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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS,)
et al.)
Plaintiffs,)
vs.)
FEDERAL INSURANCE)
COMPANY,)
Defendant.)
-----)

COPY

No. C-06-00198
JW (PVT)

September 7, 2006
9:07 a.m.

Deposition of MICHELE MIDWINTER, held
at the offices of Duval & Stachenfeld, 300
East 42nd Street, New York, New York, before
Laurie A. Collins, a Registered Professional
Reporter and Notary Public of the State of New
York.

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A P P E A R A N C E S :

ABELSON HERRON LLP
Attorneys for Netscape Communications
and American Online

333 South Grand Avenue, Suite 650
Los Angeles, California 90071

BY: MICHAEL BRUCE ABELSON, ESQ.

GORDON & REES LLP
Attorneys for St. Paul Mercury
Insurance Company

275 Battery Street, Suite 2000
San Francisco, California 94111

BY: SARA M. THORPE, ESQ.

ALSO PRESENT :

THOMAS KEIGHLEY, Videographer

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THE VIDEOGRAPHER: We're going on the record. Today's date is September 7th, 2006, and the time is approximately 9:07 a.m. This begins the videotaped deposition of Michele Midwinter in the matter of Netscape Communications Corp., et al., as plaintiffs, versus Federal Insurance Company, et al., as defendants. This is under the jurisdiction of the United States District Court for the Northern District of California.

This deposition is being held at the offices of Duval & Stachenfeld, which is 300 East 42nd Street, New York, New York.

My name is Thomas Keighley, legal videographer, with Veritext, New York.

If I could ask counsel to state their appearance for the record.

MR. ABELSON: I am Michael Abelson, counsel for plaintiffs.

MS. THORPE: Sara Thorpe from Gordon & Rees for St. Paul.

THE VIDEOGRAPHER: And if I could ask the court reporter, Laurie Collins, to please swear in the witness.

Midwinter

M I C H E L E M I D W I N T E R ,

called as a witness, having been duly sworn

by the Notary Public, was examined and

testified as follows:

EXAMINATION BY

MR. ABELSON:

Q. Good morning, Ms. Midwinter.

A. Good morning.

Q. Would you state and spell your name for the court reporter, please?

A. Michele, M-I-C-E-E-L-E, Midwinter, M-I-D-W-I-N-T-E-R.

Q. And where are you currently employed, Ms. Midwinter?

A. Travellers Insurance Company.

Q. What is your title as it exists today?

A. Account executive officer.

Q. And you are here today in your capacity as the underwriter of a policy for America Online -- I'll refer to them as AOL -- for 1999 and a subsequent policy that lasted through a period 2001?

A. Correct.

Q. And you are also here in your capacity

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Midwinter

as a PMK, a person most knowledgeable, on certain designated topics. You understand that?

A. Correct.

Q. Let me just specify what those topics are and make sure that we have a common understanding here.

First and foremost, you're here not only in your individual capacity but also as the person most knowledgeable as the underwriter for St. Paul's policy for AOL; correct?

A. Yes.

Q. You are also here as the person most knowledgeable about the scope of coverage provided by St. Paul's technology commercial general liability policy; correct?

A. Yes, yes.

Q. You're also designated as the person most knowledgeable as the meaning of St. Paul's policy on personal injury and advertising injury. I guess there was an endorsement of October 5, 2000?

A. Yes.

Q. Okay. And you're also here as the PMK, person most knowledgeable, on the negotiation --

1 Midwinter

2 negotiating history and the acceptance by St. Paul
3 of the policies personal injury and advertising
4 injury endorsement for October 2000?

5 A. Yes.

6 Q. That's a mouthful.

7 You're also the person most
8 knowledgeable about the scope of the advertising
9 injury and personal injury coverage originally
10 intended to be included in St. Paul's policy;
11 correct?

12 A. Correct.

13 Q. Just in terms of shorthand or we'll go
14 through shorthand in a minute, but you understand
15 when I say -- or can we agree when I say AI/PI
16 we're talking about advertising injury/personal
17 injury coverage?

18 A. Yes.

19 Q. That will save me a lot of words in
20 this deposition.

21 And the final topic -- I guess there
22 are others -- but that we'll be talking with you
23 today about is you are the person most
24 knowledgeable about St. Paul's policies --
25 St. Paul policies personal injury and advertising

Midwinter

injury endorsement for nononline activities?

A. Yes.

Q. You understand that as well.

Okay. Just some shorthand. Let's see if we can save a couple words when Ms. Thorpe and I go review the transcript, and you too. We agree AI/PI will be our shorthand designation for advertising injury/personal injury?

A. Yes.

Q. Okay. And throughout the course of our prior depositions, we have been using the shorthand Marsh to refer to Johnson & Higgins or Marsh McLennan. I guess they subsequently merged together, but Marsh in terms of the shorthand for the broker. Is that your understanding?

A. Yes, it is.

Q. Okay. Let's use that.

And there is an individual whose name I'm sure is going to come up, Nancy Perkins, who subsequently got married, and I guess she was formerly the Ms. Nancy Hessen, H-E-S-S-E-N. Just so we're on the same page, I may or you may interchangeably use them as Ms. Perkins to mean Ms. Hessen, Ms. Perkins, same person.

1 Midwinter

2 struggled with is --

3 (Discussion off the record.)

4 MR. ABELSON: Exhibit Number 108 is a
5 compilation of documents consisting of
6 SPM 1724, which is an e-mail. I've then
7 attached -- if I've done it right -- that
8 Marsh 633, March 634, and March 635.

9 (Exhibit 108, documents, Bates stamped
10 SPM 1724 and Marsh 633 through 635, marked for
11 identification, as of this date.)

12 Q. Okay. My question to you is --
13 actually take a look at the last page here, Marsh
14 635, and ask you if you recognize that as the
15 endorsement that you attempted to script you just
16 referred to.

17 A. Yes.

18 Q. Am I correct that you transmitted Marsh
19 635 to Ms. Perkins on or about May 11th. That's
20 the attached file that's reflected there.

21 A. Correct.

22 Q. On SPM 1724.

23 A. Correct.

24 Q. This is now the nononline activities
25 endorsement, as you've entitled it -- correct? --

Midwinter

1
2 your title?

3 A. Correct.

4 Q. And this is meant to do what?

5 A. The way that I tried to construct it is
6 that this would provide coverage for the nononline
7 activities that were not being provided underneath
8 the multimedia policy.

9 MR. ABELSON: Can I have her answer
10 back? I don't want to have her repeat it.

11 (Record read.)

12 Q. I'm not quite sure I understand your
13 answer, but let me try it a different way.

14 You say here in the third paragraph of
15 this endorsement: We won't cover personal injury
16 or advertising injury as respects to all matter --
17 and you've italicized the word "matter" --
18 contained on or accessible via the worldwide Web
19 site www.aol.com, including matter contained on
20 any Web site accessible via a link or series of
21 links from www.aol.com. Then you continue in the
22 next paragraph to define matter.

23 Correct?

24 A. Correct.

25 Q. Is your definition of matter, then,

1 Midwinter

2 meant to capture online activities?

3 A. The definition -- the wording that I
4 took for those first two paragraphs was extracted
5 from the multimedia policy.

6 Q. I understand.

7 Your policy as you testified you
8 attempted to underwrite was to exclude AOL's
9 online activity; correct?

10 A. Correct.

11 Q. Is the definition of matter on Marsh
12 1635, then, what you understood AOL's online
13 activities to consist of?

14 A. I believed it was at the time that I
15 was constructing the endorsement.

16 Q. And you say you, St. Paul, will provide
17 coverage for everything that didn't get excluded
18 by this endorsement?

19 A. Yes, that was the draft of this
20 endorsement.

21 Q. That was what you intended to do?

22 A. That was what I tried to do to rectify
23 the situation to make sure that our policy would
24 respond to the nononline activities for AI and PI.

25 Q. Did anyone provide you with any help or

1 Midwinter

2 assistance in drafting this document?

3 A. I don't recall.

4 Q. Do you recall whether Angie or anyone
5 reviewed it prior to your sending it to
6 Ms. Perkins?

7 A. I don't recall.

8 Q. Okay. You've titled it, as I've said,
9 this is an PI and AI interreport nononline
10 activities endorsement.

11 A. Correct.

12 Q. So how would you describe -- if this
13 endorsement had been accepted, how would you
14 describe the coverage, then, that St. Paul was
15 describing?

16 A. We were providing -- we were not
17 providing PI or AI as respects to all matter
18 contained on. So anything that didn't fall within
19 that definition would have been covered if this
20 endorsement had been accepted.

21 Q. Was this endorsement accepted?

22 A. No, it was not.

23 Q. Marsh got back to you, I think they say
24 here on the top of SPM 1724 -- strike that.

25 You're saying on 1724, in the final

1 Midwinter

2 line of your e-mail to Mike O'Connor: I have to
3 tell you that when CHQ -- that's headquarters at
4 St. Paul?

5 A. Correct.

6 Q. -- sees this -- that's the definition
7 of matter -- they are not going to allow me to
8 include this in our wording since there is already
9 coverage of wording for them.

10 What are you referring to there?

11 A. I think he was looking for us to
12 actually include matter under our coverage, but
13 there was coverage afforded to them for matter
14 underneath the media liability policy.

15 Q. So you said no way?

16 A. Correct.

17 Q. He wanted cover for matter, and you
18 said, Look, you've already got it, and
19 headquarters won't let me give it anyways?

20 A. Correct.

21 Q. And Mr. O'Connor got back to you and
22 said your proposed endorsement is unacceptable?

23 A. Yes, I believe so, yeah.

24 Q. Let me show you what we'll mark as
25 Exhibit Number 109. This is a document SPM 1729

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Midwinter

and 1730.

(Exhibit 109, e-mail from O'Connor to Midwinter, Bates stamped SPM 1729 and 1730, marked for identification, as of this date.)

A. I'm sorry, I have the same document from 108.

Q. Oops. (Handing.)

A. Thank you.

Q. This is SPM 1729-1730. It's an e-mail to Michele Midwinter from Michael O'Connor. He says that he has discussed your endorsement and amended it as he felt St. Paul originally agreed. See red wording on the attached endorsement.

And I've attached under it what I found in the underwriting file as the attachment, but I didn't find anything that showed an amendment, red or otherwise.

A. Correct.

Q. Do you recall what the wording was of the changes that Mr. O'Connor was proposing to your draft?

A. I don't know.

MR. ABELSON: Are you digging? Do you recall?

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Midwinter

MS. THORPE: Yeah. We've used it as an exhibit. Do you have the exhibit list? I think I used it at Spencer's depo.

MR. ABELSON: Let's just go off the record a second.

THE VIDEOGRAPHER: The time is 5:02. We're off the record.

(Pause.)

THE VIDEOGRAPHER: The time is 5:08. We're back on the record.

MR. ABELSON: While we were off the record, Ms. Thorpe was kind enough to refresh my recollection of Exhibit Number 33, which had previously been marked in this matter, and which I'm placing back in front of the witness and asking her if she recognizes the second page of that exhibit as the response that she received from Mr. O'Connor that was attached to his e-mail of -- reflected on the first page of Exhibit 109.

THE WITNESS: Yes, I do.

Q. And do you recall having any reaction to the -- I guess it's in italics, the wording that was proposed back to you?

1 Midwinter

2 A. No, because AOL's own advertising,
3 there would have been coverage within our form for
4 that.

5 Q. Let me ask you this: Did you discuss
6 this reaction that you just stated with
7 Mr. O'Connor?

8 A. Not that I can recall, no.

9 Q. Or anyone at Marsh?

10 A. Not that I recall, no.

11 Q. Do you recall when you reached this
12 conclusion that AOL's own advertising would have
13 been covered under your form?

14 A. I think when we would have -- because
15 we had a total exclusion for AI/PI, there wouldn't
16 have been coverage. But if we were adding it
17 back, there would have been coverage for AOL's own
18 advertising. That was kind of the intent, that we
19 were going to be picking up their own advertising,
20 just not advertising that they would have been
21 doing for other individuals.

22 Q. Okay. So you get back, in connection
23 with Exhibit 109, the language that's reflected on
24 the second page of Exhibit 33, and you look at the
25 markup that Marsh has proposed back to you. And

1 Midwinter

2 what do you do next, if anything?

3 A. I don't recall what I did after this.

4 Q. But you don't recall discussing with
5 Marsh or anyone at AOL your reaction to their
6 proposed revision of your language; correct?

7 A. Not that I recall, no.

8 Q. Do you recall discussing with anyone at
9 St. Paul the proposed revision to your language?

10 A. No, I do not recall.

11 Q. As far as you know, this just sat on
12 your desk, then?

13 A. I don't recall.

14 Q. You just don't know what happened to it
15 either way?

16 A. I don't know what happened to it, no.

17 MR. ABELSON: Actually let's put
18 Exhibit 67 back in front of her.

19 Q. Let me see if I can fill in that part
20 of your memory. This is a document that was
21 actually not in the underwriting file. This is
22 Marsh 628. At the top there's an e-mail from
23 Michele Midwinter to Mike O'Connor. It says, I
24 need to review your e-mail and changes you made to
25 the endorsement. I will get back to you as soon

1 Midwinter

2 were resolved through a conference call you
3 participated in, you and Angie participated in?

4 A. Yes.

5 Q. Do you recall who else took part in
6 that conference call?

7 A. I don't recall all the parties
8 involved, no.

9 Q. Let me show you what we'll mark as
10 Exhibit 112 -- actually we don't need to mark it.
11 This is Exhibit Number 47. These are actually
12 Mr. Spencer's notes from a June 30th conference
13 call. It says, Michele Midwinter, Angie Adamson,
14 which Mr. Spencer miscopied, Michael O'Connor.
15 Then he notes: Angie agrees the advertising
16 injury should be covered and then it says Adams,
17 Bob Ditmore equal underwriting manager, bracket
18 out to the side. He read that. He read his
19 handwriting to say she needs to sign off.

20 Are you with me?

21 A. Yes, I am.

22 Q. Let me ask you first of all do you
23 recall or does Exhibit 47 refresh your
24 recollection that you participated in a conference
25 call on or about June 30th, 2000, when Mr. Spencer

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Midwinter

and some folks from Marsh and Ms. Adams trying to correct the AI/PI coverage in the AOL policy?

A. Yes.

Q. What do you recall from the conversation?

A. Just trying to come to an agreement as to what the exclusion wording should actually state on our policy, or what the coverage should state on our policy, I should say.

Q. Was there any closure that was reached on the phone?

A. I believe that Marsh was going to manuscript-up or word-up a document that they felt would have been appropriate and were going to send it to us.

Q. Okay. Then you would either approve it or disapprove it?

A. Correct.

Q. What about this note that Mr. Spencer makes: She needs to sign off? Do you recall some discussion about there needing to be some person or some level of authority that would approve whatever the manuscript form would be to the follows?

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Midwinter

A. I believe Angie just wanted to see a copy of the endorsement when it came to my attention.

Q. I realize these aren't your notes, but your recollection of the discussion was that Angie would need to sign off on it?

A. That's my recollection, yes.

Q. I think Mr. Spencer -- my recollection of his testimony was Angie would need Bob Ditmore to sign off on it. Does that refresh your recollection either way?

A. No.

Q. So your best recollection is, as a consequence of this conference call, you were waiting for Marsh to take some action?

A. Correct. I believe they were going to draft up a copy of an endorsement to run past us.

(Discussion off the record.)

Q. This Exhibit 112 is a document headed by an e-mail from Angela Adams to Mike O'Connor dated July 5th, 2000. And the second page -- it's coded SPM 1725-1726.

(Exhibit 112, e-mail dated 7/5/00 from Adams to O'Connor, Bates stamped

1 Midwinter

2 SPM 1725-1726, marked for identification, as
3 of this date.)

4 Q. Let me ask you to review the second
5 page of this and ask you if that affects your
6 recollection of what action was to be taken as a
7 result of the June 30th conference call.

8 A. Yes, we actually agreed to provide
9 Marsh with a draft of an endorsement.

10 Q. Okay. That refreshes your recollection
11 that you were to take action and Marsh was not to
12 take the action?

13 A. Correct.

14 Q. And you were all marching toward a
15 deadline of July 5th?

16 A. Correct.

17 Q. It looks like, if I compiled this
18 right, on or about July 5th Angie copied to you --
19 sends an e-mail to Mr. O'Connor and says, Let me
20 know if the following wording works; if not, let
21 me know what will. She proposes in essence the
22 same language that had previously been -- that you
23 previously drafted as a manuscript form; correct?

24 A. Correct.

25 Q. And that language had previously been

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rejected; correct?

A. Correct.

Q. And I guess my question is do you recall why she was proposing language that had previously been rejected.

A. I don't know the answer to that question, no.

Q. Did you have any discussion or -- with Ms. Adams about what was to be provided to Marsh in terms of bringing this matter to closure?

A. I don't recall. I would have thought she would have had the underwriting file that would have had all the correspondences, you know, what took place so far.

Q. You were on the phone with Ms. Adams it looks like a couple days prior?

A. Correct.

Q. It was left that St. Paul was going to take some action; correct?

A. Correct.

Q. Was there some decision between Ms. Adams and yourself that she was going to take ownership of this issue?

A. I -- I don't recall. I mean, she

1 Midwinter

2 A. I don't recall, no.

3 Q. This X that appears on 1725, is that
4 your handwriting?

5 A. I don't know whose that is.

6 Q. Do you recall Ms. Adams making this
7 proposal to Marsh?

8 A. Well, I had received a copy of the
9 e-mail. I was aware that she made it.

10 Q. I agree. But as you sit here today, do
11 you recall her making this proposal?

12 A. I don't recall her doing it at the
13 time, no.

14 Q. Other than your now reviewing the
15 document?

16 A. Correct.

17 Q. Let me show you a document we'll mark
18 as next in order, 113.

19 (Exhibit 113, e-mail from Adams to
20 O'Connor, marked for identification, as of
21 this date.)

22 Q. Exhibit 113 is another e-mail from
23 Angela Adams to Mike O'Connor, copied to Michele
24 Midwinter. And it says, Per our conversation, see
25 below. I see you're doing what I did.

1 Midwinter

2 The first e-mail, Exhibit 112, was sent
3 at 9:11 in the morning, and then at 9:49 she sends
4 a second e-mail.

5 A. Correct.

6 Q. So this one is subsequent to the other
7 one. And she writes, For purposes of advertising
8 injury and personal injury, all online activities
9 are excluded from these coverages.

10 Are you with me?

11 A. Yes, I am.

12 Q. Do you recall discussing with Ms. Adams
13 a second effort at trying to come up with an
14 online activities exclusion that would be
15 acceptable to Marsh?

16 A. No, I don't recall having the
17 conversation with her.

18 Q. Do you recall anything about this
19 particular language reflected in Exhibit 113 being
20 proposed to Marsh?

21 A. I think this -- this was the purpose of
22 the conference call that we had when we spoke with
23 Glenn Spencer at AOL and the Marsh folks was that
24 this was what the actual final determination was,
25 that this is what the wording should be. I

1 Midwinter

2 remember that coming from the conference call that
3 we had with them.

4 Q. Let me try again, then. You recall
5 from the conference call that there was an agreed
6 wording that came out of that conference call?

7 A. It was an agreed intent. The wording
8 itself, no. But the intent of what the wording
9 was going to be was agreed upon. And then we
10 needed to put the wording together to send to
11 them.

12 Q. And Ms. Adams' first effort was to
13 repropose unacceptable wording?

14 A. I honestly don't know the answer to
15 that.

16 Q. Do you know what prompted the second
17 e-mail from Ms. Adams?

18 A. I don't know.

19 Q. She says, per our conversation. Are
20 you aware of any conversation that took place
21 between Ms. Adams and Mr. O'Connor on July 5th?

22 A. I believe she could be referring to the
23 conference call, as she indicated after that to
24 see below.

25 Q. But you don't know, do you?

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A. No, I do not.

Q. You don't know if it in fact was a reaction to the unacceptable wording that had been proposed?

A. Correct.

Q. You just don't know either way?

A. No, I do not.

Q. Do you know, looking at Exhibit 113, if Ms. Adams' language was ever accepted by Marsh?

A. I believe Marsh came back and took this wording but then also tried to include a definition for online activities in their document.

Q. So am I correct your recollection is this particular wording was not accepted as a one-liner; correct?

A. No, it was not. I'm sorry.

MS. THORPE: Objection. I think it assumes facts, lacks foundation.

Q. In fact, Mr. --

MS. THORPE: I think the record will show it was accepted, so you can go ahead and show her documents. I think it's a little tough this late in the day to --

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Midwinter

MR. ABELSON: I've offered to continue this deposition.

MS. THORPE: I think we should go ahead. I've asked the witness, and she said she's fine. Let's go ahead.

MR. ABELSON: By the way, I disagree with you the language was accepted. But that will be something we'll work out. Let me continue, however. We can argue about that later.

THE VIDEOGRAPHER: Counsel, I need 30 seconds for a tape change.

MS. THORPE: Sure.

MR. ABELSON: Sure.

THE VIDEOGRAPHER: The time is 5:33. We're off the record a moment.

(Recess taken from 5:33 to 5:38.)

THE VIDEOGRAPHER: The time is 5:38. We're back on the record.

Q. I've put Exhibit Number 69 back in front of deponent and ask Ms. Midwinter, the additional wording that Marsh requested, is that reflected at the bottom of Exhibit Number 69 on the second page, SP 1935.

1 Midwinter

2 A. Yes, it is.

3 Q. And with respect to that, Mr. O'Connor
4 writes, in paragraph 4 of Exhibit Number 69, he
5 says, As we -- this is an e-mail to you, by the
6 way. As we previously discussed, the current
7 PI/AI endorsement will cause problems if there is
8 an advertising claim that involves both print
9 advertising and advertising online.

10 That is a topic that you had previously
11 discussed with Mr. O'Connor?

12 A. I believe that was discussed in the
13 conference call we had in the group.

14 Q. Back on the 30th?

15 A. Correct.

16 Q. He goes on to say, In addition, we
17 agree that there will be claims that call into
18 question the definition of online activities.

19 Are you with me there?

20 A. Yes, I am.

21 Q. Do you recall that being discussed on
22 the conference call of June 30th?

23 A. I don't recall if we spoke about the
24 definition of online activities at that time.

25 Q. Do you recall him discussing with you

1 Midwinter

2 that there might be instances that might be online
3 and not online and that it might call into
4 question what the definition of online activities
5 would be?

6 A. I think the first communication was in
7 his number 4 bullet in this document.

8 Q. Okay. So you recall the first point
9 being discussed in the conference call but not the
10 last line being discussed in the conference call;
11 is that correct?

12 A. Correct. I don't believe we spoke
13 about definitions during the conference call.

14 Q. Okay. Okay. But the concept that
15 there might be conduct that is both online and
16 offline being intermixed posing a problem, was
17 that discussed?

18 A. I believe it was, yes.

19 Q. And so Marsh then proposes a definition
20 of online activities that appears on the second
21 page of this; correct?

22 A. Correct.

23 Q. Do you recall any prior conversation
24 with Mr. O'Connor prior to receiving this
25 particular wording that appears on 1935?

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A. No, not that I recall.

Q. And when you received it, what did you do with it?

A. Janice Corbetis, who was -- let me start over.

Angela Adams, who was involved with this, had left the company in August of 2000. So when this came in, I had presented the e-mail to Janice Corbetis and had asked her her opinion.

Q. What did Ms. Corbetis say or do?

A. She had indicated that since this was the actual intent since the beginning that it was okay to endorse the policy.

Q. Ms. Corbetis, from your prior testimony, had not been in on any of the prior discussions; correct?

A. Correct.

Q. So what was her basis for saying this was the intent since the beginning of the policy?

A. I basically told her the conversations that Angie and I had had with Marsh and then AOL during the June 30th conference call -- June 30th?

Q. Correct.

A. -- and told her that this was what we

1 Midwinter

2 had agreed upon at that point and that this was
3 our intent of what we were covering. So it was
4 information that I provided to her.

5 Q. So when she says this was the intent,
6 she means that this captures the intent that you
7 had formed?

8 A. That Angela Adams and I had formed
9 together, correct.

10 Q. Okay. But this does not express any
11 intent that Ms. Corbetis had and formed
12 independent of your intent?

13 A. No.

14 Q. She was relying on whatever agreements
15 and conversations you had had?

16 A. Yes.

17 Q. You say you forwarded the e-mail. You
18 mean Mr. O'Connor's e-mail to Ms. Corbetis?

19 A. No, I didn't forward it to her. She
20 was in our office on the day that I had asked her
21 to take a look at this.

22 Q. How lucky for Ms. Corbetis.

23 A. Exactly.

24 Q. Did you print it out? Did you read it
25 online?

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Netscape Communications
Corporation, a Delaware
corporation; and
America Online, Inc.,
a Delaware corporation,

Plaintiffs,

vs.

No. C-06-00198 JW (PVT)

Federal Insurance Company,
an Indiana corporation;
St. Paul Mercury Insurance
Company, a Minnesota
corporation; Executive Risk
Specialty Insurance Company,
a Connecticut corporation;
and DOES 1 through 50,

Defendants.

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

* * *

VIDEO DEPOSITION OF
ERIC SOLBERG

* * *

(VOLUME I)

Taken before LISA M. PETERSON, on the 29th day of
September 2006 in St. Paul, Minnesota, commencing
at approximately 9:21 a.m.

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APPEARANCES

MS. LESLIE A. PEREIRA, Attorney at Law,
Abelson & Herron, LLP, Suite 650, 333 South Grand
Avenue, Los Angeles, California, 90071, appeared on
behalf of named Plaintiffs.

MS. SARA M. THORPE, Attorney at Law,
Gordon & Rees, LLP, Suite 2000, 275 Battery Street,
San Francisco, California, 94111, appeared on
behalf of named Defendant St. Paul Mercury
Insurance Company.

ALSO PRESENT: Mr. Joe Mildenberger, Videographer.

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I N D E X

EXAMINATION

Page

By Ms. Pereira 5

* * *

INSTRUCTIONS NOT TO ANSWER

Page

By Ms. Thorpe 26, 101, 176

* * *

REQUEST FOR PRODUCTION OF DOCUMENTS

Page

(No requests were made)

* * *

REFERENCE INDEX

(Attached to back of transcript)

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I N D E X

DEPOSITION EXHIBITS

4	Exhibit	Page
5	No. 115	9
6	No. 116	16
7	No. 117	68
8	No. 118	129
9	No. 119	144
10	No. 120	147
11	No. 121	152

12

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14 NOTE: Deposition Exhibit Nos. 115 through 121
 15 were retained by Attorney Leslie A. Pereira and
 16 are not appended to the transcript.

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1 P R O C E E D I N G S

2

3 ERIC SOLBERG

4

5 A witness in the above-entitled action, after
6 having been first duly sworn, testifies and
7 says as follows:

8

9 EXAMINATION

10

11 BY MS. PEREIRA:

12 Q Good morning, Mr. Solberg.

13 A Good morning.

14 Q As I just mentioned, my name is Leslie Pereira.
15 I'm an attorney with the law firm of Abelson Herron
16 in Los Angeles and I am representing Netscape
17 Communications Corporation and America Online in a
18 coverage action they have going in San Jose,
19 California against St. Paul Insurance Company.

20 Have you had your deposition taken before?

21 A Yes.

22 Q Let me go through a few different ground rules just
23 so we have them in mind. I don't know how recently
24 your deposition experience was.

25 Even though we are sitting in this somewhat

1 form is what is at issue. I will allow some leeway
2 so we know the parameters of things so hopefully we
3 can avoid the motion you are filing, but since you
4 have a witness here, I will allow you some general
5 questioning just to know that revisions happened,
6 but really the focus should be on the '96 form.

7 MS. PEREIRA: I don't agree with that. I
8 do intend to show the witness the 2001 version of
9 the policy and ask him questions about that. If
10 you are going to disallow that, then we will deal
11 with that when we get to that, but for now I guess
12 I'm just trying to understand what he just
13 testified and what his role was in connection with
14 the 2001 revision.

15 BY MS. PEREIRA:

16 Q So am I correct that you recall there was a 2001
17 revision to the technology CGL policy?

18 A Yes.

19 Q And did that same revision also pertain to
20 St. Paul's CGL policy?

21 A Yes.

22 Q What was your role in connection with those
23 revisions?

24 A I was one of the principal architects of the
25 St. Paul standard CGL agreement. I also approved

1 the agreement.

2 Q When you say you were the principal architect, do
3 you mean you actually drafted the language in the
4 changes?

5 A Not all of the changes within the form but the
6 majority of the changes.

7 Q Did you have drafting responsibility for the
8 changes that were made to the personal injury
9 coverage?

10 A Yes.

11 Q Did you have responsibility for the changes that
12 were made to the advertising injury provisions?

13 A Yes.

14 Q So you drafted them and you said that you also
15 approved them?

16 A Yes.

17 Q What does that mean exactly? You just approved
18 your own work or was it you drafted them, other
19 input was given and then you -- How did that work
20 exactly?

21 MS. THORPE: Objection. Compound.

22 Assumes facts.

23 A My role was to draft the forms. I would then ask
24 for input from others that would have an interest
25 in the form. I would then redraft the forms and

1 coverage was the same and only the wording changed,
2 that there was no intent to broaden coverage or
3 limit coverage?

4 A When we use the word editorial or clarification,
5 our intent was to use different words but
6 essentially the same coverage. It was our intent
7 to provide that kind of coverage.

8 Q Was the intent to change the coverage at all?

9 A No.

10 Q I understand there was also a change or there were
11 also changes made in 1996 to St. Paul's CGL form
12 and St. Paul's technology CGL form, is that
13 right?

14 A Yes.

15 Q Can you tell me what -- So at that time in 1996 you
16 were according to your CV vice president of the
17 actuarial and underwriting services department, is
18 that right?

19 A Yes.

20 Q Did you have any role with respect to the 1996
21 revisions to the technology CGL policy and the CGL
22 policy -- I'm sorry -- CGL form and the technology
23 CGL form?

24 A My role for those forms was the same as what it was
25 when I was assistant vice president of regulatory

1 and statutory underwriting in 1999 to 2005.

2 Q So your role was the same for the 1996 revisions as
3 it was for the 2001 revisions?

4 A Yes.

5 Q So meaning that with respect to the 1996 revisions,
6 you were also responsible for drafting a lot of the
7 language and the changes, is that right?

8 A Yes.

9 Q Then were you also responsible for approving the
10 changes?

11 A Yes.

12 Q And approving it through the system as you
13 described in the filing department?

14 A Yes, as I described.

15 Q So then were you also responsible in connection
16 with the 1996 revisions for drafting the
17 side-by-side or for preparing the side-by-side
18 comparison?

19 A Yes.

20 Q What I mean by that, tell me what was your role
21 with regard to the side-by-side comparison for the
22 1996 revisions?

23 A My staff would make the comparisons, they would
24 provide that comparison to me and I would review
25 and approve.