

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 08-6630-VBF(PJWx)**

Dated: **December 29, 2009**

Title: Konami Digital Entertainment, Inc., et al. -v- Vintage Sports Cards, Inc., et al.

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Rita Sanchez
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

None Present

PROCEEDINGS (IN CHAMBERS):

**RULING ON SUBMITTED MATTER:
KONAMI'S MOTION FOR SUMMARY
JUDGMENT OR SUMMARY ADJUDICATION
ON UPPER DECK'S COUNTER-CLAIMS FOR
BREACH OF CONTRACT, BREACH OF
IMPLIED COVENANT AND SLANDER PER SE
[Dkt. #312]**

This Court has received, read and considered the Motion of Plaintiffs (Counterclaim-Defendants) Konami Digital Entertainment, Inc. ("KDI") and Konami Corporation for Summary Judgment as to Upper Deck Nevada's Counter-Claims (dkt. #312); Upper Deck Nevada (UD NV)'s Opposition (dkt. #342); Counterclaim-Defendants' Reply (dkt. #367) and related papers. The Court heard oral argument on December 21, 2009 and took the matter under submission.

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After considering the papers filed and counsel's oral arguments, this Court GRANTS the Counterclaim-Defendants' Motion for Summary Judgment as to the Second Amended Counterclaim's First Cause of Action for Breach of Contract - Distribution Agreement; Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing - Distribution Agreement; Third Cause of Action for Breach of Contract - LOI; Fourth Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing - LOI; and Ninth Cause of Action for Slander Per Se. The Motion is granted pursuant to grounds set forth in the moving papers as set forth herein. As to these Causes of Action, the Counterclaim-Defendants met their burden under Federal Rule of Civil Procedure Rule 56(b).

The Fifth, Sixth, Seventh, Eighth, Eleventh and Twelfth Causes of Action of the Second Amended Counterclaim were dismissed by this Court on July 13, 2009 (dkt. #217). In a separate Order of December 23, 2009, this Court granted the Counterclaim-Defendants' Motion for Partial Summary Judgment on the Thirteenth Cause of Action for Declaratory Relief (dkt. #410). Although listed in the caption page of the Second Amended Counterclaim, the Tenth Cause of Action for Constructive Fraud is not pled. *See* Second Amended Counterclaim of UD NV (dkt. # 189). Accordingly, all the Causes of Action in the Second Amended Counterclaim are dismissed and the Counterclaim-Defendants are entitled to judgment in their favor of the Second Amended Counterclaim.

Third Cause of Action for Breach of Contract - Letter of Intent ("LOI")

The Counterclaim-Defendants' Motion is granted as to the Third Cause of Action on the ground that undisputed material facts establish "an absence of evidence to support the non-moving party's case." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is an absence of evidence showing that the Counterclaim-Defendants breached the LOI. As the Counterclaim-Defendants assert, UD NV's evidence of Counterclaim-Defendants' alleged breach is insufficient as a matter of law. "The mere existence of a scintilla of evidence in support of the plaintiff's [in this case, the Counterclaimant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

A review of the Separate Statements (dkt. # 314, 343, 368) reveals that UD NV's evidence is insufficient to establish its contentions that Counterclaim-Defendants breached the LOI. In the Opposition, UD NV primarily relies on Additional Facts #220-222 to support its argument that Counterclaim-Defendants breached the LOI by failing to "consider in good faith suggestions and changes to product content," "unreasonably [withholding] approval of promotional materials and

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activities," and "[making] false and misleading representations that content changes had been presented to the upstream licensors." *See* Dkt. #342, pp. 9-10. Drawing all inferences in UD NV's favor, the evidence does not support its contentions. Additional Facts #220-222 rely on three pieces of evidence -- the deposition excerpts of Shinichi Hanamoto (affiliated with the Konami entities) and Daniel Scheidegger (affiliated with the Upper Deck entities) and an April 13, 2007 email from Yumi Hoashi (affiliated with the Konami entities) to Kevin Tewart (then affiliated with the Upper Deck entities). The cited deposition excerpts are vague, ambiguous, and unclear and do not demonstrate when, why, or how Counterclaim-Defendants breached the LOI. With respect to the April 13, 2007 email, as set forth in Counterclaim-Defendants' Reply papers, UD NV's reliance on this email is selective and out of context. *See* Dkt. #367, pp. 2-4. The email and the context of the communications between Mr. Hoashi and Mr. Tewart do not support UD NV's allegation that Counterclaim-Defendants did not consider UD NV's product suggestions in good faith. Even if the evidence did support such a contention (which it does not), at most, the evidence is an insufficient scintilla for a reasonable jury to find in favor of UD NV.

Counterclaim-Defendants request in the alternative, pursuant to Rule 56(d)(1), that if partial summary judgment is not granted as to the entire Counterclaim for "Breach of Contract--LOI," then the Court should adjudicate ten allegations in UD NV's Counterclaim and determine whether they are disputed. *See* Dkt. #313 p. 15. Because the Court finds that UD NV does not have sufficient evidence to move forward on this Counterclaim, Counterclaim-Defendants's alternative request is moot. However, in the interests of being thorough, the Court finds that it would adjudicate in Counterclaim-Defendants' favor all of UD NV's allegations in the Third Cause of Action in the Second Amended Counterclaim, for the reasons asserted in the Counterclaim-Defendants' papers. Referring to the ten allegations listed in the Second Amended Counterclaim (dkt. #189, ¶ 39), also listed in Counterclaim-Defendants' moving papers (dkt. #313 at p.15), UD NV only addresses allegations (1) and (2) in its Opposition, alleging that there is evidence establishing that Counterclaim-Defendants breached the LOI by failing to "consider in good faith suggestions and changes to product content," "unreasonably [withholding] approval of promotional materials and activities," and "[making] false and misleading representations that content changes had been presented to the upstream licensors." For the reasons discussed above, UD NV's evidence in support of these allegations is insufficient.

Fourth Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing - LOI

The Counterclaim-Defendants' Motion is granted as to the Fourth Cause of Action on the ground that this claim is superfluous and duplicative of the Third Cause of Action. UD NV does

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not present evidence of bad faith. UD NV acknowledges that its implied covenant claim is based on the same allegations as its breach of contract claim for the LOI. *See* Dkt. 368 (Facts #114-115); Second Amended Counterclaim (dkt. #189, ¶¶ 43-46).

The Parties agree that if claims for breach of the implied covenant of good faith and fair dealing are duplicative of a claim for breach of contract, they may be disregarded by the Court. *See Trinity Hotel Investors v. Sunstone Op Props., LLC*, 2009 WL 303330 (C.D. Cal, Feb. 6, 2009) (quoting *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990)). Though UD NV correctly argues that a claim for breach of the implied covenant of good faith and fair dealing is not duplicative or superfluous when the claimant alleges bad faith, that is not the case here. UD NV has not alleged or presented evidence of bad faith in this Cause of Action.

Further, UD NV's reliance on *Brawley v. Crosby Research Foundation*, 73 Cal. App. 2d 103, 112 (1946), to argue that the implied covenant of good faith and fair dealing imposes affirmative duties in licensing agreements to accomplish the purposes of the licensing agreement, is misplaced. As set forth in the Counterclaim-Defendants' papers, *Brawley* is factually distinguishable, because in that case, the duty was imposed on the licensee, not the licensor. *See* Dkt. #367 p.7.

First Cause of Action for Breach of Contract - 2003 Distribution Agreement ("Distribution Agreement")

The Counterclaim-Defendants' Motion is granted on the First Cause of Action on the ground that undisputed material facts establish an absence of evidence that Counterclaim-Defendants breached the Distribution Agreement. Counterclaimant UD NV does not demonstrate a triable issue that Counterclaim-Defendants breached the Distribution Agreement.

UD NV's arguments regarding Counterclaim-Defendants' alleged breach (dkt. #342, at pp. 6-8) are inadequately supported by the evidence, and further, do not establish how such conduct breached the Distribution Agreement, i.e. UD NV does not indicate which provisions are violated by Counterclaim-Defendants' actions. For example, UD NV proffers evidence that in September and October 2005, it made suggestions to Counterclaim-Defendants regarding, inter alia, the development of the Yu-Gi-Oh! products. *See* Dkt. #342, p. 3 (citing Facts #195-198). UD NV does not explain how Counterclaim-Defendants violated the terms of the Distribution Agreement in connection with these requests. Further, UD NV contends that Counterclaim-Defendants rejected requests for "equal promotion" of the Yu-Gi-Oh! TCG Brand, requests for similar content between the Yu-Gi-Oh! *anime* and the trading card game, and requests for new cards or content

improvements. Dkt. #342, pp. 5-8 (citing Additional Facts #205-219). In addition, UD NV alleges that Counterclaim-Defendants made false and misleading representations that content changes had been presented to upstream licensors. *Id.* A review of the Separate Statements (dkt. # 314, 343, 368) and evidence cited therein reveals two defects. First, as stated in the Counterclaim-Defendants' papers, the evidence cited in Additional Facts #205-219 does not support UD NV's contentions. *See* Dkt. #367 at pp. 9-11. For example, in support of the argument that UD NV requested that Counterclaim-Defendants provide "equal promotion" of the Yu-Gi-Oh! brand in the United States and in Japan, the evidence does not establish that UD NV made such a request to the Counterclaim-Defendants. Second, with all inferences drawn in favor of the non-moving party, UD NV has not established how this evidence constitutes a violation of the Distribution Agreement. The Distribution Agreement, unlike the LOI (described above), contains no requirement that Counterclaim-Defendants must use their best efforts to include reasonable content changes as requested by Upper Deck. Rather, the relevant provision that Upper Deck appears to rely on in the Distribution Agreement is that "[Konami] shall not unreasonably withhold any approval [regarding Promotional Materials]." *See* Dkt. #295-5 ¶ 10. UD NV has not demonstrated how refusing requests for "equal promotion" would violate this or any other provision of the Distribution Agreement. UD NV's related argument – that the requirement to not unreasonably withhold the approval of promotional materials is, "by inference," a good faith requirement to review content changes – is inadequately supported and lacks merit. *See* Dkt. #342 p.21. Accordingly, UD NV has not met its burden in demonstrating a triable issue of material fact as to breach of the Distribution Agreement.

In granting Counterclaim-Defendants' Motion with respect to the First Cause of Action, the Court does not find that UD NV has impliedly waived its claims for breach with respect to the Distribution Agreement by entering into the 2006 LOI. To establish waiver, Counterclaim-Defendants are required to show by clear and convincing evidence that a party's acts are "so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." *See Burdick v. Union Sec. Ins. Co.*, 2009 U.S. Dist. LEXIS 35611,*35-36 (C.D. Cal. April 2, 2009). Counterclaim-Defendants have not made the requisite showing.

Counterclaim-Defendants request in the alternative, pursuant to Rule 56(d)(1), that if partial summary judgment is not granted as to the entire Counterclaim for "Breach of Contract–Distribution Agreement," then the Court should adjudicate six allegations in UD NV's Counterclaim and determine whether they are disputed. *See* Dkt. #313 page 21. Because the Court finds that UD NV does not have sufficient evidence to move forward on this Counterclaim, Counterclaim-Defendants's alternative request is moot. However, in the interests of being

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thorough, the Court finds that it would adjudicate in Counterclaim-Defendants' favor all of UD NV's allegations in the First Cause of Action in the Second Amended Counterclaim, for the reasons asserted in the Counterclaim-Defendants' papers. In Opposition, with respect to the First Cause of Action, UD NV did not specifically address which allegations are supported by evidence. Nevertheless, the defects in UD NV's evidence supporting its claim that Counterclaim-Defendants breached the Distribution Agreement, described above, apply equally here.

Second Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing - 2003 Distribution Agreement

The Counterclaim-Defendants' Motion is granted as to the Second Cause of Action on the ground that this claim is superfluous and duplicative of the First Cause of Action. UD NV does not present evidence of bad faith. UD NV acknowledges that its implied covenant claim is based on the same allegations as its breach of contract claim for the Distribution Agreement. *See* Dkt. 368 (Facts #122-123); Second Amended Counterclaim, Dkt. #189, ¶¶ 33-36.

As stated above, if claims for breach of the implied covenant of good faith and fair dealing are duplicative of a claim for breach of contract, they are superfluous and may be disregarded by the Court. *See Trinity Hotel Investors v. Sunstone Op Props., LLC*, 2009 WL 303330 (C.D. Cal, Feb. 6, 2009) (quoting *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990)). Because UD NV has not presented allegations or evidence beyond those underlying its breach of contract, UD NV's claims for breach of the implied covenant are superfluous.

Ninth Cause of Action for Slander Per Se

The Counterclaim-Defendants' Motion is granted as to the Ninth Cause of Action on the ground that UD NV has no evidence to support its claim for Slander Per Se. In its papers and at the hearing, UD NV argued that its evidence supporting its claim for Slander Per Se is a letter from Yumi Hoashi (Vice President of Card Business at Konami Digital Entertainment, Inc.) to retailers and distributors. *See* Dkt. #337-11; Dkt. #342 at p.22.

UD NV's evidence is insufficient as a matter of law to support a claim on slander per se because slander per se must be an oral publication. *See* Cal. Civ Code § 46(3). Though UD NV's Opposition papers allege that this evidence supports a claim for "libel," which pertains to written defamation, UD NV's Counterclaim makes no mention of libel. *See* Dkt. #189 ¶¶ 78-82.

Evidentiary and Fifth Amendment Issues

The Court has considered UD NV's evidentiary objections (dkt. #332, #363) in reaching the conclusions herein and the objections are overruled to the extent that they are inconsistent with this Ruling. Furthermore, the evidentiary objections and Court's rulings on them are not outcome-determinative, particularly because material facts relevant to this and the other Motions are undisputed by the Upper Deck entities. In the interests of a thorough record, the Court will provide its rulings on the individual objections in a separate order.

For the purposes of ruling on this Motion, the Court does not need to and is not relying on Counterclaim-Defendants' arguments (although they have merit) in connection with Defendants' witnesses exercising their Fifth Amendment rights during depositions.