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NORTHERN DISTRICT OF CALIFORNIA  
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13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA

15 SAN JOSE DIVISION

C08 05391

16 MULTIVEN, INC., a Delaware  
 17 corporation,

18 Plaintiff,

19 vs.

20 CISCO SYSTEMS, INC., a  
 21 California corporation,

22 Defendant.

) CAS. NO. CV  
 )  
 ) 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

23 [DEMAND FOR JURY TRIAL]

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

28 / / /

/ / /

/ / /

COMPLAINT

BLECHER & COLLINS

A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

I.

SUMMARY OF THE CASE

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

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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

15  
16  
17  
18 By: 

MAXWELL M. BLECHER  
Attorneys for Plaintiff  
Multiven, Inc.

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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BLECHER & COLLINS  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW

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