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 7 ST. PAUL MERCURY INSURANCE COMPANY

8 **UNITED STATES DISTRICT COURT**
 9 **NORTHERN DISTRICT COURT OF CALIFORNIA**
 10 **SAN JOSE DIVISION**

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12	NETSCAPE COMMUNICATIONS)	CASE NO. 5:06-CV-00198 JW (PVT)
	CORPORATION, a Delaware corporation; and)	
13	AMERICAN ONLINE, INC., a Delaware	)	ST. PAUL'S RESPONSES TO
	corporation,	)	PLAINTIFFS' OBJECTIONS TO
14		)	EVIDENCE IN ST. PAUL'S MOTION
	Plaintiffs,	)	FOR PARTIAL SUMMARY
15	vs.	)	JUDGMENT
)	
16	FEDERAL INSURANCE COMPANY, an	)	Complaint Filed: 12/12/05
	Indiana corporation, et al.,	)	Amended Complaint: 2/24/06
17)	
	Defendants.	)	Date: March 26, 2007
18		)	Time: 9:00 a.m.
		)	Judge: Honorable James Ware
19		)	Courtroom: 8, 4th 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 as
 24 "St. Paul's Motion"). St. Paul requests that at the hearing on St. Paul's Motion the court deny
 25 plaintiffs' objections and consider evidence produced in support of St. Paul's Motion.

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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].

6 3. Response To Objection That Factual Propositions Are Not Supported

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 of 1998, defendant AOL agreed to merge with defendant Netscape . . . []
 14 Since the consummation of the merger, the operations of AOL and
 15 Netscape have been functionally merged and inextricably intermingled, . . .
 16 [] They are using Internet computers and other assets under their joint
 17 control to accomplish the wrongs complained of herein. [] Netscape
 18 introduced SmartDownload in November of 1998, virtually simultaneously
 19 with the execution of the merger agreement with AOL. . . (Ex. 129 [at
 20 SPM 0011]).

21 • Allegations of third party dissemination of private information never developed.

22 Under Virginia law, the duty to defend is determined by the four corners of the
 23 complaint. *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.* 407 F.3d 631, 636 (4th Cir.
 24 2005) (applying Va. law); *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 93 (4th
 25 Cir. 2003) (applying Va. law). Here, there is no question but that the complaints did not allege
 26 injury from the disclosure of private information to third parties.

27 Under California law, the duty to defend is determined at the time of tender. *Waller v.*
 28 *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
 Cir. 2002). Information that AOL provides for the first time during the coverage suit is not
 relevant or admissible. *Safeco*, 19 Cal.Rptr.3d at 27. See Objections to Evidence and Motion to
 Strike. There was nothing presented to St. Paul at the time of tender that indicated the class suits

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).

6 • that AOL's insurance program was designed to avoid duplication of coverage or
7 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
11 between the St. Paul policy and Executive Risk policy; the two policies were purchased to
12 compliment each other. See, Ex. 22 (Marsh's letter to AOL describing how St. Paul and
13 Executive Risk policies worked); Ex. 4 (Marsh's email to St. Paul indicating how St. Paul and
14 Executive Risk covered different risks). See also Ex. 21, 23, 24 (Marsh and St. Paul
15 communications confirming St. Paul policy did not cover personal injury for online activities,
16 whereas Executive Risk policy did).

17 **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

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

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

By: /s/ Sara M. Thorpe

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INSURANCE COMPANY