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CORPORATION and AMERICA ONLINE, INC.

**UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

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| NETSCAPE COMMUNICATIONS CORPORATION, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL INSURANCE COMPANY, et al.,<br><br>Defendants. | CASE NO. 5:06-CV-00198 JW (PVT)<br><br>**PLAINTIFFS' RESPONSE TO ST. PAUL'S OBJECTIONS AND MOTION TO STRIKE EVIDENCE**<br><br>Motion to be Heard<br><br>Date: March 26, 2007<br>Time: 9:00 a.m.<br>Judge: Hon. James Ware<br>Place: 8, 4th Floor, San Jose |

**TABLE OF CONTENTS**

# TABLE OF AUTHORITIES

## Federal Cases



## State Cases

**Federal Rules**

**Other Authorities**

## INTRODUCTION

Plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc. ("AOL" and collectively with Netscape, "Plaintiffs") respond to Defendant St. Paul Mercury Insurance Company's ("St. Paul's") evidentiary objections as follows:

## RESPONSE TO EVIDENTIARY OBJECTIONS

### 1. Marc Patterson Declaration

Plaintiffs submitted Marc Patterson's expert declaration in response to St. Paul's assertion that the Policy's "Online Activities Exclusion" bars coverage. See St. Paul's Motion for Summary Judgment ("St. Paul Motion") at 21-23. Because application of this Policy exclusion was asserted in St. Paul's affirmative motion – where it bears burdens of both proof and persuasion – Plaintiffs are entitled to respond in their Opposition by submitting competent evidence to refute St. Paul's contention. See id. at 21-22. Mr. Patterson – whose expertise is not challenged[1] – does this in three ways: (a) He explains, as a *factual* matter, SmartDownload's functionality;[2] (b) He explains, as a *factual* matter, ISPs and the dynamics of Internet access;[3] 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.[4] All of this is proper. St. Paul's objections to Mr. Patterson's declaration are not well-taken.

- *Disclosure Issues* St. Paul further (incorrectly) argues that Plaintiffs were required to disclose Mr. Patterson pursuant to FRCP Rule 26 before making use of his testimony. See St. Paul Objections at 2. St. Paul is wrong. By its terms, FRCP Rule 26(a)(2)(A)(1) governs the disclosure of experts. That provision 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. Both case law and FRCP Rule 56

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[1] See Patterson Decl., at ¶¶ 1-2.

[2] See id. at ¶¶ 3(a), 3(b), 3(d), 3(e)(1), 3(e)(2).

[3] See id. at ¶ 3(b); see also 3(b) n.1 & 3(c) n.2.

[4] See id. at ¶ 3(c); see also 3(e)(1) & 3(e)(2).

confirm this conclusion. 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).

Given this background, St. Paul's reliance on Trost v. Trek Bicycle, 162 F.3d 1004 (8th Cir. 1998) and FRCP Rule 37 is misplaced. In Trost, a products liability suit, the court barred plaintiff's use of an expert declaration in connection with its summary judgment motion, finding no "substantial justification" for delayed disclosure under FRCP Rule 37. See id. at 1008-1009. As the opinion there makes clear, the trial court's decision to exclude was actually based on FRCP Rule 16 and, in particular, on plaintiff's violation of an explicit court order requiring disclosure of expert reports by a date certain. See id. at 1006, 1008-1009. Based on *this* record, the Eighth Circuit reviewed the trial court's evidentiary exclusion under an "abuse of discretion" standard, and affirmatively *declined* to decide the very Rule 26 issue St. Paul tenders here. See id. at 1009. In other words, Trost is no support at all. There is no Rule 16 violation here, and Rule 26 speaks directly to the issue when experts need to be disclosed ("trial").

Yet *even if* Trost did have some precedential force, the fact remains that Plaintiffs' submission of the Patterson Declaration is "substantially justified" pursuant to Rule 37(c)(1). This is so because (a) it is a *responsive* declaration, filed by way of answer to an exclusionary issue raised in St. Paul's motion for summary judgment; and, (b) it refutes an argument where St. Paul has the initial burdens of proof and persuasion. Given this procedural posture, Plaintiffs had no reason to come forward with expert testimony unless and until the insurer raised the issue of the Policy exclusion. To require otherwise would upset settled evidentiary notions, and require insureds to muster proof on issues which may never be raised, and which they are not required to affirmatively disprove.

- *Relevance Objections (Issue of Law)* – St. Paul improperly objects to Mr. Patterson's declaration because, it claims, Mr. Patterson seeks to give expert opinion regarding an issue of law. See St. Paul Objections at 2. Although St. Paul fails to state the precise *legal* issue upon which Mr. Patterson opines, presumably St. Paul means the applicability of the Online Activities Exclusion's phrase "providing internet access to 3rd parties." See Ex. 1 at SPM 0341.

Assuming this is so, St. Paul's objection is misguided. As Mr. Patterson's declaration makes clear, no attempt is made to construe the exclusion's language. Rather, Mr. Patterson simply states facts concerning: (a) SmartDownload's functionality; (b) the dynamics of Internet access; and (c) disjunctions between the two. Although Mr. Patterson concludes, as a matter of fact, that SmartDownload does not provide Internet access to third parties, that conclusion is an objective reality. It is not a legal construction of the Policy which, of course, remains the sole province of this Court. On this basis alone, all of St. Paul's cited cases are distinguishable.[5]

- *Relevance* (Injection of technical meaning – FRE 401, 402) – St. Paul attacks the relevance of Mr. Patterson's declaration claiming that he is injecting a "technical meaning into an exclusion that is not based upon any technical explanation." See St. Paul Objection at 3. This is not a proper objection, especially since the touchstone of expert testimony is whether the tendered opinion is "helpful" to the ultimate decisionmaker. See FRE 702; United States v. Rahm, 993 F.2d 1405, 1413 (9th Cir. 1993) (helpfulness to jury is "central concern" of FRE 702); Walker v. Contra Costa County, 2006 U.S. Dist. Lexis 86339, *12 (N.D. Cal.). Here, Mr. Patterson's explanation of SmartDownload's functionality, third party Internet access, and operational gaps between the two is clearly helpful for purposes of understanding the evidence and determination of a fact at issue. Accordingly, the opinion is both relevant and admissible, as Mr. Patterson seeks to "demystify" matters St. Paul would prefer to obscure.

- *Lack of Personal Knowledge (FRE 602).* St. Paul's attack upon Mr. Patterson's personal knowledge is silly. Mr. Patterson is an expert – a status St. Paul does not appear to dispute. See also Paterson Decl. at ¶¶ 1, 2 (background and credentials). In that regard, the admissibility of his opinion does not turn upon his use of the SmartDownload product or even his knowledge of the underlying dispute. Rather, admissibility is governed by FRE 702 (not FRE

[5] See Makhtar v. Cal. State Univ., 299 F.3d 1053, 1066 n.10 (9th Cir. 2002) ("It is well-established . . . that expert testimony concerning an ultimate issue is not per se improper. E.g., Shad v. Dead Witter Reynolds, Inc., 799 F.2d 525, 529 (9th Cir. 1986). Indeed, Federal Rule of Evidence 704(a) provides that expert testimony that is 'otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' However, an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law. *E.g.*, McHugh v. United Serv. Auto Ass'n, 164 F.3d 451, 454 (9th Cir. 1999); United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994) ('when an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert's judgment for the jury's')") (emphasis in original).

602)[6] and merely requires a showing that the opinion is "rationally related" to his perceptions and helpful to clear understanding of the witness' testimony or a determination of a fact in issue. As discussed above, Mr. Patterson's declaration satisfies both criteria.[7]

**2-3. Patrick Carome Declaration and Exhibits**

Patrick Carome represented Plaintiffs in the underlying SmartDownload lawsuits. His declaration (as well as its accompanying exhibits) discusses the progress of the underlying litigation, as well as the claims and evidence advanced against Plaintiffs. As set forth more fully in Plaintiffs' Cross-Motion and Opposition, St. Paul is charged with knowledge of these matters because it failed to conduct a timely and good faith inquiry into the SmartDownload claim. See Plaintiffs' Cross Motion and Opposition at 22-23. That St. Paul would want to exclude Mr. Carome's testimony is understandable: It is detrimental to its position, inasmuch as he demonstrates that – *had* St. Paul properly investigated coverage – it would have learned of facts, theories, and other matters triggering the Policy's duty to defend. Instead, St. Paul did exactly what the law prohibits: It constructed and hid "behind a 'formal fortress' of the underlying plaintiff's pleadings." See Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966).

In an effort to escape the consequence of the Carome Declaration, St. Paul objects and, instead, argues declaration is irrelevant. According to St. Paul, facts and theories developed subsequent to Plaintiffs' tender of the SmartDownload Lawsuits are irrelevant to "duty to defend" analysis under both Virginia law (which follows a so-called "four corners" rule)[8] and California law (which looks to information readily available at the time of tender). St. Paul is

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[6] Recognizing this foundation exception for expert testimony, FRE 602 explicitly provides that its strictures regarding witnesses' personal knowledge is "subject to the provisions of FRE 703, relating to opinion testimony by expert witnesses." FRE 602.

[7] St. Paul's argument that Mr. Patterson's testimony is "at odds" with other evidence is just that: Argument. In any event, such contentions go to the weight of Mr. Patterson's testimony, not to its admissibility.

[8] For simplicity and consistency, we utilize the "four corners" reference in this discussion. However, we note some courts prefer to use an "eight corners" reference, counting the four corners of the underlying complaint, *plus* the four corners of the policy evaluated.

wrong. It misreads the underlying law and, in the process, misapplies evidentiary rules concerning this evidence.

Contrary to St. Paul's assertions, Virginia's "four corners" rule is not the end of an insurer's duty to defend analysis. Rather, Virginia's "four corners" rule only applies to an insurer's initial obligation to defend an action.[9] Thereafter, subsequent facts may be considered when assessing an insurer's liability for breaching its duty to defend. Drawing this precise distinction, Virginia's Supreme Court long ago recognized (and recently reaffirmed) a time-structured distinction for assessing an insurer's exposure for defense determinations:

> "[T]he duty to defend is, ***in the first instance***, to be determined by the allegations of the notice of motion [i.e., the complaint], yet if those allegations leave it in doubt whether the case alleged is covered by the policy, the refusal of that insurance company to defend is at its own risk ***and if it turns out on development of the facts that the case is covered by the policy, the insurance company is necessarily liable for breach of its covenant to defend***."

London Guar. & Accident Co., Ltd v. White & Bros, Inc., 188 Va. 195, 199-200 (1948) (emphasis and italics added); Virginia Elec. & Power Co. v. Northbrook Prop. & Cas. Ins. Co., 252 Va. 265, 269 (1996) (*affirming* London Guarantee's vitality). In other words, insureds may challenge the insurers' *initial* denial of a defense after a claim has come to rest. In so doing, they may draw upon all of the facts and circumstances "subsequently developed" in the underlying liability action.

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 be entirely ignored. Virginia's "four corners" rule

[9] Likewise incorrect is St. Paul's wholesale assertion that Virginia courts do not consider extrinsic evidence when determining duty to defend. See e.g., Metcalf Bros., Inc v. Am. Mut. Liab. Ins. Co., 484 F. Supp, 826, 831-32 (W.D. Va. 1980).

does not sanction such an outcome. Rather, Virginia insureds regularly rely upon London Guarantee's "subsequent development" rule and the underlying action's record to prove-up their insurer's breach of defense obligations. See e.g., 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) (*citing* London Guarantee rule, 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); Travelers Indem. Co. v. Obsenshaim, 219 Va. 44, 46 (1978) (*citing* London Guarantee, court holds that pending entry of final judgment, duty to defend assessed by initial pleading); Rowe v. United States Fidelity & Guaranty Co., 375 F.2d 215, 221 (4th Cir. 1967) (court makes inferences from underlying record in support of subsequent coverage analysis). Applying London Guarantee's rule here, the subsequent facts and legal theories tendered by Mr. Carome's declaration are plainly relevant under Virginia law to determining whether St. Paul breached its obligations to defend Plaintiffs in the SmartDownload Lawsuits.

In the case of California law, St. Paul is likewise incorrect when it claims an insurer's defense obligation is limited to facts "known or *readily available* to it at the time of tender." St. Paul Evidentiary Objections at 3 (italic supplied). In truth, California's rule is (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 owing 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 investigative obligation, facts resulting from a reasonable investigation are binding upon the insurer. California Court of Appeals summarized this standard, viz:

> "[T]he covenant of good faith and fair dealing implied in all insurance agreements entails a duty to investigate properly submitted claims . . . and the insurer is charged with constructive notice of facts that it might have learned if it had pursued the requisite investigation."

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 Plaintiffs challenge this central proposition – i.e., the propriety of St. Paul's "bare bones" coverage analysis – Mr. Carome's evidence is both relevant and, therefore, admissible. Compare Mullen v. Glens Falls Ins. Co., 73 Cal. App. 3d 163, 169 (1977) ("an insurer's duty to defend its insured in . . . a lawsuit is not merely determined by looking to the language of the complaint filed against the insureds.") with Plaintiffs' Opposition and Cross Motion at 6-7 (detailing St. Paul's "minimalist" coverage investigation).

The upshot of all this demonstrates the relevance of Mr. Carome's declaration and accompanying exhibits. To the extent St. Paul failed to undertake a timely, good faith coverage investigation, subsequent facts and theories developed in the SmartDownload Lawsuits bear directly and immediately upon the assessment of its duty to defend. Accordingly, the evidence is admissible.

- *Hearsay Objections (FRE 801, 802)* – Interposing a hearsay objection, St. Paul challenges (unspecified) testimony of Mr. Carome concerning "theories plaintiffs were pursuing

in the class actions."[10] See St. Paul Objections at 4. According to St. Paul, such objection lies because "that [unspecified] testimony is presented for the truth that those statements were made and actions taken." See id.

St. Paul misunderstands the hearsay rule. By definition, hearsay is a *statement* offered to prove the truth of the matter asserted. FRE 801. As the attorney who handled Plaintiffs' defense in the underlying SmartDownload Actions (see Carome Decl. at ¶ 1), Mr. Carome is fully competent to testify as to the existence of claims (statements, theories, documents, etc.) asserted there against Plaintiffs.[11] For, indeed, Mr. Carome has personal knowledge of such facts. In this regard, Mr. Carome is not testifying as to the truth of those assertions (hearsay). Nor does he have to. The substantive truth of the claimants' assertions is irrelevant to St. Paul's duty to defend. What matters is the fact that the allegations were made. Period. This is so because St. Paul's Policy obligates the insurer to provide a defense against allegations which are groundless, false or fraudulent. See Ex. 1 at SPM 0142. Moreover, both California and Virginia law are in accord: An insurer's duty to defend is determined by the potentiality of liability, not the objective truth of claims asserted. See e.g., Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966); Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 5 (1995); 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)

- *Misleading, incomplete, incorrect testimony (FRE 403).* St. Paul's "objection" here is not proper. Relying on FRE 403, the insurer contends that Mr. Carome's testimony conflicts with other evidence, is incorrect, and/or is incomplete. See St. Paul's Objection at 4. Stated differently, St. Paul argues Mr. Carome's testimony is prejudicial to its claims analysis which: (a) was limited to a cursory review of the SmartDownload complaints; (b) included no

[10] St. Paul's failure to identify, with precision, challenged statements, evidence, or other tendered matters is, itself, a waiver of its objection. See FRE 103(a)(1).

[11] Analysis here applies with equal force to St. Paul's hearsay objection to Carome Exhibit H (the PowerPoint Presentation). See St. Paul Evidentiary Objection at 4. At bottom, Mr. Carome isn't endorsing the truth of that exhibit or any of its contents. He's merely authenticating the document and placing it in the relevant time period when such matters were asserted against Plaintiffs.

independent investigation of the underlying facts and circumstances prior to its denial; and (c) failed to account for subsequent legal and factual developments in that extremely dynamic litigation. Given this record, evidentiary conflicts do not justify exclusion. Rather, they highlight the need for a trial so that an independent decision-maker can determine – in the case of conflicting testimony – such evidentiary subtleties as relevance, weight, and credibility of evidence tendered. Accordingly, St. Paul's objection here must be overruled.

**4. Carome Declaration, Exhibit J (@stake)**

St. Paul's "relevance" challenge to this exhibit is based entirely upon its insistence that Virginia law governs. The insurer points to no other evidentiary defect. Given that Plaintiffs directly challenge St. Paul's legal conclusion regarding choice-of-law,[12] the evidence tendered here is *per se* relevant to the determination this Court is asked to make. As such, the insurer's objection is improper.

**5-11. Park Declaration and Exhibits**

The foregoing evidentiary response regarding Mr. Carome's declaration and exhibits is equally applicable to Mr. Park's declaration and exhibits. Relevance arguments regarding "duty to defend"[13] and "choice of law"[14] issues are incorporated herein by reference. Likewise incorporated are Plaintiffs' responses to Rule 403 challenges to Mr. Carome's Declaration.[15]

**12-14. Deposition Testimony: Weiss, Evensen, & Solberg**

Ironically, St. Paul objects to testimony of its own witnesses. As the underlying record reflects, Messrs. Weiss and Evensen were adjusters with direct and immediate responsibility for adjusting Plaintiffs' claim for coverage. As such, their "understanding" of the Policy's meaning and intent is highly relevant to the underlying contract's operation. In the case of Mr. Solberg –

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[12] See Plaintiffs Cross-Motion and Opposition at 8-12.

[13] See St. Paul Evidentiary Objections, Items 5, 6, 7, 8, 9, 10 and 11.

[14] See id., Item 5.

[15] See id. Item 8..

St. Paul's designated PMK on the meaning/intent of the Policy's "making known" and "deliberately breaking the law" provisions – the relevance of his testimony could not be more clear. See Ex. 115 (Topics 4, 7 & 8); Solberg Depo. Tr. at 4:21-6:8. To state the matter colloquially, "He's '*The* Guy.'"

- *Question of Law / Making Known / Deliberately Breaking the Law* – St. Paul seeks to exclude all such testimony via its (conclusory) argument that policy construction is a matter of law and, thus, extrinsic evidence of meaning is prohibited. According to the insurer, the testimony is irrelevant pursuant to FRE 401, 402.

St. Paul is half right. While policy construction *is*, at bottom, a legal undertaking, procedurally, the court's analysis is actually a search for meaning and, more precisely, the parties' mutual intent. As such, the primary tools for ascertaining intent include, among other things, testimony of insurers' witnesses who are called upon to give their views regarding the policy's drafting history and intent behind the various provisions.

In California, the law regarding consideration of extrinsic evidence of meaning is well-settled: Courts are required to consider such extrinsic evidence when seeking to determine intent. So strong is this mandate that

> "it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is reasonable susceptible."

Morey v. Vannucci, 64 Cal. App. 4th 904 (1998); see also South Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc., 74 Cal. App. 4th 1232 (1999) ("It is reversible error to refuse to consider extrinsic evidence"). Accordingly, Courts are instructed to consider "all credible evidence to prove the intention of the parties" so as to determine whether the contract's language is "fairly susceptible of either one of the two interpretations contended for." See Pacific Gas & Electric Co. v. G.W. Drayage & Rigging Co., 69 Cal. 2d 33, 40 (1968). If it is, extrinsic

evidence is relevant (and admissible) to prove either of such meanings. See id.; see also Founding Members of the Newport Beach Country Club. v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 955 (2003) ("Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. . . if the trial court decides, after receiving the extrinsic evidence, that language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract."); Banco Do Brasil, S.A. v. Latian, Inc., 234 Cal. App. 3d 973 (1991). Such an approach makes good sense. For a contrary rule "would either deny the relevance of intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." G.W. Drayage & Rigging, 69 Cal. 2d at 37. Applying California law, the testimony is both relevant and admissible.

As for Virginia law (which St. Paul cites but does not fully commit to), the construction rules are more strict except where, as here, an ambiguity exists. As Virginia's Supreme Court framed the analysis:

> "when a contract is complete on it face and plain and unambiguous in terms, a court is not free to search for meaning beyond the contract itself. Management Enterprise v. The Thorncroft Co., 243 Va. 469, 472 (1992). ***When a contract is ambiguous, however, a court should resort to parole evidence to ascertain the true intention of the parties***. The Anden Group v. Leesburg Joint Venture, 237 Va. 453 (1989). An 'ambiguity' is defined as 'the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time.' Berry v. Klinger, 225 Va. 201, 207 (1983) (quoting Webster's Third New International Dictionary 66 (3d ed. 1976).

Aetna Cas. & Sur. Co. v. Fireguard Corp., 249 Va. 209, 215 (1995) (emphasis supplied).

So it is here. The meaning and application of the policy's "making known" and "deliberately breaking the law" provisions are directly at issue. Conflicting interpretations are

posited and, as St. Paul's own people testify, the contract's words do not always mean what they say. See e.g., Abelson Decl., (Solberg Depo. Tr. 128:13-19) (testifying policy's "making known" language is simply a "more modern" way of expressing insurer's intent for phrase "made public"). Where such ambiguities exist, Virginia not only allows (but, in fact, requires) consideration of extrinsic evidence as a tool for correct construction. See Cascades North Venture Ltd. Part. V. PRC., Inc., 249 Va. 574 (1995) ("[T]he rule excluding parole evidence has no application where the writing on its face is ambiguous, vague, or indefinite. In such a case, the proper construction of the contract is an issue for the trier of fact, and the court should receive extrinsic evidence to ascertain the intention of the parties and to establish the real contract between them.") (*citing* Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc., 200 Va. 593, 596 (1959); Shockey v. Westcott, 189 Va. 381, 389 (1949)).

- *Online Activities Exclusion (FRE 401, 402)* — Using the same "policy construction" objection noted above, St. Paul (incorrectly) claims that Mr. Evensen's testimony is improper because it concerns "the meaning of the 'internet access' portion of the policy's Online Activities Exclusion." See St. Paul Objections at 9. That's wrong. Actually, Mr. Evensen's cited testimony concerns his understanding of Netscape's operations, the SmartDownload product's functionality, and the dynamics of adjusting the Plaintiffs' claim. The cited portions do not discuss Mr. Evensen's understanding of the policy's meaning or any of its terms. As such, St. Paul's objection must be overruled.

- *Incomplete Hypotheticals* – St. Paul seeks to exclude (unspecified) evidence "to the extent testimony was based upon incomplete hypotheticals and assumed facts." Such broadsides are not proper. As the Weiss, Evensen and Solberg testimony all reflects, St. Paul failed to properly preserve the record on such "hypothetical" points. Accordingly, this objection is deemed waived. See FRCP Rule 32(d)(3)(A).

**14. Glenn Spencer Testimony**

St. Paul's objections here are nothing more than argument. St. Paul contends that Mr. Spencer's views regarding the limited nature of the Online Activities Exclusion are improper

because they (purportedly) conflict with the exclusion itself or the parties' mutual understanding.[16] As such, St. Paul says the Spencer testimony is irrelevant and misleading.

In truth, there is no conflict. Mr. Spencer's views regarding the limited nature of the Online Activities Exclusion's language were perfectly consistent with the limited wording he used to draft the Online Activities Exclusion. Looking at the exclusion itself (Ex. 1, SPM 0341), the entire realm of online activities is narrowly "defined as" only five specific items and, even then, complexities of Internet access are further confined to a single undertaking: "providing internet access to 3rd parties." Very narrow, very clean. Moreover, there is no "misunderstanding" regarding the limited nature of the language St. Paul agreed to accept. As Ms. Corbetis' handwritten endorsement reflects, the language Mr. Spencer drafted, did, in fact, reflect the parties' mutual intentions. See Abelson Decl., (Corbetis Depo, 21:17-22:15); Ex. 69 ("*OK to endorse / This was the Intent / J. Corbetis / 9/22/00*"). Absent a proper legal or factual basis for St. Paul's objection, the insurer's challenge must be overruled.

**15. Complete Idiot's Guide To the Internet**

Like a dictionary or other resource tool, Plaintiffs citation to an excerpt from The Complete Idiot's Guide to the Internet (the "Guide") provides contextual support/understanding for the Online Activities Exclusion's phrase, "providing Internet access to 3rd parties." As case law demonstrates, the Complete Idiot's series has been used (and relied upon) by courts to establish understandings as diverse as the "genericness" of the Israeli martial arts term "*krav maga*,"[17] as well as commonplace notions of the phrase "march madness."[18] In other words, the Guide reflects mainstream understanding. Although St. Paul makes several (misguided) attacks

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[16] St. Paul's objection rests upon the further assertion that Mr. Spencer's views were "unexpressed" to St. Paul. See St. Paul Objection at 10 (*citing* St. Paul Mercury Ins. Co. v. Frontier Pac. Union Ins. Co., 4 Cal. Rptr. 3d. 416, 428 n.8 (2003). Notably, the insurer cites no fact(s) for this assertion. However, to the extent reliance is placed upon the testimony of Mr. O'Connor, the record there actually reflects that Mr. O'Connor did not recall any discussion. He does not testify that no discussion took place. See Thorpe Supp. Decl., (O'Connor Depo at 82:20, 86:4-21).

[17] Krav Maga Ass'n of Am. v. Yanilov , 464 F. Supp. 2d 981, *15-16 (C.D. Cal) (*citing* The Complete Idiot's Guide to Martial Arts).

[18] March Madness Ath. Ass'n v. Netfire, Inc., 310 F. Supp. 2d 786, 804 n.66 (N.D. Tex. 2003) (*citing* The Complete Idiot's Guide to Basketball).

on the Guide, notably, the insurer does not challenge any aspect of the Guide's information. This is not surprising, because the Plaintiffs' commonsense presentation of Internet access (and its relationship to Internet Service Providers ("ISPs")) is the right one. See also Patterson Decl. at ¶ 3(c) ("[T]hird party Internet access is a service provided by an ISP, and represents the users' 'on-ramp' to the Internet.").

Against this background, St. Paul's objections are all misplaced. Arguments regarding the book's publication date and (non-use) by the parties all miss the mark. So, too, are St. Paul's assertions that policy language is a question of law. Indeed, Plaintiffs do not claim the parties used the Guide, nor do they claim it definitively speaks to the issues in controversy here. Rather, the Guide is simply positioned to *aid* this Court's interpretation of the parties' agreement, and to place relevant concepts in context. Nothing more.

**16. St. Paul's Response to Plaintiffs' RFA (Ex. 224)**

In response to Plaintiffs' RFAs, St. Paul admitted, without qualification, that the SmartDownload claim did not involve "3rd party advertising." See Ex. 224 at 4. As a result, the matter was conclusively established. Plaintiffs were entitled to rely on St. Paul's admission. For its part, the insurer is not permitted to unilaterally recant, amend, or otherwise wriggle-out of its response absent a court order. See FRCP Rule 36(b) ("Any matter admitted under this rule is conclusively established unless the court *on motion* permits withdrawal or amendment of the admission") (italics supplied). See e.g., 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.) (absent properly noticed motion, defendant cannot amend or withdrawal RFA responses in face of summary judgment motion). See also Plaintiffs' Objection and Motion to Strike Evidence and Other Matters at 3-5. To date, no such motion/relief has been sought. As such, St. Paul's objection must be overruled.

**17. August 29, 2006 Email from Sara Thorpe, Ex. 22**

Ms. Thorpe's email – arguing the *irrelevance* of the very "blast fax" cases now at the heart of St. Paul's Motion[19] – is either a judicial admission or a "dirty trick," designed to preclude Plaintiffs' access to relevant discovery. Either way, St. Paul should be held to account for its statement. To blithely claim it is "irrelevant" is to minimize the gamesmanship bound-up in counsel's assertion.

**18. Side by Side Comparison, Ex. 118**

Plaintiffs respond to St. Paul's relevance objection here by incorporating their analysis to Items 12-14, supra. Additionally, it is worth noting, by way of context, that Ex. 118 – both reflecting and explaining the Policy's change in wording from "made public" to "making known" – prompted the following explanation by Eric Solberg, St. Paul's designated PMK on the *intent* of the Policy's wording and attendant changes:

> Q [by Plaintiff's counsel]: I want to direct your attention to the page that's – it's probably easier to follow the Bates Nos. which is 2801. This change or this page appears to show the change between the 1985 version of the personal injury offense which we looked at earlier compared to the 1996 revision, is that correct?
>
> A: [by Mr. Solberg]: Yes.
>
> Q: Under the Comment section the last comment it states, 'Replaced made public with making known to any person or organization.' This change clarifies overage." Do you see that?
>
> A: Yes
>
> Q: Can you tell me what that means, this change clarifies coverage?

[19] ACS Systems, Inc. v. t. Paul Fire & Marine Ins. Co., ___Cal. Rptr. ___, 2007 WL 214258 (Cal. App. 2007); Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F.3d 631 (4th Cir. 2005), cert denied 126 S. Ct. 568 (2005); Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d 488 (E.D. Pa. 2006).

A: It means it's just an editorial change. **It doesn't change the intent**.

Q: So in effect that says there really is no substantive difference between the language made public and the replacement language making known to any person or organization, is that correct?

A: The intent is that it's trying to use more modern language, if I can put it that way.

Q: What do you mean by that? What is more modern about the replacement language?

A: **It's just a different way of expressing our intent, by the intent of made public with making known to any person or organization is I think consistent**.

Q: **Between the two forms**?

A: **Uh-huh.**

Q: Now you can see two comments above from that it talks about a different change and it says, 'This is an editorial change.' So in your view is there any difference between something which is an editorial change and something which is a change that clarifies coverage?

MS. THORPE [St. Paul's counsel]: Asked and answered.

A: Editorial change and clarifies coverage. Clarifies coverage and editorial change, we use those words interchangeably.

Q [by Plaintiffs' Counsel]: Because to me clarify means something was previous unclear. Is the word clarifies coverage not being used in that sense here?

A: **No. It means it's an editorial change. Clarifies can be that we used words we thought were better words. The English language evolves over time. So we use different words, but the intent and what the meaning is here is equivalent**.

See Ex. 118; Abelson Decl. (Solberg Depo. 132:6-134:4 (emphasis supplied)).

The upshot of this testimony is two-fold: (1) It is proof positive that St. Paul's policy is ambiguous as St. Paul concedes that the words in its contract do not mean what they say; and (2) it confirms that Plaintiffs' analysis of St. Paul's language is correct, inasmuch as "making known" connotes a publication requirement. Either way, Exhibit 118 and Mr. Solberg's testimony are both material and relevant to the interpretative question at the heart of the parties' dispute.

**19. Memo and Order Denying Motion to Compel Arbitration, Ex. 221**

Contrary to St. Paul's conclusory choice-of-law analysis, Ex. 221 is both relevant and admissible to demonstrate the applicability of California law to this action. As the New York Judge notes in Ex. 221, Netscape is a California-based company. The offending product here (SmartDownload) was created in California and, furthermore, it was distributed to users worldwide from Netscape's California website. Given these factors, it is neither surprising nor unexpected that St. Paul would be called upon to perform its coverage obligations under California law. The exhibit is plainly relevant to determination of choice-of-law and related issues. It is not made irrelevant because St. Paul argues it ought to win the instant choice-of-law battle. This is litigation. An adversarial process. Plaintiffs are entitled to put on their side of the case by presenting opposing evidence. St. Paul may not like it, but, then, that is not the test of admissibility.

## CONCLUSION

For all the foregoing reasons, St. Paul's evidentiary objections should be overruled. Similarly, its Motion to Strike should be denied.

Date: March 2, 2007

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