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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT COURT OF CALIFORNIA

SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and AMERICAN 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 OBJECTIONS TO AND MOTION TO STRIKE EVIDENCE IN PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION** Date: March 26, 2007 Time: 9:00 a.m. Judge: Honorable James Ware Courtroom: 8, 4th Floor, San Jose

Defendant St. Paul Mercury Insurance Company ("St. Paul") hereby objects to and moves to strike, pursuant to Federal Rule of Evidence 103(a)(1), the following evidence presented by plaintiffs America Online Inc. and Netscape Communications Corp. (collectively, "AOL" or "plaintiffs") in connection with plaintiffs' cross-motion for partial summary judgment and its opposition to St. Paul's motion for partial summary judgment.

Plaintiffs' proffered evidence violates the Federal Rules of Evidence ("FRE") and Federal Rules of Civil Procedure ("FRCP"). Accordingly, this Court should not consider this evidence in deciding St. Paul's motion or plaintiffs' cross-motion. *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 n.9 (9th Cir. 1980) (only admissible evidence properly considered by trial court in granting summary judgment).

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Proffered Evidence/Grounds For Objection

1. Marc Patterson Declaration

St. Paul objects to and moves to strike the Declaration of Marc Patterson in its entirety.

Inadmissible, undisclosed expert: FRCP 26(a), 26(e), 37(c)(1). AOL did not disclose Patterson as an expert pursuant to FRCP 26(a) or 26(e). Absent such disclosure, AOL is not permitted to offer Patterson's declaration in connection with plaintiffs' motion and opposition. FRCP 37(c)(1) ("A party that without substantial justification fails to disclose information required … is not … permitted to use as evidence … at a *hearing, or on a motion* any witness or information not so disclosed.") (emphasis added); *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998) (excluding expert declaration under FRCP 37(c)(1) because of party's failure to disclose prior to motion for summary judgment). Thus, Patterson's Declaration should be stricken in its entirety.

Irrelevant, not proper expert witness testimony: FRE 401, 402, 702. Expert testimony is not permitted on a question of law for the court to decide. *McHugh v. United Serv. Auto. Ass'n*, 164 F.3d 451, 463 (9th Cir. 1999) (experts' testimony cannot be used to provide legal meaning or interpret insurance policies); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996) (expert testimony is not proper for issues of law, like contract interpretation); *Flintkote Co. v. Gen. Accident Assur. Co. of Can.*, 410 F.Supp.2d 875, 885 (N.D. Cal. 2006) (expert testimony inadmissible to establish meaning of language in an insurance policy); *Cooper Companies v. Transcontinental Ins. Co.*, 31 Cal.App.4th 1094,1100 (Cal.App. 1995) ("meaning of the policy is a question of law about which expert opinion testimony is inappropriate"); *Chatton v. National Union Fire Ins. Co.*, 10 Cal.App.4th 846, 865 (Cal.App. 1992) ("opinion evidence is completely irrelevant to interpret an insurance contract"); *Suarez v. Life Ins. Co. of North America*, 206 Cal.App.3d 1396, 1406-07 (Cal.App. 1988) (trial court did not abuse discretion in ruling expert testimony from linguistics professor on meaning of policy's terms was inadmissible).

Irrelevant: FRE 401, 402. Patterson's testimony is offered on the subject of the meaning of online activities and internet access in the Online Activities Exclusion that St. Paul and AOL negotiated and whether the function of the SmartDownload product falls within that definition.

Patterson was not involved in the negotiation of St. Paul's policy language. There is no evidence the parties involved in negotiating the exclusion consulted any technical information about the Internet or used anything other than their common sense meaning in the words they chose. See, e.g., Ex. 36, 37, 21, 22, 23, 24. Patterson is attempting to interject technical meaning into an exclusion that is not based upon any technical explanation.

Lack of personal knowledge: FRE 602. Patterson has no personal knowledge of SmartDownload or of the creation of the Online Activities Exclusion. While he states he reviewed data and information regarding it, Patterson never states he actually used the SmartDownload function. He does not indicate he has read the allegations of the complaints in the class action suits or is familiar with the claims. His testimony is at odds with AOL's own description of SmartDownload as a product that assisted Internet users so as to avoid interrupted Internet access. See, e.g., Exs. 220, 231. His testimony is at odds with the parties' statements of their intentions at the time of contracting. Exs. 36, 37, 21, 22, 23, 24.

2. Patrick Carome Declaration

St. Paul objects to and moves to strike the Declaration of Patrick Carome in its entirety.

Irrelevant: FRE 401, 402. The Carome Declaration ("Carome Decl.") is presented in support of plaintiffs' "making known" argument. (AOL Brf. at 5, 6, 22.) The Declaration is irrelevant under both Virginia and California law. Under Virginia law, the duty to defend is determined from the four corners of the complaint. An insurer's obligation to defend an action "depends on comparison of the policy language with the underlying complaint to determine whether the claims alleged [in the complaint] are covered by the policy." *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* 407 F.3d 631, 636 (4th Cir. 2005) (applying Va. law); *America Online, Inc. v. St. Paul Mercury Ins. Co.,* 347 F.3d 89, 93 (4th Cir. 2003) (applying Va. law).

Even if California law were to apply, the Declaration is still irrelevant. California law requires the insurer to take into account facts known or readily available to it at the time of tender. *Waller v. Truck Ins. Exch. Inc.,* 44 Cal.Rptr.2d 370, 378 (Cal. 1995); *Safeco Ins. Co. v. Parks,* 19 Cal.Rptr.3d 17, 27 (Cal.App. 2004); *Gunderson v. Fire Ins. Exchange*, 44 Cal.Rptr.2d 272, 277 (Cal.App. 1995). Once an insurer denies a claim, the insurer does not have a

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continuing duty to investigate to see if anything changes that might create a potential for coverage. *Safeco,* 19 Cal.Rptr.3d at 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 27; *Haggerty v. Fed. Ins. Co.,* 32 Fed.Appx. 845, 848 n. 4 (9th Cir. 2002).

The Declaration is also irrelevant for the reasons set forth below as to the specific exhibits attached to the Declaration.

Hearsay: FRE 801, 802. Carome's testimony regarding what theories plaintiffs were pursuing in the class actions is hearsay since that testimony is presented for the truth that those statements were made and actions taken.

Misleading, incomplete, incorrect testimony: FRE 403. Carome's testimony regarding what plaintiffs were alleging in the class actions is not only contrary to the allegations in the complaints (see, e.g., Ex. 129), but also contrary to pleadings AOL filed in the class actions which argued the claimants were *not* contending there had been any sharing of private information (see, Ex. 217). Indeed, class plaintiffs' counsel irrefutably indicated that class plaintiffs were not alleging there had been use of the stolen private information, because class plaintiffs did not need to allege this in order to prove a violation of the criminal statutes. Ex. 226 (at NET/SDL 0004140).

3. PowerPoint Settlement Presentation, Ex. H to Carome Decl.

Irrelevant: FRE 401, 402. The PowerPoint presentation is relied on by plaintiffs for their "making known" argument. (See, e.g., AOL Brf. at 6, n. 28.) The PowerPoint is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the PowerPoint is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

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Hearsay: FRE 801, 802. The PowerPoint is inadmissible hearsay since it is presented for the truth that those statements were made and actions taken.

Misleading: FRE 403. Plaintiffs suggest the PowerPoint indicates there was a claim of injury from disclosure of private information, but the PowerPoint does not say that. At the most it can only be said to suggest AdForce was capable of using user's information. The class plaintiffs were not in fact making any claim for injury from the disclosure of private information and plaintiffs' own witness, Park, testified that no private information was given to AdForce. Ex. 229 (at NET/SDL 0006529-6527, 6429, 6430).

4. @stake, Ex. J to Carome Decl.

Irrelevant: FRE 401, 402. This document is apparently presented for the purpose of plaintiffs' choice of law argument. (AOL Brf. at 4, n. 11; at 5, n. 15.) Plaintiffs argue the document shows SmartDownload was distributed to users from Netscape's servers in California and certain electronic data was transmitted to and stored on Netscape's services in California. All of this is irrelevant. The relevant factors are where the named insured (AOL) and St. Paul negotiated and issued this insurance policy, that the claims were to be handled through AOL's office, and that AOL has already selected a jurisdiction to interpret this very insurance contract. Cal. Civ. Code § 1646. The state that has those type of contacts and has the greatest interest in this coverage dispute is Virginia (not California).

5. David Park Declaration

St. Paul objects to and moves to strike the Declaration of David Park in its entirety.

Making known testimony irrelevant: FRE 401, 402. Park's Declaration ("Park Decl.") is presented for the purpose of plaintiffs' "making known" argument. (AOL Brf. at 5, 6, 14, 22.) Park's testimony is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, Park's testimony is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44

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Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4. The Declaration is also irrelevant for the reasons set forth below as to the specific exhibits and deposition testimony attached to the Declaration.

Choice of law testimony irrelevant: FRE 401, 402. To the extent AOL is relying upon Park's testimony for its choice of law argument, the testimony is irrelevant to the factors this Court should consider. (AOL Brf. at 4.) Where Park was working and where Netscape is located has no relevance to this insurance coverage dispute. The relevant factors are where the named insured (AOL) and St. Paul negotiated and issued this insurance policy, that the claims were to be handled through AOL's office, and that AOL has already selected a jurisdiction to interpret this very insurance contract. Cal. Civ. Code § 1646. The state that has those type of contacts and has the greatest interest in this coverage dispute is Virginia (not California).

6. Augusta Feature Plan, Ex. A to Park Decl.

Irrelevant: FRE 401, 402. This document is apparently presented for the purpose of plaintiffs' "making known" argument. (AOL Brf. at 5, 22.) The memo is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the memo is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

7. Sept. 19, 1998 Memo, Ex. B to Park Decl.

Irrelevant: FRE 401, 402. This memo is apparently presented in support of plaintiffs' "making known" argument. (No specific mention in AOL Brf.) The memo is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the memo is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus,

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it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

8. Park Deposition Testimony, Ex. C to Park Decl.

Irrelevant: FRE 401, 402. The deposition testimony of Park used by plaintiffs to support their "making known" argument is irrelevant. (AOL Brf. at 4, 5, 22.) Park's testimony is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the testimony is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

Misleading, incomplete: FRE 403. The excerpts from Park's deposition are misleading and incomplete because they are offered to suggest there was evidence of possible disclosure of private information to an advertising agency, AdForce. However, there is no evidence the class plaintiffs were ever alleging injury from the disclosure of private information to a third party. In fact, Park testified at his deposition that there was no disclosure of private information to third parties. Ex. 229 (at NET/SDL 0006529-6527, 6429, 6430). Park testified the use of SmartDownload for advertising purposes was an idea that was not executed upon because of loss of focus and lack of resources. See, Ex. 229 (at NET/SDL 0006419). There also was nothing nefarious about AOL's use of AdForce: AdForce was providing banner ads that ran while a person was downloading information. Ex. 229 (at NET/SDL 0006469-6470).

9. Software Requirements Spec. for NSDA, Ex. D to Park Decl.

Irrelevant: FRE 401, 402. This exhibit is apparently presented for the purpose of plaintiffs' "making known" argument. (AOL Brf. at 5, n. 14.) The exhibit is irrelevant under Virginia law because the duty to defend is determined by the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law

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applies, the exhibit is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

10. Augusta Feature Plan, Ex. E to Park Decl.

Irrelevant: FRE 401, 402. This exhibit is apparently presented for the purpose of plaintiffs' "making known" argument. The exhibit is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the exhibit is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty v. Fed. Ins. Co.,* 32 Fed.Appx. 848, n. 4.

11. Sept. 30, 1998 Memo, Ex. F to Park Decl.

Irrelevant: FRE 401, 402. This memo is apparently presented for the purpose of plaintiffs' "making known" argument. (No specific mention in AOL Brf.) The memo is irrelevant under Virginia law because the duty to defend is determined from the four corners of the complaint. *Resource*, 407 F.3d at 636; *America Online*, 347 F.3d at 93. To the extent California law applies, the memo is also irrelevant because it was not provided to St. Paul at the time of tender or at any time during the class action suits; it was not provided until this coverage lawsuit. Thus, it is not evidence that is proper for consideration on the duty to defend. *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 27; *Gunderson*, 44 Cal.Rptr.2d at 277; *Haggerty,* 32 Fed.Appx. at 848, n. 4.

12. Dan Weiss Deposition Testimony

"Making known" testimony irrelevant: FRE 401, 402. Weiss' testimony regarding the meaning of "making known" is irrelevant. (AOL Brf. at 15, n. 59 [Weiss 76:17-77:14]; AOL

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Brf. at 21, n. 73 [Weiss 282:15-283:9].) Interpretation of policy language is a question of law for the court to decide. *Pilot Life Ins. Co. v. Crosswhite*, 145 S.E.2d 143, 146 (Va. 1965); *Seabulk Offshore, Ltd. v. American Home Assur. Co.,* 377 F.3d 408, 418 (4th Cir. 2004) (applying Va. law); *Waller,* 44 Cal.Rptr.2d at 378; *Palmer v. Truck Ins. Exch.*, 90 Cal.Rptr.2d. 647, 652 (Cal. 1999). The policy language should be interpreted as to its plain meaning. *Id.*

Irrelevant, misleading: FRE 401, 402, 403. To the extent the testimony was based upon incomplete hypotheticals and assumed facts not then or now in evidence, the testimony is irrelevant and misleading.

13. Dale Evensen Deposition Testimony

"Making known" testimony irrelevant: FRE 401, 402. Evensen's testimony as to the meaning of the "making known" provision is irrelevant. (AOL Brf. at 15, n. 58 [Evensen 134:14-17]; AOL Brf. at 16, n. 63 [Evensen 232:7-233:6, 233:19-234:2].) Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller,* 44 Cal.Rptr.2d at 378; *Palmer,* 90 Cal.Rptr.2d at 652. The policy language should be interpreted as to its plain meaning. *Id.*

Irrelevant: FRE 401, 402, 403. To the extent the testimony was based upon incomplete hypotheticals and assumed facts not then or now in evidence, the testimony is irrelevant and misleading.

Online Activities Exclusion testimony irrelevant: FRE 401, 402. Evensen's testimony as to the meaning of the "internet access" portion of the Online Activities Exclusion is irrelevant. (AOL Brf. at 28, n. 101 [Evensen 182:19-23]; AOL Brf. at 28, n. 102 [Evensen 180:12-182:14]; AOL Brf. at 28, n. 103 [Evensen 184:1-15].) Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller,* 44 Cal.Rptr.2d at 378; *Palmer,* 90 Cal.Rptr.2d at 652. The language should be interpreted as to its plain meaning. *Id.* If there is any ambiguity, the court should consider the parties' mutual intentions at the time of contracting. *American Realty Trust v. Chase Manhattan Bank, N.A.,* 281 S.E.2d 825 (Va. 1981); *Bay Cities Paving & Grading v. Lawyers Mut.*, 21 Cal.Rptr.2d 691, 699 Cal. 1993).

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Irrelevant, misleading: FRE 401, 402, 403. To the extent the testimony was based upon incomplete hypotheticals and assumed facts not then or now in evidence, the testimony is irrelevant and misleading.

14. Eric Solberg Deposition Excerpts

"Making known" testimony irrelevant: FRE 401, 402. Solberg's testimony as to the meaning of the "making known" provision is irrelevant. (AOL Brf. at 15, n. 59 [Solberg 121:3-122:9]; AOL Brf. at 15, n. 60 [128:24-129:12, 132:6-134:4]; AOL Brf. at 16, n. 63 [97:13-98:17, 120:13-122:9].) Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller*, 44 Cal.Rptr.2d at 378; *Palmer*, 90 Cal.Rptr.2d. at 652. The policy's language should be interpreted as to its plain meaning. *Id.*

Irrelevant, misleading: FRE 401, 402, 403. To the extent the testimony was based upon incomplete hypotheticals and assumed facts not then or now in evidence, the testimony is irrelevant and misleading.

"Deliberately breaking the law" testimony irrelevant: FRE 401, 402. Solberg's testimony as to the meaning of the "deliberately breaking the law" provision is irrelevant. (AOL Brf. at 24, n. 83 [Solberg 227:4-228:18]; AOL Brf. at 24, n. 84 [Solberg 227:18-24], AOL Brf. at 25, n. 89 [Solberg 230:1-231:1, 238:12-239:6].) Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller*, 44 Cal.Rptr.2d at 378; *Palmer*, 90 Cal.Rptr. 2d. at 652. The language should be interpreted as to its plain meaning. *Id.*

Irrelevant, misleading: FRE 401, 402, 403. To the extent the testimony was based upon incomplete hypotheticals and assumed facts not then or now in evidence, the testimony is irrelevant and misleading.

15. Glenn Spencer's Deposition Testimony

Online Activities Exclusion testimony irrelevant: FRE 401, 402. Spencer's testimony in 2006 that the definition portion of the Online Activities Exclusion was *his* attempt to limit what online activities meant is irrelevant. (AOL Brf. at 27, n. 95, and at 28, ns. 104, 105, 107 [(Spencer 170:21-23; 173:17-174:6; 184:9-185:11].) A "party's unexpressed subjective intent or

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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 Spencer's purported interest in limiting or narrowing the exclusion was disclosed to St. Paul at the time the definition was added to the exclusion. See, Exs. 174, 175, 39; Ex. G (O'Connor 74:13-23, 82:14-20; 86:4-21); Ex. E (Midwinter, 322:8-323:2).

Also, irrelevant, misleading: FRE 403. Spencer's 2006 testimony as to his intention in defining online activities is at odds with what the parties (including Spencer) intended and understood the words "online" and "internet access" meant at the time the policy was negotiated. See, e.g., Exs. 36, 37, 22, 23, 24. Spencer's June 2000 email (prepared prior to service of the class action suits) stated in no uncertain terms that his understanding (as the risk manager of AOL and former broker on the AOL team) was that there was *no intention to have personal injury coverage in the St. Paul policy for AOL's online business activities.* Exs. 36, 37.

16. Complete Idiot's Guide To The Internet (7th ed. 2001), Ex G to Pereira Decl.

Irrelevant, lack of foundation: FRE 401, 402. AOL relies upon The Complete Idiot's Guide to the Internet to establish what "providing internet access" means in the Online Activities Exclusion. (AOL Brf. at 27, n. 99; Ex. G to Pereira Decl.) However, the book, published in 2001, was not in existence at the time St. Paul's policy was negotiated, the policy was issued, or the definition was added to the Online Activities Exclusion.

Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller,* 44 Cal.Rptr.2d at 378; *Palmer,* 90 Cal.Rptr.2d at 652. The policy language should be interpreted as to its plain meaning. *Id.* To the extent there is any ambiguity, the Court should consider the parties' intentions at the time of contracting. *American Realty,* 281 S.E.2d 825; *Bay Cities,* 21 Cal.Rptr.2d at 699.

At issue is the meaning of the Online Activities Exclusion. There is no evidence any of the persons involved in negotiation and preparation of this exclusion or its definition consulted this book or considered any technical or special meaning for the word "access" in the context of this exclusion. "Access" has an ordinary and popular dictionary definition. "Access" means

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"the ability . . . to approach, enter, exist, communicate with, or make use of." American Heritage Dictionary, 4th ed., c. 2000, p. 10. Furthermore, the exhibit is irrelevant because it is at odds with the parties' testimony regarding their intentions in having the Online Activities Exclusion. See Exs. 36, 37, 21, 22, 23, 24.

17. St. Paul's Responses to Requests for Admissions, Ex. 224

Irrelevant, misleading: FRE 401, 402, 403. AOL relies upon St. Paul's response to requests for admissions in which St. Paul admits, based upon the information provided to St. Paul at the time the class action suits and AG Investigation were tendered, the SmartDownload claims do not involve "3rd party advertising." Ex. 224. (AOL Brf. at 27, n. 96). The new information plaintiffs provided during discovery in this coverage lawsuit and in the arguments now being advanced in support of their motion for partial summary judgment (to which St. Paul has objected on the grounds of relevancy and under the law on the duty to defend[1]), *does* implicate the "3rd party advertising" part of the Online Activities Exclusion. On that basis St. Paul *denies* the request for admission. See Ex. 232.

18. August 29, 2006 Email from Sara Thorpe, Ex. 222

Irrelevant: FRE 401, 402. The August 29, 2006 e-mail that plaintiffs attach as "Exhibit 222" is part of a meet-and-confer between St. Paul's outside counsel in this action (Sara Thorpe) and plaintiffs' counsel over plaintiffs' request for the deposition transcript of James Zacharski. AOL relies upon this email to contend "St. Paul has previously admitted [the] irrelevance" of the *Melrose Hotel* and *Resource Bankshares* "blast fax" cases. (AOL Brf. at 18, n. 68.) However, in meeting and conferring with plaintiffs' counsel and debating over discovery issues, Thorpe did not intend to nor did she waive any argument as to the relevancy of those cases to this dispute. See Suppl. Thorpe Decl. at ¶ 5. Counsel's argument is not an admission. Interpretation of the insurance contract is for this Court to decide. Clearly *Melrose Hotel* and *Resource Bankshares* are relevant as they interpret St. Paul's language. They are also consistent with California's new

[1] Evidence that was not presented to the insurer at the time of the tender is not relevant on the duty to defend. *Resource,* 407 F.3d at 636; *America Online,* 347 F.3d at 93; *Waller,* 44 Cal.Rptr.2d at 378; *Safeco,* 19 Cal.Rptr.3d at 24-25, 27; *Haggerty*, 32 Fed.Appx. at 848, n. 4.

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decision of *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.*, __ Cal.Rptr.3d __, 2007 WL 214258 (Cal.App. 2007).

19. Side by Side Comparison, Ex. 118

Irrelevant: FRE 401, 402. AOL relies upon the "Side by side comparison" that St. Paul prepared of the changes to policy language in the St. Paul policy in 1991. Ex. 118. (AOL Brf. at 15, n. 60.) Ex. 118 is irrelevant. It shows that the "making known" language in the St. Paul policy at issue in this coverage lawsuit was a change from an earlier version that used the words "made public." Ex. 118 (at SPM 2801). Interpretation of policy language is a question of law for the court to decide. *Pilot*, 145 S.E.2d at 146; *Seabulk*, 377 F.3d at 418; *Waller*, 44 Cal.Rptr.2d at 378; *Palmer*, 90 Cal.Rptr.2d. at 652. The policy's language should be interpreted as to its plain meaning. *Id.*

20. Memorandum and Order Denying Motion to Compel Arbitration, Ex. 221

Irrelevant: FRE 401, 402. AOL submits Ex. 221, the Order Denying AOL's motion to compel arbitration, in support of its choice of law argument. (AOL Brf. at 9, n. 40.) However, the contract at issue in the decision is a software licensing agreement, and not the same contract that is at issue in this coverage lawsuit. This Court's decision about choice of law should be determined by the contract at issue in this coverage dispute – the St. Paul policy. The policy was negotiated in Virginia and issued to a corporation with its principal place of business in Virginia. Virginia is the state in which AOL chose to litigate an earlier coverage dispute with St. Paul under this very same policy. Under Cal. Civ. Code § 1646, this dispute should be determined applying Virginia's law.

Dated: February 9, 2007

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