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 8 ST. PAUL MERCURY INSURANCE COMPANY

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

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 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.)
 20)
 21)
 22)

CASE NO. C-06-00198 JW (PVT)

**DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO DISMISS
 PLAINTIFFS' SEVENTH CAUSE OF
 ACTION; MEMORANDUM OF
 POINTS AND AUTHORITIES**

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

Date: April 17, 2006
Time: 9:00 a.m.
Judge: James Ware
Dept.: Courtroom 8

Complaint Filed: 12/12/05
Amended Complaint Filed: 2/24/06

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on April 17, 2006 at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 8 of the above entitled court, located at 280 South First Street, San Jose, California, Defendant St. Paul Mercury Insurance Company (“St. Paul”), will move for an order pursuant to Federal Rules of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) and applicable case law dismissing Plaintiffs Netscape Communications Corporation’s and America Online, Inc.’s (collectively “Plaintiffs”) Seventh Cause of Action for Unfair Business Practices pursuant to Cal. Bus. & Prof. Code § 17200 *et seq.* (“Section 17200 Claim”) with prejudice.

This motion is made on the grounds that Plaintiffs’ Seventh Cause of Action for Unfair Business Practices fails to state a cognizable Section 17200 Claim because plaintiffs have an adequate remedy at law.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Netscape Communications Corporation (“Netscape”) and America Online, Inc. (“AOL”) take a second shot in this insurance coverage dispute at pleading a claim for unfair business practices against St. Paul, but fail because plaintiffs have an adequate remedy at law and therefore they cannot plead the elements of a Section 17200 Claim. If there is any privacy claim brought against plaintiffs in the future, and if St. Paul denies that claim under its policy, and if plaintiffs disagree with that decision, then plaintiffs have available to them the remedies of breach of contract and bad faith (the very remedies they seek in this current dispute). Furthermore, plaintiffs’ Seventh Cause of Action alleges future wrongful claims handling, which California courts have held cannot be recast as an unfair business practice. For these reasons, St. Paul requests that this Court dismiss plaintiffs’ Seventh Cause of Action.

II. STATEMENT OF ISSUE TO BE DECIDED

Plaintiffs’ Seventh Cause of Action for violation of Section 17200 fails to state a claim upon which relief can be granted because (1) plaintiffs have an adequate remedy at law, and (2) wrongful claims handling cannot be recast as an unfair business practice.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs’ Amended Complaint Against The Insurers

Plaintiffs originally filed their lawsuit against four insurers under four insurance policies issued over a two year period. Plaintiffs voluntarily dismissed one insurer (National Union Insurance Company). Plaintiffs asserted against St. Paul causes of action for breach of contract and breach of the covenant of good faith and fair dealing based on St. Paul’s conclusion that it had no duty to defend or indemnify plaintiffs against four lawsuits. In its original Complaint, plaintiffs also included a Ninth Cause of Action for unfair business practices under Cal. Bus. & Prof. Code § 17200.

Defendants St. Paul, Federal and Executive Risk filed a motion to dismiss plaintiffs’ Ninth Cause of Action for failure to state a claim. The Court granted the motion with leave to amend. In its Order granting the motion, the Court explained that:

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In this case, Plaintiffs [] claim a breach of contract, and therefore have an adequate remedy to recover the money owed to them under the insurance policies. Plaintiffs, however contend that they are entitled to bring a section 17200 claim to recover two additional types of remedies: injunctive relief and disgorgement. Plaintiffs' position is untenable for the following reasons.

First, as Defendants point out, the complaint fails to establish any ongoing need for injunctive relief. Rather, the complaint contains allegations that each of the policies at issue were in effect for a finite period, ending no later than April of 2000. If indeed the parties are no longer in contractual privity, which the complaint clearly suggests, Plaintiffs have no basis for seeking injunctive relief.

Second, Plaintiffs are not entitled to seek disgorgement on behalf of the public. Section 17203 of the California Business & Professions Code, which was amended in 2004, provides in pertinent part that a party seeking relief on behalf of the public must satisfy class action pleading requirements. Plaintiffs' complaint lacks the requisite class allegations.

Court's February 22, 2006 Order, pp. 6-7.

In response, Plaintiffs filed an Amended Complaint on February 24, 2006, which attempts to remedy failings in their earlier unfair business practices claim, but again falls short.

As in the original Complaint, there are no specific factual allegations regarding the unfair business practices. Plaintiffs incorporate by reference all the prior allegations in the Complaint which set forth that plaintiffs were sued in four class actions and investigated by the government, that the three insurers issued policies to plaintiffs, and that the insurers concluded there was no duty to defend or indemnify plaintiffs under those policies. (Amended Complaint, ¶¶ 12-65.)

In an obvious attempt to address some of the Court's February 22nd ruling, plaintiffs now allege that the St. Paul Policy is an "occurrence" policy and therefore plaintiffs are still in "contractual privity" with St. Paul. (Amended Complaint, ¶ 69.) Plaintiffs allege that privacy claims "may be brought against them in the future." (*Id.*, ¶ 70.) These claims will be tendered to the insurers. (*Id.*) The insurers have "a policy and practice of automatically denying (or severely limiting available coverage for) all claims that implicate their 'personal injury' and/or 'Media Activities' coverages, particularly when privacy allegations are asserted against their insureds." (*Id.*, ¶ 71.) These acts that might happen in the future are "unfair practices" because they "present a continuing threat to Netscape, AOL and members of the public and because they deprive policyholders of the insurance coverage they intend to purchase, and believe that they have, in fact, purchased." (*Id.*, ¶ 72.) Plaintiffs allege they have no adequate remedy at law and

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1 therefore the insurers should be “preliminarily and permanently enjoined from engaging in these
2 fraudulent and/or unfair business practices at any time in the future . . .” (*Id.*, ¶ 73.)

3 **B. The St. Paul Policy**

4 Plaintiffs allege St. Paul issued commercial general liability policy no. TE0900917 with
5 limits of \$2 million to AOL and its wholly-owned subsidiary, Netscape, for the policy period
6 April 1, 1999 through April 1, 2000 (“St. Paul Policy”). (Amended Complaint, ¶ 25.) A copy of
7 the St. Paul policy is attached as Exhibit 6 to the Amended Complaint and incorporated by
8 reference. *Id.* Plaintiffs contend the St. Paul Policy is an “occurrence” policy that provides
9 coverage for liability for “personal injury,” which is defined as injury caused by certain offenses
10 including “[m]aking known to any person or organization written or spoken material that violates
11 a person’s right of privacy.” (*Id.* ¶ 26-27.)

12 The St. Paul Policy provides under the personal injury liability coverage that:

13 We’ll pay amounts any protected person is legally required to pay as damages for
14 covered personal injury that:

- 15 • results from your business activities, other than advertising, broadcasting,
publishing, or telecasting done by or for you; and
- 16 • *is caused by a personal injury offense committed while this agreement is in
17 effect.*

18 (Amended Complaint, Exhibit 6, St. Paul Policy, Technology Commercial General Liability
19 Protection, page 2; emphasis added.) “Personal injury offense” is defined as including “making
20 known to any person or organization written or spoken material that violates a person’s right of
21 privacy.” (*Id.*) The policy also has an endorsement which provides that “for purposes of
22 advertising injury and personal injury, all Online Activities are excluded from these coverages.”
23 (*Id.*, St. Paul Policy, Online Activities Exclusion.)

24 **C. The Underlying Lawsuits and Investigation**

25 In 2000, three class actions were filed in the Southern District of New York and a fourth
26 was filed in the District of Columbia against Netscape and AOL (“the Underlying Actions”).
27 Amended Complaint, ¶ 14-15. In the Underlying Actions, Plaintiffs were accused of violating
28 the Electronic Communications Privacy Act (18 U.S.C. §§ 2511 and 2520) and the Computer

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1 Fraud and Abuse Act (18 U.S.C. § 1030) by allegedly intercepting web users’ electronic
2 communications for the purpose of tracking information regarding those web users’ specific web
3 viewing habits. *Id.*, ¶ 15. Shortly thereafter, the Attorney General for the State of New York
4 initiated an investigation “on certain privacy-related consumer protection issues.” *Id.*, ¶ 16.

5 **D. Plaintiffs’ Alleged Damages**

6 The Underlying Actions and Investigation were tendered to the insurers, seeking defense
7 and indemnification. Amended Complaint, ¶ 17. St. Paul concluded there was no coverage for
8 the Underlying Actions under the St. Paul Policy. *Id.*, ¶ 28. Plaintiffs make similar allegations
9 as to the other two insurers. *Id.*, ¶ 24, 32. Plaintiffs claim these coverage determinations were
10 wrongly decided and “erroneous.” *Id.*, ¶ 24, 28, 32.

11 Plaintiffs defended and resolved the claims and “incurred and paid in excess of
12 \$4,273,064 in attorneys’ fees, consultants’ fees and other expenses in connection with their
13 defense.” Amended Complaint, ¶ 33. In addition, plaintiffs claim they paid “at least \$100,000 to
14 effect closure” of the Underlying Actions and government investigation. *Id.*, ¶ 34. Plaintiffs
15 claim Netscape may be “required to pay an additional \$1,340,113.86 to finally resolve these
16 matters (as well as incurring additional defense costs).” *Id.* Plaintiffs seek to “force the Insurers
17 to do what they refused to do voluntarily: To honor their contractual obligations. To pay
18 amounts owing. And to take full and complete responsibility for other damages caused their
19 Insureds by their systematic and improper tactics to avoid coverage.” *Id.*, ¶ 35.

20 **IV. POINTS AND AUTHORITIES**

21 **A. Applicable Legal Standard Under Rule 12(b)(6)**

22 In viewing the factual allegations, if those facts fail to state a claim that would entitle
23 plaintiff to the form of relief requested, dismissal of the claim is appropriate. Rule 12(b)(6), Fed.
24 R. Civ. P.; *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d 1027, 1032
25 (9th Cir. 2005); *Golden Day School, Inc. v. Pirillo*, 118 F.Supp.2d 1037, 1041 (C.D. Cal. 2000);
26 *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th Cir. 1987); *North Star Intern. V.*
27 *Arizona Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983).

28 The court is “not required to accept conclusory legal allegations cast in the form of

1 factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.”
 2 *Palmer v. Stassinis*, 348 F.Supp.2d 1070, 1076 (N.D. Cal. 2004) (citation omitted). Here,
 3 plaintiffs make the conclusory allegation that they do not have an adequate remedy at law for
 4 possible future anticipatory breaches by the insurance companies, which is belied by plaintiffs’
 5 factual allegations and their present claims.

6 **B. Plaintiffs Have An Adequate Remedy At Law**

7 To plead a Section 17200 Claim, plaintiffs must allege, among other things, that they do
 8 not have an adequate remedy at law. *Heighley v. J.C. Penney Life Ins. Co.*, 257 F.Supp.2d 1241,
 9 1259-1260 (C.D. Cal. 2003) (plaintiff failed to state a claim under Section 17200 against insurer
 10 arising out of refusal to pay claim where plaintiff did not allege lack of adequate remedy at law
 11 and failed to request injunctive relief or restitution); *Stewart v. Life Ins. Co. of N.A.*, 388
 12 F.Supp.2d 1138, 1144 (E.D. Cal. 2005) (“Plaintiff does not claim she has no adequate remedy at
 13 law. Her breach of contract claim will provide any benefits she is due.”).

14 Where damages are sought for existing claims, and damages are available to address any
 15 future claims, an adequate remedy exists at law. See, *Rubin v. Green*, 4 Cal.4th 1187, 1199,
 16 1202, 17 Cal.Rptr.2d 828, 835, 837 (1993) (plaintiff had other potential remedies and therefore
 17 injunctive relief pursuant to a Section 17200 Claim was not viable claim).

18 The unfair business practices act is not a substitute for a tort or contract action. See,
 19 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1150, 131 Cal.Rptr.2d 29, 42-43
 20 (2003). The purpose of the act is to provide a procedure to prevent “ongoing or threatened acts
 21 of unfair competition.” *Id.* Injunctions, in general, are not appropriate unless there is an
 22 imminent threat of irreparable harm. See, e.g., *Korean Phil. Pres. Church v. Calif. Pres.*, 77
 23 Cal.App.4th 1069, 1084, 9 Cal.Rptr.2d 275, 298 (2000) (an injunction cannot be issued in a
 24 vacuum based on the fear that something might happen in the future).

25 Here, plaintiffs allege a present complaint about St. Paul’s decision not to defend or
 26 indemnify the Underlying Actions, and they speculate there might be some future wrongful
 27 denial of policy benefits. As to the present claim, plaintiffs have an adequate remedy at law and
 28 are pursuing that remedy. Plaintiffs assert claims for breach of contract and breach of the

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1 covenant of good faith and fair dealing. See, Amended Complaint, 2nd and 5th Causes of Action.
2 Plaintiffs allege specific amounts they seek to recover. See, *Id.*, ¶ 33, 34, Prayer for Relief.

3 As to the possibility of a future breach of contract, plaintiffs’ claims are not only pure
4 speculation but, even if there were to be such a claim, plaintiffs still have an adequate remedy at
5 law – a claim for monetary damages for breach of contract and breach of the covenant of good
6 faith and fair dealing. Plaintiffs do not allege there is any other “privacy claim” against AOL or
7 Netscape that St. Paul has wrongly denied. Plaintiffs allege there “may” be a future claim. That
8 would mean there would have to be a “personal injury offense” that took place between April 1,
9 1999 to April 1, 2000 (the period of the St. Paul Policy), that a person or entity would have to
10 sue AOL and/or Netscape, that AOL and/or Netscape would have to tender the claim to St. Paul,
11 that St. Paul would have to decide the claim was not covered by the St. Paul Policy, and AOL
12 and/or Netscape would have to disagree with that determination.

13 If a claim were to arise in California in the future, there is a two year statute of limitations
14 for bringing claims for personal injury which makes it not only speculative but far-fetched that a
15 person or entity will bring a claim for injury based upon an offense that first occurred 6 or more
16 years ago. See, Calif. Code Civ. Proc. § 335.1 (two year statute of limitation on personal injury
17 claims). (There are similar statutes in other states.)

18 Each claim for coverage is evaluated on its own individual facts, the policy language and
19 the law. *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 93 (4th Cir. 2003)
20 (applying Va. Law) (obligation to defend depends on comparison of policy language with
21 underlying complaint).¹ Accord, *Waller v. Truck Ins. Exchg.*, 11 Cal.4th 1, 19, 44 Cal.Rptr.2d
22 370, 378 (1995) (duty to defend is made by comparing allegations against insured with terms of
23 policy); *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467,
24 471 (1993) (same).

25 Plaintiffs seek to enjoin the insurers from making an erroneous claims decision in the
26 future. There is nothing to suggest there is imminent danger of this happening (especially as the

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28 ¹ It is St. Paul’s position that Virginia’s law applies to this dispute because Virginia is where the St. Paul Policy was issued to AOL at its principal place of business.

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1 St. Paul Policy’s coverage period ended six years ago). Plaintiffs do not plead “ongoing” or
2 “threatened acts” as required by *Korea Supply*, nor “any ongoing need for injunctive relief” as
3 required by this Court’s February 22nd Order. Rather, plaintiffs plead there may be a future
4 claim and a future breach of the insurance contract. There is nothing to suggest the same
5 remedies that plaintiffs avail themselves of now would not be available for any future claim.

6 Plaintiffs have an adequate remedy at law for their present, and any future, claim that St.
7 Paul erred in its coverage determination. Plaintiffs can in the future, as they have now, bring a
8 claim for breach of contract and breach of the covenant of good faith and fair dealing and seek
9 monetary damages. That is an “adequate remedy.”

10 **C. Under California Law, An Erroneous Claims Decision Cannot Be Recast As**
11 **An Unfair Business Practice**

12 Plaintiffs’ unfair business practices claim is that there “may” in the future be “privacy
13 claims” made against AOL and/or Netscape which plaintiffs may tender to the insurers and
14 which the insurers may decide are not covered under their insurance policies. See, Amended
15 Complaint, ¶ 69-72. As such, plaintiffs’ claim is no more than a claim that the insurers may in
16 the future wrongfully deny plaintiffs benefits owed under the insurance contracts. These are
17 claims that squarely fall within the insurance code regulations regarding fair claims handling
18 practices (Cal. Ins. Code § 790, et seq.).

19 A Section 17200 Claim “borrows violations from other laws by making them
20 independently actionable as unfair competitive practices” and deems other practices unfair even
21 if not specifically proscribed by a law. *Korea Supply, supra*, 29 Cal.4th at 1143, 131 Cal.Rptr.2d
22 at 37 (quote and citation omitted); *Cel-Tech Communications, Inc. v. Los Angeles Cellular*
23 *Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 560 (Cal. 1999). However, while the
24 unfair business practice law is “sweeping, it is not unlimited.” *Cel-Tech, supra*, 20 Cal.4th at
25 182, 83 Cal.Rptr.2d at 562.

26 Plaintiffs cannot “‘plead around’ absolute barriers to relief by relabeling the nature of the
27 action as one brought under the unfair competition statute.” *Cel-Tech, supra*, 20 Cal.4th at 180,
28 83 Cal.Rptr.2d at 560, citing *Rubin, supra*, 4 Cal.4th at 1187, 17 Cal.Rptr.2d at 837. Violations

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1 of Calif. Ins. Code § 790.03 cannot be the basis for a private cause of action against an insurer
2 for wrongful claims handling. *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287,
3 304-305, 250 Cal.Rptr. 116, 126 (1988); *Rubin, supra*, 4 Cal.4th at 1201-1202, 17 Cal.Rptr.2d at
4 838; *Textron Financial Corp. v. Nat'l Union Fire Ins. Co. of Pitts.*, 118 Cal.App.4th 1061, 1070-
5 1072, 13 Cal.Rptr.3d 586, 593-595 (2004).

6 Plaintiffs cannot plead around this rule merely by relabeling their cause of action as one
7 for unfair competition under Section 17200. *Textron, supra*, 118 Cal.App.4th at 1070-1072, 13
8 Cal.Rptr.3d at 593-595 (allegations of unfair business practices based on insurer misrepresenting
9 terms of the insurance policies and obligations under the policy for its own benefit, as well as an
10 insurer's failure to comply with a policy or to provide benefits are the type of activities covered
11 by Ins. Code § 790, et seq.); *Safeway, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 805
12 F.Supp. 1484, 1492 (N.D. Cal. 1992) (Section 790.03(h) "simply codifies the common law tort
13 of 'the implied covenant of good faith and fair dealing as applied to insurance'" [citation
14 omitted]).²

15 Here plaintiffs seek to enjoin and require the insurers to pay to defend and indemnify
16 future possible "privacy claims" that may be brought against AOL and/or Netscape. Although
17 not specifically stated, it is apparent that plaintiffs' claims are that the insurers should comply
18 with their duties under the contracts and the law, including as codified at Calif. Ins. Code
19 § 790.03, et seq. As such, plaintiffs fail to state a viable Section 17200 Claim.

20 **V. CONCLUSION**

21 Plaintiffs filed an Amended Complaint attempting again to assert an unfair business
22 practice claim. This case is an insurance coverage dispute. Plaintiffs have an adequate remedy
23 at law for their present complaints. They assert causes of action for breach of contract and
24 breach of the covenant of good faith and fair dealing, and seek monetary damages. As to the
25 future, they speculate that there "may" be a "privacy claim" against AOL and/or Netscape that

26 _____
27 ² *State Farm Fire & Cas. Co. v. Sup. Ct.*, 45 Cal.App.4th 1093, 53 Cal.Rptr.2d 229 (Ct. Cal. App. 1996) (referenced
28 in the Court's Order of February 22, 2006) was criticized by the California Supreme Court in *Cel-Tech*. [20 Cal.4th
at 185, 83 Cal.Rptr.2d at 564], and by the California appellate court in *Textron* [118 Cal.Rptr.2d at 1071, 13
Cal.Rptr.3d at 594].

1 may be a "personal injury offense" that they would tender under the St. Paul Policy (which
2 provided coverage for a policy period that ended six years ago), and that St. Paul might
3 conclude, erroneously, that there is no coverage for that claim. To prevent this possibility,
4 plaintiffs seek an injunction under the unfair business practices act. That is not the type of
5 situation the unfair business practices act was intended to address. Plaintiffs have an adequate
6 remedy at law for any such claim if it were to occur in the future.


7 For these reasons, Plaintiffs' Section 17200 Claim is not viable as a matter of law and
8 plaintiffs' Seventh Cause of Action should be dismissed.

9 Date: March 10, 2006

GORDON & REES LLP

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By: 
SARA M. THORPE
Attorneys for Defendant
ST. PAUL MERCURY INSURANCE
COMPANY

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