Plaintiffs' and Defendants' Counsel
Listed on Signature Block

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION This Document Relates to: ALL ACTIONS	Case No. 4:09-cv-1967 VRW **JOINT CASE MANAGEMENT CONFERENCE STATEMENT** **Judge:** **Hon. Vaughn R. Walker** **Date:** **July 6, 2010** **Time:** **11:00 a.m.** **Courtroom:** **6, 17th Floor**

Plaintiffs and Defendants in the above-captioned consolidated actions hereby submit this Joint Case Management Conference Statement in advance of the Case Management Conference scheduled for July 6, 2010.

1. INTRODUCTION

On January 15, 2010, the Hon. Claudia Wilken consolidated two putative class actions, *Keller v. Electronic Arts, Inc., et al.*, No. C 09-1967 (N.D. Cal., filed May 5, 2009) ("*Keller*") and *O'Bannon v. NCAA, et al.*, No. C 09-3329 (N.D. Cal., filed July 21, 2009) ("*O'Bannon*"). *See* Doc. # 145.[1] Judge Wilken also consolidated six other putative class actions that were essentially identical to either *Keller* or *O'Bannon*. *See id.*

These consolidated cases are not in their inception. Prior to reassignment to this Court, Judge Wilken previously issued several orders including ones regarding appointment of interim co-lead class counsel, a motion to transfer venue to the Southern District of Indiana (*see O'Bannon v. NCAA*, No. C 09-3329, 2009 WL 4899217 (N.D. Cal., Dec. 11, 2009)), various motions to dismiss and a motion to strike, and consolidation. *See* Doc. #s 142; 145; 146; 150; *O'Bannon* Doc. #s 135 and 142.

Keller is brought on behalf of a putative class of current and former NCAA student-athletes against defendants Electronic Arts Inc. ("EA"), the National Collegiate Athletic Association ("NCAA"), and the Collegiate Licensing Company ("CLC"). The plaintiffs therein contend that Defendants conspired to utilize class members' names, images, and likenesses in EA's NCAA videogames in violation of, among other things, the laws of California and Indiana governing rights of publicity. Plaintiffs also assert claims for civil conspiracy, unjust enrichment and breach of contract.

O'Bannon was brought on behalf of: (1) a putative damages class of former NCAA student-athletes who competed on an NCAA Division I college or university men's basketball team or an NCAA Football Bowl Subdivision football team and who contend that the NCAA,

[1] Unless otherwise indicated, "Doc." refers to the docket in the present consolidated litigation. Prior to Judge Wilken's consolidation order, this docket was dedicated solely to the *Keller* action.

CLC, EA and others conspired to deprive class members of compensation for the use of their names, images, and likenesses used in connection with numerous products following the conclusion of their collegiate athletic careers, and (2) a putative injunctive relief class of current and former NCAA student-athletes. The products at issue in *O'Bannon* include, but are not limited to, EA's NCAA video-games, DVDs, on-demand "streamed" games, video clips, premium website content, photographs, video games sold by companies other than EA, and television broadcasts of "classic" or previously played games.

Defendants deny that they use, or grant to any third party any license or permission to use, Plaintiffs' names or likeness in any of the products identified by Plaintiffs, as forming a basis for their claims, including videogames. Defendants further deny that they, individually or together, have violated any Plaintiff's right of publicity, unlawfully conspired, unfairly competed, breached any contract, violated the antitrust laws, or have been unjustly enriched at Plaintiffs' expense. EA further contends that all of its conduct is protected by the First Amendment.

Prior to consolidation, Defendants moved to separately dismiss the *Keller* and *O'Bannon* complaints (though EA did not move to dismiss the *O'Bannon* action because it was not named as a defendant in the original *O'Bannon* complaint), and defendant EA also filed a motion to strike the *Keller* claims pursuant to California's anti-SLAPP statute. The NCAA and CLC also moved to dismiss the complaint brought against them by Craig Newsome (*Newsome v. NCAA*, et al. No. CV-09-4822-CW (N.D. Cal.)) ("*Newsome*"), that echoed the claims made in *O'Bannon*.

On February 8, 2010, Judge Wilken issued two orders on the total of five motions to dismiss and one motion to strike. In *Keller*, the Court denied EA's motion to dismiss and motion to strike; denied CLC's motion to dismiss; and denied in part and granted in part NCAA's motion to dismiss, with leave for Plaintiffs to amend their complaint. *See Keller v. Electronic Arts, Inc.*, No. C 09-1967, 2010 WL 530108 (N.D. Cal., Feb. 8, 2010) (Doc. # 150).

In *O'Bannon*, the Court denied in total the NCAA's and CLC's motions to dismiss with respect to plaintiffs' federal antitrust claims and unjust enrichment claim. The court granted their motions with respect to plaintiffs' accounting claim, with leave to amend. *See O'Bannon v. NCAA*, No. C 09-3329, 2010 WL 445190 (N.D. Cal., Feb. 8, 2010) (*O'Bannon* Doc. #142). The

Court also granted the NCAA's and CLC's motion to dismiss the *Newsome* complaint in its entirety. *See Id.*

In her orders on Defendants' motions to dismiss, Judge Wilken ordered Plaintiffs to file a consolidated amended complaint ("CAC") on or before March 10, 2010 (*see id.* at *8), and Plaintiffs did so on that date. *See Keller* Doc. # 175.

With respect to the CAC, Judge Wilken gave the following guidance with respect to how to compartmentalize the *Keller* right of publicity claims and the *O'Bannon* antitrust claims:

> The Court: Could you file something that could be unconsolidated? In other words, don't mix them up too much, have the causes of action be somewhat separate so that if we had to deconsolidate them for trial, it wouldn't be too difficult to do?
>
> [Plaintiff O'Bannon's Counsel]: It would not be difficult at all, your Honor, because the different theories would be in different counts.
>
> The Court: Okay.
>
> . . .
>
> The Court: [With respect to the *Keller* California right of publicity claims] Hopefully they will be in separate discernable causes of action that if necessary can be severed be [*sic*] and stayed or put on a fast track [or] something.

(Transcript of Hearing of December 17, 2009 at 67:11 – 70:17). In short, Judge Wilken anticipated that severance of the *Keller* Right of Publicity Claims and *O'Bannon* Antitrust claims might be necessary at a later date, and instructed the Plaintiffs to draft the CAC so that the two claims could easily be separated. Plaintiffs' CAC complied with this guidance in all respects.

On February 18, 2010, EA appealed Judge Wilken's denial of EA's anti-SLAPP motion to the Ninth Circuit. *See* Doc. # 155. Thereafter, EA moved to stay these proceedings pending the Ninth Circuit's consideration of its appeal, contending that the Court lacks jurisdiction to proceed on matters encompassed by EA's appeal. *See* Doc. # 156. NCAA and CLC also have moved to stay these proceedings pending EA's appeal. Plaintiffs have opposed Defendants' motions to stay.

See Doc. #s 163, 166. Judge Wilken took the motions to stay under submission prior to the transfer of this case to this Court. The motions to stay are pending.

The Parties stipulated not to serve discovery until after the motions to stay were resolved. *See* Doc # 173. On March 30, 2010, Judge Wilken issued an order extending the time to respond to the CAC until 30 days from the date the stay of claims against defendants is lifted (assuming their motion is granted) or 30 days after defendants' motion to stay is denied. *See* Doc. # 198.

EA's opening appellate brief is due on August 30, 2010, the *Keller* plaintiffs' response is due on September 29, 2010, and EA's reply is due on October 13, 2010. The Ninth Circuit has not yet scheduled a date for oral argument.

On April 14, 2010, this Court granted Defendant EA's motion to relate the present litigation to the case captioned *Pecover v. Electronic Arts Inc.*, No. C 08-02820 VRW (N.D. Cal., filed June 5, 2008) ("*Pecover*"). *See* Doc # 200.

For ease of reference, as used herein, "Plaintiffs" shall mean all plaintiffs in the present litigation, the "*Keller* Right of Publicity Plaintiffs" shall mean the plaintiffs in the *Keller* action and any similar right-of-publicity based actions, and the "*O'Bannon* Antitrust Plaintiffs" shall mean the plaintiffs in the *O'Bannon* federal antitrust action and any similar antitrust-based actions.

2. JURISDICTION AND SERVICE

The Parties agree that the Court has diversity jurisdiction pursuant to 28 U.S.C. 1332(a) and (d) because the amount in controversy for the purported classes exceeds $5,000,000. EA, however, contends that its appeal of the Court's denial of its anti-SLAPP motion divested the Court of jurisdiction to proceed on any matters encompassed by EA's appeal.

There are no issues regarding personal jurisdiction or venue. The plaintiff in *Thrower v. NCAA, et al*., Case No. 3:10-cv-00632-VRW (N.D. Cal., filed Feb. 12, 2010), has failed to serve his complaint on any defendant, and the time to do so provided by Fed.R.Civ.P. 4(m) has expired. Defendants will shortly be filing a motion to dismiss the *Thrower* complaint on these grounds. There are no other issues with service.

3. FACTS

a. ***O'Bannon* Antitrust Plaintiffs' Statement**

The following information is culled directly from the CAC. *O' Bannon* Antitrust Plaintiffs and putative Class Representatives Ed O'Bannon, Harry Flournoy, Alex Gilbert, Sam Jacobson, Thad Jaracz, David Lattin, Patrick Maynor, Tyrone Prothro, Damien Rhodes, Eric Riley, Bob Tallent, and Danny Wimprine bring this action both individually and on behalf of antitrust damages and injunctive relief classes as described in the Introduction. The *O' Bannon* Antitrust Plaintiffs allege that Defendants NCAA, EA, the CLC (the NCAA's licensing arm), and their co-conspirators have committed violations of the federal antitrust laws by engaging in a price-fixing conspiracy and a group boycott / refusal to deal that has unlawfully foreclosed class members from receiving compensation in connection with the commercial exploitation of their images, likenesses and/or names following their cessation of intercollegiate athletic competition. The *O' Bannon* Antitrust Plaintiffs also set forth a claim for unjust enrichment and request that the Court require Defendants to provide an accounting of ill-gotten gains and the monies unlawfully withheld from Antitrust Class members.

The *O' Bannon* Antitrust Class Representatives' collective collegiate experiences include: (1) eight appearances in NCAA national championship games; (2) competing for teams that won two NCAA championship titles, the 1994-95 UCLA men's basketball team, and the 1965-66 Texas Western men's basketball team; (3) competing on opposing teams in a game still considered the most socially significant game in college basketball history, the 1966 Texas Western vs. University of Kentucky men's basketball championship game; (4) competing in the 1979 Indiana State University vs. Michigan State University men's basketball game, the intense popularity of which is credited for revolutionizing the commercialization of not only the NCAA but the National Basketball Association ("NBA") as well; (5) competing on the famous "Fab 5"-era University of Michigan basketball teams; (6) competing on teams in the Southeastern Conference (the "SEC"), the Big 10, the Pac 10, Conference USA, and on teams from the schools of Alabama, Kentucky, UCLA, Syracuse, Stanford, and Memphis. The Antitrust Class representatives further include multiple All-American players, team captains, and a former

NCAA Division I basketball coach.

One of the NCAA's business partners, Thought Equity Motion ("TEM"), has described the NCAA's video content archive as "one of the most unique and valuable content collections in the world." Defendant CLC states on its website that there is a "$4.0 billion annual market for collegiate licensed merchandise."

The *O' Bannon* Antitrust Plaintiffs allege that the NCAA and its co-conspirators have unreasonably and illegally restrained trade in order to commercially exploit former student-athletes previously subject to its control, with such exploitation affecting those individuals well into their post-collegiate competition lives. The *O' Bannon* Antitrust Plaintiffs further allege that the NCAA's conduct is blatantly anticompetitive and exclusionary, as it wipes out in total the future ownership interests of former student-athletes in their own images -- rights that all other members of society enjoy -- even long after student-athletes have ceased attending a college or university.

The *O'Bannon* Antitrust Plaintiffs further allege that the NCAA accomplishes its unreasonable restraint of trade in part by requiring all student-athletes to sign a form each year – such as 2008's "Form 08-3a" – that purports to require each of them to relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations. The *O' Bannon* Antitrust Plaintiffs allege that the NCAA further requires student-athletes to sign at least one other similarly illegal consent form pursuant to Article 12.5.1.1 of its Bylaws (the "Institutional, Charitable, Educational, or Nonprofit Promotions Release Statement"), that allows commercial exploitation of former student-athletes by effecting another purported perpetual release of rights. The NCAA's Bylaws contain further provisions allowing for-profit third parties to benefit financially from the commercial exploitation of former student-athletes. The penalty for a student-athlete who refuses to sign the forms described herein is that the student-athlete is declared permanently ineligible for participation on his or her respective team, unless he or she later signs the forms.

b. ***Keller* Right of Publicity Plaintiffs' Statement**

The *Keller* Right of Publicity Plaintiffs, Sam Keller, Bryan Christopher Cummings, Byron

Bishop, and Lamar Watkins, filed putative class actions against Defendants EA, the NCAA, and CLC for the blatant and unlawful use of athlete likenesses in videogames produced by EA. Despite clear prohibitions on the use of student names and likenesses in NCAA bylaws, contracts and licensing agreements, EA utilizes the names and likenesses of individual student-athletes in its NCAA basketball and football videogames to increase sales and profits. Rather than enforcing its own rules, the NCAA and its licensing arm, the CLC, sanction EA's conduct. In fact, the NCAA and the CLC have expressly investigated and approved EA's use of player names and likenesses. They have done so because EA's use of player names and likenesses benefits the NCAA and CLC by increasing the popularity of the relevant games and therefore increases the royalties that the NCAA and CLC can collect.

To stop this abuse, the *Keller* Right of Publicity Plaintiffs allege, on behalf of themselves and a class of former and current college football and basketball players, that Defendants unlawfully used their likeness in videogames created, distributed, marketed, and sold by Defendants EA, the NCAA, and CLC. The *Keller* Right of Publicity Plaintiffs assert causes of action for statutory and common law violations of their rights of publicity, conspiracy, unfair competition, breach of contract, and unjust enrichment.

c. **Defendants' Statement as to the *O'Bannon* Plaintiffs**

The *O'Bannon* plaintiffs have not alleged, and cannot prove, a conspiracy, a restraint, a relevant market, substantial anticompetitive effects in any relevant market, or, frankly, any injury at all, much less antitrust injury. Plaintiffs' claims simply are not the stuff of antitrust.

First, the *O'Bannon* plaintiffs have not alleged, and cannot prove, that Defendants conspired to impose any restraints that have the purpose and effect of excluding Plaintiffs from any market and/or forcing them to abdicate their publicity rights for zero consideration. While the CAC describes a variety of commercial products and NCAA bylaws that Plaintiffs apparently feel evidence an antitrust "restraint," Plaintiffs have failed to allege facts showing that any of Defendants' actions have restrained Plaintiffs in any manner at all, much less in a manner that causes (a) anticompetitive effects in a well-defined relevant market, or (b) antitrust injury to the plaintiffs.

- Form 08-3a, for example, provides no support for the *O'Bannon* plaintiffs' theories. The form only provides that the NCAA, or someone acting on its behalf, can use a student-athlete's "name or picture" to promote NCAA events, activities or programs. It says nothing about the use of student-athlete images by member institutions, nothing about video games, and absolutely nothing about the right of a former student-athlete to sell his own collegiate image after graduation. Moreover, no named plaintiff in the O'Bannon litigation is alleged to have actually signed Form 08-3a.

- Similarly, Bylaw 12.5.1.1 is even less relevant, as it does not even require student-athletes to provide a release. It only states that NCAA schools "may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics" ***if*** they obtain a release from the student-athlete "ensuring that the student-athlete's name, image or appearance is used in a manner consistent with the requirements of this section." CAC ¶ 301 (citing Bylaw 12.5.1.1). Bylaw 12.5.1.1 does not say that student-athletes are required to sign such a release, and the *O'Bannon* plaintiffs have not identified any other bylaw that requires student-athletes to do so.

Indeed, despite their claims that the "conspiracy" they've alleged between the Defendants somehow deprives Plaintiffs of the ability to sell or license the use of their names, images and likenesses, the *O'Bannon* plaintiffs have ***already conceded*** that former student-athletes are not restrained from licensing their publicity rights. During the hearing on Defendants' motion to dismiss O'Bannon's antitrust claims, Judge Wilken questioned whether former student-athletes "could go out and sell their likeness or their photo or their action figure or whatever else." 12/17/09 Transcript, 62:4-5. Counsel for the *O'Bannon* plaintiffs was very clear that they could, and no alleged "conspiracy" between the defendants prevented it, when he responded that the case involves "two different markets. One is the market for an individual endorsement by a specific athlete. ***There is no preclusion there***. " *Id.* at 62:8-11, 63:10-13 (emphasis added).

The *O'Bannon* plaintiffs have not alleged an antitrust conspiracy to exclude them from any relevant market. The NCAA forms and bylaws they allege "restrict" them do not, on their face, have the effect plaintiffs claim. Plaintiffs remain in full possession of any publicity rights they might have, as their own allegations and their concessions in open court amply demonstrate. Plaintiffs have not alleged, and cannot prove, any conspiracy, any restraints, any economically anticompetitive effects in any well-defined relevant market, and have not suffered any antitrust injury. Plaintiffs' antitrust claims are little more than an attempt to bootstrap flawed and

unsupported tort allegations into the antitrust framework.

Separate and apart from whether NCAA Form 08-3a, NCAA Bylaw 12.5.1.1, and any similar forms, bylaws or devices excluded Plaintiffs from any cognizable relevant market and/or forced Plaintiffs to abdicate their rights for no consideration, the Plaintiffs have not alleged and cannot prove that EA has taken any action to create, impose or maintain the allegedly exclusionary restraints at issue. Indeed, Plaintiffs concede that EA's arms-length license agreements with the CLC and/or NCAA do not convey or attempt to convey any of Plaintiffs' publicity rights that were allegedly impacted by any alleged exclusionary restraints. As such, Plaintiffs have not alleged and cannot prove that EA is complicit in any alleged antitrust conspiracy to harm Plaintiffs.

d. **Defendants' Statement as to the *Keller* Plaintiffs**

Defendants deny that they use, or grant to any third party any license or permission to use, Plaintiffs' names or likeness in any of the products identified by Plaintiffs, which forms the basis for all of their claims, including videogames. Defendants further deny that they, individually or together, have violated any Plaintiff's right of publicity, unlawfully conspired, breached any contract, or have been unjustly enriched at Plaintiffs' expense.

Moreover, EA contends that all of its conduct is protected by the First Amendment. "Video games are expressive works entitled to as much First Amendment protection as the most profound literature." *Kirby v. Sega of Am.*, 144 Cal. App. 4th 47, 58 (2006). Because plaintiffs' claims impermissibly intrude upon EA's First Amendment right to create, develop, and publish video games, they cannot succeed.

Additionally, the *Keller* plaintiffs have amended the breach of contract claims against the NCAA that were initially dismissed by Judge Wilken. Plaintiffs' attempt to amend the claims was insufficient, and the "contract" the plaintiffs have alleged in detail does not contain the "provision" they assert the NCAA breached. As such, plaintiffs have not alleged and will not be able to prove a breach of contract.

4. LEGAL ISSUES

a. ***O'Bannon* Antitrust Plaintiffs' Statement**

Plaintiffs believe the primary legal issues are:

i. Whether the classes of persons identified in *O'Bannon* should be certified;

ii. Whether the Defendants' conduct (a) is unlawful under the Sherman Act; and (b) gives rise to claims for unjust enrichment and an accounting; and

iii. Whether Plaintiffs and other members of the respective classes were injured by the alleged unlawful conduct of Defendants and, if so, the appropriate class-wide measure of damages.

b. ***Keller* Right of Publicity Plaintiffs' Statement**

Plaintiffs believe the primary legal issues are:

i. Whether the classes identified in *Keller* should be certified;

ii. Whether EA's use of collegiate athlete likenesses in its videogames is unlawful under Indiana Code § 32-36-1-1 or California Civil Code § 3344;

iii. Whether Defendants' conduct gives rise to claims for unjust enrichment and for civil conspiracy;

iv. Whether NCAA's duty of good faith and fair dealing requires them to protect players' likeness rights when dealing with EA;

v. The interpretation of Form 08-3a and its enforceability as against both the NCAA and class members;

vi. Whether NCAA and CLC have conspired with EA to illegally use players' likenesses; and

vii. Whether EA's conduct constitutes an unfair trade practice.

c. **Defendants' Antitrust Claims Statement**

Defendants NCAA and CLC believe the primary legal issues are:

i. Whether the plaintiffs have sufficiently alleged or can prove that the defendants conspired, amongst themselves and/or with any named or unnamed "co-conspirators", to restrain commercial competition in any relevant market via use of the NCAA bylaws and forms plaintiffs allege are anticompetitive;

ii. Whether the plaintiffs have sufficiently alleged or can prove that the defendants conspired, amongst themselves and/or with any named or unnamed "co-conspirators", to restrain commercial competition in any relevant market by allegedly "selling" products that purportedly include plaintiffs' likenesses without payment to plaintiffs;

iii. Whether the plaintiffs have sufficiently alleged or can prove that defendants conspired, amongst themselves and/or with any named or unnamed "co-conspirators", to restrain commercial competition in any relevant market by precluding prospective student-athletes from negotiating deferred compensation agreements during the recruiting process;

iv. Whether the plaintiffs have sufficiently alleged or can prove that defendant CLC participated in the alleged conspiracy to deprive plaintiffs of compensation for the use of plaintiffs' names and likenesses and to boycott plaintiffs to prevent them from licensing their names and likenesses;

v. Whether the plaintiffs have sufficiently alleged or can prove standing, antitrust standing and antitrust injury;

vi. Whether plaintiffs have sufficiently alleged or can prove a relevant market;

vii. Whether plaintiffs have sufficiently alleged or can prove any restraints that have a substantial, adverse impact on commercial competition in a well-defined relevant market;

viii. Whether the bylaws, forms, actions, sales or other activity alleged by plaintiffs to be anticompetitive have procompetitive purposes, benefits or justifications;

ix. Whether plaintiffs have sufficiently alleged or can prove that there is a substantially less restrictive alternative to any of the bylaws, forms, actions, sales or other activity alleged to be anticompetitive that meet the procompetitive benefits provided by the challenged "restraints";

x. Whether plaintiffs' claims are barred by the statute of limitations;

xi. Whether plaintiffs have sufficiently alleged or can prove any injury as a result of the conduct challenged in the Consolidated Amended Complaint; and

xii. Whether plaintiffs' putative classes, as defined in the Consolidated Amended Complaint, can be certified pursuant to Fed. R. Civ. P. 23;

In addition to the above, EA believes the primary legal issues also include:

i. Whether the "collegiate licensing market" for products incorporating the images and likeness of current former student-athletes is a relevant antitrust market.

ii. Whether EA entered into any unlawful agreements with the CLC, NCAA, or their member institutions that are anticompetitive and unreasonable restraints of trade.

iii. Whether EA took any action to create, implement, or maintain NCAA Form 08-3a, NCAA By-Law 12.5.11, or any other device allegedly used to exclude Plaintiffs from the relevant market and/or force Plaintiffs to abdicate their rights in perpetuity for no consideration.

iv. Whether EA is complicit in the alleged cartel to abdicate Plaintiffs' publicity rights when its agreement to license certain trademarks and intellectual property rights from the CLC and NCAA does not convey or attempt to convey any of Plaintiffs' publicity rights.

v. Whether EA had engaged in any overt acts that demonstrate a conscious commitment to the alleged conspiracy to abdicate Plaintiffs' publicity rights, that excludes the possibility of independent, competitively benign conduct.

vi. Whether EA entered into a contract or conspiracy with the CLC, NCAA, or their member institutions that created or enhanced market power within the relevant market.

vii. Whether EA entered into a contract or conspiracy with the CLC, NCAA, or their member institutions that has a causal nexus to the allegedly illegal restraint of trade.

viii. Whether the actions of EA have caused harm to competition in a relevant market.

ix. Whether the actions of EA have injured Plaintiffs.

x. Whether Plaintiffs have suffered cognizable harm as a result of EA's conduct and, if so, the nature and extent of those damages.

xi. Whether Plaintiffs have antitrust standing to challenge conduct that is First-Amendment protected and/or unconnected to the type of conduct the antitrust laws are intended to regulate.

xii. Whether any class should be certified and whether plaintiffs are appropriate class representatives.

d. **Defendants' Right of Publicity Claims Statement**

i. Whether the Court lacks jurisdiction to proceed pending the appeal of all of Keller's claims;

ii. Whether Plaintiffs' claims are barred by the First Amendment;

iii. Whether Plaintiffs' Consolidated Amended Complaint states claims upon which relief may be granted;

iv. Whether Plaintiffs' Consolidated Amended Complaint is a strategic lawsuit against public participation, impermissibly burdening EA's expressive activity;

v. Which state's law governs to Plaintiffs' statutory and common law claims;

vi. Whether a right of publicity class may be certified;

vii. Whether EA uses plaintiffs' likenesses;

viii. Whether Plaintiffs' likenesses are identifiable;

ix. Whether Plaintiffs waived their claims regarding EA's alleged conduct;

x. Whether Plaintiffs have been injured by EA's alleged conduct;

xi. Whether Plaintiffs can demonstrate damages resulting from EA's alleged conduct.

xii. Whether Plaintiffs can demonstrate that defendants engaged in a legally cognizable conspiracy in connection with any alleged wrongdoing or damages

5. MOTIONS

a. **Plaintiffs' Statement**

The *Keller* Right of Publicity Plaintiffs anticipate filing a motion to unconsolidate the cases based on several factors, including the relation of this case to the *Pecover* action, a case for which *Keller* counsel is co-lead, which has caused Defendants to raise certain issues. Because the Court contemplated separating the *Keller* and *O'Bannon* claims, as evidenced by the instruction to compartmentalize the CAC, the *Keller* Right of Publicity Plaintiffs believe that severing the two cases at this time is prudent, especially if issues are already arising. The *Keller* Right of Publicity Plaintiffs anticipate a motion to be made in the next month.

Plaintiffs intend to move for class certification and will propose to the Court a pretrial schedule in consultation with Defendants 30 days after the Defendants' previously-described motions to stay are resolved.

Plaintiffs intend to move for summary judgment following the close of discovery.

It has been indicated that various Defendants may file a motion to dismiss the claims by the *O'Bannon* Antitrust Plaintiffs. At the hearing on the motions to dismiss, Judge Wilken stated the following with respect to the filing of the consolidated amended complaint, and any subsequent efforts to dismiss it:

> The Court: If something is upheld and not dismissed, then I won't be wanting to see the same arguments again. I would see only new arguments based on new changes. I would assume that's what I would see.

> [EA's Counsel Mr. Van Nest]: That's right. Particularly for EA, we haven't been a defendant in the O'Bannon case. So we'll certainly deal with that also.
>
> The Court: Don't make arguments that other people have made that are the same –
>
> [EA's Counsel Mr. Van Nest]: Of course not.
>
> The Court: -- and have been rejected. You can assert them for purposes of preserving them for appeal, but you don't need to rebrief them.
>
> [EA's Counsel Mr. Van Nest]: Absolutely.
>
> [NCAA's Counsel Mr. Curtner]: We understand that, your Honor.
> The Court: Okay.

(Transcript of Hearing of December 17, 2009 at 71:20 – 72:9)

b. **Defendants' Statement**

Pending Motions to Stay: On February 18, 2010, following its notice of appeal of Judge Wilken's order denying its Special Motion to Strike pursuant to California's anti-SLAPP statute, EA moved to stay these proceeding in their entirety. NCAA and CLC filed similar motions on February 25, 2010. Plaintiffs opposed the motions, which are now fully briefed. Judge Wilken took them under submission prior to the time this matter was transferred to this Court. Pursuant to the Court's request, Defendants summarize here some of the arguments from their motions.

The denial of a motion to strike is properly appealable as an interlocutory order. *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003). EA's filing of a notice of appeal divested the trial court of jurisdiction to proceed with all aspects of the case subject to its appeal. *Griggs v. Provident Consumer Discount Co*., 459 U.S. 56 (1982). Because EA's anti-SLAPP motion to strike attacked *all* causes of action asserted in the *Keller* case against EA, the claims originally asserted in the *Keller* action were—and remain—automatically stayed pending the resolution of EA's appeal. This stay is automatic and non-discretionary.

Defendants also argue that the Court should exercise its discretion to stay the *O'Bannon* claims because they are equally vulnerable to EA's First Amendment defenses pending before the

Ninth Circuit. Because EA's alleged conduct is fully protected by the First Amendment, the antitrust laws may not condemn it or asses damages for it. If EA's *Keller* appeal succeeds, both the *Keller* and *O'Bannon* claims against EA will fall. The overlap between the *Keller* and *O'Bannon* claims, on which Plaintiffs based their successful Motion to Consolidate, therefore justifies extending the automatic *Keller* stay to all claims of the consolidated action. Moreover, staying all claims pending resolution of EA's appeal is clearly the most efficient manner in which to conduct this litigation, even in the unlikely event that EA's appeal does not succeed.

Motions to Dismiss and Motion to Strike: Should the Ninth Circuit not grant EA's appeal, Defendants anticipate filing motions to dismiss Plaintiffs' Consolidated Amended Complaint. EA also anticipates filing a Special Motion to Strike pursuant to California's Anti-SLAPP statute.

The NCAA anticipates filing motions to dismiss the CAC. The CAC adds several new plaintiffs with putative claims that are literally decades old, and raise serious statute of limitations and antitrust standing questions under Ninth Circuit law. Both the *Keller* and *O'Bannon* plaintiffs have significantly changed their factual and legal allegations in a manner that (a) fails, in some instances, to address concerns raised by Judge Wilken, (b) creates new problems with plaintiffs' antitrust and common law claims, and (c) directly belies plaintiffs' representations to the Court at the hearing on the motion to dismiss. Moreover, the continued insufficiency of the *O'Bannon* plaintiffs' allegations is particularly stark in light of their previous concessions regarding the lack of preclusion in the alleged "market" for student-athlete likenesses and continued inability—despite prior express representations to the Court to the contrary—to allege that any named plaintiff signed the particular forms that are alleged to form the basis of all of plaintiffs' antitrust claims. For these reasons, additional motions to dismiss are appropriate.

Anticipated Summary Judgment Motions: Should the district court and appellate court deny Defendants' motions to dismiss, Defendants anticipate filing motions for summary judgment.

6. **AMENDMENT OF PLEADINGS**

a. ***O' Bannon* Antitrust Plaintiffs' Statement**

The *O'Bannon* Antitrust Plaintiffs anticipate no further amendments to the CAC at this time.

b. ***Keller* Right of Publicity Plaintiffs' Statement**

The *Keller* Right of Publicity Plaintiffs do not anticipate any amendments to the CAC. In the event the Court orders that the plaintiffs unconsolidate the CAC, the *Keller* Right of Publicity Plaintiffs can sever their claims without any substantive changes to the *Keller* Right of Publicity Plaintiffs' allegations, causes of action, or prayer for relief.

7. EVIDENCE PRESERVATION

a. **Plaintiffs' Statement**

Plaintiffs have advised their clients of preservation responsibilities. They are willing to work out an appropriate preservation order with Defendants. The *Keller* Right of Publicity Plaintiffs attempted to identify exactly what Defendants were doing to preserve such evidence, but Defendants would only confirm that they were fulfilling their obligations under law.

b. **Defendants' Statement**

The Parties have informed one another that each has taken appropriate action to preserve evidence likely to be relevant and/or related to the issues raised by the CAC, including evidence in electronic form.

8. DISCLOSURES

a. **Plaintiffs' Statement**

Initial disclosures under Rule 26(a) have not been made yet.

b. **Defendants' Statement**

In light of the unsettled nature of the pleadings and EA' pending appeal of the Court's order denying its anti-SLAPP motion, the Defendants' pending motions to stay to these proceedings in their entirety, and Defendants anticipated motions to dismiss the CAC, Defendants believe that it is premature to exchange initial disclosures (and specifically object to doing so) or commence discovery at this time.

9. DISCOVERY

a. **Plaintiffs' Statement**

On March 30, 2010, Judge Wilken granted a request to delay responses to the CAC until 30 days after the stay of claims against defendants is lifted (assuming their motion is granted) or 30 days after their motion is denied. *See* Doc. # 198. Plaintiffs are prepared to conduct a Rule 26(f) conference with Defendants as soon as the Court permits, and to proceed to discovery at the earliest allowable time permitted by the Court.

The United States Department of Justice's Antitrust Division ("DOJ") recently announced an investigation into the legality of the NCAA's rule mandating that its member schools can only offer one-year athletic scholarships (known as "grants-in-aid"), as opposed to multiple-year grants-in-aid, and only offer a maximum of five grants-in-aid for any given student-athlete. The *O'Bannon* Antitrust Plaintiffs anticipate seeking production of any documents and information provided to the DOJ, as both that investigation and the present antitrust matter pertain in part to agreements to limit and/or eliminate the rights of student-athletes.

b. **Defendants' Statement**

In light of the unsettled nature of the pleadings and EA' pending appeal of the Court's order denying its ant-SLAPP motion, the Defendants' pending motions to stay to these proceedings in their entirety, and Defendants anticipated motions to dismiss the CAC, Defendants believe that it is premature to exchange initial disclosures (and specifically object to doing so) or commence discovery at this time.

The NCAA further objects to the *O'Bannon* plaintiffs' claim (made for the first time in this Case Management Statement) that they are entitled to discovery related to current NCAA financial aid rules. The *O'Bannon* claims allege, insufficiently, that the NCAA has violated the antitrust laws by supposedly preventing Mr. O'Bannon and others from commercially exploiting their images *after* graduation. *See, for example*, Consolidated Amended Complaint at 9. Nothing in those claims even arguably relates to the propriety of NCAA rules on the terms of financial aid awards made to current student-athletes. Indeed, in opposition to the NCAA's motion to dismiss the *O'Bannon* complaint, the *O'Bannon* plaintiffs claimed that: "Unlike other

cases involving the NCAA, ***this case does not involve questions of the protection of amateur sports, the student athlete experience, or other goals***. The damages class here (Compl. 43) involves former student athletes, who are citizens not subject to NCAA governance, and who should be entitled to control, license, and profit from their own image and likeness." Doc. # 107 at 3 (emphasis added).

10. CLASS ACTIONS

a. **Plaintiffs' Statement**

The consolidated cases are brought as class actions. Plaintiffs anticipate filing motions for class certification.

b. **Defendants' Statement**

Defendants will oppose Plaintiffs' motions for class certification. Defendants believe that it is premature to discuss proposals for how and when to address class certification.

11. RELATED CASES

a. **Plaintiffs' Statement**

Judge Wilken also consolidated six other putative class actions that were essentially identical to either *Keller* or *O'Bannon*. *See* Doc. # 145.

b. **Defendants' Statement**

The following cases are pending in federal court in Tennessee and also relate to the alleged unauthorized use of college athletes' likenesses in videogames: *Tommy Hubbard v. Electronic Arts Inc*., United States District Court for the Eastern District of Tennessee, Case No. 09-cv-233; *Tommy Hubbard v. Electronic Arts Inc*., United States District Court for the Eastern District of Tennessee, Case No. 09-cv-234.

In addition, the following case is pending in federal court in New Jersey and also relates to the alleged unauthorized use of athletes' likenesses in videogames: *Ryan Hart v. Electronic Arts Inc*., United Stated District Court for the District of New Jersey, Case No. 3:09-cv-05990-FLW-LHG. Electronic Arts Inc. is the only defendant in the *Hart* matter.

12. RELIEF

a. ***Keller* Right of Publicity Plaintiffs' Statement**

As detailed more in the CAC, the *Keller* Right of Publicity Plaintiffs seek, *inter alia*, class certification, declaratory and injunctive relief, actual, statutory and exemplary damages, disgorgement of profits, seizure of products, attorneys' fees and costs.

b. ***O' Bannon* Antitrust Plaintiffs' Statement**

As detailed more in the CAC, the *O'Bannon* Antitrust Plaintiffs seek, *inter alia*, class certification, treble damages, disgorgement of profits, declaratory and injunctive relief, an accounting, and attorneys' fees and costs.

13. SETTLEMENT AND ADR

The Parties have participated in the mandatory N.D. Cal. ADR program, and also participated in a mandatory assessment pursuant to the Ninth Circuit's mediation program. The Parties concluded during those proceedings that mediation was premature. No other settlement discussions have occurred and the Parties continue to believe that they may be premature at this juncture. The Parties are willing to participate in ADR at the appropriate time.

14. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The Parties do not consent to have a magistrate judge conduct all further proceedings including trial.

15. OTHER REFERENCES

a. **Plaintiffs' Statement**

Plaintiffs are willing to have a magistrate judge appointed to address potential discovery disputes.

b. **Defendants' Statement**

Defendants believe that it is premature to discuss the prospects for reference of this case to arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

16. NARROWING OF ISSUES

The Parties believe that it is premature to consider the narrowing of issues at this time.

17. EXPEDITED SCHEDULE

a. **Plaintiffs' Statement**

This case has been pending at the initial stages for some time and should be allowed to move forward. Once discovery commences, Plaintiffs would hope to have it ready for trial in 18 months.

b. **Defendants' Statement**

Defendants do not believe that this is the type of case that could be handled on an expedited basis, given the amorphous and expansive nature of Plaintiffs' claims.

18. SCHEDULING AND TRIAL

The Parties propose that the Court schedule another Case Management Conference after the Court rules on Defendants' motions to stay and after the Court rules on any further motions to dismiss in this action, if any. At that time, the Parties will be in a better position to propose a comprehensive case management schedule through trial.

19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS.

Not applicable.

20. OTHER MATTERS

Not applicable.

21. CASE MANAGEMENT ORDER

a. **Plaintiffs' Statement**

The Plaintiffs are prepared to meet with the Defendants in order to come up with a case management schedule at a time ordered by the Court.

b. **Defendants' Statement**

Defendants are prepared to meet with Plaintiffs in order to come up with a case management schedule for proceedings in this matter following the Court's consideration of Defendants' motions to stay and motions to dismiss the CAC.

Dated: June 29, 2010

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I, Jon T. King, am the ECF User whose ID and password are being used to file this **JOINT CASE MANAGEMENT CONFERENCE STATEMENT**

In compliance with General Order 45, X.B., I hereby attest that Robert B. Carey, William H. Brewster, Gregory L. Curtner, R. James Slaughter, and Timothy L. O'Mara, Jr. have 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 June 29, 2010, I filed the following:

JOINT CASE MANAGEMENT CONFERENCE STATEMENT

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. Vaughn R. Walker
U.S.D.C., Northern District of California
450 Golden Gate, Ave.
San Francisco, CA 94102

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

/s/ Jon T. King
JON T. KING