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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.	CASE NO. C-06-00198 JW (PVT) **ST. PAUL'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SEVENTH CAUSE OF ACTION** **[F. R. Civ. P. 12(b)(6)]** Date: April 17, 2006 Time: 9:00 a.m. Judge: Hon. James Ware Dept.: Courtroom 8 Complaint Filed: 12/12/05 Amended Complaint Filed: 2/24/06

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I. INTRODUCTION

The Opposition filed by plaintiffs Netscape Communications Corporation ("Netscape") and America Online, Inc. ("AOL") ignores the central arguments made by St. Paul Mercury Insurance Company ("St. Paul") in its motion to dismiss the Seventh Cause of Action for unfair business practices ("Section 17200 Claim"). First, plaintiffs have an adequate remedy at law and therefore they cannot state a cognizable 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. Second, plaintiffs' Seventh Cause of Action alleges future wrongful claims handling, which California courts have held cannot be recast as an unfair business practice. Plaintiffs' Opposition does not dispute or distinguish a single authority cited by St. Paul on these issues. For these reasons, the Court should dismiss plaintiffs' Seventh Cause of Action, *without* leave to amend.

II. ARGUMENT

A. St. Paul's Motion To Dismiss Should Be Granted Because Plaintiffs Fail To State A Claim Under Section 17200

Plaintiffs' discussion on the standards governing a motion to dismiss filed pursuant to Rule 12(b)(6) does not save their fatally flawed Section 17200 Claim. In viewing the factual allegations, if those facts fail to state a claim that would entitle plaintiff to the form of relief requested, dismissal of the claim is appropriate. Rule 12(b)(6), Fed. R. Civ. P.; *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club*, 407 F.3d 1027, 1032 (9th Cir. 2005); *Golden Day School, Inc. v. Pirillo*, 118 F.Supp.2d 1037, 1041 (C.D. Cal. 2000).

Significantly, the court is "not required to accept conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Palmer v. Stassinos*, 348 F.Supp.2d 1070, 1076 (N.D. Cal. 2004) (citation omitted). See also, *SEC v. Seaboard Corp.*, 677 F.2d 1315, 1316 (9th Cir. 1982) (mere conclusions need not be accepted as true absent supporting allegations). Here, plaintiffs make the conclusory legal allegation that they do not have an adequate remedy at law for possible future anticipatory

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breaches by the insurance companies. Plaintiffs not only fail to provide any factual support for this conclusory allegation, this conclusion is belied by plaintiffs' factual allegations and their present claims.

B. Plaintiffs Have An Adequate Remedy At Law

Plaintiffs do not dispute that to plead a Section 17200 Claim, they must allege, among other things, that they do not have an adequate remedy at law. See, e.g., *Heighley v. J.C. Penney Life Ins. Co.*, 257 F.Supp.2d 1241, 1259-1260 (C.D. Cal. 2003).

Nor do plaintiffs dispute that where damages are sought for existing claims, and damages are available to address any future claims, an adequate remedy exists at law. See, *Stewart v. Life Ins. Co. of N.A.*, 388 F.Supp.2d 1138, 1144 (E.D. Cal. 2005) ("Plaintiff does not claim she has no adequate remedy at law. Her breach of contract claim will provide any benefits she is due."); *Rubin v. Green*, 4 Cal.4th 1187, 1199, 1202, 17 Cal.Rptr.2d 828, 835, 837 (1993) (plaintiff had other potential remedies and therefore injunctive relief pursuant to a Section 17200 Claim was not viable claim). Plaintiffs' Opposition ignores entirely these authorities at the heart of St. Paul's motion to dismiss.

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

Here, plaintiffs allege a present complaint about St. Paul's decision not to defend or indemnify the Underlying Actions, and they speculate there might be some future wrongful denial of policy benefits. As to the present claim, plaintiffs have an adequate remedy at law and are pursuing that remedy. Plaintiffs assert claims for breach of contract and breach of the covenant of good faith and fair dealing. See, Amended Complaint, 2nd and 5th Causes of Action. Plaintiffs allege specific amounts they seek to recover. See, *Id.*, ¶ 33, 34, Prayer for Relief.

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As to the possibility of a future breach of contract, plaintiffs' claims are not only pure speculation, but even if there were to be such a claim, plaintiffs still have an adequate remedy at law – a claim for monetary damages for breach of contract and breach of the covenant of good faith and fair dealing. Plaintiffs do not allege there is any other "privacy claim" against AOL or Netscape that St. Paul has wrongly denied. Plaintiffs allege there "may" be a future claim.

Plaintiffs' lengthy discussion on the "contractual privity" between plaintiffs and St. Paul (Opposition at 9), as well distinctions in statutes of limitation between various jurisdictions (including whether a "discovery rule" might affect the tolling of the statute of limitations in a particular jurisdiction) (Opposition at 9-10), does not establish the imminence of any future claim and a future breach of the insurance contract. Plaintiffs seek to enjoin the insurers from making an erroneous claims decision in the future. There is nothing to suggest there is imminent danger of this happening (especially as the St. Paul Policy's coverage period ended six years ago). Plaintiffs do not plead "ongoing" or "threatened acts" as required by ***Korea Supply***, nor "any ongoing need for injunctive relief" as required by this Court's February 22nd Order. Rather, plaintiffs plead there "may" be a future claim and a future breach of the insurance contract.

More fundamentally, there is nothing to suggest the same remedies that plaintiffs avail themselves of now would not be available for any future claim. Plaintiffs have an adequate remedy at law for their present, and any future, claim that St. Paul erred in its coverage determination. Plaintiffs can in the future, as they have now, bring a claim for breach of contract and breach of the covenant of good faith and fair dealing and seek monetary damages. That is an "adequate remedy." Plaintiffs' Opposition fails to address this central argument.

C. Plaintiff Fail To Present A Viable Claim For Injunctive Relief

While Plaintiffs cite a number of cases purportedly holding that a complaint properly pleads entitlement to an injunction under Section 17203 "when it alleges ongoing misconduct or a threat of continuing or future misconduct" (Opposition at 8), plaintiffs misstate the pleading requirements for such injunctive relief. In particular, the court in *Madrid v. Perot Systems Corp.*, 130 Cal.App.4th, 30 Cal.Rptr. 210 (2005), found that "the current UCL has not altered the nature of injunctive relief, which requires a threat that the misconduct to be enjoined is likely to be

repeated in the future." *Id.* at 48. The *Madrid* court specifically held that plaintiff failed to present a viable claim for injunctive relief, since "plaintiff's complaint did not allege any facts that another incident is likely to occur. Plaintiff argues that defendants' conduct was ongoing and likely to recur, but he fails to point to any supporting factual allegation in his complaint." *Id.* at 49. Here, as in *Madrid*, plaintiffs' mere conclusory allegations, without any supporting factual allegations that privacy-related claims are likely to be repeated in the future, cannot present a viable claim for injunctive relief.

Moreover, the cases cited by plaintiffs are also inapplicable to the circumstances here. None of these cases arise in the insurance context, nor in circumstances where (as here) the plaintiffs have adequate remedies for each of the claims they are making. Plaintiffs do not point to a single case where an insured was entitled to bring a claim for injunctive relief under Section 17203 based upon allegations that the insurer may in the future wrongfully deny plaintiffs benefits owed under the insurance contract.

Nor would the broad injunctive relief sought by plaintiffs be appropriate under any circumstances. Plaintiffs here seek to enjoin and require the insurers to pay to defend and indemnify future possible "privacy claims" that may be brought against AOL and/or Netscape in the future. See, Amended Complaint, ¶ 73. However, each claim for coverage is evaluated on its own individual facts, the policy language and the law. *America Online, Inc. v. St. Paul Mercury Ins. Co.*, 347 F.3d 89, 93 (4th Cir. 2003) (applying Va. Law) (obligation to defend depends on comparison of policy language with underlying complaint); *Waller v. Truck Ins. Exchg.*, 11 Cal.4th 1, 19, 44 Cal.Rptr.2d 370, 378 (1995) (duty to defend is made by comparing allegations against insured with terms of policy); *Montrose Chemical Corp. v. Superior Court*, 6 Cal.4th 287, 295, 24 Cal.Rptr.2d 467, 471 (1993) (same). 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.

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D. Under California Law, An Erroneous Claims Decision Cannot Be Recast As An Unfair Business Practice

Plaintiffs also fail to state a viable Section 17200 Claim because wrongful claims handling cannot be recast as an unfair business practice. Plaintiffs' unfair business practices claim is that there "may" in the future be "privacy claims" made against AOL and/or Netscape which plaintiffs may tender to the insurers and which the insurers may decide are not covered under their insurance policies. See, Amended Complaint, ¶ 69-72. These are claims that squarely fall within the insurance code regulations regarding fair claims handling practices (Cal. Ins. Code § 790, et seq.).

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

Plaintiffs cannot "'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 560 (Cal. 1999); *Textron, supra,*118 Cal.App.4th at 1070-1072, 13 Cal.Rptr.3d at 593-595; *Safeway, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 805 F.Supp. 1484, 1492 (N.D. Cal. 1992). Accordingly, plaintiffs fail to state a viable Section 17200 Claim.

While plaintiffs' Opposition argues that St. Paul's motion is "an improper motion for reconsideration" (Opposition at 11:1), plaintiffs offer no legal authority to support their argument. Plaintiffs reasserted a Section 17200 Claim pursuant to the Court's Order granting leave to amend. There is no legal basis that St. Paul cannot again argue that the Section 17200 Claim raised in the Amended Complaint fails on these grounds.

III. CONCLUSION

Plaintiffs' Section 17200 Claim is not viable as a matter of law because (1) plaintiffs have an adequate remedy at law, and (2) wrongful claims handling cannot be recast as an unfair

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business practice. For these reasons, the Court should dismiss plaintiffs' Seventh Cause of Action, *without* leave to amend.

Date: April 3, 2006

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