

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

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

Dated: **December 23, 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 MATTERS: (1) NOTICE OF MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON UPPER DECK'S COUNTERCLAIM FOR DECLARATORY RELIEF RE: INTERPRETATION OF THE "APPROVAL" CLAUSE OF THE DISTRIBUTION AGREEMENT [Dkt. #309]; (2) UPPER DECK'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. #297]

The Court has received and considered the following: (1) Plaintiffs' Motion and Cross-Motion for Partial Summary Judgment on Upper Deck's Counterclaim for Declaratory Relief (dkt. #309), Defendant's Opposition (dkt. #333), Plaintiffs' Reply (dkt. #364) (and related papers); and (2)

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Upper Deck's Motion for Partial Summary Judgment as to Limitation of Liability (dkt. #297), Plaintiffs' Opposition (dkt. #346), and Defendant's Reply (dkt. #361) (and related papers).

The Court heard oral argument on these cross-motions on December 21, 2009 and took the matters under submission.

After considering the papers and counsel's arguments, the Court rules as follows:

(1) The Court GRANTS Plaintiffs' Motion for Partial Summary Judgment on the grounds that, as a matter of law, the reproduction and/or manufacture of unauthentic cards does not fall within the "Approval" clause of the 2006 Letter of Intent. There is no genuine issue as to any material fact and the Plaintiffs are entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(b).

(2) The Court DENIES Defendant/Counterclaimant Upper Deck Company, a Nevada Corporation ("Upper Deck NV")'s Motion for Partial Summary Judgment, on the grounds that it has not shown that it is entitled to judgment as a matter of law. As set forth, the undisputed material facts establish that the Plaintiffs, and not the Defendant/Counterclaimant, are entitled to judgment as a matter of law.

There is no genuine issue as to any material fact relevant for these Motions. In making this determination, the Separate Statements submitted in connection with each Motion were considered. By way of example, the Court would refer to, in connection with Plaintiffs' Motion, the Plaintiffs' Separate Statement (dkt. #311), Defendant's Statement of Facts in Opposition (dkt. #334), Plaintiffs' Reply to Separate Statement (dkt. #365); and in connection with Defendant's Motion, Defendant's Separate Statement (dkt. #300), Plaintiffs' Statement in Response (dkt. #347), and Defendant's Statement in Response (dkt. #362).

Significantly, the Parties do not dispute that Defendant Upper Deck NV and Defendant Upper Deck Company LLC caused the unauthorized manufacturing of unauthentic Yu-Gi-Oh! trading cards ("YGO"). *See* Dkt. #360 (facts 9, 15, 22, 53); Dkt. #365 (facts 86-88); Dkt. #362 (fact 42).

Further, both Motions relate to the 2006 Letter of Intent ("LOI"), entered into as of September 30, 2006 by and between Konami Digital Entertainment, Inc. and Upper Deck NV. *See* Declaration of Mari Tasaki, dkt. # 295-3. The Court finds that the relevant terms of the LOI, including the "Approval" clause are clear and unambiguous. "Summary judgment is appropriate

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when the contract terms are clear and unambiguous, even if the parties disagree to their meaning.” *United States v. King Entm’t, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988).

For the reasons asserted in Plaintiffs’ Motion papers, the “Approval” clause is not ambiguous, and applies to advertising, promotional materials, and promotional activity. Exhibit C to the LOI provides illustrative examples, and though not an exhaustive list, reveals that a reasonable interpretation of the "Approval" clause of the LOI would not include reproduction of unauthentic YGO.

Even though the contract is unambiguous, the Court preliminarily examines extrinsic evidence offered by parties. *See Marder v. Lopez*, 450 F.3d 445, 453 (9th Cir. 2006); *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39-40 (1968). Though Defendant Upper Deck NV’s extrinsic evidence, construed in its favor, suggests that trading cards could generally be used as a promotional activity, the evidence does not support Upper Deck NV’s argument that under the terms of the LOI, Upper Deck NV would be allowed to manufacture unauthentic cards for promotion purposes. Further, even if the extrinsic evidence advanced Upper Deck’s argument (which it does not), such a contractual interpretation would not be reasonable, in light of the other provisions in the LOI. For example, the "Trademarks" clause reinforces that "Products" are developed and manufactured by Konami Digital Entertainment, Inc., not Upper Deck NV. The "Appointment" clause reaffirms that Upper Deck NV is a distributor of Konami’s products, not a manufacturer.

As stated, Upper Deck NV’s argument that the manufacture of unauthentic YGO is at most an "unauthorized promotional activity" subject to the "Approval" clause of the LOI is without merit. Upper Deck NV proffers evidence surrounding the negotiations leading up to the execution of the LOI, and evidence of the possibility that authentic YGO could be used as promotional activity. Even if this evidence was construed in Upper Deck’s NV favor, the evidence is not material to the case here, which involves Upper Deck NV’s manufacturing of unauthentic YGO.

In sum, for the reasons set forth above, the Court finds that the LOI is not ambiguous. Further, upon a preliminary review of the extrinsic evidence, Upper Deck’s NV interpretation that the manufacture of unauthentic YGO would be permitted under the "Approval" clause is unreasonable. On this key issue, which is central to both Motions, the Court finds, as the Plaintiffs’ assert, that the “Approval” clause does not apply to the conduct here, i.e. the unauthorized manufacture of unauthentic YGO.

Referring to the Plaintiffs' Notice of Motion (dkt. 309), Konami Digital Entertainment, Inc. and Konami Corporation move for partial summary judgment. Referring to the Third Amended Counterclaim (dkt. #189), the Counterdefendants are Konami Digital Entertainment, Inc. and Konami Marketing Inc. Konami Corporation is not named in the Counterclaim. This issue is not addressed in the papers, including Upper Deck NV's Opposition to Plaintiffs' Motion. However, the Court notes that in its Statement of Facts in support of its Motion for Partial Summary Judgment (dkt. #324, p.1 fn. 1), Defendant and Counterclaimant Upper Deck NV states, "The contracting parties to each of the agreements were either affiliates of or predecessors in interest to Upper Deck and Konami. For purposes of this Motion, it is immaterial which specific entities were parties to the previous agreements. The parties to the LOI are Plaintiff and Counterdefendant Konami Digital Entertainment, Inc. and Defendant and Counterclaimant The Upper Deck Company, a Nevada corporation." Under the facts and circumstances presented, the Court agrees that the specific entities are not material to resolution of these Motions.

The Court has considered Defendant'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, although the evidentiary objections and Court's rulings on them are not outcome-determinative, in the interests of a thorough record, the Court will provide its rulings on the individual objections in a separate minute order.

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

For the reasons stated above, the material facts are undisputed and establish that the Plaintiffs, and not Upper Deck NV, are entitled to summary adjudication as a matter of law in their favor on the Thirteenth Cause of Action for Declaratory Relief in the Second Amended Counterclaim. *See* Fed. R. Civ. P. 56(b).

IT IS SO ORDERED.

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