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11 The Upper Deck Company, a Nevada corporation

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

BY FAX

14 KONAMI DIGITAL
15 ENTERTAINMENT, INC. and
16 KONAMI CORPORATION,

17 Plaintiffs,

18 vs.

19 VINTAGE SPORTS CARDS, INC.;
20 THE UPPER DECK COMPANY, a
21 California Corporation; THE UPPER
22 DECK COMPANY, a Nevada
23 Corporation; and DOES 3 - 10, inclusive,

24 Defendants.

25 THE UPPER DECK COMPANY, a
26 Nevada corporation,

27 Counterclaimant,

28 v.

29 KONAMI MARKETING, INC., a
30 California corporation; KONAMI
31 DIGITAL ENTERTAINMENT, INC.,
32 an Illinois corporation; and DOES 1
33 through 10,

34 Counterdefendants.

Case No. CV 08-06630 VBF PJWx

**COUNTERCLAIM OF THE UPPER
DECK COMPANY, A NEVADA
CORPORATION, FOR:**

1. BREACH OF CONTRACT-
2. DISTRIBUTION AGREEMENT;
3. BREACH OF IMPLIED
4. COVENANT OF GOOD FAITH
5. AND FAIR DEALING -
6. DISTRIBUTION AGREEMENT
7. BREACH OF CONTRACT-LOI;
8. BREACH OF IMPLIED
9. COVENANT OF GOOD FAITH
10. AND FAIR DEALING - LOI
11. EXPRESS INDEMNITY -
12. DISTRIBUTION AGREEMENT;
13. EXPRESS INDEMNITY-LOI;
14. FRAUD IN THE INDUCEMENT-
15. DISTRIBUTION AGREEMENT;
16. FRAUD IN THE INDUCEMENT-
17. LOI;
18. SLANDER PER SE;
19. CONSTRUCTIVE FRAUD;
20. NEGLIGENT
21. MISREPRESENTATION;
22. CIVIL CONSPIRACY

DEMAND FOR JURY TRIAL

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1 Counterclaimant The Upper Deck Company, a Nevada corporation
2 ("Counterclaimant" or "UDC NV"), for its Counterclaim against defendants Konami
3 Marketing, Inc. and Konami Digital Entertainment, Inc. and Does 1 through 10
4 (collectively, "Counterdefendants" or "Konami"), alleges as follows:

5 **JURISDICTION AND VENUE**

6 1. This Court has jurisdiction over the subject matter of this action by
7 reason of 28 U.S.C. § 1332 in that the parties are citizens of different states and the
8 amount in controversy exceeds \$75,000, exclusive of interest and costs.

9 2. The Court has personal jurisdiction over Counterdefendants by virtue
10 of their presence in this judicial district, their substantial contacts and business in
11 this judicial district and because, among other things, of Konami's initiation of this
12 action in this district.

13 3. On or about December 10, 2008 Plaintiff UDC NV initiated an action
14 in the United States District Court for the District of Nevada, Case No. 2:08-cv-
15 1737 RCJ (GWF), captioned The Upper Deck Company v. Konami Marketing, Inc.
16 and Konami Digital Entertainment, Inc. ("Nevada Action"). The subject matter of
17 this counterclaim is the same as the subject matter of the Nevada Action. Plaintiff
18 contends and alleges that venue for this counterclaim is more appropriate in the
19 Nevada Action and in this action and that this counterclaim need not be ground in
20 this action as a compulsory counterclaim because the subject matter of this claim is
21 already the subject of Plaintiff's complaint in the Nevada Action. However, the
22 Nevada Action is the subject of a pending and as yet undecided motion to dismiss
23 or alternatively change venue by the defendants. Plaintiff files this counterclaim as
24 a precautionary matter in the event Konami's motion is granted in the Nevada
25 Action, in whole or in part, and in the event this counterclaim is for any reason
26 deemed to be a compulsory counterclaim in this matter. In the event Konami's
27 pending motion is denied, and in any other appropriate context, UDC NV reserves
28 its rights to pursue the Nevada Action.

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1 4. Plaintiff contends and alleges that venue for this counterclaim is at least
2 permissible pursuant to 28 U.S.C. § 1391 because Konami is a resident of this
3 district and because of Konami's initiation of this action in this district.

4 **THE PARTIES**

5 5. Counterclaimant UDC NV is a corporation duly organized and in good
6 standing under the laws of the State of Nevada. UDC NV's principal place of
7 business is now, and at all times relevant hereto was, in Clark County, State of
8 Nevada.

9 6. UDC NV is informed and believes and based thereon alleges
10 Counterdefendant Konami Marketing, Inc. ("KMI") is a corporation organized and
11 existing under the laws of the State of California. UDC NV is further informed and
12 believes and based thereon alleges that at all times relevant hereto, KMI's principal
13 place of business was 1400 Bridge Parkway in Redwood City, California.

14 7. UDC NV is informed and believes and based thereon alleges
15 Counterdefendant Konami Digital Entertainment, Inc. ("KDE") is a corporation
16 organized and existing under the laws of the State of Illinois. UDC NV is further
17 informed and believes and based thereon alleges that at all times relevant hereto,
18 KDE's principal place of business was 2381 Rosecrans Avenue, Suite 200, in El
19 Segundo, California.

20 **FACTUAL BACKGROUND**

21 8. Yu-Gi-Oh! Trading Card Game ("Yu-Gi-Oh!") is a collectible trading
22 card game based upon a popular Japanese anime and manga franchise which is an
23 immensely successful global brand extending into numerous commercial markets,
24 including, without limitation, television shows, movies, video games and toys.

25 UDC NV is informed and believes, and based thereon alleges, that Konami owns the
26 license for Yu-Gi-Oh! trading cards and video games.

27 9. In or around April 2002, The Upper Deck Company, LLC ("UDC
28 LLC") and KMI entered into a Letter of Intent (the "2002 LOI") to provide UDC

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1 LLC with exclusive distribution rights related to Yu-Gi-Oh!. Subsequently, and
2 consistent with the terms of the 2002 LOI, on or about October 1, 2003, UDC LLC
3 and KMI entered into a written Distribution Agreement for UDC LLC to become
4 the exclusive distributor of KMI's licensed product, Yu-Gi-Oh!, in certain territories
5 including, without limitation, North America, Guam, Mexico, Spain, Portugal,
6 Oceania, and the countries of Central and South America (the "Territory").
7 Attached hereto as **Exhibit 1** is a true and correct copy of the October 1, 2003
8 Distribution Agreement (without exhibits).

9
10 10. Subsequent to the execution of the exclusive Distribution Agreement,
11 UDC LLC and UDC NV entered into an agreement that transferred and assigned all
12 contractual rights and obligations of whatever kind and nature pursuant to the
13 Distribution Agreement from UDC LLC to UDC NV. KMI was aware of the
14 assignment of the exclusive Distribution Agreement from UDC LLC to UDC NV
15 and consented to the same in writing, verbally and by and through the course of its
16 conduct.

17 11. UDC NV is informed and believes, and based thereon alleges, that in or
18 about October 2005, KMI and KDE merged and entered into an agreement in which
19 KMI transferred and assigned all of its rights and obligations under the exclusive
20 Distribution Agreement to KDE.

21 12. On or about September 30, 2006, UDC NV and KDE entered into a
22 written Letter of Intent Agreement ("LOI") for UDC NV to be the exclusive
23 distributor of Yu-Gi-Oh! in the Territory. The LOI, by its terms, superseded "all
24 prior and/or contemporaneous oral or written agreements, representations, and
25 understandings" between the parties. Among its many terms, the LOI provided that
26 "[b]oth parties understand and agree that the preparation and execution of a formal
27 distribution agreement [] is required, containing the terms set forth in this LOI and
28

Some of the areas within the Territory were added after the initial agreement was entered into between the parties.

1 such additional business and legal terms as KDE and UDC NV may agree upon
2 following good faith negotiations.” Attached hereto at **Exhibit 2** is a true and
3 correct copy of the September 30, 2006 LOI (without exhibits).

4 13. Despite the provision in the LOI regarding the parties’ obligation to
5 negotiate in good faith to enter into a long form agreement, KDE failed and refused
6 to participate in any negotiations to put a formal distribution agreement in place.
7 UDC NV is informed and believes that KDE never intended to enter into a formal
8 distribution agreement with UDC NV, and instead, used that contractual promise
9 and representation of its intent as a method of inducing UDC NV into entering into
10 the LOI and performing consistent therewith, including the expenditure of
11 significant time and effort to the enterprise which was the subject of the LOI.

12 **FIRST CLAIM FOR RELIEF**

13 **(Breach of Contract – Distribution Agreement)**

14 14. UDC NV realleges each and every allegation set forth in paragraphs 1
15 through 12, inclusive, and incorporates them herein by this reference as though set
16 forth in full.

17 15. UDC NV and its assignor, UDC LLC, have fully performed all
18 obligations, conditions and covenants required of them pursuant to the terms of the
19 exclusive Distribution Agreement, except as said performance has been waived,
20 excused or prevented by Counterdefendants.

21 16. Within the past four (4) years Konami and Does 1 through 10, and each
22 of them, breached the terms of the exclusive Distribution Agreement in numerous
23 respects by, among other things, (1) failing to consider in good faith changes to
24 product content reasonably requested by UDC NV and its assignor, UDC LLC,
25 (2) unreasonably withholding approval of certain promotional materials and
26 activities (including a e-commerce website to be designed and paid for by UDC
27 LLC) requested by UDC NV and its assignor, UDC LLC, (3) making false and
28 misleading representations that content changes were presented to the Consortium.

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1 Kazuki Takahashi, and Shueisha, including Torishima Kazuhiko, when in fact UDC
2 NV is informed that said content suggestions were ignored or unilaterally rejected
3 by Counterdefendants (4) failing to cooperate with and support UDC NV's requests
4 regarding specific procedures and actions to be taken against third parties for
5 infringement of certain intellectual property rights, including but not limited to
6 participating in raids in China and the United States (resulting in tens of millions of
7 counterfeit cards being distributed into the market place) (5) packaging rare Yu-Gi-
8 Oh! cards with video games and selling them directly into the Territory, and
9 (6) failing to provide UDC NV and its assignor, UDC LLC, with all information
10 necessary to carry out performance of the Distribution Agreement.

11 17. Implicit in the exclusive Distribution Agreement is a covenant of good
12 faith and fair dealing obligating the parties to act towards each other in good faith, to
13 deal fairly with one another, to make all material disclosures, and not to do anything
14 which might deprive the other of the expectations and benefits of the exclusive
15 Distribution Agreement and obligating each party to do everything that the
16 exclusive Distribution Agreement presupposes to accomplish its purpose. For the
17 reasons stated herein, Counterdefendants and Does 1 through 10, and each of them,
18 have breached the covenant of good faith and fair dealing.

19 18. As a direct and proximate result of these breaches of the exclusive
20 Distribution Agreement by Counterdefendants and Does 1 through 10, and each of
21 them, UDC NV has been damaged through, among other things, (1) payments made
22 to Counterdefendants in connection with the Distribution Agreement, (2) the
23 incurrence of fees associated with mitigating Counterdefendants' failure to
24 cooperate and support UDC NV and its assignor, UDC LLC's, efforts to combat
25 third party intellectual property infringement, and (3) lost sales and profits in a sum
26 not yet ascertained, but in excess of \$75,000.

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SECOND CLAIM FOR RELIEF

**(Breach of Implied Covenant of Good Faith and Fair Dealing –
Distribution Agreement)**

19. UDC NV realleges each and every allegation set forth in paragraphs 1 through 18, inclusive, and incorporates them herein by this reference as though set forth in full.

20. The exclusive Distribution Agreement contained an implied covenant of good faith and fair dealing, which includes a covenant that the parties will not deprive the each other of the intended benefits of the contract.

21. As a result of their conduct as alleged above, Counterdefendants breached the implied covenant of good faith and fair dealing in the exclusive Distribution Agreement.

22. As a direct and proximate result of these breaches of the exclusive Distribution Agreement by Counterdefendants and Does 1 through 10, and each of them, UDC NV has been damaged through, among other things, (1) payments made to Counterdefendants in connection with the exclusive Distribution Agreement, (2) the incurrence of fees associated with mitigating Counterdefendants' failure to cooperate and support UDC NV and its assignor, UDC LLC's, efforts to combat third party intellectual property infringement, and (3) lost sales and profits in a sum not yet ascertained, but in excess of \$75,000.

THIRD CLAIM FOR RELIEF

(Breach of Contract – LOI)

23. UDC NV realleges each and every allegation set forth in paragraphs 1 through 22, inclusive, and incorporates them herein by this reference as though set forth in full.

24. UDC NV has fully performed all obligations, conditions and covenants required of it pursuant to the terms of the LOI, except as said performance has been waived, excused or prevented by KDE.

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1 25. KDF and Does 1 through 10, and each of them, has breached the LOI
2 in numerous respects by, among other things, (1) failing to use its best efforts to
3 include reasonable content and changes in the products as requested by UDC NV,
4 (2) unreasonably withholding approval of certain promotional materials and
5 activities (including a e-commerce website to be designed and paid for by UDC NV)
6 requested by UDC NV, (3) failing to cooperate with and support UDC NV's
7 requests regarding specific procedures and actions to be taken against third parties
8 for infringement of certain intellectual property rights including, but not limited to,
9 participating in raids in China and the United States (resulting in tens of millions of
10 counterfeit cards being distributed into the market place), (4) directly contacting
11 UDC NV's customers regarding sales, product development and creation, (5) failing
12 to use its best efforts to finalize and negotiate a formal distribution agreement,
13 (6) failing to enter into good faith negotiation regarding the revision of certain
14 pricing based upon current economic conditions, (7) making false and misleading
15 representations that suggested content changes were presented to the Consortium,
16 Kazuki Takahashi, and Shueisha, when in fact UDC NV is informed that KDF never
17 presented UDC NV's suggested content changes to the Consortium, Kazuki
18 Takahashi or Shueisha for their review and approval, and (8) abusing its contractual
19 right to request an audit to improperly request and perform an inspection of UDC
20 NV's internal records for the improper purpose of gathering confidential UDC NV
21 information for purposes of unilaterally terminating the LOI without proper or
22 adequate notice.

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28 This is specifically evidenced by KDF's wholly improper demand to inspect
UDC NV's confidential financial documents at the December 2008 audit
documents having no relationship to the LOI or UDC NV's performance thereunder.

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1 26. Subsequent to or roughly contemporaneous with UDC NV's initiation
2 of the Nevada Action, KDEI wrongfully and without legal or equitable justification
3 purported to terminate the LOI and UDC NV's thereunder. KDEI's actions in this
4 regard were a material breach of the LOI.

5 27. Implicit in the LOI is a covenant of good faith and fair dealing
6 obligating the parties to act towards each other in good faith, to deal fairly with one
7 another, to make all material disclosures, and not to do anything which might
8 deprive the other of the expectations and benefits of the LOI and obligating each
9 party to do everything that the LOI presupposes to accomplish its purpose. For the
10 reasons stated herein, Counterdefendants and Does 1 through 10, and each of them,
11 have breached the covenant of good faith and fair dealing.

12 28. As a direct and proximate result of these breaches of the LOI by
13 Counterdefendants and Does 1 through 10, and each of them, UDC NV has been
14 damaged through, among other things, (1) payments made to KDEI in connection
15 with the LOI, (2) the incurrence of fees associated with mitigating Defendant's
16 failure to cooperate and support UDC NV's efforts to combat third party intellectual
17 property infringement, (3) lost sales and profits in a sum not yet ascertained, but in
18 excess of \$75,000, and (4) unnecessarily incurrence of costs and expenses
19 associated with hosting and overseeing KDEI's improper audit in December 2008.

20 **FOURTH CLAIM FOR RELIEF**

21 **(Breach of Implied Covenant of Good Faith and Fair Dealing – LOI)**

22 29. UDC NV realleges each and every allegation set forth in paragraphs 1
23 through 28, inclusive, and incorporates them herein by this reference as though set
24 forth in full.

25 30. The LOI contained an implied covenant of good faith and fair dealing,
26 which includes a covenant that the parties will not deprive the each other of the
27 intended benefits of the contract
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1 31. As a result of their conduct as alleged above, Counterdefendants
2 breached the implied covenant of good faith and fair dealing in the LOI.

3 32. As a direct and proximate result of these breaches of the LOI by
4 Counterdefendants and Does 1 through 10, and each of them, UDC NV has been
5 damaged through, among other things, (1) payments made to KDE in connection
6 with the LOI, (2) the incurrence of fees associated with mitigating Defendant's
7 failure to cooperate and support UDC NV's efforts to combat third party intellectual
8 property infringement, (3) lost sales and profits in a sum not yet ascertained, but in
9 excess of \$75,000, and (4) unnecessarily incurrence of costs and expenses
10 associated with hosting and overseeing KDE's improper audit in December 2008.

11 **FIFTH CLAIM FOR RELIEF**

12 **(Express Indemnity - Distribution Agreement)**

13 33. UDC NV realleges each and every allegation set forth in paragraphs 1
14 through 32, inclusive, and incorporates them herein by this reference as though set
15 forth in full.

16 34. The exclusive Distribution Agreement includes an express
17 indemnification clause at Section 19-4, which provides:

18 KMI agrees to and shall . . . indemnify and hold harmless
19 Upper Deck . . . from and against any and all . . . damages,
20 costs, losses, expenses (including reasonable attorney's
21 fees and expenses) and other liabilities arising from, in
22 connection with or related in any way to, directly or
23 indirectly . . . any breach of any representation or warranty
24 under this Agreement or material non-fulfillment or non-
25 performance of any agreement, covenant or obligation
26 contained in this Agreement . . .

27 35. UDC NV has made, and does hereby make demand upon
28 Counterdefendants that they indemnify and hold harmless UDC NV from any and
all damages, costs, losses and expenses arising from their breach of certain
provisions of the exclusive Distribution Agreement, material non-fulfillment of the
exclusive Distribution Agreement and non-performance of certain agreements,
covenants and obligations contained in the Distribution Agreement.

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1 36. Counterdefendants and Does 1 through 10, and each of them, have
2 breached the exclusive Distribution Agreement by refusing and continuing to refuse
3 to indemnify and hold UDC NV harmless as set forth in Section 19-4 of the
4 Distribution Agreement.

5 37. UDC NV and its assignor, UDC LLC, have fully performed all
6 obligations and conditions required of them pursuant to the terms of the exclusive
7 Distribution Agreement, except as said performance has been waived, excused or
8 prevented by Counterdefendants.

9 38. As a direct and proximate result of Counterdefendants and Does 1
10 through 10, and each of them, breaches of the express indemnification provision of
11 the exclusive Distribution Agreement, UDC NV has sustained damages in a sum not
12 yet ascertained, but in excess of \$75,000.

13 **SIXTH CLAIM FOR RELIEF**

14 **(Express Indemnity - LOI)**

15 39. UDC NV realleges each and every allegation set forth in paragraphs 1
16 through 38, inclusive, and incorporates them herein by this reference as though set
17 forth in full.

18 40. The LOI includes an express indemnification clause which provides:

19 . . . KDE . . . agrees to and shall indemnify . . . and hold
20 harmless the other party . . . from and against any and all
21 . . . damages, costs, losses, expenses (including reasonable
22 attorney's fees and expenses) and other liabilities arising
23 from, in connection with or related in any way to, directly
24 or indirectly, any breach or alleged breach of any of the
25 representations, warranties, undertakings or agreements
26 made by it under this LOI.

27 41. UDC NV has made, and does hereby make demand upon KDE that it
28 indemnify and hold harmless UDC NV from any and all damages, costs, losses and
29 expenses arising from KDE's breach of certain representations, warranties,
30 undertakings and agreements made by it under the LOI.

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1 42. KDE has breached the LOI by refusing and continuing to refuse to
2 indemnify and hold UDC NV harmless as set forth in the express indemnification
3 section of the LOI.

4 43. UDC NV has fully performed all obligations and conditions required of
5 it pursuant to the terms of the LOI, except as said performance has been waived,
6 excused or prevented by KDE.

7 44. As a direct and proximate result of Counterdefendants and Does 1
8 through 10, and each of them, breaches of the express indemnification provision of
9 the LOI, UDC NV has sustained damages in a sum not yet ascertained, but in excess
10 of \$75,000.

11 **SEVENTH CLAIM FOR RELIEF**

12 **(Fraud in the Inducement – Distribution Agreement)**

13 45. UDC NV realleges each and every allegation set forth in paragraphs 1
14 through 44, inclusive, and incorporates them herein by this reference as though set
15 forth in full.

16 46. In the course of negotiating the terms of the exclusive Distribution
17 Agreement, KMI representatives and officers expressly represented to UDC LLC
18 that if UDC LLC agreed to be the sole distributor of Yu-Gi-Oh! product that KMI
19 would, among other things, (1) consider in good faith changes to product content
20 reasonably requested by UDC LLC, (2) not unreasonably withhold approval of
21 certain promotional materials and activities requested by UDC LLC, (3) cooperate
22 with and support UDC LLC requests regarding specific procedures and actions to
23 be taken against third parties for infringement of certain intellectual property rights,
24 and (5) provide UDC LLC with all information necessary to carry out performance
25 of the Distribution Agreement.

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1 47. Based in part on the foregoing express representations provided by
2 KMI, UDC NV agreed to enter into the exclusive Distribution Agreement. Each of
3 the foregoing promises in fact became express terms of the exclusive Distribution
4 Agreement.

5 48. Within the past three years, UDC NV has discovered that the true facts
6 were that KMI never intended to fulfill the foregoing promises, and instead intended
7 to, and in fact did, conduct itself in manner wholly inconsistent with these promises.
8 Konami's abusive conduct included acts such as (1) failing to consider in good faith
9 changes to product content reasonably requested by UDC LLC or its assignee UDC
10 NV, (2) unreasonably withholding approval of certain promotional materials and
11 activities (including a e-commerce website to be designed and paid for by UDC
12 LLC) requested by UDC LLC or its assignee UDC NV, (3) failing to cooperate with
13 and support UDC LLC's, and its assignee UDC NV's, requests regarding specific
14 procedures and actions to be taken against third parties for infringement of certain
15 intellectual property rights (resulting in tens of millions of counterfeit cards being
16 distributed into the market place), (4) packaging rare Yu-Gi-Oh! cards with video
17 games and selling them directly into the Territory, and (5) failing to provide UDC
18 LLC or its assignee UDC NV with all information necessary to carry out
19 performance of the exclusive Distribution Agreement.

20 49. When KMI made these misrepresentations, concealed information, and
21 failed to disclose material information as set forth herein, it knew its statements to
22 be false and misleading or acted in reckless disregard of their truth or falsity, and
23 made the misrepresentations and/or concealed information with the intent to defraud
24 and deceive UDC NV and its assignor, UDC LLC, and with the intent to induce
25 UDC NV and its assignor, UDC LLC, to enter into the exclusive Distribution
26 Agreement and perform consistent therewith and to devote significant time and
27 money to development of a market for the product which was the subject of the
28 exclusive Distribution Agreement.

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1 50. UDC LLC justifiably relied upon the representations made by KMI in
2 entering into the exclusive Distribution Agreement. At no time did KMI inform
3 UDC LLC of the true facts. Had UDC LLC been made aware of the material
4 misrepresentations by KMI and material facts hidden from UDC LLC, it would not
5 have chosen to enter into the exclusive Distribution Agreement.

6 51. As a direct and proximate result of the forgoing acts and omissions of
7 Konami and Does 1 through 10, and each of them, UDC NV has been damaged, as
8 alleged above, in a sum not yet ascertained, but in excess of \$75,000.

9 52. UDC NV is informed and believes, and based thereon alleges, that
10 Konami's conduct was done with a conscious disregard for the rights of UDC NV
11 and its assignor, UDC LLC, and with the intent to vex, injure or annoy such as to
12 constitute oppression, fraud or malice entitling UDC NV to punitive damages in an
13 amount appropriate to punish or set an example of Konami.

EIGHTH CLAIM FOR RELIEF

(Fraud in the Inducement -- LOI)

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16 53. UDC NV realleges each and every allegation set forth in paragraphs 1
17 through 52, inclusive, and incorporates them herein by this reference as though set
18 forth in full.

19 54. In the course of negotiating the terms of the LOI, KDE representatives
20 and officers expressly represented to UDC NV that if UDC NV agreed to be the sole
21 distributor of Yu-Gi-Oh! product that KDE would, among other things, (1) use its
22 best efforts to include reasonable content and changes in the products as reasonably
23 requested by UDC NV, (2) not unreasonably withhold approval of certain
24 promotional materials and activities requested by UDC NV, (3) cooperate with and
25 support UDC NV's requests regarding specific procedures and actions to be taken
26 against third parties for infringement of certain intellectual property rights, (4) use
27 its best efforts to finalize and negotiate a long-form formal distribution agreement,
28 and (5) enter into good faith negotiation regarding the revision of certain pricing

1 based upon current economic conditions.

2 55. Based in part on the foregoing express representations provided by
3 KDE, UDC NV agreed to enter into the LOL. Each of the foregoing promises in fact
4 became express terms of the LOL.

5 56. Within the past three years, UDC NV has discovered that the true facts
6 were that KDE never intended to fulfill the foregoing promises, and instead intended
7 to, and in fact did, conduct itself in manner wholly inconsistent with these promises.
8 KDE's abusive conduct included acts such as (1) failing to use its best efforts to
9 include reasonable content and changes in the products as reasonably requested by
10 UDC NV, (2) unreasonably withholding approval of certain promotional materials
11 and activities (including a e-commerce website to be designed and paid for by UDC
12 NV) requested by UDC NV, (3) failing to cooperate with and support UDC NV's
13 requests regarding specific procedures and actions to be taken against third parties
14 for infringement of certain intellectual property rights including raids in China and
15 investigations with the U.S. Customs Department (resulting in tens of millions of
16 counterfeit cards being distributed into the market place), (4) failing to use its best
17 efforts to finalize and negotiate a long-form formal distribution agreement, and
18 (5) failing to enter into good faith negotiation regarding the revision of certain
19 pricing based upon current economic conditions.

20 57. In addition to the above, UDC NV is informed and believes and based
21 thereon alleges that Konami permitted and/or allowed Yumi Hoashi, while an
22 employee of Viz Media, Inc., to sell tens of thousands of variant cards directly to
23 UDC NV's customers within UDC NV's contractual territory.

24 58. The above described actions by Konami and Does 1 through 10, and
25 each of them, were done with a reckless disregard and with the intent to defraud and
26 deceive UDC NV.

27 59. UDC NV justifiably relied upon the representations made by KDE in
28 entering into the LOL. At no time did KDE inform UDC NV of the true facts. Had

1 UDC NV been made aware of the material misrepresentations by KDE and material
2 facts hidden from UDC NV, UDC NV would not have chosen to enter into the LOL.

3 60. As a direct and proximate result of the forgoing acts and omissions of
4 Konami and Does 1 through 10, and each of them, UDC NV has been damaged, as
5 alleged above, in a sum not yet ascertained, but in excess of \$75,000.

6 61. UDC NV is informed and believes, and based thereon alleges, that
7 Konami's conduct was done with a conscious disregard for the rights of UDC NV
8 and with the intent to vex, injure or annoy such as to constitute oppression, fraud or
9 malice entitling UDC NV to punitive damages in an amount appropriate to punish or
10 set an example of Konami.

11 **NINTH CLAIM FOR RELIEF**
12 **(Slander Per Se)**

13 62. UDC NV realleges each and every allegation set forth in paragraphs 1
14 through 61, inclusive, and incorporates them herein by this reference as though set
15 forth in full.

16 63. UDC NV is informed and believes, and based thereon alleges, that
17 Konami, by and through its agents and employees, have and continue to orally utter
18 non-privileged false statements about UDC NV to various parties, including but not
19 limited to existing and potential customers, competitors and business associates.
20 Such false statements include, among other things, the following: (1) that UDC
21 NV's incapable of performing under the LOL, (2) that UDC NV is a dishonest entity
22 and engages in suspect, fraudulent, and dishonest business activities, and (3) that
23 UDC NV has allegedly breached the LOL. UDC NV is informed and believes and
24 based thereon alleges that Konami is engaging in these slanderous activities to
25 further its untoward and improper plans to unilaterally terminate the LOL in the
26 immediate future and revoke UDC NV's distribution rights. UDC NV is further
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1 informed and believes and based thereon alleges that Yumi Hoashi has recently
2 informed third parties and customers of Konami's intention to terminate the LOI
3 prior to its expiration date and to immediately revoke UDC NV's distribution rights.

4 64. The foregoing slanderous statements that have been made, continued
5 to be made subsequent to the initiation of the Nevada Action and continue to be
6 made, were and are directed towards UDC NV's business, and in particular to UDC
7 NV's alleged inability to distribute Yu-Gi-Oh! and allegedly improper actions in
8 connection with the LOI.

9 65. Konami's false statements were designed and orally uttered to directly
10 impact UDC NV's going business concern and ability to profit from its distribution
11 of Yu-Gi-Oh! product pursuant to the LOI.

12 66. As a result of Konami's and Does 1 through 10's conduct, UDC NV
13 has and continues to sustain damages in an amount to be proven at trial.

14 **ELEVENTH CLAIM FOR RELIEF**

15 **(Negligent Misrepresentation)**

16 67. UDC NV realleges each and every allegation set forth in paragraphs 1
17 through 66, inclusive, and incorporates them herein by this reference as though set
18 forth in full.

19 68. Konami, as a party to both the LOI and Distribution Agreement, owed
20 a duty to provide truthful representations to UDC NV and its assignor, UDC LLC.

21 69. Konami breached said duty by providing numerous false and untrue
22 representations to UDC NV and its assignor, UDC LLC. Such misrepresentations
23 include but are not limited to: (1) agreeing to use its best efforts to finalize and
24 negotiate a long-form agreement, (2) agreeing to enter into good faith negotiation
25 regarding the revision of certain pricing based upon current economic conditions,
26 (3) agreeing to take action against various counterfeit manufactures, and
27 (4) agreeing to refrain from contacting and/or selling product directly to UDC NV's
28 customers.

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1 70. On information and belief, Konami made said representations without
2 any reasonable ground for believing them to be true.

3 71. The representations were made with the intent to induce UDC NV to
4 continue to perform under the LOI and distribution agreement and to devote
5 substantial time and money to development of a market for the products which are
6 the subjects of those agreements.

7 72. UDC NV and its assignor, UDC LLC, justifiably relied upon the
8 misrepresentations of Konami by continuing to perform under the LOI and
9 Distribution Agreement and to devote substantial time and money to development of
10 a market for the products which are the subjects of those agreements.

11 73. Konami's conduct was the proximate cause of UDC NV's damages, in
12 an amount to be proven at trial.

13 **TWELFTH CLAIM FOR RELIEF**

14 **(Civil Conspiracy)**

15 74. UDC NV realleges each and every allegation set forth in paragraphs 1
16 through 73, inclusive, and incorporates them herein by this reference as though set
17 forth in full.

18 75. Within the past four years and continuing until the present,
19 Counterdefendants and Does 1 through 10, and each of them, knowingly, willfully,
20 conspired and agreed among themselves to sabotage the ability of UDC NV to
21 perform under the Distribution Agreement and the LOI in an effort to defraud UDC
22 NV and gain economic advantage for themselves. Counterdefendants and Does 1
23 through 10, and each of them, did the acts and things herein alleged pursuant to, and
24 in furtherance of, the conspiracy.

25 76. Plaintiff UDC NV reaffirms its allegations in the Nevada Action, on
26 information and belief, that Counterdefendants and Does 1 through 10, and each of
27 them, have engaged in meetings, as recently as the first week of December 2008,
28 with Konami's American and European entities to finalize their scheme to terminate

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1 the LOI and improperly revoke UDC NV's distribution rights. UDC NV is
2 informed and believes and based thereon alleges that prior to KDE's improper and
3 illegal termination of the LOI prior to its expiration date Yumi Hoashi commented
4 to third parties and customers that Konami intended to terminate the LOI prior to its
5 expiration date and to immediately revoke UDC NV's distribution rights.

6 Moreover, as alleged above, KDE now publicly and conspicuously asserts that it has
7 properly terminated the LOI due to allegedly improper activities by UDC NV.

8 77. As a proximate result of the wrongful acts herein alleged, UDC NV has
9 suffered damages, all according to proof at trial.

10 78. The aforementioned conduct of Counterdefendants and Does 1 through
11 10 and each of them, was malicious and fraudulent with the intention of depriving
12 UDC NV of property and legal rights and otherwise caused and continues to cause
13 injury, and was despicable conduct that subjected UDC NV to a cruel and unjust
14 hardship in conscious disregard to UDC NV's rights, so as to justify an award of
15 punitive damages.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Counterclaimant prays for judgment against
18 Counterdefendants as follows:

19 1. That Counterdefendants pay actual damages to Counterclaimant
20 according to proof at trial;

21 2. For any and all pre and post judgment interest in the maximum amount
22 allowed by law;

23 3. That Counterclaimant recover from Counterdefendants reasonable
24 attorneys' fees, costs and disbursements relating to this action and this dispute
25 pursuant to statutory law and otherwise;

26 4. That Counterdefendants pay punitive damages to Counterclaimant
27 pursuant to applicable law;

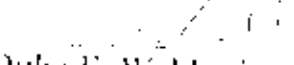
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1 5. That any monetary award include pre- and post-judgment interest at the
2 highest rate allowed by applicable law; and

3 6. For such other and further relief against Counterdefendants as the Court
4 may deem just and proper.

5 Dated: March 9, 2009

RUTAN & TUCKER, LLP
RICHARD K. HOWELL
DUKE E. WAHLQUIST
ROGER F. FRIEDMAN
BRADLEY A. CHAPIN

By: 
Duke E. Wahlquist
Attorneys for The Upper Deck
Company, a Nevada corporation

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JURY DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure,
Counterclaimant The Upper Deck Company, a Nevada corporation, hereby demands
a trial by jury of all issues so triable on its Counterclaim against Counterdefendants
Konami Digital Entertainment, Inc. and Konami Corporation (collectively,
"Konami") and on Konami's Answer and Affirmative Defenses in this matter.

Dated: March 9, 2009

RUTAN & TUCKER, LLP
RICHARD K. HOWELL
DUKE F. WAHLQUIST
ROGER F. FRIEDMAN
BRADLEY A. CHAPIN

By: _____
Duke F. Wahlquist
Attorneys for The Upper Deck
Company, a Nevada corporation

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EXHIBIT 1

Pt. 03-1

Distribution Agreement

Need your initial
(not sign)

1st day of October, 2003

THIS AGREEMENT is made as of the 1st day of October, 2003 by and between Konami Marketing, Inc. ("KMI"), a corporation organized and existing under the laws of the State of California, with its principal place of business at 1900 Bridge Parkway, Redwood City, CA 94065, USA, and The Upper Deck Company, LLC ("Upper Deck") a Delaware limited liability corporation organized and existing under the laws of the State of California, with offices at 5909 Sea Otter Place, Carlsbad, California 92008-6621, USA.

RECFALS

- A. KMI is granted the right to exclusively distribute the Yu-Gi-Oh! Trading Card Games and its supply goods (separately, "Cards" and "Supplies", collectively "Products"). The descriptions of the Supplies shall be designated to Exhibit B attached hereto in the Territory set forth below by its affiliated company, KONAMI CORPORATION ("Konami").
- B. Upper Deck desires to be appointed as an exclusive distributor of the Products in the Territory.
- C. KMI desires to sublicense the right to distribute the Products in the Territory to Upper Deck

NOW THEREFORE, in consideration of the promises set forth above and the mutual agreements set forth hereunder, KMI and Upper Deck agree as follows;

- 1. Territory
 - The Territory means North America (United States and Canada), Guam, Mexico, Spain, Portugal, Iceland and the countries of Central and South America. Upper Deck shall not sell any Products outside the Territory or knowingly sell Products to any party for resale outside the Territory.
- 2. Appointment
 - 2-1 KMI hereby grants to Upper Deck, and Upper Deck hereby accepts, the exclusive right to distribute, sell, advertise and promote the Products in the Territory.
 - 2-2 UD agrees to render prepress service of the Products in addition to KMI or Konami. Such service shall include, but not be limited to, gridding, setting appearance rate of rare cards and manipulation of coloring.
- 3. Order
 - 3-1 Each order for the Products from Upper Deck to KMI shall be in writing and identified as an order under this Agreement and shall further set forth the items as listed in Exhibit A hereto. Unless otherwise mutually agreed in writing between

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the parties, the price of the Products shall be as set forth in *Exhibit B* attached hereto. The total order quantity of blister packs in each Term Year shall not exceed twenty-five percent (25%) of the total order quantity of booster packs for each Term Year (the "Blister Pack Allocation"). For example, if Upper Deck orders one million (1,000,000) booster packs during a Term Year, the maximum number of blister packs ordered during such Term Year shall not exceed two hundred fifty thousand (250,000) blister packs. In the event that the accumulated order quantity of blister packs ordered during a Term Year exceeds the Blister Pack Allocation for such Term Year, the parties shall meet and confer to determine a mutually acceptable increase in the price for such blister packs that exceeds the Blister Pack Allocation for such Term Year.

- 3-2 Such order ("Order") shall become effective when KMI "accepts" each order placed by Upper Deck. If KMI does not notify its rejection or request to change the order placed within ten (10) days from the receipt of an order, such order shall be deemed "accepted" by KMI and shall become the effective Order between KMI and Upper Deck.
- 3-3 The Order shall be subject to the terms and conditions of this Agreement. Unless otherwise agreed in writing, relevant provisions in this Agreement shall be applicable to the Order.
- 3-4 If there are any differences between the terms and conditions set forth in the Order and this Agreement, the terms and conditions set forth in the Order shall prevail.
- 3-5 If the amount of Order plus the accumulated amount of Upper Deck's outstanding payment due to KMI exceeds KMI's Credit Insurance, which is currently \$50,000,000 (the "Guaranteed Amount"), Upper Deck shall provide KMI with a bank guarantee for the balance of the total outstanding payments (including the latest Order placed by Upper Deck) and the Guaranteed Amount ("Exceed Order") upon the placement of the Order by Upper Deck. In the event that Upper Deck does not provide the bank guarantee for such Exceed Orders within the above period to KMI, KMI is entitled to (i) cancel such Order or (ii) stop production on all pending Order and has the right not to accept future Order. In such cases, KMI will not be deemed in default of this Agreement.
- 3-6 Unless otherwise set forth in this Agreement, all the payments owed by Upper Deck to KMI will be due and payable as set forth in Section 9 below.

4 Term

4.1 The term of this Agreement ("Term") commenced on ~~June 1, 2003~~ ^{October 1, 2003} and shall remain effective, unless earlier terminated as provided in Section 22 below or by mutual consent, until ~~December 31, 2006~~ ^{4.0. [Signature]}. Renewal of the Term shall be subject to mutual agreement.

4.2 Term Year of this Agreement shall be as follows:

The first Term Year

^{October 1, 2003}
From ~~June 1, 2003~~ ^{4.0. [Signature]} to December 31, 2003.

Need your initial.

The second Term Year:	From January 1, 2004 to December 31, 2004
The third Term Year:	From January 1, 2005 to December 31, 2005
The fourth Term Year:	From January 1, 2006 to December 31, 2006

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5. Minimum Purchase

Upper Deck warrants to purchase the following amount of the Products ("Minimum Purchase Guarantee") from KMI for each Term Year during the Term. Should Upper Deck not achieve the Minimum Purchase Guarantee for any given period, for reasons other than any act or failure to act of KMI, KMI shall have the right on written notice thereof (i) to convert Upper Deck's right to non-exclusive right or (ii) to terminate this Agreement.

- \$35,000,000 for the first Term Year
- \$5,000,000 for the second Term Year
- \$3,000,000 for the third Term Year
- \$5,000,000 for the fourth Term Year

6. Delivery

Unless otherwise agreed in writing, and so long as the Cards are manufactured at GrapNe Manufacturing, Inc.'s facility located in the Territory, all deliveries of the Cards sold by KMI to Upper Deck shall be ex-factory. Notwithstanding the foregoing, deliveries of the Supplies shall be CIF Los Angeles.

7. Inspection

7.1 Within seven (7) days from the delivery of the Products, Upper Deck shall inspect the Products. Such Products shall be deemed to have passed the inspection upon the elapse of such inspection period and Upper Deck shall disclaim any further claims regarding any defects (except for the latent defect as set forth in Section 19 hereof) of the Products.

7.2 In the event that the Products do not pass the inspection set forth in Section 7.1 above, Upper Deck shall immediately notify such to KMI in writing. Upon receipt of such notice and upon acceptance of the Products from Upper Deck (not to be unreasonably withheld), KMI will promptly replace or repair such Products at its own cost and responsibility.

8. Translations

KMI will be responsible for translating all the Products and related materials (excluding all marketing and advertising materials produced by Upper Deck) into English language. KMI shall submit such translations to Upper Deck approximately thirty (30) days prior to the first manufacturing of the Products. KMI agrees to consider in good faith the changes reasonably requested by Upper Deck.

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- 9. Payment
- 9-1 Unless otherwise agreed in the Order, the sales prices of the Products are set forth in Exhibit B attached hereto and shall be set forth and confirmed in each Order. Unless otherwise agreed in the Order, the payment shall be made in the United States Dollars.
- 9-2 Unless otherwise agreed in the Order, Upper Deck shall pay by wire transfer to the bank account designated by KMI the sales price of the Products (plus any applicable taxes, shipping and other charges), not sixty (60) days from the invoice date.

10. Promotional Activities

- 10-1 Upper Deck, at its own cost and expense, shall be responsible for the advertisement and sales promotion of the Products, including but not limited to, publishing on any media, participating in major trade shows, conducting promotional activities and sending direct mails to customers in the Territory. Upper Deck shall make its commercially reasonable effort to promote and advertising the Products in the Territory.
- 10-2 Upper Deck shall prepare marketing and promotional materials (collectively, "Promotional Materials") that are reasonable and appropriate for the successful marketing of the Products at its own cost and expense.
- 10-3 Upper Deck shall obtain prior written approval of KMI regarding all Promotional Materials and promotional activities. Upper Deck shall not use any Promotional Materials or conduct any promotional activities unless it obtains KMI's approval. KMI shall not unreasonably withhold any approval.
- 10-4 Upper Deck shall be solely responsible for providing demonstration of the Products to its customers, end users and/or potential end users and for holding tournaments of the end-users of the Products. Upper Deck shall provide KMI with the demonstration and tournament schedule for each Term Year as soon as commercially practicable.

11. Third Party Contractor

- 11-1 Upper Deck may subcontract some of its marketing and promotional activities to third party contractor such as PR agencies, ad agencies, and promotional material vendors ("Subcontractor"). Upper Deck shall execute agreements with such Subcontractor in which Subcontractor shall be bound by all the terms and conditions of this Agreement applicable to its function.
- 11-2 Upper Deck shall be responsible to have Subcontractor comply with the terms and conditions of this Agreement. Any breach by Subcontractor of the terms and conditions of this Agreement is deemed to be the breach of Upper Deck of this Agreement.

12. Marketing Commitment

Upper Deck agrees to spend US\$1,000,000 for the first Term Year on consumer or trade advertising, promotion and marketing activities ("Marketing Commitment"). The Parties shall

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separately discuss and agree in writing on the Marketing Commitment for the following Term
Year.

13. Intellectual Property Rights

13-1 Upper Deck is granted the right to use the copyrights, trademarks, tradenames and other intellectual property rights incorporated in the Products ("Intellectual Property Rights") solely in connection with the marketing, distribution and sale of the Products in the Territory; provided that Upper Deck shall obtain KMI's prior written approval for such use of Intellectual Property Rights, and KMI may grant or withhold its approval in its sole discretion.

13-2 Upper Deck will not acquire any intellectual property rights in and to the Products.

13-3 Upper Deck shall immediately notify KMI of any infringement of the Intellectual Proprietary Rights by a third party. The parties shall enter into a separate written agreement regarding the specific procedures and actions to be taken for such infringement and any costs and expenses related thereto.

13-4 KMI agrees to provide ten (10) days prior notice to Upper Deck, if KMI or its affiliated companies conduct any promotions related to the Products in the Territory.

14. Upper Deck's Trademark

So long as Upper Deck's right hereunder remains exclusive, KMI agrees to add Upper Deck's trademarks and legal lines to all Products packaging, advertising, marketing and solicitation materials. KMI and Upper Deck shall separately discuss and agree to the specific trademarks and legal lines of Upper Deck to be incorporated in the above.

15. Maintenance and Support

15-1 In the event that any of the Products are found defective during the Warranty Period (as defined in Section 19), Upper Deck shall immediately notify KMI of such defects in writing. In such event KMI shall provide Upper Deck with replacements thereof free of charge.

15-2 Upper Deck shall be solely responsible for providing and maintaining high-quality customer service to its customers and end-users with respect to the Products at its own cost and expense.

15-3 Upon KMI's request, Upper Deck shall, as soon as reasonably practicable, provide KMI with activity reports relating to customer service issues detailing, to the extent applicable, the type of issues and the problem resolutions thereof.

16. Insurance

Upper Deck and KMI shall at its sole cost and expense, obtain and maintain the following insurance throughout the Term.

- Commercial General Liability Insurance
- per occurrence, with limits of no less than US\$5,000,000

Signature lines and date fields at the bottom of the page.

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shall name the other party and its affiliates as additional named insureds, and shall contain a waiver of subrogation with respect to the additional insureds.

17. Information and Report

17-1 Upper Deck shall submit to KMI a statement showing (i) the sales of the Products (including quantity and sales in US Dollars), (ii) customer data (name and country) and (iii) expenditures relating to the Marketing Commitment, during the immediately preceding quarter and cumulative for the Term to date by each country in the Territory, within twenty (20) days following the end of each calendar quarter during the Term. Upper Deck hereby agrees that KMI may, from time to time, request to add or change certain items to be reported by Upper Deck.

17-2 Upper Deck shall report estimated sales forecast of the Products to KMI monthly. Upper Deck shall provide such report at the end of each month, and such report shall include the estimated order quantity and sales quantity of the Products for the upcoming six (6) months.

17-3 If Upper Deck is aware of any revision of applicable laws and regulations, including, but not limited to, local and national laws, rules and regulations, treaties, voluntary industry standards, association articles or codes in the Territory ("Laws") related to this Agreement, Upper Deck shall notify KMI of such revision promptly. If requested by KMI, Upper Deck shall use commercially reasonable efforts to check into any revision of the Laws.

17-4 KMI shall provide Upper Deck with all information which KMI acknowledges as necessary to perform this Agreement.

18. Audit

18-1 Upper Deck agrees to keep and preserve, for at least three (3) years after the termination or expiration of this Agreement, accurate records of all transactions relating to this Agreement.

18-2 No more than once during each Term Year and once during each year for a period of three (3) years thereafter, KMI, Kosamu and its agents, employees, licensees (limited to TV Tokyo and NAS), and representatives shall have the right, upon five (5) business days prior written notice during normal business hours to Upper Deck, to examine, inspect and make copies of all the records, including without limitation all records, invoices, books of account, computer and database information, documents and correspondences that directly relate to the purchase, shipment and sale (including returns) of the Products.

19. Warranty and Indemnification

19-1 Each Party represents and warrants (i) that it will comply with all laws of the Territory, (ii) that it has the full right, power and authority to enter into this Agreement and to perform and discharge its duties and obligations under this Agreement and (iii) that the execution, delivery and performance of this Agreement will not violate, result in the breach of or cause a default under

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any agreement to which it is a party.

19.2 Unless otherwise set forth in the Order, KMI warrants that the Products sold hereunder are free from defects in materials and workmanship for ninety (90) days (the "Warranty Period") after the shipment of such Products by KMI.

19.3 Upper Deck agrees, and shall, indemnify, defend, at its sole expense, and hold harmless KMI and Kisman, and its respective directors, shareholders, officers, agents, employees, successors and assigns from and against any and all claims, demands, suits, actions, judgments, damages, costs, losses, expenses (including reasonable attorney's fees and expenses) and other liabilities arising from, in connection with or related in any way to, directly or indirectly, (a) any breach or alleged breach of any of the representations, warranties, undertakings or agreements made by it under this Agreement or (b) any negligent act or omission of Upper Deck in connection with the distribution of the Products.

19.4 KMI agrees to and shall defend, at its sole expense, indemnify and hold harmless Upper Deck and its respective directors, shareholders, officers, agents, employees, successors and assigns from and against any and all claims, demands, suits, actions, judgments, damages, costs, losses, expenses (including reasonable attorney's fees and expenses) and other liabilities arising from, in connection with or related in any way to, directly or indirectly, (a) the Products' infringement of any intellectual property or other rights of any third parties in the Territory; or (b) any breach of any representation or warranty under this Agreement or material non-fulfillment or non-performance of any agreement, covenant or obligation contained in this Agreement or any claim related to product liability.

19.5 With respect to the indemnification obligations set forth above, the indemnifying party shall be given written notice of and shall have the sole right to undertake and conduct the defense of any such claim, demand, suit or cause of action covered under the provisions set forth above with attorneys of its own selection.

20. Confidentiality

20.1 Each party agrees that it shall not, directly or indirectly, either during or subsequent to the term of this Agreement:

- (i) disclose any Proprietary Information (defined below) of the other party disclosed, other than to its own employees or subcontractors who participate directly in the performance of the receiving party's respective obligations under this Agreement;
- (ii) or copy or use any Proprietary Information of the other party except for the purpose of fulfilling its respective obligations hereunder. The degree of care employed by each Party to protect and safeguard the Proprietary Information of the other party shall be no less protective than the degree of care used by such party to protect its own confidential information of like importance.

20.2 For the purposes of this Agreement, KMI's Proprietary Information includes (i) any information

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designated in writing as "Proprietary Information" by KMI or if not so designated, communicated at the time of disclosure as proprietary; and (ii) any materials and information containing the Products or supplied to or related to the Products.

10-1 For the purposes of this Agreement, Upper Deck's Proprietary Information includes (i) its know-how or process used for the services rendered under Section 2 to KMI; (ii) any information contained in any reports provided hereunder or any documents provided in connection with any audit performed hereunder and; (iii) any additional information designated in writing as "Proprietary Information" by Upper Deck or if not so designated, communicated at the time of disclosure as proprietary.

10-4 The obligations set forth in this Section shall not be applicable to any proprietary information which:

- (i) the receiving party is authorized by the disclosing party in writing to disclose;
- (ii) is generally known or becomes part of the public domain through no fault of the receiving party;
- (iii) is disclosed by the disclosing party to third parties without restriction on subsequent disclosure;
- (iv) is provided to the receiving party by a third party without breach of any separate non-disclosure agreement; or
- (v) is required pursuant to valid court or arbitration process to be disclosed in the context of any administrative or judicial proceeding and then only after notification to the other party.
- (vi) is required to disclose to the licensors and agents of the "Yu-Gi-Oh!" property under the license agreement of "Yu-Gi-Oh!".

21. Notices

Any notices to be given hereunder by either party to the other party may be effected by either party by personal delivery in writing, facsimile, e-mail or by overnight mail. Notices delivered personally will be deemed communicated as of the actual receipt and facsimile, e-mail and overnight mailed notices will be deemed communicated upon confirmation of receipt by the receiving party. All notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this Agreement or to the address as may be designated by a party from time to time.

22. Termination

Either party may terminate this Agreement immediately by giving written notice to the other party upon the occurrence of any of the following events;

- (i) if the other party breaches any material obligations under this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice describing the

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breach and the manner of cure therefore.

(ii) if the other party ceases to conduct business in the normal course or is adjudicated bankrupt or insolvent or a receiver for its property is appointed or it is subject to the commencement of proceedings of any nature against it under bankruptcy, insolvency or debtor's relief laws (which proceeding is not vacated or set aside within thirty (30) days after commencement).

(iii) if the other Party voluntarily files a bankruptcy petition, or otherwise seeks relief under bankruptcy, insolvency or debtor's relief laws (which filing is not withdrawn within thirty (30) days after filing).

(iv) if the other party fails to promptly secure or renew any license, registration, permit, authorization, clearance or approval for the conduct of its business necessary to perform its obligations under this Agreement or if any such license, registration, permit, authorization or approval is revoked or suspended and not reinstated within thirty (30) days.

(v) if Upper Deck engages in any conduct, activity or practice which in KMI's reasonable judgment is detrimental to the good name, goodwill or reputation of KMI, the Products or the Intellectual Property Rights, KMI will notify Upper Deck in writing. If such conduct, activity or practice is curable, Upper Deck has thirty (30) days from the receipt of the notice from KMI to cure such conduct, activity or practice. If KMI demonstrates that such conduct, activity or practice is incurable, or if such conduct, activity or practice is not cured, in KMI's reasonable discretion, in such thirty-days period, KMI may, at its sole discretion, terminate this Agreement without giving any further written notice to Upper Deck. Upon reasonable request from Upper Deck, and if not terminated pursuant to this Section, KMI agrees to work together in good faith with Upper Deck to resolve any outstanding issues and establish an action plan to avoid future actions that might impact the good name, goodwill or reputation of KMI, the Products or the Intellectual Property Rights.

Notwithstanding any termination or expiration of this Agreement, sections 18, 19, 20, 26 and 27 and any other provisions that should naturally survive such termination or expiration, shall so survive. In the event of the expiration of this Agreement, Upper Deck shall have ninety (90) days to sell-off its remaining inventory of Products, unless this Agreement is terminated by KMI for reasons attributable to Upper Deck.

3. Force Majeure

Neither of the parties shall be liable for any failure or delay in the performance of any obligation imposed upon it hereunder (except for the payment due), nor shall such failure or delay be due to circumstances of any nature whatsoever which are not within its control and are not preventable

by reasonable diligence on its part.

Assignability

This Agreement, including all rights and obligations in whole or in part, shall not be assigned by either of the Parties to any third party without the prior written consent of the other party.

25. Severability

In the event that any of the terms of this Agreement are declared to be illegal by any court of competent jurisdiction, such term or terms shall be null and void with respect to the jurisdiction of that court and shall be deemed deleted from this Agreement, and all the remaining terms of this Agreement shall remain in full force and effect.

26. Governing Law

This Agreement shall be governed by, and construed in accordance with, the laws of the state of California, U.S.A. without regard to any conflict of laws principles or the United Nations Convention on Contracts for the International Sale of Goods.

27. Jurisdiction

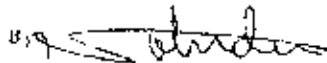
The parties hereby agree that any legal action or proceeding relating to or arising out of this Agreement shall be submitted to the US District Court, North District of California.

29. Entire Agreement

This Agreement and hereto constitutes the entire agreement between the parties hereto pertaining to the distribution of the Products and supersedes any and all written or oral agreements previously existing between the parties hereto. No modification, change, or amendment of this Agreement shall be binding upon the parties except for the mutual express consent in writing at a subsequent date signed by an authorized officer or representative of each of the parties hereto.

IN WITNESS WHEREOF, this Agreement is executed on the date and year as indicated below.

Konard Marketing, Inc.

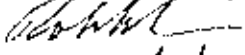


Name: Naoki Okada

Title: President

Date: 4/30/03

The Upper Deck Company, LLC

By: 
Name: Robert Andrews
Title: Chief Financial Officer
Date: 7/18/03

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EXHIBIT 2

Final

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LETTER OF INTENT

THIS LETTER OF INTENT ("LOI") is entered into as of September 10 2006 by and between Kazumi Digital Entertainment, Inc. ("KDE") and The Upper Deck Company, a Nevada corporation ("Upper Deck"); This LOI will confirm the parties' understanding of the principal business terms and conditions pursuant to which they will enter into long form definitive documentation further evidencing KDE's exclusive arrangement with Upper Deck. Both parties understand and agree that the preparation and execution of a formal distribution agreement ("Agreement") is required, containing the terms set forth in this LOI and such additional business and legal terms as KDE and Upper Deck may agree upon following good faith negotiations. Unless and until the Agreement is signed, this LOI shall serve as a binding agreement between KDE and Upper Deck.

APPOINTMENT

Subject to the terms and conditions of the LOI, KDE hereby appoints Upper Deck as its exclusive distributor of the Products in the Territory. Upper Deck may not sublicense these rights to any other party without KDE's prior written approval thereof.

EXCLUSIVITY EXCEPTION

The exclusivity shall have the exception of KDE having the ability to (i) use its E-Commerce website to distribute Products directly to end-users, (ii) distribute or have any third party distribute the Products bundled with other KDE-produced "Yu-Gi-Oh!" products or (iii) sell or use the Products for or as give-aways or premiums. The price of the Products distributed in KDE's E-Commerce website shall be equal to the price of the Products distributed in Upper Deck's E-Commerce website. Prior to selling or using the Products as give-aways or premiums, KDE shall notify Upper Deck and engage in good faith discussions with Upper Deck regarding such give-aways and/or premiums (including, but not limited to, with respect to the content thereof).

PRODUCTS

"Yu-Gi-Oh!" Trading Card Games.

KDE shall use its best efforts to include such reasonable content/changes as requested by Upper Deck in and to the Products. Notwithstanding the foregoing, Upper Deck acknowledges and understands that the Products are based on the Yu-Gi-Oh! property written and produced by Kazuki Takahashi and SHUEISHA (collectively, "Original Licensors") and therefore, all Products are subject to the approval of the Original Licensors, such approval which will be made in the Original Licensors' sole discretion.

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TERRITORY

USA, Canada, Guam, Mexico, Oceania, and the countries of Central and South America (collectively, "US"). Upper Deck shall not sell any Products outside the Territory or knowingly sell Products to any party for resale outside the Territory.

TERM

Four (4) years, commencing on January 1, 2007 and ending on December 31, 2010.

Notwithstanding the foregoing, the Term and the financial obligations shall be automatically shortened if the license agreement of "Yu-Gi-Oh!" entered into between KDE (or its affiliated companies) and the licensors of "Yu-Gi-Oh!" is terminated for whatever reason.

RENEWAL TERM

Subject to mutual agreement.

PRICE

The Price of the Products shall be as set forth on Exhibit A.

The price of Blister shall become effective with Purchase Order Number of 105820.

The prices for all other product configurations will be effective as of January 1, 2007 (Order date).

Prices for Products of different specifications or configurations than the specifications or configurations as set out in Exhibit A shall be mutually agreed upon.

DELIVERY TERMS

Ex-Factory (for those Products manufactured in Korea; FOB Busan. For those Products manufactured in other countries than US and Korea, the delivery terms shall be FOB)

PAYMENT TERMS

Quarterly payments of the Performance Minimums (Jan/April/July/Oct) shall be made within five (5) working days from the first (1st) day of each quarter; provided that if Upper Deck has paid KDE US\$50million in any Contract Year (US\$49,669,520 if in the first Contract Year) for the Products ordered in such Contract Year, it will not be obligated to pay any additional Performance Minimum(s) in such Contract Year and will only be obligated to pay KDE the amounts otherwise owed pursuant to each subsequent purchase order upon the payment terms set forth below. Each Performance Minimum payment made will

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be applied against and used to satisfy amounts owed pursuant to purchase orders.

Payment after recognition of quarterly Performance Minimums:
10%: Before each purchase order

Any and all such amounts paid in excess of the Performance Minimum will be applied against and used to satisfy subsequent Performance Minimum payments on a dollar-by-dollar basis within the applicable Contract Year. As a result the subsequent Performance Minimum shall be the amount after deducting the amount paid by Upper Deck hereunder.

50%: 60 days from the delivery of the Products.

If the next payment of quarterly Performance Minimums within the applicable Contract Year is made prior to the due date of the payment hereunder, the amount to be paid hereunder will be applied against such Performance Minimum regardless of the due date upon the payment of such Performance Minimum.

Exhibit B shows the example of how the payment shall be applied against the Performance Minimum.

If Upper Deck fails to pay to KDE any amount due hereunder, Upper Deck shall pay interest to KDE at a rate that is the lesser of (i) 1% above the US prime rate from the date due on any unpaid amount and (ii) the maximum rate permitted by law.

PERFORMANCE MINIMUMS

US\$50million/Contract Year

Notwithstanding the foregoing, the Performance Minimums for the first Contract Year (January 1, 2007 – December 31, 2007) shall be US\$49,669,520.

The period starting on January 1 and ending on December 31 of each year during the Term shall be hereinafter called "Contract Year."

The Performance Minimums shall only apply to the Products ordered (and accepted by KDE) during the Contract Year. If the actual sale of Upper Deck during Contract Year does not achieve the Performance Minimums for any Contract Year, for reasons other than any act or failure to act of KDE, KDE shall have the right on written notice thereof to terminate this LOI.

MARKETING COMMITMENT

Whichever is the higher one of 12% Annual Revenue or US\$8million.

For the avoidance of doubt, Upper Deck may credit any cost and expense used for tournaments or other organized play activities against the Marketing Commitment, so long as such cost and expense are paid by Upper Deck.

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STATEMENT

By the tenth (10th) day following the end of each month, and also on the fifth (5th) day following the end of each week during the Term, Upper Deck shall submit KDE a statement showing (i) the sales and returns of the Products (including quantity and sales in US Dollars), and (ii) customer data (name and country), during the immediately preceding month and/or week and cumulative for the Contract Year to date by each country in the Territory. The format of such reports will be designated by KDE. Upper Deck also agrees to participate in face-to-face monthly meeting at KDE Office.

By the tenth (10th) day following the end of each month during the Term, Upper Deck shall submit to KDE an inventory of all Products currently available at Upper Deck.

By the tenth (10th) day following the end of each month during the Term, Upper Deck shall submit to KDE a statement showing expenditures relating to the Marketing Commitment, during the immediately preceding month and cumulative for the Contract Year to date by each country in the Territory. The format of such reports will be designated by KDE.

In addition to the above statement, Upper Deck shall provide KDE with an annual Marketing Commitment report showing (i) the activities performed by Upper Deck, (ii) the expenditure for each activity and (iii) the total expenditures made by Upper Deck for the Products by the twentieth (20th) day following the end of each Contract Year. If the total expenditures do not meet or exceed the Marketing Commitment, then Upper Deck shall pay the shortfall within 30 days from the provision of the annual Marketing Commitment report.

AUDIT

Upper Deck agrees to keep and preserve, for at least three (3) years after the termination or expiration of this LOI, accurate records of all transactions relating to this LOI. KDE and its agents, employees, licensors and representatives shall have the right, upon fourteen (14) days prior written notice during normal business hours to Upper Deck, to examine, inspect and make copies of all such records, including without limitation all records, invoices, book of account, computer and database information, documents and correspondence that relate to the transactions relating to this LOI.

APPROVAL

All advertising and promotional materials ("Promotional Materials") and promotional activity are subject to KDE's prior written approval. Upper Deck acknowledges and understands that any Promotional Materials used without the approval of KDE may result in the termination of the license agreement between KDE and Original Licensors and therefore Upper Deck shall not use any Promotional Materials or conduct any promotional activities unless it obtains KDE's prior approval. If a promotion is conducted without KDE's approval, KDE shall have the right to (i) terminate this LOI or, (ii) claim for an immediate payment

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of a reasonable penalty that is commensurate with the scope of the breach, subject to and as more fully described in Exhibit C hereof.

TRADEMARKS

So long as Upper Deck's right hereunder remains exclusive, KDE will include the trademarks and legal lines of Upper Deck on all Product packaging, advertising, marketing and solicitation materials created by or on behalf of KDE in the Territory. The parties shall separately discuss and agree to the specific trademarks and legal lines of Upper Deck.

Upper Deck shall include the names and logos of KDE (as separately designated by KDE) in all materials (including, but not limited to, posters, solicitations, commercial films, publications, press releases, event booths) so that the end-users can recognize that the Products are developed and manufactured by KDE.

DEMONSTRATION/TOURNAMENT

Upper Deck shall be responsible for providing demonstration of the Product to its customers, end users and/or potential end users and holding tournaments for the end-users of the Product. Within five (5) days from the beginning of each Contract Year, Upper Deck shall provide KDE with the demonstration and tournament schedule for such Contract Year in writing. KDE may provide tournaments or demonstrations in the Territory at its own discretion, in consultation with Upper Deck. In such cases, Upper Deck shall reasonably cooperate with KDE to provide such tournaments or demonstration.

CUSTOMER SERVICE

Upper Deck shall be solely responsible for providing and maintaining high-quality customer service to its customers and end-users with respect to all Products. Upper Deck shall provide KDE with activity reports relating to customer service issues detailing, to the extent applicable, the type of issue and the problem resolution thereof at the end of each month during the Term.

LOCALIZATIONS

KDE will be responsible for translating all Products and related materials from Japanese into the other languages. KDE shall submit such translations to Upper Deck approximately thirty (30) days prior to manufacturing any Products containing such translations and Upper Deck shall perform native check thereof and make its recommendations for changes thereto. KDE shall provide with text and artwork data to Upper Deck and Upper Deck shall create the production data file.

THIRD PARTY CONTRACTOR

In the event Upper Deck uses any third party contractor such as PR agencies, ad agencies, and promotional material vendors for the services contained herein, Upper Deck agrees to execute agreements with such third party contractor in which such third party contractor agrees to be bound by all terms and conditions of this LOI

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applicable to its function. Upper Deck shall be responsible to have such third party contractor comply with the terms of this LOI. In the event Upper Deck is aware of the breach of this LOI by the third party contractor, Upper Deck shall immediately notify such to KDE in writing. Upon KDE's written notice of any act or failure to act by any such third party contractor of Upper Deck that is a breach of this LOI, and if Upper Deck cannot cure such breach within thirty (30) days from its receipt of such notice, KDE shall be entitled to terminate this LOI.

TERMINATION

Either party may terminate this LOI immediately upon giving written notice to the other party upon the occurrence of any of the following events:

- a. The other party breaches any material obligations under this LOI and fails to cure such breach within thirty (30) days after receipt of written notice in sufficient specificity describing the breach and the manner of cure therefore.
- b. The other party ceases to conduct business in the normal course or is adjudicated bankrupt or insolvent or a receiver for its property is appointed or it is subject to the commencement of proceedings of any nature against it under bankruptcy, insolvency or debtor's relief laws (which proceeding is not vacated or set aside within thirty (30) days after commencement).
- c. The other party voluntarily files a bankruptcy petition, or otherwise seeks relief under bankruptcy, insolvency or debtor's relief laws (which filing is not withdrawn within thirty (30) days after filing).
- d. If the other party fails to promptly secure or renew any license, registration, permit, authorization, clearance or approval for the conduct of its business necessary to perform its obligations under this LOI or if any such license, registration, permit, authorization or approval is revoked or suspended and not reinstated within thirty (30) days.

COMPETITIVE PRODUCTS

In the event that during the Term Upper Deck intends to develop (have developed), manufacture (have manufactured) and/or distribute (have distributed) a new trading card game (specifically excluding sports) that is competitive with the Products in the Territory, Upper Deck shall notify and discuss with KDE prior thereto. This requirement will specifically exclude any such product which Upper Deck or any of its affiliates has already developed (had developed), manufactured (had manufactured) and/or distributed (had distributed).

CONFIDENTIALITY

The parties hereto acknowledge and agree that by virtue of the relationship created by this LOI each of the parties may acquire confidential information from the other party. Each party agrees, respectively, not to utilize any such information except as expressly permitted hereunder, and, further, except as may be required by law. Any materials embodying such confidential information shall be identified orally or in writing by the disclosing party and shall be returned upon the expiration or earlier termination of this

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Agreement, or sooner if so requested by the original disclosing party.

INTELLECTUAL PROPERTY

KDB will grant Upper Deck the right to use KDE's copyrights, tradenames, trademarks and other intellectual property rights (collectively, "Konami IP". Konami IP shall include the copyrights, trade names, trademarks and other intellectual property rights owned by KDB and KDE's affiliated companies) solely in connection with the marketing, distribution and sale of the Products in the Territory. The use of KDE's IP is subject to KDE's prior written approval. KDE may grant or withhold its approval in its sole discretion. KDE will retain all ownership rights in all such KDE IP and in any enhancements or derivative works thereof. The KONAMI Logo and KONAMI name should be clearly posted on all promotional materials developed by Upper Deck. Upper Deck shall post the KONAMI Logo and KONAMI name on the promotional materials strictly as instructed by KDB. The parties shall agree in writing to the specific procedures and actions to be taken against potential and actual infringement of the Konami IP by third parties, including the costs and expenses related thereto. If Upper Deck uses Konami IP without KDE's prior approval, this LOI will be terminated.

THE AGREEMENT

The parties will use their respective best efforts to finalize and execute the agreement by January 31, 2007. The Agreement will expand upon the high level terms set forth in this LOI and will contain standard terms and conditions for the subject matter thereof, including but not limited to indemnification provisions from all parties.

REPRESENTATIONS AND WARRANTIES

Each party represents and warrants that it has the full right, power and authority to enter into this LOI and to perform and discharge its duties and obligations under this LOI and that the execution, delivery and performance of this LOI will not violate, result in the breach of or cause a default under any agreement to which it is a party.

INDEMNIFICATION

Both KDE and Upper Deck agrees to, and shall indemnify, defend, at its sole expense, and hold harmless the other party, its affiliates and licensors and their respective directors, shareholders, officers, agents, employees, successors and assigns from and against any and all claims, demands, suits, actions, judgments, damages, costs, losses, expenses (including reasonable attorney's fees and expenses) and other liabilities arising from, in connection with or related in any way to, directly or indirectly, any breach or alleged breach of any of the representations, warranties, undertakings or agreements made by it under this LOI.

GOVERNING LAW

This LOI will be governed by and interpreted in accordance with the laws of

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the state of California, U.S.A. without regard to any conflict of laws principles or the United Nations Convention on Contracts for the International Sale of Goods.

NO ASSIGNMENT

Upper Deck shall not assign any of its rights or obligations under this LOI without the prior written consent of KDE.

NO ANNOUNCEMENT

Neither party may make any public announcement concerning this LOI without the prior written consent of the other party.

ENTIRE AGREEMENT

This LOI supersedes all prior and/or contemporaneous oral or written agreements, representations, and understandings of KDE and Upper Deck regarding the subject matter of this LOI. KDE and Upper Deck acknowledge that no other party nor any agent of any other party, has made any express or implied promise, representation, or warranty whatsoever, which is not contained in this instrument and neither party has relied upon any promise, representations, or warranties not contained herein. No supplement, modification, or amendment of this LOI or any representations concerning the subject matter of this LOI shall be binding unless executed in writing and signed by both parties.


AGREED AND ACCEPTED:

Konami Digital Entertainment, Inc.


By: Kazumasa Kitano

Title: Chairman and CEO
Date: Jan 11th, 2007

The Upper Deck Company


By: Richard P. McWilliam

Title: President
Date: 01-11-07

PROOF OF SERVICE BY ELECTRONIC MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On March 9, 2009, I served on the interested parties in said action the within:

COUNTERCLAIM OF THE UPPER DECK COMPANY, A NEVADA CORPORATION

by Electronic Service (FRCP Rule 5(b)) by electronically mailing a true and correct copy through Rutan & Tucker, LLP's electronic mail system to the email addresses set forth below, or as stated on the attached service list per agreement in accordance with Federal Rules of Civil Procedure Rule 5(b).

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Jeffrey D. Burbach (jburbach@winstead.com) Attorneys for Defendant
Winstead, PC Vintage Sports Cards
24 Waterway Avenue, Ste. 500
The Woodlands, TX 77380

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 9, 2009, at Costa Mesa, California.

AMIE MARIE LANCAS
(Type or print name)

(Signature)

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