ABELSON | HERRON LLP
Michael Bruce Abelson (State Bar No. 130739)
Leslie A. Pereira (State Bar No. 180222)
333 South Grand Ave, Suite 1550
Los Angeles, California 90071-1559
Telephone: (213) 402-1900
Facsimile: (213) 402-1901
mabelson@abelsonherron.com
lpereira@abelsonherron.com

BERGESON, LLP
Daniel J. Bergeson (State Bar No. 105439)
Marc G. Van Niekerk (State Bar No. 201329)
303 Almaden Boulevard, Suite 500
San Jose, California 95110-2712
Telephone: (408) 291-6200
Facsimile: (408) 297-6000

Attorneys for Plaintiffs
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' OBJECTIONS AND MOTION TO STRIKE EVIDENCE AND OTHER MATTERS FILED IN CONNECTION WITH ST. PAUL'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, OPPOSITION AND REPLY; DECLARATION OF MICHAEL BRUCE ABELSON

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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Plaintiffs Netscape Communications Corporation and America Online, Inc. (collectively, "Plaintiffs") hereby object to and move to strike, pursuant to Federal Rule of Evidence 103(a)(1), the following evidence presented by Defendant St. Paul Mercury Insurance Company ("St. Paul") in connection with its cross-motion for partial summary judgment ("St. Paul's Motion") and reply and opposition to Plaintiffs' motion for partial summary judgment. ("St. Paul's Reply and Opp.").

As detailed more fully below, St. Paul's proffered evidence violates the Federal Rules of Evidence ("FRE") and Federal Rules of Civil Procedure ("FRCP"). Accordingly, this Court should not consider such objectionable evidence in deciding Plaintiffs' motion or St. Paul's cross-motion. See Hollingsworth Solderless Terminal Co. v. Turley, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980) (only admissible evidence properly considered by trial court in granting summary judgment).

PROFFERED EVIDENCE / GROUNDS FOR OBJECTION

1. St. Paul's Responses to Plaintiffs' Objection to Evidence in St. Paul's Motion for Partial Summary Judgment.

St. Paul's Response violates Local Rule 56-2(a) of the Northern District of California. By its terms, that rule prohibits the filing of a Separate Statement unless required by the Court. St. Paul's pleading attempts to skirt the Local Rule's prohibition on Separate Statements by renaming its pleading "Responses to Plaintiffs' Objections to Evidence." This disingenuous, especially since Plaintiffs did not previously interpose evidentiary objections. Consequently, there were no objections to respond to. Rather, the "extra" pleading submitted by St. Paul is a Separate Statement.

The veracity of this conclusion is borne-out by the substance of the pleading itself. In its "Response." St. Paul disputes the "fairness" of Plaintiffs' evidentiary presentation;[1] it corrects St. Paul's typographical error;[2] it argues (and cites to) the existence of alternative documents and

[1] See e.g., St. Paul Response, Item #1.

[2] See id., Item #2. Despite the fact that Plaintiffs timely served their opposition and cross-motion on January 12, 2007, St. Paul (inexplicably) waited a full month before advising Plaintiffs of their "typographical error" and, then,

testimony;[3] and it consistently attempts to spin, explain, blunt, and re-position evidence in ways favorable to St. Paul.[4] In so doing, St. Paul effectively extends, by five additional pages, its already lengthy Reply and Opposition which, by Stipulation and Order, was previously extended (and limited) to 25 total pages. See Docket Instrument ["DI"] #90 at ¶ 4(a) (Stipulation and Order). Taken as a whole, St. Paul's extra pleading is an "end-run" around the Local Rule's prohibition on Separate Statements and the page limits imposed by this Court. It is both procedurally improper and substantively prejudicial.

For their part, Plaintiffs followed this Court's rules and procedures by filing within agreed page limits, foregoing a Separate Statement, and presenting their responses to St. Paul's "Statement of Undisputed Facts" in their Cross-Motion and Opposition. See R. Kendall, R. Seeborg, M. Shartis & F. Smith, 4 Federal Pretrial Civil Procedure in California § 29.16[5][d] (2005) (Local Rule 56-2 requires "discussion of what facts are and are not disputed must be addressed as part of the brief."). Unlike St. Paul, Plaintiffs did not unilaterally avail themselves of an unauthorized, multi-page "Response." Instead, they played by the rules.

As matters stand, Plaintiffs face an unenviable choice. They can either restrict their reply by following this Court's limitations/directives or, alternatively, they can risk violating Local Rules and this Court's Orders by responding, in kind, to St. Paul's filing, i.e., Two wrongs to make a right.

Fortunately, no choice needs to be made. Instead, the proper result here is to strike St. Paul's "Response" and, thereby, maintain the integrity of this Court's Local Rules and procedural orders. See e.g., Operating Eng'rs Health & Welfare Trust Fund v. Mega Life & Health Ins. Co., 2003 U.S. Dist. LEXIS 18818, *22 (N.D. Cal.) (striking unauthorized separate statement); see also Cavender v. Sutter Lakeside Hosp., Inc., 2005 U.S. Dist. Lexis 33766, *1 n.1 (N.D. Cal.) (declining to strike separate statement where, unlike here, no assertion of prejudice

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only in connection with St. Paul's Reply and Opposition. The effect of this delay was to prevent Plaintiffs from offering further/additional examples in support of their position.

[3] See id., (Items #2, #3, #4, #5).

[4] See id., Items #1-5.

and overall page limitation not exceeded by accounting for unauthorized separate statement). This is only just.[5]

2. St. Paul's Supplemental Response to Plaintiffs' First Set of RFA's

Plaintiffs' Supplemental RFA Response seeks to change an unqualified "Admit" to a 15-line, objection-laden "Deny." At issue is St. Paul's response to Plaintiffs' RFA #4 – based upon the Policy's Online Activities Exclusion – asking the insurer to "Admit that the SMARTDOWNLOAD CLAIM does not involve '3rd party advertising.'"[6] (Emphasis supplied). As the record here reflects, St. Paul previously admitted, under oath, that "3rd party advertising" was not at issue. Now, after the close of discovery and after the filing of Plaintiffs' Cross-Motion for Summary Judgment, St. Paul unilaterally changed its position. It did so without prior notice to Plaintiffs and, seemingly, to allow the insurer to assert that a new provision of the Policy's Online Activities Exclusion ("providing 3rd party advertising") bars coverage for this action. See St. Paul Opp. & Reply at 14, 17-19. In essence, the insurer seeks to interpose a new exclusion nearly *seven years* after the claim was originally tendered and at the absolutely last moment before this Court renders judgment.

St. Paul's evidentiary flip-flop is improper. With regard to prior admissions, litigants cannot resort to self-help. Rather, FRCP Rule 36(b) requires court approval for the withdrawal or amendment of an unqualified admission. See 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, *2 (N.D. Ill.). Here, St. Paul has completely failed to follow this mandatory procedure. Moreover, the insurer has failed to raise the specter of compliance at some future date. It just ignores the rules. Plaintiffs' Motion to Strike should be granted.

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[5] Whether stricken or not, the unavoidable conclusion of St. Paul's "Response" – indeed, its mere existence – highlights the fact that evidentiary conflicts do exist with respect to the insurer's "Undisputed" Statement of Facts. Consequently, the insurer's request for partial summary judgment must be denied, no matter how one views St Paul's explanations, corrections, and/or supplements to the record.

[6] Attached hereto as Ex. A is a true and correct copy of Defendant St. Paul's Supplemental Response to Plaintiff America Online Inc.'s First Set of Requests for Admission.

This is as it should be. For any turnabout at this late date would prove extremely prejudicial to Plaintiffs who, as their Cross-Motion reflects, already relied upon St. Paul's admission to support their dispositive analysis. See Plaintiffs' Cross-Motion at 27 n.96. Furthermore, St. Paul's "explanation" for its last-minute change – revelation of new information in the Cross-Motion – cannot be believed for two different reasons:

(a) St. Paul's Discovery Lapses. The "new" information St. Paul claims it first discovered in Plaintiffs' Cross-Motion (thus, necessitating its change) is premised upon the Park Declaration, the Carome Declaration, and documents obtained from their respective files. See Plaintiffs' Cross-Motion at 22-23. As St. Paul well-knows, Mr. Carome was listed in Plaintiffs' Rule 26 disclosures.[7] Moreover, Mr. Park's deposition transcript was produced to St. Paul as part of its July 28, 2006 document production. The NET/SDL bates stamp on each page of testimony confirm both its pedigree and its produced status. Thus, St. Paul knew (or should have known) from its adjustment of the underlying SmartDownload claim and this lawsuit's discovery processes that Mr. Carome was Plaintiffs' prior counsel and that Mr. Park was a witness in the underlying proceeding.

Given all this – as well as St. Paul's affirmative obligation to *continue investigating* the SmartDownload claim even *after* the instant lawsuit's filing[8] – the insurer cannot claim surprise. Rather, St. Paul's injury is self-inflicted. Given Plaintiffs' Rule 26 disclosures and subsequent production, the insurer was on notice that Messrs. Carome had relevant, discoverable information relating to the SmartDownload Action. That St. Paul opted not to pursue this evidence is a risk the insurer decided to take. It cannot shift the consequence of that decision to Plaintiffs, especially in violation of the FRCP Rule 36(b)'s provisions regarding binding admissions.

[7] Attached hereto as Ex. B is a true and correct copy of Plaintiffs' Rule 26 disclosures.

[8] See White v. Western Title Ins. Co., 40 Cal. 3d 870, 886 (1985) (a contrary rule "would encourage insurers to induce the early filing of suits, and delay serious investigation and negotiation until after suit was filed when its conduct would be unencumbered by any duty to deal fairly and in good faith.")

(b) *Timing Issues*. Assuming, for argument's sake, that St. Paul could credibly claim surprise and ignore its investigative obligations, it *still* must explain why it waited four weeks *after* service of Plaintiffs' Cross-Motion to amend its response. As the record here reflects, Plaintiffs' Cross Motion was served on January 9, 2007. From that instant forward, the insurer was undeniably on notice of Plaintiffs' contentions. Nevertheless, St Paul waited a full month (Feb. 9, 2007) before "supplementing" its RFA Response. The reason for this delay is never addressed by St. Paul.

For all the foregoing reasons, St. Paul cannot unilaterally change (or otherwise amend) its conclusively established admission. Accordingly, St. Paul's Supplemental RFA Response must be stricken.

3. St. Paul's Supplemental Response to Special Interrogatories.

St. Paul's Supplemental Interrogatory Response is an outgrowth of its Supplemental RFA Response.[9] Indeed, Plaintiffs' discovery required the explanation of any RFA responses which were not unqualified admissions. As such, St. Paul's change of its RFA response required it to change its corresponding interrogatory response. The two are interconnected.

With one exception, the very same reasons that support striking St. Paul's Supplemental RFA Response require the striking of St. Paul's Supplemental Interrogatory Response. The exception is this: St. Paul's Supplemental Interrogatory Response (served February 15, 2007) was served upon Plaintiffs one week *after* its (already late) Supplemental RFA Response (served February 9, 2007). Accordingly, St. Paul's Supplemental Interrogatory Response is even more prejudicial (and less defensible) than its Supplemental RFA Response. Once again, St. Paul offers no explanation for its dilatory tactics. As such, the insurer's Supplemental Interrogatory Response must be stricken.

[9] Attached hereto as Ex. C is a true and correct copy of Defendant St. Paul's First Set of Specially Prepared Interrogatories.

4. Thorpe Supplemental Declaration

(a) Page 2, ¶3, lines 9-24 (entire paragraph). Irrelevant (FRE 401, 402) and no personal knowledge (FRE 601, 602). Declarant is St. Paul's counsel. She is not a St. Paul claims adjuster, nor the insurer's custodian of records. Likewise, Ms. Thorpe's declaration does not demonstrate her competence to attest to the completeness of St. Paul's claim files. As such, she cannot properly say whether (or not) St. Paul was ever provided with the documents detailed. Compare Objection 5, infra (Weiss Declaration).

(b) Page 2, ¶4, lines 25-26 (entire paragraph). Irrelevant (FRE 401, 402). Declarant's statement is based upon a mistake of law, namely, that prior disclosure of expert witnesses is required for summary judgment motions. It is not. See FRCP Rule 26(a)(2)(A)(1); See e.g., In re Mercedes-Benz Anti-Trust Lit., 225 F.R.D. 498 at *16, *21 (D. N.J. 2005) (disclosure requirement does not extend to summary judgment motions).

(c) Page 3, ¶ 5, lines 12-14 – Irrelevant (FRE 401, 402). Declarant's intent is irrelevant. The issue of whether (or not) this is an admission is solely for the Court's determination. The same is true for the applicability (or irrelevance) of the cited case law.

(d) Exhibit E-1, Midwinter Deposition Excerpt (Tr. 327:11-24). Per the Reply, the tendered excerpt supports the proposition that St. Paul's acceptance of the Online Activities Exclusion's language was tied to "the very low premium charged." See St. Paul Reply and Opp. at 23 n.68. That's wrong. The excerpt actually makes no mention of the premium and, therefore, is irrelevant to the proposition it allegedly supports.

5. Daniel Weiss Declaration

(a) Page 2, ¶5, lines 14-17 – Irrelevant (FRE 401, 402), and no personal knowledge (FRE 602). The Declarant is not St. Paul's custodian of records. Moreover, Mr. Weiss states himself that his term as a Technology Claim Attorney (an adjuster) began in May 2001 and ended some 18-months later, i.e., November 2002. See Weiss Decl. ¶ 2-3. Whereas Mr. Weiss might, arguably, be competent to testify as to matters which transpired during that 18 month window, he is not now competent – nearly five years later and based on the testimony presented – to authenticate St. Paul's claims files, the integrity of those files' contents, and what

was submitted (or not) based on his present day review of Ex. 128. Proof positive of this assertion is Mr. Weiss' own statement, which he only makes upon "*information and belief*" that the "claims [sic – files?] contain all written communications between St. Paul and AOL and all documents provided to St. Paul in connection with the insurance claims involving the four [SmartDownload] class actions and the AG Investigation." See Weiss Decl. at ¶ 5, lines 7-19. Given the nature of the testimony here – proving the contents of the claim file – the Best Evidence Rule (FRE 1002, 1003) is also applicable.

(b) Page 2, ¶ 5, lines 17-19. As the Declarant himself admits, this statement is made "upon information and belief" and, therefore, it admittedly lacks personal knowledge required for relevance and/or admissibility. See FRE 401, 402 and 602.

(c) Page 2-3, ¶ 6 (entire paragraph) – See Objection 5(a), supra, incorporated herein by reference. See FRE 401, 402, 602, 1002, 1003.

6. Exhibit 229 (Park Deposition Excerpt – Reply n.48)

The cited testimony is irrelevant to the instant coverage question, which is: What was *alleged* against Plaintiffs in the SmartDownload Actions. For defense purposes, that is the only issue. The entirely different question – *Whether the allegations are true* – is irrelevant. To trigger coverage, it is enough if a "potentially covered" allegation is made. This is so because St. Paul's Policy covers Plaintiffs and their interests even when a claimant's allegations are groundless, fraudulent or false. See Ex. 1 at SPM 0142. On this point, California and Virginia law are in accord. See e.g., Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 252 Va. 265, 268-69 (1996); Rowe v. United States Fid. & Guar. Co., 375 F.2d 215, 221 (4th Cir. 1967) (Virginia law requires defense against any suit alleging liability for which insurance coverage is provided, even if later is subsequently shown to be "groundless, false or fraudulent."); Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966); Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 5 (1995).

Given this framework, it is completely irrelevant (for coverage purposes) that Mr. Park testified that Netscape never disclosed users' information. What matters is the claimants' assertions – true, false, or otherwise. It is this risk against which St. Paul insured Plaintiffs.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request St. Paul's evidence, as designated, be stricken and not considered in connection with the instant cross-motion and opposition.

Date: March 2, 2007

ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

By /S/
Michael Bruce Abelson
Attorneys for Plaintiffs
Netscape Communications Corporation and
America Online, Inc.

DECLARATION OF
MICHAEL BRUCE ABELSON

I, Michael Bruce Abelson, declare as follows:

1. I am an attorney licensed to practice law in the State of California and before the bar of this Court. I am a partner in the law firm of Abelson | Herron LLP and, in that capacity, I am counsel of record for Plaintiffs Netscape Communications Corporation and America Online, Inc. (collectively, the "Insureds") in this action. I have personal knowledge of the matters stated herein, except as to matters upon which I state they are based upon information and belief. I could and would competently testify as to the same.

2. Attached hereto as Exhibit A is a true and correct copy of Defendant St. Paul Mercury Insurance Company's Supplemental Response to Plaintiff America Online Inc.'s First Set of Requests for Admission.

3 Attached hereto as Exhibit B is a true and correct copy of Plaintiffs' Initial Disclosures Pursuant to Rule 26.

4. Attached hereto as Exhibit C is a true and correct copy of St. Paul Mercury Insurance Company's Supplemental Response to Plaintiff Netscape Communications Corporation's First Set of Specially Prepared Interrogatories.

Executed this 2nd day of March 2007 at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct

_____/S/_____
Michael Bruce Abelson