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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

**DEFENDANTS' REPLY BRIEF IN
SUPPORT OF MOTION TO TRANSFER
VENUE**

Date: n/a

Time: n/a

Dept: Courtroom 2, 4th Floor

Judge: Hon. Claudia Wilken

Date Complaint Filed: July 21, 2009

1 As Defendants argued in their opening brief, this case has no business being litigated in
2 this District. Plaintiff's opposition brief has made this point even clearer, demonstrating the lack
3 of connections between this case and the District, and Defendants respectfully request that this
4 case be transferred to the Southern District of Indiana.

5
6 **I. THIS CASE HAS NO CONNECTION TO THE NORTHERN DISTRICT OF CALIFORNIA**

7 Plaintiff's opposition brief reveals what the defendants have argued all along: Plaintiff's
8 case has no connection to the Northern District of California. Plaintiff attempts to dodge this
9 shortcoming by claiming that the NCAA and CLC have some institutional connections to
10 California, but this answers the wrong question. This question is not whether the NCAA and
11 CLC have connections to the forum or could have anticipated being sued in the forum; the
12 question is whether the *activities alleged in the complaint* are connected to the forum. *See*
13 *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001).

14
15 *Young v. Wells Fargo* is on point. In that case, just as here, the named plaintiffs had no
16 connection to the Northern District of California. *Young v. Wells Fargo & Co.*, No. C 08-3735,
17 2008 WL 5245894, at *3 (N.D. Cal. Dec. 17, 2008). The defendant had some institutional
18 connections to the district, as Wells Fargo & Co. was located in San Francisco. *Id.* at *1.
19 However, the subsidiary that actually "developed, implemented and managed" the "policies,
20 procedures and practices" at issue in the case was located in Des Moines, Iowa. *Id.* at *3. The
21 Court found that even if the California parent company was involved to some degree in the
22 formulation of the disputed policies and practices, the connection between the plaintiffs' claims
23 and the Northern District of California was much more tenuous than the connection to Iowa, and
24 the Court transferred the case. *Id.*

25
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27 Here, Plaintiff claims that there is a connection between this District and his claims
28 because the NCAA and CLC both have member institutions or clients within the District. Opp.

1 Br. at 2-4. However, Plaintiff does not allege that these particular members or clients have any
2 relevance to the issues alleged in the complaint. There are no allegations that they will have
3 relevant documents or that they will provide witnesses. As Plaintiff has asserted no connection
4 between the member institutions or clients within the District and his claims, their mere existence
5 cannot make this District the preferable forum. *See Young*, 2008 WL 5245894 at *3.

7 Similarly, Plaintiff's claim that there is a connection between this District and his claims
8 because Electronic Arts and one of its former employees, Mr. Jeff Karp, are located in the District
9 is misguided. Opp. Br. at 5-6. Plaintiff has failed to identify in his opposition papers any current
10 employee from Electronic Arts who would be called to testify, and he has failed to articulate how
11 Mr. Karp – who is not even mentioned in the complaint – is at all relevant in this litigation. The
12 fact that one potential third-party witness would be “less inconvenienced” if this case remained in
13 this District does not create a connection with the District. *See Silverlit Toys Manufactory, Ltd. v.*
14 *Absolute Toy Marketing, Inc.*, No. C 06-7966, 2007 WL 521239, at *10 (N.D. Cal. Feb. 15, 2007)
15 (Wilken, J.) (discounting inconvenience to witnesses when it was not clear they would even be
16 called to testify at trial).

18 Plaintiff also argues, without support, that the fact that the NCAA and the CLC have
19 litigated in the Ninth Circuit in the past constitutes a connection to the Northern District of
20 California. Plaintiff's Opp. at 3-4. This Court has previously rejected this argument, finding no
21 source of law which instructs the Court to count unrelated lawsuits as contacts for the purposes of
22 determining venue. *Italian Colors Restaurant v. American Express Co.*, No. C 03-3719, 2003
23 WL 22682482, at *5 (N.D. Cal. Nov. 10, 2003) (finding no substantial contact with the forum
24 even when one or more of the defendants was a party in 225 civil cases and more than 25,000
25 bankruptcy proceedings currently pending in California courts); *Cardoza v. T-Mobile USA Inc.*,

1 No. 08-5120, 2009 WL 723843, at *4-5 (N.D. Cal. Mar. 18, 2009) (finding the fact that the
2 defendant is a huge company that routinely litigates in California irrelevant).

3 Finally, the fact that Plaintiff has moved to consolidate this case with *Keller v. NCAA*,
4 Case No. 4:09-cv-01967-CW (N.D. Cal.) does not constitute a connection with the forum.
5 Plaintiff argues that this action should remain in this District because a related case, *Keller*, will
6 be litigated here. This argument is unpersuasive because there is no risk of multiplicity of
7 litigation. The operative complaints in *O'Bannon* and *Keller* contain distinct claims for relief.¹
8 Consequently, the resolution of *Keller* will not affect the resolution of this action. This
9 significant fact differentiates this case from those cited by Plaintiff. Opp. Br. at 6-7.

11 **II. PLAINTIFF CLAIMS AN UNFETTERED RIGHT TO CHOOSE THE FORUM**

12 Plaintiff's argument with respect to the location of documents and witnesses goes too far
13 and amounts to a claim of an unfettered right for a plaintiff to choose the forum. This is clearly
14 not right. A plaintiff's choice of forum is not dispositive. *Farmer v. Ford Motor Co.*, No. C 07-
15 3539, 2007 WL 4224612, at *2 (N.D. Cal. Nov. 28, 2007). Indeed, a plaintiff's choice is given
16 "considerably less weight" when the transactions giving rise to the action lack a significant
17 connection to the plaintiff's chosen forum, *Knapp v. Wachovia*, No. C 07-4551, 2008 WL
18 2037611, at *2 (N.D. Cal. May 12, 2008), when the plaintiff does not reside in the venue,
19 *Williams*, 157 F. Supp. 2d at 1106, or when the plaintiff has alleged a class action with a
20 nationwide class. *Johns v. Panera Breads*, No. 08-1071, 2008 WL 2811827, at *2 (N.D. Cal.
21 July 21, 2008). Each of these conditions is true here.

22 It is not true that courts simply ignore the location of party-affiliated witnesses. *See id.* at
23 *3 (considering the convenience of defendant's employees in transferring case to Missouri). In
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27 ¹ Plaintiff's claim that it intends to file "a unified complaint" with the *Keller* plaintiff is entitled to
28 no weight, as Plaintiff has yet to do so. Opp. Br. at 6.

1 *Cardoza*, for example, the Court found that “[s]ince the allegations in this case focus on
2 defendant’s conduct,” the convenience of the defendant’s employees favored transfer. *Cardoza*,
3 2009 WL 723843 at *4-5. Further, when, as here, no viable third-party witnesses have been
4 identified, the Court will focus on the convenience of the parties and the witnesses affiliated with
5 the parties. *Foster v. Nationwide Mut. Ins. Co.*, No. C 07-04928, 2007 WL 4410408, at *3 (N.D.
6 Cal. Dec. 14, 2007) (transferring case to Ohio when defendant’s national office and likely
7 witnesses were in Ohio).
8

9 The courts also do not ignore the location of relevant documents. Even when evidence is
10 available in electronic format, the Northern District of California has held that “developments in
11 electronic conveyance have reduced the cost of document transfer somewhat, the cost of litigation
12 will be substantially lessened if the action is venued in the same district where most of the
13 documentary evidence is found.” *Id.* at *6 (citing *Italian Colors*, 2003 WL 22682482 at *5). A
14 case should be transferred to its “center of gravity,” that is, the place where the key witnesses and
15 documents are located, even when documents are available electronically. *Johns*, 2008 WL
16 2811827 at *4-5.
17

18 Plaintiff is simply wrong to claim that his choice of forum should prevail when the
19 Northern District of California has no connection to the transactions giving rise to his complaint,
20 when Plaintiff does not live in the District, when Plaintiff has alleged a nationwide class action,
21 and when the majority of the key witnesses and relevant documents are closer to the Southern
22 District of Indiana than to this District.
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24 **III. CONCLUSION**

25 Defendants respectfully request that this Court enter an Order transferring the venue of
26 this action to the Southern District of Indiana.
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Robert J. Wierenga, the filer of this Reply Brief, hereby attests that Peter M. Boyle concurs in the filing of this Reply Brief.

Dated: October 8, 2009

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Dated: October 8, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 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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