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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS,)
et al.)

Plaintiffs,)

vs.)

FEDERAL INSURANCE)
COMPANY,)

Defendant.)
-----)

ORIGINAL

No. C-06-00198
JW (PVT)

September 7, 2006

9:07 a.m.

Deposition of MICHELE MIDWINTER, held
at the offices of Duval & Stachenfeld, 300
East 42nd Street, New York, New York, before
Laurie A. Collins, a Registered Professional
Reporter and Notary Public of the State of New
York.

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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
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2 THE VIDEOGRAPHER: We're going on the
3 record. Today's date is September 7th, 2006,
4 and the time is approximately 9:07 a.m. This
5 begins the videotaped deposition of Michele
6 Midwinter in the matter of Netscape
7 Communications Corp., et al., as plaintiffs,
8 versus Federal Insurance Company, et al., as
9 defendants. This is under the jurisdiction of
10 the United States District Court for the
11 Northern District of California.

12 This deposition is being held at the
13 offices of Duval & Stachenfeld, which is 300
14 East 42nd Street, New York, New York.

15 My name is Thomas Keighley, legal
16 videographer, with Veritext, New York.

17 If I could ask counsel to state their
18 appearance for the record.

19 MR. ABELSON: I am Michael Abelson,
20 counsel for plaintiffs.

21 MS. THORPE: Sara Thorpe from Gordon &
22 Rees for St. Paul.

23 THE VIDEOGRAPHER: And if I could ask
24 the court reporter, Laurie Collins, to please
25 swear in the witness.

Midwinter

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

called as a witness, having been duly sworn
by the Notary Public, was examined and
testified as follows:

EXAMINATION BY

MR. ABELSON:

Q. Good morning, Ms. Midwinter.

A. Good morning.

Q. Would you state and spell your name for
the court reporter, please?

A. Michele, M-I-C-H-E-E-L-E, Midwinter,
M-I-D-W-I-N-T-E-R.

Q. And where are you currently employed,
Ms. Midwinter?

A. Travellers Insurance Company.

Q. What is your title as it exists today?

A. Account executive officer.

Q. And you are here today in your capacity
as the underwriter of a policy for America
Online -- I'll refer to them as AOL -- for 1999
and a subsequent policy that lasted through a
period 2001?

A. Correct.

Q. And you are also here in your capacity

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Midwinter

as a PMK, a person most knowledgeable, on certain designated topics. You understand that?

A. Correct.

Q. Let me just specify what those topics are and make sure that we have a common understanding here.

First and foremost, you're here not only in your individual capacity but also as the person most knowledgeable as the underwriter for St. Paul's policy for AOL; correct?

A. Yes.

Q. You are also here as the person most knowledgeable about the scope of coverage provided by St. Paul's technology commercial general liability policy; correct?

A. Yes, yes.

Q. You're also designated as the person most knowledgeable as the meaning of St. Paul's policy on personal injury and advertising injury. I guess there was an endorsement of October 5, 2000?

A. Yes.

Q. Okay. And you're also here as the PMK, person most knowledgeable, on the negotiation --

1 Midwinter

2 negotiating history and the acceptance by St. Paul
3 of the policies personal injury and advertising
4 injury endorsement for October 2000?

5 A. Yes.

6 Q. That's a mouthful.

7 You're also the person most
8 knowledgeable about the scope of the advertising
9 injury and personal injury coverage originally
10 intended to be included in St. Paul's policy;
11 correct?

12 A. Correct.

13 Q. Just in terms of shorthand or we'll go
14 through shorthand in a minute, but you understand
15 when I say -- or can we agree when I say AI/PI
16 we're talking about advertising injury/personal
17 injury coverage?

18 A. Yes.

19 Q. That will save me a lot of words in
20 this deposition.

21 And the final topic -- I guess there
22 are others -- but that we'll be talking with you
23 today about is you are the person most
24 knowledgeable about St. Paul's policies --
25 St. Paul policies personal injury and advertising

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A. Correct.

Q. Finally, you're here in your capacity -- both in your individual capacity and, as we just discussed, the person most knowledgeable on designated topics. It's my intent to try and depose you on everything simultaneously rather than to break this out into a deposition of you as an individual and you as a person most knowledgeable.

My questions are meant to elicit from you both your individual knowledge and your knowledge as the person most knowledgeable on topics. But if there's some distinction between those two, I'd ask you to point that out to me so that we could at least go down whichever path is appropriate for the examination. Otherwise let's agree that you're speaking in your capacity both individually and as the person most knowledgeable.

A. Okay.

Q. Okay. So far I feel like I've been deposed, doing all the talking here.

Can you describe for me what you did to prepare for your deposition today?

A. I spoke with Sara Thorpe the other day,

Midwinter

MR. ABELSON: Okay. Let's actually talk about this claim now. I've warmed her up now. I'm getting warm.

Q. In 1999-2000 time period, you were employed with St. Paul; correct?

A. Yes, I was.

Q. And in what capacity were you employed at that time?

A. I was an underwriter.

Q. When did you start with the company?

A. June of 1987.

Q. Were you in a particular section or division of the company?

A. I pretty much worked in the typing department at that time doing transcription for the claims department.

Q. When did you first take on underwriting responsibilities for the company?

A. I believe it was in June of '94.

Q. Had the technology unit been created at that time?

A. Yes.

Q. But you were not yet in the technology unit?

1 Midwinter

2 A. I don't recall, no.

3 Q. This X that appears on 1725, is that
4 your handwriting?

5 A. I don't know whose that is.

6 Q. Do you recall Ms. Adams making this
7 proposal to Marsh?

8 A. Well, I had received a copy of the
9 e-mail. I was aware that she made it.

10 Q. I agree. But as you sit here today, do
11 you recall her making this proposal?

12 A. I don't recall her doing it at the
13 time, no.

14 Q. Other than your now reviewing the
15 document?

16 A. Correct.

17 Q. Let me show you a document we'll mark
18 as next in order, 113.

19 (Exhibit 113, e-mail from Adams to
20 O'Connor, marked for identification, as of
21 this date.)

22 Q. Exhibit 113 is another e-mail from
23 Angela Adams to Mike O'Connor, copied to Michele
24 Midwinter. And it says, Per our conversation, see
25 below. I see you're doing what I did.

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Midwinter

The first e-mail, Exhibit 112, was sent at 9:11 in the morning, and then at 9:49 she sends a second e-mail.

A. Correct.

Q. So this one is subsequent to the other one. And she writes, For purposes of advertising injury and personal injury, all online activities are excluded from these coverages.

Are you with me?

A. Yes, I am.

Q. Do you recall discussing with Ms. Adams a second effort at trying to come up with an online activities exclusion that would be acceptable to Marsh?

A. No, I don't recall having the conversation with her.

Q. Do you recall anything about this particular language reflected in Exhibit 113 being proposed to Marsh?

A. I think this -- this was the purpose of the conference call that we had when we spoke with Glenn Spencer at AOL and the Marsh folks was that this was what the actual final determination was, that this is what the wording should be. I

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Midwinter

remember that coming from the conference call that we had with them.

Q. Let me try again, then. You recall from the conference call that there was an agreed wording that came out of that conference call?

A. It was an agreed intent. The wording itself, no. But the intent of what the wording was going to be was agreed upon. And then we needed to put the wording together to send to them.

Q. And Ms. Adams' first effort was to repropose unacceptable wording?

A. I honestly don't know the answer to that.

Q. Do you know what prompted the second e-mail from Ms. Adams?

A. I don't know.

Q. She says, per our conversation. Are you aware of any conversation that took place between Ms. Adams and Mr. O'Connor on July 5th?

A. I believe she could be referring to the conference call, as she indicated after that to see below.

Q. But you don't know, do you?

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A. No, I do not.

Q. You don't know if it in fact was a reaction to the unacceptable wording that had been proposed?

A. Correct.

Q. You just don't know either way?

A. No, I do not.

Q. Do you know, looking at Exhibit 113, if Ms. Adams' language was ever accepted by Marsh?

A. I believe Marsh came back and took this wording but then also tried to include a definition for online activities in their document.

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.

MS. THORPE: Objection. I think it assumes facts, lacks foundation.

Q. In fact, Mr. --

MS. THORPE: I think the record will show it was accepted, so you can go ahead and show her documents. I think it's a little tough this late in the day to --

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Q. Anything else come to mind?

A. No.

Q. How about third-party advertising, what's your understanding of that as used in the exclusion?

A. The pop-up links that come up on the automatic pop-ups.

Q. Anything else come to mind?

A. No.

Q. How about supplying third-party content, what's your understanding of that term as used in the exclusion?

A. I'm actually not sure what that's referring to.

Q. How about the last category, providing Internet access to third parties, what's your understanding of that, as used in the exclusion?

A. Customers that are signing up for AOL's Internet service. It's providing them access to the Internet and their e-mail services and...

Q. Other than as you have explained those five categories, is there any other types of conduct that you believe are covered by the five categories that are reflected in the exclusion?

1 Midwinter

2 A. I'm sorry, can you repeat your
3 question?

4 MR. ABELSON: Read it back, would you,
5 please.

6 THE WITNESS: Sorry.

7 (Record read.)

8 A. I think anything related to the online
9 would have been covered in the exclusion, anything
10 that transpired online.

11 Q. Well, have we not narrowed the
12 definition of online at this point?

13 MS. THORPE: Objection to the form of
14 the question.

15 Q. Was it the intent to narrowly define
16 online activities to five categories?

17 MS. THORPE: Are you asking for her
18 intent or the person who wrote this?

19 MR. ABELSON: I'm asking for her
20 intent.

21 A. My understanding was that this was
22 going to encompass all of the online activities.

23 Q. So the words "is defined as," are these
24 five categories merely examples?

25 A. I took it as meaning that this

1 Midwinter

2 encompassed all online activities at the time.

3 Q. And your understanding that these five
4 categories are examples of online activities?

5 MS. THORPE: Objection, asked and
6 answered.

7 A. Again, I believe that they encompassed
8 all online activities.

9 Q. Oh, let me try a different way, then.
10 That it was your understanding that this was the
11 full universe of online activities, then?

12 A. No, I didn't think it was the full
13 universe.

14 Q. Then I guess I'm not following what
15 you're saying here.

16 A. I'm sorry, I'm --

17 Q. It says -- I just want your
18 understanding -- online activities is defined as,
19 and you say -- I think what you're saying is this
20 means all online activities.

21 Are you following me? That's what
22 you're saying to me?

23 A. Yes, I'm following what you're saying.

24 Q. So my question to you is are the five
25 categories examples of online activities or is

1 Midwinter

2 that the universe of online activities.

3 A. I think that they're examples of online
4 activities.

5 Q. And the words "is defined as" don't
6 provide a limitation in this context?

7 A. It does provide a limitation, because
8 it's saying is defined as.

9 Q. Okay.

10 A. I read the document as being examples.

11 Q. Okay. But you agree with me the "is
12 defined as" is meant to limit it to the universe?

13 A. As I'm looking at it now, yes.

14 Q. Do you recall what your understanding
15 of it was back in September of -- 13th of 2000?

16 A. No, I don't.

17 Q. You subsequently sent to Mr. Evensen a
18 copy of the exclusion that was agreed to by
19 St. Paul?

20 A. I believe so, yes, once the
21 endorsements were issued to the policy.

22 MR. ABELSON: Let me mark the next in
23 order number, Sara, help me.

24 MS. THORPE: 114.

25 MR. ABELSON: Exhibit 114 is a fax from