Sterling v. National Basketball Association

United States District Court, C.D. California. | March 22, 2016 | Not Reported in Fed. Supp. | 2016 WL 1204471

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United States District Court, C.D. California.

Donald STERLING, et al.
v.
NATIONAL BASKETBALL ASSOCIATION, et al.

Case No. CV 14–4192 FMO (SHx)
|
Signed March 22, 2016

Attorneys and Law Firms

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Proceedings: (In Chambers) Order Re: Pending Motions

Honorable Fernando M. Olguin, United States District Judge

***1** Having reviewed and considered all the briefing filed with respect to defendants' motions to dismiss and special motions to strike, the court concludes that oral argument is not necessary to resolve them. *See* Fed.R.Civ.P. 78; Local Rule 7–15; *Willis v. Pac. Mar. Ass'n,* 244 F.3d 675, 684 n. 2 (9th Cir.2001).

INTRODUCTION

On March 6, 2015, plaintiff Donald T. Sterling ("Sterling" or "plaintiff"), filed his First Amended Complaint *(see* Dkt. 46, First Amended Complaint of Donald T. Sterling ("FAC")), alleging claims against the National Basketball Association (the "NBA"), Adam Silver ("Silver") (the NBA and Silver are collectively referred to as the "NBA parties"), David Stern ("Stern"), Rochelle H. Sterling ("Rochelle"), Meril Sue Platzer ("Platzer"), and James Edward Spar ("Spar") (Platzer and Spar are collectively referred to as the "doctor defendants").

In the FAC, Sterling asserts three federal causes of action: (1) constitutional violations for denial of due process against the NBA parties *(see* Dkt. 46, FAC at ¶¶ 68–76); (2) violations of the Sherman Act, 15 U.S.C. § 1, against the NBA parties *(see id.* at ¶¶ 77–91); and (3) violations of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. §§ 1320d, *et seq.,* against the NBA parties, Rochelle, and the doctor defendants. *(See id.* at ¶¶ 107–111). Sterling also asserts state law claims for: (1) breach of contract and breach of the implied covenant of good faith and fair dealing against the NBA parties *(see* Dkt. 46, FAC at ¶¶ 39–50); (2) breach of fiduciary duty against the NBA parties, Rochelle, and the doctor defendants *(see id.* at ¶¶ 51–59); (3) intentional misrepresentation against the NBA parties and Rochelle *(see id.* at ¶¶ 60–64); (4) violations of the California constitution against the NBA parties *(see id.* at ¶¶ 65–76); (5) intentional interference with prospective economic advantage against the NBA parties *(see id.* at ¶¶ 92–97); (6) violations of California Business & Professions Code §§ 17200, *et seq.,* against the NBA parties and the doctor defendants *(see id.* at ¶¶ 98–101); (7) conversion against the NBA parties *(see id.* at ¶¶ 102–106); (8) violations of the Confidentiality of Medical Information Act ("CMIA"), Cal. Civ.Code §§ 56, *et seq.* against Rochelle and the doctor defendants *(see id.* at ¶¶ 112–119); and (9) an accounting against the NBA parties. *(See id.* at ¶¶ 120–125). Finally, although Stern is identified as a defendant on the caption page of the FAC, Sterling does not allege any cause of action against him. *(See, generally, id.).*

PLAINTIFF'S ALLEGATIONS

This case arises from events leading up to the August 12, 2014, sale of the Los Angeles Clippers (the "Clippers") professional basketball team. In 2005, Sterling transferred the Clippers to the Sterling Family Trust (the "Trust"), in which Sterling and Rochelle were the settlors and co-

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trustees. *(See* Dkt. 85–1, Declaration of Caroline S. Heindel at ¶ 2; Dkt. 85–2, The Sterling Family Trust Agreement, 2013 Restatement (the "Trust Agreement")). [1] Under ¶ 7.5(c) of the Trust Agreement, "[a]ny individual who is deemed incapacitated ... shall cease to serve as a Trustee." (Dkt. 85–2, Trust Agreement at 56; *see id.* at 79, ¶ 10.24 (defining "incapacity")). Sterling, as a co-trustee, agreed that he: (1) "shall cooperate in any examination reasonably appropriate to carry out the provisions of this Paragraph 7.5.c.," *(id.* at 56, ¶ 7.5.c(A)); (2) "waives the doctor-patient and/or psychiatrist-patient privilege with respect to the results of such examination," *(id.* at 56, ¶ 7.5.c(B)); and (3) "waiv[es] any privacy rights governed by the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d (HIPAA), and the regulations thereunder, including 45 C.F.R. §§ 160–164, to the extent required to implement this Paragraph 7.5.c." (*Id.* at 56–57, ¶ 7.5.c(C)).

***2** Sterling alleges that on September 12, 2013, a "former friend," V. Stiviano ("Stiviano"), "surreptitiously and illegally" recorded a conversation between him and Stiviano in Stiviano's living room without Sterling's knowledge or consent. *(See* Dkt. 46, FAC at ¶ 15). The contents of the recording were disseminated by the celebrity news website, TMZ, on April 26, 2014. [2] (*See id.* at ¶ 18). TMZ's release of that recording "prompt[ed] a predictable public backlash against Sterling," *(see id.* at ¶ 19), as Sterling's statements expressed "deeply offensive, demeaning, and discriminatory views toward African Americans, Latinos, and 'minorities' in general, and demanded that a female acquaintance not associate publicly with African Americans or 'minorities' or bring them to Clippers games." *(See* Dkt. 46–3, Exh. 3 to FAC at 1 ("May 18, 2014 Charge")).

Within 24 hours of TMZ's dissemination of the recording, the NBA parties appointed David Anders to investigate the recording and its authenticity. *(See* Dkt. 46, FAC at ¶ 20; Dkt. 46–3, May 18, 2014 Charge at 5). As part of that investigation, Anders interviewed Sterling by telephone. [3] *(See* Dkt. 46–3, May 18, 2014 Charge at 6). Although Sterling claims that "statements alleged to be [his] were apparently altered by Stiviano or her agents," *(see* Dkt. 46, FAC at ¶ 15), Sterling admitted during the telephone interview with Anders that the male voice on the recording was his. *(See* Dkt. 46–3, May 18, 2014 Charge at 6). As a result of the investigation, the NBA, on April 29, 2014, fined Sterling $2.5 million and issued a "lifetime ban," prohibiting him "from having any involvement with the business operations or management of the Clippers" and "from attending any NBA games." *(See* Dkt. 46, FAC at ¶ 21).

On May 11, 2014, Sterling "participated in a televised interview with CNN's Anderson Cooper in which he admitted making the racially offensive statements in the Recording and acknowledged the harm he had caused. However, he also made additional offensive and discriminatory statements about African–Americans during the interview." (Dkt. 85–3, *In the Matter of The Sterling Family Trust,* Case No. BP152858 (Cal.Super.Ct.) *("Trust Action"),* [4] Rochelle's Verified *Ex Parte* Petition at 95). "Rochelle's concerns were significantly increased when she saw the Anderson Cooper interview[ ] on or about May 12, 2014." (Dkt. 85–5, *Trust Action,* Statement of Decision at 270).

On May 18, 2014, the NBA began proceedings to terminate Sterling's ownership interest in the Clippers. *(See* Dkt. 46–3, May 18, 2014 Charge). The NBA's decision to initiate proceedings was based on findings that, among other things, "[NBA team] owners expressed deep concern that the views expressed by Mr. Sterling had undermined years of effort by the NBA to establish and maintain its well-deserved and widely recognized reputation for promoting and upholding the principles of diversity, inclusion, and respect that form the very foundation of the League." *(Id.* at 9). A survey "of more than 500 Clippers fans, conducted more than a week after Commissioner Silver's discipline was announced, confirmed that fan support for the Clippers would erode dramatically if Mr. Sterling did not sell the team." *(Id.* at 10). NBA sponsors Kia, Spring, Samsung, and State Farm publicly announced that they were terminating or suspending their relationships with the Clippers. *(See id.* at 13–14). Also, "nearly all of the Clippers' local sponsors terminated or suspended their relationships with the team, including adidas, AquaHydrate, CarMax, Chumash Casino, Commerce Casino and Hotel, Diageo, LoanMart, Lumber Liquidators, Mandalay Bay Hotel, Mercedes, Red Bull, Southern California Ford, Virgin America, and Yokohama Tires." *(Id.* at 14). Many of these sponsors "stated publicly and/or privately that they will not reactivate their sponsorships of the Clippers if current ownership remains in place." *(Id.).*

***3** The May 18, 2014 Charge provided Sterling notice that the NBA Board of Governors would vote on June 3, 2014, to terminate Sterling's ownership in the Clippers and set forth the procedure for that vote. *(See* Dkt. 46–3, May 18, 2014 Charge at 19 & 23–30; FAC at ¶ 72). On May 22, 2014, Sterling filed

a response to the May 18, 2014 Charge. *(See* Dkt. 46–6, FAC at Exh. 6).

On May 19 and May 22, 2014, Platzer and Spar, respectively conducted a neurological examination of Sterling. *(See* Dkt. 46, FAC at ¶¶ 31–32). Sterling alleges that these examinations were "fraudulently arranged" by Rochelle for the purpose of removing him as trustee of the Trust under ¶ 7.5.c of the Trust Agreement and in furtherance of the conspiracy by the NBA parties, Rochelle, and the doctor defendants to force the sale of the Clippers before the June 3, 2014, vote by the Board of Governors was to take place. *(See id.).* On May 27, 2014, and May 29, 2014, respectively, Spar's and Platzer's reports on Sterling's neurological examinations were disseminated. *(See id.* at ¶ 34).

"Sterling signed a letter on May 22, 2014, permitting Rochelle to 'negotiate' with the NBA and others for the sale of the Clippers." (Dkt. 46, FAC at ¶ 28). Rochelle "retained valuation experts, undertook a search for buyers and conducted the auction, which produced bids of $1.2 Billion, $1.6 Billion and $2 Billion." (Dkt. 85–5, *Trust Action,* Statement of Decision at 272).

Sterling alleges that "on May 29, 2014, it was officially announced and widely reported that Rochelle and Ballmer had reached an agreement on the sale of the Clippers for $2 billion[.]" (Dkt. 46, FAC at ¶ 36). On May 30, 2014, the NBA announced that it would vacate [5] the June 3, 2014 Board of Governor's vote pending resolution of probate litigation between Sterling and Rochelle. *(See id.* at ¶ 37). The sale of the Clippers to Ballmer closed on August 12, 2014.

LEGAL STANDARD

"The focus of any Rule 12(b)(6) dismissal—both in the trial court and on appeal—is the complaint." *Schneider v. Cal. Dep't of Corr.,* 151 F.3d 1194, 1197 n. 1 (9th Cir.1998). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965 (2007). Rather, plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 127 S.Ct. at 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009); *see Twombly,* 550 U.S. at 555, 127 S.Ct. at 1965 (factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, "even if doubtful in fact"); *Moss v. United States Secret Serv.,* 572 F.3d 962, 969 (9th Cir.2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). In determining whether the complaint states a plausible claim for relief, the court must "draw on its judicial experience and common sense[,]" *Iqbal,* 556 U.S. at 679, 129 S.Ct. at 1950, and consider " 'obvious alternative explanation[s].' " *Id.* at 682, 129 S.Ct. at 1951 (quoting *Twombly,* 550 U.S. at 567, 127 S.Ct.1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Corinthian Colls.,* 655 F.3d at 991.

***4** In considering whether to dismiss a complaint, "a court must accept as true all of the allegations contained in a complaint," *Iqbal,* 556 U.S. at 678, 129 S.Ct. at 1949, construe the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in the pleader's favor. *See Hebbe v. Pliler,* 627 F.3d 338, 340 (9th Cir.2010). Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. *See Mendiondo v. Centinela Hosp. Med. Ctr.,* 521 F.3d 1097, 1104 (9th Cir.2008). A complaint may be dismissed also for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. *See Franklin v. Murphy,* 745 F.2d 1221, 1228–29 (9th Cir.1984).

DISCUSSION

I. MOTIONS TO DISMISS.

A. *Federal Claims.*

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1. **Due Process**.

Sterling alleges that the NBA parties, in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution, did not give him adequate notice and an opportunity to be heard regarding the imposition of the $2.5 million fine, the lifetime ban, and the termination of his ownership interest in the Clippers. *(See* Dkt. 46, FAC at ¶¶ 68 & 70–72).

As an initial matter, plaintiff's FAC does not assert a claim under 42 U.S.C. § 1983,[6] which is required to assert a claim under the Fourteenth Amendment. *See* *Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 617, 99 S.Ct. 1905, 1916 (1979) (§ 1983 "serve[s] only to ensure that an individual had a cause of action for violations of the Constitution."). The Fourteenth Amendment is not self-executing, and a cause of action arising under it can only be brought by plaintiff pursuant to § 1983.[7] *See* *Magana v. Com. of the N. Mariana Islands,* 107 F.3d 1436, 1441 (9th Cir.1997) ("Section 1983 is ... the modern-day statute 'to enforce the Provisions of the Fourteenth Amendment to the Constitution.' ").

Assuming plaintiff had invoked 42 U.S.C. § 1983, to state a claim he would have to allege the violation of a right secured by the Constitution or laws of the United States, and show that the deprivation was committed by a person acting under color of state law. *See* *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49–50, 119 S.Ct. 977, 985 (1999); *West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 2254–55 (1988). "Acting under color of state law is a 'jurisdictional requisite for a § 1983 action.' " *Gritchen v. Collier,* 254 F.3d 807, 812 (9th Cir.2001) (quoting *West,* 487 U.S. at 46, 108 S.Ct. at 2253). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *West,* 487 U.S. at 49, 108 S.Ct. at 2255 (citations omitted); *McDade v. West,* 223 F.3d 1135, 1139 (9th Cir.2000). In other words, "the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Am. Mfrs. Mut. Ins. Co.,* 526 U.S. at 49–50, 119 S.Ct. at 985 (internal quotation marks and citations omitted); *see* *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 835 (9th Cir. 1999).

***5** Here, plaintiff has not put forth any allegations that the NBA parties were acting under color of law when they engaged in the conduct of which plaintiff complains. *(See, generally,* FAC); *see Neeld v. Nat'l Hockey League,* 594 F.2d 1297, 1300 & 1301 n. 6 (9th Cir.1979) (denying leave to amend to add § 1983 claim, because even if federal law were to apply, there was "not sufficient state action involvement to maintain the action"); *Mattheis v. Jockey Club,* 387 F.Supp. 1126, 1127 (E.D.Ky.1975) ("The mere reliance by the state racing commission upon the defendant's registration files is not sufficient to confer the requisite state involvement."). Nor could he, because there is no dispute that the NBA parties are private actors and the alleged conduct is merely between private parties. Further, there are no allegations of a close nexus between the NBA parties and the state or federal government such that the NBA's conduct could be treated as that of the government itself. *(See, generally,* FAC); *see* *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 349 & 351, 95 S.Ct. 449, 453 (1974) ("[P]rivate action is immune from the restrictions of the Fourteenth Amendment" and a private actor may only be held liable for a constitutional violation if there is a "sufficiently close nexus between the State and the challenged action of the [private actor]."); *Rank v. Nimmo,* 677 F.2d 692, 701 (9th Cir.), *cert. denied* 459 U.S. 907 (1982) ("In order to apply the proscriptions of the Fifth Amendment to private actors there must exist a sufficiently close nexus between the government and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the government itself.") (internal citations, quotation marks and alteration marks omitted); *Klobnock v. City of Los Angeles,* 2012 WL 4471141, at *3 (C.D.Cal.2012) ("The Takings Clause [of the Fifth Amendment] does not apply to a private party unless the complained-of-conduct by the private party is 'fairly attributable to the state.' ").

Moreover, even assuming plaintiff had established that the NBA parties are government actors, Sterling's own allegations show that he did receive notice and an opportunity to be heard. Prior to the imposition of the fine and lifetime ban, the NBA informed Sterling's attorney, Robert Platt, that "Sterling would be afforded every opportunity to be heard and

that the NBA would consider any evidence or other materials Mr. Sterling wished to submit." (Dkt. 46–3, May 18, 2014 Charge at 6). Sterling participated in a telephonic interview with Anders *(see id.),* and scheduled but then cancelled an in-person interview with Anders. *(See id.).* Other than participating in the phone interview with Anders, Sterling did not proffer any other evidence to the NBA. *(See id.).*

As for the termination of his ownership interest in the Clippers, the NBA served the May 18, 2014 Charge on Sterling, which clearly explained the reasons why the NBA would vote to terminate his ownership interest in the Clippers. Having received the Charge, Sterling took the opportunity to be heard by providing a written, 26–page response to the May 18, 2014 Charge, which also included a declaration from Sterling. *(See* Dkt. 46–6, FAC at Exh. 6).

Finally, the NBA's Board of Governors never voted to terminate Sterling's ownership interest on June 3, 2014, or any other date. *(See* Dkt. 46, FAC at ¶ 89) (Sterling alleges that the vote to terminate his ownership interest "never happened"). That is because Sterling's own action mooted the necessity for a vote. "Sterling signed a letter on May 22, 2014, permitting Rochelle to 'negotiate' with the NBA and others for the sale of the Clippers." *(Id.* at ¶ 28). Rochelle "retained valuation experts, undertook a search for buyers and conducted the auction, which produced bids of $1.2 Billion, $1.6 Billion and $2 Billion." (Dkt. 85–5, *Trust Action,* Statement of Decision at 272). "[O]n May 29, 2014, it was officially announced and widely reported that Rochelle and Ballmer had reached an agreement on the sale of the Clippers for $2 billion." (Dkt. 46, FAC at ¶ 36). That sale closed on August 12, 2014. In short, Sterling cannot show that the NBA parties deprived him of a constitutionally protected interest.

2. **Violations of the Sherman Act, 15 U.S.C. § 1**.

It is worth noting that the state court recently affirmed the probate court's order allowing the sale of the Clippers by Rochelle to Ballmer. *See Sterling v. Sterling,* 242 Cal.App.4th 185, 188 (Cal.Ct.App.2015). Thus, any claim—such as the instant one—that is premised on challenging the sale of the team is arguably barred by *res judicata* and the doctrine of collateral estoppel. *See Lodin v. Bank of Am., N.A.,* 2014 WL 296927, *2 (N.D.Cal.2014) ("If the former judgment is a state court judgment, the court applies the res judicata and collateral estoppel rules of the state."); *Noble v. Draper,* 160 Cal.App.4th 1, 11 (2008) ("Res judicata prevents relitigation of the same cause of action in a second suit between the same parties.... [J]udgment for the defendant serves as a bar to further litigation of the same cause of action."); *Branson v. Sun–Diamond Growers,* 24 Cal.App.4th 327, 346 (1994) ("[C]ollateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding."). For example, the state court considered and made a factual finding (which was upheld by the appellate court) that there was no credible evidence of a "secret Plan B," *i.e.,* a conspiracy between the NBA parties, Rochelle, and the two doctors to wrest control of the Clippers from plaintiff. *See Sterling,* 242 Cal.App.4th at 197 (rejecting Sterling's contention that "Rochelle and her lawyer met with the Commissioner of the NBA, Adam Silver, on or about May 13, 2014, and began to plot with the NBA to wrest control of the team away from Donald knowing he never sells any property.... This lead to secret Plan B."). Further, under the Rooker–Feldman doctrine, this court has no authority to review the state court's decision. *See Bianchi v. Rylaarsdam,* 334 F.3d 895, 898 (9th Cir.2003), *cert. denied,* 540 U.S. 1213 (2004) (Rooker–Feldman doctrine serves as a jurisdictional bar that "prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments[.]").

***6** In any event, assuming plaintiff has a viable conspiracy claim that is not barred by the findings of the state court, Sterling's antitrust claim is plainly insufficient, as it is not a conspiracy claim in restraint of trade under the Sherman Act. Sterling alleges that he suffered at least $600 million in damages because the lifetime ban resulted in a "forced sale," which "produced a lower price" *(see* Dkt. 46, FAC at ¶ 84), and exposed him to "massive tax liability stemming from the capital gains of the 'sale' of the Clippers." *(Id.* at ¶ 83). According to Sterling, the market for NBA franchises is, in practical terms, "only open to members of the 'billionaires' club,' " and the looming vote restricted the amount of time available to solicit buyers from this small "club." *(See id.* at ¶¶ 81, 84, 87 & 88). Sterling also claims that the lifetime ban "compromises the competitive process for acquiring club ownership" and "injured competition and created an antitrust injury by making the relevant market unresponsive to consumer preference[.]" *(See id.* at ¶ 82 & 84).

Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce." *See* 15 U.S.C. § 1.

Adequately pleading a § 1 claim requires: "(1) a 'contract, combination or conspiracy among two or more persons or distinct business entities'; (2) which is intended to restrain or harm trade; (3) 'which actually injures competition'; and (4) harm to the plaintiff from the anticompetitive conduct." *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers,* 795 F.3d 1124, 1129 (9th Cir.2015) (quoting *Brantley v. NBC Universal, Inc.,* 675 F.3d 1192, 1197 (9th Cir.2012)).

Sterling's claimed injuries of a "lower price," *(see* Dkt. 46, FAC at ¶ 84), and "massive tax liability" *(see id.* at ¶¶ 79 & 83), are injuries belonging to him, individually, and not injuries to competition in the market. As the Ninth Circuit has stated, "claimants must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors in the market." *Les Shockley Racing, Inc. v. Nat'l Hot Rod Ass'n,* 884 F.2d 504, 508 (9th Cir.1989). Here, Sterling's claims of antitrust injury are not an injury to competition, but rather, disappointment that he lost ownership of the Clippers as a result of the probate court's order.

Even assuming, *arguendo,* that Sterling had lost ownership of the Clippers as a result of actions taken by the NBA, that would not change the result.[8] "The exclusion of [Sterling's] membership in the league [would] not have an anticompetitive effect nor an effect upon the public interest. The [Clippers] continue as an operating club." *Levin v. Nat'l Basketball Ass'n,* 385 F.Supp. 149, 152 (S.D.N.Y.1974) ("Here the plaintiffs wanted to join with those unwilling to accept them, not to compete with them, but to be partners in the operation of a sports league for plaintiffs' profit. Further, no matter which reason one credits for the rejection, it was not an anti-competitive reason."); *see* *Fichman v. Estate of Wirtz,* 807 F.2d 520, 544 (7th Cir.1986) (there is no antitrust injury "for the NBA to have picked the [ownership] it preferred[.]"); *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League,* 783 F.2d 1347, 1350 (9th Cir.), *cert. denied,* 479 U.S. 932 (1986) ("The Totems were not competing with the NHL; they were seeking to join it. They were granted a conditional NHL franchise but failed to fulfill the conditions precedent to obtaining a final franchise."); *Dunn v. Mavis, Inc. v. Nu–Car Driveaway, Inc.,* 691 F.2d 241, 243–44 (6th Cir.1982) ("When stripped to its essential allegations, the complaint does no more than state plaintiffs' commercial disappointment at losing Chrysler's patronage—the recurrent case of the jilted customer, dealer or supplier who loses a manufacturer's franchise and accuses the manufacturer and the new suitor of attempting to monopolize something.").

***7** Finally, the court is skeptical that Sterling suffered any injury at all, let alone an antitrust injury. Contrary to Sterling's contention that Rochelle is an "inexperienced business person," *(see* Dkt. 46, FAC at ¶ 81), Rochelle "retained valuation experts" and "conducted [an] auction, which produced bids of $1.2 Billion, $1.6 Billion, and $2 Billion." (Dkt. 85–5, *Trust Action,* Statement of Decision at 272). In other words, Rochelle obtained the highest price ever paid for an NBA team. Indeed, even Rochelle's lowest bid of $1.2 billion was more than twice the $550 million paid for the Milwaukee Bucks in early 2014 which, at that time, was the highest price paid for an NBA team.[9] *See NBA Owners Approve Sale of Bucks to Edens, Lasry,* Associated Press, May 15, 2014 *(available at* http://www.nba.com/2014/news/05/15/Milwaukee-bucks-sale-news-release (last visited on March 17, 2016) (reporting sale of $550 million); *see also* Fed.R.Evid. 201(b) & (c) (permitting courts to judicially notice "on its own" facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Indep. Living Ctr. of S. Cal. v. City of Los Angeles, Cal.,* 973 F.Supp.2d 1139, 1155 n. 14 (C.D.Cal.2013) (same). Rochelle's lowest bid of $1.2 billion is also significantly higher than the $850 million price (including outstanding bonds) for the June 2015 sale of the Atlanta Hawks, the current second highest price paid for an NBA team. *See* Des Bieler, *Hawks Officially Sold to Ownership Group that Includes Grant Hill,* Washington Post, June 25, 2015, available at https://www.washingtonpost.com/news/early-lead/wp/2015/06/25/ (last visited March 17, 2016); *see also* Fed.R.Evid. 201(b) & (c). Sterling provides no basis for his speculation that, had he run the auction, the Clippers would have garnered a price of his claimed $2.6 billion or $8 billion. *(See, generally,* Dkt. 46, FAC at ¶ 79).

3. **Violations of HIPAA, 42 U.S.C. §§ 1320d, *et seq.***

Sterling alleges that the NBA parties, Rochelle, and the doctor defendants are liable for violating HIPAA, 42 U.S.C. §§ 1320d, *et seq.,* because he "never consented to nor provided written authorization for the release of his medical records and reports taken by defendants Spar and Platzer[,]" (Dkt. 46, FAC at ¶ 108), and the NBA parties "acquiesce[d]" to

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Rochelle's use of those records to remove him as co-trustee of the Trust. *(See id.* at ¶ 109).

Sterling's cause of action fails for two reasons. First, "HIPAA itself provides no private right of action." *Webb v. Smart Document Solutions, LLC,* 499 F.3d 1078, 1081 (9th Cir.2007); *see* *Seaton v. Mayberg,* 610 F.3d 530, 533 (9th Cir.2010), *cert. denied,* 131 S.Ct. 1534 (2011) (same); *Curry v. GMAC Mortg.,* 2010 WL 4553503, at *2 (C.D.Cal.2010) (no federal question jurisdiction because HIPAA provides no private right of action); *Gall v. City of San Jose,* 2008 WL 5046296, at *1 (N.D.Cal.2008) (denying plaintiff's motion for leave to amend because alleging HIPAA claim would be futile); *Chrisanthis v. Nicholson,* 2007 WL 2782860, at *5 (N.D.Cal.2007) (granting motion to dismiss without leave to amend because amending HIPAA claim would be futile). Second, Sterling expressly waived any right to assert a cause of action for violation of his privacy rights under HIPAA. Under ¶ 7.5.c(C) of the Trust Agreement, Sterling, as co-trustee, agreed to "waiv[e] any privacy rights governed by the Health Insurance Portability and Accountability Act of 1996, U.S.C. § 1320d (HIPAA), and the regulations thereunder, including 45 C.F.R. §§ 160–164, to the extent required to implement this Paragraph 7.5.c." (Dkt. 85–2, Trust Agreement at 56–57, ¶ 7.5.c(C)).

4. **Leave to Amend**.

***8** Rule 15 of the Federal Rules of Civil Procedure provides that the court "should freely give leave [to amend] when justice so requires." Fed.R.Civ.P. 15(a)(2); *see* *Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir.1990) (the policy favoring amendment must "be applied with extreme liberality."). However, "[i]t is settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 330, 91 S.Ct. 795, 802 (1971). This decision is guided by an examination of several factors, including: (1) whether the amendment causes the opposing party undue prejudice; (2) whether the amendment is sought in bad faith; (3) whether the amendment causes undue delay; (4) whether the amendment constitutes an exercise in futility; and (5) whether the plaintiff has previously amended his or her complaint. *See* *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 & n. 3 (9th Cir.1987).

Having liberally construed and assumed the truth of the allegations in the FAC, the court is persuaded that giving Sterling a third opportunity to state a federal claim would be futile. *See* *Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc.,* 637 F.3d 1047, 1058 (9th Cir.2011) ("[T]he district court's discretion to deny leave to amend is particularly broad where the plaintiff has previously filed an amended complaint.") (internal quotation marks omitted); *Zucco Partners, LLC v. Digimarc Corp.,* 552 F.3d 981, 1007 (9th Cir.2009) ("[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to [his] claims, the district court's discretion to deny leave to amend is particularly broad."). Sterling's claims for violations of the Fifth and Fourteenth Amendment are clearly barred for lack of state action. As for the antitrust claim, the claim is arguably foreclosed by the state court's decision and, in any event, Sterling cannot allege any injury, let alone injury to competition, in connection with the $2 billion sale of the Clippers. Finally, because HIPAA does not afford Sterling a private right of action, and because Sterling expressly waived any privacy rights he has under HIPAA, Sterling cannot allege any additional or different facts to save that claim. In short, the federal claims are dismissed with prejudice.

B. Stern.

Although Stern is identified as a defendant on the caption page of the FAC, Sterling does not allege any cause of action against Stern. *(See, generally,* Dkt. 46, FAC). Because Sterling has not alleged any claim for relief against Stern, the court dismisses the FAC as to Stern.

C. State Claims.

Pursuant to 28 U.S.C. § 1367(c)(3), the court may decline to exercise supplemental jurisdiction when the Court "has dismissed all claims over which it has original jurisdiction." The Court should consider factors such as "economy, convenience, fairness, and comity." *Acri v. Varian Assocs.,* 114 F.3d 999, 1001 (9th Cir.1997) *(en banc).* "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 35 n. 7, 108 S.Ct. 614, 619 n. 7 (1987).

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Because the court has dismissed the federal claims with prejudice, the balance of factors weighs in favor of dismissing Sterling's state law claims against defendants. [10] This action is still at the pleading stage, and few judicial resources are wasted by dismissal. *See* *Acri,* 114 F.3d at 1001. Further, dismissal promotes comity by allowing California courts to interpret state law concerning the state law claims in the first instance. *Id.*

CONCLUSION

***9** Based on the foregoing, IT IS ORDERED THAT:

1. Defendants' motions to dismiss the FAC (**Document Nos. 50, 70, 80 & 85**) are **granted**. Sterling's claims for violations of the Fifth and Fourteenth Amendment of the Constitution; violations of the Sherman Act, 15 U.S.C. § 1; and violations of HIPAA, 42 U.S.C. §§ 1320d, *et seq.,* are **dismissed with prejudice**. The action as to defendant Stern is **dismissed with prejudice**. The state claims are **dismissed without prejudice**.

2. Defendant Rochelle H. Sterling's, James Edward Spar's, and Meril Sue Platzer's motions to strike (**Document Nos. 66, 84 & 91**) are **denied as moot**.

3. Judgment shall be entered accordingly.

All Citations

Not Reported in Fed. Supp., 2016 WL 1204471

Footnotes

1 A court may judicially notice a document if the complaint refers to that document, it is central to plaintiff's claim, and no party questions the authenticity of the copy of that document. *See* *United States v. Corinthian Colls.,* 655 F.3d 984, 999 (9th Cir.2011). Rochelle asks that the court judicially notice the Trust Agreement (Dkt.85–2), which Sterling does not oppose. *(See, generally,* Dkt.). Because Sterling's FAC references the Trust Agreement *(see, e.g.,* Dkt. 46, FAC at ¶¶ 15, 30 & 35), is central to Sterling's causes of action, and Sterling does not dispute its authenticity, the court may judicially notice the Trust Agreement.

2 Sterling sued Stiviano and TMZ in state court for violation of California Penal Code §§ 630, *et seq.* and California Business & Professions Code §§ 17200, *et seq.* (*See* Dkt. 119–1, NBA Parties and Mr. Stern's Notice of Supplemental Authority ("Notice of Suppl. Auth.") at Exh. A).

3 Although an in-person interview was scheduled to take place, Sterling, represented by counsel, cancelled the interview. *(See* Dkt. 46–3, May 18, 2014 Charge at 6).

4 Pursuant to Fed. R. Evid. 201, this court takes judicial notice of the superior court's decision, *i.e., Trust Action*, and the California Court of Appeal's decision, *Sterling v. Sterling*, 242 Cal.App.4th 185, 188 (2015), as well as related briefing in the actions. *See* *Rosales–Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that we may take judicial notice of judicial proceedings in other courts."); *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (The Court " 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.' ") (citations omitted).

5 The FAC does not specify when the NBA parties actually vacated the vote. *(See, generally,* Dkt. 46, FAC). However, Sterling acknowledges that the vote "never happened[.]" (*Id.* at ¶ 89).

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6 Section 1983 provides, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]"

7 A cause of action and a damages remedy can be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated. *See* *Davis v. Passman,* 442 U.S. 228, 230, 99 S.Ct. 2264, 2269 (1974); *cf.* *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999 (1971) (holding that a cause of action for damages arises under the Constitution when Fourth Amendment rights are violated). And "[t]he Supreme Court has long recognized that the just compensation clause of the Fifth Amendment is self-executing: the right to recover just compensation is guaranteed by the Constitution and statutory recognition is not necessary." *Seven Up Pete Venture v. Schweitzer,* 523 F.3d 948, 953–54 (9th Cir.2008) (internal alteration marks omitted). But, as noted below, Sterling has not alleged that any defendant is a federal government actor rather than a private party. *(See, generally,* Dkt. 46, FAC).

8 Sterling's reliance on *Sullivan v. Nat'l Football League,* 34 F.3d 1091 (1st Cir.1994), *cert. denied* 513 U.S. 1190 (1995), *(see* Dkt. 57, Plaintiff Donald T. Sterling's Opposition to Defendant NBA, Adam Silver and David Stern's Motion to Dismiss Plaintiff's First Amended Complaint ("Opp."), at 23–24), is unpersuasive. It is not the case, as Sterling contends, that *Sullivan* stands for the proposition that "replacing the owner of such an exclusive entity as an NBA team undoubtedly affects competition and commerce." *(Id.* at 23). Rather, in *Sullivan,* the court found that there was sufficient evidence to support the jury's verdict that the NFL's broad-based policy prohibiting the sale of shares in NFL teams to the public depressed sales prices to owners of NFL teams. *See* 34 F.3d at 1098–99. The court in *Sullivan* distinguished the facts of that case from the type at issue here, stating that "[i]ndividual decisions to block the sale of a franchise do not implicate the harm to competition that is caused by a policy restricting all sales of a certain type of ownership interest. Only the broad-based policy has the potential to compromise the entire competitive process for the buying and selling of a good in a relevant market." 34 F.3d at 1099 n. 2.; *see* *id.* at 1099 ("[T]he NFL's public ownership policy allegedly does not merely prevent the replacement of one club owner with another—an action having little evident effect on competition—it compromises the entire process by which competition for club ownership occurs."). In other words, the NBA's decision to impose a lifetime ban—resulting in Sterling's ownership of the Clippers being replaced with that of another owner—affected Sterling, but it had no effect, generally, on competition for the purchase or sale of NBA teams.

9 Sterling's allegation that the lifetime ban created a barrier to entry into the market for purchasing NBA teams, *(see* Dkt. 46, FAC at ¶ 81) ("had Sterling been given more time and an opportunity to canvass a single prospective purchaser – either domestic or international," Sterling would have garnered a higher price), is clearly implausible, especially given that the state court concluded that Rochelle had the right to sell the team. There is simply no basis to conclude that Sterling had (or could have found) one prospective purchaser who would have outbid the three bidders solicited by Rochelle (who were already bidding against each other). *Cf.* *NCAA v. Board of Regents,* 468 U.S. 85, 98, 104 S.Ct. 2948, 2958 (1984) ("Only when the restraining force of an agreement or other arrangement affecting trade becomes unreasonably disruptive of market functions such as price setting, resource allocation, market entry, or output designation is a violation of the Sherman Act threatened.").

10 Arguably, all state claims based on the NBA's use of the recording are legally deficient because the recording by Stiviano had already been made public and the NBA has the right to use public materials in its private

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proceedings. Indeed, the state court has already dismissed claims against the *publisher* of the recording, TMZ, in state court. (*See* Dkt. 119–1, Notice of Suppl. Auth.) (*Sterling v. TMZ Prods. Inc., et al.,* No. BC590575 (Cal. Super. Ct.)) (Court's Order of Nov. 6, 2015 granting TMZ's special motion to strike pursuant to Cal. Civ. Proc. Code §§ 425.16). In granting TMZ's special motion to dismiss pursuant to California Civil Procedure Code 425.16, the state court held that "Penal Code § 632 does not prohibit the disclosure of information gathered in violation of its terms," and accordingly dismissed that claim as well as the remaining claim against TMZ. (*Id.* at 12). Unlike Stiviano, who is alleged to have "surreptitiously and illegally" recorded the conversation between her and Sterling, and TMZ, who published that recording, (*See* Dkt. 46, FAC at ¶ 15; Dkt. 119–1, Notice of Suppl. Auth.), defendants in this action are only alleged to have used the recording publicly disseminated by TMZ. (*See, e.g.,* Dkt. 46, FAC at ¶¶ 50, 67, 72 & 93).

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