

# EXHIBIT 13

**The Upper Deck Company, Inc. v. Executive Trading, LLC, LLC**

**Supplemental Report of Heather H. Xitco, CPA, MBA, CFF**

**February 14, 2014**

**I. INTRODUCTION**

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6 1. I was retained by counsel representing The Upper Deck Company, Inc.  
7 to respond to claims of economic damages sustained by Executive Trading, LLC.  
8 The purpose of this report is to supplement my expert opinions expressed in my  
9 report dated November 18, 2013. This report summarizes my opinions based on  
10 the documents I have reviewed to date. I may receive additional relevant  
11 information and, upon receipt and review of such information, will file a  
supplemental report, if necessary.

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13 **II. DOCUMENTS REVIEWED AND RELIED UPON**

14 2. In connection with my assignment, I reviewed the materials and  
15 information detailed in the attached Exhibit "C".

16  
17 **III. OPINIONS**

18 3. Based on the information that I have received to date, it remains my  
19 opinion that any economic damage sustained as a result of the alleged actions of  
20 The Upper Deck would be not exceed \$201, if any. The foundation for my opinion  
21 is described in my November 18, 2013 report. Subsequent to my November 18,  
22 2013 report, I was provided and reviewed Dennis Mandell's and Tim Girvin's Expert  
23 Reports, my observations are summarized as follows:

24 4. Mr. Mandell opines that if it is found that The Upper Deck violated its  
25 confidentiality agreement with Executive Trading, LLC by producing the World of  
26 Politics inserts, damages payable to Executive Trading, LLC would [REDACTED]. To  
27 arrive at this damage amount Mr. Mandell assumes that 1) The Upper Deck would  
28 have agreed to enter a 5-year agreement where it would have paid a [REDACTED] royalty

1 on an [REDACTED] gross margin,<sup>1</sup> and 2) that The Upper Deck benefited in the form of  
2 branding provided by Executive Trading, LLC.

3 5. The Upper Deck and Executive Trading, LLC had discussions to enter  
4 an agreement to produce a new line of solely composed of political cards, under this  
5 agreement the pre-tax profits would be split 50/50 between the two parties<sup>2</sup>. Per  
6 the last discussions between The Upper Deck and Executive Trading, had their  
7 venture gone forward, they would have agreed to a royalty arrangement under  
8 which Executive Trading, LLC would manufacture and The Upper Deck would  
9 distribute the new line of political cards.<sup>3</sup> The Upper Deck chose not to enter this  
10 agreement. However, to quantify the damages allegedly owed to Executive Trading,  
11 LLC Mr. Mandell assumes the hypothetical scenario that The Upper Deck would have  
12 paid a royalty of [REDACTED]% on the gross profits derived from the inclusion of the World of  
13 Politics cards to the already existing World of Sports to which he presumes a [REDACTED]%  
14 margin of gross sales – ignoring the actual gross margin of [REDACTED]<sup>4</sup>.

15 6. In Mr. Mandell's conclusions he uses an average of the actual revenues  
16 of The World of Sports 2010 and 2011 trading cards – ignoring the fact that these  
17 were not World of Politics trading cards, but inserts comprising 0.38% of the total  
18 cards. Thus, Mr. Mandell is claiming that Executive Trading, LLC would have  
19 benefitted from 100% of the World of Sports sales versus, a more appropriate  
20 measure considering any increase in sales attributable to World of Politics since The  
21 Upper Deck was producing World of Sports prior to any interaction with Executive  
22 Trading LLC.

23 Additionally, The Upper Deck did not include any political inserts in its 2010  
24 World of Sports release, and when it did, net sales decreased by 11%. Thus, it is  
25 unclear as to why Mr. Mandell uses the totality of average sales from the 2010-  
26 2011 World of Sports releases as his basis, rather than noting the difference in  
27 sales between the two releases, which clearly demonstrate that Upper Deck did not  
28 derive any additional revenue from its World of Politics inserts.

<sup>1</sup> Report of Dennis Mandell, 01/16/14

<sup>2</sup> Drafts Letter of Intent between The Upper Deck and Executive Trading, UD2332-2334, UD935-936

<sup>3</sup> Counter Complaint

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3 7. Mr. Mandell arbitrarily assumes an [REDACTED] % profit margin on subject sales,  
4 ignoring the actual profit margins of [REDACTED] % for the World of Sports releases. It is  
5 unclear why Mr. Mandell presumes that for this new product line that one would not  
6 only achieve the same revenue as the existing World of Sports cards, but also the  
7 additional profitability (ten-fold) without accounting for any development or start-  
8 up costs. Thus, Mr. Mandell's calculation of an [REDACTED] % gross margin is not valid and is  
9 unsubstantiated by the records I have received to date.

10 8. Mr. Mandell utilizes a [REDACTED] % royalty rate which he bases on the range  
11 provided by Mr. Girvin's opinion and his own professional experience negotiating  
12 agreements. [REDACTED]  
13 [REDACTED]. Moreover, as Mr. Girvin states, royalties would  
14 be paid based on sales - "a typical modeling in my experience, is - we'll sign on  
15 your ideas... and if they sell, we'll pay you for what is sold"<sup>6</sup>- however, Mr. Mandell  
16 utilizes gross profits instead of sales to calculate royalties.

17 Mr. Sanground opines that a reasonable royalty rate that could be expected  
18 on the sale of political inserts is a rate of [REDACTED] %. Based on an average royalty rate  
19 of [REDACTED] of the actual 2011 World of Sports net sale, the amounts due to Executive  
20 Trading, LLC would be as follows:

2011 World of Sports Net Sales	\$	
Political Inserts, 0.38%		
Royalty Rate		
<b>Potential Royalties Due</b>	<b>\$</b>	<b>84</b>

24 Assuming The Upper Deck had agreed to pay Executive Trading, LLC a  
25 royalty rate of [REDACTED] % based on sales of the 2011 World of Sports political inserts,  
26

27 <sup>4</sup> World of Sports Profit and Loss, 2010 and 2011 releases UD002904

28 <sup>5</sup> License Agreement Between The Upper Deck and the Collegiate Licensing Company

<sup>6</sup> Report by Tim Girvin, 01/16/14

1 then the royalties due to Executive Trading, LLC would be \$479<sup>7</sup>.

2  
3 9. Both Mr. Mandell and Mr. Girvin argue that The Upper Deck benefitted  
4 from the branding derived from Executive Trading, LLC's political cards and that  
5 these benefits had a long lasting effect on Upper Deck sales and position as a  
6 brand. Neither has explained how said "benefit" translated into sales or profits for  
7 The Upper Deck as World of Sports sales declined 11% after inclusion of the  
8 political inserts. In his calculations Mr. Mandell assumes that The Upper Deck and  
9 Executive Trading, LLC would have agreed to a 5-year term contract and that  
10 during this period sales of the World of Sports would have increased year to year  
11 due to the value added from Executive Trading, LLC's unique branding.

12 In making this assumption Mr. Mandell does not account for the fact that the  
13 inclusion of World of Politics did not generate any additional revenues for The Upper  
14 Deck, but rather, the 2011 World of Sports released suffered a decrease in sales.  
15 With this decreasing sales trend The Upper Deck, as any other business, would  
16 evaluate its operations, thus, if its venture with Executive Trading, LLC had not  
17 been profitable (as Projected by The Upper Deck)<sup>8,9</sup> then it is not reasonable to  
18 assume that it would have continued this venture to 2016 as claimed by Mr.  
19 Mandell. In fact given the poor sales performance of the 2011 World of Sports line  
20 it was deemed a failed product and since then Upper Deck discontinued the line<sup>10</sup>.  
21 Additionally, as noted by Mr. Mandell himself the Letter of Intent provided the  
22 option to terminate the agreement within a 60 days notice, in the case that  
23 minimum pre-tax profits were not achieved.<sup>11</sup> Thus, Mr. Mandell provides no valid  
24 basis to assume that damages should be calculated to 2016.

25 10. Mr. Girvin claims that The Upper Deck's interactions with Executive  
26 Trading, LLC had an effect that transformed The Upper Deck's brand in a "holistic"  
27 manner. Mr. Girvin states that this innovation became an asset of monetary value.  
28 However, per the records provided The Upper Deck did not generate any increased

<sup>7</sup> 2011 World of Sports Net Sales, .38% or \$2,397 x 20% Royalty.

<sup>8</sup> Complaint

<sup>9</sup> Report by Grant Sanground

<sup>10</sup> Report by Grant Sanground

<sup>11</sup> Draft Letter of Intent between The Upper Deck and Executive Trading, UD2332-2334, UD935-936

1 monetary value from the inclusion of the political insert cards in its 2011 World of  
2 Sports release, rather, sales decreased. Moreover, Mr. Girvin does not provide any  
3 specific indicators as to how The Upper Deck has benefited from a purported brand  
4 improvement, or how its status in the industry has changed since its interactions  
5 with Executive Trading, LLC. While it is true that a brand is an intangible asset, it's  
6 value is still determined by how it helps a company generate profits, and to date I  
7 have not been provided with any evidence demonstrating that The Upper Deck  
8 brand has, or will benefit from its interactions with Executive Trading, LLC.

8 11. Even after the release of World of Politics inserts in 2012 by The Upper  
9 Deck, Executive Trading, LLC has continued to produce its lines of political trading  
10 cards. As I stated in my previous report, in 2012 Executive Trading had its highest  
11 sales year in record<sup>12</sup>. Thus, from the records provided to date it is not possible to  
12 conclude that Executive Trading has been precluded or impaired from earning  
13 profits from its venture into political trading cards.

14 The views expressed in this report are those of the author and should not be  
15 construed as representing the positions of other experts at Dolan Xitco Consulting  
16 Group.

17  
18 I declare under penalty of perjury under the laws of the United States of America  
19 that the foregoing is true and correct to the best of my belief and that this report  
20 was signed on February 14, 2014 at San Diego, California.

21  
22 Heather H. Xitco, CPA, MBA, CFF

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24 \_\_\_\_\_  
25 Principal  
26 Dolan Xitco Consulting Group

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<sup>12</sup> EXEC743-745

# Exhibit C

**The Upper Deck Company, Inc. v. Executive Trading, LLC**

Exhibit C

Bates #***Depositions***

Don Utic taken 08/29/13

***Legal***

Upper Deck's Complaint, 08/03/12

Executive Trading's Answer, Affirmative Defenses and Counterclaims, 08/31/12

**Upper Deck**

1	World of Politics Cards Printed by Athlete Name and Amount	
2	License Agreement Between Upper Deck and the Collegiate Licensing Company	UD986-987
3	2011 World of Sports Product Definition Memorandum, 12/19/11	UD778-787
4	Profit & Loss for World of Sports 2010, 2011	UD2904
5	Profit and Loss Forecasts, Cost and Revenue Estimates, 09/11-02/12 (Various)	UD990-992, 1320-1368, 1391, 1420, 1427-1428, 1430, 1440, 1442
6	General Ledger Transactions, 10/01/10-06/30/13	UD943-984
7	General Ledger Transactions, 07/31/11-02/29/12	UD993-1002
8	World of Sports Plan Production Update and Profit and Loss 2012	UD988-989
9	General Ledger Sales Transactions, 09/30/09-09/30/13	UD2907-2941
10	Drafts of Letter of Intent with Executive Trading	UD2332-2334, UD935-93

**Executive Trading**

1	Cash Flow Statements, 2009-2013	EXEC717-724, 728-729, 733-734
2	Various Income Statements and Balance Sheets, 01/01/11-09/30/11	EXEC725-727, 730-731, 735-737
3	Sales and Customer Ledger, 2009-2013	EXEC738-751
4	Vendors	EXEC752-850
5	Profit and Loss Projections 11/09-10/10 Income Statement 12/31/09-06/30/10	EXEC1683-1686
6	Historical Financial Statements and Projected Balance Sheet, 12/31/09-06/30/10 Submitted to Small Business Association	EXEC1687-1692

**Expert Reports**

Dennis Mandell, 01/16/14

Tim Girvin, 01/16/14

Grant Sanground, 01/17/14



**The Upper Deck Company, Inc. v. Executive Trading, LLC**

Exhibit C

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**II. Research**

[www.executivetradingcards.com](http://www.executivetradingcards.com)

[www.upperdeck.com](http://www.upperdeck.com)

[www.cardsone.com](http://www.cardsone.com)

[www.cardboardconnection.com](http://www.cardboardconnection.com)

[www.ebay.com](http://www.ebay.com)