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 Attorneys for Plaintiff
 8 FORTINET, INC.

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

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

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

24 **THE PARTIES**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 27. On May 5, 2004, Trend Micro sued Fortinet in the United States District Court for
27 the Northern District of California ("Prior Fortinet Northern District Action"), Case No. 04-CV-
28 01785-RMW, alleging infringement of the '600 patent. Trend Micro also filed a complaint with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 42. Despite Fortinet's efforts, Trend Micro has made no good faith effort to resolve
27 this dispute with Fortinet, and, thus, Fortinet requires specific relief from the Court in the form of
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1 a declaration that because the Licensed Patents are invalid and/or unenforceable, Fortinet has no
2 contractual obligation to continue to pay royalties pursuant to the License Agreement.

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

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

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

19 **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

1 **Specific Intent to Monopolize**

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

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

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

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

23 **Reasonable Probability of Success**

24 74. On information and belief, Trend Micro’s share of the relevant market has been
25 increasing since it began to assert the ‘600 patent against its competitors. Trend Micro’s share of
26 the relevant market will continue to increase if Trend Micro is successful in continuing to
27 enforce the fraudulently obtained ‘600 patent, and Trend Micro already controls a substantial
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1 share of the relevant market. Trend Micro and its licensees presently sell approximately 50% of
2 all AV systems purchased worldwide.

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

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

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

11 **Harm to Fortinet and to Competition**

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

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

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

25 **FOURTH CAUSE OF ACTION**

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

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

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

3 Dated: February 3, 2009

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

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5

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

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Attorneys for Plaintiff
FORTINET, INC.

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