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6 *Attorneys for Plaintiff Bryon Bishop*  
7 *in the Potentially Consolidated Case*  
8 *Bryon Bishop v. Electronic Arts, Inc., et al.,*  
*Case No. CV-09-4128 (CW).*

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**

12 \_\_\_\_\_ : CIVIL ACTION NO. 09-1967 (CW)  
13 SAMUEL MICHAEL KELLER, On Behalf of :  
Himself and All Others Similarly Situated, :  
14 Plaintiff, : **PLAINTIFF BRYON BISHOP'S NOTICE**  
v. : **OF MOTION AND MOTION FOR**  
15 : **CONSOLIDATION OF BISHOP (CV- 09-**  
16 ELECTRONIC ARTS, INC., NATIONAL : **4128 (CW)) AND KELLER (CV-09-1967**  
COLLEGIATE ATHLETIC ASSOCIATION, : **(CW)) ACTIONS PURSUANT TO FED. R.**  
17 and COLLEGIATE LICENSING COMPANY, : **CIV. P. 42**  
: Date: November 19, 2009  
18 Defendants. : Time: 2:00 p.m.  
: Judge: Hon. Claudia Wilken  
19 : Courtroom: 2, 4<sup>th</sup> Floor  
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23 **TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:**

24 Please take notice that on November 19, 2009, at 2:00 p.m., or as soon as the matter may

1 be heard<sup>1</sup> before the Honorable Judge Claudia Wilken of the United States District Court for the  
2 Northern District of California, Oakland Division, Courtroom 2, 4<sup>th</sup> Floor, 1301 Clay Street,  
3 Oakland, California 94612, Plaintiff Bryon Bishop (“Plaintiff”) will hereby move pursuant to Fed.  
4 R. Civ. P. 42 for an order consolidating *Bryon Bishop v. Electronic Arts, Inc., National Collegiate*  
5 *Athletic Association and Collegiate Licensing Company*, No. CV-09-4128 (CW) (“*Bishop*  
6 *Action*”) with *Samuel Michael Keller v. Electronic Arts, Inc., National Collegiate Athletic*  
7 *Association and Collegiate Licensing Company*, No. CV-09-1967 (CW) (“*Keller Action*”). The  
8 consolidation of the *Bishop Action* and the *Keller Action* is appropriate because the cases involve  
9 common issues of law and fact, and because consolidation will avoid unnecessary duplication of  
10 evidence, unnecessary procedures and inconsistent adjudications in this Court.  
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13 This Motion is based on the notice of motion, the supporting memorandum of  
14 points and authorities, and any other papers filed in this action.  
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25 <sup>1</sup> Per this Court’s Order of September 23, 2009 (Doc. 93), filed in the related matter of *Samuel Michael Keller v.*  
26 *Electronic Arts, Inc., National Collegiate Athletic Association, and Collegiate Licensing Company*, No. CV-09-1967  
27 (CW), this Court will hear argument on the motions to dismiss filed by defendants in *Keller*; the motion for  
28 consolidation filed by plaintiffs in *Keller* and in *Edward C. O’Bannon, Jr. v. National Collegiate Athletic Association,*  
*et al.*, No. CV-09-3329 (CW); and the motion to appoint lead counsel filed by plaintiffs in *Keller* and *O’Bannon* on  
November 17, 2009, at 2:00 p.m. All cases, *Bishop*, *Keller*, and *O’Bannon*, are scheduled for a case management  
conference on November 17 as well. See Doc. 93 (*Keller Action*); Doc. 9 (*Bishop Action*).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. STATEMENT OF ISSUES TO BE DECIDED**

4 Pursuant to Civil L.R. 7-4, Plaintiff Bryon Bishop (“Plaintiff”), plaintiff in the *Bishop*  
5 Action, states that the issue to be decided is whether:  
6

7 *Bryon Bishop v. Electronic Arts, Inc., National Collegiate Athletic Association,*  
8 *and Collegiate Licensing Company*, No. CV-09-4128 (CW) (“*Bishop Action*”)  
9 should be consolidated with *Samuel Michael Keller v. Electronic Arts, Inc.,*  
10 *National Collegiate Athletic Association, and Collegiate Licensing Company*, No.  
CV-09-1967 (CW) (“*Keller Action*”) pursuant to Rule 42 of the Federal Rules of  
Civil Procedure.

11 **II. INTRODUCTION**

12 Per this Court’s Order of October 2, 2009 (No. CV-09-4128, Doc. No. 9), the *Bishop*  
13 Action and the *Keller Action* have been deemed related pursuant Civil L.R. 3-12. Plaintiff Bishop  
14 now seeks consolidation of these two Actions pursuant to Federal Rule of Civil Procedure 42(a).  
15 The Actions involve common questions of law and fact, and are substantially identical such that  
16 consolidation will promote efficient handling and resolution of the Actions.  
17

18 **III. BACKGROUND**

19 On September 4, 2009, Plaintiff Bishop, individually and on behalf of a class of current  
20 and former NCAA football and basketball players, commenced an action against three defendants:  
21 (1) Electronic Arts, Inc. (“Electronic Arts”); (2) National Collegiate Athletic Association  
22 (“NCAA”); and (3) Collegiate Licensing Company (“CLC”). Plaintiff Bishop is represented by  
23 the law firm of Weinstein Kitchenoff & Asher LLC. See WKA firm resume, Exhibit 1 to  
24 Declaration of Steven A. Asher, attached hereto.  
25

26 Bishop’s case arises out of claims that defendants improperly utilized the likenesses of  
27 NCAA football and basketball players in video games produced by defendant Electronic Arts. His  
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1 case is substantially similar to a case filed on May 5, 2009, *Samuel Michael Keller v. Electronic*  
2 *Arts, Inc., National Collegiate Athletic Association, and Collegiate Licensing Company*, No. CV-  
3 09-1967 (CW), involving the same putative class, defendants, and claims. Plaintiff Keller is  
4 represented by the law firm of Hagens Berman Sobol Shapiro LLP. *See* Doc. 81, *Keller* Action  
5 (motion for appointment as interim lead counsel).  
6

#### 7 **IV. ARGUMENT**

8 The *Bishop* and *Keller* Actions should be consolidated for all purposes.

9 Consolidation pursuant to Rule 42(a) is appropriate when actions involve common  
10 questions of fact and law. *See* Manual for Complex Litigation, Fourth, § 11.631 (2004); *Owen v.*  
11 *Labor Ready Inc.*, 146 Fed. Appx. 139, 141 (9<sup>th</sup> Cir. 2005); *In re Cendant Corp. Litig.*, 182 F.R.D.  
12 476, 478 (D.N.J. 1998); *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 175  
13 (C.D. Cal. 1976). Courts have broad discretion under this Rule to consolidate cases. *Investors*  
14 *Research Co. v. U.S. District Court for Cent. Dist.*, 877 F.2d 777, 777 (9<sup>th</sup> Cir. 1989); *Perez-Funez*  
15 *v. Dist. Director, Immigration and Naturalization Serv.*, 611 F. Supp. 990, 994 (C.D. Cal. 1984)  
16 (“A Court has broad discretion in deciding whether or not to grant a motion for consolidation,  
17 although, typically, consolidation is favored.” (citations omitted)).  
18

19 Courts have recognized that class actions, in particular, are well-suited for consolidation  
20 pursuant to Rule 42(a) because consolidation expedites pretrial proceedings, reduces case  
21 duplication, avoids the need to contact parties and witnesses for multiple proceedings, and  
22 minimizes the expenditure of time and money for all parties involved. *Vincent v. Hughes Air*  
23 *West, Inc.*, 557 F.2d 759, 773 (9<sup>th</sup> Cir. 1977); *Owen*, 146 Fed. Appx. at 141 (citing *Huene v.*  
24 *United States*, 743 F.2d 703, 704 (9<sup>th</sup> Cir. 1984)). Consolidating class action lawsuits simplifies  
25 pretrial and discovery motions, class action issues, and clerical and administrative management  
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1 duties.<sup>2</sup> Consolidation also reduces the confusion and delay that may result from prosecuting  
2 related putative actions separately. *Id.*

3 Here, the two Actions involve common issues of fact and law: First, both Actions are  
4 brought on behalf of the same plaintiff class, *i.e.*, all current or former student athletes who  
5 competed in Division I basketball or football pursuant to the Rules of the NCAA and whose  
6 likenesses have been used in a video game produced by defendant Electronic Arts without consent  
7 or compensation.

8  
9 Second, both cases name the same defendants, *i.e.*, Electronic Arts, NCAA and the CLC.

10 Third, both cases allege substantially the same claims against defendants:

- 11 • Count I of the *Bishop* complaint alleges that the NCAA has conspired and  
12 continues to conspire with Electronic Arts and CLC to use plaintiff's and class  
13 members' valuable likenesses without consent in violation of Section 32-36-1-1 of  
14 the Indiana Code. This Count corresponds to Count I of the *Keller* complaint, in  
15 which substantially the same allegation is set forth.
- 16 • Count II of the *Bishop* complaint alleges that Electronic Arts knowingly and  
17 intentionally misappropriated and continues to misappropriate the names and  
18 likenesses of plaintiff and class members by using their names and likenesses in  
19 video games that it produces without plaintiff's and class members' consent in  
20 violation of Section 3344 of the California Civil Code. This Count corresponds to  
21 Count II of the *Keller* complaint in which substantially the same allegation is set  
22 forth.
- 23 • Count III of the *Bishop* complaint alleges that defendant Electronic Arts utilizes the  
24 names, likenesses and identities of plaintiff and the members of the class without  
25 their consent in violation of the California Common Law. This Court corresponds  
26 to Count III of the *Keller* complaint in which substantially the same allegation is set  
27 forth.
- 28 • Count IV of the *Bishop* complaint alleges that the defendants conspired and  
combined with each other to deprive plaintiff and the members of the class of their  
right to protect their names, likenesses, right to publicity and their contractual  
property rights. This Count corresponds to Count IV of the *Keller* complaint in  
which substantially the same allegation is set forth.

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<sup>2</sup> Consolidation will not affect resolution of the motions to dismiss filed in the *Keller* Action. *See* Stipulation Extending Time to File and Serve Responsive Pleadings (Doc. 5, *Bishop* Action).





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Bryon Bishop v. Electronic Arts, Inc., et al.,  
Case No. CV-09-4128 (CW).*

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**CERTIFICATE OF SERVICE**

I, David H. Weinstein, declare that I am over the age of 18 and not a party to the entitled actions. I am a partner in the law firm of Weinstein Kitchenoff & Asher LLC, and my office is located at 1845 Walnut Street, Suite 1100, Philadelphia, Pennsylvania 19103.

On October 15, 2009, I served copies of **PLAINTIFF BRYON BISHOP'S NOTICE OF MOTION AND MOTION FOR CONSOLIDATION OF BISHOP AND KELLER ACTIONS PURSUANT TO FED. R. CIV. P. 42** with the Clerk of 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 documents(s) to be delivered via Federal Express 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.

Date: October 15, 2009 By: /s/David H. Weinstein