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 13

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16

17 SAMUEL MICHAEL KELLER

18 Plaintiff,

19 v.

20 ELECTRONIC ARTS, INC.,
 NATIONAL COLLEGIATE
 21 ATHLETICS ASSOCIATION,
 COLLEGIATE LICENSING
 22 COMPANY
 23

24 Defendant.
 25
 26
 27
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Case No. 4:09-cv-1967 CW

**DEFENDANT COLLEGIATE LICENSING
 COMPANY'S MEMORANDUM IN
 OPPOSITION TO PLAINTIFFS KELLER'S
 AND O'BANNON'S JOINT MOTION FOR
 APPOINTMENT OF INTERIM CO-LEAD
 COUNSEL PURSUANT TO FED. R. CIV. P.
 23(g)**

Date: November 17, 2009
 Time: 2:00 p.m.
 Dept: Courtroom 2, 4th Floor
 Judge: Hon. Claudia Wilken

Date Comp. Filed: May 5, 2009 (Keller)
 July 21, 2009 (O'Bannon)

FBE&M

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**MEMORANDUM IN OPPOSITION TO PLAINTIFFS KELLER'S AND O'BANNON'S JOINT MOTION
 FOR APPOINTMENT OF INTERIM CO-LEAD COUNSEL PURSUANT TO FED. R. CIV. P. 23(G)**

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

Plaintiff,

4 v.

5 NATIONAL COLLEGIATE
6 ATHLETIC ASSOCIATION (a/k/a the
7 "NCAA"); and COLLEGIATE
8 LICENSING COMPANY (a/k/a
9 "CLC"),

Defendants.

Case No.: 09-cv-03329 (CW)

Judge: Hon. Claudia Wilken

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 Defendant Collegiate Licensing Company ("CLC") hereby submits this response to
12 Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr's Joint Motion for Appointment
13 of Interim Co-Lead Counsel. (*Keller* Rec. Doc. No. 81; *O'Bannon* Rec. Doc. No. 76.)

14 Plaintiff Keller filed his complaint on May 5, 2009. (*Keller* Rec. Doc. No. 1.) In sum,
15 Plaintiff Keller alleges that CLC conspired with the other Defendants, Electronic Arts, Inc.
16 ("EA") and the National Collegiate Athletics Association ("NCAA"), to use the class members'
17 likenesses without their permission. Currently pending before the Court is each of the
18 Defendant's Motions to Dismiss the *Keller* Complaint for various reasons described therein.
19 (*Keller* Rec. Doc. Nos. 34, 47, 48.)¹ On July 28, 2009, Plaintiff Keller filed a motion seeking the
20 appointment of interim class counsel pursuant to Fed. R. Civ. R. 23(g). (*Keller* Rec. Doc. No.
21 31.) Defendants CLC and NCAA submitted responses to that motion requesting that it be denied
22 as premature. (*Keller* Rec. Doc. Nos. 62, 76). Plaintiff Keller withdrew the motion prior to any
23 decision on September 17, 2009. (*Keller* Rec. Doc. No. 82.)

24 Plaintiff O'Bannon filed his complaint on July 21, 2009. (*O'Bannon* Rec. Doc. No. 1.) In
25 sum, O'Bannon alleges that the NCAA and its members schools, facilitated by CLC, have
26 conspired to force former NCAA athletes to sell the rights to use their names, likenesses, and
27

28 ¹ Those motions are scheduled for oral argument on November 17, 2009.

1 images to the schools for free and to boycott the athletes to prevent schools from offering better
2 terms and prices to these former student-athletes. EA is not a named defendant in the *O'Bannon*
3 complaint. Currently pending before the Court are CLC's and NCAA's Motions to Dismiss the
4 *O'Bannon* Complaint for various reasons described therein. (*O'Bannon* Rec. Doc. Nos. 91, 92.)
5 Also, pending is CLC's and NCAA's Motion to Transfer Venue. (*O'Bannon* Rec. Doc. No. 69).

6 Subsequent to the filing of Plaintiff Keller's initial motion for the appointment of interim
7 lead counsel, it appears that counsel for Plaintiff Keller and counsel for Plaintiff O'Bannon have
8 entered into some type of co-prosecution agreement. The result of which was apparently the
9 withdrawal of Plaintiff Keller's initial motion. This agreement has also resulted in the filing of a
10 joint motion by Plaintiffs Keller and O'Bannon to consolidate *Keller* and *O'Bannon* (*Keller* Rec.
11 Doc. No. 69; *O'Bannon* Rec. Doc. No. 55) and the present motion for appointment of interim co-
12 lead counsel. In the consolidation motion, the Plaintiffs have stated that if it is granted, they
13 intend to file a consolidated amended complaint. For the reasons discussed below, the present
14 motion is premature.

15 Traditionally, courts have not appointed class counsel until a class is certified, if one is
16 certified. In 2003, Federal Rule of Civil Procedure 23 was amended to create a limited exception
17 to this long-established rule. Rule 23(g)(3) provides "the court may designate interim counsel to
18 act on behalf of a putative class before determining whether to certify the action as a class
19 action." The advisory committee's note explains this pre-certification appointment can be made
20 "if necessary to protect the interests of the putative class." Fed. R. Civ. P. 23(g)(3) advisory
21 committee's note to 2003 amendments.²

22 The appointment of interim counsel is usually only necessary where there are numerous
23 cases raising the same issues against the same defendants and there are numerous plaintiffs'
24 counsel competing to represent the same class. For example, the Manual for Complex Litigation
25 states:

26 If the lawyer who filed the suit is likely to be the only lawyer seeking appointment
27 as class counsel, appointing interim class counsel may be unnecessary. *If,*

28 ² At the time of the advisory committee's note, this provision was located at Fed. R. Civ. P. 23(g)(2)(A).

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1 **CERTIFICATE OF SERVICE**

2 I, the undersigned, declare:

3 I am a citizen of the United States and employed in Alameda County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 1999 Harrison Street, Suite 1800, Oakland, California 94612-3520. On the date listed below, I
6 served a copy of the within document(s):

7 **DEFENDANT COLLEGIATE LICENSING COMPANY'S**
8 **MEMORANDUM IN OPPOSITION TO PLAINTIFFS**
9 **KELLER'S AND O'BANNON'S JOINT MOTION FOR**
10 **APPOINTMENT OF INTERIM CO-LEAD COUNSEL**
11 **PURSUANT TO FED. R. CIV. P. 23(g)**

- 10 by transmitting via facsimile the document(s) listed above to the fax number(s) set
11 forth below on this date before 5:00 p.m.
- 12 by placing the document(s) listed above in a sealed envelope with postage thereon
13 fully prepaid, the United States mail at Oakland, California addressed as set forth
14 below.
- 14 by placing the document(s) listed above in a sealed _____ envelope and
15 affixing a pre-paid air bill, and causing the envelope to be delivered to a
16 _____ agent for delivery.
- 16 by personally delivering the document(s) listed above to the person(s) at the
17 address(es) set forth below.
- 18 by transmitting via the CM/ECF system which will send notification to the email
19 addresses registered with the Clerk of the Court.

20 I declare under penalty of perjury under the laws of the State of California that the above
21 is true and correct.

22 Executed on October 27, 2009, at Oakland, California.

23
24 _____
25 /s/Amber M. Trincado
26 AMBER M. TRINCADO

27 05951 34963 ATRINCADO 620365.1