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 16 NETSCAPE COMMUNICATIONS  
 17 CORPORATION and AMERICA ONLINE, INC.

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 19 COUNTY OF SANTA CLARA

20 NETSCAPE COMMUNICATIONS  
 21 CORPORATION, a Delaware corporation;  
 22 and AMERICA ONLINE, INC., a Delaware  
 23 corporation;

24 Plaintiffs,

25 v.

26 FEDERAL INSURANCE COMPANY, an  
 27 Indiana corporation; NATIONAL UNION  
 28 FIRE INSURANCE COMPANY OF  
 PITTSBURGH, PA., a Pennsylvania  
 corporation; ST. PAUL MERCURY  
 INSURANCE COMPANY, a Minnesota  
 corporation; EXECUTIVE RISK  
 SPECIALTY INSURANCE COMPANY; a  
 Connecticut corporation, and DOES 1  
 through 50,

Defendants.

(ENDORSED)  
**FILED**

DEC 12 2005

KIRI TORRE  
 Chief Executive Officer/Clerk  
 Superior Court of CA County of Santa Clara  
 BY J. Herrera DEPUTY

CASE NO. **105CV054312**

**COMPLAINT FOR BREACH OF  
 CONTRACT; TORTIOUS BREACH OF  
 THE COVENANT OF GOOD FAITH  
 AND FAIR DEALING; UNFAIR  
 BUSINESS PRACTICES**

Jury Trial Demanded

COMPLAINT FOR BREACH OF CONTRACT; TORTIOUS BREACH OF THE COVENANT OF GOOD FAITH  
 AND FAIR DEALING; UNFAIR BUSINESS PRACTICES

1 Plaintiffs Netscape Communications Corporation and America Online, Inc., for their  
2 Complaint against the above-named Defendants Federal Insurance Company; National Union  
3 Fire Insurance Company of Pittsburgh, PA; St. Paul Mercury Insurance Company; and Executive  
4 Risk Specialty Insurance Company; and Does 1 through 50, inclusive, allege as follows:

5 SUMMARY

6 1. This insurance coverage action arises out of the wrongful refusal of the Defendant  
7 insurers Federal, National Union, St. Paul and Executive Risk (hereinafter, collectively, the  
8 "Insurers") to defend and indemnify Plaintiffs Netscape and AOL (hereinafter, collectively, the  
9 "Insureds") for a series of underlying liability actions alleging that the Insureds' products  
10 violated consumers' privacy rights by, among other things, surreptitiously intercepting electronic  
11 communications for the purpose of tracking information regarding consumers' specific web  
12 viewing habits. Similar allegations formed the core of an investigation into Netscape's software  
13 products by New York State's Attorney General.

14 2. At all times relevant to this action, the Insureds had in place – and had paid  
15 millions of dollars in premiums to secure – insurance coverage from the Insurers which was  
16 specifically designed to protect the Insureds against allegations similar to those set forth in the  
17 consumers' lawsuits and the New York Attorney General's investigation. Despite this, the  
18 Insurers uniformly and categorically refused to perform their contractual obligations. As a  
19 result, Plaintiffs were forced to incur millions of dollars in (as yet unrecompensed) defense and  
20 indemnity costs which the Insurers were contractually obligated to pay.

21 3. The Insurers' denials of coverage were wrongful and without a reasonable basis in  
22 either fact or law.

23 4. Plaintiffs/Insureds Netscape and AOL now bring this action to vindicate their  
24 policy rights and to recover the substantial sums they incurred both defending and resolving the  
25 underlying actions and the New York Attorney General's investigation. Netscape and AOL also  
26 seek to recover further and additional damages on account of the Insurers' unreasonable denials,  
27 and for the unfair business practices the Insurers have pursued against AOL and others to  
28 wrongfully deprive them of insurance coverage which is legitimately due and owing.

THE PARTIES

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2 5. Plaintiff Netscape Communications Corporation ("Netscape") is, and at all times  
3 material to this action was, a corporation organized and existing under and by virtue of the laws  
4 of the State of Delaware. Netscape's principal place of business is in Mountain View,  
5 California.

6 6. Plaintiff America Online, Inc. ("AOL") is, and at all times material to this action  
7 was, a corporation organized and existing under and by virtue of the laws of the State of  
8 Delaware. AOL's principal place of business is Dulles, Virginia. On March 17, 1999, Netscape  
9 was acquired by, and became a wholly owned subsidiary of, AOL.

10 7. Defendant Federal Insurance Company ("Federal") is, and at all times material to  
11 this action was, a corporation organized and existing under and by virtue of the laws of the State  
12 of Indiana. Federal's principal place of business is in Warren, New Jersey. At all times material  
13 to this action, Federal was qualified to transact, and was transacting, the business of insurance in  
14 the State of California.

15 8. Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National  
16 Union") is, and at all times material to this action was, a corporation organized and existing  
17 under and by virtue of the laws of the State of Pennsylvania. National Union's principal place of  
18 business is in New York, New York. At all times material to this action, National Union was  
19 qualified to transact, and was transacting, the business of insurance in the State of California.

20 9. Defendant St. Paul Mercury Insurance Company ("St. Paul") is, and at all times  
21 material to this action was, a corporation organized and existing under and by virtue of the laws  
22 of the State of Minnesota. St. Paul's principal place of business is in Minnesota. At all times  
23 material to this action, St. Paul was qualified to transact, and was transacting, the business of  
24 insurance in the State of California.

25 10. Defendant Executive Risk Specialty Insurance Company ("Executive Risk") is,  
26 and at all times material to this action was, a corporation organized and existing under and by  
27 virtue of the laws of the State of Connecticut. Executive Risk's principal place of business is in  
28 Connecticut. At all times material to this action, Executive Risk was qualified to transact, and

1 was transacting, the business of insurance in the State of California.

2 11. Plaintiffs Netscape and AOL do not know the true names and capacities, whether  
3 individual, associate, corporate otherwise of Defendant DOE 1 through DOE 50, inclusive, and  
4 Plaintiffs therefore sue these DOE defendants by such fictitious names and will amend this  
5 complaint to show their true names and capacities when the same are ascertained. Plaintiffs are  
6 informed and believe, and based thereupon allege, that Defendant DOE 1 through DOES 50,  
7 inclusive, and each of them, were in some manner responsible or legally liable for the events,  
8 actions, transactions and circumstances alleged herein.

9 VENUE

10 12. Venue of this action is properly laid in Santa Clara County under Section 395.5 of  
11 the Code of Civil Procedure as the county where Defendants' obligation or liability arose and  
12 their respective breaches occurred.

13 THE UNDERLYING ACTIONS AGAINST NETSCAPE AND AOL

14 13. Plaintiff AOL is the Internet's premier service and content provider. For nearly  
15 two decades, AOL has set the standard for interactive online services which have both shaped  
16 and influenced the direction of the evolving community known as the world wide web. As part  
17 of its history and development, AOL has acquired a number of products and services designed to  
18 support and enhance its operations including, in March 1999, products and services developed by  
19 Plaintiff Netscape.

20 14. As part of their business strategies, both AOL and Netscape developed and  
21 maintained risk management programs to protect their businesses against unanticipated  
22 exposures and losses. A key component of such strategy was insurance. In the case of Netscape,  
23 the company maintained multimillion dollar liability coverage through Federal (\$2 million).  
24 Similarly, AOL insured itself and its subsidiaries, including Netscape, with policies issued by  
25 National Union (\$2 million); St. Paul (\$2 million); and Executive Risk (\$10 million). The  
26 fundamental principle of such coverage was to provide the Insureds with assets to both defend  
27 and, if necessary, indemnify themselves against unexpected liabilities by way of legal action or  
28 otherwise. Coverage was also specifically placed to provide resources to the Insureds when

1 faced with actions which were groundless, fraudulent and/or false.

2 15. In 2000, four related civil actions were filed against Netscape and AOL  
3 (hereinafter, the "Underlying Actions"):

4 (a) *Specht v. Netscape Communications Corp. and American Online, Inc.*, 00  
5 CIV 4871 (S.D.N.Y.). A true and correct copy of the complaint in the Specht lawsuit is attached  
6 hereto as Exhibit 1 and incorporated herein by reference;

7 (b) *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No.  
8 00 CIV 6219 (S.D.N.Y.). A true and correct copy of the complaint in the Weindorf lawsuit is  
9 attached hereto as Exhibit 2 and incorporated herein by reference;

10 (c) *Gruber v. Netscape Communications Corp. and America Online, Inc.*, No. 00  
11 CIV 6249 (S.D.N.Y.). A true and correct copy of the complaint in the Gruber lawsuit is attached  
12 hereto as Exhibit 3 and incorporated herein by reference.

13 (d) *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00  
14 CIV 01723 (D.D.C.). A true and correct copy of the complaint in the Mueller lawsuit is attached  
15 hereto as Exhibit 4 and incorporated herein by reference. On or about August 24, 2002, Mueller  
16 voluntarily dismissed his complaint.

17 16. As set forth in the complaints in each of the Underlying Actions, the lawsuits  
18 served upon Plaintiffs were styled as putative class actions and sought, among other things,  
19 compensatory damages and other relief for Netscape's and AOL's alleged interception of  
20 consumers' private electronic communications. Specifically, the Underlying Actions alleged that  
21 two Netscape software products, Netscape Communicator and SmartDownload, operated in  
22 tandem to surreptitiously collect personal and private information from consumers by causing  
23 them to (unwittingly) disclose through the Internet the electronic address of files they  
24 downloaded, together with identifying codes. It was further alleged there that records of sites  
25 consumers visited were then monitored, captured and transmitted to, among others, Netscape and  
26 AOL, thereby imparting the contents of consumers' communications to parties who were not  
27 authorized, entitled, or otherwise intended to view such private communications. Among the  
28 claims asserted were violations of two federal statutes: The Electronic Communications and



1 Privacy Act (18 U.S.C. §§ 2511 and 2520) and the Computer Fraud and Abuse Act (18 U.S.C. §  
2 1030).

3 17. Shortly after the filing of the Underlying Actions, New York's Attorney General  
4 initiated an investigation into certain privacy-related consumer protection issues (the "Attorney  
5 General's Investigation"). At its core, the Attorney General's Investigation focused on privacy  
6 violations similar to those asserted in the Underlying Actions.

7 18. Promptly following the receipt of the complaints in the Underlying Actions and  
8 the Attorney General's Investigation, AOL and Netscape gave notice of those proceedings to  
9 their respective insurers for purposes of triggering defense and, if necessary, indemnity  
10 obligations. As described more fully below, none of the Insurers acknowledged coverage. Each  
11 denied its responsibility. And all refused to provide any benefits whatsoever under their  
12 respective policies. Thus, notwithstanding the millions of dollars in premiums the insureds had  
13 paid to the Insurers to secure coverage for allegations such as those contained in the Underlying  
14 Action and the Attorney General Investigation, AOL and Netscape were forced to defend and,  
15 ultimately, resolve those lawsuits with their own resources.

16 19. On September 2, 2004, Netscape and AOL resolved all claims asserted against  
17 them in the Underlying Actions by entering into a Stipulation of Settlement with each action's  
18 class representatives. Prior to doing so, the Insurers were advised of the forthcoming settlement  
19 and invited to participate in the actions' resolution so as to mitigate the harm caused by their  
20 failures to defend. The Insurers were unmoved. None availed themselves of the settlement  
21 opportunity offered.<sup>1</sup>

22 20. On January 11, 2005, the Court entered a Final Order and Judgment approving the  
23 terms of the Stipulation of Judgment.

24 **THE INSURERS' POLICIES AND THEIR DENIALS OF COVERAGE**

25 21. As part of their comprehensive risk management programs, Netscape and AOL

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27 <sup>1</sup> The Attorney General Investigation continued only until June 12, 2003, at which time the New  
28 York Attorney General's office agreed not to commence a proceeding against Netscape in return  
for Netscape's agreement to undertake (and refrain from taking) certain activities.

1 each procured and maintained insurance coverage to guard against unanticipated exposures and  
2 losses.

### 3 Netscape's Insurance

4 22. Federal. For the time period April 1998 to April 30, 1999, Federal issued  
5 Netscape its so-called "Electronics Insurance Program," policy number 35351119, which  
6 included both first-party property and third-party liability insurance (the "Federal Policy"). The  
7 third-party liability portion of the policy included occurrence-based, primary comprehensive  
8 general liability coverage with limits of \$2 million. A true and correct copy of the Federal Policy  
9 is attached hereto as Exhibit 5 and incorporated herein by reference. By its terms, the Federal  
10 Policy provided Netscape with coverage for liability for personal injuries such as those alleged in  
11 the Underlying Actions. The Federal Policy defined "personal injury" as injury arising out of a  
12 number of offenses, including "oral or written publication of material that violates a person's  
13 right of privacy." The Federal Policy further provided that Federal had "the right and duty to  
14 defend any insured against a suit seeking damages for . . . personal injury."

15 23. Notwithstanding such provisions, Federal denied coverage for the Underlying  
16 Actions. In so doing, Federal wrongly asserted, among other things, that the Underlying Actions  
17 did not trigger its policy's definition of "personal injury." A number of other (inapplicable)  
18 exclusions were also cited. Despite good faith efforts to convince Federal of its numerous  
19 analytical errors, the insurer refused to relent.

### 20 Insurance Applicable to both Netscape and AOL

21 24. St. Paul. For the time period April 1, 1999 to April 1, 2000, St. Paul issued its  
22 occurrence-based, technology commercial general liability policy number TE0900917 with  
23 limits of \$2 million (the "St. Paul Policy"). A true and correct copy of the St. Paul Policy is  
24 attached hereto as Exhibit 6 and incorporated herein by reference.

25 25. By its terms, the St. Paul Policy provided AOL and Netscape (as AOL's wholly-  
26 owned subsidiary) with coverage for liability for personal injuries such as those alleged in the  
27 Underlying Actions. The St. Paul Policy defined "personal injury" as injury arising out of a  
28 number of offenses, including "[m]aking known to any person or organization written or spoken

1 material that violates a person's right of privacy." The St. Paul Policy further provided that St.  
2 Paul had "the right and duty to defend [AOL and Netscape] against a claim or suit for injury or  
3 damage" covered by its insuring agreement.

4 26. Notwithstanding such provisions, St. Paul denied coverage for the Underlying  
5 Actions. With little explanation of the St. Paul Policy's specific coverage, the insurer stated that  
6 it was denying coverage because the Underlying Actions did not "seek damages for personal  
7 injury" as defined in its policy. A variety of other (inapplicable) exclusions were also cited.  
8 Despite Netscape's and AOL's good faith efforts to convince St. Paul that its coverage position  
9 was erroneous, the insurer refused to reverse its denial.

10 27. Executive Risk. For the time period April 1, 1999 to April 1, 2000, Executive  
11 Risk issued its multimedia liability insurance policy number 151-166530-99 with limits of \$10  
12 million (the "Executive Risk Policy") covering both AOL and Netscape (as AOL's wholly-  
13 owned subsidiary). A true and correct copy of the Executive Risk Policy is attached hereto as  
14 Exhibit 7 and incorporated herein by reference.

15 28. By its terms, the Executive Risk Policy provided coverage for claims arising out  
16 of "Media Activities" such as those alleged in the Underlying Actions. As defined in the policy,  
17 "Media Activities" included assertions of "invasion or infringement of the right of privacy" if  
18 done in connection with "Covered Media." For its part, "Covered Media" was broadly defined  
19 in Executive Risk's Policy to mean "all Matter contained on or accessible via the World Wide  
20 Web site [www.aol.com](http://www.aol.com), including all Matter contained on any web site accessible via a link or  
21 series of links from [www.aol.com](http://www.aol.com). Given the nature and extent of coverage set forth in  
22 Executive Risk's Policy, the insurer there was obligated to provide coverage for the privacy-  
23 related allegations set forth in both the Underlying Actions complaints, as well as those of the  
24 Attorney General's Investigation.

25 29. Notwithstanding such provisions, Executive Risk denied coverage for the  
26 Underlying Actions and Attorney General's Investigation. In so doing, the insurer wrongly  
27 asserted that the Underlying Actions did "not pertain in any way to Covered Media," as that term  
28 was defined in Executive Risk's Policy. It further claimed that an inapplicable exclusion for



1 "unauthorized access" barred coverage. Despite good faith efforts to convince Executive Risk  
2 that its denial was in error, Executive Risk refused to acknowledge coverage under its policy.

3 30. National Union. For the time period April 1998 to April 1, 1999, National Union  
4 issued its occurrence-based, primary comprehensive general liability insurance policy number  
5 RMGL 143-96-31 with limits of \$2 million (the "National Union Policy"). A true and correct  
6 copy of the National Union Policy is attached hereto as Exhibit 8 and incorporated herein by  
7 reference. AOL was a named insured under National Union's policy. By virtue of its subsidiary  
8 relationship with AOL, Netscape was also an insured because no other similar insurance was  
9 available to Netscape by reason of other insurers' denials of coverage.

10 31. By its terms, the National Union Policy provided AOL and Netscape with  
11 coverage for liability for personal injuries such as those alleged in the Underlying Actions. The  
12 National Union Policy defined personal injury in its policy as an injury arising out of a number  
13 of offenses, including "oral or written publication of material that violates a person's right of  
14 privacy." The National Union Policy further provided that National Union would "have the right  
15 and duty to defend [its Insureds] against any suit seeking damages for personal injury."

16 32. Notwithstanding such provisions, National Union denied coverage for the  
17 Underlying Actions by wrongly asserting that the Underlying Actions did not allege "personal  
18 injury" as defined in the insurer's policy. National Union further denied coverage on the basis of  
19 several other (inapplicable) provisions and exclusions. Despite good faith efforts to convince  
20 National Union that its denial was in error, National Union refused to acknowledge coverage  
21 under its policy.

#### 22 The Consequences of the Insurers' Coverage Denials

23 33. As a result of the Insurers' denials, Netscape and AOL were compelled to use  
24 their own resources to defend themselves against allegations asserted in the Underlying Actions  
25 and the Attorney General's Investigation. From the commencement of the Underlying Actions  
26 through settlement, the insureds incurred and paid in excess of \$4,273,064 in attorneys' fees,  
27 consultants' fees and other expenses in connection with their defense. None of the Insurers has  
28 ever reimbursed Netscape or AOL any part of that sum. Not one single penny.

1 34. In addition to Insurers' failure to defend Netscape and AOL in the Underlying  
 2 Actions and the Attorney General's Investigation, they also breached their indemnity obligations.  
 3 Indeed, the Insurers' abandonment of their Insureds resulted in Netscape and AOL having to  
 4 settle the Underlying Actions and the Attorney General's Investigation by paying at least  
 5 \$100,000 to effect closure. At this time, an appeal pertaining to the settlement of the Underlying  
 6 Actions is pending and could result in Netscape being required to pay an additional  
 7 \$1,340,113.86 to finally resolve these matters (as well as incurring additional defense costs).  
 8 Had the Insurers timely and properly honored their defense and indemnity obligations, the  
 9 amounts paid in settlement (or possibly to be paid) could have been minimized or avoided in  
 10 their entirety.

11 35. By this action, Netscape and AOL now seek to force the Insurers to do that which  
 12 they refused to do voluntarily. To honor their contractual obligations. To pay amounts owing.  
 13 And to take full and complete responsibility for other damages caused their Insureds by their  
 14 systematic and improper tactics to avoid coverage.

15 **FIRST CAUSE OF ACTION**

16 **(Breach of Contract against Federal)**

17 36. Netscape incorporates the allegations of Paragraphs 1 through 35 of this  
 18 Complaint, inclusive, as though fully set forth herein.

19 37. The Underlying Actions sought damages against Netscape which were within,  
 20 and which in any event were at all material times potentially within, the indemnity coverage  
 21 afforded by Federal's policies.

22 38. Netscape is informed and believes and thereon alleges that the limits of liability of  
 23 Federal's policies were never exhausted and, in all events, were not exhausted at the time that  
 24 Netscape requested coverage for the Underlying Actions.

25 39. Netscape has performed each and every material obligation imposed upon it by  
 26 Federal's policies, except to the extent such performance was been either prevented or excused  
 27 by Federal.

28 40. By failing to provide coverage to Netscape for the Underlying Actions, Federal

1 breached its respective contractual obligations to Netscape.

2 41. As a direct and proximate result of Federal's breaches, Netscape suffered  
3 damages in such amounts as will be proven at the trial of this action.

4 **SECOND CAUSE OF ACTION**

5 **(Breach of Contract against St. Paul)**

6 42. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 of this  
7 Complaint, inclusive, as though fully set forth herein.

8 43. The Underlying Actions sought damages against Netscape and AOL which were  
9 within, and which in any event were at all material times potentially within, the indemnity  
10 coverage afforded by St. Paul's policy.

11 44. Netscape and AOL are informed and believes and thereon allege that the limits of  
12 liability of St. Paul's policy were never exhausted and, in all events, were not exhausted at the  
13 time that Netscape and AOL requested coverage for the Underlying Actions.

14 45. Netscape and AOL have performed each and every material obligation imposed  
15 upon them by St. Paul's policy, except to the extent such performance was been either prevented  
16 or excused by St. Paul.

17 46. By failing to provide coverage to Netscape and AOL for the Underlying Actions,  
18 St. Paul breached its respective contractual obligations to Netscape and AOL.

19 47. As a direct and proximate result of St. Paul's breaches, Netscape and AOL  
20 suffered damages in such amounts as will be proven at the trial of this action.

21 **THIRD CAUSE OF ACTION**

22 **(Breach of Contract against Executive Risk)**

23 48. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 of this  
24 Complaint, inclusive, as though fully set forth herein.

25 49. The Underlying Actions and the Attorney General Investigation sought damages  
26 against Netscape and AOL which were within, and which in any event were at all material times  
27 potentially within, the indemnity coverage afforded by Executive Risk's policy.

28 50. Netscape and AOL are informed and believe and thereon allege that the limits of

1 liability of Executive Risk's policy were never exhausted and, in all events, were not exhausted  
2 at the time that Netscape and AOL requested coverage for the Underlying Actions and the  
3 Attorney General Investigation.

4 51. Netscape and AOL have performed each and every material obligation imposed  
5 upon them by Executive Risk's policy, except to the extent such performance was been either  
6 prevented or excused by Executive Risk.

7 52. By failing to provide coverage to Netscape and AOL for the Underlying Actions  
8 and the Attorney General Investigation, Executive Risk breached its contractual obligations to  
9 Netscape and AOL.

10 53. As a direct and proximate result of Executive Risk's breaches, Netscape and AOL  
11 suffered damages in such amounts as will be proven at the trial of this action.

12 **FOURTH CAUSE OF ACTION**

13 **(Breach of Contract against National Union)**

14 54. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 of this  
15 Complaint, inclusive, as though fully set forth herein.

16 55. The Underlying Actions sought damages against Netscape and AOL which were  
17 within, and which in any event were at all material times potentially within, the indemnity  
18 coverage afforded by National Union's policies.

19 56. Netscape and AOL are informed and believe and thereon allege that the limits of  
20 liability of National Union's policies were never exhausted and, in all events, were not exhausted  
21 at the time that Netscape and AOL requested coverage for the Underlying Actions.

22 57. Netscape and AOL have performed each and every material obligation imposed  
23 upon them by National Union's policies, except to the extent such performance was been either  
24 prevented or excused by National Union.

25 58. By failing to provide coverage to Netscape and AOL for the Underlying Actions,  
26 National Union breached its contractual obligations to Netscape and AOL.

27 59. As a direct and proximate result of National Union's breaches, Netscape and AOL  
28 suffered damages in such amounts as will be proven at the trial of this action.

**FIFTH CAUSE OF ACTION**  
**(Breach of the Covenant of Good Faith and Fair Dealing against Federal)**

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60. Netscape incorporates the allegations of Paragraphs 1 through 35 and 37 through 41 of this Complaint, inclusive, as though fully set forth herein.

61. Federal refused to defend or indemnify Netscape under the terms of its policies for claims asserted in the Underlying Actions. Federal's position was inherently unreasonable and reflected its failure to give at least equal regard to the interests of Netscape as it (obviously) gave to its own interests. By its actions and inactions, Federal breached the respective covenants of good faith and fair dealing implied into its policies by, among other things, the following:

- a. Asserting that the Underlying Actions did not allege any "personal injury" when it knew or should have known that they did allege a "personal injury";
- b. Interposing an exclusion for "Intentional Falsehoods" when it knew (or should have known) that such exclusion was inapplicable;
- c. Interposing an exclusion for "Willful Violations" when it knew (or should have known) that such exclusion was inapplicable;
- d. Insisting that other policy provisions barred coverage when it knew (or should have known) that such provisions were inapplicable.

62. As a proximate result of Federal's (mis)conduct, Netscape has been damaged as heretofore alleged, and has incurred substantial additional costs, including but not limited to its attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy Federal's breach of its coverage obligations. The full amount of such damages will be proven at the trial of the action of this matter.

63. As alleged herein, Federal's conduct with respect to its insured was malicious, oppressive, and fraudulent, and taken in willful disregard of Netscape's rights. Consequently, Netscape is entitled to recover punitive damages both to punish Federal for its transgressions and to deter others from engaging in similar wrongful conduct.

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**SIXTH CAUSE OF ACTION**  
**(Breach of the Covenant of Good Faith and Fair Dealing against St. Paul)**

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64. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 and 44 through 47 of this Complaint, inclusive, as though fully set forth herein.

65. St. Paul refused to defend or indemnify Netscape and AOL under the terms of its policy for claims asserted in the Underlying Actions. St. Paul's position was inherently unreasonable and reflected its failure to give at least equal regard to the interests of Netscape and AOL as it (obviously) gave to its own interests. By its actions and inactions, St. Paul breached the respective covenants of good faith and fair dealing implied into its policy by, among other things, the following:

- a. Asserting that the Underlying Actions did not allege any "personal injury" when it knew or should have known that they did allege a "personal injury";
- b. Interposing an exclusion for "Online Activities" when it knew (or should have known) that such exclusion was inapplicable;
- c. Insisting that other policy provisions barred coverage when it knew (or should have known) that such provisions were inapplicable.

66. As a proximate result of St. Paul's (mis)conduct, Netscape and AOL have been damaged as heretofore alleged, and have incurred substantial additional costs, including but not limited to their attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy St. Paul's breach of its coverage obligations. The full amount of such damages will be proven at the trial of the action of this matter.

67. As alleged herein, St. Paul's conduct with respect to its insureds was malicious, oppressive, and fraudulent, and taken in willful disregard of Netscape's and AOL's rights. Consequently, Netscape and AOL are entitled to recover punitive damages both to punish St. Paul for its transgressions and to deter others from engaging in similar wrongful conduct.

**SEVENTH CAUSE OF ACTION**  
**(Breach of the Covenant of Good Faith and Fair Dealing against Executive Risk)**

68. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 and 49

1 through 53 of this Complaint, inclusive, as though fully set forth herein.

2           69. Executive Risk refused to defend or indemnify Netscape and AOL under the  
3 terms of its policy for claims asserted in the Underlying Actions and Attorney General  
4 Investigation. Executive Risk's position was inherently unreasonable and reflected its failure to  
5 give at least equal regard to the interests of Netscape and AOL as it (obviously) gave to its own  
6 interests. By its actions and inactions, Executive Risk breached the respective covenants of good  
7 faith and fair dealing implied into its policy by, among other things, the following:

8           a. Asserting that the Underlying Actions and Attorney General Investigation  
9 did not allege a "Claim" when it knew or should have known that they did allege a "Claim";

10           b. Asserting that the Underlying Actions and Attorney General Investigation  
11 did not allege a "Claim" in connection with "Media Activities" when it knew or should have  
12 known that they did;

13           c. Interposing an exclusion for "unauthorized access" when it knew (or  
14 should have known) that such exclusion was inapplicable;

15           d. Insisting that other policy provisions barred coverage when it knew (or  
16 should have known) that such provisions were inapplicable.

17           70. As a proximate result of Executive Risk's (mis)conduct, Netscape and AOL have  
18 been damaged as heretofore alleged, and have incurred substantial additional costs, including but  
19 not limited to its attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy  
20 Executive Risk's breach of its coverage obligations. The full amount of such damages will be  
21 proven at the trial of the action of this matter.

22           71. As alleged herein, Executive Risk's conduct with respect to its insureds was  
23 malicious, oppressive, and fraudulent, and taken in willful disregard of Netscape's and AOL's  
24 rights. Consequently, Netscape and AOL are entitled to recover punitive damages both to punish  
25 Executive Risk for its transgressions and to deter others from engaging in similar wrongful  
26 conduct.

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**EIGHTH CAUSE OF ACTION**  
**(Breach of the Covenant of Good Faith and Fair Dealing against National Union)**

72. Netscape and AOL incorporate the allegations of Paragraphs 1 through 35 and 55 through 59 of this Complaint, inclusive, as though fully set forth herein.

73. National Union refused to defend or indemnify Netscape and AOL under the terms of its policies for claims asserted in the Underlying Actions. National Union's position was inherently unreasonable and reflected its failure to give at least equal regard to the interests of Netscape and AOL as it (obviously) gave to its own interests. By its actions and inactions, National Union breached the respective covenants of good faith and fair dealing implied into its policies by, among other things, the following:

a. Asserting that the Underlying Actions did not allege any "personal injury" when it knew or should have known that they did allege a "personal injury";

b. Interposing an exclusion for "willful violation of a penal statute" when it knew (or should have known) that such exclusion was inapplicable;

c. Insisting that other policy provisions barred coverage when it knew (or should have known) that such provisions were inapplicable.

74. As a proximate result of National Union's (mis)conduct, Netscape and AOL have been damaged as heretofore alleged, and have incurred substantial additional costs, including but not limited to its attorneys' fees, expenses and costs incurred in seeking to mitigate and remedy National Union's breach of its coverage obligations. The full amount of such damages will be proven at the trial of the action of this matter.

75. As alleged herein, National Union's conduct with respect to its insureds was malicious, oppressive, and fraudulent, and taken in willful disregard of Netscape's and AOL's rights. Consequently, Netscape and AOL are entitled to recover punitive damages both to punish National Union for its transgressions and to deter others from engaging in similar wrongful conduct.

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**NINTH CAUSE OF ACTION**

**(Unfair Business Practices against All Defendants)**

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76. Netscape and AOL incorporate the allegations of Paragraphs 1 through 75 of this Complaint, inclusive, as though fully set forth herein.

77. Netscape and AOL bring this cause of action in their individual capacities.

78. Netscape and AOL are informed and believe that Insurers have a policy and practice of automatically denying all claims that implicate their "personal injury" and/or "Media Activities" coverages when privacy allegations are asserted against insureds.

79. The acts and practices alleged above constitute acts of unfair competition as defined by California Business and Professions Code Section 17200 in that they are unfair and present a continuing threat to Netscape, AOL and members of the public and because they deprive policyholders of the insurance coverage they intend to purchase and believe they have purchased.

80. Defendants should be preliminarily and permanently enjoined from engaging in these practices at any time in the future.

WHEREFORE, Netscape and/or AOL pray for judgment as follows:

**On The First Cause of Action:**

1. For compensatory damages in an amount to be proved at trial;

**On The Second Cause of Action:**

2. For compensatory damages in an amount to be proved at trial;

**On The Third Cause of Action:**

3. For compensatory damages in an amount to be proved at trial;

**On The Fourth Cause of Action:**

4. For compensatory damages in an amount to be proved at trial;

**On The Fifth Cause of Action:**

5. For compensatory damages in an amount to be proved at trial;

6. For punitive damages in an amount sufficient to punish and make an example of

Federal;

**On The Sixth Cause of Action:**

7. For compensatory damages in an amount to be proved at trial;

8. For punitive damages in an amount sufficient to punish and make an example of

St. Paul;

**On The Seventh Cause of Action:**

9. For compensatory damages in an amount to be proved at trial;

10. For punitive damages in an amount sufficient to punish and make an example of

Executive Risk;

**On The Eighth Cause of Action:**

11. For compensatory damages in an amount to be proved at trial;

12. For punitive damages in an amount sufficient to punish and make an example of

National Union;

**On The Ninth Cause of Action:**

13. Pursuant to California Business and Professions Code Section 17200, and under the equitable powers of the Court, for an order preliminarily and permanently enjoining Defendants from committing, aiding, abetting, or inducing the commission of the unfair business practices alleged herein.

14. Pursuant to California Business and Professions Code Section 17203, and under the equitable powers of the Court, for an order directing Defendants to disgorge to the public all funds and profits acquired by means of any act or practice described herein which is found by the Court to be unlawful, unfair or fraudulent within the meaning of that statute;

**On All Of The Causes of Action:**

15. For their costs of suit incurred herein,

16. For prejudgment and post judgment interest at the maximum legal rate on all sums awarded; and

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17. For such other relief as the Court may deem just and proper.

Dated: December 12, 2005

BERGESON, LLP

By   
Marc G. Van Niekerk  
Attorneys for Plaintiffs  
Netscape Communications Corporation and  
America Online, Inc.