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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Netscape Communications Corporation,  
et al.,

NO. C 06-00198 JW

Plaintiffs,

**ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS**

v.

Federal Insurance Company, et al.,

Defendants.

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**I. INTRODUCTION**

Netscape and America Online (“Plaintiffs”) bring suit against Federal Insurance Company (“Federal”), St. Paul Mercury Insurance Company (“St. Paul”), Executive Risk Specialty Insurance Company (“Executive”), (collectively “Defendants”), alleging common law breach of contract, common law tortious breach of the covenant of good faith and fair dealing, and unfair business practices under Cal. Bus. & Prof. Code § 17200. Defendants filed motions to dismiss Plaintiffs’ seventh cause of action for unfair business practices. Under Local Rule 7-1(b), the Court took these motions under submission for a ruling without oral argument. The parties subsequently notified the Court that Plaintiffs reached a settlement with Defendants Federal and Executive, leaving St. Paul as the sole Defendant. Presently before the Court is St. Paul’s Motion to Dismiss Seventh Cause of Action For Unfair Business Practices. For the reasons set forth below, the Court DENIES St. Paul’s Motion to Dismiss.

**II. BACKGROUND**

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2 In 2000, four civil actions were filed against Plaintiffs for alleged interceptions of  
3 consumers' private electronic communications. (First Amended Complaint, "FAC," Docket Item  
4 No. 22, ¶ 14). The plaintiffs in those suits argued that two of Plaintiffs' products acted in concert to  
5 surreptitiously collect personal and private information in violation of the Electronic  
6 Communications and Privacy Act, and the Computer Fraud and Abuse Act. (FAC at ¶ 15.)  
7 Plaintiffs allege they promptly notified their respective insurers of the claims in order to trigger  
8 defense and indemnity obligations. (FAC at ¶ 17.)

9 As to St. Paul, Plaintiffs believe their policy covered them from liability for personal injuries  
10 such as those brought by the underlying actions. Plaintiffs allege that the St. Paul Policy was issued  
11 as a technology commercial general liability policy, running from April 1, 1999 to April 1, 2000.  
12 Plaintiffs further allege that the St. Paul Policy was an "occurrence-based" policy providing  
13 coverage for any claim against AOL and/or Netscape for the specified wrongful conduct, regardless  
14 of when the claim was brought. (FAC at ¶ 26).

15 Defendants denied coverage and did not pay any benefits. Although the four suits eventually  
16 settled, Plaintiffs allege they were forced to defend and resolve the suits with their own resources, at  
17 the cost of \$4,273,064 in attorneys' fees and \$100,000 to effect closure. (FAC at ¶ 33.) Plaintiffs  
18 also anticipate an additional \$1,340,113,86 to resolve an appeal. (FAC at ¶ 33.) In addition to  
19 restitution, Plaintiffs seek to enjoin Defendants from committing alleged unfair business practices in  
20 the future. (FAC at ¶ 73.)

21 On December 12, 2005, Plaintiffs initiated this action against Federal Insurance Company,  
22 Executive Risk Specialty Insurance Company, and St. Paul Mercury Insurance Company, alleging  
23 claims for breach of contract; breach of covenant of good faith and fair dealing; and violation of  
24 California Bus. & Prof. Code Section 17200 ("Section 17200"). (Plaintiffs' Opposition to  
25 Defendants' Motions to Dismiss, "Opp'n," Docket Item No. 29, 4:1-3.)

26 On January 19, 2006, Defendants moved to dismiss Plaintiffs' Section 17200 claim, arguing  
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1 that the claim was barred as an improper private action, was legally deficient because Plaintiffs  
2 failed to allege that they have no adequate remedy at law, and Plaintiffs improperly sought non-  
3 restitutionary disgorgement. (Opp'n at 4:5-10.)

4 On February 22, 2006, the Court issued an Order granting Defendants' Motion to Dismiss  
5 with leave to amend. ("Order," Docket Item No. 21.) The Order rejected Defendants' first  
6 argument that Plaintiffs' Section 17200 claim was an improper private action, but dismissed the  
7 claim because Plaintiffs failed to allege an inadequate remedy at law. Further, the Court found that  
8 Plaintiffs were not entitled to seek disgorgement on behalf of the public. (Opp'n at 4:11-28.)

9 Plaintiffs subsequently filed their FAC, again asserting claims against Defendants for breach  
10 of contract and breach of covenant of good faith and fair dealing. Plaintiffs' Seventh Cause of  
11 Action in the FAC also attempts to remedy the deficiencies of their previously stated claim under  
12 Section 17200. (Opp'n at 5:4-6). St. Paul moves to dismiss the Seventh Cause of Action, arguing  
13 that Plaintiffs still fail to state a cognizable claim under 17200. (Defendant St. Paul's Motion to  
14 Dismiss ("St. Paul MTD"), Docket Item No. 25, 1:9-11). The Court took Defendants' motions  
15 under submission for a ruling without a hearing. The parties subsequently notified the Court that  
16 Plaintiffs reached a settlement with Defendants Federal and Executive, leaving St. Paul as the sole  
17 Defendant in this case.

### 18 **III. STANDARDS**

19 The strict standard for granting a motion to dismiss under Rule 12(b)(6) is set forth in Conley  
20 v. Gibson, 355 U.S. 41 (1957). A motion to dismiss under Rule 12(b)(6) must not be granted  
21 "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim  
22 which would entitle him to relief." Id. at 45-46. As the Ninth Circuit observed, a "motion to dismiss  
23 for failure to state a claim is viewed with disfavor and is rarely granted." Gilligan v. Jamco  
24 Develop. Corp., 108 F.3d 246, 249 (9th Cir. 1997).

25 In ruling on a motion to dismiss, the Court must accept as true all material allegations in the  
26 complaint, as well as reasonable inferences to be drawn from them. Leatherman v. Tarrant County

1 Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993); Pareto v. FDIC, 139 F.3d  
2 696, 699 (9th Cir. 1998). However, the court need not accept as true conclusory allegations or legal  
3 characterizations. Pareto, 139 F.3d at 699. Also, the court need not accept unreasonable inferences  
4 or unwarranted deductions of fact. Spewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.  
5 2001).

#### 6 IV. DISCUSSION

7 Defendant argues that Plaintiffs fail to meet the requirements for bringing a claim under  
8 Section 17200. According to Defendant, an injunction would be improper here because Plaintiffs  
9 have unsuccessfully alleged that there are inadequate legal remedies available to them.

##### 10 **A. No Adequate Remedy at Law**

11 Defendant contends that Plaintiffs fail to allege an inadequate remedy at law for the current  
12 action and, consequently, Plaintiffs cannot pursue a Section 17200 claim. In order to state a claim  
13 under California Business and Professional Code § 17200, “A party must allege [that] . . . Plaintiff  
14 has no adequate remedy at law.” (Order at 5:23-24); (citing Heighley v. J.C. Penney Life Ins. Co.,  
15 257 F. Supp. 2d 1241, 1259-60 (C.D. Cal., 2003); Crosky et al., California. Practice Guide:  
16 Insurance Litigation § 15:112. See Stewart v. Life Ins. Co. of North America, 388 F. Supp. 2d 1138,  
17 1144 (E.D. Cal. 2005) (citing Cel-Tech, 83 Cal. Rptr. 2d 548)).

18 The Court previously held that Plaintiffs’ claim for breach of contract provides an adequate  
19 remedy to recover the money owed to them under the insurance policies. (Order at 6:17-21). In the  
20 FAC, Plaintiffs seek injunctive relief regarding the possibility of *future* actions and harm – not acts  
21 that allegedly happened in the past and have an adequate remedy at law. Defendant argues that if a  
22 breach of contract occurs in the future, Plaintiffs will have an adequate remedy at law. However,  
23 this argument fails to recognize that the very purpose of injunctory relief is to prevent harm *before* it  
24 occurs. Because Plaintiffs’ FAC seeks relief to prevent future actions and harm, their allegation of  
25 an inadequate remedy at law for any future breach of contract by Defendant is sufficient under  
26 Section 17200. (FAC at ¶ 69-73). Accordingly, the issue before the Court is whether injunctive

1 relief is available to Plaintiffs, under Section 17200, to prevent Defendant from denying coverage  
2 under their policies for any privacy claims that may arise in the future.

3 **B. Entitlement to an Injunction**

4 Defendant contends that Plaintiffs' claims regarding the possibility of a future breach of  
5 contract are purely speculative and insufficient to meet the requirements necessary for an injunction.  
6 (St. Paul MTD at 7:3-12). Section 17200 of the California Business and Professional Code  
7 authorizes injunctive relief. Cal. Bus. & Prof. Code § 17203. A complaint properly pleads  
8 entitlement to an injunction against an unfair business practice under Section 17203 when it alleges  
9 ongoing misconduct or a threat of continuing or future misconduct. See Madrid v. Perot Systems  
10 Corp., 130 Cal. App. 4th 440, 463 (2005).

11 Defendant argues that this case parallels the claim in Madrid, where the court found that  
12 plaintiffs' mere conclusory allegations could not present a viable claim for relief because the  
13 complaint failed to provide any supporting factual allegations that privacy-related claims were likely  
14 to be repeated in the future. (St. Paul MTD at 4:1-7). The factual allegations in the Madrid  
15 complaint referred to only acts that happened in the past. 130 Cal. App. 4th at 463. In particular,  
16 the Madrid complaint's broad allegation that the conduct was likely to recur was merely conclusory  
17 and contained no factual support, stating that the defendant "continues to aid traders. . .by modifying  
18 and updating deceptive schemes. . . [and therefore] defendant's wrongful conduct is ongoing and  
19 likely to recur." 130 Cal. App. 4th at 466.

20 This case differs from Madrid, in that Plaintiffs FAC does more than state a broad allegation  
21 without providing any factual support in the complaint. Here, Plaintiffs's FAC alleges that  
22 Defendant has a fraudulent and unfair "policy and practice of automatically denying (or severely  
23 limiting available coverage for) all claims that implicate their 'personal injury' and/or 'Media  
24 Activities' coverages, particularly when privacy allegations are asserted against their insureds."  
25 (FAC at ¶ 71). This factual allegation supports Plaintiff's conclusion that because Defendant's  
26 unfair business practice is ongoing, it is likely to cause harm in the future.

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1 In ruling on a motion to dismiss, the Court must accept as true all material allegations in the  
2 complaint, as well as reasonable inferences to be drawn from them. Leatherman v. Tarrant County  
3 Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993); Pareto v. FDIC, 139 F.3d  
4 696, 699 (9th Cir. 1998). Thus, the Court must accept as true the allegation that Defendant has a  
5 fraudulent and unfair practice of automatically denying particular claims. The St. Paul Policy  
6 provides “occurrence-based” or “offense-based” coverage, providing coverage for any claim against  
7 AOL and/or Netscape for the specified wrongful conduct, regardless of when the claim is brought.  
8 For this reason, AOL and Netscape are currently in contractual privity with St. Paul until such time  
9 as the limits of the St. Paul Policy are exhausted. (FAC at ¶ 26). Further, because the Plaintiffs are  
10 in contractual privity with Defendant, Plaintiffs have an ongoing relationship in which they will be  
11 subjected to Defendant’s unfair practice of automatically denying claims. The Court finds that  
12 Plaintiffs have sufficiently alleged a threat of future harm from Defendant, and are therefore entitled  
13 to an injunction if they prevail on their Section 17200 claim.

14 3. Re-casting UIPA claims under Section 17200

15 Defendant St. Paul argues that Plaintiffs improperly characterize their claim as a Section  
16 17200 claim, contending that Plaintiffs’ claim circumvents the UIPA, which bars private actions  
17 against insurers. (St. Paul MTD at 8). Because the Court previously denied Defendant St. Paul’s  
18 motion to dismiss on this issue, allowing Plaintiff’s claim to stand (Order at 5), it will not reconsider  
19 the matter in this Order.

20 **V. CONCLUSION**

21 For the reasons set forth above, the Court DENIES Defendant’s Motion to Dismiss for  
22 failure to state a claim under California Business and Professional Code Section 17200.

23 The parties shall appear before the Court for a Case Management Conference on June 19,  
24 2006 at 10:00 a.m.

25 Dated: May 8, 2006

26 06cv198mtd

\_\_\_\_\_  
JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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**Dated: May 8, 2006**

**Richard W. Wieking, Clerk**

**By:** \_\_\_\_\_  
**Melissa Peralta**  
**Courtroom Deputy**