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22 **UNITED STATES DISTRICT COURT**

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

24 NETSCAPE COMMUNICATIONS
 25 CORPORATION, et al.

26 Plaintiffs,

27 v.

28 FEDERAL INSURANCE COMPANY, et al.

Defendants.

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

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION TO DISMISS
 DEFENDANT ST. PAUL'S COUNTER-
 CLAIMS FOR REFORMATION OR, IN
 THE ALTERNATIVE, MOTION FOR
 SUMMARY JUDGMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES; DECLARATION OF
 MICHAEL BRUCE ABELSON**

Date: September 11, 2006

Time: 9:00 a.m.

Judge: Hon. James Ware

Dept.: Courtroom 8

Complaint filed December 12, 2005

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

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO
 DISMISS DEFENDANT ST. PAUL'S COUNTER-CLAIMS FOR
 REFORMATION OR, IN THE ALTERNATIVE, MOTION FOR
 SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND
 AUTHORITIES; DECLARATION OF MICHAEL BRUCE
 ABELSON

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1 TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 11, 2006 at 9:00 a.m , or as soon thereafter
3 as may be heard, in Courtroom 8 of the above-referenced court, located at 280 South First Street,
4 San Jose, California, Plaintiffs Netscape Communications Corporation and America Online, Inc.
5 will and hereby do move to dismiss without leave to amend the Second, Third, and Fourth
6 Causes of Action in the Counter-Claim filed by Defendant St. Paul Mercury Insurance Company
7 (the "Counter-Claim") In the alternative, Plaintiffs will and hereby do move for summary
8 judgment on the Second, Third, and Fourth Causes of Action in the Counter-Claim.

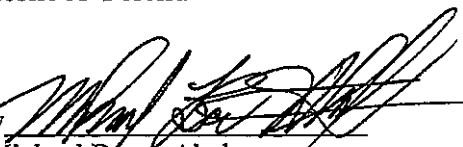
9 Plaintiffs' Motion to Dismiss or, in the alternative, Motion for Summary Judgment is
10 brought pursuant to the provisions of Rule 12(b)(6), Rule 12(b), and Rule 56 of the Federal Rules
11 of Civil Procedure, and is made on the grounds that the reformation claims in the Counter-Claim
12 are barred by the applicable statute of limitations, that they fail to seek an appropriate remedy,
13 and that they fail to allege any inequitable conduct or intentional misrepresentations by Plaintiffs.

14 Plaintiffs' Motion to Dismiss or, in the alternative, Motion for Summary Judgment is
15 based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the
16 Declaration of Michael Bruce Abelson; the Court's file in this matter; and on such oral argument
17 as Netscape and AOL may present at the hearing if oral argument is so ordered by this Court.

18 Pursuant to this Court's Standing Order Regarding Case Management in Civil Cases,
19 counsel for Netscape and AOL conferred with opposing counsel and determined that the hearing
20 date proposed will not cause undue prejudice

21 Dated: June 16, 2006

ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

22
23
24 By 
25 Michael Bruce Abelson
26 Attorneys for Plaintiffs
27 Netscape Communications Corporation
and America Online, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

St Paul's Counter-Claims for Reformation should be dismissed.

First, they're untimely. The statute of limitations in California for an action to reform an insurance policy on the ground mistake is three years. Time begins to run on the date the party seeking relief discovered (or should have discovered) the facts constituting the mistake. Here, the Counter-Claim plainly alleges that by October 5, 2000 (or December 13, 2000, latest), St. Paul was aware of the endorsement it now claims was mistakenly added to its policy. Because that date is more than three years before St. Paul filed its reformation claims, St. Paul's claims are now time-barred.

Second, they're improper. A careful reading of the Counter-Claim's allegations demonstrates St. Paul is not asking this Court to reform its policy to the parties' expressed intentions. Rather, St. Paul is asking this Court to write a new insurance policy. The Counter-Claim asserts that the parties mutually agreed that the policy would exclude coverage for "online activities," but it fails to allege what that critical phrase was agreed to mean. Thus, there is no standard to which the Court can reform the policy. So, in effect, St. Paul is asking the Court to craft a new definition of "online activities." One they like better. One that encompasses the actions underlying Plaintiffs' claims here so that coverage is foreclosed. That's not reformation. That's a coverage determination, and it can't be effectuated pursuant to this Court's equitable powers.

Third, they're legally and factually unsupported. St. Paul's third and fourth causes of action seek reformation based upon Plaintiffs' inequitable conduct and/or intentional misrepresentations. In this regard, St. Paul claims Plaintiffs were aware of – but failed to tell St. Paul about – the Underlying Lawsuits at the time the Policy Change Endorsement was negotiated. What St. Paul's causes of action fail to mention – but other portions of the Counter-Claim plainly allege – is that the Underlying Lawsuits were tendered to St. Paul *well before* the

1 Policy Change Endorsement was negotiated and agreed to by St. Paul. St. Paul wasn't duped. It
2 was either negligent or, more likely, now simply wishes it had made a different contract

3 For these reasons, and the reasons set forth herein, Plaintiffs respectfully request that the
4 Court dismiss St. Paul's second, third and fourth causes of action without leave to amend.

5 **II. FACTUAL BACKGROUND**

6 **A. *The St. Paul Technology General Liability Policy***

7 St. Paul issued AOL a technology commercial general liability insurance policy for the
8 period April 1, 1999 to April 1, 2000 (the "St. Paul Policy"). Counter-Claim ("CC") at ¶ 16.
9 According to the Counter-Claim, "[i]t was the stated mutual intention and understanding of St
10 Paul and AOL that the St. Paul Policy was not intended to provide coverage to AOL, and its
11 related companies, for risks associated with online activities." CC, ¶ 17.

12 The Counter-Claim further alleges that, as originally issued, the St. Paul Policy contained
13 a "Personal Injury and Advertising Injury Exclusion Endorsement" that excluded all personal
14 injury and advertising injury coverage ("Endorsement 1"). CC, ¶ 19. According to the Counter-
15 Claim, Endorsement 1 was deleted on August 2, 2000 and replaced with a "Personal Injury and
16 Advertising Injury for Non-Online Activities Endorsement" ("Endorsement 2"). CC, ¶ 20
17 Endorsement 2 stated the following:

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

20 Other Terms:

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

22 Id

23 Finally, the Counter-Claim alleges that on October 5, 2000, Endorsement 2 was deleted
24 and replaced by a third endorsement (the "Policy Change Endorsement") titled "Personal Injury
25 and Advertising Injury Endorsement" which stated:

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

28 "Online Activities" is defined as providing e-mail services, instant messaging services,
3rd party advertising, supplying 3rd party content and providing internet access to 3rd

1 parties. However, it is understood that America Online's own advertising is not
2 considered "Online Activity" regardless of the medium or format in which it is presented.

3 Other Terms:

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

5 Id., ¶ 21; Ex 1 to Abelson Decl. It is the existence, scope and wording of the Policy Change
6 Endorsement that lies at the heart of St. Paul's instant Counter-Claim for Reformation.

7 **B. Underlying Privacy Lawsuits Against Netscape and AOL**

8 In 2000, AOL and Netscape were sued in four lawsuits as follows:

- 9 • *Specht v. Netscape Communications Corp and America Online, Inc.*, No 00 CIV
10 4871 (S D N Y), filed on or about June 30, 2000;
- 11 • *Mueller v. Netscape Communications Corp and America Online, Inc.*, No. 00
12 CIV 01723 (D.D.C.), filed on or about July 21, 2000;
- 13 • *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No 00
14 CIV 6219 (S.D.N.Y.), filed August 18, 2000; and
- 15 • *Gruber v Netscape Communications Corp and America Online, Inc.*, No. 00 CIV
16 6249 (S D N Y), filed on August 21, 2000.

17 CC, ¶ 7 These four lawsuits are collectively referred to as the "Underlying Lawsuits." Id. The
18 Underlying Lawsuits alleged that Netscape and AOL collected information about the personal
19 Internet habits of Internet users through their "SmartDownload" program, in violation of users'
20 privacy rights CC, ¶ 8. On August 20, 2000, AOL and Netscape tendered two of the
21 Underlying Lawsuits (*Mueller* and *Specht*) to St Paul. CC, ¶ 9. This date of tender is important
22 here because, as discussed below, the Policy Change Endorsement was added to the policy
23 almost two months later. As such, St. Paul was on notice of the deficiencies in its policy which
24 now – *six years later* – it claims warrant reformation.

25 On December 13, 2000, St. Paul sent AOL a letter denying its claim for coverage with
26 regard to the *Mueller* and *Specht* actions (the "Denial Letter"). See Ex. 2 to Abelson Decl.¹ In

27 ¹ As discussed below in Section III A , this Court can consider the Denial Letter in connection
28 with Plaintiffs' Motion to Dismiss because the Denial Letter is referenced in St. Paul's Counter-
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1 the Denial Letter, St. Paul advised AOL and Netscape that there was no duty to defend or
2 indemnify AOL and Netscape in the Underlying Lawsuits because the Underlying Lawsuits do
3 not allege "bodily injury," "property damage," or "advertising injury" under the St. Paul policy.
4 CC, ¶ 11. The Denial Letter further advised Plaintiffs that the Underlying Lawsuits do not allege
5 "personal injury" and, even if the claims fell within one of the personal injury offenses, the
6 Underlying Lawsuits were excluded from coverage because St. Paul's insurance policy excludes
7 coverage for offenses arising out of AOL and Netscape's online activities. In support of its
8 position, the Denial Letter set forth the full text of the Policy Change Endorsement:

9 The following endorsement amends the Technology Commercial General
10 Liability Protection:

11 **FORM: 40502 01-1980**

12 **PERSONAL INJURY AND ADVERTISING INJURY**
13 **ENDORSEMENT**

14 This endorsement changes your Commercial General Liability Protection.

15 **How Coverage Is Changed**

16 For the purposes of advertising injury and personal injury, all Online
17 Activities are excluded from these coverages

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

23 **Other terms:**

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

25
26 Claim (see CC, ¶ 11) and its authenticity is not disputed. Abelson Decl., ¶ 3. If this Court
27 determines that it may not consider the Denial Letter in connection with Plaintiffs' Rule 12(b)(6)
28 motion, Plaintiffs' hereby request that the Court treat its motion to dismiss as a summary
judgment motion under Fed. Rule Civ. Proc. 56. See Fed. Rule Civ. Proc., 12(b).

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1 St. Paul's recitation of the Policy Change Endorsement in their letter denying coverage for the
 2 Underlying Lawsuits, makes it clear that St. Paul considered at this time whether the language of
 3 the endorsement comported with its original intentions

4 **C. Procedural Background**

5 On May 18, 2006, St Paul filed its Answer to Plaintiffs' First Amended Complaint. At
 6 that time, it also interposed the instant Counter-Claim for Declaratory Relief and Reformation
 7 (the "Counter-Claim"). In its Counter-Claim, St. Paul alleges reformation is necessary "to reflect
 8 the true intention of the parties that the St Paul Policy does not cover personal injury liability
 9 arising out of online activities." CC, Prayer for Relief, ¶ 3. The purported basis for all three of
 10 St Paul's reformation claims is that the St. Paul Policy – including the Policy Change
 11 Endorsement as written – "may not" reflect the mutual intentions of the parties.

12 **III. ARGUMENT**

13 **A. Legal Standard for this Motion**

14 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move to
 15 dismiss an action for failure to state a claim upon which relief can be granted "Dismissal under
 16 [Rule 12(b)(6)] is appropriate when it is clear that no relief could be granted under any set of
 17 facts that could be proven consistent with the allegations in the complaint." Golden Day School,
 18 Inc. v. Pirillo, 118 F.Supp.2d 1037, 1041 (C D Cal. 2000).

19 In ruling on a Rule 12(b)(6) motion, the reviewing court must indulge in the presumption
 20 that all well-pleaded facts in the action are true, and must further construe such allegations in the
 21 light most favorable to the claimant Parks School of Business, Inc. v. Symington, 51 F. 3d
 22 1480, 1481 (9th Cir. 1995). However, a court need not accept as true conclusory allegations and
 23 legal characterizations contained in a complaint. Transphase Systems, Inc. v. Southern Calif.
 24 Edison Co , 839 F. Supp 711, 718 (C.D. Cal. 1993)

25 Generally, a district court may not consider any material beyond the pleadings in ruling
 26 on a Rule 12(b)(6) motion. Branch v. Tunnell, 14 F 3d 449, 453 (9th Cir 1994), *overruled on*
 27 *other grounds* by Galbraith v. County of Santa Clara, 307 F. 3d 1119 (9th Cir. 2002). However,

1 under the “incorporation by reference” doctrine, “documents whose contents are alleged in the
2 complaint and whose authenticity no party questions, but which are not physically attached to the
3 pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Id.* at 454.

4 Moreover, the Ninth Circuit has extended the “incorporation by reference” doctrine to
5 allow a court to consider on a motion to dismiss a document not explicitly alleged in the
6 plaintiff’s complaint if the claim depends on the contents of the document and the parties do not
7 dispute its authenticity. *Knievel v. ESPN*, 393 F. 3d. 1068, 1076 (9th Cir. 2005); *Marder v.*
8 *Lopez*, 2006 U.S. App. LEXIS 14330 (9th Cir. 2006). “The court may treat such document as
9 part of the complaint, and thus may assume that its contents are true for purposes of a motion to
10 dismiss under Rule 12(b)(6).” *Marder*, 2006 U.S. App. at * 5. Such consideration does not
11 convert the motion to dismiss into a motion for summary judgment *Branch*, 14 F. 3d at 454.

12 **B. *St. Paul’s Reformation Claims Are Untimely***

13 In California, reforming an insurance policy based on claims of fraud or mistake are
14 subject to a three-year statute of limitations Cal. Code Civ. Proc., §338(d) (three-year statute of
15 limitations for an “action for relief on the ground of fraud or mistake”); *North Star Reinsurance*
16 *Corporation v. Superior Court*, 10 Cal. App. 4th 1815, 1822-1823 (finding that claims to reform
17 an insurance policy are governed by the three-year statute of limitations in Cal. Code Civ. Proc.,
18 §338(d)); *Rashtian v. Allstate Ins. Co.*, 2003 U.S. Dist. LEXIS 1840 (same).

19 The limitations period begins to run on the date the cause of action “accrued,” and the
20 cause of action “is not to be deemed to have accrued until the discovery, by the aggrieved party,
21 of the facts constituting the fraud or mistake ” Cal. Code Civ. Proc., §338(d). Notably, equitable
22 tolling doctrines are not available to extend the limitations period. *North Star Reins. Corp. v.*
23 *Superior Court*, 10 Cal. App. 4th 1815, 1823-25.

24 The seminal case in California regarding the statute of limitations for reformation claims
25 is *North Star Reins. Corp.* There, an insured sought reformation of its excess insurance policy
26 after its insurer (North Star) denied coverage on the basis of a “work exclusion” the insured
27 contended was erroneously included in the policy. *Id.* at 1820-1821. North Star sent the insured
28

1 its reservation of rights letter denying coverage on or about March 24, 1987 (the "ROR Letter").
 2 Id. at 1819. The ROR Letter set forth the full text of the "work exclusion," and stated that North
 3 Star believed there was no coverage for the claim on the basis the "work exclusion" and for other
 4 reasons. Id. at 1819-1820. More than three and a half years later, the Insured filed its
 5 reformation claim against North Star, seeking removal of the "work exclusion." Id. at 1820-
 6 1821.

7 The Court held that the insured's reformation claim was time-barred because the Insured
 8 failed to file it within three years of its receipt of North Star's ROR Letter. In upholding
 9 summary judgment for North Star, the Court stated:

10 "Here, there cannot be any factual dispute of merit that [the Insured] discovered 'the facts
 11 constituting the ... mistake' when it received, through [its attorney], the March 27, 1987,
 12 letter from North Star. The letter which [the attorney] read directly set forth the excess
 13 insurance policy language showing the presence of the exclusions from coverage which
 14 [the Insured] alleges were included by mistake and entitle it to reform the insurance
 15 contract."

16 Id. at 1822-1823. The Court rejected the insured's argument that it had insufficient knowledge
 17 of the mistake at the time it received the ROR Letter, and further held that there were no
 18 questions of fact regarding the Insured's knowledge preventing resolution as a matter of law. Id.
 19 at 1823.

20 Similar principles apply to dismissal of reformation claims pursuant to Rule 12(b)(6).
 21 See e.g., Rashtian v. Allstate Ins. Co., 2003 U.S. Dist. LEXIS 1840 (C.D. Cal. 2003); Hal Roach
 22 Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1547-1549 (9th Cir. 1989). In
 23 Rashtian, for example, the insureds (Rashtians) sued Allstate in 2001 for reformation of their
 24 homeowner's policy (issued in 1994) after denial of their claim for earthquake damage. Allstate
 25 asserted the policy did not contain earthquake coverage. Id. at *9. For their part, the Rashtians
 26 contended that they contracted for earthquake coverage, and that it was mistakenly omitted from
 27 Allstate's policy. In granting Allstate's Rule 12(b)(6) motion, the court held that the Rashtian's
 28

1 claim was subject to a three-year statute of limitations which would have begun running *when*
2 *the amended policy was issued* to the Rashtian's in 1994. Since the Rashtian's action was not
3 brought until 2001, it was time-barred and subject to dismissal under Rule 12(b)(6) without leave
4 to amend. *Id* at *7, 11.

5 The effect of applying the rules of North Star Reins. Corp, Rashtian and Hal Roach
6 Studios, Inc. here is such that St Paul's Counter-Claims for reformation must be dismissed as
7 untimely.

8 **1. *The Counter-Claim Itself Establishes That St. Paul's Reformation***
9 ***Claims are Time-Barred***

10 Here, all three of St. Paul's reformation claims are untimely because the Counter-Claim
11 alleges that St. Paul learned of facts constituting the alleged fraud or mistake in 2000 when the
12 Underlying Lawsuits were tendered to St. Paul for coverage Now, six years later, St Paul seeks
13 reformation. Such untimely claims are plainly barred by California's three-year statute of
14 limitations.

15 According to the Counter-Claim, the St Paul policy was issued to AOL for the policy
16 period April 1, 1999 to April 1, 2000, and was extended to June 1, 2000, and then to June 1,
17 2001. CC, ¶ 16 At the time the contract was entered into, "it was the stated mutual intention
18 and understanding of St. Paul and AOL that the St. Paul Policy was not intended to provide
19 coverage to AOL, and its related companies, for risks associated with online activities" CC, ¶
20 17. After twice amending the Policy's personal injury coverage, a "Policy Change Endorsement
21 was added to the policy" on October 5, 2000 (effective April 1, 1999) which provided as follows:

22 "For the purposes of advertising injury and personal injury, all Online Activities are
23 excluded from these coverages

24 'Online Activities' is defined as providing e-mail services, instant messaging services,
25 3rd party advertising, supplying 3rd party content and providing internet access to 3rd
26 parties. However, it is understood that America Online's own advertising is not
27 considered 'Online Activity' regardless of the medium or format in which it is presented

27 Other Terms:

28 All other terms and conditions of the policy remain the same."

1
2 CC, ¶ 21.

3 According to St. Paul, this (third) Policy Change Endorsement *must* be reformed because,
4 “[t]he St. Paul Policy currently *may not* reflect the mutual intentions of the parties to the extent
5 the St. Paul Policy does not exclude *all* coverage for personal injuries arising out of online
6 activities.” CC, ¶ 31 (italics added) The insurer’s words here are carefully chosen. In essence,
7 St. Paul concedes coverage (or at least an ambiguity in coverage) by arguing that its definition of
8 “online activities” added by the Policy Change Endorsement *may not be* sufficiently broad to
9 encompass all activities that St. Paul believes constitute and/or should be considered “online
10 activities.”² It now seeks to have this Court re-write its Policy to eliminate coverage for the
11 Underlying Lawsuits. Such relief is improper

12 Indeed, all three of St. Paul’s causes of action for reformation are based on an alleged
13 mistake. Thus, the statute of limitations began to run on the date that St. Paul first discovered
14 facts constituting the alleged mistake. Cal. Code Civ. Proc., § 338(d) Practically speaking, that
15 means the same date that the endorsement was issued (October 5, 2000). That must be so
16 because St. Paul is an insurer. Unlike the plaintiffs in Rashtian, insureds who were nevertheless
17 charged with knowledge of the policy’s provisions when they received their coverage contract,
18 St. Paul actually approved and endorsed its own form. It cannot claim it did not read its own
19 form. Thus, if St. Paul contends there was a mistake with respect to the language used by the
20 policy, it will be deemed to be aware of the erroneous policy terms as of the date of issuance.

21 Despite such logic, St. Paul nonetheless argues that it was not aware of its mistake until
22 the Underlying Lawsuits were tendered to it for coverage. As before, St. Paul cannot escape the
23 realities of time. The fact is Plaintiffs’ tender of the Underlying Actions occurred before the

24
25 ² Indeed, it is this precise issue which is raised by the Underlying Lawsuits. Those actions allege
26 that Plaintiffs released a software product intended to assist users in downloading Internet files
27 (SmartDownload) but which also invaded users’ privacy by intercepting their private
28 information. Based on their belief that the Underlying Lawsuits do not allege “online activities”
by Plaintiffs (as that term was understood and specially defined in the St. Paul Policy), Plaintiffs
tendered the Underlying Lawsuits to St. Paul for a defense. St. Paul denied coverage for the
Underlying Lawsuits on this basis (and others).

1 Policy Change Endorsement was issued *Thus, by its own admissions, St Paul was aware of the*
2 *Underlying Actions – and the fact that Plaintiffs were demanding coverage under the St Paul*
3 *Policy for those actions – at the time it issued the Policy Change Endorsement.* The fact that St
4 Paul issued the Policy Change Endorsement anyway, now precludes their ability to seek
5 reformation

6 The Counter-Claim further alleges that if there is a material difference between what the
7 parties intended and the wording of the Policy Change Endorsement itself, “it was not known to
8 the parties until claims arose that involved alleged privacy violations in connection with online
9 activities (e.g., the Underlying Actions).” CC, ¶ 32

10 Wrong again.

11 Indeed, it is undisputed – and the Counter-Claim so alleges – that the Underlying Actions
12 were all filed in 2000. Moreover, it is undisputed – and the Counter-Claim so alleges – that St.
13 Paul was notified by Plaintiffs of at least two of the Underlying Actions on **August 20, 2000**
14 CC, ¶ 9. Thereafter, on **October 5, 2000**, St. Paul agreed to add to its policy – and did add to its
15 policy – the very Policy Change Endorsement it now seeks to reform. Given the realities of this
16 timing, St. Paul’s error is obvious: St. Paul was aware of at least two of the Underlying Actions
17 at the time it added the Policy Change Endorsement to its Policy. Presumably it did so after
18 reading and considering the allegations of the Underlying Actions – allegations which it now
19 seeks to disclaim coverage for by way of retroactive endorsement. The time to do so has long
20 since passed.

21 **2. The St. Paul Denial Letter Establishes That Its Reformation Claims are**
22 **Time-Barred**

23 On the basis of the allegations in St. Paul’s Counter-Claim alone, the Court should
24 dismiss St. Paul’s second, third and fourth causes of action as untimely. However, the bar to St.

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1 Paul's reformation claims is further underscored by St. Paul's Denial Letter which can be
2 considered by the Court in connection with this Motion to Dismiss.³

3 Denial of Plaintiffs' claim for coverage for two of the Underlying Lawsuits took place via
4 St. Paul's letter dated December 13, 2000 Unless St Paul wishes to admit that it denied
5 Plaintiffs' claim without adequate review and investigation, the working assumption for this
6 motion is that St. Paul actually read the lawsuits' allegations Supporting this assumption, is the
7 fact that St. Paul's Denial Letter recites the key privacy allegations asserted in those actions and
8 proceeds to analyze them with regard to coverage under the terms of its Policy. Pages 3 and 4 of
9 the Denial Letter then sets out the full text of the Policy Change Endorsement and concludes that
10 the Underlying Lawsuits are excluded as "online activities."

11 The importance of St. Paul's Denial Letter cannot be overstated. On its face, the letter
12 demonstrates that St. Paul analyzed the terms of the Policy Change Endorsement in connection
13 with the very privacy claims at issue in this lawsuit Pursuant to North Star Reins. Corp., the
14 statute of limitations must have begun to run on or before this date (December 13, 2000) Three
15 years later, St Paul's reformation claims were extinguished by operation of law. Consequently,
16 because St Paul's reformation claims were filed well beyond the three-year statute of
17 limitations, the second, third and fourth causes of action in St Paul's Counter-Claim should be
18 dismissed without leave to amend.

19 **C. *The Counter-Claim Fails To Allege Any Legal Basis for Reformation***

20 California Civil Code Section 3399 sets forth the statutory guidelines for reformation of a
21 written contract, viz:

22 "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which
23 the other at the time knew or suspected, a written contract does not truly express the
24 intentions of the parties, it may be revised on the application of a party aggrieved, so as to
25

26 ³ The Denial Letter was referenced in St. Paul's Counter-Claim. See CC, ¶ 11 Moreover, the
27 copy presented to this Court was produced during discovery by St. Paul and its authenticity is not
28 contested. Abelson Decl., ¶ 3. Accordingly, pursuant to Branch, Knievel and Marder (cited
above in Section III.A.) this Court may properly consider the Denial Letter.

1 express that intention, so far as it can be done without prejudice to the rights acquired by
2 third persons, in good faith and for value.”

3 Cal. Civ. Code, § 3399. Here, St. Paul’s Counter-Claim seeks reformation on all bases: mutual
4 mistake (Second Cause of Action), unilateral mistake based on inequitable conduct (Third Cause
5 of Action), and unilateral mistake based on fraud (Fourth Cause of Action). Each of the causes
6 of action, however, fails to state a claim upon which relief can be granted.

7 **1. All Three Reformation Claims Impermissibly Ask This Court To Write a**
8 **New Contract for the Parties**

9 The purpose of reformation is to make a written contract properly express the parties’
10 intentions. “Although a court of equity may revise a written instrument to make it conform to
11 the real agreement, it has no power to make a new contract for the parties, whether the mistake
12 be mutual or unilateral.” American Home Ins. Co. v. Travelers Indemnity Co., 122 Cal. App. 3d
13 951, 963 (1981). Basic to a cause of action for reformation is a showing by the aggrieved party
14 that the parties had a mutual agreement on “all essential terms” of the agreement. Id. at 961; see
15 also Appalachian Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 21 (1989). Absent
16 such a showing, there would be “no standard” to which the policy could be reformed. American
17 Home Ins. Co., 122 Cal. App. 3d at 961 (1981).

18 Here, the Counter-Claim fails to allege an agreement on “all essential terms” and, thus,
19 provides no standard for its proposed reformation. The substance of St. Paul’s reformation
20 claims – excluding, for now, the various reasons it alleges caused the mistake – is as follows:

- 21 • The parties mutually intended for the policy to exclude coverage for “online activities.”
22 CC, ¶ 17.
- 23 • Thereafter, the parties mutually agreed to add a Policy Change Endorsement to the policy
24 which stated that “online activities” were excluded, and specifically defined “online
25 activities” as: “providing e-mail services, instant messaging services, 3rd party
26 advertising, supplying 3rd party content and providing internet access to 3rd parties.
27 However, it is understood that America Online’s own advertising is not considered

1 'Online Activity' regardless of the medium or format in which it is presented."⁴ CC, ¶
2 21.

3 • To the extent the definition of "online activities" in the Policy Change Endorsement does
4 not exclude all "online activities," a mistake was made because it does not reflect the
5 mutual intention of the parties, *i.e.* to exclude all "online activities" CC, ¶ 31, 36, 42
6 According to St Paul, this Court should reform the St Paul policy so that it reflects the
7 parties' mutual intention to exclude coverage for all "online activities" CC, ¶¶ 33, 38, 44, and
8 Prayer for Relief, ¶ 3. Yet this the Court cannot do. The reason is plain: The policy itself
9 already excludes coverage for "online activities." The critical term already exists. It's just that
10 now St. Paul dislikes its handiwork. But St Paul's Counter-Claim fails to allege any agreement
11 by the parties as to some other or contrary meaning for the term "online activities." Thus, St.
12 Paul fails to provide a standard to which this Court can reform the St Paul Policy.

13 **2. The Counter-Claim's Third Cause of Action Fails To Allege Any**
14 **Inequitable Conduct, Misrepresentation and/or Omission**

15 The Counter-Claim's third cause of action seeks reformation based on a unilateral
16 mistake. Pursuant to California law, a unilateral mistake by one party to the contract will not
17 support reformation without some sort of inequitable conduct by the other party. Cal Civ. Code,
18 § 3399

19 Here, the Counter-Claim alleges that the St Paul Policy does not reflect the mutual
20 intentions of the parties "because of inequitable conduct, misrepresentations, and/or omissions"
21 by Plaintiffs CC, ¶ 36. The particular misconduct alleged is that Plaintiffs knew about the
22 Underlying Lawsuits and sought to "game" the coverage by changing the wording of the St Paul
23 Policy in an effort to obtain coverage for claims arising out of online activities. *Id.*

24
25
26 ⁴ It is notable that "online activities" is defined *as* the listed items and not merely *to include* the
27 listed items. Likewise, the listed items are not deemed to be *examples* of "online activities."
28 Furthermore, excluded from the definition are Plaintiffs' own advertising activities, whether or
not conducted "online." In other words, the parties appear to have carefully crafted a definition
for the term "online activities" and, thus, a "standard" already exists.

1 No other inequitable conduct is alleged.

2 Even assuming the truth of these allegations – as the Court must on this motion – it is
 3 clear that Plaintiffs’ conduct was not inequitable, and did not involve any misrepresentations or
 4 omissions. This is so because, elsewhere in the Counter-Claim, the insurer affirmatively alleges
 5 that Plaintiffs *told St. Paul* about the Underlying Lawsuits shortly after they were filed, and *told*
 6 *St. Paul* they were seeking coverage for the Underlying Lawsuits under the St. Paul policy. CC,
 7 ¶¶ 7, 9 All of this was communicated on August 20, 2000, which was well *before* St. Paul and
 8 Plaintiffs allegedly agreed to clarify the policy through the Policy Change Endorsement. CC, ¶¶
 9 9. Thus, there was no misrepresentation and no omission. Precisely the opposite is true: There
 10 was full disclosure. Thus, the Counter-Claim’s own allegations foreclose a supportable charge
 11 of inequitable conduct. Absent a proper assertion of Plaintiffs’ inequitable conduct, St. Paul’s
 12 purported “unilateral mistake” does not provide grounds for reformation. For these reasons, the
 13 Counter-Claim’s second cause of action should be dismissed without leave to amend.

14 **3. The Counter-Claim’s Fourth Cause of Action Fails to Allege Any**
 15 **Intentional Misrepresentation**

16 The Counter-Claim’s fourth cause of action also seeks reformation based on an alleged
 17 unilateral mistake. Again, under California law, a party’s unilateral mistake is not grounds for
 18 reforming the contract unless the aggrieved party can show fraud or inequitable conduct by the
 19 other party. Cal. Civ. Code, § 3399.

20 Here, St. Paul attempts to satisfy its burden by alleging that Plaintiffs engaged in
 21 “intentional misrepresentations” which caused St. Paul to agree to the Policy Change
 22 Endorsement. CC, ¶ 42. According to the Counter-Claim, those intentional misrepresentations
 23 consisted of the following: “St. Paul was unaware” that Plaintiffs knew about the Underlying
 24 Lawsuits but Plaintiffs “did not disclose this material information” in discussing further revisions
 25 of the policy. CC, ¶ 41.

26 No other intentional misrepresentations are alleged.

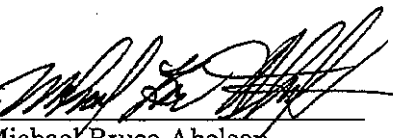
1 The Counter-Claim itself belies St. Paul's assertion that Plaintiffs engaged in *any*
 2 misrepresentation, let alone an intentional misrepresentation. Specifically, the Counter-Claim
 3 *admits* that Plaintiffs "tendered" to St. Paul at least two of the Underlying Lawsuits on August
 4 20, 2000. At that time, Plaintiffs are deemed to have effectively told St. Paul the following:
 5 "Here are two new lawsuits alleging privacy violations. We demand that you defend us against
 6 these actions under the terms of your policy." Thus, the Counter-Claim admits – as it must – that
 7 the "material" information allegedly misrepresented *was disclosed* to St. Paul on August 20,
 8 2000, six weeks *prior* to the parties' negotiations and agreement regarding the Policy Change
 9 Endorsement. St. Paul's subsequent – *and flatly contradictory* – allegation that Plaintiffs "did
 10 not disclose this material information," should be disregarded by this Court. Transphase
 11 Systems, Inc. v. Southern Calif. Edison Co., 839 F. Supp. 711, 718 (C.D. Cal. 1993). Without
 12 any supporting "intentional misrepresentation," the Counter-Claim's fourth cause of action fails
 13 to state a claim and should be dismissed.

14 **IV. CONCLUSION**

15 On its face, the Counter-Claim establishes that St. Paul's reformation claims are barred
 16 by California's three-year statute of limitations. As demonstrated, the defect cannot be cured by
 17 amendment. For all the foregoing reasons, Plaintiffs' motion to dismiss should be granted
 18 without leave to amend.

19 Dated: June 16, 2006

ABELSON | HERRON LLP
 Michael Bruce Abelson
 Leslie A. Pereira

22 By 
 23 Michael Bruce Abelson
 24 Attorneys for Plaintiffs
 25 Netscape Communications Corporation
 and America Online, Inc

DECLARATION OF MICHAEL BRUCE ABELSON

I, Michael Bruce Abelson, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California and before this Court. I am a partner in the firm of Abelson | Herron, counsel of record for Plaintiffs Netscape Communications Corp. and America Online, Inc. in the above-referenced matter. I have personal knowledge of the matters set forth herein, and if called to testify, I could and would testify competently thereto.

2. On June 13, 2006, my firm received a certified copy of the St. Paul Policy from Sara Thorpe of Gordon & Rees, counsel to St. Paul in this action. Attached hereto as Exhibit 1 is a true and correct copy of the Policy Change Endorsement upon which St. Paul's Counter-Claims for Reformation rely. Plaintiffs do not contest the authenticity of this document.

3. On May 3, 2006, my firm received from Ms. Thorpe documents produced by St. Paul in connection with their Rule 26 initial disclosure obligations. Contained within that production was a letter dated December 13, 2000 from St. Paul to America Online, Inc. in which St. Paul denied coverage for two of the Underlying Lawsuits (the "Denial Letter"). Attached hereto as Exhibit 2 is a true and correct copy of the Denial Letter. Plaintiffs do not contest the authenticity of this document.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 16th day of June, 2006 at Los Angeles, California

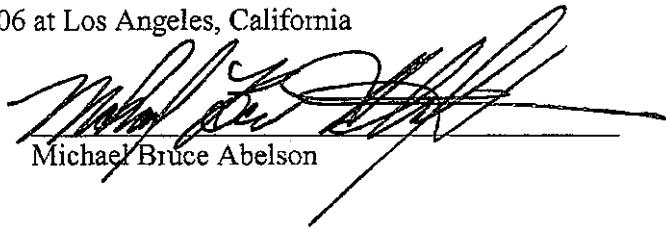

Michael Bruce Abelson

EXHIBIT 1

This is a true and certified copy of the policy issued

To: America Online Inc.

Effective: 4/1/99

To: 4/1/00

Company: St. Paul Mercury Insurance Company

By: *Michelle Madurait*

Title: Account Executive Officer

JUN 0 8 2006

SPM 0108

The **St Paul**

POLICY CHANGE ENDORSEMENT

This endorsement summarizes the changes to your policy. All other terms of your policy not affected by these changes remain the same.

How Your Policy Is Changed

General Liability

The following endorsement has been deleted:
 40502 - Personal Injury and Advertising Injury for Non Online Activities
 Endorsement

The following endorsement has been added to your policy:
 40502 - Personal Injury and Advertising Injury Endorsement

Premium Change Which Is Due Now

Additional premium

Returned Premium

If issued after the date your policy begins, these spaces must be completed and our representative must sign below.

Policy issued to
 AMERICA ONLINE INC.;

SPM 0339

Authorized representative

Endorsement takes effect

Policy Number

04/01/99

IE09000917

Processing Date: 10/05/00

13:21 008

The **St Paul**

Personal Injury and Advertising Injury Endorsement

This endorsement amends the Technology Commercial General Liability Protection.

How Coverage Is Changed

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

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

Other Terms:

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

SPM 0341

Name of Insured AMERICA ONLINE INC.;	Policy Number IE09000917	Effective Date 04/01/99
	Processing Date 10/05/00	13:21 008

EXHIBIT 2



St. Paul Fire and Marine Insurance Company
385 Washington Street
St. Paul, Minnesota 55102-1396
651.310.7911

December 13, 2000

Charles Curran
America Online, Inc.
22000 AOL Way
Dulles, Virginia 20166-9323

Re: Christopher Specht vs. Netscape and America Online, Inc.
Walter Mueller vs. Netscape and America Online, Inc.

Insured: America Online, Inc.
Claim No.: TE09000917 22H014
Date of Loss: various
Policy No.: TE09000917
Policy Dates: 4/1/99 - 4/1/00
Issuing Co.: St. Paul Mercury (St. Paul)

Dear Mr. Curran:

I am writing to acknowledge receipt of the above-entitled claim and to provide you with St. Paul's coverage position. Based on the materials supplied for our review, the Complaints and the policy language, we must respectfully deny your request, on behalf of America Online (AOL), for defense and indemnity. Careful consideration was given to your request and if there is any additional information, which you feel would materially affect this decision, please notify the undersigned at your earliest convenience.

I. CLAIM ALLEGATIONS

The above entitled actions involve the alleged theft of private information and violation of electronic communications privacy act through Netscape's Smart Load Product. The claimants allege that when they used Netscape Smart download to download information it secretly transmits information back to America Online. They alleged that the actions of Netscape and America Online constitute theft of private information and are in violation of the Electronic Communications Privacy Act, and Compute Fraud and Abuse Act. In essence the claimants allege that the defendants are spying on their internet activities.

Members of
The St. Paul Companies:
St. Paul Fire and Marine
Insurance Company
St. Paul Mercury
Insurance Company
St. Paul Guardian
Insurance Company
The St. Paul
Insurance Company
The St. Paul
Insurance Company
of Illinois
St. Paul Property
and Casualty
Insurance Company
St. Paul Fire and Casualty
Insurance Company
Adena Assurance
Company
St. Paul Indemnity
Insurance Company
St. Paul Medical Liability
Insurance Company
St. Paul Insurance
Company of
North Dakota
Economy Fire & Casualty
Company
Economy Preferred
Insurance Company
Economy Premier
Assurance Company
United States Fidelity and
Guaranty Company
Fidelity and Guaranty
Insurance Underwriters, Inc.
Fidelity and Guaranty
Insurance Company
USF&G Business
Insurance Company
USF&G Family
Insurance Company

SPM 0077

Charles Curran
December 13, 2000
Page 2

II. THE ST. PAUL POLICY

In order to determine whether or not the subject claim is covered, we refer you to the St. Paul policy TE09000917, issued to America Online, Inc., for the policy term beginning 4/1/99 through 6/1/00. The Applicable policy forms are:

**47150 1/96 - TECHNOLOGY COMMERCIAL GENERAL LIABILITY
PROTECTION**

**40502 1/80 - PERSONAL INJURY AND ADVERTISING INJURY
ENDORSEMENT**

Policy form 47150 reads, in relevant part, as follows:

What This Agreement Covers

Bodily injury and property damage liability. We'll pay amounts any protected person is legally required to pay as damages for covered bodily injury, property damage, or premises damage that:

- happens while this agreement is in effect; and
- is caused by an event.

Protected person means any person or organization who qualifies as a protected person under the Who Is Protected Under This Agreement section.

Bodily injury means any physical harm, including sickness or disease, to the physical health of other persons. It includes any of the following that results at any time from such physical harm, sickness, or disease:

- Mental anguish, injury, or illness.

- Emotional distress.
- Care, loss of services, or death.

Property damage means:

- physical damage to tangible property of others, including all resulting loss of use of that property; or
- loss of use of tangible property of others that isn't physically damaged.

Event means an accident, including continuous or repeated exposure to substantially the same general harmful conditions:

Charles Curran
December 13, 2000
Page 3

The claimant does not seek damages for bodily injury or property damage as defined by the St. Paul CGL policy, nor do they seek damages for injury that was caused by an event as defined by the policy.

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

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

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

Personal injury offense means any of the following offenses:

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

Advertising means attracting the attention of others for the purpose of seeking customers or increasing sales or business.

Advertising injury liability. We'll pay amounts any protected person is legally required to pay as damages for covered advertising injury that:

- results from the advertising of your products, work, or completed work; and
- is caused by an advertising injury offense committed while this agreement is in effect.

Advertising injury means injury, other than bodily injury or personal injury, that's caused by an advertising injury offense.

Charles Curran
December 13, 2000
Page 4

Advertising injury offense means any of the following offenses:

- Libel or slander.
- Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
- Making known to any person or organization written or spoken material that violates a person's right of privacy.
- Unauthorized use of any advertising material, slogan, or title of others in your advertising.

The claimant does not seek damages for personal injury or advertising injury as defined by the St. Paul CGL policy.

Continuing with policy form 47150, the following exclusions apply:

Exclusions - What This Agreement Won't Cover

Expected or intended bodily injury or property damage. We won't cover bodily injury or property damage that's expected or intended by the protected person. Nor will we cover medical expenses that result from such bodily injury.

But we won't apply this exclusion to bodily injury, property damage, or medical expenses that result from the use of reasonable force to protect people or property.

Even if it could be argued that the Bodily Injury Coverage Grant has been triggered by the Claims which St. Paul denies has occurred, coverage for the claim is expressly excluded by the Expected or Intended Bodily Injury or Property Damage exclusions.

The following endorsement amends the Technology Commercial General Liability Protection:

FORM: 40502 01-1980

**PERSONAL INJURY AND ADVERTISING INJURY
ENDORSEMENT**

SPM 0080

Charles Curran
December 13, 2000
Page 5

This endorsement changes your Commercial General Liability Protection.

How Coverage Is Changed

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

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

Other terms:

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

Even if it could be argued that the advertising injury or personal injury coverage grant has been triggered by the claims, which St. Paul denies has occurred, coverage for the claims is expressly excluded by the above endorsement because the alleged injury arises out of America Online, Inc.'s Online Services.

III. SUMMARY

Based upon our review of the St. Paul policy and the Complaints, St. Paul has determined that it is not obligated to defend or indemnify Netscape or America Online, Inc. pursuant to the commercial general liability policy issued to Netscape and America Online, Inc. by St. Paul for the following reasons:

- The claimant does not seek damages for *bodily injury* or *property damage* as defined by the St. Paul CGL policy.
- The claimants do not seek damages for injury that was caused by an *event* as those terms are defined by the St. Paul CGL coverage.
- The claimants do not seek damages for *personal injury* or *advertising injury* as defined by the St. Paul CGL policy.

Charles Curran
December 13, 2000
Page 6

- Coverage is precluded by the Expected or Intended Bodily Injury or Property Damage exclusions.
- The language in the insuring agreement limits coverage to amounts the insured is "legally required" to pay as damages" and restricts coverage to tort damages. There is no coverage for the equitable relief attorney fees and costs as sought by the claimants.
- Coverage for the claims is excluded because they arise out of America Online's Online Activities.

Nothing in this letter should be construed as a waiver of St. Paul's rights under any of the provisions of the St. Paul policy or any other defense St. Paul may have. St. Paul expressly reserves all rights to limit or deny coverage for this claim on the basis of any other or additional grounds.

St. Paul's coverage determination is based on the information made available to date. If you have any other information which you believe may affect our determination or if you have any questions about our determinations, please feel free to contact the undersigned.

Sincerely,



Dale J. Evensen, Esq.
Technology Claim Attorney
(651) 310-8561 Direct
(651) 310-3344 Fax
dale.evensen@stpaul.com

cc: Glenn Spencer, AOL
Dennis Love, Marsh USA, Inc.
Michele Midwinter, via e-mail only