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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. 5:06-CV-00198 JW (PVT)

PLAINTIFFS' OPPOSITION TO ST. PAUL'S MOTION TO AMEND ADMISSION

Magistrate Judge Patricia V. Trumbull

Date: April 17, 2007
Time: 10:00 a.m.
Dept.: 5

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I. INTRODUCTION

St. Paul's Motion to Amend seeks to change a prior, unqualified "Admit" to a 15-line, objection-laden "Deny." At issue is St. Paul's response to Plaintiffs' Request for Admission ("RFA") No. 4 asking the insurer to "Admit that the SMARTDOWNLOAD CLAIM does not involve '3rd party advertising.'" As the record here reflects, St. Paul previously admitted, under oath, that "3rd party advertising" was not at issue. Now, after the close of discovery, and after submission of all briefing on the parties' Cross-Motions for Summary Judgment, St. Paul seeks to change its position. St. Paul's evidentiary flip-flop should not be allowed. A retraction is not necessary to allow St. Paul's presentation of its case on the merits, but Plaintiffs will be severely prejudiced by such a change in position. Accordingly, this Court should not exercise its discretion in permitting such a dramatic change at the eleventh hour.

II. FACTUAL BACKGROUND

In this action, Plaintiffs are seeking coverage for their substantial costs defending against four civil actions alleging that Netscape's SmartDownload software violated consumers' privacy rights (the "SmartDownload Claim"). As set forth more fully in the parties' pending Cross-Motions for Partial Summary Judgment Re: Duty to Defend ("Cross-Motions"),[1] the following are two of the significant issues being litigated in this coverage action:

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

2. **Online Activities Exclusion**. Whether the St. Paul policy's online activities exclusion barred coverage for the SmartDownload Claim. In relevant part, that exclusion states the following:

> For the purposes of advertising injury and personal injury, all Online Activities are excluded from these coverages.

[1] All papers submitted in connection with the parties' Cross-Motions are incorporated herein by reference.

> "Online Activities" is defined as [1] providing e-mail services, [2] instant messaging services, [3] 3rd party advertising, [4] supplying 3rd party content and [5] providing Internet access to 3rd parties.

(Hereinafter, the "Online Activities Exclusion.") (Bracketed numbers added for clarity.)

On June 19, 2006, the Court held a case management conference. Declaration of Leslie A. Pereira ("Pereira Decl."), ¶ 2. During that conference, the parties jointly agreed and proposed that this coverage litigation proceed in two phases. Id. "Phase One" would include discovery and motion practice on the issue of whether St. Paul had a duty to defend AOL and Netscape under its policy.[2] Id. As part of Phase One, the parties' would file Cross-Motions for Partial Summary Judgment Re: Duty to Defend (the "Cross-Motions"). Id. Thereafter, "Phase Two" would proceed (if necessary) on the contingent issues relating to the causes of action for breach of the covenant of good faith and fair dealing and unfair business practices. Id. Immediately after the conference, and consistent with the parties' proposals made therein, the Court entered an order setting the hearing on the parties' Cross-Motions for November 20, 2006. Id. at ¶ 3. For a variety of reasons, the hearing date was changed on multiple occasions. Id. The parties' Cross-Motions are currently set to be heard on April 30, 2007. Id.

A. *Plaintiffs Produced Significant Information Regarding the So-Called "Advertising" Aspects of this Claim During the Summer of 2006*

The parties immediately proceeded with discovery pertinent to the issues to be raised in the Cross-Motions. Pereira Decl., ¶ 4. In response to St. Paul's discovery requests, Plaintiffs produced the following information during the summer of 2006:

- The deposition of former Netscape employee David Park, including all exhibits thereto. Id.
- A settlement presentation prepared by the claimants' attorney, Joshua Rubin, in the underlying SmartDownload litigations (the "Settlement Presentation"). Id. The Settlement Presentation – produced to St. Paul on June 22 – made numerous

[2] At the time, it was also envisioned that Phase One would include discovery and motion practice pertinent to St. Paul's reformation counter-claim, but St. Paul ultimately dismissed its counter-claim.

advertising-related allegations, including its repeated assertions that Netscape was partnered with an ad-serving company called "AdForce" and sent the claimants' private information collected by SmartDownload to AdForce. Id.

Plaintiffs' written discovery responses made it clear to St. Paul that they would argue that the SmartDownload Claim involved allegations Plaintiffs shared consumers' private information with third parties, including AdForce. For example, St. Paul served Plaintiffs with an RFA asking that Plaintiffs admit that the SmartDownload Actions did not allege that any user information was "made known to any third person." Pereira Decl., ¶ 6; Ex. 1 to Pereira Decl. [St. Paul RFA #12]. Because Plaintiffs disputed this contention, they responded on July 28, 2006 by denying the RFA. Id. Furthermore, Plaintiffs explained the basis for their denial of the RFA in a correlative interrogatory response stating that "information allegedly collected by Netscape and/or AOL either was – or was to have been – shared with third parties." Pereira Decl., ¶ 7; Ex. 2 to Pereira Decl. [Supp. Responses to Rogs 9-11]. In support thereof, Plaintiffs specifically referenced the Settlement Presentation which alleged that claimants' private information was shared with AdForce. Id. Given these details, Plaintiffs' early discovery responses – both written and documentary – made it clear to St. Paul that Plaintiffs would argue in this action that the SmartDownload claimants asserted that their private information was shared with third parties, including AdForce, a third-party ad-serving company.

B. *Plaintiffs Propounded RFAs on St. Paul to Identify Its Coverage Defenses and Narrow the Issues Prior to the Parties' Cross-Motions*

Thereafter, in an effort to identify St. Paul's purported defenses to coverage, and to narrow the issues that required briefing in the parties' Cross-Motions, Plaintiffs served St. Paul with a set of nine requests for admission ("RFA"). Pereira Decl., ¶ 8; Ex. 3 to Pereira Decl. The RFAs were served on July 24, 2006. Id. The first six of the RFAs directly related to determining whether St. Paul intended to rely on the Online Activities Exclusion as a defense to Plaintiffs' claim and, if so, how. Id. As noted above, the Online Activities Exclusion defined "online activities" as five specific categories of conduct, and precluded coverage only for those activities. Thus, to identify and narrow the coverage defenses at issue here, Plaintiffs asked that

St. Paul admit that the SmartDownload Claim did not involve "online activities" and then, in five separate RFAs, requested that St. Paul admit that the SmartDownload Claim did not involve any of the five categories of conduct listed in the Online Activities Exclusion.[3] Id. At issue here is RFA No. 4 which is as follows:

> **REQUEST FOR ADMISSION NO. 4:**
>
> Admit that the SMARTDOWNLOAD CLAIM does not involve "3rd party advertising."

Plaintiffs' RFA No. 4 was clear and unambiguous. (Indeed, St. Paul made no objections to the form of the request.) It requested that St. Paul admit that the SmartDownload Claim does not involve "3rd party advertising." Now. In this coverage action. Its clear purpose was to identify St. Paul's *current* contentions and eliminate, if possible, potential defenses prior to the parties' depositions and motions. Contrary to St. Paul's current assertions, RFA No. 4 did *not* ask St. Paul whether this particular prong of the Online Activities Exclusion was relied on to deny the SmartDownload Claim at the time of tender.[4] Such a "backward-looking" RFA makes no sense, and would not have been propounded by Plaintiffs, because an insurer's defenses in a coverage action are generally not limited to those raised by the insurer at the time of tender.[5]

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[3] Simultaneously, Plaintiffs propounded corollary interrogatories which requested that, for each RFA that St. Paul failed to admit, St. Paul (1) identify and describe the basis for its response; (2) identify the persons with knowledge of its response; and (3) identify the documents upon which St. Paul relies for its response. Pereira Decl., ¶ 9; Ex. 4 to Pereira Decl. [Netscape's First Set of Specially Prepared Interrogatories to Defendant St. Paul] at 3 [Rogs 13-15].

[4] Indeed, St. Paul's "re-drafted" RFA would not even have been pertinent to Phase One issues given that St. Paul is entitled to raise any defense to coverage, even those not raised in its denial letter.

[5] St. Paul knows this. Indeed, it wouldn't have been able to assert the policy's "Deliberately Breaking the Law" exclusion as a defense to this action without such a rule since it never raised this exclusion at any time prior to this litigation.

With full knowledge of Plaintiffs' discovery and legal contentions, St. Paul responded as follows to RFA No. 4 on August 28, 2006:

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Admit.

Pereira Decl., ¶ 10; Ex. 5 to Pereira Decl. St. Paul made no objection to the form of the request, and did not qualify its response in any way. Id. Because of this unqualified admission, Plaintiffs' corollary interrogatories asking that St. Paul identify the factual basis, witnesses, and documents supporting any denied RFAs went unanswered. Pereira Decl., ¶ 11; Ex. 6 to Pereira Decl. Plaintiffs understood this admission to mean that St. Paul would not defend against this coverage action on the ground that the Online Activities Exclusion applied because the SmartDownload Claim involved "3rd party advertising." Pereira Decl., ¶ 12.

Throughout the fall, Plaintiffs took numerous depositions of St. Paul's witnesses, including claim handlers Daniel Weiss and Dale Evensen, and underwriter Michelle Midwinter. Pereira Decl., ¶ 13. In response to Plaintiffs' request that St. Paul designate a corporate representative to testify regarding its written discovery responses – including its RFA responses – St. Paul designated all three of these individuals. Id. Plaintiffs took Ms. Midwinter's deposition in September, 2006, and took Mr. Weiss' and Mr. Evensen's depositions in October and November, 2006.[6] Id.

In its current Motion, St. Paul now seeks to change its prior, unqualified admission – *six months after the discovery cut-off and more than two months after summary judgment briefing was complete* – to what is effectively a denial. Its proposed response is as follows:

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.

[6] Although the discovery cut-off in this case was October 17, 2006, for a variety of reasons the parties agreed to allow completion of these Minnesota depositions after that date.

> 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 be 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.

Pereira Decl., ¶ 14; Ex. 7 to Pereira Decl.

In connection with its proposed amended response to RFA No. 4 (now a denial), St. Paul also served amended responses to Interrogatory Nos. 13-15 on February 15, 2007. Pereira Decl., ¶ 15; Ex. 8 to Pereira Decl. St. Paul's supplemental response to Interrogatory No. 14 identifies St. Paul employee Dan Weiss as a witness with knowledge about the basis for St. Paul's amended response to RFA No. 4. Id.

At the time Plaintiffs deposed Mr. Weiss in October and November, 2006, Plaintiffs were not aware that St. Paul contended that the "3rd party advertising" prong of the Online Activities Exclusion barred coverage, or that Mr. Weiss had information in that regard.

III. LEGAL ARGUMENT

A. *The Purpose of RFAs is to Eliminate Issues from the Case*

Rule 36 of the Federal Rules of Civil Procedure governs requests for admission ("RFAs"). RFAs "serve two vital purposes" – "first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." See Fed. R. Civ. Proc., Rule 36, Advisory Committee Notes, 1970 Amendment; see also Conlon v. United States, 474 F. 3d 616, 622 (9th Cir. 2007). It is for this reason that litigants seeking to amend prior admissions must do so by motion, and courts considering the issue have urged that such motions be granted cautiously. 999 v. C.I.T. Corp., 776 F.2d 866, 869 (9th Cir. 1985). "Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated." See Fed. R. Civ. Proc., Rule 36, Advisory Committee Notes, 1970 Amendment; see also Conlon, 474 F. 3d at 625.

Rule 36(b) sets forth the requirements for amending a prior admission. First, it can be done only by motion. Fed. R. Civ. Proc. 36(b). Second, such motions are entirely within the court's discretion. Fed. R. Civ. Proc. 36(b); Conlon, 474 F. 3d at 624. A court presented with such a motion is required to consider (1) whether presentation of the merits of the action will be subserved if amendment is not permitted; and (2) whether the party who obtained the admission will be prejudiced by the amendment. However, even if the court finds that this two-part test is satisfied, it is not required to grant relief to the moving party. Conlon, 474 F. 3d at 624. Rather, "[t]he text of Rule 36(b) is permissive," and the court "may consider other factors, including whether the moving party can show good cause for the delay and whether the moving party appears to have a strong case on the merits." Id.

St. Paul's Motion strongly presents a scenario where this Court should be "cautious" and refuse to exercise its discretion to permit St. Paul to retract its prior admission.

B. *St. Paul's Motion Is Not Necessary to Insure Presentation of this Action on the Merits*

St. Paul argues that allowing it to retract its prior admission at this late date will "aid in having the action resolved on the merits." Motion at 9. Not only is this not so, but it is not enough. At issue here is nothing more than St. Paul's desire to make one *additional* argument about application of one *additional* aspect of the Online Activities Exclusion. All of its other purported coverage defenses – of which there are many – are unaffected by this single admission, and will be presented to the Court on the parties' Cross-Motions regardless of whether this Motion is granted. Thus, St. Paul's existing response to RFA No. 4 is not case dispositive and, if retained, will not "eliminate[] any need for a presentation on the merits." Conlon, 474 F. 3d at 622. St. Paul's Rule 36(b) motion is not like that in Conlon, and most of the other reported decisions seeking relief under Rule 36(b), where a party is seeking relief from *deemed* admissions which fully establish a case against him. Rather, this is plainly a situation where St. Paul belatedly recognized a potential legal argument that it felt might be strategically beneficial. This is too little, too late, and certainly does not warrant the relief that St. Paul is now seeking.

C. *Plaintiffs Will Be Prejudiced If St. Paul is Allowed to Retract its Prior, Affirmative Admission at this Late Date*

A court considering whether to exercise its discretion to permit withdrawal of an admission must consider the prejudice to the party who obtained the admission. Fed. R. Civ. Proc. 36(b). Here, Plaintiffs will be severely prejudiced if St. Paul is permitted to change its prior admission to a denial.

First, Plaintiffs relied on St. Paul's August 28 admission in preparing for depositions they took in October and November. It was at this time that Plaintiffs' counsel traveled to Minnesota several times to depose the St. Paul claim handlers who denied the SmartDownload Claim (Dan Weiss, Dale Evensen, and Michelle Enright). If Plaintiffs had known that St. Paul was contending that the SmartDownload Claim involved "3rd party advertising," they would have questioned these claim handlers extensively about how this prong of the Online Activities Exclusion purportedly operated and how it applied to the facts of this case. Plaintiffs did not do

so because they understood that St. Paul's response to RFA No. 4 effectively relinquished such an argument.[7]

Second, Plaintiffs relied on St. Paul's admission in preparing their Cross-Motion. They understood St. Paul's admission to mean that St. Paul did not contend that the SmartDownload Claim triggered the "3rd party advertising" prong of the Online Activities Exclusion. Thus, Plaintiffs' Cross-Motion only addresses the entirely distinct issue of whether or not the "providing Internet access" prong of the exclusion applies. If Plaintiffs had known that St. Paul would contend that the SmartDownload Claim involved "3rd party advertising," they would have addressed this portion of the exclusion in their briefing.

Third, Plaintiffs' reliance on St. Paul's admission caused it to forego other factual investigation and/or discovery it would have taken. If Plaintiffs had known that St. Paul would contend that the SmartDownload Claim involved "3rd party advertising," they would have conducted some investigation into the business operations and practices of AdForce, and "ad serving" company (versus an "advertising company"). Moreover, it is possible that Plaintiffs would have determined it necessary to consult and/or retain an expert regarding the nature and differences of "ad serving" versus "advertising." Such distinctions might have been critical, as would information about the types of advertisements being served by AdForce (i.e. were they Plaintiffs' advertisements or those of other third parties?).

Plaintiffs' substantial reliance on St. Paul's admission was entirely reasonable. This is not a situation like Conlon which involved *deemed* admissions, where as party is stuck with an admission they may not have intended based on the fact that they failed to timely respond to RFAs. Rather, this is a case where St. Paul affirmatively responded with an unqualified admission through its outside counsel. Moreover, St. Paul's unqualified admission was verified by an internal St. Paul attorney. Ex. 5 to Pereira Decl. Thus, several pairs of eyes reviewed St.

[7] The deposition testimony attached to the Declaration of Christopher Kerby demonstrates that Plaintiffs did not ask the specific questions that would reasonably be asked if they had believed St. Paul contended that the "3rd party advertising" prong of the Online Activities Exclusion barred their claim.

Paul's response to RFA No. 4 before it was disclosed to Plaintiffs on August 28, 2006. Plaintiffs' subsequent reliance on this unqualified admission during its depositions, in its dealings with its technical expert, and in its summary judgment briefing was therefore entirely justified.

D. ***There is No Good Cause for St. Paul's Failure to Bring Its Motion to Amend Sooner***

In deciding whether to exercise its discretion to permit withdrawal of an admission under Rule 36(b), a court may consider other factors, including "whether the moving party can show good cause for the delay" in moving to withdraw its admission. Conlon, 474 F. 3d at 625. Here, no such good cause exists.

St. Paul's Motion erroneously argues that "[t]here is no dispute that it was not until the filing of AOL/Netscape's Cross-Motion and Carome's Declaration that St. Paul became aware" that Plaintiffs would argue in this action that the SmartDownload claimants' alleged that Plaintiffs transmitted their private information to third parties, including AdForce. Motion at 9. **Plaintiffs absolutely dispute this**. As demonstrated above, Plaintiffs' discovery – first provided to St. Paul in mid-2006 – made it absolutely clear that Plaintiffs intended to argue that the SmartDownload claimants asserted that their private information was shared with AdForce, a third-party ad-serving company. Thus, the "3rd party advertising issue" – if, indeed, there is one – first arose when Plaintiffs responded to St. Paul's discovery more than nine months ago.

Even assuming, however, that St. Paul could credibly claim it was unaware of Plaintiffs' position until Plaintiffs filed their Cross-Motion, it still fails to justify its delay of 2+ months in bringing this Motion. St. Paul filed its response to Plaintiffs' Cross-Motion on February 9, 2007. At this time, it could have (and should have) filed this Motion. It failed to do so. Instead, it simply served Plaintiffs with an amended admission, ignoring the plain and unambiguous requirements of Rule 36. Moreover, Plaintiffs pointed-out St. Paul's procedural error in papers filed on March 2nd. Instead of moving promptly to correct its error at that time, St. Paul waited another four weeks – until March 29 – to file its motion. In short, St. Paul's Motion is not only unmeritorious, but late, and should be denied.

E. *If Allowed, St. Paul's Amended Admission Will Merely Bolster an Argument Which is Extremely Weak on the Merits*

In determining whether to exercise its discretion to allow withdrawal of an admission under Rule 36(b), a court is permitted to consider "whether the moving party has a strong case on the merits." Conlon, 474 F.3d at 625. Here, no credible argument can be made that the SmartDownload claim involved "3rd party advertising."

St. Paul seeks to withdraw its admission to support the argument made in its Cross-Motion reply brief that the Online Activities Exclusion bars coverage for the SmartDownload claim because "AdForce is plainly '3rd party advertising.'" (SP Reply at 25.) St. Paul's argument is nonsensical and wrong.

AdForce is not "advertising" – it was an "ad serving" company. Thus, it had two functions. The first was to serve advertisements to web site visitors. The second was to collect information regarding internet users' habits so that it could perform its first function better. Indeed, only with user-specific data could more profitable "targeted advertising" be sent (i.e. advertisements that match the user's demographic profile or product preference.) But, critically, the SmartDownload Actions have nothing to do with AdForce's first function: They do not allege that any "3rd party advertising" was sent to the claimants, and do not allege that any "3rd party advertising" invaded claimants' privacy. Rather, those actions complain only about the fact that Plaintiffs shared their private information with AdForce. Thus, claimants' complaint would have been the same regardless of whether Plaintiffs allegedly shared their private information with an ad server company like AdForce, a demographic researcher, the mailman, or anyone else they did not consent to receive their (allegedly) private information. The SmartDownload Actions are about *disclosure* of private information; they are not about "3rd party advertising."

F. *St. Paul's Proposed Amended Response is Legally Improper*

St. Paul's proposed amended response to RFA No. 4 is legally improper for several reasons.

First, it improperly contains an admissibility objection (and long string of case law citations) that must be raised by way of separate motion. See Fed. R. Civ. Proc. 26(b)(1). Thus, the entire following paragraph should be stricken from its response: "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)."

Second, St. Paul cannot now make any objection to the form of the RFA since it failed to make such objection at the time it first responded to RFA No. 4.[8] Such objection was therefore waived. Thus, the Court should strike the following from St. Paul's proposed response: "St. Paul further objects to the term 'involve' as vague and ambiguous such that Request for Admission No. 4 cannot be meaningfully answered." It is also interesting to note that Plaintiffs' other RFAs also used the term "involve" and St. Paul did not object to use of that term and had no problem responding to those RFAs.

IV. CONCLUSION

For all of these reasons, St. Paul's Motion to Amend Admission should be denied.

Dated: April 12, 2007

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By _____/s/_____
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[8] St. Paul fails to provide any explanation as to why this objection was not made (and could not have been made) at the time it first responded to Plaintiffs' RFAs.