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ST. PAUL MERCURY INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT COURT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiffs,

vs.

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

Defendants.

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

ST. PAUL'S REPLY IN SUPPORT OF ST. PAUL'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE DUTY TO DEFEND AND ST. PAUL'S OPPOSITION TO PLAINTIFFS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Accompanying Papers:
OBJECTIONS TO EVIDENCE; RESPONSE TO AOL'S OBJECTIONS TO EVIDENCE; SUPPLEMENTAL DECLARATION OF SARA M. THORPE; DECLARATION OF DANIEL WEISS; SUPPLEMENTAL COMPENDIUM OF AUTHORITIES

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

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I. INTRODUCTION

Plaintiffs AOL and Netscape (collectively, "AOL") try to fit the tendered claims into the provisions of the St. Paul policy. But AOL neither raises a genuine issue sufficient to defeat summary judgment, nor meets its burden to show entitlement to summary judgment on its cross-motion. This is the result regardless of whether the court applies Virginia law (the state that is AOL's principal place of business, where the policy was made, where claims were to be handled, and under whose law AOL previously sought interpretation of this very policy), or California law. Just last week, the California Court of Appeals issued a published decision confirming that St. Paul's decision was correct, even under California law. *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, __ Cal.Rptr.3d __, 2007 WL 214258 (Cal.App. 2007) ("*ACS*"). Although the duty-to-defend standard differs, St. Paul was correct under both states' laws in concluding it had no duty to defend AOL against the class action suits and AG Investigation.

The parties specifically intended this "brick-and-mortar" general liability policy, for which AOL paid only $106,000 in premium in 1999, would not cover online risks like this. Even more fundamentally, the class-action suits and AG Investigation do not even allege a claim for injury from a third-party disclosure of private information, a requirement under both Virginia and California law for St. Paul's "making known" language. Instead, the class actions allege injury from AOL's theft of private information. AOL's creative attempts fall short, even as it tries to personify the SmartDownload product, attempts to suggest that somehow the insured itself is a third party, and offers irrelevant and inadmissible evidence to try to show the nature of the claims against AOL were something it never bothered to communicate to St. Paul.

Moreover, each claim in the class-action suits alleged AOL violated a criminal statute, and that such violation was "conscious, intentional, wanton and malicious." The policy's criminal-acts exclusion excludes this type of claim from coverage.

In addition, the policy's "Online Activities Exclusion" reflects the parties' intention to exclude coverage for the Internet-related activities that led to the underlying actions. AOL tries to import a technical meaning into the definition of "online activities," but there is no evidence the parties discussed any technical meaning or limitation. The parties expected the definition would

reflect their mutual intentions, as reported by AOL's own risk manager, "to exclude PI/AI arising out of our online business." SmartDownload was designed to improve Internet connections and usage and therefore plainly falls within "providing internet access to 3rd parties." Such risks were meant to be covered by AOL's far-more-expensive professional and multimedia liability policies. Even if AOL were successful recasting the claims it tendered, those claims are still excluded.

Finally, as AOL did not even oppose this part of St. Paul's motion, there is no question the AG Investigation did not seek damages and, therefore, there was no duty to defend against the AG Investigation for that independent reason.

II. ARGUMENT

A. Partial Summary Judgment For St. Paul (And Denial Of AOL's Cross-Motion) Is Appropriate Under Governing Legal Standards

1. Insurance Coverage Is Question Of Law For Court To Decide

The purpose of summary judgment is "to isolate and dispose of factually unsupported claims or defenses." *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, 2006 WL 3832794, at *2 (N.D. Cal. 2006) [citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986)]. An insurer's duty to defend can be resolved by way of summary judgment because the scope of coverage under an insurance policy is a question of law for the court to decide. *Haggerty v. Federal Ins. Co.*, 32 Fed.Appx. 845, 847 (9th Cir. 2002). As a matter of law, St. Paul has established it had no duty to defend the class action suits and the AG Investigation.

2. AOL Has Presented Inadmissible Facts

To defeat St. Paul's motion and support its own motion, AOL had the burden of presenting admissible evidence of specific facts that show a genuine issue for trial. Fed. R. Civ. Proc. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995). Only declarations and evidence setting forth facts admissible in evidence may be considered. Fed. R. Civ. Proc. 56(e); *FDIC v New Hampshire Ins. Co.*, 953 F.2d 478 (9th Cir. 1991).

AOL relies on documents and testimony (including the Declaration of Patrick Carome and Declaration and deposition of David Park) it provided to St. Paul for the first time during this

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coverage lawsuit.[1] That evidence is inadmissible as it is irrelevant to the issue of the duty to defend.[2] AOL offers a declaration of an expert, which is irrelevant and inappropriate since the expert was not previously designated under the Federal Rules.[3] AOL's evidence should be stricken. But even if it were considered, AOL failed to establish there was a potential for coverage under the St. Paul policy. St. Paul's motion should be granted, and AOL's motion denied.

B. Virginia Substantive Law Applies To The Extent There Is Any Conflict Between Virginia's and California's Laws

1. Choice of Law Should Be Decided Under Cal. Civ. Code § 1646

There can be no reasonable dispute that "[a]n insurance policy is a contract and therefore subject to California choice-of-law provisions codified in Cal. Civ. Code § 1646" ("Section 1646"). See *Gitano Group, Inc. v. Kemper Group*, 31 Cal.Rptr.2d 271, 275 n.4 (Cal.App. 1994). See also Cal. Civ. Proc. Code § 1857 ("Section 1857") (writing to be interpreted according to meaning it bears in the place of its execution unless parties reference a different place).

AOL contends that "California courts have moved away from mechanical application of § 1646 and toward the 'governmental interest' analysis" of *Washington Mutual*[4] and other cases." (AOL Brf. at 12, n. 53.[5]) But this miscasts California's choice-of-law analysis as recently clarified. For instance, Judge Ronald Whyte of the Northern District of California, addressing the disputed interpretation of an insurance policy, recently held that "to determine the law governing a contract, California law looks *first* to the relevant statute and, *only* should further guidance be necessary, *second* to the government interest test." *Royal Indemnity Group v. Travelers Indem. Co. of R.I.*, 2005 WL 2176896, at *4 (N.D. Cal. 2005) ("*Royal Indemnity*"). The Court rejected the insured's argument that *Washington Mutual* had overruled the choice-of-law provisions in Sections 1646 and 1857, holding that "there is no indication in that case that the California choice

[1] Declaration of Daniel Weiss ("Weiss Decl.") ¶ 3-6; Supplemental Declaration of Sara Thorpe ("Supp. Thorpe Decl.") ¶ 3; St. Paul's Objections to and Motion to Strike Evidence ("Evid. Objs."), and discussion, *infra*.
[2] See Evid. Objs.
[3] See Evid. Objs.
[4] *Washington Mutual Bank, FA v. Sup. Ct.*, 24 Cal.4th 906, 919-920 (Cal. 2001) ("*Washington Mutual*").
[5] AOL's combined Opening/Opposition Brief, filed January 20, 2007, is referred to as "AOL Brf."

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of law provisions have been abrogated." *Id.* Based upon "the clear direction provided by section 1646," the court applied the substantive law of Texas (where the contract was entered) "to interpret the critical language in the contract without the need to resort to the *Washington Mutual* government interest analysis." *Id.* at *5. Under Section 1646, Virginia law applies to this dispute.

2. AOL's Choice-of-Law Cases Are Distinguishable

The *Royal Indemnity* decision expressly distinguishes the two principal cases upon which AOL relies: *Washington Mutual* and *Johnson Controls.*[6] (AOL Brf. at 8-9, 12 at n. 53.)

Royal Indemnity reasoned that *Washington Mutual* "involved a class action certification and implicated a more detailed governmental interest analysis than would be warranted where the issue at hand is determining the law governing the interpretation of a contract." *Royal Indemnity,* 2005 WL 2176897 at *4. That argument is equally applicable here. *Royal Indemnity* also rejected application of *Johnson Controls* because in that case the "statutory choice of law provision was uninformative." *Id.* at *5. That same distinction can be made here.[7] Like *Royal Indemnity*, this case involves nothing more than the interpretation of a contract.

The facts in *Royal Indemnity* also point to its applicability. There the insured was a Texas corporation, using a Texas insurance broker. The policies included endorsements unique to Texas. Here, AOL's principal place of business is Virginia and AOL has already availed itself of its state's interpretation of this very policy.[8] This dispute also involves a policy with provisions specific to Virginia, and a claims handling arrangement requiring that claims under the policy be handled through AOL's office in Virginia.[9] *Royal Indemnity*, not *Washington Mutual* or *Johnson Controls*, provides the proper choice-of-law analysis for this contract case, an analysis that leads to

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[6] *Washington Mutual*, 24 Cal.4th 906; *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 17 Cal.Rptr.2d 713 (Cal.App. 1993) ("*Johnson Controls*").

[7] *Ford Motor* is also distinguishable. *Ford Motor Co. v. Ins. Co. of North Am.*, 35 Cal.App.4th 604 (1995). That case involved motions to dismiss for *forum non convenience* and California's strong interests in cleaning up pollution, a situation and concerns that have no application here.

[8] The Fourth Circuit found that "the insurance contract between AOL and St. Paul was formed in Virginia and therefore we apply Virginia substantive law." *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 92-93 (4th Cir. 2003) ("*America Online*").

[9] AOL's Amended Complaint ¶ 6; Ex. 1 (at, e.g., SP 0109, 0114, 0118, 0121-0125, 0164-0165); Ex. 161 (at SPM 2654-2657).

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application of Virginia law.[10]

Thus, California law looks *first* to the relevant statute and, *only* should further guidance be necessary, *second* to the governmental interest test. *Royal Indemnity,* 2005 WL 21768976 at *4. Here that inquiry leads to the application of Virginia law.[11]

3. That A New York Court Applied California Law To Determine Whether A License Was Formed Between Netscape And Web Users Is Irrelevant To This Court's Determination

The New York judge's ruling in the underlying class actions that California law applied to contract interpretation issues in those matters is irrelevant. (AOL Brf. at 9 [citing Ex. 221 (at NET/SDL 0003959)].) The "issue of contract formation" in the class actions pertained to a Software Licensing Agreement between Netscape and the many web-user plaintiffs. The issue there was whether the parties were bound by an arbitration clause.[12] The court applied New York's "center of gravity" choice-of-law test and noted a lack of any evidence of any other state's interest in the dispute. *Id.* St. Paul was not a party to the underlying software contracts, nor do any of the relevant factors – like where St. Paul's policy was issued – have anything to do with the web-user software contracts in the underlying litigation. The fact that this insurance coverage and that software case happen to involve contracts is a red herring for choice-of-law analysis. The insurance contract between *these* parties points to Virginia law. Other contracts are irrelevant.

4. Even Under The "Government Interest" Test, Virginia Has A Materially Greater Connection To And Interest In This Dispute

Even if the "governmental interest test" were applied, Virginia law should still apply. Virginia has a greater and overriding interest in whether there is coverage under the St. Paul policy for the class action suits and claim. AOL is the first named insured, the entity to which St. Paul

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[10] This Court's decision in *Paulsen,* cited by AOL, concerned a motion to dismiss *tort claims* for professional negligence. *Paulsen v. CNF, Inc.*, 391 F.Supp.2d 804, 810-811 (N.D. Cal. 2006). Section 1646, applicable to contract interpretation, was not part of the Court's analysis.

[11] AOL's contention that "even Virginia would not apply its own law to this dispute" (AOL Brf. at 11) is undermined by these facts and the Fourth Circuit's choice-of-law determination in *America Online*. AOL's attempt to limit the *America Online* choice-of-law determination (AOL Brf. at 12, n. 53) likewise fails. The referenced authority – *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal.Rptr.2d 73, 76 at n. 3 (Cal.App. 1998) – is distinguishable, as the foreign court there did not make a choice-of-law determination and choice-of-law was not essential to the judgment.

[12] See, Ex. 221 (at NET/SDL 0003955-3956).

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issued the policy, and the entity to whom claims were to be directed. AOL, a company with worldwide operations, has its principal place of business in Virginia. For consistency in interpretation and results, Virginia has an interest in seeing its law applied to the contracts entered into by its corporate citizens, especially where Virginia previously interpreted this very insurance contract between these very parties.

And the connection with California is tenuous. True, Netscape is located in California, but when it became an insured it was merged into and became AOL's wholly-owned subsidiary, one of many such subsidiaries insured by the St. Paul policy. Netscape did not have its own policy and none of the negotiations for the St. Paul policy took place in California. Nothing connects the St. Paul policy to California except the bare existence of AOL's subsidiary. Moreover, the four class actions were filed in federal courts in New York and Washington D.C., not in California, and involved a purported "class" of Internet users across the country. And the AG Investigation was instigated by the Attorney General of New York (not California). All told, Virginia has a greater, and overriding, governmental interest in seeing its laws applied to this insurance dispute.

C. The Class Actions Do Not Allege A Covered Offense Because They Do Not Allege Injury Based On Liability For "Making Known To Any Person Or Organization Written Or Spoken Material That Violates A Person's Right of Privacy"

The duty to defend applies only when the underlying action alleges liability that is potentially within the policy's indemnity provision. *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 636 (4th Cir. 2005) ("*Resource*") (applying Va. Law); *America Online*, 347 F.3d at 93; *Waller v. Truck Ins. Exchg.*, 44 Cal.Rptr.2d 370, 378 (Cal. 1995) ("*Waller*"). Here, indemnity could only have potentially applied if AOL were alleged to be "legally required to pay [amounts] as damages for covered personal injury that . . . [was] caused by a personal injury offense."[13] The offense in question is "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy."[14] Did the class plaintiffs allege liability based upon injury caused by a "making known" of material? No.

[13] Ex. 1 (at SP 0141).
[14] Ex. 1 (at SP 0141).

Therefore, as a matter of law St. Paul had no duty to defend.

"Making known" means "telling, sharing or otherwise divulging . . ." *Resource*, 407 F.3d at 641 (applying Va. law). *See also, ACS,* 2006 WL 214258 at *7 (approving expressly of, and applying, *Resource's* construction of "making known"). AOL tries to satisfy this requirement by contending that AOL/Netscape "divulged" the class plaintiffs' personal data to themselves and to each other, and further that the class plaintiffs claimed an actual disclosure to a third-party advertiser called AdForce. These arguments are without merit for two reasons. First, the actual basis for the class actions was AOL/Netscape *acquiring* personal information – or, as the *Specht*[15] complaint actually alleges, "the intentional theft of their private information."[16] This cannot reasonably be construed as alleging an act of divulging, not only because acquiring and divulging are polar opposites, but because divulging – i.e., "making known" – requires sharing with a third party. Second, the scenarios that AOL suggests satisfy the "making known" requirement not only would not legally satisfy that provision, but the *Specht* complaint does not actually allege that AOL was liable for damages for disclosing private information to third parties. No potential for liability within the policy's indemnity coverage existed, and thus St. Paul had no duty to defend.

1. "Making Known" Requires Disclosure To A Third Party

AOL bases its entire argument on the notion that the term "third party" does not appear in the policy provision at issue. But the law requires the court to examine both the text *and the context* of an insurance-policy provision. *Resource*, 407 F.3d at 636; *ACS,* 2007 WL 2142358 at *4. And courts in both California and Virginia hold that in the context of this very provision, "the coverage applies to liability for injury caused by the disclosure of private content *to a third party* – to the invasion of 'secrecy privacy' caused by 'making known' *to a third party* 'material that violates an individual's right of privacy.'" *ACS,* 2007 WL 2142358 at *7 (emphasis added, original emphasis deleted); *Resource*, 407 F.3d at 641 ("making known to any person or organization" does not include sending material to the claimant himself or herself). Thus, based

[15] AOL uses the *Specht* complaint as representative of the four underlying class-action complaints (see AOL Brf. at 2, n. 16), and so, therefore, does St. Paul.
[16] Ex. 129 (at SPM 0009).

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on exactly the same policy language, both California and Virginia law hold that an allegation of disclosure of secret material to a third party is required before an insurer must defend.

AOL tries to distinguish these cases on two grounds. First, AOL points out that those cases involved underlying allegations of liability under the Telephone Consumer Protection Act ("TCPA"), a statute that purportedly implicates the so-called seclusion interest in privacy, whereas this case involves underlying allegations that implicate the so-called secrecy interest in privacy. (AOL Brf. at 18-19.) But while that distinction is true, it does not change the third-party requirement of "making known," in those cases or in this one.

In the TCPA cases, there are two reasons why an insurer has no duty to defend. One is the policy requirement that it be the "*material* that violates" a person's right of privacy. That can happen only when the *content* of what is made known violates a right of privacy. Such a content-based privacy interest exists only in the right to keep private information secret. *See, e.g., ACS*, 2007 WL 2142358 at *7 (ruling St. Paul had no duty to defend, in part because "[n]othing in the *content* of the 'written or spoken material' in unsolicited faxed advertisements [prohibited by the TCPA] violated the recipient's *secrecy* right of privacy") (first emphasis in original, second emphasis added). Because the content-based coverage requirement – i.e., requiring that it be the "material that violates" – implicates only a person's secrecy interest in privacy, and because the TCPA implicates only a seclusion interest in privacy (the statutory right to be free from the intrusion of unsolicited commercial facsimiles), both *ACS* and *Resource* held that St. Paul had no duty to defend. But St. Paul does not make the same argument in this case, because it does not apply. The underlying classes here asserted a secrecy-type interest, and St. Paul does not deny that. Thus, AOL draws a straw-man distinction – one that defeats an argument not advanced.

Both *ACS* and *Resource*, however, provided a second basis for holding the duty to defend inapplicable – the absence of a third-party disclosure. *ACS*, 2007 WL 2142358 at *9; *Resource*, 407 F.3d at 641. That is the basis upon which St. Paul relies here. AOL tries to avoid the third-party-disclosure requirement on the ground that the requirement goes unfulfilled in a different way in a TCPA case than it did here, as though the third-party requirement could only be missing in one conceivable situation. It is true, as AOL points out, that a TCPA case involves no third-party

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disclosure because, by definition, the prohibited facsimile in such cases is always transmitted to the claimant himself or herself, not to a third party. But neither *ACS* nor *Resource* hold, as AOL now contends, that the entire universe of non-claimants therefore qualifies as "third parties." (AOL Brf. at 18.) Such a contention defies any sustained, reasoned analysis.

In fact, a prohibited fax more nearly satisfies the "making known to" provision than what occurred here. In fax cases, the insured actually sends written material to someone. Here, AOL did no more than allegedly *acquire* the class plaintiffs' private material. Acquiring and divulging cannot reasonably be the same thing. The federal district court in another fax case made this distinction simply and succinctly:

> The phrase "making known to" requires that at least *three* parties be involved – Melrose [the underlying defendant/insured], who must be the one disclosing; *the recipient of the disclosure*; and the person whose private material has been disclosed.

Melrose Hotel Co. v. St. Paul Fire and Marine Ins. Co., 432 F.Supp.2d 488, 503 (E.D. Pa. 2006) ("*Melrose*") (emphasis added).[17] In short, AOL is the first party, and the claimants – the underlying class – are the second party. The law requires there be disclosure to a third party. But just as there was no third-party disclosure in *ACS* and *Resource*, there is no third-party disclosure alleged here. Thus, St. Paul has no duty to defend under its coverage for "making known to any person or organization written or spoken material that violates a person's right of privacy."

2. The Class Actions Do Not Allege Injury Caused By AOL/Netscape "Making Known" Private Information, But Instead Allege That Each Class Member Was "Injured In Exactly The Same Way – By The Intentional Theft Of Their Private Information"

St. Paul's coverage potentially applies only when the insured is alleged to be liable for "personal injury that . . . [was] caused by a personal injury offense."[18] But the underlying class alleged no injury from AOL's "making known" – divulging – their private information. Instead, the class alleged they were "injured . . . by the intentional theft of their private information in

[17] *Melrose* is currently on appeal in the Third Circuit. *Subclass 2 Master v. St. Paul Fire*, US Court of Appeal for the Third Circuit, Case No. 06-2755.
[18] Ex. 1 (at SPM 0141).

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violation of federal law . . ."[19] AOL tries to avoid the conclusion that the class plaintiffs alleged no injury within coverage by imagining scenarios that: (1) do not involve "making known" to begin with; and (2) are not alleged as a cause of the class injuries in any event. AOL's scenarios do not support a duty to defend and should be rejected.

a. Factually, The Complaints In The Class Action Suits Do Not Support AOL's Arguments

First, AOL tries to create the appearance of "making known" by attempting to personify SmartDownload. It makes such statements as "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 . . ." (AOL Brf. at 2.)[20] SmartDownload is a computer program, not a person, not an insured, not a potentially liable party. The class plaintiffs did not "accuse" SmartDownload of anything. They accused AOL and Netscape of using that technology to steal their private information. So although AOL's personification attempt allows it to use terms like "transmit" and "disclose" – creating the perception of a "making known" – nothing in the *Specht* complaint alleges such potential liability on the part of any actual insured.

Second, "making" is a verb. "Making known" requires action. Corporations like AOL and Netscape do not take action per se. Instead, a corporation acts only through its individual employees. *See, e.g., Selman v. American Sports Und., Inc.*, 697 F.Supp. 225, 238 (W.D. Va. 1988) ("a corporation . . . can only act through its agents, officers, and employees," and a conspiracy between corporation and its employees is a legal impossibility); *Janken v. GM Hughes Electronics*, 46 Cal.App.4th 55, 78 (Cal.App. 1996) ("[a] corporation can act only through its individual employees" and a corporate employee cannot conspire with his or her corporate employer). It is legal nonsense, therefore, for AOL to argue that Netscape stole (allegedly) the

[19] Ex. 129 (at SPM 0009).

[20] See also, AOL Brf. at 5 (stating "[a]ll such private information obtained was alleged to have been 'transmitted' by SmartDownload to 'defendants' [meaning Netscape and AOL]"]; at 13 (stating "the underlying lawsuits allege that SmartDownload secretly intercepted the class members' private information and 'transmitted it back' to Netscape"); at 14 (stating "claimants accused SmartDownload of secretly 'intercepting' class members' private information . . . and 'transmitting' it back to Netscape").

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class plaintiffs' personal information and "made known" that information to itself and its employees, thus committing a "making known" offense. (AOL Brf. at 14-15.) Netscape did not "make known" private information to its employees. Netscape, through its employees, stole (allegedly) private information from the class plaintiffs. A corporation's illegal acquisition of private information is not an act of "making known to" within the meaning of St. Paul's coverage.

AOL's scenario in which it claims *Netscape* "made known" the plaintiffs' private information to *AOL* is similarly unavailing. In fact, *Specht* alleges precisely the opposite. It alleges: "Netscape has no bona fide existence independent of AOL" and "the operations of AOL and Netscape have been functionally merged and inextricably intermingled."[21] The complaint alleges AOL and Netscape worked jointly to steal the class members' private data: "They are using Internet computers and other assets under their joint control to accomplish the wrongs complained of herein."[22] It alleges not that Netscape divulged data to AOL, but that both AOL and Netscape worked together to automatically receive data through SmartDownload.[23] More importantly, *Specht* could not more clearly allege that the damages sought are for *theft* of private information, *not* for the divulging of data between the joint wrongdoers: "Plaintiffs bring this action . . . to recover damages caused to the Class by defendants' theft of their private information in violation of the Electronic Communications Privacy Act and the Computer Fraud and Abuse Act."[24]

In short, three separate bases require rejection of the making-known-to-AOL scenario. AOL is not a third party within the meaning of the St. Paul policy. Netscape did not, in any event, allegedly divulge plaintiffs' private information to AOL; instead, Netscape and AOL allegedly worked in tandem to steal the data. And the class action plaintiffs did not seek damages based upon an act of "making known," but instead sought damages for theft of information. The duty to defend exists only when the underlying action seeks damages potentially within the policy's coverage. The policy, in turn, applies only to damages for injury caused by a "making known." The underlying actions do not seek such damages. Thus, St. Paul had no duty to defend.

[21] Ex. 129 (at SPM 0011).
[22] Ex. 129 (at SPM 0011).
[23] Ex. 129 (at SPM 0014).
[24] Ex. 129 (at SPM 0005).

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b. *Lenscrafters* Is Factually Distinguishable And Contrary To *ACS* and *Resource*

The unpublished case on which AOL bases most of its argument (*Lenscrafters*) does not support a different result. *Lenscrafters v. Liberty Mut. Fire Ins. Co.*, 2005 WL 146896 (N.D. Cal. 2005). *Lenscrafter*s involved the class plaintiffs' alleged sharing of private medical information with persons – i.e., non-medical personnel – they did not authorize to receive it. The sharing occurred while the plaintiffs gave their private information to medical personnel they did authorize to receive it. This case, by contrast, involves no authorized versus unauthorized sharing of information; it involves theft. Moreover, the *Lenscrafters* defendants actually saw plaintiffs' private data *and used it*. 2005 WL 146896 at *11. Here, according to AOL, "[p]laintiffs [did] not allege that any human being at Netscape ever saw any of this information, [did] not identify any respect in which Netscape ever used any of this information for any purpose whatsoever, and do not claim that Netscape ever shared any of this information with any other person or entity."[25]

Not only are the *Lenscrafters* facts distinguishable on the basis of the nature of the wrongful conduct on which the plaintiffs there based the right of recovery, but the *Lenscrafters* court so ruled (1) based on materially different policy language, and (2) by applying case law that would contradict both Virginia and California law if applied here as AOL advocates. First, *Lenscrafters* involved an offense that required the "*publication* of material that violates a person's right of privacy." *Lenscrafters,* 2005 WL 146896 at *8 (emphasis added). St. Paul's policy requires "making known." Every court to consider the issue has ruled that St. Paul's "making known" language focuses on third-party disclosure. *See Valley Forge Ins. Co. v. Swiderski Elec., Inc.*, ___ N.E.2d ___, 2006 WL 3491675 at *14 (Ill. 2006) (finding TCPA coverage under "publication" policy language while finding cases involving St. Paul's "making known" language "distinguishable . . . in one particularly significant aspect: they involved the interpretation of different policy language"); *Park Univ. Enters. v. American Cas. Co. of Reading, PA*, 442 F.3d 1239, 1249 n.5 (10th Cir. 2006) ("*Park*") (finding TCPA coverage under "publication" policy language while finding St. Paul's "making known" provision to be "language distinct from the

[25] Ex. 217 (at NET/SDL 0004012).

policy language at issue here"); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 Fed.Appx. 201, 205-210 (11th Cir. 2005) (finding TCPA coverage under "publication" policy language while distinguishing result in *Resource* as involving "a more tightly worded advertising-injury provision"). In fact, the court in *ACS* likewise found that "publication" policy language is distinguishable from St. Paul's "making known" provision. *ACS*, 2007 WL 214258 at *9-10. In short, the policy in *Lenscrafters* is materially different from the one here.

Second, *Lenscrafters* based its reasoning on *Park*, a case that reached a result inconsistent with *ACS*. *Lenscrafters*, 2005 WL 146896 at *10-11 (agreeing with *Park* that "publication" need not involve third-party disclosure). Thus, either *Lenscrafters* is distinguishable on the basis of its different policy language, or it is inconsistent with California law (and Virginia law as well). Regardless, *Lenscrafters* cannot be used in support of the result AOL advocates here.

c. The Class Suits Do Not Allege Disclosure To Advertisers

Finally, AOL's contention that the class action complaints "suggest[] Netscape's disclosure of users' private information to third-party advertisers (like AdForce) . . ." (AOL Brf. at p. 14) is utterly unsupported in the record, and its contention that St. Paul had a duty to defend on that basis is contrary to law. First, this Court will search the underlying complaints in vain for any allegation supporting the notion that the class alleged disclosure of private information to any type of third party, much less to a third-party advertiser "like AdForce." No such allegation exists. Instead, the very first allegation in the *Specht* complaint is that the action is one "to recover damages caused to the Class by defendants' theft of their private information in violation of [federal statutes]."[26]

AOL's own underlying pleadings confirm no allegations of disclosure were being made. AOL argued in its January 2003 motion to dismiss that the class actions were *not* contending there had been any sharing of private information.[27] AOL does not dispute this. More significant (because at odds with AOL's arguments) is that even the class plaintiffs did not dispute AOL's contention. Instead, the class argued the viability of its causes of action did not depend on such a third-party disclosure. In opposing AOL's motion to dismiss, the class plaintiffs argued that:

[26] Ex. 129 (at SPM 0005).
[27] Ex. 217 (at NET/SDL 0004012).

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> Defendants also assert that the Complaints do not sufficiently plead that Defendants used the information that they harvested from the unsuspecting SmartDownload users. . . *Plaintiffs need not allege what use Defendants intended because the nature of the use is not relevant to the existence of the violation.*[28]

Thus, at that time (as throughout the class action suits) there was no claim of injury from private information being disclosed to third parties.

Second, as discussed below, even if the underlying class later inquired about, or even tried to develop a theory based upon, a third-party disclosure, AOL at no time brought this to St. Paul's attention or asked for a defense on that basis. *Resource,* 407 F.3d at 636 (Virginia law looks to four corners of complaint to determine duty to defend); *Waller,* 44 Cal.Rptr.2d at 378 (California law looks to allegations of complaint and facts readily available to the insurer to determine duty to defend). The undisputed facts show the underlying complaint and information provided to St. Paul make no claim for damage based upon a "making known" of private information to a third party.

3. Even If California Law Applies, AOL Relies Only On Facts First Disclosed During This Coverage Litigation, An Improper Basis For Imposing A Duty To Defend Under California Law

AOL argues that the result for plaintiffs here would be better if California law applies. But AOL makes that argument based upon facts that were not disclosed to St. Paul until this coverage litigation. This is not a proper basis for imposing a duty to defend under California law. Furthermore, even if this evidence were admissible, such a claim would be excluded under the Online Activities Exclusion, which expressly applies to "3rd party advertising" like AdForce. Either way, AOL's after-the-fact submission of evidence cannot lead to a duty to defend.

In the first instance, the duty to defend is made by comparing the allegations in the class-action complaints and AG Investigation with the policy terms. *Waller,* 44 Cal.Rptr.2d at 378. An insurer is not required to speculate about unpled claims, even if an unpled claim could be made (which is not even the case here). *Hurley Construction Co. v. State Farm Fire & Casualty Co.*, 12 Cal.Rptr.2d 629, 631 (Cal.App. 1992); *Gunderson v. Fire Ins. Exchange*, 44 Cal.Rptr.2d 272, 277 (Cal.App. 1995); *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968, 971 (9th Cir. 1994) (applying Ca. law). The underlying class actions and AG Investigation undisputedly alleged

[28] Ex. 226 (at NET/SDL 0004140) (emphasis added).

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no claim of injury from disclosure of private information to third parties.

It's true that California law also requires the insurer to take into account facts known or readily available to it. *Safeco Ins. Co. v. Parks,* 19 Cal.Rptr.3d 17, 24-25, 27 (Cal.App. 2004); *Waller*, 44 Cal.Rptr.2d at 378; *Montrose Chemical Corp. v. Sup. Ct.,* 24 Cal.Rptr.2d 467, 471 (Cal. 1993).[29] But once an insurer denies a claim, it has no continuing duty to investigate for changes that might create a potential for coverage. *Safeco,* 19 Cal.Rptr.3d at 24-25, 27; *Gunderson,* 44 Cal.Rptr.2d at 277. The duty to defend is *not* judged by information the insured provides after the claim is resolved and it sues its insurer. *Safeco,* 19 Cal.Rptr.3d at 24-25, 27.

The information provided to St. Paul at initial tender and during later communications did not show that claimants alleged an injury caused by AOL making known private information to a third party. AOL has not demonstrated that it provided any such information or even that such information existed at the time of the tender or at the time AOL requested reconsideration (as discussed further below). The information upon which AOL relies in its Opposition/Cross-Motion was never provided to St. Paul before this coverage action, even though there was the opportunity to do so.[30] This new information is inadmissible and irrelevant, even if California law applied.[31]

It is the *insured's* burden to establish that the proffered claim falls within the basic coverage of the policy. *Royal Globe Ins. Co. v. Whitaker,* 226 Cal.Rptr. 435, 437 (Cal.App. 1986); *Aydin Corp. v. First State Ins. Co.*, 77 Cal.Rptr.2d 537, 539 (Cal. 1998); *Aeroquip Corp. v. Aetna Cas. & Sur.*, 26 F.3d 893, 895 (9th Cir. 1994) (applying Ca. law). The reason for so placing the burden is that the insured is the one with superior knowledge of, and access to, the facts. *Aydin,* 77 Cal.Rptr.2d at 541-542; *Aeroquip,* 26 F.3d at 895. AOL failed to inform St. Paul of *any facts* that

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[29] *Eigner, Betts,* and *Anthem* are distinguishable. (AOL Brf. at 13, 22, 23, citing *Eigner v. Worthington*, 57 Cal.App.4th 188 (Cal.App. 1997); *Betts v. Allstate Ins. Co.,* 154 Cal.App.3d 688 (1984); *Anthem Elecs. Inc. v. Pac. Employers Ins. Co.*, 302 F.3d. 1049 (9th Cir. 2002).) *Eigner* concerned an insurer that, in the face of a complaint indicating there were "other damages" did not investigate further. In *Betts,* the insurer was accused of hiding its head in the sand because it "hid adverse reports." In *Anthem*, the complaint's allegations were enough to trigger the potential for coverage. Here, in contrast, the complaints do not raise the potential for coverage, AOL did not provide information indicating potential coverage, and the class action plaintiffs agreed they were not making any such claim. Even AOL's new information does not present a covered claim.

[30] See, Weiss Decl. ¶ 3-6; Supp. Thorpe Decl. ¶ 3.

[31] See, pp. 17-19, *infra*; Evid. Objs.

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would bring the class action suits within the personal injury coverage of the policy.

a. The Information Provided At Initial Tender

When AOL first tendered the class action suits in August and September of 2000, the Class (in its complaints or pursuant to other available information) did not allege injury based on disclosure of private information to third parties.[32]

b. The Request For Reconsideration

When AOL requested reconsideration in March 2001, its counsel provided no additional information.[33] Rather, counsel questioned St. Paul's refusal to defend *based upon the class action complaints only.*[34] From that time until St. Paul reiterated its denial in August 2002, AOL provided no information to show the complaints were amended or that other information existed that demonstrated the class actions potentially fell within the coverage of the St. Paul policy.[35] No evidence shows that during this time period the class-action plaintiffs alleged injury from private information being disclosed to third parties, and AOL undisputedly provided no such information to St. Paul. There is no duty to defend under California law in such circumstances.

c. The Continuing Communications Between AOL and St. Paul

AOL's communications did not stop with St. Paul's denial. In October 2002, Carome's office advised St. Paul of a "significant development" in the case – the denial of AOL's motion to compel arbitration.[36] St. Paul responded, stating that: "If you have any other information which you believe may affect our determination . . . please feel free to contact me."[37] In June 2004, Carome again advised St. Paul of a "development," this time that settlement discussions were underway.[38] In neither communication did AOL provide or even suggest the existence of new information about allegations of injury from disclosure of private information to a third party.

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[32] AOL's argument that the word "use" in the complaints "suggests" there was disclosure of private information to a third party is just that, argument. (AOL Brf. at 14:4.) AOL's argument that the class action plaintiffs "maintained that Netscape did, in fact, share" private information to third parties is unsupported by any citation to evidence. (AOL Brf. at 22:13-14.)
[33] Ex. 132.
[34] Ex. 132.
[35] See, Carome Decl. (if not excluded); Weiss Decl.¶ 3-6; Evid. Objs.
[36] Ex. 137.
[37] Ex. 227.
[38] Ex. 228.

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Between October 2002 and June 2004, AOL continued to communicate regarding other matters, including the AG Investigation.[39] St. Paul has other open AOL claims, and had regular contact with AOL's legal department and its broker.[40] During this same period, AOL and St. Paul communicated frequently about the 5.0 action that AOL had filed against St. Paul in Virginia.[41] At no time did AOL provide or suggest the existence of new information about allegations of injury from disclosure of private information to third parties. Again, California law provides no basis for a duty to defend in such circumstances.

d. The New Information Provided After Coverage Lawsuit Filed[42]

AOL provided St. Paul with documents from the class action suits during discovery in this coverage lawsuit.[43] These documents show that AOL argued in a January 2003 motion to dismiss that the class plaintiffs were *not* contending there had been any disclosure of private information.[44] The documents also show that class plaintiffs *agreed*, stating they did not need to plead whether or how AOL used the stolen private information.[45] Thus, irrefutably, the class plaintiffs confirmed they were not making any claim of injury from private information being disclosed to third parties.

David Park's deposition was apparently taken on October 20, 2003.[46] The deposition did not result in a report from Carome to St. Paul of any "significant development." Rather, St. Paul first learned about the deposition during discovery in this coverage dispute.[47] AOL failed to tell this Court that Park affirmatively testified in his deposition that there was no disclosure of private information to third parties:

Q. [Carome] To the best of your knowledge, did Netscape ever make any use whatsoever at

[39] Ex. 190, 191, 192.
[40] Weiss Decl. ¶ 3.
[41] Weiss Decl. ¶ 4; *America Online,* 347 F.3d 89 (4th Cir. 2003).
[42] This new information should not be considered by the Court since it was not provided to St. Paul at the time of tender. See Weiss Decl. The evidence is not relevant and not admissible. See, Evid. Objs. However, if the Court considers AOL's new evidence, the Court should also consider St. Paul's.
[43] Supp. Thorpe Decl. ¶ 3.
[44] Ex. 217 (at NET/SDL 0004012).
[45] Ex. 226 (at NET/SDL 0004140).
[46] Ex. 229 (at NET/SDL 0006334). Park was an employee at Netscape responsible for the creation of SmartDownload. Ex. 229 (at NET/SDL 0006341-6342, 6350, 6355, 6356 [Park 8:24-9:6, 17:22-25, 22:3-5, 23:4-8]). See also Park Decl.
[47] Supp. Thorpe Decl. ¶ 3.

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any time of the URL information regarding the file that user downloaded that the SmartDownload client transmitted to Netscape?
A. [Park] To the best of my knowledge, we never used that information.
Q. To the best of your knowledge, did anyone within Netscape ever even do so much as to look at that information or know what that information was?
A. To the best of my knowledge, I don't think anyone did.
. . .
Q. [Rubin] Now, Mr. Carome asked you a couple of questions about whether Netscape at any time made any use of URL information, and you testified to the best of your knowledge that Netscape never used that information; is that correct?
A. Yes.
Q. Would you have known if Netscape had used that information.
A. I probably would have.
. . .
Q. I think you also testified that, to the best of your knowledge, Netscape never shared that information with anyone; is that correct?
A. Yes.
Q. Would you have known if Netscape had shared that information.
A. I would say I would have known, yes.[48]

Park referred to document SDB 618 (Ex. D to Park's Decl.) and testified that the words "must have an ad solution" refer to banner ads displayed to users as they used SmartDownload as a "revenue opportunity for Netscape."[49] AdForce was the company that served up the ad the users saw when they launched SmartDownload.[50] The idea of using a user's URL information was discussed but, according to Park, not implemented because "[i]t basically lost its focus, lack of resources to maintain the initiative to have targeted advertising."[51] Carome at no time alerted St. Paul that Park's testimony was a development warranting reconsideration of its coverage position.

There apparently also was a settlement conference in March 2004 at which the class plaintiffs used a PowerPoint (also not communicated to St. Paul).[52] While the PowerPoint may suggest a contention that AdForce was capable of using user information to create ads, it does not indicate there was evidence this was being done or that it was causing injury. Even if the class plaintiffs were trying to develop this theory, they never made any claim for injury from private information being provided to AdForce. Certainly, AOL never communicated any such claim. Frankly, the PowerPoint must not have concerned AOL because not only did AOL not advise St.

[48] Ex. 229 (at NET/SDL 0006526-6527, 6429, 6430 [Park 194:13-195:2; 197:17-25; 198:13-23]).
[49] Ex. 229 (at NET/SDL 0006412-6413 [Park 79:25-80:12]).
[50] Ex. 229 (at NET/SDL 0006469-6470 [Park 136:19-137:10]).
[51] Ex. 229 (at NET/SDL 0006419 [Park 86:7-22]).
[52] Carome Decl. ¶ 6, Ex. H; Weiss Decl. ¶ 6; Supp. Thorpe Decl. ¶ 3.

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Paul about the settlement conference and PowerPoint, but the class plaintiffs were willing shortly thereafter to settle without receiving any payment from AOL in return for AOL's agreement to take steps it had already voluntarily agreed to take to revise its software program.[53]

The new information AOL belatedly offers is irrelevant and inadmissible even under California law.[54] AOL did not provide this information with its tender, or during the course of the class action suits. In short, AOL had the burden of bringing the underlying claims potentially within the coverage grant of the St. Paul policy, and it failed to do so.

In sum, Virginia and California law require the same result. Under Virginia law, the four corners of the class action complaints do not state a claim potentially within the St. Paul policy. Therefore, St. Paul had no duty to defend. Under California law, neither the complaints nor the extrinsic evidence in existence at the time of the tender created a potential for coverage under the policy. The facts AOL now brings forth are irrelevant and do not form the basis for imposing a duty to defend, even if California law were applied to this dispute. Even if that new information is considered, it does not show a claim of injury from disclosure of private information to a third party. St. Paul is entitled to summary judgment under both Virginia and California law.

D. St. Paul's Criminal Act's Exclusion Precludes Coverage

St. Paul's policy excludes coverage for personal injury that results from: the protected person knowingly breaking any criminal law; or any person or organization breaking any criminal law with the consent or knowledge of the protected person.[55] The exclusion must be interpreted according to its plain meaning. *Waller,* 44 Cal.Rptr.2d at 378. It is irrelevant how any underwriter or claims person interprets the provision; policy interpretation is for the Court. *Waller*, 44 Cal.Rptr.2d at 378; *Palmer v. Truck Ins. Exch.*, 90 Cal.Rptr.2d 647, 652 (Cal. 1999).[56]

AOL's argument that there were no allegations that AOL knowingly broke any criminal law is belied by the class action complaints. Each suit states only two causes of action, both based

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[53] Ex. 230 (at NET/SDL 0009419-9420).
[54] See Evid. Objs.
[55] Ex. 1 (at SPM 0154).
[56] Solberg's and Weiss' testimony have no bearing on this Court's determination of the meaning and application of the plain language in the St. Paul policy. See Evid. Objs.

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on criminal statutes. All causes of action incorporate the allegation that defendants' actions were "conscious, intentional, wanton and malicious . . ."[57] AOL argues that these allegations merely allege an intention to act, not an intention to violate a criminal law. But it cites no authority on this point. Moreover, cases analyzing a similar "willful violation" exclusion have found no duty to defend, even where there was no evidence that the insured knew of the penal statutes. *See, e.g., MGM, Inc. v. Liberty Mut. Ins. Co.*, 855 P.2d 77, 80 (Ks. 1993) ("*MGM*"); *State Farm Fire & Casualty Co. v. Singh*, 2006 WL 1520516 (E.D. Va. 2006).[58]

AOL contends that negligent or unintentional violations of criminal law do not trigger the exclusion. (AOL Brf. at 24.) But there are *no* allegations of unintentional or negligent acts. The class actions allege intentional conduct, and the ECPA and CFAA require intent as an element.

AOL's contention that the exclusion does not apply because "the insured was sued in a civil action for civil damages" is unsupported by its authorities. (AOL Brf. at 25.) AOL principally relies upon *Lenscrafters*, which held that the exclusion did not absolve the insurer's duty to defend because not all Liberty's policies had the exclusion. *Lenscrafters*, 2005 WL 146896 at *12 ("exclusion does not even appear in two of the six policies triggered by the [underlying action], and so it cannot be the basis to deny a duty to defend as to those policies"). In *Lenscrafters*, further analysis was not necessary to its decision, making the ruling in that unpublished decision *dicta*.[59]

Here, the allegations in the class action suits were that injury resulted from the insureds knowingly breaking a criminal law, conduct the St. Paul policy excludes.

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[57] Ex. 129 (at SPM 0020, 0022).

[58] AOL attempts to distinguish cases cited by St. Paul because they involved insureds who were apparently convicted of crimes. (AOL Brf. at 26 and n. 94.) Yet that factor is not essential to the holdings. Indeed, *MGM* applied the "willful violation" exclusion to claims of secretly recording employees' telephone conversations, *even* where there was no evidence the insured knew of the penal statutes *or* had been charged with or convicted of a crime. *MGM,* 855 P.2d at 80.

[59] *California Shoppers* is likewise inapposite. That case concerned an insurer's duty to indemnify for punitive damages, under insurance provisions that are not cited and under Cal. Ins. Code § 533 ("[a]n insurer is not liable for a loss caused by the willful act of the insured . . ."). *California Shoppers v. Royal Globe*, 175 Cal.App.3d 1, 31-32 (Cal.App. 1985). The court did not analyze allegations of intentional violation of criminal statutes under a criminal act exclusion.

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E. The Class Actions And AG Investigation Involved Claims Arising From AOL's "Online Activities" And Are Therefore Excluded

1. AOL's Evidence As To The Meaning Of "Providing Internet Access" And Whether SmartDownload Fits That Definition Are Inadmissible

AOL's Opposition/Cross-Motion ignores the parties' mutual intentions with respect to the Online Activities Exclusion, and relies instead on inadmissible and irrelevant information (including the Patterson Decl.) to suggest a meaning of the exclusion and the operation of SmartDownload.[60] AOL relies upon a book published in 2001 to establish what "any idiot" would know about the meaning of "internet access." (AOL Brf. at 27, n. 99.) AOL's source did not exist when St. Paul's policy was finalized and it is fanciful to suggest that AOL and St. Paul had an obscure and technical reference in mind when using the everyday term "access."[61] Further, AOL's own documents show SmartDownload was created to improve customers' access to the Internet, exactly what the parties did not intend to cover under the St. Paul policy. As shown below, the law rejects AOL's attempt to provide a narrow, technical meaning to terms used to define "Online Activities."

2. The Exclusion's Plain Language And The Parties' Undisputed Intent Establish That The Exclusion Precludes A Duty To Defend

Three separate bases support application of the Online Activities Exclusion: (1) the ordinary meaning of the exclusion and its definition; (2) the parties intended the Online Activities Exclusion to apply broadly to activities like those alleged in the class actions; and (3) if the exclusion is ambiguous, it must be construed against AOL.

AOL's focus runs afoul of elementary rules of policy interpretation under which the court looks first to the contract language to ascertain its plain meaning. *Seabulk Offshore, Ltd. v. American Home Assur. Co.*, 377 F.3d 408, 419 (4th Cir. 2004) (applying Va. law); *Waller*, 44 Cal.Rptr.2d at 378. The parties' intent is to be inferred, if possible, solely from the contract's

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[60] Patterson's Declaration is inadmissible and should be stricken. See, Evid. Objs. AOL did not disclose Patterson as an expert pursuant to the federal rules. Fed. R. Civ. Pro. Rule 26(a), 26(e), 37(c)(1); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998). The Declaration is also irrelevant and not proper expert testimony. Fed. Rules of Evid. 402, 403, 702 and 703.

[61] See Evid. Objs.

written provisions. *Id.* No evidence here suggests the parties intended any technical or special meaning for the words used. *See Bay Cities Paving & Grading v. Lawyers Mut.*, 21 Cal.Rptr.2d 691, 698 (Cal. 1993) ("*Bay Cities*") (policy language interpreted in ordinary and popular sense unless parties used technical or special meaning). AOL, however, would have the Court limit the phrase "providing internet access to 3rd parties" to a technical meaning that would confine its application to AOL's role as a so-called "ISP" (Internet Service Provider). This is tantamount to asking the Court to rewrite the exclusion to provide a narrow, technical meaning of "providing *commercial access to the internet* to 3rd parties *as an ISP,*" rather than, as worded, "providing *internet access* to 3rd parties." The ordinary and popular dictionary definition of "access" conveys a broader meaning than what AOL suggests. "Access" means "the ability . . . to approach, enter, exit, communicate with, or make use of." *American Heritage Dictionary*, 4th ed., c. 2000, p. 10. "Access," in its popular sense, does not mean "providing one narrow kind of service for a fee." The law does not permit AOL to smuggle a narrow technical meaning into a plainly worded contract.

SmartDownload undisputedly involved "providing internet access to 3rd parties." The very reason for SmartDownload was to facilitate use of the Internet and to aid in the entering into, exiting, and communicating through the Internet. SmartDownload solved the problem in which the downloading of documents often interrupted a user's Internet connection and bumped the user off the Internet.[62] In describing what SmartDownload does, the web site proclaimed: "SmartDownload lets you pause, resume and surf the web while you download."[63] SmartDownload is plainly part of AOL's defined "Online Activities."

The class actions alleged that the SmartDownload product, while providing uninterrupted Internet access in the course of downloading documents, also intruded on the Internet user's privacy by intercepting and collecting information about the user's viewing habits. The allegations describe activity occurring during the providing of Internet access to third parties. This is the very type of risk the parties did not intend to cover under the St. Paul policy. Thus, the class

[62] Ex. 231 (at NET/SDL 0002323); Ex. 220 (at NET/SDL 00010585-10587).
[63] Ex. 219 (at NET/SDL 00010072). See also Ex. 219 (at NET/SDL 00010058-10059).

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action suits and AG Investigation fall within, and are excluded by, the Online Activities Exclusion.

Moreover, even if there are two reasonable policy interpretations such that an ambiguity exists, this Court then examines extrinsic evidence to determine what the parties intended. *American Realty Trust v. Chase Manhattan Bank, N.A.*, 281 S.E.2d 825 (Va. 1981); *Bay Cities*, 21 Cal.Rptr.2d at 699. Such an ambiguity, if it existed, must be examined in the context of *this* policy in the circumstances of *this* case. *Bay Cities,* 21 Cal.Rptr.2d at 699 (emphasis in case).

What the parties intended the words to mean is given great weight. *American Realty Trust,* 281 S.E.2d at 831 (interpretation placed by parties themselves entitled to great weight); *Bank of the West v. Sup. Ct.,* 10 Cal.Rptr.2d 538, 545 (Cal. 1992) (fundamental goal is to give effect to mutual intention of the parties); *AIU Ins. Co. v. Sup. Ct.,* 274 Cal.Rptr. 820, 831 (Cal. 1990) (same).[64] Throughout negotiations, AOL and St. Paul mutually agreed that the policy would not cover personal injury arising out of online activities. Instead, the parties intended that the policy would provide personal-injury coverage for normal business activities but not for AOL's and its subsidiaries' online activities.[65] In fact, AOL's own risk manager (Spencer) (previously one of the brokers on Marsh's AOL team), in a June 23, 2000 email, set forth AOL's belief that "the intent all along was to exclude [Personal Injury/Advertising Injury] that resulted from AOL's operations as an online company . . ."[66]

St. Paul understood the AOL-drafted definition to encompass the parties' mutual intentions not to cover personal injury offenses for online business activities.[67] Consistent with that understanding and the very low premium charged, St. Paul accepted the definition of "Online Activities."[68] There was no adjustment to the premium as a result of AOL's definition, further demonstrating that the parties had no intention in 2000 to provide broader coverage than what they had intended in 1999. Nothing supports the notion that the parties somehow intended an unwritten

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[64] The intent of the contracting parties is an issue of law appropriate for summary judgment. *Trex Co. v. ExxonMobil Oil Corp.,* 234 F.Supp.2d 572, 575-576 (E.D. Va. 2002); *Flintkote Co. v. Gen. Accident Assur. Co. of Can.,* 410 F.Supp.2d 875, 881-882 (N.D. Cal. 2006).
[65] Ex. 21, 22, 23, 24, 36, 37.
[66] Exs. 36, 37.
[67] Ex. E (Midwinter 320:21-324:16), Ex. E-1 (Midwinter 330:22-331:22).
[68] Ex. E-1 (Midwinter 327:11-24).

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and narrow application of the Online Activities Exclusion. The opposite is true; the parties mutually intended a broad application of the exclusion commensurate with AOL's overall program to insure its online activities elsewhere. Notably, AOL purchased more expensive forms of other insurance to cover its online activities from Lloyds (E&O) and Executive Risk (multimedia).[69]

And one "party's unexpressed subjective intent or understanding is inadmissible to prove an intent different from either the expressed terms of the written agreement or the parties' mutual understanding." *St. Paul Mercury Insurance Co. v. Frontier Pacific Union Ins. Co.*, 4 Cal.Rptr.3d 416, 428 n.8 (Cal.App. 2003). There is no evidence that Spencer's purported interest in limiting or narrowing the exclusion was discussed with or disclosed to St. Paul at the time the definition was added to the exclusion.[70] Spencer's "understanding" is irrelevant.

Finally, AOL drafted the final version of the Online Activities Exclusion; therefore, any ambiguity should be construed against the one causing the uncertainty - AOL. *Martin & Martin, Inc. v. Bradley Enterprises, Inc.*, 504 S.E.2d 849, 851 (Va. 1998); *Doe v. Group Hosp. & Medical Services*, 3 F.3d 80, 89 (4th Cir. 1993); *Fireman's Fund Ins. Co. v. Fibreboard Corp.*, 227 Cal.Rptr. 203, 206-207 (Cal.App. 1986); *Hartford v. State of Calif.*, 49 Cal.Rptr.2d 282, 285 (Cal.App. 1996).

For all these reasons, the Online Activity Exclusion precludes coverage for this claim.

3. AOL's New Evidence Presents Additional Reasons The Online Activity Exclusion Applies

Although the new information AOL presents in its Opposition/Cross-Motion is inadmissible,[71] such evidence would not change the result. AOL argues that this new information shows that the class actions involved claims of disclosure of (or at least the ability to disclose) private information to third parties because information could have been or was being sent to "a third-party advertising company, AdForce, and used for marketing purposes." (AOL Brf. at 22.)[72] But even if AOL were now permitted to introduce this information about AdForce as an attempt to

[69] Ex. 18, 22, 4, 3.
[70] Ex. 174, 175, 39; Ex. G (O'Connor 7:13-19; 8:20-22; 74:13-23; 82:14-20; 86:4-21); Ex E (Midwinter 322:8-323:2).
[71] See Evid. Objs.
[72] See, also, Carome Decl. ¶ 6-7.

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satisfy the "making-known to" requirement in St. Paul's policy, this is just the type of claim the parties intended would fall within the Online Activities Exclusion. AdForce is plainly "3rd party advertising" within the definition of the Online Activities Exclusion. As such, even if the Court considered AOL's new information, the Online Activities Exclusion applies.[73]

F. The AG Investigation Did Not Demand Damages And Is Not Covered

AOL completely ignores St. Paul's argument that the AG Investigation is not covered because it was not a claim seeking damages. AOL does not (and cannot) dispute that the AG Investigation did not seek covered damages. Rather, the AG sought information. The investigation was resolved with AOL's agreement it would undertake, and refrain from undertaking, certain activities.[74] As a result, there was no duty on the part of St. Paul to defend AOL against that investigation. The AG Investigation was not a claim seeking "damages" and, therefore, it is not covered.

III. CONCLUSION

St. Paul respectfully requests this Court grant St. Paul partial summary judgment, deny AOL and Netscape partial summary judgment, and find St. Paul had no duty to defend AOL or Netscape with respect to the class action suits and AG Investigation.

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[73] AOL argues St. Paul admits the class actions suits did not involve 3rd party advertising. (AOL Brf. at 27, n. 96.) Based upon the information provided at the time of tender, this is a true statement. However, if this Court permits AOL to present new information about the nature of the claims, information that was not provided at the time the claim was tendered to St. Paul or at any time before this coverage action was filed, then this part of the Online Activities Exclusion does apply. See Ex. 232.

[74] Ex. 220.