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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICA ONLINE, INC., a Delaware corporation,)	CASE NO. . C-06-00198 JW (PVT)
)	JOINT REPORT AND JOINT CASE MANAGEMENT STATEMENT; [PROPOSED] CASE MANAGEMENT ORDER
Plaintiffs,)	
v.)	Date: June 5, 2006
FEDERAL INSURANCE COMPANY, an Indiana corporation; ST. PAUL MERCURY INSURANCE COMPANY, a Minnesota corporation; EXECUTIVE RISK SPECIALTY INSURANCE COMPANY; a Connecticut corporation, and DOES 1 through 50,)	Time: 9:00 a.m.
)	Judge: Hon. James Ware
Defendants.)	Courtroom 8
)	Complaint Filed: December 12, 2005
)	Amended Complaint Filed: Feb. 22, 2006

The parties to the above-entitled action jointly submit this Report, Case Management Statement and [Proposed] Case Management Order.

DESCRIPTION OF THE CASE

1. Brief description of the events underlying the action

In 2000, Plaintiffs Netscape Communications Corp. (“Netscape”) and America Online (“AOL”) were sued in four class actions brought in New York and Washington, D.C. (the “Class Actions”). The Class Actions alleged that through Netscape’s

1 “SmartDownload” program, AOL and Netscape intercepted their private information. The
 2 Class Actions alleged claims for violation of the Electronic Communications Privacy Act, 18
 3 U.S.C. sec. 2511 and 2520, and the Computer Fraud and Abuse Act, 18 U.S.C. 1030. In
 4 addition, the New York Attorney General initiated an investigation into Netscape's and
 5 AOL's practices in this regard.

6 The Class Actions were tendered to defendants Federal Insurance Company
 7 ("Federal"), Executive Risk Specialty Insurance Company ("Executive Risk"), and St. Paul
 8 Mercury Insurance Company ("St. Paul"), among other insurance companies. Federal,
 9 Executive Risk and St. Paul denied coverage for the Class Actions and, to the extent
 10 tendered, the Attorney General investigation. The Class Actions were settled in September
 11 2004.

12 Plaintiffs Netscape and AOL seek to recover in this action the amounts incurred in
 13 connection with the Class Actions and Attorney General investigation. Plaintiffs allege
 14 causes of action for breach of contract, breach of the covenant of good faith and fair
 15 dealing, and unfair business practices under California Business & Professions Code sec.
 16 17200 (the “Section 17200 Claim”). Defendants filed a motion to dismiss the Section
 17 17200 Claim, which was granted by this Court with leave to amend on February 22, 2006.
 18 Plaintiffs filed a first amended complaint on February 24, 2006. On March 10, 2006,
 19 Defendants again filed a motion to dismiss the Section 17200 Claim, which is s cheduled
 20 for hearing on April 17, 2006.

21 **2. Principal legal and factual issues which the parties dispute**

22 **a. Factual issues**

- 23 • Which claims were tendered to each insurer and when.
- 24 • The timing of the insurers' denials of each claim.
- 25 • The precise terms of at least one of the policies at issue in this lawsuit.
- 26 • The nature of Plaintiffs' conduct as alleged in the underlying actions.
- 27 • The timing and adequacy of the insurers' investigations.
- 28 • Whether, if there was coverage afforded by any of these policies, the claims

1 handling by the insurers was in breach of the covenant of good faith and fair
2 dealing, in other words unreasonable and without proper cause.

- 3 • Whether (if any such claim can be stated) any of the insurers engaged in any
4 fraudulent or unfair business practice of automatically denying privacy claims
5 under their policies.
- 6 • Whether Defendants' conduct was oppressive, fraudulent, or malicious.
- 7 • One or more factual disputes with respect to the nature of the costs incurred
8 by Plaintiffs.

9 **b. Legal issues**

- 10 • Which state's law should be applied to the issues in this case.
- 11 • Whether Plaintiffs' amended complaint properly pleads a Section 17200
12 Claim and whether defendants' conduct supports such a claim .
- 13 • Whether Defendants had a duty to defend the underlying actions.
- 14 • Whether Plaintiffs are entitled to Brandt fees.
- 15 • Whether Plaintiffs are entitled to an injunction.

16 **3. The other factual issues [e.g. service of process, personal jurisdiction, subject**
17 **matter jurisdiction or venue] which remain unresolved for the reason stated below**
18 **and how the parties propose to resolve those issues.**

19 Defendants are still investigating the claims being made in this lawsuit and reserve
20 the right to contest venue.

21 **4. The parties which have not been served and the reasons.**

22 All parties have been served.

23 **5. The additional parties which the below-specified parties intend to join and the**
24 **intended time frame for such joinder.**

25 No additional parties are expected to be joined at this time .

26 **ALTERNATIVE DISPUTE RESOLUTION**

27 **6. The following parties consent to assignment of this case to a United States**
28 **Magistrate Judge for [court or jury] trial.**

1 The parties do not consent to the assignment of this case to a Magistrate Judge.

2 **7. The parties have already been assigned [or the parties have agreed] to the**
3 **following court ADR process [e.g. *Nonbinding Arbitration, Early Neutral Evaluation,***
4 ***Mediation, Early Settlement with a Magistrate Judge*] [State the expected or**
5 ***scheduled date for the ADR session*].**

6 The parties have not been assigned to any ADR process.

7 **8. The ADR process to which the parties jointly request [or a party separately**
8 ***requests*] referral.**

9 The parties agree to use private mediation for this ADR process. The parties are
10 agreed that referral to ADR will be most effective after one or more dispositive motions
11 have been filed and briefed.

12 DISCLOSURES

13 **9. The parties certify that they have made the following disclosures [*list***
14 ***disclosures of persons, documents, damage computations and insurance***
15 ***agreements*].**

16 No disclosures have yet been made. The parties are agreed that the Initial
17 Disclosures pursuant to Rule 26(a)(1) should take place on March 17, 2006. However, the
18 parties are in disagreement as to the scope of those Initial Disclosures.

- 19 • **Plaintiffs' Position:** Plaintiffs believe the parties are obligated to exchange
20 Initial Disclosures which fully comply with Rule 26(a)(1) and which pertain to
21 *all* of the claims in Plaintiffs' amended complaint in this matter (breach of
22 contract, bad faith, and violation of Section 17200).
- 23 • **Defendants' Position:** Defendants object to making disclosures in
24 connection with the Section 17200 Claim because of their pending motions
25 to dismiss that cause of action, and as to any claims other than the breach of
26 contract claim, consistent with Rule 26(a)(1) and 16(c)(6) of the Fed. Rules of
27

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1 Civ. P.¹, for the reasons set forth more fully in Section 11.b, below.

2 **10. Calculation Of Damages.**

3 Plaintiffs have advised Defendants that their estimate of damages incurred in this
4 action are in the range of \$4.3 million for attorneys' fees and other expenses incurred in
5 connection with their defense, and that they may incur an additional \$1.3 million depending
6 on the outcome of the appeal of the underlying matters.

7 **DISCOVERY (AND MOTIONS)**

8 **11. The parties agree to the following discovery plan [*Describe the plan e.g., any***
9 ***limitation on the number, duration or subject matter for various kinds of discovery,***
10 ***discovery from experts; deadlines for completing discovery*].**

11 On February 27, 2006, the parties conferred in good faith regarding a discovery plan.
12 However, the parties did not agree on how discovery should be conducted in this case. The
13 parties have continued to meet and confer regarding this Report.

14 **a. Plaintiffs' Position:** This is not a complex case. Plaintiffs see no need for a
15 discovery plan that diverges from the Federal Rules of Civil Procedure. There are numerous
16 factual issues in this case which must be resolved through discovery before any dispositive
17 motions can be filed. Accordingly, Plaintiffs have already served Defendants with
18 interrogatories and document requests in accordance with the federal rules, and intend to
19 schedule depositions, if necessary, after Defendants' discovery responses have been
20 reviewed. Plaintiffs propose a fact discovery cut-off of August 31, 2006, an expert discovery
21 cut-off of September 29, 2006, with dispositive motions to be filed no later than 45 days
22 thereafter.

23 Plaintiffs' position is that Defendants are attempting to delay this action and avoid
24 their discovery obligations by demanding a "Discovery Plan" which severely limits Plaintiffs'
25 rights and ability to pursue their claims.

26 ¹ Rule 26(a)(1), Fed. Rules Civ. P., provides that initial disclosures are to be made "unless a party objects
27 during the conference that initial disclosures are not appropriate in the circumstances of the action and
28 states the objection in the Rule 26(f) discovery plan." Fed. Rules of Civ. P., Rule 16(c)(6) provides that
the Court may consider and take appropriate action with respect to "the control and scheduling of
discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rule 29 through
37."

1 **b. Defendants' Position:** Defendants' position is that all the claims against them
2 depend upon, as an initial matter, whether there is a duty to defend under any of the three
3 insurance policies at issue for the Class Actions and governmental investigation of AOL and
4 Netscape. Thus, the first thing that should be done is to get those issues before the Court
5 for resolution. Whether there was a duty to defend under any of the insurance policies is a
6 legal issue for the Court to determine and can be decided based upon limited discovery
7 and/or the parties' initial disclosures. The parties can probably stipulate as to most, if not all,
8 of the relevant facts (e.g., the lawsuits tendered, the insurance policies, and the denials).
9 Any other discovery should be stayed during the period of this initial phase.

10 Dispositive motions can be filed at the latest 30 days after the pleadings are set in this
11 case (following decision on the motion to dismiss plaintiffs' 7th cause of action). After the
12 dispositive motions are decided, if any of the insurance policies remain in the case, discovery
13 in the case can then proceed. To allow broader discovery during the initial phase would be a
14 distraction and potentially a waste of the parties' and the Court's resources.

15 Defendants' position is that Plaintiffs sent voluminous written discovery and document
16 requests *before* even initial disclosures were made and without agreement of the parties or a
17 Discovery Plan in this case (to which responses are due on April 3, 2006), all of which is in
18 violation of the spirit, if not the letter of, the federal and local rules on discovery.

19 Defendants propose the following schedule:

- 20 • Initial disclosure on breach of contract (duty to defend) issues (by 3/17/06)
- 21 • Hearing on motion to dismiss 7th cause of action – April 17, 2006
- 22 • Answer or respond to Amended Complaint
- 23 • File motions for summary judgment (MSJs) on coverage (no later than 30 days
24 after Answer)
 - 25 • Opposition, reply and hearing on MSJ
 - 26 • Further status conference to set scheduling of further discovery in case
 - 27 • Fact discovery
 - 28 • Expert discovery

1 The parties agree that in all other respects, the Federal Rules of Civil Procedure
2 regarding the timing and amount of discovery shall apply in this case.

3 **TRIAL SCHEDULE**

4 **12. The Parties Request A Trial Date As Follows:**

5 **Plaintiffs' Position:** Plaintiffs request that the Court set trial for December, 2006.

6 **Defendants' Position:** Defendants request the Court defer setting a trial date until
7 after hearing of the MSJs because then more will be known about the number of parties
8 and issues in the case.

9 **13. The Parties Expect That The Trial Will Last For The Following Number of Days:**

10 The parties estimate trial will take approximately 7 to 10 trial days, depending on
11 whether there are one or three defendants and insurance policies in the case.

12 DATED: March 17, 2006

GORDON & REES LLP

13
14 By /s/ Sara M. Thorpe

15 Sara M. Thorpe
16 Attorneys for Defendant St. Paul Mercury
17 Insurance Co.

18 DATED: March 17, 2006

ROSS, DIXON & BELL, LLP

19
20 By /s/ Terrence R. McInnis

21 Terrence R. McInnis
22 Monique M. Fuentes
23 Attorneys for Defendants Federal Insurance Co.
24 and Executive Risk Specialty Insurance Co.

25 DATED: March 17, 2006

ABELSON HERRON LLP

26 By /s/ Leslie A. Pereira

27 Michael B. Abelson
28 Leslie A. Pereira
Attorneys for Plaintiffs Netscape Communications
Corp. and America Online, Inc.

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[PROPOSED] ORDER

The parties having submitted their proposals, the Court having considered the submissions and arguments of counsel, and good cause appearing,

IT IS HEREBY ORDERED THAT

1. Joinder of Parties: Any new parties shall be joined no later than

_____.

2. ADR. The parties shall be referred to mediation before a private mediator no later than _____.

3. Initial Disclosures. [Plaintiffs' proposal] Defendants' Initial Disclosures as to the claims for (1) breach of the covenant of good faith and fair dealing and (2) violation of Business and Professions Code section 17200 shall be served no later than _____

_____.

4. Discovery.

[Plaintiffs' proposal]

a. Fact Discovery Cut-Off: Fact discovery shall be completed no later than _____.

b. Expert Discovery shall be completed no later than _____

_____.

[Defendants' proposal] No discovery shall be conducted except as it relates to plaintiffs' causes of action for breach of contract until after decision on motions for summary judgment on the duty to defend.

5. Motions: _____.

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6. Trial: _____.

Dated: _____

JUDGE, UNITED STATES DISTRICT
HON. JAMES WARE