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17
18 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
19 **OAKLAND DIVISION**

20 BYRON BISHOP, individually and on behalf
of himself and all others similarly situated,
21 Plaintiff,

22 v.

23 ELECTRONIC ARTS, INC., NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION,
24 and COLLEGIATE LICENSING COMPANY,
25 Defendants.

Case No. 09-4128 (CW)

**OPPOSITION OF DEFENDANT NCAA
TO PLAINTIFF'S MOTION FOR
CONSOLIDATION OF BISHOP (CV-09-
4128(CW)) AND KELLER (CV-09-
1967(CW)) ACTIONS PURSUANT TO
FED. R. CIV. P. 42**

Date: November 17, 2009

Time: 2:00 p.m.

Judge: Hon. Claudia Wilken

Courtroom: 2, 4th Floor

28 **OPPOSITION OF DEFENDANT NCAA TO PLAINTIFF'S MOTION FOR CONSOLIDATION**

Case Nos. 09-cv-4128 (CW) and 09-cv-1967 (CW)

1 **INTRODUCTION**

2 Plaintiff moves for the consolidation of *Bishop v. NCAA*, Case No. CV-09-4128
 3 ("*Bishop*"), and *Keller v. Electronic Arts*, Case No. CV-09-1967 ("*Keller*"). While Defendant
 4 NCAA does not oppose the consolidation of *Bishop* and *Keller*, it notes that the *Keller* plaintiff
 5 has filed a joint motion to consolidate his case with *O'Bannon v. NCAA*, Case No. CV-09-3329
 6 ("*O'Bannon*"). NCAA has written in opposition of the consolidation of *Keller* and *O'Bannon* and
 7 further opposes any consolidation of *Bishop* and *O'Bannon*.
 8

9 **LEGAL STANDARD**

10 Consolidation of cases in the same district is permissible when actions involving a
 11 common question of law or fact are pending before the Court. Fed. R. Civ. P. 42(a). A decision
 12 on a motion to consolidate requires examination of the parties, claims and factual predicates at
 13 issue in each operative complaint. *Levitte v. Google, Inc.*, No. C 08-03369, 2009 U.S. Dist.
 14 LEXIS 18198, at *4 (N.D. Cal. Feb. 25, 2009). If cases are pending in the same district and have
 15 the same essential issues of law and fact, consolidation is generally a matter of discretion for the
 16 Court. *See, e.g., Lewis v. City of Fresno*, No. CV-F-08-1062, 2009 U.S. Dist. LEXIS 57083, at
 17 *2 (E.D. Cal. July 6, 2007).
 18

19 **ARGUMENT**

20 **I. THE NCAA DOES NOT OPPOSE THE CONSOLIDATION OF THE *BISHOP***
 21 **AND *KELLER* CASES**

22 The NCAA does not oppose the consolidation of *Bishop* and *Keller*. The two cases
 23 involve common issues of fact and law, identify the same plaintiff class, name the same
 24 defendants, and allege substantially the same claims against the defendants.

25 **II. *BISHOP* SHOULD NOT BE CONSOLIDATED WITH *O'BANNON***

26 *Bishop* should not, however, be consolidated with *O'Bannon*. Although Plaintiff's motion
 27 requests consolidation with only *Keller* on its face, there is a pending motion to consolidate
 28

1 *Keller* and *O'Bannon*. Just like *Keller*, *Bishop* cannot properly be consolidated with *O'Bannon*.

2 **A. *Bishop* and *O'Bannon* do not involve common issues of fact and law**

3 *Bishop* and *O'Bannon* do not involve common issues of fact and law. *Bishop* is a case
4 brought under California and Indiana state law against EA, the NCAA and CLC, in which *Bishop*
5 alleges a right to damages for himself and on behalf of a purported class of current college
6 football and basketball players based on theories of statutory and common law rights of publicity,
7 breach of contract, and unjust enrichment. *Bishop* alleges that EA appropriated his and other
8 student-athletes' likenesses for use in two video games, that EA, the NCAA and CLC engages in a
9 civil conspiracy to enable that to happen, that CLC and EA were unjustly enriched by that
10 activity, and that the NCAA breached an alleged contract with *Bishop* and other student-athletes
11 in purportedly "allowing" EA to engage in the alleged appropriation.
12

13
14 *O'Bannon*, on the other hand, is a federal antitrust case against NCAA and CLC only.
15 *O'Bannon* alleges that certain NCAA practices "restrain trade" in a purported "collegiate licensing
16 market" (or some other related market) and allege both *per se* and rule of reason violations of the
17 Sherman Act. The *O'Bannon* complaint purports to include separate classes for both damages
18 and injunctive relief. Specifically, *O'Bannon* alleges that NCAA rules – and in particular, a form
19 regarding the use of student-athletes to promote charitable, non-profit, institutional and NCAA
20 events – operate as a wide-ranging conspiracy in restraint of trade that restricts the manner in
21 which schools and conferences "negotiate" with student-athletes regarding compensation for the
22 use of their images after graduation. *O'Bannon* alleges that this "conspiracy" somehow affects the
23 markets for DVDs, television rights to classic games, video clips, photos, action figures, trading
24 cards, and posters, as well as video games.
25

26 These cases are fundamentally different in fact and in law. Moreover, even if *Bishop* and
27 *O'Bannon* were factually related, the disparity of their legal claims would be sufficient to deny
28

1 the motion for consolidation. In *E.E.O.C. v. Pan American World Airways, Inc.*, No. C-81-3636
2 RFP, 1987 WL 97215, at *2 (N.D. Cal. Dec. 3, 1987), the Court found that both actions arose out
3 of essentially the same operative facts, that the primary defendants were the same, that the actions
4 shared a plaintiff, and that the plaintiff sought the same legal and equitable relief. However,
5 despite this "considerable factual overlap," the Court found the two cases to be completely
6 dissimilar in law and denied the motion for consolidation. The plaintiffs in *Keller* and *O'Bannon*
7 have argued that the disparate claims alleged in their complaints are more similar than those in
8 *Pan American* – even though one of the cases at issue contained a claim of federal age
9 discrimination and other a claim of California age discrimination. If these claims were
10 "completely dissimilar," *Bishop's* state law theories of violations of right of publicity, breach of
11 contract and unjust enrichment must be infinitely dissimilar from *O'Bannon's* federal antitrust
12 claims.
13

14
15 The dissimilarity of the facts underlying *Bishop* and *O'Bannon*, combined with the
16 dissimilarity of their legal claims and the added layer of complexity that accompanies any
17 antitrust action, demands that *Bishop* and *O'Bannon* not be consolidated.

18 **B. Consolidation of *Bishop* and *O'Bannon* would be inefficient and create**
19 **prejudice and confusion**

20 The consolidation of *Bishop* and *O'Bannon* would be inefficient and create prejudice and
21 cause confusion. First, any consolidation would be premature, as the defendants have already
22 filed motions to dismiss and to transfer venue in *O'Bannon*. If the Court grants any of the
23 pending motions, this motion will be moot, as there will be nothing to consolidate.

24
25 Second, there will be no efficiency benefit to combining two such different cases. Rather
26 than creating efficiencies and eliminating duplicative proceedings and simplifying the course of
27 the litigation, consolidation of *Bishop's* state law publicity rights claims with the complex
28 antitrust issues raised by the *O'Bannon* complaint would add complexity and confusion. *O'Diah*

1 v. *Univ. of California*, No. C-90-0915 RFP, 1991 U.S. Dist. LEXIS 13468, at *12 (N.D. Cal.
2 Sept. 19, 1991).

3 Finally, the *O'Bannon* plaintiff has claimed that he plans to eventually file a complaint
4 that will unite his claims with the claims in *Keller* (and, by extension, in *Bishop*).¹ However, the
5 Court should disregard these claims and decide the consolidation motions before it on the basis of
6 the complaints current before it – not a complaint that a plaintiff wished he filed or may intend to
7 file in the future.

8
9 **CONCLUSION**

10 Defendant NCAA does not oppose Plaintiff's motion for consolidation with *Keller*.
11 However, *Bishop* should not be consolidated with *O'Bannon*.

12
13 MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

14 By: /s/Robert J. Wierenga

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19 Dated: October 27, 2009

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21
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23
24 ¹ When, exactly, the *O'Bannon* plaintiff will actually file his amended complaint is
25 anyone's guess. On September 16, 2009, the *Keller* and *O'Bannon* plaintiffs claimed they would
26 file an amended complaint "within 10 days of the issuance of any order consolidating the
27 actions." See *Keller* Dkt. Entry No. 81 ("Plaintiffs' Joint Motion for Appointment of Interim Co-
28 Lead Counsel"). But on October 21, 2009, the plaintiffs claimed they would require "30 days
after any order granting consolidation is entered" to file an amended complaint. See *O'Bannon*
Dkt. Entry No. 108 ("Consolidated Reply to Opposition to Motion to Consolidate Actions").

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 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.

By: /s/ Robert J. Wierenga
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