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

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THE UPPER DECK COMPANY; and THE  
UPPER DECK COMPANY, INC.

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Plaintiffs,

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vs.

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ENDURANCE AMERICAN SPECIALTY  
INSURANCE COMPANY; and DOES 1  
through 10,

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Defendants,

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**AND RELATED CLAIMS.**

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On August 19, 2011, Defendant Endurance American Specialty Insurance Company (“Endurance”) filed a motion for terminating sanctions and monetary sanctions, pursuant to Fed.R.Civ.P. 37, for discovery abuses against Plaintiffs The Upper Deck Company and The Upper Deck Company, Inc. (collectively, “Upper Deck”) and Counter-defendant Richard McWilliam. (Doc. No. 82.) Upper Deck filed a response in opposition on September 2, 2011.<sup>1</sup> (Doc. No. 102.) Counter-defendant McWilliam did not file an opposition or join in Upper Deck’s opposition. On September 23, 2011, Endurance filed a reply. (Doc. No. 119.)

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<sup>1</sup>Despite numerous requests from the Court, Upper Deck failed to provide Judge Skomal with a courtesy copy of its opposition, which includes 22 exhibits and totals 70 pages, as required by Judge Skomal’s Chambers’ Rules and Electronic Case Filing Administrative Policies and Procedures Section 2(e).

1 On September 27, 2011, the Court, pursuant to its discretion under Civ.L.R. 7.1(d)(1),  
2 submitted Endurance's motion on the parties' papers and vacated the hearing. (Doc. No. 125.)  
3 The Court, for the reasons set forth below, denies in part and grants in part Defendant  
4 Endurance's motion for terminating sanctions.

### 5 **Relevant Background**

6 Upper Deck brought this action against Endurance for breach of contract, breach of the  
7 implied covenant of good faith and fair dealing, and declaratory relief relating to Endurance  
8 insurance policies issued to Upper Deck. (Doc. No. 1.) Upper Deck claims that Endurance  
9 failed to fully defend and indemnify Upper Deck against losses incurred in an underlying  
10 lawsuit entitled *Konami Digital Entertainment, et al v. Vintage Sport Cards, Inc., et al.* (*Id.*)  
11 Endurance filed a counterclaim against Upper Deck, Upper Deck Authenticated, Ltd., Upper  
12 Deck International, LLC, Fler, LLC, Stellina, LLC, Ascent Group, LLC, Hunt Auctions, LLC  
13 and Richard McWilliam. (Doc. No. 3.) Endurance claims that before the issuance of the two  
14 insurance policies, Upper Deck had already begun engaging in a willful scheme to infringe the  
15 copyright protections of Konami by counterfeiting the most rare and valuable Yu-Gi-Oh!  
16 trading cards and failed to disclose this scheme to Endurance. Endurance's counterclaims seek  
17 rescission of the insurance policies and a return of the defense payments it made before it  
18 discovered Upper Deck's alleged fraud. (*Id.*)

19 Currently before the Court is Endurance's motion for terminating sanctions. In its  
20 motion, Endurance requests the Court to issue an order striking Upper Deck's answer to  
21 Endurance's counterclaim, holding Upper Deck in default and dismissing its complaint against  
22 Endurance with prejudice, barring Upper Deck from denying that it engaged in a willful  
23 counterfeiting scheme prior to the inception of Endurance insurance policies, barring Upper  
24 Deck from denying that it knew at all relevant times that its conduct was unlawful and  
25 fraudulent but failed to disclose this scheme to Endurance, barring Upper Deck from denying  
26 that it failed to disclose this scheme to Endurance, barring Upper Deck from denying this  
27 information was material to Endurance, and barring Upper Deck from denying that Endurance  
28 would not have issued the policies had it known about Upper Deck's willful conduct. (Doc.

1 No. 82-1 at 4-5.) Endurance also requests monetary sanctions in the amount of \$22,445.00.  
2 (*Id.* at 5.) Endurance bases its requests for sanctions on what it considers “rampant discovery  
3 abuse since the inception of this case.” (*Id.* at 4.)

4 As the following discovery history will show, the Court has heavily managed discovery  
5 between the parties in this action, as the parties have presented the Court with a litany of  
6 discovery disputes and have fought with each other every step of the way. A significant factor  
7 in discussing the history of discovery in this case is Plaintiffs’ counsel’s absence from the  
8 practice of law from March 28, 2011 to May 23, 2011 due to a family medical emergency.  
9 (Doc. No. 102-1, Anderson Decl. ¶3; *see* Doc. No. 33 at 2.) In its motion, Endurance focuses  
10 on several discovery-related events as evidence of discovery abuse supporting its request for  
11 various sanctions. Many of these events concern disputes that have been separately brought  
12 before the Court and ruled upon. The Court discusses the background of these events and the  
13 parties’ positions below.

14 **Rule 26(a)(1) Initial Disclosures**

15 On June 16, 2010, the Court issued an order that the date of initial disclosure pursuant  
16 to Rule 26(a)(1)(A-D) shall occur before July 27, 2010. (Doc. No. 7 ¶3.) On July 21, 2010,  
17 the parties jointly moved to continue a scheduled Case Management Conference (“CMC”) and  
18 requested that the parties exchange initial disclosures 14 days after the Case Management  
19 Conference. (Doc. No. 13.) Following a CMC on September 13, 2010, the Court entered a  
20 Case Management Conference Order Regulating Discovery and Other Pretrial Proceedings that  
21 directed the parties to exchange initial disclosures no later than 30 days after the Case  
22 Management Conference, October 13, 2010. (Doc. No. 16 ¶1.)

23 Endurance served its initial disclosures on October 13, 2010. (Doc. No. 82-2, Le  
24 Montree Decl. ¶5.) Upper Deck served its initial disclosures on October 22, 2010. (*Id.*)  
25 Endurance asserts that Upper Deck’s initial disclosures were late and therefore violated Rule  
26 26’s disclosure requirements. Upper Deck did not address its service of initial disclosures in  
27 its opposition. During discovery, Endurance never contacted the Court regarding this issue.

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1           **Rule 26(a)(2) Expert Report Disclosures**

2           Pursuant to Court order, each expert witness designated by a party was to prepare a  
3 written report and provide it to all other parties no later than June 6, 2011. (Doc. No. 21 ¶1.)  
4 Upper Deck served its expert report on June 15, 2011. (Doc. No. 82-2, Le Montree Decl. ¶7;  
5 Doc. No. 82-5, Ex. 3.) On June 22, 2010, the parties jointly contacted the Court regarding a  
6 dispute concerning Plaintiff’s expert report. (Doc. No. 37.) The Court held a hearing on the  
7 matter on June 24, 2011 and issued an order following the hearing. (Doc. Nos. 38 & 39.) In  
8 the order, the Court noted the parties agreed that “Defendant will inform the Court on July 12,  
9 2011 whether it wants to pursue a motion for sanctions against Plaintiffs for the expert report  
10 that was produced after the deadline of June 6, 2011.” (Doc. No. 39 ¶3.) After a status  
11 conference on July 12, 2011, Endurance indicated it would not pursue a motion for sanctions  
12 to strike the expert report and indicated it wanted Plaintiffs’ expert’s opinions and testimony  
13 strictly limited to the scope of his report. (See Doc. No. 42 ¶4.) Endurance did not further  
14 pursue a motion for sanctions as it was discussed that the relief Endurance sought was more  
15 appropriate for a motion in limine or objection at trial if Upper Deck’s expert strays from his  
16 opinions in the report. In its current motion, Endurance does not seek to strike the expert  
17 report for late disclosure. Upper Deck does not address its tardy expert report disclosure in its  
18 opposition.

19           **Requests for Admission**

20           Endurance served requests for admission (“RFA”s) on Upper Deck on March 25, 2011.  
21 (Doc. No. 82-2, Le Montree Decl. ¶8; Doc. No. 82-6 Ex. 4.) Pursuant to Fed.R.Civ.P.  
22 36(a)(3), a party must respond to an RFA within 30 days after being served, unless a shorter  
23 or longer time is stipulated to under Rule 29 or ordered by the court. Upper Deck served its  
24 objections and responses to the RFAs on May 27, 2011, more than 30 days after being served.  
25 (Doc. No. 82-2, Le Montree Decl. ¶9.) Thereafter, the parties contacted the Court regarding  
26 a discovery dispute over whether the RFAs would be deemed admitted due to the late  
27 responses by Upper Deck. (Doc. No. 37.)

28           The Court held a hearing on the matter on June 24, 2011 and issued an order following

1 the hearing. (Doc. Nos. 38 & 39.) During the hearing, the Court indicated that it would be  
2 inclined to excuse Upper Deck's late responses in light of counsel's personal family medical  
3 situation that caused him to be out of the office from March 28 to May 23, 2011. The order  
4 reflecting the hearing states that the parties agreed that, "Plaintiffs will produce amended  
5 responses to the Requests for Admission no later than July 1, 2011. If Defendant is not  
6 satisfied with the amended responses, the parties are to jointly contact Judge Skomal on July  
7 6, 2011." (Doc. No. 39 ¶1.) After receiving Upper Deck's amended responses, Endurance was  
8 not satisfied with the responses and contacted the Court regarding the ongoing dispute. In light  
9 of the dispute, the Court directed Endurance to lodge with the Court the disputed RFAs, the  
10 responses thereto, and an explanation of its issues with the amended responses. (Doc. No. 47  
11 ¶3; Doc. No. 59 ¶7.)

12 Following another discovery hearing on July 28, 2011, the Court directed the parties  
13 to meet and confer and submit a joint status report on the status of each disputed RFA  
14 reflecting the parties' and the Court's discussion during the hearing. (Doc. No. 61 ¶4.) After  
15 receiving only a submission by Endurance that did not reflect the agreed upon changes to the  
16 RFAs discussed at the hearing, the Court issued an order regarding the disputed RFAs and  
17 what had been agreed upon at the July 28 hearing. (Doc. No. 65.) In this order, the Court also  
18 noted that as all of the RFAs were admitted, denied, or being re-written, all of Upper Deck's  
19 objections were either moot or overruled. (*Id.* at 2.) On August 5, 2011, the Court held a  
20 further discovery hearing and again discussed issues with the RFAs. Following the hearing,  
21 the Court ordered Upper Deck to produce amended responses, not including RFA Nos. 17 and  
22 18, no later than August 8, 2011. (Doc. No. 69 ¶4.) The Court also stated that it was  
23 reviewing Nos. 17 and 18 due to a dispute over how Endurance re-wrote the requests. (*Id.*)  
24 On August 8, 2011, the Court issued an order finding that as re-written Nos. 17 and 18 were  
25 completely new RFAs, denying Endurance's request to replace Nos. 17 and 18 with the  
26 completely new RFAs, and permitting Endurance to re-write Nos. 17 and 18 as initially  
27 permitted by the Court. (Doc. No. 71 at 1-2.)

28 Endurance complains that the amended responses Upper Deck served on August 8,

1 2011 were unverified and still incorporated Court-stricken objections. (Doc. No. 82-2, Le  
2 Montree Decl. ¶12; Doc. No. 82-9 Ex. 7.) Upper Deck submits that it served verified amended  
3 responses on August 8, 2011. (Doc. No. 102 at 6; Doc. No. 102-1, Anderson Decl. ¶12.)  
4 Upper Deck argues it was Endurance who violated a court order by replacing RFA Nos. 17 and  
5 18 instead of re-writing them as instructed by the Court. (Doc. No. 102 at 6.)

### 6 **Requests for Production and Privilege Log**

7 Endurance served Upper Deck with requests for production on March 18, 2011. (Doc.  
8 No. 82-10 Ex. 8.) Endurance's request set April 19, 2011 as the date for Upper Deck to  
9 produce the requested materials. (*Id.* at 2.) Upper Deck produced responses on June 20, 2011.  
10 (Doc. No. 82-2, Le Montree Decl. ¶14.) On June 22, 2011, the parties jointly contacted the  
11 Court regarding discovery disputes concerning Upper Deck's production. (Doc. No. 37.) At  
12 the discovery hearing held on June 24, these disputes were discussed. (Doc. No. 39.)  
13 Following the hearing, the Court issued an order indicating that the parties agreed Upper Deck  
14 would produce the correspondence file no later than July 1, 2011, would produce a privilege  
15 log for the correspondence file as soon as possible, and would verify that the privilege logs  
16 produced with the rest of the production covers all that was produced. (*Id.* ¶2.) On July 19,  
17 the Court ordered Upper Deck to produce a privilege log no later than July 25, 2011. (Doc.  
18 No. 47 ¶1.) Upper Deck produced a privilege log by email on July 25, 2011. (Doc. No. 102-9  
19 Ex. 7.) Endurance complains that Upper Deck produced the correspondence file without any  
20 *Bates* labeling and has failed to confirm that the privilege log for the correspondence file  
21 reflects all documents withheld. (Doc. No. 82-1 at 7.)

22 On July 25, 2011, the Court held another discovery hearing regarding various disputes,  
23 including ongoing issues Endurance had with Upper Deck's production of documents. At the  
24 hearing, the Court ordered Upper Deck to produce communications with the insurance broker  
25 no later than July 27 and to produce relevant insurance policies, applications, and  
26 communications relating to the *Konami* matter. (Doc. No. 59 ¶¶5 & 7.) The Court also  
27 ordered Upper Deck to investigate the burden of producing the requested documents from the  
28 Nevada litigation file and the parties to brief the issue regarding Endurance's request for

1 settlement discussions between Upper Deck and Konami. (*Id.* ¶¶6 & 8.) On July 28, 2011,  
2 the Court held a follow-up discovery hearing and again addressed concerns and issues with  
3 document production. Upper Deck indicated that its insurance broker would not produce the  
4 broker file without a subpoena. The Court ordered Upper Deck to subpoena the complete file  
5 from the insurance broker, RJF, no later than July 28, 2011 and to produce it to Endurance  
6 without delay once Upper Deck reviewed it for privilege. (Doc. No. 61 ¶1.) The Court  
7 instructed Upper Deck to produce a privilege log identifying any materials withheld based  
8 upon privilege at the same time they produce the RJF file. (*Id.*) The Court also ordered Upper  
9 Deck to produce the relevant insurance policies, applications, and communications relating to  
10 the *Konami* matter no later than August 4, 2011. (*Id.* ¶3.) Because Endurance raised more  
11 issues with production of documents, the Court held another hearing on August 5, 2011 and  
12 ordered Plaintiffs to produce the RJF file and the relevant insurance policies, applications, and  
13 communications relating to the *Konami* matter no later than August 8, 2011. (Doc. No. 69 ¶3.)

14 Endurance claims that Upper Deck has failed to produce any documents on the relevant  
15 insurance policies and received less than the entire RJF file from Upper Deck. (Doc. No. 82-1  
16 at 8.) Endurance asserts that despite Upper Deck’s counsel’s representation that the insurance  
17 documents were placed in outgoing mail on August 8<sup>2</sup>, Upper Deck has failed to produce them.  
18 (*Id.*; Doc. No. 82-2, Le Montree Decl. ¶25.) Additionally, Endurance complains that Upper  
19 Deck did not serve a copy of the subpoena to RJF on Endurance’s counsel, did not supply a  
20 certification of RJF’s custodian of records, did not indicate whether any documents were  
21 withheld for privilege, and produced an additional 324 pages from the RJF file at an August  
22 10 deposition. (Doc. No. 82-1 at 8; Doc. No. 82-2, Le Montree Decl. ¶¶24 & 26.) Upper Deck  
23 asserts that it has produced the relevant and requested insurance file from RJF, including  
24 policies of insurance. (Doc. No. 102-1, Anderson Decl. ¶13.) The parties never jointly

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27 <sup>2</sup>Endurance asserts that if Upper Deck produced the insurance documents on August 8, the production  
28 was already ten days late. (Doc. No. 82-1 at 8.) The basis for this assertion is unclear, as the Court specifically  
ordered Upper Deck to produce the relevant insurance documents no later than August 8, 2011. (Doc. No. 69  
¶3.)

1 contacted the Court after meeting and conferring on a discovery dispute concerning an alleged  
2 incomplete RFJ file production nor on an alleged failure to produce insurance documents.<sup>3</sup>

3 After receiving briefing from the parties and holding two hearings on Endurance's  
4 request for settlement discussions, the Court resolved the parties' discovery dispute concerning  
5 this request. The Court found settlement discussions between Upper Deck and Konami from  
6 the underlying litigation not privileged and ordered Upper Deck to produce, to the extent they  
7 exist, any such documents no later than August 16. (Doc. No. 76 ¶1.) The Court found  
8 settlement discussions between Upper Deck and its counsel in the underlying litigation  
9 privileged, not subject to waiver of the privilege, and therefore not subject to discovery. (*Id.*  
10 ¶2; Doc. No. 93.)

11 After ordering production of some of the settlement documents, on August 16 Plaintiff's  
12 counsel sent a fax to Endurance's counsel indicating that Upper Deck is not in the custody,  
13 control or possession, nor is aware of the existence of, documents relating to settlement  
14 discussions between Upper Deck and Konami from the underlying litigation. (Doc. No. 82-21  
15 Ex. 19.) Endurance asserts that Upper Deck's privilege log reflects at least twelve documents  
16 relating to settlement in the underlying action. (Doc. No. 82-1 at 8; Doc. No. 82-20 Ex. 18.)  
17 The parties never jointly contacted the Court after meeting and conferring regarding a dispute  
18 concerning the documents identified on the privilege log and Upper Deck's August 16  
19 assertion that no documents exist relating to settlement discussions between Upper Deck and  
20 Konami.

21 Notwithstanding, on August 30, 2011 the Court held a telephonic discovery hearing  
22 during which Endurance complained that Upper Deck had not turned over all the settlement  
23 communications between Upper Deck and Konami. Michael Anderson, counsel for Upper  
24 Deck, again told Darren Le Montree, counsel for Endurance, that he had turned over all such

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27 <sup>3</sup>Judge Skomal's chambers' rules require parties to promptly meet and confer if a discovery dispute  
28 arises. If the parties are unable to resolve the dispute, they are to then jointly contact Judge Skomal's chambers  
and speak with the research attorney assigned to the case within thirty (30) days after the date upon which the  
event giving rise to the dispute occurred.



1 communications. A discussion ensued regarding settlement communications listed within the  
2 privilege log. The Court told Mr. Le Montree that it was holding Mr. Anderson at his word  
3 that all communications had been turned over, and further, that nothing in the privilege log fit  
4 within the Court's order directing Upper Deck to turn over Konami settlement  
5 communications.

6 **Deposition of Counter-defendant Richard McWilliam**

7 Richard McWilliam, according to Endurance's counterclaim, is a member and partner  
8 as well as the majority owner of Upper Deck. (Doc. No. 3 at 15, ¶16.) Endurance noticed the  
9 deposition of McWilliam. After some initial scheduling changes, Endurance reset  
10 McWilliam's deposition for July 12, 2011, a date that counsel for Upper Deck and McWilliam,  
11 Michael Anderson, confirmed to be the only date McWilliam and his personal counsel could  
12 attend. (Doc. No. 82-24 Ex. 22.) On July 8, 2011, Mr. Anderson advised counsel for  
13 Endurance that McWilliam did not place the July 12 date on his calendar and therefore would  
14 not be attending the deposition. (Doc. No. 82-25 Ex. 23.) McWilliam's deposition was then  
15 rescheduled for July 28, 2011 and confirmed by Mr. Anderson. (Doc. No. 82-26 Ex. 24 &  
16 Doc. No. 82-27 Ex. 25.) On the afternoon of July 27, 2011, McWilliam went to Scripps  
17 Encinitas Hospital and left the hospital at 9:00 p.m. (Doc. No. 102-14 Ex. 12.) Mr. Anderson  
18 notified counsel for Endurance of McWilliam's medical unavailability by fax and letter on July  
19 27, 2011. (Doc. No. 102-13 Ex. 11.) On August 1, 2011, McWilliam consulted his primary  
20 care physician, who based upon his present condition and McWilliam's known condition on  
21 July 27, opined by affidavit signed August 15, 2011 that McWilliam would have been  
22 medically unable to attend his all day deposition on July 28. (Doc. No. 102-15 Ex. 13.)

23 On July 29, 2011, Mr. Anderson emailed counsel for Endurance, stating that he had  
24 spoken with McWilliam's assistant and was advised that August 9 at 10:00 a.m. or August 11  
25 at 10:00 a.m. were available dates for McWilliam's deposition. (Doc. No. 82-30 Ex. 28 at 4.)  
26 Counsel for Endurance then apprised Mr. Anderson that the August 11 date worked. (*Id.* at  
27 3-4.) On August 4, 2011, Mr. Anderson emailed counsel for Endurance to advise him that  
28 McWilliam "is unavailable for deposition on August 11" and informed him that August 23 was

1 cleared as a secure date. (*Id.* at 3.) This email, and emails regarding the same, did not contain  
2 an explanation of why McWilliam was suddenly unavailable for a date cleared by his assistant  
3 six days earlier. (*Id.* at 1-3.)

4 At the request of counsel for Endurance, the Court held a discovery conference on  
5 August 5, 2011 regarding McWilliam's deposition, as well as other discovery dispute matters.  
6 (Doc. No. 68.) At the hearing, the Court asked counsel for Upper Deck and McWilliam, Mr.  
7 Anderson, why McWilliam was unable to attend the scheduled August 11 deposition. Mr.  
8 Anderson replied that McWilliam was still ill and unable to attend. When asked what illness  
9 prevented McWilliam from attending, Mr. Anderson could not specify and indicated he did  
10 not have direct communications with McWilliam. Because Mr. Anderson could offer no facts  
11 supporting McWilliam's unavailability other than vague assertions about an undefined illness,  
12 the Court ordered McWilliam to appear for his deposition on August 11, 2011 at 10:00 a.m.  
13 in Carlsbad, CA. (Doc. No. 69 at 1.) Following the Court's order, neither Upper Deck nor  
14 McWilliam presented any additional facts regarding McWilliam's unavailability or moved for  
15 a protective order regarding the deposition. On August 10, 2011, counsel for Endurance  
16 received a voicemail from Mr. Anderson stating that he had spoken with Upper Deck and was  
17 informed that McWilliam is still out of the country and won't be able to appear for the August  
18 11 deposition. (Doc. No. 82-2, Le Montree Decl. ¶39.) On August 11, 2011, defense counsel,  
19 John Clifford, took a Statement of Non-appearance of Richard McWilliam at the scheduled  
20 deposition. (*Id.* ¶40; Doc. No. 82-32 Ex. 30.) The statement of non-appearance states, "It is  
21 now 10:17 a.m. and Mr. McWilliam has not yet appeared for the deposition." (*Id.* at 5:6-7.)

22 Upper Deck asserts that McWilliam was out of the country from August 5, 2011 to  
23 August 20, 2011 for both work and health reasons. (Doc. No. 102 at 8.) Upper Deck has not  
24 provided any documentation regarding the alleged health reasons that required McWilliam to  
25 travel out of country for two weeks nor what the work purposes entailed. In response to an  
26 order to show cause why sanctions should not be issued against McWilliam for failing to  
27 appear at a court-ordered deposition, McWilliam submitted a declaration stating that on August  
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1 5, 2011 he was scheduled to fly to Italy for a trip that consisted of both business and rest.<sup>4</sup>  
2 (Doc. No. 135, McWilliam Decl. ¶15.) The declaration does not state that McWilliam traveled  
3 for health reasons. (*See id.*) The declaration also states that this trip had been planned for  
4 several months and that before leaving for his trip to Italy, McWilliam personally informed Mr.  
5 Anderson that he was available to be deposed on August 23, 2011 but that he would not be  
6 available between August 5, 2011 and August 20, 2011 due to his trip to Italy. (*Id.*, ¶¶15 &  
7 16.) A copy of a travel itinerary printed on August 4 and provided with McWilliam's unsigned  
8 declaration indicates that he traveled on August 5, 2011 from Carlsbad, CA and arrived in  
9 Rome, Italy after two stop-overs on August 6, 2011. (*Id.*, Ex. 3.) On August 20, 2011,  
10 McWilliam departed Rome and returned to California. (*Id.*)

11 **Upper Deck's 30(b)(6) Designee**

12 Endurance also raises concerns regarding Upper Deck's Rule 30(b)(6) designee, George  
13 Rikos and his preparation for the 30(b)(6) deposition of Upper Deck. Endurance separately  
14 raised this issue with the Court and the Court ordered the parties to properly meet and confer  
15 on the issue. (Doc. No. 91.) Due to a voluntary settlement conference, the Court vacated, at  
16 the request of the parties, the briefing schedule on a dispute concerning claims of attorney-  
17 client privilege and work product protection at George Rikos's 30(b)(6) deposition and  
18 indicated the Court would set a deadline to meet and confer if the case failed to settle.  
19 Accordingly, the Court will not consider Endurance's allegations regarding George Rikos in  
20 connection with the current motion.

21 The parties are to properly meet and confer on the issue of the preparedness of Rikos  
22 and prepare a list of the topic areas in issue no later than **October 14, 2011**. If the parties are  
23 unable to resolve the issues, the parties are to jointly call the Court to obtain a date by which  
24 to file a joint motion listing the topic areas in issue and their supporting arguments for their

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26 <sup>4</sup>On September 23, 2011, Michael Bernstein, general counsel for Upper Deck, submitted an unsigned  
27 and undated declaration on behalf of McWilliam stating that McWilliam's current health condition prevented  
28 him from executing and signing a declaration. (Doc. No. 122, Bernstein Decl. ¶5.) After the Court ordered  
McWilliam to file a signed declaration, on September 29, 2011 McWilliam filed the identical declaration  
Bernstein earlier submitted on his behalf. (Doc. No. 135.)

1 respective positions.

2 With respect to Upper Deck's assertions of attorney-client privilege and work product  
3 protection during the 30(b)(6) deposition, the parties are to meet and confer and agree on the  
4 specific topic areas at issue. Thereafter, the parties are to file a joint motion, not to exceed 5  
5 pages in length, addressing their grounds for and against privilege and/or protection no later  
6 than **October 21, 2011**.

### 7 **Problems Between Counsel**

8 Counsel for Endurance and counsel for Upper Deck and McWilliam both make  
9 allegations regarding the other's unprofessional conduct. These allegations include lobbying  
10 obscenities at each other, refusing to meet and confer on scheduling and discovery issues, and  
11 improperly filing joint papers with the Court. The undersigned has experienced all too much  
12 of the unprofessional conduct that has taken place between counsel in this case and will not  
13 engender to lay blame more heavily on one party. Part of the reason the Court has been so  
14 heavily involved in discovery in this case is due to counsel's inability to communicate with  
15 each other as reasonable professionals. That being said, the Court will not engage in the mud-  
16 flinging in deciding the motion currently before it. However, all counsel are reminded of their  
17 duties under Civ.L.R. 83.4.

### 18 **Discussion**

19 Rule 37 of the Federal Rules of Civil Procedure empowers this Court to issue sanctions  
20 against a party for failing to make disclosures and for not obeying a discovery order. These  
21 sanctions include but are not limited to: (1) establishing designated facts for the purposes of  
22 the action; (2) refusing to allow the disobedient party to support or oppose designated claims  
23 or from introducing designated matters in evidence; (3) striking pleadings or parts of pleadings  
24 until the order is obeyed; (4) staying further proceedings until the order is obeyed; (5)  
25 dismissing the action or proceeding in whole or in part or rendering a judgment of default  
26 against the disobedient party; and (6) treating as contempt of court the failure to obey any order  
27 except an order to submit to a physical or mental examination. *See* Fed.R.Civ.P.  
28 37(b)(2)(A),(i-vii); Fed.R.Civ.P. 37(c)(1). Endurance's motion really boils down to one major

1 event—McWilliam’s failure to attend a court-ordered deposition. As explained below, the  
2 Court does not find the other discovery “abuses” Endurance lists worthy of sanctions.

3 **1. Initial Disclosures and Expert Report Disclosures**

4 Under Rule 37, if a party fails to make required disclosures required by Rule 26(a), the  
5 party is not allowed to use that information or witness to supply evidence on a motion, at a  
6 hearing, or at a trial, unless the failure was substantially justified or harmless. Fed.R.Civ.P.  
7 37(c)(1). In addition, the court may impose other appropriate sanctions, including those listed  
8 in Rule 37(b)(2)(A)(i)-(vi) that are delineated above. Fed.R.Civ.P. 37(c)(1)(C). Here,  
9 Endurance complains that Upper Deck’s initial disclosures were about one week late.  
10 Although Upper Deck does not address this issue in its opposition, the Court finds that this  
11 tardiness does not warrant sanctions. Endurance has not explained how the week-long delay  
12 in receiving initial disclosures harmed Endurance. It appears from the factual background  
13 Endurance provides that this delay was harmless, as Endurance received Upper Deck’s initial  
14 disclosures in October 2010 and did not serve the discovery requests that are subject to many  
15 of the disputes between the parties until March 2011, slightly more than a month prior to the  
16 close of fact discovery on April 29, 2011.<sup>5</sup> Furthermore, Endurance never brought this issue  
17 to the Court’s attention pursuant to Judge Skomal’s discovery dispute rules.

18 The Court similarly finds that Upper Deck’s late-disclosed expert report does not  
19 support issuing sanctions. The parties previously raised this dispute with the Court. The Court  
20 provided Endurance with the opportunity to bring a motion for sanctions under Rule 37 for the  
21 late-produced report. Endurance indicated it would not, partly based on the Court’s indication  
22 that it felt the failure to timely disclose was substantially justified under the circumstances.

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25 <sup>5</sup>The Court originally set the fact discovery cutoff in this case for April 29, 2011. (Doc. No. 16 ¶3.)  
26 On joint motion of the parties, on April 19, 2011 the Court extended this deadline to June 17, 2011 based upon  
27 Upper Deck’s counsel’s personal family health matter that precluded the parties from completing depositions.  
28 (Doc. No. 31 at 1.) The Court again extended fact discovery to July 5, 2011 based upon the same family health  
matter that caused Mr. Anderson to be out of the office. (Doc. No. 36 ¶1.) In light of outstanding fact witness  
depositions, the Court again extended fact discovery to July 12, 2011. (Doc. No. 39 at 2, ¶1.) Finally, the  
Court extended the deadline to complete fact witness depositions to August 12, 2011, with all other fact  
discovery to be completed by July 12, 2011. (Doc. No. 44 ¶1.)

1 Endurance has not indicated how it was harmed by receiving Upper Deck’s expert report nine  
2 days past the deadline.

### 3 **2. Requests for Admission**

4 Under Rule 37(b)(2)(A), if a party fails to obey an order to provide or permit discovery,  
5 the court may issue any of the sanctions delineated above. Fed.R.Civ.P. 37(b)(2)(A)(i)-(vii).  
6 The basis for Endurance’s sanctions motion regarding the RFAs is that Upper Deck continued  
7 to state objections in its amended responses after the Court overruled or found moot the  
8 objections. However, Upper Deck asserts Endurance also violated a court order by replacing  
9 RFA Nos. 17 and 18 instead of re-writing them in compliance with the court order. (*See* Doc.  
10 No. 65 ¶5.) The Court does not find the conduct of either party worthy of the sanctions  
11 Endurance seeks. The Court held many hearings and conferences regarding the RFAs and  
12 dealt with the parties’ issues.

### 13 **3. Requests for Production and Privilege Log**

14 As discussed in relation to the RFAs, Rule 37(b)(2)(A) permits a court to issue sanctions  
15 if a party fails to obey an order to provide or permit discovery. Fed.R.Civ.P. 37(b)(2)(A)(i)-  
16 (vii). Endurance asserts that Upper Deck failed to obey this Court’s orders directing Upper  
17 Deck to produce a privilege log for the correspondence file, the RJF file, the relevant insurance  
18 policies, applications and communications relating to the *Konami* matter, and settlement  
19 documents between Upper Deck and Konami. According to Upper Deck, it has produced the  
20 relevant RJF documents, the insurance policies, and does not have any settlement documents  
21 in its possession, custody or control.

22 The Court does not find the issues relating to document production worthy of  
23 sanctions, especially terminating sanctions. Upper Deck claims it has produced all that was  
24 ordered to be produced and Endurance claims documents are still being withheld. From the  
25 parties’ assertions, it is not clear that Upper Deck failed to obey a court order. At most, the  
26 issues reflect ongoing discovery disputes between the parties that have not been properly  
27 brought to the Court’s attention under Judge Skomal’s chambers’ rules. It appears from the  
28 parties’ briefing that a proper, and civil, **telephonic or in-person** meet and confer may resolve

1 many of these issues. The parties are to meet and confer regarding the issues outlined with  
2 respect to document productions and privilege logs and attempt to resolve the issues. After  
3 meeting and conferring, the parties may jointly contact the Court with any remaining disputes  
4 concerning correspondence file or RJF file privilege logs, RJF documents, or insurance  
5 documents no later than **October 21, 2011**.

#### 6 **4. Deposition of Richard McWilliam**

7 Endurance's request for sanctions premised on Richard McWilliam's and Upper Deck's  
8 failure to obey a court order regarding McWilliam's deposition also falls under Rule 37(b).  
9 Following a discovery conference on the matter, the Court ordered Richard McWilliam to  
10 appear for his deposition on August 11, 2011 at 10:00 a.m. in Carlsbad, CA. It is undisputed  
11 that McWilliam did not appear for his deposition and did not seek a protective order after the  
12 Court issued its order. Therefore, the Court finds that McWilliam and Upper Deck, as  
13 McWilliam is Upper Deck's officer, failed to obey an order permitting discovery under Rule  
14 37(b). Endurance seeks dispositive sanctions based upon this failure.

15 Dispositive sanctions such as dismissal of the complaint are "authorized only in extreme  
16 circumstances and only where the violation is due to willfulness, bad faith, or fault of the  
17 party." *In re The Exxon Valdez*, 102 F.3d 429, 432 (9th Cir.1996) (quoting *United States v.*  
18 *Kahaluu Const.*, 857 F.2d 600, 603 (9th Cir.1988)). "Disobedient conduct not shown to be  
19 outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault."  
20 *Jorgensen v. Cassidy*, 320 F.3d 906, 912 (9th Cir. 2003) (quoting *Hyde & Drath v. Baker*, 24  
21 F.3d 1162, 1166 (9th Cir.1994)). Dismissal of an action in its entirety represents the most  
22 severe penalty that can be imposed. *Kahaluu Const.*, 857 F.2d 600, 602 at n. 5.

23 Based upon the record before the Court, the Court finds that McWilliam knowingly,  
24 voluntarily, and intentionally failed to appear at his court-ordered deposition. According to  
25 McWilliam's declaration, he knew for months that he would be out of the country between  
26 August 5 and August 20, 2011. However, on July 29, 2011, just days before McWilliam was  
27 scheduled to leave on his two week trip for "business and rest" that had been planned for  
28 months, Mr. Anderson emailed counsel for Endurance, stating that he had spoken with

1 McWilliam's assistant and was advised that August 9 at 10:00 a.m. or August 11 at 10:00 a.m.  
2 were available dates for McWilliam's deposition. (Doc. No. 82-30 Ex. 28 at 4.) The Court  
3 has trouble believing that McWilliam's secretary was unaware that McWilliam had a planned  
4 two week "business" trip to Italy when advising Mr. Anderson of McWilliam's availability.  
5 On August 5, 2011, during the discovery conference regarding the deposition, Mr. Anderson  
6 indicated that McWilliam could not appear for the deposition on August 11 because he was ill.  
7 The Court indicated during the conference that unless McWilliam could document some  
8 ailment preventing him from attending the deposition, the Court would order him to appear on  
9 August 11. Mr. Anderson indicated that he did not have details of the illness, as he did not  
10 have direct contact with McWilliam. Mr. Anderson never indicated to the Court that  
11 McWilliam would be out of the country in Italy on August 11. Given that McWilliam had  
12 himself provided August 11 as an available date and could not document his illness, the Court  
13 ordered the deposition to proceed on August 11. Following the Court's order, neither Upper  
14 Deck nor McWilliam moved for a protective order or sought relief from the Court. There has  
15 also been no showing that McWilliam was too ill to attend his deposition on August 11.  
16 Rather, Upper Deck and McWilliam concede that he voluntarily traveled to Italy from August  
17 5 to August 20, 2011, disregarding the Court's order. McWilliam's failure to appear at his  
18 August 11 deposition was not outside of his control, and therefore demonstrates willfulness,  
19 bad faith, or fault. *Jorgensen*, 320 F.3d at 912.

20 In determining whether to issue a default or dismissal of a party's action pursuant to  
21 Rule 37(b), the Court must consider the following five factors: "(1) the public's interest in  
22 expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of  
23 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on  
24 their merits; and (5) the availability of less drastic sanctions." *Computer Task Group, Inc. v.*  
25 *Brotby*, 364 F.3d 1112, 1115 (9th Cir.2004) (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d  
26 128, 130 (9th Cir.1987)). This test is a disjunctive balancing test, so not all five factors must  
27 support dismissal. See *Bolden v. Los Angeles County Sheriff*, 2008 WL 1969230, \*5 (C.D.Cal.  
28 April 30, 2008) (citing *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir.1998))



1 (explaining that dismissal is appropriate when four factors support dismissal or where three  
2 factors “strongly” support dismissal).

3         The Court finds that a majority of the factors do not support dismissal of this case. The  
4 public’s interest in expeditious resolution of this litigation generally weighs in favor of case-  
5 dispositive sanctions, as does the court’s need to manage its docket. *Yourish v. Cal. Amplifier*,  
6 191 F.3d 983, 990 (9th Cir.1999). The Court has spent considerable time trying to manage this  
7 litigation and move it forward due to the litany of discovery disputes between the parties.  
8 However, the Court notes that much of the discovery fights in this case were in part  
9 precipitated by the unfortunate family medical issue Upper Deck’s counsel faced and the  
10 Court’s and the parties’ attempts to make up for lost time with an aggressive extension of fact  
11 discovery. As noted above, counsel for Endurance and counsel for Upper Deck have been less  
12 than civil to each other and their inability to properly meet and confer and informally resolve  
13 disputes has also contributed to the delay in this case. The delay caused by the unprofessional  
14 conduct of counsel has not been solely at Upper Deck’s hands.

15         The risk of prejudice to Endurance at this stage does not heavily weigh in favor of case-  
16 dispositive sanctions. The prejudice factor looks to whether one party’s “actions impaired ...  
17 [the other party’s] ability to go to trial or threatened to interfere with the rightful decision of  
18 the case.” *Kahalu Const.*, 857 F.2d at 604 (citing *Malone*, 833 F.2d at 131). Delay alone,  
19 however, is not sufficient to justify dismissal. *See Mir v. Fosburg*, 706 F.2d 916, 919 & n. 2  
20 (9th Cir.1983). Upper Deck offered August 23 as an alternative date for McWilliam’s  
21 deposition, which was rejected by Endurance. The Court will allow Endurance to take  
22 McWilliam’s deposition and therefore Endurance’s preparation for such will not be wasted.  
23 Furthermore, Endurance’s ability to prepare a motion for summary judgment is not impaired  
24 by McWilliam’s failure to appear for his deposition. Endurance filed a motion for summary  
25 judgment on March 18, 2011, more than a month before the initial period of fact discovery was  
26 set to close and prior to any noticing of McWilliam’s deposition. (*See* Doc. Nos. 16, 22, & 82-  
27 22 Ex. 20.) Endurance has since been permitted to file amended motions for summary  
28 judgment to address its rescission argument. (*See* Doc. No. 111.) Endurance argues that it has

1 been prejudiced by delay in receiving discovery in this case near the cutoff so that it cannot  
2 follow up on the discovery it receives. However, Endurance waited until just over a month  
3 prior to the fact discovery cutoff to serve its requests for admission and requests for  
4 production, which both require thirty day response times, so that there would have been no  
5 time left in fact discovery to serve additional, follow-up discovery after receiving Upper  
6 Deck's responses. The Court notes that Endurance has received over one million pages of  
7 discovery from Upper Deck, taken all other requested depositions, and has not moved to  
8 extend fact discovery to pursue additional discovery based upon newly acquired information.  
9

10 The public policy favoring resolution on the merits also weighs against case-dispositive  
11 sanctions. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002). Endurance's motion for  
12 summary judgment is currently pending before the Court and will be fully briefed by  
13 November 7, 2011 and heard by the Court on November 21, 2011. (Doc. No. 139.)

14 Finally, less drastic alternatives are available and likely to accomplish the necessary  
15 result. The Court finds that issue preclusion or evidentiary sanctions, while a less drastic  
16 alternative, are inappropriate at this stage for McWilliam's failure to appear for his deposition.  
17 While Endurance complains that Upper Deck violated several court orders and engaged in a  
18 pattern of discovery abuse, the Court disagrees with this characterization and finds the only  
19 violation worthy of sanctions is McWilliam's failure to appear. Rule 37(b)(2)(C) provides that  
20 instead of the sanctions listed in Rule 37(b)(2)(A), the court must order the disobedient party,  
21 the attorney advising the party, or both to pay the reasonable expenses, including attorney's  
22 fees, caused by the failure to obey a court order, unless substantially justified or other  
23 circumstances make an award of expenses unjust. As this is McWilliam's first failure to obey  
24 a court order, the Court finds it appropriate to again order McWilliam to sit for his deposition  
25 and pay monetary sanctions for the reasonable expenses, including attorney's fees, caused by  
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1 his failure to appear on August 11, 2011.<sup>6</sup> The Court does not find, given the circumstances  
2 of his failure to appear, that McWilliam's failure to attend his deposition on August 11 was  
3 substantially justified and does not find other circumstances making an award of expenses  
4 unjust. The Court bases its award on a reasonable rate and number of hours worked. *Gracie*  
5 *v. Gracie*, 217 F.3d 1060, 1070 (9th Cir.2000).

6 Endurance requests \$49,856.75 in monetary sanctions, which represents the attorneys'  
7 fees incurred in connection with the motion before the Court and the various discovery  
8 disputes Endurance asserts were caused by Plaintiffs. (Doc. No. 82-2, Le Montree Decl. ¶53.)  
9 Endurance seeks compensation for 137 hours of attorney and paralegal work for handling  
10 discovery disputes, 40 hours of attorney and paralegal work preparing the motion for  
11 sanctions<sup>7</sup>, and 47 hours of attorney and paralegal work in preparing for McWilliam's  
12 deposition. (*Id.* ¶¶54-56; Doc. No. 120, Le Montree Decl. ¶¶14-15.) Because the Court grants  
13 in part and denies in part Endurance's motion for sanctions, the Court finds it appropriate to  
14 apportion expenses accordingly. The Court denies Endurance's motion to the extent it is based  
15 on alleged discovery abuses other than McWilliam's failure to obey a court order for his  
16 deposition. Therefore, the Court does not award Endurance attorneys' fees for handling  
17 discovery disputes. As the Court is ordering McWilliam to sit for his deposition, the Court  
18 does not award Endurance attorneys' fees for preparing for McWilliam's deposition, as that  
19 preparation will not be wasted. Additionally, because the Court only grants in part

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21 <sup>6</sup>Although Endurance's requested sanctions would fully dispose of a claim or defense, courts  
22 have held that the sanction actually imposed by the court determines whether an order is dispositive  
23 or nondispositive for purposes of deciding the standard of review a district court judge utilizes in  
24 reviewing the order. *See, e.g., Phinney v. Wentworth Douglas Hosp.*, 199 F.3d 1, 4-5 (1st Cir. 1999);  
25 *see also Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747-48 (9th Cir. 1990). Accordingly, because  
the Court denies Endurance's motion for sanctions to the extent it seeks terminating sanctions, the  
Court need not issue a report and recommendation on Endurance's request for default judgment on  
its counterclaims and dismissal of Upper Deck's complaint.

26 <sup>7</sup>Endurance sought 35 hours for the motion for sanctions in its moving papers and noted in its  
27 declaration in response to the Court's request for an accounting of time for the related Order to Show Cause  
28 that it estimated an additional 5 hours of work preparing its reply papers. Endurance also estimated 7 hours  
of work for attending the motion hearing. (Doc. No. 120, Le Montree Decl. ¶15.) The Court vacated the  
hearing and therefore will not include the estimate for traveling to and attending the hearing.

1 Endurance's motion for sanctions, the Court does not award Endurance the entire 40 hours  
2 sought for preparing the motion for sanctions.

3 In evaluating the reasonable expenses, the Court awards \$3,407 in attorneys' fees and  
4 costs. This represents one-third of the hours, or 13.3 hours, spent in preparing the motion for  
5 sanctions and supporting papers at an average rate of \$192.50 per hour<sup>8</sup>, 2.4 hours at \$260 per  
6 hour spent attending the August 11, 2011 deposition, and the reporter fees of \$222.75 for the  
7 August 11, 2011 deposition. This amount takes into account a reduction in the total number  
8 of hours claimed by Endurance due to the fact that it did not prevail on every issue in its  
9 motion. The Court finds that the \$260 hourly rate for Mr. Le Montree and Mr. Clifford, both  
10 partners at their law firm, the \$185 hourly rate for Ms. Kelly, an associate at the law firm, and  
11 the \$95 hourly rate for Ms. Flores, a paralegal, are well within the range of reasonable hourly  
12 rates for attorneys and paralegals of comparable skill, experience, and reputation litigating  
13 similar cases in the San Diego area. Therefore, the Court awards sanctions in the total amount  
14 of \$3,407.

### 15 Conclusion

16 For the reasons set forth above, the Court denies in part and grants in part Defendant  
17 Endurance's motion for terminating sanctions. The Court denies Endurance's request for  
18 evidentiary and dispositive sanctions. The Court grants in part Endurance's request for  
19 monetary sanctions. The Court awards Endurance fees and costs in the amount of \$3,407.00.  
20 The sanctions shall be paid by Upper Deck and McWilliam to Endurance by **October 14,**  
21 **2011.** Upper Deck and McWilliam must file with the Court a Notice of Payment of Sanctions  
22 by **October 21, 2011.** Counter-defendant McWilliam shall appear for his deposition. Counsel  
23 are to meet and confer on a date and location and file a joint status report indicating the date,  
24 time and location that have been agreed upon no later than **October 14, 2011.** The Court

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26 \_\_\_\_\_  
27 <sup>8</sup>For its preparation of the current motion, Endurance claims 10 hours of Mr. Le Montree's time at \$260  
28 per hour, 25 hours of Ms. Kelly's time at \$185 per hour, and 5 hours of Ms. Flores's time at \$95 per hour. This  
is a total of \$7,700, which for 40 hours averages to a \$192.50 hourly rate.

1 warns McWilliam and Upper Deck that any future failure to comply with Court orders will  
2 result in sanctions that may result in the dismissal of Upper Deck's complaint and default  
3 against Upper Deck on Endurance's counterclaim. *See* Fed.R.Civ.P. 37.

4 **IT IS SO ORDERED.**

5 DATED: October 5, 2011

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7 **BERNARD G. SKOMAL**  
United States Magistrate Judge

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