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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION,	)	Case No.: C 06-0198 JW (PVT)
	)	
Plaintiff,	)	<b>ORDER RE ST. PAUL’S MOTION TO AMEND ADMISSION</b>
	)	
v.	)	
	)	
FEDERAL INSURANCE COMPANY, et al.,	)	
	)	
Defendants.	)	

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On March 29, 2007, Defendant St. Paul Mercury Insurance Company (“Defendant”) filed a Motion for Leave to Amend Admission.<sup>1</sup> Plaintiff opposed the motion. Having reviewed the papers submitted by the parties, the court finds it appropriate to issue this order without oral argument.

Based on the moving, opposition and reply papers submitted,

IT IS HEREBY ORDERED that, for the reasons discussed herein, Defendant’s motion for leave to amend its response to Request for Admission (“RFA”) No. 4 is GRANTED.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

This is an insurance coverage action. Plaintiffs allege that Defendant, their insurer, failed to

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<sup>1</sup> The holding of this court is limited to the facts and the particular circumstances underlying the present motion.

1 provide a defense to a series of underlying lawsuits alleging injury from certain software known as  
2 “SmartDownload.” The complaints in the underlying actions (the “SmartDownload Lawsuits”)  
3 alleged that SmartDownload violated the claimants’ privacy by, among other things, collecting,  
4 storing, and disclosing to Plaintiffs and their engineers claimants’ Internet usage. At the time of the  
5 SmartDownload Lawsuits, Plaintiffs were insured under Defendant’s Technology Commercial  
6 General Liability Protection Policy (the “Tech Policy”).

7 Plaintiffs tendered defense of the SmartDownload Lawsuits to Defendant, but Defendant  
8 denied coverage. Defendant argued, among other things, that the underlying lawsuits failed to  
9 trigger the Tech Policy’s “personal injury” coverage.

10 Ultimately the SmartDownload Lawsuits settled without any payment to the SmartDownload  
11 claimants and their attorneys. On January 11, 2006, Plaintiffs filed the present lawsuit seeking  
12 reimbursement of the attorneys’ fees and costs they incurred in defending the underlying  
13 SmartDownload Lawsuits.

14 During discovery in this action, in response to a request for admission propounded by  
15 Defendant, Plaintiffs denied that “the UNDERLYING COMPLAINTS do not allege any user  
16 information allegedly collected by AOL/Netscape through its SmartDownload program was made  
17 known to any person.” Defendant proceeded to propound discovery seeking information regarding  
18 the basis for that denial by Plaintiffs. Plaintiffs ultimately stated in a June 12, 2006 supplemental  
19 response to Defendant’s Interrogatory No. 9 that “information allegedly collected by AOL and/or  
20 Netscape was – or was to have been – shared with third parties.”<sup>2</sup> And in a July 28, 2006,  
21 supplemental response to Defendant’s Interrogatory No. 11 Plaintiff’s identified as supporting  
22 documentation “Complaints in the Underlying Actions; pleadings in the Underlying Actions,  
23 including, but not limited to, Plaintiffs’ counsel’s fee application; the settlement presentation made  
24 by the plaintiffs in the Underlying Actions and transcripts of depositions taken in the Underlying  
25 Actions.”

26 On July 24, 2006, Plaintiff America Online, Inc. (“AOL”) served RFA No. 4 on Defendant.  
27 RFA No. 4 asked Defendant to “Admit that the SMARTDOWNLOAD CLAIM does not involve ‘3<sup>rd</sup>

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28 <sup>2</sup> Conspicuously missing from Plaintiffs’ response is any specific reference to AdForce.

1 party advertising.”<sup>3</sup> The “Definitions and Instructions” section of AOL’s RFAs define  
2 “SMARTDOWNLOAD CLAIM” as:

3 “any demand made by NETSCAPE and/or AOL for insurance coverage in connection  
4 with the following actions and/or investigations brought against NETSCAPE and/or  
5 AOL: *Specht v. Netscape Communications Corp. and American Online, Inc.*, 00 CIV  
6 4871 (S.D.N.Y.); *Weindorf v. Netscape Communications Corp. and America Online,  
7 Inc.*, No. 00 CIV 6219 (S.D.N.Y.); *Gruber v. Netscape Communications Corp. and  
8 America Online, Inc.*, No. 00 CIV 6249 (S.D.N.Y.); *Mueller v. Netscape  
9 Communications Corp. and America Online, Inc.*, No. 00 CIV 01723 (D.D.C.); and  
10 investigation by New York’s Attorney General into consumer protection issues  
11 associated with Netscape Communicator and/or Smartdownload.”

12 In its initial response to AOL’s RFAs, Defendant asserted objections on grounds that, among other  
13 things, the RFAs were irrelevant, vague, ambiguous, unintelligible and overly broad. Defendant  
14 expressly stated that it was not waiving those objections by providing responses, and with regard to  
15 RFA No. 4, Defendant responded “admit.”<sup>4</sup>

16 On January 12, 2007, Plaintiffs filed their Cross-motion for Summary Judgment Re: Duty to  
17 Defend in which they articulated a coverage theory based on a claim that the plaintiffs in the  
18 underlying lawsuits claimed that their private information was shared with a third party advertising  
19 company called “AdForce.”

20 In response, Defendant served a “supplemental response” to RFA No. 4, purporting to narrow  
21 its prior admission to the information provided to it with Plaintiffs’ tender of defense, and to deny  
22 the request based on both the information provided by Plaintiffs in discovery in this action and the  
23 arguments now being advanced in Plaintiffs’ summary judgment brief. After it was brought to  
24 Defendant’s attention that a court order was required to amend a response to a request for admission,  
25 on March 29, 2007, Defendant filed the instant motion.

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26 <sup>3</sup> The phrase “3<sup>rd</sup> party advertising,” although placed in quotes, was not specifically  
27 defined.

28 <sup>4</sup> This is the proper procedure for responding to an RFA when the responding party  
believes the request is objectionable, is not at that time aware of a factual basis for denying the request,  
but does not wish to run the risk of sanctions for not admitting the matter in the event the objections are  
overruled. *See Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 936-37 (9<sup>th</sup> Cir. 2002),  
amended by 313 F.3d 1093 (2002).

1           **II.     DISCUSSION**

2           Under all the circumstances of this case, leave to amend is warranted. Rule 36(b) of the  
3 Federal Rules of Civil Procedure provides, in relevant part:

4           Subject to the provision of Rule 16 governing amendment of a pre-trial order, the  
5 court may permit withdrawal or amendment when the presentation of the merits of the  
6 action will be subserved thereby and the party who obtained the admission fails to  
maintain the action or defense on the merits.

7           In this case, allowing amendment will subserve presentation of the merits because there is a  
8 legitimate factual dispute regarding whether or not any of the underlying lawsuits or investigations  
9 involved “3<sup>rd</sup> party advertising.” *See Conlon v. United States*, 474 F.3d 616, 622 (9<sup>th</sup> Cir. 2007)  
10 (noting that one of the goals of Rule 36(b) is truth-seeking in litigation). Defendant argues, and  
11 Plaintiffs do not dispute, that before production of certain documents in discovery six months *after*  
12 this lawsuit was filed, Defendant had never been provided with any information suggesting that the  
13 underlying claims against Plaintiffs involved disclosure of any information to an advertising-related  
14 company. Based on the record before the court, it appears that Defendant never intended to admit  
15 that any claim of disclosure to AdForce of information gathered by SmartDownload did not “involve  
16 3<sup>rd</sup> party advertising.” Saddling Defendant with such an unintended admission would subvert, not  
17 subserve, the truth-seeking goal of litigation.

18           Further, Plaintiffs have not met their burden of satisfying the court that withdrawal or  
19 amendment of the admission would prejudice them in maintaining their action on the merits. *See*  
20 *ibid.* (“The party relying on the deemed admission has the burden of proving prejudice.”) In light of  
21 the numerous objections Defendant asserted in response to the requests for admission, Plaintiffs  
22 could not reasonably have relied on the admissions in determining what discovery to pursue.<sup>5</sup>

23 \_\_\_\_\_  
24           <sup>5</sup> It appears at least some of the objections may be well taken. For example, RFA No. 4  
25 appears to be vague and ambiguous with regard to whether it is limited to the information included in  
26 the coverage demands Plaintiffs actually made on Defendant prior to filing this lawsuit, or whether it  
27 is intended to cover any demands for coverage based on factual scenarios which Plaintiffs hypothetically  
28 could have relied on during the claim review process. This RFA also appears to be vague and  
ambiguous because it does not apprise either Defendant or this court whether it is limited to the actual  
claims and allegations in the underlying complaints and investigation, or if it somehow encompasses any  
and all extraneous comments made during the course of litigation. In light of this order allowing  
Defendant to amend its response to RFA No. 4, the court takes no position on the objections at this time.  
The court makes this observation only as part of its explanation why Plaintiffs could not have reasonably  
relied on RFA No. 4 in determining what discovery they needed to conduct.

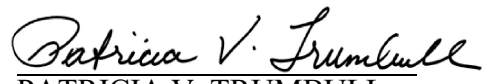
1 Moreover, even without additional discovery, Plaintiffs were able in their summary judgment reply  
2 brief to articulate their legal argument with regard to why the “3<sup>rd</sup> Party Advertising” should not  
3 apply to their claims.

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**III. CONCLUSION**

Because the presentation of the merits will be subserved by allowing Defendant to amend its response to RFA No. 4, and because Plaintiffs have not satisfied the court that they will be prejudiced by the amendment, leave to amend is warranted.

Dated: 4/27/07

  
PATRICIA V. TRUMBULL  
United States Magistrate Judge