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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 all cases.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' JOINT MOTION TO DISMISS

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This action is the latest in a long line of cases that have sought reparations for slavery. Like all of those earlier cases, this action 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, Union Pacific Railroad Company, and Union Pacific Corporation (collectively, "defendants") respectfully submit this memorandum in support of their joint motion to dismiss, with prejudice, the claims asserted in plaintiffs' Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

INTRODUCTION

The named plaintiffs seek reparations on behalf of a class consisting of all "descendants of formerly enslaved Africans" and a recently added sub-class of all living "formerly enslaved African-Americans." Am. Compl. ¶ 60. Defendants are 18 present-day companies whose predecessors are alleged to have "illicitly profit[ed] from slave labor" between 1619 and 1865 and post-emancipation slavery through the 1930's. Id. ¶¶ 53, 54. Plaintiffs seek to hold defendants responsible for the entire sweep of slavery and its consequences. Without alleging any connection between themselves or their ancestors and these defendants, they seek to hold defendants jointly and severally liable for "the appointment of an independent historic commission," "an accounting," "the imposition of a constructive trust," restitution of the value of the slave labor performed by the ancestors of the putative class, disgorgement of profits, compensatory and punitive damages, and other forms of equitable and injunctive relief. Id. ¶¶

55, Prayer.[1] It is beyond debate that the practice of slavery marked a deplorable period in our nation's history, but it is also beyond debate that grievances arising from that period cannot be heard in 2003 in a court of law.

For the past century, descendants of slaves have repeatedly attempted to obtain reparations from the United States government through litigation. Courts have consistently dismissed these lawsuits because of insurmountable problems including lack of standing, untimeliness, nonjusticiability, sovereign immunity, and/or failure to state a claim. See, e.g., Cato v. United States, 70 F.3d 1103 (9th Cir. 1995) (dismissing slavery reparations claims based on plaintiffs' lack of standing, the political question doctrine, and sovereign immunity); Johnson v. McAdoo, 45 App. D.C. 440, 441 (1916) (affirming on sovereign immunity grounds dismissal of claims by three former slaves, on behalf of themselves and their ancestors, seeking $68 million from the federal government for uncompensated work associated with cotton production between 1859 and 1868), aff'd mem., 244 U.S. 643 (1917).[2]

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[1] Plaintiffs' fourteen-count Amended Complaint asserts claims under the labels "conspiracy," "demand for an accounting," "crime against humanity," "piracy," "intentional infliction of emotional distress," "conversion," "unjust enrichment," "42 U.S.C. § 1982," "Alien Torts [Statute]," "Illinois state claim," "Louisiana state claim," "New Jersey claim," "New York state claim," and "Texas state claim."

[2] See also Johnson v. United States, 70 F.3d 1279, No. 94-36012, 1995 WL 713502 (9th Cir. 1995) (political question doctrine, standing, sovereign immunity); Bey v. United States, No. 02-705 (W.D. Pa. Oct. 31, 2002) (report and recommendation) (political question doctrine, statute of limitations), adopted, No. 02-705 (W.D. Pa. Dec. 19, 2002) (memorandum order); Bell v. United States, No. Civ. A. 301CV0338D, 2001 WL 1041792 (N.D. Tex. Aug. 31, 2001) (standing, sovereign immunity); Campbell v. IRS, No. 1:01 CV 588, 2001 U.S. Dist. LEXIS 23639 (N.D. Ohio Mar. 31, 2001) (statute of limitations, failure to exhaust administrative remedies); Butts v. IRS, No. 1:01CV0589, 2001 WL 1823930 (N.D. Ohio Mar. 26, 2001) (sovereign immunity); Boatwright v. IRS, No. 1:01CV0063, 2001 WL 350238 (N.D. Ohio Feb. 28, 2001) (same); Boatwright v. IRS, Case No. 1:01 CV 70, 2001 U.S. Dist. LEXIS 3100 (N.D. Ohio Feb. 28, 2001) (statute of limitations, failure to exhaust administrative remedies); Bey v. United States Dep't of Justice, No. 95 CIV. 10401 (LMM), 1996 WL 413684 (S.D.N.Y. July 24, 1996) (adopting Cato) (standing, political question doctrine, sovereign immunity); Langley v. United States, No. C. 95-4227 SBA, 1995 WL 714378 (N.D. Cal. Nov. 30, 1995) (standing);

These plaintiffs now bring these same claims against private companies. But naming private defendants (rather than the government) does not cure the fatal flaws in the claims – lack of standing, untimeliness, nonjusticiability, and failure to state a claim. These judicial limitations bar suits against both governmental and private entities.[3] Indeed, that is the lesson conveyed by actions seeking reparations from private companies that allegedly profited from the use of slave and forced labor during World War II. Courts addressing such claims have

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Patterson v. United States, No. C. 95-4146 SBA, 1995 WL 714372 (N.D. Cal. Nov. 30, 1995) (same); Hamilton v. United States, No. C-94-1540-CAL, 1994 WL 412433 (N.D. Cal. Aug. 1, 1994) (standing, failure to raise a federal question); Nelson v. United States, No. C-94-2143-CAL, 1994 WL 398513 (N.D. Cal. July 12, 1994) (same); Bailey v. United States, No. C 94-1387 VRW, 1994 WL 374524 (N.D. Cal. July 7, 1994) (sovereign immunity, failure to raise a federal question); Staten v. United States, No. C 94-1511 VRW, 1994 WL 374519 (N.D. Cal. July 7, 1994) (same); Madison v. United States, No. C 94-1539 VRW, 1994 WL 374533 (N.D. Cal. July 7, 1994) (same); Ogletree v. United States, No. C 94-1665 VRW, 1994 WL 374522 (N.D. Cal. July 7, 1994) (same); Berry v. United States, No. C-94-0796-DLJ, 1994 WL 374537 (N.D. Cal. July 1, 1994) (statute of limitations, failure to state claim, lack of subject matter jurisdiction); Powell v. United States, No. C 94-01877 CW, 1994 U.S. Dist. LEXIS 8628 (N.D. Cal. June 20, 1994) (statute of limitations); Lewis v. United States, No. C 94-01380 CW, 1994 U.S. Dist. LEXIS 7868 (N.D. Cal. June 7, 1994) (same); Lloyd v. United States, No. C 94-01192 CW, 1994 U.S. Dist. LEXIS 7869 (N.D. Cal. June 7, 1994) (same); Jackson v. United States, No. C 94-01494, 1994 U.S. Dist. LEXIS 7872 (N.D. Cal. June 7, 1994) (same); Farr v. United States, No. C-94-0965-CAL, 1994 WL 285037 (N.D. Cal. June 14, 1994) (standing, failure to raise a federal question); Miller v. United States, No. C-94-1451 DLJ, 1994 WL 224815 (N.D. Cal. May 9, 1994) (standing); Mahone v. United States, No. C-94-1337 DLJ, 1994 WL 225095 (N.D. Cal. May 9, 1994) (same); Trice v. United States, No. C 94-1474 BAC, 1994 WL 225179 (N.D. Cal. May 6, 1994) (sovereign immunity, failure to raise a federal question); Anderson v. United States, No. C 94-1221 BAC, 1994 WL 180302 (N.D. Cal. May 3, 1994) (same); Conley v. United States, No. C 94-1222 BAC, 1994 WL 180338 (N.D. Cal. May 3, 1994) (same); Washington v. United States, No. C 94-1306 BAC, 1994 WL 180342 (N.D. Cal. May 3, 1994) (same); Gray v. United States, No. C 94-1335 BAC, 1994 WL 180304 (N.D. Cal. May 3, 1994) (same); accord Obadele v. United States, 52 Fed. Cl. 432 (2002) (rejecting argument that equal protection requires slave reparations), aff'd, No. 02-5134, 2003 WL 1878947 (Fed. Cir. Apr. 11, 2003); Scott v. Comptroller of the Treasury, 659 A.2d 341 (Md. Ct. Spec. App. 1995) (noting in dicta that sovereign immunity bars slave reparation claims).

[3] Although the doctrine of sovereign immunity does not bar claims against purely private defendants, sovereign immunity was only one of several alternative grounds for dismissal relied on by the courts in many of the lawsuits against the government.

consistently dismissed them on standing, justiciability, and/or untimeliness grounds. See, e.g., Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing forced labor reparations claims against private company on grounds of political question, comity and statute of limitations); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing slave labor claims against private defendant on political question grounds).[4]

Consistent with this long line of precedent, plaintiffs' claims against defendants must be dismissed on at least four independent grounds. The recent addition of nine new plaintiffs who contend, without alleging any connection to any defendant, that they were forced by unnamed persons to work without pay during the early decades of the last century, does nothing to save plaintiffs' claims from dismissal on grounds that include:

First, plaintiffs' claims fall far short of both constitutional and prudential standing requirements. Without alleging any connection between these plaintiffs and these defendants, plaintiffs seek reparations for events between 1619 and 1865 involving not plaintiffs but their ancestors, and for post-emancipation slavery through the 1930's. Plaintiffs do not allege that they personally have suffered any constitutionally cognizable injury that is fairly traceable to defendants. Rather, they seek – in direct contravention of the law of standing – to assert a

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[4] See also Deutsch v. Turner Corp., 317 F.3d 1005, 1028-29 (9th Cir.) (affirming dismissal of slave labor claims against private corporations as, inter alia, time-barred), amended by 324 F.3d 692 (9th Cir.), petition for cert. filed, 71 U.S.L.W. 3776 (U.S. June 2, 2003); Wolf v. Fed. Republic of Germany, 95 F.3d 536, 544 (7th Cir. 1996) (dismissing claims against private defendant on standing grounds); Kelberine v. Societe Internationale, 363 F.2d 989, 992 (D.C. Cir. 1966) (dismissing on justiciability and statute of limitations grounds reparations claims for World War II era slave labor against private company); Ungaro-Benages v. Dresdner Bank AG, No. 01-CV-2547 (S.D. Fla. Feb. 14, 2003) (memorandum opinion) (dismissing claims against private defendants for seized property on grounds of standing, statute of limitations, justiciability, and failure to state a claim), appeal filed, No. 03-11880 (11th Cir. 2003); In re Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 389 (D.N.J. 2001) (dismissing slave and forced labor claims as nonjusticiable); Fishel v. BASF Group, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230, at *26-33 (S.D. Iowa Mar. 11, 1998) (holding claims

generalized, class-based grievance. See infra § I.

Second, each of plaintiffs' causes of action is time-barred, and has been for many decades or even centuries. Plaintiffs' cursory tolling allegations do not revive their claims. See infra § II.

Third, plaintiffs' claims are nonjusticiable. Courts have declined to address the issue of reparations for former slaves through private litigation. Rather, during and immediately after the Civil War, and up to the present, the subject has been handled exclusively by Congress and the President. Given this history, there is no question that the issue of reparations for slavery is constitutionally committed to the political branches of the federal government. Moreover, because the Amended Complaint's allegations are so sweeping, the connections between the parties so tenuous, and the events in question so remote, there are no judicially discoverable and manageable standards for the Court to apply in addressing these claims. See infra § III.

Fourth, plaintiffs' Amended Complaint fails to state any cognizable claim. Plaintiffs attempt to convert an historical wrong into a present-day dispute through the use of inapplicable legal labels like "unfair competition." That attempt is unavailing. Plaintiffs cannot state a claim under present-day legal doctrines, let alone under the law in effect at the time of the alleged conduct. See infra § IV.

The infirmities in plaintiffs' Amended Complaint cannot be remedied by amendment. Accordingly, as set forth below, the Court should dismiss plaintiffs' claims with prejudice.

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arising out of corporation's forced-labor practices during World War II to be time-barred).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION.

Federal courts must determine standing at the outset of every case, see Wolf, 95 F.3d at 544, and a plaintiff bears the burden to allege facts "demonstrating that he is a proper party to invoke judicial resolution of the dispute." Renne v. Geary, 501 U.S. 312, 316 (1991) (quotation omitted). The Amended Complaint does not come close to meeting that burden. While it focuses on the issue plaintiffs seek to litigate – the practice of slavery – the doctrine of standing requires focus "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Flast v. Cohen, 392 U.S. 83, 99 (1968) (emphasis added).

This focus "involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise." Massey v. Helman, 196 F.3d 727, 739 (7th Cir. 1999) (quotation omitted). Specifically, Article III requires a plaintiff to establish "a personal injury" that is "fairly traceable to the defendant's allegedly unlawful conduct" and that is "likely to be redressed by the requested relief." Baaske v. City of Rolling Meadows, 191 F. Supp. 2d 1009, 1014 (N.D. Ill. 2002) (citing Allen v. Wright, 468 U.S. 737, 751 (1984); Johnson v. Allsteel, Inc., 259 F.3d 885, 887 (7th Cir. 2001)).

Beyond these constitutional limitations, "courts also impose 'prudential limitations' on the class of persons who may invoke federal jurisdiction." Massey, 196 F.3d at 739. These prudential limitations prompt courts to "refrain[] from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Locals 666 & 780 v. United States Dep't of Labor, 760 F.2d 141, 143-44 (7th Cir. 1985) (quoting Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 472 (1982)).

Prudential limitations also require that a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 499 (1975) (citing United States v. Raines, 362 U.S. 17, 22-23 (1960)).

The Amended Complaint falls far short of satisfying these standing requirements. As with all of the named plaintiffs in the original complaints, ten of the named plaintiffs in the Amended Complaint allege that they are "descendants of enslaved African-Americans," Am. Compl. ¶ 1, and they seek – just as they did by their separate actions – reparations for slavery as it existed between 1619 and 1865. As discussed below, these plaintiffs cannot meet the constitutional and prudential standing requirements necessary to pursue this historical wrong. The Amended Complaint now adds, for the first time, nine new plaintiffs (eight unidentified) who allege that they were held against their will and forced to work without compensation, after Emancipation, in the early decades of the last century. See Am. Compl. ¶¶ 75, 89, 91. But the addition of these new plaintiffs does nothing to save the Amended Complaint from dismissal because they, too, lack standing to sue these defendants. The Amended Complaint should be dismissed, just as numerous other complaints for slavery reparations have been dismissed. See, e.g., Cato, 70 F.3d at 1109-10; see also supra pp. 2-3 n.2 (citing numerous cases).

A. The Plaintiffs Who Allege They Are Descendants of Enslaved African-Americans Fail To Satisfy the Requirements of Article III.

The plaintiffs in this action who allege that they are the descendants of African-Americans who were enslaved in this country before 1865 cannot establish the constitutional standing requirements necessary to sue these defendants.

1. The Amended Complaint fails to demonstrate any "distinct and palpable" injury to these plaintiffs.

The most basic requirement for access to the courts, often described as "injury in fact," requires a plaintiff, at an "irreducible minimum," to "show that he personally has suffered

some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge, 454 U.S. at 472 (quotation omitted) (emphasis added); accord Massey, 196 F.3d at 739-40; Baaske, 191 F. Supp. 2d at 1014. A plaintiff cannot circumvent this requirement through general allegations of injury to a class to which plaintiff claims to belong. See Warth, 422 U.S. at 502. To establish standing, the plaintiff himself or herself must be among the injured. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992). And the plaintiff's injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Plotkin v. Ryan, 239 F.3d 882, 885-86 (7th Cir. 2001) (quotation omitted).

The Amended Complaint does not begin to satisfy this basic requirement. It recites the suffering of slaves generally in America during the period between 1619 and 1865 when slavery was permitted in some places, see Am. Compl. ¶¶ 9-26, and it alleges that plaintiffs' ancestors were enslaved. Yet a plaintiff cannot establish a "concrete and particularized" personal injury by merely identifying a tort victim and alleging some familial relationship. See, e.g., Simonsen v. Bd. of Educ., No. 01 C 3081, 2001 WL 1250103, at *7 (N.D. Ill. Oct. 17, 2001) (dismissing claims brought by wife and children of teacher suspended without pay) ("That they may be indirectly suffering the consequences of his being suspended does not create standing. . . ."); Patterson, 1995 WL 714372, at *2 n.4 (slave descendant "lacks standing to assert constitutional deprivations suffered by his ancestors"); Langley, 1995 WL 714378, at *2 n.3 (same); cf. infra § I.C.

Nor do the plaintiffs' sweeping, general allegations that African-Americans today are subjected to the vestiges of slavery, and lag behind other citizens in terms of "literacy, life expectancy, income and education," Am. Compl. ¶ 50, come close to alleging the required "injury-in-fact." Read in the light most favorable to plaintiffs, at best the Amended Complaint

alleges that some putative class members have been exposed to general social and economic injustices. As a matter of law, such exposure does not constitute the "concrete and particularized" individual injury required to establish standing. See, e.g., Plotkin, 239 F.3d at 886 ("[Plaintiff's injury] is too speculative and generalized to constitute an injury-in-fact for standing purposes.").

For example, in Cato, 70 F.3d 1103, the Ninth Circuit held that the plaintiff, who sued for slavery reparations and complained of "disparities in employment, income, and education," lacked standing "to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination." Id. at 1109-10. "Without a concrete, personal injury that is not abstract and that is fairly traceable to the government conduct that she challenges as unconstitutional, [plaintiff] lacks standing." Id. at 1109. Similarly, the United States District Court for the Northern District of California dismissed complaints seeking reparations for injuries that included "miseducation [and] lack of knowledge of self, culture, social facets, [and] indigenous religion." Miller, 1994 WL 224815, at *1. In dismissing the complaints, the court emphasized the absence of a particularized injury: "These claimed injuries are not of the character to create standing, as they do not represent the type of sufficiently particularized injury that courts have deemed constitutionally necessary in order to find the existence of a case or controversy." Id. at *1; accord Mahone, 1994 WL 225095, at *1 (same).

Like these prior plaintiffs who sought reparations for slavery, the named plaintiffs in this case who are the alleged descendants of enslaved African-Americans cannot satisfy the first and most basic requirement of constitutional standing – a concrete and particularized personal injury.

2. The Amended Complaint fails to allege any injury "fairly traceable" to these defendants.

In addition, plaintiffs fail to allege a sufficient connection between any "injury" and these defendants. To establish standing, a plaintiff must demonstrate "that the injury can be fairly traced to the challenged action of the defendant and not from the independent action of some third party not before the court." Perry v. Vill. of Arlington Heights, 186 F.3d 826, 829 (7th Cir. 1999) (citing Lujan, 504 U.S. at 560-61). Courts cannot confer standing where the causal link is tenuous, and where "[s]peculative inferences are necessary to connect the[] injury to the challenged actions of [defendants]." Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 45 (1976); see also Linda R.S. v. Richard D., 410 U.S. 614, 618-19 (1973); Shakman v. Dunne, 829 F.2d 1387, 1396-97 (7th Cir. 1987); Plotkin v. Ryan, No. 99 C 53, 1999 WL 965718, at *4 (N.D. Ill. Sept. 29, 1999), aff'd, 239 F.3d 882 (7th Cir. 2001). Thus, for example, even though deprivation of the opportunity for an integrated education was "one of the most serious injuries recognized in our legal system," that allegation of injury did not establish standing when the theory of causation by the defendants' acts was "attenuated at best." Allen, 468 U.S. at 756-57.

The Amended Complaint seeks to obtain relief from 18 present-day companies for the "vestiges" of events that occurred beginning in 1619 and extending to the abolition of slavery in 1865. See Am. Compl. ¶¶ 46, 49-52. Yet it does not identify any conduct committed at any time by any named defendant that is "fairly traceable" to any injury suffered by any plaintiff. Indeed, the Amended Complaint does not aver any contact between any one of these plaintiffs (none of whom were living in the period 1619–1865) and any one of these defendants (many of which did not even exist in that time period). Nor does the Amended Complaint allege even a connection between any defendant and any of plaintiffs' ancestors. Even at its most general level, in fact, the Amended Complaint does not aver a causal connection between the

actions of these defendants and the general social and economic inequities allegedly suffered by some members of the putative class.

Thus, plaintiffs here cannot satisfy the causal connection requirement of standing, just as prior plaintiffs seeking slavery reparations failed to meet this requirement. See, e.g., Cato, 70 F.3d at 1110; Patterson, 1995 WL 714372, at *2; Langley, 1995 WL 714378, at *2; Bey, 1996 WL 413684, at *1; Hamilton, 1994 WL 412433, at *1; Nelson, 1994 WL 398513, at *1; Farr, 1994 WL 285037, at *1. Put simply, "'[t]he remote possibility, unsubstantiated by allegations of fact, that the plaintiffs' situation might have been better had the defendants acted otherwise, and might improve were the court to afford relief' is simply insufficient" to establish standing. Shakman, 829 F.2d at 1394 (quoting Warth, 422 U.S. at 507) (brackets and citation omitted).

B. Prudential Limitations Also Prevent Adjudication of the Claims of the Alleged Descendants of Enslaved African-Americans.

In addition to its constitutional standing deficiencies, the Amended Complaint fails to meet prudential standing requirements. The federal courts are not "publicly funded forums for the ventilation of public grievances." Valley Forge, 454 U.S. at 473. Thus, federal courts refrain from "adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." Id. at 475 (quoting Warth, 422 U.S. at 499-500).

Yet plaintiffs are trying to use the federal courts for precisely that purpose: to "ventilate" a "generalized grievance" over an entire chapter in our nation's history. Their Amended Complaint, which starkly illustrates the reasons for prudential standing limitations, mirrors multiple prior complaints seeking reparations for identical grievances. Those prior attempts to ventilate these same grievances through the courts repeatedly have been dismissed on

standing grounds. For example, in Miller, 1994 WL 224815, at *1, after concluding that the plaintiffs failed to demonstrate an injury in fact, the district court found that prudential standing limitations also required dismissal: "Here, plaintiffs' grievances are claimed to arise from the fact of their inclusion in a racial group, and are therefore insufficient to overcome the problem that they constitute a 'generalized grievance' which does not give them standing to bring this lawsuit." Id. at *1; see Mahone, 1994 WL 225095, at *1 (same); accord Bell, 2001 WL 1041792, at *2 (same); Langley, 1995 WL 714378, at *2 (same); Patterson, 1995 WL 714372, at *2 (same). Similarly, the Ninth Circuit agreed that a slavery reparations plaintiff lacked standing to pursue "a generalized, class-based grievance." Cato, 70 F.3d at 1109; id. at 1109-10 ("Neither does [this plaintiff] have standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination."). The legislature, not the judiciary, remains the appropriate forum for plaintiffs' grievances. See id. at 1105; cf. infra § III.

C. Plaintiffs Lack Third-Party Standing To Sue for Injuries to Their Ancestors.

To the extent that plaintiffs seek redress for the injuries suffered by their ancestors, constitutional and prudential standing limitations – as well as state law prohibitions – foreclose those claims as well.

A litigant in federal court "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth, 422 U.S. at 499; see also Massey, 196 F.3d at 740 (federal courts "hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of rights of third persons not parties to the litigation") (quotation omitted). Before a litigant is permitted to seek vindication of the rights of some third party, the plaintiff must establish not only (1) that the third party would have standing to sue, but also (2) that the plaintiff himself or herself (a) has suffered an injury-in-fact, (b) has a close relation to the third party, and that (c) there exists some

hindrance to the third party's ability to protect his or her own interests. See Massey, 196 F.3d at 739-41. Here, plaintiffs have failed to establish any of these requirements.

First, although plaintiffs apparently seek to stand in the shoes of their ancestors, the Amended Complaint does not identify any conduct committed by any named defendant that is "fairly traceable" to any injury suffered by any one of those ancestors.[5] Thus, the Amended Complaint fails to establish that plaintiffs' ancestors would themselves have had standing to sue these defendants. Yet, inherent in the law of third-party standing is the requirement that the third party on whose behalf the suit is being brought actually possess a valid legal claim against the defendant. Cf. Warth, 422 U.S. at 516 (an association can have standing to sue as the representative of its members "only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit"). Where, as here, the complaint fails to show that the third party would have standing to sue, a fortiori there can be no derivative action to assert that third party's rights – there are simply no rights to enforce. On this ground alone, plaintiffs' attempt to assert the claims of their ancestors must fail.

Second, prudential standing limitations (and state law prohibitions) preclude plaintiffs from litigating the claims of their now-deceased ancestors.

(a) As discussed supra, plaintiffs cannot demonstrate that they have suffered an injury-in-fact. The absence of a cognizable injury to these plaintiffs precludes them from asserting the rights of their ancestors. See Massey, 196 F.3d at 739-40 (physician lacked standing to assert third-party claims on behalf of [alleged victims] in part because he lacked a constitutionally sufficient injury-in-fact).

(b) Moreover, plaintiffs lack a legally sufficient relation with the ancestors on

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[5] Indeed, the Amended Complaint does not aver any contact whatsoever between any

whose behalf they purport to sue. No plaintiff alleges that he or she has been appointed executor, administrator, or any other type of duly-appointed representative of the estates of any of their ancestors. Only such a representative has standing to assert causes of action belonging to a decedent. The "well-established rule . . . is that the executor or administrator of a decedent's estate has standing to file suit on behalf of the decedent, but the legatees, heirs, and devisees have no such standing." McGill v. Lazzaro, 416 N.E.2d 29, 31 (Ill. App. Ct. 1980) (affirming dismissal of action brought by decedent's children for lack of standing).[6] Thus, for example, the Southern District of Florida recently dismissed a claim seeking compensation for property seized during World War II on this very ground, among others. See Ungaro-Benages, No. 01-CV-2547, mem. op. at 32-33 (decedent's heirs lacked capacity to sue for seized property; such claims could

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defendant and any one of plaintiffs' ancestors.

[6] The law in the other jurisdictions mentioned in the Amended Complaint would lead to the same result. See N.J. Stat. Ann. § 2A:15-3 (2003) ("[e]xecutors and administrators may have an action for any trespass done to the person . . . of their testator or intestate"); Estate of Maselli by Maselli v. Silverman, 606 F. Supp. 341, 343 (S.D.N.Y. 1985) (noting that New York law "requires all surviving actions be brought by a legally appointed representative"); Frazier v. Wynn, 472 S.W.2d 750, 752 (Tex. 1971) ("It is settled in Texas that the personal representative of the estate of a decedent is ordinarily the only person entitled to sue for the recovery of property belonging to the estate."); Snipes v. Estates Admin., Inc., 28 S.E.2d 495, 498 (N.C. 1944) (noting that the "better, and more orderly, procedure" is for administrator of estate to bring action on behalf of estate rather than heirs bringing suit); Berryhill v. Nichols, 158 So. 470, 471 (Miss. 1935) (action for injuries to decedent outside scope of wrongful death act must be maintained by decedent's personal representative and "not by the next of kin or heirs at law"); S.C. Code Ann. § 62-3-703(c) (2002) ("personal representative of a decedent . . . has same standing to sue . . . as his decedent had immediately prior to death"); Strader v. Metro. Life Ins. Co., 105 S.E. 74, 76 (Va. 1920) (noting that legatee may not maintain action to recover property of decedent without approval from personal representative of decedent's estate). Finally, current Louisiana law (La. Civ. Code Ann. art. 2315.1 (2003)) provides that designated relatives may bring action for damages caused to their decedent by offense or quasi-offense (the civil law analogues to tort), but the same statute specifies that any such action must be brought within one year of the death of the relative whose rights are sought to be asserted, which unquestionably has not happened here. This time period is "peremptive" under Louisiana law, and thus not subject to tolling or extension. See Ayo v. Johns-Manville Sales Corp., 771 F.2d 902, 906-07 (5th Cir. 1985) (applying Louisiana law and affirming judgment against widow and surviving children who failed to bring suit within one year of death).

be pursued only by the personal representative of the estate).[7]

(c) In addition, although the Amended Complaint asserts generally that there were barriers preventing newly emancipated African-Americans from asserting their legal rights, see Am. Compl. ¶¶ 192-196, there are no allegations that these plaintiffs' ancestors – on whose behalf these plaintiffs purport to sue – sought to and were prevented from ever asserting their rights following the abolition of slavery. See, e.g., Massey, 196 F.3d at 741 ("[t]here is no allegation . . . that the [alleged victims] have any obstacle preventing them from properly asserting their own rights"); cf. Johnson, 45 App. D.C. at 441 (reparations claims by three former slaves in 1916).

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[7] Moreover, all of the claims plaintiffs seek to assert on behalf of their ancestors were abated and extinguished no later than the dates of death of the various persons in whose favor they might have originally accrued. Even if their ancestors had a cause of action arising from pre-emancipation slavery (cf. infra § IV.A), such an action must necessarily have accrued no later than the enactment of the Thirteenth Amendment in 1865, and there is no dispute that all such ancestors are now deceased. "At common law, when a person died any personal tort causes of action which he might have had died with him." Burgess v. Clairol, Inc., 776 F. Supp. 1278, 1283 (N.D. Ill. 1991) (citation omitted). All states have now modified this universal common-law rule by statute, enacting so-called survival acts. However, these survival acts cannot provide any benefit to plaintiffs, because virtually without exception they were first enacted well after 1865 – indeed, in many cases, not until the 20th century. See, e.g., Wilmere v. Stibolt, 504 N.E.2d 916, 917 (Ill. App. Ct. 1987) (Illinois Survival Act was first enacted in 1872); Flight Line, Inc. v. Tanksley, 608 So. 2d 1149, 1167 (Miss. 1992) (claims for "injuries or torts done to the person" did not survive under Mississippi law prior to 1871) (quotation omitted); Hofer v. Lavender, 679 S.W.2d 470, 471-72 (Tex. 1984) (common law rule in Texas first changed by adoption of survival act in 1895); Hoke v. Atl. Greyhound Corp., 38 S.E.2d 105, 108 (N.C. 1946) (tort claims for personal injury did not survive under North Carolina law prior to 1915 amendment of survival act); Fontheim v. Third Ave. Ry., 12 N.Y.S.2d 90, 92 (App. Div. 1939) (noting 1935 enactment of first New York statute providing for survival of causes of action for personal injury); Ferguson v. Charleston Lincoln/Mercury, Inc., 544 S.E.2d 285, 288 (S.C. Ct. App. 2001) (noting that personal injury claims did not survive death in South Carolina prior to 1905 amendment of statute), aff'd, 564 S.E.2d 94 (S.C. 2002); see also Miller v. Am. Mut. Liab. Ins. Co., 42 So. 2d 328, 330 (La. Ct. App. 1949) ("[B]oth at common law and at civil law a right of action for damages for personal injuries does not survive in case of death [but rather] died with the death of the injured party. . . .").

In light of these same incurable deficiencies, other plaintiffs similarly seeking reparations for slavery have been denied third-party standing. See, e.g., Patterson, 1995 WL 714372, at *2 n.4 (alleged slave descendant "lacks standing to assert constitutional deprivations suffered by his ancestors"); Langley, 1995 WL 714378, at *2 n.3 (same).

D. The New Plaintiffs Who Allege They Were Formerly Enslaved Do Not Have Standing To Sue These Defendants.

The recent addition of nine plaintiffs who allege that they were enslaved during the early decades of the last century does not cure the standing defects in this action. These new plaintiffs also fail to demonstrate a fundamental constitutional requirement of standing: a causal connection between their alleged injury and the challenged actions of these defendants. The Amended Complaint does not allege that any defendant participated in the enslavement of any one of these nine plaintiffs. Indeed, the Amended Complaint does not aver any contact whatsoever between any defendant and any one of these nine plaintiffs – let alone any wrongdoing by a defendant that injured one of these plaintiffs personally. At most, the Amended Complaint alleges, "[u]pon information and belief," that "in or about the 1920's-1930's some/or all of Defendants corporate entities doing business in Mississippi or Louisiana had reason to know of the construction of forms of slavery yet failed to take steps to eliminate same." Am. Compl. ¶ 90. This vague assertion adds nothing to the Amended Complaint, and fails to establish standing on behalf of these nine plaintiffs. See, e.g., Simon, 426 U.S. at 45 (a plaintiff cannot establish a causal connection where "[s]peculative inferences are necessary to connect the[] injury to the challenged actions of [defendants]"); Shakman, 829 F.2d at 1394 ("'[t]he remote possibility, unsubstantiated by allegations of fact, that the plaintiffs' situation might have been better had the defendants acted otherwise, and might improve were the court to afford relief' is simply insufficient" to establish standing) (quoting Warth, 422 U.S. at 507) (brackets

and citation omitted).

The Amended Complaint itself makes clear that any injuries suffered by these nine plaintiffs were caused by the independent actions of unidentified third parties who are not before the Court, rather than by the defendants. See Am. Compl. ¶¶ 75, 89, 91. Accordingly, like the other named plaintiffs, these nine newly added plaintiffs have no standing to maintain this lawsuit.

II. THE STATUTES OF LIMITATIONS BAR PLAINTIFFS' CLAIMS.

A. All of Plaintiffs' Claims Are Barred by the Statutes of Limitations.

Plaintiffs' Amended Complaint fails for the additional, independent reason that all of the claims are time-barred. These claims – which are at a minimum decades, and in most cases centuries, old – are barred by statutes of limitations in every jurisdiction. See, e.g., Am. Compl. ¶ 9 (millions enslaved from 1619 to 1865); id. ¶ 89 (C. Doe alleges he was "enslaved through the 1960's"). Under Illinois law, for example, all state common law claims are barred by the statutes of limitations:

- Intentional Infliction of Emotional Distress – two years. See, e.g., Dahl v. Fed. Land Bank Ass'n of W. Ill., 572 N.E.2d 311, 314 (Ill. App. Ct. 1991).
- Conspiracy – three years. See, e.g., People v. Peebles, 457 N.E.2d 1318, 1322 (Ill. App. Ct. 1983); 720 Ill. Comp. Stat. 5/3-5 (2003).
- Accounting – five years. See, e.g., Schlossberg v. Corrington, 400 N.E.2d 73 (Ill. App. Ct. 1980); 735 Ill. Comp. Stat. 5/13-205 (2003).
- Conversion – five years. See, e.g., Bontkowski v. Smith, 305 F.3d 757 (7th Cir. 2002); 735 Ill. Comp. Stat. 5/13-205 (2003).
- Unjust Enrichment – five years. See, e.g., Burns Philp Food, Inc. v. Cavalea Cont'l Freight, Inc., 135 F.3d 526 (7th Cir. 1998); 735 Ill. Comp. Stat. 5/13-205 (2003).

Plaintiffs' state statutory claims also are time-barred:

- Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. &

Com. Code Ann. § 17.41 (Vernon 2002) – two years. See Tex. Bus. & Com. Code Ann. § 17.565 (Vernon 2002).

- Illinois Consumer Fraud and Deceptive Business Act, 815 Ill. Comp. Stat. 505/1 (2003) – three years. See, e.g., 815 Ill. Comp. Stat. 505/10a(3) (2003); Dreisilker Elec. Motors, Inc. v. Rainbow Elec. Co., 562 N.E.2d 970 (Ill. App. Ct. 1990).

- New York Consumer Protection from Deceptive Acts and Practices Laws, N.Y. Gen. Bus. Law §§ 348, 350 – three years. See, e.g., Soskel v. Handler, 736 N.Y.S. 2d 853 (N.Y. Sup. Ct. 2001).

- New Jersey Unfair Trade Practice Law, N.J. Stat. Ann. § 56:8-1 (2003) – six years. See, e.g., Mirra v. Holland Am. Line, 751 A.2d 138 (N.J. Super. Ct. App. Div. 2000).

- Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. Ann. § 51:1401 (2003) – one year. See La. Rev. Stat. Ann. § 51:1409(e) (2003).

- California Unfair Competition Act, Cal. Bus. & Prof. Code § 17200 – four years. See Cal. Bus. & Prof. Code § 17208; Snapp & Assocs. Ins. Servs., Inc. v. Malcolm Bruce Burlingame Robertson, 96 Cal. App. 4th 884, 891 (Cal. Ct. App. 2002) (statute of limitations begins to run on 17200 claim "irrespective of whether plaintiff knew of its accrual") (quotation omitted).[8]

Plaintiffs' federal claims also are barred by the statutes of limitations:

- Piracy – five years. 18 U.S.C. § 3282 (2000).

- 42 U.S.C. § 1982 – two years. See, e.g., Honorable v. Easy Life Real Estate Sys., Inc., 182 F.R.D. 553 (N.D. Ill. 1998).

- Alien Tort Statute – at most, ten years. See, e.g., Deutsch, 317 F.3d at 1005; Iwanowa, 67 F. Supp. 2d at 462.[9]

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[8] The California statutory claim, asserted in the Hurdle complaint, was not included in the Amended Complaint. Cf. infra n.57.

[9] The "standard and almost universal" practice under federal law has been to borrow the statute of limitations applicable to the most analogous cause of action under the law of the state in which the federal court sits. 19 Charles A. Wright, et al., Fed. Prac. & Proc. § 4519, at 595 (1996); see, e.g., North Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) ("Since 1830, 'state statutes have repeatedly supplied the periods of limitation for federal causes of action' when federal legislation made no provision.") (quoting Auto. Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 703-04 (1966)); Wilson v. Garcia, 471 U.S. 261 (1985) (adopting state law personal injury limitation period for claims under 42 U.S.C. § 1983).

Finally, plaintiffs' international law claim of "crimes against humanity" also is time-barred. Plaintiffs contend, erroneously, that there is no statute of limitations for such a claim, citing the Rome Statute of the International Criminal Court ("ICC") ("The Rome Statute"), 17 July 1998, and Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, in support. See Am. Compl. ¶ 190 & n.85. In fact, the federal courts consistently have applied statutes of limitations to civil claims for crimes against humanity. See, e.g., Papa v. United States, 281 F.3d 1004, 1012 (9th Cir. 2002) (claims under the ATS); Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 550-51 (D.D.C. 1981) (claims under the ATS and for "assault, battery, false imprisonment, intentional infliction of emotional distress and/or intentional infliction of cruel, inhuman and degrading treatment") (quotation omitted), aff'd on other grounds, 726 F.2d 774 (D.C. Cir. 1984); Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 117-19 (D.D.C. 2003) (claims for "crimes against humanity, war crimes, and other violations of international law and domestic law"). The longest limitations period any court has applied to such a claim is ten years under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note § 2(c) (2000). See Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 192-93 (D. Mass. 1995).

Plaintiffs' reliance on the Rome Statute for an exception is misplaced. First, the United States has not ratified this treaty.[10] Second, Article 29 of the Rome Statute states that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." Thus, for nations that have ratified it, Article 29 only supersedes the statute of limitations applicable to "crimes within the jurisdiction of the Court." This civil action

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[10] See Ratification Status of the Rome Statute at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N6>.

obviously is not within the criminal jurisdiction of the ICC. Third, for those nations that have ratified it, the ICC has jurisdiction only over crimes "committed after the entry into force of this Statute," – i.e., July 17, 1998. See Rome Statute, art. 11. The Amended Complaint alleges only events that occurred long before July 17, 1998.

Nor does the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968 (the "Convention"), save plaintiffs' claims. First, the United States is not a signatory to the Convention.[11] Second, the Convention applies only to the "prosecution and punishment of the crimes referred to in articles I and II. . . ," Convention, art. IV (emphasis added), not to civil claims. See Handel v. Artukovic, 601 F. Supp. 1421, 1431 (C.D. Cal. 1985). Thus, these international criminal treaties do not save plaintiffs' claims, which have been barred for many decades by the statutes of limitations.

Consequently, it is not surprising that numerous other complaints seeking slavery reparations were dismissed on statutes of limitations grounds. See, e.g., Cato v. United States, No. C94-01228CW, 1994 U.S. Dist. LEXIS 7908 (N.D. Cal. June 7, 1994) (slavery reparations complaint time-barred), aff'd on alternative grounds, 70 F.3d 1103, 1107-08 n.6 (9th Cir. 1995); see also Bey, No. 02-705, report and rec., adopted, No. 02-705, mem. order; supra pp. 2-3 n.2 (citing numerous cases). Statutes of limitations also resulted in the dismissal of comparatively recent reparations claims stemming from World War II.[12] The claims at bar should likewise be

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[11] See Ratification Status of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity at <http://193.194.138.190/html/menu3/b/treaty6.htm>.

[12] See, e.g., Deutsch, 317 F.3d at 1028-29; Hair v. United States, 52 Fed. Cl. 279 (2002); Hohri v. United States, 847 F.2d 779 (Fed. Cir. 1988); Ungaro-Benages, No. 01-CV-2547, mem. op. at 23-27; Iwanowa, 67 F. Supp. 2d at 424; Fishel, 1998 U.S. Dist. LEXIS 21230; Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States, 373 F.2d 356 (Ct. Cl. 1967); Sampson v. Fed. Republic of Germany, 975 F. Supp. 1108 (N.D. Ill. 1997), aff'd, 250 F.3d 1145 (7th Cir. 2001); Handel, 601 F. Supp. at 1434.

dismissed.

B. Equitable Tolling, the Discovery Rule, and the Continuing Violation Doctrine Do Not Revive Plaintiffs' Claims.

Acknowledging that their claims are well beyond any limitations period, plaintiffs attempt to plead equitable tolling, the discovery rule, and the continuing violation doctrine. See Am. Compl. ¶¶ 189-204. These doctrines cannot revive plaintiffs' claims. Plaintiffs do not seek recovery for any act committed by any defendant against any plaintiff. They seek to impose successor liability on defendants for unpled wrongful acts by often unnamed predecessors against unidentified slaves many decades before most of the named plaintiffs were born. If cognizable pre-emancipation claims ever existed, they were owned by the former slaves themselves and became barred when the statutes of limitations expired in the nineteenth century. Post-emancipation claims also lapsed decades ago.

None of the doctrines cited in the Amended Complaint can revive claims already barred by statutes of limitations. They can only suspend the running of limitations periods before claims are barred. See, e.g., Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 186 (7th Cir. 1985).

Here, plaintiffs make a number of conclusory allegations based on events that occurred long after the statutes of limitations had already barred their claims. For example, plaintiffs allege that they were "unable to secure records with regards to their ancestors" and, thus, unable to acquire an accounting from defendants. Am. Compl. ¶ 200. Whether plaintiffs, born long after these claims were barred, could secure certain records or acquire an accounting is irrelevant to any tolling doctrine. Similarly, plaintiffs refer to unsuccessful efforts to raise reparations issues in Congress, but allege that these efforts date back only 11 years. See id. ¶ 195. None of these events could revive lapsed pre-emancipation claims. And because these

events have no connection to the newly-pled claims of post-emancipation unlawful enslavement by unidentified persons, they cannot avoid the bar of those claims either. Accordingly, neither the equitable tolling doctrine, nor the discovery rule, nor the continuing violation doctrine can revive plaintiffs' barred claims.

1. The equitable tolling doctrine does not revive plaintiffs' claims.

Equitable tolling occurs only if (1) "the defendant has actively misled the plaintiff," (2) "the plaintiff has been prevented from asserting his or her rights in some extraordinary way," or (3) "the plaintiff has mistakenly asserted his or her rights in the wrong forum." Clay v. Kuhl, 727 N.E.2d 217, 223 (Ill. 2000) (citing Ciers v. O.L. Schmidt Barge Lines, Inc., 675 N.E.2d 210 (Ill. App. Ct. 1996)). Equitable tolling must be applied with caution. See Ciers, 675 N.E. 2d at 214; see also United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998) ("Federal courts invoke the doctrine of equitable tolling 'only sparingly.'"). Conclusory assertions will not suffice. "To avoid dismissal, a complaint asserting equitable tolling must contain particularized allegations that the defendant 'actively misled' plaintiff." Iwanowa, 67 F. Supp. 2d at 467 (emphases added). And a plaintiff alleging equitable tolling through self-concealing conduct must have acted with due diligence. See, e.g., Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996).

Plaintiffs fail to plead, let alone particularize, the required elements of equitable tolling. For example, they do not allege that any defendant misled any plaintiff or any of their ancestors in any way prior to the running of the statute of limitations. Nor do they allege that they or their ancestors timely asserted their rights in the wrong forum. They merely assert in conclusory fashion that unspecified persons prevented plaintiffs and their ancestors from asserting claims for unrelated reasons.

For example, plaintiffs claim that "shipping manifests," "human cargo lists," and

other documents were unavailable and that family names were changed over time. See Am. Compl. ¶ 200. But they do not explain how this caused their ancestors to delay seeking redress in court.

Plaintiffs also complain of the inaccessibility of corporate histories and records. Id. ¶ 202. However, the difficulty in reconstructing relevant records more than a century after the events in issue is a fundamental reason for statutes of limitations, not a justification for ignoring them. See Freeman v. New Jersey, 788 A.2d 867 (N.J. Super. Ct. App. Div. 2002) (rejecting equitable tolling argument); accord Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitations are "practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost"); see also Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993) (policy of statute of limitations is to bar stale suits), aff'd, 512 U.S. 477 (1994).

Finally, plaintiffs allege that defendants' conduct was self-concealing because "there [was] no reason for the slaves to know or be aware that their lives were insured; that financing deals controlled their lives; or that profits far a field from their miserable existence occurred." Am. Comp. ¶ 198. But plaintiffs' complaint does not contain any "particularized allegations that the defendant[s] actively misled" plaintiffs prior to the running of the statute of limitations. Iwanowa, 67 F. Supp. 2d at 467 (emphases added). Accordingly, equitable tolling did not halt the running of the statutes of limitations on plaintiffs' claims.

2. The discovery rule does not revive plaintiffs' claims.

Nor does the discovery rule revive plaintiffs' claims. Under the federal discovery rule, "a claim accrues once the party performs the alleged unlawful act and once the party bringing a claim discovers an injury resulting from this unlawful act." Tolle v. Carroll Touch,

Inc., 977 F.2d 1129, 1139 (7th Cir. 1992); see also United States v. Duke, 229 F.3d 627, 630 (7th Cir. 2000); Sellars v. Perry, 80 F. 3d 243, 245-46 (7th Cir. 1996). The same rule applies under Illinois law. See Kumpfer v. Shiley, Inc., 741 F. Supp. 738, 739 (N.D. Ill. 1990). While the date on which a plaintiff has or should have the knowledge necessary to trigger the limitations period often is a question of fact, the question may be answered as a matter of law if, as here, the answer is clear from the pleadings. See, e.g., Horn v. A.O. Smith Corp., 50 F.3d 1365, 1370 (7th Cir. 1995) ("Despite the fact-specific nature of this inquiry, the point at which a cause of action accrues may be determined as a matter of law if the relevant facts are undisputed and they lead to but one conclusion").

Plaintiffs try to evade the statutes of limitations by alleging that slaves "were not privy to the causes and extent of the harms they suffered," that slaves were "in large part uneducated, unsophisticated, and . . . in extremely difficult circumstances," and that "[t]o impute to these individuals . . . what amounts to an omniscient knowledge of their rights, the violations they suffered, those that were the cause of and those that illegally profited from those violations is an incredible fiction." Am. Compl. ¶¶ 192-193.[13] But the discovery rule does not require them to possess such knowledge. Plaintiffs' ancestors discovered their immediate (not latent) injury at the time that they were enslaved. Thus, the discovery rule did not delay the accrual of plaintiffs' claims.[14]

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[13] Plaintiffs also refer to efforts in Congress, repeated for the past eleven years, to obtain legislative relief for slavery. See Am. Compl. ¶ 195. But plaintiffs do not explain how these failed legislative efforts, more than a century after emancipation, invoke the discovery rule.

[14] Moreover, the discovery rule is inapplicable as a matter of law to certain of plaintiffs' statutory claims. Canal Marine Supply, Inc. v. Outboard Marine Corp., 522 So. 2d 1201, 1204 (La. Ct. App. 1988) (one-year limitations period applicable to Lousiana unfair trade practices and consumer protection claim is "peremptive," and thus subject neither to the discovery rule nor any other tolling doctrine); Wender v. Gilberg Agency, 716 N.Y.S. 2d 40, 41-42 (App. Div. 2000) (three-year limitations period applicable to claims under N.Y. Gen. Bus. Law § 349 not subject

3. The continuing violation doctrine does not revive plaintiffs' claims.

Plaintiffs also allege that the "continuing violation" doctrine tolls the statutes of limitations. See Am. Compl. ¶ 204. But the continuing violation doctrine governs accrual, not tolling. See Heard v. Sheahan, 253 F.3d 316, 319 (7th Cir. 2001). It does not save a claim arising from "a single event giv[ing] rise to continuing injuries." Id. "A continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation." Diliberti v. United States, 817 F.2d 1259, 1263 (7th Cir. 1987) (quoting Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1989)).

Plaintiffs claim that defendants' alleged "failure to provide an accounting to the plaintiffs constitutes a continuing violation that tolls" the statutes of limitation. Am. Compl. ¶ 204. This alleges a single event with purported continuing injuries, not a "continuing violation." If, in fact, any plaintiff ever asked any defendant to provide an accounting, and putting aside whether any plaintiff actually had a claim to an accounting, that plaintiff could have sued that defendant the first time the defendant refused to provide an accounting. Indeed, under plaintiffs' theory, any unredressed claim would constitute a "continuing" violation, such that the statute of limitations would be meaningless.

Plaintiffs also fail to allege any date on which the purported duty to provide an accounting arose. (In fact, defendants have no such duty. See infra § IV.B.1.) A gap in time between alleged acts (here, the alleged enslavement and the alleged failure to provide an accounting) is sufficient to dissociate the acts, meaning that there is no "continuing violation." See Garrison v. Burke, 165 F.3d 565, 569-70 (7th Cir. 1999) (two years between acts); Selan v. Kiley, 969 F.2d 560, 566 (7th Cir. 1992) (same). Thus, the continuing violation doctrine does

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to extension by discovery rule).

not revive plaintiffs' claims.

III. PLAINTIFFS' CLAIMS ARE BARRED BY THE POLITICAL QUESTION DOCTRINE.

Plaintiffs' claims fail separately as a matter of law under the political question doctrine, which precludes a court from adjudicating claims that infringe on the exclusive discretion of the political branches. See Baker v. Carr, 369 U.S. 186, 210 (1962); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 259-61 (1796). This doctrine is firmly rooted in constitutional separation of powers and, like standing, imposes "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." Allen, 468 U.S. at 750 (citation and quotation omitted).[15] The clearest modern articulation of this doctrine is in Baker v. Carr:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

Dismissal for lack of subject matter jurisdiction on political question grounds is warranted if any one of the six Baker factors is present, let alone, as here, when virtually all of them are implicated. Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum

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15 See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the

Laden Aboard the Tanker Dauntless Colocotronis, 577 F.2d 1196, 1203 (5th Cir. 1978).[16] First, the questions raised by these actions – i.e., reparations to former slaves and peace-making in the wake of the Civil War – were consistently committed to the President and Congress, both during and after the Civil War. See infra § III.A. Additionally, these historical claims are not amenable to judicially discoverable and manageable standards for resolution. See infra § III.B. Finally, the remaining Baker factors also are implicated and independently justify dismissal. See infra § III.C.

It is thus not surprising that federal courts have widely concluded that reparations claims raise nonjusticiable political questions, in both slavery and other contexts:

> While plaintiff may be justified in seeking redress for past and present [racial] injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances.

Cato, 70 F.3d at 1105 (quoting district court order); id. at 1110 ("[T]here is no cognizable avenue for litigating a complaint about the judgment calls of legislators in their legislative capacity."); see also supra p. 4 & n.4. The claims here should likewise be dismissed.

A. Plaintiffs' Claims Are Barred Because There Is a Demonstrable Constitutional and Historical Commitment of the Reparations Issue to the Executive and Legislative Branches.

Dismissal is required because there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." Baker, 369 U.S. at 217. The political question doctrine bars interference with the powers of the President and Congress (i) to

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halls of Congress or the confines of the Executive Branch."); Iwanowa, 67 F. Supp. 2d at 484.

[16] See also Baker, 369 U.S. at 216; Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52, 65 (D. D.C. 2001) ("If any of these six factors is inextricable from the case at bar, then dismissal for non-justiciability on the ground of a political question's presence is appropriate") (internal quotations omitted), aff'd, No. 01-7169, 2003 WL 21473010 (D.C. Cir. June 27, 2003); Kwan v. United States, 84 F. Supp. 2d 613, 622 (E.D. Pa. 2000), aff'd, 272 F.3d 1360 (Fed. Cir. 2001).

make war and set the conditions of peace (including the treatment of former slaves),[17] (ii) to suppress rebellion, (iii) to settle Civil War-related property and reparations claims, and (iv) to grant amnesty. See Baker, 369 U.S. at 211-13; see also Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (war making powers "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").[18]

Moreover, dismissal is separately required by the historical record showing that these issues have been, in fact, addressed by the political branches of government, not the judiciary. As the Supreme Court noted in Baker v. Carr:

> Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

369 U.S. at 211-12 (emphasis added); see Made in the USA Found. v. United States, 242 F.3d 1300, 1311 n.27 (11th Cir. 2001) ("history may inform the inquiry inasmuch as it fleshes out the manner in which the executive and legislative branches have sought to exercise and accommodate their textually committed foreign affairs powers over time" and "may illuminate

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[17] The Supreme Court noted in Baker v. Carr, "the cessation of hostilities does not necessarily end the war power . . . [which] includes the power to remedy the evils which have arisen from its rise and progress and continues during that emergency." 369 U.S. at 213 (quotations omitted).

[18] This is not the first time a challenge has been brought to the political arrangements that ended the Civil War chapter of American history. Indeed, the Supreme Court long ago held that courts should not interject themselves into the Civil War-era efforts of the President and Congress to bring the war to an end and to attempt to compensate and protect former slaves – the very subject of this litigation. See Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 54-55, 61-62 (1867) (refusing to consider challenge to the Reconstruction Acts of 1867, which effectively imposed martial law in the post-war South to protect former slaves, because it involved a non-justiciable political question); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499-501 (1866) (refusing to enjoin the President from performing his duties as commander-in-chief in enforcing Reconstruction Acts because "general principles . . . forbid judicial interference with the exercise of Executive discretion").

any prudential considerations governing the advisability or inadvisability of judicial intervention in a given controversy"), cert. denied, 534 U.S. 1039 (2001). Thus, in assessing this Baker factor, the Court need not precisely allocate responsibility to any political branch, but need only "consider whether the issue in question is one whose resolution is best left to the political branches of government." Greenberg v. Bush, 150 F. Supp. 2d 447, 452 (E.D.N.Y. 2001).

During and after the Civil War, Congress and the President considered reparations for former slaves along with other important national goals, including:

- the need to end the war with a consensus that could preserve the Union;
- the need to abolish slavery throughout the Union, including in the politically important border states;
- the need to provide civil liberties and political protections to freed slaves; and
- the need to provide an amnesty program to induce Confederate citizens to return to the Union.[19]

The resulting political choices led to civil rights legislation and Constitutional amendments for the protection of freed slaves, rather than to reparations programs. See, e.g., Eric Foner, Politics and Ideology in the Age of the Civil War 131-44 (1980). These choices, driven by myriad historical, political, social and economic factors that were considered by Presidents and Congress, are precisely those which the "political question" doctrine bars a court from revisiting.

1. Efforts at the Civil War's outset to punish rebels and to induce defections from the Confederacy.

How to deal with slavery was part of the war plans even early in the Civil War. To punish those in rebellion and to induce them to rejoin the Union, President Lincoln and the

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[19] In considering a motion under Fed. R. Civ. P. 12(b), the Court may take judicial notice of official acts of government. See Menominee Indian Tribe v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998).

Congress took the first steps toward ending slavery and providing relief for freed slaves, while not alienating the important "border" regions of Kentucky, Missouri, Maryland and western Virginia. The threat of property confiscations and the promise of amnesty were aimed at undermining the rebellion.[20]

By September 1862, Lincoln issued a proclamation that in the next Congress he would recommend financial aid to states that (i) rejected the Confederacy and (ii) adopted "immediate or gradual abolishment of slavery." 12 Stat. 1267 (1862). Lincoln also promised that on January 1, 1863, he would take the controversial step of freeing slaves in states still in rebellion, again tying freedom for slaves to the President's war effort.

2. Later wartime efforts to address Freedmen refugee problems.

On January 1, 1863, after a series of Union victories, Lincoln issued the Emancipation Proclamation. 12 Stat. 1268-69 (1863). See also The Wartime Genesis of Free Labor, 1861-1865 at 33, in Freedom: A Documentary History of Emancipation 1861-1867 (Ira Berlin et al. eds., 1990) ("History of Emancipation").[21] Expressly relying on his war-making

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[20] For example: In 1861, Congress passed the First Confiscation Act as the first step to punish persons who participated in the rebellion by confiscating their property. This legislation also freed slaves who had been forced to join the Confederate army. 12 Stat. 319 (1861). Later, in 1862, Congress prohibited the U.S. military from returning escaped slaves to their owners. 12 Stat. 354 (1862). Congress abolished slavery in the District of Columbia. 12 Stat. 376 (1862). Congress enacted the Direct Tax Act, which imposed a tax lien on Confederate real property and authorized the President to confiscate such property in areas occupied by the Union army. 12 Stat. 422-26 §§ 1, 5-7, 11 (1862). This Act specifically provided for the use of confiscated Confederate property to fund relief for freed slaves. Congress abolished slavery in the United States territories. 12 Stat. 432 (1862). The Militia Act was passed to authorize the President to employ "persons of African descent" in the armed forces and to free them from any owners who had supported the Confederacy. 12 Stat. 597-600 §§ 12, 13 (1862). And Congress passed the Second Confiscation Act, 12 Stat. 589-92 (1862), which freed all escaped slaves who were owned by "persons who shall hereafter be engaged in rebellion against the government of the United States." Id.

[21] This book contains a reprinted collection of a number of the orders, proclamations and directives issued by the Union Army and members of the Executive Branch during and after the

powers as commander-in-chief, Lincoln issued the proclamation "as a fit and necessary war measure for suppressing . . . rebellion." 12 Stat. 1268-69. Indeed, the political and war-related nature of this proclamation is confirmed by the remarkable fact that it did not purport to emancipate slaves in the states loyal to the Union, but only in those areas then in rebellion. See id.[22] Throughout the war, Lincoln's war- and peace-making powers then continued to be used to ensure proper treatment of freed slaves.[23]

Other initiatives similarly confirm that relief for former slaves was integral to the Union's war- and peace-making concerns. In 1865, Congress created an agency within the War Department, the Freedman's Bureau, to provide provisions, clothing, fuel and shelter to freed slaves. 13 Stat. 507-09 (1865). The Bureau had the authority to rent or sell to freed slaves land abandoned or confiscated in the Confederacy. Id. § 4; see also The Wartime Genesis of Free

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Civil War that ultimately resulted in the emancipation of the slaves.

[22] Driven by pragmatic concerns about prosecuting the Union war effort, Lincoln expressly excused from this proclamation certain strategically important areas of the country considered loyal or potentially loyal to the Union, including Tennessee, West Virginia and certain parts of Louisiana. Id.

[23] See, e.g., Order by Cmdr. of the Dep't of the Gulf, in History of Emancipation, vol. III, doc. 81. General Order No. 12, issued by the Military Governor in the Department of the South, apportioned to former slaves (i.e., "freedmen") small plots of land on which they could grow their own sustenance. See General Order No. 12, Dec. 20, 1862, in History of Emancipation, vol. III, doc. 28; see also Order by Sec'y of War, Jan. 28, 1863, in History of Emancipation, vol. II, doc. 15. On July 29, 1864, the Secretary of the Treasury promulgated regulations respecting the employment and welfare of former slaves. See Plantation Regulations by the Sec'y of Treasury, in History of Emancipation, vol. III, doc. 119. The best known of these initiatives was General Sherman's January 16, 1865 order – rescinded not long thereafter by President Andrew Johnson – that select areas along the South Carolina, Georgia and Florida coasts be used to provide plots of not more than 40 acres to freed slaves. Special Field Order No. 15, in History of Emancipation, vol. III, at 338-40. The order provided certain other settlement rights to former slaves that had served in the U.S. armed forces. Id. § IV; see also Order by Cmdr. of the South Carolina Expeditionary Corps (BG Sherman), Feb. 6, 1862, in History of Emancipation, vol. III, doc. 9.

Labor, supra, at 59.[24]

The Second Freedmen's Bureau Act authorized the sale to freed slaves of all remaining confiscated land in twenty-acre parcels. 14 Stat. 173-75 §§ 7, 9 (1866). This confirmed the policy of the political branches to reject reparations to freed slaves in the form of free land. See Eric Foner, Reconstruction: America's Unfinished Revolution 1863-1877 245-46 (1988) ("Reconstruction").[25] Indeed, in the Southern Homestead Act, Congress provided for the sale of up to 80-acre parcels of the public lands in Alabama, Mississippi, Louisiana, Arkansas and Florida to freed slaves. 14 Stat. 66-67 (1866). Thus, although land was provided to freed slaves as interim relief during the war, in the Reconstruction era, this policy was not continued.

3. Post-war amnesties to secure a lasting peace.

At the end of the Civil War, it was again the political branches, exercising their peace-making powers, which addressed proposals to compensate former slaves. These were inextricably tied to the amnesties and other political efforts to reintegrate the former Confederate

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[24] After the Confederate surrender, as the statutory term of the Freedman's Bureau Act came to a close, Congress twice enacted legislation to extend it. Each time, President Johnson vetoed the legislation because he objected to giving confiscated land to former slaves. See 8 Messages and Papers of the Presidents 3596-3603 (1896) (Feb. 19, 1866 veto message); 8 Messages and Papers of the Presidents 3620-24 (1896) (July 16, 1866 veto message); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397-98 (1978) (Marshall, J., concurring in the judgment in part and dissenting in part). Congress overrode the President's second veto, but with only a watered down version of the previous Freedmen's Bureau Act. See George R. Bentley, A History of the Freedmen's Bureau 133 (1955). In the end, the Freedmen's Bureau, which became embroiled in controversy over the construction of Howard University, see id. at 203-14, expired from lack of funding.

[25] In fact, Congressman Stevens' effort to make it illegal for the Freedmen's Bureau to restore to their former owners lands held under the possessory titles conferred by General Sherman was defeated, as was a proposal to reserve one million acres of public land in the South for the use of refugees and freedmen. See Bentley, supra, at 134. Similar resolutions introduced by Senator Sumner were also defeated. See Foner, Reconstruction at 308-09 (citing Cong. Globe, 40th Cong., 1st Sess., 15, 51, 55, 79, 114, 147, 203-08, 304-08, 463 (1867)); Foner, Politics and Ideology at 131-49.

states into the Union.

Several amnesties were offered to Confederates in which their property rights were restored. See supra § III.A.2; 13 Stat. 741 (1864). President Johnson extended Lincoln's earlier amnesty to most rebels, restoring all property rights except the right to former slaves, 13 Stat. 758-59 (1865), and amnesty was further extended to virtually all persons willing to take an oath to support the Union of States. 15 Stat. 699-700 (1867). President Johnson later extended a full amnesty – one that was no longer contingent on the taking of any oath of allegiance. 15 Stat. 702-03 (1868). These measures put an end to proposals to use confiscated property to compensate former slaves because they restored property rights to former rebels.

4. The later enactment of civil rights legislation in lieu of reparations.

As noted, by the end of the Civil War there was insufficient political support for proposals to provide free land or other direct compensation to freed slaves. Ultimately, Congress rejected reparations in favor of laws providing civil and employment rights to freed slaves. This led to the Civil Rights Acts of 1866, 1870, 1871 and 1875 and the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.[26] In the end, the political controversy surrounding the legislation enacted to redress the evils of slavery was considerable and led to the impeachment of President Johnson and the eventual fall of the Radical Republicans. See Foner, Reconstruction at 333-45.

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[26] The Radical Republicans in Congress (led by Congressman Thaddeus Stevens and Senator Lyman Trumbull), unable to muster the votes for an expanded Freedmen's Bureau, turned to civil rights legislation, principally to ensure the rights to vote, to due process and, in particular, to contract to work for wages. In anticipation of this civil rights legislation, in March 1867, Congress enacted the Reconstruction Acts to provide for martial law in the former Confederacy until such time as new state constitutions and various civil rights acts were enacted and the states reincorporated into the Union. 14 Stat. 2-4, 428-29 (1867). Such enactments and the President's associated enforcement of martial law in the South were a clear exercise of the war- and peace-making powers granted to the political branches under the Constitution. See Stanton, 73 U.S. at 54-55, 61-62; Johnson, 71 U.S. at 499-501.

5. Later reparations efforts by the political branches.

Events after Reconstruction confirm that the determination of the proper remedies for slavery has always been committed to the political branches.[27] In 1890, for example, Representative William J. Connell introduced a bill that would have provided for maximum payments of $500 and awarded lifetime pensions of up to $15 per month to former slaves, see H.R. 11119, 51st Cong., 1st Sess. (1890). This bill was not enacted. In 1898, a similar bill was proposed in the U.S. House of Representatives to award a "pension" to "all persons released from involuntary servitude, commonly called slaves." H.R. 8479, 55th Cong. § 1 (1898); see also Senate Bill No. 1176, 56th Cong. (1899). That bill was not enacted either.

Calls for congressionally sanctioned reparations for slave descendants were revived about a decade ago following the enactment of the Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b (2000) (the "CLA"), which provided reparations to Japanese-Americans interned during World War II. Prompted by that act, Representative John Conyers began advocating the "African American Reparations Commissions Act" (currently H.R 40) to establish a national commission to study and make recommendations concerning reparations for slavery.[28]

Simply put, reparations for former slaves were from the very beginning inextricably connected with the wartime and post-war efforts of the President and Congress to

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[27] As the Supreme Court noted, in "abolish[ing] slavery, and establish[ing] universal freedom" in this nation, the Framers of the Thirteenth Amendment empowered Congress "to enforce the article by appropriate legislation." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438-40 (1968) (quotations omitted); U.S. Const. amend. XIII, § 2. This enabling "clause clothe[s] Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." Jones, 392 U.S. at 439 (internal quotation omitted). Similar enabling clauses were included in the Fourteenth and Fifteenth Amendments. See U.S. Const. amend. XIV, § 5; id. amend. XV, § 2.

[28] See H.R. 40, 107th Cong., 1st Sess. (2001); H.R. 40, 106th Cong., 1st Sess. (1999); H.R. 40, 105th Cong., 1st Sess. (1997); H.R. 891, 104th Cong., 1st Sess. (1995); H.R. 40, 103d Cong., 1st Sess. (1993); H.R. 3745, 101st Cong., 1st Sess. (1989).

prosecute the military and political aspects of the Civil War and to conclude a peace that would be lasting, accepted and enforceable. These efforts ultimately eschewed direct compensation to former slaves in favor of amending the Constitution, enacting and enforcing civil rights legislation, and selling land to former slaves on favorable terms. The constitutional commitment of such issues to the political branches is clear, as is the record of those branches managing such issues without interference from the judiciary. Plaintiffs' invitation for this Court to second-guess these branches in the political, military, economic, moral and social considerations with which they grappled more than 130 years ago is patently unworkable, and in the end confirms the wisdom of the well-settled "political question" doctrine.

B. Plaintiffs' Claims Cannot Be Resolved Pursuant to Any Judicially Discoverable and Manageable Standards.

Baker also requires dismissal for the independent reason that there are no judicially discoverable and manageable standards for resolution of these claims. See, e.g., Baker, 369 U.S. at 198 (justiciability concerns "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded"). The historical issues raised here involve too broad a span of conduct over too broad an expanse of time to be susceptible to any manageable judicial standards for resolution. Indeed, in affirming the dismissal of comparatively recent World War II-era reparations claims, the D.C. Circuit spoke in words equally applicable here:

> It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. . . . The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought – adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power – is too

> complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed. . . . The events, the witnesses, the guilty tortfeasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation.

Kelberine, 363 F.2d at 995; see also Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994).[29]

Even more than the dismissed World War II reparations claims noted above, the claims here are rife with uncertainties that preclude adjudication by a court on a blank slate without any political framework. For example:

- The relevant events took place as far back as 1619, see Am. Compl. ¶ 9.
- The parties that would be necessary to the adjudication of claims for slavery reparations, including the federal government of the United States, various state governments, various foreign nations, slave traders, slave holders, etc. cannot be joined.
- The nature of the relief requested in plaintiffs' Amended Complaint – e.g., "the appointment of an independent historic commission" – underscores that the relief they are seeking is political, not judicial.

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[29] See also Hwang Geum Joo, 172 F. Supp. 2d at 67 ("[t]here is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions [about reparations for sexual slavery] nearly a half century later"); id. at 66 (the rationale for dismissal in Kelberine is "even more persuasive now, decades later, when plaintiffs seek to adjudicate conduct sixty to seventy years after it occurred"); In re Nazi Era Cases, 129 F. Supp. 2d at 389 ("This Court must dismiss Plaintiff's claims because the magnitude of World War II has placed claims such as his beyond the province of this Court, and into the political realm."); Iwanowa, 67 F. Supp. 2d at 489 ("The specter of adjudicating thousands of claims arising out of a war that took place more than fifty years ago amounts to a more daunting task for this Court to tackle than the Kelberine Court could have ever contemplated."); Burger-Fischer, 65 F. Supp. 2d at 284 ("By what conceivable standard could a single court arrive at a fair allocation of resources among all the deserving groups? By what practical means could a single court acquire the information needed to fashion such a standard?"); see also Ungaro-Benages, No. 01-CV-2547, mem. op. at 12-16 (adopting Iwanowa, Burger-Fischer, and In re Nazi Era Cases).

- There is no manageable standard nor practical methodology for determining the degree of lineage or level of consanguinity that should be necessary for an individual to be deemed a "descendant[] of enslaved African-Americans," id. ¶ 1.

- The apportionment of liability and damages is simply not subject to judicial determination. There is no reasoned basis for determining, for example, whether damages should be pegged to the number of ancestors who were slaves, or whether damages should be tied to plaintiffs' current economic status.

Having failed in the effort to bring similar charges against the government, plaintiffs seek nothing less than to hold defendant corporations responsible for the entire sweep of centuries of American slavery and its consequences. They couch their claims as "private claims" against "private defendants" as if that saved them from the political question bar. But this ignores that in resolving justiciability issues, the Court must "determine the nature of the underlying dispute and the interests of the parties in having the dispute resolved," not "how Plaintiff has styled his suit." In re Nazi Era Cases, 129 F. Supp. 2d at 375 (citing Renne, 501 U.S. at 316). These claims are "fundamentally interrelated with" a variety of sweeping political questions whose resolution can only be achieved in Congress. Id. at 375, 389.

C. The Adjudication of Plaintiffs' Claims Would Also Necessarily Implicate the Remaining Baker Factors.

The last four Baker factors are also independent bases to dismiss plaintiffs' dated claims. See Baker, 369 U.S. at 217. To allow claims for reparations would be to ignore or second-guess the political decisions that went into the enactment of the Civil War era constitutional amendments and associated civil rights laws, and a myriad of other political decisions that galvanized civil rights and other relief programs enacted to benefit minorities (including the descendants of slaves) throughout the past century. These policy determinations are for elected officials, not the courts.

Moreover, a resolution of these claims would necessarily tread on the political

branches of government. Id. As described above, during and after the bloodiest war in this country's history, these branches grappled with the whole host of reparations issues while simultaneously trying to end the war successfully. These are not choices that the judicial branch may second-guess.

In sum, plaintiffs here are inviting the Court to engage in the same kind of political re-examination encouraged by the plaintiffs in Burger-Fischer, where the court concluded that the political question doctrine compelled dismissal of four class actions over World War II era slave labor:

> In effect, plaintiffs are inviting this court to try its hand at refashioning the reparations agreements which the United States and other World War II combatants (whose blood and treasure brought the war of conquest and the program of extermination to an end) forged in the crucible of a devastated post-war Europe and in the crucible of the Cold War. . . . [T]his is a task which the court does not have the judicial power to perform. . . To state the ultimate conclusion, the questions whether the reparation agreements made adequate provision for the victims of Nazi oppression and whether Germany has adequately implemented the reparation agreements are political questions which a court must decline to determine.

65 F. Supp. 2d at 282. The claims here should likewise be dismissed.

IV. PLAINTIFFS' ALLEGATIONS DO NOT SUPPORT ANY CAUSE OF ACTION.

In the absence of the other defects (lack of standing, untimeliness, non-justiciability), the Amended Complaint still would be subject to dismissal for failure to state a claim. Plaintiffs attempt to take a long-ago historical wrong and – with the use of inapplicable legal labels like "unfair competition" – convert it into a present-day dispute. The attempt fails.

A. Plaintiffs Cannot Use Present-Day Law To Impose Retroactive Liability for Alleged Conduct Dating Back Centuries.

Plaintiffs cannot conceal that they are trying to use the law as it exists in 2003 to impose liability for alleged conduct dating back to the 1600's – that is, they seek to impose

retroactive liability using the law today, rather than the law at the time of the alleged conduct. In the immediate aftermath of the abolition of slavery, however, the Supreme Court rejected precisely such retroactive liability in a pair of decisions: White v. Hart, 80 U.S. (13 Wall.) 646 (1872), and Osborn v. Nicholson, 80 U.S. (13 Wall.) 654 (1872). The plaintiffs in both cases had sold slaves prior to the abolition of slavery, in Georgia and Arkansas respectively, but had accepted promissory notes rather than cash in return. When they sued after abolition to collect on the promissory notes, the lower courts dismissed the actions on the basis of state constitutional provisions adopted by Georgia and Arkansas in the Reconstruction era that made slavery-related contracts and debts unenforceable as against public policy. The Supreme Court reversed those decisions, holding that the states lacked the constitutional authority to bar the collection of slavery-related debts that had been lawful at the time they were entered into. White and Osborn thus bar plaintiffs' claims in their entirety. See also Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . . For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.") (internal quotation omitted).

B. Plaintiffs Fail To State a Claim Even Under Present-Day Law.

Moreover, as set forth below, when the legal requirements for each of the individual alleged causes of action are compared with the allegations of the Amended Complaint, it becomes clear that plaintiffs have not stated any of those causes of action even under present-day law. Plaintiffs' federal and state statutory claims fail under the law governing those statutes. Plaintiffs' state common law claims fail under the law of Illinois (the forum state) and any other

state conceivably implicated in this multidistrict litigation.[30] Finally, as discussed infra in § IV.B.11, although plaintiffs begin the counts of the Amended Complaint with theories of vicarious liability, such theories are inapposite because plaintiffs have failed to first establish primary liability on an underlying tort, let alone allege the other requirements to establish third-party liability.

1. Plaintiffs' accounting claim fails as a matter of law.

Plaintiffs' claim for an "accounting" (Count II) is wholly deficient. To maintain a claim for an accounting under Illinois law, a complaint must allege an inadequate remedy at law, see Couri v. Couri, 431 N.E.2d 711 (Ill. App. Ct. 1982), rev'd on other grounds, 447 N.E.2d 334 (Ill. 1983), "the existence of a fiduciary relationship" between the plaintiff and defendant, "a need for discovery, and the existence of mutual accounts which are of a complex nature." Newton v. Aitken, 633 N.E.2d 213, 218 (Ill. App. Ct. 1994) (citing Couri, 431 N.E.2d at 714).[31] To maintain an accounting action that is cognizable at law, "the plaintiff must meet a high standard of showing that the accounts between the parties are so complicated that they necessitate a court in equity to unravel them to determine damages." Enter. Warehousing Solutions, Inc. v. Capital One Servs., Inc., No. 01 C 7725, 2002 WL 406976, at *4 (N.D. Ill. Mar. 15, 2002).[32]

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30 Although plaintiffs have made no effort to plead facts relevant to a choice-of-law analysis, variations between the relevant laws of the different states are not material for purposes of this motion to dismiss because plaintiffs have failed to allege the most basic requirements for a claim under the laws of any potentially applicable jurisdiction. Accordingly, at this stage, a choice-of-law analysis is not required. See Jean v. Dugan, 20 F.3d 255, 260 (7th Cir. 1994).

31 Other Illinois courts have recognized accounting claims upon a showing of fraud. See, e.g., People ex rel. Hartigan v. Candy Club, 501 N.E.2d 188, 190 (Ill. App. Ct. 1986); Mayr v. Nelson Chesman & Co., 195 Ill. App. 587, 1915 WL 2527 (1915). The Amended Complaint does not advance a claim of fraud.

32 Other jurisdictions impose similar requirements, to the extent that they even recognize a

These elements require plaintiffs to have a direct relationship with defendants through a fiduciary relationship and/or maintenance of mutual accounts. An accounting action cannot exist between strangers. Plaintiffs attempt to assert a fiduciary relationship by alleging that it arose "by virtue of defendants' superior position, maintenance of those positions and, their holding in constructive trust, the proceeds of the unpaid labor of the plaintiffs and/or their ancestors." Am. Compl. ¶ 222.[33] This allegation is insufficient, as it does not allege a fiduciary relationship; it is only a conclusory assertion that is belied by the utter failure of the Amended Complaint to allege any relationship – let alone a fiduciary relationship – between plaintiffs and/or their ancestors and any defendant. Accordingly, plaintiffs fail to state a claim for accounting.[34]

2. Plaintiffs' crime against humanity claim fails as a matter of law.

Plaintiffs' claim under "international law," "international norms," or "human rights" (Count III) fails not only because it does not meet the requirements of standing, timeliness, or justiciability, but separately because: (1) there is no private right of action, (2) the

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separate cause of action for accounting. See, e.g., Burdick v. Grimshaw, 168 A. 186 (N.J. Ch. 1933); Leveraged Leasing Admin. Corp. v. PacifiCorp Capital, Inc., 87 F.3d 44 (2d Cir. 1996) (New York); Rodgers v. Roulette Records, Inc., 677 F. Supp. 731 (S.D.N.Y. 1988); Hodson v. Hodson, 292 So. 2d 831 (La. Ct. App. 1974); Crescent River Port Pilots' Ass'n v. Heuer, 193 So. 2d 276 (La. Ct. App. 1966); Norman v. Nash Johnson & Sons' Farms, Inc., 537 S.E.2d 248 (N.C. Ct. App. 2000); Watson v. Fulk, 198 S.E.2d 730 (N.C. Ct. App. 1973); Elliott v. Ballentine, 173 S.E.2d 552 (N.C. Ct. App. 1970); Burgin v. Smith, 141 So. 760 (Miss. 1932); Bradley v. Howell, 134 So. 843 (Miss. 1931); T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n, 79 S.W.3d 712 (Tex. App. 2002).

33 Plaintiffs do not even allege that plaintiffs and defendants maintained mutual accounts.

34 Plaintiffs also cannot establish the absence of an adequate remedy at law and a need for discovery. Indeed, the Amended Complaint includes, for example, a claim for conversion – a remedy at law.

claim is barred under the Supremacy Clause of the U.S. Constitution; and (3) at the time plaintiffs' claim accrued, "international law" did not prohibit slavery.

a. No private right of action under international law.

Plaintiffs have no private right of action to press international law claims. See, e.g., Dreyfus v. Von Finck, 534 F.2d 24, 28 (2d Cir. 1976); Tel-Oren, 726 F.2d at 816-819 (Bork, J., concurring); Handel, 601 F. Supp. at 1424-28; Ungaro-Benages, No. 01-CV-2547, mem. op. at 29-32; Fishel, 1998 U.S. Dist. LEXIS 21230, at *22-26.

There are only two bases for a private right of action under international law: (i) self-executing treaties, and (ii) express statutory grants. See, e.g., Dreyfus, 534 F.2d at 29-31; Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968-69 (4th Cir. 1992); Tel-Oren, 726 F.2d at 808-10; Friedman v. Bayer Corp., No. 99-CV-3675, 1999 WL 33457825, at *3 (E.D.N.Y. Dec. 15, 1999); Handel, 601 F. Supp. at 1424-28. Neither applies here.

Plaintiffs cite no self-executing treaties – i.e., agreements in which the United States as a signatory nation expressly denotes its specific intent to allow private citizens to sue thereunder – supporting a private right of action here under international law.[35] In addition, plaintiffs cite no federal statute conferring private rights of action based on international law. Mere mention of "customary international law" is insufficient. See Tel-Oren, 726 F.2d at 777-78; Heinrich v. Sweet, 49 F. Supp. 2d 27 (D. Mass. 1999). As the court in Handel noted, where "no American legislative body has acted in any way with respect to customary international law . . . [t]o imply a cause of action from the law of nations would completely defeat the critical right

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[35] U.S. courts have held that broad international human rights conventions are not self-executing. See Dreyfus, 534 F.2d at 31-32 (Hague Convention); United States v. Noriega, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990) (U.N. Charter, O.A.S. Charter), aff'd, 117 F.3d 1206 (11th Cir. 1997); Handel, 601 F. Supp at 1424-27 (Hague and Geneva Conventions); Tel-Oren, 726 F.2d at 818-19 (Int'l Torture Convention).

of the sovereign to determine whether and how international rights should be enforced in that municipality." 601 F. Supp. at 1428.

b. Plaintiffs' international law claim fails under the Supremacy Clause.

Independently, plaintiffs' international law claim fails under the Supremacy Clause. International law cannot provide a basis for a right of action in the United States if it conflicts with the U.S. Constitution or Congressional legislation.[36] As the modern Supreme Court noted, "[i]n analyzing the Constitution, we cannot ignore the regrettable fact that, as originally framed, it expressly tolerated the institution of slavery." Karcher v. Daggett, 462 U.S. 725, 746 (1983) (Stevens, J., concurring); see also U.S. Const., art. I, § 2; U.S. Const., art. I, § 9; U.S. Const., art. IV, § 2. The Supremacy Clause alone bars a claim under international law.[37]

c. Separately, no claim under international law can be stated.

Plaintiffs' international law claim also fails because at the time the claim could have accrued, there was no universal consensus to condemn slavery sufficient to constitute an accepted and enforceable norm of "international law."[38] Indeed, the international law prohibition

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36 See United States v. Yousef, 327 F.3d 56, 92-93, 100-106 (2d Cir. 2003); United States v. Pinto-Mejia, 720 F.2d 248, 259 (2d Cir. 1934) ("[I]n enacting statutes, Congress is not bound by international law."); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1161, 1178 (E.D. Pa. 1980) ("It is therefore possible that the United States might find it necessary, in order to enforce domestic law, to violate international principles."); accord United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982); Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959) (in discussing treaties, statutes and constitutional provisions, "the federal courts are bound to recognize any one of these three sources of law as superior to canons of international law").

37 See Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001) (rejecting "international law" defense to the death penalty as inconsistent with the accepted view of the Eighth Amendment in the United States); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.").

38 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-29 (1964) (noting, in affirming dismissal of claims, the lack of consensus respecting the status under international law

against slavery is a relatively recent historical development – the result of decades of debate, negotiation and changes in historical circumstances. To state the obvious: it required the Civil War for that consensus to be formed in the United States alone. International law as it existed in 1865 did not reflect a universal condemnation of slavery. Absent such manifest consensus, no claim based on "international law" is (or could have been) recognized in the United States.

The United States Supreme Court has already addressed this very issue and held that as of 1861 the practice of slavery was not a violation of international law. In Osborn v. Nicholson, 80 U.S. (13 Wall.) 654, 661 (1872), the Court explained:

> Slavery . . . rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property. Though contrary to the law of nature it was recognized by the law of nations. The atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade, was also sanctioned by the latter code [i.e., by international law]. . . . The institution has existed largely under the authority of the most enlightened nations of ancient and modern times.

Id. at 661 (emphasis added).

Similarly, the Supreme Court's last decision on the question before the Civil War held that the slave trade (and, a fortiori, slavery) was not prohibited by the law of nations as such law existed before the Civil War. See The Antelope, 23 U.S. (10 Wheat.) 66, 114-23 (1825). Chief Justice Marshall, writing for the Court, explained:

> However abhorrent this traffic may be to a mind whose original feelings are not blunted by familiarity with the practice, it has been sanctioned in modern times by the laws of all nations who possess distant colonies, each of whom has engaged in it as a common commercial business which no other could rightfully interrupt. . . . That trade could not be considered as contrary to the law of nations

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of government expropriation of alien property); Yousef, 327 F.3d at 92-93, 100-106; Tel-Oren, 726 F.2d at 791-96.

> which was authorized and protected by the laws of all commercial nations; the right to carry on which was claimed by each, and allowed by each.

Id. at 115-19 (emphasis added).[39] These cases establish that "international law," as it was recognized in the United States at the time, would not support the claim made here.[40]

3. Plaintiffs' piracy claim fails as a matter of law.

Plaintiffs' claim of "piracy" (Count IV) is likewise deficient. Piracy is a crime, not a civil tort, and plaintiffs have no private right of action to prosecute it. And even if plaintiffs could privately prosecute a piracy claim, they fail to allege the necessary elements of such a claim.

Count IV points to the fourth section of the Act of May 15, 1820, 3 Stat. 600-01 ("the 1820 Act"), which is the statutory precursor of today's 18 U.S.C. § 1585, and alleges that defendants committed piracy "by their actions . . . in support for the continuation of the smuggling of Africans." Am. Compl. ¶ 230. This allegation fails for several reasons.

First, both the 1820 Act and the current statute are criminal statutes providing no

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[39] See also The Amistad, 40 U.S. (15 Pet.) 518, 593 (1841) (noting in dicta that if claimants could prove ownership of the slaves in question under the laws of Spain in effect at the time then such slaves "ought to be restored to the claimants") (Story, J.); Maria v. McElroy, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999) ("During the nineteenth century, the rights of individuals were not subjects of international law."), aff'd sub nom. Pottinger v. Reno, 242 F.3d 367 (2d Cir. 2000).

[40] Indeed, not until 1890 did seventeen of the largest nations of the world sign the General Act of Brussels respecting the "Slave Trade and Importation into Africa of Firearms, Ammunition and Spiritous Liquors," 27 Stat. 886 (1890), the first broad prohibition against the slave trade (but not against slavery itself), which barred then ongoing "slave-trade in the interior of Africa," id., art. I, and expressly noted that certain signatory nations continued to "recognize the existence of domestic slavery." Id., art. LXII. And not until September 25, 1926 did thirty-seven countries enter into the Geneva Convention on the Suppression of Slave Trade and Slavery, 46 Stat. 2183 (1926), to ensure that signatories took steps "(a) [t]o prevent and suppress the slave trade;" and "(b) [t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms." Id., art. 2. This Convention alone shows that, as recently as 1926, the condemnation of slavery was still not universal.

civil remedy. See 1820 Act, 3 Stat. 600-01; 18 U.S.C. § 1585. The plain language of both statutes declares piracy a crime, punishable by fines or imprisonment. They create no civil cause of action. Without demonstrated congressional intent to create a private cause of action, criminal statutes that provide a specific penalty do not provide a private cause of action. See Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 532-33 (1989). Nothing in either statute suggests that a private right of action exists.

Second, no plaintiff has alleged that he, she, or any ancestor was the victim of a violation of the 1820 Act or the current statute. If a private civil action could be found, it would not be available to anyone not victimized by a violation.

Finally, plaintiffs have not alleged that any defendant committed any act of "piracy" as listed in the statute.[41] The 1820 Act punished any of four actions if done with an intent to turn Africans into slaves: (1) landing and seizing Africans, (2) forcibly bringing and carrying them onto a vessel, (3) decoying them, or (4) receiving them on board a vessel. United States v. Westervelt, 28 F. Cas. 529, 530 (C.C.S.D.N.Y. 1861) (No. 16668). Similarly, the current piracy statute, 18 U.S.C. § 1585, allows the United States to imprison or fine those convicted of taking a person from "any foreign shore" with intent to make the person a slave, transporting a person on a vessel with intent to make the person a slave, giving or selling a person on the high seas with intent to make the person a slave, or delivering a person onto land with intent to make the person a slave. Both the 1820 Act and current version of the statute criminalize the creation of slaves by those on the high seas, not the derivation of some benefit from slavery by those on dry land. Westervelt, 28 F. Cas. at 530; United States v. Corrie, 25 F. Cas. 658, 664 (C.C.D.S.C. 1860) (No. 14869); 18 U.S.C. § 1585.

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41 The statute also limits its application to members "of the crew or ship's company."

The Amended Complaint alleges only that defendants or their alleged predecessors benefited from slavery by their involvement in the United States economy during the period of history when African-Americans were enslaved. It does not allege facts sufficient to satisfy the elements of a prosecution for piracy. If it did, plaintiffs would not be able to bring such an action, which can only be pursued by the executive branch of government. Plaintiffs fail to state a claim for piracy.

4. Plaintiffs' claim for intentional infliction of emotional distress fails as a matter of law.

Plaintiffs' claim for intentional infliction of emotional distress (Count V) is equally flawed and fails as a matter of law. Plaintiffs contend that the institution of slavery was based upon, and perpetuated through, repeated acts of rape, murder, torture, "breeding," and racist propaganda. See Am. Compl. ¶¶ 233-238. These allegations, while horrific, do not state a claim for intentional infliction of emotional distress against these defendants.

There are four basic elements of the tort of intentional infliction of emotional distress as defined in the Restatement (Second) of Torts § 46(1), and as defined in the substantive law of most jurisdictions, including Illinois. To state a claim, a plaintiff must allege: (1) extreme and outrageous conduct *by the defendant*; (2) intent *by the defendant* to cause, or a reckless disregard of the probability of causing, emotional distress; (3) severe or extreme emotional distress suffered *by the plaintiff*; and (4) *an actual and proximate causation of the plaintiff's emotional distress by the defendant's outrageous conduct.* See, e.g., Wilson v. Norfolk & W. Ry., 718 N.E.2d 172, 180 (Ill. 1999); Hayes v. Ill. Power Co., 587 N.E.2d 559, 563 (Ill. App. Ct. 1992).[42]

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[42] See also White v. Monsanto Co., 585 So. 2d 1205, 1209 (La. 1991) (same); Buckley v. Trenton Sav. Fund Soc'y, 544 A.2d 857, 863 (N.J. 1988) (same); Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993) (same); Waddle v. Sparks, 414 S.E.2d 22, 27 (N.C. 1992) (same);

Plaintiffs' Amended Complaint does not satisfy these basic requirements. Plaintiffs do not allege that these defendants (or their alleged predecessors-in-interest) engaged in the "extreme and outrageous" conduct underlying their claim. See Am. Compl. ¶¶ 233, 234, 236. (At best, plaintiffs seek to hold defendants liable for that conduct under theories of third party liability that are, as discussed infra in § IV.B.11, wholly without merit.) And they do not allege any causal connection between such distress and the actions of these defendants. As stated supra in § I, the Amended Complaint does not identify any conduct committed at any time by any named defendant that is fairly traceable to any injury suffered by any plaintiff. Indeed, the Complaint does not aver any contact whatsoever between any one of these plaintiffs – or any one of these plaintiffs' ancestors – and any one of these defendants. Count V fails to state a claim for intentional infliction of emotional distress.

5. Plaintiffs' conversion claim fails as a matter of law.

Plaintiffs do not come any closer to stating a claim under the label "conversion" (Count VI). This Court has stated that a "conversion is understood as the wrongful deprivation of an identifiable object of property to which the plaintiff was entitled." Pritikin v. Liberation Publ'ns, Inc., 83 F. Supp. 2d 920, 922-23 (N.D. Ill. 1999). Thus, a conversion claim "may not be maintained to satisfy a mere obligation to pay money." In re Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985).[43]

Upchurch v. N.Y. Times Co., 431 S.E.2d 558, 561 (S.C. 1993) (same); Twyman v. Twyman, 855 S.W.2d 619, 621-22 (Tex. 1993) (same); Russo v. White, 400 S.E.2d 160, 162 (Va. 1991) (same). The state of Mississippi does not appear to have specifically adopted the Restatement definition, but it does require that "there is something about the defendant's conduct which evokes outrage or revulsion" before a plaintiff can recover for emotional distress. Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981).

[43] See also, e.g., Ehrlich v. Howe, 848 F. Supp. 482, 492 (S.D.N.Y. 1994) (under New York law, "[a]n action of conversion does not lie to enforce a mere obligation to pay money") (citation omitted); Upper Valley Aviation, Inc. v. Mercantile Nat'l Bank, 656 S.W.2d 952, 955 (Tex. App.

Plaintiffs' conversion claim is based on the alleged failure by the defendants or their predecessors in interest "to account for, acknowledge and return to plaintiffs and the plaintiff class, the value of their ancestors' slave labor." See Am. Compl. ¶ 240.[44] Even if defendants had received, and been obligated to pay for, the value of such labor, the failure to make such payments would not constitute conversion. See Thebus, 483 N.E.2d at 1260. Were the law otherwise, every statutory or contractual dispute between employers and employees over wage and salary issues (and, indeed, every contractual dispute over payment outside an employment relationship) could turn into a suit for conversion, which is simply not the case.

Plaintiffs likewise cannot base a claim for conversion on the alleged retention by defendants of the "value" of plaintiffs' ancestors' labor, or profits derived from such labor. See Am. Compl. ¶ 240 (alleging defendants have "converted the value of that labor and its derivative profits into defendants' own property"). Conversion requires a well-pleaded allegation of the wrongful taking of a "chattel," or an "object," or "personal property which is tangible, or at least represented by or connected with something tangible." Thebus, 483 N.E.2d at 1260 (quotation omitted). Neither the abstract "value of labor," nor any right to any profits allegedly derived from such labor, can be characterized as the sort of tangible property that can be the subject of a claim for conversion. See Great Lakes Higher Educ. Corp. v. Austin Bank, 837 F. Supp. 892, 897 (N.D. Ill. 1993) ("Illinois courts do not recognize an action for conversion of intangible

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1983) ("[W]hen an indebtedness can be discharged by payment of money generally, an action in conversion is inappropriate to enforce the debt."); Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 119 (S.C. 1975) ("[T]here can be no conversion where there is a mere obligation to pay a debt. . . .").

[44] The Amended Complaint contains no allegation that any defendant received or refused to pay for the value of any labor or other services rendered by any of the newly added plaintiffs who allege that they themselves were enslaved after 1865. Nor does the Amended Complaint contain any allegation that any uncompensated labor allegedly "converted" by any of these defendants was performed by any of these plaintiffs or their ancestors.

rights").[45] The conversion claim should be dismissed.

6. Plaintiffs' unjust enrichment claim fails as a matter of law.

Plaintiffs' "unjust enrichment" claim (Count VII) fares no better than plaintiffs' other claims. At a minimum, a plaintiff claiming unjust enrichment must allege that a specific defendant received a specific benefit belonging to the plaintiff. See, e.g., HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672, 679 (Ill. 1989) (under Illinois law, a plaintiff must plead "that the defendant has unjustly retained a benefit to the plaintiff's detriment"); TRW Title Ins. Co. v. Security Union Title Ins. Co., 153 F.3d 822, 828 (7th Cir. 1998) (same).[46]

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[45] See also Dual Drilling Co. v. Mills Equip. Invs., Inc., 721 So. 2d 853, 856 (La. 1998) (under Louisiana law, conversion actions may be brought only by dispossessed owners of "corporeal movables" - the civil law analogue to tangible personal property); Mossler Acceptance Co. v. Moore, 67 So. 2d 868, 873 (Miss. 1953) ("Conversion lies only for personal property which is tangible."); Cameco, Inc. v. Gedicke, 690 A.2d 1051, 1058 (N.J. Super. Ct. App. Div. 1997) (conversion claim properly dismissed when property allegedly "converted" was neither "tangible personal property, [nor] tangible evidence of title to intangible or real property"), aff'd in pertinent part, 724 A.2d 783 (N.J. 1999); Ippolito v. Lennon, 542 N.Y.S.2d 3, 6 (App. Div. 1989) ("[C]onversion is limited to those intangible property rights customarily merged in, or identified with, some document[.]") (citation omitted); Matzan v. Eastman Kodak Co., 521 N.Y.S.2d 917, 918 (App. Div. 1987) ("A claim for conversion does not lie for the withholding of indefinite, intangible, and incorporeal species of property[.]") (citation omitted); Norman, 537 S.E.2d at 264 (North Carolina law does not recognize conversion claim for intangible interests); Owens, 220 S.E.2d at 119 ("Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another. . . ."); Express One Int'l, Inc. v. Steinbeck, 53 S.W.3d 895, 901 (Tex. App. 2001) ("Texas law has never recognized a cause of action for conversion of intangible property except in cases where an underlying intangible right has been merged into a document. . . ."); United Leasing Corp. v. Thrift Ins. Corp., 440 S.E.2d 902, 906 (Va. 1994) ("[A] cause of action for conversion does not encompass claims for interference with undocumented intangible property rights.").

[46] See also Willis v. Ventrella, 674 So. 2d 991, 995 (La. Ct. App. 1996) (under Louisiana law plaintiffs' failure to allege any connection between themselves or their ancestors and the defendants negates any possibility of a viable unjust enrichment claim); Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 496 (D.N.J. 1998) (under New Jersey law "it is the plaintiff's (as opposed to a third party's) conferral of a benefit on defendant which forms the basis of an unjust enrichment claim"); Fordice Constr. Co. v. Cent. States Dredging Co., 631 F. Supp. 1536,

Plaintiffs' Amended Complaint fails to allege this most basic requirement. Not only have plaintiffs failed to allege that they themselves conferred any benefit upon any defendant, they have failed to allege that any of their ancestors conferred a specific benefit upon any defendant. Indeed, as noted supra in § I, plaintiffs have not alleged any connection between themselves or their ancestors and any of the defendants. For much the same reasons that the named plaintiffs in this litigation lack standing to pursue their claims, they also lack any basis for a viable claim of unjust enrichment. See, e.g., Int'l Bhd. of Teamsters Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 34 F. Supp. 2d 656, 665 (N.D. Ill. 1998) (rejecting unjust enrichment claim where plaintiffs failed to "allege[] what, if any, benefit they have conferred upon the defendants," and noting that dismissal would be appropriate either for failure to state a claim or for lack of standing), aff'd, 196 F.3d 818 (7th Cir. 1999).[47] Like their other

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1538-39 (S.D. Miss. 1986) (under Mississippi law, plaintiffs must allege "that the defendant holds money which in equity and good conscience belongs to the plaintiff") (quotation omitted); Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000) (under New York law, benefit conferred by plaintiff upon defendant must be sufficiently "specific and direct . . . to support an unjust enrichment claim") (citing Wolf v. Nat'l Council of Young Israel, 694 N.Y.S.2d 424, 426 (App. Div. 1999)); Norman Owen Trucking, Inc. v. Morkoski, 506 S.E.2d 267 (N.C. Ct. App. 1998) (North Carolina law requires showing of a direct benefit conferred by plaintiff on defendant) (citing Effler v. Pyles, 380 S.E.2d 149, 152 (N.C. Ct. App. 1989)); Jupiter Enters., Inc. v. Harrison, No. 05-00-01914-CV, 2002 WL 318305, at *3 (Tex. App. Mar. 1, 2002) (unpublished decision) (Texas unjust enrichment law requires, inter alia, "that valuable services were rendered or materials furnished . . . for the person sought to be charged") (citing Vortt Exploration Co. v. Chevron U.S.A., Inc., 787 S.W.2d 942, 944 (Tex. 1990)); Brown v. Resolution Trust Corp., 30 F.3d 128, Nos. 93-2597, 94-1104, 1994 WL 384727, at *3 (4th Cir. July 25, 1994) (unjust enrichment claim requires proof "plaintiff conferred a benefit on the defendant, which was requested and accepted by the defendant"); Ellis v. Smith Grading & Paving, Inc., 366 S.E.2d 12, 15 (S.C. Ct. App. 1988) (dismissing claim where plaintiff failed to demonstrate that she, rather than a third party, conferred a benefit on defendant).

[47] In addition to this threshold requirement, the laws of some states impose additional requirements for a claim for unjust enrichment. For example, to support a claim for unjust enrichment under New Jersey law, plaintiffs must show that they "expected remuneration from the defendant at the time [they allegedly] performed or conferred a benefit on defendant," VRG Corp. v. GKN Realty Corp., 641 A.2d 519, 526 (N.J. 1994), a requirement that plaintiffs cannot meet since at the time in question there was no such expectation in law or equity, see supra

claims, plaintiffs' unjust enrichment claim must be dismissed.

7. Plaintiffs' claim under 42 U.S.C. § 1982 fails as a matter of law.

The claim under 42 U.S.C. § 1982 (Count VIII) is equally deficient. Plaintiffs complain of a "loss of wealth," Am. Compl. ¶ 260; see id. ¶ 258 ("denial of wealth"), and contend that this alleged monetary loss "in turn denies them . . . the opportunity to inherit and convey personal and real property," id. ¶ 257. These allegations do not state a claim under section 1982.

Section 1982, originally enacted as part of the Civil Rights Act of 1866, "deals with discrimination in property transactions." Morris v. Office Max, Inc., 89 F.3d 411, 413 (7th Cir. 1996); accord Jones, 392 U.S. at 420 (section 1982 "grants to all citizens, without regard to race or color, 'the same right' to purchase and lease property").[48] The statute "is limited on its face to discrimination with respect to property rights." S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 713 F. Supp. 1068, 1089 (N.D. Ill. 1988) (internal quotation omitted), aff'd in part and rev'd in part on other grounds, 935 F.2d 868 (7th Cir. 1991).

In short, a plaintiff cannot maintain a claim under section 1982 unless he or she pleads and proves discrimination *in a transaction involving real or personal property*. See, e.g., Morris, 89 F.3d at 415 (where plaintiffs could not demonstrate that they tried to purchase personal property, their § 1982 claim failed); New Christian Valley M.B. Church v. Bd. of Educ.,

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§ IV.A. See also Eli Lilly & Co., 23 F. Supp. 2d at 496. Similarly, Texas law requires that at the time of the alleged enrichment, the defendant was "reasonably notified . . . that the plaintiff in performing such services was expecting to be paid by" the defendant. Jupiter Enters., 2002 WL 318305, at *3 (citing Vortt, 787 S.W.2d at 944); see also Brown, 1994 WL 384727, at *3 (Virginia law same). Plaintiffs do not allege, nor can they, that any defendant received such notice.

48 "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982 (2000).

704 F. Supp. 868, 870 (N.D. Ill. 1989) (church congregation members did not state claim under § 1982 where they did not personally try to buy building); see also Rash v. Minority Intermodal Specialists, Inc., No. 00-C-6352, 2003 U.S. Dist. LEXIS 4311, at *11 (N.D. Ill. Mar. 19, 2003) (claim for termination of employment did not state claim for deprivation of property under § 1982); Rick Nolan's Auto Body Shop, Inc. v. Allstate Ins. Co., 711 F. Supp. 475, 477 (N.D. Ill. 1989) (repair shop owner's claim that insurance company terminated "direct repair" agency relationship did not state claim under § 1982).

Here, plaintiffs have not identified any real or personal property of any kind that they (or their ancestors) tried to buy, sell, lease, etc., let alone any property transaction that they (or their ancestors) attempted with any of these defendants (or their alleged predecessors). Plaintiffs' claim rests on the speculation that if they or their ancestors had not been "denied wealth," they or their ancestors would have purchased real or personal property that they would, in turn, have conveyed and distributed to their descendants. Were such a theory sufficient to state a claim under section 1982, *any* claim for monetary loss could be converted into a claim under section 1982. But it is not sufficient. Count VIII fails as a matter of law.[49]

8. Plaintiffs' claim under the Alien Tort Statute fails as a matter of law.

Plaintiffs plead "in the alternative" claims under the Alien Tort Statute, 28 U.S.C. § 1350 (2000) ("ATS"). Plaintiffs' ATS claims (Count IX) fail as a matter of law for several independent reasons.

First, plaintiffs fail to satisfy the jurisdictional requirements of the statute. To invoke the court's subject matter jurisdiction under the ATS, a plaintiff must allege: (1) that he

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[49] Not surprisingly, no court has ever applied section 1982 to claims arising from conduct before 1866. Thus, as discussed supra in § IV.A, this claim, like the others, also fails because it is an attempt to impose liability retroactively.

or she is an alien; (2) suing for a "tort only"; and (3) a violation of the law of nations or a treaty. See 28 U.S.C. 1350. Plaintiffs satisfy none of these requirements.

No named plaintiff alleges that he or she is an alien.[50] Accordingly, plaintiffs cannot pursue claims on their own behalf under the ATS. Nonetheless, plaintiffs suggest that the ATS allows them to pursue claims on behalf of "alien, non-citizen Africans" who were victims of the slave trade and slavery, because "[e]nslaved Africans were aliens, i.e., not considered citizens of the United States." Am. Compl. ¶¶ 239, 238. This allegation does not help plaintiffs. To begin with, plaintiffs have not alleged facts sufficient to establish that they are legal representatives of their ancestors. See supra § I.C.[51] Even if plaintiffs were able to demonstrate that they were the legal representatives of their ancestors, the jurisdictional inquiry focuses on plaintiffs' own status, not the status of their ancestors. See, e.g., Jones v. Petty Ray Geophysical Geosource, Inc., 722 F. Supp. 343, 348 (S.D. Tex. 1989) (plaintiff's ATS claim on behalf of estate of her deceased husband dismissed because "plaintiff's complaint does not allege that the plaintiff is an alien") (emphasis added), aff'd, 954 F.2d 1061 (5th Cir. 1992).

Nor have plaintiffs satisfied the second and third jurisdictional requirements of ATS – a tort only in violation of the law of nations or a treaty of the United States. As discussed supra in § IV.B.2, the Supreme Court has held that neither slavery nor slave trading violated the law of nations prior to 1865. See Osborn, 80 U.S. at 661 (slavery and slave trade recognized by

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50 In determining the status of a party for purposes of jurisdiction, the United States Supreme Court recently reiterated the "'longstanding principle that "the jurisdiction of the Court depends upon the state of things at the time of the action brought."'" Dole Food Co. v. Patrickson, 123 S. Ct. 1655, 1662 (2003) (quoting Keene Corp. v. United States, 508 U.S. 200, 207 (1993) (quoting Mollan v. Torrance, 9 Wheat. 537, 539 (1824)).

51 Moreover, no plaintiff has alleged a sufficient connection to any former slave to establish third-party standing. See supra § I.C.

the law of nations); The Antelope, 23 U.S. (10 Wheat) 66 (1825) (same); see also Handel, 601 F. Supp. at 1428-1429 (global consensus regarding human rights developed during the decades between the two World Wars). Even if these Supreme Court precedents were disregarded, plaintiffs have failed to allege that any defendant committed a tort against them or any of their ancestors.[52]

Second, even if this court had subject matter jurisdiction under the ATS (it does not), the ATS does not provide an independent cause of action. Enacted as part of the Judicial Code of 1789, the ATS merely provides original jurisdiction in district courts for actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The Supreme Court has held that the "Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions." Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 249 (1951). Nor can courts imply a private cause of action in the absence of clear statutory intent. See Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001); Miller Aviation v. Milwaukee County Bd. of Supervisors, 273 F.3d 722, 729-30 (7th Cir. 2001). Accordingly, the ATS cannot be read to create a private cause of action. See Al Odah v. United States, 321 F.3d 1134, 1146-47 (D.C. Cir. 2003) (Randolph, J., concurring); Tel-Oren, 726 F.2d at 799 (Bork, J., concurring) (same); Jones, 722 F. Supp. at 348

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[52] Plaintiffs might attempt to argue that even if defendants did not directly injure plaintiffs or their ancestors, they can be held liable for aiding and abetting unnamed third parties. But the ATS does not provide for aiding and abetting liability, and the Supreme Court has held that that under federal law, liability for aiding and abetting is unavailable unless specifically provided for by statute. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182-183 (1994); cf. infra § IV.B.11.b. Plaintiffs suggest that defendants can be held liable as non-state actors under the ATS, Am. Compl. ¶ 241 n.99, but, as noted above, private actors cannot be held liable for acts that were not even considered violations of the law of nations when they allegedly occurred. See, e.g., Tel-Oren, 726 F.2d at 791-795 (Edwards, J. concurring).

("Section 1350 merely serves as an entrance into the federal courts and in no way provides a cause of action to any plaintiff.").[53] Plaintiffs fail to state a claim under the ATS.

9. Plaintiffs have not pled a claim under any of the state statutes they invoke.

Plaintiffs' invocation (in Counts X-XIV) of private rights of action under the consumer protection or trade practices statutes of five separate states (Illinois, Louisiana, New Jersey, New York, and Texas) adds nothing to the merits of their case. These statutes were not enacted until a century after the abolition of slavery, and cannot be applied retroactively to impose liability for pre-enactment events (even if such claims would not otherwise be barred by the applicable statutes of limitations, which they are, see supra § II.A). Moreover, to the extent plaintiffs seek to attack more recent conduct of the defendants, they have not pled the elements of a violation of any of these statutes with respect to any of the defendants.

a. The statutes cannot be applied retroactively.

The statutory private rights of action plaintiffs seek to assert were created by the respective state legislatures at various times between 1971 and 1980. See La. Rev. Stat. Ann. §§ 51:1401-1420 (enacted 1973); 815 Ill. Comp. Stat. 505/10a (statute enacted in 1961, but section

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[53] The Seventh Circuit has never addressed whether the ATS creates a private cause of action. However, there are good reasons not to read a cause of action into the ATS. If the ATS created substantive rights, all treaties (whether U.S. ratified or not) would be self-executing, contrary to the well-settled presumption that treaties do not create a privately enforceable cause of action. Al Odah, 321 F.3d at 1146 (Randolph, J., concurring); Tel-Oren, 726 F.2d at 812 (Bork, J., concurring); see also Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 Harv. L. Rev. 815 (1997). Additionally, the Constitution makes it clear that it is Congress, not the judiciary, which is to define and punish violations of the law of nations. U.S. Const. art. I, § 8, cl. 10; see also Al Odah, 321 F.3d at 1147 (Randolph, J., concurring). Textual powers assigned to a particular branch may not be shifted from one branch to the other. See Clinton v. City of New York, 524 U.S. 417, 438-40 (1998). But see Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (en banc) (concluding without substantial analysis that the ATS provides a private cause of action); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996) (holding that the ATS creates a private right of action).

authorizing private right of action not enacted until 1973); N.J. Stat. Ann. §§ 56:8-19 (statute enacted in 1960, but section authorizing private right of action not enacted until 1971); N.Y. Gen. Bus. L. § 349(h) (statute enacted 1970, but section authorizing private right of action not enacted until 1980); Tex. Bus. &. Com. Code §§ 17.41-17.63 (enacted 1973). None of these statutes can be applied to impose liability for pre-enactment conduct.[54]

The Amended Complaint's allegations concerning the conduct of defendants is unspecific as to date, but all of the alleged conduct relating to profiting or benefiting from slavery necessarily occurred prior to 1865.[55] Likewise, the plaintiffs' lengthy recital of facts they assert are "related" to their claims under the various state laws they invoke – a recital which does not link any of these "related" facts to any act or omission of any of the defendants – is almost entirely devoted to events prior to 1865. Am. Compl. ¶¶ 103-124 (including, as only post-1865 event, a 1908 race riot in Springfield, Illinois not alleged to have involved either any of the plaintiffs or any of the defendants). Because these statutes are thus necessarily inapplicable to such pre-enactment conduct (and would in any event be unconstitutional if applied retroactively

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[54] First of Am. Bank, Rockford, N.A. v. Netsch, 651 N.E.2d 1105, 1112-13 (Ill. 1995) ("[S]tatutes are presumed to apply prospectively only and will not be given retroactive effect absent clear language within the statute indicating that the legislature intended such effect."); State ex rel. Guste v. Orkin Exterminating Co., 528 So. 2d 198, 204 (La. Ct. App. 1988) (rejecting claim of improper retroactive application of statute because finder of fact had properly found post-enactment commission of unfair trade practice); Williamson v. Treasurer, 814 A.2d 1153, 1163 (N.J. Super. Ct. App. Div. 2003) (New Jersey "courts have long preferred a rule of statutory construction which favors prospective application of statutes"); Buccino v. Cont'l Assurance Co., 578 F. Supp. 1518, 1527 (S.D.N.Y. 1983) (holding amendment providing private cause of action under New York deceptive practices statute not entitled to retroactive application); Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984) (reversing judgment for plaintiff because of failure of sufficient evidence to support a jury finding that the alleged violation by defendant had occurred on or after May 21, 1973 effective date of statute).

[55] There is also a vague allegation that some, unspecified Defendants had constructive knowledge of violations of the laws against slavery at some unspecified time during the 1920's or 1930's but failed to prevent the law from being broken. See Am. Compl. ¶ 90. This time period also long predated the enactment of any of the relevant statutes.

to slavery-related transactions that were lawful at the time – see supra § IV.A), Counts X, XI, XII, XIII, and XIV must be dismissed.

b. No violation of any of the statutes is pleaded.

To the extent plaintiffs' vague and conclusory allegations (see Am. Compl. ¶ 93) of "unconscionable, fraudulent and deceptive public communications made by defendants" are intended to provide a basis for a post-enactment violation of any of these statutes, no such claim can be maintained. First and foremost, the Amended Complaint's conclusory allegations utterly fail to comply with the specificity requirements of Rule 9(b) – they do not disclose to the reader who allegedly said what to whom on what date, much less how any such statement might constitute a violation of any statute invoked. See Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (Rule 9(b) "requir[es] the plaintiff to allege the who, what, where, and when of the alleged fraud"); Unique Coupons, Inc. v. Northfield Corp., No. 99 C 7445, 2000 WL 631324, at *3 (N.D. Ill. May 16, 2000) (dismissing Illinois consumer fraud statutory claim under Rule 9(b) because plaintiff's "allegations are too conclusory; there is no indication of who said what and when and how"). Moreover, plaintiffs fail to allege the location of any of these unspecified public statements, and in particular do not allege that any particular defendant made any such statements in any of the five states at issue, much less in all of them, a critical element of any state statutory claim. See, e.g., Goshen v. Mut. Life Ins. Co., 774 N.E.2d 1190, 1195 (N.Y. 2002) (no violation of New York statute unless transaction in which the consumer is allegedly deceived occurs in New York). Nor does the Amended Complaint contain any allegation that any of the plaintiffs engaged in any consumer transaction with any of the defendants in reliance on such statements.[56] Plaintiffs also fail to plead one or more essential

[56] Plaintiffs cannot base any alleged violation on any statements made by defendants after the actual or threatened filing of any of the cases in this consolidated action. Any such allegation

elements required for liability under each of the five statutes they invoke. For example:

Illinois. 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 v. Amoco Oil Co., 776 N.E.2d 151, 160 (Ill. 2002). A plaintiff specifically "must state the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated." Gallagher Corp. v. Mass. Mut. Life Ins. Co., 940 F. Supp. 176, 180 (N.D. Ill. 1996) (internal quotation omitted). Plaintiffs have not done so, and Count X must be dismissed.

Louisiana. 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 a violation by the defendant of the statute. Id. None of the plaintiffs have alleged any such ascertainable loss of money or movable property, and Count XI must therefore be dismissed.

New Jersey. In language similar to that of the Louisiana statute, 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. Since no such ascertainable loss of money or property is alleged, Count XII must therefore be dismissed.[57]

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would be self-defeating, since plaintiffs could not have been mislead or deceived by any statement made in response to, or after the filing of, their allegations.

[57] There is likewise no allegation that any statement by any defendant was made "in connection with the sale or advertisement of any merchandise or real estate," a necessary element of liability under N.J. Stat. Ann. § 56:8-2. Indeed, the majority of the defendants are not

New York. Plaintiffs have not alleged that any 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, 744-45 (N.Y. 1995). Accordingly, there is no potential basis for liability under the New York statute. Likewise, there is no allegation that any plaintiff has been injured as a result of any alleged public statement by any defendant, which is likewise fatal to such a claim. See id. Count XIII must therefore be dismissed.

Texas. 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 which was detrimentally relied on by plaintiff, or by one of the other three types of conduct proscribed by § 17.50(a). Plaintiffs have not done so, and Count XIV must therefore be dismissed.

10. The California plaintiffs' unfair competition (Section 17200) claim fails as a matter of law.

Plaintiffs in the Hurdle action (the only action that was not included in the Amended Complaint) have asserted an additional – but equally deficient – state law claim against certain defendants under California's unfair competition law (the "UCL").[58] In addition to being barred by the four-year statute of limitations (see supra § II.A), plaintiffs' claim fails as

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even alleged to be in a line of business which involves the sale of merchandise or real estate.

[58] The claim is asserted against the following defendants: Aetna Inc., Canadian National Railway Company, FleetBoston Financial Corporation, Liggett Group, Inc., The Society of Lloyd's, Loews Corporation, New York Life Insurance Company, R.J. Reynolds Tobacco Company and WestPoint Stevens. Because the Hurdle complaint was not served on any of the defendants, only Aetna, FleetBoston and New York Life, the three defendants that removed the action to federal court, join in this section of the joint motion and memorandum.

a matter of law because the UCL cannot be retroactively applied to reach the conduct described in their complaint.

California's unfair competition law first appeared in 1933 in California Civil Code § 3369 and provided that "any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction." Id. In 1977, this provision was separately codified at Cal. Bus. & Prof. Code § 17203 as part of what is now known as the UCL. Section 17203, like its predecessor, reached only ongoing and imminent business practices. In August 1992, the California legislature amended Section 17203 to reach instances of past unfair competition, see Cal. Bus. & Prof. Code § 17203 (2003), so long as such conduct took place after August of 1992, the date of this enactment, an issue that already has been squarely decided. See Solomon v. N. Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1139 (9th Cir. 1998) (1992 amendments to the UCL have no retroactive application); accord Cal. Civ. Code § 3 (2003) (a statute is not retroactive unless it so states expressly); Myers v. Philip Morris Cos., 50 P.3d 751, 758-62 (Cal. 2002) (absent express statement of retroactivity, statute has only prospective application).

Conduct that ended by 1865 is not within the purview of the UCL. As discussed supra in § IV.B.1, defendants' purported failure to provide an accounting to plaintiffs, the only conduct alleged in the Hurdle complaint that extends past 1865, cannot support an unfair competition claim because defendants were under no obligation – legal or otherwise – to provide such an accounting, and thus there is nothing unlawful, unfair or fraudulent in defendants' failure to do so. Moreover, although the Hurdle complaint alleges that the effects of slavery continued past 1865, there is no allegation that the defendants engaged in any conduct after 1865 that would constitute an unfair or unlawful business practice. In sum, California's modern unfair

competition law simply does not reach the conduct alleged in the Hurdle complaint.[59]

11. Plaintiffs' conspiracy claim and other third-party liability allegations fail as a matter of law.

As noted throughout this brief, one of the fundamental defects in the Amended Complaint is its failure to connect an alleged injury of any one of these plaintiffs to alleged conduct by any one of these defendants. Rather, plaintiffs seek to hold defendants liable for an entire chapter of history simply because their alleged predecessors purportedly were doing business in nineteenth century America. To try to obscure this fundamental defect, the Amended Complaint includes a "conspiracy" count, as well as assorted terms like "aiding-and-abetting," "criminal enterprise," "joint venture," and "agency relationship," which are intended to allege some kind of third-party liability. As discussed herein, the attempt fails. The conspiracy count does not state a claim, and the use of other terms like "aiding and abetting" cannot cure the defects in the Amended Complaint.

a. The conspiracy count fails to state a claim.

Plaintiffs' conclusory allegation that the defendants' industries generally conspired with one another and with "their industry groups" to perpetuate and profit from slavery, Am. Compl. ¶¶ 216-218, fails the most basic requirement for maintaining such a claim: that the plaintiffs plead facts demonstrating the existence of an agreement. See Sain v. Nagel, 997 F. Supp. 1002, 1017 (N.D. Ill. 1998) (Illinois law).[60]

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[59] Nor does California's unfair competition law permit the recovery of the relief requested by the Hurdle plaintiffs in their complaint. Non-restitutionary disgorgement of profits, like that requested in the complaint, is not an available remedy under the UCL. See Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937 (Cal. 2003); Kraus v. Trinity Mgmt. Servs., Inc., 999 P.2d 718 (Cal. 2000).

[60] Accord Apani Southwest, Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620, 635 (5th Cir. 2002) (Texas law); Wells v. Shelter Gen. Ins. Co., 217 F. Supp. 2d 744, 753 (S.D. Miss. 2002) (Mississippi law); Speedway Promoters, Inc. v. Hooter's of Am., Inc., 123 F. Supp. 2d 956, 963

predecessors of other companies were also doing business, and that they were "co-dependent on each other." Am. Compl. ¶ 217. Thus, rather than allege any specific agreement, plaintiffs simply assert that defendants or their alleged predecessors existed pre-Civil War, and such existence, ipse dixit, subjects them to liability because of the nature of this country's interdependent economy. Under plaintiffs' "doing-business-equals-a-conspiracy" theory, any business would be liable as a co-conspirator for any other business' conduct at any point in history. Such allegations are even further removed from proper pleading of a civil conspiracy than allegations of parallel action, which themselves would be insufficient. See, e.g., McClure v. Owens Corning Fiberglas Corp., 720 N.E.2d 242, 259 (Ill. 1999); Rastelli v. Goodyear Tire & Rubber Co., 591 N.E.2d 222, 224 (N.Y. 1992); Matthews v. Johnson Publ'g Co., 366 S.E.2d 525, 527 (N.C. Ct. App. 1988). Indeed, the complaint alleges a mere commonality of interest, which is entirely inadequate to show a conspiracy. See, e.g., Bldg. Indus. Fund v. Local Union No. 3, 992 F. Supp. 162, 186 (E.D.N.Y. 1996), aff'd, 141 F.3d 1151 (2d Cir. 1998); Green v. Advance Ross Elecs. Corp., 408 N.E.2d 1007, 1013 (Ill. App. Ct. 1980), aff'd, 427 N.E.2d 1203 (Ill. 1981).

Moreover, the conspiracy claim fails for an additional, independent reason: Conspiracy is "not an independent cause of action, but . . . only the mechanism for subjecting co-conspirators to liability when one of their members committed a tortious act." Beck v. Prupis, 529 U.S. 494, 503-04 (2000). Thus, "[w]here . . . a plaintiff fails to state an independent cause of action underlying its conspiracy allegations, the claim for a conspiracy also fails." Indeck N. Am. Power Fund, L.P. v. Norweb PLC, 735 N.E.2d 649, 662 (Ill. App. Ct. 2000).[61] Because, as

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40, 1995 WL 1055819, at *4 (Va. Cir. Ct. Mar. 27, 1995) (Virginia law).

[61] Accord Wells, 217 F. Supp. 2d at 755; Sokol v. Addison, 742 N.Y.S.2d 311, 312 (N.Y. App. Div. 2002); Aranyosi v. Delchamps, Inc., 739 So. 2d 911, 917 (La. Ct. App. 1999).

demonstrated above, plaintiffs have not stated a claim for any underlying tort, the conspiracy count must fail. The "civil conspiracy" label adds nothing to save the Amended Complaint from dismissal.

b. Plaintiffs' other allegations of third-party liability fail to create such liability.

Plaintiffs' attempt to create third-party liability through the use of terms like "aiding and abetting" is no more successful than their attempt to use the conspiracy count to create such liability. Plaintiffs assert that "Defendants aided and abetted others in the furtherance of the commission of . . . crimes." Am. Compl. ¶ 206 (emphasis added). Private citizens, however, have no authority to bring suits claiming violations of the criminal law, Kuhne v. Illinois, 124 F.3d 204, No. 96-3160, 1997 WL 452312, at *2 (7th Cir. Aug. 6, 1997) (imposing sanctions on private citizen seeking to bring criminal suit), and the federal statute authorizing criminal aiding and abetting liability does not create a *civil* cause of action for aiding and abetting. See Cent. Bank of Denver, N.A., 511 U.S. at 191.

Moreover, even if plaintiffs had alleged that defendants were civilly liable for a tort of aiding and abetting, instead of for aiding and abetting "crimes," the allegations of the Amended Complaint would still fail because "[t]here is no tort of aiding and abetting under Illinois law." Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 452 (7th Cir. 1982). Indeed, Judge Posner went on to say in Cenco that he was unaware of a general civil tort of aiding and abetting under the law of any other state either. Id.; cf. Guidry v. Bank of LaPlace, 661 So. 2d 1052, 1057 (La. Ct. App. 1995) (in absence of conspiracy, no distinct cause of action for aiding and abetting). Nor is there any general federal civil aiding and abetting liability. See Cent. Bank of Denver, N.A., 511 U.S. at 181-82. Rather, civil liability for aiding and abetting under federal law may be imposed only when a statute expressly creates such liability. See id. at 183 (to hold

otherwise would be a "vast expansion of federal law").

Finally, even if plaintiffs had alleged liability for aiding and abetting a tort or statutory violation (they have not), and even if such liability were expressly recognized by law (it is not), their Amended Complaint would have to be dismissed because they have failed entirely to plead facts supporting such liability: specific knowledge by the defendant of an identified principal's intent to commit the wrongful act, intent by the defendant to further the wrong, and action by the defendant in furtherance of the wrongful act. See, e.g., Damato v. Hermanson, 153 F.3d 464, 473 (7th Cir. 1998) (requirements under Commodity Exchange Act, which creates a cause of action for aiding and abetting).

The other terms used by plaintiffs fall even further afield. For example, plaintiffs allege third-party liability under a "criminal enterprise" theory, see Am. Compl. ¶ 208, but the continuing criminal enterprise statute is a federal criminal statute for which the federal government has the *sole* power to bring an action or punishment. See 21 U.S.C. § 848 (2000). Similarly, plaintiffs have not pled any facts to support that each or any defendant was engaged in a "joint venture" or "agency relationship" with any other party, or that such concepts could somehow create third-party liability. See, e.g., Pinski v. Adelman, No. 94 C 5783, 1995 WL 669101, at *14 (N.D. Ill. Nov. 7, 1995) (to survive a motion to dismiss, plaintiffs must plead "sufficient allegations to support the legal conclusion respecting agency"); Zeising v. Kelly, 152 F. Supp. 2d 335, 348-349 (S.D.N.Y. 2001) (dismissing claim where plaintiff failed adequately to plead each element of joint venture) (citing Barrett v. POAG & McEwen Lifestyle Cts.-Deer Park Town Ctr., LLC, No. 98 C 7783, 1999 WL 691850, at **6-8 (N.D. Ill. Aug. 26, 1999)). Put simply, like plaintiffs' conspiracy claim, plaintiffs' other allegations of third-party liability do not create such liability or cure the incurable defects in the Amended Complaint.

CONCLUSION

Without question, the historical events described in the Amended Complaint caused great suffering and deep scars in this nation's history. But it is also beyond debate that our judicial system is not a proper forum for redressing the grievances arising from that era. Without alleging any connection between themselves or their ancestors and these present-day companies named as defendants, plaintiffs seek to use the courts to examine a tragic period in our nation's history. But plaintiffs cannot meet the basic requirements of standing, timeliness, and justiciability; nor can they state a cognizable claim. Defendants respectfully request that plaintiffs' Amended Complaint be dismissed with prejudice.

Respectfully Submitted,

O'MELVENY & MEYERS LLP

John F. Niblock /byhkh
John H. Beisner
John F. Niblock
555 13th Street, N.W.
Suite 500 West
Washington, DC 20004
Attorneys for Aetna Inc.

WHITE & CASE LLP

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

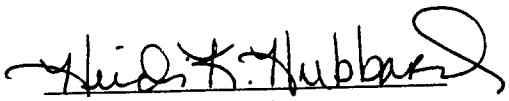
KIRKLAND & ELLIS LLP

Andrew R. McGaan /byhkh
Andrew R. McGaan
Douglas G. Smith
200 East Randolph Drive
Chicago, IL 60601
Attorneys for Brown & Williamson Tobacco Corp.

CANADIAN NATIONAL RAILWAY COMPANY

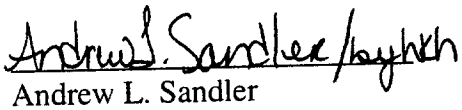
Michael Barron /byhkh
Michael Barron
455 North Cityfront Plaza Drive
Chicago, IL 60611-5317
Attorneys for Canadian National Railway Company

WILLIAMS & CONNOLLY LLP



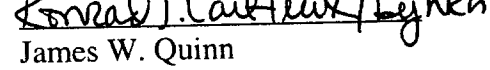
Heidi K. Hubbard
Andrew W. Rudge
725 12th Street, N.W.
Washington, DC 20005
Attorneys for CSX Corp.

SKADDEN, ARPS, SLATE, MEAGER & FLOM LLP



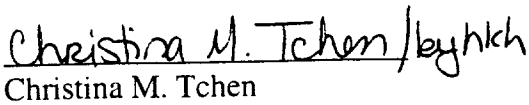
Andrew L. Sandler
1440 New York Avenue, N.W.
Washington, DC 20005-2111
Attorneys for FleetBoston Financial Corp.

WEIL, GOTSHAL & MANGES LLP



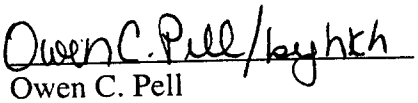
James W. Quinn
Arvin Maskin
Konrad L. Cailteux
767 Fifth Avenue
New York, NY 10153
Attorneys for Lehman Brothers Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM (ILLINOIS)



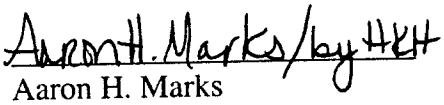
Christina M. Tchen
333 West Wacker Drive, Suite 2100
Chicago, IL 60606-1285
Attorneys for FleetBoston Financial Corp.

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.

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 (ILLINOIS)

Christina M. Tchen/by hkh
Christina M. Tchen
333 West Wacker Drive, Suite 2100
Chicago, IL 60606-1285
Attorneys for New York Life Insurance Co.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Vaughn C. Williams/by hkh
Vaughn C. Williams
Four Times Square
New York, NY 10036-6522
Attorneys for New York Life Insurance Co.

HUNTON & WILLIAMS LLP

Jack E. McClard/by hkh
Jack E. McClard
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Attorneys for Norfolk Southern Railway Company

JONES DAY

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

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

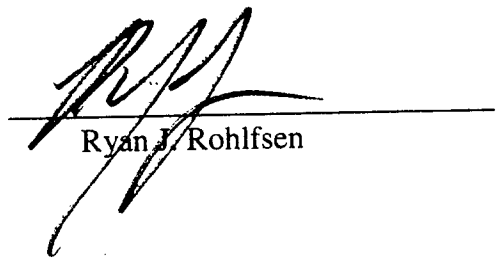
Debra M. Torres/by hkh
Debra M. Torres
John W. Brewer
One New York Plaza
New York, NY 10004
Attorneys for The Society of Lloyd's

SONNENSCHEIN NATH & ROSENTHAL LLP

Gary Senner/by hkh
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

I, Ryan J. Rohlfsen, an attorney, hereby certify that on July 18, 2003, a true and correct copy of the foregoing **Memorandum In Support of Defendants' Joint Motion to Dismiss** was served upon the attached service list via messenger to plaintiffs' counsel Lionel Jean-Baptiste, via Federal Express to all other plaintiffs' counsel, and via U.S. Mail to defendants' counsel.



Ryan J. Rohlfsen

SERVICE LIST

Counsel for plaintiffs:

Diane E. Sammons
Jay J. Rice
NAGEL, RICE & MAZIE, LLP
301 South Livingston Avenue, Suite 201
Livingston, New Jersey 07039
Telephone: (973) 535-3100
Facsimile: (973) 535-3373

Pius A. Obioha
PIUS A. OBIOHA & ASSOCIATES, LLC
1546 North Broad Street
New Orleans, Louisiana 70119
Telephone: (504) 944-1049
Facsimile: (504) 949-0071

Roger S. Wareham
Jomo Sanga Thomas
THOMAS WAREHAM & RICHARDS, LLP
572 Flatbush Avenue, Suite 2
Brooklyn, New York 11225
Telephone: (718) 941-6407
Facsimile: (718) 941-6360

Morse Geller
116-10 Queens Boulevard
Forest Hills, New York 11375
Telephone: (718) 520-0300
Facsimile: (718) 520-8211

Edward D. Fagan
FAGAN & ASSOCIATES
51 JFK Parkway, 1st Floor, West
Short Hills, NJ 07078
Telephone: (973) 218-2610

Bryan R. Williams
46 Trinity Place, 4th Floor
New York, New York 10006
Telephone: (212) 797-4600
Facsimile: (212) 505-1800

Lionel Jean-Baptiste
JEAN-BAPTISTE & ASSOCIATES
1900 Asbury Avenue
Evanston, Illinois 60201
Telephone: (847) 424-0400
Facsimile: (847) 424-1049

Robert Notzon
Law Office of Robert Notzon
509 W. 16th Street
Austin, Texas 78701
Telephone: (512) 474-7563
Facsimile: (512) 474-9489

Gary Bledsoe
Law Offices of Gary L. Bledsoe
312 West 12th Street, Suite 307
Austin, Texas 78701
Telephone: (512) 322-9992
Facsimile: (512) 322-0840

Harry E. Cantrell
The Cantrell Law Firm
309 Baronne Street, Suite 300
New Orleans, Louisiana 70112-1605
Telephone: (504) 585-7347

Joseph M. Wright
Chief Deputy Court Administrator
State of Michigan, 36th District Court
421 Madison Avenue, Suite 5028
Detroit, Michigan 48226
Telephone: (313) 965-2788

Barbara K. Ratliff
880 W. First St., Ste. 522
Los Angeles, CA 90012-2446
Telephone: (213) 687-7171
Facsimile: (213) 687-9796

Counsel for defendants :

John H. Beisner
John F. Niblock
Pammela Quinn
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Suite 500 West
Washington, D.C. 20004-1109
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
-and-
Ann C. Turetsky
O'MELVENY & MYERS LLP
153 East 53rd Street, 54th Floor
New York, New York 10022-4611
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
Attorneys for Aetna Inc.

Andrew R. McGaan
Douglas G. Smith
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
Phone: (312) 861-2183
Fax: (312) 861-2200
Attorneys for Brown & Williamson Tobacco Corporation

Vincent R. FitzPatrick, Jr.
Heather K. McDevitt
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
Telephone: (212) 819-8200
Facsimile: (212) 354-8113
Attorneys for Brown Brothers Harriman & Co.

Michael J. Barron, Jr.
CANADIAN NATIONAL RAILWAY COMPANY
455 North Cityfront Plaza Drive
Chicago, IL 60611-5317
Telephone: (312) 755-7954
Facsimile: (312) 755-7669
-and-
James Fletcher
FLETCHER & SIPPEL LLC
180 N. Stetson Avenue, #3125
Chicago, IL 60601-6721
Telephone: (312) 540-9448
Facsimile: (312) 540-9098
Attorneys for Canadian National Railway Company

Heidi K. Hubbard
Andrew W. Rudge
WILLIAMS & CONNOLLY LLP
725 – 12th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 434-5000
Facsimile: (202) 434-5029
-and-
David M. Kroeger
JENNER & BLOCK, LLC
One IBM Plaza
Chicago, IL 60611
Telephone: (312) 923-2861
Facsimile: (312) 527-0484
Attorneys for CSX Corporation

Christina M. Tchen
Ryan J. Rohlfsen
SKADDEN, ARPS, SLATE, MEAGHER & FLOM (Illinois)
333 W. Wacker Drive, Suite 2100
Chicago, Illinois 60606-1285
Telephone: (312) 407-0700
Facsimile: (312) 407-0411
-and-
Andrew M. Sandler
Gary DiBianco
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
1440 New York Avenue N.W.
Washington, D.C. 20005-2111
Telephone: (202) 371-7000
Facsimile: (202) 393-5760
Attorneys for FleetBoston Financial Corporation

James W. Quinn
Arvin Maskin
Konrad L. Cailteux
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007
Attorneys for Lehman Brothers Inc.

Aaron Marks
Michael Rosenstein
KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
1633 Broadway
New York, New York 10019
Telephone: (212) 506-1721
Facsimile: (212) 506-1800
Attorneys for Liggett Group Inc.

Christina M. Tchen
Ryan J. Rohlfsen
SKADDEN, ARPS, SLATE, MEAGHER & FLOM (Illinois)
333 W. Wacker Drive, Suite 2100
Chicago, Illinois 60606-1285
Telephone: (312) 407-0700
Facsimile: (312) 407-0411
-and-
Vaughn C. Williams
Marco E. Schnabl
William J. Hine
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
4 Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000
Facsimile: (212) 735-2000
Attorneys for New York Life Insurance Company

Jack E. McClard
HUNTON & WILLIAMS
951 East Byrd Street
Richmond, Virginia 23219
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Attorneys for Norfolk Southern Railway Company

Thomas F. Gardner
Susan L. Winders
JONES DAY
77 West Wacker, Suite 3500
Chicago, Illinois 60601-1692
Telephone: (312) 782-3939
Facsimile: (312) 782-8585
Attorneys for R.J. Reynolds Tobacco Company

John W. Brewer
Debra M. Torres
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
One New York Plaza
New York, New York 10004
Telephone: (212) 859-8000
Facsimile: (212) 859-4000
Attorneys for The Society of Lloyd's

Gary Senner
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
Telephone: (312) 876-8000
Facsimile: (312) 876-7934
Attorneys for Union Pacific Corporation

Frank Carling
COLLAZO CARLING & MISH LLP
747 Third Avenue
New York, New York
10017-2803
Telephone: (212) 758-7600
Facsimile: (212) 758-7609
Attorneys for WestPoint Stevens, Inc.

Owen C. Pell
Karen M. Asner
Timothy S. Pfeifer
J.P.MORGAN CHASE LEGAL DEPT.
1155 Ave. of the Americas
New York, New York 10036
Telephone: (212) 819-8200
Attorneys for JPMorgan Chase & Co.

Robert T. Stephenson
1 Chase Manhattan Plaza,
26th Floor
New York, New York 10081
Telephone: (212) 552-0948
Attorneys for JPMorgan Chase & Co.