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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)
)	UPDATED JOINT REPORT AND JOINT CASE MANAGEMENT STATEMENT; [PROPOSED] CASE MANAGEMENT ORDER
Plaintiffs,)	
v.)	Date: June 19, 2006
)	Time: 9:00 a.m.
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,)	Judge: Hon. James Ware Courtroom 8
)	Complaint Filed: December 12, 2005 Amended Complaint Filed: Feb. 22, 2006
Defendants.)	

The parties to the above-entitled action jointly submit this *updated* Report, Case Management Statement and [Proposed] Case Management Order to set forth their respective positions on the management of this case in light of: (1) Plaintiffs' settlement with Federal Insurance Company ("Federal") and Executive Risk Specialty Insurance Company ("Executive Risk"), leaving St. Paul Mercury Insurance Company ("St. Paul") as the sole defendant; (2) the Court's denial of St. Paul's motion to dismiss plaintiffs' Seventh

1 Cause of Action; and (3) St. Paul's filing of a Counterclaim for Reformation.¹

2 **DESCRIPTION OF THE CASE**

3 **1. Brief description of the events underlying the action**

4 In 2000, Plaintiffs Netscape Communications Corp. ("Netscape") and America
5 Online ("AOL") were sued in four nationwide class actions brought in New York and
6 Washington, D.C. (the "Class Actions"). The Class Actions alleged that through
7 Netscape's "SmartDownLoad" program, AOL and Netscape intercepted private information.
8 The Class Actions alleged claims for violation of the Electronic Communications Privacy
9 Act, 18 U.S.C. sec. 2511 and 2520, and the Computer Fraud and Abuse Act, 18 U.S.C.
10 1030. In addition, the New York Attorney General initiated an investigation into Netscape's
11 and AOL's practices in this regard ("AG Investigation").

12 The Class Actions were tendered to defendant St. Paul and several other of AOL's
13 and Netscape's insurance companies. As part of Plaintiffs' insurance program during the
14 April 1, 1999 to April 1, 2000 time period, St. Paul issued a technology commercial general
15 liability policy (the "St. Paul Policy"). On December 13, 2000, St. Paul denied coverage for
16 the Class Actions. AOL and Netscape also tendered to the insurers defense of the AG
17 Investigation. St. Paul also denied coverage for the AG Investigation. The Class Actions
18 were settled in September 2004, and the AG Investigation was resolved.

19 Plaintiffs commenced this action alleging causes of action for breach of contract,
20 breach of the covenant of good faith and fair dealing, and unfair business practices under
21 California Business & Professions Code § 17200 (the "Section 17200 Claim"). By way of
22 recovery, Plaintiffs seek amounts incurred in connection with the Class Actions and AG
23 Investigation, damages for St. Paul's alleged bad faith, and an injunction against St. Paul's
24 alleged unfair business practices.

25 Since instituting this lawsuit, Plaintiffs have settled with two insurers: Federal and
26 Executive Risk.

27
28 ¹ Plaintiffs are filing a Motion to Dismiss St. Paul's Counter-Claim for Reformation pursuant to Fed. Rule Civ. Proc. 12(b)(6).

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

2 **a. Factual issues**

- 3 • The terms of the St. Paul Policy.
- 4 • Whether there was mutual or unilateral mistake or an intentional
- 5 misrepresentation such that the St. Paul Policy should be reformed with
- 6 respect to the Online Activities Exclusion.
- 7 • The nature of Plaintiffs' conduct as alleged in the underlying actions.
- 8 • The timing and adequacy of St. Paul's investigation.
- 9 • Whether, if there was coverage afforded by the St. Paul Policy, St. Paul's
- 10 claims handling was in breach of the covenant of good faith and fair dealing,
- 11 in other words unreasonable and without proper cause.
- 12 • Whether St. Paul engaged in any fraudulent or unfair business practice of
- 13 automatically denying this and other privacy claims.
- 14 • Whether St. Paul's conduct vis-à-vis its insureds was oppressive, fraudulent,
- 15 or malicious.
- 16 • The nature and amount of fees and costs incurred by Plaintiffs.

17 **b. Legal issues**

- 18 • Whether California or Virginia law applies to the issues in this case.
- 19 • Whether St. Paul had a duty to defend the Class Actions or AG Investigation.
- 20 • Whether St. Paul is entitled to a credit for settlement amounts paid to
- 21 Plaintiffs by other insurers.
- 22 • Whether St. Paul's reformation claim is timely.
- 23 • Whether St. Paul properly states a claim for reformation.
- 24 • Whether the St. Paul Policy should be reformed with respect to the Online
- 25 Activities Exclusion.
- 26 • Whether Plaintiffs are entitled to Brandt fees.
- 27 • Whether Plaintiffs have an adequate remedy at law for any possible future
- 28 denial of coverage of a privacy claim tendered under the St. Paul Policy.

- Whether Plaintiffs are entitled to an injunction.

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

There are no disputes as to service, jurisdiction or venue.

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

All parties have been served.

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

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

ALTERNATIVE DISPUTE RESOLUTION

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

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

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

The parties have not been assigned to any ADR process.

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

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

DISCLOSURES

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

1 The parties exchanged Initial Disclosures pursuant to Rule 26(a)(1) on March 17,
2 2006, and have been exchanging documents relating to Phase One of this case (as
3 proposed below) since that date.

4 **10. Calculation Of Damages.**

5 Plaintiffs estimate their damages to be in the range of \$4.3 million for attorneys' fees
6 and other expenses incurred in connection with their defense of the Class Actions and AG
7 Investigation. Plaintiffs have not yet calculated their additional damages flowing from St.
8 Paul's alleged bad faith conduct. St. Paul contends it will be entitled to a credit for
9 settlement amounts paid to Plaintiffs by other insurers; Plaintiffs dispute this.

10 **DISCOVERY (AND MOTIONS)**

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

14 Beginning on February 27, 2006, and on numerous occasions thereafter, the parties
15 conferred in good faith regarding a discovery plan. The parties propose a "phased"
16 approach to this litigation as the most effective and efficient way to resolve it.

17 **a. Phase One**

18 Phase One proposes disposition of a threshold issue: Whether St. Paul's policy
19 provides coverage for the Class Actions and AG Investigation under the
20 "personal injury" portion of the policy. Only limited further discovery is needed
21 for Phase One because the questions are based largely on undisputed facts
22 (i.e., the pleadings, the St. Paul Policy). The parties probably can stipulate to
23 some, if not all, of the material facts. The parties propose the following briefing
24 schedule:

25 So as not to burden the Court with unnecessary paper, the parties stipulate to
26 a regimented briefing procedure with the resulting presentations being treated as
27 "cross motions." This will be accomplished as follows:

28 St. Paul will file the initial motion(s) for summary judgment by July 21, 2006;

1 AOL/Netscape will file an opposition by August 11, 2006 which will be treated
2 as their “cross motion” and which will seek affirmative relief;

3 St. Paul file reply to AOL, Netscape’s opposition by September 1, 2006; and
4 AOL/Netscape file surreply to St. Paul’s reply by September 20, 2006.

5 A hearing date will be scheduled that is convenient for the Court.

6 If the Court grants St. Paul’s motion(s), it is St. Paul’s position that the case will be
7 over. Plaintiffs claim there still will be a remaining claim (Plaintiffs’ Section 17200
8 claim). If the Court grants Plaintiffs’ cross motion, an order will be entered finding a
9 duty to defend subject to determination of Phase Two. If the Court denies both
10 motions, then the case would proceed to Phase Two.

11 While the parties have agreed to this phased approach, they have not agreed on the
12 scope of Phase One.

- 13 • Plaintiffs’ position: Plaintiffs believe Phase One motion practice should
14 include all arguments regarding whether there is coverage for the Class
15 Actions and AG Investigation under the terms of the St. Paul Policy. At issue
16 should be the policy’s insuring agreement as well as any exclusions St. Paul
17 contends preclude or negate coverage. The point here is to enable the Court
18 to determine, early on, whether St. Paul breached its duty to defend
19 Plaintiffs. To the extent St. Paul believes any endorsements, including its
20 “Online Activities Exclusion,” has application here, it should raise those
21 issues in Phase One. Reformation issues (an affirmative defense and
22 counter-claim) also should be raised here, or reserved for Phase Two. To
23 proceed as St. Paul suggests – reserving exclusion and reformation issues to
24 Phase Two – forecloses the possibility of a true summary adjudication order,
25 and seeks to waste the Court’s time by effectively re-opening, attacking, and
26 unraveling matters determined in Phase One.
- 27 • St. Paul’s Position: St. Paul’s position is that the question presented in Phase
28 One should be limited to whether the St. Paul Policy potentially covered the

1 Class Actions as covered “personal injury,” and the AG Investigation as a suit
2 or claim for damages for “personal injury.” Whether the Policy’s “Online
3 Activity Exclusion,” or any other exclusions, preclude coverage would be
4 determined in Phase Two, if St. Paul is not successful in Phase One. The
5 reason is (as is explained further below) application of the “Online Activity
6 Exclusion” in the St. Paul Policy will necessarily require discovery and more
7 facts than are needed for the preliminary, and potentially dispositive, issue of
8 whether the personal injury coverage in the Policy applies.

9 **b. Phase Two**

- 10 • *St. Paul’s Position:* Phase Two proposes disposition of the issue of whether
11 the Class Actions and AG Investigation are excluded from coverage by the
12 St. Paul Policy’s “Online Activity Exclusion. St. Paul proposes that the
13 “Online Activity Exclusion” be part of a separate phase because it was an
14 exclusion drafted by both parties and, if it does not as worded exclude
15 coverage for personal injury claims involving online activity, it does not reflect
16 the mutual intentions of the parties. Phase Two would require more
17 extensive discovery, as the parties may need to depose a number of
18 individuals. Further written discovery, including subpoenas to third parties
19 would also be necessary. Fact discovery would be completed within 90 days
20 of commencement of Phase Two. Phase Two will proceed by motion(s) or
21 trial *without* jury. An appropriate time for mediation may be at the conclusion
22 of discovery and prior to the motion/trial contemplated by this Phase. Phase
23 Two would be concluded within 5 months of its commencement. If the Court
24 grants St. Paul’s motion(s) or rules in St. Paul’s favor after trial proceedings,
25 the case is over. If the Court denies St. Paul’s motion(s), or rules for
26 Plaintiffs, then the case would proceed to Phase Three. A Case
27 Management Conference would be held at this point to set further deadlines
28 and a trial date, if necessary.

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- **Plaintiffs’ Position:** Plaintiffs dispute St. Paul’s characterization of events giving rise to the policy’s “Online Activities Exclusion.” There is no dispute that the exclusion is in the Policy. However, to the extent St. Paul wishes to challenge this assertion to undercut coverage, such issues are properly addressed in Phase One, during the determination of whether the St. Paul Policy provides coverage for the Class Actions and Attorney General Investigation.

c. Phase Three

Phase Three would address the contingent issues relating to the causes of action for breach of the covenant of good faith and fair dealing and unfair business practices. Phase Three would include discovery, preparation for trial, and trial on the remaining issues. St. Paul reserves the right to request that discovery and/or trial of the punitive damage request be bifurcated from the rest of the proceedings. Fact discovery would be concluded within 60 days of commencement of this Phase. Expert discovery would be concluded within 30 days thereafter.

TRIAL SCHEDULE

12. The Parties Request A Trial Date As Follows:

In light of the phased approach outlined above, the parties request that the trial date not be scheduled until the conclusion of Phase Two.

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

The parties estimate trial will take approximately 5 to 7 trial days.

DATED: June 5, 2006

GORDON & REES LLP

By /s/ Sara M. Thorpe
Sara M. Thorpe
Attorneys for Defendant St. Paul Mercury
Insurance Co.

1 DATED: June 5, 2006

ABELSON HERRON LLP

2
3 By /s/ Leslie A. Pereira

4 Michael B. Abelson
5 Leslie A. Pereira
6 Attorneys for Plaintiffs Netscape Communications
7 Corp. and America Online, Inc.

8 **[PROPOSED] ORDER**

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

11 IT IS HEREBY ORDERED THAT

12 1. Joinder of Parties: Any new parties shall be joined no later than June 30,
13 2006.

14 2. ADR. The parties shall be referred to mediation before a private mediator
15 after the conclusion of discovery and briefing in Phase Two of the case.

16 3. Initial Disclosures. The parties have been and shall continue to exchange
17 initial disclosures consistent with Phase One.

18 4. Discovery and Motions – Phasing of Case.

19 This case shall proceed according to three Phases, as follows:

20 a. [Phase One shall focus on whether the St. Paul Policy’s “personal
21 injury” coverage applies to the Class Actions and AG Investigation – or
22 - Phase One shall focus on whether there was a duty to defend under
23 the terms of the St. Paul Policy.]

24 b. [(If not included in Phase One pursuant to Plaintiffs’ proposal) Phase
25 Two shall focus on whether the Online Activity Exclusion (or any other
26 exclusion) in the St. Paul Policy precludes coverage for the Class
27 Actions and AG Investigation and whether the St. Paul Policy should
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be reformed to reflect the mutual intentions of the parties at the time of contracting.]

c. Phase Three will proceed, if necessary, with discovery and trial on the contingent issues relating to the causes of action for breach of the covenant of good faith and fair dealing and unfair business practices. St. Paul reserves the right to request that discovery and/or trial of the punitive damage request be bifurcated from the rest of the proceedings.

5. Phase One. The following deadlines apply to Phase One:

- July 21, 2006 – St. Paul file summary judgment motion(s);
- August 11, 2006 - AOL/Netscape file opposition;
- September 1, 2006 – St. Paul file reply; and
- September 20, 2006 - AOL/Netscape file surreply.
- _____ - Hearing on motion(s).

6. A further Case Management Conference is scheduled for _____ at which time the Court will set deadlines and dates for Phase Two, if necessary.

Dated: _____

JUDGE, UNITED STATES DISTRICT COURT
HON. JAMES WARE