. The allegations of paragraph 59 of the Complaint constitute legal argument to which no response is required. To the extent a response is required, Cisco denies the allegations of paragraph 59 of the Complaint.

16 60. The allegations of paragraph 60 of the Complaint constitute legal argument to which
17 no response is required. To the extent a response is required, Cisco denies the allegations of
18 paragraph 60 of the Complaint.

61. The allegations of paragraph 61 of the Complaint constitute legal argument to which no response is required. To the extent a response is required, Cisco denies the allegations of paragraph 61 of the Complaint.

(Intentional Interference Prospective Economic Advantage

25 62. Except as expressly admitted in response to paragraphs 1 through 61 above, Cisco
26 denies the allegations of paragraph 62 of the Complaint.

63. Cisco admits that this Court has supplemental jurisdiction over the state law claims
alleged in the Complaint. Cisco otherwise denies the allegations of paragraph 63 of the Complaint.

1 64. Cisco is without knowledge or information sufficient to form a belief as to the truth of
2 the allegations or to enable it to answer the allegations regarding Multiven's business relationships,
3 and on that basis denies them. Cisco otherwise denies the allegations of paragraph 64 of the
4 Complaint.

5 65. The allegations of paragraph 65 of the Complaint constitute legal argument to which
6 no response is required. To the extent a response is required, Cisco denies the allegations of
7 paragraph 65 of the Complaint.

8 66. The allegations of paragraph 66 of the Complaint constitute legal argument to which
9 no response is required. To the extent a response is required, Cisco denies the allegations of
10 paragraph 66 of the Complaint.

11 67. The allegations of paragraph 67 of the Complaint constitute legal argument to which
12 no response is required. To the extent a response is required, Cisco denies the allegations of
13 paragraph 67 of the Complaint.

14 68. The allegations of paragraph 68 of the Complaint constitute legal argument to which
15 no response is required. To the extent a response is required, Cisco denies the allegations of
16 paragraph 68 of the Complaint.

17 69. The allegations of paragraph 69 of the Complaint constitute legal argument to which
18 no response is required. To the extent a response is required, Cisco denies the allegations of
19 paragraph 69 of the Complaint.

20 **FIFTH CAUSE OF ACTION**

21 **(Unfair Competition in Violation of**

22 **Cal. Bus. & Prof. Code § 17200 et seq.)**

23 70. Except as expressly admitted in response to paragraphs 1 through 69 above, Cisco
24 denies the allegations of paragraph 70 of the Complaint.

25 71. Cisco admits that this Court has supplemental jurisdiction over the state law claims
26 alleged in the Complaint. Cisco otherwise denies the allegations of paragraph 71 of the Complaint.

27 72. The allegations of paragraph 72 are vague, ambiguous, and constitute legal argument
28 to which no response is required. To the extent a response is required, Cisco denies the allegations

1 of paragraph 72 of the Complaint.

2 73. The allegations of paragraph 73 of the Complaint constitute legal argument to which
3 no response is required. To the extent a response is required, Cisco denies the allegations of
4 paragraph 73 of the Complaint.

5 74. The allegations of paragraph 74 of the Complaint constitute legal argument to which
6 no response is required. To the extent a response is required, Cisco denies the allegations of
7 paragraph 74 of the Complaint.

8 75. The allegations of paragraph 75 of the Complaint constitute legal argument to which
9 no response is required. To the extent a response is required, Cisco denies the allegations of
10 paragraph 75 of the Complaint.

11 76. The allegations of paragraph 76 of the Complaint constitute legal argument to which
12 no response is required. To the extent a response is required, Cisco denies the allegations of
13 paragraph 76 of the Complaint.

14 77. The allegations of paragraph 77 of the Complaint constitute legal argument to which
15 no response is required. To the extent a response is required, Cisco denies the allegations of
16 paragraph 77 of the Complaint.

17 78. The allegations of paragraph 78 of the Complaint constitute legal argument to which
18 no response is required. To the extent a response is required, Cisco denies the allegations of
19 paragraph 78 of the Complaint.

20 **SEPARATE AND ADDITIONAL DEFENSES**

21 79. Without assuming any burden of proof that it would not otherwise bear, Cisco asserts
22 the following separate and additional defenses, all of which are pleaded in the alternative, and none
23 of which constitute an admission that Cisco is in any way liable to Plaintiff, that Plaintiff has been or
24 will be injured or damaged in any way or that Plaintiff is entitled to any relief whatsoever. As a
25 defense to the Complaint and each and every allegation contained therein, Cisco alleges:

26 **FIRST SEPARATE AND ADDITIONAL DEFENSE**

27 **(Failure to State a Claim for Relief)**

28 80. Plaintiff's claims fail to allege facts sufficient to state a claim for relief against Cisco.

SECOND SEPARATE AND ADDITIONAL DEFENSE

(Actions or Conduct of Plaintiff)

81. Any right of recovery that Plaintiff asserts is barred, either in whole or in part, to the extent that any loss, damage, or injury that Plaintiff has allegedly suffered or will suffer, as alleged in the Complaint or otherwise, is the direct or proximate result, either in whole or in part, of Plaintiff's own intentional, reckless, negligent or careless conduct.

THIRD SEPARATE AND ADDITIONAL DEFENSE

(Privilege / Justification)

82. Cisco's actions were privileged or justified under applicable law, and that Plaintiff therefore is barred from recovery.

FOURTH SEPARATE AND ADDITIONAL DEFENSE

(Good Faith / Legitimate Business Justification)

83. Cisco's actions were undertaken in good faith to advance legitimate business interests and had the effect of promoting, encouraging, and increasing competition.

FIFTH SEPARATE AND ADDITIONAL DEFENSE

(Meeting Competition)

84. Cisco's actions met competition, and therefore each of Plaintiff's claims is barred.

SIXTH SEPARATE AND ADDITIONAL DEFENSE

(Waiver / Estoppel)

85. Plaintiff has waived and/or is estopped from recovery by reason of its own conduct, acts, and omissions, including the conduct, acts, and omissions alleged in Cisco's counterclaims below.

SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Unclean Hands)

86. By reasons of Plaintiff's own conduct, acts, and omissions, including the conduct, acts, and omissions alleged in Cisco's counterclaims below, Plaintiff is barred from any recovery under its Fourth and Fifth Claims by the doctrine of unclean hands.

EIGHTH SEPARATE AND ADDITIONAL DEFENSE

(Standing)

87. Plaintiff lacks standing to assert some or all of the claims asserted therein.

NINTH SEPARATE AND ADDITIONAL DEFENSE

(Injury-In-Fact / Antitrust Injury)

88. Plaintiff has not suffered an injury-in-fact or antitrust injury as a result of Cisco's challenged conduct.

TENTH SEPARATE AND ADDITIONAL DEFENSE

(Unjust Enrichment)

89. Plaintiff would be unjustly enriched were it allowed to recover any relief claimed to be due.

ELEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Failure to Mitigate Damages)

90. Plaintiff has failed to mitigate its damages, if any, and that any recovery should be reduced or denied accordingly.

TWELFTH SEPARATE AND ADDITIONAL DEFENSE

(Commerce Clause)

91. Plaintiff's claims arising under state law (Count 4 – Intentional Interference With Prospective Economic Advantage and Contractual Relations and Count 5 – Unfair Competition in Violation of California Business & Professions Code Section 17200) are barred in whole or in part, because the application of these claims to wholly interstate or foreign commerce violates the Commerce Clause of the United States Constitution and is otherwise beyond the scope of jurisdiction of those laws.

THIRTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Uncertainty of Damages)

92. Any damages Plaintiff alleges to have suffered from the matters alleged in the Complaint are too uncertain, speculative, remote, and impossible to allow recovery.

FOURTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Causation)

93. Any injuries Plaintiff claims to have suffered were not actually, proximately or materially caused by Cisco's alleged conduct, and Plaintiff therefore should be barred from all recovery or relief.

FIFTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Intervening or Superseding Acts of Third Parties)

94. Any injuries Plaintiff claims to have suffered resulted from the acts or omissions of third parties over whom Cisco had no control. The acts of such third parties constitute intervening or superseding causes of the harm, if any, suffered by Plaintiff.

SIXTEENTH SEPARATE AND ADDITIONAL DEFENSE

(Protection of Patents, Trademarks and Other Rights)

95. Cisco's actions to protect its patents, trademarks, and other rights were privileged and are immune from suit.

SEVENTEENTH SEPARATE AND ADDITIONAL DEFENSE

(No Contractual Relationship)

96. Plaintiff cannot establish the existence of an existing contract with which Cisco intentionally interfered, and Plaintiff is therefore barred from any recovery on its Fourth Claim for Relief (Intentional Interference With Prospective Economic Advantage and Contractual Relations).

EIGHTEENTH SEPARATE AND ADDITIONAL DEFENSE

(No Prospective Business Relationship)

97. Plaintiff cannot establish the existence of an actual existing prospective business relationship with which Cisco intentionally interfered, and Plaintiff is therefore barred from any recovery on its Fourth Claim for Relief (Intentional Interference With Prospective Economic Advantage and Contractual Relations).

NINETEENTH SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

98. The imposition of punitive or exemplary damages in this case would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and state constitutions because the standards of liability for such damages are unduly vague and subjective, and permit retroactive, random, arbitrary, and capricious punishment that serves no legitimate governmental interest.

TWENTIETH SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

99. The imposition of punitive or exemplary damages in this case would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and state constitutions because post-verdict review procedures for scrutinizing punitive damage verdicts do not provide a meaningful constraint on the discretion of juries to impose punishment.

TWENTY-FIRST SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

100. The imposition of punitive or exemplary damages in this case in the absence of the procedural safeguards accorded to defendants subject to punishment in criminal proceedings, including a reasonable doubt standard of proof, would violate the Fourth, Fifth, and Sixth Amendments and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

TWENTY-SECOND SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

101. The imposition of punitive or exemplary damages in this case based upon evidence of Cisco's wealth or financial status would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

TWENTY-THIRD SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

102. The imposition of punitive or exemplary damages in this case in the absence of a showing of malicious intent to cause harm to Plaintiff would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

TWENTY-FOURTH SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Due Process)

103. The imposition of punitive or exemplary damages in this case pursuant to state law to punish Cisco for conduct that occurred outside of that state would violate the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution as well as the Commerce Clause of the Constitution.

TWENTY-FIFTH SEPARATE AND ADDITIONAL DEFENSE

(Punitive Damages / Excessive Fines)

104. Any award of exemplary, treble or punitive damages would violate the Excessive Fines Clauses of the United States and state constitutions.

TWENTY-SIXTH SEPARATE AND ADDITIONAL DEFENSE

**(Punitive Damages / Commerce Clause, Equal Protection
and Privileges and Immunities)**

105. The imposition of punitive or exemplary damages in this case based on the out-of-state conduct, profits or aggregate financial status of Cisco would violate the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the United States Constitution.

TWENTY-SEVENTH SEPARATE AND ADDITIONAL DEFENSE

(Statutes of Limitations)

106. Each cause of action in the Complaint is barred to the extent that an applicable statute of limitations has run.

TWENTY-EIGHTH SEPARATE AND ADDITIONAL DEFENSE

(Set-Off)

107. Each cause of action in the Complaint is barred, and the damages related thereto reduced, under the doctrine of set-off.

TWENTY-NINTH SEPARATE AND ADDITIONAL DEFENSE

(Additional Defenses)

108. Cisco has insufficient knowledge or information upon which to form a belief as to whether it may have additional, as yet unstated, separate defenses available. Cisco's investigation into the Complaint is ongoing, and Cisco therefore reserves the right to plead any other appropriate separate and additional defenses that discovery or further legal analysis may reveal during the course of this litigation.

PRAYER FOR ANSWER

WHEREFORE, Cisco prays:

1. That Plaintiff take nothing by the Complaint;
2. That the Complaint be dismissed with prejudice;
3. That Cisco recover its costs of suit incurred herein, including reasonable attorneys' fees; and
4. For any other and further relief as the Court may deem just and proper.

SECOND AMENDED COUNTERCLAIMS

Cisco Systems, Inc. ("Cisco Systems") and Cisco Technology, Inc. ("Cisco Technology") (hereafter collectively "Cisco") bring these Counterclaims against Plaintiff and Counterdefendant Multiven, Inc. ("Multiven") and Counterdefendants Peter Alfred-Adekeye ("Adekeye") and Pingsta, Inc. ("Pingsta") (collectively "Counterdefendants") and alleges as follows:

INTRODUCTION

1. Rather than invest the time and resources required to develop their own businesses, Counterdefendants stole and continue to steal from Cisco in order to set up competing businesses and extract a pay off.

2. Adekeye was a Cisco Systems employee with inside knowledge of Cisco's proprietary information, internal operations, security, and personnel.

3. Prior to leaving Cisco Systems, Adekeye started Multiven, which was created to, among other things, compete with Cisco in the purported area of service and maintenance support of routers, switches, and networking systems.

4. Later, Adekeye started Pingsta, which was created to compete with Cisco in the purported area of customer support and technical assistance for products related to routers, switches and networking systems.

5. After Adekeye left Cisco Systems, he, Multiven, and Pingsta illegally obtained, exchanged, and used current employee usernames and passwords to illegally access and steal Cisco's proprietary computerized data and intellectual property for use in setting up Multiven and Pingsta as Cisco competitors.

6. By the unlawful use of such passwords and through other acts of deception, fraud, oppression, and malice, Multiven, Adekeye, Pingsta, and/or their agents wrongfully accessed Cisco's computer systems and proprietary data, including its valuable and copyrighted operating system software.

7. Following Adekeye's departure from Cisco Systems, Counterdefendants, on no less than 99 occasions, accessed Cisco's computerized data by use of Cisco employee usernames and passwords.

8. On those occasions, Counterdefendants downloaded, copied, or used Cisco's valuable proprietary information.

9. On information and belief, Counterdefendants have distributed and re-sold this copyrighted and proprietary information that they downloaded without authorization from Cisco.

10. Pingsta has used and is attempting to use Cisco's core asset – its employees – to service Multiven's and Pingsta's customers.

11. Although Counterdefendants knew that Cisco employees are prohibited from working concurrently for both Cisco and one of its competitors, Pingsta has and continues to solicit Cisco engineers to join Pingsta's secret society of engineers, who perform contract work for Multiven and

1 Cisco customers.

2 12. On information and belief, to do this contract work for Counterdefendants, the Cisco
3 employees use copyrighted and proprietary information that they can access solely because they
4 work for Cisco.

5 13. Multiven does not disclose on its website that its business is built upon the theft of
6 Cisco's information and the secret use of Cisco employees.

7 14. Rather, it touts the strength and independence of its business, misrepresenting, among
8 other things, the size, experience, and certifications of its technical staff to existing and prospective
9 customers on its website.

10 15. These misleading practices not only harm customers who are tricked into hiring
11 Multiven and/or Pingsta, but also harm Cisco by devaluing its confidential data and substantial
12 goodwill.

13 16. Cisco seeks just compensation for Counterdefendants' theft of Cisco's proprietary
14 information and other illegal business practices, and an injunction to put an end to their improper
15 conduct.

16 **JURISDICTION AND VENUE**

17 17. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because
18 certain claims asserted herein arise under the Copyright Act, 17 U.S.C. § 101, *et seq.*, the Trademark
19 Act of 1946, as amended (the "Lanham Act"), 15 U.S.C. § 1125(a), and the Computer Fraud and
20 Abuse Act, 18 U.S.C. § 1030. This Court also has jurisdiction over the state-law claims asserted
21 herein on the basis of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

22 18. Personal jurisdiction exists generally over Counterdefendant Multiven because it has
23 minimum contacts with this forum as a result of business regularly conducted within the State of
24 California and within this District, including maintaining an office and personnel in California and
25 because it has consented to the jurisdiction of this Court by filing its action here.

26 19. Personal jurisdiction exists generally over Counterdefendant Adekeye because,
27 during the relevant time period, he was domiciled within the State of California and has minimum
28 contacts with this forum as a result of business regularly conducted within the State of California and

1 within this District.

2 20. Personal jurisdiction exists generally over Counterdefendant Pingsta because it has
3 minimum contacts with this forum as a result of business regularly conducted within the State of
4 California and within this District, including maintaining offices and personnel in California.

5 21. Venue is proper in this District pursuant to 28 U.S.C. § 1391(a) because a substantial
6 part of the events giving rise to these claims occurred in this District.

7 **PARTIES**

8 22. Cisco Systems is, and at all times mentioned herein was, a corporation organized and
9 existing under the laws of the State of California, having a principal place of business at 170 W.
10 Tasman Drive, San Jose, California.

11 23. Cisco Technology is, and at all times mentioned herein was, a corporation organized
12 and existing under the laws of the State of California, having a principal place of business at 170
13 W. Tasman Drive, San Jose, California. Cisco Technology is a wholly-owned subsidiary of Cisco
14 Systems.

15 24. Counterdefendant Multiven, Inc. is a Delaware corporation with its principal place of
16 business located at 1700 Seaport Boulevard, Suite 110, Redwood City, California.

17 25. Counterdefendant Adekeye is an individual who was a resident of California at the
18 time of acts alleged herein. At all times relevant, he was the CEO of Multiven, Inc. and the CEO of
19 Pingsta, Inc.

20 26. Counterdefendant Pingsta, Inc. is a Delaware corporation with its principal place of
21 business located at 1700 Seaport Boulevard, Suite 110, Redwood City, California.

22 **FACTUAL BACKGROUND**

23 **Cisco and Its Intellectual Property**

24 27. Cisco designs, manufactures, and sells Internet Protocol (“IP”)-based networking and
25 other products related to the communications and information technology (“IT”) industries and
26 provides services associated with these products and their use.

27 28. One of Cisco’s products is routers. Routers interconnect IP networks, moving
28 information such as data, voice, and video from one network to another across metropolitan-area

1 networks (“MANs”) and wide-area networks (“WANs”). Cisco offers a broad range of routers, from
2 core network infrastructure for service providers and large businesses, to access routers for the
3 service-rich branch office, to home network deployments for telecommuters and consumers. Many
4 of Cisco’s routers host a wide range of functions and advanced technologies, delivering integrated
5 voice, video, data, and mobility for homes and businesses.

6 29. Another one of Cisco’s products is switches. Switching is another integral
7 networking technology used in campuses, branch offices, and data centers to build local-area
8 networks (“LANs”), across cities to build MANs, and across great distances to build WANs. Cisco’s
9 switching products offer many forms of connectivity to end users, workstations, IP phones, access
10 points, and servers, and function as aggregators on LANs, MANs, and WANs.

11 30. Cisco devotes tremendous resources to development of new technology and
12 processes. Cisco’s research and development expenditures were \$4.1 billion, \$4.5 billion, and \$5.2
13 billion in its 2006, 2007, and 2008 fiscal years, respectively. Cisco’s research and development
14 efforts are of paramount importance because the markets in which it competes are subject to rapid
15 technological change, evolving standards, changes in customer requirements, and new product
16 introductions and enhancements. As a result, Cisco’s success depends in significant part upon its
17 ability, on a cost-effective and timely basis, to continue to enhance its existing products, develop and
18 introduce new products that improve performance, reduce total cost of ownership, and deliver high-
19 quality service to customers.

20 31. Given the highly competitive world of IP-based networks, Cisco treats information as
21 a valuable asset; if proprietary information is stolen, the competitive playing field can tip in favor of
22 a competitor that, unlike Cisco, did not expend many billions of dollars to develop the technology.
23 While it allows its services customers access to data and information to support the products they
24 purchase, the data and information are protected using passwords and other data-protection devices.

25 32. Cisco employees are required to sign non-disclosure agreements requiring them to
26 maintain the secrecy of Cisco’s proprietary information and their employee credentials that allow
27 them access to that proprietary information.
28

1 **Cisco's Services**

2 33. Cisco's Technical Assistance Center ("TAC") is Cisco's award-winning technical
3 support services center, which helps ensure that Cisco's products operate efficiently and effectively.

4 34. If entities, such as Multiven and Pingsta, who do not have access to the correct Cisco
5 engineering and diagnostic equipment that cost hundreds of millions of dollars, give incorrect
6 technical advice, it can result in major system crashes that can harm Cisco's current and former
7 customers and irreparably harm Cisco's goodwill.

8 **Cisco's Copyrighted Software**

9 35. Cisco Technology holds valid registrations in software products relevant to this
10 lawsuit, including, but not limited to, the following registrations: IOS 11.0 (TXu 1-036-057); IOS
11 11.1 (TX 5-531-435; TXu 1-048-569); IOS 11.2 (TXu 1-036-063); IOS 11.3 (TXu 1-036-062; TXu
12 1-057-804); IOS 12.0 (TXu 1-036-064; TXu 1-057-805); IOS 12.1 (TXu 1-036-066; TXu 1-057-
13 807); IOS 12.2 (TXu 1-036-065; 1-057-806); IOS 12.3 (TXu 1-188-975); IOS 12.4 (TXu 1-259-
14 162). True and correct copies of these registrations are attached hereto as Exhibit A.

15 36. Cisco Systems is a licensee of Cisco Technology's copyrights in these and other
16 software products.

17 37. Cisco has complied in all respects with the United States Copyright Act and all other
18 laws governing copyright, including the application and deposit requirements, for its registrations in
19 software products relevant to this lawsuit.

20 38. Cisco owns and operates a system or network of protected computers and data storage
21 devices containing its proprietary and copyrighted software.

22 **Cisco's Computerized Systems and Data**

23 39. Cisco grants access or limits access to its protected system or network of computers
24 and data storage devices containing its proprietary and copyrighted software through the use of
25 username and password pairs granted to its employees.

26 40. Cisco grants or limits authorization to use this protected system or network of
27 computers by the use of username and password pairs to certain channel partners and customers for
28 access to certain parts of Cisco's network.

1 41. Cisco's computers and data storage media are active in interstate and foreign
2 commerce and communication, because Cisco's employees and paying customers access Cisco's
3 computerized data from all over the world.

4 42. Following Adekeye's departure from Cisco Systems, Counterdefendants were not
5 authorized to have access to Cisco employee usernames and passwords.

6 43. Following Adekeye's departure from Cisco Systems, Counterdefendants were not
7 authorized to use Cisco employee usernames and password to access, copy, or download Cisco's
8 computerized data.

9 44. Following Adekeye's departure from Cisco Systems, Counterdefendant Adekeye has
10 not been authorized to have access to employee password-protected areas on Cisco's protected
11 system or network of computers.

12 **Adekeye**

13 45. Until 2005, Adekeye was employed by Cisco Systems as a TAC engineer.

14 46. While a Cisco Systems employee, Adekeye acquired confidential inside knowledge
15 of Cisco's proprietary information, internal operations, security, and personnel.

16 47. Adekeye's employment with Cisco Systems ended on May 6, 2005.

17 **Multiven**

18 48. Even before leaving Cisco Systems, on or about March 2, 2005, Adekeye started
19 Multiven.

20 49. At all relevant times, Adekeye has been Multiven's CEO.

21 50. On information and belief, Multiven provides service and maintenance support for
22 networking hardware and systems, including those placed in the market by Cisco.

23 51. On or around March 1, 2006, Adekeye persuaded a Cisco employee to lend Multiven
24 twenty-five thousand dollars (\$25,000.00) through a corporation controlled by that Cisco employee.

25 52. The promissory note for this loan was "convertible," giving the Cisco employee the
26 right to acquire shares in Multiven.

27 53. Adekeye knew that Cisco employees were not permitted to lend or invest money in
28 other service providers, which compete with Cisco, without permission from Cisco.

1 54. Adekeye persuaded the employee to do so nonetheless.

2 55. On its website, Multiven claims to have customers that include network service
3 providers and Fortune 500 enterprises.

4 56. Upon information and belief, however, Multiven has only a handful of customers,
5 none of which are Fortune 500 enterprises.

6 57. On its website, Multiven makes several additional material misrepresentations.

7 58. For example, Multiven's website states that it has "15,000 on-site support field
8 engineers in 130 countries."

9 59. The number of on-site engineers is a specific and measurable claim, capable of being
10 proved true or false by way of empirical verification, or of being reasonably interpreted as a
11 statement of objective fact capable of being adjudged true or false by way of empirical verification.

12 60. The number of on-site engineers is a material fact because customers of the types of
13 services that Multiven purports to provide rely heavily on the number of on-site engineers in
14 choosing whether to do business with a firm.

15 61. The number of on-site engineers, in truth, that Multiven employs is approximately
16 six.

17 62. And Multiven has nowhere near the 15,000 on-site support field engineers it claims.

18 63. Upon information and belief, Multiven's total office space for all of its locations
19 includes no more than approximately ten offices.

20 64. On information and belief, Multiven has made additional false statements in other
21 commercial advertisements and promotions, and in discussions with actual and potential customers.

22 **Pingsta**

23 65. In or around March 2007, Adekeye founded Pingsta.

24 66. At all relevant times, Adekeye has been CEO of Pingsta.

25 67. According to the websites located at <http://www.pingsta.com> and
26 <http://www.multiven.com>, Pingsta and Multiven have the same physical address.

27 68. On information and belief, Pingsta and Multiven share offices and an Internet
28 connection in Redwood City, California.

1 69. Pingsta bills itself as an online intellectual collaboration platform for Internet
2 engineers.

3 70. Pingsta has created a web-based, members-only group of engineers called Pingsta
4 Intellectual Commerce Ecosystem (“Pingsta ICE”).

5 71. Pingsta ICE is, in effect, a secret society of engineering consultants.

6 72. Companies contract with Pingsta for technical services and Pingsta sends the work
7 out to Pingsta ICE members.

8 73. Thus, Pingsta has Pingsta ICE engineers to provide technical services for networking
9 equipment.

10 74. Pingsta customers pay Pingsta for services.

11 75. Pingsta provides some portion of that amount to the Pingsta ICE engineers who
12 provide technical services to the Pingsta customers.

13 76. Pingsta does not publicly disclose the identities of its Pingsta ICE engineers.

14 77. Pingsta keeps the identity of the Pingsta ICE engineers a secret even from the
15 customers for whom they provide technical services.

16 78. Pingsta has willfully sought out, actively recruited, and contracted with or employed
17 current Cisco and other entities’ employees as Pingsta ICE engineers.

18 79. On information and belief, Pingsta keeps the identity of these Pingsta ICE engineers a
19 secret because they are engaged in unlawful conduct, including the improper access, use and/or
20 distribution of Cisco’s and potentially other entities’ proprietary information.

21 80. Working with Pingsta is a direct violation of common law and Cisco employees’
22 employment agreements, which forbid concurrent employment or business activity with a Cisco
23 competitor.

24 81. Pingsta is aware that such conduct is a violation of such agreements.

25 82. On information and belief, Multiven has used engineers solicited or retained through
26 Pingsta to provide service to Multiven customers and/or current or former Cisco customers.

27
28

1 **Multiven, Adekeye, and Pingsta's Unlawful Access and Use of Cisco Employee Usernames and**
2 **Passwords and Access and Theft of Cisco's Computerized Data and Intellectual Property**

3 83. Multiven, Adekeye, and/or Pingsta obtained employee usernames and passwords and
4 used them to gain access to Cisco's restricted-access employee websites.

5 84. Upon information and belief, a Counterdefendant obtained the employee usernames
6 and passwords and provided them to the other Counterdefendants.

7 85. The usernames and passwords of the Cisco employee provided Multiven, Adekeye,
8 and/or Pingsta with access to Cisco's proprietary information, including its confidential online TAC
9 resources, copyrighted software and updates, and other proprietary information.

10 86. On myriad occasions, Multiven, Adekeye, and/or Pingsta unlawfully accessed, used,
11 downloaded, and/or distributed Cisco's valuable proprietary information, including but not limited to
12 Cisco's copyrighted software, proprietary TAC service resources, and other valuable information.

13 87. Using the usernames and passwords, Multiven, Adekeye, and/or Pingsta downloaded
14 Cisco's proprietary information, including but not limited to copyrighted software.

15 88. The software Multiven, Adekeye, and/or Pingsta downloaded is identical to or
16 substantially the same as the software bearing some or all of the copyright registration numbers
17 listed above and attached hereto as Exhibit A, among others.

18 89. Multiven, Adekeye, and Pingsta were not authorized to download this software.

19 90. Multiven, Adekeye, and/or Pingsta accessed secure Cisco data—including but not
20 limited to Cisco's copyrighted material and other Cisco proprietary information—using the
21 employee usernames and passwords without authorization on many occasions between September
22 2005 and July 2007.

23 91. Multiven, Adekeye, and/or Pingsta also accessed Cisco's employee password-
24 protected websites in other ways to view Cisco's technical support resources, some of which are
25 contained in a database rich with technical guidance regarding network configurations and software-
26 related information.

27 92. Multiven, Adekeye, and/or Pingsta also contacted Cisco's TAC seeking information
28 on Cisco's proprietary information, including Cisco's copyrighted materials, as well as to

1 troubleshoot issues related to Cisco's proprietary information for unlawful use of such information.
2 During these times when Cisco's TAC engineers were assisting Multiven, Adekeye, and/or Pingsta,
3 these Cisco TAC engineers were unable to assist Cisco clients with legitimate and lawful requests.

4 93. Multiven and Pingsta personnel, including Adekeye himself, used false names and/or
5 newly-created email addresses to make these contacts.

6 94. On information and belief, at the time of the masquerading calls, Multiven, Adekeye,
7 and Pingsta were not acting as lawful agents for companies that had purchased support or had a
8 lawful right to support for the particular devices which Multiven, Adekeye, and/or Pingsta were
9 troubleshooting and seeking information on.

10 95. Multiven, Adekeye, and Pingsta did not have authority to access this information or,
11 to the extent they had authority, their conduct exceeded such authority.

12 96. On several occasions from 2005 through 2007, Counterdefendants accessed Cisco's
13 protected bug fix toolkit on its computer system, including but not limited to November 15, 2005,
14 May 11, 2006, August 7, 2006, August 8, 2006, August 17, 2006, September 6, 2006, February 26,
15 2007, and March 24, 2007.

16 97. Counterdefendants accessed Cisco's protected TAC Service Request Tools on its
17 computer system on, among other occasions, September 2, 2005, August 7, 2006, February 26, 2007,
18 and February 27, 2007.

19 98. Counterdefendants accessed Cisco's protected Partner Support Tools on its computer
20 system on, among other occasions, September 6, 2005, August 8, 2006, August 17, 2006, February
21 14, 2007, February 27, 2007, March 13, 2007, May 2, 2007, and July 20, 2007.

22 99. Further, Counterdefendants accessed Cisco's protected software download center on
23 its computer system without authorization on, among other occasions, September 6, 2005,
24 September 7, 2005, March 7, 2006, August 17, 2006, August 18, 2006, December 12, 2006,
25 February 26, 2007, March 13, 2007, and March 19, 2007.

26 100. The information Multiven, Adekeye, and/or Pingsta stole from Cisco assisted them in
27 attempting to service Multiven and/or Pingsta customers.
28

1 101. In other words, Multiven, Adekeye, and/or Pingsta rely on illegally obtained Cisco
2 proprietary information to service Multiven and/or Pingsta customers and in certain instances,
3 misused Cisco credentials and/or other login information to illicitly help themselves to copyrighted
4 materials.

5 102. On information and belief, Counterdefendants have used, reproduced and distributed
6 Cisco's copyrighted software and other proprietary information, without authorization and without
7 Cisco's permission or consent.

8 103. On information and belief, Pingsta maintains a repository of information and software
9 that includes Cisco copyrighted information, including software copyrighted under the registration
10 numbers given above.

11 104. On information and belief, Pingsta shares such information with its customers as well
12 as with Multiven and Multiven's customers.

13 105. On information and belief, Pingsta has disseminated Cisco's proprietary and
14 copyrighted information on its members-only forum, and allowed and encouraged Pingsta ICE
15 engineers to do the same.

16 **FIRST COUNTERCLAIM FOR RELIEF**

17 **(Copyright Infringement: Infringement of Cisco's**

18 **Rights in Violation of 17 U.S.C. § 106)**

19 **(Against All Counterdefendants)**

20 106. Cisco repeats and realleges the allegations of paragraphs 1, 5–9, 12, 31, 32, 35–37 ,
21 42–44, 79, and 83–105 above.

22 107. Upon information and belief, without authorization from Cisco, Multiven, Adekeye,
23 and/or Pingsta downloaded Cisco's copyrighted software.

24 108. Upon information and belief, Multiven and/or Pingsta, without authorization from
25 Cisco, have copied Cisco copyrighted software onto their file servers for the use of their employees
26 or engineers in servicing their customers.

27 109. Counterdefendants' downloading and copying of Cisco's copyrighted software
28 unlawfully infringed upon Cisco's registered copyrights and its exclusive right to reproduce under

1 the Copyright Act in violation of 17 U.S.C. § 106(1).

2 110. The software Multiven, Adekeye, and/or Pingsta downloaded from Cisco is designed
3 to be installed on a switch, firewall, or router.

4 111. Upon information and belief, Multiven, Adekeye, and/or Pingsta, without Cisco's
5 authorization, installed Cisco software on the routers, switches and/or firewalls of one or more
6 customers of Multiven and/or Pingsta.

7 112. Upon information and belief, without authorization from Cisco, Counterdefendants
8 distributed Cisco's copyrighted software to third parties, including distributions within the United
9 States.

10 113. Counterdefendants' distribution of Cisco's copyrighted software unlawfully infringed
11 upon Cisco's registered copyrights and its exclusive right to distribute under the Copyright Act in
12 violation of 17 U.S.C. § 106(3).

13 114. Each infringement of Cisco's rights in its copyrighted software constitutes a separate
14 and distinct act of infringement separately actionable under the Copyright Act.

15 115. Counterdefendants' acts of infringement are willful, intentional and purposeful, in
16 violation of Cisco's rights.

17 116. Counterdefendants concealed their illegal and otherwise improper conduct. As a
18 result, Cisco, despite reasonable efforts and precautions, did not begin to discover
19 Counterdefendants' conduct until 2008.

20 117. Counterdefendants' acts of infringement have caused Cisco damages in an amount to
21 be determined at trial.

22 118. Cisco is entitled to recover the maximum statutory damages, pursuant to 17 U.S.C.
23 § 504(c) in the amount of \$150,000 with respect to each work infringed, or other such amounts as
24 may be proper under 17 U.S.C. § 504(c). Alternatively, at Cisco's election, pursuant to 17 U.S.C.
25 § 504(b), Cisco shall be entitled to its actual damages, including Counterdefendants' profits from
26 infringement, as will be proven at trial.

27 119. Cisco is further entitled to an award of its attorneys' fees and full costs pursuant to
28 17 U.S.C. § 505.

1 120. Counterdefendants' conduct is causing and, unless enjoined by this Court, will
2 continue to cause Cisco severe and irreparable harm that cannot be fully compensated or measured
3 in terms of money, and for which Cisco does not have an adequate remedy at law.

4 121. Cisco is entitled to an injunction under 17 U.S.C. § 502 prohibiting the continued
5 infringement of Cisco's copyrights and its exclusive rights under the Copyright Act.

6 122. Cisco is also entitled under 17 U.S.C. § 503 to an order directing the impoundment,
7 destruction or other reasonable disposition of all infringing copies of Cisco's copyrighted software.

8 WHEREFORE, Cisco prays for relief as set forth below.

9 **SECOND COUNTERCLAIM FOR RELIEF**

10 **(Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030)**

11 **(Against All Counterdefendants)**

12 123. Cisco repeats and realleges the allegations of paragraphs 1, 2, 5–9, 12, 38–47, 68, 79,
13 83–91, 96–101, and 103 above.

14 124. Cisco's system or network of protected computers and data storage devices
15 containing its proprietary and copyrighted software are "protected computers" as that term is defined
16 in 18 U.S.C. § 1030(e)(1) and (2) (hereinafter the "Protected Computers").

17 125. Counterdefendants knowingly and with intent to defraud, accessed Cisco's Protected
18 Computers without authorization and/or exceeding authorized access and through this access,
19 furthered the intended fraud and improperly obtained things of value over a multi-year period,
20 thereby causing Cisco damage.

21 126. Counterdefendants intentionally accessed Cisco's Protected Computers without
22 authorization and as a result of this access recklessly caused Cisco damage.

23 127. Multiven and/or Adekeye, knowingly and with the intent to defraud, trafficked
24 Cisco's passwords thereby allowing themselves and others, including but not limited to Pingsta, to
25 access Cisco's Protected Computers without authorization and this trafficking affected interstate
26 commerce.

27 128. The amount of loss to Cisco as a result of unlawful access, copying, and or
28 destruction of computerized data is to be determined, but exceeds \$5,000 in a single year.

1 129. The loss to Cisco includes, but is not limited to, the cost of investigation of the
2 unauthorized access and re-securing of the network, the impairment of the value of Cisco's
3 proprietary and copyrighted data, and lost profits due to Counterdefendants' access of the data
4 without paying Cisco as well as Counterdefendants' using that data in its service business. These
5 losses, independently, are in excess of \$5,000.

6 130. Multiven, Adekeye, and Pingsta concealed their illegal and otherwise improper
7 conduct. As a result, Cisco, despite reasonable efforts and precautions, did not begin to discover
8 their conduct until 2008.

9 131. Cisco is entitled to compensatory damages, injunctive relief, and other equitable relief
10 as the Court may deem appropriate.

11 WHEREFORE, Cisco prays for relief as set forth below.

12 **THIRD COUNTERCLAIM FOR RELIEF**

13 **(False Advertising in Violation of 15 U.S.C. § 1125(a))**

14 **(Against Multiven)**

15 132. Cisco Systems repeats and realleges the allegations of paragraphs 3, 13–15, and 55–
16 64 above.

17 133. Multiven has made false statements of fact on its website.

18 134. On information and belief, Multiven has made false statements of fact in other
19 commercial advertisements and promotions concerning the scope of its services.

20 135. On information and belief, Multiven has made additional false statements in
21 discussions with actual and potential customers.

22 136. These statements include, but are not limited to, misrepresentations about Multiven's
23 size, its partners, and its engineers.

24 137. These false statements were material because, for example, the quality and number of
25 on-site engineers at a company offering networking equipment service is important to users of
26 networking equipment.

27 138. Multiven's false statements have the tendency to deceive a substantial segment of its
28 audience.

1 139. On information and belief, Multiven's false statements have actually deceived
2 Multiven customers and potential customers.

3 140. Multiven's false statements are likely to influence customers' purchasing decisions.

4 141. Multiven's false statements have entered interstate commerce by means of Internet
5 transmission, among other things.

6 142. Cisco Systems has been injured as a result of Multiven's false statement by direct
7 diversion of sales from Cisco Systems to Multiven.

8 143. Multiven's conduct has caused Cisco Systems damages in an amount to be
9 determined at trial.

10 144. Multiven's false statements have caused and will cause Cisco Systems damage and
11 other irreparable injury for which it does not have an adequate remedy at law.

12 145. Multiven's activities entitle Cisco Systems to recover its actual damages and
13 Multiven's profits in an amount to be proven at trial, together with Cisco's attorneys' fees and costs.

14 146. Furthermore, Cisco Systems is entitled to a permanent injunction to prevent future
15 violations of 15 U.S.C. § 1125.

16 WHEREFORE, Cisco Systems prays for relief as set forth below.

17 **FOURTH COUNTERCLAIM FOR RELIEF**

18 **(California Penal Code § 502)**

19 **(Against All Counterdefendants)**

20 147. Cisco repeats and realleges the allegations of paragraphs 1, 2, 5–9, 12, 22, 38–47, 68,
21 79, 83–105 above.

22 148. Multiven, Adekeye, and/or Pingsta knowingly accessed and without permission used
23 Cisco's data, computer, computer system, and/or computer network (as those terms are defined in
24 California Penal Code § 502(b)) to devise and/or execute a scheme or artifice to defraud, deceive, or
25 extort and/or to wrongfully control or obtain money, property, or data.

26 149. Multiven, Adekeye, and/or Pingsta knowingly accessed and without permission took
27 copies and/or made use of data from Cisco's computer, computer system, and/or computer network
28 (as those terms are defined in California Penal Code § 502(b)) and/or took or copied supporting

1 documentation.

2 150. Multiven, Adekeye, and/or Pingsta knowingly and without permission used and/or
3 caused to be used Cisco's computer services (as that term is defined in California Penal Code §
4 502(b)).

5 151. Multiven, Adekeye, and/or Pingsta knowingly and without permission disrupted
6 and/or caused the disruption of computer services (as that term is defined in California Penal Code §
7 502(b)) and/or caused the denial of computer services (as defined in Section 502(b)) to an authorized
8 user of Cisco's computer, computer system, and/or computer network (as those terms are defined in
9 California Penal Code § 502(b)).

10 152. Multiven, Adekeye, and/or Pingsta knowingly and without permission provided
11 and/or assisted in providing a means of accessing Cisco's computers, computer system, and/or
12 computer network (as those terms are defined in California Penal Code § 502(b)) in violation of
13 California Penal Code Section 502.

14 153. Multiven, Adekeye, and/or Pingsta knowingly and without permission accessed
15 and/or caused to be accessed Cisco's computers, computer system, and/or computer network (as
16 those terms are defined in California Penal Code § 502(b)).

17 154. In carrying out this unlawful access, Multiven, Adekeye, and/or Pingsta acted with
18 fraud, oppression, and malice.

19 155. Cisco is entitled to compensatory damages, punitive or exemplary damages,
20 reasonable attorneys' fees, injunctive relief, and other equitable relief as the Court may deem
21 appropriate.

22 WHEREFORE, Cisco prays for relief as set forth below.

23 **FIFTH COUNTERCLAIM FOR RELIEF**

24 **(Trespass to Chattels)**

25 **(Against All Counterdefendants)**

26 156. Cisco repeats and realleges the allegations of paragraphs 1–9, 12, 31, 38–44, 68, 79,
27 83–92, and 95–105 above.

157. Cisco's password-protected computer systems are repositories of valuable proprietary information. They are essential to Cisco's technical support services.

158. Counterdefendants Multiven and Adekeye, through their unauthorized access to and download from Cisco's computers, as described above, intentionally and without authorization interfered with plaintiff's possessory interest in Cisco's computer system.

159. Counterdefendants' unauthorized use proximately resulted in damage to Cisco.

160. The loss includes, but is not limited to, the diminution of value of these proprietary resources.

161. Cisco is entitled to compensatory damages, injunctive relief, and such other relief as the Court may deem appropriate.

WHEREFORE, Cisco prays for relief as set forth below.

SIXTH COUNTERCLAIM FOR RELIEF

(Tortious interference with contract)

(Against All Counterdefendants)

162. Cisco repeats and realleges the allegations of paragraphs 1, 3, 4, 10, 11, 15, 32, 51–54, 70–76, 83–87, and 95–99 above.

163. Most if not all Cisco employees sign employment contracts with Cisco by which they agree to keep their Cisco passwords and credentials confidential and to not work for Cisco competitors while employed at Cisco.

164. Multiven is a competitor of Cisco.

165. Pingsta is a competitor of Cisco.

166. Multiven, Adekeye, and Pingsta are aware that most if not all Cisco employees have employment contracts under which they agreed to keep their Cisco passwords and credentials confidential.

167. Multiven, Adekeye, and/or Pingsta nevertheless have persuaded at least one, and possibly more, employees to provide them with Cisco passwords and/or credentials.

168. These employees are in breach of their employment contracts with Cisco.

1 169. Multiven, Adekeye, and Pingsta are aware that most if not all Cisco employees have
2 employment contracts under which they agreed not to work for Cisco's competitors.

3 170. Multiven, Adekeye, and/or Pingsta nevertheless solicit Cisco employees to work for
4 Pingsta while retaining their jobs at Cisco, intending that they breach their employment contracts
5 with Cisco.

6 171. As a result of these solicitations, various Cisco employees have started to
7 simultaneously work for Multiven and/or Pingsta.

8 172. As a result of Counterdefendants conduct, these employees are in breach of their
9 employment contracts with Cisco.

10 173. These breaches have damaged Cisco.

11 174. Cisco is entitled to compensatory damages, injunctive relief, and such other relief as
12 the Court may deem appropriate.

13 WHEREFORE, Cisco prays for relief as set forth below.

14 **SEVENTH COUNTERCLAIM FOR RELIEF**

15 **(Unfair Competition)**

16 **(California Business and Professional Code § 17200, et seq.)**

17 **(Against All Counterdefendants)**

18 175. Cisco repeats and realleges the allegations of paragraphs 1–9, 12, 22, 23, 31, 38–47,
19 68, 79, 83–92, 95–101, and 105 above.

20 176. Cisco is a “person” within the meaning of California Business & Professions Code
21 Section 17201.

22 177. As alleged herein, Counterdefendants’ conduct is “unlawful” because, among other
23 reasons, it violated the Computer Fraud and Abuse Act and California Penal Code section 502.

24 178. As alleged herein, Counterdefendants’ conduct constitutes “unfair” business
25 practices.

26 179. Counterdefendants engaged in “unfair” business practices by obtaining Cisco’s
27 proprietary information without authorization.

28

180. By reason of, and as a direct and proximate result of, Counterdefendants' unfair and unlawful practices and conduct, Cisco has suffered and will continue to suffer, financial injury to its business and property in an amount to be determined at trial.

181. Counterdefendants concealed their illegal and otherwise improper conduct. As a result, Cisco, despite reasonable efforts and precautions, did not begin to discover Counterdefendants' conduct until 2008.

182. The entry of a permanent and mandatory injunction against Multiven, Adekeye, Pingsta, and each of them, is necessary to stop these ongoing unlawful and unfair business practices.

183. Cisco is also entitled to restitutionary disgorgement as a result of Multiven, Adekeye, and Pingsta's unfair and unlawful business practices.

WHEREFORE, Cisco prays for relief as set forth below.

PRAYER FOR RELIEF

WHEREFORE, Cisco prays for relief as set forth below:

1. For a judgment in favor of Cisco and against Counterdefendants on all claims for relief;

2. For a preliminary and permanent injunction requiring Counterdefendants, their agents, employees, and other persons acting in concert with or for them (i) to cease and desist use, copying, or distribution of the infringed works; and (ii) to return works or copies in the possession of Counterdefendants, including without limitation any infringing copies on Counterdefendants' computers, computer servers, and computer storage media;

3. For an order directing the impoundment, destruction or other reasonable disposition of all infringing copies of Cisco's copyrighted software;

4. For a preliminary and permanent injunction to stop Counterdefendants' illegal activities, including violations of the Copyright Act, Computer Fraud and Abuse Act, California Penal Code § 502, trespass to chattels, tortious interference with contract, and California Business and Professional Code § 17200, and specifically for an order precluding Counterdefendants from accessing Cisco's computerized data and proprietary information;

1 5. For an award of Cisco's actual damages and Counterdefendants' profits, or at Cisco's
2 election before entry of judgment, statutory damages in the amount of \$150,000 per work infringed
3 for the Counterdefendants' copyright violations;

4 6. For an award of compensatory damages for the Counterdefendants' violations of the
5 Computer Fraud and Abuse Act;

6 7. For an award of compensatory damages and exemplary or punitive damages for the
7 Counterdefendants' violations of California Penal Code § 502, trespass to chattels, and tortious
8 interference with contract;

9 8. For restitutionary disgorgement against Pingsta for its violation of California
10 Business and Professional Code § 17200;

11 9. For an award of costs of the actions, including attorneys' fees on the Copyright and
12 Section 502 claims for relief; and

13 10. For any other and further relief as the Court may deem just and proper

14 Dated: November 20, 2009

WINSTON & STRAWN LLP

15
16 By /s/ Patrick M. Ryan
 PATRICK M. RYAN
17 Attorneys for Defendant and Counterclaimant
 CISCO SYSTEMS, INC. and Counterclaimant
18 CISCO TECHNOLOGY, INC.

19 **DEMAND FOR JURY TRIAL**

20 Cisco hereby renews its demand for a trial by jury on all issues triable to a jury, including
21 Plaintiff's claims and Cisco's counterclaims.

22 Dated: November 20, 2009

WINSTON & STRAWN LLP

23
24 By /s/ Patrick M. Ryan
 PATRICK M. RYAN
25 Attorneys for Defendant and Counterclaimant
 CISCO SYSTEMS, INC. and Counterclaimant
26 CISCO TECHNOLOGY, INC.

27
28 SF:265573.7