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NETSCAPE COMMUNICATIONS
CORPORATION and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al.,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

CASE NO. 5:06-CV-00198 JW (PVT)

PLAINTIFFS' REPLY RE: CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT RE: DUTY TO DEFEND; MEMORANDUM OF LAW IN SUPPORT

Accompanying Papers:

Plaintiffs' Objections to St. Paul's Evidence; Plaintiffs' Response to St. Paul's Objections To and Motion to Strike Evidence; Supplemental Declaration of Michael Bruce Abelson; Supplemental Declaration of Leslie A. Pereira

Motion to be Heard:

Date: March 26, 2007
Time: 9:00 a.m.
Judge: Hon. James Ware
Place: 8, 4th Floor, San Jose

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I. INTRODUCTION

The problems with St. Paul's Cross Motion for Partial Summary Judgment are numerous. They include:

- St. Paul's failure to directly address the threshold coverage issue in this action: Whether an insured's alleged intra-corporate disclosure of a person's private information satisfies the St. Paul Policy's privacy offense of: "*making known to any person or organization written or spoken material that violates a person's right of privacy*" (the "Privacy Offense"). Instead, St. Paul argues that it Privacy Offense requires disclosure to a "third party." Yet it never bothers to explain what "third party" means, except to conclude (without supporting authority) that it does not include either (a) an insured's employees or (b) the insured's parent corporation. St. Paul is wrong. The Policy's language, the Policy's context, and all referenced authorities – including both coverage decisions and substantive privacy law – contradict St. Paul's position. As discussed herein, Netscape's intra-corporate disclosures alleged in the underlying SmartDownload Actions satisfy the Policy's Privacy Offense and, thereby, triggered coverage.
- St. Paul's Cross Motion urges this Court to interpret the Policy's "Deliberately Breaking the Law" Exclusion (the "DBL Exclusion") in a manner that *contradicts* its own witnesses' prior sworn testimony regarding that exclusion's "intent." This effort is misguided, and has no legal support. As the DBL Exclusion's text and intent both establish, application is limited to circumstances where an insured is adjudged to have "knowingly" broken the criminal law. Because no such circumstances exist here, the DBL Exclusion does not apply.
- St. Paul is wrong to insist the term "internet access" in the Policy's "Online Activities" Exclusion means something other than connecting to the Internet. Both the evidence and common sense prove otherwise. Because SmartDownload does not provide "internet access," St. Paul has no proper ground for invoking this exclusion to deny Plaintiffs' claim.

For all of these reasons and those set forth in Plaintiffs' Cross Motion, St. Paul's Cross Motion for Partial Summary Judgment must be denied. Instead, Plaintiffs' Cross Motion for Partial Summary Judgment should be granted.

II. LEGAL DISCUSSION

A. St. Paul Has Not Met Its Burden Establishing Virginia Law's Application

St. Paul's choice-of-law argument is puzzling. The insurer spends pages (upon pages) arguing for the application of Virginia's "four corners" law only to assert that "it really doesn't matter" whether California or Virginia law applies. See St. Paul's Reply at 19. While St. Paul's concession would typically preclude the need for further conflicts analysis, the insurer (presumably) seeks a choice-of-law ruling. Thus, Plaintiffs' discuss St. Paul's errors.

- **Procedural Mistakes.** As a procedural matter, St. Paul has the burden of properly invoking foreign law. This requires St. Paul to: (1) Demonstrate that Virginia's "four corners" rule for duty to defend analysis is materially different than California's rule, Washington Mutual Bank, FA v. Sup. Ct., 24 Cal. 4th 906, 919-920 (2001); **and** (2) Show that application of Virginia law would "further the interests" of Virginia, Hartford Ins. Co. of the Midwest v. Wisk Computer Services, Inc., 1991 U.S. Dist. LEXIS 16260, *8 (N.D. Cal.); McGhee v. Arabian American Oil Co., 871 F.2d 1412, 1424 (9th Cir. 1989). St. Paul has not shown (much less attempted) such critical analysis. Moreover, because St. Paul is moving for summary judgment, it must also set forth an "undisputed" factual record to support its conflicts analysis. St. Paul fails to carry this burden as well because it fails to refute Plaintiffs' extensive evidentiary showing that the Policy was made entirely outside of Virginia. See Plaintiffs' Cross-Motion at 3, n. 4.

While each of these critical failings precludes application of Virginia law, St. Paul continues to urge its application based solely on a previous, unrelated case between the parties: America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89 (4th Cir. 2003). Using the action as a platform, the insurer makes a simplistic collateral estoppel argument, to wit: "If it applied there, it oughta apply here." Despite this argument's surface appeal, it cannot prevail. As the record in the Virginia case reflects, Netscape was not a party to that prior proceeding and the precise duty-to-defend/choice-of-law question posed here was never litigated in Virginia. Yet even if it had been litigated, the issue would have been decided under the forum's (Virginia's)

different choice-of-law rules which, automatically, make estoppel improper.[1] Indeed, St. Paul cannot blithely excuse its evidentiary burdens by pointing to a prior Virginia decision, ignoring its conceptual bases, and then running away.

- **The False Conflict** – St. Paul's choice-of-law argument also fails to account for the fact that the laws of California and Virginia are substantively *consistent* as regards insurers' duty to defend. This point is critical, because St. Paul makes too much of Virginia's "four corners" rule which, it says, limits duty to defend analysis to two documents: The complaint and the policy. According to St. Paul, this rule stands in stark contrast to California's duty to defend rule, which requires examination of "extrinsic evidence." St. Paul's comparison is incorrect.

In truth, Virginia law holds only that the initial defense obligation is limited to the "four corners" of the complaint. Thereafter, subsequent facts may be considered when assessing an insurer's liability for breaching its duty to defend. This point is made plain in Brenner v. Lawyers Title Ins. Co., 240 Va. 185 (Va. 1990) – the only state case St. Paul cites in support of its (erroneous) reading of Virginia law:

> The duty to defend is to be determined ***initially*** from the allegations of the complaint. But if it is doubtful whether the case alleged is covered by the policy, the refusal of the insurer to defend is at its own risk. And, ***if it be shown subsequently upon the development of the facts that the claim is covered by the policy, the insurer necessarily is liable for breach of its covenant to defend.***

[1] A party asserting collateral estoppel must show, among other things, "that the factual or legal issue is identical to the issue that was previously litigated" and "that the issue was actually litigated in a prior proceeding . . ." Jones v. Bates, 127 F.3d 839, 848 (9th Cir. 1997) (Italics supplied). St. Paul has failed to prove either of these elements. First, the issue is not "identical" because: (1) St. Paul has presented no evidence that the parties in the previous case litigated whether Virginia's "four corners" rule or California's (allegedly) different rule applied to the duty to defend analysis (Eureka Fe. Savings & Loan Ass'n v. CNA Ins. Co., 873 F. 3d 229, 233 (9th Cir. 1989) ("Collateral estoppel is inappropriate if there is any doubt as to whether an issue was actually litigated in a prior proceeding"); and (2) in any case, the choice-of-law determination was made under Virginia's choice-of-law rules, which St. Paul must concede are not the same as California's conflicts rules. See Peterson v. Clark Leasing Corp., 451 F.2d 1291, 1292 (9th Cir. 1971) ("Issues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits be the same"); Tang v. Aetna Life Ins. Co., 523 F. 2d 811 (8th Cir. 1975); Feniello v. Univ. of Pa. Hosp., 558 F. Supp. 1365, 1367 (D. N.J. 1983) (choice of law determination made by foreign jurisdiction does not estop court from making choice of law determination under forum rules). Second, St. Paul presents no evidence that the choice-of-law issue was even argued at the district court or the appellate level. Finally, it is unclear that the choice-of-law determination in the previous case was essential to the ruling, so that part of the ruling is dicta and is not entitled to collateral estoppel effect. See Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 887 n.3 (1998).

Brenner, 240 Va. at 189-193 (emphasis added). In other words, insureds may revisit their insurers' initial denial of its defense obligation (duty to defend) after a claim has come to rest. At that juncture, duty to defend analysis may be based upon all of the facts and circumstances which "subsequently . . . develop[ed]." This only makes sense. For, indeed, a contrary rule would forever limit/freeze coverage to whatever is first alleged against an insured. As a result, coverage for claims and assertions revealed during the discovery process would otherwise be entirely ignored. Virginia's "four corners" rule does not sanction this outcome. Rather, Virginia courts have long permitted insureds to use the underlying litigation record and other materials to prove-up their insurer's breach of its defense obligations based on the "subsequent development" rule.[2]

The laws of California and Virginia do not conflict here because the SmartDownload Actions have been resolved. It's the morning after. To the extent any Virginia rule applies, it is the "subsequent development" rule, not the "four corners" rule. In light of this understanding, California and Virginia rules do not materially conflict. Both jurisdictions allow consideration of extrinsic evidence bearing on the issue of an insurer's duty to defend. Inasmuch as "no conflict" exists here, California's forum law ought to apply.[3] See State Farm Mut. Auto. Ins. Co. v. Davis, 937 F.2d 1415 (9th Cir. 1991); Hurtado v. Sup. Ct., 11 Cal.3d 574, 580 (1974).

- **St. Paul's § 1646 Analysis is Incorrect**. As Plaintiffs' Cross Motion details, the California Supreme Court and the Ninth Circuit have both held that the "governmental interest" test must be applied to choice-of-law determinations in contract cases. See Plaintiffs' Cross Motion at 8. St. Paul responds to this by asserting that Royal Indemnity Group v. Travelers Indem. Co. of R.I., 2005 WL 2176896 (N.D. Cal.), an unpublished decision from this District, has "clarified" (i.e., changed) these established rules and, instead, requires mechanistic application of Cal. Civ. Code § 1646 to the exclusion of the "governmental interest" test. See St.

[2] See e.g., London Guar. & Accident Co., Ltd v. White & Bros, Inc., 188 Va. 195, 199-200 (1948); Virginia Elec. & Power, 252 Va. at 270 (court revisits record of underlying trial to find that insurer wrongfully breached its duty to defend); Brenner v. Lawyers Title Ins. Co., 240 Va. 185, 189-193 (1990) (subsequent duty to defend analysis based on pre-litigation correspondence, pleadings and relief sought in the litigation through judgment); Lerner v. General Ins. Co., 219 Va. 101 (1978) (factual development principle basis for finding insurer breached obligation to defend insured against punitive damage claim).

[3] Moreover, even if there were a difference, St. Paul has failed to identify any interest Virginia has in applying its "four corners" rule to protect a foreign insurer and limit coverage for a Virginia insured.

Paul's Reply at 3-5. That's incorrect.[4] Royal Indemnity is an outlier. Instead, this District's courts routinely follow state and Ninth Circuit precedent and apply the "governmental interest" test to contract cases, including cases involving insurance contracts. See, e.g., Brentwood Investors v. Wal-Mart Stores, Inc., 1998 U.S. Dist. LEXIS 9222 (N.D. Cal.), aff'd, 225 F.3d 661 (9th Cir. 2000); Edwards v. U.S. Fid. & Guar. Co., 848 F. Supp. 1460 (N.D. Cal. 1994), aff'd, 74 F.3d 1245 (9th Cir. 1996).[5]

Atop these realities, the fact remains that St. Paul's resort to § 1646 fails to dictate the application of Virginia law. Baekgaard v. Carreiro, 237 F.2d 459, 464 n. 4 (9th Cir. 1956) (under § 1646, policies interpreted under California law where premiums were payable and policy was serviced in California). Here, St. Paul presents no evidence that premiums were paid in Virginia[6] or that the policy was "serviced" in Virginia. Instead "servicing" of the policy appears to have taken place in St. Paul's California[7] and Minnesota offices.[8] Given that neither factor points to Virginia, this Court cannot properly "choose" to apply Virginia law here. Rather, California law should apply to this claim by a California insured (Netscape) based on liabilities for a product developed and distributed from Netscape's California offices (SmartDownload).

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[4] In any event, Royal Indemnity is distinguishable on several bases: ***First,*** it involved a "false conflict." See Royal Indemnity, 2005 WL 2176896 at *9-10 (court found no difference between California and Texas law). In fact, St. Paul's brief fails to cite a single "true" conflict case in support of its § 1646 proposition. ***Second,*** Royal Indemnity focused on a possible (though ultimately non-existent) conflict between the *applicable trigger rules* – a potential conflict not at issue here. Compare Sentex Systems, Inc. v. Hartford Acc. & Indem. Co., 882 F. Supp. 930, 936-937 (C.D. 1995), aff'd 93 F.3d 578 (9th Cir. 1996) (applying "governmental interest" analysis to determine whether to apply Maryland's "four corners" rule).

[5] Even if this Court accepted St. Paul's strained reading of Royal Indemnity, Virginia law still would not apply. For despite St. Paul's assertions that the policy was "made" in Virginia, the only evidence it offers on this point is (**1**) the Policy's "Delivery Invoice" (Ex. 1 at SPM 114) and (**2**) the Specht complaint's allegation regarding the Virginia situs of AOL's corporate headquarters. See St. Paul Motion at 8, n. 39. The first reference lists addresses of the insured (VA) and its broker (DC), but says nothing regarding where actual delivery was made; by contrast Ex. 22, which St. Paul cites in the very next footnote, reflects Marsh's (DC) receipt of the policy and its forwarding it on to AOL (VA). The second reference is a "neutral" fact which proves nothing about where the policy was "made." Plaintiffs, on the other hand, have put forward substantial evidence demonstrating the Policy, renewals, and binders were "made" outside of Virginia. (See Plaintiffs' Cross Motion 3, n. 4).

[6] Indeed, the Policy indicates that premiums were payable to St. Paul in New York. See Ex. 1 at SPM 0118.

[7] See Ex. 208 (AOL's Rosenthal claim "serviced" out of St. Paul's Brea, California office.)

[8] See Exs. 131, 210, and 212 (various other AOL claims serviced out of St. Paul's Minnesota office).

B. The Policy's Privacy Offense Was Satisfied, Thereby Triggering Coverage

Pursuant to the Policy, St. Paul is obligated to defend Plaintiffs against all claims involving "making known to any person or organization written or spoken material that violates a person's right of privacy" (the "Privacy Ofense").[9] While the SmartDownload Actions unquestionably allege a violation of claimants' privacy rights, St. Paul insists it had no duty to defend Plaintiffs because: (1) the underlying actions did not allege Plaintiffs made claimants' private information known to a *third party;* and (2) the actions only allege injury based on the *theft* of claimants' private information. As discussed below, both assertions are wrong.

1. The Phrase "Making Known to Any Person or Organization" Only Requires Disclosure to Someone Other Than the Injured Party

St. Paul insists that its Privacy Offense requires disclosure to a "third party." St. Paul's Reply at 7. Exactly who (or what) constitutes a "third party" for disclosure purposes is never explained. Instead, St. Paul simply parrots this undefined language, derived from a series of "seclusion-based" privacy cases which the insurer now admits are conceptually distinct from the "secrecy-based" privacy claim posed here. St. Paul's Reply at 8. St. Paul's argument cannot withstand scrutiny.

a) The "Blast Fax" Coverage Cases Are Inapposite

St. Paul asserts disclosure to an (undefined) "third party" is a required element of its Privacy Offense. It does so based entirely on dicta in two cases involving violations of the federal Telephone Communications Privacy Act ("TCPA"): (1) ACS Systems, Inc. v. St. Paul Fire and Marine Ins. Co., 2007 Cal. App. LEXIS 113, and (2) Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d 488 (E.D. Pa. 2006), a Pennsylvania district court decision currently on appeal.[10] Granted, both decisions say that "third party" disclosure is required to

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[9] Ex. 1 at SPM 0141.

[10] Although St. Paul also purports to rely on Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005) for its assertion that its policy requires "third party" disclosure (St. Paul's Reply at 7-9), that decision does not support its proposition. Indeed, only once in that decision is the phrase "third party" even used, and the Court merely says that the policy's "'making known' provisions [the disparagement and invasion of privacy offenses] focus on harm to a third party." Id. at 641. Thus, the term "third party" in that decision refers to the *victim* and not the *recipient* of the victim's private information. Thus, contrary to St. Paul's assertions, the Court does not say anything about whether private information must be disclosed to a "third party" in order to satisfy the personal injury coverage's "making known to any person or organization" provision.

trigger the "making known" provision of St. Paul's advertising injury coverage. However, *neither* decision explains the scope of that phrase. This is important because context counts. Indeed, a proper reading of both ACS and Melrose demonstrate that, in context, the courts construe "third party" to mean "*someone other than the injured party*." Analysis of these decisions proves this reading.

Both ACS and Melrose are TCPA coverage cases. In the underlying actions, the insureds were accused of sending unwanted faxes containing the insureds' own advertising information ("blast faxes").[11] Claimants argued that the insureds violated their "seclusion" privacy (i.e. the right to be left alone) by sending them information they did not request or want.[12] Notably, claimants did not allege that their "secrecy" privacy (i.e. the right to keep private information private) was violated.[13] Private information not at issue. This distinction is dispositive.

Based on this legal and factual backdrop, the courts in both actions denied coverage. In so doing, they held that St. Paul's "making known" advertising injury provision (which, word-for-word tracks the language of the Privacy Offense here) covered only *secrecy*-type privacy violations, which inherently involve publication.[14] Because *seclusion*-type privacy violations have no publication element, the court held coverage was not triggered.[15] In the words of the ACS Court:

> "[T]he coverage applies to liability for injury *caused by the disclosure of private content to a third party—to the invasion of 'secrecy privacy' caused by 'making known' to a third party 'material that violates an individual's right of privacy*.' The coverage does not apply to injury caused by receipt of an unauthorized advertising fax, because in that case no disclosure of private facts to a third party has occurred. The recipient of an unauthorized advertising fax has no claim that 'material that violates an individual's right of privacy' has been made known to a third party."

ACS, 2007 Cal. App. LEXIS at *21. Similarly, the Melrose Hotel Court stated:

> "The Court finds that the clear and unambiguous provision 'making known to any person or organization covered material that violates a person's right of privacy' requires that the content contained in the covered material must violate a person's right of privacy and must be made known to a third party."

Melrose Hotel, 432 F. Supp. 2d at 504.

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[11] ACS Systems, 2007 Cal. App. LEXIS at *2; Melrose Hotel, 432 F. Supp. at 490.
[12] ACS Systems, at *19; Melrose Hotel, at 492.
[13] ACS Systems, at *19; Melrose Hotel, at 492.
[14] ACS Systems, at *26; Melrose Hotel, at 503.
[15] ACS Systems, at *20; Melrose Hotel, at 503.

Although both courts recognize that disclosure to a "third party" was required to trigger coverage, neither court discusses the meaning of "third party." They didn't have to. For, indeed, the only "disclosure" in those cases was a disclosure *to the injured party*. Unsurprisingly, both courts agreed that this was not sufficient. Instead, they found there must be a privacy disclosure to someone other than the injured party – in their words, to a "third party."[16] Left unresolved by both courts are the following two (dispositive) questions posed by Plaintiffs' here:

- Does an insured's disclosure of the injured party's private information to one or more of its employees satisfy the offense of "making known to any person or organization written or spoken material that violates a person's right of privacy"?; and
- Does an insured's disclosure of the injured party's private information to its parent corporation satisfy the offense of "making known to any person or organization written or spoken material that violates a person's right of privacy"?

St. Paul's Reply does not address either issue. Instead, the insurer avoids meaningful analysis by repeating the words "third party" like a mantra. Repetition is not a substitute for meaningful examination of the issues. Thus, Plaintiffs demonstrate below that St. Paul's Policy covered the SmartDownload Actions' alleged disclosures.

b) Netscape's Alleged Intra-Corporate Disclosures Satisfy the St. Paul Policy's "Making Known" Provision

Plaintiffs' Cross Motion provided extensive support for the proposition that Netscape's alleged disclosures to its own employees (and to AOL) satisfied the Policy's Privacy Offense. Plaintiffs' Cross Motion at 14-21. St. Paul responded by ignoring these authorities which, for reasons of brevity, will not be repeated here. Noteworthy, however, is the recent ACS decision which provides *additional* support for Plaintiffs' position.

As that opinion reveals, the ACS Court meticulously scrutinized both the *text* and the *context* of St. Paul's Policy. ACS, 2007 Cal. App. LEXIS at *17. Given the facts of Plaintiffs' claim, both the *text* and the *context* affirm that intra-corporate disclosures to Netscape's employees and disclosures to Netscape's parent corporation (AOL) satisfy the "making known" criterion of St. Paul's Privacy Offense.

[16] ACS Systems, at *21; Melrose Hotel, at 503-4.

- ***Text***. The Policy's key phrase says "making known to *any* person or organization written or spoken material that violates a person's right of privacy" (italics supplied). As worded, there is no qualification on the type of person *to whom* the disclosure is made. Rather, *any* person will suffice so long as the disclosure violates some other person's right of privacy. Here, this understanding is critical, because the substantive law regarding invasion of privacy holds that purely intra-corporate disclosures of private information establish the tort. See Operating Engineers Local 3 v. Johnson, 110 Cal. App. 4th 180 (2003) (invasion of privacy claim based on employer's disclosure of employee's reprimand to other employees). This principle carriers over into the realm of insurance law, where courts have found CGL policies' "publication" requirement satisfied where an insured discloses a claimant's private information to its employees. See, e.g., Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL 146896 (N.D. Cal.); Bowyer v. Hi-Lad, Inc., 609 S.E. 2d 895, 912; Tamm v. Hartford Fire Ins. Co., 2003 Mass. Super. LEXIS 214 (Mass. Super. Ct.); Community TV Corp. v. Twin City Fire Ins. Co., No. 199905819J, 2002 WL 31677184, *6 (Mass. Super. Ct.).

- ***Context***. Policy context also supports Plaintiffs' assertion that disclosure to employees and parent corporations satisfy the Policy's "making known" provision. Proof here is derived from the Policy's format. The "personal injury liability" section at issue provides coverage for injury caused by a "personal injury offense." "Personal injury offense" is defined as seven different offenses, the last of which is the "making known" provision upon which Plaintiffs rely. Given its proximity to – and inclusion in a group with – these other offenses, the meaning of the Privacy Offense is informed by the meaning of its neighboring offenses. Palmer v. Truck Ins. Exchange, 21 Cal. 4th 1109, 1116-18 (1999); Maxconn Inc. v. Truck Ins. Exchange, 74 Cal. App. 4th 1267, 1276-77 (1999). Of the seven-listed offenses, the last three are:

  - Libel or slander.
  - Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
  - Making known to any person or organization written or spoken material that violates a person's right of privacy.

Common to each offense is an express or implied publication requirement. See Witkin, Summary of California Law, Torts, § 529. Importantly, California law is settled that for defamation claims, intra-corporate disclosures satisfy the tort's publication requirement. See Kelly v. General Telephone Co., 136 Cal. App. 3d 278, 284 (1982) (rejecting defendant's argument that disclosure by one employee to another did not constitute "publication" and holding that "publication occurs when a statement is communicated to any person other than the party defamed.").

In light of these commonalities, the same conceptual rules which allow intra-corporate disclosures to trigger coverage for libel and slander claims, necessarily applied here to trigger coverage for Netscape's alleged intra-corporate disclosures that violated claimants' right of privacy. Coverage in this circumstance is entirely consistent with the insureds' reasonable expectations. Thus, St. Paul's denial of benefits breached its duty to defend.

2. The SmartDownload Actions Satisfy the St. Paul Policy's "Making Known" Provision Because They Allege Injury Caused By SmartDownload's "Transmission" of Behavioral Data to Persons Other than the Claimants

St. Paul's Reply – like its Cross Motion – ignores and distorts the actual allegations in Specht and the other class actions.[17] Rather than fairly summarizing and/or referencing those allegations, St. Paul repeats – *over and over again* – the single allegation that claimants were injured by Plaintiffs' "theft" of their private information. St. Paul's Reply at 1, 7, 9, 11, and 12. In doing so, St. Paul ignores other material allegations relevant to its duty to defend, including those conclusively implicating a potential for coverage.

For example, the Specht complaint, in its own words, alleges the following (emphasis added):

> "2. Unbeknowst to the members of the Class, and without their authorization, defendants have been ***spying*** on their Internet activities. 'SmartDownload,' … is an ***electronic bugging device***. It secretly ***intercepts*** electronic communications … [and] then ***transmits*** the contents of those communications … **back to defendants** … This **continuing *surveillance*** of the Class members' electronic communications permits Netscape to create a continuing profile of [users' activities].
>
> "35. … SmartDownload automatically ***transmits to defendants*** the name and Internet address of the file and the Web site from which it is being sent …

[17] See Ex. 129 [Specht complaint].

> 36. … SmartDownload will ***transmit to defendants*** the name of the setup file … and the Internet address of the file … **Thus, through SmartDownload's *spying*, Netscape can obtain information** about who is downloading which version of its competitor's browser.
>
> 37. … **Thus, through SmartDownload's *spying*, AOL can obtain information** about [users' activities].
>
> 38. Defendants are using SmartDownload to ***eavesdrop***. They are using SmartDownload to ***intercept and obtain* information** about communications to which they are not a party. Moreover, by including the contents of the Netscape cookie and the SmartDownload Key in the transmission, they are intentionally providing themselves with all of the information that they need to create moment-by-moment profiles of file transactions by both individual Web users and individual Web sites.
>
> 50. Moreover, **defendants intentionally use these *intercepted* communications …**"

Rather than grapple with these precise allegations, St. Paul makes the strange (and seemingly pointless) argument that Plaintiffs are "personifying" SmartDownload by using terms like "spied" and "transmit" to "create the appearance" of "making known." St. Paul's Reply at 10. Exactly what that means is unclear. In any event, the record is clear that the cited terms were formulated by the SmartDownload claimants, not Plaintiffs.

a) The SmartDownload Complaints Allege Netscape's Transmittal of Private Data to Netscape Employees and Therefore Satisfy the "Making Known" Provision

As demonstrated above, the SmartDownload claimants plainly alleged that Netscape – through use of the SmartDownload product – intercepted their private information and transmitted it back to Netscape. Specht, ¶¶ 2, 35, 36. Further, Specht expressly alleged that such transmittal meant that Netscape was "intentionally providing" itself with the information needed to create moment-by-moment user profiles (Specht, ¶¶ 2, 38), and that it "intentionally used" the intercepted communications (Specht, ¶ 50). The logical inference from these assertions is that Netscape made claimants' private information known to its employees so they could create user profiles.[18] Such intra-corporate disclosures satisfy the St. Paul Policy's personal injury offense because it is a "making known to any person or organization [Netscape's employees] written or spoken material that violates a person's right of privacy." See Lenscrafters, 2005 WL 146896 (N.D. Cal.); Bowyer, 609 S.E. 2d at 912; Tamm, 2003 Mass. Super. LEXIS 214 (Mass. Super. Ct.); Community TV Corp., 2002 WL 31677184, *6 (Mass. Super. Ct.).

[18] Further support for this inference derives from St. Paul's own brief, wherein it points out that corporations cannot act by themselves, rather they act through their employees. St. Paul's Reply at 10.

To avoid this analysis, St. Paul narrows the complaints' allegations and, instead, argues that Netscape did not "make known" private information to its employees; rather it "stole" users' private information. St. Paul's Reply at 11. The insurer then argues, without citation, that "a corporation's illegal acquisition of private information" is not an act of "making known" within the meaning of the Policy's terms. Id. Such an unsupported assertion is wrong. Furthermore, it conflicts with St. Paul's admission that "making known" means "[d]isclosing, releasing, publicizing, providing, giving, sending to a person or organization."[19] This is, of course, precisely what the SmartDownload claimants alleged: That Netscape disclosed, released, provided, gave or sent claimants' private information to its employees (and possibly others). Contrary to St. Paul's contention, the SmartDownload claimants' did not allege that Netscape *stole* their information and then locked it out of view. Rather, they allege that Netscape (and AOL) "intentionally used these intercepted communications." Specht, ¶¶ 38, 50. As St. Paul must concede, such "use" cannot occur unless the subject information has first been "made known" to someone.

For all of these reasons (including those set forth in Plaintiffs' Cross Motion), allegations regarding transmittal of information by Netscape to its employees triggered the Policy's "making known" provision. St. Paul's refusal to defend breached its Policy obligations.

b) The SmartDownload Complaints Allege Transmittal to AOL and, Thereby, Satisfy the Policy's "Making Known" Provision

As demonstrated above, Specht alleges that Netscape's SmartDownload product "transmitted" claimants' private information to AOL. Specht, ¶¶ 2, 35-38, 50. St. Paul argues that these allegations don't qualify as "making known to any person or organization" because Specht alleges that Netscape and AOL were "inextricably intermingled." St. Paul's Reply at 11. St. Paul's argument is without merit because, of course, Specht *also alleges* that Netscape and AOL are separate and legally distinct corporations. Specht, ¶¶ 10, 11. In all events, St. Paul was aware of the companies' true status (separate but related) through documentation adding

[19] Evensen Depo., 134:14-17. Mr. Evensen is one of St. Paul's witnesses designated pursuant to Federal Rule of Civ. Proc., 30(b)(6) to testify on St. Paul's behalf regarding the intent and meaning of the Policy's "making known" provision.

Netscape to AOL's Policy following the parties' 1999 merger.[20] Finally, even if St. Paul's corporate distinction were right (it's not), the Policy does not qualify its "making known" language by exempting privacy violations between "inextricably intermingled" organizations. For all these reasons (and those set forth in Plaintiffs' Cross Motion), the allegations regarding transmittal of information by Netscape to AOL triggered the St. Paul Policy's "making known" provision. St. Paul's failure to defend breached its Policy obligations.

c) Lenscrafters is Relevant and Persuasive Authority

Further supporting Plaintiffs' analysis is Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL 146896 (N.D. Cal.),[21] a secrecy decision holding that disclosure to a related person or entity satisfies a general liability policy's privacy offense. Id. at *9-11. Understandably, St. Paul dislikes this decision which it seeks to distinguish with two different arguments: (1) Lenscrafters involved different "wrongful conduct"; [22] and (2) Lenscrafters involved "materially different policy language." St. Paul's Reply at 12. Neither argument is persuasive.

- ***Wrongful Conduct***. In Lenscrafters, insureds Lenscrafters and Eyexam (a subsidiary of Lenscrafters) were sued for violating California's Confidentiality of Medical Information Act. Claimants alleged that Lenscrafters had improperly obtained eye patients' private information by having their opticians (laypersons who dispense eyeglasses) present during patients' eye examinations with Eyexam's optometrists (licensed doctors of optometry). The specific privacy allegations against Lenscrafters stemmed from the presence of its opticians in patients' exams. According to claimants, the opticians' presence caused them to disclose medical information that Lencrafters, in turn, then "cause[d] and allow[ed]" to be "accessed and reviewed" by its employees for non-medical purposes. Id. at *11. The Lenscrafters Court found that this *secrecy-type* violation triggered the insurance policy's coverage provision for

[20] See, e.g., Ex. 85.
[21] An appeal is currently pending before the Ninth Circuit.
[22] St. Paul argues that Lenscrafters is distinguishable because it involved disclosure to unauthorized persons whereas Specht involved "theft" of private information. Again, St. Paul's focus on a single word in the Specht complaint is not determinative of the nature of the action. Specht was not a criminal prosecution for "theft"; it was a civil action brought under the federal Electronic Communications Privacy Act which prohibits the interception and transmission of the electronic communications of others. St. Paul's "distinction" is nothing more than semantics and is not supported by the record.

"publication of material that violates a person's right of privacy." Id. This, of course, is the very same type of "wrongful conduct" at issue in Specht: Improper disclosure of private information (a "*secrecy-type*" privacy violation). St. Paul's distinction is, thus, misplaced.

- ***Different Policy Language***. St. Paul's assertion that Lenscrafters involved "materially different policy language" is flatly contradicted by the testimony of its own Rule 30(b)(6) witness, designated to testify regarding the "intent" of the Policy's "making known" provision. According to Eric Solberg – the self-described "architect" of the Policy's language – the phrase "making known" was intended to mean the same thing as "made public," a term analogous to "publication" that appeared in St. Paul's prior policy form.[23] Given such testimony, St. Paul cannot credibly argue that the holding in Lenscrafters is distinguishable because of the differences in policy language. The "intent" of "making known" is "publication." As such, Lenscrafters is relevant and persuasive authority.

3. Information Available to St. Paul Demonstrates the SmartDownload Claimants Alleged Their Private Data Was Made Known to Others

St. Paul's assertion that an insurer's defense obligation is limited to facts "known or *readily available* to it at the time of tender" is not correct. California's rule is actually (much) more robust, and imposes upon insurers an obligation to "affirmatively" seek-out information relevant to its insured's claim. See e.g., Shade Foods, Inc. v. Innovative Prods. Sales & Mktg. Inc., 78 Cal. App. 4th 847, 879-880 (2000); Frommoethelydo v. Fire Ins. Exch., 42 Cal. 3d 208, 214-215 (1986). Such an investigative duty is an outgrowth of the insurers' good faith obligations to its insureds. See Egan v. Mut. of Omaha Ins. Co., 24 Cal. 3d 809, 819 (1979) ("an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial."). Where, as here, the insurer breaches that

[23] Solberg Depo., 27:22-28:10, 37:10-38:11, 132:14-134:4. The precise "making known" provision at issue in this lawsuit first appeared in the 1991 revision of St. Paul's general liability form. See Ex. 118. (In the last 20 years, the St. Paul policy form has been revised four times: in 1985, 1991, 1996 and 2001). Prior to that time, the 1985 version of St. Paul's general liability form contained the following, comparable privacy offense: "written or spoken material *made public* which violates an individual's right of privacy." Id. When St. Paul revised this language to its present formulation, it was required to submit to state insurance departments a "Side-by-Side Comparison" explaining the changes. Mr. Solberg, who authored the "Side-by-Side Comparison," testified that the revision from "made public" to "making known" was merely an "editorial change." The new language was perceived to be "more modern," but was in no way intended to alter the meaning. Solberg Depo., 132:14-134:4.

investigative obligation, facts resulting from a reasonable investigation are binding on the insurer. KPFF Inc. v. Cal. Union Ins. Co., 56 Cal. App., 4th 963, 973 (1997); see also Am. Int'l Bank v. Fid. & Dep. Co., 49 Cal. App. 4th 1558, 1577 (1996); Eigner v. Worthington, 57 Cal. App. 4th 188, 195-200 (1997).

St. Paul's cited authorities are not contrary. Although the insurer's decisions (correctly) note that carriers have no continuing obligation to investigate coverage, all such decisions presume – as they must – that the insurer has initially performed an "appropriate investigation" before denying coverage. See Montrose Chem. Corp v. Superior Court, 6 Cal. 4th 287, 298-99 (1993); see also Egan, 24 Cal. 3d 809 (thorough investigation). Because St. Paul failed to undertake a timely, good faith coverage investigation, subsequent facts and theories developed in the SmartDownload Actions bear directly and immediately upon the assessment of its duty to defend. This "subsequent development" theory is, of course, similar to Virginia's rule allowing insureds to challenge an insurer's breach of its duty to defend based upon the entire record of a settled claim. See London Guar. & Accident Co., Ltd v. White & Bros, Inc., 188 Va. 195, 199-200 (1948); see also Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 252 Va. 265, 269 (1996) (*affirming* London Guarantee's vitality).

As shown, through the declarations of Patrick Carome and David Park (including the exhibits thereto), the SmartDownload claimants repeatedly asserted that their private information was collected by Netscape and sent to a third-party advertising company, AdForce, for marketing purposes.[24] This evidence provides a further basis to conclude that there were allegations sufficient to establish that Plaintiffs allegedly "made known" claimants' private information.

C. The "Deliberately Breaking the Law" Exclusion Does Not Bar Coverage

By its express terms, the DBL Exclusion only precludes coverage for an insured's "knowingly breaking any criminal law."[25] St. Paul's designated witnesses testified as to the intent and meaning of this exclusion. There, they explained that the DBL Exclusion is only intended to bar coverage when the following three conditions have been satisfied: (1) the insured

[24] Park Decl., ¶ 6; Carome Decl., ¶¶ 5-6.
[25] Ex. 1 at SPM 0154.

is alleged to have violated a criminal law; (2) the insured has done so with the knowledge that his conduct violated a criminal law; and (3) the insured is actually determined to have violated a criminal law.[26]

Here, only the first condition is (arguably) satisfied: The SmartDownload Actions allege that Netscape and AOL violated the ECPA and the CFAA. With that said, the actions do not allege that these are *criminal* statutes, and merely seek to enforce the *civil* aspects of those laws. Moreover, the SmartDownload Actions do not allege that Netscape and AOL "knowingly" violated these laws[27] and, at the end of the day, neither Netscape nor AOL was found to have violated either law.[28] For these reasons, the DBL Exclusion does bar Plaintiffs' claim.

[26] Solberg Depo., 227:4-228:18, 230:1-231:1, 238:12-239:16; Weiss Depo., 189:11-24. Ironically, St. Paul seeks to exclude its own witnesses' testimony because its attorneys are now urging this Court to adopt an interpretation of the DBL Exclusion that *contradicts* their witnesses' (sworn) interpretation. St. Paul's position is obvious gamesmanship, and is unsupported by the law. Extrinsic evidence regarding a contracting party's intent – including policy drafting history and even an insurer's undisclosed intent – must be considered by the Court in construing the policy language. Owens-Brockway Glass Container, Inc. v. Seaboard Surety Co., 1992 U.S. Dist. LEXIS 10337, *5-7 (E.D. Cal. 1992); Morey v. Vannucci, 64 Cal. App. 4th 904 (1998); The Anden Group v. Leesburg Joint Venture, 237 Va. 453, 458 (1989).

[27] St. Paul's assertion that the SmartDownload Actions allege that Plaintiffs "knowingly broke a criminal law" (St. Paul's Reply at 19) is wrong. As support, the best (and only) allegations that St. Paul cites are Specht Paragraphs 53 and 63 both of which, as part of the claimants' punitive damages allegations, assert that Plaintiffs' conduct (as described in the complaint) was "conscious, intentional, wanton and malicious." Ex. 129 at SPM 0020, 0022. These boilerplate allegations do not support the notion that claimants were alleging that Netscape and AOL "knowingly" broke the law, especially in the context of a civil litigation. Rather, Specht alleged that Netscape and AOL intercepted claimants' private communications and transmitted the contents of those communications back to themselves. *This* is the crux of their action, and it is this same basic conduct complained of throughout their complaint. The further allegation that Netscape's and AOL's conduct was "intentional" merely asserts that Netscape and AOL *intended* for SmartDownload to intercept the communications and *intended* for SmartDownload to transmit the contents of the communications back to themselves. St. Paul's own witness agreed with this analysis, and stated that these allegations did not support application of the DBL Exclusion. See Weiss Depo., 190:25-191:17. Thus, the "intent" alleged is the intent of Netscape and AOL to have SmartDownload operate as it did operate. Critically, there is no allegation in the complaint stating that Netscape or AOL *intended* to violate either the ECPA or the CFAA – the two statutes at issue in the underlying actions. Nor are there any allegations from which an intent to violate the law can be inferred. For example, the complaint does not allege that the claimants had previously informed Netscape and/or AOL that they believed their conduct was illegal and requested that it stop. Rather, this is simply a situation where Netscape released software that functioned in a particular way the Plaintiffs believed was legal and proper.

[28] There has never been any determination that Netscape and/or AOL *actually broke* any criminal law. In fact, Judge Hellerstein dismissed the CFAA claims in 2003 (see Ex. 219), and the ECPA claims were dismissed pursuant to the parties' stipulated settlement in which Netscape and AOL expressly and vehemently *denied* having violated any law. See Ex. 218.

D. The Policy's "Online Activities" Exclusion Does Not Bar Coverage

1. The Patterson Declaration is Admissible

Contrary to St. Paul's objections, the expert declaration of Plaintiffs' expert, Marc Patterson, is both relevant and admissible.[29] It was submitted by Plaintiffs in response to St. Paul's assertion that the "Online Activities Exclusion" – particularly the provision excluding coverage for "providing internet access to 3rd parties" – bars coverage. See St. Paul Cross Motion at 21-23. Because St. Paul raised this exclusion in its Cross Motion – where it bears the burdens of both proof and persuasion – Plaintiffs are entitled to respond by submitting competent evidence to refute the assertion that SmartDownload provides "internet access." See id. at 21-22. Mr. Patterson – whose substantive expertise is not challenged – does this in three ways: (a) He explains, as a *factual* matter, SmartDownload's functionality;[30] (b) He explains, as a *factual* matter, ISPs and the dynamics of Internet access;[31] and (c) He compares SmartDownload's functionality with notions of Internet access to conclude, as a *factual* matter, that SmartDownload does not provide such access.[32] All of this is proper. St. Paul's objections to Mr. Patterson's declaration are not well-taken.[33]

2. The SmartDownload Actions Have Nothing to Do With "Providing Internet Access to 3rd Parties"

St. Paul's assertion that SmartDownload (and the SmartDownload Actions) involved "providing internet access to 3rd parties" (St. Paul's Reply at 22) is obvious bootstrapping and is wrong. At bottom, St. Paul argues that "internet access" – rather than having its own meaning – is nothing more than the sum of two broad concepts: "Internet" + "access." St. Paul's Reply at 22. Thus, its argument is as follows: SmartDownload downloads files from the "internet." Id.

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[29] Plaintiffs' Response to St. Paul's Evidentiary Objections and Motion to Strike, submitted concurrently herewith, are incorporated herein by reference.
[30] See Patterson Decl. at ¶¶ 3(a), 3(b), 3(d), 3(e)(1), 3(e)(2).
[31] See id. at ¶ 3(b); see also 3(b) n.1 & 3(c) n.2.
[32] See id. at ¶ 3(c); see also 3(e)(1) & 3(e)(2).
[33] St. Paul's argument that Plaintiffs were required to disclose Mr. Patterson pursuant to FRCP Rule 26 is wrong. That rule only requires prior disclosure of experts "who may be used at *trial* to present evidence." See FRCP 26(a)(2)(A)(1) (emphasis supplied). Prior disclosure is not required for summary judgment motions. See e.g., In re Mercedes-Benz Anti-Trust Lit., 225 F.R.D. 498, *16, *21 (D. N.J. 2005) (disclosure requirement does not extend to summary judgment motions).

The dictionary definition for the word "access" includes "the ability to … communicate with, or make use of." Id. Therefore, SmartDownload provides "internet access." Id.

Plainly this is wrong. Mr. Patterson says as much.[34] Generic "access" is not the issue here. Rather, the issue is "internet access." That phrase is commonly-understood[35] on Google,[36] in statutes,[37] and elsewhere to mean the ability to connect to the Internet. See P. Kent, The Complete Idiot's Guide to the Internet 13-19 (7th ed. 2001).

In response, St. Paul asserts that Plaintiffs are creating a "technical or special meaning" for the phrase "internet access" by interpreting it to mean the ability to connect to the Internet. That's wrong. There is nothing technical about the term "internet access." Properly read, the words go together. "Internet" is not to be read separate and apart from the word "access." Reading the two words separately – as St. Paul suggests – plainly misconstrues the term. Indeed, such an approach would be akin to interpreting the phrase "America Online" (a company well-recognized as an internet service provider) as "America" (a country) plus "Online" (a term generally considered to mean connected to the Internet), and concluding the entire people, geography, and economy of the United States can be found within the ether of cyberspace. Common sense dictates otherwise.

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[34] Patterson Decl., ¶ 3.

[35] Wikipedia, a popular encyclopedia available free on the Internet, defines "Internet access" as follows: "Internet access refers to the means by which users connect to the Internet." See Ex. K to Supp. Pereira Decl. Another free online dictionary available at computeruser.com defines "Internet access" as "[a]ccess to the Internet via dial-up account or direct connection." See Ex. L to Supp. Pereira Decl. Similarly, Newton's Telecom Dictionary (22nd Ed. 2006) defines "Internet access" as follows: "The method by which users connect to the Internet, usually through the service of an Internet Service Provider (ISP)." See Ex. M to Supp. Pereira Decl.

[36] A general Internet search for "Internet access" on google.com resulted in advertisements for various internet service providers (ISPs) and links to various sites intended to help consumers choose an ISP. See Ex. N to Pereira Decl. For example, one of the first entries is an advertisement for NetZero, an ISP. The text of the advertisement uses the term "internet access" repeatedly to refer to the service of connecting the Internet: "NetZero HiSpeed Internet offers accelerated dial up Internet access" and "The NetZero Free ISP offers ad-supported free internet access."

[37] The federal Internet Tax Freedom Act, generally prohibits state and political subdivisions from imposing "taxes on Internet access." Pub. Law No. 105-277, Div. C, Title XI, § 1100 *et seq*., 112 Stat. 2681-719 (1998) (current version at 47 U.S.C. § 151 note); see Concentric Network Corp. v. Commonwealth of Pennsylvania, 897 A. 2d 6, 14-15 (Pa. Commonw. Ct. 2006). While the statute doesn't specifically define "Internet access," it defines "Internet access services" as "the provision of computer and communications services *through which a customer using a computer and a modem or other communications device may obtain access to the Internet*." Id. Similarly, "Internet access provider" is defined as "a person engaged in the business of providing a computer and communications facility *through which a customer may obtain access to the Internet*." Id. Critically, the statute contains a separate definition for an "Internet information location tool," defined to mean a service that refers or links consumers to various locations *once they are already connected to the Internet*. Id.

As used in the Online Activities Exclusion, the term "internet access" is not ambiguous. There can be no doubt that the parties intended that the phrase "internet access" be given its commonly-understood meaning: Connecting to the internet. There is no evidence to suggest the parties intended any broader meaning, but there is affirmative evidence to suggest a narrow one was intended.[38] Accordingly, St. Paul's suggestion that the term "internet access" is ambiguous must be rejected.

On the off chance this Court determines that the phrase "internet access" is ambiguous, St. Paul provides no support for the proposition that the Online Activities Exclusion should be interpreted against Plaintiffs. Here, St. Paul argues that because AOL was responsible for drafting the language of the Online Activities Exclusion, any ambiguity must be construed against AOL. Not so. While AOL did draft the language, it was fully and finally accepted by St. Paul after a long period of negotiation where a variety of formulations were proposed.[39] Clearly, St. Paul – a sophisticated insurance company with bargaining power at least equal to AOL's – was actively involved in the negotiation of this exclusion. In no sense can it be considered an adhesion contract – the reason for the contra-insurer rule. Nor can St. Paul argue that there is any public policy reason for protecting its expectations of non-coverage. As such, there is no justification for this Court to apply a highly-unusual contra-*insured* rule here.[40]

3. AOL's New Evidence Does Not Establish that the SmartDownload Claim is "3rd Party Advertising"

For the first time in its Reply, St. Paul retracts its former (unqualified) *admission* that the SmartDownload claim did not involve "3rd party advertising" and now claims that it does.

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[38] Ex. 39; Spencer Depo., 164:25-165:5; 170:21-23; 184:9-185:11.

[39] See e.g., Midwinter Depo., 4:1-7:1; Ex. 66 at SP 1974, 1976; Ex. 69 & Midwinter Depo., 320:21-324:16; Ex. 81 at SPM 1433, 1435; Ex. 102 at SPM 1658; Ex. 108 at SPM 724 & Midwinter Depo., 293:4-297:23; Ex. 33 and Ex. 109 at SPM 1729-30 & Midwinter Depo., 287:4-301:16; Ex. 110 at SPM 720-23; Ex. 112 at SPM 1725-26 & Midwinter Depo., 310:9-314:8; Ex. 113 at SPM 1728 & Midwinter Depo., 316:17-319:18. See also Ex. 69 (Corbetis: "OK to endorse. This was the intent.") & Corbetis Depo., 21:17-22:15.

[40] The authorities cited by St. Paul do not suggest otherwise. Doe v. Group Hosp. & Medical Services, 3 F. 3d 80, 89 (4th Cir. 1993) involved a situation where a policy ambiguity was construed *against the insurance company*. Martin & Martin, Inc. v. Bradley Enterprises, Inc., 256 Va. 288 (1998), involved a commercial contract and not an insurance policy. In Fireman's Fund Ins. Co. v. Fibreboard Corp., 182 Cal. App. 3d 462, 468-69 (1986), the Court held that the policy *did not contain any ambiguity*. Therefore, statements regarding the construction of ambiguity are dicta. Finally, Hartford v. State of California, 49 Cal. Rptr. 2d 282, 285 (Cal.App. 1996), does not say the policy ambiguity should be construed *against* the insured; it merely says there is no grounds for application of the contra-insurer rule. In sum, St. Paul cites no authority holding that an ambiguity should be construed against an insured in the situation posed here.

Absent a court order, St. Paul cannot unilaterally change its position. Fed. R. Civ. Proc., Rule 36(b); see also Semitool, Inc. v. Dynamic Micro Sys. Semiconductor, 2002 U.S. Dist. Lexis 23050 * 20 n.11 (N.D. Cal.); Hoffman v. Partners in Collections, Inc., 1994 U.S. Dist. LEXIS 12884 at *2 (N.D. Ill. 1994). Accordingly, St. Paul's argument is improper and must be ignored.[41]

However, even if St. Paul were released from its prior admission, no credible argument can be made that the SmartDownload claim involved "3rd party advertising." The SmartDownload Actions have nothing to do with "3rd party advertising." They do not allege that any "3rd party advertising" was sent to the claimants and do not allege that any "3rd party advertising" invaded claimants' privacy. Rather, the SmartDownload claimants alleged that Plaintiffs allegedly shared their private information with AdForce without their knowledge or consent.[42] Indeed, the key here is consent. Thus, claimants' allegations would have been the same regardless of whether Netscape and/or AOL shared their private information with an ad server company like AdForce, a demographic researcher, or anyone else who was not authorized to receive their (allegedly) private information. At bottom, the SmartDownload Actions are about *unauthorized acquisition and disclosure* of private information. They are not about "3rd party advertising." Accordingly, the Online Activities Exclusion does not preclude coverage.

III. CONCLUSION

Plaintiffs respectfully request entry of Partial Summary Judgment in their favor and against St. Paul on the First Amended Complaint's Second Cause of Action (Breach of Contract).

Dated: March 2, 2007

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[41] See Plaintiffs' Affirmative Objections to St. Paul's Evidence, filed concurrently herewith, and incorporated herein by reference.
[42] Park Decl., ¶ 6, Carome Decl., ¶¶ 5-6.