

1 Absent a court order, St. Paul cannot unilaterally change its position. Fed. R. Civ. Proc., Rule
2 36(b); see also Semitool, Inc. v. Dynamic Micro Sys. Semiconductor, 2002 U.S. Dist. Lexis
3 23050 * 20 n.11 (N.D. Cal.); Hoffman v. Partners in Collections, Inc., 1994 U.S. Dist. LEXIS
4 12884 at *2 (N.D. Ill. 1994). Accordingly, St. Paul’s argument is improper and must be
5 ignored.⁴¹

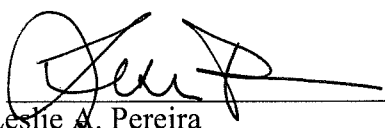
6 However, even if St. Paul were released from its prior admission, no credible argument
7 can be made that the SmartDownload claim involved “3rd party advertising.” The
8 SmartDownload Actions have nothing to do with “3rd party advertising.” They do not allege that
9 any “3rd party advertising” was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

18 **III. CONCLUSION**

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

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ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

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24 By 
Leslie A. Pereira
Attorneys for Plaintiffs
Netscape Communications Corporation and
26 America Online, Inc.

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28 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.