*Twombly*, 550 U.S. at 556. For these reasons, the Court should dismiss Plaintiff's antitrust claims against CLC.

**2. Plaintiff Has Failed to State an Antitrust Claim Because He Has Not Alleged Facts Sufficient to Show Any Cognizable Antitrust Injury to Himself or Harm to Competition.**

In addition to the deficiencies addressed above, Plaintiff fails to allege any facts that could show he has suffered a cognizable antitrust injury. To state a claim under Section 1 of the Sherman Act, Plaintiff must adequately plead antitrust injury, which is necessary but, by itself, insufficient to establish antitrust standing. *See Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986). To properly plead antitrust injury, and thus not foreclose himself from establishing antitrust standing, the Plaintiff must allege facts sufficient to show, among other things, that he is a market participant in the alleged relevant market. *See Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540-41 (9th Cir. 1987); *see also In re: Dynamic Random Access Memory Antitrust Litig.*, 536 F. Supp. 2d 1129, 1137 (N.D. Cal. 2008) (Hamilton, J.) (applying federal antitrust injury to state antitrust claims). Courts, including the Supreme Court, have recognized that whether a plaintiff has adequately established antitrust standing at the pleadings stage is a question of law that can and should be resolved on a motion to dismiss. *See Mun. Utils Bd. of Albertville v. Ala. Power Co.*, 934 F.2d 1493, 1498 (11th Cir. 1991); *see also Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 545 (1983) ("in each [antitrust] case [plaintiff's] alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall"); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987) (determination at pleading stage must be made that plaintiff has suffered antitrust injury and is a proper plaintiff to assert an antitrust claim).

Here, Plaintiff alleges no facts that would show that he has suffered any antitrust injury or that he has antitrust standing to bring this action. The Complaint refers to a "collegiate licensing

market," in which the alleged violation presumably occurred. Compl. ¶¶ 79-81. But Plaintiff alleges no facts at all to show that he (or for that matter most of the putative class) actually participates in that purported market. For instance, the Complaint contains no allegations that show Plaintiff sells or licenses his name, image, or likeness or that he has taken any steps to do so. Merely suggesting in an indirect and conclusory fashion that Plaintiff sells his rights or competes in the relevant market does not suffice to show that he participates in the relevant market. *See Parrish v. Nat'l Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1091 (N.D. Cal. 2007) (Alsup, J.). Indeed, in a strikingly similar case, this Court dismissed a claim brought by several former professional players against a players' union for allegedly illegally licensing the former players' names, images, and likenesses. *See Parrish,* 534 F. Supp. 2d at 1091. One reason for the dismissal was that the former players had not alleged that they had taken any steps to try to license their own names, images, or likeness and, therefore, had not sufficiently alleged that they competed against the union in any licensing market. *See id.*

In *Parrish*, the former players asserted a California state law claim for unfair competition under Section 17200, the predicate act for which was an alleged antitrust violation. Although the plaintiffs there had alleged in a cursory manner that they competed against the union to license their names, likenesses, and images, they failed to allege that they entered into or even attempted to enter into any license in competition with the union. *Id.* This Court therefore accepted defendants' argument that the former players failed to plead any casual nexus between the union's allegedly improper licensing of their images and the competitive injury claimed by the former players, lost licensing opportunities. The Court held that "Plaintiffs' bare assertion that they are in competition with defendants and that they have suffered injury is simply not sufficient." *Id.*

Plaintiff does not complain about being denied the right or ability to compete but rather only about being denied compensation for the alleged misappropriation of his image and likeness. Compl. ¶¶ 193-195. Because the Complaint does not allege that O'Bannon sells or licenses his rights in competition with the NCAA or its members (or that O'Bannon has ever tried to compete), he has not been harmed as a competitor in the alleged relevant market. Plaintiff cannot state a claim under the Sherman Act merely by dressing up in antitrust language allegations about purported unauthorized use of his image and likeness. *See Arbitron Co. v. Tropicana Prod. Sales, Inc.*, No. 91 Civ 3697, 1993 WL 138965, at *12 (S.D.N.Y. Apr. 28, 1993) (quoting *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1004 (2d Cir. 1970) (Friendly, J.), *cert. denied*, 400 U.S. 1001 (1971)); *see also Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) ("[I]f the facts 'do not at least outline or adumbrate' a violation of the Sherman Act, the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.'") (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (internal quotations omitted)). Indeed, for example, misappropriating an alleged competitor's intellectual property rights generally will not result in the type of anticompetitive effect necessary to raise concerns under the antitrust laws. *See, e.g., Appleton v. Intergraph Corp.*, 627 F. Supp. 2d 1342, 1357-58 (M.D. Ga. 2008) (misappropriating trade secrets would not be deemed capable of producing anticompetitive effects needed to support antitrust claim because it does not prevent competitors from entering market); *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-12 (2004) (merely violating laws or regulations does not within itself justify the imposition of the antitrust laws, even if competitive effects are shown).

Moreover, O'Bannon has failed to plead harm to competition, a separate and distinct element of a Section 1 claim. *See Les Shockley Racing Inc. v. Nat'l Hot Rod Ass'n*, 884 F.2d 504, 507-08 (9th Cir. 1989). Here, as in *Les Shockley,* the Complaint is "disturbingly silent" as to how

the alleged conspiracy harmed either the Plaintiff's ability to compete or competition to the market as a whole. *Id.* This is particularly true given O'Bannon's admission that the NCAA forms described in the Complaint did not result in any transfer of his rights (or the rights of any putative class member) to the NCAA or its member institutions. *See* Compl. ¶¶ 12, 67. The Complaint is devoid of any plausible facts suggesting that any former athlete was restrained in any way from licensing his or her own name, image, or likeness and instead contains examples to the contrary. The Complaint's naked, unsupported assertions that the alleged conspiracy resulted in reduced output (Compl. ¶¶ 182) clearly do not satisfy *Twombly's* and *Iqbal's* pleading requirements. Because O'Bannon has failed to plead sufficient facts from which one could plausibly infer any harm to competition, O'Bannon has failed to state a claim under Section 1 of the Sherman Act. *See Les Shockley Racing Inc.*, 884 F.2d at 507-08.

For the foregoing reasons, Plaintiff's antitrust claim should also be dismissed for failing to properly plead antitrust injury, antitrust standing, and injury to competition.[5]

**C. Plaintiff's Unjust Enrichment and Accounting Claims Fail as a Matter of Law.**

Plaintiff's unjust enrichment and accounting claims fail to state claims upon which relief may be granted. First, Plaintiff has failed to identify under which state's common law he purports to bring these claims. CLC should not be forced to guess. *In re Static Random Access Memory, Antitrust Litig.*, 580 F. Supp. 2d 896, 910 (N.D. Cal. 2008) (Wilken, J.) (dismissing unjust

[5] Under the circumstances, unless O'Bannon states a claim against the NCAA, no action can lie against CLC because, as pleaded by Plaintiff, CLC's liability derives entirely from allegedly facilitating the alleged conspiracy between the NCAA and its member schools. Consequently, to the extent this Court dismisses any antitrust claims against Defendant NCAA, the claims against CLC must be dismissed as well. CLC therefore incorporates by reference the arguments addressed in NCAA's Memorandum Of Points and Authorities as if fully set forth herein.

enrichment claim for failure to identify the state's law under which plaintiff sought relief).[6] Second, these claims are wholly derivative of Plaintiff's substantive claims under Section 1 of the Sherman Act. Because the Sherman Act claims fail as a matter of law, these common-law claims must be dismissed as well. *Faigman v. Cingular Wireless, LLC,* No. C. 06-04622, 2007 WL 708554, at *6 (N.D. Cal. Mar. 2, 2007) (Patel, J.) (dismissing unjust enrichment claim where plaintiffs "failed to plead a substantive claim for relief"); *County of Santa Clara v. Astra USA, Inc.,* C 05-03740, 2006 WL 2193343, at *6 (N.D. Cal. July 28, 2006) (Alsup, J.) (accounting claim is "derivative of other claims"). Third, as discussed in more detail below, Plaintiff has failed to meet the pleading requirements for these claims.

**1. Plaintiff Has Failed To State A Claim For Unjust Enrichment.**

First, there is no independent cause of action for unjust enrichment. Rather, "unjust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust." *McKinniss v. Sunny Delight Beverages, Co.,* No. 07-02034, 2007 WL 4766525, at *6 (C.D. Cal. Sept. 4, 2007); *Sheakalee v. Fortis Ben. Ins. Co.,* No. 08-CV-00416, 2008 WL 4224575, at *3 (E.D. Cal. Sept. 15, 2008) ("constructive trust is an equitable remedy in California, not a cause of action"). Plaintiff has not articulated a basis for restitution or why the imposition of a constructive trust is proper. This deficiency warrants dismissal in its own right. *See id.*

Second, assuming unjust enrichment is recognized as an independent cause of action, Plaintiff must allege that he conferred a benefit on CLC and that CLC knew it was being unjustly enriched, but nevertheless retained the benefit unjustly. *See Mangindin v. Wash. Mut. Bank,* No.

[6] Given the intricacies of each state's common law and the constitutional due process and comity concerns with applying one state's law to non-residents, it would be improper for a nationwide class to proceed under one state's common law in any event. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). However, the laws of California (this forum) and Georgia (where CLC is headquartered) are discussed in the following Sections.

09-1268, 2009 WL 1766601, at *8-9 (N.D. Cal. June 18, 2009) (Ware, J.); *Smith Serv. Oil Co. v. Parker,* 549 S.E.2d 485, 487 (Ga. App. 2002). Here, there is not a single allegation as to what benefit Plaintiff allegedly conferred on CLC. For example, there is no plausible claim that CLC granted a license for the use of Plaintiff's image without just compensation to the Plaintiff. Further, the Complaint is devoid of any allegation that CLC was unjustly enriched at the Plaintiff's expense, much less that CLC allegedly knew about any purported unjust enrichment. For these additional reasons, Plaintiff's claim for unjust enrichment should be dismissed as a matter of law. *See, e.g., Parrish v. Nat'l Football League Players Ass'n,* 534 F. Supp. 2d 1081, 1100 (N.D. Cal. 2007) (Alsup, J.) (dismissing unjust enrichment claim because plaintiffs failed to plead that they conferred any benefit on defendants).

**2. Plaintiff Has Failed To State A Claim For Equitable Accounting.**

"An accounting is available where the nature of the relationship requires an accounting, a balance is due to the plaintiffs, and there is no adequate remedy at law." *Id.* at 1100 (citing 1 CAL. JUR.3D *Accounts & Accounting* § 77). Plaintiff's accounting claim fails for three independent reasons. First, Plaintiff has not alleged any relationship between him and CLC to warrant accounting. *Kritzer v. Lancaster*, 96 Cal. App. 2d 1, 6-7 (1950) (an accounting requires a relationship between the parties or some circumstance that in equity warrants accounting). Second, Plaintiff has also failed to allege that the calculation of alleged licensing revenues owed would be unusually complicated to warrant accounting. *See Aguero v. Mortgageit, Inc.,* 09-CV-0640, 2009 WL 2486311, at *7 (E.D. Cal. Aug, 19, 2009); *Faircloth v. A.L. Williams & Assocs., Inc.,* 465 S.E.2d 722, 723 (Ga. App. 1995) (dismissing accounting claim because Plaintiff did not show how the calculation of commissions owed would be unusually complicated). Finally, Plaintiff has failed to allege there is no adequate remedy at law. *See Parrish,* 534 F. Supp. 2d at 1100 (dismissing accounting claim in part for failing to plead there is no adequate remedy at law).

For these reasons, Plaintiff's claim for an equitable accounting should be dismissed as a matter of law.

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiff's federal antitrust claims and state law claims for unjust enrichment and an accounting should be dismissed in their entireties.

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Respectfully submitted,

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