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NATIONAL FOOTBALL LEAGUE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

CAITLIN Y and JENNY C, Individually and on Behalf of All Others Similarly Situated and in the Interest of the General Public of the State of California,

Plaintiffs,

v.

The NATIONAL FOOTBALL LEAGUE, the OAKLAND RAIDERS, LLC, and DOES 1-50, inclusive,

Defendants.

Case No. RG14727746

Assigned to Hon. George C. Hernandez, Jr.

DEFENDANT NATIONAL FOOTBALL LEAGUE'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[*Request for Judicial Notice and [Proposed] Order filed concurrently herewith*]

Date: August 7, 2014
Time: 3:00 p.m.
Dept.: 17

Complaint Filed: June 4, 2014
Trial Date: None Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 7, 2014 at 3:00 p.m., or as soon thereafter as counsel may be heard, in Department 17 of the Alameda County Superior Court, Administration Building located at 1221 Oak Street, 4th Floor, Oakland, California 94612 before the Honorable George C. Hernandez, Jr., presiding, Defendant National Football League (the "NFL") will, and hereby does, demur to all causes of action alleged against the NFL in Plaintiffs Caitlin Y and Jenny C's Complaint, namely, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Causes of Action. The Demurrer is made pursuant to California Code of Civil Procedure section 430.10(e) on the grounds that each of the causes of action in the Complaint fails to state facts sufficient to constitute a cause of action against the NFL.

This Demurrer is based on this Notice of Demurrer, the Demurrer and Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice filed concurrently herewith, the pleadings and records on file with the Court in this action, and such other evidence and argument as may be presented at or before the time of the hearing on the Demurrer.

DATED: July 3, 2014

BINGHAM MCCUTCHEN LLP

By: _____

Debra L. Fischer
Attorneys for Defendant
National Football League

DEMURRER

Defendant National Football League (the "NFL") hereby generally demurs to all causes of action in Plaintiffs Caitlin Y and Jenny C's (jointly, "Plaintiffs") Complaint, the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Causes of Action, on the following grounds:

Demurrer to First Cause of Action for Violations of the Cartwright Act, Business & Professions Code § 16720

1. The NFL demurs to the first cause of action on the grounds that: (a) it fails to state facts sufficient to constitute a cause of action (Cal. Civ. Proc. Code § 430.10(e)) because Plaintiffs do not, and cannot, allege a combination in restraint of trade involving the NFL (or anyone else) *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 265 (1983) and (b) the application of the Cartwright Act to the interstate activities of professional football would violate the Commerce Clause. *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 380 (1983) ; *Hebert v. Los Angeles Raiders Ltd.*, 23 Cal. App. 4th 414, 422-25 (1994).

Demurrer to Second Cause of Action for Failure to Pay Wages

2. The NFL demurs to the second cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez v. Combs*, 49 Cal. 4th 35, 64 (2010)) and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Third Cause of Action for Breach of Labor Code § 510

3. The NFL demurs to the third cause of action on the ground that it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64) and (b) the application of the California Labor Code to the interstate activities of professional

football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Fourth Cause of Action for

Failure to Provide Meal and Rest Breaks

4. The NFL demurs to the fourth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Fifth Cause of Action for

Waiting Time Penalties

5. The NFL demurs to the fifth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Sixth Cause of Action for

Breach of Labor Code §§ 204 and 204(B)(1)

6. The NFL demurs to the sixth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Seventh Cause of Action for

Violation of California Business and Professions Code § 17200 *et seq.*

7. The NFL demurs to the seventh cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because it is premised on the Complaint's labor-based causes of action, which all fail to state a claim against the NFL as a matter of law (*Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal. App. 4th 1134, 1147 (2003)) and (b) the application of the Unfair Competition Law to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Eighth Cause of Action for

Unlawful Deduction from Wages

8. The NFL demurs to the eighth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Ninth Cause of Action for

Failure to Provide Wage Statements

9. The NFL demurs to the ninth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Tenth Cause of Action for

Unlawful Prohibition on Discussing Wages and Working Conditions

10. The NFL demurs to the tenth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Eleventh Cause of Action for

Imposition of Unlawful Working Conditions

11. The NFL demurs to the eleventh cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Twelfth Cause of Action for

Failure to Reimburse Business Expenses

12. The NFL demurs to the twelfth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Thirteenth Cause of Action for Failure to Provide Changing Facilities

13. The NFL demurs to the thirteenth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64); and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Fourteenth Cause of Action under the Private Attorneys General Act

14. The NFL demurs to the fourteenth cause of action on the ground that: (a) it fails to state facts sufficient to constitute a cause of action (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not, and never was, Plaintiffs' "employer" (*Martinez*, 49 Cal. 4th at 64), and therefore cannot be liable for the civil penalties set forth in the Labor Code which are applicable only to "employers"; and (b) the application of the California Labor Code to the interstate activities of professional football would violate the Commerce Clause. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

Demurrer to Fifteenth Cause of Action for Breach of Contract

15. The NFL demurs to the Fifteenth cause of action on the ground that it fails to state facts sufficient to constitute a cause of action against the NFL (Cal. Civ. Proc. Code § 430.10(e)) because the NFL is not a party to the Raiderette Agreement between Plaintiffs and Defendant Oakland Raiders, LLC. *Gold v. Gibbons*, 178 Cal. App. 2d 517, 519 (1960).

DATED: July 3, 2014

BINGHAM MCCUTCHEN LLP

By: _____

Debra L. Fischer
Attorneys for Defendant
National Football League

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Complaint tries to turn a straightforward labor dispute between employees and their employer, the Oakland Raiders (the "Raiders"), expressly arbitrable by contract, into a complex labor and antitrust class action against the National Football League (the "NFL"). That effort is misguided. The NFL did not employ Plaintiffs, was not the Raiders' principal (or agent), and did not conspire with, control, or direct the Raiders (or Plaintiffs) in any way remotely relevant to this case.

Plaintiffs' only basis for suggesting otherwise consists of artful pleading, illogical inferences from irrelevant facts, and bare legal conclusions, all insufficient as a matter of law. The linchpin of their story is the erroneous suggestion that the NFL's Constitution and Bylaws (the "Bylaws") somehow made the NFL an employer and co-conspirator by dictating the terms of Plaintiffs' employment. Plaintiffs never actually allege any facts to support that theory, and the publicly available and judicially noticeable Bylaws conclusively disprove it. Even assuming their story were true, and it is not, Plaintiffs' state law claims would be constitutionally barred because they would impermissibly burden interstate commerce, as the California Supreme Court has unequivocally held.

In sum, this case presents a dispute between Plaintiffs and the Raiders. The NFL does not belong in it. Plaintiffs do not and cannot allege facts to state a claim against the NFL. No amendment could make their demonstrably false story true, or their purported claims against the NFL constitutional. The demurer should be sustained without leave to amend.

II. PLAINTIFFS' ALLEGATIONS

The NFL, based in New York, "is an unincorporated association consisting of separately owned professional football teams that operate out of many different cities and states in this country." Compl., ¶ 4. It is "engaged in interstate commerce in the business [sic] promoting, operating, and regulating the league and its member teams." *Id.*, ¶ 4.

Plaintiffs allege that "The NFL's Role" in the alleged wrongs is, on information and belief: "The NFL Constitution and Bylaws requires [sic] all NFL teams, including the Raiders,

to file all written employment contracts with all non-player employees with the NFL League Office"[1] and "regulate specific terms and conditions which must be present" in those contracts; "the NFL knew the contents of the Agreements that Defendant Raiders had with the Raiderettes"; the "NFL directed and regulated the Raiderette Agreements, exercised control over the Raiderettes' wages, hours and working conditions, suffered or permitted the Raiderettes to work, and/or engaged the Raiderettes to work." Compl., ¶¶ 29, 77.

From this, Plaintiffs conclude that the "NFL, the Raiders, and the other NFL clubs all therefore engaged in a concerted action to depress the wages of female athletes in the NFL such as the Raiderettes . . ., includ[ing] yearly agreements to illegally prevent Raiderettes and other NFL female athletes from discussing their wages with each other [and] to prevent Raiderettes and other female athletes from gaining employment with other NFL clubs [and] to depress the wages of Raiderettes and other NFL female athletes." Compl., ¶¶ 30, 78, 80. "These concerted efforts to restrict the movement and wages of the Raiderettes amounted to an unreasonable restraint of trade which effects [sic] local, state, and interstate commerce." *Id.*, ¶¶ 30, 79.

Based on the same Bylaws, Plaintiffs also conclude that the NFL was a party to their employment contracts with the Raiders and/or an agent of the Raiders for purposes of Plaintiffs' employment. On that basis, they allege a variety of labor law claims against the NFL. Compl., ¶¶ 29-30, 82-125, 133-162.

III. JUDICIALLY NOTICEABLE MATERIAL

Plaintiffs' case against the NFL expressly depends on the NFL's Constitution and Bylaws. Compl., ¶ 29. Section 9.3(A)(2) of the Bylaws is, in turn, the source of their allegation that the NFL required the Raiderette Agreement to be "filed" with the NFL and to contain "specific terms." It reads:

> "Every contract with any employee of the League or of a club therein shall contain a clause wherein the employee agrees to abide and be legally bound by the Constitution and Bylaws and the Rules and Regulations of the League, as well

[1] In fact, the Raiders have not submitted cheerleader agreements to the NFL. However, for purposes of this demurrer, the NFL will assume as true Plaintiffs' allegation that they did and that the NFL therefore knew about the agreements.

> as by the decisions of the Commissioner, which decisions shall be final, conclusive, and unappealable. Such contract shall provide further that the contracting parties, if involved or affected in any manner by a decision of the Commissioner, agree to release the Commissioner and to waive every claim he, they, or it have against the Commissioner, individually and in his official capacity, as well as against the League, each and every member club thereof, and any and all directors, officers, stockholders, partners, or holders of an interest therein, for damages and for any other claims or demands arising out of or connected with any decision of the Commissioner. Every written employment contract with any non-player employee of a club shall be filed in the League office promptly following its execution and shall provide: that such contract sets forth the entire agreement between the parties; that no oral agreements, and no other written agreements, except as are attached to the contract or specifically incorporated by reference therein, exist between them; that such written contract (including agreements attached thereto or incorporated therein) sets forth the entire agreement with respect to the employee's services for the club; and that neither party will rely on any agreement or understanding not reduced to writing and specifically incorporated into such employment contract prior to its execution or when subsequently amended."

RJN, Exs. A & B, §9.3(A)(2);

http://static.nfl.com/static/content/public/static/html/careers/pdf/co_.pdf. As discussed in the accompanying Request for Judicial Notice, the Bylaws are expressly relied on and cited extensively throughout Plaintiffs' complaint, publicly available online,[2] dispositive of Plaintiffs' claims, and therefore properly judicially noticeable on this demurrer.[3]

[2] The 2006 version is publicly available and section 9.3(A)(2) is identical in both the 2006 and 2010 versions.

[3] The NFL submits that its demurrer should be sustained regardless of whether judicial notice is taken because Plaintiffs fail to allege any facts to support a claim against the NFL, but that judicial notice of the Bylaws would affirmatively demonstrate that the claims are invalid and that any amendment would be fruitless.

IV. ARGUMENT

A. Plaintiffs' Cartwright Act Claim Fails as a Matter of Law (First Cause of Action)

The Cartwright Act is California's primary antitrust statute. Cal. Bus. & Prof. Code § 16720 (2014). It proscribes only "trusts," or "combinations," in restraint of trade, and does not reach conduct by a single actor as a matter of substantive law. *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1152, 1163(1988), *superseded by statute on other grounds*, Cal. Bus. & Prof. Code § 17200 (2014) (amended August 1992). As a matter of constitutional law, the Cartwright Act cannot unreasonably burden interstate commerce. *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 384-85 (1983). Plaintiffs do not and cannot allege that the NFL did anything remotely related to the restraint of trade they purport to allege, so the Cartwright Act claim fails as a matter of substantive law for lack of a conspiracy. (Part 2, below). If they did, the claim would violate the Commerce Clause and fail as unconstitutional. (Part 3, below).

1. Plaintiffs Must Allege Specific Facts Establishing an Antitrust Conspiracy

"A cause of action for violation of the Cartwright Act must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 373 (2001) (internal quotes and citation omitted).

"[I]t is well settled" that a "general demurrer will be sustained where the complaint makes conclusory allegations of a combination and does not allege with factual particularity that separate entities maintaining separate and independent interests combined for the purpose to restrain trade." *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 266 (1983). In particular, "[t]he unlawful combination or conspiracy must be alleged with specificity." *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 196 (1999). "Thus, general allegations of a conspiracy unaccompanied by a statement of facts constituting the conspiracy and explaining its objectives and impact in restraint of trade will not suffice. [citations] Put slightly differently, the lack of

factual allegations of specific conduct directed toward furtherance of the conspiracy to eliminate or otherwise reduce competition renders the complaint legally insufficient." *G.H.I.I.*, 147 Cal. App. 3d at 265-66.

Plaintiffs may not turn a conclusory allegation of an antitrust violation into "a blind 'fishing expedition' for some unknown wrongful acts." *Smith v. State Farm Mut. Auto. Inc. Co.*, 93 Cal. App. 4th 700, 722 (2001) (citation omitted).

2. Plaintiffs Do Not and Cannot Allege a Combination in Restraint of Trade

None of Plaintiffs' allegations remotely suggests, much less specifically pleads "factual allegations" to show, that the NFL (either as a "combination" of its members or in a "conspiracy" with the Raiders) actually did anything to restrain trade. Plaintiffs claim various provisions of the Raiderette Agreement restrain "wages, hours and working conditions," but fail to assert any well-pled allegation that the NFL had anything to do with those alleged restrictions. They claim the alleged antitrust conspiracy "is contained at least in part in the NFL Constitution and Bylaws" (Compl., ¶ 77), but identify no provision of the Bylaws that imposed the alleged restraints of trade on them, either directly or through their Agreement with the Raiders. Thus, Plaintiffs do not and cannot allege "specific facts" showing either "the formation and operation" of the alleged conspiracy, or any "wrongful act" the NFL supposedly did "pursuant thereto." *Chavez*, 93 Cal. App. 4th at 373. Instead, Plaintiffs' allegations relating to the NFL consist of conclusory assertions of antitrust boilerplate based on irrelevant factual allegations, made on "information and belief." None of it suffices to state an antitrust claim against the NFL (or anyone else), or even comes close.

Plaintiffs allege that the NFL "knew of the terms" of the Raiderette Agreement, citing to the language of the Bylaws concerning the filing of written agreements. For purposes of this demurrer, the NFL assumes as true that it was made aware of the Raiderette Agreement (although the Raiders did not in fact provide any cheerleader agreements to the NFL). Regardless, receiving a copy of someone else's agreement, or reading it, does not suggest that the NFL made it, or established or agreed to any of its terms, much less those at issue here.

Plaintiffs attempt to prove the point. They further allege that the Bylaws "regulate specific terms and conditions which must be present" in the agreement. The problem is that none of those "specific terms" have anything to do with the alleged restraints on "wages, hours, and working conditions" on which plaintiffs' antitrust claims purport to be based.[4] Although the Bylaws are publicly available online (and we submit judicially noticeable), Plaintiffs deliberately avoid alleging any relevant provision that "directed and regulated" any term relevant to their "wages, hours and working conditions."

The rest of Plaintiffs' allegations - the NFL engaged in "concerted efforts to restrict the movement and wages of the Raiderettes" - are legal conclusions that do not even follow from the few, irrelevant facts they allege, and are therefore insufficient as a matter of law. *See Chi. Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 328 (1968) (affirming order sustaining demurrer in part because plaintiff pled general conspiracy allegations and no facts to support them), *superseded by statute on other grounds*, Sen. Com. on Judiciary, Analysis of Assem. Bill No. 3222 (1977-1978 Reg. Sess.), *as cited in Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758 (2010). The demurrer should be sustained under "well settled" law. *G.H.I.I.*, 147 Cal. App. 3d at 265-69 (affirming order sustaining demurrer for failure to allege an antitrust conspiracy); *Chavez*, 93 Cal. App. 4th at 373 (same); *Freeman*, 77 Cal. App. 4th at 195-98 (same).

3. Any Purported Cartwright Act Challenge To The NFL Constitution and Bylaws Would Be Unconstitutional

If Plaintiffs were somehow to allege that the NFL, acting "in many different cities and states in the country," had "engaged in a concerted action to depress the wages of female athletes in the NFL such as the Raiderettes" and thereby harmed "local, state, and interstate commerce" (Compl., ¶¶ 4, 30, 79), it would be futile. The California Supreme Court has held that "the Cartwright Act is not applicable to the interstate activities of professional football." *Partee*, 34

[4] Plaintiffs pretend that their allegations are on "information and belief" but there is no need to speculate. The Bylaws are publicly available online. The provision Plaintiffs refer to, Section 9.3(A)(2), requires, in general terms, that employee agreements require the employee to abide by the Bylaws and decisions of the Commissioner, and to release the Commissioner, the NFL, and others from liability related to such decisions; and that they contain an integration clause. *See* RJN, Exs. A & B, § 9.3(A)(2). Ironically, the Raiderette Agreement, attached to the Complaint, does not contain the very terms that Plaintiffs claim the NFL required as the purported basis for their claims against it. *Compare id. with* Compl., Ex. A. In any event, none of those terms have anything to do with their claims.

Cal. 3d at 380; *accord Hebert v. Los Angeles Raiders Ltd.*, 23 Cal. App. 4th 414, 422-25 (1994).

Our Supreme Court's holding in *Partee* reflects the fact, which the Ninth Circuit has also recognized, that national sports leagues are "unique," with only one or two teams in each state, and "state legislation . . . would have . . . significant impact on the whole league fabric, not just on the state's one or two teams." *Valley Bank of Nevada v. Plus Sys., Inc.*, 914 F.2d 1186, 1192, 1192 n.12 (9th Cir. 1990) (recognizing *Partee* court's holding that "state antitrust laws [are] inapplicable to [the] national football league"); *see also Turner v. Am. Ass'n of Med. Col.*, No. RG04166148, 2004 WL 5258113 (Cal. Super. Ct. Aug. 6, 2004) (the "state cannot regulate substantial elements of sports leagues because the leagues are inherently interdependent and require uniformity across all states"); *City of San Jose v. Office of the Comm'r of Baseball*, No. C–13–02787 RMW, 2013 WL 5609346, at *13 (N.D. Cal. Oct. 11, 2013) (relying on *Partee* to dismiss Cartwright Act challenge to Major League Baseball's failure to approve the Athletics' proposed relocation from Oakland to San Jose).

Plaintiffs' case, assuming that they actually alleged conduct by the NFL relevant to their Cartwright Act claims, would be indistinguishable from, and controlled by, *Partee* and *Hebert*. Those cases challenged NFL Bylaws that allegedly restrained competition among NFL clubs and suppressed the wages and mobility of NFL players. *See Hebert*, 23 Cal. App. 4th at 423-24. Plaintiffs here challenge NFL Bylaws that allegedly restrain competition among NFL clubs and "depress the wages and internal mobility" of "Raiderettes and other similar NFL female athletes." Compl., ¶¶ 77-80. Thus, Plaintiffs' claim, like those in *Partee* and *Hebert*, "would constitute an impermissible burden on interstate commerce," and must be dismissed. *Hebert*, 23 Cal. App. 4th at 425.

Partee's bar is simple and unequivocal—California antitrust laws are "not applicable to the interstate activities of professional football." *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 423-26 (following *Partee* and affirming order sustaining demurrer without leave to amend). Plaintiffs' Cartwright Act claim fails as a matter of law on any reading.

B. Plaintiffs' Labor Code and IWC Wage Order Claims Fail as a Matter of Law (Second through Sixth and Eighth through Fourteenth Causes of Action)

Plaintiffs fling a barrage of labor claims against the NFL – thirteen causes of action in total – despite the basic fact that the NFL is, and never was, Plaintiffs' "employer" under any applicable definitions of the term. It is axiomatic that the Labor Code and Industrial Welfare Commission ("IWC") Wage Orders regulate and impose liability only on those who "employ" workers. *See, e.g., Martinez v. Combs*, 49 Cal. 4th 35, 71-77 (2010) (refusing to hold certain parties liable under the Labor Code because they were not Plaintiffs' "employers"); *Futrell v. Payday California, Inc.*, 190 Cal. App. 4th 1419, 1434-35 (2010) (same).[5] Accordingly, Plaintiffs' labor-based causes of action – specifically, the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Causes of Action – fall flat and fail to state any claim against the NFL as a matter of law.

1. The NFL Is Not, and Never Was, Plaintiffs' Employer

Whether an entity is an "employer" for purposes of an alleged violation of the Labor Code or any IWC Wage Order is governed by *Martinez v. Combs*, in which our Supreme Court interpreted IWC Wage Order 14's definition of the term "employ" to embody three alternative definitions. "It means (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship. *Martinez,* 49 Cal. 4th at 64 (emphasis in original); *see also Futrell*, 190 Cal. App. 4th at 1431 (holding that *Martinez*'s three-pronged definition governs).[6] The NFL is not the

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[5] *See also, e.g.,* IWC Wage Order 10, Cal. Code Regs. tit. 8, § 11100 ("The provisions of this order shall apply to all employees employed by any *employer*...."); Cal. Lab. Code § 203 ("If an *employer* willfully fails to pay...."); *id.*, § 221 ("It shall be unlawful for any *employer* to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."); *id.*, § 226 ("Every *employer* shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees...."); *id.*, § 226.7 ("An *employer* shall not require an employee to work during a meal or rest or recovery period...."); *id.*, §§ 232, 232.5 ("No *employer* may do any of the following...."); *id.*, § 432.5 (No *employer* ... shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such *employer* ... to be prohibited by law."); *id.*, § 512 ("An *employer* may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes...."); *id.*, § 2802 ("An *employer* shall indemnify his or her employee....") (emphasis added in all citations).

[6] Note, the applicable IWC Wage Order here is Wage Order 10 for "amusement and recreation industry" employees. Cal. Code Regs. tit. 8, § 11100. However, "the Supreme Court's three alternative definitions of employment articulated in *Martinez* are equally applicable" because all of the IWC's industry occupation wage orders "use

Plaintiffs' employer under any of these three definitions.

a. The NFL Did Not "Exercise Control" Over Plaintiffs' Wages, Hours or Working Conditions

To exercise control over wages, hours and working conditions, one must control "the hiring, firing, and day-to-day supervision of workers supplying the labor." *Id.* at 1434. Here, the NFL did not "exercise control" over the Plaintiffs' wages, hours or working conditions because this right, along with the rights to hire, fire and supervise the Raiderettes' day-to-day activities, belonged solely to the Raiders per the terms of the Raiderette Agreement *between Plaintiffs and the Raiders*. Compl., Ex. A.[7] The NFL is not a party to and has no authority to enforce the Raiderette Agreement. The NFL did not sign or negotiate the terms of the Raiderette Agreement. Plaintiffs' conclusion that the NFL "by operation of law" became a party to the Raiderette Agreement because the Bylaws allegedly required it to be filed with the NFL (Compl., ¶ 29) has no basis in the law – receiving a copy of someone else's agreement, or reading it, does not suggest that the NFL made it, agreed to be bound by it, established or agreed to any of its terms, or has some power to enforce its terms. *See Gold v. Gibbons*, 178 Cal. App. 2d 517, 519 (1960) ("breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations"); *cf. Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999) (mutual assent is necessary to form a contract). *Cf. Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999) (mutual assent is necessary to form a contract).

Plaintiffs do not, and cannot, identify any provision of the Bylaws that gives the NFL the right to enforce the Raiderette Agreement or otherwise exercise control over Plaintiffs' wages, hours or working conditions, because no such provision exists. The Bylaws do not even give the NFL the authority to disapprove the Raiderette Agreements, as it does for the contracts of

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identical language to define the terms 'employ,' 'employee' and 'employer.'" *Futrell*, 190 Cal. App. 4th at 1429; *see also Martinez*, 49 Cal. 4th at 50 (same).

[7] The Raiderette Agreement grants *the Raiders* the power to hire the Raiderettes (Compl., Ex. A para. 1); control when and where the Raiderettes perform services (*id.*, para. 3); set the Raiderettes' compensation (*id.*, para. 4); terminate Raiderettes (*id.*, para. 10); define the physical abilities that are required to maintain employment (*id.*, para. 15); and regulate a host of day to day activities of the Raiderettes through a document titled "*Oakland Raiders* Raiderette Rules and Regulations." *Id.*, Ex. A (emphasis added).

coaches and players. *Compare* RJN, Ex. A, § 9.3(A)(2), *with id.*, §§ 9.3(A)(1), 15.4. And although the Bylaws do "regulate specific terms and conditions which must be present" in the Raiderette Agreement, none of those regulations pertain to Plaintiffs' wages, hours or working conditions,[8] let alone grant the NFL the right to hire, fire, or supervise day-to-day activities of the Raiderettes or to negotiate and set the Raiderettes' rate of pay. *Futrell,* 190 Cal. App. 4th at 1434 (To exercise control, one must control "the hiring, firing, and day-today supervision of workers supplying the labor."); *id.* at 1432 ("'Control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay ....").

Plaintiffs' conclusory allegation that the NFL somehow "exercised control over the Raiderettes' wages, hours and working conditions" is meritless and cannot withstand demurrer because it is flatly contradicted by the clear terms of the judicially noticeable Bylaws. *Hoffman v. Smithwoods RV Park, LLC*, 179 Cal. App. 4th 390, 400 (2009) ("In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' ... Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts that are judicially noticed.' 'False allegations of fact, inconsistent with annexed documentary exhibits or contrary to facts judicially noticed, may be disregarded....") (citations omitted); *see also Scott v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 751-52 (2013), as modified on denial of reh'g (Apr. 16, 2013) ("Indeed, a demurrer may be sustained where judicially noticeable facts render the pleading defective, and allegations in the pleading may be disregarded if they are contrary to facts judicially noticed.") (citations omitted).

b. <u>The NFL Did Not "Suffer or Permit" Plaintiffs to Work</u>

The NFL similarly did not "suffer or permit" Plaintiffs to work because the NFL did not have the power to prevent Plaintiffs from working. *See Martinez*, 49 Cal. 4th at 70 (holding that

[8] *See* note 2, *supra.*

defendants did not suffer or permit plaintiffs to work because "neither had the power to prevent plaintiffs from working"); *Futrell*, 190 Cal. App. 4th at 1434 (holding that plaintiff failed to establish that defendant suffered or permitted him to work because he failed to submit any evidence that defendant "had the power to either cause him to work or prevent him from working"). As mentioned above, even though for purposes of this Demurrer, it is assumed that the Raiderette Agreement was required to be filed with the NFL, the NFL had no power under the Bylaws to disapprove of the agreement or otherwise stop Plaintiffs from working (RJN Ex. A § 9.3(A)(2)), and Plaintiffs identify no facts suggesting differently.

Moreover, the fact that the Raiders, through the Raiderette Agreement, had the exclusive power to hire and fire Plaintiffs, to set their wages and hours, and to tell them when and where to work – as set forth in Section IV(B)(1)(a) above – necessarily forecloses the NFL from being Plaintiffs' "employer" under the "suffer or permit" test. *Martinez*, 49 Cal. 4th at 70 (holding that defendants could not "suffer or permit" plaintiffs to work because another party "had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work.").[9]

c. The NFL Did Not Engage Plaintiffs to Work

Finally, the NFL did not "engage" the Plaintiffs to work because the NFL did not hire Plaintiffs. *Id.* at 64 ("[T]he verb 'to engage' has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,' that is, to create a common law employment relationship."). The Raiderette Agreement undeniably establishes that the Raiders, and the Raiders alone, hired Plaintiffs, thereby creating a common law employment relationship. Compl., Ex. A ("This Raiderette Agreement ('Agreement') is made and entered into … *by and between the Oakland* Raiders, a California limited partnership ('CLUB') *and [name redacted] ('RAIDERRETTE')* ….)." (emphasis added)

[9] Note, any argument by Plaintiffs that the NFL "suffered or permitted" them to work because the NFL received some benefit from their services would have no bearing on the employment analysis. *Martinez,* 49 Cal. 4th. at 70 ("[T]he concept of a benefit is neither a necessary nor a sufficient condition for liability under the 'suffer or permit' standard. Instead, as we have explained, the basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring.") (emphasis in original).

Thus, the NFL is not, and never was, Plaintiffs' "employer" under any of the applicable definitions.[10] Plaintiffs' labor-based causes of action – the Second through Sixth, and Eighth through Fourteenth Causes of Action – fail as a matter of law.

2. No Agency Relationship Exists Between the NFL and the Oakland Raiders with Respect to Plaintiffs' Employment

Plaintiffs assert that based on the Bylaws and "by regulating the Raiderette Agreements ... an agency relationship between the NFL and the Raiders was created for the purposes of regulating Raiderette employment." Compl. ¶ 29. No agency relationship exists between the NFL and the Raiders with respect to Plaintiffs' employment because the NFL did not "control the activities" of the Raiders. *CenterPoint Energy, Inc. v. Superior Court*, 157 Cal. App. 4th 1101, 1118 (2007).

Plaintiffs do not, and cannot, point to any provision of the Bylaws that grants the NFL the right to control, or as Plaintiffs would state, "direct and regulate," the Raiders with respect to Plaintiffs' wages, hours, and working conditions. This is because nothing in the Bylaws grants the NFL any such right. The NFL does not even have the authority to disprove the Raiderette Agreements, as it does for coaches and players. *Compare* RJN, Ex. A, § 9.3(A)(2), *with id.*, §§ 9.3(A)(1), 15.4. Moreover, the few "specific terms" of Plaintiffs' employment the NFL allegedly regulates through the Bylaws are completely unrelated to Plaintiffs' "wages, hours, and working conditions."[11] Because the Bylaws unequivocally do not grant the NFL any right to control the Raiders with respect to Plaintiffs' wages, hours, and working conditions, Plaintiffs' conclusory allegations of agency are properly disposed of via demurrer. *CenterPoint Energy*, 157 Cal. App. 4th at 1118 ("[W]here the evidence is undisputed, the issue [of agency] becomes

[10] Although it no longer applies to alleged Labor Code violations, the NFL also would not be deemed Plaintiffs' "employer" under the common law definition because, as further discussed in Section IV(B)(1)(a), the NFL has minimal, if any, control over the details of Plaintiffs' employment and lacks the power to hire or fire Plaintiffs. *Futrell*, 190 Cal. App. 4th at 1434 ("The essence of the common law test of employment is in the 'control of the details.'"); *id.* at 1435 (holding that common law definition of employment did not result in finding that defendant was plaintiff's employer because defendant "did not and could not hire or fire [plaintiff], nor did [defendant] have any control over [plaintiff's] work activities."); *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1187 (2012) ("Under common law, the principal test of an employment relationship is whether the alleged employer 'has the right to control the manner and means of accomplishing the result desired.'") (citations omitted).

[11] *See* note 2, *supra.*

one of law."); *Hoffman*, 179 Cal. App. 4th at 400 ("We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.").

It is irrelevant whether or not the Raiderette Agreement is required to be filed with the NFL, that the NFL may have known the terms of the agreement, or that the Bylaws allegedly "regulate specific terms and conditions which must be present" in the agreement, because the Bylaws do not give the NFL *the right to control* the Raiders actions with respect to Plaintiffs' "wages, hours, and working conditions." *Korean Air Lines Co., Ltd. v. Cnty. of Los Angeles*, 162 Cal. App. 4th 552, 562 (2008) ("An agent acts on behalf of the principal and subject to the principal's control.") (citing *Van't Rood v. County of Santa Clara*, 113 Cal. App. 4th 549, 571 (2003)). "In the absence of the essential characteristic of the right of control, there is no true agency ...." *Edwards v. Freeman*, 34 Cal. 2d 589, 592 (1949); *accord Korean Air Lines*, 162 Cal. App. 4th at 562; *Van't Rood*, 113 Cal. App. 4th at 572.

Thus, under no set of circumstances can the NFL be deemed Plaintiffs' direct or indirect employer, and Plaintiffs' labor-based causes of action of action – specifically, the Second through Sixth, and Eighth through Fourteenth Causes of Action – fail to state any claim against the NFL as a matter of law.

3. Any Purported Labor Code Challenge to the NFL's Alleged Conduct Would Be Unconstitutional

In any event, Plaintiffs' state labor claims are barred by *Partee* and its progeny. *Partee*'s reasoning is equally applicable to the California Labor Code – just as with state antitrust laws, divergent state legislation concerning employer-employee relations would disrupt and have a "significant impact on the whole league fabric...." *Valley Bank,* 914 F.2d at 1192; *see also Turner*, 2004 WL 5258113 (the "state cannot regulate substantial elements of sports leagues because the leagues are inherently interdependent and require uniformity across all states"). *Hebert*, for this same reason, extended *Partee* to bar challenges to the NFL's activities under the California Constitution and Business & Professions Code § 16600, which represents "a strong public policy of the state," *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 949 (2008). *Hebert*, 23 Cal. App. 4th at 424-25.

This Court should not permit Plaintiffs to circumvent the essence of *Partee* and *Hebert* by challenging the NFL's activities by simply asserting claims under a different set of California statutes. Because Plaintiffs' Labor Code and IWC Wage Order-based claims against the NFL, like the claims in *Partee* and *Hebert*, "would constitute an impermissible burden on interstate commerce," those claims must be dismissed. *Id.* at 425.

C. Plaintiffs' Business & Professions Code § 17200 Claim Fails as a Matter of Law (Seventh Cause of Action)

Plaintiffs next contend that the NFL violated California Business and Professions Code § 17200 et seq. ("UCL"). Compl. ¶ 128. They have not, however, stated any facts on which to base such a claim because their underlying wage and hour claims fail (see section IV(B)). *See Byars v. SCME Mortgage Bankers, Inc.*, 109 Cal. App. 4th 1134, 1147 (2003) ("a business practice that might otherwise be considered unfair or deceptive cannot be the basis of a section 17200 cause of action if the conduct has been deemed lawful"). In any event, *Partee* and its progeny are such that the application of the UCL to Plaintiffs' employment (assuming somehow that the NFL were their employer) would be unconstitutional as an impermissible burden on interstate commerce. *Partee*, 34 Cal. 3d at 380; *Hebert*, 23 Cal. App. 4th at 422-25.

D. Plaintiffs' Breach of Contract Claim Fails as a Matter of Law (Fifteenth Cause of Action)

The NFL is not a signatory to the Raiderette Agreement between Plaintiffs and the Raiders. *See* Compl., Ex. A. Plaintiffs nevertheless conclude that the NFL "by operation of law" became a party to the Raiderette Agreement because the Bylaws allegedly require it to be filed with the NFL and the NFL must have been aware of its terms. Compl. ¶ 29. On the contrary, receiving a copy of someone else's agreement, or reading it, does not mean that the NFL made it, agreed to be bound by it, or established or agreed to any of its terms, much less those at issue here. *See Gold,* 178 Cal. App. 2d at 519 (1960) ("breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations"); *Cf. Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999) (mutual assent is necessary to form a contract). The NFL, as a matter of law and logic, cannot have breached a contract to which it was not a party. Plaintiffs have not, and cannot,

plead facts to show any contractual relationship existed between them and the NFL, and in the absence of such allegations Plaintiffs' breach of contract claim necessarily fails.

V. NO AMENDMENT COULD CURE THE LEGAL DEFECTS IN PLAINTIFFS' CASE

The Court should exercise its discretion to sustain the demurrer without leave to amend. "Sustaining a general demurrer without leave to amend is not an abuse of discretion if it appears from the complaint that under applicable substantive law there is no reasonable probability that the defect can be cured by amendment." *Hebert*, 23 Cal. App. 4th at 425-26. No amendment could cure the legal defects in this complaint, because it relies on a story of the NFL's involvement that is demonstrably false, and asserts claims that would be unconstitutional if it were true.

VI. CONCLUSION

For the reasons stated above, the National Football League respectfully requests that the Court sustain its Demurrer without leave to amend.

DATED: July 3, 2014

BINGHAM MCCUTCHEN LLP

By: _____

Debra L. Fischer
Attorneys for Defendant
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PROOF OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in Los Angeles County, California at 355 South Grand Avenue, Suite 4400, Los Angeles, California 90071-3106. I am readily familiar with the practice of this office for collection and processing of correspondence for mail/fax/hand delivery/next business day delivery, and they are deposited that same day in the ordinary course of business.

On July 3, 2014, I served the attached:

DEFENDANT NATIONAL FOOTBALL LEAGUE'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

☐ (BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at Los Angeles, California in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

☒ (EXPRESS MAIL/OVERNIGHT DELIVERY) by causing a true and correct copy of the document(s) listed above to be delivered by UPS Next Day Air in a sealed envelope(s) with all fees prepaid at the address(es) set forth below.

☒ (COURTESY COPY -- VIA EMAIL) by transmitting a true and correct copy via email of the document(s) listed above on this date before 5:00 p.m. PST to the person(s) at the email address(es) set forth below.

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THE OAKLAND RAIDERS

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 3, 2014 at Los Angeles, California.

Nichele M. Goitia