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Attorneys for Defendant and Counterclaimant NetScout Systems, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

DIAGNOSTIC SYSTEMS CORPORATION,
Plaintiff,

vs.

SYMANTEC CORPORATION, et al.
Defendants.

DIAGNOSTIC SYSTEMS CORPORATION,
Plaintiff,

vs.

ORACLE CORPORATION, et al.
Defendants.

AND RELATED COUNTERCLAIMS.

LEAD CASE NO. SACV06-1211 DOC (ANx) (CONSOLIDATED with Case No. SACV07-960 AG (MLGx))

DEFENDANT NETSCOUT SYSTEMS, INC.'S ANSWER TO PLAINTIFF'S CONSOLIDATED FIRST AMENDED COMPLAINT, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

DEMAND FOR JURY TRIAL

Complaint Filed:	Dec. 14, 2006
Discovery Cutoff:	Apr. 8, 2008
Trial Date:	Oct. 31, 2008
Proposed Trial Date:	Mar. 31, 2009
Judge:	David O. Carter

ANSWER

Defendant NetScout Systems, Inc. ("NetScout"), by and through its counsel, hereby submits its Answer to Plaintiff Diagnostic Systems Corporation's ("Plaintiff") Consolidated First Amended Complaint ("CFAC"). To the extent not specifically admitted herein, the allegations of Plaintiff's CFAC are denied.

Jurisdiction and Venue

1. Paragraph 1 of the CFAC contains legal conclusions to which no answer is required. To the extent an answer is required, NetScout denies the allegations contained in paragraph 1 of the CFAC.

2. NetScout denies that it has committed acts of infringement in this judicial district, or that the alleged acts or transactions complained of in the CFAC as to NetScout were conceived, carried out, made effective, or had effect within the district or any other place, and on that basis denies that venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and 1400(b). As to all other defendants, NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the CFAC and therefore denies those allegations. The remainder of paragraph 2 of the CFAC contains legal conclusions to which no answer is required. To the extent an answer is required, NetScout denies those allegations contained in paragraph 2 of the CFAC.

Background and Parties

3. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the CFAC, and accordingly denies the same.

4. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegation set forth in paragraph 4 of the CFAC that the United States Patent and Trademark Office (the "PTO") duly and legally issued United States Letters Patent No. 5,701,400 ("the '400 patent"), entitled "Method

and apparatus for applying if-then-else rules to data sets in a relational data base and generating from the results of application of said rules a database of diagnostics linked to said data sets to aid executive analysis of financial data." NetScout admits that the copy of the '400 patent attached to the CFAC states that the '400 patent issued on December 23, 1997. NetScout is without knowledge or information sufficient to form a belief as to the allegation that the '400 patent attached to the CFAC is a true and correct copy and therefore denies the truth of that allegation.

5. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph *5* of the CFAC, and accordingly denies the same.

6. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegation set forth in paragraph 6 of the CFAC that the PTO duly and legally issued United States Letters Patent No. 5,537,590 ("the '590 patent"), entitled "Apparatus for applying analysis rules to data sets in a relational database to generate a database of diagnostic records linked to the data sets." NetScout admits that the copy of the '590 patent attached to the CFAC states that the '590 patent issued on July 16, 1996. NetScout is without knowledge or information sufficient to form a belief as to the allegation that the '590 patent attached to the CFAC is a true and correct copy and therefore denies the truth of that allegation.

7. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7 of the CFAC, and accordingly denies the same.

8. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8 of the CFAC, and accordingly denies the same.

9. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 9 of the CFAC, and accordingly denies the same.

10. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the CFAC, and accordingly denies the same.

11. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 11 of the CFAC, and accordingly denies the same.

12. NetScout admits the allegations in paragraph 12 of the CFAC.

13. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 of the CFAC, and accordingly denies the same.

14. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 of the CFAC, and accordingly denies the same.

15. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the CFAC, and accordingly denies the same.

16. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16 of the CFAC, and accordingly denies the same.

17. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17 of the CFAC, and accordingly denies the same.

18. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 18 of the CFAC, and accordingly denies the same.

19. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 19 of the CFAC, and accordingly denies the same.

20. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the CFAC, and accordingly denies the same.

21. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21 of the CFAC, and accordingly denies the same.

22. NetScout is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 22 of the CFAC, and accordingly denies the same.

FIRST CLAIM FOR RELIEF
(Against Defendants For Direct, Contributory And Inducing Infringement Of The '400 And/Or '590 Patents)

23. NetScout incorporates by reference its responses to all preceding allegations as if set forth fully herein.

24. Paragraph 24 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 24.

25. Paragraph 25 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 25.

26. Paragraph 26 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 26.

27. Paragraph 27 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 27.

28. Paragraph 28 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 28.

29. Paragraph 29 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 29.

30. Paragraph 30 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 30.

31. Paragraph 31 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 31.

32. Paragraph 32 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 32.

33. Paragraph 33 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 33.

34. Paragraph 34 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 34.

35. Paragraph 35 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 35.

36. Paragraph 36 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 36.

37. Paragraph 37 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 37.

38. Paragraph 38 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 38.

39. Paragraph 39 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 39.

40. Paragraph 40 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 40.

41. Paragraph 41 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 41.

42. Paragraph 42 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 42.

43. Paragraph 43 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 43.

44. Paragraph 44 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 44.

45. Paragraph 45 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 45.

46. Paragraph 46 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 46.

47. Paragraph 47 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 47.

48. Paragraph 48 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 48.

49. Paragraph 49 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 49.

50. Paragraph 50 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 50.

51. Paragraph 51 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 51.

52. Paragraph 52 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 52.

53. Paragraph 53 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 53.

54. Paragraph 54 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 54.

55. Paragraph 55 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 55.

56. Paragraph 56 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 56.

57. Paragraph 57 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 57.

58. Paragraph 58 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 58.

59. Paragraph 59 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 59.

60. Paragraph 60 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 60.

61. Paragraph 61 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 61.

62. Paragraph 62 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 62.

63. Paragraph 63 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 63.

64. Paragraph 64 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 64.

65. Paragraph 65 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 65.

66. Paragraph 66 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 66.

67. Paragraph 67 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 67.

68. NetScout denies each and every allegation in paragraph 68 of the CFAC, and specifically denies any wrongdoing or infringement.

69. NetScout denies each and every allegation in paragraph 69 of the CFAC, and specifically denies any wrongdoing or infringement.

70. NetScout denies each and every allegation in paragraph 70 of the CFAC, and specifically denies any wrongdoing or infringement.

71. NetScout denies each and every allegation in paragraph 71 of the CFAC, and specifically denies any wrongdoing or infringement.

72. NetScout denies each and every allegation in paragraph 72 of the CFAC, and specifically denies any wrongdoing or infringement.

73. NetScout denies each and every allegation in paragraph 73 of the CFAC, and specifically denies any wrongdoing or infringement.

74. NetScout denies each and every allegation in paragraph 74 of the CFAC, and specifically denies any wrongdoing or infringement.

75. NetScout denies each and every allegation in paragraph 75 of the CFAC, and specifically denies any wrongdoing or infringement.

76. NetScout denies each and every allegation in paragraph 76 of the CFAC, and specifically denies any wrongdoing or infringement.

77. NetScout denies each and every allegation in paragraph 77 of the CFAC, and specifically denies any wrongdoing or infringement.

78. NetScout denies each and every allegation in paragraph 78 of the CFAC, and specifically denies any wrongdoing or infringement.

79. Paragraph 79 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 79.

80. Paragraph 80 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 80.

81. Paragraph 81 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 81.

82. Paragraph 82 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 82.

83. Paragraph 83 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 83.

84. Paragraph 84 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 84.

85. Paragraph 85 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 85.

86. Paragraph 86 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 86.

87. Paragraph 87 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 87.

88. Paragraph 88 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 88.

89. Paragraph 89 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 89.

90. Paragraph 90 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 90.

91. Paragraph 91 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 91.

92. Paragraph 92 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 92.

93. Paragraph 93 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 93.

94. Paragraph 94 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 94.

95. Paragraph 95 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 95.

96. Paragraph 96 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 96.

97. Paragraph 97 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 97.

98. Paragraph 98 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 98.

99. Paragraph 99 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 99.

100. Paragraph 100 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 100.

101. Paragraph 101 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 101.

102. Paragraph 102 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 102.

103. Paragraph 103 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 103.

104. Paragraph 104 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 104.

105. Paragraph 105 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 105.

106. Paragraph 106 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 106.

107. Paragraph 107 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 107.

108. Paragraph 108 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 108.

109. Paragraph 109 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 109.

110. Paragraph 110 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 110.

111. Paragraph 111 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 111.

112. Paragraph 112 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 112.

113. Paragraph 113 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 113.

114. Paragraph 114 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 114.

115. Paragraph 115 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 115.

116. Paragraph 116 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 116.

117. Paragraph 117 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 117.

118. Paragraph 118 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 118.

119. Paragraph 119 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 119.

120. Paragraph 120 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 120.

121. Paragraph 121 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 121.

122. Paragraph 122 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 122.

123. Paragraph 123 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 123.

124. Paragraph 124 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 124.

125. Paragraph 125 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 125.

126. Paragraph 126 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 126.

127. Paragraph 127 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 127.

128. Paragraph 128 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 128.

129. Paragraph 129 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 129.

130. Paragraph 130 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 130.

131. Paragraph 131 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 131.

132. Paragraph 132 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 132.

133. Paragraph 133 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 133.

134. Paragraph 134 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 134.

135. Paragraph 135 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 135.

136. Paragraph 136 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 136.

137. Paragraph 137 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 137.

138. Paragraph 138 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 138

139. Paragraph 139 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 139

140. Paragraph 140 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 140

141. Paragraph 141 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 141

142. Paragraph 142 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 142

143. Paragraph 143 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 143

144. Paragraph 144 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 144.

145. Paragraph 145 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 145.

146. Paragraph 146 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 146.

147. Paragraph 147 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 147.

148. Paragraph 148 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 148.

149. Paragraph 149 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 149.

150. Paragraph 150 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 150.

151. Paragraph 151 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 151.

152. Paragraph 152 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 152.

153. Paragraph 153 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 153.

154. Paragraph 154 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 154.

155. Paragraph 155 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 155.

156. Paragraph 156 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 156.

157. Paragraph 157 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 157.

158. Paragraph 158 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 158.

159. Paragraph 159 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 159.

160. Paragraph 160 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 160.

161. Paragraph 161 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 161.

162. Paragraph 162 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 162.

163. Paragraph 163 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 163.

164. Paragraph 164 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 164.

165. Paragraph 165 of the CFAC does not pertain to NetScout and hence this paragraph does not require a response by NetScout. To the extent that an affirmative response is required, NetScout denies the allegations of paragraph 165.

PRAYERS FOR RELIEF

166. Answering items (1) through (13) of the section of the CFAC entitled "Prayers For Relief," NetScout denies that Plaintiff is entitled to any of the relief requested from or with respect to NetScout, either as prayed or otherwise.

NETSCOUT'S AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The CFAC fails to state a claim against NetScout on which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(Non-infringement)

NetScout has not infringed and is not infringing, either literally or under the doctrine of equivalents, either directly or indirectly, contributorily, or by inducement or otherwise, any valid claim of U.S. Patent Nos. 5,701,400 or 5,537,590.

THIRD AFFIRMATIVE DEFENSE

(Invalidity)

NetScout cannot be liable for infringement of U.S. Patent Nos. 5,701,400 or 5,537,590 because the claims are invalid under one or more provisions of 35 U.S.C. § 101, 102, 103 and/or 112.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

Plaintiff is barred in whole or in part by the doctrine of laches from seeking any relief in this action, and at a minimum is barred from seeking any damages based on any conduct prior to the filing of this action.

FIFTH AFFIRMATIVE DEFENSE

(Prosecution History Estoppel/Judicial Estoppel)

Plaintiff is estopped from construing the claims of the '400 and/or the '590 patents in such a way as may cover NetScout's activities by reason of, *inter alia*, amendments and/or statements made in and to the PTO, prior statements made in this or any other Court, prior rulings of this or any other Court, and/or Plaintiff's prior conduct.

SIXTH AFFIRMATIVE DEFENSE

(Unclean Hands)

Plaintiff is barred from maintaining this action for patent infringement because of Plaintiff's unclean hands including, but not limited to, assertion of the patents in suit without proper bases for alleging infringement.

SEVENTH AFFIRMATIVE DEFENSE

(Failure To Mark)

Plaintiff is barred or limited from recovery in whole or in part by the failure to mark, by itself or by one or more parties licensed to practice the '400 patent or the '590 patent, as required by 35 U.S.C. § 287.

EIGHTH AFFIRMATIVE DEFENSE

(Injunctive Relief)

Plaintiff is not entitled to injunctive relief because any injury to Plaintiff is not immediate or irreparable, and Plaintiff has an adequate remedy at law.

WHEREFORE, Defendant NetScout Systems, Inc. denies that it is infringing or has infringed any valid claim of U.S. Patent Nos. 5,701,400 or 5,537,590, and further denies that Plaintiff is entitled to any judgment against NetScout whatsoever. NetScout prays that Plaintiff's CFAC be dismissed in its entirety and with prejudice, that judgment be entered for NetScout, and that NetScout be awarded its reasonable attorneys' fees, costs and expenses incurred in defending

this action, together with such further and other relief as the Court deems just and proper.

NETSCOUT'S COUNTERCLAIMS

Defendant/Counterclaimant NetScout Systems, Inc. ("NetScout") hereby states its counterclaims against Plaintiff/Counterclaim-Defendant Diagnostic Systems Corporation ("DSC"), and states as follows:

Jurisdiction and Venue

1. This is an action for declaratory relief over which this Court has jurisdiction under Title 35 of the United States Code as well as 28 U.S.C. § 1331, 1338 and 2201.

2. Venue is proper in this District because DSC has filed a CFAC for patent infringement in this District, in response to which these counterclaims are asserted.

The Parties

3. NetScout is a Delaware Corporation with a principal place of business in Westford, Massachusetts.

4. In its CFAC, DSC purports to be a corporation duly organized and existing under the laws of the State of California, with its principal place of business in Newport Beach, California, and on that basis NetScout pleads the same.

First Counterclaim: Declaration of Non-infringement

5. NetScout incorporates by reference all preceding allegations as if fully set forth herein.

6. DSC has purported to assert claims against NetScout for the alleged infringement of U.S. Patent Nos. 5,701,400 and 5,537,590.

7. NetScout has denied DSC's claims of infringement and believes that DSC's CFAC against NetScout was filed without good or proper cause.

8. An actual case and controversy exists between NetScout and DSC concerning the alleged infringement of U.S. Patent Nos. 5,701,400 and 5,537,590.

9. NetScout is entitled to judgment from this Court declaring that NetScout has not infringed U.S. Patent Nos. 5,701,400 and 5,537,590.

Second Counterclaim: Declaration of Invalidity

10. NetScout incorporates by reference all preceding allegations as if fully set forth herein.

11. NetScout has asserted that U.S. Patent Nos. 5,701,400 and 5,537,590 are invalid pursuant to 35 U.S.C. § 101, 102, 103 and/or 112.

12. NetScout is entitled to judgment from this Court that U.S. Patent Nos. 5,701,400 and 5,537,590 are invalid pursuant to 35 U.S.C. §§ 101, 102 and/or 112.

PRAYERS FOR RELIEF

WHEREFORE, Defendant/Counterclaimant NetScout Systems, Inc. respectfully prays that the court enter judgment as follows:

A. Declaring that NetScout does not infringe and has not infringed U.S. Patent Nos. 5,701,400 and 5,537,590;

B. Declaring that U.S. Patent Nos. 5,701,400 and 5,537,590 are invalid;

C. Ordering that DSC pay NetScout's attorneys' fees pursuant to 35 U.S.C. § 285;

D. Dismissing DSC's CFAC against NetScout with prejudice, with DSC taking nothing; and

E. Awarding to NetScout such further and other relief as this Court deems just and proper.

Dated: November 30, 2007

/s/ Richard S. Sanders
By: Richard S. Sanders

Attorneys for Defendant/Counter-Claimant NetScout Systems, Inc.

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DEMAND FOR JURY TRIAL

Defendant and Counterclaimant NetScout hereby demands a jury trial pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues in this lawsuit triable to a jury.

Dated: November 30, 2007

/s/ Richard S. Sanders
By: Richard S. Sanders

Attorneys for Defendant/Counter-Claimant NetScout Systems, Inc.

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