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NETSCAPE COMMUNICATIONS
CORPORATION and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al.,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.

Defendants

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

PLAINTIFFS' SUPPLEMENTAL RESPONSES TO ST. PAUL MERCURY INSURANCE COMPANY'S REQUESTS FOR ADMISSIONS, SET NO. ONE

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

PROPOUNDING PARTY: **ST. PAUL MERCURY INSURANCE COMPANY**

RESPONDING PARTY: **PLAINTIFFS NETSCAPE COMMUNICATIONS CORPORATION AND AMERICA ONLINE, INC.**

SET NO.: **ONE [Nos. 1 - 13]**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, Plaintiffs America Online, Inc. ("AOL") and Netscape Communications Corporation ("Netscape") hereby submit the following supplemental response as follows:

PRELIMINARY STATEMENT

At the June 19, 2006 Case Management Conference in this matter, the Court accepted the parties' proposal that the litigation be "phased." Specifically, the Court determined that the parties would proceed with a "Phase One" which would permit discovery and motions on issues pertaining to St. Paul's duty to defend under the terms of the St. Paul Policy. Discovery unrelated to Phase One will be reserved until after completion of Phase One.

The responses set forth here are based on information and documents presently available to and known to Plaintiffs. Discovery, further investigation, and legal research and analysis may give rise to additional contentions, facts, documents and witnesses, all of which may lead to substantial additions to, changes in or variations from these responses. Accordingly, Plaintiffs reserve the right to change, modify, supplement, add to or subtract from its responses.

By responding to these requests for production, Plaintiffs do not waive, or intend to waive, but rather intend to preserve and are preserving: (1) all objections as to competency, relevancy, materiality and admissibility; (2) all objections on any grounds to the use of any of the responses herein or documents in any subsequent proceedings, including the trial of this or any other action; (3) all objections as to vagueness and ambiguity; and (4) all objections on any grounds.

GENERAL OBJECTIONS

1. Plaintiffs object to the Requests as improper to the extent they seek documents and information beyond the scope of discovery contemplated by the Federal Rules of Civil Procedure.

2. Plaintiffs object to the Requests to the extent they seek information or documents protected against disclosure by the attorney-client privilege and/or the attorney work product doctrine.

3. Plaintiffs object to the Requests to the extent they seek documents and/or information that is confidential, proprietary, trade secret, constitutionally protected business information, and/or information that is otherwise protected from discovery.

4. Plaintiffs object to the Requests to the extent they are overly broad, unduly burdensome, harassing, and impose inappropriate burdens and expenses exceeding the obligations imposed by the Federal Rules of Civil Procedure and case law.

5. Plaintiffs object to the Requests to the extent they seek documents and/or information already in the possession of St. Paul or its agents or that is equally available to St. Paul.

6. Plaintiffs object to the Requests to the extent they are irrelevant to the subject matter of the pending action and not reasonably calculated to lead to the discovery of admissible evidence.

7. Plaintiffs object to the Requests to the extent they are vague and ambiguous.

The foregoing Preliminary Statement and General Objections are applicable to and specifically incorporated into each response set forth herein below. The assertion of any General Objection does not preclude the assertion of specific objections.

SUPPLEMENTAL RESPONSES TO REQUESTS FOR ADMISSIONS

REQUEST NO. 1:

Admit Virginia law applies to determine whether there is coverage under ST. PAUL POLICY for the UNDERLYING COMPLAINTS and AG INVESTIGATION.

RESPONSE TO REQUEST NO. 1:

Denied.

REQUEST NO. 2:

Admit in the lawsuit titled "America Online, Inc. v. St. Paul Mercury Insurance Company" which AOL filed in the United States District Court for the Eastern District of Virginia, Virginia law was applied to a coverage dispute between AOL and ST. PAUL under the ST. PAUL POLICY.

RESPONSE TO REQUEST NO. 2:

Plaintiffs object to this Request on the ground that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Netscape Communications Corporation, one of the plaintiffs herein, was not a party to that action. Moreover, that action involved different factual circumstances and different legal issues. In addition, that action was brought under a different jurisdiction with different choice of law rules.

REQUEST NO. 3:

Admit that in 1999, Glenn Spencer was the Vice President of Risk Management at AOL.

RESPONSE TO REQUEST NO. 3:

Denied.

REQUEST NO. 4:

Admit that on June 23, 2000, Glenn Spencer was the Vice President of Risk Management at AOL.

RESPONSE TO REQUEST NO. 4:

Denied.

REQUEST NO. 5:

Admit that from 1998 through 2001, MARSH acted on AOL's behalf for purposes of obtaining insurance coverage.

RESPONSE TO REQUEST NO. 5:

Plaintiffs object to this Request on the ground that it is overly broad. Plaintiffs also object to this Request on the ground that it is vague and ambiguous. Plaintiffs also object that the Request (improperly) seeks a conclusion of law (i.e., MARSH's agency status) which is not properly the subject of a request for admission. Subject to and without waiving their objections, Plaintiffs respond as follows: Admitted in part and denied in part. Beginning in early 1997, and throughout 2001, MARSH brokers assisted AOL in placing some lines of insurance.

REQUEST NO. 6:

Admit that the document attached hereto includes a true and correct copy of Glenn Spencer's June 23, 2000 email communication from Spencer to MARSH.

RESPONSE TO REQUEST NO. 6:

Admitted.

REQUEST NO. 7:

Admit that it was AOL's intent "all along" to exclude coverage under the St. Paul Policy for personal injury and advertising injury arising out of AOL's online activity.

RESPONSE TO REQUEST NO. 7:

AOL objects to this request on the ground that it is vague and ambiguous as to the phrase "all along" and as to the time period and how, precisely, corporate "intent" is to be divined, much less defined. AOL also objects to this request on the ground that it is vague and ambiguous with respect to its use of the phrase "online activities," a term whose meaning and application here is the subject of St. Paul's pending Counter-Claim for Reformation.

REQUEST NO. 8:

Admit SmartDownLoad is a service designed to assist in downloading files from the Internet.

RESPONSE TO REQUEST NO. 8:

Admitted in part and denied in part. Assisting file downloads is one of the product's many functions. Numerous other functions exist. To the extent the Request is construed to mean file downloading is the product's exclusive function, the Request is denied. Likewise, the Request improperly characterizes SmartDownload as an undefined "service." Properly stated, it is a software product and, to the extent the Request is construed otherwise, the Request is denied.

REQUEST NO. 9:

Admit the use of SmartDownLoad involves online activity.

RESPONSE TO REQUEST NO. 9:

AOL objects to this request on the ground that it is vague and ambiguous with respect to its use of the phrase "online activity," a term whose meaning and application here is the subject of St. Paul's pending Counter-Claim for Reformation. Subject to and without waiving their objections, Plaintiffs respond as follows: Denied.

REQUEST NO. 10:

Admit the UNDERLYING COMPLAINTS allege claims that result from online activity.

RESPONSE TO REQUEST NO. 10:

AOL objects to this request on the ground that it is vague and ambiguous with respect to its use of the phrase "online activity," a term whose meaning and application here is the subject of St. Paul's pending Counter-Claim for Reformation. Subject to and without waiving their objections, Plaintiffs respond as follows: Denied

REQUEST NO. 11:

Admit the AG INVESTIGATION involved claims or alleged violations that result from online activity.

RESPONSE TO REQUEST NO. 11:

AOL objects to this request on the ground that it is vague and ambiguous with respect to its use of the phrase "online activity," a term whose meaning and application here is the subject of St. Paul's pending Counter-Claim for Reformation. Subject to and without waiving their objections, Plaintiffs respond as follows: Denied

REQUEST NO. 12:

Admit the UNDERLYING COMPLAINTS do not allege any user information allegedly collected by AOL/Netscape through its SmartDownLoad program was made known to any person.

RESPONSE TO REQUEST NO. 12:

Denied.

REQUEST NO. 13:

Admit that in September 2000, when AOL, through MARSH, presented ST. PAUL an endorsement with a proposed definition of "online activity," AOL was already aware of claims of invasion of privacy involving the SmartDownLoad program.

RESPONSE TO REQUEST NO. 13:

Plaintiffs object to this Request on the ground that it is vague and ambiguous with respect to its use of the phrase "online activity," and how, precisely, "AOL's awareness" is to be divined, much less defined. The phrase "online activity" is specially defined in the St. Paul Policy and is the subject of St. Paul's pending Counter-Claim for Reformation. Subject to and with waiving their objections, Plaintiffs respond as follows: Admitted, to the extent AOL was in receipt of the Underlying Actions which alleged an invasion of privacy among its contentions.

Dated: June 23, 2006

Respectfully Submitted,
ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

By _____
Michael Bruce Abelson
Attorneys for Plaintiffs
NETSCAPE COMMUNCATIONS CORPORATION, AND
AMERICA ONLINE, INC.

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 June 23, 2006, I served the foregoing document(s) described as:

PLAINTIFFS' SUPPLEMENTAL RESPONSES TO ST. PAUL MERCURY INSURANCE COMPANY'S REQUESTS FOR ADMISSIONS, SET NO. ONE

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 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 June 23, 2006 at Los Angeles, California.

L. Kotrba

Lynelle R. Kotrba

SERVICE LIST

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

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