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 15 NETSCAPE COMMUNICATIONS
 16 CORPORATION and AMERICA ONLINE, INC.

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

19 NETSCAPE COMMUNICATIONS
 20 CORPORATION, et al.;

21 Plaintiffs,

22 v.

23 FEDERAL INSURANCE COMPANY, et al.,

24 Defendants.

CASE NO. 5:06-CV-00198 JW (PVT)

**OPPOSITION TO MOTION TO
 SHORTEN TIME TO HEAR ST. PAUL’S
 MOTION FOR LEAVE TO AMEND
 ADMISSION [L.R. 6-3]; DECLARATION
 OF LESLIE A. PEREIRA IN SUPPORT
 THEREOF**

Magistrate Judge Patricia V. Trumbull
 Dept.: 5

1 **I. INTRODUCTION**

2 St. Paul's Motion to Shorten Time ("MST") asks this Court to hear its motion to amend
 3 its prior Rule 36 admission on less than 35 days' notice. The MST should be denied. Indeed, St.
 4 Paul's request results from its own inattention to the early discovery taken in this case and its
 5 neglect in bringing its motion sooner. Moreover, St. Paul's MST fails to satisfy the local rule's
 6 requirement that it identify "the substantial harm or prejudice that *would* occur if the court did
 7 not change the time." See L.R. 6-3(a) (italics supplied). St. Paul fails to identify *any* harm or
 8 prejudice from a denial of its MST, let alone "substantial" harm or prejudice. Finally, permitting
 9 St. Paul to bring its motion on shortened time will prejudice Plaintiffs by allowing St. Paul to
 10 take unfair advantage of a hearing delay occasioned purely for scheduling purposes. For all of
 11 these reasons, St. Paul's MST should be denied.

12 **II. FACTUAL BACKGROUND**

13 As set forth more fully in the parties' pending Cross-Motions for Partial Summary
 14 Judgment,¹ the following are two of the significant issues being litigated in this coverage action:

15 1. **Insuring Agreement.** Whether the underlying SmartDownload Actions satisfied
 16 the policy's insuring agreement by alleging that Plaintiffs made consumers' private information
 17 known to *any* third parties (including ad-serving companies); and

18 2. **Online Activities Exclusion.** Whether the SmartDownload Actions fell within
 19 the scope of the policy's Online Activities Exclusion which effectively barred coverage for
 20 claims based on "3rd party advertising."

21 See Declaration of Leslie A. Pereira ("Pereira Decl.") at ¶ 2.

22 Discovery on these precise issues was taken throughout this litigation. *Id.* at ¶ 3. For
 23 example, on June 22, 2006, *more than nine months ago*, Plaintiffs produced to St. Paul a
 24 settlement presentation prepared by the claimants' attorney, Joshua Rubin, in the

25
 26
 27 ¹ The parties' Cross-Motions for Partial Summary Judgment are set for hearing before Judge
 28 Ware at 9:00 a.m. on April 30, 2007. All of the papers on file in connection with these Cross-
 Motions are incorporated herein by reference for context.

1 SmartDownload Actions which made numerous advertising-related assertions. For example, the
 2 settlement presentation asserted that Netscape was partnered with an ad-serving company called
 3 “AdForce” and sent the claimants’ private information collected by SmartDownload to AdForce.
 4 Pereira Decl., ¶¶ 3-4. The settlement presentation was filed under seal in connection with
 5 Plaintiffs’ Cross-Motion.²

6 Plaintiffs’ own discovery responses made it clear to St. Paul that they would rely on this
 7 document – and the facts set forth therein – in connection with their prosecution of this coverage
 8 action. For example, St. Paul served Plaintiffs with an RFA asking that Plaintiffs admit that the
 9 SmartDownload Actions did not allege that any user information was “made known to any third
 10 person.” Pereira Decl., ¶ 5 and Ex. 1 to Pereira Decl. [St. Paul RFA #12]. Because Plaintiffs
 11 disputed this contention, they responded on July 28, 2006 by denying the RFA. *Id.*
 12 Furthermore, Plaintiffs explained the basis for their denial of the RFA in a correlative
 13 interrogatory response stating that “information allegedly collected by Netscape and/or AOL
 14 either was – or was to have been – shared with third parties.” Pereira Decl., ¶ 6 and Ex. 2 to
 15 Pereira Decl. [Supp. Responses to Rogs 9-11]. In support thereof, Plaintiffs specifically
 16 referenced Joshua Rubin’s settlement presentation which alleged that claimants’ private
 17 information was shared with AdForce. *Id.* Given these details, Plaintiffs’ early discovery
 18 responses – both written and documentary – made it clear to St. Paul that Plaintiffs would argue
 19 in this action that the SmartDownload claimants asserted that their private information was
 20 shared with third parties, including AdForce, a third-party ad-serving company.

21 It was with full knowledge of these facts and circumstances that St. Paul responded on
 22 August 28, 2006 to the following request for admission which is at issue in its current motion:

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

24 Admit that the SMARTDOWNLOAD CLAIM does not involve “3rd party advertising.”

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

26 Admit.

27 _____
 28 ² The settlement presentation was submitted as Exhibit H to the Declaration of Patrick Carome.
 USDS CASE NO. C-06-00198 JW (PVT)

1 Pereira Decl., ¶ 7.

2 St. Paul now seeks to change its prior admission to a denial. Its MST, however, fails to
3 present any rational basis for allowing St. Paul to present its belated motion on an expedited
4 basis.

5 **II. ST. PAUL'S INATTENTION AND NEGLECT ARE NOT A REASONABLE**
6 **BASIS FOR ORDERING A MOTION HEARD ON SHORTENED TIME**

7 St. Paul's MST makes the inaccurate and self-serving assertion that the so-called "3rd
8 party advertising issue" "first came up" in Plaintiffs' Cross-Motion for Summary Judgment filed
9 on January 12, 2007. (MST at 1 and 2).

10 This critical statement is wrong.

11 As demonstrated above, Plaintiffs' discovery – first provided in mid-2006 – made it
12 absolutely clear that Plaintiffs intended to argue that the SmartDownload claimants asserted that
13 their private information was shared with AdForce, a third-party ad-serving company. Thus, the
14 "3rd party advertising issue" – if, indeed, there is one – first arose when Plaintiffs responded to
15 St. Paul's discovery more than nine months ago.

16 Even assuming, however, that St. Paul could credibly claim surprise, the insurer still fails
17 to justify its delay of 2+ months in bringing its motion. St. Paul filed its response to Plaintiffs'
18 Cross Motion on February 9, 2007. At this time, it could have (and should have) filed its Motion
19 to Amend its Admission. It failed to do so. Instead, it simply *served* Plaintiffs with an amended
20 admission, ignoring the plain and unambiguous requirements of Rule 36. St. Paul's error in
21 failing to review and adhere to the requirements of Rule 36 does not provide a justification for its
22 current MST. Moreover, Plaintiffs pointed-out St. Paul's procedural error in papers filed on
23 March 2nd. Instead of moving promptly to correct its error at *that* time, St. Paul waited another
24 four weeks – until March 29 – to file its motion. To be clear: St. Paul's "emergency" is self-
25 created. Its repeated decisions to delay have necessitated its current request for an expedited
26 hearing. Such negligence does not provide a legitimate basis for special treatment.

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1 **III. ST. PAUL FAILS TO IDENTIFY ANY “SUBSTANTIAL HARM OR**
 2 **PREJUDICE” TO OCCUR IF THE COURT DOES NOT SHORTEN TIME**

3 Local Rule 6-3(a)(1) requires that any motion to change time be accompanied by a
 4 declaration which “[i]dentifies the harm or prejudice that would occur if the Court did not
 5 change the time.” St. Paul’s MST fails to do so. The Declaration of Sara M. Thorpe – submitted
 6 in support of St. Paul’s MST – does not identify *any* harm or prejudice that would result to St.
 7 Paul if its MST is denied, let alone “substantial” harm or prejudice. Indeed, Ms. Thorpe’s
 8 declaration acknowledges that – prior to filing its MST – St. Paul planned to raise the issue of its
 9 amended admission at the hearing on the parties’ Cross-Motions before Judge Ware. See Thorpe
 10 Decl., ¶ 4. In all events, however, neither Ms. Thorpe’s declaration nor St. Paul’s MST identifies
 11 any substantial harm or prejudice that would result from the denial of its MST. Pursuant to
 12 Local Rule 6-3(a)(1), St. Paul’s MST should be denied.

13 **IV. PLAINTIFFS WILL BE PREJUDICED IF ST. PAUL’S MOTION FOR**
 14 **SHORTENED TIME IS GRANTED**

15 Final paperwork for the parties’ pending Cross-Motions was submitted to Judge Ware on
 16 March 2, 2007. At that time, all issues – including evidentiary issues – were joined before Judge
 17 Ware. The hearing on the parties’ Cross-Motions was set for March 26 and St. Paul made no
 18 effort prior to that date to bring the motions it now proposes. The Court, however, continued the
 19 hearing to April 7 and, thereafter, purely for reasons of professional convenience, the parties
 20 further continued the hearing to April 30. St. Paul cannot now be permitted to use this
 21 scheduling delay as a means to present an entirely new argument in connection with fully-briefed
 22 motions. Indeed, given this history, it is procedurally improper for St. Paul to now attempt to
 23 oust Judge Ware’s jurisdiction over this matter.

24 At bottom, St. Paul is seeking to take advantage of its own dilatory tactics by setting up a
 25 situation where it gets “two bites” of the (proverbial) apple: Once before Magistrate Trumbull
 26 and a second bite before Judge Ware at the hearing scheduled for April 30, 2007. Such tactics
 27 are improper, and certainly not the basis for emergency relief.

1 **V. CONCLUSION**

2 For all of these reasons, St. Paul's Motion to Shorten Time should be denied.

3 Dated: April 3, 2007

ABELSON | HERRON LLP

Michael Bruce Abelson

Leslie A. Pereira

6 By _____/s/_____

7 Leslie A. Pereira

8 Attorneys for Plaintiffs

9 Netscape Communications Corporation and
America Online, Inc.

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DECLARATION OF LESLIE A. PEREIRA

I, Leslie A. Pereira, declare as follows:

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

2. The following are two of the significant issues being litigated in this coverage action:

a. **Insuring Agreement.** Whether the underlying SmartDownload Actions satisfied the policy’s insuring agreement by alleging that Plaintiffs made consumers’ private information known to any third parties (including ad-serving companies); and

b. **Online Activities Exclusion.** Whether or not the SmartDownload Actions fell within the scope of the policy’s Online Activities Exclusion which effectively barred coverage for claims based on “3rd party advertising.”

3. Discovery on these precise issues was taken throughout this litigation. For example, on June 22, 2006, *more than nine months ago*, Plaintiffs produced to St. Paul a settlement presentation prepared by the claimants’ attorney, Joshua Rubin, in the SmartDownload Actions which made numerous advertising-related assertions. For example, the settlement presentation asserted that Netscape was partnered with an ad-serving company called “AdForce” and sent the claimants’ private information collected by SmartDownload to AdForce.

4. This settlement presentation was filed under seal with Court in connection with Plaintiffs’ Cross-Motion. It was filed as Exhibit H to the Declaration of Patrick J. Carome.

5. Plaintiffs’ own written discovery responses made it clear to St. Paul that they would rely on the settlement presentation – and the facts set forth therein – in connection with their prosecution of this coverage action. For example, St. Paul served Plaintiffs with RFA #12

1 asking that Plaintiffs admit that the SmartDownload Actions did not allege that any user
2 information was “made known to any third person.” Plaintiffs responded on July 28, 2006 by
3 denying the RFA. A true and correct copy of Plaintiffs’ responses to St. Paul’s RFAs are
4 attached hereto as Exhibit 1.

5 6. Critically, in response to a correlative interrogatory asking that Plaintiffs explain
6 the basis for their denial of the RFA, Plaintiffs responded that the SmartDownload claimants
7 asserted that “information allegedly collected by Netscape and/or AOL either was – or was to
8 have been – shared with third parties.” A true and correct copy of Plaintiffs’ relevant
9 interrogatory responses are attached hereto as Exhibit 2. Plaintiffs specifically referenced Joshua
10 Rubin’s settlement presentation which alleged that claimants’ private information was shared
11 with AdForce.

12 7. On August 28, 2006, St. Paul responded as follows to Plaintiffs’ RFA #4 which is
13 at issue in its current motion:

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

15 Admit that the SMARTDOWNLOAD CLAIM does not involve “3rd party advertising.”

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

17 Admit.

18 A true and correct copy of St. Paul’s RFA responses are attached hereto as Exhibit 3.

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

21 Executed this 3rd day of April 2007 at Los Angeles, California.

22
23 _____ /s/

24 Leslie A. Pereira