

Robert B. Carey (*pro hac vice*)  
 Leonard W. Aragon (*pro hac vice*)  
 HAGENS BERMAN SOBOL SHAPIRO LLP  
 2425 East Camelback Road, Suite 650  
 Phoenix, Arizona 85016  
 Tel: (602) 840-5900  
 Fax: (602) 840-3012  
 Email: rcarey@hbsslaw.com  
 leonard@hbsslaw.com

*Counsel for Plaintiffs in Keller Action*

Michael P. Lehmann (Cal. Bar No. 77152)  
 Jon T. King (Cal. Bar No. 205073)  
 Arthur N. Bailey, Jr. (Cal. Bar No. 248460)  
 HAUSFELD LLP  
 44 Montgomery Street, 34th Floor  
 San Francisco, CA 94104  
 Tel: (415) 633-1908  
 Fax: (415) 358-4980  
 Email: mlehmann@hausfeldllp.com  
 jking@hausfeldllp.com  
 abailey@hausfeldllp.com

*Counsel for Plaintiffs in O'Bannon Action*

[Additional counsel listed on signature page]

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

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

Plaintiff,

v.

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

Defendants.

Case No. CV 09 1967 (CW)

**PLAINTIFFS SAMUEL MICHAEL  
 KELLER'S AND EDWARD C.  
 O'BANNON, JR.'S NOTICE OF JOINT  
 MOTION AND MOTION TO  
 CONSOLIDATE ACTIONS**

Date: October 8, 2009  
 Time: 2:00 p.m.  
 Judge: The Hon. Claudia Wilken  
 Courtroom: 2, 4th Floor

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

3 Plaintiff,

4 v.

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

8 Defendants.

Case No. CV 09-3329 (CW)

Judge: Hon. Claudia Wilken

9 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

10 Please take notice that on October 8th at 2:00 p.m. or as soon as the matter may be  
11 heard before the Honorable Claudia Wilken of the United States District Court for the Northern  
12 District of California, Oakland Division, Courtroom 2, 4th Floor, 1301 Clay Street, Oakland,  
13 California 94612, Plaintiffs Samuel Michael Keller and Edward Charles O'Bannon, Jr.  
14 ("Plaintiffs") will and hereby do jointly move pursuant to Rule 42 of the Federal Rules of Civil  
15 Procedure for an order consolidating their actions.

16 Plaintiffs seek consolidation because, as explained herein, their actions "involve a  
17 common question of law or fact." Fed. R. Civ. Proc. 42. Consolidation will therefore promote  
18 efficiency by avoiding duplication and preventing inconsistent adjudications. Both Plaintiffs are  
19 entitled to amend their complaints as a matter of right, and desire to do so in the form of a  
20 consolidated amended complaint. Defendants' pending motions to dismiss and strike in the  
21 *Keller* action therefore are moot and not a proper basis for a claim of prejudice. Moreover, their  
22 work on those motions is likely to be useful with respect to future dismissal attempts in the  
23 consolidated matter.

24 This Motion is based on this notice of motion, motion, the supporting memorandum of  
25 points and authorities, and any other papers filed in this action.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF ISSUES TO BE DECIDED.**

3 Pursuant to Civil L.R. 7-4, Plaintiffs Samuel Michael Keller and Edward C. O'Bannon, Jr.  
4 (collectively, "Plaintiffs"), plaintiffs in the two above-captioned actions (the "*Keller*" and  
5 "*O'Bannon*" actions, respectively), state that the issue to be decided is whether the *Keller* and  
6 *O'Bannon* actions should be consolidated pursuant to Rule 42 of the Federal Rules of Civil  
7 Procedure.  
8

9 **II. INTRODUCTION.**

10 Plaintiffs respectfully request that this Court issue an Order consolidating their cases, both  
11 of which are pending in this Court. As further described below, both actions are putative  
12 nationwide class actions brought on behalf of similar groups of current and former collegiate  
13 student-athletes who compete or competed in men's Division I basketball and football pursuant to  
14 the rules of the National Collegiate Athletic Association (the "NCAA") and whose images have  
15 been licensed and/or used without consent and compensation. The actions share two common  
16 defendants (the NCAA and the Collegiate Licensing Company), a common co-conspirator in  
17 Electronic Arts, and contain overlapping factual allegations. Consequently, the litigation of the  
18 cases will undoubtedly involve common witnesses, experts, and discovery.  
19

20 Moreover, in the *O'Bannon* action, the NCAA and the CLC have already agreed to a  
21 schedule relating to motion to dismiss briefing that envisions Plaintiff filing an amended  
22 complaint. At minimum, Plaintiff O'Bannon expects to add Electronic Arts as a defendant, which  
23 will further increase the overlap between the two actions. With respect to Plaintiff Keller, he also  
24 is entitled as a matter of right to amend his complaint because Defendants have not filed answers.  
25 *See* Fed. R. Civ. Proc. 15(a)(1) (plaintiff "may amend its pleading once as a matter of course:  
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1 (A) before being served with a responsive pleading; . . .”); Fed. R. Civ. Proc. 7(a) and 7(b)  
2 (distinguishing between pleadings and motions).<sup>1</sup>

3 Plaintiffs desire to exercise their rights to amend by filing a consolidated amended  
4 complaint. Defendants’ pending motions to dismiss and strike in the *Keller* action therefore are  
5 moot and not a proper basis for a claim of prejudice. Moreover, their work on those motions is  
6 likely to be useful with respect to future dismissal attempts in the consolidated matter.  
7

8 Significantly, this Court has already determined in its Related Case Order dated August  
9 11, 2009 that the two actions are related. *See Keller* Dkt. Entry No. 59; *O’Bannon* Dkt. Entry No.  
10 27). In issuing that Order, the Court implicitly found that the *Keller* and *O’Bannon* actions  
11 “concern substantially the same parties, property, transaction or event,” and that “[i]t appears  
12 likely that there will be an unduly burdensome duplication of labor and expense or conflicting  
13 results if the cases are conducted before different Judges.” Civil L.R. 3-12 (“Related Cases”).  
14

15 As the Manual for Complex Litigation, Fourth, notes, “[a]ll related civil cases pending in  
16 the same court should initially be assigned to a single judge to determine whether consolidation,  
17 or at least coordination of pretrial proceedings, is feasible and is likely to reduce conflicts and  
18 duplication.” Manual for Complex Litigation, Fourth (“MCL 4th”), § 20.11. Following the  
19 issuance of the Related Case Order, Plaintiffs’ counsel met and conferred on how the two actions  
20 might proceed together in the most efficient and expeditious way possible, and concluded that the  
21 actions should be consolidated pursuant to Rule 42 of the Federal Rules of Civil Procedure.<sup>2</sup>  
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25 <sup>1</sup> See also Advisory Committee Notes to 2009 Amendments to Fed. R. Civ. Proc. 15 (discussing amendments  
26 not effective until December 1, 2009, and noting that prior to December 1, 2009, “[s]erving a motion attacking the  
pleading did not terminate the right to amend, because a motion is not a ‘pleading’ as defined in Rule 7.”).

27 <sup>2</sup> Plaintiffs have conferred with counsel for Defendants, and they do not agree that the actions should be  
28 consolidated. See accompanying Declaration of Jon T. King (“King Decl., ¶ 3).

1 Accordingly, Plaintiffs respectfully request that the Court consolidate the two actions as  
2 permitted under Rule 42(a) to further effect substantial preservation of time, effort, and resources  
3 of the Court and the parties, as well as to avoid potentially inconsistent adjudications.

### 4 **III. STATEMENT OF FACTS.**

#### 5 **A. DESCRIPTION OF THE *KELLER* AND *O'BANNON* ACTIONS.**

6 The *Keller* and *O'Bannon* actions both are putative nationwide class actions brought on  
7 behalf of similar groups of current and former collegiate student-athletes who compete or  
8 competed in men's Division I basketball and football pursuant to the rules of the NCAA and  
9 whose images have been licensed and/or used without consent and compensation. The *O'Bannon*  
10 complaint sets forth two classes: the "Declaratory and Injunctive Relief Class" includes both  
11 current and former student-athletes who compete on, or competed on, NCAA men's "Division I"  
12 basketball and football teams, and the "Damages Class" includes only former student-athletes that  
13 competed on those teams. See *O'Bannon* Compl., ¶ 43. The *Keller* complaint's putative class  
14 also is confined to basketball and football, and includes both current and former student-athletes  
15 who participated in those sports. See *Keller* Compl., ¶58.

16 Both actions name the NCAA as a defendant, and also name as a defendant the Collegiate  
17 Licensing Company ("CLC"), the NCAA's licensing arm. In *Keller*, the complaint also names  
18 the video-game manufacturer Electronic Arts, Inc. ("EA") as a defendant, and in *O'Bannon*, the  
19 complaint names EA as a non-defendant co-conspirator. See *O'Bannon* Compl., ¶ 38. Both  
20 actions assert that the defendants unlawfully utilized class members' images in basketball and  
21 football-themed video games. See *O'Bannon* Compl., ¶¶ 135-148; *Keller* Compl., ¶¶ 11-53.  
22 The *O'Bannon* complaint further asserts claims related to the alleged unlawful licensing and use  
23 of players' images in other formats including DVDs offered for sale and rental, photos, video on-  
24 demand services, "stock footage" sold to corporate advertisers and other purchasers for use in  
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1 commercials and other end-products, apparel sales, and rebroadcasts of “classic” games on  
2 television.

3         The *O’Bannon* and *Keller* complaints both assert causes of action for unjust enrichment.  
4 Both actions also reference class members’ deprivation of their right of publicity -- in the *Keller*  
5 case as a part of its first, second, and third causes of action under various Indiana and California  
6 statutes and common law, and in the *O’Bannon* action as an element of damages. *See O’Bannon*  
7 *Compl.*, ¶¶ 15-16. Both complaints also set forth theories of conspiracy. The *Keller* complaint  
8 lists a state-law based “civil conspiracy” cause of action alleging that Defendants NCAA, CLC,  
9 and EA “have conspired and combined with each other, and possibly with third parties, to use  
10 class members’ likenesses without permission.” *Keller Compl.*, ¶ 79. The *O’Bannon* complaint  
11 similarly alleges, as a part of its federal antitrust cause of action, that Defendants NCAA and CLC  
12 have conspired with EA, the NCAA’s member schools and conferences, and unnamed third  
13 parties. *See, e.g., O’Bannon Compl.*, ¶ 38-39.

14         The *O’Bannon* and *Keller* cases also both reference Defendant NCAA’s standardized  
15 forms relating to use of student-athletes’ likeness, and the NCAA’s rules regarding same, as being  
16 important items of evidence. *See, e.g., O’Bannon Compl.*, at ¶¶ 61-66; *Keller Compl.*, ¶ 14.

17         The *O’Bannon* and *Keller* actions clearly concern substantially the same parties (the  
18 NCAA and the CLC), property (student-athletes’ and former student-athletes’ rights in the future  
19 commercial use of their images), and transactions (the sale and licensing of student-athletes’  
20 images and products containing same).

21         While the *O’Bannon* action is a broader case in terms of relevant product lines at issue  
22 and the *Keller* action is broader in the number of defendants sued, both cases involve overlapping  
23 classes, overlapping factual allegations and common questions of law. As a result, both will  
24 undoubtedly involve overlapping witnesses, experts, and discovery. There will certainly be an  
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1 unduly burdensome duplication of labor and expense if the cases are conducted independently.  
2 Consolidating the actions will also avoid conflicting results arising out of the same set of  
3 allegations, and will promote the just and efficient conduct of the actions.

4 More specifically, both cases will involve examining the alleged use of class members'  
5 images with respect to EA's videogames, and both cases will focus on determining the relevant  
6 roles of Defendants NCAA and CLC in that process. Clearly substantial discovery will result  
7 regarding the usage of player images in video-games. It would be highly inefficient to have  
8 litigation proceeding in multiple actions and addressing identical issues at the various stages of  
9 these matters, including in the discovery, motion to dismiss, class certification, summary  
10 judgment, and trial portions of these actions.

#### 11 **B. PROCEDURAL STATUS OF THE ACTIONS.**

12 Both the *Keller* and *O'Bannon* actions are in their nascent stages. On May 5, 2009,  
13 Plaintiff Keller filed his complaint. On July 29, 2009, Defendants NCAA, EA and CLC filed  
14 motions to dismiss. *See Keller* Dkt. Entry Nos. 34, 47, and 48. Defendant EA also filed a  
15 "Special Motion to Strike Pursuant to Cal. Code Civ. Proc. § 425.16." *Keller* Dkt. Entry No. 35.  
16 Plaintiff Keller's opposition briefs are due on September 1, 2009, Defendants' reply briefs are  
17 due on September 18, 2009, and the hearing is set for October 1, 2009. *See Keller* Dkt. Entry No.  
18 68. A Case Management Conference also is set for that date.<sup>3</sup> *See id.* Because Defendants have  
19 not answered the complaint, Plaintiff Keller may file an amended complaint as a matter of right.

20 In the *O'Bannon* action, Plaintiff O'Bannon filed his complaint on July 21, 2009.  
21 Pursuant to agreement with Defendants NCAA and CLC and a soon to be filed stipulation,  
22 Plaintiff O'Bannon's amended complaint would be due to be filed on September 11, 2009, with

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27 <sup>3</sup> Plaintiffs understand that one or more defense counsel may be unavailable on October 8, 2009, the hearing  
28 date set for the instant Motion, and suggested to Defendants' counsel that the parties confer regarding moving the  
hearing date to October 1, 2009. *See King* Decl., ¶ 4.

1 Defendants' motions to dismiss due 45 days later. *See* King Decl., ¶ 5. A Case Management  
2 Conference is set for November 17, 2009. *See O'Bannon* Dkt. Entry No. 36.

3 Defendants' briefing in connection with their motions to dismiss and EA's motion to  
4 strike undoubtedly will be of use to them in connection with their expected similar efforts to  
5 dismiss any consolidated amended complaint; no inefficiency or prejudice will result by  
6 consolidating the *Keller* and *O'Bannon* actions.

#### 8 **IV. ARGUMENT.**

9 Plaintiffs request that their respective actions be consolidated pursuant to the Court's  
10 authority under Federal Rule of Civil Procedure 42(a). Rule 42(a) provides that, "[i]f actions  
11 before the court involve a common question of law or fact, the court may: (1) join for hearing or  
12 trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other  
13 orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a). Subsection (b) of Rule 42  
14 further provides a court with flexibility to "order a separate trial of one or more separate issues,  
15 claims, crossclaims, counterclaims, or third-party claims."

17 As the Manual for Complex Litigation, Fourth notes, "[c]ontrol over the proliferation of  
18 cases and coordination of multiple claims is crucial to effective management of complex  
19 litigation." MCL 4th, § 20. A district court has "broad discretion" to consolidate in whole or in  
20 part cases pending in the same district. *See Pierce v. County of Orange*, 526 F.3d 1190, 1203 (9th  
21 Cir. 2008) *cert. denied* 129 S.Ct. 597, 172 L.Ed.2d 456; *Investors Research Co. v. United States*  
22 *District Court for the Central District of California*, 877 F.2d 777, 777 (9th Cir. 1989). However,  
23 it is necessary that the actions have a common question of law or fact. *See Enterprise Bank v.*  
24 *Saettele*, 21 F.3d 233, 235 (8th Cir. 1994). The purpose of consolidation is not only to enhance  
25 efficiency of the trial court by avoiding unnecessary duplication of evidence and procedures, but  
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28



1 also to avoid inconsistent adjudications. *See E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir.  
2 1998).

3 As detailed above in Section III regarding the description of the *Keller* and *O'Bannon*  
4 actions, there are substantial areas of overlap between the two cases that merit consolidation. To  
5 the extent that differences in legal theories or factual allegations exists, they will be resolved by  
6 the joint preparation and filing of a consolidated amended complaint that will streamline and  
7 centralize claims into one pleading.  
8

9 The parties' intention to jointly file a consolidated amended complaint will moot any  
10 currently existing variations in their legal claims and defendants. But in any case, consolidation  
11 has been found to be appropriate in this District despite variations in legal claims and defendants.  
12 *See, e.g., Weisz v. Calpine Corp.*, No. 4:02-CV-1200, 2002 WL 32818827, at \*2 -3 (N.D. Cal.,  
13 Aug. 19, 2002) (Armstrong, J.) ("*Weisz*"). In *Weisz*, the Court, in consolidating multiple actions,  
14 stated the following:  
15

16 [A party] contends that consolidation of his complaint with the  
17 remaining actions is inappropriate in light of the different claims  
18 alleged . . . Since different pleading requirements and standards of  
19 proof apply to these claims, [the party] asserts that the better  
20 course of action is to keep these claims separate . . . [T]he  
21 differences inherent in bondholder versus shareholder claims are  
22 outweighed by the fact that the claims alleged in [one of the  
23 actions] and the remaining actions are based on the same alleged  
24 course of conduct. [citation omitted]. As such, the Court is not  
25 convinced by [the party's] contention that differences in the  
26 pleading and evidentiary burdens . . . are sufficient to avoid  
27 consolidation.

28 . . .

Finally, [the party] contends that his action includes the bond  
underwriters as defendants, who are not joined in the other  
actions. As above, this fact is not a persuasive basis for  
preventing consolidation. [citation omitted]. . . .

The factual allegations underlying these lawsuits are essentially  
identical with respect to the underlying alleged misconduct.

1 Despite some differences and unique issues presented in [one of  
2 the actions], the Court finds that such distinctions are far  
3 outweighed by the benefits of consolidation. The Court further  
4 finds that given the common questions of law or fact, and in light  
of the interests of avoiding unnecessary costs or delays,  
consolidation is proper.

5 Consolidation is appropriate despite the pendency of Defendants' motions to dismiss the  
6 *Keller* matter. This Court, in another matter, granted a motion to consolidate despite the prior  
7 filing of motions to dismiss. *See Monolithic Power Systems, Inc. v. O2 Micro Intern. Ltd.*, Nos. C  
8 04-2000 CW, C 06-2929 CW, 2006 WL 2329466, at \*1 (N.D.Cal., Aug. 9, 2006) (Wilken, J.)  
9 (consolidating actions on "judicial efficiency" grounds and noting that certain defendants "object  
10 to the prosecution of these cases against them, and, accordingly, have filed motions to dismiss."").  
11 Indeed, because Plaintiff Keller has the right to file an amended complaint without leave of the  
12 Court anyway, consolidation and the filing of an amended complaint cannot prejudice  
13 Defendants.  
14

15 Absent consolidation, it is likely that duplicative motions to dismiss will be prepared and  
16 filed. Moreover, the various class plaintiffs will likely file overlapping motions for class  
17 certification without consolidation and a coordinated briefing schedule. Consolidation will also  
18 help facilitate an efficient discovery process that will inure to the benefit of the parties and the  
19 Court.  
20

## 21 **V. LOGISTICS OF CONSOLIDATION.**

22 The Manual for Complex Litigation, Fourth, recommends the following:

23 When cases are coordinated or consolidated, the court should  
24 enter an order establishing a master file for the litigation in the  
25 clerk's office, relieving the parties from multiple filings of the  
26 same pleadings, motions, notices, orders, and discovery materials,  
27 and providing that documents need not be filed separately in an  
28 individual case file unless uniquely applicable to that particular  
case.

1 MCL 4th, § 20.11. Here, Plaintiffs propose that the Court establish a master file for the litigation  
2 and that the consolidated action bear the name “*In re NCAA Student-Athlete Name & Likeness*  
3 *Licensing Litigation.*”

4 Plaintiffs further propose to jointly file a consolidated amended complaint within 10 days  
5 of the issuance of any Order consolidating the actions. Plaintiffs also intend to soon file for the  
6 Court’s consideration a motion for appointment of interim class counsel pursuant to Fed. R. Civ.  
7 P. 23(g)(3), so that an interim class counsel leadership structure can be in place by the time of the  
8 filing of any consolidated amended complaint that the Court may authorize.  
9

## 10 VI. CONCLUSION.

11 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion  
12 to consolidate the above referenced actions onto a single docket and subject to a single scheduling  
13 order, and enter the attached Proposed Order that further provides that a consolidated amended  
14 complaint shall be filed within 10 days of the date of the Order.  
15

16 Dated: September 1, 2009

Respectfully submitted,

18 HAGENS BERMAN SOBOL SHAPIRO LLP

HAUSFELD LLP

19 /s/ Robert B. Carey

/s/ Jon T. King

20 Robert B. Carey (*pro hac vice*)  
21 Leonard W. Aragon (*pro hac vice*)  
22 2425 East Camelback Road, Suite 650  
Phoenix, Arizona 85016  
23 Telephone: (602) 840-5900  
Facsimile: (602) 840-3012  
24 rcarey@hbsslaw.com  
leonard@hbsslaw.com

25 *Counsel for Plaintiff Samuel Michael Keller*  
26

Michael P. Lehmann (Cal. Bar No. 77152)  
Jon T. King (Cal. Bar No. 205073)  
Arthur N. Bailey, Jr. (Cal. Bar No. 248460)  
44 Montgomery Street, 34th Floor  
San Francisco, CA 94104  
27 Tel: (415) 633-1908  
Fax: (415) 358-4980  
Email: mlehmann@hausfeldllp.com  
jking@hausfeldllp.com  
28 abailey@hausfeldllp.com

*Counsel for Plaintiff Edward Charles  
O’Bannon, Jr.*

1 Steve Berman (*pro hac vice*)  
2 HAGENS BERMAN SOBOL SHAPIRO  
3 LLP  
4 1301 Fifth Avenue, Suite 2900  
5 Seattle, Washington 98101  
6 Telephone: (206) 623-7292-  
7 Facsimile: (206) 623-0594  
8 *steve@hbsslaw.com*

6 Shana E. Scarlett (Cal. Bar No. 217895)  
7 HAGENS BERMAN SOBOL SHAPIRO  
8 LLP  
9 715 Hearst Avenue, Suite 202  
10 Berkeley, CA 94710  
11 Telephone: (510) 725-3000  
12 Facsimile: (510) 725-3001  
13 *shanas@hbsslaw.com*

11 *Additional Counsel for Plaintiff Samuel*  
12 *Michael Keller*

13 Michael D. Hausfeld (*pro hac vice*)  
14 Megan E. Jones (*pro hac vice*)  
15 HAUSFELD LLP  
16 1700 K Street, NW, Suite 650  
17 Washington, DC 20006  
18 Tel: (202) 540-7200  
19 Fax: (202) 540-7201  
20 Email: *mhausfeld@hausfeldllp.com*  
21 *mjones@hausfeldllp.com*

20 John F. Cove, Jr. (Cal. Bar No. 212213)  
21 BOIES, SCHILLER & FLEXNER LLP  
22 1999 Harrison Street, Suite 900  
23 Oakland, CA 94612  
24 Tel: (510) 874-1000  
25 Fax: (510) 874-1480  
26 Email: *jcove@bsfllp.com*

Stuart M. Paynter (Cal. Bar. No. 226147)  
THE PAYNTER LAW FIRM PLLC  
1200 G Street N.W., Suite 800  
Washington DC 20005  
Telephone: (202) 626-4486  
Facsimile: (866) 734-0622  
*stuart@smplegal.com*

William A. Isaacson (*pro hac vice*)  
Tanya Chutkan (*pro hac vice*)  
Jack Simms (*pro hac vice*)  
BOIES, SCHILLER & FLEXNER LLP  
5301 Wisconsin Avenue, 8th Floor  
Washington, DC 20015  
Tel: (202) 237-2727  
Fax: (202) 237-6131  
Email: *wisaacson@bsfllp.com*  
*tchutkan@bsfllp.com*  
*jsimms@bsfllp.com*

Jonathan W. Cuneo  
Daniel M. Cohen  
CUNEO GILBERT & LaDUCA LLP  
507 C Street NE  
Washington, D.C. 20002  
Tel: (202) 789-3960  
Fax: (202) 789-1813  
Email: *jonc@cuneolaw.com*  
*danielc@cuneolaw.com*

Vincent J. Esades  
HEINS MILLS & OLSON, P.L.C.  
310 Clifton Avenue  
Minneapolis, MN 55403  
Tel: (612) 338-4605  
Fax: (612) 338-4692  
Email: vesades@heinsmills.com

Daniel S. Mason (Cal. Bar No. 54065)  
ZELLE HOFMANN VOELBEL & MASON  
LLP  
44 Montgomery Street, Suite 3400  
San Francisco, CA 94104  
Tel: (415) 693-0700  
Fax: (415) 693-0770  
Email: dmason@zelle.com

Mitchell J. Rapp (Michigan Bar No. P43081)  
Shawn D. Stuckey (MN Bar No. 0388976)  
ZELLE HOFMANN VOELBEL & MASON  
LLP  
500 Washington Avenue South, Suite 400  
Minneapolis, MN 55415  
Telephone: (612) 339-2020  
Facsimile: (612) 336-9100  
Email: mrapp@zelle.com  
sstuckey@zelle.com

Brian M. Sund  
Joshua G. Hauble  
MORRISON FENSKE & SUND, P.A.  
5125 County Road 101, Suite 202  
Minnetonka, MN 55345  
Tel: (952) 975-0050  
Fax: (952) 975-0058  
Email: bsund@morrisonsfenske.com  
jhauble@morrisonsfenske.com

Steven J. Greenfogel  
MEREDITH COHEN GREENFOGEL &  
SKIRNICK, P.C.  
1521 Locust Street, 8th Floor  
Philadelphia, Pennsylvania 19102  
Tel: (215) 564-5182  
Fax: (215) 569-0958  
Email: sgreenfogel@mcgslaw.com

Bruce L. Simon (Cal. Bar. No. 96241)  
Jessica L. Grant (Cal. Bar. No. 178138)  
PEARSON, SIMON, WARSHAW &  
PENNY, LLP  
44 Montgomery Street, Suite 1430  
San Francisco, CA 94104  
Tel: (415) 433-9000  
Fax: (415) 433-9008  
Email: bsimon@pswplaw.com  
jgrant@pswplaw.com

Eugene A. Spector  
SPECTOR ROSEMAN KODROFF &  
WILLIS, P.C.  
1818 Market Street, Suite 2500  
Philadelphia, Pennsylvania 19103  
Tel: (215) 496-0300  
Fax: (215) 496-6611  
Email: espector@srkw-law.com

Jay L. Himes  
Morissa Falk  
LABATON SUCHAROW LLP  
140 Broadway  
New York, NY 10005  
Tel: (212) 907-0700  
Fax: (212) 818-0477  
Email: jhimes@labaton.com  
mfalk@labaton.com

1 Gordon Ball  
2 BALL & SCOTT, A PROFESSIONAL  
3 ASSOCIATION  
4 550 Main Avenue, Suite 750  
5 Knoxville, TN 37902  
6 Tel: (865) 525-7028  
7 Fax: (865) 525-4679  
8 Email: GBall@ballandscott.com

Stanley D. Bernstein  
Ronald J. Aranoff  
Dana Statsky Smith  
BERSTEIN LIEBHARD LLP  
10 East 40th Street, 22nd Floor  
New York, New York 10016  
Tel: (212) 779-1414  
Fax: (212) 779-3218  
Email: bernstein@bernlieb.com  
aranoff@bernlieb.com

8 Allan Steyer (Cal. Bar. No. 100318)  
9 STEYER LOWENTHAL BOODROOKAS  
10 ALVAREZ & SMITH LLP  
11 One California Street, Third Floor  
12 San Francisco, CA 94111  
13 Tel: (415) 421-3400  
14 Fax: (415) 421-2234  
15 Email: asteyer@steyerlaw.com

Carl A. Taylor Lopez  
LOPEZ & FANTEL  
1510 114<sup>th</sup> Avenue  
Seattle, WA 98122-4024  
Tel: (206) 322-5200  
Email: clopez@lopezfantel.com

13 *Additional Attorneys for Plaintiff Edward*  
14 *Charles O'Bannon, Jr.*

15 I, Jon T. King, am the ECF User whose ID and password are being used to file this  
16 **PLAINTIFFS SAMUEL MICHAEL KELLER'S AND EDWARD C. O'BANNON, JR.'S**  
17 **NOTICE OF JOINT MOTION AND MOTION TO CONSOLIDATE ACTIONS.** In  
18 compliance with General Order 45, X.B., I hereby attest that Robert B. Carey has concurred in  
19 this filing.  
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1 **CERTIFICATE OF SERVICE**

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

5 On September 1, 2009, I filed the following:

6 **PLAINTIFFS SAMUEL MICHAEL KELLER'S AND EDWARD C. O'BANNON, JR.'S**  
7 **NOTICE OF JOINT MOTION AND MOTION TO CONSOLIDATE ACTIONS;**

8 **DECLARATION OF JON T. KING IN SUPPORT OF PLAINTIFFS SAMUEL MICHAEL**  
9 **KELLER'S AND EDWARD C. O'BANNON, JR.'S NOTICE OF JOINT MOTION AND**  
10 **MOTION TO CONSOLIDATE ACTIONS;**

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

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

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

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

21  
22 /s/ Jon T. King