ABELSON | HERRON LLP
Michael Bruce Abelson (State Bar No. 130739)
Leslie A. Pereira (State Bar No 180222)
333 South Grand Ave, Suite 650
Los Angeles, California 90071-1559
Telephone: (213) 402-1900
Facsimile: (213) 402-1901
mabelson@abelsonherron.com
lpereira@abelsonherron.com

BERGESON, LLP
Daniel J. Bergeson (State Bar No 105439)
Hway-ling Hsu (State Bar No. 196178)
303 Almaden Boulevard, Suite 500
San Jose, California 95110-2712
Telephone: (408) 291-6200
Facsimile: (408) 297-6000
dbergeson@be-law.com
hhsu@be-law.com

Attorneys for Plaintiff
NETSCAPE COMMUNICATIONS CORP.
and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al., Plaintiffs, v. FEDERAL INSURANCE COMPANY, et al., Defendants.	CASE NO C-06-00198 JW (PVT) **PLAINTIFFS' REPLY TO ST. PAUL'S OPPOSITION TO MOTION TO COMPEL PRODUCTION; MEMORANDUM OF LAW; DECLARATION OF LESLIE A. PEREIRA** Motion to be Heard Date: October 17, 2006 Time: 10:00 a.m. Judge: Magistrate Trumbull Dept: Courtroom 5 (Fourth Floor) Complaint filed December 12, 2005 **REDACTED – PUBLIC VERSION**

Dockets.Justia.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1
II. DISCUSSION 2
A Extrinsic Evidence of Meaning is (Presumptively) Relevant 2
B. The Policy's "Making Known" Language is Ambiguous 4
(i) St. Paul Has Conceded its Cases Have No Application 5
(ii) The Concept of "Publication" is Inherently Ambiguous 6
C. Production of Specific Evidence 9
(i) Discovery of Documents Created After the Policy's Issuance 9
(ii) Production of Deposition and Trial Testimony is Warranted 10
a. Relevance Arguments 10
b. Burden Arguments 11
(iii) St. Paul Already Agreed to Produce the Zacharski Deposition 13
III. CONCLUSION 14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89 (4th Cir. 2003) 3

Carey-Canada, Inc v. Cal. Union Ins. Co., 118 F.R.D 242 (D.C. Cir 1986) 9, 10

Connolly Data Systems, Inc. v. Victor Technologies, Inc., 114 F.R.D. 89 (S.D. Ca. 1987) 3

Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL 146896 (N.D. Cal. 2005) 7, 8

Mariner's Cove Site Assoc. v. Traveler's Indem. Co., 2005 U S Dist LEXIS 8352 (S.D.N Y 2005) 10

Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d 488 (E.D. Pa 2006) ..... passim

Nat'l Union Fire Ins. Co. v. Stauffer Chem. Co., 558 A. 2d 1091 (Del. 1989) 10

Owens-Brockway Glass Container v. Seaboard Surety Co., 1992 U S. Dist. LEXIS 10337 (E D Cal 1992) 10

Park University Enterprises v. Am. Cas. Co. of Reading, 314 F. Supp. 2d 1094 (2005), aff'd 442 F. 3d 1239 (10th Cir. 2006) 8

Potomac Electric Power v. Cal. Union Ins. Co., 136 F.R.D. 1 (D.C Cir 1990) 10

Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F 3d 631 (4th Cir. 2005) 2, 4, 5, 6

Surfvivor Media, Inc. v. Survivor Productions, 406 F 3d 625 (9th Cir 2005) 9

United Pac. Ins. Co. v. Kilroy Indus., 608 F Supp 847 (C D Cal. 1985) 9

STATE CASES

Banco Do Brasil, S.A. v. Latian, Inc., 234 Cal. App. 3d 973 (1991) 4

Founding Members of the Newport Beach Country Club. V. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944 (2003) 4

McKee v. State Farm Fire Ins. Co., 145 Cal App 3d 772 (1983) 9

1 ***State Cases Continued***

2 Morey v. Vannucci,
64 Cal. App. 4th 904, 912 (1998) ... 3

3 Pacific Gas & Electric Co. v. G.W. Drayage & Rigging Co.,
4 69 Cal. 2d 33 (1968) ... 3, 4

5 South Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.,
74 Cal. App. 4th 1232 (1999) ... 3

6

7 **FEDERAL STATUTES**

Federal Rule of Civil Procedure 26(b)(1) ... 9

8

Federal Rule of Evidence 407 ... 9

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF LAW

I. INTRODUCTION

Notwithstanding the parties' instant dispute, they do agree on one thing: The *"making known"* provision in St. Paul's Tech Policy is critical to this action's determination. Given this shared recognition, St. Paul's Opposition is curious, especially its arguments that discovery into the provision's meaning/understanding is improper. Indeed, the insurer's entire opposition here is undercut by the fact that St. Paul both sought – and received – extensive testimony from Plaintiffs into the meaning of its own Tech Policy's "making known" provision. To be precise, St Paul asked Plaintiffs' (former) broker and (current) AOL claims administrator, Nancy Perkins, far-ranging questions regarding the policy's key "making known" provision, including:

- Questions regarding her "understanding" of the challenged language, and what she "thought those words meant." (Pereira Decl., ¶ 2, Ex. C (Perkins Depo.) Tr. at 132:3-14; 133:21-134:1);
- Questions seeking explanation of whether she "agreed or disagreed" that the Tech Policy was "providing coverage if [Plaintiffs] were to make known to other persons or organizations, written or spoken material that violated a person's right of privacy." (See id., Tr. at 132:3-21). St. Paul also sought to have Ms. Perkins "explain why" she believed the coverage operated as it did. See id;
- Questions regarding various hypothetical situations implicating the challenged language. See id., Tr. at 133:21-134:22; and
- Whether the subject provision's meaning was discussed "at any time" with "anyone," *including* discussions with counsel. See id., Tr. at 136:4-137:4.

Moreover, St. Paul elicited such testimony while, at the same time, belittling many of the same foundational objections the insurer now interposes to block Plaintiffs' discovery. See id., Tr. at 132:22-133:3. Stated otherwise, St. Paul had its opportunity to discover this information from Plaintiffs. Now it's Plaintiffs' turn. Fair is fair.

That St Paul should insist upon such asymmetry is not surprising. In fact, it seems to be the norm. For example, St Paul seeks to block Plaintiffs' discovery of the policy's "advertising injury" coverage, which uses the same "making known" language as St. Paul's "personal injury coverage. According to St. Paul, the issue is irrelevant because it's a different coverage provision. See Opposition at 3, 9, 10. Yet despite this argument, St. Paul's Opposition here relies upon two different "advertising injury" cases –Melrose Hotel and Resource Bankshares St. Paul also argues that the "advertising injury's" language in those cases is determinative of "personal injury" issues found here. See id. at 6-8. How can this be, if the issue is (truly) irrelevant? Similar discovery disjunctions concern St. Paul's refusal to produce the deposition transcript of Mr. Zacharski, the St. Paul claims adjuster whose name repeatedly appears in Plaintiffs' claim file (see Moving Papers, Ex B), and who also testified in the Melrose Hotel action regarding the policy's "making known" language According to St. Paul, the Zacharski deposition is irrelevant. *Nevertheless*, St. Paul strenuously argues that the Melrose Hotel decision will be binding precedent in this action See Opposition at 7-8. It's either irrelevant or it's not. St. Paul can't have it both ways.[1]

Taken as a whole, Plaintiffs are entitled to discover the meaning/construction of St. Paul's "making known" provision. As further discussed below – and despite the (obvious) lack of reciprocity in St. Paul's position – Plaintiffs' proposed discovery is relevant to critical issues in this action.

II. DISCUSSION

A. *Extrinsic Evidence of Meaning is (Presumptively) Relevant*

As matters stand, the parties' have structured this action so the District Court may dispose of coverage issues by way of cross-motions for summary adjudication. Hearing on those motions is set for February 12, 2007. Central to any determination will be the meaning and application of the Tech Policy's "making known" language. Despite this, St. Paul argues that

[1] As noted in below, St. Paul also previously *agreed* to produce the Mr. Zacharski's deposition. See Section II(C)(iii), infra. A position it now (seemingly) disavows.

1 "intent" or "meaning" evidence has no place in the forthcoming proceeding.[2] See Opposition at
2 5-8 Such a conclusion is wrong.
3 Indeed, California courts are affirmatively required to consider extrinsic evidence
4 when called upon to make coverage determinations. So strong is this mandate that
5 "it is reversible error for a trial court to refuse to consider such extrinsic
6 evidence on the basis of the trial court's own conclusion that the language
7 of the contract appears to be clear and unambiguous on its face Even if a
8 contract appears unambiguous on its face, a latent ambiguity may be
9 exposed by extrinsic evidence which reveals more than one possible
10 meaning to which the language of the contract is reasonable susceptible"
11 Morey v. Vannucci, 64 Cal. App. 4th 904, 912 (1998); see also South Pacific Transportation Co.
12 v. Santa Fe Pacific Pipelines, Inc., 74 Cal. App. 4th 1232, 1246 (1999) ("[i]t is reversible error to
13 refuse to consider extrinsic evidence"). Accordingly, Courts are instructed to preliminarily
14 consider "all credible evidence to prove the intention of the parties" so as to determine whether
15 the contract's language is "fairly susceptible of either one of the two interpretations contended
16 for." See Pacific Gas & Electric Co. v. G.W. Drayage & Rigging Co., 69 Cal 2d 33, 39-40
17

18 [2] St. Paul's Opposition implies – but does not seem to fully commit to – the argument that
19 Virginia law applies to the underlying coverage dispute here. See Opposition at 5, n.6. Plaintiffs contest this assertion and, to date, the Court has not been formally presented with (nor has it
20 ruled upon) the choice-of-law argument St. Paul posits here

21 While it is true Virginia law was applied to various issues in an *unrelated* coverage litigation solely between *AOL and St Paul* (America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d
22 89 (4th Cir 2003), it is also true that Plaintiff Netscape was not a party to that action. Indeed, the instant dispute is a wholly different animal. At bottom, it is a coverage action arising out of the
23 conduct of Netscape, a company based in California, regarding a product developed at
24 Netscape's offices in Mountain View, California (SmartDownload), and touching upon the rights of nationwide consumers, including consumers located in California. AOL was made a party to
25 the underlying SmartDownload Lawsuits merely because it purchased Netscape in April 1999. Given such factors, as well as St. Paul's failure to make a proper choice-of-law showing,
26 California discovery law presumptively applies to this proceeding. Cf Connolly Data Systems,
27 Inc. v. Victor Technologies, Inc., 114 F.R.D. 89, 91 (S.D. Ca. 1987) (court sitting in diversity follows forum law in discovery disputes unless party timely invokes law of foreign state and
28 demonstrates latter rule of decision will further interests of foreign state and, therefore, is an appropriate one for the forum to apply in the case before it.)

1 (1968). If it is, extrinsic evidence is relevant (and admissible) to prove either of such meanings
2 See id.; see also Founding Members of the Newport Beach Country Club. V. Newport Beach
3 Country Club, Inc., 109 Cal App. 4th 944, 955 (2003) ("Extrinsic evidence is admissible to
4 prove a meaning to which the contract is reasonably susceptible . if the trial court decides, after
5 receiving the extrinsic evidence, that language of the contract is reasonably susceptible to the
6 interpretation urged, the evidence is admitted to aid in interpreting the contract."); Banco Do
7 Brasil, S.A. v. Latian, Inc., 234 Cal App. 3d 973 (1991).

8 Such an approach makes good sense For a contrary rule "would either deny the
9 relevance of intention of the parties or presuppose a degree of verbal precision and stability our
10 language has not attained" Pacific Gas & Electric Co., 69 Cal. 2d at 37. It is for this very
11 reason, one supposes, that St. Paul questioned Plaintiffs' witness (Nancy Perkins) regarding the
12 meaning and application of the Tech Policy's "making known" provisions. Like Plaintiffs, St.
13 Paul gathered such information in order to present a defensive response in the event the Court
14 determines the policy's language is ambiguous and/or Plaintiffs introduce extrinsic evidence, as
15 is their right. To now deny Plaintiffs access to the very discovery they need to both mount their
16 case and to fend-off St. Paul's anticipated defense is tantamount to a denial of process.
17 Accordingly, the requested discovery should be ordered.

18 ***B. The Policy's "Making Known" Language is Ambiguous***

19 St. Paul backstops its "legal" argument by pointing to two different cases
20 implicating the "making known" language found in the "advertising injury" provisions of St.
21 Paul's *Standard* GL Policy: Resource Bankshares Corp. v. St. Paul Mercury Ins. Co., 407 F. 3d
22 631 (4th Cir. 2005) and Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d
23 488 (E.D. Pa. 2006). Based on those two cases, St. Paul argues its *Tech* Policy's "making
24 known" language requires third party disclosure. See Opposition at 6-8.

25 Such a conclusion is wrong for at least two different reasons. *First*, St. Paul has
26 previously conceded that its purported precedent has no application here. *Second*, the courts of
27 this district have previously held as ambiguous the "publication" criterion at the heart of
28 Plaintiff's "making known" language.

1 *(i)* **St. Paul Has Conceded its Cases Have No Application.**

2 The fact is, St. Paul's reliance on Resource Bankshares and Melrose Hotel is
3 misplaced Indeed, distinctions here are many, and include:

4 (1) Both cases are based upon transgressions against the
5 Telephone Consumer Protection Act (TCPA) – a statute which has no application
6 here. See Resource Bankshares, 407 F 3d at 633-34; Melrose Hotel, 432 F. Supp.
7 2d at 492-93;

8 (2) The privacy violations at issue in both cases (unwarranted
9 intrusions) are predicated upon the "pushing" of unwanted faxes upon unwitting
10 recipients, and property damage caused thereby. See Resource Bankshares, 407
11 F. 3d at 633-34; Melrose Hotel, 432 F. Supp. 2d at 492-93. By contrast, the
12 SmartDownload Lawsuits had no property component, and the basic privacy
13 allegation there was the interception and dissemination of consumers' private
14 information;

15 (3) In both cases coverage is based upon alleged property
16 damage (PD) and advertising injury (AI) coverages. See Resource Bankshares,
17 407 F. 3d at 634-35; Melrose Hotel, 432 F Supp 2d 496-504 (advertising injury),
18 504-512 (property damage). By contrast, the SmartDownload Lawsuits
19 implicated the Tech Policy's "personal injury" (PI) coverage;

20 (4) Neither case considered the impact of California privacy
21 rights which, of course, are quite different those of other states, and even more
22 extensive than their federal analogues.

23 Happily, this Court doesn't need to determine the validity of these distinctions.
24 Moreover, this Court doesn't even need to read St. Paul's authorities This is so because St. Paul
25 has previously *admitted away* the entire line of TCPA cases like Resource Bankshares and
26 Melrose Hotel Indeed, St. Paul's litigation counsel (Sara Thorpe) previously declared to
27 Plaintiffs, "TCPA claims" and cases "allegedly implicat[ing] the PD and AI coverages" have
28 "nothing to do with the PI coverage in this case." See Pereira Decl., ¶ 3, Ex. D (August 29, 2006

email from Thorpe to Leslie Pereira)

REDACTED

For the insurer to now turn around and cite Resource Bankshares and Melrose Hotel as dispositive authority smacks of gamesmanship. Moreover, St. Paul's tactics highlight the absolute need for the discovery Plaintiffs seek. Indeed, the parties will soon be filing their cross-motions on coverage issues The mere possibility that St. Paul may (again) try to use TCPA authority and press "advertising injury" type cases means that Plaintiffs are entitled to discovery to repulse the insurer's efforts.

(ii) **The Concept of "Publication" is Inherently Ambiguous**

In an effort to determine the meaning of the Tech Policy's "*making known*" provision, Plaintiffs have sought documents and testimony bearing on the evolution of that critical phrase. Prior to 1991, St Paul's "personal injury" coverage for privacy violations was triggered by "written or spoken material *made public* which violates an individual's right of privacy " See Pereira Decl., ¶ 4, Ex E (Solberg Depo.), Tr. at 124:17-25, 127:23-19 In 1991, St. Paul changed its coverage formulation for privacy violations to the instant "*[m]aking known to any person or organization* written or spoken material that violates an individual's right of privacy." See id (italics supplied).

According to Eric Solberg – St. Paul's "person most knowledgeable" regarding changes to the policy's language since 1985 – the reformulation of the policies' "*made public*" language to "*making known to any person or organization*" language was merely an editorial change, oriented toward modernizing the policy's verbiage. According to Mr Solberg, the instant phrase still means "*made public*." As Mr Solberg testified:

[3] Ms. Lamble is, of course, the same "Senior Claim Attorney" who submits here a detailed declaration regarding the purported burden of producing trial and deposition testimony regarding "other claims "

REDACTED

At a minimum, Ms. Lamble – or some other St. Paul PMK – should be deposed to test the veracity of her sworn assertions re: burden. See Section II(C)(ii)(b), infra

REDACTED

1 Q [by Plaintiffs' Counsel]: What do you mean by that? What is more
2 modern about the replacement language?
3 A [by Mr. Solberg]: It's just a different way of expressing our intent,
4 but the intent of *made public* with *making known to any person*
5 *or organization* is I think consistent.
6 Q: Between the two forms?
7 A Uh-huh.
8 See id., Ex. E (Solberg Depo Tr. 128:13-19) (italics supplied)[4]
9 St. Paul's view that no material difference exists between the phrases "made
10 public" and "making known to any person or organization" is important, especially in light of
11 this district's recent decision in Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL
12 146896 (N.D. Cal. 2005).
13 In Lenscrafters, plaintiff/insureds sued their insurers for failing to defend them
14 against a putative class action alleging, among other things, privacy violations based on the
15 disclosure of patients' private medical information Id. at *1-2 At issue was a business
16 relationship between Lenscrafters (a purveyor of eyewear) and Eyexam (an HMO that employed
17 optometrists to provide eye examinations); Eyexam's offices were located next to Lenscrafters'
18 stores. As alleged, Lenscrafters' "optical specialists" would work with Eyexam's optometrists
19 by, among other things, eliciting patients' medical and "lifestyle" histories, attending patients'
20 optometric examinations, and transcribing for Eyexam optometrists during patients'
21 examination. Such information would then be used to sell patients Lenscrafters' products.
22 According to Lenscrafters, coverage for the patients' privacy lawsuit was
23 triggered under its policy's "personal injury" coverage, defined there as "[o]ral or written
24
25
26
27
28

[4] While St. Paul is certainly free to put forward whomever it believes is best-suited to serve as its PMK, Mr Solberg's lack of preparation raises serious questions regarding his adequacy as a corporate witness. As he (candidly) testified, "I did not prepare for the deposition. The only time that I have given thought to this particular deposition would be for scheduling purposes and meeting with my counsel [90 minutes to 2 hours the day prior]" See Pereira Decl, ¶ 4, Ex. E (Solberg Depo., Tr. At 5:6 to 7:20).

1 publication of material that violates a person's right of privacy." See id. at *8. Its insurer
2 disagreed. Like St. Paul here, the insurer argued that Lenscrafters was not alleged to have
3 "published any confidential medical information to any third parties." See id. at *8-9. Rather,
4 the insurer argued that the underlying action merely described Lenscrafters' pattern and practice
5 of accessing and invading the optometrists' realm, and ultimately obtaining access to patient
6 information." See id. at *9. Accordingly, Lenscrafters' insurer said that no coverage applied.
7 Dissatisfied with this determination, Lenscrafters sued.

8 Following cross-motions for summary judgment, the district court held for the
9 insured (Lenscrafters). See id. at *13. Applying California insurance and privacy principles, the
10 court noted, among other things, that: (1) the term "publication" was not defined in the insurer's
11 policy, see id. at *10; (2) the insurer's policy did not limit covered "right of privacy" to common
12 law privacy rights, see id.; and (3) California's privacy rights are more extensive than common
13 law privacy rights, see id. The district court also found, "at the very least" that the policy's term
14 "publication of material that violates a person's right of privacy" was ambiguous. See id. at *11.
15 In doing so, it relied upon the decision in Park University Enterprises v. Am. Cas. Co. of
16 Reading, 314 F. Supp. 2d 1094, 1107 (2005), aff'd 442 F. 3d 1239 (10th Cir. 2006), holding that
17 "publication could include mere transmittal of material, *regardless* of whether such transmittal is
18 to a third party." See Lenscrafters, id. at *11 (italics supplied).

19 All these same principles apply here to establish coverage: St. Paul's policy does
20 not define the terms "*made public*" nor the phrase "*making known to any person or*
21 *organization*." The SmartDownload Lawsuits were national in scope and, therefore, implicated
22 California privacy rights which, as the Lenscrafters Court noted, are broader than common law
23 privacy rights. For its part, St. Paul's policy does not define the nature or the extent of the
24 privacy rights it covers and, in fact, St. Paul's underwriter previously testified that its Tech
25 Policy was meant to cover *all* forms of privacy, whether common law, constitutional, statutory,
26 or otherwise. See Pereira Decl., ¶ 5, Ex. F (Midwinter Depo., Tr. 117:15 to 119:13). Finally,
27 California privacy and coverage law hold that, in context, the term "publication" – a variant of
28 the phrase "*made public*" and the predecessor to the instant policy's "*making known*" phrase, is

1 ambiguous. Accordingly, Plaintiffs are entitled to develop extrinsic evidence to further
2 prosecute their action As such, the documents and testimony requested in Plaintiffs' discovery
3 requests should be produced

4 *C.* ***Production of Specific Evidence***

5 *(i)* **Discovery of Documents Created After the Policy's Issuance**

6 St. Paul argues that its production obligations ended with the 2001 revision of its
7 policy, and that documents created *after* the Tech Policy's issuance are not relevant. Support for
8 its position is based upon Fed. R Evid. 407 and McKee v. State Farm Fire Ins. Co., 145 Cal
9 App 3d 772, 777-78 (1983), holding, on the basis of relevance, that evidence of an insurer's
10 revision of policy language is *inadmissible* as a subsequent remedial measure. See Opposition at
11 9

12 Such authority has no application at this stage of the proceedings where the
13 precise issue is discoverability, not admissibility In this regard, the requested documents and
14 testimony are extremely relevant – arguably to the point of being prejudicial in the context of an
15 actual trial. But see United Pac. Ins. Co. v. Kilroy Indus., 608 F. Supp. 847, 854 (C.D. Cal.
16 1985) (court recognizes policy ambiguity based upon insurer's subsequent revision of policy).
17 Yet, this is not a trial. It is a Motion to Compel Its primary purpose is to press the insurer to
18 reveal information "reasonably calculated" to lead to the production of admissible evidence. See
19 Fed. R. Civ. Proc 26(b)(1); Surfvivor Media, Inc. v. Survivor Productions, 406 F.3d 625, 634
20 (9th Cir 2005). Recognizing these procedural distinctions, the court in Carey-Canada, Inc v. Cal.
21 Union Ins. Co., 118 F.R.D. 242, 245 (D.C. Cir 1986), revisited McKee's *ratio decindi*, to
22 reinterpret its "relevance" explanation, noting viz:

23 "Although the [*McKee*] court stated that evidence of subsequent
24 revision . . . in an insurance policy is inadmissible because it is
25 irrelevant, the court's reasoning compels a different conclusion. In
26 excluding this evidence the court analogized to an evidentiary rule
27 that subsequent remedial or precautionary measures are
28 inadmissible to prove culpable conduct. This rule is based,

1 however, not on the grounds that the evidence is not probative of
2 culpable conduct, but rather that public policy favors remedial
3 action. *Cf Fed R. Evid 407* [parenthetical omitted]. Thus,
4 contrary to the *McKee* court's statement, the information plaintiff
5 seeks **is relevant**, but for reasons of public policy may not be
6 admissible at trial"

7 See id., 242 n 10 (underscoring and bold supplied)

8 Without a doubt, the information Plaintiffs seek to discovery is relevant to the
9 interpretative issues in controversy here. Whether, in the final analysis, particular post-policy
10 documents will be admissible at trial remains to be seen. Ultimate questions of admissibility will
11 be made at the time of the pre-trial conference and will turn, in part, upon the peculiarities of the
12 precise issues set for trial Pending such determinations, discovery of the requested information
13 should be allowed.

14 *(ii)* **Production of Deposition and Trial Testimony is Warranted**

15 Relying on three separate arguments, St Paul seeks to duck its obligation to
16 provide sworn testimony – deposition and trial transcripts – regarding its policies' "making
17 known" language. In order, St. Paul relies upon arguments of relevance, burden, and the
18 specifics of James Zacharski's testimony in the Melrose Hotel action. None of these arguments
19 are persuasive, and all are easily refuted

20 **a. Relevance Arguments** St. Paul claims that "sworn" testimony of
21 other claims is irrelevant. See Opposition at 10. Extensive case law authority – in California
22 and elsewhere – holds otherwise See e.g., Owens-Brockway Glass Container v. Seaboard
23 Surety Co., 1992 U.S. Dist LEXIS 10337, *8-9 (E.D. Cal. 1992) (allowing discovery of "other
24 claims" to demonstrate, in interpretative context, insurers' course of dealing, carriers
25 understanding of policy language at time of issuance, language reasonably susceptible to
26 insured's understanding favoring coverage); Mariner's Cove Site Assoc. v. Traveler's Indem.
27 Co., 2005 U S Dist. LEXIS 8352, *3 (S D N.Y. 2005); Potomac Electric Power v. Cal. Union
28 Ins. Co., 136 F.R.D. 1, 4 (D.C. Cir 1990); Nat'l Union Fire Ins. Co. v. Stauffer Chem. Co., 558

1 A 2d 1091, 1095-96 (Del. 1989). As exemplified in the listed authorities, courts routinely order
2 production of "other claim" information where, as here, policy interpretation is at issue.
3 b. **Burden Arguments**. St. Paul's "burden" argument – based on Judi
4 Lamble's detailed declaration – is intriguing. Viewed as a whole, Ms. Lamble's unilateral (and,
5 as yet, unchallenged) statements paint a portrait of an insurance behemoth in disarray. To
6 believe Ms. Lamble, the insurer is barely holding together, given its antiquated computer and
7 claims tracking systems. See Lamble Decl. at ¶¶ 7-9. According to Ms. Lamble, finding
8 Plaintiffs' requested transcripts "would be nearly, if not completely, impossible." See id. at ¶ 8.
9 She avers that transcripts are not held in any type of central depository (see id. at ¶ 7), and that a
10 "refined" computer search cannot be created to locate such information. See id. at ¶ 9. Ms.
11 Lamble's picture of St. Paul's claims department is not pretty, and it stands in stark contrast to
12 the company's public presentation of itself as a $113.2 ***B***illion company who proclaims to be
13 "[A] leading provider of property casualty insurance and surety products and of risk management
14 services to a wide variety of businesses and organizations and to individuals." See Pereira Decl.,
15 ¶ 6, Ex. G at 1 (sampling of pages collected from St Paul's Internet website: "About Us").
16 Needless to say, Ms. Lamble's declaration raises more questions than it settles
17 The St. Paul Traveler's Company is a publicly traded entity (NYSE: STA) which, by law, is
18 required to track and disclose material litigation as part of its routine financial reporting Given
19 Ms. Lamble's statements, one wonders how the company complies with its obligations. Surely,
20 it has systems for querying its personnel regarding relevant litigation. Ms. Lamble does not
21 explain why these systems (or some other alternatives) cannot be utilized. Likewise,
22 unexplained is the fact that the St. Paul website lists Bonita Girard (not Judi Lamble) as the
23 relevant contact for St. Paul's Technology and Intellectual Property claims unit. See id. at 3.
24 ("Specialty Claim Services – Contact Information"). This issue is, perhaps, best understood
25 when assessing Ms. Lamble's statements made "to the best of [her] knowledge" regarding non-
26 existent "customs and practices" of Travelers' claim unit. See Lamble Decl., at ¶ 7 Such
27 testimony causes one to question whether Ms. Lamble is, indeed, the right declarant here, or
28 whether St. Paul has purposefully put forward a witness who is intentionally uninformed/

misinformed as to relevant topics. Finally, there is the issue of Ms. Lamble's language. She refers to "*Travelers*" (id. at ¶ 7), "*Travelers'* Technology Claim group" (id. at ¶ 4), and "*Travelers* Claim Services organization." Id. at ¶ 8. In other instances, Ms. Lamble speaks clearly of "St. Paul." See e.g., id. at ¶¶ 6, 9, 12, 14. In so doing, it is uncertain whether Ms. Lamble has both conflated and confused the St Paul organization in an effort to cloud issues and, thereby, thwart Plaintiffs' discovery

Whatever the answer to these questions, St. Paul should not be allowed to use its systems' shortcomings to shield itself from Plaintiffs' legitimate discovery requests. ***Nevertheless*, in an effort to move this matter ahead, Plaintiffs offer to both narrow and resolve Netscape Request No. 22 by limiting the designated time period for production of "sworn testimony" to January 2003 to October 2006, inclusive**[5] To the extent St. Paul opts to stand on its objections, Plaintiffs request the opportunity to test the veracity of Ms. Lamble's claims of burden and impossibility. Toward that end, Plaintiffs request a court order:

(a) Requiring St Paul to produce Ms Lamble for deposition regarding the subjects raised in her declaration and, further, ordering attorney-client and work-product privileges are waived This latter requirement is essential to head-off anticipated disputes By her own admission, Ms. Lamble is a "Senior Claim Attorney" who has affirmatively injected herself, her work-product, and her communications into this proceeding As such, St. Paul cannot rely upon Ms. Lamble's testimony to fend-off discovery and then "hide behind" attorney-client and work product privileges when Plaintiffs question her assertions; and

(b) Requiring St. Paul to produce for deposition Ms Bonita Girard *and* St. Paul's "person most knowledgeable" regarding the insurer's computer claims management systems ("Systems PMK"). The reason for such depositions is viz: St. Paul's public website identifies

[5] This is a return to Plaintiffs' prior attempts to negotiate this request to resolution. When St. Paul proved resistant, Plaintiffs resolved to move on its broader formulation

Plaintiffs also understand that St. Paul may desire to redact irrelevant or other information it deems non-responsive. As previously stated, Plaintiffs stipulate to such measures. All they want is testimony concerning the "making known" provisions of the insurers' "personal injury" and 'advertising injury" policies.

1 Ms Girard (and not Senior Claims Attorney, Judi Lamble) as the relevant company contact for
2 its Technology and Intellectual Property Claims unit. Presumably, Ms. Girard
3 knows/understands how her department operates, its abilities, and its limitations. As for St.
4 Paul's Systems PMK, testimony is sought to both test Ms. Lamble's explanation of St Paul's
5 computer complexities, and to explore whether (alternative) solutions exist for locating
6 Plaintiffs' requested discovery.

7 As indicated, Plaintiffs want to be reasonable. Whether this dispute will require
8 this Court's intervention is (again) up to St. Paul The "sworn testimony" Plaintiffs seek here is
9 indisputably relevant. Left unknown is how far St. Paul wants to push its claim of burden

10 *(iii)* **St. Paul Already Agreed to Produce the Zacharski Deposition**

11 Production of Mr. Zacharski's deposition from the Melrose Hotel action should
12 not be controversial. St Paul *knows* of the case. It *has* Mr. Zacharski's transcript. *None* of the
13 "burdens" Ms. Lamble describes are in play. St. Paul's Opposition repeatedly references the
14 Melrose Hotel decision as *dispositive* precedent against Plaintiffs' interpretative arguments *and*
15 Mr. Zacharski's name even shows-up in Plaintiffs' claim file See Plaintiffs' Motion to Compel,
16 Ex. B. Given this record, it's difficult to understand what evidence could be more relevant

17 It is also no answer for St. Paul to claim that Plaintiffs "do not need the Zacharski
18 deposition" because it produced other witnesses or evidence in this matter. See Opposition at 13.
19 As St. Paul well-knows, the purpose of discovery is for Plaintiffs to ask *their* own questions,
20 gather *their* own evidence, and to seek discovery in *their* own way St. Paul's production of
21 "other testimony" does not discharge this obligation, especially when such testimony has been
22 circumscribed in time, scope, or subject matter Indeed, the depositions of Mr Solberg, Mr.
23 Weiss, and Ms. Evensen are riddled with objections and interruptions which either block or color
24 the unrehearsed testimony Plaintiffs seek here.

25 Finally, St. Paul's rationales for refusing to produce Mr. Zacharski's deposition
26 testimony are all but mooted by the fact that St. Paul previously agreed to produce his transcript.
27 See Pereira Decl., ¶ 3, Ex. D As St. Paul's email on this topic makes plain, the insurer's sole
28 concern is compliance with existing court orders – a condition to which Plaintiffs readily agree.

Given St. Paul's prior agreement, all other objections appear feigned. The Zacharski transcript should be produced.

III. CONCLUSION

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

Dated: October 12, 2006

ABELSON | HERRON LLP
Michael Bruce Abelson
Leslie A. Pereira

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

DECLARATION OF LESLIE A. PEREIRA

I, Leslie A. Pereira, declare as follows:

1. I am an attorney licensed to practice law in the state of California, as well as the bar of this court. In that capacity, I am counsel to Plaintiffs Netscape Communications Corporation and America Online, Inc. (collectively, "Plaintiffs") in this action.

2. Attached hereto as Exhibit C are true and correct copies of pages from the August 3, 2006 deposition transcript of Plaintiffs' (former) insurance broker and (present) AOL claims administrator, Nancy Perkins.

3. Attached hereto as Exhibit D is a true and correct copy of an August 29, 2006 email I received from St. Paul's counsel in this matter, Sara Thorpe. Attached immediately underneath Ms. Thorpe's email to me – and forwarded to me by Ms. Thorpe – is an email purporting to be an email Ms. Thorpe received on August 29, 2006 from Ms. Judi Lamble, St. Paul's Senior Claim Attorney and a declarant in this proceeding.

4. Attached hereto as Exhibit E are true and correct copies of "rough" transcription pages from the September 29, 2006 deposition of Mr. Eric Solberg, St. Paul's designated "person most knowledgeable" concerning changes to St. Paul's personal injury liability coverage since 1985. As of the time of this filing, final deposition pages are not available to me. If they are ready by the time Plaintiffs' Motion to Compel is heard, they will be brought to the proceeding for the Court's inspection.

5. Attached hereto as Exhibit F are true and correct copies of pages from the September 7, 2006 deposition of St. Paul's underwriter, Michelle Midwinter.

///

///

///

6. Attached hereto as Exhibit G is a true and correct copy of various "screenshots" taken from the Internet website of the St. Paul Traveler's Company, whose web address is viz: http://www.stpaultravelers.com

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed this 12 day of October 2006 at Los Angeles, California.

Leslie A. Pereira

EXHIBIT C

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION
3
4 - - - - - - - - - - - - - - -x
5 NETSCAPE COMMUNICATIONS :
6 CORPORATION, ET AL., :
7 Plaintiffs, : Civil Action Number
8 vs. : C-06-00198 JW (PVI)
9 FEDERAL INSURANCE COMPANY, :
10 ET AL., :
11 Defendants. :
12 - - - - - - - - - - - - - - -x
13
14
15
16
17
18 DEPOSITION OF NANCY PERKINS
19
20 Dulles, Virginia
21 Thursday, August 3, 2006
22
23
24 REPORTED BY:
25 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
20
21
22
23
24
25 --continued--

BARKLEY Court Reporters

1 APPEARANCES (Continued):
2
3 MICHAEL BRUCE ABELSON, ESQ.
4 Abelson Herron LLP
5 333 South Grand Avenue, Suite 650
6 Los Angeles, California 90071
7 213-402-1900
8 mabelson@abelsonherron.com
9 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
16
17
18
19
20
21
22
23
24
25

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 Hesen 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.

BARKLEY Court Reporters

1 in the policy. Is that a true general statement?
2 A Yeah -- yes.
3 Q Going back to this personal injury offense
4 definition we were talking about, the making known
5 to any person or organization, was it your
6 understanding that this was providing coverage if
7 AOL or any of its subsidiaries were to make known to
8 other persons or organizations, written or spoken
9 material that violated a person's right of privacy?
10 MR. ABELSON: The question lacks
11 foundation. It's also --
12 BY MS. THORPE:
13 Q I'm just asking your understanding as to
14 what you thought those words meant.
15 MR. ABELSON: The question lacks
16 foundation, poses an incomplete hypothetical.
17 THE WITNESS: I don't know how to answer
18 that.
19 BY MS. THORPE:
20 Q Do you agree or disagree with that
21 statement? I'm going to ask you to explain why.
22 MR. ABELSON: She may not agree or
23 disagree or even understand it. That's the problem.
24 You haven't demonstrated foundationally that she has
25 an understanding of how that operates. To ask her

1 to agree or disagree is misleading.
2 MS. THORPE: I completely disagree with
3 your objection if that's what that was.
4 MR. ABELSON: That's what that was.
5 BY MS. THORPE:
6 Q Nancy, as a Marsh broker putting together
7 this AOL insurance program, did you try to have an
8 understanding about the insurance you were
9 suggesting that AOL purchase?
10 A I was one of several people, but yes.
11 Q On the general liability part which was
12 the part you were responsible for, you had a general
13 understanding of the insurance coverages you were
14 trying to obtain for your client, AOL; correct?
15 A Yes.
16 Q Once you became a risk manager at AOL, did
17 you have a general understanding of the coverage
18 provided by insurance policies that were purchased
19 for AOL?
20 A Yes.
21 Q Looking back again at the personal injury
22 offense, the "making known to any person or
23 organization written or spoken material that
24 violates a person's right to privacy," did you have
25 an understanding, both as a Marsh broker and as an

1 AOL risk manager as to what that meant?
2 MR. ABELSON: The question is compound.
3 You can answer.
4 THE WITNESS: I don't even know how to
5 answer it.
6 BY MS. THORPE:
7 Q Let me go about it another way. AOL was
8 privy to private information from people; right?
9 A Yes.
10 Q Example, people gave credit card
11 information?
12 A Correct.
13 Q And in the course of AOL's business, they
14 got other private information from people; isn't
15 that correct?
16 A Yes.
17 Q So it's possible that AOL could put out a
18 newsletter or somehow make public information that
19 people considered private. That's a possibility of
20 risk, isn't it?
21 MR. ABELSON: The question is speculative.
22 THE WITNESS: Could be a risk.
23 BY MS. THORPE:
24 Q Is that the kind of risk that you
25 contemplated that you needed insurance coverage for?

BARKLEY Court Reporters

1 A I don't recall talking about that specific
2 risk.
3 Q Was it your understanding this part of the
4 personal injury coverage in a general liability
5 policy is for risks that the insured might
6 disseminate to other people information that was
7 private?
8 MR. ABELSON: The question lacks
9 foundation, vague and ambiguous. If you can't
10 answer a question -- if you don't know, don't make
11 up an answer.
12 THE WITNESS: I can't answer.
13 BY MS. THORPE:
14 Q Why can't you answer that question?
15 MR. ABELSON: Don't answer that question.
16 MS. THORPE: What is it about my question
17 you don't --
18 MR. ABELSON: No, no, no. You can ask it
19 and I'm going to prevent her from answering. Go
20 ahead and ask your question.
21 MS. THORPE: I'm not getting a I don't
22 recall, I don't know, I didn't think about that.
23 All you're doing is not answering. What is it that
24 makes you unable to answer that question?
25 MR. ABELSON: I'm going to instruct you

1 not to answer that question that she just posed to
2 you. Do you have a different question?
3 BY MS. THORPE:
4 Q As AOL's risk manager in analyzing whether
5 you have appropriate coverage for the risks that AOL
6 faces, have you ever considered the personal injury
7 offenses and specifically the making known to any
8 person or organization written or spoken material
9 that violates a person's right to privacy?
10 MR. ABELSON: You can answer that
11 question.
12 THE WITNESS: No.
13 BY MS. THORPE:
14 Q Has anyone at AOL ever asked you what that
15 means in the policy?
16 A Back in 1999?
17 Q No, any time.
18 MR. ABELSON: You're not to answer from
19 any discussion you've had with counsel.
20 MS. THORPE: Leaving out counsel.
21 THE WITNESS: And what was your question
22 again?
23 BY MS. THORPE:
24 Q Have you ever talked with anyone at AOL in
25 your position as risk manager about what is meant by

1 the personal injury offense "making known to any
2 person or organization written or spoken material
3 that violates a person's right to privacy"?
4 A No.
5 Q Another topic, let's move to page 15 of
6 this, which is Bates labeled SP 2308.
7 MR. ABELSON: Before you ask your
8 question, I'm going to talk to my client for a
9 moment. Step outside for a moment.
10 (Witness conferred with counsel.)
11 BY MS. THORPE:
12 Q 2308, on the right-hand side, there's some
13 bolding and it says "deliberately breaking the law."
14 Do you see that? Before I ask you the question, was
15 it your understanding as a broker at Marsh placing
16 coverage in April 1999, that in general, general
17 liability policies don't cover criminal activity?
18 MR. ABELSON: The question lacks
19 foundation. It's vague.
20 THE WITNESS: Do you want to ask it again?
21 MS. THORPE: No. I don't think there's
22 anything vague or lacking in foundation with that
23 question.
24 MR. ABELSON: We'll debate that later.
25 You can answer the question.

EXHIBIT D

Leslie Pereira

Subject: FW: AOL - Discovery Issues

From: Sara Thorpe [mailto:SThorpe@gordonrees.com]
Sent: Tuesday, August 29, 2006 11:20 AM
To: Leslie Pereira
Cc: Jason Nelson
Subject: AOL - Discovery Issues

Leslie:

Answers to some of your discovery questions:

[1 Melrose. I will send you James Zacharski's deposition after we determine whether it is subject to a Protective Order in the Melrose case. It will be provided pursuant to the Prot Order in this case. I do not have the exhibits to that deposition. I will not be providing any other documents from that case. That case involved TCPA claims that allegedly implicated the PD and AI coverages It has nothing to do with the PI coverage in this case.]

2. Side by sides and other documents going back to 1979. We are producing side by sides of the PI coverage going back to 1986. That, itself, is long before the policy at issue here. We are not going back to 1979, which is 20 years prior to this policy. AOL and Marsh witnesses have already testified they did not negotiate the PI coverage provisions in the St. Paul policy. How that language changed over the years is not relevant. To the extent AOL and St. Paul are arguing the words in the policy should be interpreted differently, that is the question for the Judge to decide at the motion for summary judgment.

Furthermore, your request is unduly burdensome.

3. I have just been advised that none of the claims people at St. Paul will be available the week of 9/25. So, we have additional challenges in working out the deposition schedule in this case. I will review whether I can rearrange anything on my calendar or get someone else to cover it.

Let me know if, rather than emailing back and forth, you want to set up a call. I am not available this afternoon, but I can talk anytime tomorrow (Wed.).

Thanks,

Sara

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

EXHIBIT E

1 DRAFT OF ERIC SOLBERG
2 9/29/06
3
4 EXAMINATION
5
6 BY MS. PEREIRA:
7 Q Good morning, Mr. Solberg.
8 A Good morning.
9 Q As I just mentioned, my name is Leslie Pereira.
10 I'm an attorney with the law firm of Abelson Herron
11 in Los Angeles, and I am representing Netscape
12 Communications Corporation and America Online in a
13 coverage action they have going in San Jose,
14 California against St. Paul Insurance Company.
15 Have you had your deposition taken before?
16 A Yes.
17 Q Let me go through a few different ground rules just
18 so we have them in mind. I don't know how recently
19 your deposition experience was.
20 Even though we are sitting in this somewhat
21 small conference room today, your testimony today
22 is given under oath as if we were sitting in a
23 court of law. Do you understand that?
24 A Yes.
25 Q And I'm going to be asking you a variety of

1 personal injury provisions in a CGL or technology
2 CGL policy?
3 A I do not recall if I was designated as the person
4 most knowledgeable for personal injury, but I have
5 certainly been designated as the person most
6 knowledgeable about the general liability forms.
7 Q Have you ever been designated by St. Paul to
8 testify as a person most knowledgeable about
9 advertising injury provisions under a CGL policy or
10 technology CGL policy?
11 A Similar to personal injury I do not recall if there
12 was a time where I was designated as the person
13 most knowledgeable about advertising injury. I
14 just don't recall that specific coverage issue as
15 far as my depositions were concerned.
16 Q Do you recall whether the deposition that you gave
17 in June 2005 pertained to either the personal
18 injury provisions of a CGL policy or the
19 advertising injuries of a CGL policy?
20 A I do not recall.
21 MS. PEREIRA: I want to mark as an
22 exhibit, we are going to start with Exhibit 115
23 since we previously used 1 through 114 and that is
24 going to be Defendant St. Paul Mercury Insurance
25 Company's Response to Plaintiff America Online,

1 Inc.' Notice of Deposition.
2
3 (Exhibit 115 was marked for identification.)
4
5 BY MS. PEREIRA:
6 Q I'm going to direct your attention to page 3 and if
7 you could look at topic No. 4 which states, "All
8 changes to the language of the personal injury
9 liability coverage in St. Paul's technology
10 commercial general liability policy since 1985."
11 I know there have been some modifications to
12 that request pursuant to St. Paul's objections but
13 do you understand that you are here today to
14 testify as a person most knowledgeable about that
15 topic?
16 MS. THORPE: Let me just clarify the
17 scope that we will allow, we will allow you to ask
18 him questions about changes to the personal injury
19 liability coverage since 1985.
20 MS. PEREIRA: So we are going to go back
21 to '85?
22 MS. THORPE: Changes since 1985.
23 MS. PEREIRA: So not including the change
24 from '85 to '91?
25 MS. THORPE: No. That will include what

1 happened in '91 but not the development of the
2 policy in '85.
3 BY MS. PEREIRA:
4 Q Okay. I understand. Mr. Solberg, do you
5 understand what you have been designated as the
6 person most knowledgeable to testify on with
7 respect to topic No. 4?
8 A Yes.
9 Q Can you tell me what did you do to prepare yourself
10 to be the person most knowledgeable for St. Paul on
11 topic No. 4?
12 A Is your question referring to discussions that I
13 may have had with my attorney that's representing
14 me today or in general?
15 Q In general. When was it you learned that you were
16 going to be put forth by St. Paul as their person
17 most knowledgeable in this deposition to testify on
18 that topic?
19 A Approximately one to two months ago.
20 Q Can you tell me what you did when you found out
21 that you were going to be designated as St. Paul's
22 person most knowledgeable on this topic?
23 MS. THORPE: Objection to the form of the
24 question.
25 A I did not prepare for the deposition. The only

1 time that I have given thought to this particular
2 deposition would be for scheduling purposes and
3 meeting with my counsel.
4 BY MS. PEREIRA:
5 Q So can you tell me when you met with your counsel,
6 just the date?
7 A That was yesterday.
8 Q How long did you meet with Counsel?
9 A Approximately an hour and a half to two hours.
10 Q Did you look at any documents during that
11 meeting?
12 A I do not recall seeing any documents.
13 MS. THORPE: Except for the
14 side-by-sides.
15 A Thank you. I did review side-by-side comparisons
16 of coverage forms.
17 BY MS. PEREIRA:
18 Q Do you recall what the years those side-by-side
19 comparisons were, what years they involved?
20 A I believe the years were the 1996 and 2001.
21 MS. THORPE: No. We didn't look at 2001.
22 We looked at 1991 and 1996.
23 A 1991 and 1996. Thank you.
24 MS. THORPE: Everything that's been
25 produced in this case.

1 MS. THORPE: Objection. Assumes facts.
2 A I don't remember any other words that we used or
3 wanted to use other than what we have here. So I'm
4 not aware of any other documentation or any other
5 material that would have offered alternatives or a
6 reason. Words that we had were carefully thought
7 through. We believe that they are very clear and
8 they express our intent.
9 MS. PEREIRA: Let me mark another
10 exhibit. I'm going to mark the side-by-side
11 comparison which is comparing the 1985 CGL form to
12 the 1991 CGL form and the Bates Nos. are SPM 2791
13 through SPM 2852.
14
15 (Exhibit 118 was marked for identification.)
16
17 BY MS. PEREIRA:
18 Q Are you familiar with this document, Exhibit 118?
19 A Yes.
20 Q Can you tell me what this document is?
21 A This is a side-by-side comparison of two different
22 forms, an April '91 form and a July '85 form.
23 Q And you testified a bit this morning about the
24 purpose of this document?
25 A Yes.

1 first page there's a person named Ken Iverson who
2 is listed there?
3 A Yes.
4 Q Can you tell me who Mr. Iverson is?
5 A Ken Iverson used to work for the company. He is
6 retired for several years now. He worked in the
7 underwriting services department as a senior
8 analyst.
9 Q Do you know if Mr. Iverson had responsibility for
10 this document at the time it was prepared?
11 A I can't say for certain. I can only tell you
12 questions would go to him, but the fact of the
13 matter is typically he did a lot of this kind of
14 work.
15 Q I want to direct your attention to the page that's
16 -- it's probably easiest to follow the Bates Nos.
17 which is SPM 2801. This change or this page
18 appears to show the change between the 1985 version
19 of the personal injury offense which we looked at
20 earlier compared to the 1996 revision, is that
21 correct?
22 A Yes.
23 Q Under the Comment section the last comment it
24 states, "Replaced made public with making known to
25 any person or organization. This change clarifies

1 coverage." Do you see that?
2 A Yes.
3 Q Can you tell me what that means, this change
4 clarifies coverage?
5 A It means it's just an editorial change. It doesn't
6 change the intent.
7 Q So in effect that says there really was no
8 substantive difference between the language made
9 public and the replacement language making known to
10 any person or organization, is that correct?
11 A The intent is that it's trying to use more modern
12 language, if I can put it that way.
13 Q What do you mean by that? What is more modern
14 about the replacement language?
15 A It's just a different way of expressing our intent,
16 but the intent of made public with making known to
17 any person or organization is I think consistent.
18 Q Between the two forms?
19 A Uh-huh.
20 Q Now, you can see two comments above that that it
21 talks about a different change and it says, "This
22 is an editorial change." So in your view is there
23 any difference between something which is an
24 editorial change and something which is a change
25 that clarifies coverage?

EXHIBIT F

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4 SAN JOSE DIVISION
5
6 NETSCAPE COMMUNICATIONS,)
et al.) COPY
7)
Plaintiffs,)
8)
vs.) No. C-06-00198
9) JW (PVT)
FEDERAL INSURANCE)
10 COMPANY,)
)
11 Defendant.)
-------------------------)
12
13
14
15
16 September 7, 2006
17 9:07 a.m.
18
19 Deposition of MICHELE MIDWINTER, held
20 at the offices of Duval & Stachenfeld, 300
21 East 42nd Street, New York, New York, before
22 Laurie A. Collins, a Registered Professional
23 Reporter and Notary Public of the State of New
24 York.
25

1
2 A P P E A R A N C E S:
3
4 ABELSON HERRON LLP
5 Attorneys for Netscape Communications
6 and American Online
7 333 South Grand Avenue, Suite 650
8 Los Angeles, California 90071
9 BY: MICHAEL BRUCE ABELSON, ESQ.
10
11 GORDON & REES LLP
12 Attorneys for St. Paul Mercury
13 Insurance Company
14 275 Battery Street, Suite 2000
15 San Francisco, California 94111
16 BY: SARA M. THORPE, ESQ.
17
18 ALSO PRESENT:
19 THOMAS KEIGHLEY, Videographer
20
21
22
23
24
25

2 M I C H E L E M I D W I N T E R ,

3 called as a witness, having been duly sworn

4 by the Notary Public, was examined and

5 testified as follows:

6 EXAMINATION BY

7 MR. ABELSON:

8 Q. Good morning, Ms. Midwinter.

9 A. Good morning.

10 Q. Would you state and spell your name for

11 the court reporter, please?

12 A. Michele, M-I-C-E-E-L-E, Midwinter,

13 M-I-D-W-I-N-T-E-R.

14 Q. And where are you currently employed,

15 Ms. Midwinter?

16 A. Travellers Insurance Company.

17 Q. What is your title as it exists today?

18 A. Account executive officer.

19 Q. And you are here today in your capacity

20 as the underwriter of a policy for America

21 Online -- I'll refer to them as AOL -- for 1999

22 and a subsequent policy that lasted through a

23 period 2001?

24 A. Correct.

25 Q. And you are also here in your capacity

1 A. To my knowledge, no, it wouldn't.

2 Q. So if it either arises out of or

3 relates to -- well, strike that. Okay. Okay.

4 Let me skip down to the final category:

5 making known to any person or organization written

6 or spoken material that violates a person's right

7 of privacy.

8 Are you with me?

9 A. Yes, I am.

10 Q. The language in this policy form was

11 actually changed from wording -- prior policy

12 language that said making public. Are you

13 familiar with that change in the policy language?

14 A. Yes.

15 Q. And it was made, as you know, went from

16 "making public" to "making known"; correct?

17 A. Correct.

18 Q. Do you know why that change was made?

19 A. I do not, no.

20 Q. Do you have any understanding of there

21 being any distinction in the coverage that's being

22 afforded by reason of the change from "making

23 public" to "making known"?

24 A. Not that I'm aware of, no.

25

1 Q. Was it your testimony -- and I'm not
2 trying to put words in your mouth. Is it your
3 testimony, though, that the coverage is exactly
4 the same and just the wording changed or you just
5 don't know?
6 A. I believe it was a clarification of
7 coverage, but, again, I'm not a hundred percent
8 sure.
9 Q. Let me ask you this: Based on what
10 knowledge you do have of it, what was your
11 understanding of what was unclear with the "making
12 public" type language used in the prior form?
13 A. I don't know.
14 Q. There's reference here to, in the last
15 line, making known to any person or organization,
16 written or spoken material. I'm going to ask you,
17 that violates a person's right of privacy.
18 Are you with me?
19 A. Yes, I am.
20 Q. There's the reference there to privacy.
21 Do you know what forms of privacy the policy is
22 meant to cover?
23 A. I don't believe that it's actually
24 defined within the policy, so I would think it
25

1 would just be common definition.

2 Q. Let me ask you about some forms of

3 privacy, and you can just say "yes," "no" or "I

4 don't know." Common-law privacy, are you familiar

5 with that?

6 A. No.

7 Q. Let me tell you what the four

8 common-law forms of privacy are.

9 A. Okay.

10 Q. Unreasonable intrusion on the seclusion

11 of another. This is from the restatement. Do you

12 know when that form of privacy is covered under

13 your policy?

14 A. Again, I would think since privacy is

15 not defined that it would include everything. So

16 I can't say a hundred percent sure. I don't know.

17 Q. Okay. I'll try the same answer with

18 regard to appropriation of another's name or

19 likeness. Same answer?

20 A. It's the same answer.

21 Q. Public disclosure of private facts.

22 Same answer?

23 A. Same answer.

24 Q. False light?

25

1 A. L-I-G-H-T?

2 Q. L-I-G-H-T.

3 A. It would be the same answer.

4 Q. Do you know whether constitutional

5 forms of privacy are covered under your policy?

6 A. It's the same answer.

7 Q. How about statutory forms of privacy?

8 A. Same answer.

9 Q. Let me ask it this way: Do you know

10 any form of privacy that your policy is not meant

11 to cover?

12 A. No, I'm not aware of any.

13 Q. Let's focus on the first part of this

14 clause: making known to any person or

15 organization written or spoken material. What's

16 your understanding of how that works, the

17 triggering phrase, "making known to any person or

18 organization"?

19 A. The making --

20 MS. THORPE: Objection, vague,

21 ambiguous.

22 MR. ABELSON: I agree, your policy form

23 is.

24 MS. THORPE: No, your question is vague

EXHIBIT G

Home > About Us

ABOUT US

St. Paul Travelers (NYSE:STA) is a leading provider of property casualty insurance and surety products and of risk management services to a wide variety of businesses and organizations and to individuals. The company reported 2005 revenues of $24.4 billion and total assets of $113.2 billion. Our products are distributed primarily through U.S. independent insurance agents and brokers. Travelers, a member of St. Paul Travelers, is the second largest writer of auto and homeowners insurance through independent agents. St. Paul Travelers is headquartered in Saint Paul, Minn., with significant operations in Hartford, Conn. The company also has offices in the U.K., Ireland and Canada.

St. Paul Travelers' corporate headquarters is located at:

385 Washington Street
Saint Paul, MN 55102
651.310.7911

© 2006 The St. Paul Travelers Companies, Inc. All Rights Reserved. Privacy Policy | Producer Compensation Disclosure | Legal Notices

ST. PAUL TRAVELERS AT A GLANCE

St. Paul Travelers offers a wide variety of insurance and surety products, as well as risk management services, to numerous types of businesses, organizations and individuals. Our products are distributed primarily through U.S. independent insurance agents and brokers under the Travelers brand.

COMPANY OVERVIEW

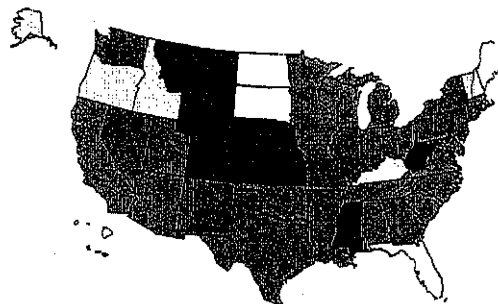
- Second-largest writer of commercial U.S. property casualty insurance[1]
- Second-largest writer of U.S. personal insurance through independent agents[2]
- Total assets of approximately $113 billion, shareholders' equity of $22 billion and total revenue of $24 billion, as of December 31, 2005
- No. 85 on the *Fortune 500* list of largest U.S. Companies, based on 2005 revenue
- Approximately 32,000 employees
- Representatives in every U.S. state, Canada, Mexico, Ireland and the U.K.
- Represented by approximately 14,000 independent agencies and brokerages countrywide

COMPETITIVE ADVANTAGES

- Considerable financial strength
- Superior depth and breadth of product offerings
- Cutting-edge technology platforms
- Fast, fair, effective claims handling
- Innovative Risk Control services
- Well-recognized brand names in the personal and commercial insurance marketplace
- Strong distribution presence with broad geographic presence across the U.S.
- Experienced and well-regarded management team
- Strong underwriting culture

[1] *Based on preliminary 2005 direct written premium, according to OneSource*
[2] *Based on 2005 direct written premium, according to A.M. Best*

U.S. Commercial Geographic Diversification



	POSITION	# OF STATES[1]
	# 1	8
	Top 2 positions	27
	Top 3 positions	39
	Top 5 positions	47
	< Top 5 positions	3

Source: A.M. Best. Based on 2005 direct premiums written. The following A.M. Best lines of business are included in the definition of "U.S. Commercial" as shown in the chart: Fire, Allied Lines, Multiple Peril Crop, Commercial Multi-Peril (Liability & Non-Liability), Financial Guaranty, Farmowners Multiple Peril, Ocean Marine, Inland Marine, Medical Malpractice, Earthquake, Workers' Compensation, Other Liability, Products Liability, Commercial Auto No-Fault, Other Commercial Auto-Liability, Commercial Auto Physical Damage, Aircraft, Fidelity, Surety, Burglary & Theft, And Boiler & Machinery
(1) Includes District of Columbia

BUSINESS SEGMENTS

Business Insurance

The Business Insurance segment offers a broad array of property and casualty insurance and insurance-related services to its clients primarily in the United States, which range from small "main street" businesses to Fortune 100 corporations. Business Insurance is organized into marketing and underwriting groups with a specialized focus on particular markets or products.

Financial, Professional & International Insurance

The Financial, Professional & International Insurance segment includes surety and financial liability coverages, which require a primarily credit-based underwriting process, as well as property and casualty products that are primarily marketed on an international basis.

Personal Insurance

Offers a broad array of property casualty insurance products to individual customers under the Travelers brand and four subsidiary company brands.

385 Washington Street
Saint Paul, MN 55102-1396

stpaultravelers.com

© 2006 The St. Paul Travelers Companies, Inc. All rights reserved CP-6352 Rev. 10-06

SPECIALTY CLAIM SERVICES

Technology and Intellectual Property Claim

St. Paul Travelers is an industry leader in providing insurance to businesses in the technology sector. We have had a dedicated underwriting business unit since 1982 and a specialty claim unit, Technology and Intellectual Property Claim, since 1998.

Technology and Intellectual Property Claim is staffed with senior claim specialists and claim attorneys who have the skills and experience necessary to resolve the complex, high exposure claims insured under our specialized coverage forms. Our claim handlers have strong litigation or litigation management experience, and extensive knowledge of technology and intellectual property and the laws related to those subjects. We handle all claims involving technology or intellectual property under any of the following, or similar, coverages:

- Technology Errors and Omissions
- Electronic Manufacturers and Computer Services Errors and Omissions
- Technology Media Liability
- Internet Liability
- Cybertech and Liability
- Web Xtend - Commercial General Liability
- Advertising Injury - Commercial General Liability

We handle claims that include allegations of damage or injury resulting from:

- Breach of contract or professional liability involving hardware, software, telecommunications, or electronic manufacturing products or services
- Medical devices
- Offenses committed on or through the Internet
- Infringement of intellectual property rights

Contact Information

Bonita Girard
385 Washington Street, Mail Code: 508A
St. Paul, MN 55102-1396
Bgirard1@stpaultravelers.com

© 2006 The St. Paul Travelers Companies, Inc. All Rights Reserved. Privacy Policy | Producer Compensation Disclosure | Legal Notices