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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION This Document Relates to: ALL ACTIONS	MDL Docket No. 14-md-02541-CW
MARTIN JENKINS, et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al., Defendants.	Case No. 14-cv-02758-CW **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINTS** Date: October 9, 2014 Time: 2:00 p.m. Courtroom: Courtroom 2, 4th Floor Before: Hon. Claudia Wilken

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PRELIMINARY STATEMENT

This Court's decision in *O'Bannon v. NCAA*, No. C 09-3329 CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014), leaves no room for doubt that the National Collegiate Athletic Association ("NCAA"), the Conference defendants and their respective members lawfully may agree to appropriate limits on the payments that may be made to student-athletes. For that reason alone, plaintiffs' theory of antitrust liability—that the antitrust laws categorically forbid any agreement among the NCAA and its members imposing any limits on the compensation student-athletes may receive for their participation in amateur intercollegiate athletics—is not plausible. Their complaints should therefore be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

Plaintiffs' oppositions never offer an adequate explanation for how the basic premise of their claims can be reconciled with the decision in *O'Bannon*. Instead, plaintiffs contend that defendants' motion to dismiss is premised on the availability or scope of the particular remedies plaintiffs seek. But the remedies sought by plaintiffs are irrelevant to the issue of whether they have stated a plausible antitrust claim. Because they have not, plaintiffs are entitled to no relief whatsoever.

Plaintiffs attempt to construe the *O'Bannon* decision too narrowly, and mischaracterize the claims in their complaints as factually and legally distinct from the issues decided in that case. The *Jenkins* plaintiffs even suggest that the primary NCAA bylaw they seek to invalidate was not at issue in *O'Bannon* despite the fact that the Court expressly addressed it in its written decision. But, plaintiffs cannot escape dismissal of their claims on the purported ground that the antitrust analysis of *O'Bannon* applies only to compensation of student-athletes for the use of their names, images or likenesses. While the plaintiffs' claim in *O'Bannon* certainly involved the issue of compensation for the use of student-athletes' names, images and likenesses, the decision in *O'Bannon* encompasses the restraint, the relevant market and the alleged anticompetitive effects asserted here—i.e., the allegation that NCAA Bylaw 15.1 unreasonably and illegally restricts the payments that student-athletes can receive in a market for their "athletic services."

Although *O'Bannon* held that restraint to be unduly restrictive to a certain, limited extent, this Court, consistent with prior federal court decisions endorsing NCAA limitations on payments to student-athletes, clearly rejected the premise on which the current complaints are founded—that any NCAA limit on payments to student-athletes constitutes an antitrust violation. Hence, plaintiffs' federal antitrust claims, as well as the consolidated plaintiffs' California Unfair Competition Act claim which relies upon the same implausible theory, should be dismissed. The Unfair Competition Act claim also should be dismissed for the independent reason that plaintiffs are not eligible as a matter of law for injunctive or restitutionary relief, the only forms of relief authorized under that statute.

ARGUMENT

I. DEFENDANTS' MOTION CHALLENGES THE PLAUSIBILITY OF THE THEORY OF PLAINTIFFS' ANTITRUST CLAIMS, NOT THE AVAILABILITY OF THE RELIEF THEY SEEK

Defendants do not assert that plaintiffs' antitrust claims should be dismissed on the basis of the remedies that plaintiffs seek. Rather, as defendants made clear in their opening brief, defendants move to dismiss the complaints under Rule 12(b)(6) because, in light of this Court's rejection in *O'Bannon* of the notion that the NCAA and its member schools cannot impose any limit on the amount of compensation that can be paid to student-athletes while they are in school, plaintiffs' theory of antitrust liability is not plausible.[1]

A. Plaintiffs' Claims are Implausible Based on this Court's Decision in O'Bannon

Plaintiffs cannot and do not dispute that, to state a claim upon which relief can be granted, a plaintiffs' claim must be plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Nor do plaintiffs dispute that a complaint that fails to state a cognizable legal theory under existing precedents cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 679; *see also In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104,

[1] The CAC, the *Jenkins* complaint and the *O'Bannon* decision repeatedly use the word "compensation" to describe the financial aid and support that NCAA schools provide to student-athletes. Defendants used that shorthand in their moving brief and herein, but do not agree that it is an accurate characterization.

1107 (9th Cir. 2013). Instead, plaintiffs simply choose not to address the primary argument set forth in defendants' motion to dismiss—that plaintiffs' claims are implausible, and must be dismissed, because they do not state a cognizable legal theory.

Plaintiffs' complaints allege that Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits the NCAA's member institutions from agreeing to limit compensation provided to student-athletes for their athletic services. (CAC Br. at 3 (citing CAC ¶ 7 ("The NCAA and Conference Defendants have agreed to unlawfully cap the value of a grant-in-aid at an amount substantially below what a football or basketball player would receive for his or her services in a competitive market, and at an amount below what it costs to attend school. This agreement violates the Sherman Act.")); Jenkins Br. at 1-2 (citing JC ¶ 7 ("These agreements to price-fix players' compensation, and to boycott any institutions or players who refuse to comply with the price fixing agreement, are *per se* illegal acts under Section 1 of the Sherman Act, 15 U.S.C. § 1. They also constitute an unreasonable restraint of trade under the rule of reason.")).)[2] To state a Section 1 claim that can survive a motion to dismiss, plaintiffs must substantiate the proposition that any agreement among the NCAA and its member institutions to limit payments to student-athletes for their athletic services "unreasonably restrain[s] trade." *Tanaka v. University of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). This plaintiffs simply cannot do.

In *O'Bannon*, this Court held that the legitimate procompetitive goals of maximizing consumer demand for the NCAA's amateur sports product and integrating student-athletes into their academic communities are furthered by appropriate agreed-upon limits on student-athlete compen-

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[2] "CAC Br." refers to Plaintiffs' Opposition to Motion to Dismiss the Complaints with Prejudice, *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 4:14-md-02541-CW, Dkt. 94 (N.D. Cal. Sept. 18, 2014). "Jenkins Br." refers to Plaintiffs' Opposition to Defendants' Motion to Dismiss, *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 4:14-md-02541-CW, Dkt. 98 (Sept. 18, 2014). "CAC" and "JC" refer respectively to the Consolidated Amended Complaint, *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 4:14-md-02541-CW, Dkt. 60 (July 11, 2014), and Complaint and Jury Demand—Class Action Seeking Injunction and Individual Damages, *Jenkins, et al. v. NCAA, et al.*, Case No, 4:14-cv-02758-CW, Dkt. 1 (N.D. Cal. Mar. 17, 2014). "NCAA Br." will refer to defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaints, *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, 4:14-md-02541-CW, Dkt. 89 (N.D. Cal. Sept. 4 2014).

sation. Although the Court found that the challenged rules were overly restrictive, it then "enter[ed] an injunction to remove any unreasonable elements from the restraint," while preserving the NCAA's lawful discretion to impose appropriate limits on the financial payments that student-athletes may receive. *O'Bannon*, 2014 WL 3899815, at *36. In explaining the contours of its decision, the Court expressly held that its ruling did "not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance." *Id.* The *O'Bannon* decision thus necessarily holds that the NCAA and its members may adopt and enforce some rules limiting student-athlete compensation without unreasonably restraining trade. Plaintiffs' complaints, however, rest on the legal theory that the NCAA and its members may not agree to *any* limits on compensation to student-athletes for their athletic services. Because plaintiffs' theory of antitrust liability directly conflicts with this Court's holding in *O'Bannon*, plaintiffs have failed to state a plausible Section 1 claim.

Under plaintiffs' theory of liability, if defendants complied with this Court's injunction in *O'Bannon* and adopted the very limitations on student-athlete compensation endorsed there, defendants nonetheless would unreasonably restrain trade in violation of Section 1. That is an implausible result. Moreover, plaintiffs have not in any way explained how a restraint from which this Court expressly "remove[d] any unreasonable elements" can still be an unreasonable restraint of trade. *Id.* Instead, they assert that defendants are arguing that the *O'Bannon* injunction affords them blanket antitrust immunity for any NCAA restraint that does not conflict with the injunction's terms, or that all rules not enjoined in *O'Bannon* are *per se* procompetitive and lawful. (Jenkins Br. at 4-5 ("*O'Bannon* cannot be read as ruling upon the antitrust legality of every rule in the 400-plus-page NCAA Division I Manual—or of future restraints—that were never litigated in *O'Bannon*.").) Defendants have made no such arguments. Defendants' arguments are limited to the implausibility of plaintiffs' allegation that no NCAA restriction on student-athlete payments is permissible under the Sherman Act given this Court's contrary conclusion in *O'Bannon*.

Finally, with respect to the putative class of women's Division I basketball players, it is irrelevant that those plaintiffs were not parties in the *O'Bannon* litigation. Defendants' arguments

regarding the plausibility of plaintiffs' claims apply equally to all plaintiffs, whether or not they are members of the *O'Bannon* class, and therefore the claims of all plaintiffs, including the women's basketball players, should be dismissed.

B. Defendants' Motion to Dismiss is Not Based on the Remedies Sought by Plaintiffs

Plaintiffs claim that defendants are improperly contesting the availability and scope of the *remedies* that plaintiffs may obtain in the event that the Court finds their claims meritorious. (CAC Br. at 2, 5-6; Jenkins Br. at 1, 3-4.) But defendants are arguing no such thing. Rather, defendants assert that where—as here—a plaintiff's complaint rests on an implausible theory of liability, the plaintiff is not entitled to *any* relief, whether an injunction or damages on an individual or class-wide basis.

Consolidated plaintiffs claim that defendants mischaracterize their request for relief by ignoring that they seek a "less-restrictive alternative [that would] allow the Conference Defendants to compete among themselves . . . as to the financial aid terms that conference members will make available to college players." (CAC Br. at 8 (quoting CAC ¶ 10).) Even if the particular form of requested relief mattered on a motion to dismiss for failure to state a legally cognizable antitrust claim—and as plaintiffs themselves assert, it does not—this Court in *O'Bannon* already held that the NCAA and all Division I member schools do not violate the antitrust laws by adopting and enforcing rules imposing appropriate limits on student-athlete compensation. Thus, plaintiffs' claims are implausible on their face and the Court need not reach the question of either available remedies or less-restrictive alternatives.

Nor is it relevant that the consolidated plaintiffs claim to limit their request for class-wide damages to the difference between the grants-in-aid awarded and cost of attendance for each putative class member. (CAC Br. at 7-8.) Consolidated plaintiffs' theory of liability, as alleged, is not that defendants have violated the antitrust laws by adopting and enforcing financial aid rules that result in student-athletes receiving financial aid packages that fall short of their full cost of attend-

ance.[3] Instead, like the *Jenkins* plaintiffs, consolidated plaintiffs seek "a truly competitive market" (CAC ¶¶ 221, 502), and the invalidation of any and all NCAA limits on student-athlete compensation,[4] including those expressly approved by this Court's *O'Bannon* decision.

II. THESE ACTIONS INVOLVE THE SAME ALLEGED RESTRAINT AS *O'BANNON*

Plaintiffs contend that these actions challenge a different restraint from that at issue in *O'Bannon* because, in their view, *O'Bannon* was limited to the narrow issue of name, image and likeness. (CAC Br. at 6; Jenkins Br. at 5-6.) Defendants do not believe the Court intended the *O'Bannon* decision to be so limited. As this Court explained, the decision in *O'Bannon* resolved "whether the NCAA violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men's basketball and FBS football players any more than the current association rules allow." 2014 WL 3899815, at *37.

A comparison of the restraint as described in the operative complaints with this Court's decision in *O'Bannon* demonstrates that the restraint challenged in the instant cases and *O'Bannon* is

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[3] To the extent consolidated plaintiffs are now seeking to reformulate their theory of liability so that their antitrust claim is limited only to the assertion that it is illegal to set a cap below the cost of attendance (but legal to set a cap at or above the cost of attendance), that new theory of liability should be ignored because plaintiffs cannot amend their theory of liability through their opposition to defendants' motion to dismiss. *Parker v. Nishiyama*, 438 F. App'x 642, 643 (9th Cir. 2011) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." (quoting *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003))); *Toro v. Napolitano*, No. 12-CV-2804, 2013 WL 4102158, at *3 (S.D. Cal. Aug. 13, 2013) (dismissing claim with prejudice because "Plaintiff's statements in his opposition brief cannot amend the Complaint" (quoting *Fabbrini v. City of Dunsmuir*, 544 F. Supp. 2d 1044, 1050 (E.D. Cal. 2008))).

[4] *See, e.g.*, CAC ¶ 8 ("In the highly competitive marketplace of Division I FBS football and basketball, every player unquestionably would receive a grant-in-aid that actually covers the Cost of Attendance. . . . Moreover, if collusion among conferences were eliminated, every player likely would receive further *additional* compensation above the Cost of Attendance." (emphasis in original)); *id.* ¶ 15 ("The artificial cap on grants-in-aid is set well below what schools would choose to offer to athletes in the absence of collusion. And it is clear that among members of the Conference Defendants, non-collusive scholarship offers would rise to at least cover the full Cost of Attendance, *and likely much more*. The NCAA thus arbitrarily restricts athletics financial aid to amounts that are *less than the athletes would receive in a competitive market*." (emphasis added)); *id.* ¶ 316 ("If a given conference felt that payment in excess of this new Cost of Attendance level were in its best financial interest, it could make such an offer. On the other hand, if a conference felt that such payments would be detrimental to overall demand, then even absent a national collusive cap, that conference need not offer more, and would live with the quality of team it could attract with a Cost of Attendance offer."); *see also infra* p. 8 and note 6.

the same. For example, the CAC describes the challenged restraint as the NCAA and Conference defendants' agreement "that no college will pay an athlete any amount for his or her work that exceeds the value of a grant-in-aid." (CAC ¶ 1.) Similarly, plaintiffs in *Jenkins* describe the challenged restraint as "an artificial and unlawful ceiling on the remuneration that players may receive for their services . . . defined by the NCAA as a 'full grant-in-aid.'" (JC ¶ 6.) This Court's description of the restraint at issue in *O'Bannon* is substantively indistinguishable: "[T]he restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid." 2014 WL 3899815, at *23.

In fact, these coordinated and consolidated actions challenge the very same bylaw identified as the basis for the restraint in *O'Bannon*. Both complaints in this action specifically challenge NCAA Bylaw 15.1, which states:

> A student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance as defined in Bylaw 15.02.2. A student-athlete may receive institutional financial aid based on athletics ability (per Bylaw 15.02.4.1) and educational expenses awarded per Bylaw 15.2.6.4 up to the value of a full grant-in-aid, plus any other financial aid up to the cost of attendance. (See Bylaws 15.01.6.1, 16.3, 16.4 and 16.12.)

(CAC ¶ 297; JC ¶ 42.)[5] And contrary to plaintiffs' assertion that "*O'Bannon* did not adjudicate or evaluate the legality of Bylaw 15.1" (Jenkins Br. at 6), this Court expressly cited to and quoted Bylaw 15.1 in describing the "challenged restraint" in *O'Bannon*. *See* 2014 WL 3899815, at *7-8 ("[The NCAA] prohibits any student-athlete from receiving 'financial aid based on athletics ability' that exceeds the value of a full 'grant-in-aid.' . . . [T]he NCAA also imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his 'cost of attendance.'"). The Court went on to hold that its "injunction will not preclude the NCAA from implementing rules capping the

[5] The *Jenkins* plaintiffs challenge at least 19 NCAA bylaws relating to limitations on financial aid, benefits and recruiting visits, "including but not limited to NCAA Bylaws 12.01.4, 12.1.2, 12.1.2.1, 13.2.1, 13.2.1.1, 13.5.1, 13.5.2, 13.6.2, 13.6.4, 13.6.7.1, 13.6.7.4, 13.6.7.5, 13.6.7.7, 15.02.2, 15.02.5, 15.1, 16.02.3, 16.1.4, and 16.11.2 (individually, and as interpreted and applied in conjunction with each other)." (JC ¶ 42.) The *Jenkins* plaintiffs also quote in their entirety NCAA Bylaws 12.1.2 and 16.02.3 that prohibit "any payment to athletes on the basis of the athletic services that they provide" and "benefits on the basis of athletic ability." (JC ¶¶ 44, 46.)

amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance." *Id.* at *36. Such a ruling necessarily encompasses plaintiffs' challenge to NCAA Bylaw 15.1 here.

The anticompetitive effects alleged in these actions also are addressed in the *O'Bannon* decision. Specifically, the CAC alleges that absent the grant-in-aid cap, "the Conference Defendants' member schools and those of their co-conspirator conferences would compete vigorously to attract talent using increased financial aid and other direct forms of compensation." (CAC ¶ 220.)[6] Likewise, *Jenkins* alleges that "Defendants' member institutions would, absent the restrictions at issue in this action, compete with each other for the services of athletes" and thus plaintiffs "would have received and would receive greater remuneration for [their] services." (JC ¶¶ 36, 114.) Those allegations are indistinguishable from this Court's conclusion regarding the anticompetitive effects in *O'Bannon*: "In the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits' athletic services and licensing rights—that is, they would engage in price competition." 2014 WL 3899815, at *23. As this Court further explained, "[i]f the grant-in-aid limit were higher, schools would compete for the best recruits by offering them larger grants-in-aid. Similarly, if total financial aid was not capped at the cost of attendance, schools would compete for the best recruits by offering them compensation exceeding the cost of attendance." *Id.* at *8 (relying on testimony of plaintiffs' expert).

These actions do not, as consolidated plaintiffs contend, "frame[] different antitrust markets" than those involved in *O'Bannon*. (CAC Br. at 3.) Both the CAC and *Jenkins* complaint de-

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[6] *See also* CAC ¶ 221 ("The demand for college athletics is such that, absent the unlawful athletics grant-in-aid cap, the colleges and universities in the Football Bowl Subdivision Labor Market would have competed against one another by offering higher amounts of athletics-based financial aid to college athletes, up to and likely past the true Cost of Attendance. Grants-in-aid are therefore artificially 'capped' by the common scheme imposed by the NCAA at amounts lower than the amounts that would prevail in a truly competitive market."); *id.* ¶ 308 ("Without the grant-in-aid cap, the colleges and universities that sponsor college football and basketball and compete in the relevant markets would provide athletic scholarships in an amount in line with the college athlete's value in a competitive market. The same competitive forces that drive schools to provide coaches with million-dollar salaries and build lavish athletic facilities would also compel those schools to provide athletics-based grants-in-aid at a truly competitive level . . . . At least some student-athletes would likely gravitate toward schools that would 'pay' them the most amount of money.").

scribe the relevant markets as those for student-athlete "player services." (CAC ¶ 1; JC ¶ 54.) This Court in *O'Bannon* similarly described the relevant market under plaintiffs' alternative monopsony theory as the "market for recruits' athletic services." 2014 WL 3899815, at *23. Indeed, the *Jenkins* plaintiffs concede that the present cases involve "markets substantially similar to, or even the same as, the relevant markets pleaded in *O'Bannon*." (Jenkins Br. at 7.)

Consolidated plaintiffs also acknowledge the overlap between the procompetitive justifications evaluated in *O'Bannon* and those likely to be at issue here. (CAC Br. at 4; *see also* CAC ¶¶ 477-90.) Yet, plaintiffs ignore this Court's conclusion that the NCAA's legitimate procompetitive goals of maximizing consumer demand for intercollegiate amateur sports and integrating student-athletes into their academic communities justify certain limits on compensation to student-athletes. *O'Bannon*, 2014 WL 3899815, at *12, 15, 29-34.

Just as the Ninth Circuit in *Century Aluminum* affirmed dismissal for failure to state a plausible claim when plaintiffs did not allege facts showing "that their situation [was] different" from earlier precedent, plaintiffs here have not alleged facts showing that their challenge is substantively different than *O'Bannon*. *Century Aluminum*, 729 F.3d at 1107-08. In light of this Court's conclusion in *O'Bannon* that certain legitimate, procompetitive goals permit the NCAA and its members lawfully to adopt and enforce rules imposing appropriate limits on student-athlete compensation, plaintiffs' claim that any and all such rules constitute a violation of the Sherman Act is not plausible on its face, and thus plaintiffs' claims should be dismissed.

III. PLAINTIFFS MISCHARACTERIZE DEFENDANTS' JOINT VENTURE AND RULE OF REASON ARGUMENTS

In addition to establishing that this Court's decision in *O'Bannon* definitively rejected plaintiffs' fundamental legal theory, defendants' motion to dismiss further explains that foundational antitrust principles permit the NCAA to adopt and enforce eligibility rules—including the rules at issue in this case—because those rules allow the NCAA as a joint venture to define and maintain its product: intercollegiate amateur athletics. (NCAA Br. at 9-10, 14 (citing *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006), and *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010)).) In stating as much, defendants are not seeking blanket antitrust immunity under

principles of joint venture law. Nor are defendants contending that plaintiffs' actions should be dismissed on the basis that the NCAA and its members are a single economic entity that by definition cannot violate Section 1 of the Sherman Act. (CAC Br. at 8-9; Jenkins Br. at 8.)

Defendants' moving brief simply demonstrates that *O'Bannon*'s conclusion that the NCAA and its members may lawfully adopt and enforce appropriate limits on payments to student-athletes is consistent with extensive and uniform Supreme Court and federal court precedent. *See O'Bannon*, 2014 WL 3899815, at *30-31 (relying on the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), in holding that "some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball," and thus would not violate the antitrust laws). Under this precedent, this Court need not conduct a full rule of reason analysis to determine that the NCAA may adopt appropriate limits on payments to student-athletes. Rather, those limits should be found lawful "in the twinkling of an eye." *See American Needle, Inc.*, 560 U.S. at 203 (quoting *Bd. of Regents*, 468 U.S. at 109 n.39); *Agnew v. NCAA*, 683 F.3d 328, 343 n.7, 347 n.8 (7th Cir. 2012). These cases further demonstrate the implausibility of plaintiffs' theory of antitrust liability, and support dismissal of their claims.[7]

IV. CONSOLIDATED PLAINTIFFS' UNFAIR COMPETITION ACT CAUSE OF ACTION FAILS TO STATE A CLAIM AND SHOULD BE DISMISSED

A. Consolidated Plaintiffs Have Failed to Plead Legally Unlawful or Unfair Conduct

Consolidated plaintiffs fail to plead any predicate acts legally capable of constituting unlawful or unfair conduct under the Unfair Competition Act, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"). The primary basis for plaintiffs' claim is that the NCAA's and Pac-12's conduct violates the antitrust laws. (CAC Br. at 14-15.) Where, as here, plaintiffs' alleged predicate is a failed statutory claim that does not qualify as "unlawful" conduct, they may not manufacture a UCL claim

[7] Defendants have not, as plaintiffs contend, moved to dismiss these actions on the independent ground that the challenged rules are non-commercial. (CAC Br. at 11; Jenkins Br. at 9.) Instead, *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999), and *Bassett v. NCAA*, 528 F.3d 426 (6th Cir. 2008), simply add to the federal precedent refusing—on one ground or another—to question the procompetitive nature of the NCAA's eligibility rules.

simply by calling the underlying conduct "unfair." *See Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001); *DocMagic, Inc. v. Ellie Mae, Inc.*, 745 F. Supp. 2d 1119, 1146-47 (N.D. Cal. 2010). Because the antitrust claims should be dismissed for the reasons explained above, the UCL claim should be dismissed as well. *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557-58 (9th Cir. 2008).

The only conduct plaintiffs allege that differs from their antitrust claims is based on California's Student Athlete Bill of Rights. Plaintiffs claim that the NCAA and Pac-12 violated the "policy and spirit" of that law, alleging that it requires universities to provide student-athletes with the "financial resources to meet their budgetary needs," and thus, by implication, requires them to provide the full cost of attendance. (CAC Br. at 15.) Plaintiffs' selective citation to a few words in a single section of the Student Athlete Bill of Rights does not support their argument, as that section relates solely to the provision of financial and budgeting *information* to student-athletes,[8] and in no way plausibly requires—in policy or spirit—any *payments* to student-athletes. Plaintiffs have failed to allege any unlawful or unfair conduct, and thus their UCL claim should be dismissed.

B. Consolidated Plaintiffs Are Not Entitled to Any Relief Authorized by the UCL

Independent of the fate of their antitrust claims, consolidated plaintiffs' UCL cause of action also fails to state a claim because they have not alleged and cannot allege any basis for entitlement to relief available under the UCL. Unlike their antitrust claims, plaintiffs do not contest that courts may, and routinely do, dismiss UCL claims on this basis at the motion to dismiss stage. *See, e.g.*, *Ice Cream Distribs. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.*, No. 09-5815 CW, 2010 WL 3619884, at *9 (N.D. Cal. Sept. 10, 2010) (Wilken, J.), *aff'd*, 487 F. App'x 362 (9th Cir. 2012); *Berman v. Knife River Corp.*, No. C 11-3698 PSG, 2012 WL 646068, at *7 (N.D. Cal. Feb. 28, 2012). Only injunctive and restitutionary relief are authorized under the UCL, and plaintiffs are entitled to neither. (*See* NCAA Br. at 16-17.) The injunction entered by this Court in

[8] California Education Code Section 67452(b) provides that "[e]ach athletic program shall conduct a financial and life skills workshop" and mandates that, among other things, "[t]his workshop shall include, but not be limited to, information concerning financial aid, debt management, and a recommended budget for full- and partial-scholarship student athletes living on or off campus during the academic year and the summer term based on the current academic year's cost of attendance."

O'Bannon already provides plaintiffs with all the relief that the Court deemed warranted in connection with the restraints alleged in this case, and specifically addresses cost of attendance, which consolidated plaintiffs now claim is the aim of the injunctive relief they seek with respect to their UCL claim. (CAC Br. at 16.) Plaintiffs are not entitled to a second injunction prohibiting the same conduct. *See Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1022 (2005); *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 465-66 (2005).

Consolidated plaintiffs also have no basis for restitution because they have not paid any sums to defendants and have not been denied any payments to which they were contractually entitled. Plaintiffs' argument is not supported by the cases they cite. The damages they seek are not "earned wages that are due and payable pursuant to section 200 *et seq.* of the Labor Code" (*Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 178 (2000)), benefits owed pursuant to a contract (*Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 733-34 (9th Cir. 2007)), "concrete, quantifiable" payments for endorsement of commercial products (*Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 812 (N.D. Cal. 2011)), or profits unlawfully obtained through false advertisements (*POM Wonderful LLC v. Coca Cola Co.*, No. CV 08-06237, 2009 WL 6254619, at *2-3 (C.D. Cal. Sept. 15, 2009)). Rather, plaintiffs seek damages to which they are not entitled under any provision of statute, contract, or any other appropriate measure of restitution, and thus do not have the "vested interest in the money [they] seek to recover," required for restitution. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149-50 (2003). Accordingly, consolidated plaintiffs' UCL claim should be dismissed.

CONCLUSION

The Supreme Court in *Twombly* directed lower courts that deficiencies in plaintiffs' claims "should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court," particularly in antitrust cases, which tend to be time-consuming and costly. 550 U.S. at 558. That directive fully applies here, where plaintiffs cannot allege a plausible theory of liability under existing precedents. Accordingly, defendants' motion to dismiss the complaints in these co-ordinated actions should be GRANTED with prejudice and without leave to amend.

DATED: September 25, 2014

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FILER'S ATTESTATION

I, Jeffrey A. Mishkin, am the ECF user whose identification and password are being used to file this REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINTS. In compliance with Local Rule 5-1(i)(3), I hereby attest that all signatories hereto concur in this filing.

/s/ Jeffrey A. Mishkin

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2014, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

/s/ Jeffrey A. Mishkin