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NATIONAL ASSOCIATION OF
COMPETITIVE SOCCER CLUBS, INC.
d/b/a US CLUB SOCCER and
AMERICAN YOUTH SOCCER ORGANIZATION

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

RACHEL MEHR; BEATA IVANAUSKIENE, as parent of minor R.K.I. JR.; SARAH ARANDA, as parent of minors B.A., D.A., AND I.A.; KIRA AKKA-SEIDEL; KAREN CHRISTINE O'DONOGHUE, as parent of minor L.L.M., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION a/k/a "FIFA;" THE UNITED STATES SOCER FEDERATION, INC., US YOUTH SOCCER ASSOCIATION, INC.; AMERICAN YOUTH SOCCER ORGANIZATION; NATIONAL ASSOCIATION OF COMPETITIVE SOCCER CLUBS, INC. d/b/a/ US CLUB SOCCER, and CALIFORNIA YOUTH SOCCER ASSOCIATION,

Defendants.

CASE NO. 4:14-cv-03879-PJH

DEFENDANT NATIONAL ASSOCIATION OF COMPETITIVE SOCCER CLUBS, INC. d/b/a US CLUB SOCCER'S MOTION TO DISMISS

Date: May 6, 2015
Time: 9:00 A.M.
Crtm: 3 – 3rd Floor

Complaint filed 08/27/14

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that, on May 6, 2015, at 9:00 A.M., or as soon thereafter as the matter may be heard, Defendant National Association of Competitive Soccer Clubs, Inc., d/b/a US Club Soccer ("USCS") will move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an Order dismissing Plaintiffs' Class Action Complaint (the "Complaint") with prejudice. This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities and Request for Judicial Notice ("RJN"), the Memorandum of Points and Authorities submitted by defendant United States Soccer Federation, Inc. ("US Soccer") in support of its motion to dismiss (which USCS joins in and incorporates herein by reference), oral argument, and such other matters as the Court may consider.

STATEMENT OF ISSUES

USCS moves to dismiss Plaintiffs' Complaint on the following grounds:

1. Counts 1 and 2 should be dismissed because Plaintiffs lack standing to pursue the relief sought (retrospective medical monitoring relief and prospective injunctive relief).

2. Counts 1 (negligence) and 2 (voluntary undertaking) should be dismissed because Plaintiffs have not alleged that USCS breached a duty owed to Plaintiffs.

3. Count 3 should be dismissed because medical monitoring is not recognized as an independent cause of action.

4. Count 3 should be dismissed because Plaintiffs have not alleged that they were exposed to a known hazardous substance as a result of USCS's negligence.

5. All Counts should be dismissed because Plaintiffs and all members of the Putative Class have expressly released USCS from liability for the matters alleged in the Complaint, and because the Court should abstain from becoming enmeshed in the matters alleged in the Complaint.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant USCS joins in, and incorporates herein by reference, the Memorandum of Points and Authorities submitted by US Soccer in support of its motion to dismiss. In addition, USCS submits the following further matters for the Court's consideration in connection with its motion.

II. PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF AGAINST USCS FAILS AS A MATTER OF LAW

USCS is a non-profit organization committed to the development and support of soccer clubs in the United States. *See* Complaint at para. 27; RJN at ¶ 1-2, Exh A, B. Soccer clubs are free to affiliate with USCS, or not, as they see fit. USCS does not staff the soccer clubs of its affiliates; its role is limited to acting as an umbrella organization, sanctioning its affiliates' events and providing them with limited administrative support such as liability insurance and registration forms. Complaint at para. 27; RJN at ¶ 2, Exh B. The programs that USCS itself staffs are limited to select tournaments and player scouting programs. RJN at ¶ 3, Exh C.

Plaintiffs ask the Court to issue a mandatory injunction compelling, among other things: 1) that USCS change the rules of the game to outright prohibit heading of the ball by players under a certain age, and limit the practice for all other players at all USCS-sanctioned events; 2) that USCS provide pre-injury ("baseline") neurological testing of all players at USCS-sanctioned events; 3) that USCS provide further, post-incident testing of any and all players suspected of sustaining a concussion at a USCS-sanctioned event; and 4) that USCS provide, at every USCS-sanctioned event, on-site medical personnel with expertise in evaluating and treating concussions. Conspicuously absent from the Complaint is any explanation of how USCS – a non-profit organization – is supposed to pay for any of these measures.

The only named plaintiff who even purports to assert a claim against USCS is Rachel Mehr. Complaint at para. 38. Although the complaint alleges, vaguely, that Ms. Mehr "is at increased risk of latent brain injuries," the complaint conspicuously *does not allege* that she has in fact experienced an actual concussion or other present injury – much less an injury fairly

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traceable to USCS's failure to adopt the concussion management rules favored by Plaintiffs. Although she alleges that in the past she played for clubs sanctioned by USCS and participated in USCS tournaments, she does not allege that she presently continues to do so. Accordingly, she does not and cannot allege a real and immediate threat of future injury as a result of USCS's failure to adopt the concussion management rules favored by Plaintiffs.

For these reasons, and as set forth in further detail in US Soccer's moving papers, Plaintiffs lack standing to seek the requested injunctive relief against USCS.

Moreover, Plaintiffs' claim for injunctive relief against USCS fails as a matter of law for additional reasons. It is widely recognized, and beyond dispute, that soccer is a contact sport with an inherent and inevitable risk that players' heads, arms, legs, feet, and other bodily parts will, on occasion, come into forceful contact not only with the soccer ball but also with the bodies of other players and the ground itself. Complaint, para. 2; *See Iverson v. Muroc Unified School Dist.*, 11 Cal. App. 4th 811 (Cal. Ct. App. 1995) (referring to soccer as hazardous activity); *Pfister v. Shusta*, 657 N.E. 2d 1013, 1018 (Ill. 1995) ("Those who participate in soccer . . . choose to play games in which physical contact among participants is inherent in the conduct of the game. Participants in such games assume a greater risk of injury . . . .") Plaintiffs admit that heading of the ball "is a legal and encouraged maneuver" in the game of soccer. Complaint, para. 12. If this Court were to issue an injunction requiring USCS and the other defendants to enact new rules prohibiting or limiting contact between a player's head and the ball, the effect would be to fundamentally alter the nature of the game as played by millions of people throughout the country – at the behest of just the five plaintiffs in this case – and would enmesh the Court in the micro-management of a sport in a manner beyond the traditional bounds of judicial expertise and discretion. The Court should abstain from doing so. *See California Dental Assn.* v. *American Dental Assn.*, 23 Cal. 3d 346, 353 (1979) ("[t]he rights and duties of members of a private voluntary association as between themselves and in their relation to [the] association, are measured by the terms of [the association's] constitution and by-laws.") (internal citations omitted); *Berke* v. *TRI Realtors*, 208 Cal. App. 3d 463, 469 (1989) ("Courts must guard against

unduly interfering with an organization's autonomy by substituting judicial judgment" for that of the organization); *Oakland Raiders* v. *National Football League*, 131 Cal. App. 4th 621, 646 (2005) (courts should abstain from becoming involved in "complex matters involving [sporting organizations] that are best left to the voluntary unincorporated association").

The prayer for an injunction compelling USCS to provide neurological testing for all persons who participated in a USCS-sanctioned during any part of the 13-year period encompassed by the Complaint also fails as a matter of law. Such complex, personal judgments about medical diagnoses and treatment are best left to players' individual physicians and their families – not to the Courts, and especially not to a volunteer soccer organization. The requested injunction would essentially put USCS in the position of being a medical care provider to all players at USCS-sanctioned events – a specialized field well beyond its ken – exposing it to incalculable liability and expense as a result. Given USCS's status as a non-profit organization, inevitably it would have no choice but to pass along that expense to its affiliates in the form of greatly increased fees – harming the very class of people on whose behalf this case is purportedly brought. Accordingly, plaintiffs cannot establish either the "balance of the hardships" or the "public interest" requirements for obtaining a mandatory permanent injunction. *See generally eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 391 (setting forth the four-factor test for a permanent injunction).

Plaintiffs also seek an injunction requiring USCS to provide medical monitoring, of an unspecified nature and for an indefinite duration, to all of the players who have ever participated in a USCS-sanctioned event at any time during the 13-year period encompassed by the Complaint. Even more so than the prospective injunctive relief discussed above, the requested medical monitoring would be crushingly expensive – either ending USCS outright or, at the least, forcing it to raise its fees astronomically and thus harming the very people on whose behalf this case is purportedly brought. This claim, too, would enmesh the Court far too deeply into sensitive and personal medical decisions best left to the judgment of players' families and personal physicians.

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Moreover, as US Soccer points out in its brief, the medical monitoring claim fails for the additional reasons that: 1) Plaintiffs lack standing to seek medical monitoring; 2) Plaintiffs do not allege, and cannot allege, exposure to a toxic substance – the only recognized circumstance in which medical monitoring has been authorized; and 3) medical monitoring is not recognized as an independent cause of action.

III. ALL OF PLAINTIFFS' CLAIMS FAIL FOR LACK OF DUTY

As US Soccer explains in its brief, a defendant owes no duty to a plaintiff who is allegedly injured as a result of a risk inherent in the nature of a sporting activity; participants are deemed to have assumed those risks. *Knight v. Jewett*, 3 Cal. 4th 296, 308-309 (Cal. 1992) (holding that "the defendant is relieved of his or her duty to use due care to avoid the plaintiff suffering an injury as a result of those inherently risky aspects of the sport."). Stated different, the law will not impose a duty of care "when to do so would tend to alter the nature of an active sport." *Kahn v. East Side Union High School Dist.*, 31 Cal. 4th 990, 1011 (Cal. 2003).

Both the caselaw and facts subject to judicial notice establish beyond dispute that, in contact sports such as soccer, there is an inherent and inevitable risk that players' heads, arms, legs, feet, and other bodily parts will, on occasion, come into forceful contact not only with the ball but also with the bodies of other players and the ground itself. Complaint, para. 2; *See Iverson v. Muroc Unified School Dist.*, 11 Cal. App. 4th 811 (Cal. Ct. App. 1995) (referring to soccer as hazardous activity); *Pfister v. Shusta*, 657 N.E. 2d 1013, 1018 (Ill. 1995) ("Those who participate in soccer . . . choose to play games in which physical contact among participants is inherent in the conduct of the game. Participants in such games assume a greater risk of injury . . . ."); *Balthazor v. Little League Baseball, Inc.*, 62 Cal. App. 4th 47, 48-53 (Cal. Ct. App. 1998) (risk of being hit by ball is inherent in the game of baseball; accordingly, minor child who participated in sport deemed to have assumed that risk). Defendants thus have no duty to protect Plaintiffs from those risks.

Plaintiffs admit that heading of the ball "is a legal and encouraged maneuver" in the game of soccer. Complaint, para. 12. The imposition of a duty on defendants to prevent heading

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or other sources of concussion risk, or to ameliorate the effects thereof, would fundamentally alter the nature of the game as played by millions of people throughout the country, would render it prohibitively expensive for many if not most families, and would enmesh the Court in the micro-management of a sport in a manner beyond the traditional bounds of judicial expertise and discretion – all at the behest of just the five plaintiffs in this case. As US Soccer points out in its brief, defendants have no duty to make the game safer or to ameliorate risks inherent in the sport; their only duty is to not increase such risks. *See, e.g., Avila v. Citrus Community College Dist.*, 38 Cal. 4th 148, 162 (2006) (defendant only owed a duty not to increase the inherent risks, not a duty to decrease them); *West v. Sundown Little League of Stockton*, 96 Cal. App. 4th 351, 358 (2002) (league's decision not to provide additional safety equipment recommended by its safety officer did not increase the risk); *Fortier v. Los Rios Community College Dist.*, 45 Cal. App. 4th 430, 439 (Cal. 1996) (failure to provide certain safety equipment did not increase the inherent risks of the game).

Plaintiffs do not, and cannot, allege that USCS somehow *increased* a risk inherent in the sport of soccer-- and in fact it does everything it can to prevent those risks. Accordingly, Plaintiffs' claims are barred by the implied assumption of risk doctrine and the resulting absence of duty.

IV. ALL MEMBERS OF THE PUTATIVE CLASS WHO PARTICIPATED IN USCS-SANCTIONED EVENTS HAVE EXPRESSLY RELEASED USCS FROM LIABILITY FOR THE CLAIMS ALLEGED HEREIN

All those members of the putative class who participate in USCS-sanctioned events (and, in the case of minor players, the player's parent or other legal guardian) are required to complete and sign a player registration form. *See* Complaint at para. 85; RJN at ¶ 5, Exh. D Included on the player registration form, in clear and conspicuous language, is the following release:

> Recognizing the possibility of physical injury associated with soccer and in consideration for US Club Soccer accepting the registrant for its soccer programs and activities, I hereby release, discharge and/or otherwise indemnify the club, US Club Soccer, the USSF, and the affiliated organizations and sponsors, their employees and associated personnel, including the owners of fields and facilities utilized for the soccer programs, against any claim by or on behalf of the registrant as a result of the registrant's participation in the programs . . . .

Player Registration Form, Exh. D to RJN.

Liability releases are generally enforceable unless they "affect the public interest." *Tunkl v. Regents of the University of California*, 60 Cal. 2d 92, 98 (Cal. 1963). The courts have consistently held that releases given in the context of recreational sporting activities do not contravene the public interest; indeed, they further the public interest by ensuring the continued availability of such activities. *See, e.g., Cohen v. Five Brooks Stable* (2008) 159 Cal.App.4th 1476, 1485; *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 842; *City of Santa Barbara v. Sup. Ct.*, 41 Cal. 4th 747, 759-60 (Cal. 2007) (collecting cases).

The USCS release language is positioned in a prominently boxed paragraph set off from the rest of the one-page registration form. The signature line for the document appears in that same box. Player Registration Form, Exh. D to RJN. Accordingly, there can be no credible argument that the release language is "buried in a lengthy document, hidden among other verbiage, or so encumbered with other provisions as to be difficult to find." *Leon v. Family Fitness Center #107, Inc.* (1998) 61 Cal.App.4th 1227, 1232. Moreover, given the document's specific reference to "the possibility of physical injury associated with soccer"-- and the express provision that the signatory "hereby release[s], discharge[s] and/or otherwise indemnif[ies] . . . US Club Soccer . . . against any claim by or on behalf of the registrant as a result of the registrant's participation in the programs" -- there can be no credible argument that the document is vague or ambiguous.

Because all members of the putative class who participated in USCS-sanctioned events have expressly released USCS from the liability alleged herein, USCS must be dismissed from the Complaint.

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V. CONCLUSION

For each of these reasons, defendant USCS respectfully requests that it be dismissed from this action without leave to amend.

Dated: January 30, 2015

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