IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCUMENT ELECTRONICALLY FILED

IN RE HUMAN TISSUE PRODUCTS LIABILITY LITIGATION	:	Civil No. 2:06-cv-135 (WJM) MDL Docket No. 1763
THIS DOCUMENT ALSO RELATES TO: *Kennedy-McInnis v. BioMedical Tissue Services, Ltd. et al.*, Civil Action No. 2:06-5140 *Wilson v. BioMedical Tissue Services, Ltd., et al.*, Civil Action No. 2:08-5153 *Fetzer v. BioMedical Tissue Services, Ltd., et al.*, Civil Action No. 2:08-3786 *Michelli v. BioMedical Tissue Services, Ltd. et al.*, Civil Action No. 2:06-4134	:	

REGENERATION TECHNOLOGIES INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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SUMMARY OF ARGUMENT

Defendant, Regeneration Technologies, Inc. ("RTI"), files this brief in opposition to plaintiffs' motion for class certification. Plaintiffs have filed this motion half-heartedly relying upon a brief that was originally filed in the Western District of New York, *Kennedy-Mclnnis v. BioMedical Tissue Services, Ltd., et al*, W.D.N.Y. No. 6:06-6140[1] ("*Kennedy*") over three and one-half years ago in April 2006. While the plaintiffs in the *Fetzer* putative class action have joined the application, they have offered no additional factual or legal support for their position. The plaintiffs in the two remaining purported class actions, *Michelli* and *Wilson*, have failed to move for class certification despite this Court's deadline of December 1, 2009 to do so.

The only conclusion that the Court should draw from the filings of record is that class certification is not appropriate in these actions. Despite the fact the purported class actions have been pending for almost four years now, plaintiffs have demonstrated no evidence that there are additional plaintiffs waiting to join the putative class. Instead, every plaintiff who wishes to assert a claim has already filed an individual suit, the notable exceptions being the additional ten plaintiffs whom counsel for *Kennedy* claims to represent and for whom he stands ready to amend the complaint if this motion for class certification is in fact denied.[2]

Even if there were additional plaintiffs waiting to join the purported class, as the State Court in New York has already recognized, *sua sponte*, these claims are particularly inappropriate for class certification. Although two putative class actions were filed in New York State Court, one Complaint has been dismissed in the entirety, and the other, *Zeltins-Olivo*

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[1] The *Kennedy* Complaint was originally filed in the Western District of New York on March 7, 2006. It was subsequently transferred to the MDL by Transfer Order of the Judicial Panel on MultiDistrict Litigation dated October 18, 2006 and was assigned MDL Docket No. 2:06-5140.

[2] *See* letter of Van Henri White to Denise Brinker Bense dated October 2, 2009, a true and correct copy of which is attached as Exhibit "1" to the Declaration of Richard E. Wegryn, Jr. in support of the instant Opposition ("Wegryn Declaration").

("*Zeltins*"), has been denied class certification.[3] In *Zeltins*, the New York State Court held, "In particular, it is the individualized nature of the claims raised in these cases that specifically prevent the satisfaction of the prerequisites to a class action. As this case involves variable forms of desecration of human remains after they were entrusted to various funeral homes it is impossible for the plaintiffs in this case to satisfy the requirements of 'typicality' and 'adequacy.'"[4]

Despite the individualized nature of these claims, as this Court has recognized in its State Federal Coordination letters there are multiple overlapping issues of law and fact in these actions now pending in the MDL and in New York, Pennsylvania and New Jersey state court. As such, this Court has urged cooperation between the related state court actions and the federal actions transferred to the MDL in an effort to reduce "costs, delays, and duplication of effort that often stem from such dispersed litigation." It is well settled, however, that common or overlapping issues of law and fact do not, in and of themselves, make class certification appropriate. As this Court has implicitly and explicitly recognized in its letters, coordinated discovery and case management is appropriate here, class certification is not.

FACTUAL BACKGROUND OF THE FAMILY CASES

Family cases, as distinguished from "recipient" cases, arise from claims for breach of contract and emotional distress by next-of-kin arising from the scheme carried out by defendant

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[3] *See Arieno, et al. v. SWB Funeral Services, et al.*, (Sup. Ct., Monroe County, Index No. 07084/07), Decision and Order dated May 8, 2008 (which also denied plaintiffs' cross motion for extension of time to move for class certification.) A true and correct copy of Judge Harold L. Galloway's Decision and Order is attached as Exhibit "2" to Wegryn Declaration.

See In re New York Human Tissue Litigation (*Zeltins-Olivo v. RTI Donor Services, Inc.)* (Sup. Ct., Richmond County, LCP Index No., 750000/08), Order denying Class Certification dated August 25, 2009. A true and correct copy of Justice Joseph J. Maltese's August 25, 2009 Order is attached as Exhibit "3" to Wegryn Declaration.

[4] *In re New York Human Tissue Litigation, supra* at *2, Exhibit "3," Wegryn Declaration.

BioMedical Tissue Services, Ltd. ("BTS") to recover human tissue from deceased loved ones without consent. Recipient cases arise from claims asserted by individuals who have received processed BTS tissue. There are family cases involving 85 donor decedents pending against four tissue processing defendants, fourteen funeral homes and several BTS related individuals in the MDL, New York State Court, Pennsylvania State Court and New Jersey State Court.

MDL Cases

In the MDL, there are six family cases, including four putative class actions, involving twelve donor decedents and 29 next-of-kin plaintiffs. The BTS tissue recoveries allegedly took place at six different funeral homes, with two located in Pennsylvania and four located in New York.[5]

State Court Cases

In New York State Court, the family cases are coordinated before Judge Joseph J. Maltese and involve 43 donor decedents and 59 next-of-kin plaintiffs. The tissue recoveries allegedly took place in twelve different funeral homes, eight located in New York, three in New Jersey and one in Pennsylvania.[6] Although two putative class actions were filed in New York State Court, one case has been dismissed[7] and other case has been denied class certification.[8]

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[5] The two in Pennsylvania are Louis Garzone Funeral Home d/b/a Garzone Funeral Home, Inc. ("Garzone") and James A. McCafferty Funeral Home ("McCafferty") and the four in New York are The Thomas Burger Funeral Home Inc. ("Burger"), Daniel George & Son Funeral Home, Inc. ("Daniel George"), SWB Funeral Services, Inc. d/b/a Profetta Funeral Chapel ("Profetta") and Serenity Hills Funeral Home ("Serenity").

[6] The eight in New York are Avalon Cremation and Funeral Services, Inc. ("Avalon"), Burger, Daniel George, English Brothers Funeral Home ("English Brothers"), New York Mortuary Services, Inc. ("NYM"), Profetta, Ruggiero & Sons Funeral Home Inc. ("Ruggiero") and Serenity. The three in New Jersey are Berardinelli Forest Hill Memorial Inc ("Berardinelli"), Maitner Cremation Services, Inc. ("Maitner") and Funeraria Santa Cruz ("Santa Cruz"), and the one in Pennsylvania is Garzone.

[7] *Arieno, et al. v. SWB Funeral Services, et al.*, (Sup. Ct., Monroe County, Index No. 07084/07), Order dated May 8, 2008, Exhibit "2" to Wegryn Declaration.

In Pennsylvania State Court, the family cases are consolidated before Judge Allan L. Tereshko and involve 27 donor decedents and 70 next-of-kin plaintiffs. The tissue recoveries allegedly took place in three different funeral homes or crematoria, two of which are named in cases in New York and/or in the MDL.[9]

Finally, in New Jersey State Court, there are three family cases before Judge Ned M. Rosenberg, Judge Brian R. Martinotti, and Judge Robert C. Wilson which involve three donor decedents and five next-of-kin plaintiffs. The tissue recoveries allegedly took place in three different funeral homes, two in New York and one in New Jersey.[10]

State Federal Coordination

The MDL Court has forwarded two separate letters to the state courts urging cooperation and coordination in the recipient and family cases. By letter dated October 10, 2006, Honorable Ronald J. Hedges, United States Magistrate Judge in the MDL, urged cooperation between the related state court actions and the federal actions transferred to the MDL in an effort to reduce "costs, delays, and duplication of effort that often stem from such dispersed litigation."[11]

By letter dated February 5, 2008, the Honorable Mark Falk, United States Magistrate Judge in the MDL, forwarded a second letter to state court judges specifically urging state court cooperation with the MDL family cases.[12] Judge Falk's request was premised on the fact that

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[8] *In re New York Human Tissue Litigation* (*Zeltins-Olivo v. RTI Donor Services, Inc.)* (Sup. Ct., Richmond County, LCP Index No., 750000/08), Order dated August 25, 2009, Exhibit "3" to Wegryn Declaration.

[9] The three in Pennsylvania are Garzone, Liberty Cremation, Inc. ("Liberty") and McCafferty. Garzone and McCafferty are named as defendants in the MDL as well.

[10] The two in New York are Daniel George and NYM, and the one in New Jersey is Santa Cruz.

[11] *See* MDL Docket, Document ("Doc.") No. 122, Hedges, U.S.M.J. October 10, 2006 letter to State Court Judges at 1.

[12] *See* MDL Docket, Doc. No. 603, Falk, U.S.M.J. February 5, 2008 letter to "Family" State Court Judges at 1.

"there are pending and likely future state court 'family' actions filed in New York, Pennsylvania, and New Jersey that will involve issues that overlap the MDL." The State Courts have affirmatively responded to the MDL's coordination efforts by effectively permitting the MDL discovery, with supplementation as necessary, to serve as discovery in their respective state court family actions.

Discovery in the Family Cases

RTI has been producing documents in the MDL relevant to both the recipient and family cases since August 2006. Written discovery in the form of Interrogatories and Requests for Production were served by the plaintiffs in the *Kennedy* and *Linda Graves, et al. v. BioMedical Tissue Services, Ltd., et al.* ("*Graves*") cases in the MDL and answered in the summer of 2008.[13] All depositions pertaining to the family cases have been cross-noticed in the MDL and in the New York, Pennsylvania and New Jersey state family cases. To date, these have included seventeen depositions of former and current employees of the tissue processing defendants in the fall of 2008, and recently the deposition of Michael Mastromarino, the principal of BTS, on December 16-17, 2009.

THE PUTATIVE CLASS ACTIONS

There are four putative class actions consolidated before this Court for pre-trial proceedings, *Kennedy*, *Fetzer*, *Wilson* and *Michelli*. The purported class actions concern the entire BTS scheme which allegedly occurred over a three year period from 2002 to 2005 in twenty-four different funeral homes and crematoriums in New York, New Jersey and Pennsylvania from 2002 to 2005. As such, the scope of the purported class actions includes, on the one hand, countless oral and written communications between various next-of-kin of the

[13] To the extent plaintiffs served written discovery in the Pennsylvania family cases, it was duplicative of the discovery requests in *Kennedy* and *Graves* but was placed on hold while settlement discussions continued.

decedent with different funeral home personnel, and, on the one hand, individualized claims for damages by these next-of-kin once they had reason to believe these communications with the funeral homes were false.

***Kennedy* Class Action**

The *Kennedy* class action was filed on March 7, 2006 in the United States District Court, Western District of New York, with an Amended Complaint filed on March 29, 2006.[14] A motion for class certification was filed in *Kennedy* on April 4, 2006, prior to its transfer of the action to the MDL.[15] Through plaintiffs' recent renewal of this motion on December 2, 2009, *Kennedy* is the only purported class action in the MDL in which a motion for class certification has been filed. So as "not to burden this Court," the plaintiffs in *Fetzer* have joined in and incorporated the arguments set forth in the *Kennedy* motion without any additional explanation.

The *Kennedy* Amended Complaint identifies thirteen class representatives[16] all of whom assert claims relating to six next-of-kin decedents[17] that were entrusted in 2005 to three Rochester, New York funeral homes, Serenity, Burger, and Profetta.[18] As such, the *Kennedy*

[14] *Kennedy* Docket, Doc. No. 2, *Kennedy* Amended Complaint.

[15] *Kennedy* W.D.N.Y. Docket (Civil Action. No. 06-06140), Doc. No. 3, *Kennedy* Motion for Class Certification (W.D.N.Y.).

[16] The class representatives have various relationships to the decedent as follows: Kennedy (children); Guerinot (grandchildren and nephew); Passarella (grandchild); Jacobsen (spouse); Bailey (spouse); Yeager (children).

[17] In light of the fact that RTI has no records kept in the normal course of business reflecting receipt of tissue from the decedent Phillip W. Bailey, it has filed a separate motion to dismiss the *Kennedy* Complaint for lack of standing as it relates to the claims of the decedent's wife, Rolann Bailey. (*See Kennedy* Docket, Doc. No. 39, RTI's Motion for Summary Judgment).

motion states five of the six purported common questions of law and fact explicitly in terms of these three Rochester, New York area funeral homes:

1. Whether defendant BTS, Serenity, Burger and Profetta harvested body parts in violation of 21 CFR §§ 1270, 1271 *et seq.* and any other applicable federal regulation.

2. Whether defendants BTS, Serenity, Burger, and Profetta mishandled and desecrated the body of decedents in violation of applicable state laws.

3. Whether defendants Serenity, Burger, and Profetta breached their individual contracts between plaintiffs when they assisted BTS in harvesting decedents' body parts without consent.

4. Whether defendants Serenity, Burger, and Profetta breached their implied covenant of good faith and fair dealing when they assisted BTS in harvesting body parts without consent.

5. Whether defendants Serenity, Burger, and Profetta inflicted emotional distress upon plaintiffs when defendants assisted with the harvesting of decedent's body parts.

6. Whether defendants RTI, LifeCell, Tutogen, Blood and Tissue Center of Central Texas, and Lost Mountain were negligent in failing to verify consent forms provided with the body parts received from BTS.

The alleged common issues of law and fact are narrowly drawn to relate to recoveries from Serenity, Burger, and Profetta, three of the twenty-four funeral homes and crematoria involved in the BTS scheme. No mention is made of the remaining twenty-one funeral homes or crematoria where BTS recoveries were allegedly made in the New York metropolitan area, New Jersey, and Pennsylvania. In addition, the facts alleged relate to only one year of the three year BTS course of conduct at issue. Notwithstanding the narrowly drawn factual predicate, the

[18] Plaintiffs' counsel in *Kennedy*, Van Henri White, also alleges that he has been retained to represent the interests of the next-of-kin from ten additional decedents. RTI has no records of receipt of tissue from three of these decedents. All ten additional decedents were entrusted to the same three Rochester area funeral homes.

putative class is expansive, consisting "of all next of kin relatives of decedents whose bodies were desecrated by BTS for the harvesting and sale of human body parts."[19]

In plaintiffs' recent motion to lift the stay filed in *Kennedy* on July 15, 2009, the primary relief sought from this Court is permission to begin discovery of the claims against Serenity, Burger, and Profetta, and ultimately to move for individualized judgments for relief against each of these defendants. No common facts pertaining to the putative class are alleged.[20] Instead, plaintiffs allege "Serenity Hills Facts," "Profetta Facts," and "Burger Facts."[21] By definition these facts pertain only to the decedents recovered from the Serenity, Profetta and Burger funeral homes, and do not apply to the decedents recovered in the remaining twenty-one funeral homes and various funeral home personnel that were involved in the BTS scheme located in the New York metropolitan area, New Jersey and Pennsylvania. These funeral homes and funeral home personnel were the parties with whom the plaintiffs entered into contracts for burial or cremation, and against whom, as evidenced by plaintiffs' recent motion, their primary claims lie.

***Fetzer* Class Action**

The *Fetzer* purported class action Complaint was filed in the United States District Court for the District of New Jersey on July 28, 2008 and was immediately transferred into the MDL.[22] The *Fetzer* Complaint concerns the decedent, John Edward Fetzer, whose body was allegedly entrusted to the Garzone Funeral Home in Philadelphia on or about May 1, 2005.[23] The purported class representatives are the decedent's children, John, Deborah, Theresa and Paul

[19] *Kennedy* Docket, Doc. No. 2, *Kennedy* Amended Complaint at ¶31

[20] *Kennedy* Docket, Doc. No. 32, *Kennedy* Affirmation In Support of Motion to Lift Order Barring All Motions at ¶¶3-24.

[21] *Id*.

[22] *Fetzer* Docket, Doc. No.1, *Fetzer* Complaint.

[23] *Id.* at ¶16.

Fetzer. The Complaint defines the alleged class as "all others similarly situated in the United States, who have had their loved ones' body parts removed by defendants without their consent."[24]

Despite the fact that the decedent was entrusted to the Garzone Funeral Home, which is not mentioned in the *Kennedy* motion for class certification, the *Fetzer* plaintiffs have joined in and incorporated the arguments set forth in the *Kennedy* motion without any additional explanation. In addition, in light of the fact that it has no record kept in the normal course of business reflecting that it received tissue from the decedent, RTI has a separate motion to dismiss the *Fetzer* Complaint as against it for lack of standing.[25]

Wilson Class Action

Prior to its transfer to this Court, the *Wilson* purported class action was filed on April 29, 2008 in the United States District Court, Eastern District of Pennsylvania. The Complaint concerns the decedents James Bonner and Felicia Pancoast, whose bodies were respectively entrusted in Philadelphia to Liberty on or about May 31, 2004, and to McCafferty on or about September 24, 2005.[26] The purported class representatives Martha, Nancy and James Wilson are the children of the decedent James Bonner, and the purported class representative Neil Pancoast is the wife of the decedent Felicia Pancoast.[27]

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[24] *Id.* at ¶32.

[25] *See Fetzer* Docket, Doc. No. 7, RTI's Motion for Summary Judgment.

[26] *Wilson* Docket, Doc. No. 5, *Wilson* Second Amended Complaint at ¶¶2, 3.

[27] In light of the fact that no records were kept in the normal course of business reflecting that it received tissue from the decedent Felicia Pancoast, RTI has a separate motion to dismiss the *Wilson* Complaint as against it for lack of standing as it relates to the claims asserted by the decedent's spouse, Neil Pancoast. (*See Wilson* Docket, Doc. No. 52, RTI's Motion for Summary Judgment).

The *Wilson* Second Amended Complaint defines a class and a sub-class as follows:

> All individuals who were contacted by the Philadelphia District Attorney's Office and informed that their next-of-kin's or loved one's corpse had body parts removed by Defendants for ultimate use as allografts or had body parts removed for ultimate use as allografts while the decedent's corpse was under the care of any Defendants, and neither the decedent (while alive) nor the decedents [sic] next-of-kin or loved one had given consent or permission to any Defendant for the removal of such body parts for ultimate use as allografts. This sub-class shall not include those individuals and/or Plaintiffs who have filed or may in the future file their own individual complaints concerning the same facts and circumstances alleged herein.
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> * * * *
>
> All individuals who did not receive explicit notice from the Philadelphia District Attorney's Office of the mutilation of their loved ones, but who, upon information and belief, allege that the body parts of their next-of-kin or loved one were removed by Defendants for ultimate use as allografts while the decedent's corpse was under the care of any Defendants, and neither the decedent (while alive) nor the decedents [sic] next-of-kin or loved one had given consent or permission to any Defendant for the removal of such body parts for ultimate use as allografts.

Wilson, Second Amended Compl. ¶53.

The Amended Complaint further alleges that the Class consists of "hundreds of persons located primarily in Pennsylvania and specifically in the Philadelphia area."[28] Notwithstanding, there is no motion for class certification pending with regard to *Wilson*.

Michelli Class Action

The *Michelli* purported class action was filed on May 22, 2006 in the United States District Court, Eastern District of New York, and was transferred to the MDL for pre-trial coordination. The purported class representative, Elizabeth Michelli, is the alleged wife of the

[28] *Wilson* Docket, Doc. No. 5, *Wilson* Second Amended Complaint at ¶54.

decedent, Michael Michelli, whose body was entrusted to Daniel George Funeral Home in Brooklyn, New York on or about November 16, 2003.

The *Michelli* Complaint has never been served on the parties, and is subject to dismissal pursuant to Fed. R. Civ. P. 4 (m). There is no motion for class certification pending with regard to *Michelli*.

LEGAL ARGUMENT

PLAINTIFFS HAVE FAILED TO MEET THE REQUIREMENTS FOR CLASS CERTIFICATION

Fed.R.Civ.P. 23(a) sets out four "prerequisites" for an individual to be certified as a class representative. These four requirements are referred to, respectively, as "numerosity," "commonality," "typicality," and "adequacy." *See* Fed. R. Civ.P. 23(a)(1)-(4). If all of these requirements are met, "a class of one of three types (each with additional requirements) may be certified." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 309 (3d Cir. 2009). These three types are set out in Fed.R.Civ.P. 23(b)(1)-(3). Here, Plaintiffs have sought certification under Fed.R.Civ.P. 23(b)(3), which involves the twin requirements known as predominance and superiority. *Hydrogen Peroxide, supra*, 552 F.3d at 310. Plaintiffs also move for certification pursuant to Fed.R.Civ.P. 23(b)(1)(B), asserting that recovery by any one individual suit may preclude recovery by future plaintiffs.

"The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification." *Hydrogen Peroxide, supra*, 552 F.3d at 316, FN 5 *citing Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) (quoting Fed.R.Civ.P. 23(b)(3)). It is well established that "[a] class may be certified only if the court is 'satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *In re Schering Plough Corporation ERISA Litigation*, 2009 WL 4893649 at *6 (3d Cir. (N.J.))(*citing Beck v. Maximus*, 457 F.3d 291, 297 (3d Cir. 2006) (quoting *Gen. Tel. Co. Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). Unless

each requirement of Rule 23 is actually met, a class cannot be certified. *Hydrogen Peroxide*, *supra*, 457 F.3d at 320.

As a result, "[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met." *Id.* at 316. Accordingly, the Court should, where appropriate, "'delve beyond the pleadings to determine whether the requirements for class certification are satisfied.'" *Id.* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 167 (3d Cir. 2001)).

Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23. *Hydrogen Peroxide, supra*, 552 F.3d at 320 (*citing Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008)). Because "each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *Id.*

Plaintiffs have failed to establish the required elements under Rule 23(a)(1)-(4), (b)(3), and (b)(1)(B). Accordingly, plaintiffs' motion for class certification should be denied.

A. Plaintiffs Have Failed To Meet The Requirements of Rule 23(a).

Plaintiffs have failed to meet the numerosity, typicality, and adequacy requirements of Rule 23(a)(1), (a)(3) and (a)(4).

(1) Plaintiffs Have Failed to Meet the Numerosity Requirement.

Numerosity requires that the "class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Despite the fact that the *Kennedy* putative class has been pending for over three and a half years, plaintiffs have failed to demonstrate *any* evidence as part of their motion for class certification that there are members ready and willing to join the

putative class. In correspondence to the defendants which is not submitted as part of the motion for certification, plaintiffs' counsel in *Kennedy* claims to represent plaintiffs relating to an additional ten decedents. In lieu of class certification, he stands ready to move to amend the Complaint to add each of these unnamed parties as named plaintiffs. Therefore, far from being "impracticable," according to plaintiffs' counsel, a motion to join these plaintiffs is imminent.[29] *See, e.g., Hum v. Dericks*, 162 F.R.D. 628, 635 (D. Hawaii 1996)(denying class certification for failure to meet the numerosity requirement under Fed.R.Civ.P. 23(a)(1) where plaintiff did not demonstrate that the 39 putative class members could not be joined as plaintiffs).

A "rigorous" analysis which "delves beyond the pleadings" must find that there is no evidence that are additional members of the putative class. The *Kennedy* putative class has been pending since March 2006. Since that time individual suits pertaining to 85 donor decedents have been filed in federal and state courts in New York, New Jersey and Pennsylvania, and plaintiffs have failed to press the certification of a putative class in any fashion. Under the rigorous standard set forth by the Circuit in *Hydrogen Peroxide*, and absent any evidence submitted by the putative class representatives to the contrary, the Court must conclude that plaintiffs have failed to meet the numerosity requirement.

(2) Plaintiffs Have Failed to Meet the Typicality Requirement

Typicality requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). This investigation properly focuses on the similarity of the legal theory and legal claims; the similarity of the individual

[29] Counsel for *Kennedy* states in his letter dated October 2, 2009, "Counsel for the various [defendants] [sic] in this action have agreed to include these unnamed plaintiffs as they are aware that circuit courts have consistently held that an order denying class certification restarts the applicable limitations statute for individua[l] claims by [putative] class members." Exhibit "1," Wegryn Declaration, FN 1. RTI does not concede that it has agreed to include any unnamed plaintiffs.

circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims. *In re Schering Plough*, 2009 WL 4893649 at *8 (*citing Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 259 F.3d 154, 183-85 (3d Cir. 2001); *Beck, supra*, 457 F.3d at 295-97, 300-01.

It is well established that a proposed class representative is not "typical" under Rule 23(a)(3) if "the representative is subject to a unique defense that is likely to become a major focus of the litigation." *Beck, supra,* 457 F.3d at 301. A motion for class certification should be denied where there is some degree of likelihood that a unique defense will play a significant role at trial. *Id.* at 300. The "challenge presented by a defense unique to a class representative" is that "the representative's interests might not be aligned with those of the class, and the representative might devote time and effort to the defense at the expense of issues that are common and controlling for the class." *Id.* at 297.

As is demonstrated by the facts alleged in each of the putative class actions pending in the MDL, each plaintiff has a unique cause of action relating to the contract for burial or cremation with one of the twenty-four funeral homes that are alleged to be involved with the BTS scheme. In *Kennedy* plaintiffs assert a breach of contract and breach of the covenant of good faith and fair dealing against the Serenity, Burger and Profetta funeral homes in Rochester, New York. In *Michelli*, plaintiffs assert similar causes of action against the Daniel George Funeral Home in Brooklyn, New York. In *Wilson*, plaintiffs assert nine of the sixteen causes of action alleged against the Garzone and McCafferty funeral homes in Philadelphia.[30] Finally, in *Fetzer*, the existence of a contract is alleged with the Garzone Funeral Home.[31]

[30] The causes of action directed solely at the Garzone and McCafferty funeral home defendants include four counts under the Pennsylvania Unfair Trade Practices and Consumer Protection Law. 73 Pa. C.S. § 201-1 *et seq.*

[31] *Fetzer* Docket, Doc. No. 1, *Fetzer* Complaint, ¶ 16.

These separate claims against the funeral homes are based upon individual contracts and representations made between funeral home representatives and the next-of-kin of decedent at twenty-four different funeral homes over a three year period. The circumstances of the death of the decedent, the meeting with the funeral home personnel, the services requested, and any representations made with regard to tissue donation by BTS and/or the funeral home to each next-of-kin are inherently unique and are, therefore, inherently subject to unique defenses.

Assuming *arguendo* that the asserted claims against the Serenity, Burger and Profetta funeral homes are "typical" of one another, they are not typical of the claims asserted against the Daniel George Funeral Home, or those asserted against the Garzone and McCafferty funeral homes or those that may be asserted against the remaining unnamed funeral homes that are allegedly a part of the BTS scheme.[32] The claims against each of the funeral homes are based upon individual oral communications and written contracts. Each purported class representative would be required to devote a significant amount of time and effort to the prosecution of their individual claim against one of the funeral homes to the exclusion of all the others. Further, since no purported class representative has a claim against all the funeral home defendants, none can possibly meet the typicality requirement as to all the funeral home defendants. *See* 5 MOORE'S FEDERAL PRACTICE, § 23.24[6][a](3rd ed. 2007)("To meet the typicality requirement, there must be at least one class representative who has been injured by and has a claim against each and every defendant.")

Similarly there is no typicality as to the damages asserted by the purported class members. In *Zeltins*, Judge Maltese denied class certification in New York State Court for an

[32] RTI does not concede that any claims asserted against any one funeral home are "typical" of one another.

identical purported class to the one asserted here.[33] The Court cited to *Hurtado v. Purdue Pharma Co.*, 6 Misc.3d 1015(A), 800 N.Y.S.2d 347 (2005) in which all prescribed users of the pain reliever OxyContin sought an order for class certification against the defendant manufacturers and distributors. *Hurtado* denied class certification stating, "[t]he effect of the prescription on each individual class member is more likely than not to be individually determined. If, for instance, the injuries range from sexual dysfunction, to nightmares, to symptoms of withdrawal and social ineptitude, it is difficult to claim there is any 'typical' injury." *Id.* at *7.

Here, the relationship of the purported class, if it were to mimic the individual suits filed to date, would include individuals of varying relations to the decedent which include spouse, child, parent, sibling, nephew, godchild, parents-in-law, daughter/son-in-law, sister/brother-in-law, and guardian.[34] Each of these potential class members learned of the events giving rise to the complaint at different times in a different manner. Each had a different relationship with the decedent prior to his or her death, and a different role in the arrangements with the funeral home for the burial or cremation. Further, each led different lifestyles and was affected by the news of

[33] *In re New York Human Tissue Litigation* (*Zeltins-Olivo v. RTI Donor Services, Inc.)* (Sup. Ct., Richmond County, LCP Index No., 750000/08), Order dated August 25, 2009. Exhibit "3," Wegryn Declaration.

[34]While the Court has not yet ruled on this issue, under New York law many of the purported class members do not have standing to sue as a matter of law because they are not the next-of-kin with the right to dispose of the body of the decedent, and therefore may not bring a cause of action for interference with that right. *See Rakow v. State*, 18 Misc.3d 904, 854 N.Y.S.2d 844, 850 (N.Y.Ct.Cl. 2007) ("Case law clearly establishes the hierarchal right to possession and the corollary duty of proper burial of the decedent, first in the spouse and thereafter to next of kin. (citations omitted) [I]n the absence of a spouse, the next of kin bear both the burden and the right to the uninterfered burial of the deceased (citations omitted). [N]ext of kin is defined in the EPTL § 2-1.1 as distributes or the person(s) entitled to take or share in the property of the decedent under statutes governing descent and distribution (EPTL § 2-1.1 and 1-2.5). Those persons under the EPTL are children first, followed by other descendants of common ancestry.")

the BTS scheme in a different manner. Therefore, like in *Hurtado*, there cannot be an injury or damages that are typical of the purported class. *See also Georgine v. Amchem Prods. Inc.*, 83 F.3d 610, 618 (3d Cir. 1996)(certification of purported class of persons exposed to asbestos not proper where "each individual plaintiffs' claim raises radically different factual and legal issues from those of other plaintiffs.")

Therefore the legal theory and legal claims of the purported class representatives fail to satisfy the typicality requirement of Fed.R.Civ.P. 23(a)(3).

(3) Plaintiffs Have Failed to Meet the Adequacy Requirement.

The final Rule 23(a) class certification prerequisite, Rule 23(a)(4), requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). The adequacy inquiry "has two components designed to ensure that absentees' interests are fully pursued." *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 630 (3d Cir.1996), *aff'd, Amchem*, 521 U.S. 591 (1997).

First, the adequacy inquiry "tests the qualifications of the counsel to represent the class." *In re Schering Plough, supra*, 2009 WL 4893649 at *12 (citing *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 532 (3d Cir.2004)) (internal citations omitted). The second component of the adequacy inquiry seeks "to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* There are clear similarities between the components of the typicality inquiry relating to the absence of unique defenses and alignment of interests, and this second part of the adequacy inquiry that focuses on possible conflicts of interest. "Because of the similarity of [the typicality and adequacy] inquiries, certain questions-like whether a unique defense should defeat class certification-are relevant under both." *Beck, supra*, 457 F.3d at 296. If the class representatives' claims are not typical of the class, he or she may have different incentives in

terms of how much time, energy, and money she is willing to spend pursuing the diverse claims of the class members. *See In re Schering Plough, supra*, 2009 WL 4893649 at *12.

For this reason, many of the same questions regarding typicality also raise issues as to adequacy. For example, the *Kennedy* plaintiffs whose claims all deal with unique claims against the Serenity, Burger, and Profetta funeral homes, have little incentive to pursue claims against the remaining twenty-one funeral homes. Likewise, class representatives who claim to have suffered unique injuries as a result of the BTS scheme based upon their personal relationship with the decedent, will have little or no incentive to proof the existence of unique, but dissimilar, injuries allegedly suffered by the class members.

Therefore, each proposed class representative fails to satisfy the adequacy requirement of Fed.R.Civ.P. 23(a)(4).

B. Plaintiffs Have Failed To Meet The Requirements of Rule 23(b)(3).

Plaintiffs seek certification under Rule 23(b)(3), which is permissible when the Court "finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). The twin requirements of Rule 23(b)(3) are known as predominance and superiority. *Hydrogen Peroxide*, *supra*, 552 F.3d at 310.[35]

Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S.Ct.

[35] Rule 23(b)(3) identifies some "matters pertinent to these findings": (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed.R.Civ.P. 23(b)(3)(A)-(D).

2231, 138 L.Ed.2d 689 (1997) a standard "far more demanding" than the commonality requirement of Rule 23(a), *id.* at 623-24, 117 S.Ct. 2231, "requiring more than a common claim," *Newton, supra*, 259 F.3d at 187.[36] The superiority requirement speaks to whether the class action is the best "available method for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

Because the decision whether to certify a class "requires a thorough examination of the factual and legal allegations," *id.* at 166, the court's rigorous analysis may include a "preliminary inquiry into the merits," *id.* at 168, and the court may "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take," *id.* at 166 (quoting 5 MOORE'S FEDERAL PRACTICE § 23.46[4] (3rd ed.). In this regard the advisory committee's note on the 2003 amendments states:

> A critical need is to determine how the case will be tried. An increasing number of courts require the party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.

Fed. R. Civ. P. 23 advisory committee's note, 2003 amendments.

The proposed class representatives have failed to present a "trial plan" as to how the trial of their claims will proceed. If they had, the trial plan would likely focus on proposed proofs of their individual oral communications and written contract with the various funeral home and BTS personnel with whom they had contact. These communications would also include individual oral representations, or lack thereof, concerning consent for tissue donation and any unique defenses to be presented by the funeral home defendants. As to damages, the trial plan

[36] As evidenced by this Court's February 5, 2008 letter urging state court cooperation with the MDL family cases, the family cases share overlapping issues of law and fact which warrant coordinated case management, particularly on discovery issues. (MDL Docket, Doc. No. 603, Falk, U.S.M.J February 5, 2008 letter.)

would include proofs of the alleged emotional distress, medical and financial damages. None of these alleged damages are "typical" of the class.

Assuming *arguendo* these claims are somehow capable of class wide proof, the trial of a class representative would present "unsurmountable" manageability problems. *See, e.g. Johnston v. HBL Film Management*, 265 F.3d 178, 194 (3d Cir. 2001). It is well settled that "as a general rule, an action based substantially on oral rather than written communications is inappropriate for treatment as a class action." *Id.* at 190 (*citing In re LifeUSA Holding, Inc.*, 242 F.3d 136, 143 (3d Cir. 2001)), because "trial of this case would involve essentially countless mini-trials to determine what alleged misrepresentation was made to each individual plaintiff, whether that person relied upon the statement, and the applicability of any defenses. Obviously, establishing proof of each of these elements and defenses would present severe manageability problems for the court." *Id.* at 194.

Therefore, plaintiffs fail to satisfy the predominance and superiority requirements of Rule 23(b)(3).

C. Plaintiffs Have Failed To Meet The Requirements of Rule 23(b)(1)(B).

The *Kennedy* plaintiffs allege that the putative class should be certified under Rule 23(b)(1)(B) because "[i]f individual suits are brought against the defendants, any one individual suit may preclude recovery by future plaintiffs. One cannot assume that defendants [have] unlimited resources to pay compensatory as well as punitive damages. [B]ecause one suit may as a practical matter substantially impair future plaintiffs from obtaining recovery, this action can be certified under Rule 23(b)(1)(B)." (Kennedy Brief at 9).

While plaintiffs do not so state, they advocate certification under the "limited fund" interpretation of Rule 23(b)(1)(B). *See, e.g., Telectronics Pacing Systems, Inc. v. TPLC Holdings*, 221 F.3d 870 (6th Cir. 2000)(threat of bankruptcy was insufficient basis for finding a

"limited fund" justifying certification of mandatory class). Hebert Newberg, in his treatise NEWBERG ON CLASS ACTIONS, explained the concept of a limited fund as follows:

> A limited fund exists when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated. Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others. Interpleader suits represent the paradigmatic example of multiple claimants to a limited fund, though most interpleader actions do not satisfy the joinder impracticability prerequisite necessary for a class action.

2 NEWBERG ON CLASS ACTIONS § 4.9 (4th ed.); Rule 23 (b)(1)(B) Class Actions: Effect On Class Members.

Here plaintiffs do not allege that they have a "preexisting interest" in a "fixed asset" or piece of property. Accordingly, plaintiffs do not allege the existence of a "limited fund" under Rule 23 (b)(1)(B) and class certification on this basis should be denied.

CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Class Certification filed in *Kennedy* and in *Fetzer* should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard E. Wegryn, Jr. certify that true and correct copies of the foregoing Regeneration Technologies Inc's Memorandum Of Law In Opposition To Plaintiffs' Motion For Class Certification and supporting Declaration of Richard E. Wegryn, Jr. was electronically served on all counsel via ECF filing on December 31, 2009.

/s/ Richard E. Wegryn, Jr.
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