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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 MULTIVEN, INC., a Delaware
corporation,

12 Plaintiff,

13 vs.

14 CISCO SYSTEMS, INC., a
15 California corporation,

16 Defendant.

CASE NO. CV
08 05391

RS

) CIVIL COMPLAINT FOR DAMAGES
) AND INJUNCTIVE RELIEF:
)
) 1) SECTION TWO OF THE SHERMAN
) ACT - ACTUAL MONOPOLIZATION;
) 2) SECTION TWO OF THE SHERMAN
) ACT - ATTEMPTED
) MONOPOLIZATION; 3) SECTION ONE
) OF THE SHERMAN ACT - UNLAWFUL
) TYING ARRANGEMENT; 4)
) INTENTIONAL INTERFERENCE WITH
) PROSPECTIVE ECONOMIC ADVANTAGE
) AND CONTRACTUAL RELATIONS; AND
) 5) CAL. BUS. & PROF. CODE §
) 17200 - UNFAIR COMPETITION

[DEMAND FOR JURY TRIAL]

21
22 Plaintiff Multiven, Inc. ("Multiven") files this Complaint
23 against defendant Cisco Systems, Inc. ("Cisco") to secure damages
24 and injunctive relief, and demanding trial by jury, claims and
25 alleges as follows:

26 / / /

27 / / /

28 / / /

COMPLAINT

ORIGINAL FILED
DEC - 1 2008
Richard W. Wiekling
Clerk, U.S. District Court
Northern District of California
San Jose
ADR

I.

SUMMARY OF THE CASE

1
2
3 1. Defendant Cisco is the world's leader in the
4 development, production and servicing of Internet Protocol ("IP")
5 based networking technologies which have evolved as a platform
6 that will allow as many as 14 billion devices to be connected to
7 the Internet by 2010. The modern day networking infrastructure
8 is comprised of routers and switches that are very complex
9 computers powered by operating system software in much the manner
10 as a server is powered by Microsoft Windows operating systems or
11 Linux operating systems. Over the past two decades the
12 networking equipment industry has experienced rapid growth and
13 expansion as businesses worldwide continue to make substantial
14 investment in network infrastructures.

15 2. This lawsuit is about Cisco's deliberate and continuing
16 attempt to monopolize for itself (and its "partners" (Cisco-
17 authorized resellers of Cisco equipment and services nationwide)
18 with which it does not significantly compete) the service and
19 maintenance of Cisco enterprise (Cisco networking equipment for
20 all segments (e.g., internet service providers, government,
21 academia, small, medium and large business, etc.) with the
22 exception of home networking equipment) hardware, principally
23 routers, switches and firewalls. Cisco possesses a market share
24 of approximately 70% in the networking equipment industry.
25 Indeed, the combined market capitalization of its major
26 competitors is less than 30% of Cisco's. Cisco has market power
27 so great that IBM exited the router and switch networking
28 equipment manufacturing business in 1999, sold its intellectual

1 property to Cisco, and then became a Cisco reseller.

2 Accordingly, Cisco's unlawful antitrust activities, as explained
3 hereafter, cannot be disciplined by competition in the primary
4 market for networking hardware.

5 3. No owner of Cisco networking equipment could effectively
6 utilize the Cisco hardware without the Cisco operating system
7 software and software "updates." An "update," sometimes also
8 called a "patch" or a "bug fix," is a software release that
9 corrects inherent manufacturer defects in the customer's existing
10 software, while an "upgrade" (which may include a "bug fix")
11 usually adds some new feature to the software.

12 4. The availability and use of "updates" are the only way
13 Cisco system owners can keep their networking hardware systems
14 functioning properly and at a state-of-the-art level. These
15 "updates" are absolutely essential to efficiently and effectively
16 utilize Cisco network hardware systems; and they cannot be
17 practicably duplicated or replicated, and there are no reasonably
18 interchangeable substitutes for such "updates."

19 5. To protect its over \$6 billion yearly stream of service
20 and maintenance revenue, Cisco has cleverly and uniquely
21 conditioned the provision of its software "updates" on the
22 customer's purchase of a hardware maintenance service agreement
23 called "SMARTnet," an acronym for Software Maintenance ("SM"),
24 Advance Replacement ("AR"), Technical support "T") and network
25 ("net"). Cisco's website, asserts that a customer cannot acquire
26 or access software "updates" without purchasing "SMARTnet." The
27 effect of this leveraging of monopoly power and unlawful tie-in
28 and/or bundling is to effectively preclude any non-Cisco

1 affiliated Independent Service Organization ("ISO") from
2 competing for the business of servicing Cisco networking
3 hardware, thus preserving for itself all but a pittance of that
4 line of commerce which is separate and distinct from the
5 "updates" of its software. There is no reasonably
6 interchangeable substitute available for the service and
7 maintenance of Cisco hardware other than "SMARTnet" offered by
8 Cisco. As a consequence, competition in the market for the
9 provision of service and maintenance for Cisco network hardware
10 has been suppressed and virtually eliminated and consumers in
11 that market have suffered a loss of choice and have been required
12 to pay higher service/maintenance prices than would be the case
13 in a competitive market.

14 6. The United States District Court in New Jersey has
15 sustained an antitrust complaint (Avaya, Inc. v. Telecom Labs,
16 Inc., No. 06-2490, 2008 U.S. Dist. LEXIS 72354 (D.N.J. Aug. 29,
17 2008) against Avaya, Inc., another major manufacturer of
18 enterprise networking equipment, for bundling software "updates"
19 to the purchase of its service contract. Computer giants such as
20 Microsoft, Apple and Hewlett-Packard, among many others, all
21 provide software "updates" as part of their software licenses or
22 in some other reasonable manner which does not insulate them from
23 competition in the servicing of their respective hardware
24 offerings.

25 7. Finally, Cisco has orchestrated a nationwide combination
26 among its so-called "partners" strictly limiting the
27 circumstances under which, and how, these "partners" can compete
28 with Cisco, or each other, for the selling of Cisco maintenance

1 service "SMARTnet."

2 II.

3 JURISDICTION AND VENUE

4 8. This Complaint is filed and this action is instituted
5 under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26)
6 to recover the damages caused by, and to secure injunctive relief
7 against, the named defendant for violations of Sections 1 and 2
8 of the Sherman Act (15 U.S.C. §§ 1, 2), as alleged herein.

9 9. This Court has original and exclusive jurisdiction over
10 the subject matter of this civil action under 15 U.S.C. § 15 and
11 28 U.S.C. §§ 1331, 1337. This Court may exercise supplemental
12 jurisdiction over the state law based claims pursuant to 28
13 U.S.C. § 1367. Defendant maintains an office and transacts
14 business on a systematic and continuous basis within this
15 District, and may be found here, within the meaning of 15 U.S.C.
16 §§ 15, 22 and 28 U.S.C. § 1391. Further, the unlawful acts
17 alleged herein were performed and occurred in material part,
18 within this District.

19 III.

20 INTERSTATE COMMERCE

21 10. The actions complained of herein have, and will,
22 restrain and adversely affect interstate commerce in that
23 defendant Cisco sells its products and services across state
24 lines. Further, defendant Cisco purchases goods and supplies in
25 interstate commerce.

26 IV.

27 THE PARTIES

28 11. Defendant Cisco Systems, Inc., is a California

1 corporation with its corporate headquarters located in San Jose,
2 California. Cisco was founded in 1984, and went public in 1990.
3 Cisco was one of the first companies to successfully develop,
4 market and sell commercial routers to support multiple computer
5 network protocols. Subsequently, as Internet Protocol became the
6 standard, Cisco became the market leader in IP-based networking
7 equipment that enables the transmission of voice, video and data
8 communication across government, academia, large, medium and
9 small enterprise network infrastructures worldwide. By 2000,
10 Cisco became the most valuable company in the world, with a
11 market capitalization of more than \$500 billion. Cisco's total
12 sales for products and services in 2008 will be almost \$40
13 billion. Cisco's net income will exceed \$8 billion.

14 12. Plaintiff Multiven, Inc., is a Delaware corporation
15 with its principal place of business located in Redwood City,
16 California. Multiven provides service and maintenance support
17 for router and networking systems, including those placed in the
18 market by defendant Cisco. Plaintiff Multiven is an independent
19 service organization for networking hardware/software
20 manufactured by the major industry players.

21 v.

22 FACTUAL ALLEGATIONS RELEVANT TO ALL CLAIMS

23 13. For the purposes of plaintiff's antitrust claims set
24 forth below, the relevant product market is defined as the
25 service and maintenance of Cisco enterprise networking equipment.
26 The relevant geographic market is the United States.

27 14. Defendant Cisco was the pioneer, and is now the world
28 leader in IP-based networking and other products and services

1 related to the communications and information technology
2 industries. Cisco asserts that its products and services are
3 designed to address a wide range of customers' business needs,
4 including improving productivity, reducing costs and gaining a
5 competitive advantage. Cisco's technology focuses on delivering
6 networking products and solutions that simplify and secure
7 customers' infrastructures and offer integrated services. Cisco
8 product offerings include its core technologies, routing and
9 switching, and a group of products and services known as advanced
10 technologies. Among the services offered by Cisco is a service
11 contract for the maintenance of Cisco equipment known as
12 "SMARTnet."

13 15. Cisco also supplies operating system software to make
14 its systems function. Each Cisco systems user must have Cisco
15 operating software, and every customer having that software must
16 also have access to "updates" (sometimes called "patches" or "bug
17 fixes") which are primarily keyed to eliminating programming
18 errors or malfunctions in the software. These "updates" are the
19 only way for Cisco system owners to keep their networking
20 hardware systems functioning properly at a state-of-the-art
21 level. These "updates" are absolutely essential to efficiently
22 and effectively utilize Cisco hardware systems.

23 16. Instead of making these necessary software "updates"
24 and bug fixes available to all customers that have purchased its
25 operating software/license, as does Microsoft, Apple, Hewlett-
26 Packard and many others, Cisco makes these software "updates" and
27 bug fixes available only to those customers that have purchased
28 Cisco's "SMARTnet" service and maintenance contract. Cisco

1 refuses to make the "updates" and bug fixes available to any
2 customer that does not purchase and sign a SMARTnet contract.

3 VI.

4 CLAIMS FOR RELIEF

5 FIRST CAUSE OF ACTION

6 (Actual Monopolization in Violation of
7 Section 2 of the Sherman Act)

8 17. Plaintiff hereby realleges and incorporates by
9 reference each allegation set forth in Paragraphs 1 through 16,
10 as if set forth in full herein.

11 18. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits,
12 *inter alia*, the willful monopolization of any part of the trade
13 or commerce among the States. Defendant Cisco is the pioneer in
14 the IP-based networking equipment industry and controls and
15 maintains at least a 70% share of that networking equipment
16 market. Further, the provision of service and maintenance
17 contracts for such Cisco equipment is not interchangeable with
18 other manufacturers' service, maintenance, parts and the
19 provision of software updates and bug fixes/patches. The
20 participants in those markets, including Cisco, consider the two
21 markets (software and the sale and provision of networking
22 equipment maintenance) separate from one another. Because
23 SMARTnet is the only way Cisco customers can access the
24 indispensable software updates and bug fixes, owners of Cisco
25 networking equipment have no reasonably interchangeable
26 substitute for the service and maintenance of their Cisco
27 networking equipment. Further, Cisco's ability to charge
28 supracompetitive prices for its SMARTnet service program

COMPLAINT

1 demonstrates that the Cisco service and maintenance market is a
2 relevant antitrust market.

3 19. Another reason that the market for service and
4 maintenance of Cisco networking equipment is separate and
5 distinct from other markets is that customers who have installed
6 Cisco networking equipment, need service and maintenance on that
7 specific equipment, and not on some other equipment. Such
8 customers have decided for their own reasons to make a
9 substantial investment in obtaining Cisco networking equipment to
10 handle their networking infrastructure needs, an investment that
11 would be lost if the Cisco equipment software did not function
12 properly and did not enjoy ongoing bug fixes to inherent
13 manufacturer defects in the software.

14 20. Defendant Cisco's monopolistic and exclusionary
15 behavior in the aftermarket for service and maintenance is not,
16 and has not been, and cannot be disciplined by competition in the
17 primary market for sales and placement of networking equipment
18 because dissatisfied Cisco networking equipment owners cannot
19 economically replace their Cisco networking systems with one
20 offered by a competitor. Virtually all owners of Cisco
21 networking equipment are "locked" into such Cisco systems'
22 service contracts because of: a) the extremely high switching
23 costs due to significant costs of obtaining and installing Cisco
24 equipment (usually amounting to millions of dollars especially
25 for owners of large network infrastructures like governments,
26 Fortune 500 corporations, and internet service providers); b)
27 costly and time-consuming retraining costs and replacing of
28 technical personnel; and c) relatively long useful life of Cisco

1 equipment, which, with updates, can exceed 15 years.
2 Additionally, the global installed base (asset value of equipment
3 currently in production) of Cisco networking systems (estimated
4 to be worth over \$200 billion) is large relative to new equipment
5 sales, allowing Cisco to profitably set and maintain
6 supracompetitive prices in the service/maintenance aftermarket.

7 21. Cisco's service and maintenance prices are
8 significantly higher than those of plaintiff Multiven's or other
9 independent service organizations for comparable
10 service/maintenance, and which many customers regard as superior
11 in quality and timeliness to that provided by Cisco.

12 22. A significant number of Cisco equipment owners are
13 unaware of Cisco's anticompetitive tying/bundling scheme;
14 specifically, before purchasing and installing Cisco equipment,
15 the Cisco equipment owners are unaware of the fact that software
16 updates and bug fixes/patches are not provided post-warranty
17 without the purchase of a Cisco SMARTnet service program. Cisco
18 does not routinely inform customers at the time of purchase of
19 its tying scheme, and many customers reasonably assume that as
20 owners and licensees of Cisco equipment and the operating
21 software, they would be provided with all necessary software bug
22 fixes/patches, much the same as Microsoft, Apple and Hewlett-
23 Packard provide updates and fixes/patches for their software
24 products. Indeed, most purchasers assume and expect that when
25 they purchase and install Cisco equipment (that is represented to
26 them by Cisco as fully functional and operational), that as
27 problems or defects in the software are discovered and/or arise,
28 Cisco will provide timely fixes, patches and/or updates to remedy

1 the problem without the need to buy SMARTnet service/maintenance
2 contracts.

3 23. Further, customers of networking equipment do not
4 generally engage in a life cycle cost analysis before purchasing
5 Cisco networking equipment. It is not unusual for equipment
6 purchase decisions to be made by a different individual or
7 department than the one which pays for non-warranty service and
8 maintenance, a fact which also precludes a life cycle cost
9 analysis. The historical presence of ISOs in the computer
10 industry has also led many customers to believe understandably
11 that they will have the option of obtaining independent service
12 for their Cisco equipment once the warranty period expires. This
13 lower cost option, however, is virtually no longer realistic in
14 the face of Cisco's anticompetitive and exclusionary practices.

15 24. Interbrand competition, or lack thereof, in the network
16 equipment foremarket does not suffice to discipline Cisco's
17 exclusionary and anticompetitive practices in the service/
18 maintenance aftermarket. Accordingly, owners of Cisco networking
19 equipment have no reasonably interchangeable substitute for the
20 service and maintenance of their Cisco networking equipment and
21 almost all of the Cisco customers necessarily subscribe to
22 SMARTnet for one or more of their Cisco pieces of equipment.

23 25. Cisco dominates the market for service and maintenance
24 of Cisco networking equipment in the United States, possessing a
25 market share greater than 90%.

26 26. There are significant and high barriers to market entry
27 that prevent competing ISOs from entering and/or expanding in the
28 relevant market, which include but are not limited to the

1 following:

2 (a) Cisco's dominant market position as a monopolist
3 of service and maintenance of Cisco networking equipment with a
4 history of engaging in exclusionary conduct to eliminate ISO
5 competition;

6 (b) patents, copyrights and other intellectual
7 property rights relating to networking products; and

8 (c) the inability of ISO competitors to develop and
9 timely provide software bug fixes/patches and updates for Cisco's
10 network operating system software.

11 27. Defendant Cisco has monopoly power in the relevant
12 market, as reflected by, *inter alia*, its substantial share of the
13 networking equipment service and maintenance market; its
14 exclusive control over the supply of software bug fixes/patches
15 and updates; its ability to exclude competition in the service
16 market; and its ability to charge supracompetitive prices for
17 service and maintenance.

18 28. Defendant Cisco's monopoly position in the relevant
19 market has been acquired and maintained through intentional
20 exclusionary and predatory conduct, as opposed to business
21 acumen, or historic accident or by virtue of offering a superior
22 product or service, greater efficiency or lower prices.

23 29. Defendant Cisco's anticompetitive and exclusionary
24 conduct described herein is not motivated or driven by
25 technological or efficiency concerns, and has no valid or
26 legitimate business justification. Rather, its purpose and
27 effect is to ensure that plaintiff Multiven and other competitive
28 rivals in the relevant market cannot successfully invade or erode

1 Cisco's \$6 billion annual revenue stream for the servicing of its
2 networking hardware.

3 30. During the relevant time period, defendant Cisco and
4 plaintiff Multiven serviced Cisco networking equipment in the
5 United States. The marketing, distribution and sale of such
6 services directly involves, and substantially affects, interstate
7 commerce. The violations of the Sherman Act alleged herein
8 adversely, directly and substantially affect the flow of such
9 products and services in interstate commerce.

10 31. As alleged herein, defendant Cisco has engaged in an
11 anticompetitive scheme to prevent ISO competitors from servicing
12 Cisco networking equipment and to prevent customers from
13 servicing that equipment themselves, all for the purpose of
14 maintaining and increasing Cisco's supracompetitive service
15 prices on its networking equipment. As a result, consumers have
16 been harmed because supracompetitive prices have been maintained
17 and increased, and the quantity, quality and variety of service
18 offerings in the marketplace has been reduced and constrained.

19 32. By reason of, and as a direct and proximate result of,
20 defendant Cisco's practices and conduct, plaintiff Multiven has
21 suffered, and will continue to suffer, financial injury to its
22 business and property. As a result, plaintiff has been deprived
23 of revenue and profits it would have otherwise made, has suffered
24 diminished market growth and sustained a loss of goodwill.

25 Plaintiff Multiven has not yet calculated the precise extent of
26 its past damages and cannot now estimate with precision the
27 future damages which continue to accrue, but when it does so, it
28 will seek leave of the Court to insert the amount of the damages

1 sustained herein.

2 33. Defendant Cisco's predatory and exclusionary conduct
3 has caused antitrust injury to plaintiff Multiven, competition
4 and consumers.

5 SECOND CAUSE OF ACTION

6 (Attempted Monopolization in Violation of
7 Section 2 of the Sherman Act)

8 34. Plaintiff hereby realleges and incorporates by
9 reference each allegation set forth in Paragraphs 1 through 33,
10 as if set forth in full herein.

11 35. Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits,
12 *inter alia*, attempts to monopolize any part of the trade or
13 commerce among the states.

14 36. The relevant product market for antitrust purposes is
15 the sale and provision of service and maintenance for Cisco
16 networking equipment. The relevant geographic market is the
17 United States.

18 37. Defendant Cisco's conduct and practices are
19 anticompetitive, predatory and exclusionary.

20 38. Defendant Cisco has undertaken its anticompetitive and
21 exclusionary conduct with the purpose of monopolizing, and with
22 the deliberate and specific intent to monopolize the market for
23 the sale and provision of service and maintenance for Cisco
24 networking equipment in the United States. Defendant Cisco
25 specifically intends to eliminate, destroy or foreclose
26 meaningful competition in the relevant market through the tactics
27 and contracts described above, including the bundling and tying
28 of bug fixes/patches and updates for its operating system

COMPLAINT

1 software, and erecting technological barriers to service.
2 Cisco's conduct discourages and/or precludes owners of Cisco
3 equipment from contracting with an independent service
4 organization, such as plaintiff Multiven, to effectively and
5 competently service and maintain their equipment. Cisco's scheme
6 is designed to exclude competition while allowing it to charge
7 supracompetitive prices for inferior service.

8 39. As described above, significant and high barriers to
9 market entry exist that preclude or discourage new ISOs from
10 entering the relevant market. Significant barriers to expansion
11 also exist for the small number of ISOs for Cisco networking
12 equipment that have managed to marginally penetrate this
13 service/maintenance market.

14 40. Defendant Cisco's anticompetitive acts affect a
15 substantial amount of interstate commerce in the relevant market
16 and constitute attempted monopolization in violation of Section 2
17 of the Sherman Act. Defendant Cisco's conduct is not motivated
18 by technological or efficiency concerns and has no valid or
19 legitimate business justification. Instead, its purpose and
20 effect is to preserve its monopoly position and stranglehold, and
21 to injure consumer welfare, plaintiff Multiven and other smaller
22 competitive rivals in the relevant market.

23 41. Defendant Cisco's anticompetitive acts have caused
24 substantial economic injury to plaintiff Multiven, and have also
25 injured competition in the relevant market by, *inter alia*,
26 foreclosing, lessening and eliminating competition and depriving
27 owners of Cisco networking equipment from securing lower cost or
28 higher quality alternatives, or both, for service and

1 maintenance.

2 42. The acts and practices of defendant Cisco have had, and
3 unless enjoined, will continue to have the following
4 anticompetitive and injurious effects:

5 (a) competition in the market for service and
6 maintenance of Cisco networking equipment has been suppressed and
7 virtually eliminated;

8 (b) customers have been deprived choice in securing
9 providers of service for Cisco networking equipment and have been
10 required to pay higher prices and receive inferior quality for
11 such services; and

12 (c) independent service organizations have been
13 effectively precluded from competing for and earning profits on
14 the servicing of Cisco networking equipment.

15 43. Absent action by this Court to enjoin and preclude
16 defendant Cisco from continuing its anticompetitive and
17 exclusionary conduct, there is a dangerous probability that Cisco
18 will succeed in obtaining a monopoly in the relevant market (or
19 continue to monopolize), including the power to set prices,
20 reduce output or exclude competition in the service and
21 maintenance of Cisco networking equipment completely.

22 44. By reason of, and as a direct and proximate result of
23 defendant Cisco's practices and conduct, plaintiff Multiven has
24 suffered, and will continue to suffer, financial injury to its
25 business and property. As a result, plaintiff has been deprived
26 of revenue and profits it would have otherwise made, suffered
27 diminished market growth and sustained a loss of goodwill.

28 Plaintiff Multiven has not yet calculated the precise extent of

1 its past damages and cannot now estimate with precision the
2 future damages which continue to accrue, but when it does so, it
3 will seek leave of the Court to insert the amount of the damages
4 sustained herein.

5 45. Defendant Cisco's predatory and exclusionary conduct
6 has caused antitrust injury to plaintiff Multiven, competition
7 and consumers.

8 THIRD CAUSE OF ACTION

9 (Unlawful Tying Arrangement in Violation of
10 Section One of the Sherman Act)

11 46. Plaintiff hereby alleges and incorporates by reference
12 each allegation set forth in Paragraphs 1 through 45, as if set
13 forth in full herein.

14 47. Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits,
15 *inter alia*, tying/bundling arrangements that unreasonably
16 restrain competition to the detriment of consumers.

17 48. A tying/bundling arrangement is a practice used by a
18 competitor with market power in one market (the "tying" product)
19 to extend or leverage its market power into an entirely distinct
20 market (the "tied" product). To accomplish this scheme, the
21 competitor agrees to provide the tying product (in this case,
22 software bug fixes/patches and updates) only on the condition
23 that its customers also purchase the tied product (in this case,
24 SMARTnet service/maintenance). The competitor uses its market
25 power in the tying product to force or coerce the customer into
26 purchasing the tied product so as to foreclose competition in the
27 tied product or service line.

28 49. The essential characteristic of an unlawful tying

1 arrangement is the seller's exploitation of its control over the
2 tying product to force the buyer into purchasing or accepting a
3 tied product which the customer either did not want, or might
4 have preferred to purchase from another competitor on different
5 terms.

6 50. Tying/bundling arrangements, which are unlawful *per se*
7 based on the market power of the offender, therefore require no
8 specific showing of unreasonable anticompetitive effect.
9 Tying/bundling arrangements may also be unlawful under a "Rule of
10 Reason" analysis where there is a showing of a substantial effect
11 on competition. Competitors such as plaintiff Multiven, in the
12 tied product market, are injured because they cannot offer their
13 service/maintenance on an equal basis with the supplier of the
14 tying product. Customers are injured because they forego choices
15 among products and services, and the consuming public is harmed
16 by the adverse effect on the market for the tied product.
17 Cisco's tying arrangement has foreclosed substantial volume of
18 commerce in the market for services/maintenance of Cisco
19 networking equipment and are herein alleged to be unlawful *per se*
20 or under the "Rule of Reason," or both.

21 51. The sale and provision of maintenance and service to
22 owners of Cisco networking equipment constitute a separate and
23 distinct product or service from software "updates" (bug
24 fixes/patches) for Cisco operating software.

25 52. There is sufficient, independent consumer demand for
26 both: (a) the maintenance and service of Cisco's networking
27 equipment, and (b) the "updates" necessary to maintain Cisco
28 operating software efficiently to ensure a state-of-the-art

1 network infrastructure so as to render it possible and efficient
2 for Cisco to sell, or provide, those products or services
3 separately from each other. There is no technological reason as
4 to why these products/services need to be bundled as a package.
5 They can instead be sold or provided separately. Plaintiff
6 Multiven, and other ISOs that provide non-warranty service and
7 maintenance for Cisco networking equipment, cannot, and do not,
8 produce Cisco operating system software "updates" and bug
9 fixes/patches. There are insurmountable barriers to ISOs
10 producing, on their own, functioning Cisco software updates and
11 bug fixes/patches. Indeed, it is not economically feasible (or
12 possible) for competing ISOs, such as plaintiff Multiven, or
13 others, to design, program, engineer and/or produce such software
14 products. Moreover, Cisco operating system software is
15 proprietary (just like Microsoft Windows) and as such, for
16 plaintiff Multiven, or any other ISO, to fix bugs in Cisco
17 software themselves, they would require access to Cisco's
18 proprietary source code, which Cisco does not make publicly
19 available.

20 53. Defendant Cisco has conditioned the receipt or access
21 to software bug fixes/patches for its Cisco operating software on
22 the purchase of its SMARTnet service and maintenance program for
23 its networking hardware. Indeed, Cisco will not provide software
24 update and bug fixes/patches to customers (including ISOs) who
25 cannot prove they have purchased a SMARTnet service maintenance
26 contract and are issued a log-in code for Cisco website to access
27 and download such software updates and bug fixes/patches.

28 54. Cisco is the only legitimate source for software

1 updates and bug fixes/patches for Cisco operating system
2 software. The bug fixes/patches are uniquely desirable and
3 critical for the proper functioning and longevity of Cisco
4 networking systems. Access to these software products is the
5 only way for system owners to ensure that their systems will
6 function properly, can enable and utilize the full range of
7 features included with the system, are updated, and operate
8 efficiently at a state-of-the-art level. Consequently, defendant
9 Cisco has sufficient market power in these products to force or
10 coerce a substantial number of small, medium and large owners of
11 Cisco networking equipment to purchase SMARTnet service and
12 maintenance contracts from defendant Cisco, or one of its
13 partners. Therefore, Cisco's tying arrangement has been highly
14 successful in distorting and/or eliminating competition in the
15 relevant market by forcing customers to choose Cisco maintenance
16 and service over that of substantially lower priced and/or better
17 quality maintenance and service from plaintiff Multiven, and
18 other ISOs.

19 55. Defendant Cisco has sufficient economic power in the
20 tying market to appreciably affect the competition in the tied
21 market. Cisco's market share for the service and maintenance of
22 Cisco networking equipment is in excess of 90%. Cisco has a
23 significant economic interest in the service/maintenance market
24 and clearly dominates and controls that market. With respect to
25 the development and distribution of fully functional, backward
26 compatible and comprehensive software update and bug
27 fixes/patches for its software operating systems, Cisco enjoys
28 and controls close to a 100% share of that market. Because Cisco

1 is the only supplier of these software products, indispensable
2 products that plaintiff Multiven and other ISOs cannot produce or
3 provide, this significant advantage or power enables Cisco to
4 condition the availability of the software products on acceptance
5 of the SMARTnet service and maintenance contract.

6 56. As a direct result of the foregoing restriction on
7 competition on ISOs of maintenance and service to owners of Cisco
8 networking equipment, such owners pay Cisco higher prices to
9 obtain maintenance and service than they would in a fully
10 competitive and open market, output has been limited, and the
11 quality and timeliness of service has been reduced and diminished
12 in that market. There are no business, technological or
13 efficiency reasons or justifications that require defendant Cisco
14 to impose its overly restrictive tying requirements.

15 57. Cisco's tying/bundling arrangements have created a
16 barrier that precludes effective entry by ISOs into the
17 service/maintenance relevant market and the quality and variety
18 of offerings in that market have been reduced and constrained.

19 58. Because defendant Cisco possesses market power in the
20 tying products (as well as the tied service), Cisco's tying
21 arrangements are illegal *per se*. Defendant Cisco's tying
22 arrangements, however, are also unlawful under the antitrust laws
23 when assessed under the "Rule of Reason." The anticompetitive
24 consequences of Cisco's conduct outweigh any procompetitive
25 effects thereof. Owners of Cisco networking equipment cannot
26 obtain service and maintenance for such systems from a provider
27 other than Cisco or a Cisco partner, and must instead pay
28 supracompetitive prices to Cisco. The tying arrangements imposed

1 by Cisco unreasonably restrain and suppress competition. Due to
2 Cisco's significant market power in the relevant market and the
3 dominant position it has obtained, competition in that market has
4 been significantly impaired by Cisco's conduct.

5 59. Defendant Cisco's tying/bundling arrangements affect a
6 substantial volume of interstate commerce in the relevant market.

7 60. By reason of, and as a direct and proximate result of
8 defendant Cisco's practices and conduct, plaintiff Multiven has
9 suffered, and will continue to suffer, financial injury to its
10 business and property. As a result, plaintiff has been deprived
11 of revenue and profits it would have otherwise made, suffered
12 diminished market growth and sustained a loss of goodwill.

13 Plaintiff has not yet calculated the precise extent of its past
14 damages and cannot now estimate with precision the future damages
15 which continue to accrue, but when it does so, it will seek leave
16 of the Court to insert the amount of the damages sustained
17 herein.

18 61. Defendant Cisco's predatory and exclusionary conduct
19 has caused antitrust injury to plaintiff Multiven, competition
20 and consumers.

21 FOURTH CAUSE OF ACTION

22 (Intentional Interference Prospective Economic
23 Advantage and Contractual Relations)

24 62. Plaintiff hereby alleges and incorporates by reference
25 each allegation set forth in Paragraphs 1 through 61, as if set
26 forth in full herein.

27 63. This Court has jurisdiction over this Fourth Cause of
28 Action based on the doctrine of supplemental jurisdiction (28

1 U.S.C. § 1367) because this Fourth Cause of Action arises from
2 the same transactions and from a common nucleus of operative
3 facts as alleged in the first three federal causes of actions.

4 64. Plaintiff Multiven has existing and valuable business
5 relationships, as well as reasonable expectations of further and
6 future relationships, with owners of Cisco networking equipment
7 to provide them with service/maintenance contracts.

8 65. Defendant Cisco is aware of these actual and
9 prospective business relationships and is engaged in intentional
10 and wrongful conduct designed or calculated to disrupt and
11 interfere with those relationships.

12 66. Defendant Cisco's conduct in interfering with such
13 prospective and actual relations is intentional, malicious and
14 without justification. Cisco's conduct and scheme is being
15 undertaken solely to hinder, if not eliminate, competition so
16 that Cisco can continue to reap supracompetitive prices and
17 profits on service/maintenance business. Cisco's anticompetitive
18 conduct is not privileged or excused and is without any
19 legitimate business justification. Cisco has knowingly engaged
20 in such conduct for the purpose of excluding competition and to
21 deprive consumers of the benefits of free and open competition.

22 67. Defendant Cisco's conduct is a substantial factor in
23 causing financial injury to plaintiff Multiven and has rendered
24 it more difficult for plaintiff to remain and survive as a viable
25 competitor.

26 68. Plaintiff Multiven's business and goodwill has been,
27 and will continue to be, substantially injured by Cisco's
28 conduct. Additionally, actual and prospective

1 service/maintenance customers will continue to be injured and
2 harmed by Cisco's acts and practices. Although plaintiff
3 Multiven has incurred substantial losses as a result of the
4 foregoing acts, and will continue to incur substantial losses in
5 the future as well as its growth being negatively impacted, all
6 such losses may be difficult to calculate with precision.
7 Therefore, in addition to any recoverable damages proximately
8 caused by Cisco's conduct, plaintiff Multiven also seeks a
9 permanent injunction preventing Cisco from continued interference
10 and requiring Cisco to unbundle and make available separately on
11 reasonable terms to owners of Cisco networking equipment, all
12 software bug fixes/patches and updates.

13 69. The intentional and disruptive conduct of defendant
14 Cisco is willful, malicious and oppressive. Consequently, an
15 award of exemplary or punitive damages in an amount sufficient to
16 punish and deter Cisco is justified.

17 FIFTH CAUSE OF ACTION

18 (Unfair Competition in Violation of
19 Cal. Bus. & Prof. Code § 17200 et seq.)

20 70. Plaintiff hereby realleges and incorporates by
21 reference each allegation set forth in Paragraphs 1 through 69,
22 as if set forth in full herein.

23 71. This Court has jurisdiction over this Fifth Cause of
24 Action based on the doctrine of supplemental jurisdiction (28
25 U.S.C. § 1367) because this Fifth Cause of Action arises from the
26 same transactions and from a common nucleus of operative facts as
27 alleged in the first three federal causes of action.

28 72. Section 17200 et seq. of the California Business &
COMPLAINT

1 Professions Code is written in the disjunctive and broadly covers
2 three varieties of unfair competition - acts that are unlawful,
3 or unfair, or fraudulent. The statute's intent and purpose is to
4 protect both consumers and competitors by promoting fair
5 competition in commercial markets for goods and services.

6 73. Plaintiff Multiven is a "person" within the meaning of
7 California Business & Professions Code § 17201.

8 74. As alleged herein, defendant Cisco's conduct
9 constitutes "unfair" business practices. A practice may be
10 deemed unfair even if not specifically proscribed by some other
11 law. Conduct that significantly threatens or harms competition,
12 or threatens an incipient violation of an antitrust law, may be
13 deemed to be "unfair."

14 75. As alleged herein, defendant Cisco's anticompetitive
15 conduct is also "unlawful." Within the meaning of § 17200,
16 virtually any violation of any civil or criminal federal, state
17 or municipal, statutory, regulatory, court-made, or local law can
18 serve as a predicate for an "unlawful" claim.

19 76. By reason of, and as a direct and proximate result of
20 defendant Cisco's unfair and unlawful practices and conduct,
21 plaintiff Multiven has suffered and will continue to suffer,
22 financial injury to its business and property.

23 77. Defendant Cisco's unfair and unlawful conduct has
24 caused harm to plaintiff Multiven, competition and consumers.

25 78. Pursuant to Section 17203, the entry of permanent and
26 mandatory injunctive relief against defendant Cisco is necessary
27 to enjoin Cisco's ongoing wrongful business conduct. An
28 injunction is needed to enable and restore competition in the

1 service and maintenance market by requiring Cisco to unbundle and
2 make available separately on reasonable terms to owners of Cisco
3 networking equipment, all software bug fixes/patches and updates.

4 PRAYER FOR RELIEF

5 WHEREFORE plaintiff Multiven prays that this Court adjudges
6 and decrees and follows:

7 1. That the conduct alleged in the First Cause of Action
8 herein be adjudged to be in violation of Section 2 of the Sherman
9 Act (15 U.S.C. § 2).

10 2. That the conduct alleged in the Second Cause of Action
11 herein be adjudged to be in violation of Section 2 of the Sherman
12 Act (15 U.S.C. § 2).

13 3. That the conduct alleged in the Third Cause of Action
14 herein be adjudged to be in violation of Section 1 of the Sherman
15 Act (15 U.S.C. § 1).

16 4. That the conduct alleged in the Fourth Cause of Action
17 herein be adjudged to constitute intentional interference with
18 prospective advantage.

19 5. That, pursuant to Section 4 of the Clayton Act (15
20 U.S.C. § 15), plaintiff recover treble the amount of its damages
21 sustained by reason of those federal antitrust violations.

22 6. That, pursuant to Section 4 of the Clayton Act (15
23 U.S.C. § 15), plaintiff be awarded a reasonable attorneys' fee
24 and costs of litigation.

25 7. That, pursuant to Section 16 of the Clayton Act (15
26 U.S.C. § 26), the unlawful leveraging, tying and bundling of
27 defendant be permanently enjoined.

28 8. That plaintiff be awarded punitive or exemplary damages

1 on its tort claim.

2 9. That the conduct alleged in the Fifth Cause of Action
3 herein be adjudged to be unfair and/or unlawful business practice
4 in violation of § 17200 of the California Business & Professions
5 Code.

6 10. That, pursuant to § 17203 of the California Business &
7 Professions Code, the unfair and/or unlawful business practices
8 of defendant be permanently enjoined.

9 11. That pursuant to Section 1021.5 of the California Code
10 of Civil Procedure, plaintiff be awarded reasonable attorneys'
11 fees.

12 12. For such other and further relief as the Court deems
13 just and proper.

14 Dated: December 1, 2008

BLECHER & COLLINS, P.C.
MAXWELL M. BLECHER
DONALD R. PEPPERMAN
JAMES ROBERT NOBLIN

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18 By: 

MAXWELL M. BLECHER
Attorneys for Plaintiff
Multiven, Inc.

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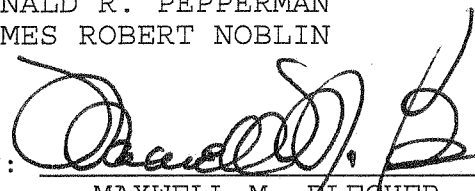
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and Local Rule 3-6.

Dated: December 1, 2008

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