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9 Attorneys for Plaintiff,
10 The Upper Deck Company, Inc.,

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

13 THE UPPER DECK COMPANY, INC., a
14 Nevada Corporation,

15 Plaintiff,

16 v.

17 EXECUTIVE TRADING, LLC,, a
18 Washington Limited Liability Company,

19 Defendants.

No.: 12-CV-1923 CAB JMA

**EX PARTE APPLICATION TO
SEAL PORTIONS OF THE JOINT
MOTION FOR DETERMINATION
OF DISCOVERY DISPUTE**

Judge: Hon. Cathy Ann Benvicengo
Mag. Judge: Hon. Jan M. Adler

20
21 Plaintiff The Upper Deck Company, Inc. hereby submits the following ex
22 parte application to seal portions of the Executive Trading’s motion to compel
23 discovery and extend discovery deadlines (Dkt. No. 31) and the second joint motion
24 for determination concerning discovery dispute and stipulation to extend discovery
25 deadlines. Defendant Executive Trading, LLC opposes this motion.

26 While there is a common law right of public access to judicial records, that
27 right is not absolute and a court may seal judicial records when there are
28 “compelling reasons” to do so. *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665,

1 677-78 (9th Cir. 2010). Courts, when evaluating a request to seal records, generally
2 weigh the reasons in favor of sealing against the public right of access to judicial
3 records. Relevant factors include “the public interest in understanding the judicial
4 process and whether disclosure of the material could result in improper use of the
5 material.” *Id.* at 679.

6 The information Upper Deck seeks to seal is confidential financial data and
7 facts concerning Upper Deck’s acquisition/loss of lucrative sports-content licenses.
8 Upper Deck is a closely held company. The public has no legitimate interest in its
9 finances or licenses. Portions of Executive Trading’s motion to compel filed on
10 October 3, 2013 contained confidential deposition testimony provided by Upper
11 Deck concerning its finances and licenses. That testimony was in fact improperly
12 used by trading card bloggers to paint Upper Deck in a negative light, likely
13 resulting in a loss of sales/goodwill. Declaration of Tracy J. Jones (“Jones Dec.”),
14 Ex. A, ¶ 2. Upper Deck seeks to prevent further damage by sealing the already filed
15 motion to compel and the joint motion for a discovery determination filed herewith.

16 Upper Deck requests the Court seal portions of Docket No. 31 and portions of
17 the Parties’ joint motion for a discovery determination as provided in redacted copies
18 filed herewith.

19
20 Respectfully submitted,

21 **NICHOLAS & TOMASEVIC, LLP**

22
23 Dated: October 21, 2013

By: s/ Tracy J. Jones

24 Craig M. Nicholas
25 Alex. M. Tomasevic
26 Tracy J. Jones

27 Attorneys for Plaintiff THE UPPER DECK
28 COMPANY, INC.

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17 v.

18 EXECUTIVE TRADING, LLC,, a
19 Washington Limited Liability Company,

20 Defendants.

No.: 12-CV-1923 CAB JMA

**DECLARATION OF TRACY J.
JONES IN SUPPORT OF
PLAINTIFF’S EX PARTE
APPLICATION TO SEAL
PORTIONS OF THE JOINT
MOTION FOR DETERMINATION
OF DISCOVERY DISPUTE**

Judge: Hon. Cathy Ann Benvicengo
Mag. Judge: Hon. Jan M. Adler

21 I, TRACY J. JONES, declare:

22 1. I am an associate attorney with the law firm of Nicholas & Tomasevic,
23 LLP, counsel of record for Plaintiff The Upper Deck Company, Inc. in this action. I
24 have personal knowledge of the facts contained in this declaration and can testify
25 competently thereto if called as a witness.

26 2. Attached hereto as **Exhibit “A”** is a true and correct copy of an article
27 from a website for trading card enthusiasts, *The Cardboard Connection*.

1 3. There is good cause to seal portions of the discovery motions. The
2 information Upper Deck seeks to seal is confidential financial data and facts
3 concerning Upper Deck's acquisition/loss of lucrative sports-content licenses. Upper
4 Deck is a closely held company. The public has no legitimate interest in its finances
5 or licenses. Portions of Executive Trading's motion to compel filed on October 3,
6 2013 contained confidential deposition testimony provided by Upper Deck
7 concerning its finances and licenses. That testimony was in fact improperly used by
8 trading card bloggers to paint Upper Deck in a negative light, likely resulting in a
9 loss of sales/goodwill. Upper Deck seeks to prevent further damage by sealing the
10 already filed motion to compel and the joint motion for a discovery determination
11 filed herewith.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed this day 21st day of October, 2013 in San Diego California.

/s/ Tracy J. Jones
TRACY J. JONES

EXHIBIT “A”



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Law of Cards: UD Witness Educates Attorney on What an “Insert” Is

By Paul Lesko | Oct 08, 2013

0

The [Upper Deck v. Executive](#) case could fill the "crazy case" vacuum left by the settling of [Upper Deck v. Upper Deck](#).

This is the case over Upper Deck's [World of Politics](#) cards found in [2011 Upper Deck World of Sports](#). Basically, Executive claims that it and Upper Deck were going to launch a line of political candidate trading cards. Allegedly, at some point, Upper Deck told Executive it changed its mind. But then Upper Deck released its World of Politics cards as an insert set in its World of Sports product.

Executive claims that the World of Politics infringes its copyrights, was a breach of contract, etc., etc.

The case has been quiet for a while, until this week when Executive Trading filed a motion to compel, seeking --

OK, who cares about the legal stuff going on. Let's get to the fun stuff.

The first bit of fun has to do with the valuation of this case. As I've written before, if Executive wins (and that is a BIG if) it'll get a ridiculously low amount of damages. Why? We're talking about inserts in one product line. Eighteen total cards (nine regular, nine short-printed) out of a set of around 400 cards. And that's if you don't take the autographs and memorabilia cards into account. At best, that's 4.5 percent of the set. I'm not sure what UD made on his set, but even if it made \$500,000, we're talking about a back of the napkin calculation of \$22,500 attributable to these inserts.

Considering that Executive already took a few depositions and filed a motion to compel, I'm willing to bet its legal expenses already exceed any potential recovery.

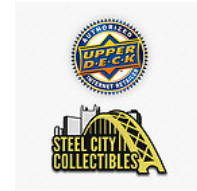
Now, if you don't know what an insert is, you're 1) not a collector or 2) not involved in the trading card industry. Don't worry though, because Executive's attorneys don't know what an insert is either. Here's from the deposition transcript:

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Shop for Upper Deck Hobby Boxes



2013-14 Upper Deck O-PEE-CHEE HOCKEY #2 BOX
LOT HOBBY SEALED* NEW LOWER PRICE
\$114.95



2013-14 Upper Deck TrilogY Hockey Hobby 4-Box Case
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2013 UPPER DECK FOOTBALL FACTORY SEALED
HOBBY BOX 3 AUTOGRAPHS PER BOX MANUAL ?
\$89.95



2013 UD Upper Deck SPX Football Factory Sealed
HOBBY BOX
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2013-14 UPPER DECK TRILOGY HOCKEY Factory
Sealed HOBBY Box - FREE US SHIP
\$195.00 (1 Bid)

Q. Okay. Earlier you said that you believed that Upper Deck deployed the World of Politics card product line in part to replicate the success associated with its earlier political cards; correct?

A. I didn't reference it as a "product line." Those World of Politics are a groove of insert cards within the World of Sports product.

Q. I don't want to trick you into a term you don't mean to use. The World of Politics cards, is it fair to call them a product, at least?

A. No, not in my world. Not in my world. It is a insert set within World of Sports.

Q. Okay. It is an element?

A. Yes.

Wow, the people running this case think an insert is a product line. And as I see it, that presents a pretty big valuation problem.

Don't worry, Executive is up to speed now thanks to Grant Sandground, the Upper Deck employee who testified above, for educating them on the definition of "insert."

And I bet they won't pay him for that education.

The second fun note is that it appears to be Executive's theme that UD allegedly ripped off the World of Politics cards from Executive to (at least in part) to fill the vacuum left when UD lost its MLB, NBA and NFL licenses.

Yeah, cards of politicians would make up that shortfall.

The third fun bit of the case is that Executive liberally attaches pages of deposition transcripts to its motion, which, allows us to peer into the trading card world.

The most interesting discussion which comes from the depositions has to do with UD's loss of its NFL, NBA and MLB licenses, and how much revenue those licenses meant to UD.

Q. In November 2008 when you began working at Upper Deck, what percentage of Upper Deck's business related to the distribution of NFL football cards?

A. I'm not -- I don't -- I would have to speculate on that.

Q. You can't give me an estimate based on what you observed when you got there?

A. I would estimate 25 percent.

Q. 25 percent of Upper Deck's business was associated with NFL football?

A. That would be my estimate.

Q. What percentage was associated with NBA basketball?

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[2013-14 Upper Deck Artifacts Hockey Cards](#)

A. 25 percent.

Q. What percentage was associated with professional baseball?

A. 25 percent.

Q. So in 2010, when Upper Deck lost its licenses to baseball, basketball and football, 75 percent of its business went away?

A. No. It's not that straightforward.

Q. Tell me why that's inaccurate.

A. Because we picked up a CLC license and started producing basketball and football products under the CLC license.

Q. Of those athletes during their collegiate years?

A. Correct.

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Yikes, potentially losing 75 percent of business? That would make anyone delirious into thinking trading cards of politicians would make back all of that money! No, you're right, nothing would make anyone delirious enough into thinking politician trading cards could make anyone a lot of money.

So, I think you'll agree with me -- given the unrealistic expectations, a lack of grasp on how the industry works, and liberal amounts of deposition transcripts (which are mostly unnecessary given the issues, but give us a great insight into the case) -- this case is the front runner for being our "crazy" to replace the void opened by the settling of the Upper Deck v. Upper Deck case.









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Items Ending First

 <p>2013-14 Upper Deck Trilogy Rookie Premieres 399 Auto RC #117 Mikhail Grigorenko \$39.99</p>	 <p>2013-14 Upper Deck Trilogy Rookie Premieres 399 Auto RC #141 Emerson Etem \$14.99</p>	 <p>2013 UPPER DECK STAR ROOKIES #122 THEO RIDDICK AUTO \$5.99</p>	 <p>2013 UPPER DECK STAR ROOKIE AUTO ERIK HIGHSMITH RC RARE TAR HEELS VIKINGS GEM \$8.78</p>
 <p>★ 2013 UPPER DECK STAR ROOKIE</p>	 <p>2013-14 UPPER DECK ARTIFACTS # #187</p>	 <p>2013-14 UPPER DECK ARTIFACTS #15 COLIN</p>	 <p>2013-14 UPPER DECK ARTIFACTS #198 VIKTOR</p>

AUTOGRAPH NICK KASA BUFFALOES RAIDERS RC SP GEM \$5.37	QUINTON HOWDEN AUTOGRAPH DUAL RELIC #D 7 12 \$8.50	GREENING RAINBOW DUAL PATCH #D 3 15 \$11.11	FASTH RAINBOW DUAL PATCH #D 2 15 \$12.50
 2013-14 Upper Deck Trilogy - Level 1 & 2 Autograph - Ryan Murphy - Hurricanes \$25.00	 DOUG GILMOUR 2013-14 UPPER DECK ARTIFACTS BLACK AUTOGRAPH #21 (4 5) TORONTO \$100.00	 2013 UPPER DECK MATT BARKLEY LETTERMAN "J" AUTO AUTOGRAPH RC 1 15 eBay 1 1 \$79.50	 2013-14 UPPER DECK TRILOGY TAYLOR HALL AUTO GROUP B GOLD AUTOGRAPH 13-14 \$8.50
 2013-14 UPPER DECK ARTIFACTS JONATHAN QUICK DUAL JERSEY PATCH # 75 13-14 \$8.50	 2013-14 UPPER DECK ARTIFACTS DREW DOUGHTY MIKE RICHARDS DUAL PATCH # 36 13-14 \$22.38	 2013-14 UPPER DECK ARTIFACTS BRYAN LITTLE DUAL PATCH #69 GOLD 13-14 \$9.50	 2013-14 UPPER DECK ARTIFACTS ZACH PARISE DUAL JERSEY PATCH # 36 13-14 \$5.53

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Paul Lesko is a shareholder at Simmons Browder Gianaris Angelides and Barnerd LLC and the chair of its Intellectual Property Department (<http://www.simmonsfirm.com>). Don't hold the fact that Paul is a lawyer against him, he's also a rabid baseball and college basketball fan, and an avid baseball card collector. Paul can be found on Twitter [@Paul_Lesko](#) and [Google+](#).



User Comments

Nick Mikulicich Jr. | [Oct 8, 2013](#) | [Reply](#)

Imagine the fun on politician trading cards. They could have Died In Office or Indicted stripes, like Pro Set football cards had Traded stripes.

Jason | [Oct 8, 2013](#) | [Reply](#)

They could have a republican and democrat insert like the limited duels but no matter how hard you try they won't fit together haha I could go on and on. Goalie pull with Obama's ears, call the redemption cards a government shutdown card. I know it's Upper Deck article but please Panini if you decide to do a Politican Set let me design it

Leave a Comment:

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12 **UNITED STATES DISTRICT COURT**
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14 THE UPPER DECK COMPANY, INC., a)
15 Nevada Corporation,)

No.: 12-CV-1923 CAB JMA

16 Plaintiff,

PROOF OF SERVICE

17 v.

18 EXECUTIVE TRADING, LLC,, a)
19 Washington Limited Liability Company,)

20 Defendants.
21
22
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1 I, **Meredith Mills**, declare that I am over the age of 18 years and am not a
2 party to the case; I am employed in the County of San Diego, California, where
3 the mailing occurs; and my business address is 225 Broadway, 19th Floor, San
4 Diego, California 92101.

5 On October 21, 2013 I served the within: **EX PARTE**
6 **APPLICATION TO SEAL PORTIONS OF THE JOINT**
7 **MOTION FOR DETERMINATION OF DISCOVERY DISPUTE;**
8 **DECLARATION OF TRACY J. JONES IN SUPPORT OF**
9 **PLAINTIFF'S EX PARTE APPLICATION TO SEAL PORTIONS**
10 **OF THE JOINT MOTION FOR DETERMINATION OF**
11 **DISCOVERY DISPUTE** on the interested parties in said action by:

12 **BY FACSIMILE TRANSMISSION:** In addition to service by mail as set
13 forth below, the counsel or interested party authorized to accept service was
14 also forwarded a copy of said document(s) by facsimile transmission at the fax
15 machine telephone number corresponding with his/her/its name. The fax
16 machine I used complied with CRC Rule 2.301(3) and no error was reported
17 by the machine. Pursuant to CRC Rule 2.306(h)(3), I caused the machine to
18 print a transmission record of the transmission, a copy of which is attached to
19 this declaration.

20 **BY PERSONAL DELIVERY:** I caused each envelope to be hand-delivered
21 to the addressee specified on the service list by leaving said envelope with
22 either the addressee directly or another person at that address authorized to
23 accept service on the addressee's behalf.

24 **BY CM/ECF:** I served the above-referenced document(s) to all parties via
25 CM/ECF.

26 **BY EMAIL:** I emailed the above-documents to the e-mail associated with
27 counsel:

28 **BY MAIL:** as follows:

1 **BY OVERNIGHT COURIER:** I placed the above-referenced
2 document(s) in an envelope for collection and delivery on this date in
3 accordance with standard FEDERAL EXPRESS overnight delivery
4 procedures.

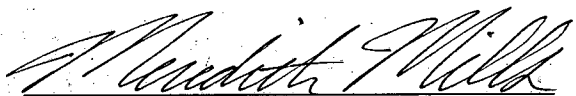
5 By placing a copy thereof in a sealed envelope addressed as follows:

6 **SEE LIST OF PARTIES SERVED**

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

11 I declare under penalty of perjury that the foregoing is true and correct.

12 Executed on **October 21, 2013**, at San Diego, California.

13
14 
15 Meredith Mills

16 **PARTIES SERVED:**

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