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Michael P. Lehmann (Cal. Bar No. 77152)
Christopher L. Lebsock (Cal. Bar No. 184546)
Jon T. King (Cal. Bar No. 205073)
Arthur N. Bailey, Jr. (Cal. Bar No. 248460)
HAUSFELD LLP
44 Montgomery Street, 34th Floor
San Francisco, CA 94104
Tel: (415) 633-1908
Fax: (415) 358-4980
Email: mlehmann@hausfeldllp.com
clebsock@hausfeldllp.com
jking@hausfeldllp.com
abailey@hausfeldllp.com

Michael D. Hausfeld (pro hac vice)
Megan E. Jones (pro hac vice)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201
Email: mhausfeld@hausfeldllp.com
mjones@hausfeldllp.com

Counsel for Plaintiff

[Additional counsel listed on signature page]

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)

PLAINTIFF EDWARD O'BANNON'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

Judge: The Hon. Claudia Wilken
Courtroom: 2, 4th Floor

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I. INTRODUCTION.

The motion to transfer venue to the Southern District of Indiana filed by the National Collegiate Athletic Association ("NCAA") and the Collegiate Licensing Company ("CLC") should be denied. Plaintiff Ed O'Bannon's choice of forum—the Northern District of California—is indisputably proper. It is also the most logical forum for litigating his claims since the *related case* captioned, *Keller v. Electronic Arts Inc.*, Case No. 09-cv-01967-CW ("*Keller*") is also pending in this district against these same defendants. Accordingly, it simply makes no sense for these two overlapping cases to be litigated in two different forums separated by thousands of miles when they can be more efficiently resolved in a consolidated proceeding in this Court.

II. ARGUMENT.

A district court may grant a *discretionary* change of venue pursuant to 28 U.S.C. §1404(a), which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The burden is on the *defendant* to show that the convenience of the parties and witnesses and the interests of justice require transfer to another district. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979). No single factor is dispositive, and a district court has broad discretion to adjudicate motions for transfer of venue. *Sparling v. Hoffman Constr. Co., Inc.*, 864 F.2d 635, 639 (9th Cir. 1988).

A. Convenience of the parties.

The NCAA argues that it will be substantially more convenient for it to litigate this case in Indianapolis because that is where its headquarters are and where the majority of the relevant documents are stored. Defendant CLC joins in this argument even though it is headquartered in Atlanta and many of its documents are presumably located in Georgia, not Indianapolis.

It seems that the NCAA is stretching a bit when it claims that most of its relevant documents will be located in Indianapolis. As described further in this opposition, the NCAA is an organization made up of member institutions dispersed throughout the United States. Its

amateurism policies are developed by its Division I Amateurism Cabinet, a committee comprised of representatives of various colleges and universities. This committee is responsible for "student-athlete likeness issues," which, of course, are at the heart of this litigation. Accordingly, relevant evidence is as likely to be contained in correspondence and emails located at any number of schools around the United States, as it is in Indianapolis. *See* http://ncaa.org/wps/ncaa?key=/ncaa/ncaa/legislation+and+governance/committees/division+i/amateurism+cabinet/index-d1_amateurism_cabinet.html.

Regardless, "the location of the evidence and witnesses . . . is no longer weighed heavily given the modern advances in communication and transportation." *Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998) ("*Panavision*"); *Silverlit Toys Manufactory, Ltd. v. Absolute Toy Marketing, Inc.*, 2007 WL 521239, *11 (N.D. Cal. Feb. 15, 2007) (Wilken, J.) ("*Silverlit*"). In fact, in modern complex litigation like this, it is now standard procedure for document productions to take place electronically (including paper documents and handwritten notes). These documents are then uploaded onto computer servers and can be reviewed by any authorized attorney from any computer with an internet connection regardless of where their office is located. Indeed, electronic production has become so common that production in any other manner would be highly unusual. Accordingly, Defendants are unable to establish that they are substantially burdened by litigating in California simply because a portion of their documents are located in other states.

This is particularly true where, as here, the Defendants' contacts with this district are sufficient to put them on notice that they may be sued here. *See Mayberry v. International Business Machines Corp.*, 2009 WL 1814436, *4 (N.D. Cal. June 25, 2009) (Wilken, J.). Although the NCAA is headquartered in Indianapolis, the association is simply an aggregation of its member institutions, including U.C. Berkeley, Stanford University, University of San Francisco, Santa Clara University, St. Mary's College of California, and San Jose State, all of which are located in this district and all of which enforced the wrongful agreements described in Plaintiff's complaint. *See* Wierenga Decl., Exhs. A and B; *see also* Complaint, ¶5 ("Defendant NCAA describes itself as 'the organization through which the colleges and universities of the

nation speak and act on athletics matters at the national level' . . . ."); Complaint, ¶56 ("The NCAA additionally states '[m]any believe the Association rules college athletics; however, it is actually a bottom-up organization in which the members rule the Association.'"). Additionally, the Pac-10 Conference is also a member of the NCAA, is headquartered in Walnut Creek, California (s*ee* http://www.pac-10.org/school-bio/pac10-school-bio.html), and is directly involved in selling the Defendant NCAA's DVDs containing images of Plaintiff during his college career (s*ee* http://shop.pac-10.com/COLLEGE_UCLA_Bruins/UCLA_Bruins_1995_NCAA_Championship_DVD)

Setting aside the related *Keller* litigation which is already pending before this Court, the NCAA frequently litigates in jurisdictions where its member schools are located. *See* Declaration of Christopher L. Lebsock ("Lebsock Decl."), Exh. 1 (reflecting litigation involving the NCAA throughout the United States, including California). Some prominent examples of litigation involving the NCAA (including litigation as a *plaintiff*) that have been previously venued in district courts within the Ninth Circuit are:

- *Regents of University of California v. ABC*, 747 F.2d 511 (9th Cir. 1984) (litigated in C.D. Cal.);
- *Associated Students of Calif. State Univ. at Sacramento v. NCAA*, 493 F.2d 1251 (9th Cir. 1974) (litigated in E.D. Cal.);
- *Matthews v. NCAA*, 79 F.Supp.2d 1199 (E.D. Wash. 1999);
- *O'Halloran v. University of Wash*., 672 F.Supp. 1380 (W.D. Wash. 1987), rev'd, 856 F.2d 1375 (9th Cir. 1988);
- *NCAA v. Miller*, 795 F.Supp. 1476 (D. Nev. 1992) ("*Miller*");
- *In re NCAA I-A Walk-On Football Litig*., 2007 WL 951504 (W.D. Wash. March 26, 2007) ("*NCAA Walk-On*"); and
- *White v. National Collegiate Athletic Association*, C.D. Cal. Case No. 06-cv-00999) ("*White*").

Indeed, in the two most recent class action litigations involving the NCAA, *NCAA Walk-On* and *White*, the NCAA did not even bother to challenge the west-coast venue of these

proceedings. In light of the foregoing, the NCAA surely has a reasonable expectation that it may be sued in this district as a result of its anticompetitive conduct and that of its member schools located here.

Similarly, Defendant CLC bills itself as "the nation's leading collegiate trademark licensing and marketing company, assisting collegiate institutions in protecting, managing and developing their brands." *See* http://www.clc.com/clcweb/publishing.nsf/Content/aboutclc.html. CLC counts as its "member institutions" U.C. Berkeley, Stanford University, Santa Clara University, and San Jose State, among many others. *See* http://www.clc.com/clcweb/publishing.nsf/Content/institutions.html. Like Defendant NCAA, Defendant CLC is regularly involved in litigation as a plaintiff and defendant all across the United States, including in California. *See* Lebsock Decl., Exh. 2. And, like Defendant NCAA, it, too, surely has a reasonable expectation of being sued in locations, such as this district, where it conducts its licensing activities.

Under the totality of the circumstances, the Defendants have failed to establish that they will be substantially burdened by defending themselves in the Northern District of California, particularly in light of the fact that they will still be litigating *Keller* here. Plaintiff, on the other hand, has no contacts with Southern Indiana and will be substantially inconvenienced if he is required to litigate there. Indeed, "it is not appropriate to transfer a case on convenience grounds when the effect would be simply to shift the inconvenience from one party to another." *Plascencia v. Lending 1st Mortg.*, 2008 WL 1902698, *9 (N.D. Cal. April 28, 2008) (Wilken, J.). On balance, this factor favors venue in the Northern District of California.

B. Convenience of the witnesses.

The NCAA identifies its president, Myles Brand and his senior advisor, Wallace Renfro as likely witnesses in this litigation and asserts that it would be more convenient for them if the case

proceeded in Indiana where they live and normally work.[1] However, the convenience of party-affiliated witnesses is not an important factor in the §1404(a) equation. *Getz v. Boeing Company*, 547 F.Supp.2d 1080, 1084 (N.D. Cal. 2008) (Wilken, J.) ("*Getz*") ("The Court, however, discounts any inconvenience to the parties' employees, whom the parties can compel to testify.").

Notably, the Defendants have failed to identify *any* non-party witnesses who would be substantially inconvenienced by this litigation in the event that it proceeds in California. Nor could they realistically do so. Depositions of third-parties are normally taken in a location of the witness' choosing and can be recorded on video for later presentation at trial. In the event that the NCAA seeks to have some currently unidentified third-party witnesses testify in the courtroom, modern technology will allow them to work from San Francisco as readily as they could from Indianapolis, or wherever their home-base may happen to be. *Panavision,* 141 F.3d at 1323.

In this regard, the Bay Area is served by three modern airports with frequent flights arriving from and departing to cities all across the United States. While Southern Indiana is certainly an accessible venue, it is not a hub of air transportation in the same way that the Bay Area is. That is one reason why the Judicial Panel on Multidistrict Litigation regularly transfers complex, nationwide antitrust class actions to this district. *See e.g. In re Transpacific Passenger Air Transp. Antitrust Litig*., 536 F.Supp.2d 1366 (J.P.M.L. 2008); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 536 F.Supp.2d 1364 (J.P.M.L. 2008); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 483 F.Supp.2d 1353 (J.P.M.L. 2007); *In re Static Random Access Memory (SRAM) Antitrust Litig*., 473 F.Supp.2d 1384 (J.P.M.L. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig*., 228 F.Supp.2d 1379 (J.P.M.L. 2002); *In re Int'l Air Transp. Surcharge Antitrust Litig.*, 460 F.Supp.2d 1377 (J.P.M.L. 2006); and *In re Graphics Processing Units Antitrust Litig.*, 483 F.Supp.2d 1356 (J.P.M.L. 2007).

Moreover, unlike the nebulous claims of witness inconvenience advanced by the Defendants, Plaintiff has specifically identified Electronic Arts, Inc. and Jeff Karp (Electronic Arts' former Group Vice President for Marketing) as important third-party witnesses in this litigation. Electronic Arts is headquartered in this district and Mr. Karp is currently employed as

[1] On September 16, 2009, Mr. Brand died of pancreatic cancer.

the Chief Executive Officer of Mevio, Inc. in San Francisco. *See* Complaint at ¶38; http://www.zoominfo.com/Search/PersonDetail.aspx?PersonID=1085367. Clearly, current and former Electronic Arts' witnesses will be less inconvenienced if *Keller* and *O'Bannon* proceed as a consolidated action in the district in which they work and reside. Accordingly, this factor weighs in favor of venue in Oakland.

C. Interest of justice factors.

Citing *Williams v. Bowman*, 157 F.Supp.2d 1103, 1106 (N.D. Cal. 2001), the NCAA identifies several additional "interest of justice" factors that district courts frequently weigh when considering whether to grant a defendant's change of venue. The factors identified by the NCAA are: 1) consolidation of claims and multiplicity of litigation; 2) familiarity of each forum with the applicable law; 3) local interest in the controversy; 4) ease of access to the evidence; and 5) relative court congestion and time of trial in each forum. *See* Defs' Brf. at 6:2-7. None of these factors support Defendants' transfer request.

1. Consolidation of claims and multiplicity of litigation.

"A major consideration [in the motion to transfer calculus] is the desire to avoid multiplicity of litigation . . . ." *Gerin v. Aegon USA, Inc.*, 2007 WL 1033472, *6 (N.D. Cal. April 4, 2007); *Center for Biological Diversity v. Kempthorne*, 2008 WL 4543043, *4 (N.D. Cal. Oct. 10, 2008) (Wilken, J.) (existence of related claims in one of the proposed venues warrants significant consideration since consolidation ameliorates risk of inconsistent adjudications).

Here, the Court has previously examined the *Keller* and *O'Bannon* complaints and has determined that the cases are related. *See O'Bannon* Dkt. Entry 59. That clearly was the correct determination, and counsel for these plaintiffs continue to move toward more collaboration, not less. For example, they have agreed to harmonize their claims and present them in a unified complaint, subject, of course, to the Court's concurrence at an October 8, 2009 hearing. But, even if the cases are never formally consolidated, there is little doubt that *Keller* and *O'Bannon* should be resolved in one forum in order to avoid the multiplicity of litigation that §1404(a) was designed to prevent. Since *Keller* will be litigated in the Northern District of California, it is

eminently sensible for *O'Bannon* to be resolved here too. This factor tips heavily toward venue in this district.

2. Familiarity of the forum with the applicable law.

The Defendants seem to suggest that this factor is neutral because this Court and the Southern District of Indiana are equally capable of interpreting the applicable law. While that may be true, the interests of justice, nevertheless lean toward venue in this district because this Court has already expended time and effort familiarizing itself with the specific allegations in the *O'Bannon* complaint (and the interplay between the claims made in *O'Bannon* and *Keller*) when it ruled on Plaintiff's related case motion. *Silverlit*, 2007 WL 521239 at *11 (the fact that a court is already familiar with the claims made in the litigation is a factor that should be considered when weighing a §1404(a) transfer request). Defendants have failed to provide a compelling justification for another judge in another district to duplicate that effort.

3. Local interest in the controversy.

The Defendants also argue that the Southern District of Indiana has a stronger interest in this litigation than the Northern District of California because the NCAA is headquartered in Indianapolis and its rule-making emanated from there. However, the NCAA policy decisions at issue in this case are the result of agreements between the NCAA's member schools, which are dispersed throughout the United States, including at least six that call the Northern District of California home. As a result, former collegiate football and basketball players nationwide (including those that played in this district) were deprived of fair compensation for the use of their likeness, including in DVDs, streaming media, and photographs; on apparel; in sports memorabilia, including trading cards; and in videogames. *See e.g.* Complaint, ¶¶9-11, 43, 58-78. In similar situations, the Court has rejected arguments that the district in which the defendant is headquartered has an overriding interest in resolving the litigation. *See Silverlit*, 2007 WL 521239 at *11 (transactions at issue occurred throughout the United States, not simply at the defendant's headquarters). Accordingly, Defendants have failed to establish that this factor supports transfer to the Southern District of Indiana.

4. Ease of access to the evidence.

Defendants' argument with respect to this factor appears to focus on the cost savings that they contend would be achieved if this case were litigated in Southern Indiana, where many of the NCAA's witnesses are likely to reside. *See* Defs' Brf. at 7:10-11. This argument lacks merit.

The *Keller* case will proceed in California regardless of where the *O'Bannon* litigation is venued. The NCAA witnesses designated to testify on common issues will still have to travel to Oakland. Moreover, for those witnesses who do not reside in Indianapolis—*i.e.* witnesses for Defendant CLC and third-party Electronic Arts, among others—Defendants' proposal actually creates a dangerous probability that costs will be increased since litigation in two venues requires twice the travel. Additionally, transferring this litigation to Southern Indiana will not reduce the cost for Plaintiff, who lives much closer to the courthouse in Oakland than to the one in Indianapolis. On prior occasions, this Court has found that this type of "cost savings" argument generally does not favor one venue over another. *See Getz*, 547 F.Supp.2d at 1084 (finding that this factor was neutral); *Asis Internet Services v. Imarketing Consultants, Inc.*, 2008 WL 2095498, *7 (N.D. Cal. May 16, 2008) (same). Unlike in those cases, however, there is a real likelihood that cost savings can be achieved if *Keller* and *O'Bannon* are jointly managed by this Court. This factor, therefore, tips in favor of venue in California.

5. Court congestion.

Defendants next suggest that the Northern District of California's docket is much more crowded than the Southern District of Indiana's docket because approximately three times as many cases were filed in this district last year than were filed in the Southern District of Indiana. While that may be true, the Defendants fail to mention that this district also has nearly three times as many judges as the Southern District of Indiana. *Compare* Lebsock Decl. Exhs. 3 and 4 (U.S District Court—Judicial Caseload Profiles for 2008).

The Judicial Caseload profiles demonstrate that for 2008, the median time from filing to disposition in civil matters is 7.7 months (N.D. Cal.) and 9.2 months (S.D. Ind.). The median time from filing to trial is 30 months (N.D. Cal.) and 29 months (S.D. Ind.). The differences

between the two districts in terms of the length of time it takes to resolve civil litigation are trivial. "[T]hese kinds of considerations should play a role in venue shifting analysis only if the backlogs in the two courts are so totally disproportionate that it is obvious that time to trial would be radically longer in the court initially selected by plaintiff." *Linear Tech. Corp. v. Analog Devices, Inc.*, 1995 WL 225672, *4 (N.D. Cal. March 10, 1995). That certainly is not the case here.

D. Plaintiff's choice of forum.

Defendants claim that Plaintiff's choice of forum is not subject to the substantial deference that is normally afforded to a plaintiff because he is not a current resident of California and because this is a class action involving nationwide conduct. But this does not mean that Plaintiff's choice of forum is entirely disregarded either. *Silverlit*, 2007 WL 521239 at *10.

It is true that Plaintiff currently resides in Henderson, Nevada. However the events that give rise to his claim partially occurred in this district, since this is one of the locations where he played college basketball as a member of the U.C.L.A. Bruins basketball team. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (consideration properly given to the parties' contacts with the forum). The case law is clear that *some* deference is to be paid to Plaintiff's choice of forum, and on the facts of this case it seems that more of it, not less, ought to be given here in light of the parties' contacts with this district.

E. The Court's decision in *Meijer v. Abbott Laboratories* provides a relevant guidepost for resolving Defendants' motion.

In *Meijer, Inc. v. Abbott Laboratories*, 544 F.Supp.2d 995 (N.D. Cal. 2008) ("*Meijer*") this Court denied a motion to transfer that involved facts remarkably similar to those presented in this case. The Court explained:

> Abbott seeks to transfer the SmithKline Beecham case to Illinois. It is true that the only apparent connection between the case and California is that California is home to a large number of HIV-positive individuals who may be consumers of boosted PIs. However, this case has no greater connection to Illinois, except that Illinois is the site of Abbott's headquarters. Illinois thus has no particular interest in this case other than the generalized interest in ensuring that its citizens receive fair adjudications.

> While Abbott claims that transferring the case to Illinois would be more convenient for it, this claim is undercut by the fact that Abbott would continue to have to defend itself in the related cases still before this Court, while defending itself in a new forum as well. Moreover, GSK apparently finds California to be a convenient forum, and it would not be appropriate to transfer this case on convenience grounds when the effect would be simply to make the litigation more convenient for one party at the expense of the other party.
>
> Additionally, it would not be in the interest of justice to transfer this case because it would needlessly splinter the litigation. Nor has Abbott shown that the availability of witnesses or evidence will be an issue if the case continues in this District, particularly considering that the related cases will continue before the Court whether SmithKline Beecham is transferred or not.

Id. at 1008-09.

The Court's rationale in *Meijer* is equally applicable here and counsels in favor of denying Defendants' motion to transfer the *O'Bannon* action.

F. The NCAA's motion should also be denied because it is premature.

Plaintiff notes that the NCAA persisted in immediately filing its motion to transfer despite his stated intention to amend the complaint, something he is entitled to do as a matter of right pursuant to FRCP 15(a)(1). Plaintiff also advised that a third complaint, *Bishop v. Electronic Arts, Inc*., N.D. Cal. Case No. 09-cv-04128, was recently filed and that a fourth complaint was soon to be filed. Wierenga Decl., Exh. 4.

The amendment contemplated by Plaintiff bears directly on factors traditionally considered by courts confronted with §1404(a) motions. Plaintiff intends to add an additional defendant, Electronic Arts (described as a non-party co-conspirator in the initial complaint), whose corporate headquarters is located in this district. He also intends to include a co-plaintiff who resides here and played college football in this district. *See* Wierenga Decl., Exh. 4. Plaintiff intends to make additional modifications to the complaint as well, some of which may be informed by counsel for plaintiffs in the related cases. Under the circumstances, the NCAA's motion is premature and should be denied on this alternative basis as well. *See Huangyan Import & Export Corp. v. Nature's Farm Products, Inc.*, 2000 WL 1224814, *5 (S.D.N.Y. Aug. 29, 2000) (denying §1404(a) motion as premature because pleadings remained unsettled).

III. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' motion to transfer venue to the Southern District of Indiana. Defendants have failed to meet their burden of demonstrating that the interests of justice militate in favor of splintering *Keller* and *O'Bannon* and having these related actions proceed in two different judicial districts separated by thousands of miles.

Dated: September 21, 2009

Respectfully submitted,

HAUSFELD LLP

/s/ Christopher L. Lebsock

Michael P. Lehmann (Cal. Bar No. 77152)
Christopher L. Lebsock (Cal. Bar No. 184546)
Jon T. King (Cal. Bar No. 205073)
Arthur N. Bailey, Jr. (Cal. Bar No. 248460)
44 Montgomery Street, 34th Floor
San Francisco, CA 94104
Tel: (415) 633-1908
Fax: (415) 358-4980
Email: mlehmann@hausfeldllp.com
jking@hausfeldllp.com
abailey@hausfeldllp.com

Michael D. Hausfeld (pro hac vice)
Megan E. Jones (pro hac vice)
HAUSFELD LLP
1700 K Street, NW, Suite 650
Washington, DC 20006
Tel: (202) 540-7200
Fax: (202) 540-7201
Email: mhausfeld@hausfeldllp.com
mjones@hausfeldllp.com

Counsel for Plaintiff Edward Charles O'Bannon, Jr.

William A. Isaacson (pro hac vice)
Tanya Chutkan (pro hac vice)
Jack Simms (pro hac vice)
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, 8th Floor
Washington, DC 20015
Tel: (202) 237-2727

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

Fax: (202) 237-6131
Email: wisaacson@bsfllp.com
tchutkan@bsfllp.com
jsimms@bsfllp.com

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

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

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

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

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

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

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

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

jgrant@pswplaw.com

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

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

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

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

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

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

CERTIFICATE OF SERVICE

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

On September 21, 2009, I filed the following:

1. **PLAINTIFF EDWARD O'BANNON'S OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE;**

2. **DECLARATION OF CHRISTOPHER L. LEBSOCK IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE**

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

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

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

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

/s/ Kathleen Vance