KEKER & VAN NEST LLP
JOHN W. KEKER - # 49092
jkeker@kvn.com
R. ADAM LAURIDSEN - # 243780
alauridsen@kvn.com
THOMAS E. GORMAN - # 279409
tgorman@kvn.com
PHILIP J. TASSIN - # 287787
ptassin@kvn.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

Attorneys for Defendants
OFFICE OF THE COMMISSIONER OF BASEBALL (d/b/a MAJOR LEAGUE BASEBALL); and ROBERT D. MANFRED, JR.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GAIL PAYNE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

OFFICE OF THE COMMISSIONER OF BASEBALL (d/b/a MAJOR LEAGUE BASEBALL); and ROBERT D. MANFRED, JR.,

Defendants.

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

NOTICE OF MOTION AND MOTION TO DISMISS CLASS ACTION COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 13, 2015
Time: 10:00 a.m.
Dept.: Courtroom 1
Judge: Honorable Samuel Conti

Date Filed: July 13, 2015

Trial Date: None set

NOTICE OF MOTION

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

PLEASE TAKE NOTICE that on November 13, 2015, at 10:00 a.m., or as soon thereafter as counsel can be heard before the Honorable Samuel Conti in Courtroom 1 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, the Office of the Commissioner of Baseball (d/b/a Major League Baseball) and Commissioner Robert D. Manfred, Jr. (collectively "MLB") will and hereby do move this Court for an order dismissing Plaintiff's Class Action Complaint in its entirety.

MLB brings this motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that Plaintiff lacks standing to assert her claims or obtain the relief sought. Alternatively, MLB brings this motion under Rules 9(b) and 12(b)(6) on the grounds that Plaintiff fails to plead fraud with particularity and fails to state any claims upon which relief may be granted. This motion is based on this Notice, the attached Memorandum of Points and Authorities, the Declaration of Thomas E. Gorman filed in support thereof, all files and records in this action, oral argument, and upon all other matters that may properly come before the Court prior to, or at, the hearing on this matter.

Dated: October 2, 2015

KEKER & VAN NEST LLP

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

Attorneys for Defendants
OFFICE OF THE COMMISSIONER OF BASEBALL (d/b/a MAJOR LEAGUE BASEBALL); and ROBERT D. MANFRED, JR.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

II. ISSUES TO BE DECIDED 3

III. STATEMENT OF RELEVANT ALLEGATIONS 3

IV. ARGUMENT 6

A. Plaintiff lacks standing to assert any of her claims or obtain the relief sought. 6

1. Plaintiff lacks standing to assert her claim for negligence. 6

2. Plaintiff lacks standing to assert her fraud claims. 9

B. Plaintiff fails to state a claim for negligence. 10

1. No Duty: Plaintiff has assumed the risk of injury from errant bats and balls. 10

2. No Breach or Causation: Plaintiff has not adequately alleged any breach of Defendants' duties, or any causal relationship between breach and injury 13

3. No Injury: Plaintiff has not actually suffered any injury or damages. 14

C. Plaintiff fails to state a claim for fraudulent concealment. 14

1. Plaintiff fails to allege reliance. 15

2. Plaintiff fails to allege that Defendants concealed a material fact. 15

3. Plaintiff fails to allege that Defendants had a duty to disclose. 18

4. Plaintiff fails to allege intent to defraud. 18

5. Plaintiff fails to allege any damages. 18

D. Plaintiff fails to state a claim under the Consumers Legal Remedies Act. 19

1. Plaintiff's tickets are not "goods or services" under the CLRA. 19

2. Plaintiff fails to allege reliance or injury. 20

3. Defendants did not sell Plaintiff her tickets. 22

E. Plaintiff fails to state a claim under the Unfair Competition Law. 23

V. CONCLUSION 23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Ashcroft v. Iqbal
556 U.S. 662 (2009) 13

Boyd v. Keyboard Network Magazine
2000 WL 274204 (N.D. Cal. Mar. 1, 2000) 23

Chamberlain v. Ford Motor Co.
2003 WL 25751413 (N.D. Cal. Aug. 6, 2003) 22, 23

City of Los Angeles v. Lyons
461 U.S. 95 (1983) 6, 7, 8

Clapper v. Amnesty Int'l USA
133 S. Ct. 1138 (2013) 6, 7, 8

Corona v. Sony Pictures Entm't, Inc.
2015 WL 3916744 (C.D. Cal. June 15, 2015) 14

DaimlerChrysler Corp. v. Cuno
547 U.S. 332 (2006) 6

Erie R.R. Co. v. Tompkins
304 U.S. 64 (1938) 12

Estate of Migliaccio v. Midland Nat'l Life Ins. Co.
436 F. Supp. 2d 1095 (C.D. Cal. 2006) 20

Fulford v. Logitech, Inc.
2008 WL 4914416 (N.D. Cal. Nov. 14, 2008) 22

Green v. Canidae Corp.
2009 WL 9421226 (C.D. Cal. June 9, 2009) 22

Hodgers-Durgin v. de la Vina
199 F.3d 1037 (9th Cir. 1999) 6

Ileto v. Glock, Inc.
349 F.3d 1191 (9th Cir. 2003) 10

In re Sony Gaming Networks & Customer Data Sec. Breach Litig.
903 F. Supp. 2d 942 (S.D. Cal. 2012) 20

Johnson v. Lucent Techs., Inc.
653 F.3d 1000 (9th Cir. 2011) 14, 18

Kane v. Chobani
973 F. Supp. 2d 1120 (N.D. Cal. 2014) 23

Kearns v. Ford Motor Co.
567 F.3d 1120 (9th Cir. 2009) 21, 23

Kennedy Theater Ticket Serv. v. Ticketron, Inc.
342 F. Supp. 922 (E.D. Pa. 1972) 20

Lee v. Am. Express Travel Related Servs.
2007 WL 4287557 (N.D. Cal. Dec. 6, 2007) 22

Lopez v. Smith
203 F.3d 1122 (9th Cir. 2000) 24

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992) 6, 7, 8, 9

Marrone v. Washington Jockey Club
227 U.S. 633 (1913) 20

Mayfield v. United States
599 F.3d 964 (9th Cir. 2010) 8

Mehr v. Féderation Internationale de Football Ass'n
— F. Supp. 3d —, 2015 WL 4366044 (N.D. Cal. July 16, 2015) 8

Munns v. Kerry
782 F.3d 402 (9th Cir. 2015) 7

Perez v. Nidek Co.
711 F.3d 1109 (9th Cir. 2013) 9

Ruiz v. Gap, Inc.
622 F. Supp. 2d 908 (N.D. Cal. 2009) 14

Seifi v. Mercedes-Benz USA, LLC
2013 WL 2285339 (N.D. Cal. May 23, 2013) 22

Shlahtichman v. 1-800 Contacts, Inc.
615 F.3d 794 (7th Cir. 2010) 10

Simonet v. SmithKline Beecham Corp.
506 F. Supp. 2d 77 (D.P.R. 2007) 10

Stone v. Writer's Guild of Am. West, Inc.
101 F.3d 1312 (9th Cir. 1996) 3

Swartz v. KPMG LLP
476 F.3d 756 (9th Cir. 2007) 21

United Bhd. of Carpenters v. N.L.R.B.
540 F.3d 957 (9th Cir. 2008) 12

Vess v. Ciba-Geigy Corp. USA
2001 WL 290333 (S.D. Cal. Mar. 9, 2001) 23

Vess v. Ciba-Geigy Corp. USA
317 F.3d 1097 (9th Cir. 2003) 15

White v. Lee
227 F.3d 1214 (9th Cir. 2000) 6

Williamson v. McAfee, Inc.
2014 WL 4220824 (N.D. Cal. Aug. 22, 2014) 20

State Cases

Aas v. Superior Ct.
24 Cal. 4th 627 (2000) 14

Akins v. Glens Falls City School Dist.
53 N.Y.2d 325 (1981) 11

Anderson v. Kansas City Baseball Club
231 S.W.2d 170 (Mo.1950) 11

Arnold v. City of Cedar Rapids
443 N.W.2d 332 (Iowa 1989) 11

Bellezzo v. Arizona
174 Ariz. 548 (1992) 10, 11

Benejam v. Detroit Tigers, Inc.
246 Mich. App. 645 (2001) 12

Berry v. Am. Express Publ'g, Inc.
147 Cal. App. 4th 224 (2007) 20

Brisson v. Minneapolis Baseball & Athletic. Assn.
185 Minn. 507 (1932) 11

Brown v. S.F. Ball Club
99 Cal. App. 2d 484 (1950) 11, 12

Collister v. Hayman
183 N.Y. 250 (1905) 20

Costa v. Boston Red Sox Baseball Club
61 Mass. App. Ct. 299 (2004) 11

Creative Ventures, LLC v. Jim Ward & Assoc.
195 Cal. App. 4th 1430 (2011) 18

Durell v. Sharp Healthcare
183 Cal. App. 4th 1350 (2010) 20, 21, 22, 23

Erickson v. Lexington Baseball Club
233 N.C. 627 (1951) 11

Fairbanks v. Super. Ct.
46 Cal. 4th 56 (2009) 20

Fields v. Napa Milling, Co.
164 Cal. App. 2d 442 (1958) 14

Frustuck v. City of Fairfax
212 Cal. App. 2d 345 (1963) 14

In re Tobacco II Cases
46 Cal. 4th 298 (2009) 23

Jordan v. Concho Theatres, Inc.
160 S.W.2d 275 (Tex. Civ. App. 1941) 20

Kavafian v. Seattle Baseball Club Assn.
105 Wash. 215 (1919) 11

Kwikset Corp. v. Super. Ct.
51 Cal. 4th 310 (2011) 23

Lawson v. Salt Lake Trappers, Inc.
901 P.2d 1013 (Utah 1995) 11

Leegin Creative Leather Prod., Inc. v. Diaz
131 Cal. App. 4th 1517 (2005) 19

Leek v. Tacoma Baseball Club
38 Wash. 2d 362 (1951) 11

Linear Tech. Corp. v. Applied Materials, Inc.
152 Cal. App. 4th 115 (2007) 15, 18

Melton v. Boustred
183 Cal. App. 4th 521 (2010) 10

Murphy v. Steeplechase Amusement Co.
250 N.Y. 479 (1929) 12

Neinstein v. L.A. Dodgers, Inc.
185 Cal. App. 3d 176 (1986) 11, 12, 14

Olsen v. Breeze, Inc.
48 Cal. App. 4th 608 (1996) 22

Persson v. Smart Inventions, Inc.
125 Cal. App. 4th 1141 (2005) 17, 18

Powless v. Milwaukee Cnty.
6 Wis. 2d 78 (1959) 11

Quinn v. Recreation Park Ass'n
3 Cal. 2d 725 (1935 ..... 2, 11, 12

Ratcliff v. San Diego Baseball Club
27 Cal. App. 2d 733 (1938) 12

S.F. Unified School Dist. v. W.R. Grace & Co.
37 Cal. App. 4th 1318 (1995) 14

Swagger v. City of Crystal
379 N.W.2d 183 (Minn. App., 1985) 11

Taylor v. Cohn
47 Or. 538 (1906) 20

Turner v. Mandalay Sports Entm't, LLC
124 Nev. 213 (2008) 11

Federal Statutes

28 U.S.C. § 1652 12

State Statutes

Cal. Civ. Code § 1761(a) 19

Cal. Civ. Code § 1761(e) 22

Cal. Civ. Code § 1770 .... 19, 22

Cal. Civ. Code § 1780 19

Federal Rules

Fed. R. Civ. P. 9(b) .... *passim*

Fed. R. Civ. P. 12(b)(1) 1, 6

Fed. R. Civ. P. 12(b)(6) 1, 15

Treatises and Restatements

6 Witkin, Summary Cal. Law, Torts § 1545 14

Rest. (2d) Torts § 328A 10

Rest. (2d) Torts § 496A, cmt. c.2 12

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

For as long as baseball has been played, foul balls and errant or broken bats have occasionally entered the stands. Plaintiff Gail Payne does not claim that she has been injured (or even struck) by a ball or bat. Instead, she claims that Defendants negligently failed to protect her from the risks that are inherent in the sport, and that Major League Baseball actually concealed these risks. Because Plaintiff has never been injured, she lacks standing to bring this suit. Even if Plaintiff had standing, her claims are contrary to a century of precedent and common sense.

Sitting in the stands at a baseball game is not just the American pastime; it is a canonical example of assumption of risk—so much so that the applicable rule barring recovery for injuries is known simply as "the baseball rule." Defendants have not concealed the risk posed by balls and bats. It is obvious to anyone viewing a baseball game that foul balls and errant bats occasionally enter the stands. Indeed, Major League tickets contain an explicit warning and Plaintiff's own complaint cites dozens of other disclosures and media reports. Ultimately, Plaintiff's action for injunctive relief is an overreaching attempt to impose unnecessary and unwanted regulation. Plaintiff's choice to sit in an unscreened upper-deck section of the Oakland Coliseum, and her alleged fear resulting from that choice, do not justify forcing the majority of baseball fans in all Major and Minor League parks to sit behind netting. For these reasons and those below, Plaintiff's claims should be dismissed with prejudice.

First, Plaintiff lacks standing to assert her negligence and fraud-based claims. To establish Article III standing, Plaintiff must allege injury-in-fact, among other constitutional requirements. Plaintiff cannot establish standing for her negligence claim because she has not actually been injured. She also does not allege that she faces an imminent risk of injury—only that "[o]n one occasion [she] ducked to avoid a foul ball flying her way" and that "there is no guarantee she can duck the next time." Compl. ¶ 15. However, such conjectural and hypothetical claims of future injury do not establish Plaintiff's standing or the Court's jurisdiction to adjudicate. Plaintiff's fraud-based claims are doubly flawed, lacking allegations both of injury-in-fact and redressability. Plaintiff has not identified a single concrete injury that she suffered

due to Defendants' allegedly fraudulent statements or concealments. And even if she had alleged such injury, her requested injunctive relief has nothing to do with any such statements, and thus would not remedy any past harm.

Second, even if Plaintiff had standing to pursue her claims, she fails to state any claim upon which relief may be granted. Plaintiff's negligence allegations are legally insufficient for *each* of the four required elements. Even if Defendants—the Office of the Commissioner of Baseball and the Commissioner (collectively, "MLB")—had a duty arising from Clubs' ballparks, Plaintiff waived that duty and assumed the risk of injury when she voluntarily chose to occupy an unscreened seat. As the California Supreme Court explained 80 years ago, "one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls." *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 729 (1935). As to breach and causation, Plaintiff admits that she chose an unscreened seat and has continued to sit there, so any possible injury cannot be blamed on MLB. And, of course, Plaintiff has not actually suffered any injury, which is yet another reason to dismiss her negligence claim.

Plaintiff's fraudulent concealment claim similarly fails on *all* elements. Plaintiff does not allege that she relied on any specific MLB statement—fraudulent or otherwise. Plaintiff's own allegations, drawn from a variety of public sources, demonstrate that MLB did not conceal the facts at issue related to balls and bats entering the stands. Even if Plaintiff could show that there were any concealed facts, she cannot satisfy two of the claim's other elements: that MLB had a duty to disclose those facts or that MLB intended to defraud Plaintiff through its alleged concealment. And as with all her claims, Plaintiff fails to allege any damages.

Plaintiff's Consumer Legal Remedies Act ("CLRA") claim suffers from an assortment of fatal flaws and should likewise be dismissed. The statute cannot provide Plaintiff a remedy here because her tickets are not "goods or services" under the CLRA. In addition, Plaintiff's claim fails because she does not specifically identify any misrepresentation or nondisclosure by MLB, she does not allege that she relied on any such statement, and she does not claim any specific injury. Moreover, because Plaintiff does not allege that she bought her tickets from Defendants, Defendants cannot be liable for purported CLRA claims.

Plaintiff's Unfair Competition Act ("UCL") allegations are entirely derivative of her other claims, and thus fall along with them.

Ultimately, Plaintiff's Complaint tries to assert untenable legal theories resting on vague and implausible facts in order to fundamentally change the way that millions of fans a year watch the game of baseball. No amendments could cure the Complaint's fundamental and multilayered defects. The Court should dismiss her claims with prejudice.

II. ISSUES TO BE DECIDED

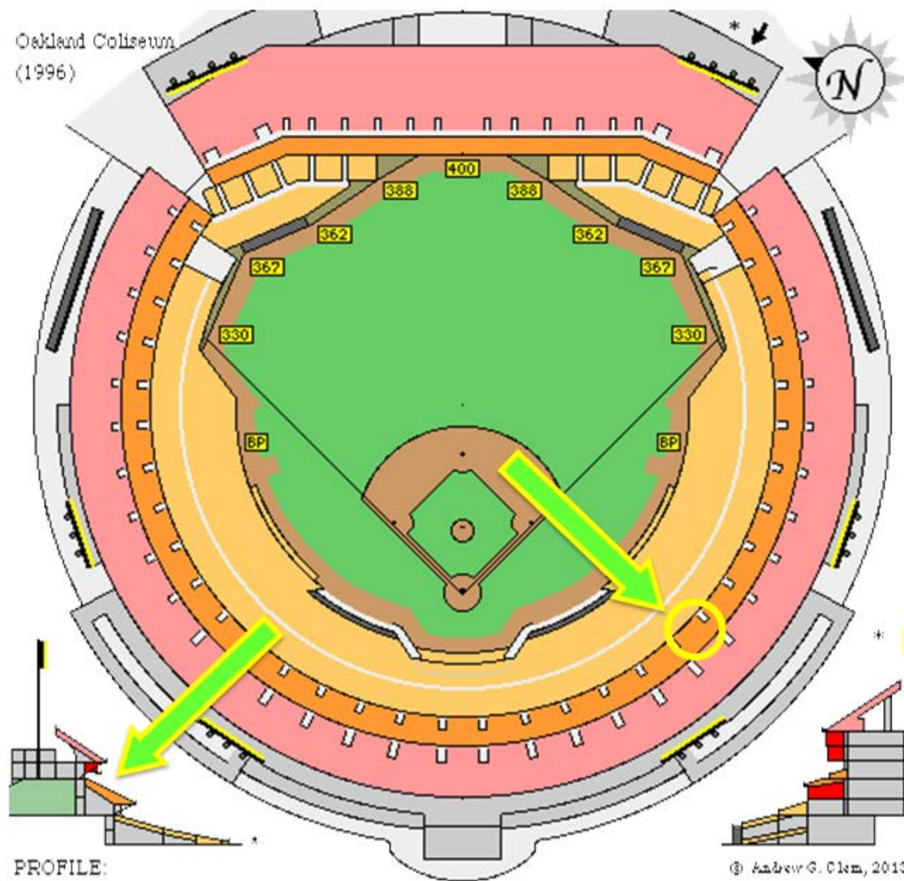
1. Should this Court dismiss the Class Action Complaint because Plaintiff lacks standing to assert her claims and to obtain the relief that she seeks?

2. Alternatively, should this Court dismiss the Class Action Complaint because Plaintiff fails to state any claim upon which relief may be granted?

III. STATEMENT OF RELEVANT ALLEGATIONS

Plaintiff Gail Payne asserts that she is a "devout fan" of the Oakland Athletics. Compl. ¶ 15. She attended her first A's game in 1968, "loves attending games, has attended many, and this year purchased tickets for the first time." *Id.* Plaintiff does not allege that she has ever been injured at a baseball game. Instead "she believes she and other fans are at increase [sic] risk of injury." *Id.* Plaintiff "estimates that at every game, at least three or four balls enter her section" and "she is constantly ducking and weaving to avoid getting hit by foul balls or shattered bats." *Id.* Although Plaintiff asserts that "there is no guarantee she can duck the next time," she has never been injured. *Id.* Plaintiff alleges that her tickets grant her a license to sit in section 211 of the Oakland Coliseum. *Id.* For the convenience of the Court, a diagram of the Oakland Coliseum was taken from the Complaint (p. 12) and annotated to identify section 211, which is on the "Plaza Level" (an upper deck that sits well above the field level[1]):

[1] The location of section 211 was confirmed by Plaintiff in a website cited in her Complaint. *See* Declaration of Thomas E. Gorman in Support of Motion to Dismiss ("Gorman Decl."), Ex. A (reproducing, for the convenience of the Court, the Oakland Coliseum seating-chart webpage cited in the Complaint at 12 n.46). Because the seating chart is explicitly referenced in the Complaint, the Court may consider it under the incorporation-by-reference doctrine. *See Stone v. Writer's Guild of Am. West, Inc.*, 101 F.3d 1312, 1313 (9th Cir. 1996). The same holds true for Exhibit B to the Gorman Declaration.



Plaintiff does not allege that the Commissioner or his Office sold her these tickets, so presumably she purchased them from the Athletics. As Plaintiff admits, her tickets contain "warnings." *Id.* at ¶ 141. Specifically, the Athletics' ticket-back contains the following specific announcement:

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

Gorman Decl., Ex. B (photocopy of Athletics ticket-back referred to in the Complaint at ¶¶ 8, 141, 156, & 48 n.185). Plaintiff "believes" that her tickets are "less expensive than the sections covered by protective netting" (Compl. ¶ 15), but this belief is contradicted by the Athletics' ticket-selling website that Plaintiff cites to substantiate her allegations. *See id.* at ¶ 30 & 12 n.46.

According to the information that Plaintiff cites, the seats in a comparable section behind the backstop netting are sold for the exact same price as Plaintiff's seats.[2]

Even though the Commissioner and his office do not own or possess the Oakland Coliseum, Plaintiff alleges that MLB was negligent in failing to provide a "reasonably safe facility for spectators sitting in the exposed areas along the first and third base lines." *Id.* at ¶ 90. Plaintiff believes that MLB should have promulgated rules to "impose adequate netting in these areas," and to deploy "technology to advance spectators safety." *Id.* at ¶¶ 90, 97. Plaintiff also believes that MLB is negligent for not "provid[ing] enough access to currently netted seats," for not banning maple bats, for not promulgating "consistent standards regarding injury response," and for allowing ballparks to introduce distractions such as "video display monitors" and "Wi-Fi." *Id.* at ¶¶ 91, 94, 99, 100, 101.

In addition to her negligence claim, Plaintiff has asserted claims for fraudulent concealment, violation of California's Unfair Competition Law, and violation of California's Consumers Legal Remedies Act. *Id.* at ¶¶ 139–56. Plaintiff bases all three of these claims on the same alleged actions: that MLB supposedly failed to disclose the risk of injury to fans, that MLB "[m]isrepresent[ed] ball parks as safe and family friendly," and that MLB concealed other unspecified "pertinent facts." *Id.* at ¶ 133. Plaintiff does not allege that she actually relied on any of MLB's allegedly false statements, that she would have acted differently if MLB had disclosed other "pertinent facts," or that she was injured by MLB's actions. In fact, Plaintiff's complaint tacitly admits that she continued to attend games in an unscreened section even after she had determined that "there is no guarantee" that she could avoid the "next" foul ball or broken bat. *Id.* at ¶ 15.

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

IV. ARGUMENT

A. Plaintiff lacks standing to assert any of her claims or obtain the relief sought.

Plaintiff fails to meet her burden to clearly allege facts that establish Article III standing to assert each of her claims and to seek each form of requested relief. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Plaintiff must allege (1) "injury in fact," (2) "a causal connection between the injury and the conduct complained of," ***and*** (3) that the injury will likely be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). For each of her claims, Plaintiff fails to meet at least the injury-in-fact requirement. And even though Plaintiff purports to represent a class of similarly situated individuals, her failure to show that she personally has standing is fatal to the entire Complaint. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999). Accordingly, the Court should dismiss her Complaint under Rule 12(b)(1) for lack of subject-matter jurisdiction. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

1. Plaintiff lacks standing to assert her claim for negligence.

With respect to her negligence claim, Plaintiff fails to adequately allege that she has suffered an injury-in-fact. To establish Article III standing, an injury must be (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 & n.1 (internal quotation marks omitted). Here, Plaintiff admits that she has never been injured by a foul ball or wayward bat (Compl. ¶ 15), and the Complaint's allegations of injuries to other individuals are insufficient to confer standing on Plaintiff. *Lujan*, 504 U.S. at 560 n.1 (explaining that to be particularized, "the injury must affect the plaintiff in a personal and individual way"); *Hodgers-Durgin*, 199 F.3d at 1045.

Plaintiff also cannot prove standing by alleging a concrete and particularized injury that is "imminent," because there is no imminent injury here. *Lujan*, 504 U.S. at 560. Since Plaintiff seeks prospective injunctive relief to prevent some future harm, a threatened injury is not "imminent" unless it is "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Allegations of "possible future injury" are insufficient. *Id.*; *see also City of Los*

Angeles v. Lyons, 461 U.S. 95, 102, 105 (1983) (explaining that the threat must be "real and immediate"—not "conjectural" or "hypothetical"—to confer standing).

Plaintiff has not alleged—and cannot allege—that the threat of being injured by a foul ball or a broken bat is "certainly impending" or "real and immediate." *Clapper*, 133 S. Ct. at 1147; *Lyons*, 461 U.S. at 105. As the Supreme Court has explained, the concept of "imminence" is "stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Lujan*, 504 U.S. at 564 n.2; *see also Munns v. Kerry*, 782 F.3d 402, 410–11 (9th Cir. 2015). The Complaint cites a magazine article's estimate to allege that about "1,750 spectators are injured each year by wayward baseballs." Compl. ¶ 2. This estimated figure represents a tiny fraction of the "tens of millions of men, women, and children" who, according to the Complaint, attend MLB games annually. *Id.* at ¶¶ 1–2, 33. Thus, by Plaintiff's own admission, the chances of her being injured at an MLB game are exceedingly slim. Plaintiff alleges that on "one occasion" she "ducked to avoid a foul ball flying her way" and that "there is no guarantee she can duck the next time."[3] *Id.* at ¶ 15. But because Plaintiff cannot show that she is virtually certain to be struck and injured, she cannot establish standing. *See Clapper*, 133 S. Ct. at 1147; *Lyons*, 461 U.S. at 105.

Similarly, to the extent that Plaintiff alleges injury simply by being exposed to an "increased" or "unreasonable" risk of harm (Compl. ¶¶ 5, 15–17, 90, 136), her allegations are inadequate to confer Article III standing. In *Clapper*, the Supreme Court expressly rejected the notion that a plaintiff can establish standing simply by alleging an "objectively reasonable likelihood" of harm (which Plaintiff here could not do). 133 S. Ct. at 1147–48. The Court demanded more—a showing that the future harm is "certainly impending." *Id.* Likewise, in *Lyons*, the Court refused to hold that the "odds" of the plaintiff being subjected to an illegal

[3] Plaintiff's allegation that she is "constantly ducking and weaving to avoid getting hit by foul balls or shattered bats" is quite implausible because she admits that her seats are in section 211. *See* Compl. ¶¶ 15, 30. According to the 2015 Oakland Coliseum seat map—which is incorporated by reference into her complaint (*see id.* ¶ 30 n.46)—section 211 is part of an upper deck of the ballpark, above the field-level sections that the Complaint describes as the most dangerous areas for foul balls and bats. Gorman Decl., Ex. A; *see* Compl. ¶¶ 32 & n.52, 37 & n.63.

police chokehold established his standing to seek an injunction, even though the plaintiff had *previously* been injured by such a chokehold. 461 U.S. at 105–08. Of course, the Court agreed that plaintiff's allegations of ***past*** injury established standing to seek damages (to remedy the past harm). *Id.* at 109. But in order to establish standing for a forward-looking injunction, the Court demanded more: an allegation that "*all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter." *Id.* at 106 (emphasis in original). Such an allegation, the Court added, would have been "incredible" and "untenable." *Id.* at 106, 108. Here, Plaintiff cannot tenably allege that she is certainly going to be injured.

In a recent case concerning the risk of concussions from playing soccer, the court ruled that allegations of "risk" must be dismissed for lack of standing. *See Mehr v. Féderation Internationale de Football Ass'n*, — F. Supp. 3d —, 2015 WL 4366044, at *13–16 (N.D. Cal. July 16, 2015). Like Plaintiff here, the *Mehr* plaintiffs sought injunctive relief requiring the defendants to implement new rules—namely, rules concerning concussion-management protocols and rules governing how soccer is played. *Id.* at *14. Among other deficiencies, the court concluded that the plaintiffs had failed to adequately allege injury-in-fact because the risk of head injuries was "speculative and nebulous," rather than "certainly impending." *Id.* at *13. Based in part on that conclusion, the court dismissed the complaint for lack of standing. *Id.* at *25. This Court should do the same.

Finally, to the extent that Plaintiff alleges simply that she fears for her safety, such fear is insufficient. Compl. ¶ 15. The mere "subjective apprehension about future harm" is not an injury-in-fact and cannot establish standing. *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010); *see also Clapper*, 133 S. Ct. at 1152.[4]

[4] Plaintiff also cannot establish that her purported injury will be redressed by her three forms of requested injunctive relief. Compl. ¶¶ 10, 137; *see Lujan*, 504 U.S. at 568–69. First, even if MLB forced all Clubs to extend netting beginning in the "2016–17 MLB season," the change would do nothing to mitigate whatever risk of injury Plaintiff claims to face *now*. And even in future seasons, the only foul balls that are currently likely to enter her upper-deck section—high, lazy fly balls—would still pose a risk if the netting is extended down the first- and third-base lines. After all, the foul balls entering Plaintiffs' upper-deck section would typically travel up and over netting, not through currently-unscreened areas. Second, requiring extended netting in other, future ballparks will do nothing to mitigate Plaintiff's risk, as she has not alleged an intention to attend a game anywhere other than the Oakland Coliseum. Third, requiring an ongoing study of spectator injuries would not redress Plaintiff's claimed injury. A study alone will not prevent any balls or bats from entering the stands. And since no one can predict the results of such a study,

2. Plaintiff lacks standing to assert her fraud claims.

Plaintiff also fails to adequately allege injury-in-fact or redressability for her claims of fraudulent concealment, violation of the CLRA, or violation of the UCL.

Injury-in-Fact. Plaintiff has not offered a single particularized allegation that she has suffered a concrete injury from MLB's allegedly fraudulent statements or concealments. Instead, Plaintiff asserts vaguely that she "has been damaged by the actions and inactions of the Defendants," that she has "suffered harm" from MLB's alleged concealment, and that she has suffered "injuries" as a result of MLB's violation of the CLRA. Compl. ¶¶ 17, 142, 148. But such conclusory allegations are insufficient to establish standing for fraud claims, which require particularized pleading under Rule 9(b). *See Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). As the Ninth Circuit recently explained, "conclusory and bare bones" allegations—"without any factual content"—are "insufficient to establish standing or to survive a motion to dismiss." *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013). Plaintiff's "conslusory and bare bones" allegations similarly fail to adequately establish injury-in-fact for her fraud claims.

Redressability. Even if Plaintiff had adequately alleged some sort of injury to support her fraud claims, there is no connection between her fraud claims and her requested relief. *See* Compl. ¶¶ 10, 137. Plaintiff demands extended nets in ballparks and a study of spectator injuries, but those requests have nothing to do with remedying whatever harm could have resulted from allegedly fraudulent statements or concealments (which by their nature are past harms). Plaintiff's failure to request appropriate relief is an independent basis to dismiss her fraud claims for lack of standing. *See Lujan*, 504 U.S. at 571.

In sum, Plaintiff has failed to allege an injury-in-fact sufficient to establish Article III standing to bring her claims. And Plaintiff has also failed to properly allege that a favorable court

---

ordering a study here will not address the harm that Plaintiff alleges that she *might* incur.

decision is likely to provide redress. Plaintiff therefore lacks standing, and her claims should be dismissed for lack of subject-matter jurisdiction.

B. Plaintiff fails to state a claim for negligence.[5]

Plaintiff's allegations fail on ***each*** of the four required elements to state a claim for negligence under California law: "(1) duty; (2) breach; (3) causation; and (4) damages."[6] *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1203 (9th Cir. 2003); *see also Melton v. Boustred*, 183 Cal. App. 4th 521, 529 (2010); Rest. (2d) Torts § 328A.

1. No Duty: Plaintiff has assumed the risk of injury from errant bats and balls.

For nearly a century, courts all across the country—including in California—have barred claims just like this one under the "baseball rule." The baseball rule states, "as a matter of law," that a "stadium operator is not liable for injury to a spectator struck by a batted or thrown ball if the spectator was seated in an unscreened area of the stadium." *Bellezzo v. Arizona*, 174 Ariz. 548, 551–52 (1992).[7] After all, "lack of a screen is as obvious as the fact that the Grand Canyon is a chasm, and the danger that a spectator hit by a foul ball may be injured is as evident as the

[5] Plaintiff lives in California and alleges claims based on tickets purchased, and games attended, in California, so California law applies to Plaintiff's claim. *See* Compl. at ¶ 15; Dkt. 1-1 (Affidavit of Venue) at ¶ 5.

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

[7] In "baseball rule" cases, Plaintiffs typically sue a stadium owner or operator. Here, Plaintiff claims that the Oakland Coliseum is unsafe, but she has not sued the Coliseum's "owner" and "operator," and instead has chosen to sue MLB and the Commissioner. But since Plaintiff has not alleged that MLB or the Commissioner actually owns or operates the Oakland Coliseum—or any other ballpark—she cannot contend that these Defendants owe a legal duty arising from the property. Instead, Plaintiff asserts that the Commissioner and his Office have "acknowledged its [sic] duty to protect spectators." Compl. ¶ 80. But Plaintiff points to comments where the Commissioner expressed concern for fan safety, or where the Commissioner said that he would "re-evaluate where we are on the topic" by holding "discussions" with players and the Clubs. *Id.* at ¶¶ 80, 82. The Commissioner did not assume a legal duty by expressing concern for the wellbeing of fans. Duty of care is a "question of law for the court," and the Court should reject Plaintiff's unsupported assertion that such a duty exists. *Melton*, 183 Cal. App. 4th at 531.

likelihood that one who falls into the Grand Canyon may be hurt." *Id.* at 553.[8] The only "duty imposed by law" in California "is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion." *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 729 (1935); *Neinstein v. L.A. Dodgers, Inc.*, 185 Cal. App. 3d 176, 182 (1986).[9] But when Plaintiff "chooses to occupy an unscreened seat," she voluntarily "assume[s] the risk of injury" from foul balls or errant bats and MLB owes her no duty. *Quinn*, 3 Cal. 2d at 729–30; *Neinstein*, 185 Cal. App. at 182–83; *Brown v. S.F. Ball Club*, 99 Cal. App. 2d 484, 488–91 (1950).[10] As the California Supreme Court has explained, "one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls." *Quinn*, 3 Cal. 2d at 729. The "management is not obliged to screen all seats because . . . many patrons prefer to sit where their view is not obscured by a screen." *Id.* If "a spectator chooses to occupy an unscreened seat" or "is unable to secure a screened seat and consequently occupies one that is not protected, he assumes the risk of being struck." *Id.*[11]

Although most baseball-rule cases focus on foul balls, the risk of injury from errant or broken bats is just as open and obvious—at least according to Plaintiff's allegations. *See* Compl. ¶¶ 49–51, 61–62, 73, 84, 88, 94. The assumption-of-risk doctrine applies equally to bats as it

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

[9] *See also Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 218–19 (2008); *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 329–30 (1981); *Leek v. Tacoma Baseball Club*, 38 Wash. 2d 362, 366–67 (1951).

[10] *See also Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185–86 (Minn. App., 1985); *Erickson v. Lexington Baseball Club*, 233 N.C. 627, 629 (1951); *Brisson v. Minneapolis Baseball & Athletic. Assn.,* 185 Minn. 507, 509–10 (1932); *Kavafian v. Seattle Baseball Club Assn.*, 105 Wash. 215, 220 (1919). *Cf. Powless v. Milwaukee Cnty.*, 6 Wis. 2d 78, 83 (1959) (basing baseball rule on contributory negligence rather than assumption of risk).

[11] Even Plaintiff's counsel admits that the baseball rule bars the claims here. As he recently wrote, "According to the [Baseball] Rule, if a baseball fan chooses an unprotected seat, the fan is deemed to have assumed the inherent or known risks associated with the sport, typically foul balls or shrapnel from broken bats that enter the stands." Bob Hilliard, "The Irrationality of the Baseball Rule in the Age of the Digital Fan," *available at* http://www.hmglawfirm.com/blog/the-irrationality-of-the-baseball-rule-in-the-age-of-the-digital-fan/ (visited Oct. 1, 2015).

does to balls. *See, e.g.*, *Benejam v. Detroit Tigers, Inc.*, 246 Mich. App. 645, 647–48, 654–58 (2001).[12]

Since California courts follow the baseball rule, under *Erie* and the Rules of Decision Act this court must follow that state-substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 77–80 (1938); 28 U.S.C. § 1652; *United Bhd. of Carpenters v. N.L.R.B.*, 540 F.3d 957, 963 (9th Cir. 2008). And even if this Court had the authority to ignore a century's worth of binding California-state-court decisions, doing so would be especially illogical here, as the baseball rule has literally become a canonical example of assumption of risk.[13] For example, the Restatement of Torts uses the "spectator entering a baseball park" as ***the*** example of a plaintiff "tacitly or impliedly agreeing to relieve the defendant of responsibility." Rest. (2d) Torts § 496A, cmt. c.2. And Benjamin Cardozo, then the Chief Judge of New York's highest state court, used baseball to explain the legal proposition that "*volenti non fit injuria*," which means "to the consenting, no injury is done." *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482 (1929). As Cardozo explained, "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." *Id.* And, as a California Court of Appeal concluded, "A person who fears injury always has the option of refraining from attending a baseball game or of sitting in a part of the park which is out of reach." *Neinstein*, 185 Cal. App. 3d at 182.

Here, Plaintiff assumed the risk of injury because she "chooses to occupy an unscreened seat." *Quinn*, 3 Cal. 2d at 729. She claims that she chose an unscreened seat because she "believes" that they are "less expensive." Compl. ¶ 15. That belief is mistaken,[14] but in any

[12] In 1938, shortly after the baseball rule was adopted by the California Supreme Court, a lower court held that a thrown-bat case raised "similar principles" to the more traditional "flying ball" case, but ultimately decided against the club. *Ratcliff v. San Diego Baseball Club*, 27 Cal. App. 2d 733, 736 (1938). But that decision applied a "rule of liability" that was "materially different" from the normal baseball-rule case because the plaintiff had "elected to occupy a seat within a screened section and was injured while approaching her seat through an unscreened passageway." *Brown*, 99 Cal. App.2d at 492. Here, Plaintiff admits that she selected—and continued to select—an unscreened seat.

[13] Plaintiff cited dozens of baseball-rule decisions in Exhibit B to the Complaint. *See* Dkt. 1-3.

[14] *See* above note 2 (explaining that information incorporated into the Complaint shows that "protected" seats are the exact same price as Plaintiff's seats).

case, the price of her ticket is irrelevant. What matters is that Plaintiff chose a seat in an "exposed section," and has continued to choose that seat. *Id.* Plaintiff's tickets for that seat specifically alert her to "the danger of being injured by thrown bats, fragments thereof, and thrown or batted balls." Gorman Decl., Ex. B. Plaintiff cannot state a claim for negligence because she has assumed the risk of injury.

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

Plaintiff also appears to allege that MLB has breached a limited duty to "provide enough access to currently netted seats for as many fans as would reasonably be expected to request such seats." Compl. ¶ 91. But this allegation suffers from three fundamental flaws.

First, Plaintiff does not allege that these defendants provide access to ***any*** seats, so they cannot be liable for not providing ***enough*** access. As explained above, Plaintiff does not allege that either the Commissioner or his Office actually own or possess the stadiums. To the extent that Plaintiff alleges that someone has a duty to provide "enough access" to "netted seats," it is not these defendants.

Second, Plaintiff does not provide enough specificity to make plausible her naked assertion that a duty has been breached. All that Plaintiff says is that "there are only *a number* of protected seats compared to *the number overall*" and that the protected "area" is not "sufficiently large." Compl. ¶ 91 (emphasis added). But Plaintiff cannot merely "plead the bare elements of [her] cause of action, affix the label 'general allegation,' and expect [her] complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Without specific factual allegations, Plaintiff cannot state a claim.

Third, even if MLB did have an obligation to provide a "sufficient" number of protected seats, and even if MLB had failed to meet that obligation, that "breach" would have no causal relationship to Plaintiff's claimed injury. Plaintiff does not allege that she attempted to obtain a protected seat but was unable to do so. Instead, she voluntarily chose an unprotected seat. As the California Court of Appeal has explained, there is no "causal nexus" between a stadium's failure to provide a sufficient number of screened seats and a "plaintiff's injuries" if the plaintiff

voluntarily chose to sit in an unscreened section. *Neinstein*, 185 Cal. App. 3d at 183. In other words, even if Plaintiff were injured while sitting in an unscreened section, that injury would be caused by Plaintiff's voluntary decision to assume the risk inherent in an unscreened seat.

3. No Injury: Plaintiff has not actually suffered any injury or damages.

As discussed above, Plaintiff has not suffered any injury. Instead, Plaintiff alleges that she bears an "unreasonable" and "improper risk of injury and will in the future suffer damages." Compl. ¶¶ 135, 136; *see also id.* at ¶¶ 15, 16, 138. But "[u]nder California law, appreciable, nonspeculative, present harm is an essential element of a negligence cause of action." *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 913 (N.D. Cal. 2009) (citing *Aas v. Superior Ct.*, 24 Cal. 4th 627, 646 (2000)). "Until physical injury occurs," Plaintiff "cannot state a cause of action for . . . negligence." *S.F. Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1327 (1995); *see also Fields v. Napa Milling, Co.*, 164 Cal. App. 2d 442, 447–48 (1958); 6 Witkin, Summary Cal. Law, Torts § 1545. At best, Plaintiff fears a "speculative harm or the mere threat of future harm," but that is "insufficient to constitute actual loss." *Corona v. Sony Pictures Entm't, Inc.*, 2015 WL 3916744, at *3–4 (C.D. Cal. June 15, 2015). So even if Plaintiff could show duty, breach, and causation, Plaintiff would ***still*** fail to state a claim because "damage" is an "essential part of the plaintiff's case." *Fields*, 164 Cal. App 2d at 448; *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 368 (1963).

In conclusion, Plaintiff has failed to allege any of the required elements of negligence and thus her claim must be dismissed. Each failure is enough to justify dismissal, and because the failures are fundamental, granting leave to amend would be futile.

C. Plaintiff fails to state a claim for fraudulent concealment.

Plaintiff's claim for fraudulent concealment fails because she does not adequately allege that: (1) MLB concealed or suppressed a material fact, (2) MLB was under a duty to disclose the fact to Plaintiff, (3) MLB concealed or suppressed the fact with the intent to defraud Plaintiff, (4) Plaintiff was unaware of the fact and would not have acted as she did if she had known of the concealed or suppressed fact, ***or*** (5) as a result of the concealment or suppression of the fact, Plaintiff sustained damage. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1011–12 (9th Cir.

2011); *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 131 (2007). Moreover, she fails to satisfy the Rule 9(b) requirement that fraud claims be pleaded with particularity, because she does not specifically allege the "who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). Because the averments of fraud are not pleaded with sufficient particularity, they must be disregarded, and the claim should be dismissed under Rule 9(b) and Rule 12(b)(6). *Id.* at 1107.

1. Plaintiff fails to allege reliance.

First, Plaintiff's fraudulent-concealment claim must fail because she does not allege that she would have acted any differently had she known of any purportedly concealed or suppressed fact. To allege reliance, Plaintiff must assert (1) that she was unaware of the allegedly concealed fact, and (2) that she would have acted differently had she known of it. *Linear*, 152 Cal. App. 4th at 131. Here, Plaintiff fails to plead that she was actually unaware of any allegedly concealed facts. And even if Plaintiff was unaware, she fails to plead what she would have done differently had she known. Indeed, Plaintiff's own allegations suggest that she would have done nothing differently—she tacitly admits that she continued to attend games in an unscreened section, even after filing this lawsuit. *See* Compl. ¶ 15. Thus, Plaintiff has failed to plead the reliance element of her fraudulent-concealment claim.

2. Plaintiff fails to allege that Defendants concealed a material fact.

Plaintiff's claim for fraudulent concealment is hard to comprehend, because—as her complaint admits—MLB tickets contain warnings about errant bats and balls. Compl. ¶¶ 8, 141, 156, & 48 n.185; Gorman Decl., Ex. B. And, while she alleges that MLB concealed certain facts, she also alleges that those same facts were both publicly known and widely discussed, including: (1) the incidence or risk of spectator injury from foul balls, (2) the incidence or risk of spectator injury from shattered bats, (3) the existence of studies regarding the reaction times of fans sitting in exposed areas of ballparks, (4) the existence of "protective measure[s]," and (5) the existence of "technology measuring the speed of baseballs and human reaction time." *Id.* at ¶¶ 133, 140.

On the issue of foul-ball injuries, Plaintiff lists dozens of publicly filed lawsuits that alleged injuries from foul balls and shattered bats. Compl., Ex. B. Plaintiff also cites in the Complaint several widely circulated articles that relied on publicly available data to quantify the risk to fans. Plaintiff cites a July 2014 *Atlanta Magazine* article for the statistic that "[i]n a typical MLB game, 35–40 batted balls fly into the stands," and cites a September 2014 *Bloomberg* article for the proposition that "1,750 spectators are injured each year by wayward baseballs." *Id.* at ¶¶ 2, 33 & n.53, 38 & n.66. Plaintiff also cites two academic articles for the proposition that fans sitting in seats along the first- and third-base lines are at an increased risk of injury from foul balls. *Id.* at ¶¶ 32 & n.52, 37 & n.63, 84. One of those articles was published in 2012, and the other—titled "Injuries from Flying Baseballs to Spectators at Ball Games"—was published ***seventy-five*** years ago. *Id.* at ¶¶ 32 n.52, 37 n.63, 84. The notion that MLB somehow concealed the fact that balls and bats enter the crowd at baseball games, and that fans closer to the batter may be at increased risk of injury, is absurd.

On the issue of shattered bats, Plaintiff again points to widely circulated articles, including a 2013 academic article and a June 2008 article published on MLB's own website. *Id.* at ¶¶ 49 & nn.87–89, 50 & n.90. Plaintiff also cites public statements made by MLB officials themselves. First, Plaintiff notes that "Major League Baseball has acknowledged the safety issue posed by broken bats in undertaking a study of all shattered bats." *Id.* at ¶ 88. Then, relying on a *Chicago Tribune* article, Plaintiff quotes former Commissioner Bud Selig as stating that "[t]he maple bats safety issue is very real" and that he was "very concerned." *Id.* at ¶¶ 88 n.150, 94. According to the Complaint, those statements were made in 2008. *Id.* Plaintiff cannot claim that MLB was concealing the very information that—in fact—it discussed publicly.

As to studies on the "reaction time" of spectators, Plaintiff again states that this data was available in "publications in the sports and medical communities." *Id.* at ¶ 123. Plaintiff also specifically notes in the Complaint that spectator reaction time was the subject of expert testimony in a lawsuit against an MLB team.[15] *Id.* at ¶ 123 & n.179.

[15] The Complaint states that the lawsuit was against the "Chicago Red Sox." Compl. ¶ 123 n.179. It is unclear whether Plaintiff actually means the Boston Red Sox or the Chicago White Sox.

Finally, as to the existence of netting and radar-tracking technology, Plaintiff again acknowledges that netting technology "has been around since before the turn of the [twentieth] century," and that radar-tracking technology is well known to spectators. *Id.* at ¶¶ 4, 97. Even without these admissions, Plaintiff cannot credibly claim that MLB has concealed the existence of netting and radar-tracking technology that are used openly in ballparks.

Even the *potentially* non-public pieces of information that Plaintiff identifies were not truly concealed. Those were: (1) that MLB players allegedly demanded extended netting during collective-bargaining negotiations in 2007 and 2012 (*id.* at ¶¶ 4, 76, 123, 140), and (2) the existence and contents of first-aid and foul-ball logs kept at every MLB ballpark (*id. at ¶* 87). But Plaintiff acknowledges that MLB players have *publicly* demanded extended netting, and that foul-ball and first-aid logs are only "sometimes" confidential.[16] *Id.* at ¶¶ 43–44, 87. Plaintiff also fails to allege how any nonpublic aspects of this information would have been material to a reasonable person, as required by California law. *See Persson v. Smart Inventions, Inc.*, 125 Cal. App. 4th 1141, 1163 (2005). Plaintiff's Complaint says nothing about why it would have mattered to the average person that players allegedly asked for more netting in the context of collective bargaining, *in addition* to complaining publicly about un-netted seats (which Plaintiff alleges they did). *Id.* at ¶¶ 43, 44, 73, & 17 n.82, 28 n.132 (and associated text). Likewise, Plaintiff's Complaint provides no explanation for what additional, marginal value the contents of "some" of the foul-ball and first-aid logs would have had considering that other logs are already public.

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

[16] The Complaint alleges that MLB and the Commissioner were "aware of the existence" of these first-aid logs, which are supposedly "kept at every MLB ballpark," but the Complaint does not actually allege that the Defendants had possession of this information. Compl. ¶ 87. Defendants cannot be liable for "suppressing or concealing" information that even Plaintiff does not allege that they had.

3. Plaintiff fails to allege that Defendants had a duty to disclose.

There are only four circumstances that give rise to a duty to disclose—a fiduciary relationship, facts known only to the defendant, active concealment, or partial and misleading representations—but none of those circumstances are alleged here. *See Linear*, 152 Cal. App. 4th at 132. First, Plaintiff does not allege that MLB is in a fiduciary relationship with Plaintiff, nor could she; Plaintiff purchased her tickets (not from the Defendants) in an arms' length transaction. *See Persson*, 125 Cal. App. 4th at 1161. Second, Plaintiff does not—and cannot—allege that the supposedly concealed facts were known or accessible only to MLB; as explained above, each of these facts was publicly known and widely discussed. Third, Plaintiff does not—and cannot—allege that MLB took active steps to prevent Plaintiff from discovering the allegedly omitted information. And fourth, Plaintiff does not—and cannot—allege that MLB spoke half-truths while suppressing material facts. Since Plaintiff did not—and cannot—specifically allege any of those circumstances, Defendants had no special duty to disclose and Plaintiff cannot state a claim.

4. Plaintiff fails to allege intent to defraud.

Plaintiff also makes no allegation that MLB concealed information with the intent to defraud her or anyone else. Nor could anyone infer such intent. According to Plaintiff's own Complaint, most (if not all) of the allegedly concealed information was public. And there are plenty of obvious, non-fraudulent reasons why the only conceivably nonpublic facts—namely, the contents of *some* first-aid logs and the details of collective-bargaining negotiations—would be kept confidential. First-aid logs contain sensitive medical information that must almost always—by law—be kept private. And the positions taken during closed-door, collective-bargaining negotiations necessarily implicate sensitive business interests for both sides involved.

5. Plaintiff fails to allege any damages.

Finally, Plaintiff fails to allege with particularity that she has sustained any damages from the alleged concealment. *See Creative Ventures, LLC v. Jim Ward & Assoc.*, 195 Cal. App. 4th 1430, 1444 (2011); *Linear*, 152 Cal. App. 4th at 131. She nakedly claims that she has "suffered harm," but such conclusory allegations are insufficient. *See Johnson*, 653 F.3d at 1010.

Furthermore, to the extent that Plaintiff alleges that she has suffered harm by being exposed to a ***risk*** of injury, her claim for damages is too speculative to support a cause of action for fraud. *See Leegin Creative Leather Prod., Inc. v. Diaz*, 131 Cal. App. 4th 1517, 1526 (2005).

In sum, Plaintiff has failed to allege ***any*** of the elements of fraudulent concealment with the particularity that Rule 9(b) requires. Because Plaintiff cannot remedy these failures—especially her failure to allege concealment—her claim for fraudulent concealment should be dismissed with prejudice.

D. Plaintiff fails to state a claim under the Consumers Legal Remedies Act.

The CLRA prohibits various "unfair methods of competition" and "unfair or deceptive acts or practices," including certain forms of fraudulent misrepresentation and nondisclosure. *See* Cal. Civ. Code §§ 1770, 1780. The statute, however, applies only when an allegedly unfair method is employed by "a[] ***person in a transaction*** intended to result or which results in the sale or lease of ***goods*** or ***services*** to a[] consumer." *Id.* at § 1770(a) (emphasis added). Plaintiff alleges that MLB committed four unlawful acts under the CLRA. Compl. ¶ 156. Plaintiff's CLRA claims fail, however, for three reasons. First, a ticket to a baseball game is not a "good or service" as those terms are defined under the CLRA. Second, Plaintiff fails to allege either reliance or injury, and therefore lacks standing under California law to assert this claim. And third, MLB was not a party to any transaction with Plaintiff.

1. Plaintiff's tickets are not "goods or services" under the CLRA.

Plaintiff alleges that a "[a] ticket to an MLB major or minor league game is a 'good' as defined [by the CLRA]." Compl. ¶ 155. This conclusory allegation, however, is contrary to both the express text of the CLRA and California case law.

The CLRA defines "goods" as "***tangible chattels*** bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods." Cal. Civ. Code § 1761(a) (emphasis added). A ticket to an MLB game is not a "tangible chattel"; rather, it is merely a representation of an intangible, revocable license to attend a

game.[17] *See* Gorman Decl, Ex. B (ticket-back language explaining that "[t]he license granted by this ticket may . . . be terminated by tendering to the holder the purchase price of this ticket"); *see also Berry v. Am. Express Publ'g, Inc.*, 147 Cal. App. 4th 224, 229 (2007) (holding that a credit card is not a "good" under the CLRA because it "has no intrinsic value and exists only as indicia of the credit extended to the card holder").[18] Courts in California have repeatedly held that intangible rights fall outside the scope of the CLRA.[19] Especially pertinent here, courts (including this Court) have held that the CLRA does not apply to licenses because they are neither "goods" nor "services."[20] Accordingly, the license to attend an Oakland Athletics game—represented by Plaintiff's ticket—is not a good or service covered by the CLRA.

2. Plaintiff fails to allege reliance or injury.

Even if the CLRA applied to Plaintiff's tickets, Plaintiff's CLRA claims would still fail because she lacks statutory standing to assert them. The CLRA does not automatically award relief upon proof that a defendant has engaged in one of the statutorily proscribed practices. *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010). Rather, to have standing to bring a claim under the CLRA, a plaintiff must allege that she actually suffered economic injury because of the proscribed conduct. *Id.* And when, as here, the plaintiff alleges that the defendant's unlawful conduct was a misrepresentation or nondisclosure, the plaintiff must also allege that she (and all putative class members) actually relied on the misrepresentation or nondisclosure. *Id.*; *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 969 n.25 (S.D. Cal. 2012). Furthermore, CLRA claims sounding in fraud are

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

[18] Plaintiff is not alleging that the physical ticket itself is the "good" sold in the covered transaction. Her allegations are that Defendants misrepresented the characteristics, standards, and quality of "MLB games," not that they somehow misrepresented the characteristics, standards, or quality of the physical, paper tickets. *See* Compl. ¶ 156.

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

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

1 subject to a heightened pleading requirement under Rule 9(b). *Kearns v. Ford Motor Co.*, 567
2 F.3d 1120, 1125 (9th Cir. 2009). Accordingly, such claims must allege an "account of the time,
3 place, and specific content of the false representations as well as the identities of the parties to the
4 misrepresentations." *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (internal quotation
5 marks omitted). Here, Plaintiff fails to satisfy Rule 9(b) and fails to establish her standing to
6 bring a CLRA claim.

7 Plaintiff alleges that in "holding out MLB games . . . as safe," MLB violated
8 §§ 1770(a)(5) and (a)(7) of the CLRA by allegedly misrepresenting the characteristics, standards,
9 and quality of ballparks where MLB games are played. Compl. ¶ 156. Because Plaintiff did not
10 allege with specificity any false statements, she fails to adequately allege "the time, place, and
11 specific content" of the alleged misrepresentations, as required by Rule 9(b). *Swartz*, 476 F.3d at
12 764. At most, Plaintiff quotes MLB's statements that "[f]an safety is our foremost goal" and that
13 baseball is "family-friendly," "kid-friendly," and an "extraordinarily healthy entertainment
14 product." Compl. ¶¶ 4–5, 80, 104, 119, 129, 141. She also points to an article posted on
15 www.mlb.com showing a man catching a foul ball while holding an infant. *Id.* at ¶ 103. To the
16 extent that Plaintiff is alleging that these innocuous statements and media content constituted
17 unlawful misrepresentations under the CLRA, Plaintiff fails to allege that she ever relied on
18 them—indeed, she fails to allege that she ever even saw or heard them. She also fails to allege
19 any economic injury stemming from the statements. Accordingly, she does not satisfy Rule 9(b),
20 and cannot establish her standing to assert a CLRA claim. *See Kearns*, 567 F.3d at 1126–27;
21 *Durell*, 183 Cal. App. 4th at 1367.

22 Plaintiff further alleges that MLB violated § 1770(a)(13) by failing to disclose that "part
23 of the reason for the reduced ticket price of unprotected seats is [allegedly] related to their
24 unprotected nature." Compl. ¶ 156 As already explained, however, there is no difference in the
25 ticket price between Plaintiff's section (section 211) and adjacent sections that are behind the
26 home-plate netting. *See* above note 2. And even if "unprotected seats" *were* actually cheaper,
27 Plaintiff does not—and cannot—allege that MLB or the Commissioner somehow controls the
28 ticket-price charged by each individual Club. In any event, Plaintiff has failed to allege either

reliance or injury, and thus lacks standing to assert this CLRA claim. *See Durell*, 183 Cal. App. 4th at 1367.

Finally, Plaintiff alleges that MLB violated § 1770(a)(19) by "insert[ing] an unconscionable assumption of risk provision in the contract entered into when a ticket is purchased." Compl. ¶ 156 & n.185. This allegation also fails, for two reasons. First, the ticket-back statement referred to in the Complaint provides a warning to fans that foul balls and other objects may enter the stands. Gorman Decl., Ex. B. Even if the ticket-back statement were considered to be a contractual release of liability, it would not be unconscionable; under California law, provisions limiting or releasing parties from personal-injury liability are generally not unconscionable, especially in the realm of sports and recreation. *See Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621–22 (1996). Second, Plaintiff cannot claim injury because she cannot allege that MLB has ever attempted to enforce the provision against her. *See Lee v. Am. Express Travel Related Servs.*, 2007 WL 4287557, at *5 (N.D. Cal. Dec. 6, 2007) (dismissing an unconscionability claim under the CLRA for lack of injury where the allegedly unconscionable terms "have not . . . been invoked against plaintiffs").

3. Defendants did not sell Plaintiff her tickets.

The CLRA applies only to "transaction[s] intended to result or which result[] in the sale or lease of goods or services to a[] consumer." Cal. Civ. Code § 1770(a). The CLRA defines "[t]ransaction" as "an agreement between a consumer and another person." *Id.* at § 1761(e). Where there is no direct agreement between a consumer and the defendant (or the defendant's agents), and where the defendant is not engaged in the sale of the allegedly misrepresented goods or services, there can be no liability under the CLRA. *See Fulford v. Logitech, Inc.*, 2008 WL 4914416, at *1 & n.2 (N.D. Cal. Nov. 14, 2008); *Green v. Canidae Corp.*, 2009 WL 9421226, at *4 (C.D. Cal. June 9, 2009).[21] Here, Plaintiff has not alleged that any of the Defendants sold her tickets. Accordingly, Plaintiff cannot assert a CLRA claim against MLB.

[21] Some courts have allowed consumers to assert a CLRA claim against an upstream supplier even though the consumer purchased the goods from an intermediary retailer. *See Seifi v. Mercedes-Benz USA, LLC*, 2013 WL 2285339, at *7 (N.D. Cal. May 23, 2013); *Chamberlain v. Ford Motor Co.*, 2003 WL 25751413, at *8 (N.D. Cal. Aug. 6, 2003). But in those cases, the supplier had originally sold the good and introduced it into the stream of commerce. Where, as here, there is no allegation that the Commissioner or his Office has ever sold the alleged good,

In sum, Plaintiff has failed to plead her CLRA claims with the specificity required by Rule 9(b). Moreover, Plaintiff has failed to allege either reliance or injury, and thus lacks standing to assert her CLRA claims under California law. Finally, her CLRA claims fail because game tickets are not "goods or services." Amendment cannot remedy these flaws, so Plaintiff's CLRA claims must be dismissed with prejudice.

E. Plaintiff fails to state a claim under the Unfair Competition Law.

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

Just as Plaintiff fails to state a claim for fraudulent concealment or a violation of the CLRA, Plaintiff has also failed to state a claim under the UCL. For her UCL claims, Plaintiff relies on the exact same allegations of misrepresentations and concealments. *See* Compl. ¶¶ 145–46. And again, Plaintiff fails to satisfy Rule 9(b) and fails to plead nonconclusory allegations of reliance and injury sufficient to establish her standing under California law. Accordingly, Plaintiff's UCL claim must be dismissed, with prejudice, for the same reasons. *See* above at IV.C.1, IV.C.5, IV.D.2.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Class Action Complaint in its entirety. The Court should dismiss with prejudice

---

there can be no liability under the CLRA. *See Chamberlain*, 2003 WL 25751413, at *8 (citing *Vess v. Ciba-Geigy Corp. USA*, 2001 WL 290333 (S.D. Cal. Mar. 9, 2001); *Boyd v. Keyboard Network Magazine*, 2000 WL 274204 (N.D. Cal. Mar. 1, 2000)).

because it would be futile to grant leave for Plaintiff to amend. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Plaintiff cannot possibly allege that she actually ***has been*** or ***certainly will be*** injured by a foul ball or bat, and thus cannot establish standing. Plaintiff also cannot plead her way around numerous other legal rules that bar her claims, including her assumption of risk, the lack of any concealment by Defendants, and the fact that baseball tickets are an intangible license rather than a tangible good or service.

Respectfully submitted,

Dated: October 2, 2015

KEKER & VAN NEST LLP

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

Attorneys for Defendants
OFFICE OF THE COMMISSIONER OF BASEBALL (d/b/a MAJOR LEAGUE BASEBALL); and ROBERT D. MANFRED, JR.