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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

11	NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and)	CASE NO. 5:06-CV-00198 JW (PVT)
12	AMERICAN ONLINE, INC., a Delaware corporation,)
13)	
14	vs. Plaintiffs,)
15	FEDERAL INSURANCE COMPANY, an Indiana corporation; et al.,)	
16	Defendants.)
17)	
18)
19)	
20)

21 I, D. Christopher Kerby, declare as follows:

22 1. I am an attorney duly licensed to practice law in the State of California and before
 23 the federal courts in this State and a senior counsel in the law firm of Gordon & Rees LLP. I am
 24 an attorney of record for defendant St. Paul Mercury Insurance Company ("St. Paul") in this
 25 matter. I have personal knowledge of the matters stated herein except as to matters upon which I
 26 state they are based upon information and belief. If called as a witness, I could and would
 27 competently testify to the same.

28 2. On July 24, 2006, plaintiff America Online Inc. ("AOL") served its Requests for

1 Admission to St. Paul ("RFA"), attached hereto at Ex. 1. AOL requested, among other things,
2 that St. Paul admit the "SMARTDOWNLOAD CLAIM" did not involve certain aspects of the
3 Online Activity Exclusion in the St. Paul policy.

4 3. On August 28, 2006, St. Paul served its Response to AOL's RFAs, attached
5 hereto at Ex. 2. In its Response, St. Paul admitted RFA No. 4, namely, that "the
6 SMARTDOWNLOAD CLAIM does not involve '3rd party advertising.'" See Ex. 2, at p. 4:17-
7 21. St. Paul responded "Admit," as this portion of the Online Activities Exclusion was not the
8 basis for St. Paul's denial of this claim at the time the claim was tendered.

9 4. Based upon arguments plaintiffs now advance in support of their cross-motion for
10 partial summary judgment and in opposition to St. Paul's motion for partial summary judgment,
11 currently pending before this Court, "3rd party advertising" may be an issue and the response to
12 RFA No. 4 should, therefore, be "Deny." Indeed, on February 9, 2007, St. Paul served its
13 Supplemental Response to AOL's RFAs, attached hereto at Ex. 3. In its Supplemental Response,
14 St. Paul amended its response to RFA No. 4, which St. Paul had previously admitted, to "Deny"
15 and explained the basis for its prior admission and this subsequent denial. See Ex. 3, at p. 2:5-
16 23.

17 5. Attached hereto are true and correct copies of excerpts from the following
18 depositions taken in this action:

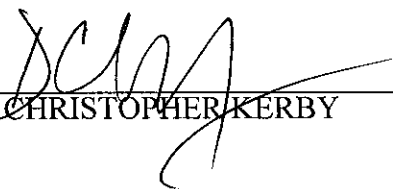
19 Exhibit 4: Michele Midwinter, taken September 7, 2006.

20 Exhibit 5: Dale Evensen, taken on October 4 and November 7, 2006.

21 Exhibit 6: Daniel Weiss, taken October 5 and November 7, 2006.

22 Exhibit 7: Michelle Enright, taken on October 6, 2006.

23 Executed this 29th day of March 2007 in San Francisco, California.

24
25 
26 D. CHRISTOPHER KERBY

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

EXHIBIT "1"

1 ABELSON | HERRON LLP
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2 Leslie A. Pereira (State Bar No. 180222)
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10 Attorneys for Plaintiffs
11 NETSCAPE COMMUNICATIONS
CORPORATION and AMERICA ONLINE, INC.
12

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

15 NETSCAPE COMMUNICATIONS
16 CORPORATION, et al.,

17 Plaintiffs,

18 v.

19 FEDERAL INSURANCE COMPANY, et al.
20

21 Defendants.
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CASE NO. C-06-00198 JW (PVT)

**PLAINTIFF AMERICA ONLINE INC.'S
FIRST SET OF REQUESTS FOR
ADMISSION TO DEFENDANT ST.
PAUL MERCURY INSURANCE
COMPANY**

Action Filed: December 12, 2005
Action Removed: January 11, 2006

1 PROPOUNDING PARTY: AMERICA ONLINE INC.
2 RESPONDING PARTY: ST. PAUL MERCURY INS. CO.
3 SET NO.: ONE [Nos. 1 - 9]

4 Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Plaintiff America Online
5 Inc. hereby requests that, within thirty (30) days hereof, Defendant St. Paul Mercury Ins. Co.
6 admit the truthfulness of each fact set forth below:

7 **DEFINITIONS AND INSTRUCTIONS**

8 A. "NETSCAPE" means Netscape Communications Corp. and all PERSONS acting
9 for, on behalf of, or at the direction of NETSCAPE, including any and all NETSCAPE
10 employees, officers, directors, agents, representatives, contractors, consultants and/or attorneys
11 who acted, in whole or in part, in one or more of those capacities at any time.

12 B. "SMARTDOWNLOAD CLAIM" means any demand made by NETSCAPE
13 and/or AOL for insurance coverage in connection with the following actions and/or
14 investigations brought against NETSCAPE and/or AOL: *Specht v. Netscape Communications*
15 *Corp. and American Online, Inc.*, 00 CIV 4871 (S.D.N.Y.); *Weindorf v. Netscape*
16 *Communications Corp. and America Online, Inc.*, No. 00 CIV 6219 (S.D.N.Y.); *Gruber v.*
17 *Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 6249 (S.D.N.Y.);
18 *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 01723
19 (D.D.C.); and investigation by New York's Attorney General into consumer protection issues
20 associated with Netscape Communicator and/or Smartdownload.

21 C. "ST. PAUL POLICY" means policy number TE 09000917 issued by ST. PAUL
22 for the period April 1, 1999 to April 1, 2000, including all declarations and endorsements
23 thereto.

24 D. "UNDERLYING LAWSUITS" means the following actions and/or investigations
25 brought against NETSCAPE and/or AOL: *Specht v. Netscape Communications Corp. and*
26 *American Online, Inc.*, 00 CIV 4871 (S.D.N.Y.); *Weindorf v. Netscape Communications Corp.*
27 *and America Online, Inc.*, No. 00 CIV 6219 (S.D.N.Y.); *Gruber v. Netscape Communications*

1 Corp. and America Online, Inc., No. 00 CIV 6249 (S.D.N.Y.); *Mueller v. Netscape*
2 *Communications Corp. and America Online, Inc.*, No. 00 CIV 01723 (D.D.C.); and investigation
3 by New York’s Attorney General into consumer protection issues associated with Netscape
4 Communicator and/or Smartdownload.

5 **REQUESTS FOR ADMISSION**

- 6 1. Admit that the SMARTDOWNLOAD CLAIM does not involve “online
7 activities.”
- 8 2. Admit that the SMARTDOWNLOAD CLAIM does not involve “e-mail
9 services.”
- 10 3. Admit that the SMARTDOWNLOAD CLAIM does not involve “instant
11 messaging services.”
- 12 4. Admit that the SMARTDOWNLOAD CLAIM does not involve “3rd party
13 advertising.”
- 14 5. Admit that the SMARTDOWNLOAD CLAIM does not involve “supplying 3rd
15 party content.”
- 16 6. Admit that the SMARTDOWNLOAD CLAIM does not involve “providing
17 internet access to 3rd parties.”
- 18 7. Admit that, as worded, the ST. PAUL POLICY’S existing “Personal Injury and
19 Advertising Injury Endorsement” (Processing Date 10/05/00) does **not** exclude coverage for the
20 SMARTDOWNLOAD CLAIM.
- 21 8. Admit that, as worded, the ST. PAUL POLICY’S existing “Personal Injury and
22 Advertising Injury Endorsement” (Processing Date 10/05/00) extends to only the five categories
23 of activities listed, and no others.
- 24 9. Admit that NETSCAPE’S alleged interception of consumers’ allegedly private
25 information (as set forth in the UNDERLYING LAWSUITS) satisfies the following personal
26
27

1 injury offense in the ST. PAUL POLICY: "Making known to any person or organization written
2 or spoken material that violates a person's right of privacy."

3 Dated: July 24, 2006

ABELSON | HERRON LLP

Michael Bruce Abelson

Leslie A. Pereira

By 

Leslie A. Pereira

Attorneys for Plaintiffs

Netscape Communications Corporation and
America Online, Inc.

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PROOF OF SERVICE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

I am over the age of 18 and not a party to the within action; I am employed by Abelson | Herron, LLP in the County of Los Angeles at 333 South Grand Avenue, Suite 650, Los Angeles, California, 90071-1559.

On July 24, 2006, I served the foregoing document(s) described as:

**PLAINTIFF AMERICA ONLINE INC.'S FIRST SET OF REQUESTS FOR
ADMISSION TO DEFENDANT ST. PAUL MERCURY INSURANCE COMPANY**

The document(s) was served by the following means:

- BY PERSONAL SERVICE** I personally delivered the documents to the persons at the addresses listed in the attached service list. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age.
- BY U.S. MAIL** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses in the attached service list and placed the sealed envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the said date, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope or package with postage fully prepaid.
- BY OVERNIGHT DELIVERY** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- BY MESSENGER SERVICE** I enclosed the documents in an envelope or package addressed to the persons in the attached service list and provided them to a professional messenger service for service. *(A declaration by the messenger is contained in the Declaration of Messenger below.)*
- BY FACSIMILE TRANSMISSION** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in the attached service list. Our facsimile activity report indicated that all pages were transmitted successfully. No error was reported by the fax machine that I used.
- BY E-MAIL OR ELECTRONIC TRANSMISSION** Based on the court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of United States of America that the foregoing is true and correct.

Executed on July 24, 2006 at Los Angeles, California.



Soonja Bin

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SERVICE LIST

Netscape Communications Corporation, et al. v. Federal Insurance Company, et al.

USDC Case No.: C-06-00198 JW (PVT)

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Attorney for Defendant
ST. PAUL MERCURY INSURANCE COMPANY

EXHIBIT "2"

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6 Attorneys for Defendant
7 ST. PAUL MERCURY
INSURANCE COMPANY
8

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

11 NETSCAPE COMMUNICATIONS
CORPORATION, a Delaware corporation;
12 and AMERICA ONLINE, INC., a Delaware
corporation;

13 Plaintiffs,

14 v.

15 FEDERAL INSURANCE COMPANY, an
Indiana corporation; ST. PAUL MERCURY
16 INSURANCE COMPANY, a Minnesota
corporation; EXECUTIVE RISK
17 SPECIALTY INSURANCE COMPANY; a
Connecticut corporation, and DOES 1
18 through 50,

19 Defendants.

CASE NO. C-06-00198 JW (PVT)

DEFENDANT ST. PAUL MERCURY
INSURANCE COMPANY'S
RESPONSE TO PLAINTIFF AMERICA
ONLINE INC'S FIRST SET OF
REQUESTS FOR ADMISSION

Complaint Filed: 12/12/05
Amended Complaint Filed: 2/24/06

20
21 PROPOUNDING PARTY: Plaintiff AMERICA ONLINE INC.

22 RESPONDING PARTY: Defendant ST. PAUL MERCURY INSURANCE COMPANY

23 SET NO.: ONE [1]

24 Defendant ST. PAUL MERCURY INSURANCE COMPANY ("ST. PAUL")
25 submits the following objections and responses to Plaintiff AMERICA ONLINE INC.'S
26 ("AOL") Requests for Admissions, Set One.
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San Francisco, CA 94111

PRELIMINARY STATEMENT AND GENERAL OBJECTIONS

1
2 1. ST. PAUL'S objections and responses are based upon information and
3 belief after a diligent search of ST. PAUL'S records relating to the AOL'S claim. ST.
4 PAUL has not yet completed its investigation of the facts pertaining to this action and
5 has not yet completed its discovery or preparation for trial in this action and therefore
6 reserves its right to amend, modify or supplement the objections or responses stated
7 here.

8 2. In providing these responses ST. PAUL does not in any way waive, or
9 intend to waive, but rather intends to preserve and is preserving: (1) all objections as to
10 competency, relevancy, materiality and admissibility; (2) all rights to object on any
11 grounds to the use of any of the supplemental responses here in any subsequent
12 proceedings, including the trial of this or any other action; (3) all objections as to
13 vagueness and ambiguity; and (4) all rights to object on any ground to any further
14 Interrogatories or other discovery requests.

15 3. ST. PAUL objects to AOL'S requests to the extent they seek information
16 that is protected by the attorney-client privilege and/or is attorney work product and/or
17 any other judicially-recognized protection or privilege.

18 4. ST. PAUL objects to AOL'S requests to the extent they purport to require
19 ST. PAUL to supply information which is not within ST. PAUL'S knowledge or in ST.
20 PAUL'S possession, custody or control. ST. PAUL objects to AOL'S requests for
21 information clearly more likely available to AOL through its own information and records
22 or some other party or entities.

23 5. ST. PAUL objects to AOL'S requests to the extent they seek information
24 that is irrelevant to the issues in this litigation to be adjudicated in Phase I of this
25 proceeding and are not reasonably calculated to lead to the discovery of admissible
26 evidence.

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1 6. ST. PAUL objects to AOL'S requests to the extent they seek information
2 containing or comprising trade secrets, proprietary, or other confidential information, as
3 such information is irrelevant to this action and otherwise protected from disclosure.

4 7. ST. PAUL objects to AOL'S requests because they are based upon
5 requests that are poorly worded, vague, ambiguous, unintelligible, overly broad, and
6 contain references that are taken out of context.

7 8. ST. PAUL further objects to AOL'S requests to the extent that they call for
8 information containing legal and/or expert opinions and conclusions.

9 9. ST. PAUL objects to Definition and Instruction A regarding the term
10 "NETSCAPE" and to all interrogatories that apply this definition/instruction on the
11 grounds that they are overly broad, unduly burdensome and attempt to expand ST.
12 PAUL'S obligations beyond those required by the Federal Rules of Civil Procedure.
13 "NETSCAPE" is not defined as described in Definition and Instruction A in this action or
14 in the underlying claims which are the subject matter of this action.

15 10. ST. PAUL objects to Definition and Instruction B regarding the term
16 "SMARTDOWNLOAD CLAIM" and to all interrogatories that apply this
17 definition/instruction on the grounds that they are overly broad, subject ST. PAUL to
18 unreasonable burden and expense and attempt to expand ST. PAUL'S obligations
19 beyond those required by the Federal Rules of Civil Procedure.

20 11. ST. PAUL objects to Definition and Instruction D regarding the term
21 "UNDERLYING LAWSUITS" and to all interrogatories that apply this
22 definition/instruction on the grounds that they are overly broad, subject ST. PAUL to
23 unreasonable burden and expense and attempt to expand ST. PAUL'S obligations
24 beyond those required by the Federal Rules of Civil Procedure.

25 12. Discovery is ongoing. AOL authored the definition of "on-line activities" in
26 the St. Paul Policy to reflect the intentions of the parties. To the extent there is any
27 ambiguity or unintended limitation because of that definition, the definition does not
28

1 accurately reflect the parties intention to exclude personal injury coverage for AOL and
2 its subsidiaries' on-line activities.

3 **RESPONSE TO REQUESTS FOR ADMISSION**

4 **REQUEST FOR ADMISSION NO. 1:**

5 Admit that the SMARTDOWNLOAD CLAIM does not involve "online activities."

6 **RESPONSE TO REQUEST FOR ADMISSION NO. 1:**

7 Deny.

8 **REQUEST FOR ADMISSION NO. 2:**

9 Admit that the SMARTDOWNLOAD CLAIM does not involve "e-mail services."

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 2:**

11 Admit.

12 **REQUEST FOR ADMISSION NO. 3:**

13 Admit that the SMARTDOWNLOAD CLAIM does not involve "instant messaging
14 services "

15 **RESPONSE TO REQUEST FOR ADMISSION NO. 3:**

16 Admit.

17 **REQUEST FOR ADMISSION NO. 4:**

18 Admit that the SMARTDOWNLOAD CLAIM does not involve "3rd party
19 advertising."

20 **RESPONSE TO REQUEST FOR ADMISSION NO. 4:**

21 Admit.

22 **REQUEST FOR ADMISSION NO. 5:**

23 Admit that the SMARTDOWNLOAD CLAIM does not involve "supplying 3rd party
24 content."

25 **RESPONSE TO REQUEST FOR ADMISSION NO. 5:**

26 Deny.

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275 Battery Street, Suite 2000
San Francisco, CA 94111

1 **REQUEST FOR ADMISSION NO. 6:**

2 Admit that the SMARTDOWNLOAD CLAIM does not involve "providing internet
3 access to 3rd parties."

4 **RESPONSE TO REQUEST FOR ADMISSION NO. 6:**

5 Deny.

6 **REQUEST FOR ADMISSION NO. 7:**

7 Admit that, as worded, the ST. PAUL POLICY'S existing "Personal Injury and
8 Advertising Injury Endorsement" (Processing Date 10/05/00) does not exclude coverage
9 for the SMART DOWNLOAD CLAIM.

10 **RESPONSE TO REQUEST FOR ADMISSION NO. 7:**

11 Deny.

12 **REQUEST FOR ADMISSION NO. 8:**

13 Admit that, as worded, the ST PAUL POLICY'S existing "Personal Injury and
14 Advertising Injury Endorsement" (Processing Date 10/05/00) extends to only the five
15 categories of activities listed, and no others.

16 **RESPONSE TO REQUEST FOR ADMISSION NO. 8:**

17 Deny.

18 **REQUEST FOR ADMISSION NO. 9:**

19 Admit that NETSCAPE'S alleged interception of consumers' allegedly private
20 information (as set forth in the UNDERLYING LAWSUITS) satisfies the following
21 personal injury offense in the ST PAUL POLICY: "Making known to any person or
22 organization written or spoken material that violates a person's right of privacy."

23 **RESPONSE TO REQUEST FOR ADMISSION NO. 9:**

24 ST. PAUL incorporates by reference its Preliminary Statement and General
25 Objections as though set forth fully here. ST. PAUL objects to this interrogatory as
26 vague and ambiguous and nonsensical, as it fails to set forth all requirements for
27 coverage in the policy, including that the allegation must be for amounts the insured is
28 legally required to pay as damages for personal injury caused by a personal injury

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1 offense (e.g., "making known to any person or organization written or spoken material
2 that violates a person's right of privacy.")

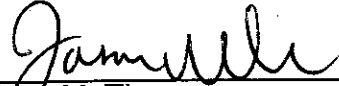
3 Subject to and without waiving these objections, ST. PAUL responds as follows:

4 Deny.

5

6 Dated: August 24, 2006

GORDON & REES LLP

By: 
Sara M. Thorpe
Attorneys for Defendant
ST. PAUL MERCURY
INSURANCE COMPANY

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Gordon & Rees LLP
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VERIFICATION

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I, Judi A. Lamble, declare:

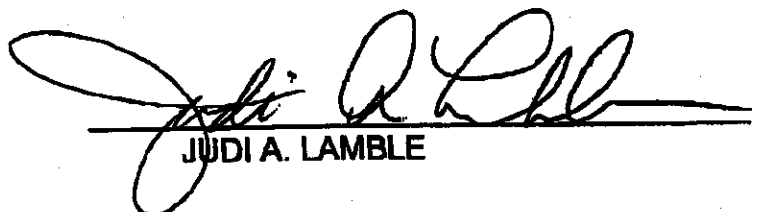
1. I am Senior Claim Attorney, Technology Claim, employed by Travelers Indemnity Company and authorized to make this Verification on behalf of St. Paul Mercury Insurance Company, defendant in this lawsuit ("St. Paul").

2. I have read St. Paul's RESPONSE TO PLAINTIFF AMERICA ONLINE, INC.'S FIRST SET OF REQUESTS FOR ADMISSION and know the contents thereof. To the extent I have personal knowledge of the matters set forth therein, the same are true and correct. To the extent said matters are a composite of information from a number of individuals or documents or I do not have personal knowledge thereof, I am informed and believe that the information set forth therein for which I lack personal knowledge is true and correct.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 28th day of August, 2006, in Reno County

Minnesota



JUDI A. LAMBLE

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

PROOF OF SERVICE

Netscape Communications Corp., v. Federal Ins. Co., et al. Case No. C 06 00198 JW

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Embarcadero Center West, 275 Battery Street, Suite 2000, San Francisco, CA 94111. On the date noted below, I served the within document(s):

Defendant St. Paul Mercury Insurance Company's Response To Plaintiff America Online Inc's First Set Of Requests For Admission

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
[X] by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid or provided for, at a station designated for collection and processing of envelopes and packages for mailing with the United States Post Office, addressed as set forth below.
[X] by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid or provided for, at a station designated for collection and processing of envelopes and packages for mailing by overnight delivery by FedEx, addressed as set forth below.
[] by transmitting via the internet the document(s) listed above to the email address(es) set forth below.

Attys for Plaintiffs:
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Leslie A. Pereira
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Los Angeles, CA 90071-1559

Attys for Plaintiffs:
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(408) 291-6200 ph
(408) 297-6000 fax

(Via FedEx)

(Via U.S. Mail)

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service and Fed Ex on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 28, 2006, at San Francisco, California.

Debbie McKee
Debbie McKee

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

EXHIBIT "3"

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6 Attorneys for Defendant
7 ST. PAUL MERCURY
INSURANCE COMPANY
8

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

11 NETSCAPE COMMUNICATIONS
CORPORATION, a Delaware corporation;
12 and AMERICA ONLINE, INC., a Delaware
corporation;

13 Plaintiffs,

14 v.

15 FEDERAL INSURANCE COMPANY, an
Indiana corporation; ST. PAUL MERCURY
16 INSURANCE COMPANY, a Minnesota
corporation; EXECUTIVE RISK
17 SPECIALTY INSURANCE COMPANY; a
Connecticut corporation, and DOES 1
18 through 50,

19 Defendants.

CASE NO. C-06-00198 JW (PVT)

DEFENDANT ST. PAUL MERCURY
INSURANCE COMPANY'S
SUPPLEMENTAL RESPONSE TO
PLAINTIFF AMERICA ONLINE INC'S
FIRST SET OF REQUESTS FOR
ADMISSION

Complaint Filed: 12/12/05
Amended Complaint Filed: 2/24/06

20
21 PROPOUNDING PARTY: Plaintiff AMERICA ONLINE INC.

22 RESPONDING PARTY: Defendant ST. PAUL MERCURY INSURANCE COMPANY

23 SET NO.: ONE [1]

24 Defendant ST. PAUL MERCURY INSURANCE COMPANY ("ST. PAUL")
25 submits the following supplemental objections and responses to Plaintiff AMERICA
26 ONLINE INC.'S ("AOL") Requests for Admissions, Set One. In particular, ST. PAUL
27 supplements its response to Request for Admission No. 4.
28

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Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

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SUPPLEMENTAL RESPONSE TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 4:

Admit that the SMARTDOWNLOAD CLAIM does not involve "3rd party advertising."

SUPPLEMENTAL RESPONSE TO REQUEST FOR ADMISSION NO. 4:


Based upon the information provided to St. Paul at the time the class action suits and AG Investigation involving the SmartDownload product were tendered to St. Paul the response was: ADMIT.

St. Paul objects to the consideration of or admission of any information that was not provided to St. Paul at the time the class action suits and AG Investigation involving the SmartDownload product were tendered to St. Paul. Such information is irrelevant and contrary to Virginia and California law. Fed. Rule of Evid. 401, 402. See, e.g., *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005) (applying Va. Law); *America Online, Inc. v. St. Paul Mercury Ins. Co* 347 F.3d 89, 93 (4th Cir. 2003); *Waller v. Truck Ins. Exchg.*, 44 Cal.Rptr.2d 370, 378 (Cal. 1995); *Safeco Ins. Co. v. Parks*, 19 Cal.Rptr.3d 17, 24-25, 27 (Cal.App. 2004); *Haggerty v. Federal Ins. Co.*, 32 Fed.Appx. 845, 848 (9th Cir. 2002). St. Paul further objects to the term "involve" as vague and ambiguous such that Request for Admission No. 4 cannot be meaningfully answered.

Subject to these objections, St. Paul further responds as follows. Based upon the new information plaintiffs provided during discovery in this coverage lawsuit and in the arguments now being advanced in support of their motion for partial summary judgment, the response to the request is: DENY.

Dated: February 9, 2007

GORDON & REES LLP

By: 
Sara M. Thorpe
Attorneys for Defendant
ST. PAUL MERCURY
INSURANCE COMPANY

VERIFICATION

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I, Aaron Latto, declare:

1. I am 2nd Vice President, Business Insurance Claim, employed by Travelers Indemnity Company and authorized to make this Verification on behalf of St. Paul Mercury Insurance Company, defendant in this lawsuit ("St. Paul").

2. I have read St. Paul's SUPPLEMENTAL RESPONSE TO PLAINTIFF AMERICA ONLINE, INC.'S FIRST SET OF REQUESTS FOR ADMISSION and know the contents thereof. To the extent I have personal knowledge of the matters set forth therein, the same are true and correct. To the extent said matters are a composite of information from a number of individuals or documents or I do not have personal knowledge thereof, I am informed and believe that the information set forth therein for which I lack personal knowledge is true and correct.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 9th day of February, 2007, in St. Paul, Minnesota.



AARON LATTO

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

PROOF OF SERVICE

Netscape Communications Corp., v. Federal Ins. Co., et al. Case No. C 06 00198 JW

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Embarcadero Center West, 275 Battery Street, Suite 2000, San Francisco, CA 94111. On the date noted below, I served the within document(s):

Defendant St. Paul Mercury Insurance Company's Supplemental Response To Plaintiff America Online Inc's First Set Of Requests For Admission

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid or provided for, at a station designated for collection and processing of envelopes and packages for mailing with the United States Post Office, addressed as set forth below.
- by placing a true copy of the document(s) listed above in a sealed envelope with postage thereon fully prepaid or provided for, at a station designated for collection and processing of envelopes and packages for mailing by overnight delivery by FedEx, addressed as set forth below.
- by transmitting via the internet the document(s) listed above to the email address(es) set forth below.

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

Attys for Plaintiffs:
 Michael Bruce Abelson, Esq.
 Leslie A. Pereira
 ABELSON HERRON LLP
 333 South Grand Ave., Suite 650
 Los Angeles, CA 90071-1559

mabelson@abelsonherron.com
lpereira@abelsonherron.com
 (213) 402-1900 ph
 (213) 402-1901 fax

Attys for Plaintiffs:
 Daniel J. Bergeson, Esq.
 Marc G. Van Niekerk
 BERGESON, LLP
 303 Almaden Blvd., Suite 500
 San Jose, CA 95110-2712

dbergeson@be-law.com
mvanniekerk@be-law.com
 (408) 291-6200 ph
 (408) 297-6000 fax

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service and Fed Ex on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 9, 2007, at San Francisco, California.


Pam Opdy

EXHIBIT "4"

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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.

1 Midwinter

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

3 called as a witness, having been duly sworn
4 by the Notary Public, was examined and
5 testified as follows:

6 EXAMINATION BY

7 MR. ABELSON:

8 Q. Good morning, Ms. Midwinter.

9 A. Good morning.

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

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

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

16 A. Travellers Insurance Company.

17 Q. What is your title as it exists today?

18 A. Account executive officer.

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

24 A. Correct.

25 Q. And you are also here in your capacity

Midwinter

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the file, I suspect.

A. Correct.

Q. And by reason of your -- well, St. Paul in effect adopted the wording, then, that was being proposed by Marsh?

A. Yes, we did.

Q. Let me ask you to take a look at the wording that appears on Exhibit Number 69. As it appears on SP 1935, what's your understanding of each of these categories? Let me start with e-mail services. What's your understanding of e-mail services, as used in the exclusion?

A. Somebody's e-mail address, being able to send e-mails.

Q. Anything else?

A. Not that I can think of.

Q. How about instant messaging service is the next category?

A. I know there's an ability to when you go into an Internet service provider that you can instant message with buddies, I believe.

Q. So it's that use of the buddy function type of thing?

A. Correct.

Midwinter

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Q. Anything else come to mind?

A. No.

Q. How about third-party advertising, what's your understanding of that as used in the exclusion?

A. The pop-up links that come up on the automatic pop-ups.

Q. Anything else come to mind?

A. No.

Q. How about supplying third-party content, what's your understanding of that term as used in the exclusion?

A. I'm actually not sure what that's referring to.

Q. How about the last category, providing Internet access to third parties, what's your understanding of that, as used in the exclusion?

A. Customers that are signing up for AOL's Internet service. It's providing them access to the Internet and their e-mail services and...

Q. Other than as you have explained those five categories, is there any other types of conduct that you believe are covered by the five categories that are reflected in the exclusion?

EXHIBIT "5"

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,

COPY

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
DALE EVENSEN

* * *

(VOLUME I)

Taken before LISA M. PETERSON, on the 4th day of
October 2006 in St. Paul, Minnesota, commencing
at approximately 9:21 a.m.

1

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT OF CALIFORNIA
 3 SAN JOSE DIVISION

4 Netscape Communications
 5 Corporation, a Delaware
 6 corporation; and
 7 America Online, Inc.,
 8 a Delaware corporation,
 9 Plaintiffs,
 10 vs. No. C-06-00198 JW (PVT)
 11 Federal Insurance Company,
 12 an Indiana corporation;
 13 St. Paul Mercury Insurance
 14 Company, a Minnesota
 15 corporation; Executive Risk
 16 Specialty Insurance Company,
 17 a Connecticut corporation;
 18 and DOES 1 through 50,
 19 Defendants.

20 CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER
 21 ***
 22 VIDEO DEPOSITION OF
 23 DALE EVENSEN
 24 ***
 25 (VOLUME I)

26 Taken before LISA M. PETERSON, on the 4th day of
 27 October 2006 in St. Paul, Minnesota, commencing
 28 at approximately 9:21 a.m.

2

1 APPEARANCES

2

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

7

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

13

14 ALSO PRESENT: Mr. Joe Mildenberger, Videographer.
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 2 I N D E X
 3 E X A M I N A T I O N

4 Page
 5 By Ms. Pereira 5
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 9 I N S T R U C T I O N S N O T T O A N S W E R
 10 Page
 11 (No instructions were given)
 12
 13
 14 ***
 15 R E Q U E S T F O R P R O D U C T I O N O F D O C U M E N T S
 16 Page
 17 (No requests were made)
 18
 19
 20 ***
 21 R E F E R E N C E I N D E X
 22 (Attached to back of transcript)
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1 ***
 2 I N D E X
 3 D E P O S I T I O N E X H I B I T S

4 Exhibit	Page
5 No. 122	20
6 No. 123	52
7 No. 124	56
8 No. 125	73
9 No. 126	81
10 No. 127	89
11 No. 128	90
12 No. 129	98
13 No. 130	113
14 No. 131	116
15 No. 132	200
16 No. 133	203

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18 NOTE: Deposition Exhibit Nos. 122 through 133
 19 were retained by Attorney Leslie A. Pereira and
 20 are not appended to the transcript.
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173

1 advertising injury or personal injury coverage
 2 grant has been triggered by the claims, which
 3 St. Paul denies has occurred, coverage for the
 4 claims is expressly excluded by the above
 5 endorsement because the alleged injury arises
 6 out of America Online, Inc.'s, online services."
 7 Do you see that?
 8 A I do, yes.
 9 Q So was your opinion that this online activities
 10 exclusions which you quote above precluded
 11 coverage for this claim?
 12 A My conclusion was that even if the coverage
 13 grants had been triggered, coverage would be
 14 excluded by this exclusion, which I think is
 15 what you are asking me.
 16 Q Now, your letter does not sort of expressly
 17 explain how you believed that online activities
 18 exclusion applied to this claim. Could you tell
 19 me how you believed that to apply to this
 20 claim?
 21 A Because the facts and allegations arose out of
 22 America Online's online activities as defined by
 23 the endorsement.
 24 Q That exclusion it basically defines online
 25 activities as five different types of

174

1 activities. Is that fair to say?
 2 A Yes.
 3 Q Did you make a determination about which of
 4 those five categories were implicated by the
 5 SmartDownload claim?
 6 A Yes.
 7 Q Which one or more -- what did you determine?
 8 A Primarily providing internet service --
 9 providing internet access to third parties,
 10 potentially supplying third-party content.
 11 Q When you say potentially supplying third-party
 12 content, can you tell me what you mean by
 13 that?
 14 A To the extent that the facts and allegations
 15 arose out of Netscape's supplying third-party
 16 content, the claims will be excluded.
 17 Q How did you see the SmartDownload complaints as
 18 potentially supplying third-party content or as
 19 alleging the supplying of third-party content?
 20 A Because the SmartDownload program was a program
 21 provided by two third-parties users by
 22 AOL/Netscape.
 23 Q So you are saying because what was alleged in
 24 the complaint is that the SmartDownload program
 25 was provided to third-party users?

175

1 A Yes.
 2 Q So then what was the third-party content that
 3 was supplied?
 4 A Like I say, the allegations were that the
 5 information was secretly gathered by Netscape
 6 through the use of the download program. To the
 7 extent that the plaintiffs were seeking damages
 8 because of the program that they were supplied
 9 by Netscape or AOL, the damages might be
 10 excluded. That's not the primary prong of this
 11 particular exclusion that I was relying on, but
 12 I think I recall to the extent that that might
 13 be applicable, it might be applicable, if that
 14 makes sense.
 15 Q Then in your analysis the third-party content is
 16 the SmartDownload program?
 17 A It certainly could be.
 18 Q Did you not read that supplying third-party
 19 content to mean content supplied by America
 20 Online on behalf of a third party?
 21 A Certainly could have applied that, yes.
 22 Q You think it also applies to the insured's own
 23 software products?
 24 A Well, keep in mind that we defend allegations
 25 whether they are frivolous or not. So to the

176

1 extent that someone were to read the complaint
 2 as arguing that the third party received a
 3 SmartDownload product whether it's AOL, Netscape
 4 or not, they received that, it was supplied by
 5 Netscape or AOL to the third person, and to the
 6 extent that the allegations were based on that
 7 program that was supplied by them, it might be
 8 excluded by this particular exclusion.
 9 Again that wasn't the primary basis. I
 10 just remember thinking about it, but the
 11 providing internet access to third parties was
 12 the primary reason.
 13 Q As to this one, the supplying third-party
 14 content, it seems what you are saying if there
 15 was a potential that this wouldn't apply, then
 16 you would have found coverage otherwise?
 17 A No.
 18 MS. THORPE: Objection.
 19 Mischaracterizes.
 20 BY MS. PEREIRA:
 21 Q This is an exclusion, isn't it?
 22 A I understand that, yes.
 23 Q So in applying that and making your coverage
 24 determination, would you not have applied that
 25 narrowly or would you have read that to mean any

EXHIBIT "6"

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4 -----
5 Netscape Communications
6 Corporation, a Delaware
7 corporation; and
8 America Online, Inc.,
9 a Delaware corporation,

10 Plaintiffs,

11 vs.

12 No. C-06-00198 JW (PVT)

13 Federal Insurance Company,
14 an Indiana corporation;
15 St. Paul Mercury Insurance
16 Company, a Minnesota
17 corporation; Executive Risk
18 Specialty Insurance Company,
19 a Connecticut corporation;
20 and DOES 1 through 50,

21 Defendants.
22 -----

23 CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

24 * * *

25 VIDEO DEPOSITION OF
DAN WEISS

* * *

(VOLUME I)

26 Taken before LISA M. PETERSON, on the 5th day of
27 October 2006 in St. Paul, Minnesota, commencing
28 at approximately 9:00 a.m.

APPEARANCES

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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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P R O C E E D I N G S

DAN WEISS

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

EXAMINATION

BY MS. PEREIRA:

Q Good morning, Mr. Weiss. How are you?

A Good morning. Fine. Thanks.

Q As I'm sure you appreciate you are under oath here today even though we are sitting in a conference room rather than a court of law. Do you understand that?

A Yes.

Q Have you been deposed before?

A Yes.

Q When have you been deposed?

A I was deposed in connection with the coverage litigation between St. Paul and America Online involving the version 5.0 and 6.0 matters and then I was also deposed in a personal matter.

1 because it involves providing internet access to
2 third parties.

3 Q In looking at this online activities exclusion,
4 it appears to have five different parts to it.

5 Do you see that?

6 A Yes.

7 Q How would you in terms of you analyzing this
8 exclusion, how many different types of
9 requirements do you see in this exclusion?

10 A Different types of requirements?

11 Q Or how would you go about determining whether
12 this exclusion applied to the SmartDownload
13 claim?

14 MS. THORPE: How did he?

15 BY MS. PEREIRA:

16 Q Yes.

17 A At the time I just reviewed the complaints,
18 tried to determine whether or not the alleged
19 activities in those complaints met the
20 definition of online activities deciding whether
21 or not it was providing e-mail services, instant
22 messaging services, third-party advertising,
23 supplying third-party content or providing
24 internet access to third parties.

25 Q Did you determine whether the allegations in the

1 SmartDownload complaint constituted online
2 activities?

3 A Yes. I agreed with Dale's conclusion that the
4 allegations met the definition.

5 Q What part of the -- What allegations met which
6 part of this definition?

7 MS. THORPE: Objection. Compound.

8 A As I just testified, I believe the allegations
9 taken as a whole in the complaints satisfied the
10 providing internet access to third parties prong
11 of the definition.

12 BY MS. PEREIRA:

13 Q So that's the last one here?

14 A Right.

15 Q So the first one is providing e-mail services.
16 Did you feel the SmartDownload complaint alleged
17 an injury from providing e-mail services?

18 A No.

19 Q Did you feel the SmartDownload complaint alleged
20 an injury from instant messaging services?

21 A No.

22 Q Did you feel the SmartDownload complaint alleged
23 an injury from third-party advertising?

24 A No.

25 Q Did you feel the SmartDownload complaint --

1 complaints plural, I guess -- alleged an injury
2 from supplying third-party content?

3 A No.

4 Q So it was only the last prong which is providing
5 internet access to third parties that you
6 believe was triggered by the SmartDownload
7 complaints?

8 A That's right.

9 Q Can you tell me how you felt that last prong
10 applied to the SmartDownload claims?

11 A Taking the allegations as a whole in the
12 underlying complaints it was clear to me that
13 the only way this information could be -- the
14 allegedly private information could be obtained
15 was through internet access to third parties,
16 and that's exactly what was being alleged here
17 is that through access to the internet that
18 SmartDownload was capturing private information
19 and transmitting it back to Netscape and AOL.

20 Q So do you believe the SmartDownload complaints
21 alleged that information was intercepted and
22 transmitted back to AOL and Netscape?

23 A Information, yes.

24 Q Are you familiar with the SmartDownload
25 product?

EXHIBIT "7"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT of CALIFORNIA
SAN JOSE DIVISION

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

COPY

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.

* * *
VIDEO DEPOSITION OF
MICHELLE ENRIGHT

* * *

Taken before LISA M. PETERSON, on the 6th day of
October 2006 in St. Paul, Minnesota, commencing
at approximately 9:04 a.m.

1

1 UNITED STATES DISTRICT COURT
 2 NORTHERN DISTRICT of CALIFORNIA
 3 SAN JOSE DIVISION

4 Netscape Communications
 5 Corporation, a Delaware
 6 corporation; and
 7 America Online, Inc.,
 8 a Delaware corporation,
 9 Plaintiffs,
 10 vs. No. C-06-00198 JW (PVT)
 11 Federal Insurance Company,
 12 an Indiana corporation;
 13 St. Paul Mercury Insurance
 14 Company, a Minnesota
 15 corporation; Executive Risk
 16 Specialty Insurance Company,
 17 a Connecticut corporation;
 18 and DOES 1 through 50,
 19 Defendants.

20 ***
 21 VIDEO DEPOSITION OF
 22 MICHELLE ENRIGHT
 23 ***

24 Taken before LISA M. PETERSON, on the 6th day of
 25 October 2006 in St. Paul, Minnesota, commencing
 at approximately 9:04 a.m.

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 2 I N D E X
 3 E X A M I N A T I O N

	Page
5 By Ms. Pereira	5

6
 7
 8 ***
 9
 10 I N S T R U C T I O N S N O T T O A N S W E R
 11 Page
 12 By Ms. Thorpe 57, 78, 84, 106, 118, 159
 13
 14
 15 ***
 16
 17 R E Q U E S T F O R P R O D U C T I O N o f D O C U M E N T S
 18 Page
 19 (No requests were made)
 20
 21
 22 ***
 23
 24 R E F E R E N C E I N D E X
 25 (Attached to back of transcript)

2

1 A P P E A R A N C E S

2
 3 MS. LESLIE A. PEREIRA, Attorney at Law,
 4 Abelson & Herron, LLP, Suite 650, 333 South Grand
 5 Avenue, Los Angeles, California, 90071, appeared
 6 on behalf of named Plaintiffs.

7
 8 MS. SARA M. THORPE, Attorney at Law,
 9 Gordon & Rees, LLP, Suite 2000, 275 Battery
 10 Street, San Francisco, California, 94111,
 11 appeared on behalf of named Defendant St. Paul
 12 Mercury Insurance Company.

13
 14 ALSO PRESENT: Mr. Joe Mildenberger, Videographer.
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1 ***
 2 I N D E X
 3 D E P O S I T I O N E X H I B I T S

	Page
4 Exhibit	
5 No. 137	108
6 No. 138	109
7 No. 139-143	141
8 No. 144-148	159
9 No. 149-158	166

10
 11
 12 NOTE: Deposition Exhibit Nos. 137 through 158
 13 were retained by Attorney Leslie A. Pereira and
 14 are not appended to the transcript.
 15
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5

1 PROCEEDINGS

2

3 MICHELLE ENRIGHT

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, Ms. Enright. Thank you for coming

13 in. Let me first ask you, are you being

14 represented today in this deposition?

15 A Yes.

16 Q And is that by Ms. Thorpe?

17 A Yes, it is.

18 Q Have you previously been deposed?

19 A Once.

20 Q When was that?

21 A 1989 or '90.

22 Q Was that in connection with any matter that you

23 handled for St. Paul?

24 A No.

25 Q Do you understand today that even though we are

6

1 sitting in a conference room talking about

2 certain matters, that you are testifying under

3 oath as if we were sitting in a court of law?

4 A Yes, I do.

5 Q Did you do anything to prepare for your

6 deposition today?

7 A I met briefly with Sara.

8 Q When did you meet with Sara?

9 A I believe it was Tuesday.

10 Q How long did you meet with Sara?

11 A Approximately an hour.

12 Q Did you review any documents when you met with

13 Ms. Thorpe?

14 A A couple.

15 Q What documents did you review?

16 A There were a couple pages of handwritten notes

17 and a letter with a copy of an arbitration

18 decision and I think one of the Settlement

19 Agreements or drafts.

20 Q Pertaining to the SmartDownload claim?

21 A Yes. And both of the larger documents, the

22 Settlement Agreement and the arbitration

23 decision, I mostly just flipped through. It

24 wasn't a thorough reading of either one.

25 Q Are there any other documents that you reviewed

7

1 during the meeting with Sara?

2 A There might have been a couple e-mails but that

3 would be it.

4 Q Other than meeting with Sara -- Where was your

5 meeting with Sara?

6 A At St. Paul Companies.

7 Q Did anyone else attend the meeting?

8 A There was someone for a part of it. Judi Lamble

9 was present.

10 Q Did anyone else participate in that meeting in

11 any way?

12 A No, and I wouldn't consider what Judi did to be

13 participating.

14 Q Did she just come in and greet you and say

15 hello?

16 A Yes.

17 Q Other than meeting with Sara, did you do

18 anything else to prepare for your deposition

19 today?

20 A No.

21 Q Do you understand that we are here today to talk

22 about the SmartDownload claim?

23 A I do.

24 Q And that pertains to a period of time that you

25 were employed by St. Paul that right?

8

1 A There was a part of the claim that was while I

2 was with St. Paul, yes.

3 Q When were you employed by St. Paul?

4 A I believe it was 2002, I think, until spring of

5 2005.

6 Q Prior to your employment with St. Paul what were

7 you doing?

8 A Immediately prior -- I guess for the whole time

9 prior I was a lawyer with a law firm in

10 St. Paul -- in Minneapolis. I'm sorry.

11 Q What law firm was that?

12 A At the time I was there it was called Zelle &

13 Larson. The name changed in the last two years

14 that I was there. It's currently known as

15 Zelle, Hoffman, Larson & Gette -- Larson, Gette

16 & Mason, I think.

17 Q What were you doing when you were employed at

18 Zelle Larson?

19 A Handling commercial litigation.

20 Q How long were you employed at Zelle?

21 A From 1988 to 2002.

22 Q Am I correct in remembering that Dan Weiss also

23 worked at Zelle for a period of time?

24 A Yes.

25 Q Did you work with Dan Weiss when he was at Zelle

77

1 looking at which is Exhibit 131. In the middle
 2 of the page there Mr. Evensen states his opinion
 3 that the SmartDownload claim is also being
 4 denied on the basis of the online activities
 5 exclusion in the policy.
 6 Do you see that?
 7 A Yes.
 8 Q Did you agree with that determination?
 9 A I don't have any specific recollection of having
 10 read this letter. If I had disagreed, I would
 11 have taken action.
 12 Q If looking at the language of the exclusion now,
 13 do you believe that would apply to preclude
 14 coverage for the SmartDownload claim?
 15 MS. THORPE: Objection. She is not
 16 going to testify about any opinion she holds in
 17 2006. She is here to testify about her claims
 18 handling from 2002 to 2005, and her testimony is
 19 going to be limited to that.
 20 MS. PEREIRA: Are you directing her
 21 not to answer my question?
 22 MS. THORPE: She can testify as to
 23 what she knew, understand, recalls about her
 24 claims handling from 2002 to 2005.
 25 BY MS. PEREIRA:

78

1 Q I asked a different question. I asked in
 2 looking at this exclusion now if you believe it
 3 precludes coverage for the SmartDownload
 4 claim?
 5 MS. THORPE: Objection. She can't
 6 answer that question.
 7 BY MS. PEREIRA:
 8 Q Are you going to follow your attorney's
 9 instruction?
 10 A Was that instruction not to answer?
 11 MS. THORPE: Yes.
 12 A Yes.
 13 MS. PEREIRA: Sara, if you are going
 14 to instruct her, if you could just do it so we
 15 have a clear record. That's all I'm trying to
 16 develop here. When I ask a question, if you are
 17 instructing her in addition to your objection,
 18 if you could say that, then I won't have to ask
 19 you that each time and she won't have to ask you
 20 that each time.
 21 MS. THORPE: I thought I already did a
 22 general objection.
 23 MS. PEREIRA: I want to preserve that.
 24 I want to make my record clear. So if a
 25 question comes up that I want to ask her and

79

1 it's one are going to instruct her not to
 2 answer, then I would like that on the record.
 3 BY MS. PEREIRA:
 4 Q Did you work on America Online claims during the
 5 entire period that you were employed as a claim
 6 handler by St. Paul?
 7 A There may have been a short period of time
 8 before they started, but yes.
 9 Q So for the most part for your two and a half
 10 year period you were working on one or more AOL
 11 claims?
 12 A Yes.
 13 Q And did you have occasion to become familiar
 14 with an online activities exclusion to their
 15 policy?
 16 A Yes.
 17 Q What is your understanding about that online
 18 activities exclusion?
 19 MS. THORPE: Objection. Overly broad.
 20 I will object if you are asking her about today,
 21 what her understanding then was is relevant. I
 22 think your question encompasses both. So if you
 23 could be more --
 24 BY MS. PEREIRA:
 25 Q At the time you were working on the AOL account,

80

1 you understood there was an online activities
 2 exclusion attached to their policy?
 3 A Yes, I did.
 4 Q At the time you worked on the account, what was
 5 your understanding about what that exclusion
 6 did?
 7 A I don't recall what my specific understanding
 8 is. I'm also not sure if I had claims that
 9 implicated it.
 10 Q Do you recall reviewing the online activities
 11 exclusion?
 12 A Yes.
 13 Q Do you have any recollection about the meaning
 14 or application of that exclusion?
 15 A I wouldn't have thought about it except if I
 16 thought it applied or potentially applied to a
 17 particular claim, and I don't have any
 18 recollection of that.
 19 Q So do you have any general recollection about
 20 what the substance of that exclusion was?
 21 A It's in the letter here in front of me but
 22 beyond that, no.
 23 Q Prior to having read the letter, did you have
 24 any recollection of what that exclusion said or
 25 did?

1 A No.
 2 Q Can you review the online activities exclusion
 3 in the letter in front of you and tell me what
 4 you believe it means?
 5 MS. THORPE: Object to her giving you
 6 a 2006 opinion. You can ask her about what she
 7 believed it meant or how she applied it from
 8 2002 through 2005 when she worked on this
 9 claim.
 10 MS. PEREIRA: I did ask her that and
 11 she said she doesn't recall. So my question now
 12 is if she can read it in the letter and tell me
 13 what she believes it means.
 14 MS. THORPE: No. I won't let her
 15 answer that question. I will let her answer if
 16 it refreshes her memory as to what she believed
 17 back then.
 18 BY MS. PEREIRA:
 19 Q Can you read the exclusion and tell me if it
 20 refreshes your recollection about what you
 21 understood that exclusion to mean when you
 22 handled AOL claims?
 23 A I just don't remember thinking about this
 24 when -- I don't have any memory of thinking
 25 about this when I was handling the AOL claims.

83
 1 Q I'm going to show you what we previously marked
 2 as Exhibit 132, and this is a March 16, 2001
 3 letter to Dale Evensen at St. Paul from Thomas
 4 Connell.
 5 MS. THORPE: Is there a question
 6 pending?
 7 BY MS. PEREIRA:
 8 Q I'm just giving the witness an opportunity to
 9 look at it.
 10 A Do you want me to read through it?
 11 Q Just skim over it, please.
 12 A Okay, I skimmed through it.
 13 Q Do you recall seeing this letter before?
 14 A Sitting here today I don't have any specific
 15 recollection of seeing it, no.
 16 Q Do you understand this to be a letter by AOL's
 17 counsel challenging St. Paul's denial of
 18 coverage for the SmartDownload claim?
 19 A That is what it appears to be.
 20 Q If you can look at page 4 of Mr. Connell's
 21 letter, Mr. Connell specifically challenges
 22 St. Paul's application of the online activities
 23 exclusion.
 24 Do you see that?
 25 A In the carryover paragraph?

1 I can't sit here today and tell you that I
 2 formed any kind of an opinion about what it was.
 3 I may have, but I don't have any recollection of
 4 having done so.
 5 BY MS. PEREIRA:
 6 Q Having now read the -- Did you just read the
 7 online activities exclusion?
 8 A I did.
 9 Q Having read it did that refresh your
 10 recollection in any way about the substance of
 11 the online activities exclusion?
 12 A In the sense that it says what these words
 13 say.
 14 Q Did it cause you to recall anything about your
 15 applying or considering the online activities
 16 exclusion while you worked as a claims handler
 17 at St. Paul?
 18 A No, I don't recall claims that implicated this
 19 exclusion.
 20 Q Do you recall having any belief about whether
 21 the SmartDownload claim implicated that
 22 exclusion?
 23 A I can't specifically recall. I assumed I agreed
 24 with the coverage determinations that had been
 25 made earlier and to that extent would agree.

84
 1 Q Yes. He says, "SmartDownload plainly and
 2 obviously does not fall into any of the five
 3 categories that constitute online activities as
 4 defined in the exclusion," and then he continues
 5 on to explain why he believes that is so.
 6 A Okay.
 7 Q As you sit here today can you tell me whether
 8 you believe Mr. Connell's comments have any
 9 merit?
 10 MS. THORPE: Objection. You can't
 11 answer that question.
 12 BY MS. PEREIRA:
 13 Q Are you going to follow your attorney's
 14 instruction?
 15 A Yes.
 16 Q Do you know whether this letter caused you or
 17 anyone at St. Paul to follow up with Mr. Connell
 18 or America Online about the issues he raised?
 19 MS. THORPE: Objection. Lacks
 20 foundation.
 21 A I wasn't even at the company at this point in
 22 time, and I haven't looked at the file. I don't
 23 know.
 24 BY MS. PEREIRA:
 25 Q Let me show you a document we previously marked