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UPPER DECK INTERNATIONAL B.V.

7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 UPPER DECK INTERNATIONAL B.V.,
a Netherlands corporation,

12 Plaintiff,

13 v.

14 THE UPPER DECK COMPANY, a
15 California corporation; THE UPPER
DECK COMPANY, a Nevada
16 Corporation; RICHARD McWILLIAM,
an Individual; and Does 1-10,

17 Defendants.
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Case No. 11CV1741 LAB (KSC)

**UPPER DECK INTERNATIONAL
B.V.'S EX PARTE APPLICATION
FOR BRIEF PHASING OF
DISCOVERY. OR IN
ALTERNATIVE ORDER
SHORTENING TIME RE
FINANCIAL DISCOVERY**

AND

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
EX PARTE APPLICATION**

Hon. Karen S. Crawford
Courtroom 1C

Complaint Filed: 08/04/2011

22 AND ALL COUNTERCLAIMS.
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1 **EX PARTE APPLICATION TO BIFURCATE DISCOVERY, OR IN**
2 **ALTERNATIVE SHORTEN TIME RE FINANCIAL DISCOVERY**

3 **PLEASE TAKE NOTICE** that Plaintiff Upper Deck International B.V.,
4 (“UDI”) hereby applies *ex parte* to request that the Court exercise its discretion to
5 issue an order resetting fact discovery so that it is phased, with written discovery
6 concerning the finances of Defendants and deceased Richard McWilliam’s estate and
7 trust to be completed by September 15, and the remaining fact discovery to resume
8 thereafter and be completed by October 20, 2013 (only about one month beyond the
9 current date). This includes ordering all discovery responses on related discovery
10 requests to be returned on the earlier of the normal due date or August 19, 2013. In
11 the alternative, Plaintiff seeks an order shortening time to allow all outstanding
12 financial discovery to be responded and conferred upon in time for any motion to
13 compel to be filed by August 16, 2013.

14 As discussed below, UDI requests the Court grant the order, good cause being
15 shown because: (1) discovery of the financial information is permissible as a general
16 matter here, (2) the weighing of the risk of prejudices here favors the request despite
17 UDI’s reasonable efforts, and (3) the requested order would likely promote an
18 efficient resolution of the suit through settlement.

19 UDI makes this request *ex parte* because of the pending motion to substitute a
20 party in for the deceased party and to give enough time after that motion is decided to
21 conduct discovery in this case.

22 Before filing this application, on August 5, 2013, UDI’s counsel contacted
23 counsel for Defendants requesting that Defendants stipulate to the relief. As of the
24 filing of this application, however, Defendants have not indicated their position
25 regarding whether they will agree to the requested stay or oppose it. Declaration of
26 Eric Eastham in Support of UDI’s *ex parte* Application (“Eastham Decl.”), ¶2 & Ex 1

27 In further support of its request, UDI submits the following memorandum of
28 points and authorities.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX**
2 **PARTE APPLICATION TO BIFURCATE DISCOVERY, OR IN**
3 **ALTERNATIVE SHORTEN TIME RE FINANCIAL DISCOVERY**

4 The actual discovery window in this case has been extremely small,
5 precipitated by a long pleadings stage, UDI's bankruptcy proceedings, and the
6 untimely death of the principal individual for all the defendants, Richard McWilliam.
7 The settlement conference with the Court has not yet produced the results that all
8 parties involved had hoped, in large part because the Defendants have failed to
9 validate their position concerning their finances (a position that will also affect UDI's
10 request for punitive damages). Defendants' financial position has an enormous
11 practical effect on whether, and on what terms, this case might be resolved amicably.

12 Importantly, the Defendants and other potentially liable parties have tried to cut
13 UDI off at the pass at every turn in assessing the truth of their financial state,
14 including:

- 15 • There are Nevada probate proceedings going on as to the MPR
16 Revocable Trust (Mr. McWilliam's main trust which UDI has sought to
17 substitute in his place in this case) and the residual estate left by Mr.
18 McWilliam, which both began in February 2013.
- 19 • Defendants' counsel did not expressly identify these proceedings or
20 share the relevant files therein; it was only through public records
21 searches and courier services that Plaintiffs could even begin to obtain
22 pertinent information;
- 23 • What UDI did learn through that due diligence is that Ms. Vivianne
24 McWilliams filed an Inventory and Appraisal, presumably providing
25 detailed information, but filed a motion to seal in order to hide it from
26 view of creditors including UDI;
- 27 • The motion to seal was plainly improper, opposed by the Commissioner,
28 and recommended to be denied by the special master (the judge has
currently held ruling on the request in abeyance);

- 1 • UDI’s public diligence has disclosed tax suits and other publicly
2 available information suggesting that hundreds of millions of dollars
3 were passing through the MPR Revocable Trust in at least 2003through
4 2004 (see Exhibit 5), only heightening the need of UDI to have clarity
5 into what the real financial status is of those potentially liable;
- 6 • UDC is contemplating an assets sale to third party, Panini, which UDI
7 discovered only through its own diligence, and which defendants’
8 counsel has not denied but has stated it will oppose discovery into;
- 9 • Despite promises to provide clarity into their finances, it is clear that
10 Defendants (and the MPR Trust) have tried to take advantage of a highly
11 suspect information gap to force UDI to make decisions in the blind
12 while they continue to operate with full visibility.

13 No prejudice will result from the requested relief; indeed both parties and the
14 court will conserve resources pending the results of the financial discovery. But the
15 failure to grant the relief would have unintended consequences implicating UDI’s due
16 process that were not foreseen at the time the operative Scheduling Order was issued.
17 Thus, the requested relief should be granted.

18 **1. Background to Request**

19 Plaintiff UDI seeks a brief window in which the outstanding financial
20 discovery can be completed, before the parties incur additional expenses in
21 developing discovery on the remaining substance of the claims and defenses in this
22 case. There will be no prejudice from such delay, indeed it should serve to promote
23 settlement, and the parties can resume the remaining substantive discovery if
24 necessary.

25 **a. Proceedings Leading Up to the June 2013 Discovery Conference**

26 As the Court will recount, discovery in this case has been “active” for only a
27 very short time. Although the case was filed in 2011, the Court did not rule on the
28 pleadings challenges until May 5, 2012, and a Rule 16(b) conference was set for June

1 27, 2012, with initial disclosures exchanged just before that. Doc. Nos. 62 & 63.
2 Over the remaining months of 2012, the case was checkered by the delays of foreign
3 discovery (Doc. No. 71-72), and the filing for bankruptcy of UDI just months later in
4 October 2012 (Doc. No. 78). This resulted in a brief delay until November 20, 2012
5 before a trustee in charge of UDI's assets was even recognized in the United States.
6 Doc. No. 83.

7 Approximately one month later, there was the unfortunate passing of
8 Defendant Richard McWilliam, a rare event in civil litigation. As Defendants
9 struggled themselves to determine who was in charge of the entities that Richard
10 McWilliams had formerly controlled (including Defendants UDC and UDN, and
11 what was now his significant estate), UDI agreed to postpone a pending settlement
12 conference until these details could be resolved on Defendants' end – this resulted in
13 discovery dates being lifted and a stay on discovery by all parties through June 11,
14 2013. Doc. Nos. 96, 98-100.

15 **b. Defendants' (and the Estate's) Financial Information**

16 At the Settlement Conference on June 11 (Doc. No. 100), the Court will recall
17 that the supposed financial straits of UDC, UDN and the Richard McWilliam's estate
18 were placed front-and-center by Defendants in an attempt to advance a workable
19 settlement. Extravagant claims of looming liabilities were made, which would
20 among other things affect the collectability calculations that went into any settlement
21 considerations and UDI's claim for punitive damages. However, UDI had no way to
22 verify the financial representations Defendants made.

23 Unfortunately, to-date UDI has not received a single document concerning
24 Defendants' finances (or the estate and trust left by Richard McWilliams). Indeed, to
25 resist further discovery and involvement in this case, Richard McWilliam's estate and
26 trust have taken a position quite inconsistent with FRCP 25 that they should be
27 excluded as parties from this lawsuit, a position based on a lone 63-year-old,
28 superseded, out-of-circuit case which has forced briefing on both sides, delaying the

1 estate's and trust's addition as defendants to this case until the August 19
2 consolidated hearing. Doc. No. 108; *see also* Doc. Nos. 101, 104.

3 This delay is not due to any unreasonable effort by UDI. UDI's counsel
4 reached out to Defendants' counsel on July 3 to begin meet-and-confer efforts on
5 discovery responses previously put on hold by Mr. McWilliam's death. [Eastham
6 Decl., Exhibit 3.] Despite repeated insistence by UDI's counsel, Defendants' counsel
7 did not agree to a date for a meet-and-confer conference until July 23, and then only
8 for Friday, July 26 — more than three weeks later. [*Id.* at ¶ 4 & Ex. 4.]

9 Meanwhile, UDI attempted to obtain financial information through other
10 means, specifically by seeking out the probate proceedings involving Richard
11 McWilliam's estate and trust in Nevada, and sending a document retrieval service to
12 obtain all the documents filed in those cases. [Eastham Decl., ¶ 5.] Unfortunately,
13 Vivianne McWilliam — who is the current trustee of the trust and administrator of
14 the estate — kept the financial documents in those case files from retrieval (including
15 master schedule of assets for the trust) by filing two pending motions to seal. *Id.*

16 **c. Defendants' Other Delay Tactics**

17 Besides promising and then delaying the meet-and-confer with Plaintiff on
18 financial discovery, Plaintiff also engaged in other tactics, playing fast-and-loose with
19 its obligations. As the Court will recall during the settlement conference, Defendants
20 initially promised it would provide financial information to Plaintiffs, only to have
21 made it clear that promise is retracted. Plaintiffs also discovered that Defendants
22 (and the MPR Trust who Plaintiff has requested to substitute in for Mr. McWilliam)
23 were receiving over \$100 million a year, yet Defendants now claim they are nearly
24 insolvent. [Eastham Decl., Ex. 5.] Defendants counsel in the Netherlands made
25 consistent settlement overtures to Plaintiff's counsel in the Netherlands, to delay
26 Plaintiff's seeking this financial information, only to continue withholding any
27 financial production. Defendants refused to produce the financial information
28 because of the lack of a protective order, yet now the protective order has been

1 entered in this case. Doc. No. 111.

2 **d. The Need for Relief Has Firmly Crystallized**

3 As a result of Defendants' refusal to provide financial data (notwithstanding
4 statements that they would voluntarily give it to UDI), UDI formally sought the
5 documents in this case by virtue of third-party subpoenas to the estate and Mr.
6 McWilliam's trust, which have a return date of August 9, 2013. Additionally, UDI
7 served a second set of RFPs on UDC and UDN focused on the relevant financials.
8 Declaration of Eric Eastham, ¶ 8 & Ex. 6. However, as with all financial information,
9 it has become apparent that there is a log jam that will likely not result in production
10 absent assistance from the Court. This is despite the Court's repeated admonition that
11 the finances of Defendants and the estate were fair game at the settlement conference.
12 At this point, UDI cannot simply sit back and "hope for the best."

13 In the absence of the requested relief, the parties must incur substantial
14 discovery expenses. There are currently a number of international depositions set to
15 take place in the final month left on the current discovery schedule, that will require
16 travel to (1) England, (2) France, (3) Australia, and (potentially) (4) the Netherlands.
17 Declaration of Eric Eastham, ¶ 7. It appears that many other substantive categories of
18 discovery (beyond financial information of Defendants, the estate and trust) are likely
19 to result in motions to compel if forced to go forward, resulting in substantial use of
20 the court's and parties' resources.

21 Moreover, the current schedule has inadvertently created a due process issue,
22 risking serious prejudice upon UDI if it is unable to utilize two important tools of
23 party discovery. The pending inquiry as to whether the estate and trust will be added
24 as parties is only set for hearing on August 19, and any ruling subsequent to that will
25 not leave sufficient time for the use of discovery mechanisms intended to be available
26 against *parties* that are currently unavailable against the estate or trust (including
27 RFAs and interrogatories). Even as to the financial discovery, although the estate and
28 trust are under subpoenas to produce responsive documents by August 9, their

1 attorney advised that Vivianne McWilliam (the trustee and beneficiary) is away until
2 at least August 15, 2013. Declaration of Eric Eastham, ¶ 9. And UDI learned during
3 the meet-and-confer conference that Defendants will try to quash the subpoenas,
4 likely causing further delay. Declaration of Eric Eastham, ¶ 10. To the extent
5 financial discovery of MPR Trust is affected by them ultimately becoming a party, it
6 would be unfair to allow literally only a week or less discovery period for financial
7 discovery from when they are added as a party in late August to when fact discovery
8 currently closes on September 6.

9 By now refusing to give up the financial information that Defendants knew
10 Plaintiff was waiting for (now hiding behind the fact that the motion to substitute has
11 not been decided), Plaintiff was forced to serve its Rule 45 subpoenas on the estate
12 and trust. As the Rule 45 subpoenas are not due until August 9, Plaintiff has to seek
13 this stay (as opposed to simply moving to compel by piecemeal). The requested
14 relief allows this financial information to be produced yet still be used in conjunction
15 with the rest of discovery (such as in depositions).

16 The relief is imminently reasonable, will minimize prejudice to the parties, and
17 will maximize the efficient resolution of this dispute, furthering FRCP 1's goals.

18 **2. A Brief Two-Month Stay of Non-Financial Discovery is Warranted**

19 Discovery may be phased, and scheduling orders modified, for good cause.
20 FRCP 26(c) (protective order), 16(b)(4) (scheduling orders); *DR Sys., Inc. v. Fujifilm*
21 *Med. Sys. USA, Inc.*, 2008 U.S. Dist. LEXIS 29485, 7-8 (S.D. Cal. Apr. 10, 2008)
22 (phasing order granted). “A district court enjoys broad discretion [vested in the
23 magistrate judge here] in controlling discovery. *Little v. City of Seattle*, 863 F.2d 681,
24 685 (9th Cir. 1988). ‘Rule 26 vests the [] judge with broad discretion to tailor
25 discovery narrowly and to dictate the sequence of discovery.’ *Crawford—El v.*
26 *Britton*, 523 U.S. 574, 599, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).” *AMTRAK v.*
27 *Camargo Trucking*, 2013 U.S. Dist. LEXIS 84469 (E.D. Cal. June 13, 2013).
28 Avoiding undue expense is an important consideration. FRCP 26(c).

1 a. **Financial Information Is Generally Discoverable Where Useful for**
 2 **Damages Purposes and Promotion of Settlement Efforts**

3 Financial discovery is always useful sooner rather than later in a dispute: “It is
 4 not appropriate to delay [financial] discovery on punitive damages because, as
 5 suggested by one court, such information is valuable to both parties in making a
 6 realistic appraisal of the case and may lead to settlement and avoid protracted
 7 litigation.” *Crawford v. Melzer*, 2011 U.S. Dist. LEXIS 49545, 6-7 (N.D. Cal. Apr.
 8 28, 2011) (collecting district court decisions in California). Here, Plaintiff UDI seeks
 9 punitive damages, bringing it within this sensible rationale. *See* Doc. No. 36 at ¶¶ 54,
 10 60, 68, 73, 78 (First Amended Complaint).

11 While the issue is not presented for final resolution on this motion, it is
 12 undisputable that financial discovery is likely to be discoverable in this case when the
 13 discovery disputes over the financials are ultimately brought before this Court. That
 14 is both because punitive damages are sought *and* because the financial discovery will
 15 promote settlement. Courts in this circuit have repeatedly held any one of these
 16 reasons permits discovery of a defendants’ financial information (such as their assets
 17 and liabilities). *3Com Corp. v. D-Link Sys., Inc.*, 2007 U.S. Dist. LEXIS 26540 **11-
 18 12 (N.D. Cal. Marc. 27, 2007) (Compelling “discovery of defendant’s financial
 19 situation” because it was relevant to damages and such discovery “may facilitate
 20 settlement of the action, which is one of the purposes behind the broad federal
 21 discovery rules.”); *Malcolm Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 286
 22 (C.D. Cal. 1998) (Compelling discovery; “The discovery of financial information
 23 relevant to a punitive damages claim is permissible under the Federal Rules of Civil
 24 Procedure, whether or not such evidence would be admissible at trial.”); *cf. DC3*
 25 *Ent’t, LLC v. Jon Galt Ent’t, Inc.*, 2005 U.S. Dist. LEXIS 40504 *8 (W.D. Wash.
 26 Dec. 6, 2005) (“In order to reduce the element of surprise and facilitate settlement,
 27 courts liberally construe pretrial discovery.”).

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1 **b. Good Cause Exists for the Requested Sequencing and Slight**
2 **Modification of the Scheduling Order**

3 Since the June 11 Settlement Conference, when discovery resumed, UDI has
4 made reasonable efforts to move financial discovery forward. It has been thwarted
5 insofar as meet-and-confer efforts were delayed on Defendants' discovery responses
6 for over two weeks from the conference date UDI sought. It has been thwarted by
7 Defendants' failure to produce a single document absent a protective order, which has
8 only just been entered. Doc. No. 111. It has been thwarted by the unanticipated
9 difficulty of a substantive fight over the substitution of the decedent Richard
10 McWilliams's estate and trust for his position in this suit; once MPR Trust is added,
11 its financials will be all the more relevant to the punitive damages inquiry. This fight
12 must now be decided by the Court near the end of discovery, because the estate and
13 trust attempted to gain a tactical advantage far beyond the breaking point of Rule 25.
14 *See* Doc. No. 104. That unreasonable position forced UDI to ultimately seek
15 discovery from the estate and trust by way of the limited non-party discovery devices.

16 Sequencing will facilitate settlement, because the results of the financial
17 discovery will impact the parties' cost-benefit analyses, and also provide information
18 on the punitive damages multiplier likely at play. *3Com Corp.*, 2007 U.S. Dist.
19 LEXIS 26540 at *11-12. Sequencing (with the revised closing date of fact discovery)
20 will also avoid prejudice, permitting party discovery mechanisms to be used as to the
21 estate and trust once added to this case. Also, without the proposed sequencing, the
22 parties will drive themselves further apart from settlement, as they incur the
23 significant expenses to complete foreign depositions and substantive discovery before
24 UDI even has a chance to obtain and evaluate Defendants' financial data.

25 Good cause appearing, discovery should be sequenced, with written discovery
26 relating to Defendants' (or Richard McWilliam's estate and trust) financial
27 information to be responded to no later than August 19, 2013, any other financial
28 written discovery completed by September 15, 2013, and the remaining fact

1 discovery resuming thereafter until October 20, 2013 (a fact-discovery cut-off
2 slightly over one month from the current cut-off).

3 **3. Alternatively, An Order Shortening Time Should be Granted**

4 In the event the Court declines to sequence the remaining fact discovery, UDI
5 alternatively requests an order shortening time so that it may obtain Defendants'
6 financial information well before the current discovery deadline (and thus can at least
7 phase the international depositions accordingly).

8 In order to accomplish this, UDI requests the following: (1) the deadline for
9 responding to all UDI's outstanding financial discovery shall be August 9; (2) the
10 parties shall meet and confer on August 12 in person (and by phone for attorneys
11 outside San Diego) on any objection upon which a refusal to produce is based; (3) a
12 joint statement shall be prepared by UDI and circulated by August 13; (4) any
13 objecting party shall insert its portion in the joint statement and return to UDI by
14 August 14; (5) the parties shall file the joint motion and 10-page points and
15 authorities called for by chamber rules by August 16; (6) the court shall rule without
16 further briefing; and (7) any ordered production shall be made not later than one week
17 of the order.

18 **4. Conclusion**

19 For the foregoing reasons, UDI requests a phasing of discovery which will
20 allow its financial discovery to be completed by September 15, 2013, and any
21 remaining fact discovery completed by October 20, 2013. In the alternative, UDI
22 requests an order shortening time as noted in Section 3 above.

23 Dated: August 5, 2013

MINTZ LEVIN COHN FERRIS GLOVSKY
AND POPEO PC

25 By s/Andrew Skale

26 Andrew D. Skale, Esq.

Eric Eastham, Esq.

27 Attorneys for Plaintiff/Counterclaim-
Defendant

28 UPPER DECK INTERNATIONAL B.V.

1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, certify and declare that I am over the age of 18 years,
3 employed in the County of San Diego, State of California, and am not a party to the
4 above-entitled action.

5 On August 5, 2013, I filed a copy of the following document:

6 **UPPER DECK INTERNATIONAL B.V.'S *EX PARTE* APPLICATION FOR
7 BRIEF PHASING OF DISCOVERY. OR IN ALTERNATIVE ORDER
8 SHORTENING TIME RE FINANCIAL DISCOVERY**

9 **AND**

10 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX
11 PARTE* APPLICATION**

12 by electronically filing with the Clerk of the Court using the CM/ECF system which
13 will send notification of such filing to the following:

- 14 • **Alex M. Tomasevic** atomasevic@nblaw.org,
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23 Executed on August 5, 2013, at San Diego, California. I hereby certify that I
24 am employed in the office of a member of the Bar of this Court at whose direction the
25 service was made.

26 s/Andrew Skale
27 Andrew D. Skale, Esq.
Eric Eastham, Esq.

28 21220771v.1