

1  
2  
3  
4  
5  
6 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 THE UPPER DECK COMPANY,

9 Plaintiff,

10 v.

11 RYAN MILLER et al.,

Defendants.

CASE NO. C23-1936-KKE

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS THE SECOND  
AMENDED COMPLAINT

12 This is a copyright infringement case between competitors in the trading card game  
13 industry. The Upper Deck Company (“Upper Deck”) alleges its former contractor, Defendant  
14 Ryan Miller, went to work for its competitor, Defendant Ravensburger North America, Inc.  
15 (“Ravensburger”), under false pretenses and used confidential, copyrighted material obtained  
16 during his employment with Upper Deck to create a new infringing game with Ravensburger. The  
17 Court granted in part Defendants’ previous motion to dismiss and allowed Upper Deck limited  
18 leave to amend. Upper Deck amended its complaint and Defendants now move to dismiss each of  
19 the amended claims: fraudulent misrepresentation, inducing breach of contract and interfering with  
20 economic relations, and violation of California’s unfair competition law. The Court grants in part  
21 Defendants’ motion (Dkt. No. 63), and finds that both of the tortious interference claims fail for  
22 lack of any alleged wrongful act and that the unfair competition claim fails to allege a recognized  
23 unfair act.

24  
ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO DISMISS THE  
SECOND AMENDED COMPLAINT - 1

## I. BACKGROUND

1  
2 In 2018, Miller entered into an agreement (“2018 Agreement”) with Upper Deck wherein  
3 Miller would attend a gaming summit to brainstorm and provide feedback on new games and game  
4 mechanics. Dkt. No. 62 ¶ 12. Rush of Ikorr was created at this gaming summit. *Id.* ¶ 14. In 2019,  
5 Miller entered into another agreement with Upper Deck (“2019 Agreement”) wherein Miller  
6 would be the lead game designer for Rush of Ikorr and would be paid upon completion of specific  
7 milestones, with a timeline running through March 2021. *Id.* ¶¶ 15–16. In October 2020, Miller  
8 terminated the 2019 Agreement and, around that time, began working with Ravensburger. *Id.* ¶¶  
9 21, 23. In September 2022, Ravensburger announced the Disney Lorcana game and identified  
10 Miller as the “product manager and co-designer” of the game. *Id.* ¶ 27.

11 In June 2023, Upper Deck filed this case against Defendants in San Diego Superior Court  
12 and Defendants removed the case to the Southern District of California. Dkt. No. 1. The case was  
13 transferred to this Court under 28 U.S.C. § 1404(a). Dkt. No. 29-1. Defendants then moved to  
14 dismiss every cause of action except the breach of the contract claim for failure to state a claim.  
15 Dkt. No. 46. The Court granted in part and denied in part the motion. Dkt. No. 58. The Court  
16 found that it had subject matter jurisdiction, California law should apply, and dismissed with  
17 prejudice the breach of fiduciary duty and conversion claims against Miller. *Id.* The Court also  
18 dismissed with leave to amend the fraudulent misrepresentation claim against Miller, the inducing  
19 breach of contract and intentional interference claims against Ravensburger, and the unfair  
20 competition claim against both Defendants. *Id.* Upper Deck amended its complaint. Dkt. No. 62  
21 (“SAC”). Defendants now move to dismiss those same four causes of action again, claiming each  
22 amended claim fails to cure the deficiencies identified in the Court’s prior order. Dkt. No. 63.  
23 Defendants responded (Dkt. No. 68) and Upper Deck replied (Dkt. No. 69). Neither party  
24 requested oral argument and the matter is ripe for the Court’s consideration.

1 **II. ANALYSIS**

2 **A. Legal Standard on Motion to Dismiss**

3 Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either the lack  
4 of a cognizable legal theory or the “absence of sufficient facts alleged to support a cognizable legal  
5 theory.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)  
6 (cleaned up). At this stage, the Court accepts as true all factual allegations in the complaint and  
7 construes them in the light most favorable to the nonmoving party. *Gonzalez v. Google LLC*, 2  
8 F.4th 871, 885 (9th Cir. 2021), *rev’d sub nom on other grounds by Twitter, Inc. v. Taamneh*, 598  
9 U.S. 471 (2023) (per curiam). “To survive a motion to dismiss, a complaint must contain sufficient  
10 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
11 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007));  
12 *see* Fed. R. Civ. P. 8(a)(2) (a plaintiff must make a “short and plain statement of the claim showing  
13 that the pleader is entitled to relief”). A claim is facially plausible “when the plaintiff pleads  
14 factual content that allows the court to draw the reasonable inference that the defendant is liable  
15 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “If a motion to dismiss is granted, a court  
16 should normally grant leave to amend unless it determines that the pleading could not possibly be  
17 cured by allegations of other facts.” *Chinatown Neighborhood Ass’n v. Harris*, 33 F. Supp. 3d  
18 1085, 1093 (N.D. Cal. 2014).

19 **B. The Fraudulent Misrepresentation Claim Survives.**

20 In California, a claim for fraudulent misrepresentation (CAL. CIV. CODE §§ 1709–1710)  
21 requires:

- 22 (1) the defendant represented to the plaintiff that an important fact was true;  
23 (2) that representation was false; (3) the defendant knew that the  
24 representation was false when the defendant made it, or the defendant made  
the representation recklessly and without regard for its truth; (4) the  
defendant intended that the plaintiff rely on the representation; (5) the

1 plaintiff reasonably relied on the representation; (6) the plaintiff was  
2 harmed; and (7) the plaintiff's reliance on the defendant's representation  
was a substantial factor in causing that harm to the plaintiff.

3 *Thomas v. Regents of Univ. of California*, 97 Cal. App. 5th 587, 637 (Cal. Ct. App. 2023) (cleaned  
4 up). As this claim sounds in fraud, it is also subject to the heightened pleading requirement of  
5 Federal Rule of Civil Procedure 9(b) which requires “the who, what, when, where, and how of the  
6 misconduct charged, including what is false or misleading about a statement, and why it is false.”  
7 *Gibson v. Al Jazeera Int'l (USA) LLC*, No. 22-CV-04153-LB, 2022 WL 16949940, at \*7 (N.D.  
8 Cal. Nov. 14, 2022) (quoting *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1145 (9th Cir.  
9 2021)) (applying Rule 9(b) pleading standard to fraudulent misrepresentation claim).

10 The Court previously dismissed the fraudulent misrepresentation claim because Upper  
11 Deck did not allege that the Miller's misrepresentation was false. Dkt. No. 58 at 10. Upper Deck  
12 amended the claim and Miller now argues it should be dismissed again because Upper Deck does  
13 not allege facts to support that the alleged misrepresentation was false and fails to plead reliance  
14 or harm. Dkt. No. 63 at 10–13. The Court finds Upper Deck properly pleaded each of these  
15 elements.

16 Upper Deck properly alleges the falsity of the alleged misrepresentation. In the SAC,  
17 Upper Deck alleges Miller made one misrepresentation:

18 Miller falsely advised Upper Deck's in-house gaming employees such as  
19 Mark Shaunessy and Bubby Johanson that he was ending his contract to  
20 obtain or find more traditional full-time employment with benefits so he  
21 was discontinuing his work as a freelance game designer. Miller's true  
22 reason for ending his contract with Upper Deck was to capitalize on his  
23 work for Upper Deck by applying it to a TCG [trading card game] he would  
24 develop with Ravensburger.

1 Dkt. No. 62 ¶ 64.<sup>1</sup> Miller argues that “Upper Deck offers no factual allegations to support this  
2 conclusion” and that because he did gain full-time employment with Ravensburger, the statement  
3 could not have been false. Dkt. No. 63 at 11. Upper Deck responds that the new allegations  
4 sufficiently allege falsity and that Miller’s ultimate employment with Ravensburger “does not  
5 make his statements about his motivation and reason for leaving Upper Deck true.” Dkt. No. 68  
6 at 8. The Court agrees with Upper Deck. The SAC identifies an allegedly false statement, when  
7 and to whom it was made, and why Upper Deck believes that statement was false. Miller’s  
8 ultimate employment with Ravensburger does not impact what Miller’s true motivations for  
9 leaving Upper Deck were and whether what he represented to Upper Deck was true.

10 Turning to whether Upper Deck sufficiently alleges reliance and harm, Upper Deck first  
11 argues these challenges have been waived. Dkt. No. 68 at 8. It is true that Miller has moved to  
12 dismiss this claim three times now (Dkt. Nos. 20, 46, 63) and only in the third motion to dismiss  
13 raises issues with the reliance and harm elements of the fraudulent misrepresentation claim. *See*  
14 Dkt. No. 20 at 36–37, Dkt. No. 46 at 18. However, such delay does not waive an argument, it only  
15 limits the argument from being raised in a later motion to dismiss. Fed. R. Civ. P. 12(g)(2). The  
16 Ninth Circuit allows district courts to consider such arguments even when they are wrongly  
17 brought in a later Rule 12(b)(6) motion because “relegating defendants to the three procedural  
18 avenues specified in Rule 12(h)(2) can produce unnecessary and costly delays, contrary to the  
19 direction of Rule 1.” *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318–19 (9th Cir. 2017).  
20 Accordingly, without evidence that this argument was withheld for the sole purpose of delay or  
21 other strategic advantage, and in the interest of judicial economy, the Court will consider Miller’s  
22 arguments on reliance and harm.

---

23  
24 <sup>1</sup> The remainder of the allegations under this cause of action in the SAC are about Miller’s concealment, which Defendants do not challenge as insufficient.

1 Miller argues that Upper Deck’s allegations regarding reliance and harm only support the  
2 fraudulent concealment subpart of the fraud claim, not the fraudulent misrepresentation subpart.  
3 Dkt. No. 63 at 12. Upper Deck responds that this argument was already rejected and that the SAC  
4 “readily alleges that the false representation of the reason for his departure, much like his  
5 concealing his true reasons for leaving, were reasonably relied on and a substantial factor in  
6 causing harm.” Dkt. No. 68 at 9. The Court agrees with Upper Deck. The Court previously  
7 determined the fraudulent concealment claim sufficiently alleged reliance (Dkt. No. 58 at 13) and  
8 those allegations are not all limited to Miller’s concealment of facts but are naturally read to also  
9 refer to the alleged misrepresentation. *See* Dkt. No. 62 ¶ 69 (“[H]ad Upper Deck known that Miller  
10 was talking to and/or potentially working with Ravensburger, or alternatively, known  
11 Ravensburger was later planning to begin the development of a TCG nearly identical to Rush of  
12 Ikorr, Upper Deck would have responded differently.”). Likewise, Upper Deck alleges that “the  
13 concealment and related activities by Miller and Ravensburger” were a substantial factor in the  
14 harm of having “a competing TCG that copies the essence of Rush of Ikorr.” *Id.* ¶ 71. Miller asks  
15 the Court to read the reliance and harm allegations too narrowly, defying the standard on a motion  
16 to dismiss. *See In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1145 (C.D. Cal.  
17 2008) (“A court reads the complaint as a whole...rather than isolating allegations and taking them  
18 out of context.”).

19 Upper Deck sufficiently pleads a fraudulent misrepresentation claim.

20 **C. The Tortious Interference Claims Fail to Allege an Independently Wrongful Act.**

21 In California, the elements of a claim for interference with a contract are: “(1) a valid  
22 contract between plaintiff and a third party; (2) defendant’s knowledge of this contract; (3)  
23 defendant’s intentional acts designed to induce a breach or disruption of the contractual  
24 relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting

1 damage.” *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 589–90 (Cal. 1990). For a  
2 claim of inducing a breach of an at-will contract, like here, Upper Deck “must allege that  
3 [Ravensburger] engaged in an independently wrongful act.” *Ixchel Pharma, LLC v. Biogen, Inc.*,  
4 470 P.3d 571, 580 (Cal. 2020). Similarly, the elements of a claim for intentional interference with  
5 prospective economic relations are: (1) an economic relationship between the plaintiff and some  
6 third party; (2) defendant’s knowledge of the relationship; (3) intentional wrongful acts on the part  
7 of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and  
8 (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Sybersound*  
9 *Recs., Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008) (cleaned up). The Court previously  
10 dismissed these claims for failing to plead an independently wrongful act. Dkt. No. 58 at 14–15  
11 (“Upper Deck only alleges that Ravensburger hired Miller away from them and caused Miller to  
12 breach the confidentiality provisions of the agreements. These are not independently wrongful  
13 acts.”). Ravensburger argues Upper Deck’s amended allegations of an independently wrongful  
14 act still fail. Dkt. No. 63 at 13–16. The Court will first explain what an “independently wrongful  
15 act” requires<sup>2</sup> and then determine whether any of Upper Deck’s amended allegations are sufficient.

16 The parties agree that an “independently wrongful act” means conduct that violates “some  
17 constitutional, statutory, regulatory, common law, or other determinable legal standard.” *Ixchel*  
18 *Pharma*, 470 P.3d at 576; *see* Dkt. No. 63 at 16, Dkt. No. 68 at 10. But the parties disagree about  
19 the relationship between the interfering conduct and the wrongful act. Ravensburger avers the  
20 interfering conduct, itself, must have been wrongful. Dkt. No. 63 at 15. Upper Deck responds

---

21  
22  
23 <sup>2</sup> The parties agree that the requirements for an independently wrongful act are the same under both causes of action.  
24 *See* Dkt. No. 63 at 16, Dkt. No. 68 at 11–12. The Court agrees and its reasoning in this section applies to both tortious  
interference claims, regardless of whether the term induce or interfere is used to describe the tortious act. *Reeves v.*  
*Hanlon*, 95 P.3d 513, 520 (Cal. 2004).

1 that interference “coupled with” or “occasioned by” a wrongful act is sufficient, and that the  
2 interference can be “a vessel” for the wrongful conduct. Dkt. No. 68 at 10–11.

3 Ravensburger is correct: the interference must have been done “through wrongful means.”  
4 *See Ixchel Pharma*, 470 P.3d at 590; *Stevenson Real Est. Servs., Inc. v. CB Richard Ellis Real Est.*  
5 *Servs., Inc.*, 42 Cal. Rptr. 3d 235, 243 (Cal. Ct. App. 2006) (“[P]laintiff must plead and prove that  
6 the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for  
7 reasons other than that it interfered with a prospective economic advantage.”). Contrary to Upper  
8 Deck’s claims, the wrongful act cannot solely occur before or after the interference, and  
9 interference “coupled with” a wrongful act is insufficient. This conclusion is consistent with the  
10 case cited by Upper Deck where the complaint sufficiently alleged an independently wrongful act:  
11 “Hertz used misappropriated data—including confidential human resource data—to [recruit  
12 Plaintiff’s employees].”<sup>3</sup> *See Neutron Holdings, Inc. v. Hertz Corp.*, No. 23-CV-00934-JSC, 2023  
13 WL 3919465, at \*7 (N.D. Cal. June 8, 2023).

14 Upper Deck must plead that the interfering act, here, Ravensburger hiring Miller, was done  
15 through some wrongful means. But none of Upper Deck’s allegations of Ravensburger’s wrongful  
16 acts are about its hiring of Miller. Instead, Upper Deck alleges that Ravensburger “used the hiring  
17 [of Miller] as a means of accomplishing other illegal acts[.]” Dkt No. 68 at 11, Dkt. No. 62 ¶ 81.  
18 Upper Deck also alleges that Ravensburger hired Miller away from Upper Deck in order to infringe  
19 its copyrights and use its confidential information. Dkt. No. 62 ¶¶ 80–81. But these allegations  
20 go to a wrongful motive which is not a wrongful act. *See Korea Supply Co. v. Lockheed Martin*  
21 *Corp.*, 63 P.3d 937, 953 (Cal. 2003) (“An act is not independently wrongful merely because  
22

---

23 <sup>3</sup> Upper Deck also cites *Insight Psychology & Addiction Inc. v. Inpsycht Psychological Services., PC*, No.  
24 SACV221304JVSKESEX, 2023 WL 2799060, at \*7 (C.D. Cal. Feb. 16, 2023). That case was decided on an unopposed  
motion for default judgment and does not meaningfully analyze the independently wrongful action element.

1 defendant acted with an improper motive.”). Upper Deck fails to explain how Ravensburger  
2 violated a “constitutional, statutory, regulatory, common law, or other determinable legal  
3 standard” when it hired Miller away from Ravensburger. *Id.* at 954. Accordingly, Upper Deck’s  
4 inducing breach of contract and intentional interference with economic relations claims fail.

5 Because Upper Deck’s tortious interference claims are based on a flawed legal theory and  
6 not a failure to plead sufficient facts, amendment would be futile and the tortious interference  
7 claims are dismissed without leave to amend. *Tremblay v. OpenAI, Inc.*, No. 23-CV-03223-AMO,  
8 2024 WL 3640501, at \*2 (N.D. Cal. July 30, 2024) (“As the defect lies in the legal theory, not the  
9 factual allegations, the dismissal is without leave to amend.”) (quoting *Brown v. Food for Life*  
10 *Baking Co.*, 658 F. Supp. 3d 732, 740 (N.D. Cal. 2023)); *see also Cafasso, United States ex rel. v.*  
11 *Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (“The district court’s discretion  
12 to deny leave to amend is particularly broad where plaintiff has previously amended the  
13 complaint.”).

14 **D. The UCL Claim Against Miller and Ravensburger Can Proceed in Part.**

15 California’s unfair competition law (CAL. BUS. & PROF. CODE § 17200) (“UCL”), prohibits  
16 “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or  
17 misleading advertising and any act prohibited by [the false advertising law (§ 17500 *et seq.*)].”  
18 CAL. BUS. & PROF. CODE § 17200. The statute “establishes three varieties of unfair competition—  
19 acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is  
20 prohibited as unfair or deceptive even if not unlawful and vice versa.” *Cel-Tech Commc’ns, Inc.*  
21 *v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 540 (Cal. 1999) (cleaned up). The Court previously  
22 dismissed Upper Deck’s UCL claim for failing to identify which prongs of the statute it was  
23 invoking. Dkt. No. 58 at 18–19. Upon amendment, Upper Deck adds the allegation:  
24 “Accordingly, Ravensburger has violated the ‘unlawful’ and ‘unfair’ prongs of the UCL.” Dkt.

1 No. 62 ¶ 110. Defendants now move to dismiss this claim against Miller for failure to identify  
2 the relevant UCL prongs, and against Ravensburger for failing to specify what conduct falls under  
3 which prong, failing to allege unfair conduct, and failing to allege unlawful conduct. Dkt. No. 63  
4 at 17–21.

5 1. The Court will analyze the “inadvertently omitted” UCL unlawful and unfair claims  
6 against Miller.

7 Defendants ask the Court to dismiss the UCL claim against Miller because, apart from the  
8 cause of action heading, the new allegations identifying the relevant UCL prongs do not mention  
9 Miller. Dkt. No. 63 at 17. Upper Deck responds that “Upper Deck inadvertently omitted the  
10 prongs applicable to Defendant Miller, but they should be the same with the addition of fraud given  
11 the fraud cause of action against him. Upper Deck seeks leave to amend one more time on this  
12 issue to plead the prongs applying to Miller specifically.” Dkt. No. 68 at 12 n.2.

13 First, the Court denies Upper Deck’s request to add allegations regarding the “fraud” prong  
14 of the UCL as to Miller. *See* Dkt. No. 68 at 12 n.2. That omission, whether inadvertent or not, is  
15 inexcusable considering the Court specifically ordered Upper Deck to identify the relevant prongs  
16 of the UCL under which its claims arose. Dkt. No. 58 at 19. Allowing Upper Deck to add this  
17 new prong based on a footnote in its opposition would prejudice Defendants who would be forced  
18 to move to dismiss again. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999) (“Liberality in  
19 granting a plaintiff leave to amend is subject to the qualification that the amendment not cause  
20 undue prejudice to the defendant, is not sought in bad faith, and is not futile.”). Such amendment  
21 would also be futile because “fraudulent” under the UCL “requires a showing that members of the  
22 public are likely to be deceived.” *Puentes v. Wells Fargo Home Mortg., Inc.*, 72 Cal. Rptr. 3d.  
23 903, 909 (Cal. Ct. App. 2008) (cleaned up). Upper Deck has not alleged that any of Miller’s  
24 alleged fraudulent misrepresentations or omissions were known by the public. *See Capella*

1 *Photonics, Inc. v. Cisco Sys., Inc.*, 77 F. Supp. 3d 850, 865 (N.D. Cal. 2014) (dismissing fraudulent  
2 UCL claim because “Cisco does not allege that members of the public have been deceived by  
3 Capella’s alleged fraudulent misrepresentations....Indeed, Cisco does not even allege that  
4 members of the public are aware of Capella’s misrepresentations”).

5 As to adding Miller to the unlawful and unfair prongs asserted against Ravensburger, while  
6 it is regrettable that Upper Deck failed to identify this omission despite three opportunities to  
7 amend its complaint (Dkt. Nos. 1, 12, 62), for efficiency and thoroughness the Court will analyze  
8 the UCL claim as if Upper Deck had used the term “Defendants” instead of solely “Ravensburger”  
9 in its UCL cause of action. *See* Dkt. No. 62 ¶¶ 109, 110. To the extent either claim survives, the  
10 Court will grant limited leave to amend to edit the allegations to apply to “Defendants,” not only  
11 Ravensburger. *See id.*

12 2. The unlawful UCL claim survives.

13 The unlawful prong of the UCL “borrows violations of other laws and treats them as  
14 unlawful practices that the unfair competition law makes independently actionable.” *Cel-Tech*,  
15 973 P.2d at 539–40 (cleaned up). However, “a common law violation such as breach of contract  
16 is insufficient” to support a claim under the unlawful prong of the UCL. *Shroyer*, 622 F.3d at  
17 1044. Defendants argue that because the only alleged UCL violations in the SAC are about  
18 Ravensburger’s use and dissemination of Upper Deck’s confidential information, and such acts  
19 “are not elements of Upper Deck’s conversion, inducement, or interference claims,” and the  
20 copyright claim is preempted, Upper Deck fails to “identify any specific violation of a statute or  
21 common law as a predicate for its UCL claim[.]” Dkt. No. 63 at 19. But Defendants ignore Upper  
22 Deck’s incorporation of the other causes of action into its UCL claim. Dkt. No. 62 ¶ 108. Thus,  
23 comparing one allegation made under the UCL cause of action with the elements of the other  
24

1 causes of action is not the correct analysis. Instead, the question is whether the remaining non-  
2 copyright<sup>4</sup> causes of action can support a UCL unlawful claim.

3 The sole remaining non-copyright claim against Ravensburger is a conversion claim. *See*  
4 Dkt. No. 62. Neither party has sufficiently briefed whether a conversion claim can be the basis for  
5 an unlawful UCL claim. *See generally* Dkt. Nos. 63, 68, 69. Because, at least under certain  
6 circumstances, conversion can support an unlawful UCL claim, the Court will not dismiss this  
7 claim at this point. *See U.S. Legal Support, Inc. v. Hofioni*, No. CIV. S-13-01770 LKK, 2013 WL  
8 6844756, at \*13 (E.D. Cal. Dec. 20, 2013) (holding that trade secret appropriation and conversion  
9 are a “sufficient basis for alleging ‘unlawful’ conduct under the UCL”). *But see Shroyer*, 622 F.3d  
10 at 1044 (holding that “a common law violation such as breach of contract is insufficient” to support  
11 an unlawful UCL claim but that “a violation of common law can support a § 17200 claim, provided  
12 that the conduct is also unlawful, unfair, or fraudulent”).

13 Likewise, because the causes of action against Miller are incorporated into the UCL claim  
14 and Defendants do not argue the fraudulent misrepresentation or fraudulent concealment claims  
15 cannot support an unlawful UCL claim, the unlawful UCL claim against Miller also survives.

16 3. Upper Deck fails to allege an unfair act by Miller or Ravensburger under the UCL.

17 Unlike the UCL unlawful prong’s “borrowing” analysis, the UCL unfair prong analysis  
18 looks at what Upper Deck alleges as unfair conduct and then determines “whether the challenged  
19 conduct is unfair within the meaning of the unfair competition law.” *Cel-Tech*, 973 P.2d at 542.

20 In *Cel-Tech*, the California Supreme Court held

21 When a plaintiff who claims to have suffered injury from a direct  
22 competitor’s “unfair” act or practice invokes section 17200, the word  
23 “unfair” in that section means conduct that threatens an incipient violation  
of an antitrust law, or violates the policy or spirit of one of those laws

---

24 <sup>4</sup> Upper Deck agrees that its copyright claim cannot form the basis of its UCL claim. Dkt. No. 68 at 13.

1 because its effects are comparable to or the same as a violation of the law,  
2 or otherwise significantly threatens or harms competition.

3 973 P.2d at 544. Upper Deck alleges Defendants “unconscionably and without authorization, used  
4 and disseminated Upper Deck’s confidential and proprietary game design to promote and market”  
5 Lorcana. Dkt. No. 62 ¶ 109. Applying the *Cel-Tech* test, Upper Deck’s UCL unfair claim against  
6 Defendants<sup>5</sup> does not allege any anticompetitive conduct or significant harms to competition and  
7 is dismissed.

8 Upper Deck argues that the *Cel-Tech* test is only one way to find unfair conduct and that  
9 “courts find actionable analogous types of claims involving trade secret violations and  
10 misappropriation of confidential information.” Dkt. No. 68 at 12. But the cases cited in support  
11 of this argument are inapposite. The post-*Cel-Tech* cases only hold that “misappropriation of trade  
12 secrets in violation of [California Uniform Trade Secrets Act] can form the predicate” for an unfair  
13 UCL claim. *DJO Glob., Inc. v. Glader*, No. 316CV02208CABNLS, 2016 WL 11622009, at \*8  
14 (S.D. Cal. Dec. 22, 2016) (quoting *U.S. Legal Support, Inc. v. Hofioni*, No. CIV. S-13-01770 LKK,  
15 2013 WL 6844756, at \*14 (E.D. Cal. Dec. 20, 2013)). There is no trade secret misappropriation  
16 claim here that could support finding a sufficiently plead unfair act. And Upper Deck’s only  
17 support for the argument that misappropriation of confidential information more broadly can be  
18 an unfair act is a case decided before *Cel-Tech* established the current test for “unfair” under the  
19 UCL. *See Courtesy Temp. Serv., Inc. v. Camacho*, 272 Cal. Rptr. 352, 360 (Cal. Ct. App. 1990).

20 Again, because Upper Deck’s legal theory is flawed, leave to amend would be futile and is  
21 denied.

22  
23  
24 

---

<sup>5</sup> Upper Deck does not dispute that Defendants are its competitors. *See generally* Dkt. No. 68.

1 **III. CONCLUSION**

2 For these reasons, Defendants second motion to dismiss is GRANTED IN PART and  
3 DENIED IN PART. Dkt. No. 68.

4 The inducing breach of a written contract claim and intentional interference with  
5 prospective economic relations claims are dismissed with prejudice.

6 The UCL claim under the unfair prong is dismissed with prejudice.

7 The remainder of the motion to dismiss is DENIED.

8 Upper Deck can amend its complaint to remove the dismissed causes of action and change  
9 “Ravensburger” to “Defendants” under its UCL claim’s unlawful prong. Dkt. No. 62 ¶¶ 109, 110.  
10 Upper Deck cannot allege a UCL fraud claim against Miller. Upper Deck shall amend the  
11 complaint by December 27, 2024.

12  
13 Dated this 16th day of December, 2024.

14 

15 \_\_\_\_\_  
16 Kimberly K. Evanson  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24