

1 SARA M. THORPE (SBN 146529)
 sthorpe@gordonrees.com
 2 GORDON I. ENDOW (SBN 099638)
 gendow@gordonrees.com
 3 JEFFREY M. RATINOFF (SBN 197241)
 jratinoff@gordonrees.com
 4 GORDON & REES LLP
 Embarcadero Center West
 5 275 Battery Street, Suite 2000
 San Francisco, CA 94111
 6 Telephone: (415) 986-5900
 Facsimile: (415) 986-8054
 7

8 Attorneys for Defendant
 ST. PAUL MERCURY INSURANCE COMPANY

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

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

12 NETSCAPE COMMUNICATIONS)
 CORPORATION, a Delaware corporation; and)
 13 AMERICA ONLINE, INC., a Delaware)
 corporation;)

14 Plaintiffs,)

15 v.)

16 FEDERAL INSURANCE COMPANY, an)
 Indiana corporation; ST. PAUL MERCURY)
 17 INSURANCE COMPANY, a Minnesota)
 corporation; EXECUTIVE RISK SPECIALTY)
 18 INSURANCE COMPANY; a Connecticut)
 corporation, and DOES 1 through 50,)

19 Defendants.)

CASE NO. C-06-00198 PVT

**DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO DISMISS
 PLAINTIFFS' NINTH CAUSE OF
 ACTION, MOTION TO STRIKE
 PRAYER, OR ALTERNATIVELY FOR
 MORE DEFINITE STATEMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

[F. R. Civ. P. 12(b)(6), 12(e), 12(f)]

**Date: February 27, 2006
 Time: 9:00 a.m.
 Judge: James Ware
 Dept.: Courtroom 8**

Complaint Filed: December 12, 2005

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. INTRODUCTION	2
II. STATEMENT OF ISSUES TO BE DECIDED	3
III. FACTUAL AND PROCEDURAL BACKGROUND.....	3
A. The Insurance Policies at Issue	3
B. The Underlying Lawsuits and Investigation	3
C. Plaintiffs’ Alleged Damages	4
D. Plaintiffs’ Causes of Action Against St. Paul	4
E. Defendants’ Removal of Action and Attempt to Informally Resolve Defects in Plaintiffs’ Complaint	5
IV. POINTS AND AUTHORITIES	5
A. Applicable Legal Standards Under Rule 12.....	5
B. Plaintiffs’ Section 17200 Claim is Legally Unsustainable	6
1. Denial of Coverage Under An Insurance Policy Cannot Support A Section 17200 Claim.....	6
2. Plaintiffs’ Legal Remedies are Adequate as a Matter of Law	7
3. Plaintiffs’ Section 17200 Claim Improperly Seeks Monetary Damages.....	8
4. Plaintiffs’ Section 17200 Claim Seeks Improper “Equitable” Relief	9
5. Plaintiffs’ Complaint Fails to Allege Sufficient Facts With Reasonable Particularity to Support a Section 17200 Claim	11
C. The Court Should Strike Plaintiffs’ Prayer For Relief.....	12
D. Alternatively, Plaintiffs Should Be Required To Provide a More Definitive Statement of the Factual Basis for Their Section 17200 Claim.....	12
V. CONCLUSION.....	13

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Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

Bank of the West v. Superior Court
2 Cal.4th 1254 (1992) 9

Baugh v. CBS, Inc.
828 F.Supp. 745 (N.D. Cal. 1993) 9

Bureerong v. Uvawas
922 F.Supp. 1450 (C.D. Cal. 1996) 12

Cortez v. Purolator Air Filtration Products Co.
23 Cal.4th 163 (2000) 8

Dunkin v. Boskey
82 Cal.App.4th 171 (2000) 11

Golden Day School, Inc. v. Pirillo
118 F.Supp.2d 1037 (C.D. Cal. 2000) 5

Heighley v. J.C. Penney Life Ins. Co.
257 F.Supp.2d 1241 (C.D. Cal. 2003) 7

In re Napster, Inc. Copyright Litigation
354 F.Supp.2d 1113 (N.D. Cal. 2005) 10, 11

Khoury v. Maly's of California, Inc.
14 Cal.App.4th 612 (1993) 11

Korea Supply Co. v. Lockheed Martin Corp.
29 Cal.4th 1134 (2003) 8, 9, 10, 11

Kraus v. Trinity Mgmt. Servs., Inc.
23 Cal.4th 116 (2000) 10

Maler v. Superior Court
220 Cal.App.3d 1592 (1990) 7

Moradi-Shalal v. Fireman's Fund Ins. Companies
46 Cal.3d 287 (1988) 6

Palmer v. Stassinis
348 F.Supp.2d 1070 (N.D. Cal. 2004) 10, 11

Progressive West Ins. Co. v. Superior Court (Preciado)
___ Cal.App.4th ___ (December 28, 2005) 8

Qarbon.com Inc. v. eHelp Corp.
315 F.Supp.2d 1046 (N.D. Cal. 2004) 11

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San Francisco, CA 94111

TABLE OF AUTHORITIES
(continued)

Page

1	<i>Rubin v. Green</i>	
	4 Cal.4th 1187 (1993)	6
2		
	<i>Safeway, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.</i>	
3	805 F.Supp. 1484 (N.D. Cal. 1992)	7
4		
	<i>Saunders v. Superior Court</i>	
5	27 Cal.App.4th 832 (1994)	11
	<i>Silicon Knights, Inc. v. Crystal Dynamics, Inc.</i>	
6	983 F.Supp. 1303 (N.D. Cal. 1997)	11
7		
	<i>Textron Financial Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh</i>	
8	118 Cal.App.4th 1061 (2004)	6, 7
	<i>Washington v. Baenziger</i>	
9	673 F.Supp.1478 (N.D. Cal. 1987)	13
10		
	<i>Western Mining Counsel v. Watt</i>	
11	643 F.2d 618 (9th Cir. 1981)	6, 12
	<i>Wood v. Apodaca</i>	
12	375 F.Supp.2d 942 (N.D. Cal. 2005)	13
13		
	Statutes	
14	Cal. Ins. Code § 790.03	7
15		
	Federal Rules of Civil Procedure	
16	Rule 8	2
	Rule 12(b)(6)	5, 12
17	Rule 12(e)	13
18	Rule 12(f)	12
19		
	Other Authorities	
20	2 W. Schwarzer <i>et al.</i> , <i>California Practice Guide: Federal Civil Procedure Before Trial</i>	
	¶ 9:389-90 (Rutter Group 2005)	12
21		
22		
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Gordon & Rees LLP
 Embarcadero Center West
 275 Battery Street, Suite 2000
 San Francisco, CA 94111

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Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
2 PLEASE TAKE NOTICE THAT, on February 27, 2006 at 9:00 a.m., or as soon
3 thereafter as the matter may be heard in Courtroom 8 of the above entitled court, located at 280
4 South First Street, San Jose, California, Defendant St. Paul Mercury Insurance Company ("St.
5 Paul"), will move for an order pursuant to Federal Rules of Civil Procedure 12(b)(6) ("Rule
6 12(b)(6)") and applicable case law dismissing Plaintiffs Netscape Communications
7 Corporation's and America Online, Inc.'s (collectively "Plaintiffs") Ninth Cause of Action for
8 Unfair Business Practices pursuant to Cal. Bus. & Prof. Code § 17200 *et seq.* ("Section 17200
9 Claim") with prejudice.

10 In the alternative, St. Paul moves for an order pursuant to Federal Rules of Civil
11 Procedure 12(f) ("Rule 12(f)") striking Paragraph 80 under Plaintiffs' Ninth Cause of Action and
12 Paragraphs 13 through 14 of the Prayer for Relief in their Complaint, and/or an Order pursuant to
13 Federal Rules of Civil Procedure 12(e) ("Rule 12(e)") and applicable case law for a more
14 definite statement of the factual basis of Plaintiffs' unfair business practices claim.

15 This motion is made on the grounds that Plaintiffs' Ninth Cause of Action for Unfair
16 Business Practices: (1) fails to state a cognizable Section 17200 Claim as a matter of law; (2)
17 seeks compensatory damages and equitable relief that are not recoverable as a matter of law; and
18 (3) fails to allege sufficient facts to establish a cognizable Section 17200 Claim.

19 This motion is based upon this Notice of Motion and Motion, the Memorandum of Points
20 and Authorities below, the Declaration of Sara M. Thorpe, the Complaint filed in this action,
21 along with the papers, records, and pleadings on file herein and on such other and further matters
22 as may be presented at the hearing on this motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an action for alleged breach of an insurance contract and alleged breach of the implied covenant of good faith and fair dealing arising out of the decisions by Defendants Federal Insurance Company, St. Paul, and Executive Risk Specialty Insurance Company (collectively "Defendants") not to defend and indemnify Plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc. ("AOL") against four class action lawsuits brought by consumers and in connection with an investigation by the New York State Attorney General. Nothing in the Complaint indicates that the dispute between the parties is anything other than a disagreement over insurance coverage for these claims.

Nevertheless, based solely on information and belief, Plaintiffs also assert an unfair business practices claim under California Business and Professions Code Section 17200 ("Section 17200 Claim") against St. Paul and the other insurers for an alleged "policy and practice of automatically denying claims" relating to internet privacy violations. Plaintiffs purport to seek injunctive relief and disgorge monies from St. Paul allegedly obtained from Plaintiffs through unfair business practices. Plaintiffs, however, fail to state a viable Section 17200 Claim as a matter of law.

California courts hold that private parties, such as Plaintiffs, cannot assert a cause of action under Section 17200 for alleged breach of obligations under an insurance contract. There is already an adequate remedy at law for those types of claims (i.e., breach of contract and breach of the covenant of good faith and fair dealing). In addition, the damages Plaintiffs seek are not recoverable under Section 17200.

Even if Plaintiffs' Section 17200 Claim were not subject to dismissal as a matter of law, Plaintiffs fail to allege their claim with sufficient particularity. Plaintiffs merely incorporate their claims of breach of contract and breach of the covenant of good faith and fair dealing by reference and assert a single vague and conclusory allegation. Even under the liberal pleading standards of Federal Rule of Civil Procedure 8 ("Rule 8"), Plaintiffs' allegation is wholly insufficient to support a Section 17200 Claim.

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275 Battery Street, Suite 2000
San Francisco, CA 94111

1 Accordingly, St. Paul respectfully requests that the Court dismiss Plaintiffs' Ninth Cause
2 of Action and strike the corresponding Prayer for Relief, or, alternatively, require Plaintiffs to
3 provide a more definitive statement of the unfair business practices that pertain to St. Paul.

4 **II. STATEMENT OF ISSUES TO BE DECIDED**

- 5 1. Whether Plaintiffs' cause of action for violation of Section 17200 fails as a matter
6 of law;
- 7 2. Whether the compensatory damages and equitable relief Plaintiffs seek under
8 Section 17200 are recoverable as a matter of law; and
- 9 3. Whether Plaintiffs fail to plead facts sufficient to establish an unfair business
10 practices claim under Section 17200.

11 **III. FACTUAL AND PROCEDURAL BACKGROUND**

12 **A. The Insurance Policies at Issue**

13 Plaintiffs allege St. Paul issued a commercial general liability policy number TE0900917
14 with limits of \$2 million to AOL and its wholly-owned subsidiary, Netscape, for the policy
15 period April 1, 1999 through April 1, 2000 ("St. Paul Policy"). Complaint, ¶ 24. Plaintiffs
16 contend the St. Paul Policy provided coverage for liability for "personal injury," which is defined
17 as injury caused by certain offenses including "[m]aking known to any person or organization
18 written or spoken material that violates a person's right of privacy." *Id.* at ¶ 25. Plaintiffs claim
19 St. Paul had a duty to defend AOL and Netscape. *Id.*

20 In addition, Plaintiffs allege Netscape maintained a policy through Federal with \$2
21 million liability coverage for the policy period April 1, 1998 to April 1, 1999, and through
22 Executive Risk with limits of \$10 million for the policy period April 1, 1999 to April 1, 2000.
23 Complaint at ¶¶ 14, 22-23, 27-29. Plaintiffs contend they obtained these insurance policies as
24 part of their "comprehensive risk management program" to protect themselves from legal actions
25 taken by consumers and various government regulatory and enforcement entities. *Id.* at ¶¶ 2, 21.

26 **B. The Underlying Lawsuits and Investigation**

27 In 2000, three related civil class actions were filed in the Southern District of New York
28 and a fourth was filed in the District of Columbia against Netscape and AOL ("the Underlying

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1 Actions”). Complaint, ¶ 15. In those actions, Plaintiffs were accused of violating the Electronic
2 Communications Privacy Act (18 U.S.C. §§ 2511 and 2520) and the Computer Fraud and Abuse
3 Act (18 U.S.C. § 1030) by allegedly intercepting web users’ electronic communications for the
4 purpose of tracking information regarding those web users’ specific web viewing habits. *Id.* at
5 ¶ 16. Shortly thereafter, the Attorney General for the State of New York initiated an
6 investigation that allegedly focused on the Plaintiffs’ violation of consumers’ privacy rights (“the
7 Investigation”). *Id.* at ¶ 17.

8 C. Plaintiffs’ Alleged Damages

9 Plaintiffs tendered the Underlying Actions and Investigation to St. Paul (and its other
10 insurers), seeking defense and indemnification. Complaint, ¶¶ 18, 26. St. Paul denied coverage
11 because the Underlying Actions did not seek damages for “personal injury” as defined in the St.
12 Paul Policy. *Id.* at ¶ 26. Plaintiffs make similar allegations in regards to the other insurers. *Id.*
13 at ¶ 18, 23, 29. Plaintiffs claim that despite “millions of dollars in premiums” paid to the
14 insurers for insurance coverage, “AOL and Netscape were forced to defend and, ultimately,
15 resolve those lawsuits with their own resources.” *Id.* at ¶ 18.

16 Plaintiffs claim to have “incurred and paid in excess of \$4,273,064 in attorneys’ fees,
17 consultants’ fees and other expenses in connection with their defense,” none of which has been
18 reimbursed by any insurer. Complaint, ¶ 33. In addition, Plaintiffs claim they paid “at least
19 \$100,000 to effect closure” of the Underlying Actions and Investigation. *Id.* at ¶ 34. Plaintiffs
20 also assert that Netscape may be “required to pay an additional \$1,340,113.86 to finally resolve
21 these matters (as well as incurring additional defense costs).” *Id.* They seek to “force the
22 [Defendants]... to pay amounts owing. And to take full and complete responsibility for other
23 damages caused their Insureds by their systematic and improper tactics to avoid coverage.” *Id.*
24 at ¶ 35.

25 D. Plaintiffs’ Causes of Action Against St. Paul

26 In the Complaint, Plaintiffs assert against St. Paul three causes of action: (1) breach of
27 contract for the decision to deny coverage (Complaint, ¶¶ 42-47); (2) tortious breach of the
28 covenant of good faith and fair dealing for failure to defend or indemnify (*Id.* at ¶¶ 64-67); and

1 (3) unfair business practices pursuant to Section 17200 (*Id.* at ¶¶ 76-80).

2 As to the Section 17200 Claim, there are no specific facts alleged. Rather, Plaintiffs
3 incorporate by reference all the prior allegations in the Complaint and assert the following:

- 4 • Plaintiffs “are informed and believe that [Defendants] have a policy and practice of
5 automatically denying all claims that implicate their ‘personal injury’ and/or ‘Media
6 Activities’” coverages when privacy allegations are asserted against insureds.
- 7 • “[T]he acts and practices alleged above constitute acts of unfair competition as
8 defined by [Section 17200] in that they are unfair and present a continuing threat to
9 [Plaintiffs] and members of the public and because they deprive policyholders of the
10 insurance coverage they intend to purchase and believe they have purchased.”

11 Complaint, ¶¶ 76-79. Under their Section 17200 Claim, Plaintiffs seek permanent injunctive
12 relief and disgorgement of “all funds and profits acquired by means of any act or practice . . .
13 which is found by the Court to be unlawful, unfair or fraudulent.” *Id.* at 17 (Prayer at ¶¶ 13-14).

14 **E. Defendants’ Removal of Action and Attempt to Informally Resolve Defects in
15 Plaintiffs’ Complaint**

16 On January 11, 2006, Defendants removed this action from the Superior Court of
17 California for the County of Santa Clara. Immediately thereafter, St. Paul made a good faith
18 effort to meet and confer with Plaintiffs regarding the impropriety of their Section 17200 Claim.
19 Declaration of Sara M. Thorpe in Support of St. Paul’s Motion to Dismiss (“Thorpe Decl.”), Ex.
20 A. Although St. Paul outlined the legal basis as to why Plaintiffs’ Section 17200 Claim is not
21 viable, Plaintiffs’ refused to voluntarily dismiss their claim. *Id.*, Exs. B-C.

22 **IV. POINTS AND AUTHORITIES**

23 **A. Applicable Legal Standards Under Rule 12**

24 Rule 12(b)(6) provides that a party may move to dismiss an action for failure to state a
25 claim upon which relief can be granted. “Dismissal under [Rule 12(b)(6)] is appropriate when it
26 is clear that no relief could be granted under any set of facts that could be proven consistent with
27 the allegations set forth in the complaint.” *Golden Day School, Inc. v. Pirillo*, 118 F.Supp.2d
28 1037, 1041 (C.D. Cal. 2000). “On a motion to dismiss pursuant to 12(b)(6), the allegations of
the complaint must be accepted as true.” *Id.* However, in ruling on a motion to dismiss, the
court need not accept as true the conclusory allegations, legal characterizations, unreasonable

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1 inferences or unwarranted deductions of fact alleged in the operative complaint. *Western Mining*
2 *Counsel v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

3 **B. Plaintiffs’ Section 17200 Claim is Legally Unsustainable**

4 **1. Denial of Coverage Under An Insurance Policy Cannot Support A**
5 **Section 17200 Claim**

6 Plaintiffs’ Section 17200 Claim incorporates by reference the allegations that St. Paul
7 failed to defend and indemnify Plaintiffs in connection with the Underlying Actions and
8 Investigation. Plaintiffs allege they “*are informed and believe* that [Defendants] have a policy
9 and practice of automatically denying all claims that implicate their ‘personal injury’ and/or
10 ‘Media Activities’” coverages when privacy allegations are asserted against insureds.”
11 Complaint, ¶ 78 (emphasis added). As a matter of law, these purported acts cannot constitute
12 unfair business practices under Section 17200.

13 Since the California Supreme Court’s 1988 decision in *Moradi-Shalal*, California’s
14 Uniform Insurance Practices Act (Insurance Code § 790.03) (“UIPA”) has not afforded a private
15 cause of action against an insurer based on claims handling. *Moradi-Shalal v. Fireman’s Fund*
16 *Ins. Companies*, 46 Cal.3d 287, 304-305 (1988) (the UIPA’s prohibition on insurance companies
17 engaging in unfair practices, such as not making good-faith effort to reach prompt and fair
18 settlement of claims, does not create any private cause of action in favor of insureds). The
19 California court have since ruled that a party cannot avoid the effect of *Moradi-Shalal* by
20 recasting the claim as a violation of Calif. Bus. & Prof. Code § 17200. As the California
21 Supreme Court noted:

22 [I]n the case of actions arising out of an insurer’s alleged bad faith refusal
23 to settle insurance claims, formerly brought under the Insurance Code,
24 several decisions of the Courts of Appeal have held that the bar on such
25 implied private causes of action imposed by our decision in [*Moradi-*
Shalal], may not be circumvented by recasting the action as one under
[Section] 17200.

26 *Rubin v. Green*, 4 Cal.4th 1187, 1201-02 (1993). *Accord, Textron Financial Corp. v. Nat’l*
27 *Union Fire Ins. Co. of Pittsburgh*, 118 Cal.App.4th 1061, 1070-72 (2004) (parties cannot plead
28 around *Moradi-Shalal*’s holding by merely relabeling their cause of action as one for unfair

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1 competition” under Section 17200); *Maler v. Superior Court*, 220 Cal.App.3d 1592, 1598 (1990)
 2 (“plaintiffs cannot circumvent [*Moradi-Shalal’s*] ban by bootstrapping an alleged violation of
 3 Section 790.03 onto [Section 17200] so as to state a cause of action”).

4 The specific allegations of wrongful conduct contained in Plaintiffs’ Section 17200 claim
 5 (i.e., breach of the insurance contract, and the alleged policy and practice of automatically
 6 denying all claims that implicate ‘personal injury’ and/or ‘Media Activities’ coverages), are
 7 exactly the type of activities covered by the UIPA. The UIPA mandates that no person or
 8 company may engage in an unfair or deceptive act or practice in the business of insurance. Cal.
 9 Ins. Code § 790.03. *See, e.g., Textron, supra*, 118 Cal.App.4th at 1070-72 (allegations of unfair
 10 business practices based on insured misrepresenting both the terms of the insurance policies and
 11 its obligations under them for its own benefit, as well as an insurer’s failure to comply with a
 12 policy or to provide benefits thereunder were covered by the UIPA); *Safeway, Inc. v. Nat’l Union*
 13 *Fire Ins. Co. of Pittsburgh, Pa.*, 805 F.Supp. 1484, 1493 (N.D. Cal. 1992) (Section 790.03(h)
 14 “simply codifies the common law tort of ‘the implied covenant of good faith and fair dealing as
 15 applied to insurance’”) (citation omitted).

16 Plaintiffs claim St. Paul wrongly denied coverage under the St. Paul Policy and that
 17 “upon information and belief, St. Paul has a “policy and practice” of denying these types of
 18 claims. Because Plaintiffs’ allegations fall within the type of activities prohibited by the UIPA,
 19 Plaintiffs’ claim cannot, as a matter of law, form the basis of a Section 17200 Claim.

20 2. Plaintiffs’ Legal Remedies are Adequate as a Matter of Law

21 Plaintiffs have not and cannot allege that their available legal remedies against St. Paul
 22 are inadequate as a matter of law. Pleading the inadequacy of legal remedies is a necessary
 23 element to support a claim for equitable relief pursuant to Section 17200. *Heighley v. J.C.*
 24 *Penney Life Ins. Co.*, 257 F.Supp.2d 1241, 1259-1260 (C.D. Cal. 2003) (plaintiff failed to state a
 25 claim under Section 17200 against insurer arising out of refusal to pay claim where plaintiff did
 26 not allege lack of adequate remedy at law and failed to request injunctive relief or restitution).

27 Plaintiffs have an adequate legal remedy in the form of monetary damages. Plaintiffs
 28 identify the *exact* dollar amounts they believe St. Paul is obligated to reimburse for failing to

1 defend and/or indemnify Plaintiffs. Complaint, ¶¶ 24-26, 33-34, 42-47, 64-67. Nowhere in the
2 Complaint do Plaintiffs allege any facts that support a claim for injunctive relief.

3 In meeting and conferring on whether they would voluntarily dismiss their Ninth Cause
4 of Action, Plaintiffs rely upon a new decision from the Third Appellate District of the California,
5 *Progressive West Ins. Co. v. Superior Court (Preciado)*, ___ Cal.App.4th ___, 2005 WL 3540865
6 (December 28, 2005) (decision is not yet final as of the filing of this motion). See Thorpe Decl.,
7 Exh. B. *Progressive*, however, is inapplicable to Plaintiffs' Section 17200 Claim and does not
8 address the authority upon which St. Paul relies in this motion.

9 *Progressive* involved a claim that a business (which happens to be an insurance
10 company) had an improper means of collecting monies from its customers. *Progressive* did not
11 involve a claim for insurance coverage or for damages based on the handling of the decision as
12 to whether coverage existed. In fact, the *Progressive* court found that Preciado failed to assert a
13 viable claim for either breach of contract or breach of the covenant of good faith because
14 Preciado was not seeking benefits under the insurance policy. Those benefits had already been
15 conferred on Preciado.

16 While St. Paul does not believe that Plaintiffs' coverage claims are meritorious, Plaintiffs
17 have pled breach of contract and breach of the covenant of good faith and fair dealing against St.
18 Paul based upon alleged denial of benefits owed under the St. Paul Policy. Since an award of
19 contract or tort damages would be available if Plaintiffs succeed with their claims, an adequate
20 legal remedy is available to Plaintiffs. As such, *Progressive* is of no help to Plaintiffs here and
21 their claim for unfair business practices under Section 17200 is unsustainable.

22 3. Plaintiffs' Section 17200 Claim Improperly Seeks Monetary Damages

23 Plaintiffs' Section 17200 Claim should also be dismissed because it improperly seeks
24 contractual and tort damages. The California Supreme Court has repeatedly affirmed that
25 Section 17200 "is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v.*
26 *Lockheed Martin Corp.*, 29 Cal.4th 1134, 1149-50 (2003) (holding that an unfair business
27 practices action under Section 17200 is equitable in nature and damages cannot be recovered)
28 (affirming *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 173 (2000)). Any

1 member of the public can bring suit under the act to enjoin a business from engaging in unfair
 2 business practices, however, “it is well established that *individuals* may not recover damages.”
 3 *Id.* (emphasis added). An individual plaintiff cannot use Section 17200 as an alternate theory of
 4 recovery for what is a suit for contractual and tort damages. *Id.* at 1151.

5 California courts recognize that insurance coverage disputes cannot form the basis of a
 6 Section 17200 Claim because compensatory damages are not recoverable under this statute. *See,*
 7 *e.g., Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1266 (1992). Remedies for violation of
 8 Section 17200 are *limited* to injunctive relief and restitution. *Korea Supply, supra*, 29 Cal.4th at
 9 1144.

10 Here, Plaintiffs bring their Section 17200 Claim in their individual capacities.
 11 Complaint, ¶ 77. The purported restitution and disgorgement remedy sought by Plaintiffs is
 12 virtually indistinguishable from what Plaintiffs seek as damages under the contract and tort
 13 claims. Plaintiffs’ Section 17200 claim impermissibly seeks recovery of unpaid defense fees and
 14 settlement costs predicated on Defendants’ alleged breach of contractual obligations. *Id.* at ¶¶ 4,
 15 24-26, 33-34, 42-47, 64-67.

16 Plaintiffs’ claim that:

17 [Plaintiffs] also *seek to recover further and additional damages* on
 18 account of the Insurers’ unreasonable denials, and *for the unfair business*
 19 *practices* the Insurers have pursued against AOL and others to wrongfully
 deprive them of insurance coverage which is legitimately due and owing.

20 Complaint, ¶ 4 (emphasis added) *and* ¶ 76 (incorporating paragraph 4 by reference in their
 21 Section 17200 claim). Plaintiffs may not “convert” a claim for damages into a claim for
 22 equitable relief by couching it as “restitution” or “disgorgement.” *See Baugh v. CBS, Inc.*, 828
 23 F.Supp. 745, 757-758 (N.D. Cal. 1993) (rejecting plaintiffs’ attempt to re-characterize their claim
 24 for damages based upon emotional distress as claims for restitution and injunctive relief).

25 4. Plaintiffs’ Section 17200 Claim Seeks Improper “Equitable” Relief

26 To the extent Plaintiffs’ prayer for relief can be construed as “equitable,” it still does not
 27 seek the type of limited equitable relief available under Section 17200. An order of “restitution”
 28 can only compel a defendant “to return money obtained through an unfair business practice to

1 those persons in interest from whom the property was taken, that is, to persons who had an
 2 ownership interest in the property or those claiming through that person.” *Korea Supply, supra*,
 3 29 Cal.4th at 1149 (quoting *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal.4th 116, 126-27 (2000)).
 4 *Accord, In re Napster, Inc. Copyright Litigation*, 354 F.Supp.2d 1113, 1126 (N.D. Cal. 2005)
 5 (quoting same). In other words, “[t]he object of restitution is to restore the status quo by
 6 returning to the plaintiff funds in which he or she has an ownership interest.” *Id.*

7 This purely restitutionary remedy is distinct from “nonrestitutionary disgorgement,”
 8 which includes “orders to compel the ‘surrender of all profits earned as a result of an unfair
 9 business practice regardless of whether those profits represent money taken directly from persons
 10 who were victims of the unfair practice.’” *In re Napster, supra*, 354 F.Supp.2d at 1126-27
 11 (quoting *Korea Supply, supra*, 29 Cal.4th at 1144). Such nonrestitutionary disgorgement is
 12 unavailable in response to an individual’s Section 17200 Claim. *Korea Supply, supra*, 29 Cal.4th
 13 at 1151; *In re Napster, supra*, 354 F.Supp.2d at 1127. *Accord, Palmer v. Stassinios*, 348
 14 F.Supp.2d 1070, 1088 (N.D. Cal. 2004) (nonrestitutionary disgorgement of profits obtained by
 15 means of an unfair business practice is not an available remedy in an individual Section 17200
 16 Claim).

17 Plaintiffs appear to premise their request for “restitution” on a theory that Defendants
 18 have been unjustly enriched by failing to pay insurance policy benefits for defense fees and
 19 settlement costs. Complaint, ¶¶ 4, 24-26, 33-34, 42-47, 64-67 and ¶ 76 (incorporating
 20 paragraphs 1-75 of the Complaint by reference into Section 17200 Claim). Such a request does
 21 not fall within the definition of restitution under Section 17200. Plaintiffs do not have a vested
 22 interest in the claimed defense fees or settlement costs on which their claim is based. St. Paul
 23 has not “taken” the defense and settlement costs allegedly incurred by Plaintiffs in the
 24 Underlying Actions and the Investigation. Furthermore, because Plaintiffs’ interest in defense
 25 fees and settlement costs is contingent upon the claim being covered under the insurance
 26 policies, this interest is a mere “expectancy” for which restitution is not a proper remedy.¹ *See*

27 ¹ In contract actions, restitution puts the plaintiff in “as good a position as that occupied by him before
 28 the contract was made,” as opposed to damages which put the plaintiff in “the position that he

(Footnote continued)

1 *Korea Supply, supra*, 29 Cal.4th at 1149.

2 Plaintiffs allege *no* facts that would support a restitution order requiring St. Paul to return
3 any money or property obtained from Plaintiffs or any other person through the alleged unfair
4 business practice. To the extent Plaintiffs seek disgorgement of any alleged profits gained in the
5 alleged unfair business practice, as individuals, they are not entitled to recover such profits. *See*
6 *Korea Supply, supra*, 29 Cal.4th at 1151; *In re Napster, supra*, 354 F.Supp.2d at 1127; *Palmer,*
7 *supra*, 348 F.Supp.2d at 1088. As such, there is no basis for Plaintiffs’ Section 17200 Claim and
8 the restitution disgorgement remedy they seek.

9 **5. Plaintiffs’ Complaint Fails to Allege Sufficient Facts With Reasonable**
10 **Particularity to Support a Section 17200 Claim**

11 Even if Plaintiffs could allege a claim for unfair business practices under Section 17200
12 (which they have not and cannot), Plaintiffs fail to allege facts with sufficient particularity to
13 establish a violation of Section 17200. “A plaintiff alleging unfair business practices under
14 [Section 17200] must state with *reasonable particularity* the facts supporting the statutory
15 elements of the violation.” *Khoury v. Maly’s of California, Inc.*, 14 Cal.App.4th 612, 618 (1993)
16 (emphasis added) (upholding dismissal of Section 17200 claim because complaint failed to
17 describe with reasonable particularity facts supporting alleged violation). *Accord, Silicon*
18 *Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1316 (N.D. Cal. 1997) (quoting same
19 in dismissing a Section 17200 claim because plaintiff failed to allege sufficient underlying facts);
20 *Qarbon.com Inc. v. eHelp Corp.*, 315 F.Supp.2d 1046 (N.D. Cal. 2004) (citing same in finding
21 that plaintiff did not meet the standards of Rule 8 by stating with reasonable particularity the
22 facts supporting an unfair business practices claim); *Saunders v. Superior Court*, 27 Cal.App.4th
23 832, 841-42 (1994) (upholding dismissal of a Section 17200 claim on basis that supporting
24 allegations were “too vague and conclusionary”).

25 _____
26 reasonably expected and has been unjustly disappointed by not attaining.” *Dunkin v. Boskey*, 82
27 Cal.App.4th 171, 198 (2000). Plaintiffs seek to recover unpaid defense fees and indemnity allegedly
28 owed under the St. Paul Policy. Because these damages constitute their expected benefit under that
contract, Plaintiffs’ claim does not support disgorgement even under the broadest definition of
restitution.

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

1 In their Section 17200 Claim, Plaintiffs merely incorporate by reference the allegation of
2 breach of contract and breach of the duty of good faith and fair dealing and assert a *single*
3 conclusory allegation that St. Paul has an alleged “policy and practice of automatically denying
4 all claims that implicate ‘personal injury’ and/or ‘Media Activities’ coverages when privacy
5 allegations are asserted against insureds.” Complaint, ¶¶ 76-78. This single conclusory
6 allegation is based on information and belief. Thus, Plaintiffs have not pled facts with
7 reasonable particularity to demonstrate how St. Paul’s denial of coverage is an unfair business
8 practice. *See Western Mining, supra*, 643 F.2d at 624. Plaintiffs’ lone allegation is simply too
9 vague and uncertain to state a claim for unfair business practices. Even with Plaintiffs’
10 incorporation by reference of the first seventy-six paragraphs in the Complaint, it is impossible
11 for St. Paul to determine what facts describe and establish an alleged unfair business practice.
12 For this reason as well, the Section 17200 Claim should be dismissed.

13 **C. The Court Should Strike Plaintiffs’ Prayer For Relief**

14 Regardless of whether the Court is inclined to dismiss Plaintiffs’ entire Section 17200
15 claim, the Court should strike Plaintiffs’ Prayer for Relief as it relates to the Section 17200
16 Claim. Complaint, ¶¶ 80, and p. 17 (Prayer for Relief at ¶¶ 13-14). Pursuant to Rule 12(f), a
17 defendant may challenge a claim for relief where it is not recoverable as a matter of law. 2 W.
18 Schwarzer *et al.*, *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 9:389-90
19 (Rutter Group 2005). *Accord, Bureerong v. Uvawas*, 922 F.Supp. 1450, 1479 fn. 34 (C.D. Cal.
20 1996) (“a motion to strike may be used to strike any part of the prayer for relief when the
21 damages sought are not recoverable as a matter of law”). Both Plaintiffs’ request for injunctive
22 relief and “restitution” under its Section 17200 Claim are improper under California law. *See*,
23 discussion in Sections IV. B. 3-4, *supra*. Accordingly, the Court should strike Paragraph 80 of
24 Plaintiffs’ Ninth Cause of Action and Paragraphs 13-14 of the Prayer for Relief.

25 **D. Alternatively, Plaintiffs Should Be Required To Provide a More Definitive**
26 **Statement of the Factual Basis for Their Section 17200 Claim**

27 If the Court is not inclined to dismiss Plaintiffs’ entire Section 17200 Claim pursuant to
28 Rule 12(b)(6), St. Paul respectively requests that the Court require Plaintiffs to provide a more

1 definite statement of the facts supporting this claim. Rule 12(e) provides that a defendant may
2 move for a more definite statement before having to answer the plaintiff's complaint if it is "so
3 vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading."
4 *Wood v. Apodaca*, 375 F.Supp.2d 942, 949-50 (N.D. Cal. 2005) (Rule 12(e) motion is
5 "appropriate where the complaint is so indefinite that the defendant cannot ascertain the nature of
6 the claim being asserted"); *Washington v. Baenziger*, 673 F.Supp.1478, 1483 (N.D. Cal. 1987)
7 (granting alternative motion for a more definite statement because plaintiffs' blanket allegations
8 of defendants' misconduct were not sufficiently particular to permit a response).

9 The factual basis for Plaintiffs' Section 17200 Claim is too vague and ambiguous for St.
10 Paul to ascertain what unfair business practice St. Paul is being accused of having. Therefore,
11 the Court should require Plaintiffs to provide a more definitive statement of the factual basis of
12 their Section 17200 Claim and the exact form of relief they seek.

13 **V. CONCLUSION**

14 St. Paul respectfully requests that the Court dismiss Plaintiffs' Ninth Cause of Action for
15 Unfair Business Practices and strike the corresponding Prayer for Relief against St. Paul with
16 prejudice because this claim is unsustainable as a matter of law. Plaintiffs cannot state a private
17 right of action for unfair claims practices under Section 17200. Plaintiffs make a claim for
18 breach of an insurance policy and breach of the covenant of good faith and fair dealing. These
19 provide Plaintiffs with an adequate remedy at law. Plaintiffs admittedly seek reimbursement of
20 and damages relating to monies they claim are owed as defense costs and indemnity under the
21 insurance policies. There is no restitution or disgorgement alleged or to which Plaintiffs would
22 be entitled under the law. For these reasons, Plaintiffs' Section 17200 Claim is unsustainable as
23 a matter of law.

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

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In the alternative, if this Court determines a Section 17200 Claim can be maintained, St. Paul respectfully requests that this Court require Plaintiffs to provide a more definite statement of the factual basis for Plaintiffs' Section 17200 Claim.

Date: January 19, 2006

GORDON & REES LLP

By: 

SARA M. THORPE

Attorneys for Defendant

ST. PAUL MERCURY INSURANCE
COMPANY

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