UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In re: National Hockey League Players' Concussion Injury Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota
Courtroom 7B
January 8, 2015
9:30 a.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON

UNITED STATES DISTRICT COURT JUDGE

DEFENDANT'S MOTIONS TO DISMISS [DOC. 37 AND DOC. 43]

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P R O C E E D I N G S

IN OPEN COURT

(Commencing at 9:33 a.m.)

THE COURT: I was thinking this morning that some of those Florida lawyers are probably rethinking this whole business. (Laughter.)

We are here today in the matter of the National Hockey League Players' Concussion Injury Litigation. This is 14-mdl-2551.

So, beginning with Mr. Zimmerman, let's introduce everyone on the Plaintiffs' side and then on the defense side.

MR. ZIMMERMAN: Charles Zimmerman, Your Honor, for the Plaintiffs.

THE COURT: Good morning.

MR. GRYGIEL: Steve Grygiel, good morning, Your Honor, for the Plaintiffs.

MR. DAVIDSON: Good morning, Judge. Stu Davidson from Robbins Geller for the Plaintiffs.

MR. DEARMAN: Mark Dearman from Robbins Geller for the Plaintiffs.

THE COURT: Good morning.

MR. KLOBUCAR: Morning, Judge. Jeff Klobucar from the Bassford Remele on behalf of Plaintiffs.

MR. REMELE: Lewis Remele on behalf of the Plaintiffs.

MR. CASHMAN: Good morning, Your Honor. Michael Cashman on behalf of the Plaintiffs.

MR. GUDMUNDSON: Good morning. Brian Gudmundson on behalf of the Plaintiffs.

MR. BRADFORD: Good morning, Your Honor. Mark Bradford on behalf of the Plaintiffs.

THE COURT: Very good. Everybody from the Plaintiffs' side been introduced?

MR. BYRNE: Morning, Your Honor. Tom Byrne for the Plaintiffs.

MR. SCOTT ANDRESON: Good morning. Scott Andreson, Bassford Remele, for the Plaintiffs.

MR. CIALKOWSKI: Good morning, Your Honor. Dave Cialkowski for the Plaintiffs.

MR. GIBBS: Good morning, Your Honor. Bill Gibbs for the Plaintiffs.

PLAINTIFF REED LARSON: Good morning, Your Honor. Reed Larson (inaudible).

MR. RISSMAN: Good morning, Your Honor. Josh Rissman for the (multiple inaudible words) --

THE COURT REPORTER: I can't actually hear you back there.

MR. RISSMAN: Oh, Josh Rissman for the (multiple inaudible words) --

THE COURT: Loud voices in the back.

MS. GEOFFIRON: Katelyn Geoffrion for the Plaintiffs.

MR. JAMES ANDERSON: Good morning, Your Honor. James Anderson for the Plaintiffs.

MR. BLEICHNER: Good morning, Your Honor. Brian Bleichner, Chestnut Cambronne, on behalf of the Plaintiffs.

MR. PENNY: Brian Penny for the Plaintiffs.

MR. HAGSTROM: Good morning, Your Honor. Richard Hagstrom, Zelle Hoffman, for the Plaintiffs.

THE COURT: Have we heard from all the Plaintiffs' counsel? Good morning to all of you.

And now we'll begin with the defense counsel.

MR. BEISNER: Good morning, Your Honor. John Beisner, on behalf of Defendant, National Hockey League.

MR. BAUMGARTNER: Good morning, Your Honor. Joseph Baumgartner, Proskauer Rose, on behalf of Defendant.

MR. LUPION: Morning, Your Honor. Adam Lupion, Proskauer Rose, on behalf of the National Hockey League.

MR. GOLDFEIN: Good morning, Your Honor. Shep Goldfein from Skadden Arps on behalf of Defendant, the NHL.

MR. WYATT: Good morning, Your Honor. Geoff Wyatt, Skadden Arps on behalf of the NHL.

MR. VAN OORT: Good morning, Your Honor. Aaron Van Oort, Faegre Baker Daniels, for the NHL.

MS. SVITAK: Morning, Your Honor. Linda Svitak,

Faegre Baker Daniels, for the NHL.

MR. CONNOLLY: Good morning, Your Honor. Dan Connolly, Faegre Baker Daniels, for the NHL.

THE COURT: Anybody else wish to make an appearance this morning? Well, good morning to all defense counsel, as well.

I thought it might make sense to just briefly do the status conference items first and get them taken care of. It doesn't look like we have that much to do on that count today and then move into the motion so we have plenty of time for them to be fully heard. I do have a joint finalized proposed agenda for today which begins with the medical records request item. I did receive from the parties a supplement to Rule 26(f) which sets forth a procedure for objecting and sets this issue on for consideration at the February 5th status conference. Is there anything else the parties wish to address in this regard?

MR. BEISNER: Your Honor, the only issue was the schedule, and we just wanted to make sure -- we were afraid we may have jammed the Court a little bit on that schedule since we won't be getting Plaintiffs' opposition in the event there is a motion to compel, and we've left time to confer on that. But it would not reach you until January 27th. We just wanted to make sure --

THE COURT: That's acceptable --

MR. BEISNER: -- that was acceptable to the Court.

THE COURT: It is.

MR. BEISNER: Okay. I think with that, the supplemental report covers it.

MR. ZIMMERMAN: That's correct, Your Honor, we're going to be serving our objections and then the briefing schedule is all set. So, if the Court finds --

THE COURT: The schedule is just fine. Yep. Great. Thanks.

All right. A brief update on discovery, documents, depositions, third-party depositions and documents, I do owe you a ruling on the document issue. I'm not quite prepared today to go forward with it. Anything else we should talk about?

MR. ZIMMERMAN: Not really, Your Honor, other than we are within the next week or ten days going to be serving all of the above --

THE COURT: You are. Okay. We will get that to you promptly.

MR. ZIMMERMAN: We're not hurrying, we're still vetting the proposals, so we will have that available to go out once the Court issues its decision on it.

THE COURT: Okay.

Mr. Beisner, anything further?

MR. BEISNER: I think that's it.

THE COURT: Okay. The notice of interest issue?

MR. ZIMMERMAN: John and I have not finished our meet-and-confers on the appropriateness or the forum. They're still both up in the air. We thought we'd get through this day first and with the holidays, it just wasn't convenient for us to find --

THE COURT: I think we have previously talked about setting it on in February anyway.

MR. BEISNER: I think the thought -- the plan was we would confer and look at a specific proposal that Plaintiffs have shared with us. We had some discussion but need to complete that, and I think the approach would be for Plaintiffs to submit the proposal to the Court. If appropriate, we'll file our comments on that and then we can take it up on February 5th.

THE COURT: Okay. Fair enough.

MR. BEISNER: So I don't think there's anything we need to do on that.

MR. ZIMMERMAN: Yeah, and we can have a discussion with the Court on the 5th, you can decide you want briefs on it, and then we'll take it from there. But they have our proposal, we've got some more meeting to do, and we'll have a further discussion on the 5th.

THE COURT: Okay. Sounds good.

Anything else we should talk about before we move

into motions?

MR. ZIMMERMAN: Not really. There are a couple of issues that John and I have to discuss, but we just discussed them briefly this morning and I don't think they're right for the agenda. They'll probably be on the next month's agenda.

THE COURT: Okay.

MR. BEISNER: That's it, Your Honor.

THE COURT: Very good. All right. I'm just going to have a switch of law clerks here. Okay.

We are also here today to consider several motions: Motion to dismiss the Master Complaint pursuant to federal Rules of Civil Procedure 12(b)(6) and 9(b); and the motion to dismiss the Master Complaint based on labor law preemption both, of course, brought by the Defendant, National Hockey League. I don't really have a strong preference about how to proceed. I guess part of me thinks we ought to get into preemption, but however the defense thinks it's appropriate, I'd be glad to entertain any ideas.

MR. BAUMGARTNER: Your Honor, I think we would like to begin with preemption, so that sounds like it's consistent with what you were thinking.

THE COURT: Okay.

MR. BAUMGARTNER: So I will cover the preemption issue, Mr. Beisner will cover the other part of the motion relating to 12(b)(6) and 9(b), if that's okay with the Court.

THE COURT: That sounds good, so let's jump right into labor law preemption.

MR. BAUMGARTNER: Good morning, Your Honor, may it please the Court. Again, my name is Joseph Baumgartner, and I represent the NHL. You have our briefs, so I think you have become immersed already in the law of preemption. It is -- it's a hot issue.

THE COURT: It even made the New York Times today.

MR. BAUMGARTNER: I didn't get a chance to check it today, but I'm not shocked to hear that, and even since the time that our motion was first filed, the case law has continued to develop and has continued to develop in the direction that calls for granting the motion here. And I'm referring, of course, to the *Dent* case that we've called your attention to in our reply papers.

So, I thought it might be helpful if I begin with a high-level review of what the case law tells us about how to apply the preemption doctrine, not to repeat the discussion that we've set forth in our motion papers. But really just for the purpose of parsing out the analysis that calls for granting the motion here. And I think after that high-level review, I can talk about the particulars of the claims here, why they're preempted under that analysis. And I suggest that as the mode of discussing this because preemption has an analytical framework, you can't really make sense of the cases

without having an appreciation for the framework.

It's a framework that calls for the application of some basic principles of federal labor law, but those principles don't exist in the abstract. You have to think about those principles side by side with the state law principles that are apropos to the particular case.

And I think what the Plaintiffs miss in their opposition to our motion is that when you think about the case-by-case inquiry that has to be made, we are really talking about a claim-by-claim inquiry. And when I say claim-by-claim inquiry, I don't mean that you can take particular tort theories and necessarily put them -- draw a line down the center of the page and say claims of negligence are preempted, claims of fraud are preempted, but claims of defamation are not preempted, claims of intentional infliction of emotional distress are not preempted. It's not that simple, and that's why you actually see different results in cases that have the same tort theory attached to them, some of which result in preemption, some of which don't.

And I think you need to think about this by starting off thinking about what are the elements of the state law claim that the Plaintiff is alleging in the particular case and what does the Plaintiff have to prove. And of course you have to do that in the context of the particular Complaint that the Plaintiff has given you. And of course I'm the

Defendant, we don't draft the Complaint, we take the Complaint as given to us, and we respond to it as such.

Now, in fairness, we're dealing here with a case brought by professional athletes who are covered by a Collective Bargaining Agreement asserting tort claims against the League in which they play.

THE COURT: Well, actually we have a case brought by retirees who are no longer a part of the collective bargaining unit.

MR. BAUMGARTNER: Based on -- based on things that happened to them and their relationship vis-à-vis the League during the period that they were working, employed by the Clubs who composed the League. That's right, Your Honor.

I think it's not enough to say -- and we would not purport to suggest that that in and of itself gives rise to preemption. You have to look more closely in this case and in every case that involves certainly negligence-based claims to make a determination based on the Complaint as to what is the nature and the scope of the duty that is being asserted, what is the injury complained of, where will you have to look to determine the nature and the scope of the duty, and to determine whether the Defendant acted reasonably or not.

Now, we've cited quite a few cases that have held tort claims just like that to have been preempted. *Williams* is perhaps the leading case, certainly binding precedent

within the Eighth Circuit. *Duerson*, *Stringer*, *Dent*, and *Sherwin* are some of the other cases that are I think very directly on point.

And in each of those cases, the Court held that negligence claims against a League, a Club, or a Union -- Union in the case of *Smith versus NHLPA*, in each of those cases the Court held that the claims were preempted. The antecedent for those holdings in some respects is actually a Supreme Court case that was not a sports case. And I think it's useful to think about that case as we begin the analysis here because there are really two prongs to preemption analysis, at least Section 301 preemption analysis, because I think the legal principles are -- are settled, at least as you would articulate it in a black-letter sense, which is that a state claim, whether based on contract or tort, is preempted if it either arises under, by virtue of a Collective Bargaining Agreement or if it would require interpretation of a Collective Bargaining Agreement. The courts sometimes use language that doesn't make it exactly clear which prong they're relying on, so you see in the cases references to claims being preempted if they are substantially dependent upon an analysis of a Collective Bargaining Agreement.

The other phrase that you see all the time is preemption applies if the claims are inextricably intertwined, with consideration of the terms of a Collective Bargaining

Agreement. But you do have the -- these two prongs analytically to look at, and it doesn't matter which prong results in preemption. If the claim is preempted, it's preempted. But a claim can be preempted under either prong. Analytically, one would start with the "arising under" prong because if you dismiss the case based on "arising under," you don't even have to get into interpretation.

Interpretation actually might be an easier case to establish. But analytically, you would begin to see where does this claim arise under? I refer to *Rawson*, and we discuss it in our papers -- I think more so in our moving brief -- because the Court there held that a state law negligence claim against a union for failing to conduct a reasonable mine inspection was preempted by Section 301. And *Rawson* involves negligence claims -- actually, they were not retirees in that case. The damaged parties were the decedents of the survivors who had brought the claim.

And the decedents had died in a fire in a mine. The Supreme Court reversed the holding of the Supreme Court of Idaho which had -- the Idaho Supreme Court had said that because -- and I'm quoting -- "Because the" (inaudible) --

THE COURT REPORTER: Can you go a little bit slower when you're reading?

MR. BAUMGARTNER: Okay. I betray my New York roots, so I apologize. The Idaho Supreme Court had said -- and I'm

quoting here -- that "Because the activity was concededly undertaken and the standard of care is imposed by state law, without reference to the Collective Bargaining Agreement." The Idaho Supreme Court said, "We're going to analyze it that way and therefore preemption doesn't apply."

And again the Supreme Court of the United States paraphrasing the Idaho court, the Idaho Court's holding said -- and again I quote -- slowly this time -- "The Union may be liable under state tort law because its duty to perform that inspection reasonably arose from the fact of inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract." And the U.S. Supreme Court rejected that argument because it said you can't describe the tort claim as independent of the CBA. You can try. But it was not a situation in which the Union's representatives had been accused of acting in a way that might violate the duty of care owed to every person in society.

If the Union failed to perform a duty in connection with the inspection, it was a duty arising out of the CBA. And again, I'll quote just a little bit more: "There is no allegation, for example, that members of the safety committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might

possibly be in the vicinity."

So, that concept distinguishing between a claim that arises out of a duty of reasonable care owed to every person in society, that could be a common law duty or it could be a duty imposed by statute. But that concept, that distinguishing factor between a duty that's owed to everybody as a matter of state law and a duty that's not, that's something that the Courts have recognized over and over again. The Plaintiffs have cited *Brown versus National Football League*, and I suspect you'll hear about it when opposing counsel takes the podium. And that was a claim in which -- a case in which a negligence claim was not preempted and that was the case involving the claim of negligence by the player who said the referee had thrown the penalty flag in a negligent way and it had struck the player in the eye and actually caused an injury that resulted in the end of his career.

And there was a negligence claim asserted there, and the Court said that that claim was not preempted. And the reason why the Court said -- and again I'll quote -- "In this case, the duty asserted by *Brown* is based on state tort law and would protect any member of the public. The NFL owes no greater duty to *Brown* than to any bystander to train its employees in the safe use of their equipment or to respond in damages if one of its employees, in the course of his work,

carelessly throws something into someone's eye." In other words, the Court said there's nothing in the Collective Bargaining Agreement that imposes the duty, there's nothing in the Collective Bargaining Agreement they found that impacts on the duty whatsoever. And while I don't think the Court said it exactly this way, in essence, the claim would have been the same claim, whether it was brought by a player, whether it was brought by a coach, a spectator, a cheerleader, any bystander. The case was no different from any case in which an employer's employee injures somebody in the normal course of his or her employment, and the employer may be vicariously liable either for the employee's negligence or for negligent hire or negligent retention.

In other words, if your employee goes out in the course of his employment and affirmatively injures someone, you as the employer may be liable for that injury under state common law. Another example -- and again I'm purposely picking on the cases that didn't find preemption in the first instance because I think they stand in contrast to the other cases and to this case. *Jurevicius versus Cleveland Browns* was a case that was decided based on the same premise. The Plaintiff there was a player who had contracted a staph infection at a training facility in the off-season and his claim -- his case alleged improper procedures at the facility to prevent infection, as well as false representations and

concealment regarding the precautions taken.

Now, here there was both negligence claims and fraudulent concealment and negligent misrepresentation claims. And the Court rejected preemption in the case, and it did so based on the fact that Ohio case law -- and the Court recited this -- that Ohio case law provides that an owner-operator of a medical facility has the duty to warn of certain hazardous conditions and to take proper precautions and therefore the claim arose out of a common law duty. And I believe actually the medical facility was open to the public in that case.

So, really what those cases involve are cases where you can identify a duty, because of the particular facts and the nature of the claim, it was a duty owed to every person in society, there was nothing that the Courts found in the Collective Bargaining Agreement that -- certainly not created the duty because the Collective Bargaining Agreement didn't address those issues in any way, shape, or form. And the claims arose out of a common law duty. As I say, anybody who had stayed in that facility would have the same rights as the player. Anybody who was struck by this weighted penalty flag would have the same rights as the player in the *Brown* case.

So, interestingly the Court in *Jurevicius* actually compared that analysis to the analysis in *Williams* that resulted in the finding that statutory claims in *Williams* were not preempted. And as I say, it's because the claims that

were not preempted were no different than they would have been anywhere else. Now, interestingly, if you go back and take a look at *Jurevicius*, there were actually two claims that were held preempted. There were claims there for constructed fraud and breach of fiduciary duty against the Club. And the Court held that those claims were preempted, and they did -- the Court did so because the constructive fraud case -- claim required the existence of a confidential relationship -- which is a concept recognized by the law of that state -- and the breach of fiduciary duty claim required a fiduciary relationship.

And the Court said -- and again I'll quote -- that it, quote, "Would have to read the CBA in order to understand the relationship between the two parties." So, again, even within the same case, you can parse out the claims and you have to parse out the claims analytically to make a determination as to what is and what is not preempted.

If you contrast the *Brown* and *Jurevicius* claims with *Sherwin versus Indianapolis Colts*, the Court there held -- and now again, we're moving towards a case involving duty of care and duty to warn a player with respect to injuries and the impact of those injuries suffered by the player in the course of playing rather than this kind of oddball cases in *Brown* and *Jurevicius*. The Court in *Sherwin* -- and *Sherwin* may have been the first of these federal cases at least that are dealing

with this and resulted in the cases that followed.

Every case followed I think has cited *Sherwin*. The Court held preempted the claim of a former, retired NFL player who alleged that the employer had failed to provide adequate medical care and had intentionally withheld information regarding the true nature of the injury. And the Court said -- and again we'll just quote a bit: "The Court cannot resolve Plaintiffs' fraud and negligent misrepresentation claims without reference to the CBA which establishes the duty of a Club physician and arguably the Club to inform a player of physical conditions which could adversely affect the player's health." And the Court went on: "Moreover, the Colt's duties are not those that would be owed to every person in society, as *Rawson* seems to require, to establish independence from the Collective Bargaining Agreement. The Colts owed a duty to provide adequate medical care and to provide truthful information regarding medical treatment and diagnoses only to their players covered by the Standard Player Agreement and the CBA."

And what the Court was saying, in essence, is that the duty claim to be violated was a duty created by virtue of the collective-bargained Standard Player Agreement and the CBA itself. Now, with that as background, we turn to the particulars of this case. And again I'm focusing in the first instance on the first prong of the preemption analysis, that

is does the duty -- where does the duty arise under?

And what we have here -- and again, Your Honor, we take the Complaint as written by the Plaintiffs, and as written by the Plaintiffs, the duty they allege is a duty that the NHL voluntarily undertook. And by the way, there's nothing unique about that theory. In each of the cases, the principle cases that are cited here, *Dent*, the *Nelson* -- the *Boogaard versus NHL* case, *Stringer*, *Duerson*, in each of those cases the same theory was proffered, which is that the League had voluntarily undertaken a duty to the players. The League doesn't employ the players, but had voluntarily undertaken a duty.

And I understand why. They're obviously sophisticated Plaintiffs' counsel, and lots of them, too, on the other side. I understand why they would make that allegation because you have to allege the elements of a claim under state law in order to survive a more traditional motion to dismiss that would otherwise be brought. And so the Complaint alleges that the NHL voluntarily undertook a duty of care to these players. And the opposition to our motion, I think, tries to back away from that.

But the allegations are there, and they're central to the claim. And the allegations are that the NHL undertook its duty of care and then failed to satisfy it, but undertook a duty of care by virtue of instituting a requirement in 1979

that players wear helmets, by virtue of initiating and administering a Concussion Program that covers everything from baseline testing to return-to-play protocols to reporting to communications and education of players; that the League undertook a duty of care by virtue of being -- the phrase I think that's used in the first page or two of the players' opposition is that the League is the game's steward and that the League controls how the game is played, what the rules are, what the disciplinary processes are.

And these are not, of course, the same kinds of duties or the facts that would give rise to duties that would be owed to spectators or bystanders or players in other leagues or hockey players generally in the world or certainly to players in other professional sports leagues. The claim is that by virtue of the relationship between the League and the players formed as a result of the League's authority and activities, if you will, that that relationship, those acts, constitute the voluntary undertaking of a duty. That's the allegation, and I think it's necessarily so.

It's not really different from the allegation that Judge Feinerman dealt with in the *Boogaard* case where there was a claim brought under the Substance Abuse and Behavioral Health Agreement which was a program administered by the NHL but its part of an agreement with the NHLPA, so it arises out of a Collective Bargaining -- the SABH is a part of the

Collective Bargaining Agreement. And the Plaintiff there made allegations that there are -- and that the NHL failed to satisfy its duties under the SABH, didn't chaperone the player, didn't give appropriate -- take appropriate preventive measures. And Judge Feinerman said there, that allegation walked itself into preemption.

So, that principle is applicable here, as well. We deal, as I say, with the Complaint that's written. I think perhaps the Plaintiffs did not comprehend that the helmet requirements, the Concussion Protocol, the disciplinary procedures, and the playing rules are all the result of Collective Bargaining. There's no dispute about that. Their opposition doesn't dispute the fact, and I don't think it could be disputed. So, you really wouldn't have to get beyond prong one in order to see that the claims arise out of collectively-bargained agreements between the League and the Union in order to find that the claim is preempted.

Now, I'll move on to prong two. The result would be the same even if there were an independent common law duty on the League. And I think several of the courts have actually, in a way, bypassed prong one and dealt with this -- gone directly to prong two because in some ways it's the easier thing to see. You don't really have to parse out the Complaint quite as much in order to reach the conclusion. But as I say, I think it doesn't make a difference. I think

Sherwin and *Boogaard* decided their cases based on prong one. I think *Duerson*, *Stringer*, and *Dent*, those decisions I think were based on prong two, this "substantially dependent upon, inextricably intertwined with, requiring interpretation of" prong of preemption doctrine.

The analysis in the *Dent* decision, which was decided just a few weeks ago, the analysis there is incisive. The claim was that the NFL was liable in tort. There were claims of both negligence and fraud. Same lawyers, same claims. And there the claim was that the NFL was liable because it had failed to prevent the Clubs from essentially misprescribing pain medications. And Judge Alsup there said -- interestingly began the decision by saying -- kind of almost scratching his head in a way and saying, I don't know where the duty of care even arises from. And he says, and I'll quote: "No decision has ever held that a professional sports league owed such a duty to intervene and stop mistreatment by the League's independent Clubs. There is simply no case law that has imposed upon a sports league a common law duty to police the health and safety treatment of players by the Clubs."

Yet the Court then went on and said, well, for the sake of argument, let's assume that the asserted claims for relief would be recognized under the common law at least of California, which is where the Court was sitting. And the Court said, the claims were preempted really for two reasons,

interestingly enough. First, he said, all you have to do is read kind of the subheadings in the decision and everything else is commentary, so to speak. First, he said, in evaluating the negligence claims, the Court would have to consider the positive protections the NFL has imposed on Clubs via collective bargaining. And he recited a litany of things that the NFL had imposed in collective bargaining, exist by virtue of the Collective Bargaining Agreement, requiring uniform treatment by all Clubs of the players, many of the same things that you find in the NHL agreement, things about treatment by Club physicians, entitlement to the treatment, continuing pay in the event of a hockey-related injury, return-to-play protocols, provisions that -- regarding trainers, provisions in the Collective Bargaining Agreement that govern players' entitlement to see their medical records, and issues concerning how they are to be treated.

And the Court said, look, if we're going to decide whether the NFL has been negligent, we're going to have to look at all of the things that the NFL has done in a positive way to protect players. All of those things exist under -- by virtue of the Collective Bargaining Agreement. So, again, in determining both the duty of care, whether there is what the nature and scope of it is, and what -- whether the Defendant has acted reasonably, you can't do that without looking at the Collective Bargaining Agreement. And then the Court said,

kind of the second aspect of it, approaching it from a slightly different lens: "In light of the many health and safety duties imposed at the Club level, the absence of any express CBA duty at the League level implies that the CBA has allocated such duties to the Clubs and elected not to allocate them to the League."

And it's that part of the decision that absolutely follows the same motive analysis as *Duerson*, *Stringer*, and again in a slightly different context, *Williams*, which is when you're talking about what are the duties owed in a relationship context, what is the relationship because you can analyze the duties owed, the nature and scope of those duties, or whether they've been satisfied in a reasonable fashion, you can't analyze that without -- when you think of relationship, a contractual relationship inevitably has to bear on this. And so that same -- that same analysis applies throughout all of these cases.

And in fact, the Eighth Circuit in *Williams* actually had very little trouble with this. Even after finding that the statutory claims were not preempted, they went on to find that the common law claims were preempted because it's simply a different animal. So, when the Plaintiffs say, as they do here -- and I was taken by the -- that there's kind of a solitary sentence at Page 31 of their brief, the Plaintiffs say, "CBA provisions about the NHL's Club's duties" -- and I

think they put that in boldface -- "NHL's Club's duties to the players, have no impact on the NHL's own duty of care to the Plaintiffs." That's just not right. No case has said that.

All the cases have said exactly the opposite, and of course it makes perfect sense that the Club's obligations to the players under the Collective Bargaining Agreement would have to be taken into account in determining the level of care one would expect from the NHL.

THE COURT: So you don't believe that the players would have a claim against the Clubs either that could avoid preemption?

MR. BAUMGARTNER: I don't think so, Your Honor. Clearly the Plaintiffs don't think so. I think there are substantial obstacles to claims against the Clubs. I think one obstacle is the existence of a workers' comp remedy that in many or most states would be the exclusive remedy.

THE COURT: But there are some exceptions to that, so --

MR. BAUMGARTNER: There are some exceptions to those, and it's not even where there is an exclusive remedy provision, there is not the same scope of that in every state. But I think that that would -- that that would create a substantial obstacle. But yes, I think if this were a case that were being brought against a Club, *Sherwin versus the Indianapolis Colts* would be the case that would be directly on

point for that. And this is not terribly unusual to find in these cases. It was interesting, in the *Rawson* case, *Rawson* against *Steelworkers*, as I read and re-read the case, I began to wonder why exactly were they suing the Union in that case for negligent inspection of the mine? And the answer -- and there's a reference to this in the Idaho Supreme Court decision -- that the -- the state law in Idaho stated that there was no civil remedy to be -- that could be asserted against the mine operator in that case. So, the Plaintiffs, I think, were -- felt themselves without a remedy, and they sued the Union. And of course the Supreme Court dismissed that case and really just dismissed it outright, and there was no remedy at all.

Now, I want to be clear about this. When we talk about what remedies might be available for an injury, let's separate it out from this case. We're not taking the position -- we need not take a position here about what rules would apply to the Clubs, although -- or what remedies -- other remedies might be available with respect to Clubs. But I have no trouble answering Your Honor's question in the affirmative that a claim -- a tort claim against the Club would be preempted by 301.

There are workers' comp claims that are available against employers. It's black letter workers' comp law that although the remedies are more limited, that's a trade off for

the fact that it's a no-fault statute. So, those are -- those are decisions that the legislatures have made in each of those cases.

There are potentially claims against physicians, and I can't comment on those. But those are out there, and we're talking about a case in which questions of duty to warn about medical risks are at issue. And whether there are potential claims against physicians, I think there are potential claims, whether there are viable claims, I wouldn't venture to guess about that. Virtually every player is represented by an agent, and so we're not here to debate the facts or to argue the merits, but there is some color at least in the Plaintiffs' papers that suggests the NHL has not done right by unsophisticated, barely educated players who don't have the wherewithal to make their own decisions or get advice from any other source.

They are represented by a very sophisticated Union that has been around for a long time and employs its own medical professionals. Each of them is represented -- or almost all of them are represented by agents, and there you are talking about a fiduciary relationship by definition. And there is nothing that I've seen alleged that suggests that any of those agents was not privy to any of the same information that supposedly gave rise to a duty to warn on behalf of my client. My client was not an agent of the players, was not in

a collective bargaining context charged or responsible for representing them.

If you look at the opening clause of the Collective Bargaining Agreement, it identifies the parties, the signatories, as the NHL as the exclusive bargaining representative for a multi-employer unit consisting of 30 NHL Clubs, and it identifies the Union as the exclusive bargaining representative for the players. And the Union was selected by the players as part of their right to engage in concerted activities for mutual aid and protection. That's the language of the National Labor Relations Act.

So, there are multiple entities out there. The legal standards may vary. And I believe Your Honor is familiar with the law of duty of fair representation and so forth. The Union has its rights and obligations, physicians have their rights and obligations, Clubs have their rights and obligations. So, I -- to suggest that if there is a suggestion that there needs to be a remedy here and there is also workers' comp, in order to right a wrong, I don't think that that's the case. So, if you look at *Stringer*, if you look at *Sherwin*, if you look at *Duerson*, if you look at *Dent*, they all reject the notion that was expressed in that sentence that I quoted from the Plaintiffs' opposition a few minutes ago. Again, the proposition that CBA provisions about the NHL Clubs' duties have no impact on the NHL's own duty of care to

Plaintiffs, that is simply an incorrect statement of the law as it has developed.

So, if you think about those same claims imported here -- and by the way, I think *Stringer* may have been the first case to have really laid this out in a very systematic, really thoughtful way. Interestingly, the Court there, although it was an Ohio court, it was applying Minnesota law. And I don't think Your Honor has to make a choice of law analysis here. I think with respect to the principles that we are talking about, these particular principles are probably applicable under the law of every state. And these decisions, Your Honor, affect not only the negligence claims -- negligence-based claims, negligence and medical monitoring -- but also the claims that sound in fraud.

And if you -- again, if you look at the cases, *Williams*, *Dent*, *Sherwin*, and to the extent I noted before, *Jurevicius*, are all cases in which fraud claims were asserted, and they're all claims in which the fraud claim -- they are all cases in which the fraud claim was held to be preempted essentially for the same reason, which is one of the essential elements, again looking at the state law elements that are necessary to establish a cause of action. Looking at the state law elements, you always have to establish reasonable reliance, and that claim is made here.

I'm just looking at one particular allegation in

Paragraph 362 of the Complaint: "The NHL's supreme status in the hockey world imbued its silence on the issue with a unique authoritativeness and is a highly reliable source of information to its players." You can't assess that without looking at the Collective Bargaining Agreement because the Collective Bargaining Agreement says it's the Club physician that makes determinations about return to work. It's the Club that has to provide the players with an end-of-season physical. It's the Club or the Club's doctor that has to provide the players with the results of that physical so that the player can determine what may be needed to be treated both during and after his career. And we've cited a lot of provisions in the Collective Bargaining Agreement, Your Honor.

I would ask that you not overlook Article 23.10 because it lays that out very, very clearly. And when you line up the provisions in Article 23 which cover a lot of things about provision of care, about insurance and Club's obligations to maintain insurance -- Club's obligations to maintain insurance, career-ending disability insurance, life insurance, and to provide physicals. When you look at Article 34 of the Collective Bargaining Agreement.

When you look at Paragraph 5 of the standard players contract, which is a collectively-bargained agreement governed by 301, it allocates all of these many, many, many responsibilities to the Clubs. And it's not surprising that

it would be structured in similar ways, and it's not surprising that you would allocate those things to the Clubs. They're dealing with the players on a regular basis. They're positioned in order to hire physicians who can -- who can do that on behalf of the players.

So, I don't want to overlook the other aspect of the interpretive exercise that would result in preemption. There are many, many aspects of that Concussion Protocol that would have to be taken into account and applied in trying to determine whether the NHL was negligent. And again, if you think about Judge Alsup's dichotomy here in analyzing this. On the one hand, I have to look at all of the positive things that the League has done in order to determine whether they should have done more, okay. When you look at that Concussion Program, the statements made to the players which we've quoted in our papers about you need to be cognizant of the risks of repeated head injuries; baseline testing; testing after an injury; standards for returning players to the ice after an injury and what has to go on, merely by virtue of the formation of what they call the Concussion Working Group. Concussion Working Group is -- it's not a legal entity, but it's a body consisting of League representatives, Union representatives, and medical professionals selected by both sides. The Concussion Working Group sets up the protocol with the participation of the Union, with the participation of

medical professionals.

What does that tell you about the responsibility of the League when the League has set up this body and has involved medical professionals and Union representatives? That has to be taken into account in any inquiry concerning the League's responsibilities, both by reference to the positive developments of having set up this body and with respect to the question of, well, having set up the body and essentially delegated this task and involved representatives from the constituencies that make sense to involve, what then is the League's duty? Does the League then have a duty as a League to communicate? Does the Union have that duty? Has the Union taken on the duty? Does the -- do the duties taken on -- assuming they've been taken on by the Union and by the medical professionals, does that relieve the League of responsibility? You don't have to answer these questions. All you have to know is know that the questions will need to be asked and answered in order to decide the case to know that the claims are preempted.

If you take a step back and think about this from a say more mundane tort kind of action, if Party A brings a claim against Party B for having caused an injury, and there's an issue about what the scope of the duty was that B owed to A, you would want to look to see whether A and B had a contractual relationship. And you would want to know what

duties were imposed. What were the rights and obligations under that contractual relationship? And you would want to know to what extent common law duties were either waived or enhanced or not affected at all by that contractual relationship.

I can't imagine a conventional kind of tort case where you wouldn't look to see whether there was a contractual relationship and what the duties and obligations were in order to help decide the case. This is no different. The only difference here is that by virtue of the need to look at that contractual relationship, that's what results in preemption because the agreement here is Collective Bargaining Agreement. This is not just about the health and safety provisions. It's about the playing rules, it's about the disciplinary procedures, as well. Again, putting aside prong one of the argument, when you talk about prong two of the argument, this claim, there is an attack here on what the Plaintiffs say was the NHL's failure to have appropriate playing rules and to enforce those playing rules. And there are paragraph after paragraph where the Plaintiffs compare the NHL rules to the rules in other leagues. And there's paragraph after paragraph where the players -- where the Plaintiffs complain about specific acts or incidents that should have been punished more severely than other incidents.

All those playing rules and disciplinary processes

are embedded in the Collective Bargaining Agreement. It's one of the essential things that a Union -- any Union negotiates, including the NHLPA, are the provisions concerning discipline. And when you look at that complaint, you would have to sit here -- ultimately you'd have to sit here and take a piece of paper and draw several lines down the page and have a column that says NHL playing rules, boarding, high-sticking, fighting, unnecessary roughness, and then have a column for an NHL and for NCAA and for International Ice Hockey Federation, and start comparing and contrasting those rules. If that is not a claim that is substantially dependent upon analysis of collectively-bargained terms and conditions, I don't know what is.

If you look at the rules concerning supplementary discipline -- and when I say supplementary discipline, I'm referring to the discipline that the League imposes, not what the on-ice officials impose for conduct that is in violation of the rules of play, there are admittedly some very highly subjective factors. It used to be in Exhibit 8 of the CBA, it's now been incorporated in Article 18 essentially without change. What was the time of the play, what was the nature of the conduct, was injury imposed? Is somebody going to sit there and say, well, those are or are not appropriate factors to take into account in deciding what the quantum of injury was -- what the quantum of discipline was? Are those

appropriate factors? Well, you're analyzing the CBA.

Were the factors properly applied in the case of a particular player who injured another player? And those are the allegations. So, there really is no -- is no getting around that. As I say, we deal with the Complaint as it's been written. We think the case law is very, very clear on this subject.

The players here -- or the Plaintiffs here are retirees who all played in the NHL just like the Plaintiffs in *Dent*. The players in *Stringer* and *Duerson* -- actually players in *Stringer* and *Duerson* were deceased, but in each case the claims arose out of how they were treated while they were employed by NHL Clubs. That's why there was a case.

So, I will either pause or I'm finished, depending upon whether Your Honor has questions.

THE COURT: I think for now, you should pause, and we'll move on to the Plaintiff. You'll be welcome back afterwards.

MR. BAUMGARTNER: Thank you, Your Honor.

MR. GRYGIEL: I need two notebooks, not just one. May it please the Court, Steve Grygiel for the Plaintiffs in this case.

I would say, Your Honor, after listening to Mr. Baumgartner, that I remain convinced of what I was convinced of after I read the NHL's briefs, and that is that

we are very far afield from something that Mr. Baumgartner mentioned at the outset of his discussion and then proceeded to ignore: The purposes of federal labor law and the purposes that Section 301 preemption are aimed at achieving. They're fundamentally those of federal labor law, and they are fundamentally far afield from the facts and the circumstances that are properly pled in this Master Amended Complaint.

What we have here is a Defendant that is trying to pound the square peg of Section 301 preemption doctrine into the very small and round hole in a very distant country for a very distant set of claims from those for which Section 301 preemption was aimed to achieve.

Now, Your Honor, in terms of the actual CBAs, because that's something that we all talk about here, I spent an awful lot of time looking through these CBAs: Mr. Daly's Declaration and the attached exhibits. And I was struck by the absence of three things. One thing one finds nowhere in these increasingly complex, increasingly finely reticulated agreements is anything that says the National Hockey League does not have a duty of care to retired players or to other players. No affirmative statement like that, nothing even suggesting it. There is nothing in these CBAs that says, players, in particular retired players, waive, discharge, forfeit, release, all common law claims they might have against the League arising out of, related to, or otherwise in

connection with their playing careers. Nothing that says retired players are confined for any claims that might arise after their playing career to whatever grievance process was in place.

Essentially, what we have here is National Hockey League attempting to use a labor law doctrine that, as the Supreme Court has told us, "Is a sensible acorn but not a mighty oak," in *Livadas*, "to shield themselves from liability of the standard tort variety that gets pled, discovered, and proven in federal and state courts all over the country every day of the week." When we start and look at what the defense here is saying is that a preemption argument, miles away from the seminal founding basis of Section 301, should excuse properly pled tort claims. Neither the law nor Section 301 preemption says that that is right.

We start with, yes, the Complaint, as it was pleaded. One thing the Defendants do not muckle onto is that for preemption argument, just like for a statute of limitations argument, just like for a specificity of pleadings argument, the Plaintiffs are entitled to all inferences. The Plaintiffs get the benefit of all factual inferences that are reasonably generated, that would lead to the discovery that suggests an inference that's to create a reasonable belief that discovery will produce evidence of the required elements. That is a fair standard, and that standard applies in this

preemption case just like it does in the other argument you're going to hear today. Towards the end of Mr. Baumgartner's presentation, he was talking about an awful lot of facts that he called color. Well, Your Honor, the facts that control the analysis for preemption and for the subsequent argument today are those that we have properly alleged. We'll come to that more specifically with respect to duty.

Your Honor's first question was exactly the right one. It really goes to the core of the matter and one that is enormously inconvenient for the NHL's case. Your Honor said, they're retirees, aren't they? Yes, they are retirees. And that, Your Honor, has an enormous impact on the analysis, and it has an enormous and I would say dispositive impact on the analysis here.

I was struck in the National Hockey League's reply brief when they said, "Plaintiffs' status as retirees is irrelevant to the claims that they are making." Your Honor, I don't think anything could be farther from the truth. Retiree status is not only relevant, but it's close here to controlling, and it illustrates the National Hockey League's fundamental misrepresentation of Section 301 in trying to stretch it to fit claims very far removed from the core purposes of federal labor law.

First, these claims in the Complaint as it is pled on the facts that must be taken as true are standard tort law

negligence-based claims against the Defendant. They are not rooted in the CBA at all. If we did what the economists do and imagine a but-for world where the CBA didn't exist, the players would be able to allege exactly the same kinds of claims based on the facts of the Complaint.

To use the *Erickson* case, the *Domagala* case, the *Reimer* case, and all of the cases the Defendants cited in their reply brief, the question of duty is one of fact: Does the relationship of the parties and does the foreseeability of the risk created by the behavior -- in this case of the Defendant -- create a duty? Now, the cases say, yes, duty is generally a question of law for the Court. But what the Defendant overlooks is that in the *Reimer* case, which they cite, contested questions of fact going to duty must go to the jury before they can be considered by a court. That was an Eighth Circuit opinion in 2003.

But anyway, back to the retirees. They're making common law claims not based on the CBA. They are non-parties to the CBA. They are outside of the bargaining unit. As Your Honor recognized in *Eller*, which the Eighth Circuit affirmed, retirees have no leverage. They have no involvement in the ongoing process of collective bargaining, the preservation of which Section 301 is aimed to achieve. The retired players are not within the definition in any of the Collective Bargaining Agreements of players represented by the National

Hockey League Players Association.

That definition evolved over time, but there was one constant, and that constant is the NHLPA represents current and future players employed by the members Clubs. Well, the retirees that we represent here do not fit within that definition. As the definition became more detailed in later years, it was even more clear that they're not covered because they're not free agents or unrestricted free agent. It takes no interpretation of a Collective Bargaining Agreement to find that. It just takes reading, and that's a very different thing from Section 301 interpretation.

THE COURT: But the NHL says in response that these claims arose when they were active players under the CBA.

MR. GRYGIEL: Two responses to that, Your Honor. These claims did not arise when they were active players. As the Complaint alleges, and what must be taken as true, the players' injuries are the latent injuries, the sequelae of the injuries they suffered while they were playing, number one. Number two, in allegations that must be taken as true for purposes of this Complaint in which in particular the Concussion Report allegations support, the NHL, our allegations are, did not tell the players what it knew then so that the players would be on notice to investigate it. The point is, for purposes of the analysis here, these claims did not arise when the players were during their career. These

claims came to light later.

And the point there, Your Honor, is and this goes right back to my first point that I haven't quite pitched yet, they couldn't go to the arbitration process then or go to their Union and seek representation for a claim they didn't know they had. That would be a legal nullity because they didn't understand they had claims. That essentially is another extension of Section 301 preemption where it is not warranted. Particularly today for players who can't initiate a grievance if they want because every Collective Bargaining Agreement says that grievances may be initiated only by the NHL or the NHLPA.

THE COURT: And you're arguing that they could not initiate a grievance back then because their injury was latent?

MR. GRYGIEL: That's correct, Your Honor.

THE COURT: Or are you arguing that they couldn't initiate a grievance back then because they didn't know they were being duped?

MR. GRYGIEL: Because they didn't know they were hurt. They didn't know that they were suffering injury. Now, if they knew then -- I would tell Your Honor this. If back then a player is on notice not only of the fact that he has a concussion, not only of the fact that he has headaches, nausea, and blurred vision, but that a potential sequelae of

that, whether statistically significant or not, but a potential risk of that is that the player is going to be suffering later in life but earlier than otherwise expected brain disease such as CTE or Alzheimers or neuro-cognitive deficits of saddening dimension, then that was probably a claim they had then and could have grieved, but they didn't know that then.

That root was foreclosed to them and it is utterly foreclosed to them today. We'll come to the NHL's arguments, it's pages basically 18 and 19 of their reply brief where they try to conjure up arguments to the contrary, and as I will show Your Honor, not a single CBA provision supports -- and they cite none -- their argument that the players today could still grieve these claims, that they're not foreclosed from the process. And you will also see -- and we will look at the cases -- that when they say that simply because you don't have a particular remedy under a CBA, that doesn't interfere with the preemption analysis.

THE COURT: But isn't it true that even if everything you say is true that the Court in evaluating whether the NHL had breached this duty would have to look to what they did under the CBA, would have to look to the Concussion Program and the Helmet Program and the like? I mean, imagine an independent duty, imagine that you're right about them being foreclosed at the time. Nonetheless, isn't

it true that we would have to take a look at the then-existing state of affairs under the CBA to evaluate the NHL's breach?

MR. GRYGIEL: Your Honor, the answer to that is yes, and the second part of that answer is it makes no difference. And this goes to the heart -- really to the heart of the matter. Section 301 interpretation, interpretation that triggers preemption is aimed to achieve two goals: The uniform interpretation of Collective Bargaining Agreements, and the preservation of the arbitral forum for the resolution of workplace disputes. Both of those goals are in service, according to the *Steelworkers* trilogy cases such as *Warrior & Gulf*; according to *Allis-Chalmers*; according to *Avco*, which the Defendants cite; according to *Lucas Flour*; according to *Lincoln Mills*, both of those goals, to repeat, are in service of one overarching objective: The smooth functioning of the economy through labor peace.

Retirees are completely foreign to the disruptive influence that Section 301 is aimed at preventing. Retirees are completely outside, as Your Honor recognized in *Eller*, from the collective bargaining process because they have no leverage. They cannot strike. They cannot engage in concerted action. They can't engage in work stoppages, they're not at the plant to picket. Retirees, Your Honor, are outside of the preemption box because they can do nothing to interfere with the purposes for which Section 301 preemption

was aimed.

And all of the cases which the Defendants like to cite but don't like to truly analyze for purposes of this key point say that Section 301 interpretation is the interpretation that is necessary when a Plaintiff has taken a CBA-based claim and tarted it up to look like it's a tort claim. Therefore, when that claim needs to be resolved, one would need to interpret a term in a CBA for purposes of resolving the tort claim. Not a single jot or tittle of the Complaint's allegations here mention, let alone rely on, a single provision or term of a CBA. They don't have to. These are negligence and standard tort claims. That, Your Honor, to repeat -- because I think it is fundamentally important -- the idea that one would need to look to what a contractual provision says, whether it's a CBA or a two-party contract for the sale of milk, to determine what the allocation of duties is, is a question of the law of the land not a question of the law of the shop floor.

In particular, Your Honor, the *Hendy versus Losse* case, which we cite, a Ninth Circuit unpublished opinion, makes that point abundantly clear that if you are looking -- and this is all the NHL alleges all through their brief -- if you have to look at a CBA to determine who has what responsibilities, that at most is a defense in a Section 301 argument but it is not a basis to extinguish a claim. And

that makes perfect sense because back to the goal of labor law preemption, taking the first one, the uniformity of interpretation of Collective Bargaining Agreement terms, what the courts don't want and quite correctly so, is competing fonts of definitional information about the law of the shop floor. We wouldn't want a savvy labor operator deciding what the content of the term "cross craft assignments" is or subcontracting out of union work or shift differentials compared to what a Federal District Judge, while able, less schooled in the ways of the shop floor, might conjure up for definitions of those terms.

That's the interpretation that triggers preemption. That's the interpretation that serves the overarching labor law goals that Section 301 was aimed to preserve. One looks at *Warrior & Gulf* -- and it's well worth re-reading -- and what the Court says there is the grievance process is the heart of the ongoing collective bargaining process. And if a party like a retired player or a current player doesn't like the result they get in a grievance hearing, they can go back and collective bargain it, they can go back and seek a new contractual term around an unhappy result. Retirees have no such chance. Retirees have no such right under the Collective Bargaining Agreement. They are strangers, utter strangers, to the process. And Your Honor, there's a very important Eighth Circuit case which I didn't hear anything about here today,

and frankly that didn't surprise me.

And that was the case of *Alpha versus Portland Cement* -- *Alpha Portland Cement* is the name of the Defendant in the case. There was an Eighth Circuit opinion, and then there was an *en banc* Eighth Circuit opinion 1985 affirming the previous panel decision. There the Court was treating with the question of retirees, and it's not just whether or not retirees can file grievances, if retirees can't file grievances, that means according to the rationale behind Section 301 according to the *Steelworkers* trilogy, that means they're outside the collective bargaining process and the Collective Bargaining Agreement itself. They are outside of the reach of Section 301.

The fact of being a retiree is crucially important except, caveat, in fairness, if there is a defined benefit in a Collective Bargaining Agreement, retirees shall get this pension benefit, retirees will get continuing healthcare if they pay the ongoing group rate which the CBA says, that's something that implicates the Collective Bargaining process. Those are none of our claims. None of our claims are rooted in a specific contractually-provided benefit under the CBA. That means automatically we're on the interpretation prong, and that means automatically for retirees, the Section 301 preemption cannot attach.

Back to *Alpha Portland*; there, the Court read *Allied*

Chemical quite correctly that retirees and their benefits in that case do not create a concern of CBA negotiations and economic warfare that Section 301 preemption was aimed at precluding. *Alpha* said, "Retirees have no recourse to economic weapons other than a hope that active employees will strike on their behalf." Following the *Schneider* case, which came out of the Eighth Circuit, the Court said the presumption of arbitrability, which is core of the application of Section 301 preemption -- the two are essentially coterminous -- following *Schneider* the Court rejected the presumption of arbitrability saying where no express contractual language is requiring. And there's no indication of intent by the parties to require exhaustion of contractual remedies via the grievance arbitration procedure in regard to trustee claims relating to the fund.

In other words, unless you specifically bring the retirees in, they're out. The Court followed *Allied Chemical* again saying retirees, uncontroversially, are not employees and cannot be joined with the employees in a collective bargaining unit. Here's the kicker.

And with Your Honor's permission, I'm going to read this because I think it's pretty important.

THE COURT: Just slow down though. Go ahead.

MR. GRYGIEL: Apologies. "A presumption in favor of arbitrability" -- which I'm interjecting here is central to

the question of Section 301 preemption because it's central to the question of whether retirees are under the CBA -- "would further the national labor policy of peaceful resolution of labor disputes only indirectly, if at all." I'm going to pause there. That shows that the question of arbitrability and the question of preemption is centrally tied to federal labor policy, preserving labor peace, preserving the smooth functioning of the shop floor in order to prosper the economy.

That's where this all comes from, and that's where it should stay. It has no application beyond that to retired sports players who are suing for common law duties. The Court went on to say, the presumption, then, likewise is not a proper rule of construction in determining whether arbitration agreements between the Union and the employer apply to disputes between retirees and employers even if those disputes raise questions of interpretation under the Collective Bargaining Agreements. Point being: Even if a retiree's claim raised a question of interpretation under a Collective Bargaining Agreement, the presumption of arbitrability does not apply and what that shows is that Section 301 preemption does not apply. There is an indissolvable link between those two propositions. And the logic of that seems quite clear upon considering the purposes of Section 301 preemption.

Keep labor peace. Retirees have nothing to do with that. They can't disturb the labor peace. Therefore, looking

at their claims through the lens of preemption without considering those core goals of Section 301 preemption is legal and analytical mistake of uncommon proportion and that is essentially the entire fulcrum on which the NHL's case and some of these other sports preemption cases have turned.

There's no provision in any of these CBAs that would gainsay, Your Honor, what I have just told you, and we haven't seen any in their briefs, and we haven't heard any in their arguments. Preemption's purpose is labor peace. Retirees are outside of that. That is fundamental to this analysis, even if some interpretation was required and no interpretation is required. As *Hendy* said, "simply looking at the terms of an agreement which are not themselves are in dispute is not a basis for preemption because you are not creating a competing definition that would then cause havoc was workplace rules and the arbitrator's authority over Collective Bargaining Agreements for current employees and for governing the workplace." There is simply no basis for anyone to say that.

When you get past that question of Section 301 interpretation and ask, is there another way to put it to make it more readily understandable than perhaps I've made it, one can look at -- there's a case we did not cite unfortunately, it's *Carmona versus Southwest Airlines*. And there, the same argument came up and as my friend, Mr. Baumgartner, said, it comes up a lot.

There, the same question came up. What was the impact of a Collective Bargaining Agreement on a claim for disability discrimination? And there, the Court said, what I am saying is true here. The Plaintiff, as we are not, was not putting into dispute any term or condition in terms of the substantive meaning as a term or condition of a Collective Bargaining Agreement. Rather, the Collective Bargaining Agreement provisions would be serving only as a part of the factual matrix for evaluating the statutory, in that case, claim.

That is not Section 301 interpretation.

THE COURT: Do you have the citation to that case?

MR. GRYGIEL: I'm sorry, Your Honor, I don't, but I will get it for you. I knew that was going to happen. And this morning when I realized I didn't have it -- I'm sorry, but I will get it for you. And I may even have the case with me, and I'll get it at a break.

But that is really what we're saying here, is that when you are considering a Collective Bargaining Agreement's uncontested terms, simply as facts for developing a standard tort-based claim or a standard fraud-based claim, there is no interpretation happening and therefore no basis for preemption.

What the Defendants are basically arguing is what the legal effect on their duty and on the elements of the

common law claims are of these CBA provisions that they toss out. And we -- and I didn't hear one from Mr. Baumgartner today, we did not put into dispute the meaning, for example, of the management rights clause. We did not put into dispute the meaning of the phrase, "Clubs shall provide doctors," very finally detailed now in Article 34 of the most recent CBA, there are a number of -- yes, a number of very densely-detailed provisions about what the Clubs shall do. We're not saying "Club doctor" meaning is elusive. We're not saying a "second opinion" or an "independent medical exam," those terms are confusing or elusive or seeking to give meaning to them.

We're simply taking them -- just like they say to take the Complaint -- we're taking those as given. They're simply part of the factual matrix of the claim. But to say that otherwise what we would be saying is that every time a Collective Bargaining Agreement dealt with something like health and welfare, virtually every common law claim would be preempted. I mean, imagine, Your Honor, you're an NHL player -- or you're a retired NHL player in this case and you're visiting your team -- you're visiting the locker room or going to the Alumni Club there and you pull out of the parking lot and a member of the NHL Board of Governors, having been drinking or otherwise not paying attention, T-bones your car. By their logic, taken to its conclusion, that claim

would be preempted because the Collective Bargaining Agreement contains terms and conditions about health and safety. That, Your Honor, I submit shows by extension, but logical extension, the argument proves far too much. You have to understand exactly what the interpretation is for Section 301 and the NHL is looking at it from exactly the wrong end of that telescope.

THE COURT: So really what you're saying is that the interpretation prong requires a dispute as to the meaning of the CBA language?

MR. GRYGIEL: Precisely, precisely. And that, Your Honor, corresponds with the view of preemption that is taken in, for example, the -- let's take *Lingle*, for example. Just what I said. If a provision of a CBA is simply a fact that would support a grievance, a labor grievance, at the same time that it would support a common law claim, a common law claim that does not depend on the interpretation, legitimate Section 301 interpretation of any term of the Collective Bargaining Agreement, we don't have -- we don't have preemption. *Caterpillar* said the same thing. *Livadas* said the same thing. The Eighth Circuit has endorsed that narrower, correctly narrower view in terms of doctrinal framework of preemption.

We see that in *Humphrey versus Sequentia*. We see that in *Schucks*. We see that in *Luecke*. We see that in

Hanks, and we see that in *Anderson*. It's not terribly elusive to think that if a CBA doesn't create the right on which you sue and none of the terms, the actual language of that CBA, are being put in issue, the preemption does not result. Otherwise, an entire swath of otherwise available common law claims would disappear in service of a labor doctrine that has no place in this common law context, but that is exactly what the NHL is inviting to happen here.

We're not disputing the meaning of any of the terms they have put forward. Let's take a few more. The Helmet Rule. The question of League rules, what they say. Nobody is saying that there's confusion over the term of "slew-footing." I did perhaps have some myself until I read all these Collective Bargaining Agreements. But we're not putting any of those Club rules, team rules, League playing rules into issue as terms. They're simply part of the factual matrix. Let me stop on that for a moment, Your Honor, simply because I'm afraid I'll forget otherwise.

The NHL says in its brief, I think it's on Page 30, that the management rights clause needs interpretation. And they say it needs interpretation because if the NHL did not have the unilateral authority to impose conditions on players as they played the game, there can be no liability. Well, for purposes of understanding precisely what the CBA terms say, I invite Your Honor to look at Article 22 and Article 33 --

Article 30 of the Daly exhibit that covers the most recent Collective Bargaining Agreement 2012 through 2022.

And what you'll find is the following, and this goes to the point that there's no interpretation needed. You'll see that the players, concerning playing rules, have the following rights, shall we say. The National Hockey League Players Association puts up five members. The League's entity puts up five members. They have to meet at least twice a year. A quorum is eight.

Here's the important part for understanding why no interpretation is necessary. All that provision provides is process, and it says the following. There will be this committee, this Competition Committee, Article 22, and they meet with the purpose of discussing and recommending issues concerning the game and the manner in which the game is played. I believe I've got that right. What can they do as a result of those discussions? They can make recommendations.

If a two-thirds vote of the playing -- this committee -- two-thirds vote of this playing committee decides on a particular, say, modification to a rule or a new rule, they can then submit it to the General Managers. What do the General Managers do with it? If with "requisite approval," says Article 22, the General Managers decide it's meritorious, they kick it upstairs to the NHL Board of Governors. The NHL Board of Governors decides what's in and what's out.

Two points there: It's purely a factual background element. We are not disputing any of the terms of it, but the significance of it for purposes of a common law tort claim and contrary to what the NHL suggested I think in its papers, the NHL does have final say over these League playing rules. Rule 30 -- or Article 30.4, Your Honor, it's fairly striking in terms of what the collective bargaining here really is. Article 30.4 says the following: "The NHL shall not amend the League playing rules," which I just discussed, tripping, boarding, slew-footing, and the like, "and shall not amend the League rules," which are the League Constitution and Bylaws, "without the written consent of the National Hockey League Players Association which shall not be unreasonably withheld."

There is nothing mysterious about any of those terms, and we put none of them at issue. The process there is one of fact. And yes, it would be relevant to a common law claim because it does go to the question of whether or not the NHL could do something or could not do something. But we're not putting into issue any of the actual terms. They're self-evident. To quote the parlance of today: "It is what it is. It says what it says." We're not putting that into dispute.

And Your Honor, on that point, as well, when you read interpretation as the NHL uses it and as I have argued, I think they use interpretation incorrectly to simply talk about

factual background of a case, but when one reads the District of Minnesota case -- it's called *Brown versus Holiday Station Stores*, and it is cited in our brief -- *Brown versus Holiday Station Stores* said some very instructive things about the definition for purposes of Section 301 preemption of interpretation.

And what it said is the following. The Court there was discussing *Lingle* -- a case, of course, that was absent from the NHL's opening brief and I think for obvious reasons, it's not congenial to their argument. But the Court in *Brown versus Holiday Station Stores* said the following: "According to the *[Lingle*] court, a state law claim may depend for its resolution both upon the interpretation of a Collective Bargaining Agreement and a separate state law analysis that does not turn on the Collective Bargaining Agreement." Thus, the fact that this case, having its origins solely in Minnesota law, might involve an interpretation of the CBA concerning work assignment and seniority does not require that the claim be preempted. What that says is, even if some interpretation would be necessary, it still is not a grounds for preemption as long as there is independent state law analysis such as our tort law and fraud-based claims have that supports the claim again demonstrating that the interpretation that triggers Section 301 preemption is far narrower than the NHL wants to suggest and is completely inapplicable to the

claims we bring here.

The Court went on in *Brown versus Holiday Station Stores* to say, "Taken together, *Luecke, Allis-Chalmers*, and *Lingle* stand for the proposition that while a claim whose origin rests in a CBA is preempted by Section 301, a cause of action stemming from an independent source of rights such as state law" -- stopping there, such as our claims -- "is not necessarily preempted even if a provision of a CBA is a factor in resolving the State Court dispute." Again, a far more limited view of interpretation than the NHL's blunderbust, "one-size-fits-all CBA provisions are somehow in this case, therefore there must be preemption," it simply doesn't work that way.

And as I demonstrated I hope with respect to Articles 22 and Article 34, not only when you're talking about the correspondence between a CBA provision and a common law claim do you properly need to understand the contours of interpretation, but understand that the contours of interpretation there require a tremendously close overlap or fit between the term in the Collective Bargaining Agreement and the term at issue in the common law claim.

In the NHL concussion case -- NFL concussion case, I should say, during the oral argument there, Judge Brody was asking the question of defense counsel. Defense counsel said, as defense counsel says here, and quite understandably, Judge,

there are health and welfare provisions, disability payments, insurance coverages, club doctors.

There are provisions like this all over the Collective Bargaining Agreement. And Judge Brody, to her credit, said, "But that's not good enough, is it?" She was looking at the Third Circuit case of *Kline versus Security Guards*. We quoted that in our brief. *Kline versus Security Guards*, according to Judge Brody and very correctly, requires a much closer fit between the CBA provision that one argues triggers preemption and the elements of the common law claim. And that again is natural because it goes right back to the purpose of Section 301 preemption. That tends to suggest that the common law claim is truly relying on elements plucked out of the CBA to support a common law claim that otherwise wouldn't be there. That's simply not our case.

The contrast to that is most easily stated when one looks at, for example, *Allis-Chalmers*. There, what we had was a Plaintiff who was arguing about the disability payments she received and didn't receive under a CBA provision that provided for them. It was clear in that case, and we would certainly have no quarrel with it, that one needed to look at the underlying terms in the CBA to ascertain precisely what the scope and nature of her rights would be. There would be interpretation of the CBA's language which dealt directly with the claim that she was bringing.

There is nothing in any of these CBA provisions here that deals with the NHL's duties specifically to warn and disclose players of risks that the Master Amended Complaint says the NHL knew of, of which the players did not know, as to which the players had no understanding they were at risk for, where the players were relying on the League for information, given the relationship they had with the League; and, as we allege, that the League knew they were relying on the players. That's entirely different. That turns on not a single provision -- as a provision -- as a term, in terms of its meaning, of the CBA. Not one. The actual terms and conditions then of the CBA, which we didn't hear much about today, do not withstand scrutiny from the interpretation analysis. I think I've said enough about that. There's nothing elusive about any of the terms. They are what they are.

In terms of the basis for interpretation that these documents are basis for the claims because they're collectively bargained, I'd like to say just a few things. The Daly Declaration from Mr. Daly here, a very smart lawyer who has been in the NHL a long time and who was at the Skadden Arps firm before that, Mr. Daly's Declaration attaches, of course, all the CBAs, and he attaches a number of, what they call Concussion Program documents there. Two things about that, Your Honor. The Concussion Program itself, unless I

have misread these many CBAs, the Concussion Program itself did not appear in any Collective Bargaining Agreement until the most recent one. And it appears, I believe, in three discrete places in Article 34, primarily dealing with disclosure of player medical information.

We are not putting any of the terms of that Concussion Program into issue, and we are not basing our claim of a failure of the NHL to disclose what it knew and to take appropriate steps to protect players on that Concussion Program. It is simply a fact. Of Mr. Daly's exhibits, three of them carry simply the NHL logo, in contradistinction to one of them which has the NHL and NHLPA logo. Those with just the NHL logo are NHL documents. They do not say, "We are incorporated in the Collective Bargaining Agreement." They do not say, "The Collective Bargaining Agreement will be adjusted to incorporate these documents."

And the corresponding Collective Bargaining Agreements do not contain provisions saying that the documents submitted, and their Exhibits 9 through 17, are incorporated by reference herein. The point I'm making there, Your Honor, is to try to say that our claims are rooted in the Concussion Program documents is wrong for two reasons: Number one, the allegations in our Complaint show they are not -- three reasons. Number two, the Concussion Program is simply part of the factual matrix. And number three, those documents,

process documents, don't reflect that they're part of the Collective Bargaining Agreement at all.

To argue otherwise would be as if I'm back in my summer job working as a shop floor machine bander and the owner of the plant comes down and says to me as a representative of the Union, "You know, your brother and some of your high school friends aren't working out very well here, these Union members. I think we need to do a work flow study." And we're documenting who's doing what. In the process of doing that, we're coming to the idea of how things may or may not work on the shop floor in the future. But that process and documents reflecting what you might call that dialogue are not a basis for preemption. They're not in the agreement. They're not something anyone could base their right on. They're in process.

In the Daly exhibits, there is a 2011 exhibit from the NHLPA's Executive Director, Donald Fehr. And Mr. Fehr is writing this memo to his players. And what he writes is concerning the Concussion Protocol. And what he says is, we are working on it. "Work in progress." He goes on to say, "The Clubs haven't been doing a very good job of this. We will continue to work with the League to determine how we will implement and enforce this protocol." Well, it's clear that's not in the Collective Bargaining Agreement. It's simply a memo from Mr. Fehr to his players, and it shows that the

Concussion Program as of 2011 wasn't a final agreement, hadn't reached form on which any rights could be based. It's simply part of the factual matrix.

Just briefly speaking about the question, again, of duty. A lot of what the interpretation argument here goes to is the question of duty. And yes, I've already made the point about *Reimer*; the contested questions of duty should go to a jury. All of the cases the Defendants cited in their reply brief to show that here the NHL shouldn't have a duty are cases that were summary judgment cases, trial cases, or post-trial cases. One dealt with a tavern where a fellow fell through an open window in a tavern. Another dealt with what the Court called a "freak accident." Another adult -- and that was a person riding a horse and the horse suddenly broke away in, apparently, rather a fast canter.

Another dealt with a carpenter who had a visitor on a worksite who got hit with a plank. None of these cases, Your Honor, have anything to say about our case. Citing a case where a drunken houseguest had a fractured skull wherein the owners of the house were found not to have a duty does not begin to address the systematic relationship that the NHL had with the NHL players. None of those cases are close to on point. And the one point they all have in common that makes sense for our case and certainly supports the Plaintiffs' view is that that question of facts and circumstances is a

fact-specific question, and one of the relevant facts are the undisputed terms not put in issue of Collective Bargaining Agreements.

I might turn briefly, Your Honor, to the question of prong one of the preemption analysis which Mr. Baumgartner helpfully and accurately described, whether or not claims are based on a Collective Bargaining Agreement. I'd like to make one initial point. Mr. Baumgartner, when he was talking about that and talking about the Concussion Agreements, said that these were collectively bargained between the NHL and the NHLPA. However, for the period from 1975 through the 1995 Collective Bargaining Agreement, the NHLPA was not a party to the Collective Bargaining Agreement.

The 1995 Collective Bargaining Agreement was made retroactive to 1993. For that period of time, the NHL expressly stated what its purposes were in the CBAs. It said its purposes do not include as an employer of the players. It said its purposes do not include as a bargaining agent for the member Clubs. Rather, what the NHL said its purposes were the education of people concerning the game, the development of the game, the teaching of sportsmanship, and a couple of other of these sort of hortatory objectives that have nothing to do with the meaning or terms of the Collective Bargaining Agreement.

Now, what the NHL was saying, though, is that all

the Plaintiffs' claims are essentially Section 301 claims, and therefore they are preempted. But the NHL's own cases -- *Covenant Coal* as one, *Golden versus Kelsey-Hayes* is another -- say that a non-party to a Collective Bargaining Agreement has no rights under that agreement, can't be sued under that agreement. By the logic of the NHL's own cases, their argument that the NHL is entitled to claim that the Plaintiffs' claims are preempted under Section 301 before 1995 is simply as a legal matter wrong and as a matter of reading the collective bargaining is just factually wrong. That's just not so.

Of the Plaintiffs, the actual named Plaintiffs, all but Mr. LaCouture played before the 1995 Collective Bargaining Agreement took effect. And some of them, for example David Christian, and I believe Mr. Larson, played the majority of their careers before the National Hockey League was even a party to the agreement. So, to argue that the Plaintiffs would be making claims against the NHL based on rights the NHL has under the agreement or rights the players have against the NHL under the agreement is to ignore the language of the agreement and to ignore the language of the cases that say parties to those agreements might be liable but non-parties are not.

Another thing we didn't see in any of the briefing, put it squarely as I'm going to put it today, is the

presumption against preemption. That presumption against preemption tends not to get written about or talked about in Section 301 cases. As Mr. Baumgartner said, yes, it's a hot topic these days. My submission is it's a hot topic because it's being over used and used in the wrong places. But the presumption against preemption applies here, and the reasons for that are well established in the law.

First of all, the Labor Management Relations Act -- and I don't think I'll get any quarrel from my learned friends on the other side -- is silent on the question of interpretation -- or strike that, silent on the question of preemption. *Allis-Chalmers* recognizes that when it says that preemption must go case by case and indeed claim by claim, otherwise the presumption against preemption would have a serious affect on the analysis. But what it really means here is that the burden is on the National Hockey League to demonstrate preemption as opposed to simply asserting it, and asserting it for purposes of evaluating comparative duties doesn't do the job.

On that presumption against preemption, Your Honor, I'll come to the *Smith* case on which the NHL relies quite heavily, particularly in its reply brief, and understandable that they do because on one reading it's a lousy case for the Plaintiffs. But on a closer reading, two points really jump out. The first is this: *Smith* was a breach of the duty of

fair representation. A breach of the duty of fair representation, by definition, means that the Union acted arbitrarily or in bad faith with respect to the Plaintiff.

The claim in that case that the Plaintiff made was a bad faith claim. The link of Section 301 preemption in *Smith* to the nature of the claim and the link between the nature of the claim and the CBA then is inherently close. The duty of fair representation fulcrum on which that entire analysis tipped is simply not present here. We're not suing a party to a CBA. We're strangers to it.

Second very important point in *Smith*, and which I think really takes *Smith* out of our consideration here. *Smith* cited a First Circuit case, and that First Circuit case I think was called *Condon*. And it cited *Condon* for the following proposition: "Congress has occupied the field of labor legislation." Congress has done no such thing. *Allis-Chalmers* said expressly, "Congress has never chosen expressly to occupy the field of labor legislation." So, if one takes that approach that Congress is occupying the field, it's a much smoother ride to suggest that Section 301 preemption should apply, but that is legally erroneous.

Coming now, Your Honor, if I might, to the NHL's cases, I'd suggest that none of them are controlling. Let me deal first with *Williams*, which the NHL saying, of course, because this is the Eighth Circuit, they say *Williams* is

controlling. I'd say a couple of things about *Williams*.

Number one, *Williams* were current employees. Number two, they were represented by a Union; so far, completely unlike our Plaintiffs. Number three, they had the ability to file a grievance. Number four, they did process a grievance. Number five, they got a result. Number six, they didn't like it, then they filed a State Court claim.

That's entirely different from our case. There, you have non-retirees who have received a very express memorandum about the StarCap substance that was banned and that triggered their suspensions from not only the League but from the Union. And there you have a very close nexus between the nature of the claims, the factual matrix, and the ongoing collective bargaining process. I mean, in fairness, what the *Williams* Plaintiffs were doing was looking for a second bite at the apple. That, of course, is violative of the Section 301 purposes for preemption, the smooth functioning of the labor grievance machinery which is at the heart of the collective bargaining process.

So *Williams* resulting in preemption doesn't really have much to do with our case except to show what our case isn't, and that becomes even more clear when one resorts to the language of *Alpha Portland Industries*, one resorts to the District Court, Your Honor's opinion and the Eighth Circuit's opinion, in *Eller* and *Schneider* and *Allied Chemical* which say

retirees are very far afield from this. *Williams* is not our case at all.

We come to *Stringer*. *Stringer* has some interesting points. Number one -- and not as they say for nothing -- that was on summary judgment. The Court heard oral argument, there was further discovery after that, there was then further briefing, and then there was a ruling. We obviously haven't had the opportunity yet to find out, for example, what did the NHL Board of Governors do with respect to player rule submissions or with respect to certain safety issues? Again, simply facts. We haven't had that opportunity yet. Our case is in a very different posture. The second thing I would say about *Stringer* is that it made the point that purely advisory committees such as the Competition Committee here are not a basis for preemption, reflecting that those sorts of committees that are purely advisory are simply setting forth a factual matrix for a Plaintiffs' claims but do not themselves constitute elusive or difficult labor terms that require interpretation for purposes of preemption.

Stringer also, unlike our case, *Stringer* essentially alleged one basis for the claim in that case, the voluntarily undertaken duty concerning relationship of player and heat conditions and whether or not players would be safe in the heat and what duties the NHL -- or the NFL undertook there. We've alleged three sources of duty in our Master Amended

Complaint. One, an ongoing duty of care. It is wrong, and there are paragraphs throughout our Master Amended Complaint that talk about a regular, general, old-fashioned, reasonable duty of care and argue that the NHL breached it. The same analysis that produces a reasonable duty of care as Judge Magnuson just found in the *Target* case applies here. The point is our Complaint is controlling for purposes of these initial proceedings, and we allege a general duty of care.

We allege a second source of the NHL's duty, and that duty, unlike in many of the cases the Defendants cite, is a special relationship. A special relationship, as Your Honor knows, is relatively readily confined in most cases to a couple of specified circumstances. But the courts, *Zosel* is a good example, talk about a category in which a special circumstance may be found. It is where Party A, in relationship with Party B, has sufficient control, power, and asymmetrical source of resources over Party B that it's reasonable for Party B to expect that Party A will expect, "Party B from harm." We plead that. For purposes of our initial stage of this litigation, that controls.

And yes, we do use the word "voluntary assumed," and we say the NHL voluntarily assumed a duty of care in a number of places. And we don't run from that. That simply is confirmatory of the overarching, general duty of care that we plead. All of those sources must be taken as true. *Stringer*

simply alleged one, and that is a distinction between our case and *Stringer*'s. Yes, *Stringer* was deceased, but it wasn't on behalf of a retiree class of Plaintiffs like we have here. Just like *Williams* wasn't on behalf of retirees.

Duerson, another interesting case. *Duerson* essentially ignores the rule of the Supreme Court in *Lingle* that facts that would support an arbitration claim, that also support a common law claim, does not itself, in terms of mere parallelism, warrant preemption. *Duerson* essentially ignores that. Most important, *Duerson* also misapprehends the nature of Section 301 interpretation, and *Duerson* denies the *Hendy* ruling. *Duerson* says *Hendy* doesn't get it right. We submit that *Hendy*'s rule is exactly right because it's the one that's consistent with the overarching purpose of Section 301 preemption.

The *Nelson* case, the *Boogaard* case as it's sometimes called, dealt with a specific CBA provision, yes, the SABH, the substance abuse program. But very importantly, that case is now in discovery because the Court there correctly, in the Northern District of Illinois, discovered that it's very difficult to talk about the impact of the NHL CBAs unless you know precisely what is in and what is out of those CBAs.

Mr. Daly's Declaration doesn't say that all of these letters that he attaches to his Declaration are included by reference in the CBA. In fact, the most recent CBA has 20

side letters attached to it, all of which say, "This side letter is incorporated by reference in the Collective Bargaining Agreement." The Daly exhibits do not, making the point that at this stage of the litigation, if there's any dispute about what the impact of those provisions of the CBA are, there should be discovery on precisely what they are in relationship to the CBA.

Finally we'll come to *Dent*, a case near and dear to my heart, since I was the one who argued it. And in *Dent*, yes, Mr. Baumgartner described the case correctly. Judge Alsup took a dim view of the question of the duty. He took a dim view of the overarching question of how is it that a League has responsibility to players. Judge Alsup, with respect, did not muckle onto the question of what Section 301 interpretation truly entails.

He also essentially adopted the view that if a CBA contains provisions that are congruent in some ways in terms of subject matter with a Plaintiffs' claims, then there must be preemption. We would submit also, Your Honor, in Judge Alsup's opinion, he quotes from the National Football League Players Association letter. And as will be more fully developed, I'm afraid, on appeal, we'll be making the point that those letters said something quite different I think from what the opinion says.

And if Your Honor would like, I can give you copies of

those if you don't have them already.

THE COURT: Sure.

(The Court is handed a document.)

MR. GRYGIEL: And simply to complete the process since I'm walking around, I'll show you the second letter. Sorry about that. I should have brought them both at once.

(The Court is handed a document.)

MR. GRYGIEL: What we see here, Your Honor -- and I have taken the liberty of underlining the important parts that I thought were relevant, and therefore I won't need to belabor them now, so I'll summarize. What the National Football League Players Association there said was that the claims that were served in *Dent*, which Mr. Baumgartner said are analogous to those here, were or could have been grievable under any applicable Collective Bargaining Agreement? No. He says no.

He also said that, of course, the NHLPA does not represent those retired players. What these letters show, as Your Honor will see upon reading them, is that the presumption of arbitrability, with its cognate place in the Section 301 preemption analysis, simply didn't apply there as it doesn't here. Retirees are in a very different category, entirely different category from current players.

That Judge Alsup disagreed with that posture does not mean that that posture is incorrect. In fact, that posture is completely rooted in the seminal cases of Lincoln,

flower -- *Lucas Flour* and *Lincoln Mills*. The other thing the *Dent* case does not have and which our Court does here, we have the *Alpha Portland* cement case. We have cases that talk about the narrowness of the interpretive approach that one takes to preemption.

The Ninth Circuit had similar cases, and Judge Alsup decided not to go with them. Ultimately, Your Honor, as the *Kline* case showed on which Judge Brody relied, the view of interpretation needs to be a lot more narrow than the one that Judge Alsup took in *Dent*. And as the NHL says, this is a case, this is an issue, we deal with case by case and claim by claim. If the NHL wants to say that the result in *Dent* is controlling, what the NHL has the burden to do is to bring in the NHL CBAs, demonstrate as a factual matter that there is clear comparability between the provisions of that CBA and the provisions of the NHL CBA, and then demonstrate why *Dent* has preemptive force in terms of precedent for our case. And they haven't done that. That's a factual issue that has not yet been done.

Finally, Your Honor, when we talk about the NHL's approach to our argument about this continued ability to pursue arbitration and what it means that these folks are retired, the NHL relegates to the end of our brief essentially a back-of-the-hand, "It doesn't really matter." The NHL cites two cases for their argument that a players' ability to pursue

arbitration through the NHLPA did not end, they said, with their careers or even when the relevant CBAs expired.

Leaving aside that that essentially renders nugatory the termination effective date and duration provisions of all the CBAs, which the *Maytag* case says is wrong, you have to give those credence. They don't cite to a single CBA provision that says that, that supports their proposition that the players' ability to pursue arbitration ended.

They ignore the definition of "player." They ignore that in the CBA, the most recent one, it's Section 11.9(b), does talk about retired players -- not capital "P," the definition of players that's contained in the definitional section of the CBA -- little P, retired players, and they do it in contradistinction to the players who are covered by the agreement, again demonstrating retirees are a different kettle of proverbial fish for purposes of preemption.

They ignore that the National Hockey League Players Association is the exclusive bargaining representative of only current and future NHL players who are employees of NHL Clubs. If, as the NHL says, the NHLPA is a party to bring grievances, they certainly aren't doing it for retirees. This argument of continued ability to arbitrate just simply wishes away *Eller*, *Schneider*, *Allied Chemical*, and *Alpha*.

They cite the *Nolde* case, and it's worth pointing out what *Nolde* was. In *Nolde*, a Union sought to arbitrate a

collectively bargained right to severance payments. As the arbitration process was going to unfold and the Union was still in the collective bargaining process, the employer terminated or the Union terminated the contract; I'm not sure which. I remember one of them did. The process hadn't been completed.

Here, what we have is a Union, not like our retirees, not outside of the collective bargaining process, but inside of it. The negotiations continued even after the contract's cancellation, and this dispute was over a contractually-specified benefit. The parties, including the Union, had agreed to resolve all disputes by the grievance process.

There, you're talking about severance pay. Severance pay, a question of the law of the shop, that was already in process in the Collective Bargaining Agreement grievance machinery that is the beating heart of the ongoing process of giving meaning to Collective Bargaining Agreements through arbitration. Very different from our common law claim. And what the Court there found was, we are not going to say that this Union and this employer who have negotiated this benefit and were in the process can simply walk away from the process without completing it.

That is completely different from retirees who weren't negotiating anything with the NHL and then suddenly

found themselves out in the cold. So, the facts of *Nolde* have nothing to do with our case. They again, in line with *Williams*, really, are within the wheelhouse of Section 301 preemption. The other case the NHL cites for that proposition is that players like Mr. Larson and Mr. Christian and Mr. Peluso and Dan LaCouture, that they have not lost their rights to grieve or to arbitrate.

The other case they cite for that is *Frontier Communications*. I think, I hope, I distinguished *Nolde*. *Frontier Communications* says something quite different. What *Frontier* says in a case involving a specified CBA benefit, their nonparticipating retirees who do not choose to be bound by what the Union was negotiating won't be, the Court said. It won't be the result of this collectively bargained process *res judicata* upon any state law claims that a nonparticipating retiree might choose to bring.

The difference was that the benefit was already specified in the Collective Bargaining Agreement which did not pose the risk that Your Honor identified correctly in *Eller* of a conflict of interest between the Union representing current employees and retirees because the benefit would be there for current employees, as well. Again, factually specific, but the overarching point was retirees are different, and it makes a big difference for purposes of preemption.

That's why cases like *Atwater* on which the Defendant

relied are simply inapposite. There you had a contractually specified benefit. In that case, the National Football League Players Association and the NFL agreed on a CBA provision. And that CBA provision said to the players, "We're going to create a panel of financial advisors to help players after they're retired manage their finances." A couple players invested with some folks on the list. Shock of shocks, some of these folks on the list turned out to be Ponzi schemers and a couple million dollars went missing. The disgruntled retirees brought a claim based on that provision. That provision was rooted right in the CBA. That is a CBA claim. That's not like our claims at all.

Finally the NHL at Pages 18 and 19 of its brief, they say that Plaintiffs claims would have to be dismissed on preemption grounds even if they're not arbitrable because preemption doesn't exist on the -- depend on the existence of a state law or arbitrable remedy. First of all, there's a difference between the availability of a specific remedy and the right to have access to a process that is central to collective bargaining. And the cases that the NHL cite make that distinction clear. That doesn't turn on the availability -- in our case doesn't turn on the availability of X, Y, or Z right compared to -- in common law compared to the CBA. Not at all. And the cases they cite don't make that connection.

Avco is quite clear on the point. *Lincoln Mills* and *Lucas Flour* say the same thing, that the access to the grievance process really is a fundamental predicate for Section 302, not that you have the right to some particular remedy. It's an important distinction. The NHL cites *Caterpillar* for this point, but in *Caterpillar*, the Plaintiff did pose a threat to labor peace, a different case from ours, implicating Section 301's core purpose. The key difference there, again, not the availability of a particular remedy but access to a process by which you can get some redress for your rights.

When we look, for example, at *Avco*, which was not a retiree case and it's one contained in the briefing, there an employer -- and this is one the Defendants cite -- there an employer sought an injunction against a strike and sought it in State Court. They said, the employer, the Union is breaching, they're breaching a no-strike clause. The State Court granted the injunction. The Union, being enjoined, sought removal of the case. The case was removed, and the District Court granted the motion to dissolve the injunction. The Court of Appeals confirmed. Very telling.

The starting point is Section 301, the Court said, of the Labor Management Relations Act, which we held in *Lincoln Mills* was fashioned by Congress to place sanctions behind agreements to arbitrate grievance disputes. That's

exactly the point of Section 301, and one the NHL ignores. But the Court went on there to say, "The relief under Section 301 cases varies, but not the power to issue an injunction." The point there is that *Avco* was simply talking about a labor case, not a retiree case based on common law rights and common law arguments and common law facts, whether those facts come from a Collective Bargaining Agreement's process or simply from other facets of the relationship.

Anyway, the Court went on in *Avco* to say, besides, the employer there is not out of luck. Even though the injunction was dissolved pursuant to the Norris-LaGuardia Act, they can still get Section 301-specific performance of promise to arbitrate, or they could get enforcement or annulment of an arbitration award, or compensatory damages. Again, the point is our retirees can't do any of that. That case doesn't stand for the proposition that our retirees are postured like the parties in *Avco*. It just doesn't add up.

Finally, *Young versus Anthony's Fish Grotto*. They cite this for the argument basically that Plaintiffs, without -- Plaintiffs can't base their preemption argument on the fact that they may not be able to grieve their disputes. And that's an important point.

Let's look what *Young* said. First of all, it was not a retiree case. There we had a probationary employee who was -- had actually left her job, came back to work, her

position was covered by the CBA, and she was fired. And she was quite upset by this because she said, "If I'm under the CBA, I'm an employee at-will, as opposed to my claim for an individual employment contract." And the Court said in *Young*, in the first footnote, that the Eighth Circuit had addressed a similar point.

In footnote one in *Young*, the Court discussed the Eighth Circuit's opinion in *Anderson versus Ford Motor Company* which rejected the Ninth Circuit's ruling in *Bale*, B-a-l-e, that individual contracts require analysis of the collective agreement and so arise under it. The point I'm making, they site a Ninth Circuit case that, in a footnote, deals with an Eighth Circuit case that goes exactly the other way. Then *Young* went on to say the following: We're going to follow the Ninth Circuit rule, the one the Eighth Circuit rejected.

Young says in footnote two, this -- it's worth reading, I think: "Discharged employees, who are like retirees, who lack access to the grievance procedure under the CBA cannot state a claim for breach of the Collective Bargaining Agreement. And Federal Courts therefore lack jurisdiction over their Section 301 claims." That's exactly what the NHL is saying our claims are.

The court went on to say, "We express no opinion whether removal jurisdiction" -- in that case via preemption -- "would exist over such employees' state contract

claims, absent of superceding federal claim." That essentially leaves open and contradicts the point for which the NHL cites that case. Essentially, the Eighth Circuit said something different: Retirees are entirely different, and there shouldn't be any analysis that turns on whether or not a non-retiree has a grievance right compared to these retirees who do not.

Covenant Coal on which they also rely was not a retiree case, and there a Union sued third-parties for tortuous interference with a CBA. And the Court's holding there basically, as I mentioned earlier, undermines some of the NHL argument here. The Court said there's no 301 claim against a non-signatory to a CBA. It was someone who was essentially interloping and breaking the Unions. I mean, *Covenant Coal* really demonstrates that the NHL can't make a claim against -- can't argue that the players' claims are based in the CBAs prior to 1995, and that means our claims are not 301 claims and therefore are not preempted.

THE COURT: I'm just going to have to interrupt you here. I know you're probably towards the end.

MR. GRYGIEL: I am.

THE COURT: We've been going for two hours and 15 minutes without a break for the court reporter. So how close are you?

MR. GRYGIEL: Very. If we could take five minutes

and I can look at my notes, and we can be done. But I'll do whatever Your Honor wants, obviously.

THE COURT: Okay. Well, obviously we have a whole other motion and we have the response from the NHL. We've got to figure out our timing this afternoon. I think the way to proceed is to take a lunch hour now until 1:00 p.m. I know that's a little unusual to cut you off at the end of your argument.

MR. GRYGIEL: Quite all right.

THE COURT: But given the time, and then we can go, at 1:00 we'll finish your argument, we'll hear from the NHL, and we'll move into the second motion. I think that's the preferred way to proceed.

MR. GRYGIEL: As I'm looking at this here, Your Honor, unless someone tells me differently -- and I don't mean in any way to countermand the Court's approach, which I think is right -- I can simply get to my conclusion now, and then if Your Honor would give me a few minutes after Mr. Baumgartner finishes, I can say anything else I felt compelled to say.

THE COURT: Why do you not bind yourself that way. Why don't we just proceed. We will resume court then at 1:00 p.m. Court is adjourned.

(Lunch recess taken.)

THE COURT: All right. I know that some of you have flights and some of you have some pretty justifiable concerns

about the weather today and all of that. I think we will finish up on this motion. And then we'll take a short break and those of you who need to leave, that's just fine, and then we'll proceed with the next motion.

The only other thing I'd ask you to consider -- it's entirely up to you -- the other motion is pretty straightforward. I think I could consider it on the papers. But if you'd like to be heard briefly on it, that's fine, as well. I don't know if anybody has any opinions, but you can pass notes back and forth while we finish this one. Okay.

Counsel.

MR. GRYGIEL: Thank you, Your Honor. Good afternoon. Steve Grygiel for the Plaintiffs.

I would like to correct one thing I said before, a mistake of which I'm aware. I was talking about the CBAs, and I said that the NFL -- I said the NFLPA was not a signatory until 1995. I meant to say the NFL was not a signatory until 1995. I suspect that would have been obvious from the --

THE COURT: NHL.

MR. GRYGIEL: NHL.

THE COURT: Yeah. Okay.

MR. GRYGIEL: It's been a long day already, Your Honor. I apologize. Two mistakes. And I'm sure there are others that I will be corrected.

Essentially, Your Honor, what we're talking about

here are retired players who didn't know about their injuries, their latent injuries when they suffered them; could not have brought them then because they didn't know about it; have no access to the grievance or collective bargaining process today. Our allegations are that the NHL knew or should have known, the players didn't know, weren't on notice to investigate. The players relied, and reasonably relied, on the League for information. And today they have no access other than their common law claims which these claims absolutely are.

THE COURT: Let me ask you this question. I think you said that the Concussion Program was not formally incorporated in the CBA either ever or until a certain time, or what is your position on that?

MR. GRYGIEL: According to the -- my review of the CBAs, Your Honor, it does not appear in terms, the Concussion Program, does not appear in terms in any CBA until the 2012 through 2022 CBA, the current one. And I believe there are three specific references to it in Article 34 of that CBA, and that previously what we have are the correspondence that Mr. Daly's Declaration attaches concerning the progress of the CBA from the SCAT, S-C-A T, 2 through the SCAT3 program, and with other terms and conditions of how this program was going to be developed and what its outcome was going to be. But essentially, in terms of its relationship to the CBA, it shows

up, on my review, in the most recent CBA and only there.

THE COURT: Okay. Thank you.

MR. GRYGIEL: And with that, Your Honor, I'd like to say thank you very much, unless you have any other questions for me.

THE COURT: Very good. Thank you.

MR. GRYGIEL: Thank you, Your Honor.

THE COURT: Mr. Baumgartner.

MR. BAUMGARTNER: I have one additional binder, but don't get alarmed, Your Honor.

I always try to focus on the things that I can agree with opposing counsel, and I identified two that I can agree with Mr. Grygiel. One, I'm gratified to say that he agreed that my interpretation or presentation of *Dent* decision was correct. And second, I wholeheartedly agree with him that Mr. Daly is a careful and smart lawyer, and --

THE COURT: Otherwise you disagree with everything else he says (laughter)?

MR. BAUMGARTNER: Otherwise we -- we have a number of differences, and I'm not going to go through every point. I'm going to hit the high points that I think are appropriate for purposes of what you need to decide for deciding the motion.

One small point, I think Mr. Grygiel said that under our interpretation as to how we've proffered preemption, that

if a member of the Board of Governors went out into a parking lot and rammed into a player, that claim would be preempted. That's not at all the case. I thought I had made it clear in my discussion of the distinction between the *Duerson, Stringer* line of cases and the *Brown* and *Jurevicius* line of cases that if there is a claim, whether it's that the player was in a medical facility where the Club owes duties to everybody in that facility or an employee who injures another employee negligently, by throwing the penalty flag, it's a duty that's owed to every person in society, and that's not preempted. And that would be true if the member of the Board of Governors ran down a player with a car, as well.

So, it is an overstatement by far to say that our view and the cases that we've cited would result in preemption, occupying the entire field or preempting the entire --

THE COURT: You know, perhaps that wasn't the best example but I think Plaintiffs' counsel intended really this point, and that is that by having some generalized provisions on health and welfare, that somehow anything to do with health and welfare of a player would be preempted.

MR. BAUMGARTNER: It -- it really is a case-by-case, claim-by-claim analysis. You know, if you -- if you look at -- at some of the older Eighth Circuit cases -- and I know Mr. Grygiel preferred to look at the older cases as opposed to

the *Williams* case, but even if you look at some of those older cases, one of the cases they cited was a case called -- I'm not sure I'm pronouncing it correctly, it's *Luecke*, L-u-e-c-k-e, and it was a case in which the Eighth Circuit said that defamation -- a claim of defamation was not preempted. And it was a claim brought by an employee who had been fired pursuant to a provision in Collective Bargaining Agreement that contained a drug testing policy. And the employee had been fired, and the employer published to a third-party statements that the employee had refused to take a drug test.

And the employee sued for defamation. And the Eighth Circuit said that that was not preempted because although the testing had been -- was a function of the Collective Bargaining Agreement, the particular claim that was made, the defamation claim, again you look at the elements of the claim, it requires the publication to a third-party of a false statement that's injurious to one's reputation. And you didn't need to look at the Collective Bargaining Agreement in that situation. And I have no quarrel, we have no quarrel with the logic of that decision.

What was interesting about it is that if you look at Footnote 6 of that decision -- and I may be -- Mr. Grygiel and I may be among the few people who have looked at Footnote 6 of that decision in some time -- there's a case that the Eighth

Circuit cited favorably called *Jackson versus Liquid Carbonic Corporation*. *Jackson versus Liquid Carbonic Corporation*, it's 863 F.2d 111, and it was a First Circuit decision from 1988.

And the Eighth Circuit cited it in that footnote, as part of a discussion of cases that were distinguishable from *Luecke*, which were cases that implicated the reasonableness of the drug policy in that case. And in the First Circuit there held that the claim that had been asserted was preempted and it was a claim there under a Massachusetts statute, actually, that created a privacy law, a right of privacy. And the claim there was that the drug testing policy was inconsistent with the right of privacy under the Massachusetts statute.

And what the First Circuit said there is that whether the employer's drug testing policy violated the Plaintiffs' privacy rights under state law depended on the reasonableness of both the policy itself and the employee's expectation of privacy because the state statute barred an unreasonable interference with privacy. And there was one quote that just stuck out when I read it, which was, "Reasonableness almost always requires investigation of the terms of the Collective Bargaining Agreement." And I think that's -- that's the essence of what we're talking about with respect to this claim or these claims in these circumstances.

So, I don't want our position to be misunderstood or as running a risk that it would engulf something that it was

not --

THE COURT: Doesn't it really come down to whether you just refer to the terms in the Collective Bargaining Agreement or you interpret them? And doesn't the phrase "interpret" suggest that there's something sort of unclear on its face and you have to bring to bear some kind of logical construct to understand that there's a dispute about what it means, it's ambiguous, it's not clear, so you have to interpret it?

MR. BAUMGARTNER: Well, it doesn't necessarily mean -- it certainly doesn't mean that you have to identify a term that's ambiguous in a contract that's susceptible -- that the word is susceptible to two different meanings. You could do that here. You would have to interpret what does the Concussion Working Group meaning? What are its responsibilities?

But if you go back and even look at *Allis-Chalmers*, which -- and I've been waiting my entire career to be able to cite Justice Blackman in the Eighth Circuit, and so now I have my opportunity. It was a Justice Blackman decision in which Justice Blackman wrote the decision for the Court and said a claim of intentional or bad faith handling of a disability claim under state law was preempted. And the Plaintiff there had sought to avoid preemption by saying there's nothing unclear in the Collective Bargaining Agreement.

In fact, the individual had actually been paid out what he was entitled to under the Collective Bargaining Agreement. So, the Plaintiff said we're not alleging -- not only are we not alleging a breach of that, there's nothing unclear about that. We are looking solely at state law. And Justice Blackman said, that doesn't do it because the assumption that the labor contract creates no implied rights is one that state law is not -- is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner and, if so, whether *Allis-Chalmers*' conduct breached that implied contract provision.

That's the same principle that was animating the decisions in *Duerson*, *Stringer*, *Dent*, *Boogaard*, and so forth, which is you have to look to the entirety of this contract, not just to interpret an ambiguous phrase but think about what it means. Is the claim substantially dependent upon an analysis of the Collective Bargaining Agreement and then think about what is going on with respect to these claims. Where is the duty? What's the nature and the scope of the duty? Has it been satisfied?

So, it's hard to imagine that you could decide whether the NHL had a duty or what the nature and the scope of that duty is without saying you should take into account the

fact that the NHL negotiated these provisions that are binding on the Clubs. You should take into account the fact that the NHL has -- has provisions in the Collective Bargaining Agreement that require the Clubs to provide end-of-season physicals.

THE COURT: But a slightly different way of looking at that is this, is that that's not really a question of duty. Assuming for a moment, as we must at this stage of the proceeding, that this is some independent tort duty that they undertook. I think what you're really saying is, in determining whether the NHL breached that duty, you should look at what they undertook to do. They undertook to have this rule about helmets, they undertook this concussion -- it's like a defense to a claim of breach of a duty. And the concern that arises there is, I don't have to interpret anything. There are facts there that you did all these things, and does that mean you didn't breach the duty? That's different than having to interpret the Collective Bargaining Agreement to determine whether there's a duty in the first instance, I think.

MR. BAUMGARTNER: Well, I think you certainly -- and certainly the courts in *Stringer* and *Duerson* and *Dent* said, this goes to whether there is a duty. This -- it is plausible, at least plausible, that where the CBA allocates responsibilities to the Clubs that there is a lesser standard

of duty on behalf of the NHL, or no duty at all on behalf of the NHL. There's a long line of cases now -- an ever-increasing line of cases that have said that. And I think that's consistent with *Williams*, where the court said -- and by the way, *Williams* was not decided on the basis that, we're not going to give the players a second bite at the apple because they've already had a right of a grievance. The Eighth Circuit allowed the statutory claim to go forward. They allowed the statutory claim to go forward because under the analysis, it was not preempted.

So, it wasn't a matter of, you can't get a second bite at the apple, and it wasn't about the fact that there was an -- there was an arbitration or that the -- I mean, there was no discussion of that whatsoever. What the Court did decide there is that you can't -- you can't -- I'll quote it: "Whether the NFL or the individual Defendants owed the players a duty" -- so they did frame it as a question of whether there's a duty -- "whether they owed the players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the policy. Thus, the breach of fiduciary duty, negligence, and gross negligence claims are inextricably intertwined with consideration of the terms of the policy."

And the Court went on to also find that the

constructive fraud -- fraud, constructive fraud, and negligent misrepresentation claims were also preempted for that reason.

THE COURT: Let's turn, though, now because this is concerning me, to the fact that the Concussion Program doesn't even appear in the CBA until 2012. Is that factually correct or incorrect?

MR. BAUMGARTNER: Well, it does not appear in the CBA booklet. Every X number of years, the parties negotiate the entirety of a CBA booklet. And it contains everything from soup to nuts, and we've attached those CBA booklets. The reference to the Concussion Policy appears in the booklet for the first time in 2012. The Concussion Policy --

THE COURT: Which has little to do with these Plaintiffs, right?

MR. BAUMGARTNER: The Concussion Program has been in existence, pursuant to agreement with the Union, since 1997; 301 is not limited to collective -- the collectively-bargained booklet. It covers every collectively-bargained agreement.

THE COURT: And that's collectively bargained, or was it being bargained? In other words, it sounds like from some of the language that was quoted to me that it was in progress or something like that.

MR. BAUMGARTNER: If you read that more carefully, you'll see that there were clarifications to it that were being made, that were being negotiated. And it is a living

program; it is constantly being updated. It is constantly being updated by the NHL together with the Union, and that is the nature of the correspondence that we've provided. It is referred to throughout, and it's not just a title as the NHL, NHLPA Concussion Program. And that makes sense because player health and safety is a mandatory subject of bargaining so that absent a waiver by the Union, an employer or employer representative cannot take action unilaterally. It would be an unfair labor practice. We dealt with this in our moving papers.

So, absent the waiver, you have to negotiate that with the Union, otherwise you're committing an unfair labor practice. Whether you're taking actions that are deleterious to health and safety or that promote health and safety, that's what the Union is there for.

THE COURT: Well, what about concussions that occurred before 1997, then? We don't have the NHL as a party, and we don't have a Concussion Program. Does that change the analysis?

MR. BAUMGARTNER: No. And in *Stringer*, the NFL was not a party to the Collective Bargaining Agreement. That was one of the limited things that they needed -- they needed discovery on in that case and I don't think -- I don't think we need discovery on in this case. The NFL was not a party to the Collective Bargaining Agreement, and the Court

nevertheless held that the Collective Bargaining Agreement preempted the claims against the NFL. What had happened in *Stringer* was that the NFL had promulgated Hot Weather Guidelines about precautions to take in hot weather. The player had died of heatstroke.

The Hot Weather Guidelines themselves had not been collectively bargained. They had actually been unilaterally issued at a time when there was no CBA in effect between the NFL and the NFLPA. I believe -- but I can't state this with certainty -- that it was during one of those periods when the NFLPA may have disclaimed its representation status, which it does from time to time. So that had been --

THE COURT: I know a little bit about that (laughter).

MR. BAUMGARTNER: I thought you might. And so the hot weather guideline was not itself the basis for the preemption. The players claim that the Hot Weather Guidelines were inadequate, but it was not -- it was not -- it was not preempted on that basis.

And *Stringer* actually contains a -- I think a very worthwhile discussion breaking out prong one of the analysis of the preemption analysis from prong two. And they say in prong one, well, the claim is based on the Hot Weather Guidelines; Hot Weather Guidelines were not part of the Collective Bargaining Agreement, so the claim does not arise

under a collectively-bargained agreement. But it was preempted, the claim was preempted, because it required interpretation and application of the Collective Bargaining Agreement.

For all the reasons that I've been talking about that the *Stringer* court -- and it's been adopted ever since then -- that says you could look at this and make a determination that the NFL doesn't owe duties, that the Clubs owe duties or somebody else owes duties, and therefore there's preemption. So, it's actually a very strong case that I think deals with some of the considerations that might otherwise be troubling.

But there is -- collective bargaining is an ongoing process, thankfully. And it doesn't stop once a full-blown Collective Bargaining Agreement gets entered into. There are constantly things that arise, and constant agreements that get entered into. And trust me, I've seen enough of them that have been scrawled almost literally on the back of an envelope at 3:00 in the morning to know that those agreements come in all sorts of forms.

There's a case on this *Retail Clerks versus Lion Dry Goods*, which is 3 -- I believe we cited this in our opening brief -- 369 U.S. 17 from 1962 in which in a particular context the Court deals with this. So, 301 says this covers suits for violation of contracts. It doesn't limit to a

particular kind of contract. And that's why it covers not just the CBA but we're talking not just about the CBA but about the Concussion Protocol, as well.

THE COURT: But I asked you about prior to the Concussion Protocol.

MR. BAUMGARTNER: I'm going to come to that.

THE COURT: Okay.

MR. BAUMGARTNER: This is not -- this is not just about the Concussion Protocol. Frankly, I think the central element that results in preemption is the provision in Paragraph 5 of the SPC that governs what happens when a player is injured, suffers a hockey-related injury, and what the players' rights -- well, really what the rights and obligations are of the player and the Club in that instance. And there has been that provision in effect in every Collective Bargaining Agreement since 1975.

Again, the SPC is part of the Collective Bargaining Agreement. This is one of the very unusual circumstances in which players, employees of the Clubs, the players, actually negotiate their own individual compensation, so what -- and this is true I think in every professional sports league, the League and the Union negotiate the terms of what is essentially a personal services contract but it's collectively bargained. And then when the individual players, through their agents, negotiate with the Clubs, more or less just fill

in the number for the salary.

Those SPCs are governed by 301. There's case law on that. *Sherwin versus Indianapolis Colts* cover that. There's a case called *Rudnay versus Kansas City Chiefs* that also covers that. SPCs are governed by 301. That paragraph in -- the Paragraph 5 of the SPC says, "When a player suffers a hockey-related injury, he is required to submit himself for examination by a club physician." The Club physician -- the Club is reacquired to provide an examination and medical treatment. The determination of whether and when the player is able to return to play is made by the physician.

And if you go back in some of those Collective Bargaining Agreements, the wording has changed somewhat. I think at one point it may have said "the doctor and the Club General Manager" and then it was changed. But the essence of how injuries are dealt with has been covered in that agreement since 1975.

THE COURT: Doesn't that beg the question a little bit, this isn't a process question. You know, the question is whether there was substantive disclosure of the risks to the hockey players, not what the order of taking care of their injuries is, you see. It's a very different issue.

MR. BAUMGARTNER: Um, I -- with all due respect, I don't think the courts have treated it that way. I think the courts that have held these claims preempted have said that

the assignment, the allocation of responsibility to Clubs even in just general terms to provide medical treatment could imply that the Clubs also have the obligation to make the disclosure. Which, by the way, makes perfect sense. If the player is being treated by a Club physician after he suffered a concussion or any other injury, one would expect that that physician would have the obligation to disclose to the player before, you know, say, "Kid, you're ready to go back on the ice," to say, "By the way, if you have any more concussions or given that this is your third concussion, here's what you ought to know," I think any responsible physician, assuming that the knowledge is as advanced as the Plaintiffs make it out to be, would certainly, certainly disclose that and would certainly have an obligation to disclose that.

THE COURT: But isn't the gravamen of this is that the disclosure should be made before you have any injuries so you take whatever precautions you need to do to avoid injury at all? Are you saying the obligation doesn't arise until they've had an injury and they say, by the way, now you're in trouble, you might suffer all these awful things?

MR. BAUMGARTNER: I -- I -- I think you have to draw inferences from the Collective Bargaining Agreement about who has the obligations to make disclosures. These folks have post-season -- they have end-of-season physicals. Who administers the end-of-season physicals? They actually have

preseason physicals which are also administered by the Clubs. So, you -- without looking at the collectively bargained -- and Mr. -- the other thing, actually third thing that Mr. Grygiel and I agree with, he referred to these -- I think he used the word "dense," I'm not sure that they're dense, but he also said "detailed" provisions in the Collective Bargaining Agreement about the provision of medical care. They are all things that were negotiated by the League and obligations and rights that are allocated among Clubs, among players themselves, and among physicians.

You would have to look at that. I mean, think about it. The notion that the players are represented by a Union which represents their interests and has negotiated all those provisions, you would have to take those things into account in determining, as the Court in *Williams* said and in *Stringer*, whether there was a duty and what the nature and the scope of the duty was. As the judge said in *Dent*, I can't decide -- the judge in *Dent* actually took it one step further and said, I can't make a determination as to whether the NFL was deficient without looking at all the positive things that they negotiated.

THE COURT: That's different. The question of deficiency, as I said before, has to do with, is there a defense to breach of this duty? And there's plenty to say. Sure, we stepped up to the plate, we required helmets, we

required a Concussion Protocol. That has to do with defending against the duty. The deficiency, as you point out. Not -- now you're conflating that with whether the allocation of a process of seeing a doctor for an injury is an analysis I need to make to determine whether you each have independent duties, I think, has nothing to do with a breach so much.

MR. BAUMGARTNER: Well, I think Judge Holderman dealt with that. And I think Judge Holderman, again, I think citing *Stringer*, which actually applied Minnesota law, said that you -- that it's not a matter of a defense, it's a matter of establishing what the elements are to make out a cause of action in the first place. And the judge in, I think, both in *Duerson* and *Dent* rejected the notion that this is in the nature of a defense as opposed to the nature of, we have to determine whether there's a duty and what's reasonable under the circumstances.

Even more recently, this was not a sports case, in the *Domagala* case, it was a Minnesota Supreme Court case, where the Court said reasonable care -- the reasonable care standard itself does not vary based on Defendant's conduct, but the degree of care required to satisfy that standard does change based on the circumstances presented to the parties. So, it's not an issue of a defense to a claim. It's an issue of what is the standard; what is the degree of care that's actually required, depending on the circumstances.

The circumstances include the Collective Bargaining Agreement. And we're talking a lot about the health and safety provisions, so I don't mean to exclude the discussion of playing rules and disciplinary procedures. I don't think Mr. Grygiel said very much about that, so I don't want to repeat those things, but I don't want them to get lost in the shuffle either.

So, I hope I've answered Your Honor's questions about the Concussion Program and the history of it and the -- sort of the legal context in which it arises. So, I don't want to prematurely leave that subject if you have additional questions about it.

THE COURT: Well, I take from what you said that to the extent that the claims arose before 1997, you are relying primarily on Paragraph 5 of the SPC. Am I right?

MR. BAUMGARTNER: Yes. Yes. That's -- I think that's very fair. And to the extent the claims arose before 1997, I assume the Plaintiffs are not relying on the supposed deficiencies in the Concussion Program either. But I think that that is a -- that that is a fair statement.

THE COURT: Okay.

MR. BAUMGARTNER: As least as to the health and safety provisions.

Mr. Grygiel made reference to really two things that I think -- two concepts that I think are related. One is the

effect of the players being retirees, and the other is what is the federal interest here in applying federal law? And I think those two things are somewhat related. First, I think he got it wrong, saying that since there's no labor dispute associated with retirees, therefore there's no federal interest. I'm oversimplifying that a bit, but basically the comments were they have no leverage, they're not part of the bargaining unit, nobody cares about them anymore, there will be no strike over retirees --

THE COURT: But perhaps most importantly, assuming for a minute, as we must at this stage, that they had latent injuries, so they didn't have a claim they could have grieved when they were a player, that they really have no claim to bring.

MR. BAUMGARTNER: Well, that's -- that's -- that's not right because the way this Complaint is worded -- and you don't have to go too much further than Paragraph 1 -- which says, "This action arises from the pathological and debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained by former NHL players during their professional careers." And --

THE COURT: And the question is whether the concussions occurred during the professional careers or whether they were sufficiently aware of the injury to bring the claim.

MR. BAUMGARTNER: Judge, if you -- if you suffered an -- suffered a concussive and sub-concussive impact during your professional career that gives rise to a claim and there was a failure of a duty to warn you while you were a player, that's a claim that --

THE COURT: Well, people don't bring claims for concussions, they don't do that until concussions cause injury -- that cause some permanent --

MR. BAUMGARTNER: And there's absolutely no reason -- let's assume that that's the case for a moment.

THE COURT: I hope for the sake of my boys who played football, that's --

MR. BAUMGARTNER: I hope so, too. If there was a duty of care, the duty of care only -- there was only a duty of care while the players were active. I don't think anybody is claiming that there was a duty of care owed to players -- retired players. If there were, we would move against that claim, and Mr. Beisner may address this more if and when he gets to actually speak today. But the allegation is that there was a duty of care to warn players while they were active and the NHL breached that duty. I understand that there's a claim that the injury arose later.

That, by the way, does not mean that the claim is not arbitrable.

THE COURT: When is it arbitrable? Is it arbitrable

now? Can they bring a --

MR. BAUMGARTNER: Yes, they could. It would fail, but it's arbitrable.

THE COURT: Would it fail because it's not being brought in a timely way?

MR. BAUMGARTNER: Well, there would be probably the same statute of limitations issue that we have in court. So, that part of the case would not be any different. It might get knocked down on timeliness, it might get knocked down on timeliness here. There is a provision -- if you look at Article 17 of the CBA, grievances have to be brought within 60 days of the time that the individual knew or should have known of the violation. There are -- there is the opportunity to toll.

Now, let me be clear about this: The arbitration provision is controlled by the Union. Every -- almost every arbitration provision, just about every one that I've seen, is controlled by the Union. So, the Union has to bring the claim.

THE COURT: So are you saying a retired player who had no reason to know that they had a claim when they were an active player, let's assume that for a minute, they had no reason to know, a retired player can bring -- can grieve the -- ask the Union to grieve a claim now for something that arose when they were playing?

MR. BAUMGARTNER: Absolutely. Absolutely. I have no trouble with that concept whatsoever. It's a claim that essentially arose during the time of the Collective Bargaining Agreement and the statute of limitations would be tolled. Again, I'm adopting your --

THE COURT: Right, assuming that --

MR. BAUMGARTNER: -- your supposition that the player can show that. And I think Counsel for the NFL made the same representation on behalf of the NFL in *Dent*, that --

THE COURT: But isn't that what these letters are about, about how that doesn't work or something? I haven't read them carefully, but --

MR. BAUMGARTNER: Un, neither have I.

THE COURT: The NFLPA does not believe that they could have grieved them.

MR. BAUMGARTNER: I'm not sure what that means, the NFLPA does not believe they could have grieved. I do recall -- I think this is a case in Judge Alsup's decision that he cites to the representation that was made by NFL counsel in that case that a claim like that could be arbitrable. Again, I don't want to be cute about this. We would assert all of the same defenses, including the limitations defenses that are applicable here.

THE COURT: Well, sure, there would have to be a determination of whether he knew or should have known.

MR. BAUMGARTNER: Right. Right. Yeah. And we would also assert the defense that there is no duty on behalf of -- on the part of the NHL, that none of these provisions do impose duties on behalf of the NHL, that they impose duties on the Clubs, or the physicians, or on the players themselves. And that there is -- the implication is -- we would -- we could -- it's not inconceivable to have that case. There's nothing -- nothing earthshattering about that concept.

We have arbitrations, I wouldn't say all the time, but we have arbitrations --

THE COURT: With retired players?

MR. BAUMGARTNER: Yes, I think so. With players who suffered career-ending injuries and there were issues about whether it was a hockey-related injury or not a hockey-related injury, and those things have gone to arbitration. There's no reason why the Union can't grieve a claim that arises under the Collective Bargaining Agreement. That's the critical issue. And this either arises under the Collective Bargaining Agreement because the NHL breached duties while the player was active, or to the extent it -- the allegations are the NHL had duties to the player after the player was no longer active, that's not a claim.

But I think this Complaint -- I was going to say "fairly read," but explicitly read, alleges that the NHL breached its duties to players by acting or failing to act in

certain ways while players were active. The arbitration provision of that CBA makes arbitrable disputes concerning interpretation or application of the agreement. So, to the extent there's any claim like that, that there is a duty, that can go to arbitration. I think it would fail, but that could go to arbitration. But the existence of an arbitrable remedy is not determinative as to the outcome of this case.

There was no arbitrable remedy that was available in the *Smith* case. There was no arbitrable remedy that was available in *Rawson*. The existence of an arbitrable remedy is not determinative. In fact, the existence of any remedy at all is not determinative. That's what the courts have said. So preemption doesn't turn on that, I just didn't want there to be misapprehension about what the landscape actually is.

And there have been -- I mean, there have been a number of cases like that. Preemption applies even to a party to a lawsuit who's not even a party to a Collective Bargaining Agreement in the proper circumstance. So, I'd say Mr. Grygiel spent a lot of time on this, but he didn't cite a single case that said that because somebody is a retiree, preemption doesn't apply to the claim. There are no cases that say that. With respect to why uniformity, why is this preempted, okay, let's take a step back now and get back to the policy issue which --

THE COURT: Yeah.

MR. BAUMGARTNER: -- I think I was going to address a few minutes ago. Mr. Grygiel says, well, the reason why you have preemption is in order to have uniformity. And the reason why you need uniformity is to avoid labor disputes. And there are no labor disputes here because, again, because they are retirees, nobody cares about them, they have no leverage, there won't be a strike over this. That's not quite right.

If you go back and read the seminal cases on this, *Lincoln Mills*, *Lucas Flour* are the cases that establish that these cases are governed by federal common law and that federal common law supplants state law. What the Supreme Court said was, the reason why we need federal law is because you do need uniformity of interpretation. And you need uniformity of interpretation so that when the parties enter into the contract, they can have certainty about what their obligations are going to be.

THE COURT: And I don't think the Plaintiff would disagree with you about that. The question is, then there must be some confusion about the interpretation of the language. You see, that gets back to this, do I just read the language, or do I have to go beyond that and interpret the language?

MR. BAUMGARTNER: Well, I do think you -- I -- this is more than just reading the language. I think there are

cases that say, well, if all you have to do is refer to the contract, then that's not preempted.

THE COURT: Here we are on a Rule 12 motion, and they haven't challenged any of these provisions of the CBA. They haven't said that they interpret them differently than you do. I'm not sure what needs interpretation at this point. What's the -- why couldn't I just read the order in which you see Club doctors and see treatment or the fact they have to wear helmets? What interpretation do I need to do with that?

MR. BAUMGARTNER: Well, you -- the interpretation that you would need to make would be to determine whether there's a duty of care, who has what obligations, and how those -- the allocation of those responsibilities affect whether and to what extent there's an obligation on behalf of the NHL. I think *Williams* --

THE COURT: I agree that I have to determine whether there's a duty. That's a legal issue, not an interpretation of the facts on a contract or the language in a contract. I think what these cases are saying is I have to -- when I look at the contract, I got to figure something out there, not just whether that leads to a legal duty. There's something -- I don't know if it's ambiguous, but there's something I need -- so that there can be some uniformity that everybody reads the provision the same way, I guess is the point.

MR. BAUMGARTNER: As creating or not creating rights

against or obligations on the part of the NHL. Again, it's not just a matter of whether a particular phrase is -- can be interpreted in more than one way. This is -- this is -- this is the way that every one of these cases has been decided, including *Williams*. And none of them, none of them have -- *Sherwin*, *Duerson*, *Dent*, *Stringer*, *Williams* -- none of those cases have -- have concluded that there has to be a word that could be interpreted -- a particular word or phrase that could be interpreted one way as opposed to another way.

Now, you do know when you look at these provisions that you're going to have some dis- -- I mean, the notion that there won't be disagreements over these provisions is I think a little bit unrealistic, and you can come up with examples if you needed to. But I don't even think you need to go that far given how the courts have applied this rule. And again, even in *Allis-Chalmers*, as Justice Blackman said, it -- it -- you don't know what was implied in a labor contract, and you may have to look to see whether there were implied rights because the existence of implied rights or the absence of implied rights will impact on the legal determination and therefore it was preempted. That -- it wasn't even -- this wasn't even a construct from -- from *Williams* itself. It really goes back as far as *Allis-Chalmers*.

I could talk more about the particulars of contract language, Your Honor, if you really want to cut through it.

We could talk about the language in the Concussion Protocol that would need to be interpreted.

THE COURT: But that doesn't exist until 2012, as I understand it, apart from the reference to the -- to the Concussion Protocol coming along before that. No, I don't think that would be useful right now.

MR. BAUMGARTNER: Okay.

THE COURT: I -- I am trying to approach this from various ways so I can make a good decision here, you know. I don't mean to be suggesting in any way -- I think this is a very close call, to be honest, between the Plaintiffs and the defense on this issue. And I appreciate that there are other District Courts out there who have gone your way. I certainly respect my colleagues on the bench. But I'm having a little bit of trouble with the notion that just having to read something in the Collective Bargaining Agreement like you see the club doctor first and then he must provide treatment and then there must be a determination, which sounds like process to me, would create preemption here when the claim is so different. That's where I'm struggling.

MR. BAUMGARTNER: And that's why -- and I promise I will not repeat the things I said this morning, unless you really want me to, but that's why I started this morning with the analytical framework. It -- because I didn't want to just make that suggestion that, well, you read this and it's over.

When you think about the analytical framework, the analytical framework for preemption says, what's the nature of the state law claim? What do you have to establish?

Now, let's think about how you establish that and the extent to which the Collective Bargaining Agreement is going to bear on that. I -- I do want to say, Your Honor, that I think with respect to the -- I don't want to ignore the first prong of the preemption argument either, because I think it's very troubling here. Mr. Grygiel said that the Complaint is based on three sources of a duty. One was the regular, general, old-fashioned duty of care. I don't think that that's right. I think there is no regular, general, old-fashioned duty of care that applies here.

Again, you could look at that *Domagala* case that says, "There's no duty to protect against harms created by others, absent a special relationship." So, this is not a case where the NHL or its employees went out and harmed somebody. Players were essentially harming each other. And the question is, well, how do you convert that into some duty on behalf of the NHL?

The second prong Mr. Grygiel said is that they've alleged a special relationship. You could look at every case, not just *Williams* -- even *Jurevicius*, which held that certain claims weren't preempted -- if you want to allege a special relationship between a League and the players, you have to

look at that. How would you not look at the Collective Bargaining Agreement to allege a special relationship?

And the third, which I think is related to the special relationship prong, is that the League voluntarily assumed a duty, and that's what we've addressed in our papers and what I addressed this morning, as well. So, I don't want to ignore either prong of the preemption argument, but I don't think that that was satisfactorily addressed as to why that shouldn't be preempted.

The -- *Dent* was decided on a motion to dismiss. *Jurevicius* was decided on a motion to dismiss. *Sherwin* was decided on a motion to dismiss. *Stringer* was a motion to dismiss or, in the alternative, for summary judgment. And I think that there was, again, the limited discovery on some issues that were unique to that case. So, there's no reason to think that this case can't be decided on a motion to dismiss either.

There was no -- I haven't seen a Rule 56(d) Affidavit that suggests a need for discovery here. Plaintiffs not only responded to our motion, they put in their own material outside the pleadings, as well. I think Your Honor has already addressed the assertion that was made by the Plaintiffs that the question of duty is a question of fact. It's not. It's a question of law.

And unless Your Honor has any other questions, I

think...

THE COURT: Thank you.

MR. BAUMGARTNER: I very much appreciate the time you've given me to argue this.

THE COURT: Sure. It's a hard one, so I need to get all the wisdom I can.

MR. BAUMGARTNER: Thank you, Your Honor.

THE COURT: Mr. Grygiel.

MR. GRYGIEL: Thank you, Your Honor.

Nothing further here.

THE COURT: Okay. All right.

All right. Any thoughts about what we should do at this point?

MR. ZIMMERMAN: I think, Your Honor, our side would like to be heard.

THE COURT: Okay.

MR. BEISNER: Your Honor, we would like to be heard, as well. I would suggest -- I think -- well, I'm not suggesting a time limit, but I don't think, given what Your Honor has said about being familiar with the briefs, that there's a need to go through step by step. I think there were some things that came up in the earlier argument that we may want to illuminate since it turns out there is some overlap. But I think we can do it pretty briefly.

THE COURT: Okay. That's fine. I do have another

hearing this afternoon, so let's try to be prompt about it. Okay?

MR. ZIMMERMAN: All right. Thank you.

THE COURT: Very good.

Did somebody want to leave or -- no, nobody?

MR. BRADFORD: I thought from your earlier comments --

THE COURT: Oh, I see. Okay.

(Discussion off the record.)

THE COURT: Okay. I think the vote from the person who matters is that we take a short break now. We will resume at about 10 minutes after 2. Make it a brief break.

(Short break taken.)

THE COURT: Okay. We move on to our second motion to dismiss, the general Master Complaint pursuant to Rule 12(b)(6) and 9(b). Who wishes to be heard on that? Mr. Beisner.

MR. BEISNER: Your Honor, John Beisner for Defendant, and consistent with what I said earlier, I'll try to hit some high points on this.

THE COURT: Okay.

MR. BEISNER: Without going through the argument in a great amount of detail.

Your Honor, I wanted to start by talking about the statute of limitations issue and heard Your Honor reference

the concept of latent injury as being what is being alleged here. And I guess there are really two points on that. One is we do not believe that as a matter of law what we're talking about here is latent injury. I won't belabor the point. We have the cases in the brief.

But what they are saying here is that there is a disease -- this is what I heard counsel saying this morning and in the briefs that has developed in the players, and I want to come back to the fact that I don't think that's really what's alleged in the Complaint, but I'll come back to that. But that seems to be the theory that they're espousing. And, you know, the cases we've cited, *Piper* from New York says, "Disease is a consequence of injury, not the injury itself." The *Klempka* case, you know, makes clear that a Plaintiff is not permitted to split one's initial and consequential injuries in order to meet the statute of limitations deadline. We think that's precisely what they are trying to do here.

And the *Ross* case out of the D.C. Court of Appeals citing a D.C. Circuit decision says much the same thing. Indeed, it's interesting, the analogy they use in that case is that if a blow is struck, the clock is running. That's what that case -- that's what that case says. So, we don't think that the law at all supports this idea that you could have concussions and now say that years later were able to bring this lawsuit to assert claims for this disease that has

resulted from those concussions from a long time ago.

There's no question that some of these cases, you know, are tough results, but the cases we're talking about that may seem somewhat harsh I think are consistent with the need to enforce statute of limitations for them to have meaning. You know, in these cases, in the D.C. case, a gentleman developed AIDS and was told, you're too late because you should have brought the action when you were determined to be HIV positive.

And in the *Piper* case, a person was diagnosed with carpal tunnel syndrome. And the Court said, no, you're too late because when you began to have symptoms of this is the point at which you should have sued, not the point at which the disease became diagnosable. So I'm not going to belabor that, Your Honor. I think those cases are pretty clear on that point.

But what I did want to spend a few minutes on is the problem with the Complaint -- I was struck by Mr. Grygiel saying earlier, well, you know, you have to look at the Complaint. The Complaint dictates it here. And I think the big problem on this issue is what's in the Complaint belies the legal theories that they are trying to espouse. Each of the named Plaintiffs, if you look at that section of the Complaint, goes on for paragraph after paragraph describing the concussion experiences that they had and the symptoms that

immediately resulted from those occurrences.

Now they seem to be saying to the Court, well, ignore all that; we're not talking about those concussions. We're talking about some later event. Well, I guess the question is, why are those sections in the Complaint? Why is that the detail of their allegations if we're not talking about those initial events that occurred many years ago? And then in describing their concussions, most of the Plaintiffs in those paragraphs talking about those events provide a fair amount of detail about the symptoms that they experienced after each event.

They talk about things like headaches, disorientation, inability to focus, insomnia, and seizures. And then for most of them, there's an immediately-following paragraph that says -- and this comes right after that discussion of what they were experiencing after -- immediately after those events -- each alleges that they -- and I'm quoting -- "continue to suffer on a daily basis." And then they have a list of maladies, along the lines of what they're saying they experienced in the more immediate aftermath of those concussion events.

How can Plaintiffs say that the limitations period didn't start running then back when those initial concussion experiences occurred, when what they're talking about now, if you look at what's actually in the Complaint, are the same

sorts of maladies and symptoms that they were talking about years ago when those concussion events have occurred? And then as far as we can tell from the Complaint, you don't have the -- any statement in there saying that a particular -- that the -- that all of these Plaintiffs have now been diagnosed with this second disease that they think starts the clock running all over again.

Indeed, quite to the contrary, uh, you know, there's nobody alleging they have CTE. No named Plaintiffs alleges dementia. No one is alleging Alzheimer's Disease among the six named Plaintiffs that we're talking about here. And indeed they have this interesting paragraph at the end of each of the named Plaintiffs' summaries that says, "Due to the injuries he suffered while playing in the NHL, Mr." -- blank, fill in whoever the named Plaintiff is -- "is at an increased risk for future harm for developing serious latent neurodegenerative disorders or diseases."

And so you're left standing there saying, why is this happening now? What has occurred? They tie, in the Complaint, the actual ends of the Complaint, they tie everything back to those individual concussion events. Let me give you a little bit more detail and a couple of examples, and I'll do this as quickly as I can.

But let's take Plaintiff LaCouture. He alleges that he suffered close to 20 concussions while playing. That's in

Paragraph 28, and he describes seven of them in considerable detail, in Paragraphs 29 through 36. Now, you wonder why is that in there if that's not the injury we're talking about here? He alleges that after those events, he experienced several problems, including -- and I'm quoting now -- "headaches, sensitivity to light, and insomnia."

Then in Paragraph 37, he goes on to allege that he "continues to suffer on a daily basis" from the same sorts of maladies, "headaches, sensitivity to light, and sleeping problems." I mean, what is the ah-ha event that has occurred here that starts the clock running again if you look at the actual named-Plaintiff allegations in the Complaint instead of this theory that we're being -- that is being discussed here about there being some new disease that starts the clock running again?

Plaintiff Peluso alleges five concussions with a fair amount of detail. And again, why are we talking about these events in the Complaint in such detail if these aren't the injury events? He alleges that after those events, he experienced a number of problems, including headaches and a grand mal seizure. And then in Paragraphs 48 and 49, he alleges he, quote -- "he continues to suffer on a daily basis" from many of those same sorts of maladies, headaches, and then he notes, "multiple grand mal seizures linked directly to his concussions in the NHL."

The named-Plaintiff allegations don't just -- just don't match the theory that Plaintiffs we're talking about here. And I think that's a very, very serious problem. And we don't think that the latent injury cases that they cite, which are instances where the Plaintiff was unaware of any injury, just -- they just don't apply here, and we just don't think they get to a legally-recognized latent injury allegation. And then, Your Honor, if you get to the concept of fraudulent concealment, first of all, we need to recognize that much of this Complaint is an argument that the NHL was too violent, allegations that the League should have restricted fighting, and the result was too many concussions.

What was unknown to the players at the time with respect to those allegations? They were there every day. They saw every game. If they thought it was too violent or that there should have been a rule change, they were there to observe that. And they had multiple concussions. It's not that no injury occurred that would have prompted them to think about those issues, so the idea that they couldn't have brought a lawsuit or a grievance or whatever at that time is beyond me.

But then you have this notion in the Complaint that what was withheld from them were the longterm ramifications of concussions, that this was hidden from them, and, Your Honor. It -- it -- I just don't know how you square that allegation

with what is repeatedly in the Complaint and what they state in the brief. I mean, the statement in the brief I think says it all: "The medical link between concussive and sub-concussive events and longterm neurological injuries following an athletic career have been documented in medical literature for over 85 years." That's what Plaintiffs state.

And there's a whole series of statements in the Complaint that totally belie the notion that there is any possibility of fraudulent concealment or substantive fraud here because it was in the public domain. Your Honor, this is not a case like the *Toyota* litigation or the *General Motors* case that Plaintiffs are citing where you have a company that manufactured a product and they've got data and information, complaint information -- maybe some of it's public, maybe some of it's not -- but it's fundamentally in their mind.

They're saying that all third-parties were reaching conclusions on concussion and sub-concussive injury -- not that the NHL was, but all of these medical folks out there in the world and others -- were reaching conclusions, were writing about this, and that the League concealed that? This was nothing exclusively in the League's knowledge. There's no allegation of that in there. And it just -- the Complaint itself belies any notion that there could have been either fraudulent concealment or, for that matter, fraud.

I mean you look through the Complaint, paragraph

after paragraph citing studies. Paragraph 193, a 1982 article indicating a medical association journal advising that all concussed athletes should defer returning, to -- and I'm quoting now -- "training and competition until all associated symptoms have been completely resolved." This is completely out there in the public domain.

And they say, well, because of this, the NHL undoubtedly should have known. But there's no explanation about why, after having concussion events, seeing physicians and so on, there was no access to this information to the named Plaintiffs. And then, Your Honor, they point to a series of -- and this is the word used in the Complaint, "infamous" incidents of violent head impacts incurred by violent -- by former NHL players. This is supposed to inform the NHL of everything they need to know on this issue. But infamous? I mean, the dictionary defines that as "Well known for some bad quality or deed." If it's well known, how can that be hidden?

And they list claims of players retiring due to the effects of concussions, they talk about Keith Primeau who, quoted, "Agreed to have his brain donated to Boston University research efforts into the cause of CTE injuries, career-ending concussions by several players in 1997, 1998." These are in Plaintiff's Complaint. We don't have to go outside. This is nothing the NHL is importing into this argument. This is in

their Complaint. You cannot square those allegations with the notion that any fraud was possible here.

And finally, Your Honor, they cite in the Complaint popular media reports on this subject suggesting that the NHL was able to hide the unhidable. I think the most important one to note there is a 1998 article in a Canadian newspaper. They cite it and quote from it. And this is in the Complaint, quoted, from 1998: "The rash of concussions has led the NHL to try to improve prevention and diagnosis of concussions and has awakened many players and coaches."

They're quoting that from 1998, yet they're saying to the Court, you have to conclude from the Complaint that we have alleged nobody knew. You can't reconcile those. And if you actually go look at the article that they're quoting from 1998, it says: "Research indicates that a person who suffers multiple concussions is more susceptible to another injury from a much milder impact," and that the, "symptoms may become progressively worse." This is in 1998 that they are citing as out there in the public domain as a basis for saying, the NHL should know, but we had absolutely no idea.

Your Honor, I think the -- you know, the *Albers* case, *Wholesale Grocery Product*, I'm not going to go through those cases in detail, but I think they all indicate you cannot say they were without -- you cannot conclude from the allegations of the Complaint that they were either without

knowledge or without access to that knowledge because of the affirmative allegations that they are -- that are in the Complaint that completely wipe out any effort to make that sort of allegation here.

And the one last thing I would note in this regard, Your Honor, is the following, and this is on the fraudulent concealment part of their Complaint. They don't ever explain, even try to explain in the Complaint, what's the epiphany, what was the ah-ha moment that says, oh, oh, oh, we have a lawsuit here. We didn't know that. They have to include that allegation in the Complaint, and they haven't.

The *Summerhill* case of the Eighth Circuit that we cited says that, "By failing to allege when and how he discovered an alleged fraud, the Plaintiff," Summerhill in that case, "failed to meet a burden of sufficiently pleading" and said the case was therefore properly dismissed on statute of limitations ground because fraudulent concealment hadn't been pled.

And, you know, the Eighth Circuit relies on *Wood v. Carpenter*, the old U.S. Supreme Court case back from 1879 that invented fraudulent concealment. But even back in those days -- before *Twombly*, *Iqbal*, Rule 9(b) said, that's got to be in the Complaint in detail or you're out. And they have not even made an effort to plead fraudulent concealment, that aspect of fraudulent concealment. And that is, okay, when did

we know? And why is it that we didn't know until that point?

Your Honor, the last point that I want to get into are on the substantive fraud allegations in the Complaint, those various counts that address fraud. And I will be as brief as I can on this. I don't think there's a lot of debate that the Plaintiffs need to demonstrate some source of a duty to disclose to Plaintiffs here. And they've suggested, too, they say first, there was an obligation of the NHL to say more under an incomplete statement theory. You spoke to the subject, but you didn't tell people everything. And second, they have an allegation of special knowledge as a basis for those claims.

Here's the problem with the incomplete disclosure theory that they've alleged. We're talking about six individual named Plaintiffs here. And for an obligation to arise, for a duty to disclose to arise, we have to talk about something that they heard, a partial statement, something that they relied upon that would have required the League to say something more. But we don't have that. You know, they -- there's a couple of references in the Complaint that are cited in Plaintiffs' brief to the effect that the NHL, "Effectively said that 'concussions are just dings.'"

But there's no -- no one is said to have said that. They don't identify anybody. There's no suggestion that anybody ever said that to any of the six players that we're

talking about here or that they relied upon that in some way. And under -- this is a 9(b) obligation. They've provided no information on that subject.

And then I'm harkening back to Mr. Grygiel's argument earlier about, well, these are former players. The other two things they cite are events that occurred after these folks were not playing anymore. What disclosure obligation existed at that point? They talk about statements that were made about the 2011 Concussion Program, and they also refer to comments by Commissioner Bettman in 2011, but they weren't playing anymore at that point.

So, what was the fraud that was committed at that point? What detrimental reliance could possibly have been placed on the statements that they're making there? And I'd further state that if you look at those statements and the context in which they were made, they are not statements that are concealing at all. You know, Commissioner Bettman talks about interpreting data that are out there, talks about risks of CTE. "Maybe it's dangerous, maybe it's not" is one of the quotes that they use.

But under *Marvin Lumber*, cases like that, I mean, there was nothing concealing about those statements. He has every right, without incurring any fraud burden, of stating his opinions. And they reference data. People have the ability to go look and see what they thought of the data

themselves or commission someone else to do that. So I don't see how those could possibly trigger any fraud claims here.

And on special knowledge, Your Honor, the special knowledge concept under the cases we cite here -- and this goes back to the comment I made earlier -- you're talking about data that other people don't have. You're talking about data that the Defendant has but isn't giving to anyone else; it's secret. That is not the theory that Plaintiffs are espousing here. They're saying lots of people have absolutely nothing to do with the League have been out there writing, being quoted in newspaper articles, being out there in the world making comments on this subject, and it's fraud? There's an obligation under these special knowledge theories in order to convey that? I mean, Your Honor, under that theory, everything would be fraud. Every case where you've got a company and a consumer where there's anybody in a slightly unequal relationship, you wipe out any notion of when there is a duty to disclose if that is the law here.

And again, the 9(b) allegations that they make in this regard are daunting because with respect to the named Plaintiffs, there simply are no allegations of instances where things occurred where they're saying that some individual at the League should have conveyed information under this special knowledge theory. We say in the briefs, what they're really arguing is superior knowledge. But as the cases we cite make

clear, that isn't the test. When you're talking about special knowledge, you're talking about information that a Defendant may have that is really exclusively in the possession of that Defendant, and we really don't have that here at all.

Finally, Your Honor, I think that I would just note very briefly on our motion with respect to the medical monitoring claims, it sounds like Plaintiffs may be saying there that they're not asserting these as distinct causes of action but rather as forms of relief that we're looking for. We think the other arguments as we've laid out in the briefs really don't defeat the -- that claim. As Your Honor is well aware, most jurisdictions do not recognize medical monitoring as a separate cause of action but may recognize that as a form of relief for other causes of action. But we do think that those claims should be dismissed; and it does not mean, though, that that form of relief would not be something that Plaintiffs may be able to assert under some of their other causes of action.

THE COURT: Thank you.

MR. BEISNER: So with that, Your Honor, I'll conclude.

THE COURT: You bet.

MR. BRADFORD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. BRADFORD: May it please the Court. Again, my

name is Mark Bradford with Bassford Remele on behalf of the Plaintiff. I had a six-page outline prepared, and I've been sitting on ice for five hours. I will promise to go fairly quickly through my outline because I recognize that there's a premium on brevity at the moment.

But before I get into the meat of the argument, let me just preface my comments with two fundamental points that I think are instrumental to how the Court disposes of this motion.

First, of course, this is a Rule 12(b)(6) motion. And while that's an obvious point, it's a very important point because we get the benefit of every inference that the Complaint alleges, and we get the benefit of all pleaded facts being deemed to be true. It also means that the time to debate the science behind the Complaint is not now; it's at a later date.

The second point I want to make before I get to the heart of the matter is obviously the principle basis for the NHL's motion to dismiss is the statute of limitations. That's an equally obvious point, but it's also an important one because the statute of limitations, of course, is an affirmative defense. It's not an element of our cause of action. It's not something that the Plaintiffs have to plead or plead around in their initial pleading. It's also a matter on which the NHL has the burden of proof.

And it's important because the Eighth Circuit has held the possible existence of a statute of limitations defense is not ordinarily a ground for Rule 12 dismissal unless the Complaint itself definitively establishes the defense. To that end, where you have accrual issues, dismissal is warranted only where no reasonable person could disagree on the date on which the cause of action accrued. It's our position, Your Honor, that before ruling as a matter of law on the NHL's statute of limitations defense, the Court should have the benefit of a fully developed, evidentiary record that's been the subject of thorough adversarial processes and informed by appropriate medical personnel. This Complaint satisfies Rule 12, it satisfies Rule 9, and it certainly satisfies Rule 8, which of course requires only a short and plain statement showing that the pleader is entitled to relief. And I just want to spend a few minutes telling you why.

Let's start with the heart of the case -- or the heart of the motion, rather, which is accrual. When did the cause of action accrue? We have a fundamental disagreement over what constitutes the legal injury in this case. As you just heard, the NHL wants the Court to conclude as a matter of law that the legal injury, which gave right to a cause of action, is any head blow that the player sustained during his playing career. And you heard the word "concussion" quite a

bit, and this lawsuit isn't just about concussions. There's allegations in the Complaint, the Complaint is, in fact, replete with allegations about sub-concussive impacts that can lead to permanent brain injuries, as well.

But the injury that is alleged in this Complaint, and it's very express, is not the single concussive event or the single sub-concussive event or a single blow to the head. It is the permanent brain injuries caused by the latent build up of Tau protein. That is expressed in the Complaint, and for purposes of this motion, that is deemed to be true.

And I think I can crystallize, aside from what's alleged in the Complaint, I think I can crystallize for Your Honor why the legal injury cannot logically or factually be any one head trauma sustained during a game. In Paragraph 1 of the Complaint, the players essentially allege that they understood that physical play was a part of the game. There's no dispute about that. They knew that even repeated head blows were part of the game. What they didn't know is that repeated sub-concussive blows to the head caused permanent neurologic damage. That's expressly alleged in the Complaint.

This is important because under the applicable discovery rules, before a cause of action accrues, there must be two things present.

Number one, a cognizable, physical manifestation of the disease or injury, and -- and it's conjunctive -- evidence

of a causal connection between the injury or disease and the Defendants' product, act, or omission. And by the way, this is the same whether we're in -- under Minnesota law or Washington DC law or New York law, and we cited the cases in the brief.

When any given player sustained a blow to the head during a game, as the Complaint alleges, there was nothing readily apparent at that time that would put the player on notice that, A, the NHL had engaged in some wrongdoing; or B, that the player had any injury or risk of injury other than that which he already knew was a part of the game, which was, of course, the initial impact. There's nothing in the Complaint that talks about the fact that these players knew when they sustained the head blow that they were at risk for a very serious permanent condition or that they knew the NHL was at fault, which are both of the prerequisites for an accrual of a cause of action. The entire gravamen of the Complaints, of course, is that the players did not know of either. So, when they sustained a blow to the head -- say it was a sub-concussive impact or even a concussive impact -- what would the cause of action have been at that time, what would the grievance have been, and what would the legal theory have been? The players had no knowledge of any wrongful concealment at that time. How would the players distinguish between what they believed were inevitable results of playing

the sport and an actionable injury caused by the NFL's [sic] misconduct, and that's what this whole lawsuit is about.

Now, you heard during the presentation today, and it was in the briefs, as well, references to a case called *Klempka* out of the Eighth Circuit. And I actually think that the Eighth Circuit cases that were referenced in the NHL's motion to dismiss actually help us with this motion because not only do they reaffirm that you have to have both a physical manifestation of the injury and knowledge of the misconduct, but the cases were summary judgment cases.

Klempka, which is the 1992 decision, was decided on summary judgment, not on a Rule 12 motion. And what's important about *Klempka* -- and it's not a long decision -- the Plaintiff in 1977 had actual knowledge of an actual -- excuse me, an actionable injury. She knew both that she had an infection; and she knew, because her doctor told her, that the cause of the infection was the IUD. She had both prerequisites for the cause of action. She then waited more than three years, which was the statute of limitations at that time, to sue. She waited until 1982 when she developed a second problem, which was her infertility. And the Court said, well, you had knowledge way back in '77 of a significant problem and of the causal connection between that problem and the Defendant. We don't have that here.

The other case that they cite in the brief, another

Eighth Circuit case from 1988, is *Goellner versus Butler*. Also decided on summary judgment, also involved an IUD where the Plaintiff had every reason to believe when she was injured that the IUD caused her injury. The most important thing, though, is that was a malpractice case where, at that time, Minnesota courts had held that there is no discovery rule in malpractice cases, and that's expressed in the opinion. Neither party here disputes that there is a discovery rule in Minnesota and in D.C. where these Complaints were filed.

Let me see if I can make a further analogy to drive home what constitutes the injury. You have a company that sells a product to the consumers. They disclose when they're selling the product that if you use our product, you may have some temporary maladie, some temporary discomfort, say in your hand. That's a fair fight. The consumer can decide, do I want to use this product and run the risk of developing these temporary symptoms? That's a fair fight. But imagine that same manufacturer didn't disclose that if you had repeated discomfort from our product, that can cause a permanent condition, call it arthritis. That's not a fair fight, and that's exactly what this case is about.

The information that was available to the players at the time they were playing the game, and we have alleged expressly that information was concealed from the players, that the NHL was duty-bound to disclose that information. But

under the NHL's logic, in my hypothetical, the Plaintiff who bought the piece of -- who bought the product would have to sue the moment she sustained the temporary hand condition that she already knew she might sustain. That's not the law, nor should it be. And what I don't want to have overlooked here is that this Complaint again alleges both concussive and sub-concussive events that can lead later to a latent distribution of Tau protein in the body.

The Complaint even spends multiple paragraphs from 215 to 220 discussing how sub-concussive impacts are in fact more dangerous than concussive impacts because there's no diagnosis at all. Discovery, medical experts, deposition testimony, documents are plainly necessary to resolve what are in every respect factual issues that the Court should have the benefit of before ruling definitively on these issues.

Just a couple comments on tolling. If you agree with us that there is at least a fact question based on the allegations in the Complaint as to when the causes of action accrued, all this stuff about tolling goes by the wayside. But let me just -- let me just highlight a few points on tolling. The law is to toll the statute of limitations, a Plaintiff must allege either that the Defendant took affirmative steps to conceal material facts or that the injury itself is of such a nature as to be self-concealing. We've obviously talked about the second prong. The injuries here

were self-concealing.

But when you have cases that deal with the first prong, affirmative acts, this Court in *Thunandor versus Uponor*, and I may be mispronouncing that, U-p-o-n-o-r, 887 F. Supp. 2d 850, stated, "The concealment may either take the form of deception or a violation of a duty." And as Mr. Grygiel walked you through this morning, we have expressly alleged violations of several duties. The NHL really only makes two arguments in response.

They say, well, we didn't conceal the initial head trauma. Well, that's sort of a truism, but it's not the point. The point isn't that they disclosed a hit to the head or a punch in the face. That's obviously not the case. What they didn't disclose is that repeated exposure to those conditions can lead to latent developed -- late and latent-developing permanent injuries. Then they say -- and you heard a little bit about it today that, well, the Plaintiffs could have discovered the basis for their cause of action by exercising due diligence because all of this information was in the public domain. That argument, in our view, fails for several reasons.

Number one, in Paragraphs 145, 330, and 340, we expressly allege that the NFL -- excuse me, NHL had information that it had itself accumulated. It was League data, League concussion data, that nobody else had access to.

The Complaint expressly alleges that the NHL took it upon itself to "educate the players on player safety." So what the NHL appears to be saying now is effectively this: Although we told players that we were going to look at the science, the players should have taken it upon themselves to double check the NHL's work.

It's our position, Your Honor, that it's certainly somewhat hypocritical and premature for the NHL to ask this Court to declare as a matter of law that the players failed to exercise due diligence to discover their claims. First of all, what's reasonable under the circumstances is inherently -- inherently a fact question. But to sort of highlight, you know, the NHL saying one thing today that we necessarily should have discovered the causal link and, as they put it, "put two and two together," and what they're saying throughout history, which is alleged in the Complaint, we have Commissioner Bettman saying, of fighting -- and fighting's important here because this is sub-concussive impacts caused by fighting, "Maybe it's dangerous, maybe it's not. You don't know that for a fact."

We've alleged repeatedly in the Complaint that the NHL itself says it can come to a proper conclusion as to what the medical science actually shows. Paragraph 269, Gary Bettman saying, "It's unfortunate if people use tragedies to jump to conclusions that probably at this stage aren't

supported." So, what they're saying is that we should have put two and two together, but they can't. At this stage of the proceedings, which is a Rule 12 motion, how is the Court supposed to referee that dispute? It's impossible.

Let me talk for a moment about -- actually, I'm going to skip the dissertation of the cases cited in the brief because we've heard a lot about cases this morning. What I will point out is that the *Albers versus Eli Lilly* case, which is the principle case that the NHL relies on, was a summary judgment case. But in any event, when it comes to all this public literature, what the NHL cannot answer is this: When should the players have undertaken this exhaustive research of the medical literature? Was it in between the time that they sustained their first sub-concussive blow and the second? Was it in 1997 when the NHL said, we're going to examine the medical literature ourself and tell you what we find? Was it in 2011 when the NHL declared that more study is needed on the topic? These are all fact questions. They may have defenses -- you should have done X, Y, or Z -- but they're just that: They're defenses.

Let me speak for a moment on the fraud-based allegations, and then I'll wrap up. I want to be very clear on one thing. Nobody in this courtroom is confused about what it is that the Plaintiffs allege the NHL knew and failed to disclose. Not a single person is confused about that. The

allegation is that the NHL knew about this causal link between concussive and sub-concussive head trauma or repeated head trauma and permanent neurologic conditions. We allege they didn't tell the players about that. There's nothing confusing, nothing indefinite, nothing ambiguous about that allegation at all.

The NFL -- NHL argues that we have not alleged our fraud-by-omission claims with sufficient particularity. But it's important to keep in mind the governing standard, and it's *Sanford versus Maid-Rite*, which is a 2014 decision by Chief Judge Davis: "Fraud-by-omission claims need not be pled with quite the same degree of specificity required of affirmative fraud claims. Requiring a Plaintiff in the initial pleading, to avoid suffering dismissal, to allege the precise time, place, and content of an event that, by definition, did not occur would effectively gut state laws prohibiting fraud by omission. Instead, the Plaintiffs," as we've done here, "need only provide the core factual basis for their claims."

The core factual basis for their claims. As I said, nobody's confused about what the core factual basis of our claims is. And remember the purpose of Rule 9(b) is simply to apprize the Defendant of the nature of the claims against it so it can prepare a defense.

We've talked a lot about the duties that have been

expressly alleged in the Complaint, and there was -- I do want to just return to the duties just for one moment, and I'm not going to rehash everything that was said this morning. But on the duty question, there was some reference earlier to whether there is a general duty of care, whether there is not a duty to care in Minnesota. What the -- a very recent decision -- this is out of the *Target* MDL where Judge Magnuson highlighted, "General negligence law imposes a general duty of reasonable care when the Defendant's own conduct creates a foreseeable risk of injury to a foreseeable Plaintiff."

Again, there are several bases for the common law duty but one of them is that the NHL promotes violence, promotes these unnecessary head traumas. And when you have created the injury -- and I think I heard one of the other attorneys say this is -- this was a danger that the players created, that this is player-on-player contact, that's completely taking the allegations in the Complaint and throwing them out the window.

It's repetitively alleged in the Complaint that the NHL itself was promoting the acts of violence that were occurring throughout these players' careers. We've also alleged that one who speaks must say enough to present -- prevent his words from misleading the other party. There are multiple acts and multiple statements that are alleged in the Complaint that are either incomplete or inconsistent with the

true nature of the science. We've alleged that the NHL took it upon itself to educate the players, but they didn't tell us everything.

That's the gravamen of the Complaint. We've alleged that the NHL -- and this is in some of the quotes we put in the brief -- undertook the duty to teach the players about the science of concussions and teach the players about health and safety. Again, the real response to this is, well, public information is not a bar. And I think we've hit that. The bottom line is that the Complaint includes all of the circumstances giving rise to the NHL's duty. It contains all of the allegations that give rise to the -- each cause of action.

And if the NHL has defenses that the players should have been on notice, that the players should have exercised due diligence, it can certainly discover the facts to support those defenses, but this is not the proper time for that to happen. The NHL even says that we haven't pled with particularity where the injury occurred. There's no requirement in the law for that to happen. There's no requirement that a Plaintiff plead, in the initial pleading, where he was injured so that the opposing party can make a choice of law analysis or determine what state's laws applies. There's no requirement.

Let me end with the medical monitoring claims. It

seems to me that this is much ado about nothing at this stage of the proceedings. We've alleged that the Plaintiffs are entitled to medical monitoring based on the allegations of present physical injury. There's no dispute from the other side that that is at the very least a remedy. So, if the objection is, well, you've got it in the wrong place in your Complaint, you put it under Count 3 instead of in the "Wherefor" clause, where it is in the Complaint is a complete non sequitur.

It's in the Complaint. And we're entitled and we've pled entitlement to that relief. But more than that, Your Honor, there are at least 13 states -- as I'm sure that you can confirm through your own research -- there are 13 states that recognize an independent cause of action for medical monitoring. Now, what states laws will ultimately apply to those claims will be the product of discovery, and it's inappropriate at this stage of the proceedings to engage in a thorough choice of law analysis when it comes to the medical monitoring claims.

With respect to the other arguments, Your Honor, we'll rest on our briefs, unless you have any particular questions for me.

THE COURT: Thank you, Mr. Bradford.

Mr. Beisner.

MR. BEISNER: Your Honor, if I may, just a few

points. Your Honor, there was a lot of reference here to other cases involving summary judgment determinations and prematurity here. And I really want to go back to the initial point I made and that is that the problem in this case is that the Complaint sinks the legal theories that Plaintiffs are talking about because of the extent to which it pleads various things that are totally inconsistent with the theories that Plaintiffs are trying to espouse at the moment.

Counsel was -- seemed to have been positing here a player who played for a number of years and had sub-concussive injuries and what was supposed to happen to that person. We have here six named Plaintiffs. All of them allege concussive events, one of them 20. They lay out in detail what they were. They were in the hospital, some of them, for extended periods of time, didn't play for a significant period of time. They suffered serious injuries, and what was never addressed here is some duty to investigate when those injuries occurred.

Plaintiffs' Complaint says this information that supposedly they didn't know about was readily available out there. There's no allegation that they investigated, even tried, and no reason why they couldn't have discovered the information that is being discussed here. I mean, that's what *Albers* and these other cases talk about is if that information is out there -- and I admit, Your Honor, this is an unusual case, but Plaintiffs affirmatively allege it's there if you

just look. But this did not happen.

This is not a case where you had a player who played for a short period, only sub-concussive injuries. They had significant injury events, or so the Complaint alleges in many paragraphs, as to each of the named Plaintiffs. And interestingly, Counsel said, well, there is some information we've alleged that the NHL had but, Your Honor, they also allege that the information that should have been disclosed to the players and should have put the NHL on notice of this information was all public and readily available information.

There's no allegation in the Complaint that anything -- and again I'm just treating this as true, but there's no allegation that there was any information the NHL had that was materially different than the public information that Plaintiffs affirmatively allege was wisely available out there.

Now, Your Honor, on -- the other thing that really was not answered here at all was the main point I was trying to make earlier. There is a suggestion that there is a disease that these players now have that's distinct from the injury they sustained when they had their concussion events. And as I said, Your Honor, that cannot be squared with the allegations that each of these named Plaintiffs put in the Complaint. There is -- there is -- they -- as far as we can tell, they really don't allege -- and I didn't hear Counsel

disagree with that, the sort of degenerative disease that the lawsuit is focusing on for any of these individual six named Plaintiffs. So, I don't know how they can be alleging now or coming before the Court saying that there needs to be some further discovery on this, any issue on that.

What's alleged in the Complaint are the injury events that happened years ago with no explanation about why claims could not have been asserted on those claims earlier. They really have not answered the question, what disease do they have now that they have not had for a number of years, because the Complaint just sort of suggests that there's an evolution of that over time.

And finally, Your Honor, I just wanted to address quickly the suggestion about fraud claims being based on statements that are incomplete. Counsel said, well, there are a number of those in the Complaint. I went through those earlier, and none of them are specific, specifically related to these named Plaintiffs in the case. They put up on the screen the statements in 2011 that counsel had up there. Well, they, you know, as Mr. Grygiel noted before, they weren't playing then. So, fraudulent nondisclosure at that point doesn't give rise to a claim. Their claim is about what should or should not have been said to the players while they were playing. Well, that doesn't give rise to that claim at all.

And there are a few other references in the Complaint to statements to players about these being dings and other things of that sort. But there just -- the Complaint literally says they were effectively -- those statements were effectively made but there's no explanation as to whom, are these things that these particular named Plaintiffs heard, no connection to them at all. And, you know, under 9(b), that needs to be pled with particularity and they have not done so.

But, Your Honor, I think the main point here is if you step back and look at this Complaint, it is all about an allegation that the League hid what Plaintiffs affirmatively allege could not be hidden, information that was in the public domain, not generated by the NHL. It all came from independent sources. It was not within the League's control, and no explanation as to the duty to investigate why that didn't happen.

And, Your Honor, I would conclude with, we got no answer to the question about why there's no explanation in the Complaint or the briefing, but most particularly in the Complaint with respect to fraudulent concealment about what was the epiphany? Why now? What was the discovering event? And the Eighth Circuit's case law is very clear on that point, that that needs to be alleged with particularity, and they have not done so.

Thank you.

THE COURT: Thank you, Mr. Beisner.

MR. BRADFORD: I'm good, Your Honor. Thank you.

THE COURT: Okay. Very good.

Anything else we should address today?

MR. ZIMMERMAN: No, Your Honor.

THE COURT: Very good.

I would say that the motions were very well briefed and very well argued. The Court really appreciates it. Court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluding at 3:12 p.m.)

* * * *

CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter