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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RICHARD DENT, *et al.*, Plaintiffs, v. NATIONAL FOOTBALL LEAGUE, a New York unincorporated association; Defendant.	**CASE NO. C-14-2324 WHA/JCS** **PLAINTIFFS' REPLY IN SUPPORT OF THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S DECEMBER 2, 2014 LETTER**

1 On November 25, 2014, the Court asked the National Football League Players
2 Association ("NFLPA") to answer two questions:

3 1. "If plaintiffs' allegations regarding the distribution of prescription drugs by clubs (or club physicians) and the failure by the clubs (or club physicians) to warn regarding the risks of such drugs are true, to what extent could the former union members have grieved those claims against their individual clubs at the time of the events in question (or later)?"

2. "To what extent could the former union members have brought lawsuits against the clubs' doctors for such conduct?"

7 On December 2, the NFLPA responded that it:

1. "[d]oes not believe that retired professional football players could have grieved the specific claims asserted in *Dent* against clubs or club physicians" (subject to an exception addressed below); and

2. "[h]as not taken and does not take the position that lawsuits by players against club doctors are prohibited by applicable CBAs, but the NFL and clubs have taken the opposite position [and in any event] as the Plaintiffs make clear … [they do not allege medical malpractice against team doctors] in this case."

(ECF 99). Plaintiffs agree – the claims asserted in the Second Amended Complaint ("SAC") could not be grieved regardless of when they were filed. A finding of preemption by this Court would therefore deprive Plaintiffs of a venue for their claims.

Plaintiffs sued the National Football League ("NFL") because it directed clubs, doctors and trainers to keep players on, or return them to, the field and thereby maximize League profits at the sake of players' health in contravention of Federal and State law and medical ethics principles. (*See, e.g.*, ECF 55-1, ¶¶ 1 – 22). The foundation of that "return to play" model is the illegal and unethical distribution of controlled substances and prescription drugs. (*See, e.g., id.*, ¶¶ 17 – 20). Plaintiffs allege that the NFL fraudulently concealed from Plaintiffs that their doctors and trainers were not primarily concerned with their health as they should have been and, therefore, should not have been trusted. (*See, e.g., id.*, ¶¶ 304 – 29).

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Absent the institution of a top-down policy, how else can one reasonably explain that players from every team over a 45-year period tell the same story about receiving medications before, during, and after games in a manner that grossly differs from the way doctors prescribe such medications normally? (*See, e.g., id.*, ¶¶ 1 – 22). No doctor acting responsibly would shoot a person with Toradol on a weekly basis, yet the stories of League doctors doing so with players are legion. (*See, e.g., id.*, ¶¶ 18, 315 – 16).

The damages caused by the NFL's conduct are latent and did not manifest until years after Plaintiffs retired. (*Id.*, ¶¶ 283 – 84). Plaintiffs also did not know that the NFL unilaterally supervised the illegal distribution of the medications at issue to prioritize returning players to, or keeping them on, the field. (*See, e.g., id.*, ¶¶ 1 – 22). Plaintiffs reasonably assumed and trusted that doctors and trainers would not sacrifice their long-term health for the sake of profit. (*See, e.g., id.*, ¶ 121).

Plaintiffs are the masters of their complaint, (*Dall v. Albertson's, Inc.*, 234 Fed. Appx. 446, 449 (9th Cir. May 14, 2007) (reversing dismissal of complaint on LMRA preemption grounds),[1] *Arnaudov v. Cal. Delta Mech., Inc.*, 2013 U.S. Dist. LEXIS 113526, at * 12 (N.D. Cal. Aug. 9, 2013) (denying motion to dismiss for lack of subject matter jurisdiction)), and the facts they allege must be assumed as true for deciding a motion to dismiss (*Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996) (reversing dismissal of complaint)). Plaintiffs adequately allege bases to hold the NFL liable in the SAC, (*see generally* ECF 79), and the NFL cannot hide its illegal conduct behind the shield of preemption, (*see Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 688 (9th Cir. 2001) (*en banc*)).

[1] Pursuant to Circuit Rule 36-3 of the United States Court of Appeals for the Ninth Circuit and Fed. R. App. R. 32.1, Plaintiffs may cite *Dall* though it is not precedent.

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The NFLPA affirms the foregoing principles and undermines the concept that the SAC constitutes artful pleading when it correctly notes that "'Plaintiffs do not allege medical malpractice against doctors' in this case." (ECF 99). The NFL is the appropriately-identified defendant for the claims alleged in the SAC, a point underscored by the fact that in response to recent raids by the Drug Enforcement Administration, NFL spokesman Brian McCarthy stated "***[o]ur*** teams cooperated with the DEA." ("DEA Meets with 49ers Doctors as Drug Enforcement Administration Investigates Potential Violations of Controlled Substances Act," *available at* www.nydailynews.com, last visited December 4, 2014) (emphasis added)).

The NFL does not tackle the foregoing allegations head on, but instead, tries to spin Plaintiffs' claims as something they are not to cabin them within the confines of a collective bargaining agreement ("CBA"). But as noted in both letters submitted by the NFLPA, no provision in any CBA covers the common law tort claims brought by Plaintiffs. Rather, Plaintiffs premise those claims on two distinct, traditional common law tort duties:

1. The duty to act in a legal manner, the basis for which can be derived from statutes such as the Controlled Substances Act and Food, Drug and Cosmetic Act as pled in the SAC. (*See* Restatement (Second) of Torts, § 286 (1965), comments (d), (e)); and

2. The duty to avoid foreseeable damage. (*See, e.g.*, Restatement (Second) of Torts, §§ 285 and 290 (1965)).

Plaintiffs' claims are not contract claims cleverly disguised as a tort action, *Sizemore v. Pacific Gas & Electric Retirement Plan*, 939 F.Supp.2d 987, 991 (N.D. Cal. 2013) (denying motion to dismiss), and as noted in both NFLPA letters, the claims are not for specified financial benefits which inure directly to the benefit of retirees nor are they medical malpractice claims filed against a team or League doctors.

Finally, Plaintiffs acknowledge that the NFLPA reserves the right to argue that Article 39 of the 2011 collective bargaining agreement imposes enforceable duties on clubs and medical personnel. Even if that article does provide for such duties, as the NFLPA acknowledges, Plaintiffs have not pled malpractice claims against the clubs or medical personnel and in any event, Article 39 does not apply to retirees.

In sum, the NFLPA agrees with Plaintiffs that they do not allege claims based on a duty created by a CBA or dependent on the interpretation of a contractual provision contained therein. No legal basis exists therefor to find that those claims should be preempted.

Dated: December 4, 2014

Respectfully Submitted,

/s/

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