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

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

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

14 Plaintiffs, )

15 vs. )

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

17 Defendants. )

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

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

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

Judge: Honorable James Ware  
 Courtroom: 8

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

21 Counter-Claimant, )

22 vs. )

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

26 Counter-Defendants. )

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1 Defendant and Counter-Claimant St. Paul Mercury Insurance Company (“St.  
2 Paul”) brings this Counterclaim against Plaintiffs and Counter-Defendants Netscape  
3 Communications Corporation (“Netscape”) and American Online, Inc. (“AOL”)  
4 (collectively “Counter-Defendants”) and alleges as follows:

5 **NATURE OF THE ACTION**

6 1. This is an action for declaratory relief in which St. Paul seeks a judicial  
7 declaration that it owed no duty to defend or indemnify Counter-Defendants under the  
8 St. Paul Policy with respect to the Underlying Lawsuits and AG Investigation, as defined  
9 below. This is also an action for reformation in which St. Paul seeks to reform the St.  
10 Paul Policy consistent with the mutual intentions and understanding of the parties that  
11 St. Paul would not provide coverage for AOL’s online business activities.

12 **PARTIES, JURISDICTION, VENUE AND APPLICABLE LAW**

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

16 3. Counter-Defendant AOL is, and at all times material to this action was, a  
17 corporation organized under the laws of Delaware, with its principal place of business in  
18 Dulles, Virginia. According to AOL’s corporate website, AOL “is the world’s leader in  
19 interactive services, Web brands, Internet technologies and e-commerce services.”

20 4. Counter-Defendant Netscape is, and at all times material to this action  
21 was, a corporation organized under the laws of Delaware, with its principal place of  
22 business in Mountain View, California. Netscape was fully acquired by AOL as a  
23 subsidiary in March 1999.

24 5. This court has jurisdiction over this matter pursuant to the court’s diversity  
25 jurisdiction under 28 U.S.C. § 1332. The amount in controversy exceeds the  
26 jurisdictional limits of this court.

27 6. Venue is proper because one of the Counter-Defendants, Netscape,  
28 resides here.

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1 7. AOL has previously sued St. Paul over interpretation of its policy  
2 language, which lawsuit AOL filed in the United States District Court, Eastern District of  
3 Virginia. Virginia law was applied in determining the coverage issues in that lawsuit.  
4 See, e.g., *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 92 (4<sup>th</sup> Cir.  
5 2003).

6 **THE UNDERLYING LAWSUITS AND AG INVESTIGATION**

7 **Underlying Lawsuits**

8 8. In 2000, Counter-Defendants were sued in four lawsuits (three in New  
9 York State and one in the District of Columbia), as follows:

- 10 • *Specht v. Netscape Communications Corp. and American Online, Inc.*, No. 00  
CIV 4871 (S.D.N.Y.), original complaint filed on or about June 30, 2000; first  
11 amended complaint filed on August 3, 2000;
- 12 • *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00  
CIV 01723 (D.D.C.), filed on or about July 21, 2000;
- 13 • *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No.  
00 CIV 6219 (S.D.N.Y.), filed August 18, 2000; and
- 14 • *Gruber v. Netscape Communications Corp. and America Online, Inc.*, No. 00  
CIV 6249 (S.D.N.Y.), filed on August 21, 2000.

15 The four lawsuits are collectively referred to here as the “Underlying Lawsuits.”

16 9. The Underlying Lawsuits alleged Counter-Defendants intercepted the  
17 electronic communications of users of the internet through its “SmartDownload”  
18 program, in violation of the users’ privacy rights. The Underlying Lawsuits alleged this  
19 activity was in violation of the Electronic Communications and Privacy Act (18 U.S.C.  
20 §§ 2511 and 2520) and the Computer Fraud and Abuse Act (18 U.S.C. § 1030).

21 10. In particular, the three lawsuits filed in the Southern District of New York  
22 allege specifically (and identically) *interception* and *continuing surveillance* of electronic  
23 communications, *theft* of private information, and *spying* by Counter-Defendants, as  
24 follows:

25 **NATURE OF THE ACTION**

26 1. Plaintiffs bring this action on their own behalf and as a class action on  
27 behalf of a class (the “Class”) consisting of plaintiffs and all other persons  
28 or entities whose *electronic communications have been intercepted by*  
*defendants* as set forth below, to recover damages caused to the Class by

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*defendants' theft of their private information* in violation of the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act.

2. Unbeknownst to the members of the Class, and without their authorization, *defendants have been spying on their Internet activities.* "SmartDownload," a product distributed by defendants to users of Netscape's "Communicator" Web browser, is an electronic bugging device. It secretly intercepts electronic communications between Web users and Web sites – communications to which defendants are not a party. It then transmits the contents of those communications – the name and location of files being exchanged over the Web, which Web user is requesting a given file and which Web site is providing it – back to defendants. SmartDownload captures and transmits this information without the consent of either the Web site or the Web user visiting the Web site. This *continuing surveillance of the Class members' electronic communications* permits Netscape to create a continuing profile of the Web site's and each visitor's file transfers using SmartDownload. (Emphasis added.)

11. The one lawsuit filed in the District Court of the District of Columbia similarly alleges interception and continuing surveillance of electronic communications, theft of private information and spying by Counter-Defendants:

NATURE OF THE ACTION

Plaintiff brings this action on his own behalf and as a class action on behalf of a class (the "Class") consisting of plaintiff and all other persons or entities who use or who have in the last 3 years used NetScape [sic] Navigator, to recover damages caused to the class by *defendants' use or theft of their private information* in violation of the Electronics Privacy Act and the Computer Fraud and Abuse Act.

Unbeknownst to the members of the Class, and without their authorization, *defendants have been spying on their Internet activities* and invading personal information stored on their computers or obtained indirectly from web sites they have visited using Netscape Navigator.

NetZip's "Download Demon" was purchased by Real Networks and renamed "Real Download". Then Netscape/AOL licensed it from Real and called it "NetScape [sic] Smart Download."

"SmartDownload", distributed by defendants to users of NetScape's [sic] "Communicator" web browser, secretly transmits to defendants information identifying the name, type, and source of each and every exe or zip file that an Internet user downloads using SmartDownload from any site on the Internet, along with information uniquely identifying the visitor. SmartDownload captures and transmits this information unbeknownst to and without the consent of either the class member or the visitor to the Web Site. This *continuing surveillance* of the class member's provisioning of exe and zip files, coupled with the unique information uniquely identifying each visitor, permits NetScape [sic] to create a continuing profile of the class member's and each visitor's file transfers over time.

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1 These programs immediately tag a computer with a unique ID, after which  
2 every single file a user downloads from anywhere on the Internet is  
3 immediately reported back to the program's Source, along with the user's  
4 machine's unique ID and its unique Internet IP address.

5 This information allows NetScape/AOL [sic] to compile and create a  
6 detailed "profile" about who a user is based upon the web Sites a user  
7 visits and the files a user has downloaded.

8 This *surveillance* is done without the user's knowledge, without prior  
9 notification to him, and without his consent. (Emphasis added.)

10 12. On August 20, 2000, Counter-Defendants tendered two of the Underlying  
11 Lawsuits (*Mueller* and *Specht*) to St. Paul. On October 3, 2000, Counter-Defendants  
12 tendered two more of the Underlying Lawsuits (*Weindorf* and *Gruber*) to St. Paul.

13 13. On December 13, 2000, St. Paul advised Counter-Defendants there was  
14 no duty to defend or indemnify Counter-Defendants in the Underlying Lawsuits.

15 14. Counter-Defendants requested that St. Paul reconsider its decision not to  
16 defend or indemnify AOL in connection with the Underlying Lawsuits. St. Paul  
17 considered the information provided by AOL and arguments made, and concluded there  
18 was no coverage under the St. Paul Policy, which conclusion was communicated to  
19 AOL to August 30, 2002.

20 15. Thereafter, Counter-Defendants continued to communicate with St. Paul  
21 regarding the Underlying Lawsuits up through and including September 2004 when  
22 settlement was reached in the Underlying Lawsuits. Despite this continuing  
23 communication, Counter-Defendants did not provide any additional information that  
24 indicated the claims were potentially covered by the St. Paul Policy.

25 16. In or about September 2004, the Underlying Lawsuits were settled, except  
26 for a remaining issue as to whether the attorneys representing the plaintiffs in those  
27 lawsuits were entitled to an award of attorneys fees, which issue was not finally  
28 resolved until March or April of 2006.

### AG Investigation

17. Counter-Defendants were also advised that the New York Attorney  
General was investigating claims of violation of privacy, i.e., "examining consumer

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1 protection issues related to background Internet communications software embedded in  
2 Netscape consumer software products and data collected by the communication’s  
3 software.” The Attorney General in September 8, 2000 requested the production of  
4 certain documents and information from AOL concerning Netscape software, including  
5 SmartDownLoad. The letter does not seek or demand the payment of any monies from  
6 AOL. Thereafter, on April 3, 2002, the Attorney General’s office issued a subpoena  
7 concerning SmartDownLoad. The stated purpose of the subpoena for documents and  
8 testimony was to determine whether an action should be instituted against AOL Time  
9 Warner and Netscape under New York State law. The Attorney General’s letters and  
10 subpoena are referred to here as the “AG Investigation.”

11 18. On April 17, 2002, Counter-Defendants tendered the AG Investigation  
12 claim to St. Paul.

13 19. On May 24, 2002, St. Paul advised Counter-Defendants there was no duty  
14 to defend or indemnify the AG Investigation because there was no “suit” seeking  
15 damages and no coverage for the claim under the St. Paul Policy.

16 20. St. Paul is informed and believes the AG Investigation was concluded in or  
17 about June 2003.

18 **THE ST. PAUL POLICY**

19 21. Counter-Defendant AOL had an insurance coverage program that  
20 included several types of insurance policies issued by several insurance companies in  
21 order to address various risks it faced as an online service provider and business. For  
22 the time period April 1, 1999 through June 2001, Counter-Defendant AOL had (among  
23 other coverages and other carriers) general liability coverage with St. Paul, “media  
24 coverage” with Executive Risk Specialty Insurance Company, and professional liability  
25 coverage with Lloyds of London.

26 22. As a part of this larger insurance coverage program, St. Paul issued to  
27 AOL policy no. TE0900917 with coverages for general liability, automobiles, and  
28 employee benefits for the policy period April 1, 1999 to April 1, 2000 (the “St. Paul

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1 Policy"). The St. Paul Policy was extended to June 1, 2000, and renewed through June  
2 1, 2001. A true and correct copy of the St. Paul Policy is attached hereto as Exhibit A  
3 and incorporated herein by this reference (bates numbers SPM 108-642).

4 23. St. Paul issued the St. Paul Policy to AOL at its corporate offices in Dulles,  
5 Virginia, where AOL accepted the St. Paul Policy. The St. Paul Policy was negotiated  
6 and prepared with the assistance of AOL's insurance broker, Marsh USA, Inc.  
7 ("Marsh"), including and predominantly through Marsh's office in Wash., DC.

8 24. Netscape was added, along with numerous other companies, as another  
9 named insured to the AOL policy by endorsement after the St. Paul Policy's inception.

10 25. It was the stated mutual intention and understanding of St. Paul and AOL  
11 that the St. Paul Policy was not intended to provide coverage to AOL, and its related  
12 companies, for risks associated with the online activities which were a core part of  
13 AOL's business. This intention was set forth during numerous conversations between  
14 AOL and/or its broker (Marsh) and St. Paul, as well as in many written communications  
15 between the parties, including but not limited to the following:

- 16 a. In a July 23, 1999 letter, Nancy Heslen Perkins, CPCU, Vice  
17 President of Marsh, sent a letter to St. Paul requesting corrections  
18 to the St. Paul Policy, among them that: "The policy should have  
19 been written to exclude PI/AI<sup>1</sup> for AOL's online activities, but this  
20 coverage should apply for all other AI/PI claims."  
21 b. Perkins' September 13, 1999 letter to St. Paul indicating that: ". . .  
22 it is true that the intent of this policy was not to cover PI/AI claims  
23 as respects AOL's online activities, . . ." (Emphasis in letter.)  
24 c. On June 23, 2000, Glenn Spencer, the Vice President of Risk  
25 Strategies for AOL, in a memo provided to St. Paul and copied to  
26 Marsh (including Perkins), Spencer explained the following  
27 background:

28 "As you know, general liability policies have historically intended to  
provide personal & advertising injury coverage for insured's own  
advertising (through the PI/AI coverage section). In the early/mid-  
90's AOL had negotiated broadened PI/AI coverage to cover its'  
[sic] online activities, as well as its' [sic] own advertising. Chubb  
was the first general liability carrier to do this, then AIG followed in  
1997 & 1998. This approach (incorporating broad PI/AI coverage

<sup>1</sup> "PI/AI" is an abbreviation for personal injury, advertising injury coverage.

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within the CG) became undesirable in 1999. The GL underwriters were becoming more and more concerned about providing quasi-professional coverage under the GL (they didn't feel comfortable with our online risks) and it was getting cost prohibitive. At the same time, we determined that AOL could secure more broader PI/AI coverage from the multi-media underwriting community. Thus, in 1999, we placed a multi-media policy to provide coverage for our online activities and we intended to exclude these risks from our GL policy.

"Just as a matter of clarification, the multi-media policies were not renewed in April of 2000 as these risks were incorporated into our comprehensive Errors & Omissions/Professional Liability policy."

d. Spencer went on to explain in that memo that: "The agreement with St. Paul was that they would provide PI/AI coverage for AOL's own advertising, but that they would exclude our online activities (third party)." He also stated "It is clear to me that the intent all along was to exclude PI/AI arising out of our online business, but that PI/AI arising out of our own advertising would be covered [sic]." Again, in the memo he states: "it is clear to me that the intent all along was to exclude PI/AI that resulted from AOL's operations as an online company, but that our own advertising should continue to be coverage [sic] by our GL policy."

26. The general liability policy form of the St. Paul Policy provides:

We'll have the right and duty to defend any protected person against a claim or suit for injury or damage covered by this agreement. We'll have such right and duty even if all of the allegations of that claim or suit are groundless, false, or fraudulent. But we won't have a duty to perform any other act or service.

We'll have the right to investigate any event, offense, claim, or suit to the extent that we believe is proper. We'll also have the right to settle any claim or suit . . .

. . .

*Claim* means a demand which seeks damages.

*Suit* means a civil proceeding which seeks damages. . ." (Exhibit A, pp. SPM 142-43.)

27. The general liability policy form of the St. Paul Policy further provides:

**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.



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

- Making known to any person or organization written or spoken material that violates a person’s right of privacy. (Exhibit A, p. SPM 141.)

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

Deliberately breaking the law. We won’t cover personal injury or advertising injury that results from:

- the protected person knowingly breaking any criminal law; or
- any person or organization breaking any criminal law with the consent or knowledge of the protected person. (Exhibit A, p. SPM 154.)

29. As originally issued, the St. Paul Policy contained a “Personal Injury and Advertising Injury Exclusion Endorsement” that modified the general liability policy form to *exclude* all personal and advertising injury coverage (Exhibit A, p. SPM 168).

30. AOL requested modification of this exclusion as it did not reflect the parties intentions that there should be coverage for personal injury and advertising injury, just not when arising out of Counter-Defendants’ online activities. The “Personal Injury and Advertising Injury Exclusion Endorsement” was deleted on August 2, 2000 by endorsement and replaced with a “Personal Injury and Advertising Injury for Non-Online Activities Endorsement,” which states that:

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

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

(Exhibit A, pp. SPM 337, 641, and 413.)

31. AOL requested further modification of the exclusion since Counter-Defendants desired coverage for claims that might arise from their advertising over the internet.

32. Marsh prepared the following endorsement:

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

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1 that America Online’s own advertising is not considered “Online Activity”  
2 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 33. Thereafter, for no extra premium, the “Personal Injury and Advertising Injury  
6 for Non-Online Endorsement” was deleted on October 5, 2000 and a “Policy Change  
7 Endorsement” was added on that same date titled “Personal Injury and Advertising  
8 Injury Endorsement” with the language set forth in paragraph 32, above. (Exhibit A, pp.  
9 SPM 339, 341, 520, and 522.)

10 33. It was not until after the filing of the instant lawsuit that St. Paul discovered  
11 the St. Paul Policy is internally inconsistent. The above described “Personal Injury and  
12 Advertising Injury Endorsement” was added to the St. Paul policy for the April 1, 1999 to  
13 April 1, 2000 and June 1, 2000 to June 1, 2001 time periods, but not for the April 1,  
14 2000 to June 1, 2000 time period.

15 34. It was not until the filing of this lawsuit that St. Paul discovered Counter-  
16 Defendants are urging a very narrow interpretation of this online activity exclusion,  
17 namely that it only excludes coverage for the five examples in the exclusion, contrary to  
18 the parties’ intentions.

19 35. It was not until the filing of this lawsuit that St. Paul discovered Counter-  
20 Defendants are urging that each of the examples in the online activity exclusion should  
21 be narrowly interpreted such that, for example, “providing internet access to 3<sup>rd</sup> parties”  
22 would not apply to an AOL product that facilitates and accelerates activities associated  
23 with internet access.

24 **FIRST CAUSE OF ACTION**  
25 **Declaratory Relief – No Duty to Defend Or Indemnify**  
26 **(Against All Counter-Defendants)**

27 36. St. Paul hereby realleges and incorporates by reference paragraphs 1  
28 through 35, inclusive, of this Counterclaim, as though set forth in full herein.

37. An actual controversy has arisen and now exists between St. Paul and  
Counter-Defendants with respect to whether the St. Paul Policy provides a duty to

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defend and/or indemnify the Underlying Lawsuits and AG Investigation.

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

- (a) The Underlying Lawsuits do not allege “bodily injury,” “property damage,” or “advertising injury” under the St. Paul Policy;
- (b) The Underlying Lawsuits do not allege an offense under the “personal injury” coverage in the St. Paul Policy because the claims did not allege AOL or Netscape were “making known to any person or organization written or spoken material that violates a person’s right of privacy.”
- (c) Even if the St. Paul Policy’s personal injury coverage applied to these claims (which it does not), there is no coverage because the St. Paul Policy excludes coverage for personal injury offenses arising out of online activities; and
- (d) There is no coverage because the St. Paul Policy excludes coverage for personal injury that results from deliberately breaking the law.

39. St. Paul further seeks a judicial declaration that there is no coverage under the St. Paul Policy for the AG Investigation because the AG Investigation was not a suit or claim seeking damages covered by the policy, and for the reasons set forth in paragraph 38, above.

40. A judicial declaration is necessary and appropriate at this time and under the circumstances to ascertain St. Paul’s rights and duties under the St. Paul Policy.

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

41. St. Paul hereby realleges and incorporates by reference paragraphs 1 through 35, inclusive, of this Counterclaim, as though set forth in full herein.

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1           42.    At the time St. Paul and AOL entered into the insurance contract reflected  
2 in the St. Paul Policy, the parties intended that the St. Paul Policy would not cover  
3 personal injury arising out of the online activities of AOL or its related companies.

4           43.    The Underlying Lawsuits and AG Investigation involve claims arising out  
5 of Counter-Defendants' online activities.

6           44.    In December 2005, Counter-Defendants filed this lawsuit seeking  
7 coverage from four separate insurers for defense costs incurred defending against the  
8 Underlying Lawsuits and the AG Investigation, including other insurers under which  
9 Counter-Defendants intended to cover the risk of personal injury claims arising out of  
10 online activities. Counter-Defendants have dismissed one of those insurers without  
11 obtaining any monies and have settled with two other insurers.

12           45.    Counter-Defendants are taking the position in this litigation that the online  
13 activity exclusion added to the St. Paul Policy in August 2000 should not be read  
14 broadly to exclude all personal injury claims arising out of Counter-Defendants' online  
15 activities, even though that was the parties' intentions. St. Paul does not agree that the  
16 exclusion should be read narrowly as to only exclude the five examples in the exclusion  
17 AOL's broker prepared. The exclusion does not indicate online activity is limited to  
18 those five examples or that the examples should be so narrowly construed.

19           46.    If Counter-Defendants are successful in arguing their narrow interpretation  
20 of the online activity exclusion in the St. Paul Policy, such that the exclusion does not  
21 exclude coverage for the Underlying Lawsuits and AG Investigation, then the St. Paul  
22 Policy does not reflect the parties' mutual intentions. The parties intended that the St.  
23 Paul Policy would not cover personal injury arising out of Counter-Defendants' online  
24 activities. If the St. Paul Policy does not exclude personal injury arising out of online  
25 activities, there has been a mutual mistake in the drafting of the endorsement.

26           47.    Evidence that the parties intended that the St. Paul Policy not cover  
27 personal injury arising out of online activities, and not what Counter-Defendants are now  
28 urging in this litigation, is reflected in many exchanges between the parties, including

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but not limited to the communications set forth in paragraph 25, above.

48. To the extent there is a material difference between the parties' intentions and the interpretation Counter-Defendants are now urging, that difference was not discovered until after this lawsuit was filed by Counter-Defendants and the parties started to meet and confer regarding their respective positions.

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

**THIRD CAUSE OF ACTION**  
**Reformation – Unilateral Mistake (Inequitable Conduct)**  
**(Against All Counter-Defendants)**

50. St. Paul hereby realleges and incorporates by reference paragraphs 1 through 35, inclusive, of this Counterclaim, as though set forth in full herein.

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

52. Evidence that the parties intended that the St. Paul Policy exclude all coverage for personal injury arising out of online activities includes, but is not limited to, the communications set forth in paragraph 25, above.

53. Counter-Defendants and their broker understood that St. Paul was not interested in insuring risks associated with Counter-Defendants' online activities and that St. Paul had no intention of insuring personal injury arising out of Counter-Defendants' online activities.

54. To the extent the St. Paul Policy does not accurately reflect the mutual intention of the parties, it is because of inequitable conduct on the part of Counter-Defendants. Counter-Defendants knew the wording they suggested did not reflect the true intentions of the parties or suspected this was the case, all in an effort to obtain coverage for claims arising out of their online activities, which they knew St. Paul did not

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intend to insure.

55. To the extent there is a material difference between the parties' intentions and the interpretation Counter-Defendants are now urging, that difference was not discovered until after this lawsuit was filed by Counter-Defendants and the parties started to meet and confer regarding their respective positions.

56. If this Court agrees with Counter-Defendants' narrow interpretation of the online activity exclusion, that is due to a unilateral mistake on the part of St. Paul based upon Counter-Defendants' inequitable conduct. The St. Paul Policy should be reformed to reflect the parties' intentions that there is no coverage for personal injury arising out of Counter-Defendants' online activities.

**FOURTH CAUSE OF ACTION**  
**Reformation – Fraud**  
**(Against All Counter-Defendants)**

57. St. Paul hereby realleges and incorporates by reference paragraphs 1 through 55, inclusive, of this Counterclaim, as though set forth in full herein.

58. At the time St. Paul and AOL entered into the insurance contract reflected in the St. Paul Policy, the parties intended that the St. Paul Policy not cover personal injury arising out of the online activities of AOL or its related companies.

59. St. Paul is conducting discovery on this issue but upon information and belief, believes that unbeknownst to St. Paul at the time, in June 2000, as Counter-Defendants were working on the wording of the online activity exclusion for the St. Paul Policy, including the definition Marsh proposed, Counter-Defendants were aware of claims that potentially implicated the exclusion.

60. St. Paul was unaware of this fact and its significance until St. Paul learned Counter-Defendants were taking a position in this litigation that is contrary to the parties' intentions as to the scope of the St. Paul Policy's online activity exclusion.

61. St. Paul relied on the stated intentions of Counter-Defendants in agreeing to place coverage and to not charge additional premium for the policy changes to the

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1 personal injury and advertising injury coverages. A ruling that the online activity  
2 exclusion is to be interpreted more narrowly than and contrary to how the parties  
3 intended would severely prejudice St. Paul as it had no intention of insuring Counter-  
4 Defendants' online business activities.

5 62. To the extent the St. Paul Policy does not accurately reflect the mutual  
6 intention of the parties, it is because of Counter-Defendants' intentional  
7 misrepresentations and omissions of material information. The St. Paul Policy should  
8 be reformed to reflect the parties' intentions that there is no coverage for personal injury  
9 arising out of Counter-Defendants' online activities.

10 **PRAYER**

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

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

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

21 3. For an order reforming the St. Paul Policy to reflect the true intention of  
22 the parties that the St. Paul Policy does not cover personal injury arising out of online  
23 activities;

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- 4. For costs of suit; and
- 5. For such other and further relief as this Court may deem just and proper.

Dated: July 25, 2006

GORDON & REES LLP

By: /s/ Sara M. Thorpe

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