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**FILED**  
NORTH COUNTY DIVISION  
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SAN DIEGO COUNTY, CA

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF SAN DIEGO**  
10 **NORTH COUNTY DIVISION**

12 JOSEPH PIROZZI, and individual; J&T )  
13 HOBBY LLC, )

14 Plaintiffs, )

15 vs. )

16 THE UPPER DECK COMPANY, INC., a )  
17 Nevada Corporation; RICHARD )  
18 MCWILLIAM, an individual; and DOES 1- )  
19 100, inclusive, )

20 Defendants. )

CASE NO.: 37-2012-0005684<sup>7</sup>-CU-BT-NC

) **NOTICE OF DEMURRER AND**  
) **DEMURRER TO COMPLAINT BY**  
) **DEFENDANTS**

) Date: December 21, 2012

) Time: 1:30 p.m.

) Dept.: N-31

) Judge: Hon. Timothy M. Casserly

**IMAGED**

21 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

22 PLEASE TAKE NOTICE THAT on December 21, 2012 at 1:30 p.m., or as soon thereafter  
23 as counsel can be heard, in Department N-31 of the above-captioned Court, located at 325 S.  
24 Melrose Dr., Vista, California, the Hon. Timothy M. Casserly presiding, defendants The Upper  
25 Deck Company, Inc. and Richard McWilliam ("Defendants") will and hereby do demur, pursuant  
26 to California Code of Civil Procedure section 430.10(e), to the Complaint filed by Plaintiffs.

27 ///

28 ///

1 The demur is supported by this notice of demurrer and demurrer, the memorandum of  
2 points and authorities in support of the demurrer, a request for judicial notice, and the Court's file  
3 for this lawsuit. This will be an appearance hearing. The department may make a tentative ruling  
4 available around 4:00 p.m. on the business day prior to the date set for the hearing. Parties and  
5 their counsel may obtain a copy of the tentative ruling by accessing the San Diego Superior  
6 Court's "Civil Law and Motion Rulings" web-page. Defendants demur to each cause of action on  
7 the following grounds:

8 **FIRST CAUSE OF ACTION**

9 Defendants demur to the First Cause of Action for fraud on the grounds that the pleading  
10 is uncertain, ambiguous, and unintelligible and that it does not state facts sufficient to constitute a  
11 cause of action for fraud. (Cal. Civ. Pro. § 430.10(e), (f).)

12 **SECOND CAUSE OF ACTION**

13 Defendants demur to the Second Cause of Action for concealment on the grounds that the  
14 pleading is uncertain, ambiguous, and unintelligible and that it does not state facts sufficient to  
15 constitute a cause of action for concealment. (Cal. Civ. Pro. § 430.10(e), (f).)

16 **THIRD CAUSE OF ACTION**

17 Defendants demur to the Third Cause of Action for conspiracy on the grounds that the  
18 pleading is uncertain, ambiguous, and unintelligible and that it does not state facts sufficient to  
19 constitute a cause of action for conspiracy to defraud/conceal. (Cal. Civ. Pro. § 430.10(e), (f).)

20 **FOURTH CAUSE OF ACTION**

21 Defendants demur to the Fourth Cause of Action for breach of the covenant of good faith  
22 and fair dealing on the grounds that the pleading is uncertain, ambiguous, and unintelligible and  
23 that it does not state facts sufficient to constitute a cause of action for bad faith. (Cal. Civ. Pro. §  
24 430.10(e), (f).)

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**FIFTH CAUSE OF ACTION**

Defendants demur to the Fifth Cause of Action for unfair business practices on the grounds that the pleading is uncertain, ambiguous, and unintelligible and that it does not state facts sufficient to constitute a cause of action for unfair and deceptive business practices. (Cal. Civ. Pro. § 430.10(e), (f).)

**SIXTH CAUSE OF ACTION**

Defendants demur to the Sixth Cause of Action for cancellation of a written instrument on the grounds that the pleading is uncertain, ambiguous, and unintelligible and that it does not state facts sufficient to constitute a cause of action for cancellation of a written instrument. (Cal. Civ. Pro. § 430.10(e), (f).)

**NICHOLAS & BUTLER, LLP**

Dated: October 11, 2012

By:



Craig M. Nicholas  
Tracy J. Jones

Attorneys for Defendants  
The Upper Deck Company, Inc. and  
Richard McWilliam

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INTRODUCTION

This action stems from a fifteen year business relationship between Plaintiffs and Upper Deck whereby Upper Deck manufactured and sold certain sports and entertainment trading cards to Plaintiffs to be distributed throughout the United States in exchange for payment. Despite this extensive relationship, Plaintiffs now—fifteen years later, file a baseless Complaint against Upper Deck and vindictively and improperly naming Upper Deck's Chief Executive Officer, Mr. McWilliam, in a transparent effort to ignore their payment obligations to Upper Deck, which is the subject matter of another lawsuit already pending in the San Diego Superior Court. Plaintiffs' Complaint lacks not only merit in its substance, but fails to state facts sufficient to constitute each cause of action.

Plaintiffs' Complaint collectively references Mr. McWilliam with Upper Deck, but does not state any facts whatsoever demonstrating Mr. McWilliam's personal participation in or facilitation of the alleged events. To overcome this glaring defect, Plaintiffs transparently attempt to allege an alter ego theory by including minimal boilerplate language found in Paragraph 8. These allegations lack any corresponding facts showing Mr. McWilliam shares a unity of interest with Upper Deck such that they lack separate personalities and that inequity will result unless Mr. McWilliam and Upper Deck are treated as one. The Complaint's use of a collective reference and alter ego theory alone does not bypass the requirement that a plaintiff must state sufficient facts to plead a cause of action against an individual defendant. Plaintiffs' failure to state any facts whatsoever demonstrating Mr. McWilliam's involvement in the alleged events reflects the need to protect Mr. McWilliam as an individual from these unwarranted and unsupported allegations against him personally.

Plaintiffs' causes of action for fraud and concealment are so uncertain that Defendants cannot determine what is alleged to have been misrepresented/concealed, by whom, when, where or why it purportedly made. The one thing that Plaintiffs do plead with specificity is that they had reason to disbelieve Defendants' statements in 2005. Plaintiffs' Complaint, filed seven years later, on August 31, 2012, is barred by the three-year statute of limitations.



1 Second, Plaintiffs' cause of action for conspiracy is legally improper because: (1)  
2 Plaintiffs improperly plead a conspiracy cause of action; and (2) a company and its agent cannot  
3 conspire.

4 Third, Plaintiffs' cause of action for breach of the covenant of good faith and fair dealing  
5 is defectively pled. Plaintiffs' allegations do not identify any contract, plead its terms, or  
6 otherwise incorporate the contract by reference. Plaintiffs and Upper Deck did business for 15  
7 years and had numerous contracts. Plaintiffs cannot respond to the Complaint without having  
8 more information about which contract is at issue. To allege a breach, Plaintiffs must plead that  
9 they substantially performed under the contract. However, in another case filed by Upper Deck  
10 against Plaintiffs in San Diego County on November 7, 2011 and referenced as Case No. 37-2011-  
11 00100599-CU-BC-CTL, Upper Deck sought a \$1.5 million judgment against Plaintiffs pursuant  
12 to breach of contract and open book account causes of action. (See Request for Judicial Notice  
13 ("RJN"), Ex. A, B.) Even if a breach were adequately pled, Plaintiffs' claim is barred by the two-  
14 year statute of limitations.

15 As an afterthought, Plaintiffs added a UCL claim. But they fail to sufficiently plead any  
16 element of a UCL violation. Plaintiffs do not plead standing, they do not describe any unlawful,  
17 unfair, or fraudulent business practice, and they request remedies which are unavailable under the  
18 UCL. Plaintiffs' UCL claim is also barred by the four-year statute of limitations.

19 Finally, the same pleading problems inherent in Plaintiffs' fraud, concealment, and  
20 covenant of good faith claims plague Plaintiffs' cancellation of a written instrument cause of  
21 action—no fraudulent conduct is specifically pled and no written instrument is identified. The  
22 Court should sustain Defendants' demurrer to every cause of action without leave to amend, as  
23 curing the many defects in the Complaint would require Plaintiffs to contradict the current  
24 allegations.

## 25 II.

### 26 STANDARD ON DEMURRER

27 Defendants may object to a complaint by filing a demurrer. (Cal. Civ. Proc. § 430.10(e),  
28 (f).) A demurrer can be used to challenge any defects that appear on the face of the pleading or

1 from judicially noticeable matters. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) On demurrer,  
2 the court admits the truth of “all material facts properly pleaded but not contentions, deductions or  
3 conclusions of fact or law.” (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

4 Defendants may demur on the ground that the complaint does not state facts sufficient to  
5 constitute a cause of action. (*Id.*) A complaint must allege *facts* in support of each element of a  
6 cause of action, mere conclusions are insufficient. (*Freeman v. San Diego Ass'n of Realtors*  
7 (1999) 77 Cal.App.4th 171, 189). The court should sustain the demurrer if a complaint fails to  
8 allege facts supporting each essential element of a cause of action. (*Banerian v. O'Malley* (1974)  
9 42 Cal.App.3d 604, 610).

10 Defendants may also demur if the allegations are uncertain, ambiguous, and unintelligible.  
11 (*Id.*) If a complaint is so uncertain or ambiguous that Defendants cannot reasonably respond,  
12 reasonably determine what issues must be admitted or denied, or what counts or claims are  
13 directed against them. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 Cal.App.4th 612, 616.)

14 Defendants may demur if there is an absolute defense to causes of action pled by Plaintiffs,  
15 like the running of the statute of limitations. (*Hightower v. Roman Catholic Bishop of*  
16 *Sacramento* (2006) 142 Cal.App.4th 759, 765.)

### 17 III.

#### 18 THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO PLEAD

#### 19 AN ALTER EGO THEORY AGAINST MR. MCWILLIAM

20 “[B]are conclusory allegations” that the individual’s and corporation’s separate characters  
21 had ceased and that one is the alter ego of the other are insufficient to plead alter ego. (*Vasey v.*  
22 *California Dance Co.*, 70 Cal.App.3d 742, 749 (1977).) “The allegation that a corporation is the  
23 alter ego of the individual stockholders is insufficient to justify the court in disregarding the  
24 corporate entity in the absence of allegations of facts from which it appears that justice cannot  
25 otherwise be accomplished.” (*Norins Realty Co. v. Consolidated Abstract & Title Guaranty Co.*,  
26 80 Cal.App.2d 879, 883 (1947).) The court will not disregard the corporate entity unless it is  
27 necessary to prevent fraud or injustice. (*Id.*) “Mere ownership of all the stock and control and  
28 management of a corporation by one or two individuals is not of itself sufficient to cause the

1 courts to disregard the corporate entity.” *Id.* The essential facts supporting an alter ego theory  
2 “must be pleaded.” (*Meadows v. Emmett & Chandler*, 99 Cal.App.2d 496, 498-499 (1950).) This  
3 requires facts showing that “recognition of the corporate entity would sanction a fraud or promote  
4 injustice . . . and that to recognize their separate entities would aid the consummation of a wrong.”  
5 (*Id.* at 499.)

6  
7 Plaintiffs’ Complaint includes one paragraph containing vague, factually deficient, and  
8 “bare conclusory [alter ego] allegations . . . insufficient to plead alter ego.” (*Vasey, supra*, 70  
9 Cal.App.3d at 749.) Plaintiffs merely allege:

10 Plaintiffs allege on information and belief that Defendants, and each of them,  
11 intermingled their assets and identities to such an extent that they are alter egos of  
12 one another, and/or that Defendants, and each of them, and DOES 1 to 100, are  
13 completely owned, controlled, dominated, used, managed and operated by and on  
14 behalf of one or more of the remaining defendants and intermingled their assets  
15 and identities to such an extent that they are the alter egos of said Defendants, are  
16 one and the same entity and are a mere shell by which the defendants conduct  
17 business. Plaintiffs further alleges [sic] on the basis of information and belief that  
18 each of the defendant entities failed to maintain corporate identities separate and  
19 distinct from one another such that the adherence to the function of the separate  
20 existence of each of those entities would promote injustice and sanction fraud  
21 upon Plaintiffs.

22 (Complaint, ¶ 8.)

23 Plaintiffs do nothing more than repeat the boilerplate and conclusory alter ego allegations.  
24 Plaintiffs allege no facts describing how Defendants supposedly intermingled assets or how the  
25 Court’s maintenance of Upper Deck’s corporate identity would “promote injustice and sanction a  
26 fraud.” “Mere ownership of stock and control and management is not of itself sufficient to cause  
27 the courts to disregard the corporate entity.” (*Norins Realty Co., supra*, 80 Cal.App.2d at 883.)  
28 Irrespective of the Complaint’s boilerplate language, merely identifying Mr. McWilliam as “the  
Owner, President, and Chief Executive Officer of The Upper Deck Companies Inc.,” while  
factually and legally inaccurate, does not lend credence to an alter ego allegation.

The Complaint also fails to factually support its request that the Court disregard Upper  
Deck’s corporate entity because “to prevent fraud or injustice.” (*Id.*) There are no facts  
whatsoever showing Mr. McWilliam’s participation, and thus, no supporting facts necessitating

1 the Court completely disregard Upper Deck as a distinct and separate corporate entity in order to  
2 prevent fraud or injustice. Mr. McWilliam never executed any agreement with J & T individually  
3 or otherwise failed to observe the requisite corporate formalities with Upper Deck. Mr.  
4 McWilliam respectfully requests the Court recognize and uphold the legal protections surrounding  
5 the corporate entity and shield McWilliam from Plaintiffs' unsupported claims.

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7  
8 IV.

9 THE COURT SHOULD SUSTAIN DEFENDANTS' DEMURRER TO  
10 PLAINTIFFS' FRAUD AND CONCEALMENT CAUSES OF ACTION

11 Plaintiffs' first and second causes of action are intentional misrepresentation and  
12 concealment, two types of fraud. In order to adequately plead a claim for intentional  
13 misrepresentation, Plaintiffs must allege facts showing: (1) Defendants represented an important  
14 fact was true; (2) the representation was false; (3) Defendants knew that the representation was  
15 false when they made it or that they made the representation recklessly and without regard for its  
16 truth; (4) Defendants intended Plaintiffs to rely on the representation; and (5) Plaintiffs reasonably  
17 relied on Defendants' representation to their detriment. (CACI, No. 1900.)

18 In order to state a claim for concealment, Plaintiffs must allege: (1) Defendants  
19 intentionally failed to disclose an important fact to Plaintiffs; (2) Plaintiffs did not know of the  
20 concealed fact; (3) Defendants intended to deceive Plaintiffs by concealing the fact; and (4)  
21 Plaintiffs reasonably relied on Defendants' deception to their detriment. (CACI, No. 1901.)

22 A. Plaintiffs Fail to Plead With Specificity Their Causes of Action for Fraud.

23 Generally, courts liberally construe complaints. (*Wilhelm v. Pray, Price, Williams &*  
24 *Russell* (1986) 186 Cal.App.3d 1324, 1332.) The policy of liberal construction of pleadings does  
25 not apply to fraud causes of action. (*Id.*) There are special pleading requirements for fraud  
26 claims. (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197,  
27 216.) Allegations of fraud must be pled *with particularity* so that the court can weed out  
28 nonmeritorious actions before defendant is required to answer. (*Id.* (emphasis added).) "Fraud

1 must be pled specifically, general and conclusory allegations do not suffice.” (*See Alfaro v.*  
2 *Community Housing Imp. System & Planning Ass’n, Inc.* (2009) 171 Cal.App.4th 1356, 1384  
3 (quoting *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993.) This  
4 particularity requirement necessitates pleading facts which show how, when, where, to whom and  
5 by what means the representations were tendered or material facts withheld. (*Wilhelm, supra*, 186  
6 Cal.App.3d at 1332.)

7 Plaintiffs do not meet these heightened pleading standards. The crux of Plaintiffs’ fraud  
8 cause of action is that despite an fifteen year business relationship, Defendants somehow allegedly  
9 misrepresented/concealed Upper Deck’s involvement with Plaintiffs’ competitors. (Complaint, ¶¶  
10 10-27.) Plaintiffs’ claims are extremely vague and uncertain. Plaintiffs fail to specifically allege  
11 what was said, by whom, when, where or why. Plaintiffs opt to imprecisely allege that over a four  
12 year period it was generally represented that “Defendant did not own, control, dominate, use [or]  
13 manage the Distributing Entities.” Plaintiffs fail to even provide an example of an instance when  
14 Defendants made the alleged representations.

15 Plaintiffs do not allege with particularity the falsity of the representations. Plaintiffs plead  
16 only a single conclusory sentence: “The representations made by Defendant, and each of them,  
17 were in fact false.” Even if the undefined representations were false, Plaintiffs do not allege how  
18 they were harmed, if at all. Plaintiffs’ exceedingly general fraud allegations lack any substantive  
19 facts and do not put Defendants on notice of the claims against them, rendering Defendants unable  
20 to respond to the Complaint.

21 **B. Plaintiffs’ Fraud Causes of Action are Barred by the Statute of Limitations.**

22 “When a ground for objection to a complaint, such as the statute of limitations, appears on  
23 its face or from matters of which the court may or must take judicial notice, a demurrer on that  
24 ground is proper.” (*Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th  
25 759, 765.) On its face, the Complaint shows that Plaintiffs’ fraud claims are barred by the three-  
26 year statute of limitations. (Cal. Civ. Proc. § 338.)

27 A cause of action accrues, and the limitations period begins to run, when the cause  
28 of action is complete with all of its elements. Under certain circumstances,  
however, the accrual of the action may be postponed and the running of the

1 limitations period tolled until the plaintiff discovers or has reason to discover the  
2 cause of action. A plaintiff has reason to discover a cause of action when he or  
3 she has reason to suspect a factual basis for its elements. Under the discovery  
rule, suspicion of one or more elements of an action, coupled with knowledge of  
any remaining elements, will generally trigger the statute of limitations period.

4 (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 960 (citations omitted, emphasis added).) The discovery  
5 rule will not apply to toll the statute of limitations where reasonable inquiries following receipt of  
6 information giving rise to reasonable suspicion of would have resulted in discovery of the fraud.  
7 (*Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 701 (the court refused to apply  
8 the discovery rule to toll the statute of limitations where employer-plaintiff was on notice its  
9 employee was dishonest but plaintiff failed to reasonably examine bank records, which would  
10 have resulted in the discovery of the fraud).) Willful ignorance will not save a cause of action  
11 which is otherwise barred by the statute of limitations. (*See Id.*)

12 Plaintiffs pled they discovered in 2005 that Defendants “owned controlled, dominated,  
13 used, [or] managed Distributing Entities.” (Complaint, ¶ 12.) As early as 2005, Plaintiffs were put  
14 on notice of the alleged facts they contend give rise to the fraud causes of action. They had a duty  
15 to make a reasonable inquiry into ownership of the Distributing Entities. Plaintiffs’ causes of  
16 action for fraud accrued in 2005 and the statute of limitations expired in 2008, four years prior to  
17 filing this Complaint. Therefore, the Court should sustain Defendants’ demurrer to Plaintiffs’  
18 fraud causes of action.

19 V.

20 **THE COURT SHOULD SUSTAIN DEFENDANTS’ DEMURRER TO**  
21 **PLAINTIFFS’ CAUSE OF ACTION FOR CONSPIRACY**

22 Plaintiffs’ third cause of action is for conspiracy (to defraud). Pleading a separate cause of  
23 action for conspiracy is procedurally improper. “Conspiracy is not a cause of action, but a legal  
24 doctrine that imposes liability on those who, although not actually committing a tort themselves,  
25 share with the immediate tortfeasors a common plan or design in its perpetration.” (*Applied*  
26 *Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-11.)

27 There can be no claim for conspiracy to defraud without a plaintiff showing the underlying  
28 elements of a fraud cause of action. (*Kerr v. Rose* (1999) 216 Cal.App.3d 1551, 1564.) The same

1 defects in failing to particularly plead fraud affect Plaintiffs' conspiracy claim. (*See infra*, §  
2 (III)(A).)

3 Even assuming Plaintiffs properly pled fraud, they fail to plead conspiracy to commit  
4 fraud. "A conspiracy is an agreement between two or more persons to commit a wrongful act."  
5 (CACI, No. 3600.) A corporation and its agents, officers, or directors cannot conspire with one  
6 another. (*See e.g., Applied Equipment, supra*, 7 Cal.4th at 512; *Doctors' Co. v. Superior Court*  
7 (1989) 49 Cal.3d 39, 47.) Plaintiffs pled that Mr. McWilliam is the owner, President, and CEO  
8 of Upper Deck. (Complaint, ¶ 4.) As a matter of law, neither Defendant can be held liable under  
9 a conspiracy theory. The Court should sustain Defendants' demurrer to Plaintiffs' cause of action  
10 for conspiracy.

11  
12 VI.

13 **THE COURT SHOULD SUSTAIN DEFENDANTS' DEMURRER TO**  
14 **PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF THE COVENANT**  
15 **OF GOOD FAITH AND FAIR DEALING**

16 Plaintiffs' Fourth Cause of Action is for breach of the covenant of good faith and fair  
17 dealing ("bad faith"). To establish a claim for bad faith, Plaintiffs must allege: (1) Plaintiffs and  
18 Defendants entered into a contract; (2) Plaintiffs did all, or substantially all of the significant  
19 things the contract required them to do or was excused from having to do those things; (3) all  
20 conditions for performance under the contract occurred; (4) Defendants unfairly interfered with  
21 Plaintiffs' right to receive the benefits of the contract; and (5) Plaintiffs were harmed by  
22 Defendants' conduct. (CACI, No. 325.) Plaintiffs' fourth cause of action fails to properly plead a  
23 cause of action for bad faith in several respects.

24 **A. Plaintiffs Fail to Plead the Terms of the Contract**

25 An action based on a written contract must set out material terms of the contract in the  
26 complaint or attach a copy of the written instrument and incorporate by reference. (*Wise v.*  
27 *Southern Pacific Co.* (1963) 223 Cal.App.2d 50, 59.) A cause of action for breach of the implied  
28 covenant of good faith and fair dealing is premised upon the breach of a specific contractual

1 obligation. (*Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026,  
2 1031.)

3 Plaintiffs pled that Plaintiffs and Defendants . entered into multiple contracts between  
4 1994 and 2009:

5 On or around 1994, in the City of Carlsbad, San Diego County, California,  
6 Plaintiffs and Defendants entered into a written contract (hereinafter "Contract")  
7 whereby Defendants agreed to manufacture and sell certain sports and  
8 entertainment trading cards (hereinafter "Product") to Plaintiffs to be distributed  
9 throughout the United States. From 1994 through 2009, the parties entered into  
10 numerous subsequent Contracts containing the same and/or similar terms of the  
11 original agreement.

12 (Complaint, ¶ 10.) Plaintiffs allege the existence of a separate agreement wherein Plaintiff, Mr.  
13 Pirozzi, President of J&T, provided a personal guarantee. (*Id.*) Plaintiffs and Upper Deck had a  
14 business relationship spanning over 15 years. Plaintiffs' failure to distinguish which contract or  
15 contracts form the basis of their bad faith claim makes it impossible for Defendants to respond to  
16 this cause of action or for the Court to know what contract provision was not honored in good  
17 faith.

18 **B. As a Matter of Law, Defendant Richard McWilliam Cannot Be Held Liable**  
19 **for Bad Faith Because He Was Not a Party to the Contract(s)**

20 There is no claim for breach of the covenant of good faith and fair dealing where there is  
21 no contract. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 690; *Carma Developers*  
22 (*Calif.*), *Inc. v. Marathon Develop. Calif., Inc.* (1992) 2 Cal.4th 342, 371-76; *Minich v. Allstate*  
23 *Ins. Co.* (2011) 193 Cal.App.4th 477, 493.) To adequately plead a bad faith claim against Mr.  
24 McWilliam, Plaintiffs must allege the existence of a contract between Plaintiffs and Mr.  
25 McWilliam. (CACI, No. 325.) It is uncertain which contract is at issue in Plaintiffs' Complaint.  
26 (*See infra*, § (V)(A).) Plaintiffs' failure to include the alleged contracts at issue further  
27 demonstrates Plaintiffs' bad faith in naming Mr. McWilliam as a defendant. Plaintiffs alleged  
28 breach of good faith and fair dealing presumably relates to an underlying contract that is likely  
only between Plaintiffs and Upper Deck. Mr. McWilliam should not be included in this allegation  
as he is not a party to or signatory of the alleged contract(s). To Defendants' knowledge, Mr.  
McWilliam never individually entered into any contracts with Plaintiffs, and Plaintiffs'



1 exceptionally vague Complaint fails to allege otherwise. Because Mr. McWilliam was not a party  
2 to the contract, he cannot be held individually liable for bad faith. Furthermore, because Mr.  
3 McWilliam was never a party to a contract, Plaintiffs' cannot amend the Complaint to state a  
4 claim for bad faith against him and should not be permitted to try.

5 **C. Plaintiffs Do Not State a Claim for Bad Faith Because They Failed to Perform**  
6 **Under the Contract(s).**

7 For bad faith, Plaintiffs are required to plead that they performed under the contract or  
8 were excused from performing. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654,  
9 658; CACI, No. 325.) Plaintiffs parrot the statutory language by alleging that they "performed  
10 all, or substantially all of the required terms under the Contract." (Complaint, ¶ 38.) In reality,  
11 Plaintiffs are in default under the Parties' latest contract. Their breach is the subject a case filed  
12 on November 7, 2011 and pending before the Hon. Richard E. L. Strauss in San Diego Superior  
13 Court, Central Division (Case No. 37-2011-00100599-CU-BC-CTL) ("Lead Case") (*See* Request  
14 for Judicial Notice ("RJN"), Exh. A.) In the Lead Case, Upper Deck is in the end stage of  
15 obtaining a default judgment in excess of \$1.5 million against Plaintiffs for their breach of  
16 contracts. (RJN, Exh. B.) Because of their own breach, as a matter of law, Plaintiffs cannot  
17 maintain a bad faith claim against Defendants under the most recent contracts.

18 **D. Plaintiffs Do Not State a Claim for Bad Faith Because They Do Not Allege**  
19 **Defendants Breached a Contract.**

20 "A cause of action for tortious breach of the covenant of good faith and fair dealing  
21 requires the existence and breach of an enforceable contract as well as an independent tort."  
22 (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194  
23 Cal.App.4th 623, 631-32 (*citing Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 57).)  
24 Nowhere in the entire Complaint do Plaintiffs allege that Defendants breached an existing and  
25 enforceable contract; therefore Plaintiffs do not state a claim for breach of the covenant of good  
26 faith and fair dealing.

27 **E. Plaintiffs Do Not State a Claim for Bad Faith Because It is Barred By the**  
28 **Two-Year Statute of Limitations.**

1 A two-year statute of limitations applies to causes of action for bad faith. (Cal. Civ. Proc.  
2 § 339; *Richardson v. Allstate Ins. Co.* (1981) 117 Cal.App.3d 8, 12-13.) Plaintiffs pled that the  
3 business relationship between Plaintiffs and Upper Deck ended October 26, 2009. (Complaint, ¶  
4 10.) Plaintiffs had two years, or until October 26, 2011 to file a bad faith claim against  
5 Defendants. Plaintiffs filed this action on August 31, 2012 - 11 months too late. Plaintiffs' bad  
6 faith claim is statutorily barred. The delayed discovery rule does not save Plaintiffs' claims for  
7 the same reasons it does not save Plaintiffs' fraud claims. (*See infra*, § (III)(B).) The Court  
8 should sustain Defendants' demurrer to Plaintiffs' fourth cause of action for bad faith.

9 VII.

10 THE COURT SHOULD SUSTAIN DEFENDANTS' DEMURRER  
11 TO PLAINTIFFS' CAUSE OF ACTION FOR UNFAIR  
12 AND DECEPTIVE BUSINESS PRACTICES

13 Plaintiffs' fifth cause of action is for "Unfair and Deceptive Business Practices" in  
14 violation of California Business and Professions Code sections 17200 *et seq.* ("UCL"). This  
15 cause of action is the most vague of all. Plaintiffs allege only these three paragraphs:

16  
17 41. Plaintiffs incorporate by reference each and every allegation above, as  
18 though fully set forth therein.

19 42. The acts of Defendants, and each of them, constituted unlawful unfair  
20 and fraudulent business practices in violation of Business and Professions Code §  
21 17200, *et seq.*

22 43. As a result, Plaintiffs have suffered and continues [sic] to suffer  
23 damages in a sum and an amount according to proof at trial and Plaintiff is  
24 entitled to rescind the Contract between the parties and the above described  
25 agreement as set forth above.

26 These allegations are insufficient to state a cause of action for violation of the UCL. Plaintiffs fail  
27 to adequately plead any element of a UCL claim.

28 A. Plaintiffs' Do Not Plead Standing To Sue Under the UCL.

To have standing to sue under the UCL, plaintiffs must plead and prove that they *lost*  
*money or property* as a result of defendant's unlawful, unfair, or fraudulent business practices.  
(*Kwikset v. Superior Court* (2011) 51 Cal.4th 310, 317.) Here, Plaintiffs fail to allege standing

1 because the Complaint contains no allegation that Plaintiffs lost money or property because of  
2 Defendants' allegedly unlawful, unfair, or fraudulent business practices.

3 **B. Plaintiffs Fail to State a Claim for Violation of the UCL Because They Do Not**  
4 **Plead Any Unlawful, Unfair, or Fraudulent Conduct.**

5 Plaintiffs fail to plead with requisite specificity the conduct they believe constitutes  
6 Defendants' "unlawful, unfair and fraudulent business practices." "A plaintiff alleging unfair  
7 business practices under these statutes must state with reasonable particularity the facts supporting  
8 the statutory elements of the violation." (*Khoury v. Maly's of Calif., Inc.* (1994) 14 Cal.App.4th  
9 612, 619.) A demurrer is properly sustained under the "unlawful" prong if the complaint  
10 "identifies no particular section of the statutory scheme which was violated or fails to describe  
11 with any reasonable particularity the facts supporting violation." (*Id.*) Under the "unfair" and  
12 "fraudulent" prong, plaintiffs must plead that "members of the public are likely to be deceived."  
13 (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1257, 1267; *No Doubt v. Activision*  
14 *Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1036.) Plaintiffs fail to state a UCL claim under  
15 any of the three prongs because Plaintiffs do not identify any law that has been violated and do not  
16 plead that Defendants' practices were likely to deceive.

17  
18 **C. Plaintiffs Plead Entitlement to Damages and Rescission of a Contract, Which**  
19 **Are Not Permitted Remedies Under the UCL.**

20 The only remedies for violation of the UCL are injunctive relief or restitution; "damages  
21 cannot be recovered." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 226.)  
22 Rescission is also not a permitted remedy. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th  
23 983, 1018 ("Rescission and restitution are distinct remedies. [citation] While rescission may be  
24 followed by restitution in an appropriate contract action (§ 1692), rescission is not a necessary  
25 predicate to granting restitution in a statutory action under the UCL. [citation] We have found no  
26 authority supporting the remedy of rescission in a UCL action.") Plaintiffs plead entitlement to  
27 damages and rescission, two remedies that are not permitted under the UCL. This is also the  
28 subject of Defendants' motion to strike, filed concurrently herewith.

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**D. Plaintiffs' UCL Claim is Time-Barred**

California Business & Professions Code section 17208 states: "Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued." As articulated above, Plaintiffs' causes of action accrued in 2005, when they allegedly discovered Defendants' supposed interest in the entities. (*See infra*, § (III)(B).) If Plaintiffs' allegations are taken as true, their cause of action for violation of the UCL accrued in 2005 and the statute of limitations expired in 2009--three years prior to filing this Complaint. The Court should sustain Defendants' demurrer to Plaintiffs' UCL claim.

**VIII.**

**THE COURT SHOULD SUSTAIN DEFENDANTS' DEMURRER TO PLAINTIFFS' CAUSE OF ACTION FOR CANCELLATION OF A WRITTEN INSTRUMENT**

Plaintiffs' sixth cause of action is for cancellation of a written instrument. Cancellation of a written instrument is an equitable remedy usually awarded where a contract or deed is found to be void or invalid, usually because of fraud, menace, or undue influence exercised by one party. (*See Campbell v. Genshlea* (1919) 180 Cal. 213, 214.) The courts' equitable power to cancel instruments was codified at California Civil Code section 3412, which states: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

Where the grounds for cancellation of a written instrument are fraud or concealment, in order to plead entitlement to cancellation, plaintiff must plead facts showing fraud or concealment with the same specificity required if plaintiff's sole relief sought were damages. (*See Carlson v. Farm Land Inv. Co.* (1917) 32 Cal.App. 538 (sustaining demurrer of a complaint to cancel a land contract where plaintiff failed to allege false statements relied upon were made with the intent to deceive plaintiff).) The same grounds for sustaining demurrer articulated above regarding Plaintiffs' fraud and concealment causes of action apply here. (*See infra*, § (III).)

The Court should also sustain the demurrer to Plaintiffs' cancellation of a written

1 instrument because the Complaint fails to identify which contract should be cancelled. (*See infra*,  
2 § (VI)(A).) The parties had a business relationship spanning over 15 years. Presumably, there are  
3 some contracts which were fully performed or otherwise not objectionable to Plaintiffs.  
4 Plaintiffs' failure to distinguish which contracts it seeks to cancel makes it impossible for  
5 Defendants to respond to this cause of action. The Court should sustain the demurrer to Plaintiffs'  
6 cause of action for cancellation of a written instrument.

7 **IX.**

8 **THE COURT SHOULD NOT GRANT PLAINTIFFS LEAVE TO AMEND**

9 "When a demurrer is sustained, the court may grant leave to amend the pleading upon any  
10 terms as may be just..." (Cal. Civ. Proc. § 472a(c).) Leave to amend following a demurrer should  
11 only be granted when there is a reasonable possibility plaintiff can amend the complaint to cure  
12 the defect. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95.) Plaintiff has the  
13 burden of establishing that there is a reasonable possibility the complaint can be amended to cure  
14 the defect. (*Sprinkles v. Assoc. Indem. Corp.* (2010) 188 Cal.App.4th 69, 76.) A party may not  
15 change, contradict or omit prior factual allegations in superseding pleadings in order to avoid a  
16 challenge to pleadings. (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.) Leave to  
17 amend is properly denied where the amendment to cure would necessarily contradict prior  
18 allegations establishing that not cause of action existed as a matter of law. (*Congleton v. National*  
19 *Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 62.)

20 Plaintiffs cannot amend their Complaint to state a claim without contradicting the  
21 allegations set forth in their Complaint. Specifically, Plaintiffs cannot amend to allege causes of  
22 action for fraud, breach of the covenant of good faith and fair dealing, or violation of the UCL  
23 because all are time-barred. Plaintiffs also cannot amend to allege a claim for conspiracy to  
24 defraud because as a matter of law corporations and their agents/officers cannot conspire.

25 **X.**

26 **CONCLUSION**

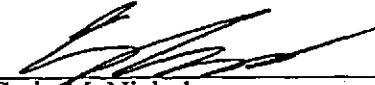
27 For the foregoing reasons, Defendants respectfully request that the Court sustain their  
28 demurrer to Plaintiffs' entire complaint without leave to amend.

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**NICHOLAS & BUTLER, LLP**

Dated: October 11, 2012

By:

  
\_\_\_\_\_  
Craig M. Nicholas  
Tracy J. Jones

Attorneys for Defendants  
The Upper Deck Company, Inc. and  
Richard McWilliam

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*Upper Deck v. J&T Hobby*  
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO  
CENTRAL DIVISION  
Case No. 37-2011-00100599-CU-BT-CTL

**PROOF OF SERVICE**  
(Code Civ. Proc., §§ 1013a, 2015)

I, **Kayleigh Klinzman**, declare that I am over the age of 18 years and am not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 19<sup>th</sup> Floor, San Diego, California 92101.

On **October 11, 2012** I served the within:

**NOTICE OF MOTION AND MOTION TO STRIKE;**  
**MEMORANDUM OF POINTS & AUTHORITES IN SUPPORT OF MOTION TO STRIKE;**  
**NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT;**  
**MEMORANDUM OF POINTS & AUTHORITES IN SUPPORT OF DEFENDANTS' DEMURRER TO COMPLAINT;**  
**DECLARATION OF CRAIG M. NICHOLAS IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE;**  
**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS DEMURRER TO THE COMPLAINT** on the interested parties in said action by:

**BY FACSIMILE TRANSMISSION:** In addition to service by mail as set forth below, the counsel or interested party authorized to accept service was also forwarded a copy of said document(s) by facsimile transmission at the fax machine telephone number corresponding with his/her/its name. The fax machine I used complied with CRC Rule 2.301(3) and no error was reported by the machine. Pursuant to CRC Rule 2.306(h)(3), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

**BY PERSONAL DELIVERY:** I caused each envelope to be hand-delivered to each addressee leaving said envelope with either the addressee directly or another person at that address authorized to accept service on the addressee's behalf.

**BY MAIL:** as follows:

**BY OVERNIGHT COURIER:** I placed the above-referenced document(s) in an envelope for collection and delivery on this date in accordance with standard FEDERAL EXPRESS overnight delivery procedures.

**E-MAIL**

By placing a copy thereof in a sealed envelope addressed as follows:

John Gaule  
Oddenino & Gaule  
444 E. Huntington Drive, Suite 325  
Arcadia, CA 91006

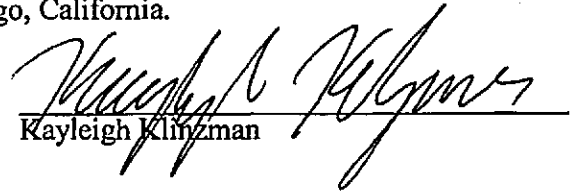
PROOF OF SERVICE (Code Civ. Proc., §§ 1013a, 2015)

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I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service via First Class Mail on that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 11, 2012**, at San Diego, California.

  
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Kayleigh Klitzman



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*Upper Deck v. J&T Hobby*  
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO  
CENTRAL DIVISION  
Case No. 37-2011-00100599-CU-BT-CTL

**PROOF OF SERVICE**  
(Code Civ. Proc., §§ 1013a, 2015)

PARTIES SERVED:

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