

1 SARA M. THORPE (SBN 146529)  
 sthorpe@gordonrees.com  
 2 D. CHRISTOPHER KERBY (SBN 124546)  
 ckerby@gordonrees.com  
 3 GORDON & REES LLP  
 Embarcadero Center West  
 4 275 Battery Street, Suite 2000  
 San Francisco, CA 94111  
 5 Telephone: (415) 986-5900  
 Facsimile: (415) 986-8054

6 Attorneys for Defendant  
 7 ST. PAUL MERCURY INSURANCE COMPANY

8 **UNITED STATES DISTRICT COURT**  
 9 **NORTHERN DISTRICT COURT OF CALIFORNIA**  
 10 **SAN JOSE DIVISION**

Gordon & Rees LLP  
 275 Battery Street, Suite 2000  
 San Francisco, CA 94111

12	NETSCAPE COMMUNICATIONS	)	CASE NO. 5:06-CV-00198 JW (PVT)
13	CORPORATION, a Delaware corporation; and	)	<b>NOTICE OF MOTION AND MOTION TO SHORTEN TIME TO HEAR ST. PAUL'S MOTION FOR LEAVE TO AMEND ADMISSION [L.R. 6-3]</b>
14	AMERICAN ONLINE, INC., a Delaware	)	
15	corporation,	)	
		)	
	Plaintiffs,	)	
15	vs.	)	
		)	<u>Accompanying Documents:</u>
16	FEDERAL INSURANCE COMPANY, an	)	Declaration of Sara M. Thorpe; [Proposed]
17	Indiana corporation; et al.,	)	Order Granting Motion to Shorten Time;
		)	Notice of Motion and Motion for Leave to
	Defendants.	)	Amend Admission
18		)	
19		)	Magistrate Judge Patricia V. Trumbull
20		)	Dept.: 5

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that pursuant to Civil Local Rule 6-3, defendant St. Paul  
3 Mercury Insurance Company (“St. Paul”) will and hereby does move for an Order Shortening  
4 Time for the Court to hear St. Paul’s Motion for Leave to Amend Admission (“Rule 36(b)  
5 Motion”), filed herewith. St. Paul requests an Order that the Rule 36(b) Motion be heard on  
6 **April 24, 2007 at 10:00 a.m.**, or as soon as possible thereafter in the above-referenced court,  
7 with plaintiffs’ opposition due on April 18, 2007 and St. Paul’s reply due by April 20, 2007.  
8 This motion is based on these points and authorities and the Declaration of Sara M. Thorpe.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. ST. PAUL SEEKS LEAVE TO AMEND AN ADMISSION**

11 Pursuant to Rule 36(b) of the Federal Rules of Civil Procedure (“FRCP”), St. Paul seeks  
12 leave to amend its prior admission made in response to Request For Admission (“RFA”) No. 4  
13 propounded by America Online, Inc. St. Paul served a Supplemental Response to these Requests  
14 for Admission (“Supplemental Response”), pursuant to FRCP 26(e), amending its prior  
15 admission. The accompanying Rule 36(b) Motion is brought because AOL objected to the  
16 Supplemental Response as not being in compliance with FRCP 36(b).

17 As detailed in the Rule 36(b) Motion, RFA No. 4 requests that St. Paul: “Admit that the  
18 SMARTDOWNLOAD CLAIM does not involve ‘3<sup>rd</sup> party advertising.’” St. Paul previously  
19 responded “Admit,” as this portion of the exclusion was not the basis for St. Paul’s denial of the  
20 claim. However, based upon arguments plaintiffs now advance in their Cross-Motion for partial  
21 summary judgment and in opposition to St. Paul’s Motion, currently pending before this Court,  
22 “3<sup>rd</sup> party advertising” may be an issue and the response to RFA No. 4 should be “Deny.”

23 **II. GOOD CAUSE EXISTS FOR AN ORDER SHORTENING TIME**

24 The grounds necessitating this motion to shorten time and the Rule 36(b) Motion relate to  
25 the parties’ cross-motions for partial summary judgment on whether St. Paul had a duty to  
26 defend AOL/Netscape against four class actions. The motions are to be heard on April 30, 2007.

27 In connection with the cross-motions, a side issue has arisen relating to a defense St. Paul  
28 wants to raise to arguments made in AOL/Netscape’s Cross-Motion. This motion to shorten

Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

1 time and the Rule 36(b) Motion are brought in order to permit St. Paul to make that argument  
2 without running afoul of discovery procedural rules.

3 Civil Local Rule 6-3(a) requires that, in seeking an order shortening time, the moving  
4 party submit a declaration that:

- 5 (1) Sets forth with particularity, the reasons for the requested ... shortening of
- 6 time; (2) Describes the efforts the party has made to obtain a stipulation to the
- 7 time change; (3) Identifies the substantial harm or prejudice that would occur if
- 8 the Court did not change the time; and (4) If the motion is to shorten time for the
- 9 Court to hear a motion: (i) Describes the moving party's compliance with Civil
- 10 L.R. 37-1(a) ... and (ii) Describes the nature of the underlying dispute that would
- 11 be addressed in the motion and briefly summarizes the position each party had
- 12 taken; (5) Discloses all previous time modifications in the case, whether by
- 13 stipulation or Court order; (6) Describes the effect the requested time
- 14 modification would have on the schedule for the case.

15 These points are addressed in the Declaration of Sara M. Thorpe ("Thorpe Decl.").

16 Plaintiffs will object to the motion to shorten time and Rule 36(b) Motion on the basis  
17 that St. Paul delayed in bringing these motions. The "3<sup>rd</sup> party advertising" issue first came up in  
18 AOL/Netscape's Cross-Motion. See Thorpe Decl., at ¶ 2. In their Cross-Motion, plaintiffs took  
19 the position that, despite not providing this information to St. Paul during the claims process, the  
20 class actions involved not only spying and gathering of private information, but also claims that  
21 AOL/Netscape was providing the private information to an advertiser, AdForce. See Rule 36(b)  
22 Motion, pp. 5-7.

23 St. Paul responded to the "3<sup>rd</sup> party advertising" issue in its Reply brief. Thorpe Dec., at  
24 ¶ 3. St. Paul also served on February 9, 2007, a Supplemental Response to RFA No. 4 (pursuant  
25 to FRCP 26(e)) indicating the response should be "Deny." *Id.* St. Paul, however, overlooked the  
26 procedural requirement of FRCP 36(b). *Id.*

27 Plaintiffs in their Reply Brief (at p. 20) and in Objections filed on March 2, 2007,  
28 objected to the revised admission on several bases including that it was not provided in  
compliance with FRCP 36(b). *Id.* ¶ 4. At that time, St. Paul's counsel was in trial and the  
hearing on the parties' cross-motions was set for March 26, 2007. *Id.* Under the circumstances,  
St. Paul intended to address AOL's objection at the hearing. *Id.*

On March 20, 2006, the Court on its own continued the hearing date to April 9, 2007. *Id.*

Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

1 at ¶ 5. Because counsel for all parties were unavailable on that date, both parties requested by  
2 way of Stipulation that the Court continue the hearing to April 30, 2007. *Id.* On March 23,  
3 2007, the Court continued the hearing to April 30, 2007. *Id.* Given the additional time with the  
4 continuance of the hearing, St. Paul took the opportunity to correct the procedural issue under  
5 FRCP 36(b). *Id.* ¶ 6. St. Paul seeks to file the Rule 36(b) Motion so that it can be resolved prior  
6 to the April 30 hearing on the parties’ cross-motions for summary judgment. *Id.*

7 Plaintiffs may claim they will be prejudiced by an early motion and any motion made  
8 pursuant to Rule 36(b). If they do claim prejudice, it is because plaintiffs seek to resolve the “3<sup>rd</sup>  
9 party advertising” issue (if it is even an issue that must be addressed in the cross-motions) on  
10 technical grounds, rather than allowing the issue to be determined on its merits. This is the very  
11 reason why leave is granted pursuant to Rule 36(b) in order to permit cases to be decided on their  
12 merits rather than based on technicalities. See, e.g., *Gallegos v. City of Los Angeles*, 308 F.3d  
13 987, 993 (9th Cir. 2002); *Hadley v. United States*, 45 F.3d 1345 (9th Cir. 1995).

14 The schedule on the motion suggested by St. Paul (with plaintiffs having until April 18,  
15 2007 in which to respond to the motion) should give counsel ample time to prepare their  
16 opposition to the timing and merits of the Rule 36(b) Motion.

17 **A. St. Paul Has Complied With The Local Rules Requiring The Parties**  
18 **To Meet and Confer**

19 St. Paul advised plaintiffs that St. Paul intended to file a Rule 36(b) Motion for leave to  
20 amend the admission, and requested that plaintiffs’ counsel agree to the shortened time in which  
21 to bring the motion. Thorpe Decl., ¶ 7. Plaintiffs’ counsel declined to agree. *Id.*

22 **II. CONCLUSION**

23 For the foregoing reasons, St. Paul requests that this Court grant its request for an Order  
24 Shortening Time, allowing the Rule 36(b) Motion to be heard on April 24, 2007, with plaintiffs’  
25 opposition due April 18, 2007, and St. Paul’s reply due April 20, 2007.

26 Dated: March 29, 2007

GORDON & REES LLP

27 Sara M. Thorpe  
SARA M. THORPE  
D. CHRISTOPHER KERBY  
Counsel to St. Paul Mercury Insurance Co.