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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GAIL PAYNE, ROBERT GORMAN, and STEPHANIE SMITH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL (d/b/a MAJOR LEAGUE BASEBALL); ROBERT D. MANFRED, JR., THE ATLANTA BRAVES, THE MIAMI MARLINS, THE NEW YORK METS, THE PHILADELPHIA PHILLIES, THE WASHINGTON NATIONALS, THE CHICAGO CUBS, THE CINCINNATI REDS, THE MILWAUKEE BREWERS, THE PITTSBURG PIRATES, THE ST. LOUIS CARDINALS, THE ARIZONA DIAMONDBACKS, THE COLORADO ROCKIES, THE LOS ANGELES DODGERS, THE SAN DIEGO PADRES, THE SAN FRANCISCO GIANTS, THE BALTIMORE ORIOLES, THE BOSTON RED SOX, THE NEW YORK YANKEES, THE TAMPA BAY RAYS, THE TORONTO BLUE JAYS, THE CHICAGO WHITE SOX, THE CLEVELAND INDIANS, THE DETROIT TIGERS, THE KANSAS CITY ROYALS, THE MINNESOTA TWINS, THE HOUSTON ASTROS, THE LOS ANGELES ANGELS OF ANAHEIM, THE OAKLAND ATHLETICS, THE SEATTLE

Case No. 3:15-cv-03229-YGR

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Date: January 12, 2016
Time: 2:00 pm
Dept.: Courtroom 1, Oakland
Judge: Hon. Yvonne Gonzalez Rogers

Complaint Filed: July 13, 2015
First Am. Complaint Filed: Oct. 23, 2015

Trial Date: None set

MARINERS, AND THE TEXAS RANGERS,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

NOTICE OF MOTION AND MOTION

TO ALL COUNSEL OF RECORD IN THE ABOVE-REFERENCED ACTION:

PLEASE TAKE NOTICE that on January 12, 2016, at 2:00 p.m., or as soon thereafter as counsel can be heard before the Honorable Yvonne Gonzalez Rogers in Courtroom 1 of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, California, all Defendants other than "Toronto Blue Jays Baseball Club" will and hereby do move this Court for an order dismissing Plaintiffs' First Amended Class Action Complaint in its entirety. Rogers Blue Jays Baseball Partnership, which owns and operates the Toronto Blue Jays, is a general partnership organized and existing under the laws of the Province of Ontario, Canada. Plaintiffs have not attempted to serve process on this, or any, entity affiliated with the Blue Jays using the Hague Treaty procedure mandated by Federal Rule 4(f)(1); thus, the Blue Jays' time for serving a motion to dismiss has not yet begun to accrue under Federal Rule 12(a)(1)(A)(1). When this brief refers to "Defendants," that reference does not include the Toronto Blue Jays.

Plaintiffs' First Amended Complaint purports to name all 30 MLB Clubs as defendants in in this action,[1] but Plaintiffs have failed to properly identify the correct legal entity for

[1] The Plaintiffs' First Amended Complaint purportedly names the following entities as Defendants: The Office of the Commissioner of Baseball (d/b/a "Major League Baseball") ("MLB"); Commissioner Robert D. Manfred, Jr. ("Manfred"); Atlanta National League Baseball Club, Inc. (the "Atlanta Braves"); Miami Marlins, L.P. (the "Miami Marlins"); Sterling Mets, L.P. (the "New York Mets"); The Philadelphia Phillies (the "Philadelphia Phillies"), Washington Nationals Baseball Club, LLC (the "Washington Nationals"); Chicago National League Ball Club, LLC (the "Chicago Cubs"); The Cincinnati Reds LLC (the "Cincinnati Reds"); Milwaukee Brewers Baseball Club (the "Milwaukee Brewers"); Pittsburgh Associates, LP (the "Pittsburg Pirates"); St. Louis Cardinals LLC (the "St. Louis Cardinals"); Arizona Professional Baseball LP (the "Arizona Diamondbacks"); Colorado Rockies Baseball Club, Ltd. (the "Colorado Rockies"); Los Angeles Dodgers LLC (the "Los Angeles Dodgers"); San Diego Padres Baseball Club (the "San Diego Padres"); San Francisco Giants Enterprises LLC (the "San Francisco Giants"); Baltimore Orioles Limited Partnership (the "Baltimore Orioles"); Boston Red Sox Baseball Club Limited Partnership (the "Boston Red Sox"); New York Yankees Partnership (the "New York Yankees"); Tampa Bay Rays Baseball Limited (the "Tampa Bay Rays"); Toronto Blue Jays Baseball Club (the "Toronto Blue Jays"); Chicago White Sox Ltd. (the "Chicago White Sox"); Cleveland Indians Baseball Company Limited Partnership (the "Cleveland Indians"); Detroit Tigers, Inc. (the "Detroit Tigers"); Kansas City Royals (the "Kansas City Royals"); Minnesota Twins Baseball Club (the "Minnesota Twins"); Houston Astros, LLC (the "Houston Astros"); Angels Baseball LP (the "Los Angeles Angels of Anaheim"); Oakland Athletics Limited Partnership (the "Oakland Athletics"); The Baseball Club Of Seattle LLP (the "Seattle Mariners"); Rangers Baseball Express LLC (the "Texas Rangers").

approximately half of those Clubs. Defendants' counsel has notified Plaintiffs that they must correct the pleadings so that they name the correct legal entity responsible for operating each Club should the First Amended Complaint survive this motion to dismiss. For the purposes of this motion, Defendants' counsel moves on behalf of the correct legal entity or entities that own(s) and operate(s) each Club.

Defendants move to dismiss Plaintiffs' First Amended Complaint in full, with prejudice, on the following grounds:

1. All Defendants move to dismiss all claims for injunctive relief under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that Plaintiffs do not have standing to assert their claims or obtain the relief sought.
2. All MLB Clubs (other than the Toronto Blue Jays) that are located outside of California (the "Out-of-State Clubs")[2] move to dismiss all claims against them under Rule 12(b)(2) on the ground that Plaintiffs have failed to establish that this Court has personal jurisdiction over them.
3. All MLB Clubs (other than the Toronto Blue Jays) that are located outside the Northern District of California (the "Out-of-District Clubs")[3] move to dismiss all claims against them under Rule 12(b)(3) on the ground that Plaintiffs have failed to establish that this district is a proper venue under 28 U.S.C. § 1391. In addition, MLB and Commissioner Manfred move to dismiss all claims against them that are based on "events or omissions" that did not take place in this district.
4. All Defendants move to dismiss all claims against them under Rule 9(b) on the ground that Plaintiffs have failed to plead their fraud-related claims with particularity, and

[2] The Out-of-State Clubs are the New York Yankees, Baltimore Orioles, Tampa Bay Rays, Boston Red Sox, Kansas City Royals, Minnesota Twins, Cleveland Indians, Chicago White Sox, Detroit Tigers, Texas Rangers, Houston Astros, Seattle Mariners, St. Louis Cardinals, Pittsburgh Pirates, Chicago Cubs, Milwaukee Brewers, Cincinnati Reds, Arizona Diamondbacks, Colorado Rockies, New York Mets, Washington Nationals, Miami Marlins, Atlanta Braves, and Philadelphia Phillies.

[3] The Out-of-District Clubs include the 24 Out-of-State Clubs as well as the San Diego Padres, Los Angeles Dodgers, and Los Angeles Angels of Anaheim.

under Rule 12(b)(6) on the ground that Plaintiffs have failed to state any claims upon which relief may be granted.

This motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Thomas E. Gorman filed in support thereof, all files and records in this action, oral argument, and upon all other matters that may properly come before the Court prior to, or at, the hearing on this matter.

Dated: November 20, 2015

KEKER & VAN NEST LLP

By: /s/ *John W. Keker*
JOHN W. KEKER
R. ADAM LAURIDSEN
THOMAS E. GORMAN
PHILIP J. TASSIN

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Gail Payne, Robert Gorman, and Stephanie Smith are baseball fans who chose to attend Major League or Minor League games this past season. Although they could have selected seats that were separated from the field by protective netting, the Plaintiffs chose to sit in seats that had an unobstructed view. Plaintiffs now bring this action to take that choice away from millions of other baseball fans. They demand that this Court order every professional baseball stadium across the country to string nets from foul pole to foul pole.

Plaintiffs' claims are meritless. For nearly 100 years, state courts across the country have held that the occasional foul ball or broken bat entering the stands is an inherent part of the game, and therefore plaintiffs like these have voluntarily assumed the risk of injury. Plaintiffs' sprawling 119-page First Amended Class Action Complaint ("FAC") is full of sensationalistic rhetoric and inflammatory pictures, but Plaintiffs cannot escape this well-established body of law. Under the *Erie* doctrine, and the Rules of Decision Act, this Court must follow those binding state-court decisions.

But before this Court reaches the merits of Plaintiffs' claims, the Court must dismiss their case because these Plaintiffs do not have Article III standing. Plaintiffs cannot establish standing for their negligence claims because they do not—and cannot—allege an imminent risk of injury. According to Plaintiffs' own allegations, and assuming that they continue to choose un-netted seats in the future, the risk of injury is slight. And Plaintiffs' claims of fraud and violations of statutory law are doubly flawed, lacking both injury-in-fact and redressability.

Even if Plaintiffs could establish standing, this Court lacks personal jurisdiction over the vast majority of the Defendants. Twenty-five of the thirty Major League Clubs reside outside California, and Plaintiffs have not explained how this Court has jurisdiction over them or their out-of-state ballparks.

And even if Plaintiffs could establish both Article III standing *and* personal jurisdiction, this district is not a proper venue for the vast majority of the Clubs, who allegedly committed misdeeds in their home ballparks in over two dozen *other* judicial districts.

Even if Plaintiffs surmounted all of those procedural problems—by demonstrating standing, establishing personal jurisdiction, and justifying lawful venue—they would ***still*** fail to state a single valid claim for relief. In fact, Plaintiffs have failed to properly allege almost every single element for every single one of their asserted causes of action. The complaint is essentially an issue-spotter exam of pleading deficiencies.

- Plaintiffs bring a negligence claim but fail to allege *any* of the required elements (duty, breach, causation, or injury).
- Plaintiffs bring a fraudulent-concealment claim but again fail to allege *any* of the required elements. Plaintiffs base this claim on the absurd notion that Defendants somehow concealed information that has been in the public domain for decades. Plaintiffs' own allegations, drawn from a variety of public sources, establish that Defendants did not conceal anything.
- Plaintiffs bring a claim under California's Consumers Legal Remedies Act, but this statute only applies to "goods or services" (which Plaintiffs have not properly identified), and Plaintiffs admit that they lack the required commercial relationship with all but one of the Defendants.
- Plaintiffs bring a claim under California's Unfair Competition Law, but those allegations are entirely derivative of their other claims, and thus fall along with them.
- And Plaintiffs bring purported claims for (1) violation of California Civil Code § 1668 and (2) "personal injury," but those are not even recognized as causes of action under state law. Even if they were, they would fail as a matter of law.

Ultimately, Plaintiffs offer a hodge-podge of untenable legal theories, based on conclusory factual allegations, in order to fundamentally change the way that tens of millions of fans a year watch the game of baseball. Plaintiffs cannot possibly cure the complaint's fundamental and multilayered defects with another round of amendments. The Court should dismiss all of Plaintiffs' claims with prejudice.

II. STATEMENT OF THE CASE

Plaintiff Gail Payne filed her original complaint, on behalf of herself and a putative nationwide class, on July 13, 2015. *See* Dkt. 1 (Class Action Complaint); Dkt. 15 (Refiled Class Action Complaint). The next day, Plaintiff's attorneys filed a "Notice of Errata" and a "[Corrected] Class Action Complaint." *See* Dkt. 16 (Notice of Errata); Dkt. 16-1 (correcting spelling of Payne's name). Although Payne has never been injured by a foul ball or errant bat,

her original complaint asserted four causes of action related to the risk of injury: (1) negligence, (2) fraudulent concealment, (3) violation of California's Unfair Competition Law ("UCL"), and (4) violation of California's Consumers Legal Remedies Act ("CLRA"). Dkt. 16-1 at ¶¶ 117–56. The original complaint named MLB and the Commissioner as defendants, but did not name any of the 30 Major League Clubs. *Id.* at ¶¶ 19–20.

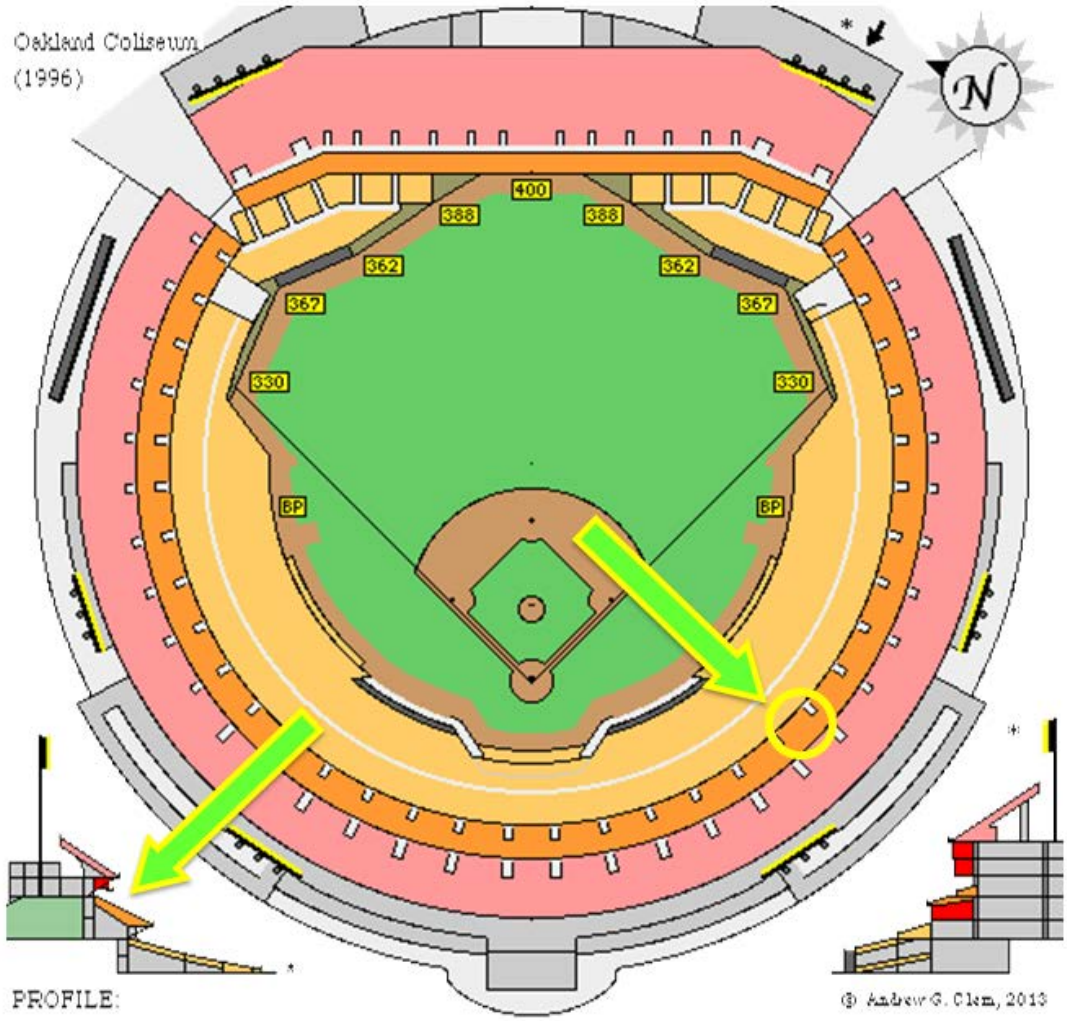
On October 2, 2015, MLB and the Commissioner filed a motion to dismiss the original complaint. Dkt. 37. MLB and the Commissioner argued that Plaintiff Payne lacked standing and that her allegations failed to establish ***any*** of the elements for ***any*** of the asserted claims. *Id.* Plaintiff Payne—rather than oppose this motion—elected to amend her original complaint. Dkt. 39 at 1 (Joint Stipulation). On October 23, 2015, Plaintiff Payne filed a First Amended Complaint. *See* Dkt. 41 ("First Amended Complaint" or "FAC"). The First Amended Complaint now includes two new Plaintiffs, neither of whom appears to fit the definition of the class that they purport to represent (because neither alleges that he or she "purchased a ticket to a Major League Baseball game"). *Compare* FAC ¶¶ 19–24 *with id.* at ¶¶ 300–01. The First Amended Complaint also adds all 30 Major League Clubs as defendants and purports to allege two new causes of action, for violation of California Civil Code § 1668 and for "personal injury." *Id.* at ¶¶ 31–60, 352–55.

III. STATEMENT OF RELEVANT ALLEGATIONS

A. Plaintiff Payne has never been injured and continued to attend Athletics games despite her knowledge of the risk.

Plaintiff Gail Payne attended her first A's game in 1968, "loves attending games, has attended many, and this year purchased tickets for the first time." FAC ¶ 17. Payne does not allege that she has ever been injured at a baseball game. Instead "she believes she and other fans are at increased and imminent risk of injury." *Id.* Payne "estimates that at every game, at least three or four balls enter her section" and "she is constantly ducking and weaving to avoid getting hit by foul balls or shattered bats." *Id.* Although Payne asserts that "there is no guarantee she can duck the next time," she has never been injured. *Id.* Payne alleges that her tickets grant her a license to sit in section 211 of the Oakland Coliseum. *Id.* For the convenience of the Court, a

diagram of the Oakland Coliseum was taken from the original Complaint (Dkt. 16-1 ¶ 28) and annotated to identify section 211, which is on the "Plaza Level" (an upper deck that sits well above the field level):



In the First Amended Complaint, Plaintiff Payne adds new allegations claiming that her "seats are in prime foul ball territory." FAC ¶ 18. But these allegations actually provide no information about her seats in section 211. Instead, Payne describes the number of foul balls that are hit to seats that are in a completely different area (section 220), or that are on a lower deck that is much closer to the field (sections 111 to 114). *Id.*[4]

[4] The information that Payne cites contradicts her claims on the prevalence of foul balls near her Coliseum seats. For example, the website cited in footnote 43 of the First Amended Complaint actually says, "You will often hear about the lack of opportunity for foul balls at O.co Coliseum. The foul ball territory is huge which greatly limits opportunities for foul balls." *See* http://www.bestfoulballseats.com/mlb-parks/oakland-alameda-county-coliseum-oakland-athletics/ (cited in FAC n.43). It continues, "I recommend . . . if you really hope to get an in-game ball" to "[o]nly buy tickets in the first 20 rows around the infield . . . . Sitting in the right seat is certainly a great way to improve your odds of catching a foul ball but remind yourself that

Plaintiff Payne admits that she "acquired" her tickets from the Oakland Athletics. *Id.* at ¶ 350. She did not purchase the tickets from MLB, the Commissioner, or the 29 other Clubs. Also, as Payne admits, her tickets contain "warnings." *Id.* at ¶ 336. Specifically, the Athletics' ticket-back contains the following announcement:

> **WARNING:** The ticket holder assumes all risk and danger incidental to the sport of baseball and all warm-ups, practices and competitions associated with baseball, including specifically (but not exclusively) the danger of being injured by thrown bats, fragments thereof, and thrown or batted balls, and agrees that none of the Office of the Commissioner of Baseball, [other entities], the Major League Clubs, and their respective agents, players, officers, employees and owners shall be liable for injuries or loss of personal property resulting from such causes.

Gorman Decl., Ex. B (photocopy of Athletics ticket-back referred to in the original Complaint, Dkt. 16-1 at ¶¶ 141, 156 & n.185, and in the FAC at ¶¶ 318, 336, 351 & n.521). Plaintiff Payne "believes" that her tickets are "less expensive than the sections covered by protective netting" (FAC ¶ 17), but this belief is contradicted by the Athletics' ticket-selling website that Plaintiff cites to substantiate her allegations (*id.* at ¶ 72 & n.75).[5] According to the information that Plaintiff Payne cites, the seats in a comparable section behind the backstop netting are sold for the exact same price as her seats.[6]

B. Plaintiff Gorman focuses his allegations on a Minor League Club that he has not sued, and attended Minor League games despite specific awareness of the risk posed by foul balls and errant bats.

Plaintiff Robert Gorman is a South Carolina resident and "has been a baseball fan since he was seven years old." FAC ¶ 19. But Gorman does not make any specific allegations about attending MLB games or purchasing MLB tickets, and instead focuses his allegations entirely on

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the odds are still stacked against you and be prepared to enjoy the game even without catching a ball." *Id.*

[5] Defendants pointed out this error on October 2, 2015 (*see* Dkt. 37 at 4:25–27), but Plaintiffs' counsel chose not to correct it in their First Amended Complaint.

[6] *See* Gorman Decl., Ex. A (Oakland Coliseum seating-chart webpage cited in the Complaint at 12 n.46). This webpage cited by the Plaintiff shows that "Plaza Infield" seats—including Plaintiff's seats in section 211 as well as seats straight behind the netted home-plate backstop in sections 216, 217, and 218—are all sold at the same price. The webpage that Plaintiff cites also shows that the "Value Deck" seats straight behind the home-plate netting are substantially cheaper, and that seats in what Plaintiff calls the "Danger Zone" along the first- and third-base lines are actually ***more expensive*** than seats behind the home-plate netting. *Id.* (comparing the prices for MVP Infield, MVP, and Lower Box sections to Plaza Infield sections behind the home-plate backstop).

tickets that he purchased from "his local Charlotte [North Carolina] minor league team, the Knights." *Id*. at ¶¶ 19, 350. Gorman, however, has not sued the Charlotte Knights, nor has he explained why he believes that Defendants in this action are responsible for stadium operations at the Knights' ballpark. All of Gorman's allegations focus on the Minor Leagues, and Gorman does not even allege to have purchased a Major League ticket.[7]

Unlike Plaintiff Payne, Gorman alleges that he "has been hit . . . by a foul ball." *Id.* at ¶ 21. This incident allegedly took place at the "Charlotte Knights' former ballpark" when a foul ball "nicked the railing, deflected, . . . and nearly shattered his glasses." *Id*. But this incident was "approximately fifteen years ago"—and barred by any relevant statute of limitations[8]—so Plaintiff Gorman, like Plaintiff Payne, is apparently suing over a belief that he is "at risk of [future] injury." *Id.*

Plaintiff Gorman has specific and extensive knowledge regarding baseball injuries and the risk posed by errant bats and balls. He literally wrote the book on baseball injuries: *Death at the Ballpark: A Comprehensive Study of Game-Related Fatalities, 1862–2007*. *See* FAC n.1; *id.* at ¶ 23. Plaintiff Gorman's book contains an entire chapter on fan injuries, including various injuries sustained from foul balls, thrown balls, errant bats, and collisions. Robert M. Gorman and David Weeks, *Death at the Ballpark*, 131–45 (McFarland 2009). Plaintiff Gorman's book offers the following summary of Defendants' immunity from suit:

> For more than a century, ballpark owners have enjoyed nearly automatic protection from injury lawsuits under the legal concept known as "assumption of risk." In most cases courts have held that the dangers inherent in baseball are widely known and that fans therefore assume the risk in attending games. Stadium owners do have a "limited duty" to provide reasonable protective measures in the most dangerous areas of their parks and sufficient seating in the protected areas for those who typically may want to sit there. Usually this has meant screening behind home plate and at least part of the way down the first and third base lines and public reminders about the dangers of foul balls and thrown bats, typically by way of signs, public address announcements, or written warnings on the backs of tickets. *Id.* at 132.

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[7] One of Gorman's allegations relates to college baseball. Plaintiff Gorman alleges that his wife was "hit, outside a college baseball stadium, when a foul ball shot backward over the backstop and hit her as she was walking . . . [to] the ticket booth." *Id.* at ¶ 21. But Plaintiff Gorman does not explain why he has standing to sue MLB or the Clubs are for an incident involving his wife that occurred outside a college stadium.

[8] N.C. Gen. Stat. § 1-52(16) (three-year statute of limitations); S.C. Code Ann. § 15-3-530(5) (same).

C. Plaintiff Smith alleges that she was injured at a Major League game, but does not allege any intention to attend future games or any threat of future injury.

Plaintiff Stephanie Smith alleges that she was "hit" by "a line drive foul ball" on June 7, 2015, while "attending a Dodgers game with her family." FAC ¶ 24. Plaintiff Smith's ticket, like all Dodgers tickets, contained the following warning:

> **WARNING – ASSUMPTION OF RISK**
>
> By using this ticket and entering Dodger Stadium, the holder assumes all risk and danger incidental to the game of Baseball, whether such risks occur prior to, during, or subsequent to the actual playing of the game, including specifically (but not exclusively) the danger of being injured by thrown bats and thrown or batted balls. The holder further agrees that Los Angeles Dodgers LLC, Dodger Tickets LLC, the participating Clubs, Tickets.com, and their respective agents and players are not liable for any injuries from such causes.
>
> Gorman Decl., Ex. C.

Plaintiff Smith claims that she was injured by the foul ball and has incurred "approximately $4,300" in medical expenses. FAC ¶ 24. In the complaint, Smith alleges that the Dodgers sent her "a letter claiming the team was not liable for her injuries." *Id.* Defendants include with this motion a copy of that letter—which describes California law on the assumption of risk doctrine. *See* Gorman Decl., Ex. D.

As explained below, allegations regarding one's intention to attend future Major League games and a fear of being hit by foul balls or errant bats are not sufficient to establish standing. But Plaintiff Smith does not even allege that she will attend games in the future, or that she is at any risk of injury going forward. Additionally, in contrast to Plaintiff Payne, who alleges that she purchased her tickets from the Athletics, and Plaintiff Gorman, who alleges that he acquired his tickets from the Charlotte Knights, the complaint is completely silent as to who purchased (and who sold) the tickets used by Smith.

D. Plaintiffs assert various causes of action in pursuit of an injunction mandating additional safety netting in the future.

The core of Plaintiffs' complaint is a demand for "all existing major league and minor league indoor and outdoor ballparks to be retrofitted to extend protective netting from foul pole to foul pole, by the beginning of the 2016–2017 [sic][9] MLB season." FAC ¶ 11. Plaintiffs also

[9] Each MLB championship season is played in a single calendar year, so there is no such thing as a "2016–2017 season."

want a court-ordered mandate forcing Defendants to implement "a program to study injuries." *Id.* Plaintiffs justify these claims for relief on five causes of action: (1) negligence, (2) fraudulent concealment, (3) violation of California's UCL, (4) violation of California's CLRA, and (5) violation of § 1668 of California's Code of Civil Procedure. *Id.* at ¶¶ 309–54. Plaintiff Smith also brings an individual claim for monetary damages for "personal injury." *Id.* at ¶¶ 28, 355.

The First Amended Complaint now lumps MLB, the Commissioner, and the 30 Clubs together as "Defendants" for the majority of their allegations, which creates significant ambiguity as to who exactly is being accused of what. The essence of Plaintiffs' negligence claim is that Defendants failed to provide a "reasonably safe facility for spectators sitting in the exposed areas along the first and third base lines." *Id.* at ¶ 267. The specifics, though, still heavily emphasize MLB's actions, and provide very few allegations about what the Clubs did or did not do.[10]

Plaintiffs have also asserted claims for fraudulent concealment, violation of California's UCL, and violation of California's CLRA. *Id.* at ¶¶ 334–51. Plaintiffs base all three of these claims on the same alleged actions: that Defendants supposedly failed to disclose the risk of injury to fans, that Defendants "[m]isrepresent[ed] ball parks as safe and family friendly," and that MLB concealed other unspecified "pertinent facts." *Id.* at ¶¶ 328, 335–36, 338–42, 351. Plaintiffs do not allege that they actually relied on any of Defendants' allegedly false statements, that they would have acted differently if Defendants had disclosed other "pertinent facts," or that they were injured by Defendants' actions. In fact, Plaintiffs' complaint tacitly admits that at least two of the three Plaintiffs continued to attend games in an unscreened section even after they were aware of the purported risk from foul balls and errant bats. *Id.* at ¶¶ 17, 22.

Plaintiffs also assert a "cause of action" that alleges that "Defendants violated California Civil Code § 1668 by requiring members of the public, as a condition of admission to an MLB game, to 'waive' their rights." *Id.* at ¶ 354. The First Amended Complaint, however, offers no details about this "waiver." *Id.*

[10] *See, e.g.*, FAC ¶¶ 254–58 (MLB and the Commissioner allegedly had a duty to act), 267 (MLB allegedly did not promulgate a consistent netting rule); 274 (MLB did not deploy radar-tracking technology); 281 (MLB allegedly allows fans to participate in the "wave").

IV. ARGUMENT

A. Plaintiffs lack standing to assert their claims for negligence, fraud, and violation of § 1668, or to obtain the injunctive relief sought.

Plaintiffs fail to clearly allege facts establishing their standing under Article III to seek injunctive relief for their claims of negligence, fraud, and violation of § 1668. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Plaintiffs must allege (1) "injury in fact," (2) "a causal connection between the injury and the conduct complained of," ***and*** (3) that the injury will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For each of their claims for injunctive relief, Plaintiffs fail to meet at least the injury-in-fact requirement. And although Plaintiffs purport to represent a class of similarly situated individuals, their failure to show that they personally have standing is fatal to the entire complaint. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). Accordingly, the Court should dismiss the First Amended Complaint under Rule 12(b)(1) for lack of subject-matter jurisdiction. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *see also Lujan*, 504 U.S. at 560–61.

1. Plaintiffs lack standing to assert their claim for negligence.

With respect to their negligence claim, Plaintiffs fail to adequately allege a concrete and particularized injury that is "imminent." *Lujan*, 504 U.S. at 560. Plaintiffs seek injunctive relief to prevent some future harm. To establish Article III standing, therefore, an injury must be (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical." *Id.* at 560 & n.1 (internal quotation marks omitted). A threatened injury is not "imminent" unless it is "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Allegations of "possible future injury" are insufficient. *Id.*; *see also City of L.A. v. Lyons*, 461 U.S. 95, 102, 105 (1983) (explaining that the threat must be "real and immediate"—not "conjectural" or "hypothetical"—to confer standing).

Plaintiffs cannot establish standing because there is no imminent injury here. *Lujan*, 504 U.S. at 560. Plaintiffs have not alleged—and cannot allege—facts showing that the threat of being injured by a foul ball or a broken bat is "certainly impending" or "real and immediate." *Clapper*, 133 S. Ct. at 1147; *Lyons*, 461 U.S. at 105. As the Supreme Court has explained, the

concept of "imminence" is "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 n.2; *see also Munns v. Kerry*, 782 F.3d 402, 410–11 (9th Cir. 2015). Plaintiffs baldly assert that they are at "imminent risk" of injury (FAC ¶¶ 17, 22), but such conclusory and factually unsupported assertions are insufficient to confer Article III standing. *See Carrico v. City and Cnty. of San Francisco*, 656 F.3d 1002, 1006 (9th Cir. 2011).

In an attempt to create the appearance of imminent harm, Plaintiffs allege that certain sections on the level *below* Payne's section "receive the most foul balls," and that a certain foul-ball aficionado prefers to sit in a section on the *opposite* side of the ballpark from Plaintiff Payne. *Id.* at ¶ 18. But neither of these allegations suggests that Payne—or anyone else—faces a "real and immediate" threat of being injured, either in her section or in the sections that receive the most foul balls.[11] Plaintiffs also allege that on "one occasion" Payne "ducked to avoid a foul ball flying her way" and that "there is no guarantee she can duck the next time." *Id.* at ¶ 17. But because Plaintiffs cannot show that Plaintiff Payne, or anyone else, is virtually certain to be struck and injured, they cannot establish standing. *See Clapper*, 133 S. Ct. at 1147; *Lyons*, 461 U.S. at 105.[12]

Plaintiffs' new allegations that Plaintiffs Gorman and Smith have been struck by foul balls in the past do nothing to change the analysis.[13] As the Supreme Court, the Ninth Circuit, and this

[11] Plaintiff Payne's allegation that she is "constantly ducking and weaving to avoid getting hit by foul balls or shattered bats" is quite implausible in light of her admission that her seats are in section 211. *See* FAC ¶¶ 17. According to the 2015 Oakland Coliseum seat map—which is incorporated by reference into her complaint (*see id.* at ¶ 72 n.75)—section 211 is part of an upper deck of the ballpark, above the field-level sections that the Plaintiffs describe as the most dangerous areas for foul balls and bats. Gorman Decl., Ex. A; FAC ¶¶ 75 & n.83, 80 & n.104.

[12] Plaintiff Gorman makes similar allegations about the frequency of foul balls entering his section at the Charlotte Knights Minor League ballpark. FAC ¶ 20. But because his allegation concerns a Minor League park, it has no bearing on whether he has standing to seek injunctive relief against the Major League Defendants in this action. And even if his allegation concerned a Major League ballpark, it would still be insufficient for the same reasons that Plaintiff Payne's allegations are insufficient.

[13] Plaintiff Payne has never been injured by a foul ball or wayward bat (FAC ¶ 17), and allegations of injuries to other individuals are insufficient to confer standing on Payne. *Lujan*, 504 U.S. at 560 n.1 (explaining that to be particularized, "the injury must affect the plaintiff in a personal and individual way"); *Hodgers-Durgin*, 199 F.3d at 1045.

Court have all made clear, past exposure to harm is insufficient to confer standing to seek injunctive relief to prevent some possible future harm. *Lyons*, 461 U.S. at 102, 111; *Munns*, 782 F.3d at 411–12; *Mehr v. Féderation Internationale de Football Ass'n*, — F. Supp. 3d —, 2015 WL 4366044, at *13–14 (N.D. Cal. July 16, 2015). For example, in *Lyons*, the Court held that a plaintiff had no standing to seek an injunction against the LAPD's use of illegal police chokeholds, even though the plaintiff had *previously* been injured by such a chokehold. 461 U.S. at 105–08. The Court held that the plaintiff's allegations of *past* injury established standing to seek monetary damages to remedy the past harm. *Id.* at 109. But in order to establish standing for a forward-looking injunction, the Court demanded more: an allegation that "*all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter." *Id.* at 105-06 (emphasis in original). Such an allegation, the Court added, would have been "incredible" and "untenable." *Id.* at 106, 108. The same is true here—Plaintiffs cannot tenably allege that they are certainly going to be injured, so they have no standing to seek an injunction.

To the extent that Plaintiffs allege injury simply by being exposed to an "increased" or "unreasonable" risk of harm (*see, e.g.*, FAC ¶¶ 6, 17, 22, 25, 267, 329, 331), their allegations are inadequate to confer Article III standing. In *Clapper*, the Supreme Court expressly rejected the notion that a plaintiff can establish standing simply by alleging an "objectively reasonable likelihood" of harm (which Plaintiffs here cannot even do). 133 S. Ct. at 1147–48. The Court demanded more—a showing that the future harm is "certainly impending." *Id.* Likewise, in *Lyons*, the Court refused to hold that the "odds" of the plaintiff being subjected to an illegal police chokehold established his standing to seek an injunction, even though it agreed that *someone* in Los Angeles would be subjected to such a chokehold. 461 U.S. at 105–08. The Court demanded more—allegations of facts showing that the plaintiff would certainly be subject to an illegal chokehold in the future. *Id.* at 106.

In a recent case concerning the risk of concussions from playing soccer, this Court ruled that allegations of "risk" must be dismissed for lack of standing. *See Mehr*, 2015 WL 4366044, at *13–16. Like Plaintiffs here, the *Mehr* plaintiffs sought injunctive relief requiring the defendants to implement new rules—namely, rules concerning concussion-management protocols and rules

governing how soccer is played. *Id.* at *14. Among other deficiencies, the court concluded that the plaintiffs had failed to adequately allege injury-in-fact because the risk of head injuries was "speculative and nebulous," rather than "certainly impending." *Id.* at *13. In reaching that conclusion, the court rejected the plaintiffs' "frivolous argument" that they were being subjected to a "heightened pleading standard," noting that *Lujan* requires the elements of standing to be pled with specificity, and that a complaint lacking the proper detail must be dismissed as jurisdictionally defective. *Id.* at *14. Accordingly, the court dismissed the complaint for lack of standing. *Id.* at *25. This Court should do the same here. Plaintiffs do not come close to showing that their risk of being struck with foul balls or errant bats is "certainly impending." Payne has attended games for nearly 50 years (FAC ¶ 17) but has never been struck. Gorman has "been a baseball fan since he was seven" and was apparently struck only once, 15 years ago. *Id.* at ¶¶19–20. And ***none*** of the Plaintiffs can possibly establish that they are at risk of imminent injury because none of them even bothers to allege—as the losing plaintiffs in *Lujan* did—that they have a vague plan to attend Major League games at some point in the future. "Such 'some day' intentions—without any description of concrete plans" would not actually be enough to establish standing, but the lack of such allegations demonstrates that Plaintiffs have not even come close to establishing an "imminent" Article III injury. *Lujan*, 504 U.S. at 564.

Finally, to the extent that Plaintiffs simply allege that they fear for their safety, such fear is insufficient. FAC ¶¶ 17, 22. The mere "subjective apprehension about future harm" is not an injury-in-fact and cannot establish standing. *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010); *see also Clapper*, 133 S. Ct. at 1152.[14]

[14] Plaintiff Gorman lacks standing to seek injunctive relief for an additional reason: there is no causal connection between any purported injury of his and any action of the Defendants. "[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation marks and alterations omitted). Plaintiff Gorman alleges only that he has attended, and continued to attend, games at the Charlotte Knights' Minor League ballpark, and that, fifteen years ago, a foul ball struck him there. FAC ¶¶ 21–22. Neither the Charlotte Knights nor the Charlotte ballpark's operator are before the Court, so Plaintiff Gorman lacks standing to assert any claims against the Defendants.

2. Plaintiffs lack standing to assert their fraud claims or their "cause of action" for violation of California Civil Code § 1668.

Plaintiffs fail to adequately allege either injury-in-fact or redressability for their claims of fraudulent concealment, violation of the CLRA, and violation of the UCL. They also fail to allege injury or redressability with respect to their so-called "cause of action" for violation of § 1668.

Injury-in-Fact. Plaintiffs have not offered a single particularized allegation that any of them has suffered a concrete injury from Defendants' alleged fraudulent statements or concealments. Instead, Plaintiffs assert vaguely that they "have been damaged by the actions and inactions of the Defendants," that they have "suffered harm" from Defendants' alleged concealment, and that they have suffered "injuries" as a result of Defendants' alleged violation of the CLRA and UCL. FAC ¶¶ 26, 337, 343, 351. But such conclusory allegations are insufficient to establish standing for fraud claims, which require particularized pleading under Rule 9(b). *See Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). As the Ninth Circuit recently explained, "conclusory and bare bones" allegations—"without any factual content"—are "insufficient to establish standing or to survive a motion to dismiss." *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013). Plaintiffs' "conclusory and bare bones" allegations similarly fail to establish injury-in-fact for their fraud claims. Their failure to specify any sort of injury is particularly egregious given that they elected to amend their complaint following Defendants' motion to dismiss on this exact same ground.

With respect to their allegations that Defendants violated California Civil Code § 1668—which concerns the validity of certain contractual limitations of liability—Plaintiffs do not even bother to provide *conclusory* assertions of injury. Nor could they, as there is no allegation that a contractual provision subject to § 1668 has ever been enforced against them.

Redressability. Even if Plaintiffs had adequately alleged some sort of injury to support their fraud claims and their "cause of action" under § 1668, there is no connection between those

claims and Plaintiffs' requested relief. Plaintiffs demand an injunction requiring extended nets in ballparks and a study of spectator injuries. FAC ¶¶ 11, 332. But those actions have nothing to do with remedying whatever harm could have resulted from allegedly fraudulent conduct or the enforcement of an allegedly invalid contractual provision (both of which, by their nature, are past harms). Plaintiffs' failure to request appropriate relief is an independent basis to dismiss their claims for lack of standing. *See Lujan*, 504 U.S. at 571.

In sum, Plaintiffs fail to allege an injury-in-fact sufficient to establish Article III standing to bring their claims for injunctive relief. Plaintiffs have also failed to properly allege that a favorable court decision is likely to provide redress. Plaintiffs therefore lack standing, and their claims for injunctive relief should be dismissed for lack of subject-matter jurisdiction.[15]

B. Plaintiffs' addition of new parties creates a variety of personal-jurisdiction and venue defects.

1. The Court lacks personal jurisdiction over all Out-of-State Clubs.

In a rush to assert claims against all MLB Clubs, Plaintiffs have failed to meet their burden of establishing personal jurisdiction over the vast majority of the Defendants. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006). Plaintiffs' sole basis for claiming personal jurisdiction is the threadbare allegation that the Defendants "are authorized to do business and in fact do business in this district, including playing baseball in this district and have sufficient minimum contacts with this district, and otherwise intentionally avail themselves of the markets in this district through sponsorship and playing of games in this district." FAC ¶ 14. This conclusory allegation is wholly insufficient to meet Plaintiffs' burden.

a. The Court lacks general jurisdiction because Plaintiffs fail to allege facts demonstrating that the Out-of-State Clubs have contacts with California that are "continuous and systematic."

There are two forms of personal jurisdiction: (1) "general or all-purpose jurisdiction," and (2) "specific or conduct-linked jurisdiction." *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). A court may assert general/all-purpose jurisdiction over an out-of-state defendant only when that

[15] Plaintiff Smith seeks monetary damages for her individual "personal injury" claim. FAC ¶¶ 28, 355; *id.* at 118 (Request for Relief). To the extent she has properly alleged a cause of action, however, there is no causal connection between her alleged injury and any of the Clubs besides the Los Angeles Dodgers. *See id.* at ¶ 24. Accordingly, Plaintiff Smith has no standing to assert her individual claim against those other Clubs. *See Lujan*, 504 U.S. at 560–61.

defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.'" *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (quoting *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945)). For example, the Supreme Court has upheld an exercise of general jurisdiction over a defendant where the forum state was the defendant's "principal, if temporary, place of business" for several years. *See id.* at 2854, 2856 (discussing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)). General jurisdiction is appropriate only where "a defendant's contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be 'present' in that forum for all purposes." *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006). "Only in an 'exceptional case' will general jurisdiction be available anywhere" other than "a corporation's place of incorporation and principal place of business." *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014). Mere "visits" to the forum state are not enough; rather, there must be some "indication that [the defendant] has sat down and made itself at home." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124–25 (9th Cir. 2002). Here, Plaintiffs do not allege any facts indicating that the Out-of-State Clubs have continuous and systematic contacts with California. Even if Plaintiffs were to allege occasional visits by the Out-of-State Clubs to California, courts have routinely held that occasional involvement in California-based events does not constitute the continuous and systematic contact necessary to justify general jurisdiction. *See, e.g.*, *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1490 (9th Cir. 1993).

Plaintiffs' only argument for asserting general jurisdiction here is that the Out-of-State Clubs occasionally play games in this district. FAC ¶ 14. However, a number of courts, including in this district, have held that "there is no general jurisdiction over sports teams" merely because they play games in the forum state. *Senne v. Kansas City Royals Baseball Corp.*, — F. Supp. 3d —, 2015 WL 2412245, at *23 (N.D. Cal. May 20, 2015) (citing *Davis v. Billick*, 2002 WL 1398560, at *6 (N.D. Tex. June 26, 2002); *Manton v. Cal. Sports, Inc.*, 493 F. Supp. 496,

496–98 (N.D. Ga. 1980)).[16] In short, Plaintiffs have not come close to meeting their burden for establishing general personal jurisdiction.

b. The Court lacks specific jurisdiction because the Plaintiffs fail to allege facts demonstrating that their claims arise out of the contacts that the Out-of-State Clubs have with California.

The test for "whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (internal citations omitted). For a court to exercise specific jurisdiction consistent with due process, the litigation must "result[] from alleged injuries that arise out of or relate to" the activities that are directed to the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quotation marks omitted). In the Ninth Circuit, courts employ a three-part test to determine whether a defendant's contacts suffice to establish specific jurisdiction: "1) the nonresident defendant must have *purposefully availed* himself of the privilege of conducting activities in the forum by some affirmative act or conduct; 2) plaintiff's claim must *arise out of* or result from the defendant's forum-related activities; and 3) exercise of jurisdiction must be *reasonable*." *Roth v. Garcia Marquez*, 942 F.2d 617, 620–21 (9th Cir. 1991) (emphasis in original). "Each of the three tests must be satisfied to permit a district court to exercise limited personal jurisdiction over a non-resident defendant." *Peterson v. Kennedy*, 771 F.2d 1244, 1261 (9th Cir. 1985).

Here, Plaintiffs cannot establish specific personal jurisdiction because they do not allege that the Out-of-State Clubs engaged in any particular conduct in California that relates to Plaintiffs' claims.[17] Under Ninth Circuit law, courts apply a "'but for' test" to determine whether a claim arises out of forum-related activities. *Doe v. Unocal Corp.*, 248 F.3d 915, 924–25 (9th Cir. 2001). The court must inquire whether the plaintiffs' claims would have arisen but for the defendants' contacts with the forum state. *Id.*at 924; *see also Ballard v. Savage*, 65 F.3d 1495,

[16] *Cf. Evans v. Boston Red Sox*, 2013 WL 6147675, at *4 (D. Haw. Nov. 22, 2013); *Sullivan v. Tagliabue*, 785 F. Supp. 1076, 1081 (D.R.I. 1992).

[17] *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803 (9th Cir. 2004) (finding no specific jurisdiction, in part, because the plaintiff did "not point to any conduct by [the defendant] in California related to the [claim] that would be readily susceptible to a purposeful availment analysis").

1498 (9th Cir. 1995) (finding that a defendant's frequent trips to California "do not weigh in favor of an exercise of specific jurisdiction, because [the plaintiff's] case against the [defendant] does not concern the [defendant's] business trips"). But here, Plaintiffs allege ***no facts*** sufficient to show that their claims arise out of the forum-related activities of the Out-of-State Clubs.

The complaint's only specific allegation related to jurisdiction is that Defendants "intentionally avail themselves of the markets in this district through sponsorship and playing of games." FAC ¶ 14. But Plaintiffs have not provided any specifics for their "sponsorship" allegation to demonstrate that it is anything other than improper speculation. And even if it were true that Out-of-State Clubs have sought in-state sponsors, those activities have no "but for" relationship to Plaintiffs' claims regarding foul balls and errant bats. As a court in this district recently held—in a case involving claims that FIFA was negligent for not imposing stricter safety protocols—plaintiffs cannot establish personal jurisdiction merely by pointing to "contracts of a commercial nature that are unrelated to" plaintiffs' allegations of negligence and "failure to implement [safety] protocols." *Mehr*, 2015 WL 4366044, at *8. Moreover, while it is true that there would be no foul balls without the "playing of games," Plaintiffs are not suing the Out-of-State Clubs because their players occasionally hit foul balls into the stands when playing games in California. Instead, Plaintiffs are suing the Out-of-State Clubs because they have allegedly provided an insufficient amount of protective netting in their home stadiums and ballparks (which all sit out of state). FAC ¶¶ 63 (photo of netting at Great American Ballpark in Ohio); 65 (same); 70 (photo of netting at Citizens Bank Park in Pennsylvania); 103–244 (describing injuries allegedly suffered by non-plaintiffs at ballparks across the country). Or Plaintiffs are suing the Out-of-State Clubs because of the allegedly distracting amenities at their stadiums, such as "video display monitors" and "Wi-Fi". *Id.* at ¶¶ 281–82. But no allegation in Plaintiffs' 119-page complaint suggests that Plaintiffs' claims arise out of anything that an Out-of-State Club did while "playing games" in California.

Plaintiffs' claims against the Out-of-State Clubs should be dismissed for lack of personal jurisdiction.

2. This district is an improper venue for the vast majority of Plaintiffs' claims.

Plaintiffs' claims are independently subject to dismissal under Rule 12(b)(3) because this Court is not a proper venue for resolution of the vast majority of their claims. "Once a defendant has raised a timely objection to venue, the plaintiff has the burden of showing that venue is proper." *Bohara v. Backus Hosp. Med. Benefit Plan*, 390 F. Supp. 2d 957, 960 (C.D. Cal. 2005); *Gamboa v. USA Cycling, Inc.*, 2013 WL 1700951, at *2 (C.D. Cal. Apr. 18, 2013).

Plaintiffs incorrectly allege—in boilerplate fashion—that venue is proper under 28 U.S.C. § 1391(b)(1) or (b)(2). FAC ¶ 15. Subsection (b)(1) is plainly inapplicable because that provision can be invoked only if "all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1). In this case, there are "multiple defendants residing in different states," so (b)(1) does not allow venue to lie in this district. Charles Alan Wright et al., *Federal Practice & Procedure* § 3804; 28 U.S.C. § 1391(b)(1). And subsection (b)(2) is no more helpful to Plaintiffs. This "transactional" venue clause states that venue is proper in the "judicial district" where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). That test "focuses on the defendant's relevant activities" and has two parts. *Gamboa*, 2013 WL 1700951, at *3. First, the Court must examine the "nature of the plaintiff's claims and the acts or omissions underlying those claims." *Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1166 (10th Cir. 2010). Second, the Court must consider whether "substantial events material to those claims occurred in the forum district." *Id.* (internal quotations marks omitted). In other words, the Court must determine whether Plaintiffs have shown that the "acts and omissions" that took place in this district "have a close nexus to the alleged claims." *Id.* (quoting *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372 (11th Cir. 2003)). This substantiality or close-nexus test is "intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute." *Cottman Transmission Sys., Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994). Plaintiffs cannot satisfy this venue test here.

In the initial Complaint, a single Plaintiff focused her allegations on stadium-safety features (and the risk of injury) at the Oakland Coliseum, so venue was proper in the Northern District of California. But in the First Amended Complaint, two new Plaintiffs have added specific allegations about "events or omissions" related to stadium safety in Los Angeles and North Carolina. FAC ¶¶ 19–24. Plaintiffs "must establish that venue is proper as to each defendant and as to each claim." *Walker v. U.S. Dept. of Commerce*, 2012 WL 1424495, at *1 (E.D. Cal. Apr. 24, 2012); *Federal Practice & Procedure* § 3807.[18] For these new claims, focused on Los Angeles and Charlotte, venue under § 1391(b)(2) is not proper in the Northern District of California. And to the extent that Plaintiffs are trying to bring claims against each Club for its particular stadium operations and safety procedures, those claims must be brought in the various venues across the country where those stadiums are located. None of the Out-of-District Clubs are "required parties" under Federal Rule 19, but even if they were, Rule 19 requires dismissal of objecting parties if "joinder would make venue improper." Fed. R. Civ. P. 19(a)(3).

Plaintiffs' attorneys created an intractable venue problem by misjoining three Plaintiffs, 32 Defendants, and six claims that have no nexus. The misjoinder makes it impossible for this court to transfer the entire "case" to a "district or division in which it could have been brought." 28 U.S.C. § 1406(a). There is no district where this case "could have been brought" because of the misjoinder of unrelated parties and claims. Under Federal Rule 12(b)(3), the Court should dismiss any claim that does not arise out of "events or omissions" that took place in this district. That means the Court should dismiss all claims brought by Plaintiffs Gorman and Smith, all claims brought against Clubs other than the Oakland Athletics and San Francisco Giants, and all claims brought against MLB and the Commissioner that do not arise out of "events or omissions" in this district.

[18] *See, e.g.*, *Hoover Grp., Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1410 (Fed. Cir. 1996) (analyzing venue for claims against company defendant separately from claims against individual defendant); *DeHaemers v. Wynne*, 522 F. Supp. 2d 240, 247 (D.D.C. 2007) (analyzing venue for ADEA claim separately from venue for Privacy Act claim).

C. Plaintiffs fail to state a claim for negligence.[19]

Plaintiffs' allegations fail on ***each*** of the four required elements to state a claim for negligence under California law: "(1) duty; (2) breach; (3) causation; and (4) damages."[20] *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1203 (9th Cir. 2003); *see also Melton v. Boustred*, 183 Cal. App. 4th 521, 529 (2010); Rest. (2d) Torts § 328A.

1. No Duty: Plaintiffs have assumed the risk of injury from errant bats and balls.

For nearly a century, courts all across the country—including in California and North Carolina—have barred claims just like this one under the "baseball rule." The baseball rule states, "as a matter of law," that a "stadium operator is not liable for injury to a spectator struck by a batted or thrown ball if the spectator was seated in an unscreened area of the stadium." *Bellezzo v. Arizona*, 174 Ariz. 548, 551–52 (Ct. App. 1992).[21] After all, "lack of a screen is as obvious as the fact that the Grand Canyon is a chasm, and the danger that a spectator hit by a foul ball may be injured is as evident as the likelihood that one who falls into the Grand Canyon may

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[19] Plaintiffs Payne and Smith allege claims based on games attended in California, so California law applies to their claims. FAC ¶¶ 17–18, 24; Dkt. 1-1 (Affidavit of Venue) at ¶ 5. Plaintiff Gorman alleges claims based on games attended in North Carolina (FAC ¶¶ 19–22), so that state's law applies to his claim.

[20] Before a putative class is certified, a complaint is considered as though "filed solely on [named plaintiffs'] behalf." *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794, 797 (7th Cir. 2010); *Simonet v. SmithKline Beecham Corp.*, 506 F. Supp. 2d 77, 81 (D.P.R. 2007). By applying California and North Carolina law to Plaintiffs' claims for purposes of this motion, Defendants take no position on what law(s) govern the claims of other purported class members.

[21] In "baseball rule" cases, Plaintiffs typically sue a stadium owner or operator. Here, Plaintiffs claim that Oakland Coliseum, Dodger Stadium, and BB&T Ballpark in Charlotte are unsafe, but they have sued every MLB Club, the Commissioner, and his Office. Obviously, Plaintiffs cannot sue any Club other than the Athletics and the Dodgers for claims regarding those Clubs' stadiums. And since Plaintiffs have not alleged that MLB or the Commissioner actually owns or operates any stadium or ballpark, they cannot contend that MLB or the Commissioner owes a legal duty arising from the property. Instead, Plaintiffs assert that the Commissioner and his Office have "acknowledge[ed] their duty to protect spectators." FAC ¶ 255. But Plaintiffs point only to comments where the Commissioner expressed concern for fan safety, or where the Commissioner said that he would "re-evaluate where we are on the topic" by holding "discussions" with players and the Clubs. *Id.* at ¶¶ 255, 258. The Commissioner did not assume a legal duty by expressing concern for the wellbeing of fans. Duty of care is a "question of law for the court," and the Court should reject Plaintiffs' unsupported assertion that such a duty exists. *Melton*, 183 Cal. App. 4th at 531.

be hurt." *Id.* at 553.[22] The only "duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion." *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 729 (1935); *Erickson v. Lexington Baseball Club, Inc.*, 233 N.C. 627, 628 (1951) (explaining that the screened seats should be "in the areas back of home plate where the danger of sharp foul tips is greatest").[23] But when one of the Plaintiffs "chooses to occupy an unscreened seat," he or she voluntarily "assume[s] the risk of injury" from foul balls or errant bats and Defendants owe no duty. *Quinn*, 3 Cal. 2d at 729–30; *see also Neinstein*, 185 Cal. App. at 182–83; *Brown v. S.F. Ball Club, Inc.*, 99 Cal. App. 2d 484, 488–91 (1950).[24] As the California Supreme Court has explained, "one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls." *Quinn*, 3 Cal. 2d at 729. The "management is not obliged to screen all seats, because . . . many patrons prefer to sit where their view is not obscured by a screen." *Id.* If "a spectator chooses to occupy an unscreened seat" or "is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck." *Id.*; *Erickson*, 233 N.C. at 629 (when plaintiff "proceeds to sit in an unscreened stand . . . he thereby accepts the common hazards incident to the game and assumes the risks of injury, and ordinarily there can be no recovery for an injury sustained as a result of being hit"). Even Plaintiffs' counsel admits that the baseball rule—if it is applied consistent with precedent—bars the claims here. As he recently wrote, "According to the [Baseball] Rule, if a baseball fan chooses an unprotected seat, the fan is deemed to have assumed

[22] *See also Costa v. Boston Red Sox Baseball Club*, 61 Mass. App. Ct. 299, 303 (2004); *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989); *Anderson v. Kansas City Baseball Club*, 231 S.W.2d 170, 173 (Mo. 1950).

[23] *See also Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 218–19 (2008); *Akins v. Glens Falls City Sch. Dist.*, 53 N.Y.2d 325, 329–30 (1981); *Leek v. Tacoma Baseball Club*, 38 Wash. 2d 362, 366–67 (1951); *Bryson v. Coastal Plain League, LLC*, 221 N.C. App. 654, 656–57 (2012); *Neinstein v. L.A. Dodgers, Inc.*, 185 Cal. App. 3d 176, 182 (1986).

[24] *See also Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185–86 (Minn. App., 1985); *Erickson*, 233 N.C. at 629; *Brisson v. Minneapolis Baseball & Athletic. Ass'n*, 185 Minn. 507, 509–10 (1932); *Kavafian v. Seattle Baseball Club Ass'n*, 105 Wash. 215, 220 (1919). *Cf. Powless v. Milwaukee Cnty.*, 6 Wis. 2d 78, 83 (1959) (basing baseball rule on contributory negligence rather than assumption of risk).

the inherent or known risks associated with the sport, typically foul balls or shrapnel from broken bats that enter the stands."[25]

Although most baseball-rule cases focus on foul balls, the risk of injury from errant or broken bats is just as open and obvious—at least according to Plaintiffs' allegations. *See* FAC at ¶¶ 17, 20, 22, 61, 93–95, 106–07, 115, 124, 129, 134, 140, 144, 150, 151, 156, 158, 175, 182, 184, 205, 208, 210, 212, 215–16, 220–21, 271. The assumption-of-risk doctrine applies equally to bats as it does to balls. *See, e.g., Benejam v. Detroit Tigers, Inc.*, 246 Mich. App. 645, 647–48, 654–58 (2001).[26]

In their First Amended Complaint, Plaintiffs now separately allege that Defendants supposedly "failed to warn spectators" of the risks inherent in sitting in unscreened seats. *See* FAC ¶ 318. But courts all across the country have held that because the risk from errant bats and balls is open and notorious, there is no duty to warn as a matter of law. *See Bellezzo*, 174 Ariz. at 551–53 (relying on Rest. (2d) Torts § 343, which requires "possessor of land" to warn invitees only if the danger is of the type that they "will not discover or realize."). "[I]t is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond." *Quinn*, 3 Cal. 2d at 730. Or as the Supreme Court of North Carolina explained: "Anyone familiar with the game of baseball knows that balls are frequently fouled into the stands and bleachers. Such are common incidents of the game which necessarily involve dangers to spectators." *Erickson*, 233 N.C. at 629. This "common knowledge of the nature of the sport" provides "sufficient warn[ing] of the risk."

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[25] Bob Hilliard, "The Irrationality of the Baseball Rule in the Age of the Digital Fan," *available at* http://www.hmglawfirm.com/blog/the-irrationality-of-the-baseball-rule-in-the-age-of-the-digital-fan/ (visited Nov. 19, 2015).

[26] In 1938, shortly after the baseball rule was adopted by the California Supreme Court, a lower court held that a thrown-bat case raised "similar principles" to the more traditional "flying ball" case, but ultimately decided against the club. *Ratcliff v. San Diego Baseball Club*, 27 Cal. App. 2d 733, 736 (1938). But that decision applied a "rule of liability" that was "materially different" from the normal baseball-rule case because the plaintiff had "elected to occupy a seat within a screened section and was injured while approaching her seat through an unscreened passageway." *Brown*, 99 Cal. App.2d at 492. Here, no Plaintiff claims that he or she attempted to sit in a screened seat, and both Payne and Gorman admit that they selected—and continued to select—seats in unscreened sections.

Neinstein, 185 Cal. App. 3d at 184.[27] And Defendants also have "no duty to warn spectators" about the "possibility that a bat . . . might leave the field" because that possibility is "well-known." *Benejam*, 246 Mich. App. at 647.

Plaintiffs repeatedly claim that Defendants had "superior knowledge of these risk [sic]," but the parties' comparative knowledge is not relevant here. FAC ¶ 249; *see also id.* at ¶¶ 260, 262–64, 267, 318, 326. Even if Plaintiffs had asserted complete "ignorance of the risk," they could not state a claim for failure to warn because a plaintiff cannot avoid the baseball rule merely by pleading ignorance. *See Brown*, 99 Cal. App. 2d at 489–90. As the Supreme Court of Minnesota explained:

> [N]o adult of reasonable intelligence, even with [ ] limited experience . . . could fail to realize that he would be injured if he was struck by a thrown or batted ball . . . , nor could he fail to realize that foul balls were likely to be directed toward where he was sitting. No one of ordinary intelligence could see many innings of the ordinary league game without coming to a full realization that batters cannot and do not control the direction of the ball which they strike and that foul tips or liners may go in an entirely unexpected direction. He could not hear the bat strike the ball many times without realizing that the ball was a hard object. Even the sound of the contact of the ball with the gloves or mitts of the players would soon apprize him of that.
>
> *Brisson*, 185 Minn. at 509–10.[28]

And, of course, these Plaintiffs cannot claim that they have "limited experience" or that they are ignorant. Plaintiff Payne has been attending professional games "for nearly 50 years" and "estimates that at every game, at least three or four balls enter her section." FAC ¶ 17. Plaintiff Gorman literally wrote the book on baseball injuries, and specifically analyzed the risk posed by foul balls and errant bats. FAC n.1 & associated text; *id.* at ¶ 23.

Courts have not endorsed Plaintiffs' view on baseball's purported duty to warn; several courts have actually held that it would be "absurd" and "resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be

[27] *See also Tucker v. ADG, Inc.*, 102 P.3d 660, 666 (Ok. 2004); *Costa*, 61 Mass. App. Ct. at 303; *Benejam*, 246 Mich. App. at 647; *Ivory v. Cincinnati Baseball Club Co.*, 62 Ohio App. 514, 520 (1939).

[28] *See also Ivory*, 62 Ohio App. at 520 ("The average person of ordinary intelligence in this country is so familiar with the game of baseball that it is reasonable to presume that he appreciates the risk of being hit by a pitched or batted ball without being specially warned of such danger.")

imperiled by vagrant baseballs in unscreened areas." *Brown*, 99 Cal. App. 2d at 491 (quoting *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368, 371 (Tex. Civ. App. 1941)). In short, Defendants have no "duty to warn" spectators about these open and notorious dangers.

Since California and North Carolina courts follow the baseball rule, under *Erie* and the Rules of Decision Act this court must follow that state substantive law.[29] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 77–80 (1938); 28 U.S.C. § 1652; *United Bhd. of Carpenters v. N.L.R.B.*, 540 F.3d 957, 963 (9th Cir. 2008). And even if this Court had the authority to ignore a century's worth of binding state-court decisions, doing so would be especially illogical here, as the baseball rule has literally become a canonical example of assumption of risk. For example, the Restatement of Torts uses the "spectator entering a baseball park" as ***the*** example of a plaintiff "tacitly or impliedly agreeing to relieve the defendant of responsibility." Rest. (2d) Torts § 496A, cmt. c.2. And Benjamin Cardozo, then the Chief Judge of New York's highest state court, used baseball to explain the legal proposition that "*volenti non fit injuria*," which means "to the consenting, no injury is done." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482 (1929). As Cardozo explained, "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." *Id.* And, as a California Court of Appeal concluded, "A person who fears injury always has the option of refraining from attending a baseball game or of sitting in a part of the park which is out of reach." *Neinstein*, 185 Cal. App. 3d at 182.

Here, Plaintiffs assume the risk of injury because they "choose[] to occupy" "unscreened seat[s]." *Quinn*, 3 Cal. 2d at 729; *Erickson*, 233 N.C. at 629. In addition, Plaintiffs' tickets specifically alert them to "the danger of being injured by thrown bats, fragments thereof, and

[29] Even if Smith and Gorman sought to apply the law of the states where they reside (Washington and South Carolina, respectively) rather than the law of the states where they attend baseball games, the baseball rule would still bar their claims. *See Kavafian*, 105 Wash. at 220; *Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424, 430 (D.S.C. 1994) (holding that Charlotte Knights' spectator "voluntarily assumed the risk of her injuries and that her action . . . thus fails as a matter of law"); *see also Hurst v. E. Coast Hockey League*, 371 S.C. 33, 37–38 (2006).

thrown or batted balls." Gorman Decl., Ex. B; *see also id.*, Ex. C. Plaintiffs therefore cannot state a claim for negligence because they have assumed the risk of injury.

2. No Breach or Causation: Plaintiffs have not adequately alleged any breach of Defendants' duties, or any causal relationship between breach and injury.

Plaintiffs also appear to allege that Defendants have breached a limited duty to "provide enough access to currently netted seats for as many fans as would reasonably be expected to request such seats." FAC ¶ 268. But this allegation suffers from three fundamental flaws.

First, Plaintiffs do not allege that MLB or the Commissioner provides access to any seats, so they cannot be liable for not providing enough access. As explained above, Plaintiffs do not allege that either the Commissioner or his Office actually owns or possesses the stadiums. To the extent that Plaintiffs allege that someone has a duty to provide "enough access" to "netted seats," it is not these defendants.

Second, as to all Defendants, Plaintiffs do not provide enough specificity to make plausible their naked assertion that a duty has been breached. In the original complaint, Plaintiff Payne alleged that "there are only *a number* of protected seats compared to *the number overall*" and that the protected "area" is not "sufficiently large." Dkt. 16-1 ¶ 91 (emphasis added). In the First Amended Complaint, Plaintiffs now claim—as to the Oakland Coliseum only—that "there are only *a* ***relatively*** [sic] number of protected seats compared to *the number overall*." FAC ¶ 268 (emphasis added). It is not clear what the amended pleading means, but neither allegation is sufficient to state a claim for relief. Plaintiffs cannot merely "plead the bare elements of [their] cause of action, affix the label 'general allegation,' and expect [their] complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Without specific factual allegations, Plaintiffs cannot state a claim.

Third, even if Defendants did have an obligation to provide a "sufficient" number of protected seats, and even if any Defendant had failed to meet that obligation, that "breach" would have no causal relationship to Plaintiffs' claimed injuries. ***None of the Plaintiffs allege that they attempted to obtain a protected seat but were unable to do so.*** Instead, each Plaintiff voluntarily chose an unprotected seat. As the California Court of Appeal has explained, there is no "causal

nexus" between a stadium's failure to provide a sufficient number of screened seats and a "plaintiff's injuries" if the plaintiff voluntarily chose to sit in an unscreened section. *Neinstein*, 185 Cal. App. 3d at 183; *see also Wade-Keszey v. Town of Niskayuna*, 772 N.Y.S.2d 401, 404 (N.Y. App. Div. 2004) (holding that "any failure of defendants to provide adequate protected viewing areas did not cause or contribute to plaintiff's injury" because plaintiff voluntarily chose to walk through "unprotected area" along the "first baseline"). In other words, even if Plaintiffs were injured while sitting in an unscreened section, that injury would have been caused by their voluntary decision to assume the risk inherent in an unscreened seat.

3. No Injury: Payne and Gorman have not actually suffered any injury or damages.

Plaintiffs Payne and Gorman have not alleged any injury. Instead, Payne and Gorman claim that they bear an "unreasonable" and "improper risk of injury and will in the future suffer damages." FAC ¶¶ 330, 331. But "[u]nder California law, appreciable, nonspeculative, present harm is an essential element of a negligence cause of action." *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 913 (N.D. Cal. 2009) (citing *Aas v. Super. Ct.*, 24 Cal. 4th 627, 646 (2000)). North Carolina law is no different. *See Tise v. Yates Constr. Co.*, 345 N.C. 456, 460 (1997). "Until physical injury occurs," Plaintiffs "cannot state a cause of action for . . . negligence." *S.F. Unified Sch. Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1327 (1995); *see also Fields v. Napa Milling Co.*, 164 Cal. App. 2d 442, 447–48 (1958); 6 Witkin, Summary Cal. Law, Torts § 1545. At best, Plaintiffs Payne and Gorman fear a "speculative harm or the mere threat of future harm," but that is "insufficient to constitute actual loss." *Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744, at *3 (C.D. Cal. June 15, 2015). So even if they could show duty, breach, and causation, Payne and Gorman would ***still*** fail to state a claim because "damage" is an "essential part of the plaintiff's case." *Fields*, 164 Cal. App 2d at 448; *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 368 (1963); *see also Miller v. Holland*, 196 N.C. 739, 740 (1929) (per curiam) (holding that "[i]njury" is an "essential element[]" of the tort of negligence).

In conclusion, Plaintiffs Payne and Gorman have failed to allege any of the required elements of negligence, and Plaintiff Smith has failed to allege duty, breach, or causation. Thus,

their claim for negligence must be dismissed. Each failure is enough to justify dismissal, and because the failures are fundamental, granting leave to amend would be futile.

D. Plaintiffs fail to state a claim for fraudulent concealment.

Plaintiffs' claim for fraudulent concealment fails because they do not allege with particularity that: (1) Defendants concealed or suppressed a material fact, (2) Defendants were under a duty to disclose that fact to Plaintiffs, (3) Defendants concealed or suppressed the fact with the intent to defraud Plaintiffs, (4) Plaintiffs were unaware of the fact and would not have acted as they did if they had known of the concealed or suppressed fact, ***or*** (5) as a result of the concealment or suppression of the fact, Plaintiffs sustained damage. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1011–12 (9th Cir. 2011); *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 131 (2007); *Bob Timberlake Collection, Inc. v. Edwards*, 626 S.E.2d 315, 321 (N.C. Ct. App. 2006).[30] Moreover, Plaintiffs fail to satisfy the Rule 9(b) requirement that fraud claims be pleaded with particularity, because they do not specifically allege the "who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). Because the averments of fraud are not pleaded with sufficient particularity, they must be disregarded, and the claim should be dismissed under Rule 9(b) and Rule 12(b)(6). *Id.* at 1107.

1. Plaintiffs fail to allege that Defendants concealed a material fact.

Plaintiffs' own allegations doom their claim for fraudulent concealment. As Plaintiffs' complaint admits, MLB tickets contain warnings about errant bats and balls. FAC ¶¶ 9, 336, 351 & n.521; Gorman Decl., Exs. B–C. And, while Plaintiffs allege that Defendants concealed certain facts, they also allege that those same facts were both publicly known and widely discussed, including: (1) the incidence or risk of spectator injury from foul balls, (2) the incidence or risk of spectator injury from shattered bats, (3) the existence of studies regarding the reaction times of fans sitting in exposed areas of ballparks, (4) the existence of "protective measure[s],"

[30] In North Carolina, the reliance element is subsumed within the duty element. *Everts v. Parkinson*, 555 S.E.2d 667, 674–75 (N.C. Ct. App. 2001).

and (5) the existence of "technology measuring the speed of baseballs and human reaction time." FAC ¶¶ 328, 335.

On the issue of foul-ball injuries, Plaintiffs cite several widely circulated articles that relied on publicly available data to quantify the risk to fans.[31] Plaintiffs cite a July 2014 *Atlanta Magazine* article for the statistic that "[i]n a typical MLB game, 35–40 batted balls fly into the stands," and they cite a September 2014 *Bloomberg* article for the proposition that "1,750 spectators are injured each year by wayward baseballs." *Id.* at ¶¶ 2 & nn.6–7, 76 & n.84, 81 & n.107. Plaintiffs also cite academic articles for the proposition that injuries suffered by fans involve head trauma, and that fans sitting in seats along the first- and third-base lines are at an increased risk of injury. *Id.* at ¶¶ 75 & n.83, 76 & nn.85–87, 80 & n.104, 261 & n.415. One of those articles was published in 2012, one was published in 2006, and the third—titled "Injuries from Flying Baseballs to Spectators at Ball Games"—was published ***seventy-five*** years ago. The notion that Defendants somehow concealed the fact that balls and bats enter the crowd at baseball games, and that fans closer to the batter may be at increased risk of injury, is absurd.

On the issue of shattered bats, Plaintiffs again point to widely circulated articles, including a 2013 academic article and a June 2008 article published on MLB's own website. *Id.* at ¶¶ 93 & nn.140–42, 94 & nn.143–44. Plaintiffs also cite public statements made by MLB officials themselves. First, Plaintiffs note that "Major League Baseball has acknowledged the safety issue posed by broken bats in undertaking a study of all shattered bats." *Id.* at ¶ 265. Then, relying on a *Chicago Tribune* article, Plaintiffs quote former Commissioner Bud Selig as stating that "[t]he maple bats safety issue is very real" and that he was "very concerned." *Id.* at n.418, ¶ 271. According to the First Amended Complaint, those statements were made in 2008. *Id.* Plaintiffs cannot claim that Defendants were concealing the very information that—in fact—MLB was discussing publicly.

Plaintiffs allege that Defendants concealed the fact that "MLB had decided to require bat manufacturers to have at least $10 million in liability insurance." *Id.* at ¶ 335. But that fact was

[31] Plaintiffs also list dozens of publicly filed lawsuits that alleged injuries from foul balls and shattered bats. Dkt. 1-3, Ex. B (cited at FAC ¶ 96).

disclosed in *The Wall Street Journal* in 2011, when the *Journal* relied on statements from MLB's Senior Vice President and General Counsel to report that "[m]anufacturers . . . have to carry an umbrella liability insurance policy of at least $10 million." Gorman Decl., Ex. E.

As to studies on the "reaction time" of spectators, Plaintiffs again state that this data was available in "publications in the sports and medical communities." FAC ¶ 315. Plaintiffs also specifically note that spectator-reaction time was the subject of expert testimony in a lawsuit against an MLB team.[32] *Id.* at ¶ 315 & n.505.

Finally, as to the existence of netting and radar-tracking technology, Plaintiffs again acknowledge that netting technology "has been around since before the turn of the [twentieth] century," and that radar-tracking technology is well known to spectators. *Id.* at ¶¶ 5, 274–75. Even without these admissions, Plaintiffs cannot credibly claim (*see id.* at ¶ 275) that Defendants have concealed the existence of netting and radar-tracking technology that is used openly in ballparks.

Even the *potentially* non-public pieces of information that Plaintiffs identify were not truly concealed. Those were: (1) that MLB players allegedly demanded extended netting during collective-bargaining negotiations in 2007 and 2012 (*id.* at ¶¶ 5, 251, 315, 335), and (2) the existence and contents of first-aid and foul-ball logs kept at every MLB ballpark (*id. at* ¶ 264). But Plaintiffs acknowledge that MLB players have *publicly* demanded extended netting, and that foul-ball and first-aid logs are only "sometimes" confidential. *Id.* at ¶¶ 87-88, 95 & n.149, 264. Plaintiffs also fail to allege how any nonpublic aspects of this information would have been material to a reasonable person, as required by California and North Carolina law. *See Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1163 (2005); *Bob Timberlake*, 626 S.E.2d at 321. Plaintiffs' complaint says nothing about why it would have mattered to the average person that players allegedly asked for more netting in the context of collective bargaining, *in addition* to complaining publicly about un-netted seats (which Plaintiffs allege they did). FAC ¶¶ 87–88, 95 & n.149, 264; *id.* at 251–52 & n.383 (and associated text). Likewise, Plaintiffs provide no

[32] The First Amended Complaint states that the lawsuit was against the "Chicago Red Sox." FAC n.505. It is unclear whether Plaintiffs actually mean the Boston Red Sox or the Chicago White Sox.

explanation for what additional, marginal value the contents of "some" of the foul-ball and first-aid logs would have had, considering that other logs were already public. *See id.* at ¶ 315 & n.506 (citing 2014 *Bloomberg* article that analyzed publicly available logs).

Perhaps recognizing that their claim of concealment is contradicted by both public documents and their own complaint, Plaintiffs now repeatedly assert that Defendants had "superior knowledge" of the allegedly concealed facts, and that the facts disclosed in the media and in publicly available studies were "not commonly known to the Plaintiffs, spectators, or the general public." *See id.* at ¶¶ 246, 247 & n.376, 249, 263, 315. These assertions fail for two reasons. First, to adequately plead fraudulent concealment, it is not sufficient for Plaintiffs to allege that Defendants were *more* aware of a material fact than Plaintiffs were—either the fact was concealed, or it wasn't. *See Johnson*, 653 F.3d at 1011–12; *Bob Timberlake*, 626 S.E.2d at 321. And as Plaintiffs admits over and over again, the supposedly concealed facts were anything but. Second, it strains all bounds of credulity to assert, as Plaintiffs do, that they were unaware of the risk of injury. Plaintiff Gorman literally *wrote the book* on the subject—titled *Death at the Ballpark*—which he describes as "a comprehensive study of game-related fatalities in amateur and professional baseball from various circumstances, such as . . . errant bats and balls." FAC n.47. Indeed, Plaintiffs cite Gorman's book throughout their complaint to provide examples and statistics regarding injuries at ballparks. *See id.* at n.1 (and related text), ¶ 62 & n.57, ¶ 278 & nn.453–54, ¶¶ 457–58. To claim that the risk of injury was "not commonly known to the Plaintiffs" is preposterous.

In short, the allegedly concealed facts that Plaintiffs point to were—in reality—widely known and widely discussed. And to the extent that Plaintiffs allege that Defendants did not disclose collective-bargaining negotiations or the contents of some foul-ball and first-aid logs, Plaintiffs fail to allege how that information would have been material to a reasonable person.

2. Plaintiffs fail to allege that Defendants had a duty to disclose.

There are only four circumstances that give rise to a duty to disclose—a fiduciary relationship, facts known only to the defendant, active concealment, or partial and misleading representations—but none of those circumstances are alleged here. *See Linear*, 152 Cal. App. 4th

at 132; *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009). First, Plaintiffs do not allege that any Defendant is in a fiduciary relationship with any plaintiff, nor could they; the only plaintiff alleged to have even purchased tickets from a Defendant is Payne, and she purchased her tickets in an arms' length transaction. *See* FAC ¶ 350; *Persson*, 125 Cal. App. 4th at 1161; *Hardin*, 199 N.C. App. at 696. Second, Plaintiffs do not—and cannot—allege that the supposedly concealed facts were known or accessible only to Defendants; as explained above, each of these facts was publicly known and widely discussed. Third, Plaintiffs do not—and cannot—allege that any Defendant took active steps to prevent Plaintiff from discovering the allegedly omitted information. And fourth, Plaintiffs do not—and cannot—allege that any Defendant spoke half-truths while suppressing material facts. Since Plaintiffs did not—and cannot—specifically allege any of those circumstances, Defendants had no special duty to disclose and Plaintiffs cannot state a claim.

3. Plaintiffs fail to allege intent to defraud.

Plaintiffs also make no allegation that Defendants concealed information with the intent to defraud them or anyone else. Nor could anyone infer such intent. According to Plaintiffs' own complaint, most (if not all) of the allegedly concealed information was public. In addition, the complaint is replete with examples of Defendants taking affirmative steps to publicly acknowledge and warn spectators of the risk of injury—steps that are entirely incongruent with an intent to defraud the public. *See, e.g.*, FAC ¶¶ 4, 250, 254-55, 265, 312, 314. Moreover, there are plenty of obvious, non-fraudulent reasons why the only conceivably nonpublic facts—namely, the contents of *some* first-aid logs and the details of collective-bargaining negotiations—would be kept confidential. First-aid logs may contain sensitive medical information that must almost always—by law—be kept private. And the positions taken during closed-door, collective-bargaining negotiations necessarily implicate sensitive business interests for both sides involved.

4. Plaintiffs fail to allege reliance.

Plaintiffs' fraudulent-concealment claim must fail because Plaintiffs do not allege anywhere that (1) they were unaware of any allegedly concealed fact, or (2) they would have acted differently had they known of it. *Linear*, 152 Cal. App. 4th at 131. As discussed above,

Plaintiffs cannot credibly allege that they were unaware of the risk of injury from foul balls or bats—Plaintiff Gorman wrote a "comprehensive study" on the subject in 2009. FAC ¶ 23 & n.47. And even if Plaintiffs were unaware, they fail to plead what they would have done differently had they known. Indeed, Plaintiff Payne's own allegations suggest that she would have done nothing differently—she tacitly admits that she continued to attend games in an unscreened section, even after filing this lawsuit. *See id.* at ¶ 17. And despite having written a book about injuries and fatalities at ballparks, Plaintiff Gorman continued to attend (Minor League) games. *See id.* at ¶ 22.

Plaintiffs' failure to plead reliance is particularly striking given that this is their second chance at doing so. The original complaint, like the First Amended Complaint, was completely devoid of any allegation that Plaintiff Payne was unaware of the risk of injury and would have acted differently had she known. *See* Dkt. 16-1; *Linear*, 152 Cal. App. 4th at 131. Plaintiffs' continued failure to plead reliance only confirms that their claim is meritless, especially in light of Rule 9(b)'s heightened requirement that plaintiffs specifically allege the "who, what, when, where, and how" of the elements of fraud. *Vess*, 317 F.3d at 1106.

5. Plaintiffs fail to allege any damages.

Finally, Plaintiffs fail to allege with particularity that they have sustained any damages from the alleged concealment. *See Creative Ventures, LLC v. Jim Ward & Assoc.*, 195 Cal. App. 4th 1430, 1444 (2011); *Linear*, 152 Cal. App. 4th at 131; *Bob Timberlake*, 626 S.E.2d at 321. They nakedly claim that they have "suffered harm," but such conclusory allegations are insufficient. *See Johnson*, 653 F.3d at 1010. Furthermore, to the extent that Plaintiffs allege that they have suffered harm by being exposed to a ***risk*** of injury, their claim is too speculative to support a cause of action for fraud. *See Leegin Creative Leather Prods., Inc. v. Diaz*, 131 Cal. App. 4th 1517, 1526 (2005); *Bob Timberlake*, 626 S.E.2d at 321.

In sum, Plaintiffs have failed to allege ***any*** of the elements of fraudulent concealment with the particularity that Rule 9(b) requires. Because this is now their second chance at curing these fundamental deficiencies, their claim for fraudulent concealment should be dismissed with prejudice.

E. Plaintiffs fail to state a claim under the Consumers Legal Remedies Act.[33]

The CLRA prohibits various "unfair methods of competition" and "unfair or deceptive acts or practices," including certain forms of fraudulent misrepresentation and nondisclosure. *See* Cal. Civ. Code §§ 1770, 1780. The statute, however, applies only when an allegedly unfair method is employed by "a[] ***person in a transaction*** intended to result or which results in the sale or lease of ***goods*** or ***services*** to a[] consumer." *Id.* at § 1770(a) (emphasis added). Plaintiffs allege that Defendants committed four unlawful acts under the CLRA. FAC ¶ 351. Plaintiffs' CLRA claims fail, however, for three reasons. First, a ticket to a baseball game is not a "good or service" as those terms are defined under the CLRA. Second, neither Plaintiff Gorman nor Plaintiff Smith is alleged to have purchased a ticket from any Defendant. And third, Plaintiffs fail to allege either reliance or injury, and therefore lack standing under California law to assert a CLRA claim.

1. Tickets are not "goods or services" under the CLRA.

Plaintiffs allege that a "[a] ticket to an MLB major [sic] or minor league game is a 'good' as defined [by the CLRA]." *Id.* at ¶ 350. This conclusory allegation, however, is contrary to both the express text of the CLRA and California case law.

The CLRA defines "goods" as "***tangible chattels*** bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods." Cal. Civ. Code § 1761(a) (emphasis added). A ticket to an MLB game is not a "tangible chattel"; rather, it is merely a representation of an intangible, revocable license to attend a game.[34] *See* Gorman Decl, Ex. B (ticket-back language explaining that "[t]he license granted by this ticket may . . . be terminated by tendering to the holder the purchase price of this ticket"); *id.*, Ex. C ("This ticket grants to the holder a revocable personal license . . ."); *see also Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229 (2007) (holding that a credit card is not a

[33] Plaintiff Gorman's CLRA claim should be dismissed on the additional ground that a South Carolina plaintiff suing over conduct at a North Carolina Minor League Club cannot seek the protection of a California statute. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

[34] *See Kennedy Theater Ticket Serv. v. Ticketron, Inc.*, 342 F. Supp. 922, 925–26 (E.D. Pa. 1972) (citing *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 637 (1913); *Jordan v. Concho Theatres, Inc.*, 160 S.W.2d 275, 276 (Tex. Civ. App. 1941); *Taylor v. Cohn*, 47 Or. 538, 540 (1906); *Collister v. Hayman*, 183 N.Y. 250, 253 (1905)).

"good" under the CLRA because it "has no intrinsic value and exists only as indicia of the credit extended to the cardholder").[35] Courts in California have repeatedly held that intangible rights fall outside the scope of the CLRA.[36] Especially pertinent here, courts (including this Court) have held that the CLRA does not apply to licenses because they are neither "goods" nor "services."[37] Accordingly, the license to attend an MLB game—represented by a ticket—is not a good or service covered by the CLRA.

2. Plaintiffs Gorman and Smith did not purchase tickets from any Defendant.

The CLRA applies only to "transaction[s] intended to result or which result[] in the sale or lease of goods or services to a[] consumer." Cal. Civ. Code § 1770(a). The CLRA defines "[t]ransaction" as "an agreement between a consumer and another person." *Id.* at § 1761(e). Where there is no direct agreement between a consumer and the defendant (or the defendant's agents), there can be no liability under the CLRA. *See Fulford v. Logitech, Inc.*, 2008 WL 4914416, at *1 & n.2 (N.D. Cal. Nov. 14, 2008); *Green v. Canidae Corp.*, 2009 WL 9421226, at *4 (C.D. Cal. June 9, 2009).

Here, the only Defendant that is alleged to have sold tickets to a named Plaintiff is the Oakland Athletics baseball club, which allegedly sold season tickets to Plaintiff Payne. FAC ¶ 350. Plaintiff Gorman acquired his Minor League baseball tickets from the Charlotte Knights, which is not a party to this lawsuit. *Id.* And Plaintiff Smith is not alleged to have purchased any tickets at all. Accordingly, neither Gorman nor Smith can plead a "transaction" within the meaning of the CLRA.

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[35] Plaintiffs are not alleging that the physical ticket itself is the "good" sold in the covered transaction. Their allegations are that Defendants misrepresented the characteristics, standards, and quality of "MLB games," not that they somehow misrepresented the characteristics, standards, or quality of the physical, paper tickets. *See* FAC ¶ 351.

[36] *See, e.g.*, *Fairbanks v. Super. Ct.*, 46 Cal. 4th 56, 60–61 (2009) (life insurance); *Estate of Migliaccio v. Midland Nat'l Life Ins. Co.*, 436 F. Supp. 2d 1095, 1108–09 (C.D. Cal. 2006) (annuities).

[37] *See, e.g.*, *Williamson v. McAfee, Inc.*, 2014 WL 4220824, at *7 (N.D. Cal. Aug. 22, 2014) (software licenses); *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 972 (S.D. Cal. 2012) (same).

3. Plaintiffs fail to allege reliance or injury.

Even if the CLRA applied to the purchase of tickets to baseball games, Plaintiffs' CLRA claims would still fail because they lack statutory standing to assert them. The CLRA does not automatically award relief upon proof that a defendant has engaged in one of the statutorily proscribed practices. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010). Rather, to have standing to bring a claim under the CLRA, a plaintiff must allege that he or she actually suffered *economic injury* because of the proscribed conduct. *Id.* And when, as here, the plaintiff alleges that the defendant's unlawful conduct was a misrepresentation or nondisclosure, the plaintiff must also allege that he or she—and all putative class members—actually relied on the misrepresentation or nondisclosure. *Id.*; *In re Sony Gaming Networks*, 903 F. Supp. at 969 n.25. Furthermore, CLRA claims sounding in fraud are subject to a heightened pleading requirement under Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009). Accordingly, such claims must allege an "account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation marks omitted). Here, Plaintiffs fail to satisfy Rule 9(b) and fail to establish their standing to bring a CLRA claim.

Plaintiffs allege that in "holding out MLB games . . . as safe," Defendants violated §§ 1770(a)(5) and (a)(7) of the CLRA by allegedly misrepresenting the characteristics, standards, and quality of ballparks where MLB games are played. FAC ¶ 351. But Plaintiffs do not allege with specificity "the time, place, and specific content" of the alleged misrepresentations, as required by Rule 9(b). *Swartz*, 476 F.3d at 764. At most, Plaintiffs quote various statements from MLB officials that "[f]an safety is our foremost goal" and that baseball is "family-friendly," "kid-friendly," and an "extraordinarily healthy entertainment product." FAC ¶¶ 4, 6, 255, 288, 311, 322, 336. They also point to an article posted on www.mlb.com showing a man catching a foul ball while holding an infant. *Id.* at ¶ 287. To the extent that Plaintiffs are alleging that these innocuous statements and media pieces constituted unlawful misrepresentations under the CLRA, Plaintiffs fail to allege that any of the Plaintiffs ever relied on them. Indeed, Plaintiffs even fail to allege that Plaintiff Payne—the only named Plaintiff who purchased tickets from a Defendant—

ever saw or heard the statements. Nor do Plaintiffs allege that the Oakland Athletics—who allegedly sold Payne her tickets—were in any way responsible for the statements. Finally, Plaintiffs also fail to allege any economic injury stemming from the statements. No Plaintiff alleges that, but for the statements, he or she would have acted differently. Accordingly, Plaintiffs fail to satisfy Rule 9(b), and cannot establish Payne's standing to assert a CLRA claim. *See Kearns*, 567 F.3d at 1126–27; *Durell*, 183 Cal. App. 4th at 1367.

Plaintiffs further allege that Defendants violated § 1770(a)(13) by failing to disclose that "part of the reason for the reduced ticket price of unprotected seats is [allegedly] related to their unprotected nature." FAC ¶ 351. These conclusory allegations suffer from the same failures of specificity, reliance, and injury described above. Moreover, for Plaintiff Payne's tickets—the only tickets allegedly purchased from a Defendant—there is no difference in the ticket price between Plaintiff's section (section 211) and adjacent sections that are behind the home-plate netting. *See* above note 6. *See Durell*, 183 Cal. App. 4th at 1367.

Finally, Plaintiffs allege that Defendants violated § 1770(a)(19) by "insert[ing] an unconscionable assumption of risk provision in the contract entered into when a ticket is purchased." FAC ¶ 351 & n.521. This allegation also fails, for two reasons. First, the ticket-back statement referred to in the FAC warns fans that foul balls and other objects may enter the stands. Gorman Decl., Ex. B. Even if the ticket-back statement were considered to be a contractual release of liability, it would not be unconscionable; under California law, provisions limiting or releasing parties from personal-injury liability are generally not unconscionable, especially in the realm of sports and recreation. *See Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621–22 (1996). Second, Plaintiffs cannot claim injury because they cannot allege that any Defendant has ever attempted to enforce the purported release provision against them. *See Lee v. Am. Express Travel Related Servs.*, 2007 WL 4287557, at *5 (N.D. Cal. Dec. 6, 2007) (dismissing an unconscionability claim under the CLRA for lack of injury where the allegedly unconscionable terms "have not . . . been invoked against plaintiffs").

In sum, Plaintiffs' CLRA claims fail because game tickets are not "goods or services." Moreover, Plaintiffs have failed to plead CLRA claims with the specificity required by Rule 9(b),

including—but not limited to—failing to allege that tickets were purchased from any Defendants other than the Oakland Athletics. Finally, Plaintiffs have failed to allege either reliance or injury, and thus lack standing to assert CLRA claims under California law. Further amendment cannot remedy these flaws, so the CLRA claims must be dismissed with prejudice.

F. Plaintiffs fail to state a claim under California's Unfair Competition Law.[38]

To establish standing to state a claim under California's UCL, a plaintiff must allege that she has suffered an economic loss. *Durell*, 183 Cal. App. 4th at 1359. Likewise, where a plaintiff's UCL claim is based on alleged misrepresentations or nondisclosures, the plaintiff must allege that she actually relied on those misrepresentations or nondisclosures, regardless of whether the plaintiff is alleging that a business practice is unfair, unlawful, or fraudulent. *See Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1129 (N.D. Cal. 2014) (citing *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011); *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009); *Durell*, 183 Cal. App. 4th at 1363)). And where a plaintiff's UCL claim sounds in fraud—as it does here—the plaintiff must satisfy Rule 9(b)'s heightened-pleading requirement. *Kearns*, 567 F.3d at 1125–27.

Just as Plaintiffs fail to state a claim for fraudulent concealment or a violation of the CLRA, Plaintiffs also fail to state a claim under the UCL. For their UCL claims, Plaintiffs rely on the exact same allegations of misrepresentations and concealments. *See* FAC ¶¶ 340–41. And again, Plaintiffs fail either to satisfy Rule 9(b) or to plead nonconclusory allegations of reliance and injury. Accordingly, Plaintiffs' UCL claim must be dismissed, with prejudice, for the same reasons. *See* Sections IV.D.4, IV.D.5, IV.E.3

G. Plaintiffs fail to state a claim under California Civil Code § 1668, because no such cause of action exists.[39]

Plaintiffs' so-called "cause of action" for violation of California Civil Code § 1668 fails

[38] Plaintiff Gorman's UCL claim should be dismissed on the additional ground that a South Carolina plaintiff suing over conduct related to an (unnamed) North Carolina Minor League club cannot seek the protection of a California statute. *Cf. Shutts*, 472 U.S. at 822.

[39] Plaintiff Gorman's purported California Civil Code § 1668 claim should be dismissed on the additional ground that a South Carolina plaintiff suing over conduct related to a North Carolina Minor League Club cannot seek the protection of a California statute. *Cf. Shutts*, 472 U.S. at 822.

for a simple reason: there is no such cause of action under California law. Section 1668 provides that "[a]ll contracts which . . . exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. The statute allows courts to invalidate certain contractual provisions if those provisions are asserted as defenses to claims for fraud, negligence, or other torts. *See, e.g.*, *Gavin W. v. YMCA of Metro. L.A.*, 106 Cal. App. 4th 662, 671-76 (2003). Section 1668 does *not* create its own freestanding cause of action, and no court—in California or elsewhere—has ever implied such a cause of action under the statute. For this reason alone, Plaintiffs' "claim" should be dismissed with prejudice.

In addition to bringing a nonexistent cause of action, Plaintiffs are also wrong to assert that Defendants have violated § 1668. Although Plaintiffs never specify what contractual "waiver" they believe is invalid, it appears that they are referring to the warning language on the back of game tickets. *See* FAC ¶¶ 351 & n.521, 354. But the actual substance of the ticket warnings, which Plaintiffs do not specifically address, is perfectly valid under § 1668. Section 1668 does not "invalidate *all* contracts that seek to exempt a party" from liability. *Health Net of Cal., Inc. v. Dep't of Health Servs.*, 113 Cal. App. 4th 224, 233 (2003) (emphasis added). Rather, § 1668 invalidates contracts that exempt a party from liability *only* for (1) fraudulent or intentional acts, (2) negligent violations of statutory law, or (3) ordinary negligence where the public interest is implicated. *Id.* at 234; *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 95–96 (1963). Otherwise, waivers of ordinary negligence or strict liability are permissible and enforceable. *Health Net*, 113 Cal. App. 4th at 234; *Grayson v. 7-Eleven, Inc.*, 2013 WL 1187010, at *6 (S.D. Cal. Mar. 21, 2013). Recreational sports—although highly enjoyable—are not considered "essential" in the same way that a "hospital is to a patient." *Randas v. YMCA of Metro. L.A.*, 17 Cal. App. 4th 158, 162 (1993). Accordingly, courts have long held that "exculpatory agreements in the recreational sports context do not implicate the public interest and

therefore are not void" under § 1668. *Capri v. L.A. Fitness Int'l, LLC*, 136 Cal. App. 4th 1078, 1084 (2006).[40]

Here, both Athletics' and Dodgers' game tickets—the only tickets allegedly issued by any Defendant to any named Plaintiffs—include a section warning ticket holders of the risk and danger incidental to the sport of baseball, including thrown bats, bat fragments, and errant balls. *See* Gorman Decl., Exs. B–C. The tickets also include language stating that the ticket holders agree not to hold MLB or the Clubs liable for injuries resulting from such incidental risks. *See id.* Even if this language were construed to be a contractual release of liability—and there is no allegation that it has been, or that anyone has sought to enforce such a waiver against a Plaintiff—it would be perfectly valid under § 1668. Nothing in the ticket-back language can be construed to exculpate any party from fraud, intentional acts, or violations of statutory law. *See Health Net*, 113 Cal. App. 4th at 234. And as explained above, agreements exculpating liability for negligence in the recreational sports context do not implicate the public interest, and are therefore immune from § 1668 challenges. *See Capri*, 136 Cal. App. 4th at 1084. Accordingly, the Court should disregard Plaintiffs' assertion that Defendants have violated California Civil Code § 1668.

H. Plaintiff Smith fails to state a claim for "personal injury."

Plaintiffs' sixth cause of action, brought by Plaintiff Smith alone, is labeled "personal injury." FAC ¶ 355. But there is no such cause of action under California law.

If Plaintiff's attorneys meant to separate (A) a claim of negligence brought by all three Plaintiffs seeking injunctive relief, from (B) an individual claim for negligence brought by Plaintiff Smith seeking monetary damages,[41] then Smith's individual claim of negligence fails for many of the same reasons that the broader negligence claim fails. As explained above in Section IV.C.1, California Courts have adopted the "baseball rule." When "a spectator chooses to occupy an unscreened seat," or "is unable to secure a screened seat and consequently occupies one that is

[40] *See also Benedek v. PLC Santa Monica*, 104 Cal. App. 4th 1351, 1356–57 (2002); *Lund v. Bally's Aerobic Plus, Inc.*, 78 Cal. App. 4th 733, 739 (2000); *Allan v. Snow Summit, Inc.*, 51 Cal. App. 4th 1358, 1373 (1996); *Randas*, 17 Cal. App. 4th at 161–162.

[41] *See* FAC ¶¶ 27–28 ("On behalf of themselves and the Class, Plaintiffs seek class-wide injunctive or equitable relief. . . Plaintiff Smith also seeks damages for her individual personal injuries."); *id.* ¶ 355 ("Defendants' negligence . . . caused Plaintiff Stephanie Smith's injuries.").

not protected," she "assumes the risk of being struck" by foul balls or errant bats and the Defendants owe her no duty. *Quinn*, 3 Cal. 2d at 729; *see also Neinstein*, 185 Cal. App. at 182–83; *Brown*, 99 Cal. App. 2d at 488–91. And, as explained above in Section IV.C.2, the Defendants have not breached any duty to provide a "reasonable number" of screened seats.[42] Indeed, Plaintiff Smith makes no specific allegations about the seating at Dodger Stadium; instead, the First Amended Complaint focuses on Oakland Coliseum. FAC ¶ 268. And—because Plaintiff Smith chose to sit in an unscreened section—any injury she suffered was caused by her own decision on where to sit rather than anything that Defendants did. *Neinstein*, 185 Cal. App. at 183. Therefore, the Court should dismiss Plaintiff Smith's individual claim for "personal injury."

V. CONCLUSION

Defendants respectfully request that the Court dismiss Plaintiffs' First Amended Class Action Complaint in its entirety. This case need detain the Court no longer. The fatal defects in this complaint—Plaintiffs' second attempt to establish standing, personal jurisdiction, proper venue, and a single valid claim for relief—simply cannot be fixed with more amendments. The Court should dismiss with prejudice because it would be futile to grant leave for Plaintiffs to amend their complaint once again. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

Respectfully submitted,

Dated: November 20, 2015

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[42] The First Amended Complaint contains imprecise language that suggests that this "personal injury" claim—for an injury suffered at Dodger Stadium—is brought against all "Defendants," including the current Commissioner, the league office, and all 30 Clubs. Plaintiff Smith has not offered any allegations to suggest that all of these various entities are somehow jointly and severally liable for safety netting at Dodger Stadium.