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7 *Federal Insurance Company and*
Executive Risk Specialty Insurance Company

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

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

14 Plaintiffs,

15 v.

16 FEDERAL INSURANCE COMPANY, an
Indiana corporation; NATIONAL UNION FIRE
17 INSURANCE COMPANY OF PITTSBURGH,
PA, a Pennsylvania corporation; ST. PAUL
18 MERCURY INSURANCE COMPANY, a
Minnesota corporation; EXECUTIVE RISK
19 SPECIALTY INSURANCE COMPANY, a
Connecticut corporation, and DOES 1 through
20 50,

21 Defendants.

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

**DEFENDANTS FEDERAL
INSURANCE COMPANY AND
EXECUTIVE RISK SPECIALTY
INSURANCE COMPANY'S NOTICE
OF MOTION TO DISMISS NINTH
CAUSE OF ACTION FOR UNFAIR
BUSINESS PRACTICES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[[Proposed] Order Lodged Concurrently
Herewith]

Date: February 27, 2006
Time: 9:00 a.m.
Courtroom: 8

ROSS, DIXON & BELL, LLP
5 PARK PLAZA, SUITE 1200
IRVINE, CA 92614-8592

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STATE STATUTES

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1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on February 27, 2006, at 9:00 a.m., or as soon thereafter as
3 the matter may be heard, in Courtroom 8 of the above-referenced court, located at 280 South First
4 Street, San Jose, California, defendants Federal Insurance Company ("Federal") and Executive
5 Specialty Insurance Company ("ERSIC") will and hereby do move to dismiss Count Nine in the
6 complaint of Plaintiffs Netscape Communications Corporation ("Netscape") and America Online,
7 Inc. ("AOL").

8 This motion is brought pursuant to the provisions of Rule 12(b)(6) of the Federal Rules of
9 Civil Procedure, and is made on the grounds that the ninth cause of action for Unfair Business
10 Practices pursuant to Cal. Bus. & Prof. Code § 17200 fails to state a claim upon which relief can
11 be granted because (1) allegations of unlawful claim practices cannot be used as a predicate to
12 state a § 17200 claim; (2) Plaintiffs have an adequate remedy at law, and thus are not entitled to
13 the equitable relief afforded under § 17200; (3) Plaintiffs lack any cognizable remedy under
14 § 17200; and (4) even if Plaintiffs could state a claim for § 17200 – which they cannot – they fail
15 to allege a violation of § 17200 with sufficient particularity.

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

20 This motion is made following an effort by Federal and ERSIC to meet and confer with
21 Plaintiffs concerning the grounds for dismissing the ninth cause of action.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF ISSUES TO BE DECIDED

Properly pled, this lawsuit is, at best, a breach of contract dispute between two insureds and their insurance carriers. However, in the Complaint, plaintiffs Netscape Communications (“Netscape”) and America Online, Inc. (“AOL”) (collectively, the “Plaintiffs”) attempt to transform their straightforward contract claims against their insurers into a claim for unfair business practices pursuant to California Business & Professions Code §§ 17200 *et seq.* However, a § 17200 claim is not an all-purpose substitute for a contract (or tort) action.

Statement of Issues to Be Decided: Plaintiffs’ Ninth Cause of Action for injunctive relief and disgorgement pursuant to § 17200 fails to state a claim upon which relief can be granted because (a) allegations of unlawful claim practices cannot be used as a predicate to state a § 17200 claim; (b) Plaintiffs have an adequate remedy at law, and thus are not entitled to the equitable relief afforded under § 17200; (c) Plaintiffs lack any cognizable remedy under § 17200; and (d) even if Plaintiffs could state a claim for § 17200 – which they cannot – they fail to allege a violation of § 17200 with sufficient particularity.

For these reasons, as set forth in detail below, Plaintiffs’ Complaint fails to state facts sufficient to constitute a claim against Federal and ERSIC for violation of § 17200. Accordingly, the Ninth Cause of Action 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 Complaint ¶ 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”). Complaint ¶ 27 and

¹ The facts set forth herein and relied on in this Motion are based on the allegations of Plaintiffs’ Complaint 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’ Complaint to be true.

1 Exhibit 7 thereto. Plaintiffs allege that as a wholly-owned subsidiary of AOL, Netscape is also an
2 Insured under the ERSIC Policy. *Id.*

3 **The Underlying Actions and Attorney General Investigation**

4 In or about 2002, four civil actions were filed against Netscape and AOL (the “Underlying
5 Actions”): Specht v. Netscape Communications Corp., et al., Case No. 00 CIV 4871 (S.D.N.Y.);
6 Weindorf v. Netscape Communications Corp., et al., Case No. 00 CIV 6219 (S.D.N.Y.); Gruber
7 v. Netscape Communications Corp., et al., Case No. 00 CIV 6249 (S.D.N.Y.); and Mueller v.
8 Netscape Communications Corp., et al., Case No. 00 CIV 01723 (D.D.C.). Complaint ¶ 15 and
9 Exhibits 1-4. The Underlying Actions, styled as class actions, sought, among other things,
10 compensatory damages and other relief for Netscape’s and AOL’s alleged interception of
11 consumers’ private electronic communications. *Id.*

12 Shortly after the filing of the Underlying Actions, New York’s Attorney General
13 commenced an investigation into certain privacy-related consumer protection issues (the
14 “Attorney General’s Investigation”). The crux of the investigation purportedly centered around
15 privacy violations similar to those asserted in the Underlying Actions. *Id.* ¶ 17. Following the
16 filing of the complaints in the Underlying Actions and the Attorney General’s Investigation, AOL
17 and Netscape tendered these matters to Federal and ERSIC. *Id.* ¶ 18.

18 Federal and ERSIC each denied coverage to AOL and Netscape for the Underlying
19 Actions and the Attorney General’s Investigation. *Id.* ¶ 18. Thereafter, Netscape and AOL
20 allegedly incurred \$4,273,064 in attorneys’ fees in defending themselves in the Underlying
21 Actions and the Attorney General Investigation. *Id.* ¶ 33. Plaintiffs also allegedly paid at least
22 \$100,000 to settle all of those matters.² *Id.* ¶ 34.

23 **Plaintiffs’ Complaint and Removal of the Action to this Court**

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

27 ² Plaintiffs allege that an appeal pertaining to the settlement in the Underlying Actions is
28 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. Complaint ¶ 34.

breach of the implied covenant of good faith and fair dealing against each of them, as well as violation of Cal. Bus. & Prof. Code § 17200 *et seq.* against all defendants in the Ninth Cause of Action. Federal and ERSIC now move to dismiss Plaintiffs' Ninth Cause of Action for unfair business practices under § 17200.

III. LEGAL ARGUMENT

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).

B. Plaintiffs Fail to State a Claim Under Cal. Bus. & Prof. Code § 17200

1. Plaintiffs Cannot State a Claim Under Cal. Bus. & Prof. Code § 17200 for Unfair Insurance Practices

In Moradi-Shalal v. Fireman's Fund Insurance Cos., 46 Cal. 3d 287, 304-05 (1988), the California Supreme Court held that a plaintiff cannot state a private right of action under Insurance Code § 790.03 for unfair insurance practices. Since Moradi-Shalal was decided, courts have held consistently that § 17200 claims based on alleged violations of the duties imposed by the California Insurance Code are barred by the holding in Moradi-Shalal. *See, e.g., Safeco Ins. Co. v. Superior Court*, 216 Cal. App. 3d 1491, 1494 (1990) ("we have no difficulty in [holding]

1 the Business and Professions Code provides no toehold for scaling the barrier of Moradi-Shalal
 2 ... [t]o permit plaintiff to maintain this action would render Moradi-Shalal meaningless”); Maler
 3 v. Superior Court, 220 Cal. App. 3d 1592, 1595 (1990) (plaintiffs “cannot circumvent that ban
 4 [against private actions under Ins. Code § 790.03] by bootstrapping an alleged violation of section
 5 790.03 onto Business & Professions Code section 17200”).

6 Most recently in Textron v. Financial Corp. v. National Union Fire Ins. Co., 118 Cal. App.
 7 4th 1061 (2004), the plaintiff sought to recover under § 17200 against an insurer for “‘engag[ing]
 8 in unfair competition’ in the ‘handling [of plaintiff’s] claim, and the claims of other persons.’”
 9 Id., at 1069-70. The court in Textron explained that “parties cannot plead around Moradi-Shalal’s
 10 holding by merely relabeling their cause of action as one for unfair competition” under § 17200.
 11 Id. at 1070. The court found that the “specific allegations contained in plaintiff’s [§ 17200 claim]
 12 . . . misrepresenting both the terms of the insurance policies and its obligations under them for its
 13 own benefit, are the type of activities covered by [Ins. Code § 790.03].” Id. at 1070. As such, the
 14 court held that “merely alleging these purported acts constitute unfair business practices under the
 15 unfair competition law is insufficient to overcome Moradi-Shalal.” Id. at 1070-71. Thus, the
 16 court in Textron concluded that the demurrers to plaintiff’s unfair competition claim were
 17 properly sustained. Id. at 1072.

18 Here, Plaintiffs purport to state a claim for relief in their ninth cause of action for unfair
 19 competition based on allegations stemming from Federal and ERSIC’s alleged “policy and
 20 practice of automatically denying claims” that implicate certain policy provisions. Complaint
 21 ¶ 78. California Ins. Code § 790.03 prohibits, among other things, “misrepresenting the terms of
 22 any policy issued or to be issued or the benefits or advantages promised thereby,” “making or
 23 disseminating ... any statement ... with respect to the business of insurance ... which is untrue,
 24 deceptive, or misleading,” and/or “[m]isrepresenting to claimants . . . insurance policy provisions
 25 relating to any coverages at issue.” Cal. Ins. Code §§ 790.03(a), (b) and (h)(1). Plaintiffs’ claims
 26 clearly implicate actions prohibited by Insurance Code § 790.03. As in Textron, allowing
 27 Plaintiffs’ allegations to proceed under a § 17200 theory of recovery would impermissibly allow
 28 the “relabeling” of claim for violation of the Insurance Code in order to avoid Moradi-Shalal. To

1 permit plaintiff to maintain such a claim would render "Moradi-Shalal meaningless." Safeco, 216
 2 Cal. App. 3d at 1494. Accordingly, Plaintiffs' § 17200 claim based on purported unlawful and
 3 unfair claims practices should be dismissed.

4 **2. Plaintiffs Cannot State A Claim For Relief Under § 17200 Because**
 5 **They Have An Adequate Remedy At Law**

6 Plaintiffs cannot state a claim for relief under § 17200 because they have an adequate
 7 remedy at law, and so are not entitled to the equitable relief afforded under § 17200. In Heighley
 8 v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241 (C.D. Cal. 2003), an insured brought a claim
 9 against its carrier alleging, among other things, breach of contract, bad faith and violation of
 10 § 17200. The court explained the essential elements of a claim for violation of § 17200 in the
 11 insurance context:

12 (1) plaintiff's status as an insured or intended beneficiary of the
 13 insurance policy, (2) the existence of the policy, (3) the insurer's
 14 conduct and that such conduct was an unfair, unlawful or fraudulent
 15 business practice in violation of Bus. & Prof. Code § 17200, (4)
plaintiff has no adequate remedy at law, (5) a request for injunctive
 relief and or restitution (monetary damages are recoverable under
 [§ 17200], and (6) a request for attorneys' fees.

16 257 F. Supp. 2d at 1259-60 (citing Croskey, et al., California Practice Guide: Insurance
 17 Litigation (The Rutter Guide 2004) § 15:126)) (emphasis added). The court in Heighley held that
 18 the plaintiff insurer had failed to allege that it had no adequate remedy at law, and thus he had
 19 could not properly allege a claim for relief under § 17200. *See also* Stewart v. Life Ins. Co. of
 20 North America, 388 F. Supp. 2d 1138, 1144 (E.D. Cal. 2005) (determining that plaintiff insurer
 21 had no adequate remedy at law under § 17200 where her breach of contract claim against insurer
 22 would provide any benefits she was due).

23 Here, as in Heighley and Stewart, because Plaintiffs (and any other members of the public
 24 whose claims allegedly were denied improperly) have adequate remedies at law – to wit,
 25 compensatory damages for breach of contract and bad faith – they cannot state a claim for
 26 equitable relief under § 17200. Accordingly, Plaintiffs' § 17200 claim should be dismissed.
 27
 28

1 **3. Plaintiffs Lack Any Cognizable Remedy Under § 17200**

2 Plaintiffs' § 17200 claim also fails because Plaintiffs lack any cognizable remedy against
 3 Federal or ERSIC under the statute. The California Supreme Court has made clear that in private
 4 § 17200 claims, remedies are limited to restitution and injunctive relief. Korea Supply Co. v.
 5 Lockheed Martin Corp., 29 Cal. 4th 1134, 1144 (2003). *See also* In re Napster, Inc. Copyright
 6 Litigation, 354 F. Supp. 2d 1113, 1126 (N.D. Cal. 2005). Disgorgement of money obtained
 7 through an unfair business practice is an available remedy in an individual action under § 17200
 8 *only* to the extent it constitutes restitution. Korea Supply, 29 Cal. 4th at 1145.

9 “[D]amages are not available under Section 17203.” Cortez v. Purotator Air Filtration
 10 Products, Inc., 23 Cal. 4th 163, 173 (2000) (citation omitted). *See also* Bank of the West v.
 11 Superior Court, 2 Cal. 4th 1254, 1266 (1992); Cal. Bus. & Prof. Code § 17203. In addressing
 12 alleged violations of § 17200 in the context of insurance coverage litigation, California courts
 13 have consistently recognized that claims-handling disputes cannot form the basis of a § 17200
 14 claim because compensatory damages are *not* recoverable under the statute. Bank of the West v.
 15 Superior Court, 2 Cal. 4th at 1266.

16 The Supreme Court has drawn a “clear line” between damages and restitution in the
 17 context of § 17203. Inline, Inc. v. A.V.L. Holding Co., 125 Cal. App. 4th 895 (2005). Under
 18 § 17200, “[t]he object of the restitution order in each case was money that once had been in the
 19 possession of the person to whom it was to be restored.” Cortez, 23 Cal. 4th at 177. *See also*
 20 Korea Supply, 29 Cal. 4th at 1149. (“[t]he object of restitution is to restore the status quo by
 21 returning to the plaintiff funds in which he or she has an ownership interest”). Restitution
 22 requires a “vested interest” in the funds. Damages, on the other hand, “describes a payment
 23 made to compensate a party for injuries suffered.” Inline, 125 Cal. App. 4th at 903 (citing Jaffe
 24 v. Cranford Ins. Co., 168 Cal. App. 930, 935 (1985)). Thus, a “monetary payment ‘is more
 25 properly characterized as restitutionary than compensatory in nature’ when ‘[t]he defendant is
 26 asked to return something he wrongfully received; he is not asked to compensate the plaintiff for
 27 injury suffered as a result of his conduct.’” Id. (citing Jaffe, 168 Cal. App. at 935).

28 Korea Supply and cases following the Supreme Court decision are dispositive of

1 Plaintiffs' claims for disgorgement here. In Korea Supply, plaintiff Korea Supply brought claims
 2 against Lockheed Martin alleging that a company purchased by Lockheed, Loral Aerospace, had
 3 used bribes and sexual favors to win a contract with the Korean government to provide radar
 4 systems at a price \$50 million greater than the bid submitted by Korea Supply. 29 Cal. 4th at
 5 1140-42. Korea Supply represented supplier MacDonald Dettwiler, and expected to receive a \$30
 6 million commission for the transaction if the bid had been accepted. Id. at 1141. After the
 7 contract was awarded to Loral Aerospace, Korea Supply brought an action against Lockheed
 8 alleging, among other things, unfair competition pursuant to § 17200, and sought restitution from
 9 Lockheed by "disgorgement to it of the profits realized by Lockheed Martin on the sale." Id. at
 10 1142. Korea Supply also sought damages for the loss of the \$30 million commission it expected
 11 as compensation from MacDonald Dettwiler for negotiating the deal. Id.

12 The California Supreme Court held that Korea Supply could not state a claim under
 13 § 17200 because it could not seek as restitution money that Lockheed received from the Korean
 14 government on the contract. The Court explained that "[a]ny award that plaintiff would recover
 15 from defendants would not be restitutionary as it would not replace any money or property that
 16 defendants took directly from plaintiff." Id. at 1149. Simply put, even though the defendant
 17 profited from its alleged misconduct, because the wrongdoing did not transfer money from the
 18 plaintiff to the defendant, no § 17200 restitutionary remedy would be proper. Id.

19 In Inline, Inc. v. A.V.L. Holding Co., 125 Cal. App. 4th 895 (2005), the Court of Appeal
 20 further clarified the limits on monetary relief that may be available to plaintiffs as restitution
 21 under § 17200. In Inline, the plaintiff sued a storage company, Apace Moving Systems, alleging
 22 that when Apace auctioned the stored property of Inline's predecessor, Production Resources, Inc.
 23 ("PRI"), to satisfy outstanding storage charges, Apace did so in a commercially unreasonable
 24 manner. Id. at 899. At the auction, Apace accepted only \$20 for the entire contents of PRI's
 25 storage lot. Id. at 900. Inline sued Apace alleging, among other things, that Apace's violation of
 26 the statutory commercial reasonableness standard in auctioning the property constituted a
 27 violation of § 17200. Id. at 901. Inline sought as "restitution" the return of the \$100,000 paid by
 28 Inline to the buyer of the PRI storage lot who had only paid \$20 for the contents. Id. at 902.

1 The trial court awarded Inline \$20 as restitution under § 17200, as it found that Apace's
 2 auction was not held in a reasonably commercial manner. *Id.* On appeal, Inline argued that the
 3 restitution remedy under § 17203 is broad enough to require Apace to reimburse Inline the
 4 \$100,000 it paid to the third-party auction winner to retrieve the property. *Id.* The Court of
 5 Appeal affirmed and explained that in requesting more in restitution than the \$20 Apace received
 6 at the auction, Inline sought more from Apace than “to return something [it] wrongfully
 7 received’ . . . but ‘to compensate plaintiff for injury suffered as a result of [defendant’s]
 8 conduct.” *Id.* at 904. In other words, Inline sought “damages,” but “damages are not available
 9 under section 17203.” *Id.* at 903. Indeed, § 17203 is not “an all-purpose substitute for a tort or
 10 contract action.” *Id.* at 904 (citing *Cortez*, 23 Cal. 4th at 173).

11 Thus, “[t]he only nonpunitive monetary relief available under [§ 17200] is the
 12 disgorgement of money that has been wrongfully obtained or, in the language of the statute, an
 13 order ‘restor[ing] . . . money . . . which may have been acquired by means of . . . unfair
 14 competition.” *Id.* at 903 (citing *Bank of the West*, 2 Cal. 4th at 1266). Because the remedy
 15 sought by Inline was “consequential damages,” such relief was “outside the restitutionary scope
 16 of section 17203.” *Id.* at 904.

17 Here, Plaintiffs label the relief sought under their § 17200 claim as “disgorgement.”
 18 However, it is clear that Plaintiffs are in fact seeking to recover damages from Federal and ERSIC
 19 – *i.e.*, policy benefits allegedly due. Plaintiffs may not “convert” an adequate claim for contract
 20 damages into a claim for equitable relief by couching it as disgorgement. *Baugh v. CBS, Inc.*,
 21 828 F. Supp. 745, 757-58 (N.D. Cal. 1993) (rejecting attempt by plaintiff to recharacterize
 22 damage claim based on emotional distress as claims for restitution and injunctive relief).

23 Moreover, while in Plaintiffs’ Ninth Cause of Action they purport to bring their § 17200
 24 claim “in their individual capacities,” Complaint ¶ 77 (emphasis added), Plaintiffs nevertheless
 25 request in their prayer for relief to “*disgorge to the public* all funds and profits acquired by
 26 means” of any violation of § 17200. *Id.*, Prayer ¶ 14 (emphasis added). However, Plaintiffs
 27 cannot maintain such a recovery on behalf of the public. First, in order to pursue representative
 28 claims on behalf of others, § 17203 (as amended by Proposition 64) requires that Plaintiffs

1 comply with Cal. Code Civ. Proc. § 382, which sets forth the requirements for a class action
 2 under California law. Indeed, Plaintiffs have made no class allegations and have merely made a
 3 conclusory and blanket statement that they seek to recover on behalf of the public in their prayer
 4 for relief. This surely does not meet the requirements of § 17203. In addition, as discussed
 5 above, non-restitutionary disgorgement of profits obtained by means of unfair business practices
 6 under § 17200 is not an available remedy in either an individual or representative action. Palmer
 7 v. Stassinis, 348 F. Supp. 2d 1070, 1088 (N.D. Cal. 2004).

8 Because Plaintiffs have no cognizable theory of recovery under § 17200, their claim fails
 9 as a matter of law and should be dismissed.³

10 **4. Plaintiffs Fail to Plead A Cause of Action Under § 17200 With** 11 **Sufficient Particularity**

12 Even if Plaintiffs could bring a claim under § 17200 – which they cannot – they do not
 13 allege a violation of § 17200 with sufficient particularity. “A plaintiff alleging unfair business
 14 practices under the unfair competition statutes [*i.e.*, § 17200] ‘must state with *reasonable*
 15 *particularity* the facts supporting the statutory elements of the violation.’” Silicon Knights, Inc.
 16 v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1316 (N.D. Cal. 1997) (citation omitted) (emphasis
 17 added). In Silicon Knights, under the federal pleading standards, the court held that the plaintiff
 18 failed to state a claim for unlawful business practices under § 17200 for misappropriation of trade

19
 20 ³ During the parties’ meet and confer process regarding this motion to dismiss, Plaintiffs
 21 relied on the recent decision in Progressive West Insurance Co. v. Yolo County Superior Court,
 22 No. C050149, 2005 WL 3540865 (Cal. Ct. App., Dec. 28, 2005), to support their contention that
 23 they have a viable claim under § 17200. In Progressive, an insured was permitted to plead a
 24 § 17200 claim against an insurer based on alleged unfair, fraudulent and unlawful business
 25 practices surrounding the insurer’s efforts to recoup from insureds those amounts it paid to
 26 insureds as medical benefits under auto policies. However, Progressive does not salvage
 27 Plaintiffs’ § 17200 claim. In Progressive, the insured’s § 17200 claim did not involve the types of
 28 claims handling issues addressed by Cal. Ins. Code § 790.03. Indeed, the court in Progressive
 makes no mention of § 790.03, Textron or Moradi-Shalal. Moreover, in Progressive, there was
 no contention that the insured had an adequate remedy at law, or that the relief sought was really
 “damage” rather than restitution. Merely because the Progressive case involved an insurance
 company does not support the proposition that every § 17200 claim can be maintained against an
 insurance company, despite the clear holding in Textron that plaintiffs are not permitted to plead
 around Moradi-Shalal, that under Heighley, if there is an adequate remedy at law there can be no
 § 17200 claim, and that under Baugh, damages are not recoverable under § 17200, even if they
 are described as “restitution.” Accordingly, to the extent Plaintiffs rely on Progressive to oppose
 this motion, such reliance is entirely misplaced.

1 secrets where plaintiff did not “identify the ‘fraudulent circumstances under which trade secrets
2 [were] disclosed.’” 983 F. Supp. at 1316.

3 Similarly, in Khoury v. Maly’s of California, Inc., 14 Cal. App. 4th 612, 618 (1993), the
4 court dismissed a § 17200 claim because the complaint identified no particular section of the
5 statutory scheme which was violated and failed to describe with any reasonable particularity the
6 facts supporting the violation. *See also Qarbon.com, Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046,
7 1052-53 (N.D. Cal. 2004) (dismissing unfair competition counterclaim where claim not pled with
8 “‘reasonable particularity’”); Levine v. Diamantheset, Inc., 722 F. Supp. 579, 589-90 (N.D. Cal.
9 1989), *rev’d on other grounds*, 950 F.2d 1478 (9th Cir. 1991) (under federal pleading standard,
10 court dismissed unfair business practices claim on basis plaintiff failed to allege with specificity
11 the duty breached by defendants); Saunders v. Superior Court, 27 Cal. App. 4th 832, 841 (1994)
12 (allegations too vague and conclusory to support claim for restraint of trade under § 17200).

13 Here, Count Nine merely alleges in conclusory fashion that the Defendants “have a policy
14 and practice of automatically denying all claims that implicate their ‘personal injury’ and/or
15 ‘Media Activities’ coverages when privacy allegations are asserted against insureds.” Complaint
16 ¶ 78. Moreover, the Complaint generally states that the “acts and practices alleged above [which
17 per ¶ 76 include all the allegations in previous 75 paragraphs] constitute acts of unfair
18 competition.” *Id.* ¶ 79. These allegations constitute the sum total of the bases for this count, and
19 are woefully insufficient to describe the facts supporting the alleged violation.

20 For example, it is entirely unclear from these vague allegations whether Plaintiffs are
21 alleging that insureds of Federal and ERSIC, unrelated to Plaintiffs, the Underlying Actions or the
22 Attorney General Investigation, have been denied coverage, or whether Plaintiffs mean to limit
23 these allegations to the particular circumstances surrounding the Underlying Actions and the
24 Attorney General Investigation. Either way – if Plaintiffs mean to plead that Federal and ERSIC
25 have committed some undefined unlawful claims practices in other cases involving different
26 insureds of Federal or ERSIC, or if Plaintiffs mean only to allege some unspecified unlawful
27 claims practices committed in connection with the Underlying Actions and the Attorney General
28 Investigation – Plaintiffs’ allegations are manifestly inadequate to state a § 17200 claim.

1 Plaintiffs' general and ambiguous allegations clearly fail the Silicon/Khoury pleading test.

2 Accordingly, Plaintiffs' § 17200 count should be also be dismissed on the basis that it is
3 not pled with sufficiently particularity.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Plaintiffs' Ninth Cause of Action for violation of § 17200
6 should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

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Respectfully submitted,

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