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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al.,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

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

PLAINTIFFS' NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY; MEMORANDUM OF LAW IN SUPPORT THEREOF

Motion to be Heard

Date: October 17, 2006
Time: 10:00 a.m.
Judge: Magistrate Trumbull
Dept: Courtroom 5 (Fourth Floor)

Complaint filed December 12, 2005

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TO DEFENDANT ST. PAUL MERCURY INSURANCE COMPANY AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Tuesday, October 17, 2006 at 10:00 a.m., or as soon thereafter as may be heard, in Courtroom 5 (Fourth Floor) of the above-referenced court, located at 280 South First Street, San Jose, California, Plaintiffs Netscape Communications Corporation and America Online, Inc. will and hereby do move this Court for an order compelling the production of documents and testimony consistent with AOL's Requests for Production Nos. 15 and 22; Netscape's Requests for Production Nos. 6, 7, and 8, and Plaintiffs' PMK Designations Nos. 4 and 5.

Plaintiffs' Motion is brought pursuant to the provisions of Rule 26 of the Federal Rules of Civil Procedure, and is made on the grounds that the documents and testimony sought are both narrowly-tailored and relevant to St. Paul's contentions in this action that: (1) for privacy-related, personal injury claims, no coverage obtains unless a claimant accuses a corporate insured of disclosing information outside its insured organization; and (2) its policy's "deliberately breaking the law" exclusion bar an insured's recovery of all defense costs, notwithstanding the fact that criminal violations are never established against an insured, or otherwise the source of any liability. As discussed more fully in the accompanying Memorandum of Points and Authorities, Plaintiffs contest the insurer's interpretative arguments and, further, contend that they are entitled to discovery of documents and testimony which purportedly support (or otherwise refutes) the insurer's positions.

Plaintiffs' Motion to Compel is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities and attendant exhibits; the Court's file in this matter; and on such oral argument as Netscape and AOL may present at the hearing of their motion.

Pursuant to this Court's Standing Order Regarding Case Management in Civil Cases, the parties have stipulated to the time, place, and briefing schedule underlying the instant Motion to Compel and, toward that end, they have determined that the hearing date proposed will not cause undue prejudice to either party or to the Court.

Dated: September 29th, 2006

ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

By_____/s/_____
Michael Bruce Abelson
Attorneys for Plaintiffs
Netscape Communications Corporation and
America Online, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Motion challenges – and seeks discovery regarding – two interpretative arguments raised by St. Paul in response to Plaintiffs' request for coverage: (1) St. Paul's novel construction of its policy's "personal injury offense" language, such that coverage for privacy-related claims rests upon an (unscripted) requirement that private information be made known outside an insured organization. Unless such disclosure is alleged, no coverage is triggered; and (2) the denial of any defense costs or other policy benefits for an insured accused of deliberately breaking the law – even though such an allegation is never proven nor, ultimately, a source of any liability whatsoever.

While St. Paul is absolutely free to make these interpretative arguments in its defense, it must be prepared to back-up its position by allowing opposing discovery. As explained more fully below, Plaintiffs' requests for production and testimony are narrowly focused and seek – from a variety of different sources – to discover facts and other evidence which put St. Paul to its proof.

II. FACTUAL BACKGROUND

A. The SmartDownload Action

This is an insurance coverage action. At issue is Plaintiffs' contention that their insurer, St. Paul, failed to provide a defense to a series of underlying lawsuits alleging injury from Netscape's software product, known as "SmartDownload." In the underlying actions, Netscape's users claimed that SmartDownload violated their privacy by, among other things, collecting, storing, and disclosing to Plaintiffs and their engineers claimants' Internet usage (the "SmartDownload Lawsuits"). At the time of the SmartDownload Lawsuits, Plaintiffs were insured under St. Paul's Technology Commercial General Liability Protection Policy (the "Tech Policy"). In substance, the Tech Policy contained terms and provisions typical of St. Paul's "standard" general liability policy form (the "Standard GL Policy"), with the exception that the Tech Policy's form provided "examples" specifically geared toward explaining coverage for technology insureds.

Despite Plaintiffs' belief that the SmartDownload Lawsuits were insured, St. Paul denied coverage. The insurer argued, among other things, that the underlying lawsuits failed to trigger the Tech Policy's "personal injury" coverage. After this lawsuit was filed in December 2005, the insurer also (belatedly) argued the SmartDownload Lawsuits ran afoul of the policy's exclusion for claims resulting from "deliberately breaking the law."[1] As alleged by the SmartDownload claimants and, subsequently, New York's Attorney General, SmartDownload's functionality violated provisions of two federal statutes – the Electronic Communications Privacy Act (18 USC §§ 2511 and 2522) and the Computer Fraud and Abuse Act (18 USC §1030). Ultimately, *neither* statute was a source of any liability. In fact, the SmartDownload Lawsuits were resolved without any payment whatsoever to claimants or their attorneys. What the insureds did pay was a rather substantial defense bill. Total attorneys' fees and costs incurred by Plaintiffs in the SmartDownload Lawsuits topped $4.3MM. For its part, St. Paul refused to pay a single penny of Plaintiffs' defense costs.

B. Smart Download and St. Paul's "Making Known" Provision

As explained in Plaintiffs' complaint, the present controversy concerns coverage for the SmartDownload Lawsuit's privacy allegations and, more particularly, whether allegations in those lawsuits satisfied the Tech Policy's definition of a "personal injury offense." As defined in St. Paul's Tech Policy, the term "personal injury offense" means, in pertinent part:

> "*Making known to any person or organization* written or spoken material that violates a person's right of privacy." (italics supplied).

The exact same language used to describe the policy's "*personal* injury offense" also appears in the Tech Policy's description of "*advertising* injury." Indeed, coverage exists there for "advertising injury offenses" which allege the "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy."

[1] The exclusion reads, in pertinent part, as follows: "We won't cover personal injury or advertising injury that results from. . .the protected person knowingly breaking any criminal law."

Here, the importance of the St. Paul Tech Policy's "making known to any person or organization" language cannot be overstated. Indeed, the provision's proper construction and application is a hotly-contested issue in this litigation.

According to St. Paul, this critical policy provision means third party disclosure. Moreover, in the case of insured organizations – like Netscape and AOL – St. Paul's underwriter (repeatedly) testified that, before coverage would be triggered, a claimant would be required to allege his private information "left" the insured organization. See e.g., Midwinter Depo, Tr. 120: 3-123:23. Given such views, St. Paul determined the SmartDownload Lawsuits were not covered because, it argues, the SmartDownload complaints did not allege Plaintiffs shared users' private information outside their organizations. In short, St. Paul argues there was no third party disclosure outside the insured organization.

Plaintiffs disagree with this interpretation of the policy's "making known" language and, in particular, the obligation that coverage turns upon whether (or not) private information actually "leaves the [insured] organization." On its face, the policy's language doesn't suggest the existence of this additional criterion and, in various areas of privacy law, St. Paul's interpretation is actually contrary to existing legal standards. For example, the (common law) privacy tort of "unreasonable intrusion" does not require any type of publication or other public disclosure. See Restatement (Second) of Torts §652B (comment a) ("publicity is not required to establish a tort on this theory") (emphasis supplied). Neither do either of the two (federal) privacy statutes at issue in the SmartDownload Lawsuits. See e.g., 18 USC §§ 2511 and 2522 (Electronic Communications Privacy Act); 18 USC §1030(Computer Fraud and Abuse Act).[2] Despite these legal realities, St. Paul's underwriter conceded in deposition that *all* forms

[2] Although the ECPA *does* criminalize disclosure of wire, oral, of electronic communications intercepted through illicit means (see 18 USC § 2511(c)), such interception, without disclosure, is, by itself, a violation. See id. at § 2511(a) & (b)). The CFAA's focus on improper (or unauthorized access) operates in a similar fashion. Compare 18 USC § 1030 (a)(1) (criminalizing access without disclosure) with §1030(a)(6) (criminalizing the trafficking in illegally obtained passwords).

of privacy were intended to be covered under its Tech Policy, and that she did not know of any form of privacy that St. Paul's policy did not cover. See Midwinter Depo. Tr. 117:15-119:13.

Finally, any number of simple examples (quickly) demonstrates how/why St. Paul's interpretation is wrong. Consider, for example, a claim by a visitor to Netscape's corporate offices. While there, a Netscape employee rifles the visitor's locked briefcase. Inside the employee finds perfumed love letters, a secret diary, and other evidence of an illicit affair. Employee shows his (horrified) co-worker his discovery. They review the materials. They discuss it. They replace the incriminating evidence, and they (wisely) determine never to speak of the matter again. Despite this, the visitor discovers the invasion and sues.

Covered?

Absolutely. St. Paul would be required to defend Netscape against visitor's claims notwithstanding the fact that private information never left the insured organization. This is so because the policy's plain language is satisfied, i.e., "Making known to any person or organization written or spoken material that violates a person's right of privacy." That the visitor's private information was never disseminated beyond Netscape's walls is irrelevant to proper analysis. The critical fact is that the insured caused private information to be disclosed in contravention of the visitor's desire to keep such information private. Similar principles apply to the SmartDownload Lawsuits, where Plaintiffs were accused of misappropriating information regarding users' (private) Internet usage. The fact that such (private) information was made known to Netscape itself was sufficient to trigger coverage. Nevertheless, St. Paul contends that the legal and logical consequence of its policy's "making known to any person or organization" language is such that, for coverage to obtain, private information must "leave" the insured organization. That's not right.

Adding to this linguistic mystery is St. Paul's own (internal) documentation, which shows that, in or about 1991, the insurer changed its policy's personal and advertising language to delete a "made public" requirement which previously functioned as a coverage trigger for both personal injury and advertising injury coverage under its Standard GCL and Tech Policy forms. According to St. Paul's own documentation, the reason for this change from

"made public" to "making known to any person or organization" was to "*clarify coverage*" – an affirmative admission that the instant "making known" language was meant (to try) to fix *something*. Exactly what that *something* was/is -- and how well the intended "fix" actually worked – are subjects Plaintiffs seek to explore in discovery. As matters stand, however, St. Paul's explanation of its "making known" language as a proxy for "disclosed outside the insured organization" does not make sense. For this reason, Plaintiffs seek to discover what the challenged phrase really means, and whether its provisions have been properly applied to deny Plaintiffs $4.3MM in attorneys' fees and costs incurred defending the SmartDownload Lawsuits.

C. Plaintiffs' Discovery Requests

Given this legal and factual background, Plaintiffs sought discovery on two different fronts: (1) The meaning of the Tech Policy's "making known" provisions; and (2) the evolution of the policy's "deliberately breaking the law" exclusion. Up until now, the parties have managed to (informally) resolve their outstanding discovery disputes and, even here, the requests presented to the Court reflect the end product of numerous, good faith negotiations to resolve and narrow issues. The requests at issue are, viz:.

"Making Known to any Person or Organization" Requests

AOL Request for Production No. 15: All DOCUMENTS which, in whole or in part, interpret, explain, and/or provide meaning to and/or for the following "personal injury offense" in the ST. PAUL POLICY:[3] "*making known to any person or organization written or spoken material that violates a person's right of privacy*."

AOL Request for Production No. 22: All transcripts of deposition or trial testimony given by ST. PAUL personnel concerning any claim under the "personal injury" or "advertising injury" portions of any policy issued by ST. PAUL concerning the following offense: "*making known to any person or organization written or spoken material that violates a person's right of privacy*."

[3] As defined, the "ST. PAUL POLICY" means the St. Paul Tech Policy at issue in this action.

Netscape Request for Production No. 6: All "Side By Side" comparisons relating to the "*making known" provision* of the Personal Injury coverage in YOUR general liability and/or technology general liability policy.

Netscape Request for Production No. 7: All "Side By Side" comparisons relating to the *"making known" provision of the* Advertising Injury coverage in YOUR general liability and/or technology general liability policy.

PMK Deposition Topic No. 4: All changes to the "*making known"* language of the "personal injury liability" coverage in ST. PAUL's technology commercial liability policy since 1985.

PMK Deposition Topic No. 5: All changes to the "*making known"* language of the "Personal Injury liability" coverage in ST. PAUL's commercial liability policy since 1985.

"Deliberately Breaking the Law" Request

Netscape Request No. 8: All "Side by Side" comparisons relating to the "deliberately breaking the law" exclusion in YOUR general liability and technology general liability policy.

For the convenience of the Court, each of the foregoing requests – and St. Paul's attendant objections thereto – are set forth, more fully, in Exhibit A to this Motion. Exactly which of the objections St Paul actually intends to actually press in opposition to this motion remains to be seen.

III. DISCUSSION

A. St. Paul Should be Compelled to Produce Documents And Testimony in Response to Plaintiffs' "Making Known" Requests

Although Plaintiffs' six "making known to any person or organization" requests intersect and, at times, overlap, they all follow from one unifying theme: To better understand the evolution and meaning of the Tech Policy's "making known" provision and, more

particularly, how St. Paul's purported "outside the insured organization" criterion does (or does not) apply to the coverage's operation.

In service of this goal, Plaintiffs have sought "all documents" relating to the "interpretation, explanation and/or meaning" of the Tech Policy's "personal injury offense" language (AOL RFP No. 15). This simple and straight-forward request goes to the very heart of this action: At its most basic level, Plaintiffs lawsuit seeks coverage for the SmartDownload Lawsuits under St. Paul Tech Policy's personal injury coverage. As such, the tendered request could not be more "on point," and extended explanation/justification is unnecessary. For its part, Netscape's Request No. 6 – asking for "Side by Side" comparisons – is a subset of RFA 15's request for documents. Indeed, St. Paul's previous productions reveal that, when the insurer changes its coverage forms, it compiles and circulates a document which compares the old policy language to the new language (in a side-by-side format), and therein explains the reason/rationale for changes. Given the importance of this particular form of document, Plaintiffs have called for its specific production.

Plaintiffs' "making known" requests also seek to clarify the Tech Policy's language in three other ways: (1) By reference to St. Paul's Standard GL Policy; (2) By reference to policies' "advertising injury" coverage; and (3) Through sworn testimony. Plaintiffs expect each source to be highly informative of the central, interpretative question posed here. Here's why:

- **St. Paul's Standard GL Policy** (AOL RFP No. 22; Netscape RFPs 6, 7; PMK Topic No. 5): As noted above, St. Paul's Tech Policy is a variant of the insurer's Standard GL Policy. As explained in discovery, the only difference between the two forms is the Tech Policy contains technology-based examples to explain coverage. Inasmuch as the Tech Policy itself is an extension of an established form, the phraseology and evolution of the "making known" language in the Standard GL form would appear to be highly relevant to the construction and interpretation of that same phrase in St. Paul's Tech Policy. Indeed, changes to, and explanations concerning, the interpretation of the Standard GL Policy would, in all likelihood, be persuasive (if not binding) precedent on the Tech Policy. For this reason, the requested

documents should be produced. Likewise, St. Paul should also be ordered to produce a "person most knowledgeable" for deposition on the Standard GL's Policy's "making known" language (PMK Topic 5). The fact that, here, a witness is requested (rather than documents) makes no difference. The arguments for discovery are the same, and production should be required.

- **Advertising Injury Language** (Netscape RFP No. 7): The "making known" language used to trigger "personal injury offenses" in St. Paul's Tech Policy is, likewise, used to trigger the Tech Policy's "advertising injury offenses." Indeed, the two provisions parallel each other in both wording and scope. Unsurprisingly, when St. Paul made changes to the "personal injury" provision's "making known" language, it made similar changes to the policy's "advertising injury's" language. On their face, the two provisions appear to have the exact same function and meaning. For these reasons, Plaintiffs contend that their request for discovery of side-by-side constructions of advertising injury's "making known" language is discoverable in this proceeding, and ought to be produced.

- **Sworn Testimony** (AOL RFP 22; PMK Topics 4 and 5) -- Given the importance of the "making known" provision to the action here, Plaintiffs seek to discover past (sworn) testimony regarding this critical policy provision (AOL RFP 22), and to elicit new/additional testimony geared to the particulars of the SmartDownload Lawsuits. Both forms of testimony are essential to Plaintiffs' understanding and effective prosecution of this matter.

(i) *Other Actions' Testimony* (AOL RFP 22) – Sworn testimony from other lawsuits regarding the "making known" language of St. Paul's policies is sought precisely because: (i) the policies' "making known" language is inherently conceptual, and not necessarily tied to the particulars of any given claim; and (ii) in all probability, such testimony will not take account of the particulars of the SmartDownload claim. That's a good thing. Because deponents will not have been schooled in the dynamics of *this* litigation, testimony regarding the "making known" provision is likely to be more candid, more honest, and more revealing than straight-up questioning of St. Paul's PMKs in this lawsuit – where the deponent has been prepped on the nuances of Plaintiffs' unique claim. The scope here is important, too. As discussed above, the

fact that advertising injury and personal injury language parallel eachother means that the discovery can be tightly focused.

This is no fishing expedition. That response testimony exists here is a certainty. For example, Plaintiffs have learned that St. Paul's claims adjuster, James Zacharski, was deposed in Melrose Hotel, v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d 488 (2006). At issue there was, among other things, the "making known" language found in the "advertising injury" provisions of St. Paul's Standard GL Policy. As it turns out, Mr. Zacharski is the same adjuster who communicated with St. Paul's adjusters in this action, before and after the filing of Plaintiffs' lawsuit. See Exhibit B (St. Paul Privilege Log). For reasons which remain unclear, St. Paul deemed Mr. Zacharski's communications with its adjusters privileged. While Plaintiffs don't (yet) challenge the propriety of withholding Mr. Zacharski's communications, they do insist on production of Mr. Zacharski's Melrose Hotel deposition.[4] At a minimum, Plaintiffs are entitled to the Zacharski transcript. However, all other sworn deposition and trial testimony should also be produced.

(ii) *PMK Testimony* (PMK Nos. 4, 5) – Applicable here are the same rationale(s) supporting Plaintiffs request for documents explaining/interpreting the "making known" provision in St. Paul's Standard GL Policy (AOL RFP 22, Netscape RFP 6, 7). In the testimonial context, a St. Paul "Person Most Knowledgeable" is sought to give voice to the company's paper record. This only makes sense. To the extent the documentary record is unclear or merits further follow-up, Plaintiffs require a living, breathing human being to speak to those issues. St. Paul must be required to make full disclosure, not just paper disclosure. Requiring a PMK on the designated topics levels the playfield.

[4] Plaintiffs anticipate St. Paul will argue Mr. Zacharski's Melrose Hotel deposition references other insureds, irrelevant matters, and is subject to a protective order in that case. That's all fine. There is a protective order in this case, and Plaintiffs have already offered to handle the transcript in accordance with the Court's order or any other court order entered. As to St. Paul's concerns for other insureds and irrelevant materials, Plaintiffs (again) invite St. Paul to redact all such information. All Plaintiffs seek is Mr. Zacharski's testimony discussing the policy's "making known" language.

Finally, Plaintiffs anticipate St Paul will seek to limit testimony regarding policy changes/interpretations to the 2000-01 time period. (Plaintiffs cancelled their policy in 2001.) Any such limitation is irrational. Like all insurers, St. Paul traffics in language. Complex language. Like all insurers, St. Paul is continually looking to the language in its forms (and other insurers' forms) to strike the proper balance among reward (premium) and risk (claims' payments). *Whenever* St. Paul changes its policies' language, that act – in and of itself – bespeaks a decision regarding intent. A big decision. Given the stakes, change is not easily made. Accordingly, Plaintiffs are entitled to discover the fact of change and, further, the reasons underlying intent whenever they occur. Indeed, if a change were made today to (further) clarify the policy's "making known" language because the insurer (secretly) agreed with Plaintiffs, that change would, of course, be incredibly relevant to the language's proper interpretation. In fact, it would probably end this lawsuit. In this regard, both relevance and discoverability are obvious.

For its part, contract language is not subject to exclusion like a subsequent remedial measure and, in any event, the standard for discovery here is not admissibility at trial. Accordingly, the requested testimony should be ordered. Plaintiffs are entitled to know if the insurer is (mis)construing its policy to deny benefits properly owed.

B. Defendants Should be Compelled to Produce Documents Responsive To Plaintiffs' "Deliberately Breaking the Law" Requests

At issue here is a single request for "side by side" comparisons relating to the St. Paul's "deliberately breaking the law" exclusion. As with the policies' "making known" language, the "deliberately breaking the law" language appears in *both* St. Paul's Standard GL and Tech Policies. Whereas St. Paul has agreed to provide comparative documents for 1991 and 1996, it has refused to produce subsequent documentation on this provision. As noted above, St. Paul interposed its "deliberately breaking the law" exclusion as a coverage defense after the filing of the instant lawsuit in December 2005. Indeed, the exclusion was not part of the insurer's initial denial. As such, there is no justification to impose any type of time limit on the insurer's response. Given that this bar was *first* asserted in 2006, Plaintiffs are entitled to discover information regarding the exclusion right up to the present day. Fair is fair.

C. Sanctions.

This is a good faith discovery dispute. Plaintiffs do not request (or otherwise seek) an award of sanctions against St. Paul for its failure to make adequate production. Plaintiffs simply want their discovery. Any entitlement to sanctions is waived.

IV. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request the Court enter an order compelling production of documents and testimony consistent with their "Making Known" and "Deliberately Breaking the Law" discovery requests presented to the Court.

Dated: September 29th, 2006

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