

2000 WL 35483078 (S.D.N.Y.) (Trial Pleading)
United States District Court, S.D. New York.

Nolan RYAN and Mattgo Enterprises, Inc., Plaintiffs,

v.

VOLPONE STAMP CO., INC., d/b/a Sport Stamps Collectors Association, Defendants.

No. 99 Civ. 9116 (CSH).
September 13, 2000.

Amended Complaint and Demand for Jury Trial

Plaintiffs, by their undersigned attorneys, for their Complaint against the defendant, allege as follows:

The Parties

1. Plaintiff Nolan Ryan (“Ryan”) is a citizen and resident of the State of Texas. Ryan is a retired Major League baseball player who, among his many career accomplishments, holds the distinction of having won 324 games, pitched 7 no-hitters and recorded 5,714 strikeouts. He is a member of Baseball's Hall of Fame in Cooperstown, New York.

2. Plaintiff Mattgo Enterprises, Inc. (“Mattgo”) is a New York corporation that maintains its principal place of business in New York. Mattgo has served as a licensing representative and agent for Ryan, and, in such capacity, has negotiated licensing agreements with the defendant, on Ryan's behalf. By Memorandum Opinion and Order, dated August 1, 2000, the Court directed that Mattgo be joined as a party to this action.

3. Upon information and belief, Volpone Stamp Co., Inc. (“Volpone”) is a New York corporation that maintains its principal place of business at 290 Duffy Avenue, Hicksville, New York. Volpone, which does business under various tradenames and through affiliated entities such as Sport Stamps Collectors Association (“SSCA”), morganmint.com and Five Seven One Four Corp., is engaged in the business of selling sports-related products and memorabilia bearing the names, signatures and/or likenesses of retired professional athletes.

Jurisdiction and Venue

4. This Court has jurisdiction of this matter pursuant to [28 U.S.C. § 1331](#), in that this action arises under the laws of the United States, and under principles of supplemental, ancillary and/or pendent jurisdiction.

5. Venue is proper in this judicial district under [28 U.S.C. § 1391](#) in that a substantial part of the events or omissions giving rise to the claim occurred in this District and the defendant is found and/or does business in this District.

Background

6. From 1966 to 1993, Ryan was a Major League Baseball player for the New York Mets, California Angels, Houston Astros and Texas Rangers.

7. Ryan retired from baseball in 1993 and was inducted into the Hall of Fame on the first ballot in 1999. He is Major League Baseball's all-time strikeout leader and one of the most widely-recognized and admired celebrities in sports. Ryan frequently is asked by companies and their advertising agencies to endorse products and services.

8. Ryan has exploited his valuable celebrity persona to earn money from endorsements and other commercial uses of his name, signature, picture and likeness. Ryan has appeared in television and other advertisements endorsing a variety of products and services, including Advil pain reliever and Wheaties breakfast cereals.

9. Ryan has established the Nolan Ryan Foundation (the "Foundation"), a not-for-profit organization that raises money for various charitable purposes. On occasion, a portion of the proceeds from Ryan's licensing and other agreements is distributed to, or set aside for, the Foundation to promote its charitable objectives.

10. In 1998, Mattgo negotiated certain letter agreements with the defendant granting SSCA the right to utilize, under certain circumstances: (i) Ryan's facsimile signature on various products, including balls, bats, baseball cards, photos and commemorative coins and other memorabilia ("the Facsimile Signature Agreement"); and (ii) Ryan's name and/or facsimile signature on Nolan Ryan teddy bears ("the Teddy Bear Agreement").

11. In 1998, at defendant's request, Ryan also agreed personally to hand sign a limited number of baseballs and flats/stamps for resale by SSCA ("the Hand Signing Agreement").

12. In consideration of the Facsimile Signature and Teddy Bear Agreements, SSCA agreed, among other things, to pay Ryan royalties based on a percentage of sales of these items, subject to certain guaranteed minimum payments that would be payable on a quarterly basis.

13. With regard to the Hand Signing Agreement, defendant agreed to pay Ryan a flat per-item fee, a portion of which was to be given to the Foundation. Defendant later requested, and Ryan agreed, to hand sign various objects in addition to balls and flats, including bats and jerseys, for per-item fees ranging from \$20 to \$75 per item, and Ryan further agreed, at defendant's request, to make certain notations, by hand, on these objects (*e.g.*, "Hall of Fame 1999" and "5714"), which he was not otherwise obligated to do, but which enhanced the value of the objects.

14. Plaintiffs have fulfilled in all respects their obligations under the aforesaid Agreements.

15. Defendant has breached its obligations under the aforesaid agreements by, among other things, failing to make minimum guarantee and other payments as they became due. In respect of the Facsimile Signature Agreement, defendant issued a check to Mattgo, as Ryan's agent, for a guaranteed minimum payment due thereunder (\$43,750), which check was deposited and dishonored by the bank for insufficient funds (Exhibit A).

16. In the case of hand-signed items which were delivered to the defendant, defendant issued checks to Ryan in the amount of \$38,035.00 and, at Ryan's request, to the Foundation in the amount of \$2,117.00, but thereafter stopped payment on those checks for invalid and pretextual reasons (Exhibit B).

17. With respect to the Teddy Bear Agreement, defendant issued a check to Mattgo, as Ryan's agent, for a guaranteed minimum payment thereunder (\$5,000), which check was deposited and dishonored by the bank for insufficient funds (Exhibit C).

18. Plaintiffs have duly demanded that defendant make good on these various checks, in legal tender, but defendant has failed and refused to do so.

19. In addition to its failure to pay royalties, fees and minimum guarantees, defendant has failed properly to account to plaintiffs for sales of those products on which the royalty and other obligations have accrued.

20. Following the aforesaid breaches, plaintiffs formally notified defendant that its right to exploit Ryan's signature, likeness, image, etc. under the agreements was terminated and that defendant no longer possessed any right, license or authority to manufacture, cause to be manufactured, promote and/or sell any objects bearing Ryan's facsimile signature, likeness, image, photograph, etc.

21. Ryan, through Mattgo, has licensed his name and photograph to appear on boxes of Wheaties breakfast cereals to promote, among other things, the Buoniconti Fund for medical research into spinal injuries.

22. In or about June 1999, without prior notice to or approval from Ryan or Mattgo, defendant purported to enter into an agreement with a firm called Authentic Images to place Ryan's name, signature and photograph on boxes of "Mini-Wheaties" and to obtain all the royalties thereon.

23. Neither Mattgo nor Ryan were notified in advance of this purported agreement and neither Ryan nor Mattgo ever gave defendant his/its prior consent thereto.

24. Defendant has ignored plaintiffs' demand to discontinue such activities and, upon information and belief, has continued to produce, cause to be produced, promote and/or sell such products throughout the United States, in violation of Ryan's contractual, statutory and common law rights.

FIRST CLAIM FOR RELIEF

25. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 24 with the same force and effect as if set forth verbatim herein.

26. Upon information and belief, following the termination of the Facsimile Signature and Teddy Bear Agreements, and without plaintiffs' consent, SSCA (directly and through morganmint.com and Five Seven One Four Corp.) has produced, caused to be produced and/or sold products bearing Ryan's name, facsimile signature and/or likeness. The production and sale of such items -- in commerce, without plaintiffs' consent and notwithstanding a formal demand that defendant cease and desist -- constitute a false or misleading representation or description of fact which is likely to cause confusion or mistake, or to deceive the public, as to SSCA's affiliation, connection or association with Ryan and/or as to Ryan's sponsorship, endorsement, authorization or approval of SSCA's goods, services or commercial activities.

27. SSCA intended to suggest, and has falsely suggested, that SSCA's goods, services or commercial activities were endorsed, sponsored, authorized, or approved by Ryan in a manner designed to mislead the public.

28. By reason of the foregoing conduct, defendant has violated Section 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#).

29. By reason of the foregoing conduct, defendant is liable to Ryan, pursuant to [15 U.S.C. § 1116](#), for damages in an amount to be determined at trial, in addition to the costs of this action.

30. Moreover, because defendant willfully intended to trade upon Ryan's name, image, likeness, celebrity and persona, in contravention of Ryan's rights, Ryan is entitled to recover defendant's profits, any damages sustained by Ryan, and the costs of this action pursuant to [15 U.S.C. § 1117\(a\)](#), including, without limitation, treble damages and attorneys' fees.

31. Ryan is further entitled to a preliminary and permanent injunction enjoining defendant and its agents, employees, subsidiaries, parents or affiliates (including, without limitation, morganmint.com and Five Seven One Four Corp.) from continuing to manufacture, cause to be manufactured, promote or sell any products which contain Ryan's name, facsimile signature, image or likeness.

SECOND CLAIM FOR RELIEF

32. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 31 above with the same force and effect as if set forth verbatim herein.

33. Defendant has used within the State of New York for commercial purposes or for purposes of trade, Ryan's picture, name, likeness, image, celebrity and persona, without Ryan's written consent.

34. By reason of the foregoing conduct, defendant has violated [Section 50 of the New York Civil Rights Law](#).

35. By reason of the foregoing conduct, and pursuant to [Section 51 of the New York Civil Rights Law](#), Ryan is entitled to recover from defendant all damages sustained by reason of such unauthorized use of his name, likeness, facsimile signature, image and persona. Moreover, because the defendant has knowingly used and exploited Ryan's name, likeness, image, facsimile signature, and persona without his consent and in a manner forbidden by [Section 50 of the New York Civil Rights Law](#), Ryan is entitled to an award of exemplary damages.

THIRD CLAIM FOR RELIEF

36. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 35 above with the same force and effect as if set forth verbatim herein.

37. Defendant has used Ryan's name, likeness, facsimile signature, image and persona notwithstanding the revocation of consent therefor and without providing Ryan with any compensation therefor.

38. Defendant has derived substantial benefits from its wrongful exploitation of Ryan's name, likeness, facsimile signature, image and persona and has thereby been unjustly enriched, to Ryan's detriment, in an amount to be proven at trial. It would be unfair and/or inequitable to allow defendant to retain the benefits of its wrongful conduct.

FOURTH CLAIM FOR RELIEF

39. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 38 above with the same force and effect as if set forth verbatim herein.

40. Defendant has breached the Facsimile Signature Agreement, as aforesaid, having failed, *inter alia*, to account properly for its sales and to make the required royalty and/or minimum guarantee payments to plaintiffs thereunder, in accordance with the terms of said Agreement, despite due demand therefor.

41. Defendant issued a check to Mattgo, as agent for Ryan, in the amount of \$43,750 (post-dated to July 31, 1999) in payment of a minimum guarantee obligation, due June 30, 1999, under the Facsimile Signature Agreement, which check was deposited on or about August 2, 1999 and was returned unpaid by the bank for insufficient funds.

42. Defendant has failed to make good on that check and otherwise to fulfill its minimum guarantee obligations to plaintiffs, despite due demand therefor.

43. Plaintiffs have been damaged by the aforesaid breaches, in an amount to be determined at trial, which damage includes, among other things, all royalties associated with the production and sale of various items described therein bearing Ryan's facsimile signature and/or likeness.

FIFTH CLAIM FOR RELIEF

44. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 43 above with the same force and effect as if set forth verbatim herein.

45. Pursuant to the Hand Signing Agreement, Ryan signed and wrote notations on numerous baseball-related objects at the specific request of the defendant for an agreed upon per-item fee.

46. Ryan, through Mattgo, rendered invoices to defendant for such signings, at the agreed upon per-item amounts, specifying that a portion of the amounts due be paid to Ryan and the remaining portion paid to the Foundation. Defendant issued two checks in payment of the aforesaid invoices, one to Ryan in the amount of \$38,035 and the other to the Foundation in the amount of \$2,117.

47. After delivering those checks, defendant stopped payment thereon, with no valid justification whatsoever, and the checks were returned unpaid to Ryan and the Foundation.

48. Defendant has failed to make good on those checks, or otherwise pay Ryan for his signatures, despite due demand therefor.

49. By reason of the foregoing, Ryan has been damaged in an amount to be determined at trial.

SIXTH CLAIM FOR RELIEF

50. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 49 above with the same force and effect as if set forth verbatim herein.

51. As set forth above, defendant has breached the Teddy Bear Agreement by failing to pay the minimum guaranteed payment due thereunder and by failing to account for all sales of Nolan Ryan Teddy Bears thereunder.

52. Defendant issued a check to Mattgo, as agent for Ryan, in the amount of \$5,000 (post-dated to July 31, 1999), in payment of a minimum guarantee obligation, due June 30, 1999, under the Teddy Bear Agreement, which check was deposited on or about August 2, 1999 and returned unpaid by the bank for insufficient funds.

53. Defendant has failed to make good on that check or to otherwise fulfill its minimum guarantee obligations to plaintiffs, despite due demand therefor.

54. Plaintiffs have been damaged by reason of the aforesaid breach in an amount not less than \$5,000, the precise amount to be determined at trial, following a full accounting of sales.

SEVENTH CLAIM FOR RELIEF

55. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 54 above with the same force and effect as if set forth verbatim herein.

56. Defendant's purported agreement with Authentic Images to exploit Ryan's name, facsimile signature and photograph for use on Mini-Wheaties, without the prior knowledge or consent of Ryan or Mattgo, constitutes yet another violation of the Facsimile Signature Agreement and of Ryan's common law and statutory rights, as aforesaid.

57. Plaintiffs have been damaged by reason of the aforesaid violation in an amount to be determined at trial and are entitled to a declaration that the purported agreement between defendant and Authentic Images is void, and an order enjoining its implementation and/or imposing a constructive trust on any monies received by defendant thereunder.

EIGHTH CLAIM FOR RELIEF

58. Plaintiffs repeat and reallege the allegations in paragraphs 1 through 57 above with the same force and effect as if set forth verbatim herein.

59. Defendant's conduct, as alleged herein, threatens to impair and dilute the value of Ryan's celebrity, persona and image. Monetary damages alone will not suffice to remedy the damage that has been and will be done to Ryan because, unless restrained, defendant may well continue to engage in such conduct in the future and further impair and dilute the value of Ryan's celebrity, persona and image.

60. By reason of the foregoing conduct, Ryan is entitled to injunctive relief, barring defendant, and those under its control, from continuing to use and otherwise exploit Ryan's name, photograph, signature, image, likeness and/or persona without his prior permission and consent.

WHEREFORE, plaintiffs demand judgment:

(i) declaring defendant to be in violation of Section 43(a) of the the Lanham Act, [15 U.S.C. § 1125\(a\)](#) and/or [Section 50 of the New York Civil Rights Law](#);

(ii) awarding Ryan damages pursuant to [15 U.S.C. § 1116](#) and [New York Civil Rights Law § 51](#) in an amount to be proven at trial, with statutory interest;

(iii) awarding Ryan treble and/or exemplary damages and attorneys' fees pursuant to law including, without limitation, [15 U.S.C. § 1117](#) and [New York Civil Rights Law § 51](#);

(iv) adjudging defendant in breach of the Facsimile Signature Agreement and awarding plaintiffs damages thereunder in an amount to be determined at trial, with statutory interest;

(v) adjudging defendant in breach of the Hand Signing Agreement and awarding plaintiffs damages in an amount to be determined at trial with statutory interest;

(vi) adjudging defendant in breach of the Teddy Bear Agreement and awarding plaintiffs damages thereunder in an amount to be determined at trial with statutory interest;

(vii) preliminarily and permanently enjoining defendant, and those acting under its control or direction (including without limitation morganmint.com and Five Seven One Four Corp.), from continuing to violate the aforesaid statutes and otherwise infringing Ryan's statutory and common law rights;

(viii) declaring defendant's "agreement" with Authentic Images relating to Mini-Wheaties null and void, enjoining defendant from implementing that agreement in contravention of plaintiffs' rights, and imposing a constructive trust, for the benefit of plaintiffs on any and all funds received by defendant in connection with said agreement;

(ix) awarding plaintiffs their costs and reasonable attorneys' fees incurred in connection with the prosecution of this action; and

(x) for such other relief as the Court may deem just and proper.

DEMAND FOR JURY

Pursuant to [Fed. R.Civ.P. 38\(b\)](#), plaintiffs hereby demand a jury trial on all issues triable by a jury.

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