

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAMUEL KELLER, et al.,
Plaintiffs,
v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION; COLLEGIATE
LICENSING COMPANY; and
ELECTRONIC ARTS INC.,
Defendants.

No. C 09-1967 CW

ORDER DENYING
MOTION TO SEVER
TRIAL ISSUES OR
CONTINUE TRIAL
DATE AND SETTING
DATES (Docket No.
1029)

EDWARD O'BANNON, et al.,
Plaintiffs,
v.

NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION; COLLEGIATE
LICENSING COMPANY; and
ELECTRONIC ARTS INC.,
Defendants.

No. C 09-3329 CW

On April 25, 2014, Defendant National Collegiate Athletic Association (NCAA) moved to continue the trial of Antitrust Plaintiffs' claims against it or, in the alternative, to sever certain claims to be tried later. Right-of-Publicity Plaintiffs and Defendants Electronic Arts Inc. (EA) and Collegiate Licensing Company (CLC) filed briefs in support of the motion. Antitrust Plaintiffs oppose the motion. After considering all of the

1 parties' submissions and the arguments raised at the May 15, 2014
2 status conference, the Court denies the motion.

3 BACKGROUND

4 As explained in prior orders, these consolidated cases
5 involve two groups of Plaintiffs. The first group, known as the
6 Right-of-Publicity Plaintiffs, alleges that the NCAA, EA, and CLC
7 misappropriated their names, images, and likenesses for use in
8 NCAA-branded videogames. They have asserted various tort and
9 contract claims against all Defendants under Indiana and
10 California state law. Their claims against EA have been stayed
11 pending their interlocutory appeal and the Ninth Circuit's
12 issuance of a mandate, which has been stayed pending EA's petition
13 for a writ of certiorari. Docket No. 853. The Supreme Court,
14 apparently in response to requests by the parties, has continued
15 the deadline for Right-of-Publicity Plaintiffs to file their
16 opposition to this petition.

17 The second group of Plaintiffs, known as the Antitrust
18 Plaintiffs, alleges that the NCAA conspired with EA and CLC to
19 restrain competition in two distinct but related markets: (1) the
20 "college education" market, in which Division I colleges and
21 universities compete to recruit the best student-athletes to play
22 men's football or basketball; and (2) the "group licensing"
23 market, in which broadcasters and videogame developers compete for
24 group licenses to use the names, images, and likenesses of
25 student-athletes on Division I football and basketball teams in
26 live game broadcasts, archival footage, and videogames. Antitrust
27 Plaintiffs have asserted claims against all Defendants under the
28

1 Sherman Antitrust Act, 15 U.S.C. §§ 1 et seq. These claims are
2 currently set for trial on June 9, 2014.

3 In September 2013, both groups of Plaintiffs notified the
4 Court that they had reached a settlement in principle with EA and
5 CLC. Because they represented that this settlement would resolve
6 all of their pending claims against EA and CLC, the Court stayed
7 all of these claims. Plaintiffs represent that they recently
8 finalized their settlement agreement with EA and CLC and are
9 planning to submit, on May 23, 2014 or not later than May 30,
10 2014, their motion for preliminary approval.

11 As a result of this Court's stay of the claims against EA and
12 CLC and the Ninth Circuit's stay of its mandate, the only claims
13 that currently remain active in these cases are those asserted
14 against the NCAA.

15 DISCUSSION

16 The Court considers the NCAA's request to continue the trial
17 on Antitrust Plaintiffs' claims before turning to its request for
18 severance.

19 I. Continuance

20 The NCAA, EA, CLC, and Right-of-Publicity Plaintiffs contend
21 that the trial on Antitrust Plaintiffs' claims against the NCAA
22 should be continued for various reasons.

23 First, the NCAA argues that the Court cannot try Antitrust
24 Plaintiffs' claims before Right-of-Publicity Plaintiffs' claims
25 because the Seventh Amendment requires that claims for monetary
26 damages be tried before claims for injunctive relief. This
27 argument presumes that Antitrust Plaintiffs' claims overlap
28 substantively with Right-of-Publicity Plaintiffs' claims; however,

1 the NCAA has not demonstrated that these claims do, in fact, raise
2 overlapping issues.¹ More importantly, even if Antitrust
3 Plaintiffs' claims and Right-of-Publicity Plaintiffs' claims did
4 require the adjudication of some common issues, the Seventh
5 Amendment would not require that they be tried together. As
6 explained at the status conference, Antitrust Plaintiffs and
7 Right-of-Publicity Plaintiffs originally filed separate complaints
8 in separate actions and, had the Court not consolidated these
9 cases, they would have proceeded to separate trials on their
10 respective claims against the NCAA without running afoul of the
11 Seventh Amendment. The fact that these cases were consolidated
12 for a time does not create a Seventh Amendment barrier to trying
13 them separately. Indeed, the two cases have been proceeding along
14 separate schedules for years due to EA's interlocutory appeal and
15 the concomitant stay. The Court specifically noted that it would
16 consider de-consolidating the cases if EA's appeal remained
17 pending when trial was set to begin. See Docket No. 253, December
18 17, 2010 Order, at 12. The Supreme Court has long recognized that
19 "consolidation is permitted as a matter of convenience and economy
20 in administration, but does not merge the suits into a single
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22 ¹ Most of the issues that the NCAA has flagged as potentially
23 overlapping are, in reality, only directly relevant to Right-of-
24 Publicity Plaintiffs' claims -- not Antitrust Plaintiffs' claims. For
25 instance, the question of whether any videogames actually use student-
26 athletes' names, images, and likenesses is not dispositive of Antitrust
27 Plaintiffs' claims because it is not determinative of whether or not a
28 market for group licenses to use student-athletes' names, images, and
likenesses exists. Nor is the question of whether the videogames meet
the transformative use test. As previously explained, videogame
developers may have sought to acquire group licenses to use student-
athletes' names, images, and likenesses as a precautionary measure, even
if they believed that their use of the names, images, and likenesses
would ultimately be lawful.

1 cause, or change the rights of the parties, or make those who are
2 parties in one suit parties in another." Johnson v. Manhattan R.
3 Co., 289 U.S. 479, 496-97 (1933).² The Court has discretion to --
4 and will -- de-consolidate these cases for trial. If factual
5 issues are decided at the bench trial that are important to the
6 subsequent jury trial, then those issues may be re-tried during
7 the jury trial unless res judicata or collateral estoppel applies.
8 Thus, the NCAA's Seventh Amendment right to a jury trial on Right-
9 of-Publicity Plaintiffs' damages claims will not be infringed by
10 trying Antitrust Plaintiffs' equitable claims first.

11 Second, the NCAA suggests -- for the first time in its post-
12 hearing brief -- that the Court should perhaps send out class
13 notice to members of the certified Rule 23(b)(2) class. However,
14 Rule 23(c) makes clear that district courts have broad discretion
15 to decide whether or not to send notice to classes certified under
16 Rule 23(b)(2). See Fed. R. Civ. P. 23(c)(2) ("For any class
17 certified under Rule 23(b)(1) or (b)(2), the court may direct
18 appropriate notice to the class." (emphasis added)); see also Wal-
19 Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) ("The
20 procedural protections attending the (b)(3) class -- predominance,
21

22 ² The one case that the NCAA cites for support, United States v.
23 Nordbrock, 941 F.2d 947 (9th Cir. 1991), is inapposite for two reasons.
24 First, Nordbrock involved the trial of an issue that was clearly
25 dispositive in both of the cases consolidated for trial. As noted
26 above, the NCAA has not identified any issues raised by both Antitrust
27 Plaintiffs' claims and Right-of-Publicity Plaintiffs' claims that are
28 clearly dispositive in both cases. Second, the district court in
Nordbrock consolidated two cases involving the exact same parties and
denied one of those parties a right to a jury trial on his claims for
monetary relief. Here, in contrast, the consolidated cases involve
claims asserted by separate parties -- Antitrust Plaintiffs and Right-
of-Publicity Plaintiffs -- and the NCAA will still receive a jury trial
on any claims for monetary relief.

1 superiority, mandatory notice, and the right to opt out -- are
2 missing from (b)(2) not because the Rule considers them
3 unnecessary, but because it considers them unnecessary to a (b)(2)
4 class." (emphasis in original)). Accordingly, there is no need to
5 delay the trial in order to send out class notice. The Court
6 notes that, during the nineteen months since the June 9, 2014
7 trial date was set, none of the parties had proposed that class
8 notice be issued.

9 While Right-of-Publicity Plaintiffs, EA, and CLC initially
10 joined in the NCAA's request to continue trial, they have not
11 provided any independent, persuasive reasons why the trial should
12 be continued. A continuance is therefore not justified.

13 II. Severance

14 In the alternative, the NCAA moves to sever Antitrust
15 Plaintiffs' claims related to videogames from their claims related
16 to live game broadcasts and archival footage. It contends that
17 Antitrust Plaintiffs' videogame-related claims raise many of the
18 same legal and factual questions as Right-of-Publicity Plaintiffs'
19 claims and, as such, should be tried in a single trial with those
20 claims at a later date. According to the NCAA, severing the
21 videogame-related claims in this way -- so that only the live
22 broadcast and archival footage claims proceed to trial in June
23 2014 -- would avoid duplicative litigation and conserve judicial
24 resources.³

26 ³ The NCAA also initially argued that the lack of a final
27 settlement between Antitrust Plaintiffs, EA, and CLC left open the
28 possibility that the Court would eventually have to hold a separate
trial on Antitrust Plaintiffs' claims against EA and CLC, all of which
relate to videogames. However, this concern has been mitigated by the

For the reasons set forth above, the NCAA's motion to sever or continue trial (Docket No. 1029) is DENIED. Antitrust Plaintiffs' motion for leave to file a reply to the NCAA's supplemental brief (Docket No. 1089) and the NCAA's motion for leave to file a sur-reply (Docket No. 1090) are GRANTED. The Court orders that these cases be de-consolidated for trial. The joint consolidated complaint filed by Antitrust Plaintiffs and Right-of-Publicity Plaintiffs is divided into separate sections which clearly delineate which factual allegations and causes of action each group of Plaintiffs has asserted in its respective case. Antitrust Plaintiffs have previously amended the sections of the complaint relevant to their claims without altering Right-of-Publicity Plaintiffs' claims or allegations. See Docket No.

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832. Accordingly, paragraphs 1-4, 7-17, 22-24, 29-236, 240-47, 337-557, 595-630, and the sections of the complaint entitled "Antitrust Prayer for Relief" and "Antitrust Jury Demand" shall be deemed the complaint in the Antitrust Plaintiffs' action. Paragraphs 1-6, 18-21, 25-28, 237-239, 248-336, 558-594, and the sections of the complaint entitled "Right of Publicity Prayer for Relief" and "Right of Publicity Jury Demand" shall be deemed the complaint in the Right-of-Publicity Plaintiffs' action. All future filings related to Antitrust Plaintiffs' claims shall be filed in the docket for case no. 09-3329, which shall be referred to as O'Bannon v. NCAA.⁴ All future filings related to Right-of-Publicity Plaintiffs' claims shall be filed in the docket for case no. 09-1967, which shall be referred to as Keller v. NCAA. All prior filings in the docket for case no. 09-1967, which has been referred to as In re NCAA Student-Athlete Name & Likeness Litigation, shall be deemed to be part of the record in both cases.

A bench trial of no more than fifteen days on all of Antitrust Plaintiffs' claims against the NCAA shall be held beginning at 8:30 a.m. on June 9, 2014. Pursuant to the amended pretrial schedule proposed by Antitrust Plaintiffs and the NCAA, any oppositions to motions in limine are due today. The deadline for the parties to exchange objections to deposition counter-designations and rebuttal designations shall be continued from May

⁴ The following actions shall remain consolidated with O'Bannon: Jacobson v. NCAA, case no. 09-5372 ; Rhodes v. NCAA, case no. 09-5378; Wimprine v. NCAA, case no. 09-5134; Russell v. NCAA, case no. 11-4948; and Robertson v. NCAA, case no. 11-0388. Bishop v. EA, case no. 09-4128, shall remain consolidated with Keller.

1 26, 2014 to May 28, 2014. The parties shall each submit a trial
2 brief, not to exceed twenty-five pages, by June 3, 2014. The
3 pretrial conference remains set for May 28, 2014 at 2:00 p.m.

4 Right-of-Publicity Plaintiffs and Antitrust Plaintiffs shall
5 file their joint motion for preliminary settlement approval as
6 soon as possible. If they fail to file to do so by May 30, 2014,
7 then they shall submit a status report at 5:00 p.m. on that date
8 and every court day thereafter. A preliminary approval hearing
9 will be held, if necessary, at 2:00 p.m. on July 3, 2014. The
10 Court anticipates that class notice will be issued on September 3,
11 2014, after it has rendered a verdict on Antitrust Plaintiffs'
12 claims against the NCAA. The opt-out deadline could then be set
13 for early October 2014 and the final approval hearing for early
14 December 2014. The parties shall attempt to settle Right-of-
15 Publicity Plaintiffs' claims against the NCAA as quickly as
16 possible so that, if a settlement is achieved, class notice of it
17 can be included in the notice of the settlement with EA and CLC.
18 If the parties reach a settlement as to the Right-of-Publicity
19 Plaintiffs' claims against the NCAA, they shall notify the Court
20 promptly.

21 Right-of-Publicity Plaintiffs shall file their motion for
22 class certification on all of their claims against the NCAA on
23 June 26, 2014. The NCAA shall file its opposition on July 10,
24 2014. On July 14, 2014, EA and CLC may join in the relevant
25 portions of the NCAA's opposition or separately file a joint
26 brief, not to exceed eight pages, opposing Right-of-Publicity
27 Plaintiffs' motion; if EA and CLC file a separate brief, they
28 shall focus only on Right-of-Publicity Plaintiffs' civil

1 conspiracy claim, which is the only claim that Right-of-Publicity
2 Plaintiffs have asserted against the NCAA that they have also
3 asserted against EA and CLC. In the alternative, EA and CLC will
4 be given an opportunity to oppose class certification later if the
5 settlement is not consummated. Right-of-Publicity Plaintiffs
6 shall file their reply on July 17, 2014. The class certification
7 hearing will be held at 2:00 p.m. on July 31, 2014. If a class is
8 certified, it may be desirable to include notice of it in the
9 September 3, 2014 class notice regarding the settlement with EA
10 and CLC.

11 The Court adopts the Right-of-Publicity Plaintiffs and NCAA's
12 joint proposed discovery schedule for the claims involving them.
13 Expert reports shall be exchanged on August 15, 2014; rebuttal
14 expert reports shall be exchanged on September 15, 2014; and fact
15 discovery shall conclude on October 1, 2014.

16 The NCAA's motion for summary judgment, contained in a single
17 twenty-five page brief along with any Daubert motions, shall be
18 filed on October 16, 2014. Right-of-Publicity Plaintiffs shall
19 file their response, contained in a single twenty-five page brief
20 with any cross-motions, on October 30, 2014. The NCAA shall file
21 its reply, contained in a single fifteen page brief with its
22 opposition to any cross-motions, on November 14, 2014. Right-of-
23 Publicity Plaintiffs shall file their reply to any of their cross-
24 motions in a single fifteen page brief on December 3, 2014. The
25 summary judgment hearing will be held at 2:00 p.m. on December 18,
26 2014.

27 The Court will hold a final pre-trial conference at 2:00 p.m.
28 on March 11, 2015. A jury trial of no more than ten days on all

of Right-of-Publicity Plaintiffs' claims against the NCAA will
begin at 8:30 a.m. on March 23, 2015.

IT IS SO ORDERED.

Dated: 5/23/2014


CLAUDIA WILKEN
United States District Judge