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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)

PLAINTIFFS EDWARD C. O'BANNON, JR. AND SAMUEL MICHAEL KELLER'S JOINT CONSOLIDATED REPLY TO ELECTRONIC ARTS, INC., NCAA, AND CLC'S OPPOSITON TO MOTION TO CONSOLIDATE ACTIONS

Date: November 17th, 2009
Time: 2:00 p.m.
Judge: The Hon. Claudia Wilken
Courtroom: 2, 4th Floor

SAMUEL MICHAEL KELLER, on behalf of himself and all others similarly situated, Plaintiff, v. ELECTRONIC ARTS, INC., NATIONAL COLLEGIATE ATHLETIC ASSOCIATION; COLLEGIATE LICENSING COMPANY, Defendants.	Case No. 4:09-cv-01967 (CW) Date: November 17, 2009 Time: 2:00 p.m. Judge: The Hon. Claudia Wilken Courtroom 2, 4th Floor

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Plaintiffs hereby submit their Reply to the Opposition of Defendants National Collegiate Athletic Association ("NCAA") and (Collegiate Licensing Company ("CLC") to Plaintiffs' Joint Motion to Consolidate Actions (Dkt. Entry No. 77) ("NCAA Opp.") and Electronic Art Inc.'s ("EA") Opposition to Plaintiffs' Joint Motion to Consolidate (Dkt. Entry No. 84) ("EAS Opp.").

SUMMARY OF ARGUMENT

Both of the above-captioned actions:

- Are putative nationwide class actions brought on behalf of current and former collegiate student-athletes who compete or competed in men's Division I basketball and football pursuant to the rules of the National Collegiate Athletic Association ("the NCAA");
- Concern the license of those athletes' images without consent or compensation;
- Share three common defendants (NCAA, Electronic Arts[1], and the Collegiate Licensing Company);
- Involve common witnesses, experts, and discovery;
- Have no procedural hurdle preventing consolidation either by federal or local rules;
- Were deemed to be related pursuant to this Court's Related Case Order dated August 11, 2009 (Dkt. Entry No. 59)
- Are at the early stages of litigation (no discovery protocols, electronic or otherwise, have been agreed upon in either action) and,
- Are requested to be consolidated *by consent* of the concerned plaintiffs.

For these reasons, Plaintiffs respectfully request that the Court consolidate the two actions as permitted under Rule 42(a) to further effect preservation of time, effort, and resources of the

[1] See Doc. No. 69 at page 2 (O'Bannon intends to name Electronic Arts as a defendant).

Court and parties, and to avoid potentially inconsistent adjudications. By consolidating these cases, this Court can issue one set of typical pre-trial and/or case management orders, issue a single coordinated discovery schedule accounting for the needs of all parties, adjudicate a consolidated answer or motion to dismiss, and otherwise conserve judicial resources.

I. LEGAL ARGUMENT

A. Consolidation Of This Matter Comports With Fed. R. Civ. P. 42 Because Both Actions Involve Common Questions of Law And Fact.

Consolidation of the above-referenced actions in this Court is demonstrably appropriate. Defendants' "cursory glance" analysis[2] misses the substantial common questions of law and fact shared by these actions. *See* NCAA Def. Br. at 1.

For example, common questions of fact include, but are not limited to: (1) The NCAA and CLC licensing with EA, *see* O'Bannon Compl. ¶ 135, Keller Compl. ¶ 15; (2) The NCAA prohibition against the licensing of an NCAA athlete's likeness or names, as set forth in NCAA Bylaw 12.5, *see* O'Bannon Compl. ¶¶ 74-77, Keller Compl. ¶ 13; (3) EA's non-transformative use of the names and likeness of NCAA athletes, *see* O'Bannon Compl. ¶¶ 139-145, Keller Compl. ¶¶ 17-39; (4) The NCAA's knowledge and express or tacit approval of EA's use of player names and likeness, *see* O'Bannon Compl. ¶ 139, Keller Compl. ¶¶ 12, 41; (5) The financial benefits obtained by the NCAA from the NCAA's licensing agreement with EA, *see* O'Bannon Compl. ¶ 146, Keller Compl. ¶¶ 1, 5; and, (6) The NCAA and EA allowing third parties to create and market modifications to the NCAA games, which allow players to upload complete roster information for various teams, including player names, *see* O'Bannon Compl. ¶ 145, Keller Compl. ¶¶ 1, 36-37. This generous factual overlap clearly warrants consolidation. *See* NCAA Def's. Br. at 2.

Additionally, common questions of law include, but are not limited to: (1) Whether EA's

[2] *See* NCAA Def. Br. at 1.

non-transformative use of NCAA player names and likeness is unlawful, *see* O'Bannon Compl. ¶ 148, Keller Compl. ¶¶ 11-12, (2) Whether the NCAA, CLC, and EA conspired between and among each other to directly or indirectly permit the non-transformative use of player names and likeness in EA's videogames for their own monetary gain and without any compensation to the individual athletes, despite contractual provisions and the NCAA's own rules prohibiting the use of player names and likeness, *see* O'Bannon Compl. ¶¶ 38-39, Keller Compl ¶ 41; (3) Whether the conduct of Defendants and their co-conspirators caused injury to the Plaintiffs and Class members, *see* O'Bannon Compl. ¶ 15, Keller Compl. ¶¶ 40-53; (4) Calculation of damages, *see* O'Bannon Compl., Keller Compl.

The *O'Bannon* and *Keller* actions overlap the same parties (NCAA, CLC, and EA), property (student-athletes' and former student athletes' rights in the commercial use of their images) and misconduct (the unlawful sale and licensing of current and former student-athletes' images). Both cases involve overlapping classes, overlapping factual allegations, and common questions of law. Defendants' reliance on *EEOC v. Pan-American World Airways, Inc., No.* C-81-3636 RFP, 1987 U.S. Dist. LEXIS 115181 (N.D. Cal. Dec. 3, 1987) is misplaced. In *EEOC*, the court refused to consolidate the claims because the "...two cases [were] completely dissimilar in law...." The court noted that case was premised on federal age discrimination law while the other was based on labor law, breach of the duty of fair representation, and state age discrimination law. The Court found that consolidating the two cases would "inject substantial intricacy into an already complex trial." There are no similar dissimilarities in the matters for which consolidation is sought here.

B. Consolidation Serves The Interests Of Justice And Conserves The Court's And Parties' Resources.

Given the commonalities of these actions, it is highly likely that there would be material

duplication of labor and expense and potentially conflicting results if the cases are not consolidated. Specifically, separation of the actions would necessitate the court to adjudicate the same or substantially similar pretrial issues, including but not limited to, the scope and timing of discovery, class certification and the scheduling of depositions of key NCAA, EA, and CLC witnesses and company representatives. In addition, both litigations will involve a significant document production and review, much of which would be the same in both actions. For example, if discovery is coordinated among the O'Bannon and Keller actions, this Court would have one set of the resulting discovery orders and motions to resolve, rather than from both cases. Given their stages in litigation, these cases are ideally situated for consolidation. A single electronic discovery protocol can be negotiated, rather than two; a single preservation agreement can be reached, rather than two; a single meet and confer process can take place between all plaintiffs and all defendants, rather than two. Prevention of such unnecessarily duplicative and costly discovery is a fundamental underlying rationale of Rule 42. *See Internet Law Library, Inc. v. Southridge Capital Management, LLC*, 208 F.R.D. 59, 61 (S.D.N.Y. 2002). Thus, to avoid such duplication, the cases should be consolidated.

Moreover, the Plaintiffs in both actions have now had an opportunity to reflect on the claims made in these actions and each Plaintiff has decided that he wants to pursue the claims set forth in both complaints. Accordingly, even if Defendants are able to point to some differences in the complaints as currently constituted, there will be little difference between them once they are amended (which is allowed as a matter of right at this stage of the proceedings). Under the circumstances, notions of efficiency militate in favor of consolidation now. Plaintiffs in both cases are prepared to file a consolidated complaint containing all of the claims 30 days after any order granting consolidation is entered.

C. Consolidation Will Not Prejudice Any Of The Parties.

No rights of any party will be impaired by this proposed consolidation. In fact, consolidation of these actions would benefit the parties because discovery would proceed in an orderly and manageable fashion without jeopardizing or diminishing any party's rights. *See Johnson v. Manhattan Ry. Cp.*, 289 U.S. 479, 496-97 (1933) (holding that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties to another."). Nor is there any risk that consolidation will result in confusion of the issues. As noted by numerous courts, the danger of confusion from consolidation, even in multi-party litigation is overstated. *See, e.g., Internet Law Library, Inc.*, 208 F.R.D. at 61 (granting plaintiff's motion for consolidation). Defendants' reliance on *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) is inapposite because it does not support Defendants' argument that inconsistent rulings are likely here due to factual distinctions in the two matters. (NCAA Def. Br. 8, 13) In *Wadsworth*, multiple putative class actions by food and beverage servers were filed against several distinct hotels and/or resorts operated by Defendants, subject to a mandatory arbitration provision, while others were subject to collective bargaining agreements. *Id.* at 6. The facts in each case, as was noted, were significantly different and would have likely resulted in different rulings because the cases were assigned to different judges. The decision in *Wadsworth* reflected the unique and particularly disparate nature of the claims asserted. There is no similar disparity between the O'Bannon and Keller claims.

Consolidation is not immutable. A court can alter consolidation at any point if situations change or if the basis for consolidation is no longer warranted. *In re NVIDIA GPU Litigation,* No. C 08-04312, 2009 U.S. Dist. LEXIS 30606 (N.D. Cal. Apr. 10, 2009) ("NVIDIA"). Finally,

consolidation should not be cleared or foreclosed because of hypothetical forecast of potential problems as suggested by Defendants.

D. DEFENDANTS' CITED CASES DO NOT SUPPORT DENIAL OF CONSOLIDATION.

No Defendant in this action provided this Court with sufficient legal justification to prohibit consolidation of the above-captioned cases, particularly in light of the efficiency of running coordinated cases and winnowing the areas of resolution for the Court.

The NCAA and CLC Defendants cite *NVIDIA* in support of their request to deny consolidation. In that case, a Plaintiff ("Decker") moved to have the case "unconsolidated" from the class claims because the "anticipated Amended Consolidated Complaint will allege only claims arising from NVIDIA's design, manufacture and sale of defective NVIDIA GPUs." *Id.* at *4. Decker noted that its claims focused "...only on defective wireless cards/devices." *Id.* at *4. While several of the consolidated cases had allegations concerning non-functioning wireless communication cards while the Amended Consolidated Complaint did not. *Id.* Accordingly, the *NVIDIA* court, in the exercise of its discretion, found that Decker's claim contained different allegations regarding defects in a completely different product and ordered the claims should no longer be consolidated. Here, in contrast, both Keller and O'Bannon support consolidation and *intend* to jointly file a consolidated complaint

Similarly, *Narvaes v. EMC Mortgage Corp.*, No. 07-00621 HG-LEK, 2009 U.S. Dist. LEXIS 38084 (D. Haw. May 1, 2009), cited by Defendants, does not foreclose the consolidation of the O'Bannon and Keller complaints. There, one case was set for trial approximately one year later than the other. *Id.* at 6-7. The court, noting the disparity in the stages of litigation, exercised its discretion and denied the motion to consolidate. Here, there is no such mismatch. No defendant has answered either the *O'Bannon* or *Keller* complaint; discovery has not begun in

either case; no electronic discovery protocols have been negotiated in either case. The cases are ideally procedurally situated for coordination.

Likewise, *O'Diah v. Univ. of California,* No. C-90-0915 RFP, 1991 U.S. Dist. LEXIS 13468 (N.D. Cal. Sept. 19, 1991) does not provide support for Defendants' position. There, a *pro se* plaintiff filed suit alleging, among other things, race discrimination and harassment arising from his employment with the University of California at Berkeley. *Id.* at *1. O'Diah, a maintenance employee, sued various defendants, including the Judges of the Superior Court of Alameda County under the federal civil rights statutes – 42 U.S.C. §§ 1983 and 1985. *Id.* at * 12. O'Diah sought to consolidate his case with a separate action that also happened to name the Judges of Alameda County as defendants under the civil rights statutes. *Id.* Other than the naming of the same judges as defendants, the two suits had nothing else factually or legally in common. Rather, the non-O'Diah matter arose from a train collision and automobile accident, and included numerous other defendants in an alleged conspiracy that was completely unrelated to O'Diah's claims. *Id.* at *12-13. As a matter of common sense and law, the shared defendants – the Judges of the Superior Court of Alameda County – were dismissed as Defendants in the same Order denying consolidation. Accordingly, this pro se case does not preclude consolidation in this matter. While the O'Bannon and Keller cases assert distinct claims, they revolve around common operative facts, common defendants and common legal issues to be resolved.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that their Motion to Consolidate Actions should be granted by this Court.

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PLAINTIFFS EDWARD O'BANNON, JR. AND SAMUEL MICHAEL KELLER'S JOINT CONSOLIDATED REPLY TO ELECTRONIC ARTS, INC., NCAA, AND CLC'S OPPOSITION TO MOTION TO CONSOLIDATE ACTIONS

In compliance with General Order 45, X.B., I hereby attest that Robert B. Carey has concurred in this filing.

CERTIFICATE OF SERVICE

I, Jon T. King, 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 October 21, 2009, I filed the following:

PLAINTIFFS EDWARD O'BANNON, JR. AND SAMUEL MICHAEL KELLER'S JOINT CONSOLIDATED REPLY TO ELECTRONIC ARTS, INC., NCAA, AND CLC'S OPPOSITION TO MOTION TO CONSOLIDATE ACTIONS

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

/s/ Jon T. King
JON T. KING