

# **EXHIBIT 5**

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6 Attorneys for Defendant  
7 ST. PAUL MERCURY  
INSURANCE COMPANY

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

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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**PRELIMINARY STATEMENT AND GENERAL OBJECTIONS**

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

7  
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  
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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  
27  
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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

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

7  
8 By:   
9 Sara M. Thorpe  
10 Attorneys for Defendant  
11 ST. PAUL MERCURY  
12 INSURANCE COMPANY

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VERIFICATION

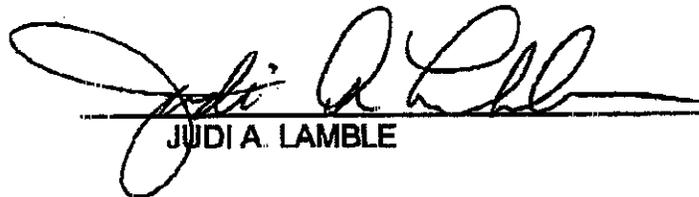
I, Judi A. Lambie, declare:

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 28<sup>th</sup> day of August, 2006, in Ramsey County, Minnesota.

  
JUDI A. LAMBLE

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**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
- 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

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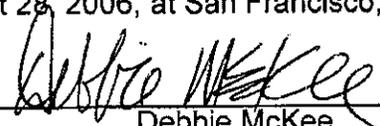
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(Via FedEx)

(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