UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	16-CV-6603 PSG (PLAx)	Date	October 20, 2017
Title	Kimberly Archie, *et al* V. Pop Warner Little Scholars, Inc. *et al*		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): **The Court GRANTS IN PART and DENIES IN PART Defendant PWLS's Motion to Dismiss, and GRANTS Defendant NOCSAE's Motion to Dismiss**

Before the Court are Defendants Pop Warner Little Scholars and National Operating Committee on Standards Athletic Equipment's motions to dismiss Kimberly Archie, *et al*'s Second Amended Complaint. Dkts. # 82, 85. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. Having considered the moving, opposing, and reply papers, the Court GRANTS In Part and DENIES In Part Defendant Pop Warner Little Scholars' motion to dismiss, and GRANTS Defendant National Operating Committee on Standards Athletic Equipment's motion to dismiss.

I. Background

The background of the case was laid out in detail in the Court's May 12, 2017 Order, and will only be summarized here. *See* Dkt. # 72. Plaintiffs Kimberly Archie (as a survivor of decedent Paul Bright), Jo Cornell (as a survivor of decedent Tyler Cornell), Debra McCrae (on behalf of Richard Caldwell), and Shannon Barnes (guardian ad litem for Chase, Drew, and Cade Barnes) (collectively, "Plaintiffs") bring this putative class action on behalf of their children who at various times between 1996 and 2015 played youth tackle football. *See* Dkt. # 76, *Second Amended Complaint* ("*SAC*"). Plaintiffs assert that Defendants Pop Warner Little Scholars, Inc. ("PWLS") and the National Operating Committee on Standards for Athletic Equipment ("NOCSAE") failed to provide for the safety and health of child participants in the Pop Warner youth football program. *See id.* As a result of Defendants' actions, representations, and omissions, Plaintiffs allege their children suffered various head injuries while playing football which, in the years after they stopped playing, led to troubling behavioral issues, depression, and even untimely death from Chronic Traumatic Encephalopathy ("CTE"). *See generally id.*

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Plaintiffs bring the following seven causes of action against both Defendants: (1) negligence; (2) fraud; (3) fraudulent concealment; (4) negligent misrepresentation; (5) wrongful death; (6) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*.; and (7) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §§ 17500 *et seq*. *See id*.

In response to Plaintiffs' first amended complaint, PWLS and NOCSAE each filed a motion to dismiss. Dkts. # 50, 53. On May 12, 2017, the Court granted both motions without prejudice. Dkt. # 72. Defendants now file motions to dismiss Plaintiffs' Second Amended Complaint. Dkts. # 82 ("*PW Mot.*"), 85 ("*NOCSAE Mot.*"). The Court will consider each motion in turn.

II. Legal Standard

A. Rule 12(b)(1)

A plaintiff must "have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (citation omitted). The "irreducible constitutional minimum" of Article III standing has three elements: (1) the plaintiff must have suffered an injury; (2) that is causally related to the defendant's challenged actions; and (3) it must be "likely" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). The plaintiff, as the party invoking federal jurisdiction, has the burden of establishing these elements. *See Lujan*, 504 U.S. at 561. Article III standing bears on the court's subject matter jurisdiction, and is therefore subject to challenge under Federal Rule of Civil Procedure 12(b)(1). *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

B. Rule 12(b)(2)

Pursuant to Federal Rule of Civil Procedure 12(b)(2), a party may seek dismissal of an action for lack of personal jurisdiction. Fed. R. Civ. P. 12(b). Once a party seeks dismissal under Rule 12(b)(2), the plaintiff has the burden of demonstrating that personal jurisdiction exists. *Menken v. Emm*, 503 F.3d 1050, 1056 (9th Cir. 2007); *Browne v. McCain*, 612 F. Supp. 2d 1118, 1122 (C.D. Cal. 2009). When a court rules on a motion to dismiss for lack of personal jurisdiction, the plaintiff "need make only a prima facie showing of jurisdictional facts to withstand the motion to dismiss." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). A court may "consider evidence presented in affidavits to assist in the determination." *Doe v.*

Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001). In the case of "conflicts between the facts in the parties' affidavits," such conflicts "must be resolved in [the plaintiff's] favor." *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996) (citation omitted). However, "the plaintiff cannot simply rest on the bare allegations of its complaint." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004) (citation and internal quotation marks omitted). A jurisdictional attack may be facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004). In reviewing a facial attack, the court must accept the allegations of the complaint as true. *Id.* In a factual attack, the court may consider evidence outside the pleadings. *Id.* at 1038-39.

There is no applicable federal statute governing personal jurisdiction in this case. Accordingly, the Court applies the law of California, the state in which the district court sits. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). "California's long-arm jurisdictional statute is coextensive with federal due process requirements, so that the jurisdictional analysis under state law and federal due process [is] the same." *Urban Textile, Inc. v. A&E Stores, Inc.*, No. CV 14-1554 CAS (ASx), 2014 WL 3955173, at *1 (C.D. Cal. Aug. 11, 2014); *see also* Cal. Civ. Proc. Code § 410.10 ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Roth v. Garcia Marquez*, 942 F.2d 617, 620 (9th Cir. 1991).

C. 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City and Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

III. Discussion

A. PWLS's Motion to Dismiss

PWLS argues that the SAC should be dismissed for (1) lack of personal jurisdiction over PWLS; (2) untimeliness of Plaintiffs' claims; (3) lack of standing; and (4) failure to state a claim under Rule 12(b)(6). *PW Mot.* 3.

i. Personal Jurisdiction

a. General Jurisdiction

In its May 12 Order, the Court determined it had no general jurisdiction over PWLS in California. PWLS is a Pennsylvania corporation with its principal place of business in Langhorne, Pennsylvania. *Butler Decl.* ¶ 3. PWLS has no office, mailing address, employees or subsidiaries in California, maintains no bank accounts or agent for service of process in California, and neither pays taxes nor is registered to do business in California. *Id*. Plaintiffs' opposition does not address the general jurisdiction issue, but rather skips over it to specific jurisdiction. *See Plaintiffs' Opposition* ("*PWLS Opp*.") 3. The Court will therefore treat PWLS's general jurisdiction argument as conceded by Plaintiffs.

b. Specific Jurisdiction

Specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1068 (9th Cir. 2015) (quoting *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). The Ninth Circuit uses a three-part test to determine whether specific jurisdiction exists:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
> (2) the claim must be one which arises out of or relates to the defendant's forum related activities; and
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Picot v. Weston, 780 F.3d 1206, 1211 (9th Cir. 2015) (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). Here, the Court labels these three prongs of specific jurisdiction (1) "minimum contacts," which has its own three sub-elements, (2) "arising out of forum activities," and (3) "reasonableness." Plaintiffs bear the burden of proof for the first two prongs, but if both are established, the "the defendant must come forward with a 'compelling case' that the exercise of jurisdiction would not be reasonable." *Boschetto v. Hansing*, 539 F.3d 1011, 1016 (9th Cir. 2008). Specific jurisdiction is lacking if any of the

prongs are not established. *Pebble Beach*, 453 F.3d at 1155 (quoting *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270 (9th Cir. 1995)).

1. Minimum Contacts

The minimum contacts prong of the specific jurisdiction analysis embodies two distinct concepts: purposeful availment and purposeful direction. *See Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 672 (9th Cir. 2012). Purposeful availment is most often used in contract suits, and purposeful direction is most often used in tort suits. *Schwarzenneger*, 374 F.3d at 802. Because Plaintiffs' claims arise in tort, the Court applies the purposeful direction analysis. *See id.* at 803; *see also Adidas Am., Inc. v. Cougar Sport, Inc.*, 169 F. Supp. 3d 1079, 1087 (D. Or. 2016).

Ninth Circuit courts use a three-part test (the "effects test") from the Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984), to evaluate minimum contacts in the purposeful direction context. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). The three elements of this minimum contacts test are: "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Picot*, 780 F.3d at 1214 (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)). The Supreme Court has held that due process permits the exercise of personal jurisdiction over a defendant who "purposefully direct[s]" his activities at residents of a forum, even in the "absence of physical contacts" with the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

a. Intentional Act

Under the first element of the *Calder* test, Plaintiffs must demonstrate that PWLS committed an "intentional act." Under the test, an "intentional act" is an "external manifestation of the actor's intent to perform an actual, physical act in the real world." *Wash. Shoe*, 704 F.3d at 674. Plaintiffs allege that PWLS "operates and controls several Pop Warner leagues throughout California," and "plays an active role in creating Pop Warner leagues throughout the state of California." *See SAC* ¶ 64. They allege that PWLS collects a fee of $25 per California league (*Id.* ¶ 67), sells and requires participants to wear PWLS patches (*Id.* ¶ 82), provides helmets (*Id.* ¶ 83), schedules games (*Id.* ¶ 84), and sets deadlines for registration (*Id.* ¶ 85). These acts are sufficient to meet the "intentional act" prong within the meaning of the *Calder* test.

b. Expressly Aimed

Under the second element of the *Calder* test, Plaintiffs must demonstrate that Pop Warner "expressly aimed" its actions at the forum state. The Ninth Circuit has "emphasized that 'something more' than mere foreseeability [is required] in order to justify the assertion of personal jurisdiction . . . and that 'something more' means conduct expressly aimed at the forum." *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010) (first alteration in original) (citations omitted).

Moreover, cases from this Circuit hold that "express aiming" encompasses wrongful conduct that targets a known forum resident. *Bancroft & Masters*, 223 F.3d at 1087; *Automattic Inc. v. Steiner*, 82 F. Supp. 3d 1011, 1023 (N.D. Cal. 2015) ("The express aiming requirement is satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.'"); *Attilio Giusti Leombruni S.p.A. v. Lsil & Co.*, No. CV-15-002128-BRO-EX, 2015 WL 12743878, at *8 (C.D. Cal. May 29, 2015) (same); *Disney Enterprises, Inc. v. Fun Vacation Network*, LLC, No. LACV-15-08062-JAK-PJWX, 2016 WL 7444860, at *4 (C.D. Cal. May 16, 2016) (same).

Plaintiffs argue that PWLS expressly aimed its activities at California when it entered into contracts with California conferences, ensuring California leagues abide by its official rules; when it charges $25 for league registration; and when it mandates that leagues purchase its rule book. *SAC* ¶¶ 66, 71. Further, PWLS requires California players to wear a Pop Warner patch, sold by PWLS. *Id.* ¶ 82. PWLS's website offers a "National League Finder" to help consumers find their local leagues. *Id.* ¶ 81. It also facilitates local California leagues' recruitment of coaches, and provides all necessary forms for California leagues and players (i.e., insurance forms, background check forms, manuals, and calendars). *Id.* "Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every state in which it is accessed." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1231 (9th Cir. 2011). Courts in the Ninth Circuit "typically examine the 'level of interactivity and commercial nature of the exchange of information that occurs on the website to determine if sufficient contacts exist to warrant the exercise of jurisdiction.'" *Craigslist, Inc. v. Kerbel*, No. C 11-3309 EMC, 2012 WL 3166798, at *4 (N.D. Cal. Aug. 2, 2012) (quoting *Cybersell v. Cybersell*, 130 F.3d 414, 416 (9th Cir. 1997)).

Defendant's website, www.popwarner.com, is interactive in nature in that it helps California leagues and players comply with PWLS's rules, regulations, and calendar, as well as helping people locate leagues and coaches; it is also commercial in that it allows Californians to purchase required rule books and patches. These acts are sufficiently directed at California to pass the second prong of the *Calder* test.

c. Foreseeable Harm

Under the third element of the *Calder* test, Plaintiff must demonstrate that Defendant's "conduct caused harm that it knew was likely to be suffered in the forum." *Brayton Purcell*, 606 F.3d at 1129 (quotation marks omitted). "This element is satisfied when a defendant's intentional act has 'foreseeable effects' in the forum." *Id.* This element may be established even if "the bulk of the harm" occurs outside the forum. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006).

The same facts discussed above are sufficient to make a showing that PWLS knew any harm suffered by Plaintiffs would be suffered in the forum state: PWLS has approximately 14,000 to 32,000 football participants in California, to whom Defendant sold patches and distributed rule books. *SAC* ¶ 65. PWLS knew Plaintiffs were located in California; they must have also known that any harm suffered would have been felt, at least in part, in California. *See Brayton*, 606 F.3d at 1131 (finding that the harm in the forum state was foreseeable because the plaintiff was known to reside in the forum state).

Accordingly, all three elements of the minimum contacts test are satisfied.

2. Arising Out of Forum Activities

The second prong of the specific jurisdiction analysis "is that the claim asserted in the litigation arises out of the defendant's forum related activities." *Panavision Intern., L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998). The Ninth Circuit applies a "but-for" test under which the Court must determine whether the plaintiff would not have suffered injury "but for" the defendant's forum-related conduct. *Id.*; *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) ("The 'but for' test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum."). Generally, the resolution of this prong relies heavily on the court's resolution of the minimum contacts prong. *Dole Food Co., Inc.*, 303 F.3d 1104, 1114 (9th Cir. 2002).

Plaintiffs allege, generally, that PWLS's message of "safety first" misled parents into signing their children up for tackle football and relying on the equipment and coaches, which led to brain injury, disease, and death. *See generally SAC*. As many of the communications, messages, rules, and regulations upon which the parents are alleged to have relied came from PWLS's website, this element is satisfied.

The Court concludes that Plaintiffs have alleged facts sufficient to establish that PWLS has minimum contacts in California and there is some nexus between them and Plaintiffs' claims. Defendants do not raise an argument as to the remaining prong. *See PW Mot* 5-6.

Therefore, the Court concludes that Plaintiffs have established personal jurisdiction over Defendant PLWS.

ii. Timeliness of Claims

a. McCrae's Claims

PWLS asserts that Plaintiff McCrae's claims are time-barred because the SAC alleges only that her son, Richard Caldwell, suffered multiple concussions while playing youth football between 1996 and 2003, and "sometime after" he stopped playing football, "Richard displayed bouts of erratic behavior and was diagnosed with depression." *SAC* ¶ 3; *PW Mot.* 7. Many years later, Caldwell was injured in a car accident rendering him wheelchair-bound. *SAC* ¶ 3. PWLS argues that any injuries that give rise to McCrae's claims occurred no later than 2003, and are thus barred by the relevant statutes of limitations. *PW Mot.* 6.

A federal court sitting in diversity jurisdiction must generally apply the law of the forum state regarding whether an action is barred by the statute of limitations. *Hendrix v. Novartis Pharmaceutical Corp*., 975 F. Supp. 2d 1100, 1105 (C.D. Cal. 2013) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109–10, (1945)). Under California law, negligence actions are subject to a two-year limitation period, Cal. Code Civ. P. § 335.1; fraud, fraudulent concealment, and negligent misrepresentation actions are subject to a three-year limitations period, Cal. Code Civ. P. § 380(d); claims under the FAL are subject to a three-year limitations period, Cal. Code Civ. P. § 338(a); and claims under the UCL are subject to a four-year limitations period, Cal. Bus. & Prof. Code § 17208.

Accordingly, because Richard Caldwell suffered injuries no later than 2003 and McCrae did not file suit until January 9, 2017,[1] the Court agrees that all of McCrae's claims in this action are barred by the relevant statutes of limitations.

In response, Plaintiffs raise the delayed discovery rule, which provides that a cause of action accrues when "the plaintiff discovers, or has reason to discover, that he has been wrongfully injured." *Hendrix*, 975 F. Supp. 2d at 1105. In order for the rule to apply, "the plaintiff must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Yumul v. Smart Balance, Inc*., 733 F. Supp. 2d 1117, 1130-31 (C.D. Cal. 2010) (quoting *Saliter v. Pierce Bros. Mortuaries*, 81 Cal. App. 3d 292, 296 (1978)) (other citations omitted). Plaintiffs argue that McCrae "did not become aware that Richard's participation in youth tackle football caused him

[1] Although this suit was filed on September 1, 2016, McCrae was only added as a Plaintiff in the FAC, filed on January 9, 2017.

to develop chronic traumatic brain injuries until the issue was widely publicized in December 2015. . . [she] could not have become aware before December 2015 because Defendants actively concealed this information from the public." *SAC* ¶ 3.

This argument falls short of meeting the discovery rule's requirement of pleading specific facts that show how and when the discovery happened and why Plaintiffs were unable to make the discovery earlier "despite reasonable diligence." *Yumul*, 733 F. Supp. 2d at 1130-31. As in the first amended complaint, Plaintiffs still allege no facts about how McCrae's discovery of Caldwell's brain injury occurred and what reasonable diligence McCrae engaged in to discover it—the SAC is lacking even in a threshold assertion that brain injury *did* occur, and that it was eventually discovered. Despite Caldwell's "bouts of erratic behavior," Plaintiffs allege no diligence in attempting to illuminate the cause of that behavior. Rather, McCrae states that "discovery" occurred when she saw the movie *Concussion*; but she offers no facts to connect the dots between seeing that film and discovering an actual brain injury in her son. *SAC* ¶ 3; *PWLS Opp*. 13. Plaintiffs state only that the delayed discovery rule applies, but offer no factual allegations to support its application.

Accordingly, because Richard Caldwell's alleged injuries occurred more than 13 years prior to filing suit and McCrae has failed to plead facts that support the application of the delayed discovery rule, the Court GRANTS Defendant's motion to dismiss McCrae's claims as barred by the applicable statute of limitations. McCrae's claims are therefore dismissed from this action with prejudice.

b. Cornell's Claims

PWLS argues that Plaintiff Cornell's claims for negligence and wrongful death are also time-barred by the applicable two-year statute of limitations pursuant to Cal. Code Civ. P. § 335.1 (imposing a two-year limitations period for causes of action arising from "injury to, or for the death of an individual caused by the wrongful act or neglect of another."). *PW Mot*. 8; *NOCSAE Mot*. 17.

Tyler Cornell committed suicide on April 3, 2014, more than two years before Cornell filed suit on September 1, 2016. *SAC* ¶ 2. The SAC alleges that Plaintiff Cornell (Tyler's mother) "did not, and could not, discover that Tyler suffered from Chronic Traumatic Encephalopathy until January 16, 2015 when a posthumous test revealed his diagnosis." *Id*. ¶ 218. As explained above, in order to invoke the delayed discovery rule, Plaintiffs "must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Yumul*, 733 F. Supp. 2d at 1130-31. In other words, "a potential plaintiff who suspects that an injury has been wrongfully caused

must conduct a reasonable investigation of all potential causes of that injury," and that "despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Fox v. Ethicon Endo-Surgery, Inc*. 35 Cal. 4th 797, 808–809 (2005).

Unlike McCrae, Cornell has added facts to the SAC to support the application of the delayed discovery rule. After her son's death, Cornell sent his brain to Boston University to be examined. *SAC* ¶ 2. The results were made available to her on January 16, 2015, when she learned that Tyler suffered from CTE. *Id*. She could not have learned of the diagnosis any earlier than receiving the results of a posthumous brain examination, because she had no reason to suspect that Tyler suffered from brain disease prior to his death and CTE can only be diagnosed posthumously. *Id*. As soon as he died, she sent his brain off for study—an act of diligence in ascertaining the cause of his suicide. *Id*. She filed her claim on September 1, 2016, within two years of the date she received the CTE diagnosis. Cornell alleges the time and manner of discovery, as well as her diligence in procuring a diagnosis. *Id*.

The Court concludes that the application of the delayed discovery rule is properly alleged, and therefore Cornell's claims are not time-barred.

c. Archie's Claims

PWLS also alleges that Plaintiff Archie's claims are time-barred. *PWLS Mot*. 7. Archie's son, Paul Bright, died on September 1, 2014. *SAC* ¶ 1. As with Cornell, Archie (Bright's mother) did not discover her son's CTE until it was diagnosed post-mortem on April 9, 2015, by Boston University. *Id*. She, too, filed suit within two years of that discovery. As with Plaintiff Cornell, the Court determines that Archie has alleged sufficient facts as to her diligence in sending her son's brain for study to determine whether he had a brain injury or disease, as well as the time and manner of the discovery on April 9, 2015 that he suffered from CTE. *Id*. Accordingly, Archie's claims are not time-barred.

In conclusion, the Court **GRANTS** Defendant's motion to dismiss for untimeliness as to Plaintiff McCrae, with prejudice; and **DENIES** its motion to dismiss for untimeliness as to Plaintiffs Cornell and Archie.

iii. Article III Standing

A court does not have subject matter jurisdiction over a case if the plaintiff does not have standing to sue. U.S. Const. art. III, § 2. To satisfy Article III's standing requirements, plaintiff must have (1) suffered an injury in fact, (2) that is traceable to the defendant's acts, and (3) that

can be redressed by a favorable judicial decision. *Chapman v. Pier 1 Imports, Inc.*, 631 F.3d 939, 946 (9th Cir. 2011). PWLS contends that this threshold requirement is not met because (1) Plaintiff Barnes (on behalf of Chase, Drew and Cade Barnes) lacks standing because her children have not suffered an "injury in fact," and (2) Plaintiffs Archie (on behalf of Paul Bright, Jr.), Cornell (on behalf of Tyler Cornell), and McCrae (on behalf of Richard Caldwell) lack standing because they have not shown an injury that is traceable to the allegedly wrongful conduct of PWLS or that can be redressed by judicial decision. *PW Mot.* 9. The Court addresses each argument in turn.

a. Barnes's Standing

To satisfy the injury-in-fact requirement, a plaintiff must show that he has "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 180–81 (2000). The injury alleged by the plaintiff must be "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

Here, the SAC alleges that the Barnes children played Pop Warner football in the Midvalley Pop Warner Conference, Albany association in Oregon as follows: Chase Barnes from 2009 through 2012 and again in 2015, Drew Barnes from 2010 through 2015, and Cade Barnes in 2014. *SAC* ¶ 4. Plaintiffs have amended their complaint to assert that Chase, Drew, and Cade Barnes "have suffered repeated head trauma resulting in micro-concussions and sub-concussive hits to the head," and as a result have been placed at increased risk of chronic injury, including CTE, that is "substantially certain and impending." *Id.*

Instructive on this point is *Mehr v. Féderation Internationale de Football Ass'n*,, a case in which seven young soccer players brought suit against various soccer organizations. *Mehr*, 115 F. Supp. 3d 1035, 1055 (N.D. Cal. 2015). There, each of the seven plaintiffs alleged that, as a result of the actions and inaction of all defendants, he or she was "at increased risk of latent brain injuries caused by repeated head impacts or the accumulation of concussive and/or subconcussive hits in [his/her] soccer career and therefore is in need of medical monitoring." *Id.* at 1054. The Court granted defendants' motion to dismiss on standing grounds, holding that "the alleged 'risk' of latent brain injuries is speculative and nebulous, rather than being 'certainly impending' such that it constitutes a real and immediate injury-in-fact." *Id.* at 1057–58.

The assertions of injury here are analogous; although Plaintiffs have amended their Complaint to include actual injuries suffered by the Barnes children while paying football, as in *Mehr*, the increased risk of a potential future injury is insufficient to meet the injury-in-fact

requirement of Article III standing. *Whitmore*, 495 U.S. at 157–58 ("[a]llegations of possible future injury" are not sufficient); *Lujan*, 504 U.S. 555, 564 n.2 (alleged injury too speculative for Article III purposes where "the plaintiff alleges only an injury at some indefinite future time."). As repeatedly emphasized by the Supreme Court, the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013); *Whitmore*, 495 U.S. at 158; *Lujan*, 504 U.S. 555, 564 n.2 ("Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'").

Courts have held that future injury is enough to confer standing where, for instance, "plaintiffs are not relying on speculative future harm, but on their *present* injuries" (emphasis in original), *Carlough v. Anchem Products*, 834 F.Supp. 1437, 1454-55 (E.D. Penn. 1993) (finding standing where plaintiffs had not yet developed asbestos-related disease because exposure to asbestos necessarily "causes immediate 'bodily injury' ..." even if disease is not manifested until much later.). Here, on the other hand, Plaintiffs have alleged neither that head trauma sustained playing football will necessarily result in later brain disease, nor that the Barnes children have any present brain injury. They have alleged only that head trauma occurred years ago while playing youth football; they have not alleged that those incidents led to actual brain injury that in turn could lead to disease or CTE. Similarly, although Plaintiffs use the terms "substantially certain and impending," they have alleged no facts to establish that chronic brain injury, disease, or CTE is "certainly impending." Plaintiffs state that CTE can result from "the cumulative toll of hundreds of traumatic impacts to the brain," and "brain damage can occur . . . from traumatic forces." *SAC* ¶¶ 38, 48. Nowhere do Plaintiffs claim, however, that all players of youth tackle football who sustained hits to the head will necessarily develop brain injury, disease, or CTE. In opposition, Plaintiffs state, for the first time, that "the probability of this occurrence is undeniable." *See Omalu Decl.* ¶ 24. But they have offered no facts in the SAC that brain injury, disease, or CTE is an undeniable outcome for the Barnes children.

Accordingly, because Barnes has not alleged that her children Chase, Drew and Cade have future injury that is "certainly impending," Barnes lacks Article III standing in this action. The Court need not reach the other two prongs of the standing analysis. PWLS's motion to dismiss Barnes and her claims on behalf of her three children is therefore **GRANTED**, with prejudice.

b. Archie & Cornell's Standing

i. Injury

Next, PWLS argues that Archie and Cornell lack standing because neither has alleged "a particular injury on a particular occasion in youth football." PWLS Mot. 10. Plaintiffs allege that Paul Bright, Jr. played youth football between 1997 and 2004, and Tyler Cornell played youth football between 1997 and 2002. *See SAC* ¶¶ 1–2. PWLS calls it "pure speculation" that Paul Bright and Tyler Cornell were injured playing youth football, and (quite unnecessarily) points out that there is no risk of future injury to them because they are deceased. PW Mot. 10. These two Plaintiffs do allege head injuries sustained while playing Pop Warner football. *See SAC* ¶¶ 1–2. While they have not specified dates and details of each incident of injury, it is not "pure speculation" that they were injured; further, each was later given a posthumous CTE diagnosis. Id. Bright and Cornell sustained multiple head injuries while playing football, and later received an actual CTE diagnosis; the Court is persuaded that an injury-in-fact as to these two Plaintiffs has been sufficiently pleaded.

Having found an injury as to Plaintiffs Archie and Cornell, the Court now turns to the remaining prong in the standing analysis.

ii. Traceable to PWLS

The second prong is that the injury alleged must be fairly traceable to the defendant's acts. PWLS argues that none of the Plaintiffs have pleaded an injury traceable to an act or omission of PWLS. PWLS Mot. 13. The remaining Plaintiffs (Archie and Cornell) have sufficiently pleaded injuries that occurred while playing Pop Warner football as well as latent brain injuries many years later, as noted above. The causal link between repeated head trauma and brain damage, injury, and disease is well established. *SAC* ¶¶ 39-51; *Omalu Dec*. ¶¶ 14, 15, 25. The Court concludes it is plausible that as alleged, Plaintiffs' repeated head injuries sustained playing youth tackle football resulted in brain injury and CTE, and are thus traceable to acts or omissions by PWLS.

iii. Redressability

PWLS argues that Plaintiffs injuries cannot be redressed because the injuries, including the CTE deaths, have already occurred and none of the Plaintiffs continues to play football. PW Mot. 13. Plaintiffs allege economic losses, however, including loss of income and other money damages arising from their injuries. *See SAC* ¶ 163. The Court agrees with Plaintiffs that a favorable decision from the Court would, at least in part, redress their injuries, and accordingly, this element is satisfied.

PWLS also argues that Archie and Cornell lack standing as "survivors" because they failed to execute an affidavit required by Cal. Civ. Proc. § 377.32. *PW Mot*. 15. Plaintiffs

Archie and Cornell are not, however, bringing survival actions under § 377.32. Rather, they are bringing a wrongful death action, and as parents, they have standing to do so ("A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by the decedent's . . . parents." *See* Cal. Civ. Proc. Code § 377.60).

Accordingly, Plaintiffs Archie and Cornell, parents of Paul Bright and Tyler Cornell, respectively, have established standing, and Defendant's motion to dismiss on this basis is **DENIED**.

iv. Abstention

Defendant PWLS argues that the Court should abstain from exercising jurisdiction "because the Court's expertise is not in establishing medical guidelines or equipment standards . . . if the Court were to grant relief, it would re-write rules for thousands of PWLS associations nationwide." PWLS Mot. 16. Plaintiffs are seeking damages under theories of negligence, fraud, and wrongful death; the only injunctive relief they request that implicates the establishment of helmet safety guidelines or equipment standards is requested of Defendant NOCSAE alone. *SAC* 47:20-24. As discussed below, the Court lacks personal jurisdiction over NOCSAE and dismisses it from the action; accordingly, the Court **DENIES** PWLS's motion to dismiss on this basis.

v. Failure to State a Claim

Defendant PWLS asserts that Plaintiffs have failed to state a claim as to the First, Second, Third, Fourth, Sixth, and Seventh causes of action. *PW Mot.* 18.

a. Negligence Claim

Plaintiffs' first cause of action is for negligence. *See SAC* 27. To establish a cause of action for negligence, a plaintiff must allege: (1) the defendant owed the plaintiff a duty of due care; (2) the defendant breached that duty; (3) the plaintiff suffered injury; and (4) the breach proximately caused the injury. *Resolution Tr. Corp. v. Rossmoor Corp.*, 34 Cal. App. 4th 93, 101 (1995). Defendants argue that Plaintiff failed to state a claim for negligence because (1) Defendants owed no cognizable duty to Plaintiffs, and (2) PWLS was not the proximate cause of Plaintiffs' injuries.

i. *Duty*

A fundamental element of any cause of action for negligence is the existence of a duty of care running from defendant to plaintiff. *Vasilenko v. Grace Family Church*, 248 Cal. App. 4th 146, 152 (2016). In the sports context, California recognizes that there is no duty to prevent risks "inherent in the sport itself" *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992); rather, there is a duty "not to increase the risks to a participant over and above those inherent in the sport." *Id*.; *see also Avila v. Citrus Comty Coll. Dist.*, 131 P.3d 383 (Cal. 2006) (holding school had no duty to player injured by a pitch thrown during tournament it was hosting); *Balthazor v. Little League Baseball, Inc*., 72 Cal. App. 2d 337, 341 (1998) (holding league had no duty to provide equipment to guard against being hit by errant balls); *Danieley v. Goldmine Ski Associates, Inc*., 266 Cal. App. 749, 757 (1990) (holding ski operator had no duty to remove trees because natural obstacles are inherent risk of skiing). Thus, in the context of inherent risk in sports, there is no duty to minimize or decrease inherent risk—only a duty not to increase it.

Plaintiffs acknowledge that head injuries are an inherent risk in the sport of tackle football. *SAC* ¶¶ 142, 145. Their burden, then, is to establish that PWLS *increased* the inherent risk of tackle football. In its first amended complaint, Plaintiffs alleged that PWLS "failed to reduce the inherent risk of the sport," which is not the legal standard with which Defendants must comply. Dkt. # 40, *FAC* ¶ 57. Plaintiffs now state that they "do not allege that Pop Warner failed to minimize or reduce the inherent risks of youth tackle football." *PWLS Opp*. 19. In fact, their SAC alleges exactly that: that PWLS should have taken the actions listed above "so as to minimize the long-term risks" inherent in tackle football. *SAC* ¶ 149. PWLS does not have a legal duty to minimize the inherent risks—they have a duty not to increase them. Despite Plaintiffs word choice, they have alleged sufficient facts of an increased risk to survive the pleading stage.

Plaintiffs argue that PWLS failed to create and implement league-wide guidelines (*SAC* ¶ 143), failed to adopt equipment standards (*Id.* ¶ 144), failed to require brain injury history (*Id.* ¶ 149), and failed to approve the best equipment available (*Id.*). The Court agrees with Plaintiff that by failing to institute league-wide guidelines, PWLS increased the risk of head injury to its youth players. As Plaintiffs note, other sporting associations have, for decades, used and implemented standardized concussion management rules. *Id.* ¶ 146. PWLS, by failing to create similar guidelines, allowed each of its leagues to adopt their own coaching standards and play techniques, which could encompass dangerous, outdated "lead with the head" instructions or other similar tactics. Plaintiffs have alleged an abundance of facts to illustrate the increased risk of head trauma football poses to children, and PWLS's failure to respond to that risk with appropriate league-wide safety guidelines, such as a mandated reduction in head-to-head contact, increased it. *See Id*. ¶¶ 42-46. Similarly, allowing a child with a pre-existing brain injury to play tackle football would greatly increase his risk of further brain trauma, and PWLS increased

that risk by failing to find to take a history from each child and disallowing those with prior brain injuries to play. *Id.* ¶¶ 42, 149.

Plaintiffs also argue that PWLS increased the risks associated with tackle football by "providing defective equipment that was not adequately designed or tested to protect minor participants from harm."[2] *SAC* ¶¶ 23-24, 49. If PWLS indeed provided defective helmets knowing they had design defects that would increase the risk of injury if players received contact to the head, they would certainly have increased the risk of the sport and breached their legal duty. Plaintiffs have not alleged any facts, however, supporting that the helmets were inadequately designed or contained defects, nor that PWLS knew of any such defects. However, PWLS "mandated the use of helmets that 'Meet[] NOCSAE Standards' (*Id*. ¶ 135) and "failed to warn the Plaintiffs. . . about the dangers of using improper equipment." *Id*. ¶ 50. Whether or not the helmets were defective, they were not safety-tested for use on children, and thus "not adequately tested to protect minor participants from harm." *Id*. ¶¶ 23-24, 30, 49. Mandating the use of helmets that have not been safety tested for children, and which bore the NOCSAE seal of approval, increased the risks for youth players; the NOCSAE rating standard, even in adults, results in a high likelihood of concussion. *Id*. ¶ 23. In children, then, the probability of concussion would necessarily be even higher. *See Id.* ¶¶ 42-46. Furthermore, the mandatory use of such helmets means that parents and coaches were not allowed to provide a safer alternative for their youth players.

Alternatively, Plaintiffs argue that Defendants assumed a duty under the "voluntary undertaking" doctrine. *SAC* ¶¶ 134, 135. "A volunteer with no initial duty, who undertakes protective services for another, has a duty to exercise due care if his failure of care increases the risk of harm, or if the other person reasonably relies on his undertaking and suffers injury." *Delgado v. Trax Bar and Grill*, 113 Cal. 1159, 1175 (Cal. 2005). PWLS argues that its "safety first" statements do not rise to the level of establishing a voluntary undertaking, noting that "voluntary efforts at minimizing risk do not demonstrate that defendant bore a legal duty to do so." *Nalwa v. Cedar Fair, L.P.*, 55 Cal. 4th 1148, 1163 (2012) (efforts to discourage bumper car drivers from head-on collisions did not create "voluntary undertaking" duty). Likewise, the court in *Mehr* held that implementing a Concussion Management Program and adopting a Concussion Procedure and Protocol did not create an affirmative duty to reduce the risk of concussion inherent in the sport of soccer. *Mehr*, 115 F. Supp. 3d at 1065. Plaintiffs argue that the cases relied on by Defendant, including *Mehr*, are distinguishable because in those cases, the defendants "did nothing to increase the risks inherent in the sport." *PWLS Opp*. 19. Here, they

[2] The Court notes that Plaintiffs allege the helmets had "known design defects," (*SAC* ¶ 49), "were not adequately designed" (*Id*. ¶ 60), and were "defective equipment that was not adequately designed." *PWLS Opp*. 20. Plaintiffs seem to be arguing a products liability claim, though they have not included the helmet manufacturer in this action.

contend, PWLS required the use of "dangerous equipment *designed to increase the risk* to minor participants." *Id*. (emphasis added). Putting aside that Plaintiffs have not elsewhere alleged that Pop Warner's equipment was actually designed to increase risks to youth players, the Court has already determined that Plaintiffs have satisfied their burden of pleading that Defendant PWLS increased the inherent risks of youth tackle football; they need not rely on the alternative voluntary undertaking theory.

ii. Causation

To establish a claim for negligence, Plaintiff must also show that the harm that it suffered was proximately caused by Defendants' actions. *See Tribeca Cos., LLC v. First Am. Title Ins. Co.*, 239 Cal. App. 4th 1088, 1103 (2015). The test of whether an independent intervening act breaks the chain of causation is "foreseeability." *Paskenta Band of Nomlaki Indians v. Crosby*, 122 F. Supp. 3d 982, 996 (E.D. Cal. 2015) (quoting *Schrimser v. Bryson*, 58 Cal. App. 3d 660, 664 (1976)). "An act is not foreseeable and is thus a superseding cause of injury if the independent intervening act is highly unusual or extraordinary, not reasonably likely to happen." *Paskenta*, 122 F. Supp. at 996.

PWLS argues that "[a]ny act of PWLS is too removed from the risk of injury to be a proximate cause, as a matter of law." *PWLS Mot.* 19. As Plaintiffs correctly note, they are not required to *prove* causation at the pleading stage; they need only allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plaintiffs have alleged sufficient facts to establish a plausible scenario in which the head trauma suffered while participating in youth tackle football caused severe brain injury. *See SAC* ¶¶ 37-49. Accordingly, PWLS's motion to dismiss the negligence claim (First cause of action) is **DENIED**.

b. Fraud and Misrepresentation Claims

Under California law, the elements of fraud are "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997). "In diversity cases where the cause of action is fraud, the substantive elements of fraud are determined by state law. These elements, however, must be pleaded in accordance with Fed.R.Civ.P. 9(b)." *Smith v. Allstate Ins. Co.*, 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001). "Under Rule 9(b), a party must state with particularity the circumstances constituting fraud or mistake. Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give

defendants notice of the *particular* misconduct so that they can defend against the charge." *Gerard v. Wells Fargo Bank, N.A.*, No. CV 14-03935 MMM (SHx), 2015 WL 12791416, at *6 (C.D. Cal. Jan. 22, 2015) (emphasis in original) (internal quotation marks and citations omitted); *see also Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003) ("Averments of fraud must be accompanied by the who, what, when, where, and how of the misconduct charged.") (internal quotation marks omitted). The Ninth Circuit has highlighted two requirements for particularity under Rule 9(b). First, fraud allegations must include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004)). Second, the allegation must also include "an explanation as to why the statement or omission complained of was false or misleading." *Johnson v. Wal-Mart Stores, Inc.*, 544 Fed. App'x 696, 698 (9th Cir. 2013). "As a consequence of this second requirement, the plaintiff is precluded from simply pointing to a defendant's statement, noting that the content of the statement conflicts with the current state of affairs, and then concluding that the statement in question was false when made." *Smith*, 160 F. Supp. 2d at 1153.

Here, PWLS argues that the fraud claims fail because head trauma is an inherent risk of tackle football, and at no time did PWLS misrepresent that the sport was "free of risk." *PWLS Mot*. 23. That is not, however, the thrust of Plaintiffs' fraud claims. Rather, they allege that PWLS misrepresented that safety was its top priority, with coaches trained in head injuries, equipment that afforded the best protection, and rules and procedures designed to protect children from injury—all with the knowledge that none of this was true, to boost the number of Pop Warner participants. *See generally SAC*.

Plaintiff has proffered sufficient facts regarding misrepresentation of PWLS's safety protocols, including coaching staff and equipment use, with specific instances of actual statements issued by the organization. For instance, Pop Warner's website states that "[t]he safety of our athletes is *always the top priority* . . . we provide extensive training for all our football . . . coaches," (emphasis in original) *see id*. ¶ 53, while Pop Warner does not in fact ensure that coaches receive any training at all. *Id*. ¶ 54. PWLS argues that because it makes no representation about what measures are taken to ensure or enforce the coaches' training, they have made no misrepresentation. *PWLS Mot*. 24. Similarly, they argue there can be no false or misleading statement in "safety is always the top priority," because there is no objective standard against which to measure this claim. *Id*. The Court finds these arguments unpersuasive. PWLS's "safety-first" message omitted that PWLS equipment was not safety-tested for children (*SAC* ¶ 149), that it had no league-wide safety guidelines (*Id.* ¶ 143), that it did not require brain injury history (*Id.* ¶ 149), and that it did not monitor whether its coaches received any safety training at all. *Id*. ¶ 54. Plaintiffs therefore "reasonably relied on . . . [the]misrepresentations to

their detriment when deciding whether to participate and/or enroll their children" in tackle football (*SAC* ¶ 211), and "Pop Warner's false representations regarding the safety of youth tackle football misled parents . . . into enrolling their children in the Pop Warner program." *See Id*. ¶ 51.

The elements of negligent misrepresentation are the same as those for fraud, but Plaintiffs need not prove scienter. *See Charnay v. Cobert*, 145 Cal. App. 4th 170, 184 (2006) ("[I]n a claim for negligent misrepresentation, the plaintiff need not allege the defendant made an intentionally false statement, but simply one as to which he or she lacked any reasonable ground for believing the statement to be true.").

Accordingly, Defendant PWLS's motion to dismiss the Second and Third causes of action (Fraud and Fraudulent Concealment) and Fourth cause of action (Negligent Misrepresentation) is **DENIED**.

c. *Business & Professions Code Claims*

California Business & Professions Code § 17200 ("UCL") prohibits any "unlawful, unfair, or fraudulent business act or practice." *See* Cal. Bus. & Prof. Code §§ 17200 *et seq.* California's False Advertising Law ("FAL") makes it unlawful for a business "to make or disseminate . . . any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . ." Cal. Bus. & Prof. Code § 17500; *see also People v. Dollar Rent-A-Car Sys., Inc.*, 211 Cal. App. 3d 119, 128-29 (1989). "To have standing to assert a [UCL] claim, the plaintiff must '(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim.'" *Cornejo v. Ocwen Loan Servicing, LLC*, 151 F. Supp. 3d 1102, 1118 (E.D. Cal. 2015) (quoting *Kwikset Corp. v. Superior Ct.*, 51 Cal. 4th 310, 322 (2011) (emphasis in original)).

PWLS argues that Plaintiffs lack standing to bring a UCL or FAL claim because their claims are based not on unfair business practices, but on personal injury. *PWLS Mot*. 24; *SAC* ¶ 61. Plaintiffs argue that they have economic losses stemming from "the costs incurred enrolling their children in tackle football programs and purchasing materials and/or equipment." *PWLS Opp*. 25. But Plaintiffs did not allege this economic loss in their SAC; rather, they claim economic losses resulting from personal injury, including loss of income, emotional distress, and death. *See SAC* ¶¶ 196, 215, 220. The Court agrees with Defendant that no economic injury occurred within the meaning of California's UCL or FAL statutes.

Defendant PWLS's motion to dismiss the Business and Profession Code claims (Sixth and Seventh causes of action) is **GRANTED**.[1]

vi. Leave to Amend

Whether to grant leave to amend rests in the sound discretion of the trial court. *See Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). The Court considers whether leave to amend would cause undue delay or prejudice to the opposing party, and whether granting leave to amend would be futile. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Generally, dismissal without leave to amend is improper "unless it is clear that the complaint could not be saved by any amendment." *Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003).

The Court concludes that Plaintiffs' insufficiencies might very well be cured through amendment, and it does not believe that Defendant would be prejudiced if leave were granted at this time. The Court therefore GRANTS Plaintiffs leave to amend.

Accordingly, the Court **GRANTS** Defendant PWLS's motion to dismiss Plaintiffs' Sixth (UCL) and Seventh (FAL) causes of action **WITH LEAVE TO AMEND**. It **DENIES** Defendant PWLS's motion to dismiss the First (Negligence), Second (Fraud), Third (Fraudulent Concealment), and Fourth (Negligent Misrepresentation) cause of action.

B. NOCSAE's Motion to Dismiss

NOCSAE moves to dismiss Plaintiffs' SAC in its entirety based on (1) lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2), (2) timeliness, and (3) improper venue. *See generally NOCSAE Mot*. Because the Court finds the personal jurisdiction argument dispositive, it need not reach NOCSAE's second and third arguments.

1. Personal Jurisdiction

a. General Jurisdiction

Plaintiffs do not assert that the Court has general jurisdiction nor do they address this issue in their opposition; they argue only in support of specific jurisdiction. *See* Dkt. # 97 ("NOCSAE Opp.") 4–10. Plaintiffs thus effectively concede that no general jurisdiction exists

[1] PWLS also seeks to have the Medical Monitoring Class dismissed as a matter of law. *PWLS Mot*. 25. Because that is a purported class and not a cause of action, the Court notes that class certification is the proper stage to address this issue rather than in a motion to dismiss.

over NOCSAE in California. *See Ramirez v. Ghilotti Bros. Inc*., 941 F. Supp. 2d 1197, 1210 (N.D. Cal. 2013) (deeming argument conceded where plaintiff failed to address it in opposition); *Qureshi v. Countrywide Home Loans*, Inc., No. 09–4198, 2010 WL 841669, at *6 (N.D. Cal. Mar. 10, 2010) (deeming plaintiff's failure to address, in opposition brief, claims challenged in a motion to dismiss, an "abandonment of those claims") (citing *Jenkins v. County of Riverside*, 398 F.3d 1093, 1095 n. 4 (9th Cir. 2005)).

Thus, the Court turns directly to the question of specific jurisdiction.

b. Specific Jurisdiction

1. Minimum Contacts

The Court again applies the Ninth Circuit's three-part test (the "effects test") from the Supreme Court's opinion in *Calder v. Jones*, 465 U.S. 783 (1984), assessing whether Defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Picot*, 780 F.3d at 1214 (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002)).

a. Intentional Act

Plaintiffs allege that NOCSAE committed an intentional act by "creating standards for various athletic equipment," *see SAC* ¶ 18, and by licensing the use of its logo, on a sticker that indicates a "helmet has been tested for safety and protection against injury." *Id.* ¶ 24. This is sufficient to meet the "intentional act" prong within the meaning of the *Calder* test.

b. *Expressly Aimed*

Plaintiffs allege that sufficient minimum contacts exist because NOCSAE has "licensing agreements with football helmet manufacturers who buy and sell goods throughout the state of California." *SAC* ¶¶ 92, 93. Further, they allege NOCSAE receives revenue from football helmets sold, reconditioned, and distributed to California players. *See SAC* ¶¶ 99, 104. Plaintiffs also note that NOCSAE's website refers to California's reconditioning law and also allows California residents to apply for research grants. *Id*. ¶ 108.

In its May 12 Order, the Court stated that "mere licensing of NOCSAE's logo to manufacturers who place helmets into the stream of commerce in California is 'not an act purposefully directed toward a forum state.'" *See* Dkt. #72, quoting *Holland Am. Line Inc. v. Wartsila N. Am., Inc*., 485 F.3d 450, 459 (9th Cir. 2007) (citing *Asahi Metal Indus. Co. v.*

Superior Court, 480 U.S. 102, 112 (1987) ("Even a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum state.")); *Bancroft & Masters, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000) (finding a "handful" of licensing agreements with California entities insufficient to confer personal jurisdiction over non-resident defendant). The SAC contains no assertion that NOCSAE has licensing agreements with California-based manufacturers, and none of the licensing fees collected by NOCSAE are determined by the type or number of helmets sold in California. *NOCSAE Reply* 3. Plaintiffs allege that NOCSAE has reconditioning agreements with two entities in California, but allege no facts indicating that such companies recondition youth helmets or any equipment for Pop Warner players, nor that they sell or redistribute helmets back into the stream of commerce in any way (in fact, they are reconditioned only at the owners' requests). *Oliver Dec.* ¶ 20. Furthermore, Plaintiffs allege the existence of California-based reconditioners for the first time only in its opposition, not in its SAC. *See NOCSAE Opp.* 7.

As to the facts alleged regarding NOCSAE's website, Plaintiffs have failed to amend their SAC in light of the Court's prior Order. The Court determined that the "non-commercial, information-based website . . . [was] insufficient to show activity 'expressly aimed' at a forum state simply because it is accessible by California residents." *May 12 Order*, Dkt. # 72 at 12; *SAC* ¶ 108. *See Callaway Golf Corp. v. Royal Canadian Gold Ass'n*, 125 F.Supp.2d 1194, 1204 (C.D. Cal. 2000) ("Simply by maintaining a Web site accessible to California users and including information on the site ... [defendant] has not purposefully availed itself of this forum."); *Pebble Beach*, 453 F.3d at1158–59 (declining to exercise specific jurisdiction over a passive website). The Court also found insufficient the allegation that NOCSAE's funding of a single research grant in California conferred jurisdiction, noting that Plaintiffs had failed to describe the research, to claim a nexus between that research and youth football or to connect it to Plaintiffs' injuries. *May 12 Order*, Dkt. # 72 at 12. Plaintiffs have alleged no additional facts about this grant in their amended complaint, but rather have relied on identical wording. *SAC* ¶ 108; *FAC* ¶ 51.

What Plaintiffs have added is a claim that in 2004, NOCSAE voided a manufacturer's certification of lacrosse helmets for non-compliance with NOCSAE standards. *SAC* ¶ 105. Presumably, Plaintiffs include this incident to illustrate that NOCSAE could have similarly voided certification of football helmets had it chosen to. However, this action cannot establish conduct "expressly aimed" at California as it is not alleged to have taken place in California, involve football helmets, or have any other connection to this case. Plaintiffs also add that in 2011, the Federal Trade Commission began investigating NOCSAE for its refusal to allow youth football players to use a Guardian Cap. *Id.* ¶ 111. NOCSAE stated that the use of a Guardian Cap would void the certification of NOCSAE compliance. *Id.* ¶ 113. It was Pop Warner who

chose to include the NOCSAE stickers on its youth helmets, however (indeed, as the Court noted in its May 12 Order, "NOCSAE's contacts with California depend entirely on California manufacturers and football leagues *choosing to* adopt its safety standards, and as such, fall far from asserting that NOCSAE engages in any affirmative activity that is purposefully aimed at California." *May 12 Order*, Dkt. # 72 at 10, (emphasis added); NOCSAE did not require any such certification. Even if it had, Plaintiffs fail to allege that any conduct giving rise to the FTC issue took place in California, was aimed at California, or is related in any way to this case.

2. Arising Out Of Forum-Related Activities

Even if Plaintiffs had sufficiently plead minimum contacts, they have not cured the problems that plagued the FAC regarding the second prong of the jurisdictional analysis: that its claims arise out of NOCSAE's forum-related activities. The Ninth Circuit applies a "but for" test under which the Court must determine whether the plaintiff would not have suffered injury "but for" the defendant's forum-related conduct. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991) ("The 'but for' test should not be narrowly applied; rather, the requirement is merely designed to confirm that there is some nexus between the cause of action and defendant's contact with the forum.").

Plaintiff SAC alleges that NOCSAE failed to promulgate standards specifically tailored to minors. *SAC* ¶ 149. As Defendant notes, Plaintiffs' complaint would necessarily be exactly the same whether or not NOCSAE had any California contacts. *NOCSAE Mot*. 14. Pop Warner could have continued placing NOCSAE stickers on its helmets, NOCSAE could have continued promulgating its safety standards from its headquarters in Kansas, players and their parents could have continued to have a false sense of security, as Plaintiffs allege, from NOCSAE's stickers and Pop Warner's "safety first" message. None of these things implicates any action whatsoever taken by NOCSAE that was directed at California.

In any event, Plaintiffs fail to respond to any of Defendant's arguments about but-for causation in their opposition. Instead, they mistakenly name Pop Warner, not NOCSAE, in their heading, and then merely state the rule established in *Ballard*. *NOCSAE Opp*. 9. As Plaintiffs have not addressed Defendant's arguments, the Court takes them as conceded.

Plaintiffs have failed to amend their complaint to meet the requirements of the first and second prongs of the specific jurisdiction analysis. Based on these considerations, Plaintiffs have failed to establish the Court's personal jurisdiction over NOCSAE. Therefore, NOCSAE's motion to dismiss for lack of personal jurisdiction is **GRANTED**, with prejudice.

IV. Conclusion

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	16-CV-6603 PSG (PLAx)	Date	October 20, 2017
Title	Kimberly Archie, *et al* V. Pop Warner Little Scholars, Inc. *et al*		

In conclusion, the Court:

- GRANTS Defendant NOCSAE's motion to dismiss WITH PREJUDICE;
- DENIES Defendant PWLS's motion to dismiss for lack of personal jurisdiction;
- GRANTS Defendant PWLS's motion to dismiss for untimeliness as to Plaintiff McCrae, WITH PREJUDICE; and DENIES as to Plaintiffs Cornell and Archie;
- GRANTS Defendant PWLS's motion to dismiss for lack of standing as to Plaintiff Barnes, WITH PREJUDICE; and DENIES as to Plaintiffs Cornell and Archie; and
- DENIES Defendant's PWLS's motion to dismiss Plaintiff's First (Negligence), Second (Fraud), Third (Fraudulent Concealment), and Fourth (Negligent Misrepresentation) causes of action; and GRANTS its motion to dismiss the Sixth (UCL) and Seventh (FAL) causes of action, WITHOUT PREJUDICE.

Plaintiffs may file a third amended complaint ("TAC") by **November 20, 2017**. If a TAC is not filed by this date, causes of action Six and Seven will be dismissed WITH PREJUDICE.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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