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14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **OAKLAND DIVISION**

17 SAMUEL MICHAEL KELLER, et al., on behalf
 of themselves and all others similarly situated,
 18 Plaintiffs,
 v.
 19 ELECTRONIC ARTS, INC.; NATIONAL
 COLLEGIATE ATHLETICS ASSOCIATION;
 20 COLLEGIATE LICENSING COMPANY,
 21 Defendants.

Case No. 4:09-cv-1967 CW

**JOINT FILING OF AMENDED
 SETTLEMENT AGREEMENTS AND
 EXHIBITS THERETO**

Judge: Hon. Claudia Wilken
 Courtroom: 2, 4th Floor
 Complaint Filed: May 5, 2009

22 EDWARD O'BANNON, et al.,
 23 Plaintiffs,
 v.
 24 NATIONAL COLLEGIATE ATHLETIC
 ASSOCIATION; COLLEGIATE LICENSING
 25 COMPANY; and ELECTRONIC ARTS INC.,
 26 Defendants.

Case No. 09-cv-3329 CW

1 This filing is submitted jointly by the Right of Publicity Plaintiffs (“ROP Plaintiffs”),¹
2 Antitrust Plaintiffs,² Ryan Hart, Electronic Arts Inc. (“EA”), and the National Collegiate Athletic
3 Association (“NCAA”) (collectively, “the Parties”), pursuant to the Court’s request.

4 I. BACKGROUND

5 After reaching agreement on a proposed class action settlement, the ROP Plaintiffs,
6 Antitrust Plaintiffs, EA, and Ryan Hart filed their proposed settlement papers with the Court on
7 May 30, 2014. (Keller Dkt. 1108.) Likewise, after reaching agreement on a proposed class action
8 settlement, the ROP Plaintiffs and the NCAA filed their proposed settlement papers with the Court
9 on June 30, 2014. (Keller Dkt. 1138.)

10 On July 3, 2014, the Court held a telephonic status conference and provided comments on
11 the Parties’ proposed class notices and claim form. The Court requested that the Parties submit
12 revised settlement papers, and rescheduled the Preliminary Approval Hearing for both Settlements
13 to July 24, 2014, at 2:00 p.m. In an effort to address the Court’s comments³ and to harmonize the
14 provisions of their respective settlements in order to streamline the class notice and claims process,
15 the Parties have revised their settlement papers, and attach hereto the exhibits listed below in
16 Section III.⁴ In addition to the attached exhibits, Class Counsel will, by July 23, 2014, be

17 ¹ The ROP Plaintiffs are: Samuel Michael Keller, Bryan Cummings, LaMarr Watkins, Bryon
18 Bishop, Shawne Alston, and Ryan Hart.

19 ² The Antitrust Plaintiffs are: Edward C. O’Bannon Jr., Oscar Robertson, William Russell, Harry
20 Flournoy, Alex Gilbert, Sam Jacobson, Thad Jaracz, David Lattin, Patrick Maynor, Tyrone
21 Prothro, Damien Rhodes, Eric Riley, Bob Tallent, Danny Wimprine, Ray Ellis, Tate George,
22 Jake Fischer, Jake Smith, Darius Robinson, Moses Alipate and Chase Garnham.

23 ³ During the status conference, the Court commented regarding the proposed “appeal” process by
24 which claimants may contest their claims decisions (*see* Paragraph 62(g) of the NCAA
25 Settlement Agreement (Ex. 2) and Paragraph 76(g) of the EA Settlement Agreement (Ex.
26 1)). The Parties wish to clarify that the appeal process does not provide for automatic appeals to
27 the Court. Instead, claimants are required to submit an appeal initially to the Notice and Claims
28 Administrator, who, working with Class Counsel, will use its best efforts to reach a resolution
with the objecting claimant. Only if a resolution cannot be reached may the claimant (if he
chooses) appeal that decision to the Court. Furthermore, the Court may, in its sole discretion,
refer the appeal to a Magistrate Judge, special master, or other person.

⁴ In addition, pursuant to Federal Rule of Civil Procedure 23(e)(3), the NCAA informs the Court
of a confidential agreement between the NCAA, EA, and CLC (described in Paragraph 49 of
the NCAA Settlement Agreement). At the Court’s request, the NCAA will provide a copy of
that agreement for the Court’s *in camera* review.

1 submitting a supplement to the motions and memoranda in support of preliminary approval of the
2 settlements.

3 As the Court is aware, on July 11, 2014, the Court granted the joint motion of EA and the
4 ROP Plaintiffs for an order for an indicative ruling under FRCP 62.1 so that the parties could
5 request a limited remand from the Ninth Circuit. (Dkt. 1152.) On July 16, 2014, EA and the ROP
6 Plaintiffs alerted the Ninth Circuit of the Court's Order and request a limited remand for the
7 purposes of considering the settlement. As of the date and time of this filing, the Ninth Circuit has
8 not acted upon the parties' request.

9 II. OUTSTANDING DISPUTE

10 Despite the Parties' best efforts, they were unable to agree on the exact language of the
11 Notices. The Parties agree to the *plan* of notice, but disagree about a sentence in the Notices, as
12 related to the *O'Bannon* trial. The Parties propose two alternative statements, because the NCAA
13 and ROP Plaintiffs do not agree with Antitrust Plaintiffs' position that the NCAA settlement does
14 not affect the injunctive relief claims of the Antitrust Class. The two alternatives are:

15 **Alternative 1** [proposed by ROP Plaintiffs and the NCAA]:

16 You may have heard recently about a trial in a case by student-athletes (led by
17 Edward O'Bannon) against the NCAA. Although the trial involved claims that
18 the NCAA used student-athlete likenesses without permission, those claims
19 were against the NCAA only for violations of antitrust laws. Also unlike the
20 claims being resolved by this settlement, the claims in the trial did not involve
21 claims for cash payments.

22 **Alternative 2** [proposed by Antitrust Plaintiffs]:

23 You may have heard recently about a class-action trial involving student-
24 athletes (led by Ed O'Bannon) against the NCAA. Although the trial involved
25 claims that the NCAA used student-athlete likenesses without permission,
26 those claims were against the NCAA only, for violations of antitrust laws.
27 Additionally, that trial concerned a request for injunctive relief (a court order
28 discontinuing certain practices)—not cash payments for past conduct. The "EA
Videogame Settlement" and the "NCAA Videogame Settlement" do not affect
the injunctive claims recently tried in the *O'Bannon v. NCAA* case.

1 **Antitrust Plaintiffs’ Position:**

2 Antitrust Plaintiffs intend to submit a short statement to the Court detailing their position that
3 the release contained in the NCAA Videogame settlement cannot release or otherwise affect the
4 injunctive claims encompassed by the *O’Bannon* trial. The two alternatives differ substantively
5 only in the final sentence of Alternative 2. The Antitrust Plaintiffs propose the following as the
6 final sentence:

7 The EA Videogame Settlement” and the “NCAA Videogame Settlement” do
8 not affect the injunctive claims recently tried in the *O’Bannon v. NCAA* case.

9 **ROP Plaintiffs’ Position:**

10 The ROP Plaintiffs believe this statement is not correct in that the release may affect the
11 injunctive claims recently tried in the *O’Bannon v. NCAA* case to the extent they relate to
12 videogames manufactured and distributed by Defendants Electronic Arts. The ROP Plaintiffs
13 believe that the release should not affect any prospective injunction issued by this Court, but cannot
14 agree to the statement set forth by the Antitrust Plaintiffs, and therefore believe that the first
15 alternative paragraph is the proper statement to send to class members.

16 This same language and dispute about the scope of the release contained in the NCAA
17 Videogame Settlement is noted in the proposed Joint Notices.

18 **NCAA’s Position:**

19 The NCAA agrees with the ROP Plaintiffs that the language proposed by the Antitrust
20 Plaintiffs is not correct. A settlement can affect pending claims, and before the start of the
21 *O’Bannon* trial, the NCAA settled and resolved all EA Videogame claims with the lead counsel
22 appointed to oversee the development and resolution of those claims in *In re NCAA Student-Athlete*
23 *Name & Likeness Licensing Litigation*. The NCAA settled in order to achieve resolution of all
24 claims relating to the alleged use of student-athletes’ names, images, and likenesses in EA
25 Videogames. The Antitrust Plaintiffs presented evidence relating to EA Videogames in the
26 *O’Bannon* trial, but their choice to present this evidence does not negate the NCAA’s settlement of
27 EA Videogame claims. A class settlement can compromise and release all claims relating to a
28

1 particular subject—here, collegiate-themed videogames. The NCAA agrees that the Court has
2 jurisdiction over these matters.

3 To the extent the Court determines that additional information about the *O'Bannon* trial is
4 required for the Notices, the NCAA proposes the following as an alternative to the Antitrust
5 Plaintiffs' proposal, to be inserted at the end of Alternative 1:

6 The NCAA believes that the *O'Bannon* antitrust injunction claims are covered
7 by the NCAA Videogame Settlement. The *O'Bannon* Plaintiffs believe that
8 they are not. The Parties agree that the Court has the authority to decide these
9 issues.

10 III. LIST OF EXHIBITS

11 Below is a list of the exhibits attached hereto, which represent the revised Joint Notices and
12 claim form requested by the Court, together with the Parties' amended settlement agreements.

13 **Ex. 1 – Amended EA Settlement Agreement, including the following exhibits:**

14 Ex. A – Proposed EA Preliminary Approval Order [AMENDED]

15 Ex. B – Draft Mailed Notice (with disputed language highlighted) [AMENDED]

16 Ex. C – Draft Published Notice (with disputed language highlighted) [AMENDED]

17 Ex. D – Draft Claim Form [AMENDED]

18 Ex. E – Fourth Consolidated Amended Class Action Complaint
19 [SAME AS ORIGINAL FILING]

20 Ex. F – Alston Consent Order & Stip. To Stay Proceeding and Request for Voluntary
21 Dismissal [SAME AS ORIGINAL FILING]

22 Ex. G – Hart Consent Order & Stip. To Stay Proceeding and Request for Voluntary
23 Dismissal [SAME AS ORIGINAL FILING]

24 **Ex. 2 – Amended NCAA Settlement Agreement, including the following exhibits:**

25 Ex. A – Proposed NCAA Preliminary Approval Order [AMENDED]

26 Ex. B – Draft Mailed Notice [AMENDED]

27 Ex. C – Draft Published Notice [AMENDED]

28 Ex. D – Draft Claim Form [AMENDED]

Ex. 3 – JOINT Amended Draft Mailed Notice (with disputed language highlighted)

Ex. 4 – JOINT Amended Draft Published Notice (with disputed language highlighted)

Ex. 5 – JOINT Amended Draft Claim Form (approved by all Parties)

1 Dated: July 23, 2014

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on July 24, 2014, I electronically filed the foregoing with the Clerk of
3 the Court using the CM/ECF system which will send notification of such filing to the e-mail
4 addresses registered, and I hereby certify that I have mailed the foregoing document or paper via
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