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CORPORATION and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al ,	CASE NO. 5:06-CV-00198 JW (PVT)
Plaintiffs,	Case Filed: December 12, 2005 Assigned to: Hon. James Ware Courtroom: 8
v.	
FEDERAL INSURANCE COMPANY, et al ,	**PLAINTIFFS' NOTICE OF MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT RE: DUTY TO DEFEND AND OPPOSITION TO ST. PAUL MERCURY'S MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF LAW IN SUPPORT THEREOF**
Defendants	Date: March 26, 2007 Time: 9:00 a.m. Judge: Hon. James Ware Place: 8, 4th Floor, San Jose

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 26, 2007 at 9:00 a.m., before the Honorable James Ware, in Courtroom 8 of the United States District Court, Northern District of California, San Jose Division, Plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc ("AOL") will, and hereby do, move the Court for partial summary judgment regarding the duty to defend as against defendant St. Paul Mercury Insurance Company ("St. Paul"), pursuant to Fed. R. Civ. P. 56(b).

The issue presented is whether St. Paul had a duty to defend Plaintiffs in four federal class action lawsuits and a New York State Attorney General investigation arising out of allegations that Netscape's software product, SmartDownload, violated Internet users' rights of privacy by, among other things, improperly intercepting and disclosing their private data, including data that reflected their Internet use habits. Netscape and AOL allege that St. Paul's policy of insurance provided coverage for the SmartDownload claims and that, as a matter of law, St. Paul's failure to defend them against the federal lawsuits and investigation constitute a breach of St. Paul's policy obligation to defend.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Law in Support Thereof, the Declarations of Marc Patterson, David Park, Patrick J. Carome, Michael Bruce Abelson and Leslie A. Pereira, the Marsh Custodian of Records affidavit, the parties' Stipulation and Agreement for Purposes of Summary Judgment Motion ("Stip-MSJ"), the parties' Stipulation Re: Exhibits ("Stip-Exs"), deposition testimony,[1] exhibits,[2] the pleadings and papers on file in this litigation, and any additional evidence that may be presented to the Court, including in connection with oral argument at hearing on the Cross-Motions.

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[1] Deposition excerpts are set forth alphabetically in the Declaration of Michael Bruce Abelson and are referenced here by deponent, page and line number, e.g., Spencer Depo., 135:15-145:25.

[2] Most of the exhibits were marked at depositions and are referenced as "Ex. ___" (with specific bates number page references). The parties have stipulated to (and the Court has "So Ordered") the provision of an exhibit compendium by March 9, 2007.

MEMORANDUM OF LAW

I. STATEMENT OF ISSUES TO DE DECIDED

1 Whether California law applies to the issues presented?

2 Whether St Paul breached its duty to defend Netscape and AOL in four underlying lawsuits alleging violation of claimants' privacy rights and/or a related investigation by New York's Attorney General?

II. INTRODUCTION

The issue presented in this Cross-Motion for Partial Summary Judgment is a narrow one: Whether St. Paul breached its duty to defend Plaintiffs Netscape and AOL (the "Insureds") in a series of civil class actions and a New York Attorney General investigation focusing upon the operation of Netscape's software product known as "SmartDownload" (the "SmartDownload Actions"). In the SmartDownload Actions, the claimants alleged that SmartDownload "spied" on them by (secretly) collecting information regarding their Internet habits and then disclosing that private information to Netscape, AOL, their employees, and others including, specifically, a third party advertiser, known as AdForce.

Based on claimants' privacy assertions, the Insureds turned to their St. Paul policy and, in particular, provisions there requiring a defense for allegations of "personal injury offense," defined to include, among other things, the "making known to any person or organization written or spoken material that violates a person's right to privacy."

St Paul responded by denying the Insureds' claim. Without any investigation, the insurer asserted the SmartDownload Actions did not satisfy the policy's personal injury provisions and, further, that the policy's so-called "Online Activities" exclusion barred coverage. The Insureds disagreed. Nevertheless, they defended themselves against the SmartDownload Actions and, ultimately, were vindicated. The total cost of defense exceeded $4.3MM, which sum the Insureds seek to recover here. Following the close of discovery, the parties agreed to pursue the instant cross-motions for partial summary judgment focused solely upon the duty to defend.

As explained below, the Insureds are entitled to judgment, as matter of law, on their First Amended Complaint's Second Cause of Action (Breach of Contract by St. Paul). Indeed, St.

Paul's refusal to defend its Insureds against the SmartDownload Actions was based on two (faulty) arguments: (1) the SmartDownload Actions did not allege the "making known" of private information; and (2) exclusions for "online activities" and "knowingly breaking" a criminal law barred coverage. Neither argument is correct. The SmartDownload Actions satisfied the Policy's "making known" provision in numerous ways including, among other things, allegations of disclosures to Netscape and its employees, disclosures to AOL, and disclosures to AdForce – a marketing firm with which Netscape allegedly contracted to provide claimants' personal data. Moreover, no exclusions preclude coverage. The narrow focus of the Policy's "Online Activities" exclusion, coupled with the realities of SmartDownload's functionality, put the actions beyond the exclusion's reach. Likewise inapplicable is the Policy's "knowingly breaking" a criminal law exclusion. As demonstrated, the Insureds were not alleged to have "deliberately" broken any laws, and, in fact, the SmartDownload Actions were resolved without any finding of liability

III. STATEMENT OF UNDISPUTED FACTS

A. St. Paul's Policy.

St. Paul provided AOL and Netscape ("Plaintiffs") with Technology General Liability Protection for the time period April 1, 1999 through June 1, 2001 (the "Policy") [3] All of St. Paul's formal negotiations regarding the Policy's terms, binding, and renewals took place in New York, as between its offices and those of AOL's brokers, J&H Marsh McLennan ("Marsh") located in New York and, later, in Washington, D.C.[4]

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[3] See Ex. 1 (Policy). Although St. Paul bound AOL's coverage in March, 1999, Netscape became an insured by reason of AOL's later acquisition of that company in April, 1999. See Exs. 84, 85.

[4] Marsh's request for proposal for AOL coverage was originally exchanged between George Bannell (Marsh -NY) and Michelle Midwinter (St. Paul – NY). See Ex. 79. St. Paul's formal response (all NY) is Ex. 79. The binder (all NY) is Ex. 81. The request to add Netscape as an insured is between Nancy Perkins (Marsh-DC) and Midwinter (NY). See Ex. 84. The confirmation of coverage (NY to DC) is Ex. 85. The 2000-01 policy specifications document lists Marsh's Bannell (NY) and Perkins (DC) and is stamped "NY" by Midwinter. See Ex. 100. St. Paul's counterproposal (all NY) is Ex. 101. The renewal binder (all NY) is Ex. 66. The binder of short-term ("gap") coverage (all NY) is Exs. 104 and 225.

The Policy provides several distinct coverages, as well as a duty to defend[5] against the alleged violations of each coverage. At issue here is the Policy's "personal injury" coverage, which purports to cover the Insureds against six different types of "personal injury offenses" including, specifically, allegations of the Insureds "making known to any person or organization written or spoken material that violates a person' right of privacy."[6] Finally, the Policy contains two exclusions that St. Paul claims are applicable here: (1) a standard form exclusion precluding coverage for "knowingly breaking any criminal law"[7] and (2) a specially-drafted endorsement excluding "personal injury" and "advertising injury" coverage for "Online Activities," which are specifically defined in the Policy as follows:

> 'Online Activities' is defined as providing e-mail services, instant messaging services, 3rd party advertising, supplying third party content and providing internet access to 3rd parties (the "Online Activities Exclusion").[8]

Except for the exclusion of the Insureds' enumerated "online activities," St. Paul's policy was structured to apply to "all other" advertising and personal injury claims.[9]

B. Netscape's SmartDownload Product and its "Profiling" Feature.

SmartDownload is a software product developed and launched from Netscape's California offices[10] and distributed to users from Netscape's servers in California.[11] SmartDownload was designed to help users download large files by enabling them to resume interrupted downloads from the point of interruption.[12] SmartDownload version 1.1 – the version at issue in the SmartDownload Actions – contained a feature known as "SmartDownload

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[5] Ex. 1 at SPM 0142 ("Right and duty to defend protected person.").
[6] Id. at at SPM 0141 ("Personal injury offense").
[7] Id. at 1 at SPM 0154 ("Deliberately breaking the law").
[8] Id. at SPM 0341. Although negotiated for many months, this exclusion was formally added to the Policy in September 2000 but applies retroactively to the Policy's inception ("Effective Date 04/01/99"). Id.
[9] Ex. 87, Ex. 90.
[10] David Park, senior product manager for Netscape's Netcenter division during 1998, was "program manager" for the SmartDownload product, and worked in Mountain View, California. Park Decl., ¶¶ 1, 3. See also Park Decl., Ex. A and C
[11] Park Decl., ¶ 4; Ex. J to Carome Decl. at NET/SDL00010390.
[12] Park Decl., ¶ 4; Ex. A to Park Decl. at NET/SDL0004536.

Profiling."[13] This feature provided Netscape with information regarding users' Internet activities for technical reasons and to create additional advertising opportunities for Netscape (the "Behavioral Data").[14] Functionally, SmartDownload was configured to transmit (and did transmit) the Behavioral Data back to Netscape's Netcenter division, where it was stored on Netscape's servers in California.[15]

C. Claimants Allege "SmartDownload Profiling" Violates Their Privacy Rights.

In June 2000, the first of four civil actions was filed against Netscape and AOL alleging, inter alia, that SmartDownload violated users' privacy rights (the "SmartDownload Actions").[16] According to claimants, SmartDownload Profiling ran afoul of the Electronic Communications Privacy Act ("ECPA") and the Computer Fraud and Abuse Act ("CFAA")[17] by intercepting information about users' Internet habits and transmitting it back to Netscape and AOL, where it was "used" it to create user profiles.[18] The claimants sought compensatory damages and other remedies.[19] Specifically, the SmartDownload Actions contained allegations of, among other things, Plaintiffs' "spying on [users'] Internet activities," and using SmartDownload as an "electronic bugging device," "secretly" intercepting "electronic communications between Web users and Web sites," "continuing surveillance of the Class members' electronic communications," and "profil[ing] . . . file transfers."[20] All such private information obtained

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[13] Ex. 220 at NET/SDL0004533.

[14] Park Decl., ¶¶ 5-6; Ex. 220 at NET/SDL0004533; Ex. D to Park Decl., at NET/SDL0004487; Park Decl., Ex. C at NET/SDL0004731-32; Park Decl., Ex. A at NET/SDL0004546-4547.

[15] Park Decl., ¶ 5; Park Decl., Ex. A at NET/SDL 0004536. Information transmitted back to Netcenter's servers included, among other things, the Internet address, or URL, of the file the user has requested to download and a "key code" stored in the system registry by SmartDownload during installation. Carome Decl., ¶ J at NET/SDL 00010390.

[16] The four lawsuits are: *Specht v. Netscape Communications Corp. and American Online, Inc.*, 00 CIV 4871 (S.D.N.Y.); *Weindorf v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 6219 (S.D.N.Y.); *Gruber v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 6249 (S.D.N.Y.); and *Mueller v. Netscape Communications Corp. and America Online, Inc.*, No. 00 CIV 01723 (D.D.C.). See Ex. 129, 130. It is undisputed that they contain virtually identical allegations. St. Paul Motion at 4. Accordingly, for the sake of simplicity, reference herein is made to the specific allegations in Specht, the first filed.

[17] See ECPA at 18 U.S.C. §§ 2511 and 2520; CFAA at 18 U.S.C. §1030.

[18] See Ex. 129 at SPM 0006 (¶ 2).

[19] Id. at SPM 0023-24.

[20] Id. at SPM 006 (¶ 2).

was alleged to have been "transmitted"[21] by SmartDownload to "defendants" (meaning both Netscape and AOL)[22] for the purpose of "creating moment-by-moment profiles of file transactions by both individual web users and individual Web sites"[23] and other (unspecified) "use "[24]

As the SmartDownload Actions were litigated, the claimants in those actions pursued various legal theories and alleged, among other things, that the Behavioral Data intercepted by the Insureds was used for marketing purposes or was otherwise shared with third parties.[25] Specifically, claimants actively pursued a theory that the Behavioral Data was sent by Netscape to a third-party advertising company named AdForce.[26] In support of their theory, claimants sought detailed discovery from Netscape regarding its dealings with AdForce.[27] Ultimately, a major theme of claimants' liability case turned upon their steadfast assertion that the Behavioral Data was, in fact, being shared with AdForce.[28]

D. St. Paul Denied Coverage Without Investigating the SmartDownload Actions.

Shortly after receiving the SmartDownload Actions, Netscape and AOL tendered them to St. Paul for a defense.[29] St. Paul denied coverage,[30] based solely on its evaluation of the complaints and the Policy.[31] St. Paul did not call Netscape, it did not call AOL, and it did not call the Insureds' brokers.[32] The insurer made no effort to determine what SmartDownload was,

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[21] Id. at SPM 0006-16 (¶¶ 2, 35, 36, 37, 38)
[22] Id.
[23] Id. at SPM 0016 (¶ 38).
[24] Id. at SPM 0019 (¶ 50).
[25] Carome Decl. at ¶ 4.
[26] Id. at ¶¶ 5-6.
[27] Id.
[28] Carome Decl., at ¶¶ 5-7; Carome Decl., Ex. H at NET/SDL 00011318-00011324 (claimants' PowerPoint presentation alleging that "Netscape Configured its Servers to Transmit SmartDownload Information to AdForce," and that "Netscape and AdForce entered into a License Agreement that explicitly required Netscape to provide demographic data about users of its products to AdForce in exchange for certain services from AdForce.").
[29] Exs. 129 and 130.
[30] Ex. 131.
[31] Id. at SPM 0077 ("based on the materials supplied for our review, the Complaints and the policy language, we must respectfully deny your request"); Evensen Depo., 119:10-15 (*Witness background*: 5:11-19; 9:13-20; 219:11-13).
[32] Ex. 131; Evensen Depo., 119:10-124:6.

how it operated, what user information it captured, why it captured user information, or where user information (once captured) was sent.[33]

Without answers to even these most basic questions, St. Paul asserted that "careful consideration" was given to the Insureds' request for coverage.[34] The insurer's denial letter – devoid of any analysis – concluded that the SmartDownload Actions did not seek damages for any "advertising or personal injury." Furthermore, St. Paul concluded that, even if one of its basic coverages had been triggered, the Policy's Online Activities Exclusion barred coverage because the SmartDownload Action's "alleged injury arises out of America Online, Ins 's [sic] Online Services." The letter did not raise the Policy's "Deliberately breaking the law" exclusion, and closed with a boilerplate offer to consider any additional information presented by the Insureds.[35]

After attempting (unsuccessfully) to change St. Paul's views,[36] the Insureds proceeded to (successfully) defend themselves against the SmartDownload Actions. Pursuant to the Final Order and Judgment Approving Class Settlement, the Insureds admitted no wrongdoing and paid no damages. Nevertheless, the Insureds did incur a sizeable defense bill. In all, the Insureds spent in excess of $4.3MM to defend themselves in the SmartDownload Actions. Of that sum, St. Paul refused to reimburse its Insureds one single penny. This coverage action followed.

IV. LEGAL DISCUSSION

Confirming St. Paul's defense obligation is a three-step process: *First*, the proper law must be determined. Typically, California law would apply here but, because St. Paul challenges this basic premise, analysis is required to negate the insurer's claim that Virginia law controls. *Second*, the Insureds demonstrate that the Policy's "personal injury" coverage was triggered by

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[33] Evensen Depo., 123:21-124:6.
[34] Ex. 131 at SPM 0077.
[35] Ex. 131.
[36] Compare Ex. 132 (challenge to initial denial) with Ex. 136 (denial reaffirmed). The Insureds challenged St. Paul's denial, informed it of the relevant aspect of SmartDownload's operations and the underlying actions, and urged the insurer to reconsider. For 18 months, St. Paul failed to respond. When it did, it reaffirmed its denial.

the privacy violations alleged by the SmartDownload claimants. *Third*, the Insureds show that none of the exclusions interposed by St. Paul apply to bar coverage.[37]

A. California Law Applies to This Coverage Action

California's choice-of-law rules require application of California law to this action. Under California's "governmental interest" approach to conflict of laws, California law applies where California has an interest in an action unless: (1) St. Paul properly invokes a foreign law which "materially differs" from California law; (2) that foreign jurisdiction has an interest in having its different law applied; and (3) even if these conditions are met, California law *still* applies unless the foreign jurisdiction's interest in the application of its own law would be more impaired by application of California law. See Washington Mut. Bank, FA v. Superior Court, 24 Cal. 4th 906, 919-20 (2001); see also Strassberg v. New England Mut. Life Ins. Co., 575 F. 2d 1262, 1263-64 (9th Cir. 1978); Paulsen v. CNF, Inc., 391 F. Supp. 2d 804 (N.D. Cal. 2006) (Ware, J.).

As California courts have repeatedly recognized, an insurance policy is a contract. As such, state interest determinations involve consideration of the following "according to their relative importance with respect to the particular issue": (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc., 14 Cal. App. 4th 637, 646 (1993) (citation omitted). The location of the insured risk is given "particular importance" in such interest analysis. Id. at 647 (*citing* Restatement (Second) of Conflicts of Law §193, comment (f)).

Here, California has a significant interest in this action. This is so because the action was filed in California and involves a California insured's (Netscape's) attempt to obtain coverage

[37] Of course, St. Paul has the burden of proving each exclusion applies. The insured does not bear the burden of *disproving* an exclusion's applicability. Aydin Corp. v. First State Ins. Co., 18 Cal. 4th 1183, 1188 (1998).

for underlying actions involving a product developed and distributed from California [38] Moreover, the privacy violations alleged in the underlying actions occurred in California as a result of California conduct regarding the collection, storage, and distribution of claimants' private information.[39] In Johnson Controls, the court applied California law on the issue of the insurability of punitive damages because the underlying case involved a product manufactured, sold, and used in California. Here, the relevant "risk" was Netscape and its SmartDownload product, which users downloaded from Netscape's servers in California, and which allegedly "operated" by collecting and storing information on Netscape's servers in California. As such, this Court should apply California law under Johnson Controls' "multiple risk" rule. See also Ford Motor Co. v. Ins. Co. of North America, 35 Cal. App. 4th 604, 614 (1995).

Importantly, the New York judge handling the SmartDownload Actions ruled that California law applied to contract interpretation issues in those matters.[40] He stated, in pertinent part, that:

> "The product at issue – SmartDownload – was created by Netscape, a Delaware corporation with its principal offices in California. Plaintiffs argue in their motion papers that SmartDownload was designed in California and is distributed from Netscape's website, which is maintained by employees at Netscape's California offices, to Internet users throughout the world. Netscape appears not to dispute these assertions . . . California has an interest in whether a California-based corporation has created a product that violates federal privacy and electronic surveillance statutes. Although the record evidence on this point is sparse at best, no other state appears to have an interest of comparable strength. **Therefore, I conclude that California has the most significant connection to this litigation**, and I apply California law to the issue of contract formation."[41] (emphasis supplied)

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[38] Netscape was a "Named Insured" under the Policy. Ex. 1 at SPM 0293. By agreeing to insure Netscape – headquartered in Mountain View, California – St. Paul knowingly undertook to cover a California corporation with "brick and mortar" operations in California. See Ex. 84 at SPM 1463-1466. St. Paul recognized this risk specifically included Netscape's software products. Ex. 1 at SPM 0245 (adding "Software Developers" as a new risk class code due to addition of Netscape).

[39] See Section III.B., infra.

[40] Ex. 221 at NET/SDL 0003959

[41] Id.

For its part, St. Paul points to only one (potential) conflict to justify application of foreign law: Whereas California requires insurers to consider extrinsic evidence when determining defense duties, Montrose Chem. Corp. v. Superior Court, 6 Cal. 4th 287, 295-96 (1993), St. Paul contends that Virginia follows the "four corners" rule, allowing insurers to ignore extrinsic evidence when determining their duty to defend. St. Paul Motion at 13-14. Whether St. Paul's understanding of Virginia law is correct is largely irrelevant. The reality is, Virginia has no interest in this case. None of the underlying lawsuits were filed in Virginia. Moreover, the St. Paul Policy was negotiated, bound and renewed *entirely outside of Virginia* between St. Paul's underwriting office located in New York and AOL's brokers located in New York and Washington, D.C.[42] The request to add Netscape as a Named Insured came from Marsh's Washington, D.C. office to St. Paul's New York office, and the response confirming this addition was transmitted from St. Paul in New York to Marsh in Washington, D.C.[43] Michelle Midwinter of St. Paul's New York office signed the Policy binder for St. Paul before it was sent to Marsh's Washington, D.C. office.[44] Finally, the policy was not serviced in Virginia,[45] the decision to deny defense was not made in Virginia,[46] the Insurer is not from Virginia,[47] and the risks covered were not primarily located in Virginia.

Since California's interest is strong and Virginia's interest is non-existent, California law must apply to this action. California's "extrinsic evidence" rule is a bedrock principle of California insurance law, designed to protect insureds (and militate against the harsh effects of "notice pleading" rules and attendant coverage denials) by elevating case facts over the complaint's specific allegations[48] See Sentex Systems, Inc. v. Hartford Acc. & Indem. Co., 882

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[42] See note 4, supra.
[43] See Ex. 84; Ex. 85.
[44] Ex. 22 (cover letter from Nancy Perkins at Marsh to AOL, including policies).
[45] See Ex. 1 at SPM 0118.
[46] Ex. 131 (denial letter drafted in and sent from St. Paul, Minnesota).
[47] St. Paul's address listed on the Policy is in New York, and the Policy states that St. Paul is "a capital stock company located in St. Paul, Minnesota." See Ex. 1 at SPM 0109 and SPM 0118.
[48] For example, a third-party claimant may "overplead" their case, alleging intentional acts (which may be excluded) when the facts show mere negligence (which is often covered). Toward this end, California decided long ago that allowing the third-party claimant to be the

F. Supp 930, 937 (C.D Cal. 1995) (under "governmental interest" test, court applied California's law instead of Maryland's "four corners" rule to a suit involving a California insured, noting that "California has a strong interest in ensuring that its residents receive the coverage they reasonably expect from their insurance."). Given that this case involves coverage for a California insured for complaints pled under modern pleading rules, California is especially interested in applying its own laws regarding determination of applicable defense duties.[49]

By contrast, Virginia is only interested in applying its own law to insurance contracts "made" in Virginia – thus, *even Virginia would not apply its law to this dispute*.[50] Indeed, the only Virginia connection here is that one insured, AOL, is headquartered in Virginia. But St. Paul fails to cite any Virginia interest in having its "four corners" rule applied so that a foreign insurer may deny a defense to California and Virginia insureds. See Nestle U.S.A. v. Travelers Cas. & Surety Co., 1998 U.S. Dist. LEXIS 17287, *8 (C.D. Cal. 1998); Sentex, 882 F. Supp. at 937 (refusing to apply Maryland law where insurer could not identify any legitimate interest Maryland had in having its "four corners" rule applied). Indeed, St. Paul simply bypasses the "governmental interest" analysis altogether.

Instead, St. Paul introduces an enormous "red herring" – the entirely irrelevant fact that a Virginia court applied Virginia law to a previous dispute between AOL and St. Paul – *a dispute that did not even involve Netscape*.[51] See St. Paul Motion at 12. Unsurprisingly, the Virginia federal court there followed the forum's choice-of-law rules, as this Court is required to do, see Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-497 (1941), but Virginia's choice-of-law

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"arbiter" of coverage is unfair to insureds, and deprives them of the coverage they reasonably expect. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 276 (1966).

[49] To the extent that New York has an interest in this case, New York law also requires insurers to consider "extrinsic evidence" in determining duty to defend. Fitzpatrick v. American Honda Motor Co., 575 N.E. 2d 90, 92-95 (N.Y. 1991). Accordingly, there is no actual conflict and California can apply its own law. State Farm Mutual Automobile Ins. Co. v. Davis, 937 F.2d 1415, 1418 (9th Cir. 1991); Hurtado v. Sup. Ct., 11 Cal. 3d 574, 580 (1974).

[50] As mentioned above, this contract was not "made," "negotiated" or "delivered" in Virginia. See note 4, supra.

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

rules are vastly different from California's.[52] Moreover, choice of law was not litigated by AOL and St. Paul in the prior coverage dispute,[53] and there is nothing to suggest that any evidence on this point was presented to either the Fourth Circuit or to the trial court. Had such a presentation been made, the evidence would show – without contradiction – that the Policy was not "made" or negotiated in Virginia.[54] Clearly, this Court should apply California law to all issues in this case, including whether an insurer must consider extrinsic evidence in determining its duty to defend. Virginia law has no application here.[55]

B. St. Paul Improperly Refused to Defend Netscape and AOL

1. St. Paul's Duty to Defend Netscape and AOL

The St. Paul Policy contains an express duty to defend. Pursuant to California law, that duty is quite broad, see Anthem Elecs. Inc. v. Pac. Employers Ins. Co., 302 F.3d 1049, 1054 (9th Cir. 2002), and requires insurers to defend if "the facts known to the insurer at the time of tender of the defense, both from the allegations on the face of the third party complaint and from

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[52] Under Virginia's choice-of-law rules, the law applicable to an insurance contract is determined by where the insurance contract was issued and delivered. See Buchanan v. Doe, 431 S.E.2d 289, 293 (Va. 1993), cited in American Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89, 93 (4th Cir. 2003). In a two-sentence "discussion," the Fourth Circuit (not the trial court), relying on Buchanan, found that Virginia law was applicable to the insurance contract.

[53] Even if the issue had been litigated, this Court is not permitted to forgo its choice-of-law analysis on the basis of a foreign court's determination under its choice-of-law standards. See Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 887 n.3 (1998) (applying California law to contract despite Maryland court's previous determination, in the same dispute between the same parties, that Maryland law applied to the contract; record did not disclose that issue was litigated or decided, and even if it had been, determination was not essential to the judgment). St. Paul's attempt to "piggyback" on the Fourth Circuit's "decision" on an unlitigated point must fail.

[54] Likewise, unavailing is St. Paul's resort to California Civil Code § 1646 to argue for application of Virginia law. *First*, California courts have moved away from mechanical application of § 1646 and toward the "governmental interest" analysis discussed above. See, e.g., Strassberg v. New England Mut. Life Ins. Co., 575 F.2d 1262, 1263-64 (9th Cir. 1978); Washington Mut. Bank, 24 Cal. 4th at 920; Johnson Controls, Inc., 14 Cal. App. 4th at 645 (1993) (applying California law to insurance contract between a Wisconsin corporation and its insurers). Application of § 1646 in this case would not lead to application of Virginia law anyway, since the contract was not "performed" in Virginia and, contrary to St. Paul's assertion, was not "made" there either.

[55] St. Paul's adjuster testified that, when reviewing coverage for the SmartDownload Actions, he didn't seek to apply any specific state's law, let alone Virginia law. Weiss Depo., 138:7-139:23 (*Witness background*: Weiss Depo., 5:1-13; 6:14-7:11; 58:6-60:5; 171:11-13; Ex. 115).

extrinsic information available to it at the time, created a potential for coverage under the terms of the policy." Barnett v. Fireman's Fund Ins. Co., 90 Cal. App. 4th 500, 510 (2001); see also Eigner v. Worthington, 57 Cal. App. 4th 188, 195 (1997). As a consequence of this rule, insurers must undertake a reasonable investigation into the circumstances of the claim before denying coverage. Anthem Elecs. Inc., 302 F.3d at 1054; Eigner, 57 Cal. App. 4th at 197. Where the insurer denies coverage without investigation, the insured may later be able to prove that a reasonable investigation would have uncovered evidence to establish coverage or a potential for coverage. See Eigner 57 Cal. App. 4th at 197. Thus, the burden on the insurer is quite heavy. Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured's favor. See id. at 299-300. Indeed, the insurer's duty can only be excused only where "the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." Montrose Chem. Corp., 6 Cal. 4th at 295 (1993) (*quoting* Gray v. Zurich Ins. Co., 65 Cal.2d 263, 276, n.15 (1966))

2. The SmartDownload Actions Triggered St. Paul's Duty to Defend Plaintiffs

By its terms, St. Paul's Policy provides coverage for personal injury claims alleging the Insureds' *"[m]aking known to any person or organization written or spoken material that violates a person's right or privacy*" (hereinafter, the "Privacy Offense"). The issue here is a narrow one: St. Paul's Motion does not dispute that the information allegedly intercepted was "written or spoken material," nor does it dispute that claimants alleged violation of their rights of privacy. Cf. St. Paul Motion at 15. Rather, St. Paul denies that the Insureds were alleged to have "made known to any person or organization" the claimants' private information. St. Paul Motion at 15-19.

St. Paul is wrong. As demonstrated below, the SmartDownload Actions plainly make out a Privacy Offense: First, the underlying lawsuits allege that SmartDownload secretly intercepted the class members' private information and "transmitted it back" to Netscape. Thus, Netscape is alleged to have made users' private information known to both itself and its employees. Second, the SmartDownload Actions allege that Netscape's product secretly intercepted claimants' private information and "transmitted it back" to AOL – an entity legally separate and distinct

from Netscape. In other words, Netscape is also alleged to have made users' private information known to AOL.[56] Third, the SmartDownload Actions allege that both Netscape and AOL made "use" of claimants' intercepted communications to create "profiles" of Internet habits, thereby suggesting Netscape's disclosure of users' private information to third-party advertisers (like AdForce), or at least doing nothing to negate that possibility. Under any (and all three) of these theories, the Insureds were entitled to coverage under the St. Paul Policy.

a) Claimants Alleged Netscape Made Private Information Known to Itself and Its Employees

A Privacy Offense is established where an insured is accused of "making known to any person or organization written or spoken material that violates a person's right of privacy." Based solely on the allegations of the SmartDownload Actions – the specifics of which St. Paul's Motion scrupulously avoids – claimants accused SmartDownload of secretly "intercepting" class members' private information (the Behavioral Data) and "transmitting" it back to Netscape.[57] The complaints further allege that Netscape was "spying" on claimants' Internet activities, and that its "continuing surveillance" permitted Netscape to "create a continuing profile" of users' Internet activities. The logical conclusion to be drawn from these allegations is obvious: Claimants accused Netscape of sharing intercepted information with one or more of its employees who compiled and analyzed the information to create "profiles" of users' web behavior.

Such allegations satisfy the Policy's coverage trigger. First, they assert the Behavioral Data was plainly shared with and, thus, "made known" to Netscape and its employees. While the Policy does not define the phrase "making known," St. Paul's acknowledges that sharing

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[56] Ex. 129 (Specht complaint, ¶¶ 2, 35, 36, 37 and 38).

[57] Importantly, if St. Paul had conducted *any* investigation – if it had only informed itself about the basic operation of SmartDownload and Netscape's transmission and use of the Behavioral Data – it would have learned that SmartDownload *did* "transmit" the Behavioral Data to Netscape's servers in Mountain View, California, and that the Behavioral Data *was* accessible by a number of Netscape employees. See Park Decl., ¶ 5. In addition, it would have learned that SmartDownload's profiling feature was included in the product, in part, to enable Netscape and its advertisers to evaluate users' Internet activities in order to develop marketing opportunities. Id. at ¶ 6.

information with others is enough.[58] According to the insurer, telling even one other person satisfies this provision.[59] Moreover, St. Paul takes the position that the phrase "making known" is simply a "modern" way of saying "made public" – the equivalent terminology used in a prior version of its policy.[60] Even assuming the correctness of this construction,[61] that precise phrase ("made public"), like the comparable phraseology "publication" used by other insurers, has been held to be satisfied where private information is *merely accessible* to unauthorized individuals, including employees of the insured. See Bowyer v. Hi-Lad, Inc., 609 S.E.2d 895, 912 (W. Va. 2004) (finding "publication" requirement satisfied where surveillance system functioned in such a way that insured's employees "had the ability to listen in on employee conversations"). Here, of course, the SmartDownload Actions' complaints go beyond this by also alleging "use" of claimants' information; nevertheless, the "mere availability" of the Behavioral Data transmitted back to Netscape's California servers means that users' private information was "made known" to both Netscape and its employees.

Second, there is no requirement in the Policy that the designated "person or organization" to whom the information is "made known" be a "third-party" – however that term is defined. (See discussion below.) Rather, the plain language of the Policy says, without limitation, "making known to *any* person or organization" (italics supplied). For that reason alone, Netscape and its employees plainly qualify as persons and organizations to whom transmittal is sufficient to trigger the Policy's coverage.

Had St. Paul intended to place limits on the phrase "any person or organization," it could have done so – and often did. For example, the Policy's definition of "Your completed work,"

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[58] St. Paul Motion at 16; Evensen Depo., 134:14-17 (stating that "making known to any person or organization" means "[d]isclosing, releasing, publicizing, providing, giving, sending to a person or organization.")

[59] Weiss Depo., 76:17-77:14; Solberg Depo. 121:3-122:9 (*Witness background*: Solberg Depo., 5:12-13, 9:12-10:17; 13:23-14:2; 14:12-24; 15:22-16:2; 183:13-15; Ex. 115)

[60] Ex. 118; Solberg Depo., 128:24-129:12; 132:6-134:4.

[61] St. Paul's "explanation" seems unlikely. Had St. Paul wished to say "made public," presumably it would have retained that language, instead of replacing it with the clumsy (seven word) phrase "making known to any person or organization." Rather, a plain reading of the phrase "making known to any person or organization" suggests coverage is triggered by disclosure even *less* extensive than "made public." At the very least, the phrase is ambiguous.

includes the following condition: "When that part of the work site has been put to its intended use by **any person or organization, *other than another contractor or subcontractor working on the same project*.**"[62] In such situations, St. Paul clearly and unambiguously intended to shrink the *un*limited category "any person or organization" to all persons *other than* contractors and subcontractors on the same project. By contrast, St. Paul opted not to attach any limitations to comparable language used in the Privacy Offense. Thus, it is unreasonable to ask this Court to create such a provision after the fact.

Moreover, St. Paul's insistence that the Privacy Offense really means "making known to any *third-party* person or organization" or "making known to any person or organization *other than the insured and its employees*"[63] (St. Paul Motion at 16) is unreasonable when considered in connection with the Policy as a whole. This is so because the Policy repeatedly uses the terms "third-party" and "others" when expressing the concept of a policy provision and someone other than the insured (or what the policy terms a "protected person"). For example, a policy provision and two endorsements reference a rule regarding the recovery of damages from a "Third Party."[64] Multiple other exclusions in the policy preclude coverage when there has been "entrustment to *others*" – meaning persons or entities excluding the insured.[65] The bottom line is this: St. Paul knew how to place limits on the phrase "any person or organization," and it knew how to say the words "third party" and "others" when it wanted to refer to parties other than the insured and its employees. None of these limitations appear in the Privacy Offense. As such, St. Paul must not be permitted to redraft its Policy to evade Plaintiffs' claim.

Notably, a court in the Northern District of California law recently rejected an insurer's claim that its privacy offense required disclosure of private information to a person other than the insured's own employees. See Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL 146896 (N.D. Cal.).[66] There, Lenscrafters and Eyexam (a subsidiary of Lenscrafters), were sued

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[62] Ex. 1 at SPM 0149 (emphasis and italics supplied).
[63] See also id. at SPM 0141; Evensen Depo., 232:7-233:6, 233:19-234:2; Solberg Depo., 97:13-98:17; 120:13-122:9.
[64] Ex. 1 at SPM 0134, 0207, and 0263
[65] Id. at SPM 0150, 0151, 0137.
[66] An appeal is currently pending before the Ninth Circuit.

for violating California's Confidentiality of Medical Information Act. Claimants alleged that Lenscrafters had improperly obtained eye patients' private information by having their opticians (laypersons who dispense eyeglasses) present during patients' eye examinations with Eyexam's optometrists (licensed doctors of optometry) (the "Privacy Action"). The specific privacy allegations against Lenscrafters were that it "caused" patients to disclose medical information to Lenscrafters by being present during the eye exam, and that Lencrafters then "cause[d] and allow[ed]" medical records to be "accessed and reviewed" by Lenscrafters employees for non-medical purposes. Id. at *11.

Lenscrafters demanded its insurers, including Liberty, defend the Privacy Action under the policies' personal injury provisions which included the following offense: "Oral or written publication of material that violates a person's right of privacy." Id. at *8. Liberty denied coverage, arguing that the Privacy Action did not contain allegations "indicating that any information obtained from any patient during any eye examination was communicated to a third party." Id. at *9. The Court rejected Liberty's argument, reasoning that the insurer's policies did not contain any limits on the rights of privacy covered – some of which can be violated by the disclosure of private information to *any* unauthorized person – a category which included Lencrafters' employees. See id. at *11. To the court, it was not clear that the term "publication" required disclosure to an unrelated third party. Id. Thus, the Court found the term "publication" to be ambiguous, and construed it against Liberty, holding that the disclosures alleged in the Privacy Action satisfied the offense of "publication of material that violates a person's right of privacy." Id.

Like Lenscrafters, other courts have held that disclosure to another person at the same (insured) entity qualifies as "publication" under the terms of a liability policy. See, e.g., Hi-Lad, Inc., 609 S.E. 2d at 912; Tamm v. Hartford Fire Ins. Co., 2003 Mass. Super. LEXIS 214 (Mass. Super. Ct.)) (finding that "intra-corporate disclosures among employees of the same company" constitutes a "publication" for purposes of invasion of privacy); Community TV Corp. v. Twin City Fire Ins. Co., No. 199905819I, 2002 WL 31677184, *6 (Mass. Super. Ct.) ("publication" requirement satisfied when comments were communicated to at least one other employee)

St. Paul's contrary argument that its Privacy Offense requires "third-party" disclosure is based entirely on language taken out of context from two irrelevant decisions by non-California courts, Resource Bankshares and Melrose Hotel.[67] While both decisions *do* state that the privacy offense under the policy's advertising injury coverage required disclosure of the claimant's private information to a so-called "third party," the courts there plainly mean nothing more than *someone other than the injured party*. Neither court – one of which applied Virginia law and the other applying Pennsylvania law – spoke to the critical issue here: Whether the insureds' interception and use of the injured party's private information satisfies the Policy's requirement of "making known to any person or organization."

This is not surprising, inasmuch as Resource Bankshares and Melrose Hotel are both distinguishable as "blast fax" claims.[68] In both cases, the insured was sued for faxing unwanted advertisements in violation of the federal Telephone Communications Privacy Act ("TCPA"). See Resource Bankshares at 633; Melrose Hotel at 490. In both cases, claimants (the "injured parties") were the *recipients* of the insureds' faxes. See Resource Bankshares at 633; Melrose Hotel at 491. In both cases, the insured demanded St. Paul defend underlying lawsuits pursuant to their policy's advertising injury coverage, which provided similar advertising coverage for (as here) "making known to any person or organization any written or spoken material that violates a person's right of privacy."[69] See Resource Bankshares at 634-35; Melrose Hotel at 491. In both cases, the insured argued St. Paul's privacy offense was triggered because their offending faxes – advertising their services and not including any of the claimants' private information – invaded

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[67] Resource Bankshares Corp. v. St. Paul Merc. Ins. Co., 407 F.3d 631 (4th Cir. 2005); Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F. Supp. 2d 488 (E.D. Pa. 2006).

[68] St. Paul has previously *admitted* such irrelevance. See Ex. 222 (St. Paul's counsel admits these cases, decided under the TCPA, discuss advertising and property damage coverages and are not applicable to the Insureds' claim in this action, implicating the Policy's "Personal injury" coverage.)

[69] Compare Resource Bankshares ("making known to any person or organization written or spoken material that violates a person's right of privacy.") and Melrose Hotel ("making known o any person or organization covered material that violates a person's right of privacy").

the claimants' right of privacy by intruding upon their seclusion [70] See Resource Bankshares at 639-40; Melrose Hotel at 496. *This point is both critical and dispositive*. For in both cases, the privacy right implicated was the claimants' right to be left alone (i.e., not to receive intrusive faxes) See Resource Bankshares at 641; Melrose Hotel at 502. *Not* implicated in either case was the very different right (implicated here) to keep private information private.

According to the insureds in both Resource Bankshares and Melrose Hotel, this intrusion upon claimants' seclusion satisfied the policy's "making known" prong of coverage. See Resource Bankshares at 639-40; Melrose Hotel at 496-97. Both courts rejected this contention. Critical to the courts' analyses was the fact that the information "made known" by the insureds was not the claimants' private information. See Resource Bankshares at 641; Melrose Hotel at 502. Rather, the courts read the offense as applying only when the information that is "made known" contains private details concerning the claimant and such information is made known to someone *other than the claimant*. See Resource Bankshares at 641; Melrose Hotel at 503-04. Such was the meaning of "third party." This point was made absolutely clear by the Melrose Hotel court's analysis, viz:

> "If a Melrose employee phoned a residence and stated that the hotel had rooms available for $100 a night, Melrose has not made known to that person information that violates another person's right of privacy. Melrose has arguably breached the right to be left alone of the person who they phoned. If, however, the Melrose employee called the same residence and revealed personal information about a Melrose customer, Melrose has 'made known' or disclosed information that violates the customer's right to privacy." Id. at *40-41.

Neither Melrose Hotel or Resource Bankshares decided (or even commented on) a situation where, as here, the insured disclosed a claimants' personal information to an employee not authorized to receive such information. For example (using the Melrose Hotel court's paradigm), if the Melrose Hotel desk clerk called another Melrose Hotel employee (like a janitor) and disclosed a guest's personal information that would be a clear invasion of privacy by

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[70] "Intrusion upon seclusion" is one of the four types of "invasion of privacy" torts. Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 230 (1998). It is intended to protect a person's right to be left alone and disclosure of private information is not a required element. Id. at 230-232.

"making known" the claimant's private information Practically speaking, it matters not to such a claimant whether her privacy was invaded through the disclosure of her personal information to a Melrose Hotel employee, or to someone other than a Melrose Hotel employee. She was injured when her private information was given to someone she did not want to have it.[71]

For all of the foregoing reasons, St. Paul cannot reasonably insist upon an *unwritten* requirement that that its Policy's Privacy Offense requires disclosure to non-employees. At best, St. Paul's position points out an ambiguity that must be construed against St Paul and in favor of coverage. Lenscrafters, Inc. v. Liberty Mutual Fire Ins. Co., 2005 WL 146896, *11 (N.D. Cal.); see also Bank of the West v. Superior Court, 2 Cal. 4th 1254 (1992). In either event, the insurer loses.

b) Claimants Alleged Disclosure of Private Information to (Third-Party) AOL

As discussed above, the Policy does not require third-party disclosure in order to trigger the Privacy Offense. Nevertheless, the SmartDownload Lawsuits *do* allege disclosure to a "third-party": They (repeatedly) allege that Netscape's SmartDownload product captured information and sent it not only to Netscape (and its employees) but also to AOL – an entity legally separate and distinct from Netscape.[72] In discovery, St. Paul dismissed the relevance of such allegations by interposing (yet another) unwritten policy requirement. According to St. Paul, a Privacy Offense only exists when information is made known to a third party *who has no corporate relationship with the insured and who is not also an insured under the policy*. The

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[71] In the event this Court finds the "blast fax" line of cases applicable here, it is noteworthy that a great number of cases actually hold that "third-party disclosure" is not required to satisfy the privacy offense in a general liability policy. See Park Univ. Enterprises, Inc. v. Am. Cas. Co. or Reading, PA, 442 F.3d 1239, 1249-1250 (10th Cir. 2006) ("publication" does not require disclosure to a third party); Western Rim Invest. Advisors v. Gulf Ins. Co., 269 F. Supp 2d 836, 846-847 (N.D Tex. 2003) (same); Nutmeg Ins. Co. v. Imp. Ins. Co. of Wausau, 2006 U.S. Dist. LEXIS 7246, *26-28 (N.D. Tex.) (same); Registry Dallas Assoc. v. Wausau Bus. Ins. Co , 2004 U.S. Dist. LEXIS 5771, *18 (N.D. Tex.) (same).

[72] See Ex. 129 (Specht complaint, ¶¶ 2, 35, 36-38).

insurer's position is contrary to the express terms of the Policy and the testimony of at least one of its adjusters [73]

Indeed, nothing in the Policy suggests that the phrase "making known to any person or organization" excludes situations where the insured made information known to a separate but affiliated corporation (like a parent or subsidiary corporation). As discussed above, St. Paul knew how to draft such qualifications when it intended to narrow the scope of the unlimited phrase "any person or organization." It did not do so here. Nor is it reasonable to read the phrase "any person or organization" to mean only persons and organizations not affiliated with the insured when no express qualification exists.

Similarly flawed is St. Paul's related contention that the phrase "any person or organization" means only "any person or organization *that is not also insured under the policy*." The Policy simply doesn't say this. What it does say is that more than a dozen different corporate entities – Netscape, CompuServe, Actra Business Systems, LLC, etc – are considered and treated as separate "named insureds" for purposes of applying coverage. Indeed, a provision in the Policy expressly requires St. Paul to apply its agreement "separately to each protected person."[74] To interpret the Privacy Offense as not applying when information is "made known" by one corporate entity to another would effectively treat all related corporate entities as one. That, in turn, would render the Policy's "Separation of protected persons" provision a nullity. See Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part . . each clause helping to interpret the other"). Moreover, St. Paul's position was rejected by at least one court presented with this issue – Lenscrafters. There, the court found that allegations that Lenscrafters and its subsidiary corporation, Eyexam, shared claimants' private information between themselves and with their employees were sufficient to constitute "publication" that "violates a person's right of privacy." See 2005 WL 146986 at *8-11.

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[73] Weiss Depo., 282:15-283:9 (stating belief coverage may exist for disclosures to corporation related to insured).

[74] Ex. 1 at SPM 0148 ("Separation of protected persons" provision).

c) A Reasonable Investigation Would Have Revealed Claimants' Allegations of Disclosure to Other Third Parties

Finally, had St. Paul investigated the SmartDownload Actions at all, it would have discovered that they did involve allegations of disclosures to third parties. Because of its failure to timely and properly investigate, St. Paul is charged with the knowledge of facts and circumstances it would have gleaned from a legitimate investigation.

Had St. Paul investigated, it would have learned that one *purpose* of SmartDownload's profiling feature was to enable Netscape and its ad partners to track users' Internet habits in order to develop marketing opportunities.[75] St. Paul also would have learned that the SmartDownload claimants repeatedly asserted that the Behavioral Data collected by Netscape and AOL was being sent to a third-party advertising company, AdForce, and used for marketing purposes.[76] Consistent with this position, the claimants sought detailed discovery from Netscape and its employees regarding their relationships with AdForce and the use of Behavioral Data.[77] St. Paul would have also learned that – right up to the very end of the action – the claimants maintained that Netscape did, in fact, share the Behavioral Data with unrelated parties.

Yet none of this came to the fore because St. Paul neglected to investigate the SmartDownload Actions prior to denying coverage. It did nothing other than review the complaints in the SmartDownload Actions and its Policy's terms.[78] Despite allegations in the SmartDownload Actions suggesting the possibility of third party disclosure of Behavioral Data (and with no allegations negating that possibility), St. Paul did not call Netscape, AOL, the claimants' attorney, or anyone else for additional information. It even failed to adequately inform itself regarding the proper operation and functionality of the SmartDownload product at issue.[79]

Faced with pleadings that plainly alerted St. Paul of the need to investigate further, St. Paul stuck its head in the sand. See Betts v. Allstate Ins. Co., 154 Cal. App. 3d 688, 707 (1984)

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[75] Park Decl., ¶ 6.
[76] Carome Decl., ¶¶ 5-6.
[77] Id.
[78] Ex. 131; Evensen Depo., 116:14-117:16;119:6-120:1.
[79] Patterson Decl., ¶¶ 1-2, 3(e)(i)-(ii)

("Allstate's figurative hiding its head in the sand . . is not a law-sanctioned approach to reasonable investigation and performance of its duty."); Eigner, 57 Cal. App. 4th at 198 (finding insurer's decision to deny coverage after simply reviewing the complaint against the insured and the policy terms unreasonable because the complaint, "on its face, should have alerted a reasonable insurer of the need to investigate further.") Pursuant to California law, St. Paul must be charged with the knowledge such an investigation would have revealed: Namely, the SmartDownload claimants alleged Behavioral Data was shared with third parties, such as AdForce.

3. St. Paul Breached its Duty to Defend Against the New York Attorney General's Investigation

Like the SmartDownload Actions, the "Initiation Letter" which began the NYAG's investigation also triggered coverage under the Policy's personal injury provisions The Initiation Letter began by broadly asserting the NYAG's "interests" include Netscape's practices related to "data transmission, use, retention, and *transfer*."[80] Indeed, the Initiation Letter expressly requested that Netscape provide, within 20 days, information or documents that detail the "[h]istory of transfers to third parties "[81] Thus, it cannot be disputed the NYAG was alleging that Netscape was "making known to any person or organization written or spoken material that violates a person's right of privacy."

4. No Exclusions Apply to Bar Coverage

Under California law, an insurer may rely on an exclusion to deny coverage only if it provides *conclusive evidence* the relevant exclusion applies. Atlantic Mutual Ins. Co. v. J. Lamb, Inc., 100 Cal App. 4th 1017, 1038-39 (2002); see also Waller v. Truck Ins. Exch., Inc., 11 Cal. 4th 1 (1995). As such, the burden is on St Paul to prove its purported exclusions apply "in all possible worlds." Atlantic Mutual Ins. Co., 100 Cal App. 4th at 1038. Moreover, exclusions are interpreted narrowly against the insurer. MacKinnon v. Truck Ins. Exch., 31 Cal. 4th 635, 648

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[80] Ex. 190 at NET/SDL00010050 (Initiation Letter) (italics supplied)
[81] Id. at NET/SDL00010051

(2003). As demonstrated below, St. Paul is unable to prove the application of its Deliberately Breaking the Law or Online Activities exclusions.

a) The Deliberately Breaking the Law Exclusion Does Not Apply

The Policy's Deliberately Breaking the Law ("DBL") Exclusion precludes coverage for an insured's "knowingly breaking any criminal law." It does not apply here.

First, by its express terms, the DBL Exclusion bars coverage only when an insured is charged with "*knowingly* breaking" a criminal law.[82] It is not enough that an insured is alleged to have broken a criminal law. Rather, the insured must be alleged to have broken a criminal law and must be alleged to have done so with full knowledge that its conduct was criminal.[83] Negligent or unintentional violations of a criminal law do not trigger this exclusion.[84]

Here, the DBL Exclusion cannot apply because the SmartDownload Complaints do not charge Netscape with "*knowingly* breaking" a criminal law. Rather, they simply allege violation of two federal statutes. There are no allegations asserting that Netscape and AOL were aware that the SmartDownload product, or any of their conduct, was illegal or knowingly violated any law.[85] Indeed, when St. Paul's "person most knowledgeable" about the application of the DBL Exclusion to the SmartDownload Actions[86] was asked to specify the particular allegations which triggered the DBL Exclusion, St. Paul's witness made general reference to Specht paragraphs 14, 19-40, 53, and 63,[87] and then admitted that there was nothing in the complaints which expressly alleged that Netscape and/or AOL *knowingly* violated any criminal law.[88]

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[82] Ex. 1 at SPM 0154.

[83] Solberg Depo., 227:4-228:18; Weiss Depo., 189:11-24. See Bowyer v. Hi-Lad, Inc., 609 S.E. 2d 895, 913 (W. Va. 2006) ("The appellee argues that most courts have held that a 'criminal act' exclusion may apply only if it is proved that the insured acted with 'criminal intent.' We agree, and find no evidence in the record that the appellant acted with criminal intent"); Federal Ins. Co. v. Cablevision Systems Development Co., 637 F. Supp. 1568, 1580 (E.D.N.Y. 1986).

[84] Solberg Depo., 227:18-24.

[85] St. Paul's assertion that "the class action lawsuits allege injury arising out of AOL's willful and/or intentional violation of federal criminal laws" (St. Paul Motion at 20) is flat-out wrong. *Thus, Plaintiffs dispute this material fact in St. Paul's Motion.*

[86] Ex. 223 at 4-5 (Topic 8 – application of provision to claim).

[87] Weiss Depo., 185:14-186:20. Most of these referenced paragraphs are irrelevant to any knowledge requirement of Netscape or AOL. Paragraph 14 states that plaintiffs were allegedly injured "by the intentional theft of their private information in violation of federal law," but St.

Moreover, St Paul's "person most knowledgeable" regarding the meaning and intent of the DBL Exclusion testified that the DBL Exclusion did **not** bar coverage – including coverage for defense costs – when it was determined in the underlying action that the insured did not violate a criminal law. He testified that "[the DBL Exclusion] says breaking the law. ***So if no law was broken, then I don't see this exclusion as applying***."[89] Here, of course, there has never been any determination that Netscape *actually broke* any criminal law. Judge Hellerstein dismissed the CFAA claims in 2003,[90] and the ECPA claims were also dismissed pursuant to the parties' stipulated settlement in which Netscape and AOL expressly and vehemently denied having violated any law.[91]

Second, under California law, this type of "criminal acts" exclusion does not apply where, as here, the insured was sued in a *civil* action for *civil* damages based on the alleged violation of a statute that contained both civil and criminal enforcement mechanisms. Lenscrafters, Inc., 2005 WL 146896 at *12; California Shoppers, Inc. v. Royal Globe Ins. Co., 175 Cal. App. 3d 1, 32 (1985). For example, in Lenscrafters, a civil action was filed against the insured for alleged privacy violations under California's Confidentiality of Medical Information Act ("CMIA"), the violation of which "is punishable as a misdemeanor." Lenscrafters, 2005 WL 146896 at *12. The insurer argued that coverage for the civil action was barred by a policy exclusion for personal injury "arising out of a criminal act committed by or at the direction of the insured." Id. at *13. The Court rejected the insurer's claim because, among other reasons, "it is undisputed that Lenscrafters has not been charged with a crime" and because the civil action "does not allege a criminal act under the CMIA or seek criminal sanctions." Id. at *13. See also California Shoppers, 175 Cal. App. 3d at 32 (finding the policy's exclusion for 'willful violations

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Paul admits – as it must – that the term "intentional" refers to the alleged taking of information and not to the violation of federal law. Weiss Depo., 187:2-22. Similarly, paragraphs 53 and 63 use the terms "conscious, intentional, wanton and malicious" in pleading their purported claims for punitive damages but, again, these terms merely allege an intention to act rather than an intention to violate a criminal law.

[88] Weiss Depo., 190:25-191:17.

[89] Ex. 223 (Topic 8 – intent of provision); Solberg Depo., 230:1-231:1 and 238:12-239:6.

[90] Ex. 219.

[91] Ex. 218.

of penal statutes inapplicable because the insured "was neither charged with nor convicted under any 'penal statute or ordinance'").

Here, as in Lenscrafters and California Shoppers, it is undisputed that the SmartDownload Actions against Netscape and AOL are civil actions and not criminal prosecutions. Nor do they seek any criminal sanctions. Rather, they seek only civil damages and attorneys fees.[92] St. Paul's view that the DBL Exclusion bars coverage for the SmartDownload Actions is not a reasonable interpretation of its Policy. No insured could have reasonably expected that a policy exclusion for "knowingly breaking any criminal law" would bar coverage for a series of civil actions seeking civil damages, and where the terms "crime" or "criminal" do not appear among the claimants' lengthy allegations.[93] At most, St. Paul's interpretation of the Policy's exclusion in this context exposes an ambiguity which should be construed against the insurer and in favor of its Insureds. Delgado v. Heritage Life Ins. Co., 157 Cal. App. 3d 262, 271 (1984).

The only California case cited by St. Paul to support its argument that its DBL Exclusion bars coverage Netscape's and AOL's defense costs for the SmartDownload Actions is Cubic Corp. v. Ins. Co. of North America, 33 F.3d 34 (9th Cir. 1994). That case does not support its position. In Cubic Corp., the insured was seeking coverage for a civil action alleging racketeering and unfair business violations due to alleged bribes paid to government officials. In fact, the complaint against the insured alleged that agents of the insured had previously plead guilty to bribery charges in response to federal criminal charges. Id. at 35. Under these circumstances, the court held that a policy exclusion for the "willful violation of a penal statute" relieved the insurer of its obligation to defend the insured. Id. at 36.[94]

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[92] Ex. 129 at SPM 0023-24.

[93] Notably, St. Paul's own claim handlers failed to raise this exclusion in their several letters setting forth the basis of St. Paul's denial of the SmartDownload Actions. See Exs. 131 and 136.

[94] None of the other cases relied on by St. Paul are relevant or dispositive here. In State Farm Fire & Casualty Co. v. Singh, 2006 U.S. Dist. LEXIS 33474 (E.D. Va.), the Court held that a policy exclusion for the "willful violation of a penal statute" precluded coverage for a civil action alleging assault after the insured had been criminally convicted of assault. Id. at *14. In Palmetto Ford, Inc. v. First Southern Ins. Co., 7 F.3d 225 (4th Cir. 1993) (unpublished) (reported as Unpublished Full-Text Opinion at 1993 U.S. App. LEXIS 24481)), the court was applying

b) The Online Activities Exclusion Does Not Apply

Contrary to St. Paul's assertions, coverage for the SmartDownload Actions is not barred by the Policy's Online Activities Exclusion. That provision precludes coverage for the insureds' "Online Activities," which it then *specifically defines* as "providing e-mail services, instant messaging services, 3rd party advertising, supplying third party content and providing internet access to 3rd parties."[95] For its part, St. Paul's Motion focuses on only one of the endorsement's five listed (excluded) categories: "providing internet access to 3rd parties."[96] Despite this focus, St. Paul is wrong: The SmartDownload Actions had absolutely nothing to do with "providing internet access to 3rd parties."

This is so because SmartDownload – the software product alleged to have violated users' privacy rights – does not provide Internet access to anyone.[97] It is simply a software tool designed to make downloading large files more convenient.[98] It does not provide anyone with "Internet access" – a term commonly understood to mean the ability to *connect to* the Internet.[99] Indeed, SmartDownload cannot even be utilized unless a user has *already obtained* Internet access from an ISP (Internet Service Provider).[100]

Moreover, the SmartDownload Actions do not allege that the claimants were injured by the *Insureds'* provision of "Internet access." The underlying claimants do not disclose their

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South Carolina law, and in MGM Inc. v. Liberty Mutual Ins. Co., 855 P. 2d 77 (Kan. 1993), the court was applying *Kansas* law.

[95] See Ex. 1 at SPM 0341; Depo., 330:22-333:16 (St. Paul underwriter concedes endorsement's use of "is defined as" language "is meant to limit the universe" of potential online activities) (*Witness background*: Midwinter Depo., 4:8-6:12; 8:3-20, 86:5-10); see also Ex. 39; Spencer Depo., 164:25-165:5, 169:16:-170:1, 170:21-23; 184:9-185:11 (endorsement's drafter testified wording was an attempt to limit what online activities meant) (*Witness background*: Spencer Depo., 4:1-11, 11:24-12:12; 23:23-24:16; 169:16-18).

[96] St. Paul Motion at 20-23. Notably, St. Paul's response to Plaintiffs' Requests for Admission admit that the SmartDownload claim did not involve e-mail services, instant messaging services, or third party advertising. Ex. 224 at 4.

[97] See Patterson Decl., ¶¶ 1-2 (background/expertise); ¶¶ 3(a)-(d) (no Internet access to third parties).

[98] See Patterson Decl., ¶ 3(a).

[99] P. Kent, The Complete Idiot's Guide to the Internet 13-19 (7th ed. 2001).

[100] An ISP is a company that provides a user's initial connection to the Internet. SmartDownload is not an ISP; moreover, SmartDownload is completely indifferent to which ISP provides a user with connectivity (access) to the Internet. Patterson Decl., ¶¶ 3(b), (c).

ISPs, and there is no allegation or other evidence in the SmartDownload Actions' complaints that claimants obtained their Internet access from either Netscape or AOL. Critically, Netscape is not an ISP and never was,[101] so it is not possible that the claimants' injuries resulted from *Netscape's* "providing internet access to 3rd parties."[102] Although, AOL is an ISP, it is not alleged to have provided the SmartDownload claimants with their Internet access. Thus, it is possible – and even likely given the large number of ISPs in existence – that that they obtained their Internet access from any one of hundreds of ISPs such as Earthlink, MSN, Juno, NetZero, Covad, and Roadrunner.[103]

St. Paul's response to all of this is to argue that "providing internet access to 3rd parties" doesn't really mean what it says. Rather, according to St. Paul, it means "providing internet access to 3rd parties, *including all activities and products included in providing Internet access to third parties*." St. Paul Motion at 21. Such an amendment takes an intentionally narrow category[104] and makes it virtually limitless. St. Paul's efforts to develop evidence supporting this (unlikely) interpretation from the exclusion's drafter (Glenn Spencer) utterly failed,[105] and, at the end of the day, St. Paul agreed to the narrow language presented in the exclusion.[106] St. Paul's efforts to now reform that language must be rejected.

Taken as a whole, the Policy's Online Activities Exclusion does not bar coverage for the SmartDownload Actions. The exclusion's plain language confines its sweep to five specific

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[101] Park Decl., ¶ 2; Evensen Depo., 182:19-23.

[102] In an effort to avoid this serious defect with its argument, St. Paul wrongly asserts that Netscape's "browser" provided "Internet access." Evensen Depo., 180:22-182:14. This is wrong, of course, insofar as a browser is nothing more than navigational device that allows someone to search out something on the Internet only after it has already been connected. Patterson Decl., ¶ 3(e)(i).

[103] Patterson Decl., ¶ 3(b) & n 1. Importantly, St. Paul's claim handler – who erroneously testified that the SmartDownload complaints alleged that AOL was the claimants' ISP, testified that his view of the exclusion's application "could" be affected if he had learned that the claimants had used an ISP other than AOL. Evensen Depo., 184:1-15.

[104] Ex. 39; Spencer Depo., 164:25-165:5, 170:21-23; 184:9-185:11

[105] Ex. 39; Spencer Depo., 164:25-165:5, 172:17-23, 173:17-174:6, 175:2-11

[106] Ex. 69 [SP 1935 "OK to Endorse. This was the intent."]; see also Corbetis Depo., 21:17-22:15 (*Witness background*: Corbetis Depo., 5:10-18;15:10-16).

activities – none of which are implicated by either the SmartDownload Actions or the SmartDownload product itself. Accordingly, the endorsement is without application here.

V. DENIAL OF ST. PAUL'S MOTION IS REQUIRED

Notwithstanding St. Paul's legal errors, the insurer's Motion for Partial Summary Judgment must be denied because, upon examination, its "undisputed" statement of material facts is not uncontested. The reverse is true. Although space considerations (and Local Rule 56-2(a)) do not allow for an in depth examination of St. Paul's errors, suffice it to say that St. Paul's factual propositions are, variously, incorrect,[107] improperly supported,[108] not unsupported,[109]

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[107] See e.g., St Paul Motion, text accompanying notes 50 and 52 (asserting policy was modified to delete erroneous endorsement excluding all PI and AI coverage and replaced with so-called "Personal Injury and Advertising Injury for Non-Online Activities Endorsement [Ex. 1 at SPM 0641]) In truth, there is no evidence the so-called "Non-Online Activities" Endorsement was ever accepted by the Insureds and, in fact, there is evidence demonstrating that it was actually rejected. See Ex. 113; Midwinter Depo., 316:19-319:18; (Q: So am I correct your recollection is this particular wording was not accepted as a one-liner, correct? A: No, it was not. I'm sorry."); Ex. 48 at Marsh 0612; Spencer Depo., 122:24-123:22; 125:15-17; 154:4-11 ("I did not accept that language."); Spencer Depo., 154:23-155:12 ("I don't think the words on that paper reflected a meeting of the minds"). By itself, the mere presence of the endorsement in the policy is no proof of St. Paul's fact, inasmuch as the insurer *admits* that the Policy had been previously *mis*endorsed to improperly exclude all AI/PI coverages. See St. Paul Motion at 10.

[108] See e.g., St. Paul Motion, text accompanying notes 30, 72 ("The premium St. Paul charged reflects that its policy was to cover only traditional general liability risks.") Support for the assertion is drawn from Exhibits 8 and Ex. 159 (Marsh 0548). For its part, Exhibit 8 ("Netscape Communications Co. Company Profile") is completely irrelevant to the "undisputed" fact. So too is Exhibit 159 (Marsh 548), which merely reflects the broker's recommended coverage program for 1999/2000. Outlined there are pricing options for coverage with and without AI/PI coverage. Nothing in the exhibit references – much less implies – distinctions between "traditional" versus "non-traditional" coverage. Moreover, St. Paul concedes (as it must) that the Policy it issued for a $100,000 premium included limited AI/PI coverage. See St. Paul's Motion at 10 ("[I]t was only AOL's and its subsidiaries' online activities that were to be completely excluded from that [AI/PI] coverage. *Otherwise, coverage for personal and advertising injury was to remain, provided the terms of that coverage were met.*") (italics supplied); Ex. 87, 90 (except for enumerated "online activities" Policy applies to "all other" advertising and personal injury claims.

[109] See e.g., "Smartdownload is software that consumers obtain directly through the Internet free of charge from AOL." (St. Paul Motion at 5 – *Actually*, the software was obtained from Netscape, not AOL. See Park Decl., ¶ 4); Allegations regarding third party dissemination of private information "[n]ever developed" (St. Paul Motion at 5 – *Actually*, claimants pursued theories that their private information had been shared with third parties. See Carome Decl. at ¶¶ 4-7); "This insurance program was designed to protect AOL from the varying risk it faced, without duplication of coverage or premium (pg. 7 - *Actually*, the program was a "mess," and

disputed,[110] and/or objectionable.[111] Consequently, St. Paul's cross-motion for judgment must be denied

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request entry of Partial Summary Judgment in its favor and against St. Paul on the First Amended Complaint's Second Cause of Action (Breach of Contract against St. Paul).

Dated: January 12TH, 2007

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contained both "gaps" and "duplications" in coverage. As Marsh executive and, later, AOL Risk Manager, Glenn Spencer, testified, online coverage for the 1999/2000 time period was found in AOL's E&O policy, it's D&O policy, its crime and fiduciary policies, its general liability policy [the St. Paul Policy], and its media policy. See Spencer Depo., 91:5-93:1).

[110] See e.g. St. Paul Motion, text accompanying notes 30 and 31 (asserting that "[i]n negotiating the general liability coverage that St. Paul would provide, AOL and St. Paul thus mutually agreed that St. Paul *would not* cover personal injury arising out of online activities. Instead, AOL intended its other policies to cover that type of risk."). But see Ex. 32 at Marsh 0632; Spencer Depo., 106:2-10; 107:17-108:16 (no agreement with St. Paul – "absolutely not" – that media and general liability policies would not overlap); 91:5-11 ("that was never the intention of anyone"); 91:18-92:23 ("there was no agreement from anyone that say, hey, if St. Paul excludes it, we cover it."). Also wrong is St. Paul's assertion that AOL insured online risks though carriers other than St. Paul. See St. Paul Motion, text accompanying note 28; but see Spencer Depo., 91:5-93:1 (For 1999/2000 time period online coverage found in a variety of policies, including St. Paul's general liability policy.)

[111] See e.g., St. Paul Motion, text accompanying note 32. (Plaintiffs "received a payment from Executive Risk in resolution of that tender."). As presented, reference is made to, and reliance is placed upon, a confidential settlement agreement (Ex. 168). See Stip-MSJ at ¶6. Accordingly, the proposed undisputed fact is both irrelevant, and violates Fed. R. Evid. 408 (compromise and offers to compromise inadmissible).