

THE PARTIES

2. Plaintiff Paul Lesko is an individual citizen of the State of Missouri. Plaintiff Lesko resides in Jefferson County, Missouri.

3. The Topps Company, Inc. is a Delaware corporation with a principal place of business at 1 Whitehall Street, New York, New York 10004. Topps manufactures and sells trading cards, including a product line called Topps Now.

JURISDICTION AND VENUE

4. This Court has personal jurisdiction over Topps pursuant to Missouri Supreme Court Rule 54.06 and MO. REV. STAT. § 506.500 because a substantial portion of the wrongdoing alleged by Plaintiff occurred in Missouri and Topps purposefully availed itself to the benefits and protections of the State of Missouri by transacting business, by, at least, selling products within Missouri, and within Jefferson County.

5. Venue is proper in this Court pursuant to MO. REV. STAT. § 508.010 because Plaintiff Lesko was first injured by the wrongful acts and conduct of Defendant in Jefferson County, Missouri. Venue is also proper in this Court pursuant to MO. REV. STAT. § 407.025.1 because Plaintiff Lesko purchased the card at issue from his residence in Jefferson County, Missouri.

FACTUAL ALLEGATIONS

6. Starting April 4, 2016, Topps began offering a new product line called “Topps Now” to coincide with the 2016 Major League Baseball season.

7. Unlike traditional trading cards which were sold in physical packs (and where customers would typically receive a random assortment of cards), Topps Now is an on-demand, trading-card product, where specific baseball cards are offered for a 24 hour period to the

purchasing public. In this manner, Topps Now customers can purchase the specific cards they desire, and have the physical cards sent to them from Topps.

8. As Topps' website explains:

Imagine your favorite player throwing a no-hitter, and then getting a card of that special moment the very next day! Starting April 4, baseball fans everywhere will get the opportunity to do so.

The Topps Company is proud to introduce TOPPS NOW™, a Topps.com-exclusive product that will depict the greatest moments and milestones from the 2016 Major League Baseball season almost as soon as they happen. The physical cards will be available the very next day to purchase through Topps.com, but for just 24 hours, and will not be available for purchase again.

Exhibit A, Topps' Blog, From: <http://www.topps.com/blog/topps-introduces-topps-now-baseball-cards-to-commemorate-the-2016-major-league-baseball-season-with-cards-available-the-day-after-a-game-is-played/>.

9. Topps informed its customers that Topps Now cards would be available for a 24 hour sales period, after which they could no longer be purchased by the public from Topps.

10. The focus of this lawsuit is on one such Topps Now card: No. 264 in the series.

11. On July 20, 2016, Topps offered four Topps Now cards for sale. One of the cards offered for sale was card No. 264: a "John Harrison" card. An image of the card as offered is below:



Ex. B, Excerpt from printout of Topps Now offer page for July 20.

12. This card was unique because upon information and belief it was the first “error” card for Topps Now; there is no “John” Harrison on the Pittsburgh Pirates—the player’s actual name is Josh Harrison.

13. Error cards are not new in the trading card world, and are sought after by many collectors. This can be seen by the many articles and blogs dedicated to discussing error cards, as well as price guides showing an increased value for error cards. See, e.g., Exhibit C, “This Card Costs ‘cause You Aren’t Supposed to Have it,’” ESPN.COM (From: <http://www.espn.com/mlb/news/story?id=2429888>).

14. In fact, some trading card companies intentionally create error cards to drive demand. See, e.g., Exhibit D, “According To The Rules of Collecting Baseball Cards, An Error Can be a Hit,” Chicago Tribune (From: http://articles.chicagotribune.com/1989-07-16/sports/8902180402_1_card-company-executive-card-manufacturers-errors).

15. Upon information and belief, the “John” Harrison card was the first Topps Now error card. This status made the “John” Harrison card more collectable (*e.g.*, collectors beyond simply Pittsburgh Pirates fans would be interested in the card) and more valuable (due to its limited availability and notoriety as first Topps Now, if not the first of any, on-demand, error card).

16. Plaintiff is a trading card collector. One of the focuses of his collection is error cards.

17. After learning that the “John” Harrison Topps Now card was an error card, Plaintiff purchased it directly from Topps, through its website.

18. Plaintiff accomplished this by first visiting the Topps Now page which displayed the “John” Harrison card. A conspicuous “BUY NOW” button was next to the graphic of the “John” Harrison card.



**JOSH HARRISON - WALK-OFF
WINNER - TOPPS NOW CARD 264**

22:10:03 HOURS REMAINING

\$9.99

JOSH HARRISON TROTTS HOME AFTER TRIPLE & ERROR FOR WALK-OFF WIN

FREE SHIPPING (CHOOSE SMARTPOST)

TOPPS NOW™ CELEBRATES BASEBALL'S GREATEST MOMENTS... AS THEY HAPPEN.
AVAILABLE FOR 24 HOURS, ONLY AT TOPPS.COM

BUY NOW **ADD TO WISHLIST**



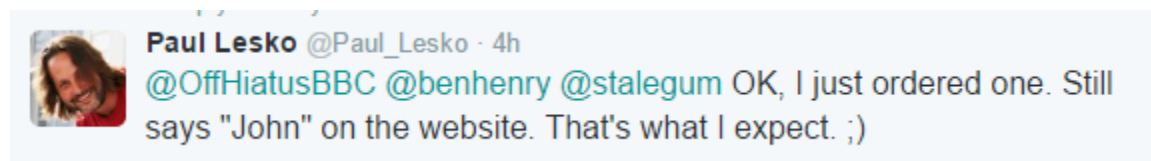
Ex. E, Excerpt of Topps Webpage selling John Harrison card (at 22:10:03 time remaining).

19. Plaintiff clicked the BUY NOW button, proceeded through checkout and paid \$9.99 for the Topps Now card. Topps assigned order number #100131457 to this purchase.

20. Being a Cardinals fan, if Card No. 264 was not an error card, he would not have purchased it.

21. Upon information and belief, other Topps Now customers also purchased Card No. 264 for the sole reason it was an error card.

22. After purchasing the card, Plaintiff visited Twitter and tweeted the following:



23. Despite informing its customers that all Topps Now cards would be available for 24 hours, less than four hours after the “John” Harrison card was offered for sale, Topps, without a public announcement, substituted a “Josh” Harrison card for the “John” Harrison card. The substituted card is below:



Ex. F, Excerpt from updated Topps Now offer page for July 20.

24. In conflict with Topps' policies, the "John" Harrison card was on sale for less than four hours, and the "Josh" Harrison card was on sale for less than 21 hours.

25. After noticing this substitution, Plaintiff tweeted the following to Topps:



Paul Lesko @Paul_Lesko · 1h

Hey @toppscards please note I ordered a "John" Harrison #toppsnow card, not the "Josh" card. Order placed before the art was changed. Thanks

26. In addition to the tweet referenced in paragraph 25, Plaintiff followed up via email to Topps stating (in part):

Hey guys - This morning I purchased Topps Now Card No. 264 with the name of "John Harrison" on the front. I specifically purchased this card because I wanted the name "John" on it. I purchased the card while the card art said "John" on it as well.

I've noted that since I purchased the "John" card, Topps has changed the art to now say "Josh". This is not the card I purchased. So...to avoid any misunderstanding, please ensure that the "John" card is sent to me.

Ex. G, July 20 email excerpts.

27. After an exchange of emails with a Topps customer service representative, Topps informed Plaintiff that it would not send him a "John" Harrison card. Plaintiff then asked that this issue be escalated to Topps' legal department.

28. Over a month has passed in which no progress has been made between Topps' legal department and Plaintiff.

29. Upon information and belief, to this day, Topps has not addressed this issue with the purchasers of the Topps Now card No. 264.

30. Plaintiff is not the only person harmed by Topps' actions.

31. As error cards are more desirable and valuable than standard cards, all customers who purchased the "John" Harrison card but received a "Josh" Harrison card are essentially victims of a bait and switch by Topps.

32. Further, a thriving secondary market exists for the reselling of baseball cards on Internet sites such as eBay. During the time period in which Topps displayed a "John" Harrison card for sale, eBay sellers relied upon this fact. For example, at least one eBay seller on July 20 referenced the fact that Card No. 264 was an "error" card in the title of his auction in order to entice buyers. See e.g., Exhibit H, Search Results from eBay in which seller's auction is entitled "2016 Topps Now #264 Josh Harrison – Walk-Off Winner (ERROR)."

33. Error cards are commonly worth more on the secondary market than the same cards without errors.

34. Further, under the law of supply and demand, if cards are of a limited quantity, they are more valuable to collectors than if those cards were in a greater quantity.

35. Here, Topps Now cards are already of a limited quantity.

36. According to Topps, only 319 of the trading card at issue were sold.

37. It logically follows that an error card in such limited quantities (or even less considering Topps offered the “John” Harrison card for sale for less than four hours) would be extremely valuable on the secondary market and to collectors, especially where Topps is doing everything it can to not release the card.

38. About a month after initially offering Card No. 264, and in an apparent admission of liability, Topps added the following conspicuous disclaimer to its Topps Now sales pages:

SKU: ARTBB-16C2S-16TN-0378

FREE SHIPPING (choose Smartpost)

Topps NOW offers trading cards featuring MLB's best moments immediately after they occur. Topps will print and deliver only the amount that is purchased within the allotted 24-hour time frame.

PRICING INFO: 1 CARD = \$9.99, 5 CARDS = \$29.99 (\$5.99 Per Card), 10 CARDS = \$49.99 (\$4.99 Per Card), 20 CARDS = \$79.99 (\$3.99 Per Card)

ALL SALES ARE FINAL. PRINT RUNS REVEALED AFTER 24 HOUR WINDOW. SHIPS IN 3-5 BUSINESS DAYS. ART SUBJECT TO CHANGE. NOT RESPONSIBLE FOR TYPOGRAPHIC/PRINTER ERRORS

Ex I, Excerpt from Topps Now webpage, August 22, 2016.

Prior to this change, the disclaimer did not address changes to “art” or “typographic” errors.

SKU: ARTBB-16C2S-16TN-0270

FREE SHIPPING (choose Smartpost)

Topps NOW offers trading cards featuring MLB's best moments immediately after they occur. These special edition cards are only available for purchase within a 24-hour window after they launch on Topps.com, and Topps will print and deliver only the amount that is purchased within this time frame.

PRICING INFO: 1 CARD = \$9.99, 5 CARDS = \$29.99 (\$5.99 Per Card), 10 CARDS = \$49.99 (\$4.99 Per Card), 20 CARDS = \$79.99 (\$3.99 Per Card)

ALL SALES ARE FINAL. PRINT RUNS REVEALED AFTER 24 HOUR WINDOW. SHIPS IN 3-5 BUSINESS DAYS.

SPECS:

- 2.5" x 3.5" trading card Printed on 16pt glossy trading card stock

Ex. J, Prior Topps Now Disclaimer Excerpt.

39. The new disclaimer from Exhibit I did not appear on the Topps Now pages at the time of purchase of the "John" Harrison card.

40. Upon information and belief, Topps made this change due to Plaintiff's contact with Topps on this issue.

41. When a company offers a product online, with an image of same product, consumers have a reasonable belief that if they purchase that product, they will receive the pictured product, especially because products offered online cannot be physically inspected prior to purchase.

42. Plaintiff reasonably relied upon the image of the "John" Harrison card when purchasing said card.

43. It is unreasonable to expect consumers to disregard the image of the card when purchasing said card.

44. Further, consumers have a reasonable belief that if a company indicates it will offer a product for sale for 24 hours, that product will be on sale for the entire time period.

45. Even beyond this, consumers have a reasonable belief that companies will not perform a bait and switch, offering a more desirable and valuable card, but then replacing it with a standard card.

46. Plaintiff, on his own behalf and on behalf of the Classes defined below, seeks specific performance (*i.e.*, receipt of the purchased card), and relief in the form of damages, pre-judgment and post-judgment interest, restitution, permanent injunctive and declaratory relief, reasonable attorneys' fees and litigation costs, and punitive damages in an amount that is fair and reasonable, yet will serve to deter Topps from similar conduct in the future.

CLASS ACTION ALLEGATIONS

47. Plaintiff brings this class action for breach of contract and violation of the New York Consumer Protection Act, pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure, on behalf of a nationwide class of consumers, defined as:

The Nationwide Class:

All purchasers of Card No. 264 in the United States during the 24 hour period starting on July 20, 2016, when Topps made Card No. 264 available for purchase. Excluded from the Class are the Defendant; subsidiaries and affiliates of the Defendant; directors and officers of Defendant and members of their immediate families; federal, state, and local governmental entities; any judicial officers presiding over this action and their immediate family and judicial staff; any juror assigned to this action; and all consumers, if any, who have received a "John" Harrison card from Defendant.

48. In addition, Plaintiff brings a class action pursuant to Rule 52.08 of the Missouri Rules of Civil Procedure on behalf of a Missouri-statewide class of consumers, defined as:

The Missouri Class:

All residents of Missouri who purchased Card No. 264 during the 24 hour period starting on July 20, 2016, when Topps made Card No. 264 available for purchase. Excluded from the Class are the Defendant; subsidiaries and affiliates of the Defendant; directors and officers of Defendant and members of their immediate families; federal, state, and local governmental entities; any judicial officers presiding over this action and their immediate family and judicial staff; any juror assigned to this action; and all consumers, if any, who have received a “John” Harrison card from Defendant.

49. The Nationwide Class and Missouri Class are collectively referred to as “the Classes.”

50. Plaintiff asserts claims against Topps individually and on behalf of members of the Classes for violations of the law as set forth below.

51. The members of both Classes are ascertainable from objective criteria.

52. If necessary to preserve the case as a class action, the Court itself can redefine the Classes, create additional classes or sub-classes, or both.

53. Members of the Classes are so numerous that their individual joinder herein is impracticable. On information and belief, and according to Topps’ website, there were 319 sales of Card No. 264 from across the United States.

54. Common questions of law and fact exist as to both Classes’ members. Common legal and factual questions include, but are not limited to:

- a) whether Topps breached its contract it had with each purchaser of Card No. 264;
- b) whether Topps bait and switch of a lower value card for the “John” Harrison card was false, misleading, deceptive or unfair;
- c) whether Topps failure to disclose the substitution of cards to Plaintiff and members of both Classes was misleading, deceptive or unfair;
- d) whether Topps failure to abide by its explicit 24 hour time period to sell Topps Now cards was misleading, deceptive or unfair;
- e) whether Topps concealed from Plaintiff and members of both Classes the substitution of cards;

- f) whether Topps had a duty to disclose material facts to Plaintiff and members of both Classes regarding the card substitution;
- g) whether Topps should have offered its customers the option of receiving either a “John” or “Josh” Harrison card, instead of unilaterally deciding all purchasers would receive a “Josh” Harrison card;
- h) whether Topps was unjustly enriched by its conduct;
- i) whether Topps breached an express or implied warranty made to Plaintiff and members of the Class;
- j) whether Topps aforementioned conduct violated applicable law;
- k) whether Plaintiff and members of both Classes are entitled to specific performance, restitution, monetary relief, injunctive relief, or punitive damages, and the amount and nature of such relief; and
- l) whether Plaintiff and members of both Classes are entitled to an award of reasonable attorneys’ fees, pre-judgment and post-judgment interest, and costs of suit.

55. Plaintiff’s claims are typical of the claims of the proposed classes that he seeks to represent because they arise from the same course of conduct by Topps and are based on the same legal theories. Further, Plaintiff seeks the same forms of relief for himself and the proposed classes and has suffered the same injury as both Classes’ members, all of which arise from Topps’ unlawful conduct.

56. Because Plaintiff’s claims are typical of the proposed Classes that Plaintiff seeks to represent, Plaintiff has every incentive to pursue those claims vigorously. Plaintiff has no conflicts with, or interests antagonistic to the proposed Classes, that may not be alleviated with proper notice and supervision by this Court. Plaintiff, a victims of unscrupulous and unlawful conduct by Topps, is committed to the vigorous prosecution of this action, which is reflected in their retention of competent counsel experienced in complex and challenging litigation.

57. Plaintiff’s counsel satisfies the requirement to serve as counsel for the proposed class. Plaintiff’s counsel (a) has identified and thoroughly investigated the claims set forth herein,

(b) has been involved in complex and class litigation; (c) has extensive knowledge of the applicable law; and (d) has or will have the resources to commit to the vigorous prosecution of this action, likely through co-counsel, on behalf of the proposed class. Accordingly, Plaintiff is an adequate representative.¹

58. Topps has acted or refused to act on grounds generally applicable to all members of both Classes. Topps has refused to provide the “John” Harrison card to the members of the Classes that purchased the card during the Class Period. Accordingly, final injunctive relief or corresponding declaratory relief is appropriate with respect to both Classes as a whole.

59. Common questions of law and fact predominate over questions affecting only individual members of the Classes. The class mechanism is also superior to any other available means for the fair and efficient adjudication of the claims asserted by Plaintiff and members of the Classes. Given the dollar value of each individual product at issue and the distribution of the Nationwide Class across the United States, individualized proceedings would result in increased delay and expense for all parties, would create an unnecessary burden on the judicial system, and would frustrate the claims of many individual class members who would be unable to incur, individually, the burden and expense necessary to establish liability against Topps.

60. The prosecution of separate actions by individual members of the Classes would create a risk of inconsistent or varying adjudications with respect to individual members of the

¹ It should be noted that Plaintiff and his counsel are in the process of opening a law firm together or becoming the St. Louis branch of another law firm. Therefore, should the Plaintiff, or another potential plaintiff who may be added at a later date, decide to move for class certification, the lead plaintiff could be selected then from one or more plaintiffs (if more plaintiffs join this action), or other parties to be discovered and added.

Classes that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

61. Class treatment will permit large numbers of similarly situated Topps customers to prosecute their respective claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would produce.

62. This action is manageable as a class action. Notice may be provided to members of the proposed Classes by first-class mail (as Topps has the July 20-21 addresses of all purchasers of Card No. 264) and through the alternative means, including electronic mail (email), internet postings including banner ads, distribution through social media, including sponsored postings on Facebook and Twitter or by publication. Thus, the superiority and manageability requirements for maintaining a class action are satisfied.

**COUNT I – ON BEHALF OF THE NATIONWIDE AND MISSOURI CLASSES
BREACH OF CONTRACT**

63. Plaintiff incorporates paragraphs 1 – 62 as if fully set forth herein.

64. Plaintiff brings this claim individually and on behalf of both Classes for breach of contract.

65. During the class period, Topps offered Card No. 264 for sale.

66. For the first few hours of the class period, the webpage selling Card No. 264 depicted a Topps Now card with the name “John Harrison” on it.

67. During this period, members of the proposed class purchased Card No. 264.

68. Further, during the entire class period, members of the Classes purchased Card No. 264.

69. Plaintiff and all other members of the Classes performed their obligations under their contract with Topps (*e.g.*, Plaintiff and all other members of the Classes paid for Card No. 264).

70. Topps breached its contract with Plaintiff and all other members of the Classes by refusing to deliver the pictured “John” Harrison trading card.

71. Plaintiff and all other members of the Classes relied upon the name of “John” Harrison on Card No. 264 in making his or their purchase.

72. Plaintiff and members of the Classes are therefore entitled to specific performance (*i.e.*, receipt of the “John” Harrison trading card), and all compensatory damages flowing from Topps’ breach of contract.

73. Specific performance is proper as the underlying contracts with Plaintiff and members of both Classes were fair and equitable.

74. The goods at issue in this action are in short supply and for all intents and purposes are custom-made for a limited number of customers (319). Accordingly, monetary damages for reimbursement of the \$9.99 purchase price does not make Plaintiff of Class members whole.

75. Further, Plaintiff and the Class members’ counter performance have been substantially performed (payment), and Topps’ completion of its promise merely requires printing and mailing of the “John” Harrison card.

**COUNT II – ON BEHALF OF THE MISSOURI CLASS
VIOLATION OF MISSOURI MERCHANDISING PRACTICES ACT**

76. Plaintiff incorporates paragraphs 1 – 75 as if fully set forth herein.

77. Plaintiff brings this claim under the Missouri Merchandising Practices Act (“MMPA”), MO. REV. STAT. § 407.010 *et seq.* on behalf of himself and the Missouri Class.

78. At the time of purchase by Plaintiff and the Missouri Class, Topps represented that it was selling a Topps Now No. 264 card, with art on the face of the card displaying the name “John Harrison.”

79. Under its explicit policy, Topps offers all Topps Now cards for a period of 24 hours.

80. Without a public explanation, Topps offered the “John” Harrison card for less than four hours; far less than the required 24 hour period.

81. Instead, without notice, Topps swapped a different card for the “John” Harrison card, after Plaintiff, and others, had purchased the card.

82. As the “Josh” Harrison card is not an error card, it is not as valuable or collectable as an error “John” Harrison card.

83. Further, Topps refused to send the “John” Harrison card to Plaintiff and Missouri Class members.

84. Topps actions and concealment constitute a “deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce,” in violation of the MMPA. See MO. REV. STAT. § 407.020.

85. Topps conduct constitutes deception, fraud, false pretense, false promise and/or misrepresentation at a minimum because Topps (a) displayed the more valuable “John” Harrison card, (b) swapped a less valuable “Josh” Harrison card for the “John” Harrison card, (c) performed the substitution without informing the purchasers, (d) offered the “John” Harrison card for less than the promised 24 hour sales period and (e) attempted to conceal the swap of the less valuable card for the more valuable “John” card from the purchasers and the public.

86. Topps conduct constitutes an unfair practice under the MMPA because it: (a) was unethical, (b) caused substantial injury to consumers, and (c) violated Defendant's duty of good faith by soliciting consumers in a dishonest manner without observing reasonable commercial standards of fair dealing. See 15 C.S.R. § 60-8.

87. Topps conduct constitutes concealment, suppression and/or omission of material facts in that (a) Topps without notice swapped the less valuable card for the more valuable "John" card, (b) attempted to cover up the existence of the more valuable, "John" error card and (c) did not inform the purchasing public that it offered the "John" card for far less than the 24 sales hour period it promised its customers.

88. As a direct and proximate result of Topps wrongful conduct, Plaintiff and the Missouri Class suffered loss by not receiving "John" Harrison trading cards that they would have had received had Topps not engaged in a deception, fraud, false promise, misrepresentation, and unfair practice or had not concealed, suppressed, or omitted material facts concerning the product despite having a duty to disclose such information.

89. Specific performance is proper as the underlying contract was fair and equitable.

90. The goods here are goods in short supply and are (basically) custom-made for a limited number of customers (319). Accordingly, monetary damages for reimbursement of the \$9.99 purchase price does not make Plaintiff or Class members whole.

91. Further, Plaintiff's and the Class's counter performance has been substantially performed (payment), and Topps' completion of its promise merely requires printing and mailing of the card at issue.

**COUNT III – ON BEHALF OF THE NATIONWIDE CLASS
VIOLATION OF NEW YORK CONSUMER PROTECTION ACT**

92. Plaintiff incorporates paragraphs 1 – 91 as if fully set forth herein.
93. Topps offers trading card products, including Topps Now, from its headquarters in New York.
94. Topps has engaged in deceptive acts and practices in and from New York in the conduct of selling the Topps Now trading card at issue.
95. Topps engaged in numerous unfair acts and practices concerning the trading card at issue, including:
- a. Offering the image of a “John” Harrison card, but then swapping a less valuable and desirable “Josh” Harrison card,
 - b. Swapping the less valuable and desirable “Josh” Harrison card without comment, hoping to conceal the substitution from purchasers, consumers and the public, and
 - c. Offering the “John” Harrison card for less than the 24 hour period required by Topps’ policy.
96. Topps’ deceptive acts and practices were consumer oriented and arose from its headquarters in New York.
97. Topps’ practices, as set forth above, were unfair in that:
- a. They constituted a bait and switch by offering a more desirable error card and substituting it with a standard trading card,
 - b. Topps substituted a standard trading card for the more desirable error card without informing the consuming public, thereby hoping to conceal the “John” Harrison card from the public,

- c. Topps performed the substitution in violation of its policy that all Topps Now cards would be available to consumers for a 24 hour period.

98. Topps intended for Plaintiff and the Nationwide Class to rely on its improper substitution and cover up, hoping that the consuming public would not notice the more valuable error card.

99. Topps allowing consumers to purchase a more valuable “John” Harrison card, but then substituting a less valuable “Josh” Harrison card is materially misleading.

100. Topps unfair and deceptive practices occurred during the course of conduct involving trade or commerce, specifically the sale of trading cards.

101. Plaintiff and the Nationwide Class incurred damages due to not receiving a more valuable and desirable “John” Harrison card.

102. Plaintiff and the Nationwide Class’s damages were directly and proximately caused by Topps’ unfair acts and practices.

103. Further, consumers generally are harmed by unfair and deceptive acts of corporations, such as those described above by Topps.

104. Topps’ conduct was addressed to the market generally and otherwise implicates consumer protection concerns and, therefore, a consumer nexus exists in that Topps’ acts of substituting a good of inferior value and less desirability, and attempting to hide that from the consuming public was directed to all individuals who purchased the “John” Harrison trading card.

105. Topps’ acts and practices otherwise implicate consumer protection concerns including, but not limited to, promoting fair and upright business practices.

106. Specific performance is therefore proper as the underlying contract was fair and equitable.

107. The goods here are goods in short supply and are custom-made for a limited number of customers (319). Accordingly, monetary damages for reimbursement of the \$9.99 purchase price does not make Plaintiff of Class members whole.

108. Further, Plaintiff's counter performance has been substantially performed (payment), and Topps' completion of its promise merely requires printing of the card at issue.

109. Finally, reasonable attorneys' fees and costs should be awarded under the New York Consumer Protection Act.

PRAYER FOR RELIEF

In view of the above, Plaintiff requests:

- A. An Order certifying a Nationwide and Missouri class or subclass, as defined at the time of movement for certification, by one or more Plaintiffs, or other parties to be discovered and added to this action, at some later date;
- B. An order finding in favor of Plaintiff and all Class members on all counts;
- C. An order requiring specific performance by Topps (*i.e.*, delivery of a "John" Harrison card) for Plaintiff and all Class Members;
- D. permanently enjoining Topps from continuing to engage in its wrongful conduct, including, but not limited to offering Topps Now cards for less than 24 hours and substituting without notification of cards of higher value for cards of lesser value;
- E. A judgment awarding Plaintiff and all Class members restitution and all other forms of equitable monetary relief, including equitable accounting, disgorgement, constructive trust, and punitive damages;

- F. A judgment awarding Plaintiff and all Class members damages as determined by the Court or jury, including compensatory damages, treble damages, and punitive damages in an amount that is fair and reasonable, yet will serve to deter Topps from similar conduct in the future;
- G. A judgment awarding pre-judgment and post-judgment interest on all monetary sums awarded;
- H. An order awarding reasonable attorneys' fees, expenses, and costs of suit;
- I. An order or judgment not to exceed \$4,999,999.99, in total, for all monetary sums, attorneys' fees, expenses, and costs of suit; and
- J. An order or judgment awarding any such other and further relief as this Court deems just and proper

DEMAND FOR JURY TRIAL

Plaintiff requests a jury trial on all issues so triable.

Respectfully submitted,

By: /s/ Brandon M. Wise
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PUTATIVE CLASSES