

United States District Court  
For the Northern District of California

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

EDWARD O'BANNON, on behalf of himself  
and all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION and COLLEGIATE LICENSING  
COMPANY,  
  
Defendants.

No. C 09-1967 CW  
  
ORDER ON NCAA'S AND  
CLC'S MOTIONS TO  
DISMISS  
(No. C 09-3329 CW,  
Docket Nos. 91 and  
92)

CRAIG NEWSOME, on behalf of himself  
and all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION and COLLEGIATE LICENSING  
COMPANY,  
  
Defendants.

(No. C 09-4882 CW,  
Docket Nos. 12 and  
14)

Plaintiffs Edward O'Bannon and Craig Newsome, in separate  
complaints, charge Defendants the National Collegiate Athletic  
Association (NCAA) and the Collegiate Licensing Company (CLC) with  
engaging in anti-competitive conduct in violation of the Sherman  
Act. In addition, they assert related common law causes of action  
for unjust enrichment and accounting. NCAA and CLC move separately  
to dismiss O'Bannon's and Newsome's complaints in their entirety.  
O'Bannon and Newsome oppose their motions. The motions were heard

1 on December 17, 2009. Having considered oral argument and all of  
 2 the papers submitted by the parties, the Court GRANTS in part  
 3 NCAA's and CLC's Motions to Dismiss O'Bannon's Complaint, and  
 4 DENIES them in part (No. C 09-3329 CW, Docket Nos. 91 and 92). The  
 5 Court GRANTS NCAA's and CLC's Motions to Dismiss Newsome's  
 6 Complaint (No. C 09-4882 CW, Docket Nos. 12 and 14).

7 BACKGROUND

8 Plaintiff Edward O'Bannon, a Nevada resident, competed as a  
 9 student athlete on the University of California, Los Angeles men's  
 10 basketball team from 1991 to 1995. Plaintiff Craig Newsome, a  
 11 Wisconsin resident, competed as a student athlete on the Arizona  
 12 State University football team from 1993 to 1994. Both maintain  
 13 that they participated on their respective teams pursuant to the  
 14 rules and regulations of NCAA.

15 The following allegations are contained in O'Bannon's  
 16 complaint.<sup>1</sup> NCAA, an unincorporated association of various  
 17 colleges, universities and regional athletic conferences, governs  
 18 collegiate athletics and is headquartered in Indiana. O'Bannon  
 19 alleges that NCAA's rules and regulations constitute anti-  
 20 competitive conduct. He cites NCAA Form 08-3a,<sup>2</sup> which NCAA  
 21 requires student athletes to sign each year. By signing Form 08-  
 22 3a, student athletes agree to the following:

23 You authorize the NCAA [or a third party acting on behalf  
 24 of the NCAA (e.g., host institution, conference, local  
 25 organizing committee)] to use your name or picture to  
 generally promote NCAA championships or other NCAA

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26 <sup>1</sup> Newsome's complaint contains allegations similar to those  
 27 contained in O'Bannon's more comprehensive complaint.

28 <sup>2</sup> Newsome refers to Form 09-3a, which appears to contain the  
 same language as Form 08-3a.

1 events, activities or programs.

2 O'Bannon Compl. ¶ 65. O'Bannon claims that the form requires  
3 student athletes to "relinquish all rights in perpetuity to the  
4 commercial use of their images, including after they graduate and  
5 are no longer subject to NCAA regulations." O'Bannon Compl. ¶ 9.  
6 He asserts that student athletes' participation in intercollegiate  
7 athletics events is conditioned on signing this form.

8 O'Bannon also cites NCAA Bylaw Article 12.5.1.1, which  
9 provides,

10 A member institution or recognized entity thereof (e.g.,  
11 fraternity, sorority or student government organization),  
12 a member conference or a non-institutional charitable,  
13 educational or nonprofit agency may use a  
14 student-athlete's name, picture or appearance to support  
15 its charitable or educational activities or to support  
16 activities considered incidental to the student-athlete's  
17 participation in intercollegiate athletics, provided the  
18 following conditions are met:

15 ...

16 (i) The student-athlete and an authorized representative  
17 of the charitable, educational or nonprofit agency sign a  
18 release statement ensuring that the student-athlete's  
19 name, image or appearance is used in a manner consistent  
20 with the requirements of this section.

19 O'Bannon Compl. ¶ 74.

20 O'Bannon claims that, among other things, Form 08-3a and  
21 Article 12.5.1.1 enable NCAA to enter into licensing agreements  
22 with companies that distribute products containing student  
23 athletes' images. He alleges that neither he nor other student  
24 athletes consent to these agreements and that they do not receive  
25 compensation for the use of their images. He claims that CLC,  
26 which is incorporated and has a principal place of business in  
27 Georgia, serves as NCAA's "licensing arm" and facilitates these  
28 arrangements. O'Bannon Compl. ¶ 80.

1 O'Bannon asserts that NCAA's and CLC's actions excluded him  
2 and other former student athletes from the collegiate licensing  
3 market. He claims that, because NCAA has rights to images of him  
4 from his collegiate career, it, along with its co-conspirators, fix  
5 the price for the use of his image at "zero." O'Bannon Compl.  
6 ¶ 86. He maintains that this conduct "has artificially limited  
7 supply and depressed prices paid by Defendants and their co-  
8 conspirators to Plaintiff and the members of the Class for use of  
9 their images after cessation of participation in intercollegiate  
10 sports." O'Bannon Compl. ¶ 182.

11 Based on this alleged conduct, O'Bannon and Newsome plead that  
12 Defendants violated section 1 of the Sherman Act by agreeing to fix  
13 prices and to engage in a group boycott, both of which constitute  
14 unreasonable restraints of trade. In addition, they assert related  
15 claims for unjust enrichment and an accounting. The remedies they  
16 seek include monetary relief, disgorgement of profits from the  
17 wrongful use of putative class members' images and a permanent  
18 injunction prohibiting Defendants from using former student  
19 athletes' images without valid consent. O'Bannon and Newsome  
20 intend to prosecute this case as a class action on behalf of former  
21 student athletes.

#### 22 PROCEDURAL HISTORY

23 O'Bannon filed his complaint on July 21, 2009; Newsome filed  
24 his on October 14, 2009. The Court consolidated their actions,  
25 along with several others making similar claims, with Keller v.  
26 Electronic Arts, Inc., et al., No. C 09-1967 CW.

#### 27 LEGAL STANDARD

28 A complaint must contain a "short and plain statement of the

1 claim showing that the pleader is entitled to relief." Fed. R.  
 2 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a  
 3 claim is appropriate only when the complaint does not give the  
 4 defendant fair notice of a legally cognizable claim and the grounds  
 5 on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
 6 (2007). In considering whether the complaint is sufficient to  
 7 state a claim, the court will take all material allegations as true  
 8 and construe them in the light most favorable to the plaintiff. NL  
 9 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).  
 10 However, this principle is inapplicable to legal conclusions;  
 11 "threadbare recitals of the elements of a cause of action,  
 12 supported by mere conclusory statements," are not taken as true.  
 13 Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949-50 (2009)  
 14 (citing Twombly, 550 U.S. at 555).

#### 15 DISCUSSION

#### 16 I. Sherman Act Claims

17 NCAA asserts that O'Bannon and Newsome have failed to state  
 18 claims for unreasonable restraints of trade under section 1 of the  
 19 Sherman Act. CLC argues that, even if O'Bannon and Newsome have  
 20 stated section 1 claims, they have not alleged facts that tend to  
 21 show that it was involved in the purported antitrust conspiracy.  
 22 Defendants also maintain that O'Bannon and Newsome lack Article III  
 23 and antitrust standing to bring their claims. The Court considers  
 24 these arguments and O'Bannon's and Newsome's complaints in turn.

#### 25 A. O'Bannon

#### 26 1. Violation of Section 1 of the Sherman Act

27 In order to state a claim under section 1 of the Sherman Act,  
 28 a plaintiff "must demonstrate: '(1) that there was a contract,

1 combination, or conspiracy; (2) that the agreement unreasonably  
 2 restrained trade under either a per se rule of illegality or a rule  
 3 of reason analysis; and (3) that the restraint affected interstate  
 4 commerce.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th  
 5 Cir. 2001) (quoting Hairston v. Pac. 10 Conference, 101 F.3d 1315,  
 6 1318 (9th Cir. 1996)).

7 a. Existence of a Contract, Combination or  
 8 Conspiracy

9 NCAA argues that O'Bannon fails to allege sufficient facts to  
 10 show that it conspires with its member schools and conferences to  
 11 restrain trade. As noted above, CLC separately asserts that, even  
 12 if O'Bannon satisfies his pleading requirement as to NCAA, he does  
 13 not allege facts that CLC is involved in the alleged conspiracy.

14 O'Bannon pleads sufficient factual allegations to show an  
 15 agreement among Defendants and their purported co-conspirators.  
 16 With regard to an agreement among NCAA and its members, O'Bannon  
 17 alleges that NCAA represents itself as "a bottom-up organization in  
 18 which the members rule the Association." O'Bannon Compl. ¶ 56.  
 19 The members presumably agree to abide by the organization's  
 20 constitution, bylaws and rules. With regard to Form 08-3a,  
 21 O'Bannon cites Article 3.2.4.6 of the NCAA Constitution, which  
 22 requires member schools to "administer annually . . . a signed  
 23 statement for each student athlete . . . ." O'Bannon Compl. ¶ 60;  
 24 see also O'Bannon Compl. ¶¶ 61-64. These allegations adequately  
 25 support an inference that there was an agreement among NCAA and its  
 26 members. Cf. Hairston, 101 F.3d at 1319 (finding that the athletic  
 27 conference's agreement to sanction a member university "fulfill[ed]  
 28 the 'contract, combination, or conspiracy' prong").

1 O'Bannon also pleads agreements among NCAA, its members, CLC  
2 and various distributors of material related to college sports.  
3 These alleged agreements are for licenses to distribute products or  
4 media containing the images of O'Bannon and other former student  
5 athletes. For example, O'Bannon pleads an arrangement involving  
6 NCAA, CLC and Electronic Arts, Inc. concerning video games that  
7 contain the likenesses of former student athletes. O'Bannon  
8 alleges that CLC is the "licensing representative" of NCAA, and  
9 that CLC represents colleges, universities and athletic  
10 conferences. O'Bannon Compl. ¶¶ 97-98. These allegations  
11 sufficiently support O'Bannon's theory that, after NCAA and its  
12 members obtain releases from student athletes, CLC brokers  
13 agreements that do not compensate him or the putative class members  
14 for the use of their images. This demonstrates CLC's role in the  
15 alleged conspiracy.

16 Accordingly, O'Bannon adequately pleads facts to satisfy the  
17 first prong of his Sherman Act claims.

18 b. Unreasonable Restraints of Trade

19 The Sherman Act does not condemn every restraint of trade;  
20 instead, the law "was intended to prohibit only unreasonable  
21 restraints of trade." NCAA v. Bd. of Regents of Univ. of Okla.,  
22 468 U.S. 85, 98 (1984) (emphasis added).

23 To determine whether an alleged restraint is unreasonable, a  
24 court may employ a rule of reason analysis or a per se rule of  
25 illegality. Under the rule of reason analysis, which presumptively  
26 applies, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006), a restraint  
27 is unreasonable if "the restraint's harm to competition outweighs  
28 its procompetitive effects," Tanaka, 252 F.3d at 1063. The rule

1 of reason analysis imposes an initial burden on the plaintiff to  
2 show that the "restraint produces 'significant anticompetitive  
3 effects' within a 'relevant market.'" Id. (citation omitted). A  
4 relevant market

5 encompasses notions of geography as well as product use,  
6 quality, and description. The geographic market extends  
7 to the "area of effective competition . . . where buyers  
8 can turn for alternative sources of supply." The product  
market includes the pool of goods or services that enjoy  
reasonable interchangeability of use and cross-elasticity  
of demand.

9 Id. at 1063 (citing Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440,  
10 1446 (9th Cir. 1988)). Because "the validity of the 'relevant  
11 market' is typically a factual element rather than a legal element,  
12 alleged markets may survive scrutiny under Rule 12(b)(6) subject to  
13 factual testing by summary judgment or trial." Newcal Indus., Inc.  
14 v. Ikon Office Solution, 513 F.3d 1038, 1045 (9th Cir. 2008).

15 Certain agreements, however, are considered per se illegal,  
16 which obviates the need for an analysis of reasonableness. "The  
17 per se rule, treating categories of restraints as necessarily  
18 illegal, eliminates the need to study the reasonableness of an  
19 individual restraint in light of the real market forces at  
20 work . . . ." Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,  
21 551 U.S. 877, 886 (2007). "Resort to per se rules is confined to  
22 restraints . . . that would always or almost always tend to  
23 restrict competition and decrease output." Id. A "per se rule is  
24 appropriate only after courts have had considerable experience with  
25 the type of restraint at issue and only if courts can predict with  
26 confidence that it would be invalidated in all or almost all  
27 instances under the rule of reason." Id. at 886-87 (citations  
28 omitted). Courts should be reticent to adopt a per se rule "where

1 the economic impact of certain practices is not immediately  
2 obvious." Id. at 887.

3 Seeking to avoid a rule of reason analysis, O'Bannon alleges  
4 that Defendants' conduct constituted price-fixing and a group  
5 boycott. Only horizontal price-fixing agreements between  
6 competitors are considered per se illegal. Dagher, 547 U.S. at 5.<sup>3</sup>  
7 Likewise, group boycotts could be subject to a per se rule of  
8 illegality. However, "precedent limits the per se rule in the  
9 boycott context to cases involving horizontal agreements among  
10 direct competitors." NYNEX Corp. v. Discon, Inc., 525 U.S. 128,  
11 135-36 (1998).

12 O'Bannon's allegations do not suggest the existence of a  
13 horizontal agreement to fix prices or to engage in a group boycott.  
14 As noted above, horizontal agreements occur between direct  
15 competitors. Here, he maintains that NCAA, its member schools and  
16 various businesses conspired to fix the price of former student  
17 athletes' images at zero and to boycott former student athletes in  
18 the collegiate licensing market. Nowhere, however, does O'Bannon  
19 allege that the parties to this agreement were direct competitors  
20 in this market. He does not claim that the member schools compete  
21 with each other to profit from former student athletes' images.  
22 Because O'Bannon has not alleged a horizontal agreement and because  
23 his antitrust theory is novel, the Court does not apply a per se

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25 <sup>3</sup> O'Bannon argues that Defendants' price-fixing scheme is per  
26 se unreasonable because "[a]ny conspiracy to fix prices . . . is  
27 illegal per se." O'Bannon Opp'n to NCAA's Mot. at 4. O'Bannon  
28 misstates the law. As noted above, horizontal agreements to fix  
prices are per se illegal. In contrast, "[v]ertical price  
restraints are to be judged according to the rule of reason."  
Leegin Creative, 551 U.S. at 907.

1 rule of illegality. Thus, the Court subjects O'Bannon's  
2 allegations to a rule of reason analysis. As noted above, under  
3 this analysis, O'Bannon has an initial burden of alleging a  
4 "relevant market" and "significant anticompetitive effects."

5 O'Bannon identifies the relevant market as the "collegiate  
6 licensing market" in the United States. O'Bannon Compl. ¶ 79.  
7 O'Bannon alleges that the market's products are rights to use the  
8 images of athletes connected with collegiate sports; without these  
9 rights, licensees would be unable to market and distribute their  
10 own products legally. O'Bannon pleads facts showing that the  
11 market exists, including CLC's representation that it manages "more  
12 than 75% share of the college licensing market." O'Bannon Compl.  
13 ¶ 36. As noted above, he identifies numerous agreements entered  
14 into by NCAA and its members, including agreements for the  
15 broadcast of athletics events. These factual allegations suggest  
16 that the market exists.

17 O'Bannon has also sufficiently plead significant anti-  
18 competitive effects. O'Bannon pleads that he and putative class  
19 members are excluded from the market by Defendants' actions. This  
20 alleged exclusion decreases the number of competitors in the  
21 market.<sup>4</sup> See Coalition for ICANN Transparency, Inc. v. VeriSign,  
22 Inc., 567 F.3d 1084, 1090 (9th Cir. 2009) (stating that the  
23 elimination of competition is "precisely the type of allegation  
24 required to state an injury to competition"). Further, O'Bannon

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26 <sup>4</sup> The Court notes that O'Bannon purportedly quotes language  
27 from Harkins Amusement Enterprises v. General Cinema Corporation,  
28 850 F.2d 477 (9th Cir. 1988); however, the quoted language does not  
appear in that case. O'Bannon must ensure that he accurately  
represents case law.

1 pleads that Defendants' conduct decreases the number of licenses  
2 available on the market. This allegation also supports the  
3 existence of anti-competitive effects.

4 Accordingly, under a rule of reason analysis, O'Bannon pleads  
5 facts to make out a prima facie case that Defendants' conduct  
6 constitutes an unreasonable restraint of trade.

7 c. Impact on Interstate Commerce

8 O'Bannon alleges that the anti-competitive effects of which he  
9 complains occur in the nation-wide collegiate licensing market.  
10 Thus, O'Bannon adequately pleads an impact on interstate commerce.

11 d. Statute of Limitations

12 NCAA argues that, even if O'Bannon pleads a cognizable  
13 section 1 claim, he is nonetheless barred by the Sherman Act's  
14 four-year statute of limitations. 15 U.S.C. § 15b. O'Bannon  
15 responds that the continuing violation doctrine applies.

16 Under the continuing violation doctrine, an antitrust claim  
17 accrues each time a plaintiff is injured by an act of the  
18 defendant and the statute of limitations runs from the  
19 commission of the act. A continuing violation is one in  
20 which the plaintiff's interests are repeatedly invaded  
21 and a cause of action arises each time the plaintiff is  
22 injured.

23 Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 237 (9th Cir.  
24 1987) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401  
25 U.S. 321, 338 (1971)). A plaintiff must allege "an overt act by  
26 the defendant . . . to restart the statute of limitations." Pace  
27 Indus, Inc., 813 F.3d at 237.

28 O'Bannon alleges that NCAA continues to enter into agreements  
that allow the use of his image without compensation paid to him.  
He claims that in 2007, NCAA entered into an agreement with Thought

1 Equity Motion, Inc. to offer "classic" college basketball games  
2 online. O'Bannon Compl. ¶¶ 108-111. This supports an inference  
3 that the image of O'Bannon as a former college basketball player  
4 was included in that agreement. Thus, O'Bannon has sufficiently  
5 alleged a continuing violation.

6 2. Article III and Antitrust Standing

7 NCAA argues that O'Bannon has failed to establish that he has  
8 Article III and antitrust standing to bring this case.

9 A plaintiff has Article III standing when (1) he or she  
10 suffers a concrete, particularized injury; (2) there is a causal  
11 connection between the injury and the conduct complained of; and  
12 (3) the injury will likely be redressed by a favorable decision.  
13 See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992);  
14 Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 61 (9th  
15 Cir. 1994). The absence of any one element deprives a plaintiff of  
16 Article III standing and requires dismissal. See Whitmore v. Fed.  
17 Election Comm'n, 68 F.3d 1212, 1215 (9th Cir. 1995).

18 Separate from Article III standing, a plaintiff asserting  
19 antitrust claims must also allege antitrust standing. Gerlinger v.  
20 Amazon.com Inc., 526 F.3d 1253, 1256 (9th Cir. 2008) (citing Assoc.  
21 Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459  
22 U.S. 519, 538 (1983)). To have antitrust standing, a plaintiff  
23 must successfully allege antitrust injury. Glen Holly  
24 Entertainment v. Tektronix, Inc., 352 F.3d 367, 371 (9th Cir. 2003)  
25 (citing Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051,  
26 1054-55 (9th Cir. 1999)). Antitrust injury consists of  
27 "(1) unlawful conduct, (2) causing an injury to the plaintiff,  
28 (3) that flows from that which makes the conduct unlawful, and

1 (4) that is of the type the antitrust laws were intended to  
2 prevent." Glen Holly, 352 F.3d at 372.

3 O'Bannon has established that he has Article III standing. He  
4 alleges that Defendants' actions have deprived him of compensation  
5 for the use of images of himself from his collegiate career. That  
6 injury is traceable to Defendants' conduct, which includes, but is  
7 not limited to, NCAA's rules and regulations. Further, O'Bannon's  
8 injury can be redressed by this Court's order.

9 O'Bannon has similarly established antitrust standing. As  
10 discussed above, he has sufficiently alleged violations of  
11 section 1 of the Sherman Act, and has plead injury as a result of  
12 the alleged violations. O'Bannon's allegations of anti-competitive  
13 conduct establish that the harm caused to him is of the type the  
14 antitrust laws were intended to prevent. In particular,  
15 Defendants' actions have allegedly prevented O'Bannon and other  
16 student athletes from participating in the collegiate licensing  
17 market. In doing so, Defendants have decreased competition in the  
18 market. Antitrust law is intended to prevent such harm. "The law  
19 directs itself not against conduct which is competitive, even  
20 severely so, but against conduct which unfairly tends to destroy  
21 competition itself." Spectrum Sports, Inc. v. McQuillan, 506 U.S.  
22 447, 458 (1993).

23 B. Newsome

24 Newsome pleads sufficient facts to suggest the existence of a  
25 conspiracy. However, he does not meet his burden with respect to  
26 alleging unreasonable restraints of trade. Like O'Bannon, Newsome  
27 pleads that Defendants engaged in price-fixing and a group boycott,  
28 in order to avoid a rule of reason analysis of his claims. His

1 allegations are similar to those of O'Bannon and, for the reasons  
2 stated above, they are not sufficient to warrant a per se rule  
3 analysis.

4 Newsome's complaint, which represents a truncated version of  
5 the O'Bannon complaint, does not contain sufficient allegations to  
6 make out a prima facie case under a rule of reason analysis. Among  
7 other things, he does not plead a relevant market. Accordingly,  
8 the Court dismisses Newsome's claims for violations of section 1 of  
9 the Sherman Act.

#### 10 II. Common Law Claims

11 NCAA and CLC argue that O'Bannon's and Newsome's common law  
12 claims must fail because they are wholly derivative of the  
13 antitrust claims. This argument is unavailing as to O'Bannon  
14 because he sufficiently alleges antitrust claims. However, because  
15 Newsome does not state antitrust claims, his common law claims  
16 fail.

17 The Court considers the sufficiency of O'Bannon's common law  
18 claims below.

##### 19 A. Unjust Enrichment

20 O'Bannon alleges claims of "unjust enrichment" to recover  
21 Defendants' profits acquired through their alleged anti-competitive  
22 practices. CLC, in its motion, argues that, even if his antitrust  
23 claims survive, O'Bannon does not make factual allegations that  
24 support his unjust enrichment claim against CLC. For the purposes  
25 of this motion, the Court assumes that O'Bannon's claims arise  
26 under California law.

27 California courts appear to be split on whether there is an  
28 independent cause of action for unjust enrichment. Baggett v.

1 Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270-71 (C.D. Cal. 2007)  
2 (applying California law). One view is that unjust enrichment is  
3 not a cause of action, or even a remedy, but rather a general  
4 principle, underlying various legal doctrines and remedies.  
5 McBride v. Boughton, 123 Cal. App. 4th 379, 387 (2004). In  
6 McBride, the court construed a "purported" unjust enrichment claim  
7 as a cause of action seeking restitution. Id. There are at least  
8 two potential bases for a cause of action seeking restitution:  
9 (1) an alternative to breach of contract damages when the parties  
10 had a contract which was procured by fraud or is unenforceable for  
11 some reason; and (2) where the defendant obtained a benefit from  
12 the plaintiff by fraud, duress, conversion, or similar conduct and  
13 the plaintiff chooses not to sue in tort but to seek restitution on  
14 a quasi-contract theory. Id. at 388. In the latter case, the law  
15 implies a contract, or quasi-contract, without regard to the  
16 parties' intent, to avoid unjust enrichment. Id.

17 Another view is that a cause of action for unjust enrichment  
18 exists and its elements are receipt of a benefit and unjust  
19 retention of the benefit at the expense of another. Lectrodryer v.  
20 SeoulBank, 77 Cal. App. 4th 723, 726 (2000); First Nationwide  
21 Savings v. Perry, 11 Cal. App. 4th 1657, 1662-63 (1992).

22 Even under the more restrictive analysis of McBride, O'Bannon  
23 sufficiently pleads his unjust enrichment claims. He alleges that  
24 CLC profited from brokering licensing agreements for products that  
25 contain his image. These agreements arose in part, O'Bannon  
26 alleges, from the anti-competitive conduct discussed above,  
27 including the requirement to sign Form 08-3a. O'Bannon maintains  
28 that student athletes sign Form 08-3a "under duress and without

1 informed consent.” O’Bannon Compl. ¶ 9. These allegations  
2 sufficiently support restitution claims against under California  
3 law.

4 B. Accounting

5 An action for accounting, which is equitable in nature, “may  
6 be brought to require a defendant to account to a plaintiff for  
7 money or property, (1) where a fiduciary relationship exists  
8 between the parties, or (2) where, though no fiduciary relationship  
9 exists, the accounts are so complicated that an ordinary legal  
10 action demanding a fixed sum is impracticable.” Witkin, California  
11 Procedure, Pleading § 775 (4th ed.); Civic W. Corp. v. Zila  
12 Industries, 66 Cal. App. 3d 1, 14 (1977).

13 O’Bannon does not allege a fiduciary relationship between  
14 himself and NCAA or CLC, and therefore must plead facts showing the  
15 existence of complicated accounts that make an ordinary legal  
16 action impracticable. He does not do so. Accordingly, his common  
17 law accounting claims against NCAA and CLC are dismissed with leave  
18 to amend. If he means to imply that he is entitled to some  
19 ascertainable percentage of every license agreement that involved  
20 his image, and that there are many, he should say so directly.

21 CONCLUSION

22 For the foregoing reasons, the Court GRANTS IN PART NCAA’s and  
23 CLC’s motions to dismiss O’Bannon’s complaint, and DENIES them in  
24 part. (No. C 09-3329 CW, Docket Nos. 91 and 92.) O’Bannon’s claim  
25 for an accounting is dismissed with leave to amend to allow him to  
26 plead facts supporting the existence of complicated accounts. The  
27 Court GRANTS with leave to amend NCAA’s and CLC’s motions to  
28 dismiss Newsome’s complaint. (No. C 09-4882 CW, Docket Nos. 12 and

1 14.)

2 In accordance with this Court's Order of January 15, 2010,  
3 which consolidated the O'Bannon and Newsome actions with the Keller  
4 action, No. C 09-1967 CW, O'Bannon and Newsome have thirty days  
5 from the date of this Order to file a consolidated amended  
6 complaint. A case management conference is scheduled for April 27,  
7 2010 at 2:00 p.m.

8 IT IS SO ORDERED.

9  
10 Dated: February 8, 2010



11 CLAUDIA WILKEN  
12 United States District Judge  
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United States District Court  
For the Northern District of California