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13 **UNITED STATES DISTRICT COURT**
 14 **DISTRICT OF NEVADA**

15 THE UPPER DECK COMPANY, a Nevada
 16 corporation,

17 Plaintiff,

18 v.

19 KONAMI MARKETING, INC., a California
 corporation; and KONAMI DIGITAL
 20 ENTERTAINMENT, INC., an Illinois
 corporation,

21 Defendants.
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Case No.

COMPLAINT FOR:

- (1) **VIOLATION OF THE LANHAM ACT [LANHAM ACT § 43(a)]**
- (2) **TRADEMARK INFRINGEMENT [NRS 600.420]**
- (3) **DECEPTIVE TRADE PRACTICES [NRS 598.0915]**
- (4) **COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION [NEVADA COMMON LAW]**
- (5) **INJUNCTIVE RELIEF**

DEMAND FOR JURY TRIAL

1 Plaintiff The Upper Deck Company (“Upper Deck”) for its complaint against defendants
2 Konami Marketing, Inc. and Konami Digital Entertainment, Inc. and Does 1 through 10
3 (collectively “Defendants” or “Konami”), alleges as follows:

4 **JURISDICTION AND VENUE**

5 1. This is an action for false designation of origin, trademark infringement, unfair
6 competition, deceptive trade practices and other relief arising under the laws of the United States,
7 specifically 15 U.S.C. § 1051 *et seq.* (the “Lanham Act”), and the statutes and common law of
8 the State of Nevada.

9 2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
10 1331 because Upper Deck’s claims arise under the laws of the United States. This Court also has
11 supplemental jurisdiction pursuant to 28 U.S.C. §§ 1338(b) and 1367 over Upper Deck’s claims
12 that arise under the laws of the State of Nevada.

13 3. This Court has jurisdiction over the subject matter of this action by reason of 28
14 U.S.C. § 1332 in that the parties are citizens of different states and the amount in controversy
15 exceeds \$75,000, exclusive of interest and costs.

16 4. The Court has personal jurisdiction over the defendants by virtue of their presence
17 in this judicial district, their substantial contacts and business in this judicial district and because,
18 among other things, the activities complained of herein have occurred and are occurring in part
19 in this judicial district.

20 5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the
21 defendants reside in this judicial district, a substantial part of the events or omissions giving rise
22 to the claims alleged herein occurred in this district, and each party is subject to personal
23 jurisdiction in this judicial district.

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1 **THE PARTIES**

2 6. Plaintiff Upper Deck is a corporation duly organized and in good standing under
3 the laws of the State of Nevada. Upper Deck's principal place of business is now, and at all
4 times relevant hereto was, in Clark County, State of Nevada.

5 7. Upper Deck is informed and believes and based thereon alleges Defendant
6 Konami Marketing, Inc. ("KMI") is a corporation organized and existing under the laws of the
7 State of California. Upper Deck is further informed and believes and based thereon alleges that
8 at all times relevant hereto, KMI's principal place of business was 1400 Bridge Parkway in
9 Redwood City, California.

10 8. Upper Deck is informed and believes and based thereon alleges Defendant
11 Konami Digital Entertainment, Inc. ("KDE") is a corporation organized and existing under the
12 laws of the State of Illinois. Upper Deck is further informed and believes and based thereon
13 alleges that at all times relevant hereto, KDE's principal place of business was 2381 Rosecrans
14 Avenue, Suite 200, in El Segundo, California.

15 **UPPER DECK'S MARK**

16 9. Yu-Gi-Oh! Trading Card Game is a collectible trading card game based upon a
17 popular Japanese anime and manga franchise, which is an immensely successful global brand
18 extending into numerous commercial markets, including, without limitation, television shows,
19 movies, video games and toys.

20 10. Upper Deck has used a square hologram since at least February 2002 to identify
21 trading cards distributed by Upper Deck, including Yu-Gi-Oh! trading cards. The mark is a
22 hologram in the shape of a square that is applied to the bottom right-hand corner of trading cards
23 (the "Mark"). An example of the Mark is shown below:



1 or that Defendants' goods or services are approved, licensed, endorsed, or sponsored by Upper
2 Deck. Defendants' acts as alleged herein constitute false designation of origin, unfair
3 competition and false advertising in violation of Lanham Act § 43(a), 15 U.S.C. § 1125(a).

4 24. Upper Deck is informed and believes, and based thereon alleges, that Defendants
5 will continue to violate Upper Deck's trademark rights unless enjoined from doing so. Upper
6 Deck has been and continues to be irreparably injured as a result of Defendants' infringement
7 and has no adequate remedy at law. Upper Deck is therefore entitled to a preliminary and
8 permanent injunction against further infringing conduct by Defendants.

9 25. Defendants have profited and are profiting by such infringement, and Upper Deck
10 has been and is being damaged by such infringement. Upper Deck is therefore entitled to
11 recover damages from Defendants in an amount to be proved at trial as a consequence of
12 Defendants' infringing activities.

13 26. Defendants' aforesaid wrongful conduct has been willful, wanton and malicious
14 and done with an intent to deceive. Upper Deck is therefore entitled to an award of its
15 reasonable attorneys' fees and costs and treble its actual damages pursuant to 15 U.S.C. §
16 1117(a). Upper Deck is also entitled to, among other things, the cost of corrective advertising.

17 **SECOND CLAIM FOR RELIEF**

18 **TRADEMARK INFRINGEMENT (NRS 600.420)**

19 27. Upper Deck realleges each and every allegation set forth in paragraphs 1 through
20 26 inclusive, and incorporates them herein by this reference as though set forth in full.

21 28. Defendants have used and/or are using Upper Deck's Mark and/or marks
22 confusingly similar to Upper Deck's Mark without Upper Deck's consent.

23 29. Defendants' use in commerce of Upper Deck's Mark and/or marks confusingly
24 similar to Upper Deck's Mark on or in connection with Defendants' goods constitutes a

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1 reproduction, copying, counterfeiting, and/or colorable imitation of Upper Deck's Mark in a
2 manner that is likely to cause confusion or mistake or is likely to deceive consumers.

3 30. By using Upper Deck's Mark and/or marks confusingly similar to Upper Deck's
4 Mark with knowledge that Upper Deck owns and that Upper Deck has used, and continue to use,
5 the Mark in the State of Nevada, Defendants have intended to cause confusion, mistake or
6 deceive consumers.

7 31. Defendants are using marks that are the same as and/or confusingly similar to
8 Upper Deck's Mark in connection with the sale, offering for sale or advertising and promotion of
9 goods and services in a manner that is likely to cause confusion or mistake, or to deceive
10 consumers as to an affiliation, connection, or association with Upper Deck or as to the origin,
11 sponsorship or approval of Defendants' goods, services or commercial activities by Upper Deck.

12 32. Defendants' use of Upper Deck's Mark and/or any marks confusingly similar to
13 Upper Deck's Mark has created a likelihood of confusion among consumers who may falsely
14 believe that Defendants' business and activities are associated with Upper Deck or that Upper
15 Deck sponsors or approves of Defendants' goods, services or commercial activities.

16 33. As a direct and proximate result of Defendants' infringement, Upper Deck has
17 suffered and will continue to suffer, monetary losses in an amount in excess of \$75,000, and
18 irreparable injury to its business, reputation and goodwill for which Upper Deck has no adequate
19 remedy at law.

20 34. Defendants' willful infringement of Upper Deck's Mark and/or use of confusingly
21 similar marks constitute oppression, fraud or malice, and Upper Deck is therefore entitled to an
22 award of punitive damages.

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THIRD CLAIM FOR RELIEF

DECEPTIVE TRADE PRACTICES (NRS 598.0915)

35. Upper Deck realleges each and every allegation set forth in paragraphs 1 through 34 inclusive, and incorporates them herein by this reference as though set forth in full.

36. In the course of conducting business, Defendants knowingly made and continue to make false representations as to an affiliation, connection and/or association with Upper Deck by using marks identical and/or confusingly similar to Upper Deck’s Mark and otherwise engaged and continue to engage in deceptive trade practices.

37. As a direct and proximate result of Defendants’ conduct, Upper Deck has suffered, and will continue to suffer, monetary damages in an amount in excess of \$75,000 and irreparable injury to its business, reputation, and good will for which Upper Deck has no adequate remedy at law.

38. Defendants’ willful deceptive conduct constitutes oppression, fraud or malice, and Upper Deck is therefore entitled to an award of punitive damages.

FOURTH CLAIM FOR RELIEF

COMMON LAW TRADEMARK INFRINGEMENT

AND UNFAIR COMPETITION

39. Upper Deck realleges each and every allegation set forth in paragraphs 1 through 38, inclusive, and incorporates them herein by this reference as though set forth in full.

40. By virtue of having used and continuing to use the Mark, Upper Deck has acquired common law rights in the Mark (which previously had been used by Defendants with Upper Deck’s consent).

41. Defendants’ use of marks that are the same as and/or confusingly similar to Upper Deck’s Mark infringes Upper Deck’s common law rights and is likely to cause confusion, mistake or deception among consumers, who will believe that Defendants’ goods and services

1 originate from or are affiliated with or endorsed by Upper Deck, when in fact they are not.

2 42. As a direct and proximate result of Defendants' conduct, Upper Deck has
3 suffered, and will continue to suffer, monetary damages in an amount in excess of \$75,000 and
4 irreparable injury to its business, reputation, and good will for which Upper Deck has no
5 adequate remedy at law.

6 43. Defendants' willful deceptive conduct constitutes oppression, fraud or malice, and
7 Upper Deck is therefore entitled to an award of punitive damages.

8 **FIFTH CLAIM FOR RELIEF**

9 **INJUNCTIVE RELIEF**

10 44. Upper Deck realleges each and every allegation set forth in paragraphs 1 through
11 43, inclusive, and incorporates them herein by this reference as though set forth in full.

12 45. The infringing use or other using of the Mark without authorization by
13 manufacturing or causing to be manufactured, by purchasing or causing to be purchased, by
14 advertising or causing to be advertised, by making available or by causing to be made available,
15 or by offering for sale or selling goods or services bearing the Mark or any confusingly similar
16 mark is continuous and ongoing.

17 46. The continuing infringement or otherwise use of the Mark without authorization
18 as described above constitutes continuing and irreparable injury to Upper Deck.

19 47. Upper Deck therefore seeks preliminary and permanent injunctive relief
20 prohibiting Defendants, their officers, directors, agents, servants, employees, attorneys and all
21 persons, firms and corporations in active concert or participation with them or any of them, from
22 infringing or otherwise using the Mark without authorization by manufacturing or causing to be
23 manufactured, by purchasing or causing to be purchased, by advertising or causing to be
24 advertised, by making available or by causing to be made available, or by offering for sale or
25 selling goods or services bearing the Mark or any confusingly similar mark.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Upper Deck prays for judgment against Defendants as follows:

3 1. That Defendants, their officers, directors, agents, servants, employees, attorneys
4 and all persons, firms and corporations in active concert or participation with them or any of
5 them, be preliminarily and permanently enjoined and restrained from infringing or otherwise
6 using the Mark without authorization by manufacturing or causing to be manufactured, by
7 purchasing or causing to be purchased, by advertising or causing to be advertised, by making
8 available or by causing to be made available, or by offering for sale or selling goods or services
9 bearing the Mark or any confusingly similar mark;

10 2. That Defendants be required to forthwith deliver up to Upper Deck for destruction
11 any and all servers, electronic storage devices, documents (written or electronic), writings, and
12 recordings of every kind and description, and any and all goods, including products and
13 merchandise, in their possession, custody, or control that would otherwise violate any of the
14 aforesaid injunctions;

15 3. That Defendants account for all profits realized as a consequence of their
16 unlawful acts of unfair competition and other violations, as alleged herein, and that the amount
17 of profits realized by Defendants by reason of their unlawful acts be trebled, as provided by law
18 pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

19 4. That Defendants be ordered pursuant to Section 34 of the Lanham Act, 15 U.S.C.
20 § 1116(a), to file with the Court and serve upon Upper Deck's counsel, within thirty (30) days of
21 the entry of the injunctions and orders prayed for herein, a written report under oath setting forth
22 in detail the form and manner in which they have complied with said injunctions and orders;

23 5. That Upper Deck be awarded damages in the full amount Upper Deck has
24 sustained as a consequence of Defendants' acts and other damages including compensatory,
25 consequential, and punitive damages in an amount in excess of \$75,000 to be determined at trial;

1 6. That Upper Deck is awarded trebled damages where provided by law, pursuant to
2 Section 35 of the Lanham Act, 15 U.S.C. § 1117 and/or NRS 600.430;

3 7. That Upper Deck recover from Defendants reasonable attorneys' fees, costs and
4 disbursements of this action pursuant to Section 35 of the Lanham Act, 15 U.S.C. § 1117;

5 8. That the Court grant Upper Deck restitution from Defendants by disgorgement of
6 all profits earned through unlawful sales of unauthorized and infringing goods;

7 9. For costs and attorneys' fees as otherwise may be authorized by law;

8 10. That any monetary award include pre- and post-judgment interest at the highest
9 rate allowed by law; and

10 11. For such other and further relief against Defendants as the Court may deem just
11 and proper.

12 DATED: February 25, 2009.

13 BAILEY❖KENNEDY

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15 By: /s/ Sarah E. Harmon
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