

1 SARA M. THORPE (SBN 146529)  
sthorpe@gordonrees.com  
2 GORDON I. ENDOW (SBN 099638)  
gendow@gordonrees.com  
3 JEFFREY M. RATINOFF (SBN 197241)  
jratinoff@gordonrees.com  
4 GORDON & REES LLP  
Embarcadero Center West  
5 275 Battery Street, Suite 2000  
San Francisco, CA 94111  
6 Telephone: (415) 986-5900  
Facsimile: (415) 986-8054

7 Attorneys for Defendant  
8 ST. PAUL MERCURY INSURANCE COMPANY

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FILED  
JAN 11 2006  
RICHARD W. VIERING  
CLERK U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

Gordon & Rees LLP  
Embarcadero Center West  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

11  
12 NETSCAPE COMMUNICATIONS  
CORPORATION, a Delaware corporation; and  
13 AMERICA ONLINE, INC., a Delaware  
corporation;  
14  
Plaintiffs,  
15 v.  
16 FEDERAL INSURANCE COMPANY, an  
Indiana corporation; NATIONAL UNION  
17 FIRE INSURANCE COMPANY OF  
PITTSBURGH, P.A., a Pennsylvania  
18 corporation; ST. PAUL MERCURY  
INSURANCE COMPANY, a Minnesota  
19 corporation; EXECUTIVE RISK SPECIALTY  
INSURANCE COMPANY; a Connecticut  
20 corporation, and DOES 1 through 50,  
21  
Defendants.

E-Filing  
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COC-00198 PVT  
CASE NO.  
SANTA CLARA COUNTY SUPERIOR  
COURT CASE NO. 1-05-CV054312  
NOTICE OF REMOVAL OF ACTION  
UNDER 28 U.S.C. § 1441(b)  
[DIVERSITY]  
JURY TRIAL DEMANDED  
ADR  
Jou

22  
23 TO THE CLERK OF THE ABOVE-ENTITLED COURT:  
24 PLEASE TAKE NOTICE that Defendants Federal Insurance Company, St. Paul Mercury  
25 Insurance Company, and Executive Risk Specialty Insurance Company (collectively  
26 "Defendants") hereby remove to this Court the state court action described below:  
27 1. On December 12, 2005, an action was commenced in the Superior Court of the  
28 State of California in and for the County of Santa Clara, entitled "NETSCAPE

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1 COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICA ONLINE,  
2 INC., a Delaware corporation; vs. FEDERAL INSURANCE COMPANY, an Indiana  
3 corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A., a  
4 Pennsylvania corporation; ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota  
5 corporation; EXECUTIVE RISK SPECIALTY INSURANCE COMPANY; a Connecticut  
6 corporation, and DOES 1 through 50; Defendants,” as case number 1-05-CV054312 (“the  
7 Complaint”). A true and correct copy of the Complaint is attached hereto as Exhibit A.

8 2. On December 13, 2005, Plaintiffs dismissed Defendant National Union Fire  
9 Insurance Company of Pittsburgh, P.A. (“National Union”), without prejudice, from the action.<sup>1</sup>  
10 A true and correct copy of the dismissal is attached hereto as Exhibit B.

11 3. The first date upon which Defendant Federal Insurance Company (“Federal  
12 Insurance”) received a copy of the Complaint was December 14, 2005, when Federal Insurance  
13 was served with a copy of the Complaint and a summons from the said state court. A true and  
14 correct copy of the summons is attached hereto as Exhibit C.

15 4. The first date upon which Defendant St. Paul Mercury Insurance Company (“St.  
16 Paul”) received a copy of the Complaint was December 15, 2005, when St. Paul was served with  
17 a copy of the Complaint and a summons from the said state court. A true and correct copy of the  
18 summons is attached hereto as Exhibit D.

19 5. The first date upon which Defendant Executive Risk Specialty Insurance  
20 Company (“Executive Risk”) received a copy of the Complaint was December 14, 2005, when  
21 Executive Risk was served with a copy of the Complaint and a summons from the said state  
22 court. A true and correct copy of the summons is attached hereto as Exhibit E.

23 **Federal Diversity Jurisdiction Justifies Removal**

24 6. Pursuant to Local Civil Rules of the United States District Court for the Northern  
25 District of California, (“Local Rules”), Local Rule 3-5(b), the following identifies the statutory  
26 basis for federal jurisdiction and facts supporting such jurisdiction: This action is a civil action  
27

28 <sup>1</sup> Hence, National Union is not required to join in this Notice of Removal.

1 of which this Court has original jurisdiction under 28 U.S.C. § 1332, and is one which may be  
2 removed to this Court by the Defendants pursuant to the provisions of 28 U.S.C. § 1441(b) in  
3 that it is a civil action between citizens of different states and the amount in controversy exceeds  
4 the sum of \$75,000, exclusive of interest and costs. Diversity jurisdiction is readily apparent  
5 from the face of the Complaint.

6 **Complete Diversity Exists Between the Parties in the Underlying Action**

7 7. Complete diversity exists between the parties in the underlying action as only one  
8 of the plaintiffs is a citizen of California. Specifically, Defendants are informed and believe that  
9 Plaintiff Netscape Communications Corporation (“Netscape”) was, and still is, a corporation  
10 organized and existing under and by virtue of the laws of the State of Delaware, and having its  
11 principal place of business in Mountain View, California. See Exhibit A at ¶ 5.

12 8. Defendants are informed and believe that Plaintiff America Online, Inc. (“AOL”)  
13 was, and still is, a corporation organized and existing under and by virtue of the laws of the State  
14 of Delaware, and having its principal place of business in Dulles, Virginia. See Exhibit A at ¶ 6.

15 9. Federal Insurance was, at the time of the filing of this action, and still is, a  
16 corporation organized and existing under and by virtue of the laws of the State of Indiana, and  
17 having its principal place of business in Warren, New Jersey. See Exhibit A at ¶ 7.

18 10. St. Paul was, at the time of the filing of this action, and still is, a corporation  
19 organized and existing under and by virtue of the laws of the State of Minnesota, and having its  
20 principal place of business in St. Paul, Minnesota. See Exhibit A at ¶ 9.

21 11. Executive Risk was, at the time of the filing of this action, and still is, a  
22 corporation organized and existing under and by virtue of the laws of the State of Connecticut,  
23 and having its principal place of business in Warren, New Jersey. See Exhibit A at ¶ 10.

24 **The Amount in Controversy Exceeds \$75,000.00**

25 12. Defendants are informed and believe that the amount in controversy exceeds the  
26 sum of \$75,000.00, exclusive of interest and costs.

27 13. Plaintiffs’ insurance coverage action arises out of an alleged wrongful refusal of  
28 the Defendants to defend and indemnify Plaintiffs for a series of four class action lawsuits

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1 brought by consumers and an investigation by the New York State Attorney General. In those  
2 actions, Plaintiffs were accused of violating the Electronic Communications Privacy Act and the  
3 Computer Fraud and Abuse Act by allegedly intercepting web users' electronic communications  
4 for the purpose of tracking information regarding those web users' specific web viewing habits.

5 14. Plaintiffs assert breach of contract claims against the Defendants based on their  
6 alleged refusal to defend and indemnify Plaintiffs under the respective policies issued by  
7 Defendants. Plaintiffs are seeking compensatory damages for the Defendants' alleged breaches  
8 of these contracts. *See* Exhibit A at 16-17. Plaintiffs also assert a claim for tortious breach of  
9 the covenant of good faith and fair dealing against each of the four Defendants. In addition to  
10 seeking compensatory damages with respect to these claims, Plaintiffs are also seeking punitive  
11 damages "in an amount sufficient to punish and make an example" of the Defendants. *See id.*  
12 Plaintiffs assert an unfair business practices claim pursuant to Cal. Bus. & Prof. Code § 17200 *et*  
13 *seq.* against each of the Defendants. Plaintiffs seek both permanent injunctive relief and the  
14 disgorgement of "all funds and profits acquired by means of any act or practice... which is found  
15 by the Court to be unlawful, unfair or fraudulent." *See id.* at 17.

16 15. Plaintiffs claim that "notwithstanding the millions of dollars in premiums  
17 [Plaintiffs'] had paid to [Defendants]" to secure coverage for Plaintiffs' alleged raised in four  
18 lawsuits and an investigation by the Attorney General for the State of New York for violations of  
19 consumers' privacy rights, "AOL and Netscape were forced to defend and, ultimately, resolve  
20 those lawsuits with their own resources." *See* Exhibit A at ¶¶ 13-32.

21 16. Plaintiffs claim that as a result of the Defendants' denial of coverage to Plaintiffs,  
22 they allegedly "incurred and paid in excess of \$4,273,064 in attorneys' fees, consultants' fees  
23 and other expenses in connection with their defense" and that none of the Defendants "has ever  
24 reimbursed Netscape or AOL any part of that sum." *See* Exhibit A at ¶ 33.

25 17. In addition, Plaintiffs claim that the Defendants purportedly "breached their  
26 indemnity obligations" and, as a result, Plaintiffs have had to allegedly pay "at least \$100,000 to  
27 effect closure" of the four lawsuits and the investigation by the Attorney General for the State of  
28 New York. Plaintiffs also assert that Netscape may be "required to pay an additional



1 \$1,340,113.86 to finally resolve these matters (as well as incurring additional defense costs).”  
2 See Exhibit A at ¶ 34.

3 18. Plaintiffs are seeking to “force the [Defendants]... to pay amounts owing. And to  
4 take full and complete responsibility for other damages caused their Insureds [sic] by their  
5 systematic and improper tactics to avoid coverage.” See Exhibit A at ¶ 35.

6 **The San Jose Division of the Northern District of California is the Proper Venue for**  
7 **Removal of the Underlying State Action**

8 19. Pursuant to Local Rule 3-5(c), all civil actions shall be assigned to a courthouse  
9 serving the county in which the action arises. A civil action arises in the county in where a  
10 substantial part of the events or omissions which give rise to the claim occurred. This Notice of  
11 Removal is being filed in the division of United States District Court for the Northern District of  
12 California, San Jose Division because that division embraces the county where the state court  
13 action was pending, *i.e.*, Santa Clara County. This statement identifies the San Jose Division  
14 pursuant to Local Rules 3-1 and 3-2(c).

15 **All Defendants Join In This Notice of Removal**

16 20. All Defendants who have been served with the Complaint and who are currently  
17 parties to this action consent to and join in this Notice of Removal.

18 21. A copy of this Notice of Removal is being filed with the Clerk of the Superior  
19 Court of the State of California in and for the County of Santa Clara.

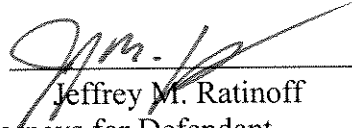
20 22. A copy of this Notice of Removal is being served on Plaintiffs.

21 **Jury Demand**

22 23. Defendants hereby demand that the trial of the underlying action in this Court be  
23 by jury.

24 Date: January 11, 2006

GORDON & REES, LLP

25  
26 By:   
27 Jeffrey M. Ratinoff  
28 Attorneys for Defendant  
ST. PAUL MERCURY INSURANCE  
COMPANY

Gordon & Rees LLP  
Embarcadero Center West  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

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Date: January 11, 2006

ROSS, DIXON & BELL, LLP

By: 

Terrence R. McInnis

Attorneys for Defendants  
FEDERAL INSURANCE COMPANY;  
EXECUTIVE RISK SPECIALTY  
INSURANCE COMPANY

Gordon & Rees LLP  
Embarcadero Center West  
275 Battery Street, Suite 2000  
San Francisco, CA 94111