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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

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

Plaintiff,

v.

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

Defendants.

Case No. 3:09-cv-03329 CW

OPPOSITION OF DEFENDANTS NCAA AND CLC TO PLAINTIFFS' JOINT MOTION TO CONSOLIDATE ACTIONS

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

Date Comp. Filed: July 21, 2009/ May 5, 2009

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES ii

INTRODUCTION 1

THE O'BANNON AND KELLER CASES 3

LEGAL STANDARD 4

ARGUMENT 6

I. PLAINTIFFS' ACTIONS DO NOT INVOLVE COMMON ISSUES OF FACT AND LAW 6

II. CONSOLIDATION WOULD BE INEFFICIENT AND CREATE PREJUDICE AND LIKELY CONFUSION 9

A. The motion is premature 10

B. There are no case management benefits to consolidation 11

CONCLUSION 13

INDEX OF AUTHORITIES

Page(s)

CASES

Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.,
No. C-92-20643 RMW, 1994 U.S. Dist. LEXIS 17569 (N.D. Cal. Apr. 19, 1994) 5

Balivi Chem. Corp. v. JMC Ventilation Refrigeration, LLC,
No. CV-07-353, 2008 U.S. Dist. LEXIS 2151 (D. Idaho Jan. 10, 2008)..... 9

Chelsea LLC v. Regal Stone, Ltd.,
No. 07-5800, 2009 U.S. Dist. LEXIS 10770 (N.D. Cal. Feb. 3, 2009) 4, 5

EEOC v. Pan-American World Airways, Inc.,
No. C-81-3636 RFP, 1987 U.S. Dist. LEXIS 15181 (N.D. Cal. Dec. 3, 1987)..... 5, 6, 12

Grinenko v. Olympic Panel Prods., LLC,
No. C07-5402 BHS, 2008 WL 1805673 (W.D. Wash. Apr. 21, 2008) 5

In re NVIDIA GPU Litigation,
No. C 08-04312, 2009 U.S. Dist. LEXIS 30606 (N.D. Cal. Apr. 10, 2009) 5

Kuroiwa v. Lingle,
No. 05-00649, 2008 U.S. Dist. LEXIS 43036 (D. Haw. May 30, 2008)..... 12

Levitte v. Google, Inc.,
No. C 08-03369, 2009 U.S. Dist. LEXIS 18198, at *4 (N.D. Cal. Feb. 25, 2009)..... 4

Lewis v. City of Fresno,
No. CV-F-08-1062, 2009 U.S. Dist. LEXIS 57083 (E.D. Cal. July 6, 2009)..... 4, 6

Makah Indian Tribe v. Verity,
No. C87-747 RC, 1988 U.S. Dist. LEXIS 15340 (W.D. Wash. May 10, 1988)..... 11

Narvaes v. EMC Mortgage Corp.,
No. 07-00621 HG-LEK, 2009 U.S. Dist. LEXIS 38084 (D. Haw. May 1, 2009) 4, 5

O'Diah v. Univ. of California,
No. C-90-0915 RFP, 1991 U.S. Dist. LEXIS 13468 (N.D. Cal. Sept. 19, 1991) 6, 11

Oregon Natural Desert Ass'n v. Shuford,
No. 06-242-AA, 2006 U.S. Dist. LEXIS 64452 (D. Oregon Sept. 8, 2006)..... 9

Sapiro v. Sunstone Hotel Investors, LLC,
No. CV-03-1555-PHX-SRB, 2006 U.S. Dist. LEXIS 21234 (D. Ariz. Apr. 4, 2006)..... 4, 6, 9, 12

Wadsworth et al. v. KSL Grand Wailea Resort, Inc.,
No. 08-00527 ACK-LEK, 2009 U.S. Dist. LEXIS 22282 (D. Haw. Mar. 19, 2009) 8, 13

Western Watersheds Project v. U.S. Forest Serv.,
No. CV-07-151-E-BLW, 2009 U.S. Dist. LEXIS 1359 (D. Idaho Jan. 8, 2009) 9

COURT RULES

Fed. R. Civ. P. 23 7

Fed. R. Civ. P. 42(a) 4, 11, 13

Local Rule 3-12 ..... 3, 6, 9

INTRODUCTION

Plaintiffs' joint motion to consolidate the *Keller* and *O'Bannon* cases[1] suffers from several fundamental defects that require that the motion be denied. The cases do not involve the same parties, the same claims, the same questions of law, or the same questions of fact.

Indeed, Keller has already ***admitted*** that these cases do not share common questions of fact or law. Just a few weeks ago, Keller opposed O'Bannon's request to relate the cases, arguing that that "the two actions do not involve 'substantially' the same parties and the events giving rise to the two actions are significantly different." (Dkt. 55 in *Keller*). Yet Keller now claims the cases are similar enough to support consolidation, without even attempting to explain or reconcile his prior position to the contrary.

Keller was right the first time: even a cursory glance at the *Keller* and *O'Bannon* complaints reveals that these cases are insufficiently similar to support consolidation. *Keller* is a state law right of publicity case, seeking damages on behalf of current (and some former) student-athletes whose images have supposedly appeared in two EA video games. *O'Bannon* is a federal antitrust case, seeking damages on behalf of former (not current) student-athletes whose ability to profit from their college images has somehow – through means never quite explained by O'Bannon – supposedly been restrained by an NCAA form that the class members supposedly signed years, if not decades, ago. Moreover, *O'Bannon* is not limited to the video games identified in the Keller complaint, but rather purports to concern a whole panoply of products including DVDs, television broadcasts of "classic" games, video clips, photos, action figures, trading cards, and posters. The only similarity between the cases is the fact that the NCAA and the CLC are defendants in both. That is not nearly enough to support consolidation.

Plaintiffs do not really attempt to argue otherwise. Their five-page brief does not, because it cannot, make a serious attempt to demonstrate that these cases share meaningful, common

[1] *Keller v. Electronic Arts, Inc. et al*, Case No. CV-09-1967-CW (Filed May 5, 2009); *O'Bannon v. Nat'l Coll. Athletic Ass'n*, Case No. CV-09-3329-CW (Filed July 21, 2009). O'Bannon's motion to have the cases declared "related" was granted, over Keller's objection, on August 11, 2009.

questions of fact or law. Instead, Plaintiffs identified a few abstract – and for legal purposes, meaningless – "similarities" between the cases, such as the fact that both supposedly "relate" to "NCAA rules." These "similarities," however, are not sufficient to justify consolidation. Plaintiffs also claim that any lack of similarity in the current complaints can be fixed by the filing of a future "consolidated" amended complaint, which will (through means plaintiffs never identify) make the cases more similar. Using the promise of a future consolidated complaint as justification to consolidate the actions in the first instance is circular and nonsensical. Of course, Keller and O'Bannon are free to dismiss their current complaints and file a complaint together at any time. But that possibility does not make consolidation of their current, entirely dissimilar cases appropriate. Rather, Plaintiffs' motion is directed to the lawsuits on file, not the combined case plaintiffs wish they had filed, or might file in the future. Any claim of future amendment is simply irrelevant to the question whether the cases currently on file are appropriate for consolidation.

Moreover, consolidation is not in the interest of judicial economy; it will complicate rather than simplify matters, will substantially prejudice Defendants and increase litigation costs and delay, and will likely lead to confusion in briefing, motion practice and at trial. There is no risk here of inconsistent verdicts, as the questions the Court and the jury will be considering if these cases go forward are separate and distinct, as are the putative classes Plaintiffs purport to represent and the relief Plaintiffs seek. Moreover, the pending and forthcoming motion practice may lead to elimination or drastic overhaul of one or both of these actions.

Finally, to the extent that discovery between the cases may overlap—which Defendants seriously doubt—it can be coordinated by the parties with the supervision of the Court, without the need for consolidation.

For these reasons, and as more fully described below, the Court should deny plaintiffs' motion. The time to consider whether, and how, these cases should be consolidated is, at a minimum, still several months away.

THE *O'BANNON* AND *KELLER* CASES

Plaintiff Samuel Keller filed his complaint on May 5, 2009, against defendants Electronic Arts Inc. ("EA"), the National Collegiate Athletic Association ("NCAA") and the Collegiate Licensing Company ("CLC"). Keller alleges that EA, the NCAA and the CLC conspired to deprive him, and a putative class of college football and basketball players, of their state law rights of publicity by wrongfully using player likenesses in two EA video games. Keller claims that these alleged activities constitute an unlawful civil conspiracy, violate statutory rights of publicity under California statutory and common law (against EA), Indiana statutory law (against the NCAA), and constitute a breach of contract (by the NCAA) and unjust enrichment (against EA and CLC).

Plaintiff Edward O'Bannon filed suit on July 21, 2009, alleging that the NCAA and CLC, in a purportedly wide-ranging conspiracy involving multitudes of unnamed co-conspirators, violated federal antitrust laws by fixing prices and/or refusing to deal with former student-athletes in an alleged "collegiate licensing market," apparently by requiring student-athletes to sign certain forms, specifically Form 08-3a and an "Institutional, Charitable, Educational or Nonprofit Promotions Release Statement." O'Bannon claims this conspiracy affected the sale of DVDs, television rights to classic games, video clips, photos, action figures, trading cards, and posters, as well as video games. O'Bannon has filed his suit on behalf of a putative damages class of former football and basketball players and a putative injunctive relief class that includes current student-athletes as well. EA is not a party to the *O'Bannon* case.

On July 29, 2009, O'Bannon filed a request with the Court to relate the two cases under Local Rule 3-12. The NCAA and CLC both opposed the request, as did Keller. Keller argued that the cases should not be related because "the parties at issue and the primary events giving rise to liability are not substantially the same and because no likelihood of unduly burdensome duplication of labor exists in light of the wholly unrelated legal theories being pursued in each case." Keller Opp. to Admin. Mtn. to Consider Whether Cases Should Be Related, 1 (Docket No. 55). The Court ordered the two cases related on August 11, 2009. Keller and O'Bannon have

now moved to have the cases consolidated pursuant to Fed. R. Civ. P. 42(a), presumably for all purposes. The cases are not suitable for consolidation, however, and the motion should be denied.

LEGAL STANDARD

Consolidation of cases in the same district is permissible when actions involving a common question of law or fact are pending before the Court. Fed. R. Civ. P. 42(a). A decision on a motion to consolidate requires examination of the parties, claims and factual predicates at issue in each operative complaint. *Levitte v. Google, Inc.*, No. C 08-03369, 2009 U.S. Dist. LEXIS 18198, at *4 (N.D. Cal. Feb. 25, 2009) (considering identity of parties and similarity of factual and legal issues). If cases are pending in the same district and have the same essential issues of law and fact, consolidation is generally a matter of discretion for the Court. *See, e.g., Lewis v. City of Fresno*, No. CV-F-08-1062, 2009 U.S. Dist. LEXIS 57083, at *2 (E.D. Cal. July 6, 2009) ("Once a common question has been established, 'consolidation is within the broad discretion of the district court.'").

"Such discretion, however, is not unfettered." *See, e.g., Narvaes v. EMC Mortgage Corp.*, No. 07-00621 HG-LEK, 2009 U.S. Dist. LEXIS 38084, at *5 (D. Haw. May 1, 2009) (citing *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)). Indeed, "even where cases involve some common issues of law or fact, consolidation may be inappropriate where individual issues predominate." *Lewis*, 2009 U.S. Dist. LEXIS 57083 at *2-3; *see also Sapiro v. Sunstone Hotel Investors, LLC*, No. CV-03-1555-PHX-SRB, 2006 U.S. Dist. LEXIS 21234, at *3 (D. Ariz. Apr. 4, 2006) ("[T]he fact that a common question is present does not guarantee consolidation.").

In assessing the appropriateness of consolidation, a court should not only consider whether the cases involve similar issues of law and fact, but should also "balance the savings of time and effort consolidation will produce against any inconvenience, delay, or expense that it would cause." *Chelsea LLC v. Regal Stone, Ltd.*, No. 07-5800, 2009 U.S. Dist. LEXIS 10770, at *7 (N.D. Cal. Feb. 3, 2009) (citing *Huene v. U.S.*, 743 F.2d 703, 704 (9th Cir. 1984)); *see also Lewis*, 2009 U.S. Dist. LEXIS 57083 at *2-3 ("To determine whether to consolidate, the interest

of judicial convenience is weighed against the potential for delay, confusion and prejudice caused by consolidation."). In particular, the court should consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Narvaes, 2009 U.S. Dist. LEXIS 38084 at *6 (citing *Johnson*, 899 F.2d at 1285); *see also Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, No. C-92-20643 RMW, 1994 U.S. Dist. LEXIS 17569, at *12 (N.D. Cal. Apr. 19, 1994) ("This weighing process involves a review of a number of different factors including, but not limited to, whether the causes of action and facts in each action are similar, whether the complexity of the consolidated case will confuse the jury, whether trying the actions separately will involve an unneeded duplication of effort, whether consolidation will delay the trial of one or both of the actions, and whether consolidation would adversely affect the rights of any of the parties.").

Even cases with overlapping parties and similar factual issues might be inappropriate for consolidation. *See, e.g., In re NVIDIA GPU Litigation*, No. C 08-04312, 2009 U.S. Dist. LEXIS 30606, at *5 (N.D. Cal. Apr. 10, 2009) (finding that *Decker* action, while related, should not be added to consolidated cases where *Decker* action focused on a different defective product than the consolidated cases); *Grinenko v. Olympic Panel Prods., LLC*, No. C07-5402 BHS, 2008 WL 1805673, at *4 (W.D. Wash. Apr. 21, 2008) (though same parties and claims appeared in both cases, consolidation denied because cases differed in procedural posture and state-law claims); *EEOC v. Pan-American World Airways, Inc.*, No. C-81-3636 RFP, 1987 U.S. Dist. LEXIS 15181, at *3 (N.D. Cal. Dec. 3, 1987) (despite considerable factual overlap, consolidation denied due to distinct issues of law). Moreover, consolidation cannot be used to impact, waive or affect the substantive rights of the parties. *Chelsea LLC*, 2009 U.S. Dist. LEXIS 10770 at *12 (citing *Geddes v. United Fin. Group*, 559 F.2d 557, 561 (9th Cir. 1977) and *J.G. Link & Co. v. Continental Cas. Co.*, 470 F.2d 1133, 1138 (9th Cir. 1972)).

The moving party bears the burden of demonstrating that consolidation is appropriate. *Lewis*, 2009 U.S. Dist. LEXIS 57089 at *4; *Sapiro*, 2006 U.S. Dist. LEXIS 21234 at *4 (citing *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993)); *EEOC*, 1987 U.S. Dist. LEXIS 15181 at *3. The purposes of consolidation are to positively impact judicial economy, efficiency and convenience and to prevent potential problems created by inconsistent decisions, verdicts and judgments. *Sapiro*, 2006 U.S. Dist. LEXIS 21234 at *3-4 (explaining purposes and collecting cases).

ARGUMENT

I. PLAINTIFFS' ACTIONS DO NOT INVOLVE COMMON ISSUES OF FACT AND LAW

Plaintiffs' motion should be denied because Plaintiffs have not demonstrated—and cannot demonstrate—that these cases involve common questions of fact or law. Keller, of course, has already admitted as much: he has told this Court that these cases involve "wholly unrelated legal theories," and argued that they are too dissimilar to warrant being related under Local Rule 3-12, let alone consolidated under Rule 42. Keller Opp. to Admin. Mtn. to Consider Whether Cases Should Be Related, 1 (Docket No. 55). And Plaintiffs still seem to concede the point, at least implicitly: their motion claims that any failure of the current complaints to satisfy Rule 42 will, somehow, be remedied in the hypothetical "consolidated" complaint they claim they will file later. Motion to Consolidate at 8.

Keller was right the first time: these cases ***do*** involve "wholly unrelated legal theories," and are legally and factually so dissimilar that consolidation will create inefficiencies rather than alleviate them. Plaintiffs attempt to obscure this fact by describing the cases in general terms, but even a cursory examination of their assertions reveals that *Keller* and *O'Bannon* are not sufficiently similar to be consolidated. The fact that the cases might each "reference," in some way, the same general topic—here, publicity rights—does not show that the cases will require determination of a common issue of law or fact. *See, e.g., O'Diah v. Univ. of California*, No. C-90-0915 RFP, 1991 U.S. Dist. LEXIS 13468, at *12 (N.D. Cal. Sept. 19, 1991) (denying motion to consolidate where plaintiff's claim that cases were "related" was supported only by cases

sharing common defendant and two causes of action, where "remaining questions of fact and law" were not "sufficiently common," and "there does not appear to be a substantial danger that these cases will result in inconsistent adjudication"). And once Plaintiffs' generalizations are set aside, it becomes apparent that *Keller* and *O'Bannon* have nothing meaningful in common.

Keller is a case brought under California and Indiana state law against EA, NCAA, and CLC, in which Keller alleges a right to damages for himself and on behalf of a purported class of current college football and basketball players based on theories of statutory and common law rights of publicity, breach of contract, and unjust enrichment. Keller alleges that EA appropriated his and other student-athlete's likenesses for use in two video games, that EA, the NCAA and CLC engaged in a civil conspiracy to enable that to happen, that CLC and EA were unjustly enriched by that activity, and that the NCAA breached an alleged contract with Keller and other student-athletes in purportedly "allowing" EA to engage in the alleged appropriation.

Issues of fact and law in *Keller*, therefore, include (a) the appropriateness of the putative class for certification under Fed. R. Civ. P. 23, including issues of choice of law, fact of damage, and causation, (b) whether EA's video games use likenesses of any class member, (c) whether such use or similarity constitutes a violation of the right to publicity under California law, (d) whether the NCAA itself "used" the likenesses of any class member, (e) whether any acts of the NCAA alleged by the Plaintiff constitutes a violation of the right to publicity under Indiana law, (e) whether there is any evidence of a civil conspiracy aimed at violating or appropriating student-athletes' rights to publicity, (e) whether any class member was damaged by any act of any defendant, (f) whether the NCAA entered into and/or breached any "contract" with Keller and/or any other student-athlete putative class member, and (g) whether EA and/or CLC wrongfully received any benefit at the expense of Keller and/or any other student-athlete class member.

O'Bannon, on the other hand, is a federal antitrust case against NCAA and CLC only. O'Bannon alleges that certain NCAA practices "restrain trade" in a purported "collegiate licensing market" (or some other related market) and alleges both *per se* and rule of reason violations of the Sherman Act. The *O'Bannon* complaint purports to include separate classes for both damages

and injunctive relief. Specifically, O'Bannon alleges that NCAA rules – and in particular, a form regarding the use of student-athletes to promote charitable, non-profit, institutional and NCAA events – operate as a wide-ranging conspiracy in restraint of trade that restricts the manner in which schools and conferences "negotiate" with student-athletes regarding compensation for the use of their images after graduation. O'Bannon alleges that this "conspiracy" somehow affected the markets for DVD's, television rights to classic games, video clips, photos, action figures, trading cards, and posters, as well as video games.

The factual and legal issues in *O'Bannon* are far different than those in *Keller*. Issues in *O'Bannon* will include (a) whether there is a conspiracy to restrain trade; (b) whether O'Bannon can prove that his alleged "collegiate licensing" market is a proper relevant market for antitrust purposes; (c) whether the NCAA's or CLC's alleged "wrongdoing" actually had a substantial adverse effect on economic competition in a well-defined relevant market; (d) what the competitive effects of the alleged NCAA and CLC activities were; (e) whether the NCAA and CLC activities alleged in the Complaint have procompetitive benefits, and if so whether O'Bannon can provide alternatives that meet those same justifications that are substantially less restrictive of economic competition; and (f) whether O'Bannon or any other putative class member was damaged by the alleged actions of the NCAA and whether that alleged injury constitutes *antitrust* injury. Because the classes alleged, the defendants' allegedly wrongful actions and the alleged impacts thereof differ from those in *Keller*, the assessment of whether the case is appropriate for class treatment will differ as well.

The cases are, in sum, fundamentally different. It is highly unlikely that similar or overlapping issues will be present in or relevant to each case, much less decided inconsistently. Any chance, moreover, of inconsistent rulings—on evidentiary issues or on dispositive motion practice—will almost certainly be ***entirely appropriate***, because the cases are different. *Wadsworth et al. v. KSL Grand Wailea Resort, Inc.*, No. 08-00527 ACK-LEK, 2009 U.S. Dist. LEXIS 22282, at *7 (D. Haw. Mar. 19, 2009) (stating that concern regarding risk of inconsistent rulings did not favor consolidation where such rulings would just as likely be the result of

differing factual patterns, rather than adjudication in different courts); *Sapiro*, 2006 U.S. Dist. LEXIS 21234 at *8-9 ("[C]oncern about inconsistent verdicts is also alleviated by the fact that different verdicts might be warranted."). Discovery, evidence, and the facts and law relevant to each case (should either survive initial motion practice) will be very different, and there is likely to be little overlap.[2] *See, e.g., Oregon Natural Desert Ass'n v. Shuford*, No. 06-242-AA, 2006 U.S. Dist. LEXIS 64452, at *32 (D. Oregon Sept. 8, 2006) ("'[W]hether consolidation is permissible or desirable will depend in large part on the extent to which the evidence in the cases is common.' ... Unless common evidence predominates, consolidation may lead to confusion while failing to improve efficiency.") (quoting Manual for Complex Litigation at §21.631). Plaintiffs' ability to over-generalize the issues created by respective complaints to assert similarities is insufficient.

The *Keller* and *O'Bannon* cases do not present common issues of fact or law. Plaintiffs' motion to consolidate should be denied.

II. CONSOLIDATION WOULD BE INEFFICIENT AND CREATE PREJUDICE AND LIKELY CONFUSION

Even if there was some meaningful similarity between the *Keller* and *O'Bannon* actions, the Court should nevertheless deny the motion because it will not promote judicial economy.

[2] Of course, in the unlikely event there is overlap in discovery or other litigation issues, the "risk" of inconsistent rulings in these cases would be significantly mitigated by the fact that the cases are already related per Local Rule 3-12, and could be adequately addressed by agreement among counsel. *See, e.g., Western Watersheds Project v. U.S. Forest Serv.*, No. CV-07-151-E-BLW, 2009 U.S. Dist. LEXIS 1359, *4 (D. Idaho Jan. 8, 2009) (concern regarding inconsistent rulings eliminated by transfer to same judge); *Balivi Chem. Corp. v. JMC Ventilation Refrigeration, LLC*, No. CV-07-353, 2008 U.S. Dist. LEXIS 2151, at *5 (D. Idaho Jan. 10, 2008) (declining to consolidate potentially confusing cases regarding distinct patents and noting that "[t]he Court is confident that counsel can stipulate to apply overlapping discovery to both cases"). Inconsistent judgments impacting plaintiffs' or others' rights, however, are highly unlikely—the allegations regarding operative fact and legal theories are simply too different.

A. The motion is premature

There is no judicial economy to be gained by consolidating these cases now, given (1) the motions to dismiss already filed in *Keller*; (2) the motion to transfer venue already filed in *O'Bannon*; and (3) the motions to dismiss that will shortly be filed in *O'Bannon*.

In the *Keller* case, all Defendants have filed motions to dismiss and EA has filed a motion to strike the Complaint pursuant to California's anti-SLAPP statute. The parties agreed upon, and the Court subsequently ordered, a briefing schedule. After additional delays at Keller's request, Keller filed his oppositions to the pending motions on September 1. Those motions are set to be heard October 1.

Similarly, the *O'Bannon* defendants have already filed a motion to transfer venue, and anticipate filing motions to dismiss by the current deadline of September 28.[3]

If the Court grants any of the pending motions, this motion for consolidation will be moot; there will be nothing to consolidate, either because *Keller* will have been dismissed or because *O'Bannon* will have been transferred or dismissed. For this reason alone, the Court should deny plaintiffs' motion to consolidate. It makes no sense to consolidate these cases before the Court has determined that plaintiffs have stated valid claims for relief, or that this Court is an appropriate forum for the *O'Bannon* case.

Plaintiffs' only response to the above is to claim that the pending motions – and, apparently, any future motions – directed to the current *Keller* and *O'Bannon* complaints are effectively mooted by plaintiffs' mere ability to file amended complaints (whether or not plaintiffs actually file those complaints). Plaintiffs' argument is not only procedurally incorrect—until either of them actually files an amended complaint, the current complaints remain operative and the pending motions are not moot—but their argument also proves far too much.

[3] Based on a proposal by O'Bannon's counsel, the parties had agreed on a schedule for the filing of O'Bannon's amended complaint by a date certain and a time for defendants to respond to that amended complaint. The deadline for O'Bannon to amend under that agreement has passed. The parties had reached a tentative agreement that would have given O'Bannon several more weeks to amend his Complaint. But on September 8, counsel for O'Bannon scuttled that tentative agreement, indicating that while O'Bannon reserved the right to file an amended complaint, he would not agree to do so by a date certain.

Since both Keller and O'Bannon concede that they are planning to file amended complaints (or an amended consolidated complaint if this motion is granted), plaintiffs are effectively asking this Court to rule on the consolidation motion in a vacuum, and to consolidate complaints that neither the Defendants nor the Court has seen. It is not possible for the Court to rule in the abstract that forthcoming amended complaints meet the standards for consolidation under Fed. R. Civ. P. 42(a). For this reason as well, Plaintiffs' motion should be denied. *See, e.g., Makah Indian Tribe v. Verity*, No. C87-747 RC, 1988 U.S. Dist. LEXIS 15340, at *67 (W.D. Wash. May 10, 1988) (denying motion to consolidate while dispositive motions pending because "[u]ntil the court rules on those motions, there is no reason to consolidate the two cases, because consolidation would serve only to delay, not expedite, resolution of both."). Here, consolidation prior to the closing of the pleadings will only result in wasted motion practice and duplicative briefing schedules. At the very least, Plaintiffs' motion should be held in abeyance until after amended complaints, if any, are filed, and after the Court has determined that either of the complaints states a claim upon which relief can be granted.

B. There are no case management benefits to consolidation

Even if Plaintiffs' vague and generalized assertions of one or two commonly "referenced" subjects could constitute sufficient "common issues of fact or law" as required by Fed. R. Civ. P. 42(a), consolidation in this instance would still not be appropriate. Consolidation of the vastly different complaints in this instance would be directly contrary to the purposes of Rule 42: rather than creating efficiencies, and eliminating duplicative proceedings and simplifying the course of the litigation, consolidation of Keller's state law publicity rights claims with the complex antitrust issues raised by the O'Bannon complaint—particularly where it is unclear if either complaint states a valid claim and both sets of plaintiffs anticipate filing amended complaints—would add complexity and confusion. *See, e.g., O'Diah*, 1991 U.S. Dist. LEXIS 13468 at *12 (stating that consolidation allowed in order to "enhance trial efficiency and avoid the substantial danger of inconsistent adjudication"). As such, even if Plaintiffs had carried their burden of demonstrating

that the cases present a common issue of law or fact, which they have not, the motion should still be denied.

First, as noted above, Defendants would be prejudiced by any consolidation. Consolidation cannot moot either the pending motions to dismiss in *Keller* or the anticipated motions in *O'Bannon*. Consolidation at this point will only result in pointless delay.

Second, neither claim, if permitted to proceed past initial dispositive motion practice, will benefit from injection of the complex issues raised by the other. Antitrust cases are complicated, and class actions are more so. Requiring inefficient joint litigation of issues that do not overlap, and consolidating these cases for class certification and perhaps trial, would create a high risk of delay, prejudice and confusion. Both cases, if they were to proceed to the class certification and/or the merits stages of the litigation, would require multiple experts on various subjects, most of which would be irrelevant to the companion case—for example, experts on market definition and anticompetitive effects will add nothing but confusion to the *Keller* litigation. Even with some factual overlap, the dissimilarities in law here weigh heavily against consolidation. *See, e.g., Kuroiwa v. Lingle*, No. 05-00649, 2008 U.S. Dist. LEXIS 43036, at *8-9 (D. Haw. May 30, 2008) (denying consolidation despite "similar factual foundation" in cases, because consolidation "would not result in more expeditious handling" but "[t]o the contrary, wholly irrelevant issues would be inserted into each case"); *Sapiro*, 2006 U.S. Dist. LEXIS 21234 at *7, n.2 ("[H]aving one trial rather than two would not necessarily save judicial resources in this case because the resulting joint trial could be longer, more complicated and potentially more confusing to jurors."); *EEOC*, 1987 U.S. Dist. LEXIS 15181 at *3-5 (denying motion to consolidate despite fact that actions arose "out of essentially the same nucleus of operative fact" where the cases were "completely dissimilar in law" and stating "[i]ntroducing evidence pertaining to Russell's claims and elucidating the law applicable therein would inject substantial intricacy into an already complex trial.").

Consolidation of these cases would be particularly inadvisable due to the *Keller* and *O'Bannon* complaints' dissimilar and intricate class definitions. Both plaintiffs have proposed

complicated and, in Defendants' view, flawed class definitions, and consolidation will only add complexity to the class certification process. This fact makes consolidation inappropriate. *See, e.g., Wadsworth*, 2009 U.S. Dist. LEXIS 22282 at *7. In *Wadsworth*, the court denied a consolidation motion despite conceding that the cases at issue shared the same basic fact pattern, alleged the same causes of action and were focused on interpretation of the same statute, because (a) multiple factual differences rendered the legal issues in each case distinguishable, (b) consolidation would be more inefficient and expensive for defendants, and (c) consolidation of multiple putative class actions would render class certification process unduly complicated. Those concerns are even more pertinent here, where there is no shared fact pattern and each case alleges different causes of action based on different factual predicates.

Consolidation of putative class actions, one based on an alleged violation of publicity rights and another based on alleged violations of federal antitrust laws, neither based on or arising from the same alleged course of conduct, and neither likely to require either discovery or presentation of the same factual evidence or legal argument, is simply not appropriate under Rule 42(a). Defendants respectfully request, therefore, that the Court exercise its discretion to deny Plaintiffs' motion in its entirety.

CONCLUSION

For all the foregoing reasons, Defendant NCAA respectfully requests that the Court DENY the pending motion to consolidate.

Robert J. Wierenga, the filer of this Opposition, hereby attests that Peter M. Boyle concurs in the filing of this Opposition.

Dated: September 17, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 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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