NO. 17-16693

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ETOPIA EVANS, *et al.*,

Plaintiff – Appellants,

v.

ARIZONA CARDINALS FOOTBALL CLUB, LLC, *et al.*,

Defendants – Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
Case No. 3:16-cv-01030-WHA
(Honorable William H. Alsup)

BRIEF OF PLAINTIFF-APPELLANT ETOPIA EVANS, *ET AL.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION[1]

For decades, to ensure that their best players would always be available to play in games, NFL clubs uniformly supplied powerful painkilling controlled substances and prescription drugs to its players in amounts (*e.g.*, number of injections and pills) and a manner (*e.g.*, without a prescription, regard for their medical history, or warning of possible side effects) that violated federal and state laws. Before the long-term effects of the illegal scheme – latent health injuries – could manifest, players had been cut from the league. At the time, they had no reason to suspect that the clubs had contributed to their shortened careers or prevented them from being able to hold steady employment during retirement. Instead, they simply believed they were just another casualty of the normal "wear and tear" of the sport.

It was only in early 2014 that the players became aware that the NFL clubs had recklessly and illegally administered medications that prematurely ended their careers and contributed to their diminished post-NFL-career prospects. With this new revelation, the players filed suit to seek redress for the business injuries they suffered, and continue to suffer, because of the shortening of their professional football careers.

In granting Defendants' motion to dismiss, the district court did not consider

[1] Plaintiffs are not corporate entities and thus they need not file a corporate disclosure statement.

these well-pled facts, as it was required to do. Instead, it prematurely decided that the players should have known that they were injured earlier than they pled they did. Because notice of a potential claim is a jury question, the district court's decision below should be vacated.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Maryland had original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the proposed class consisted of more than 100 persons, the overall amount in controversy exceeded $5,000,000, exclusive of interests, costs, and attorney's fees, and at least one plaintiff was a citizen of a State different from one Defendant.

This matter was transferred to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1404 because of a related case, *Dent v. Nat'l Football League*. No. 3:14-cv-0234-WHA.[2] This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court granted Defendants' motion for summary judgment on July 22, 2017. Plaintiffs filed a timely notice of appeal on August 21, 2017.

[2] *Dent* is currently on appeal in this Court and was argued on December 15, 2016. Appeal No. 15-15143.

STATEMENT OF THE ISSUES

Whether the district court erred in dismissing Plaintiffs' RICO claims as time-barred where, accepting their well-pled allegations as true and construing inferences in their favor, they did not have reason to know that Defendants caused their business injury.

STATEMENT OF THE CASE

Defendants conspired to hide from Plaintiffs a "return to play" business plan that encouraged doctors and trainers to pump players with powerful pain killers, anti-inflammatories, and sleep aids ("Medications") to get them back on the field despite their injuries. ER 2. Club doctors/trainers provided "injections or pills, not telling the players what they were receiving, misstating the effects of the Medications (if they addressed them at all), and not talking about . . . the long-term effects of what they were taking." ER 2-3. These actions violated the Controlled Substances Act and/or Food Drug & Cosmetic Act and yet knowingly occurred on every NFL club ("Club") between 1976 and 2014. ER 3.

While Defendants conspired to keep their players on the field and maximize profits, Plaintiffs lost money. Their battered bodies and latent medical conditions caused them to lose other contracts and endorsements, prematurely shortened their professional careers, and interfered with prospective business opportunities like coaching and announcing. ER 89-90.

At the end of their careers, Plaintiffs did not think they had suffered a business injury due to Defendants' wrongdoing – they thought only that they were being released from their Clubs and were unable to sign new contracts with others. It was not until March 2014 that they became aware of Defendants' illegal actions and intentional misrepresentations and omissions, at which time they first connected Defendants' illegal conduct to their business injury. ER 4-9, ¶¶ 16, 24, 26, 28, 30, 32, 34.[3]

I. <u>Defendants' Motion to Dismiss</u>.

Defendants contended that Plaintiffs' RICO claim was "plainly barred" because "[i]t [did] not permit claims for physical injuries." ER 116. They argued in the alternative that "[t]he Supreme Court has squarely held that the four-year limitations period for RICO claims begins running as soon as a plaintiff knows of an injury to his business or property, *regardless of whether he knows that the injury was caused by a RICO violation*." *Id.* According to Defendants, the "business" injury – the ending of his playing career – "occurred, and was unquestionably known to him, more than a decade before plaintiffs' complaint was filed." ER 116-17. Consequently, Defendants claimed that "it [was] immaterial whether any plaintiff knew or had reason to know then that his career ended because of 'racketeering activity.'" ER 122.

[3] The "¶" symbol denotes paragraphs in the Amended Complaint.

II. **Plaintiffs' Opposition.**

Plaintiffs contended that their claimed "business injury" was not "solely based on the ending of their NFL careers," but also sought "redress for their post-NFL career economic injuries, including loss of employment, diminished earnings, and loss of employment opportunities sustained as a result of Defendants' fraudulent scheme." ER 170. At bottom, Plaintiffs contended that "it is axiomatic that they need to have knowledge that their injuries were ***caused by the conduct of Defendants*** for the limitations period to begin to run ***for causes of action against Defendants***." ER 171. "To hold otherwise would 'penalize [Plaintiffs] for an inability to distinguish between financial injury as a result of Defendants' wrongdoing, and financial loss arising out of potentially legitimate [wear and tear on Plaintiffs' bodies].'" ER 171-72. Because "it was only until years after their careers ended that Plaintiffs discovered that the ending of the NFL careers were economic injuries cognizable under RICO," ER 172, such claims are not barred.

Alternatively, Plaintiffs argued that Defendants' fraudulent conduct tolled limitations because the lack of notice concerning their RICO claim was "primarily, if not solely, traceable" to Defendants' efforts to conceal the risks of the Medications provided. ER 173. As such, they were "prevented from obtaining the necessary facts and information that could have led them to discover their RICO causes of action at an earlier time." ER 174.

III. The District Court's Ruling.

The district court dismissed Plaintiffs' RICO claim as time-barred. According to the court, Plaintiffs "had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the injury." ER 286. The court concluded that Plaintiffs "had, at minimum, constructive knowledge of the alleged injury to their post-NFL prospects" because they "knew or should have known 'the critical facts that [they had] been hurt or who [had] inflicted the injury' over a decade prior to this action." ER 286, 288.

SUMMARY OF THE ARGUMENT

A plaintiff must first know the cause of their injury before the statute of limitations begins to run – not simply the fact of the injury as the district court erroneously found. This fatal conclusion caused the district court to disregard the heart of Plaintiffs' RICO claim – *i.e.*, Defendants' fraudulent concealment of their scheme to pump players with Medications to drive them to return to play ultimately cost players' their health, safety, and business pursuits. The allegations demonstrated that Plaintiffs had no reason to think that at the end of their careers they had suffered a business injury due to the Defendants' wrongdoing; rather, they thought they were being released from their Clubs after the normal "wear and tear" and were unable to sign new contracts with others. In these circumstances, this Court should allow the jury to decide this important factual question.

ARGUMENT

The United States District Court for the Northern District of California ("District Court") committed reversible error by misapplying the applicable injury discovery rule and not taking into account Defendants' fraudulent conduct to equitably toll Plaintiffs' RICO claim.

I. Standard of Review.

A district court's dismissal on statute of limitations grounds is reviewed *de novo*. *See Donoghue v. Orange Cnty.*, 848 F.2d 926, 929 (9th Cir. 1989).[4] In conducting that review, the court "may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.'" *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030-31 (9th Cir. 2008). The court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.* at 1031.

"A motion to dismiss based on the running of the statute of limitations period may be granted only 'if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.'" *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995).

[4] Here and throughout, internal quotations and citations are omitted and emphasis supplied unless otherwise noted.

"Because the applicability of the equitable tolling doctrine often depends on matters outside the pleadings, it 'is not generally amenable to resolution on a Rule 12(b)(6) motion.'" *Id.*

Moreover, the statute of limitations is ordinarily an affirmative defense that a defendant must plead and prove. *See United States v. Carter*, 906 F.2d 1375, 1378 (9th Cir. 1990). When such a defense is raised on a Rule 12(b)(6) motion, as defendants did here, the "complaint [should not] be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Presnell v. Arsenault*, 543 F.3d 1038, 1042 (9th Cir. 2008), *abrogated on other grounds by Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016) (quoting *Supermail Cargo*, 68 F.3d at 1207).[5] The Ninth Circuit has thus "reversed dismissals where the applicability of the equitable tolling doctrine depended upon factual questions not clearly resolved in the pleadings" or where "the factual and legal issues are not sufficiently clear to permit [the court] to determine with certainty

[5] Although *Supermail Cargo* based its holding on the now "retired" pleading standard set forth in *Conley v. Gibson*, *Presnell* post-dates *Bell Atl. Corp. v. Twombly* and has been relied on by district courts in this Circuit. *See, e.g., Adler v. Sullivan*, 2013 U.S. Dist. LEXIS 96469, at *12 (E.D. Cal. July 9, 2013); *Knighton v. Kemper Sports Mgmt.*, 2012 U.S. Dist. LEXIS 156951, at *5 (D. Or. Sept. 25, 2012); *Teamsters Local 617 Pension & Funds v. Apollo Grp., Inc.*, 633 F. Supp. 2d 763, 780 (D. Ariz. 2009); *but see Kamar v. Krolczyk*, 2008 U.S. Dist. LEXIS 55975, at *23 (E.D. Cal. July 16, 2008).

whether the doctrine could be successfully invoked." *Supermail Cargo*, 68 F.3d at 1207.

II. The Court Misapplied the Applicable Injury Discovery Rule.

For years, federal courts of appeals applied different tests to determine when a civil RICO claim accrued. But for just as long, it has been the settled law of this Circuit that the injury discovery rule – *i.e.*, that a plaintiff knew or should have known of their injury – governs that analysis. The District Court failed to correctly apply that rule, along with the correct standard of review, in concluding that Plaintiffs' civil RICO claims are barred. As such, reversal is warranted.

A. Civil RICO Claims Predicated on Fraud Do Not Accrue Until a Plaintiff Knew or Should Have Known of the Fraud.

In *Rotella v. Wood*, 528 U.S. 549 (2000), the Supreme Court reviewed whether the "injury and pattern discovery" rule governed the four-year statute of limitations period for a civil RICO claim. In doing so, the Court first examined "three distinct approaches" that federal appellate courts had employed: the "injury discovery accrual;" the "injury and pattern discovery rule;" and the "last predicate act rule." *See id.* at 553-54. The Court noted that it had already "cut . . . the last predicate rule," *id.* at 554, and went on to eliminate the "injury and pattern discovery" rule, *id.* at 555. But in a footnote, it stated that "[w]e do not … settle upon a final rule [governing the date when RICO's statute of limitations period begins to run]," noting that in a previous decision, *Klehr v. A.O. Smith Corp.*, 521

U.S. 179, 198 (1997), it had left "open the possibility of a straight injury occurrence rule" under which "discovery would be irrelevant." *Id.* at 555, n.2.

Therefore, *Rotella* left it to the courts of appeals to determine whether to utilize the injury discovery or straight injury occurrence rule to review timeliness of a RICO claim.

The Ninth Circuit applies the "injury discovery" rule to civil RICO. *See Crown Chevrolet v. General Motors, LLC*, 637 F. App'x 446, 446 (9th Cir. 2016) (citing *Pincay v. Andrews*, 238 F.3d 1106, 1108-09 (9th Cir. 2001)). As such, "[t]he limitations period . . . begins to run when a plaintiff knows or should know of the injury which is the basis for the action." *Living Designs, Inc. v. E.I. DuPont de Nemours and Co.*, 431 F.3d 353, 365 (9th Cir. 2005).

In *Living Designs*, commercial nurserymen alleged that DuPont and others had fraudulently concealed adverse testing data to obtain a favorable settlement of claims in a prior products liability matter. *Id.* The trial court dismissed plaintiffs' civil RICO claims on a motion for judgment on the pleadings[6] but the Ninth Circuit reversed, stating that "Plaintiffs' RICO claims accrued when [they] had actual or constructive knowledge of DuPont's fraud" and finding that "Plaintiffs have

[6] The standard for deciding a motion for judgment on the pleadings is essentially the same at issue here. *See, e.g., U.S. v. In re Seizure of One Blue Nissan Skyline Automobile, and One Red Nissan Skyline*, 683 F. Supp. 2d 1087, 1089 (C.D. Cal. 2010)(citing *Enron Oil Trading & Trans. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997).

tendered sufficient evidence to raise a genuine issue of material fact as to when they knew of or should have discovered the fraud." *Id.* at 365.

Living Designs is the natural extension of *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271 (9th Cir. 1988), in which the Ninth Circuit substantively addressed when a civil RICO claim accrues. There, the district court entered summary judgment against two defendants on limitations grounds, holding that Beneficial "did not acquire knowledge of the fraud until [one of the defendant's] conviction in July, 1984." *Id.* at 275. On appeal, defendants argued "that they raised a triable issue of fact as to whether Beneficial knew or should have known about the schemes when it investigated and terminated [one of the defendants] in 1980." *Id.* The Ninth Circuit agreed and remanded, noting that Beneficial's "failure to connect the 'cloud' surrounding [one of the defendants] . . . le[ft] open an inference that more diligence could have been used" therefore, the "defendants [were] entitled to a trial on the knowledge issue." *Id.* at 276.

Consistent with these principles, it follows that where, as here, there is evidence to raise a genuine dispute as to a plaintiff's knowledge of his RICO claim, dismissal is improper.

B. The District Court Focused on Plaintiffs' Business Injuries and Not Defendants' Fraud Like It Should Have.

According to the District Court, "plaintiffs' theory of injury to business or property amounted to (1) pressuring plaintiffs to keep playing and (2) giving them

medications so they could do so despite unhealed injuries." ER 287. It further found that "[b]oth types of conduct would have been readily apparent to plaintiffs – who felt the pressure to play, sustained the injuries, and took the medications – as soon as they occurred[.]" *Id.* As such, the District Court found that Plaintiffs knew or should have known that their careers would be shortened while they were still playing and determined that "no further factual development [was] required . . . to conclude that plaintiffs' RICO claim [was] untimely." ER 285-87.

As an initial matter, while the District Court paid lip service to the injury discovery rule, as the foregoing makes clear, it in fact applied a straight injury occurrence rule. As discussed *supra* at 10, while the Supreme Court has acknowledged that the straight injury occurrence rule may be applicable to civil RICO claims, it does not mandate its use and the Ninth Circuit adheres to the injury discovery rule. Thus for this reason alone, this matter should be remanded to the District Court to apply the proper rule.

By focusing on the injury, rather than discovery of the injury, the District Court also committed error in that it should have focused on when Plaintiffs became aware of the fraud. As discussed *supra* at 10-11, Ninth Circuit case law spanning the last 30 years makes clear that in deciding whether to dismiss on limitations grounds a civil RICO claim predicated on fraud, a court must look to "when Plaintiffs had actual or constructive knowledge of [defendant's] fraud." *Living*

Designs, Inc., 431 F.3d at 365. The District Court did not do so here, instead focusing solely on injury.

Plaintiffs pled that the Clubs conspired to defraud them, which they did not learn of until March 2014. They further pled that the conspiracy manifested itself through intentional misrepresentations, both affirmative and through omissions, and other acts, such as the provision of Medications. Put simply, Plaintiffs drew a distinction between the cause of their business injuries – the conspiracy to defraud, which they did not learn of until March 2014 – and the normal "wear and tear" to be expected with playing professional football, about which they did know.

More specifically, Plaintiffs pled:

- that they "did not learn of the cause of their injuries until within the applicable statute of limitations," ER 4; *see also* ER 4-9, ¶¶ 16, 24, 26, 28, 30, 32, and 34;

- because "the Clubs mandated that players use their doctor and trainers," ER 15; *see also* ER 15-17, ¶¶ 81-88;

- who the players trusted implicitly and did not question, ER 22-23, 49, 61-62, 63-64, 91; *see also* ¶¶ 104, 109, 182, 236, 239, 245, 247, and 337;

- but who, in furtherance of the Clubs' conspiracy to defraud, "affirmatively misrepresent[ed], or provide[d] false or misleading statements to the players, regarding the reasons for providing medications and the scope of the players' injuries," ER 22; *see also* ER 22-23, ¶¶ 105-08; ER 23-34, ¶¶ 109-14; ER 57, ¶ 223; and ER 59-65, ¶¶ 231, 234-39, 241, 244-45, 250, and 253.

It is simply error to think that the foregoing allegations, read with the "required liberality," evidence that Plaintiffs had actual or constructive notice of Defendants' fraud outside the relevant statute of limitations period.

To the contrary, Plaintiffs took pains throughout this matter, and the related *Dent* matter, to explain that, *e.g.*, they knew at the time it was occurring that they were receiving Medications but they did not know that receipt of those Medications (and so much more) was part of a conspiracy to defraud and injure them. The District Court was required to accept those allegations as true; it failed to do so. *See Manzarek*, 519 F.3d at 1031.

While Plaintiffs concede that the acts and omissions complained of could support an argument that they should have known of the fraud before the limitations period ran, the applicable standard is whether "the assertions, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Supermail Cargo*, 68 F.3d at 1206. Again, it is error to think that, the well-pled allegations of the complaint notwithstanding, it is "beyond doubt" that Plaintiffs could prove no set of facts that would establish timeliness. *Id.* at 1207.

C. Even If the District Court's Focus Was Proper, Plaintiffs Did Not Have Actual or Constructive Notice of Their Business Injuries Until March 2014.

The District Court grouped Plaintiffs' RICO injuries into two categories: their unnecessarily-shortened careers and their diminished "post-NFL prospects." ER

286. With regard to the former, the District Court began its brief analysis by noting that "[t]he last 'unnecessarily shortened' NFL career alleged by plaintiffs . . . ended [in 2004,] over a decade prior to the filing of this action." *Id.* It went on to find that the "specific allegations – that the clubs pressured them to play and gave them medications to continue playing, that they thus did not fully heal from injuries, and that the toll thereof on their health 'shortened' their career – are all of facts plaintiffs knew or should have known as soon as they occurred" and thus they cannot now assert RICO claims. *Id.*

With regard to the equally-brief analysis of the latter, the District Court considered it a *fait accompli* that knowledge of shortened careers should have given Plaintiffs actual or constructive notice that they would suffer from diminished "post-NFL prospects," in particular because Plaintiffs pled that "the brevity of NFL careers, the importance of post-NFL career trajectories, and even the widespread practice of substance abuse . . . were well-known realities of the profession." *Id.* Reversible error exists in both analyses.

First, with regard to the "shortened careers" category, Plaintiffs were fully transparent about the fact that they had actual knowledge "that the clubs pressured them to play and gave them medications to continue playing" when those events actually occurred. Certainly, there are instances identified in the complaint, *see, e.g.*, ER 64, ¶ 246, when Plaintiffs knew they had not fully healed. But it is impossible

to conclude from this complaint alone that Plaintiffs had actual knowledge that they had failed to fully heal for every injury they suffered while playing in the NFL and about which they complain of here.

Plaintiffs are not doctors – they could not have known on their own if they had "fully healed" from injuries. And the persons they trusted to provide them that information, the club doctors, often lied to them about the scope of their healing. *See, e.g.*, ER 61-64, ¶¶ 236, 239, 247. Plaintiffs' injuries were legion, spread out over decades amongst various teams, and involving interactions with scores of doctors and trainers. As such, it is impossible at this stage to lump those injuries together and state in passing, without explanation, that Plaintiffs had actual notice of all of them or, for that matter, state with any certainty what notice Plaintiffs had with regard to any of those injuries.

Defendants will argue that the foregoing matters not because, as Plaintiffs knew they had not healed but nonetheless played, they were on inquiry notice. While a jury may ultimately agree, that issue should not be decided in a single sentence without any supporting analysis at the motion to dismiss stage. There are too many factual questions surrounding it that dictate otherwise; *e.g.*:

- if a player felt no pain or discomfort due to being pumped full of painkillers, should they have known to ask a doctor or trainer if they had fully healed?

- if a doctor or trainer, whose first duty is to the player, told they player that they were fine to play, should the player nonetheless have asked whether the doctor was lying to him?

- if a doctor or trainer lied to a player about the status of their health, should the player nonetheless have sought another opinion or otherwise overruled the professional by choosing to play?

The last "specific allegation" is that Plaintiffs knew or should have known "that the toll [of the pressure, medications and playing while hurt] on their health 'shortened' their NFL careers." ER 286. That conclusion flies in the face of Plaintiffs' allegations that they did not know that their careers had been shortened by Defendants' fraud until 2014. While the District Court obviously had a hard time believing that, ER 288 ("plaintiffs' suggestion that they could not have known the clubs' alleged conduct shortened their NFL careers and diminished their post-NFL prospects beggars belief."), Plaintiffs' credibility is not on trial at the motion to dismiss stage.

As evidenced by the use of the word "thereof," this allegation is the ultimate issue predicated upon the other allegations identified by the District Court: the pressure, medications, and lack of healing. It thus follows that, if factual questions exist for any one of those issues such that they could not be decided as a matter of law, the same is true for the ultimate issue. And while Plaintiffs had actual notice that they were being pressured to play and were receiving Medications, the District Court made the impermissible leap that such notice automatically means that every

Plaintiff, regardless of what knowledge they had, team they played for, injury they suffered, medication they took, pressure they received, or persons they interacted with regarding the foregoing, should have known why their careers were shortened.

Second, with regard to the diminished "post-NFL prospects," the District Court linked that injury to the other injury at issue, Plaintiffs' shortened careers, stating that "[P]laintiffs knew or should have known that both shortened NFL careers and career-ending injuries would diminish their post-NFL prospects." ER 286. As an initial matter, because the District Court predicated its analysis of this second injury on the first, it (again) follows that if factual questions exist relating to that first injury such that the issue of actual or constructive knowledge thereof cannot be decided as a matter of law, the same applies to the second injury.

Equally important, the District Court did not explain how any player could know, or should have known, that a shortened career would diminish their post-NFL prospect of, *e.g.*, "coaching, announcing, sidelines, [or] working for the Club." ER 90, ¶ 325(d) (one of the business injuries complained of by Plaintiffs in their RICO count). It does not naturally follow that a shortened career would have any impact on a player's ability to, *e.g.*, coach at some future date – without more, the two simply have nothing to do with each other – and the District Court's insistence on linking the two constitutes error.

Finally, with regard to constructive notice, it bears repeating that the standard for dismissal requires that a complaint' allegations demonstrate that a plaintiff had "enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Ward v. Chanana*, 2008 WL 5383582, at * 4 (N.D. Cal. Dec. 23, 2008) (Ware, J.) (citing *Pincay*, 238 F.3d at 1110). In *Ward*, the district court made quick work of the actual notice issue, correctly finding that it must presume plaintiff's allegations to be true and, as plaintiff alleged he did not discover the injury until within the limitations period, his claim was not "time-barred under the actual notice prong." *Id.* at * 3.

Turning to constructive notice, the district court acknowledged the foregoing standard and (again) correctly looked to plaintiff's allegations, which "make it clear" that plaintiff knew "he had suffered financial loss" outside the applicable limitations period but "do not . . . connect Plaintiff's awareness of financial loss to Plaintiff's concomitant awareness of wrongdoing on the part of Defendants." *Id.* at *4. As such, the court denied defendant's motion to dismiss as to do otherwise would "penalize[plaintiff] for an inability to distinguish between financial injury as a result of Defendant's wrongdoing, and financial loss arising out of potentially legitimate business decisions." *Id.*

The foregoing reasoning applies with full force here. The injuries complained of could be the result of legitimate activity – playing professional football – and that

is what Defendants want this Court to believe. Or they could be the result of Defendants' wrongdoing. By not allowing Plaintiff the opportunity of discovery to adduce evidence as to what in fact the cause was, however, the District Court unfairly penalized Plaintiffs.

In sum, by finding that Plaintiffs had actual and/or constructive notice of their injuries before the limitations period ran, the District Court impermissibly disregarded Plaintiffs' allegations to the contrary. And factual questions abound as to whether Plaintiffs had "enough information" to warrant an investigation that could have led to the discovery of the fraud at issue.

III. The Court Erred in Its Equitable Tolling Analysis.

Even if this Court were to find that Plaintiffs' RICO claims accrued from the date their NFL careers ended, Plaintiffs adequately pled facts to establish that Defendants' fraudulent concealment equitably tolled limitations. *See Rotella*, 528 U.S. at 560-61.

It has long been established that the purpose of the fraudulent concealment doctrine is to prevent a defendant from "concealing a fraud . . . until such a time as the party committing the fraud could plead the statute of limitations to protect it[.]" *See Bailey v. Glover*, 88 U.S. 342, 349 (1874). Therefore, the "statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know

of its existence." *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060 (9th Cir. 2012). Further, and particularly important at this stage, "the question of whether a plaintiff knew or should have become aware of a fraud" is ordinarily left to the jury. *Living Designs*, 431 F.3d at 365.

At the time Plaintiffs' NFL careers ended, they sufficiently alleged that they lacked the requisite information by which, with reasonable diligence, they could have discovered that their careers ended prematurely, and later-in-life business prospects would be harmed, as a result of Defendants' wrongful conduct. The reason for Plaintiffs' lack of knowledge of their claims is primarily, if not solely, traceable to the efforts by Defendants to conceal the risks of Medications provided. ER 95-97, ¶¶ 365-387. The Clubs, through their doctors and trainers, engaged in affirmative conduct – the administration of dangerous Medications to players – and passive conduct – the purposeful concealment from them of that information they were required to provide, both of which constitute sufficient bases to invoke this doctrine. *See, e.g.*, ER 23-34, ¶¶ 109-14; ER 57-71, ¶¶ 222-65; and ER 95, ¶ 367 – 68; *see also Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978) ("Silence or passive conduct of the defendant is not deemed fraudulent, ***unless*** the relationship of the parties imposes a duty upon the defendant to make disclosure."). Plaintiffs were thus prevented from obtaining the necessary facts that could have led them to discover their RICO claims at an earlier time. *See id.*

(fraudulent concealment considers affirmative conduct that would lead a reasonable person to believe there was no claim). Plaintiffs' allegations, which must be taken as true for purposes of ruling on this motion, are sufficient to establish equitable tolling for Defendants' fraudulent concealment.

The District Court dismissed the foregoing in two short paragraphs. In the first, the District Court offered the conclusory statement that the aforementioned "efforts" on the part of Defendants "would not have obscured the specific facts underlying plaintiffs' RICO theory that the clubs' conduct shortened their NFL careers and diminished their post-NFL prospects." ER 289. The District Court then offered the example that the amended complaint does not explain how "concealment of a medication's side effects could possibly prevent a player from knowing that their club was pressuring them to play and giving them medications to do so." *Id.*

Again, Plaintiffs concede that they knew they were being pressured to play and were receiving medications when those events occurred. But that is entirely beside the point. Equitable tolling tests whether "the defendant fraudulently concealed the existence ***of a cause of action*** in such a way that the plaintiff, acting as a reasonable person, did not know of its existence." *Hexcel Corp.*, 681 F.3d at 1060; *see also Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986); *Rutledge*, 576 F.2d at 249-50. It does not test whether some of the facts underlying that cause of action were obscured or not. Were it otherwise, equitable

tolling would focus on the same issue as constructive notice – both would ask whether a plaintiff knew enough to put them on inquiry notice as to a defendant's conduct.

Turning to the second paragraph, the District Court rightly noted that, to take advantage of the equitable tolling, Plaintiffs must establish affirmative conduct by Defendants that could lead a "reasonable person to believe they did not have a claim to relief" and plead with particularity the necessary facts to support invocation of the doctrine. ER 290 (citing *Pincay*, 238 F.3d at 1110). And in a single sentence, it concluded that: "[t]he amended complaint satisfies none of these requirements." *Id.*

To the contrary, the amended complaint is full of affirmative conduct pled with the requisite particularity – the provision of Medications on specific dates at specific places by doctors and trainers. *See* ER 81-83. Further, the amended complaint adequately explained the relationship of trust that exists between doctors and their patients and how that relationship was heightened between the doctors/trainers and the players. ER 91, ¶¶ 336-37. And it follows naturally from the foregoing that, if someone you trust affirmatively directs you to do something without identifying any associated risk, the "reasonable person [would] believe that he did not have a claim for relief" based on that conduct. *Pincay*, 238 F.3d at 1110; *cf. Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987). Put simply,

the District Court's conclusory analysis notwithstanding, Plaintiffs adequately pled affirmative conduct and fraudulent concealment.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the Order of the District Court dismissing Plaintiffs' RICO claim as time-barred and remand this matter to the District Court for further proceedings consistent with this Court's opinion.

Dated: February 23, 2018

SILVERMAN THOMPSON SLUTKIN & WHITE, LLC

/s/ William N. Sinclair
William N. Sinclair

STATEMENT OF RELATED CASES

This case relates to *Dent, et al. v. National Football League*, No. 15-15143 (2015).

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Dated: February 23, 2018

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I am employed in the City of Baltimore, State of Maryland. I am over the age of 18 and not a party to the within action; my business address is 201 N. Charles St., Suite 2600, Baltimore, MD 21201 and my email address is dfarmer@mdattorney.com.

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