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RYAN MILLER and RAVENSBURGER NORTH AMERICA, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE UPPER DECK COMPANY, a Nevada corporation,

Plaintiff,

v.

RYAN MILLER, an individual; RAVENSBURGER NORTH AMERICA, INC., a Washington corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No. 3:23-cv-01249-L-BLM

DEFENDANTS RYAN MILLER AND RAVENSBURGER NORTH AMERICA, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: August 14, 2023
Time: 10:30 a.m.
Ctrm: 5B
Judge: Hon. M. James Lorenz

(*No oral argument pursuant to Local Rules*)

TO THE COURT, ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 14, 2023, at 10:30 a.m., or as soon as the matter may be heard by the Honorable M. James Lorenz, in Courtroom 5B of the United States District Court for the Southern District of California, located at the Edward J. Schwartz United States Courthouse, 221 West Broadway, San Diego, CA 92101, Defendants Ryan Miller and Ravensburger North America, Inc. will and hereby do move the Court for dismissal of Plaintiff The Upper Deck Company's Complaint.

Defendants move for dismissal, pursuant to Federal Rule of Civil Procedure 12(b)(2), on the grounds that this Court lacks personal jurisdiction. Defendants also move for dismissal under Rule 12(b)(6), because Plaintiff has failed to allege several essential elements of the causes of action stated in the Complaint, such that Plaintiff has not adequately stated claims for relief.

The motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Ryan Miller and Florian Baldenhofer and all exhibits attached thereto, and on such other written and oral argument as may be presented to the Court.

Dated: July 12, 2023

PERKINS COIE LLP

By: s/Alisha C. Burgin

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Sweeney v. Carter,
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Zumbrun v. Univ. of S. Cal.,
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Fed. R. Civ. P. 12(b)(6) 21, 32, 33

OTHER AUTHORITIES

A Primer On Collectible And Trading Card Games, REALITY IS A GAME (Feb. 2, 2014), http://www.realityisagame.com/archives/2513/a-primer-on-collectible-and-trading-card-games/ 11

How To Play, DISNEY LORCANA, https://www.disneylorcana.com/en-US/how-to-play/ (last visited July 10, 2023) 14

Restatement (Second) of Torts § 766 cmt. i (Am. L. Inst. 1979) 28

Trading Card Games for the Rest of Us-Cards, Decks, and Basics of Play, GEEKDAD (Jan. 9, 2014), https://geekdad.com/2014/01/tcgs-rest-us-cards-decks-basics-play/ 12

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Upper Deck Company ("**Upper Deck**") has filed suit against Ryan Miller, a Washington resident, and Ravensburger North America, Inc. ("**Ravensburger**"), a Washington company. The crux of the Complaint is that Mr. Miller misappropriated Upper Deck's "ideas" for a trading card game, and used those ideas to help Ravensburger create a game of its own.

Even a cursory review of the two games would show that Ravensburger's game—which is based on Disney characters, and was in the works long before Mr. Miller joined the company—is nothing like Upper Deck's card game. Discovery will show Upper Deck's Complaint to be a strained and clumsy effort to slow down a competitor. But that's not the focus of this motion.

In this motion to dismiss, the defendants will take Upper Deck's (reasonable) allegations at face value, as is the standard under Rule 12. But even by that standard, all the claims should be dismissed outright because Upper Deck cannot establish personal jurisdiction over two non-resident defendants. Now Upper Deck may argue that its contract with Mr. Miller has a dispute resolution clause identifying San Diego; but that clause is specific to an *arbitration provision* that Upper Deck assiduously avoided to file this rushed Complaint publicly. There is no personal jurisdiction over *either* Mr. Miller or Ravensburger.[1]

Jurisdiction aside, Upper Deck's laundry-list of claims fails as a matter of law, even under the most basic level of scrutiny. The fiduciary duty claim fails because Mr. Miller is not and never was a *fiduciary* to Upper Deck; he was an independent contractor and freelance designer; and nothing in his agreements prevented him from working with a competitor. Upper Deck's attempt to use this

[1] Defendants will move separately (and soon) to transfer this action, pursuant to 28 U.S.C. § 1404, to the Western District of Washington in Seattle, where Ravensburger is based and Mr. Miller lives. While Defendants defer to the Court on the sequencing of this Motion and the forthcoming § 1404 Motion, Defendants respectfully suggest that it may be most efficient to decide the § 1404 Motion first.

claim, and others, to manufacture a non-compete clause where none exists is the legal equivalent of alchemy.

The fraud claim fares no better because Upper Deck cannot possibly meet Rule 9's heightened pleading standards, and its own allegations confirm that no legal duties were breached. The inducement to breach claim fails because the Complaint does not (and cannot) allege that Ravensburger knew about Upper Deck's agreements with Mr. Miller. Likewise, the negligence interference claim cannot pass muster under Rule 12 as a matter of law because Ravensburger—a *direct competitor to Upper Deck*—does not owe Upper Deck a duty of care.

The other claims fail because of the economic loss rule (conversion), or because they do not exist (constructive trust), or because Upper Deck did not bother to invoke the right statute (unfair competition and attorneys' fees).

Taken together, the Complaint should be dismissed for lack of jurisdiction, and for failure to state a claim. But the Court may choose instead to rule on Defendants' forthcoming § 1404 motion and defer this motion to the Western District of Washington.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

Trading card games (e.g., Pokémon and Magic: The Gathering) have been popular amongst those who collect and play them for decades.[2] Typically, a trading card game ("**TCG**") will feature many commonalities, including without limitation, that players will purchase and build their own decks, using cards sold in random distribution such that each player's deck is unique. *Id.* While each player will have their own self-designed decks and strategies for play, the basics of how each game's cards are designed and their "core tactics" for play can often be universally

[2] *See* Adam Clare, *A Primer On Collectible And Trading Card Games*, REALITY IS A GAME (Feb. 2, 2014), http://www.realityisagame.com/archives/2513/a-primer-on-collectible-and-trading-card-games/.

understood and applied.[3] In other words, strategies vary significantly in TCG play, but the mechanics of play include many basic commonalities across games.

1. The Parties

Upper Deck is a "sports and entertainment company" that manufactures, "among other products, sports and entertainment trading cards and trading card games." ECF No. 1, at 16–17 (Compl. ¶¶ 7, 11) (hereinafter, "**Compl.**"). The "latest" TCG in Upper Deck's line up is the "still-in-progress" Rush of Ikorr™ ("**Rush of Ikorr**"). *Id.* ¶ 12.

Ravensburger is headquartered in Seattle. Compl. ¶ 9. Ravensburger focuses its business on family-friendly games, puzzles, crafts, and toys. *Id.* ¶ 14; Decl. of Florian Baldenhofer ("**Baldenhofer Decl.**") ¶ 2. Ravensburger's latest family-friendly project is the TCG at issue in this action, Disney Lorcana™ ("**Lorcana**"). Baldenhofer Decl. ¶ 2; *see also* Compl. ¶ 32.

2. Mr. Miller is a prominent and well-established trading card game designer.

Except for a few short stints in Virginia, Maryland, and Alabama, Mr. Miller has lived in the greater Seattle area since 1998. Compl. ¶ 8; *see also* Decl. of Ryan Miller ("**Miller Decl.**") ¶ 2. With decades of experience in the industry, Mr. Miller has worked on several popular games, such as Magic: The Gathering, Duel Masters, Kaijudo, and Digimon. Compl. ¶ 13. Mr. Miller has done this work as a full-time employee of a company (e.g., Wizards of the Coast), as a business owner, and as an independent freelance designer/consultant retained for projects on a work-for-hire basis. Miller Decl. ¶ 3.

Mr. Miller is employed full-time at Ravensburger as Senior Brand Manager - Lorcana, a role he has held since November 9, 2020. *Id.* ¶ 4. Prior to joining Ravensburger, Mr. Miller worked for six years as an independent freelance game

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[3] *Id.*; *see also* Rory Bristol, *Trading Card Games for the Rest of Us—Cards, Decks, and Basics of Play*, GEEKDAD (Jan. 9, 2014), https://geekdad.com/2014/01/tcgs-rest-us-cards-decks-basics-play/ (describing how in most TCGs, "each card has a 'cost,' 'type,' 'speed,' 'color,' and 'rarity'" among other similarities).

designer/consultant, a role that afforded him the opportunity to collaborate with other designers and/or companies on multiple projects. *Id.* ¶ 5.

3. Miller's Relationship with Upper Deck

During his stint as a freelance game designer, Mr. Miller undertook a few projects for Upper Deck on a work-for-hire basis. Miller Decl. ¶ 6. While Mr. Miller never worked on a game named Rush of Ikorr, he was retained by Upper Deck to collaborate and develop a TCG known to Mr. Miller as "Shell Beach." Miller Decl. ¶¶ 6–7, 9; *id.* Ex. 2 ("**Shell Beach Agreement**"); *see also* Compl. ¶ 19 (referring to the Shell Beach Agreement).

Mr. Miller's involvement with Shell Beach began around November 2018, when Upper Deck invited him and "several game designers" to a summit to brainstorm and collaborate on new TCGs. Compl. ¶ 15. In exchange for compensation for his time and work over a weekend visit to Upper Deck, Mr. Miller signed the 2018 Upper Deck Gaming Summit Agreement. *Id.* ¶ 16; *see also* Miller Decl. ¶ 8, Ex. 1 ("**2018 Summit Agreement**") (together with the Shell Beach Agreement, the "**Agreements**").[4]

Six months later, in June 2019, Upper Deck retained Mr. Miller as an independent contractor to do additional design work for the Shell Beach game. *See* Compl. ¶¶ 18–19; *see also* Miller Decl. ¶ 9, Ex. 2 at 13 (Shell Beach Agreement § 2). Mr. Miller was compensated based on his completion of various milestones. Compl. ¶¶ 20, 24.

Like many freelancers, Mr. Miller eventually concluded that he needed stable, full-time employment, and on October 21, 2020 he informed Upper Deck that he would be terminating the Shell Beach Agreement. *Id.* ¶ 25. Upper Deck alleges that it retained two new work-for-hire game designers who continued to

[4] The Agreements are incorporated into the complaint and thus may be considered along with the pleadings. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). The Agreements are the subject of a concurrently filed motion to file under seal.

work on Upper Deck's TCG project. Compl. ¶ 28. In April 2023, Upper Deck filed a trademark application for the Rush of Ikorr name and a provisional patent application for the game. *See* Compl. ¶ 30.

4. Ravensburger's Development of Lorcana

In early 2020, Ravensburger's representatives met with Disney to pitch a family-friendly card game featuring Disney characters, meant to capture untapped segments of the tabletop game market. Baldenhofer Decl. ¶ 3. Ravensburger quickly put together a team. Months later, in November 2020, the company hired Mr. Miller. *Id.* ¶ 4; Miller Decl. ¶ 4; Compl. ¶ 27. The Ravensburger team of designers, developers, and artists worked for years to create a cohesive game (i.e., characters, strategy, and story), that was simultaneously accessible and complex enough to appeal to Disney fans, families, and to both die-hard and new trading card gamers alike. Baldenhofer Decl. ¶ 5; *see also* Compl. ¶ 31.

An application to trademark the Disney Lorcana name was filed in December 2021. On August 30, 2022, Ravensburger officially announced its years-long development of Lorcana along with its plans to release the first "Chapter" of the game in fall 2023. Baldenhofer Decl. ¶ 6. Ravensburger released the rules for Lorcana, along with helpful videos demonstrating how to play the game, on its website in April 2023. *Id.* ¶ 7; *see also How To Play*, DISNEY LORCANA, https://www.disneylorcana.com/en-US/how-to-play/ (last visited July 10, 2023).[5]

B. Procedural History

Upper Deck filed this lawsuit in San Diego Superior Court on June 7, 2023, and served Ravensburger and Mr. Miller with the Summons and Complaint on June 9, 2023 and June 12, 2023, respectively. On July 6, 2023, Defendants removed the lawsuit to this Court.

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[5] The Court may take judicial notice of publicly available documents, including websites and their contents, "without converting the motion to dismiss into a motion for summary judgment." *Ritchie*, 342 F.3d at 908; *see also Rajapakse v. Escrow.Com*, 2021 WL 2473933, at *1 n.1 (S.D. Cal. June 17, 2021).

III. THE COURT LACKS PERSONAL JURISDICTION[6]

A. Legal standard under Rule 12(b)(2).

"When a defendant moves to dismiss for lack of personal jurisdiction [under Rule 12(b)(2)], the plaintiff bears the burden of demonstrating that the court has jurisdiction over the defendant." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006); *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (citation omitted). In meeting this burden, a plaintiff cannot "rest on the bare allegations of its complaint," *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011), but must "make a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010), *abrogation on other grounds recognized by Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064 (9th Cir. 2017).

To establish personal jurisdiction over a non-resident defendant, a plaintiff must show both that jurisdiction exists under the forum state's long-arm statute, and that the exercise of jurisdiction comports with federal due process. *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1404–05 (9th Cir. 1994). This is a single analysis in California, as the state's long-arm statute is coextensive with the U.S. Constitution. Cal. Civ. Proc. Code § 410.10; *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *In re Star & Crescent Boat Co., Inc.*, 549 F. Supp. 3d 1145, 59–61 (S.D. Cal. 2021) ("*Star & Crescent*").

Jurisdiction comports with due process only if the defendant has such "minimum contacts" with the forum state that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (cleaned up). Personal jurisdiction may be either general or specific. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*,

[6] For brevity (and to comply with page limits), Defendants have collectively raised arguments for dismissal under Rule 12(b)(2). Defendants respectfully request that the Court assess the merits of these arguments as to each defendant individually. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (personal jurisdiction over each defendant must be "assessed individually").

466 U.S. 408, 414 nn.8–9 (1984).

As explained below, the Court lacks personal jurisdiction over Defendants. The Complaint should be dismissed pursuant to Rule 12(b)(2).[7]

B. This Court lacks general jurisdiction.

"General jurisdiction exists when a defendant is domiciled in the forum state or his activities there are substantial or continuous and systematic." *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (cleaned up); *Star & Crescent*, 549 F. Supp. 3d at 1159–61.[8] The "paradigm[atic] forum" for general jurisdiction is an individual's domicile, and an entity's "place of incorporation and principal place of business[.]" *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). "Only in an exceptional case will general jurisdiction be available anywhere else." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014) (cleaned up).

To assess whether a corporation is "essentially at home, sufficient to trigger the exceptional case," courts will examine "the longevity, continuity, volume, and economic impact of [a defendant's contacts with the forum state], as well as the defendant's physical presence and integration into the state's regulatory or economic markets." *Loomis v. Slendertone Distrib., Inc.*, 420 F. Supp. 3d 1046, 1065 (S.D. Cal. 2019) (cleaned up). This is "an exacting standard," because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for its activities anywhere in the world. *Id.*

Here, it would clearly be inappropriate to exercise general jurisdiction over Defendants. Washington state is the "paradigm[atic] forum" for both Defendants: Mr. Miller has resided in the greater Seattle area for much of the past 24 years (*see* Miller Decl. ¶ 2), and Ravensburger is a Washington corporation with its principal

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[7] Alternatively, the action should be transferred to the Western District of Washington, a forum with personal jurisdiction over both Mr. Miller and Ravensburger.

[8] "General jurisdiction in the case of a nonresident corporation is viewed analogously to the presence of a natural person." *Serafini v. Superior Ct.*, 68 Cal. App. 4th 70, 79 (1998).

1 place of business in Seattle (Compl. ¶ 9). *Daimler AG*, 571 U.S. at 117.
2 Nor do the circumstances present an "exceptional case" warranting the
3 exercise of general jurisdiction in California. *Martinez*, 764 F.3d at 1070; *Loomis*,
4 420 F. Supp. 3d at 1065. Mr. Miller's alleged contacts with California are tenuous
5 and infrequent, at best. As alleged in the Complaint, Mr. Miller signed two (short-
6 term) personal services contracts with Upper Deck and traveled to San Diego once
7 in 2018 to work with Upper Deck and other game designers. Compl. ¶ 4; *see also*
8 Miller Decl. Exs. 1 (Summit Agreement), 2 (Shell Beach Agreement). This
9 represents a fraction of Mr. Miller's decades-long career in game design. Miller
10 Decl. ¶ 3. Mr. Miller's contacts are insufficiently "substantial" or "continuous and
11 systematic" to make him "at home" in California. *Branca v. Bai Brands, LLC*, 2019
12 WL 1082562, at *16–17 (S.D. Cal. Mar. 7, 2019) (no general jurisdiction over
13 individuals who resided in other states).
14 So too for Ravensburger. Ravensburger's only alleged ties to California are a
15 single license with a California-based company, and a limited number of "pre-
16 sales" of a product that have yet to be delivered. Compl. ¶ 5. Such allegations do
17 not establish contacts with the "longevity, continuity, volume, and economic
18 impact" necessary to trigger an "exceptional case." *Loomis*, 420 F. Supp. 3d at
19 1065; *Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986) (collecting
20 cases where defendants with significant forum contacts lacked general jurisdiction).
21 **C. The Court lacks specific jurisdiction.**
22 "Specific jurisdiction" only exists where the claim for relief arises directly
23 from the defendant's contacts with the forum state. *AT&T Co. v. Compagnie*
24 *Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir.), *supplemented on other grounds*, 95
25 F.3d 1156 (9th Cir. 1996). A court "will exercise specific jurisdiction over a non-
26 resident defendant only when three requirements are satisfied: (1) the defendant
27 either purposefully directs its activities or purposefully avails itself of the benefits
28 afforded by the forum's laws; (2) the claim arises out of or relates to the

defendant's forum-related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, i.e., it is reasonable." *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1023 (9th Cir. 2017) (cleaned up). Upper Deck must establish the first two prongs, which shifts the burden to the defendant to establish the third prong. *Schwarzenegger*, 374 F.3d at 800. Even a cursory review of the Complaint reveals Upper Deck has not met this burden—as to either Defendant.

Upper Deck's bid for personal jurisdiction over Ravensburger rests on three allegations: (1) "Ravensburger has acted in concert with Miller . . . resulting in a breach of Miller's California contracts"; (2) Lorcana is a "Disney-licensed product," and Disney "is a California headquartered company"; and (3) Ravensburger will soon deliver pre-sold copies of Lorcana to San Diego residents. Compl. ¶ 5. That doesn't come close to establishing personal jurisdiction.

As for Mr. Miller, Upper Deck alleges: (1) The services Mr. Miller performed pursuant to the Agreements; (2) the alleged breach of the Agreements; (3) that the Agreements call for application of California law and venue in San Diego (notably *in a mandatory arbitration clause*, which Upper Deck has selectively ignored); and (4) a weekend visit to San Diego nearly five years ago for a gaming summit. *Id.*

No specific jurisdiction as to Ravensburger. Upper Deck cannot show that Ravensburger purposefully directed its activities toward California or purposefully availed itself of the benefits of California law. Ravensburger's license agreement with Disney, who Upper Deck alleges is headquartered in California, does not show purposeful direction or purposeful availment. *Id.*[9] Indeed, it is well-settled that

[9] The Disney license is nothing more than a red herring in this analysis. The crux of Upper Deck's claims against Ravensburger is the alleged misuse of Upper Deck's confidential information to develop Lorcana. Upper Deck claims Ravensburger stole Upper Deck's "design, details, concepts, and mechanics," Compl. ¶ 101, but does not allege theft of specific characters, personalities, images, backstories, or themes, which are Disney's. Upper Deck's allegations are entirely distinct and separate from Disney or the specific use of Disney characters. Ravensburger (or Upper Deck) could have applied the same game play to any characters unrelated to Disney and Upper Deck's allegations would not change. Moreover, Upper Deck

"[a]n out-of-state party does not purposefully avail itself of a forum merely by entering into a contract with a forum resident." *HK China Grp., Inc. v. Beijing United Auto. & Motorcycle Mfg. Corp.*, 417 F. App'x 664, 665 (9th Cir. 2011) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)); *see also Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991) ("[T]he existence of a contract with a resident of the forum state is insufficient by itself to create personal jurisdiction over the nonresident."). And, those cases analyzed the specific contracts at issue between the parties to the lawsuit. Disney is a third-party licensor and not a party to this suit—one more step removed from the contractual relationships that still did not give rise to personal jurisdiction, without more. *See Burger King*, 471 U.S. at 479.

Moreover, Upper Deck's vague allegations of general pre-sales made, but not yet delivered, to California residents is insufficient. Indeed, limited sales to California residents that are not targeted to or expressly aimed at California residents do not give rise to specific personal jurisdiction. *Schwartz E Liquid v. OMW Techs. Inc.*, 2019 WL 4459324, at *4 (C.D. Cal. June 13, 2019) (finding no specific personal jurisdiction when plaintiff failed to allege sales and marketing specifically to California residents other than "by the general appeal" of defendant's products). Upper Deck offers no allegations about the sales volume in California, whether Ravensburger specifically targeted California residents, or whether Ravensburger marketed its products specifically to California residents. *See generally* Compl.

Finally, according to even Upper Deck's own allegations, Ravensburger's relationship with Mr. Miller occurred entirely in Washington—not California. *See* Compl. ¶¶ 8 (Miller is a resident of Washington state), 9 (Ravensburger is a Washington corporation), 71 (alleging that Miller lived in Washington state during

pleads no license with Disney, or even the prospect of having a license with Disney. At bottom, the Disney license cannot be the hook for jurisdiction in this case.

the alleged wrongful conduct). As such, Ravensburger's interactions with Mr. Miller cannot give rise to purposeful direction or purposeful availment.

Upper Deck also cannot show that the claims against Ravensburger arose out of or relate to its forum-related activities. Upper Deck brings five claims against Ravensburger (some of which are also alleged against Mr. Miller): inducing breach of a written contract; negligent interference with prospective economic relations; constructive trust; conversion; and unfair competition. All of these claims are based on the alleged misuse of Upper Deck's confidential information to develop Lorcana. It is undisputed that Ravensburger and Miller are located in Seattle. It is also undisputed that the alleged conduct giving rise to or relating to these five claims occurred in Seattle. **None of it occurred in California**. On this ground alone, Upper Deck fails to meet its burden to establish personal jurisdiction.

No specific jurisdiction as to Mr. Miller. Upper Deck also cannot show that Mr. Miller purposefully directed his activities toward California or purposefully availed himself of the benefits of California law. Upper Deck merely alleges that Mr. Miller attended a two-day brainstorm session with Upper Deck, *five years ago*, and then entered into a less than two year "Work for Hire Agreement," that Mr. Miller terminated. *See* Compl. ¶¶ 15–20. Upper Deck alleges no other future work with Mr. Miller, whether foreseeable or even contemplated. But for a handful of days in California, Mr. Miller did his work for Upper Deck entirely in Washington state, not California. *Sweeney v. Carter*, 2021 WL 4776064, at *4–6 (C.D. Cal. Oct. 12, 2021).

Moreover, Upper Deck fails to show how any of the six claims asserted against Mr. Miller arose out of or relate to his forum-related activities. Similar to the claims against Ravensburger, the claims against Mr. Miller are based on the alleged misuse of Upper Deck's confidential information to develop Lorcana. Upper Deck does not, and cannot, allege any conduct giving rise to or relating to these six claims that occurred in California. Any such conduct occurred where

Mr. Miller resides, in Seattle, Washington.

* * *

Taken together, the Court lacks jurisdiction over Ravensburger and Mr. Miller, and the Complaint should be dismissed under Rule 12(b)(2).

IV. UPPER DECK'S CLAIMS FAIL AS A MATTER OF LAW.[10]

A. Legal standard under Rule 12(b)(6).

A complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than sheer possibility that a defendant acted unlawfully." *Id.*

Dismissal is appropriate where there is no cognizable legal theory or where there is an absence of sufficient alleged facts to support a cognizable legal theory. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In ruling on a Rule 12(b)(6) motion, the Court need not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted), *opinion amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001). Legal conclusions and "[t]hreadbare recitals of the elements of a cause of action" do not suffice. *Iqbal*, 556 U.S. at 678.

[10] Upper Deck's claims are predicated on its business relationship with Mr. Miller, which is governed by the Shell Beach Agreement. *See, e.g.*, Compl. ¶¶ 1, 60, 65, 70, 74, 79, 86, 102. The Shell Beach Agreement provides that "[a]ny dispute, controversy or claim . . . arising out of or relating in any way to the provisions of the [Shell Beach] Agreement shall be resolved . . . [in] binding arbitration." Miller Decl. Ex. 2, at 17 (Shell Beach Agreement § 14). Defendants therefore reserve their rights to move to compel arbitration of this action.

B. The fiduciary duty claim should be dismissed.

In its second cause of action, Upper Deck alleges Mr. Miller "breached his fiduciary duty to Upper Deck by stealing core concepts and proprietary, novel elements of [Rush of Ikorr] and using it to develop Lorcana." Compl. ¶ 66. This claim fails as a matter of law for at least two reasons.

First, Upper Deck has not alleged an essential element of its fiduciary duty claim: a fiduciary relationship between Upper Deck and Mr. Miller. "In the absence of a fiduciary relationship, there can be no breach of fiduciary duty as a matter of law." *O'Byrne v. Santa Monica–UCLA Med. Ctr.*, 94 Cal. App. 4th 797, 812 (2001).[11]

"[B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 386 (2008) (quoting *Comm. on Child.'s Tel., Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 221 (1983)). Here, the Agreements contain no indicia that Mr. Miller knowingly undertook such an obligation for Upper Deck. In fact, the Agreements state the opposite: "[Mr. Miller] shall have no right or authority . . . to assume or create an obligation or liability of any kind . . . in the name of or on behalf of UDC." Miller Decl. Ex. 1, at 7 (Summit Agreement § 3); *id.* Ex. 2, at 16 (Shell Beach Agreement § 9).

Upper Deck simply alleges that Mr. Miller had a contractual obligation not to disclose Upper Deck's information—which is not a fiduciary relationship. *See* Compl. ¶ 65; *id.* ¶ 70. In fact, Upper Deck's contentions are inconsistent with the Agreements and settled California law.

For starters, the Agreements expressly provide that Mr. Miller "is . . . an

[11] *See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 483 (1998) ("The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach.").

1 independent contractor" and that "nothing in [the Agreements] shall be construed to
2 create a partnership, joint venture, or similar arrangement between [Mr. Miller] and
3 UDC." Miller Decl. Ex. 1, at 7 (Summit Agreement § 3); *id.* Ex. 2, at 16 (Shell
4 Beach Agreement § 9); Compl. ¶ 70 (identifying Mr. Miller as a contractor). The
5 California Supreme Court has declined to find a fiduciary relationship under such
6 circumstances. *See City of Hope*, 43 Cal. 4th at 389–90, 392.
7 Nor is a fiduciary relationship necessarily created, where, as here, "one party
8 . . . entrusts a secret invention to another party to develop." *Id.* at 389; *see also*
9 Compl. ¶ 65. "The mere placing of a trust in another person does not create a
10 fiduciary relationship." *Zumbrun v. Univ. of S. Cal.*, 25 Cal. App. 3d 1, 13 (1972).
11 Upper Deck has failed to allege facts that plausibly support the inference that it had
12 a fiduciary relationship with Mr. Miller.
13 ***Second***, even if the parties had a fiduciary relationship, the claim fails
14 because it is barred by California's economic loss rule: "[a] person may not
15 ordinarily recover in tort for the breach of duties that merely restate contractual
16 obligations." *Aas v. Superior Ct.*, 24 Cal. 4th 627, 643 (2000), *superseded on other*
17 *grounds by statute as stated in S. Cal. Gas Leak Cases*, 7 Cal. 5th 391 (2019). "The
18 economic loss rule requires a [party] to recover in contract for purely economic loss
19 due to disappointed expectations, unless [they] can demonstrate harm above and
20 beyond a broken contractual promise." *Robinson Helicopter Co. v. Dana Corp.*, 34
21 Cal. 4th 979, 988 (2004); *see also Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d
22 865, 873 (9th Cir. 2007) ("[C]ertain economic losses are properly remediable only
23 in contract.").
24 Here, the Complaint alleges "Miller breached his fiduciary duty to Upper
25 Deck by stealing core concepts and proprietary, novel elements of Upper Deck's
26 game and using it to develop Lorcana." Compl. ¶ 66. This is a mere restatement of
27 the allegations of breach of contract. *See id.* ¶ 62 ("Miller breached [the
28 Agreements] by . . . copying Upper Deck's proprietary and novel TCG game and

1 disclosing the central, proprietary components and expressions within the game to .
2 . . Ravensburger, to develop the Lorcana trading card game."). And the alleged
3 fiduciary duty at issue—to maintain the confidentiality of Upper Deck's proprietary
4 information—is an express obligation in the Agreements. *Compare* Compl. ¶¶ 65–
5 66, *with* Miller Decl. Ex. 2, at 16 (Shell Beach Agreement § 10). Finally, Upper
6 Deck seeks purely economic relief. Because the fiduciary duty claim "merely
7 restate[s] contractual obligations" it is barred by the economic loss rule. *Aas*, 24
8 Cal. 4th at 643; *see also CleanFuture, Inc. v. Motive Energy, Inc.*, 2019 WL
9 2896132, at *3–4 (C.D. Cal. Apr. 15, 2019) (fiduciary duty claim barred by
10 economic loss rule).

11 Upper Deck's fiduciary duty claim should be dismissed with prejudice. *See*
12 *BP W. Coast Prod., LLC v. Crossroad Petroleum, Inc.*, 2013 WL 12377979, at *10
13 (S.D. Cal. Dec. 3, 2013) (a finding of no fiduciary duty amounts to dismissal of
14 claim with prejudice); *CleanFuture*, 2019 WL 2896132, at *5 (dismissing fiduciary
15 duty claim with prejudice where "incurably barred" by economic loss rule).

16 **C. The fraud claim should be dismissed.**

17 In its third cause of action, Upper Deck contends it was defrauded by
18 Mr. Miller's "intentional[] conceal[ment]" of certain material facts, namely, that
19 Mr. Miller: (1) discussed possible employment opportunities and accepted
20 employment with Ravensburger ("**Employment Omission**"); (2) would be working
21 to design a competing game for a competitor ("**Competing Game Omission**"); and
22 (3) intended to seize Upper Deck's "confidential and proprietary game" and transfer
23 it to Ravensburger ("**Transfer Omission**"). Compl. ¶¶ 71–73; *id.* 69–77. Not so.
24 Upper Deck's meandering and incendiary allegations of fraud fail to state a claim
25 for relief, for at least two reasons.

26 To begin, the fraudulent concealment claim is barred by the economic loss
27 rule. Upper Deck again seeks to recover purely economic losses in tort—lost profits
28 and opportunities resulting from the earlier release of competing TCG that "copies

the essence of Rush of Ikorr" (Compl. ¶ 76)—for harms caused by the alleged breach of contract. *Compare* Compl. ¶¶ 72 (alleging Mr. Miller concealed his intent to "seize confidential and proprietary [information] and transfer them to Ravensburger without Upper Deck's knowledge"), *with id.* ¶ 62 ("Miller breached [the Agreements] by, without authorization, copying Upper Deck's proprietary and novel TCG game and disclosing . . . the game to . . . Ravensburger . . . ."), *and* Miller Decl. Exs. 1 at 8 (Summit Agreement § 7), 2 at 16 (Shell Beach Agreement § 9) ("Designer agrees not to reveal Confidential Information to any third party . . . ."). Upper Deck's failure to "demonstrate harm above and beyond a broken contractual promise" is fatal to its claim. *Robinson Helicopter Co.*, 34 Cal. 4th at 988; *see also Cho v. Hyundai Motor Co.*, 2022 WL 16966537, at *5 (C.D. Cal. Oct. 21, 2022) (dismissing class action claims for fraudulent concealment with prejudice after finding the claims were barred by the economic loss rule); *id.* at *4 (collecting cases). The fraudulent concealment claim should be dismissed—with prejudice.

The fraud claim also fails because its elements are not pled with the requisite level of particularity—not by a long shot. Under California law, the elements of fraudulent concealment are: (1) concealment or suppression of a material fact; (2) by a defendant who was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact, intending to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would not have acted as it did had it known the concealed or suppressed fact; and (5) resulting damage. *Boschma v. Home Loan Ctr., Inc.*, 198 Cal. App. 4th 230, 248 (2011). Claims for fraudulent concealment are subject to the heightened pleading requirement in Rule 9(b). *Immobiliare, LLC v. Westcor Land Title Ins.*, 424 F. Supp. 3d 882, 890 (E.D. Cal. 2019). This particularity requirement necessitates pleading *facts* which set forth "the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). *See also Tapia v. Davol, Inc.*, 116 F. Supp. 3d 1149, 1164 (S.D. Cal. 2015) (evaluating

fraudulent concealment claim based on "'what' was concealed, 'when' it was concealed and 'why' it was concealed").

Here, the Complaint conclusorily alleges three "material" facts concealed by Mr. Miller: the Employment Omission, Competing Game Omission, and the Transfer Omission. Compl. ¶¶ 71–73. The Complaint alleges (again, *conclusorily*) that Mr. Miller had a special relationship that required him to "keep in confidence the nature of his work for Upper Deck." Compl. ¶ 70. But the Complaint is utterly and notably silent on the source of Mr. Miller's legal duty to disclose either the Employment Omission or the Competing Game Omission. Upper Deck's omission is fatal to its fraudulent concealment claim. *Immobiliare*, 424 F. Supp. 3d at 888 ("To maintain a cause of action for [fraudulent concealment], there *must* be allegations demonstrating that the defendant was under a legal duty to disclose those facts.").

The Complaint's silence on the legal duty to disclose the Employment and Competing Game Omissions is not surprising. Upper Deck could not credibly require Mr. Miller to disclose concurrent freelance projects or future employment when Upper Deck itself had a "confidential business relationship" with Mr. Miller. Miller Decl. Ex. 1, at 8 (Summit Agreement § 7). Likewise, Upper Deck does not allege—nor can it—that Mr. Miller had a *duty* to disclose his intent to design a competing game. Nor can Upper Deck plausibly allege that it was *unaware* Mr. Miller would be designing a competing game; after all, Mr. Miller *is a game designer by trade*. This is literally his day job and why Upper Deck retained him in the first place.

More the point: the Agreements do not contain a non-compete clause. Upper Deck's attempts to manufacture one is the equivalent of legal alchemy.

The Transfer Omission fails for a different reason. Upper Deck's Complaint omits allegations regarding an essential element of fraudulent concealment: that Upper Deck would have acted differently if it knew the concealed or suppressed

1 fact. *Boschma*, 198 Cal. App. 4th at 248. Upper Deck does not specify how it would
2 have behaved differently if it were aware of the alleged Transfer Omission, instead
3 vaguely alleging it would have taken affirmative action to protect its "ideas,
4 concepts, details, and intellectual property[.]" *See* Compl. ¶ 75; *id.* ¶¶ 69–77.
5 Relatedly, the facts alleged in the Complaint contradict Upper Deck's
6 allegations regarding its reliance on the Employment and Competing Game
7 Omissions. Upper Deck claims it would have sought the return of confidential
8 information and/or prevented its employees from communicating with Mr. Miller if
9 it was aware of Mr. Miller's employment at Ravensburger and the company's work
10 on a competing TCG. Compl. ¶ 74. But Upper Deck ***was aware*** of Mr. Miller's
11 employment with Ravensburger and work on Lorcana when the game was
12 announced in September 2022. *See* Compl. ¶¶ 31–32. And despite that awareness,
13 Upper Deck did nothing. Upper Deck cannot now lament that it was damaged by its
14 own inaction.

15 **D. The claim for inducing breach of contract should be dismissed.**

16 To raise a claim for inducing breach of a written contract, Upper Deck must
17 plead and prove: (1) the existence of a valid contract between the plaintiff and a
18 third party; (2) the defendant's knowledge of that contract; (3) the defendant's
19 intentional acts designed to induce a breach; (4) actual breach; and (5) resulting
20 damage. *Soil Retention Prods., Inc. v. Brentwood Indus., Inc.*, 521 F. Supp. 3d 929,
21 961 (S.D. Cal. 2021). Upper Deck failed to plead at least two elements of its
22 inducement claim.
23 ***First***, absent from the Complaint is any allegation regarding Ravensburger's
24 knowledge of one or more specific contracts between Upper Deck and Mr. Miller.
25 Upper Deck alleges "Ravensburger knew or reasonably should have known *Miller*
26 *was subject to valid confidentiality contracts*[.]" Compl. ¶ 80 (emphasis added). But
27 that allegation—the only one in the Complaint about Ravensburger's
28 "knowledge"—does not identify a specific contract, much less point to the

Agreements purportedly at issue in this action. The Court should not take context cues from the surrounding conclusory allegations, or accept "unwarranted deductions of fact, or unreasonable inferences[.]" *Sprewell*, 266 F.3d at 988. The plausibility standard "asks for more than sheer possibility that a defendant acted unlawfully." *Iqbal*, 556 U.S. at 678. The realm of possible confidentiality contracts that Ravensburger knew or could have known about is endless: Mr. Miller was a freelance game designer for six years before joining Ravensburger in November 2020. Miller Decl. ¶ 5.

More to the point: Upper Deck did not allege that Ravensburger knew about *the Agreements identified in the Complaint*. *See* Compl. ¶¶ 78–84. That omission is fatal to the inducement claim.

Nor is it enough to allege that Ravensburger *should* have known about these vague confidentiality contracts. Compl. ¶ 80. The tort requires *actual knowledge*. *Evans Hotels, LLC v. Unite Here! Loc. 30*, 2021 WL 10310815 (S.D. Cal. Aug. 26, 2021) (dismissing claim that failed to allege actual knowledge of development contract); *see also* Restatement (Second) of Torts § 766 cmt. i (Am. L. Inst. 1979) ("To be subject to liability [for inducing a breach of contract], the actor must have knowledge of the contract with which he is interfering and of the fact he is interfering with the performance of the contract.").

Second, Upper Deck has not pled any acts or conduct by Ravensburger designed to induce any breach. Upper Deck alleges in a conclusory manner that "Ravensburger induced and intended for Miller to breach his obligations[.]" Compl. ¶ 81. That's it. There are *no allegations* about what Ravensburger actually *did* to induce Miller's supposed breach of contract (probably because Upper Deck can't even allege Upper Deck *knew* about the contract).

If Upper Deck's theory of liability is based on Ravensburger's hiring Mr. Miller away from Upper Deck, *see* Compl. ¶ 83, that theory cannot stand because Upper Deck has failed to show any independent wrongful conduct by

Ravensburger. *Ixchel Pharma, LLC v. Biogen, Inc.*, 9 Cal. 5th 1130, 1145–46 (2020). Even if Ravensburger expressly *asked* Mr. Miller to terminate his freelance project with Upper Deck, that would not be actionable either. *See Reeves v. Hanlon*, 33 Cal. 4th 1140, 1151 (2004) ("Where no unlawful methods are used, public policy generally supports a competitor's right to offer more pay or better terms to another's employee, so long as the employee is free to leave.").

E. The negligent interference with prospective economic relations claim should be dismissed.

A claim for negligent interference with prospective economic relations has five elements: "(1) the existence of a valid economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge (actual or construed) of (a) the relationship and (b) that the relationship would be disrupted if the defendant failed to act with reasonable care; (3) the defendant's failure to act with reasonable care; (4) actual disruption of the relationship; and (5) resulting economic harm." *Soil Retention Prods., Inc.*, 521 F. Supp. 3d at 961. Upper Deck fails to plausibly allege several elements.

First, Upper Deck does not and cannot allege that Ravensburger owes it a duty of care. After all, as Upper Deck acknowledges, "Ravensburger . . . is a direct competitor to Upper Deck." Compl. ¶ 9; *id.* ¶ 1. California law is clear: "there is no duty of care between competitors[.]" *S. Cal. Elec. Firm v. S. Cal. Edison Co.*, 2023 WL 2629893, at *11 (C.D. Cal. Jan. 10, 2023) (applying California law); *Stolz v. Wong Commc'ns Ltd. P'ship*, 25 Cal. App. 4th 1811, 1825 (1994) ("[C]omplaint did not allege such a duty, nor could it, since it was plain that plaintiff and defendants were competitors."); *Original Beauty Tech. Co. v. Oh Polly USA, Inc.*, 2022 WL 17224542 (C.D. Cal. Aug. 16, 2022) (same).

Even if Ravensburger owed Upper Deck a duty of care—as a direct competitor, it does not—the "duty" proposed in the Complaint would require the

very breach of confidentiality that is the basis of this action. According to Upper Deck's strained view of negligent interference, "Ravensburger was required to vet the specifics of the prior work the game designer had undertaken[.]" Compl. ¶ 87. But the very agreement Mr. Miller signed required him "not to reveal the Confidential Information to any third party[.]" Miller Decl. Ex. 2, at 16 (Shell Beach Agreement § 10). When a liability theory collapses on itself, that's a good sign the claim should be dismissed with prejudice.

Second, Upper Deck fails to show that it was "reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 522 (1996). "[A] hope of future transactions is insufficient to support a claim of tortious interference." *Soil Retention Prods.*, 521 F. Supp. 3d at 961–62. Here, Upper Deck concedes Rush of Ikorr game is "still-in-progress," i.e., the game has not been "publicly announced or launched[.]" Compl. ¶¶ 12, 29. This is insufficient as a matter of law. *See Soil Retention Prods.*, 521 F. Supp. 3d at 961–62.

Third, Upper Deck relies exclusively on conclusory allegations about Ravensburger's knowledge. *See, e.g.*, Compl. ¶ 87 ("Ravensburger knew of, or should have known of [Upper Deck's contractual relationship with Mr. Miller] through any basic due diligence . . . ."); *id.* ¶ 88. But "conclusory allegations that Defendant knew of Plaintiff's economic relations fail to state a plausible claim for relief under the *Twombly/Iqbal* standard." *Soil Retention Prods.*, 521 F. Supp. 3d at 962 (dismissing negligent interference claim).

F. The conversion claim should be dismissed.

To raise a claim for conversion, Upper Deck must allege: (1) "ownership or right to possession of a certain piece of property; (2) the defendant's conversion of the property by a wrongful act or disposition of property rights; and (3) damages." *Counts v. Meriwether*, 2015 WL 12656945, at *5 (C.D. Cal. June 12, 2015). Upper Deck's conversion claim fails for at least three independent reasons.

First, it is unclear what property was allegedly converted. *See generally* Compl. ¶¶ 100–05. Rather than point to a document or other specific tangible property, Upper Deck references "Rush of Ikorr as a whole and the related design, details, concepts, and mechanics upon which Rush of Ikorr is played." *Id.* ¶ 101.

Second, the crux of Upper Deck's allegations appears to be that Defendants converted Upper Deck's *ideas* for Rush of Ikorr, i.e., its structure, gameplay, and mechanics. Compl. ¶ 101. But California law is clear: *ideas* are not subject to conversion. *See Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) (finding no conversion claim based on defendant's alleged use of an idea for a television series); *see also Counts*, 2015 WL 12656945, at *5–6 (dismissing conversion claim alleging defendants "improperly appropriated [plaintiffs'] intangible ideas" conveyed in a script for a television show).[12]

Finally, the conversion claim against Mr. Miller is barred by the economic loss rule. As noted above, California law bars tort recovery "for the breach of duties that merely restate contractual obligations." *Aas*, 24 Cal. 4th at 643; *see also Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047, 1058 (N.D. Cal. 2021) (applying *Aas* to a conversion claim).

Here, the allegedly converted property interest—"design . . . concepts, and mechanics . . . for Rush of Ikorr"—is covered by the prohibitions on use and disclosure of confidential information in the Agreements. *Compare* Compl. ¶ 101, *with id.* ¶ 60, *and* Miller Decl. Ex. 2, at 16 (Shell Beach Agreement § 10). The Court should dismiss the conversion claim against Mr. Miller. *See Aas*, 24 Cal. 4th at 643; *Baggett v. Hewlett–Packard Co.*, 2009 WL 3178066, at *3 (C.D. Cal. Sept. 29, 2009) (conversion barred by economic loss rule where "[p]laintiff's relationship with [defendant] arises solely out of their contract and commercial transaction").

[12] *See also Thakur v. Betzig*, 2019 WL 2211323, at *2 (N.D. Cal. May 22, 2019) (dismissing conversion claim regarding an equation)

G. There is no cause of action for constructive trust in California.

In California, it is well-settled that "[a] constructive trust is 'not an independent cause of action but merely a type of remedy.'" *E.g.*, *Kenneally v. Bank of Nova Scotia*, 711 F. Supp. 2d 1174, 1190 (S.D. Cal. 2010); *Strasburger v. Blackburne & Sons Realty Cap. Corp.*, 2020 WL 6128223, at *7 (C.D. Cal. June 25, 2020) (dismissing claim because constructive trust is not a cause of action); *Arena Rest. & Lounge LLC v. Southern Glazer's Wine & Spirits, LLC*, 2018 WL 1805516, at *11 (N.D. Cal. Apr. 16, 2018); *Lund v. Albrecht*, 936 F.2d 459, 464 (9th Cir. 1991).

Additionally, and alternatively, Upper Deck has failed to state a claim because a constructive trust is an available *remedy* only where there is specifically "identifiable" property, "not where the plaintiff seeks to impose general personal liability as a remedy for the defendant's monetary obligations." *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Loc. Union No. 675 v. Foster*, 332 F.3d 1234, 1238 (9th Cir. 2003) ("*Honolulu No. 675*"); *Sanjiv Goel MD, Inc. v. Cigna Healthcare of Cal., Inc.*, 2016 WL 11507380, at *4 (C.D. Cal. June 16, 2016). Here, Upper Deck alleged the property it seeks to put in trust at the highest level of generality—"confidential information and any money and/or other property" *see* Compl. ¶ 99—a far cry from "specifically identifiable" property. *Honolulu No. 675*, 332 F.3d at 1238.

H. Upper Deck has failed to allege a specific and/or legally cognizable claim for relief under California's unfair competition law.

California's unfair competition law, Business and Professions Code §§ 17200 *et seq.*("**UCL**") "prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 320 (2011) (quoting Cal. Bus. & Prof. Code § 17200). Upper Deck's claimed violation of the UCL suffers from two fatal flaws, both independently warranting dismissal under Rule 12(b)(6).

First, Upper Deck does not specify which prong of the UCL its claim relies upon. Compl. ¶¶ 106–10. This "deprives [Defendants] of fair notice of the claims" alleged against them and warrants dismissal. *Nuvo Rsch. Inc. v. McGrath*, 2012 WL 1965870, at *6 (N.D. Cal. May 31, 2012) (cleaned up); *see also United States ex rel. Integrated Energy, LLC v. Siemens Gov't Techs., Inc.*, 2016 WL 11743176, at *5 (C.D. Cal. June 13, 2016) ("To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must identify the prong(s) underlying its unfair competition claim."); *Qureshi v. Countrywide Home Loans, Inc.*, 2010 WL 841669, at *7 (N.D. Cal. Mar. 10, 2010) (dismissing UCL claim where plaintiff failed to identify specific prong at issue). The UCL claim must be dismissed on this basis alone.

Second, at least as to Ravensburger, Upper Deck has failed to plausibly allege that it has standing to bring a claim under the UCL because it has not suffered a legally cognizable "injury in fact" and "lost money or property as a result of the unfair competition." *Hawkins v. Kroger Co.*, 906 F.3d 763, 768 (9th Cir. 2018). The law is clear: "lost business opportunities, lost anticipated profits, or injury to goodwill" are not recoverable under the UCL. *Dyson, Inc. v. Garry Vacuum, LLC*, 2010 WL 11595882, at *8 (C.D. Cal. July 19, 2010) (citing cases) ("Courts assessing standing under the UCL . . . have found that it is not sufficient for business competitor plaintiffs to allege lost business opportunities, lost anticipated profits, or injury to goodwill."); *see also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152 (2003) ("[N]onrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL.").

Here, Upper Deck—an admitted "direct competitor" of Ravensburger (*see* Compl. ¶¶ 1–2, 9, 62, 71)—seeks to recover from Ravensburger for the alleged UCL violation, "disgorgement of revenue and income earned by Ravensburger[.]" Compl. ¶ 110. Upper Deck's alleged harms include, without limitation, "lost sales, loss of goodwill and popularity of [its] game, thwarting the Rush of Ikorr launch,

loss of related revenue streams, [and] loss of capital[.]" *Id.* ¶ 83; *see also id.* ¶ 76.[13] But the California Supreme Court has clearly held that the monetary relief Upper Deck seeks from Ravensburger is not recoverable under the UCL. *See Korea Supply Co.*, 29 Cal. 4th at 1152. The UCL claim against Ravensburger should be dismissed.

V. THE COURT SHOULD STRIKE UPPER DECK'S REQUEST FOR ATTORNEYS' FEES UNDER CALIFORNIA CIVIL CODE § 3426.4

Upper Deck seeks attorneys' fees under Civil Code section 3426.4—the fee recovery provision of California's Uniform Trade Secrets Act ("**CUTSA**"). But Upper Deck did not allege a violation of CUTSA. As such, the Court should strike the prayer for attorneys' fees based on this provision from the Complaint. *See CytoDyn of N.M., Inc. v. Amerimmune Pharms., Inc.*, 160 Cal. App. 4th 288, 297–98 (2008) (denying attorneys' fees under CUTSA where plaintiff "did not allege, or even try to allege" trade secret misappropriation).

VI. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court: (1) dismiss the Complaint for lack of jurisdiction; (2) dismiss claims two through seven for failure to state a claim; (3) strike the demand for damages from the eighth cause of action; and (4) strike Upper Deck's prayer for attorneys' fees under CUTSA.

Dated: July 12, 2023

PERKINS COIE LLP

By: s/ Alisha C. Burgin

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[13] Upper Deck also seeks, presumably only from Mr. Miller, "restitution of sums paid to Miller[,]" and "costs and expenses paid to Miller[.]" Compl. ¶¶ 83, 110. While restitution is available as a remedy under the UCL, it is axiomatic that such an award under the UCL "replace[s] . . . money or property that [a] defendant[] took directly from plaintiff." *Korea Supply Co.*, 29 Cal. 4th at 1149.