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Attorneys for Defendant and Counterclaim Plaintiff TREND MICRO INCORPORATED

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| BARRACUDA NETWORKS, INC., a Delaware corporation,<br><br>Plaintiff,<br><br>v.<br><br>TREND MICRO INCORPORATED, a California corporation and DOES 1 through 10;<br><br>Defendants. | CASE NO.: C07-01806-MHP<br><br>**JOINT CLAIM CONSTRUCTION STATEMENT PURSUANT TO PATENT L.R. 4-3** |
| TREND MICRO INCORPORATED, a California corporation,<br><br>Counterclaim Plaintiff,<br><br>v.<br><br>BARRACUDA NETWORKS, INC., a Delaware corporation;<br><br>Counterclaim Defendant. | |

Pursuant to Patent Local Rule 4-3, Plaintiff and Counterclaim Defendant Barracuda Networks, Inc. ("Barracuda") and Defendant and Counterclaim Plaintiff Trend Micro Incorporated ("Trend Micro") submit this Joint Claim Construction and Prehearing Statement regarding U.S. Patent No. 5,623,600 ("the '600 patent").

**(a) The construction of those claim terms, phrases, or clauses on which the parties agree is as follows:**

Many of the claim terms, phrases, and clauses in the asserted claims are not disputed by the parties. Further, the parties have met and conferred in an attempt to narrow the list of disputed terms and have agreed upon a construction for the following terms:

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | AGREED CONSTRUCTION |
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| Sequence of the steps of claim 4<br>(claim 4) | The recited steps do not need to be performed in sequential order. The most logical order of the steps is 1, 2, 6, 7, 3, 4 and 5. The claim does not require the step of "determining whether the data contains a virus at the server" if the data is not "of a type that is likely to contain a virus." |
| Server<br>(all claims) | A computer and/or software that performs services for other computers or programs. |
| Daemon<br>(claims 9 and 13) | A program that is capable of running in the background without user (i.e., human) intervention and is further not limited to providing services to other programs. |
| Temporary<br>(claims 5, 11, and 14) | Non-permanent. |

**(b) Each party's proposed construction of each disputed claim term, phrase, or clause, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction of the claim or to oppose any other party's proposed construction of the claim, including, but not limited to, as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of percipient and expert witnesses:**

Barracuda objects to Trend Micro's refusal to provide constructions for many of the below identified terms. For six of the disputed terms, Trend Micro has provided the following phrase instead of a construction: "Ordinary meaning. Does not require further interpretation." Trend Micro has provided no explanation regarding what it believes "ordinary meaning" to be, nor has Trend Micro explained how its "ordinary meaning" differs from Barracuda's proposed

constructions.

Conversely, Trend Micro contends that "ordinary meaning" means just that: the customary meaning of the phrase. Trend Micro contends that Barracuda's proposed constructions are circular and will not aid a jury in its understanding of the claims at issue. For example, Barracuda proposes that the Court construe "the steps of storing the data in a temporary file at the server after the step of electronically transmitting" to mean "[t]he server stores the data in a temporary file after it transmits the data to the destination." Trend Micro also contends that Barracuda's proposed constructions are artificially limiting and will not aid a jury in its understanding of the claims at issue. For example, Barracuda proposes that the Court construe "[d]etermining whether the data contains a virus" to mean "[d]etermining whether the unit of information that is associated with the data transfer request contains a virus. Such unit of information must be sufficiently large to contain a virus." The first clause simply repeats the language of the claim term, whereas the second clause adds an artificial limitation to the claim term. Trend Micro has explained this objection to Barracuda and has further explained that it may provide further explanation of why Barracuda's proposed construction are wrong. Trend Micro contends that this does not equate to providing an alternate construction-it merely shows why Barracuda's attempt to depart from the plain meaning is wrong. Finally, Trend Micro objects to Barracuda's insistence – contrary to its representations to this Court – in revisiting numerous claim terms that have already been construed. *See e.g.*, *Trend Micro Incorporated v. Network Associates, Inc.*, No. C 97-20438 RMW, Order Re Claim Construction (Dec. 29, 1998) (hereinafter "NAI Claim Construction Order") and Final Initial and Recommended Determination of the ITC Inv. No. 337-TA-510 entitled *In the Matter of Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing the Same*. (Public Version, July 2007) ("Final ID").

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
|---|---|---|
| Virus | A computer virus is a section of code that is buried or hidden in | A section of malicious code that is buried or hidden in another program. |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| (all claims) | another program. Once the program is executed, the code is activated and attaches itself to other programs in the system. Infected programs in turn copy the code to other programs.<br><br>**Support:**<br><br>'600 Patent at 1:45-49 ("A computer virus is a section of code that is buried or hidden in another program. Once the program is executed, the code is activated and attaches itself to other programs in the system. Infected programs in turn copy the code to other programs");<br><br>In the Matter of Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing Same, International Trade Commission, Complaint Under Section 337 of the Tariff Act of 1930, as Amended, ¶ 9 (November 21, 2007);<br><br>Andrew S. Tanenbaum, *Modern Operating Systems* 187-199 (1992);<br><br>Abraham Silberschatz & Peter B. Galvin, *Operation System Concepts* 468-469 (4th ed. 1994). | When executed, the malicious code may attach itself to other programs, open a backdoor for a hacker or other malicious code, destroy data, perform a prank, or other actions harmful to the server or recipient client computer.<br><br>**Support:**<br><br>'600 Patent at 1:43-57 ("One particular problem that has plagued computers, in particular microcomputers, have been computer viruses and worms. A computer virus is a section of code that is buried or hidden in another program. Once the program is executed, the code is activated and attaches itself to other programs in the system. Infected programs in turn copy the code to other programs. The effect of such viruses can be simple pranks that cause a message to be displayed on the screen or more serious effects such as the destruction of programs and data. Another problem in the prior art is worms. Worms are destructive programs that replicate themselves throughout disk and memory using up all available computer resources eventually causing the computer system to crash. Obviously, because of the destructive nature of worms and viruses, there is a need for eliminating them from computers and networks.").<br><br>*Virus-L/comp.virus Frequently Asked Questions (FAQ) v2.00*, Oct. 9, 1995, www.faqs.org/faqs/computer- |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | | virus/faq/.<br><br>Mathew A. Bishop, *Computer Security: Art and Science* (Addison-Wesley 2003).<br><br>In *Computer Security: Art and Science*, Dr. Bishop distinguishes viruses from worms and provides a separate definition for each. For example, Dr. Bishop defines computer viruses as "a program that inserts itself into one or more files and then performs some (possibly null) action." *Computer Security* at 616. Dr. Bishop then defines computer worms as "a program that copies itself from one computer to another." *Id.* at 623. Thus, Dr. Bishop's book differentiates between "viruses" and "worms" in a manner consistent with the '600 patent.<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| Data … type (claims 4 and 21) | The data's format (*e.g.*, .exe, .txt, plain text email)<br><br>**Support:**<br><br>'600 Patent at 7:33-41, 8:58-61, 10:26-45;<br><br>Harry Newton, *Newton's Telecom Dictionary* 252 (SX-6) (BAR-TM 061253-061268) (File extension);<br><br>Abraham Silberschatz & Peter B. Galvin, *Operation System Concepts* 354-58 (4th ed. 1994). | Ordinary meaning. Does not require further interpretation.<br><br>The ordinary meaning of "data … type" is: A classification identifying a particular kind of data.<br><br>**Support:**<br><br>*Trend Micro Incorporated v. Network Associates, Inc.*, No. C 97-20438 RMW, Order Re Claim Construction (Dec. 29, 1998) (hereinafter "NAI Claim Construction Order") at 1. Judge Whyte adopted the parties agreed upon construction for "data … of a |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | | type likely to contain a virus" which was "data which, because of its characteristics, is more likely to contain a virus than data not having such characteristics, and which includes, but is not limited to, an executable file, a macro, or an embedded portion of an electronic mail message."<br><br>21st Century Dictionary of Computer Terms 100 (Princeton Language Institute ed., Dell Publishing 1994) ("data type" is defined as "[a]n identifier given to data to direct the program in how to use them. For example, text data are identified as such in a computer program, to distinguish them from numeric data.").<br><br>Dictionary.com defines "data type" as (1) In programming, *a classification identifying one of various types of data*, as floating-point, integer, or Boolean, stating the possible values for that type, the operations that can be done on that type, and the way the values of that type are stored and (2) In databases or spreadsheets, *a classification identifying one of various kinds of data*, as a name, date, or dollar amount, found in a specific data field. Dictionary.com, http://dictionary.reference.com/search?q=data%20type (citing The American Heritage Dictionary of the English Language (Houghton Mifflin Co. 4th ed. 2006)). |
| Destination address<br><br>(claims 4, 9, 11, | Any name, number, or other form of address identifying the destination computer. | Trend Micro adopts the below construction as determined by Administrative Law Judge Paul J. |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| 13, 16, and 22) | **Support:**<br><br>'600 Patent at 8:52-57, 9:56-63. | Luckern in the Final Initial and Recommended Determination of the ITC Inv. No. 337-TA-510 entitled *In the Matter of Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing the Same*. (Public Version, July 2007) ("Final ID").<br><br>Any name, number or other form of address identifying a computer, user, mailbox, computer process, or groups thereof, for the purpose of delivering electronic data to intended recipients.<br><br>**Support:**<br><br>NAI Claim Construction Order at 4.<br><br>Webster's defines "destination" as "the record, file, document, or disk to which information is copied or moved, as opposed to the source" and defines "address" as "the precise location of some type of resource (such as file, a web site, or storage space) in a computer system or network". Brian Pfaffenberger, *Webster's New World Dictionary of Computer Terms* (Macmillan General Reference 6th ed. 1997); Brian Pfaffenberger, *Webster's New World Dictionary of Computer Terms* (IDG Books Worldwide, Inc. 8th ed. 2000); Brian Pfaffenberger, *Webster's New World Computer Dictionary* (Hungry Minds, Inc. 9th ed. 2001); Brian Pfaffenberger, *Webster's New World Computer Dictionary* (Wiley Publishing, Inc. 10th ed. 2003). |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | | Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| Determining whether the data contains a virus<br>(claims 4, and 18) | Determining whether the unit of information that is associated with the data transfer request contains a virus. Such unit of information must be sufficiently large to contain a virus.<br><br>**Support:**<br><br>'600 Patent at 1:58-2:11, 7:14-65, 8:65-9:3, 12:46-62; 15:6-16; | Ordinary meaning. Does not require further interpretation.<br><br>**Support:**<br><br>NAI Claim Construction Order at 4 (finding that no interpretation was necessary for this phrase).<br><br>In *In the Matter of Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-510, the parties agreed that ordinary meaning should govern this phrase except to the extent that the phrase includes disputed language. *See* Final ID at 19. |
| File<br>(claims 5, 11, and 14) | A collection of information associated with a unique name in the computer's file system.<br><br>**Support:**<br><br>'600 Patent at Abstract, 3:7-9 ('The preferred method for processing a file comprises the steps of: receiving the data transfer command and file name.), '600 7:14-18, 7:33-40, 7:53-58, 8:10-16, 8:45-47, 8:65-9:2, 10:63-65., 11:22-27 ("[R]ename the encode portions of the message containing viruses, store the renamed portions as files in a specified directory on the SMTP proxy server 62 and | Trend Micro adopts the below construction as determined by J. Whyte in the NAI Claim Construction Order.<br><br>Collection of one or more related records treated as a unit.<br><br>**Support:**<br><br>Final ID at 37-39 (and evidence cited therein).<br><br>'600 Patent at 10:57-11:8 ("On the other hand if in step 822 it is determined the message does include encoded portions, the |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | notify the user of the renamed files and directory path.");<br><br>Alan Freedman, *The Computer Glossary: The Complete Illustrated Dictionary* 148 (7th ed. 1995) (BAR-TM 061243-061247) (file);<br><br>Denis Howe, Free Online Dictionary of Computing, http://foldoc.doc.ic.ac.uk/foldoc/ (BAR-TM 061230-061232), http://foldoc.org/foldoc.cgi?query=file, http://foldoc.org/foldoc.cgi?query=file+system;<br><br>TechTarget Security Media, SearchSecurity.com: The Web's best security-specific information resource for enterprise IT professionals, http://searchexchange.techtarget.com/sDefinition/0,290660,sid43_gci212118,00.html (file);<br><br>*Microsoft Press: Computer Dictionary* 164 (2d ed. 1994) (file);<br><br>Abbay Bhushan, et al., RFC 0265: The File Transfer Protocol, Network Working Group at section II (November 17, 1971), (http://rfc.activedomain.org/0000-0499/rfc0265.html) (BAR-TM 061152-061163);<br><br>J. Postel & J. Reynolds, RFC 0959: File Transfer Protocol (FTP), Network Working Group at "file" (October 1985), http://rfc.activedomain.org/0500- | SMTP proxy server 62 stores each of the encoded portions of the message in its own temporary file at the gateway node 33 in step 828. For example, if a message included three encoded portions, each encoded portion will be stored in a separate file. Then in step 830, each of the encoded portions stored in its own file is individually decoded using uudecode program …[and] in step 832, the SMTP proxy server 62 calls and executes a virus-checking program on each message portion stored in its temporary file(s). Then in step 834, the SMTP proxy server 62 determines whether any viruses were detected. If no viruses are detected, the method continues to steps 824, 814, 816 and 826 as has been described above. However, if a virus is detected, the present invention advantageously allows the SMTP proxy server 62 to respond in any number of a variety of ways....").<br><br>'600 Patent at 11:33-40 ("For example, if a message has three encoded portions, two encoded portions contain viruses, and the configuration file indicates that virus containing portions are to be deleted, then the method of the present invention would send a transformed message that was the same as the original message, but with the two encoded portions containing viruses deleted, to the server task 102.").<br><br>U.S. Patent No. 5,319,776 (filed Sep. 29, 1992) at 2:67 and 4:7. |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | 0999/rfc0959.html (BAR-TM 061164-061229);<br><br>Pradeep K. Sinha, Distributed Operating Systems: Concepts and Designs 421-27 (IEEE Press 1997) (BAR-TM 061233-061242);<br><br>Abraham Silberschatz & Peter B. Galvin, *Operation System Concepts* 349-58 (4th ed. 1994);<br><br>Andrew S. Tanenbaum, *Modern Operating Systems* 145-154 (1992). | The IEEE Dictionary defines a "file" as "a collection of related records treated as a unit." IEEE Standard Dictionary of Electrical and Electronic Terms, (Frank Jay ed., The Institute of Electrical Engineers 3d ed. 1984).<br><br>*Prentice Hall's Illustrated Dictionary of Computing* defines "file" as a collection of records. *See* Jonar C. Nader, *Prentice Hall's Illustrated Dictionary of Computing* 218 (Prentice Hall 2d ed. 1995).<br><br>IBM Dictionary of Computing defines "file" as "[a] collection of information treated as a unit." IBM Dictionary of Computing 269 (McGraw-Hill 10th ed. 1994).<br><br>McGraw-Hill Electronics Dictionary defines "file" as "[a] collection of related records..." McGraw- Hill Electronics Dictionary 208 (John Markus and Neil Sclater eds., McGraw-Hill 5th ed. 1994).<br><br>21st Century Dictionary of Computer Terms (Princeton Language Institute ed., Dell Publishing 1994).<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| Further comprising the steps of storing the data in a temporary file at the server after the step of electronically transmitting | The server stores the data in a temporary file after it transmits the data to the destination.<br><br>**Support:**<br><br>'600 patent at 12:63-67, 12:58-62. | Ordinary meaning. Does not require further interpretation. |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| (claim 5) | | |
| Proxy server<br>(claims 9 and 13) | An intermediary program that controls and handles data transfers on behalf of a client.<br><br>**Support:**<br><br>'600 Patent at Fig. 4, 2:54-58 ("The central processing unit of the gateway node also executes the FTP proxy server for transmitting and receiving files over the communications unit, and executes the SMTP proxy server for transmitting and receiving messages over the communications unit."), 4:66-5:7 ("The FTP proxy server is a routine for controlling file transfers to and from the gateway node via the communications uit, thus controlling file transfers to and from a given network of which the gateway node is a part. . . . Similarly, the SMTP proxy server is a routine for controlling the transfer of messages to and from the gateway node."), 7:9-14 ("When a connect request is detected, the Internet daemon constructed in accordance with the present invention, spawns the FTP proxy server, which is the server that will actually handle the data transfer. Thereafter, the FTP proxy server controls the network traffic passing between the client task and the server task."), 9:32-36 ("The SMTP proxy server is preferably a program that resides on the gateway node 33, and controls and handles all transfers of electronic messages or mail in and out of the network through the | Trend Micro adopts the below construction as determined by J. Luckern in the Final ID. *See* Final ID at 49.<br><br>A computer and/or software program that performs services for other computers or programs which proxy server (a) receives data to be transferred; (b) scans the data to be transferred for viruses which would include worms; (c) controls transmission of said data according to preset handling instructions and the presence of said viruses; (d) has a data input, a data output and a control input with the data input coupled to receive the data to be transferred and with the location of the proxy server residing intermediate the trusted client and untrusted host.<br><br>**Support:**<br><br>Final ID at 40-52 (and evidence cited therein).<br><br>'600 Patent at FIGS. 6A-6C, 7.<br><br>'600 Patent at 9:32-35 ("The SMTP proxy server 62 is preferably a program that resides on the gateway node 33, and controls and handles all transfers of electronic message or mail in and out of the network….").<br><br>Prosecution History, Petition to Make Special at 4-4 and 11 ("Applicants' claimed invention prevents the spread of viruses in data transfers which are routed |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | communications unit 54 and the media 34.");<br><br>Ari Loutonen, *Web Proxy Servers* 4 (Prentice Hall 1998) (BAR-TM 003499-003501);<br><br>Jupitermedia Corp., Webopedia, http://www.webopedia.com/ TERM/p/proxy_server.html;<br><br>Trend Micro Incorporated v. Network Associates, Inc., Case No. C 97-20438 RMW, N.D. Cal., Deposition of Michael Crider at 84, 299, 406-407, 498-500 (June 22-23, 1999) (TMI_BN0175358-175490 and TMI_BN0175491-0175551). | through the server such as those between a first computer outside of a network and a second computer within the network.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| Scanning<br><br>(claims 5, 6, 11, 13, 14, 15, 19, and 21) | Examining the internal contents of<br><br>"Scanning" does not include behavior interception or use of checksums.<br><br>**Support:**<br><br>'600 Patent at 1:60-2:9 ("One such virus detection method, commonly referred to as behavior interception, monitors the computer or system for important operating system functions such as write, erase, format disk, etc. ... Another virus detection method, known as signature scanning, scans program code that is being copied onto the system. ... Yet another prior art approach to virus detection performs a checksum on all host programs stored on a system and known to be free from viruses."), 10:26-28 ("[T]he method continues in step 820 with the SMTP proxy server 62 scanning the message body and checking for any portions that are | Trend Micro adopts the below construction as determined by J. Luckern in the Final ID. *See* Final ID at 39.<br><br>To examine intensively.<br><br>**Support:**<br><br>Final ID at 39 (and evidence cited therein).<br><br>'600 Patent at 1:57-2:23; 4:51-55; 7:56-65; 9:1-3; 10:67-11:2.<br><br>Webster's Ninth New Collegiate Dictionary 1047 (Merriam-Webster, Inc. 1989).<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | encoded."), '600 Patent at 10:28-40, 10:57-11:2;<br><br>Computing Dictionary, http://computing-dictionary.thefreedictionary.com/scan. | |
| Scanning the mail message for encoded portions; determining whether the mail message contains a virus; . . . sending the mail message to the destination address if the mail message does not contains (sic) a virus; and wherein the step of sending the mail message to the destination address is performed if the mail message does not contain any encoded portions<br><br>(claim 13) | If the mail message contains no encoded portions, it is sent to the destination address without determining whether it has a virus.<br><br>**Support:**<br><br>'600 Patent at 10:40-45 ("If the message does not include any encoded portions, the SMTP proxy server 62 transmits the message through the second command port to the SMTP daemon 98 in step 824."); Fig. 8B;<br><br>Trend Micro Incorporated v. Network Associates, Inc., Case No. C 97-20438 RMW, N.D. Cal., Plaintiff Trend Micro's Brief in Support of Proposed Claim Construction at 33 (August 11, 1998) (TMI_BN0067745-0067783);<br><br>Investigation No. 337-TA-510, International Trade Commission, Public Version of Final Initial and Recommended Determination at 72 (May 10, 2005). | Ordinary meaning. Does not require further interpretation. |
| Storing each encoded portion of the mail message in a separate temporary file<br><br>(claim 11) | Storing each encoded portion of the mail message in its own temporary file (i.e., separate from the other encoded portions and separate from the mail message).<br><br>**Support:**<br><br>'600 Patent at 10:58-60 ("[T]he SMTP proxy server 62 stores each | Ordinary meaning. Does not require further interpretation.<br><br>"Separate" would be distinct in some respect, such as space or time.<br><br>**Support:**<br><br>Oxford Desk Dictionary defines |

| TERM, PHRASE, OR CLAUSE AND CLAIM IN WHICH IT APPEARS | BARRACUDA'S PROPOSED DEFINITION AND EVIDENCE | TREND MICRO'S PROPOSED DEFINITION AND EVIDENCE |
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| | of the encoded portions of the message in its own temporary file at the gateway node 33 in step 828."), 10:61-62 ("[I]f a message included three encoded portions, each encoded portion will be stored in a separate file."); Fig. 8B;<br><br>*Webster's Universal Dictionary and Thesaurus* at 475 (BAR-TM 003509-003511) (separate (*adj.*)). | "separate" as "forming a unit by itself; existing apart; disconnected; distinct; individual." Oxford Desk Dictionary: American Edition 527 (Lawrence Urdang ed., Oxford University Press 1995).<br><br>Webster's defines "separate" as "to put or keep apart; disjoin." Webster's II New Riverside Dictionary, Revised Edition 619 (Houghton Mifflin Co. 1996). |
| Transmitting the data from the server to the destination without performing the steps of determining whether the data contains a virus . . . if the data is not of a type that is likely to contain a virus<br><br>(claim 4) | If the data's type is unlikely to contain a virus, then the system transmits the data without determining whether any viruses are present.<br><br>**Support:**<br><br>'600 Patent at Fig. 6B, 7:33-58, 8:58-9:21, 10:26-11:33; Fig. 8B;<br><br>Trend Micro Incorporated v. Network Associates, Inc., Case No. C 97-20438 RMW, N.D. Cal., Plaintiff Trend Micro's Brief in Support of Proposed Claim Construction at 33-35 (August 11, 1998) (TMI_BN0067745-0067783). | Ordinary meaning. Does not require further interpretation.<br><br>Furthermore, "determining whether the data contains a virus" and "data type" are already being construed, thus construction of this phrase is redundant. |

For the Court's convenience, the parties below identify the claim terms, phrases, and clauses which they each believe most important to the resolution of this case:

**<u>Barracuda's Top Five Terms Include:</u>**

(1) Virus (all claims)

(2) File (claims 5, 11, and 14)

(3) Storing each encoded portion of the mail message in a separate temporary file (claim 11)

(4) Transmitting the data from the server to the destination without performing the steps of determining whether the data contains a virus . . . if the data is not of a type that is likely to contain a virus (claim 4)

(5) Scanning the mail message for encoded portions; determining whether the mail message contains a virus; . . . sending the mail message to the destination address if the mail message does not contains (sic) a virus; and wherein the step of sending the mail message to the destination address is performed if the mail message does not contain any encoded portions (claim 13)

**Trend Micro's Top Five Terms Include:**

(1) Virus (all claims)

(2) File (claims 5, 11, and 14)

(3) Destination address (claims 4, 9, 11, 13, 16, and 22)

(4) Proxy server (claims 9 and 13)

(5) Scanning (claims 5, 6, 11, 13, 14, 15, 19, and 21)

In addition to the terms listed above, there exists a dispute between Barracuda and Trend Micro regarding the structure corresponding to each element the parties contend is governed by 35 U.S.C. § 112(6). The parties agree that each element of asserted claims 18, 19, 21, and 22 is governed by 35 U.S.C. § 112(6).

Barracuda believes that the parties' dispute with regard to each such element is fundamentally similar such that the Court need only decide the method of interpreting such elements and then apply the method to each such claim element, rather than address each element alone and independently. Further, while Barracuda believes that its methodology is the correct one, Barracuda also believes that the difference in approach results in substantive differences only for the means-plus-function elements in claims 21 and 22, and the differences between the parties respective positions on claims 18 and 19 are immaterial. Moreover, Trend Micro has indicated that it may provide alternative constructions under Barracuda's methodology in its reply papers, something to which Barracuda would strenuously object.

Trend Micro contends that Barracuda's methodology for construing the means-plus-function elements is flawed and believes that under such a flawed methodology, Barracuda's proposals may be incorrect. Trend Micro does not provide an "alternative construction" using Barracuda's flawed methodology, because doing so would imply that Trend Micro is willing to

concede to or accept Barracuda's flawed methodology, and may invite the Court to be misled into adopting that flawed methodology. Accordingly, Trend Micro believes that the construction of each of the below terms is disputed.

| CLAIM ELEMENT GOVERNED BY 35 U.S.C. § 112(6) | BARRACUDA'S IDENTIFICATION OF CORRESPONDING STRUCTURE | TREND MICRO'S IDENTIFICATION OF CORRESPONDING STRUCTURE |
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| means for receiving a data transfer request including a destination address<br>(claim 18) | The specification discloses the following corresponding structures:<br>Fig. 6A (Box 606) and 7:14-19<br>Fig. 8A (Box 800) and 10:20-24. | This is a means-plus-function element, and it is to be construed to cover a proxy server and/or daemon or a portion thereof, or their equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP daemon 78; (iv) the SMTP daemon 98; (v) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (vi) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418.<br><br>**Support:**<br><br>'600 Patent at 7:9-12 and 7:18-19.<br><br>'600 Patent at 8:45-58.<br><br>'600 Patent at 9:21-23 ("As can be seen from FIG. 5B, the data transfer request is passed from the client task 72 to the FTP proxy server 60....") |

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| | | FIGS. 4, 5A, 5B, 6A-6C and 7 of the '600 Patent.<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>M. Crispin, *Internet Message Access Protocol – Version 4rev1, RFC 2060*, Dec. 1996, www.ietf.org/rfc/rfc2060.txt.<br><br>J, Myers, *Post Office Protocol – Version 3, RFC 1939*, May 1996, www.ietf.org/rfc/rfc1939.txt.<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for electronically receiving data at a server<br><br>(claim 18) | The specification discloses the following corresponding structures:<br><br>Fig. 6B (Box 614) and 7:53-55<br><br>Fig. 6C (Box 644) and 8:55-57<br><br>Fig. 8A (Box 818) and 10:23-25. | This is a means-plus-function element, and it is to be construed to cover a proxy server and/or daemon or a portion thereof, or their equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP daemon 78; (iv) the SMTP daemon 98; (v) the |

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| | | FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (vi) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418.<br><br>**Support:**<br><br>'600 Patent at 7:12-14 and 7:18-19.<br><br>'600 Patent at 8:45-58.<br><br>'600 Patent at 9:32-35 ("The SMTP proxy server 62 is preferably a program that resides on the gateway node 33, and controls and handles all transfers of electronic messages or mail…."). <br><br>'600 Patent at 9:53-56 ("The preferred method of the present invention for sending electronic mail begin in step 802 with the spawning or running the SMTP proxy server 62."). <br><br>'600 Patent at 10:23-25 ("The message is transmitted from the client task 92 through the first command port to the SMTP proxy server 62."). <br><br>FIGS. 4, 5A, 5B, 6A-6C and 7 of the '600 Patent.<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents."). |

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| | | Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for determining whether the data contains a virus at the server<br>(claim 18) | The specification discloses the following corresponding structures:<br>Fig. 6B (Box 618) and 7:56-63<br>Fig. 6C (Box 652) and 9:1-3<br>Fig. 8B (Box 832) and 10:67-11:2. | This is a means-plus-function element, and it is to be construed to cover virus detection software or mechanism, and its equivalents.<br><br>The corresponding structures or acts disclosed in the specification are the following and their equivalents: (i) step 618 where the temporarily stored file is analyzed by virus detection method to determine if it contains viruses; (ii) step 652 where the temporarily stored file is analyzed by virus detection method to determine if it contains viruses; (iii) step 832 where the SMTP proxy server 62 calls and executes a virus checking method on each message portion stored in its temporary file(s); (iv) the step wherein all files being transferred are temporarily stored and scanned for viruses using virus detection method; or (v) the step wherein all messages being transferred are temporarily stored and scanned for viruses using virus detection method.<br><br>**Support:** |

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| | | '600 Patent at 7:56-65 ("Then in step 618, the temporarily stored file is analyzed to determine if it contains viruses. This is preferably done by invoking a virus-checking program on the temporarily stored file. For example, a program that performs a version of signature scanning virus detection such as PCCillin…may be used. However, those skilled in the art will realize that *various other virus detection methods may also be used*…." (emphasis added)).<br><br>'600 Patent at 8:21-25 ("In step 626, the FTP proxy server determines if it is to ignore the existence of a virus and continue the transfer. If so, the method continues in step 612 where the file is passed to the FTP daemon 78 and the temporary file is deleted.").<br><br>'600 Patent at 9:1-6.<br><br>'600 Patent at 10:67-11:2.<br><br>'600 Patent at 11:40-60.<br><br>FIGS. 6A-6C and 8B of the '600 Patent.<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for performing a preset action on the data | The specification discloses the following corresponding | This is a means-plus-function element, and it is to be |

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| using the server if the data contains a virus<br>(claim 18) | structures:<br>Fig. 6B (Boxes 624, 626, and 628) and 8:4-34<br>Fig. 6C (Boxes 658, 660, and 662) and 9:9-20<br>Fig. 8B (Boxes 836, 838, and 840) and 11:4-40. | construed to cover a proxy server and/or daemon or a portion thereof, or their equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP daemon 78; (iv) the SMTP daemon 98; (v) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (vi) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418.<br><br>**Support:**<br><br>'600 Patent at 8:4-39; 9:9-26; 11:6-40.<br><br>'600 Patent at 8:4-6 ("However, if a virus is detected, the present invention advantageously allows the FTP proxy server 60 to respond in any number of a variety of ways.").<br><br>'600 Patent at 8:21-25 ("In step 626, the FTP proxy server determines if it is to ignore the existence of a virus and continue the transfer. If so, the method continues in step 612 where |

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| | | the file is passed to the FTP daemon 78 and the temporary file is deleted.").<br><br>'600 Patent at 11:6-9 ("However, if a virus is detected, the present invention advantageously allows the SMTP proxy server 62 to respond in any number of a variety of ways, just as the FTP proxy server.").<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for sending the data to the destination address if the data does not contain a virus<br>(claim 18) | The specification discloses the following corresponding structures:<br>Fig. 6B (Box 622 to 612) and 8:2-3 and 7:41-51<br>Fig. 6C (Box 656 to 648) and 9:7-9 and 8:61-65<br>Fig. 8B (Box 834 to Boxes 824, 814, 816, and 826) and 11:4-6 and 10:43-56. | This is a means-plus-function element, and it is to be construed to cover a proxy server or a portion thereof, or its equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (iv) the SMTP proxy server layer 422 independently or as |

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| | | a part of the SMTP layer 418.<br><br>**Support:**<br><br>'600 Patent at 8:2-3 ("If no viruses are detected, the method continues in step 612 and transmits the file as has been described above.").<br><br>'600 Patent at 7:41-51 ("In step 612, a second data port 80 is established and the data transfer request and file are sent from the FTP proxy server 60 to the FTP daemon 78 so that the file can be sent to the server task 82….[o]nce transmitted, the method is complete and ends.").<br><br>'600 Patent at 8:6-15 ("The *response of the FTP proxy server* 60 is determined according to user's needs and wants as specified in a configuration file. . .some options the user might specify are: 1) to do nothing and transfer the file; 2) to delete or erase the temporary file and do not transfer the file; 3) to rename the file and store it in a specified directory on the gateway node 33 and notify the user of the new file name and directory path...." (emphasis added)).<br><br>'600 Patent at 8:61-9:1 and 9:7-8.<br><br>'600 Patent at 10:42-56 and 11:4-6. |

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| | | FIGS. 4, 5A, 5B, 6A-6C, 7, 8A and 8B of the '600 Patent.<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for determining includes a means for scanning that scans the data using a signature scanning process<br>(claim 19) | The specification discloses the following corresponding structure:<br><br>Invoking a virus-checking program on the temporarily stored file (7:59-63). | This is a means-plus-function element, and it is to be construed to cover virus detection software or mechanism using a signature scanning process, or its equivalents.<br><br>The corresponding structures or acts disclosed in the specification are the following and their equivalents: (i) step 618 where the temporarily stored file is analyzed by a signature scanning virus detection method to determine if it contains viruses; (ii) step 652 where the temporarily stored file is analyzed by a signature scanning virus detection method to determine if it contains viruses; (iii) step 832 where the SMTP proxy server 62 calls and executes a signature scanning virus detection method on each message portion stored in its temporary file(s); (iv) the step wherein all files being transferred are temporarily |

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| | | stored and scanned for viruses using a signature scanning virus detection method; or (v) the step wherein all messages being transferred are temporarily stored and scanned for viruses using a signature scanning virus detection method.<br><br>**Support:**<br><br>'600 Patent at 1:58-2:11 (describing the virus detection methods known as signature scanning, behavior interception, and checksum).<br><br>'600 Patent at 7:56-65 ("Then in step 618, the temporarily stored file is analyzed to determine if it contains viruses. This is preferably done by invoking a virus-checking program on the temporarily stored file. For example, a program the performs a version of signature scanning virus detection such as PC-Cillin manufactured and sold by Trend Micro Devices Incorporated of Cupertino, Calif. may be used. However, those skilled in the art will realize that various other virus detection methods may also be used in step 618.").<br><br>'600 Patent at 9:1-6<br><br>'600 Patent at 10:67-11:2<br><br>'600 Patent at 11:40-60 |

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| | | FIGS. 6A-6C and 8B of the '600 Patent.<br><br>NAI Claim Construction Order at 6 ("In Claim 19 the recited function is 'scanning that scans the data using a signature scanning process.' The only structure disclosed for performing that function is prior art signature scanning software, such as 'PC-Cillin.' Therefore, the Claim 19 is limited to such a structure and its structural equivalents."). Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| second means for determining whether the data is of a type that is likely to contain a virus<br>(claim 21) | The specification discloses the following corresponding structures:<br>Checking the extension of the file name (7:35-40); and<br>Checking whether a mail message has encoded portions (10:26-40). | This is a means-plus-function element, and it is to be construed to cover a proxy server or a portion thereof, or its equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (iv) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418. |

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| | | **Support:**<br><br>'600 Patent at 7:33-35 ("In step 610, the FTP proxy server 60 determines whether the file to be transferred is of a type that can contain viruses.").<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for transmitting the data from the server to the destination without performing the steps of scanning, determining, performing and sending, if the data is not of a type that is likely to contain a virus (claim 21) | Indefinite.<br><br>This claim element is indefinite because there is no "scanning" function recited in claim 18 (i.e., "scanning" in claim 21 has no antecedent basis).<br><br>For the rest of the element, the specification, discloses the following corresponding structures:<br><br>Fig. 6B (boxes 610 to 612) and corresponding text at 7:40-51<br><br>Fig. 6C (boxes 646 to 648) and corresponding text at 8:58-65<br><br>Fig. 8B (boxes 822 to 824, 814, 816, and 826) and corresponding text at 10:42-56. | This is a means-plus-function element, and it is to be construed to cover a proxy server and/or daemon or a portion thereof, or their equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP daemon 78; (iv) the SMTP daemon 98; (v) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (vi) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418. |

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| | | **Support:**<br><br>'600 Patent at 15:17-16:15 (Claims 19-22).<br><br>'600 Patent at 8:58-65 ("in step 646, the FTP proxy server 60 determines whether the file to be transferred is of a type that can contain viruses …[i]f the file to be transferred is not of a type that can contain viruses, then the method continues in step 648 where the file is transferred from FTP proxy server 60 through the first port 76 to the client task 72, then the method is complete and ends.").<br><br>'600 Patent at 8:65-9:8 (On the other hand if the data is of a type likely to contain viruses, the file is analyzed to determine whether it contains a virus).<br><br>'600 Patent at 11:41-58.<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |
| means for determining whether the data is being transferred into a first | Indefinite.<br><br>This element is governed by | This is a means-plus-function element, and it is to be construed to cover a proxy |

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| network by comparing the destination address to valid addresses for the first network<br>(claim 22) | 35 U.S.C. § 112 ¶ 6.<br>The recited function is "determining whether the data is being transferred into a first network by comparing the destination address to valid addresses for the first network." The specification does not disclose or link any corresponding structure for this function. | server and/or daemon or a portion thereof, or their equivalents. A proxy server could be an FTP or SMTP proxy server, an HTTP proxy server, or a proxy server of another type.<br><br>The corresponding structures disclosed in the specification are the following and their equivalents: (i) the FTP proxy server 60; (ii) the SMTP proxy server 62; (iii) the FTP daemon 78; (iv) the SMTP daemon 98; (v) the FTP proxy server layer 421 independently or as a part of the FTP layer 417; or (vi) the SMTP proxy server layer 422 independently or as a part of the SMTP layer 418.<br><br>**Support:**<br><br>'600 Patent at 6:55-7:28.<br><br>NAI Claim Construction Order at 5-6 ("Therefore, Claims 18 through 22 cover FTP, SMTP, and HTTP proxy servers and their structural equivalents.").<br><br>Expert testimony of Dr. John Mitchell and Dr. Matthew Bishop. |

**(c) The anticipated length of time necessary for the Claim Construction Hearing is:**

Consistent with the discussion at the Case Management Conference held in this case on July 30, 2007, the parties agree that the Claim Construction Hearing can be completed in three

hours. The parties further agree that each party will present a 15 minute tutorial on the technology at issue in this case at the beginning of the claim construction hearing.

**(d) Whether any party proposes to call one or more witnesses, including experts, at the Claim Construction Hearing, the identity of such witness, and for each expert, a summary of each opinion to be offered in sufficient detail to permit a meaningful deposition of that experts:**

The parties reserve the right to rely upon expert testimony to demonstrate what the proposed claim terms and phrases would have meant to one of ordinary skill in the art at the relevant time period for the '600 patent if the Court believes such testimony would be helpful. Barracuda may provide testimony from its experts, Matt Bishop and/or Richard Ford, to demonstrate that its construction of the proposed claim terms and phrases is consistent with the understanding of individuals of ordinary skill in the art at the relevant time period for the '600 patent. Trend Micro may provide testimony from Dr. John Mitchell to support its construction of certain terms and on the meaning of these terms to a person of ordinary skill in the art. Both parties reserve the right to provide expert testimony as rebuttal evidence as well.

**(e) A list of any other issues which might appropriately be taken up at a prehearing conference prior to the Claim Construction Hearing, and proposed dates, for any prehearing conference:**

The parties do not presently intend to request a prehearing conference.

Dated: November 26, 2007

WILSON SONSINI GOODRICH & ROSATI

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Christopher R. Parry

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BARRACUDA NETWORKS, INC.

Dated: November 26, 2007

McDERMOTT WILL & EMERY

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