		ations Corporation et al v. Fede Case 5:06-cv-00198-JW	Document 93	Filed 02/09/2007	Page 1 of 5	Doc
Gordon & Rees LLP 275 Battery Street, Suite 2000 San Francisco, CA 94111	1 2	SARA M. THORPE (SBN 146529) sthorpe@gordonrees.com D. CHRISTOPHER KERBY (SBN 124546)				
	3	ckerby@gordonrees.com GORDON & REES LLP				
	4	Embarcadero Center West 275 Battery Street, Suite 2000				
	5	San Francisco, CA 94111 Telephone: (415) 986-5900 Facsimile: (415) 986-8054				
	6 7	Attorneys for Defendant ST. PAUL MERCURY INSURANCE COMPANY				
	8	UNITED STATES DISTRICT COURT				
	9	NORTHERN DISTRICT COURT OF CALIFORNIA				
	10					
	11	SAN JOSE DIVISION				
	12	NETSCAPE COMMUNICA CORPORATION, a Delawa			CV-00198 JW (PVT)	
	13	AMERICAN ONLINE, INC corporation,) ST. PAUL'S RESPONSES TO) PLAINTIFFS' OBJECTIONS TO		
	14 15	vs.	Plaintiffs,		ST. PAUL'S MOTION	
	16	FEDERAL INSURANCE C Indiana corporation, et al.,	COMPANY, an) Complaint Filed:) Amended Compl 		
	17		Defendants.) Date: March 26,		
	18		D'elendanto.) Time: 9:00 a.m.) Judge: Honorabl		
	19				th Floor, San Jose	
	20					
	21	Defendant St. Paul Mercury Insurance Company ("St. Paul") hereby responds to the				
	22	objections by plaintiffs America Online Inc. and Netscape Communications ("plaintiffs") to				
	23	evidence presented in St. Paul's motion for partial summary judgment (hereafter referred to a				
	24	"St. Paul's Motion"). St. Paul requests that at the hearing on St. Paul's Motion the court deny				
	25 26	plaintiffs' objections and consider evidence produced in support of St. Paul's Motion.				
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V/1036622/114125	8v.1		DEGDONGEG TO DE	1 NTIFFS' OBJECTIONS T	CASE NO. 5:06-CV-00198 JW (P	PVT)

Proffered Evidence and Objection/Response to AOL's Objection

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Response To Objection That Factual Propositions Are Incorrect

It is a minor point and not critical for St. Paul's Motion, but AOL objects to St. Paul's statement that the "Personal Injury For Non-Online Activities Endorsement" (Ex. 1 at SPM 0337) was accepted by AOL. (See AOL Brf. at 29, n. 107.¹) AOL argues there is no evidence of acceptance of the endorsement by AOL and there is evidence that it actually was rejected.

AOL's characterization of the evidence and of Michele Midwinter's testimony in particular are not a fair characterization. In Ex. 69 (also Ex. 39), the email sent by Mike O'Connor (Marsh) confirming receipt of the Online Activity Exclusion that did *not* contain a definition (Ex. 1 at SPM 0337), Marsh does not indicate there is any dispute over the new exclusion being part of the policy. Rather, Marsh indicates that "the current PI/AI endorsement" needed additional corrections, and that Marsh was proposing a definition be added to that exclusion.

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14 2. **Response To Objection That Factual Propositions Are Improperly Supported** 15 AOL objects to St. Paul's statement that the premium St. Paul charged reflects that its 16 policy was to cover only traditional general liability risks. (See AOL Brf. at 29, n. 108.) In 17 making this objection, AOL singles out some references in support of this proposition, but 18 ignores that St. Paul's Motion contains other support. AOL contends Exhibits 8 [should be 18] 19 and 159 do not support St. Paul's statement. 20 Although there was a typographical error in St. Paul's Motion in one place (Ex. 8 21 referred to at footnote 72 should have referenced Ex. 18), Ex. 18 is also referenced at footnotes 22 25, 27, and 28. There is also more than ample evidence before the Court for the proposition that

23 || the premium charged by St. Paul reflects the policy was only intended to cover "traditional"

- 24 personal injury claims and **not** intended to cover personal injury for online risks. See, the
- 25 comparison of policy premiums charged for the St. Paul policy (\$106,000) to the premium for
- 26 || the broader coverage afforded by AIG the year before (\$700,000). See Ex. 18 (at NET/SDL

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²⁷ References to AOL's Opposition/Cross-Motion are "AOL Brf. at __." References to St. Paul's
28 Opening Brief are "SP Brf. at __."

1 0011480); Ex. 159 (at Marsh 0543); Ex. 160 (at AOL 048 0004). See, also Ex. 22 (at Marsh 2 1385-1386) [Marsh's letter to AOL noting that the St. Paul policy excludes coverage for personal 3 injury "as respects AOL's online activities," and that "this coverage is insured under the AOL 4 Multimedia policies with Executive Risk and Employers Reinsurance Corp."]. See, also SP Brf. 5 at 7, n. 25 [referencing Exs. 18, 79, 159, 160 and deposition testimony]. 3. **Response To Objection That Factual Propositions Are Not Supported** 6 7 AOL objects to the following statements as not supported by the evidence (AOL Brf. at 8 29, n. 109): 9 SmartDownload was obtained from "AOL." St. Paul in its Opening Brief used 10 "AOL" to refer to both AOL and Netscape. (See SP Brf. at 1:6.) The complaints in the class 11 action suits alleged that: 12 [] Netscape has no bona fide existence independent of AOL. In November 13 Since the consummation of the merger, the operations of AOL and Netscape have been functionally merged and inextricably intermingled, ... 14 [] They are using Internet computers and other assets under their joint control to accomplish the wrongs complained of herein. [] Netscape 15 introduced SmartDownload in November of 1998, virtually simultaneously with the execution of the merger agreement with AOL... (Ex. 129 [at 16 SPM 0011]). 17 Allegations of third party dissemination of private information never developed. 18 Under Virginia law, the duty to defend is determined by the four corners of the complaint. Resource Bankshares Corp. v. St. Paul Mercury Ins. Co. 407 F.3d 631, 636 (4th Cir. 19 2005) (applying Va. law); America Online, Inc. v. St. Paul Mercury Ins. Co., 347 F.3d 89. 93 (4th 20 21 Cir. 2003) (applying Va. law). Here, there is no question but that the complaints did not allege 22 injury from the disclosure of private information to third parties. 23 Under California law, the duty to defend is determined at the time of tender. *Waller v.* 24 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); Haggerty v. Fed. Ins. Co., 32 Fed.Appx. 845, 848 n. 4 (9th 25 26 Cir. 2002). Information that AOL provides for the first time during the coverage suit is not 27 relevant or admissible. Safeco, 19 Cal.Rptr.3d at 27. See Objections to Evidence and Motion to 28 Strike. There was nothing presented to St. Paul at the time of tender that indicated the class suits CASE NO. 5:06-CV-00198 JW (PVT) ST. PAUL 'S RESPONSES TO PLAINTIFFS' OBJECTIONS TO EVIDENCE

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1 sought damages for injuries from the disclosure of private information to third parties; anything 2 presented during the coverage case is inadmissible and should not be considered.

3 Furthermore, there is no evidence that plaintiffs in the class action suits ever alleged 4 injury from the disclosure of private information to a third party. See, e.g., Ex. 129, 226 (at 5 NET/SDL 0004140).

that AOL's insurance program was designed to avoid duplication of coverage or premium. AOL contends the program was a "mess" with gaps and duplications and that online 8 coverage was found in various types of policies. AOL's citations do not indicate the program 9 was a "mess." That there was coverage for online risks in many policies does not mean there 10 was duplication. It is clear AOL and St. Paul intended that there would not be duplication between the St. Paul policy and Executive Risk policy; the two policies were purchased to compliment each other. See, Ex. 22 (Marsh's letter to AOL describing how St. Paul and Executive Risk policies worked); Ex. 4 (Marsh's email to St. Paul indicating how St. Paul and Executive Risk covered different risks). See also Ex. 21, 23, 24 (Marsh and St. Paul communications confirming St. Paul policy did not cover personal injury for online activities, whereas Executive Risk policy did).

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4. **Response To Objection That Factual Propositions Are Disputed**

18 AOL objects to St. Paul's statements that AOL and St. Paul agreed St. Paul would not 19 cover personal injury arising out of online activities and that AOL intended to insure (and did 20 insure) online risks through carriers other than St. Paul. (See AOL Brf. at 30, n. 110.) AOL 21 claims this point is "disputed." AOL's evidence on this point does not raise a genuine issue of 22 fact. AOL's objection is not well-taken.

23 Glenn Spencer, the person upon whose testimony AOL now relies, prepared an email in 24 June 2000 (prior to the class action suits being served) stating in no uncertain terms that it was 25 his understanding (as the risk manager of AOL, and a broker on Marsh's AOL team) that there 26 was no intention to obtain personal injury coverage from the St. Paul policy for AOL's online 27 activities. Ex. 36, 37. In addition, Marsh (which for purposes of this motion, AOL has conceded 28 is the same as AOL [see Stip-MSJ at ¶ 12]) sent numerous letters to St. Paul following issuance

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

ST. PAUL 'S RESPONSES TO PLAINTIFFS' OBJECTIONS TO EVIDENCE

of the policy indicating that the St. Paul policy was not intended to cover personal injury for 1 2 online activities. See Exs. 21, 23.

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5. **Response To Objection That Factual Propositions Are Irrelevant** And/Or Inadmissible

AOL objects, as irrelevant and inadmissible, to St. Paul's reference to and reliance upon the confidential settlement agreement between Executive Risk and AOL (Ex. 168). (AOL Brf. at 30, n. 111, citing FRE 408.) AOL fails to explain its relevancy objection. It is undisputed that AOL received payment from Executive Risk in resolution of AOL's tender. See Stip-MSJ at ¶ 6. St. Paul offers the settlement agreement to establish AOL intended to insure and did insure online risks through other carriers, like Executive Risk.

FRE 408 provides that evidence of an offer to settle a disputed claim or acceptance of such offer "is not admissible to prove liability for or invalidity of the claim or its amount." However, Rule 408 "does not require exclusion when the evidence is offered for another purpose." FRE 408 (emphasis added). Here, the settlement agreement between AOL and Executive Risk is offered to establish that AOL and St. Paul mutually intended St. Paul would not cover personal injury for online activities and that AOL intended its other policies, including specifically Executive Risk, to cover that type of risk. AOL's settlement agreement with Executive Risk is admissible for this purpose. The settlement is consistent with other evidence in the case, including Marsh's statements when providing St. Paul a copy of the Executive Risk policy (Ex. 4), and Marsh's statements in providing AOL with the 1999 insurance program which included both the St. Paul and Executive Risk policies (Exs. 21, 22, 23).

Dated: February 9, 2007

GORDON & REES LLP

/s/ Sara M. Thorpe By:

> SARA M. THORPE Attorneys for Defendant ST. PAUL MERCURY **INSURANCE COMPANY**

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