COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 1981CV00784

TAMARA LANIER,

Plaintiffs,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE AKA HARVARD CORPORATION, HARVARD BOARD OF OVERSEERS, HARVARD UNIVERSITY, THE PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants President and Fellows of Harvard College, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology (the "Peabody Museum") (collectively, "Harvard")[1] respectfully move the Court to dismiss the amended complaint in its entirety under Massachusetts Rule of Civil Procedure 12(b)(6).

[1] The amended complaint incorrectly identifies the Harvard entities as "President and Fellows of Harvard College a/k/a Harvard Corporation, Harvard Board of Overseers, Harvard University, and the Peabody Museum of Archaeology and Ethnology." The President and Fellows of Harvard College is the legal entity that comprises the various named defendants and is the only proper party to this litigation. All other Harvard entities, including the Peabody Museum, should be dismissed from this proceeding.

INTRODUCTION

Plaintiff Tamara Lanier's amended complaint ("Complaint"), which focuses in large part on Harvard's historic connection to slavery, raises a number of complex policy questions. Most of the issues raised in the Complaint, however, do not present legal questions susceptible to resolution by this Court.

To be sure, the policy matters raised by Ms. Lanier are compelling and timely. Harvard readily acknowledges the importance of examining its historic connection to slavery, and is continuing to do so. Most recently, Harvard launched a University-wide initiative on Harvard and the Legacy of Slavery [2] that will build on and provide greater structure to numerous prior efforts to understand the University's historic and enduring connections to slavery, including a report[3] and a conference on the topic.[4] The University has initially committed $5 million to this effort, which will be led by the Dean of the Radcliffe Institute and eleven other faculty members from across the University. The initiative will undertake rigorous research, especially with respect to the connections and impact of slavery that are specific to Harvard, and provide opportunities for a broad cross-section of the Harvard community to learn more about the University's relationship to slavery and discuss the ramifications of this learning.

Harvard also agrees with the importance of reckoning with the legacy of Professor Louis Agassiz, a scientist who promoted utterly repugnant views about race. This work is likewise

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[2] Initiative on Harvard and the Legacy of Slavery (Nov. 21, 2019), https://www.harvard.edu/slavery.

[3] *See* S. Beckert, Harvard and Slavery: Seeking a Forgotten History (2011), available at http://www.harvard.edu/sites/default/files/content/Harvard-Slavery-Book-111110.pdf.

[4] Radcliffe Institute for Advanced Studies at Harvard University, Universities and Slavery: Bound by History (March 3, 2017), https://www.radcliffe.harvard.edu/event/2017-universities-and-slavery-conference.

ongoing. Indeed, many of the allegations about Agassiz's racist beliefs contained in Ms. Lanier's Complaint were explored many years ago in an award-winning book by Harvard faculty member Stephen Jay Gould. *Compare* Compl. Part I *with* Stephen Jay Gould, THE MISMEASURE OF MAN 74-83 (2d ed. 1996) (describing Agassiz as a Harvard professor who "became the leading spokesman for polygeny in America").

Harvard also strives to be an ethical steward of the millions of historical objects from around the globe within its museum and library collections. The Peabody Museum, in particular, has dedicated significant resources to developing practices for the care and treatment of sensitive collections that are rooted in active engagement with relevant stakeholders, including descendant communities.[5]

Nevertheless, there is more work to be done, and Harvard can and will do more on these and other difficult issues. But unlike these important policy issues with which Harvard continues to grapple, Ms. Lanier's *legal* claims set forth in the Complaint *can* be resolved by this Court. Even assuming for purposes of this motion that every one of the Complaint's factual allegations is true, the Complaint must be dismissed.

All but one of Ms. Lanier's claims rests on the legal assertion that Ms. Lanier has a property interest in the daguerreotypes of Delia and Renty at the Peabody Museum because (i) the enslaved individuals depicted in these daguerreotypes were the rightful owners of the daguerreotypes due to the horrific circumstances in which they were created; and (ii) Ms. Lanier, as a descendant of those individuals, now possesses their property interest. For purposes of this motion, Harvard does not dispute Ms. Lanier's claim of ancestry. But her argument nevertheless

[5] *See, e.g.*, P. Capone & D. Loren, "Stewardship of Sensitive Collections: Policies, Procedures and the Process of their Development at the Peabody Museum" *in* STEWARDS OF THE SACRED (2004).

fails at its premise: there is no support for the proposition that a person, in any circumstance, derives a property interest in a physical photograph (or painting, or sculpture) because that photograph contains his or her image. All but one of Ms. Lanier's claims—Counts One, Two, Four, Five, and Six—fail as a matter of law for that reason alone.[6]

Ms. Lanier's remaining claim is brought under Massachusetts General Law, chapter 214, § 3A, which authorizes suit by a person whose image has been used, without authorization, for an "advertising" or "trade" purpose. That claim cannot proceed for two reasons. First, § 3A does not create any right that survives the death of the photograph's subject. Second, the Complaint does not plausibly allege that Harvard used the images in the daguerreotypes for advertising or trade purposes.

For these and other reasons explained below, Harvard respectfully requests that its motion to dismiss be granted.

FACTUAL BACKGROUND

A. The Complaint's Allegations[7]

1. *Origin and Use of the Daguerreotypes*: The Complaint alleges that in 1850, Louis Agassiz, then a member of the Harvard faculty, traveled to South Carolina to collect photographs of individuals he characterized as "racially 'pure' slaves born in Africa" in support of polygenism—a theory espoused by Agassiz that "racial groups do not share a common origin." Compl. ¶¶ 44, 61, 65-66, 72. Agassiz visited a plantation in Columbia, South Carolina, owned by

[6] As explained below, those claims fail for several other independent reasons, including that they are untimely under the applicable three-year statute of limitations; each of these claims accrued either when Ms. Lanier alleges that she came to believe she was a descendant of Renty and Delia (2011), or when she alleges that Harvard denied her claim of ancestry (2014), so that to be timely, her complaint had to be filed no later than 2017. Instead, her claim was not filed until 2019.

[7] At the pleadings stage, the complaint's factual, non-conclusory allegations must be accepted as true. *See Edwards v. Commonwealth*, 477 Mass. 254, 260 (2017).

B.F. Taylor, where Ms. Lanier alleges that "Agassiz selected several enslaved men and women to be photographed," including "an older man named Renty" and his daughter, Delia. *Id.* ¶¶ 73-75. Renty and Delia were subsequently taken to a studio owned by Joseph T. Zealy, where they were ordered to disrobe and photographed. *Id.* ¶¶ 105-08. Agassiz later received the photographs, which are known as daguerreotypes due to the process used to create them. *Id.* ¶¶ 105-10. He also published an article "refer[ring] to his recent study of black bodies." *Id.* ¶ 111. Ms. Lanier alleges that the daguerreotypes were found in the Peabody Museum's collection in 1976. *Id.* ¶¶ 139-40.

The Complaint contains no allegations concerning Harvard's possession or use of the daguerreotypes between 1850 and 1976. Ms. Lanier alleges that since 1976, Harvard has taken no steps to locate descendants of the individuals depicted in the daguerreotypes. *Id.* ¶¶ 145-46. Ms. Lanier further alleges that Harvard has required anyone who wishes to see the daguerreotypes to sign a contract "promising not to use any of the images without permission" and has charged a "licensing fee" to "[t]hose who wish to use reproductions of the images." *Id.* ¶¶ 147-48. In 2017, an image of the Renty daguerreotype was included on the cover of a textbook, titled "From Site to Sight: Anthropology, Photography and the Power of Imagery" ("*Site to Sight*"). *Id.* ¶¶ 181-82. That image was also depicted at a conference that Harvard hosted in 2017, entitled Universities and Slavery: Bound By History (the "2017 Conference"). *Id.* ¶¶ 185-87.

2. *Ms. Lanier's Communication with Harvard Concerning Her Ancestry*: When Ms. Lanier's mother died in 2010, Ms. Lanier became interested in her genealogy. *Id.* ¶ 162-64. Ms. Lanier alleges that her mother, Mattye Thompson, who was born in Montgomery, Alabama, repeatedly told Ms. Lanier always to remember that she is a Taylor not a Thompson. *Id.* ¶ 79-81. Mattye Thompson also told Ms. Lanier that her family traced its origin to a man named "Renty Taylor, or Papa Renty," who was known as the "Black African" and was "enslaved in South

Carolina on the B.F. Taylor plantation." *Id.* ¶¶ 86-88. Ms. Lanier claims that her mother also told her that the last name of Papa Renty's grandson, Renty Taylor III, changed to Thompson when he "was transferred from South Carolina to the Thompson family in Montgomery, Alabama." *Id.* ¶¶ 98-100. Ms. Lanier alleges that while researching her family, she learned about the Renty and Delia daguerreotypes in the Peabody Museum collection. *Id.* ¶¶ 165-66. The Complaint contains no other allegations concerning whether Ms. Lanier is a descendant of an enslaved man named Renty who appears in the daguerreotype.[8]

In March 2011, Ms. Lanier wrote to Harvard's then-President Drew Faust to request that Harvard review certain "documentation to reaffirm" her relationship to Renty and Delia Taylor. *Id.* ¶¶ 167-68. No documentation, however, was attached to that correspondence. Ex. A.[9] President Faust replied that she understood that Ms. Lanier had previously spoken with relevant staff at the Peabody Museum, who had arranged for her to "view the daguerreotypes" and had agreed to be in touch with Ms. Lanier if research that they were then conducting on the daguerreotypes yielded "new relevant information." *Id.* President Faust further invited Ms. Lanier to share with the Peabody Museum any additional information she discovered. *Id.* Ms. Lanier alleges that Harvard "never contacted [her] about ongoing projects, new information, or interest in verifying her lineage and connection to the daguerreotypes." Compl. ¶ 172; *but see infra* at 7.

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[8] Ms. Lanier alleges that she looked for information about the Taylors in "libraries and archives in South Carolina," Compl. ¶ 165, but does not allege what, if any, relevant information she discovered there.

[9] "The 'court may consider documents referenced in [the] plaintiff's complaint without converting [the] motion to dismiss into [a] motion for summary judgment.'" *Johnston v. Box*, 453 Mass. 569, 582 n.19 (2009) (quoting *Harhen v. Brown*, 431 Mass. 838, 840 (2000)). Ms. Lanier and Dr. Faust's March 2011 correspondence is referenced in paragraphs 167-68 and 171 of the Complaint. The Complaint dates the correspondence from May 2011, but the correspondence itself is dated March 2011. *See* Ex. A.

In 2014, an article in the Norwich Bulletin quoted a Peabody Museum employee as saying that Ms. Lanier had "given [the Museum] nothing that directly connects her ancestor to the person in [the Peabody's] photograph." *Id.* ¶ 174. On October 27, 2017, after the 2017 conference at which Renty's image was displayed, Ms. Lanier sent an email to President Faust stating that her "own research and certification confirm[ed] that [she is a] linea[l] descendant of the individual in the Daguerreotypes" and "request[ed] ...[that] the Slave Daguerreotypes [be] immediately relinquished to [her]." Ex. B.[10] On November 13, 2017, a Peabody Museum staff member responded to Ms. Lanier that "new and exciting research" regarding the daguerreotypes "has been completed" and that "[a] volume of essays is currently under peer review for publication," which was "expect[ed] to appear in about a year." Ex. C.[11] The Peabody Museum also invited Ms. Lanier to share any additional documentation or information she could provide. *Id.*

B. Procedural History

On March 20, 2019, Ms. Lanier filed (and on March 26, 2019, served) a complaint against Harvard in Middlesex Superior Court, alleging both state and federal claims. On April 25, 2019, Harvard removed the case to federal court. *Lanier v. President and Fellow of Harvard College et al.*, No. 19–10978–NMG (D. Mass.), Dkt. No. 4. On May 29, 2019, Ms. Lanier filed an amended complaint (the Complaint), dropping her federal claims. *Id.* at Dkt. No. 27. The Complaint alleges five claims based on Ms. Lanier's allegation that she is a descendant of individuals pictured in the daguerreotypes, and that she therefore possesses a property interest in the daguerreotypes and is

[10] Ms. Lanier's October 2017 letter is incorporated by reference in paragraphs 193-95 of the Complaint and thus can be considered on a motion to dismiss. *See supra* note 9.

[11] The Peabody's response to Ms. Lanier's October 2017 is incorporated by reference in paragraphs 196-98 of the Complaint.

their rightful owner.[12] *E.g.*, Compl. ¶¶ 9, 13, 24, 209 (p.19).[13] The Complaint also alleges a claim under Massachusetts General Laws, chapter 214, § 3A, which creates a cause of action for the unauthorized use of a person's image for "advertising" or "trade" purposes. That claim is not based on Ms. Lanier's alleged property interest in the daguerreotypes, but instead asserts that Harvard misappropriated Renty's and Delia's images in violation of this provision, and that Ms. Lanier, as one of their descendants, can sue to redress that violation.

On May 30, 2019, Ms. Lanier filed an unopposed motion to remand the case back to state court; the court granted the motion to remand on July 10, 2019. *Lanier v. President and Fellow of Harvard College et al.*, No. 19–10978–NMG (D. Mass.), Dkt. No. 28. Harvard now moves to dismiss the Complaint in its entirety under Mass. R. Civ. P. 12(b)(6).

ARGUMENT

On a motion to dismiss under Mass. R. Civ. P. 12(b)(6), the court must determine whether the pleading contains "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief." *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)). "Although a complaint need not contain 'detailed factual allegations,' it must offer more than mere 'labels and conclusions.'" *Galiastro v. Mortgage Elec. Registration Sys.*, 467 Mass. 160, 165 (2014) (quoting *Iannacchino*, 451 Mass. at 623). Massachusetts courts "look beyond the conclusory allegations in the complaint and focus on

[12] These five Massachusetts law claims are replevin (Count One), conversion (Count Two), intentional harm to a property interest (Count Four), negligent infliction of emotional distress (Count Five), and equitable restitution (Count Six).

[13] Beginning on page 19 of the Complaint, the paragraph numbers repeat with each cause of action. For the sake of clarity, citations to each such repeating paragraph in this brief also include the relevant page number.

whether the factual allegations plausibly suggest an entitlement to relief." *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

I. MS. LANIER'S PROPERTY-RELATED CLAIMS FAIL AS A MATTER OF LAW.

All Ms. Lanier's claims but one (discussed in Part II below) rely on her assertion that she possesses a property interest, as one of Renty and Delia's descendants, in the daguerreotypes. Specifically, as to each count:

- Ms. Lanier's replevin (Count One) and conversion (Count Two) claims expressly assert that she owns the daguerreotypes as one of Renty's descendants, Compl. ¶¶ 209 (p.19), 211 (p. 20), as they must for Ms. Lanier to prevail, *see Portfolioscope, Inc. v. I-Flex Sols. Ltd.*, 473 F. Supp. 2d 252, 256 (D. Mass. 2007) (conversion and replevin claims "require an allegation of wrongful possession of tangible property").

- Ms. Lanier's claim for intentional harm to a property interest (Count Four) is based on her alleged "legally protected property interest in the daguerreotypes of Renty and Delia." Compl. ¶ 202 (p. 20).

- Ms. Lanier's negligent infliction of emotional distress claim (Count Five) alleges that Harvard inflicted emotional distress on her by using the daguerreotypes for profit, "refus[ing] to engage [with her] in good faith," denying her "claim of lineage," and deceiving her "about the images' provenance." Compl. ¶ 202 (p.21). None of these actions could plausibly count as violation of any duty to Ms. Lanier unless she possessed a legally protected interest in the daguerreotypes. Massachusetts law only imposes a duty to exercise reasonable care to avoid foreseeably harming others. *See Jupin v. Kask*, 447 Mass. 141, 147 (2006). Harvard's alleged conduct could not have foreseeably harmed Ms. Lanier if she had no legal claim to the daguerreotypes in the first place.

- Ms. Lanier's claim for equitable restitution (Count Six) alleges that Ms. Lanier "is the rightful owner of the daguerreotypes of Renty and Delia." Compl. ¶ 201 (p. 21). This claim requires a showing that "the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." *Santagate v. Tower*, 64 Mass. App. Ct. 324, 335-36 (2005).

All of these claims fail for two fundamental reasons: (1) Ms. Lanier has no property interest in the daguerreotypes as a matter of law (Section A); and (2) her property-related claims are in any event time-barred (Section B). Each of these claims also fails for numerous claim-specific reasons discussed in Section C below.

A. Ms. Lanier Lacks Any Property Interest In The Daguerreotypes.

Ms. Lanier claims a property interest in the daguerreotypes based on the following assertions: (i) the enslaved individuals pictured in the daguerreotypes, Renty and Delia, were the rightful owners of the daguerreotypes because they are the subjects, and the daguerreotypes were created without their consent; and (ii) Ms. Lanier is now the rightful owner because she is one of Renty and Delia's descendants. The first legal question before the Court, then, is whether Renty and Delia had a tangible property interest in the daguerreotypes because they are their subjects. As explained below, the answer is no, not because Renty and Delia were enslaved, but because no person acquires a property interest in a photograph of which they are the subject.

Ms. Lanier cites no statute or precedent—in Massachusetts or elsewhere—suggesting that the subject of a photograph has a property interest in the photograph. The common law rule is the opposite: the subject of a photograph has "no property in the negative or the photographs printed." *Thayer v. Worcester Post Co.*, 284 Mass. 160, 163-64 (1933). Instead, a photograph is "the property of the photographer, not [the subject]." *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877, 883 (9th Cir. 1988).

That basic rule holds true even if a photograph is taken without consent. Thus, for example, courts routinely hold that prisoners and arrestees have no property interest in photographs taken of them while they are arrested or incarcerated. *See, e.g.*, *United States v. Jiles*, 658 F.2d 194, 200 (3d Cir. 1981) (criminal defendant had no property interest in photograph taken while he was in juvenile detention); *Grandal v. City of New York*, 966 F. Supp. 197, 203 (S.D.N.Y. 1997) (plaintiff had no property interest in photograph taken of him at police station after arrest). Similarly, a federal district court rejected conversion claims as to photographs taken without consent on private property because "the photographs were the property of the photographer, not of the person photographed," so while the photograph is "tangible" property, it is the property "of

the [photographers], not of the[ir subjects]." *Berger v. Hanlon*, 1996 WL 376364, at *10 (D. Mont. Feb. 26, 1996), *aff'd in relevant part, rev'd in part*, 129 F.3d 505 (9th Cir. 1997). *Cf. Zacchini v. Scripps-Howard Broad. Co.*, 47 Ohio St. 2d 224, 227 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977) (rejecting conversion claim in case where plaintiff was filmed against his express wishes because "it has never been held that one's countenance or image is 'converted' by being photographed.").

There is an understandable rationale for this common law rule, which is applicable regardless of the circumstances of the subject. The ability to use photographs and other representations of people is critical to numerous activities protected by the First Amendment, including museum displays and news reports in print and on television. *See Berger*, 1996 WL 376364, at *10 (rejecting conversion claim against CNN for images taken without consent on property being raided by FBI). The daguerreotypes at issue here convey in stark and troubling relief historically significant images. The law has never provided those whose image is reflected in photographs—or paintings, or sculptures, or any other medium—an ownership interest that would preclude the display of historically significant images, however objectionable the circumstances of the photograph's origins.

Of course, although there is no legal basis to assert that a photograph's subject has a property interest in the photograph, Harvard does not excuse or in any way seek to defend the reprehensible circumstances in which the daguerreotypes of Renty and Delia were made. Moreover, Harvard believes that ethical stewardship of historical artifacts includes active engagement with descendant communities connected to those artifacts. *See supra* at 3. But those are statements of Harvard's moral and ethical positions. The *legal* rules attendant to those positions are clear, and preclude Ms. Lanier's claim to an ownership interest in the daguerreotypes.

For this reason, Counts One, Two, Four, Five, and Six—all of which are predicated on Ms. Lanier's alleged property interest in the daguerreotypes, *see supra* at 9—must be dismissed.

B. The Property-Related Claims Are Time-Barred.

Massachusetts General Law, chapter 260, §2A provides that "tort" and "replevin" actions "shall be commenced only within three years next after the cause of action accrues." This provision applies to every state-law property-related action alleged here.[14] And each one is time-barred under that provision because they all accrued more than three years before Ms. Lanier filed this action in 2019.

In Massachusetts, a cause of action accrues on "the date when a plaintiff discovers, or any earlier date when she should reasonably have discovered, that she has been harmed or may have been harmed by defendant's conduct." *Bowen v. Eli Lilly & Co.*, Inc., 408 Mass. 204, 205-06 (1990). Several of Ms. Lanier's property-related claims—replevin (Compl. p. 19), conversion (Compl. pp. 19-20), intentional harm to property (Compl. p. 20), and equitable restitution (Compl. p. 21)—are based *entirely* on the assertion that Harvard wrongfully possesses the daguerreotypes despite Ms. Lanier's rightful ownership of them. Thus, those claims accrued when Ms. Lanier discovered or reasonably could have discovered that Harvard's conduct deprived her of ownership or control of property that she contends she owned. *See, e.g.*, *MacCleave v. Merchant*, 2002 WL 31480307, at *2 (Mass. Super. Oct. 1, 2002) ("[A]ll that is required for a cause of action for

[14] *See Elms v. Osgood*, 1998 WL 1284174, at *4 (Mass. Super. May 13, 1998) (conversion (Count Two)); *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 333 (1982) (negligent infliction of emotional distress (Count Five)); *Clark v. First Resolution Inv. Corp.*, 2016 WL 1078702, at *2 (Mass. Super. Feb. 22, 2016) (unjust enrichment, the basis for equitable restitution (Count Six)). The statute specifically refers to "replevin" actions (Count One). M.G.L. c. 260, § 2A. Intentional harm to a property interest (Count Four) is a tort action that is likewise subject to § 2A.

conversion to accrue is the wrongful exercise of ownership or control. A cause of action accrues on the happening of an event likely to put the plaintiff on notice."); *id.* (same as to replevin).

Here, Ms. Lanier alleges that in May 2011, she explained in a letter to Harvard's then-President Faust that she believed she was one of Renty and Delia's descendants. Compl. ¶ 167. As explained above, her claim to ownership of the daguerreotypes rests on that ancestral claim. Moreover, Ms. Lanier alleges that she knew at the time that Harvard possessed the daguerreotypes. *See supra* at 6-7. Therefore, she knew enough in 2011 to bring these claims, and the limitations period on these claims thus expired no later than May 2014. Accordingly, the claims should be dismissed as untimely. *See, e.g.*, *MacCleave*, 2002 WL 31480307, at *2.

Ms. Lanier's claims would likewise be untimely if she argued that some of them accrued not when she became aware of her alleged ownership interest, but when Harvard allegedly rejected her claim of ancestry.[15] The Complaint alleges that a Peabody official in 2014 said "of Ms. Lanier: 'She's given us nothing that directly connects her ancestor to the person in our photograph.'" Compl. ¶ 174. If any of Ms. Lanier's claims did continue through 2014, the limitations period still would have run by 2017, and those claims would still be time-barred.

C. Several Of The Property-Related Claims Fail For Numerous Other Claim-Specific Reasons.

1. Replevin (Count One), Conversion (Count Two), and Equitable Restitution (Count Six).

Even if Ms. Lanier did possess some property interest in the daguerreotypes (which she does not), that is not enough to state a claim for replevin, conversion, or equitable restitution. To prevail on a replevin claim, Ms. Lanier must either demonstrate that she is "the sole owner of the

[15] The paragraphs of the Complaint relating to Ms. Lanier's claim for negligent infliction of emotional distress claim (Compl. p. 21) suggest Ms. Lanier's belief that this alleged violation continued through Harvard's alleged rejection of her claim of ancestry.

property replevied," *Bray v. Raymond*, 166 Mass. 146, 150-51 (1896), or join the co-owners of the property, *see Corcoran v. White*, 146 Mass. 329, 330 (1888) (finding trial court erred in instructing jury that plaintiff need not join co-owners of a chattel to bring a replevin claim). Conversion likewise requires a showing that the plaintiff is the "rightful owner" of the property, *In re Hilson*, 448 Mass. 603, 611 (2007), with an "immediate right to its possession," *Mazeikis v. Sidlauskas*, 346 Mass. 539, 544 (1963); *see also Ring v. Neale*, 114 Mass. 111, 112 (1873) (to maintain a conversion action, "[i]t is not enough that [the plaintiff] shows an equitable title, such as a right to redeem, or a reversionary interest subject to the present legal title of another."). And equitable restitution similarly requires a showing "that the defendant has been unjustly enriched by receiving something, tangible or intangible, that properly belongs to the plaintiff." *Santagate v. Tower*, 64 Mass. App. Ct. at 335-36.

Assuming for this motion that Ms. Lanier is a lineal descendant of Renty and Delia, and assuming that she thus derives some property interest in the daguerreotypes, *but see supra* at 10-12, Ms. Linear still could not show that she owns the daguerreotypes outright. After all, Renty presumably has numerous other relatives, and Ms. Lanier does not allege that she has a property interest superior to those other relatives, including any still-living members of earlier generations. *See* M.G.L. c. 190B, §§ 2-102, 2-103 (upon death of decedent's surviving spouse, entirety of intestate's property passes to all decedent's lineal descendants); R. S. 1836, c. 61, § 1; M.G.L. c. 91, § 1 (1860) (similar for statute in effect at the time of Renty's death). In other words, Ms. Lanier does not (and cannot) allege Renty has no other surviving relatives, and thus does not (and cannot) allege that she is the sole or rightful owner of the daguerreotypes. Ms. Lanier's replevin, conversion, and equitable restitution claims fail for that reason, as well.

2. Intentional Harm To A Property Interest (Count Four)

Ms. Lanier's claim for intentional harm to a property interest, which derives from the Restatement (Second) of Torts § 871, should be dismissed because Massachusetts courts have never recognized such a cause of action. *See Ostroff v. F.D.I.C.*, 847 F. Supp. 270, 279 n.3 (D. R.I. 1994) (noting that Massachusetts has never adopted this doctrine). Nor is there a reason for Massachusetts to do so. The Restatement defines the tort as giving rise to liability where "[o]ne ... intentionally deprives another of his legally protected property interest or causes injury to the interest ... if his conduct is generally culpable and not justifiable under the circumstances." Restatement (Second) of Torts § 871. There is no need to recognize this cause of action, at least in these circumstances, because replevin and conversion already protect against private deprivation of property interests. *See supra* at 9; *cf. Yoneji v. Yoneji*, 136 Haw. 11, 20 (Ct. App. 2015) (recognizing "a cause of action for intentional harm to a property interest, under § 871, that narrowly applies to cases . . . where no other well-recognized causes of action are pled to address the alleged harm.").

II. MS. LANIER'S § 3A CLAIM LIKEWISE FAILS AS A MATTER OF LAW.

The single non-property-related claim, Count Three, alleges a violation of Massachusetts General Law, chapter 214, § 3A, which grants a right of action to "[a]ny person whose name, portrait or picture is used within the commonwealth for advertising purposes or for the purposes of trade without his written consent." M.G.L. c. 214, § 3A. While it is unclear what use of the daguerreotypes by Harvard Ms. Lanier alleges was a statutory violation, the Complaint alleges that Harvard used Renty's image on the cover of *Site to Sight* and at the 2017 Conference. *See supra* at 5. Any claim that either or both of these uses constitute a statutory violation fails for two reasons. First, the right recognized in § 3A does not extend post-mortem, and thus does not apply to the

alleged uses. Second, the Complaint does not plausibly allege that the image was used for "advertising" or "trade" purposes within the meaning of § 3A.

A. Section 3A Does Not Create A Post-Mortem Right.

For Ms. Lanier to prevail on her § 3A claim, the Court would need to construe § 3A to establish not only a post-mortem right, but also a post-mortem right that lasts indefinitely (so far, well over 100 years). But § 3A does not state that it applies post-mortem, let alone indefinitely. In contrast, other states that have recognized a statutory right against the unauthorized use of an image akin to § 3A *and* have extended that right post-mortem (neither of which has occurred here) have done so expressly, and even then only for a term of years not exceeding 100.[16] If the Massachusetts Legislature intended for § 3A to create a post-mortem right, it would have said so. And even if a post-mortem right could somehow be implied in that statute, it is entirely implausible that the Legislature would have silently created an indefinite right. Unsurprisingly, then, the only Massachusetts court to have considered whether § 3A applies post-mortem held that it does not. *See Hanna v. Ken's Foods, Inc.*, 69 Mass. App. Ct. 1107, 1107 n.4 (2007) (opinion issued pursuant to Appeals Court Rule 1:28) (indicating that the trial court concluded that there is no post-mortem right under § 3A, and that the ruling was not appealed).

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[16] *See, e.g.*, Code of Ala. § 6-5-771 (55 years); Cal. Civ. Code § 3344.1990 (70 years); Fla. Stat. § 540.08(54) (40 years); Haw. Rev. Stat. § 482P-4 (70 years); 765 Ill. Comp. Stat. 1075 (50 years); Ind. Code Ann. § 32-36-1-8 (100 years); Ky. Rev. Stat. Ann. § 391.170(2) (50 years); Neb. Rev. Stat. § 20-208 (right of action deemed to "survive the death of the subject," with no stated duration); Nev. Rev. Stat. § 597.790 (1) (50 years); Oh. Rev. Code Ann. § 2741.02 (for Ohio National Guard and U.S. soldiers, 10 years; for other individuals, 60 years); Okla. Stat. tit. 12, § 1448(G) (100 years); 42 Pa. Cons. Stat. § 8316 (30 years); S.D. Codified Laws § 21-64-2 (70 years); Tenn. Code Ann. § 47-25-1104 (10 years and thereafter until terminated by non-use for two years); Tex. Prop. Code Ann. § 26.012(d) (50 years); Va. Code Ann. § 8.01-40 (20 years); Rev. Code Wash. (ARCW) § 63.60.040 (for names and likenesses without commercial value, 10 years; for those with commercial value, 75 years).

Indeed, Massachusetts lawmakers recently recognized that there is no post-mortem § 3A right. In 2012 and then again in 2014, the Massachusetts legislature considered bills to amend § 3A to confer a post-mortem right for 70 years after death. S.2382, 187th Gen. Ct. (Mass 2012); S.2022, 188th Gen. Ct. (Mass 2014). Both passed the Senate but stalled in the House.[17]

These failed efforts to extend § 3A posthumously are important for two reasons. First, and most important, proponents of these bills understood that § 3A currently does not extend posthumously at all. The bills' sponsor in the Senate, Senator Rosenberg, explained that legislation was necessary because "[u]nder the current law, . . . once [an] artist dies everything moves into public domain, and they [i.e., people who use an image commercially without authorization] can do anything they want."[18] Representative Kulik, the 2014 bill's champion in the House, likewise explained that he supported the bill because "it strikes me as strange that these kinds of protections have not already been in place."[19] It would be particularly odd to construe § 3A as silently establishing a post-mortem right when legislators who support such a right do not believe it exists.

Second, even the Massachusetts legislators who wanted to extend the provision did not want to do so *indefinitely*—only for 70 years. There is no basis to imply an indefinite posthumous right from legislative silence. Ms. Lanier's claim under § 3A must thus be dismissed.

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[17] *See* Shira Schoenberg, Bill supported by comedian Bill Cosby would protect Massachusetts celebrities' rights to their image after death, Mass Live (July 3, 2014), https://www.masslive.com/politics/2014/07/bill_supported_by_comedian_bil.html.

[18] Steve Annear, Celebs Could Soon Have Post-Mortem 'Personality' Protections, Boston Magazine (June 13, 2014), https://www.bostonmagazine.com/news/2014/06/13/post-mortem-personality-bill-mass-senate/.

[19] Schoenberg, *supra* note 17.

B. The Complaint Does Not Plausibly Allege That Renty's Image Was Used For "Advertising" Or "Trade" Purposes.

Ms. Lanier's claim under M.G.L. c. 214, § 3A cannot proceed for the additional reason that the Complaint does not plausibly allege that Harvard used Renty's image for "advertising" or "trade" purposes as those terms are used in §3A.

The Supreme Judicial Court has held there is a crucial distinction "between situations in which the defendant makes an incidental use of the plaintiff's name, portrait or picture and those in which the defendant uses the plaintiff's name, portrait or picture deliberately to exploit its value for advertising or trade purposes." *Tropeano v. Atl. Monthly Co.*, 379 Mass. 745, 749 (1980). Exploitation for advertising or trade purposes requires that the use of the image be "for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or likeness." *Id.* (quoting *Nelson v. Me. Times*, 373 A.2d 1221, 1224 (Me. 1977)).

Here, the Complaint does not allege that Renty's image was used for any commercial purpose. Rather, it alleges that Harvard used the image on materials relating to the 2017 Conference on Universities and Slavery (Compl. ¶¶ 185-87), and on the cover of *Site to Sight* (Compl. ¶¶ 181-83). In other words, the image was allegedly used at an academic conference about slavery, and on an academic book cover—not in any commercial or advertising context. And while the Complaint alleges that Harvard may have believed that using Renty's image on a book cover "would sell more copies," Compl. ¶ 184, that allegation is not enough to permit this claim to proceed: "[t]he fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness." *Albright v. Morton*, 321 F. Supp. 2d 130, 139-40 (D. Mass. 2004), *aff'd sub nom. Amrak Prods., Inc. v. Morton*, 410 F.3d 69 (1st Cir. 2005) (quotation omitted); *see Tropeano*, 379 Mass. at 751 (dismissing commercial use

claim because plaintiff's photograph was published as part of commentary, not as means of soliciting sales or in an advertisement). Because the Complaint does not allege that Harvard used Renty's image in an advertisement or a similar setting, § 3A has no application. Ms. Lanier's claim under that provision must be dismissed for this reason as well.

CONCLUSION

For all of these reasons, Harvard respectfully requests that the Court dismiss the Complaint for failure to state a claim.

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE; HARVARD BOARD OF OVERSEERS; HARVARD UNIVERSITY; and THE PEABODY MUSEUM OF ARCHAEOLOGY AND ETHNOLOGY,

By their attorneys,

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Date: November 25, 2019

CERTIFICATE OF SERVICE

I, Maria Davis, Esq. do hereby certify that on this 25th day of November, 2019, a copy of the foregoing pleading was served via first class mail and email upon:

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ADDENDUM

69 Mass.App.Ct. 1107
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Michael HANNA, [1]
v.
KEN'S FOODS, INC., & another. [2]

No. 06-P-1071.
June 12, 2007.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

*1 Plaintiff Michael Hanna (Hanna) brought this action pursuant to G.L. c. 230, § 5, [3] on behalf of the estate of his father, Kenneth M. Hanna (Ken or Ken Hanna), alleging the unauthorized use of Ken Hanna's name, image, and likeness by the defendant, Ken's Foods, Inc .(KFI). [4] Following various dismissals and amendments, see note 4, *supra,* Hanna's remaining claims against KFI consisted of (1) a violation of G.L. c. 110, § 4; (2) unjust enrichment; (3) a violation of G.L. c. 93A, § 11; and (4) unfair competition. On cross-motions for summary judgment, the judge allowed KFI's motion as to all counts and denied Hanna's motion. This appeal followed.

Background: The following facts are undisputed. In the early 1940's, Ken Hanna and his wife, Florence, bought a restaurant in Framingham, which they named Ken's Steak House (KSH). Ken, reportedly an affable and charming host, worked the front of the restaurant while Florence oversaw the cooking and staffing. While the restaurant flourished, Florence's salad dressing was particularly popular and gained some renown in the community over the years. In the 1950's Frank Crowley, a grocery store executive who frequented the restaurant with his wife, Louise, persuaded Ken that the salad dressing could be successfully marketed. In an oral agreement, Ken allowed the use of his name on the salad dressing bottles to be marketed as Ken's Steak House Salad Dressing. On May 22, 1958, Ken, Florence, Frank, and Louise formed the corporation Ken's Food Inc., [5] with each an original director and Ken Hanna as president; each received one quarter ownership of the company stock. [6] In May, 1958, Ken Hanna wrote a letter to the Department of Corporations, in which he stated:

> "I, Kenneth M. Hanna majority stockholder of 'KEN'S STEAKHOUSE, INC.' and commonly known and doing business as 'KEN'S' authorize the use of the name 'KEN'S FOOD, INC.' to the corporation recently formed and seeking the use of that name. My wife and I are majority stock holders of the corporation formed and known as 'KEN'S FOOD, INC." '

While he was a shareholder and president, Ken Hanna recorded a radio advertisement in which he recounted the history of Ken's Steak House and Ken's Steak House salad dressings. He also appeared in several print advertisements describing the history of the salad dressing business and his role in the success of the company. In addition, the labels affixed to the dressings then and now include a statement that reads, "Satisfaction guaranteed or your money back from Ken." During this period, Ken repeatedly signed shareholder meeting minutes in which he and other shareholders represented:

> "That all acts, contracts and undertakings from the date of the last meeting of the Stockholders to the present time by the officers and Directors of the Corporation be and the same are hereby ratified, approved and adopted as and for the action of the Corporation."

In 1969 the Hannas, interested in buying real estate in Florida, explored the possibility of selling stock in KFI. Their tax consultant calculated the value of their stock to be $222,800, $43,600 of which was the value of the trade name and company name, including the value of "[t]he giving up of the use of the name 'Ken's Foods." '

*2 In 1970, Florence sold seventeen of her shares in KFI, and in 1973 Ken and Florence sold their remaining shares to their son, Timothy Hanna, and their son-in-law, Joseph Shay. In 1979 KFI registered the trademarks "Ken's" and "Ken's Steak House" with the United States Patent and Trademark Office. Ken remained president and chairman of the board until 1992; there is no evidence in the record, and Hanna does not contend, that Ken ever complained about the use of his

name and image on the label of KFI's products and in its advertising, and it is undisputed that he never revoked his consent to that use. Ken died on November 23, 1995, leaving his three sons, Timothy, Michael, and Mark (since deceased) as beneficiaries of his estate.

Discussion. On appeal, Hanna presents four arguments: (1) KFI's motion for summary judgment should have been dismissed as violating the tracking order; (2) KFI is in violation of G.L. c. 110, § 4, where Ken Hanna did not provide written consent to the use of his name following his sale of stock, and his legal representative did not do so after Ken Hanna's death; (3) the wrongful use of Ken Hanna's trademark to confuse the public by falsely claiming Ken Hanna promoted KFI's products constitutes unfair competition; and (4) the judge erred in denying Hanna's motion to amend his complaint to add an additional count of a violation of G.L. c. 93A where the administrator of the estate had standing pursuant to *Quinton v. Gavin,* 64 Mass.App.Ct. 792, 835 N.E.2d 1124 (2005).[7] We address each contention in turn.

1. *Violation of the tracking order.* We may quickly dispense with Hanna's argument that KFI's motion for summary judgment should be dismissed as not timely filed in violation of the tracking order.[8] Standing Order 1-88 provides that a judge may disregard a motion that is filed outside the established time period, but is not required to do so. *Bonnie W. v. Commonwealth,* 419 Mass. 122, 123 n. 1, 643 N.E.2d 424 (1994) ("[a] rule providing that late filed motions may be disregarded by the court is not the equivalent of a rule that would require such a result").

2. *Violation of G.L. c. 110, § 4.* Hanna claims that the plain language of G.L. c. 110, § 4, prohibits the use of Ken Hanna's name after his death without the written consent of his legal representative.[9] Hence, his argument goes, KFI's continued use of the name "Ken" or "Ken Hanna" on the salad dressing labels and in advertising without written consent violates the statute.

Section 4 of G.L. c. 110 provides:

> "A person who conducts business in the commonwealth shall not assume or continue to use in his business the name of a person formerly connected with him in partnership or the name of any other person, either alone or in connection with his own or with any other name or designation, without the consent in writing of such person or of his legal representatives."

The right conferred by the statute is in the nature of a property right, and may be enforced by that person and by his legal representative should his name continue to be used by another. *China Clipper Restaurant, Inc. v. Yue Joe,* 312 Mass. 540, 542-543, 45 N.E.2d 748 (1942). "[T]he statute forbids not only the assumption, but the continued use of the name of another person without consent first duly obtained." *Kelly v. Morrison,* 231 Mass. 574, 577, 121 N.E. 418 (1919), quoting from *Bowman v. Floyd,* 85 Mass. 76, 3 Allen 76, 80 (1861).

*3 In *Lowenstein v. Lowenstein's, Inc.,* 294 Mass. 133, 135-136, 1 N.E.2d 183 (1936), the court in dictum stated that under G.L. c. 110, § 4, a name "is in the nature of a property right which may be enforced not only by him but, where the use of his name is continued by another after his death, by his legal representatives, when they see fit, regardless of the statute of limitations." In *Lowenstein,* one of two brothers who had founded a furniture company sought to enjoin a successor corporation from using the name Lowenstein. *Id.* at 134, 1 N.E.2d 183. The court noted that the statute "gives a man the right unknown to the common law and to courts of equity to control the business use of his name." *Id.* at 135, 1 N.E.2d 183. There is nothing in *Lowenstein,* however, to indicate that a person's death automatically revokes that right.[10] To the contrary, we read both *Kelly, supra,* and *Lowenstein* as standing for the proposition that only a person or his legal representative may consent to the use of his name and that, once having done so, this property right vests in the person to whom it is given unless expressly revoked.

Our conclusion in this regard is supported by the plain language of the statute, which requires "the consent in writing of such person *or* of his legal representatives." G.L. c. 110, § 4 (emphasis supplied). Hanna's argument that, upon Ken's death, the statute necessitates the additional consent of Ken's legal representative would have us substitute "and" for "or"; this we decline to do. See *State Bd. of Retirement v. Boston Retirement Bd.* ., 391 Mass. 92, 94, 460 N.E.2d 194 (1984) ("we need not look beyond the words of the statute where the language is plain and unambiguous"). See also *1010 Memorial Drive Tenants Corp. v. Fire Chief of Cambridge,*

424 Mass. 661, 668, 677 N.E.2d 219 (1997) "We are not free to add language that the Legislature chose not to supply"). Nothing in the statutory language leads us to believe that the Legislature intended that the death of a person revokes his consent to the use of his name and compels further consent by his legal representative.

It is clear from the record before us that Ken Hanna at all times during his life intended that KFI use the name "Ken" and "Ken's" on its labels and in its advertisements, and that he so consented in writing. His letter to the Department of Corporations authorizes KFI's assumption of his name, and his repeated approval as a shareholder of KFI's acts indicates his continued acquiescence to its use. Ken enforced the property right to "Ken" and "Ken's" by allowing its use by KFI, see *Lowenstein, supra* at 135-136, 1 N.E.2d 183, and at no time did he revoke his consent. [11] There thus is no violation of G.L. c. 110, § 4. [12]

3. *Unfair competition.* In a claim for unfair competition, "[t]he burden is upon the plaintiff to show that the defendants are conducting their business in such a manner as to mislead the public into believing that in trading with them they are trading with the plaintiff." *Silbert v. Kerstein,* 318 Mass. 476, 479, 62 N.E.2d 109 (1945). "There can be no unfair competition unless the plaintiff is in fact a rival for the trade which the defendants secure." *Women's Mut. Ben. Soc., St. Mary of Carmen v. Catholic Soc. Feminine of Maria S.S ., of Monte Carmelo,* 304 Mass. 349, 352, 23 N.E.2d 886 (1939), quoting from *Kaufman v. Kaufman,* 223 Mass. 104, 106-107, 111 N.E. 691 (1916). See *Lowenstein, supra* at 135, 1 N.E.2d 183 (no competition where "the plaintiff as an individual is not shown to be engaged in any business").

*4 There is no evidence that Ken Hanna, as an individual, used the name "Ken's" in a competitive business; to the contrary, Ken's Steak House Salad Dressings were always marketed by KFI, which was founded for that precise purpose. [13] Lack of evidence in this regard also disposes of Hanna's argument that the trademarks "Ken's Steak House" and "Ken's Foods" were in fact licenses, terminable at will, and that Ken therefore retained the trademark rights to "Ken's." A trademark "can have no existence in gross, unconnected with some business in which it is used." *Russell v. Caroline-Becker, Inc.,* 336 Mass. 161, 165, 142 N.E.2d 899 (1957), quoting from *Jackman v. Calvert-Distillers Corp. of Mass.,* 306 Mass. 423, 426, 28 N.E.2d 430 (1940). Where it is undisputed that Ken was never in business for himself, neither he nor his estate can claim ownership of a trademark. *Ibid.*

3. *Denial of amendment to add a violation of G.L. c. 93A, § 11* . Hanna argues incorrectly that our decision in *Quinton v. Gavin,* 64 Mass.App.Ct. 792, 835 N.E.2d 1124, overturned our holding in *Gannett v. Lowell,* 16 Mass.App.Ct. 325, 450 N.E.2d 1121 (1983). In *Gannett* we held that recovery pursuant to G.L. c. 93A, § 11 was not available against an administrator of an estate where "the transaction is strictly private in nature and is in no way undertaken in the ordinary course of trade or business." *Id.* at 328, 450 N.E.2d 1121, quoting from *Lantner v. Carson,* 374 Mass. 606, 608, 373 N.E.2d 973 (1978). In *Quinton,* however, we held that relief under c. 93A was fitting where the administrator advertised and sold his services as a professional financial advisor and "self-styled 'independent trustee' ... whose business was designed to bilk unwitting consumers into entrusting their assets to him for his own private gain." *Quinton, supra* at 799, 835 N.E.2d 1124. Here, however, the record indicates that duties undertaken by the administrator of Ken Hanna's estate served "a principally private function," *id.* at 798, 835 N.E.2d 1124, precluding recovery under c. 93A, § 11.

For the aforesaid reasons and for substantially the reasons set forth in the appellee's brief at pages 13 through 49, we discern no error in the allowance of KFI's motion for summary judgment, and the entry of judgment dismissing Hanna's complaint.

Judgment affirmed.

All Citations

69 Mass.App.Ct. 1107, 868 N.E.2d 183 (Table), 2007 WL 1695311

Footnotes

1 On behalf of the estate of Kenneth M. Hanna.

2 Michael J. Puzo, administrator d.b.n. c.t.a. of the estate of Kenneth M. Hanna.

3 Mr. Puzo declined to bring suit, as he determined the complexity and expense to be prohibitive.

4 Hanna's second amended complaint originally consisted of nine counts, claiming the following: in Count I a violation of G.L. c. 110, § 4; in Count II a violation of G.L. c. 214, § 3A; in Count III a declaration of rights regarding the ownership

of Ken Hanna's name; in Count IV a declaration of rights regarding the use of Ken Hanna's name, image, and likeness pursuant to G.L. c. 214, § 3A; in Count V injunctive relief preventing KFI's use of Ken Hanna's name pursuant to G.L. c. 110, § 4; in Count VI injunctive relief preventing KFI's use of Ken Hanna's image or likeness pursuant to G.L. c. 214, § 3A; in Count VII unjust enrichment; in Count VIII fraud; and in Count IX a violation of G.L. c. 93A. A judge dismissed Counts II, IV, VI, and VIII as having abated upon Ken Hanna's death. Hanna does not appeal from the dismissal of these four counts. Hanna then moved to amend his complaint to include two counts of unfair competition (Counts X and XI) and an additional count for a violation of G.L. c. 93A, § 11, premised on the factual allegations of unfair competition Count XII). The judge allowed the former but denied the latter, from which Hanna appeals. Remaining before the motion judge were Counts I, III, V, VII, IX, X, and XI.

5 The name was changed in 1999 to Ken's Foods, Inc.

6 Originally Ken received twenty-six shares, Florence and Frank twenty-five shares each, and Louise twenty-four shares. About three weeks after the corporation was founded, Ken conveyed one share to Louise.

7 On appeal, Hanna does not press his claim of unjust enrichment.

8 Although Hanna does not identify the tracking order he alleges KFI violated, we assume it is Superior Court Second Amended Standing Order 1-88(E).

9 In his brief on appeal, Hanna argues that the motion judge incorrectly focused on the "non-issue" of KFI's use of Ken Hanna's name in his lifetime, rather than KFI's liability for the use of the name after Ken's death. In his reply brief, however, Hanna contends for the first time that Ken's written consent to use his name was required in 1973 after he sold his stock.

10 The plaintiff in *Lowenstein* did not die, but severed his connection with Lowenstein's, Inc., following its initial incorporation. *Lowenstein v. Lowenstein's, Inc.*, 294 Mass. at 134, 1 N.E.2d 183. The court concluded that the mere use of the name "Lowenstein," even though the family name of the plaintiff, did not warrant a conclusion that Lowenstein's, Inc., was using the plaintiff's name rather than the name of some other Lowenstein. *Id*. at 134, 1 N.E.2d 183.

11 Nothing in the statute prohibits KFI from using Ken Hanna's full name in its advertising, as argued by the plaintiff. A corporation may inform its consumers of its history and development or its predecessors in interest. *Martin v. Bowker,* 163 Mass. 461, 462, 40 N.E. 766 (1895) (successor in interest has a right to advertise that fact). See *Kelly v. Morrison,* 231 Mass. at 578, 121 N.E. 418.

12 Equitable principles also compel this result. See *Caines v. Caines College of Physical Culture, Inc.,* 247 Mass. 402, 405, 142 N.E. 99 (1924) where, under facts very similar to the case at bar, the court concluded that it would be "unjust and contrary to equity and fair dealing" to prohibit the college from using the plaintiff's name, where "while the plaintiff remained with the corporation he made no objection to the use of the name, but approved of it, used the name himself and directed its use by others; that the public understood that the word 'Caines' used alone or in combination with other words as hereinbefore set out, indicated the institution and business conducted by the defendant corporation; that the word 'Caines' has attained a secondary meaning, separate and apart from the plaintiff as an individual, it is known to the public as designating the defendant's place of business and course of instruction, and it has acquired a valuable good will in connection with the use of its corporate name."

13 Hanna relies on *Planned Parenthood Fedn. of America v. Problem Pregnancy of Worcester,* 398 Mass. 480, 489, 498 N.E.2d 1044 (1986), for the proposition that confusion as to the origin of sponsorship or endorsement of one's products is sufficient to show unfair competition; his reliance is misplaced. While the court in *Planned Parenthood* extended confusion to include confusion as to sponsorship and endorsement as well as goods and services, the requirement of some form of competition was not eliminated. *Ibid.*

End of Document

EXHIBIT A

Drew Faust

From: Lanier, Tamara [mailto:Tamara.Lanier@jud.ct.gov]
Sent: Friday, March 18, 2011 8:29 AM
To: Drew Faust; Ogletree, Charles J., Jr; kathy reddick; shonrael.lanier@gmail.com; Tamara.Lanier@jud.ct.gov
Subject: Louis Agassiz and The Slave Renty Taylor
Importance: High

March 17, 2011

Office of the President
Harvard University
Massachusetts Hall
Cambridge, MA 02138 USA
Attn: President Drew Faust

Dear President Faust,

The purpose of this correspondence is to formally request your assistance in a matter, that has by many, been deemed historically significant. Approximately thirty seven years ago, a Harvard associate unearthed an amazing discovery. Found in the Peabody Museum were piercing and poignant images of the evils of slavery.

In 1850, Louis Agassiz commissioned the photographer J.T. Zealy to capture what he believed to be evidence racial superiority. The slaves depicted in these daguerreotypes have touched the hearts and conscience of people worldwide. Amazingly, I have historical and US Census information confirming that two of these slaves are, in fact, my ancestors. I have shared this information with historians in many parts of the world all of whom have found my story remarkable. I have shared this information with scholars from both Yale and Princeton all of whom are all astonished. On numerous occasions, I have reached out to the Harvard academia and found them to be unresponsive. I have called the W.E.B Du Bois Institute of African Studies and have left messaged and forwarded e-mails almost to the point of adnauseam.

I ask myself, why is Harvard, the keeper of such historically significant information, seemingly not interested in what has been described by the Connecticut Historical Society as a "Great American Story". Earlier this week I met with and shared my plight with the Cambridge Branch of the NAACP. In that meting I was strongly encouraged to seek your assistance. I reach out to you for two reasons. Firstly, I would like to learn more about the slave daguerreotypes and know how they have or will be used. Secondly, I would like a formal review of my documentation to reaffirm that Renty and Delia Taylor are indeed my ancestors. I anxiously await your response and would be willing to sit with you and discuss this further.

Sincerely,

Tamara K. Lanier

Tamara K. Laneir

To be sent as Email: Tamara K. Lanier (Tamara.Lanier@jud.ct.gov)
Subject: RE: Louis Agassiz and The Slave Renty Taylor
cc:
bcc: Lisa Barbash, Pamela Gerardi
Attachment:

March 31, 2011

Dear Ms. Lanier,

Thank you for writing and sharing your story with me. Subsequent to receiving your email, I was glad to learn that you have also been in touch with Lisa Barbash and Pamela Gerardi at the Peabody Museum and that you have had the opportunity to view the daguerreotypes you mention in your email. I understand that the Peabody Museum is involved in an ongoing project regarding those daguerreotypes and that Ms. Barbash and Ms. Gerardi have agreed to be in touch with you directly if they discover any new relevant information. I hope you will also do the same.

As a historian, I recognize the significance of this important study, and I very much appreciate your offer to be of assistance.

With my best wishes,
Drew Faust

EXHIBIT B

From: Tamara Lanier [mailto:tamara.lanier@me.com]
Sent: Friday, October 27, 2017 12:09 PM
To: Drew Faust <president@harvard.edu>
Subject: Letter To Harvard President Dr. Drew Faust.docx

Please see the attached.
Tamara K. Lanier

October 27, 2017

Office of the President
Harvard University
Massachusetts Hall
Cambridge, MA 02138 USA
Attn: President Drew Faust

Dear President Faust,

My name is Tamara Lanier, and we have previously discussed the Slave Daguerreotypes as well as my desire to know how the images would be used. In your original response, you explained that the Peabody would be involved in ongoing activities and that Ms. Gerardi had agreed to keep me apprised.

President Faust, I reach out to you this evening to advise that Harvard has hosted a number of events relative to the Slave Daguerreotypes and not once have I been contacted. Despite Harvard's silence, I regularly receive notices and or correspondence, alerting me of upcoming activities involving the images. Yes, I am often contacted by members of the public touting concerns of access, fair use and suppression.

Just last week, I was contacted by a historian who advised of Harvard's involvement in a large manuscript containing a multitude of scholarly essays offering an in-depth academic discussion as to the Daguerreotypes, but no mention of me or my discovery. This was very troublesome to this historian and myself!

President Faust, I have tried to convince Harvard to give my information a fair look, and I have been ignored. The University had lead to believe on more than one occasion that it was taking my information and was going to work with me in this endeavor. However, based upon the recent developments noted above, the University's lack of interest and unwillingness to offer a forthright review and certification of my documents is now apparent. Therefore I have recently completed my own research and certification confirming that I am linear descendant of the individual in the Daguerreotypes. Please accept this notice as my formal request to have the Slave Daguerreotypes immediately relinquished to me as the lineal descendant of Congo Renty and our family.

Respectfully,

Tamara K. Lanier

Tamara K. Lanier

EXHIBIT C

Gerardi, Pamela

From: Gerardi, Pamela
Sent: Monday, November 13, 2017 3:26 PM
To: 'Tamara.Lanier@jud.ct.gov'
Cc: Faust (president@harvard.edu)
Subject: Re: Letter To Harvard President Dr. Drew Faust

Dear Tamara:

Thank you for your note to President Faust. She has referred the matter to me. As you know the photographs were commissioned by Dr. Robert W. Gibbs of Columbia, South Carolina in 1850 and sent to Louis Agassiz, then at Harvard University. In 1936, the photographs were transferred to the Peabody Museum for proper care and study. Despite their fragility, the special conditions under which they are now housed allow their use in teaching and research, and in recent years much new and exciting research has been completed. A volume of essays is currently under peer review for publication, and we expect it to appear in about a year. If you have any additional documentation or information that you would like to share with us, we would, of course, be pleased to see it.

Best wishes,

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