

2011 WL 6396413

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United States District Court,
S.D. California.

The UPPER DECK COMPANY; and The
Upper Deck, Company, Inc., Plaintiffs,

v.

ENDURANCE AMERICAN SPECIALTY
INSURANCE COMPANY, Defendant.
and Related Counterclaims.

No. 10cv1032 JM(WMC). | Dec. 15, 2011.

Opinion

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

[JEFFREY T. MILLER](#), District Judge.

*1 Endurance American Specialty Insurance Company (“Endurance”) moves for summary judgment or partial summary judgment on all claims alleged in the complaint of Plaintiffs The Upper Deck Company and The Upper Deck, Company, Inc. (collectively “Upper Deck”) and its counterclaims. Upper Deck opposes the motion. For the reasons set forth below, the court grants the motion for summary judgment in favor of Endurance and against Upper Deck on all relevant claims and counterclaims. The court grants the claim for rescission and instructs the Clerk of Court to close the file.

BACKGROUND

On March 30, 2010, in the Superior Court of the State of California, County of San Diego, Upper Deck commenced an action against Endurance for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. (Ct.Dkt.1). On May 13, 2010, Endurance removed the action to this court based upon diversity jurisdiction. On May 14, 2010, Endurance filed an answer and counterclaim seeking rescission of the insurance contracts and a declaration that the contracts of insurance issued to Upper Deck are void *ab initio*.

Upper Deck manufactures, markets and distributes sports and memorabilia trading cards. At issue are two errors and omissions insurance policies issued to Upper Deck. The first policy is Professional Liability Insurance Policy No. PPL10000416001 (the “2007 Policy”), which was issued on a claims made and reported basis for the policy period of December 10, 2007 to December 10, 2008. Subject to its terms and conditions, the 2007 Policy affords limits of liability of \$2 million per Claim and in the aggregate, subject to a \$250,000 self-insured retention for each Claim. The second policy consists of the renewal of the 2007 Policy. Endurance issued Professional Liability Insurance Policy No. 100001166000 (the “2008 Policy”) in favor of the Upper Deck Company, LLC, as the Named Insured, on a claims made and reported basis for the policy period of December 10, 2008 to December 10, 2009. Subject to its terms and conditions, the 2008 Policy affords limits of liability of \$2 million per Claim, and in the aggregate, subject to a \$250,000 self-insured retention for each Claim.

Upper Deck's claims against Endurance arise from a complaint for damages and injunctive relief allegedly commenced against Upper Deck on December 11, 2008.¹ (Compl.¶ 13). The underlying third party action, *Konami Digital Entertainment v., Vintage Sports Cards, Inc.*, Case No. CV 08–06630, alleged claims for Federal Trademark Counterfeiting and Infringement, Unfair Competition in Violation of Federal Law, Copyright Infringement, State Unfair Competition, Common Law Trademark Infringement and Breach of Contract. Filed on December 11, 2008, the first amended complaint in that action joined Upper Deck as a defendant when Konami learned that Vintage was a sub-distributor owned by Upper Deck. (UF No. 12). During the relevant time frame, Upper Deck had an exclusive distribution agreement with Konami Digital Information (“Konami”) for the United States market for Konami's Yu-Gi-Oh! Trading cards. (AMF 4).

*2 On January 20, 2009 Upper Deck tendered the claim to Endurance who accepted the tender on July 2, 2009, subject to a reservation of rights. Over the course of the *Konami* action, Endurance paid about \$1.2 million of the \$2 million burning limits policy in defense costs. Ultimately, on the first day of trial, Upper Deck and Konami settled the action for an undisclosed amount in excess of the policy limits. Endurance

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refused to contribute the remaining policy funds toward either defense costs of settlement.

The Konami Action

Discovery in the *Konami* action, as also set forth in the Pretrial Order in that case,² revealed that in or about late 2006, Richard McWilliam, Upper Deck's CEO, requested that Upper Deck's brand manager provide a list of the ten most popular and sought-after Yu-Gi-Oh! Cards. (Le Montree Exh. B, ¶ 16). Shortly thereafter, Upper Deck hired InnerWorking, Inc. to facilitate the printing of about 608,000 copies of nine rare cards by the Beijing Goldhawk Package and Production Co. in China without the permission of Konami. (*Id.* ¶ 22). No authentic Yu-Gi-Oh! Cards are made in China.

On or about August 23, 2007, about 610,000 cards were manufactured and imported from China and sent to Upper Deck. In late September 2007 through May 2008, Upper Deck sent about 530,000 cards to Vintage Sports Cards, a sub-distributor owned by Upper Deck. Approximately 100,000 cards were sent by Upper Deck to other distributors. While the boxes containing the cards designated China as the originator, Upper Deck's website represented that authentic Yu-Gi-Oh! cards were not made in China.

On October 24, 2008, Konami seized the counterfeit cards from Vintage. After learning that Upper Deck was the source for the counterfeit cards, on October 30, 2008 Upper Deck was served with the *Konami* complaint. Konami also demanded that Upper Deck cease its counterfeiting activities and comply with the preliminary injunction issued by the District Court. (Le Montree Decl. Exh. Z). During the discovery process in *Konami*, five Upper Deck management personnel asserted their Fifth Amendment rights against self-incrimination and did not answer any questions at their depositions.

On December 23, 2009, the District Court granted summary judgment in favor of Konami and against Upper Deck on the following causes of action: violations of the Federal Trademark Counterfeiting and Infringement laws; Unfair Competition in Violation of Federal Law; State Unfair Competition, and Common Law Trademark Infringement. (*Id.* Exh. F). At a pretrial conference on January 25, 2010, the parties stipulated to a finding of willfulness with respect to the counterfeiting scheme. (Le Montree Exh. G at p.2; Exh. DD).

In Upper Deck's opening statement, its counsel acknowledged that, "I'm here defending a counterfeiter and now I have to deal with that issue." (*Id.* Exh. H). Thereafter, the parties settled their dispute for an undisclosed amount.

The Settlement

*3 Shortly after opening statements, on January 26, 2010, Konami and Upper Deck reached an undisclosed settlement of the action. Upper Deck did not provide notice to Endurance of the proposed settlement.

DISCUSSION

Legal Standards

A motion for summary judgment shall be granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." [FED. R. CIV. P. 56\(c\)](#); [Prison Legal News v. Lehman](#), 397 F.3d 692, 698 (9th Cir.2005). The moving party bears the initial burden of informing the court of the basis for its motion and identifying those portions of the file which it believes demonstrate the absence of a genuine issue of material fact. [Celotex Corp. v. Catrett](#), 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). There is "no express or implied requirement in [Rule 56](#) that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The opposing party cannot rest on the mere allegations or denials of a pleading, but must "go beyond the pleadings and by [the party's] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citation omitted). The opposing party also may not rely solely on conclusory allegations unsupported by factual data. [Taylor v. List](#), 880 F.2d 1040, 1045 (9th Cir.1989).

The court must examine the evidence in the light most favorable to the non-moving party. [United States v. Diebold, Inc.](#), 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Any doubt as to the existence of any issue of material fact requires denial of the motion. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). On a motion for summary judgment, when " 'the *moving party* bears the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence were uncontroverted at trial.'" [Houghton v. South,](#)

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965 F.2d 1532, 1536 (9th Cir.1992) (emphasis in original) (quoting *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264–65 (5th Cir.1991), cert. denied, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992)).

The Evidentiary Objections

Before addressing the merits of the motion, Upper Deck raises several broad-based evidentiary challenges. The court addresses the broad evidentiary challenges herein and, where appropriate, discusses the specific evidentiary challenges in analyzing the claims. In large part Upper Deck argues that Endurance has failed to properly authenticate the *Konami* court documents. (Ct.Dkt.153). This evidentiary objection is moot in light of the filing by Endurance of its Augmented Request for Judicial Notice. (Ct.Dkt.176). The court, pursuant to [FRE 201](#), takes judicial notice of the pleadings and files in United States District Court for the Central District of California Case No. CV–08 06630, *Konami Digital Information v. Vintage Sports Cards*, and the United States District Court for the District of Nevada, Case No: 08–CV–01737, *The Upper Deck Company v. Konami Marketing, Inc.*³ The filings in these cases are generally known and capable of ready determination. [FRE 201](#).

*4 In sum, the court denies the broad-based evidentiary challenges raised by Upper Deck.

Judicial Estoppel

Endurance argues that Upper Deck should be precluded from challenging the stipulation reached in the *Komani* action that its conduct, in relation to the counterfeiting scheme, was willful. “Federal law governs the application of judicial estoppel in federal court.” *Samson v. NAMA Holding, LLC*, 637 F.3d 915, 935 (9th Cir.2011) (quoting *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir.1996)) The doctrine applies “to positions taken in the same action or in different actions.” *Id.*

Relevant factors in deciding whether to apply the doctrine include

whether the party's later position is clearly inconsistent with its earlier position; [] whether the party has successfully advanced the earlier position, such that judicial acceptance of an inconsistent position in the later proceeding would create a perception that either the first

or the second court had been misled; [] whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped, [and] whether the party to be estopped acted inadvertently or with any degree of intent.

Id.

Applying relevant factors, the court concludes that Upper Deck is judicially estopped from challenging its representation in *Komani* that Upper Deck stipulated to a finding of its willfulness with respect to the counterfeiting scheme. (UF 30; Le Montree Decl. Exh. DD). Here, Upper Deck's current position that its conduct was merely “negligent,” (Oppo. at p.13:26–14:2), and therefore a covered occurrence, is directly contrary to its earlier position in *Komani* that its counterfeiting activities were willful. The “willful” stipulation in *Komani* also benefitted Upper Deck in the sense that the jury would not be exposed to potentially significant negative consequences arising from testimony of Upper Deck's senior management engaging in willful conduct in relation to the counterfeiting scheme, including any negative inferences that the jury could draw from senior management asserting their Fifth Amendment rights. There is also no doubt that permitting Upper Deck to switch its position on willfulness would unfairly benefit them in this litigation. Upper Deck has acknowledged in open court that it engaged in willful misconduct with respect to the underlying counterfeiting scheme and they should not benefit in this action from their earlier misconduct. Lastly, the underlying counterfeiting scheme was not the result of mere neglect or inadvertence, but one of intent. The evidence shows that Upper Deck sought to identify the nine most popular and valuable Yu–Gi–Oh! Cards in late 2006 and then, in July 2007, Upper Deck arranged for InnerWorkings, Inc. to manufacture the cards in China in violation of Konami's intellectual property rights and then to distribute the infringing cards in the United States. (UF 4, 5, 14). The factors strongly weigh in favor of applying judicial estoppel on the willfulness element of Upper Deck's conduct.

*5 In sum, the court finds that Upper Deck is judicially estopped from challenging its earlier representation of willfulness with respect to the counterfeiting scheme.

The Rescission Claim

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Endurance seeks to rescind its contracts of insurance *ab initio* because Upper Deck misrepresented and concealed material information in connection with obtaining the contracts of insurance. Pursuant to [Cal. Ins.Code § 331](#), “[c]oncealment, whether intentional or unintentional, entitles the injured party to rescind insurance.” Concealment is defined as “[n]eglect to communicate that which a party knows, and ought to communicate.” [Cal. Ins.Code § 330](#). Summary judgment on a rescission claim may only be granted where “the false negative answers and omissions of [the applicant] were material to [the insurer’s] decision to provide insurance coverage. *Imperial Casualty & Indemnity Co. v. Sogomonian*, 198 Cal.App.3d 169, 179–180, 243 Cal.Rptr. 639 (1988). Under [Cal. Ins.Code § 334](#), “materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.” *Unionamerica Ins. CO., Ltd. v. Fort Miller Group, Inc.*, 590 F.Supp.2d 1254, 1258–59 (N.D.Cal.2008). The test is subjective in the sense that “the critical question is the effect truthful answers would have had on [the particular insurer], not on some ‘average reasonable’ insurer.” *Sogomonian*, 198 Cal.App.3d at 181, 243 Cal.Rptr. 639. Materiality may be determined as a matter of law where no reasonable person can disagree as to the materiality of the misrepresentation. See *Cummings v. Fire Ins. Exch.*, 202 Cal.App.3d 1407, 249 Cal.Rptr. 568 (1988).

According to Upper Deck, no claim was made against it until December 11, 2008 (within the claims period of the 2008 Policy), when Konami amended the complaint to add it as a party, (Oppo. at p.8:23–24, 249 Cal.Rptr. 568), and it promptly informed Endurance of the claim on January 20, 2009. (Minett Decl. Exh. 2). The October 22, 2008 application for insurance, for the period of December 10, 2008 through December 10, 2009, required Upper Deck to disclose any claims experience. Questions 16, 17, and 20 required Upper Deck to identify whether Upper Deck was aware of any alleged deficiencies, errors or omissions in work performed by Upper Deck that had not previously been reported to Endurance. (Minnet Decl. Exh 5, ¶ 20). Upper Deck did not respond to these questions. The policy then set forth the following exclusion:

NOTE: It is agreed that any claim or lawsuit against the Applicant, or any principal, partner, managing member, director, officer, or employee of the Applicant, or other proposed insured, arising from any fact, circumstance, act, error or omission disclosed or required to be disclosed in response to Questions 16, 17, 18, 19, and /or 20 is hereby expressly excluded from coverage under the proposed policy.

*6 *Id.*

The undisputed evidence reveals that, at the latest on October 30, 2008, Upper Deck learned that it, and all parties acting in concert with Vintage (Richard McWilliam is the owner of both Upper Deck and Vintage), had been preliminarily enjoined by the district court in the *Komani* action from engaging in any counterfeiting and distribution related activities. (Le Montree Decl. Exh. Z). While Upper Deck was not joined and named as a party in the *Komani* action until December 11, 2008, they were under the jurisdiction of the district court in the *Komani* action as the injunction extended to “all persons, firms and corporations in active concert or participation” with Vintage and Upper Deck had actual knowledge of the injunction.⁴ See *Westrec Marina Management, Inc. v. Arrowood Indemnity Co.*, 163 Cal.App.4th 1387, 78 Cal.Rptr.3d 264 (2008) (letter from claimant’s counsel was a “Claim” under the claims made and reported policy).

There is no doubt that the information related to intentional counterfeiting is material to the decision of Endurance to issue the contract of insurance to Upper Deck in the first instance. (Vandegriff Decl. ¶¶ 5–10). The court concludes, from the evidentiary record identified by the parties, that no reasonable person could disagree that had Upper Deck disclosed its long-term scheme to wilfully violate the intellectual property rights of Komani, Endurance would not have issued the contracts of insurance at issue. (Vandegriff Decl. ¶ 10).⁵

In opposition to the evidence submitted by Endurance, Upper Deck argues that there was no concealment on the 2008 Policy Application because it drew a line through questions Nos. 16, 17, and 20 and left them unanswered and that no suit had been filed against it until December 11, 2008 when Komani filed an amended complaint naming it as a party. The court rejects both assertions. The crossing out of the questions on the application for insurance does not somehow excuse Upper

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Deck's concealment of its intentional counterfeiting activities nor does it impact Upper Deck's duty to disclose material information relevant to the assessment of risk. Furthermore, Questions 16, 17, and 20 are specifically subject to the exclusion providing, in essence, that any undisclosed lawsuit or claim against the insured is excluded from coverage. (Minnet Decl. Exh. 5). The court also rejects Upper Deck's argument that it did not learn of the existence of a claim until December 11, 2008. At the latest, on October 30, 2011, Upper Deck learned that it had been enjoined from engaging in any counterfeiting related activities. Moreover, the policy specifically provides that a claim may be initiated through a demand for monetary damages or for *injunctive relief*. (Minnet Decl. Exh. 1, pg. 3 ¶ G). Upper Deck was under a duty to timely disclose the existence of *Konami's* claims but failed to do so.

In sum, the court concludes that Endurance may rescind the contracts of insurances pursuant to [Cal. Ins.Code § 331](#) because the concealment by Upper Deck of its counterfeiting scheme and related activities constitutes material information that had to be disclosed to Endurance.

The Fortuity Doctrine

*7 The fortuity doctrine is a basic insurance concept codified in [Cal. Civ.Code § 3517](#) whereby “no man can take advantage of his own wrong.” “The concept of ‘fortuity’ is basic to insurance law. Insurance typically is designed to protect contingent or unknown risks of harm, not to protect against harm that is certain or expected. Insurance protects against risks of Loss, not certainties of loss.” *Chu v. Canadian Indem. Co.*, 224 Cal.App.3d 86, 94–95, 274 Cal.Rptr. 20 (1990). This principle is further codified in [Cal. Ins.Code § 22](#) which provides, “Insurance is a contract whereby one undertakes to indemnify another against Loss, not certainties of Loss.”

Here, the evidentiary record establishes that Upper Deck intentionally and willfully engaged in a scheme to violate the intellectual property rights of Konami for financial gain. “Any insured who participates in a conspiracy to defraud, [] cannot reasonably expect insurance coverage based upon the intentionally created ‘occurrence.’ “ *Hurly Construction Co. v. State Farm Fire & Cas. Co.*, 10 Cal.App.4th 533, 12 Cal.Rptr.2d 629 (1992). The evidentiary record demonstrates that Upper Deck controlled the risk of loss as it proceeded with its counterfeiting activities for

financial gain. In discussing the concepts of “fortuity” and “accident,” the Court of Appeals in *Chu* noted that the “ ‘fortuity’ and ‘accident’ concepts have an opposite corollary: First party insurance does not protect against losses which are certain to occur, []. And third party liability insurance does not protect against nonaccidental harm inflicted by the insured.” *Chu*, 224 Cal.App.3d at 95. Here, the contracts of insurance do not provide coverage for Upper Deck's willful violation of Konami's intellectual property rights. The harm suffered by Konami is the product of Upper Deck's intentional, purposeful conduct in violating Konami's intellectual property rights. Moreover, it is contrary to public policy to permit a wrongdoer like Upper Deck to retain the benefit of defense costs it received in relation to the *Konami* action to defend against a known injury, the counterfeiting of Konami's intellectual property. The failure to grant rescission under these circumstances would eliminate any deterrent effect of financial responsibility and shift the burden of loss from an intentional wrongdoer, like Upper Deck, to other innocent insureds who would bear the burden through higher insurance premiums.

In sum, Endurance has met its burden on summary judgment to show that Upper Deck's claims are barred by the fortuity doctrine.

The Professional Service to Others Provision

Endurance also comes forward with admissible evidence to show that the Professional Service to Others Provision bars coverage. The 2008 insuring agreement extends coverage to claims against an insured for “Wrongful Acts committed by the Insureds solely in the performance of or failure to perform Professional Services.” (Minnet Decl. Exh 1, ¶ W). “Professional Services” is defined to mean

*8 those services provided by the Insured to others in connection with the design and distribution of sports and entertainment trading card, collectibles, and memorabilia including such services that are performed electronically....

Id. The term “Wrongful Act” means “any actual or alleged negligent act, error, or omission committed or attempted solely in the providing or failure to provide Professional Services by an Insured.” (*Id.*, ¶ BB). Here, the evidentiary record, based upon Upper Deck's stipulation as to admitted facts in the pretrial order; the district court's order on the motion for summary judgment granting summary judgment in favor of Konami and against Upper Deck on the following

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claims: Unfair Competition in Violation of Federal Law; State Unfair Competition and Common Law Trademark Infringement; and the admission and stipulation by Upper Deck to a finding of willfulness with respect to the counterfeiting scheme, demonstrate that the underlying intentional counterfeiting scheme is not a wrongful act within the scope of its professional services and therefore not a covered occurrence. These documents establish that in July 2007 Upper Deck hired InnerWorkings, Inc. to facilitate the printing of about 610,000 copies of Yu-Gi-Oh! Trading Cards in China by Beijing Goldhawk Package and Production Co. in violation of Konami's intellectual property rights. Upper Deck provided InnerWorkings with electronic card files and a disk containing Konami's copyrighted reverse art that Konami had entrusted to Upper Deck's safe keeping. (UF Nos. 7-9). The cards arrived to Vintage in boxes labeled "Made in China," contrary to Upper Deck's representation on its own website that authentic Yu-Gi-Oh! cards were not made in China. Upper Deck's conduct violated the Lanham Act, the Copyright Act, and [Cal. Bus. & Prof.Code § 17200](#). Moreover, with respect to the counterfeiting claims, such conduct was willful on the part of Upper Deck.

The court concludes that the evidence submitted satisfies Endurance's summary judgment burden. Upper Deck, through the operation of the judicial estoppel doctrine, fails to come forward with any evidence to raise genuine issues of law or material fact.

In sum, Endurance has demonstrated that the underlying counterfeiting scheme is not a covered event under applicable policy provisions

The Willfulness and Intentional Exclusion

Footnotes

- 1 December 11, 2008 is the date Upper Deck was joined as a defendant.
- 2 For the reasons set forth herein, the court takes judicial notice of the documents filed in the *Konami* action.
- 3 As a general proposition, Upper Deck argues that Endurance has failed to cite specific and relevant portions of the exhibit, "making it impossible for the Court to determine what part of the document is being referenced." (Motion at p.6:10-22). In part to address this issue, on November 22, 2011, the court issued a scheduling order requiring Endurance to resubmit its exhibits and to highlight relevant portions of the exhibit. (Ct.Dkt.174). Upon review of the resubmitted exhibits, Endurance has generally identified relevant portions, by highlighting the text. One difficulty with the approach taken by Endurance is that the courtesy copy submitted to the court was highlighted in hues of grey, rendering certain highlighted portions illegible. The court notes that only legible exhibits have been relied upon by the court. Where the factual assertion is not specifically identified in the record, the court need not consider that evidence. See *Orr v. Bank of America*, 285 F.3d 764, 774-75 (9th Cir.2002).

Endurance argues that the Willful Exclusion Provision applies to bar coverage for Upper Deck's claim. That provision bars coverage for any claim "based upon, arising from or in consequence of a fraudulent act or omission or any willful violation by any Insured if a final and non-appealable judgment or adjudication establishes such a fraudulent act or omission or willful violation." (Minnet Decl. Exh. 1). Here, the parties to the *Konami* action settled their dispute at the time of trial. At the time of oral argument on this motion, the court requested Endurance to supplement the record with any final judgment or orders in the *Konami* action. Endurance complied with this request and submitted the Permanent Injunction Order entered against Upper Deck on January 29, 2010. (Notice of Lodgement, Ct. Dkt. 187).

*9 The court denies partial adjudication on this ground because it is not entirely clear that the Permanent Injunction Order, standing alone, establishes that Upper Deck engaged in "a fraudulent act or omission or willful violation," (Minnet Decl. Exh. 1), as required by the applicable exclusion. As Endurance fails to show that there is a final judgment establishing that Upper Deck engaged in fraudulent or willful misconduct, the court denies summary adjudication on this ground.

In sum, the court grants summary judgment in favor of Endurance and against Upper Deck on all claims alleged in the complaint and counterclaim, declares the insurance policies void *ab initio* (for the period December 10, 2007 through December 10, 2009, Policies Nos. 10000416001 and 10001166000), and instructs the Clerk of Court to close the file.

IT IS SO ORDERED.

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- 4 The court notes that the owner of both Vintage and Upper Deck, Richard McWilliam, likely knew of the existence of the *Konami* action prior to October 30, 2011.
- 5 As set forth herein, the evidentiary record developed in the *Konami* action demonstrates that Upper Deck conceived and began orchestrating its counterfeiting scheme 2006.

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