

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JAYLEN BRANTLEY and JARED
NICKENS,

Plaintiffs,

v.

EPIC GAMES, INC., JOHN AND JANE
DOES 1 THROUGH 50, and JOHN DOE
CORPORATIONS 1 THROUGH 10,

Defendants.

CASE NO. 8:19-cv-00594-PWG

**DEFENDANT EPIC GAMES, INC.'S MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT**

In accordance with the Court's order to file Defendant Epic Games, Inc.'s ("Epic Games") motion to dismiss the Amended Complaint by May 30, 2019 (Dkt. No. 25), Epic Games moves the Court for an order dismissing this case in its entirety, pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion"). In support of its Motion, Epic Games submits the accompanying memorandum of law, exhibits submitted therewith, and a proposed order. As explained in the memorandum, each of the claims in the Amended Complaint fails as a matter of law for a number of reasons:

1. Plaintiffs Jaylen Brantley's ("Brantley") and Jared Nickens' ("Nickens") (collectively, "Plaintiffs") claims of violation of the right of publicity (Count I), unfair competition (Counts II and III), unjust enrichment (Count IV), trademark infringement (Counts V and VI), and false designation of origin (Count VIII) fail because they are preempted by the Copyright Act.
2. Count I also fails because Plaintiffs cannot state a right of publicity claim. As Brantley resides in Massachusetts and Nickens resides in New Jersey, their publicity rights are governed by the laws of those respective states. Plaintiffs cannot state a claim under either state's laws.
3. Plaintiffs' unfair competition (Counts II and III), unjust enrichment (Count IV), and trademark (Counts V through VIII) claims are barred by the First Amendment based on *Rogers v. Grimaldi* principles. *See* 875 F.2d 994 (2d Cir. 1989).
4. Plaintiffs fail to state a claim for trademark infringement (Counts V and VI) or trademark dilution (Count VII) because they have failed to allege the existence of a valid trademark. Moreover, Plaintiffs' trademark dilution claim fails for the independent reason that

Plaintiffs have not and could not allege that Epic Games has used Plaintiffs' alleged mark as Epic Games' own mark or to identify the source of Epic Games' own goods or services.

For the Court's convenience, Epic Games provides the following chart summarizing the applicability of each of the above bases for dismissal to each claim in the Complaint.

Count	Claim	Preemption	First Amendment		Failure to State a Claim
			Transformative Use	<i>Rogers v. Grimaldi</i>	
I	Right of Publicity (Brantley)	✓			✓
	Right of Publicity (Nickens)	✓	✓		
II	Unfair Competition (Lanham Act)	✓		✓	
III	Unfair Competition (Common Law)	✓		✓	
IV	Unjust Enrichment	✓		✓	
V	Trademark Infringement (Lanham Act)	✓		✓	✓
VI	Trademark Infringement (Common law)	✓		✓	✓
VII	Trademark Dilution (Lanham Act)			✓	✓
VIII	False Designation of Origin (Lanham Act)	✓		✓	

As Plaintiffs amended their complaint with full knowledge of the basis for this Motion and after reviewing Epic Games' initial pre-motion letter, Epic Games seeks dismissal with prejudice, as any further amendment would be futile.

DATED: May 30, 2019

/s/ Dale M. Cendali

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