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The Upper Deck Company (CA & NV)  
7 and Richard McWilliam

8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10  
11 UPPER DECK INTERNATIONAL B.V., a  
Netherlands corporation,

12 Plaintiff,

13 v.

14 THE UPPER DECK COMPANY, a California  
15 corporation; THE UPPER DECK COMPANY, a  
Nevada Corporation; RICHARD McWILLIAM,  
16 an Individual; and Does 1-10,

17 Defendants.

18  
19 THE UPPER DECK COMPANY, a Nevada  
20 Corporation,

21 Counterclaimant,

22 v.

23 UPPER DECK INTERNATIONAL B.V., a  
24 Netherlands corporation; NICO BLAUW, an  
Individual; and Roes 1-20,

25 Counterclaim-Defendants.  
26  
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CASE NO.: 11CV1741 LAB (CAB)

**COUNTERCLAIM BY THE UPPER  
DECK COMPANY FOR:**

- 1. **BREACH OF FIDUCIARY  
DUTY**
- 2. **WASTE OF CORPORATE  
ASSETS**
- 3. **CONVERSION**
- 4. **DECLARATORY RELIEF**

Hon. Larry Alan Burns

Complaint Filed: August 4, 2011

1 Defendant/Counterclaimant The Upper Deck Company, a Nevada corporation  
2 (“Counterclaimant” or “UD Nevada”) by and through its attorneys brings this counterclaim against  
3 Upper Deck International, B.V. (“UDI”) and its principal, Nico Blauw. UD Nevada hereby  
4 alleges, upon information and belief, as follows:

5 **I.**

6 **INTRODUCTION**

7 1. This is a direct counterclaim by UD Nevada against UDI’s Chief Executive Officer  
8 (“CEO”), Counterclaim-Defendant Nico Blauw, seeking to remedy his breaches of fiduciary duty,  
9 breach of duty of care, waste of corporate assets and fraudulent conversion, which damaged UDI  
10 and its shareholders. This action also seeks declaratory relief finding that a September 15, 2010  
11 transfer of 52.5% of UDI, to an entity under Blauw’s control, is invalid and unenforceable.<sup>1</sup>

12 2. UDI is a worldwide sports and entertainment company emphasizing sports and  
13 entertainment trading cards and trading card games as well as the creation and selling of sports  
14 and entertainment collectibles and memorabilia.

15 3. Counterclaim-Defendant Nico Blauw started as an employee of The Upper Deck  
16 Company LLC (a related non-party) in May of 1997. In May of 2007, Blauw became the CEO of  
17 UDI. During Blauw’s reign as CEO, Counterclaim-Defendant Blauw mis-managed UDI to the  
18 detriment of UDI and its shareholders.

19 **II.**

20 **PARTIES**

21 4. Defendant/Counterclaimant UD Nevada is a Nevada corporation having its  
22 principal place of business in Clark County, Nevada and is doing business in the State of  
23 California and in this judicial district.

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26 <sup>1</sup> UD Nevada was assigned these causes of action by Upper Deck B.V. (“UD BV”). UD BV was once the 100%  
27 owner of UDI and after the (invalid) transfer of the 52.5% ownership-stake, maintained, at a minimum, the remaining  
28 47.5%. UD BV was incorporated on January 13, 1998. UD BV is the holding company to which Upper Deck  
International, B.V. (“UDI”) is the operating company. UD BV, owner and parent company of UDI, assigned its  
rights and remedies regarding its interest in UDI to Upper Deck Nevada prior to the filing of this counterclaim.





1 **Breach of Fiduciary Duties Owed By Counterclaim-Defendant Blauw**

2 17. By reason of Counterclaim-Defendant Blauw's position at UDI as the CEO and a  
3 member of the Board of Directors, Blauw accepted a fiduciary relationship with UD BV. Blauw  
4 owed UDI, as well as UD BV, the highest duty of good faith, fair dealing, loyalty, and full, candid  
5 and adequate disclosure.

6 18. To discharge these fiduciary duties required Counterclaim-Defendant Blauw to  
7 exercise reasonable and prudent supervision over the management, policies, practices, controls  
8 and financial affairs of UDI, and to ensure that UDI issued truthful statements about its financial  
9 condition to both its own Board of Directors and to the Board of the Directors of its holding  
10 company, UD BV. This application of due care and diligence required, among other things, that  
11 Blauw:

12 a. Exercise reasonable control and supervision over the officers, employees, and  
13 agents of UDI;

14 b. Remain informed about how UDI conducted its operations;

15 c. Maintain sufficient insight in and control over costs and cash flow of UDI;

16 d. Ensure the prudence of the policies and practices undertaken or proposed to be  
17 undertaken by UDI;

18 e. Ensure that UDI complied with its legal obligations and requirements, among other  
19 things, including the duty to disseminate truthful and accurate statements to shareholders and the  
20 timely filing of financial statements with the public register of the Dutch Chamber of Commerce;

21 f. Make a reasonable investigation upon receiving notice or information of an  
22 imprudent or unsound decision, condition, or practice, and take steps to correct any imprudent or  
23 unsound decision, condition, or practice;

24 g. Provide material corporate information to other members of the Board of  
25 Directors;

26 h. Conduct the affairs of UDI in an efficient, business-like manner so as to make it  
27 possible to provide the highest quality performance of its business and to thereby maximize the  
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1 profits to its owners.

2 19. In accordance with his fiduciary duties of loyalty and good faith, Counterclaim-  
3 Defendant Blauw, as a director and officer of UDI, was obligated to refrain from participating in  
4 any transaction where his loyalties were divided. Here, Blauw's loyalties were divided between  
5 his own self-interests in protecting his individual liability by negligently and recklessly handling  
6 the financial affairs of UDI to the detriment of UDI and its owner, UD BV (again, UD Nevada's  
7 assignor).

8 **Blauw's Mismanagement and Wrongful Withholding of UDI Financial Statements**

9 21. As CEO of UDI, Blauw is responsible for its management and operations.

10 22. Unfortunately, Blauw has repeatedly failed to conduct its affairs in an efficient and  
11 business-like manner. For example, UDI has a staggering ratio of managers to staff. In January  
12 of 2011, the commercial department at UDI had 17 managers out of 23 total employees. Blauw's  
13 overstaffing of UDI has created excessive overhead expenses and labor costs. Such  
14 mismanagement constitutes a misuse and waste of corporate assets and has harmed UDI.

15 23. Blauw's mismanagement of UDI is also reflected in UDI's incomprehensible, or  
16 sometimes non-existent, financial statements.

17 24. On December 22, 2010, it was resolved at a UDI board meeting that: (i)  
18 shareholder financials would be presented to UD BV within 30 days of month end, and (ii) the  
19 board members of UDI would receive the shareholder financials by the 15<sup>th</sup> of each month.

20 25. On March 5, 2011, Mr. McWilliam, on behalf of UD BV, requested that Blauw  
21 provide him with, among other things, UDI's annual operating plan and the business plan for  
22 2011. Such information is discoverable by UD BV, as an owner of UDI, and necessary to assess  
23 the financial position of UDI. It was not provided.

24 26. Again, on March 22, 2011, Mr. McWilliam, on behalf of UD BV, requested  
25 information pertaining to UDI's financials. Once more Blauw refused to provide such  
26 information. As such, UD BV was unable to assess the economic viability of UDI, a right it holds  
27 as its owner and parent company.

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1           27. Moreover, Blauw's inability, and downright refusal, to provide financial  
2 statements of UDI was not limited to UD BV requests. On July 28, 2010, outside accountants  
3 Ernst & Young informed Blauw that it had not received sufficient information regarding UDI and  
4 UD BV's consolidated financials, thus, rendering it unable to provide the financial statements  
5 2008/2009 of UD BV. Additionally, Ernst & Young explained that UDI and UD BV's unaudited  
6 financial statements 2008/2009 were delinquently filed with the public register of the Dutch  
7 Chamber of Commerce. Under Dutch law, the failure to timely publish the financial statements  
8 triggers a statutory presumption that UDI and UD BV's management materially breached its  
9 duties. Consequently, Mr. McWilliam, as a member of UDI and UD BV's board, as well as UD  
10 BV itself, were exposed to liability for Blauw's mismanagement. Additionally, Blauw's failure to  
11 file the 2008/2009 consolidated statements of UDI and UD BV caused UDI to lose the benefit of  
12 a statutory exemption to publish its own 2009 financial statements before January 31, 2010.

13           28. This was not Blauw's first oversight. Blauw's pattern of mismanagement is  
14 extensive. A year earlier, Blauw negligently filed UDI and UD BV's 2007/2008 consolidated  
15 financial statements belatedly. Consequently, the filing of UDI's 2008 financial statements was  
16 not permitted.

17           29. Furthermore, Blauw's mismanagement of UDI is evidenced by his failure to  
18 ensure that VAT returns of the foreign branches of UDI were timely filed. Specifically, Blauw's  
19 overdue filing of UDI's VAT returns for the third and fourth quarter of 2010 created serious  
20 problems for UDI with foreign tax authorities, and exposed its shareholders to liability. As a  
21 consequence, UDI incurred significant costs in order to remedy Blauw's delinquency, causing  
22 further damage to UD Nevada's assignor (UD BV).

23 **Blauw Takes Advantage of Mr. McWilliam's Health Issues and Wrestles Away Control of**  
24 **UDI, from UD BV**

25           30. In June of 2008, Mr. Richard McWilliam, sole owner and principal of assignor UD  
26 BV, underwent open heart surgery. Around that same time, Mr. McWilliam began battling an  
27 addiction to alcohol and prescription medication.

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1 31. Quickly, Mr. McWilliam's health rapidly deteriorated. The latter half of 2009 was  
2 filled with numerous hospital appointments, emergency room visits, and medical evaluations.

3 32. As a consequence of his worsening health, Mr. McWilliam did not have the  
4 capacity to manage The Upper Deck Company, a California corporation and The Upper Deck  
5 Company, a Nevada corporation (collectively referred to as "UDC"). As such, Mr. McWilliam  
6 requested that Blauw, who was mindful of Mr. McWilliam's grave health issues, manage and  
7 operate UDC and UDI in Carlsbad, California beginning on March 23, 2009 for approximately  
8 four (4) weeks.

9 33. Understanding and acknowledging his need to seek serious rehabilitative medical  
10 care, in May of 2009, Mr. McWilliam voluntarily admitted himself into the Betty Ford Clinic for  
11 treatment. Mr. McWilliam remained at the Clinic during the entire month of May, 2009.

12 34. Unfortunately, Mr. McWilliam's battle with alcohol and drug abuse persisted.  
13 Thus, on September 11, 2009, Blauw returned to UDC's headquarters in Carlsbad, California, to  
14 manage and operate UDC and UDI. During this stay in Carlsbad, Blauw managed and operated  
15 UDC and UDI for approximately two (2) weeks. Mr. McWilliam relied on Mr. Blauw.

16 35. Mr. McWilliam's impaired medical condition endured until October of 2010. In  
17 2010 alone, on approximately 10 occasions, Mr. McWilliam was admitted into the emergency  
18 room.

19 36. Again, from September 17, 2010 until October 16, 2010, Mr. McWilliam was an  
20 inpatient at a rehabilitation center for mental and physical healthcare.

21 **The Sale of UDI for One Euro**

22 37. From the time of UDI's incorporation, UD BV was its sole owner. Mr.  
23 McWilliam, as UD BV's sole shareholder and member of its Board of Directors was UD BV's  
24 chief decision maker.

25 38. In November of 2009, Blauw initiated discussions with Mr. McWilliam for the  
26 purchase of UD BV's interest in UDI. Originally, Blauw offered, by and through his company  
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1 Europraxis, to purchase 35% of UDI from UD BV for 512.834 Euros. Mr. McWilliam rejected  
2 this offer.

3 39. Blauw, apparently, was unwilling to take “no” for an answer. Thus, from  
4 November 2009 until March 2010 Blauw repeatedly and continuously pressured Mr. McWilliam  
5 with drafts and proposals of a purchase agreement requesting that he sign them. Each draft  
6 included provisions designed to grant greater authority and discretion to Blauw while  
7 concurrently lessening UD BV’s control and involvement in UDI. Significantly, during this  
8 entire period, Mr. McWilliam was undergoing medical treatment and in an impaired mental and  
9 physical state. Mr. McWilliam’s health greatly impacted his capacity to understand, appreciate,  
10 and realize the significance of these discussions. At all times relevant, Blauw was fully aware of  
11 Mr. McWilliam’s mental and physical condition.

12 40. Regardless, on February 25, 2010, Blauw signed and presented a draft of a  
13 purchase agreement for UDI. Soon thereafter, however, on March 11, 2010, Blauw rescinded his  
14 acceptance. All the while, Mr. McWilliam was undergoing extensive medical treatment, therapy,  
15 and rehabilitation.

16 41. As Mr. McWilliam was fighting against substance abuse and related medical  
17 problems, Blauw continued to aggressively coerce him to sell UDI. In June of 2010, Blauw  
18 presented Mr. McWilliam with a new proposal for the purchase of UDI. Notably, this draft was  
19 for the purchase of a majority interest in UDI. Specifically, the terms outlined in the proposed  
20 transfer called for the sale of 51% of UDI to another entity owned by Blauw in exchange for the  
21 sensational price of 1 Euro (about \$1.35 today). Given Mr. McWilliam’s impaired capacity and  
22 Blauw’s admitted knowledge regarding such, the timing of such a proposal is highly suspicious.

23 42. Unfortunately, in September of 2010, Blauw’s wish to steal UDI from Mr.  
24 McWilliam was realized. On September 15, 2010, Mr. McWilliam, in his impaired cognitive  
25 state, signed a document calling for UD BV, by and through MPR Trust, to sell 52.5% of UDI to  
26 Mr. Blauw’s entity for one (1) Euro (hereinafter referred to as “Purchase Agreement”). After  
27 execution of the Purchase Agreement UD BV held a 47.5% interest and BOE held a 52.5%

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1 interest in UDI. Two days later, Mr. McWilliam was re-admitted into a rehabilitation center for  
2 substance abuse.

3 V.

4 **FIRST CLAIM**  
5 **(Breach of Fiduciary Duty)**  
6 **Against Nico Blauw and Roes 1-20.**

7 43. UD Nevada incorporates by reference the allegations contained in the paragraphs  
8 above, as if fully set forth here.

9 44. Blauw, as an officer and director of UDI and by virtue of the trust, responsibility,  
10 and confidence reposed in him by UDI and UD BV, owed a fiduciary obligation to, among other  
11 things: (a) act with candor toward UDI and UD BV, including providing full disclosure regarding  
12 to financials; (b) hold and maintain in strict confidence confidential information acquired by him  
13 in his capacity as an employee, officer, and director of UDI; and (c) refrain from using  
14 confidential information of UDI to compete with it; and (d) generally act in the best interests of  
15 UDI and UD BV.

16 45. Counterclaim-Defendant Blauw owed UD BV and UDI the fiduciary obligation of  
17 loyalty which mandates that the best interest of the corporation, UDI, and its parent company, UD  
18 BV, take precedence over any interests possessed by a director, officer, or controlling shareholder  
19 and not shared by the shareholders generally.

20 46. Included in the duty of care and loyalty in UDI and UD BV is the obligation to act  
21 in good faith.

22 47. A director, officer, or other corporate fiduciary cannot act loyally towards UDI  
23 unless he believes in good faith that his actions are in UDI's best interest.

24 48. Counterclaim-Defendant Blauw breached his fiduciary duty of loyalty and his  
25 obligation to act at all times in good faith to UDI and UD BV by, among other things: (a)  
26 misstating and omitting facts regarding the financials, including costs and cash flow, of UDI; (b)  
27 wasting corporate assets with excessive overhead and labor costs; (c) failing to publish timely  
28 financial statements with the Dutch Chamber of Commerce; (d) failing to timely file VAT returns

1 of UDI's foreign branches; (e) negotiating the Konami settlement to protect his own interests at  
2 the expense of UDI and UD BV; (f) ignoring requests by Mr. McWilliam, on behalf of UD BV, to  
3 correct erroneous reports that Blauw submitted to the bank in order to obtain a new credit  
4 agreement for UDI; (g) refusing to cooperate with McWilliam, UD BV, and their consultants'  
5 requests for urgent documentation related to a Dutch tax audit being conducted against both UD  
6 BV and related entities; and (h) not acting in the best interest of UDI and UD BV.

7 49. As a direct and proximate result of Blauw's breaches of fiduciary duty, UD BV has  
8 and will continue to sustain damages. The precise nature and amount of such accrued and  
9 continuing damages are, on information and belief, substantial and in excess of the jurisdictional  
10 minimum of this court.

11 50. In committing the acts alleged herein, Blauw acted with oppression, fraud, malice,  
12 and a willful and conscious disregard of UD BV's rights.

13 **VI.**

14 **SECOND CLAIM**  
15 **(Waste of Corporate Assets)**  
16 **Against Nico Blauw and Roes 1-20.**

17 51. UD Nevada incorporates by reference the allegations contained in the paragraphs  
18 above, as if fully set forth here.

19 52. As a result of the misconduct described above, Counterclaim-Defendant wasted  
20 corporate assets by: (a) failing to ensure proper financial accounting for the benefit of UDI and  
21 UD BV; (b) incurring substantial costs in remedying the failure to timely file VAT returns of the  
22 foreign branches of UDI; and (c) incurring excessive and unreasonable overhead and labor costs.

23 53. As a result of the waste of corporate assets, Counterclaim-Defendant Blauw is  
24 liable to UDI and UD Nevada (as the assignee of UD BV's rights).

25 54. UD BV has no adequate remedy at law.  
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**VII.**

**THIRD CLAIM**  
**(Conversion)**  
**Against Nico Blauw and Roes 1-20.**

55. UD Nevada incorporates by reference the allegations contained in the paragraphs above as if fully set forth here.

56. Since incorporation of UDI, UD BV was sole owner of UDI.

57. UD BV believes that Blauw intentionally and fraudulently forced the conveyance of UD BV's majority interest in UDI and still possesses that majority interest today. Blauw took this property while Mr. McWilliam, on behalf of UD BV, was incapacitated and unable to willingly and voluntarily enter into the Purchase Agreement.

58. As a direct and proximate result of Blauw's conversion of UD BV's property, UD BV has sustained and will continue to sustain damages. The precise nature and amount of such accrued and continuing damages is not known by UD BV and cannot be ascertained now, but such damages are, on information and belief, substantial and in excess of the jurisdictional minimum of this court.

59. In committing the acts alleged herein, Blauw acted with oppression, fraud, malice, and a willful and conscious disregard of UD BV's rights.

**XIII.**

**FOURTH CLAIM**  
**(Declaratory Relief)**  
**Against UDI and Nico Blauw and Roes 1-20.**

60. UD Nevada incorporates by reference the allegations contained in the paragraphs above as if fully set forth here.

61. An actual controversy now exists between UD BV and BOE concerning their respective rights, duties, and obligations under the Purchase Agreement. UD BV contests that the Purchase Agreement is valid and otherwise contends that the Purchase Agreement is unenforceable because Mr. McWilliam was not of sound mind when executing it on behalf of UD BV.



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**X.**

**DEMAND FOR JURY TRIAL**

Counterclaimant UD Nevada hereby demands trial by jury in this action.

Respectfully submitted,

**NICHOLAS & BUTLER, LLP**

/s/ Alex Tomasevic

Dated: September 29, 2011

By: \_\_\_\_\_  
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Attorneys for Defendants

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10 Attorneys for Defendants  
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22 an Individual; and Does 1-10

23 Defendants.

CASE NO.: 11CV1741 LAB (CAB)

**PROOF OF SERVICE**

Hon. Larry Alan Burns  
Courtroom 9

Complaint Filed: August 4, 2011

24 I, **Alex Tomasevic**, declare that I am over the age of 18 years and am not a party to the  
25 case; I am employed in the County of San Diego, California, where the mailing occurs; and my  
26 business address is Nicholas & Butler, LLP, 225 Broadway, 19<sup>th</sup> Floor, San Diego, California  
27 92101. On September 29, 2011 I served the within: **COUNTERCLAIM** on the interested parties  
28 in said action by:

[ ] **BY FACSIMILE TRANSMISSION**: In addition to service by mail as set forth below,  
the counsel or interested party authorized to accept service was also forwarded a copy of  
said document(s) by facsimile transmission at the fax machine telephone number  
corresponding with his/her/its name. The fax machine I used complied with CRC Rule

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2.301(3) and no error was reported by the machine. Pursuant to CRC Rule 2.306(h)(3), I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

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

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

**BY EMAIL:**

**BY MAIL:** as follows:

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

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

**SEE NEXT PAGE**

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

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

Executed on **September 29, 2011**, at San Diego, California.

/s/ Alex Tomasevic



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