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

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

19 Plaintiff,

20 v.

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

24 Defendants.

Case No. CV 09 1967 (CW)

**PLAINTIFFS SAMUEL MICHAEL  
 KELLER'S AND EDWARD C.  
 O'BANNON, JR.'S JOINT MOTION TO  
 EXTEND ALL DEADLINES PENDING  
 DETERMINATION ON MOTION TO  
 CONSOLIDATE ACTIONS**

Judge: The Hon. Claudia Wilken

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: The Hon. Claudia Wilken

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

10 Pursuant to Civil L.R. 7-4, Plaintiffs Samuel Michael Keller and Edward C. O'Bannon, Jr.  
11 (collectively, "Plaintiffs"), plaintiffs in the two above-captioned actions (the "*Keller*" and  
12 "*O'Bannon*" actions, respectively), state that the issue to be decided is whether all case deadlines  
13 in both the *Keller* and *O'Bannon* actions should be extended pursuant to Civil L.R. 6-3 pending a  
14 determination on Plaintiffs' Joint Motion to Consolidate Actions, filed concurrently herewith.

15 **II. ARGUMENT.**

16 Pursuant to Civil L.R. 6-3 ("Motion to Change Time"), Plaintiffs jointly move to extend  
17 all case deadlines pending a determination on their Motion to Consolidate Actions. A short,  
18 omnibus extension will promote efficiencies by preventing the simultaneous litigation of  
19 overlapping actions that have a strong likelihood of being consolidated, and Defendants will  
20 suffer no prejudice as a result.

21  
22 As explained in the Motion to Consolidate, both actions are putative nationwide class  
23 actions brought on behalf of similar groups of current and former collegiate student-athletes who  
24 compete or competed in men's Division I basketball and football pursuant to the rules of the  
25 National Collegiate Athletic Association (the "NCAA") and whose images have been licensed  
26 and/or used without consent and compensation. The actions share two common defendants (the  
27 NCAA and the Collegiate Licensing Company ("CLC")), a common co-conspirator in Electronic  
28

1 Arts, and contain overlapping factual allegations. Consequently, the litigation of the cases will  
2 undoubtedly involve common witnesses, experts, and discovery.

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

11  
12 Both Plaintiffs are entitled to amend their complaints as a matter of right, and desire to do  
13 so in the form of a consolidated amended complaint. Defendants’ pending motions to dismiss  
14 and strike in the *Keller* action therefore are moot and not a proper basis for a claim of prejudice.  
15 Moreover, their work on those motions is likely to be useful with respect to future dismissal  
16 attempts in the consolidated matter.

17  
18 Significantly, this Court has already determined in its Related Case Order dated August  
19 11, 2009 that the two actions are related. *See Keller* Dkt. Entry No. 59; *O'Bannon* Dkt. Entry No.  
20 27). In issuing that Order, the Court implicitly found that the *Keller* and *O'Bannon* actions  
21 “concern substantially the same parties, property, transaction or event,” and that “[i]t appears  
22 likely that there will be an unduly burdensome duplication of labor and expense or conflicting  
23 results if the cases are conducted before different Judges.” Civil L.R. 3-12 (“Related Cases”).  
24  
25

26  
27 <sup>1</sup> *See also* Advisory Committee Notes to 2009 Amendments to Fed. R. Civ. Proc. 15 (discussing amendments  
28 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.”).

1 As the Manual for Complex Litigation, Fourth, notes, “[a]ll related civil cases pending in  
2 the same court should initially be assigned to a single judge to determine whether consolidation,  
3 or at least coordination of pretrial proceedings, is feasible and is likely to reduce conflicts and  
4 duplication.” Manual for Complex Litigation, Fourth (“MCL 4th”), § 20.11. Following the  
5 issuance of the Related Case Order, Plaintiffs’ counsel met and conferred on how the two actions  
6 might proceed together in the most efficient and expeditious way possible, and concluded that the  
7 actions should be consolidated pursuant to Rule 42 of the Federal Rules of Civil Procedure.<sup>2</sup>

8  
9 Plaintiffs therefore have requested that the Court consolidate the two actions as permitted  
10 under Rule 42(a) to further effect substantial preservation of time, effort, and resources of the  
11 Court and the parties, as well as to avoid potentially inconsistent adjudications.

12  
13 The standard for consolidation is not a particularly high one. Rule 42(a) provides that,  
14 “[i]f actions before the court involve a common question of law or fact, the court may: (1) join for  
15 hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue  
16 any other orders to avoid unnecessary cost or delay.” Fed. R. Civ. P. 42(a). Subsection (b) of  
17 Rule 42 further provides a court with flexibility to “order a separate trial of one or more separate  
18 issues, claims, crossclaims, counterclaims, or third-party claims.”

19  
20 As is readily apparent, the *Keller* and *O’Bannon* actions meet the criteria of sharing  
21 common questions. Plaintiffs requested that Defendants agree to an extension of all deadlines in  
22 the actions until the Court makes a determination on the Motion to Consolidate. This omnibus  
23 extension clearly would prevent inefficiencies that would otherwise result from the litigation of  
24 multiple overlapping cases, and would impose only a short delay in the litigation. Plaintiffs also  
25 propose in the Motion to Consolidate to file a consolidated amended complaint within 10 days of  
26

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

1 any Order granting the motion, thus further minimizing any delay in the actions. Nonetheless,  
2 Defendants have not agreed to Plaintiffs' proposal.

3 The deadlines affected by this Motion and previous time modifications are as follows:

4 *Keller Action:*

5 **September 3, 2009** (deadline for any opposition to Plaintiff's Motion for  
6 Appointment of Interim Lead Counsel);

7 **September 10, 2009** (deadline for Plaintiff's reply in support of Motion for  
8 Appointment of Interim Lead Counsel);

9 **September 18, 2009** (deadline for Defendants' replies in support of their three  
10 motions to dismiss, and Defendant Electronic Arts' motion to strike; *see*  
11 Dkt. Entry No. 68);

12 **September 24, 2009** (hearing on Plaintiff's motion for appointment of interim  
13 lead counsel; *see* Dkt. Entry No. 61); and

14 **October 1, 2009** (hearing on motions to dismiss and motion to strike; Case  
15 Management Conference; *see* Dkt. Entry No. 68).<sup>3</sup>

16 The previous time modifications in the *Keller* action are as follows:

17 Stipulation Extending Time to File and Serve Responsive Pleadings (extending  
18 deadline for Defendants' responses to complaint to July 29, 2009; Dkt. Entry No.  
19 12);

20 Order Setting Briefing Schedule and Hearing Date on Defendants' Motions to  
21 Dismiss and Special Motion to Strike Plaintiff's Complaint (setting Plaintiffs'  
22 opposition brief deadline of August 24, 2009, Defendants' reply brief deadline of  
23 September 10, 2009, and a hearing for September 24, 2009; Dkt. Entry No. 25);

24 Amended Order Setting Briefing Schedule and Hearing Date on Defendants'  
25 Motions to Dismiss and Special Motion to Strike Plaintiff's Complaint (repeating  
26 above dates and further resetting Case Management Conference from August 11,  
27 2009 to September 24, 2009; Dkt. Entry No. 26); and

28 <sup>3</sup> Plaintiffs are uncertain whether the Court, in its Order Granting Administrative Plaintiffs' Administrative Motion for Extension of Time for Plaintiff to File Opposition Paper, filed August 28, 2009 (*Keller* Dkt. Entry No. 68), intended to move the hearing on Plaintiff's motion for appointment of interim lead counsel to October 1. The Order only addresses moving the hearing on the motions to dismiss and motion to strike to that date, and additionally moves the Case Management Conference to that date from September 24, 2009.

1 Order Granting Administrative Plaintiffs' Administrative Motion for Extension of  
2 Time for Plaintiff to File Opposition Paper (extending deadline for Plaintiff's  
3 oppositions to the motions to dismiss and motion to strike from August 24, 2009 to  
4 September 1, 2009, extending deadline for reply briefs to September 18, 2009  
from September 9, 2009, and setting hearing and case management conference for  
October 1, 2009; Dkt. Entry No. 68)

5 O'Bannon Action:

6 **September 11, 2009** (amended complaint to be filed pursuant to stipulated  
7 agreement soon to be filed by Defendants' counsel)

8 **October 26, 2009** (Defendants' motions to dismiss to be filed pursuant to  
9 stipulated agreement soon to be filed by Defendants' counsel)

10 The previous time modifications in the *O'Bannon* action are as follows:

11 Stipulation Extending Time to File and Serve Responsive Pleadings (setting time  
12 for Plaintiff to file an amended complaint to August 21, 2009, and defendants time  
to file responses to complaint to September 21, 2009; Dkt. Entry No. 28); and

13 Letter from Jon T. King to Court dated August 21, 2009 (advising Court that  
14 Defendants agreed to modified schedule for filing amended complaint and  
responses; Dkt. Entry No. 39)

15 **III. CONCLUSION.**

16 For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion  
17 to extend case deadlines pending a determination on Plaintiffs' Motion to Consolidate.

18 Dated: September 1, 2009

Respectfully submitted,

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21 /s/ Jon T. King

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

I, Jon T. King, am the ECF User whose ID and password are being used to file this  
**PLAINTIFFS SAMUAEL MICHAEL KELLER'S AND EDWARD C. O'BANNON, JR.'S  
JOINT MOTION TO EXTEND DEADLINES.** 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, 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. 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 SAMUAEL MICHAEL KELLER'S AND EDWARD C. O'BANNON, JR.'S**  
7 **JOINT MOTION TO EXTEND DEADLINES; and**

8 **DECLARATION OF JON T. KING IN SUPPORT OF PLAINTIFFS SAMUAEL**  
9 **MICHAEL KELLER'S AND EDWARD C. O'BANNON, JR.'S JOINT MOTION TO**  
10 **EXTEND DEADLINES**

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 next  
15 day.

16 The Hon. Claudia Wilken, Judge  
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  
23 \_\_\_\_\_  
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