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

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

20 Plaintiff,

21 v.

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

24 Defendants.
 25

Case No. CV 09 1967 (CW)

**PLAINTIFFS SAMUEL MICHAEL
 KELLER'S AND EDWARD C. O'BANNON,
 JR.'S JOINT NOTICE OF MOTION AND
 MOTION FOR APPOINTMENT OF
 INTERIM CO-LEAD COUNSEL
 PURSUANT TO FEDERAL RULE OF
 CIVIL PROCEDURE 23(g)(3)**

Date: October 22, 2009

Time: 2:00 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 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

10 Please take notice that on October 22, 2009, 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 23(g)(3) of the Federal Rules of
15 Civil Procedure for an order appointing the law firms of Hagens Berman Sobol Shapiro LLP and
16 Hausfeld LLP (collectively, "Proposed Interim Co-Lead Counsel") as interim co-lead counsel for
17 the putative plaintiff classes in these matters.

18 The appointment of Interim Co-Lead Counsel is appropriate at this time to "fairly and
19 adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). Proposed Interim
20 Co-Lead Counsel have extensive experience in complex commercial class action litigation
21 including antitrust class actions. In addition, Plaintiff *Keller's* and Plaintiff O'Bannon's actions
22 were the first actions filed concerning this subject matter, and proposed Interim Co-Lead Counsel
23 have already expended substantial resources researching, investigating and prosecuting these
24 actions.

25 This Motion is based on this notice of motion, motion, the supporting memorandum of
26 points and authorities, and any other papers filed in this action.

TABLE OF AUTHORITIES

Cases

Four In One Co., Inc. v. SK Foods, L.P.
 No. 2:08-cv-03017-MCE-EFB, 2009 WL 747160, at *1
 (E.D.Cal., March 20, 2009)..... 5

Hill v. The Tribune Co.
 Nos. 05 C 2602, 2005 WL 3299144, at *3-4 (N.D. Ill. Oct. 13, 2005) 5

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In re Air Cargo Shipping Services Antitrust Litigation
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In re Bextra Marketing Sales Practices and Product Liability Litig.
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In re California Title Ins. Antitrust Litig.
 No. 08-01341 JSW, 2008 WL 4820752, at *1 (N.D. Cal., Nov. 3, 2008)..... 5

In re Dynamic Random Access Memory (DRAM) Antitrust Litig.
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In re International Air Transportation Surcharge Antitrust Litig.
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In re Pharmaceutical Industry Average Wholesale Price Litig.
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In re Transpacific Passenger Air Transport Antitrust Litig.
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In re Visa Check/MasterMoney Antitrust Litig.
 280 F.3d 124, 129-30 (2d Cir. 2001), cert. denied, 536 U.S. 917 (2002)..... 8

In re Visa Check/MasterMoney Antitrust Litig.
 No. CV-96-5238 (E.D.N.Y.)..... 7

In re Vitamins Antitrust Litig.
 MDL No. 1285 (D.D.C.)..... 12

In Re: Rubber Chemicals Antitrust Litig.
 Master Docket No. C-03-1496 (N.D. Cal.)..... 11

New England Carpenters Benefits Fund, et al. v. First DataBank Inc. and McKesson Corp.
 Case No. 05-11148 (D. Mass.)..... 7

Parkinson v. Hyundai North America
 Nos. CV06-345(AHS), 2006 WL 2289801, at *2 (C.D. Cal. Aug. 7, 2006)..... 4

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Federal Rule of Civil Procedure 23..... *passim*

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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 law firms of
6 Hagens Berman Sobol Shapiro LLP (“Hagens Berman”) and Hausfeld LLP (collectively,
7 “Proposed Interim Co-Lead Counsel”) should be appointed as interim co-lead counsel for the
8 putative classes pursuant to Rule 23(g)(3) of the Federal Rules of Civil Procedure.

9 **II. INTRODUCTION.**

10 Plaintiffs have jointly moved to consolidate their actions, and proposed to file a
11 Consolidated Amended Complaint within 10 days of the issuance any order consolidating the
12 actions. *See Keller* Dkt. Entry No. 69 (“Motion to Consolidate”), at 10. Plaintiffs further
13 indicated their intention to file the present motion for appointment of interim class counsel
14 pursuant to Fed. R. Civ. P. 23(g)(3), so that an interim class counsel leadership structure could be
15 in place in connection with filing of any consolidated amended complaint that the Court may
16 authorize. *See id.* Recent developments have further reinforced the desirability of appointing an
17 interim leadership structure, as one new substantially similar complaint has already been filed in
18 this District, and at least one more is expected to be filed within the next week. *See King Decl.*, ¶
19 3.

20 Federal Rule of Civil Procedure 23(g)(3) permits the Court to “designate interim counsel
21 to act on behalf of a putative class before determining whether to certify the action as a class
22 action.” In making this determination, the Court should consider (i) the work counsel has done in
23 identifying or investigating potential claims in the action; (ii) counsel’s experience in handling
24 class actions, other complex litigation, and the types of claims asserted in the action; (iii)
25 counsel’s knowledge of the applicable law; and (iv) the resources that counsel will commit to
26 representing the class. *See Fed. R. Civ. P. 23(g)(1)(A)*. In addition, the Court “may consider any
27
28

1 other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the
2 class.” Fed. R. Civ. P. 23(g)(1)(B).

3 Here, Proposed Interim Co-Lead Counsel’s qualifications more than meet the
4 requirements of Rule 23(g). Proposed Interim Co-Lead Counsel have devoted extensive time to
5 investigating the claims in this action. They are experienced in complex commercial litigation,
6 well versed in the applicable law, and have ample resources to devote to the prosecution of this
7 action.

8 **III. BACKGROUND.**

9 Plaintiff Samuel Michael *Keller* filed his action on May 5, 2009, on behalf of a class of
10 current and former NCAA football and basketball players against Electronic Arts, the National
11 Collegiate Athletic Association (“NCAA”) and its licensing arm, the Collegiate Licensing
12 Company (“CLC”). *Keller*, Compl. ¶¶ 4-6. Plaintiff alleges that Defendants conspired to utilize
13 the likenesses and names of individual student-athletes in basketball and football videogames
14 produced by Electronic Arts. *See id.*, ¶ 1. Plaintiff’s complaint states claims for violations of
15 putative class members statutory and common law publicity rights under California and Indiana
16 law as well as class member’s contractual rights under form contracts signed with the NCAA.
17 Compl. ¶¶ 66-91.

18 Plaintiff Edward C. O’Bannon, Jr. filed his action on July 21, 2009, on behalf of classes of
19 current and former NCAA football and basketball players against the NCAA and CLC, and
20 named Electronic Arts as a non-defendant co-conspirator. In addition to focusing on video-
21 games, the O’Bannon complaint further asserts antitrust and other claims related to the alleged
22 unlawful licensing and use of players’ images in other formats including DVDs offered for sale
23 and rental, photos, video on- demand services, “stock footage” sold to corporate advertisers and
24 other purchasers for use in commercials and other end-products, apparel sales, and rebroadcasts
25 of “classic” games on television.
26

27 As detailed in the Motion to Consolidate, Plaintiffs’ counsel have certain similar causes of
28 action and legal theories, and some that are distinctive in each complaint. As is readily apparent

1 from the detailed pleadings, each firm has done extensive and unique research that will redound
2 to the benefit of class members. Both firms are in the process of harmonizing their respective
3 pleadings so that they may file a single consolidated amended complaint with this Court. This is
4 entirely common. As one recent example, in *In re Insurance Brokerage Antitrust Litigation*, No.
5 04-5184(GEB) (D.N.J.), multiple groups of plaintiffs asserted claims under the federal antitrust
6 laws and the federal racketeering laws, respectively. The court appointed one interim lead
7 counsel from each group, and they then jointly presented a consolidated amended complaint to
8 the Court. *See* King Decl., ¶ 4.

9 **IV. ARGUMENT.**

10 Rule 23(g)(3) of the Federal Rules of Civil Procedure provides that a court “may
11 designate interim counsel to act on behalf of the putative class before determining whether to
12 certify the action as a class action.” When appointing lead counsel, the court must consider (1)
13 the work counsel has done in identifying or investigating potential claims in the action; (2)
14 counsel’s experience in handling class actions, other complex litigation, and the types of claims
15 asserted in the action; (3) counsel’s knowledge of the applicable law; and (4) the resources
16 counsel will commit to representing the class.” *See* Fed. R. Civ. P. 23(g)(1)(A). Proposed
17 Interim Co-Lead Counsel more than satisfy these requirements.

18 The Advisory Committee notes to former Rule 23(g)(2)(A) explain that the rule
19 “authorizes [a] court to designate interim counsel during the pre-certification period if necessary
20 to protect the interests of the putative class.” The *Manual for Complex Litigation*, Fourth (“MCL
21 4th”) elaborates as follows:

22 If . . . there are a number of overlapping, duplicative, or competing
23 suits pending in other courts, and some or all of those suits may be
24 consolidated, a number of lawyers may compete for class counsel
25 appointment. *In such cases, designation of interim counsel clarifies
26 responsibility for protecting the interests of the class during pre-
certification activities, such as making and responding to motions,
conducting any necessary discovery, moving for class certification
and negotiating settlement.*

27 MCL 4th § 21.11 (emphasis added).
28

1 Courts considering motions for appointment interim class counsel have generally applied
2 the factors set forth in Rule 23(g)(1)(A). *See, e.g., Parkinson v. Hyundai North America*, Nos.
3 CV06-345(AHS), 2006 WL 2289801, at *2 (C.D. Cal. Aug. 7, 2006); *Hill v. The Tribune Co.*,
4 Nos. 05 C 2602, 2005 WL 3299144, at *3-4 (N.D. Ill. Oct. 13, 2005).¹ One California district
5 court recently observed the following:

6 Courts have held that the same standards applicable to choosing
7 class counsel at the time of class certification apply in choosing
8 interim class counsel. *See In re Air Cargo Shipping Services*
9 *Antitrust Litigation*, 240 F.R.D. 56, 57 (E.D.N.Y.2006) (“Although
10 neither the federal rules nor the advisory committee notes expressly
11 so state, it appears to be generally accepted that the considerations
12 set out in [Fed.R.Civ.P. 23(g)(1)(A) and (B)], which governs
13 appointment of class counsel once a class is certified, apply equally
14 to the designation of class counsel before certification.”).

15 *Four In One Co., Inc. v. SK Foods, L.P.*, No. 2:08-cv-03017-MCE-EFB, 2009 WL 747160, at *1
16 (E.D.Cal., March 20, 2009). *See also In re California Title Ins. Antitrust Litig.*, No. 08-01341
17 JSW, 2008 WL 4820752, at *1 (N.D. Cal., Nov. 3, 2008) (White, J.) (“[w]hen appointing interim
18 class counsel, a court must find that the applicant is adequate under [Rule 23(g)(1)(A) and (B)].”).
19 Application of these Rule 23(g) factors strongly supports appointing the Hagens Berman and
20 Hausfeld LLP as interim co-lead counsel.

21 Here, approval of the proposed interim leadership structure will allow for, among other
22 things, (1) the coordinated preparation and filing of a consolidated amended complaint; (2) the
23 efficient prosecution of this action through a decision on class certification and appointment of
24 permanent class co-counsel; and (3) the facilitation of any potential settlement discussions that
25 may occur in the future. *See* Advisory Committee Notes to former Fed. R. Civ. P. 23(g)(2)(A).
26 Other benefits will also accrue, including providing third parties with assurances that they are
27 dealing with counsel with authority to negotiate document preservation and production issues.
28 Approving the proposed interim leadership structure and granting these firms interim co-lead

¹ These cases refer to the factors contained in former rule Fed. R. Civ. P. 23(g)(1)(C), which was renumbered to Fed. R. Civ. P. 23(g)(1)(A) by the December 1, 2007 Amendments to the Federal Rules of Civil Procedure.

1 counsel status will provide all concerned with the requisite indicator that these firms are
2 empowered to act on behalf of the proposed class.

3 **A. Proposed Interim Lead Counsel Have Expended Substantial Resources**
4 **Investigating the Underlying Claims And Are Familiar With The Underlying**
5 **Law.**

6 Proposed Interim Co-Lead Counsel expended substantial resources investigating this case.
7 As the King and Carey Declarations explain, Proposed Interim Co-Lead Counsel have conducted
8 numerous interviews with former players, player agents, and industry professionals. In addition,
9 Proposed Interim Co-Lead Counsel reviewed voluminous materials from the NCAA, including
10 NCAA rules and other public reports, as well as materials from the Knight Commission on
11 Intercollegiate Athletics, scholarly conferences on intercollegiate athletics and the CLC, and
12 researched and read numerous law review articles.

13 Proposed Interim Co-Lead Counsel also conducted and continues to conduct extensive
14 statistical analysis of the videogames at issue and extensive technical analysis of the videogame
15 software at issue including the mechanism for uploading player rosters and the evolution of that
16 mechanism over time. Hausfeld additionally has done substantial research on the other revenue
17 streams at issue, as reflected in its complaint, and has retained numerous athletics industry
18 consultants and antitrust economists, as well as conferred with various sports law professors.

19 Finally, Proposed Interim Co-Lead Counsel have expended substantial attorney time
20 developing appropriate legal theories and are consequently extremely well versed in the
21 applicable law.

22 **B. Proposed Interim Lead Co-Counsel Are Experienced in Efficiently Litigating**
23 **Complex Commercial Litigation.**

24 Both on a national scale and in California, Proposed Interim Co-Lead Counsel have the
25 experience and knowledge necessary to provide the putative classes the best representation
26 possible. As discussed in more detail below, Proposed Interim Co-Lead Counsel have extensive
27 experience with class actions and complex litigation generally, and have experience working
28 efficiently together as co-counsel in other actions. *See generally* Carey Declaration, Exh. A; King

1 Decl., Exh. A (Firm Resumes). Members of the two firms, including those attorneys described
2 below, have worked collaboratively on many previous cases, and will continue that working
3 relationship in the present matter.

4 **(i) Hagens Berman.**

5 Hagens Berman is one of the nation's preeminent and most experienced plaintiff-side
6 class action firms and possesses the background, experience, and requisite legal knowledge to
7 manage and prosecute the litigation and the claims asserted therein. Hagens Berman has been
8 repeatedly recognized as one of the nation's leading plaintiffs' law firms by the *National Law*
9 *Journal*. Since its founding, Hagens Berman has represented plaintiffs in class actions and other
10 complex, large-scale litigation across the country. To give just a few representative examples:

11
12 *New England Carpenters Benefits Fund, et al. v. First DataBank*
13 *Inc. and McKesson Corp.*, Case No. 05-11148 (D. Mass.). Hagens
14 Berman was lead counsel representing consumers and third party
15 payers against healthcare services giant McKesson for violations of
16 the Racketeer Influenced and Corrupt Organizations Act (RICO)
for conspiring to fraudulently inflate the Average Wholesale Price
of most common prescription medicines. Hagens Berman settled
the case on behalf for \$350 million on November 21, 2008.

17 *In re Bextra Marketing Sales Practices and Product Liability Litig.*,
18 MDL 1699 (N.D. Cal.). Hagens Berman filed suit against Pfizer
19 claiming that the pharmaceutical giant launched a misleading
marketing campaigns for its drugs Bextra and Celebrex. On
October 17, 2008, the firm, serving as lead counsel, settled the case
for \$89 million.

20 *In re Pharmaceutical Industry Average Wholesale Price Litig.*,
21 MDL 1456 (D. Mass.). Since 2001 Hagens Berman has led this
22 litigation against 20 pharmaceutical companies. Serving as lead
23 counsel, Hagens Berman has participated in all phases of the case,
24 including a successful eight week trial. To date, approximately
\$210 million has been recovered and the remainder of the case is
still pending. The case is considered at the top of the scale in terms
of complexity of discovery and motion practice.

25 *In re Visa Check/MasterMoney Antitrust Litig*, No. CV-96-5238
26 (E.D.N.Y.) Hagens Berman was appointed co-lead counsel by the
27 Court in this case, in which a number of large and small merchants
28 and three trade associations sued Visa and MasterCard, alleging
that defendants have created a tying arrangement in violation of § 1
of the Sherman Antitrust Act by means of their 'honor all cards'
policy, which requires stores that accept defendants' credit cards to

1 accept their debit cards as well. Plaintiffs also alleged that
2 defendants attempted and conspired to monopolize the debit card
3 market in violation of § 2 of the Sherman Act. In re Visa
4 Check/MasterMoney Antitrust Litig., 280 F.3d 124, 129-30 (2d Cir.
5 2001), cert. denied, 536 U.S. 917 (2002). Following affirmation of
6 class certification by the Second Circuit, the parties ultimately
7 settled the case on the eve of trial in a settlement valued at \$3
8 billion. *Id.*

9
10 *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*,
11 MDL No. 1486 (N.D. Cal.). Hagens Berman recently served as co-
12 lead counsel in this matter, recovering settlements in excess of \$325
13 million for the direct purchaser class and winning praise from the
14 Honorable Judge Phyllis Hamilton for its skill, efficiency, and
15 cooperation with other parties and the Court.

16
17 In addition, Hagens Berman also played a major role in litigation by State Attorneys
18 General against the tobacco industry, representing 13 states and resulting in the largest state
19 settlement in history. Only two States took their cases against that industry to trial: Washington
20 and Minnesota. As a result, only two private firms tried cases on behalf of the States against the
21 industry. Hagens Berman is one of those firms.

22
23 Significantly, Hagens Berman has specific experience litigating against the majority of the
24 defendants in this action. In particular, Hagens Berman is sole counsel in *George v. NCAA*, No.
25 08-03401 (C.D. Cal), a putative class action against the NCAA that alleges breaches of state
26 lottery laws in connection with the NCAA's men's basketball tournament. In addition, Hagens
27 Berman is co-counsel for the plaintiffs in *Pecover v. Electronic Arts*, No. 08-cv-02820 (N.D.
28 Cal), an antitrust putative class action against Electronic Arts alleging monopolization and
unlawful horizontal agreements in the market for football videogames. As a result of its
investigations into those cases, Hagens Berman has generalized useful background knowledge
regarding the NCAA and the sports videogame industry.

The attorneys Hagens Berman will staff this matter include (but are not limited to) the
following experienced class action attorneys:

Steve Berman is Hagens Berman's managing partner and is regarded as one of the
country's top civil litigators. Recognized as one of the "Top 100 Influential Lawyers in America"

1 by the National Law Journal, Mr. Berman served as a special assistant attorney general for 13
2 states in the tobacco litigation which resulted in the largest settlement in history. He is an
3 experienced trial lawyer in large scale cases. He was in the eighth week of trial of the
4 Washington tobacco trial when tobacco settled on a global basis. He has experience in
5 multidistrict litigation trials. He was part of the trial team in the WPPS Litigation (a four-month
6 trial) and is the lead trial lawyer for several classes in claims against twenty-two pharmaceutical
7 companies in *In re Average Wholesale Price Litigation*, MDL 1456 (D. Mass). In recognition of
8 his prominence, Mr. Berman was also retained by Microsoft to be part of the core national team
9 representing the company in antitrust class actions resulting from Judge Jackson's Findings of
10 Fact in the U.S. Department of Justice's antitrust case against the company.

11 **Robert Carey** handles consumer-related class-action lawsuits involving various claims
12 such as mini-Tucker Act claims, statutory rights, insurance issues, and property rights. He was
13 recently selected as lead counsel in a highly contested lead counsel fight in the matter *In re*
14 *LifeLock, Inc. Marketing and Sales Practices Litigation*, a consolidated MDL proceeding pending
15 in United States District Court for the District of Arizona. He previously served as co-lead
16 counsel for the Hyundai Horsepower Litigation which settled for approximately \$100 million, and
17 is currently working on other putative class actions against Hyundai for manufacturing and
18 warranty problems.

19 Mr. Carey has argued several high-profile cases in federal and state courts, including the
20 supreme courts of three different states, served as trial counsel on multi-billion dollar claims for
21 damages stemming from county losses for tobacco-related illnesses, and has led dozens of
22 consumer and insurance class actions in various states. He also served as judge pro tempore in
23 Maricopa County Superior Court and as special counsel for Hagens Berman Sobol Shapiro suits
24 to recover Medicaid and statutory damages in the landmark public health litigation brought by
25 states. He was recently asked to serve as the chairman for the State Bar of Arizona's
26 subcommittee on Class and Derivative Actions. From 1990 to 1996, as Arizona's Chief Deputy
27 Attorney General, Mr. Carey oversaw all major legal claims for the Arizona Attorney General's
28

1 Office. This experience included a \$4 billion divestiture action, a landmark \$165 million
2 settlement, litigation involving patent rights, and dozens of consumer and tort cases.

3 **Leonard Aragon** is a senior associate in Hagens Berman Sobol Shapiro's Phoenix office.
4 Mr. Aragon's practice focuses on nationwide class actions on behalf of plaintiffs. While his
5 diverse practice has included numerous appellate and election law matters, he currently focuses
6 on consumer protection claims, especially those related to the pharmaceutical, insurance and
7 sports industries. In that capacity, Mr. Aragon is currently co-lead counsel in cases against
8 several prominent corporations, including the National Collegiate Athletic Association, Electronic
9 Arts, LifeLock, Inc. and Wells Fargo. In addition, Mr. Aragon is lead counsel in a putative class
10 action against the state of Louisiana for failing to provide promised medical care to poor and
11 uninsured residents following Hurricane Katrina. In the past, Mr. Aragon has successfully
12 obtained several multi-million dollar judgments and settlements on behalf of thousands of
13 consumers. Recently, Mr. Aragon obtained a multi-million dollar settlement against one of the
14 country's largest pharmaceutical benefits managers for violations related to the sale of its
15 services.

16 Prior to college, Mr. Aragon was a scout for the 2/68 Armored Tank Battalion. Mr.
17 Aragon graduated summa cum laude from Arizona State University in 1998 with degrees in
18 History and Political Science. He received his J.D. from Stanford Law School in 2001.

19
20 **Shana Scarlett** is an attorney with Hagens Berman Sobol Shapiro's San Francisco office
21 and has over six years experience in prosecuting class actions, including securities fraud,
22 consumer protection and privacy rights violations. Ms. Scarlett graduated from Stanford Law
23 School in 2001, and was the articles editor on the Stanford Law Review. Ms. Scarlett has
24 participated in numerous consumer class actions, including representing a nationwide class of
25 uninsured hospital patients in Tenet Healthcare Cases II (Los Angeles Superior Court);
26 representing consumers against the major telecommunications carriers for their participation in
27 the Terrorist Surveillance Program (In re National Security Agency Telecommunications Record
28 Litigation); representing California home owners against a large subprime lender (Valdes v.

1 Ameriquest Mortgage Co., Alameda Superior Court). Ms. Scarlett was also a member of the
2 litigation team in *In re Sony BMG Audio Compact Disc Litigation*, where she helped plaintiffs to
3 secure a multi-million dollar settlement for consumers and an agreement from Sony BMG to stop
4 using harmful rootkit software that created a number of serious security, privacy and consumer
5 protection issues on music CDs.

6 **(ii) Hausfeld LLP.**

7 Hausfeld LLP is widely acknowledged to be one of the nation's most notable plaintiffs'
8 class action firms, and its attorneys possess wide-ranging expertise that they will bring to bear in
9 this matter. Hausfeld attorneys have been repeatedly recognized as leaders in the class action bar
10 by publications such as *The New York Times* and *The Wall Street Journal*. *The New York Times*
11 referred to Michael Hausfeld, who has personally worked on this case from its inception,
12 as one of the nation's "most prominent antitrust lawyers."

13 Hausfeld LLP is currently serving as co-lead counsel in 21 major national class action
14 cases, including numerous antitrust class actions. Members of the firm have achieved notable
15 recent successes, including in this District, in terms of settlements and leadership appointments,
16 as follows:

17 *In re International Air Transportation Surcharge Antitrust Litig.*,
18 ("Air Passengers"). Case No. M:06-cv-01793-CRB, MDL No.
19 1793: Hausfeld LLP was appointed by the Hon. Charles R. Breyer
20 as Interim Co-Lead Counsel on behalf of thousands of air travellers
21 around the world against British Airways and Virgin Atlantic
22 Airways for fixing prices of air passenger transportation to and
23 from the UK to all long-haul destinations in the world. This matter
24 settled in 2008 for approximately \$190 million.

25 *In Re: Rubber Chemicals Antitrust Litig.*, Master Docket No. C-03-
26 1496 (N.D. Cal.). In 2006, in this matter before the Hon. Martin J.
27 Jenkins, Hausfeld LLP lawyers, serving as Co-Lead Counsel,
28 settled the direct purchaser class's global price-fixing claims with
defendants Flexsys N.V., Flexsys America L.P., Akzo Nobel
Chemicals International B.V., Akzo Nobel Chemicals, Inc.,
Crompton (now Chemtura) and Bayer for more than \$300 million.

In re Air Cargo Shipping Services Antitrust Litig., 06-MD-1775,
MDL No. 1775 (E.D.N.Y.). Hausfeld LLP is serving as Interim
Co-Lead Class Counsel on behalf of air freight customers against a
group of international flagship airlines for fixing prices on air
freight shipping. This case has already resulted in a landmark \$85

1 million settlement with Lufthansa. The settlement will result in
2 thousands of European businesses recovering damages for
3 infringements of both US antitrust and EU competition law.
Michael Hausfeld was the architect and lead settlement negotiator
for the claimants.

4 *In re Transpacific Passenger Air Transport Antitrust Litig.*, 3:07-
5 cv-05634 (N.D. Cal.). In 2009, Hausfeld was appointed by the
6 Hon. Charles R. Breyer as Interim Co-Lead Counsel for a putative
7 class of direct purchaser plaintiffs in this antitrust class action
8 alleging a conspiracy by airlines to fix the prices of passenger fares
and/or fuel surcharges for trans-Pacific air passenger transportation
services to and from the United States in violation of the federal
Sherman Act. This case is in its inception.

9 *In re Vitamins Antitrust Litig.*, MDL No. 1285 (D.D.C.). Hausfeld
10 LLP lawyers served as co-lead counsel for two certified classes of
11 businesses that directly purchased bulk vitamins and were
12 overcharged as a result of a ten year global price-fixing and market
13 allocation cartel. Chief Judge Hogan approved eight major
14 settlements between certain vitamin defendants and the Class
15 Plaintiffs, including a landmark partial settlement of \$1.1 billion.
16 In a later trial before Chief Judge Hogan concerning four of the
17 Class Plaintiffs' remaining unsettled Vitamin B4 (choline chloride)
claims, a federal jury in Washington unanimously found Japan's
second largest trading company, Mitsui & Co., Ltd., its wholly-
owned U.S. subsidiary Mitsui & Co. (U.S.A.), Inc., DuCoa, LP, a
choline chloride manufacturer based in Highland, Illinois, and
DuCoa's general partner, DCV, Inc. liable for participating in the
cartel and ordered them to pay \$49,539,234, which was trebled to
\$148,617,702 under the federal antitrust laws. The case was
subsequently settled against the Mitsui defendants.

18 Hausfeld's lawyers have garnered significant praise from District Court judges including
19 in California. In *Air Passenger*, for example, the firm was praised by the District Judge Charles
20 R. Breyer of the Northern District of California for its efforts in achieving "really, an outstanding
21 settlement in which a group of lawyers from two firms coordinated the work . . . and brought an
22 enormous expertise and then experience in dealing with the case." The Court also stated that the
23 firm's lawyers are "more than competent. They are outstanding." *See King Decl*, Exh. C.
24 Similarly, in *Four In One Company, Inc. v. SK Foods*, 08-cv-03017, 2009 WL 747160 (E.D. Cal.,
25 March 20, 2009), District Judge Morrison C. England Jr. of the Eastern District of California
26 praised the firm for having "the breadth of experience, resources and talent necessary to navigate
27 a case of this import." In that case, "[a]lthough there [was] no question that the other firms
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1 proposed as co-lead counsel are also well qualified” the Court believed that only Hausfeld LLP
2 and one other firm “st[ood] out from the rest.” *Id.* at *3.

3 Additionally details on the firm, including its work on human rights issues and in other
4 significant litigation, are supplied in its Firm Resume (*see* King Decl., Exh. B) and on its website
5 located at <<http://www.hausfeldllp.com>>.²

6 The Hausfeld LLP attorneys that have worked in this case from its inception, and that will
7 continue to staff this matter include (but are not limited to) the following experienced class action
8 attorneys:

9 **Michael D. Hausfeld**’s career has included some of the largest and most successful class
10 actions in the fields of human rights, discrimination and antitrust law. He long has had an abiding
11 interest in social reform cases, and was among the first lawyers in the U.S. to assert that sexual
12 harassment was a form of discrimination prohibited by Title VII; he successfully tried the first
13 case establishing that principle. He represented Native Alaskans whose lives were affected by
14 the 1989 Exxon Valdez oil spill; later, he negotiated a then-historic \$176 million settlement from
15 Texaco, Inc. in a racial-bias discrimination case.

16 Chief Judge Edward Korman (E.D.N.Y.), has noted that Mr. Hausfeld is one of the two
17 “leading class action lawyers in the United States.” He has been profiled in, and recognized by,
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19 _____
20 ² With respect to pro bono work, as further described on the firm’s website and in its Firm
21 Resume, members of the Hausfeld firm pioneered the effort on behalf of Holocaust victims to
22 recover a portion of their family’s assets that were wrongfully taken from them by certain Swiss
23 Banks and their German collaborators during World War II. In total, \$1.25 billion in assets was
24 recovered for these victims. Hausfeld lawyers also represented the largest group of survivors and
25 their families who had been forced into slave labor for German companies during World War II.
26 Our efforts resulted in an agreement by these companies and the German Government to create a
27 fund of \$5.2 billion from which individual payments were made to victims wherever in the world
28 they resided. Hausfeld lawyers additionally litigated a case against the government of Japan on
behalf 200,000 women that had been forced into prostitution by the Japanese military during
World War II. These so-called “comfort women” were systematically held against their will and
raped by Japanese military personnel during Japan’s conquest of Southeast Asia. Additionally,
Hausfeld lawyers represented survivors of the 1921 Tulsa Race Riot.

1 many articles and surveys. Most recently, a Forbes magazine article reported on Mr. Hausfeld's
2 work to establish an international alliance for the protection of consumers and investors
3 worldwide. He was named one of thirty master negotiators in *Done Deal: Insights from*
4 *Interviews with the World's Best Negotiators*, by Michael Benoliel, Ed.D. *The Wall Street*
5 *Journal* profiled him and his practice, and he has been recognized by *The National Law Journal*
6 as one of the "Top 100 Influential Lawyers in America." *The New York Times* referred to Mr.
7 Hausfeld as one of the nation's "most prominent antitrust lawyers," and *Washingtonian Magazine*
8 has listed Mr. Hausfeld in several surveys as one of Washington's 75 best lawyers, saying he
9 "consistently brings in the biggest judgments in the history of law" and that he is "a Washington
10 lawyer determined to change the world – and succeeding."

11 **Michael P. Lehmann**, the head of Hausfeld LLP's San Francisco office, has 32 years of
12 experience as a business litigator, with a practice that has ranged from class action litigation to
13 business litigation on behalf of individual clients to extensive regulatory work before federal,
14 state and international bodies to domestic and international arbitration. Prior to joining Hausfeld
15 LLP, Mr. Lehmann had worked since graduating from law school at what became Furth Lehmann
16 LLP, where he eventually served as Managing Partner. In recent years he has served as co-lead
17 counsel for direct or indirect purchaser classes in numerous antitrust cases, including in this
18 District, in numerous state court actions in California, and various national class actions around
19 the country. Mr. Lehmann played a major role in a number of the most important recent
20 multidistrict antitrust class actions, including *In re International Air Transport Surcharge*
21 *Antitrust Litig.*, MDL No. 1793 (N.D. Cal.) ("*Air Passenger*"); *In re Transpacific Passenger Air*
22 *Transportation Antitrust Litig.*, MDL No. 1913 (N.D. Cal.); *In re Municipal Derivatives Antitrust*
23 *Litig.*, MDL No. 1950 (S.D.N.Y.); *In re Publication Paper Antitrust Litig.*, MDL No. 1631 (D.
24 Conn.); *In re High Pressure Laminates Antitrust Litig.*, MDL No. 1368 (S.D.N.Y.), and *In re*
25 *Graphics Processing Units Antitrust Litig.*, MDL No. 1826 (N.D. Cal.)

26 **Jon T. King**, a partner in Hausfeld LLP's San Francisco office, represents plaintiffs in
27 competition matters, including antitrust cases, and in other complex litigation. Mr. King currently
28

1 represents the Golden Gate Bridge, Highway & Transportation District, the governmental entity
2 that operates the Golden Gate Bridge and various transit systems, as one of the plaintiffs in *In re*
3 *Insurance Brokerage Antitrust Litigation*, MDL No. 1663 (D.N.J.), a case that has resulted in
4 approximately \$220 million in settlements to date. Prior to joining the firm, Mr. King practiced
5 antitrust law for eight years with Messrs. Lehmann and Lebsock at Furth Lehmann and for one
6 year at Cohen Milstein Hausfeld & Toll, P.L.L.C., out of which the Hausfeld firm was born. At
7 those firms, Mr. King worked on dozens of direct and indirect purchaser actions that resulted in
8 hundreds of millions of dollars in settlements. He began his legal career in Los Angeles at
9 Skadden, Arps, Slate, Meagher & Flom LLP, where he worked on matters for the National
10 Football League and various entertainment industry companies.

11 **Christopher L. Lebsock**, a partner in Hausfeld LLP's San Francisco office, has worked
12 on numerous complex antitrust and other matters including in this District. Mr. Lebsock was a
13 principal member of the plaintiffs' trial team in *Savaglio v. Wal-Mart*, a class action in Alameda
14 County Superior Court before the Hon. Ronald M. Sabraw. In that case, nearly 119,000 Wal-
15 Mart hourly employees who sued their employer for wrongfully denying them meal periods and
16 rest breaks. After more than three months of trial, in December of 2005, the jury returned a
17 verdict for the plaintiff class of more than \$172 million, including \$115 million in punitive
18 damages. Mr. Lebsock also has significant appellate experience. Mr. Lebsock was also the
19 primary attorney at Furth Lehmann responsible for litigating *In Re Automobile Antitrust Cases I*
20 *& II*, (S.F. Superior Court), a California class action in which the plaintiffs alleged that major
21 automobile manufacturers illegally conspired to prevent the export of Canadian vehicles to the
22 United States. Mr. Lebsock authored and argued an appeal in that case before California's First
23 District Court of Appeal.

24 **Megan E. Jones**, a partner in Hausfeld LLP's Washington, D.C. office, has been involved
25 in, among other class actions: *In re Polyester Staple Antitrust Litigation* (W.D.N.C), which
26 recovered over \$30 million on behalf of the class; and *ERC v. Archstone* (D.Md.), which was
27 recognized by the Washington Lawyers' Committee for Civil Rights. Ms. Jones was also
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1 involved in the \$300 million global settlement with Bayer (resolving EPDM, Rubber Chemicals
2 and NBR liability). In addition to her antitrust expertise, Ms. Jones has developed an expertise in
3 electronic discovery, and is the co-author of *The Sedona Conference Glossary: E-Discovery and*
4 *Digital Management* (2nd Ed). (Dec. 2007) and *Navigating the Vendor Proposal Process: Best*
5 *Practices for the Selection of Electronic Discovery Vendors*. Ms. Jones also is the founder of the
6 Women Antitrust Plaintiffs' Attorney networking group.

7 Finally, Proposed Interim Lead Counsel have already established and intend to maintain
8 professional working relationships with all counsel for Defendants in this action.

9 In light of the above, there can be no doubt that Proposed Interim Co-Lead Counsel have
10 the requisite skills and experience to efficiently litigate this action.

11 **C. Proposed Interim Co-Lead Counsel Can Devote Substantial Resources to the**
12 **Prosecution of this Action.**

13 Proposed Interim Co-Lead Counsel are familiar with the substantial resources necessary to
14 litigate a case of this magnitude. Hagens Berman has seven offices nationwide including two
15 offices in California and numerous experienced staff. Hausfeld LLP has four offices in the
16 United States, including one in San Francisco, and a substantial case team functioning on this
17 matter. Proposed Interim Co-Lead Counsel have achieved excellent results in the past and are
18 committed providing the resources required to prosecute this litigation through all phases,
19 including rigorous motion practice, discovery, class certification, summary judgment and trial.
20 The two firms have respectively prosecuted and financed some of the largest civil litigation in the
21 United States, including the tobacco litigation, the average wholesale price litigation against most
22 major companies in the pharmaceutical industry, and the Vitamins antitrust litigation. Proposed
23 Interim Co-Lead Counsel have the experience and resources to deal with large volumes of
24 documents and the substantial amount of discovery, motion practice, and trial work that will be
25 required in this action.

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V. CONCLUSION.

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

Dated: September 16, 2009

Respectfully submitted,

HAGENS BERMAN SOBOL SHAPIRO LLP

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/s/ Jon T. King

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I, Jon T. King, am the ECF User whose *ID* and password are being used to file this **PLAINTIFFS SAMUEL MICHAEL *KELLER'S* AND EDWARD C. O'BANNON, JR.'S JOINT NOTICE OF MOTION AND MOTION FOR APPOINTMENT OF INTERIM CO-LEAD COUNSEL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(g)(3)**. 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, and my office is located at 44
4 Montgomery Street, Suite 3400, San Francisco, California 94104.

5 On September 16, 2009, I filed the following:

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

9 **DECLARATION OF ROBERT B. CAREY IN SUPPORT OF PLAINTIFFS SAMUEL
10 MICHAEL *KELLER*'S AND EDWARD C. O'BANNON, JR.'S MOTION FOR
11 APPOINTMENT OF INTERIM CO-LEAD COUNSEL PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 23(g)(3);**

12 **DECLARATION OF JON T. KING IN SUPPORT OF PLAINTIFFS SAMUEL
13 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); and**

14 **[PROPOSED] ORDER GRANTING PLAINTIFFS SAMUEL MICHAEL *KELLER*'S
15 AND EDWARD C. O'BANNON, JR.'S MOTION FOR APPOINTMENT OF
16 INTERIM CO-LEAD COUNSEL PURSUANT TO FEDERAL RULE OF CIVIL
PROCEDURE 23(g)(3)**

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

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

22 The Hon. Claudia Wilken
23 U.S.D.C., Northern District of California
Oakland Division
24 1301 Clay Street, Suite 400 S
25 Oakland, CA 94612-5212

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

27 /s/ Jon T. King
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