

1 Gregory L. Curtner (*Pro Hac Vice*)
curtner@millercanfield.com

2 Robert J. Wierenga (SBN183687)
wierenga@millercanfield.com

3 Kimberly K. Kefalas (*Pro Hac Vice*)
kefalas@millercanfield.com

4 Atleen Kaur (*Pro Hac Vice*)
kaur@millercanfield.com

5 Suzanne L. Wahl (*Pro Hac Vice*)
wahl@millercanfield.com

6 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

7 101 North Main St., 7th Floor

8 Ann Arbor, MI 48104

9 Telephone: (734) 663-2445

Facsimile: (734) 663-8624

10 Jason A. Geller (SBN168149)

11 Glen R. Olson (SBN111914)

12 David Borovsky (SBN 216588)

LONG & LEVIT LLP

465 California Street, 5th Floor

13 San Francisco, CA 94104

14 Telephone: (415) 397-2222

Facsimile: (415) 397-6392

15 Attorneys for Defendant

16 National Collegiate Athletic Association

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **OAKLAND DIVISION**

20 EDWARD C. O'BANNON, JR., on behalf of
 himself and all others similarly situated,

21 Plaintiff,

22 v.

23 NATIONAL COLLEGIATE ATHLETIC
 24 ASSOCIATION (a/k/a the "NCAA"), and
 25 COLLEGIATE LICENSING COMPANY,
 (a/k/a "CLC").

26 Defendants.

Case No. 3:09-cv-03329 CW

**OPPOSITION OF DEFENDANT NCAA
 TO PLAINTIFFS' MOTION FOR
 APPOINTMENT OF INTERIM CO-LEAD
 COUNSEL PURSUANT TO FEDERAL
 RULE OF CIVIL PROCEDURE 23(g)(3)**

Date: November 17, 2009

Time: 2 p.m.

Dept: Courtroom 2, 4th Floor

Judge: Hon. Claudia Wilken

Date Comp. Filed: July 21, 2009

1 Plaintiffs Samuel Keller and Edward O'Bannon, Jr. have filed a Motion asking the Court
2 to appoint the law firms of Hagens Berman Sobol Shapiro LLP and Hausfeld LLP as interim co-
3 lead counsel for the putative classes in *Keller v. Electronic Arts* and *O'Bannon v. NCAA*. The
4 NCAA opposes plaintiffs' motion as premature for several reasons.

5
6 First, it would be premature to appoint Keller's lawyers – Hagens Berman – as "class
7 counsel" when Keller's individual claims are still the subject of motions to dismiss. All three
8 defendants in *Keller* have filed motions to dismiss, which are currently pending before the Court.
9 The motions identify various infirmities in Keller's claims, all of which are fatal to those claims in
10 whole or in part. The NCAA's motion, for example, demonstrates that Keller's claim under the
11 Indiana right of publicity statute fails because Keller has failed to allege that the NCAA has
12 "used" Keller's likeness. The NCAA has also shown that Keller's breach of contract claims fails
13 because Keller has failed to allege facts sufficient to demonstrate formation of the alleged
14 "contract," the terms of the alleged "contract," or breach of the alleged "contract." Finally, the
15 NCAA and the other defendants have demonstrated that Keller's civil conspiracy claim fails for
16 want of a separate, validly alleged underlying tort. Since Keller's own claims seem unlikely to
17 survive the defendants' motions, it would be premature, to say the least, to appoint Keller's
18 lawyers as class counsel.
19

20
21 Second, it would be premature to appoint O'Bannon's lawyers – Hausfeld – as "class
22 counsel" when O'Bannon's individual claims are also the subject of motions to dismiss. Both the
23 defendants in *O'Bannon* have filed motions to dismiss, which are currently pending before the
24 Court. Like Keller, O'Bannon's claims suffer from a variety of infirmities, all of which are fatal
25 to those claims in whole or in part. The NCAA, for example, demonstrates that O'Bannon has
26 failed to allege injury to competition, a relevant market, or that the NCAA has conspired to
27 restrain trade. Additionally, O'Bannon fails to allege that he has actually been restrained from
28

1 selling his images. Finally, O'Bannon's claims are barred by the statute of limitations. Since
2 O'Bannon's own claims, like Keller's, seem unlikely to survive the defendants' motions, it would
3 be premature to appoint O'Bannon's lawyers as class counsel.

4 Third, it would be premature to appoint Keller's or O'Bannon's lawyers as "class counsel"
5 before a class has been certified and, indeed, before either plaintiff has even *moved* to have a
6 class certified. Even a cursory review of either complaint reveals that the claims brought by
7 Keller and O'Bannon, and their purported "classes," are not suitable for class treatment.
8 Moreover, it would obviously be inappropriate to appoint Keller's or O'Bannon's lawyers as class
9 counsel when (1) Keller and O'Bannon's own claims may not make it past the pleadings stage and
10 (2) neither Keller nor O'Bannon has even attempted to carry his burden of showing that class
11 treatment is appropriate in this case. It would waste the Court's and the parties' time to brief and
12 argue these issues at this extremely early juncture in this case. *See, e.g., Webb v. Onizuka*, No.
13 08-00487, 2009 WL 1687492, at *1 (D. Haw. June 15, 2009).

14 Under Fed. R. Civ. P. 23(g), courts normally appoint lead class counsel only *after* a class
15 has been certified. Only under unusual circumstances is it necessary to appoint lead class counsel
16 before the class has been certified. There is no such urgency here. The standard Rule 23(g)
17 schedule should be followed in this case. *See, e.g., Italian Colors Rest. v. Am. Express Co.*, No. C
18 03-3719, 2003 WL 22682482, at *7 (N.D. Cal. Nov. 10, 2003).

19 For all the foregoing reasons, the NCAA respectfully requests that this Court deny as
20 premature Plaintiffs' Motion for appointment of interim co-lead counsel.

21
22
23
24
25 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

26 By: /s/Robert J. Wierenga
27 Robert J. Wierenga (SBN183687)
28 Attorneys for National Collegiate Athletic Association

Dated: October 27, 2009

OPPOSITION TO PLAINTIFFS' MOTION FOR APPOINTMENT OF INTERIM CO-LEAD COUNSEL

Case Nos. 4:09-cv-01967-CW and 3:09-cv-03329 CW

