

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY BARNETT, et al. : CIVIL ACTION  
 :  
 v. :  
 :  
 THE TOPPS COMPANY, INC., et al. : NO. 98-0462

**MEMORANDUM ORDER**

AND, NOW, TO WIT, this day of May, 1998, presently before the court is defendant Pinnacle Brands, Inc.'s ("Pinnacle") motion to sever and to dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(6), 20 and 21 of the Federal Rules of Civil Procedure, Pinnacle's motion for leave to file a reply, and the responses thereto. For the following reasons, the motions will be denied.

Plaintiffs are thirteen Major League Baseball umpires who assert claims for federal and common law unfair competition, unjust enrichment and infringement of the right of publicity against five defendant trading card companies.<sup>1</sup> Plaintiffs allege that each defendant is "involved in the manufacture, promotion, distribution and/or sale of baseball trading cards and related merchandise." (Compl. at ¶ 22.) They further allege that each defendant used photographs, likenesses and personas of "one or more of the Plaintiffs in connection with the merchandise without permission, authorization or knowledge of the Plaintiffs." (Compl. at ¶ 23.) Plaintiffs attached to their

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1. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367 and 15 U.S.C. § 1121.

complaint ten baseball trading cards as examples of the unauthorized use of their photographs, likenesses and personas. (Compl. Exs. 1-10.) Pinnacle asks the court to sever the claims against it. Pinnacle also asks the court to dismiss Plaintiffs' unfair competition and right of publicity claims on the ground that assertion of those claims is barred by the statute of limitations. Pinnacle further asks the court to dismiss Plaintiffs' unjust enrichment claim for failure to state a claim upon which relief can be granted.

Pinnacle seeks severance of the claims against it under Federal Rules of Civil Procedure 20 and 21. Pinnacle argues that of the ten exhibits, only two are trading cards which they manufactured and sold and that the remaining eight player trading cards were produced by another manufacturer. Pinnacle asserts that because they manufactured only two of the cards attached to the Complaint that only two of the thirteen Plaintiffs have asserted cognizable claims against Pinnacle. Pinnacle asks the court to sever the claims of these two Plaintiffs on this ground.

Plaintiffs argue that Pinnacle's motion is premature because discovery has not begun. Plaintiffs assert that the exhibits attached to their Complaint are only examples of trading cards and are not the sole cards at issue in this litigation. They further argue that discovery is required to ascertain the extent to which Pinnacle and other defendants may have used their photographs, likenesses or personas without permission on other cards.

The court agrees that Pinnacle's motion ignores the premature stage of this litigation. It is clear on the face of Plaintiffs' Complaint that the trading cards attached as exhibits are examples of the alleged unauthorized use of their photographs, likenesses or personas and are not intended to define the universe of trading cards at issue in this litigation. Discovery is necessary to ascertain the parameters of the claims asserted by Plaintiffs. The court will not sever the claims against Pinnacle at this time. See Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790 (3d Cir. 1984)("Under the modern federal rules, it is enough that a complaint put the defendant on notice of the claims against him. It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action.").

Pinnacle asks the court to dismiss the unfair competition and right of publicity claims against it on the ground that the claims are untimely and violate the statute of limitations because it has not produced, distributed or sold either of the two Pinnacle cards attached to Plaintiffs' Complaint during the past two years. This argument also rests on the invalid assumption that the exhibits define the universe of cards at issue in the litigation. Plaintiffs' Complaint provides Pinnacle with notice that the claims alleged against it pertain to a greater universe of trading cards than the exhibits attached to the Complaint as examples. (Compl. at ¶¶ 23, 24, 47D, and 47E.) It is not clear from the face of the Complaint that Plaintiffs

have not complied with the limitations period. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994). Accordingly, the court will deny Pinnacle's motion to dismiss on this ground.

Pinnacle also asks the court to dismiss Plaintiffs' unjust enrichment claim for failure to state a claim upon which relief can be granted because the Complaint does not allege any benefit conferred upon Pinnacle by Plaintiffs. The court cannot dismiss a complaint for "failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Additionally, under the system of notice pleading contemplated by the Federal Rules of Civil Procedure all that is required is that a complaint give the defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests." Id. at 47. The court finds that Plaintiffs' unjust enrichment claim contained in count three of the Complaint states a claim upon which relief could be granted and that Pinnacle has received notice of the ground upon which Plaintiffs' claim rests. The court will not dismiss Plaintiffs' unjust enrichment claim on this ground.

While the instant motion was pending before the court, Pinnacle filed a motion for leave to file a reply to Plaintiffs' response. The court has been presented with sufficient information in Pinnacle's moving papers and the response thereto to decide the issues presently before the court. The court will

deny the motion to file a reply.

Accordingly, IT IS ORDERED that:

- (1) Pinnacle's motion for leave to file a reply is DENIED.
- (2) Pinnacle's motion to sever and dismiss the claims against it is DENIED.

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LOUIS C. BECHTLE, J.