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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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|-------------------------------------|-----------------------|
| ANIPLEX, INCORPORATED, a Japanese) | 2:08-cv-00442-HDM-PAL |
| corporation,) | |
|) | |
| Plaintiff and Counter-) | |
| Defendant,) | ORDER |
|) | |
| vs.) | |
|) | |
| THE UPPER DECK COMPANY, a Nevada) | |
| corporation,) | |
|) | |
| Defendant and) | |
| Counterclaimant.) | |
|) | |

Before the court is plaintiff Aniplex's motion in limine 1 which seeks to exclude testimony regarding Aniplex's alleged lack of rights to the original Kiba property. (#227) Defendant Upper Deck has opposed the motion.¹ (#245) Plaintiff has replied. (#254)

¹ Upper Deck's opposition also discusses the issue of Upper Deck's approval rights of Kiba anime production under the Madhouse's agreement with Aniplex, but this is not the subject of Aniplex's motion in limine 1, which focuses solely on Aniplex's right to the

1 Plaintiff argues that it had a verbal agreement with Dream
2 Ranch, an original co-owner of the Kiba property, to the Kiba
3 copyrights before entering into the Kiba Short Form Agreement with
4 Upper Deck, and that a verbal agreement to transfer copyrights is
5 enforceable under Japanese law. Accordingly, plaintiff seeks to
6 preclude any evidence relating to Aniplex's right to transfer the
7 original Kiba copyrights to Upper Deck.

8 Defendant argues that the transfer of the Kiba copyrights was
9 not valid because the agreement was not in writing and was not
10 approved by all co-owners of the Kiba property. Thus, testimony
11 regarding the Kiba copyrights is material, because if Aniplex had
12 failed to secure the rights to the original Kiba property before
13 granting a license to Upper Deck, then it lacked the ability to
14 perform its obligations to Upper Deck under the parties' contract
15 and materially breached that contract. Defendant's strongest
16 evidence in support of this argument is a July 25, 2006 demand
17 letter from SME, another original co-owner of the rights, to
18 Aniplex threatening legal action for Aniplex's and Upper Deck's
19 alleged unauthorized use of the original Kiba copyrights in their
20 production of the Kiba anime series and trading card game.

21 On February 24, 2011, the court denied plaintiff's partial
22 motion for summary judgment (#129) on the same issue of the Kiba
23 property rights now raised in plaintiff's motion in limine 1.
24 (#227) By precluding evidence on that issue now, the court would be
25 reversing its earlier decision. In order to do so the court must
26 consider five factors: (1) the first decision was clearly

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28 Kiba copyrights from the original owners.

1 erroneous, (2) there has been an intervening change of law, (3) the
2 evidence is substantially different, (4) other changed
3 circumstances exist, or (5) a manifest injustice would otherwise
4 result. *McClain v. National Fire & Marine Insurance Co.*, 2009 WL
5 484412 *1 (D. Nev. Feb. 24, 2009) (citing *United States v. Cuddy*,
6 147 F.3d 1111, 1114 (9th Cir. 1998)).

7 The court finds none of these factors present. First,
8 declines to find that its first decision on summary judgment was
9 clearly erroneous. Second, there has been no change in law.
10 Third, the evidence before the court now is identical to that which
11 was before the court on plaintiff's partial motion for summary
12 judgment. Fourth, no other changed circumstances exist. Fifth, no
13 manifest injustice would occur if the court were to permit the
14 parties to present competing evidence on the issue of the Kiba
15 rights. Moreover, motions in limine are not intended to resolve
16 factual disputes. See *Woods v. Slater Transfer and Storage, Inc.*,
17 2010 WL 3433052 *1 (D. Nev. Aug. 27, 2010); *Sprint/United Mgmt. Co.*
18 *v. Mendelsohn*, 552 U.S. 379, 384 (2008). Therefore, the court
19 concludes that in this respect plaintiff's motion in limine 1 is
20 denied.


21 However, one discreet issue was raised by plaintiff in its
22 motion in limine 1 that the court believes warrants the granting of
23 the motion, and that is the July 25, 2006 demand letter from SME to
24 Aniplex. Demand letters constitute inadmissible hearsay. *Woods v.*
25 *Slater Transfer and Storage, Inc.*, 2010 WL 3433052 *4 (D. Nev.
26 August 27, 2010); FRE 801, 802, 408. Defendant does not dispute
27 the letter is hearsay or offer an exception to the rule in its
28 opposition. The court concludes that the SME demand letter is

1 inadmissable hearsay.

2 Accordingly, plaintiff's motion in limine 1 (#227) is GRANTED
3 as to the SME demand letter and DENIED in all other respects.

4 **IT IS SO ORDERED.**

5 DATED: This 2nd day of September, 2011.

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8 UNITED STATES DISTRICT JUDGE
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