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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **OAKLAND DIVISION**

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

21 Plaintiff,

22 v.

23 NATIONAL COLLEGIATE ATHLETIC
 24 ASSOCIATION (a/k/a the "NCAA"), and
 25 COLLEGIATE LICENSING COMPANY,
 (a/k/a "CLC").

26 Defendants.

Case No. 3:09-cv-03329 CW

**DEFENDANTS' NOTICE OF MOTION TO
 TRANSFER VENUE AND STATEMENT
 OF RELIEF SOUGHT; MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Hearing Date: October 22, 2009
 Time: 2 P.M.
 Dept: Courtroom 2, 4th Floor
 Judge: Hon. Claudia Wilken

Date Complaint filed: July 21, 2009

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 28 **DEFENDANTS' NOTICE OF MOTION TO TRANSFER VENUE AND STATEMENT OF RELIEF SOUGHT;
 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Case No. 3:09-cv-03329-CW

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NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT

Please take notice that on October 22, 2009 at 2:00 P.M. before the Honorable Claudia Wilken, United States District Court, 1301 Clay Street, Suite 400 S, Oakland, C A94612-5212, Courtroom 2, 4th Floor, Defendants, the National Collegiate Athletic Association (“NCAA”) and the Collegiate Licensing Company (“CLC”), will and hereby do move for an Order transferring this action to the Southern District of Indiana pursuant to 28 U.S.C. §1404. Defendants move to transfer the venue on the following grounds:

1. The convenience of the parties is best served by transferring the venue;
2. The convenience of the witnesses is best served by transferring the venue;
3. Ease of access to evidence and documents is best served by transferring the venue; and
4. Other public factors regarding the interest of justice are best served by transferring the venue.

Therefore, Defendants respectfully request that this Court enter an Order transferring the venue of this action to the Southern District of Indiana.

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STATEMENT OF ISSUES TO BE DECIDED

Whether this Court should transfer the venue of this action to the Southern District of Indiana where most of the parties, witnesses and evidence are located in or close to Indiana and where the convenience of the parties and the interest of justice will be served by transferring the venue to the Southern District of Indiana.

INTRODUCTION

This case has no business being litigated in this District. None of the parties to this action is located in this District: Plaintiff Edward O’Bannon is a resident of Henderson, Nevada, Complaint at ¶25;¹ Defendant National Collegiate Athletic Association (“NCAA”) is an unincorporated association headquartered in Indianapolis, Indiana, ¶35, Wierenga Decl, ¶2; and Defendant Collegiate Licensing Company (“CLC”) is a Georgia corporation with its principal place of business in Atlanta, Georgia. ¶36, Boyle Decl, ¶3. None of the currently known likely witnesses lives here, and most of the likely relevant documents are not kept here. Indeed, the *only* apparent connection between this case and this District is the fact that one of Plaintiff’s lawyers works in San Francisco.

The convenience of one of Plaintiff’s lawyers is not enough to justify putting everyone else associated with this case through the inconvenience, and unnecessarily increased expense, of litigating in a distant forum. As Defendants demonstrate below, the public and private interests of justice require that this case be transferred to the Southern District of Indiana.

ARGUMENT

This case should be transferred to the Southern District of Indiana because litigating it in this District – thousands of miles from most, if not all, of the witnesses and documents likely to

¹ References herein to “¶__” are to paragraphs in Plaintiff’s Complaint, filed July 21, 2009.

1 be relevant to the claims asserted in the Complaint – will cause the parties and the witnesses to
2 suffer unnecessary inconvenience and expense. 28 U.S.C. §1404(a) provides that “[f]or the
3 convenience of parties and witnesses, in the interest of justice, a district court may transfer any
4 civil action to any other district or division where it might have been brought.” The purpose of
5 §1404(a) is to “prevent the waste of time, energy and money and to protect litigants, witnesses
6 and the public against unnecessary inconvenience and expense.” *Van Dusen v. Barrack*, 376 U.S.
7 612, 616 (1964). Transferring this case to the Southern District of Indiana will serve the
8 convenience of the parties and witnesses and promote the interest of justice.

9
10 **I. VENUE IS PROPER IN THE SOUTHERN DISTRICT OF INDIANA**

11 There is no question that this action could have been brought in the Southern District of
12 Indiana, because as the Complaint pleads, subject matter jurisdiction is based on a federal
13 question under the federal antitrust laws. ¶21. And, just like this Court, the Southern District of
14 Indiana could exercise pendent jurisdiction over the state law claims. This case may, therefore,
15 be transferred to the Southern District of Indiana pursuant to 28 U.S.C. §1404.

16
17 **II. TRANSFER WILL SERVE THE INTERESTS OF JUSTICE**

18 Since the action could have been brought in the Southern District of Indiana, the next
19 question on this motion is whether transfer will serve the convenience of parties and witnesses
20 and the interests of justice. It will do so, as we explain below.

21
22 **A. Convenience of the Parties**

23 Transferring this case will make this litigation more convenient for the parties. None of
24 the parties are residents of this District, nor is there any reason to believe that most of the
25 evidence relevant to this case is located in this District. On the contrary: based on the allegations
26 of the Complaint, it seems likely that the NCAA and CLC will be the largest party producers of
27

1 documents in this case,² and their records are kept primarily in Indianapolis and Atlanta,
2 respectively. Wierenga Decl, ¶5; Boyle Decl, ¶6. Indeed, the Complaint recites allegations
3 regarding various NCAA forms, rules, bylaws, and constitutional provisions (¶¶ 7-13, 58-78, and
4 83-90). Most of the documents relevant to these rules and bylaws are located at the NCAA
5 headquarters in Indianapolis. Similarly, because most of the “wrongdoing” alleged in the
6 Complaint supposedly happened, if anywhere, in Indiana, the Court should transfer this case to
7 that State.³ See *Knapp v. Wachovia Corp.*, 2008 U.S. Dist. LEXIS 41000, *5 (N.D. Cal. May 12,
8 2008).

9
10 Indianapolis is, of course, in the Southern District of Indiana; and while Atlanta is not,
11 CLC joins in this motion because the Southern District of Indiana is substantially closer to
12 Atlanta than this District, and thus is a more convenient forum for CLC as well. Boyle Decl, ¶¶
13 4-5.

14
15 Finally, Plaintiff is not entitled to deference in his choice of forum for two reasons. First,
16 Plaintiff is not a resident of this District, which substantially limits the deference properly due to
17 his choice of this forum. See, e.g., *MTS Systems Corp. v. Hysitron, Inc.*, 2006 U.S. Dist. LEXIS
18 66338, *8-*9 (N.D. Cal. September 1, 2006) (Wilken, J.) (granting motion to transfer venue
19 where plaintiff was not a California resident and had not shown that a large part of the challenged
20 events took place in California).

21
22 ² This presumes, of course, that Plaintiff has stated a valid claim for relief and that this case
23 will survive into the discovery phase. Defendants do not believe that either of those propositions
24 is true, and will be filing motions to dismiss shortly. If this case does proceed to discovery – and
25 depending on the direction that Plaintiff’s rather opaque allegations take in litigation –
26 documents maintained by NCAA member institutions and other third parties may also be relevant
27 to this litigation. But, again, there is no reason to believe that most of these documents are
28 located in this District. Therefore, the possibility of third-party discovery does not weigh against
transfer.

29 ³ Although the Complaint recites allegations based on various NCAA rules and bylaws,
Defendants do not concede that these allegations are sufficient to provide a factual predicate for
Plaintiff’s claims and reserve the right to bring a motion to dismiss the Complaint.

1 Second, Plaintiff has brought this action as a putative nation-wide class action, which also
2 limits the deference to his choice of forum. *See, e.g., Johns v. Panera Bread Co.*, 2008 U.S. Dist.
3 LEXIS 78756, *5 (N.D. Cal. July 21, 2009) (“Plaintiff’s decision to seek to represent a
4 nationwide class substantially undercuts [the] deference” to her choice of forum) (citing *Foster v.*
5 *Nationwide Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 95240, *3 (N.D. Cal. Dec. 14, 2007)); *see also*
6 *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (“when an individual ... represents a class, the
7 named plaintiff’s choice of forum is given less weight.”).

9 Plaintiff’s decision to sue in this District does not outweigh the fact that litigating this case
10 in the Southern District of Indiana will be substantially more convenient for the parties than
11 litigating it in this District will be. Defendants’ motion should be granted.

12 **B. Convenience of the Witnesses**

13 The Southern District of Indiana is also a substantially more convenient forum for the
14 witnesses. As noted above, the NCAA is headquartered in Indianapolis, and its employees –
15 several of whom are likely to be witnesses in this case – live and work there. Wierenga Decl, ¶2.
16 Indeed, the only individuals who are quoted directly in the Complaint are the NCAA’s President,
17 Myles Brand (¶16) and Wallace Renfro, a senior advisor to Dr. Brand (¶17), both of whom live in
18 or near Indianapolis and work in Indianapolis. Wierenga Decl, ¶¶3-4. Most of CLC’s employees
19 work in and around Atlanta, which again is substantially closer to the Southern District of Indiana
20 than it is to this District. Boyle Decl, ¶¶4-5. Therefore, it will be more convenient for the
21 potential witnesses if this action is transferred to Indiana. *See, e.g., Panera Bread Co.*, 2008 U.S.
22 Dist. LEXIS 78756 at *10; *Young v. Wells Fargo & Co.*, 2008 U.S. Dist. LEXIS 103955, *12
23 (N.D. Cal. Dec. 17, 2008); *Farmer v. Ford Motor Co.*, 2007 U.S. Dist. LEXIS 90289, *8-9
24 (N.D. Cal. Nov. 28, 2007).

1 Nor is there any offsetting convenience to Plaintiff's potential witnesses from litigating in
2 this District. Plaintiff's alleged classes consist of certain former or current student athletes who
3 competed for NCAA Division I men's basketball athletic teams and NCAA Football Bowl
4 Subdivision teams. ¶1. The vast majority of NCAA member schools that sponsor Division I
5 men's basketball are found in the Midwest, South or East region of the United States, which are
6 closer to Indiana than to California. See Wierenga Decl, ¶7, Ex. A (List of schools sponsoring
7 Division I men's basketball from the NCAA's website).⁴ Similarly, the majority of schools that
8 sponsor Football Bowl Subdivision teams are also closer to Indiana than to California. See
9 Wierenga Decl, ¶8, Ex. B (List of schools sponsoring Division I FBS teams from the NCAA's
10 website).
11

12 Finally, Plaintiff himself is not a California resident, and there is no real convenience to be
13 served to him by retaining this action in California. The fact that some of Plaintiff's lawyers
14 work in San Francisco is not entitled to any deference on this motion. *Center for Biological*
15 *Diversity v. Rural Utilities Svc.*, 2008 U.S. Dist. LEXIS 51835, *5 (N.D. Cal. June 27, 2008)
16 ("the convenience of counsel is not a recognized factor."). Nor is it sufficient for Plaintiff to
17 claim that some of the class members may be located in California because "the relevant inquiry
18 is the convenience of the *named* parties and principal witnesses likely to be deposed or testify at
19 trial." *Wells Fargo & Co.*, 2008 U.S. Dist. LEXIS 103955 at *12 (emphasis added).
20
21

22 Therefore, this factor also weighs in favor of transferring this action to the Southern
23 District of Indiana.
24

25 _____
26 ⁴ The Court can take judicial notice of the location of NCAA member institutions on this
27 motion, because the fact of the location of these schools is not subject to reasonable dispute and is
28 generally known within the territorial jurisdiction of this Court and/or is capable of accurate
determination by sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

1 **C. Interest of Justice**

2 Finally, public interest factors weigh in favor of transfer here. These factors include: 1)
3 ease of access to the evidence, 2) familiarity of each forum with the applicable law, 3) local
4 interest in the controversy, 4) feasibility of consolidation with other claims, and 5) relative court
5 congestion and time of trial in each forum. *See Williams v. Bowman*, 157 F. Supp. 2d 103, 1106
6 (N.D. Cal. 2001). All of these factors favor transferring the action to Indiana.
7

8 First, as discussed above, access to the evidence is facilitated by transferring the case
9 because the likely relevant documents, and potential witnesses, are much more likely to be
10 located in or near the Southern District of Indiana than in or near this District.

11 Second, the Southern District of Indiana is equally familiar with the application of federal
12 antitrust laws as this Court. Although Plaintiff also brings two state law claims for Unjust
13 Enrichment and Accounting, Plaintiff does not specify which state law is applicable to these
14 claims. Nonetheless, the Southern District of Indiana will be equally able to adjudicate these
15 claims. *See, e.g., Foster*, 2007 U.S. Dist. LEXIS 95240.
16

17 Third, because the NCAA is located in Indiana, and the Complaint seems to claim that
18 most of the actions alleged took place at or through the NCAA, that State has a greater local
19 interest in the adjudication of the legality of the NCAA’s actions and the NCAA’s rules and
20 regulations. *Farmer*, 2007 U.S. Dist. LEXIS 90289 at *10.
21

22 Fourth, although Plaintiff has filed a motion to consolidate the case with *Keller v. EA*,
23 Case No. 09-cv-01967, currently pending in this Court, that motion is inappropriate and should
24 not be granted – as one of the plaintiffs has already conceded. Keller previously *opposed* relation
25 of these cases, claiming that “the two actions do not involve ‘substantially’ the same parties and
26 the events giving rise to the two actions are significantly different.” (Dkt. 55 in Case No. 09-cv-
27

1 01967 at 3). Defendants respectfully suggest that it would be inappropriate to grant plaintiffs'
2 consolidation motion when one of the plaintiffs himself has already conceded (accurately) that the
3 two actions do not involve common questions of fact or law. And Keller, who now supports
4 consolidation, previously pointed out to the Court the insubstantial contacts that the *O'Bannon*
5 case has to this District and noted that the *O'Bannon* case likely would have to be transferred to a
6 more appropriate venue. (Dkt. 58 in Case No. 09-cv-01967 at 2). For these reasons, and others
7 that Defendants will set forth in their opposition to plaintiffs' consolidation motion, the
8 possibility of consolidation should not weigh against transfer here.

9
10 Finally, because of the location and minimal required travel time for witnesses the costs of
11 litigating this case in Indiana are likely to be lower than for litigating this case in California.
12 Furthermore, according to the Federal Judicial Caseload Statistics, maintained by the
13 Administrative office of the U.S. Courts and published at <http://www.uscourts.gov/caseload2008/>
14 contents.html (last visited September 10, 2009), the caseload of civil cases filed in the Southern
15 District of Indiana is much lower than in the Northern District of California, making the Southern
16 District of Indiana less congested than this District. The new filings in the twelve months ending
17 in March 31, 2008⁵ in the Southern District of Indiana were 2,561 cases and the pending cases
18 were 2,231. In the Northern District of California, in contrast, the new filings were 6,630 cases
19 and 8,364 cases were pending. *See* Wierenga Decl, ¶9, Ex. C (excerpt from the Federal Judicial
20 Caseload Statistics showing the civil cases commenced, terminated and pending in U.S. District
21 Courts for the 12 month periods ending March 31, 2007 and March 31, 2008).

22
23
24 Therefore, keeping all of the above factors in mind, it is clear that the interests of justice
25 will be well served by transferring the case to the Southern District of Indiana.

26
27 ⁵ These statistics are only available up to March 31, 2008.

1 **III. PLAINTIFF CANNOT MAKE THIS FORUM MORE CONVENIENT BY**
2 **AMENDING HIS COMPLAINT**

3 Plaintiff has previously claimed to Defendants, and to the Court, that he will shortly be
4 filing an amended complaint, which (Plaintiff claims) may add California plaintiffs or defendants
5 to this action. Plaintiff’s supposed future amendments are irrelevant to this motion, for at least
6 two reasons.

7 First, despite having had ample opportunity to file an amended complaint, Plaintiff has
8 failed to do so – and apparently has no intention of doing so anytime soon. This motion is
9 properly directed to the case that Plaintiff has filed, not the case that Plaintiff wishes he had filed,
10 or might file in the future. Any claim of future amendment is simply irrelevant to the question
11 whether the case currently on file is most appropriately litigated in this District. As we have
12 shown above, the answer to that question is “no.” Indeed, Plaintiff only began mentioning in
13 correspondence to Defendants that he might add a California Defendant *after* Defendants pointed
14 out to the Court in their opposition to the motion to relate the *Keller* and *O’Bannon* cases that this
15 case had no apparent connection to this District. And, Plaintiff has thus far failed to amend his
16 Complaint, most recently informing Defendants that he no longer intends to amend the Complaint
17 anytime in the near future, unless of course, Defendants file this Motion to Transfer Venue -- all
18 in an apparent attempt to “cure” this defect. *See* Wierenga Decl, ¶10, Ex. D (email from counsel
19 for Plaintiff). Amending a complaint in this fashion “smacks of forum shopping.” *In re: Funeral*
20 *Consumers Antitrust Litig.*, 22005 WL 2334362, *7 (N.D. Cal. Sept. 23, 2005) (Alsup, J.).

21 Second, the inconvenience of this forum is not a superficial matter of whose name appears
22 on the caption, and cannot be fixed merely by adding a party or two who call this District home.
23 The apparent gravamen -- although insufficiently pled -- of Plaintiff’s case is that the Defendants,
24 somehow acting through the vehicle of the NCAA’s rules or forms, have violated the antitrust
25

1 laws. Those allegations place the center of gravity of this case in Indianapolis, Indiana, not in this
2 District. Unless Plaintiff radically changes the nature of his allegations, simply adding a
3 California party or two is not going to change that center of gravity. The Southern District of
4 Indiana is, by far, the most logical and convenient forum for this lawsuit. Defendants' motion
5 should be granted.
6

7 **CONCLUSION**

8 Defendants respectfully request that this Court enter an Order transferring the venue of
9 this action to the Southern District of Indiana.

10 Robert J. Wierenga, the filer of this Motion, hereby attests that Peter M. Boyle concurs in
11 the filing of this Motion and Memorandum of Point and Authorities.
12

13 Dated: September 11, 2009

14 By: /s/ Robert J. Wierenga

15 Robert J. Wierenga (SBN 183687)
16 MILLER, CANFIELD PADDOCK AND STONE
17 Attorneys for Defendant NCAA

18 Dated: September 11, 2009

19 By: /s/ Peter M. Boyle

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification to the e-mail addresses registered and I hereby certify that I have mailed the foregoing document(s) via the U.S. Postal Service to the following non-CM/ECF participant:

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