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

11	NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and)	CASE NO. 5:06-CV-00198 JW (PVT)
12	AMERICAN ONLINE, INC., a Delaware corporation,)	DECLARATION OF SARA M. THORPE IN SUPPORT OF ST. PAUL'S MOTION FOR PARTIAL SUMMARY JUDGMENT [WITH EXHIBITS A-B]
13)	
14	Plaintiffs,)	
15	vs.)	
16	FEDERAL INSURANCE COMPANY, an Indiana corporation; et al.,)	
17	Defendants.)	

Gordon & Rees LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

18 I, Sara M. Thorpe, declare as follows:

19 1. I am an attorney duly licensed to practice law in the State of California and before
 20 the federal courts in this State and a partner in the law firm of Gordon & Rees LLP. I am
 21 counsel of record for defendant St. Paul Mercury Insurance Company ("St. Paul") in this matter.
 22 I have personal knowledge of the matters stated herein except as to matters upon which I state
 23 they are based upon information and belief. If called as a witness, I could and would
 24 competently testify to the same.

25 2. I took, defended, and/or attended all the depositions taken during Phase I of this
 26 case. Based upon information and belief, none of the witnesses deposed reside in California.

27 3. Accompanying St. Paul's motion for partial summary judgment are the excerpts
 28 from the following depositions:

Gordon & Rees LLP
275 Battery Street, Suite 2000
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- Exhibit A: Glenn Spencer, taken August 15, 2006.
- Exhibit B: Nancy Perkins, taken August 3, 2006.
- Exhibit C: George Bannell, taken August 18, 2006.
- Exhibit D: Alejandra Evans, taken October 12, 2006.
- Exhibit E: Michele Midwinter, taken September 7, 2006.
- Exhibit F: Daniel Weiss, taken October 5 and November 7, 2006.

4. Documents have been produced in this case by the parties with their initial disclosures and in response to discovery requests, and documents have been produced by third parties in response to subpoenas. The documents produced have been designated by bates numbers as follows:

- “NET/SDL” are documents produced by AOL and Netscape in this case.
- “AOL” are documents produced by AOL to St. Paul coverage litigation AOL filed in Virginia in 2002.
- “SPM” are document produced by St. Paul in this case.
- “SP” are documents produced by St. Paul to AOL in the coverage litigation in Virginia.
- “MARSH” are document produced by Marsh in this case (and in the coverage litigation in Virginia). See Affidavit of Marsh Custodian of Records filed with this motion.

5. 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. I am informed and believe that case has been briefed and was argued before the Second Appellate District Court – Division 3, on July 18, 2006.

Executed this 1st day of December 2006 in San Francisco, California.


SARA M. THORPE

EXHIBIT "A"

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

Plaintiffs,

vs. Case No. 5:06-CV-00198-JW (PVT)

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

Defendants.

ST. PAUL MERCURY INSURANCE
COMPANY, a Minnesota
corporation,

Counter-Claimant,

vs.

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

Counter-Defendants.

DEPOSITION OF GLENN A. SPENCER, a witness,
taken on behalf of the Defendant and
Counter-Claimant, pursuant to Subpoena, on the 15th
day of August, 2006, at the law offices of
Constangy, Brooks & Smith, 2600 Grand Boulevard,
Suite 300, Kansas City, Missouri, before

KATHRYN A. LANNING,

1 of AAA Court Reporting Company, a Registered
Professional Reporter, Certified in Missouri and
2 Kansas.

3
4 APPEARANCES

5 For the Plaintiffs:

6 MR. MICHAEL BRUCE ABELSON
ABELSON HERRON, LLP
333 South Grand Avenue, Suite 650
Los Angeles, California 90071

7
8 For the Defendant and Counter-Claimant:

9 MS. SARA M. THORPE
GORDON & REES, LLP
Embarcadero Center West
275 Battery Street, Suite 2000
10 San Francisco, California 94111

11 STIPULATIONS

12 It was stipulated by and between
13 counsel and the witness that the presentment of
14 this deposition to the witness by the officer
15 is expressly waived.

16 It was further stipulated by and
17 between counsel that if said deposition is not
18 signed by the witness by the time of the
19 commencement of the trial, it may be used as
20 though signed.

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Reporter's Note: Original exhibits were retained
by Ms. Thorpe.

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(The deposition commenced at 9:00

a.m.)

GLENN A. SPENCER,

a witness, being first duly sworn, testified

under oath as follows:

EXAMINATION BY MS. THORPE:

Q. Can you state your name for the record.

A. Glenn Spencer.

Q. Would you spell your name for the court reporter?

A. G-l-e-n-n, middle initial A, S-p-e-n-c-e-r.

Q. Mr. Spencer, my name is Sara Thorpe and I represent St. Paul. And we're here on a lawsuit that AOL brought against St. Paul arising out of what are referred to in the lawsuit the SmartDownload claims.

Are you generally familiar with the fact that there's a lawsuit pending?

A. Yes.

Q. You've had your deposition taken before in May of 2002 in another lawsuit that AOL filed against St. Paul relating to the 5.0 litigation. Do you recall having your deposition taken before?

A. I do.

1 insurance business for awhile. And from 1987
2 to 1990 you were with Travelers; is that
3 correct?

4 A. Yes.

5 Q. What was your position there?

6 A. I was an underwriter.

7 Q. Where were you based?

8 A. In three years I was based in Baltimore,
9 Wilmington, and Washington, DC.

10 Q. And from 1990 to '91, you were with Sedgwick?

11 A. Yes.

12 Q. What was your responsibilities there?

13 A. I was sales, client executive.

14 Q. From 1991 to 1992, you were with a company
15 called Thomas Rutherford?

16 A. Yes.

17 Q. What was your position there?

18 A. The same as my prior job.

19 Q. Sales?

20 A. Yes.

21 Q. From 1992 to 2000, you were with Marsh, Johnson
22 & Higgins; correct?

23 A. That's correct.

24 Q. And we're going to be talking about Marsh here
25 and because it's gone through a few name

1 changes, can we have an agreement we'll just
2 refer to the company as Marsh?

3 A. That's fine with me.

4 Q. What were your position or positions from 1992
5 to 2000 at Marsh?

6 A. I started in sales and then I ran the sales
7 department and then I managed their middle
8 market division in Washington, DC. That was
9 basically it through 2000.

10 Q. What -- during what years were you the middle
11 market -- running the middle market division in
12 Washington, DC?

13 A. 1997 to 2000.

14 Q. What were your responsibilities in that role?

15 A. I oversaw -- we had sales, client executives,
16 account executives or brokers, you know, we
17 call them brokers, claims, loss control people.
18 It was basically half of the office was -- half
19 of our revenue came from middle market clients,
20 half came from Fortune 500 clients and I ran
21 the division that handled all the middle market
22 business in the office, so I oversaw all the
23 people in operations.

24 Q. And from two -- about February, 2000, to
25 February, 2001, you were with AOL; is that

1 right?

2 A. I was.

3 Q. And your position there was what?

4 A. Vice president of risk strategies, I think they
5 called it.

6 Q. What did your position entail at AOL?

7 A. I was responsible for the risk management
8 function in the organization, which was
9 identifying the risks that the company faced
10 and quantifying them, developing strategies on
11 avoiding, mitigating the exposures to loss and
12 risk financing.

13 Q. Who had that position before you took that
14 position?

15 A. It was a newly created position when I took it.

16 Q. Were there others in the risk management
17 department when you took over as vice
18 president?

19 A. Not when I took over, no.

20 Q. Did -- later were people added?

21 A. Yes.

22 Q. When, who was added?

23 A. Nancy Perkins was added and I had an assistant,
24 Lisa Creel, and Scott Morrow.

25 Q. And then in February, 2001, or about then, you

1 returned to Marsh; is that right?

2 A. I did.

3 Q. What was your position at Marsh?

4 A. Chief operating officer of the Baltimore,
5 Washington office.

6 Q. How long did you have that position?

7 A. 2003.

8 Q. And where did you go in 2003?

9 A. Palmer & Cay, C-a-y.

10 Q. What is Palmer & Cay?

11 A. It's a competitor of Marsh's, insurance broker.

12 Q. What was your position there?

13 A. Managing partner of the northeast region.

14 Q. How long were you there?

15 A. Till April of 2005.

16 Q. And where did you go then?

17 A. Lockton.

18 Q. What is Lockton?

19 A. Lockton is an insurance broker.

20 Q. And that's where you are today?

21 A. I am.

22 Q. What's your position?

23 A. Senior vice president of operations.

24 Q. When you were at Marsh from '97 to 2000, were
25 you in the Washington, DC, office?

1 A. I was.

2 Q. And when you were at AOL in 2000 and 2001, were
3 you in their Dulles office?

4 A. I was.

5 Q. When you left Marsh in 2000 to go to AOL, what
6 was the reason for leaving?

7 A. That's an interesting question. Basically,
8 they offered me an opportunity to make a lot of
9 money and at the end of the day, that's why I
10 took the job.

11 Q. At AOL?

12 A. Yes. I mean, when they originally came to talk
13 to me about it, I said I wasn't interested.
14 But it wasn't a lot of money, it was an
15 opportunity -- it was stock options and such.
16 I ended up not making any money, by the way,
17 for the record.

18 MR. ABELSON: And for the IRS,
19 apparently.

20 Q. (By Ms. Thorpe) You did get stock options?

21 A. I did.

22 Q. Why did you leave AOL and go back to Marsh?

23 A. Because I never really wanted to leave in the
24 first place. When they made me the offer, I
25 sort of went to my boss at Marsh and I'm like

1 Q. So 1996 is when Marsh landed this account with
2 AOL?

3 A. I believe that was -- it might have been the
4 end of '95, but it was right around there.

5 Q. You mentioned the services that Marsh provided
6 AOL, what services were those?

7 A. I'd say risk management consulting services,
8 insurance brokerage services, claims advisory
9 services, loss control services. We were their
10 outsource risk management function, if you
11 will, for a large component of their
12 operations. They also dealt with a competitor
13 of ours, Aon, who did the same sort of work.

14 Q. And Aon handled the professional liability
15 aspect; is that right?

16 A. Yes. They handled other programs, as well.

17 Q. What other programs?

18 A. Their directors and officers liability, their
19 fiduciary, their crime, their -- I can't
20 remember all the policies but they probably
21 handled six or seven other policies for AOL.

22 Q. And AOL handled -- I mean, Marsh handled what
23 aspect of AOL's insurance needs?

24 A. We probably had 30 different policies. We did
25 their international, their property, their

1 liability, their auto, their kidnap and ransom,
2 their international. I mean, everything else
3 that they bought, their umbrella, their excess,
4 we handled the vast majority of their policies
5 and programs.

6 Q. And Marsh -- in providing these services, did
7 Marsh provide these services out of its
8 Washington, DC, office?

9 A. There were other offices involved, but the
10 engagement was managed through Washington.

11 Q. What other offices were involved?

12 A. I couldn't remember all of the offices. I know
13 New York was involved, I know our San Jose
14 office was involved, I know there -- you know,
15 there were various people. It was a large
16 account that accessed lots of resources in the
17 company, so I wouldn't even -- I couldn't even
18 begin to tell you. I don't know, there were
19 probably -- and then we had all our global
20 offices involved, I mean, there were probably
21 25 or 30 offices that touched the account.

22 Q. Was it mainly handled out of the Washington,
23 DC, Marsh office?

24 A. Yes.

25 Q. In connection with the services Marsh was

1 providing, were you involved with the renewal
2 coverage placement in 1999 for AOL?

3 A. Can you repeat the question?

4 Q. Yes. In connection with the services that
5 Marsh was providing, were you involved in 1999
6 with the placement of coverage for AOL?

7 A. I'm sure I was.

8 Q. And focusing on 1999 because that's when
9 St. Paul got involved in the insurance program,
10 do you recall that?

11 A. Yes.

12 Q. Do you recall being involved in a change in
13 the -- how the insurance program was going to
14 work for AOL with the 1999 renewal in that
15 there was going to be certain risks that would
16 be handled through a media policy?

17 A. Yes.

18 Q. What do you recall about that?

19 A. I recall a lot about that. I mean, do you have
20 a specific question?

21 Q. Well, tell me generally what you recall about
22 that and then we can get into specifics.

23 A. I generally recall that the coverage that we
24 had in place was difficult to secure in the
25 market, the insurance market, there weren't a

1 lot of carriers that wanted to provide
2 coverage, and that in our analysis of -- of the
3 program that we had -- I guess there were a
4 couple dynamics going on, one, that the
5 marketplace was very reluctant to provide this
6 personal advertising injury component of the
7 coverage and at the same time, we felt like
8 there were broader terms and conditions in the
9 market available for other exposures that AOL
10 had through a media policy.

11 And so given the market was pushing us
12 in one direction and given the fact that we
13 could improve things through this media policy,
14 we were looking to place two programs enhancing
15 coverage and keeping -- but at the same time
16 keeping the components of what we had in our
17 original program, in other words, we're not
18 going to lose anything but we're going to
19 improve on the media exposures, and so that was
20 our strategy in 1999.

21 Q. You referred a little earlier to personal and
22 advertising injury. Are you referring to
23 personal injury coverage and advertising injury
24 coverage?

25 A. I am.

1 injury is, defamation of character, wrongful
2 termination, false imprisonment, they vary by
3 policy, but it's basically you have to go
4 according to the terms and condition of the
5 policy, whatever personal injury is defined as
6 to get coverage for personal injury and they --
7 most general liability policies lump personal
8 advertising injury together under one sublimit
9 with common terms and conditions, et cetera.

10 Q. (By Ms. Thorpe) And we were talking about the
11 need to look for other ways of handling the
12 personal injury and advertising injury as you
13 got involved in the 1999 renewal. What was it
14 about, as you understood it, what was it that
15 the general liability carriers were hesitant
16 about covering?

17 A. Well --

18 MR. ABELSON: Let me just object to
19 the form of the question.

20 You can answer.

21 A. At the time, the Internet was still relatively
22 new and there were a lot of things related,
23 activities related to personal advertising
24 injury that were occurring on the Internet in a
25 new dynamic way. And the underwriters,

1 insurance underwriters, didn't feel as if they
2 understood the exposures well enough, and on
3 top of that, didn't feel as if there were
4 enough controls in place to manage that risk
5 within these Internet-based companies, they
6 didn't feel like they had -- because of the
7 dynamic nature of the medium, that the controls
8 weren't in place to assure that you're having
9 proper review from outside counsel on ads that
10 were placed, as an example. And so they were
11 leery of the risk.

12 And at the same time, AOL had some
13 activity in that we had been sued a few times
14 over those coverage parts in our other policy.

15 So those two factors led to us having
16 a little -- having challenges and securing that
17 coverage, led to concern around personal
18 advertising injury.

19 Q. And you were talking about AOL having claims
20 involving that coverage. You're talking about
21 claims under the '98, '99 insurance program?

22 A. Prior policies.

23 Q. There was a team put together for that 1999
24 renewal; correct?

25 A. Yes.

1 Q. Do you recall what role you had with that team?

2 A. Well, 90 percent of that team reported to me in
3 some way or another and I was -- I think if you
4 probably found a chart somewhere, I was
5 probably shown as sort of senior adviser or
6 something on the account, so I had a role on
7 the account team and they also reported to me
8 at Marsh in some way or another.

9 Q. Were you involved in the presentation put on
10 for AOL about -- with the recommendations for
11 the insurance program for 1999?

12 A. I'm sure I was.

13 Q. Were you involved in the communications with
14 AOL regarding what their needs were and what
15 Marsh's recommendations were?

16 A. Yes.

17 Q. Alex Evans was the person who coordinated the
18 team; is that correct?

19 A. Yes.

20 Q. And Lisa Conway was the one in charge of the
21 media coverage; is that correct?

22 A. Yes.

23 Q. Nancy Perkins was the one in charge of the
24 general liability coverage; is that right?

25 A. Yes.

1 Q. How many conversations did you have with
2 St. Paul people?

3 A. I can't recall, I couldn't recall.

4 Q. Do you recall who from St. Paul you had
5 conversations with?

6 A. Michele Midwinter and Angie --

7 Q. Adams?

8 A. -- Adamson.

9 Q. Angie Adams?

10 A. Yes.

11 Q. What do you recall about your conversations
12 with Michele Midwinter prior to April, 1999,
13 when the St. Paul policy was bound and issued?

14 A. Well, we were marketing the program, meaning
15 that they were going out to a bunch of
16 different insurance companies and soliciting
17 proposals from them, and so I just recall
18 generally talking to her about that process
19 and, you know, articulating what we were
20 looking for, what they had. I couldn't recall
21 any specifics, but I recall having general
22 conversations with her about it.

23 Q. Do you recall talking with Michele about the
24 risks that AOL faced because it was an Internet
25 company?

1 A. I don't recall specifically talking about that,
2 no.

3 Q. Do you recall talking to her about what an
4 online risk was versus a normal business risk?

5 A. Yes.

6 Q. What do you recall in that regard?

7 A. I recall having conversations with her about
8 the fact that we expected AOL's traditional
9 risks in that area, traditional meaning risks
10 similar to any other business, whether it be a
11 law firm or a drug store or a manufacturing
12 company or whatever, but the risks that looked
13 similar to other businesses in America, we
14 expected those to be covered by the general
15 liability policy. So I remember having that
16 general conversation with her.

17 Q. Are there, in this category of normal business
18 risks, risks associated with conducting
19 business over the Internet that were normal
20 business risks in 1999?

21 A. I don't understand the question.

22 Q. You're saying that there were normal business
23 risks. Were any of those normal business risks
24 you're talking about businesses conducting
25 business over the Internet?

1 what Nancy Perkins was doing?

2 A. No.

3 Q. Once you moved over to AOL, did you get more
4 intimately involved in getting the corrections
5 made?

6 A. Yes.

7 Q. Let me -- well, first of all, you went over to
8 AOL, I think in February of 2000; is that
9 correct?

10 A. Yes.

11 Q. Do you remember when after arriving at AOL you
12 got involved specifically with the corrections
13 to the St. Paul policy?

14 A. I don't recall specifically. It would have
15 been soon after I started there, I would have
16 started following up on things.

17 Q. Just to give us context, I'm going to show you
18 Exhibit 36, which is a June 23, 2000, memo that
19 you prepared; is that right?

20 A. Yes.

21 Q. Did you prepare that first as a memo or first
22 as an e-mail?

23 A. No such thing as a memo at AOL, everything is
24 e-mail. Most communication was by e-mail.

25 Q. Did you prepare this document which we've

1 Q. Yes. Let me ask you: Have you looked at this
2 recently?

3 A. I skimmed through it, yes.

4 Q. Yesterday?

5 A. Yesterday, yeah.

6 Q. Why don't you read it because we're going to
7 ask a lot of questions about it.

8 A. Okay.

9 MR. ABELSON: Actually, before you
10 answer any questions, I'd like to take a break
11 for a couple minutes, so don't pose any
12 questions that he has in mind, but I'd like to
13 talk with you for a moment before we go any
14 further. Going to go off the record.

15 MS. THORPE: Okay.

16 (A recess was taken.)

17 Q. (By Ms. Thorpe) We were talking about your
18 June, 23, 2000, memo, which is Exhibit 36, and
19 my question went to what you did to prepare for
20 this, and I asked you had talked to Nancy
21 Perkins.

22 A. Uh-huh.

23 Q. Do you recall what the substance of those
24 conversations were in connection with the
25 intent surrounding the issuance of the St. Paul

1 policy?

2 A. I don't recall the specifics, you know,
3 specific conversations I had with her.

4 Q. Is your memo based on those conversations?

5 A. In part.

6 Q. When you came over to AOL, did you look at the
7 insurance program that was in place for the '99
8 to 2000 policy period?

9 A. Yes.

10 Q. Did you review the St. Paul policy?

11 A. Yes.

12 Q. Did you review the Executive Risk policy?

13 A. Yes.

14 Q. In here you talk -- in your June 23 memo you
15 talk repeatedly about the intent of the policy.
16 And let me refer you to under -- you have a
17 little subheading called "The St. Paul
18 Agreement" in bold and you have about three
19 paragraphs down starting with, "It is clear to
20 me."

21 A. Uh-hum.

22 Q. It says, "It is clear to me that the intent all
23 along was to exclude PI/AI arising out of our
24 online business." What did you mean there in
25 June 23, 2000, about -- when you refer to our

1 MR. ABELSON: Question lacks
2 foundation, speculative.

3 A. There are different theories on that.

4 Q. (By Ms. Thorpe) How about your theory, is it
5 your theory approach in obtaining coverage for
6 a client to try to give them an insurance
7 program where they're not having an overlap in
8 coverage?

9 MR. ABELSON: The question is
10 hypothetical, vague as to time, lacks
11 foundation.

12 A. Well, that would be my -- that is my theory, so
13 that's easy to answer.

14 Q. (By Ms. Thorpe) Let me hand you to look at in
15 conjunction with Exhibit 33 what we'll mark as
16 Exhibit 44, which is a June 15 fax with two
17 enclosures from Glenn Spencer to Matt Swingle,
18 NET/SDL11624 through 11626, and then also
19 Exhibit 45, which is a four-page document,
20 MARSH621 through 624, which is a series of
21 drafts of endorsements. And there is
22 duplication in this, but if you could just look
23 at it and, first of all, tell me if any of the
24 handwriting is your handwriting.

25 (Deposition Exhibit Nos. 44 and 45

1 A. I don't know that phone number, no.

2 Q. (By Ms. Thorpe) It lists Skadden Arps in the
3 summons. Was Skadden Arps AOL's counsel in
4 Boston?

5 A. I don't recall.

6 Q. Do you recall when you became aware of the
7 Specht lawsuit?

8 A. No, it's just an unusual name, so I remember
9 it. I may have just read it on the litigation
10 bordereaux. I don't even know if I saw a
11 lawsuit, I remember seeing that name.

12 (Deposition Exhibit No. 51 was marked
13 for identification.)

14 Q. (By Ms. Thorpe) Let me hand you what we've
15 marked as Exhibit 51, which is a copy of the
16 class action complaint filed by Specht against
17 Netscape and AOL, which shows a filing date of
18 June 30, and then up in the right a July 10,
19 2000, it looks like, receipt stamped from AOL
20 legal department. You see that?

21 A. Date stamp, yes.

22 Q. And on the last page it shows July 5, 2000,
23 that the summons and class action complaint
24 were hand delivered to Netscape and AOL. Do
25 you see that reference?

1 A. I do.

2 Q. Is it your recollection that you would have
3 received a copy of the Specht lawsuit in your
4 role at AOL in July of 2000?

5 A. It would have taken a while to get to me.

6 Q. The legal department is in Dulles; correct?

7 A. Well, the Netscape legal department was in
8 California.

9 Q. And was Netscape to route those things to the
10 Dulles office?

11 A. I can't recall at this exact point in time.
12 Again, this was like a year or so or two, you
13 know, year and a half or whatever after the
14 Netscape acquisition and there were lots of
15 turf wars going on. And I would -- there were
16 probably attorneys in California and attorneys
17 in Dulles.

18 Q. Was there a claim arrangement with the St. Paul
19 policy where all claims were to be handled in
20 Dulles and sent to a claims consultant in
21 Marsh?

22 A. Well, the St. Paul policy had provisions in it
23 for -- or had -- yeah, provisions that told us,
24 you know, what our obligations were to report
25 claims, but I don't recall us having special --

1 a special arrangement with St. Paul about how
2 we would report claims to them.

3 Q. You didn't recall that there was a claim
4 consultant that was set up at Marsh?

5 A. Oh, yeah, I definitely recall that, Dennis
6 Love.

7 Q. Were all claims that came in to AOL and any of
8 its subsidiaries supposed to be routed to
9 Dennis Love at Marsh?

10 A. Yes. You're asking about the procedure between
11 AOL and Marsh, yes.

12 Q. And was there a point person at AOL for
13 handling of claims, no matter which subsidiary
14 they were against?

15 A. No. We moved in that direction, but -- and I
16 don't know exactly what date that occurred, but
17 when I first arrived, it was just -- there was
18 no procedure. Some lawyers would report claims
19 directly and so we, then -- you know, I became
20 someone with -- I became a person that had
21 knowledge of almost all the litigation,
22 provided the attorneys told me about it. And
23 then we migrated towards having another guy in
24 the legal department who would handle most of
25 the litigation. But then there were two other

1 lawyers that because of the type of litigation
2 they handled, they had a lot of insurance
3 litigation, so then those guys tended to deal
4 direct on the insurance litigation, as well.
5 So I rambled, but there wasn't a clean answer
6 for your question.

7 Q. Let me refer you just for a moment to sidetrack
8 to Exhibit 19, which is MARSH323 through 344,
9 which is the business auto and general
10 liability binder for the April, '99, to April,
11 2000, coverage afforded by St. Paul and
12 specifically to MARSH340 and thereafter, which
13 is called auto and general liability special
14 claims handling specifications.

15 A. Okay.

16 Q. Are you familiar with those?

17 A. I'm familiar that Marsh would have asked for
18 these, yeah.

19 Q. And that's set up that there would be a contact
20 person at Marsh to handle claims that came in
21 that might implicate the general liability
22 coverage and auto coverage under the St. Paul
23 policy?

24 A. Yes.

25 Q. And if you go to the following page, it

1 indicates who the contact people would be at
2 AOL and at Marsh for claims?

3 A. Yes.

4 Q. And that was -- that would be any claim by any
5 of the insureds under the St. Paul policy;
6 correct?

7 A. You're asking if she is the person to report
8 for any claim that comes in at AOL?

9 Q. Yeah, the contact person.

10 A. Yes, she's the contact person.

11 Q. Now, going back to Specht, do you have any
12 recollection of when it was that you became
13 aware of the Specht lawsuit after it was filed
14 and received by AOL?

15 MR. ABELSON: Asked and answered.

16 A. I'm -- I can't recall exactly when I became
17 aware of this case.

18 MR. ABELSON: This case meaning
19 Specht.

20 A. The Specht case, yes.

21 Q. (By Ms. Thorpe) Obviously, from what we've
22 seen, it's filed after your June 15th e-mail?

23 A. Yes.

24 Q. Do you recall even after sending the June 15th
25 e-mail that you became aware of additional

1 claims that were coming in to AOL that might
2 implicate coverage under the St. Paul policy?

3 MR. ABELSON: Question is -- question
4 lacks foundation.

5 A. There were a lot of claims, I mean, there was a
6 lot of litigation going on. As I sit here
7 today, I can't remember a specific claim.

8 We moved on from your other question,
9 but... Looks like it took five days for the
10 people, whoever got it at Netscape, to get it
11 to AOL.

12 (Deposition Exhibit No. 52 was marked
13 for identification.)

14 Q. (By Ms. Thorpe) Let me hand you what we've
15 marked as Exhibit 52, is an August 20, 2000 --
16 August 22 letter from Dennis Love to Glenn
17 Spencer.

18 A. Yes.

19 Q. Do you recall receiving this letter?

20 A. No, but looks like I did.

21 Q. Do you have any reason to believe that you
22 didn't receive this letter?

23 A. No.

24 Q. And it was putting you on notice that there had
25 been a Specht lawsuit filed against AOL and

1 Netscape; correct?

2 A. Yes.

3 Q. Do you recall if you were aware of the Specht
4 lawsuit prior to receiving this August 22,
5 2000, letter?

6 A. I do not. I mean, it looks like Chuck sent it,
7 Chuck Curran, Charles Curran, who was the
8 lawyer handling the case, looks like he sent it
9 directly to Dennis or Dennis wouldn't have
10 copied on it. In other words, if it came from
11 me, Chuck came to me and told me about it, I
12 would have sent it, he probably wouldn't have
13 copied Chuck.

14 Q. And then -- and it's your understanding that
15 the Specht lawsuit was being tendered to
16 St. Paul and to other carriers?

17 A. Yes.

18 Q. Did you review the Specht lawsuit to review
19 what the allegations were and whether they
20 posed any concerns with the online activity
21 exclusion in the St. Paul policy?

22 MR. ABELSON: Question lacks
23 foundation, it's vague and overbroad.

24 A. I'm sure I read the Specht lawsuit at some
25 point. I don't recall reading it. I mean, it

1 would have been early on in this case. And I
2 probably read it and -- I'm sure I read it and
3 I probably didn't take any action on it, just
4 going to see how the thing evolved, I mean,
5 these kind of things.

6 Q. (By Ms. Thorpe) Do you recall what the gist of
7 the claim was in the Specht lawsuit?

8 A. I do.

9 MR. ABELSON: Hang on a second. I
10 want you to answer to the extent you recall,
11 answer from what you recall, nothing that
12 you've learned from counsel.

13 A. Please repeat the question.

14 Q. (By Ms. Thorpe) You said you understood what
15 the gist of the Specht lawsuit was and Mike's
16 comment is accurate, I don't want what the
17 lawyers have told you, I want to know what you
18 understood the gist of the Specht lawsuit was
19 about.

20 A. That there -- that we had some software, that
21 Netscape had developed some software that
22 collected information about where people were
23 on the Internet and it was housed in a big
24 database and that we never did anything with --
25 "we" being AOL -- that AOL never did anything

1 with the information, it just sort of sat there
2 and that there was some litigation about the
3 fact that we were tracking -- you know, that we
4 were tracking where they were going and could
5 potentially be a privacy breach and that it was
6 an invasion of privacy and that's sort of what
7 I knew about it.

8 And the other thing I knew about it
9 was that --

10 MR. ABELSON: Wait a minute, she's
11 asking do you recall what was alleged in it.

12 Q. (By Ms. Thorpe) That's fine. What else did
13 you know about it?

14 A. Okay. Well, that was the allegation.

15 Q. What else did you know about it?

16 MR. ABELSON: Again, answer only from
17 what you recall about it, not --

18 A. I remember this stuff pretty well. That we
19 didn't do anything with it, that had the
20 capability to do it and it was just, there was
21 like unbelievable volumes of information that
22 no one could even deal with, that it was just
23 sitting on a server somewhere and we didn't do
24 anything with the data because it was so
25 voluminous.

1 A. Yes.

2 Q. What -- who was involved in coming up with this
3 definition of online activities?

4 A. Me and I recall -- just the way that I work, I
5 recall -- I would have definitely talked to
6 somebody in legal and I would have -- and I
7 recall talking to someone in legal, but I can't
8 recall whether it was one of three -- you know,
9 one of three possibilities, it could have been
10 that I would have talked to somebody down
11 there.

12 Q. Who were the three possibilities?

13 A. Probably would have been Jim Bramson is the
14 first guy I would have gone to.

15 MR. ABELSON: B-r-a-m-s-o-n.

16 A. S-o-n. He's probably the first guy I would
17 have talked to about it. The second person I
18 would have talked to about would have been
19 Randy Boe, Randall Boe, B-o-w-e.

20 MR. ABELSON: B-o-e.

21 Q. (By Ms. Thorpe) No, just B-o-e.

22 A. Oh, yeah, you're right.

23 Q. And who is the third person?

24 A. David Goldberg.

25 Q. But you don't recall which of those three you

1 talked to about this definition?

2 A. I don't.

3 Q. Is it possible you talked to all three?

4 A. Highly unlikely, but possible.

5 Q. Besides people in your legal department, who
6 else did you discuss the definition with?

7 A. Nancy Perkins, I'm sure that she and I talked
8 about it before.

9 Q. Anybody else?

10 A. The people at Marsh that I sent it to.

11 Q. Well, you sent them this definition, but did
12 you talk to anyone at Marsh prior to creating
13 this definition?

14 A. I'm sure I did. I wouldn't have just sent it
15 without having a conversation.

16 Q. Did you come up with the words that are in this
17 definition?

18 A. Yes.

19 Q. How did you go about determining the items to
20 include in the definition?

21 A. I used my knowledge of AOL based on sitting
22 there working on it, you know, all the time,
23 and using the service. And so with my
24 knowledge of the service and my -- my
25 understanding of the intent between the

1 parties, I developed this language.

2 Q. Did you also consider the Specht claim, which
3 you had received right in this time period?

4 A. No.

5 Q. Did you consider any other claims that were
6 coming in that might implicate personal injury,
7 advertising injury under the St. Paul policy?

8 A. I'm sure I did because I said before that there
9 were some claims that we had on our bordereaux
10 that could potentially be covered or not
11 covered as a result of this, but I can't
12 specifically recall what they were, because
13 back then, I don't know, we can go back to the
14 dates and the timeline back then, this case
15 wouldn't even have known about this case.

16 Q. And you can't, as you sit here today, recall if
17 there was any other invasion of privacy or
18 defamation of claim pending at the time that
19 you were working on this language?

20 A. I can't recall, like I said, now.

21 Q. Were you attempting to limit what online
22 activity meant?

23 A. Yes, absolutely.

24 Q. And were you -- well, let's go through the
25 words that you came up with.

1 A. Okay.

2 Q. And before we do that, the rest of that

3 paragraph that I started that said, "Mike, I

4 know St. Paul hasn't agreed," you go on and you

5 talk about the intention to cover AOL's own

6 advertising. Do you see that reference?

7 A. I do.

8 Q. Are you there -- does that refresh your memory

9 that it was advertising that was of more

10 interest to you or are you still of the

11 recollection that it was just an analogy?

12 A. That's the example that I use, because, again,

13 in the first -- number one, I say personal and

14 advertising injury needs to be deleted, so it's

15 obvious that I'm talking about both of them.

16 And down here I'm just -- this is the

17 example that we -- I'm referencing the

18 conference call, that the example I kept using

19 in the conference call because it was easily

20 understood by everybody.

21 Q. Your online activities in coming up with this

22 definition, did you refer to any technical

23 documents?

24 A. No. I don't know what a technical document is,

25 but ...

1 intention was and at that point, I knew that
2 there was not a common -- it was clear to me
3 that there wasn't a common understanding of
4 what online activities meant.

5 Q. Did the legal department change your wording in
6 the definition?

7 A. If they did, it was not substantive, these are
8 substantially my words.

9 Q. Did you consider putting in the word "only" so
10 that it would read online activities as defined
11 as only providing e-mail services, et cetera?

12 A. Well, I would never do that as a broker and I
13 clearly avoided online activities includes. I
14 mean, I wanted it to be specific so that it
15 could be -- that it would be understood, I
16 mean, that was my whole intent.

17 MR. ABELSON: Sara, are you arguing
18 that when your insurance policy defines
19 something and doesn't use the word "only," it
20 leaves it subject to interpretation?

21 MS. THORPE: No, I'm not saying that.

22 MR. ABELSON: Because I'm going to
23 have a very interesting line of questioning for
24 your underwriters, then.

25 MS. THORPE: I'm just asking him what

EXHIBIT "B"

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

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NETSCAPE COMMUNICATIONS :

CORPORATION, ET AL., :

Plaintiffs, : Civil Action Number

vs. : C-06-00198 JW (PVI)

FEDERAL INSURANCE COMPANY, :

ET AL., :

Defendants. :

-----x

DEPOSITION OF NANCY PERKINS

Dulles, Virginia

Thursday, August 3, 2006

REPORTED BY:

JULIE BAKER, RPR, CRR

1 Deposition of NANCY PERKINS, called for
2 examination pursuant to notice of deposition, on
3 Thursday, August 3, 2006, in Dulles, Virginia, at
4 the office of AOL, 22000 AOL Way, at 9:26 a.m.,
5 before JULIE BAKER, a Notary Public within and for
6 the Commonwealth of Virginia, when were present on
7 behalf of the respective parties:

8
9 SARA M. THORPE, ESQ.
10 Gordon & Rees LLP
11 Embarcadero Center West
12 275 Battery Street, Suite 2000
13 San Francisco, California 94111
14 415-986-5900
15 sthorpe@gordonrees.com
16 On behalf of Defendant St. Paul Mercury
17 Insurance Company
18
19
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--continued--

1 APPEARANCES (Continued):

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On behalf of Plaintiffs Netscape

10

Communications Corporation

11

and America Online, Inc.

12

13

14

ALSO PRESENT: DAVID C. GOLDBERG, AOL chief

15

litigation counsel

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1 P R O C E E D I N G S

2 Whereupon,

3 NANCY PERKINS

4 was called as a witness and, having first been duly
5 sworn, was examined and testified as follows:

6 EXAMINATION

7 BY MS. THORPE:

8 Q Can you state your full name for the
9 record.

10 A Nancy Heszen Perkins.

11 Q Ms. Perkins, we're here for your
12 deposition in a case that AOL has filed against
13 St. Paul. Do you understand that?

14 A Yes.

15 Q And you had your deposition taken before
16 in another lawsuit between AOL and St. Paul in April
17 of 2002. Do you recall that?

18 A Yes.

19 Q Have you had your deposition taken at any
20 time since the time that you had a deposition taken
21 in April 2002?

22 A No.

23 Q So that's the only deposition that you've
24 ever sat for; is that right?

25 A Yes.

1 We can talk about it that after.

2 BY MS. THORPE:

3 Q Just to set the stage for the questions
4 here today, of 1999, you were employed by Johnson
5 Higgins Marsh; right?

6 A Yes.

7 Q And can we have an understanding when we
8 talk about Marsh, whether it was Johnson Higgins or
9 Marsh USA, we can just use the word Marsh?

10 A I agree, yes.

11 Q You had been working for Marsh for a
12 number of years, I think, since 1992; is that right?

13 A Yes.

14 Q And at some point in 2000, you left Marsh
15 and you became employed with AOL; is that right?

16 A Yes.

17 Q Do you recall the month?

18 A May 2000.

19 Q May of 2000?

20 A May of 2000 I came to AOL.

21 Q While you were at Marsh, at least in the
22 period starting January 1999, what was your title?

23 A I was a broker. I don't recall my title
24 to be honest with you. I don't recall any title.

25 Q In connection with the placement of

1 insurance for AOL, was your title client advisor?

2 A Yes.

3 Q What was the role of the client advisor?

4 A The client advisor was the broker on the
5 account, so my role at that time was to work with
6 the client, AOL, and to also work with Global
7 Broking in New York, a division or group within
8 Marsh and to pull together a submission to answer
9 questions about the program that we were requesting
10 from to place the insurance for the client.

11 Q And were you the client advisor for the
12 AOL account from January of 1999 until you left in
13 May of 2000?

14 A Yes.

15 Q When you started with AOL in May of 2000,
16 what was your title?

17 A Senior manager, risk strategies.

18 Q Were you in that role responsible for
19 AOL's insurance program?

20 A Yes.

21 Q Including the coverage that it had placed
22 with St. Paul?

23 A Yes.

24 Q Is that still your title at AOL?

25 A No.

1 Q When did your title change?

2 A September 2005.

3 Q What was your title starting in September
4 2005?

5 A Program director, risk strategies.

6 Q Is that your current title?

7 A Yes.

8 Q During the May 2000 to September 2005 time
9 period, what were your responsibilities as senior
10 manager of risk strategies?

11 A I am the risk manager for AOL. I am
12 responsible for contract review. I work with Marsh
13 to place our property insurance program. I
14 interface with corporate Time-Warner and provide
15 them with information about the AOL divisions,
16 things such as head count, payrolls, exposure
17 information. I handle claim reporting, just risk
18 management duties.

19 Q Is what you just described what your
20 current role is?

21 A Yes -- well, but it's been that -- it's
22 been consistent the whole time I've been at AOL.

23 Q What you've described is what your
24 responsibilities have been ever since you started at
25 AOL in May of 2000; is that correct?

1 A Let me think. In May of 2000 we had not
2 yet merged with Time-Warner, so the role evolved a
3 little bit after the merger, but essentially I've
4 been doing the same thing since I've been here.

5 Q When you first started at AOL as senior
6 manager of risk strategies, did you report to
7 anyone?

8 A Yes.

9 Q Who did you report to?

10 A Glen Spencer.

11 Q How long did you report to him?

12 A From May of 2000 until February 2001.

13 Q Is that when Glen Spencer left AOL?

14 A Yes.

15 Q After Glen Spencer left in February 2001,
16 did you report to someone different?

17 A Yes.

18 Q Who did you report to?

19 A Terry Billingsley.

20 Q How do you spell Billingsley?

21 A B-i-l-l-i-n-g-s-l-e-y.

22 Q What was Glen Spencer's title when you
23 reported to him?

24 A Vice president risk strategies.

25 Q Was that Terry Billingsley's title?

1 A Yes.

2 (Recess.)

3 BY MS. THORPE:

4 Q So we're back in 1999, and you're at
5 Marsh. What I'd like you to do is explain in
6 general terms the process that you went through at
7 Marsh in placing insurance for AOL. You were part
8 of a team; correct?

9 A Yes.

10 Q Just to lay the foundation, who was on
11 that team in 1999?

12 A The account team was made up of an account
13 executive.

14 Q Who was that?

15 A Alex Evans -- Alejandra Evans.

16 Q Who else was on the team?

17 A Myself.

18 Q As the account advisor?

19 A Account advisor, a client representative.

20 Q Who was that?

21 A In 1999, Bill Armstrong.

22 Q Anybody else on the team?

23 A Yes, a claims consultant.

24 Q Who is that?

25 A Craig Accocelli.

1 Q Anybody else on the team?

2 A Yes, a loss control consultant, Greg
3 Martin. There was another broker, another client
4 advisor, Lisa Conway.

5 Q Can you think of anybody else?

6 A I think that was it.

7 Q Was George Bannell part of the team?

8 A Yes.

9 Q What was his title?

10 A He was global broker, a global broker.

11 Q What was his role?

12 A He negotiated the deal, the program
13 directly with the insurance carriers.

14 Q All the insurance carriers?

15 MR. ABELSON: The question lacks
16 foundation. Do you want to be more specific, Sara,
17 or do you want her to answer it?

18 MS. THORPE: I want her to explain her
19 answer. That's the words she used.

20 THE WITNESS: Not all insurance carriers.

21 BY MS. THORPE:

22 Q All insurance carriers for placing the AOL
23 coverage?

24 A No.

25 Q He only was dealing directly with certain

1 Q Any others?

2 A Not that I'm aware of.

3 Q George Bannell, he was operating out of
4 Marsh's New York office; is that right?

5 A Yes.

6 Q You were operating out of the D.C. office;
7 right?

8 A Yes.

9 Q Where was Alex Evans located?

10 A Washington, D.C.

11 Q How about Bill Armstrong?

12 A Washington, D.C.

13 Q How about Craig Accocelli?

14 A Washington, D.C.

15 Q How about Greg Martin?

16 A Washington, D.C.

17 MR. ABELSON: Is it Martin or Morton?

18 THE WITNESS: Martin.

19 BY MS. THORPE:

20 Q Marsh had been the broker for AOL for a
21 number of years prior to 1999; is that correct?

22 A Johnson and Higgins Marsh, yes.

23 Q Remember we agreed we were going to use
24 the word Marsh for --

25 A To be inclusive, then yes.

1 Q Had you been part of the AOL team for
2 Marsh for a number of years prior to 1999?

3 A Yes.

4 Q Was it basically the same team that had
5 been working on this account for a number of years,
6 or had there been changes?

7 A There were changes.

8 Q Had George Bannell been the global broker
9 at Marsh for the AOL account for a number of years
10 prior to 1999?

11 A No.

12 Q Is there somebody in his place for the
13 prior year?

14 MR. ABELSON: For 1998?

15 MS. THORPE: Right.

16 THE WITNESS: Not that I recall.

17 BY MS. THORPE:

18 Q What was Alex Evans's responsibilities as
19 the account executive?

20 A She was the relationship manager.

21 Q The relationship among the Marsh people?

22 A Yes.

23 Q Anything else?

24 A And the relationship manager with AOL.

25 She coordinated the efforts of the team.

1 (Deposition Exhibit 4 identified.)

2 MS. THORPE: Let me hand you what we've
3 marked as Exhibit 4, which is a fax cover sheet
4 dated May 9, 2000 -- actually two copies of the same
5 fax, with a declarations of a multimedia liability
6 insurance policy issued by Executive Risk Specialty
7 Insurance Company and additional pages all Bates
8 labeled Marsh 209 through Marsh 235. Can you take a
9 minute and look at that and let me know if that's an
10 executive -- the Executive Risk Specialty policy
11 that you provided to St. Paul in May of 2000.

12 MR. ABELSON: You mean in connection with
13 this litigation -- I'm sorry. I apologize.

14 MR. ABELSON: She's not asking you if it
15 looks like it. She's asking you do you recall
16 sending that policy to St. Paul in May of 2000.

17 THE WITNESS: Yes.

18 BY MS. THORPE:

19 Q Suspect that the attached Executive Risk
20 policy that's attached to that memo in front of you,
21 Exhibit 4 the Executive Risk policy that's
22 referenced on Exhibit 2?

23 A Yes.

24 Q Had you, prior to April 1999, had
25 experience with multimedia liability policies?

1 Q Did AOL have risks that -- use a term that
2 you use in the documents -- normal business
3 activities that any other business, even if they're
4 not an Internet service provider has?

5 MR. ABELSON: The question is compound,
6 overbroad, ambiguous and lacks foundation. Have at
7 it.

8 THE WITNESS: In general, AOL would have
9 had those same business risks, yes.

10 BY MS. THORPE:

11 Q What are normal business risks? That's a
12 term you use, and we'll see it in the documents.
13 What are you referring to?

14 MR. ABELSON: Do you want to show her a
15 document and ask her what she's referring to in that
16 document?

17 BY MS. THORPE:

18 Q Let me rephrase it. The normal business
19 activities, what are AOL's normal business
20 activities in April 1999?

21 A They had employees who get injured at
22 work. They had automobiles that could get into
23 accidents. They had advertising risk. In general,
24 I would say AOL wasn't any different from any other
25 company.

1 A The workers' comp, the umbrella, yes.
2 That was my focus.

3 Q Later on, and it's in bold, about midway
4 down the page, it says "we must also want to
5 consider a different approach with San Jose if it
6 looks like San Jose is trying to compete with us."
7 What is that referring to?

8 MR. ABELSON: Do you know?

9 THE WITNESS: I do.

10 MR. ABELSON: Tell her.

11 THE WITNESS: Marsh was structured in 1998
12 such that each individual office was its own profit
13 center. So if the Netscape account was handled by
14 Marsh's San Jose's office and they lost that
15 business because it was being merged into the AOL
16 program, that would have been an income loss for the
17 San Jose office. There used to be internal battles
18 at Marsh over income and who owned the account and
19 how fees might be split and handled. You didn't
20 want to lose an account.

21 BY MS. THORPE:

22 Q With Netscape becoming part of AOL, did it
23 become part of your Marsh team in operating out of
24 Washington, D.C. your responsibility and no longer
25 involve San Jose?

1 A Yes. San Jose had some things to
2 finalize, but the account was transitioned to the
3 D.C. office.

4 Q That would make sense because it all
5 became part of one insurance program; correct?

6 A Correct.

7 Q Did Netscape have any operations other
8 than in California, as far as a premise, as far as
9 you knew?

10 A Yes.

11 Q Where were its other locations?

12 A They had offices in Mountain View,
13 California. They had some international locations
14 as well, but I don't recall specific addresses or
15 states, but a big office in California and some
16 international exposure.

17 Q Any other offices in the United States?

18 A I'm sure they did, but I don't recall
19 where they are -- where they were.

20 MS. THORPE: I want to go back in time and
21 mark this as Exhibit 11.

22 (Deposition Exhibit 11 identified.)

23 BY MS. THORPE:

24 Q I've handed you what we've marked as
25 Exhibit 11, which is a Marsh document with Bates

1 that are listed?

2 A Right.

3 Q And those were some of the alternatives
4 that you were considering as you talked to AOL; is
5 that correct?

6 A Correct.

7 Q And some of the options were to higher
8 retentions. Is that one?

9 A Yes.

10 Q And do you recall that another option was
11 moving some of the personal injury, advertising
12 injury risk to media policies?

13 A Yes.

14 Q Do you recall reviewing the option of
15 maybe transferring some of those advertising and
16 personal injury risks to a professional liability
17 policy?

18 A I recall having a conversation about how
19 could we have a media policy, media E&O policy and a
20 traditional general liability policy and between the
21 two, how could we provide AOL with coverage.

22 Q On the second page of this document,
23 document 11447, it refers to the Netscape
24 acquisition we've been talking about. Do you see
25 that?

1 A Yes.

2 Q Ease of administration with it all being
3 one insurance program; correct?

4 A Correct.

5 Q It also indicates there'd be a coordinated
6 claims and loss control services for the two
7 companies. Do you see that reference?

8 A Yes.

9 Q Is that, in fact, what was done with the
10 acquisition of Netscape?

11 A Were the claims and loss control
12 coordinated?

13 Q Yes.

14 A The Netscape business was consolidated or
15 merged into the AOL program, so they had all the
16 same services going forward.

17 Q For loss control, it was all -- the people
18 at Marsh and AOL that were working on loss control
19 were the same for Netscape as they were for AOL; is
20 that correct?

21 A After they merged, yes.

22 Q And the same claims people handled the
23 claims for Netscape as handled claims for AOL; is
24 that correct?

25 A Yes.

1 Q And do you recall talking -- did you talk
2 with George Bannell about the submission and the
3 idea that one option would be completely excluding
4 online personal injury and advertising injury?

5 A Yes, I would have talked to George.

6 Q Did you have more than one conversation
7 with him about that?

8 A I may have.

9 Q If it was excluded on a general liability
10 policy, where would the online personal injury and
11 advertising injury risk be pick up in the insurance
12 program?

13 A What we were attempting to do in this
14 renewal was to have a general liability policy and
15 the media E&O policy handled by Lisa and between the
16 two, they would provide the coverage, the AI/PI
17 coverage for AOL.

18 Q In talking to George Bannell about the
19 option of excluding online, personal injury and
20 advertising injury risks in a general liability
21 policy, what did you and he talk about, if anything,
22 about what online met?

23 A I don't know that we had a conversation
24 about that. When this initial submission was sent
25 out, Lisa was working her side of the program, and I

1 St. Paul references. But if you want to, you can
2 certainly at any time tell me you want to look at
3 the whole document. Why don't you take a second to
4 glance at it so you can get a general familiarity.
5 First of all, do you recall receiving this e-mail in
6 February of 1999?

7 A It says I did, but I don't recall the
8 specific e-mail, no.

9 Q Do you recall George Bannell, in the
10 course of working on this team, advised you of
11 conversations he's having with insurance carriers?

12 A Yes.

13 Q Under the title primary casualty, he
14 reports back on the general sense he's getting from
15 the carriers about concern about placing the PI/AI
16 coverage; is that right?

17 A That's correct.

18 Q Does that refresh your memory about some
19 of the conversations you had with him and others?

20 A A little bit.

21 Q Do you have a recollection that carriers
22 were concerned because this general industry that
23 AOL was in was in its infancy stages and the legal
24 environment was not yet established?

25 A Yes.

1 Q And concern about there not being a
2 precedence for pricing purposes for this kind of
3 exposure, personal injury and advertising injury
4 with Internet companies?

5 A Yeah.

6 Q Other than what the document says, does it
7 refresh your memory there was that concern?

8 A Yes.

9 Q Do you remember him reporting back that
10 there was generally interest from insurance
11 companies that want to place coverage with AOL;
12 correct?

13 A Yeah. If I recall, insurance companies
14 were interested in AOL.

15 Q It says something in here for obvious
16 reasons was his quote. I can't find it, but AOL was
17 an attractive customer for insurance companies?

18 A Absolutely, yes.

19 Q And what was your understanding as to why
20 that was the case?

21 A It was a growing business. It was
22 exciting times for this company, and I think the
23 perception was that it was a key account, an account
24 that would be nice to have.

25 Q On the second page, Marsh 55, George

1 BY MS. THORPE:

2 Q Did you prepare that part of the chart?

3 A I was one of several people involved in
4 this overall proposal. I don't recall if I
5 specifically put this together.

6 MR. ABELSON: She asked did you put
7 together this part of the chart. You're referring
8 to the fourth line?

9 MS. THORPE: Right.

10 THE WITNESS: I don't recall.

11 BY MS. THORPE:

12 Q You don't recall what is intended to be
13 conveyed in having a yes/no with the indication
14 provided for online activities?

15 A I can't remember.

16 (Deposition Exhibit 18 identified.)

17 BY MS. THORPE:

18 Q Let me give you what we've marked as
19 Exhibit 18, which is a document titled "America
20 Online recommended program April '99 to April 2000."
21 Do you recognize this document?

22 A Yes.

23 Q Did you help prepare it?

24 A I would have been one of the people
25 preparing it, yes.

1 Q Did you prepare the part that refers to
2 general liability coverage?

3 MR. ABELSON: On 11480.

4 MS. THORPE: Page 1, 11480.

5 THE WITNESS: I would have been one of the
6 people involved with that.

7 BY MS. THORPE:

8 Q And it refers to the St. Paul policy with
9 \$100,000 premium, and under the comments it says
10 "St. Paul would provide general liability coverage
11 but their policy would specifically exclude personal
12 injury and advertising injury claims resulting from
13 AOL's online business activities. Instead we
14 recommend a broader stand-alone media policy to
15 ensure the PA/AI exposure." Do you see that
16 comment?

17 A Yes.

18 Q Did you write that?

19 A I don't recall.

20 Q Do you agree with that statement?

21 MR. ABELSON: Today or back then?

22 BY MS. THORPE:

23 Q That was what your understanding was in
24 April '99 on the recommended program for AOL?

25 A I don't think it's completely accurate.

1 Q How is it not completely accurate?

2 A The St. Paul policy was going to give back
3 some AI/PI coverage.

4 Q That was your understanding in April of
5 '99?

6 A Yes.

7 Q Was this an inaccurate representation to
8 AOL as to the scope?

9 A I think it's just a summary, just
10 comments.

11 Q The portion you're saying would have been
12 given back would have been
13 non-online-activity-related; correct?

14 MR. ABELSON: She's asking you to agree or
15 not.

16 THE WITNESS: Yes, I agree.

17 BY MS. THORPE:

18 Q The second page indicates "the executive
19 risk has quoted a media policy that not only
20 provides PI/AI coverage but broadens the scope of
21 coverage all for a lower premium." Do you see that
22 reference?

23 MR. ABELSON: You're on 11481.

24 MS. THORPE: Right, across from multimedia
25 liability executive risk.

1 MR. ABELSON: I'm sorry, Sara. Would you
2 ask the question again.

3 BY MS. THORPE:

4 Q I was reading the comment. Do you see the
5 comment?

6 A Yes, I see the comment.

7 Q And I accurately quoted it?

8 A Yes.

9 Q The idea was that executive risk would
10 pick up the personal injury/advertising injury
11 coverage that the St. Paul policy wouldn't provide?

12 MR. ABELSON: The question lacks
13 foundation. It was vague.

14 BY MS. THORPE:

15 Q Is that correct?

16 A Can you ask it again?

17 Q Was the idea in the proposal you were
18 making to AOL that the executive risk policy would
19 pick up advertising injury and personal injury
20 liabilities that the St. Paul policy would not pick
21 up?

22 MR. ABELSON: The question is vague. You
23 can answer if you can.

24 THE WITNESS: The two policies were meant
25 to work together to provide a complete program.

1 BY MS. THORPE:

2 Q They weren't intended to overlap; correct?

3 A I don't know what the intent was.

4 Q You just said the intent was they were to
5 work together?

6 A To work together to provide complete
7 coverage.

8 Q And your intent was not to have AOL pay
9 two premiums for the same coverage. Would you
10 agree?

11 A I would agree.

12 Q So the intent was to try to avoid having
13 overlapping coverage; true?

14 A True.

15 MS. THORPE: Let me mark as Exhibit 19
16 America Online business auto and general liability
17 binder signed by Michelle Midwinter for St. Paul on
18 March 1999 marked as Marsh 323 through 334.

19 (Deposition Exhibit 19 identified.)

20 BY MS. THORPE:

21 Q Do you recall seeing that document before?

22 A Yes.

23 Q You've referred earlier in your testimony
24 about the next part in the process was that there
25 would be a binder issued by the insurance companies

1 A Yes.

2 Q Do you know who?

3 A With St. Paul?

4 Q Yes.

5 A George Bannell.

6 Q This provides for how claims are going to
7 be managed if they come in under this policy; is
8 that correct?

9 MR. ABELSON: The question lacks
10 foundation. Are you asking her to read it and tell
11 you what it says or her understanding back then?

12 Q Did you have an understanding that there
13 was a claims arrangement that St. Paul and Marsh had
14 agreed upon that's reflected in a document?

15 A Yes.

16 Q Included with this binder?

17 A Yes.

18 Q Did you have an understanding that claims
19 would be -- review claims would be conducted out of
20 AOL's offices in Dulles, Virginia?

21 MR. ABELSON: She's not asking what the
22 document says. She's asking what your understanding
23 was.

24 THE WITNESS: Yeah. We would have
25 assigned a claims consultant on the account, and

1 they would have done various work.

2 BY MS. THORPE:

3 Q A claims person would receive the claim.
4 Was there one claim person at AOL that receives
5 claims?

6 A That I don't know.

7 Q During the '99 to 2000 policy period, you
8 don't know who that was?

9 A I'm not sure.

10 Q Do you know if that was Lori O'Connell
11 that was receiving them?

12 A It may have been.

13 Q Was there a designated person with Marsh
14 who would help with claims and responding to claims?

15 A Yes.

16 Q And that was Craig Accocelli?

17 A Yes.

18 Q That applied to all claims, regardless of
19 which subsidiary of AOL it was; is that right?

20 A Yes.

21 (Deposition Exhibit 20 identified.)

22 BY MS. THORPE:

23 Q I've marked as Exhibit 20 a document which
24 is dated April 27, 1999 from Michelle Midwinter at
25 St. Paul to you at Marsh. Marsh 322 is the number

1 MR. ABELSON: The question has an
2 incomplete hypothetical. You can answer.

3 THE WITNESS: In general, policies aren't
4 issued error free.

5 BY MS. THORPE:

6 Q And you essentially make a punch list and
7 go through them and try to correct the errors; is
8 that correct?

9 A Yes.

10 (Deposition Exhibit 21 identified.)

11 BY MS. THORPE:

12 Q Exhibit 21 is a July 23, 1999 letter from
13 you to Michelle Midwinter at St. Paul, Marsh 251 to
14 252. Do you recall sending this letter to Michelle?

15 A Yes.

16 Q Is this a letter that you prepared that
17 indicates the discrepancies between the St. Paul
18 policy that was issued and the binder?

19 A Yes.

20 Q The one I want to talk about is the first
21 paragraph. It indicates the St. Paul policy that
22 was issued completely excludes personal injury and
23 advertising injury and provides no coverage for that
24 whatsoever. Do you see that reference?

25 A Yes.

1 Q You indicate the policy should have been
2 written to exclude personal injury and advertising
3 injury for AOL's online activities but that there
4 should be coverage for other advertising and
5 personal injury claims; is that right?

6 MR. ABELSON: Actually, it says all other.

7 MS. THORPE: All other.

8 BY MS. THORPE:

9 Q Is that right?

10 A Yes.

11 Q And that's exactly what you just told us a
12 few minutes ago, your understanding of what the
13 policy was supposed to cover; correct?

14 A Correct.

15 Q And when you wrote to Michelle on July 23,
16 1999, what did you mean when you indicated that the
17 policy should have been written to exclude personal
18 injury, advertising injury for AOL's online
19 activities?

20 A I mean just what I say right here.

21 Q Remember in the very beginning of the
22 deposition, we were talking about online, and you
23 said Internet. Is your understanding -- is that
24 what you meant when you wrote the St. Paul policy
25 wasn't supposed to provide personal injury and

1 being coverage for AOL's online activities?

2 MR. ABELSON: The question is speculative
3 and lacks foundation.

4 THE WITNESS: I'm not certain what
5 Michelle's mind-set was.

6 BY MS. THORPE:

7 Q I'm not asking you what her mind-set was.
8 Did you believe that you had an agreement as to what
9 was meant by there would be no PI/AI coverage for
10 AOL's online activities?

11 A I thought we did.

12 Q What follows is you reminding Michelle
13 Midwinter several times there needs to be these
14 corrections to the policies; correct?

15 A Yes.

16 (Deposition Exhibit 22 identified.)

17 BY MS. THORPE:

18 Q Let me show you what we've marked as
19 Exhibit 22, which is an August 13, 1999 letter.
20 This is a letter that you sent to David Prince,
21 Marsh 1385 to 1387. Do you recall sending this
22 letter to David Prince?

23 A Yes.

24 Q Was that your job as the client advisor,
25 to provide the client with the copies of the

1 policies -- with the information about the policies
2 that had been obtained for their insurance program?

3 A Yes.

4 Q And you, in this letter, list those
5 policies; is that correct?

6 A Yes.

7 Q On the first page you refer to the
8 St. Paul policy, and you describe it that "it
9 excludes personal injury and advertising injury as
10 respects AOL's online activity. Please note this
11 coverage is insured under AOL's multimedia policies
12 with Executive Risk and Employers' Reinsurance
13 Corp." Do you see that?

14 A Yes.

15 Q As you were providing this information to
16 David Price at AOL, did you have -- let me ask it
17 differently.

18 Had you ever talked to David Prince about
19 what was meant by the fact that there's no personal
20 injury or advertising injury for AOL's online
21 activities as you reference it on this document?

22 A As part of the renewal proposals, Dave
23 would have been in the meetings where all this was
24 discussed by me and by others, so he would have been
25 aware of the program they bought.

1 Q Do you recall specifically talking to him
2 about what that meant, that there wasn't coverage
3 for the online activities?

4 A I don't specifically remember other than
5 the presentations that we made.

6 (Deposition Exhibit 23 identified.)

7 BY MS. THORPE:

8 Q Marked as Exhibit 23, September 13, 1999
9 letter that you sent to St. Paul Marsh 248 to 249.
10 Do you recall sending this letter to St. Paul?

11 A I recall having to follow up with Michelle
12 numerous times to get this problem straightened out,
13 yes.

14 Q This problem being to correct the problems
15 so there was some personal injury and advertising
16 injury coverage for non-online activities; correct?

17 A Correct.

18 Q In your first paragraph, you're mentioning
19 this issue, and you say "while it is true that the
20 intent of this policy was not to cover PI/AI claims
21 as respects AOL's online activities, coverage for
22 PI/AI was supposed to be included for AOL's normal
23 business activities." Do you see that?

24 A Yes.

25 Q What do you mean by "normal business

1 activities"?

2 A I think earlier I referenced some examples
3 of normal business activities, so I think I've
4 already answered that question.

5 Q The things we talked about before that
6 were more premises related and those examples you
7 gave. Is that what you're referring to?

8 A No, because PI/AI coverage isn't premises
9 coverage.

10 Q Things can happen at the premise versus in
11 the Internet world or in the intranet world;
12 correct?

13 A Yes.

14 MR. ABELSON: To be clear, I'm not sure.
15 You may be talking across each other. If you're
16 trying to reference a prior answer, maybe you want
17 to give her the answer again. I'm not going to
18 object that it's been asked and answered.

19 BY MS. THORPE:

20 Q Earlier when we talked about normal
21 business activities, that was a term you used in
22 describing the difference between what this -- there
23 was personal injury and advertising injury coverage
24 for and what there wasn't coverage for?

25 MR. ABELSON: That misstates prior

1 here in Dulles?

2 A Back in '99?

3 Q Right.

4 MR. ABELSON: The question is speculative.

5 BY MS. THORPE:

6 Q Let me back up. If a claim came to any of
7 these subsidiaries, they would forward it on to AOL
8 here in Dulles?

9 A You know, I don't know.

10 Q Remember we talked about the claim
11 services agreement with St. Paul?

12 A I wasn't here in '99 so I don't know what
13 their practices were. I'm not certain.

14 Q As risk manager since May of 2000 when you
15 joined AOL, was the idea that claims against any of
16 these subsidiaries would be routed to the offices
17 here in Dulles?

18 A That's the practice now, current practice.

19 Q Has that practice changed since you
20 started in May of 2000?

21 A Yes.

22 Q What was it in May of 2000?

23 A There was a time when legal was very
24 involved in claims, and they reported claims
25 directly, and I was not involved.

1 Q Legal is also here in this office?

2 A AOL legal.

3 Q So the difference is that the claims might
4 have gone to the legal department for AOL and now
5 they go to the risk management department. Is that
6 the change?

7 A They've always gone to the legal
8 department. The change would have been that now I'm
9 looped in to claims. In 2000 legal reported claims
10 directly to the broker.

11 Q What I'm more interested in is the claims
12 are coming to Dulles, whether it's going to the
13 legal department or the risk management department.

14 MR. ABELSON: What period?

15 THE WITNESS: In what period?

16 BY MS. THORPE:

17 Q In 2000, when you were here, are you aware
18 the claims are coming here to Dulles?

19 A I think they were.

20 Q Maybe I have to ask David that one.

21 As far as the Marsh claims consultant
22 contact, who was Craig Accocelli, at some point that
23 became Dennis Love; is that right?

24 A Yes.

25 Q And he's also in Dulles?

1 online activity?

2 A You know, I really didn't recall this
3 whole series of events, so I guess that should be my
4 answer. I don't know.

5 Q Do you recall that's something that Mike
6 O'Connor came up with?

7 A I don't think so.

8 Q Do you recall that it's something that
9 Glen Spencer came up with, the idea that online had
10 to be defined?

11 A This whole time frame is blurry. No, I
12 don't recall.

13 Q You don't recall ever from April 1, '99
14 until you left Marsh in May of 2000, ever having a
15 conversation with anyone where the topic was that we
16 need to define online activity?

17 A No.

18 MS. THORPE: I'll mark the next exhibit,
19 which is Exhibit 34. This is an e-mail from Glen
20 Spencer to Matthew Swingle. You're copied as is
21 Dennis Love, and it's Bates stamped NET/SDL 11639 to
22 11641.

23 (Deposition Exhibit 34 identified.)

24 BY MS. THORPE:

25 Q Do you recall receiving this e-mail?

1 Beatty?

2 A No.

3 MS. THORPE: That's all I have. I thought
4 I had something else, but I can't find it.

5 MR. ABELSON: I actually have a couple
6 questions.

7 EXAMINATION

8 BY MR. ABELSON:

9 Q Nancy, is there a reason why 1999, when
10 you were placing the initial St. Paul policy, you
11 didn't have cause to formulate a definition of
12 online activities?

13 A Yes.

14 Q What's that reason?

15 A In 1999, it was my role to place a
16 traditional CGL policy, and Lisa Conway from Marsh
17 was placing a multimedia E&O policy. And together,
18 we were working on these two placements, and I
19 wasn't concerned about having an online activity or
20 any kind of definition because she was placing the
21 coverage in that area. And I was just picking up
22 anything that she wasn't able to cover in her
23 program. When I say "anything," I should talk about
24 that carve-back, that AI/PI coverage carve-back.

25 Q If Lisa didn't get did under the

1 multimedia policy, it was your expectation or
2 understanding that you were attempting to get it
3 back by way of carve-back?

4 A Yes.

5 Q And by that, carve-back, we're talking
6 about the AI/PI coverage?

7 A Yes.

8 Q Do you recall when the term online
9 activities first came into use?

10 A No.

11 Q Was it your understanding that the term
12 online activities, as you were using them and you
13 saw in the exhibits today, ultimately became a
14 shorthand for coverage that Lisa was getting under
15 the multimedia coverage?

16 A Yes.

17 Q To your mind, is the term online
18 activities exclusion and in particular, the term
19 online activities in that phrase a misnomer?

20 A Yes.

21 Q What would be a more accurate description
22 of what it should be called?

23 A Anything that Lisa doesn't negotiate.

24 MR. ABELSON: I have nothing else.

25 MS. THORPE: I have, of course, a couple

1 your attorney's questions that the intent in 1999
2 was that the executive risk policy would pick it up
3 or the St. Paul policy would pick it up?

4 MR. ABELSON: The question is
5 hypothetical, speculative and lacks foundation.

6 THE WITNESS: I think we were talking
7 about a coverage issue. You're talking about a
8 claims issue, so I'm having difficulty answering
9 your question because I'm focused on the coverage
10 issue.

11 BY MS. THORPE:

12 Q What's the difference between a coverage
13 issue and a claim issue?

14 A I think they're totally different.

15 Q Isn't the purpose of coverage to have
16 insurance when claims come in?

17 A Yes.

18 Q And the purpose that you've described was
19 to have a seamless insurance product so that a claim
20 comes in, there'd be coverage for it; correct?

21 A That was the goal, yes.

22 Q What you've just described in response to
23 your attorney's questions is that when a claim came
24 in, the goal was that it would be covered by the
25 executive risk policy, and if it wasn't covered by

1 that policy, you'd have the St. Paul policy to cover
2 it; correct?

3 A Yes. The goal is if a claim occurs, an
4 insured has coverage.

5 Q You just suggested that online activity,
6 instead of using that term, you should have been
7 saying that the St. Paul policy shouldn't cover
8 what's covered by the media coverage in the
9 executive risk policy; correct?

10 A Yes.

11 Q First of all, isn't that also what
12 Michelle Midwinter was saying when she e-mailed you
13 back when she said I don't want to cover you and
14 that's in the executive risk policy?

15 MR. ABELSON: The question is speculative.

16 THE WITNESS: I don't know what Michelle
17 Midwinter was thinking.

18 BY MS. THORPE:

19 Q Isn't there an agreement there? What
20 you've described sounds exactly like what Michelle
21 Midwinter said to you in some of these e-mails we
22 went over today, which is I don't want to cover in
23 the St. Paul policy what you already have in the
24 executive risk policy; correct?

25 MR. ABELSON: That mischaracterizes