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Federal Insurance Company and
Executive Risk Specialty Insurance Company

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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

Plaintiffs,

v.

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

Defendants.

No. 5:06-cv-00198 JW (PVT)

DEFENDANTS FEDERAL INSURANCE COMPANY AND EXECUTIVE RISK SPECIALTY INSURANCE COMPANY'S NOTICE OF MOTION TO DISMISS SEVENTH CAUSE OF ACTION FOR UNFAIR BUSINESS PRACTICES AND MOTION TO STRIKE PORTIONS OF PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: April 17, 2006
Time: 9:00 a.m.
Courtroom: 8

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TO PLAINTIFFS 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-referenced court, located at 280 South First Street, San Jose, California, Defendants Federal Insurance Company ("Federal") and Executive Risk Specialty Insurance Company ("ERSIC") will and hereby do move to dismiss without leave to amend Count Seven in the first amended complaint of Plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc. ("AOL").

In the alternative, Federal and ERSIC will and hereby do move to strike from Plaintiffs' first amended complaint (1) the phrase "and members of the public" from Paragraph 72; and (2) the phrase "aiding, abetting, or inducing" from the prayer for relief in connection with Count Seven.

Federal and ERSIC's motion to dismiss is brought pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of Civil Procedure, and is made on the grounds that Count Seven for Unfair Business Practices pursuant to Cal. Bus. & Prof. Code § 17200 fails to state a claim upon which relief can be granted because (1) Plaintiffs have an adequate remedy at law, and thus are not entitled to the equitable relief afforded under Section 17200; (2) Plaintiffs lack any cognizable remedy under Section 17200; and (3) Section 17200 does not apply to conduct occurring outside California.

Federal and ERSIC's alternative motion to strike is brought pursuant to the provisions of Rule 12(f) of the Federal Rules of Civil Procedure, and is made on the grounds that the subject phrases seek relief that is not recoverable as a matter of law.

Federal and ERSIC's Motion to Dismiss and their alternative Motion to Strike are based on this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, the Court's file in this matter and on such oral argument as Federal and ERSIC may present at the hearing if oral argument is so ordered by this Court.

Pursuant to this Court's *Standing Order Regarding Case Management in Civil Cases*, counsel for Federal and ERSIC conferred with opposing counsel and determined that the hearing date proposed will not cause undue prejudice.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

This is Plaintiffs second attempt to turn this insurance coverage dispute into a claim for violations of Cal. Bus. & Prof. Code §§ 17200 *et seq.* – the "Unfair Competition Law." However, Plaintiffs fail, as they did in their original complaint, to state a Section 17200 claim in their First Amended Complaint ("FAC").

Statement of Issues to Be Decided: Plaintiffs' Seventh Cause of Action for violations of Section 17200 fails to state a claim upon which relief can be granted because Plaintiffs: (1) have an adequate remedy at law; (2) cannot demonstrate an ongoing need for an injunction; (3) lack any cognizable relief under Section 17200; and (4) have not pled and cannot plead that any of the alleged wrongful conduct upon which the Section 17200 claim is based occurred in California.

For these reasons, as set forth in detail below, Plaintiffs' FAC fails to state facts sufficient to constitute a claim against Federal and ERSIC for violations of Section 17200. Accordingly, the Seventh Cause of Action in Plaintiffs' FAC should be dismissed against Federal and ERSIC.

II. BACKGROUND

The Insurance Policies

Federal issued Electronics Insurance Program Insurance Policy No. 3535-11-19 to Netscape Communications Corporation for the April 30, 1998 to April 30, 1999 Policy Period (the "Federal Policy").[1] FAC ¶¶ 21 and 22 and Exhibit 5 thereto. Plaintiffs further allege that ERSIC issued Multimedia Liability Insurance Policy No. 151-166530-99 to America Online, Inc. for the April 1, 1999 to April 1, 2000 Policy Period (the "ERSIC Policy"). FAC ¶¶ 29 and 30 and Exhibit 7 thereto. Plaintiffs allege that as a wholly-owned subsidiary of AOL, Netscape is also an Insured under the ERSIC Policy. Id. ¶ 29.

[1] The facts set forth herein and relied on in this Motion are based on the allegations of Plaintiffs' FAC and documents referenced therein. As is required, and solely for purposes of this Motion, Federal and ERSIC treat all the material facts set forth in Plaintiffs' FAC as true.

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The Underlying Actions and Attorney General Investigation

In or about 2000, four civil actions were filed against Netscape and AOL (the "Underlying Actions"): Specht v. Netscape Communications Corp., *et al.*, Case No. 00 CIV 4871 (S.D.N.Y.); Weindorf v. Netscape Communications Corp., *et al.*, Case No. 00 CIV 6219 (S.D.N.Y.); Gruber v. Netscape Communications Corp., *et al.*, Case No. 00 CIV 6249 (S.D.N.Y.); and Mueller v. Netscape Communications Corp., *et al.*, Case No. 00 CIV 01723 (D.D.C.). Id. ¶ 14 and Exhibits 1-4. The Underlying Actions, styled as class actions, sought, among other things, compensatory damages and other relief for Netscape's and AOL's alleged interception of consumers' private electronic communications. Id. ¶¶ 14 and 15.

Shortly after the filing of the Underlying Actions, New York's Attorney General commenced an investigation into certain privacy-related consumer protection issues (the "Attorney General's Investigation"). The crux of the investigation purportedly centered around privacy violations similar to those asserted in the Underlying Actions. Id. ¶ 16. Following the filing of the complaints in the Underlying Actions and the Attorney General's Investigation, AOL and Netscape tendered these matters to Federal and ERSIC. Id. ¶ 17.

Federal and ERSIC each denied coverage to AOL and Netscape for the Underlying Actions and the Attorney General's Investigation. Id. ¶ 17. Thereafter, Netscape and AOL allegedly incurred $4,273,064 in attorneys' fees defending themselves in the Underlying Actions and the Attorney General's Investigation. Id. ¶ 33. Plaintiffs also allegedly paid at least $100,000 to settle all of those matters.[2] Id. ¶ 34.

Dismissal of Plaintiffs' Section 17200 Cause of Action and Plaintiffs' First Amended Complaint

On December 12, 2005, Plaintiffs filed this action in Santa Clara Superior Court. On or about January 11, 2006, the matter was removed to this Court. Plaintiffs bring this action against, among others, Federal and ERSIC, alleging separate causes of action for breach of contract and

[2] Plaintiffs allege that an appeal pertaining to the settlement in the Underlying Actions is pending and could result in Netscape being required to pay an additional $1,340,113.86 to finally resolve those matters, as well as incurring additional defense costs. FAC ¶ 34.

breach of the implied covenant of good faith and fair dealing against each of them, as well as violations of Cal. Bus. & Prof. Code §§ 17200 *et seq*. against all defendants. On January 19, 2006, Federal and ERSIC moved to dismiss the Ninth Cause of Action (violation of Cal. Bus. & Prof. Code §§ 17200 *et seq*.). On February 22, 2006, this Court entered an order granting Federal and ERSIC's motion with leave to amend. On February 24, 2006, Plaintiffs filed the FAC, again asserting claims against Federal and ERSIC for breach of contract and breach of the implied covenant of good faith and fair dealing. Plaintiffs also attempt to remedy the deficiencies of their previously stated claim for unfair business practices under Section 17200 and restate that claim in their Seventh Cause of Action. Once again, however, they fail to state a cognizable claim under Section 17200. Indeed, it is clear that Plaintiffs cannot state such claim. Thus, Federal and ERSIC now move to dismiss the Seventh Cause of Action of the FAC without leave to amend.

III. PLAINTIFFS' SECTION 17200 CLAIM SHOULD BE DISMISSED

A. Standards on a Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may, by way of a motion, attack a complaint on the grounds that it "fails to state a claim upon which relief can be granted." Such a motion to dismiss tests the legal sufficiency of one or more claims asserted in the complaint under attack.

In ruling on a Rule 12(b)(6) motion, the reviewing court must indulge in the presumption that all well-pleaded facts in the complaint are true, and must further construe such allegations in the light most favorable to the plaintiff. Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1481 (9th Cir. 1995). However, a court need not accept as true the conclusory allegations and legal characterizations contained in a complaint. Transphase Systems, Inc. v. Southern Calif. Edison Co., 839 F. Supp. 711, 718 (C.D. Cal. 1993). Indeed, as one court stated, a court ruling on a motion to dismiss need not "swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996).

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B. Plaintiffs Fail to State a Claim Under Section 17200

1. Plaintiffs Cannot State A Claim For Relief Under Section 17200 Because They Have An Adequate Remedy At Law

This Court granted Federal and ERSIC's motion to dismiss Plaintiffs' original Section 17200 claim on the grounds that Plaintiffs failed to allege the inadequacy of the legal remedies available to them. Order at 5:23-24. In doing so, this Court recognized that to state a claim under Section 17200, "a party must allege the following: . . . *plaintiff has no adequate remedy at law*." Id. at 6:1-9 (citing Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1259-60 (C.D. Cal. 2003); Crosky, et al., California Practice Guide: Insurance Litigation § 15:112; and Stewart v. Life Ins. Co. of North America, 388 F. Supp. 2d 1138, 1144 (E.D. Cal. 2005) (citing Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 83 Cal. Rptr. 2d 548, 561 (Cal. Ct. App. 1999))). Plaintiffs' FAC likewise lacks allegations demonstrating that Plaintiffs have no adequate legal remedies available to them.

a) Plaintiffs' FAC Recognizes Plaintiffs Have An Adequate Remedy At Law

Plaintiffs' breach of contract and bad faith claims are based entirely upon Federal and ERSIC's allegedly wrongful and unreasonable denials of coverage under their respective insurance policies. In connection with these contract and tort claims, Plaintiffs seek monetary damages. This same conduct is the basis upon which Plaintiffs assert their Section 17200 claim. Because the same alleged conduct is the basis for both Plaintiffs' coverage related claims and their Section 17200 claim, Plaintiffs effectively concede that monetary damages can adequately and wholly compensate them for the alleged wrongful acts of Federal and ERSIC. Indeed, Plaintiffs state that the purpose of this lawsuit is to recover *damages* stemming from Federal and ERSIC's alleged conduct:

> By this action, [Plaintiffs] now seek to force the Insurers to do what they refused to do voluntarily: To honor their contractual obligations. To pay amounts owing. And to take full responsibility for damages caused [Plaintiffs] by their systematic and improper tactics to avoid coverage.

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FAC ¶ 35.

As this Court recognized, the remedy available to Plaintiffs in connection with their breach of contract claim – to recover the money owed to them under the insurance policies – is an "adequate remedy." Order at 6: 17-21. Specifically, this Court held that "Plaintiffs similarly claim a breach of contract, and therefore have an adequate remedy to recover the money owed to them under the insurance policies." Id.

In reaching this conclusion, this Court relied on Stewart v. Life Ins. Co. of North America, 388 F. Supp. 2d 1138 (E.D. Cal. 2005). There, the plaintiff asserted that the defendant insurance company misled its customers by failing to give notice of delinquent payments. The plaintiff sought to recover benefits on an insurance policy that had expired due to lack of payment. The defendant brought a motion for summary judgment against the Section 17200 claim. The court granted the motion because the plaintiff failed to allege that she had no adequate remedy at law. Id. at 1144. The court noted that the plaintiff's breach of contract claim would provide any benefits owed. Id.

The same conclusion should be reached here. Just as in Stewart, there is an adequate remedy at law – benefits allegedly owed under the policies. Accordingly, just as in Stewart, Plaintiffs' Section 17200 claim is defective as a matter of law.

b) Plaintiffs' Attempts To Plead An Inadequate Remedy At Law Fail

Plaintiffs' legal conclusion that they "have no adequate remedy at law" (FAC ¶ 72) is not enough. The law is clear: bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited. Aulson v. Blanchard, 83 F.3d at 3. To give credence to such allegations on a motion to dismiss would require courts to "swallow the plaintiff's invective hook, line, and sinker." Id. See also In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993) (recognizing that the court need not accept as true conclusionary allegations or legal characterizations); SEC v. Seaboard Corp., 677 F.2d 1315, 1316 (9th Cir. 1982) (recognizing that a mere conclusion need not be accepted as true absent supporting allegations); Taylor v. FDIC, 132 F.3d 753, 762 (D.C. Cir. 1997); Beliveau v. Caras, 873 F. Supp.

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1393, 1395-96 (C.D. Cal. 1995).

Because naked allegations are not enough, the Court must consider whether Plaintiffs have alleged an "ongoing need for injunctive relief." Order at 6: 22-23. In granting Federal and ERSIC's original motion to dismiss, this Court held that "the complaint fails to establish any ongoing need for injunctive relief." Id.

Like the original complaint, Plaintiffs' FAC does not establish any ongoing need for injunctive relief. Plaintiffs contend that because the policies in issue are "occurrence-based" policies (as opposed to "claims made" policies), claims may be made under the policies until the limits of the policies are exhausted. FAC ¶ 69. Plaintiffs also "anticipate" that privacy claims that would trigger coverage under the policies may be brought against them in the future. Id. ¶ 70. Plaintiffs reason that because Federal and ERSIC purportedly deny, or severely limit, coverage available for privacy claims, that an injunction is necessary to prevent Federal and ERSIC from denying these "anticipated" claims.

These allegations are defective for a number of reasons. First, an adequate remedy at law would be available to Plaintiffs should Federal and/or ERSIC wrongfully deny any future privacy (or other) claims. As Plaintiffs have done here when faced with what Plaintiffs perceive to be a wrongful denial of coverage, Plaintiffs can bring a breach of contract and/or bad faith action against the insurer to recover monetary damages representing, among other things, benefits due under the policy. Thus, not only do Plaintiffs have an adequate remedy at law available to them now (as discussed above) for Federal and ERSIC's alleged wrongful denials of coverage, Plaintiffs would have the same adequate legal remedies available to them in connection with future claims.[3]

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[3] Moreover, although the Federal Policy and the ERSIC Policy are "occurrence-based" policies, the fact is that they expired approximately six years ago. FAC ¶¶ 22 and 30. Thus, it appears that any invasion of privacy claim brought now or in the future based on offenses that occurred during the Federal and ERSIC policy periods would be barred by the statute of limitations. See, e.g., Cal. Code Civ. P. § 335.1 (two year statute of limitations for personal injury claims). In addition, the Underlying Actions for which Plaintiffs seek coverage here were settled on a class-wide basis thus precluding the possibility of future claims arising from the conduct at issue here. See id. ¶¶ 18-19 and 33-34.

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Second, the injunction sought is overbroad and improper. Plaintiffs seek to enjoin Federal and ERSIC from denying coverage under their policies for any privacy claims that may arise in the future. FAC ¶ 73. All claims, even privacy related claims, are different, and whether a particular policy provides coverage for a claim cannot be decided in a vacuum, and certainly cannot be decided *before* the claim even exists. See Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993) (recognizing that the determination of whether there is coverage is made in the first instance by comparing the allegations of the complaint with the terms of the policy). Thus, coverage for a particular claim cannot be determined unless and until that claim is made against the insured.

For example, under California law, indemnification for liability resulting from intentional injuries is prohibited by Cal. Ins. Code § 533. Section 533 reflects a fundamental public policy of denying coverage for willful wrongs. See J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d 1009, 1020-21 n. 8 (1991). Any claim made in California against Plaintiffs for willful invasion of privacy would not (and could not) be covered. Moreover, insurers are entitled to limit the scope of coverage by way of policy exclusions and provisions. Martin v. World Sav. & Loan Ass'n, 92 Cal. App. 4th 803, 809 (2001) (recognizing that insurers can limit the scope of coverage with exclusionary language); Century Transit Systems, Inc. v. American Empire Surplus Lines Ins. Co., 42 Cal. App. 4th 121, 129 (1996) (stating that "[t]he very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would otherwise exist"). Certain terms and exclusions in both the Federal Policy and the ERSIC Policy could, as they did here, come into play in connection with any given claim. Thus, it follows that it would be impossible to fashion injunctive relief regarding coverage for *future* unknown claims.

In short, California law dictates that the proper way to evaluate coverage is to compare the allegations in the complaint to the terms of the policy under which the claim is tendered. Here, Plaintiffs, in essence, improperly ask this Court to enjoin Federal and ERSIC from doing so.

2. Plaintiffs Lack Any Cognizable Remedy Under Section 17200

Plaintiffs' Section 17200 claim also fails because Plaintiffs lack any cognizable remedy against Federal or ERSIC under the statute. The California Supreme Court has made clear that in

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private Section 17200 claims[4], ***remedies are limited to restitution and injunctive relief***. Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003). See also In re Napster, Inc. Copyright Litigation, 354 F. Supp. 2d 1113, 1126 (N.D. Cal. 2005). Although Plaintiffs purported to seek restitution in connection with their Section 17200 claim in their original complaint, Plaintiffs have abandoned that request in their FAC and seek only the injunctive relief discussed above.

As demonstrated in detail above, Plaintiffs are not entitled to injunctive relief because 1) they have an adequate remedy at law; and 2) it would be improper to enjoin an insurer from denying coverage for all privacy claims against Plaintiffs into perpetuity regardless of the allegations made in connection with such claims.

As they did in their opposition to Federal and ERSIC's motion to dismiss their original complaint, Plaintiffs may argue that a motion to dismiss for failure to state a claim may not be based on an improper request for relief. This, however, is not the case here. It is not a matter of Plaintiffs seeking the wrong remedy, it is a matter of Plaintiffs asserting a cause of action for which neither of the only two available remedies can be obtained. See Massey v. Banning Unified School Dist., 256 F. Supp. 2d 1090, 1092 (C.D. Cal. 2003) (a complaint is subject to motion to dismiss if ***no*** relief is available to complainant); Doe v. United States Dept. of Justice, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (complainant must show that he is entitled to ***some form*** of relief). See also Doss v. South Central Bell Telephone Co., 834 F.2d 421, 425 (5th Cir. 1987). Thus, because Plaintiffs lack any cognizable remedy under Section 17200, their Section 17200 claim should be dismissed.

[4] As explained below in connection with Federal and ERSIC's motion to strike, Plaintiffs have not alleged the requisite facts to pursue a claim on behalf of the public. Moreover, Plaintiffs concede that they are bringing their Section 17200 claim "in their individual capacities" FAC ¶ 67.

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3. Alternatively, Because None of the Alleged Wrongful Conduct Occurred In California, Plaintiffs' Section 17200 Claim Against ERSIC Should Be Dismissed

For the reasons set forth above, Plaintiffs' Section 17200 claim should be dismissed, without leave to amend, as to both Federal and ERSIC. However, even if Plaintiffs' claim could overcome those arguments, which they cannot, the law is clear that Plaintiffs cannot state a Section 17200 claim against ERSIC, because all of ERSIC's conduct at issue occurred outside of California.

Section 17200 does not support claims by non-California residents where none of the alleged misconduct occurred in California. Norwest Mortgage v. Sup. Ct., 72 Cal. App. 4th 214, 222 (1999). See also Churchill Village, L.L.C. v. General Electric Co., 169 F. Supp. 2d 1119, 1126-27 (N.D. Cal. 2000). The Norwest court held that even though California may have personal jurisdiction over a defendant which does business (or is incorporated) in California, application of Section 17200 to the claims of non-residents against a non-residents for conduct occurring outside California would be "arbitrary and unfair and transgress due process limitations." 72 Cal. App. 4th at 227.

In Norwest, a mortgage company incorporated in California with its principal place of business in Iowa made and serviced loans to homeowners across the United States. At issue was Norwest Mortgage's "Forced Placement Insurance" ("FPI"). Plaintiffs alleged that on lapse or cancellation of the insurance they were required to maintain as borrowers from Norwest Mortgage, Norwest Mortgage would provide replacement insurance under the FPI program and charge the cost to plaintiffs.

Plaintiffs' complaint, styled as a class action, asserted Section 17200 claims against Norwest Mortgage alleging that Norwest Mortgage overcharged plaintiffs for the replacement insurance to cover "kickbacks" provided by the insurer to Norwest Mortgage. Norwest Mortgage opposed Plaintiffs' motion for class certification on the grounds, *inter alia*, that Section 17200 was not intended to, and constitutionally could not, apply to the claims of non-California residents. The trial court granted the motion concluding that the Section 17200 claim applied to

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all class members regardless of the state of their residence and regardless of the state in which Norwest Mortgage engaged in the allegedly wrongful conduct (purchasing FPI) occurred. The Court of Appeal vacated the certification order and held that non-California residents for whom Norwest Mortgage's conduct of purchasing FPI occurred outside California could not assert a Section 17200 claim. Id. at 222. In so holding, the court explained that Section 17200 "contains no express declaration that it was designed or intended to regulate claims of nonresidents arising from conduct occurring entirely outside of California." Id. The court then went on to conclude:

> [T]he only contact between the claims of [non-California residents for whom Norwest Mortgage's conduct of purchasing FPI occurred outside California] and California is Norwest Mortgage's state of incorporation [California]. [Footnote omitted]. Because Norwest Mortgage's headquarters and principal place of business, the place [of the injuries], and the place the injury-producing conduct occurred are outside California, we conclude application of the UCL to the claims of [non-California residents for whom Norwest Mortgage's conduct of purchasing FPI occurred outside California] would be arbitrary and unfair and transgress due process limitations.

Id. at 227. In coming to this conclusion, the court focused on the ***conduct*** giving rise to the Section 17200 claim. Indeed the court said that Section 17200 was not intended to regulate conduct not connected to California. Id. at 222 (citing the longstanding presumption against extraterritorial application of California law stemming from North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 4 (1916)).

According to the FAC, Plaintiff AOL is a Delaware corporation with its principal place of business in Virginia. FAC ¶ 6. The FAC further alleges that Netscape is a Delaware corporation with its principal place of business in California. Id. ¶ 5. The FAC further alleges that Defendant ERSIC has its principal place of business in, and is organized under the laws of Connecticut. Id. ¶ 9. According to the FAC, the Underlying Actions and the Attorney General's Investigation for which Plaintiffs seek coverage were venued in New York and Washington D.C. Id. ¶14.

In support of their Section 17200 claim, Plaintiffs fail to allege that the purported wrongful conduct – the unreasonable denial of coverage – occurred in California. Indeed, every

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denial letter from ERSIC originated in Connecticut.[5] Thus, because the alleged wrongful conduct giving rise to Plaintiffs' Section 17200 claim occurred outside California, Plaintiffs' Section 17200 claim against ERSIC should be dismissed.[6]

4. Plaintiffs' Section 17200 Claim Should Be Dismissed Without Leave to Amend

In connection with the dismissal of Plaintiffs' Section 17200 claim, leave to amend should be denied, as any attempt at amending the Section 17200 claim would be futile. Plaintiffs have been given two chances to properly plead their Section 17200 claim. As the Ninth Circuit recognized, leave to amend may be denied if the proposed amendment is *futile* or would be subject to dismissal. Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991). Leave to amend is likewise inappropriate when, as is the case here, Plaintiffs have been given the opportunity to cure the defects and have failed to do so. Shermoen v. United States, 982 F.2d 1312, 1319 (9th Cir. 1992).

Here, it would be futile to grant Plaintiffs leave to amend because, as discussed in detail above, 1) Plaintiffs have an adequate remedy at law (*e.g.*, monetary damages); 2) Plaintiffs request an improper and unnecessary injunction; and 3) AOL cannot identify any alleged wrongful conduct that occurred in California. The futility of granting leave to amend is evident from the fact that in ruling on Federal and ERSIC's original motion to dismiss, this Court held that the Plaintiffs must be able to allege an inadequate remedy at law, and a continuing need for an injunction. As demonstrated above, Plaintiffs have not, and *cannot* make these requisite allegations. Accordingly Federal and ERSIC's motion to dismiss should be granted without leave

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[5] Because Plaintiffs quote and refer to ERSIC's denial letters in the FAC (¶ 32), those letters are properly considered on a motion to dismiss. See Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994) (recognizing that a defendant may attach to Rule 12(b)(6) motion documents referred to in complaint to show that they do not support plaintiff's claim).

[6] The California Supreme Court may consider the issue of whether California residents can properly bring Section 17200 claims where the conduct occurred outside California. Kearney v. Salomon Smith Barney, Inc., 14 Cal. Rptr. 3d 810 (Cal. 2004). Any ruling by the California Supreme Court on this issue, however, could only affect Netscape's (not AOL's) ability to assert its Section 17200 claim, as only Netscape is a California resident.

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to amend.

IV. THE COURT SHOULD STRIKE PORTIONS OF PLAINTIFFS' FAC

Should this Court deny Federal and ERSIC's motion to dismiss, this Court should strike from the FAC (1) the phrase "and members of the public" from Paragraph 72; and the phrase "aiding, abetting, or inducing" from the prayer for relief in connection with Count Seven.

Pursuant to Fed. R. Civ. P. 12(f), a defendant may challenge a claim for relief where such relief is not recoverable as a matter of law. Bureerong v. Uvawas, 922 F. Supp. 1450, 1479 n. 34 (C.D. Cal. 1996). First, Plaintiffs seek an injunction in connection with their Section 17200 claim that enjoins Federal and ERSIC from, among other things, "aiding, abetting or inducing" the commission of Section 17200 violations. FAC Prayer. This language should be stricken because the FAC contains no allegations to support a claim that Federal and ERSIC conspired to violate the UCL. See Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002) ("'The concept of vicarious liability has no application to actions brought under [Section 17200] . . . .'") (quoting People v. Toomey, 157 Cal. App. 3d 1, 14 (1984)).

Second, Plaintiffs' request on behalf of the public ("and members of the public") should also be stricken. See FAC ¶ 72. As this Court explained, "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." Order at 7:1-4.

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V. CONCLUSION

For the foregoing reasons, Plaintiffs' Seventh Cause of Action for violations of Section 17200 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, the relief sought in connection with that cause of action should be stricken.

Dated: March 13, 2006

Respectfully submitted,

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