

1 ABELSON | HERRON LLP
Michael Bruce Abelson (SBN 130739)
2 Leslie A. Pereira (SBN 180222)
333 South Grand Ave, Suite 650
3 Los Angeles, California 90071-1559
Telephone: (213) 402-1900
4 Facsimile: (213) 402-1901
mabelson@abelsonherron.com
5 lpereira@abelsonherron.com

6 BERGESON, LLP
Daniel J. Bergeson (SBN 105439)
7 Hway-ling Hsu (SBN 196178)
303 Almaden Boulevard, Suite 500
8 San Jose, California 95110-2712
Telephone: (408) 291-6200
9 Facsimile: (408) 297-6000
dbergeson@be-law.com
10 hhsu@be-law.com

11 Attorneys for Plaintiffs
NETSCAPE COMMUNICATIONS
12 CORPORATION and AMERICA ONLINE, INC.

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION**

15
16
17 NETSCAPE COMMUNICATIONS
CORPORATION, a Delaware corporation;
18 and AMERICA ONLINE, INC., a Delaware
corporation,

19 Plaintiffs,

20
21 v.

22 FEDERAL INSURANCE COMPANY, an
Indiana corporation; ST. PAUL MERCURY
23 INSURANCE COMPANY, a Minnesota
corporation; EXECUTIVE RISK
24 SPECIALTY INSURANCE COMPANY; a
Connecticut corporation, and DOES 1
25 through 50,

26 Defendants.
27

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

**FIRST AMENDED COMPLAINT FOR
BREACH OF CONTRACT; TORTIOUS
BREACH OF THE COVENANT OF
GOOD FAITH AND FAIR DEALING;
UNFAIR BUSINESS PRACTICES**

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

JURY TRIAL DEMANDED

1 Plaintiffs Netscape Communications Corporation and America Online, Inc.
2 (hereinafter, collectively, "Insureds"), for their Complaint against the Defendants Federal
3 Insurance Company; St. Paul Mercury Insurance Company; and Executive Risk Specialty
4 Insurance Company (hereinafter, collectively, "Insurers"); and Does 1 through 50, inclusive,
5 allege as follows:

6 **SUMMARY**

7 1. This insurance coverage action arises out of the wrongful refusal of the Defendant
8 insurers Federal, St. Paul and Executive Risk to defend and indemnify Plaintiffs Netscape and
9 AOL for a series of underlying liability actions alleging that the Insureds' products violated
10 consumers' privacy rights by, among other things, surreptitiously intercepting electronic
11 communications for the purpose of tracking information regarding consumers' specific web-
12 viewing habits. Similar allegations formed the core of an investigation into Netscape's software
13 products by New York State's Attorney General.

14 2. At all times relevant to this action, the Insureds had in place – and had paid
15 millions of dollars in premiums to secure – insurance coverage from the Insurers which was
16 specifically designed to protect the Insureds against allegations similar to those in the
17 consumers' lawsuits and the Attorney General's investigation. Despite this, the Insurers refused
18 to perform their contractual obligations. As a result, Plaintiffs incurred millions of dollars in (as
19 yet unrecompensed) defense and indemnity costs which the Insurers were contractually obligated
20 to pay.

21 3. The Insurers' denials of coverage were wrongful and without a reasonable basis in
22 either fact or law.

23 4. Plaintiffs/Insureds now bring this action to vindicate their policy rights and to
24 recover the substantial sums they incurred both defending and resolving the underlying actions
25 and the Attorney General's investigation. Netscape and AOL also seek to recover further and
26 additional relief on account of the Insurers' unreasonable denials and unfair business practices
27 which deprived them of insurance coverage that was due and owing.

THE PARTIES

1
2 5. Plaintiff Netscape Communications Corporation (“Netscape”) is, and at all times
3 material to this action was, a corporation organized and existing under and by virtue of the laws
4 of the State of Delaware. Netscape’s principal place of business is in Mountain View,
5 California.

6 6. Plaintiff America Online, Inc. (“AOL”) is, and at all times material to this action
7 was, a corporation organized and existing under and by virtue of the laws of the State of
8 Delaware. AOL’s principal place of business is Dulles, Virginia. On March 17, 1999, Netscape
9 was acquired by, and became a wholly owned subsidiary of, AOL.

10 7. Defendant Federal Insurance Company (“Federal”) is, and at all times material to
11 this action was, a corporation organized and existing under and by virtue of the laws of the State
12 of Indiana. Federal’s principal place of business is in Warren, New Jersey. At all times material
13 to this action, Federal was qualified to transact, and was transacting, the business of insurance in
14 the State of California.

15 8. Defendant St. Paul Mercury Insurance Company (“St. Paul”) is, and at all times
16 material to this action was, a corporation organized and existing under and by virtue of the laws
17 of the State of Minnesota. St. Paul’s principal place of business is in Minnesota. At all times
18 material to this action, St. Paul was qualified to transact, and was transacting, the business of
19 insurance in the State of California.

20 9. Defendant Executive Risk Specialty Insurance Company (“Executive Risk”) is,
21 and at all times material to this action was, a corporation organized and existing under and by
22 virtue of the laws of the State of Connecticut. Executive Risk’s principal place of business is in
23 Connecticut. At all times material to this action, Executive Risk was qualified to transact, and
24 was transacting, the business of insurance in the State of California.

25 10. Plaintiffs Netscape and AOL do not know the true names and capacities, whether
26 individual, associate, corporate otherwise of Defendant DOE 1 through DOE 50, inclusive, and
27 Plaintiffs therefore sue these DOE defendants by such fictitious names and will amend this
28 complaint to show their true names and capacities when the same are ascertained. Plaintiffs are

1 informed and believe, and based thereupon allege, that Defendant DOE 1 through DOES 50,
2 inclusive, and each of them, were in some manner responsible or legally liable for the events,
3 actions, transactions and circumstances alleged herein.

4 **JURISDICTION AND INTRADISTRICT ASSIGNMENT**

5 11. This action was filed in Santa Clara County Superior Court on December 12,
6 2005. It was removed by Defendants on January 11, 2006, who alleged jurisdiction is proper
7 under 28 U.S. C. §1332, and that assignment to the United States District Court for the Northern
8 District of California, San Jose Division, is proper under the Civil Local Rules because the San
9 Jose Division embraces the county where the state court action was pending.

10 **THE UNDERLYING ACTIONS AGAINST NETSCAPE AND AOL**

11 12. Plaintiff AOL is the Internet's premier service and content provider. For nearly
12 two decades, AOL has set the standard for interactive online services which have both shaped
13 and influenced the direction of the evolving community known as the world wide web. As part
14 of its history and development, AOL has acquired a number of products and services designed to
15 support and enhance its operations including, in March 1999, products and services developed by
16 Plaintiff Netscape.

17 13. As part of their business strategies, both AOL and Netscape developed and
18 maintained risk management programs to protect their businesses against unanticipated
19 exposures and losses. A key component of such strategy was insurance. In the case of Netscape,
20 the company maintained multimillion dollar liability coverage through Federal (\$2 million).
21 Similarly, AOL insured itself and its subsidiaries, including Netscape, with policies issued by St.
22 Paul (\$2 million) and Executive Risk (\$10 million). The fundamental principle of such coverage
23 was to provide the Insureds with assets to both defend and, if necessary, indemnify themselves
24 against unexpected liabilities by way of legal action or otherwise. Coverage was also
25 specifically placed to provide resources to the Insureds to fend-off actions which were
26 groundless, fraudulent and/or false.

27 14. In 2000, four related civil actions were filed against Netscape and AOL
28 (hereinafter, the "Underlying Actions"):

1 (a) *Specht v. Netscape Communications Corp. and American Online, Inc.*, 00
2 CIV 4871 (S.D.N.Y.). A true and correct copy of the complaint in the Specht lawsuit is attached
3 hereto as Exhibit 1 and incorporated herein by reference;

4 (b) *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No.
5 00 CIV 6219 (S.D.N.Y.). A true and correct copy of the complaint in the Weindorf lawsuit is
6 attached hereto as Exhibit 2 and incorporated herein by reference;

7 (c) *Gruber v. Netscape Communications Corp. and America Online, Inc.*, No. 00
8 CIV 6249 (S.D.N.Y.). A true and correct copy of the complaint in the Gruber lawsuit is attached
9 hereto as Exhibit 3 and incorporated herein by reference.

10 (d) *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00
11 CIV 01723 (D.D.C.). A true and correct copy of the complaint in the Mueller lawsuit is attached
12 hereto as Exhibit 4 and incorporated herein by reference. On or about August 24, 2002, Mueller
13 voluntarily dismissed his complaint.

14 15. As set forth in the Underlying Actions' complaints, the lawsuits served upon
15 Plaintiffs were styled as putative class actions and sought, among other things, compensatory
16 damages and other relief for Netscape's and AOL's alleged interception of consumers' private
17 electronic communications during the late 1990s. Specifically, the Underlying Actions alleged
18 that two Netscape software products, Netscape Communicator and SmartDownload, operated in
19 tandem to surreptitiously collect personal and private information from consumers, causing the
20 (unwitting) disclosure through the Internet of electronic addresses of files downloaded, together
21 with identifying codes. The complaints further alleged that records of sites consumers visited
22 were monitored, captured and transmitted to Netscape and AOL, thereby imparting the contents
23 of consumers' communications to parties who were not authorized, entitled, or otherwise
24 intended to view such private communications. Among the claims asserted in the Underlying
25 Actions were violations of two federal statutes: The Electronic Communications and Privacy
26 Act (18 U.S.C. §§ 2511 and 2520) and the Computer Fraud and Abuse Act (18 U.S.C. § 1030).

27 16. Shortly after the filing of the Underlying Actions, New York's Attorney General
28 initiated an investigation into certain privacy-related consumer protection issues (the "Attorney

1 General's Investigation"). At its core, the Attorney General's Investigation focused on privacy
2 violations similar to those asserted in the Underlying Actions.

3 17. Following the receipt of the Underlying Actions' complaints and the Attorney
4 General's Investigation, AOL and Netscape gave notice of those proceedings to their respective
5 insurers for purposes of triggering defense and, if necessary, indemnity obligations. As
6 described more fully below, none of the Insurers acknowledged coverage. Each denied its
7 responsibility and, without exception, they refused to provide any benefits whatsoever under
8 their respective policies. Thus, notwithstanding the millions of dollars in premiums the Insureds
9 had paid to secure coverage for allegations such as those contained in the Underlying Action and
10 the Attorney General Investigation, AOL and Netscape were forced to use their own resources to
11 defend and, ultimately, resolve those matters.

12 18. On September 2, 2004, Netscape and AOL resolved all claims asserted against
13 them in the Underlying Actions by entering into a Stipulation of Settlement with each action's
14 class representatives. Prior to doing so, the Insurers were advised of the forthcoming settlement
15 and invited to participate in the actions' resolution so as to mitigate the harm caused by their
16 failures to defend. The Insurers were unmoved. None availed themselves of the settlement
17 opportunity offered.¹

18 19. On January 11, 2005, the Court entered a Final Order and Judgment approving the
19 terms of the Stipulation of Judgment.

20 **THE INSURERS' POLICIES AND THEIR DENIALS OF COVERAGE**

21 20. As part of their comprehensive risk management programs, Netscape and AOL
22 each procured and maintained insurance coverage to guard against unanticipated exposures and
23 losses.

24
25
26
27 ¹ The Attorney General Investigation continued until June 12, 2003, at which time the New York
28 Attorney General's office agreed not to commence a proceeding against Netscape in return for
Netscape's agreement to undertake (and refrain from taking) certain specified activities.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Netscape's Insurance

21. **Federal**. Federal issued Netscape its so-called "Electronics Insurance Program," policy number 35351119, which includes both first-party property and third-party liability insurance (the "Federal Policy"). The Federal Policy provides primary comprehensive general liability coverage with limits of \$2 million. A true and correct copy of the Federal Policy is attached hereto as Exhibit 5 and incorporated herein by reference.

22. The Federal Policy covers the time period April 30, 1998 to April 30, 1999. However, because the third-party liability portion of the Federal Policy provides "occurrence-based" or "offense-based" coverage, the policy provides coverage for any claim against Netscape (now or in the future) alleging that Netscape engaged in specified wrongful conduct during the time period April 30, 1998 to April 30, 1999, *regardless of when the claim is brought*. Thus, the Federal Policy stands in stark contrast to a "claims made" insurance policy which provides coverage only for claims that are brought against the insured *during the policy period*. For this reason, Netscape and Federal are currently in contractual privity (and will continue to be into the future) until such time as the limits of the Federal Policy are exhausted.

23. By its terms, the Federal Policy provides Netscape with coverage for liability for personal injuries such as those alleged in the Underlying Actions. The Federal Policy defines "personal injury" as injury arising out of a number of offenses, including "oral or written publication of material that violates a person's right of privacy." The Federal Policy further provides that Federal had "the right and duty to defend any insured against a suit seeking damages for . . . personal injury."

24. Notwithstanding such provisions, Federal denied coverage for the Underlying Actions. In so doing, Federal wrongly asserted, among other things, that the Underlying Actions did not trigger its policy's definition of "personal injury." A number of other (inapplicable) exclusions were also cited. Despite good faith efforts to convince Federal of its errors, the insurer refused to relent.

Insurance Applicable to both Netscape and AOL

1
2 25. **St. Paul.** St. Paul issued its technology commercial general liability policy
3 number TE0900917 with limits of \$2 million (the “St. Paul Policy”). A true and correct copy of
4 the St. Paul Policy is attached hereto as Exhibit 6 and incorporated herein by reference.

5 26. The St. Paul Policy covers the time period April 1, 1999 to April 1, 2000.
6 However, because the St. Paul Policy provides “occurrence-based” or “offense-based” coverage,
7 the policy provides coverage for any claim against AOL and/or Netscape (now or in the future)
8 alleging that AOL and/or Netscape engaged in specified wrongful conduct during the time period
9 April 1, 1999 to April 1, 2000, *regardless of when the claim is brought*. Thus, the St. Paul
10 Policy stands in stark contrast to a “claims made” insurance policy which provides coverage only
11 for claims that are brought against the insured *during the policy period*. For this reason, AOL
12 and Netscape are currently in contractual privity with St. Paul (and will continue to be into the
13 future) until such time as the limits of the St. Paul Policy are exhausted.

14 27. By its terms, the St. Paul Policy provides AOL and Netscape (as AOL’s wholly-
15 owned subsidiary) with coverage for liability for personal injuries such as those alleged in the
16 Underlying Actions. The St. Paul Policy defines “personal injury” as injury arising out of a
17 number of offenses, including “[m]aking known to any person or organization written or spoken
18 material that violates a person’s right of privacy.” The St. Paul Policy further provides that St.
19 Paul had “the right and duty to defend [AOL and Netscape] against a claim or suit for injury or
20 damage” covered by its insuring agreement.

21 28. Notwithstanding such provisions, St. Paul denied coverage for the Underlying
22 Actions. With little explanation of the St. Paul Policy’s specific coverage, the insurer stated that
23 it was denying coverage because the Underlying Actions did not “seek damages for personal
24 injury” as defined in its policy. A variety of other (inapplicable) exclusions were also cited.
25 Despite Netscape’s and AOL’s good faith efforts to convince St. Paul that its coverage position
26 was erroneous, the insurer refused to reverse its denial.

27 29. **Executive Risk.** Executive Risk issued its multimedia liability insurance policy
28 number 151-166530-99 with limits of \$10 million (the “Executive Risk Policy”) covering both

1 AOL and Netscape (as AOL's wholly-owned subsidiary). A true and correct copy of the
2 Executive Risk Policy is attached hereto as Exhibit 7 and incorporated herein by reference.

3 30. The Executive Risk Policy covers the time period April 1, 1999 to April 1, 2000.
4 However, because the Executive Risk Policy provides "occurrence-based" or "offense-based"
5 coverage, the policy provides coverage for any claim against AOL and/or Netscape (now or in
6 the future) alleging that AOL and/or Netscape engaged in specified wrongful conduct during the
7 time period April 1, 1999 to April 1, 2000, *regardless of when the claim is brought*. Thus, the
8 Executive Risk Policy stands in stark contrast to a "claims made" insurance policy which
9 provides coverage only for claims that are brought against the insured *during the policy period*.
10 For this reason, AOL and Netscape are currently in contractual privity with Executive Risk (and
11 will continue to be into the future) until the limits of the Executive Risk Policy are exhausted.

12 31. By its terms, the Executive Risk Policy provides coverage for claims arising out
13 of "Media Activities" such as those alleged in the Underlying Actions. As defined in the policy,
14 "Media Activities" includes assertions of "invasion or infringement of the right of privacy" if
15 done in connection with "Covered Media." For its part, "Covered Media" is broadly defined in
16 Executive Risk's Policy to mean "all Matter contained on or accessible via the World Wide Web
17 site www.aol.com, including all Matter contained on any web site accessible via a link or series
18 of links from www.aol.com. Given the nature and extent of coverage set forth in Executive
19 Risk's Policy, the insurer there was obligated to provide coverage for the privacy-related
20 allegations set forth in both the Underlying Actions complaints, as well as those of the Attorney
21 General's Investigation.

22 32. Notwithstanding such provisions, Executive Risk denied coverage for the
23 Underlying Actions and Attorney General's Investigation. In so doing, the insurer wrongly
24 asserted that the Underlying Actions did "not pertain in any way to Covered Media," as that term
25 is defined in Executive Risk's Policy. It further claimed that an inapplicable exclusion for
26 "unauthorized access" barred coverage. Despite good faith efforts to convince Executive Risk
27 that its denial was in error, Executive Risk refused to acknowledge coverage under its policy.
28

The Consequences of the Insurers' Coverage Denials

1
2 33. As a result of the Insurers' denials, the Insureds were compelled to use their own
3 resources to defend themselves against allegations asserted in the Underlying Actions and the
4 Attorney General's Investigation. From the commencement of the Underlying Actions through
5 settlement, the Insureds incurred (and paid) in excess of \$4,273,064 in attorneys' fees,
6 consultants' fees and other expenses in connection with their defense. The Insurers have never
7 reimbursed Netscape or AOL any part of those sums. Not one single penny.

8 34. In addition to failing to defend Netscape and AOL in the Underlying Actions and
9 the Attorney General's Investigation, the Insurers also breached their indemnity obligations.
10 Indeed, the Insurers' abandonment of their Insureds resulted in Netscape and AOL having to
11 settle the Underlying Actions and the Attorney General's Investigation by paying at least
12 \$100,000 to effect closure. Furthermore, an appeal pertaining to the settlement of the
13 Underlying Actions is presently pending and could result in Netscape being required to pay an
14 additional \$1,340,113.86 to resolve these matters, in addition to further defense costs, interest
15 and other sums. Had the Insurers timely and properly honored their defense and indemnity
16 obligations under their respective policies, the amounts paid in settlement (or possibly to be paid)
17 could have been minimized or avoided in their entirety.

18 35. By this action, Netscape and AOL now seek to force the Insurers to do what they
19 refused to do voluntarily: To honor their contractual obligations. To pay amounts owing. And
20 to take full responsibility for damages caused their Insureds by their systematic and improper
21 tactics to avoid coverage.

FIRST CAUSE OF ACTION

(Breach of Contract against Federal)

22
23
24 36. Netscape incorporates the allegations of Paragraphs 1 through 35 of this
25 Complaint, inclusive, as though fully set forth herein.

26 37. The Underlying Actions sought damages against Netscape which were within,
27 and which in any event were at all material times potentially within, the indemnity coverage
28 afforded by Federal's policies.

1 **THIRD CAUSE OF ACTION**

2 **(Breach of Contract against Executive Risk)**

3 48. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 of this
4 Complaint, inclusive, as though fully set forth herein.

5 49. The Underlying Actions and the Attorney General Investigation sought damages
6 against Netscape and AOL which were within, and which in any event were at all material times
7 potentially within, the indemnity coverage afforded by Executive Risk's policy.

8 50. Netscape and AOL are informed and believe and thereon allege that the limits of
9 liability of Executive Risk's policy are not exhausted and, in all events, were not exhausted at the
10 time that Netscape and AOL requested coverage for the Underlying Actions and the Attorney
11 General Investigation.

12 51. Netscape and AOL have performed each and every material obligation imposed
13 upon them by Executive Risk's policy, except to the extent such performance was been either
14 prevented or excused by Executive Risk.

15 52. By failing to provide coverage to Netscape and AOL for the Underlying Actions
16 and the Attorney General Investigation, Executive Risk breached its contractual obligations to
17 Netscape and AOL.

18 53. As a direct and proximate result of Executive Risk's breaches, Netscape and
19 AOL suffered damages in such amounts as will be proven at the trial of this action.

20 **FOURTH CAUSE OF ACTION**

21 **(Breach of the Covenant of Good Faith and**

22 **Fair Dealing against Federal)**

23 54. Netscape incorporates the allegations of Paragraphs 1 through 41 of this
24 Complaint, inclusive, as though fully set forth herein.

25 55. Federal refused to defend or indemnify Netscape under the terms of its policies
26 for claims asserted in the Underlying Actions. Federal's position was inherently unreasonable
27 and reflected its failure to give equal regard to the interests of Netscape as it (obviously) gave to
28

1 its own interests. By its actions and inactions, Federal breached the respective covenant of good
2 faith and fair dealing implied into its policy by, among other things, the following:

- 3 a. Asserting that the Underlying Actions did not allege any “personal injury”
4 when it knew or should have known that they did allege a “personal injury”;
- 5 b. Interposing an exclusion for “Intentional Falsehoods” when it knew (or
6 should have known) that such exclusion was inapplicable;
- 7 c. Interposing an exclusion for “Willful Violations” when it knew (or should
8 have known) that such exclusion was inapplicable;
- 9 d. Insisting that other policy provisions barred coverage when it knew (or
10 should have known) that such provisions were inapplicable;
- 11 e. Failing to follow fair and appropriate policies and procedures in
12 processing Netscape’s insurance claim.

13 56. As a proximate result of Federal’s (mis)conduct, Netscape has been damaged as
14 heretofore alleged, and has incurred substantial additional costs, including but not limited to its
15 attorneys’ fees, expenses and costs incurred in seeking to mitigate and remedy Federal’s breach
16 of its coverage obligations. The full amount of such damages will be proven at the trial of the
17 action of this matter.

18 57. As alleged herein, Federal’s conduct with respect to Netscape was malicious,
19 oppressive, and fraudulent, and taken in willful disregard of Netscape’s rights. Consequently,
20 Netscape is entitled to recover punitive damages both to punish Federal for its transgressions and
21 to deter others from engaging in similar wrongful conduct.

22 **FIFTH CAUSE OF ACTION**

23 **(Breach of the Covenant of Good Faith and**
24 **Fair Dealing against St. Paul)**

25 58. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 and 42
26 through 47 of this Complaint, inclusive, as though fully set forth herein.

27 59. St. Paul refused to defend or indemnify Netscape and AOL under the terms of its
28 policy for claims asserted in the Underlying Actions. St. Paul’s position was inherently

1 unreasonable and reflected its failure to give equal regard to the interests of Netscape and AOL
2 as it (obviously) gave to its own interests. By its actions and inactions, St. Paul breached the
3 respective covenant of good faith and fair dealing implied into its policy by, among other things,
4 the following:

5 a. Asserting that the Underlying Actions did not allege any "personal injury"
6 when it knew or should have known that they did allege a "personal injury";

7 b. Interposing an exclusion for "Online Activities" when it knew (or should
8 have known) that such exclusion was inapplicable;

9 c. Insisting that other policy provisions barred coverage when it knew (or
10 should have known) that such provisions were inapplicable;

11 d. Failing to follow fair and appropriate policies and procedures in
12 processing Netscape's and AOL's insurance claims.

13 60. As a proximate result of St. Paul's (mis)conduct, Netscape and AOL have been
14 damaged as heretofore alleged, and have incurred substantial additional costs, including but not
15 limited to their attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy St.
16 Paul's breach of its coverage obligations. The full amount of such damages will be proven at the
17 trial of the action of this matter.

18 61. As alleged herein, St. Paul's conduct with respect to its insureds was malicious,
19 oppressive, and fraudulent, and taken in willful disregard of Netscape's and AOL's rights.
20 Consequently, Netscape and AOL are entitled to recover punitive damages both to punish St.
21 Paul for its transgressions and to deter others from engaging in similar wrongful conduct.

22 **SIXTH CAUSE OF ACTION**

23 **(Breach of the Covenant of Good Faith and**

24 **Fair Dealing against Executive Risk)**

25 62. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 and 48
26 through 53 of this Complaint, inclusive, as though fully set forth herein.

27 63. Executive Risk refused to defend or indemnify Netscape and AOL under the
28 terms of its policy for claims asserted in the Underlying Actions and Attorney General

1 Investigation. Executive Risk's position was inherently unreasonable and reflected its failure to
2 give equal regard to the interests of Netscape and AOL as it (obviously) gave to its own interests.
3 By its actions and inactions, Executive Risk breached the respective covenant of good faith and
4 fair dealing implied into its policy by, among other things, the following:

5 a. Asserting that the Underlying Actions and Attorney General Investigation
6 did not allege a "Claim" when it knew or should have known that they did allege a "Claim";

7 b. Asserting that the Underlying Actions and Attorney General Investigation
8 did not allege a "Claim" in connection with "Media Activities" when it knew or should have
9 known that they did;

10 c. Interposing an exclusion for "unauthorized access" when it knew (or
11 should have known) that such exclusion was inapplicable;

12 d. Insisting that other policy provisions barred coverage when it knew (or
13 should have known) that such provisions were inapplicable;

14 e. Failing to follow fair and appropriate policies and procedures in
15 processing Netscape's and AOL's insurance claims.

16 64. As a proximate result of Executive Risk's (mis)conduct, Netscape and AOL have
17 been damaged as heretofore alleged, and have incurred substantial additional costs, including but
18 not limited to its attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy
19 Executive Risk's breach of its coverage obligations. The full amount of such damages will be
20 proven at the trial of the action of this matter.

21 65. As alleged herein, Executive Risk's conduct with respect to its insureds was
22 malicious, oppressive, and fraudulent, and taken in willful disregard of Netscape's and AOL's
23 rights. Consequently, Netscape and AOL are entitled to recover punitive damages both to punish
24 Executive Risk for its transgressions and to deter others from engaging in similar wrongful
25 conduct.

26
27
28

SEVENTH CAUSE OF ACTION

(Unfair Business Practices against All Defendants)

1
2
3 66. Netscape and AOL incorporate the allegations of Paragraphs 1 through 65 of this
4 Complaint, inclusive, as though fully set forth herein.

5 67. Netscape and AOL bring this cause of action in their individual capacities.

6 68. Netscape and/or AOL are insureds or intended beneficiaries under Defendants'
7 policies.

8 69. As "occurrence-based" (as opposed to "claims-made") insurance policies,
9 Defendants' policies are currently in full force and effect. Thus, Plaintiffs and Defendants are
10 currently in contractual privity, and will remain in such a relationship until such time as the
11 limits of the Insurers' underlying policies are exhausted by reason of payment of claims.

12 70. Given the nature and extent of the Insureds' business operations, Plaintiffs
13 anticipate that privacy claims implicating the "personal injury" and/or "Media Activities"
14 coverages in the Insurers' policies may be brought against them in the future, including privacy-
15 related claims which are groundless, fraudulent or false. Like the Underlying Actions at issue in
16 this lawsuit, all such claims will be tendered to Defendants for defense and indemnity coverage.

17 71. Notwithstanding the Insurers' coverage obligations, Netscape and AOL are
18 informed and believe (and on that basis allege) that the Insurers have a policy and practice of
19 automatically denying (or severely limiting available coverage for) all claims that implicate their
20 "personal injury" and/or "Media Activities" coverages, particularly when privacy allegations are
21 asserted against their insureds.

22 72. The acts and practices alleged above constitute acts of unfair competition as
23 defined by California Business and Professions Code Section 17200 in that they are fraudulent
24 and/or unfair and present a continuing threat to Netscape, AOL and members of the public and
25 because they deprive policyholders of the insurance coverage they intend to purchase, and
26 believe that they have, in fact, purchased.

27 73. Plaintiffs have no adequate remedy at law. Accordingly, Defendants should be
28 preliminarily and permanently enjoined from engaging in these fraudulent and/or unfair business

1 practices at any time in the future, especially because the occurrence-based nature of the subject
2 policies means that the Insureds are Insurers will continue in privity into the future and until such
3 time as Insurers' policy obligations are terminated by reason of exhaustion of their policy limits
4 though payment of claims.

5 WHEREFORE, Netscape and/or AOL pray for judgment as follows:

6 **On The First Cause of Action:**

- 7 1. For compensatory damages in an amount to be proved at trial;

8 **On The Second Cause of Action:**

- 9 2. For compensatory damages in an amount to be proved at trial;

10 **On The Third Cause of Action:**

- 11 3. For compensatory damages in an amount to be proved at trial;

12 **On The Fourth Cause of Action:**

- 13 4. For compensatory damages in an amount to be proved at trial;
14 5. For punitive damages in an amount sufficient to punish and make an example of
15 Federal;

16 **On The Fifth Cause of Action:**

- 17 6. For compensatory damages in an amount to be proved at trial;
18 7. For punitive damages in an amount sufficient to punish and make an example of
19 St. Paul;

20 **On The Sixth Cause of Action:**

- 21 8. For compensatory damages in an amount to be proved at trial;
22 9. For punitive damages in an amount sufficient to punish and make an example of
23 Executive Risk;

24 **On The Seventh Cause of Action:**

- 25 10. Pursuant to California Business and Professions Code Section 17203, and under
26 the equitable powers of the Court, for an order preliminarily and permanently enjoining
27 Defendants from committing, aiding, abetting, or inducing the commission of the fraudulent
28 and/or unfair business practices alleged herein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

On All Of The Causes of Action:

11. For their costs of suit incurred herein,

12. For prejudgment and post judgment interest at the maximum legal rate on all sums awarded; and

13. For such other relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a jury trial.

Dated: February 24, 2005

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

BERGESON, LLP
Daniel J. Bergeson
Hway-ling Hsu

By _____ /s/
Hway-ling Hsu
Attorneys for Plaintiffs
Netscape Communications Corporation and
America Online, Inc.