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13 and KONAMI CORPORATION and Counter-
14 Defendant KONAMI MARKETING, INC.

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 KONAMI DIGITAL
18 ENTERTAINMENT, INC. and
19 KONAMI CORPORATION,

20 Plaintiffs,

21 v.

22 VINTAGE SPORTS CARDS INC.;
23 THE UPPER DECK COMPANY, a
24 California Corporation; THE UPPER
25 DECK COMPANY, a Nevada
26 Corporation; THE UPPER DECK
27 COMPANY, LLC; and DOES 4 –
28 10, inclusive,

Defendants.

No. CV 08-06630 VBF PJWx

**REPLY TO SEPARATE
STATEMENT OF
UNCONTROVERTED FACTS IN
SUPPORT OF KONAMI'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT FOR A
FINDING OF LIABILITY
AGAINST UPPER DECK**

[Filed with Konami's Reply]

[Motion No. 1 of 3]

Date: December 21, 2009

Time: 1:30 p.m.

Courtroom: 9

Action Filed: October 8, 2008

Trial Date: January 26, 2010

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¹For the Court’s convenience, we include the table headings used in Konami’s Memorandum of Points and Authorities in Support of its Motion for Partial Summary Judgment for a Finding of Liability Against Upper Deck.

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TABLE OF RECORD ABBREVIATIONS

Declarations Filed With Konami’s Moving Papers

“Fox Decl.”	Declaration of Benjamin J. Fox
“Hoashi Decl.”	Declaration of Yumi Hoashi (Konami)
“Tasaki Decl.”	Declaration of Mari Tasaki (Konami)
“Matsumoto Decl.”	Declaration of Eddie Matsumoto (JAL Cargo shipping company)

Declarations Previously Filed and Lodged With the Moving Papers

“Chai Decl.”	Declaration of Jason Chai filed January 21, 2009 (Dkt. 85)
“Coviello Decl.”	Declaration of Robert Coviello filed January 28, 2009 (Dkt. 107)
“Freece Decl.”	Declaration of Barry A. Freece filed January 21, 2009 (Dkt. 88)
“Goldstab Decl.”	Declaration of Dawn Goldstab filed January 21, 2009 (Dkt. 119)
“Hansen Decl.”	Declaration of Diane Hansen filed January 21, 2009 (Dkt. 93)
“Lawrence Decl.”	Declaration of Christopher Lawrence filed January 21, 2009 (Dkt. 92)

1 Plaintiffs (together “Konami”) respectfully submit the following fact-by-fact
2 reply to Upper Deck’s response to Konami’s separate statement of uncontroverted
3 facts in support of its motion for partial summary judgment for a finding of liability
4 against Upper Deck. This document also includes Konami’s responses to Upper
5 Deck’s alleged additional facts numbered 127-161.

6 **A. Konami’s Yu-Gi-Oh! Trading Card Game**

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>7</p> <p>8 1. Konami is a developer and publisher</p> <p>9 of many popular and strong-selling</p> <p>10 video games, trading cards, toys and</p> <p>11 other products, including the Yu-Gi-</p> <p>12 Oh! Trading Card Game.</p> <p>13 <u>Supporting Evidence:</u></p> <p>14 Tasaki Decl. ¶ 2.</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p>	<p>Objection, irrelevant. FRE §§ 401, 402. Also, lacks foundation (FRE § 602) that Konami is the developer of the Yu-Gi-Oh! Trading Card Game [See Tasaki decl., Ex. 3, LOI, “Products” clause stating that “the Products are based on the Yu- Gi-Oh! property written and produced by Kazuki Takahashi and SHUEISHA . . .”]. Subject to these objections and qualifications, undisputed (for purposes of this motion).</p>

22 **REPLY: The fact is UNDISPUTED.**

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>23</p> <p>24 2. Yu-Gi-Oh! is a highly successful</p> <p>25 Japanese Manga (a form of</p> <p>26 comics), animated television series,</p> <p>27 and other properties based on the</p> <p>28</p>	<p>Objection, irrelevant. FRE §§ 401, 402. Subject to this objection, undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
successful Manga. <u>Supporting Evidence:</u> Tasaki Decl. ¶ 5.	

REPLY: The fact is UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
3. All authentic Yu-Gi-Oh! TCG cards are made by Konami and bear Konami's federally registered trademark (Konami's "Mark"). <u>Supporting Evidence:</u> Tasaki Decl. ¶¶ 3, 7 & Ex. 1 thereto (U.S. Trademark Registrations for the "Konami" word mark and stylized logos).	Objection, lacks foundation/ personal knowledge. FRE § 602. Subject to this objection, undisputed (for purposes of this motion) that, to Upper Deck's knowledge, Konami causes all authentic Yu-Gi-Oh! cards to be manufactured by third-party printers and that those cards bear Konami's federally registered trademark.

REPLY: UNDISPUTED that all authentic Yu-Gi-Oh! TCG cards are made by Konami (with printing assistance from Konami's authorized printers) and that all authentic Yu-Gi-Oh! TCG cards bear Konami's federally registered trademark. The rest of Upper Deck's response is irrelevant.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
4. Konami has used its name and federally registered Marks in interstate commerce for more than	Objection, lacks foundation/ personal knowledge. FRE § 602. Subject to this objection,

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
five years. <u>Supporting Evidence:</u> Tasaki Decl. ¶ 4.	undisputed (for purposes of this motion).

REPLY: The fact is UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
5. Konami has registered with the U.S. Copyright Office the artwork that appears on the reverse side of all authentic Yu-Gi-Oh! TCG cards (the "Reverse Art"). <u>Supporting Evidence:</u> Tasaki Decl. ¶ 8 & Ex. 2 thereto (U.S. Copyright Registration for the Reverse Art).	Undisputed (for purposes of this motion).

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
6. Konami is the exclusive licensee of all other artwork in Yu-Gi-Oh! TCG, through a series of license agreements with the Japanese upstream rights-holders to the Yu-Gi-Oh! property. <u>Supporting Evidence:</u> Tasaki Decl. ¶¶ 15-29 & Exs. 6-30	Undisputed (for purposes of this motion) in part and disputed in part. Disputed in that, during the period between April 26, 2008 and August 2, 2008, no Konami entity appears to have had rights to distribute YGO in the United States. Konami's proffered evidence suggests that

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>thereto (agreements with upstream rights-holders).</p>	<p>initially between April 26, 2001 to April 26, 2008 Konami Corporation only (and no other Konami entity, and in particular not the plaintiff Konami Digital Entertainment, Inc.) was “license[d] to manufacture and s[ell] . . . products using the representations of the characters, cartoons, designs, and the like and parts that constitute these (hereinafter, `these film works’) that constitute the television animated film Yu-Gi-Oh! Duel Monsters.” Tasaki Decl. ¶ 21, Ex. 15, pp. 26, 61. That agreement, however, expired by its own terms on April 26, 2008.</p> <p>A subsequent, August 2, 2008 license agreement grants a copyright license to (1) Konami Digital Entertainment, Co. Ltd. (which is not a party to this action); (2) Konami Digital Entertainment, Inc. (a plaintiff in this action) and (3) Konami Digital Entertainment</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
	<p>B.V. (not a party to this action), licensing them to sell Yu-Gi-Oh! Card Games “Globall[y] (except Asia, Japan and South Korea).” It does not grant any rights to Konami Corporation. Tasaki Decl. ¶22, Ex. 17 pp. 74, 76, 77. Although Konami Digital Entertainment B.V. and Konami Digital Entertainment, Co. Ltd. each had global license rights under the August 2, 2008 license agreement, neither of these entities is a party to this action. The only party to the August 2, 2008 agreement who also is a party to this action is Konami Digital Entertainment, Inc, and it is not an exclusive licensee for the period after April 26, 2008.</p>

REPLY: No material factual dispute. As Konami’s reply brief explains, Upper Deck’s argument is based on a misreading of Konami’s contract with its upstream licensor and is wrong. The second license agreement with Konami’s upstream licensor was dated August 2, 2008, but it had an effective term from April 1, 2008 through March 31, 2009, which followed concurrently Konami’s prior license term. (Tasaki Decl. [Dkt. 295] Ex. 17 at 69, ¶ 1.2.) The agreement granted exclusive license rights to Konami Digital Entertainment Co. Ltd. (“KDE-Japan”) and a right

1 for KDE-Japan to sub-license those rights to other Konami entities. (*Id.*) KDE-
2 Japan then exclusively licensed the rights to plaintiff Konami Digital
3 Entertainment, Inc., for all territories outside of Asia, including for the period
4 between April 26, 2008 and August 2, 2008. (*Id.* Ex. 23 at 104, ¶¶ 1-3.) Thus,
5 based on the uncontroverted evidence, Konami is the exclusive licensee.
6

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>7</p> <p>8 7. The rules of the Yu-Gi-Oh!</p> <p>9 Trading Card Game assign a</p> <p>10 variety of powers and values to the</p> <p>11 specific cards that comprise the</p> <p>12 Yu-Gi-Oh! TCG collection.</p> <p>13 Individual Yu-Gi-Oh! TCG cards</p> <p>14 are manufactured in differing</p> <p>15 quantities, which has created</p> <p>16 several levels of rarity in the</p> <p>17 marketplace.</p> <p>18 <u>Supporting Evidence:</u></p> <p>19 Hoashi Decl. ¶ 7.</p>	<p>Objection, irrelevant, FRE, §§ 401, 402. Subject to this objection, undisputed (for purposes of this motion).</p>

20 **REPLY: UNDISPUTED.**

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>21</p> <p>22</p> <p>23 8. Konami's cards are categorized as</p> <p>24 "Common Cards," "Rare Cards,"</p> <p>25 "Super Rare Cards," "Ultra Rare</p> <p>26 Cards," "Ultimate Rare Cards" and</p> <p>27 "Secret Rare Cards." Konami's</p>	<p>Objection, lacks foundation/ personal knowledge as to what cards are the most sought after and have the greatest commercial value. FRE § 602. Subject to this</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>Rare Cards are the most sought-after by game players and collectors, and have the greatest commercial value among all Yu-Gi-Oh! TCG cards.</p> <p><u>Supporting Evidence:</u> Hoashi Decl. ¶¶ 7-8.</p>	<p>objection, undisputed (for purposes of this motion).</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>9. No authentic Yu-Gi-Oh! TCG cards are made in China.</p> <p><u>Supporting Evidence:</u> Bonar Depo. at 52:7-17 and Ex. 56 thereto, attached as Fox Decl. Exs. 48-49 (Upper Deck's website admits that "Cards stating that they are manufactured in China . . . ARE NOT authentic."); <i>see also</i> Hoashi Decl. ¶ 4 (confirming that no authentic Yu-Gi-Oh! TCG cards are made in China); Perrigo Decl. ¶ 6, attached as Fox Decl. Ex. 92 (Upper Deck's director of operations states that, except for involvement in the prepress process, "Upper Deck does not manufacture, package, foil stamp, collate, box, or do</p>	<p>Except insofar as the Letter of Intent entered into as of September 30, 2006 may have authorized manufacture of the cards at issue in this matter, undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>any other component of printing”); Eggleston Decl. ¶¶ 12-13, attached as Fox Decl. Ex. 93 (stating that “Upper Deck has never been responsible for manufacturing or packaging the actual YGO TCs”).</p>	

REPLY: UNDISPUTED. As Konami’s briefs explain, the LOI never authorized Upper Deck to manufacture cards in China or elsewhere.

B. The Parties’ Exclusive Distribution Agreement

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>10. In or about 2002, Konami hired Upper Deck to serve as its exclusive distributor of Yu-Gi-Oh! TCG in North America and other territories.</p> <p><u>Supporting Evidence:</u> Tasaki Decl. ¶ 9.</p>	<p>Disputed that Konami “hired” Upper Deck. Undisputed (for purposes of this motion) that Konami Corporation and Konami of America, Inc. “appoint[ed] Upper Deck [Company, LLC] as its (sic) exclusive distributor” of Yu-Gi-Oh! TCG in North America and other territories pursuant to a letter of intent entered into in 2002. See Upper Deck Notice of Lodgment [“NL”] Ex. I [Wahlquist Decl.], ¶ 6, Ex. 10, at p. 85, ¶ 7, Ex. 11, at p. 92.)</p>

REPLY: No material factual dispute. Whether Konami “hired” or “appointed” Upper Deck to serve as its exclusive distributor is irrelevant.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>11. Prior to the termination of the distribution agreement, Konami and Upper Deck's relationship was governed by a binding Letter-of-Intent distribution agreement dated as of September 30, 2006 (the "LOI").</p> <p><u>Supporting Evidence:</u> Tasaki Decl. ¶ 10 & Ex. 3 thereto (the LOI).</p>	<p>Undisputed (for purposes of this motion) that Konami Digital Entertainment, Inc. and Upper Deck, Nevada's relationship was governed in some respects by the LOI for the time periods from September 20, 2006 and January 1, 2007, and at least through the termination of the LOI.</p>

REPLY: UNDISPUTED. The LOI states that it "supersedes all prior and/or contemporaneous oral or written agreements" of the parties (the "Entire Agreement" clause). (Tasaki Decl. [Dkt. 295] Ex. 3 at 29.) Upper Deck's claim that the relationship was "governed in some respects by the LOI" is wrong and unsupported by any citation to evidence or legal authority.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>12. The LOI obligated Upper Deck, during the term of the parties' agreement, to market and promote the Yu-Gi-Oh! TCG as Konami's agent.</p> <p><u>Supporting Evidence:</u> Tasaki Decl. Ex. 3 at 24 (the LOI's "Marketing Commitment" provision).</p>	<p>Disputed that any Upper Deck entity was Konami's agent. Tasaki Decl. Ex. 3 (the LOI). Undisputed (for purposes of this motion) that the LOI obligated Upper Deck Nevada to: purchase stated minimum amount of Yu-Gi-Oh! TCG, spend stated amounts to market the Yu-Gi-Oh! TCG, provide demonstrations of and</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
	hold tournaments for the Yu-Gi-Oh! TCG, and provide customer service as set forth in the LOI.

REPLY: No material factual dispute. It is undisputed that Konami hired or “appointed” Upper Deck to market Konami’s trading card game in North America, as provided in the LOI.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>13. The LOI provides that Konami has the right “in its sole discretion” to control the use of its intellectual property in Yu-Gi-Oh! TCG. The LOI further provides: “The use of KDE’s IP is subject to KDE’s prior written approval. KDE may grant or with[o]ld its approval in its sole discretion. . . . If Upper Deck uses Konami IP without KDE’s prior approval, this LOI will be terminated.” “Konami IP” is defined broadly to include Konami Digital Entertainment’s “copyrights, tradenames, trademarks and other intellectual property rights.”</p> <p><u>Supporting Evidence:</u></p>	<p>Undisputed (for purposes of this motion) that the LOI included with Konami’s evidence is a true and correct copy of the LOI, with certain redactions, and that the LOI speaks for itself. Disputed to the extent Konami’s selective quotation from the LOI takes language out of context from the entire document. Civ. Code § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”]</p> <p>Additionally, the LOI is between Upper Deck Nevada and Konami Digital Entertainment, Inc., not</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
Tasaki Decl. Ex. 3 at 28 (“Intellectual Property” clause).	Konami Corporation.

REPLY: UNDISPUTED. The parties agree that the LOI is contained in the record (Tasaki Decl. Ex. 3) and contains the text quoted above.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>14. The LOI also provided that, during the contract’s term, the outside packaging for Yu-Gi-Oh! TCG would include Upper Deck’s trademark alongside Konami’s, to indicate that Upper Deck is the exclusive distributor. The Yu-Gi-Oh! TCG card packages sold by Konami to Upper Deck bore this dual labeling.</p> <p><u>Supporting Evidence:</u> Tasaki Decl. Ex. 3 at 26 (“Trademarks” clause); Hoashi Decl. ¶ 31.</p>	<p>Undisputed (for purposes of this motion) that the LOI included with Konami’s evidence is a true and correct copy of the LOI, with certain redactions, and that the LOI speaks for itself. Disputed to the extent Konami’s characterization of the LOI takes language out of context from the entire document. Civ. Code § 1641 [“The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.”]</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
15. Upper Deck never has been a manufacturer of Yu-Gi-Oh! TCG and never was authorized to	Undisputed (for purposes of this motion) that Upper Deck never has been the printer of the Yu-Gi-Oh!

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>commission the manufacture of Yu-Gi-Oh! cards.</p> <p><u>Supporting Evidence:</u></p> <p>Hoashi Decl. ¶ 4; <i>see also</i> Perrigo Decl. ¶ 6, attached as Fox Decl. Ex. 92 (Upper Deck’s director of operations states that, except for involvement in the prepress process, “Upper Deck does not manufacture, package, foil stamp, collate, box, or do any other component of printing”); Eggleston Decl. ¶¶ 12-13, attached as Fox Decl. Ex. 93 (stating that “Upper Deck has never been responsible for manufacturing or packaging the actual YGO TCs”).</p>	<p>TCG and generally was authorized to commission the manufacture of Yu-Gi-Oh! cards without the consent of Konami entity, with the caveat that Upper Deck performed pre-press work that necessary for the printing of Yu-Gi-Oh! cards, and provided the prepress work directly to the third-party companies who printed the cards. NL, Ex. G [Eggleston Decl.] ¶¶ 3-13, at pp. 9-12.</p>

REPLY: UNDISPUTED. The Eggleston declaration cited by Upper Deck states, “Upper Deck has never been responsible for manufacturing or packaging the actual YGO TCs.” (Eggleston Decl. [Dkt. 341-3] ¶ 12.) It does not support the notion that Upper Deck “generally was authorized to commission the manufacture of Yu-Gi-Oh! cards without the consent of the Konami entity,” as Upper Deck claims. The remainder of Upper Deck’s response — including the assertion that Upper Deck had at times performed pre-press work for Konami — is irrelevant.

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C. Upper Deck Commissions the Manufacture of Counterfeit Yu-Gi-Oh! TCG Cards in China

1. Upper Deck Identifies 9-10 Popular and Sought-After Cards and Prepares a Disk With the Images Needed to Print Them

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>16. In or about late 2006, Upper Deck's chairman, Richard McWilliam, asked Upper Deck LLC's Brand Manager, Stephanie Mascott, to provide him a list of approximately 10 popular and sought-after Yu-Gi-Oh! cards.</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo. at 60:15-61:8, 64:10-17, 110:7-17 & 122:8-14 and Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 ("Richard asks for a list of the top 10 most popular YGO cards"); Sepenuk Depo. at 41:24-42:12, attached as Fox Decl. Ex. 56 (Mascott admitted to Sepenuk that McWilliam asked her to produce a disk of Yu-Gi-Oh! TCG card images).</p>	<p>Undisputed (for purposes of this motion).</p>

REPLY: UNDISPUTED.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>17. Mascott directed Leighton Kurashima at Upper Deck LLC to prepare such a list.</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo. at 65:1-16 & 110:7-17, attached as Fox Decl. Ex. 89 (“I asked him if he could put together a list of the — of ten, you know, popular sought-after cards. Basically just what Richard asked me to do, I asked Leighton to — to do because I don’t know the cards.”); <i>see also</i> Mascott Depo. at 122:8-14 & 267:7-268:8 and Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 90-91 (“I ask Leighton for a list of the most popular, sought after cards in YGO.”); Sepenuk Depo. at 46:16-20, attached as Fox Decl. Ex. 56 (Mascott admitted that Kurashima was involved in selecting the card images McWilliam asked her to prepare); <i>see also</i> Kurashima Depo. at 29:24-30:4, attached as Fox Decl. Ex. 62 (pleading the Fifth Amendment as to Mascott’s directing him to create the list).</p>	<p>Undisputed (for purposes of this motion) that Mascott asked Leighton Kurashima at Upper Deck LLC to prepare a list of approximately 10 popular, sought after Yu-Gi-Oh! cards.</p>

REPLY: UNDISPUTED.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>18. On June 4, 2007, Kurashima sent an email entitled “card project” to Upper Deck LLC’s Brand Manager Stephanie Mascott and Upper Deck Nevada’s Vice President of Sales, John Skrajewski, which identifies Rare Cards from Yu-Gi-Oh! TCG, including: (1) Elemental Hero Flame Wingman, (2) Destiny Hero – Dreadmaster, (3) Elemental Hero Aqua Neos, (4) Water Dragon, (5) Elemental Hero Electrum, (6) Elemental Hero Mudballman, (7) The Flute of Summoning Kuriboh, (8) Mist Body, and (9) White Horned Dragon (referred to collectively herein as the “Nine Rare Cards”).</p> <p><u>Supporting Evidence:</u> Kurashima Depo. at 26:16-31:9 & Ex. 140 thereto, attached as Fox Decl. Exs. 62-63 (Kurashima’s email dated June 4, 2007 and his pleading the Fifth Amendment in response to questions about it).</p>	<p>Undisputed (for purposes of this motion).</p>

REPLY: UNDISPUTED.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>19. Leighton Kurashima invoked the Fifth Amendment in deposition, refusing to answer questions about his email dated June 4, 2007 or the Nine Rare Cards; he invoked the Fifth as to every question asked of him.</p> <p><u>Supporting Evidence:</u> Kurashima Depo. at 26:16-31:9 & Ex. 140 thereto, attached as Fox Decl. Exs. 62-63 (pleading the Fifth as to his June 4, 2007 email); <i>see also</i> entire Kurashima Depo., attached as Fox Decl. Ex. 62 (pleading the Fifth as to every question asked).</p>	<p>Objection, irrelevant. FRE §§ 401, 402. Subject to this objection, undisputed (for purposes of this motion).</p>

REPLY: UNDISPUTED.

<p>20. McWilliam also asked Mascott to have a disk prepared containing 10 Yu-Gi-Oh! card images; at McWilliam's direction, Mascott provided that disk to Horst Riechers, Upper Deck's Vice President of Global Operations.</p> <p><u>Supporting Evidence:</u> Mascott Depo. at 60:15-21, 76:13-77:10,</p>	<p>Undisputed (for purposes of this motion) that McWilliam asked Mascott to have a disk prepared containing the Yu-Gi-Oh! card images for the cards in the June 4, 2007 email, and that, at McWilliam's direction, Mascott provided that disk to Horst Riechers, Upper Deck's Vice President of Global Operations.</p>
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<p>122:8-14 & Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 (at row 6, “I give the list to Richard and he asks for a disk with the card files. I ask Leighton to get the disk made. . . . I gave the disk to Richard and he told me to give the disk to Horst”); <i>see also</i> Kurashima Depo. at 37:15-21, attached as Fox Decl. Ex. 62 (pleading the Fifth as to creating the disk); Riechers Depo. at 202:13-207:7, attached as Fox Decl. Ex. 57 (pleading the Fifth when questioned about Kurashima’s June 4, 2007 email).</p>	
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REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>21. Horst Riechers invoked the Fifth Amendment in deposition, refusing to answer any questions related to that disk or the production of Yu-Gi-Oh! TCG cards.</p> <p><u>Supporting Evidence:</u></p> <p>Riechers Depo. at 202:13-207:7, attached as Fox Decl. Ex. 57 (pleading the Fifth when questioned about Kurashima’s June 4, 2007 email); <i>see also id.</i> at 108:25-120:5 (pleading the Fifth when asked</p>	<p>Undisputed (for purposes of this motion), but irrelevant.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>about a request from Upper Deck employees for help in obtaining Yu-Gi-Oh! security foil in “secrecy”); <i>id.</i> at 130:4-14 (pleading the Fifth when asked about sending an Upper Deck employee to China to conduct a Yu-Gi-Oh! printing press check); <i>id.</i> at 98:3-101:20 (pleading the Fifth when asked about a “to do” list containing a note, “Horst working on variant cards in China”); <i>id.</i> at 141:7-153:4 (pleading the Fifth when questioned about McWilliam admonishing him for botching the counterfeiting job).</p>	

REPLY: UNDISPUTED.

2. Upper Deck Contracts With InnerWorkings, Inc. to Have the Cards Made in China

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>22. In or about July 2007, Upper Deck hired InnerWorkings, Inc., to facilitate the printing of approximately 608,000 copies of the Nine Rare Cards by the Beijing Goldhawk Package and Production Co. (“Goldhawk”) in China.</p>	<p>Undisputed (for purposes of this motion), that Upper Deck Nevada commissioned Inner Workings, Inc. to do this work.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p><u>Supporting Evidence:</u> S. Leclair Depo. at 105:16-106:7 & Ex. 204 thereto, attached as Fox Decl. Exs. 67 & 69; accord G. Leclair Depo. at 28:12-29:20, attached as Fox Decl. Ex. 79 (testifying that Upper Deck's Modaffari requested the price quote for producing the 608,000 Yu-Gi-Oh! TCG cards).</p>	

REPLY: UNDISPUTED. The Upper Deck employees who hired InnerWorkings (Modaffari and Zuniga) were employees of Upper Deck LLC. (Fox Decl., Ex. 83 at 471 [Modaffari Depo. at 10:23-11:10; Fox Decl. Ex. 80 at 413 [Zuniga Depo. at 8:14-24].) Upper Deck's chairman, Richard McWilliam, who directed the project, chaired all three Upper Deck entities. (McWilliam Depo. at 197:19-200:14.) The uncontroverted evidence shows that each of the Upper Deck entity defendants was involved in the counterfeiting. (UF 16-17, 26, 31-35, identifying Upper Deck LLC employees who participated directly in the counterfeiting, and other direct involvement of Upper Deck LLC in the counterfeiting activities.)

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>23. Upper Deck assigned various code names to the Yu-Gi-Oh! TCG printing project, including "Wiz Kids" and "Wizards in Training" (also referred to as "WIT").</p> <p><u>Supporting Evidence:</u></p>	<p>Undisputed (for purposes of this motion) that Upper Deck Nevada did so.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>S. Leclair Depo. at 32:11-36:1, attached as Fox Decl. Ex. 67 (Upper Deck called the project “Wizards” and “Wizards in Training”); G. Leclair Depo. at 24:1-25:6, attached as Fox Decl. Ex. 79 (same); <i>id.</i> at Ex. 202 thereto, attached as Fox Decl. Ex. 68 (referring to “the YuGiOh cards,” Leclair states “we are calling this Wizards in Training”).</p>	

REPLY: UNDISPUTED. Please see Konami’s Reply to Undisputed Fact No. 22, which summarizes the evidence that the counterfeiting activities were not carried out solely by Upper Deck Nevada. *See also* UF 16-17, 26, 31-35.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>24. Upper Deck provided InnerWorkings the electronic card files needed to print the Nine Rare Cards, as well as a disk containing Konami’s copyrighted Reverse Art.</p> <p><u>Supporting Evidence:</u></p> <p>S. Leclair Depo. at 45:4-46:11, 50:20-52:15, 86:20-88:14 & Ex. 205 thereto, attached as Fox Decl. Exs. 67 & 70 (email from S. Leclair requesting missing card image files); <i>id.</i> at Ex. 227 thereto, attached as Fox Decl. Ex. 77</p>	<p>Undisputed (for purposes of this motion) that Upper Deck Nevada did so.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
(CD containing image files for Reverse Art).	

REPLY: UNDISPUTED. Please see Konami's Reply to Undisputed Fact No. 22, which summarizes the evidence that the counterfeiting activities were not carried out solely by Upper Deck Nevada. *See also* UF 16-17, 26, 31-35.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
25. InnerWorkings provided the Yu-Gi-Oh! card files and specifications for the printing of the Nine Rare Cards to Goldhawk. <u>Supporting Evidence:</u> S. Leclair Depo. at 45:4-46:11, 76:2-13 & Ex. 224 thereto, attached as Fox Decl. Exs. 67 & 75 (specification sent to Goldhawk).	Undisputed (for purposes of this motion).

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
26. Upper Deck LLC's employee, Nancy Modaffari, provided additional specifications concerning the inks and varnish to be used for the cards, and other directions for the production of the cards in China.	Undisputed (for purposes of this motion).

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p><u>Supporting Evidence:</u> S. Leclair Depo. at 63:14-65:4, 73:1-11 and Exs. 218, 219 & 222 thereto, attached as Fox Decl. Exs. 67, 71-72 & 74.</p>	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>27. Nancy Modaffari invoked the Fifth Amendment in her deposition. <u>Supporting Evidence:</u> Modaffari Depo., attached as Fox Decl. Ex. 83.</p>	<p>Undisputed (for purposes of this motion) that Nancy Modaffari invoked the Fifth Amendment at various point during her deposition. Modaffari also answered substantive questions at her deposition. Modaffari Depo., attached as Fox Decl. Ex. 83.</p>

REPLY: UNDISPUTED. The rest of Upper Deck's response is non-responsive.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>28. InnerWorkings' employees Stephen and Genji Leclair confirmed in deposition that the Yu-Gi-Oh! TCG card printing project was commissioned and paid for by Upper Deck. <u>Supporting Evidence:</u> S. Leclair Depo. at 71:10-16, 82:7-86:7,</p>	<p>Objection, lacks foundation as to which Upper Deck entity commissioned or paid for the card printing project. FRE § 602. Subject to this objection, undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
98:21-102:9 and Exs. 221, 226 & 229 thereto, attached as Fox Decl. Exs. 67, 73, 76 & 78; G. Leclair Depo. at 13:20-23, 41:6-22, attached as Fox Decl. Ex. 79.	

REPLY: UNDISPUTED.

3. Upper Deck Obtains the Holographic Security Foil and Paper for Its "Secret Project" in China

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
29. In a July 16, 2007 email entitled "security foil-HELP," Nancy Modaffari sought help from Horst Riechers and Stacy Zuniga at Upper Deck with obtaining the holographic Yu-Gi-Oh! TCG security foil "to send to China for the secret project." <u>Supporting Evidence:</u> Riechers Depo. at 108:25-120:5 & Ex. 132 thereto, attached as Fox Decl. Exs. 57-58 (attaching the "security foil-HELP" email and Riechers' pleading the Fifth Amendment as to it); Modaffari Depo. at 41:25-44:15 & Ex. 239 thereto, attached as Fox Decl. Exs. 81 & 83 (same); Zuniga Depo. at 54:23-56:1 & Ex. 239	Undisputed (for purposes of this motion).

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
thereto, attached as Fox Decl. Exs. 80-81 (same).	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>30. Modaffari, Zuniga and Riechers refused to testify about the “security foil-HELP!” email dated July 16, 2007, or about Upper Deck’s counterfeiting activities generally, based on the Fifth Amendment.</p> <p><u>Supporting Evidence:</u> Riechers Depo. at 108:25-120:5 & Ex. 132 thereto, attached as Fox Decl. Exs. 57-58 (pleading the Fifth as to the “security foil-HELP” email); Modaffari Depo. at 41:25-44:15 & Ex. 239 thereto, attached as Fox Decl. Exs. 81 & 83 (same); Zuniga Depo. at 54:23-56:1 & Ex. 239 thereto, attached as Fox Decl. Exs. 80-81 (same).</p>	<p>Undisputed (for purposes of this motion)’ that Modaffari and Riechers refused to testify about the “security foil-HELP!” email dated July 16, 2007, or about Upper Deck’s causing the variant cards to be manufactured based on the Fifth Amendment. Also undisputed (for purposes of this motion) that Zuniga refused to testify about the “security foil-HELP!” email dated July 16, 2007, based on the Fifth Amendment.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
31. On July 18, 2007, Upper Deck LLC placed an order with API Foils, Inc. for the purchase of Silver Yu-Gi-	Undisputed (for purposes of this motion).

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>Oh! Security Foil for its “WI Special Project,” to be shipped directly to Goldhawk in China.</p> <p><u>Supporting Evidence:</u></p> <p>Riechers Depo. at 186:21-191:22 & Ex. 139 thereto, attached as Fox Decl. Exs. 57 & 59 (the security foil documents at bates nos. UDC NV 271235-271239 and Riechers’ pleading the Fifth as to these purchase order documents); Zuniga Depo. at 60:10-96:25 & Ex. 240 thereto, attached as Fox Decl. Exs. 80 & 82 (Zuniga generated these documents at Riechers’ direction); <i>see also</i> Zuniga Depo. at 64:20-65:9 (confirming that Upper Deck LLC paid for the security foil).</p>	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>32. The order forms for acquisition of the Yu-Gi-Oh! security foil were signed by Zuniga and Riechers.</p> <p><u>Supporting Evidence:</u></p> <p>Zuniga Depo. at 60:10-61:13 & Ex. 240 thereto, attached as Fox Decl. Exs. 80 & 82 (confirming her signature); <i>see also id.</i></p>	<p>Undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
at 64:20-65:9 (confirming that Upper Deck LLC paid for the security foil); Riechers Depo. at 191:15-22 & Ex. 139 thereto, attached as Fox Decl. Exs. 57 & 59 (pleading the Fifth as to his signature at UDC NV 271236).	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
33. On June 28, 2007, Upper Deck LLC ordered the card paper for its “Special Project” to be delivered directly to Goldhawk. The order and requisition forms for the paper were signed by Zuniga and Riechers at Upper Deck. <u>Supporting Evidence:</u> Zuniga Depo. at 60:10-96:25 & Ex. 240 thereto, attached as Fox Decl. Exs. 80 & 82 (confirming the order of card paper from Nationwide Papers); <i>see also id.</i> at 78:8-10 & 93:19-96:1 (confirming that Upper Deck LLC paid for the paper); Riechers Depo. at 191:24-202:12 & Ex. 139, attached as Fox Decl. Exs. 57 & 59 (pleading the Fifth as to the paper	Undisputed (for purposes of this motion).

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
documents at UDC NV 271240-271254).	

REPLY: UNDISPUTED.

4. Nancy Modaffari of Upper Deck Travels to China to Supervise the Printing of the Counterfeit Cards

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>34. In August 2007, Nancy Modaffari traveled to Goldhawk's factory in Beijing, China to supervise the printing of copies of the Nine Rare Cards.</p> <p><u>Supporting Evidence:</u> S. Leclair Depo. at 52:16-53:15, attached as Fox Decl. Ex. 67 (Leclair and Modaffari conducted the "press check" at Goldhawk); Modaffari Depo. at 49:24-50:6, attached as Fox Decl. Ex. 83 (pleading the Fifth as to her trip to China).</p>	Undisputed (for purposes of this motion).

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>35. Modaffari "gave the okay" that the Nine Rare Cards were printed properly by the Chinese printer.</p> <p><u>Supporting Evidence:</u></p>	Undisputed (for purposes of this motion).

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
S. Leclair Depo. at 54:5-55:12, attached as Fox Decl. Ex. 67.	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>36. Upper Deck's freight forwarder then picked up the Yu-Gi-Oh! cards from Goldhawk's factory in Beijing.</p> <p><u>Supporting Evidence:</u> S. Leclair Depo. at 55:2-12, attached as Fox Decl. Ex. 67; Matsumoto Decl. ¶¶ 4-5 & Ex. A thereto; <i>see also</i> Modaffari Depo. at 50:8-18, attached as Fox Decl. Ex. 83 (pleading the Fifth as to shipment of cards from China).</p>	Undisputed (for purposes of this motion) that Upper Deck Nevada did so.

REPLY: UNDISPUTED.

5. The Counterfeit Cards Are Imported to the United States

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>37. On or about August 23, 2007, Upper Deck caused to be imported 76 boxes of Yu-Gi-Oh! TCG cards from Beijing, China to its facility in North Las Vegas, Nevada.</p> <p><u>Supporting Evidence:</u></p>	Undisputed (for purposes of this motion) that Upper Deck NV caused to be imported 76 boxes of Yu-Gi-Oh! TCG cards from Beijing, China to its facility in North Las Vegas, Nevada.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>Matsumoto Decl. ¶¶ 4-10 & Ex. A thereto (declaration from JAL Cargo shipper re: these shipments); <i>see also</i> Skrajewski Depo. at 125:20-131:10 & Ex. 24 thereto, attached as Fox Decl. Exs. 51 & 53 (pleading the Fifth as to these shipping documents); Riechers Depo. at 211:4-215:9 & Ex. 24 thereto, attached as Fox Decl. Exs. 53 & 57 (same).</p>	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>38. The shipment of the 76 boxes was made through the Liaoning Air Sea World Ltd. and JAL Cargo shipping companies; their shipping records identify Upper Deck as the consignee.</p> <p><u>Supporting Evidence:</u> Matsumoto Decl. ¶¶ 4-10 & Ex. A thereto; <i>see also</i> Skrajewski Depo. at 125:20-131:10 & Ex. 24 thereto, attached as Fox Decl. Exs. 51 & 53 (pleading the Fifth as to these shipping documents); Riechers Depo. at 211:4-215:9 & Ex. 24 thereto, attached as Fox Decl. Exs. 53 & 57 (same).</p>	<p>Undisputed (for purposes of this motion) that the shipment of the 76 boxes was made through the Liaoning Air Sea World Ltd. and JAL Cargo shipping companies; their shipping records identify Upper Deck NV as the consignee.</p>

1 **REPLY: UNDISPUTED.**

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>39. On August 27, 2007, the 76 boxes were received by Upper Deck at its Nevada facility.</p> <p><u>Supporting Evidence:</u></p> <p>Matsumoto Decl. ¶¶ 4-10 & Ex. A thereto; <i>see also</i> Skrajewski Depo. at 125:20-131:10 & Ex. 24 thereto, attached as Fox Decl. Exs. 51 & 53 (pleading the Fifth as to these shipping documents); Riechers Depo. at 211:4-215:9 & Ex. 24 thereto, attached as Fox Decl. Exs. 53 & 57 (same).</p>	<p>Undisputed (for purposes of this motion) that Proof of Delivery by Synergy Core Logistics dated August 27, 2007 reflects that 76 boxes were received by Upper Deck NV.</p>

15 **REPLY: UNDISPUTED.**

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17 **D. Upper Deck Provided The Counterfeit Cards to its Sub-Distributors**

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>40. On or about October 3, 2007, Upper Deck's sub-distributor, Vintage Sports Cards ("Vintage"), received into inventory copies of the Rare Cards, including (1) 60,000 Elemental Hero Flame Wingman cards; (2) 50,000 Destiny Hero – Dreadmaster cards; (3) 60,000 Elemental Hero Aqua</p>	<p>Undisputed (for purposes of this motion) that on or about October 3, 2007, Upper Deck's sub-distributor, Vintage Sports Cards ("Vintage"), received from Upper Deck NV copies of the following cards at no charge for the purpose of promoting the sale of existing Yu-Gi-Oh! TCG cards: (1) 60,000 Elemental Hero</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>Neos cards; (4) 50,000 Water Dragon cards; (5) 60,000 Elemental Hero Electrum cards; (6) 50,000 Elemental Hero Mudballman cards; (7) 50,000 Flute of Summoning Kuriboh cards; (8) 55,000 Mist Body cards; and (9) 60,000 White Horned Dragon cards.</p> <p><u>Supporting Evidence:</u> Lawrence Decl. [Dkt. 92] ¶¶ 1-5; Dean Depo. at 41:14-43:10 & Ex. 2 thereto, attached as Fox Decl. Exs. 44-45; Skrajewski Depo. at 73:3-80:10 (pleading the Fifth) & Ex. 2 thereto, attached as Fox Decl. Exs. 45 & 51; Modaffari Depo at 63:16-71:6 & Ex. 274 thereto, attached as Fox Decl. Exs. 83-84 (pleading the Fifth as to bill of lading and packing list for “misc. trading cards” to Rick Dean at Vintage in September 2007).</p>	<p>Flame Wingman cards; (2) 50,000 Destiny Hero - Dreadmaster cards; (3) 60,000 Elemental Hero Aqua Neos cards; (4) 50,000 Water Dragon cards; (5) 60,000 Elemental Hero Electrum cards; (6) 50,000 Elemental Hero Mudballman cards; (7) 50,000 Flute of Summoning Kuriboh cards; (8) 55,000 Mist Body cards; and (9) 60,000 White Horned Dragon cards.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>41. The quantities of certain of these Rare Cards vastly exceeded the total</p>	<p>Undisputed (for purposes of this motion) that the quantities of the</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>number of authentic Rare Cards authorized for printing by Konami.</p> <p><u>Supporting Evidence:</u> Hoashi Decl. ¶ 16; Goldstab Decl. [Dkt. 119] ¶ 16.</p>	<p>Elemental Hero Flame Wingman cards and Elemental Hero Aqua Neos cards delivered to Vintage may have exceeded the number of Elemental Hero Flame Wingman cards and Elemental Hero Aqua Neos cards authorized for printing by Konami. Hoashi Decl. ¶ 16; Goldstab Decl. [Dkt. 119] ¶ 16.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>42. The 495,000 Rare Cards were provided by Upper Deck to Vintage at “no cost” to assist Vintage in selling inventory that otherwise may have been returned to Upper Deck.</p> <p><u>Supporting Evidence:</u> Dean Depo. at 34:1-15, attached as Fox Decl. Ex. 44; Skrajewski Depo. at 73:3-80:10 (pleading the Fifth) & Ex. 2 thereto, attached as Fox Decl. Exs. 45 & 51.</p>	<p>Undisputed (for purposes of this motion) that the 495,000 Cards were provided by Upper Deck to Vintage at “no cost” to assist Vintage in selling inventory.</p>

REPLY: UNDISPUTED.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>43. Upper Deck's Vice President, John Skrajewski, arranged for the Nine Rare Cards to be provided to Vintage; he too invoked the Fifth Amendment in deposition.</p> <p><u>Supporting Evidence:</u> Dean Depo. at 30:8-11, attached as Fox Decl. Ex. 44; Skrajewski Depo. at 73:3-80:10 (pleading the Fifth) & Ex. 2 thereto, attached as Fox Decl. Exs. 45 & 51.</p>	<p>Objection, irrelevant that John Skrajewski invoked the Fifth Amendment in deposition. FRE §§ 401, 402. Subject to this objection, undisputed (for purposes of this motion) that Skrajewski arranged for the single cards to be provided to Vintage.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>44. Vintage's Operations Manager, Chris Lawrence, received the cards in inventory and confirmed they were received from Upper Deck in boxes labeled "Made in China" and "UD Card Test."</p> <p><u>Supporting Evidence:</u> Lawrence Decl. [Dkt. 92] ¶¶ 3, 9 & Ex. F thereto; <i>see also</i> S. Leclair Depo at 76:1-77:19 and Ex. 224 thereto at bates no. IW0069, attached as Fox Decl. Exs. 67 & 75 (confirming that the cartons shipped from Goldhawk were to contain the marks</p>	<p>Undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
"UD Card Test" and "Made in China").	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>45. In May 2008, Vintage received a second shipment of 36,240 of the Nine Rare Cards. Vintage's Chris Lawrence received these cards into inventory and confirmed that they were provided by Upper Deck.</p> <p><u>Supporting Evidence:</u></p> <p>Lawrence Decl. [Dkt. 92] ¶¶ 6-8; <i>see also</i> Skrajewski Depo. at 82:9-85:15 and Exs. 2 & 3 thereto, attached as Fox Decl. Exs. 45 & 51-52 (pleading the Fifth as to the May 2008 shipment); Modaffari Depo. at 86:11-90:5 & 93:22-99:3, and Exs. 280 & 283 thereto, attached as Fox Decl. Exs. 83 & 87-88 (pleading the Fifth as to documents evidencing the provision of "Special Project Cards" and "non-inventory cards" to Vintage in May 2008).</p>	<p>Objection, lacks foundation that Lawrence confirmed that the cards were provided by Upper Deck. FRE § 602. Subject to this objection, undisputed (for purposes of this motion).</p>

REPLY: UNDISPUTED.

E. The Counterfeit Cards Are Sold in Toys R Us Stores and Other Retail Locations

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>46. In or about late 2007, Vintage re-packaged the counterfeit Rare Cards it obtained from Upper Deck and sold them to Toys R Us stores and other retailers.</p> <p><u>Supporting Evidence:</u> Dean Depo. at 32:1-13, 63:22-64:3, 112:919-113:1 and Ex. 9 thereto, attached as Fox Decl. Exs. 44 & 47; Coviello Decl. ¶ 8 [Dkt. 107]; Hoashi Decl. ¶¶ 9-10 & Ex. 31 thereto.</p>	<p>Objection, lacks foundation as to when Vintage repackaged the cards. FRE § 602. See NL, Ex. F [Coviello Decl.] ¶ 8, at p. 4. Subject to that objection, disputed in part and undisputed (for purposes of this motion) in part. Disputed that Vintage re-packaged all of the unauthorized cards it obtained from Upper Deck NV and sold them to Toys R Us stores and other retailers. Undisputed (for purposes of this motion) that Vintage re-packaged some of the unauthorized cards it obtained from Upper Deck NV and sold them to Toys R Us stores and other retailers, some of which were “picked up for return by Vintage” or returned by Vintage to Konami’s counsel. NL, Ex. F [Coviello Decl.] ¶¶ 4-8, at pp. 5-6.</p>

REPLY: It is **UNDISPUTED** that Vintage re-packaged the counterfeit Rare Cards and sold them to Toys R Us stores and other retailers (except for the cards that were recovered by Konami after the Court authorized expedited discovery). The rest of Upper Deck’s response is non-responsive.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>47. Upper Deck's employee, Leighton Kurashima, purchased the counterfeit cards at a Toys R Us store and showed them to co-workers, but did not disclose that information to Konami.</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo at 122:15-128:3, attached as Fox Decl. Ex. 89 (Kurashima showed Mascott the counterfeit Vintage repack he purchased at a Toys R Us store); <i>see also</i> Kurashima Depo. at 73:4-75:10, attached as Fox Decl. Ex. 62 (pleading the Fifth when asked about his purchase of the Vintage repack); Kurashima Depo. at 78:10-84:25 & Ex. 152 thereto, attached as Fox Decl. Exs. 62 & 65 (Upper Deck employees also received customer complaints about the counterfeit cards and failed to disclose these complaints to Konami); <i>accord</i> Sepenuk Depo. at 88:9-18 & 91:17-92:15, attached as Fox Decl. Ex. 56 (Sepenuk purchased one of the counterfeit Vintage repacks himself and did not inform Konami).</p>	<p>Upper Deck objects to Konami's use of the term "counterfeiting" as pejorative and inflammatory, and calling for a legal conclusion.</p> <p>Subject to that objection, undisputed (for purposes of this motion).</p>

1 **REPLY: UNDISPUTED.** The term “counterfeit” is the term used in the
2 Lanham Act. 15 U.S.C. § 1127.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>3</p> <p>4</p> <p>5 48. Stephanie Mascott later admitted to</p> <p>6 Upper Deck’s Vice President, John</p> <p>7 Sepenuk, that she “came to the</p> <p>8 realization” that the Yu-Gi-Oh!</p> <p>9 images that McWilliam had asked</p> <p>10 her to produce were appearing as</p> <p>11 Yu-Gi-Oh! cards in Toys R Us</p> <p>12 stores.</p> <p>13 <u>Supporting Evidence:</u></p> <p>14 Sepenuk Depo. at 45:5-47:20, attached as</p> <p>15 Fox Decl. Ex. 56 (Mascott came to this</p> <p>16 realization through conversations with</p> <p>17 Kurashima after the GAMA Trade Show);</p> <p>18 <i>see also</i> Mascott Depo. Ex. 457, attached</p> <p>19 as Fox Decl. Ex. 91 (Mascott’s “Timeline”</p> <p>20 at row 15, stating “leighton told me that</p> <p>21 the three cards in the product were on the</p> <p>22 list/disk that was prepared in 2006. The</p> <p>23 cards did not look real and we both could</p> <p>24 not believe what we were seeing.”); <i>accord</i></p> <p>25 Mascott Depo. at 259:10-260:11, attached</p> <p>26 as Fox Decl. Ex. 89 (“When Leighton</p> <p>27 showed the cards to me and told me that</p> <p>28</p>	<p>Objection, hearsay as to the</p> <p>Mascott “Timeline.” FRE 801, 802.</p> <p>The exhibit contains hearsay for</p> <p>which there is no applicable</p> <p>exception. FRE 803. Also, lacks</p> <p>foundation/personal knowledge.</p> <p>FRE 602. Mascott is drawing an</p> <p>inference to connect two events as</p> <p>to how she “came to the</p> <p>realization,” which is the role of the</p> <p>trier of fact. Subject to that</p> <p>objection, undisputed (for purposes</p> <p>of this motion) that Stephanie</p> <p>Mascott later told Upper Deck’s</p> <p>Vice President John Sepenuk, in</p> <p>substance, that she drew an</p> <p>inference that the Yu-Gi-Oh!</p> <p>images for the cards from the list</p> <p>and disk from 2006 were the cards</p> <p>appearing as Yu-Gi-Oh! cards in</p> <p>Toys R Us stores. That statement,</p> <p>however, is hearsay.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>those cards were from the disk, and they didn't look right, it caused me concern. . . . One of the concerns was could these be counterfeit cards or printed improperly or, you know, I don't know what — what it was.”).</p>	

REPLY: UNDISPUTED. The timeline and Mascott's statements to Sepenuk (about which Sepenuk testified) are admissions, not inadmissible hearsay. Moreover, the facts stated in Mascott's timeline were confirmed in her deposition and by Upper Deck's chairman, McWilliam, whose deposition was taken pursuant to Court order on December 1, 2009. (McWilliam Depo. [Dkt 348-2] at 27:11-18 (admitting that approximately 600,000 cards were printed in China); 24:15-19 (cards printed without Konami's authorization); 31:19-33:5 (unauthorized cards that did not look authentic were being sold in Toys R Us stores).

F. Konami Discovers the Counterfeit Cards, Files Suit Against Vintage, and Seeks Information From Upper Deck

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>49. In August 2008, Konami became aware of the counterfeit Rare Cards being offered for sale in Toys R Us stores in Los Angeles. <u>Supporting Evidence:</u> Hoashi Decl. ¶¶ 9-13.</p>	<p>Objection, lacks foundation as to when Konami first became aware of the cards in question. FRE 602. Upper Deck further objects to Konami's use of the term "counterfeiting" as pejorative and inflammatory, and calling for a legal conclusion. Subject to those</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
	objections, undisputed (for purposes of this motion).

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>50. In October 2008, Konami filed suit against Vintage, which was identified on the packaging of the counterfeit Rare Cards, and obtained a TRO and the right to conduct expedited discovery to identify the source of the goods.</p> <p><u>Supporting Evidence:</u> Complaint [Dkt. 1]; Order Granting Leave to Conduct Expedited Discovery [Dkt. 11]; TRO [Dkt. 12]; Hoashi Decl. ¶ 9.</p>	<p>Undisputed (for purposes of this motion) that Konami filed suit against Vintage in October 2008, that Konami obtained a TRO and that Konami obtained an order concerning conducting expedited discovery. Disputed to the extent Konami overstates the scope of the order concerning expedited discovery.</p>

REPLY: UNDISPUTED. The scope of the Court's order permitting expedited discovery, Dkt. 11 – which applied to all Defendants, including Does 1-10 – is irrelevant.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>51. Vintage's discovery responses indicated that the counterfeit cards came from Upper Deck.</p> <p><u>Supporting Evidence:</u> Fox Decl. ¶¶ 44-45, 52-54 & Exs. 94-96</p>	<p>Undisputed (for purposes of this motion).</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
thereto.	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>52. On October 24, 2008, Konami's private investigator seized from Vintage's warehouse 20 shipping boxes containing copies of the Nine Rare Cards that had not yet been sold by Vintage.</p> <p><u>Supporting Evidence:</u> Freece Decl. ¶¶ 3-6 [Dkt. 88]; Hoashi Decl. ¶¶ 14-15.</p>	<p>Disputed in part and undisputed (for purposes of this motion) in part. Disputed that Konami's private investigator "seized" the cards. Undisputed (for purposes of this motion) that on or about October 24, 2008, Vintage made the referenced cards available to Konami's counsel and private investigator for inspection, and for Konami to take custody of those cards. NL, Ex. F [Coviello Decl.] ¶¶ 4-8, at pp. 5-6.</p>

REPLY: No material factual dispute. Upper Deck does not dispute that the fake Rare Cards that had not yet been sold by Vintage to retail stores were recovered by Konami during an inspection of Vintage's warehouse. The remainder of Upper Deck's response is irrelevant.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
53. The copies of the Nine Rare Cards seized by Konami's private	Disputed in part and undisputed (for purposes of this motion) in

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>investigator bear Konami's Marks and are distinguishable on their face from authentic Rare Cards, based on discrepancies in the security foils, font types, the feel of the paper and gloss used on the cards, and other distinguishing characteristics.</p> <p><u>Supporting Evidence:</u> Hoashi Decl. ¶ 14-16.</p>	<p>part. Disputed that Konami's private investigator "seized" the cards. Undisputed (for purposes of this motion) that on or about October 24, 2008, Vintage made the referenced cards available to Konami's counsel and private investigator for inspection, and for Konami to take custody of those cards. NL, Ex. F [Coviello Decl.] ¶¶ 4-8, at pp. 5-6.</p>

REPLY: UNDISPUTED that the fake Rare Cards are distinguishable on their face from genuine Rare Cards, and that Konami recovered them from Vintage pursuant to the Court's order granting expedited discovery. The remainder of Upper Deck's response is irrelevant.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>54. On October 30, 2008, Konami requested information from Upper Deck about the counterfeit Rare Cards being distributed by Vintage.</p> <p><u>Supporting Evidence:</u> Fox Decl. ¶¶ 55-56 & Exs. 97-98 thereto.</p>	<p>Undisputed (for purposes of this motion) that the October 30, 2008 correspondence from Konami's counsel to Upper Deck's counsel is genuine.</p>

REPLY: UNDISPUTED.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>55. Upper Deck refused to respond substantively to Konami's requests for information.</p> <p><u>Supporting Evidence:</u> Fox Decl. ¶¶ 55-59 & Exs. 97-101 thereto.</p>	<p>Disputed. Upper Deck provided a prompt, substantive response and proposed that "the parties should meet and we should meet as soon as possible" - a proposal Konami rejected. Fox decl., Ex. 98, pp. 574, 580; NL, Ex. K [Howell Decl.] ¶¶ 8-16, at pp 168-172.</p>

REPLY: UNDISPUTED. Upper Deck's cited evidence does not contain any substantive response to Konami's requests for information, and Upper Deck does not assert or demonstrate that it provided any such information.

G. Upper Deck Attempted to Conceal Its Role in the Counterfeiting Activities

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>56. On September 18, 2007, Skrajewski emailed Upper Deck's Chairman, Richard McWilliam, seeking approval for a deal to provide cards to Vintage "at no charge." McWilliam wrote back immediately, "I cannot believe you sent me this email."</p> <p><u>Supporting Evidence:</u> Riechers Depo. Ex. 141 thereto, attached as Fox Decl. Ex. 60; <i>see also</i> Skrajewski Stip. [Dkt. 265], attached as Fox Decl.</p>	<p>Undisputed (for purposes of this motion) that the email attached as Ex. 141 to the deposition of Riechers is authentic, and that the dates and the times stated therein are likely correct.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>Ex. 55 (asserting that he would continue to plead the Fifth if questioned about additional documents produced in discovery); Riechers Depo. at 215:10-221:4, attached as Fox Decl. Ex. 57 (Riechers pleads the Fifth as to the “I cannot believe you sent me this email” email).</p>	

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>57. Several months later, Mascott attended a meeting in Richard McWilliam’s office, where she and McWilliam discussed that the cards at issue “didn’t look authentic enough,” due to discrepancies in “the security foil hologram” and problems with “the finish, the varnish, the UV coating.”</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo. at 303:22-320:18, attached as Fox Decl. Ex. 89 (Mascott recounts the meeting in McWilliam’s office); <i>id.</i> at Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 90-91 (Mascott’s “Timeline” of</p>	<p>Objection, hearsay as to the Mascott “Timeline.” FRE 801, 802. The exhibit contains hearsay for which there is no applicable exception. FRE 803. Subject to those objections, undisputed (for purposes of this motion) that Mascott attended a meeting in Richard McWilliam’s office, where she showed McWilliam the discrepancies in “the security foil hologram” between the Yu-Gi-Oh! cards purchased from Toys R Us stores and authorized Yu-Gi-Oh! cards.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>events, describing the meeting in McWilliam's office at row 16); Sepenuk Depo. at 127:23-128:21, attached as Fox Decl. Ex. 56 (Mascott made the same admissions to Sepenuk).</p>	

REPLY: UNDISPUTED. The timeline is not hearsay because it is an admission. It also is consistent with the cited deposition testimony of Stephanie Mascott.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>58. At a meeting in McWilliam's office in April 2008, Mascott's notes reflect and her testimony confirmed, "Richard [<i>McWilliam</i>] . . . proceeded to yell profanities at Horst [<i>Riechers</i>] blaming him for how the cards looked. Horst said he would have to talk to Nancy [<i>Modaffari</i>]. Richard then yelled at him for sending the cards through Cheyanne [<i>Upper Deck's Nevada facility</i>]. Horst replied and said the cards were shipped from Goldhawk to the customer, not through Cheyanne. I [later] pieced the information together and realized that these cards were printed in</p>	<p>Objection, hearsay as to the Mascott "Timeline." FRE 801, 802. The exhibit contains hearsay for which there is no applicable exception. FRE 803. Also, lacks foundation/personal knowledge. FRE 602. Mascott is drawing an inference to connect two events as to how she "pieced the information together," which is the role of the trier of fact.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>China.</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo. at 303:22-320:18 & 328:13-329:15 and Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 (Mascott's "Timeline" of events at row 16).</p>	

REPLY: UNDISPUTED. The timeline is not hearsay because it is an admission. Moreover, Ms. Mascott confirmed the timeline in her testimony, as did Mr. McWilliam. (McWilliam Depo. [Dkt. 348-2] at 29:23-30:25 [Riechers did a bad job printing the cards in China]; 68:9-11, 68:20-69:2 [McWilliam criticized Riechers for bad job and for sending the cards through Cheyenne].)

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>59. During the April 2008 meeting (with McWilliam, Riechers, and in-house counsel, Sullins), McWilliam placed a phone call and instructed the person on the phone "remember, you do not know where you got the cards from, okay?"</p> <p><u>Supporting Evidence:</u></p> <p>Mascott Depo. at 303:22-320:18 & 328:13-329:15 and Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 (Mascott's "Timeline" of events at row</p>	<p>Objection, hearsay as to the Mascott "Timeline." FRE 801, 802. The exhibit contains hearsay for which there is no applicable exception. FRE 803. Subject to those objections, undisputed (for purposes of this motion) that Ms. Mascott testified that during the April 2008 meeting, McWilliam placed the said phone call.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
16).	

REPLY: UNDISPUTED. The timeline is not hearsay because it is an admission. Upper Deck does not dispute the substantive point in its response above.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>60. Mascott's recounting of the meeting to John Sepenuk confirmed that, at that meeting, "Richard basically was admonishing Horst [Riechers] for incorrectly reproducing these cards, which then subsequently led him to tell Horst that he was off the job, that particular job, and that Stephanie was now in charge of handling this direct with Chris Toepker [a Hong Kong-based employee], and that there was some kind of a statement made, I guess, to Rick Dean [of Vintage] on the phone that in no way, shape, or form did these cards come from Upper Deck."</p> <p><u>Supporting Evidence:</u> Sepenuk Depo. at 129:3-130:5, attached as Fox Decl. Ex. 56; <i>accord</i> Mascott Depo. at</p>	<p>Objection, irrelevant. FRE §§ 401, 402; Sepenuk's deposition testimony regarding "Mascott's recounting of the meeting" with McWilliam to Sepenuk is hearsay not subject to any exception to the hearsay rule. FRE § 601; at her deposition, Ms. Mascott testified that she did not recall McWilliam telling Riechers that she is off the job.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>303:22-320:18 & 328:13-329:15 and Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 (Mascott’s “Timeline” stating that McWilliam “proceeded to yell profanities at Horst blaming him for how the cards looked,” and “called a man, I believe it was Vintage and said in cryptic language ‘remember that you do not know where you got the cards from, okay?’”).</p>	

REPLY: UNDISPUTED. Ms. Mascott’s recounting of the facts and Mr. Sepenuk’s testimony are not hearsay because they are admissions.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>61. McWilliam then shredded the counterfeit cards in his office. <u>Supporting Evidence:</u> Mascott Depo. at 319:13-320:18 & Exs. 456 & 457 thereto, attached as Fox Decl. Exs. 89-91 (“Richard shredded the cards in his office”).</p>	<p>Undisputed (for purposes of this motion) that Mascott testified that McWilliam shredded all cards - authorized and allegedly “counterfeit.”</p>

REPLY: UNDISPUTED. Mr. McWilliam confirmed during his deposition that he shredded the both the genuine and the counterfeit cards during his deposition. (McWilliam Depo. [Dkt. 348-2] at 34:17-22.)

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>62. Vintage’s president, Rick Dean, testified that McWilliam told him,</p>	<p>Objection, as Upper Deck was not given notice of the deposition of</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>after Konami became aware of Vintage’s distribution of the Rare Cards in August 2009, that Dean should take the position that he does “not know the source in a lot of instances [of] . . . the product we purchase on the secondary market.” Dean rejected that suggestion as factually inaccurate.</p> <p><u>Supporting Evidence:</u> Dean Depo. at 73:12-75:2, 87:15-88:25 & Ex. 7 thereto, attached as Fox Decl. Exs. 44 & 46.</p>	<p>Dean, this deposition testimony is not admissible against Upper Deck. FRCP Rule 30(b)(1) [The party desiring to take a deposition must give reasonable written notice to every other party to the action.] Moore’s Federal Practice, ¶ 32.04 (3d ed. 2004) [the requirement of notice rules out use of a witness’s deposition against a person who was not a party at the time the deposition was taken, because the party who later joined the action would not have had opportunity to cross-examine the witness.]</p>

REPLY: UNDISPUTED. The Dean testimony is admissible as an affidavit under Fed. R. Civ. P. 56(e). *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 967 (9th Cir. 1981) (depositions taken prior to joinder of a party considered affidavits for purposes of a summary judgment motion). Moreover, Upper Deck cannot both claim that the Dean testimony is inadmissible and seek to use that testimony, as it does below. (*See, e.g.*, UD’s Response to UMF 128 below.)

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>63. In January 2009, Upper Deck issued a press release declaring that any suggestion that Upper Deck was</p>	<p>Undisputed (for purposes of this motion) that Upper Deck’s press release attached as Exhibit 43 to</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
involved in counterfeiting is “absurd.” <u>Supporting Evidence:</u> Hoashi Decl. Ex. 43 thereto (Upper Deck press release).	Hoashi Declaration is authentic.

REPLY: UNDISPUTED.

**H. Konami Provides Notice to Upper Deck That the
Distribution Agreement Has Terminated**

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
64. On December 11, 2008, Konami provided notice that the LOI had terminated as a result of Upper Deck's involvement in the distribution of counterfeit Yu-Gi- Oh! TCG cards. Konami demanded that Upper Deck cease immediately the use of Konami's intellectual property, stop holding itself out as the authorized distributor of Yu-Gi-Oh! TCG, and return to Konami the computer disks, files and other materials used to create works bearing Konami's Marks.	Undisputed (for purposes of this motion) that Konami's termination letter attached as Exhibit 101 to Fox declaration is authentic.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p><u>Supporting Evidence:</u> Fox Decl. ¶ 60 & Ex. 101 thereto.</p>	

REPLY: UNDISPUTED.

I. Despite Notice of the Termination, Upper Deck Continues to Misuse Konami’s Intellectual Property

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>65. Notwithstanding the termination of the LOI and notice by Konami that Upper Deck was not authorized to use its intellectual property, Upper Deck continued to display prominently on its website Konami’s federally registered Marks and the copyrighted works from Yu-Gi-Oh! TCG.</p> <p><u>Supporting Evidence:</u> Hoashi Decl. ¶ 21 & Ex. 37 thereto; Fox Decl. ¶ 61 & Ex. 103 thereto.</p>	<p>Undisputed (for purposes of this motion) that Exhibit 37 to Hoashi declaration and Exhibit 61 to Fox declaration are authentic. The characterization that Upper Deck displayed Konami’s marks “prominently” is disputed.</p>

REPLY: UNDISPUTED. Upper Deck offers no contrary evidence and the authenticity of the print-outs from Upper Deck’s website – which show Konami’s trademark being used more than 100 times – are not contested.

J. Despite Notice of the Termination, Upper Deck Continues to Hold Itself Out as Konami’s Authorized Distributor

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>66. Following notice of the LOI’s termination, Upper Deck issued a series of press releases claiming that it remained the authorized distributor of Yu-Gi-Oh! TCG and that it was “maintain[ing] business as usual . . . fulfilling orders and shipping [Yu-Gi-Oh! TCG] product.”</p> <p><u>Supporting Evidence:</u> Hoashi Decl. Exs. 36, 38, 39 & 41 thereto; Skrajewski Depo. at 42:15-44:21 & Ex. 72 thereto, attached as Fox Decl. Exs. 51 & 54 (Skrajewski invokes the Fifth as to the Dec. 24, 2008 email he sent to Upper Deck retailers, stating that “Upper Deck remains ready and willing to continue to supply Yu-Gi-Oh! to all of our loyal customers. In addition, we will continue with all planned events and advertising commitments.”); Hansen Decl. [Dkt. 93] ¶ 3 & Ex. A thereto (email from Skrajewski sent to his “Valued Partners”).</p>	<p>Objection, irrelevant as to the press releases and emails stating in substance that Upper Deck would continue to sell its inventory of Yu-Gi-Oh! cards. FRE §§ 401,402.</p> <p>Stating it was selling, and selling, genuine cards is lawful under the first sale doctrine.</p> <p>Subject to this objection, undisputed (for purposes of this motion) that Exhibits 36, 38, 39 & 41 to Hoashi declaration are authentic copies of press releases by Upper Deck; undisputed (for purposes of this motion) that Exhibit 54 to Skrajewski declaration and Exhibit A to Hansen declaration are authentic copies of emails by Upper Deck.</p>

1 **REPLY: UNDISPUTED.** Konami’s briefs explain why Upper Deck’s offers to
2 sell and sale of Konami’s product after notice of the LOI’s termination constituted
3 infringement and unfair competition.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>7 67. Upper Deck also represented to the 8 public that Konami remained 9 contractually obligated to provide 10 Yu-Gi-Oh! TCG cards to 11 Upper Deck.</p> <p>12 <u>Supporting Evidence:</u> 13 Hoashi Decl. Ex. 36 thereto (Jan. 13, 2009 14 press release stating, “Despite contractual 15 obligations, Konami Digital Entertainment 16 failed to send the Yu-Gi-Oh! TCG 17 Champion Packs to Upper Deck for 18 distribution to hobby stores”); <i>id.</i> Ex. 41 19 thereto (Jan. 16 press release stating, 20 “Konami Digital Entertainment has failed 21 to deliver <i>Crimson Crisis</i> to Upper Deck, 22 despite contractual obligations”); Chai 23 Decl. [Dkt. 85] ¶¶ 3-4 & Ex. A thereto 24 (consumers believed Konami was 25 wrongfully withholding Yu-Gi-Oh! TCG 26 product from Upper Deck).</p>	<p>Undisputed (for purposes of this motion) that Exhibit 36 and Exhibit 41 to Hoashi declaration are authentic copies of press releases by Upper Deck, which accurately stated that Konami had contractual obligations to deliver the cards at issue, as these cards had already been ordered and the payment had been accepted by Konami - only to be returned subsequent to the date of the press releases.</p>

27 **REPLY: UNDISPUTED.**
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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>68. In addition, Upper Deck continued to assert that Yu-Gi-Oh! TCG was an “Upper Deck Brand.”</p> <p><u>Supporting Evidence:</u> Hoashi Decl. Ex. 42 thereto (Jan. 14, 2009 press release identifying Yu-Gi-Oh! TCG as the first on a list of “Upper Deck Brand[s]”).</p>	<p>Undisputed (for purposes of this motion) that Exhibit 42 to Hoashi declaration is an authentic Upper Deck press release, which accurately provided that Upper Deck continued to sell Yu-Gi-Oh! TCG! cards, as Upper Deck still had millions of these cards in its inventory which it previously purchased from Konami.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK’S RESPONSE</u>
<p>69. It did so, <i>inter alia</i>, through a series of “Upper Deck Day” events that marketed Yu-Gi-Oh! TCG alongside brands that compete directly with Konami’s card game.</p> <p><u>Supporting Evidence:</u> Hoashi Decl. Ex. 42 thereto (press release announcing “Upper Deck Day” featuring Yu-Gi-Oh! TCG, and competing Huntik TCG, and World of Warcraft TCG games).</p>	<p>Undisputed (for purposes of this motion) that Exhibit 42 to Hoashi declaration is an authentic Upper Deck press release, which accurately provided that Upper Deck continued to sell Yu-Gi-Oh! TCG! cards, as Upper Deck still had millions of these cards in its inventory which it previously purchased from Konami.</p> <p>Objection, the fact that Upper Deck marketed Yu-Gi-Oh! TCG</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
	alongside competing brands is irrelevant, as the LOI was terminated and Upper Deck was free to market competing brands. FRE §§ 401, 402.

REPLY: UNDISPUTED.

K. The Court Issues a Preliminary Injunction Against Upper Deck

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
70. On February 26, 2009, the Court issued a preliminary injunction prohibiting Upper Deck from (a) continuing to use Konami's Marks and copyrighted works in Yu-Gi-Oh! TCG; (b) holding itself out as an authorized distributor or "rights holder" to Yu-Gi-Oh! TCG; and (c) liquidating unsold inventory obtained from Konami during the term of the LOI. <u>Supporting Evidence:</u> Order Granting Preliminary Injunction [Dkt. 140]; Ruling on Plaintiffs' Renewed Motion for a Preliminary	Undisputed (for purposes of this motion) that the attached Order Granting Preliminary Injunction and Plaintiff's Renewed Motion for a Preliminary Injunction are authentic. The Order Granting Preliminary Injunction has been appealed (Appellate No. 09-5548.) The appeal has been fully briefed and argued on November 2. The parties are awaiting disposition by the Ninth Circuit.

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
Injunction [Dkt. 141].	

REPLY: UNDISPUTED.

L. Even After Issuance of the Preliminary Injunction, Upper Deck Continues to Compete Unfairly With Konami

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>71. Even after the issuance of the preliminary injunction, Upper Deck has continued to compete unfairly with Konami: It failed to remove Konami's Marks from its website, and then created a website link that re-directed Internet users who visited <entertainment.upperdeck.com/yugioh> to a website for Upper Deck's Huntik trading card game, which competes with Yu-Gi-Oh! TCG.</p> <p><u>Supporting Evidence:</u> Bonar Depo. at 57:17-61:9 and Ex. 58 thereto, attached as Fox Decl. Exs. 48 & 50; <i>see also</i> Fox Decl. ¶ 62 & Ex. 104 thereto (March 4, 2009 letter to Upper Deck's counsel attaching printouts of post-injunction displays of Konami's</p>	<p>Undisputed (for purposes of this motion) that Konami briefly had a website link that re-directed Internet users who visited <entertainment.upperdeck.com/yugioh> to a website for Upper Deck's Huntik trading card game. The redirect was promptly removed by Mr. Bonar upon his conversation with Upper Deck's general counsel George Rikos. (Bonar depo., pp. 62-64.) Disputed that Konami has continued to compete unfairly with Konami.</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
Marks on Upper Deck's website).	

REPLY: UNDISPUTED. The remainder of Upper Deck's response is non-responsive.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>72. In August 2009, Upper Deck maintained an Internet URL address, "www.yugiohsneak.com," which directed Internet users to Upper Deck's website promotions for competing trading card games "Huntik," "World of Warcraft" and other non-Konami card games.</p> <p><u>Supporting Evidence:</u> Fox Decl. ¶ 63 & Ex. 105 thereto.</p>	<p>Undisputed (for purposes of this motion) that in August 2009, Internet URL. address, "www.yugiohsneak.com," contained links to Upper Deck's promotions for competing trading card games "Huntik," "World of Warcraft" and other non-Konami card games.</p>

REPLY: UNDISPUTED.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
<p>73. To date, Upper Deck continues to maintain on its website a press release stating: "To think that Upper Deck would be involved in YGO counterfeit activity is . . . not only absurd, it simply does not make sense."</p> <p><u>Supporting Evidence:</u></p>	<p>Undisputed (for purposes of this motion) that in January, 2009, Upper Deck issued a press release: stating "To think that Upper Deck would be involved in YGO counterfeit activity is ... not only absurd, it simply does not make sense."</p>

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>UPPER DECK'S RESPONSE</u>
Fox Decl. ¶ 65 & Ex. 107 thereto.	

REPLY: UNDISPUTED. Upper Deck offers no evidence to dispute that the press release continues to appear on its website to date.

UPPER DECK'S PURPORTED ADDITIONAL MATERIAL FACTS

<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>127. Upper Deck NV and Konami began their relationship in October 2001 when they entered into a “Deal Memo” which set forth the terms for Upper Deck NV to be Konami’s exclusive authorized distributor of the Yu-Gi-Oh! trading card game in North America (United States and Canada)</p>	<p>DISPUTED in part, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> Upper Deck Notice of Lodgment (“NL”), Ex. 1 [Wahlquist Decl.], ¶ 6, Ex. 10, at p. 85.</p> <p><u>Konami’s Response:</u></p> <p>a. Upper Deck’s proffered evidence is not authenticated and inadmissible. (<i>See Evid. Obj.</i>)</p> <p>b. It is undisputed that the relationship began in or about October 2001 with a Deal Memo. The LOI superseded any prior agreements or understandings of the parties, and renders Upper Deck’s proffered evidence irrelevant. (Tasaki Decl. [Dkt. 295] Ex. 3</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>128. [T]he 608,000 alleged unauthorized cards were given by Upper Deck NV to its distributors at no cost, as part of a promotion to assist these distributors in moving stale Yu-Gi-Oh! inventory.</p>	<p>at 29.)</p> <p>DISPUTED, unsupported by evidence, and wrong.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. I [Wahlquist Decl.], ¶ 2, Ex. 6 (Dean Tr.), at p. 41 [34:1-5]; ¶ 3, Ex. 7 [Hundley Tr.], at pp. 44-46 [44:12-46:13].</p> <p><u>Konami's Response:</u></p> <p>a. Upper Deck has offered no evidence that the cards were part of a "promotion." The cited testimony makes no mention of a "promotion."</p> <p>b. The uncontroverted evidence shows that Upper Deck's chairman, McWilliam, had a special incentive to provide the fake Rare Cards to Vintage. (McWilliam Depo. at 208-09, attached to Dkt. 348, Ex. 112.) Other sub-distributors received the fake Rare Cards pursuant to deals that benefitted Upper Deck financially, at Konami's expense, including in deals to <i>sell products that compete with Yu-Gi-Oh! TCG.</i></p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
	<p>(Kurashima Depo. at 105:5-114:25 & Ex. 154 thereto, attached to Fox Decl. Ex. 62, 66 [Dkt. 318]; Riechers Depo. at 243:5-249:19 & Ex. 144 thereto, attached as Fox Decl. Exs. 57 & 61; Modaffari Depo. at 82:7-86:8 and Exs. 278 & 279 thereto, attached as Fox Decl. Exs. 83, 85 & 86; Press Decl. Ex. 115 [Dkt. 348].)</p>
<p>129. OMIT</p>	<p>OMIT</p>
<p>130. The Deal Memo included the following provision which granted Upper Deck NV the right to use Konami’s intellectual property rights related to Yu-Gi-Oh!: “Konami will grant Upper Deck NV an exclusive license to use Konami’s patents, copyrights, tradenames, trademarks and intellectual property upon and in connection with the marketing, distribution and sale of [Yu-Gi-Oh! trading card games].”</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. I [Wahlquist Decl], ¶ 6, Ex. 10, at p. 86.</p> <p><u>Konami’s Response:</u></p> <p>a. Upper Deck’s cited evidence is not properly authenticated and thus inadmissible. (<i>See Evid. Obj.</i>)</p> <p>b. The parties’ relationship prior to the termination was governed by the LOI, which contained an integrated, “Entire Agreement” clause which</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
	<p>“supersedes all prior and/or contemporaneous oral or written agreements” and renders Upper Deck’s arguments concerning the prior contracts irrelevant. (Tasaki Decl. [Dkt. 295] Ex. 3 at 29.)</p>
<p>131. The Deal Memo was the precursor to a series of more formal agreements between the parties, all of which granted Upper Deck NV the right to use Konami’s copyrights, trade names, trademarks and other intellectual property rights in connection with the marketing, distribution and sale of Yu-Gi-Oh! trading cards.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. I [Wahlquist Decl.], ¶ 7, Ex. 11, at p. 92.</p> <p><u>Konami’s Response:</u> No personal knowledge (FRE 602); Lacks authentication (FRE 901); Relevance (FRE 402). The 2001 Deal Memo is irrelevant based on the LOI’s “Entire Agreement” clause. (Tasaki Decl. [Dkt. 295] Ex. 3 at 29.).</p>
<p>132. The last of these agreements between Upper Deck NV and Konami was the parties’ “Letter of Intent,” which was entered into as of September 30, 2006 (the “LOI”).</p>	<p>UNDISPUTED.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶¶ 4-14, at pp. 95-99.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>133. On December 11, 2008, Konami provided written notice that it had terminated the LOI based on Upper Deck’s purported “misuse of Konami’s intellectual property and other wrongful conduct by Upper Deck.”</p>	<p>UNDISPUTED that Konami provided notice of the termination on December 11, 2008.</p> <p><u>Upper Deck’s Evidence:</u> Upper Deck Request for Judicial Notice [“RJN”], ¶ 1, Ex. A.</p>
<p>134. Konami alleges in its Third Amended Complaint that it is entitled to various types of damages and relief based on its claims against Upper Deck NV for trademark counterfeiting and infringement, copyright infringement, unfair competition, and breach of contract, but does not specify what monetary damages it suffered as a result of this alleged conduct.</p>	<p>UNDISPUTED.</p> <p><u>Upper Deck’s Evidence:</u> RJN, ¶ 1, Ex. A.</p>
<p>135. Upper Deck NV provided the unauthorized cards to its distributors at no cost for the specific purpose of repackaging and moving existing</p>	<p>DISPUTED, unsupported by evidence, and wrong.</p> <p><u>Upper Deck’s Evidence:</u></p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
product.	<p>NL, Ex. I [Wahlquist Decl.], ¶ 2, Ex. 6 [Dean Tr.], at p. 41; ¶ 3. Ex. 7 [Hundley Tr.] at pp. 44-46 [44:12-46:13]</p> <p><u>Konami's Response:</u></p> <p>a. Upper Deck's chairman, McWilliam, had a special incentive to provide the fake Rare Cards to Vintage. (McWilliam Depo. at 208-09, attached to Dkt. 348, Ex. 112.)</p> <p>b. Other sub-distributors received the fake Rare Cards pursuant to deals that benefitted Upper Deck financially, at Konami's expense, including in deals to <i>sell products that compete with Yu-Gi-Oh! TCG</i>. (Kurashima Depo. at 105:5-114:25 & Ex. 154 thereto, attached to Fox Decl. Ex. 62, 66 [Dkt. 318]; Riechers Depo. at 243:5-249:19 & Ex. 144 thereto, attached as Fox Decl. Exs. 57 & 61; Modaffari Depo. at 82:7-86:8 and Exs. 278 & 279 thereto, attached as Fox Decl. Exs. 83, 85 & 86; Press Decl. Ex. 115 [Dkt. 348].)</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	<p><u>c.</u> Messrs. Dean and Hundley are witnesses for Vintage and do not have personal knowledge (FRE 602) as to Upper Deck NV's "specific purpose."</p>
<p>136. This was all part of a plan to help revitalize the Yu-Gi-Oh! brand and to increase Yu-Gi-Oh! sales. Konami is well aware that promotional cards can be used to increase sales of existing inventory, and Konami and Upper Deck NV expressly discussed permitting Upper Deck NV to use promotional cards for such purposes.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. H [Mansolino Decl.], ¶ 6 at p. 32.</p> <p><u>Konami's Response:</u> <u>a.</u> The manufacture of fake Rare Cards in China is not an "unauthorized promotion" under the LOI's terms. <u>b.</u> Ms. Mansolino's notes are inadmissible hearsay (FRE 802). As such, Upper Deck has offered no admissible evidence to support this purported fact.</p>
<p>137. In fact, Konami permitted Upper Deck NV to print cards for promotional use in a number of instances.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> RJN, Ex. D, at p. 109 (2:7-9)</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	<p><u>Konami's Response:</u></p> <p>Upper Deck's purported fact is not supported by the evidence it cites and is false. The prior Hoashi Declaration states that "Konami, not Upper Deck, is the manufacturer of authentic Yu-Gi-Oh! TCG cards." It explains that on prior, limited occasions, <i>Konami</i> had manufactured single Yu-Gi-Oh! cards (as opposed to the "packs" or "sets of cards" typically sold to Upper Deck) and provided those cards to Upper Deck <i>to distribute</i> for promotional purposes (as prizes or give-aways). Hoashi Decl. [Dkt. 91] ¶ 4.</p> <p>The concurrently filed Hoashi Declaration makes clear that Konami had never been aware (prior to discovery in this lawsuit) that Upper Deck commissioned for printing its own copies of Yu-Gi-Oh! TCG cards.</p> <p>(12/8/09 Hoashi Decl. ¶¶ 3-6.)</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>138. In early 2007, former Upper Deck NV employee/current Konami employee Robert Caruana prepared a written “Yu-Gi-Oh! Reduction Plan” while still working for Upper Deck. His plan outlined how Upper Deck NV intended to assist its distributors and major retailers such as Target and Wal-Mart in reducing their then existing backlog of Yu-Gi-Oh! product.</p>	<p>DISPUTED and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. I [Wahlquist Decl.], ¶ 8, Ex. 4 [Caruana Tr.], at pp. 49-57 (84:14-87:23, 109:3-110:20, 115:24-117:19),), Deposition Exs. 250 and 251 at pp. 60-79 [Yu-Gi-Oh! Reduction Plans].</p> <p><u>Konami’s Response:</u></p> <p>a. The manufacture of fake Rare Cards in China is not an “unauthorized promotion” under the LOI’s terms.</p> <p>b. Robert Caruana, who during his employment with Upper Deck was directed by John Skrajewski to prepare an “inventory reduction plan,” never understood that any such plan would involve Upper Deck commissioning the printing of copies of Konami’s trading cards and then passing them off as originals. (Caruana Decl. ¶¶ 3-4.)</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>139. Included in Mr. Caruana's Yu-Gi-Oh! Reduction Plan was the concept that Upper Deck NV would design and create - with Konami's authorization - repack products featuring variant Yu-Gi-Oh! Cards that could be "repackaged" with older Yu-Gi-Oh! product in order to boost sales.</p>	<p>DISPUTED and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. I [Wahlquist Decl.], ¶ 8, Ex. 4 [Caruana Tr.], at pp. 49-57 (84:14-87:23, 109:3-110:20, 115:24-117:19),), Deposition Exs. 250 and 251 at pp. 60-79 [Yu-Gi-Oh! Reduction Plans].</p> <p><u>Konami's Response:</u></p> <p>a. The manufacture of fake Rare Cards in China is not an "unauthorized promotion" under the LOI's terms.</p> <p>b. Robert Caruana, who during his employment with Upper Deck was directed by John Skrajewski to prepare an "inventory reduction plan," never understood that any such plan would involve Upper Deck commissioning the printing of copies of Konami's trading cards and then passing them off as originals. (Caruana Decl. ¶¶ 3-4.)</p>
<p>140. The April 26, 2001 Agreement and the August 2, 2008 Agreement</p>	<p>UNDISPUTED and irrelevant.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>referred to in the Declaration of Mari Taskai [sic] were not produced during discovery in this case. The Japanese versions of the agreements were produced to my office by Konami's counsel on October 26, 2009, and the versions translated into English were produced by Konami's counsel to my office on November 25, 2009.</p>	<p><u>Upper Deck's Evidence:</u> Wahlquist Decl., ¶ 37, filed concurrently herewith in support of Upper Decks' Opposition to Konami's Motion for Partial Summary Judgment (Motion 1 of 3).</p> <p><u>Konami's Response:</u> Upper Deck does not assert that it has been prejudiced by the timing of the production. Upper Deck continued to produce documents in this action long after production of the Japanese versions of the agreements and their translations. In addition, Konami did not have an obligation to obtain translations, and it produced them shortly after they were prepared.</p>
<p>141. Based on the agreements cited by Konami, no Konami entity appears to have had rights to distribute Yu-Gi-Oh! Cards during the period between April 26, 2008 and August 2, 2008 - a period for which Konami is claiming copyright infringement.</p>	<p><u>DISPUTED, unsupported by evidence, and wrong.</u></p> <p><u>Upper Deck's Evidence:</u> Tasaki Decl. ¶ 21, Ex. 15, pp. 26, 61 (filed by Konami in support of its Motions for Partial Summary Judgment).</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	<p><u>Konami's Response:</u></p> <p>As Konami's brief explains, the license agreement granted KDE-J Konami Digital Entertainment Co. Ltd. ("KDE-J") the exclusive license to merchandise the YGO TCG from April 1, 2008 through March 31, 2009 in an August 2, 2008 license agreement. (Tasaki Decl. Ex. 17 at 69, ¶ 1.2.)</p> <p>KDE-J then exclusively licensed these rights to Konami Digital Entertainment, Inc., including between April 26, 2008 and August 2, 2008. (Tasaki Decl. Ex. 23 at 104, ¶¶ 1-3.)</p>
142. Accordingly, Konami held no copyrights during the period of April 26, 2008 and August 2, 2008.	<p>DISPUTED, unsupported by evidence, and wrong.</p> <p><u>Upper Deck's Evidence:</u></p> <p>Tasaki Decl. ¶ 22, Ex. 17 pp. 74, 76, 77 (filed by Konami in support of its Motions for Partial Summary Judgment).</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
	<p><u>Konami’s Response:</u></p> <p>NAS granted KDE-J Konami Digital Entertainment Co. Ltd. (“KDE-J”) the exclusive license to merchandise the YGO TCG from April 1, 2008 through March 31, 2009 in an August 2, 2008 license agreement. (Tasaki Decl. Ex. 17 at 69, ¶ 1.2.)</p> <p>KDE-J exclusively licensed these rights to Konami Digital Entertainment, Inc., including between April 26, 2008 and August 2, 2008. (Tasaki Decl. Ex. 23 at 104, ¶¶ 1-3.)</p>
<p>143. The August 2, 2008 license agreement grants a copyright license to (1) Konami Digital Entertainment, Co. Ltd. (which is not a party to this action); (2) Konami Digital Entertainment, Inc. (a plaintiff in this action) and (3) Konami Digital Entertainment B.V. (not a party to this proceeding), licensing them to sell Yu-Gi-Oh! Card Games “Global</p>	<p>DISPUTED and unsupported by evidence as to all but the words “It does not grant any rights to Konami Corporation” and wrong.</p> <p><u>Upper Deck’s Evidence:</u></p> <p>Tasaki Decl. ¶ 22, Ex. 17 pp. 74, 76, 77 (filed by Konami in support of its Motions for Partial Summary Judgment).</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>[y] (except Asia, Japan and South Korea).” It does not grant any rights to Konami Corporation.</p>	<p><u>Konami’s Response:</u> The August 2, 2008 agreement exclusively licenses the merchandising rights in the YGO TCG to KDE-J only. (Tasaki Decl. Ex. 17 at 69, ¶ 1.2.) It gives KDE-J the right to sub-license these rights to other Konami entities, but it does not grant any of those entities any rights. (<i>Id.</i> at 69, ¶ 1.2 & 78.)</p>
<p>144. The only party to the August 2, 2008 agreement who is also a party to this action is Konami Digital Entertainment, Inc.</p>	<p><u>DISPUTED, unsupported by evidence, and irrelevant.</u></p> <p><u>Upper Deck’s Evidence:</u> Tasaki Decl. ¶ 22, Ex. 17 pp. 74, 76, 77 (filed by Konami in support of its Motions for Partial Summary Judgment).</p> <p><u>Konami’s Response:</u> As stated above in response to Fact 143, Konami Digital Entertainment, Inc. is not a party to the August 2, 2008 agreement. (Tasaki Decl. Ex. 17 at 69, ¶ 1.2.)</p>
<p>145. The LOI provides for certain, specified “penalties” that Konami</p>	<p><u>UNDISPUTED and irrelevant.</u></p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>may assess against Upper Deck in the event Upper Deck ever failed to obtain Konami’s express written approval prior to conducting a promotion using Konami’s intellectual property.</p>	<p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶¶ 5, 6, 9 and 10, at pp. 96-98.</p> <p><u>Konami’s Response:</u> As Konami’s briefs explain, the counterfeiting of Konami’s Product was not a “promotion” under the LOI.</p>
<p>146. The LOI specifies that if Upper Deck NV were to conduct an unauthorized promotion, Konami could elect either to terminate the LOI or collect \$100,000 for an unauthorized national promotion, \$50,000 for an unauthorized regional promotion, or \$10,000 for an unauthorized local promotion.</p>	<p>UNDISPUTED and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶ 14, Ex. 20, at p. 163.</p> <p><u>Konami’s Response:</u> As Konami’s briefs explain, the counterfeiting of Konami’s Product was not a “promotion” under the LOI.</p>
<p>147. These provisions were extensively negotiated by the parties and arose out of previous incidents where Konami believed Upper Deck NV had promoted Yu-Gi-Oh! using</p>	<p>UNDISPUTED that the LOI was “extensively negotiated.” The rest is DISPUTED, unsupported by evidence, and irrelevant.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>Konami’s intellectual property rights without prior approval.</p>	<p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶ 9, at pp. 97-98; NL, Ex. H [Mansolino Decl.], ¶¶ 4-5, at pp. 31-32.</p> <p><u>Konami’s Response:</u></p> <p>a. Upper Deck has cited no admissible evidence to support the disputed portion of the fact; this portion of the Sullins declaration is made on information and belief and without personal knowledge. (See Evid. Obj. [Dkt. 351].)</p> <p>b. Prior to Konami’s discovery through this lawsuit of Upper Deck’s “secret project” in China, Konami had never been aware of Upper Deck printing copies of Konami’s trading cards. (12/8/09 Hoashi Decl. ¶ 6.)</p>
<p>148. It was these incidents that led Konami to seek definitive damages provisions in the LOI so that it could have a specific and immediate remedy available to it should it ever conclude that Upper Deck NV again had run an unauthorized promotion</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶ 9, at pp. 97-98.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>of Yu-Gi-Oh! cards.</p>	<p><u>Konami’s Response:</u></p> <p>a. Upper Deck has cited no admissible evidence; the portion of the Sullins declaration (at page 4:5-9) is made on information and belief and without personal knowledge. (<i>See Evid. Obj.</i> [Dkt. 351].)</p> <p>b. Negotiations preceding the LOI are irrelevant to the contract’s interpretation. <i>See</i> the LOI’s Entire Agreement clause. (Tasaki Decl. [Dkt. 295] Ex. 3 at 29.)</p>
<p>149. In addition to the potential monetary damages, Konami persisted in requiring that it have the option of terminating Upper Deck in the event of an unauthorized promotion; Upper Deck NV ultimately acquiesced to all of Konami’s demands, which resulted in the APPROVAL section and Exhibit C contained in the final version of the LOI.</p>	<p>DISPUTED that “Upper Deck NV ultimately acquiesced to all of Konami’s demands” and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶¶ 13-14, Exs. 19-20, at pp. 139-163.</p> <p><u>Konami’s Response:</u></p> <p>a. Negotiations preceding the LOI are irrelevant to the interpretation of the contract. <i>See</i> the LOI’s Entire Agreement clause. (Tasaki</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	<p>Decl. [Dkt. 295] Ex. 3 at 29.)</p> <p>b. Konami never understood that the Approval clause could apply to Upper Deck's unauthorized manufacturing (i.e., counterfeiting) of Konami's trading cards.</p> <p>(Tasaki Decl. [Dkt. 295] ¶ 11.)</p> <p>c. The cited evidence does not state that Upper Deck "acquiesced to all of Konami's demands" and the declarant's statement made "on information and belief" is inadmissible for lack of personal knowledge. (<i>See</i> Evid. Obj. [Dkt 351].)</p>
<p>150. The LOI contains a choice of law provision which states the LOI will be governed by and interpreted in accordance with California law.</p>	<p>UNDISPUTED.</p> <p><u>Upper Deck's Evidence:</u> NL, Exh. J [Sullins Decl.], ¶ 13, Ex. 20 [LOI], p. 158-159.</p>
<p>151. Upper Deck NV was required to buy, and did buy, over 1.2 billion, undisputedly genuine Yu-Gi-Oh!</p>	<p>DISPUTED and irrelevant.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>cards from Konami from 2006 through 2008, paying over \$151 million to Konami.</p>	<p><u>Upper Deck’s Evidence:</u> Declaration of John Zimmer, ¶ 3, filed concurrently herewith in support of Upper Deck’s Opposition to Konami’s Motion for Partial Summary Judgment (Motion 1 of 3)</p> <p><u>Konami’s Response:</u> Lacks Foundation; Lacks Personal Knowledge (FRE 602); Hearsay (FRE 802) (reciting “from Upper Deck’s internal records which state”); Relevance (FRE 402).</p>
<p>152. Upper Deck NV also expended millions of dollars to market these cards after the supposed “automatic termination,” pursuant to the marketing requirements of the LOI, and used a huge portion of its sales and management resources to promote and sell Yu-Gi-Oh products.</p>	<p>DISPUTED and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> Zimmer Decl., ¶ 4, filed concurrently herewith in support of Upper Deck’s Opposition to Konami’s Motion for Partial Summary Judgment (Motion 1 of 3)</p> <p><u>Konami’s Response:</u> Lacks Foundation; Lacks Personal Knowledge (FRE 602); Relevance (FRE 402). Mr. Zimmer’s declaration says nothing about the</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	"automatic termination."
<p>153. In granting Konami's second application for preliminary injunction, the Court implicitly treated December 11, 2008, the date of Konami's notice of termination to Upper Deck, as the date of termination. [RJN, ¶5, Ex. 5.] The court enjoined Upper Deck from, among other things, Offering for sale, selling or otherwise distributing without Konami's authorization any Yu-Gi-Oh! TCG products that were authorized to be printed by Konami, . . . other than authorized products in Upper Deck's actual possession that were paid for by customers prior to December 11, 2008.</p>	<p>UNDISPUTED that the injunction restrains Upper Deck from selling product obtained from Konami prior to notice of the termination on December 11, 2008.</p> <p>DISPUTED that the Order addressed the date of termination for purposes of seeking disgorgement.</p> <p><u>Upper Deck's Evidence:</u> RJN, ¶ 5, Ex. E, at p. 152, emphasis added.</p> <p><u>Konami's Response:</u></p>
<p>154. The parties' prior dealings show that they had discussed and engaged in the promotion of repackaging existing card inventory with more desirable or rare cards in order to stimulate sales of such inventory. Upper Deck NV and Konami discussed using rare cards to promote</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. H [Mansolino Decl.], ¶ 6, at p. 32; RJN, ¶ 4, Ex. D, at p. 109 (2:7-9).</p> <p><u>Konami's Response:</u></p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>the sale of regular packs of cards, and Upper Deck NV had done this with Konami's approval on prior occasions.</p>	<p>These notes by Mansolino are inadmissible hearsay (FRE 802). Moreover, the evidence is irrelevant (FRE 402) because it does not address the use of <i>counterfeit</i> trading cards in repack products.</p>
<p>155. In January 30, 2007, Yumi Hoashi and Shinichi Hanamoto from Konami met with representatives of Upper Deck including Greg Goldstein, Stephanie Mascott, Horst Riechers, and Leighton Kurishima.</p>	<p>UNDISPUTED and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. H [Mansolino Decl.], ¶ 6, Ex. 5, at p. 33.</p> <p><u>Konami's Response:</u> Relevance (FRE 402).</p>
<p>156. The parties discussed inventory assistance for Upper Deck's sub-distributors whose inventories of Yu-Gi-Oh! cards were becoming backlogged.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. H [Mansolino Decl.], ¶ 6, Ex. 5, at pp. 34-35.</p> <p><u>Konami's Response:</u> Ms. Mansolino's notes are inadmissible hearsay (FRE 802). Moreover, the evidence is irrelevant (FRE 402) because it does not address the use of <i>counterfeit</i></p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI’S RESPONSE</u>
<p>157. The parties specifically discussed the possibility of repack products using variant or rare cards - although Konami indicated this approach was less desirable than other repack proposals.</p>	<p>trading cards in repack products.</p> <p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. H [Mansolino Decl.], ¶ 6, Ex. 5, at pp. 34-35.</p> <p><u>Konami’s Response:</u> Ms. Mansolino’s notes are inadmissible hearsay (FRE 802). Moreover, the evidence is irrelevant (FRE 402) because it does not address the use of <i>counterfeit</i> trading cards in repack products.</p>
<p>158. Upper Deck NV and Konami have different ideas about what the parties intended with respect to the “Approval” clause.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck’s Evidence:</u> NL, Ex. J [Sullins Decl.], ¶¶ 9-10, 12-13 at p. 97-99; NL, Ex. H [Mansolino Decl.], ¶ 6 at p. 32; Mari Tasaki Decl., ¶ 11 (filed by Konami in support of its Motions for Partial Summary Judgment).</p> <p><u>Konami’s Response:</u> a. Upper Deck’s declarants do not</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
	<p>state what they believed their interpretation of the Approval clause to be at the time of contracting.</p> <p>b. Upper Deck's chairman, McWilliam, testified that he did not believe the counterfeiting activities to be a "promotion" until after the lawsuit was filed and he showed a copy of the LOI to his counsel. (McWilliam Depo. at 125:21-126:18, attached to Press Decl. Ex. 112.)</p>
<p>159. The parties expressly discussed and contemplated the use of variant cards for promotional purposes.</p>	<p>DISPUTED, unsupported by evidence, and irrelevant.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. H [Mansolino Decl], ¶ 6, Ex. 5, at p. 34.</p> <p><u>Konami's Response:</u> Ms. Mansolino's notes are inadmissible hearsay (FRE 802). Moreover, the evidence is irrelevant (FRE 402) because it does not address the use of <i>counterfeit</i> trading cards in repack products.</p>

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<u>PURPORTED ADDITIONAL FACTS</u>	<u>KONAMI'S RESPONSE</u>
<p>160. Konami's remedy for an unauthorized promotion was either to terminate the LOI under the termination clause or collect the agreed upon penalty.</p>	<p>DISPUTED that Upper Deck's counterfeiting was a "promotion" under the LOI.</p> <p><u>Upper Deck's Evidence:</u> NL, Ex. J [Sullins Decl.], ¶¶ 4-5, 9-10, 13-15, at pp. 95-100.</p> <p><u>Konami's Response:</u> Konami's briefs explain why Upper Deck's counterfeiting of Konami's Product was not a "promotion" under the LOI's express terms.</p>
<p>161. Konami asserts that it did not consider the use of unauthorized variant cards a "promotion," and the Approval clause was not intended to cover Upper Deck's "unauthorized reproduction of Konami's trading cards from YGO TCG."</p>	<p>UNDISPUTED.</p> <p><u>Upper Deck's Evidence:</u> Tasaki Decl., ¶¶ 10-11 (filed by Konami in support of its Motions for Partial Summary Judgment).</p>

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Dated: December 14, 2009

MORRISON & FOERSTER LLP

By: /s/ Benjamin J. Fox

Benjamin J. Fox

Attorneys for Plaintiffs
KONAMI DIGITAL
ENTERTAINMENT, INC.,
KONAMI CORPORATION and
Counter-Defendant KONAMI
MARKETING, INC.