In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

JON SNOW, and other similarly situated individuals;
Petitioner,

v.

NATIONAL COLLEGIATE ATHLETIC ASS'N; THE NATIONAL FOOTBALL LEAGUE
Respondent,

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF TULANIA

BRIEF FOR PETITIONER

Team Number 7

QUESTIONS PRESENTED

I. Whether the NCAA Amateurism and eligibility bylaws prohibiting players from receiving compensation for their name, image, and likeness violates Section 1 of the Sherman Act.

II. Whether the United States Supreme Court of the Fourteenth Circuit erred in deciding that the negligence based claims were preempted by section 301 of Labor Management Relations Act.

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The opinion of the United States Court of Appeals for the Fourteenth Circuit is unreported, but can be found in the Record on Appeal. (R. at 3–11). The unreported opinion of the United States District Court for the Southern District of Tulania can be found in the Record on Appeal. (R. at 12–26).

JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit issued its opinion after hearing the appeal from the United States District Court for the Southern District of Tulania pursuant to 28 U.S.C. §1291. This Court granted certiorari and has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

Mr. Jon Snow played multiple successful seasons as the star quarterback for Tulania University and was nominated for numerous athletic achievement awards. After three seasons, Apple approached Mr. Snow to participate in their new Apple Emoji Keyboard. (R. at 13). Mr. Snow agreed to sell his rights for the use of his image and likeness to Apple on their emoji keyboard in exchange for an immediate $1,000 and a royalty fee of $1 for each download by an Apple consumer. (R. at 13). During his trial term with Apple, Mr. Snow earned approximately $3,500. (R. at 13). The NCAA subsequently suspended Mr. Snow from Tulania's athletic program for violating NCAA Bylaw 12.5.2.1. (R. at 13). Mr. Snow has brought an antitrust claim, with similarly situated individuals, against the NCAA for violating Section 1 of the Sherman Act in preventing him, and others, from engaging in competition. (R. at 13).

Additionally, Mr. Snow was successfully drafted into the NFL by the New Orleans Saints, performing exceptionally well his first year and earning recognition for his talent and effort. (R. at 13). Over the course of his first year on the team, Mr. Snow sustained head collisions and minor ankle injuries. Doctors and trainers prescribed Mr. Snow multiple painkillers to treat these conditions. (R. at 13). Mr. Snow was never given any form of disclosure regarding the side effects of these medications or the risks these drugs posed to his health. (R. at 13). The doctors and trainers opted for treatment that would get Mr. Snow back on the field in the shortest amount of time, regardless of the long-term consequences. (R. at 13). In Mr. Snow's second contract year, he was diagnosed with permanent nerve damage in his ankle and an enlarged heart. (R. at 13). As a result of the numerous prescriptions given to him, Mr. Snow became addicted to painkillers. (R. at 13). Mr. Snow is bringing a claim against the NFL for negligent distribution and handling of controlled substances. (R. at 13).

STANDARD OF REVIEW

This court reviews all matters de novo. (R. at 2).

SUMMARY OF THE ARGUMENT

1. Antitrust

The United States Court of Appeals for the Fourteenth Circuit erred in upholding the legality of the NCAA's bylaw prohibiting compensation of a player's name, image, and likeness (hereinafter "NIL"). NCAA rules are evaluated using the rule of reason test to determine if they violate the Sherman Act. The bylaw at hand fails this test. The NCAA bylaw, in fixing the price of Division I college football players' NIL rights at zero in the college education market, is anticompetitive under the Sherman Act and serves no proper procompetitive purpose, including amateurism. Even if the court finds amateurism to be a procompetitive purpose, the Bylaw

remains violative of the Sherman Act under the rule of reason analysis because there are alternatives that are substantially less restrictive of commercial activity and would still accomplish the procompetitive justification of amateurism.

2. Preemption

The United States Court of Appeals for the Fourteenth Circuit erred in deciding that section 301 of the Labor Management Relations Act preempted Mr. Snow's negligence based claims. The rights, asserted by Mr. Snow and like players, are independent from the collective-bargaining agreement (hereinafter "CBA") because they are based in state and federal law surrounding controlled substances. Moreover, adjudicating that claim does not require interpretation of the collective-bargaining agreement.

Since a well plead prima facie negligence claim can be plead without requiring interpretation of the CBA, this claim is not preempted. First, the NFL owes the players a duty of care based on the highly dangerous activity they are participating in, prescribing controlled substances. Second, the lack of disclosure of risks involved in taking such drugs is a violation of state and federal laws as well as a breach of duty. Third, the active prescription of drugs by the NFL and the reasonable reliance by the players demonstrates the cause of these injuries. Finally, Mr. Snow's enlarged heart, permanently damaged ankle, and painkiller addiction serve as clear evidence of injury. Mr. Snow's claims should not be preempted.

ARGUMENT

I. THE NCAA'S BYLAW HAS VIOLATED SECTION 1 OF THE SHERMAN ACT BECAUSE THE BYLAW HAS FORECLOSED ANY POTENTIAL COMPETITION FOR A PLAYER'S NAME, IMAGE, AND LIKENESS.

The NCAA, in promulgating and enforcing NCAA Bylaw 12.5.2.1 (hereinafter "Bylaw"), has violated Section 1 of the Sherman Act and prevented Mr. Snow and others from

engaging in competition. The relevant section of the Sherman Act makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy" that "restrain[s] trade or commerce among the several States." 15 U.S.C.S. § 1. The Bylaw prohibits a college athlete from "accept[ing] any remunerations for or [permitting] the use of his or her name or picture or advertis[ing], recommend[ing], or [promoting] directly the sale or use of a commercial product or service in any way." (R. at 14). Mr. Snow, and countless other college athletes participating under the NCAA, are illegally prohibited from participating in a competitive market of their name, image, and likeness rights.

A. NCAA Bylaw 12.5.2.1 is anticompetitive in the college education market because it fixes the price of commercial transactions of players' NIL rights at zero.

The market at issue here involves Division I football players, like Mr. Snow, exchanging their athletic labor and NIL rights for the opportunity to be educated at a higher education institution and compete athletically at the college level. In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1003–04 (N.D. Cal. Oct. 25, 2013) (holding the "college education" market for student-athletes in which players are offered scholarships, facilities, and the opportunity to compete in exchange for athletic labor and NILs is a sufficient market for a valid antitrust claim against the NCAA). When determining if the market is sufficient for an antitrust claim, courts consider the choices available to the buyers (hereinafter "college education market"). White v. NCAA, No. CV 06-999-RGK, 2006 U.S. Dist. LEXIS 101366 at *6 (C.D. Cal. Sept. 21, 2006) (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 19 (1984)). There is realistically no interchangeable substitute for the high-achieving college football player competing at Division I to the NCAA, as "no other alternative combines the opportunity to compete at the highest level of college sports while earning a college degree, together with a greater prospect for advancement to a professional football…career…" Id. at *7

(finding a product market where Division I student-athletes buy coaching-services and academics and the NCAA and its member schools sell the opportunity to compete and earn a college degree); see Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 961 (6th Cir. 2004) (using the "reasonable interchangeability" test to evaluate the relevant market).

The NCAA could be seen as the seller in this situation—selling the opportunity to receive an education through grants-in-aid and receiving from the player his labor and NIL rights. O'Bannon v. NCAA, 802 F.3d 1049, 1058 (9th Cir. 2015). Without the Bylaw, "schools would compete with each other by offering recruits compensation exceeding the cost of attendance," effectively lowering the price potential college players are paying. Id. at 1057. The NCAA, and its member colleges, use the Bylaw as a price-fixing agreement: "recruits pay for the bundles of services provided by colleges with their labor and their NILs, but the 'sellers' of these bundles… collectively 'agree to value [NILs] at zero'…collud[ing] to fix the price of their product." Id. at 1058.

Alternatively, the NCAA could be classified as the buyer, exercising monopsony power to purchase the rights of the NILs of its players without compensation. See In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (finding the market denoting the NCAA as a buyer is sufficient). In both scenarios, the NCAA has become the sole owner of the rights after fixing the price of NILs at zero[1]. O'Bannon, 802 F.3d at 1065.

[1] In explaining the operation of the NCAA compensation rules as a price fix, Gary Roberts states that: "To tell the overwhelming majority of producers of an intercollegiate athletics product…that the only compensation they may give their athletes is a scholarship, room, and board is the establishment of a uniform maximum salary…And for many star athletes, there is no question that the value of this fixed maximum compensation is well below their free-market value." Gary R. Roberts, The NCAA, Antitrust, and Consumer Welfare, 70 Tul. L. Rev. 2631, 2649–50 (1996).

An antitrust claim requires that a commercial exchange occur. Agnew v. NCAA, 683 F.3d 328, 332 (7th Cir. 2012) (finding a "commercial market" necessary for a claim under the Sherman Act). Courts interpret commercial activity very broadly—effectively any activity in which the actor "anticipates economic gain." O'Bannon, 802 F.3d at 1065. Such a broad definition "surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain from it." Id. at 1065. See Agnew, 683 F.3d at 340 (finding big-time college football programs competing for skilled players expect economic gain); NCAA v. Board of Regents, 468 U.S. 85, 113 (1984) (presuming the applicability of the Sherman Act since the procompetitive justifications are unnecessary for noncommercial activity, as that is outside the Sherman Act's purview); but see Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998) (finding NCAA's eligibility, not compensatory, rule prohibiting former college athlete from participating in athletics at her subsequent graduate school was noncommercial); Bassett v. NCAA, 528 F.3d 426, 429 (6th Cir. 2008) (finding NCAA's rules that prohibit improper inducements and academic fraud to be noncommercial even though such inducements are financial transactions).

B. The NCAA's Bylaw must be evaluated under the rule of reason analysis and is not valid as a matter of law.

In determining whether this exchange qualifies as an unreasonable restraint in trade, we must evaluate the Bylaw under the rule of reason analysis. Regents, 468 U.S. at 103. It is well established law that "no NCAA rule should be invalidated without a Rule of Reason analysis." O'Bannon, 802 F.3d at 1063 (citing Regents, 468 U.S. at 101–02); see Am. Needle, Inc. v. NFL, 560 U.S. 183 (2010) (finding when competition restraints are necessary for the product to exist, courts must judge the restraint under the rule of reason test).

The NCAA claims amateurism rules, including the Bylaw, are valid as a matter of law under Regents. (R. at 14). The Regents Court recognized that horizontal price fixing agreements, such as the Bylaw, are ordinarily considered illegal per se because of the high "probability that these practices are anticompetitive." Regents, 468 U.S. at 100. However, the Regents court forwent application of "per se illegality" and opted for a rule of reason analysis because *some* horizontal restraints in the industry are necessary for the product to exist at all. Id. at 101. As a result, courts consider the validity of NCAA amateurism rules under the rule of reason test; such rules are not valid as a matter of law. Id. at 100–03.

Interpretation of the Regents dicta has also never held that the NCAA's rules preserving amateurism are valid as a matter of law. See Smith, 139 F.3d at 186 (applying the rule of reason analysis to an NCAA rule); McCormack v. NCAA, 845 F.2d 1338, 1343–44 (5th Cir. 1988) (applying the rule of reason analysis to an NCAA rule). The 7th Circuit in Agnew came closest to the NCAA's desired interpretation, but even that court did not go so far as to hold that NCAA rules preserving amateurism were valid as a matter of law. Agnew, 683 F.3d. at 343. The logical interpretation of Agnew is that if the rule does not preserve amateurism, the rule of reason test may be necessary to evaluate procompetitive justifications, which is merely one aspect of the rule of reason test. Id. at 343 (stating if a rule is not clearly protecting amateurism "a more searching Rule of Reason analysis [may] be necessary to convince us of its procompetitive…nature"). Ultimately ruling on a separate issue entirely, Agnew's dicta speaks to whether we need to presume a rule as procompetitive, not whether the rule in its entirety is exempt from Sherman analysis if it preserves amateurism. Id. at 345 (implying that a finding of a procompetitive purpose "*could*" lead to a finding that the restriction was reasonable under the Sherman Act) (emphasis added).

C. The NCAA's Bylaw is violative of the Sherman Act because it does not pass the rule of reason test.

Under the rule of reason test, the plaintiff first bears the burden of showing the agreement at issue has an anticompetitive effect. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001); Agnew, 683 F.3d at 335; see Regents, 468 U.S. at 104. Next, the defendant must establish a procompetitive purpose of the restraint that could justify the anticompetitive injury. Worldwide Basketball, 388 F.3d at 959. If there are procompetitive purposes, the rule may still violate the Sherman Act if a substantially less restrictive alternative can achieve the procompetitive purpose. Id.

1. The NCAA Bylaw is anticompetitive because it fixes the price of players' NIL rights.

The Bylaw, in fixing the price of players' NILs at zero, has a clear anticompetitive effect. See O'Bannon, 802 F.3d at 1072 (concluding "the plaintiffs have met their burden at the first [anticompetitive] step of the Rule of Reason by showing that the NCAA's compensation rules fix the price of one component (NIL rights) of the bundle that schools provide to recruits.").

The NCAA argues that there is not an anticompetitive effect in this case because it does not currently allow a college sports emojis market, nor allow the use of players' NILs in any non-NCAA approved applications. (R. at 19). However, the choice of the NCAA to not sell the players' NILs has no effect on the current issue. O'Bannon, 802 F.3d at 1068 (finding "our conclusion is unaffected by the NCAA's claim that other rules and policies, not directly at issue here, would forbid video game makers from using student-athletes' NILs in their games…"). Their foreclosure of the market is anticompetitive given the Bylaw prohibits commercial transactions. See O'Bannon, 802 F.3d at 1069 (finding that because third parties would engage in commercial transactions with the players absent the NCAA's compensation rules, the plaintiffs have shown antitrust standing); see also Rock v. NCAA, 2013 U.S. Dist. LEXIS 116133 (S.D.

Ind. 2013) (finding a Division I athlete sufficiently alleged a prohibition on multi-year scholarships was anticompetitive because athletes on the market receive less than they would without the restrictions).

2. There are no valid procompetitive justifications for the NCAA's Bylaws.

Given the anticompetitive effects of the bylaw, we must evaluate potential procompetitive purposes. The NCAA bylaws are not presumed procompetitive. O'Bannon, 802 F.3d at 1064; but see Agnew, 683 F.3d at 342 (interpreting dicta, *in its own dicta, on grounds unrelated to the claim at issue* that rules preserving amateurism should be presumed procompetitive).

Firstly, the Bylaw's restrictions on the sale of NILs have no impact on the competitive balance that puts low-revenue schools, who would struggle to recruit top players if compensation by schools were permitted, on the same playing field as higher-revenue schools. The compensation at issue stems from a third party and is therefore not dependent upon any school's ability to compensate players. Thus, restricting NIL rights does not serve any legitimate purpose in balancing the playing field and does not impact the quality, quantity, or price of the product of college football in this way. O'Bannon, 802 F.3d at 1072 (holding the rules barring compensation of players for their NILs do not promote a competitive balance).

The integration of academics and athletics is also not a procompetitive justification for the Bylaw. The O'Bannon Court found this justification plausible only in the narrowest purpose the rule could serve in preventing a "social wedge" between paid athletes and non-athlete students. 802 F.3d at 1060. However, anticompetitive rules attempting to create a harmonious student body do not affect the cost, quality, or quantity of a college football product. Regardless, a "social wedge" would be aggravated more so when the school itself is paying, but not when a

player-student is compensated by a third party. Non-athlete students are able to seek compensation by third parties as well.

Lastly, the role of amateurism in the NCAA's product has been found to be a procompetitive justification by various courts. Regents, 468 U.S. at 101–02; Agnew, 683 F.3d at 343; Gaines v. NCAA, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (finding an eligibility rule preventing students from entering the draft protected amateurism); Banks v. NCAA, 977 F.2d 1081, 1089–90 (7th Cir. 1992) (finding an eligibility rule preventing students from entering the draft protected amateurism); Jones v. NCAA, 392 F. Supp. 295 (D. Mass. 1975) (finding rules affecting eligibility for players who received compensation for athletic labor prior to college protected amateurism).

The Regents Court found that amateurism is procompetitive in that it creates more choices for athletes who can choose college or professional athletics. Regents, 468 U.S. at 102. However, retaining the ability to sell NILs does not diminish the choices amateurism provides to college athletes—it does not impact the educational value of the experience, nor does it interfere with their athletic competition. Restricting the opportunity to sell NIL rights might instead *diminish* choice, since inhibiting a player's ability to take advantage of his position may encourage a player to leave college athletics sooner in search of compensation. See O'Bannon, 802 F.3d at 1073. Additionally, the O'Bannon Court finds no evidence that amateurism attracts athletes to the market and thus, no evidence that amateurism increases or allows the product of college football in this way. Id. at 1072–73.

There is also no evidence that amateurism is procompetitive because it makes the product of college football more popular among consumers. A relevant antitrust question is whether the prohibition of compensation creates a product of college football so distinct that it "provides a

large number of consumers with a product they greatly desire and could not otherwise get." Roberts, The NCAA, supra, at 2658–59. There is no indication college football is a desirable product because of its amateur quality; perhaps consumers enjoy the product because of school loyalty, hometown pride, or the high quality of the athletic competition and television programming. Jeffrey L. Harrison & Casey C., The Law and Economics of the NCAA's Claim to Monopsony Rights, 54 Antitrust Bull. 923, 941 (2009). In fact, the sale of a player's NIL rights to a third party, such as Apple, could increase the popularity of college football and increase the viewing market, as it markets the NCAA's product. The NCAA would have us accept anticompetitive practices based on a speculative ideal that allows them to reap immense profits at the expense of student-athletes.

Furthermore, at the heart of amateurism is the prohibition of pay-for-play, but the sale of any player's NILs is distinctive from their athletic labor and requires different "skills and efforts." Id. at 948. Should the NCAA allow players to individually sell or license their NILs, colleges would still be able to "maintain the illusion that players are not paid to play while allowing them to enjoy their income from the sale of their images." Id. Thus, amateurism is not a procompetitive justification for the Bylaw.

3. Even if the NCAA Bylaw is found to serve a procompetitive purpose, there exists a substantially less restrictive alternative that would serve the procompetitive purpose equally well.

A substantially less restrictive alternative that would achieve the procompetitive purpose of amateurism would be for the NCAA to allow third parties to compensate players for the use of their NILs. In allowing compensation for NILs, and not for athletic labor, amateurism remains intact—the players are compensated for NILs, not their athletic performance, and third-party

compensation would not allow for any competitive edge by a higher-revenue school as the school is removed from the transaction altogether.

There is a concern that this alternative allows compensation indirectly for athletic performance and thus, implicates amateurism. However, a grant-in-aid by a member school can be doled out to student athletes without implicating amateurism, even though it is a form of indirect payment to play football at that member school since the money allows the product in the first place. Furthermore, certain compensation that is incident to players' athletic labor is permitted above the cost of attendance. In re NCAA Ath. Grant-In-Aid Cap. Antitrust Litig., Nos. 14-md-02541-CW and 14-cv-02758-CW at *56 (N.D. Cal. 2018) (explaining a witness' testimony that some NCAA-allowed payments, like payment for per diem during trips, costs for certain family members to attend games, and other expenses incident to athletic participation, do not affect amateur status). Therefore, prohibition of compensation by unaffiliated third parties for a player's NIL rights is an illogical restraint on competition without any additional protection of amateurism. See O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014) (finding that the NCAA applies "amateurism" inconsistently when a football player retains his amateur status when he takes a Pell grant that pushes his compensation package above the cost of attendance "[b]ut the same football player would no longer be an amateur if he were to…receive an equivalent sum of money from his school for the use of his name, image, and likeness…"); see also In re NCAA, at *60 (finding the Court would consider less restrictive alternatives that involved payment tethered to athletic participation).

The court is faced with a rule that has indelibly allowed the NCAA to avoid proper compensation and to have full control over players' NIL rights and their derived revenues. A football player talented enough to play on the Division I level does not have a reasonable

alternative—no institution can offer the same opportunity for training or preparation for a professional league. To participate, athletes must give away significant, profitable rights in the name of preserving a "tradition" that is financially exploitative. We ask the court to recognize the NCAA's Bylaw for the anticompetitive violation of the Sherman Act that it is.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT ERRED IN HOLDING THAT SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT PREEMPTED THE NEGLIGENCE-BASED CLAIMS.

A. The negligence-based claims are not preempted because they arise from an independent right that can be adjudicated without interpreting the collective-bargaining agreement.

There is a two prong analysis to analyze whether a claim is independent and not preempted by section 301. First, the claim must be based on a right that does not depend on the collective-bargaining agreement. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007). Second, the claim must not be "substantially dependent on analysis of a collective-bargaining agreement." Caterpillar v. Williams, 482 U.S. 386, 394 (1987). See also Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985).

The negligence-based claims asserted arise separately from the CBA and no interpretation of the CBA is needed. Therefore the claims are not preempted.

1. The asserted cause of action involves an independent right rooted in state and federal law, not the CBA.

To fully understand if a right is independent of the CBA, the court must analyze the "legal character of a claim, as 'independent' of rights under the collective-bargaining agreement." Livadas v. Bradshaw, 512 U.S. 107, 123 (1994). Only if the right is solely created by the CBA is it preempted by section 301. Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1033 (9th Cir. 2015). See also Caterpillar, 482 U.S. at 394.

Here, the claims arise from state and federal law. The negligence claims involve the NFL's administration of controlled substances without proper precautions. (R. at 22). The conduct in question violates the Controlled Substances Act, 21 U.S.C. § 801 *et seq*.; the Food, Drugs and Cosmetics Act, 21 U.S.C. §301 *et seq*.; and the California Pharmacy Laws, Cal. Bus. & Prof. Code § 4000 *et. seq*.. If the CBA were not even to mention controlled substances, the right would still exist independently. Burnside, 491 F.3d at 1065 (explaining that even without a CBA the state right to be paid for travel time would still exist).

Further, settled Supreme Court precedent explains that preemption does not allow parties under the CBA to contract for what is illegal. Cramer v. Consol. Freightways, 255 F.3d 683, 695 (9th Cir. 2001) (arguing that under state privacy laws two-way mirrors and video surveillance in work bathrooms are a per se violation regardless if employees waived this right under the CBA). See also Lueck, 471 U.S. at 212. If a state law establishes "nonnegotiable rights conferred on individual employees," then section 301 should not be read broadly to preempt such rights. Livadas, 512 U.S. at 123; See also Lueck, 471 U.S. at 212. Because of the immutability of state and federal laws surrounding controlled substances, the right is independent of the CBA and cannot be preempted.

Employers carry certain duties that are nontransferable. Similar to our case, in Green v. Ariz. Cardinals Football Club LLC, several NFL players filed suit against the national organization claiming negligence and negligent misrepresentation based on the concussions and resulting CTE they received from playing many years of football. 21 F. Supp. 3d 1020, 1023-24 (E.D. Mo. 2014). The NFL, in that case, pointed to the same provisions of the CBA that the NFL points to here, such as the sections on physicians, trainers, and players' rights to a second medical opinion. Green, 21 F. Supp. 3d at 1024. The court determined their claims were not

preempted because the duties arose out of a common law employer-employee relationship and do not require interpretation of the CBA. Id. at 1028. The NFL players, in Green, argued that the league did not properly inform them of long-term health risks inherent in their employment. Id. This is analogous to our case, since the NFL did not inform the players about long-term health risks of NFL proscribed painkillers. Additionally, the NFL in the Green case argued that it may have delegated its duty to warn players of health risks to club physicians, requiring interpretation of the CBA. However, the court explained that an employer has a duty to be informed of matters "that relate to the hazards of the business and to relay that knowledge to his employees," so the duty to warn cannot be passed on to a third party. Id. at 1030. Here, the NFL may argue that the team doctors separately should have been the ones to warn Mr. Snow and other players about the side effects of taking controlled substances, but as explained above, this duty to warn is nondelegable. The duty arises separately from the CBA and, like the Green case, the NFL has a duty it cannot escape simply because of preemption.

2. The negligence claims do not depend on interpretation of the CBA.

This factor depends on "whether the claim can be resolved by "look[ing] to" versus interpreting the CBA. If the latter, the claim is preempted; if the former, it is not." Burnside, 491 F.3d at 1060. Interpretation is a narrow term that means there must actually be active dispute over meaning of terms for a claim to be preempted. Livadas, 512 U.S. at 124. Further, claims are only completely preempted when they are inextricably intertwined with the CBA. Lueck, 471 U.S. at 213.

The sections of the CBA that the NFL claim require interpretation are not essential to the key issue that plaintiffs are asserting. For example, the NFL mentions that each club is required to retain board-certified orthopedic surgeons and certified full-time trainers (R. at 9). Both

provisions concern each "club" but not the NFL organization's duties as a whole. Further, the NFL points to provisions in the CBA that give players a right to a second medical opinion, access to records, and a prognosis of a player's recovery. (R. at 9). Once again, none of these provisions target the behavior addressed by this complaint—who is responsible to disclose the side effects of controlled substances? Finally, the NFL cites a CBA section that mentions if continued performance could significantly aggravate a condition, the physician should advise the player of such fact. (R. at 9). This provision, like the aforementioned ones, does not touch on the fundamental question. Instead, the provision focuses on continued performance on the field, rather than the duty to inform a player of the negative side effects of taking controlled substances off the field, such as a lifetime of addiction.

B. A well plead prima facie negligence claim that does not require interpretation of the CBA should survive a motion to dismiss.

In California, to plead a negligence claim properly, a plaintiff must establish four elements: (1) defendant had a duty; (2) defendant breached that duty; (3) the breach proximately caused plaintiff's injuries; and (4) plaintiff suffered an injury or damages. Corales v. Bennett, 567 F.3d 554, 572 (9th Cir. 2009). See also McGarry v. Sax, 158 Cal. App. 4th 983, 994 (Cal. Ct. App. 2008). The NFL illegally distributed controlled substances and often dispensed these powerful drugs without explaining to the players what they were taking and the negative side effects. (R. at 22). As a result, the NFL violated state and federal laws governing these substances. These violations include negligent hiring, negligent retention of medical professionals, negligent misrepresentation of medical risks and negligence per se violations. (R. at 9). Since the complaint can make out each element of a prima facie case for negligence without interpretation of the CBA, the claims are not preempted by section 301.

1. The NFL owes its players a duty of care.

A duty of care can arise from "the general character of the activity in which the defendant engaged…" J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 803 (Cal. 1979). To determine if such a duty should exist, the California courts examine several factors such as foreseeability of harm, the degree of certainty that plaintiff suffered injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy of preventing future harm, extent of burden to defendant and the consequences to the community of imposing duty to exercise care, and availability, cost, and prevalence of insurance for risk involved. Kesner v. Superior Court, 1 Cal. 5th 1132, 1145 (Cal. 2016). However, these concerns can be grouped into two main categories: foreseeability of the relevant injury and public policy concerns. Id.

First, the court must evaluate whether the type of negligent conduct in dispute is "sufficiently likely to result in the type of harm experienced" that it would be appropriate to impose liability. Id. Here, the likelihood that a person would become addicted or misuse controlled substances when they are given without fair warning is almost certain. Today, the United States is experiencing an opioid crisis. Each day, on average, 130 people die from overdosing on opioids[2], and roughly 36% of those deaths involved prescription opioids.[3] In fact, almost 30% of people prescribed opioids for pain misuse them.[4] In today's climate, it was a foreseeable risk that prescription of a controlled substance would lead to harm and injury to those prescribed.

[2] Understanding the Epidemic, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/drugoverdose/epidemic/index.html (Dec. 19, 2018).
[3] Overview of the Drug Overdose Epidemic, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/drugoverdose/data/index.html (Dec. 19, 2018).
[4] Opioid Overdose Crisis, Nat'l Inst. on Drug Abuse, https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis#one (Jan. 2019).

The public policy concerns weigh even more heavily in favor of a duty of care. As mentioned above, we are in an opioid health crisis. Controlled substances are regulated for a reason—they are strong and highly addictive.[5] The moral blame the NFL should receive for giving out these drugs without explaining the possible side effects is high. This behavior is harmful since players —like Jon Snow— take the drugs the NFL tells them will help in their recovery without fair warning of their heinous side effects, resulting in addiction to painkillers. Further, due to the misconceptions around painkillers, one may not know the true extent of their addictive nature. This makes it necessary that a medical professional warn a user about the likelihood for physical dependency. If this court does not establish a duty now, other professional sports teams will have legal precedent to continue this behavior and further exacerbate this addiction crisis. The burden for the NFL to comply is low, since under the state and federal laws, this organization should already be abiding by these laws.

It is imperative that if the NFL is to act like any other health professional and prescribe potentially addictive drugs, they must do so with reasonable care. Due to the foreseeability of possible harm and strong policy considerations, a duty of care should be found against the NFL in their drug distribution activities.

Other courts have found a duty of care to protect the health and safety of professional sports players. In In re NHL Players' Concussion Injury Litig., the court found that the negligence claims were not preempted finding the NHL *did* have a duty to provide players with accurate information of the neurological risks of head injuries suffered while playing hockey. 189 F. Supp. 3d 856, 878–79 (D. Minn. 2016). Despite arguments that the CBA should preempt

[5] Prescription Opioids, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/drugoverdose/opioids/prescribed.html (Aug. 29, 2017) (explaining as many as one in four patients on prescription opioids become addicted).

the claim, the court held that there was no preemption because there was no directly relevant section of the agreement that targeted the alleged duties. Id. at 879. Further, the court distinguished two earlier cases in which they found preemption. In the previous cases, the claims were preempted at the summary judgment stage, after some time for discovery. Id. at 877. In Boogaard v. NHL, one of the distinguished cases, the claim also dealt with a professional sports team and a player who had an addiction to drugs but his claims were preempted. 126 F. Supp. 3d 1010, 1022 (N.D. Ill. 2015). However, it is distinguishable from this case because the NHL did not give the plaintiff the addictive painkillers, unlike, here where the NFL *distributed* these drugs without fair warning. See id.

Our case is more similar to In re NHL than Boogaard. This is because Snow is part of a class of professional sports players seeking a duty of reasonable care for the players' health in disclosing key information about painkillers, like in the NHL case when the court confronted the risks of concussions. In re NHL, 189 F. Supp. 3d at 877. Both cases discuss duties running directly from the national league to the players and do not have sections of the CBA perfectly on point. Finally, both this case and In re NHL were decided at the motion to dismiss stage, before any discovery.

2. Under a negligence per se claim, there is a breach of duty.

Negligence per se is not a standalone cause of action under California law but can be applied under the regular negligence doctrine. Quiroz v. Seventh Ave. Ctr., 140 Cal. App. 4th 1256, 1284 (Cal. App. Dep't Super. Ct. 2006). Since the defendants allegedly violated several state and federal statutes, under negligence per se, a breach of duty can be found by comparing the NFL's conduct to the conduct required by statute. Here, the lack of information regarding

side effects is in violation of conduct required by law and is a breach of duty. The court need only to look at the statutes and NFL conduct, not the CBAs, to determine if there was a breach.

3. Since the NFL was actively prescribing controlled substances the league is the proximate cause of the players' injuries.

Causation is a purely factual issue that does not require courts to interpret the CBA. Hawaiian Airlines v. Norris, 512 U.S. 246, 261 (1994).

Under the misrepresentation claim, the court must only assert the players reasonably relied on the league's representations about controlled substances. The NFL argues that to do so will require interpretation of the CBA. California courts, however, tell us that reliance is reasonable when based on the circumstances, and is judged on the plaintiff's knowledge and experience. Goonewardene v. ADP, LLC, 5 Cal. App. 5th 154, 178 (Cal. App. Dep't Super. Ct. 2016). Rookie NFL players like Mr. Snow, have no medical training and are new to the professional league. They likely want to impress the team, perform well, and secure future contract of play; therefore, it is reasonable they would rely on experienced NFL medical professionals and not seek second opinions or investigate further before agreeing to take whatever panacea is supposed to get them back onto the field.

However, two circuits have held misrepresentation claims by NFL players were preempted because they believed that determining if a player's reliance was reasonable or not would require interpretation of the CBA. See Williams v. NFL, 582 F.3d 863, 881 (8th Cir. 2009); Atwater v. NFL Players Ass'n, 626 F.3d 1170, 1183 (11th Cir. 2010). We can distinguish both of those cases from the situation here.

In the 11th circuit case, negligent misrepresentation claims were asserted against the NFL, claiming the league was negligent in failing to act reasonably in providing information to the players on financial advisors. Atwater, 626 F.3d at 1182. The court established that the plaintiff's

reasonable reliance required clear interpretation of the CBA because there was a provision that explicitly stated that while the NFL may provide information to players on handling of their money because it was "understood that players shall be solely responsible for personal finances." Id. at 1183. As a result, the court would need to interpret that phrase to decipher the negligent misrepresentation claim. In the 8th circuit case, NFL players sued the league when they were suspended for testing positive for a banned supplement. Williams, 582 F.3d at 869. In that case, the players were using the drug against the NFL's wishes, which was incorporated in the CBA. Id. at 869. Further, the provision that was incorporated in the CBA went so far as to say that players are strongly encouraged to avoid this drug and if they do take it, they do so at their own risk. Id.

In this case, the NFL did not discourage players from taking controlled substances but were the ones to prescribe the drugs. Additionally, as explained above, there is not an on-point provision of the CBA that addresses this specific issue. This negligence misrepresentation claim is in regards to the NFL's lack of disclosure of the risks involved in taking controlled substances. Nowhere in the CBA is there a clause explaining who is responsible for these disclosures, thus the court does not need to interpret or even look to the CBA to resolve this issue and it should not be preempted.

4. Mr. Snow and enjoined players all suffered physical and mental injuries.

Mr. Snow suffers from permanent nerve damage in his ankle, was diagnosed with an enlarged heart, and has developed an addiction to painkillers. (R. at 13). All other players included in this lawsuit have similar stories, experiences, and injuries to the lead plaintiff.

A negligence claim can be plead properly without the need to interpret the CBA. A duty of care is established by the foreseeable harm of doling out controlled substances without proper

warning and the negative policy implications of such conduct. A breach of duty is presumed under negligence per se theory since the conduct by the NFL was in conflict with conduct required by state and federal law. NFL's distribution of drugs caused the injuries to the players based on the players' reasonable reliance on the advice they received from the NFL. Finally, Mr. Snow and the other players party to the suit have suffered serious and irreparable injuries. Based on the prima facie case that can be made, this claim should not be preempted by section 301 and should survive a motion to dismiss.

CONCLUSION

For the foregoing reasons, the judgement of the United States Court of Appeals for the Fourteenth Circuit should be reversed on both counts.

Respectfully submitted,

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