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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 AMERICA ONLINE, INC., a Delaware corporation,

Plaintiffs,

vs.

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

Defendants.

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

NOTICE OF MOTION AND MOTION BY DEFENDANT ST. PAUL MERCURY INSURANCE CO. FOR PARTIAL SUMMARY JUDGMENT RE DUTY TO DEFEND; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SAME

Date: March 26, 2007
Time: 9:00 a.m.
Judge: Honorable James Ware
Courtroom: 8, 4th Floor, San Jose

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 26, 2007, at 9:00 a.m., before the Honorable James Ware in Courtroom 8 of the United States District Court, Northern District of California, San Jose Division, defendant St. Paul Mercury Ins. Co. ("St. Paul") will and does move the Court for partial summary judgment against plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc. ("AOL") (collectively, "AOL") pursuant to Federal Rule of Civil Procedure 56(b).

The issue presented is whether St. Paul had a duty to defend AOL with respect to four federal class action lawsuits and a New York State Attorney General's investigation arising out of allegations that AOL unlawfully intercepted private data, including data that reflected Internet use habits. St. Paul alleges its policy of insurance provides no coverage for the claims against, and investigation of, AOL and thus it is entitled to summary judgment in its favor on the duty to defend, as a matter of law.

This motion is based on this Notice of Motion and Memorandum of Points and Authorities, the Declaration of Sara M. Thorpe ("Thorpe Decl."), the Marsh Custodian of Records affidavit, the parties' Stipulation and Agreement for Purposes of Summary Judgment Motion ("Stip-MSJ"), the parties' Stipulation Re Exhibits ("Stip-Exs"), deposition testimony[1], exhibits[2], the pleadings and papers on file in this litigation, and any additional evidence that may be presented to the Court, including in connection with oral argument at hearing on this motion.

ST. PAUL'S MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES TO BE DECIDED

The issues addressed by St. Paul's motion are:

1. Does Virginia substantive law apply to the insurance coverage issues presented?

2. Did St. Paul have a duty to defend AOL? In particular:

[1] Deposition excerpts are contained in Exhibits A through F (*see* Thorpe Decl. ¶ 3) and are referenced here by deponent, page and line, e.g., Ex. A (Spencer 135:15-145:25). The first reference to the deponent includes background information as to his or her employer and role.

[2] Exhibits were marked at depositions and in connection with this motion and referenced here as "Ex. __" (with, as appropriate, specific bates number page reference). The parties have stipulated to provide all exhibits to the Court by March 9, 2007 (prior to the hearing of the motion), and the Court has so Ordered.

a. Do the class action suits and Attorney General investigation allege a personal injury offense, namely that AOL was "making known to any person or organization written or spoken material that violates a person's right of privacy"?

b. Are the class action suits excluded from coverage because they allege injury resulting from violations of criminal law?

c. Are the class action suits and Attorney General investigation excluded from coverage because they involve online activities?

d. Is the Attorney General investigation a claim or suit which seeks damages?

II. INTRODUCTION

AOL was sued in four virtually identical class action complaints for "eavesdropping" on the online activities of the class plaintiffs, allegedly collecting private information concerning their Internet use. Each suit contained as its sole claim for relief the alleged violation of two criminal statutes, the federal Electronic Communications Privacy Act ("ECPA") and the federal Computer Fraud and Abuse Act ("CFAA"). Although the ECPA and CFAA prohibit both collecting private information and transmitting such information to a third party, the class action complaints allege *only* the wrongful collection of private information. None of the class action complaints alleged that AOL made private information known to any person or organization. In fact, the documents that confirmed the settlement of these suits specifically acknowledge that the class had made no claim for dissemination of private information to a third party because there was no evidence that such a dissemination had occurred.

AOL tendered these four class action suits to St. Paul for a defense. AOL eventually resolved the suits without payment of damages, so only defense costs are at issue here. AOL bases its claim for defense costs on a part of the policy's personal injury liability coverage – language that the Fourth Circuit Court of Appeals described as "written in admirably plain English"[3] – that applies only where there has been a communication by the insured *to a third party* of material that

[3] *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* ("*Resource*"), 407 F.3d 631, 634 (4th Cir. 2005) (applying Virginia law).

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violates the claimant's right of privacy. Thus, while AOL may have allegedly violated the class plaintiffs' right of privacy by collecting for itself information regarding their Internet use habits, the St. Paul policy does not protect against that offense. And because the offense it did protect against – the "making known to any person or organization written or spoken material that violates a person's right of privacy" – unquestionably was never alleged and never occurred, St. Paul properly denied AOL's tender.

The coverage that St. Paul did provide to AOL was part of a package of policies, issued by a number of different insurers, designed to cover AOL's varying business risks, without unnecessary duplication of coverage – or premium. The part of this insurance package that AOL agreed St. Paul was to provide was traditional "bricks and mortar" general liability insurance, with no personal or advertising injury coverage for AOL's online activities. AOL insured its online risks through multimedia and professional liability policies issued by other carriers. Accordingly, the St. Paul policy was endorsed to exclude all online activities from its coverage for personal and advertising injury. That endorsement contained a definition of "Online Activities" drafted by AOL, which included "providing e-mail services, instant messaging services, 3rd party advertising, supplying 3rd party content and providing internet access to 3rd parties." Because the St. Paul coverage under which AOL tendered its defense excluded AOL's "Online Activities," that coverage would not have applied to the class action suits, even if those suits had alleged a making known to any person or organization written or spoken material that violated a person's right of privacy. St. Paul thus also properly denied a defense on the basis of the policy's "Online Activities" exclusion.

In addition, the federal statutes upon which the class action suits were based are criminal statutes. Both require as an element of the offense that the defendant's conduct be intentional, and each of the class action suits alleged that AOL's violation of those statutes was "conscious, intentional, wanton and malicious." The St. Paul policy excludes from coverage personal 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. As a result, there is also no duty to defend AOL on the basis of this criminal activity exclusion.

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Finally, the same conduct that gave rise to the class action suits was also the subject of an investigation by the New York State Attorney General. AOL tendered its "defense" of that investigation to St. Paul; but the St. Paul policy only covers amounts the protected person is legally obligated to pay as covered damages, and only defends against demands or civil proceedings that seek covered damages. Since the Attorney General's investigation did not seek covered damages – it sought only information and was resolved with AOL's agreement that it undertake, and refrain from undertaking, certain actions – there was no duty on the part of St. Paul to defend AOL against that investigation.

AOL disagreed with St. Paul's denial and commenced this suit. But an insurer has no duty to defend unless there is alleged against the insured a claim that could potentially result in liability within the policy's coverage. Here, the underlying actions allege claims that are beyond St. Paul's coverage as a matter of law. St. Paul brings this motion for partial summary judgment to confirm that it has no duty to defend, as a matter of law.

III. STATEMENT OF UNDISPUTED FACTS

A. The Class Action Suits And The Attorney General Investigation For Which A Defense Is Sought

AOL contends that St. Paul was obligated by the terms of its insurance contract to defend AOL against four class action lawsuits, three commenced in New York and one commenced in the District of Columbia (the "class action suits").[4] AOL also contends that St. Paul was obligated to defend it against an investigation commenced by the New York State Attorney General of the same activities giving rise to the class action suits.[5]

The class action suits, all virtually identical in their wording, allege that AOL "intercepted electronic communications of users of the internet" through the SmartDownload program, in

[4] The four class action suits are: *Specht v. Netscape Communications Corp. and American Online, Inc.*, No. 00 CIV 4871 (S.D.N.Y.), filed June 30, 2000, First Amended Complaint filed August 3, 2000 (Exs. 51, 129); *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 01723 (D.D.C.), filed on or about July 21, 2000 (Ex. 129); *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 6219 (S.D.N.Y.), filed August 18, 2000 (Ex. 130); and *Gruber v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 6249 (S.D.N.Y.), filed August 21, 2000 (Ex. 130). *See* Ex. F (Weiss 58:6-60:25; 66:22-67:21).

[5] Exs. 190, 191; Ex. F (Weiss 196:10-197:21, 199:23-201:12).

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violation of the federal Electronic Communications Privacy Act ("ECPA") and the federal Computer Fraud and Abuse Act (the "CFAA"), both criminal statutes.[6] According to the class plaintiffs, AOL, through its use of the SmartDownload program, was allegedly "spying on their internet activities" and conducting "continuing surveillance" of electronic communications in order to create a "profile" about Internet users based upon web sites visited and files downloaded.[7] SmartDownload is software that consumers obtain directly through the Internet free of charge from AOL. It is described as a "download manager" designed to assist users with downloading electronic files from the Internet, allowing users to pause and resume downloads and to recover a download after experiencing a lost Internet connection.[8]

None of the class action complaints, however, alleged that AOL disseminated to any third party or parties any of the private information the class plaintiffs claim AOL improperly obtained online through SmartDownload.[9] Nor did such an allegation ever develop. Although St. Paul requested more information,[10] AOL's counsel never reported that there were any such allegations.[11] In fact, AOL affirmatively stated in its own pleadings in the class action suits that there was no allegation of dissemination of private information to third parties.[12] And the parties to the settlement agreement drafted by AOL and the class plaintiffs in July 2004 conceded that despite discovery into the "purpose" and "use" of the information collected by SmartDownload, there was *no evidence* that AOL had ever used the private information for "any purpose whatsoever" or "shared such with any third party."[13]

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[6] *See, e.g.*, Ex. 129; 18 U.S.C. §§ 2511 and 2520 (the ECPA) and 18 U.S.C. § 1030 (the CFAA).
[7] *See, e.g.*, Ex. 129 (at SPM 0026-27, 0006).
[8] *See, e.g.*, Ex. 129 (at SPM 0031, 0011-12); Ex. F (Weiss 118:5-119:4; 154:25-155:20); Ex. 137 (at SPM 900) [*Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002)]; from Ex. 128 [claim file] (at SPM 0939-949) [*Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 587-88 (S.D.N.Y. 2001)]; Ex. 9; Ex. 216 (at NET/SDL 002125) [AOL's Memorandum in Support of Motion to Compel Arbitration in *Specht* case, filed in September 2000].
[9] *See, e.g.*, Exs. 129, 130.
[10] Exs. 131, 136; Ex. F (Weiss 67:22-68:14).
[11] Ex. 132; Ex. F (Weiss 149:11-19).
[12] *See* Ex. 217 (at NETSDL 0004012) [AOL's Motion to Dismiss, filed in January 2003]. In its Motion to Dismiss, AOL wrote: "Plaintiffs do not allege that any human being at Netscape ever saw any of this information, do not identify any respect in which Netscape ever used any of this information for any purpose whatsoever, and do not claim that Netscape ever shared any of this information with any other person or entity." *Id.* at 4012.
[13] *See* Ex. 143 (at SPM 0851-852); *see also* Ex. 218 (at NET/SDL 0005463-5464).

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The investigation by the New York State Attorney General (hereinafter "AG"), tendered two years later to St. Paul, began with a three-page letter, dated September 8, 2000, advising AOL that the AG was examining consumer protection issues arising from the SmartDownload system.[14] The letter asks AOL to "provide information," lists the information and documents requested, and sets deadlines for the provision of that information.[15] There is no demand for compensation for injury or damage to anyone.

Thereafter, on April 3, 2002, the AG sent a *subpoena duces tecum* and *ad testificandum* to AOL requesting production of documents and records and production of an individual to testify.[16] The subpoena states that the information and testimony is "to determine whether an action or proceeding should be instituted against" AOL.[17] St. Paul, in its denial, requested additional information that related to coverage for the claim, but AOL submitted nothing further.[18]

The AG's Investigation was resolved in June 2003 with AOL's agreement that it undertake and refrain from certain activities.[19] In the "Assurance of Discontinuance," AOL represented that any information collected was not linked to any particular individual and was "never used or disclosed" in any way.[20]

B. AOL's Insurance Program

AOL is the self-described "world's leader in interactive services, web brands, Internet technologies, and e-commerce services.[21] Thus, in the late 1990s, while it still needed traditional "bricks and mortar" insurance coverage, AOL also understood that because of its online activities it faced risks unique from those presented to non-online businesses.[22] It would, therefore, have to be creative in designing an insurance program to account for its Internet-related business risks.[23]

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[14] Ex. 190.
[15] Ex. 190. In response, AOL advised the New York Attorney General that Netscape never used or accessed any of the data that any version of SmartDownload software ever transmitted from a user's computer to Netscape. Ex. 219 (at NET/SDL 00010057).
[16] Ex. 191.
[17] Ex. 191.
[18] Ex. 192; Ex. F (Weiss 202:6-22).
[19] *See* Ex. 220 [AG Assurance of Discontinuance, dated June 2003].
[20] Ex. 220 (at NET/SDL 00010588).
[21] *See, e.g.*, Ex. 129 (at SPM D008).
[22] Ex. A (Spencer 10:21-13:7, 22:10-23:22).
[23] Ex. A (Spencer 18:25-20:20, 22:10-23:18); Ex. C (Bannell 75:18-76:20).

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As a result, in anticipation of the 1999 renewal of its annual insurance program, AOL's broker (Marsh) assembled an "AOL team" to design an insurance program to cover the various risks AOL faced.[24]

St. Paul's proposal to Marsh's AOL team gave AOL two options for coverage and three choices of premium. St. Paul would either sell general liability coverage for AOL's online business risks, with premium options of $650,000 and a $100,000 deductible; or $375,000 with a $500,000 deductible.[25] Or St. Paul would provide general liability insurance with *no* coverage for online business risks resulting in personal or advertising injury, for a premium of just over $100,000.[26]

AOL picked St. Paul's most limited and least expensive option – general liability coverage without online protection.[27] AOL chose to insure its online risks through multimedia and professional liability policies issued by other carriers.[28] As a result, commencing on April 1, 1999, AOL's liability insurance program included a multimedia policy through Executive Risk Assurance Company ("Executive Risk"), for premium of $240,188; a Lloyds professional liability policy, with a three-year premium of over $2.2 million; and a St. Paul general liability and auto policy, with an annual premium of $106,693.[29] This insurance program was designed to protect AOL from the varying risks it faced, without duplication of coverage *or premium.*

In negotiating the general liability coverage that St. Paul would provide, AOL and St. Paul thus mutually agreed that the St. Paul policy *would not* cover personal injury arising out of online activities.[30] Instead, AOL intended its other policies to cover that type of risk.[31] Consistent with the design of its insurance program, AOL tendered its defense of the class action suits and the AG

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[24] Exs. 55, 159 (at Marsh 0523), 161 (at SPM 2646); Ex. A (Spencer 23:23-24:25, 109:4-13); Ex. B (Perkins 4:8-10, 7:7-10:14, 24:10-25:13, 28:18-25); Ex. D (Evans 9:3-10:8, 31:15-21, 14:4-16:3, 16:17-17:7).

[25] Ex. 79 (at SPM 2305); Ex. E (Midwinter 4:14-5:4, 86:5-10, 87:4-6, 101:17-102:9, 161:24-162:19, 164:5-11). In contrast, the premium for the expiring general liability policy, which did not exclude online activities, was $700,000. *See,* Ex. 159 (at Marsh 0543); Ex. 160 (at AOL 048 0004); Ex. 18.

[26] Ex. 79 (at SPM 2305).

[27] Ex. 18; Ex. B (Perkins 141:18-145:14); Ex. 159 (at Marsh 0548); Ex. 22.

[28] Ex. 18; Ex. 159 (at Marsh 0548); Ex. 22.

[29] Ex. 22; Ex. 159; Ex. 4 (at Marsh 211); Ex. 3 (at NETSDL 0011347l); Ex. 1 (at SPM 0114).

[30] Discussed in section V.C., *infra.*

[31] Exs. 4, 22; Ex. B (Perkins 264:9-265:16, 267:18-268:10, 51:2-23, 157:18-158:6).

Investigation to Executive Risk and to Lloyds. It received a payment from Executive Risk in resolution of that tender.[32] The Lloyds coverage was subject to a $2.5 million retention.[33] AOL also tendered its defense against the class action suits under the insurance policy that replaced the Executive Risk multimedia policy and Lloyds professional liability policy. That policy was issued by American International Specialty Lines Insurance Company ("AISLIC") for the period June 1, 2000 to June 1, 2001, at a premium cost of $1.7 million.[34] AISLIC agreed there was potentially coverage for the class action suits under its policy, but reserved rights because the policy had a $5 million self-insured retention, which AOL had to first pay before the AISLIC policy could be called upon to respond.[35]

C. The St. Paul Policy

1. The St. Paul Policy Was Negotiated And Issued To AOL At Its Principal Place Of Business In Virginia.

The policy St. Paul issued to AOL and its subsidiaries bore policy number TE 09000917.[36] Ex. 1. It was initially in effect for the period April 1, 1999 to April 1, 2000.[37] It was then extended to June 1, 2000, and renewed through June 1, 2001.[38] (Referred to here as the "St. Paul Policy" or "Policy").

The St. Paul Policy was issued to AOL (a Delaware corporation) at its principal place of business in Dulles, Virginia.[39] Negotiations between AOL and St. Paul were managed and conducted predominantly by persons located in Virginia, Washington, D.C., and New York.[40]

AOL has subsidiaries and operations around the world. Among the many subsidiaries insured by the St. Paul Policy was Netscape, which AOL acquired in 1999.[41] At that time Netscape was automatically added to the St. Paul Policy as an acquired company and later was

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[32] Stip-MSJ, ¶¶ 1-6; Ex. 168.
[33] Ex. 3.
[34] Stip-MSJ, ¶ 10-11; Ex. 169.
[35] Stip-MSJ at ¶ 12; Ex. 170.
[36] Ex. 1; Midwinter Decl. ¶ 2.
[37] Ex. 1 (at SPM 0109).
[38] Ex. 1 (at SPM 0547, 0344). The St. Paul policy was renewed in 2000 for a similar premium charge ($107,000). Ex. 1 (at SPM 0344).
[39] Ex. 1 (at SPM 114). *See,* AOL's First Amended Complaint ("Complaint"), ¶ 6.
[40] *See* Exs. 12, 79, 22; Ex. A (Spencer 14:2-4, 18:6-24); Ex. C (Bannell 25:14-22); Ex. B (Perkins 27:3-16).
[41] Complaint, ¶6.

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named as an insured.[42] Netscape was just one of many subsidiaries insured by the St. Paul Policy.[43] AOL's insurance program for Netscape was handled by Marsh's AOL team in Washington., D.C.[44] And Netscape's claims, like claims from all of AOL's subsidiaries, were (pursuant to agreement between AOL and St. Paul) forwarded to AOL in Virginia and administered through Marsh's claims consultant in Washington, D.C.[45]

2. The St. Paul Policy's Duty To Defend

The St. Paul Policy contains the following defense provision:

> **Right and duty to defend a protected person.** We'll have the right and duty to defend any protected person *against a claim or suit for injury or damage covered by this agreement*. We'll have such right and duty even if all of the allegations of that claim or suit are groundless, false, or fraudulent. But we won't have a duty to perform any other act or service.[46] (Emphasis added.)

According to the Policy's definitions, "[c]laim means a demand which seeks damages," and "[s]uit means a civil proceeding which seeks damages. . . ."[47] Thus, for St. Paul to have a duty to defend, there must be a demand or civil proceeding which seeks damages covered by the Policy.

In addition, at least one of the Policy's coverages must be potentially implicated for there to be a duty to defend. The coverage contained within the St. Paul Policy under which AOL tendered these matters is the coverage for "personal injury liability," which provides:

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

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[42] Ex. 1 (SPM 0148); Exs. 85, 86; Ex. E (Midwinter 206:15-208:24).
[43] *See, e.g.*, Ex. 1 (at SPM 0547-548).
[44] Ex. B (Perkins 87:22-88:6, 93:22-94:25).
[45] Ex. 161 (at SPM 2654-2657); Ex. B (Perkins 151:12-152:20, 165:14-166:19); Ex. A (Spencer 140:18-143:10); Ex. C (Bannell 52:3-25).
[46] Ex. 1 (at SPM 0142).
[47] Ex. 1 (at SPM 0143).

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- False arrest, detention, or imprisonment.
- Malicious prosecution.
- Wrongful entry into, or wrongful eviction from, a room, dwelling, or premises that a person occupies.
- Invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies.
- Libel or slander.
- Making known to any person or organization written or spoken material that disparages the products, work, or completed work of others.
- Making known to any person or organization written or spoken material that violates a person's right of privacy.[48]

Although the St. Paul Policy was mistakenly issued with an endorsement excluding all "advertising injury" and "personal injury" coverage, the parties agreed that it was only AOL's and its subsidiaries' *online* activities that were to be completely excluded from that coverage.[49] Otherwise, coverage for personal and advertising injury was to remain, provided the terms of that coverage were met. Thus, on August 2, 2000, but effective retroactively to the date the Policy was issued, the St. Paul Policy was modified by deleting the erroneously added endorsement that excluded all personal injury and advertising injury coverage.[50] It was replaced with an endorsement – the "Personal Injury and Advertising Injury for Non-Online Activities Endorsement" – that, as its name suggests, eliminated all personal and advertising injury coverage for AOL's online activities:

> For the purposes of advertising injury and personal injury, all online activities are excluded from these coverages.
>
> Other Terms: All other terms and conditions of the policy remain the same.[51]

The St. Paul Policy was further amended on October 5, 2000 after AOL drafted a definition of "online activities" and submitted it to St. Paul. That definition was incorporated as follows into the Endorsement that excludes online activities from the coverage for advertising injury and personal injury:

> For the purposes of advertising injury and personal injury, all Online Activities are excluded from these coverages.
>
> "Online Activities" is defined as providing e-mail services, instant messaging

[48] Ex. 1 (SPM 0141). There is a similar "making known" requirement in the Policy's definition of advertising injury offense. *See* Ex. 1 (at SPM 0142).
[49] Exs. 21, 23, 24; Ex. B (Perkins 154:12-155:20, 159:8-160:13).
[50] Ex. 1 (at SPM 0333).
[51] Ex. 1 (at SPM 0337).

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> services, 3rd party advertising, supplying 3rd party content and providing internet access to 3rd parties. However, it is understood that America Online's own advertising is not considered "Online Activity" regardless of the medium or format in which it is presented.
>
> Other Terms: All other terms and conditions of the policy remain the same.[52]

Finally, the St. Paul Policy contains the following exclusion precluding coverage for deliberately breaking the law:

> 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.[53]

IV. GOVERNING LEGAL STANDARDS

A. Law Regarding Summary Judgment

Summary judgment is appropriate if the pleadings, discovery and affidavits "show there is no genuine issue as to any material fact." Fed. R. Civ. Proc. 56(c); *see also 20th Century Ins. Co. v. Liberty Mut. Ins. Co.*, 965 F.2d 747, 749-50 (9th Cir. 1992); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). An insurer's duty to defend is often susceptible to resolution at the summary judgment stage because the scope of coverage under a policy of insurance is a matter for judicial interpretation. *See Allstate Ins. Co. v. Tankovich*, 776 F.Supp. 1394, 1396 (N.D. Cal. 1991); *Pilot Life Ins. Co. v. Crosswhite*, 145 S.E.2d 143, 146 (Va. 1965) ("*Pilot*"); *Seabulk Offshore, Ltd. v. American Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004) (applying Va. law) ("*Seabulk*"); *Waller v. Truck Ins. Exch. Inc.*, 44 Cal.Rptr.2d 370, 378 (Cal. 1995) ("*Waller*").

B. Virginia Law Applies To This Dispute To The Extent There Is Any Conflict In The States' Laws

As the forum state, California's choice-of-law rules apply to this suit. *Klaxon Co. v. Stentor Elec. Manufacturing Co.*, 313 U.S. 487, 496 (1941); *Ledesma v. Jack Stewart Produce,*

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[52] Ex. 1 (at SPM 0339-0341). The manner in which this change was made was such that for a two month period, April 1, 2000 to June 1, 2000, the policy contains an online activity exclusion without the definition. See, Ex. 1 (at SPM 0641). For the purposes of this Motion for Summary Judgment, and viewing the facts in the light most favorable to the non-moving party, it will be presumed that this definition was intended by AOL, as its drafter, to apply to the entire period the St. Paul policy was in effect.

[53] Ex. 1 (at SPM 0154).

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Inc. 816 F.2d 482, 484 (9th Cir. 1987). An insurance policy is a contract and therefore subject to California choice-of-law provisions codified in California Civil Code section 1646. *See Gitano Group, Inc. v. Kemper Group*, 31 Cal.Rptr.2d 271, 275 n.4 (Cal.App. 1994). Section 1646 provides that "[a] contract is to be interpreted according to the law and usage of the place where it is being performed; or, if it does not indicate a place, according to the law and usage of the place where it is made."

There is no one place where the St. Paul Policy was to be performed; it was intended to cover general liability risks of AOL and its many subsidiaries "anywhere in the world."[54] Since the contract does not indicate a single place of performance, it must be interpreted according to the law of the place where it was made – Virginia. AOL was and is located in Virginia. The AOL persons responsible for negotiating and correcting the Policy were located in Virginia, Washington, D.C., and New York. The claims handling agreement provides that claims under the Policy, no matter from which insured entity or where located, were to be handled through AOL in Virginia, and its broker in Washington, D.C.

Indeed, when AOL had an earlier dispute with St. Paul over this very Policy, AOL chose to litigate in a Virginia court, which applied Virginia law. *See America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 92-93 (4th Cir. 2003) ("*America Online*"). As that court explained: "The insurance contract between AOL and St. Paul was formed in Virginia and therefore we apply Virginia substantive law." *Id.* Therefore, under the choice-of-law provisions of California Civil Code section 1646, Virginia substantive law governs interpretation of the St. Paul Policy.

Despite its previous choice of Virginia as the forum for its prior litigation with St. Paul, AOL may argue for the application of California law in this case. But any connection with California is tenuous at best. Its only tie to this case is that Netscape is located in California. Netscape is just one of many of AOL's world-wide subsidiaries insured by the St. Paul Policy. Moreover, general liability insurance for Netscape, once it merged with AOL, was handled in Virginia, Washington, D.C., and New York, *not* California. California is neither the situs of the

[54] Ex. 1 (at SPM 0144).

class actions suits or of the AG Investigation. Nor are any of the witnesses to this coverage dispute located in California.[55] All told, Virginia, not California, has the greater governmental interest in seeing its laws applied to this insurance dispute.

C. Virginia and California Policy Interpretation Rules Are Consistent

Virginia and California law are consistent on the rules that govern the interpretation of contracts. An "insurance policy is a contract to be construed in accordance with the principles applicable to all contracts." *Seabulk,* 377 F.3d at 419 (citing *Graphic Arts Mut. Ins. Co. v. C.W. Warthen Co.,* 397 S.E.2d 876, 877 (Va. 1990)); *Palmer v. Truck Ins. Exchange,* 90 Cal.Rptr.2d 647, 652 (Cal. 1999) ("*Palmer*"). The task of interpreting an insurance policy is to ascertain what the parties mutually intended at the time they entered into the policy. *Pilot,* 145 S.E.2d at 146; *AIU Ins. Co. v. Sup. Ct.,* 274 Cal.Rptr. 820, 831 (Cal. 1990); *Waller*, 44 Cal.Rptr.2d at 378; Cal. Civ. Code §§ 1636, 1638, 1644. The meaning of the words in the policy must be inferred, if possible, solely from the written provisions of the contract. *Seabulk,* 377 F.3d at 419; *Waller*, 44 Cal.Rptr.2d at 378. If the policy language is clear and explicit, it governs. *Graphic,* 397 S.E.2d at 877; *Palmer,* 90 Cal.Rptr.2d at 652.

When interpreting an insurance policy, courts must not strain to find ambiguities. *See, e.g., Salzi v. Virginia Farm Bureau Mut. Ins. Co.,* 556 S.E.2d 758, 760 (Va. 2002). Words are given their ordinary and customary meaning when susceptible of such construction. *Id.* (quoting *Graphic,* 397 S.E.2d at 877). Specific words or provisions should not be considered in a vacuum, apart from the policy as a whole. *TM Delmarva Power, L.L.C. v. NCP of Va., L.L.C.,* 557 S.E.2d 199, 200 (Va. 2002) ("*TM*"); *Bank of the West v. Sup. Ct.,* 10 Cal.Rptr.2d 538, 545 (Cal. 1992) ("*Bank of the West*"). Instead, the policy is to be considered in the context of the whole, and given the meaning that is plain from the context presented.

D. On The Duty To Defend, Virginia Refers To The "Four Corners," Whereas California Also Examines Evidence Extrinsic To The Complaint

The test of whether an insurer has a duty to defend differs under Virginia and California law, but, given the specific facts here, the result is the same under either test.

[55] Thorpe Decl. ¶ 2.

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Virginia is a "four corners state." An insurer's obligation to defend an action "depends on comparison of the policy language with the underlying complaint to determine whether the claims alleged [in the complaint] are covered by the policy." *Resource*, 407 F.3d 631, 636 (applying Va. law); *see also America Online,* 347 F.3d at 93; *Superperformance Int'l Ins. v. Hartford Cas. Ins. Co.,* 332 F.3d 215, 220 (4th Cir. 2003); *Brenner v. Lawyers Title Ins. Corp.,* 397 S.E.2d 100, 102 (Va. 1990).

Under California law, "the determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." *Waller,* 44 Cal.Rptr.2d at 378. California law also requires the insurer to take into account facts known or readily available to it as well as the allegations contained in the underlying lawsuit against the insured. *Id.*; *Montrose Chemical Corp. of Cal. v. Sup. Ct.,* 24 Cal.Rptr.2d 467, 471 (Cal. 1993). However, an insurer does not have a continuing duty to investigate where it makes an informed decision on the basis of the complaint and extrinsic facts known to it at the time of tender. *Gunderson v. Fire Ins. Exchange*, 44 Cal.Rptr.2d 272, 277 (Cal.App. 1995) ("*Gunderson*"). Moreover, the insurer does not have to speculate about unpled claims, even if a covered claim could be made. *See, e.g., Hurley Construction Co. v. State Farm Fire & Casualty Co.*, 12 Cal.Rptr.2d 629, 631 (Cal.App. 1992); *Gunderson,* 44 Cal.Rptr.2d at 277; *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968, 971 (9th Cir. 1994) (applying Ca. law).

Here, there are no facts beyond those pled in the underlying complaints that change the allegations in those complaints, or which would bring a claim otherwise pled beyond the available coverage within the Policy's protections. None of the complaints alleged AOL disseminated to third parties private information concerning the class members. No facts beyond the complaints exist to support such an allegation. Indeed, the draft and final settlement documents between AOL and the class plaintiffs show that not only was there no allegation of dissemination of private information, there were no factual grounds upon which any such allegation could have been made.

Similarly, there are no facts either within or beyond the AG's letter and subpoena that would bring the AG's Investigation within the Policy's protections. The AG did not seek damages or allege any injury from the making known of private information to a third party.

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V. ST. PAUL'S POLICY DID NOT OBLIGATE IT TO DEFEND AOL

The St. Paul Policy contains four types of general liability coverage: "bodily injury," "property damage," "advertising injury," and "personal injury." It is undisputed that the class action suits and AG Investigation do not allege "bodily injury," "property damage," or "advertising injury." There is a dispute only over whether a specific provision within the coverage for personal injury liability applies. Namely, AOL contends that St. Paul owed it a defense because the Policy's protection against personal injury caused by the "making known to any person or organization written or spoken material that violates a person's right of privacy" is potentially implicated.

A. The Class Action Suits Do Not Allege That AOL Was "Making Known To Any Person Or Organization Written or Spoken Material That Violates A Person's Right of Privacy"

Personal injury coverage is offense based. For coverage to apply, the insured's liability must arise from actionable conduct that consists of the elements comprising a covered offense. It is not enough that a given outcome take place, like an invasion of privacy or the disparagement of another's product. Such a result must also stem from conduct that satisfies the elements of an enumerated offense. If it does not, coverage is inapplicable.

Here the policy provides personal injury coverage, but it also requires that the claimed injury be "caused by a personal injury offense."[56] The offense in dispute here consists of these elements: "Making known to any person or organization written or spoken material that violates a person's right of privacy." Because the alleged privacy violation did not occur as a result of conduct consisting of each of the elements required under this insurance contract, there is no coverage and no duty to defend.

The missing element is conduct by the insured that consists of the "making known to any person or organization written or spoken material." The plain meaning of the term "making known" cannot be reversed to also mean its polar opposites – "acquiring" or "learning" – as AOL's argument would require. Indeed, what AOL is alleged to have done is the opposite of making known. It *acquired* its customers' personal information; the private information came *into*

[56] Ex. 1 (at SPM 0141).

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AOL's possession. One does not read the newspaper to "make known" the day's top stories to himself or herself. One does not open a bank statement to "make known" the current balance to himself or herself. Such usage would be absurd. One reads the information in a newspaper or a bank statement to acquire it and learn it. If the reader shares that information with others, only then has that person "made known" the information. An insured does not "make known" information flowing *into* its possession. The insured could only "make known" information flowing *from* its possession. The policy bears out this common usage, since it requires that the "making known" be "***to*** any person or organization."

As St. Paul understands AOL's argument, this policy requirement would either disappear or be interpreted so AOL would have coverage for "making known" the class plaintiffs' private material to itself, a nonsensical and absurd concept. The first alternative, reading this phrase out of the insurance contract, violates every rule of insurance policy construction in both Virginia and California. *See, e.g., TM*, 557 S.E.2d at 200; *American Spirit Ins. Co. v. Owens*, 541 S.E.2d 553, 555 (Va. 2001); *D.C. McClain, Inc. v. Arlington Co.*, 452 S.E.2d 659, 662 (Va. 1995). The second alternative, allowing coverage to AOL for "making known" information to itself, would turn language that the Fourth Circuit Court of Appeals has described as "written in admirably plain English" (*Resource*, 407 F.2d at 634) into redundant nonsense. It would distort language that now clearly requires the "making known to any person or organization written or spoken material that violates a person's right of privacy" into coverage that would apply if AOL "makes known" to itself material it already possesses.

When read in its context (as required under both California and Virginia rules of contract interpretation), where each term is given its common and accepted meaning, and none are rendered superfluous, redundant, or absurd (also required steps under California and Virginia law), the term "making known" requires a communication to a third person, something that undisputedly was never alleged in the class action suits or in the AG Investigation.

Because this is the clear meaning of the language used to describe the covered offense, it is not surprising that in every case to address the issue of whether identical policy language provides coverage in the absence of communication of private information regarding the claimant to a third

party, the courts have found that communication to a third party was required for coverage to exist.

Two courts have considered this very policy language in a context that permitted them to rule on the requirement that there be a communication by the insured of private information concerning the claimant to a third party for coverage to exist. First and foremost, the Fourth Circuit Court of Appeals, applying Virginia law to a dispute over coverage for an unsolicited fax advertisement claim, held in *Resource,* 407 F.3d at 631, that the same offense at issue here, contained in that policy's advertising injury liability coverage ("making known to any person or organization written or spoken material that violates a person's right of privacy"), requires that there must be a "telling, sharing or otherwise divulging" by the insured of the claimant's private material for coverage to exist. As that court explained:

> Consider closely the text and context of the operative sentence. It states that coverage exists for advertisements 'making *known* to any person or organization written or spoken material that violates a person's right of privacy.' … It 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. at 641 (emphasis in original).

The Fourth Circuit went on to examine this provision in the context of its related provisions, and found that the "making known" language assumes that the victim of the offense "is harmed by the sharing of the content of the ad, not the mere receipt of the advertisement." *Id.* As a result, the Fourth Circuit confirmed that St. Paul had no duty to defend a claim against its insured that did not allege a communication by the insured of the claimant's private information to a third party, *i.e.*, a making known to any person or organization written or spoken material that violates a person's right of privacy.

This same rationale and holding was announced by the United States District Court for the Eastern District of Pennsylvania in *Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co.*, 432 F.Supp.2d 488, 490-93 (E.D. Pa. 2006). In *Melrose*, decided under Pennsylvania law, the court considered another unsolicited fax advertisement case, where advertising injury coverage was again claimed under the identical offense at issue here. The *Melrose* court said of the St. Paul policy that the "clear and unambiguous ['making known'] provision . . . requires that the content

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contained in the covered material must violate a person's right of privacy and must be made known to a third party." *Id* at 504. As the *Melrose* court explained:

> 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 known to a third party. It is the person whose secret is revealed by the content of the ad, not the person or organization to whom the secret is revealed, that suffers the injury. *Id.* at 503.

The *Melrose* court expressly held, "[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." *Melrose Hotel Co.*, 432 F.Supp.2d at 503. As a result, that court also found no coverage, and thus no duty to defend, under policy language identical to that involved here, where there was no allegation of communication of the claimant's private information by the insured to a third party.[57]

Even courts that have refused to reach the same ultimate conclusion regarding whether unsolicited fax advertisement claims fall within a policy's advertising injury coverage acknowledge that *Resource* was correctly decided based on St. Paul's policy language. For example, in *Hooters of Augusta, Inc. v. American Global Ins. Co.,* 157 Fed. App. 201, 208 (11th Cir. 2005) (applying Ga. law), the Eleventh Circuit distinguished the policy language at issue there from that involved in *Resource*, noting the St. Paul policy in *Resource* involved "a more tightly worded" provision. *Id.*

In sum, the personal injury provision of the St. Paul Policy under which AOL bases its claim that it was owed a defense applies only to circumstances where there has been a

[57] California's appellate court should shortly rule on this same policy language. Judge Robert L. Hess of the Los Angeles County Superior Court held in an unsolicited fax case involving St. Paul's policy language that a complaint which did not allege dissemination of private facts could not withstand demurrer. *ACS Systems v. St. Paul Fire & Marine Ins. Co.*, Los Angeles County Superior Court, Case No. BC 305455. That case has been briefed and was argued before the Second Appellate District Court – Division Three on July 18, 2006. *See* Thorpe Decl., ¶ 5.

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communication by the insured *to a third party* of material that violates a person's right of privacy. None of the complaints in the four class action suits allege that AOL made the private information it allegedly gathered known to any person or organization.[58] To the contrary, both AOL and the claimants against it acknowledged in settling their dispute that there was no claim for, nor any evidence of, dissemination of any private information to any third party.[59] Likewise, there is no allegation of injury because of a making known of private information to third parties in the AG's information letter or subpoena. Thus, while AOL allegedly violated the class plaintiffs' right of privacy, the St. Paul policy does not protect against that offense. The only offense that it did protect against – the "making known to any person or organization written or spoken material that violates a persons right of privacy" – unquestionably was not alleged and did not occur. St. Paul, therefore, had no duty to defend AOL against those claims.

B. The St. Paul Policy Excludes Coverage for Criminal Activity

The St. Paul Policy excludes coverage for personal injury resulting from criminal activity:

> **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.[60]

Very few cases have interpreted this particular policy provision and many do so without much analysis. Cases analyzing a similar (though not identical) "willful violation" exclusion, which excludes coverage for personal injury or advertising injury "arising out of the willful violation of a penal statute or ordinance committed by or with the consent of the insured," have found no duty to defend, even where there was no evidence the insured knew of the penal statutes. *See State Farm Fire & Cas. Co. v. Singh,* 2006 WL 1520516, at *5 (E.D. Va. 2006) ("*Singh*")

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[58] Exs. 129, 130.
[59] Ex. 143 (at SPM 0851-0852).
[60] Ex. 1 (at SPM 0154). While this exclusion was not specifically raised in St. Paul's denial, St. Paul specifically reserved its rights to rely on all Policy provisions. Exs. 131, 136. St. Paul is not estopped from relying upon this exclusion, nor did it waive it. *Norman v. INA,* 239 S.E.2d 902, 908 (Va. 1978) (since coverage may not be expanded by implied waiver or estoppel, an insurer's reliance on a particular policy provision to deny coverage does not preclude insurer from later claiming rights under other provisions). *See also Waller,* 44 Cal.Rptr.2d at 386-390 (insurer did not impliedly waive and was not estopped from relying upon defense, notwithstanding that the denial letter failed to specifically mention that defense).

(applying Va. law) (no duty to defend assault and false imprisonment claims based on exclusion), citing *Palmetto Ford Inc. v. First Southern Ins. Co.*, 7 F.3d 225, 1993 WL 369248, at *7 (4th Cir. 1993) (no duty to defend defamation claim based on exclusion). This rule, embodied in the recent *Singh* decision reached under Virginia law, is consistent with decisions from other states, including California. *See, e.g., Cubic Corp. v. Ins. Co. of N.A.*, 33 F.3d 34, 36 (9th Cir. 1994) (applying Ca. law) (no duty to defend suit alleging criminal bribery based on "willful violation" exclusion); *MGM, Inc. v. Liberty Mut. Ins. Co.*, 855 P.2d 77, 80 (Ks. 1993) (exclusion for willful violations of a penal statute applied to claims of secretly recording employees' telephone conversations).

Each of the class action suits states only two causes of action, both based on criminal statutes, the ECPA and CFAA.[61] Under the ECPA, it is a crime to intercept and use electronic communications.[62] The CFAA refers to "fraud" in connection with computers and makes it a crime to access a computer without authorization.[63] Both statutes require intent as an element of the offense. The class action suits allege that AOL's violations of these statutes was "conscious, intentional, wanton and malicious."[64] Because the class action suits allege injury arising out of AOL's willful and/or intentional violation of federal criminal laws, coverage is excluded under the St. Paul Policy. St. Paul therefore has no duty to defend.

C. The Class Action Suits and the AG Investigation Involved AOL's "Online Activities" And Were Therefore Excluded

The St. Paul Policy excludes coverage for personal injury claims involving online activities. The Policy provides: "For the purposes of advertising injury and personal injury, *all Online Activities* are excluded from these coverages. "'Online Activities' is defined as "providing

[61] AOL acknowledges these are criminal statutes. *See* Ex. 217 (at NETSDL 0004013).
[62] The ECPA provides it is unlawful to intentionally intercept wire, oral or electronic communication, or intentionally use a device to intercept communications, or intentionally disclose, or intentionally use contents of intercepted communications. 18 U.S.C. § 2511.
[63] The CFAA provides it is a crime to: "(a)(2) intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain[]...(C) information from any protected computer if the conduct involved an interstate or foreign communication." 18 U.S.C. § 1030. Penalties for such federal offenses can include a fine and/or prison for up to five years (or ten years for repeat offenders). The law also provides for a private right of action by those who suffer damage or loss from such a violation. 18 U.S.C. § 1030(g).
[64] *See, e.g.*, Ex. 129 (at SPM 0020, 0022).

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e-mail services, instant messaging services, 3rd party advertising, supplying 3rd party content and providing internet access to 3rd parties. . . ."[65] This exclusion applies to all insureds under the St. Paul Policy.[66] The Online Activities Exclusion is a manuscript endorsement negotiated by the parties, with the definition prepared by AOL and accepted by St. Paul.[67]

On its face, the Online Activities Exclusion applies to *all* online activities, including all activities and products included in providing Internet access to third parties. This would include, as is applicable here, the providing of products over the Internet that specifically assist internet users with downloading information from the Internet.

AOL would have the Court limit what is meant by "providing internet access to 3rd parties" to only the sale of internet services.[68] This is not, however, what the exclusion says. Moreover, such interpretation ignores the fact that AOL and its many subsidiaries did more than *sell* (the word AOL now wishes the definition it drafted used) access in *providing* (the word AOL actually used in the definition it drafted) internet access to customers and other internet users. Had AOL intended the exclusion to apply only to the *purchase* of internet access from AOL, rather than the *providing* of internet access to third parties, AOL – as the drafter of the definition – could certainly have said so.

At best, AOL can only claim that its own drafted language is ambiguous. But if an ambiguity exists, the Court should consider extrinsic evidence to determine the parties' intentions. *American Realty Trust v. Chase Manhattan Bank, N.A.*, 281 S.E.2d 825, 831 (Va. 1981). "[T]he interpretation placed thereon by the parties themselves is entitled to great weight and will be followed if that may be done without violating applicable legal principles." *Id.* (quoting *Dart Drug v. Nicholakos*, 277 S.E.2d 155, 158 (Va. 1981)).[69] In this regard, throughout the negotiation of the St. Paul Policy, AOL and St. Paul intended that the general liability policy issued by St. Paul would

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[65] Ex. 1 (at SPM 0341).
[66] Ex. 1 (at SPM 0341).
[67] Ex. 39; Ex. A (Spencer 168:2-11, 169:5-170:1, 171:21-25; 184:5-8); Ex. 69; Ex. 54.
[68] *See, e.g.,* Ex. 132 (at SPM 0086).
[69] Similarly, under California law, in case of ambiguity, the parties' mutual intention at the time the insurance contract was formed controls. Cal. Civ. Code § 1636; *Bank of the West,* 10 Cal.Rptr.2d at 545 ("fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties"); *AIU,* 274 Cal.Rptr. at 831 ("mutual intention of the parties at the time the contract is formed governs interpretation").

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not cover personal injury claims arising out of AOL's "unique exposures because of [its] online activities."[70] What was meant by "online," as American Online's name indicates, was AOL's and its subsidiaries' business on and through the Internet.[71] The premium St. Paul charged reflects that its policy was to cover only traditional general liability risks.[72] The parties' intentions in this regard are reflected in numerous documents exchanged by the parties up to and following issuance of the St. Paul Policy.[73] Online activities were to be excluded under the St. Paul Policy and insured under the multimedia policy.[74]

For example, in a June 23, 2000 e-mail, AOL's risk manager (who was previously on Marsh's AOL team for renewal of the 1999 insurance program[75]) explained the historical background for liability insurers' concerns and AOL's intent that the St. Paul Policy not include personal injury coverage for online activities.[76] The email should be read in its entirety, but for sake of brevity, the following excerpts reflect the gist of AOL's comments:

> [T]his approach (incorporating broad PI/AI coverage within the [general liability] GL) became undesirable in 1999. The GL underwriters were becoming more and more concerned about providing quasi-professional coverage under the GL (they didn't feel comfortable with our online risks) and it was getting cost prohibitive. At the same time, we determined that AOL could secure much broader PI/AI coverage from the multi-media underwriting community. Thus, in 1999, we placed a multi-media policy to provide coverage for our online activities and we intended to exclude these risks from our GL policy.
>
> . . .
>
> The agreement with St. Paul was that they would provide PI/AI coverage for AOL's own advertising but that they would exclude our online activities (third party). . . .
>
> It is clear to me that the intent all along was to exclude PI/AI arising out of our online business. . . .
>
> Again it is clear to me that the intent all along was to exclude PI/AI that resulted from AOL's operations as an online company. . . .[77]

Following a meeting on June 30, 2000 between St. Paul, AOL, and Marsh, the exclusion of all online activity was deleted from the St. Paul Policy by endorsement and an exclusion added

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[70] Ex. A (Spencer 30:23-31:16); Ex. C (Bannell 32:2-10); Ex. B (Perkins 64:18-25, 107:21-108:5); Ex. E (Midwinter 158:9-159:10) Exs. 21, 23, 36.
[71] Exs. 36, 76, 77.
[72] Exs. 8, 159 (at Marsh 0548).
[73] Exs. 4, 21, 23, 24, 37.
[74] Exs. 22; Ex. 4 (at Marsh 0209); Ex. B (Perkins 101:9-17, 264:9-265:16, 267:18-268:10).
[75] Ex. 159 (at Marsh 0523).
[76] Exs. 36, 37; Ex. A (Spencer 86:17-20, 88:17-89:5).
[77] Ex. 36; *see also* Ex. 37.

providing that: "For the purposes of advertising injury and personal injury, all online activities are excluded from these coverages," (added in August 2000 and effective retroactive to April 1, 1999).[78] A month later, coincident with AOL's receipt of the class action suits,[79] AOL decided to add a definition of online activity, even though admittedly the parties had not discussed a need to define the term.[80] St. Paul understood the definition drafted by AOL to encompass the parties' mutual intentions not to cover personal injury offenses for online business activities.[81] On that basis, St. Paul accepted the definition.[82] There was no adjustment to the premium as a result of this change to the Policy.

Thus, either as written by AOL, or as interpreted consistent with the parties' mutual intent (should AOL claim the language it drafted is ambiguous), the class action suits and AG Investigation fall within the purview of the Online Activities Exclusion. The class action suits and AG Investigation both arose because of the concern that AOL was eavesdropping on and collecting private information through an AOL product obtained and used online. Not only is SmartDownload online by its very nature, but its purpose is to facilitate Internet users' access to online information by aiding in the downloading function. The SmartDownload allegations are the very type of risk the parties did *not* intend to cover under the St. Paul Policy. St. Paul has no duty to defend.

D. The AG Investigation Does Not Seek Damages

The St. Paul Policy only covers amounts the protected person is legally obligated to pay as covered damages, and only defends against demands or civil proceedings that seek covered damages. "Damages" are "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." *Morrow Corp. v. Harleysville Mut. Ins. Co.,* 101 F.Supp.2d 422, 434 (E.D. Va. 2000) (applying Va. law) (citing *Black's Law Dictionary* 393 (7th ed. 1999)); *Golden Eagle Ins. Co. v. Ins. Co. of the West,* 121 Cal.Rptr.2d 682, 690 (Cal.App. 2002) (damages are "detriment,"

[78] Ex. 1 (at SPM 0333).
[79] *See*, Ex. 51 [*Specht* lawsuit filed June 30, 2000 and received by AOL's legal department July 10, 2000]; Ex. 53 [August 20, 2000 letter, copied to Spencer, tendering *Specht* and *Mueller* lawsuits]; Ex. A (Spencer 139:14-142:6, 144:14-147:25).
[80] Ex. B (Perkins 213:13-17).
[81] Ex. E (Midwinter 320:21-324:13).
[82] Exs. 69, 68.

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"loss" or "injury" the party has suffered through the acts of another); *R&D Maidman Family L.P. v. Scottsdale Ins. Co.,* 783 N.Y.S.2d 205, 214-215 (N.Y. Sup. 2004), citing, *inter alia*, *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.,* 944 F.2d 940, 947 (D.C. Cir. 1991) (damages are dollars for recompense).[83]

The AG Investigation of AOL's online activities did not seek covered damages – it sought only information, and was resolved with AOL's agreement that it undertake, and refrain from undertaking, certain activities. As a result, there was no duty on the part of St. Paul to defend AOL against that investigation.

VI. CONCLUSION

For the reasons set forth above, St. Paul respectfully requests this Court grant partial summary judgment and find St. Paul had no duty to defend AOL or Netscape with respect to the class action suits and AG Investigation. There is no coverage, as a matter of law, and therefore, no duty on the part of St. Paul to defend AOL. Partial summary judgment is thus appropriate.

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[83] For example, restitution and disgorgement of profits are not damages. *Vigilant Ins. Co. v. Bear Stearns Cos. Inc.,* 814 N.Y.S.2d 566, 2006 WL 118368, at *4 (N.Y. Sup. 2006). Fines are not "damages." *R&D Maidman,* 783 N.Y.S.2d at 214-215, citing, inter alia, *Independent Petrochemical,* 944 F.2d at 947 (distinguishing between "damages" as "dollar-for-dollar recompense" and "a fine or penalty" as "a pecuniary form of punishment for the commission of an act society finds repugnant and seeks to deter").