No. 19-16017

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, 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 the Northern District of California, No. 3:14-cv-02324-WHA
The Honorable William Alsup

BRIEF OF DEFENDANT-APPELLEE NATIONAL FOOTBALL LEAGUE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee states that the National Football League ("NFL") is an unincorporated association of 32 member Clubs organized under the laws of New York. The following table identifies the member Clubs:

CLUBS	ENTITIES
Arizona Cardinals	Arizona Cardinals Football Club LLC; Arizona Cardinals Holding Company LLC
Atlanta Falcons	Atlanta Falcons Football Club, LLC
Baltimore Ravens	Baltimore Ravens Limited Partnership; Baltimore Football Company LLC (general partner)
Buffalo Bills	Buffalo Bills, Inc.
Carolina Panthers	Panthers Football, LLC; P.F.F., Inc. (general partner)
Chicago Bears	The Chicago Bears Football Club, Inc.
Cincinnati Bengals	Cincinnati Bengals, Inc.
Cleveland Browns	Cleveland Browns Football Company LLC
Dallas Cowboys	Dallas Cowboys Football Club, Ltd.; JWJ Corporation (general partner)
Denver Broncos	PDB Sports, Ltd. d/b/a Denver Broncos Football Club; Bowlen Sports, Inc. (general partner)
Detroit Lions	The Detroit Lions, Inc.
Green Bay Packers	Green Bay Packers, Inc.
Houston Texans	Houston NFL Holdings, L.P.; RCM Sports and Leisure, L.P. (general partner); Houston NFL Holdings G.P.,

CLUBS	ENTITIES
	L.L.C. (general partner of RCM Sports)
Indianapolis Colts	Indianapolis Colts, Inc.
Jacksonville Jaguars	Jacksonville Jaguars, LLC; TDJ Football, Ltd. (general partner); Dar Group Investments, Inc. (general partner of TDJ Football)
Kansas City Chiefs	Kansas City Chiefs Football Club, Inc.
Los Angeles Chargers	Chargers Football Company, LLC; Alex G. Spanos (general partner)
Los Angeles Rams	The Los Angeles Rams, LLC
Miami Dolphins	Miami Dolphins, Ltd.; South Florida Football Corporation (general partner)
Minnesota Vikings	Minnesota Vikings Football, LLC
New England Patriots	New England Patriots LLC
New Orleans Saints	New Orleans Louisiana Saints, L.L.C.; Benson Football, Inc. (general partner)
New York Giants	New York Football Giants, Inc.
New York Jets	New York Jets LLC
Oakland Raiders	The Oakland Raiders; A.D. Football, Inc. (general partner)
Philadelphia Eagles	Philadelphia Eagles, LLC
Pittsburgh Steelers	Pittsburgh Steelers LLC
San Francisco 49ers	Forty Niners Football Company LLC; San Francisco Forty Niners, LLC (general partner)
Seattle Seahawks	Football Northwest LLC
Tampa Bay Buccaneers	Buccaneers Limited Partnership; Tampa Bay Broadcasting, Inc. (general partner)

CLUBS	ENTITIES
Tennessee Titans	Tennessee Football, Inc.; Cumberland Football Management, Inc. (general partner)
Washington Redskins	Pro-Football, Inc.

No publicly held corporation owns 10 percent or more of any of the above-listed entities' stock.

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INTRODUCTION

The last time that Plaintiffs appeared before this Court, they managed to avoid preemption under federal labor law by re-characterizing their negligence theory as one alleging *affirmative conduct* of the NFL in violation of certain drug laws, rather than the NFL's failure to stop any such alleged conduct by individual teams. Specifically, Plaintiffs insisted that the NFL *itself* had violated federal and state statutes governing the distribution, handling, and administration of medications. Accepting Plaintiffs' representations, this Court remanded with clear guidelines regarding factual allegations of the kind necessary for their negligence claim to survive a motion to dismiss. As this Court explained, such allegations would have to support a determination that (i) the NFL had distributed, handled, or administered medications to Plaintiffs; (ii) the "relevant statutes apply to the NFL"; (iii) "the NFL violated those statutes"; and (iv) "the alleged violations caused the players' injuries." Based on its observation that the prior complaint "appear[ed] to conflate the NFL and the teams," this Court directed that the claims be limited to "conduct of the NFL

and NFL personnel—not the *** individual teams' employees." *Dent v. National Football League*, 902 F.3d 1109, 1121 (9th Cir. 2018).

Plaintiffs have not met that pleading burden. In a Third Amended Complaint filed on remand, Plaintiffs failed to allege any facts that, if proved, would establish that the NFL itself had distributed, handled, and administered medications—or directed and controlled such activities. Plaintiffs failed to allege or explain how the Controlled Substances Act, Federal Food, Drug, and Cosmetic Act, or any relevant state statute applies to the NFL. And Plaintiffs failed to plead facts raising a plausible inference that the NFL, rather than the team personnel who actually prescribed and administered the medications in question, had violated those statutes. Seeking to obscure those failures, Plaintiffs try to resurrect the argument that the NFL's liability rests on its failure to stop team doctors and athletic trainers from violating the drug laws—*precisely the theory that Plaintiffs previously disclaimed before this Court*.

In light of those glaring deficiencies, the district court concluded that Plaintiffs' "best and final" complaint failed to "sufficiently allege any duty owed by the NFL to plaintiffs" or "that the NFL breached its

duty." As the hearing transcript and opinion on remand make clear, the district court took pains to afford Plaintiffs every opportunity to point to specific factual allegations indicating that the NFL (as opposed to the teams) had engaged in affirmative conduct prohibited by the statutes at issue. Plaintiffs simply could not do so. Accordingly, this Court should finally put an end to Plaintiffs' bait-and-switch litigation tactics and affirm the district court's dismissal.

JURISDICTIONAL STATEMENT

Plaintiffs alleged that the district court had jurisdiction over this putative class action under 28 U.S.C. § 1332(d)(2). On April 18, 2019, the district court dismissed Plaintiffs' complaint with prejudice. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

Whether the Third Amended Complaint alleges facts sufficient to support Plaintiffs' lone remaining negligence claim—specifically, facts supporting the existence of a duty of care or a breach thereof arising from the NFL's (as opposed to the teams') affirmative conduct in violation of federal and state drug laws—per this Court's instruction in *Dent v. National Football League*, 902 F.3d 1109 (9th Cir. 2018).

STATEMENT OF THE CASE

1. Defendant-Appellee NFL is an unincorporated association of 32 separately owned and independently operated professional football teams (known as Clubs). Each Club selects and retains its own professional staff, including the doctors and athletic trainers who provide medical care to the players. *E.g.*, ER 154 ¶ 1.

Plaintiffs-Appellants are nine retired football players who were employed by various NFL Clubs between 1969 and 2008. ER 160 ¶ 17; *see* ER 153 (caption). In May 2014, Plaintiffs filed this lawsuit against the NFL, asserting nine causes of action on behalf of a putative class of more than 1,000 retired NFL players who had played in the NFL over four decades. SER 119-140 ¶¶ 277-401.

In the first round of litigation, the NFL filed two motions to dismiss the Second Amended Complaint ("SAC"): one seeking dismissal on preemption grounds under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and a second seeking dismissal due to the expiration of the limitations period and Plaintiffs' failure to state a claim. The district court granted the preemption motion and denied the second motion as moot. ER 244-265. In ordering

dismissal, the district court held that "[t]he essence of plaintiffs' [negligence-based] claim for relief is that the individual clubs mistreated their players and the league was negligent in failing to intervene and stop their alleged mistreatment." ER 249. Such a claim was preempted by the LMRA because "determining the extent to which the NFL was negligent in failing to curb medication abuse by the clubs" would require analysis of various provisions of the collective bargaining agreement ("CBA") between the Clubs and the National Football League Players Association ("NFLPA"). ER 255.

2. Shortly after Plaintiffs' claims were dismissed in this case, another group of players—on behalf of the same putative class and represented by the same counsel as here—filed a separate but "related" federal lawsuit with "virtually identical claims against the clubs themselves." *Dent*, 902 F.3d at 1121; ER 154 ¶ 1; *see Evans v. Arizona Cardinals Football Club, LLC*, No. 1:15-cv-01457 (D. Md. filed May 21, 2015).

Despite making essentially the same factual allegations, the *Evans* plaintiffs sought to place legal responsibility for their allegedly deficient medical care *not on the NFL* but on the individual Clubs. The

Evans complaint alleged, for example, that Club physicians and athletic trainers did not provide adequate or accurate explanations of side effects and long-term health consequences of medications used to treat the players during their NFL careers, and that every member of the purported class had sustained injuries "which were exacerbated by the Clubs' administration of [m]edications to keep players on the field or in practice." *Evans* Compl. ¶ 13. The district court dismissed or granted summary judgment on all of the *Evans* plaintiffs' claims, and this Court subsequently affirmed the final dismissal of their suit. *See Evans v. Arizona Cardinals Football Club, LLC*, 761 F. App'x 701, 702-703 & n.2 (9th Cir. 2019).

3. During the prior appeal in this case, Plaintiffs argued that the district court's preemption ruling—*i.e.*, that resolving the negligence claim would require interpretation of the CBA—rested on a misreading of their complaint. Plaintiffs insisted that their negligence claim was not that the NFL had failed to adequately supervise the medication practices of the Clubs, but rather that "the NFL, not the clubs," had distributed and dispensed medications to the players in a manner that violated the law. Opening Br. for Appellants 13, *Dent v. National*

Football League, No. 15-15143 (9th Cir. Oct. 9, 2015) ("2015 Br."); *see id.* (arguing that the SAC in *Dent* alleged that "the NFL *** supplied players with opioids" and violated "Federal criminal laws") (ellipsis in original).

In reversing, this Court accepted Plaintiffs' representations, and proceeded on the premise that they were "not merely alleging that the NFL failed to prevent medication abuse by the teams, but that the NFL *itself* illegally distributed controlled substances[.]" *Dent*, 902 F.3d at 1118. This Court observed that "to the extent the NFL is involved in the distribution of controlled substances, it has a duty to conduct such activities with reasonable care," and it held that "no examination of the CBAs is necessary to determine that distributing controlled substances is an activity that gives rise to a duty of care." *Id.* at 1119-1121. Rather, "under the plaintiffs' negligence per se theory, whether the NFL breached its duty to handle drugs with reasonable care can be determined by comparing the conduct of the NFL to the requirements of the statutes at issue." *Id.* at 1119; *see id.* at 1121 ("[L]iability for a negligence claim alleging violations of federal and state statutes does

not turn on how the CBAs allocated duties among the NFL, the teams, and the individual doctors.").

This Court emphasized, however, that its ruling was on preemption alone, and "express[ed] no opinion about the ultimate merits of the players' claims," which "may be susceptible" to a "motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Dent*, 902 F.3d at 1126. This Court left "it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL." *Id.* at 1121. And, based on its observation that the SAC "appear[ed] to conflate the NFL and the teams," this Court directed that "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." *Id.*

4. Following remand, the district court granted Plaintiffs leave to file their "best and final" complaint. SER 54. That Third Amended Complaint ("TAC") asserted a single negligence cause of action but dropped the other eight causes of action that this Court had reviewed in their first appeal (including claims for fraud, negligent misrepresentation, and negligent hiring and retention of the doctors

who allegedly "gave" them the medications). The TAC also discarded most of the allegations in the SAC that the NFL had "directly and indirectly" supplied medications to players, presumably because no such evidence turned up in the extensive discovery that Plaintiffs' counsel conducted in the related *Evans* litigation. *See* ER 154 ¶ 1 (asserting that the TAC's "allegations *** are supported by hundreds, if not thousands, of documents" and testimony from eleven Club doctors and trainers from the *Evans* litigation).

Specifically, *none* of the following allegations from the SAC—all referenced by this Court in *Dent* as potentially suggesting affirmative misconduct by the NFL itself—survived Plaintiffs' amendment:

- "The NFL directly and indirectly supplied players with and encouraged players to use opioids to manage pain before, during and after games in a manner the NFL knew or should have known constituted a misuse of the medications and violated Federal drug laws."

- "The NFL directly and indirectly administered Toradol on game days to injured players to mask their pain."

- "The NFL directly and indirectly supplied players with NSAIDs [non-steroidal anti-inflammatory drugs], and otherwise encouraged players to rely upon NSAIDs, to manage pain without regard to the players' medical history, potentially fatal drug interactions or long-term health consequences of that reliance."

- "The NFL directly and indirectly supplied players with local anesthetic medications to mask pain and other symptoms stemming from musculoskeletal injury when the NFL knew that doing so constituted a dangerous misuse of such medications."

- "NFL doctors and trainers gave players medications without telling them what they were taking or the possible side effects and without proper recordkeeping. Moreover, they did so in excess, fostering self-medication."

Compare ER 153-242, *with* SER 60, 100 ¶¶ 17-20, 205; *see also Dent*, 902 F.3d at 1115.

Instead, the TAC's lone negligence count alleges generally that the NFL—pursuant to an illusory "Business Plan"—violated federal and state law through "provision and administration" (ER 239-241 ¶¶ 299, 301-302) of medications without the written prescriptions and warnings required by statute. Despite this Court's clear instruction that Plaintiffs may not "conflate" the NFL and the Clubs to establish a "theory of direct liability, not vicarious liability," *Dent*, 902 F.3d at 1121, the TAC offers no specific allegation identifying any NFL personnel as distributing or dispensing—or even directing and controlling the distribution of—a single medication.

The TAC's only specific allegations of distributing medication pertain to *Club* personnel. Dent and the other Plaintiffs purport to be

representatives of a class of players who received medications from the Clubs. ER 236 ¶ 289 (defining putative class as "consisting of all Players *** who received Medications *** from an NFL Club"). The TAC attaches an exhibit identifying "the names of the Club doctors and trainers [who allegedly provided the medications] for each year through 2008 as provided by the Defendants during discovery in the *Evans* case." ER 190 ¶ 106. For example, Plaintiff Richard Dent alleges that he received medications from "team doctors and trainers" for the Chicago Bears, the San Francisco 49ers, the Indianapolis Colts, and the Philadelphia Eagles. ER 160-164 ¶¶ 17-27. He further alleges that "the person providing the Medication" did not identify the dosage or provide "the statutorily required warnings about the side effects of any of the Medications," ER 162 ¶ 22, and that this "wrongful administration of Medications" to him caused the injuries for which he seeks damages in the TAC, ER 163 ¶ 25. Evidently still referring to Club personnel, Dent then alleges that he "trusted and relied on the NFL's doctors and trainers and would not have taken the Medications in the manner and amount in which he did had the [NFL] provided him

with the information it was legally obligated to provide as discussed herein." ER 164 ¶ 27.[1]

5. The NFL moved to dismiss the TAC under Federal Rule of Civil Procedure 12(b)(6) on two grounds—first, that Plaintiffs had failed to plead facts supporting their sole remaining negligence claim, and second, that the claim is barred by the statute of limitations. ER 97-120.

The district court dismissed the case on the first ground. Based on an application of this Court's *Dent* opinion, the district court concluded that Plaintiffs had "failed to adequately plead the requisite elements of negligence." ER 12. In particular, the district court held that Plaintiffs had failed to allege plausible facts giving rise to "any duty owed by the NFL to plaintiffs" or "that the NFL breached its duty." ER 19, 21.

[1] Each Plaintiff makes this identical allegation. *See* ER 167 ¶ 36 (Newberry); ER 171 ¶ 45 (Green); ER 173-174 ¶ 55 (Hill); ER 176 ¶ 64 (Van Horne); ER 181 ¶ 74 (Stone); ER 183 ¶ 84 (Pritchard); ER 188 ¶ 94 (McMahon); ER 190 ¶ 105 (Wiley).

The district court first rejected Plaintiffs' primary theory that the NFL owed (and breached) an independent duty based on "the nature of the NFL's alleged conduct." ER 12. The court observed:

> Despite ninety pages of allegations (largely directed to the clubs' conduct), nowhere in the third amended complaint do plaintiffs allege, as they previously pitched before our court of appeals, that the NFL undertook to provide direct medical care and treatment to players such that its conduct violated any relevant drug laws.

ER 14-15. Rather, the TAC ultimately hinges on "the NFL's alleged failure to act," which "echoes the exact theory already found preempted by Section 301—namely, that the NFL failed to intervene in the *club's* implementation of the supposed 'Business Plan'[.]" ER 16. Because Plaintiffs had "abandoned" any allegation "related to the NFL's direct involvement in the handling, distribution, and administration of medications *within the meaning of the relevant drug statutes*," the district court reasoned, "they have failed to sufficiently allege that the general character of the NFL's conduct gave rise to a duty of care owed to the players (or that the NFL breached its duty)." ER 18-19.[2]

[2] Despite being given an additional opportunity at the district court hearing, Plaintiffs' counsel could not point to any specific instance

In so holding, the district court made explicit its understanding that "*Dent* arguably leaves room to find the NFL liable even if it is not physically handing out drugs to players itself." ER 17. Yet it recognized "the clear import of *Dent*" that, to survive a motion to

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of the NFL actually engaging in conduct in violation of the pertinent statutes:

> THE COURT: Give me what you would say is your best example of an NFL employee violating the Controlled Substances Act.
>
> MR. CLOSIUS: When they are telling people to distribute it illegally. Your Honor, the —
>
> THE COURT: Where is that —
>
> MR. CLOSIUS: Let me rephrase that. The Third Amended Complaint is replete with people telling the NFL that what's happening is illegal. The DEA is doing it. The Matava report is doing it. They are being told all through about illegal dispensation of controlled substances.
>
> THE COURT: By who? By the Clubs?
>
> MR. CLOSIUS: By the Clubs.
>
> THE COURT: Okay. That's not the same though. Let's say that the— let's say the — somebody is telling the NFL, Hey, the Clubs are violating the Controlled Substances Act. That's not the same as the NFL itself violating anything.
>
> MR. CLOSIUS: Well, they never did anything to remedy it.
>
> THE COURT: Well, that's the original theory.

ER 16.

dismiss, Plaintiffs must allege facts indicating the NFL's "provision of medical care to the players and *direct distribution* (at least, under the NFL's specific direction) of the medications *in violation of the relevant statutes*." *Id.* The district court thus treated "direct distribution" as extending beyond the NFL's physical distribution of medications to the NFL's specific direction of such distribution.

The district court then turned to Plaintiffs' alternative theories of duty and found them deficient. The district court concluded that Plaintiffs had "failed to adequately plead an assumption of duty by the NFL" given the lack of any allegations about "how the NFL's conduct *increased* the risk of harm to plaintiffs" or about "their reasonable reliance on the NFL's supposed assumption of duty or their suffering of injury as a result of the NFL's conduct." ER 19. Equally meritless was Plaintiffs' attempt to anchor the NFL's duty in a purported "special relationship" between the NFL and Plaintiffs. ER 20-21. As the district court put it, Plaintiffs, "who were compensated adult professional athletes with collectively bargained rights over their medical care," did not qualify as a "particularly vulnerable" group deserving of treatment under the special-relationship doctrine. *Id.*

Having determined that Plaintiffs had failed to plead facts giving rise to the existence of a duty or breach thereof in their "best and final" complaint, the district court dismissed Plaintiffs' claim with prejudice (without addressing causation or the statute of limitations). ER 21.

SUMMARY OF THE ARGUMENT

Faithfully applying this Court's instructions in *Dent* to the newly filed TAC, the district court held that Plaintiffs failed to allege facts that, if proved, would establish that the *NFL* owed (or breached) any duty to players arising out of the *Clubs'* distribution of medications. Plaintiffs offer no basis for reversing that sound conclusion or the resulting dismissal.

I. This Court's prior decision in *Dent* provides the framework for assessing the legal sufficiency of Plaintiffs' sole remaining negligence claim. In *Dent*, in a strategic effort to avoid preemption under federal labor law, Plaintiffs assured this Court that their negligence theory required no interpretation of the parties' CBA because it was predicated "exclusively" on the NFL's (not the Clubs') violation of federal and state drug laws. 2015 Br. 20. Relying on that representation, this Court remanded so the district court could evaluate

whether Plaintiffs adequately alleged that the NFL itself engaged in conduct in violation of those statutes.

In doing so, however, this Court set forth specific requirements for asserting any such (non-preempted) negligence claim. First, Plaintiffs would have to allege facts establishing, among other things, that "the relevant statutes apply to the NFL" and that "the NFL violated those statutes." *Dent*, 902 F.3d at 1121. Second, any further proceedings would "be limited to claims arising from the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees," so as to avoid "conflat[ing] the NFL and the teams" as Plaintiffs had done in the SAC. *Id.*

II. The district court on remand committed no error in applying this Court's directives to the TAC—Plaintiffs' "best and final" complaint—which they filed after receiving voluminous discovery in the related *Evans* litigation. Because the TAC lacks specific factual allegations plausibly supporting a conclusion that the NFL itself owed (or breached) any duty of care, the district court correctly dismissed it. Plaintiffs now reprise the same three flawed arguments they advanced below.

A. Plaintiffs first contend that the NFL's duty arises from its alleged distribution of medications to players. But the TAC pleads no facts to support that theory. Abandoning the SAC's (vague) allegations that the NFL "directly and indirectly" "administered," "supplied," or "gave" certain medications to players, the TAC is bereft of any allegations that the NFL distributed, handled, or administered medications—or even directed and controlled such activities—in violation of the relevant federal and state statutes.

Plaintiffs instead rely on a hodgepodge of eighteen factual allegations in an attempt to cobble together an inference that the NFL "directed and controlled" the distribution, administration, and handling of medications. But, as explained further below, Plaintiffs' proffered allegations concern the distribution activities of *Club* doctors and athletic trainers and the NFL's efforts to encourage *Club* personnel to comply with federal and state laws. Those allegations fall far short of showing that the NFL itself unlawfully distributed medications—whether by physically handing them out or by specifically directing Club personnel to do so.

B. Plaintiffs next pivot to the theory that the NFL somehow voluntarily assumed a duty of care. But Plaintiffs disclaimed the "voluntary assumption" theory to escape preemption in *Dent*; having done so, they should not be permitted to resurrect that theory of liability now. In any event, as even a cursory review of the TAC makes plain, Plaintiffs failed to allege any facts showing that any such affirmative undertaking by the NFL increased their risk of harm, or that they reasonably relied upon that affirmative undertaking (and suffered injury as a result). Those failures are fatal to Plaintiffs' theory.

C. Plaintiffs' final contention—that the NFL incurred a duty based on a "special relationship" with Plaintiffs—is both forfeited and meritless. As the district court noted, Plaintiffs failed to allege a "special relationship" in the TAC. Beyond that failure, the doctrine applies only in limited circumstances to protect "particularly vulnerable and dependent" groups like college students or prisoners. It offers no sanctuary for adult professional athletes like Plaintiffs who enjoy (among other advantages) collectively bargained rights to medical care.

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although well-pleaded allegations are accepted as true, the complaint's "non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). "Determining whether a complaint states a plausible claim for relief" 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.

ARGUMENT

I. THIS COURT'S DECISION IN *DENT* REQUIRES FACTUAL ALLEGATIONS THAT THE NFL ITSELF ENGAGED IN AFFIRMATIVE CONDUCT IN VIOLATION OF DRUG LAWS

To prevail in the prior appeal, Plaintiffs argued to this Court that their negligence claim targeted the NFL's (as opposed to the Clubs') affirmative conduct distributing or directing the distribution of

medications, and that the district court need only resolve whether the NFL complied with the relevant statutes to grant them relief. This Court thereafter remanded, but cautioned—in light of its recognition that Plaintiffs had "appear[ed] to conflate the NFL and the teams"—that Plaintiffs could face dismissal on the merits under Rule 12(b)(6). On remand, the district court determined that Plaintiffs' TAC failed to allege sufficient facts to support the theory that they had peddled to this Court, *i.e.*, that the NFL itself had distributed and administered the medications *or* directed and controlled those activities. That determination was correct and should not be disturbed.

Before addressing the adequacy of their pleading, Plaintiffs contend that the district court "misunderstood" the arguments that they had made to this Court and the type of allegations that this Court required on remand to survive dismissal on the merits. But the record and decision speak for themselves: Accepting Plaintiffs' characterization of their theory, this Court conditioned a (non-preempted) negligence claim against the NFL on the existence of factual allegations specifying that the NFL itself (not just the Clubs) had engaged in affirmative conduct violating the pertinent laws.

A. Plaintiffs' Prior Appeal Touted The NFL's Own Liability Under Specific Statutes To Obtain Reversal Of The District Court's Preemption Ruling

In 2014, the district court construed Plaintiffs' prior complaint as premising liability on the NFL's failure to intervene and stop the alleged medication-related misconduct by Club personnel. Because resolving such claims would require interpretation of the CBA—in particular, determining the respective duties of the NFL, the Clubs, the players, and individual doctors with respect to medical treatment—the district court found them preempted by federal labor law. *See* ER 247-265; *see also Dent*, 902 F.3d at 1116 (noting that the LMRA preempts state-law claims that "require[] interpretation of a CBA," as such interpretation would "threaten[] the proper role of grievance and arbitration" in labor relations).

In obtaining reversal, Plaintiffs persuaded this Court that their negligence claim required no CBA interpretation—and therefore was not preempted—because, to find the NFL liable, a court need only "compare the NFL's conduct with the requirements of state and federal laws governing the distribution of prescription drugs." *Dent*, 902 F.3d at 1120; *see also* 2015 Br. 29. That was because, Plaintiffs argued, they

"premise[d] their claims *exclusively* on the NFL's violation of federal and state statutory regimes governing Medications." 2015 Br. 20 (emphasis added).

Plaintiffs now contend that the district court was "wrong[]" to find that they had previously represented to this Court that "the NFL *itself* supplied and distributed the endless stream of drugs" to players—whether by physically handling them or by specifically directing Club personnel to do so. ER 9. But that is precisely what Plaintiffs had represented to the Court, literally from the first line of their opening brief:

> For decades the National Football League ("NFL") *supplied* 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.

2015 Br. 1 (emphasis added);[3] *see, e.g.*, 2015 Br. 13 (highlighting SAC allegation that "[t]he NFL *** supplied players with *** opioids")

[3] The first line of Plaintiffs' brief in this appeal substitutes the broader phrase "directed and controlled the distribution of" for the word "supplied." *Compare* Br. 1 ("For decades the National Football League ('NFL') *directed and controlled the distribution of* controlled substances and prescription drugs to its players *** .") (emphasis added). As

(modification in original); Reply Br. for Appellants 7, *Dent v. National Football League*, No. 15-15143 (9th Cir. Feb. 12, 2016) ("2015 Reply") (highlighting SAC allegation that "[t]he NFL directly and indirectly supplied players with and encouraged players to use opioids") (alteration in original).

Accordingly, Plaintiffs could hardly have been clearer in insisting that their negligence claim was based on the NFL's violation of various statutes in such activities as "administer[ing]" medications: "Plaintiffs claim that the NFL violated the Drug Control Act, Food and Drug Act, and corresponding state statutes with regard to the manner in which it (*not the clubs*) obtained and administered Medications." 2015 Br. 19 (emphasis added).[4]

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explained in Part II.A, *infra*, the specific factual allegations proffered in the TAC do not support either formulation.

[4] *See also, e.g.*, 2015 Br. 14 ("Plaintiffs plainly pled that the NFL, not the clubs, violated federal and state statutes and mistreated its players and in finding otherwise, the District Court impermissibly misconstrued Plaintiffs' allegations."); *id.* at 3 ("gravamen" of complaint is that "the NFL obtained, maintained, and distributed to its players controlled substances and prescription drugs in violation of" various federal and state statutes); *id.* at 9 ("Plaintiffs have not alleged that the clubs violated federal statutes" but rather that, *inter alia*, the NFL "violated duties established by detailed statutory schemes that regulate the distribution and administration of" medications); *id.* at 25 ("The

B. This Court Remanded So The District Court Could Assess Whether Plaintiffs Had Alleged Specific Facts That, If Proved, Would Establish The NFL's Violation Of Relevant Statutes

Although "the fact that the claims may have been inadequately pled is not a reason for finding them preempted," this Court warned in *Dent* that Plaintiffs' claims "may be susceptible" to a "motion to dismiss for failure to state a claim under Rule 12(b)(6)." 902 F.3d at 1126. This Court left "it to the district court to determine whether the plaintiffs have pleaded facts sufficient to support their negligence claim against the NFL," specifically their claim that the NFL had engaged in conduct in violation of the relevant statutes. *Id.* at 1121. Based on its observation that the complaint "appear[ed] to conflate the NFL and the teams," and recognizing that Plaintiffs' counsel was separately pursuing substantively similar claims against the teams in *Evans*, this Court instructed that "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." *Id.*

CBAs at issue have no bearing on whether the NFL could illegally obtain and administer medications.").

Plaintiffs protest that the district court went too far in requiring them "to allege that NFL personnel directly gave drugs to NFL players." Br. 14. But the district court did no such thing. To the contrary, it explicitly acknowledged that *Dent* "arguably leaves room to find the NFL liable even if it is not physically handing out drugs to players itself" but instead is "specific[ally] direct[ing]" that activity, ER 17—a point Plaintiffs later concede. *See* Br. 17 ("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.").

The district court recognized that the key issue is whether the NFL's alleged activities were "in violation of the relevant statutes." ER 17 (emphasis omitted). That instruction comes directly from *Dent*, which noted that proving "the merits of the plaintiffs' negligence claim *** will require the players to establish that the relevant statutes apply to the NFL, the NFL violated those statutes, and the alleged violations caused the players' injuries." 902 F.3d at 1121; *see* ER 11, 15 (quoting this Court's language). Indeed, Plaintiffs themselves emphasize language from *Dent* that confirms this Court's focus on the NFL's compliance with the drug statutes. *See* Br. 15 ("[I]f the NFL had any

role in distributing prescription drugs, it was required to *follow the laws regarding those drugs*.") (some emphasis added and omitted) (quoting *Dent*, 902 F.3d at 1121).[5]

Thus, to avoid dismissal, Plaintiffs needed to allege facts plausibly supporting their theory that the NFL itself—not just the Clubs—engaged in some affirmative conduct proscribed by the Controlled Substances Act ("CSA") or a related statute, such as "distribut[ing]" or "dispens[ing]" "a controlled substance." 21 U.S.C. § 841(a). Plaintiffs were required to allege that the NFL engaged in the "actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8), (11). At a minimum, that would require specific factual allegations backing the assertion that the NFL *itself* "directed" the

[5] Plaintiffs argue that the *Dent* opinion could not have been referring to whether the NFL's conduct violated the relevant statutes because one of the three terms it used—"handling"—is not specifically defined in the CSA (unlike both "distribution" and "administration," which Plaintiffs admit are defined, *see* Br. 14). That misses the point. Regardless of whether "handling" is a defined term, *Dent* used the word "handle" in reference to *compliance with the relevant statutes*, which collectively encompass various aspects of handling medications. *See* ER 18 (citing *Dent*, 902 F.3d at 1119) (referring to "whether the NFL breached its duty to *handle* drugs with reasonable care can be determined by *comparing the conduct of the NFL to the requirements of the statutes at issue*") (first emphasis added).

distribution activity. *See Wedgewood Vill. Pharmacy v. D.E.A.*, 509 F.3d 541, 551 (D.C. Cir. 2007) ("Black's Law Dictionary defines 'constructive transfer' as '[a] delivery of an item—esp. a controlled substance—by someone other than the owner *but at the owner's direction*.'") (quoting BLACK'S LAW DICTIONARY 1503 (7th ed. 1999)) (emphasis added). As discussed in Part II, *infra*, such allegations are absent here.[6]

The same is true for the Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 331. By Plaintiffs' own account, the FDCA prohibits physicians from manufacturing or dispensing drugs that have been

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[6] On their face, the cases on which Plaintiffs rely involve "direct[]" involvement in drug distribution—including "directly negotiat[ing] the amounts, prices and methods of payment, and receiv[ing] the purchase money" in illegal drug deals. They therefore are consistent with requiring "direction" for CSA liability. *United States v. DeRosa*, 670 F.2d 889, 893 (9th Cir. 1982); *see id.* (denying drug-distribution sufficiency challenge where defendant not only "directed and oversaw the distribution of the cocaine," but "arranged the meeting in which the *** cocaine distribution occurred, provided [an] informant *** with the drug connection *** and negotiated the price of the transaction"); *United States v. Ahumada-Avalos*, 875 F.2d 681, 683 (9th Cir. 1989) (rejecting challenge to sufficiency of indictment because defendant "clearly participated in 'distributing' drugs" in the jurisdiction where "[h]e arranged for delivery of the drugs, made phone calls negotiating the price, amount, place of delivery, and payment, and travelled in furtherance of the crime, all while in the district").

"misbranded" or "adulterated." *See* ER 201 ¶¶ 151-152; *see also, e.g.*, 21 U.S.C. § 331 (prohibiting misbranding or adulterating drugs or the manufacture, introduction, or delivery of such drugs). Given the lack of any specific allegations that the NFL engaged in any such unlawful conduct, Plaintiffs resort to contending (for the first time in this litigation) that the NFL should be deemed to have violated the FDCA under the so-called "responsible corporate officer" doctrine. Br. 17. In addition to being forfeited, that contention is wholly inapt. As its name implies, the "responsible corporate officer" doctrine deems a corporate officer liable for certain acts committed by a corporation, provided that the officer "had, by reason of *his position in the corporation*, responsibility and authority either to prevent" the act or "promptly to correct" it. *United States v. Park*, 421 U.S. 658, 673-674 (1975) (emphasis added); *see id.* at 667 (discussing "standard of liability of *corporate officers* under the Federal Food, Drug, and Cosmetic Act") (emphasis added). Because the NFL is neither a corporation nor a corporate officer, the doctrine has no application to the NFL vis-à-vis acts of the independent Clubs.[7]

[7] Unlike with respect to the CSA and the FDCA, Plaintiffs offer no

II. THE THIRD AMENDED COMPLAINT LACKS THE REQUISITE FACTUAL ALLEGATIONS

Applying the framework described above in Part I.B, the district court dismissed Plaintiffs' sole negligence claim on the ground that Plaintiffs had failed to allege facts plausibly demonstrating that the NFL itself (as opposed to the Clubs) owed them an independent duty of care or breached any such duty. ER 19, 21. The district court did not "exceed[] the scope" of its authority in doing so, Br. 18; it fulfilled this Court's mandate after Plaintiffs had "abandoned [the necessary] allegations," ER 18. Resisting that conclusion, Plaintiffs contend (as they did below) that the NFL breached duties arising from three independent sources: (A) the NFL's "direction and control" of the handling, distribution, and administration of medications to players, Br. 24-26; (B) the NFL's voluntary involvement in Club medication practices generally, Br. 27-29; and (C) a "special relationship" that

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substantive discussion of any relevant state statute (let alone how the NFL's conduct might violate it).

purportedly exists between the NFL and players, Br. 29-31. Each theory fails.[8]

A. Plaintiffs Failed To Adequately Allege A Duty Based On The NFL's Purported Distribution of Medications

This much appears to be common ground: the NFL owes Plaintiffs a duty of care here only "to the extent that the NFL is involved in the distribution of controlled substances." *Dent*, 901 F.3d at 1119; *see* ER 79 (Plaintiffs recognizing that "the NFL owed a duty to Plaintiffs *** *assuming, in fact, the NFL engaged in the handling, distribution and administration* of Medications" (emphasis added)). Accordingly, at a minimum, Plaintiffs must offer specific allegations that the NFL "directed and controlled the provision of prescription drugs." Br. 20.

[8] Plaintiffs fault the district court for treating their negligence claim as a negligence *per se* claim, which they contend "is not a separate cause of action but the application of an evidentiary presumption provided by California Evidence Code § 669." Br. 34. But the district court acknowledged that very fact, *i.e.*, that the negligence *per se* doctrine is merely "a presumption of negligence aris[ing] from the violation of a statute." ER 12 (quoting *Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal. 4th 925, 938 (1998)) (alteration in original). The district court correctly observed that "plaintiffs primarily rely on a negligence *per se* theory to support their negligence claim." *Id.* Indeed, nearly every paragraph of Plaintiffs' complaint setting forth its legal claim asserts the NFL's purported "violation" of the CSA, the FDCA, or state law. *See* ER 239-241 ¶¶ 298-310.

Plaintiffs' concession follows from *Dent*'s emphasis that the NFL's alleged duty must flow from "the conduct of the NFL and NFL personnel—not the conduct of individual teams' employees," with the pertinent "minimum standards [of care] established by statute." *Dent*, 902 F.3d at 1118-1119, 1121.

On remand, however, Plaintiffs abandoned the very factual allegations from the SAC on which this Court had relied in reversing and remanding: that "[t]he NFL directly and indirectly supplied players with and encouraged players to use opioids to manage pain *** in a manner the NFL knew or should have known constituted a misuse of the medications and violated Federal drug laws"; "[t]he NFL directly and indirectly administered Toradol on game days"; "[t]he NFL directly and indirectly supplied players with NSAIDs"; and "[t]he NFL directly and indirectly supplied players with local anesthetic medications." *Dent*, 902 F.3d at 1115 (quoting SER 60). Each and every one of those allegations is conspicuously absent from Plaintiffs' TAC. *See* ER 153-242; *see also* ER 13-15 (Plaintiffs no longer "allege that the NFL *itself* violated the relevant drug laws and regulations governing the medications at issue," "that the relevant statutes apply to the NFL," or

that "the NFL undertook to provide direct medical care and treatment to players such that its conduct violated any relevant drug laws."). In short, in their "best and final" pleading, ER 63, Plaintiffs stripped out the few and limited factual allegations of affirmative NFL conduct violating the relevant statutes—presumably because they knew from extensive discovery in the related *Evans* litigation that those allegations were not true.

Instead, Plaintiffs attempt to cobble together from eighteen disparate and inapt factual allegations an inference that the NFL distributed, or specifically directed and controlled distribution of, medications. Contrary to Plaintiffs' assertion, those allegations (which fall into four categories) do not come close to demonstrating that the NFL engaged in the handling, administration, or distribution of medications—including directing and controlling those activities—in a manner prohibited by the CSA, FDCA, or any state laws. If anything, they underscore the critical point that it is the *Club doctors and Club athletic trainers* (not NFL personnel) who independently handle, administer, and distribute medications to players.

1. Club Doctor's Conduct (Allegations 1 & 14)

Plaintiffs point first to the allegation that a Club doctor—"Doctor Pellman *of the New York Jets*"—purportedly "dispens[ed] drugs to players." Br. 20 (emphasis added) (citing ER 209 ¶ 184). That allegation about a single Club doctor reveals how thin their NFL "distribution" allegations really are. The TAC paragraph that Plaintiffs cite states only that Dr. Pellman, "in his capacity as medical advisor to the League," "regularly interacts with the League" and attends meetings of the professional association of Club doctors known as the NFL Physicians Society. ER 209 ¶ 184. Needless to say, that allegation says nothing about Dr. Pellman's distribution activities, let alone such activities conducted in his capacity as an NFL representative.

The TAC does make one reference to Dr. Pellman's alleged dispensing of medications. But it makes abundantly clear that Dr. Pellman is alleged to have engaged in that activity "while serving in [his] capacity as a team doctor" for the Jets, not in in his role as an NFL medical advisor. ER 220 ¶ 216 (alleging that "Pellman *** has testified that [he] violated one or more *** federal laws and regulations, *while serving in [his] capacity as a team doctor*") (emphasis added); *cf.* ER 217

¶ 210 (alleging that, "[f]or the Jets (at least), the usage of Toradol and Vicodin exploded between 2004 and 2009"). Plaintiffs' misguided reliance on Dr. Pellman's alleged actions taken in his "capacity as a team doctor" merely confirms that *Club* doctors—not the NFL or its employees—were the ones alleged to have engaged in the allegedly unlawful distribution of medications.[9]

Equally unavailing is Plaintiffs' glancing reference to the allegation that Dr. Pellman tried to stop one team's attempt to conduct a survey about distribution of medications. Br. 21 (citing ER 223 ¶¶ 227-228). That allegation falls far short of the type of affirmative NFL conduct in violation of the drug laws that this Court determined would be necessary to survive a motion to dismiss.

2. Compliance Efforts (Allegations 2-6, 9-13, 18)

The next bucket of allegations cited by Plaintiffs describes the NFL's efforts to encourage team compliance with governing federal and

[9] There is no allegation that Dr. Pellman (a) distributed medications to any of the Plaintiffs; (b) distributed medications to players on other teams; (c) prescribed or provided medications to other team doctors to distribute to their players; or (d) otherwise directed the activities of other team doctors in respect of administering medications to players on those teams.

state laws. *See* ER 59 (noting that "the few allegations specifically about the NFL all assert that the NFL tried to *encourage* compliance with the law"). By definition, such allegations cannot be examples of the NFL's *violation* of the statutes at issue.

For instance, Plaintiffs point to the NFL's so-called "prescription drug program" managed by an NFL medical advisor. Br. 20 (allegations 2-4). But Plaintiffs concede that the program was intended to encourage compliance with relevant laws—specifically, "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" of medications. ER 211-212 ¶ 194. That is the polar opposite of distributing medications to players in violation of the CSA, FDCA, and state law.[10]

[10] Plaintiffs attempt to rely on a new program announced by the NFL and NFL Players Association on May 20, 2019—five years *after* they filed their lawsuit—to suggest that "[t]he NFL had the ability to stop Club doctors and trainers from acting illegally whenever it wanted to do so." Br 22. Not only is that allegation outside the record, but the joint labor-management program it references hearkens back to the preempted theory of negligence that Plaintiffs previously disclaimed in this Court. It does not speak to whether the NFL itself was illegally directing and controlling distribution of medications at the time the last named Plaintiff retired in 2008, more than a decade earlier.

Plaintiffs also rely on a bevy of allegations that the NFL imposed certain requirements on Club personnel—*e.g.*, mandating Club doctors "to register Club stadiums and practice facilities as storage facilities" in response "to DEA reprimands," Br. 20 (allegation 6); encouraging Clubs to use "SportPharm—drug tracking software," Br. 21 (allegation 12); requiring players to sign a Toradol waiver, *id.* (allegation 13); and implementing a policy prohibiting teams from traveling across state lines with medications to curb Club "violations of the Controlled Substances Act," Br. 20 & 22 (allegations 5 & 18). Conspicuously absent are any allegations of the NFL's involvement in the unlawful or unauthorized distribution, administration, or handling of medications. If anything, these are all examples of the NFL "encourag[ing] compliance with the law." ER 59.

The same holds true for Plaintiffs' allegations that NFL personnel met with Club doctors and the DEA to discuss distribution of medications throughout the League. Br. 21 (allegations 9 & 10). Even Plaintiffs themselves do not allege that the NFL's "regular meetings" with the Clubs involved NFL direction or control over the distribution of medications; they allege only that the meetings gave "the NFL *** the

chance to share information with the Clubs." ER 208 ¶ 183. By the same token, the NFL's meetings with the DEA were designed "to open lines of communication between the DEA, the NFL, and the [NFL Physicians Society]." ER 219 ¶ 215. Plaintiffs wholly fail to explain how such precatory attempts to encourage regulatory compliance by the Clubs make the NFL subject to the relevant laws or amount to "directing and controlling" distribution in violation of those laws.

3. Monitoring and Auditing Activities (Allegations 7-8, 16)

Plaintiffs fare no better in invoking allegations regarding the NFL's efforts to monitor and audit the distribution of medications of Club doctors and athletic trainers. *See* Br. 21-22. Take, for example, Plaintiffs' vague and conclusory assertion that the "NFL Security Office controls aspects of drug distribution and conducts on-site inspections." Br. 21 (allegation 7). Plaintiffs fail to identify which "aspects of drug distribution" the NFL Security Office "controls" or how such control is exercised. *See id.* The most Plaintiffs can say is that unnamed NFL security personnel "meet and consult with club officials" and "conduct regular audits of club record keeping and facilities." ER 207 ¶ 180.

Neither amounts to direction and control of drug distribution by the NFL, much less doing so in violation of the law.

Plaintiffs' reliance on the NFL Security Office's purported "control" over distribution of medications is particularly unfounded given their prior intimation (in the SAC and during the prior appeal) that "the NFL itself was dispensing medications to teams" through that office. SER 9-11 (citing SER 101 ¶¶ 209-210); *see* SER 101 ¶ 210 (alleging that "medications are controlled by the NFL Security Office in New York"). When pressed by the district court during the hearing on remand, Plaintiffs' counsel abandoned the suggestion that the NFL Security Office was distributing medications to players, and expressly declined the district court's offer to conduct discovery on the presence of medications in that office. *See* SER 11-12.

Plaintiffs relatedly observe that the NFL requires Club doctors to "report to the League the types of drugs being administered, the amounts in which they were administered, violations of applicable laws they encountered, and other information." ER 203-204, ¶ 163; *see* Br. 21 (allegation 8). But these activities—meetings, consultation, audits, and information-gathering about the Clubs' distribution of

medications—are not even alleged to constitute unlawful distribution, administration, and handling of medications of the kind prohibited by the CSA, FDCA, and state law.[11]

Nor can Plaintiffs anchor the NFL's purported duty in two allegedly NFL-funded reports exploring the use of Toradol among players. *See* Br. 21-22 (allegation 16). That assertion is puzzling given that Toradol is not even a controlled substance governed by the CSA. *See generally* 21 U.S.C. § 801 *et seq.*[12] In any event, Plaintiffs themselves acknowledge that those reports explored the frequency of

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[11] Plaintiffs imply that the NFL may have violated CSA "recordkeeping and storage" requirements. Br. 16. But as Plaintiffs acknowledge in the TAC, those requirements apply only to "registrants." ER 197 ¶ 131 ("The CSA also establishes specific recordkeeping requirements *for those registered to dispense* controlled substances scheduled thereunder.") (emphasis added); *see* 21 U.S.C. § 827(a) (except as otherwise provided, "every registrant" shall maintain complete and accurate records); 21 C.F.R. § 1304 (titled "Records And Reports Of Registrants"). Plaintiffs do not allege that the NFL is a registrant—it is not, unlike the Club doctors—and there is no requirement that the NFL become registered. *See* 21 C.F.R. § 1301.11(a) (CSA applies to persons who "manufacture, distribut[e], dispens[e], import[] or export[] any controlled substance," and thus "only persons actually engaged in such activities are required to obtain a registration; *related or affiliated persons who are not engaged in such activities are not required to be registered*") (emphasis added).

[12] Neither are the other NSAIDS described in the TAC, including Motrin, Vioxx, Celebrex, Ketorolac, Indocin, or Naprosyn.

Toradol distribution by *Club* doctors and athletic trainers and made "recommendations" for best practices. *See* ER 204-207 ¶¶ 164-165, 177. Far from establishing "direction and control" over distribution of medications, those reports (which were prepared by and for Club physicians) reinforce the district court's conclusion that "nowhere in the third amended complaint do plaintiffs specifically allege any facts as to how the NFL instructed the club doctors' handling, distribution, and administration of the drugs or otherwise forced the club doctors to violate any relevant drug laws." ER 15.

4. Remaining Allegations (Allegations 11, 15, & 17)

The final set of allegations cited by Plaintiffs add nothing to support the existence of an independent duty owed by the NFL. Plaintiffs allege that, as a general practice, individual Clubs must obtain NFL approval for the hiring of team doctors and any medical sponsorship arrangements. Br. 21 (allegation 11). But Plaintiffs do not even attempt to offer any connection between such approvals and the NFL's liability under drug laws for the Clubs' distribution of medications. And, unlike the SAC at issue in the prior appeal, the TAC

no longer alleges that the NFL negligently "hired" or "retained" the Club doctors. *Compare* SER 138-140 ¶¶ 385-401.

Equally irrelevant are Plaintiffs' remaining allegations that the NFL has made public statements seemingly conflating the League with the Clubs. *See* Br. 21-22 (allegations 15 & 17). The statement of an outside consultant who served on a League committee—characterizing alleged over-prescription of certain medications as a "shared responsibility" of the NFL and the Clubs, Br. 22 (citing ER 158 ¶ 11, ER 220 ¶ 217)—is hardly an admission that the NFL is somehow directing or controlling the Clubs' distribution of medications. The mere fact that the NFL has (for example) touted the "unparalleled medical care" received by "NFL players," ER 223 ¶ 229, does nothing to call into question the undisputed fact that the NFL and the Clubs "are separate legal entities." ER 76. Indeed, any other conclusion would impermissibly override *Dent*'s admonition that Plaintiffs not "conflate the NFL and the teams." 902 F.3d at 1121.

* * * * *

Tellingly, immediately after laying out these eighteen "facts" as its best allegations of the NFL's supposed "direct role in controlling and

distributing prescription drugs," Plaintiffs draw the following conclusion: "The NFL had the ability to stop Club doctors and trainers from acting illegally whenever it wanted to do so." Br. 22. Plaintiffs' own (ever-shifting) characterization confirms the district court's determination that the TAC boils down to "the NFL's alleged failure to act," *i.e.*, "the exact theory" that Plaintiffs disavowed before this Court. ER 16. At the end of the day (and after extensive discovery in *Evans*), the TAC is devoid of even a single specific allegation identifying any NFL personnel distributing or directing the distribution of medication to any player. That is fatal to Plaintiffs' claim.

B. Plaintiffs Failed To Adequately Allege That The NFL "Voluntarily Assumed" A Duty Of Care

Unable to marshal plausible factual allegations that the NFL incurred a duty by distributing medications (including directing and controlling their distribution) in violation of federal or state law, Plaintiffs fall back on an alternative argument: that the NFL voluntarily assumed a duty to prevent the Clubs from violating the relevant laws. Br. 27-29. That "voluntary assumption" theory suffers from numerous flaws.

As a threshold matter, Plaintiffs disclaimed that theory to survive preemption in *Dent* and should therefore be estopped from invoking it here. *See, e.g.*, *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996) ("Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."). The NFL previously argued, and the district court held, that the LMRA would preempt any claim that the NFL "voluntarily assume[d]" a duty to the players to stop the Clubs' medication-related abuses. Br. for Appellee 26, *Dent v. National Football League*, No. 15-15143 (9th Cir. Jan. 29, 2016); ER 249-263. Plaintiffs rebuffed that characterization of its negligence claim, insisting that "the primary duty at issue *** was that the NFL must abide by federal and state law regulating, *inter alia*, the dispensation of Medications." 2015 Reply Br. 5. Yet, on remand, the gravamen of the TAC is that "the NFL did *nothing* to protect the players" from the Clubs' unlawful distribution of certain medications. ER 19 (citing ER 218-223 ¶¶ 213-229). Plaintiffs cannot have it both ways.

Even if this Court were to countenance their reversal, Plaintiffs have not pled sufficient facts to support their "voluntary assumption" theory. *See* ER 19. To proceed on that theory, which is "not favored in the law," Plaintiffs must plead that the NFL "increase[d] the risk of harm to" Plaintiffs or that they "reasonably relie[d] upon the [NFL's] undertaking and suffer[ed] injury as a result." *Jackson v. AEG Live, LLC*, 183 Cal. Rptr. 3d 394, 410 (Cal. Ct. App. 2015); *Rotolo v. San Jose Sports & Entm't, LLC*, 59 Cal. Rptr. 3d 770, 792 (Cal. Ct. App. 2007).

Plaintiffs fall short at both steps of the analysis. As the district court explained, Plaintiffs failed to allege that the NFL's voluntary conduct—*i.e.*, the compliance and monitoring of the Clubs described above, pp. 35-41, *supra*—"*increased* the risk of harm" to Plaintiffs. ER 19. The handful of paragraphs cited by Plaintiffs are inapposite. *See* ER 160 ¶ 16 (alleging that failure to comply with statutes caused injuries), ER 199 ¶ 143 (alleging that NFL's failure to ensure compliance with CSA requirements led to injuries), ER 221 ¶ 220 (alleging that NFL failed to comply with federal law by allowing teams to travel across state lines with medications). At most, those allegations suggest that the NFL could have eliminated a preexisting

risk and failed to do so. But it is settled law that "[a] defendant does not increase the risk of harm by merely failing to eliminate a preexisting risk." *University of S. Cal. v. Superior Court*, 241 Cal. Rptr. 3d 616, 631 (Cal. Ct. App. 2018).

Nor have Plaintiffs sufficiently alleged that they reasonably relied on the NFL's supposed "assumption of duty" and suffered injury as a result. *See Jackson*, 183 Cal. Rptr. 3d at 410. Plaintiffs cite to the allegation that each named plaintiff "trusted and relied on the NFL's doctors and trainers." *See, e.g.*, ER 164 ¶ 27. But that perfunctory allegation does not suffice. As the district court noted, "[f]or all their statements about 'NFL doctors and trainers,' Plaintiffs still have not identified the name of a single 'NFL doctor' or 'NFL trainer' who allegedly prescribed medicine unlawfully." ER 53 n.2. That is for good reason. As noted, Plaintiffs' repeated reference to the "NFL's doctors and trainers," actually refers to the *Club* doctors and athletic trainers who allegedly distributed, handled, and administered medications to the players—in flat contravention of this Court's directive not to "conflate the NFL and the teams." *Dent*, 902 F.3d at 1121.

Plaintiffs' reliance on *Mayall ex rel. H.C. v. USA Water Polo, Inc.*, 909 F.3d 1055 (9th Cir. 2018), is unavailing. That case did not involve a professional sports league or its relationship to independent member clubs; rather, *Mayall* allowed a negligence claim to proceed based on an allegation—absent here—that the water polo organization "undertook a specific responsibility to establish and enforce rules to ensure the safety of athletes in its youth water polo league." *Id.* at 1067. Such an allegation could not be made in this case without running headlong into the preempted theory that Plaintiffs had disclaimed. Unlike in *Mayall*, a comprehensive collective bargaining agreement between the Clubs and players governs the rules covering safety and medical care in this case, such that an analogous voluntary undertaking claim would be squarely preempted by the LMRA.

In any event, as the district court observed, "no decision in any state (including California) has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the league's independent clubs." ER 249. Plaintiffs offer no reason to break new ground here.

C. Plaintiffs Failed To Adequately Allege That The NFL Owes Them A Duty Based On A "Special Relationship"

In a last-ditch effort to salvage their suit, Plaintiffs argue that the NFL owed them a duty because of a "special relationship." Br. 29-31. At the outset, Plaintiffs forfeited reliance on the special relationship doctrine by failing to allege it in the TAC. *See* ER 20 ("[P]laintiffs fail to allege this 'special relationship' in their third amended complaint. This order thus need not consider this argument."). That alone warrants rejection of Plaintiffs' late-breaking theory. *See, e.g.*, *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) ("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.").

Even if this Court were to consider Plaintiffs' new theory, it would fail on the merits. The special relationship doctrine applies in rare circumstances to protect "particularly vulnerable and dependent" populations. *See Regents of Univ. of Cal. v. Superior Court*, 413 P.3d 656, 665 (Cal. 2018). Classic examples include the relationships between student and colleges, jailers and prisoners, and common carriers and passengers. *Id.* (citing *Giraldo v. Dep't of Corrs. & Rehab.*,

85 Cal. Rptr. 3d 371, 382 (Cal. Ct. App. 2008); *Lopez v. Southern Cal. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985)). Common among these prototypical "special relationships" is "an aspect of dependency in which one party relies to some degree on the other for protection." *Regents of Univ. of Cal.*, 413 P.3d at 664.

Plaintiffs are adult professional athletes with collectively bargained rights to medical care, including the ability to seek a second opinion of their choice, the ability to have medical care provided at a Club's expense by a surgeon of the player's choice, the ability to inspect Club medical records, and the right to receive care from Club-retained board-certified doctors and certified athletic trainers obligated to keep the players' best interests at the forefront. *See* ER 57 n.8 (citing CBA provisions). Plaintiffs are therefore nothing like college students "learning how to navigate the world as adults," who are "dependent on their college communities to provide structure, guidance, and a safe learning environment." *Regents of Univ. of Cal.*, 413 P.3d at 668. Plaintiffs concede as much, noting that "when it comes to the direction and control of prescription drugs, [NFL players] are *as vulnerable as any other person in the United States*." Br. 30 (emphasis added). Thus,

by Plaintiffs' own admission, NFL players are not the type of *particularly* vulnerable or dependent group warranting treatment under the "special relationship" doctrine.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 9,893 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14-point Century Schoolbook.

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Date: October 23, 2019

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee NFL states that there are no known related cases pending in this Court. District court proceedings in this case gave rise to a prior appeal that is no longer pending: *Dent v. Nat'l Football League*, No. 15-15143 (9th Cir.). This case is also related to a prior appeal raising closely related issues that is no longer pending: *Evans v. Arizona Cardinals Football Club, LLC*, No. 17-16693 (9th Cir.).

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Pratik A. Shah
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October 23, 2019