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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

ED O'BANNON, on behalf of himself and all others similarly situated, Plaintiff, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (a/k/a the "NCAA"); and COLLEGIATE LICENSING COMPANY (a/k/a "CLC"), Defendants.	Case No. 4:09-cv-03329 CW **PLAINTIFF'S OPPOSITION TO COLLEGIATE LICENSING COMPANY'S MOTION TO DISMISS THE COMPLAINT** Date: November 17, 2009 Time: 2:00 p.m. Dept: Courtroom 2, 4th Floor Judge: Honorable Claudia Wilken Date Complaint Filed: July 21, 2009

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I. INTRODUCTION AND ISSUES TO BE DECIDED

Plaintiff Ed O' Bannon ("Plaintiff") has filed a 73 page, 210 paragraph class action complaint alleging that the National Collegiate Athletic Association ("NCAA") and Collegiate Licensing Company ("CLC"), among others, committed per se violations of federal antitrust laws by engaging in a price-fixing conspiracy and a group boycott/refusal to deal that has unlawfully foreclosed putative Class members from receiving compensation in connection with the commercial exploitation of their images following their cessation of intercollegiate athletic competition. Plaintiff also asserts a claim for unjust enrichment, and requests that the Court require defendants to provide an accounting of monies claimed to have been unlawfully withheld from class members.

CLC has moved to dismiss the Complaint on four grounds: (1) that Plaintiff has not alleged antitrust injury ("Defendant Collegiate Licensing Company's Notice of Motion And Motion To Dismiss The Complaint Pursuant To Rule 12(b)(6)," pp. 13-16 (Oct. 13, 2008) ("CLC Memo"); (2) that Plaintiff has not adequately pled CLC's involvement in any conspiracy (*id.*. pp. 5-13); (3); that Plaintiff has not adequately pled unjust enrichment (*id.*. pp. 17-18); and, (4) that Plaintiff has not adequately pled a claim for an accounting (*id.*. pp. 18-19). For the reasons set forth below, none of these objections has merit and CLC's motion must therefore be denied.

CLC's motion is principally focused on the argument that it is down the distribution chain from the horizontal restraints imposed by the NCAA described in the Complaint. However, as the Complaint alleges, CLC does not act as a party down the distribution chain with respect to these horizontal arrangements. Instead, as described in detail in the Complaint, it licenses and directly manages every aspect of illegal arrangements at issue and works with the NCAA and its members to do so. CLC thus is the licensing and marketing arm that imposes the horizontal restraints at issue here; CLC even acknowledges that it is the representative of the "consolidated retail power," which the Complaint alleges constitutes the illegal horizontal arrangement that is

the subject of the Complaint.

Plaintiff's separate opposition to the NCAA's motion to dismiss describes how those horizontal restraints, which pay former student athletes zero in agreements for licensing of their publicity rights negotiated by CLC, are illegal restraints of trade long condemned by the antitrust laws. Individuals and companies who knowingly participate in—indeed, are closely involved in administering, implementing and designing-- horizontal restraints of trade, whether they be price-fixing or market allocations, are properly coconspirators under the plain language of Section 1 of the Sherman Act.

II. FACTUAL BACKGROUND

A. Description of CLC

CLC is a "for-profit" company and NCAA's largest "licensing representative" in the "$4.0 billion annual market for collegiate licensed merchandise." "Class Action Complaint" ¶5 (July 21, 2009) ("Compl." or "Complaint"). CLC is a division of IMG Worldwide, Inc. ("IMG"). *Id.* Quoting an affiliate's website, the Complaint alleges that CLC is "the unrivaled leader in collegiate brand licensing, managing the licensing rights for nearly 200 leading institutions that represent more than $3 billion in retail sales and more than 75% share of the college licensing market." *Id.* ¶36. Also quoting this website, the Complaint alleges that:

- "CLC is a full-service licensing company…with the capability to establish and manage every aspect of a collegiate licensing program" (*id.* ¶98);
- CLC "provides every institution with a greater voice in the market, increased exposure, the broadest range of available licensing services, and reduced administration expenses" (*id.* ¶99);
- CLC's "approach" has "guide[d] and shape[d] the $4.0 billion annual market for collegiate licensed merchandise" (*id.*);

- "CLC's long-standing relationships with retailers and licensees have also been essential to the growth of the industry and the success of each client's individual licensing program" (*id.*.); and,
- CLC "represents the consolidated retail power of the many colleges, universities, athletic conferences, bowl games, and other collegiate institutions" (*id.*).

Citing NCAA representations, the Complaint alleges that "CLC is responsible for administering the licensing program, including processing applications, collecting royalties, enforcing trademarks and pursuing new market opportunities for the NCAA." *Id.* ¶97. The Complaint contains specific examples of CLC-brokered deals involving the uses of student-athletes' names, likenesses and images, including videogame deals with co-conspirator Electronic Arts, Inc. ("EA"). *Id.* ¶¶139-148.

B. CLC and NCAA Regulations

The NCAA regulations "span more than 400 pages" and "regulate all aspects of collegiate athletic competition." *Id.* ¶57. As alleged, they evidence "the NCAA's control of the collegiate licensing market and the horizontal agreements by which the NCAA's members agree to abide by, implement and enforce." *Id.* Quoting an article in Legal Affairs, the Complaint describes CLC as a "key player" in managing the NCAA's "amateurism regulations." *Id.* ¶139.

The Complaint alleges that all student athletes must sign the NCAA's Form a 08-3a before he or she may participate in collegiate athletics. *Id.*. ¶59. The Complaint cites the NCAA's Articles and Bylaws and a newspaper article, all of which confirm that Form 08-3a is mandatory. *Id.* ¶¶60-61, 63, 73, 78. Part IV of the Form requires student-athletes to "authorize the NCAA" to use their "name or picture to generally promote NCAA championships or other NCAA events, activities or programs." *Id.* ¶65. This causes the "release of rights in connection with use of their images." *Id.* ¶59.

The releases become "in effect from the date this document is signed" until a "subsequent Division I Student-Athlete Statement/Drug-Testing Consent form is executed." *Id.* ¶64. The Complaint alleges that this latter provision, in combination with Part IV of Form 08-3a, has the effect of "granting a purported release in perpetuity" and has been "utilized by the NCAA, its members, and its co-conspirators to engage in the unlawful licensing of Class members' commercial rights." *Id.* ¶66. As alleged, this "'authorization" is "entirely coerced and uninformed" (*id.* ¶68); the NCAA's releases "fail[] to indicate that legal rights are being relinquished" (*id.* ¶70); and "fail[] to counsel student-athletes, who are sometimes minors, that they may wish to seek legal advice in connection with the release of future compensation rights." *Id.*

The Complaint alleges that Article 12.5.1.1 of the NCAA's bylaws effectuates another "release" of rights (*see id.* ¶74(i)), which further "allows schools and conferences to commercially exploit former student athletes." *Id.*. ¶10. That provision expressly provides that "all moneys derived from" any activity or project using a student athlete's "name, picture or appearance" go "directly to the member institution, member conference or the charitable, education or non-profit agency." *Id.* ¶74. The Complaint alleges that the aforementioned releases in part are an unreasonable restraint of trade because they require each athlete to relinquish all rights in perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations. *Id.* ¶¶9-10.

C. Licensing And Antitrust Violations

The Complaint describes for-profit entities (such as CLC) that broker license deals on behalf of the NCAA and its affiliate schools (*id.* ¶¶92-103) and various ways that NCAA and its co-conspirators have exploited the acquisition of rights from student-athletes. *See Id.* ¶¶105-107 (media rights for televising games), ¶¶108-18 (DVD and on-demand sales and rentals), ¶¶119-29 (video-clip sales to corporate advertisers and others), ¶¶130-32 (photos), ¶¶133-34 (action-figures, trading cards and posters), ¶¶135-48 (video games), ¶¶149-56 (rebroadcasts of classic games), ¶¶157-65 (jerseys, T-shirts and other apparel). *See* also *id.* ¶7 (summarizing various ways

that NCAA exploits student-athletes' rights). The alleged conduct allows co-conspirators to "develop an array of multi-media revenue streams for itself without providing any compensation whatsoever to the former athletes whose images are sold over and over again via NCAA-owned, controlled, and licensed entities" (*id.* ¶11), which "wipes out in total the future ownership interests of former student-athletes in their own images – rights that all other members of society enjoy – even long after student-athletes have ceased attending a university." *Id.* ¶6.

As alleged, the late Myles Brand (President of the NCAA) has "acknowledged that student-athletes possess a right of publicity," and the Complaint quotes him as confirming that the "use of names of student-athletes violates the principles of amateurism." *Id.* ¶16. The Complaint also quotes Wallace Renfro, "NCAA's vice president and senior advisor to President Myles Brand," who admitted that "[e]xploiting student-athletes for commercial purposes is as contrary to the collegiate model as paying them." *Id.* ¶17.

The Complaint alleges in detail CLC's role in the NCAA licensing program. It notes that the NCAA on its website directs parties to CLC for information on the former's licensing information. *Id.* ¶96. The same website says that CLC is the "licensing representative" of the NCAA and is "responsible for administering the licensing program, including processing applications, collecting royalties, enforcing trademarks, and pursuing new marketing opportunities for the NCAA." *Id.* ¶97. CLC on its website has an online "Collegiate Exchange," a business-to-business trading exchange that sells game highlight videotapes and DVDs. *Id.* ¶113. As noted above, one article quoted in the Complaint has described CLC as a "key player" in getting lucrative licensing deals for the NCAA. *Id.* ¶139.

CLC, the trademark representative for NCAA, has stated it is a full-service licensing company with the "capacity to establish and manage every aspect of a licensing company." *Id.* ¶98. It served as the "guiding force in collegiate trademark licensing." *Id.* ¶99. It was designed to be the "a center of excellence in providing licensing services of the highest quality to institutions, licensees, retailers and consumers." *Id.* (noting exclusion of any reference to former student athletes). It "represents the consolidated retail power of the many colleges, universities,

athletic conferences, bowl games, and other collegiate institutions." *Id.* (again, excluding former student athletes). Through CLC's site, "retailers can review catalogs from participating licensees and place orders for collegiate merchandise. Only collegiate retail stores and licensees can participate in the program" *Id.* ¶113. Yet, it never once permitted former student athletes to license their image. Nor did it ever confirm that the former student athletes were, in fact, the true "licensees."

CLC's motion assumes that the licensing of rights at issue in the Complaint would ordinarily be initiated by a licensing program by former student athletes such as Plaintiff. CLC ignores the fact that companies desiring such rights may also initiate such contacts and seek those rights out from former student athletes. Such companies, such as video game companies etc., would ordinarily seek out former student athletes to negotiate over such rights and licensing, rather than CLC or the NCAA, in the absence of the horizontal restraints described in the Complaint. Compl. ¶ 2. As alleged in the Complaint, however, companies licensing the images or rights of former student athletes such as plaintiff negotiate such agreements exclusively with the NCAA and the CLC and remarkably ignore the actual former student athletes whose rights are at issue because the NCAA and CLC has asserted control over those rights. *Id.* ¶¶ 92-165.

Based on the totality of its conduct, CLC is alleged to have conspired with NCAA and its members and others to depress the compensation of former NCAA Division 1 student-athletes for use of their images to zero. *Id.* ¶¶184-88. CLC is also alleged to have conspired with NCAA and its members and others to boycott putative Class members by refusing to compensate them for the use of their images and to concertedly prevent them from obtaining such compensation. *Id.* ¶¶193-98.

III. ARGUMENT

A. The Governing Legal Standard On A Motion To Dismiss

As an initial matter, it is important to keep in mind the pleading standards that govern dismissal of a complaint in this Circuit, even after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) ("*Iqbal*"). The following

fundamental propositions are unaltered by *Twombly* and *Iqbal*.

First, a complaint is to be construed in the light most favorable to the plaintiff, with all properly pleaded factual allegations to be taken as true, and all reasonable inferences to be drawn in plaintiffs' favor. *Operating Engineers' Pension Trust Fund v. Clark's Welding & Machine*, 2009 U.S. Dist. LEXIS 43379 at *6 (N.D. Cal. May 8, 2009) (citations omitted).

Second, allegations in a price-fixing case are to be considered as a whole, not on a piecemeal basis. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).[1]

Third, the longstanding rule that a conspiracy can be stated solely through circumstantial allegations (from which agreement might plausibly be inferred) is as true after *Twombly* and *Iqbal* as before. "The Ninth Circuit has aptly observed that 'direct evidence will rarely be available' to prove the existence of a price fixing conspiracy. It is for that reason that 'circumstantial evidence is the lifeblood of antitrust law.'" *In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA 2009 WL 1096602 at *10 (N.D. Cal. Mar. 31, 2009) ("*Flash Memory*") (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied sub nom. Chevron Corp. v. Arizona*, 500 U.S. 959 (1991)). *See*, e.g., *In re TFT-LCD (flat Panel) Antitrust Litig.*, 599 F.Supp. 2d 1179, 1184 (N.D. Cal. 2009) ("*TFT-LCD II*"); *In re Graphics Processing Units Antitrust Litig.*, 540 F.Supp. 2d 1085, 1096 (N.D. Cal. 2007) ("direct allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary").

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[1] *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F.Supp. 2d 27, 33 (D.D.C. 2008) (in evaluating plausibility under *Twombly*, court must consider allegations of complaint as a whole); *In re Southeastern Milk Antitrust Litig.*, 555 F.Supp. 2d 934, 943 (E.D. Tenn. 2008) ("[m]oreover, defendants attempt to parse and dismember the complaints, contrary to the Supreme Court's admonition that '[t]he character and effect of a [Sherman Act] conspiracy are not to be judged by dismembering it and viewing its separate parts'"); *Standard Iron Works v. ArcelorMittal*, No. 08 C 5315, 2009 WL 1657449 at *20 (N.D. Ill. June 12, 2009) ("[d]efendants' attempt to parse the complaint and argue that none of the allegations (i.e., quoted public statements, parallel capacity decisions, trade association and industry meetings) support a plausible inference of conspiracy is contrary to the Supreme Court's admonition that '[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts.'")

The Ninth Circuit emphasized the continued vitality of notice pleading after *Twombly* in *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832, 839 (9th Cir. 2007):

> Federal Rule of Civil Procedure 8(a)(1)-(2) requires only that a complaint contain "a short and plain statement of the grounds upon which the court's jurisdiction depends" and "a short and plain statement of the claim showing that the pleader is entitled to relief." When enacted, Rule 8 eliminated the archaic system of fact pleading found in the state codes of pleading applied by the federal courts under the 1872 Conformity Act. Today, "[t]he only function left to be performed by the pleadings alone is that of notice." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1202, at 89 (3d ed.2004); *see Erickson v. Pardus*, 551-U.S. 89 , 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007). Rule 8's concluding admonishment that "[a]ll pleadings shall be so construed as to do substantial justice" confirms the liberality with which we should judge whether a complaint gives the defendant sufficient notice of the court's jurisdiction. Fed.R.Civ.P. 8(f).

This same principle was reaffirmed in the antitrust context in *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 561 F.3d 1004, 1009 (9th Cir. 2009):

> "To successfully state a claim under § 1 of the Sherman Act, a plaintiff need only meet the notice pleading standard articulated in Fed.R.Civ.P. 8(a)(2). *Bell Alt. Corp.* v. *Twombly*, 550 U.S. 544, 127 S.Ct. at 1964, 167 L.Ed.2d 929 (2007). Rule 8(a)(2) requires " 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.' " *Id.*. (quoting Fed.R.Civ.P. 8(a)(2)). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Id.*. at 1965. Additionally, dismissals for failure to state a claim are disfavored in antitrust actions. *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 406 (9th Cir.1983).

Lower courts in numerous antitrust cases decided since *Twombly* have made similar points.[2]

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[2] *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F.Supp. 2d 896, 900 (N.D. Cal. 2008) ("*SRAM*") (complaint need only present a short and plain statement of the claim; no detailed factual recitations are needed); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F.Supp. 2d 363, 370 (M.D. Pa. 2008) (Rule 8 pleading standards continue to apply after *Twombly*; no heightened pleading standard is applied to antitrust complaints); *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F.Supp. 2d 404, 408 n.2 (D. Del. 2007) (court read *Twombly* liberally in declining to dismiss most of the indirect purchaser antitrust claims at issue); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 5 (D.D.C. 2008) ("a complaint need not be dismissed where it does not 'exclude the possibility of independent business action.' . . . Such a requirement at this stage in the litigation would be counter to Rule 8's requirement of a short, plain statement with 'enough heft to "sho[w] that the pleader is entitled to relief"); *Flash Memory*, 2009 WL 1096602 at *4 (specific factual allegations are not necessary; the statement in

None of the foregoing principles are undermined by the Supreme Court's decision earlier this year in *Iqbal*. There, the Court held that, after considering the factual allegations in the complaint, a court should determine whether the allegations "plausibly give rise to an entitlement to relief." 129 S.Ct. at 1950. A plausible claim "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*. (citing *Twombly*, 550 U.S. at 557). Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*. at 1950. Thus, properly read, *Iqbal* effectuated no sea change in the law. *Al-Kidd v. Ashcroft*, No. 06-36059, 2009 WL 2836448 at *11 (9th Cir. Sept. 4, 2009) (applying *Twombly* "plausibility" standard post-*Iqbal* and upholding complaint).

As this Circuit noted in *Al-Kidd*, "*Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden. 'Asking for plausible grounds to infer' the existence of a claim for relief 'does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' to prove that claim." *Id.*. at *24 (quoting *Twombly*, 550 U.S. at 556).

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a complaint need only give the defendants fair notice of what the claim is and the grounds upon which it rests); *Fair Isaac Corp. v. Equifax, Inc.*, No. 06-4112 ADM/JSM, 2008 WL 623120 at *6 (D. Minn. March 4, 2008) (*Twombly* does not require specific pleading of the evidentiary details of a conspiracy); *Flying J Inc. v. TA Operating Corp.*, No. 1:06CV00030, 2007 WL 3254765 at *1 (D. Utah Nov. 2, 2007), *interlocutory appeal denied*, 2007 WL 4165749 at *2 (D. Utah Nov. 20, 2007) (*Twombly* imposed no heightened pleading standard; a short and plain statement of a claim is still all that is needed); *Trans World Technologies, Inc. v. Raytheon Co.*, No. 06-5012 (RMB), 2007 WL 3243941 at * 4 (D.N.J. Nov. 1, 2007) ("[a]s long as the complaint alleges that the alleged co-conspirators had a plausible reason to participate in the conspiracy, the complaint is sufficient"); *Hyland v. Homeservices of America, Inc.*, No. 3:05-CV-612-R, 2007 WL 2407233 at *3 (W.D. Ky. Aug. 17, 2007) (complaint sufficed if "[p]laintiffs had alleged more than parallel business conduct and a 'bare' assertion of a 'belief' of a conspiracy); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419 at *3 (E.D. Pa. Aug. 3, 2007) (in denying a motion to dismiss a price-fixing conspiracy claim, "[p]laintiffs situate these allegations of parallel conduct in a context that suggests preceding agreement"); *In re Hypodermic Prods. Antitrust Litig.*, No. 05-CV-1602 (JLL/CCC), 2007 WL 1959225 at *6, *8 (D.N.J. June 29, 2007) (liberal antitrust pleading standards apply after *Twombly*; allegations of anticompetitive exclusive dealing arrangements stated a claim under § 1 of the Sherman Act).

Plaintiff readily meets the plausibility standards established in *Twombly* and *Iqbal*.

B. The Complaint Sufficiently Alleges Antitrust Injury

CLC asserts that Plaintiff "alleges no facts that would show that he has suffered any antitrust injury or that he has antitrust standing to bring this action." CLC Memo, p. 13. However, CLC ignores the series of factual allegations in the Complaint that amply demonstrate Plaintiff's antitrust injury and standing. The Complaint specifically alleges that defendants are engaging in "a price-fixing conspiracy and a group boycott/refusal to deal that has unlawfully foreclosed class members from receiving compensation in connection with the commercial exploitation of their images following their cessation of intercollegiate athletic competition." *Id.*. ¶ 2. Plaintiff alleges that he has been injured by the uncompensated commercial use of his image, name, and likeness by CLC and the NCAA. *See* Compl. ¶ 34. *See* also *id.* ¶ 26 (alleging that Plaintiff's image has been used "without compensation paid to him").) The Complaint goes on to offer a number of examples of this uncompensated, injurious use of Plaintiff's image. *See id.* ¶¶ 26-33.

In response, CLC does not argue that the allegations of injury are implausible under *Twombly*. CLC instead argues for a new legal standard to demonstrate injury, contending that the Complaint must show that "Plaintiff sells or licenses his name, image, or likeness or that he has taken any steps to do so." *Id.* ¶14. This assertion is incorrect as a matter of law. Defendant cites no authority indicating that Plaintiff is required to show that he has marketed or attempted to market his name, image, or likeness in order to properly state an antitrust injury.

In support of its position, CLC cites *Parrish v. Nat'l Football League Players Ass'n*, 534 F.Supp. 2d 1081, 1091 (N.D. Cal. 2007) ("Parrish"). CLC Memo, pp. 13-14. However, CLC's reliance on this case is misplaced. In *Parrish*, retired professional football players brought a class action against the players' union and its subsidiary alleging, inter alia, that defendants' conduct violated California's unfair competition law, and that, as a result of defendants' conduct, plaintiffs had suffered "(1) lost dues; and (2) lost licensing opportunities." 534 F.Supp.2d at 1090. The court granted defendants' motions to dismiss, finding that the complaint failed to

allege that any of the named plaintiffs had ever paid dues to the players' union or "actually attempted to enter in any license in competition" with the defendants.

This case is readily distinguishable from *Parrish*. Here, Plaintiff alleges, with great specificity, that he participated in NCAA athletics as a student-athlete and that NCAA rules and regulations require all student-athletes to sign Form 08-3a or an analog. Compl. ¶¶ 9, 13, 59, 60, 73, 83, 87, 194. *See id.* ¶ 25 (alleging that Plaintiff, as a member of the UCLA men's basketball team, competed "pursuant to the NCAA's rules and regulations"). In addition, as stated above, Plaintiff and the other Class members have suffered antitrust injury independent of their inability to compete with Defendants—the component of their injury arising from the uncompensated use of their images.

CLC also alleges that "Plaintiff fails to plead harm to competition[.]" CLC Memo, p. 15. This assertion conveniently ignores numerous allegations in the Complaint that show that Form 08-3a and the other waiver documents have had their intended effect of preventing student-athletes from selling and licensing their images. *See*, e.g., *id.* ¶¶ 13, 67, 81-82, 85, 87. Specifically, the Complaint cites and quotes relevant provisions of the NCAA Constitution and Bylaws mandating administration of the waiver forms (*id.* ¶¶ 9-10, 13, 59-65, 74-75, 77), denying eligibility to any student-athlete who does not sign the forms (*id.* ¶¶ 10, 61-62), prescribing the forms' non-negotiable language permanently releasing the student-athletes' rights to their likenesses (*id.* ¶¶ 65-66), and siphoning all income derived from use of student-athlete images away from the student-athletes *Id.* ¶¶ 74-77.

These allegations provide a more than sufficient basis to support the Complaint's assertion that the NCAA has asserted its plenary control over intercollegiate athletics to achieve its anticompetitive goal: "Plaintiff and Class members losing their freedom to compete." *Id.* ¶ 182.

C. The Complaint Sufficiently Alleges CLC's Participation In The Claimed Conspiracy

The Complaint contains multitudinous and interrelated allegations that, when viewed together, show a conspiracy to force student-athletes to relinquish their rights to commercial use of their names, images and likenesses; deprive current and former student-athletes of revenues

from the commercial use of their names, likenesses and images; and, influence the ultimate price at which such commercial uses are licensed in the multi-billion dollar collegiate athletics market. As shown above and explained herein, CLC is unequivocally implicated in this conspiracy.

CLC repeatedly recasts the conspiracy as procuring student-athlete signatures on NCAA-mandated releases. CLC Memo, pp. 7 (arguing it had no "role in the actions [taken] in connection with the NCAA eligibility forms"), 8 (arguing it had no role concerning "NCAA schools' alleged requirement that student-athletes sign the particularly NCAA eligibility forms"), 11 (arguing that "Plaintiff fails to elaborate, however, as to how CLC possibly facilitated a conspiracy the aim of which allegedly was to force NCAA student-athletes to sign certain NCAA eligibility forms"), 2 (arguing that it had nothing "to do with the subject matter of the alleged conspiracy, i.e., the NCAA eligibility forms"), 1 ("CLC…has nothing to do with the allegedly offensive NCAA forms…"). But these allegations comprise only one aspect of the Complaint; another is CLC's brokering of licensing deals that provide no royalties to student-athletes. Taken together, defendants' actions set forth in the Complaint suppresses the price paid for releases to zero and influences licensing rates for student-athletes' names, likeness and images.

Assuming there were no releases--or if CLC and its co-conspirators actually represented that they had no such rights, because the releases were for a limited time--a third party would need to purchase rights from former student-athletes prior to offering products using their names, likenesses or images. This would increase licensing costs and decrease CLC's royalty revenue, as a portion would now go to the former student-athletes. *See* Compl. ¶99 (CLC promoting that its approach reduces expenses for every institution). But, as it stands now, CLC performs "two tasks" for the NCAA: "protecting the amateur standing of its members' athletes and obtaining for members the most lucrative licensing deals." *Id.* ¶139. CLC's protecting "amateur standing" involves implementing and enforcing releases, which invariably leads to "members" enjoying unabated royalty streams.

The Court's opinion in *SRAM*, where it denied a motion to dismiss similar to CLC's, confirms the sufficiency of the Complaint's allegations. In that case, the complaint alleged a

"highly concentrated" market with high barriers to entry; a product that was "particularly susceptible" to price fixing; a handful of entities that held "between seventy-nine and eighty-four percent of the market share;" and cited emails evidencing an agreement. 580 F.Supp.2d at 898.

Here, market concentration and barriers to entry are even higher due to the nature of the NCAA, its regulations, and NCAA's selective licensing practices, which results in CLC controlling 75% market share. This significantly increases the vulnerability of the market to price fixing. Also, the NCAA is a "bottom-up" organization comprised of representatives from member schools and conferences. Compl. ¶¶ 55, 56. The organization enacted regulations that mandated releases and sanctions for noncompliance; it relied on CLC as a key manager of amateurism regulations; and primarily exploited these rights through CLC. These alleged facts and others--such as the specific examples of deals involving uses of student-athletes' names, images and likenesses--when construed in a light most favorable to Plaintiff support an inference of a conspiracy more convincingly than the allegations and cited emails in *SRAM*, and leave no question as to "who, did what, to whom (or with whom), where and when." *See Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2007) ("*Kendall*") (affirming dismissal of antitrust claims where plaintiff failed to plead any evidentiary facts beyond parallel conduct in support of allegations of a conspiracy). These allegations also place CLC on notice of the claims against it, pursuant to the Rule 8 pleading standards described above.

CLC's reliance on *Hackman v. Dickerson Realtors, Inc.*, 520 F.Supp. 2d 954, 965 (N.D. Ill. 2007) ("*Hackman*") and *AD/SAT v. Associated Press*, 181 F.3d 216, 241-43 (2d Cir. 1999) ("*AD/SAT*") (CLC Memo, p. 7) is misplaced. *Hackman* stands for the simple proposition that "[e]ncouragement absent an agreement is not enough." *Id.*. But, as explained above, the Complaint's allegations show an agreement to conspire. In *AD/SAT*, the court rejected plaintiff's summary judgment argument that the chairman of the Newspaper Association of America ("NAA") encouraged the AP to "enter the delivery market" to destroy competition, in light of strong evidence that showed that the NAA would have "no rational motive" to destroy competition and that the encouragement was "consistent" with the "primary interest" of the

chairman to make "newspapers a more attractive medium for advertisers." *Id.* The court further ruled that the evidence did not exclude the possibility that the chairman was an "independent" actor. In stark contrast, CLC contracts and licenses based on and effectively manages and enforces the "perpetual" releases and cannot be considered an "independent" actor in deals involving the use of student-athletes' names, likenesses and images. Nor are there any countervailing considerations that weigh against the CLC's interests in the success of the conspiracy alleged in the Complaint as was the case in *AD/SAT*.

CLC argues that allegations concerning CLC's role in the conspiracy are "overbroad," "vague," and "contradict[ory]" and should not be considered. CLC Memo, p. 8. But a review of the allegations, as summarized above, show ample detail and specificity. These allegations and are certainly not vague, overbroad or conclusory, and plausibly support the others in the Complaint. *See Kendall*, 518 F.3d at 1047 ("'terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying ...a basis for inferring a tacit agreement"). Furthermore, the mere fact that the Complaint contains allegations describing other entities' involvement in NCAA licensing certainly does not somehow nullify the allegations concerning CLC as contradictory as CLC insinuates, especially given the allegation that CLC holds a majority -- but not all -- of the market share.

CLC cites a series of cases in support of its contention that the Complaint's allegation that CLC's service as the NCAA's "licensing arm" is insufficient to demonstrate a connection to "improper licensing transactions or to the alleged conspiracy." CLC Memo, p. 8. However, the cases cited are inapposite.[3] *Ivey v. Bd of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) involved a pleading that was completely "devoid of specific factual allegations" and, thus, is distinguishable for the reasons explained previously. *Thomas v. Mundell*, 572 F.3d 756, 763-64 (9th Cir. 2009)

[3] *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("*Steckman*"), which is cited on page 12 of CLC's brief, did not involve an antitrust claim and merely recites the general rule that "conclusory allegations which are contradicted by documents referred to in the complaint" should not be taken as true. Because there has been no such contradiction here, this rule is inapplicable.

concerned the issue of constitutional standing of with respect to claims under the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964; and, 42 U.S.C. § 1981 and did not involve an antitrust claim. Furthermore, the plaintiff/mayor in that case merely alleged that he "represents the people" and that he and his officers "were compelled to participate" in the DUI courts, which was too vague to confer standing to challenge post-sentencing probation programs used by such courts. Here, the Complaint contains fact-based allegations that show CLC's involvement in a rampant conspiracy to suppress the price paid for student-athlete releases; deprive current and former student-athletes proper revenues relating to commercial uses of their names, likenesses and images; and influence the ultimate price at which such commercial uses are licensed in the multi-billion dollar collegiate athletics market.

CLC also argues at length that it only licenses the trademarks of NCAA member schools. CLC Memo, pp. 9-10. But CLC does not dispute that it brokers deals involving the use of student-athletes' names, images or likenesses--the rights to which have been improperly obtained by the NCAA and are enforced by CLC.

CLC further argues that CLC's recent brokering of deals involving former student-athletes somehow negates any inference that CLC joined the conspiracy. CLC Memo, pp. 3, 10, 12. Far from negating such an inference, such arguments confirm that CLC only recently allowed such deals, and beforehand successfully prevented them. They also show CLC's proclivity not to consider student-athletes' rights to royalties when brokering deals.

CLC's argument that dismissal is proper because "no allegations exist to suggest the party further down the distribution chain handled the product supposedly tainted by the alleged conspiracy" makes no sense. CLC Memo, p. 11. This case concerns student-athlete releases and related licenses brokered by CLC and others regarding commercial uses of student-athletes' names, likenesses and images.[4] Moreover, the Complaint need not even plead CLC's

[4] CLC cites three additional cases, but each is inapplicable for reasons previously stated. For instance, the appellants in *Kendall* pled "only ultimate facts, such as conspiracy, and legal conclusions" and failed to plead any evidentiary facts, even after being permitted to take limited discovery. 518 F.3d at 1048. *Temple v. Circuit City Stores, Inc.*, Nos. 06 CV 5303, 06 CV 5304,

involvement in every detail in the execution of the conspiracy, "for each conspirator may be performing different tasks to bring about the desired result." *Beltz Travel Service v. Int'l Air Travel Ass'n*, 620 F.2d 1360, 1367 (9th Cir. 1980). *See* also *SRAM*, 580 F.Supp. 2d at 903-907 (rejecting argument that plaintiffs must allege each defendant's specific role in an antitrust conspiracy); *In re Rubber Chemicals Antitrust Litig.*, 504 F.Supp. 2d 777, 790 (N.D. Cal. 2007) (allegations of defendant's involvement in agreement to implement price increases and other allegations of "general participation" in conspiracy sufficient to state antitrust claim).

D. The Complaint Sufficiently Alleges Unjust Enrichment

CLC raises various arguments challenging plaintiff's unjust enrichment claim, none of which has any merit. First, CLC contends that there is no independent cause of action for unjust enrichment. This is not the law. Numerous courts, including this one, have certified nationwide unjust enrichment causes of action.[5] *See*, e.g., *Rios v. State Farm Fire and Cas. Co.*, 469 F. Supp. 2d 727, 740-42 (S.D. Iowa 2007) (denying motion to dismiss nationwide class allegations on unjust enrichment claims as premature); *Schumacher v. Tyson Fresh Meats, Inc.*, 221 F.R.D. 605, 612 (D.S.D. 2004) (certifying nationwide class of unjust enrichment claimants); *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 240 (C.D. Cal. 2003) (same); *In re Abbott Labs. Norvir Antitrust Litig.*, No. C 04-1511 CW, 2007 WL 1689899 at *9 (N.D. Cal. June 11, 2007) (certifying nationwide unjust enrichment claim, with the exception of Ohio and Indiana, because "variations among some States' unjust enrichment laws do not significantly alter the

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2007 WL 2790154 at *7 (E.D.N.Y. Sept. 25, 2007) involved a complaint that "mention[ed] no facts to support the claim that such an agreement or conspiracy existed." *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986) is another summary judgment case where, after discovery, plaintiff merely alleged that a contractual agreement should, in and of itself, be sufficient to show a conspiracy for the purposes of summary judgment.

[5] Relying on *SRAM*, CLC also argues that the unjust enrichment claim must be dismissed if the Complaint does not separately identify each state's common law under which plaintiff seeks relief. However, one court, after surveying various states' unjust enrichment laws, found "few real differences" among them. *See Powers v. Lycoming Engines*, 245 F.R.D. 226, 231 (E.D. Pa. 2007). *Accord In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 518 (E.D. Mich. 2003) (characterizing the standards of unjust enrichment around the country as "virtually identical"). If the Court deems it necessary to identify each state's unjust enrichment law, plaintiff requests that he be permitted leave to do so.

central issue or the manner of proof").

Equally without merit is CLC's claim that the Complaint fails to allege that Plaintiff conferred a benefit on CLC, that CLC was unjustly enriched at plaintiff's expense, or that there is any basis for restitution. In addition to describing in great detail defendants' conspiracy to unlawfully prevent class members from receiving compensation owed to them in connection with the commercial exploitation of their images (*see* Compl. ¶¶ 2-15, 58-78, 81-90, 173-78), the Complaint also alleges that CLC unlawfully obtained licensing revenues that rightfully belong to plaintiff and the putative class members. *Id.*. ¶¶ 2, 13-15, 96-99, 181-89, 195-99. Thus, the Complaint sufficiently pleads a claim for unjust enrichment against CLC, as well as a basis for the imposition of a constructive trust.[6] *See Asher v. Reliance Ins. Co.*, 308 F. Supp. 847, 852 (N.D. Cal. 1970) (constructive trust imposed by law to prevent party from benefitting by that which he has wrongfully obtained or detained); *In re Pennsylvania Baycol Third-Party Payor Litig.*, No. 1874, 2005 WL 852135 at *6 (Pa. Com. Pl. Apr. 4, 2005) ("[a]ll state laws commonly find unjust enrichment when a defendant wrongfully retains the money received...under circumstances in which retention is inequitable"). The Complaint more than adequately meets these requirements.

CLC cites Judge Patel's decision in *Faigman v. Cingular Wireless, LLC*, No. C 06-04622, 2007 WL 708554 (N.D. Cal. Mar. 2, 2007) ("*Faigman*") in support of its claim that the unjust enrichment claim is derivative of plaintiff's antitrust claims and should be dismissed. CLC's reliance on *Faigman* is misplaced since Judge Patel expressly recognized that courts have "allowed causes of action plead as 'unjust enrichment' to proceed as restitution claims." *Id.* at *6. Moreover, in *Faigman*, Judge Patel found it significant that plaintiffs did not respond to defendant's argument that they failed to plead a claim for unjust enrichment separate and apart from their substantive claims. *Id.*. Here, by contrast, plaintiff has pled a distinct claim for unjust enrichment, which differs from the elements required to establish the alleged Sherman Act

[6] CLC's reliance on *Sheakalee v. Fortis Ben. Ins. Co.*, No. 08-CV-00416, 2008 WL 4224575 (E.D. Cal. Sept. 15, 2008), is inapt since Plaintiff has not pled a "constructive trust" cause of action.

violations.

E. The Complaint Sufficiently Alleges An Accounting Claim

An accounting claim is "equitable in nature and appropriate when 'the accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable'...Normally, an accounting is appropriate where plaintiff seeks recovery in an amount that is unliquidated and unascertained, and that cannot be determined without an accounting." *Aguero v. Mortgageit, Inc.*, 09-CV-0640, 2009 WL 2486311 at *7 (E.D. Cal. Aug. 12, 2009) ("*Aguero*"). Here, the Complaint alleges that the NCAA, facilitated by its licensing arm, CLC, entered into a "web of licensing agreements with for-profit entities" through which they unlawfully obtain licensing revenues that rightfully belongs to plaintiffs and the putative class members. *See* Compl. ¶¶ 92-103. These licensing revenues, which defendants continue to wrongfully retain, were derived from a myriad of revenue streams, including: (1) media rights for televised games: (2) DVD and On-Demand sales and DVD rentals; (3) "stock footage" for video clip sales; (4) photographs; (5) action figures; (6) video games; (7) rebroadcasts; (8) jerseys and other apparel. *Id.* ¶¶ 104-65. Unlike the plaintiff in *Aguero* who merely demanded a payoff balance on his mortgage, determining the amount of defendants' ill-gotten gains in this case would be complicated and not subject to an easily identifiable, fixed sum. Accordingly, an accounting is warranted.[7]

CLC's argument that plaintiff's equitable claims fail because there is an adequate remedy at law ignores the well-settled rule that parties are allowed to plead alternative theories of recovery. *See* Fed. R. Civ. P. 8. Accordingly, numerous courts have rejected CLC's argument, and this Court should do so as well. *See*, e.g., *In re G-Fees Antitrust Litig.*, 584 F.Supp. 2d 26, 46 (D.D.C. 2008) (denying defendants' motion to dismiss because "[i]t is not generally a ground for dismissal of a complaint asserting equitable claims that the plaintiff has an adequate remedy at law") (quoting 1 Moore's Fed. Practice & Procedure § 2.03[2] (Matthew Bender 3d ed.)); *In re K-*

[7] CLC relies on *Kritzer v. Lancaster*, 96 Cal. App. 2d 1 (1950) ("*Kritzer*") to suggest that there must be some relationship between the parties that necessitates an accounting. However, *Kritzer* merely notes that "an action for an accounting is a matter of equity jurisdiction" and that such cases "frequently" involve relations among fiduciaries. *Id.* at 6.

Dur Antitrust Litig., 338 F.Supp. 2d 517, 544 (D.N.J. 2004) (denying motion to dismiss unjust enrichment claim since plaintiffs are "clearly permitted to plead alternative theories of recovery").

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff requests that the Court deny CLC's motion to dismiss.

Dated: October 27, 2009

Respectfully submitted,

By: /s/

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CERTIFICATE OF SERVICE

I, Michael P. Lehmann, declare that I am over the age of eighteen (18) and not a party to the entitled action. I am a partner in the law firm of HAUSFELD LLP, and my office is located at 44 Montgomery Street, Suite 3400, San Francisco, California 94104.

On October 27, 2009, I filed the following:

PLAINTIFF'S OPPOSITION TO COLLEGIATE LICENSING COMPANY'S MOTION TO DISMISS THE COMPLAINT

with the Clerk of the Court using the Official Court Electronic Document Filing System which served copies on all interested parties registered for electronic filing. The following parties not registered for electronic filing will be served on October 27, 2009, via U.S. Mail:

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I also certify that I caused a true and correct Chambers Copy of the foregoing document to be hand-delivered to the following Judge pursuant to Civil L.R. 3-12(b) by noon of the following day:

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

/s/ Michael P. Lehmann
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