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8 Joseph Pirozzi and J & T Hobby, LLC

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/06/2015 at 11:12:00 AM
Clerk of the Superior Court
By Lee McAlister, Deputy Clerk

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

11 THE UPPER DECK COMPANY, INC., a)
12 Nevada Corporation,)

13 Plaintiffs,)

14 vs.)

15 JOSEPH PIROZZI, and individual;)
16 J&T HOBBY LLC, a New York Limited)
17 Liability Company; and DOES 1-100,)
18 inclusive,)

19 Defendants.)

20 AND RELATED CROSS-COMPLAINT)

CASE NO.: 37-2011-00100599-CU-BC-
CTL

Consolidated with: CASE NO.: 37-2012-
00056843-CU-BT-NC

DEFENDANTS AND CROSS-
COMPLAINANTS, JOSEPH PIROZZI
AND J&T HOBBY, LLC'S NOTICE OF
MOTION AND MOTION FOR A NEW
TRIAL; MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION OF
JOHN V. GAULE IN SUPPORT
THEREOF

Date: May 15, 2015

Time: 9:00 am

Dept: 75

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28 DEFENDANTS AND CROSS-COMPLAINANTS, JOSEPH PIROZZI AND J&T HOBBY, LLC'S
NOTICE OF MOTION AND MOTION FOR A NEW TRIAL; MEMORANDUM OF POINTS AND
AUTHORITIES; DECLARATION OF JOHN V. GAULE IN SUPPORT THEREOF

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE THAT, on May 15, 2015 at 9:00 am in Department
3 75, Defendants and Cross-Complainants, JOSEPH PIROZZI and J&T HOBBY
4 LLC ("Cross-Complainants") will move the Court for an order granting a new trial.
5 This motion will be made pursuant to California Code of Civil Procedure §§ 656
6 and 657 and will be made on the grounds that


7
8 1. There was an irregularity in the proceedings by the adverse party and an
9 abuse of discretion by the Court, by which Joseph Pirozzi and J&T Hobby LLC
10 were prevented from having a fair trial.

11
12 2. There was an error in law occurring at trial, which was excepted by
13 Joseph Pirozzi and J&T Hobby LLC.

14
15 This motion will be based upon this notice, the Notice of Intention to Move
16 for a New Trial filed on March 23, 2015, the minutes of the court, the trial
17 transcript, the attached Memorandum of Points and Authorities, and the attached
18 Declaration of John V. Gaule.

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21 Dated: April 2, 2015

ODDENINO & GAULE

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25 John V. Gaule
26 Attorney for Cross-Complainants,
27 Joseph Pirozzi and J&T Hobby LLC

28 DEFENDANTS AND CROSS-COMPLAINANTS, JOSEPH PIROZZI AND J&T HOBBY, LLC'S
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF FACTS**

3 The trial in this mater commenced on March 2, 2015. The jury rendered its
4 verdict on March 9, 2015. On March 23, 2015, Defendants and Cross-
5 Complainants, JOSEPH PIROZZI and J&T HOBBY LLC ("Cross-Complainants")
6 filed their notice of intention to move the Court for a new trial. The notice of
7 intention was made on the grounds that:
8

9 1. There was an irregularity in the proceedings by the adverse party and an
10 abuse of discretion by the Court, by which Cross-Complainants were prevented
11 from having a fair trial; and
12

13 2. There was an error in law occurring at the trial, which was excepted by
14 Cross-Complainants.
15

16 As set forth in the Declaration of John V. Gaule, Cross-Complainants are
17 moving this Court for a new trial because they were prevented from presenting the
18 testimony of third party witness, Dominick Magliaro, by the inappropriate actions of
19 Plaintiff, Upper Deck ("Plaintiff"). That the Cross-Complainants' request to
20 continue the trial should have been granted and the Court erred in preventing
21 Cross-Complainants from presenting evidence of lost profits, particularly in light of
22 Plaintiff's counsel's closing argument, where he was critical of Cross-
23 Complainants' failure to present that evidence.
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II. LEGAL STANDARD FOR MOTION FOR A NEW TRIAL

The party seeking a new trial must file with the court clerk and serve each adverse party a notice of intention to move for a new trial before the entry of judgment, but after the jury, court, or referee has rendered a decision (Code of Civ. Proc. §§ 656 and 659) or after judgment is entered and within the earliest of the following times: 15 days after the court clerk mailed the notice of entry of judgment under Code Civ. Proc. §664.5; 15 days after any party served a written notice of entry of judgment on the moving party; or 180 days after the judgment is entered (Code Civ. Proc. § 659).

A motion for new trial asks the trial court to reexamine one of more issues of fact or law after a trial and decision by judge or jury (Code of Civ. Proc. §§ 656 and 657). The principal statutory authority for new trial motions is found under Code of Civ. Proc. § 657 and a new trial motion may be granted for any of the following causes, materially affecting the substantial rights of the requesting party:

"1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded

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1 against.

2 4. Newly discovered evidence, material for the party making the application,
3 which he could not, with reasonable diligence, have discovered and produced at
4 trial.
5

6 5. Excessive or inadequate damages.

7 6. Insufficiency of the evidence to justify the verdict or other decision, or the
8 verdict or other decision is against law.

9 7. Error in law, occurring at the trial and excepted to by the party making the
10 application." (Code of Civ. Proc. 657)
11

12 **III. THE COURT SHOULD HAVE GRANTED A CONTINUANCE TO ALLOW**
13 **FOR THE INVESTIGATION OF DOMINICK MAGLIARO'S FAILURE TO**
14 **APPEAR FOR TRIAL AND/OR ALLOW FOR HIS DEPOSITION**
15

16 As set forth in the declaration of John V. Gaule, in a matter of days,
17 Dominick Magliaro went from being a willing participant in the trial of this matter to
18 a cowering fugitive. The court should have granted Cross-Complainants' request
19 for a continuance to investigate what Plaintiff had done to intimidate Mr. Magliaro
20 to the point he refused to appear and testify at this matter.
21

22 **IV. THE COURT SHOULD HAVE ALLOWED EVIDENCE OF**
23 **CROSS-COMPLAINANTS LOST PROFITS**
24

25 It is inherently unfair and prejudicial to have excluded Cross-Complainants'
26 evidence of lost profits, based upon a motion in limine by Plaintiff, and to then
27 have Plaintiff take advantage of that and knowingly argue to the judge that that
28 DEFENDANTS AND CROSS-COMPLAINANTS, JOSEPH PIROZZI AND J&T HOBBY, LLC'S
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1 barred evidence should have been presented to the jury.

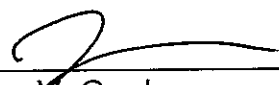
2 Cross-Complainants' case was materially prejudiced and very likely resulted
3 in a favorable result for Plaintiff because Cross-Complainants could not present
4 evidence of lost profits, while Plaintiff argued to the jury that such evidence should
5 have been presented.
6

7 **V. CONCLUSION**

8 It is respectfully requested that the Court grant Defendants and Cross-
9 Complainants motion for a new trial on all issues.
10

11
12 Dated: April 2, 2015

ODDENINO & GAULE

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17 John V. Gaule
18 Attorney for Cross-Complainants,
19 Joseph Pirozzi and J&T Hobby LLC
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DECLARATION OF JOHN V. GAULE

1. I, John V. Gaule, declare that I am an attorney at law licensed to practice before all the Courts in the state of California. I am the attorney of record for Defendants, Joseph Pirozzi and J&T Hobby LLC in this matter. If called upon to testify to the following facts, I could competently do so as they are of my own personal knowledge.

2. The trial of this matter commenced on March 2, 2015. Plaintiff and Cross-Defendant, Upper Deck, filed a number of motions in limine, one of which sought to exclude any evidence of lost profits by Defendants and Cross-Complainants, Joseph Pirozzi and J&T Hobby LLC ("Cross-Complainants"). Cross-Complainants filed an opposition to that motion in limine and also argued against that motion. Cross-Complainants should have been allowed to present evidence of lost profits. Their inability to do so was prejudicial, especially in light of Plaintiff and Cross-Defendant, Upper Deck's counsel's closing argument when he repeatedly and aggressively pointed out to the jury that Cross-Complainants had presented no written evidence of lost profits or profit and loss statements.


3. Also, on the first day of trial, I requested that the court continue the matter for 60 to 90 days so that I could investigate and determine the cause of one of Cross-Complainants' witnesses, Dominick Magliaro's failure to appear for trial. I read to the Court an email I received, a copy of which I attached hereto as Exhibit A, and expressed to the Court my concern that Upper Deck had inappropriately threatened Mr. Magliaro to prevent him from testifying at the trial. I also asked the

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1 Court in the alternative to continue the trial to allow me to depose Mr. Magliaro to
2 preserve his testimony. It was not until a few days before the trial was I made
3 aware that Mr. Magliaro would not appear for trial. Up to that time, he had agreed
4 to testify at trial. Airplane and hotel reservations had been made on his behalf for
5 his appearance at trial.
6

7 The Court denied my request.

8 4. I declare under penalty of perjury under the laws of the State of California
9 that the foregoing is true and correct. Executed this 2d day of April, 2015
10 at Arcadia, California.
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15 John V. Gaule
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EXHIBIT A

EXHIBIT A

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> Sent from my iPhone
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> Begin forwarded message:
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>
> From: Craig Nicholas <CNicholas@NicholasLaw.org>
>
> Date: February 19, 2015 at 5:37:36 AM PST
>
> To: "pat@chapinlaw.net"
> <pat@chapinlaw.net>
>
> Subject: Dominick Magliaro
>
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>
>
> Hi Patrick,
>
> I have heard a rumor that Dominick Magliaro received a
> subpoena for the J&T trial and may plan to attend. I
> have to assume that rumor is false because Dominick could
> not be served with a California subpoena, he already signed
> a declaration verifying his
> lack of knowledge, and he recognizes his legal
> responsibilities to Upper Deck. Please confirm for me
> that this rumor is untrue so we can put the issue to
> rest.
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>
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> Thanks,
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>
> Craig
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>
>
> Craig Nicholas
>
> Nicholas & Tomasevic, LLP
>
> 225 Broadway, 19th Floor
>

1 **STATE OF CALIFORNIA,)**
2 **COUNTY OF SAN DIEGO)**

Upper Deck Company, Inc. v. Pirozzi, et al.
Case No: 37-2011-00100599-CU-BC-CTL

3 **PROOF OF SERVICE**

4 I, Linnea Vaughan, declare as follows:

5 I am employed in the County of Los Angeles, State of California. I am over
6 the age of eighteen and not a party to the within action. My business address is
7 444 East Huntington Drive, Suite 325, Arcadia, California 91006.

8 On April 2, 2015, I served the following document described as

9 **DEFENDANTS AND CROSS-COMPLAINANTS, JOSEPH PIROZZI AND J&T HOBBY LLC'S**
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11 **AUTHORITIES; DECLARATION OF JOHN V. GAULE IN SUPPORT THEREOF**

12 on all interested parties in this action by placing the () original a (X) true copy
13 thereof enclosed in a sealed envelope addressed as follows

14 Craig Nicholas
15 Tracy Jones
16 Nicholas & Tomasevic, LLP
17 225 Broadway, 19th Floor
18 San Diego, CA 92101
19 ***Attorney for Plaintiffs***
20 ***The Upper Deck Company, Inc.***

21 (X) **By Mail**, I am readily familiar with the firm's practice of collection and
22 processing correspondence for mailing. It is deposited with the U.S. Postal
23 Service on the same day in ordinary course of business. I know that the
24 envelope was sealed and, with postage thereon fully prepaid, placed for
25 collection and mailing on this date in the United States mail at Arcadia, California.

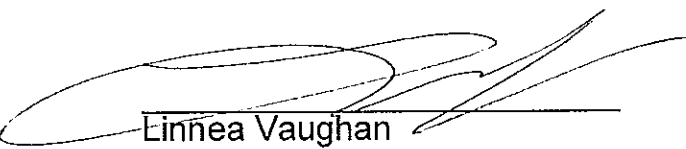
26 () **By Facsimile**, I caused the above-referenced document(s) to be
27 transmitted to the following fax number(s):

28 () **By Personal Service**, I caused such envelope(s) to be delivered by hand
to the above addressee(s).

() **By Email**, I caused the above-reference document(s) to be transmitted via
email to the following email address: tjones@nicholaslaw.org
cnicholas@nicholaslaw.org

I declare under the penalty of perjury under the law of the state of California that
the foregoing is true and correct of my own knowledge.

Executed this 2nd day of April, 2015, at Arcadia, California.


Linnea Vaughan