

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

ROBERT JEAN, et al.	)	CASE NO. 1:04 CV 1904
	)	
Plaintiffs,	)	JUDGE KATHLEEN O'MALLEY
	)	
v.	)	<b>MEMORANDUM IN SUPPORT OF</b>
	)	<b>MOTION TO DISMISS FIRST</b>
THE STANLEY WORKS, et al.	)	<b>AMENDED CLASS ACTION</b>
	)	<b>COMPLAINT FOR DAMAGES AND</b>
Defendants.	)	<b>FOR DECLARATORY AND</b>
	)	<b>INJUNCTIVE RELIEF AND JOINED</b>
	)	<b>INDIVIDUAL PLAINTIFFS'</b>
	)	<b>COMPLAINT FOR DECLARATORY</b>
	)	<b>RELIEF AND DAMAGES WITH JURY</b>
	)	<b>DEMAND</b>

**INTRODUCTION**

Pursuant to Fed. R. Civ. P. 12(b)(6), defendant The Stanley Works (“Stanley”) moves to dismiss all of the claims attempted to be stated by the ten named plaintiffs who do not have an arbitration agreement with Stanley’s Mac Tools Division (“Mac”).<sup>1</sup> As to these ten plaintiffs, the Complaint attempts to state seven claims against Mac on their own behalf and on behalf of an

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<sup>1</sup> These plaintiffs are Vince Bainter, Harlan Grantham, Kenneth Hankins, Robert Jean, Rob Love, Jerry Mead, Stan Schwartz, Fidel Tallet, Rick Williams and Joseph Zollo. Concurrently with this motion, Stanley has filed a motion to compel arbitration and memorandum in support relating to the other 93 named plaintiffs. That memorandum sets forth generally the background of the business relationship between Mac and its distributors who are plaintiffs herein; Stanley incorporates that motion and memorandum by reference.

improper putative class,<sup>2</sup> including breach of fiduciary duty (Count III); conversion (Count IV); unjust enrichment (Count V); breach of contract (Count VI); legal or constructive fraud (Count VII); tortious interference with business relations (Count VIII); injunctive relief (Count IX); and three additional “individual” claims, including actual fraud and fraud in the inducement (“Individual” Count I); defamation (“Individual” Count II); and false imprisonment (“Individual” Count III).<sup>3</sup> For the reasons stated below, the Complaint should be dismissed with prejudice in its entirety as to these plaintiffs.

## **LAW AND ARGUMENT**

### A. STANDARD OF REVIEW

A motion to dismiss may be granted if it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. Arrow v. FRB of St. Louis, 358 F.3d 392, 393 (6<sup>th</sup> Cir. 2004), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957). While well-pleaded factual allegations in the complaint must be taken as true (even where, as here, certain facts pled in the Complaint are not accurate), the trial court need not accept as true legal conclusions or unwarranted factual inferences. Lewis v. ACB Bus Servs., 135 F.3d 389, 405 (6<sup>th</sup> Cir. 1998). As demonstrated below, plaintiffs fail to state a single cognizable claim.

### B. PLAINTIFFS FAIL TO STATE A BREACH OF FIDUCIARY DUTY CLAIM (COUNT III) BECAUSE THEY FAIL TO ALLEGE SUFFICIENT FACTS TO SUPPORT THE EXISTENCE OF A FIDUCIARY RELATIONSHIP.

In Count Three of the Complaint, plaintiffs allege Mac breached a fiduciary duty it owed to Plaintiffs pursuant to the parties’ Distributorship Agreements. (First Amended Complaint

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<sup>2</sup> Count II of the First Amended Complaint purports to seek declaratory relief against defendants AMEX and KBNA only.

<sup>3</sup> These ten plaintiffs were not included as plaintiffs in Count I of the Complaint, requesting a declaratory judgment regarding the arbitration provisions in the contracts between Mac and the other plaintiffs.

(“Am. Compl.”) ¶135.) However, the parties’ Distributorship Agreements<sup>4</sup> do not create a fiduciary relationship and plaintiffs wholly fail to allege any other basis to create such a duty.

Under Ohio law,<sup>5</sup> a fiduciary is a person having a duty, created by his or her undertaking, to act primarily for the benefit of another in matters connected with this undertaking. Strock v. Pressnell, 38 Ohio St. 3d 207, 216 (1988). To allege a fiduciary duty, plaintiffs must allege the existence of either an express fiduciary relationship or a *de facto* fiduciary relationship. See Applegate v. Fund For Constitutional Gov’t, 70 Ohio App. 3d 813, 816 (1990).

Plaintiffs do not allege the existence of an express fiduciary relationship. Instead, they allege that in discharging its obligations to plaintiffs under their Distributorship Agreements, Mac became a *de facto* fiduciary. However, plaintiffs’ relationship with Mac is governed by these Distributorship Agreements, which do not create a *de facto* fiduciary relationship.

Indeed, all ten plaintiffs expressly agreed in their Distributorship Agreements that they are independent contactors. Where, as here, a distributor’s agreement with a manufacturer defines their relationship and expressly states that the distributor is an independent contractor, the manufacturer cannot be deemed a fiduciary. Tool Steel Products Sales Corp. v. XTEK, Inc., No. C-910533, 1993 Ohio App. LEXIS 333, \*12-13 (1<sup>st</sup> Dist. App. January 29, 1993) (Ex. C) (summary judgment against distributor on breach of fiduciary duty claim upheld; the agreement denominates the distributor as an **independent contractor**). After agreeing to such provisions, the distributor could reasonably expect no more than that the manufacturer would abide by the terms of the contract. Id. at \*13. See also Eyerman v. Mary Kay Cosmetics, Inc., 967 F.2d 213,

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<sup>4</sup> Although not attached to plaintiffs’ complaint, plaintiffs’ Distributorship Agreements (Ex. A) are deemed part of the pleadings and may be considered by the Court because plaintiffs refer to them in their complaint, and they are central to plaintiffs’ claims. Armengau v. Cline, 7 Fed. Appx. 336, 344 (6<sup>th</sup> Cir. 2001) (Ex. B).

<sup>5</sup> Each of the plaintiffs’ Distributorship Agreements contains an Ohio choice of law clause.

220-21 (6<sup>th</sup> Cir. 1992) (court upheld summary judgment for manufacturer on distributor's fiduciary duty claim).

In The Iams Co. v. L.A. Pet Foods, Inc., No. C-3-93-307, 1998 U.S. Dist. LEXIS 6584 (S.D. Ohio March 26, 1998), the district court emphasized that the "Ohio Supreme Court has been loathe to recognize the existence of a de facto fiduciary duty." Id. at \*39 (Ex. D). "Such a confidential relationship," the court noted, "cannot be unilateral." Id. at \*41. "[A] fiduciary duty may arise from an informal relationship **only if both parties understand** that a special trust or confidence has been reposed." Id. (emphasis supplied). Important to the court's determination in Iams was the language provided for in the agreement itself:

Herein, the parties' relationship was governed by Distributorship Agreements, **which provided that Defendants were independent contractors, a status which, objectively, contravenes the Defendants' assertion that Plaintiff owed them a de facto fiduciary duty.**

Id. at \*43 (emphasis supplied).

The same situation is presented here. The parties' relationship is governed by Distributorship Agreements that provide that plaintiffs are independent contractors. No fiduciary duty was owed to plaintiffs and no claim for breach of such a duty can be stated as a matter of law.

C. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR CONVERSION (COUNT IV).

Plaintiffs' conversion claim fails as a matter of law. For their conversion claim, plaintiffs allege that, as part of the contractual relationship created by the Distributorship Agreements, they were required to send the funds collected from their customers to Mac, and Mac would apply the funds to the distributors' accounts. (Am. Compl. ¶¶ 135-138.) Plaintiffs then allege "Mac failed

to properly and accurately account to Plaintiffs [] for the property and money Mac received from them.” (Am. Compl. ¶ 142.)

Where, as here, a purported conversion claim is merely a recasting of a breach of contract claim, no independent tort claim for conversion is stated. See DeNune v. Consol. Capital of N. Am., Inc., 288 F. Supp. 2d 844, 854 (N.D. Ohio 2003). A claim for conversion “lies against a contracting party independent of a breach of contract claim so long as the plaintiff alleges a breach of a duty owed separately from obligations created by the contract.” Id. Here, plaintiffs allege no such independent duty arising separate from the parties’ contractual relationship, and thus fail to state an independent tort claim for conversion.

In any event, plaintiffs fail to plead (and cannot plead) the necessary elements of a conversion claim because they fail to identify any specific money or property allegedly converted. To state a claim for conversion, a plaintiff must identify a specific res that the defendant converted, and a general allegation that a plaintiff’s “money” was converted does not state a claim. Howard v. McWeeney (In re McWeeney), 255 B.R. 3, 6 (Bankr. S.D. Ohio 2000) (“A broken promise to pay a certain sum of money does not meet the stringent specific fund requirement for the establishment of a money conversion claim.”). Rather, money can only be converted “when it is identifiable and there is an obligation to return the specific money in question.” Javitch v. First Montauk Fin. Corp., 279 F. Supp. 2d 931, 946 (N.D. Ohio 2003). The money involved must be “earmarked” or otherwise capable of identification, “such as money in a bag, coins or notes that have been entrusted to the defendant’s care, or funds that have otherwise been sequestered.” NPF IV, Inc. v. Transitional Health Servs., 922 F. Supp. 77, 81 (S.D. Ohio 1996).

Not only do plaintiffs wholly fail to identify any specific property or funds that Mac purportedly “wrongfully exercised” its control over, they also fail to plead a demand for return of their property, and this failure is independently fatal to their claim. See id. Accordingly, Count IV of plaintiffs’ Complaint fails to state a claim.

**D. PLAINTIFFS’ CLAIM FOR UNJUST ENRICHMENT (COUNT V) SHOULD BE DISMISSED.**

Plaintiffs’ unjust enrichment claim (Count V) also fails to state a proper claim. In this Count, plaintiffs allege that they paid Mac for tools, trucks and other items, and that Mac’s “retention of the benefit [incurred under the parties’ distributorship relationship] by Mac would be inequitable and unjust in this case because Mac misrepresented and omitted to disclose material facts regarding the viability of the distributor business model, but for which the distributors would not have gone into the business and made payments to Mac.” (Am. Compl. ¶ 148). Accordingly, this claim is based on plaintiffs’ fraud allegations (which are also pled in Count VII of the Complaint).

Fed. R. Civ. P. 9(b) applies not only to claims of fraud, but also to all claims predicated on allegations of fraudulent conduct. As the Second Circuit recently explained:

By its terms, Rule 9(b) applies to “all averments of fraud.” Fed. R. Civ. P. 9(b). This wording is cast in terms of the conduct alleged, and is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action. Fraud is not an element or a requisite to a claim under Section 11 or Section 12(a)(2); at the same time, claims under those sections may be—and often are—predicated on fraud. The same course of conduct that would support a rule 10b-5 claim may as well support a Section 11 claim or a claim under Section 12(a)(2). So while a plaintiff need allege no more than negligence to proceed under Section 11 and Section 12(a)(2), claims that do rely upon averments of fraud are subject to the test of Rule 9(b).

Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004). See also Lone Star Ladies Inv. Club v. Schlotzsky's, Inc., 238 F.3d 363, 368 (5th Cir. 2001) (“Rule 9(b) applies by its plain language to all averments of fraud, whether they are part of a claim of fraud or not.”); Tramontana v. May, Nos. 02-10012-BC and 02-10234-BC, 2004 U.S. Dist. LEXIS 4557 \*18 (E.D. Mich. Mar. 16, 2004) (Ex. E) (“It matters not whether a claim is ‘grounded in fraud,’ terminology not found in the Rule. Rather, if an allegation contains ‘an averment of fraud’ whether as part of a fraud claim or an element of a non-fraud claim, the ‘averment of fraud’ must be stated with the requisite particularity.”). Accordingly, because plaintiffs’ unjust enrichment claim is predicated on fraud, it is subject to the heightened pleading requirements of Rule 9(b).

As discussed in greater depth in regard to Count VII, *infra*, plaintiffs wholly fail to meet the pleading standard in regard to their allegations that Mac committed a fraud. Indeed, plaintiffs fail to allege the time, place, or particular content of any supposed fraudulent representation leading to unjust enrichment. See Res. Title Agency, Inc. v. Morreale Real Estate Servs., 314 F. Supp. 2d 763, 775 (N.D. Ohio 2004). Count V thus fails to state a cognizable claim and should be dismissed.

**E. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR BREACH OF CONTRACT (COUNT VI).**

Count VI fails to state a proper claim for breach of contract because the Complaint does not identify any contractual provision allegedly breached by Mac, and thus does not meet even the most basic pleading requirements required by Fed. R. Civ. P. 8(a). Indeed, although this count contains a number of paragraphs describing various terms in the parties’ Distributorship Agreements and alleging that some of these terms are “unconscionable,” nowhere in these allegations do plaintiffs identify what provision of the parties’ contracts was supposedly breached by Mac. (See Am. Compl. ¶¶ 156-174.) Instead, plaintiffs make only the conclusory

allegation that Mac breached the Distributorship Agreements by failing to “fulfill its contractual obligations without legal excuse.” (Am. Compl. ¶ 175.)

Plaintiffs’ failure to identify which contractual obligations were allegedly breached renders this claim appropriate for dismissal. See Schoonover v. Van Leunen’s, Inc., No. C-780035, 1979 Ohio App. LEXIS 9863 \*3 (1<sup>st</sup> Dist. App. March 21, 1979) (Ex. F) (“The instant complaint alleged that . . . defendant breached its duties ‘as called for in said contract’ . . . . [T]he instant complaint fails to identify the promised [sic] claimed to have been broken and thus it fails to state a claim under Civ. R. 8(A).”); see also Wolff v. Rare Medium, Inc., 210 F. Supp. 2d 490, 496 (S.D.N.Y. 2002), aff’d, 65 Fed. Appx. 736 (2d Cir. 2003) (“For a breach of contract claim to exist, the Plaintiffs must identify what provision of the contract was breached as a result of the acts at issue.”) (internal punctuation omitted); Sweeney v. St. Joseph’s Hosp., 769 F. Supp. 747, 751 (M.D. Pa. 1991), aff’d, 980 F.2d 724 (3d Cir. 1992) (holding that plaintiffs failed to state a claim for breach of contract when he did not specify which provisions of the employee handbook defendant breached or which provisions indicated his employer’s intent to create a contract).

F. PLAINTIFFS FAIL TO STATE A COGNIZABLE FRAUD CLAIM (COUNT VII AND INDIVIDUAL COUNT I).

To state a claim for common law fraud, each of the following elements must be pled:

(a) a representation, or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

State ex rel. The Illuminating Co. v. Cuyahoga County Court of Common Pleas, 97 Ohio St. 3d 69, 74 (2002). Pursuant to the Federal Rules of Civil Procedure, averments of fraud must be stated with particularity. Fed. R. Civ. P. 9(b). This requires Plaintiffs to set forth the “who, what,

when, where and how” of the alleged fraud. Williams v. WMX Techs., Inc., 112 F.3d 175, 179 (5<sup>th</sup> Cir. 1997); City of Painesville v. First Montauk Corp., 178 F.R.D. 180, 188 (N.D. Ohio 1998).

Plaintiffs fail to identify the time, place, or contents of any alleged misrepresentation, thereby failing to meet the “when,” “where” and “what” pleading requirement. See id. Plaintiffs merely contend generally that Mac violated its duty to disclose material information, made “actual or implied representations and concealment of matters of fact,” and “made actual and implied false representations concerning material facts to the transactions.” (Am. Compl. ¶¶ 178, 192.) Plaintiffs allege nothing beyond mere legal conclusions, and simply listing the elements of fraud is not sufficient to stave off dismissal. See Lewis, 135 F.3d at 405-06 (“[T]he admonishment to liberally construe plaintiffs’ claim when evaluating a Rule 12(b)(6) dismissal does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions.”)

Because plaintiffs’ Complaint does not even come close to alleging a claim of fraud with the particularity required by Rule 9(b), the Court should dismiss the fraud claims.

**G. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS (COUNT VIII).**

In Count VIII, plaintiffs allege that Mac tortiously interfered with their relationships with their customers by sending incorrect “credit-dunning” letters to plaintiffs’ customers. Under Ohio law, the elements necessary for a tortious interference with business relations claim are: “(1) a business relationship or contract; (2) the wrongdoer’s knowledge of the relationship or contract; (3) the wrongdoer’s intentional and improper action taken to prevent a contract formation, procure a contractual breach, or terminate a business relationship; (4) a lack of

privilege; and (5) resulting damages.” Salatin v. Trans Healthcare of Ohio, Inc., 170 F. Supp. 2d 775, 780 (N.D. Ohio 2001).

Mac cannot be liable for tortious interference, however, because Mac was privileged to send the collection letters. A person is “privileged to interfere in a contract, if the person is legitimately asserting a legally protected interest that the person believes will be impaired by the performance of a contract.” Emergency Preemption, Inc., v. Emergency Preemption Systems, Inc., No. 71350, 1997 Ohio App. LEXIS 3691 \*15 (8<sup>th</sup> Dist. App. Aug. 14, 1997) (Ex. G); see also RESTATEMENT (SECOND) OF TORTS § 773. Under plaintiffs’ allegations, Mac would receive these funds and therefore clearly had an interest in these debts and therefore had a privilege to send the collection letters. (Am. Compl. ¶ 100). Indeed, plaintiffs do not allege otherwise, but rather complain that *some* of the letters were incorrectly sent, because of Mac’s poor accounting system, to customers who already had paid. (Id.)

To overcome a qualified privilege, a plaintiff must demonstrate, by clear and convincing evidence, that a defendant acted with malice. Andrews v. Carmody, 145 Ohio App. 3d 27, 33 (2001). A defendant acts with malice if he acts with knowledge that the statements that were made were false or with disregard as to the veracity of the statements. Id. Nowhere in plaintiffs’ complaint do they allege that Mac acted with the requisite malice.<sup>6</sup> At most, plaintiffs allege mistake or negligence – far short of malice. Accordingly, this Count should be dismissed.

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<sup>6</sup> While plaintiffs allege “intentional” interference and that “Mac’s intent can be readily ascertained from its utter failure to issue letters of correction and apology to the wrongfully dunned customers” (Am. Compl. ¶ 185), they never allege that Mac knew that its collection letters were incorrect. In fact, plaintiffs suggest otherwise, claiming that Mac’s accounting problems resulted from a “lack of knowledgeable management, software failures, and inadequate administrative and technical support.” (Am. Compl. ¶ 70).

H. PLAINTIFFS FAIL TO STATE A COGNIZABLE CLAIM FOR INJUNCTIVE RELIEF (COUNT IX).

In Count IX, plaintiffs purport to seek an injunction prohibiting defendants from collecting certain amounts owed by the plaintiffs. A “claim” for an injunction is a request for relief only and does not state a cognizable claim. Chamberlain v. The American Tobacco Co., 1999 U.S. Dist. LEXIS 22636 \*61 (N.D. Ohio 1999) (“[E]quitable relief is not a cognizable legal theory of recovery but is merely a request for a specific type of relief.”) (Ex. H). Ohio does not recognize a cause of action for injunctive relief. Id. (“There is no ‘cause of action’ under Ohio law for ‘equitable (injunctive and/or declaratory) relief.’”). Count IX should be dismissed.

I. PLAINTIFFS’ DEFAMATION AND FALSE IMPRISONMENT COUNTS (“INDIVIDUAL” COUNTS II AND III) FAIL TO STATE COGNIZABLE CLAIMS.

Fed. R. Civ. P. 8(a) requires complaints to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” This notice pleading requirement demands more than bare assertions of legal conclusions. See Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). A complaint must contain “either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.” Id.

1. Defamation

The Court should dismiss plaintiffs’ defamation claim because it does not satisfy the basic requirements of notice pleading. To recover for defamation, a plaintiff must show that a defendant made a false, defamatory statement pertaining to the plaintiff and was (at least) negligent in publishing it. Golem v. Village of Put-In-Bay, 222 F. Supp. 2d 924, 935 (N.D. Ohio 2002). In the Complaint, plaintiffs allege only that “Mac through its employees, management officers, Board of Directors, and other agents, made false and defamatory statements concerning

certain Plaintiffs.” (Am. Compl. ¶ 198.) Only ten of the 103 plaintiffs will remain following the Court’s ruling on Mac’s Motion to Compel Arbitration and there is nothing in the Complaint to indicate that any of those ten were defamed (or falsely imprisoned – see Section I.2, *infra*).

Furthermore, these bare assertions of legal conclusions do not satisfy the requirements of notice pleading. See Scheid, 859 F.2d at 436; Fenley v. Bowman, No. CA98-02-013, 1998 Ohio App. LEXIS 3876 \*6 (12<sup>th</sup> Dist. App. August 24, 1998) (Ex. I) (“The allegation in Fenley’s complaint that Bowman ‘made numerous slanderous remarks’ about Fenley at the Society’s meeting is a conclusory statement that is insufficient to withstand a motion to dismiss.”). Because plaintiffs fail to identify who made the statements, which plaintiffs the statements concerned, or even the general substance of the comments, their claim is legally insufficient.

## 2. False Imprisonment

Plaintiffs’ false imprisonment claim (Am. Compl. ¶¶ 203-207) also fails to meet the requirements of notice pleading. See Lewis, 135 F.3d at 405-06. First, as noted above, there is nothing in the Complaint to indicate that any of the ten non-ADR plaintiffs was falsely imprisoned. A valid claim of false imprisonment under Ohio law requires that a person confine another intentionally, “without lawful privilege and against his consent within a limited area for any appreciable time, however short.” Bennett v. Ohio Dep’t of Rehab. & Corr., 60 Ohio St. 3d 107, 109 (1991). While plaintiffs allege that “[c]ertain individual Plaintiffs were intentionally detained by Mac” and that the detentions supposedly resulted from unspecified allegations that the detainees had committed crimes (Am. Compl. ¶¶ 204-206), plaintiffs never identify who was allegedly detained, whether the area of detainment was a “limited area,” and how long the individuals were detained. Simply stated, the Complaint does not contain “either direct or inferential allegations respecting all the material elements to sustain a recovery under some

viable legal theory.” Scheid, 859 F.2d at 436. Therefore, the Court should dismiss the claim. See, e.g., Mitchell v. Lawson Milk Co., 40 Ohio St. 3d 190, 193 (1988) (“Unsupported conclusions that appellant committed an intentional tort are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion.”); Wright v. Dep’t of Rehab. & Corrections, No. 94API08-1169, 1995 Ohio App. LEXIS 1317 \*9 (10<sup>th</sup> Dist. App. March 28, 1995) (Ex. J) (“Conclusory allegations that plaintiff was ‘forcibly kidnapped’ are insufficient to state a claim for relief against defendant.”).

### CONCLUSION

For the foregoing reasons, Defendant The Stanley Works respectfully requests that this Court dismiss the First Amended Class Action Complaint of the ten-ADR plaintiffs with prejudice. Although the numerous pleading deficiencies in the original Complaint were pointed out in this defendant’s original motion to dismiss, these ten plaintiffs have not cured any of them in their First Amended Class Action Complaint, and therefore this dismissal should be with prejudice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The foregoing Memorandum in Support of Motion to Dismiss First Amended Class Action Complaint for Damages and for Declaratory and Injunctive Relief and Joined Individual Plaintiffs' Complaint for Declaratory Relief and Damages with Jury Demand was filed electronically this 10th day of January, 2005. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

*s/ Thomas S. Kilbane* \_\_\_\_\_