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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **OAKLAND DIVISION**

15 SAMUEL MICHAEL KELLER, on behalf of
himself and all others similarly situated,

16 Plaintiff,

17 v.

18 ELECTRONIC ARTS, INC.; NATIONAL
19 COLLEGIATE ATHLETICS ASSOCIATION;
COLLEGIATE LICENSING COMPANY,

20 Defendants.
21
22

Case No. 4:09-cv-1967 CW

**RIGHT OF PUBLICITY
PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR ATTORNEYS'
FEES, EXPENSES, AND INCENTIVE
AWARDS (EA SETTLEMENT)**

Judge: Hon. Claudia Wilken
Courtroom: 2, 4th Floor

Complaint Filed: May 5, 2009
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1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE THAT on July 16, 2015, at 2:00 p.m., before the Honorable
4 Claudia Wilken, United States District Judge of the Northern District of California, located in
5 Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, CA 94612, Right of Publicity Plaintiffs and
6 Class Representatives Samuel Keller, Bryan Cummings, LaMarr Watkins, Shawne Alston, and
7 Bryon Bishop, by and through their counsel and Class Counsel Hagens Berman Sobol Shapiro, The
8 Paynter Law Firm, Saltz, Mongeluzzi, Barrett, & Bendesky, and Weinstein Kitchenoff & Asher,
9 will, and hereby do, move for an award of attorneys' fees, expenses, and incentive awards to the
10 named plaintiffs. This motion is based on this Notice of Motion and Motion; the accompanying
11 Memorandum of Points and Authorities, the declarations in support of the motion, argument by
12 counsel at the hearing before this Court, any papers filed in reply, such oral and documentary
13 evidence as may be presented at the hearing of this motion, and all papers and records on file in
14 this matter.

15 **STATEMENT OF ISSUES**

16 Whether this Court should approve (1) an award of attorneys' fees in the amount of
17 \$8,580,000 to Right of Publicity Plaintiffs' counsel, which equals 21.45 percent of the \$40 million
18 EA Settlement; (2) reimbursement of \$224,443.20 in expenses incurred by counsel on behalf of the
19 class, and (3) incentive awards of \$15,000 to named plaintiff Samuel Keller; \$5,000 to named
20 plaintiff Shawne Alston; and \$2,500 each to named plaintiffs Bryan Cummings, LaMarr Watkins,
21 and Bryon Bishop.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 For over a decade, Defendants Electronic Arts Inc. (“EA”), the Collegiate Licensing
4 Company (“the CLC”), and the National Collegiate Athletic Association (“the NCAA”) reaped
5 handsome profits by blatantly and unlawfully using the names and likenesses of college student-
6 athletes in videogames produced by EA. After extensive pre-filing investigation, class counsel for
7 the Right of Publicity Plaintiffs (“ROP Plaintiffs”¹) were the first to file a nationwide right-of-
8 publicity class action lawsuit in 2009 to put a stop to this illegal conduct and compensate student-
9 athlete class members. From the start, the suit was extremely risky. Indeed, if ROP Plaintiffs had
10 not prevailed, they would have had to pay Defendants’ fees and costs under mandatory fee-shifting
11 provisions. Although ROP Plaintiffs’ case was later consolidated with the antitrust claims filed in
12 the *O’Bannon* lawsuit, it was the strength of the right-of-publicity claims and ROP class counsel’s
13 prosecution of the case that drove settlement discussions and ultimately resulted in the highly
14 favorable settlement that class members now enjoy.

15 Five years after filing this groundbreaking suit, ROP counsel seek to recover the fees and
16 costs incurred in obtaining a historic recovery for the class. The \$40 million settlement reached
17 between ROP Plaintiffs and EA (“EA Settlement”) makes monetary relief available to thousands of
18 student-athletes. Together with the \$20 million settlement reached with the NCAA (“NCAA
19 Settlement”), a gross fund of \$60 million is available to compensate student-athletes for the first
20 time for the use of their name, image, or likeness in videogames produced by EA (“Combined
21 Settlement”). In the aggregate, the Combined Settlement fund represents a significant share of the
22 recovery—50-75%, by counsel’s estimate—that could be had at trial. The claims procedures ensure
23 that, individually, class members who make timely claims receive close to the maximum they
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25
26 ¹ The term “Right of Publicity Plaintiffs” (“ROP Plaintiffs”) refers to (a) the plaintiffs named in
27 the “Third Consolidated Amended Class Action Complaint” (July 18, 2013) (Dkt. No. 831)
28 (“TCAC”) asserting right of publicity claims (Samuel Keller, Bryan Cummings, LaMarr Watkins,
and Bryon Bishop); and (b) the plaintiff (Shawne Alston) in *Alston v. Electronic Arts, Inc.*, 3:13-
cv-05157-FLW-LHG (D. N.J.) (“Alston”).

1 could achieve at trial, while remaining funds are distributed to all other class members that can be
2 identified with additional effort (and cost), on an equitable basis.

3 ROP Plaintiffs' class counsel request (i) an award of \$8,580,000 in attorneys' fees,
4 representing 21.45% of the EA Settlement fund; (ii) reimbursement of \$224,434.20 in expenses;²
5 and (iii) incentive awards of \$15,000 to named plaintiff Samuel Keller; \$5,000 to named plaintiff
6 Shawne Alston; and \$2,500 each to named plaintiffs Bryan Cummings, LaMarr Watkins, and
7 Bryon Bishop. This request is reasonable given ROP class counsel's dedication to this case, their
8 zealous advocacy on behalf of the class, the risks of bringing and proceeding with the case, and the
9 vigorous opposition posed by Defendants represented by well-funded defense counsel with
10 substantial experience litigating related issues.

11 II. THE WORK UNDERTAKEN BY ROP CLASS COUNSEL

12 A. ROP Plaintiffs File Their Complaint.

13 In early 2009, counsel for the ROP Plaintiffs began investigating accusations that EA was
14 using the names, images, and likenesses of student athletes without consent or pay in its NCAA-
15 Branded Videogames.³ ROP counsel investigated the case for months, reviewing and cataloguing
16 game and real-world rosters, researching state right-of-publicity statutes and other applicable laws,
17 researching choice of law issues, investigating potential defendants, meeting with student-athletes
18 from across the country, and reviewing complex NCAA rules, regulations, bylaws, and
19 constitutions. In May of that year, Plaintiff Samuel Keller filed the first nationwide class action
20 against the NCAA, EA, and the CLC.⁴ The complaint alleged the unlawful use of college athletes'
21 names, images, and likenesses in NCAA-branded football and basketball videogames produced and
22 sold by EA. ROP Plaintiffs asserted claims under California (as to EA) and Indiana (as to the
23

24 ² ROP Plaintiffs seek fees and costs in addition to costs incurred by the notice and claims
25 administrator.

26 ³ *NCAA Football 2004, NCAA Football 2005, NCAA Football 2006, NCAA Football 2007,*
27 *NCAA Football 08, NCAA Football 09, NCAA Football 10, NCAA Football 11, NCAA Football 12,*
28 *NCAA Football 13, NCAA Football 14, NCAA March Madness 2004, NCAA March Madness 2005,*
NCAA March Madness 06, NCAA March Madness 07, NCAA March Madness 08, NCAA
Basketball 09, and NCAA Basketball 10 (collectively, "NCAA-Branded Videogames").

⁴ Dkt. No. 1. Unless otherwise indicated, docket references are to the docket in No. C-09-1967.

1 NCAA) right of publicity statutes (Cal. Civ. Code § 3344, Ind. Code § 32-36-1-1), and the
 2 California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200) (as to EA). The complaint
 3 also asserted various common law theories, including common law right-of-publicity claims and
 4 the existence of a conspiracy between EA and the NCAA to violate publicity rights. The case was
 5 unique and immediately drew national attention, but it also presented a substantial risk: The novel
 6 legal questions presented were subject to California’s anti-SLAPP and right of publicity statutes’
 7 mandatory fee shifting provisions.

8 After Keller’s groundbreaking filing challenging Defendants’ exploitation of college
 9 athletes, plaintiff Edward O’ Bannon filed an antitrust case against the NCAA and the CLC in July
 10 2009.⁵ The Court ordered consolidation of the *O’ Bannon* and *Keller* cases (as well as other actions)
 11 in March 2010.⁶ The Court appointed Hausfeld LLP as co-lead counsel in this litigation with
 12 “primary responsibility” for the claims in *O’ Bannon* and Hagens Berman Sobol Shapiro LLP
 13 (“HBSS”) as co-lead counsel with “primary responsibility” for the claims in *Keller*.⁷ The two firms
 14 filed a Consolidated Amended Complaint in March 2010 asserting both right-of-publicity and
 15 antitrust claims.⁸

16 **B. ROP Plaintiffs Defeat Defendants’ Motions to Dismiss and EA’s Anti-SLAPP Motion.**

17 Before consolidation, the NCAA, EA, and the CLC filed motions to dismiss the right-of-
 18 publicity claims.⁹ EA also filed a special motion to strike under California’s anti-SLAPP statute,
 19 arguing that its conduct was protected by the First Amendment.¹⁰ In February 2010, the Court
 20 issued an order denying the CLC’s and EA’s motions to dismiss, as well as EA’s anti-SLAPP
 21 motion.¹¹ The Court granted the NCAA’s motion to dismiss the Indiana right-of-publicity and
 22

23
 24 ⁵ Dkt. No. 1 in *O’ Bannon v. NCAA*, No. 09-cv-3329-CW (N.D. Cal.) (“*O’ Bannon*”).

25 ⁶ *O’ Bannon* Dkt. No. 139.

26 ⁷ Dkt. No. 146.

27 ⁸ Dkt. No. 175. The Court deconsolidated the cases for trial on May 23, 2014. *See* Dkt. No.
 28 147.

⁹ Dkt. Nos. 34, 47, 48.

¹⁰ Dkt. No. 35.

¹¹ *Keller v. Electronic Arts, Inc.*, No. C-09-1967, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

1 breach of contract claims, but with leave to amend.¹² After the filing of the Consolidated Amended
 2 Complaint, the NCAA and CLC moved again to dismiss certain right-of-publicity claims, but those
 3 motions were denied in full.¹³

4 EA filed an interlocutory appeal of its anti-SLAPP motion, and this Court stayed further
 5 proceedings as to EA in *Keller* pending that appeal.¹⁴ Over a dozen amici participated, highlighting
 6 the national significance of the case. The amici included virtually every major professional sports
 7 players association, the Screen Actors Guild, the Motion Picture Association of America, and
 8 numerous publishing companies. In July 2013, the Ninth Circuit affirmed this Court's ruling in
 9 full.¹⁵ The Court rejected all of EA's First Amendment defenses, including the argument that its
 10 use of Keller's likeness was protected as a transformative use.¹⁶ EA filed a petition for *certiorari* in
 11 the United States Supreme Court but agreed to dismissal of its petition in connection with the EA
 12 Settlement.¹⁷ The decision has become a leading right-of-publicity case in the country, defining the
 13 law for the Ninth Circuit, California state courts, and courts across the country.¹⁸

14 **C. ROP Plaintiffs Prepare For Trial.**

15 Although their case was stayed as to EA pending the appeal of the Court's anti-SLAPP
 16 decision, ROP Plaintiffs pursued discovery from the NCAA, CLC, and third parties, and monitored
 17 and processed EA discovery, to prepare for trial and minimize discovery on remand. The following
 18 is a brief summary of the discovery sought and obtained:

19
20
21
22 ¹² *Id.*

23 ¹³ Dkt. No. 325.

24 ¹⁴ *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C-09-1967, 2010 WL 5644656
(N.D. Cal. Dec. 17, 2010).

25 ¹⁵ *In re NCAA Student-Athlete Name & Likeness Litig.*, 724 F.3d 1268 (9th Cir. 2013).

26 ¹⁶ *Id.* at 1280.

27 ¹⁷ Carey Decl. ¶ 28, Order Dismissing Writ of Certiorari, Supreme Court Dkt. No. 13-377.

28 ¹⁸ The Ninth Circuit's decision in *Keller* has been cited by numerous courts including *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1178 (9th Cir. 2015); *Dryer v. Nat'l Football League*, No. CIV. 09-2182 PAM/FLN, 2014 WL 5106738, at *12-13 (D. Minn. Oct. 10, 2014); and *Ross v. Roberts*, 222 Cal. App. 4th 677, 687, 166 Cal. Rptr. 3d 359, 367 (2013), *review denied* (Apr. 16, 2014).

1 **1. Discovery from Defendants and Third Parties**

2 ROP Plaintiffs coordinated their discovery efforts with the Antitrust Plaintiffs¹⁹ and
3 Defendants to minimize the burdens on all parties and to comply with the Court's order
4 consolidating the two cases and appointing co-lead counsel. With respect to Defendants CLC and
5 NCAA, ROP Plaintiffs served discovery, negotiated and entered into ESI protocols, and obtained
6 approximately 257,000 documents.²⁰ ROP Plaintiffs' counsel efficiently reviewed and analyzed the
7 documents by coding and indexing all relevant documents, and identifying exhibits for trial.²¹ ROP
8 counsel also reviewed responses to interrogatories and RFAs relevant to ROP claims.²² When
9 discovery disputes arose, ROP Plaintiffs resolved individual disputes without judicial intervention.
10 ROP Plaintiffs' counsel also participated in almost three dozen depositions relating to Defendants'
11 conduct, and while most depositions covered antitrust topics unrelated to ROP claims, counsel
12 monitored each deposition to identify ROP issues and protect the interests of the putative class.
13 When depositions were clearly focused on antitrust issues, ROP Plaintiffs' counsel participated in
14 the deposition by internet stream and/or phone to avoid incurring unnecessary costs and travel
15 expenses. When depositions were likely to discuss ROP issues, counsel attended in person.²³

16 With respect to Defendant EA, ROP Plaintiffs were not permitted to serve discovery due to
17 the stay, but counsel reviewed all materials produced in response to antitrust discovery requests,
18 coded and indexed all relevant documents produced by EA, and identified exhibits for trial.²⁴ ROP
19 counsel also monitored all EA depositions, and actively communicated with counsel for EA in
20 efforts to minimize discovery on remand.²⁵ In addition, ROP counsel reviewed, coded, and indexed

21
22 ¹⁹ The term "Antitrust Plaintiffs" refers to the plaintiffs raising antitrust claims in the "Third
23 Consolidated Amended Class Action Complaint" (July 18, 2013) (Dkt. No. 831) ("TCAC"): Edward C. O'Bannon Jr., Oscar Robertson, William Russell, Harry Flournoy, Alex Gilbert, Sam
24 Jacobson, Thad Jaracz, David Lattin, Patrick Maynor, Tyrone Prothro, Damien Rhodes, Eric Riley, Bob Tallent, Danny Wimprine, Ray Ellis, Tate George, Jake Fischer, Jake Smith, Darius Robinson, Moses Alipate, and Chase Garnham.

25 ²⁰ Carey Decl. ¶ 29.

26 ²¹ Carey Decl. ¶ 30.

27 ²² Carey Decl. ¶ 31.

28 ²³ Carey Decl. ¶ 32.

²⁴ Carey Decl. ¶ 33.

²⁵ Carey Decl. ¶ 34.

1 thousands of documents from third parties, and conducted substantial informal discovery from
 2 third parties before and during the litigation.²⁶ Indeed, ROP counsels' investigation led to the initial
 3 complaint that started this entire process. Despite the stay, ROP Plaintiffs had sufficient
 4 documentary evidence to move for class certification and proceed to trial against the NCAA by
 5 March 23, 2015, as ordered by this Court.²⁷

6 **2. Compilation of Player Database**

7 The antitrust motion to certify a damages class was denied, in part, because the “[Antitrust]
 8 Plaintiffs have not offered a feasible method for determining on a class-wide basis which student-
 9 athletes are depicted in these videogames and which are not.”²⁸ By contrast, ROP Plaintiffs
 10 identified this issue early in the case and began preparing a comprehensive interactive database of
 11 all student-athletes in real-world rosters and videogame rosters.²⁹ This was a massive undertaking
 12 given that the NCAA-Branded Videogames had approximately 3,900 teams and 75,000 students.³⁰
 13 To create the databases for use at class certification, ROP counsel collected Division I football and
 14 men's basketball rosters for the ROP class period.³¹ Using this information, ROP counsel created a
 15 database containing roster information—including, among other things, school, assigned uniform
 16 number, position, sport/division, and home state—for each student-athlete.³² The database is
 17 referred to as the Real Roster Database. ROP counsel created a second database with the same
 18 roster information pulled from the virtual rosters in EA's NCAA-Branded Videogames—the
 19 Virtual Roster Database.³³ ROP counsel then merged the Real Roster Database and Virtual Roster
 20 Database (together the “Player Database”) to allow the creation of queries based on the virtual and
 21 real-world roster information.³⁴ This allows anyone to quickly and objectively match student-
 22

23 ²⁶ Carey Decl. ¶ 35.

24 ²⁷ Dkt. No. 1092 at 10-11.

25 ²⁸ Dkt. No. 893 at 21.

26 ²⁹ Carey Decl. ¶ 36.

27 ³⁰ Carey Decl. ¶ 37.

28 ³¹ Carey Decl. ¶ 38.

³² Carey Decl. ¶ 39.

³³ Carey Decl. ¶ 40.

³⁴ Carey Decl. ¶ 41.

1 athletes from the real world with their virtual counterpart using uniform number, school, division,
2 sport, position and home state.³⁵ The parameters can be adjusted based on the desired comparison,
3 but in all cases the resulting queries are consistent, accurate, and easily verified.³⁶ To confirm the
4 reliability of the Player Database, ROP Plaintiffs hired expert consultants OSKR—experts in sports
5 and entertainment cases with institutional knowledge about the issues that allowed them to quickly
6 and efficiently complete their work.³⁷

7 Once the EA/CLC case was settled, ROP Plaintiffs conducted confirmatory discovery with
8 EA regarding its virtual player database.³⁸ Even though the information from EA was incomplete,
9 the data allowed ROP Plaintiffs to confirm the accuracy of the Virtual Roster Database.³⁹ ROP
10 Plaintiffs also confirmed that the Virtual Roster Database contains more information about virtual
11 players in NCAA-Branded Videogames than EA’s own records and is equally accurate.⁴⁰ Likewise,
12 the NCAA did not maintain rosters with corresponding information regarding student-athletes’
13 likeness for the entire class period.⁴¹ ROP Plaintiffs’ Real Roster Database resolved this issue by
14 locating and incorporating relevant data for all schools over the entire ROP class period.⁴² To assist
15 the Antitrust Plaintiffs and Plaintiff in *Hart*,⁴³ ROP Plaintiffs updated the database to include class
16 members from their respective classes who were not included in the original database.⁴⁴ This was a
17 substantial task because the longer limitations period required collection of much older real-world
18 data. The final Player Database, however, contains all relevant information for the California right
19 of publicity, Antitrust, and New Jersey right of publicity class periods.

22 ³⁵ Carey Decl. ¶ 42.

23 ³⁶ Carey Decl. ¶ 43.

24 ³⁷ Carey Decl. ¶ 44; *see also* www.OSKR.com (last visited April 11, 2015).

25 ³⁸ Carey Decl. ¶ 45.

26 ³⁹ Carey Decl. ¶ 46.

27 ⁴⁰ Carey Decl. ¶ 47.

28 ⁴¹ Carey Decl. ¶ 48.

⁴² Carey Decl. ¶ 49.

⁴³ *Hart v. Electronic Arts, Inc.*, No. 3:09-cv-05990-FLW-LHG (D. N.J.) (“*Hart*”).

⁴⁴ Dkt. No. 49.

1 **D. After More Than Four Years of Litigation, the Parties Settle the Claims.**

2 **1. EA & CLC Settlement**

3 Settlement talks among ROP Plaintiffs, Antitrust Plaintiffs, NCAA, EA, and the CLC took
4 place before Judge Edward Infante (Ret.) in 2011, but did not lead to a resolution.⁴⁵ Following the
5 Ninth Circuit's *Keller* decision on July 31, 2013, which rejected Defendants' primary defense to a
6 publicity rights claim, counsel for ROP Plaintiffs, Antitrust Plaintiffs, and EA scheduled another
7 mediation before Randy Wulff on September 10, 2013. This time the mediation included then-
8 counsel for Hart. The basic parameters of the settlement were agreed upon at that session and the
9 parties proceeded to draft a term sheet and then a long-form agreement.⁴⁶ The client in *Hart* then
10 rejected the settlement and replaced his counsel. The substitute counsel, Lum, Drasco & Positan,
11 LLC and the McKenna Law Firm LLC, continued negotiations and agreed to substantively
12 analogous settlement terms after consulting with counsel for ROP Plaintiffs.⁴⁷ There were issues
13 remaining about how to allocate the proposed settlement fund and those were resolved in multiple
14 sessions with Wulff in April 2014.⁴⁸ The settling parties spent the next month finalizing the
15 settlement agreement and filed the proposed settlement papers on May 30, 2014.⁴⁹ ROP Plaintiffs
16 and EA also filed a joint motion under Federal Rule of Civil Procedure 62.1 and Federal Rule of
17 Appellate Procedure 12.1 for an indicative ruling.⁵⁰ The Court granted the Joint Motion and
18 indicated that it would preliminarily approve the settlement on July 16, 2014, allowing for a limited
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20
21

22 ⁴⁵ Carey Decl. ¶ 50.

23 ⁴⁶ Carey Decl. ¶ 51.

24 ⁴⁷ Carey Decl. ¶ 52.

25 ⁴⁸ Carey Decl. ¶ 53.

26 ⁴⁹ Dkt. No. 1108. A fee dispute arose between the *Hart* Plaintiffs and the ROP Plaintiffs and
27 was resolved with the assistance of a mediator. Hagens Berman agreed to give the *Hart* Plaintiffs'
28 attorneys \$300,000 of any fee received in this case to resolve the fee dispute. This money is in
addition to fees-awarded to counsel for the *Hart* Plaintiffs and will be paid for by counsel for the
ROP Plaintiffs. The parties also agreed that counsel for the ROP Plaintiffs would not raise any
issues with the lodestar submitted by *Hart* Plaintiffs' counsel, but may respond to Court questions
regarding contributions to the settlement.

⁵⁰ Carey Decl. ¶ 54.

1 remand to the District Court from the Court of Appeals.⁵¹ The Court of Appeals granted the limited
2 remand on July 24, 2014.⁵²

3 **2. NCAA Settlement**

4 In 2014, the ROP Plaintiffs, Antitrust Plaintiffs, and the NCAA participated in two
5 mediation efforts with Magistrate Judge Cousins to settle the NCAA issues, but were
6 unsuccessful.⁵³ ROP Plaintiffs continued to negotiate with the NCAA on their own and reached an
7 agreement in principle with the NCAA on or about June 9, 2014.⁵⁴ The resulting settlement
8 agreement was signed on June 30, 2014.⁵⁵ The historic settlement represented the first time
9 student-athletes would be compensated for the use of their names, images, and likenesses—a sea
10 change in NCAA dogma. ROP Plaintiffs and the NCAA filed their settlement papers on June 30,
11 2014.⁵⁶

12 **3. The Revised Settlement Agreement and Coordination of Settlement Procedures**

13 On July 3, 2104, the Court held a telephonic status conference and provided comments on
14 the parties' proposed class notices and claim form for each settlement. The Court also requested
15 that the parties submit revised settlement papers, and rescheduled the Preliminary Approval
16 Hearing for both settlements to July 24, 2014.⁵⁷ In response, the parties to each settlement revised
17 their agreements to allow for a single notice, allocation plan, preliminary and final approval
18 schedule, objection and opt-out plan, and claims process. The parties also reached consensus
19 regarding several ancillary issues, such as defined terms and deadlines, to ensure consistency
20 between the two settlements. The new settlements also completely altered the plans of allocations
21 by moving to a point-based system, although the settlement amounts and proportional distribution
22 to each settlement class was substantively the same. The entire process was designed to reduce
23

24 ⁵¹ Carey Decl. ¶ 55.

25 ⁵² Dkt. No. 179.

26 ⁵³ Dkt Nos. 1015, 1017.

27 ⁵⁴ Carey Decl. ¶ 57.

28 ⁵⁵ Carey Decl. ¶ 58.

⁵⁶ Dkt. No. 1138.

⁵⁷ Dkt. No. 1145.

1 administrative costs, increase the claims rate, and avoid confusion. The streamlining process was
 2 contentious and time consuming, but ultimately fruitful.⁵⁸

3 **4. The Notice Campaign**

4 A major component of the notice campaign was a requirement that the settling parties make
 5 a good faith effort to collect last known contact information for class members.⁵⁹ Counsel for ROP
 6 Plaintiffs led the coordination efforts, assisted primarily by the NCAA. ROP counsel subpoenaed
 7 over 135 NCAA member institutions, and spoke directly to hundreds of students, school-officials,
 8 attorneys, agents, and other staff members representing NCAA member institutions and their
 9 affiliates, ultimately collecting contact information for approximately 87,406 student athletes.⁶⁰
 10 The notice campaign is still ongoing but has been hugely successful. To date, there have been
 11 8,273 claims; only three putative class members have requested exclusion and only one person has
 12 filed an objection.⁶¹ The single objection has nothing to do with ROP Plaintiffs' claims and is
 13 based on a dispute between counsel for the Antitrust Plaintiffs and a former class representative.⁶²

14 **III. ARGUMENT**

15 **A. Plaintiffs Have Requested a Reasonable Amount of Attorneys' Fees.**

16 Rule 23 of the Federal Rules of Civil Procedure provides that "[i]n a certified class action,
 17 the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or
 18 by the parties' agreement."⁶³ "[A]wards of attorneys' fees serve the dual purpose of encouraging
 19 persons to seek redress for damages caused to an entire class of persons and discouraging future
 20 misconduct."⁶⁴ The U.S. Supreme Court has opined that consensual resolution of attorneys' fees, as

23 ⁵⁸ Carey Decl. ¶ 59.

24 ⁵⁹ Dkt. No. 312.

25 ⁶⁰ Carey Decl. ¶ 60.

26 ⁶¹ See Ex. A, Decl. of Kenneth Jue on Behalf of Settlement Administrator, ¶¶ 9-13.

27 ⁶² Carey Decl. ¶ 61.

28 ⁶³ Fed. R. Civ. P. 23(h).

⁶⁴ *In re Apollo Group Inc. Secs. Litig.*, No. CV 04-2147, 2012 U.S. Dist. LEXIS 55622, at *19 (D. Ariz. Apr. 20, 2012). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

1 was achieved here, is the ideal.⁶⁵ In “common fund” cases, such as this, the district court has the
 2 discretion to award attorneys’ fees as either a percentage of the common fund, or by using the
 3 lodestar method.⁶⁶ The district court’s decision in awarding attorneys’ fees and expenses to the
 4 plaintiffs is reviewed for abuse of discretion.⁶⁷ Importantly, “the question on appeal is not whether
 5 the district court should have applied some other percentage, but whether in arriving at its
 6 percentage it considered all the circumstances of the case and reached a reasonable percentage.”⁶⁸

7 In the Ninth Circuit, the “benchmark” award in common fund cases is 25 percent of the
 8 recovery obtained, while awards of 30 percent or more of the common fund are not uncommon.⁶⁹
 9 The court may also apply the lodestar method to determine a reasonable attorney’s fee by
 10 multiplying the number of hours reasonably expended by a reasonable hourly rate.⁷⁰ In common
 11 fund cases, the lodestar method may also be used as a cross-check of the percentage-of-fund
 12 method.⁷¹

13 ROP class counsel seek \$8,580,000 in attorneys’ fees. This represents 21.45 percent of the
 14 \$40 million EA Settlement fund. EA has agreed not to oppose a request up to 33% of the
 15 settlement fund, or a total of \$13,200,000 in attorneys’ fees.⁷² ROP Plaintiffs take no position as to
 16 how the remainder of the allowable fee is divided between the Antitrust Plaintiffs and *Hart*.⁷³
 17 However, as discussed below, ROP Plaintiffs believe the strength of their claims and the quality of
 18 their performance in this case, as compared to the other Plaintiffs, entitles them to a larger portion
 19

20 ⁶⁵ See *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (“A request for attorney’s fees should
 21 not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee.”).

22 ⁶⁶ *Id.* at 457; see *In re Wachovia Corp. “Pick-A-Payment” Mortg. Mktg. & Sales Practices
 Litig.* (“*Wachovia*”), No. 5:09- md-02105, 2011 U.S. Dist. LEXIS 55351, at *23-24 (N.D. Cal.
 May 17, 2011).

23 ⁶⁷ See *City of Roseville Emps. Ret. Sys. v. Orloff Fam. Tr. UAD 12/31/01*, No. 11-35455, 2012
 U.S. App. LEXIS 11512, at *4 (9th Cir. June 7, 2012).

24 ⁶⁸ *Glass v. UBS Fin. Servs.*, 331 Fed. Appx. 452, 456 (9th Cir. 2009).

25 ⁶⁹ *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002).

26 ⁷⁰ See *Hensley*, 461 U.S. at 433.

27 ⁷¹ See *Wachovia*, 2011 U.S. Dist. LEXIS 55351, at *24.

28 ⁷² Dkt. No. 1158, Ex. 1, ¶ 71.

⁷³ Despite lengthy discussions, ROP class counsel were unable to reach an agreement with
 counsel for the Antitrust Plaintiffs and *Hart* as to how the attorneys’ fees awarded in connection
 with the EA Settlement should be apportioned. Carey Decl. ¶ 62.

1 of the fee award. Further, the reasonableness of ROP Plaintiffs' fee request is confirmed when
 2 cross-checked against the lodestar. Accordingly, under either the percentage of the common fund
 3 or lodestar approach, ROP Plaintiffs' requested fee award is reasonable.

4 **1. ROP Plaintiffs' Fee Request Is Reasonable under the "Common Fund"**
 5 **Percentage of Recovery Analysis.**

6 ROP class counsel seek an award of 21.45 percent of the EA Settlement fund. Courts
 7 routinely award attorneys' fees and expenses totaling 25 percent or more of the common fund
 8 provided under the settlement.⁷⁴ Indeed, "in most common fund cases, the award exceeds that
 9 benchmark, with a 30% award the norm absent extraordinary circumstances that suggest reasons to
 10 lower or increase the percentage."⁷⁵ In *Vizcaino*, the Ninth Circuit outlined a number of factors that
 11 courts may consider in setting an appropriate fee, including whether counsel achieved exceptional
 12 results and the degree of risk assumed by counsel.⁷⁶ The Ninth Circuit has clarified that these are
 13 not the only factors that the district courts may consider in awarding fees and expenses; rather, "in
 14 selecting a reasonable percentage fee award in a common fund case the district court must consider

17 ⁷⁴ See, e.g., *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003) (fee award of 33%
 18 of settlement fund); *Hernandez v. Kovacevich*, No. 1:04CV5515OWWDLB, 2005 WL 2435906, at
 19 *8 (E.D. Cal. Sept. 30, 2005) (fee award of 33% of settlement fund); *Brailsford v. Jackson Hewitt*
 20 *Inc.*, No. C 06 00700 CW, 2007 WL 1302978, at *5-7 (N.D. Cal. May 3, 2007) (fee award of 30%
 21 of settlement fund); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW, 2010 WL
 22 1687829, at *2-3 (N.D. Cal. Apr. 22, 2010) (fee award of 30% of settlement fund); *Wachovia*,
 23 2011 U.S. Dist. LEXIS 55351, at *24 (fee award of one-third of settlement fund); *In re Nuvelo*,
 24 *Inc. Secs. Litig.*, No. C 07-04056, 2011 U.S. Dist. LEXIS 72260, at *10 (N.D. Cal. July 6, 2011)
 25 (fee award of 30% of settlement fund); *Thieriot v. Celtic Ins. Co.*, No. C 10-04462, 2011 U.S. Dist.
 26 LEXIS 44852, at *15 (N.D. Cal. Apr. 21, 2011) (fee award of 33% of settlement fund); *In re TFT-*
 27 *LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at *8 (N.D. Cal. Apr. 3,
 28 2013) (fee award of 28.6% of settlement fund); *Vedachalam v. Tata Consultancy Servs., Ltd.*, No. C
 06-0963 CW, 2013 WL 3941319, at *2 (N.D. Cal. July 18, 2013) (fee award of 30% of settlement
 fund); *Pokorny v. Quixtar, Inc.*, No. C 07-0201 SC, 2013 WL 3790896, at *1 (N.D. Cal. July 18,
 2013) (fee award of 29.5% of settlement fund); *Burden v. SelectQuote Ins. Servs.*, No. C 10-5966
 LB, 2013 WL 3988771, at *4 (N.D. Cal. Aug. 2, 2013) (fee award of 33% of gross settlement
 fund); *Cordy v. USS-POSCO Indus.*, No. 12-CV-00553-JST, 2014 WL 1724311, at *2 (N.D. Cal.
 Apr. 28, 2014) (fee award of 30% of settlement fund); see also *In re Online DVD-Rental Antitrust*
Litig., No. 12-15705, 2015 WL 846008, at *13 (9th Cir. Feb. 27, 2015) (district court did not abuse
 its discretion in calculating fee award as a percentage of the total settlement fund, including notice
 and administrative costs, and litigation expenses).

⁷⁵ *Pokorny*, 2013 WL 3790896, at *1.

⁷⁶ See *Vizcaino*, 290 F.3d at 1048-50; see also *Nuvelo*, 2011 U.S. Dist. LEXIS 72260, at *5.

1 all relevant circumstances.”⁷⁷ Taking all the relevant circumstances into account, ROP Plaintiffs’
 2 fee request of 21.45%—and the Plaintiffs’ total fee request of 33% of the EA Settlement fund—is
 3 fully supported by the particular circumstances of this case.

4 *First*, there is no question that ROP class counsel achieved an exceptional result on behalf
 5 of plaintiffs and the class. The Combined Settlement negotiated by class counsel provides, for the
 6 first time, compensation to thousands of student-athletes for the use of their name, image or
 7 likeness. The Combined Settlement produces a cash fund collectively valued at \$60 million, before
 8 fees, expenses, and costs of notice. A victory at trial would, in counsel’s opinion, result in a median
 9 verdict of \$80 million to \$120 million.⁷⁸ Plaintiffs, then, will recover in the Combined Settlement
 10 the significant sum of 50-75% of the amount success at trial would produce—an exceptional result
 11 which merits an upward adjustment of the benchmark in this case.⁷⁹

12 Looking at the estimated potential recovery per individual publicity rights class member
 13 further illustrates the stellar results achieved by ROP class counsel. Even assuming a claims rate of
 14 100%, ROP class members would recover \$270.00 for each year his avatar appeared in an NCAA-
 15 Branded videogame between 2006-2014 and \$74 for each year his avatar appeared in a game
 16 between 2003-2005 games. Assuming a much more realistic claims rate of 25%, that recovery
 17 jumps to \$1,081 for each 2006-2014 appearance and \$295 for each 2003-2005 appearance. Thus, to
 18 use an example on the higher end of the recovery scale, a publicity rights class member who has
 19 appeared in the videogame for four seasons from 2007-2011, assuming a 25% claim rate, could
 20
 21
 22

23 ⁷⁷ *Steiner v. Am. Broad. Co. Inc.*, 248 Fed. Appx. 780, 782 (9th Cir. 2007). In determining a
 24 reasonable award under the common fund method, courts may also consider other factors,
 25 including: plaintiffs’ counsel’s hourly rate, counsel’s experience and skill, the complexity of the
 26 issues, and a comparison with counsel’s lodestar. *Nuvelo*, 2011 U.S. Dist. LEXIS 72260, at *5.
 27 These factors are examined below in section III.A.2, *infra*, which addresses the lodestar analysis.

28 ⁷⁸ Carey Decl. ¶ 63.

⁷⁹ *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *7 (approving
 upward adjustment to benchmark where settlement amount represented approximately 50% of
 potential recovery); *Burden*, 2013 WL 3988771, at *4 (approving upward adjustment to benchmark
 based on factors including exceptional result equivalent to 75% of maximum damages available).

1 recover \$4,324.00.⁸⁰ Such an exceptional individual recovery further justifies an award of 21.45%
2 of the EA Settlement fund.⁸¹

3 Moreover, the monetary recovery from the EA Settlement Agreement represents a
4 significant percentage of EA's NCAA-Branded Videogame sales revenue during the class period.⁸²
5 The EA Settlement, therefore, compares favorably to settlements approved in other class cases.⁸³
6 ROP class counsel further believe that the recovery exceeds the amount EA Settlement class
7 members would have received in arm's-length negotiations with EA had the NCAA not prohibited
8 student-athletes from licensing their names, images, and likenesses.⁸⁴

9 *Second*, ROP Plaintiffs' class counsel assumed a high degree of risk in bringing and
10 pursuing this action to a successful conclusion. This was a novel case alleging class-wide theories
11 against Defendants who are not known to shy away from litigation. Had ROP class counsel not
12 prevailed, not only would they have received no fees but they would have had to pay the
13 Defendants' fees pursuant to the fee-shifting provisions of California's publicity rights statute, Cal.
14 Civ. Code § 3344, and California's Anti-SLAPP statute, Cal. Code Civ. P. § 425.16.

15 *Third*, the case also presented unique legal issues involving, among other things, choice of
16 law, copyright, the single publication rule, and ascertainability of the class. ROP Plaintiffs' counsel
17 exhaustively researched these issues before filing the complaint to avoid the unnecessary costs and
18 time associated with litigating poorly pled claims and to avoid these fee-shifting provisions.⁸⁵

19 _____
20 ⁸⁰ See ROP Plaintiffs' Mot. for Preliminary Approval of Class Action Settlement, Dkt. 1138-1,
at 23-24, for an explanation of the methodology underlying these estimates.

21 ⁸¹ See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL 1365900, at *7 (awarding
22 upward adjustment to benchmark where claimants would receive \$64 per monitor or laptop and
\$128 per TV); *Ching v. Siemens Indus., Inc.*, No. 11-CV-04838-MEJ, 2014 WL 2926210, at *7
(N.D. Cal. June 27, 2014) (awarding upward adjustment to benchmark where claimants would
23 receive on average \$2672.56).

24 ⁸² Carey Decl. ¶ 64.

25 ⁸³ See, e.g., *Fisher Bros. v. Mueller Brass Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985)
(recoveries equal to .1%, .2%, 2%, .3%, .65%, .88%, and 2.4% of defendants' total sales); *In re*
Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004) (granting final approval to
26 settlement where recovery was 1.62% of sales).

27 ⁸⁴ Carey Decl. ¶ 65.

28 ⁸⁵ See, e.g., *Garner*, 2010 WL 1687829, at *2 (awarding upward adjustment of benchmark
where case was "wholly without precedent, raised numerous novel and complex issues of both law
and fact, and required a considerable effort from Class Counsel simply to be in a position to file
suit, let alone to litigate this case successfully").

1 **2. Plaintiffs' Fee Request Is Reasonable Under the Lodestar Cross-Check Method.**

2 ROP Plaintiffs' fee request of \$8,580,000 is also reasonable when cross-checked using the
3 lodestar method. Under the lodestar method, a presumptively reasonable fee award can be
4 determined by multiplying the number of hours reasonably expended by plaintiffs' counsel by their
5 reasonable hourly rate.⁸⁶

6 **a. The Number of Hours that ROP Plaintiffs' Counsel Devoted to this**
7 **Litigation Is Reasonable.**

8 Under the lodestar method, courts first look at the number of hours spent by counsel on the
9 case.⁸⁷ Here, in support of the lodestar determination, ROP Plaintiffs submit the declarations of
10 class counsel attesting to their total hours, hourly rates, experience, and efforts to prosecute this
11 action.⁸⁸

12 As set forth in the supporting declarations, ROP Plaintiffs' counsel have collectively spent
13 more than 20,061.3 hours of attorney and litigation support time on this action.⁸⁹ The number of
14 hours that ROP counsel have devoted to pursuing this litigation is appropriate and reasonable,
15 given: (1) the extensive pre-filing investigation required to file the first nationwide right-of-
16 publicity class action; (2) the extensive briefing at the motion to dismiss stage and the appeal of
17 EA's anti-SLAPP motion to the Ninth Circuit; (3) the depositions of dozens of witnesses; (4) the
18 coding and indexing of hundreds of thousands of documents; (5) the creation of a comprehensive
19 working database of student-athletes featured in the NCAA-Branded Videogames, which has over
20 3,900 teams and 75,000 students; (6) the parties' preparation for class certification motions; (7) the
21 extensive and contentious arm's-length negotiations regarding the settlement; and (8) the efforts to
22 locate the last-known contact information for over 87,000 class members. Class counsel have spent
23 numerous hours working with the notice and claims administrator to answer the questions of class
24

25
26 ⁸⁶ See *Hensley*, 461 U.S. at 433.

27 ⁸⁷ *Id.*

28 ⁸⁸ Carey Decl. ¶¶ 9-14.

⁸⁹ Carey Decl. ¶ 14.

1 members, to launch the settlement website, to prepare the electronic claims form, and address
2 issues regarding notice.

3 ROP class counsel's responsibilities will not end with final approval. Class counsel will
4 assist class members with inquiries and work with the notice and claims administrator and EA to
5 resolve them. Class counsel may also have to expend further time and effort to resolve any
6 objections that are lodged and litigate any appeals that result therefrom. Past experience shows that
7 this ongoing work will add significant time to the work already undertaken. In addition to the hours
8 already billed, counsel anticipates incurring at least 500 additional hours finalizing materials for the
9 final fairness hearing, appearing at the final fairness hearing, continuing outreach to class members,
10 coordinating efforts to increase the claims rate, distributing funds to class members, resolving any
11 appeals and/or objections, and filing a reply in support of this motion.

12 In sum, the hours that ROP Plaintiffs' counsel devoted to this action were reasonable and
13 necessary, particularly given the contentious nature of the settlement negotiations with EA and the
14 CLC. The hard work and commitment ultimately paid off, resulting in a comprehensive settlement
15 that provides substantial relief to class members.⁹⁰

16 **b. ROP Plaintiffs' Counsel's Hourly Rates Are Reasonable.**

17 The hourly rates of class counsel and other ROP Plaintiffs' counsel, as detailed in their
18 declarations, are also fair and reasonable. Under the lodestar method, counsel's reasonable hourly
19 rates are determined by the prevailing market rates that a lawyer of comparable skill, experience,
20 and reputation could command in the relevant community.⁹¹ "Affidavits of the plaintiffs' attorney
21 and other attorneys regarding prevailing fees in the community, and rate determinations in other
22 cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the
23 prevailing market rate."⁹²

24
25 ⁹⁰ See *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) ("By and large, the
26 court should defer to the winning lawyer's professional judgment as to how much time he was
required to spend on the case.").

27 ⁹¹ See, e.g., *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).

28 ⁹² *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990);
Chaudhry v. City of Los Angeles, 751 F.3d 1096, 1110 (9th Cir.) cert. denied sub nom. *City of Los
Angeles, Cal. v. Chaudhry*, 135 S. Ct. 295, 190 L. Ed. 2d 141 (2014).

1 ROP counsel's hourly rates in this action range from \$900 to \$215, with the high-end
 2 reserved only for the most senior attorney working on the case, Steve Berman, the managing
 3 partner of Hagens Berman Sobol Shapiro LLP ("Hagens Berman").⁹³ Hourly rates for paralegals
 4 are \$250 or lower.⁹⁴ Class counsel are highly-respected members of the bar with extensive
 5 experience in prosecuting high-stakes complex litigation, including consumer class actions.⁹⁵ Class
 6 counsel's hourly rates are comparable to those approved in courts in this district,⁹⁶ and counsel's
 7 customary rates have been previously approved by courts across the country.⁹⁷ Indeed, this Court
 8 approved almost identical rates for Hagens Berman two years ago in the *Pecover* case.⁹⁸

9 **c. ROP Plaintiffs' Fee Request Is Reasonable Considering the Results**
 10 **Obtained, Time and Labor Required, Novelty and Complexity of the**
 11 **Litigation, the Risks Involved, and Counsel's Skill and Experience.**

12 Multiplying the hours spent by ROP Plaintiffs' counsel on the litigation by their respective
 13 hourly rates yields a lodestar calculation of \$6,771,390.75. "Though the lodestar figure is
 14 presumptively reasonable, the court may adjust it upward or downward by an appropriate positive
 15 or negative multiplier reflecting a host of reasonableness factors, including the quality of
 16 representation, the benefit obtained for the class, the complexity and novelty of the issues
 17 presented, and the risk of nonpayment."⁹⁹ The fee award of \$8,580,000 requested here—combined

18 ⁹³ Carey Decl. ¶ 68.

19 ⁹⁴ Carey Decl. ¶ 69.

20 ⁹⁵ Carey Decl. ¶ 70.

21 ⁹⁶ *See, e.g., Stuart v. RadioShack Corp.*, No. C-07-4499, 2010 U.S. Dist. LEXIS 92067, at *16
 22 (N.D. Cal. Aug. 9, 2010) (finding rates ranging between \$600 and \$1,000 reasonable); *In re Apple*
 23 *Inc. Secs. Litig.*, No. 5:06-CV-05208, 2011 U.S. Dist. LEXIS 52685, at *16 (N.D. Cal. May 17,
 24 2011) (approving hourly rate of \$836); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2013 WL
 25 1365900, at *9 (approving hourly rates up to \$1000); *In re Conseco Life Ins. Co. Life Trend Ins.*
 26 *Mktg. & Sales Practice Litig.*, No. C 10-02124 SI, 2014 WL 186375, at *2 (N.D. Cal. Jan. 16,
 27 2014) (approving hourly rates up to \$850).

28 ⁹⁷ *See* Final Judgment and Order of Dismissal with Prejudice, *Ruwe et al. v. Cellco P'ship*
d/b/a Verizon Wireless, No. 07-03679 JSW (N.D. Cal. Nov. 16, 2012); Order Granting Motions for
 Final Approval of Class Settlement Agreements (Dkt. Nos. 837 and 841) and Granting in Part
 Motion for Attorney's Fees and Expenses (Dkt. No. 844), *In re Charles Schwab Corp. Secs. Litig.*,
 No. 08-01510-WHA (N.D. Cal. Apr. 19, 2011), ECF No. 1101.

⁹⁸ Final Judgment and Order of Dismissal with Prejudice, *Pecover v. Electronic Arts, Inc.*, No.
 08-cv-02820-CW (N.D. Cal. May 30, 2013). In fact, the rates are generally lower than in *Pecover*,
 with the exception of Mr. Berman, whose rate increased from \$800 to \$900.

⁹⁹ *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941-42 (9th Cir. 2011); *see also*
Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975).

1 with the requested fee of \$5,800,000 in connection with the NCAA Settlement—amounts to a total
 2 of \$14,380,000 in attorneys’ fees, which represents a multiplier of two on ROP Plaintiffs’ lodestar.
 3 This falls on the low end of the range of multipliers accepted by courts in this district and across
 4 the country.¹⁰⁰ As discussed below, the reasonableness factors weigh heavily in favor of granting
 5 the total requested fee award of \$14,380,000.

6 “Foremost among these considerations . . . is the benefit obtained for the class.”¹⁰¹ Here,
 7 ROP class counsel obtained an outstanding settlement result for class members nationwide. In light
 8 of the looming risks and uncertain outcome of the litigation, the results obtained for the class are
 9 exceptional. Class counsel have negotiated and achieved a meaningful settlement that provides
 10 student-athlete class members the opportunity to obtain compensation for the first time for the use
 11 of their name and likeness. Although the claims period has not expired, to date, over 8,200 class
 12 members have submitted claims. Only 3 class members have requested to be excluded and only
 13 one objection has been filed (although the deadline for exclusions has not expired).¹⁰² As
 14 demonstrated by the claims to date, this settlement provides economic relief to thousands of class
 15 members. ROP class counsel has achieved an excellent result for the class in light of all of the
 16 circumstances of the case.

17 *Second*, ROP Plaintiffs’ counsel have expended a significant amount of time and resources
 18 on the case. To date, counsel have expended more than 20,061.3 hours, totaling more than
 19 \$6,771,390.75 in lodestar, and have incurred more than \$448,868.40 in expenses in prosecuting
 20

21 ¹⁰⁰ See, e.g., *Vizcaino*, 290 F.3d at 1051 n.6 (surveying class actions settlements nationwide,
 22 and noting 54 percent of lodestar multipliers fell within the 1.5 to 3.0 range, and that 83 percent of
 23 multipliers fell within the 1.0 to 4.0 range); *Hopkins v. Stryker Sales Corp.*, No. 11-CV-02786-
 24 LHK, 2013 WL 496358, at *5 (N.D. Cal. Feb. 6, 2013) (multiplier of 2.86); *In re TFT-LCD (Flat
 25 Panel) Antitrust Litig.*, 2013 WL 1365900, at *8 (multipliers ranging on average between 2.4 –
 26 2.6); *Pokorny*, 2013 WL 3790896, at *2 (multiplier of 2.2); see also *Milliron v. T-Mobile USA,
 27 Inc.*, 423 F. App’x 131, 135 (3d Cir. 2011) (approving district court’s use of 2.2 multiplier); *Di
 28 Giacomo v. Plains All Am. Pipeline*, Nos. 99–4137 & 99–4212, 2001 WL 34633373, at *10–11
 (S.D. Fla. Dec. 19, 2001) (5.3 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358,
 369 (S.D.N.Y. 2002) (4.65 multiplier); *In re Aremissoft Corp. Sec. Litig.*, 210 F.R.D. 109, 134–35
 (D.N.J. 2002) (4.3 multiplier); *Sobel v. Hertz Corp.*, No. 306-CV-00545-LRH-RAM, 2014 WL
 5063397, at *10 (D. Nev. Oct. 9, 2014) (multiplier of 2.0).

¹⁰¹ *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d at 942.

¹⁰² See Ex. B, Decl. of Kenneth Jue on Behalf of Settlement Administrator, ¶¶ 9-13.

1 this action for the benefit of the class.¹⁰³ Class counsel vigorously litigated this action and were
2 challenged by aggressive, skilled, and well-funded defense counsel every step of the way. To
3 effectively prosecute this very large and complex class action, ROP counsel had to commit a
4 significant amount of time, personnel, and expenses to this litigation on a contingency basis with
5 absolutely no guarantee of being compensated in the end. Such efforts included, but were certainly
6 not limited to: (1) investigating the factual and legal claims and filing this action; (2) successfully
7 defeating motions to dismiss filed by all three defendants; (3) actively engaging in discovery,
8 including the taking and defending of depositions, written discovery, and reviewing documents
9 from both the NCAA and 150 third parties; (4) developing a database to identify class members for
10 all parties; (5) disseminating notice after preliminary approval to tens of thousands of class
11 members; (6) answering hundreds of inquiries from class members regarding the litigation,
12 settlement, claim forms, and other matters concerning their claims; (7) engaging in numerous hard-
13 fought mediations and informal settlement negotiations before settling this matter; and (8) assisting
14 the claims administrator with the settlement website, electronic claim form, and notice issues.

15 *Third*, ROP Plaintiffs faced a number of novel and complex legal and factual issues in this
16 litigation, including but not limited to right of publicity, choice of law, ascertainability, copyright,
17 the First Amendment, and agency law. And although the ROP Plaintiffs prevailed in the Ninth
18 Circuit, a Petition for Certiorari was still pending before the United States Supreme Court when the
19 settlement was signed. ROP Plaintiffs would have continued to litigate these complicated issues
20 and, in particular, would have faced a complex and time-consuming Opposition to the Petition for
21 Certiorari, as well as a motion to certify the class, a motion for summary judgment, and cross-
22 motions to exclude the testimony of each side's proposed experts, combined with the near certainty
23 that no matter the outcome of the litigation, an appeal would have followed.

24 *Fourth*, given that ROP class counsel undertook this case on a contingency basis, they faced
25 a considerable risk of non-payment, in particular because the case was the first nationwide class
26 action of its kind and thus untested. In addition, ROP class counsel faced the risk of paying
27

28 ¹⁰³ Carey Decl. ¶¶ 14-16.

1 Defendants' fees pursuant to statutory fee-shifting provisions. Courts have "routinely" awarded an
 2 enhanced lodestar in cases involving similar risks.¹⁰⁴

3 *Fifth*, class counsel Hagens Berman is one of the most well-respected class action litigation
 4 firms in the country and has litigated some of the largest class actions in history,¹⁰⁵ including the
 5 tobacco litigation,¹⁰⁶ *In re Visa MasterCard Litigation*,¹⁰⁷ and the *Toyota Motor Corporation*
 6 *Unintended Acceleration Litigation*.¹⁰⁸ Hagens Berman is a fifty-five lawyer firm, with offices
 7 across the country.¹⁰⁹ Since its founding in 1993, the firm has been recognized in courts throughout
 8 the United States for its ability and experience in handling major class litigation efficiently and
 9 obtaining outstanding results for its clients.¹¹⁰ Courts in the Northern District of California have
 10 repeatedly appointed Hagens Berman as lead or co-lead counsel in large multidistrict litigation
 11 proceedings, including the *Pecover* case; *In re Carrier IQ Privacy Litig.*, an MDL currently
 12 pending before Judge Chen;¹¹¹ *In re Optical Disk Drives Prods. Antitrust Litig.*, currently pending
 13 before Judge Seeborg where Hagens Berman acts as sole lead counsel on behalf of the indirect
 14

15
 16 ¹⁰⁴ See *Vizcaino*, 290 F.3d at 1051 ("[C]ourts have routinely enhanced the lodestar to reflect the
 17 risk of non-payment in common fund cases This mirrors the established practice in the private
 18 legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium
 19 over their normal hourly rates for winning contingency cases."); see also e.g., *Garner*, 2010 WL
 20 1687829, at *2; *Larsen v. Trader Joe's Co.*, No. 11-CV-05188-WHO, 2014 WL 3404531, at *9
 21 (N.D. Cal. July 11, 2014); *Bellinghausen v. Tractor Supply Co.*, No. 13-CV-02377-JSC, 2015 WL
 22 1289342, at *11 (N.D. Cal. Mar. 20, 2015).

23 ¹⁰⁵ Carey Decl. ¶ 71, Ex. A, Firm Resume.

24 ¹⁰⁶ In the historic litigation against Big Tobacco, Hagens Berman represented 13 states and
 25 advanced groundbreaking legal claims to secure a global settlement worth \$260 billion, the largest
 26 recovery in history. Only two firms went to trial, and Hagens Berman served as co-lead trial
 27 counsel.

28 ¹⁰⁷ *In re Visa-MasterCard Litigation*, CV-96-5238 (E.D.N.Y.). Hagens Berman was co-lead
 counsel in a case alleging antitrust violations by Visa and MasterCard. The case settled for \$3
 billion in cash and changes in practices valued at \$20 billion.

¹⁰⁸ *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab.*
Litig., 8:10ML2151 JVS (C.D. Cal.). Hagens Berman recovered \$1.6 billion for the class.

¹⁰⁹ Carey Decl. ¶ 73.

¹¹⁰ Carey Decl. ¶ 5, Ex. 1. In addition, ROP Plaintiffs' co-counsel, The Paynter Law Firm,
 Saltz, Mongeluzzi, Barrett, & Bendesky, P.C., and Weinstein Kitchenoff & Asher LLC have
 extensive experience in prosecuting and managing complex class actions. See Carey Decl. Exs. B
 (Paynter declaration); D (Howard declaration); E (firm resume for Salt Mongeluzzi); G (Asher
 declaration); H (firm resume for Weinstein Kitchenoff).

¹¹¹ *In re Carrier IQ Privacy Litig.*, No. 12-md-2330 EMC (N.D. Cal.).

1 purchaser class;¹¹² and *Schwab*, where Hagens Berman acted as lead counsel on behalf of a class of
 2 purchasers of securities.¹¹³ In addition, this Court recently appointed Hagens Berman as co-lead
 3 class counsel in *In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Litigation*
 4 over other firms with experience litigating against the NCAA.¹¹⁴

5 The reputation, experience, and skill of ROP counsel were essential to the success in this
 6 litigation. From the outset, class counsel used their expertise and skill to obtain maximum recovery
 7 for the class, given the particular factual and legal complexities of this litigation. At no time have
 8 the Defendants ever conceded liability, the appropriateness of certification other than for settlement
 9 purposes, or the existence of damages. Given the significant risks and uncertainty associated with
 10 this complex class action, it is a testament to class counsel's skill, creativity, and determination that
 11 they were able to negotiate an excellent Combined Settlement providing substantial economic
 12 relief.

13 The quality of opposing counsel should also be considered.¹¹⁵ The counsel engaged by
 14 Defendants – Kecker & Van Vest LLP, Schiff Hardin LLP, Kilpatrick Townsend & Stockton LLP
 15 and others – are nationally recognized law firms in the defense of class actions. Class counsel
 16 vigorously litigated, and defense counsel vigorously defended against, the class-wide claims
 17 asserted by ROP Plaintiffs. Virtually every point in this litigation and in the settlement negotiations
 18 process was relentlessly disputed by the Defendants.

19 *Sixth*, the fee request is reasonable in light of the future work and expenses that will be
 20 incurred by class counsel under the settlement, beyond the current lodestar. This includes all pre-

22 ¹¹² Order at 4-5, *In re Optical Disk Drive Prods. Antitrust Litig.*, No. 10-md-2143 RS (N.D.
 23 Cal. June 4, 2010), ECF No. 96 (in deciding lead counsel in an antitrust MDL, Judge Walker noted
 24 that each firm applying to be lead counsel brought “impressive skills and experience to the
 proposed task,” but that when taking into account the proposed fee and analysis of the prospects for
 recovery, the “clear choice” was Hagens Berman).

25 ¹¹³ *Schwab*, No. 08-01510-WHA (N.D. Cal.).

26 ¹¹⁴ Case No. 4:14-md-02541-CW, Dkt. No. 82 (August 22, 2014 Order Denying the Floyd
 Plaintiff's Motion to Appoint Hausfeld LLP and Zelle Hofmann Voelbel & Mason LLP as Co-
 Lead Counsel; Denying the Application to Appoint the Dugan Law Firm as Col-Lead Counsel; and
 27 Appointing Plaintiffs Interim Co-Lead Counsel.)

28 ¹¹⁵ See, e.g., *In re Equity Funding Corp. of Am. Secs. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal.
 1977).

1 and post-approval work such as overseeing claims administration, communications with class
2 members, disputes over claims, appeals, and any other issues that may arise under the settlement.
3 This future work is substantial and could last for many months.

4 **B. ROP Plaintiffs' Expenses Are Reasonable and Were Necessarily Incurred.**

5 In addition to the \$8,580,000 sought in attorneys' fees, ROP Plaintiffs seek an award of
6 \$224,434.20, representing half of the expenses necessarily incurred in connection with the
7 prosecution of this action. The other half of the expenses will be sought by ROP Plaintiffs in
8 connection with the NCAA Settlement. The Ninth Circuit allows recovery of pre-settlement
9 litigation costs in the context of class action settlements.¹¹⁶ All expenses that are typically billed by
10 attorneys to paying clients in the marketplace are compensable.¹¹⁷ With this Motion, class counsel
11 provide an accounting of the \$448,868.40 in expenses incurred by ROP Plaintiffs' counsel.¹¹⁸
12 Several categories account for the bulk of these expenses: filing fees, e-Discovery, travel expenses,
13 costs of court and deposition transcripts, experts, and computer research expenses. The request for
14 reimbursement of half of these expenses is in addition to the costs associated with notice and
15 claims administration, also to be split evenly between this settlement and the NCAA settlement. All
16 of these costs were necessarily and reasonably incurred to bring this case to a successful
17 conclusion, and they reflect market rates for the various categories of expenses incurred. Further,
18 counsel advanced these necessary expenses without assurance that they would even be recouped.
19 ROP Plaintiffs' request for expenses is reasonable.

20 **C. ROP Plaintiffs Request Incentive Awards for the Five Class Representatives.**

21 ROP Plaintiffs also request that the Court approve incentive awards for the five named
22 plaintiffs, to be deducted from the EA Settlement fund. Incentive awards for class representatives
23 are routinely provided to encourage individuals to undertake the responsibilities of representing the
24 class and recognize the time and effort spent in the case.¹¹⁹ Incentive awards "compensate class

25 _____
26 ¹¹⁶ See *Staton v. Boeing Co.*, 327 F.3d 938, 974 (9th Cir. 2003).

27 ¹¹⁷ *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994).

28 ¹¹⁸ Carey Decl. ¶¶ 15, 74.

¹¹⁹ See *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive *awards* are fairly typical in class action cases.") (emphasis in original).

1 representatives for work done on behalf of the class, to make up for financial or reputational risk
2 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
3 attorney general.”¹²⁰ Courts have discretion to approve incentive awards based on, *inter alia*, the
4 risk (financial or otherwise) of commencing suit, the notoriety and personal difficulties
5 encountered, the amount of time and effort spent, and the duration of the litigation.¹²¹

6 ROP class counsel request incentive awards ranging from \$2,500 to \$15,000. ROP
7 plaintiffs recommend \$15,000 for named plaintiff Samuel Keller, who has been actively involved
8 since the inception of this five-year old case, assisting counsel in all phases of the case, including
9 gathering evidence to file the pleadings.¹²² As the first named plaintiff, Mr. Keller was subject to
10 intense media scrutiny and experienced personal and professional criticism for filing the complaint.
11 He was unfairly used as a poster-child for people who believed that student-athletes were being
12 ungrateful to their schools by not letting private corporations profit from their names, images, and
13 likenesses. Mr. Keller defended himself and his fellow class members in numerous television,
14 print, and radio interviews, and ultimately helped change the public perception of the NCAA and
15 this litigation. ROP class counsel has spoken to hundreds of student athletes, and cannot recall a
16 single athlete who does not support the litigation and this settlement; this change in public
17 perception is largely attributable to Mr. Keller and his fellow class representatives.¹²³ Mr. Keller
18 took unpaid leave from his job to meet with counsel and attend hearings and mediation sessions.¹²⁴
19 Courts in this circuit have awarded comparable incentive payments particularly where, as here, the
20 class representatives devoted substantial time to the litigation and risked personal and/or financial
21 difficulties as a result of their involvement.¹²⁵

22 _____
¹²⁰ *Id.* at 958-59.

23 ¹²¹ *See Van Vracken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Ca. 1995).

24 ¹²² Carey Decl. ¶ 76.

25 ¹²³ Carey Decl. ¶ 77.

26 ¹²⁴ Carey Decl. ¶ 78.

27 ¹²⁵ *See, e.g., Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 221862, at *16-17
28 (N.D. Cal. Jan. 26, 2007) (awarding \$25,000 incentive payments where named plaintiffs risked
careers in commencing suit); *Pokorny*, 2013 WL 3790896 at *2 (awarding \$20,000 incentive
payments where class representatives spent significant time assisting in 7-year litigation);
Bellinghausen, 2015 WL 1289342, at *17 (awarding \$15,000 incentive payment in light of time
and effort expended and risks associated with initiating litigation); *see also Weeks v. Kellogg Co.*,

1 ROP counsel additionally request incentive awards in the amount of \$5,000 to named
 2 plaintiff Shawne Alston, and \$2,500 each to named plaintiffs Bryan Cummings, LaMarr Watkins,
 3 and Bryon Bishop. Messers. Cummings, Watkins, and Bishop were added as class representatives
 4 when the Consolidated Class Action Complaint was filed. Alston filed a separate action in New
 5 Jersey to help protect the interest of the putative class after counsel for Hart received several
 6 adverse rulings. The named plaintiffs responded to voluminous discovery requests, including 203
 7 Requests for Production, 23 Interrogatories, and 189 Requests for Admission.¹²⁶ They also actively
 8 participated in the settlement of this action, including reviewing and approving the EA Settlement
 9 agreement.¹²⁷ The time and effort expended by these named plaintiffs resulted in a significant
 10 recovery for the class. The incentive awards are reasonable and compare favorably to incentive
 11 awards in other cases.¹²⁸

12 Including the incentive awards requested in connection with the NCAA Settlement, ROP
 13 Plaintiffs request of total of \$62,500, a sum that comprises only .104% of the Combined Settlement
 14 of \$60 million. This sum is modest in comparison to awards in other cases.¹²⁹ The class
 15 representatives' efforts and dedication to the case should not go unrecognized. Thus, ROP
 16 Plaintiffs and class counsel respectfully request that the Court approve the incentive awards for
 17 Plaintiffs Keller, Cummings, Watkins, Bishop, and Alston.

18
 19
 20 No. CV 09-08102 MMM RZX, 2013 WL 6531177, at *36 (C.D. Cal. Nov. 23, 2013) (“An
 21 incentive award is particularly appropriate where class representatives have attracted significant
 22 media attention and notoriety as a result of the litigation, and experienced personal difficulties as a
 23 result.”).

24 ¹²⁶ Carey Decl. ¶ 79. Plaintiff Alston was not served with discovery, but provided the same
 25 materials to counsel as all other Plaintiffs in anticipation of receiving the same requests.

26 ¹²⁷ Carey Decl. ¶ 80.

27 ¹²⁸ See e.g., *In re Online DVD-Rental Antitrust Litig.*, 2015 WL 846008, at *8 (incentive
 28 awards of \$5,000); *Pierce v. Rosetta Stone, Ltd.*, No. C 11-01283 SBA, 2013 WL 5402120, at *6-7
 (N.D. Cal. Sept. 26, 2013) (incentive awards of \$5,000); *In re Conseco Life Ins. Co. Life Trend Ins.
 Mktg. & Sales Practice Litig.*, 2014 WL 186375, at *3 (incentive awards of \$5,000).

¹²⁹ See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463 (approving incentive awards
 constituting .56% of settlement fund); *In re Online DVD-Rental Antitrust Litig.*, 2015 WL 846008,
 at *8 (approving incentive awards totaling .17% of total settlement fund); see also *In re U.S.
 Bancorp. Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002) (total incentive payments did not exceed
 0.35% of total settlement); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (incentive
 payment did not exceed 0.17% of total settlement).

IV. CONCLUSION

For the foregoing reasons, ROP Plaintiffs request an award of \$8,580,000 in attorneys' fees, 224,443.20 in expenses, and incentive awards of \$15,000 to named plaintiff Samuel Keller; \$5,000 to named plaintiff Shawne Alston; and \$2,500 each to named plaintiffs Bryan Cummings, LaMarr Watkins, and Bryon Bishop.

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