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7 Attorneys for Defendant and Counter-Claimant
 ST. PAUL MERCURY INSURANCE COMPANY

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT COURT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

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11 NETSCAPE COMMUNICATIONS)
 CORPORATION, a Delaware corporation;)
 12 and)
 AMERICAN ONLINE, INC., a Delaware)
 13 corporation,)

14 Plaintiffs,

15 vs.

16 FEDERAL INSURANCE COMPANY, an)
 Indiana corporation; et al.,)

17 Defendants.

CASE NO. 5:06-CV-00198 JW (PVT)

**ST. PAUL'S ANSWER TO FIRST
 AMENDED COMPLAINT AND
 COUNTERCLAIM FOR
 DECLARATORY RELIEF AND
 REFORMATION**

Complaint Filed: 12/12/05
 Action Removed: 1/11/06
 First Amended Complaint Filed: 2/24/06

Judge: Honorable James Ware
 Courtroom: 8

19 ST. PAUL MERCURY INSURANCE)
 COMPANY, a Minnesota corporation,)
 20

21 Counter-Claimant,

22 vs.

23 NETSCAPE COMMUNICATIONS)
 CORPORATION, a Delaware corporation;)
 24 and)
 AMERICAN ONLINE, INC., a Delaware)
 25 corporation,)

26 Counter-Defendants.

1 Defendant ST. PAUL MERCURY INSURANCE COMPANY ("St. Paul") answers
2 the First Amended Complaint (the "FAC") of Plaintiffs NETSCAPE COMMUNICATIONS
3 CORPORATION ("Netscape") and AMERICA ONLINE, INC. ("AOL") (collectively,
4 Plaintiffs") as follows:

5 **SUMMARY**

6 1. In answer to Paragraph 1 of the FAC, St. Paul is without knowledge or
7 sufficient information to form a belief as to the truth of the allegations, and on that basis
8 denies each and every allegation contained therein.

9 2. In answer to Paragraph 2 of the FAC, St. Paul is without knowledge or
10 sufficient information to form a belief as to the truth of the allegations, and on that basis
11 denies each and every allegation contained therein.

12 3. In answer to Paragraph 3 of the FAC, St. Paul expressly denies the
13 allegations with respect to St. Paul. As to the remaining insurers, St. Paul is without
14 knowledge or sufficient information to form a belief as to the truth of the allegations, and
15 on that basis denies each and every allegation contained therein.

16 4. In answer to Paragraph 4 of the FAC, St. Paul is without knowledge or
17 sufficient information to form a belief as to the truth of the allegations, and on that basis
18 denies each and every allegation contained therein.

19 **THE PARTIES**

20 5. In answer to Paragraph 5 of the FAC, upon information and belief, St. Paul
21 admits the allegations contained therein.

22 6. In answer to Paragraph 6 of the FAC, upon information and belief, St. Paul
23 admits the allegations contained therein.

24 7. In answer to Paragraph 7 of the FAC, St. Paul is without knowledge or
25 sufficient information to form a belief as to the truth of the allegations, and on that basis
26 denies each and every allegation contained therein.

27 8. In answer to Paragraph 8 of the FAC, upon information and belief, St. Paul
28 admits the allegations contained therein.

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1 9. In answer to Paragraph 9 of the FAC, St. Paul is without knowledge or
2 sufficient information to form a belief as to the truth of the allegations, and on that basis
3 denies each and every allegation contained therein.

4 10. In answer to Paragraph 10 of the FAC, St. Paul is without knowledge or
5 sufficient information to form a belief as to the truth of the allegations, and on that basis
6 denies each and every allegation contained therein.

7 **JURISDICTION AND INTRADISTRICT TRANSFER**

8 11. In answer to Paragraph 11 of the FAC, upon information and belief, St.
9 Paul admits the allegations contained therein.

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

11 12. In answer to Paragraph 12 of the FAC, St. Paul is without knowledge or
12 sufficient information to form a belief as to the truth of the allegations, and on that basis
13 denies each and every allegation contained therein.

14 13. In answer to Paragraph 13 of the FAC, St. Paul admits it issued an
15 insurance policy to AOL. Except as admitted herein, St. Paul is without knowledge or
16 sufficient information to form a belief as to the truth of the remaining allegations
17 contained in Paragraph 13, and on that basis denies each and every allegation
18 contained therein.

19 14. In answer to Paragraph 14 of the FAC, upon information and belief, St.
20 Paul admits the truth of the allegations contained therein.

21 15. In answer to Paragraph 15 of the FAC, upon information and belief, St.
22 Paul admits the Underlying Claims made claims relating to the privacy interests of the
23 underlying plaintiffs, but does not agree with plaintiffs' characterization of the claims and
24 on that basis denies the allegations contained therein.

25 16. In answer to Paragraph 16 of the FAC, upon information and belief, St.
26 Paul admits the Attorney General initiated an investigation into certain privacy-related
27 consumer protection issues. As to the remaining allegations, St. Paul is without
28 knowledge or sufficient information to form a belief as to the truth of the allegations

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1 contained therein, and on that basis denies each and every allegation contained therein.

2 17. In answer to Paragraph 17 of the FAC, St. Paul admits notice was
3 provided to St. Paul of the Underlying Claims and Attorney General investigation, but is
4 without knowledge or sufficient information to form a belief as to the truth of the other
5 allegations contained therein, including as to notice to other insurers and whether
6 Plaintiffs' notice to St. Paul was "upon receipt of the Underlying Claims and Attorney
7 General Investigation," and on that basis denies each and every other allegation
8 contained therein.

9 18. In answer to Paragraph 18 of the FAC, St. Paul is without knowledge or
10 sufficient information to form a belief as to the truth of the allegations, and on that basis
11 denies each and every allegation contained therein.

12 19. In answer to Paragraph 19 of the FAC, St. Paul is without knowledge or
13 sufficient information to form a belief as to the truth of the allegations, and on that basis
14 denies each and every allegation contained therein.

15 **THE INSURERS' POLICIES AND THEIR DENIAL OF COVERAGE**

16 20. In answer to Paragraph 20 of the FAC, St. Paul is without knowledge or
17 sufficient information to form a belief as to the truth of the allegations, and on that basis
18 denies each and every allegation contained therein.

19 **NETSCAPE'S INSURANCE**

20 **Federal**

21 21. In answer to Paragraph 21 of the FAC, St. Paul is without knowledge or
22 sufficient information to form a belief as to the truth of the allegations, and on that basis
23 denies each and every allegation contained therein.

24 22. In answer to Paragraph 22 of the FAC, St. Paul is without knowledge or
25 sufficient information to form a belief as to the truth of the allegations, and on that basis
26 denies each and every allegation contained therein.

27 23. In answer to Paragraph 23 of the FAC, St. Paul is without knowledge or
28 sufficient information to form a belief as to the truth of the allegations, and on that basis

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1 denies each and every allegation contained therein.

2 24. In answer to Paragraph 24 of the FAC, St. Paul is without knowledge or
3 sufficient information to form a belief as to the truth of the allegations, and on that basis
4 denies each and every allegation contained therein.

5 **INSURANCE APPLICABLE TO BOTH NETSCAPE AND AOL**

6 **St. Paul**

7 25. In answer to Paragraph 25 of the FAC, St. Paul admits that it issued to
8 AOL a technology commercial general liability policy number TE0900917 with a general
9 total limit of \$2 million ("the St. Paul Policy"). St. Paul denies that Exhibit 6 to the FAC is
10 a true and correct copy of the St. Paul Policy.

11 26. In answer to Paragraph 26 of the FAC, St. Paul admits that the St. Paul
12 Policy includes coverage for the period April 1, 1999 to April 1, 2000, but denies each
13 and every other allegation contained therein.

14 27. In answer to Paragraph 27 of the FAC, St. Paul denies that the St. Paul
15 Policy provides Plaintiffs with coverage for liability for personal injuries such as those
16 alleged in the Underlying Actions. St. Paul admits that the policy provisions set forth in
17 Paragraph 27 are quoted accurately. St. Paul denies these are the only relevant policy
18 provisions to the extent that is insinuated in these allegations.

19 28. In answer to Paragraph 28 of the FAC, St. Paul admits it denied coverage
20 for the Underlying Actions. Except as admitted herein, St. Paul denies each and every
21 other allegation contained therein.

22 **Executive Risk**

23 29. In answer to Paragraph 29 of the FAC, St. Paul is without knowledge or
24 sufficient information to form a belief as to the truth of the allegations, and on that basis
25 denies each and every allegation contained therein.

26 30. In answer to Paragraph 30 of the FAC, St. Paul is without knowledge or
27 sufficient information to form a belief as to the truth of the allegations, and on that basis
28 denies each and every allegation contained therein.

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1 31. In answer to Paragraph 31 of the FAC, St. Paul is without knowledge or
2 sufficient information to form a belief as to the truth of the allegations, and on that basis
3 denies each and every allegation contained therein.

4 32. In answer to Paragraph 32 of the FAC, St. Paul is without knowledge or
5 sufficient information to form a belief as to the truth of the allegations, and on that basis
6 denies each and every allegation contained therein.

7 **THE CONSEQUENCES OF THE INSURERS' COVERAGE DENIALS**

8 33. In answer to Paragraph 33 of the FAC, St. Paul is without knowledge or
9 sufficient information to form a belief as to the truth of the allegations, and on that basis
10 denies each and every allegation contained therein.

11 34. In answer to Paragraph 34 of the FAC, St. Paul is without knowledge or
12 sufficient information to form a belief as to the truth of the allegations, and on that basis
13 denies each and every allegation contained therein.

14 35. In answer to Paragraph 35 of the FAC, St. Paul is without knowledge or
15 sufficient information to form a belief as to the truth of the allegations, and on that basis
16 denies each and every allegation contained therein.

17 **FIRST CAUSE OF ACTION -- BREACH OF CONTRACT AGAINST FEDERAL**

18 36. In answer to Paragraph 36 of the FAC, St. Paul realleges and incorporates
19 by reference its answers to paragraphs 1 through 35.

20 37. In answer to Paragraph 37 of the FAC, St. Paul is without knowledge or
21 sufficient information to form a belief as to the truth of the allegations, and on that basis
22 denies each and every allegation contained therein.

23 38. In answer to Paragraph 38 of the FAC, St. Paul is without knowledge or
24 sufficient information to form a belief as to the truth of the allegations, and on that basis
25 denies each and every allegation contained therein.

26 39. In answer to Paragraph 39 of the FAC, St. Paul is without knowledge or
27 sufficient information to form a belief as to the truth of the allegations, and on that basis
28 denies each and every allegation contained therein.

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1 50. In answer to Paragraph 49 of the FAC, St. Paul is without knowledge or
2 sufficient information to form a belief as to the truth of the allegations, and on that basis
3 denies each and every allegation contained therein.

4 51. In answer to Paragraph 50 of the FAC, St. Paul is without knowledge or
5 sufficient information to form a belief as to the truth of the allegations, and on that basis
6 denies each and every allegation contained therein.

7 52. In answer to Paragraph 51 of the FAC, St. Paul is without knowledge or
8 sufficient information to form a belief as to the truth of the allegations, and on that basis
9 denies each and every allegation contained therein.

10 53. In answer to Paragraph 52 of the FAC, St. Paul is without knowledge or
11 sufficient information to form a belief as to the truth of the allegations, and on that basis
12 denies each and every allegation contained therein.

13 **FOURTH CAUSE OF ACTION – BREACH OF COVENANT OF GOOD FAITH**
14 **AND FAIR DEALING AGAINST FEDERAL**

15 54. In answer to Paragraph 54 of the FAC, St. Paul realleges and incorporates
16 by reference its answers to paragraphs 1 through 35.

17 55. In answer to Paragraph 55 of the FAC, St. Paul is without knowledge or
18 sufficient information to form a belief as to the truth of the allegations, and on that basis
19 denies each and every allegation contained therein.

20 56. In answer to Paragraph 56 of the FAC, St. Paul is without knowledge or
21 sufficient information to form a belief as to the truth of the allegations, and on that basis
22 denies each and every allegation contained therein.

23 57. In answer to Paragraph 57 of the FAC, St. Paul is without knowledge or
24 sufficient information to form a belief as to the truth of the allegations, and on that basis
25 denies each and every allegation contained therein.

26 **FIFTH CAUSE OF ACTION – BREACH OF COVENANT OF GOOD FAITH**
27 **AND FAIR DEALING AGAINST ST. PAUL**

28 58. In answer to Paragraph 58 of the FAC, St. Paul realleges and incorporates
by reference its answers to paragraphs 1 through 35 and 42 to 47.

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1 59. In answer to Paragraph 59 of the FAC, St. Paul admits that it refused to
2 defend or indemnify Plaintiffs under the terms of the St. Paul Policy for claims asserted
3 in the Underlying Actions. Except as expressly admitted, St. Paul denies the remaining
4 allegations of Paragraph 59.

5 60. In answer to Paragraph 60 of the FAC, St. Paul denies the allegations.

6 61. In answer to Paragraph 61 of the FAC, St. Paul denies the allegations.

7 **SIXTH CAUSE OF ACTION – BREACH OF COVENANT OF GOOD FAITH**
8 **AND FAIR DEALING AGAINST EXECUTIVE RISK**

9 62. In answer to Paragraph 62 of the FAC, St. Paul realleges and incorporates
10 by its answers to paragraphs 1 through 35 and 48 through 53.

11 63. In answer to Paragraph 63 of the FAC, St. Paul is without knowledge or
12 sufficient information to form a belief as to the truth of the allegations, and on that basis
13 denies each and every allegation contained therein.

14 64. In answer to Paragraph 64 of the FAC, St. Paul is without knowledge or
15 sufficient information to form a belief as to the truth of the allegations, and on that basis
16 denies each and every allegation contained therein.

17 65. In answer to Paragraph 65 of the FAC, St. Paul is without knowledge or
18 sufficient information to form a belief as to the truth of the allegations, and on that basis
19 denies each and every allegation contained therein.

20 **SEVENTH CAUSE OF ACTION – UNFAIR BUSINESS PRACTICES**
21 **AGAINST ALL DEFENDANTS**

22 66. In answer to Paragraph 66 of the FAC, St. Paul realleges and incorporates
23 by reference its answers to paragraphs 1 through 65.

24 67. In answer to Paragraph 67 of the FAC, St. Paul is without knowledge or
25 sufficient information to form a belief as to the truth of the allegations, and on that basis
26 denies each and every allegation contained therein.

27 68. In answer to Paragraph 68 of the FAC, St. Paul admits that AOL and
28 Netscape are insureds under the St. Paul Policy, but is without knowledge or sufficient

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1 information to form a belief as to the truth of the allegations, and on that basis denies
2 each and every other allegation contained therein.

3 69. In answer to Paragraph 69 of the FAC, St. Paul is without knowledge or
4 sufficient information to form a belief as to the truth of the allegations, and on that basis
5 denies each and every allegation contained therein.

6 70. In answer to Paragraph 70 of the FAC, St. Paul is without knowledge or
7 sufficient information to form a belief as to the truth of the allegations, and on that basis
8 denies each and every allegation contained therein.

9 71. In answer to Paragraph 71 of the FAC, St. Paul denies each and every
10 allegation contained therein with respect to St. Paul. As to the remaining insurers, St.
11 Paul is without knowledge or sufficient information to form a belief as to the truth of the
12 allegations, and on that basis denies each and every allegation contained therein.

13 72. In answer to Paragraph 72 of the FAC, St. Paul denies each and every
14 allegation contained therein with respect to St. Paul. As to the remaining insurers, St.
15 Paul is without knowledge or sufficient information to form a belief as to the truth of the
16 allegations, and on that basis denies each and every allegation contained therein.

17 73. In answer to Paragraph 73 of the FAC, St. Paul denies each and every
18 allegation contained therein with respect to St. Paul. As to the remaining insurers, St.
19 Paul is without knowledge or sufficient information to form a belief as to the truth of the
20 allegations, and on that basis denies each and every allegation contained therein.

21 **AFFIRMATIVE DEFENSES**

22 St. Paul raises the following affirmative defenses to each and every cause of
23 action asserted against it and as to each of the acts and/or omissions with which St.
24 Paul is charged in the FAC. St. Paul hereby alleges the following affirmative defenses
25 without assuming the burden of proof for such where the burden is by law upon
26 Plaintiffs.

27 **FIRST AFFIRMATIVE DEFENSE**

28 Plaintiffs' FAC, and each and every claim therein, in whole or part, fails to state

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1 facts sufficient to constitute a claim or cause of action against St. Paul.

2 **SECOND AFFIRMATIVE DEFENSE**

3 Plaintiffs' causes of action are barred by the applicable statute of limitations.

4 **THIRD AFFIRMATIVE DEFENSE**

5 Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs have
6 waived their right to assert, or are estopped from, asserting those claims.

7 **FOURTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' claims are barred, in whole or in part, by the doctrine of unclean hands.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches in that
11 Plaintiffs failed to take timely action to assert their rights, if any, and this delay has
12 caused substantial prejudice to St. Paul.

13 **SIXTH AFFIRMATIVE DEFENSE**

14 Plaintiffs' claims are barred, in whole or in part, because Plaintiffs have failed to
15 name, serve and/or join all indispensable parties to this action.

16 **SEVENTH AFFIRMATIVE DEFENSE**

17 Plaintiffs' claims are barred, in whole or in part, by terms, limitations, conditions,
18 exclusions and other provisions in the St. Paul Policy and applicable law.

19 **EIGHTH AFFIRMATIVE DEFENSE**

20 Plaintiffs' claims are barred, in whole or in part, to the extent insurance other than
21 the St. Paul Policy applies to the requests for coverage.

22 **NINTH AFFIRMATIVE DEFENSE**

23 Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs have
24 recovered from other insurance carriers, settled, or compromised their claim. St. Paul is
25 entitled to an off-set for any such amounts recovered by Plaintiffs.

26 **TENTH AFFIRMATIVE DEFENSE**

27 Plaintiffs' damages, if any, are barred in whole or in part to the extent Plaintiffs
28 failed to mitigate, minimize or avoid damages, and recovery, if any, against St. Paul

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1 must be reduced by that amount.

2 **ELEVENTH AFFIRMATIVE DEFENSE**

3 Plaintiffs' claims are barred, in whole or in part, to the extent Plaintiffs have
4 misrepresented coverage or the nature of the claims in tendering to and pursuing
5 coverage for the Underlying Claims and Attorney General Investigation.

6 **TWELFTH AFFIRMATIVE DEFENSE**

7 At the time St. Paul and AOL entered into the St. Paul Policy, those parties
8 intended that the St. Paul Policy would not cover personal injury offenses arising out of
9 the online activities of AOL or its related companies. To the extent the St. Paul Policy
10 does not reflect the mutual intention of the parties to exclude all coverage for personal
11 injuries arising out of online activities, there has been a mutual mistake on the part of
12 the parties in including an endorsement inconsistent with this intention. The St. Paul
13 Policy should be reformed to be consistent with the parties' mutual intentions. Pursuant
14 to the parties' mutual intentions, Plaintiffs' claims are barred.

15 **THIRTEENTH AFFIRMATIVE DEFENSE**

16 At the time St. Paul and AOL entered into the St. Paul Policy, those parties
17 intended that the St. Paul Policy would not cover personal injury offenses arising out of
18 the online activities of AOL or its related companies. St. Paul was unaware that
19 Plaintiffs already knew of privacy claims and/or the Underlying Claims involving online
20 activities that might implicate personal injury coverage under a general liability policy,
21 depending on the allegations in those claims. Plaintiffs did not disclose this material
22 information to St. Paul's underwriters in further discussing revisions to the wording of
23 the St. Paul Policy. Any mistake in the provisions of the St. Paul Policy is due to the
24 inequitable conduct and/or misrepresentations and/or omissions of Plaintiffs. To the
25 extent the St. Paul Policy does not reflect the mutual intention of the parties to exclude
26 all coverage for personal injuries arising out of online activities, there has been a
27 unilateral mistake on the part of St. Paul in approving of revised wording to the St. Paul
28 Policy suggested by AOL and/or its broker. The St. Paul Policy should be reformed to

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1 be consistent with the parties' mutual intentions. Pursuant to the parties' mutual
2 intentions, Plaintiffs' claims are barred.

3 **FOURTEENTH AFFIRMATIVE DEFENSE**

4 At the time St. Paul and AOL entered into the St. Paul Policy, those parties
5 intended that the St. Paul Policy would not cover personal injury offenses arising out of
6 the online activities of AOL or its related companies. St. Paul was unaware that
7 Plaintiffs already knew of privacy claims and/or the Underlying Claims involving online
8 activities that might implicate personal injury coverage under a general liability policy,
9 depending on the allegations in those claims. Plaintiffs did not disclose this material
10 information to St. Paul's underwriters in further discussing revisions to the wording of
11 the St. Paul Policy. Plaintiffs in not disclosing this information and in pursuing coverage
12 under the St. Paul Policy for the Underlying Claims and Attorney General Investigation
13 have intentionally misrepresented the scope of coverage they intended to and received
14 when they purchased the St. Paul Policy and are acting contrary to the stated intentions
15 of the parties in entering into this insurance contract. To the extent the St. Paul Policy
16 does not reflect the mutual intention of the parties to exclude all coverage for personal
17 injuries arising out of online activities, there has been a mistake made based on
18 intentional misrepresentations on the part of Plaintiffs. The St. Paul Policy should be
19 reformed to be consistent with the parties' mutual intentions. Pursuant to the parties'
20 mutual intentions, Plaintiffs' claims are barred.

21 **FIFTEENTH AFFIRMATIVE DEFENSE**

22 Plaintiffs' claims of violation of the covenant of good faith and fair dealing are
23 barred because there has been no breach of contract.

24 **SIXTEENTH AFFIRMATIVE DEFENSE**

25 Plaintiffs' claims of violation of the covenant of good faith and fair dealing are
26 barred because all the acts done by St. Paul were performed fairly, in good faith, and for
27 a lawful purpose, and were in compliance with the explicit and implied terms of the St.
28 Paul Policy and applicable law.

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SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims of violation of the covenant of good faith and fair dealing are barred because St. Paul has not acted in breach of the covenant of good faith and fair dealing because there is a genuine dispute.

EIGHTEENTH AFFIRMATIVE DEFENSE

The acts alleged to have been committed by St. Paul were not the cause in fact, proximate cause, or legal cause of any damages of which Plaintiffs complain.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims of unfair business practices are barred, in whole or part, because Plaintiffs have an adequate remedy at law.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiffs' claims of unfair business practices are barred, in whole or part, because California law does not apply to these claims, and even if it does, the acts alleged fail to state a claim under California's Unfair Business Practices Act.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent the amount of punitive damages sought is unconstitutionally excessive under the California and United States Constitutions, including that it violates the Excessive Fines Clause of the Eighth Amendment, U.S. Const. amend. VIII, and the Due Process Clause of the Fourteenth Amendment, U.S. Const. Amendment XIV, section 1.

TWENTY-SECOND AFFIRMATIVE DEFENSE

The FAC does not describe the claims with sufficient particularity to enable St. Paul to determine all of its legal, contractual and equitable rights, and St. Paul reserves the right to amend and/or supplement its answer and assert any and all pertinent defenses ascertained through investigation and discovery in this action.

PRAYER

WHEREFORE, St. Paul prays:

- 1. That Plaintiffs take nothing by way of their FAC;

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- 1 2. That judgment be entered in favor of St. Paul and against Plaintiffs;
- 2 3. That Plaintiffs' FAC be dismissed with prejudice;
- 3 4. That, if necessary, the St. Paul Policy be reformed to comport with the
- 4 parties' mutual intentions;
- 5 5. For costs of suit; and
- 6 5. Such other and further relief as the court may deem just and proper.

COUNTERCLAIM

8 Defendant and Counter-Claimant St. Paul Mercury Insurance Company ("St.
9 Paul") brings this Counterclaim against Plaintiffs and Counter-Defendants Netscape
10 Communications Corporation ("Netscape") and American Online, Inc. ("AOL")
11 (collectively "Counter-Defendants") and alleges as follows:

NATURE OF THE ACTION

12
13 1. This is an action for declaratory relief in which St. Paul seeks a judicial
14 declaration that it owed no duty to defend or indemnify Counter-Defendants under the
15 St. Paul Policy with respect to the Underlying Lawsuits. This is also an action for
16 reformation in which St. Paul seeks to reform the St. Paul Policy consistent with the
17 mutual intent and understanding of the parties that St. Paul would not provide coverage
18 for online activities.

PARTIES AND VENUE

19
20 2. Defendant and Counter-Claimant St. Paul is, and at all times material to
21 this action was, a corporation organized under the laws of Minnesota, with its principal
22 place of business in St. Paul, Minnesota.

23 3. Counter-Defendant Netscape Communications Corporation is, and at all
24 times material to this action was, a corporation organized under the laws of Delaware,
25 with its principal place of business in Mountain View, California.

26 4. Counter-Defendant American Online, Inc. is, and at all times material to
27 this action was, a corporation organized under the laws of Delaware, with its principal
28 place of business in Dulles, Virginia.

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1 injury” and, even if the claims fell within one of the personal injury offenses, the
2 Underlying Claims were excluded from coverage because St. Paul’s insurance policy
3 excludes coverage for offenses arising out of AOL and Netscape’s online activities.

4 12. Counter-Defendants were also advised that the New York Attorney
5 General was investigating claims against them for violation of privacy, i.e., “examining
6 consumer protection issues related to background Internet communications software
7 embedded in Netscape consumer software products and data collected by the
8 communication’s software.” The Attorney General’s initial letter dated September 8,
9 2000 requested the production of certain documents and information from AOL
10 concerning Netscape software, including SmartDownload. The letter does not seek or
11 demand the payment of any monies from AOL. Thereafter, on April 3, 2002, the
12 Attorney General’s office issued a subpoena concerning SmartDownload. The stated
13 purpose of the subpoena for documents and testimony was to determine whether an
14 action should be instituted against AOL Time Warner and Netscape under New York
15 State law. The Attorney General’s letters and subpoena are referred to here as the “AG
16 Investigation.”

17 13. Counter-Defendants tendered the AG Investigation claim to St. Paul.

18 14. St. Paul advised Counter-Defendants that there was no duty to defend or
19 indemnify the AG Investigation because there was no “suit” and for the reasons set forth
20 above in connection with the Underlying Lawsuits.

21 **THE ST. PAUL POLICY**

22 15. For the years including 1998, 1999 and 2000, Counter-Defendants
23 purchased an insurance coverage program that included several types of insurance
24 policies issued by several insurance companies, including Lloyds of London, Executive
25 Risk, and others.

26 16. As a part of this larger insurance coverage program, St. Paul issued to
27 AOL a commercial general liability policy no. TE0900917 for the policy period April 1,
28 1999 to April 1, 2000 (the “St. Paul Policy”). The St. Paul Policy was extended to June

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1 1, 2000, and then renewed through June 1, 2001.

2 17. It was the stated mutual intention and understanding of St. Paul and AOL
3 that the St. Paul Policy was not intended to provide coverage to AOL, and its related
4 companies, for risks associated with online activities.

5 18. The core general liability policy form of the St. Paul Policy provides:

6 **Personal injury liability.** We'll pay amounts any protected person is
7 legally required to pay as damages for covered personal injury that:

- 8 • results from your business activities, other than advertising,
9 broadcasting, publishing, or telecasting done by or for you; and
- is caused by a personal injury offense committed while this
10 agreement is in effect.

11 *Personal injury* means injury, other than bodily injury or advertising
12 injury, that's caused by a personal injury offense.

13 *Personal injury offense* means any of the following offenses:

- 14 • False arrest, detention, or imprisonment.
- 15 • Malicious prosecution.
- 16 • Wrongful entry into, or wrongful eviction from, a room, dwelling, or
17 premises that a person occupies.
- Invasion of the right of private occupancy of a room, dwelling, or
18 premises that a person occupies.
- Libel or slander.
- Making known to any person or organization written or spoken
19 material that disparages the products, work, or completed work of
20 others.
- Making known to any person or organization written or spoken
21 material that violates a person's right of privacy.

22 19. As originally issued, the St. Paul Policy contained a "Personal Injury and
23 Advertising Injury Exclusion Endorsement" that modified the core general liability policy
24 form to exclude all personal and advertising injury coverage.

25 20. The "Personal Injury and Advertising Injury Exclusion Endorsement" was
26 deleted on August 2, 2000 by an endorsement with an effective date of April 1, 1999,
27 and replaced with a "Personal Injury and Advertising Injury for Non-Online Activities
28 Endorsement" effective April 1, 1999, which states that:

For the purposes of advertising injury and personal injury, all online activities are
excluded from these coverages.

Other Terms:
All other terms and conditions of the policy remain the same.

21. The "Personal Injury and Advertising Injury for Non-Online Endorsement"

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1 was deleted on October 5, 2000 by an endorsement with an effective date of April 1,
2 1999. A "Policy Change Endorsement" was added to the policy effective April 1, 1999,
3 titled "Personal Injury and Advertising Injury Endorsement," which provides:

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

6 "Online Activities" is defined as providing e-mail services, instant
7 messaging services, 3rd party advertising, supplying 3rd party content
8 and providing internet access to 3rd parties. However, it is understood
9 that America Online's own advertising is not considered "Online Activity"
10 regardless of the medium or format in which it is presented.

11 Other Terms:

12 All other terms and conditions of the policy remain the same.

13 22. In addition, the St. Paul Policy contains the following exclusion:

14 **Deliberately breaking the law.** We won't cover personal injury or
15 advertising injury that results from:

- 16 • the protected person knowingly breaking any criminal law; or
- 17 • any person or organization breaking any criminal law with the consent
18 or knowledge of the protected person.

19 **FIRST CAUSE OF ACTION**

20 **Declaratory Relief**
21 **(Against All Counter-Defendants)**

22 23. St. Paul hereby realleges and incorporates by reference paragraphs 1
23 through 22, inclusive, of this Counterclaim, as though set forth in full herein.

24 24. An actual controversy has arisen and now exists between St. Paul, on one
25 hand, and Counter-Defendants, on the other, with respect to whether the St. Paul Policy
26 provides a duty to defend and/or indemnify the Underlying Lawsuits and AG
27 Investigation.

28 25. Counter-Defendants maintain that they are entitled to have defense costs
reimbursed under the St. Paul Policy, whereas St. Paul denies that the St. Paul Policy
provides coverage for these claims.

26 26. St. Paul seeks a judicial declaration that there is no coverage for the
27 Underlying Lawsuits because:

- 28 (a) The Underlying Lawsuits do not allege "bodily injury," "property damage,"

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1 or "advertising injury" under the St. Paul Policy;

2 (b) The Underlying Lawsuits do not allege any of the specifically enumerated
3 offenses under the "personal injury" coverage in the St. Paul Policy;

4 (c) Even if the St. Paul Policy's personal injury coverage applied to these
5 claims (which it does not), there is no coverage because the St. Paul Policy excludes
6 coverage for personal injury offenses arising out of online activities; and

7 (d) There is no coverage because the St. Paul Policy excludes coverage for
8 "personal injury or advertising injury that results from the protected person knowingly
9 breaking any criminal law; or any person or organization breaking any criminal law with
10 the consent or knowledge of the protected person."

11 27. St. Paul further seeks a judicial declaration that there is no coverage
12 under the St. Paul Policy for the AG Investigation because the AG Investigation was not
13 a suit or claim seeking damages covered by the policy, and for the reasons set forth in
14 paragraph 25, above.

15 28. A judicial declaration is necessary and appropriate at this time and under
16 the circumstances in order that St. Paul may ascertain its rights and duties under the St.
17 Paul Policy.

18 **SECOND CAUSE OF ACTION**
19 **Reformation – Mutual Mistake**
20 **(Against All Counter-Defendants)**

21 29. St. Paul hereby realleges and incorporates by reference paragraphs 1
22 through 22, inclusive, of this Counterclaim, as though set forth in full herein.

23 30. At the time St. Paul and AOL entered into the insurance contract reflected
24 in policy no. TE9000917, the parties intended that the St. Paul Policy would not cover
25 personal injury offenses arising out of the online activities of AOL or its related
26 companies.

27 31. The St. Paul Policy currently may not reflect the mutual intentions of the
28 parties to the extent the St. Paul Policy does not exclude all coverage for personal

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1 injuries arising out of online activities. If the policy does not exclude all such coverage,
2 there has been a mutual mistake of the parties in the drafting of endorsements intended
3 to modify the policy to reflect those intentions.

4 32. To the extent there is a material difference, the difference between the
5 parties' intentions and the wording of the St. Paul Policy was not known to the parties
6 until claims arose that involved alleged privacy violations in connection with online
7 activities (e.g., the Underlying Lawsuits). Although the claims alleged in the Underlying
8 Lawsuits do not constitute "personal injury" offenses under the St. Paul Policy, they also
9 should be excluded from coverage because they arise out of online activities.

10 33. St. Paul seeks to have the St. Paul Policy reformed to reflect the parties'
11 intentions that there is no coverage for personal injury offenses arising out of the
12 Counter-Defendants' online activities.

13 **THIRD CAUSE OF ACTION**

14 **Reformation – Unilateral Mistake (Inequitable Conduct,**
15 **Misrepresentation and/or Omission)**
16 **(Against All Counter-Defendants)**

17 34. St. Paul hereby realleges and incorporates by reference paragraphs 1
18 through 22, inclusive, of this Counterclaim, as though set forth in full herein.

19 35. At the time St. Paul and AOL entered into the insurance contract reflected
20 in policy no. TE9000917, the parties intended that the St. Paul Policy not cover personal
21 injury offenses arising out of the online activities of AOL or its related companies.

22 36. To the extent the St. Paul Policy does not accurately reflect the mutual
23 intention of the parties, it is because of inequitable conduct, misrepresentations, and/or
24 omissions on the part of Counter-Defendants. Counter-Defendants knew about the
25 existence or possibility of the Underlying Lawsuits. Counter-Defendants sought to
26 change the wording in the St. Paul Policy even though they knew the wording they
27 suggested did not reflect the true intentions of the parties, all in an effort to obtain
28 coverage for claims that arose out of Counter-Defendants' online activities.

37. Due to a unilateral mistake on the part of St. Paul, based upon Counter-

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1 Defendants' inequitable conduct, misrepresentation, and/or failure to disclose material
2 information, the St. Paul Policy does not reflect the true intentions of St. Paul and
3 Counter-Defendants.

4 38. The St. Paul Policy should be reformed to reflect the parties' intentions
5 that there is no coverage for personal injury offenses arising out of Counter-Defendants'
6 online activities.

7 **FOURTH CAUSE OF ACTION**
8 **Reformation – Unilateral Mistake (Intentional Misrepresentation)**
9 **(Against All Counter-Defendants)**

10 39. St. Paul hereby realleges and incorporates by reference paragraphs 1
11 through 22, inclusive, of this Counterclaim, as though set forth in full herein.

12 40. At the time St. Paul and AOL entered into the insurance contract reflected
13 in policy no. TE9000917, the parties intended that the St. Paul Policy not cover personal
14 injury offenses arising out of the online activities of AOL or its related companies.

15 41. St. Paul was unaware that Counter-Defendants already knew about
16 privacy claims and/or the Underlying Claims involving online activities that might
17 implicate personal injury coverage under a general liability policy, depending on the
18 allegations in those claims. Counter-Defendants did not disclose this material
19 information to St. Paul's underwriters in further discussing revisions to the wording of
20 the St. Paul Policy.

21 42. To the extent the St. Paul Policy does not accurately reflect the mutual
22 intention of the parties, it is because of Counter-Defendants' intentional
23 misrepresentations, all in an effort to obtain coverage for claims that arose out of
24 Counter-Defendants' online activities.

25 43. Counter-Defendants' pursuit of coverage under the St. Paul Policy for the
26 Underlying Claims and Attorney General Investigation is contrary to the stated
27 intentions of the parties in entering into this insurance contract.

28 44. The St. Paul Policy should be reformed to reflect the parties' intentions

1 that there is no coverage for personal injury offenses arising out of Counter-Defendants'
2 online activities.

3 **PRAYER**

4 WHEREFORE, St. Paul prays for judgment against Counter-Defendants, and
5 each of them, as follows:

6 1. For a judicial declaration of St. Paul's rights and obligations to Counter-
7 Defendants, and each of them, including a declaration that St. Paul had no obligation to
8 defend or indemnify Counter-Defendants against the Underlying Lawsuits because the
9 Underlying Lawsuits are not covered by the St. Paul Policy;

10 2. For a judicial declaration of St. Paul's rights and obligations to Counter-
11 Defendants, and each of them, including a declaration that St. Paul had no obligation to
12 defend or indemnify Counter-Defendants against the AG Investigation because the AG
13 Investigation is not covered by the St. Paul Policy;

14 3. For an order reforming the St. Paul Policy to reflect the true intention of
15 the parties that the St. Paul Policy does not cover personal injury liability arising out of
16 online activities.

17 4. For costs of suit; and

18 5. For such other and further relief as this Court may deem just and proper.

19 Dated: May 18, 2006

GORDON & REES LLP

21 By: /s/ Sara M. Thorpe

22 SARA M. THORPE
23 Attorneys for Defendant and Counter-
24 Claimant ST. PAUL MERCURY INSURANCE
25 COMPANY

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