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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

EDWARD C. O'BANNON, JR., on behalf of  
himself and all others similarly situated,

Plaintiff,

v.

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION and COLLEGIATE  
LICENSING COMPANY,

Defendants.

Case No. 4:09-cv-03329-CW

**NOTICE OF MOTION AND MOTION TO  
DISMISS COMPLAINT PURSUANT TO  
FED. R. CIV. P. 12(b)(1), 12(b)(6);  
STATEMENT OF RELIEF SOUGHT AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Date: November 17, 2009

Time: 2:00 P.M.

Dept: Courtroom 2, 4th Floor

Judge: Hon. Claudia Wilken

Date Compl. Filed: July 21, 2009

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Edward O'Bannon ("O'Bannon") claims that he is the victim of a vast antitrust  
3 conspiracy aimed at preventing him from selling images of himself playing basketball for UCLA.  
4 O'Bannon alleges – insufficiently – that the NCAA has "conspired" with its member institutions  
5 to "coerce" student-athletes into signing a form in which they give the NCAA permission to use  
6 their image to promote its championships and activities. He also alleges – again, insufficiently –  
7 that he has not received what he regards as his proper share of the money that the NCAA, schools  
8 and third parties make from licensing NCAA and school intellectual property.

9  
10 O'Bannon has not even tried to allege facts demonstrating that the NCAA forms he doesn't  
11 like have had *any* effect on his ability to make money by selling images of himself as a UCLA  
12 basketball player. On the contrary: O'Bannon has affirmatively alleged facts demonstrating that  
13 the vague and insubstantial "conspiracy" he has alleged does not, indeed cannot, restrain him  
14 from selling such images. O'Bannon's apparent failure to profit from his own likeness has  
15 nothing to do with the NCAA, and his unhappiness over the fact that others are allegedly doing so  
16 has nothing to do with the antitrust laws. The NCAA's motion should be granted.

17  
18 **O'BANNON'S COMPLAINT**

19 O'Bannon's prolix complaint is long on rhetoric and fatally short on alleged facts  
20 sufficient to support his claims against the NCAA. As a result, it is less than clear what, exactly,  
21 O'Bannon regards as the "conspiracy" that supposedly gives rise to his Sherman Act Section 1  
22 claims. In some allegations, O'Bannon seems to claim that the "conspiracy" he challenges is  
23 between the NCAA and its members to require "all student-athletes to sign a form each year –  
24 currently known as 'Form 08-3a' – that purports to require each of them to relinquish all rights in  
25 perpetuity to the commercial use of their images, including after they graduate and are no longer  
26  
27

1 subject to NCAA regulations." Compl. ¶9. This allegation – frequently adorned with utterly  
2 conclusory (and insufficient) antitrust buzz words like "cartel," "group boycott" and "illegal  
3 conspiracy" – is repeated several times throughout the complaint. *See, for example, id.* at ¶13.  
4 O'Bannon also alleges that the "NCAA further requires student-athletes to sign at least one other  
5 similarly illegal consent form pursuant to Article 12.5.1.1 of its Bylaws" that allegedly "allows  
6 schools and conferences to commercially exploit former student-athletes by effecting another  
7 purported perpetual release of rights." *Id.* at ¶10. O'Bannon then speculates that the NCAA and  
8 others use these forms as the basis for their "collegiate licensing." *Id.* at ¶¶11-13.

10 In other allegations, however, O'Bannon claims that those forms "do not in any way grant  
11 licenses in perpetuity," and later alleges that "no reasonable person" would read the forms to do  
12 so. *Id.* at ¶¶12, 69. In these portions of the complaint, O'Bannon seems to claim that the  
13 conspiracy is between the NCAA, its members and perhaps third parties to willfully  
14 "misinterpret" the forms to somehow freeze former student-athletes out of the "market." *Id.* at  
15 ¶12. O'Bannon alleges no facts to support this implausible claim.

### 17 LEGAL STANDARD

18 A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint.  
19 A Rule 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or  
20 "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica*  
21 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

23 While the court must accept all factual allegations pleaded in the complaint as true, it need  
24 not accept as true unreasonable inferences or conclusory legal allegations cast in the form of  
25 factual allegations. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544; 127 S. Ct. 1955, 1965  
26 (2007). This is particularly true in the context of antitrust claims, because "the costs of modern  
27

1 federal antitrust litigation and the increasing caseload of the federal courts counsels against  
2 sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can  
3 construct a claim from the events related in the complaint." *Id.* at 1967 (quoting *Car Carriers,*  
4 *Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (alteration deleted)); *see also*  
5 *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905 (9th Cir. 2008) (noting the potential  
6 burden of antitrust trials, and "declin[ing] to adopt a rule that might encourage more antitrust  
7 litigation than is reasonably necessary to ferret out anticompetitive practices").

### 9 ARGUMENT

10 To prevail on his Section 1 claims, O'Bannon must prove three elements: (1) an agreement  
11 or conspiracy intended to restrain trade; (2) which actually restrains trade; and (3) which causes  
12 an injury to competition. *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507  
13 (9th Cir. 1989). Further, the plaintiff must establish both the relevant market and market power.  
14 *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008). O'Bannon has  
15 not adequately alleged any of these elements.

#### 17 **I. O'BANNON HAS FAILED TO ALLEGE A PERSONAL CLAIM AGAINST THE** 18 **NCAA**

19 Despite its prolixity, the complaint's allegations about Mr. O'Bannon are remarkably  
20 spare. The complaint alleges that he played basketball at UCLA from 1991 through 1995,  
21 Compl. ¶25; that he has supposedly "been deprived of compensation by Defendants and their co-  
22 conspirators for the continued use of his image following the end of his intercollegiate career," *id.*;  
23 and that it is possible to purchase video, pictures or video games of UCLA games in which he  
24 participated as a player, *id.* at ¶¶26-33. The complaint says nothing further about O'Bannon.

1 O'Bannon has not even attempted to explain how he, personally, was "injured" by the  
2 NCAA's "conspiracy" to force student-athletes to sign Form 08-3a or documents like it, or its  
3 "conspiracy" to "misinterpret" those forms. The complaint:

- 4 • Does *not* allege that O'Bannon signed Form 08-3a, any other document identified  
5 in the complaint, or any documents like them;
- 6 • Does *not* allege that O'Bannon has ever attempted to sell or license any kind of  
7 image or likeness of himself playing basketball for UCLA;
- 8 • Does *not* allege that NCAA, acting alone or in combination with others, has ever  
9 prevented O'Bannon from selling or licensing an image of himself playing  
10 basketball for UCLA; and
- 11 • Does *not* allege that the NCAA, UCLA or anyone else has ever denied him  
12 compensation for his collegiate image because he has signed a "perpetual release,"  
or that O'Bannon *personally* has been injured in any way by the NCAA's alleged  
"wrongdoing."

13 The complaint, in other words, contains literally no allegations that even attempt to connect the  
14 "wrongdoing" identified in the complaint to anything that Mr. O'Bannon has done or not done, or  
15 to any "injury" that Mr. O'Bannon has supposedly suffered.

16 Each of these failures is fatal, as we explain below.

17 **A. O'Bannon has failed to adequately allege that defendants are restraining him**  
18 **from selling his images**

19 First, O'Bannon's complaint suffers from a startlingly basic – but nonetheless fatal – flaw:  
20 O'Bannon has not alleged that he, personally, ever signed *any* of the forms that he now claims the  
21 NCAA and its "co-conspirators" have used as "perpetual waivers" for the purpose of "boycotting"  
22 O'Bannon in his supposed attempts to sell his UCLA image. *Cf.* Compl. ¶¶9, 10.

23 These should have been easy facts for O'Bannon to allege (even though he graduated from  
24 UCLA more than a decade ago), if they were in fact true. His failure to do so is telling and is  
25 reason enough to dismiss the complaint. *Dry v. Methodist Medical Center of Oak Ridge, Inc.*,

1 No. 89-5470, 893 F.2d 1334, at \*3 (6th Cir. Jan. 19, 1990) (finding that the omission of an  
2 essential fact in a complaint "strongly implies its nonexistence"). In a case which begins and ends  
3 with the notion that the NCAA has "restrained trade" by supposedly forcing Mr. O'Bannon to sign  
4 a "perpetual release" under "duress," and then using that "perpetual release" to freeze him out of  
5 the "collegiate licensing" market, it was incumbent on Mr. O'Bannon to allege that he had, in fact,  
6 signed the alleged "perpetual release." O'Bannon is not entitled to have the NCAA, or this Court,  
7 simply pretend that he has made the key allegation on which his entire case rests.<sup>1</sup> *Twombly*, 127  
8 S. Ct. at 1965 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief'  
9 requires more than labels and conclusions . . . Factual allegations must be enough to raise a right  
10 to relief above the speculative level"); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir.  
11 2008); *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

12  
13  
14 Nor has O'Bannon alleged any facts to support his claim that the NCAA has actually  
15 prevented him from selling his images playing basketball for UCLA, through improper use of the  
16 "perpetual release" or any other means – another missing set of facts easy to allege if true. In a  
17 case in which he alleges that the NCAA has "restrained" or "excluded" him from selling his  
18 image as a UCLA basketball player, it was incumbent on O'Bannon to allege (1) that he has  
19 actually attempted to sell such images and (2) that the NCAA has prevented him from doing so.  
20 His failure to do so necessitates that his complaint be dismissed. *Twombly*, 127 S. Ct. at 1965;  
21 *Kendall*, 518 F.3d at 1047; *Dry*, 893 F.2d 1334 at \*3.

22  
23  
24  
25 <sup>1</sup> The fact that O'Bannon has brought this case as a putative class action in no way relieves  
26 him of his obligation to plead facts sufficient to support his own claims. *Parrish v. National*  
27 *Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1094 (N.D. Cal. 2007); *Mathison v.*  
*Bumbo*, No. SA CV08-0369, 2008 U.S. Dist. LEXIS 108511, at \*6-7 (C.D. Cal. 2008); *Situ v.*  
*Leavitt*, No. C06-2841, 2006 WL 1530129, at \*1 (N.D. Cal. June 2, 2006).



1 *Amazon.com Inc.*, 526 F.3d 1253 (9th Cir. 2008) is directly on point. The plaintiff in *Gerlinger*  
2 was a customer of Amazon.com who claimed that Amazon and Borders Books had entered into a  
3 *per se* illegal price fixing and market allocation agreement when they agreed that Amazon would  
4 take over operation of the Borders website. 526 F.3d at 1255. The Ninth Circuit held that  
5 Gerlinger had failed to establish Article III standing for his antitrust claims because he had failed  
6 to "show or even allege that *he himself* experienced any reduced selection of titles, poorer service  
7 or any other potentially conceivable form of injury, or "that he paid higher prices after the  
8 agreement than he would have paid otherwise." *Id.* at 1256 (emphasis added).

10 O'Bannon's claims fail for the same reason. As noted above, he has failed to allege that he  
11 himself has been prevented from selling his collegiate images, or received reduced prices for  
12 those images, or suffered "any other potentially conceivable form of injury," *id.*, as a result of the  
13 NCAA's alleged wrongdoing. He therefore does not have standing to pursue an antitrust action  
14 based on that alleged wrongdoing.<sup>2</sup> The complaint should be dismissed.

16 2. O'Bannon has failed to allege antitrust standing

17 O'Bannon's failure to allege facts demonstrating that the NCAA's alleged "restraint" has  
18 had any effect on his ability to sell his image as a UCLA basketball player also means that he has  
19 failed to allege antitrust injury or antitrust standing. In order to establish antitrust standing,  
20 O'Bannon must adequately allege and prove antitrust injury. *Glen Holly Entertainment, Inc. v.*  
21 *Tektronix Inc.*, 352 F.3d 367, 371 (9th Cir. 2003); *Cyntegra, Inc. v. Idexx Laboratories*, 322 Fed.  
22 Appx. 569, 572 (9th Cir. 2009). Antitrust injury is made up of four elements: "(1) unlawful  
23 conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct  
24

25 <sup>2</sup> Again, O'Bannon's obligation to show that he personally has standing to pursue these  
26 claims is not lessened by the fact that he purports to represent a class. *See, e.g., Warth v. Seldin*,  
27 422 U.S. 490, 508 (1975) ("the plaintiff still must allege a distinct and palpable injury to himself,  
even if it is an injury shared by a large class of other possible litigants").

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

3 Antitrust injury "is defined not merely as injury caused by an antitrust violation, but more  
4 restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from  
5 that which makes defendants' acts unlawful.'" *Id.* at 371, quoting *Brunswick Corp. v. Pueblo*  
6 *Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). As the Ninth Circuit has explained:

8 To show antitrust injury, a plaintiff must prove that his loss flows from an  
9 anticompetitive aspect or effect of the defendant's behavior, since it is inimical to  
10 the antitrust laws to award damages for losses stemming from acts that do not hurt  
11 competition. If the injury flows from aspects of the defendant's conduct that are  
beneficial or neutral to competition, there is no antitrust injury, even if the  
defendant's conduct is illegal *per se*.

12 *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995). Accordingly, "the antitrust laws are  
13 only concerned with acts that harm 'allocative efficiency *and* raise the price of goods above their  
14 competitive level . . .'" *Pool Water Products v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001)  
15 (quoting *Rebel Oil*, 51 F.3d at 1433) (emphasis in original).

16 Additionally, "the injured party must be a participant in the same market as the alleged  
17 malefactors." *Id.*; see also *American Ad Management, Inc. v. General Telephone Co. of*  
18 *California*, 190 F.3d 1051, 1057-58 (9th Cir. 1999). In other words, the party alleging the injury  
19 must be either a consumer of the alleged violator's goods or services or a competitor of the  
20 alleged violator in the restrained market." *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538 (9th Cir.  
21 1987).

22  
23 O'Bannon's claims flunk the antitrust injury test in several ways.

24 **O'Bannon has not alleged that he is an actual or potential competitor in the**  
25 **"market."** First, O'Bannon has failed to allege facts showing that he was an actual competitor,  
26 or ready to be a competitor, in the alleged relevant market. "Only an actual competitor or one  
27

1 ready to be a competitor can suffer antitrust injury." *Bourns, Inc. v. Raychem Corp.*, 331 F.3d  
2 704, 711 (9th Cir. 2003). A prospective participant in a market has standing only if he alleges  
3 facts to show "a genuine intent to enter the market and a preparedness to do so." *Bubar v. Ampco*  
4 *Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985).

5  
6 O'Bannon has alleged no facts to show that he is an actual competitor in the "collegiate  
7 licensing market," or that he has "a genuine intent to enter the market and a preparedness to do  
8 so." He has alleged no facts demonstrating that he has ever attempted to sell or license his image  
9 as a UCLA basketball player, or that he has any plans or ability to do so in the future. As this  
10 Court has recently held, this failure is fatal to his claims. In *Parrish v. National Football League*  
11 *Players Association*, 534 F. Supp. 2d 1081 (N.D. Cal. 2007), this Court dismissed a claim brought  
12 by former NFL players alleging that the NFL Players Association had illegally licensed their  
13 names, images and likenesses. One reason for the dismissal was the players' failure to allege that  
14 they had taken any steps to license their own image or that they competed in the licensing  
15 "market" in any way. *Id.* at 1091. O'Bannon's claim fails for the same reason.

17 **O'Bannon has not alleged that the NCAA's "wrongful" conduct injured him.** As  
18 noted above, O'Bannon has also failed to allege that he has actually been "restrained" in his  
19 attempts to sell his own image as a UCLA basketball player, or indeed that he even owns such  
20 images. *See* Section I.A., above. He has thus failed to allege that he has actually been injured by  
21 the NCAA's alleged "restraint." For this reason as well, he has failed to allege antitrust injury.

22  
23 **O'Bannon has not alleged an injury that the antitrust laws were designed to prevent.**  
24 Finally, O'Bannon has failed to allege that his alleged injury – whatever that is – flows from an  
25 allegedly anticompetitive act by the NCAA, i.e., an act that harms "allocative efficiency *and*  
26 raise[s] the price of goods above their competitive level." The complaint contains no allegation  
27

1 of fact demonstrating that the alleged "restraint" has caused the output of products in the  
2 "collegiate licensing market" to go down, or has raised the prices of those "products." While the  
3 complaint contains the bare allegation that the supposed restraint "has artificially limited supply  
4 and depressed prices" for use of former student-athletes' collegiate images, Compl. ¶182, the  
5 Ninth Circuit has long held that such boilerplate allegations are insufficient. To allege antitrust  
6 injury, O'Bannon "may not merely recite the bare legal conclusion that competition has been  
7 restrained unreasonably." *Les Shockley*, 884 F.2d at 508. "[A]t a minimum," he must "sketch the  
8 outline of the antitrust violation with allegations of supporting factual detail." *Id.*; *see also*  
9 *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) ("The pleader may  
10 not evade [antitrust] requirements by merely alleging a bare legal conclusion; if the facts do not at  
11 least outline or adumbrate a violation of the Sherman Act, the plaintiffs `will get nowhere merely  
12 by dressing them up in the language of antitrust.").

15 Indeed, O'Bannon's real complaint does not appear to be that the NCAA has restrained  
16 competition in the "collegiate licensing market;" but rather that the NCAA has allegedly *engaged*  
17 in such competition and has failed to pay O'Bannon the sums he believes he is due from the  
18 NCAA's efforts. *See* Compl. ¶183 ("Plaintiff and the members of the Class received less than  
19 they otherwise would have received for the use of their images in a competitive marketplace,  
20 were thus damaged, and seek to recover for those damages"). That is simply not antitrust injury.  
21 *JES Properties, Inc. v. USA Equestrian, Inc.*, No. 802CV1585T24MAP, 2005 WL 1126665, at  
22 \*11 (M.D. Fla. May 9, 2005) (not being able to share in alleged monopoly profits is not antitrust  
23 injury); *Daniel v. American Bd. of Emergency Medicine*, 269 F. Supp. 2d 159, 183-84 (W.D.N.Y.  
24 2003) (plaintiff's inability to charge allegedly artificially inflated prices not antitrust injury);  
25 *Indiana Telecom Corp. Inc. v. Indiana Bell Telephone Co., Inc.*, No. IP97-1532-C-H/G, 2001 WL  
26  
27

1 1168169, at \*13 (S.D. Ind. Sept. 25, 2001) ("Loss of business to a competitor is not, without  
2 more, an antitrust injury.").

3 O'Bannon has, in sum, utterly failed to allege facts sufficient to support his claim that he  
4 has suffered any injury at all, let alone antitrust injury. That failure is reason enough to dismiss  
5 the complaint.  
6

7 **II. O'BANNON HAS FAILED TO ALLEGE THAT THE NCAA HAS "CONSPIRED"**  
8 **TO "RESTRAIN TRADE"**

9 Nor has O'Bannon alleged facts sufficient to support his claim that the NCAA has been  
10 conspiring with its member schools or conferences to "restrain" trade in a "collegiate licensing  
11 market."

12 **A. O'Bannon has failed to allege that the NCAA is "restraining" trade, even if**  
13 **the factual deficiencies of his complaint are ignored**

14 First, O'Bannon has utterly failed to allege facts demonstrating that the NCAA has  
15 actually restrained trade in any market. Although the complaint is replete with conclusory  
16 allegations that the NCAA and its "co-conspirators" have artificially "fixed" the price of former  
17 student-athlete image rights at zero, or have "boycotted" former student-athletes who wanted to  
18 sell images of themselves playing college ball, the complaint contains no factual allegations to  
19 back those claims up. There is not a single alleged instance of the NCAA preventing O'Bannon,  
20 or anyone else, from selling his collegiate image after graduation. Nor is there a single alleged  
21 instance of O'Bannon, or anyone else, being told that the price for his collegiate image is zero,  
22 because the NCAA had secured a "perpetual release" for those images.  
23

24 On the contrary: O'Bannon *admits* that former student-athletes are not restrained from  
25 making individual deals for the sale of their collegiate images. In Paragraph 133 of the  
26 complaint, O'Bannon alleges that former NCAA football players have struck deals with  
27

1 McFarlane Toys to produce "action figures" in which they are shown playing in their collegiate  
2 uniforms. O'Bannon admits that the former student-athletes *will receive a royalty* from  
3 McFarlane Toys – as will the schools in question, for use of their uniforms. *Id.* There is no  
4 mention of the NCAA receiving any money, nor is there any mention of the NCAA using its  
5 alleged "perpetual release" to prevent the former student-athletes from receiving payment for the  
6 use of their images. *Id.*

8 O'Bannon makes a similar admission in Paragraph 143, where he admits that former  
9 NCAA football players have entered into licensing deals with Electronic Arts to use their  
10 collegiate likenesses in advertisements for EA's video games. Again, there is no mention of the  
11 NCAA receiving any money, nor is there any mention of the NCAA using its alleged "perpetual  
12 release" to prevent those former student-athletes from receiving payment for the use of their  
13 images. *Id.*

15 The complaint cannot survive these admissions that former student-athletes are free to  
16 enter into licensing agreements for their collegiate images, especially when those admissions are  
17 coupled with O'Bannon's utter failure to allege facts to support his conclusory claim that the  
18 NCAA somehow uses its forms as a "perpetual release" to block such payments (or divert them to  
19 itself). O'Bannon cannot sue the NCAA for restraining trade without first alleging facts  
20 demonstrating that the NCAA has actually done so. *Rutman Wine*, 829 F.2d at 736 ("if the facts  
21 do not at least outline or adumbrate a violation of the Sherman Act, the plaintiffs `will get  
22 nowhere merely by dressing them up in the language of antitrust.").

24 **B. O'Bannon's "Form 08-3a" allegations are insufficient to state a Section 1**  
25 **claim**

26 Moreover, none of O'Bannon's "conspiracy" allegations are sufficient to support his  
27 Section 1 claim even when taken on their own terms. While O'Bannon focuses most of his

1 attention on what he calls NCAA Form 08-3a, that language provides no support for O'Bannon's  
2 "perpetual license" theory:

3           You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g.,  
4           host institution, conference, local organizing committee)] to use your name or  
5           picture to generally promote NCAA championships or other NCAA events,  
6           activities, or programs.

7 Compl. ¶65. Form 08-3a thus provides only that the NCAA, or someone acting on its behalf, can  
8 use a student-athlete's "name or picture" to promote NCAA events, activities or programs. It does  
9 not purport to grant *anyone* other than the NCAA any rights, nor does it grant permission for any  
10 use other than the promotion of *NCAA events*. It says nothing about granting UCLA, or any  
11 other NCAA member school, the right to use student-athlete images, before or after graduation.  
12 It says nothing about the use of student-athlete images in video games. And perhaps most  
13 importantly, it says absolutely nothing about the right of a former student-athlete to sell his own  
14 collegiate image after graduation. O'Bannon has not even tried to allege that it somehow grants  
15 the NCAA an exclusive license to his or anyone else's image. He alleges, instead, the opposite.

16           These shortcomings in O'Bannon's "Form 08-3a" theory are compounded by the fact that  
17 the vast majority of the "revenue streams" that the complaint identifies, *see* Compl. ¶104, have no  
18 arguable relation to the authorization found in Form 08-3a. For the companies and products listed  
19 in the complaint, O'Bannon has failed to allege (1) that the NCAA is making sales of these  
20 products, (2) that sales are made pursuant to a "perpetual release," or (3) that the companies listed  
21 are making sales as part of a conspiracy with the NCAA to misinterpret Form 08-3a or any other  
22 release. *See id.* at ¶114 (CBS and DVDs of NCAA championship broadcasts); ¶¶135-148  
23 (Electronic Arts and video games); ¶132 (Replay Photo and photographs); ¶¶149-155 (ESPN, the  
24 Big Ten Network and Brigham Young University and "classic" college football and basketball  
25 games); ¶¶157-165 (Wal-Mart and replica jerseys).

1           There is thus a fundamental mismatch between O'Bannon's alleged "restraint" – e.g., the  
2 "unconscionable release" that allows the NCAA (only) to use his name or image when promoting  
3 its championships or "events, activities or programs" (only) – and the licensing activity that  
4 O'Bannon claims results from that "restraint," most of which does not even allegedly involve  
5 actions by the NCAA to promote its championships or events. O'Bannon's bare and conclusory  
6 allegations provide no reasonable basis for inferring that the Form 08-3a "release" is somehow  
7 responsible for O'Bannon's alleged failure to receive the payment he thinks he is owed from the  
8 commercial activities identified in the complaint. *Twombly*, 127 S. Ct. at 1965.

9  
10           O'Bannon attempts to solve this problem by alleging that the NCAA and its member  
11 institutions have all "conspired" to "misinterpret" Form 08-3a to allow such activity. Compl. ¶12.  
12 The problem is that O'Bannon has not alleged a single fact to support his wholly conclusory  
13 allegation that the NCAA is orchestrating a vast conspiracy to "misinterpret" the terms of its own  
14 forms. O'Bannon's fanciful claims cannot survive in the absence of such allegations. *See In re*  
15 *Static Random Access Memory (SRAM) Antitrust Litig.*, 580 F. Supp. 2d 896, 904 (N.D. Cal.  
16 2008) (Wilken, J.); *International Norcent Technology v. Koninklijke Philips Electronics N.V.*, No.  
17 CV 07-00043, 2007 U.S. Dist. LEXIS, at \*38-39 (C.D. Cal. Oct. 29, 2007) ("As with the magic  
18 words "coerce," "combine," and "conspiracy," a mere allegation that parties entered into an  
19 agreement to restrain trade does not suffice to state a § 1 claim"); *Floors-N-More, Inc. v. Freight*  
20 *Liquidators*, 142 F. Supp. 2d 496, 501 (S.D.N.Y. 2001) ("plaintiff must do more than allege the  
21 existence of a conspiracy – it must allege some facts in support of the claim"); *Petrochem*  
22 *Insulation, Inc. v. Northern Cal. & N. Nev. Pipe Trades Council*, No. C-90-3628, 1992 WL  
23 131162, at \*6 (N.D. Cal. Mar. 19, 1992) (dismissing a complaint that "fail[ed] to state with whom  
24  
25  
26  
27

1 the supposed agreement was made; what its terms were; . . . or [to] state what acts any defendant  
2 undertook in furtherance of it").

3 O'Bannon also appears to claim that Form 08-3a is used by the NCAA to prohibit schools  
4 from "compet[ing] against each other by offering higher amounts of post-graduation licensing  
5 revenues to student athletes." Compl. ¶85. Again, however, Form 08-3a does not even arguably  
6 do so. It gives the NCAA permission to use a student-athlete's "name or picture" to promote  
7 NCAA "events, activities or programs." And that is all it does. Form 08-3a, according to the  
8 terms O'Bannon himself has alleged, simply does not address the question whether NCAA  
9 members may, consistent with NCAA rules, "compete[] against each other by offering higher  
10 amounts of post-graduation licensing revenues to student-athletes."<sup>3</sup>

11  
12 **C. O'Bannon's "Bylaw 12.5.1.1" allegation is not sufficient**

13 O'Bannon also alleges that the "NCAA further requires student-athletes to sign at least one  
14 other similarly illegal consent form pursuant to Article 12.5.1.1 of its Bylaws (the "Institutional,  
15 Charitable, Educational or Nonprofits Promotions Release Statement"), that allows schools and  
16 conferences to commercially exploit former student-athletes by effecting another purported  
17 perpetual release of rights." Compl. ¶10.

18 The problem, again, is that the Bylaw in question says no such thing.

19 Bylaw 12.5.1.1 – *as O'Bannon admits* – does not require student-athletes to provide their  
20 schools with a release. Bylaw 12.5.1.1 says only that NCAA schools "may use a student-athlete's  
21 name, picture or appearance to support its charitable or educational activities or to support  
22 activities considered incidental to the student-athlete's participation in intercollegiate athletics" *if*  
23  
24

25  
26 <sup>3</sup> There are NCAA Bylaws that address this topic, but O'Bannon is not challenging them in  
27 this litigation.

1 they obtain a release from the student-athlete "ensuring that the student-athlete's name, image or  
2 appearance is used in a manner consistent with the requirements of this section." Compl. ¶74  
3 (quoting NCAA Division I Bylaw 12.5.1.1(i)). The Bylaw does *not* say that student-athletes must  
4 provide the release upon request, *id.*, nor has O'Bannon identified any Bylaw that requires a  
5 student-athlete to do so or any Bylaw that requires a school to solicit such a release.<sup>4</sup> O'Bannon  
6 cannot turn Bylaw 12.5.1.1 into a NCAA-mandated release simply by labeling it as such.  
7

8 Moreover, Bylaw 12.5.1.1 applies only to student-athletes; it does not even mention  
9 former student-athletes. Compl. ¶74. By his own admission, O'Bannon was not a student-athlete  
10 at any time relevant to his claims. *Id.* at ¶¶1, 2. O'Bannon has not even attempted to explain, or  
11 allege facts to demonstrate, how a NCAA rule that applies only to student-athlete likenesses could  
12 have been used by the NCAA, or anyone else, to "restrain" him from selling his image as a  
13 UCLA basketball player *when he was no longer a student-athlete*. Even if one ignores all of the  
14 other flaws with O'Bannon's conclusory claim that Bylaw 12.5.1.1 results in a "mandated release"  
15 that creates an "unconscionable contract," *id.* at ¶75, O'Bannon's claim founders on the fact that  
16 the "contract," according to the "terms" O'Bannon himself has alleged, did not apply to O'Bannon  
17 during the time period relevant to this case.  
18

19 Finally, O'Bannon has alleged no facts sufficient to demonstrate how the Bylaw 12.5.1.1  
20 "release" is supposedly used by the NCAA, its member institutions, or anyone else to restrain  
21

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22  
23 <sup>4</sup> O'Bannon attempts to address this issue in Paragraph 78 of the complaint, but those  
24 allegations do not come close to fixing the problem. First, that paragraph says nothing about the  
25 NCAA requiring student-athletes to sign the "release" forms, nor does it say anything about  
26 NCAA members agreeing to require such signatures. Without such allegations, O'Bannon's  
27 Section 1 claim goes nowhere. Second, the paragraph discusses only Iowa and Iowa State – not  
28 UCLA, or any other of the more than 300 Division I schools – and is thus simply irrelevant to  
O'Bannon's claim. Finally, the paragraph does not even demonstrate that Iowa and Iowa State  
"require" their student-athletes to sign the supposed "release" forms; rather, it says that Iowa sells  
the likenesses of student athletes only when it has the "signed permission" of the student-athlete.

1 trade in the "collegiate licensing market." Although O'Bannon has made the conclusory  
2 allegation that "the NCAA's members" use the Bylaw 12.5.1.1 "release" to "engage in unlawful  
3 licensing" of former student-athlete images, *id.* at ¶75, and to "exclude both current and former  
4 student-athletes" from the "market," *id.* at ¶81, he provides no facts to support, or even explain,  
5 these claims.<sup>5</sup> His conclusory allegations are entitled to no deference on this motion in the  
6 absence of such alleged facts.<sup>6</sup>

8 **D. O'Bannon has alleged no other facts sufficient to support his conspiracy**  
9 **allegations**

10 Nor are O'Bannon's allegations saved by the conclusory boilerplate that he has sprinkled  
11 throughout the complaint regarding the NCAA's alleged "conspiracy" with its "co-conspirators"  
12 to engage in a "group boycott" or otherwise "restrain" him from selling his image as a UCLA  
13 basketball player. After *Twombly*, such allegations are not even arguably sufficient to support a  
14 Section 1 claim of conspiracy. *Twombly*, 127 S. Ct. at 1965; *Rutman Wine*, 829 F.2d at 736; *In re*  
15 *Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007). A  
16 complaint must answer the basic questions: "who did what, to whom (or with whom), where, and  
17 when." *Kendall*, 518 F.3d at 1047-48 ("A bare allegation of a conspiracy is almost impossible to  
18

19  
20 <sup>5</sup> Moreover, the vast majority of the "revenue streams" that O'Bannon has alleged result  
21 from the NCAA's "restraint" has nothing to do with Bylaw 12.5.1.1 – which merely states that  
22 schools do not violate NCAA rules by using student-athlete likenesses to support the schools'  
23 "charitable or educational activities or to support activities considered incidental to the student-  
24 athlete's participation in intercollegiate athletics." The complaint's allegations do nothing to  
25 connect the NCAA's decision to allow schools to use student-athlete likenesses for charitable or  
26 educational activities, on the one hand, with O'Bannon's claim that he has been "restrained" from  
27 selling his image as a UCLA basketball player in the "markets" identified in the complaint, on the  
28 other. O'Bannon's Bylaw 12.5.1.1 theory is a *non sequitur*.

<sup>6</sup> O'Bannon's "Bylaw 12.5.1.7" theory fails for all of the reasons his Bylaw 12.5.1.1 theory  
fails. The text of the Bylaw does not even arguably support O'Bannon's claim that the NCAA  
uses the Bylaw as part of some conspiracy to "restrain" the "collegiate licensing market" through  
an assertion of "perpetual releases." O'Bannon's wholly conclusory claim to the contrary is not  
sufficient to support his claims.

1 defend against, particularly where the defendants are large institutions with hundreds of  
2 employees").

3 **III. O'BANNON HAS FAILED TO ALLEGE INJURY TO COMPETITION**

4 O'Bannon has also failed to allege facts demonstrating that the NCAA's alleged  
5 wrongdoing has caused an injury to competition as a whole in the alleged "collegiate licensing  
6 market," either by causing the output of products in the "collegiate licensing market" to go down,  
7 or raising the prices of those "products." This, too, is fatal to his claims.  
8

9 The antitrust laws exist to protect competition as whole, not to protect individual  
10 competitors, which O'Bannon cannot even seriously claim to be. *See Gough v. Rossmoor Corp.*,  
11 585 F.2d 381, 386 (9th Cir. 1978) ("the antitrust laws . . . were enacted for 'the protection of  
12 Competition, not Competitors,'" *quoting Brunswick Corp.*, 429 U.S. at 488 (1977)). For this  
13 reason, O'Bannon was required to allege injury to competition as a whole "within a field of  
14 commerce in which [he] is engaged." *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 811 (9th  
15 Cir. 1988); *see also Gough*, 585 F.2d at 386 ("The conduct must have an adverse impact on the  
16 competitive conditions in general as they exist within the field of commerce in which the plaintiff  
17 is engaged").  
18

19 Moreover, O'Bannon "may not merely recite the bare legal conclusion that competition  
20 has been restrained unreasonably." *Les Shockley*, 884 F.2d at 508. "[A]t a minimum," he must  
21 "sketch the outline of the antitrust violation with allegations of supporting factual detail." *Id.*; *see*  
22 *also Rutman Wine*, 829 F.2d at 736.  
23

24 O'Bannon has failed to allege facts showing that the NCAA's alleged wrongdoing has  
25 injured competition as a whole in any relevant market. While the complaint contains the bare  
26 allegation that the supposed restraint "has artificially limited supply and depressed prices" for use  
27

1 of former student-athletes' collegiate images, Compl. ¶182, such "bare legal conclusions" are not  
2 sufficient. *Les Shockley*, 884 F.2d at 508; *Rutman Wine*, 829 F.2d at 736. For this reason as well,  
3 the complaint should be dismissed.

4 **IV. O'BANNON HAS FAILED TO ALLEGE A RELEVANT MARKET**

5 O'Bannon also fails to adequately allege a relevant market. O'Bannon has the burden of  
6 defining the relevant market. *Tanaka v. USC*, 252 F.3d 1059, 1063 (9th Cir. 2001). A complaint  
7 may be dismissed under Rule 12(b)(6) if the complaint's relevant market definition is facially  
8 unsustainable. *Newcal Indus., Inc.*, 513 F.3d at 1045 (citing *Queen City Pizza, Inc. v. Domino's*  
9 *Pizza, Inc.*, 124 F.3d 430, 436-37 (3d. Cir. 1997)). First, the relevant market must be defined by  
10 the products or the producers, not its consumers. *Id.* (citing *Brown Shoe v. United States*, 370  
11 U.S. 294, 325 (1962)). Second, the relevant market must encompass the product at issue as well  
12 as all economic substitutes for the product. *Id.* The outer boundary for substitutes is the  
13 reasonable interchangeability or cross-elasticity of demand. *Id.* (citing *Brown Shoe*, 370 U.S. at  
14 325).

15 If a complaint fails to allege facts regarding substitute products, to distinguish among  
16 apparently comparable products, or to allege other pertinent facts relating to cross-elasticity of  
17 demand, as the complaint here fails to do, a court may grant a Rule 12(b)(6) motion.

18 **A. O'Bannon fails to identify a product**

19 Although O'Bannon never explicitly identifies a relevant market, the NCAA assumes for  
20 the purposes of this motion that O'Bannon intends to argue that the relevant market is all  
21 "products" in a so-called (and ill-defined) "collegiate licensing market." Compl. ¶79. This market  
22 fails because O'Bannon has failed to provide anything more than a legal conclusion that this  
23 market exists. *Twombly*, 550 U.S. at 555; *Electronics For Imaging, Inc. v. Coyle*, No. C 01-4853,  
24  
25  
26  
27

1 2005 WL 1661958, at \*3 (N.D. Cal. July 14, 2005) (finding that statement that the market is the  
2 "printer control industry" is nothing more than a legal conclusion).

3 From O'Bannon's vague allegations, the NCAA literally has no idea what is included in  
4 the proposed relevant market. Does it include the licensing of an individual university's  
5 trademarks? The licensing of a coach's likeness? The licensing of the image of a celebrity  
6 attending a college football game? O'Bannon alleges that the market includes "licensing rights to  
7 current and former players' images and likenesses." Is that the whole market, or just a subset of  
8 the market's "products?"  
9

10 O'Bannon's failure to provide factual allegations that answer these sorts of questions is  
11 fatal to his antitrust claims. When, as here, the complaint does not identify which products are in  
12 the alleged market, the proposed relevant market is legally insufficient. *See Graco, Inc. v. PMC*  
13 *Global, Inc.*, No. 08-1304, 2009 WL 904010 (D.N.J. Mar. 31, 2009) (finding no relevant market  
14 when "[i]t is unclear what exactly defines the [in-plant polyurethane processing equipment]  
15 market 'materials and equipment' or the 'pump and spray industry'").  
16

17 **B. O'Bannon fails to allege facts regarding substitute products**

18 O'Bannon's market allegations are also insufficient because he has failed to allege *any*  
19 facts to demonstrate that there are no reasonable substitutes for the "products" in the "collegiate  
20 licensing market" (whatever those products may be). *See E&E Co., Ltd. v. Kam Hing*  
21 *Enterprises, Inc.*, No. C-08-0871, 2008 WL 3916256, at \*3 (N.D. Cal. Aug. 25, 2008);  
22 *Electronics For Imaging, Inc.*, 2005 WL 1661958 at \*3; *UGG Holdings, Inc. v. Severn*, No. CV  
23 04-1137, 2004 WL 5458426, at \*3 (C.D. Cal. Oct. 1, 2004).  
24

25 Courts have frequently granted motions to dismiss for failures of this sort. In *Fresh Made,*  
26 *Inc. v. Lifeway Foods, Inc.*, a product market of "specialty Russian dairy foods, including kefir"  
27

1 was insufficient when the plaintiff failed to allege why these products were distinct from the  
2 markets for yogurt, drinkable yogurt products, or even other dairy products in general. *Fresh*  
3 *Made, Inc. v. Lifeway Foods, Inc.*, No. Civ. A. 01-4254, 2002 WL 31246922, at \*5-6 (E.D. Pa.  
4 Aug. 9, 2002). Similarly, the court in *Adidas America, Inc. v. NCAA* rejected Adidas's claim that  
5 the relevant market was "the market for the sale of NCAA Promotional Rights," since Adidas –  
6 like O'Bannon – failed to explain or even address why other similar forms of advertising were  
7 not reasonably interchangeable with NCAA promotion rights or sponsorship agreements. *Adidas*  
8 *America, Inc. v. NCAA*, 64 F. Supp. 2d 1097, 1103 (D. Kan. 1999).<sup>7</sup>

10 O'Bannon has failed to make any allegations as to why his proposed relevant market of  
11 "collegiate licensing" is sufficiently distinct from other licensing markets.<sup>8</sup> He has not even  
12 attempted to demonstrate why other types of licensing opportunities are not seen as reasonable  
13 substitutes for "collegiate licensing" opportunities. The complaint should be dismissed.

15 **V. O'BANNON'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS**

16 Finally, O'Bannon's claims must be dismissed because they are time-barred. Sherman Act  
17 claims must be brought within four years of their accrual. 15 U.S.C. § 15b; *see Pace Indus., Inc.*  
18 *v. Three Phoenix Co.*, 813 F.2d 234, 236 (9th Cir. 1987). A claim may be dismissed under Rule  
19 12(b)(6) on statute of limitations grounds when "the running of the statute is apparent on the face  
20

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21 <sup>7</sup> See also *UGG Holdings, Inc.*, 2004 WL 5458426 at \*4 ("sheepskin, fleece-lined boots"  
22 and other boots); *Shepard Indus., Inc. v. 135 East 57th Street, LLC*, No. 97 Civ. 8447, 1999 WL  
23 728641, at \*4 (S.D.N.Y. 1991) ("supplemental" cleaning and maintenance services and other  
24 kinds of cleaning and maintenance services); *B.V. Optische Industrie De Oude Delft v. Hologic,*  
25 *Inc.*, 909 F. Supp. 162, 172 (S.D.N.Y. 1995) ("chest equalization radiography" and "overall X-ray  
26 market").

27 <sup>8</sup> Nor has O'Bannon alleged facts to support his plainly implausible notion that all licensing  
28 rights associated with collegiate sports – from pictures, to television broadcasts, to replica jerseys,  
to bobbleheads – are somehow properly placed in one "market." See *Ticketmaster LLC v. RMG*  
*Techs., Inc.*, 536 F. Supp. 2d 1191, 1196 (C.D. Cal. 2008) ("Someone who wants to attend a  
Lakers game is not going to find the opportunity to sell tickets on TeamExchange is a reasonable  
substitute for a ticket to the game.").

1 of the complaint." *Von Saher v. Norton Simon Museum of Art at Pasadena*, --- F.3d ---, No. 07-  
2 56691, 2009 WL 2516336, at \*13 (9th Cir. Aug. 19, 2009) (citing *Huynh v. Chase Manhattan*  
3 *Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). A cause of action accrues and the statutes begin to run  
4 when a defendant commits an act that injures a plaintiff's business. *Zenith Radio Corp. v.*  
5 *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). The statute of limitations runs from the  
6 commission of the act. *Pace Indus., Inc.*, 813 F.2d at 237.

8 O'Bannon filed the complaint in this matter on July 21, 2009. In order to avoid being  
9 time-barred, O'Bannon's claims must have accrued after July 21, 2005 or fit within some  
10 exception to the statute of limitations. To the extent that O'Bannon's convoluted and unclear  
11 complaint has alleged any improper conduct by the NCAA, such conduct occurred either when  
12 O'Bannon was allegedly required to sign "Form 08-3a" or "at least one other similar illegal  
13 consent form pursuant to Article 12.5.1.1 of its Bylaws," Compl. ¶¶9-10, or when he ceased to be  
14 a student-athlete. O'Bannon's complaint fails to allege when (or even if) he signed either of the  
15 forms or when he became a former student-athlete, but, for the purposes of this section, the  
16 NCAA will assume that he signed a "perpetual release" sometime between 1991 and 1995 and  
17 that he graduated in 1995. Compl. ¶25. In any event, his claims certainly accrued well before  
18 July 21, 2005. O'Bannon's antitrust claims are therefore time-barred.

20 Since O'Bannon's claims are time barred on their face, it falls to O'Bannon to plead an  
21 exception to the statute of limitations. *Wollman v. Gross*, 637 F.2d 544, 549 (8th Cir. 1980); *see*  
22 *also Franklin v. Sacramento Area Flood Control Agency*, No. CIV. 07-1263, 2009 WL 2399569,  
23 at \*7 (E.D. Cal. Apr. 29, 2009). He has failed to do so.

25 O'Bannon may argue that his claims are timely under the "continuing violation" doctrine,  
26 *see Pace Indus., Inc.*, 813 F.2d at 237 (citing *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d  
27

1 1299 (9th Cir. 1986)), but has failed to allege facts sufficient to demonstrate a continuing  
2 violation. To do so, O'Bannon had to allege facts sufficient to demonstrate that the NCAA  
3 committed an overt, injurious act within the limitations period. *Id.* (citing *Steiner v. 20th*  
4 *Century-Fox Film Corp.*, 232 F.2d 190, 195 (9th Cir. 1956)). There are two elements that  
5 characterize an overt act sufficient to restart the statute of limitations: (1) there must be a new and  
6 independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and  
7 accumulating injury on the plaintiff. *Id.* at 238. O'Bannon has alleged neither.

9 Courts have consistently held that the performance, enforcement or benefit of an  
10 agreement made outside the limitations period does not constitute a new and independent act.  
11 *Varner v. Peterson Farms*, 371 F.3d 1011, 1020 (8th Cir. 2004); *Eichman v. Fotomat Corp.*, 880  
12 F.2d 149, 160 (9th Cir. 1989); *Aurora Enters. v. NBC*, 688 F.2d 689, 694 (9th Cir. 1982); *Trane*  
13 *U.S. Inc. v. Meehan*, 563 F. Supp. 2d 743 (N.D. Ohio 2008). O'Bannon's claims here begin and  
14 end with the notion that the NCAA wrongfully "forced" him to sign a "perpetual release" while he  
15 was still in school. Since he graduated in 1995, Compl. ¶25, the limitations period on O'Bannon's  
16 claims expired no later than 1999, and O'Bannon cannot resuscitate those claims by arguing that  
17 the "perpetual release" he supposedly signed is still being used to his detriment. *See Wilson*  
18 *Learning Corp. v. Schlechte*, No. Civ. 04-4703, 2005 WL 2063944 (D. Minn. Aug. 24, 2005)  
19 ("where a complaint complains of an anti-competitive agreement, the statute of limitations begins  
20 to runs when the claimant becomes subject to the terms of the agreement;" "Later acts in  
21 performance of the agreement do not restart the limitations period.") (citing *Varner*, 371 F.3d at  
22 1020); *see also Rx.com v. Medco Health Solutions, Inc.*, 322 Fed. Appx. 394, 397 (5th Cir. 2009)  
23 (requiring evidence of "specific act or word of refusal during the limitations period" to find a  
24 continuing violation).  
25  
26  
27

1 Having alleged that he has been injured by being "forced" to sign a "perpetual release" in  
2 1995 (or earlier), O'Bannon cannot avoid the statute of limitations merely by claiming that he  
3 has only just noticed the "release" allegedly being used in a manner he dislikes. *See* Compl. ¶8.  
4 Additionally, O'Bannon has pointed to no new "specific act or word of refusal during the  
5 limitations period." The continuing violation doctrine does not apply.

6  
7 **VI. O'BANNON'S COMMON LAW CLAIMS MUST BE DISMISSED**

8 Finally, O'Bannon's common law claims – Counts III (Unjust Enrichment) and IV  
9 (Accounting) of the complaint – must be dismissed in light of the infirmity of his antitrust claims.  
10 Both of those claims are wholly derivative of the antitrust claims, *see* Compl. ¶¶205, 208, and  
11 neither can survive without a finding that the NCAA has actually violated the antitrust laws.  
12 *County of Santa Clara v. Astra USA, Inc.*, No. C 05-03740, 2006 WL 2193343, at \*6 (N.D. Cal.  
13 July 28, 2006). Since O'Bannon has failed to allege an antitrust violation, his derivative common  
14 law claims necessarily fail as well.

15  
16 Respectfully submitted,

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28 Dated: October 13, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 13, 2009, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification to the e-mail addresses registered and I hereby certify that I have mailed the foregoing document via the U.S. Postal Service to the following non-CM/ECF participant:

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