

**In the United States District Court for the Southern District of New York**

**NETSCAPE SMARTDOWNLOAD SOFTWARE LITIGATION**

**OFFICIAL NOTICE OF PROPOSED SETTLEMENT OF  
PUTATIVE CLASS ACTIONS AND SETTLEMENT HEARING**

**If you installed or used any version of Netscape SmartDownload software that was distributed before October 2000, or if you made available through the Internet a file that anyone downloaded (or attempted to download) using such software,**

**Please read this carefully as it may affect your rights.**

Netscape Communications Corporation (“Netscape”) previously offered to the public a free software program called Netscape SmartDownload (“SmartDownload”). This software facilitated the process of downloading certain types of electronic files — in particular, files having .zip, .exe, or .idp extensions — from Internet websites. The versions of SmartDownload that are the subject of this notice were distributed to the public from the Fall of 1998 until October 2000 (“Covered Versions of SmartDownload”). They include SmartDownload version 1.0, version 1.1, and version 1.2.

This notice concerns a proposed settlement of three putative class action lawsuits related to SmartDownload and a hearing on the proposed settlement that is scheduled for January 10, 2005. You may exclude yourself from the proposed settlement or object to the proposed settlement by following the instructions contained in this notice, but to do so you must take action by December 16, 2004.

**I. OVERVIEW OF LAWSUITS AND PROPOSED SETTLEMENT**

Beginning in June 2000, three putative class action complaints (the “Complaints”) were filed against Netscape and its parent, America Online, Inc. (“AOL”), in the United States District Court for the Southern District of New York: *Specht v. Netscape Communications Corp.*, Docket No. 00-CIV-4871 (AKH); *Weindorf v. Netscape Communications Corp.*, Docket No. 00-CIV-6219 (AKH); and *Gruber v. Netscape Communications Corp.*, Docket No. 00-CIV-6249 (AKH) (together, the “Actions”). Those Complaints alleged that the versions of SmartDownload that were distributed before October 2000 (when version 1.3 was released) violated the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (“ECPA”), because the software allegedly intercepted users’ and website operators’ communications by transmitting to Netscape, during the course of a download and unbeknownst to the user, the URL address of the file the user was downloading, along with a string of characters called the “key” or “Key Code” and a Netscape cookie. The plaintiffs in these cases are persons who allegedly used a Covered Version of SmartDownload software or who allegedly operated or used websites that offered a file of a type that could be downloaded with the assistance of such software. The Plaintiffs have filed the Complaints on behalf of themselves and putatively on behalf of all other users and website operators whose communications were allegedly intercepted in this manner. The Complaints also claimed that the versions of SmartDownload at issue violated the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (“CFAA”), by allegedly accessing a computer without or beyond the scope of authorization, but the Court dismissed those CFAA claims. The Complaints sought declaratory and injunctive relief as well as compensatory damages and statutory damages under ECPA.

Netscape and AOL strenuously deny the allegations in the Plaintiffs’ Complaints. Netscape and AOL specifically deny that any version of Netscape’s SmartDownload software intercepted users’ or website operators’ communications in violation of ECPA, accessed any computer in violation of the CFAA, or violated any other law. Netscape and AOL further maintain that the feature of SmartDownload about which Plaintiffs complain was entirely lawful and completely innocuous, was disclosed to users, and could easily be turned off at the user’s option. Netscape and AOL additionally maintain that the URL and Key Code data that Covered Versions of SmartDownload transmitted to Netscape were never used in any manner whatsoever, that before the *Specht* Complaint was filed it was Netscape’s practice routinely to delete the server

logs containing such data approximately six months after the data was automatically stored in such logs, and that the reason Netscape still holds some such data today is that Netscape was required to preserve those server logs during the pendency of the Actions.

A proposed Settlement of these putative class action lawsuits has been reached. Under the proposed Settlement, Netscape has committed to continue to refrain from distributing the versions of SmartDownload that prompted the lawsuits. Netscape has also committed to take several steps — including a series of periodic reviews of its software by a qualified outside contractor — to help to ensure that Netscape does not distribute consumer software products that it knows will intercept user communications in a manner that constitutes a violation of ECPA by Netscape, and to ensure that none of the URL and Key Code information that SmartDownload previously sent to it can be used in any way. Those measures are described more fully below. No money will be paid to any Settlement Class Members under the proposed Settlement.

As more fully set forth in Section III below, after conducting discovery, consulting with experts, and assessing the risks of litigation, Plaintiffs' Counsel believe that the Settlement is fair and equitable to Settlement Class Members, especially because of the uncertainty of proving all of the elements of a violation of ECPA and of overcoming all of Netscape's asserted legal and factual defenses, extreme uncertainty of certifying a damages class, extreme uncertainty of obtaining statutory damages, evidence that Netscape never used the URL or Key Code data at issue, and the relief afforded by the Settlement. During discovery, Plaintiffs and their counsel found no evidence that Netscape had ever (i) used, for any purpose whatsoever, the URL address or Key Code information that it received from Covered Versions of SmartDownload; or (ii) constructed or assembled such information into any profile or other organized format that would reflect a history of an individual user's download activity. For these and other reasons summarized in Section III below, Plaintiffs' Counsel believe that the proposed Settlement fairly and equitably settles the claims. Plaintiffs' willingness to settle does not reflect any concession whatsoever that their claims were invalid or lacked merit.

Netscape and AOL assert that they are willing to settle these Actions as provided in the proposed Settlement simply to avoid the burden of litigation with valued users of Netscape's software products. Their willingness to settle does not reflect any concession whatsoever that they did anything wrong or could be subject to any liability. Indeed, Netscape and AOL believe that the versions of SmartDownload at issue were entirely lawful, effective, and valuable software products that harmed no one and that made using the Internet and downloading files simpler, more convenient, and more reliable.

Your Options: As described in more detail below, you can do the following with respect to the proposed Settlement:

- Do nothing. If the Settlement is approved, choosing to do nothing will extinguish your right to take independent legal action against Netscape or AOL with respect to the claims explained in this Official Notice in exchange for the benefits described in this Official Notice.
- Exclude yourself from the Settlement and not participate in the Settlement (if it is approved), by following the instructions set out in Section V below.
- If you do not exclude yourself from the Settlement, you may object to the proposed Settlement by following the instructions set out in Section VII below.

If you have any questions regarding this notice, please review the materials available at the Settlement Website address at [www.SmartDownloadSettlement.com](http://www.SmartDownloadSettlement.com). These materials also may be obtained by sending an e-mail requesting them to [SmartDocs@abbeygardy.com](mailto:SmartDocs@abbeygardy.com). No inquiries should be directed to the Court. This notice is not an expression by the Court as to the fairness or adequacy of the Settlement.

## II. THE SETTLEMENT CLASS

The proposed Settlement Class – that is, the group of persons and entities who will be affected and bound by the Settlement if it is approved – consists of:

(1) all persons and entities who at any time prior to September 2, 2004 downloaded, installed, or used any Covered Version of SmartDownload, including versions that Netscape designated as version 1.0, version 1.1, and version 1.2,

and

(2) all persons and entities who at any time prior to September 2, 2004 communicated, published, distributed, or otherwise made available through the Internet any file that was downloaded or sought to be downloaded by any other person or entity who was using any Covered Version of SmartDownload, including versions that Netscape designated as version 1.0, version 1.1, and version 1.2.

Excluded from the Settlement Class are Netscape, AOL, any person, firm, trust, corporation, or entity in which either Netscape or AOL has a controlling interest, the officers, directors, employees, parents, subsidiaries and affiliates of either Netscape or AOL, and the legal representatives, heirs, successors in interest, or assigns of any such excluded party.

## III. PLAINTIFFS' REASONS FOR SETTLEMENT

After conducting discovery, consulting with experts, and assessing the risks of litigation, Plaintiffs' Counsel state that they believe that the Settlement is fair and equitable to Settlement Class Members, especially because of the following factors:

- Discovery disclosed no evidence that Netscape had ever analyzed, sold, traded, or otherwise in any way used or derived any benefit from any of the URL or Key Code information that it received from the Covered Versions of SmartDownload.
- Absent such use, Plaintiffs believe that there would be no legal "actual damages" that could be compensated.
- Absent actual damages, Plaintiffs believe that the only damages possibly available to the Class are so-called "statutory damages."
- Plaintiffs believe that it is extremely unlikely that the Court would have awarded statutory damages because the minimum statutory damages under ECPA are \$10,000. In the absence of compensable actual damages and in light of other relevant facts and circumstances, Plaintiffs believe that the Court was likely to have characterized the alleged violation as "de minimis" and thus refuse to award statutory damages.
- Discovery also disclosed that Netscape did not record the Netscape "cookie" (which Covered Versions of SmartDownload transmitted with the URL and Key Code data) in a manner that was associated with the URL or Key Code data;
- Plaintiffs believe that Netscape's servers were configured so that the information Netscape received from the Covered Versions of SmartDownload could not have been associated with individuals absent measures that would have been disproportionately expensive in relation to the value of the data.

- Because Netscape appears to have derived no benefit from the information at issue, even assuming that Plaintiffs were able to obtain class certification and prevailed at trial, Plaintiffs believe the Court could have issued an injunction that did no more than compel Netscape to stop recording data transmitted by the Covered Versions of SmartDownload and to destroy the data that it had recorded.

#### **IV. SUMMARY OF NETSCAPE'S UNDERTAKINGS IN THE PROPOSED SETTLEMENT**

Netscape will make the following commitments to Plaintiffs and Members of the Settlement Class as part of the proposed settlement:

(1) Netscape will refrain (as it has since October 2000) from distributing to U.S. consumers any version of Netscape SmartDownload that preceded version 1.3;

(2) Netscape will continue to operate (as it has since Spring 2002) its servers so that they do not record or retain any URL or Key Code data transmitted to Netscape in connection with downloads performed using versions of SmartDownload that preceded version 1.3;

(3) Within forty-five (45) days after the Court's final approval of the Settlement, Netscape will delete or destroy any and all URL or Key Code data still in Netscape's possession that was previously transmitted by SmartDownload software;

(4) For the next four years, Netscape will refrain from distributing in the U.S. Netscape-branded software that it knows will "intercept" users' Internet communications in a manner that constitutes an actionable violation by Netscape of ECPA; and

(5) Over the course of the next four years, Netscape will cause a qualified outside contractor to conduct certain periodic reviews of the functionality of all current Netscape-branded software distributed to U.S. consumers and will have the results of these reviews reported to a senior officer of Netscape, Netscape's chief technology officer (or a functional equivalent), and its senior in-house counsel. In the event that Netscape's senior management determines based on information contained in these reports that Netscape has distributed Netscape-branded software to U.S. consumers that "intercepts" users' Internet communications in a manner that constitutes an actionable violation by Netscape of ECPA, Netscape will promptly cease and desist from distributing the software and (absent an overriding legal obligation) will promptly delete or destroy all records in its possession that constitute the contents of any user communications that have been unlawfully intercepted as a result of such a violation.

The foregoing undertakings are in addition to certain steps that Netscape voluntarily took after the Actions were filed. In particular, in early July 2000, within one week after the Specht Complaint was filed, Netscape publicly announced that future versions of SmartDownload would be changed to omit the function that transmits to Netscape the URL of the file being downloaded and Key Code, and Netscape took immediate steps to direct the outside contractor that had developed SmartDownload to build a new version of the software that would not include that function. Before the Specht Complaint was filed, Netscape did not have a plan to introduce a version of SmartDownload that would omit that function. In October 2000, Netscape began to distribute such a new version of SmartDownload, ceased distributing prior versions of SmartDownload, and commenced a campaign to encourage users of prior versions to upgrade to the new version. Netscape took these actions without conceding, admitting, or implying it was under any legal obligation to do so.

Some but not all of the foregoing undertakings either resemble in some respects, or are congruent with, certain commitments Netscape made in June 2003 to the Attorney General of New York ("NYAG") as part of an agreed Assurance of Discontinuance ("Assurance") that resolved a NYAG inquiry pertaining to SmartDownload. The NYAG first contacted Netscape concerning the inquiry after the Actions were filed. That inquiry focused in part on a statement Netscape had made to consumers to the effect that the data sent to Netscape by Covered Versions of SmartDownload was not "saved." The NYAG asserted this statement was "potentially misleading" because the data generally was not purged from Netscape's server logs or backup

tapes until six months after being sent. In the Assurance, Netscape denied that it had violated any law, but nonetheless promised to (among other things): (a) maintain its server processes so as not to record URL or Key Code data sent from the Covered Versions of SmartDownload; (b) delete all previously received URL and Key Code data still in its possession, subject to any legal impediments; (c) have an outside contractor conduct two reviews (one commencing in 2003, the other in 2004) to confirm the accuracy of its disclosures to consumers regarding the existence or operation of any feature of its consumer software products that sends to it Uniquely Identified User Data reflecting user activity on websites that are not affiliated with it or regarding its retention and/or use of any such data; and (d) comply with applicable New York consumer protection laws with respect to the presence, form, and content of such disclosures.

## V. YOUR OPTIONS WITH RESPECT TO THE PROPOSED SETTLEMENT

(1) Remain in the Settlement Class and release your claims. You can remain in the Settlement Class by simply doing nothing. If you do not opt out of the Settlement pursuant to the following paragraph and the Settlement is approved by the Court, you will remain in the Settlement Class and be deemed to have agreed to the Settlement. This means you will release any and all claims against Netscape, AOL, and related entities that fall within the scope of the Release and Waiver contained in the Settlement (and described in more detail below) in exchange for the benefits described in Section IV above.

(2) Exclude yourself from the Settlement. You may decide that you do not want to participate in the Settlement. To exclude yourself, you must: send a letter or postcard, which **must be postmarked no later than December 16, 2004**, and include (i) your name, address, and telephone number; (ii) a statement that you want to be excluded from the Class; (iii) the name and docket number of the first of the Actions (*Specht v. Netscape Communications Corp.*, Docket No. 00-CIV-4871 (AKH) (S.D.N.Y.)); (iv) a statement that all information provided as part of your request is truthful to the best of your knowledge and belief; and (v) your **original** signature, to the Settlement P.O. Box at: SmartDownload Software Settlement, P.O. Box 1623, New York, NY 10150. **(If your request contains no signature, or contains a conformed, reproduced, facsimiled, or other non-original signature, it will be rejected as invalid.)**

If you are requesting exclusion and believe that you are part of the Settlement Class because you have downloaded, installed, or used a Covered Version of SmartDownload, your request for exclusion should also include the following information to the extent that it is available to you: (i) a statement that you believe you are within the Settlement Class because of past downloading, installing, or usage of a Covered Version of SmartDownload; (ii) the version(s) of SmartDownload that you downloaded, installed or used; (iii) the make and model of each computer on which you downloaded, installed, or used a Covered Version of SmartDownload; (iv) the operating system of each such computer; and (v) for each such computer, the type(s) of browser software, if any, that was installed on the computer when a Covered Version of SmartDownload was downloaded, installed, or used.

If you are requesting exclusion and believe you are part of the Settlement Class because you communicated, published, distributed, or otherwise made available through the Internet a file or files that were downloaded or sought to be downloaded by another person or entity who was using a Covered Version of SmartDownload, your request for exclusion should also include the following information to the extent it is available to you: (i) a statement that you believe you are within the Settlement Class because you communicated, published, distributed, or otherwise made available through the Internet a file or files that were so downloaded or sought to be downloaded; (ii) the URL address and name of the file(s) you made available for such downloading; (iii) the time frame or date range during which the file(s) were made available for such downloading; and (iv) the approximate number of downloads of such files by users of Covered Versions SmartDownload.

If you validly request exclusion from the Settlement, (i) you will be excluded from the Settlement Class and the Settlement, and cannot object to the Settlement; (ii) you will not be bound by the final judgment entered if the Settlement is approved; and (iii) you will not be

precluded from otherwise prosecuting any individual claim, if timely, that you may have related to the matters referred to in the Complaints in these Actions.

(3) Remain in the Settlement Class and object to the Settlement. If you decide that you would like to participate in the Settlement Class and/or the Settlement, you may still have the option of objecting to the Settlement under the procedures set forth in Section VII below.

## **VI. DISMISSAL AND RELEASE OF CLAIMS**

If the Settlement is approved by the Court, and certain other conditions in the Settlement are satisfied, all individual and Class claims asserted in these putative class actions will be dismissed on the merits and with prejudice as set forth in the following Release and Waiver. Settlement Class Members who do not exclude themselves from the Settlement Class may not assert these claims in any other lawsuit or proceeding.

### Release and Waiver

(1) In return for the consideration provided in the Stipulation of Settlement, the Plaintiffs, and all other Settlement Class Members, on their behalf and on behalf of all other Releasors, shall as of the Effective Date release, acquit, and forever discharge the Released Parties from any and all past, present, and future Causes of Action that are based upon, connected with, or related to, directly or indirectly, in whole or in part (i) the allegations, facts, subjects, or issues set forth or raised in the Actions or (ii) the Released Conduct.

(2) Plaintiffs and all other Settlement Class Members, on their own behalf and on behalf of all other Releasors agree, covenant, and acknowledge that they shall not now or hereafter initiate, participate in, maintain, or otherwise bring any Causes of Action, either directly or indirectly, derivatively, on their own behalf, or on behalf of the Settlement Class or the general public, or any other person or entity, against the Released Parties based on allegations that are based upon, connected with, or related to, directly or indirectly, in whole or in part (i) the allegations, facts, subjects, or issues set forth or raised in the Actions or (ii) the Released Conduct, regardless of whether such Causes of Action accrue after the Stipulation of Settlement is approved.

(3) Plaintiffs and all other Settlement Class Members, and all other Releasors, will be forever barred and enjoined from commencing or prosecuting any action or other proceeding in any court of law or equity, arbitration tribunal, or administrative forum, directly, representatively, or derivatively, asserting claims or allegations that are based upon, connected with, or related to, directly or indirectly, in whole or in part (i) the allegations, facts, subjects, or issues set forth or raised in the Actions or (ii) the Released Conduct, regardless of whether such Causes of Action accrue after the Stipulation of Settlement is approved.

(4) Plaintiffs and the Settlement Class Members acknowledge that they are releasing both known and unknown and suspected and unsuspected Causes of Action, and are aware that they may hereafter discover legal or equitable claims or remedies presently unknown or unsuspected, or facts in addition to or different from those which they now know or believe to be true with respect to the allegations and subject matters in the Complaints or other filings in the Actions or with respect to the Released Conduct. Nevertheless, it is the intention of Plaintiffs and the Settlement Class Members to fully, finally, and forever settle and release all such matters, and all Causes of Action relating thereto, which exist, hereafter may exist, or might have existed (whether or not previously or currently asserted in the Actions).

(5) Plaintiffs and the Settlement Class Members hereby expressly acknowledge certain principles of law applicable in some states, such as Section 1542 of the Civil Code of the State of California, which provide that a general release does not extend to claims that a creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor. Notwithstanding the choice of law provision in the Stipulation of Settlement, to the extent that California or other law may be applicable, Plaintiffs and the Settlement Class Members hereby agree that the

provisions of Section 1542 of the Civil Code of the State of California and all similar federal or state laws, rights, rules, or legal principles of any other jurisdiction that may be applicable herein, are hereby knowingly and voluntarily waived and relinquished by Plaintiffs and the Settlement Class Members, and Plaintiffs and the Settlement Class Members agree and acknowledge that this provision is an essential term of the Stipulation of Settlement and this Release.

(6) Nothing in this Release shall preclude any action to enforce the terms of the Stipulation of Settlement.

(7) Plaintiffs and the Settlement Class Members further agree and acknowledge that the provisions of this Release constitute an essential term of the Settlement, and will be included in the Final Order and Judgment entered by the Court.

(8) Class Counsel, Plaintiffs, and Settlement Class Members agree that payment of attorneys' fees and expenses to Class Counsel in the full amount (if any) awarded by the Court shall fully satisfy, release, and extinguish any and all interests that Class Counsel may have with respect to receipt of attorneys' fees, reimbursement of any costs or expenses, or any other payment or other consideration with respect to the Actions.

#### Certain Release and Waiver Definitions

(1) The term "Causes of Action" means any and all causes of action (including any legal or equitable claims for relief, complaints, suits, or petitions in law or equity) and any allegations of wrongdoing (including any factual allegations of liability, debts, contracts, agreements, obligations, or promises) and any demands for legal or equitable or administrative relief (including any claims for rescission, reformation, restitution, damages, punitive damages, attorneys' fees, costs, interest, or expenses) that have been, may be, or could be asserted in the Actions or in any other action before any court, arbitration, proceeding, tribunal, or administrative body, regardless of whether the causes of action are based on federal, state, or local law, statute, ordinance, regulation, contract, common law, or any other source, and regardless of whether they are known or unknown, foreseen or unforeseen, suspected or unsuspected, or fixed or contingent at the time of the Settlement.

(2) The term "Released Conduct" means any and all direct or indirect acts, omissions, representations, suggestions, or communications that are related to or connected in any way with the design, development, distribution, marketing, description, disclosure, suitability, modification, performance, features, functions, operation, installation, uninstallation, value, benefit, replacement, or any costs of SmartDownload.

(3) The term "Released Parties" means America Online, Inc., Netscape Communications Corporation, and all of their respective past, present, and future parents, subsidiaries, affiliates, successors, predecessors, assigns, shareholders, directors, officers, employees, agents, brokers, attorneys, representatives, indemnitors, insurers, reinsurers, and other entities who have assumed any obligations on their behalf, and all of the foregoing entities' respective past, present and future parents, subsidiaries, affiliates, successors, predecessors, directors, officers, employees, agents, representatives, brokers, and attorneys.

(4) The term "Releasers" means Plaintiffs and all Settlement Class Members, and all their respective heirs, executors, administrators, attorneys, trustees, guardians, beneficiaries, representatives, administrators, predecessors, successors and assigns.

### **VII. THE FAIRNESS HEARING**

A hearing (the "Fairness Hearing") will be held on January 10, 2005, at 4:00 p.m., before the Honorable Alvin K. Hellerstein, United States District Judge, at the United States District Court for the Southern District of New York, located at 500 Pearl Street, New York, NY 10007, to determine (i) whether the Settlement Class should be finally certified for Settlement purposes; (ii) whether the proposed Settlement should be approved by the Court as fair, reasonable, and adequate; (iii) whether these cases should be dismissed with prejudice pursuant to the terms of

the Stipulation of Settlement; (iv) whether Settlement Class Members should be bound by the release set forth above and in the Stipulation of Settlement; and (v) whether the Settlement Class Members should be subject to a permanent injunction that, among other things, bars Settlement Class Members from filing, commencing, prosecuting, intervening in, or participating in (as class members or otherwise) any lawsuit, claim, demand, or proceeding in any jurisdiction that is based on or related to, directly or indirectly, these Actions, the Causes of Action, and/or the Released Conduct (as defined above).

If you decide to participate in the Settlement and not to request exclusion, you may follow the requirements set forth below and come to the Fairness Hearing to support or to object to any aspect of the Settlement, including the fairness, reasonableness, or adequacy of the Settlement, or the certification of the Settlement Class for Settlement purposes. You may choose to hire, at your own expense, an attorney to represent you for this purpose. If you object, you will be barred from bringing your own individual lawsuit asserting claims related to the matters referred to in this Notice and, if the Settlement is approved, you will be bound by the final judgment.

In order to object, you must file a written objection. Your written objection must include: (i) your name, address, and telephone number; (ii) a statement of your objection(s), including the specific reason(s) for each objection, any legal support that you wish to bring to the Court's attention, and a copy of any and all evidence you wish to introduce in support of your objection(s); (iii) information sufficient to show there is a basis to conclude you are a Settlement Class member; and (iv) the names and docket numbers of these Actions (*Specht v. Netscape Communications Corp.*, Docket No. 00-CIV-4871 (AKH) (S.D.N.Y.), *Weindorf v. Netscape Communications Corp.*, Docket No. 00-CIV-6219 (AKH) (S.D.N.Y.), and *Gruber v. Netscape Communications Corp.*, Docket No. 00-CIV-6249 (AKH) (S.D.N.Y.)). If you contend that you are part of the Settlement Class because you have downloaded, installed, or used a Covered Version of SmartDownload, you should also include the following information to the extent that it is available to you: (i) the version(s) of SmartDownload that you downloaded, installed or used; (ii) the make and model of each computer on which you downloaded, installed, or used a Covered Version of SmartDownload; (iii) the operating system of each such computer; and (iv) for each such computer, the type(s) of browser software, if any, that was installed on the computer when a Covered Version of SmartDownload was downloaded, installed, or used. If you contend you are part of the Settlement Class because you communicated, published, distributed, or otherwise made available through the Internet a file or files that were downloaded or sought to be downloaded by another person or entity who was using a Covered Version of SmartDownload, you should also include the following information to the extent it is available to you: (i) the URL address and name of the file(s) you made available for such downloading; (ii) the time frame or date range during which the file(s) were made available for downloading; and (iii) the approximate number of downloads of such files by users of Covered Versions of SmartDownload.

Any written objection (along with any evidence) must be filed with the Clerk of the Court and served upon Class Counsel and AOL's and Netscape's counsel and sent to the Settlement P.O. Box, all postmarked no later than December 16, 2004, at the following addresses:

**Clerk**

Clerk  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, NY 10007

Re: Specht v. Netscape Communications Corp., 00-CIV-4871 (AKH),  
Weindorf v. Netscape Communications Corp., 00-CIV-6219 (AKH),  
Gruber v. Netscape Communications Corp., 00-CIV-6249 (AKH)



### **Class Counsel**

Joshua N. Rubin, Esq.  
Abbey Gardy, LLP  
212 East 39th St.  
New York, NY 10016

Re: Specht v. Netscape Communications Corp., 00-CIV-4871 (AKH),  
Weindorf v. Netscape Communications Corp., 00-CIV-6219 (AKH),  
Gruber v. Netscape Communications Corp., 00-CIV-6249 (AKH)

### **Defendants' Counsel**

Patrick J. Carome, Esq.  
Wilmer Cutler Pickering Hale and Dorr LLP  
2445 M Street N.W.  
Washington, DC 20037

Re: Specht v. Netscape Communications Corp., 00-CIV-4871 (AKH),  
Weindorf v. Netscape Communications Corp., 00-CIV-6219 (AKH),  
Gruber v. Netscape Communications Corp., 00-CIV-6249 (AKH)

### **Settlement P.O. Box**

SmartDownload Settlement  
P.O. Box 1623  
New York, NY 10150

Re: Specht v. Netscape Communications Corp., 00-CIV-4871 (AKH),  
Weindorf v. Netscape Communications Corp., 00-CIV-6219 (AKH),  
Gruber v. Netscape Communications Corp., 00-CIV-6249 (AKH)

Settlement Class Members who file and serve a written objection as described above may appear at the Fairness Hearing, either in person or through an attorney (at their own expense) to object to any aspect of the Settlement. If a Settlement Class member intends to appear at the Fairness Hearing, the Settlement Class Member must file a Notice of Intention to Appear with the Clerk of the Court, and serve the same on Class Counsel and Defendants' Counsel, at the addresses listed above. In addition, if a Settlement Class Member hires an attorney to represent him or her, the attorney must file a Notice of Appearance with the Clerk of the Court, and serve the same on Class Counsel and the Defendants' Counsel at the addresses listed above. **All Notices of Appearance must be filed no later than December 16, 2004.**

## **VIII. ATTORNEYS' FEES AND LITIGATION COSTS**

Under no circumstances shall Plaintiffs' Counsel seek from any member of the Settlement Class reimbursement of attorneys' fees or litigation costs incurred in this litigation.

There presently is no agreement between the Parties or their counsel regarding whether Plaintiffs' Counsel are entitled to or should receive any attorneys' fees or litigation costs from Netscape in connection with the Actions. If the Settlement is approved, Plaintiffs' Counsel intend to ask the Court to order Netscape to pay them attorneys' fees of up to \$1.5 million, plus litigation costs not to exceed \$160,000. Plaintiffs' Counsel believe that the Court will have authority under Section 2520(b)(3) of ECPA to award a reasonable attorneys' fee in these circumstances. The applicants for such fees shall be Abbey Gardy, LLP, 212 East 39th Street, New York, NY 10016; Law Offices of James V. Bashian, 500 Fifth Avenue Suite 2800, New York, NY 10010; Leesfield Leighton Rubio & Boyers, 2350 South Dixie Highway, Miami, FL 33133; and Paskowitz & Associates, 600 East 42nd Street, New York, NY 10165. Netscape intends to oppose the application for these fees and costs, and it reserves all rights to do so on any grounds. If the Settlement is approved, a hearing will be held on April 11, 2005, at 4:00 p.m., or at a later time determined by the Court, before the Honorable Alvin K. Hellerstein, United States District Judge, at the United States District Court for the Southern District of New York, located at 500 Pearl

Street, New York, NY 10007, to decide the reasonable and appropriate attorneys' fees and costs, if any, to be awarded to Plaintiffs' Counsel in connection with these Actions.

If you decide to participate in the Settlement and not request exclusion, you, or an attorney representing you at your own expense, may come to the Attorneys' Fee Hearing to support or to object to Plaintiffs' Counsel's request for fees and costs.

#### **IX. PRELIMINARY INJUNCTION AND EFFECT ON OTHER PROCEEDINGS**

The Court has preliminarily enjoined all Settlement Class Members who have not timely excluded themselves from the Settlement Class and all persons acting on behalf of or in concert with any such Settlement Class Member from (directly or indirectly) filing, commencing, prosecuting, continuing, litigating, intervening in, or participating in (as class members or otherwise) any lawsuit, claim, demand, or proceeding in any jurisdiction that is based on or related to, directly or indirectly, in whole or in part, the allegations, facts, subjects or issues set forth or raised in the Actions, the Causes of Action, and/or the Released Conduct (as those terms are defined in the Release and Waiver above).

Upon final approval of the Settlement, Plaintiffs and the Defendants will ask the Court to enter a permanent injunction which will be similar to the preliminary injunction described above. All Settlement Class Members who have not excluded themselves from the Settlement will be bound by the permanent injunction.

#### **X. ADDITIONAL INFORMATION**

This notice is only a summary of the proposed Settlement. The full terms are set forth in detail in the Stipulation of Settlement, which is available (along with other related documents) on the Settlement Website, [www.SmartDownloadSettlement.com](http://www.SmartDownloadSettlement.com), and is on file with the Clerk of the United States District Court, Southern District of New York. You may also obtain a copy of the Stipulation of Settlement and other related documents by sending an e-mail to [SmartDocs@abbeygardy.com](mailto:SmartDocs@abbeygardy.com). You may also inspect the Stipulation of Settlement at the Clerk's Office at any time during normal business hours.

If you still have questions or need additional information after reviewing the documents on the Settlement Website, you may send an e-mail inquiry to [SmartDownload@abbeygardy.com](mailto:SmartDownload@abbeygardy.com), or you may call toll-free at 1-800-901-2505, Monday through Friday, 9:00 a.m. through 5:00 p.m. Eastern Time. NO INQUIRIES SHOULD BE DIRECTED TO THE COURT OR THE CLERK OF THE COURT.

Dated: September 29, 2004

By Order of the Court  
THE HONORABLE ALVIN K. HELLERSTEIN