

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
CHRISTOPHER HOLMES,

Plaintiff,

- against -

THE TOPPS COMPANY, INC.,

Defendant.

-----X

INDEX NO.: _____
Filed _____

SUMMONS

Plaintiff designates
NEW YORK
County as Place of Trial

12101738

The place of venue is
Defendant's Place of Business

TO THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorneys within **20** days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of new York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: February 13, 2012

Angelo G. Garubo, Esquire
ROMANO & GARUBO,
Counselors at Law LLC
Attorneys for Plaintiff, Christopher Holmes
52 Newton Avenue, P.O. Box 456
Woodbury, New Jersey 08096
(856) 384-1515

DEFENDANT'S ADDRESS:

The Topps Company, Inc.
One Whitehall Street
New York, New York 10004

FILED
FEB 16 2012
COUNTY CLERK'S OFFICE
NEW YORK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
CHRISTOPHER HOLMES,

Plaintiff,

-against-

THE TOPPS COMPANY, INC.,

Defendant.
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COMPLAINT AND DEMAND
FOR JURY TRIAL

Index No.

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Plaintiff CHRISTOPHER HOLMES ("Plaintiff"), by and through his attorneys, Romano & Garubo Counselors at Law LLC, for his Complaint alleges as follows:

PARTIES

1. Plaintiff is a citizen of the United States residing in North Bergen, New Jersey.
2. Upon information and belief, Defendant THE TOPPS COMPANY, INC. ("TOPPS") at all times pertinent to this action was and is a corporation organized under the Laws of the State of Delaware, and authorized to transact business within the State of New York with offices located at One Whitehall Street, New York, New York 10004.

FACTUAL ALLEGATIONS

3. In or about April 1994, Plaintiff became employed by TOPPS.
4. Among other positions with TOPPS, Plaintiff was employed as a Brand Manager in the Marketing Department.
5. While employed as a Brand Manager with TOPPS, some of the duties of Plaintiff included marketing various products and dealing with retailers and distributors of same.
6. On a couple of occasions during his employment with TOPPS, prior to July 2011, employees of TOPPS advised Plaintiff that TOPPS wanted to use a picture of him in association

with trading card promotions.

7. On each of those occasions, Plaintiff was informed of the particular use of his picture and furnished a sample copy of the promotional trading cards prior to their circulation and the use of the picture of Plaintiff was expressly conditioned upon his review and approval of the trading card to being published.

8. Nevertheless, TOPPS never obtained the written consent of Plaintiff for the use of his picture in any manner whatsoever.

9. In or about July 2011, an employee of TOPPS advised Plaintiff that TOPPS wanted to take a picture of him in association with another trading card promotion that TOPPS was contemplating.

10. TOPPS thereafter took a picture of Plaintiff while he was still employed by TOPPS. However, Plaintiff expressly prohibited the use of his picture in any manner until such time, if ever, that Plaintiff was informed of the particular use of his picture, furnished a sample copy of the promotional trading card which he was to review and approve prior to any publication thereof.

11. Plaintiff was never informed of the particular use of his picture or furnished with a sample copy of the promotional trading card, nor did Plaintiff ever approve or consent to its use in any manner.

12. Upon information and belief, on September 28, 2011, TOPPS released a trading card using the likeness, image, portrait, and/or picture of Plaintiff as the mythical character John Henry (the "John Henry Card").

13. TOPPS never obtained the written authorization of Plaintiff for the use of his picture in the subject promotion nor did the Plaintiff provide his consent in any manner.

14. Upon information and belief, the John Henry Card describes and depicts the likeness, image, portrait, and/or picture of Plaintiff as a former slave.

15. Plaintiff, through his counsel, demanded that TOPPS immediately cease and desist from further depicting the likeness, image, portrait, and/or picture of Plaintiff without authorization.

16. TOPPS knew, or should have known, that it was unlawful to use the likeness, image, portrait, and/or picture of Plaintiff without his written consent and that TOPPS had not obtained such required consent.

17. TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave.

18. The use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS relative to promotional trading cards, including, without limitation, the John Henry Card, was for advertising or trade purposes.

19. On or about August 26, 2011, Plaintiff was terminated by TOPPS without good cause.

20. Plaintiff was terminated after his photograph was taken by TOPPS, but prior to the publication of the John Henry Card. Plaintiff was not an employee of TOPPS at the time of publication.

21. As a result of the outrageous conduct of TOPPS, Plaintiff has suffered public ridicule, degradation, humiliation, emotional distress, economic damages, and other injuries.

22. TOPPS has been unjustly enriched as a result of its improper and unauthorized action.

FIRST CAUSE OF ACTION
(Violation of New York Civil Rights Act §§ 50 and 51)

23. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

24. TOPPS used the likeness, image, portrait, and/or picture of Plaintiff in association with promotional trading cards, including, without limitation, the John Henry Card.

25. The likeness, image, portrait, and/or picture of Plaintiff was repeatedly used by TOPPS for the purpose of advertising or trade relative to the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

26. The repeated use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS was done without the written consent of Plaintiff.

27. Sections 50 and 51 of the New York Civil Rights Law prohibit the use of a person's name, portrait, picture, or voice for the purposes of advertising or trade without the written consent of the subject.

28. The repeated use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS without the written consent of Plaintiff is a violation of the New York Civil Rights Law.

29. As a result of the violation of the New York Civil Rights Law by TOPPS, particularly with respect to the marketing and sale of the John Henry Card, Plaintiff has suffered public ridicule, degradation, humiliation, emotional distress, economic damages, and other injuries.

30. The wrongful use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS in any manner, including, without limitation, the marketing and sale of the John Henry Card, should be restrained in accordance with Section 51 of the New York Civil Rights Law.

31. The wrongful use of the likeness, image, portrait, and/or picture of Plaintiff by

TOPPS in connection with the marketing and sale of the John Henry Card was intentional, reckless and wanton in that TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave.

32. As a result of the knowing and reckless violation of the New York Civil Rights Law by TOPPS, punitive damages should be assessed against TOPPS.

SECOND CAUSE OF ACTION
(Quantum Meruit / Unjust Enrichment)

33. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

34. TOPPS repeatedly used the likeness, image, portrait, and/or picture of Plaintiff in association with the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

35. The likeness, image, portrait, and/or picture of Plaintiff was repeatedly used by TOPPS for the purpose of advertising or trade relative to the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

36. The repeated use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS was done without the written consent of Plaintiff.

37. By repeatedly misappropriating the likeness, image, portrait, and/or picture of Plaintiff without the written consent of Plaintiff, TOPPS obtained a benefit at the expense and disadvantage of Plaintiff that in equity and good conscious TOPPS should not have obtained.

38. TOPPS profited substantially from its unlawful misappropriation of the likeness, image, portrait, and/or picture of Plaintiff without the written consent of Plaintiff.

39. By virtue of the foregoing, equity warrants that Plaintiff receive substantial

compensation from TOPPS for the unauthorized use of his likeness, image, portrait, and/or picture, and that TOPPS be compelled to account and disgorge any and all profits, revenues and consideration realized by the unauthorized use of the likeness, image, portrait, and/or picture of Plaintiff relative to the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

THIRD CAUSE OF ACTION
(Accounting)

40. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

41. TOPPS repeatedly used the likeness, image, portrait, and/or picture of Plaintiff in association with the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

42. The likeness, image, portrait, and/or picture of Plaintiff was repeatedly used by TOPPS for the purpose of advertising or trade relative to the sale of promotional trading cards, including, without limitation, the John Henry Card.

43. The repeated use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS was done without the written consent of Plaintiff.

44. TOPPS profited substantially from its unlawful misappropriation of the likeness, image, portrait, and/or picture of Plaintiff without the written consent of Plaintiff.

45. By virtue of the foregoing, equity warrants that TOPPS be compelled to provide Plaintiff with a detailed accounting of any and all profits, revenues and consideration that in any way relates to its unauthorized use of the likeness, image, portrait, and/or picture of Plaintiff relative to the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

FOURTH CAUSE OF ACTION
(Conversion)

46. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

47. TOPPS intentionally exerted dominion and control over the likeness, image, portrait, and/or picture of Plaintiff by repeatedly using same in association with the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

48. The likeness, image, portrait, and/or picture of Plaintiff was repeatedly used by TOPPS for the purpose of advertising or trade relative to the marketing and sale of promotional trading cards, including, without limitation, the John Henry Card.

49. The repeated use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS was done without the written consent of Plaintiff and seriously interfered with the right of Plaintiff to control same.

50. TOPPS has converted the likeness, image, portrait, and/or picture of Plaintiff for TOPPS' own use, benefit and profit.

51. Plaintiff has made demand upon TOPPS to cease and desist misappropriating and using the likeness, image, portrait, and/or picture of Plaintiff without authorization.

52. As a result of the foregoing, Plaintiff has sustained damage.

FIFTH CAUSE OF ACTION
(Infliction of Emotional Distress)

53. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

54. TOPPS knew, or should have known, that it was unlawful to use the likeness, image, portrait, and/or picture of Plaintiff without his written consent and that TOPPS had not

obtained such required consent.

55. TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave.

56. In wanton disregard of the rights and sentiment of Plaintiff, TOPPS negligently, intentionally, recklessly, and maliciously engaged in conduct that it knew or should have know would cause Plaintiff emotional distress and injury.

57. As a result of the foregoing, Plaintiff has sustained damage.

SIXTH CAUSE OF ACTION
(Wrongful Discharge)

58. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

59. While employed by TOPPS in or about July 2011, TOPPS advised Plaintiff to have a picture of him taken in association with an unspecified trading card promotion that TOPPS was contemplating.

60. TOPPS never informed Plaintiff of the particular use of his picture, furnished him with a sample copy of the John Henry Card nor obtained his written authorization to use his likeness, image, portrait, and/or picture in any manner.

61. TOPPS never intended to inform Plaintiff of the particular use of his picture, furnish him with a sample copy of the John Henry Card nor obtain his written authorization to use his likeness, image, portrait, and/or picture in any manner.

62. During his employment with TOPPS, Plaintiff consistently received good performance reviews and annual raises.

63. On or about August 26, 2011, Plaintiff was terminated by TOPPS without good cause.

64. Upon information and belief, on September 28, 2011, TOPPS released the John Henry Card that, upon further information and belief, describes and depicts the likeness, image, portrait, and/or picture of Plaintiff as a former slave.

65. TOPPS knew, or should have known, that it was unlawful to use the likeness, image, portrait, and/or picture of Plaintiff without his written consent and that TOPPS had not obtained such required consent.

66. TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave.

67. Because TOPPS knew, or should have known, that it was unlawful to use the likeness, image, portrait, and/or picture of Plaintiff without his written consent and that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave, TOPPS terminated Plaintiff without good cause before TOPPS released the John Henry Card.

68. As a direct result of the foregoing, Plaintiff has sustained economic and emotional damages.

SEVENTH CAUSE OF ACTION
(Prima Facie Tort)

69. Plaintiff repeats and realleges each and every allegation set forth in the aforementioned paragraphs as if they were fully set forth at length herein.

70. While employed by TOPPS in or about July 2011, TOPPS advised Plaintiff to have a picture of him taken in association with an unspecified trading card promotion that TOPPS was contemplating.

71. TOPPS never informed Plaintiff of the particular use of his picture, furnished him with a sample copy of the John Henry Card nor obtained his written authorization to use his

likeness, image, portrait, and/or picture in any manner.

72. TOPPS never intended to inform Plaintiff of the particular use of his picture, furnish him with a sample copy of the John Henry Card nor obtain his written authorization to use his likeness, image, portrait, and/or picture in any manner.

73. On or about August 26, 2011, Plaintiff was terminated by TOPPS without good cause.

74. Upon information and belief, on September 28, 2011, TOPPS released the John Henry Card that, upon further information and belief, describes and depicts the likeness, image, portrait, and/or picture of Plaintiff as a former slave.

75. TOPPS knew, or should have known, that it was unlawful to use the likeness, image, portrait, and/or picture of Plaintiff without his written consent and that TOPPS had not obtained such required consent.

76. TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave.

77. Because TOPPS knew, or should have known, that Plaintiff did not and would not consent to the use of his likeness, image, portrait, and/or picture to depict him as a former slave, TOPPS terminated Plaintiff without good cause before TOPPS released the John Henry Card.

78. As a direct result of the foregoing, Plaintiff has sustained damages in the amount of any and all profits, revenues and consideration realized by TOPPS from its unauthorized use of the likeness, image, portrait, and/or picture of Plaintiff relative to the marketing and sale of the John Henry Card.

WHEREFORE, Plaintiff CHRISTOPHER HOLMES demands judgment against Defendant THE TOPPS COMPANY, INC. as follows:

- a) Awarding damages in the sum of \$1,000,000.00 in favor of Plaintiff and against TOPPS;
- b) Restraining the use of the likeness, image, portrait, and/or picture of Plaintiff by TOPPS in connection with the John Henry Card or otherwise;
- c) Directing TOPPS to provide an accounting of all income, proceeds, profits, and consideration in any way derived or associated with the use of the likeness, image, portrait, and/or picture of Plaintiff, including, without limitation, the John Henry Card;
- d) For lost wages, benefits and other related remuneration;
- e) For any and all profits, revenues and consideration realized by TOPPS from its unauthorized use of the likeness, image, portrait, and/or picture of Plaintiff relative to the marketing and sale of the John Henry Card;
- f) Awarding punitive damages in the sum of \$3,000,000.00 in favor of Plaintiff and against TOPPS;
- g) For costs and disbursement of this action, including attorneys' fees; and
- h) For such other relief as the Court deems just, equitable and proper.

Dated: February 13, 2012
Woodbury, New Jersey

Respectfully submitted

ROMANO & GARUBO Counselors at Law LLC

By: 

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P.O. Box 456
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(856) 384-1515

Attorneys for Plaintiff Christopher Holmes