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15  
 16 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**

17 SAMUEL MICHAEL KELLER, on behalf  
 18 of himself and all others similarly situated,

19 Plaintiff,

20 v.

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

24 Defendants.

Case No. CV 09 1967 (CW)

**REPLY MEMORANDUM IN SUPPORT  
 OF PLAINTIFFS SAMUEL MICHAEL  
 KELLER'S AND EDWARD C.  
 O'BANNON, JR.'S 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.  
 Judge: The Hon. Claudia Wilken  
 Courtroom: 2, 4th Floor

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

2  
3 Plaintiff,

4 v.

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

7 Defendants.

Case No. CV 09-3329 (CW)

Judge: Hon. Claudia Wilken

8  
9 Plaintiffs Samuel Michael Keller and Edward C. O'Bannon, Jr. submit this reply to the  
10 Oppositions filed by the National Collegiate Athletic Association ("NCAA") and the Collegiate  
11 Licensing Company ("CLC"), and in support of their motion for appointment of interim co-lead  
12 counsel.

13 Rule 23(g)(3) of the Federal Rules of Civil Procedure provides that a court "may  
14 designate interim counsel to act on behalf of the putative class before determining whether to  
15 certify the action as a class action." Courts may, and routinely do, appoint interim class counsel  
16 prior to class certification, if it is necessary to protect the interests of the putative class. Fed. R.  
17 Civ. P. 23(g)(3) advisory committee's note to 2003 amendments. *See e.g. Levitte v. Google, Inc.*,  
18 Nos. C 08 3369, C 08 3452, C 08 3888, C 08 4701, 2009 WL 482252 at \*2 (N.D. Cal. February  
19 25, 2009); *In re California Title Ins. Antitrust Litig.*, No. 08 1341, 2008 WL 4820752 (N. D. Cal.  
20 November 3, 2008); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 07 5944, MDL 1917,  
21 2008 WL 2024957 at \*2-3 (N.D. Cal. May 9, 2008). Such necessity exists if a number of lawyers  
22 may compete for class counsel appointment because there are a "number of overlapping,  
23 duplicative, or competing suits pending in other courts, and some or all of those suits may be  
24 consolidated..." *Manual for Complex Litigation*, Fourth, § 21.11. "In such cases, designation of  
25 interim counsel clarifies responsibility for protecting the interests of the class during  
26 precertification activities, such as making and responding to motions, conducting any necessary  
27 discovery, moving for class certification and negotiating settlement." *Id.*

1 Contrary to the assertions of the NCAA and the CLC, there is a more than reasonable  
2 expectation that competition to be appointed class counsel will exist between plaintiffs' counsel.  
3 To date, six overlapping, duplicative and competing suits have been filed in this court alleging  
4 substantially similar right of publicity and/or antitrust causes of action involving a conspiracy to  
5 unlawfully use the names and likeness of college basketball and college football student-athletes.<sup>1</sup>  
6 As the most recent case was filed today, it seems likely that more cases may also be filed.  
7 Approximately forty-one (41) separate firms represent plaintiffs in the six actions. Given the  
8 large number of firms involved, it is more than likely that a number of these will pursue  
9 appointment as co-lead counsel. Accordingly, it is necessary to appoint interim co-lead counsel  
10 at this time.

11 It serves the interests of judicial economy and efficiency and the interests of the putative  
12 class to appoint interim counsel now. As noted above, appointment of counsel clarifies  
13 responsibilities in protecting the interests of the class during precertification activities. Approval  
14 of the proposed interim leadership structure will allow for efficient prosecution of this action  
15 through a decision on class certification and appointment of permanent class co-counsel and help  
16 facilitate of any potential settlement discussions that may occur in the future. *See* Advisory  
17 Committee Notes to former Fed. R. Civ. P. 23(g)(2)(A).

18 Approval will provide third parties with assurances that they are dealing with counsel with  
19 authority to negotiate document preservation and production issues. Approving the proposed  
20 interim leadership structure and granting these firms interim co-lead counsel status will provide  
21 all concerned with the requisite indicator that these firms are empowered to act on behalf of the  
22 proposed class.

23 Approval will also allow for the coordinated preparation and filing of a consolidated  
24 amended complaint.

25  
26  
27 <sup>1</sup> In addition to the *Keller* and *O'Bannon* actions, the following cases have been filed: *Bishop v.*  
28 *Electronic Arts, et al.*, Case No. 09-cv-04128 CW; *Newsome v. NCAA, et al.*, Case No. 09-cv-  
04882 CW; *Anderson v. NCAA, et al.*, Case No. 09-cv-5100 BZ; and *Wimprime v. NCAA, et al.*,  
Case No. 09-cv-5134 BZ.

1 Also contrary to Defendants' assertions, it is standard operating procedure to appoint  
2 interim co-lead counsel prior to resolution of motions to dismiss. Regardless of whether motions  
3 to dismiss may or may not be granted, there still exist the issues of amendment of the pleadings,  
4 the efficient prosecution of the other actions, and the need for interim leadership among the  
5 counsel in the various cases. The existence of pending motions to dismiss does not negate the  
6 stated reasons justifying the necessity for appointment.

7 For the foregoing reasons, Plaintiffs respectfully request that this Court appoint Hagens  
8 Berman Sobol Shapiro LLP and Hausfeld LLP as interim co-lead counsel pursuant to Rule  
9 23(g)(3).

11 Dated: November 3, 2009

Respectfully submitted,

13 HAGENS BERMAN SOBOL SHAPIRO LLP

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1 I, Arthur N. Bailey, Jr., am the ECF User whose *ID* and password are being used to file  
2 **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS SAMUEL MICHAEL**  
3 **KELLER'S AND EDWARD C. O'BANNON, JR.'S MOTION FOR APPOINTMENT OF**  
4 **INTERIM CO-LEAD COUNSEL PURSUANT TO FEDERAL RULE OF CIVIL**  
5 **PROCEDURE 23(g)(3).**

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In compliance with General Order 45, X.B., I hereby attest that Robert B. Carey has  
concurred in this filing.

1 **CERTIFICATE OF SERVICE**

2 I, Arthur N. Bailey, Jr., declare that I am over the age of eighteen (18) and not a party to  
3 the entitled action. I am a partner in the law firm of HAUSFELD LLP, and my office is located  
4 at 44 Montgomery Street, Suite 3400, San Francisco, California 94104.

5 On November 3, 2009, I filed the following:

6 **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS SAMUEL MICHAEL**  
7 **KELLER'S AND EDWARD C. O'BANNON, JR.'S MOTION FOR APPOINTMENT**  
8 **OF INTERIM CO-LEAD COUNSEL PURSUANT TO FEDERAL RULE OF CIVIL**  
9 **PROCEDURE 23(g)(3);**

10 with the Clerk of the Court using the Official Court Electronic Document Filing System which  
11 served copies on all interested parties registered for electronic filing.

12 I also certify that I caused true and correct Chambers Copies of the foregoing document(s)  
13 to be hand-delivered to the following Judge pursuant to Civil L.R. 3-12(b) by noon of the  
14 following day:

15 The Hon. Claudia Wilken  
16 U.S.D.C., Northern District of California  
17 Oakland Division  
18 1301 Clay Street, Suite 400 S  
19 Oakland, CA 94612-5212

20 I declare under penalty of perjury that the foregoing is true and correct.

21 /s/ Arthur N. Bailey, Jr.  
22 Arthur N. Bailey, Jr.