

1 SMITH & HENNESSEY, PLLC
Geoffrey P. Knudsen (SBN 45451)
2 James A. Smith, Jr. (*Pro Hac Vice*)
Whitney I. Furman (*Pro Hac Vice*)
3 316 Occidental Avenue South, Suite 500
Seattle, Washington 98104
4 Telephone: (206) 292-1770
Facsimile: (209) 292-1790
5 Email: gknudsen@smithhennessey.com
jas@smithhennessey.com
6 wfurman@smithhennessey.com

7 NEWMAN | DU WORS, LLP
John Du Wors (SBN 233913)
8 1201 Third Avenue, Suite 1600
Seattle, Washington 98101
9 Telephone: (206) 271-2800
Email: john@newmanlaw.com
10 Attorneys for Defendant Executive Trading, LLC

11 UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 THE UPPER DECK COMPANY, INC.,) Case No. 12CV1923 CAB JMA
14 a Nevada corporation,)
15) DEFENDANT EXECUTIVE
Plaintiff) TRADING, LLC’S OPPOSITION
16 v.) TO PLAINTIFF THE UPPER
17) DECK COMPANY, INC.’S EX
EXECUTIVE TRADING, LLC, a) PARTE APPLICATION TO SEAL
18 Washington limited liability company,) PORTIONS OF THE JOINT
19) MOTION FOR DETERMINATION
20) OF DISCOVERY DISPUTE
21 Defendant.) **Hon. Cathy Ann Bencivengo**
) **Mag. Judge: Hon. Jan M. Adler**
)

22 **I. RELIEF REQUESTED**

23 On October 21, 2013, Plaintiff The Upper Deck Company, Inc. (“Plaintiff”
24 or “Upper Deck”) filed an Ex Parte Application To Seal Portions of the Joint
25 Motion for Determination of Discovery Dispute (“Ex Parte Application”). The
26

1 testimony of Upper Deck's Fed. R. Civ. P. 30(b)(6) representatives cited in
2 Defendant Executive Trading, LLC's ("Defendant" or "Executive Trading")
3 Motion to Compel which Upper Deck belatedly seeks to seal is directly related to
4 the core issues underlying Executive Trading's causes of action. Executive
5 Trading, and the public, has a compelling need for documents related to Upper
6 Deck's gross revenue, as well as the licenses that it lost leading up to its dealings
7 with Executive Trading in this case, that far outweighs Upper Deck's untimely
8 desire to seal the discovery motion.

9 Upper Deck's displeasure about online commentary from a blogger
10 regarding the issues in this case does not outweigh the need of counsel for
11 Executive Trading to communicate with their client about the testimony given by
12 Upper Deck's Fed. R. Civ. P. 30(b)(6) deposition testimony, or the public's right
13 of access to court records. Upper Deck's Ex Parte Application fails both
14 procedurally and substantively to demonstrate good cause for sealing highly
15 relevant, non-privileged information. Accordingly, for all of the reasons discussed
16 herein, Executive Trading respectfully requests that the Court deny Upper Deck's
17 Ex Parte Application.

18 II. BACKGROUND FACTS

19 On August 29, 2013, Executive Trading conducted a Federal Rule of Civil
20 Procedure 30(b)(6) deposition of three Upper Deck. (See Declaration of Whitney
21 I. Furman in Support of Opposition to Ex Parte Application To Seal ("Furman
22 Dec."). at ¶ 2) Plaintiff designated three representatives including Grant
23 Sandground, Don Utic and Steve Tran, to testify on the company's behalf on
24 certain matters. Upper Deck did not designate any of the deposition testimony
25 confidential on the record. (Id.) On September 12, 2013, the parties received from
26 the court reporter, the final transcript of the Rule 30(b)(6) deposition. (Id.)

1 Under the Stipulated Protective Order in this case, a party may:

2
3 within fifteen (15) calendar days of receipt of the final deposition transcript,
4 designate any portion of the deposition under the terms of [the] Protective
5 Order if not so designated previously, by giving written notice to all counsel
6 present at the deposition and Outside Counsel of record. During the period
7 commencing with a deposition session and ending sixteen (16) calendar days
8 following receipt of the final deposition transcript, the parties shall treat all
9 information disclosed in the deposition as Highly Confidential Information.

10 (See Docket No. 23 at 6.)

11 On September 30, 2013, counsel for Executive Trading sent a draft of a joint
12 discovery motion to counsel for Upper Deck, for its review and participation in the
13 joint motion process. (See Furman Dec. ¶ 4.) Executive Trading's draft motion
14 contained the testimony that Upper Deck now belatedly alleges should be sealed in
15 its Ex Parte Application. (Id.) On October 1, 2013, Upper Deck designated certain
16 portions of the deposition transcript of one company representative, Don Utic,
17 Plaintiff's director of finance, as highly confidential and for attorneys' eyes only.
18 (Id. ¶ 5.) This was 19 days after receipt of the final deposition transcript and well
19 outside the timeframe for designating such testimony under the protective order.
20 Despite Upper Deck's noncompliance with the protective order, in an act of good
21 faith, Executive Trading did not use any of the testimony that Upper Deck alleged
22 was for attorneys' eyes only. (Id.)

23 On October 3, 2013, after Upper Deck continued to refuse to respond to
24 Executive Trading's draft joint discovery motion, Executive Trading was forced to
25 file the motion as a Motion to Compel. (See Docket No. 31.) On October 7, 2013,
26 the Court ordered the parties to meet and confer and, if necessary, to file a Joint
Motion for Determination of Discovery Disputed by no later than October 18,
2013. (See Docket No. 32.)

1 On October 15, 2013, counsel for Upper Deck emailed counsel for
2 Executive Trading stating that “[i]t has come to our attention that your original
3 motion to compel breached the protective order by including sensitive deposition
4 testimony that has now become public.” (Furman Dec. ¶ 7.) In its October 15,
5 2013, counsel for Upper Deck cited an article from an online blogger that includes
6 commentary on the issues raised in Executive Trading’s Motion to Compel. (Id.)
7 Upper Deck’s assertion that it had recently become aware that Executive Trading
8 had cited the testimony in its Motion to Compel was, at best, disingenuous, given
9 that Defendant provided Upper Deck with a draft of its motion on September 30,
10 2013, and since the motion had been publically available since October 3, 2013.
11 (Id.)

12 On October 15, 2013, counsel for Executive Trading responded to counsel
13 for Upper Deck, pointing out that none of the testimony which Upper Deck had
14 previously belatedly contended on October 1, 2013 as highly confidential had been
15 used in Defendant’s Motion to Compel. (Furman Dec. ¶ 8.) However, Executive
16 Trading asked Upper Deck to direct them to the portion of the Motion which it
17 believed was objectionable and, if appropriate, they would consider taking
18 remedial measures to correct any quotations from Mr. Utic’s deposition transcript
19 which may have been appropriately designated pursuant to the terms of the
20 protective order. (Id.) Counsel for Upper Deck did not respond. (Id.)

21 On October 18, 2013, Upper Deck belatedly designated nearly all of the
22 deposition testimony quoted in Executive Trading’s argument in the Joint
23 Discovery Motion – all of which was previously quoted in Executive Trading’s
24 October 3, 2012 Motion to Compel—as highly confidential and for attorneys’ eyes
25 only under the Stipulated Protective Order. (Furman Dec. ¶ 9.) Counsel for Upper
26 Deck stated that it was preparing a motion to seal the testimony and that it and

1 Upper Deck's portion of the Joint Discovery Motion would not be complete or
2 ready for filing until October 21, 2013, as Upper Deck would not be able to review
3 it until that time. (Id.) This date was obviously past the October 18, 2013 deadline
4 imposed by the Court's October 7, 2013 Order, which Executive Trading assumed
5 the parties were working towards. (Id. at ¶ 10.) Counsel for Upper Deck stated that
6 it had not calendared the appropriate due date and obtained permission from the
7 Court to file the Joint Discovery Motion on October 21, 2013. (Id.) Had Upper
8 Deck bothered to cooperate with the Joint Discovery Motion process, it would
9 have realized well before Executive Trading was forced to incur additional expense
10 and to suffer further delay in this case, that Executive Trading used the testimony
11 of Upper Deck's 30(b)(6) representatives in furtherance of its motion. (Id. at ¶ 11.)

12 More importantly, Upper Deck's dislike of negative commentary about this
13 case on the Internet is no basis for sealing testimony about Upper Deck's loss of
14 licensing agreement, the accounting reports it is capable of generating, and the
15 company's gross revenue—all of which are highly relevant to Executive Trading's
16 claims—does not constitute a compelling reason or good cause for sealing those
17 portions of Executive Trading's discovery motions. (Furman Dec. ¶ 12.)
18 Moreover, an "attorneys' eyes only" designation of the identified testimony will
19 prevent counsel for Executive Trading from discussing key testimony of Upper
20 Deck personnel with their client and will unfairly hinder and prejudice counsel's
21 ability to prosecute this case. (Id.)

22 The testimony from Upper Deck's 30(b)(6) representatives underscores
23 Defendant's need for critical documents that show Upper Deck's gross revenue
24 and benefits received across the company, as a result of the World of Politics
25 products. (Furman Dec. ¶ 13.) The testimony demonstrates the relevance of
26 information about benefits—or the lack thereof as Upper Deck alleges—that

1 Plaintiff received from the World of Politics cards, not just by showing the revenue
2 Upper Deck made from the World of Sports cards, in which the World of Politics
3 cards were released, which is the only information Executive Trading has been
4 able to obtain to date. (Id.) Executive Trading's Motion to Compel demonstrates
5 its need for these documents and why Upper Deck cannot shield the relevant, non-
6 privileged information that became clear during the Fed. R. Civ. P. 30(b)(6)
7 deposition from discovery, either under California law or Fed. R. Civ. P. 26(b)(1).

8 Executive Trading's compelling need for discovery vastly outweighs Upper
9 Deck's manufactured and untimely displeasure with public opinion and
10 commentary about this case. (Furman Dec. ¶ 13.) Upper Deck should not be
11 rewarded for its failures to comply with the stipulated protective order and/or with
12 deadlines in this case, particularly in light of the presumption of openness and the
13 right of the public to access documents filed with the Court. (Id. ¶ 14.)
14 Furthermore, Upper Deck has failed to meet its high burden of demonstrating that
15 any of the testimony contained in Defendant's October 3, 2013 Motion to Compel
16 and/or in the October 21, 2013 Second Joint Discovery Motion contains any
17 material that could be deemed highly confidential under the stipulated protective
18 order. (Id.)

19 For all of these reasons, Executive Trading respectfully requests that this
20 Court deny Upper Deck's Ex Parte Application To Seal.

21 III. EVIDENCE RELIED UPON

22 This motion is based upon the Declaration of Whitney I. Furman in Support
23 of Defendant's Opposition to Plaintiff's Ex Parte Application To Seal Portions of
24 the Joint Motion for Determination of Discovery Dispute, and the records and files
25 herein.

IV. AUTHORITY

1
2 The testimony cited in Executive Trading's Motion to Compel and in the
3 Joint Motion for Determination of Discovery Dispute which Upper Deck belatedly
4 attempts to seal via its Ex Parte Application is directly related and critical to the
5 underlying causes of action in this case. The discovery obtained during the Upper
6 Deck 30(b)(6) deposition is unlike cases where information that surfaces during
7 pretrial discovery may be unrelated or only tangentially related to the underlying
8 cause of action. See, e.g., Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122
9 (9th Cir. 2003) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S.Ct.
10 2199, 81 L.Ed.2d 17 (1984)). Rather, it underscores the fact that Executive
11 Trading is entitled to information related to Upper Deck's overall gross revenue,
12 not just the limited revenue it contends that it made from the World of Sports
13 Products in which the World of Politics cards were released. It is core to
14 Executive Trading's damages theory.

15 Furthermore, contrary to Upper Deck's assertions, there are no "compelling
16 reasons" to seal the testimony from public disclosure or to designate it as highly
17 confidential, preventing access of Defendant. The "compelling reasons" standard
18 requires a party seeking to seal a judicial record to bear the burden of meeting the
19 standard. See Pintos v. Pacific Creditors Ass'n, 605 F.3d 665 (9th Cir. 2010)
20 (citing Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1178 (9th Cir.
21 2006). This standard derives from the common law right "to inspect and copy
22 public records and documents, including judicial records and documents." Id.
23 (internal citation omitted). To limit the common law right of access, a party
24 seeking to seal judicial records must show that "compelling reasons supported by
25 specific factual findings ... outweigh the general history of access and the public
26 policies favoring disclosure." Id. Upper Deck has merely offered vague

1 allegations that it will suffer loss of goodwill as a result of online commentary
2 about this case. Nor is there good cause under Fed. R. Civ. P. 26 to seal the
3 testimony cited in Defendant's discovery motions. See Pintos, 605 F.3d at 678.
4 Here, Executive Trading's need to participate in the discovery process far
5 outweighs Upper Deck's desire to prevent online blogging about these issues.

6 The public has demonstrated interest in the issues presented in this case and
7 Upper Deck is not entitled to belatedly attempt to shield relevant information from
8 disclosure, particularly given its history of delay, refusals to respond to repeated
9 attempts by Defendant's counsel to communicate and obtain its cooperation in
10 discovery, its failures to calendar deadlines, and—most importantly—its wrongful
11 withholding of key non-privileged documents and information. Executive Trading
12 should not continue to be hindered and delayed by Upper Deck's lack of
13 compliance with its discovery obligations.

14 **V. CONCLUSION**

15 For all of the reasons discussed herein, Executive Trading respectfully
16 requests that the Court deny Upper Deck's Ex Parte Application to Seal.

17 DATED this 23rd day of October, 2013.

18
19 SMITH & HENNESSEY PLLC

20 /s/ Whitney I. Furman

21 James A. Smith, Jr.

22 Geoffrey P. Knudsen

23 Whitney I. Furman

Attorneys for Executive Trading, LLC

24 NEWMAN |DU WORS

25 John Du Wors

26 Attorney for Executive Trading, LLC