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 7 *Executive Risk Specialty Insurance Company*

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN JOSE DIVISION

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

13 Plaintiffs,

14 v.

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

19 Defendants.

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

**DEFENDANTS FEDERAL  
 INSURANCE COMPANY AND  
 EXECUTIVE RISK SPECIALTY  
 INSURANCE COMPANY'S REPLY IN  
 SUPPORT OF MOTION TO DISMISS  
 SEVENTH CAUSE OF ACTION FOR  
 UNFAIR BUSINESS PRACTICES AND  
 MOTION TO STRIKE PORTIONS OF  
 PLAINTIFFS' FIRST AMENDED  
 COMPLAINT**

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

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1 **I. INTRODUCTION**

2 Try as they might, Plaintiffs cannot transform this breach of contract dispute between two  
3 insureds and their insurance carriers into a claim for unfair business practices under Section  
4 17200. With their First Amended Complaint (“FAC”), Plaintiffs seek to remedy the deficiencies  
5 of their previously stated Section 17200 claim. Once again, however, Plaintiffs fail to state a  
6 cognizable claim under Section 17200. As demonstrated in Federal and ERSIC’s moving papers  
7 and below, Plaintiffs cannot state such a claim. Plaintiffs’ Seventh Cause of Action for violations  
8 of Section 17200, therefore, should be dismissed with prejudice.

9 **II. PLAINTIFFS FAIL TO STATE A SECTION 17200 CLAIM**

10 **A. Plaintiffs Have An Adequate Remedy At Law**

11 This Court dismissed Plaintiffs’ original Section 17200 claim because Plaintiffs failed to  
12 allege the inadequacy of the contract and tort remedies available to them. Order at 5:23-24. In its  
13 Order, this Court explained that to plead a Section 17200 claim, “a party must allege the  
14 following: . . . *plaintiff has no adequate remedy at law.*” Id. at 6:1-9 (emphasis added by this  
15 Court) (citing Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1259-60 (C.D. Cal.  
16 2003); Crosky, et al., California Practice Guide: Insurance Litigation § 15:112; and Stewart v.  
17 Life Ins. Co. of North America, 388 F. Supp. 2d 1138, 1144 (E.D. Cal. 2005) (citing Cel-Tech  
18 Communications, Inc. v. Los Angeles Cellular Telephone Co., 83 Cal. Rptr. 2d 548, 561 (Cal. Ct.  
19 App. 1999))). In this regard, this Court recognized that the remedy available to Plaintiffs in  
20 connection with their breach of contract claim – to recover money owed them under the Policies –  
21 is an “adequate remedy.” Id. at 6:17-21. More specifically, this Court held that “Plaintiffs  
22 similarly claim a breach of contract, and therefore have an adequate remedy to recover the money  
23 owed to them under the insurance policies.”

24 Plaintiffs filed the FAC in an attempt to remedy the deficiencies of their previously stated  
25 Section 17200 claim. In restating their Section 17200 claim, however, Plaintiffs have again failed  
26 to plead an inadequate remedy at law.

27 First, the FAC’s sole allegation concerning the inadequacy of legal remedies is deficient as  
28 a matter of law. The FAC states that Plaintiffs “have no adequate remedy at law,” nothing more.

1 FAC ¶ 72. As explained in Federal and ERSIC's moving papers, courts consistently hold that  
2 naked allegations such as this are not enough to defeat a motion to dismiss. Moving Papers at  
3 7:20-28 (citing, *inter alia*, Aulson v. Blanchard, 83 F. 3d 1, 3 (1st Cir. 1996) (recognizing that  
4 unsupportable conclusions need not be credited on a motion to dismiss); SEC v. Seaboard Corp.,  
5 677 F.2d 1315, 1316 (9th Cir. 1982) (recognizing that a mere conclusion need not be accepted as  
6 true absent supporting allegations)). In their opposition, Plaintiffs do not refute this authority.  
7 They cannot. Nor do Plaintiffs point to any supporting *factual* allegation in the FAC that would  
8 support an argument that the contract and tort remedies available to Plaintiffs are inadequate.  
9 Again, they cannot.

10 Second, as also explained in Federal and ERSIC's moving papers, by basing their Section  
11 17200 claim on the same conduct upon which their contract and tort claims are based (the  
12 allegedly wrongful and unreasonable denials of coverage), Plaintiffs effectively concede that  
13 contract and tort damages will wholly compensate them for the alleged wrongful acts of Federal  
14 and ERSIC. Moving Papers at 6:16-28 – 7:1-17. This conclusion is bolstered by Plaintiffs' own  
15 statement in the FAC that the purpose of this action is "to force the Insurers to do what they  
16 refused to do voluntarily: To honor their contractual obligations. To pay amounts owing." FAC  
17 ¶ 35. In their opposition, Plaintiffs make no attempt to counter the conclusion that by way of  
18 their contract and tort claims, Plaintiffs have effectively conceded that adequate legal damages  
19 are available to them.

20 Third, in dismissing Plaintiffs' original Section 17200 claim, this Court recognized that  
21 Plaintiffs' breach of contract claim provides Plaintiffs with an adequate remedy. Order at 6:17-  
22 21. In so holding, this Court relied on Stewart v. Life Ins. Co. of North America, 388 F. Supp. 2d  
23 1138 (E.D. Cal. 2005). As explained by the Court in its Order, and by Federal and ERSIC in their  
24 moving papers, in Stewart, the plaintiff asserted that the defendant insurance company misled its  
25 customers by failing to give notice of delinquent payments. The plaintiff sought to recover  
26 benefits on an insurance policy that had expired due to lack of payment. The defendant brought a  
27 motion for summary judgment against the Section 17200 claim. The court granted the motion  
28 because the plaintiff failed to allege that she had no adequate remedy at law. Id. at 1144. The

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1 court noted that the plaintiff's breach of contract claim would provide any benefits owed. Id.  
2 The same conclusion should be reached here. Just as in Stewart, Plaintiffs' contract and tort  
3 claims provide them with an adequate remedy at law. As noted above, this Court has already so  
4 held. Order at 6:17-21.

5 In their opposition, Plaintiffs notably omit any discussion of the requirement that they  
6 plead an inadequate remedy at law in order to state a Section 17200 claim. Indeed, Plaintiffs do  
7 not even attempt to argue that the contract and tort damages they seek are inadequate in any way.  
8 Moreover, Plaintiffs wholly ignore the legal authority cited by Federal and ERSIC in their  
9 moving papers (and relied upon by the Court in its Order). More specifically, Plaintiffs make no  
10 attempt to distinguish Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1259-60  
11 (C.D. Cal. 2003), which, as recognized by this Court, holds that parties may only seek relief  
12 under Section 17200 if they have no adequate remedy at law. Plaintiffs also ignore Stewart,  
13 which, as discussed above, squarely supports the dismissal of Plaintiffs' Section 17200 claim.

14 Instead, Plaintiffs' opposition attempts to shift this Court's attention away from the fact  
15 that Plaintiffs have not pled, and cannot plead, that the tort and contract damages they seek are  
16 inadequate. Plaintiffs do so by simply ignoring the law cited in Federal and ERSIC's moving  
17 papers (and cited by this Court in its prior order) and instead citing a string of cases that do not  
18 deal with the issue at hand – whether Plaintiffs have an adequate remedy at law. Opposition at  
19 8:1- 22 (citing Madrid v. Perot Systems Corp., 130 Cal. App. 4th 440 (2005); Fieldturf Int'l Inc.  
20 v. Sprinturf, Inc., 395 F. Supp. 2d 929 (E.D. Cal. 2004); Sun Microsystems, Inc. v. Microsoft  
21 Corp., 87 F. Supp. 2d 992 (N.D. Cal. 2000); Herr v. Nestle U.S.A., Inc., 109 Cal. App. 4th 779  
22 (2003)).<sup>1</sup>

23  
24 <sup>1</sup> Even if Plaintiffs' discussion of this authority were not inapposite, which it is, Plaintiffs'  
25 contention that an injunction is necessary to address any future wrongful conduct by ERSIC or  
26 Federal is without merit. As discussed in detail in Federal and ERSIC's moving papers, should  
27 Plaintiffs allege at some future date, involving some unknown future claim, that Federal and/or  
28 ERSIC wrongfully denied coverage under the Policies, Plaintiffs could, as they have done here,  
bring contract and tort claims to redress what they perceive to be a wrongful denial of coverage.  
Should Plaintiffs prevail on such a claim, they would be made whole through the legal remedies  
available to them – compelling the conclusion that Plaintiffs have an adequate remedy at law.

1           **B. The Injunctive Relief Sought By Plaintiffs Is Improper**

2           Even if Plaintiffs met the threshold pleading requirements for a Section 17200 claim,  
3           which, as discussed above, they cannot, the injunctive relief they request is improper and  
4           inconsistent with California law. In connection with their Section 17200 claim, Plaintiffs  
5           essentially seek to enjoin Federal and ERSIC from denying coverage under the Policies for any  
6           privacy claims that *may* be brought against Plaintiffs in the future. As explained in Federal and  
7           ERSIC's moving papers, under California law, any claims tendered under the Policies would have  
8           to be evaluated by Federal and/or ERSIC and compared with the terms of the relevant policy in  
9           order to determine whether such claims are covered. Moving Papers 9:1-25 (citing Horace Mann  
10          Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993)). Accordingly, injunctive relief regarding  
11          coverage for future unknown claims would be inconsistent with California law. Plaintiffs, again,  
12          fail to refute this argument in their opposition. Nor do Plaintiffs offer any authority that would  
13          support a contention that the injunctive relief they seek is proper.

14           **C. Plaintiffs Cannot State A Section 17200 Claim Against ERSIC Because None Of**  
15          **ERSIC's Alleged Wrongful Conduct Occurred In California**

16          In its moving papers, ERSIC explains that Section 17200 is not intended to regulate conduct  
17          occurring outside California. Moving Papers at 11:4-28 – 13:1-3 (citing and discussing Norwest  
18          Mortgage v. Sup. Ct., 72 Cal. App. 4th 214 (1999) and Churchill Village, L.L.C. v. General  
19          Electric Co., 169 F. Supp. 2d 1119 (N.D. Cal. 2000)). As demonstrated in the moving papers,  
20          Plaintiffs do not allege that any wrongful conduct on the part of ERSIC took place in California.  
21          The absence of such allegations in and of itself supports dismissal of Plaintiffs' Section 17200  
22          claim as against ERSIC. Moreover, as demonstrated in ERSIC's moving papers, Plaintiffs cannot  
23          allege that the wrongful conduct at issue in the FAC – ERSIC's allegedly wrongful denial of  
24          coverage – occurred in California based on the fact that each and every denial letter issued by  
25          ERSIC originated in Connecticut. Moving Papers at 12:20-24.<sup>2</sup>

26                   <sup>2</sup> Plaintiffs contend that ERSIC cannot use the denial letters to support its motion to  
27                   dismiss. However, because Plaintiffs reference those documents in their complaint, those  
28                   documents can be relied upon to support this motion. Branch v. Tunnell, 14 F.3d 449, 454 (9th  
                  Cir. 1994) (recognizing that a defendant may use documents referenced in a complaint to support  
                  a motion to dismiss).

1 Instead of refuting this argument and the supporting authority, Plaintiffs characterize  
 2 ERSIC's argument as a challenge of personal jurisdiction that ERSIC waived by not raising it in  
 3 its motion to dismiss Plaintiffs' original complaint. Opposition at 11:8-14. Plaintiffs' argument  
 4 in this regard reflects a misunderstanding of the law. ERSIC does not contend that there is a lack  
 5 of personal jurisdiction here. Rather, as recognized by the authority cited by ERSIC, Section  
 6 17200 was not intended to redress – and as a matter of due process cannot redress – alleged unfair  
 7 practices occurring outside of California. Indeed, the authority cited by ERSIC (and ignored by  
 8 Plaintiffs) illustrates the distinction between challenging the reach of Section 17200 and  
 9 ~~challenging personal jurisdiction. Norwest, 72 Cal. App. 4th at 227 (recognizing that even~~  
 10 though California may have personal jurisdiction over a defendant which does business in  
 11 California, the application of Section 17200 to conduct occurring outside California violates due  
 12 process limitations). And, a defense of failure to state a claim upon which relief may be granted  
 13 is not waived. Fed. R. Civ. P. 12 (g) and (h)(2). Thus, Plaintiffs' "waiver" argument fails.

14 **D. Plaintiffs' Section 17200 Claim Should Be Dismissed Without Leave To Amend**

15 Plaintiffs have been given two chances to properly plead their Section 17200 claim. Any  
 16 further attempt by Plaintiffs would be futile, thus, leave to amend should not be granted. See Saul  
 17 v. United States, 928 F. 2d 829, 843 (9th Cir. 1991). The defects in Plaintiffs' Section 17200  
 18 claim are simply not curable because (1) Plaintiffs' contract and tort claims provide Plaintiffs  
 19 with an adequate remedy at law; (2) any injunction issued would be improper; and (3) Plaintiffs  
 20 cannot plead that any wrongful conduct on the part of ERSIC occurred in California.

21 Accordingly, Federal and ERSIC's motion to dismiss should be granted without leave to amend.

22 **III. PARTS OF PLAINTIFFS' FAC SHOULD BE STRICKEN**

23 Pursuant to Fed. R. Civ. P. 12(f), a claim for relief may be challenged where such relief is  
 24 not recoverable as a matter of law. Bureerong v. Uvawas, 922 F. Supp. 1450, 1479 n. 34 (C.D.  
 25 Cal. 1996). Two such claims should be stricken from Plaintiffs' FAC.

26 First, Plaintiffs seek to enjoin Federal and ERSIC from, among other things, "aiding,  
 27 abetting or inducing" the commission of Section 17200 violations. As explained in Federal and  
 28 ERSIC's moving papers, this language should be stricken because the FAC contains no

1 allegations to support a conspiracy claim under Section 17200. Moving Papers at 14: 8-14 (citing  
2 Emery v. Visa Int'l Serv. Ass'n, 95 Cal. App. 4th 952, 960 (2002)).

3 Second, Plaintiffs' claim on behalf of the public ("and members of the public") should also  
4 be stricken. See FAC ¶ 72. As explained by this Court, Plaintiffs are not entitled to seek relief on  
5 behalf of the public because Plaintiffs' FAC lacks the requisite class allegations. Order at 7:1-4.

6 In their opposition, Plaintiffs contend that they are entitled to make such "observations" and  
7 seek broad relief. Opposition at 13:4-15. However, Plaintiffs' "observations" and other claims  
8 for relief must be recoverable as a matter of law or they should be stricken. See Bureerong, 922  
9 F. Supp. at 1479. ~~As demonstrated above and in Federal and ERSIC's moving papers, the~~  
10 phrases "and members of the public" and "aiding, abetting or inducing" constitute claims for  
11 relief that are not recoverable as a matter of law and as such, should be stricken.

12 **IV. CONCLUSION**

13 For the foregoing reasons, and for the reasons set forth in Federal and ERSIC's moving  
14 papers, Plaintiffs' Seventh Cause of Action for violations of Section 17200 should be dismissed  
15 pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, portions of the relief sought in connection  
16 with that cause of action should be stricken.

17 Dated: April 3, 2006

Respectfully submitted,

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/s/

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