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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

RICHARD DENT, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE,

Defendant.

CASE NO.: 3:14-CV-02324-WHA

DEFENDANT NATIONAL FOOTBALL LEAGUE'S RESPONSE TO THE PLAYERS ASSOCIATION'S DECEMBER 2, 2014 LETTER BRIEF

After the NFLPA filed its November 19, 2014 letter brief (ECF No. 92), the Court asked the NFLPA two follow-up questions. In response to the first question, the Union provides no explanation as "to what extent" former players could have filed grievances against their Clubs concerning the "distribution" of, and "failure . . . to warn" about, prescription drugs. ECF No. 96 at 1. Instead, the Union gives the same answer it gave last time: that the players could not have "grieved the *specific claims* asserted in *Dent*." ECF No. 99 (Dec. 2, 2014) (emphasis added); c*ompare* ECF No. 92 (Nov. 19, 2014) (NFLPA does not believe that "the specific claims" are grievable).

The Court, however, may take guidance from the NFLPA's positions in analogous cases, including a recent grievance against "the NFL Clubs" for violating "various provisions of the CBA, NFL Player Contract and longstanding custom and practice" by failing to provide medical care in the players' best interest. Declaration of Dennis L. Curran ("Curran Decl.") (ECF No. 73) Ex. 18 (*NFLPA v. NFL Clubs & NFLMC* (Toradol Waivers) (2012)) at 1. That grievance claims that a Club's (or Club physician's) improper disclosure and administration practices—including a failure to sufficiently explain the "medical risk" and "long-term effects" of Toradol use, or otherwise act for "the benefit of the player-patient"—would violate both new and longstanding CBA provisions. *Id.* at 2; *see id.* (Article 39 "underscore[s]" existing "position and practice"). The Union cannot explain why those allegations may be grieved but plaintiffs' comparable failure-to-warn and like allegations may not. The NFLPA's position here is also at odds with other grievances filed against the Clubs regarding player medical care. *See, e.g.*, Curran Decl. Ex. 16 (*Wilson v. Denver Broncos* (2008) (Townley, Arb.)) at 3 (Wilson, with Union support, grieved "[w]hether the Broncos violated the NFL Collective Bargaining Agreement Article XLIV when [Club physicians] did not inform Al Wilson in writing that his physical condition could be significantly aggravated by continued performance due to his injuries suffered on December 3, 2006").

In response to the Court's second question, the NFLPA asserts that it "does not take the position that lawsuits by players against club doctors are prohibited by applicable CBAs[.]" ECF No. 99. That is consistent with what the NFL told this Court. *See* Hr'g Tr. 20-21 (explaining that, under court's hypothetical, there "very well could be" a non-preempted malpractice lawsuit against

a Club doctor). Whether such a suit could proceed would depend on the specifics of the claim and the relationship between the doctor and the Club, *see id.* 20-24, but there is no dispute that such suits regularly are brought to verdict against Club physicians. *See, e.g.*, *Jury finds doctor not negligent in advice to former Bronco Al Wilson*, Denver Post, June 17, 2011, http://www.denverpost.com/ci_18296823 (Broncos team physician); *Novak wins suit, $5.3 million award*, Florida-Times Union, July 20, 2002, http://jacksonville.com/tu-online/stories/072002/met_9965297.html (Jaguars team physician); *Hoge Wins Lawsuit Against Doctor*, Chicago Tribune, July 22, 2000, http://articles.chicagotribune.com/2000-07-22/sports/0007220191_1_hoge-concussions-brain-damage (Bears team physician); *see also* Curran Decl. Ex. 15 (*Jeffers v. Carolina Panthers* (2008) (Das, Arb.)) at 16 (noting that while Jeffers' claims against the Panthers must be arbitrated, his "claims against Dr. D'Alessandro and the Miller Clinic are proceeding in state court").

Finally, it bears noting that, earlier this week, the Union successfully asserted LMRA preemption to defeat claims by a putative class of retired players who alleged that the Union did not properly warn them of the long-term medical risks of concussions sustained during the retirees' careers. *See Smith v. NFLPA*, No. 4:14CV01559 ERW, 2014 WL 6776306, at *5-7 (E.D. Mo. Dec. 2, 2014). Among other things, the district court agreed with the Union's position that "[t]he fact Plaintiffs are now retirees does not preclude [LMRA] preemption of claims based on events which occurred while Plaintiffs were members of the bargaining unit." *Id.* at *7. In addition, the Court agreed with the NFLPA that, at a minimum, the retired players' "negligent misrepresentation" claim against the Union—asserting that it "knew the dangers and risks" associated with head trauma but "knowingly concealed the information from Plaintiffs"—is preempted by the LMRA because "it will substantially depend on interpretation of the CBA." *Id.* at *2, *8; *compare* Second Am. Compl. ¶¶ 354-369 (*Dent* plaintiffs' "negligent misrepresentation" count alleges that the NFL, despite knowing "risks" and "dangers" of medications, "did not inform the Class Members about the Medications' dangers and continually exposed the Class Members to those dangers"). Just as those claims are preempted by federal labor law, so too are the claims of plaintiffs here.

Respectfully submitted,

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