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ST. PAUL MERCURY INSURANCE COMPANY

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT COURT OF CALIFORNIA**

**SAN JOSE DIVISION**

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICAN ONLINE, INC., a Delaware corporation,

Plaintiffs,

vs.

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

Defendants.

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

**DEFENDANT ST. PAUL MERCURY INSURANCE COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY**

Date: October 17, 2006
Time: 10:00 a.m.
Dept.: Courtroom 5

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

Accompanying Documents:

Declaration of Sara M. Thorpe
Declaration of Judi Lamble

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## I. INTRODUCTION

Defendant St. Paul Mercury Insurance Company ("St. Paul") submits the following points and authorities in opposition to the motion to compel production of documents and testimony filed by plaintiffs American Online, Inc. ("AOL) and Netscape Communications Corporation ("Netscape") (collectively referred to as "plaintiffs").

St. Paul has produced documents and testimony in response to all but one of the discovery requests that are the subject of plaintiffs' motion. This dispute has actually been significantly narrowed to two types of requests, neither of which is likely to lead to the discovery of admissible evidence. The requests are for: (1) documents and testimony regarding revisions made to St. Paul's Commercial General Liability ("CGL") policy forms *after* the issuance of the St. Paul policy involved in this lawsuit; and (2) an exceedingly broad request for deposition and trial testimony from any St. Paul employee given at any time relating to any claim involving the "making known" provisions in St. Paul's advertising and personal injury coverages in its CGL forms.

St. Paul has produced documents relating to, and witnesses to testify about, topics relevant to the subject of this coverage litigation. These remaining documents and testimony sought by plaintiffs are irrelevant to this dispute, and the request for depositions and trial transcripts is also overbroad and unduly burdensome. Exhibit A to this opposition sets forth plaintiffs' discovery requests and St. Paul's objections thereto.

## II. FACTUAL BACKGROUND

### A. The St. Paul Policy

St. Paul issued to AOL policy no. TE 09000917 for the period April 1, 1999 to April 1, 2000 ("the St. Paul Policy"). *See* Exhibit 6 to Complaint. The St. Paul Policy was renewed with the same Technology CGL form through June 1, 2001[1]. After its merger with AOL, Netscape was added as a named insured.

[1] St. Paul uses a standard CGL form and versions of that form crafted to serve the specific needs of various industry segments, such as the Technology segment. The language of the "making known" personal injury offense at issue in this coverage action is identical in the standard and Technology CGL

*(Footnote continued)*

The relevant parts of the St. Paul Policy at issue in this coverage dispute and for purposes of this motion to compel are set forth in the Technology CGL form (no. 47150) and are as follows:

> **Personal injury liability.** We'll pay amounts any protected person is legally required to pay as damages for covered personal injury that:
>
> - results from your business activities, other than advertising, broadcasting, publishing, or telecasting done by or for you; and
> - is caused by a personal injury offense committed while this agreement is in effect.
>
> *Personal injury* means injury, other than bodily injury or advertising injury, that's caused by a personal injury offense.
>
> *Personal injury offense* means any of the following offenses:
>
> . . .
>
> - Making known to any person or organization written or spoken material that violates a person's right of privacy.
>
> 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.

**B. "SmartDownload" Class Actions**

Starting in June 2000, four lawsuits were filed against plaintiffs, three in New York and one in the District of Columbia. (*See* Exs. 1-4 to Complaint.) These lawsuits allege plaintiffs "intercepted electronic communications of users of the internet" through SmartDownload, a program designed to facilitate a computer user's downloading of files from the internet. The class actions alleged plaintiffs violated two criminal statutes: the Electronic Communications Privacy Act (18 U.S.C. §§ 2511 and 2522) and the Computer Fraud and Abuse Act (18 U.S.C. § 1030). Plaintiffs were allegedly "spying on internet activities" and conducting "continuing surveillance" of electronic

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forms.

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communications in order to "create a continuing profile of the Web site's and each visitor's file transfers using SmartDownload." *Id.* Significantly, the lawsuits did not allege plaintiffs disseminated any of this private information to any third party.

Plaintiffs tendered the four SmartDownload claims to St. Paul. St. Paul determined there was no duty to defend or indemnify the SmartDownload claims because the complaints did not allege "bodily injury," "property damage," or "advertising injury" under the St. Paul Policy (which points are not disputed in this litigation), and because the claims did not allege any "personal injury" offense and were excluded by the policy's online activities exclusion.

After resolving the SmartDownload claims, plaintiffs initiated this coverage action against St. Paul. Plaintiffs contend the SmartDownload claims potentially fall within the St. Paul's Policy's personal injury offense of "making known to any person or organization written or spoken material that violates a person's right of privacy."

**C. Plaintiffs' Discovery Is A Fishing Expedition**

Plaintiffs have gone on a fishing expedition in order to attempt to create ambiguity and issues of fact relating to the meaning of the "making known" language in the St. Paul Policy even though the language is easy to read, clear, unambiguous, and has been interpreted by a federal court applying Virginia law (the law that should be applied to this dispute).

Plaintiffs have conducted extensive document discovery. They have also, to date, spent six hours deposing the person most knowledgeable at St. Paul (Eric Solberg) regarding the history and intent of the words "making known" for Technology and standard CGL forms in use from 1985 to 2001. (*See* Declaration of Sara M. Thorpe ["Thorpe Decl."], ¶ 7.) Plaintiffs spent almost 7 hours deposing a Technology Claim employee (Dale Evensen) who handled the SmartDownload claims and who was designated as a person most knowledgeable about the application of the making known language to the claim. (*Id.*, ¶ 9.) They spent another five hours deposing another former Technology Claim employee (Dan Weiss) who worked on the claim and who

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also testified as a person most knowledgeable about the application of "making known" to the claim. (*Id.*, ¶ 10.) Continuations of these depositions and additional depositions on the "making known" topic are still to take place.

Plaintiffs have requested and received the following documents, in addition to the claim file, policy, and underwriting documents relating to the specific policy and claim at issue: (1) Side by Side comparisons[2] of changes in the CGL form (which includes reference to "making known" language and the "deliberately breaking the law" exclusion from 1985 to 1991)[3]; and (2) Side by Side comparisons of the 1991 to 1996 changes in the standard and Technology CGL forms. (*Id.*, ¶ 5.) Plaintiffs have a copy of the 1985 standard CGL form and the 2001 standard CGL form and have used those forms in questioning witnesses[4]. (*Id.*, ¶ 7.)

**D. Discovery Requests Still At Issue**

The remaining discovery requests can be grouped into two categories:

1) Discovery of documents and testimony relating to the 2001 CGL form regarding the "making known" offense and the "deliberately breaking the law" exclusion in the personal injury and advertising injury coverages in the Technology and standard CGL forms[5] (documents: AOL RFP 15, Netscape RFPs 6, 7, & 8; testimony: PMK topics 4 & 5); and

2) Discovery seeking production of all transcripts of deposition or trial testimony given by any company personnel concerning the "making known" provisions of any claim under the "personal injury" or "advertising injury" portions of any policy issued by St. Paul (AOL RFP 22).

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[2] A Side by Side comparison is a formal document submitted to some State regulatory authorities in connection with the use of insurance forms in a particular state.

[3] These are the only discovery topics relevant to AOL's motion. Discovery of additional topics has also been conducted and are not the subject of this discovery dispute.

[4] St. Paul has also produced additional documents, including the St. Paul Claim Procedure Manual and the St. Paul "Best Practices" document.

[5] AOL RFP 15 only seeks documents pertaining to St. Paul's Technology Commercial General Liability Policy.

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St. Paul objects to producing documents and further testimony regarding changes to the St. Paul CGL forms after issuance of the St. Paul Policy did not change from the 1996 form to the 2001 form. Evidence regarding the later form is therefore not relevant to this dispute. St. Paul objects to producing deposition and trial testimony concerning other unrelated claims submitted by other unrelated insureds because that request is irrelevant, as well as phenomenally and unduly burdensome. St. Paul already has produced much more discovery than is relevant to this dispute and allowed plaintiffs to probe extensively regarding the history, intent, and application of the CGL policy provisions. St. Paul should not be required to provide any of the additional requested information.

## III. LEGAL ARGUMENT

### A. The Coverage Dispute Involves A Legal Question For The Judge

The interpretation of the "making known" provision in the St. Paul Policy, as it applies to the particular facts of these SmartDownload claims will be a decision for the Court to decide. *Pilot Life Ins. Co. v. Crosswhite,* 206 Va. 558, 561, 145 S.E.2d 143, 146 (Va. 1965) (function of court to interpret language of insurance policy); *Seabulk Offshore, Ltd. v. American Home Assur. Co.*, 337 F.3d 408, 418 (4th Cir. 2004) (applying Virginia law) (interpretation of insurance contract is question of law); *Waller v. Truck Insurance Exch. Inc.*, 11 Cal.4th 1, 18 (Cal. 1995) (interpretation of insurance policy a question of law); *Parsons v. Bristol Dev. Co.*, 62 Cal.2d 861, 865 (Cal. 1965); Cal. Evid. Code § 310(a).[6]

There will be no need for, nor will it be appropriate to have, testimony from witnesses as to "intent" or "meaning" or their opinion as to the application of this particular policy language to plaintiffs' underlying claim. What any document says or

[6] As the forum state, California's choice-of-law rules apply. *Arno v. Club Med., Inc.*, 22 F.3d 1464, 1467 (9th Cir. 1994). California applies the law of the state where the contract was entered. Cal. Civ. Code § 1646. These parties have litigated over this St. Paul Policy before in Virginia and Virginia law was applied. See *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89 (4th Cir. 2003). That Court explained: "In this case, the insurance contract between AOL and St. Paul was formed in Virginia and therefore we apply Virginia substantive law." *Id.*, 347 F.3d at 92.

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any witness thinks is irrelevant. What is relevant is what the parties intended *at the time they entered into this specific contract*. *Pilot Life Ins. Co.*, 206 Va. at 561, 145 S.E.2d at 146; *Waller*, 11 Cal.4th at 18; *AIU Ins. Co. v. Sup. Ct. (FMC Corp.)*, 51 Cal.3d 807, 821-22 (Cal. 1990); Cal. Civ. Code §§ 1636, 1638, 1644. Here, plaintiffs' witnesses involved in the issuance of the St. Paul Policy have underscored that point with their testimony that they did not discuss or negotiate the personal injury coverage provisions of the policy. (*See* Thorpe Decl., ¶ 2-3; Dep. of Nancy Perkins, pp. 127-29; Dep. of George Bannell, pp. 40-41.)

Policy language is interpreted, first, according to is plain meaning. *Gov't Employees Ins. Co. v. Moore*, 266 Va. 155, 165, 580 S.E.2d 823, 828 (Va. 2003); *Salzi v. Virginia Farm Bureau Mutual Ins. Co.*, 263 Va. 52, 55, 556 S.E.2d 758, 760 (Va. 2002) ("as in the case of any other contact, the words [in an insurance policy] are given their ordinary and customary meaning when they are susceptible of such construction"); *Waller*, 11 Cal.4th at 18. The meaning of the words in the policy must be inferred, if possible, solely from the written provisions of the contract. *Wells Fargo Bank, N.A. v. Cal. Ins. Guarantee Ass'n*, 38 Cal.App.4th 936, 942 (Cal.App. 1995). Courts do not torture language in order to try to find an ambiguity where none exists. *Thomas v. Standard Fire Ins. Co.*, 414 F.Supp.2d 567, 571 (E.D. Va. 2006); *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005) (under Virginia law, courts must not strain to find ambiguities); *Reserve Ins. Co. v. Pisciotta*, 30 Cal.3d 800, 807 (Cal. 1982); Cal. Civ. Code § 1638. Therefore, the search for documents to prove ambiguity, where there is none on the face of the policy, is not warranted.

**B. <u>The "Making Known" Provision Requires Disclosure To A Third Party</u>**

Plaintiffs argue the "making known" provision in the definition of the "personal injury offense" does not require an allegation by claimants of disclosure of private information to a third party. (Motion to Compel, pp. 3-5.) Plaintiffs interpret the phrase "[m]aking known to any person or organization" to include the mere gathering of private

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information, without disclosure of that information. Plaintiffs contend their discovery requests are relevant to determine whether their interpretation is correct.

Plaintiffs' proffered interpretation of the "making known" provision of the policy is nonsensical and incorrect according to the language's plain meaning. Plaintiffs fail to cite any case law in support of their interpretation, which is significant because this exact provision has been interpreted by the Fourth Circuit Court of Appeals applying Virginia law. *Resource Bankshares Corp.*, 407 F.3d at 631. Plaintiffs in the lawsuit against Resource asserted violation of the Telephone Consumer Protection Act ("TCPA") arising out of the receipt of unsolicited faxes from Resource. Resource sought defense and indemnity for the TCPA claim. *Id.* at 633-34.

Construing the "making known" language in a St. Paul policy in the context of the alleged advertising injury offense,[7] the Fourth Circuit "[c]onsider[ed] closely the text and context of the operative sentence." *Id.* at 641. As for the text itself, the court remarked that: "[i]t surely seems to us that the plainest and most common reading of the phrase indicates that 'making known' implies, telling, sharing or otherwise divulging, such that the injured party is the one whose private material is *made known*, not the one *to whom* the material is made known." *Id.* (emphasis added). Therefore, the Fourth Circuit held "making known," in the context of its related provisions, assumes the victim of the offense "is harmed by the sharing of the content of the ad . . ." *Id.* (no duty to defend TCPA claims for this and other reasons).

Similarly, in *Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co.*, 432 F.Supp.2d 488 (E.D. Pa. 2006) (applying Pennsylvania law), Melrose's alleged violation of the TCPA, which consisted of mass unsolicited fax advertisements, was outside the advertising injury offense which required "[m]aking know to any person or organization covered material that violates a person's right to privacy." *Id.* at 503-504 The *Melrose* court said of St. Paul's policy that the "clear and unambiguous ['making known']

[7] The advertising injury and personal injury coverages in the St. Paul Policy both include offenses with the "making known" language.

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provision . . . requires that the content covered in the covered material must violate a person's right of privacy and must be made known to a third party." *Id.* According to the *Melrose* court:

> "Making known to any person or organization" implies a disclosure to a third party or divulging of a secret. This stands in contrast with the term "publication," which can include the simple act of issuing or proclaiming. "Making known to" denotes that [the insured] Melrose is only covered if the relevant material reveals an item of information that violates a third party's right to privacy. . . .
>
> Furthermore, by requiring that the covered material be made known to any person or organization but insisting that the covered material violate a person's right of privacy, the Policy makes clear that the "making known" can be to a person or a company, but the covered material must be violative of an individual's privacy rights. This further highlights that the Policy covers Melrose for the content of its ads and requires the privacy-invading information be made know to a third party.

*Id.*

The *Melrose* court expressly held that "[t]he phrase 'making known to' requires that at least three parties be involved – [the insured] Melrose, who must be the one disclosing; the recipient of the disclosure; and the person whose private material has been disclosed." *Id.*

Plaintiffs' stated basis for seeking documents pertaining to the "interpretation, explanation and/or meaning" of the "making known" offense in the St. Paul Policy, as well as production of additional "Side by Side" comparisons, is to see "how St. Paul's purported 'outside the insured organization' criterion does (or does not) apply to the coverage's operation." (Motion to Compel, pp. 6-7.) The cases above make clear the "making known" language in the St. Paul Policy requires disclosure to a third party and no contrary case authority has been cited by plaintiffs. There is nothing "novel" regarding St. Paul's application of the "making known" language. Plaintiffs do not (and cannot) dispute that the SmartDownload claim do not involve disclosure to a third party of the allegedly private information gathered by SmartDownload. Plaintiffs' requests are, therefore, not relevant to this coverage dispute.

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**C. Documents Created After Issuance Of The Policy Are Not Relevant**

St. Paul has already produced responsive documents created prior to issuance of the St. Paul Policy which reflect development of the language in the policy sold to plaintiffs. (*See* Part II(C), *supra*.) St. Paul also produced a witness to testify regarding the history, changes, and intent of the "making known" language in St. Paul's standard and Technology CGL forms. (*Id.*) Even though the language pertaining to disclosure to a third party *did not change in the 2001 form*, St. Paul witness Solberg was allowed to testify about creation of the 2001 form[8]. (Thorpe Decl., ¶ 7-8.)

Plaintiffs argue that St. Paul's reliance upon the "deliberately breaking the law" exclusion as a coverage defense also warrants discovery relating to the 2001 CGL form. But this exclusion was not modified in the 2001 form (as plaintiffs know since they have the 2001 form). Therefore, this issue cannot support an argument for additional discovery.

Furthermore, any change to provisions in the policy (including to "making known") is, in evidentiary parlance, a subsequent remedial measure, and inadmissible. Fed. R. Evid. 407; *McKee v. State Farm Fire & Cas. Co.*, 145 Cal.App.3d 772, 777-78 (Cal.App. 1983) (evidence of insurer's revision of policy language is inadmissible because it lacks relevance).

**D. Deposition And Trial Testimony**

The second category of discovery that plaintiffs' counsel still seeks consists of deposition and trial transcripts of testimony given by St. Paul personnel at any time concerning any claim involving the "making known" language in the "personal injury" or "advertising injury" portions of any policy issued by St. Paul (AOL RFP 22). Not only does the "refined" request contained in Ex. A seek irrelevant information on a extraordinarily burdensome level, but the scope of the request has actually expanded since the time the parties initially met and conferred.

[8] The only change in this personal injury offense was a change to the "written or spoken material" term.

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**1. Testimony Regarding Other Claims And Other Insureds Is Not Relevant**

Deposition and trial testimony with respect to other claims with different fact patterns, different insureds, and different policies is irrelevant. Plaintiffs are obviously hunting for testimony to demonstrate the "making known" language does not require disclosure of private information to a third party, although they cite no legal authority for the propriety of their request.

Discovery about other claims is irrelevant. Fed. R. Evid. 402. The 1983 amendment to Rule 26(b)(1), Fed. Rule Civ. Proc., emphasizes that discovery must be proportional and relevant to the lawsuit and must be tailored to the case at hand. The rule of proportionality is intended to "guard against redundant or disproportionate discovery . . ." *See* Fed. R. Civ. P. 26 advisory committee note of 1983. Even if plaintiffs could somehow demonstrate the relevancy of testimony from other claims and lawsuits, which they cannot, this request is out of proportion to any value responsive documents could provide.

There is no need to go beyond the facts at issue in this case and the interpretation given to the policy language by the claims personnel who handled this claim, the underwriting staff who drafted it, and the underwriters who worked on the St. Paul Policy at issue in this dispute.

**2. The Request For Transcripts Is Preposterously And Unduly Burdensome**

St. Paul objected to searching for and producing deposition and trial testimony because the request is unfathomable. First, plaintiffs refused to limit the time period applicable to the request. In order to comply, St. Paul would be required to produce testimony going back to the first use of the "making known" language (i.e., 1991).

Even if it were possible that there might be some relevant information out there, the request is burdensome in the extreme. *See Leksi, Inc. v. Federal Insurance Co.*, 129 F.R.D. 99, 105-106 (D.N.J. 1989) (discovery of files pertaining to other insureds is

not discoverable because, although it may be considered remotely relevant, its production would be unduly burdensome and disproportionate to the litigation); *North River Ins. Co. v. Greater New York Mutual Ins. Co.*, 872 F.Supp. 1411, 1412 (E.D. Pa. 1995) (discovery of claim information pertaining to other insureds "would properly be characterized as a fishing expedition, causing needless expense and burden to all concerned").

The underlying claim at issue in this coverage litigation was handled by the Technology Claim group at Travelers, which came into existence in the late 1990s. No depositions have been taken in any coverage action arising out of any claim handled by that group in which the "making known . . . right of privacy" "personal injury" and "advertising injury" offense has been at issue over at least the last six years, with only one exception. (Decl. of Judi Lamble ["Lamble Decl."], ¶ 4.) That exception is the deposition of James Zacharski in the suit styled *Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co.*, the real motivator for plaintiff's request for transcripts, which is discussed below. (*Id.* at ¶ 5.)

It would be impossible for St. Paul to comply with plaintiffs' overreaching request. It is not the custom and practice of Travelers to act as a depository for transcripts of deposition and trial testimony provided in coverage litigation with its insureds. (Lamble Decl., ¶ 8.) It is not, and has not been for at least the last six years, the practice of the Technology Claim group to maintain such transcripts. (*Id.* at ¶ 7.) Finding such transcripts, if they exist, would be nearly, if not completely, impossible, because the computer system used by Travelers' Claim Services organization, including those persons who handle claims against St. Paul policies, has no mechanism by which to retrieve claims based on what advertising injury or personal injury offense may be at issue in a claim. (*Id.* at ¶ 8.)

Extrapolating from data for the period 2001-2005, there have been over 605,000 claims tendered against St. Paul CGL ("CGL") policies since the "making known . . . right of privacy" offense was incorporated in the company's CGL form. (*Id.* at ¶ 9.) The

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most refined search available for those claims would generate a list of claims against CGL policies coded as "bodily injury, other line of authority" or "property damage." There is no separate coding for claims involving "personal injury" or "advertising injury," much less the specific "making known . . . right of privacy" offense. (*Id.*)

Further, there is no mechanism by which to identify coverage actions that involve any particular advertising injury or personal injury offense. (*Id.* at ¶ 9.) Just the identification of coverage suits in CGL claims would require manual review of payments issued in all those claims identified by the computer system as "in suit" to determine in which ones the "suit" was a coverage action, as opposed to the underlying claim. (*Id.* at ¶ 10.) To attempt to locate the transcripts requested by plaintiffs, if any exist, one would have to identify manually all the CGL claims "in suit" involving coverage litigation over the last fifteen years, then retrieve from storage the files for those hundreds of thousands of claims. (*Id.* at ¶ 11.) Many of those files no longer exist, however, as the document retention requirements for claim and litigation files imposed by different states vary from 2 to 10 or more years. (*Id.*)

For those files that existed, once retrieved, they would have to be manually searched for transcripts generated in coverage litigation. (*Id.* at ¶ 12.) To the extent transcripts existed, company personnel would have to read each transcript from each file to determine if they concerned the "making known . . . right of privacy" offense. (*Id.*) If so, personnel would then have to review the transcripts for confidential and/or privileged information, information deemed confidential and/or privileged either from the perspective of the insured, such as financial, corporate, personal, or other data, and from the perspective of St. Paul, such as testimony relating to settlement discussions and proprietary information. (*Id.*)

In addition, prior to production of the deposition and trial testimony, company personnel would need to determine if a protective order was entered in the coverage litigation in which the testimony arose and whether production of the testimony violates the terms of the protective order. (*Id.* at ¶ 13.)

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The resources necessary to try to comply with this request—complete compliance would be impossible—would be severe and far out-weigh any possible benefit plaintiffs could obtain from having the requested transcripts.

**3. The Melrose Hotel Deposition Testimony**

What plaintiffs really want is production of a specific deposition transcript from another lawsuit, *Melrose Hotel*, 432 F.Supp.2d at 488. In *Melrose Hotel*, Mr. Zacharski testified as claim handler and person most knowledgeable for the company, pursuant to Federal Rule of Civil Procedure 30(b)(6), on issues of interpretation of the "making known . . . right of privacy" offense in a coverage case arising out of the sending of unsolicited fax advertisements. (Lamble Decl., ¶ 5.) Plaintiffs' do not need the Zacharski deposition, however, because in this action, St. Paul has already produced for deposition Solberg as a person most knowledgeable about the "making known . . . right of privacy" offense. (Thorpe Decl., ¶ 7; Lamble Decl., ¶ 6.) Mr. Solberg was involved first-hand in drafting the policy language at issue. (Lamble Decl., ¶ 6.) And St. Paul has produced for deposition the individuals who principally handled the underlying claim in this dispute, Weiss and Evensen. (Thorpe Decl., ¶ 9-10; Lamble Decl., ¶ 6.)

In addition, this transcript is not responsive to plaintiffs' original discovery request, which was limited to testimony involving "personal injury," not personal injury and advertising injury coverage. Moreover, plaintiffs cite no legal authority to support their request for this deposition transcript. To the contrary, similar discovery demands have been soundly rejected by courts. *Leksi, Inc.*, 129 F.R.D. at 105-6; *North River Ins. Co.*, 872 F.Supp. at 1412.

The Zacharski transcript involves a different insured, different claim facts, and different policy provisions (albeit one of the provisions at issue in *Melrose* was the "making known" part of the advertising injury offense). (Thorpe Decl., ¶ 11.) Indeed, as plaintiffs acknowledge in their motion, the deposition transcript includes testimony without any bearing on this lawsuit and testimony about confidential settlement

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discussions. (*Id.*) Accordingly, St. Paul should no be compelled to produce the transcript.

## IV. CONCLUSION

Discovery under the federal rules should be narrowly circumscribed. Plaintiffs have been given reasonable latitude to inquire into the claims decisions and history and intent of the policy provisions at issue in this dispute. St. Paul has cooperated in producing more that it believes is required under federal discovery rules, but plaintiffs' remaining requests are far-afield of the issues in this case and unreasonably far-reaching. For all of the foregoing reasons, St. Paul respectfully requests this court deny plaintiffs' request for the additional documents and transcripts.

Dated: October 6, 2006

GORDON & REES LLP

By _____
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Jason K. Nelson
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ST. PAUL MERCURY INSURANCE COMPANY

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# EXHIBIT A

# EXHIBIT A

## SUPPLEMENTAL RESPONSE TO REQUESTS FOR PRODUCTION

**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: *"making known to any person or organization written or spoken material that violates a person's right of privacy."*

**SUPPLEMENTAL RESPONSE TO REQUEST NO. 15:**

ST. PAUL objects to this request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the attorney work-product doctrine, or any other judicially-recognized protection or privilege. ST. PAUL objects to this request as vague and ambiguous as to the terms "interpret" and "meaning." This Request is also overbroad as to time and unduly burdensome and seeks documents not relevant to the scope of this litigation or reasonably calculated to lead to discovery of admissible evidence. The parties did not discuss or negotiate the language in the general liability form, including this particular personal injury offense and the language is clear and unambiguous. Any documents created after issuance of the subject policy are not relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving these objections, ST. PAUL has provided documents that pertain to history and intent regarding this particular personal injury offense in the commercial general liability form. ST. PAUL has produced "Side by Side" documents that explain changes in the form in 1991 and 1996. St. Paul has not located any earlier "Side by Side" documents pertaining to the commercial general liability form. St. Paul has produced all "Side by Side" documents it has located pertaining to the technology commercial general liability form.



Exhibit A

**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."*

**SUPPLEMENTAL RESPONSE TO REQUEST NO. 22:**

ST. PAUL objects to this request on the grounds that it seeks information which is neither relevant to the subject matter of this litigation nor reasonably calculated to lead to the discovery of admissible evidence. ST. PAUL objects to this request to the extent it seeks documents or information protected from discovery by the attorney-client privilege, the attorney work-product doctrine, or any other judicially-recognized protection or privilege. Further, the deposition testimony sought by AOL pertains to activities and affairs of other ST. PAUL insureds and disclosure of this information violates the privacy interests of these insureds. ST. PAUL also objects to this Request as overbroad and unduly burdensome, as ST. PAUL does not collect the requested documents and the request is not limited to a specific time period. ST. PAUL further objects to the production of the specific transcript AOL has identified pertaining to James Zacharski's testimony in the Melrose Hotel litigation for all the above reasons and because this transcript contains confidential testimony regarding settlement discussions and it is subject to a protective order in that litigation and production of this transcript by ST. PAUL would violate the terms of that protective order.

**RESPONSE TO REQUESTS FOR PRODUCTION**

**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.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

ST. PAUL objects to producing these documents as they are not relevant to this dispute and not reasonably calculated to lead to the discovery of admissible evidence. ST. PAUL further objects to this Request as overbroad, including as to time, and unduly burdensome. The parties did not discuss or negotiate the language in the general liability form, including this particular personal injury offense and the language is clear and unambiguous. Any documents created after issuance of the subject policy are not relevant to this litigation or reasonably calculated to lead to discovery of admissible evidence.

Subject to and without waiving these objections, ST. PAUL has produced "Side by Side" documents that explain what changes in the commercial general liability form in 1991 and 1996. St. Paul has not located any earlier "Side by Side" documents pertaining to the commercial general liability form. St. Paul has produced all "Side by Side" documents it has located pertaining to the technology commercial general liability form.

**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.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

ST. PAUL objects to producing these documents as they are not relevant to this dispute and not reasonably calculated to lead to the discovery of admissible evidence. ST. PAUL further objects to this Request as overbroad, including as to time, and unduly burdensome. The parties did not discuss or negotiate the language in the general liability form, including this particular personal injury offense and the language is clear and unambiguous. Any documents created after issuance of the subject policy are not relevant to this litigation or reasonably calculated to lead to discovery of admissible evidence.

Subject to and without waiving these objections, ST. PAUL has produced "Side by Side" documents that explain changes in the commercial general liability form in 1991 and 1996. St. Paul has not located any earlier "Side by Side" documents pertaining to the commercial general liability form. St. Paul has produced all "Side by Side" documents it has located pertaining to the technology commercial general liability form.

**NETSCAPE REQUEST FOR PRODUCTION NO. 8:**

All "Side By Side" comparisons relating to the "Deliberately breaking the law" exclusion in YOUR general liability and/or technology general liability policy.

**RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

ST. PAUL objects to producing documents that are irrelevant to this dispute and not reasonably calculated to lead to the discovery of admissible evidence. ST. PAUL further objects to this Request as overbroad, including as to time, and unduly burdensome. The parties did not discuss or negotiate the language in the general liability form, including this particular personal injury offense and the language is clear and unambiguous. Any documents created after issuance of the subject policy are not relevant to this litigation or reasonably calculated to lead to discovery of admissible evidence.

Subject to and without waiving these objections, ST. PAUL has produced "Side by Side" documents that explain changes in the commercial general liability form in 1991 and 1996. St. Paul has not located any earlier "Side by Side" documents pertaining to the commercial general liability form. St. Paul has produced all "Side by Side" documents it has located pertaining to the technology commercial general liability form.

## RESPONSE TO TOPICS FOR EXAMINATION

**PLAINTIFFS' TOPIC FOR EXAMINATION 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.

**RESPONSE TO TOPIC FOR EXAMINATION NO. 4:**

ST. PAUL objects to this topic as being overbroad and unduly burdensome, including as to time. ST. PAUL objects to the topic to the extent it includes subject matter that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter. The parties did not negotiate the policy form language and, therefore, its creation is not at issue in the lawsuit. The policy form language is clear and unambiguous. Any changes made subsequent to the issuance of the subject policy are not relevant to this dispute or reasonably calculated to lead to discovery of admissible evidence.

Subject to and without waiving these objections, ST. PAUL will produce Eric Solberg to testify regarding any changes to the "making known" language in the technology commercial general liability form made in 1991 and 1996.

**PLAINTIFFS' TOPIC FOR EXAMINATION NO. 5:**

All changes to the "*making known*" language of the "Personal Injury liability" coverage in St. PAUL'S commercial liability policy since 1985.

**RESPONSE TO TOPIC FOR EXAMINATION NO. 5:**

ST. PAUL objects to this topic as being overbroad and unduly burdensome, including as to time. ST. PAUL objects to the topic to the extent it includes subject matter that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence in this matter. The parties did not negotiate the policy form language and, therefore, its history is not at issue in the lawsuit. The policy form language is clear and unambiguous. Any changes made subsequent to the issuance of the subject policy are not relevant to this dispute or reasonably calculated to lead to discovery of admissible evidence. Further, the policy at issue is a technology commercial general liability policy.

Subject to and without waiving these objections, ST. PAUL has agreed to produce Eric Solberg testify regarding any changes to the "making known" language made in 1991 and 1996.