

1 NICHOLAS & BUTLER, LLP
2 Craig M. Nicholas (SBN 178444)
3 Tracy J. Jones (SBN 262632)
4 225 Broadway, 19th Floor
5 San Diego, California 92101
6 Telephone: (619) 325-0492
7 Facsimile: (619) 325-0496
8 Attorneys for Defendant
9 The Upper Deck Company, Inc. and
10 Richard McWilliam

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NORTH COUNTY DIVISION
2012 OCT 11 PM 12:19
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CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

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

11
12 JOSEPH PIROZZI, and individual; J&T
13 HOBBY LLC,
14 Plaintiffs,
15 vs.
16 THE UPPER DECK COMPANY, INC., a
17 Nevada Corporation; RICHARD
18 MCWILLIAM, an individual; and DOES 1-
19 100, inclusive,
20 Defendants.

3
) CASE NO.: 37-2012-00056847-CU-BT-NC
)
) **IMAGED**
) **NOTICE OF MOTION AND MOTION TO**
) **STRIKE**
)
)
) Date: December 21, 2012
) Time: 1:30 p.m.
) Dept.: N-31
) Judge: Hon. Timothy M. Casserly
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)
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21 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

22 PLEASE TAKE NOTICE THAT on December 21, 2012 at 1:30 p.m., or as soon thereafter
23 as counsel can be heard, in Department N-31 of the above-captioned Court, located at 325 S.
24 Melrose Dr., Vista, California, the Hon. Timothy M. Casserly presiding, defendants The Upper
25 Deck Company, Inc. and Richard McWilliam ("Defendants") will make, and hereby do make a
26 motion to strike following paragraphs of Plaintiffs Complaint pursuant to California Code of Civil
27 Procedure sections 435 and 436 on the ground that the language identified is irrelevant, improper
28 and not drawn in conformity with applicable law:

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18. The aforementioned conduct of Defendants, and each of them, was an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendants, and each of them, with the intention on the part of the Defendants, and each of them of thereby depriving the Plaintiffs of property or legal rights or otherwise causing injury and unjust hardship in conscious disregard of the Plaintiffs' rights, so as to justify an award of exemplary and punitive damages.

27. The aforementioned conduct of Defendants, and each of them, was an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendants, and each of them, with the intention on the part of the Defendants, and each of them of thereby depriving the Plaintiffs of property or legal rights or otherwise causing injury and unjust hardship in conscious disregard of the Plaintiffs' rights, so as to justify an award of exemplary and punitive damages.

34. The aforementioned conduct of Defendants, and each of them, was an intentional misrepresentation, deceit, or concealment of a material fact known to the Defendants, and each of them, with the intention on the part of the Defendants, and each of them of thereby depriving the Plaintiffs of property or legal rights or otherwise causing injury and unjust hardship in conscious disregard of the Plaintiffs' rights, so as to justify an award of exemplary and punitive damages.

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

Under Prayer For Relief:

...

6. For Exemplary and punitive damages.

Striking paragraphs, 18, 27, 34, and prayer for relief at paragraph 6 is proper because Plaintiffs are not entitled to punitive damages as they have not sufficiently pled Defendants are guilty of malice, oppression, or fraud. Striking paragraph 43 is proper because damages and rescission are not available remedies under a claim for violation of California Business & Professions Code sections 17200 *et seq.*

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This motion is supported by this notice of motion and motion, a memorandum of points and authorities, and all other papers on file with the Court.

NICHOLAS & BUTLER, LLP

Dated: October 11, 2012

By: 
Craig M. Nicholas
Tracy J. Jones

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

1 NICHOLAS & BUTLER, LLP
2 Craig M. Nicholas (SBN 178444)
3 Tracy J. Jones (SBN 262632)
4 225 Broadway, 19th Floor
5 San Diego, California 92101
6 Telephone: (619) 325-0492
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8
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10 The Upper Deck Company, Inc. and
11 Richard McWilliam

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

12 JOSEPH PIROZZI, and individual; J&T) CASE NO.: 37-2012-00056842-CU-BT-NC
13 HOBBY LLC,)
14 Plaintiffs,) MEMORANDUM OF POINTS AND
15 vs.) AUTHORITIES IN SUPPORT OF
16) DEFENDANTS' MOTION TO STRIKE
17 THE UPPER DECK COMPANY, INC., a)
18 Nevada Corporation; RICHARD) Date: December 21, 2012
19 MCWILLIAM, an individual; and DOES 1-) Time: 1:30 p.m.
20 100, inclusive,) Dept.: N-31
21 Defendants.) Judge: Hon. Timothy M. Casserly
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21 Defendants The Upper Deck Company, Inc. ("Upper Deck") and Richard McWilliam
22 ("Mr. McWilliam") (collectively "Defendants") submit the following memorandum of points and
23 authorities in support of their Motion to Strike portions of the Complaint filed by Plaintiff Joseph
24 Pirozzi ("Pirozzi") and J & T Hobby LLC ("J & T") ("collectively "Plaintiffs").

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1 I.

2 INTRODUCTION

3 Plaintiffs' Complaint alleges that Defendants misrepresented/concealed Upper Deck's
4 involvement with Plaintiffs' competitors. (Complaint, ¶¶ 10-27.) Plaintiff alleges six causes of
5 action: (1) fraud (intentional misrepresentation); (2) concealment; (3) conspiracy (to defraud); (4)
6 breach of the covenant of good faith and fair dealing ("bad faith"); (5) unfair and deceptive
7 business practices (violation of California Bus. & Prof. Code §§ 17200 *et seq.* ("UCL")); and (6)
8 cancellation of a written instrument. Under the First, Second, and Third Causes of Action,
9 Plaintiffs plead this paragraph:

10 The aforementioned conduct of Defendants, and each of them, was an intentional
11 misrepresentation, deceit, or concealment of a material fact known to the
12 Defendants, and each of them, with the intention on the part of the Defendants,
13 and each of them of thereby depriving the Plaintiffs of property or legal rights or
otherwise causing injury and unjust hardship in conscious disregard of the
Plaintiffs' rights, so as to justify an award of exemplary and punitive damages.

14 (Complaint, ¶¶ 18, 27, 34.) The prayer for relief also requests an award of exemplary and punitive
15 damages. (Complaint, Prayer, ¶ 6.) However, Plaintiffs have not pled sufficient allegations to
16 support a claim for punitive or exemplary damages.

17 Under their Fifth Cause of Action for violation of the UCL, Plaintiffs allege: "As a result,
18 Plaintiffs have suffered and continues [sic] to suffer damages in a sum of an amount according to
19 proof at trial and Plaintiff is entitled to rescind the Contract between the parties and above
20 described agreement as set forth above." (Complaint, ¶ 43.) However, Plaintiffs' only remedies
21 under the UCL are restitution or injunctive relief, not damages or rescission. Therefore, the Court
22 should strike Plaintiffs Complaint at Paragraphs 18, 27, 34, 43, and the Prayer at Paragraph 6.

23 II.

24 STATUTORY AUTHORITY FOR MOTIONS TO STRIKE

25 The proper procedure to eliminate improper or irrelevant material in a complaint is filing a
26 motion to strike those allegations. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 163-
27 64.) Upon such motion, the Court has the power to strike irrelevant or improper subject matters
28 inserted in the complaint. California Code of Civil Procedure section 436 states:

1 The court may, upon a motion made pursuant to Section 435, or at any time in its
2 discretion, and upon terms it deems proper: (1) strike out any irrelevant, false or
3 improper matter inserted in any pleading. (2) Strike out all or any part of any
4 pleading not drawn or filed in conformity with the laws of the state, a court rule or
5 an order of the court.

6 An immaterial allegation that may be stricken includes a “demand for judgment requesting
7 relief not supported by the allegations of the complaint...” (Cal. Civ. Proc. § 431.10(b)(3).) The
8 Court may strike allegations of Plaintiffs Complaint regarding punitive damages, compensatory
9 damages, and rescission because they are not supported by the facts and legal theories pled.

10 III.

11 **THE COURT SHOULD STRIKE PLAINTIFFS’ PUNITIVE DAMAGES ALLEGATIONS 12 BECAUSE THEY ARE NOT SUPPORTED BY FACTS SHOWING DEFENDANTS 13 ALLEGED CONDUCT WARRANTED EXEMPLARY DAMAGES**

14 Under California law punitive damages can only be awarded based upon clear and
15 convincing evidence that the defendant is guilty of malice, oppression or fraud, which are defined
16 in California Civil Code section 3294(c) (“Section 3294”) as follows:

- 17 (1) “Malice” means conduct which is intended by the defendant to cause
18 injury to the plaintiff or despicable conduct which is carried on by the
19 defendant with willful or conscious disregard of the rights or safety of
20 others;
- 21 (2) “Oppression” means despicable conduct that subjects a person to cruel and
22 unjust hardship and conscious disregard of that person’s rights;
- 23 (3) “Fraud” means an intentional misrepresentation deceit or concealment of a
24 material fact known to the defendant with the intention on the part of the
25 defendant thereby depriving a person of property or legal rights or
26 otherwise causing injury.”

27 When pleading a claim for punitive damages, simply quoting the above-listed statutory
28 definitions is insufficient. “Not only must there be circumstances of oppression, fraud, or malice,
29 but *facts must be alleged in the pleading to support such a claim.*” (*Grieves, supra*, 157
30 Cal.App.3d at 166 (emphasis added).) To survive a motion to strike, a complaint must allege the
31 “ultimate facts” that, if true, would entitle the claimant to punitive damages. (*Id.*) Mere
32 allegations that the defendant committed an intentional tort are insufficient to support a claim for
33 punitive damages. “Something more than the mere commission of a tort is always required for
34 punitive damages.” (*Grieves, supra*, 157 Cal.App.3d at 166.) A “conclusory characterization of

1 defendant's conduct as intentional, willful and fraudulent is a patently insufficient statement of
2 oppression, fraud, or malice." (*Brousseau v. Jarrett* (1977) 73 Cal.App.3d 864, 872.) This is
3 because fairness demands that a defendant receive adequate notice of the kind of conduct charged
4 against him. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041.)

5 Here, the only allegations supporting Plaintiffs' claim for punitive damages are boilerplate
6 paragraphs regurgitating the buzzwords in Section 3294:

7 The aforementioned conduct of Defendants, and each of them, was an intentional
8 misrepresentation, deceit, or concealment of a material fact known to the
9 Defendants, and each of them, with the intention on the part of the Defendants,
10 and each of them of thereby depriving the Plaintiffs of property or legal rights or
otherwise causing injury and unjust hardship in conscious disregard of the
Plaintiffs' rights, so as to justify an award of exemplary and punitive damages.

11 (Complaint, ¶¶ 18, 27, 34.) The above paragraph does not plead any *facts* supporting Plaintiffs'
12 entitlement to punitive damages. Therefore, the Court should strike the punitive damages
13 allegations appearing at Paragraphs 18, 27, 34, and the Prayer at Paragraph 6 of Plaintiffs'
14 Complaint.

15 **IV.**

16 **THE COURT SHOULD STRIKE DAMAGES AND RESCISSION ALLEGATIONS**
17 **UNDER PLAINTIFFS' CAUSE OF ACTION FOR UNFAIR**
AND DECEPTIVE BUSINESS PRACTICES

18 Plaintiffs' Fifth Cause of Action is for "Unfair and Deceptive Business Practices" in
19 violation of California Business and Professions Code sections 17200 *et seq.* ("UCL"). Plaintiffs
20 request damages and rescission as relief for Defendants' alleged violation of the UCL:

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

24 (Complaint, ¶43.)

25 The only available remedies for violation of the UCL are injunctive relief or restitution;
26 "damages cannot be recovered." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th
27 201, 226.) Rescission is also not a permitted remedy. (*Nelson v. Pearson Ford Co.* (2010) 186
28 Cal.App.4th 983, 1018 ("Rescission and restitution are distinct remedies. [citation] While

1 rescission may be followed by restitution in an appropriate contract action (§ 1692), rescission is
2 not a necessary predicate to granting restitution in a statutory action under the UCL. [citation] We
3 have found no authority supporting the remedy of rescission in a UCL action.”.) Plaintiffs plead
4 entitlement to damages and rescission, two remedies that are not permitted under the UCL.
5 Therefore, the Court should strike Paragraph 43 of Plaintiffs’ Complaint.

6 V.

7 **CONCLUSION**

8 For the foregoing reasons, Defendants respectfully request that the Court strike Plaintiffs’
9 Complaint at Paragraphs 18, 27, 34, 43, and the Prayer at Paragraph 6.

10 **NICHOLAS & BUTLER, LLP**

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13 Dated: October 11, 2012

By: 

Craig M. Nicholas
Tracy J. Jones

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

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

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

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

On October 11, 2012 I served the within:

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

- BY FACSIMILE TRANSMISSION**: In addition to service by mail as set forth below, the counsel or interested party authorized to accept service was also forwarded a copy of said document(s) by facsimile transmission at the fax machine telephone number corresponding with his/her/its name. The fax machine I used complied with CRC Rule 2.301(3) and no error was reported by the machine. Pursuant to CRC Rule 2.306(h)(3), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.
- BY PERSONAL DELIVERY**: I caused each envelope to be hand-delivered to each addressee leaving said envelope with either the addressee directly or another person at that address authorized to accept service on the addressee's behalf.
- BY MAIL**: as follows:
- BY OVERNIGHT COURIER**: I placed the above-referenced document(s) in an envelope for collection and delivery on this date in accordance with standard FEDERAL EXPRESS overnight delivery procedures.
- E-MAIL**
- By placing a copy thereof in a sealed envelope addressed as follows:

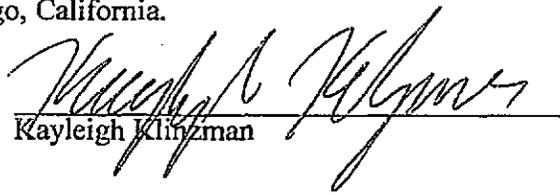
John Gaule
Oddenino & Gaule
444 E. Hunington Drive, Suite 325
Arcadia, CA 91006

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

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

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

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

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

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

PARTIES SERVED:

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

Counsel for Plaintiff