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 ST. PAUL MERCURY INSURANCE COMPANY

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

Gordon & Rees LLP
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

12	NETSCAPE COMMUNICATIONS CORPORATION, a Delaware corporation; and	)	CASE NO. 5:06-CV-00198 JW (PVT)
13	AMERICAN ONLINE, INC., a Delaware corporation,	)	SUPPLEMENTAL DECLARATION OF
14		)	SARA M. THORPE IN SUPPORT OF
15	Plaintiffs,	)	ST. PAUL'S MOTION FOR PARTIAL
16	vs.	)	SUMMARY JUDGMENT AND IN
17		)	OPPOSITION TO PLAINTIFFS'
18	FEDERAL INSURANCE COMPANY, an Indiana corporation; et al.,	)	CROSS-MOTION FOR PARTIAL
19		)	SUMMARY JUDGMENT
20	Defendants.	)	Complaint Filed: 12/12/05
21		)	Amended Complaint: 2/24/06

22 I, Sara M. Thorpe, declare as follows:

23 1. I am an attorney at law, duly licensed to practice before all of the courts in the
 24 state of California. I am an attorney of record for defendant St. Paul Mercury Insurance
 25 Company ("St. Paul") in this action. I make this supplemental declaration in support of St.
 26 Paul's Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Cross-Motion for
 27 Partial Summary Judgment. I have personal knowledge of the matters stated herein, or, if
 28 otherwise indicated, base my statements upon information and belief. If called as a witness, I
 could and would competently testify as follows.

2. Plaintiffs produced on and after April 19, 2006, as part of their initial disclosures

1 and in response to document production requests in this coverage litigation, documents that are
2 labeled by the bates number "NET/SDL." Plaintiffs' counsel advised in producing these
3 documents that these documents would include the relevant, non-privileged documents
4 pertaining to the underlying SmartDownload civil actions and New York Attorney General
5 investigation, and the relevant non-privileged documents pertaining to AOL's prior coverage
6 litigation with St. Paul. See attached Ex. 1 (letter from Leslie A. Pereira to Sara M. Thorpe,
7 dated April 19, 2006). Those documents were produced over the course of several days some
8 time after April 19, 2006.

9 3. As counsel for St. Paul I have reviewed St. Paul's claim files which plaintiffs
10 marked as "Exhibit 128." In reviewing St. Paul's claim files, I have determined that St. Paul was
11 **not** provided with the following documents:

- 12 a. PowerPoint settlement presentation (Ex. H to Carome Decl.);
- 13 b. @stake report (Ex. J to Carome Decl.);
- 14 c. David Park's Deposition in the underlying SmartDownload litigation
15 against AOL and Netscape (taken October 20, 2003);
- 16 d. Augusta Feature Plan dated August 25, 1998 (Ex A to Park Decl. and Ex.
17 8 to Park Depo.)
- 18 e. September 18, 1998 memo (Ex. B to Park Decl. and Ex. 10 to Park
19 Depo.);
- 20 f. Software Requirements Spec. for NSDA (Ex. D to Park Decl. and Ex. 3 to
21 Park Depo.);
- 22 g. Augusta Feature Plan dated September 20, 1998 (Ex. E to Park Decl. and
23 Ex. 11 to Park Depo.); and
- 24 h. September 30, 1998 memo (Ex. F to Park Decl. and Ex. 12 to Park Depo.).

25 4. Plaintiffs have not made any disclosure that they would be using expert
26 Marc Patterson.

27 5. The August 29, 2006 e-mail that plaintiffs attach as "Exhibit 222" is part of my
28

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1 meet-and-confer with plaintiffs' counsel over plaintiffs' request for the deposition transcript of
2 James Zacharski. St. Paul took the position that plaintiffs' discovery requests (which broadly
3 asked for "all transcripts of depositions or trial testimony by St. Paul personnel concerning any
4 claim for coverage under the 'personal injury' portion of any policy issued by St. Paul") were
5 overly broad, burdensome and irrelevant. We argued that one claim handlers' handling of a
6 claim for a different insured should not be discoverable in this proceeding. Eventually, a
7 compromise was reached and plaintiffs were provided with only Zacharski's deposition and just
8 portions of that deposition which pertained to application of the provisions of the St. Paul policy
9 (including the property damage and advertising injury coverages). (Other issues, such as
10 settlement discussions, were not provided.) Plaintiffs dropped their request for all other
11 deposition and trial transcripts. In meeting and conferring with plaintiffs' counsel and debating
12 over discovery issues, I did not intend to nor did I waive any argument in this case as to the
13 relevancy of the Virginia court's review of legal issues and interpretation of the St. Paul policy
14 language. Clearly that case law is relevant.

15 6. Attached here in support of St. Paul's Opposition/Reply are excerpts from the
16 following depositions:

17 Exhibit E-1: Michele Midwinter, taken September 7, 2006.

18 Exhibit G: Michael O'Connor, taken November 2, 2006.

19 Executed this 9th day of February 2007, in San Francisco, California.



20
21 SARA M. THORPE
22

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Exhibit 1

333 South Grand Avenue, Suite 650
Los Angeles, California 90071-1559
(213) 402-1900 – telephone
(213) 402-1901 – facsimile
www.abelsonherron.com

Leslie A. Pereira, Of Counsel
(213) 402-1902 – direct dial
lpereira@abelsonherron.com

April 19, 2006

Abelson | Herron LLP

VIA E-MAIL AND FEDERAL EXPRESS

Ms. Sara M. Thorpe
Gordon & Rees LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

Re: Netscape Communications Corp., et al. v. Federal Ins. Co., et al.
United States District Court (N.D. Cal.), Case No. 105CV054312

Dear Ms. Thorpe:

Enclosed please find a copy set of certain documents being produced by Netscape and AOL in connection with their initial disclosures. Enclosed herein are the relevant, non-privileged portions of the plaintiffs' insurance files, and copies of the defense expenses incurred by plaintiffs in connection with the defense of the civil litigations and NY AG investigation. **Please note that Netscape and AOL are seeking reimbursement of the NY AG investigation expenses from St. Paul.**

The enclosed documents have been bates-labeled NET/SDL 0000001-0001944.

As we discussed yesterday, we will have additional documents to produce to you within the next week or so. These include the relevant, non-privileged documents pertaining to the underlying SDL civil litigations and NY AG investigation, and the relevant, non-privileged documents pertaining to AOL's prior coverage litigation with St. Paul. This next production may involve confidential information and, therefore, we would appreciate receiving your draft protective order as soon as possible.

Please let me know if you have any questions.

Very truly yours,



Leslie A. Pereira
Of Abelson | Herron LLP

Enclosures (by Federal Express only)

Exhibit E-1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS,)
et al.)
)
Plaintiffs,)
)
vs.)
)
FEDERAL INSURANCE)
COMPANY,)
)
Defendant.)
-----)

COPY

No. C-06-00198
JW (PVT)

September 7, 2006
9:07 a.m.

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

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A P P E A R A N C E S:

ABELSON HERRON LLP

Attorneys for Netscape Communications
and American Online

333 South Grand Avenue, Suite 650
Los Angeles, California 90071

BY: MICHAEL BRUCE ABELSON, ESQ.

GORDON & REES LLP

Attorneys for St. Paul Mercury
Insurance Company

275 Battery Street, Suite 2000
San Francisco, California 94111

BY: SARA M. THORPE, ESQ.

ALSO PRESENT:

THOMAS KEIGHLEY, Videographer

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

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

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

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

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

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

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

Midwinter

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and she signed off on it?

A. That's what I recall, yes.

Q. You didn't hand her any materials;
correct?

A. Not that I recall, no.

Q. And her statement, okay to endorse,
this was the intent, did you tell her what to
write on the e-mail?

A. No, I did not.

Q. What did you ask her to do?

A. I had asked her if she would be able to
or if she could approve the wording that we were
going to put on the policy. And that's when I
explained to her what has been going on.

Q. And at the end of the one-way
conversation, she said, okay, you can endorse it.
Did you offer her the e-mail or did she just lean
over and initial it? How did that work?

A. I don't remember.

Q. Okay. But you didn't tell her what to
write on it, the words "okay to endorse, this is
the extent"; that was her formulation?

A. Correct.

Q. After she signed off on it, have ever

Midwinter

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Q. Anything else come to mind?

A. No.

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

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

Q. Anything else come to mind?

A. No.

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

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

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

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

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

Midwinter

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

3

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

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THE WITNESS: Sorry.

7

(Record read.)

8

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

9

10

11

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

12

13

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

14

15

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

16

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

18

19

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

20

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

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

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A. I took it as meaning that this

Exhibit G

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT COURT OF CALIFORNIA
DAN JOSE DIVISION

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NETSCAPE COMMUNICATIONS : Case No.:
CORPORATION, a Delaware Corporation; : C06-00198 JW (PVT)
and :
AMERICAN ONLINE, INC., a Delaware :
corporation, :
Plaintiffs, :
vs. :
ST. PAUL MERCURY INSURANCE :
COMPANY, a Minnesota corporation, :
Defendant. :

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DEPOSITION OF MICHAEL O'CONNOR

Washington, DC
Thursday, November 2, 2006

REPORTED BY:
DAVID L. HOFFMAN

1 Deposition of MICHAEL O'CONNOR, called for
2 examination pursuant to notice of deposition, on Thursday,
3 November 2, 2006, in Washington, DC at Ace-Federal
4 Reporters, Inc., Conference Room, 1120 G St., NW, Suite 500,
5 at 11:30 a.m. before DAVID L. HOFFMAN, a Notary Public
6 within and for the District of Columbia, when were present
7 on behalf of the respective parties:

8 MICHAEL BRUCE ABELSON, ESQ.
9 Abelson Hesson, LLP
10 333 South Grand Avenue, Suite 650
11 Los Angeles, CA 90071
12 (213) 402-1900

13 On behalf of Plaintiffs

14
15 JONATHAN P. WOLFERT, ESQ.
16 Kaplan, Thomashower & Landau LLP
17 26 Broadway
18 New York, NY 10004
19 (212) 593-1700

20 On behalf of Defendant

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APPEARANCES CONTINUED:

SARA M. THORPE, ESQ.

Gordon & Rees LLP

Embarcadero Center West

275 Battery Street, Suite 2000

San Francisco, CA 94111

(415) 986-5900

On behalf of Defendant

1 A No.

2 Q And throughout this deposition, we're going to be
3 talking about Marsh, and I know Marsh has had several names.
4 Can we just have an agreement that, regardless of name
5 changes, we're talking -- we can just use the word, "Marsh,"
6 to describe Marsh McClennan or Johnson Higgins Marsh?

7 A Yes.

8 Q Okay, for Marsh USA, all those.

9 Do you -- how are you currently employed?

10 A I work for Lockton Company in Washington, D.C.

11 Q How long have you worked for Lockton?

12 A A little over a year.

13 Q Prior to working at Lockton, where were you
14 employed?

15 A Marsh and McClennan.

16 Q How long were you employed at Marsh?

17 A Approximately seven years.

18 Q So, would that be 1998 to 2005?

19 A I think that's about right.

20 Q Before you worked at Marsh, where were you
21 employed?

22 A I was at Giant Food.

23 Q What was your position at Giant Food?

24 A I had various positions within their Risk
25 Management Department.

1 Q Have you ever been an employee of AOL?

2 A No.

3 Q While you were at Marsh, what was your position
4 or positions?

5 A I started out as a casualty broker, and then
6 moved into a client executive.

7 Q Were you a client executive at the time you left
8 Marsh?

9 A Yes.

10 Q Why did you leave Marsh?

11 A Found a better opportunity.

12 Q What's your position at Lockton?

13 A I am Vice President.

14 Q And do you have a title like broker or client
15 executive or anything?

16 A Team leader.

17 Q Is AOL a client of Lockton?

18 A No -- not to my knowledge; I should change that;
19 not to my knowledge.

20 Q While you were at Marsh, did you, for any period
21 of time, work on the AOL account?

22 A Yes.

23 Q Do you recall what period of time?

24 A I do not.

25 Q Do you recall what your role was on that account?

1 that and let me know if you recall ever receiving this e-
2 mail?

3 (Pause.)

4 A I don't recall.

5 Q Do you recall that at some point, Glen Spencer
6 suggested that there should be a definition to "online
7 activities"?

8 A I recall that there was a definition of "online
9 activities." I do not know the origin, where it came from.

10 Q Do you recall you preparing a definition for
11 "online activities"?

12 A I don't recall.

13 Q In this e-mail from Mr. Spencer to you, he
14 proposes a definition down in the second half of the e-mail,
15 Exhibit 39. Do you see that? It's italicized.

16 A I see the definition, yes.

17 Q He's proposing that in the endorsement to the St.
18 Paul policy, this definition of "online activities" be
19 added. Do you recall discussing with him, how he came up
20 with this definition?

21 MR. ABELSON: The question lacks foundation;
22 assumes facts not in evidence.

23 THE WITNESS: I don't.

24 (Pause.)

25 BY MS. THORPE:

1 definition that was in the e-mail of August 21, 2000, from
2 Glen Spencer to you, which was Exhibit 39, correct?

3 MR. ABELSON: Do you want to represent that it
4 is, or do you want him to compare it?

5 MS. THORPE: I want him to compare it.

6 (Pause.)

7 MR. ABELSON: The question is irrelevant.

8 (Pause.)

9 THE WITNESS: It appears to be the same
10 definition.

11 MR. ABELSON: Let the record reflect that the
12 witness has just undertaken the comparison in real time.

13 BY MS. THORPE:

14 Q Do you recall any discussions between August 21,
15 2000, when you received Mr. Spencer's e-mail, and September
16 13, 2000, when you forwarded this definition to Michelle
17 Midwinter, regarding the definition of "online activities"?

18 MR. ABELSON: Question lacks foundation; assumes
19 facts not in evidence.

20 THE WITNESS: No.

21 BY MS. THORPE:

22 Q As you sit here today, do you recall that there
23 was any debate or discussion over the online activities
24 definition that Glen Spencer proposed?

25 A I don't.

1 MR. ABELSON: Same objection.

2 THE WITNESS: I don't remember specifics.

3 BY MS. THORPE:

4 Q Okay. You, at the end of this e-mail, which is
5 Exhibit 174, forward to Michelle Midwinter, the language
6 that Glen Spencer had forwarded to you, as far as an online
7 activity definition, correct?

8 MR. ABELSON: The question lacks foundation;
9 assumes facts not in evidence.

10 MR. WOLFERT: Objection to the form. You can
11 answer.

12 THE WITNESS: I forwarded on the definition that
13 was in his e-mail, yes.

14 BY MS. THORPE:

15 Q Okay, and do you recall any discussions with
16 Michelle Midwinter about the definition of "online
17 activities" that was being proposed?

18 A I don't.

19 Q Do you recall discussing it with anyone at St.
20 Paul?

21 A No.

22 Q In September of 2000, did you have people at St.
23 Paul that you were in contact with regarding the AOL
24 account, other than Michelle Midwinter?

25 MR. ABELSON: Assumes facts not in evidence.