ABELSON | HERRON LLP
Michael Bruce Abelson (State Bar No. 130739)
Leslie A. Pereira (State Bar No. 180222)
333 South Grand Ave, Suite 650
Los Angeles, California 90071-1559
Telephone: (213) 402-1900
Facsimile: (213) 402-1901
mabelson@abelsonherron.com
lpereira@abelsonherron.com

BERGESON, LLP
Daniel J. Bergeson (State Bar No. 105439)
Hway-ling Hsu (State Bar No. 196178)
303 Almaden Boulevard, Suite 500
San Jose, California 95110-2712
Telephone: (408) 291-6200
Facsimile: (408) 297-6000
dbergeson@be-law.com
hhsu@be-law.com

Attorneys for Plaintiffs
NETSCAPE COMMUNICATIONS
CORPORATION and AMERICA ONLINE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

NETSCAPE COMMUNICATIONS CORPORATION, et al.

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' (1) MOTIONS TO DISMISS PLAINTIFFS' SEVENTH CAUSE OF ACTION AND (2) MOTION TO STRIKE; MEMORANDUM OF POINTS AND AUTHORITIES

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

Complaint filed December 12, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In granting Defendants' first motion to dismiss, this Court made three critical determinations:

- First, it found that Plaintiffs' allegations that Defendants have a "policy and practice of automatically denying claims alleging privacy violations" were **sufficient** to meet the requirements of an unfair business practice under Section 17200.
- Second, it found that Plaintiffs **failed** to establish any ongoing need for injunctive relief.
- Third, it found that Plaintiffs are **not** entitled to seek disgorgement on behalf of the public.

See Court Order, February 22, 2006. In other words, this Court found that the only "problem" with Plaintiffs' Section 17200 Claim was the allegations supporting the requested remedies. Leave to amend was granted.

In response, Plaintiffs' First Amended Complaint ("FAC") cures the pleading deficiencies found by the Court in its February 22 order: It adds new allegations establishing Plaintiffs' ongoing need for injunctive relief and it drops Plaintiffs' request for disgorgement on behalf of the public.

Dissatisfied with this revision, Defendants' new motions to dismiss argue that Plaintiffs' FAC fails to properly plead their entitlement to an injunction. Defendants are wrong. The FAC now satisfies California's pleading requirements for a Section 17200 injunction. Specifically, the FAC alleges that Defendants' misconduct is ongoing, and because Plaintiffs and Defendants are in contractual privity, Plaintiffs are likely to suffer future harm from Defendants' continued misconduct. Accordingly, Defendants' motions should be denied.

II. FACTUAL BACKGROUND

A. *Underlying Privacy Lawsuits Against Netscape and AOL*

In 2000, four putative class action lawsuits were filed against Plaintiffs Netscape and AOL (hereinafter, the "Underlying Actions") seeking, among other things, compensatory

damages and other relief for Netscape's and AOL's alleged interception of consumers' private electronic communications. See First Amended Complaint ("FAC"), ¶¶ 15,16. Specifically, the Underlying Actions alleged that two Netscape software products, Netscape Communicator and SmartDownload, operated in tandem to surreptitiously collect personal and private information from consumers by causing them to (unwittingly) disclose through the Internet the electronic address of files they downloaded, together with identifying codes. Id. at ¶15. Shortly after the filing of the Underlying Actions, New York's Attorney General initiated an investigation into alleged privacy violations similar to those asserted in the Underlying Actions (the "AG Investigation"). Id. at 16. The AG Investigation was resolved in 2003, and the Underlying Actions were settled in approximately 2004. Id. at ¶ 18. (The Underlying Actions and AG Investigation are hereinafter collectively referred to at the "Privacy Suits").

B. *Defendants' Policies Provide Coverage for the Privacy Suits and Expected Future Lawsuits Alleging Privacy Violations*

As explained more fully in the FAC, Defendants' insurance policies all provide coverage for claims like the Privacy Suits, which allege privacy violations by Netscape and/or AOL (and any AOL subsidiary). For example, the St. Paul policy provides AOL and Netscape with coverage for "personal injury liability." FAC, ¶ 27. This is defined in the policy to mean injury arising out of a "personal injury offense," including the offense of "[m]aking known to any person or organization written or spoken material that violates a person's right of privacy."[1] Id. Accordingly, coverage should have been provided to Plaintiffs under the St. Paul policy's "personal injury liability" coverage.

Defendants cannot escape their obligations based on their policies' coverage periods. This is so because the insurers' policies are "occurrence" or "offense" based forms rather than

[1] The relevant terms in the Federal and Executive Risk policies are similar. See FAC, ¶¶ 21-24, 29-32; see also Exs. 5 and 7 to FAC.

"claims-made" forms.[2] See The Rutter Group, California Practice Guide: Insurance Litigation, §7:41 ("'Occurrence' policies generally cover claims based on wrongful acts, offenses, injuries, or damage during the policy period even if the claim is not made until after the policy expires"); §7:79 ("'Claims-made' policies cover only claims made against the insured while the policy is in effect"). St. Paul, for example, is thereby obligated to provide coverage for all claims alleging a personal injury offense committed by Netscape or AOL during its policy period (April 1, 1999 to April 1, 2000) *irrespective* of whether that claim was brought during its policy period or many years thereafter. Thus, the fact that the Privacy Suits were not filed until *after* St. Paul's policy period ended is irrelevant. St. Paul must provide coverage because the alleged privacy violations were purportedly committed during its policy period. See Exs. 1-4 of FAC. Similarly, St. Paul will be obligated to provide coverage for any lawsuits against Netscape and/or AOL in the future alleging privacy violations committed during St. Paul's policy period.

C. *Defendants' Refusal to Provide Coverage for the Privacy Suits*

AOL and Netscape gave notice of the Privacy Suits to Defendants for purposes of triggering defense and, if necessary, indemnity obligations under the terms of their respective policies. FAC, ¶17. As alleged, Defendants summarily denied coverage pursuant to their business policies of automatically rejecting coverage for privacy-related claims. FAC, ¶¶ 24, 28, 32, 71. As a result of the Defendants' improper business policies, Plaintiffs were forced to use their own resources to defend against the Privacy Suits' allegations. FAC, ¶¶ 33-34. In all, Plaintiffs incurred and paid in excess of $4,273,064 in attorneys' fees, consultants' fees and other expenses in connection with their defense.[3] FAC, ¶ 33. Defendants have never reimbursed Plaintiffs any part of that sum. Id. Not a single penny. Likewise, Defendants refused to fund any portion of the $100,000 paid to resolve the Privacy Suits. FAC, ¶ 34.

---

[2] The Federal and Executive Risk policies were also written on an "occurrence" rather than "claims made" basis and the same analysis applies to those policies. See FAC ¶¶ 22, 30.

[3] An appeal in the Underlying Actions was resolved in Plaintiffs' favor on or about March 20, 2006. Plaintiffs incurred additional defense costs in connection with this appeal, the total of which has not yet been calculated.

On December 12, 2005, Plaintiffs filed the instant action against Defendants alleging claims for breach of contract; breach of the covenant of good faith and fair dealing; and violation of California Bus. & Prof. Code sec. 17200 ("Section 17200 Claim").

D. *Defendants' Prior Motion to Dismiss the Section 17200 Claim*

On January 19, 2006, Defendants moved to dismiss Plaintiffs' Section 17200 Claim under Fed. Rule Civ. Proc. 12(b)(6). Defendants argued that: (1) Plaintiffs' Section 17200 claim was barred as an improper private action under section 790.03 of the Unfair Insurance Practices Act "UIPA"); (2) Plaintiffs' Section 17200 Claim was legally deficient because Plaintiffs failed to allege that they have no adequate legal remedy; and (3) Plaintiffs improperly seek non-restitutionary disgorgement.

On February 22, 2006, the Court issued an order granting Defendants' motions with leave to amend (the "Court Order"). The Court Order *rejected* Defendants' first (private action) argument and, instead, held that Plaintiffs' Section 17200 Claim stated a pattern of conduct that met the pleading requirements of section 17200. Specifically, the Court held:

> "Plaintiffs' common law claims sufficient to meet the requirements of section 17200. Other courts, too, have held that a pattern of conduct which disregarded common law doctrine and misled consumers constituted "unfair business practices," as "immoral, unethical … or substantially injurious to consumers." Progressive, 37 Cal. Rptr. 3d at 453."

Court Order at 5.

However, the Court *agreed* with Defendants' other arguments and *granted* Defendants' motions to dismiss on those bases. Specifically, the Court stated:

> "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 Order at 6-7 (emphasis supplied). The Court granted Plaintiffs' request for leave to amend.

E. *Plaintiffs' First Amended Complaint Addresses the Court's Concerns*

On February 24, 2006, Plaintiffs filed their First Amended Complaint ("FAC") to directly address the perceived pleading deficiencies identified by the Court Order. In connection with their Section 17200 Claim, Plaintiffs' FAC does several things.

First, it adds allegations to the background section of the complaint which establish that Plaintiffs and Defendants are – *and continue to be* – in contractual privity. Specifically, the FAC now states the following with respect to Defendant St. Paul:

> The St. Paul Policy covers the time period April 1, 1999 to April 1, 2000. However, because the St. Paul Policy provides "occurrence-based" or "offense-based" coverage, the policy provides coverage for any claim against AOL and/or Netscape (now or in the future) alleging that AOL and/or Netscape engaged in specified wrongful conduct during the time period April 1, 1999 to April 1, 2000, *regardless of when the claim is brought*. Thus, the St. Paul Policy stands in stark contrast to a "claims made" insurance policy which provides coverage only for claims that are brought against the insured *during the policy period*. For this reason, AOL and Netscape are currently in contractual privity with St. Paul (and will continue to be into the future) until such time as the limits of the St. Paul Policy are exhausted.

See FAC, ¶ 26 (italics in original).[4]

Second, the FAC adds allegations to its Section 17200 cause of action establishing Plaintiffs' ongoing need for injunctive relief and lack of an adequate remedy at law with respect to Defendants' unfair business practices. Specifically, the FAC's Section 17200 cause of action now states the following:

> 69. As "occurrence-based" (as opposed to "claims-made") insurance policies, Defendants' policies are currently in full force and effect. Thus, Plaintiffs and Defendants are currently in contractual privity, and will remain in such a relationship until such time as the limits of the Insurers' underlying policies are exhausted by reason of payment of claims.

[4] Similar "contractual privity" allegations are made with respect to Defendant Federal (see FAC, ¶ 22) and Defendant Executive Risk (see FAC, ¶ 30).

70. Given the nature and extent of the Insureds' business operations, Plaintiffs anticipate that privacy claims implicating the "personal injury" and/or "Media Activities" coverages in the Insurers' policies may be brought against them in the future, including privacy-related claims which are groundless, fraudulent or false. Like the Underlying Actions at issue in this lawsuit, all such claims will be tendered to Defendants for defense and indemnity coverage.

71. Notwithstanding the Insurers' coverage obligations, Netscape and AOL are informed and believe (and on that basis allege) that 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.

72. The acts and practices alleged above constitute acts of unfair competition as defined by California Business and Professions Code Section 17200 in that they are fraudulent and/or unfair and 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.

73. Plaintiffs have no adequate remedy at law. Accordingly, Defendants should be preliminarily and permanently enjoined from engaging in these fraudulent and/or unfair business practices at any time in the future, especially because the occurrence-based nature of the subject policies means that the Insureds are Insurers will continue in privity into the future and until such time as Insurers' policy obligations are terminated by reason of exhaustion of their policy limits though payment of claims.

See FAC, ¶¶ 69-73.

Third, Plaintiffs' FAC abandons Plaintiffs' request for disgorgement and/or restitution. See FAC, Prayer for Relief.

III. DEFENDANTS' CURRENT MOTIONS TO DISMISS SHOULD BE DENIED

Defendants' current motions to dismiss argue that Plaintiffs have (again) failed to plead a proper claim under Section 17200 because they have an adequate remedy at law. Defendants are wrong. For the reasons set forth below, Plaintiffs' FAC properly states a Section 17200 claim. Accordingly, Defendants' motions to dismiss should be denied.

A. *Rule 12(b)(6) Motions Should Rarely Be Granted Because of the Federal Rule's Liberal Pleading Standard*

The strict standard for granting a motion to dismiss under Rule 12(b)(6) is set forth in Conley v. Gibson, 355 U.S. 41 (1957). A motion to dismiss under Rule 12(b)(6) must not be granted "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46 (italics supplied). As the Ninth Circuit Court of Appeals has observed, a "motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Gilligan v. Jamco Develop. Corp., 108 F.3d 246, 249 (9th Cir. 1997). In ruling on a motion to dismiss, the Court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

B. *The First Amended Complaint Properly Pleads Entitlement To An Injunction Under Section 17203*

Defendants argue that the FAC fails to properly allege entitlement to an injunction for Defendants' unfair business practices. That's wrong.

California Business & Professions Code section 17203 governs the availability of injunctions for Section 17200 violations. It states, in relevant part:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Cal. Bus. & Prof. Code, § 17203.

//

//

Courts have determined that a complaint properly pleads entitlement to an injunction against an unfair business practice under Section 17203 when it alleges ongoing misconduct or a threat of continuing or future misconduct. See Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440, 463 (2005); see also Fieldturf Int'l Inc. v. Sprinturf, Inc., 395 F. Supp. 2d 929, 940 (E.D. Cal. 2004), *judgment entered by* Fieldturf Int'l, Inc. v. Sprinturf, Inc., 2004 U.S. Dist. LEXIS 19516 (E.D. Cal. 2004), *aff'd in part, rev'd in part, vacated in part on unrelated grounds in* Fieldturf Int'l, Inc. v. Sprinturf, Inc., 2006 U.S. App. LEXIS 136 (Fed. Cir. 2006) (Section 17200 claimant must show defendant "is continuing its unfair business conduct or that the subject conduct is likely to reoccur"); Sun Microsystems, Inc. v. Microsoft Corp., 87 F. Supp. 2d 992, 1004 (N.D. Cal. 2000) ("injunctive relief under section 17203 has no application to completed wrongs absent a showing of threatened future harm or a continuing violation."); Herr v. NESTLÉ U.S.A., Inc., 109 Cal. App. 4th 779, 789 (Age discrimination plaintiff entitled to enjoin company under Section 17203 from utilizing policy and practice of discriminating against older employees).

In Madrid, the California Court of Appeal affirmed the trial court's dismissal of a Section 17200 Claim on the ground that the plaintiff's complaint failed to show he was entitled to an injunction. Madrid, 130 Cal. App. 4th at 463. The Court held that the complaint failed to allege a continuing threat of misconduct because "[t]he complaint's factual allegations referred only to acts that happened in the past." Id. at 462. In so finding, the Court rejected the plaintiff's argument that he "did not need to allege a threat of future misconduct." Id. at 463. Because the plaintiff in Madrid did not seek to amend his complaint to allege any ongoing or threatened acts, the dismissal was held to be proper. Id. at 463.

By contrast here, the FAC alleges entitlement to an injunction because it alleges *ongoing* misconduct and threatened future harm. Specifically, the FAC alleges that Defendants have a fraudulent and unfair "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." See FAC, ¶

71. While Plaintiffs do allege that they have been harmed by Defendants' past unfair business practices, they also allege that Defendants' unfair business practice is ongoing and, therefore, likely to harm them in the *future*. See FAC, ¶¶ 69-73. This is so because Plaintiffs are in contractual privity with Defendants and, therefore, have an ongoing relationship with them. See FAC, ¶ 69. Such is the nature of Defendants' "occurrence-based" coverage. Indeed, each of the policies at issue in this lawsuit remains in full force, and will be obligated to provide coverage for future claims alleging wrongdoing by Netscape and/or AOL (or by any other AOL subsidiaries) which falls within the policies' coverage periods. See FAC ¶ 70.

Defendants attempt to avoid such continued obligations to Plaintiffs by arguing that any future claims are "speculative" and "far-fetched." St. Paul Motion at 7. As support, they point to California's two-year statute of limitations for personal injury claims (which would cover any invasion of privacy claim) and assert that it is highly unlikely a claim for privacy violations will be brought against Plaintiffs in 2006 alleging wrongful conduct that occurred in 1999 or 2000. Defendants' argument is without merit.

First, Defendants' policies are obligated to provide coverage against claims even when the claim's allegations are groundless, false or fraudulent. See, e.g. Exhibit 6 to FAC at 3. ("We'll have such right and duty even if all of the allegations of that claim or suit are groundless, false, or fraudulent.") In other words, even if a time-barred claim is filed against Plaintiffs, the Defendants are still required to provide a defense and other resources to fend-off such untimely allegations. Such protection is a critical aspect of Defendants' coverage obligations.

Second, Defendants' argument ignores the fact that California – like many jurisdictions – has a "discovery rule" which affects the tolling of the statute of limitations. Cain v. State Farm Mut. Automobile Ins. Co., 62 Cal. App. 3d 310, 315 (1976). This means that the two-year statute of limitations does not even begin to run until the claimant "discovers" facts supporting his invasion of privacy cause of action. Id. Given the effect of the discovery rule, it is highly probable that a claimant could allege that he did not discover the facts constituting the invasion of his privacy until 2004, thereby satisfying California's statute of limitations.

Third, Defendants' policies provide broad geographic protection. For example, the St. Paul policy protects against claims made anywhere in the United States, Canada and Puerto Rico. See Ex. 6 to FAC. Plaintiffs are not just concerned about privacy violations being asserted against them by California residents, but must necessarily be concerned about privacy claims by residents of *all* covered jurisdictions. For example, Utah has a four-year statute of limitations for invasion of privacy claims See Utah Code Ann. § 78-12-25(3). Moreover, just as in California, a discovery rule applies. See Robinson v. Morrow, 2004 UT App 285 (2004). Accordingly, as in Robinson, privacy claims can be filed based on alleged activities which occurred many years earlier. Where such is the case, Defendants' policies will be required to respond.

Fourth, AOL's insurance policies cover America Online, Inc. as well as AOL's many subsidiaries. Thus, there is a significant possibility that one (or more) of these entities could face a lawsuit alleging privacy violations that purportedly occurred during the period of Defendants' policies.

In short, there is a real and substantial possibility that Plaintiffs (or their subsidiaries) could face a future privacy claim alleging misconduct during the period 1998 to 2000. If they do, Plaintiffs will certainly tender the claim to Defendants. As before, they will be subjected to Defendants' existing business policy and practice of automatically denying such claims.

Taken as a whole, Plaintiffs have sufficiently alleged a threat of future harm from Defendants' practices and are, therefore, entitled to an injunction if they prevail on their Section 17200 Claim. Accordingly, Defendants' motion to dismiss should be denied.

C. *Plaintiffs' Section 17200 Claim Is Not An Improper UIPA Claim*

Defendant St. Paul renews its unsuccessful argument that Plaintiffs' Section 17200 Claim should be dismissed as an improper attempt to plead around the bar on certain private actions under the Unfair Insurance Practices Act (Cal. Ins. Code section 790.03). St. Paul Motion at 8-9. This Court previously ruled against St. Paul on this issue. See Court Order at 5. As such, St.

Paul's motion is an improper motion for reconsideration and should be denied. See Civil L.R. 7-9.[5]

D. *Defendants' Jurisdictional Argument is Without Merit*

Defendants Federal and ERSIC argue (for the first time) in their separate motion[6] that Plaintiffs' Section 17200 Claim should be dismissed because "none of the alleged wrongful conduct occurred in California." Federal/ERSIC Motion at 11. Defendants' argument is procedurally improper and legally without merit.

First, Defendants' argument could have – *and therefore should have* – been made in their first motion to dismiss. At that time, the facts and law underlying their jurisdictional argument was known. To permit Defendants to piecemeal their motions to dismiss in this manner is wasteful of resources and fundamentally unfair. Because Defendants failed to make this jurisdictional argument in their first motion to dismiss, it is now waived. Fed. Rule Civ. Proc., 12(g); Fed. Rule Civ. Proc. 12(h)(1); Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999).

Second, Defendants cannot establish that "none of the alleged wrongful conduct occurred in California." Instead, Defendants (half-heartedly) argue that their denial letters – which they claim originated in Connecticut – demonstrate that the alleged wrongful conduct occurred outside of California. Federal/ERSIC Motion at 13. This may be so. However, Federal/ERSIC do not introduce those letters into the record. Therefore, this purported "fact" – even if accurate – may not be considered by the Court in connection with this motion to dismiss. Arpin v. Santa Clara Valley Transp. Agency, 261 F. 3d 912, 925 (9th Cir. 2001).

More to the point, however, Plaintiffs' Section 17200 Claim alleges a course of conduct much broader than the issuance of a denial letter. Rather, Plaintiffs allege that Defendants have a

[5] In the event this Court determines to reconsider this issue, Plaintiffs incorporate by reference herein the opposition they filed in response to St. Paul's prior motion to dismiss.

[6] Defendant St. Paul did not make this argument in its separate motion and has not joined the Federal/ERSIC motion.

"policy and practice" of automatically denying claims alleging privacy violations. Plaintiffs intend to support these allegations with discovery regarding Defendants' internal policies and procedures. It is possible these policies and procedures were proposed, developed, approved, and/or implemented within California. In all events, however, the specific locations of all of the acts constituting Defendants' wrongful conduct cannot be determined until discovery has been taken.

Third, Netscape is a California resident. Accordingly, Netscape need not allege wrongful conduct within California; rather it is a violation of Section 17200 to engage in fraudulent or unfair business conduct *against* a California resident. Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222 (approving a class action by "Category I members" which consisted of "California residents *regardless of where Norwest Mortgage's [wrongful conduct] occurred*") (emphasis added).

For all of these reasons, Defendants' motion to dismiss must be denied.

E. *In The Event Plaintiffs' Complaint Is Found Insufficient, Leave To Amend Should Be Granted*

For the reasons set forth above, Plaintiffs' Section 17200 claim is sufficiently pled, and Defendants' Motions to Dismiss must be denied. If, however, the Court determines that there is a deficiency in Plaintiffs' Section 17200 cause of action, leave to amend should be granted. See Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986) ("If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency."); Neubronner v. Milken, 6 F.3d 666, 672 (9th Cir. 1993) (Courts may dismiss claims with prejudice where plaintiffs have failed to plead with the requisite particularity after "repeated opportunities."); Doe v. U.S., 58 F.3d 494, 497 (9th Cir. 1995) (Leave to amend should be granted even if the plaintiff did not request leave, unless it is clear that the complaint cannot be cured by the allegation of different facts). As a protective matter,

Plaintiffs respectfully request leave to amend in the event Defendants' motion to dismiss are granted.

IV. DEFENDANTS' MOTION TO STRIKE IS WITHOUT MERIT

Defendants urge the Court to strike two phrases from Plaintiffs' FAC. Defendants' position is without merit. First, Defendants argue that the phrase "and members of the public" should be stricken from Paragraph 72. Federal/ERSIC Motion at 14. This is so, they argue, because Plaintiffs are not entitled to seek disgorgement. Id. Plaintiffs are not seeking disgorgement. Their FAC merely observes that Defendants' wrongful conduct threatens Plaintiffs as well as members of the public. Plaintiffs are entitled to make such observations and include them in their FAC. Second, Defendants argue that the phrase "aiding, abetting, or inducing" must be stricken from the FAC's prayer for relief. Federal/ERSIC Motion at 14. Defendants' position is specious. Although Defendants may not like the language Plaintiffs' utilize in their prayer for relief, there is nothing improper about Plaintiffs' request. Plaintiffs are merely requesting a broad order to insure that it covers all forms of Defendants' misconduct. For these reasons, Defendants' motion to strike should be denied.

V. CONCLUSION

For all the foregoing reasons, Defendants' motions to dismiss and motion to strike should be denied. To the extent Defendants' motions are granted, either in whole or in part, Plaintiffs request leave to file an amended complaint.

Dated: March 27, 2006

BERGESON, LLP

By /s/
Hway-ling Hsu
Attorneys for Plaintiffs
Netscape Communications Corporation
and America Online, Inc.