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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

Civil Action No. 02-7764 (CRN)

MDL Docket No. 1491

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)

**DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFFS'
SECOND CONSOLIDATED AND AMENDED COMPLAINT**

Plaintiffs' Second Consolidated and Amended Complaint ("Second Amended Complaint" or "SAC"), like their prior dismissed complaint, fails on multiple legal grounds. Defendants Aetna Inc., Brown Brothers Harriman & Company, Brown & Williamson Tobacco Corporation, Canadian National Railway Company, CSX Corporation, FleetBoston Financial Corporation, J.P. Morgan Chase & Co., Lehman Brothers Inc., Liggett Group, Inc., New York Life Insurance Company, Norfolk Southern Railway Company, R.J. Reynolds Tobacco Company, The Society of Lloyd's, and Union Pacific Railroad Company and Union Pacific Corporation (collectively, "defendants") respectfully move to dismiss, with prejudice, plaintiffs' Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

The Court dismissed plaintiffs' prior complaint on four independent grounds: 1) lack of standing; 2) statutes of limitations; 3) the political question doctrine; and 4) failure to state a

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cognizable claim.¹ The Second Amended Complaint fails to cure any of these four deficiencies. In material respects, the Second Amended Complaint restates the same allegations contained in the prior dismissed complaint, attaching new labels to the same legally deficient theories. As discussed more fully in defendants' accompanying memorandum of law, the handful of "new" allegations in the Second Amended Complaint provide no basis to modify the Court's prior dismissal ruling.

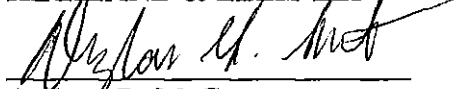
The deficiencies in plaintiffs' Second Amended Complaint cannot be cured by amendment. Accordingly, the Court should dismiss all of plaintiffs' claims with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

¹ R.J. Reynolds, Brown & Williamson and Liggett (the "Tobacco Defendants") raised additional arguments for dismissal of the previous complaint by joining and incorporating by reference the 12(b)(6) arguments made by Loews in its separate motion to dismiss. Specifically, Loews demonstrated that, as a matter of law, there is no liability for conduct alleged to have occurred before Loews or any of the Tobacco Defendants or their alleged predecessors even existed. *See* Motion and Memorandum in Support of Motion to Dismiss Plaintiffs' First Consolidated and Amended Complaint Pursuant to Rule 12, filed by Loews on July 18, 2003. Plaintiffs conceded those arguments by failing to respond to Loews' motion, though the Court has yet to rule. Now, because the SAC fails to cure those pleading failures in any way, Loews has moved to dismiss the SAC for all of the same reasons. The Tobacco Defendants again join and incorporate by reference these additional 12(b)(6) grounds for dismissal which are unopposed by plaintiffs, and respectfully request that for these additional reasons the motion be granted with prejudice at this time.

April 26, 2004

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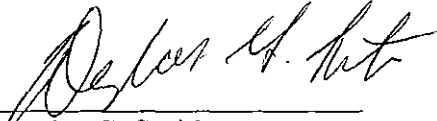
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**MEMORANDUM IN SUPPORT OF DEFENDANTS'
JOINT MOTION TO DISMISS
PLAINTIFFS' SECOND CONSOLIDATED AND AMENDED COMPLAINT**

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INTRODUCTION

Plaintiffs' Second Amended Complaint¹ does not cure any of the four deficiencies that caused this Court to dismiss the prior complaint. In fact, in material respects, plaintiffs' allegations are virtually unchanged. Defendants hereby incorporate by reference, without repeating, their prior Memorandum ("Def. Mem.") and Reply ("Def. Reply") in support of dismissal of the prior complaint. They address briefly herein the "new" allegations of the Second Amended Complaint, which are – in essence – simply a repackaging of the prior, unsuccessful allegations.²

The "new" allegations provide no basis to modify the Court's prior dismissal ruling. The Second Amended Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

¹ The Second Consolidated and Amended Complaint (cited herein as "Second Amended Complaint" and "SAC ¶ __") is brought by plaintiffs in eight of these nine consolidated cases. The plaintiffs in the ninth case, Hurdle v. FleetBoston et al., No. 03cv2644, which was originally filed (but not served) against certain of the defendants in California, chose not to join the Second Amended Complaint and, instead, filed a premature notice of appeal.

² Defendants joining in this brief are Aetna Inc., Brown Brothers Harriman & Company, Brown & Williamson Tobacco Corporation, Canadian National Railway Company, CSX Corporation, FleetBoston Financial Corporation, J.P. Morgan Chase & Co., Lehman Brothers Inc., Liggett Group, Inc., New York Life Insurance Company, Norfolk Southern Railway Company, R.J. Reynolds Tobacco Company, The Society of Lloyd's, and Union Pacific Railroad Company and Union Pacific Corporation (collectively, "defendants"). (Upon information and belief, the other two named defendants – American International Group, Inc. and Southern Mutual Insurance Company – have not been served in any action and have not appeared in this litigation. A defendant named in the dismissed complaint, WestPoint Stevens, is in bankruptcy and has been dropped by plaintiffs from the Second Amended Complaint.) By joining in this motion, defendants do not waive any and all defenses to jurisdiction and service in any and all of these actions.

I. PLAINTIFFS LACK STANDING.

Article III “injury-in-fact” requirement. Plaintiffs again allege injury through their inability to inherit their ancestors’ assets, but now refer to unspecified “property” rather than “lost pay.” See, e.g., SAC ¶ 67. Either way, these allegations are “conjectural” and “speculat[ive]” and “insufficient to show a personal injury to Plaintiffs.” Jan. 26, 2004 Order of Dismissal at 27 (cited herein as “Order at __”) (“Plaintiffs can only speculate that their ancestors’ estates would have passed on to them”). Plaintiffs also again allege a continuing injury through “daily indignities from the legacy of slavery, including, but not limited to, racial profiling, racial slurs, and improper and hurtful assumptions regarding their overall status.” SAC ¶ 115. This is identical to the allegation the Court already determined to be “too speculative and generalized” to establish an injury-in-fact. Order at 28, 30. Finally, two plaintiffs allege that they are consumers of two defendants, see SAC ¶¶ 84, 90, and assert the harm “of being misled, confused, and deceived about the roles the defendants played in the enslavement of African people,” id. ¶ 104. This “consumer injury” allegation is likewise not new, and this Court already ruled that “alleging a general state of confusion” is insufficient to state a cognizable injury. See Order at 32.

Article III “causation” requirement. Plaintiffs’ Second Amended Complaint still fails “to allege any conduct by the [seventeen] specifically named Defendants that individually affected any of the Plaintiffs.” Order at 34. Instead, the Second Amended Complaint’s allegations of a “causal connection” remain vague and conclusory. See, e.g., SAC ¶ 69 (“[Plaintiff Madison’s ancestor] was victimized by the atrocities of the institution of slavery, instigated, supported and financed by one or more of the defendants, in particular by R.J. Reynolds Tobacco Co., Brown and Williamson Tobacco Corp., Fleetboston Financial Corporation, Aetna Casualty, CZX [sic] and/or their predecessors”) (emphasis added); see also

id. ¶¶ 67, 72, 75, 79. Thus, plaintiffs have failed to satisfy the second requirement of constitutional standing.

Prudential limitations. The Second Amended Complaint also fails to meet prudential standing requirements. Plaintiffs are still trying to litigate a “generalized grievance” over an entire chapter of our nation’s history, see SAC ¶¶ 1-59, rather than a personal dispute. See Order at 36-37. Thus, as discussed further in § II, this dispute must be left to the political branches. See id. Moreover, to the extent that the Second Amended Complaint seeks redress for injuries to plaintiffs’ ancestors, those claims fail. See id. at 35-36. Two plaintiffs allege that they are now seeking to become administrators of their ancestors’ estates, see SAC ¶¶ 83, 84, but neither plaintiff currently possesses a legally sufficient relationship to pursue their ancestors’ claims. In any event, such third party claims fail on multiple additional standing grounds, including the lack of (1) any injury-in-fact attributable to these defendants suffered by these plaintiffs’ ancestors, (2) any injury-in-fact suffered by these plaintiffs, and (3) any allegation that these plaintiffs’ ancestors were prohibited from asserting their own rights. See Order at 35-36.

II. **PLAINTIFFS’ CLAIMS ARE NON-JUSTICIABLE UNDER THE POLITICAL QUESTION DOCTRINE.**

Plaintiffs offer nothing new to distinguish the Second Amended Complaint from the dismissed complaint with respect to the political question doctrine. Precisely as they did before, plaintiffs improperly invite the Court to second-guess the momentous political decisions made by the Political Branches pursuant to their war-making and other powers to remedy the consequences of slavery. Thus, this Court’s previous analysis applies fully to the claims in the Second Amended Complaint, which again implicate all the Baker factors that render them non-justiciable on political question grounds. See Order at 37-53; see also Def. Mem. at 26-38; Def. Reply at 16-22.

III. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTES OF LIMITATIONS.

The Second Amended Complaint also provides no basis to disturb the Court's ruling that plaintiffs' claims are barred by statutes of limitations. Order at 65. The new Complaint adds two new claims – for replevin and negligent infliction of emotional distress – both of which became time-barred long ago. Under Illinois law, for example, the statute of limitations for both replevin and negligent infliction of emotional distress is five years. See 735 Ill. Comp. Stat. 5/13-205.³ Because more than 130 years have passed since the statutes of limitations ran, those new claims are barred.

Plaintiffs also re-cast their equitable estoppel argument as a “fraudulent concealment” claim in the Second Amended Complaint. See SAC pp. 18-19, ¶¶ 53-54. The Court, however, already addressed the issue of fraudulent concealment in the context of the prior equitable estoppel argument:

Plaintiffs have not asserted any facts alleging that any Defendant concealed information in a way that would have prevented Plaintiffs' ancestors from asserting their claims within the proscribed statute of limitations period. Plaintiffs do not allege that Defendants concealed the injury. In fact, the injury was not concealed, but rather quite obvious when inflicted. Plaintiffs merely make vague generalizations about Defendants and their perceived practices. Plaintiffs' vague assertions are not enough to satisfy the requirements for equitable estoppel.

Order at 70.

Far from curing that deficiency, the Second Amended Complaint alleges, in only conclusory terms, that defendants “fraudulently concealed the facts supporting the plaintiffs' plead causes of action within this complaint from the heirs or the estates of the slaves and former slaves[.]” SAC pp. 18-19, ¶ 53; see also SAC ¶ 296 (same). But the “fraudulent concealment” is

³ As before, “the vagueness of Plaintiffs' [SAC] prevents a thorough choice of law analysis,” Order at 61 n.30, but no applicable law would provide a long enough statute of limitations to allow these claims now.

by silence: “No defendant had disclosed any facts . . . which would provide the plaintiffs with notice of any facts of the cause of action as plead within this complaint.” Id. Plaintiffs then just repeat that they “have been unable to secure records from a number of the defendants” Compare SAC p. 19, ¶ 54 with Am. Compl. ¶ 200; cf. Van Tu v. Koster, No. 02-4209, 2004 WL 823494, at *3 (10th Cir. Apr. 16, 2004) (rejecting tolling argument, which was based on “plaintiffs’ poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel,” as insufficient to justify tolling claims for more than 20 years).

As before, plaintiffs fail to allege any affirmative act or representation by any defendant designed to prevent any of their ancestors from discovering their claims. To prove fraudulent concealment, a plaintiff “must show” that the defendant made “affirmative acts or representations” that “were designed to prevent and, in fact, did prevent, plaintiff from discovering his claim.” Gredell v. Wyeth Labs., Inc., 803 N.E.2d 541, 548 (Ill. App. Ct. 2004); see also 735 ILCS 5/13-215; Worthington v. Wilson, 8 F.3d 1253, 1257 (7th Cir. 1993); Martin v. Consultants & Adm’rs, Inc., 966 F. 2d 1078, 1095 (7th Cir.1992) (fraudulent concealment requires trick or contrivance to exclude suspicion or inquiry). “[M]ere silence by defendants and failure by plaintiff to learn of his cause of action does not amount to fraudulent concealment.” Id.; see also Halas v. Executor of Estate of Halas, 445 N.E.2d 1264, 1271 (Ill. App. Ct. 1983) (“silence alone does not constitute fraudulent concealment”).

Plaintiffs’ fraudulent concealment allegations, like their prior attempts to avoid the statutes of limitations, are based on defendants’ purported failure to provide information to

plaintiffs, which is insufficient to establish fraudulent concealment. See Order at 65-73; Halas, 445 N.E.2d at 1271.⁴ Accordingly, the statutes of limitations bar plaintiffs' claims.⁵

IV. PLAINTIFFS FAIL TO STATE A CLAIM.

Plaintiffs' Second Amended Complaint asserts common law claims for conspiracy (Count I), conversion (Count II), unjust enrichment (Count III), 42 U.S.C. § 1982 (second Count IV),⁶ and intentional infliction of emotional distress (Count V). These claims are identical in all material respects to the same claims asserted in plaintiffs' dismissed complaint. This Court has already ruled that in addition to being barred by the doctrines of standing, political question, and limitations, the allegations fail to state a claim. See Order at 55-57.

Plaintiffs now add two common law claims – replevin and negligent infliction of emotional distress – that are equally deficient. So, too, are plaintiffs' attempts to revise their prior unsuccessful state statutory “consumer protection” claims. As before, plaintiffs’ “broad allegations . . . fail to give Defendants fair notice of what conduct is alleged to have injured which persons, in what manner, and when over the past four centuries covered in the [Second Amended] Complaint.” Order at 56.

⁴ Plaintiffs' allegations regarding some defendants' recent statements, see, e.g., SAC ¶¶ 227-256; compare Am. Compl. ¶ 199, cannot establish fraudulent concealment because the allegations are “merely a veiled attempt to circumvent the statute of limitations for their underlying claims.” Order at 69.

⁵ Plaintiffs also repeat that slaves and their descendants did not have “omniscient knowledge of their rights, the violations they suffered, those that were the cause of and those that illegally profited from those violations.” SAC ¶ 46; compare Am. Compl. ¶ 193 (same). This is merely a reiteration of plaintiffs' previous attempt to avoid the statutes of limitations, which this Court already rejected. See Order at 69.

⁶ The Second Amended Complaint contains two counts numbered IV.

A. Replevin (first Count IV)

Plaintiffs' newly-added claim for replevin fares no better than their unsuccessful claim for conversion. See Def. Mem. at 48-50; Def. Reply at 33-36. Plaintiffs "do not allege that they had any present property interest that was injured as a result of the Defendants' actions." Order at 34.⁷

Personal property that cannot be specifically identified and returned to a plaintiff either because it is intangible or because – like money – it is fungible, cannot, as a matter of law, be the subject of a replevin claim, just as it could not be the subject of a conversion claim.⁸ See FMC Corp. v. Capital Cities, Inc., No. 88C10199, 1989 U.S. Dist. LEXIS 7719, at *2 (N.D. Ill. June 29, 1989) (dismissing replevin claim seeking return of intangible property because "[b]oth conversion and replevin require, as the subject of their action, a chattel"); Daenzer v. Wayland Ford, Inc., 193 F. Supp. 2d 1030, 1041 (W.D. Mich. 2002) (replevin not available "for the return of money"); Williams Mgmt. Enters., Inc. v. Buonauro, 489 So. 2d 160, 163 (Fla. App. Ct. 1986) (funds on deposit in a checking account not tangible personal property which can be the subject of a replevin action). Thus, there is no identifiable tangible personal property that could be subject to replevin.

⁷ Likewise, plaintiffs have not alleged that any defendant obtained any tangible personal property from any of their own ancestors. "It is well-established that an order of replevin can only be entered against the person who has possession of the goods." Relational Funding Corp. v. Advantage Sch., Inc., No. 2C1242, 2002 U.S. Dist. LEXIS 10622, at *28 (N.D. Ill. June 13, 2002) (dismissing replevin claim against defendant not presently in possession of property in question).

⁸ Here, plaintiffs allege that defendants "hold personal property that was never properly vested in them," SAC ¶ 290, but this "personal property" is not alleged to be tangible or identifiable. It rather appears to consist of the alleged value of "the enslaved person's work [which] was unpaid." SAC ¶ 291.

B. Negligent Infliction of Emotional Distress (Count VI)

Plaintiffs fare no better with their claim that defendants' alleged participation in the pre-Civil War economy constituted a "negligent infliction of emotional distress" on modern-day descendants of African-American slaves. See SAC ¶ 312. In jurisdictions that recognize this disfavored tort,⁹ a plaintiff must allege that the defendant breached some specific duty of care arising from a special relationship between plaintiff and defendant. See Corgan v. Muehling, 574 N.E.2d 602, 606 (Ill. 1991); see, e.g., Calhoun v. Jumer, 686 N.E.2d 406, 408 (Ill. App. Ct. 1997) (dismissing a mother's emotional distress claim against a house-guest who allegedly assaulted her child).¹⁰ In addition to this claim's myriad other defects, supra §§ I-III, plaintiffs have failed to allege any facts from which the Court could conclude that any pre-Civil War actions of any defendant breached a legal duty to these Twenty-First Century plaintiffs who were born later. See SAC ¶ 313. The passage of so much time compels the determination that the connection is far too tenuous to state a claim for negligent infliction of emotional distress.

C. "Consumer Protection" Claims (Counts VII, IX - XIII)¹¹

In addition to the foregoing new claims, plaintiffs reassert causes of action for violations of the consumer protection laws of New York, Texas, California, Illinois, Louisiana, and New Jersey. As this Court previously ruled, plaintiffs' reliance on these state consumer protection

⁹ New York and Louisiana, for example, generally do not permit recovery for negligent infliction of emotional distress. See, e.g., Maracallo v. Bd. of Educ. v. City of New York, 769 N.Y.S.2d 717, 724 (N.Y. Sup. Ct. 2003); Lann v. Davis, 793 So. 2d 463, 466 (La. App. 2d Cir. 2001).

¹⁰ See also Cox Tex. Newspapers, L.P. v. Wooten, 59 S.W.3d 717, 723 (Tex. App. Ct. 2001) (dismissing a widow's negligent infliction of emotional distress claim against a newspaper for publishing photographs of her deceased husband). Some jurisdictions also require that the plaintiff allege "bodily injury or sickness" proximately caused by the defendant's conduct. Dello Russo v. Nagel, 817 A.2d 426, 435 (N.J. Super. Ct. App. Div. 2003). Plaintiffs here have not made such an allegation.

¹¹ There is no count numbered VIII in the Second Amended Complaint.

laws to seek reparations for defendants' alleged connections to the institution of slavery fail for at least three independent reasons: lack of standing, the political question doctrine, and statutes of limitations. The "injuries alleged in Plaintiffs' status as consumers of Defendants do not establish a legally cognizable injury. Aside 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.

Plaintiffs try to overcome these incurable infirmities by including in the Second Amended Complaint certain recent alleged "intentional misrepresentations" made by some – but not all – defendants after plaintiffs threatened to or actually filed these lawsuits. See SAC ¶¶ 227-256. But these new allegations do not cure the deficiencies in the "consumer protection" claims.¹²

First, plaintiffs' new allegations do not satisfy the minimum pleading requirements of the Federal Rules of Civil Procedure. As this Court has noted, to provide defendants with fair notice of their claims, "a complaint must allege facts bearing on all material elements necessary to sustain a recovery under some viable legal theory." Order at 55 (quoting Looper Maint. Serv., Inc. v. City of Indianapolis, 197 F.3d 908, 911 (7th Cir. 1999)). Plaintiffs repeat their vague assertion of "deceptive public communications made by defendants," SAC ¶ 104, but fail to include allegations of public communications of any kind attributable to 10 of the 17

¹² As previously noted, see supra n.3, plaintiffs' Second Amended Complaint is so vague as to make it impossible to conduct a proper choice of law analysis. Presumably, 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. Indeed, a contrary result – allowing plaintiffs to apply the laws of a state with no significant contact or significant aggregation of contacts to the claims asserted by each plaintiff – would violate due process. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985).

defendants.¹³ As to the other seven defendants, the Second Amended Complaint merely complains of defendants' public responses to plaintiffs' highly publicized claims against them, either when this litigation was threatened or in response to its filing. The Second Amended Complaint fails to draw any connection between any of these so-called "misrepresentations" and any injury suffered by any plaintiff, thus underscoring plaintiffs' fundamental lack of standing.¹⁴

¹³ The Second Amended Complaint makes no allegations of such comments by defendants The Society of Lloyd's ("Lloyd's"), Lehman Brothers Inc., Norfolk Southern Railway Company, New York Life Insurance Co., Union Pacific Railroad Co. (or Union Pacific Corporation), AIG, Brown & Williamson Tobacco Corp., Liggett Group Inc., Loews Corporation or Southern Mutual Insurance Company.

While plaintiffs do not allege any such public communications by defendant Lloyd's, they do allege that "Lloyd's withheld information in that it failed to report any documents to the California registry as required," SAC ¶ 175, in what appears to be an indirect reference to Cal. Ins. Code §§ 13810 *et seq.* However, that statute applies by its express terms (*see* §§ 13810, 13812) only to "insurers licensed . . . in this state." Plaintiffs have not alleged that Lloyd's is an insurer licensed in California and have therefore not pleaded a necessary element of any claim related to that statute. Indeed, not only is Lloyd's itself not an insurer, *see, e.g., Society of Lloyd's v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000), a cursory review of the information available on the California Department of Insurance's website (<http://www.insurance.ca.gov/docs/FS-Insurer.htm>) will confirm that none of the underwriters who conduct business in the Lloyd's market are licensed in California. (Certain syndicates of underwriters appear on the Department's List of Eligible Surplus Lines Insurers; such "nonadmitted" or "surplus lines" insurers are by definition not licensed in California. *See* Cal. Ins. Code § 1764.1.)

¹⁴ Indeed, only two plaintiffs even attempt to allege that they have any connection whatsoever with any of the defendants. Plaintiff Ina Bell Daniels Hurdle McGee alleges that she is a "customer of Defendant Aetna Insurance Company. But for Aetna's deception, Ina would not have been a customer of Aetna." SAC ¶ 90. However, the Second Amended Complaint does not identify what "deception" Aetna allegedly engaged in, where or when the alleged deception occurred, or what damages, if any, plaintiff McGee suffered. Nor could the statements of apology attributed to Aetna elsewhere in the Second Amended Complaint possibly give rise to a deceptive practices act claim. Plaintiffs allege that Aetna has "long ago acknowledged that for several years shortly after its founding in 1853, the company may have insured the lives of slaves" and that Aetna "express[ed] [its] deep regret over any participation at all in this deplorable practice" and "apologized." SAC ¶¶ 229, 230. Finally, as the caption of the Second Amended Complaint makes starkly clear, plaintiff McGee has not named Aetna as a defendant in the lawsuit she filed in Texas.

Similarly, plaintiff Marcelle Porter alleges that she is "a customer of Defendant, JP Morgan Chase. But for this Defendant's deception, she would not have been its customer." SAC ¶ 84. The Second Amended Complaint does not identify what "deception" J.P. Morgan

Because the “broad allegations” “fail[] to connect any alleged injury of any one of the Plaintiffs . . . to . . . any one of the defendants,” they “fail to give Defendants fair notice of what conduct is alleged to have injured which persons, in what manner, and when.” Order at 55-56.

Second, the so-called “intentional misrepresentations” cited in the Second Amended Complaint focus on defendants’ responses to the allegations asserted against them and their expectations of success in defending against these lawsuits. See, e.g., SAC ¶ 232, 241, 247 (“Courtrooms are the wrong setting for this issue”; “Any reparations suit against CN is wholly without merit and CN will defend itself vigorously”; allegations are “completely without merit”). Not only are defendants fully within their rights to contest liability, this Court dismissed plaintiffs’ claims for reparations because they lack legal merit. Such statements asserting valid defenses to actual or threatened lawsuits cannot possibly give rise to a consumer protection claim. Otherwise, anyone could manufacture a consumer protection claim simply by filing a complaint, giving it as much publicity as possible, and then claiming that the defendant’s public response caused them harm. This cannot be and is not the law.

Third, the so-called “intentional misrepresentations” on which the Second Amended Complaint focuses were made after the actual or threatened filing of the cases in this consolidated action. These plaintiffs, who were either contemplating or already actually suing these defendants for slavery reparations, cannot argue that they were misled as consumers by defendants’ responses to their claims. After all, plaintiffs have continued vigorously to pursue their claims despite defendants’ defenses and cannot therefore suggest that they suffered a compensable injury in reliance on the statements quoted in the Second Amended Complaint.

Chase allegedly engaged in, where or when the alleged deception occurred, or what damages, if any, plaintiff Porter suffered. Nor has plaintiff Porter named J.P. Morgan Chase as a defendant in the lawsuit she filed in Illinois.

See, e.g., Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 160 (Ill. 2002) (affirming dismissal of complaint where plaintiffs did not allege that they were deceived by the alleged misrepresentation and thus could not show proximate causation); Stanley v. Wal-Mart Stores, Inc., 839 F. Supp. 430, 434 (N.D. Tex. 1993) (plaintiffs failed to prove “actual and justifiable” reliance, as required to state a claim under the Texas statute).

Fourth, without a coherent factual allegation that any of the alleged misrepresentations caused any named plaintiff some actual harm or ascertainable loss, plaintiffs cannot state a claim under any of their re-pled consumer protection theories.¹⁵ See, e.g., Greisz v. Household Bank, 8 F. Supp. 2d 1031 (N.D. Ill. 1998) (dismissing claim under Illinois Consumer Fraud Act for failure to show any actual harm);¹⁶ see also City of Marshall v. Bryant Air Conditioning Co., 650 F.2d 724 (5th Cir. 1981) (reversing verdict under Texas unfair competition statute where plaintiffs could not show that behavior would have been any different and thus could not show

¹⁵ Plaintiffs make the identical, general allegation that each plaintiff was harmed under each statute as follows: “The Continued Intentional Misrepresentations were a direct, foreseeable, producing, and proximate cause of monetary and other economic damages to Plaintiffs.” SAC ¶¶ 321, 331, 339, 348, 357, 365. This conclusory allegation is not sufficient to state a claim. See Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995) (conclusory statements of law, and their unwarranted inferences, are not sufficient to defeat a motion to dismiss for failure to state claim).

In addition, Plaintiffs' claims under California's unfair competition law fail because none of the named plaintiffs is a California resident and plaintiffs do not allege that any of the challenged conduct occurred in California. See Norwest Mortgage, Inc. v. Superior Court, 85 Cal. Rptr. 2d 18 (1999) (California's unfair competition law does not apply to claims of non-California residents caused by conduct occurring outside of California's borders); see also Churchill Vill., L.L.C. v. Gen. Elec. Co., 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000) (same). Chester and Timothy Hurdle, the only two California residents who have appeared as plaintiffs, conspicuously elected not to join the Second Amended Complaint, but instead filed a premature notice of appeal.

¹⁶ In order to state a claim under the Illinois statute, a plaintiff must plead and prove: “(1) a deceptive act or practice by the defendant, (2) the defendant’s intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception.” Oliveira, 776 N.E.2d at 160.

misrepresentations caused actual damage);¹⁷ Cannon v. Cherry Hill Toyota, Inc., 161 F. Supp. 2d 362, 373-75 (D.N.J. 2001) (dismissing claim for violation of New Jersey Consumer Fraud Act because plaintiffs could not show misrepresentation caused any ascertainable loss);¹⁸ Bath Petroleum Storage, Inc. v. Mkt. Hub Partners, L.P., 129 F. Supp. 2d 578, 598 (W.D.N.Y. 2000) (dismissing claim under New York consumer protection statute where plaintiffs have not pled and cannot show misrepresentation proximately caused any injury), aff'd, 229 F.3d 1135 (2d Cir. 2000), cert. denied, 532 U.S. 1037 (2001);¹⁹ Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176 (E.D. La. 1975) (dismissing claim under Louisiana Unfair Trade Practices Act where plaintiff failed to show unfair trade practice caused actual damage to plaintiffs), aff'd in part and rev'd in part on other grounds, 575 F.2d 580 (5th Cir. 1978).²⁰

For all of these reasons, plaintiffs' consumer protection act claims must be dismissed.

¹⁷ Under the Texas statute, a plaintiff must plead and prove damages caused by one of the twenty-six specific unlawful practices enumerated in Tex. Bus. & Com. Code § 17.46, id. § 17.50(a)(1), or prove there was a breach of warranty, id. § 17.50(a)(2), unconscionability, id. § 17.50(a)(3), or a violation of article 21.21 of the Insurance Code, id. § 17.50(a)(4).

¹⁸ N.J. Stat. Ann. § 56:8-19 provides that a private right of action is available only to “[a]ny person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act.” Id. There must also be a statement by a defendant made “in connection with the sale or advertisement of any merchandise or real estate.” N.J. Stat. Ann. § 56:8-2.

¹⁹ To state a claim under the New York statute, it must be proved that defendant has engaged in “[c]onsumer-oriented conduct” with a “broad[] impact on consumers at large” or that any act or practice of any defendant was “likely to mislead a reasonable consumer acting reasonably under the circumstances.” Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (N.Y. 1995). There must also be proof that plaintiff was injured as a result of any alleged public statement by a defendant. See id.

²⁰ Under La. Rev. Stat. Ann. § 51:1409(A), a private right of action is available only to a plaintiff who “suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result” of unfair competition or unlawful or deceptive acts. Id.

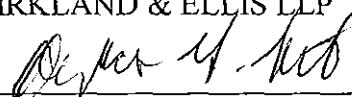
CONCLUSION

For the foregoing reasons and the reasons reflected in this Court's prior Order, defendants respectfully request that the Second Amended Complaint be dismissed with prejudice.

April 26, 2004

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