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**FILED**  
**JUN 19 2006**  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

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

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICA ONLINE, INC., a Delaware corporation;  
  
Plaintiffs,  
  
v.  
  
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,  
  
Defendants.

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

**STIPULATED PROTECTIVE ORDER AGAINST UNAUTHORIZED USE OR DISCLOSURE OF TRADE SECRETS AND CONFIDENTIAL MATERIAL**

**Complaint Filed: 12/12/05**  
**Amended Complaint Filed: 2/24/06**

The parties, through their respective counsel, hereby stipulate to the entry of the following Protective Order pursuant to Federal Rule of Civil Procedure 26(c) and Federal Rule of Evidence 501:

1. In this action, this Protective Order shall control (a) the exchange of all documents, things and other products, including discovery material, between and among America Online, Inc., Netscape Communications Corporation, and St. Paul Mercury Insurance Company (collectively the "Parties"), and from Applicable Nonparties (as defined below); (b) the filing of pleadings, motions, memoranda, exhibits, and other papers; and (c) the questioning of witnesses.

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2. **Definitions.** As used herein:

- a. “Confidential Material” means information, including trade secrets, that is of value to its owner and is treated by it in the ordinary course of business as confidential. “Confidential Material” shall include the information, document, material or thing itself as well as all data derived therefrom and all copies, summaries, abstracts, excerpts, indices and descriptions. “Confidential Material” shall not include information properly obtained from an independent source that is purposely not designated by that source as “Confidential Material” even if the information has been designated as “Confidential Material” pursuant to this Protective Order by a producing Party in this litigation. “Confidential Material” shall include information labeled as such pursuant to the Stipulated Protective Order entered in *Specht, et al. v. Netscape Communications Corporation, et al.*, United States District Court, District of New York, Civil Action No. 00 CIV. 4871, and related Actions, and the Stipulated Protective Order entered in *America Online, Inc. v. St. Paul Mercury Insurance Company*, United States District Court, Eastern District of Virginia, Civil Action No. 01-1636-A.
- b. “Trade secrets” means information, without regard to form, which is a trade secret under applicable law.
- c. “Applicable Nonparty” means a nonparty from whom discovery is sought or whose Confidential Material is at issue in the proceeding.

3. **Designation of Confidential Material.** Any Party or Applicable Nonparty may designate as “Confidential” any exhibits, papers, things, representations of facts, discovery material (including answers to interrogatories, documents and things responsive to requests for production or inspection, and responses to requests for admissions) and sworn testimony (including affidavits, depositions, and exhibits thereto), or any portion thereof, produced or given

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1 in the course of this action that the Party or Applicable Nonparty contends in good faith contains  
2 or reflects trade secrets or other Confidential Material.

3           4.       **Production of Confidential Material.** When producing material designated as  
4 “Confidential,” the producing Party or Applicable Nonparty shall mark the face of the document  
5 or thing (including responses to interrogatories, requests for admissions, or written deposition  
6 questions) to indicate its confidential nature and production pursuant to this Protective Order. In  
7 the case of electronic media, the case or container shall be marked as applicable. A producing  
8 Party may make documents or things available to a receiving Party prior to designating them  
9 Confidential Material, by informing the receiving Party of its intention to do so, in which event  
10 initial inspection of the documents and things shall be limited to in-house attorneys for the  
11 receiving Party, active outside attorneys of record and the partners, associates, secretaries,  
12 paralegal assistants, and employees of such attorneys. In such cases, only persons qualified  
13 under this Protective Order will be permitted to inspect such documents and things. Such initial  
14 inspection does not constitute any waiver of confidentiality with respect to any document or  
15 thing so inspected.

16           5.       **Designation of Confidential Testimony.** When giving testimony designated as  
17 “Confidential,” a testifying witness (or his or her counsel) may announce on the record that such  
18 testimony is Confidential Material pursuant to this Protective Order. Alternatively, the testifying  
19 witness (or his or her counsel) may designate the beginning and end of the confidential testimony  
20 on the errata sheet or in any written form within five (5) calendar days after receipt of a copy of  
21 the transcript from the court reporter. All testimony shall be deemed “Confidential” until that 5-  
22 calendar day period has expired. After that 5-calendar day period has expired, only that  
23 testimony that has been designated as such shall be deemed “Confidential” in accordance with  
24 this Order. The reporter shall bind the Confidential testimony in separate volumes and mark the  
25 face of the transcript to indicate its confidential nature and production pursuant to this Order.  
26 The producing Party or Applicable Nonparty seeking to have testimony treated as Confidential  
27 pursuant to this Order shall bear any and all costs charged by the Court reporter in connection  
28 with the separate binding or marking of Confidential Material.

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1           6.       **Filing of Confidential Material.** In the event a Party or Applicable Nonparty  
2 deems it necessary to file material designated as "Confidential" with the Court, the material shall  
3 be filed with the Clerk of the Court under seal, and the Clerk of the Court shall keep the material  
4 under seal unless and until the Court enters a separate order specifically directing it to be  
5 unsealed. The filing Party or Applicable Nonparty will take steps necessary to ensure that any  
6 such material will be maintained under seal by the Clerk of the Court before filing it. When  
7 filing material under seal, the filing Party or Applicable Nonparty shall ensure that it is sealed in  
8 an envelope or other container which, on its face, contains the caption of the case, the identity of  
9 the Party or Applicable Nonparty filing the material, the statement "CONFIDENTIAL-FILED  
10 UNDER SEAL" and a statement in substantially the following form:

11                   THIS ENVELOPE CONTAINS MATERIAL SUBJECT TO A PROTECTIVE  
12                   ORDER ENTERED IN THIS ACTION. IT IS NOT TO BE OPENED NOR  
13                   MAY THE CONTENTS THEREOF BE DISPLAYED, REVEALED OR MADE  
14                   PUBLIC, EXCEPT BY WRITTEN ORDER OF THE COURT

15           7.       **Unsealing of Filed Confidential Material.** In the event the Court determines sua  
16 sponte to unseal any material filed under seal, the Parties or Applicable Nonparties will be  
17 provided with adequate advance notice of the planned action and will have the opportunity to  
18 object.

19           8.       **Removal of "Confidential" Designation.** Any Party may move the Court, upon  
20 notice, to remove the designation of "Confidential" with respect to any specified document,  
21 testimony, or any other thing, or any portion thereof. The Party challenging the designation that  
22 such document, testimony or other thing as "Confidential" shall have the burden of proving the  
23 impropriety of such designation.

24           9.       **Use of Confidential Material.** Confidential Material produced or testimony  
25 given in this action that is "Confidential", including all information derived therefrom and all  
26 copies, summaries, abstracts, excerpts, indices and descriptions, shall be held in confidence and  
27 shall not be used, reproduced, distributed, transmitted, disclosed, transferred, reverse engineered,  
28 decompiled or disassembled, directly or indirectly, in any form, by any means, or for any  
purpose other than to assist counsel of record in the prosecution, defense, or settlement of the

1 action captioned above. Confidential Material produced in this action may not be used by any  
2 Party or other person in any other litigation.

3 **10. Persons Who May Access Confidential Material.** Material or testimony  
4 designated as "Confidential" shall not be made available or disclosed by the receiving Party to  
5 anyone other than the following:

- 6 a. in-house attorneys for any Party, active outside attorneys of record and the  
7 partners, associates, secretaries, paralegal assistants, and employees of  
8 such attorneys to the extent reasonably necessary to render professional  
9 services in the litigation;
- 10 b. employees for any Party, for the sole purpose of assisting in the litigation,  
11 and reinsurers of any Party, provided that each executes a copy of the  
12 declaration attached hereto as Exhibit A prior to the disclosure of any such  
13 Confidential Material;
- 14 c. deposition witnesses pursuant to Paragraph 14, infra;
- 15 d. independent persons (i.e., non-employees) retained by a Party or its  
16 attorney solely for the purpose of assisting counsel of record in the  
17 prosecution, defense or settlement of this action, such as independent  
18 experts or consultants, but only in accordance with the provisions of  
19 Paragraph 11 hereof;
- 20 e. the Court, the Court's staff attorney(s), and judicial assistants of the Court;
- 21 f. court reporters and videographers;
- 22 g. persons retained by a Party for the purpose of producing graphic or visual  
23 aids;
- 24 h. any outside copying or document processing vendor (independent of the  
25 Parties) retained by counsel to assist such counsel in connection with this  
26 action; and

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- i. any other person designated by written agreement between the Parties or Applicable Nonparties or by subsequent order of the Court after reasonable notice to all Parties and Applicable Nonparties.

11. **Procedures for Disclosure to Experts or Consultants.** The following procedures shall govern the disclosure of confidential material or testimony to independent experts or consultants:

- a. Any party proposing to disclose any Confidential Material or Testimony marked as such by an opposing party to independent experts or consultants shall provide a listing of the names of all such experts or consultants at least five (5) calendar days prior to such disclosure.
- b. This disclosure may be in the form of a listing of multiple experts or consultants and need not set out the specifics of the material or testimony which is proposed to be disclosed to each expert. The disclosure shall contain the name, address and job title of each person and of his or her employer.
- c. If an opposing Party or Applicable Nonparty objects to the disclosure of Confidential Material to an expert or consultant listed, it shall notify the proposing Party in writing of its objection and the grounds therefore within three (3) business days of the notification. If the objection cannot be resolved without court intervention, the Party or Applicable Nonparty opposing disclosure shall, within five (5) calendar days after such written objection, file a Motion for Protective Order with the Court for consideration of the disclosure issue. If such an objection is raised, the disclosure of any Confidential Material or testimony shall be stayed pending written agreement between the Parties (and Applicable Nonparties) or ruling of the Court.

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d. Any expert or consultant who will be given access to Confidential Material or testimony shall execute a copy of the declaration attached hereto as Exhibit A prior to the disclosure of any such material or testimony.

**12. Declarations of Persons With Access to Confidential Material.** In no event shall any material or testimony designated as "Confidential" be disclosed to any person, including counsel and their staff, (but excluding those persons identified in Paragraph 10(c) and 14), pursuant to this Protective Order until that person has executed a written, dated declaration in the form attached as Exhibit A acknowledging that he or she has received and read a copy of this Protective Order and that he or she agrees to be bound by its terms. The Parties warrant that they will obtain declarations for all such persons prior to disclosure. Counsel of record shall be responsible for maintaining a file of all original executed declarations.

**13. Inadvertent Omission of Designation.** In the event that a confidential document paper, or thing is produced without having been previously marked "Confidential," the Party in a receipt of that material shall, upon written notice from the producing Party or Applicable Nonparty, stamp the document or thing "Confidential," as applicable, and thereafter preserve such document or thing in accordance with this Protective Order.

**14. Use of Confidential Material at Depositions.** Except as provided below, witnesses at depositions taken during this action may be shown any Confidential Material without restriction during the course of their deposition and a Party's ability to use, exhibit, or disclose such Confidential Material at depositions taken in this action shall not be limited. Such use will not be deemed a waiver of the provisions of this Protective Order. The Party using Confidential Material during a deposition shall notify the court reporter of this Protective Order. After time for correction of the deposition has expired, the court reporter shall not retain a copy of any Confidential Material.

**15. Exclusion During Deposition Testimony.** Whenever Confidential Material or testimony is to be discussed or disclosed in a deposition, the Party or Applicable Nonparty producing the Confidential Material or giving the Confidential testimony, may require the

1 exclusion from the room of any person who is not entitled to receive the Confidential Material or  
2 testimony under this Protective Order, except the witness, his or her counsel, the court reporter,  
3 and if applicable, the videographer.

4       **16. Replacement at Trial Without Waiver.** Confidential Material designated  
5 Confidential can be replaced by an unmarked copy, if appropriate, for use at trial, without  
6 waiving the rights and obligations under this Order.

7       **17. Objections Reserved.** Nothing in this Protective Order shall be deemed an  
8 acknowledgment by any Party or Applicable Nonparty that discovery of Confidential Material is  
9 reasonably likely to lead to the discovery of admissible evidence in this action, or an  
10 acknowledgment that particular discovery requests are not burdensome or overbroad or  
11 otherwise objectionable, or a waiver by a Party or Applicable Nonparty of its right to maintain  
12 that even under the protections of this Order some material is too confidential or proprietary to  
13 be disclosed. Nothing herein shall be construed as a waiver of the right of any Party to object to  
14 the admissibility of any evidence where such objection is based on a ground or grounds other  
15 than that the evidence involves Confidential Material or testimony. Nothing contained in this  
16 Protective Order shall be construed to require production or disclosure of any Confidential  
17 Material deemed by counsel for the Party or an Applicable Nonparty possessing such material to  
18 be privileged or otherwise immune from discovery.

19       **18. Return of Confidential Material.** Within thirty (30) days after the conclusion of  
20 this action (including all appeals, if any) each Party shall assemble and deliver to the producing  
21 Party or Applicable Nonparty all Confidential Material, whether from formal or informal  
22 discovery, including papers, documents, things, testimony, and all extracts, summaries and  
23 reproductions thereof. The producing Party or Applicable Nonparty will bear the cost of  
24 shipping such documents from the non-producing Party's location. Alternatively, at the option  
25 and expense of the producing Party or Applicable Nonparty, counsel for the receiving Party may  
26 within the thirty (30) day period certify to the producing Party or Applicable Nonparty the  
27 destruction of all such Confidential Material that would otherwise be returned. Insofar as the  
28 provisions of this Protective Order restrict communication about, and the use of, the discovery

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1 material produced and testimony given thereunder, this Protective Order shall continue to be  
2 binding after the conclusion of the action. Notwithstanding the foregoing, outside counsel may  
3 retain a complete set of all papers filed in this matter.

4       **19. Retrieval of Confidential Material.** All originals or reproductions of any  
5 Confidential Material given by a non-producing Party to any expert, consultant or other person  
6 shall be retrieved by the non-producing Party and returned to the producing Party or Applicable  
7 Nonparty, within 30 days of the conclusion of this action. All Parties receiving such documents  
8 or information shall certify within thirty (30) days of the conclusion of the action that they have  
9 returned all such documents or information and all copies thereof.

10       **20. Additional Protective Order and Modifications of This Order.**

11       Nothing in this Protective Order precludes any Party or Applicable Nonparty from  
12 seeking the entry of a separate confidentiality order or protective order by the Court, or from  
13 seeking to modify this Protective Order with regard to any Confidential Material or testimony  
14 produced or given in this action or with regard to any other matter, including but not limited to  
15 the method of safekeeping and review of Confidential Material and testimony. The Parties may  
16 modify this Order by mutual written agreement as defined in Paragraph 23.

17       **21. Third Party Requests for Confidential Material.** In the event that any Party is  
18 served any judicial process, court order, and/or administrative or regulatory order to compel  
19 production or disclosure of any documents, materials, papers, testimony, or things obtained by  
20 that Party from another Party or Applicable Nonparty in this action, and which have been  
21 designated "Confidential" by the producing Party, the Party served with such judicial process or  
22 order shall, in writing, inform the Parties to this Order, or Applicable Nonparties, within three (3)  
23 calendar days of the receipt of such process or order.

24       **22. No Waiver of Privilege or Immunity.** In the event materials which are claimed  
25 to be privileged or subject to the work product doctrine are inadvertently produced, such  
26 documents and all copies shall be returned by the receiving Party or Parties within two working  
27 days of any written request therefore. The receiving Party or Parties, after returning the  
28 documents, may challenge the assertion of privilege or work product protection with respect to

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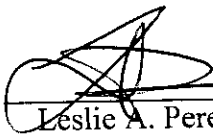
1 the document(s). Assertion of the privilege or claim of work product doctrine shall be made as  
2 soon as practicable after learning of the inadvertent disclosure and in no event later than the date  
3 of the final pretrial conference. The inadvertent production of any document claimed to be  
4 privileged or subject to the work product doctrine shall not constitute a waiver of such privilege.

5 23. **Protective Order Remains In Effect.** The terms of this Order shall apply to any  
6 and all material designated as "Confidential" pursuant to this Order unless and until (a) the Party  
7 producing any such material agrees that the order shall no longer applies to the material; (b) the  
8 Parties mutually agree in writing to modify this Order; or (c) this Court orders that this Order  
9 shall no longer apply to the material. This Court shall retain continuing jurisdiction beyond the  
10 conclusion of this action, including without limitation during any appeal, to enforce the  
11 provisions of this Order against all persons bound by it, pursuant to its contempt powers and with  
12 all other powers provided for in this Order.

13 IT IS SO STIPULATED:


14 Date: June 19, 2006

ABELSON HERRON LLP

15 By:   
16 Leslie A. Pereira  
17 Counsel for Plaintiffs AMERICA ONLINE,  
18 INC., NETSCAPE COMMUNICATIONS  
CORPORATION

19 Date: June 12<sup>th</sup>, 2006

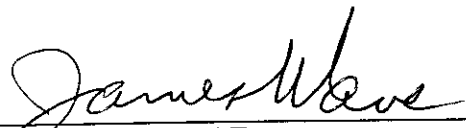
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20 By:   
21 Sara M. Thorpe  
22 Attorneys for Defendant ST. PAUL  
23 MERCURY INSURANCE COMPANY

24 Based upon the Stipulation (above) of the parties, and good cause appearing,

25 IT IS SO ORDERED.

26 Date: June 19, 2006

27   
28 HON. JAMES WARE  
UNITED STATES DISTRICT JUDGE

**EXHIBIT A**

**DECLARATION RE PROTECTIVE ORDER**

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1. I, \_\_\_\_\_, have read the foregoing STIPULATED PROTECTIVE ORDER AGAINST UNAUTHORIZED USE OR DISCLOSURE OF TRADE SECRETS AND CONFIDENTIAL MATERIAL dated \_\_\_\_\_ by the Hon. James Ware (the "Order"), and agree to be bound by its terms with respect to any designated Confidential Material furnished to me as set forth in the Order.

2. I further agree (a) not to disclose to anyone any such Confidential Material or materials and (b) not to make any copies of any Confidential Material furnished to me.

3. I hereby consent to the jurisdiction of the United States District Court, Northern District of California with regard to any proceedings to enforce the terms of this Order.

4. I hereby agree that any Confidential Material furnished to me will be used by me only for the purposes of this litigation and for no other purpose, and will not be used by me in any business affairs of my employer or of my own or be imparted by me to any other person and will be returned to the person who furnished such Confidential Material to me.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

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