

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

U.S. DISTRICT COURT
CLERK
07 JUN - 7 PM 4:25
FILED
DOCKETED
JUN 8 - 2004

IN RE:)
)
AFRICAN-AMERICAN SLAVE)
DESCENDANTS LITIGATION)
)
_____)

Civil Action No. 02-7764 (CRN)

MDL Docket No. 1491 Judge Norgle

This document relates to:

- 02-CV-6180 (Porter/Hurdle-Toomey)
- 02-CV-7765 (Barber)
- 02-CV-7766 (Farmer-Paellmann)
- 02-CV-7767 (Carrington)
- 02-CV-7768 (Madison)
- 02-CV-9180 (Johnson/Wall)
- 02-CV-9181 (Bankhead)
- 03-CV-2430 (Wyatt-Kervin)

**REPLY IN SUPPORT OF DEFENDANTS’
JOINT MOTION TO DISMISS
PLAINTIFFS’ SECOND CONSOLIDATED AND AMENDED COMPLAINT**

Ignoring this Court’s prior ruling, Plaintiffs’ Memorandum in Opposition to Defendants’ Joint Motion to Dismiss the Second Amended and Consolidated Complaint¹ merely re-argues the allegations that already have been held by this Court to be insufficient as a matter of law.

I. STANDING

Article III “injury-in-fact” requirement. First, plaintiffs repeat their generalized allegations of harm to the class. See Pl. Resp. at 1-2 (e.g., loss of “opportunities,” “loss of their history, language and culture”). This Court and courts in other reparations cases already have held that these assertions do not allege the concrete

¹ Referred to herein as “Plaintiffs’ Response” and cited as “Pl. Resp.”

164

and particularized injury-in-fact required by Article III. See Jan. 26, 2004 Order of Dismissal² at 28-30 (and cases cited therein).

Article III “causation” requirement. Next, plaintiffs acknowledge that they have alleged “their connections to the defendants as clearly as they can.” Pl. Resp. at 2. Because those allegations “fail to allege any conduct by the [seventeen] specifically named Defendants that individually affected any of the Plaintiffs,” however, they fail to satisfy Article III.³ Order at 34. “Likewise, the named Plaintiffs who alleged that they were slaves [see Pl. Resp. at 2] fail to allege that they were enslaved by any of the [seventeen] specifically named Defendants.” Order at 28. Rather, plaintiffs now ask to be allowed to pursue this litigation in the hope that they might discover a connection to satisfy Article III. See Pl. Resp. at 2-3. But standing is a threshold requirement for justiciability. See Wolf v. Fed. Republic of Germany, 95 F.3d 536, 544 (7th Cir. 1996). Having failed again to meet their burden of alleging facts demonstrating Article III

² Cited herein as “Order.”

³ Though never pled in any complaint and therefore not properly before the Court, plaintiff Farmer-Paellman includes assertions in a footnote (1) that she was a passenger on CSX, whose railroad subsidiary, CSXT, is a freight railroad that transports no passengers; (2) that she was misled by denials of defendant Fleet’s (alleged) connections to slavery while simultaneously suing Fleet for such connections; and (3) that her great-great-grandfather, who was still living in 1860 (see Pl. Resp. at 3 n.2), may be the same person as an insured slave who necessarily must have died in or before 1858 when – as shown by the documents attached to Plaintiffs’ Response – Aetna Life Insurance Company approved payment on the policy (see Pl. Resp. Exh. A, at 1). Even if these contradictory and insupportable allegations had been properly pled, they would not establish standing. For instance, even if she could establish some connection between one of her ancestors and some Aetna company, Farmer-Paellmann has not alleged facts showing that she personally has suffered concrete and particularized injury-in-fact, nor that her ancestors were prevented continually from pursuing their own rights, nor that she possesses a legally sufficient relationship to pursue her ancestors’ supposed claims – all requirements for third-party standing. Nor would her allegations survive the multiple other grounds for dismissal.

standing, see Order at 24-25 (and cases cited therein), plaintiffs may not pursue this litigation.

Prudential limitations. Plaintiffs do not dispute that they still are trying to litigate a generalized grievance, see Order at 36-37, or that the Second Amended Complaint largely repeats their prior allegations with respect to third-party standing, see Def. 2d Mem.⁴ at 3. They merely insist that the repeated allegations are sufficient. See Pl. Resp. at 3. As this Court and courts in similar cases already have held, however, prudential standing limitations mandate dismissal of plaintiffs' claims. See Order at 34-37; see also Def. Mem. at 11-15.

II. **POLITICAL QUESTION**

Plaintiffs' latest attempt to avoid the political question doctrine is no more viable than their effort preceding this Court's decision that their claims are non-justiciable. Undeterred by the Court's determination that "the President and Congress have the constitutional authority to determine the nature and scope of the relief sought in this case, not the courts," Order at 74, plaintiffs in fact confirm the appropriateness of that determination. They say, "[e]quality under the law and freedom from discrimination" – i.e., the remedies chosen by the political branches in place of reparations after the Civil War – "are not reparations." Pl. Resp. at 4 (emphasis in original). That is correct, and as this Court has held, those very decisions by the political branches render all reparations claims non-justiciable on a political question basis. Order at 49. Plaintiffs simply offer

⁴ Citations to "Def. 2d Mem." are to the memorandum in support of defendants' motion to dismiss the pending Second Amended Complaint. The memorandum in support of defendants' motion to dismiss plaintiffs' prior, dismissed complaints will be cited as "Def. Mem."

their continued disagreement with the choices made by the political branches over a century ago, but offer no basis for this Court to disregard them.⁵

III. STATUTES OF LIMITATIONS

Other than an erroneous assertion about their replevin claim,⁶ Plaintiffs' Response simply re-argues the limitations points this Court already properly rejected. It does so without suggesting that any allegation in the Second Amended Complaint would require a different outcome. And it appears that plaintiffs have abandoned the only arguably new tolling theory they raised (fraudulent concealment). Accordingly, because nothing has changed in the arguments this Court already has rejected, it once again should find plaintiffs' claims barred by the statutes of limitations.

IV. FAILURE TO STATE A CLAIM

Plaintiffs' Response does not dispute that the claims in their Second Amended Complaint for conspiracy, conversion, unjust enrichment, 42 U.S.C. § 1982, and intentional infliction of emotional distress are identical in all material respects to the same claims in their dismissed complaint. Cf. Order at 55-57. Nor do plaintiffs dispute that their new claim for negligent infliction of emotional distress fails to state a claim.

⁵ Plaintiffs erroneously assert that defendants' political question argument "ignor[es]" the claims they have labeled "consumer protection" claims. Pl. Resp. at 5. To the extent those claims are based on defendants' alleged participation in the institution of slavery, the political question doctrine bars them as well. And to the extent they are intended to be true consumer protection claims, rather than re-labeled reparations claims, they fail on other grounds. See infra Part IV.B.

⁶ Inexplicably, plaintiffs assert that "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." Pl. Resp. at 15. In fact, defendants specifically demonstrated in their opening brief on this motion that the replevin claim became time-barred long ago under Illinois' five-year statute of limitations for replevin claims. See Def. 2d Mem. at 4. With respect to the replevin claim, plaintiffs also repeat, without support, the same general type of tolling allegations already rejected by this Court. See Pl. Resp. at 8; Order at 65-67.

See Def. 2d Mem. at 8. Plaintiffs' Response mentions only their new claim for replevin and their previously dismissed "consumer protection" claims. The replevin and "consumer protection" claims, however, are no more viable than any of the other claims.

A. Replevin

Plaintiffs attempt to circumvent the Court's dismissal of their conversion claim by re-styling it as a claim for replevin. But replevin, like conversion, is unavailable where a plaintiff would at best have a right to an "indeterminate sum of money" rather than the entirety of a "specific identifiable fund." Sutherland v. O'Malley, 882 F.2d 1196, 1200-01 (7th Cir. 1989) (affirming district court's rejection of conversion claim). Plaintiffs cite no cases to support their assertion that wages allegedly owed to their ancestors constitute "personal property," distinguishable from "money in general." See Pl. Resp. at 15.⁷ In fact, the courts have uniformly rejected attempts to invoke replevin even with respect to specific bank accounts.⁸ Plaintiffs' replevin claim fails on that ground alone.

⁷ The cases cited by plaintiffs dealing with alleged "specifically identifiable" funds of money involve allegations that bear no resemblance to plaintiffs' claims here. See, e.g., Cirrincione v. Johnson, 703 N.E.2d 67 (Ill. 1998) (claims arising from physician's lien); Collin County Sav. & Loan v. Miller Lumber Co., 653 S.W.2d 114, 117 (Tex. App. 1983) (claim for recovery of a deposit; conversion claim unavailable because sum certain deposited with bank did not create "obligation to return specific, identifiable currency"). Plaintiffs' reliance on the Seventh Circuit's opinion in FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300 (7th Cir. 1990), is equally misplaced. The Seventh Circuit in FMC did not address replevin; instead, it reversed the dismissal of a conversion claim on an issue that has no application to this case – *i.e.*, whether a copy of a document is the sort of personal property which can be the subject of a conversion claim when the original of the document is missing.

⁸ See, e.g., Williams Mgmt. Enters., Inc. v. Buonauro, 489 So. 2d 160, 163 (Fla. Dist. Ct. App. 1986) (funds on deposit in a checking account are not tangible personal property which can be the subject of a replevin action); Walther v. Cent. Trust Co., NA, 590 N.E.2d 375, 379 (Ohio Ct. App. 1990) (bank account balance is an intangible asset that

Moreover, plaintiffs' rhetoric about "stolen property" and "a thief's title [being] void," Pl. Resp. at 14, cannot obscure the other fatal flaw in their claim: they have failed to plead facts showing that any of their ancestors was owed but not paid wages by any of these defendants, nor have they alleged that wages which were owed but not paid to their ancestors were paid to any of these defendants instead.

B. "Consumer Protection" Claims

As defendants have demonstrated, the conclusory allegations of the Second Amended Complaint fail to state a claim under any of the state consumer protection statutes invoked by plaintiffs; and Plaintiffs' Response does not explain how their allegations satisfy the elements of a claim under any of those statutes.

To the extent plaintiffs seek reparations on behalf of "their ancestors and all other descendants" of former slaves, SAC ¶¶ 315, 323, 333, 341, 350 and 359, their consumer protection claims – like all of their other claims – are barred by lack of standing, the political question doctrine, and statutes of limitations. See also Def. Mem. at 57 & n.54 (consumer protection statutes are inapplicable to pre-enactment conduct). Even if the claims are treated as pertaining solely to alleged "current misrepresentations made by the defendants," Pl. Resp. at 9 n.8, rather than as re-labeled reparations claims barred by the foregoing doctrines, plaintiffs fail to state a claim under any relevant state statute. To begin with, plaintiffs do not identify any representations of any kind attributable to 10 of the 17 defendants.⁹ Plaintiffs' Response makes no effort to explain

cannot be the subject of a replevin claim); see also *A.R. v. Topper*, 834 S.W.2d 238, 239 (Mo. Ct. App. 1992) ("Money is not the subject of an action of replevin, unless it be marked, or designated in some manner, so as to become specific as regards the power of identification, such as being in a bag, or package.") (quotation omitted).

⁹ See Def. 2d Mem. at 10 n.3.

how these 10 defendants can possibly be held liable under consumer protection statutes in the absence of any identified misrepresentations.

With regard to those defendants who are alleged to have made identified statements, plaintiffs offer no rebuttal to the argument that these statements made in defense of actual or threatened litigation cannot possibly give rise to a consumer protection claim. See Def. 2d Mem. at 11. It is hardly surprising that plaintiffs cite no case to support their novel theory that a defendant's denial of liability in response to highly publicized litigation can give rise to liability. Nor do plaintiffs attempt to explain how they could possibly have been "deceived" by public statements made in response to their actual or threatened filing of these lawsuits. Plaintiffs have continued vigorously to pursue their claims and cannot therefore suggest that they suffered a compensable injury in reliance on the statements quoted in the Second Amended Complaint. Id. at 11-12. Indeed, plaintiffs make no effort to explain how the alleged statements are in any way deceptive, unfair, or misleading.

Instead, plaintiffs simply assert that they have met the pleading requirements under each of the state statutes upon which they rely. But as defendants have demonstrated, plaintiffs' bare bones and conclusory allegations are insufficient to state a claim under any of the relevant state statutes.¹⁰ See Def. 2d Mem. at 9-13.

¹⁰ As defendants have noted, plaintiffs' allegations are so threadbare as to make a proper choice-of-law analysis impossible. However, plaintiffs do not dispute – and appear to accept – defendants' assumption that "each named plaintiff intends to pursue a consumer protection act claim against the defendants named in his or her original complaint, under the statute of the state in which his or her complaint was originally filed." Def. 2d Mem. at 9 n.12.

Plaintiffs' bald assertion that they suffered "damages" caused (in some completely unspecified way) by certain statements made by certain defendants is clearly not enough to satisfy the statutory "injury" or "causation" elements for purposes of a motion to dismiss. Cf. Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995); see also Def. 2d Mem. at 12-13 & nn.15-20. Nor are plaintiffs' vague, nonspecific, and conclusory allegations sufficient to establish other required elements of each of the state statutes. See id.

Rather than explaining how their conclusory allegations satisfy the minimal pleading requirements to state a claim, plaintiffs argue that some of the cases cited by defendants identifying the elements of the state statutes are inapplicable because they were decided after the motion-to-dismiss (or state equivalent) stage of the proceedings. This argument misses the mark for two reasons. First, the elements of a claim remain the same at every stage of the proceedings. Second, contrary to plaintiffs' suggestion, courts routinely dismiss consumer protection claims on motions to dismiss where plaintiffs base their claims on conclusory allegations or otherwise fail to allege facts sufficient to satisfy the elements of the claims. See, e.g., Champion Parts, Inc. v. Oppenheimer & Co., 878 F.2d 1003, 1009 (7th Cir. 1989) (affirming dismissal of Illinois and New York consumer fraud and deceptive practices act claims); DeJohn v. The .TV Corp. Int'l, 245 F. Supp. 2d 913, 924 (C.D. Ill. 2003) (dismissing Illinois consumer fraud claims); Pelman v. McDonald's Corp., No. 02-Civ-7821, 2003 WL 22052778, **11-13 (S.D.N.Y. Sept. 3, 2003) (dismissing New York deceptive practices act claim for failure to allege with specificity, inter alia, causation and deceptive conduct); Bracco Diagnostics Inc. v. Bergen Brunswig Drug Co., 226 F. Supp. 2d 557, 562 (D.N.J. 2002)

(dismissing New Jersey consumer fraud act claim); Filmlife, Inc. v. Mal “Z” Ena, Inc., 598 A.2d 1234, 1237 (N.J. Super. Ct. App. Div. 1991) (affirming dismissal of New Jersey consumer fraud act claim where allegations did not rise to level of “unconscionable commercial practice”); Am. Waste & Pollution Control Co. v. Browning-Ferris, Inc., 949 F.2d 1384, 1391-92 (5th Cir. 1991) (affirming dismissal of Louisiana consumer protection claim); Watson v. State Farm Lloyds, 56 F. Supp. 2d 734, 738 (N.D. Tex. 1999) (dismissing Texas deceptive practices act claim because “conclusory allegations are insufficient to avoid dismissal for failure to state a claim”); Bush v. Loanstar Mortgagee Servs., L.L.C., 286 F. Supp. 2d 1210, 1216 (N.D. Cal. 2003) (dismissing California unfair competition claim for failure to identify any unfair or fraudulent conduct by defendant); Searle v. Wyndham Int’l, Inc., 102 Cal. App. 4th 1327, 1333-36 (2002) (affirming grant of demurrer to California unfair competition claim where complaint failed to allege any unfair, unlawful or fraudulent conduct by defendant). Plaintiffs’ consumer protection claims also must be dismissed under Rule 12(b)(6).

Finally, after choosing to file their claims in federal court and urging them in federal court for the past two years, plaintiffs now argue that should the Court conclude that they lack standing to assert their consumer protection claims,¹¹ the Court

¹¹ Plaintiffs assert that their general allegations that they themselves suffered “monetary and other economic damages” as a result of contemporaneous statements by certain defendants gives them standing to assert those particular claims. Pl. Resp. at 9 & n.7. Even if these allegations were sufficient to establish standing, plaintiffs’ claims must be dismissed for failure to state a claim. Moreover, federal courts commonly dismiss deficient claims on alternate and independent grounds. See, e.g., Chow v. Aegis Mortgage, 185 F. Supp. 2d 914, 918 (N.D. Ill. 2002); Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997); Venetian Casino Resort, L.L.C. v. Cortez, 96 F. Supp. 2d 1102, 1108 (D. Nev. 2000); see also DeJohn, 245 F. Supp. 2d at 924.

should dismiss those claims without prejudice so they can refile in state court. Pl. Resp. at 13-14. However, despite repeated opportunities to replead, plaintiffs have been unable to state any claim under any theory. Plaintiffs' claims clearly are not viable. The Court should reject plaintiffs' invitation and dismiss the Second Amended Complaint with prejudice. Cf. Crenshaw v. Baynerd, 180 F.3d 866 (7th Cir. 1999) (affirming dismissal with prejudice – with no reference to prior amendments – where action was barred by immunity or, in the alternative, for failure to state a claim); Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032 (7th Cir. 1998) (affirming dismissal with prejudice – with no reference to prior amendments – where claim was barred as a matter of law).

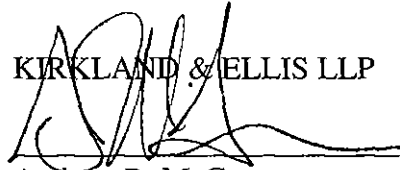
CONCLUSION

Plaintiffs have been given generous time and ample opportunity to state justiciable claims. They have not done so and cannot do so. For the foregoing reasons, the reasons in this Court's Order dismissing plaintiffs' prior complaint, and the reasons set forth in defendants' prior briefs, defendants respectfully request that all of plaintiffs' claims be dismissed with prejudice.¹²

¹² The claims against the Tobacco Defendants (Brown & Williamson Tobacco Corporation, Liggett Group, Inc., and R.J. Reynolds Tobacco Co.) should be dismissed for an additional, independent reason. Plaintiffs have failed to respond to Loews Corporation's motion to dismiss in which the Tobacco Defendants joined and, accordingly, the claims against them should be dismissed pursuant to Local Rule 78.3

June 7, 2004

Respectfully Submitted,


KIRKLAND & ELLIS LLP

Andrew R. McGaan
Douglas G. Smith
200 East Randolph Drive
Chicago, IL 60601
**Attorneys for Brown & Williamson
Tobacco Corp.**
**(Authorized to sign on behalf of all
defendants listed below)**

O'MELVENY & MEYERS LLP
John H. Beisner
John F. Niblock
1625 Eye Street, N.W.
Washington, DC 20006
Attorneys for Aetna Inc.

WHITE & CASE LLP
Vincent R. FitzPatrick, Jr.
Heather K. McDevitt
1155 Avenue of the Americas
New York, NY 10036
**Attorneys for Brown Brothers
Harriman & Co.**

KIRKLAND & ELLIS LLP
Andrew R. McGaan
Douglas G. Smith
200 East Randolph Drive
Chicago, IL 60601
**Attorneys for Brown & Williamson
Tobacco Corp.**

CANADIAN NATIONAL RAILWAY
COMPANY
Michael J. Barron, Jr.
17641 S. Ashland Avenue
Homewood, IL 60430
**Attorney for Canadian
National Railway Company**

WILLIAMS & CONNOLLY LLP
Heidi K. Hubbard
Andrew W. Rudge
725 12th Street, N.W.
Washington, DC 20005
Attorneys for CSX Corp.

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Christina M. Tchen
Ryan J. Rohlfesen
333 West Wacker Drive, Suite 2100
Chicago, IL 60606-1285

-and-

Andrew L. Sandler
Gary DiBianco
1440 New York Avenue, N.W.
Washington, DC 20005-2111
**Attorneys for FleetBoston
Financial Corp.**

WHITE & CASE LLP
Owen C. Pell
Karen M. Asner
Timothy S. Pfeifer
1155 Avenue of the Americas
New York, NY 10036
Attorneys for J.P. Morgan Chase & Co.

WEIL, GOTSHAL & MANGES LLP
James W. Quinn
Arvin Maskin
Konrad L. Cailteux
767 Fifth Avenue
New York, NY 10153
Attorneys for Lehman Brothers Inc.

HUNTON & WILLIAMS LLP
Jack E. McClard
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Attorneys for Norfolk Southern Railway Company

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
Debra M. Torres
John W. Brewer
One New York Plaza
New York, NY 10004
Attorneys for The Society of Lloyd's

KASOWITZ, BENSON, TORRES &
FREIDMAN LLP
Aaron H. Marks
Michael P. Rosenstein
1633 Broadway
New York, NY 10019
Attorneys for Liggett Group Inc.

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Christina M. Tchen
Ryan J. Rohlfson
333 West Wacker Drive, Suite 2100
Chicago, IL 60606-1285
-and-
Vaughn C. Williams
Marco E. Schnabl
Four Times Square
New York, NY 10036-6522
Attorneys for New York Life Insurance Co.

JONES DAY
Thomas F. Gardner
Susan L. Winders
77 West Wacker, Suite 3500
Chicago, IL 60601-1692
Attorneys for R.J. Reynolds Tobacco Co.

SONNENSCHN NATH &
ROSENTHAL LLP
Gary Senner
Suite 8000 Sears Tower
233 South Wacker Drive
Chicago, IL 60606
Attorneys for Union Pacific Railroad Co. and Union Pacific Corp.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Reply in Support of Defendants' Joint Motion to Dismiss Plaintiffs' Second Consolidated and Amended Complaint was served via First Class Mail, postage prepaid, this 7th day of June, 2004, upon:

Lionel Jean-Baptiste
Jean Baptiste & Associates
1900 Asbury Avenue
Evanston, Illinois 60201

Diane E. Sammons
Nagel, Rice, Dreifuss & Mazie
301 South Livingston Ave., Suite 201
Livingston, New Jersey 07039

Roger S. Wareham
Thomas Wareham & Richards
572 Flatbush Avenue, Suite 2
Brooklyn, New York 11225

Edward D. Fagan
Fagan & Associates
51 JFK Parkway, 1st Floor, West
Short Hills, New Jersey 07078

Harry E. Cantrell, Jr.
The Cantrell Law Firm
309 Baronne Street, Suite 300
New Orleans, Louisiana 70112

Pius A. Obioha
Pius A. Obioha & Associates, LLC
1546 North Broad Street
New Orleans, Louisiana 70119

Morse Geller
116-10 Queens Boulevard
Forest Hills, New York 11225


Bryan R. Williams
46 Trinity Place, 4th Floor
New York, New York 10006

Robert Notzon
509 W. 16th Street
Austin, Texas 78701

Joseph M. Wright
36th District Court
421 Madison Avenue, Suite 5028
Detroit, Michigan 48226

Gary Bledsoe
Law Offices of Gary L. Bledsoe
312 W. 12th Street, Suite 307
Austin, Texas 78701

Deadria Farmer-Paellmann
305 2nd Avenue, Apt. 344
New York, New York 10003
(At Ms. Farmer-Paellman's request)



Andrew R. McGaan