IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD DENT; JEREMY NEWBERRY; ROY GREEN; J. D. HILL; KEITH VAN HORNE; RON STONE; RON PRITCHARD; JAMES MCMAHON; MARCELLUS WILEY; JONATHAN REX HADNOT, JR., On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

— v. —

NATIONAL FOOTBALL LEAGUE, a New York unincorporated association,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR NORTHERN CALIFORNIA, SAN FRANCISCO

BRIEF FOR PLAINTIFFS-APPELLANTS

WILLIAM N. SINCLAIR
PHILLIP J. CLOSIUS
STEVEN D. SILVERMAN
ANDREW G. SLUTKIN
SILVERMAN THOMPSON SLUTKIN
& WHITE LLC
201 N. Charles Street, Suite 2600
Baltimore, Maryland 21201
(410) 385-2225

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

STATUTES, RULES AND OTHER AUTHORITY

Other Authorities

INTRODUCTION

For decades the National Football League ("NFL") directed and controlled the distribution of controlled substances and prescription drugs to its players in amounts (*e.g.*, number of injections) and a manner (*e.g.*, without a prescription and failure to warn of side effects) that violate federal and state laws. It did so for a lucrative financial benefit, yet left its "money-makers" – the players – with latent injuries (*e.g.*, kidney failure that did not manifest until years after a player retired) and drug addictions they now battle on their own, without NFL assistance, years after their careers ended.

In early 2013, Plaintiffs/Appellants (hereinafter, "Plaintiffs") first made the connection between their injuries and the aforementioned illegal conduct. In May 2014, on behalf of all retired players, they filed a complaint to seek redress for the injuries the class has suffered, and continues to suffer, as a result thereof. The NFL filed two motions to dismiss and on December 17, 2014, the District Court dismissed on preemption grounds (the "2014 Decision"). Plaintiffs appealed that decision to the Ninth Circuit, which reversed and remanded to the District Court for further proceedings on September 6, 2018. Thereafter, Plaintiffs filed a Third Amended Complaint ("TAC") in which they streamlined the case to a single cause of action – negligence. After oral argument, on April 18, 2019, the District Court dismissed Plaintiffs' TAC on the grounds that Plaintiffs failed to adequately plead their sole

negligence claim because they did not demonstrate any duty owed by the NFL to Plaintiffs. The District Court came to this conclusion after deciding Plaintiffs' well pleaded allegations were inaccurate, a colossal misstep at this stage in litigation. For the reasons discussed herein, the District Court committed reversible error dismissing Plaintiffs' TAC as it misapplied the standard for deciding a motion to dismiss and failed to abide by Supreme Court and Ninth Circuit decisions pertaining to Federal Rule of Civil Procedure 12(b)(6) motions. This Court should thus reverse and remand this matter for further proceedings below.

JURISDICTIONAL STATEMENT

Plaintiffs appeal from the District Court's April 18, 2019 judgment granting the NFL's motion to dismiss. The District Court has jurisdiction under 28 U.S.C. § 1332(d)(2) because the proposed class consists of more than one hundred persons, the overall amount in controversy exceeds $5,000,000 exclusive of interest, costs, and attorney's fees, and at least one plaintiff is a citizen of a state different from one defendant. Plaintiffs filed a timely notice of appeal on May 14, 2019. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

There are 4 issues on appeal:

1. The District Court concluded that Plaintiffs did not comply with the Ninth Circuit's 2018 holding, when it remanded the matter to the District Court. The

District Court found that Plaintiffs had convinced the Ninth Circuit that the NFL had directly handed drugs to players and Clubs and that the Ninth Circuit in effect required the TAC to contain allegations to that effect. Did the District Court commit reversible error when it mischaracterized Plaintiff's argument and the Ninth Circuit's opinion in *Dent*,[1] by holding that Plaintiffs' well-pled allegations regarding the NFL having directed and controlled the distribution of drugs was insufficient to support a negligence claim?

2. In deciding a motion such as the one at issue, the trial court must accept all well-pled allegations as true and cannot resolve disputed issues of fact. The District Court found the individual clubs and its respective employees, not the NFL, the conglomerate, as pled, were responsible for the conduct at issue and therefore dismissed the case. Did the District Court commit reversible error when it substituted its view of the allegations for what Plaintiffs pled and when it resolved factual disputes in the NFL's favor?

3. The District Court held that none of the three duties alleged in the TAC were sufficiently plead under applicable California law. Did the District Court err in so holding?

[1] *Dent* refers to *Dent v. National Football League*, 902 F.3d 1109 (9th Cir. 2018)

4. The District Court concluded that Plaintiffs relied on a negligence *per se* theory to support their negligence claim, when in actuality California recognizes negligence *per se* as an application of an evidentiary presumption provided by California Evidence Code §669. Did the District Court commit reversible error when it conflated the evidentiary presumption of negligence *per se* with the theory of negligence as pled by Plaintiffs?

STATEMENT OF THE CASE

On May 20, 2014, Hall of Famer Richard Dent and seven other retired football players filed a putative class action suit against the NFL. Appellants' Excerpts of Record, Volume I, Page 279.[2] The complaint was amended ("SAC") to include two additional retired players as named Plaintiffs. E.R. 279. After the District Court dismissed Plaintiffs' SAC and the Ninth Circuit reversed the District Court's decision, Plaintiffs filed a third and final amended complaint. E.R. 289. Cumulatively, at least one of the ten Plaintiffs played in every NFL season from 1969 through 2012. E.R. 245. The gravamen of the TAC was simple: since 1971, the NFL directed and controlled the distribution to its players of controlled substances and prescription drugs in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* ("Controlled Substances

[2] Appellants' Excerpts of Record are hereinafter referred to as "E.R."

Act"); the Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.* ("Food and Drug Act"), and corresponding state statutes. E.R. 10.

Plaintiffs' stories are remarkably similar. Regardless of the team or year, players were given large quantities of opioids, non-steroidal anti-inflammatory drugs, and anesthetics without a prescription, with little regard for their medical history or potentially fatal interaction with other medications, and without warning about possible side effects. E.R. 105. While the types of medications changed over the years, from amphetamines in the 1970s to Toradol in the 1990s and beyond, the volume and manner in which they were distributed remained constant. E.R. 159–60.

The NFL engaged in this conduct to keep its players on the field and its revenues high, with the former becoming increasingly difficult over time and the latter becoming all-encompassing. E.R. 154–57. From 1966 (when the AFL and NFL merged) to the present, the NFL has steadily expanded its schedule to include more games in an overall season and has also increased their frequency, with games now being played on Sundays, Mondays and Thursdays (and after college football ends, Saturdays too). E.R. 154. The offseason is far shorter than it was 50 years ago, as now a player might participate in the Super Bowl in February and have to report back in April (and until recently, March), whereas they used to go months at a time with no involvement with their clubs.

In a survey by *The Washington Post*, nearly nine out of 10 former players reported playing while hurt. E.R. 155. Fifty-six percent said they did this "frequently." E.R. 155. An overwhelming number – 68 percent – said they did not feel like they had a choice whether to play hurt. E.R. 155. And they are right – the NFL gave them no choice. E.R. 155. Rather than allowing players the opportunity to rest and heal, the NFL illegally substituted Medications for proper health care. E.R. 156. For example, Plaintiff Keith Van Horne played a playoff game when he could not lift his arm. E.R. 175. During that time, he received two Percodan for the first half of the game and another two Percodan for the second half of the game to deal with the pain rather than proper medical care and rest. E.R. 175.

The similarity in which Medications were distributed to players on different clubs scattered across the country over five decades indicates that the decision to engage in this illegal conduct came from the NFL. E.R. 76.

The foregoing allegations form the nucleus of the TAC, the operative amended pleading filed on December 5, 2018. E.R. 289. Plaintiffs further allege that, as a result of the NFL's illegal conduct, they suffer from addiction, muscular-skeletal injuries, and harm to their internal organs. E.R. 160.

Procedurally, the District Court first District Court granted the NFL's preemption motion to dismiss on December 17, 2014. E.R. 288. The Order further provided that Plaintiffs could have until December 31, 2014 to file a motion for leave

to amend their claims. E.R. 288. Plaintiffs did not, and the District Court entered a final Order on December 31, 2014. E.R. 288. Plaintiffs appealed the District Court's December 17, 2014 ruling to the Ninth Circuit. E.R. 288. On September 6, 2018, the Ninth Circuit reversed on the collective bargaining agreement ("CBA") issue and remanded the matter to the District Court for further proceedings. E.R. 151. The Ninth Circuit was clear that Plaintiffs were to focus on the NFL's responsibility and actions that support Plaintiffs' negligence claim against it. E.R. 151.

On December 5, 2018, Plaintiffs filed their TAC asserting one cause of action – negligence. E.R. 289. This claim is supported by several facts pled therein, including the following:

- Doctor Pellman of the New York Jets, the public face of the League's health problems, distributed drugs to players, E.R. 209 at ¶¶ 184;
- NFL's employment of a doctor as the head of its prescription drug program since at least 1973 with the purpose of maintaining NFL's Return to Play Business Plan ("Business Plan"), E.R. 203 at ¶¶ 159–62, E.R. 210 ¶ 188;
- The NFL holds annual meetings to coordinate details regarding the distribution of Medications among all of its clubs, E.R. 208 at ¶ 183;
- The NFL mandated that its players sign a Toradol waiver. E.R. 208 at ¶ 181;
- The NFL audits and reviews the distribution of medications, E.R. 210 at ¶ 188.; and
- The imposition by the NFL of reporting software and bulk drug procurement from SportPharm, a company that voluntarily surrendered its pharmacy license in 2010 in the face of charges that it illegally distributed drugs to multiple NFL clubs, E.R. 207.

The NFL moved to dismiss the TAC for failure to state a claim and on supposed statute of limitations problems. E.R. 289. After oral argument on April 18, 2019, the District Court dismissed Plaintiff's TAC, explaining that it did not find that the NFL was directly involved in handling, distributing, and administrating of medications within the meaning of the pertinent statutes and further that the NFL had no duty to Plaintiffs that it may have plausibly breached. E.R. 290. The District Court found the statute of limitations motion to be moot. E.R. 21.

Plaintiffs timely filed the current appeal. E.R. 291.

SUMMARY OF THE ARGUMENT

The District Court analyzed Plaintiffs' TAC under a fundamental misapplication of the law at this stage in litigation. It required Plaintiffs to prove that the NFL itself was providing prescription drugs to NFL players or Clubs. Rather, the standard at this stage is to assess whether Plaintiffs sufficiently pleaded allegations that, if true, would state a negligence claim. Further, the District Court mischaracterized negligence *per se* as a vehicle for Plaintiffs to prove negligence, when in fact California recognizes it as an evidentiary presumption. As explained, both *supra* and *infra*, Plaintiffs allege that the NFL owed a duty – under California law – to Plaintiffs, which it breached when it directed and controlled the distribution of prescription drugs to NFL players, leaving them with latent injuries decades after each player retired. Last, the District Court misinterpreted this Court's 2018 holding.

The District Court incorrectly determined that Plaintiffs convinced the Ninth Circuit that NFL was directly providing prescription drugs to NFL players and Clubs. However, Plaintiffs assert, then and now, that NFL directs and controls its pyramidal prescription drug scheme and is therefore liable to Plaintiffs.

The question thus presented is: If in fact Plaintiffs can prove that the NFL directed, controlled and profited from the prescription drug scheme on a routine basis, did the NFL breach a duty it owed to each of the players?

In the appropriate analysis that should flow from that question, *who* else was involved in distributing and administering the prescription drugs is not relevant. The District Court's decision should be reversed because it failed to recognize Plaintiffs' claims as pled and did not correctly construe the duty at issue.

ARGUMENT

I. THE DISTRICT COURT MISUNDERSTOOD THE NINTH CIRCUIT'S OPINION IN *DENT v. NFL*.

A. The District Court Mischaracterized Plaintiffs' Arguments before the Ninth Circuit in *Dent*.

The District Court premised its analysis of the Ninth Circuit's opinion in *Dent* is on a misunderstanding that Plaintiffs argued that NFL personnel were directly giving drugs to the players or the Club doctors and trainers. These key passages from the District Court's decision stating as much are as follows:

- "By their own admission then, plaintiffs do not allege that the NFL *itself* violated the relevant drug laws and regulations governing the medications at

issue – that violation is specifically attributed to the club doctors and trainers." *Dent v. National Football League*, No. C 14-02324 WHA, 2019 WL 1745118 at *5 (N.D. Cal. Apr. 18, 2019) (hereinafter "*Dent II*").

– "Significantly, plaintiffs do not make any specific, plausible allegation that the relevant statutes apply to the NFL, let alone that the NFL violated those statutes." *Id.* at *6.

– "Plaintiffs now acknowledge in their third amended complaint and briefing that the NFL did not itself provide medical care for or distribute medications to the players, and the operative complaint contains only conclusory allegations related to conduct by the NFL that would give rise to a duty of care." *Id.*

Plaintiffs neither made such representations nor did the *Dent* Court rely on any such assertions.

The District Court's improper reasoning, by its own admission, was driven by one specific exchange during the appellate oral argument between NFL's counsel and the *Dent* Court, which it quoted in its opinion:

> "THE COURT: Counsel, what do we do with the allegation in the complaint that NFL directly gave drugs to athletes?
> MR. CLEMENT: Well, I think what you do is you read it in the context of the entire complaint, so with respect to every one of the ten plaintiffs, the specific allegations are that they were given injections by the team doctors, the doctors …
> THE COURT: I'm looking at paragraph 17 of the complaint. This is the second amended complaint, the NFL directly? *I'm going to put some Ellipses in here. The NFL directly supplied players with Opioids*." *Id.* at *2. (stating that this exchange and interpretation "of the complaint drove our court of appeals' analysis.").

Conspicuously missing from the District Court's opinion is the exchange immediately following the above-referenced dialogue, which addressed a potential

negligence claim under the theory that the NFL is the "outside force" causing medications to be distributed to the players. The following dialogue took place between the *Dent* Court and NFL's counsel:

> MR. CLEMENT: Well, again, I mean look, if they want to isolate their whole complaint to being the, you know, the direct distribution of opioids by the NFL, not through the club trainers and the club doctors, I mean, I think what they would then perhaps have is a claim that just is fanciful. But that's, I don't think that's a fair reading of what they actually alleged in their whole complaint If you take it as a whole and I think if you go back and you …
>
> THE COURT: I'm sorry, I think this is where you're going but they're not in fact alleging this is independent, they are in fact alleging that they use club doctors but why does the type use the club doctors bring this under the collective bargaining agreement?
>
> THE COURT: Okay, so, you know, I think they take that as a given so the collective bargaining agreement say the doctors have certain duties and in the (inaudible) thing there was this outside force that is causing the doctors to breach their duty and we're not suing the doctors for the breach of duty, we're suing this outside force for causing the doctors to do these terrible things. Oral Argument at 16 min. 01 sec. – 18 min. 00 sec., *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010751.

In short, the NFL, through counsel, states that Plaintiffs' claims did not depend on the NFL directly giving drugs to players and the Ninth Circuit confirmed that they agreed with such a reading of Plaintiffs' complaint.

Indeed, the District Court quoted a statement from Plaintiffs: "the NFL controlled and directed a pyramidal scheme for the distribution of controlled substances and prescription drugs in flagrant disregard of federal and state law."

Dent II, 2019 WL 1745118 at *1. The District Court, however, drew the wrong conclusion from the pyramidal scheme argument. Wrongly, it found that "plaintiffs argued that they alleged that the NFL *itself* supplied and distributed the endless stream of drugs, thereby violating the relevant federal and state statutes governing controlled substances." *Id.* Unsurprisingly, the pyramidal scheme is designed to do the exact opposite – it insulates the top of the pyramid from direct contact with the victim or ultimate purchaser. The *Dent* oral argument reveals that Plaintiffs' counsel clearly stated as such to the Ninth Circuit panel. *See e.g.*, Oral Argument at 8 min. 16 sec. – 9 min. 33 sec., *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010751 (explaining that "what happens in a classic pyramid is everybody blames somebody else… that's why pyramid schemes have been in existence…because they confuse duties, they confuse responsibilities and everybody's got plausible denial…").

Despite having the transcript of the Dent oral argument, the District Court emphasized its incorrect assumption of the *Dent* opinion: "To repeat, plaintiffs escaped preemption before our court of appeals by asserting the NFL's *proactive* involvement with medication distribution. Having convinced our court of appeals that they were alleging that the NFL itself directly provided medical care and supplied drugs to players, plaintiffs may not bob and weave back to old theories of

negligence that, in essence, amount to the NFL's failure to intervene." *Dent II*, 2019 WL 1745118 at *7. This exemplifies the District Court's misunderstanding of Plaintiffs' argument, which resulted in the District Court erroneously concluding that Plaintiffs had convinced the *Dent* Court that they had alleged NFL personnel had directly given drugs to NFL players. Rather, Plaintiffs clearly argued the opposite – that the NFL itself had directed and controlled others to do so.

B. The *Dent* Opinion Did Not Require the TAC to Allege that NFL Personnel Gave Drugs to NFL Players.

The *Dent* Court, therefore, was cognizant that Plaintiffs' allegations centered on the NFL directing and controlling the Clubs' distribution of the drugs to the players. This reading of the TAC, not the one adopted by the District Court, should inform any interpretation of the language used in *Dent*.

1. The District Court considered restrictive interpretations of statutory terms resulting in an improper decision.

The Ninth Circuit discussed Plaintiffs' negligence claim with specific attention to the NFL's required duty to Plaintiffs. *Dent v. National Football League*, 902 F.3d 1109, 1118–19 (9th Cir. 2018) (hereinafter "*Dent*"). In its analysis, the opinion uses three words – handling, distribution and administration – either together, or more frequently, independently to describe the NFL's role with regard to how players received prescription drugs. *Id.* at 1119. Yet, the District Court concluded that the *Dent* opinion used those words as defined in the applicable

statutes, and therefore required the TAC to allege that NFL personnel directly gave drugs to NFL players. "Our court of appeals thus clearly reversed (on the preemption issue) based on plaintiffs' prior representations related to the NFL's direct involvement in the handling, distribution, and administration of the medications *within the meaning of the relevant drug statutes.*" *Dent II*, 2019 WL 1745118 at *8.

However, the word "handling" is not defined in the Controlled Substances Act. In fact, the word is neither used in the Controlled Substances Act nor is it used in the Food, Drug and Cosmetic Act. The District Court was categorically wrong to assert that "handling" had a meaning in the relevant drug statutes. The TAC cites to an NFL document which defines handling as "purchase, distribution, dispensing, administration and recordkeeping." E.R. 211 at ¶ 194. This document provides a rather broad and all-encompassing definition of "handling," which includes actions other than handing drugs to players or giving them to the Clubs. E.R. 211–12 at ¶ 194. Yet, the District Court simply ignored this definition of "handling."

The word "administration" is used only once in the *Dent* opinion, and, even so, it is combined with handling and distribution. *Dent*, 902 F.3d at 1119. The Controlled Substances Act does not define administration but it does define the word "administer." "Administer" is defined as "the direct application of a controlled substance to the body of a patient or research subject by – (A) a practitioner (or, in his presence, by his authorized agent) or (B) the patient or research subject at the

direction and in the presence of the practitioner." 21 U.S.C. § 802(2) (2016). "Administer" is not used in the Food, Drug and Cosmetic Act. The District Court erred in holding that the *Dent* opinion was referring to the application of a topical cream or ointment to a players' body when it used the term "administration." *Dent II*, 2019 WL 1745118 at *8.

The Controlled Substances Act defines the words "distribute," "deliver," and "delivery." "Distribute" is defined as "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. § 802(11) (2016). "Deliver" and "delivery" are defined as "the actual, **constructive**, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." 21 U.S.C. § 802(8) (2016) (emphasis added). The *Dent* opinion is clearest in its application of the word "distribute" to this case. "Regardless of what (if anything) the CBAs say about those issues, if the NFL had ***any role*** in distributing prescription drugs, it was required to follow the laws regarding those drugs." (emphasis added). *Dent*, 902 F.3d at 1121. "Any role" clearly includes more conduct than simply handing pills to players. As will be discussed *infra*, the TAC details the multiple roles NFL personnel played in directing and controlling the distribution of prescription drugs.

In addition, the Ninth Circuit, in applying the Controlled Substances Act, has stated "the distribution provision has been held to criminalize participation in the

transaction viewed as a whole." *United States v. Ahumada-Avalos*, 875 F.2d 681, 683 (9th Cir. 1989) (quoting *United States v. Brunty*, 701 F.2d 1375, 1381 (11th Cir. 1983)). In fact, "courts usually interpret the term "distribute' quite broadly." *Id.* The Ninth Circuit also has specifically held that a defendant violated the Controlled Substances Act when he "directed and oversaw the distribution of drugs" even though he himself never possessed the drugs. *United States v. DeRosa*, 670 F. 2d 889, 893 (9th Cir. 1982). The TAC echoed the DeRosa opinion with its multiple allegations that the NFL directed and controlled the distribution of controlled substances.

The District Court also asserted that "plaintiffs aim for a broader interpretation of liability allowed under *Dent* to include the NFL's alleged activities beyond those governed by the relevant drug statutes, such as recordkeeping and storage." *Dent II*, 2019 WL 1745118 at *7. However, recordkeeping and storage are governed by the Controlled Substances Act. *See* 21 U.S.C. § 827(c); 21 C.F.R. § 1304(22)(c) (2018); 21 C.F.R. § 1301.71(a) (2018); *see also* E.R. 198 at ¶¶ 131–33. The District Court's improper focus on the physical handing off drugs to players led to its misunderstanding of the reach of the Controlled Substances Act.

2. The District Court improperly relied solely on the Controlled Substances Act and blatantly disregarded other statutes that Plaintiffs pleaded in the TAC.

The District Court only looked to the Controlled Substances Act in forming its opinion. The Plaintiffs clearly also allege violations of the Food, Drug and Cosmetic Act and the California Pharmacy Laws, as noted in the *Dent* opinion. *Dent*, 902 F.3d at 1119. Assuming *arguendo* that the District Court is correct in its interpretation of the Controlled Substances Act, the NFL's Motion to Dismiss should have been denied based on the other statutes at issue. Failure to consider them was reversible error.

With respect to the Food, Drug and Cosmetic Act, the United States Supreme Court has established the "responsible corporate officer" doctrine to impose direct, not vicarious, liability when a "… defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so." *United States v. Park*, 421 U. S. 658, 673–74 (1975). This Court should apply the "responsible corporate office" doctrine to the NFL as the literal structure is less important than the underlying policies supporting the "responsible corporate office" doctrine, especially in the context of interpreting reasonable conduct in a negligence claim. As noted *infra*, the TAC clearly alleges and demonstrates that the NFL was in a position to prevent or correct the statutory violations contained therein.

The District Court noted that the Controlled Substances Act could be violated even if the NFL did not possess or directly hand drugs to the players or teams. While

questioning NFL's counsel regarding the "kingpin" hypothetical, the District Court noted the following:

> "[a]ll right. Well, but the argument I think is like in a criminal case, the kingpin may be careful enough never to have drugs in their possession. In fact, the drugs will be down at the street level or at some stash house or someplace where the kingpin never has to go. So let's say the kingpin never touches the drugs. Never has physical possession, but controls the whole enterprise. Under your assumption, the Government couldn't put the kingpin in jail because they don't touch the drugs. **That can't be right**." (emphasis added). Transcript of Oral Argument at 35, *Dent v. National Football League*, No. C 14-02324 WHA, 2019 WL 1745118 (N.D. Cal. Apr. 18, 2019).

Although the District Court made the connection that the NFL, at a *de minimis* level, was akin to a "kingpin," it clearly came to an inapposite determination. Based on the District Court's improper interpretation of both the *Dent* opinion and statutory definitions, this Court should reverse the District Court decision.

II. THE DISTRICT COURT'S ORDER EXCEEDED THE SCOPE OF A MOTION TO DISMISS.

A. Standard of Review.

A district court's dismissal of a complaint for failure to state a claim is reviewed *de novo*. *Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty.*, 708 F.3d 1109, 1115 (9th Cir. 2013). "In assessing whether a party has stated a claim upon which relief can be granted, a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party[.]" *Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015). "Because this

case was decided on a motion to dismiss," the court must "take the [complaint]'s allegations as true and construe them in the light most favorable to the plaintiffs." *Dent v. Nat'l Football League*, 902 F.3d 1109, 1117 (9th Cir. 2018).

A motion to dismiss a complaint for failure to state a claim can only be granted "if the allegations, taken as true, show the plaintiff is not entitled to relief." *El-Shaddai v. Zamora*, 833 F.3d 1036, 1043 (9th Cir. 2016) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)). At this stage, all reasonable inferences are drawn in favor of the nonmoving party. *See Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 697 F.3d 1192, 1196 (9th Cir. 2012). "[W]hen the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" a claim has facial plausibility. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

B. The TAC is Replete with Specific Allegations of NFL Personnel Directing and Controlling the Provision of Prescription Drugs to NFL Players.

The District Court erred in holding that Plaintiffs' TAC did not comply with the *Dent* Court's instruction. To be clear, the *Dent* opinion held that "on remand, any further proceedings in this case should be limited to claims arising from the conduct

of the NFL and NFL personnel – not the conduct of individual teams' employees." *Dent*, 902 F.3d at 1121.

The TAC contains numerous factual allegations that NFL personnel directed and controlled the provision of prescription drugs to NFL players, including but not limited to the following: (1) Doctor Pellman of the New York Jets seen as the public face of the League's health problems, dispensing drugs to players E.R. 209 at ¶ 184; (2) NFL's employment of a doctor as the head of its prescription drug program since at least 1973 with the purpose of maintaining NFL's Business Plan, *see* E.R. 203 at ¶¶ 159–62, E.R. 210 ¶ 188; (3) Dr. Brown's 1999 memo detailing the main purpose was "to provide guidelines for the utilization of all prescription drugs provided to players and team personnel by physicians and other healthcare providers" and "to ensure the appropriate handling (purchase, distribution, dispensing, administration and recordkeeping)," *see* E.R. 211–12 at ¶ 194; (4) NFL Prescription Drug Program emphasis was placed on "(1) the on-site audit, (2) the initial inventory and reconciliation reports, and (3) procedures used to provide controlled drugs to team personnel, to obtain prescription drugs from pharmacies, and to secure controlled drugs[,]" *see id.*; (5) violations of the Controlled Substances Act when travelling with controlled substances across state lines, *see* E.R. 219–20 at ¶ 215, E.R. 220–21 ¶¶ 218–21; (6) NFL's mandate to register Club stadiums and practice facilities as storage facilities for prescription drugs subsequent to DEA reprimands, *see* E.R. 207

at ¶ 178; (7) NFL Security Office controls aspects of drug distribution and conducts on-site inspections, *see* E.R. 157 ¶ 8, E.R. 207 at ¶ 180; (8) NFL's requirement that all Clubs report regularly to it regarding injury status and number of dispensed drugs, *see* E.R. 204–05 ¶ 163, E.R. 210–12 ¶¶ 188–96, E.R. 216–18 ¶¶ 206–12; (9) NFL's regular meetings with Club doctors and trainers regarding the use of prescription medications, *see* E.R. 208–09 ¶¶ 183–87, E.R. 216 ¶¶ 204–06; (10) NFL personnel regularly meeting with the DEA to discuss the legality of drug use in the league, *see* E.R. 218–21 ¶¶ 214–20; (11) NFL's approval of hiring Clubs' doctors and medical sponsorship, *see* E.R. 207 ¶ 179, which led to NFL (through counsel) referring to NFL as a "super-employer," *see* Oral Argument at 14 min. 20 sec., 19 min. 09 sec., *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018) (No. 15-15143), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010751; (12) NFL mandate that Clubs use SportPharm – drug tracking software, *see* E.R. 207 ¶ 179; (13) NFL requirement that all players sign a Toradol waiver that was drafted by the NFL preceding the 2010 season, *see* E.R. 208 at ¶ 181 (14) San Diego Chargers' attempt to survey all Clubs regarding their distribution of controlled substances, which was squelched by Dr. Pellman, the acting NFL Medical Advisor, *see* E.R. 223 at ¶¶ 227–28; (15) NFL officials authoring its response to Harvard's report on NFL doctors, *see* at E.R. 155–56 at ¶ 6, E.R. 223 at ¶ 229; (16) NFL funding two significant reports with respect to the use of Toradol in the NFL, *see*

E.R. 204–07 at ¶¶164–77; (17) references to NFL's liability regarding the use and distribution of prescription drugs, *see* E.R. 158 at ¶ 11, E.R. 220 at ¶ 217; and, (18) NFL's 2015 policy that teams could not travel with controlled substances but needed to use an independent doctor in the away city to dispense them, *see id.* at E.R. 208 at ¶ 182, E.R. 221 at ¶ 221.

The eighty-nine page and three-hundred and ten paragraph TAC is painstakingly detailed with specific allegations and references to demonstrate the NFL's direct role in controlling and distributing prescription drugs to NFL players. *See* E.R. 154–241. In the context of a 12(b)(6) motion, those allegations must be accepted as true. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003); *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1021 (9th Cir. 2000). Considering the TAC's assertions as true at this stage, the District Court had very little discretion to find that Plaintiffs did not sufficiently allege facts to support their claim.

The NFL had the ability to stop Club doctors and trainers from acting illegally whenever it wanted to do so. In fact, on May 20, 2019, the NFL unilaterally announced that a new Prescription Drug Monitoring Program (the "Program") had been developed to "monitor all prescriptions issued to NFL players by club physicians and unaffiliated physicians" and "[p]rior to the start of the 2019 NFL Season, each NFL club must appoint a Pain Management Specialist …" The NFL further stated that the Program and appointment were "mandatory across all clubs."

See "NFL-NFLPA joint agreements to protect health, safety, wellness of players," NFL.com, May 20, 2019 at www.nfl.com/news/story/0ap3000001031345/article/nflnflpa-joint-agreements-to-protect-health-safety-wellness-of-players (announcing simultaneously that the NFL and NFLPA would create a joint committee to "establish uniform standards for club practices and policies regarding pain management and the use of prescription medication by NFL players …'). Evidently, the NFL is finally mandating that prescription drugs be delivered to players legally.

Therefore, it is evident that Plaintiffs' TAC clearly alleges that NFL personnel directed and controlled literally every aspect of the distribution of prescription drugs to NFL players. This conclusion is even more warranted in the assessment of a Motion to Dismiss. The District Court erred in holding that the TAC did not do so.

C. The Third Amended Complaint Adequately Pleads Negligence.

A negligence cause of action in California consists of the following elements: (1) the existence of a legal duty of care; (2) breach of that duty; and, (3) the proximate cause resulting in injury. *McIntyre v. The Colonies-Pac., LLC*, 228 Cal. App. 4th 664, 671 (2014). California recognizes that negligence is the failure to use reasonable care to prevent harm to others; thus, a person is negligent if they do something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

Coppola v. Smith, 935 F. Supp. 2d 993, 1013 (E.D. Cal. Mar. 26, 2013) (citing *Raven H. v. Gamette*, 157 Cal. App. 4th 1017, 1025 (2007)). The TAC adequately pleads a negligence claim as defined by California law.

1. The NFL Owed a Duty of Care to Plaintiffs.

The District Court was incorrect when it concluded that Plaintiffs did not plead an independent duty of care. Again, Plaintiffs do not have to establish anything at this point; they simply need to allege plausibly, and that they have done. The duties owed by the NFL to Plaintiffs exist because of the very nature of the activity at issue. The NFL assumed such duties, and further, a duty arises because of the "special relationship" that exists between the NFL and its players. Plaintiffs need only sufficiently plead one of these duties to justify reversal.

i. The NFL failed to exercise reasonable care in its utilization of prescription medications.

The Ninth Circuit has already determined that, applying the *Rowland* factors,[3] the "lack of reasonable care in the handling, distribution, and administration of controlled substances can foreseeably harm the individuals who take them." *Dent*,

[3] The *Rowland* factors consist of: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty that the plaintiff suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise case with resulting liability for breach; and, (7) the availability, cost, and prevalence of insurance for the risk involved. *Rowland v. Christian*, 69 Cal. 2d 108, 113 (1968).

902 F. 3d at 1119. The Ninth Circuit stated that *Rowland* factors had been satisfied and took the time to explain that:

> "Carelessness in the handling of dangerous substances is both illegal and morally blameworthy, given the risk of injury it entails. Imposing liability on those involved in improper prescription-drug distribution will prevent harm by encouraging responsible entities to ensure that the drugs are administered safely. And it will not represent an undue burden on such entities, which should already be complying with the laws governing prescription drugs and controlled substances."

Dent, 902 F.3d at 1119.

Ultimately, the question is whether the NFL conducted its business in a reasonable manner. In deciding the issue of reasonability and consequent duty, statutory provisions inform the interpretation of reasonable conduct even if the pertinent statute does not provide a private right of action. *See* RESTATEMENT (SECOND) OF TORTS: §285, Cmt. C (1965) ("Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence."). The Ninth Circuit, in *Dent*, recognized such a duty under California common law:

> "Here, any duty to exercise reasonable care in the distribution of medications does not arise through statute or by contract; no statute explicitly establishes such a duty, and as already noted, none of the CBAs impose such a duty. However, we believe that a duty binding on the NFL – or any entity involved in the

> distribution of controlled substances – to conduct its activities with reasonable care arises from "the general character of (that) activity." See *J'Aire Corp*., 157 Cal. Rptr. 407, 598 P. 2d at 62. … Of course, establishing that an entity owes a duty does not necessarily establish what standard of care applies, or whether it was breached. But when it comes to the distribution of potentially dangerous drugs, minimum standards are established by statute." *Dent*, 902 F.3d at 1119.

It is well established under California law that a business establishment's legal obligations to its customers and others may arise…[because of] the Legislature's enactment of a statutory provision. *Verdugo v. Target Corp.*, 59 Cal. 4th 312, 326 (2014) ("A duty of care … may of course be found in a legislative enactment which does not provide for civil liability."); *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 604 (2010) (quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 304–05 (1988)) ("even without a private right of action under a statute courts retain jurisdiction to impose civil damages or other remedies … in appropriate common law actions.").

The TAC is replete with factual allegations that specifically identify how the "general character of" the NFL's maintenance of its Business Plan and its direction and control of the distribution of the Medications is unreasonable. The NFL has violated every aspect of the standard set forth by the *Coppola* Court. To be clear, the NFL failed to use reasonable care to prevent harm to Plaintiffs. A reasonable person would not have pushed prescription drugs in a manner contrary to the requirements of federal and California statutes as the NFL did, and further the NFL failed to stop

the illegal use of prescription drugs as a reasonable person would have done with the same knowledge the NFL possessed.

ii. For decades the NFL assumed a duty when it voluntarily involved itself in the distribution of medications.

A separate duty to exercise due care arises when a person with no affirmative duty to act voluntarily does so. *University of Southern California v. Superior Court*, 30 Cal. App. 5th 429, 448 (2018). This duty arises when a defendant voluntarily undertakes to provide protective services for the plaintiff's benefit, and either the defendant's failure to exercise reasonable care increases the risk of harm to the plaintiff or the plaintiff reasonably relies on the undertaking and suffers injury as a result. *Id.* at 623.

The Ninth Circuit recently dealt with such a duty in the context of sports. The Ninth Circuit reversed a district court's dismissal of a claim against the defendant USA Water Polo for failure to state a claim. *Mayall on Behalf of H.C. v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2018). Plaintiff alleged she had been damaged when her coach consistently returned her to play despite her receiving multiple concussions over a number of same day tournament games. *Id.* at 1058. Plaintiff sued defendant for failure to implement concussion-management and return-to-play protocols for its youth water polo league. *Id.* The Court recited California's negligence rule of law discussed *supra*. *Id.* at 1066. The Court noted that California law imposes liability "if a defendant acts (or fails to act) in a way that increases the

risk beyond that 'inherent in the sport." *Id.* The Court found a 1992 Supreme Court of California case illustrative in that it quoted

> "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." *Id.* at 1061 (citing *Knight v. Jewett*, 3 Cal. 4th 296, 315 (1992)).

Here, the TAC adequately alleges that the NFL voluntarily involved itself in the distribution of Medications to its players. *See supra* Section III.C.1.ii. Indeed, a section of the TAC is titled "The League Voluntarily Undertook a Duty to its Players With Regard to the Administration of Medications." E.R. 203–08. The pertinent parts of the TAC detail how the League voluntarily undertook to establish a drug program starting in 1973 and how that program evolved to its current state with regard to distributing and administering Medications to players and therefore increase the risks to players. E.R. 203–04 at ¶¶ 159–64. It explains the various means by which the NFL has voluntarily assumed this duty with the imposition of Club audits, League-wide policies related to Toradol, the security and handling of Medications, and the support of various studies that warned the NFL of the danger to players of continuing its practices. *See id.*

Plaintiffs have also adequately pled that the NFL's failure to exercise reasonable care has increased the risk of harm to them beyond that inherent in the sport, *see e.g.*, E.R. 160 at ¶ 16, E.R. 199 at ¶ 143, E.R. 221 at ¶ 220, and that they

reasonably relied on the NFL's undertaking and suffered injury as a result, *see e.g.*, at E.R. 164 at ¶ 27, E.R. 167 at ¶ 36, E.R. at 171 at ¶ 45, E.R. 173–74 at ¶ 55, E.R. 176 at ¶ 64, E.R. 181 at ¶ 74, E.R. 188 ¶ 94, E.R. 190 at ¶105. The District Court erred in holding that the TAC did not do so.

iii. The NFL owed Plaintiffs a duty because they were in a "special relationship."

The NFL owed a third separate and distinct duty of care to Plaintiffs because of the "special relationship" that intertwines the NFL, the Clubs, and players. The California Supreme Court has held that a university has a duty of care to protect a student from foreseeable violence of another student during chemistry lab. *Regents of Univ. of Cal. v. Superior Court*, 4 Cal. 5th 607 (2018). The Court discussed special relationships that create a duty to protect against foreseeable risks, and recognized that "special relationships" share common features.[4] *Id.* at 620. These features include an "aspect of dependency in which one party relies to some degree on the other for protection." *Id.* (citing *Baldwin v. Zoradi*, 123 Cal. App. 3d 275, 283 (Aug.

[4] The court grounded its analysis in the Restatement Third of Torts, which identifies several "special relationships" that may support a duty to protect against foreseeable risks. *Regents of Univ. of Cal.*, 4 Cal. 5th at 621 (RESTATEMENT (THIRD) OF TORTS: Liability for Physical and Emotional Harm, §40(b) (2010)). Restatement writers have recognized a growing trend in which courts consider a duty to aid or protect in any relation of dependence or of mutual dependence. RESTATEMENT (SECOND) OF TORTS: §314A, Cmt. B, p. 119 (1965).

31, 1981); *Mann v. State of California*, 70 Cal. App.3d 773, 229–80 (June 16, 1977)); *see also Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3rd Cir. 1993) (holding that a college owed its lacrosse player a duty of care based on the special relationship between the college and the player in his capacity as an intercollegiate athlete engaged in school-sponsored activity for which he had been recruited). The corollary of dependence is control, with one party dependent and the other having superior control over the means of some protection. *Id.* at 621. "[A] typical setting for the recognition of a special relationship is where the plaintiff is particularly ***vulnerable and dependent*** upon the defendant who, correspondingly, has ***some control over the plaintiff's welfare***." *Regents of Univ. of Cal.*, 4 Cal. 5th at 621 (citing *Giraldo v. Department of Corrections & Rehabilitation*, 168 Cal. App. 4th 231, 245–46 (2008)) (internal citations omitted) (emphasis added).

One might not think of NFL players as vulnerable, but when it comes to the direction and control of prescription drugs, they are as vulnerable as any other person in the United States to overuse or misuse and the resulting long-term health problems; to quote the Ninth Circuit, "[t]hat's why they're 'controlled' in the first place." *Dent*, 902 F.3d at 1120. Further, there can be no doubt that Plaintiffs have adequately alleged that the NFL exerts "some control" over its players' medical well-being. *See* E.R. 160 at ¶ 16, E.R. 199 at ¶ 143, E.R. 202 at ¶ 156, E.R. 203 at ¶ 159, E.R. 203–04 at ¶ 162–64, E.R. 207–08 at ¶ 178–82, and E.R. 216 at ¶ 204. And

while true that the duty imposed by a special relationship extends only to foreseeable risks, again, the Ninth Circuit has already explained that the risks complained-of here – long-term health problems – are precisely the foreseeable type of risks that come from mishandling of controlled substances. *Id.*

The District Court erred in holding that the TAC failed to allege a "special relationship" between players and the NFL (the TAC need only allege the facts of such a relationship and did so) and that the California doctrine of "special relationship" only applied in the context of higher education. *Dent II*, 2019 WL 1745118 at *9.

2. Plaintiffs have adequately pled the remaining elements of negligence.

Plaintiffs have adequately pled their negligence claim. As discussed *supra*, they have identified three common law duties owed by the NFL to Plaintiffs. Plaintiffs have also pled breaches of those duties. For example, the TAC details a number of instances over several decades in which NFL personnel knew that the drug program it voluntarily created to monitor the handling and distribution of controlled substances was failing and yet the NFL took no action. *See* E.R. 210–12 at ¶¶ 189–95. Failure to act is the very definition of a breach of a duty. *Curtis v. Q. R. S. Neon Corp.*, 147 Cal. App. 2d 186, 195 (1956) ("An act or failure to act in violation of a statute is negligence as a matter of law."); *Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd.*, 96 Cal. App. 3d 923, 930 (1979) ("Gross negligence

involves a failure to act under circumstances that indicate a passive and indifferent attitude toward the welfare of others. Negative in nature, it implies an absence of care.").

Lastly, causation is not nearly the hurdle that the District Court states (though mistakenly in the context of a negligence *per se* claim), at least at this stage of the proceedings. The Ninth Circuit recognized that the injuries complained-of here – long-term health problems – "can be established with certainty, and they are closely connected to the misuse of controlled substances." *Dent*, 902 F.3d at 1119. In other words, it is foreseeable that the NFL's conduct as alleged in the TAC, if true, proximately caused the injuries complained-of here. The TAC also includes the expert opinion of Leslie Z. Benet, Ph.D., a noted expert in the field of pharmacology and biopharmaceutics, that the injuries noted by the Plaintiffs could plausibly be caused by the misuse of prescription medications. E.R. 224–25 at ¶¶ 230–34. The TAC alleges that some of the injuries complained of by Plaintiffs are specifically listed in the black box warning for the drug Toradol. E.R. 225 at ¶ 235. Additionally, under California law, "issues of breach and causation are questions of fact for the jury." *J.P. ex rel. Balderas v. City of Porterville*, 801 F. Supp. 2d 965, 990 (E.D. Cal. 2011) (citing *Lindstrom v. Hertz Corp.*, 81 Cal. App. 4th 644, 652 (2000)).[5] In

[5] *See also Ileto v. Glock, Inc.*, 349 F.3d 1191, 1206 (9th Cir. 2003); *Schaeffer v. Gregory Village Partners, L.P.*, 105 F.Supp.3d 951 (N.D. Cal. May, 14, 2015); *Andrews v. Wells*, 204 Cal. App. 3d 533, 538 (Sept. 12, 1988). *See also Jackson v.*

any event, Plaintiffs have adequately alleged that the NFL, through the maintenance of its Business Plan and its failings associated with the direction and control of Medications, caused the injuries at issue. *See* E.R. 180–82 at ¶¶ 72–77; E.R. 232–3610 at ¶¶ 269–87; *see e.g.*, E.R. 160–61 at ¶¶17–19, E.R. 163–64 at ¶¶ 25–27, E.R. 171 at ¶¶ 43–45, E.R. 173–74 at ¶¶ 53–55, E.R. 176 at ¶¶ 62–64, E.R. 180–81 at ¶¶ 72–74, E.R. 183 at ¶¶ 82–84, E.R. 187–88 at ¶¶ 91–94, E.R. 190 at ¶¶ 103–105.

AEG Live, LLC, 233 Cal. App. 4th 1156, 1173 (Jan. 30, 2015) (Breach of duty and proximate cause normally present factual questions); *Clarke v. Hoek*, 174 Cal. App. 3d 208, 214 (Nov. 8, 1985) ("…The province of the jury, as trier of fact, [is] to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case…"); *Hatch v. Ford Motor Co.*, 163 Cal. App. 2d 393, 397 (1958) ("The reasonableness of a defendant's actions is a quintessential jury question. The duty [of care] having been found to exist, whether it has been breached is a question of fact for the triers of the facts."); *Trujillo v. G.A. Enters, Inc.*, 36 Cal. App. 4th 1105, 1109 (1995) (reversing summary judgment on the issue of the reasonableness of defendant's actions, because "whether [defendant] acted reasonably under the circumstances ... [is a] question[ ] of fact to be resolved by trial, not summary judgment); *Saelzler v. Advanced Group 400*, 25 Cal. 4th 763, 785 (2001) ("The question of causation long has been recognized as a *factual* one, and it is only where reasonable men [and women] will not dispute the absence of causality." (internal quotations omitted)); *Steinle v. City and County of San Francisco*, 230 F. Supp. 3d 994, 1034 (N.D. Cal. Jan. 6, 2017) (proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint); *Garman v. Magic Chef, Inc.*, 117 Cal. App. 3d 634, 638 (Apr. 1, 1981) ("Proximate cause is a legal relationship. Whether an act or incident is the proximate cause of injury is a question of law where the facts are uncontroverted and only one deduction or inference may reasonably be drawn from those facts."); *Lacy v. Pacific Gas & Elec. Co.*, 220 Cal. 97, 101 (Feb. 10, 1934) (explaining that proximate cause is a question of fact for the jury).

III. THE DISTRICT COURT MISUNDERSTOOD CALIFORNIA'S NEGLIGENCE PER SE LAW.

Negligence *per se* is not a separate cause of action, but the application of an evidentiary presumption provided by California Evidence Code §669. *Coppola*, 935 F. Supp. 2d at 1016–17. It is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages. *Spencer v. DHI Mortg. Co., Ltd.*, 642 F.Supp.2d 1153, 1162 (E.D. Cal. 2009). To claim negligence *per se*, a plaintiff must allege that: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused injury; (3) the injury resulted from an occurrence that the enactment was designed to prevent; and, (4) the plaintiff fits within the class of persons for whose protection the enactment was adopted. Cal. Evid. Code §669; *see also Coppola*, 935 F.Supp.2d at 1017.

The District Court treated the negligence per se issue as if it were the negligence claim. "Here, plaintiffs primarily rely on a negligence *per se* theory to support their negligence claim …" *Dent II*, 2019 WL 1745118 at *4. As noted supra, Plaintiffs did not rely on an evidentiary presumption to prove their negligence claim. The "Cause of Action" section of the TAC has but one cause – Negligence – and in particular, paragraphs 304 and 305, which identify common law duties (discussed *supra*) owed by the NFL to Plaintiffs, and paragraphs 306 and 307, which distinguish between violations of the law (negligence *per se*) and breaches of duties

(negligence). The Plaintiffs could lose on the issue of negligence *per se* and still have a valid negligence claim. The District Court failed to realize that, even it was correct in its analysis, failure of the negligence *per se* argument would only mean that Plaintiffs lost an evidentiary presumption, not that the negligence claim should be dismissed.

Even though the Plaintiffs did not primarily rely on it, they are entitled to the evidentiary presumption because the TAC clearly contains allegations that satisfy the *Coppola* negligence *per se* standard discussed *supra*. *See* Coppola, F. Supp. 2d 993. The violations of the Controlled Substances Act, the Food Drug and Cosmetic Act and the California Pharmacy Law are the foundation of the Plaintiffs' negligence *per se* claim, regardless of whether either federal statute provides a private right of action against the NFL. *See Beaver v. Tarsadih Hotels*, 29 F. Supp. 3d 1294, 1321-1322 (S. D. Cal. 2014).

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the Order of the District Court granting Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint and remand this matter to the District Court for further proceedings consistent with this Court's opinion.

Dated: August 22, 2019 Respectfully Submitted,

/s/ Willian N. Sinclair

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 North Charles Street, Suite 2600
Baltimore, Maryland 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432

STATEMENT OF RELATED CASES

Plaintiffs are not aware of any related cases pending in the United States Court of Appeals for the Ninth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on August 22, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/
William N. Sinclair

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Dated: August 22, 2019

Respectfully Submitted,

/s/ William N. Sinclair

William N. Sinclair (SBN 222502)
(bsinclair@mdattorney.com)
SILVERMAN|THOMPSON|SLUTKIN|WHITE|LLC
201 North Charles Street, Suite 2600
Baltimore, Maryland 21201
Telephone: (410) 385-2225
Facsimile: (410) 547-2432