UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	Civil Action No. 02-7764 (CRN)
AFRICAN-AMERICAN SLAVE DESCENDANTS' LITIGATION	MDL Docket No. 1491 This Document relates to all cases.

NOTICE OF FILING

TO: See the attached Service List.

PLEASE TAKE NOTICE that I filed the attached **RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED AND CONSOLIDATED COMPLAINT** with the above referred court on this 17th day of May, 2004.

ATTORNEY

Proof of Service

The undersigned certifies under penalty of perjury that a copy of the foregoing instrument and the accompanying documents were served upon the attorneys of record for the Defendants in the above cause by enclosing same in an envelope addressed to such attorneys at their last known address as disclosed by the pleading or record herein, with postage fully prepaid, and by depositing said envelope in a United States Post Office Mail Box on May 17, 2004.

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IN RE:	
AFRICAN-AMERICAN SLAVE DESCENDANTS' LITIGATION	Civil Action No. 02-7764 (CRN) MDL Docket No. 1491 This Document relates to all cases.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS THE SECOND AMENDED AND CONSOLIDATED COMPLAINT

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INTRODUCTION

As the defendants acknowledge in their Introduction, the Defendants' Memorandum in Support of Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended and Consolidated Complaint [hereinafter Def. Mem 2] is simply a warmed-over version of the arguments they made in their response to the First Amended and Consolidated Complaint [hereinafter FACC]. Those arguments which were legally unpersuasive vis a vis the FACC remain so in relation to the Second Amended Complaint [hereinafter SACC]. Plaintiffs therefore incorporate by reference, without repeating, their prior Memorandum ("Pl. Mem 1.") and Sur-Reply ("Pl. Sur") in support of their opposition to Defendants' Memorandum in Support of the Motion to Dismiss the FACC [Def. Mem 1]. The Plaintiffs will briefly review the new "old" arguments put forth by Defendants, arguments which, Plaintiffs maintain, do not controvert the legal sufficiency of the SAC.

The Defendants' Motion to Dismiss should be denied.

I. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED STANDING

Injury-in-Fact: A present day injury has been suffered by all named plaintiffs. It is neither "speculative," nor "conjectural." Defendants cannot contend that the plaintiffs, descendants of enslaved Africans: i) had the same opportunities as did their white contemporaries; ii) did not have to overcome barriers to their human right to development which their white counterparts did not; iii) did not suffer irreparable psychological damage from the loss of their history, language and culture; iv) know the actual birth names of, not the enslaved names given to, their forbears and, consequently, to this day

do not know their own real names[1]. These very real, personal harms constitute a sufficient level of injury, i.e. the "identifiable trifle" set out in *U.S. v. SCRAP*, 412 U.S. 669, 689 n.14, to establish Article III "injury-in-fact" standing. [See Pl. Sur. pp 2-3]

In addition, there are particular Plaintiffs - Cain Wall and his children, and the Estate of Emma Clark - whose allegations of actual enslavement in the 20th century further satisfy the requirement of an "injury-in-fact."

In the SACC, some plaintiffs (SACC, ¶¶ 83-84) have already filed to be administrators of the estates of their enslaved ancestors thus removing one more alleged obstacle to standing. Other plaintiffs will soon file the requisite papers.

Plaintiffs also have standing vis a vis the state consumer protection allegations. [section IV infra]

Causation Requirement: Given the information that is available, the plaintiffs have alleged the injuries they have suffered and their connections to the defendants as clearly as they can and in more than sufficient detail to satisfy the requirement of causation. However, plaintiffs are caught in a Catch-22 situation as the defendants are in possession of the very information that would allow the plaintiffs to delineate the connections most clearly.[2] If the Court concludes that greater specificity is necessary, other means are

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[1] The property interest in a name cannot be overstated. It is through a name that inheritance rights are determined and one can establish a historical connection to one's country of origin and one's ancestors. African-Americans slave descendants today are indelibly marked with the name of their white slave master, a constant and painful reminder of their prior servitude status.

[2] Plaintiff Farmer-Paellmann has informed counsel that only recently has she discovered further information in regards to: 1) Defendant Aetna – i.e. Aetna Inc.'s predecessor company wrote a policy in 1858 on Abel, her great-great-grandfather who was enslaved on St. Helena's Island. According to her, a policy on a slave on this Island would have been written out of Charleston, SC as was the case here. It was of public record that her ancestor was named Abel and was enslaved on St. Helena's Island, S.C. up to around

available to remedy the situation, e.g. a pre or post-discovery bill of particulars, short of granting the defendants' Motion to Dismiss.

Prudential Limitations: As set out in the previous sections of this memorandum, Plaintiffs' SACC establishes: 1) injury-in-fact attributable to the defendants suffered by plaintiffs' ancestors; 2) injury-in-fact suffered by plaintiffs. The allegation that plaintiffs' ancestors were prohibited from asserting their rights is contained in the paragraphs which assert that defendants had concealed their own connections to slavery and its aftermath (SACC ¶¶ 44-60).

For all the foregoing reasons, Plaintiffs have satisfied the requirements for standing.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT APPLY TO THE INSTANT CASE.

1860 when he ran away (This information was not a part of the original Slavery Era report filed in California on May 1, 2002. They filed this separately and notes about it were later added to the online registry as an amendment.) [SEE EXHIBIT A] It was Ms. Farmer-Paellmann's request to them for this information that began the whole exposure of corporate ties to slavery and the slave trade. She was not told about the policy with her great-great grandfather's name in January of 2000, when she asked. But for Senator Tom Hayden's slavery era law in California, she would never have learned the truth; 2) Fleetboston re Consumer Protection Allegations: i.e. she was injured by FleetBoston Financial corporation (now Bank of America). She was their student loan customer when they said they had no connection to John Brown or slave trading . She was still their customer when the case was filed in March 2002. She was injured because she lost money paid to them due to their said fraudulent statements in that she could have obtained similar loan servicing for less money (i.e. via loan consolidation, etc.) had she known the truth. She is still a customer of the company (AFSA Data Corp) that Fleet owned at the time of their consumer fraud. ; 3) CSX, i.e. Farmer-Paellmann lost money due to defendant's misleading statements in that she could have obtained similar transportation service for less money (i.e. via bus, air flight, or local commuter train service) had she known the truth.

Def.'s Mem2 (at 3) pays scant attention to the political question issue. It relies on the arguments made in Def. Mem1 which were adopted by the Court in its Order of January 26, 2004 [hereinafter "Order"].

The Court concludes in its Order that the political doctrine does apply. It summarizes the plaintiff's claims as being essentially about restitution, which it interprets to mean "reparations," then cites several cases that it says demonstrates that all of these type cases are political questions. It finally cites a 2001 New Jersey District Court case which "rejected the very same argument that Plaintiffs raise here." [Order at. 41]. That case, *In re Nazi Era Cases against German Defendants Litig*, 129 F. Supp. 2d 370, 375), is distinguishable from the instant case because it involved a question of foreign policy and war powers that "are generally within the acknowledged realm of executive power."

While Plaintiffs reiterate the arguments set out in Pl Mem1 at 25-31 and Pl. Sur at 2-4, they will focus on the crux of the Defendants' argument on the Political Question, i.e. "that the representative branches considered the issue of reparations to former slaves, and the *chosen vessels* [emphasis, Plaintiffs] of reparations came in the form of constitutional and legislative enactments guaranteeing equality under the law and freedom from discrimination." [Order at 48]. In that incorrect historical summation lies the flaw in the defendants' position. Equality under the law and freedom from discrimination are *not* reparations. They are separate issues *from* reparations. Their implementation does not provide repair for the damage done nor restitution for the property stolen. A decision by the Representative branches on those issues does *not* ipso facto relegate the issue of reparations to their exclusive purview. Plaintiffs' lawsuit alleges damages for torts and other legal wrongs. By lumping reparations together with

seemingly related but different acts of the Representative Branches, the defendants hope to escape liability by painting them all with the same "political question" brush.

Finally, since the Defendants cannot seriously contend that the allegations of consumer fraud fall within the political question doctrine, they conveniently ignore it.

III. PLAINTIFFS' CLAIMS ARE NOT BARRED BY STATUTE OF LIMITATIONS

General Issue Re: Exceptions to Statute of Limitations Affirmative Defense

The defendants' arguments and the Courts' holdings related to the affirmative defense of the statute of limitations are more appropriate to a motion for summary judgment, if not inapplicable to a motion to dismiss. Plaintiffs' pleadings meet the general pleading requirements to put the defendants on notice of their claims and grounds upon which they are based and to allow them to move forward to the discovery phase of the case.[3] There are allegations pleaded that, if supported by evidence, would make out causes of action against the defendants that would in turn survive a motion for summary judgment.

In Def. Mem2, the defendants mix up plaintiffs' claims of equitable tolling, with the discovery rule and with fraudulent concealment/equitable estoppel. Plaintiffs' claims under the discovery rule of inherently concealed and unknowable facts are not related or transferable to their claims for equitable estoppel, nor were they pleaded that way. Similarly, the inherently concealed acts and injuries pleaded by plaintiffs, although providing support for their claims for equitable tolling, are not the main source of factual

[3] Clearly, under the leading case on pleading requirements, *Conley v. Gibson*, 355 U.S. 41, (1957) (also, not surprisingly and not without import, a case related to the mistreatment of African-Americans), it is not certain that there are no set of facts which would support plaintiffs' allegations under which relief could be granted and therefore this Court must deny in all respects the defendants' motion to dismiss.

support for that claim. The Court should consider plaintiffs' pleadings for what they are and not what the defendants' mischaracterization of them.

Discovery Rule: Although the enslavement of people is an obvious historical wrong, the plaintiffs factually and legally broadened their pleadings to incorporate acts which harmed the plaintiffs and their ancestors outside of the actual racist brutalization of people for over three hundred years.[4] Therefore, the defendants', and the Courts', exclusive and incorrect focus on the act of enslavement as the sole illegal act upon which to base their attack on plaintiffs' pleadings ignores a plain reading of those pleadings and the legal reasoning supporting them.[5] Although the defendants do not make any legal argument to support their restrictive misrepresentation of plaintiffs' pleadings; preferring instead to obtusely ignore the full range of plaintiffs' pleaded causes of action, the Court attempt to improve the defendants' position by quoting a 2004 7th Circuit case should be reconsidered. *Brademas v. Indiana Housing Finance Authority*, 354 F.3d 681, 687 (7th Cir. 2004) holds that knowledge of the "predicate injury" is the proper trigger for accrual under the federal common law discovery rule. It is factually distinguishable. In this case, plaintiffs have sued the defendants (the majority of the plaintiffs' claims), who are

[4] While plaintiffs have sued only defendant, Brown Brothers, for harms directly related to the owning of slaves, the plaintiffs rely on equitable tolling to defeat an affirmative defense of statute of limitations for those causes of action directly related to the owning of slaves, however, the plaintiffs also bring the remaining causes of action against these defendants just as are brought against the other defendants for profiteering from the institution of slavery.

[5] Plaintiffs also wish to clarify the intent of their pleadings that both the Court and the defendants have misrepresented as somehow surreptitious, if not mendacious. It is hardly a secret that the plaintiffs' pleadings seek recovery from the defendants for a range of illegal activities, which were perpetrated from more than a hundred years ago through to the present. As such, plaintiffs' pleadings specifically and overtly address the obvious statute of limitations issues for a number of their claims and the associated accrual and tolling exceptions that exist in the law for these circumstances. It is hardly appropriate, or accurate for that matter, for the Court, or the defendants, to negatively characterize the plaintiffs' motives in the drafting of their pleadings as a "veiled attempt to circumvent the statute of limitations." Clearly such a mischaracterization adds no supportive legal reasoning but rather highlights, along with other rulings, an apparent bias by the Court against the plaintiffs and their causes of action, regardless of the merits of their claims.

independent of the actors that had actually enslaved plaintiffs' ancestors. These independent defendants are sued for illegal actions and harms, which are also independent from the act of enslavement. Therefore, it is not reasonable to conclude that the "enslaved person" was put on notice of the majority of plaintiffs' pleaded causes of action. Plaintiffs should be allowed to conduct discovery on these issues. Plaintiffs sufficiently pleaded facts that establish the independence of the illegal acts of the defendants, which also lead to independent injuries to plaintiffs and their ancestors. Therefore, it is patently unjust and outside the law to impute the fiction of knowledge of these causes of action onto plaintiffs or their ancestors when, as pleaded, the acts and injuries by these derivative defendants against the plaintiffs and their ancestors were inherently unknowable and undiscoverable.

The defendants have not argued against and have provided nothing for the Court to consider related to plaintiffs' assertion that a majority of the defendants' illegal acts and the associated harms plead by plaintiffs in this case are inherently concealed and unknowable. On that basis alone, the court should deny defendants' motion to dismiss as to each of these causes of action.

Continuing Tort: The Court and the defendants hold and assert that plaintiffs' claims, related to the continuing tort theory of recovery, are merely continuing harm from the original act of enslavement: see discussion above. However, plaintiffs' pleaded causes of action specifically refer to the independent, continuing and currently repeating act of the defendants' failure to provide an accounting. It is clear that this cause of action is independent from the actual taking and therefore should not be dismissed on statute of limitations grounds.

The plaintiffs are not attempting to resurrect a stale cause of action. Defendants could easily defend against a claim for an accounting by providing the accounting. If their claim to the affirmative defense of a statute of limitation is valid, providing the accounting would in no way resurrect a cause of action for the original act of the illegal taking. Again, the two acts: the taking and the failure to provide an accounting, are independent of each other and therefore independently actionable.

Similarly, plaintiffs' causes of action for replevin should also be tolled under both the continuing tort or the discovery rule. To the extent that defendants have property that rightly belongs to plaintiffs as alleged in plaintiffs' pleadings, the continued possession, which in detail is currently unknown to plaintiffs, supports the finding of a continuing tort and a tolling of the accrual of the cause of action under the discovery rule.

Consumer Protection: See the discussion [Section IV, fn. 9 below]

Equitable Tolling: As in their first motion to dismiss, the defendants again cite the Court to a case for the proposition that plaintiffs in this case do not make out a case for application of the equitable tolling doctrine. However, yet again, the case cited, *Van Tu v. Koster*, 02-4209, page 4 (10th Cir. 2004), is factually distinguishable from the case at bar and the holding is in that case is factually unique and therefore not transferable to this case. Therefore, the court's holding came down to a question uniquely related to the facts of that case which were in turn not rendered in detail by the court in its written opinion to make it applicable to the present case.

IV. PLAINTIFFS STATE CONSUMER PROTECTION LAW ARE JUSTICIABLE

Defendants violated various state consumer protection laws. Defendants' response to Plaintiffs' SACC is cursory at best, contained in three pages of their Brief at 9-13.[6] Primarily, Defendants seek to regurgitate the Court's previous ruling regarding the state law claims based upon the FACC. The SACC's specific allegations meet each and every requirement raised by the Court including: standing,[7] statute of limitations,[8] and political

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[6] Defendants make the allegation, buried in a footnote, that a "conclusory allegation is not sufficient to state a claim." Brief at 12 fn. 15, citing *Northern Trust Co. v. Peters*, 69 F.3d 123, 132 (7th Cir. 1995). One point that the Court of Appeals noted as "conclusory" was that the party alleged conduct but "fails to identify which of Northern Trust's actions constituted this conduct." *Northern Trust Co. v. Peters*, 69 F.3d 123, 132 (7th Cir. 1995). Here, however, Plaintiffs have proposed amendments that completely and verbatim identify what actions of what Defendants constitute the conduct to which they seek to apply state consumer protection laws.

[7] The Court's conclusions that the "injuries alleged in Plaintiffs' status as consumer of defendants do not establish a legally cognizable injury" and "[a]side from alleging a general state of confusion, the Plaintiffs fail to allege any injury- in- fact that has come about as a result of that confusion," (Order at 32, cited by D. Brief at 9) has been cured by the specific allegations under each state claim that the "Continued Intentional Misrepresentations ***were a direct, foreseeable, producing, and proximate cause of monetary and other economic damages to Plaintiffs*** and the other members of the Class . . .." (SACC ¶¶ 321, 331, 339, 348, 357, 365). Likewise, under the Illinois UDAP statute, all the plaintiff need allege is that he/she is "a consumer" for the Court to confer standing. Illinois UDAP § 505/2.

Similarly, the Court's discussion on constitutional standing at 31-32 of its previous opinion has no application given the current revised allegations where the plaintiffs have precisely alleged harm, but even where the Court advises that a "a state statute that dispenses with the requirement that an injury be alleged does not, and cannot abrogate constitutional limitations imposed by Article III..." Op at 31 cannot be a basis to dismiss the SACC on a separate ground, as the defendants have wisely not argued that the state statutes are unconstitutional in this regard, nor have the defendants pointed to a consumer protection statute that has been voided on such a ground.

[8] The defendants cannot seriously argue that plaintiff's consumer protection claims are barred by the Statute of Limitations. These allegations are based upon the current misrepresentations made by the defendants regarding their involvement in the transatlantic slave trade, hence, the applicable statues of limitations are determined by the state statutes on consumer protection, none of which have expired. *See e.g.*, 815 ILCS 505/10(a)(e) West 2002 (3 year statute of limitations); *Mirra v. Holland America Lines*,

question.[9] Plaintiffs will address this response, in the order as alleged in the SACC. **Violations of New York Law**. Plaintiffs amended to plead specifically that Defendants violated a New York consumer protection statute, N.Y. GEN. BUS. LAW §§ 349 and 350 (SACC ¶¶ 315-321). In their Brief at 13, Defendants cite a case that notes that claims under Sections 349 and 350 require a plaintiff to show proximate causation. *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F.Supp.2d 578, 597 (W.D.N.Y. 2000).[10]

In the SACC, Plaintiffs allege that the "Continued Intentional Misrepresentations ***were a direct, foreseeable, producing, and proximate cause of monetary and other economic damages to Plaintiffs*** and the other members of the Class . . .." [¶321, emphasis added.] The proposed amendment thus meets the requirements of New York law, as discussed in *Bath Petroleum*.

Violations of Texas Law. The sole point raised by Defendants in response to the SACC is to cite to a case that held that plaintiffs had failed to introduce evidence *at trial* that they were damaged by deceptive trade practices. *City of Marshall, Tex. v. Bryant Air*

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331 N.J. 86 (App. Div. 2000) (6 year statute of limitations applies to consumer fraud statute). Plaintiffs' claims under the consumer protection statutes all occurred in or around 2002.

[9] The consumer protection claims arise from current day actions and hence cannot be reasonably barred by the political question doctrine. Again the genesis of the state consumer protection claim is not slavery, nor the plaintiffs standing as descendants, but rather, plaintiffs standing as consumers who were damaged by the misrepresentations or material omissions of the defendants.

[10] The *Bath Petroleum* case should not be read for more than it is. It was dismissed in its entirety based on the Noerr-Pennington doctrine. *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F.Supp.2d 578, 596 (W.D.N.Y. 2000). Having decided to dismiss the case, the court in *dictum* made a finding that the actions of those defendants were not the proximate cause of injury to the plaintiff. *Bath Petroleum Storage, Inc. v. Market Hub Partners, L.P.*, 129 F.Supp.2d 578, 597 (W.D.N.Y. 2000).

Conditioning Co., 650 F.2d 724, 728 (5th Cir. 1981) (cited in Reply Brief at 41). Defendants apparently want the Court to pre-judge the merits of this case, and decide now—simply on the pleadings—that Plaintiffs will lose at trial. This is not a valid point on a motion to dismiss.

Violations of California Law. Defendants do not contest, and hence, concede, that plaintiffs make out a claim in California law, except to note in their Brief at 12, n 15 that none of the named plaintiffs is a California resident except the Hurdles. However, this Court has repeatedly noted that all plaintiffs are considered before this Court. Moreover, defendants have waived any right to preclude the California residents from being considered where they have moved to stay the appeal.

Violations of Illinois Law. Plaintiffs allege that Defendants violated two Illinois laws, the Illinois Consumer Fraud Act, 815 ILCA Sec 505/1 *et seq.* ("ICFA"), and the Illinois Uniform Deceptive Trade Practices Act, 815 ILCA § 510/1 *et seq.* ("IDTPA"). The ICFA allows actual economic damages and any other relief which the court deems proper (including equitable relief). 815 ILCA Sec 505/10a. The IDTPA allows equitable relief but not damages. In the SACC, Plaintiffs have adequately pleaded their causes of action under Illinois law. Nonetheless, Def.'s Mem2 at 12 suggests that Plaintiffs' Illinois claims have not been sufficiently alleged, citing *Greisz v. Household Bank (Illinois)*, 8 F.Supp.2d 1031 (N.D. Ill. 1998). Defendants are far off base.

Illinois Consumer Fraud Act ("ICFA"). Acts prohibited by the ICFA "include the use or employment of any 'deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact.'" *Chicago*

Messenger Service, Inc. v. Nextel Communications, Inc., 2003 WL 22225619, *9 (N.D.Ill. 2003). "The ICFA may be employed 'to the utmost degree in eradicating all forms of deceptive and unfair business practices and to grant appropriate remedies to defrauded consumers.' . . . Because the terms of the ICFA are not subject to a precise definition, whether a particular set of circumstances is "unfair" or "deceptive" is determined on a case-by-case basis." *Tylka v. Gerber Products Co.*, 1999 WL 495126, *4 -5 (N.D.Ill. 1999) (internal citations omitted). Plaintiffs' SACC more than adequately pleads the ICFA claims. Defendants' reliance on *Greisz v. Household Bank (Illinois)* for the proposition that the Court dismissed for failure to show any actual harm, is misplaced where the *Greisz* court did not "dismiss" those claims, but rather granted summary judgment on the merits.

Illinois Uniform Deceptive Trade Practices Act ("IDTPA"). Under the IDTPA, "injunctive relief is obtainable by an individual consumer where that consumer can allege facts that he likely would be damaged by the defendant's conduct in the future." *Greisz v. Household Bank (Illinois)*, 8 F. Supp.2d 1031, 1044 (N.D. Ill. 1998). Plaintiffs SACC expressly pleads damage from future conduct.

Violations of Louisiana Law. As to Louisiana law, and in keeping with their citing to merits cases as to Illinois and Texas law, Defendants cite to another case where the plaintiff lost only after a trial on the merits. *Gerasta v. Hibernia Nat. Bank*, 411 F.Supp. 176 (D.C.La. 1975). Plaintiffs' Louisiana law claim has been properly pleaded.

Violations of New Jersey Law. As to New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1 *et seq.* ("NJCFA") applies whether or not any person has in fact been misled, deceived or damaged by a violation. NJCFA § 56:8-2. Defendants merely cite *Cannon v.*

Cherry Hill Toyota, Inc., 161 F.Supp.2d 362, 374 (D.N.J. 2001)—yet another summary judgment decision, bringing Defendants' citation of inapposite merits decisions to a total of four out of five. The court noted that "a plaintiff need not actually expend a sum of money as a result of defendant's unlawful consumer practice in order to demonstrate a loss." 161 F. Supp.2d at 374. Once the plaintiff makes a preliminary showing of causation in fact (*i.e.*, that defendant knowingly omitted facts), the burden then shifts to the defendant to prove "that even if the information were disclosed, the plaintiff would not have acted differently." *Id.* Moreover, defendants' argument that N.J. law "provided a private right of action only to any person who suffers any ascertainable loss of moneys or property" (D. Brief at 13, n.18) is flatly wrong. The statute cited by defendants NJSA 58:8-19 merely allows the state the same opportunity for recovery of costs as those provided private plaintiffs. Senate Commerce Committee Statement, N.J.S.A. 58: 8-19 (2001) at 212; *Cox v. Sears Roebuck & Co,* 138 N.J. 2 (1994) (consumer fraud plaintiff can recover reasonable attorneys; fees and costs if plaintiff cancan prove that defendant committed unlawful practice, even if one cannot show any ascertainable loss)

Plaintiffs' SACC alleges (SACC ¶¶ 359-366) that Defendants knowingly omitted the true facts from their public statements, and that they were damaged by this omission. This meets the requirements of pleading under New Jersey law. Whether they will prevail on the merits not the issue on this motion to dismiss.

Alternatively, Should this Court Dismiss The Consumer Protection Claims on Federal Standing Grounds, it Should be Without Prejudice to Refile in State Court. Should this Court continue to apply a more stringent federal standing requirement than

state court (Order at 31), this Court should allow the consumer protection claim to be refiled in State courts.

V. PLAINTIFFS' SACC SUFFICIENTLY ALLEGES REPLEVIN.

It is elemental that at common law, a thief's title is void. 3 WILLIAM BLACKSTONE, COMMENTARIES 145.[11] The thief cannot give a buyer, even a BFP, good title. *Kunsktsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982). Under replevin, an entity that has possession of stolen property cannot obtain valid title or a right to possession. *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*_717 F. Supp 1374 (S.D. Ind. 1989). Here plaintiffs have sufficiently alleged that the "defendants hold personal property that was never properly vested in them." (SACC ¶ 290) They further alleged, "[t]itle to the property never vested in the defendants because the enslaved person's work was unpaid, stolen and forcibly held" and, therefore, "the plaintiffs hold a superior right of possession of the property." (SACC ¶¶291, 292). Plaintiffs' new allegations of replevin easily meet the standard for notice pleading.

Defendants' argue that the claim fails in that: 1) plaintiffs have not alleged "a present property interest that was injured as a result of defendants' actions". (Def Mem2 at 7, citing Order at 34) and; 2) plaintiffs cannot bring a replevin claim where the property sought to be returned "consists of money." Defendants simply ignore the plain language of the new pleading. First, the plaintiffs do allege a present property interest as the

[11] Blackstone describes the rationale underlying actions for replevin and detinue: "For there must be an end of all social commerce between man and man, unless private possession be secured from unjust invasion: and, if an acquisition of goods by either force or fraud, were allowed to be sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simpleminded of mankind (which is by far the most numerous division) could never be secure of their possessions." cited in in Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 Yale L.J., 2437 at *2440, n 10 (June 1994).

present-day heirs and/or equitable owners of the property. (SACC ¶¶ 290, 292, 297) Second, the new amended complaint does not state that the property sought is "money in general," but rather "personal property," including wages that were owed and payable for the labor rendered. *Id.* Plaintiffs need not identify every item of property, as that is more properly a matter of proof left to discovery. Even if the Complaint were construed to establish a claim in the nature of money, as argued in Plaintiffs' Mem1, this does not preclude relief as an equitable claim for replevin, like conversion, is allowable where the money is specifically identifiable or where the amount is capable of discernment.[12]

The cases cited by the Defendants are without merit. Defendants mischaracterize the holding of *FMC Corp v. Capital Cites, Inc*, failing to mention that the appellate court reinstated the plaintiff's claim for replevin. 915 F. 2d 300 (7th Cir. 1990).

Notably however, defendants do not dispute, and hence, effectively concede that the statute of limitations on replevin has not expired per Illinois statutory law cited in the new complaint. Likewise, the non-expiration of the statute of limitations in a replevin claim runs from the time plaintiff had "reasonable notice" of the identity of the possessor of the property. *Autocehalous Greek-Ortho*, 717 F. Supp at 1388. At a minimum, defendants cannot dispute that the issue of accrual of a claim for replevin is a disputed factual matter that precludes summary judgment. Hence, the plaintiffs sufficiently state a claim for replevin.

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[12] See cases cited at n. 93 of Pl. Mem. 1: *Melnick v. Sable*, 206 N.Y.S. 2d 825 (N.Y. Sup. Ct. 1960) (conversion appropriate where money was given to a corporate defendant with promise to repay the money if purchase was not consummated); *Collin County Savings & Loan of Plano Texas v. Miller Lumber Co, Inc,* 653 S.W.2d 114 (Tex. Ct. App. 1983) (conversion for money maintainable if the is obligation to return specifc, identifiable currency); *Sutherland v O'Malley* 882 F.2d 1196, 1197-98 (7th Cir. 1989); *Cirricione v Johnson*, 703 N.E.2d 67 (Ill. 1998) (Chiropractor sued patient's attorney to recover payment of his service under a physician's lien). *U.S. v. Moffit, Zwerling & Kemler, P.C.* 875 F.Supp. 1190 (E.D. Va. 1995), *aff'd in part, revs'd in part on other gds*, 83 F.3d 660 (4th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1996)

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that defendants' Joint Motion to Dismiss be denied.

May 17, 2004

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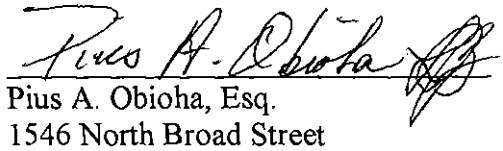

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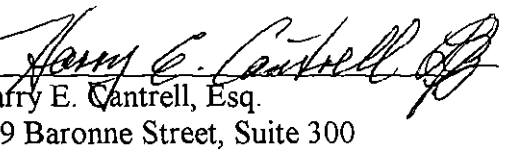

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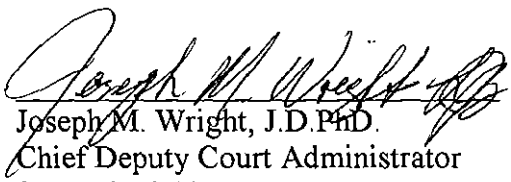

Joseph M. Wright, J.D.PhD.
Chief Deputy Court Administrator
State of Michigan
36th District Court
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Detroit, MI 48226
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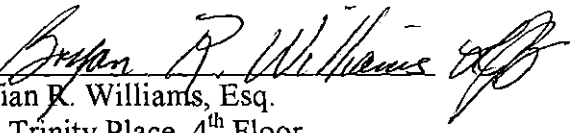
BRYAN R. WILLIAMS, ESQ.



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DUMISA BUHLE NTSEBEZA,
JUDGE ADVOCATE

Dumisa Buhle Ntsebeza
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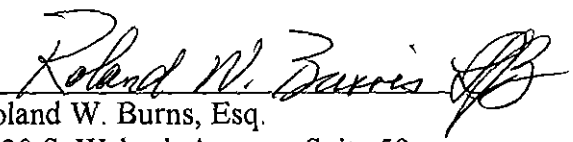
Republic of South Africa
Advisor for Plaintiffs

ROLAND W. BURRIS, ESQ.



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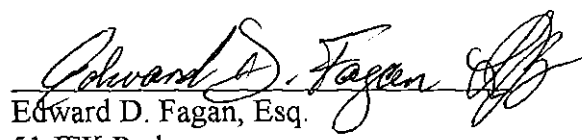
FAGAN & ASSOCIATES



Edward D. Fagan, Esq.
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Short Hills, NJ 07078
Attorney for Plaintiffs

EXHIBIT A

Aetna

Aetna Inc.
151 Farmington Avenue, RC4A
Hartford, CT 06156-8975

Thomas C. Strohmenger
Vice President and Chief Compliance Officer
Law and Regulatory Affairs, RC4A
(860) 273-7111
Fax: (860) 273-8340

July 2, 2002

VIA OVERNIGHT MAIL

Slavery Era Insurance Registry
Ms. Leslie Tick, Senior Staff Counsel
California Insurance Department
45 Fremont Street, 21st Floor
San Francisco, CA 94105

Re: **Supplemental Report of Aetna Inc.**
Aetna Life Insurance Company, 60054, 0001

Dear Ms. Tick:

This letter is in response to your e-mail dated July 1, 2002 in which you requested the translation of the additional document ("Attachment A") that mentions a policy on Abel for $800 in ALIC's supplemental report dated June 28, 2002.

Pursuant to your request, here is the translation of the Minute Book by our professional archivist:

Page 70 Regular Meeting Nov 22d 1858
"Slave policy 35. Charleston agency, negro Abel ins'd $800, approved Oct 5th payable Jany 5th.."

Very truly yours,

Aetna Life Insurance Company

By: Thomas C. Strohmenger
Thomas C. Strohmenger
Vice President and Chief Compliance Officer

Supp filing translation.doc

Aetna

Aetna Inc.
151 Farmington Avenue, RC4A
Hartford, CT 06156-3973

Thomas C. Strohmenger
Vice President and Chief Compliance Officer
Law and Regulatory Affairs, RC4A
(860) 273-7111
Fax: (860) 273-8340

June 28, 2002

VIA OVERNIGHT MAIL

Slavery Era Insurance Registry
Ms. Leslie Tick, Senior Staff Counsel
California Insurance Department
45 Fremont Street, 21st Floor
San Francisco, CA 94105

Re: **Supplemental Report of Aetna Inc.**

Dear Ms. Tick:

This letter with attached documentation is a supplemental report submitted on behalf of Aetna Inc., specifically, Aetna Life Insurance Company ("ALIC"), in response to California's "Slavery Era Insurance Policies" statutes and subsequent regulation, the "Slavery Era Insurance Policy Registry", California Code of Regulations Title 10, Sections 2393 through 2398 (the "Regulation") requiring all insurers doing business in California to submit information (as more particularly described in the Regulation). ALIC's initial report was dated October 11, 2001.

1. INSURER IDENTIFICATION

NAME	ADDRESS	NAIC CODE	NAIC GROUP	YEAR FORM	DATE ADMIT IN CA
Aetna Life Insurance Company ("ALIC")	151 Farmington Avenue Hartford, CT 06156	60054	0001	1853	12/24/1868

The telephone number, fax number, e-mail address and URL for the above-listed company are as follows:

TELEPHONE NUMBER	FAX NUMBER	E-MAIL ADDRESS	URL
(860) 273-7111	(860) 273-8340	TomStrohmenger@aetna.com	www.aetna.com

2. CONTACT PERSON

The contact person is the same as ALIC's original report:

Thomas C. Strohmenger, Vice President and Chief Compliance Officer
151 Farmington Avenue, RC4A
Hartford, CT 06156
Phone: (860) 273-7111 Fax: (860) 273-8340

3. RESEARCH METHODOLOGY

We have one record we could not read with confidence because of the antiquity of the handwritten script. It is a record of Aetna Life Insurance Company's Board of Directors Meetings titled "Minute Book No. 1 to 1875 Aetna Life Insurance Company" ("Minute Book"). This Minute Book indicates the existence of one additional policy not identified in either our original October 11, 2001 filing or the supplemental filing dated April 12, 2002. The Minute Book is a record of the monthly meetings of ALIC's Board of Directors and is handwritten in 1800's penmanship. We retained a professional archivist with expertise in 19th Century documents to review the Minute Book in order to ascertain whether there were any references to slave policies. She uncovered a reference on page 70 of the Minute Book for the Regular Meeting, November 22, 1858 that stated, "Slave Policy No. 35. Charleston agency, Negro Abel ins'd $800, approved Oct. 5th payable Jany 5th ..." (See Attachment A). This policy was not noted in the previously disclosed Claim Registry that listed losses from 1851-1873. We have not been able to locate this policy, nor do we expect to find it, or to discover any other relevant documents.

4. NAMES OF SLAVES

The name of the slave whose life was insured is identified as Abel in the Minute Book.

5/6. NAMES OF APPARENT SLAVEHOLDERS/POLICYHOLDERS/BENEFICIARIES and POLICY INFORMATION

The name of the slaveholder, policyholder and/or beneficiary is not identified in the Minute Book.

As required by the Regulation, ALIC is including a properly executed verification. We are also submitting the requisite two copies of this report (an original plus one copy), two copies of the information contained in the electronic report that lists the name of the slave (Attachment B), and the electronic report on the enclosed diskette.

Very truly yours,

Aetna Life Insurance Company

By: _____
Thomas C. Strohmenger
Vice President and Chief Compliance Officer

Attachments/Enclosure

VERIFICATION

STATE OF CONNECTICUT)
)SS.
COUNTY OF HARTFORD)

Thomas C. Strohmenger, first being duly sworn, deposes and says that he is the Vice President and Chief Compliance Officer of Aetna Life Insurance Company, the Company preparing and filing the attached papers; that he has read the same and knows the contents thereof and that the contents accurately reflect the Company's books and records.

Thomas C. Strohmenger
Vice President and Chief Compliance Officer

Subscribed and sworn to before me this

28th day of June 2002.

(Notary Seal)

Notary Public in and for said County
and State

My commission expires 3/28/07

ELIZABETH DEITELBAUM
NOTARY PUBLIC
My Commission Expires Feb. 28, 2007

70 Regular meeting Nov. 8th 1858
Present The Full Bdy.
Balance of Cash on hand at this date $4,502.77, Policies issued since last meeting 4. Prems on same $70.02
6 applications recd since last meeting
T. Eudon Secy

Regular meeting Nov. 15th 1858
Present The Full Bdy.
Cash on hand this date $3,774.97
8 policies issued during the week, the premiums on which amount to $266.32
T. Eudon Secy

Regular Meeting Nov 22d 1858.
Neither of Directors present.
Cash on hand this date $1503.22
Eleven policies issued since last meeting premiums on same amounting $89.[illegible]
outstanding loans [illegible], policies #3229 #3413
[illegible] approved
[illegible] payable Feby 22d
slave policy for Charleston agency, negro [illegible] $800. approved [illegible] payable
[illegible] under Policy # [illegible]
[illegible], cancelled, policy was for $1000, being all outstanding loans to this date
T. Eudon Secy

AFFIRMATION

I, Deadria Farmer-Paellmann, affirm that I was granted Power of Attorney to act as executor of the estates of Clara and Abel Hinds by Geneva (Capers) Phenix.

Geneva (Capers) Phenix is granddaughter of Abel Hinds. She is the daughter of Alice (Hinds) Capers, who was the child of Clara and Abel Hinds.

Alice Hinds and all her siblings are deceased.

According to South Carolina law, Geneva (Capers) Phenix is a priority heir to the estates of Clara and Abel Hinds.

Deadria C. Farmer-Paellmann

Deadria C. Farmer-Paellmann

5/17/2004
Date