

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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IN RE: NATIONAL HOCKEY LEAGUE)	MDL No. 14-2551 (SRN/JSM)	
PLAYERS’ CONCUSSION INJURY)		
LITIGATION)		
)		
This Document Relates to:)		
ALL ACTIONS)		
)		

**RESPONDENT TRUSTEES OF BOSTON UNIVERSITY’S MEMORANDUM IN
OPPOSITION TO NATIONAL HOCKEY LEAGUE’S MOTION TO COMPEL**

INTRODUCTION

This matter presents the Court with a troubling issue: can a neutral third party be compelled to produce confidential information that will violate research subjects’ privacy, impose a significant burden on researchers, and create a chilling effect on future scientific inquiry?

Respondent Trustees of Boston University (the “University”) submits this memorandum in opposition to Defendant National Hockey League’s (“NHL” or the “League”) Motion to Compel Production of documents, communications, information, brain tissue slides, and raw data from the University’s Chronic Traumatic

Encephalopathy Center (“CTE Center” or the “Center”). Neither the University nor any of its employees are parties to the underlying litigation.¹

The University respectfully requests that this Court deny the NHL’s motion to compel or, alternately, quash those portions of the subpoena that seek information the University refuses to produce. There are multiple grounds. First, the League has failed to demonstrate with specificity why it needs the requested material, much of which, when deidentified, will dramatically reduce its value. Second, the subpoena violates research subjects’ right of privacy, a right that cannot be protected by a “compromise” proposed by the NHL or by this Court’s July 31, 2015 Order (Doc. 196). Third, the burden of responding to the subpoena would effectively shut down the Center and its principal researchers for months, if not longer, thereby preventing them from doing needed research and writing, and risking the termination of current and future grant funding. This burden far outweighs any probative value. Finally, compelled compliance with the subpoena will infringe on researchers’ protected academic interests, create a chilling effect on the Center’s research, and, given the high-profile nature of this litigation, risks chilling scientific research beyond the scope of the work of the Center.

¹ This Court has acknowledged that “courts give special weight to the intrusion that subpoenas impose upon third parties in determining the balance of competing needs for discovery.” In re: National Hockey League Players’ Concussion Injury Litigation, Memorandum Opinion and Order, Doc. no. 196 at 23.

THE BOSTON UNIVERSITY CHRONIC TRAUMATIC ENCEPHALOPATHY CENTER

Chronic Traumatic Encephalopathy (“CTE”) is a progressive degenerative brain disease found in athletes (and others) with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head. CTE has been known to affect boxers since the 1920s. However, recent published neuropathological reports have confirmed CTE in retired professional football players and other athletes with a history of repetitive brain trauma. Affidavit of Ann McKee (“McKee Aff.”), ¶¶ 7-12.

The CTE Center is part of the Boston University Alzheimer’s Disease Center (“BU ADC”), established in 1996 as one of twenty-nine centers in the United States to be funded by the National Institutes of Health to advance research on Alzheimer’s disease and related conditions. The Center conducts innovative research on chronic traumatic encephalopathy and other long-term consequences of repetitive brain trauma in athletes and military personnel, including the neuropathology and pathogenesis of CTE, its clinical presentation, genetics and other risk factors, biomarkers, methods of detection during life, and methods of prevention and treatment. <http://www.bu.edu/cte/about/>

The CTE Center collaborates with other institutions, partners, and academic researchers to expand the understanding of CTE. The clinical research program is located at the University’s School of Medicine. The VA-BU-CLF² Brain Bank is located at the

² “CLF” is the acronym for the Concussion Legacy Foundation. McKee Aff. ¶ 4.

Bedford (MA) Veterans Administration Medical Center. (“McKee Aff.”), ¶¶ 4-5;

<http://www.bu.edu/cte/our-research/>

THE NHL’S SUBPOENAS TO BOSTON UNIVERSITY

On or about September 2, 2015, the University received the NHL’s first two subpoenas, directed to Dr. Ann McKee and Dr. Robert Stern. Dr. McKee is a Professor of Neurology and Pathology at the University’s School of Medicine, Director of the University’s CTE Center, and Associate Director of the University’s Alzheimer’s Disease Center. McKee Aff. ¶ 1. Dr. Stern is Professor of Neurology, Neurosurgery, and Anatomy & Neurobiology at the University’s School of Medicine and Clinical Core Director of its Alzheimer’s Disease Center. Affidavit of Robert Stern (“Stern Aff.”), ¶ 1. The identical subpoenas requested the University to produce, among other things,

All documents related to sub-concussive head injuries, concussions, brain injuries, post-concussion syndrome, second-impact syndrome or long-term neurological problems, including CTE, for hockey players generally or NHL players specifically.

Declaration of Lawrence S. Elswit (“Decl.”) Ex. 1. On October 26, 2015, the University asserted a range of objections, including that the subpoena was burdensome and that compliance would require the University to violate confidentiality agreements and the privacy of research participants, but nonetheless produced documents relating to individual research subjects whose families authorized the release of the requested information.

That 2015 production included materials relating to the late Lawrence Zeidel, a proposed class representative in this litigation, and other hockey players whose families consented to disclosure of records. As the NHL notes (NHL Memorandum in Support of Motion to Compel³ at 8, n.5), the Center has performed autopsies on only five NHL players' brains. In response to the initial subpoenas to Dr. McKee and Dr. Stern, the University sent the NHL the records for four of those players whose families had provided authorization to do so. (In January 2017 the University supplemented that production with additional information about these individuals.)

On February 3, 2016, the NHL informed the University that it viewed the October 2015 production as incomplete. Decl. Ex. 2. On March 31, 2016, the University responded with additional materials. Decl. Ex. 3.

The University heard nothing in response until August 4, 2016. An email exchange suggested that the NHL was concerned that the University had not conducted a diligent search for responsive materials. Decl. Ex. 4. There was no further communication between the parties until October 12, 2016, when the University received the subpoena that is the subject of the current dispute (the "Subpoena"). NHL Counsel's cover email indicated that the current subpoena was necessitated by the fact that Mr. Zeidel, whose brain was examined at the CTE Center, had been named as participant in the lawsuit. Decl. Ex. 5.

³ Hereafter, "NHL Memorandum."

But the subpoena itself goes far beyond requesting additional information relating to Mr. Zeidel. Ten of the nineteen requests (Requests 6 – 15) seek information about “Zeidel, other hockey players, including NHL players, and other athletes.”

On October 20, 2016, the University formally objected to the subpoena in accordance with Fed. R. Civ. P. 45 (d)(1) and 45 (d)(2)(B). Over the next few months, counsel held phone conferences and exchanged letters in a good faith but ultimately unsuccessful effort to narrow the gap. Decl. Ex. 6. On January 11, 2017, the University sent counsel for both parties its formal response and objections, with additional documents.

The NHL Subpoena contains 19 requests that fall into several categories: (1) requests for identifying information related to “Zeidel, other hockey players, including NHL Players, and other athletes” including their medical records, autopsy reports, slides, photographs, neuropathology reports and related clinical findings and interview notes (Requests 2, 3, 6 – 15); (2) all communications relating to CTE research, including unpublished draft papers, notes, private scientific communications among Center researchers and others, and “all documents related to” the Center’s research methodologies, findings, hypotheses and scientific statements made by Center researchers related to CTE (Requests 4, 5, 9 – 13, 18, 19); and (3) specific requests related to the CTE Center’s founding, relationships with CLF, and communications with specifically-identified individuals involved with the NHL. (Requests 1, 16, 17).

In sum, the subpoena demands a step-by-step accounting of the nature of every researcher’s scientific inquiry into the study of chronic traumatic encephalopathy,

complete with examples of findings involving individuals (or their families) who were given every expectation of privacy.

SUMMARY OF ARGUMENT

A subpoenaing party must first show that its requests are relevant to its claims or defenses within the meaning of Fed. R. Civ. P. 26(b)(1). Next, the burden shifts to the subpoenaed nonparty, who must show that disclosure of the information is protected under Rule 45(d)(3)(A) or (B).

If the subpoenaed nonparty claims the protections under Rule 45(d)(3)(B) or asserts that disclosure would subject it to undue burden under Rule 45(d)(3)(A), it must show that disclosure will cause it a clearly defined and serious injury. In re: Domestic Drywall Antitrust Litigation, 300 F.R.D. 234, 239 (E.D. Penn. 2014). The court must then determine if the asserted interest in disclosure outweighs the harm that may result. In re: National Hockey League Players' Concussion Litig., 120 F. Supp. 3d 942, 955-56 (D. Minn. 2015) (balancing the need for discovery of non-party medical information against privacy interests of hockey players).

The balance of competing interests clearly favors the University's opposition to the NHL subpoena. The NHL has not identified a specific research finding exclusive to the Center that is central to its defense. The League simply wants all information in any way related to the Center's work. On the other hand, the University's interest in preventing disclosure is clear. There is no practical way to provide the information requested without invading researchers' and research subjects' privacy, imposing a

burden on the Center that will functionally prevent it from conducting any work, and creating a chilling effect on research in this field, at Boston University and elsewhere. The Center has and will continue to cooperate with the NHL regarding any individual who authorizes disclosure, but is absolutely bound to honor the pledges of confidentiality it made to hundreds of individuals and families⁴ – the vast majority of whom never played professional hockey - who are in no way connected with the lawsuit that has brought Boston University to this courtroom.

ARGUMENT

I. Overview: This Court Should Apply a Balancing Test to Determine the Reasonableness of the Subpoena

The NHL misframes the appropriate analysis by asserting that the Eighth Circuit has not “recognized an exemption to the Federal Rules of Civil Procedure for academic researchers.” NHL Memorandum at 14. Rather, the League ignores Rule 45(d)(1)’s

⁴ For many participants, the promise of confidentiality is also subject to the additional protections of a Certificate of Confidentiality issued by the Department of Health and Human Services. As provided in section 301(d) of the Public Health Service Act 42 U.S.C. 241(d), “Persons so authorized to protect the privacy of such individuals may not be compelled in any Federal, State or local civil, criminal, administrative, legislative or other proceedings to identify such individuals.” *See* n. 13 *infra* p. 23.

mandate that a party serving a subpoena “must take reasonable steps to avoid imposing undue burden and expense” on the subpoenaed party.⁵

The Eighth Circuit recognizes that “ ‘the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.’ ”

Misc. Docket Matter # 1 v. Misc. Docket Matter # 2, 197 F.3d 922, 927 (8th Cir. 1999) (emphasis added) (quoting Cusumano v. Microsoft, 162 F.3d 708, 717 (1st Cir. 1998))⁶.

That decision, in turn, has been cited by United States District Courts throughout the Eighth Circuit,⁷ including this Court. General Parts Distribution, LLC, v. Perry, 2013 WL 3223374, June 25, 2013 at *2. *See also* fn. 1, *supra* p. 1.

The Misc. Docket Matter #1 court recognized that “[e]ven if relevant, discovery is not permitted where no need is shown or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking information.” 197 F.3d at 925 (quoting Micro Motion, Inc. v. Kane Steel

⁵ The University acknowledges the NHL’s offer to pay for the cost of compliance, and is not asserting the financial burden of copying, packing or shipping as part of its opposition to production. But the NHL has not offered to pay for the time researchers will be required to invest in the process if the subpoena is enforced, or cover any grant funding that may be lost as a result of compliance. Stern Aff. ¶¶ 10, 13; McKee Aff. ¶¶ 17-22.

⁶ Cusumano is discussed in detail *infra* §3(C), pp. 31 ff.

⁷ *See, e.g., American Broadcasting Cos., Inc. v. Aereo Inc.*, 2013 WL 5276124 at *6 (N.D. Iowa Sept. 17, 2013); In re: NCAA Student-Athlete Name & Likeness Licensing Litigation, 2012 WL 4856968 at *3 (E.D. Mo. Oct. 12, 2012); Gray v. Cottrell, 2007 WL 1445492 at * 1 (E.D. Mo. May 10, 2007).

Co., 894 F.2d 1318, 1323 (Fed. Cir. 1990). The existence of any one of those factors justifies quashing a subpoena.

The Eighth Circuit, and this Court, have balanced the competing needs of a party seeking information and a non-party resisting production. Here, the Court must balance the NHL's need for information against (1) researchers' confidential communications and research subjects' privacy; (2) the burden that production would impose, and why it is not mitigated by the NHL's offer to pay a third party to redact confidential information; and (3) the chilling effect of the subpoena and the risk it poses to scientific research generally.

“Although a litigant is generally entitled to broad discovery, a nonparty may hold such a strong interest in withholding certain material that a court will not compel the nonparty to comply with the subpoena, even when a strong need for the information has been demonstrated.” In re: Domestic Drywall Antitrust Litigation, 300 F.R.D. at 246 (citing Mgmt. Info. Tech., Inc. v. Alyeska Pipeline Serv., 151 F.R.D. 478, 481–82 (D.D.C.1993) (precluding disclosure of whistleblower identities), and Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 389 (N.D.Cal.1976) (precluding disclosure of research-participant identities)). Here, that is certainly the case. The NHL's explanation of relevance (NHL Memorandum at 10 - 12) does not translate into “substantial need.” In re: Domestic Drywall Antitrust Litigation, 300 F.R.D. at 246. The balancing of competing interests favors protection from disclosure.

II. The NHL Has Failed to Show Why it Needs the Materials it Seeks

The Court has considered the factors to evaluate when a party seeks to compel production. In re: National Hockey League Players' Concussion Injury Litigation, Memorandum Opinion and Order [relating to third party CLS Strategies' Motion to Quash]⁸, June 30, 2016 at pp. 6-7 (listing factors a movant must show that weigh in its favor, including “(1) the relevance of the information requested; (2) the need of the party for production. . . .” (citing cases)). *See also* Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 565 (7th Cir. 1984) (“Anything not necessary must be viewed as covered by the privilege.”); Micro Motion, Inc., 894 F.2d at 1323 (“Even if relevant, discovery is not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information.”).

The NHL cites several cases articulating the general rules of discovery. NHL Memorandum at 12 – 14. But these cases offer limited support for the NHL's argument, because they all acknowledge that courts must balance the needs of the party seeking discovery against the burdens a subpoena imposes on a non-party. *See* Heitzman v. Engelstad, 2013 WL 4519403 (D. Minn. July 13, 2013, at *5) (quashing an aspect of a subpoena it found to be “unduly burdensome.”); Credit Lyonnais. S.A. v. SGC Int'l, Inc., 160 F.3d 428, 431 (8th Cir. 1998) (“[t]he District Court does have discretion to limit the scope of discovery.”); StoneEagle Servs Inc. v. NMB Bank, N.A., 2015 WL 2452926, at

⁸ The University has been advised that this Order is no longer under seal.

*3 (W.D. Mo. May 22, 2015) (“In determining whether a subpoena imposes an undue burden, the court should balance the relevance of the testimony sought and the requesting party's need for the testimony against the potential hardship to the party subject to the subpoena.”) (internal citations omitted); Bombardier Recreational Prod., Inc. v. Arctic Cat, Inc., 2014 WL 5685463, at *2 (D. Minn. Sept. 24, 2014) (“courts apply a ‘balancing test’ to determine whether good cause exists” for a protective order). Significantly, none of the discovery sought in those cases was even remotely similar in scope or in kind to the discovery the NHL demands.

The NHL’s reliance on Kellington v. Bayer Healthcare Pharm, Inc., 2016 WL 5349801, (W.D. Va. Sept. 23, 2016) (NHL Memorandum at 14, 18) deserves special mention. That case involved a request for international judicial assistance to secure the deposition of a researcher who had previously testified as an expert witness for the plaintiff. The court allowed the defendant’s request for discovery “under the specific and unique facts” of the case, including the prior relationship between the witness and a party. (Id. at *2) The court also noted that the discovery request did not involve issues of confidentiality or premature disclosure. Id. The NHL’s claim that the Kellington court “considered the exact issue before this Court” (NHL Memorandum at 18) is inaccurate at best, because the “unique facts” (Id.) in that case minimize any precedential value it might have for this case.

The NHL’s assertion that even where courts have recognized a privilege for academic research, “those courts nonetheless have required non-party academic entities to produce ‘relevant’ information pursuant to a protective order and/or with confidential

information redacted” is misleading. NHL Memorandum at 15 (citing Deitchman and Application of Am. Tobacco Co., 880 F.2d 1520 (2d Cir. 1989)). That general statement does not apply to this case.

The NHL draws comfort from Deitchman (NHL Memorandum at 15-16), a products liability case, but it should not guide the outcome here. That case held that certain underlying data were discoverable, and that privacy could be addressed through a protective order. But Deitchman also acknowledged that certain data enjoys a qualified privilege from disclosure; that courts must balance the need of the party seeking discovery with the burden imposed on the party from whom discovery is sought; and that “[n]o discovery should be allowed of any material reflecting development of [an expert’s] ideas or stating his or others’ conclusions not yet published.” 740 F.2d at 565. Thus it supports the CTE Center’s position that scholarly research, or scientific research, must be judged by a heightened standard of sensitivity.

Deitchman involved questions of access to a one-of-its-kind centralized repository of information related to the prevalence and incidence of the disease at issue in the case. The court also expressed concern that the “statistical basis for [the expert’s] published conclusions [could be] inaccurate or incomplete.” Id. at 563. No such skepticism – at least no credible skepticism - applies here. Further, researchers across the country and around the world are studying the link between concussions and neurodegenerative diseases. The CTE Center does not conduct prevalence or other epidemiological studies and it is not a “sole source” of any centralized repository or of any finding at issue in this case (except for information relating to Mr. Zeidel). The NHL’s assertion that it needs all

of the CTE Center’s research materials and unpublished data to “probe the scientific basis for published conclusions” and “confirm the accuracy of published findings” (NHL Memorandum 10 – 12) is, as discussed immediately below, inconsistent with established scientific methodology.

Deitchman has never been cited by the Eighth Circuit. But that Court has cited the First Circuit’s decision in Cusumano v. Microsoft Corp., *supra* p. 9 which makes clear that when academic research is subpoenaed, the request is a subject to a balancing test, factors of which may include the confidentiality and privacy rights of research subjects, the burden placed on researchers, and how a protective order may mitigate such burdens.⁹

A. The NHL Has Not Identified a Valid Scientific Need for the Materials it Seeks.

The NHL states that a “major issue in this case is whether valid, scientific evidence has existed throughout the alleged class period showing that concussions or so-called subconcussive blows cause later-in-life neurodegenerative brain diseases or the pathology referred to as chronic traumatic encephalopathy (“CTE”).” NHL Memorandum at 1. But its explanation of relevance (NHL Memorandum at 10 - 12) is unpersuasive and does not justify the discovery it seeks from the CTE Center, particularly

⁹ Burka v. U.S. Dep’t of Health & Human Servs, 87 F.3d 508 (D.C. Cir. 1996) (NHL Memorandum at 16) does not advance the League’s argument because it involved a FOIA analysis, which does not require a court to balance need against burden. 87 F.3d at 517.

because the NHL's objectives go far beyond the realm of reasonable discovery, and are inconsistent with accepted scientific methodology. McKee Aff. ¶ 28, Stern Aff.- ¶ 18-19.

The CTE Center has published over 60 peer-reviewed primary research publications related to chronic traumatic encephalopathy. McKee Aff. ¶ 12. Other investigators, working with faculty affiliated with the Center, have published numerous additional reviews and articles relating to chronic traumatic encephalopathy. McKee Aff. Ex. A at 18 ff.; Stern Aff. Ex. A at 23 ff. These investigators are affiliated with institutions all over the world. Each of these publications may be relevant to the current understanding of neurodegenerative disease—why it develops, how it develops, how it clinically manifests, its neuropathology, the individual variations observed, and the role of concussive and subconcussive impacts. For example, a longitudinal clinical study that conducts neurological tests on live athletes (and controls) may be relevant to understanding early brain changes in regions that correlate to the neuropathologies seen post-mortem in CTE sufferers. Separately, a study that focuses on concussions or subconcussive hits may be relevant to understanding the physiological changes that occur to a brain following impact. And a seemingly unrelated study on behavioral changes of individuals who have damage to the regions of the brain corresponding to those associated with CTE pathologies may provide evidence of a potential causal relationship between the damage to this region and the behaviors observed.

These examples are illustrative only, but they provide a window into the scope of the research and the literature. No one paper, or the published work of one organization, is dispositive. A body of interrelated evidence supports the conclusions that the NHL

seeks to explore and/or challenge. McKee Aff. ¶¶ 9-12, 30. The CTE Center does not conduct prevalence or epidemiological studies¹⁰ and it is not the only source of data supporting the link between concussion or subconcussive blows and CTE. The NHL's assertion that it needs all of the CTE Center's research materials and unpublished data to "probe the scientific basis for published conclusions" and "confirm the accuracy of published findings" defies logic and common sense. NHL Memorandum at 10-12 (referencing Requests 6, 7, 11, 14, 15, 18, 19). The published science speaks for itself.

The NHL has not argued, much less shown evidence, that the CTE Center's work was published following a failed peer review process; or that the researchers failed to use the scientific methods they claimed they used; or that calculations were performed improperly; or that data was inaccurately analyzed; or that the Center's published work reflects bias or chance; or that there is any reason to challenge the scientific integrity of the work. In short, the NHL's claims for relevance are not anchored in any aspect of scientific research that leads a reasonable person to conclude that the Center's published work was deficient in any way. The League has not carried its legal burden and instead, seeks to impose an unreasonable burden of a different sort on the CTE Center.

Nor can the NHL argue that researchers' notes, drafts, unpublished communications and underlying data are relevant to evaluate "whether valid scientific evidence [regarding the development of CTE] has existed throughout the alleged class

¹⁰ Thus the NHL's explanation of why the information it seeks in Requests nos. 2 and 3 – "relevant to understanding the prevalence rates of CTE" – is unpersuasive. NHL Memorandum at 11.

period” (NHL Memorandum at 1), or “how hypotheses about CTE developed” (NHL Memorandum at 10). The relevant legal standard in this case involves what the NHL knew (through review of published literature) or should have known (because information was available to the public). *See* Doc. 615, Plaintiffs’ Second Amended Consolidated Class Action Complaint. Private, unpublished and publicly-unavailable information is irrelevant to that inquiry.

The NHL claims that “doctors at the BU CTE Center have interjected themselves into discussions relevant to this litigation,” and cite Dr. McKee’s recent ESPN television interview as an example. NHL Memorandum at 7 – 8. That assertion is misleading. Dr. McKee’s research and public commentary on issues relevant to this lawsuit, in both professional settings (e.g., scientific conferences) and mainstream media, long preceded the filing of the complaint. *See, e.g., McKee Aff., Ex. A* at 30 ff. And regardless of timing, those comments would be inadmissible except insofar as the NHL seeks to compel Boston University researchers to testify and then attempts to impeach their scientific integrity. But the University urges the Court to be wary of compelling the production of documents to be used mainly for “purposes akin to impeachment.” Cusumano, 162 F.3d at 712.

The NHL has retained its own expert to advance its theories regarding the link (or lack of it) between concussions and neurodegenerative brain diseases. In order to demonstrate a scientific need for the information it seeks, the League must comport with standard scientific protocols for evaluating the quality and integrity of peer reviewed, published research with which it may disagree. It cannot utilize the subpoena power to

gather valuable research materials from a third party to conduct advocacy-oriented research. Perhaps the NHL's expert distrusts the scientific method: he asserts that he needs the raw data described in Requests. 6, 7, 14, and 15 to "verify the accuracy of the reports, evaluate for other pathological processes that may be significant, and conduct a full, *independent* neuropathological analysis of the cases reported by researchers at the BU CTE Center" (Doc. 671, ¶ 13) (emphasis added). This argument does not justify the League's purported need, because that is not the way science works. Affidavit of Nigel Cairns ("Cairns Aff.") ¶ 5. Unless the NHL has a basis to challenge the integrity of the Center's work – and it does not, and has not advanced one – this Court cannot allow it to dismantle the operations of a productive research group simply to satisfy a litigant's needs. If the NHL wants to advance an alternate theory it should conduct independent research. (Stern Aff. ¶ 18.)

B. The NHL has not demonstrated a specific need for data supporting each of the CTE Center's studies.

Part of the University's response to the NHL subpoena the University included 62 studies and articles published by CTE Center researchers. Dissatisfied, the NHL demands all of the underlying data and communications relevant to all of these studies. But the

NHL has not attested which if any of these studies are actually relevant to their defense, or that they have any basis for doubting the scientific validity of each and every study.¹¹

The NHL's expert, Dr. Rudy Castellani, attests that he has reviewed "publicly available materials related to case series purporting to identify CTE pathology in the brains of deceased athletes, including papers published by researchers at the BU CTE Center." Doc. 671 at ¶ 12. He describes what, in his view, are deficiencies in the papers, which preclude "independent assessment." *Id.* But he fails to identify which research papers he has actually reviewed, or the specific data or methodical information that believes is missing. Thus it is unclear why the NHL wants every shred of information relating to every paper ever published by CTE researchers.

Dr. Castellani's own body of work includes several papers and presentations in which he claims to be doing what his affidavit says is impossible: assessing the CTE Center's methodology and the accuracy of the conclusions in its published work. *See*, e.g., Presentation at The University of Michigan Sports Concussion Summit, Ann Arbor, Michigan, September 2015, <https://www.youtube.com/watch?v=d9->

¹¹ The NHL is on record as expressing skepticism about the link between concussions and CTE (Decl. Ex. 7.) John Branch, NHL Commissioner Gary Bettman Continues to Deny C.T.E. Link, NY Times, July 26, 2016, available at www.nytimes.com/2016/07/27/sports/nhl-commissioner-gary-bettman-denies-cte-link.html?_r=2; *See also* Ex. 7 (letter from NHL Commissioner Gary Bettman to Sen. Richard Blumenthal, Oct. 24, 2016) at 13.

[JvPZVUbk&feature=youtu.be&t=897](#)¹² He co-authored a recent article discussing the methodologies used in Dr. McKee's papers which states that "detailed neuropathological findings" and other supplemental materials are available online. Gardner AJ, McCrory P, Zafonte R, Castellani RJ, A critical review of chronic traumatic encephalopathy, 56 Neurosci Biobehav Rev. 276, 283 (2015). Dr. Castellani was capable of criticizing the work of Center researchers based on this information, but now claims that the information available to the public is insufficient.

It is telling that Dr. Castellani's affidavit to the Court described deficiencies in only one research paper - a paper that was not published by CTE Center researchers. Doc. 671, ¶ 11. This is hardly a substantive basis on which the NHL can rely in demanding the right to vacuum up every bit of information ever generated by the CTE Center.

C. De-identification will diminish the probative value of the original data.

Although the NHL acknowledges that much of the data it requests will need to be de-identified, it fails to acknowledge that such de-identification will significantly reduce, if not completely eliminate, the value of the data, particularly as it pertains to either undermining or verifying the scientific accuracy of the Center's findings with respect to any individual brain. McKee Aff. ¶ 23, Stern Aff. ¶ 10, 13. De-identification, especially

¹² In this presentation Dr. Castellani specifically critiqued the CTE Center's use of slides containing 50 micron thick brain samples, and states that "nobody really does these for diagnostic purposes, it's purely for illustration purposes." However, the NHL is still demanding that Center provide all such slides (Request no. 7(d)), even though their expert states that they have no value.

of high profile individuals, requires elimination of any information that could be used in combination with publicly available information to re-identify the research participant (e.g., significant medical events, family status, team affiliation, years played, other personal information). Once deidentified, it would be impossible to verify the accuracy of “posthumous family interviews” or determine which data is associated with hockey players or other athletes. NHL Memo 19-20. The NHL has neither argued nor shown that the data it seeks, once de-identified, will add meaningful value to its defense in this case.

The NHL’s failure to articulate or demonstrate its need for raw data pertaining to human research subjects, or drafts and communications relating to published work, is fatal to their demand, and should be dispositive in deciding this motion.

III. The CTE Center has a Strong Interest in Withholding the Requested Documents

A. Compliance with Request Will Impermissibly Violate Research Subjects’ Privacy

An individual’s health information, particularly behavioral and mental health, is generally considered to be the most private of all information that might be available about a person, living or dead. This Court has gone to great lengths to protect the privacy of former NHL hockey players. (Doc. 196). Mindful of those concerns, the NHL has proposed a methodology to protect research subjects’ privacy:

[T]he NHL also has agreed to (a) accept de-designated materials for any subjects for whom there is no authorized medical release; (b) use a HIPAA-compliant protective order to maintain the confidentiality of produced materials; and (c) pay

for the costs of having an independent third party review the materials and of producing any relevant materials that are identified. These approaches . . . have already been used at the Court's direction in response to other third party discovery in this case. *See, e.g.,* Dkt. # 556, Order on Motion to Enforce Chubb Subpoena at 8 (finding that "by requiring deidentification of certain identifying fields of information, the Court determined that privacy concerns in those records had been ameliorated").

(Decl. Ex. 6, Letter from Daniel J. Connolly, page 2.)

The University acknowledges the League's effort to allay its concerns, but even that approach is fatally flawed because, as the affidavits of Dr. McKee and Dr. Stern make clear, (1) most of the material the NHL requests cannot be anonymized without guidance and supervision by a CTE Center researcher; (2) production of the sheer volume of material sought by the League will grind the work of the CTE Center and its scientists to a halt; and (3) the NHL proposal would require someone, regardless of his/her lack of affiliation with the NHL, to review the personal information of public figures to whom, or to whose families, the CTE Center has pledged confidentiality – a requirement of most

federal research funding.¹³ Affidavit of Ronald C. Peterson (“Peterson Aff.”) ¶ 4 (“To ensure compliance with confidentiality rules and to meet ethical obligations to research participants, principal investigators must be directly involved in deidentification of the requested materials.”). Neither the University nor, it respectfully submits, this Court will want the next phase of this issue to be a dispute about the identity, experience, and skillset of the proposed third party responsible for de-identifying data.

Furthermore, the NHL’s reliance on this Court’s Order on Motion to Enforce Chubb Subpoena (Dkt. No. 556, the “Order”) is inapposite. That Order addressed a different problem – whether notice and an opportunity to object to production must be given to players whose records will be released - and does not provide a template for protecting the confidentiality of the information the NHL seeks from the Center.

The “Chubb Subpoena” was limited to former NHL players only, and was limited to independent medical examinations. Order at 4. In contrast, the NHL seeks all the

¹³ For many research participants, the Center’s promise of confidentiality is also subject to the additional protections afforded by Certificates of Confidentiality issued by the National Institute of Neurological Disorders and Stroke (NINDS) protecting the identity of research subjects. CoCs have been issued to the following studies: (i) Longitudinal Examination to Gather Evidence of Neurodegenerative Disease (LEGEND); (ii) Chronic Traumatic Encephalopathy: Detection, Diagnosis, Course and Risk Factors (Also known as: Diagnostics, Imaging and Genetics Network for the Objective Study and Evaluation of Chronic Traumatic Encephalopathy (DIAGNOSE CTE); (iii) Diagnosing and Evaluating Traumatic Encephalopathy Using Clinical Test (DETECT) (Also known as: Chronic Traumatic Encephalopathy: Clinical Presentation and Biomarkers); and (iv) CTE and Posttraumatic Neurodegeneration: Neuropathology and Ex Vivo Imaging. *See* Decl. Ex 8. Federal regulations define the “identifying characteristics” that are protected by the Certificate to include any “item or combination of data about a research subject which could reasonably lead directly or indirectly by reference to other information to identification of that research subject.” 42 C.F.R. § 2a.2(g).

underlying information and “raw data” relating to every brain examined by the Center, regardless of whether the donor played professional hockey. Further, the parties agreed to narrow the scope of the Chubb subpoena to a time-limited subset. Order, n. 3. There is no such limitation in the NHL subpoena.

This Court relied on the Third Circuit’s decision in U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980), listing factors to be evaluated when a discovery request threatens a privacy interest:

(1) The type of record requested; (2) the information it does or might contain; (3) the potential for harm in subsequent, nonconsensual disclosure; (4) the injury disclosure would inflict on the relationship in which the record was generated; (5) the adequacy of the safeguards to prevent unauthorized disclosure; (6) the degree of need for access; and (7) whether there is an express statutory mandate, public policy or “other recognizable public interest militating toward access.”

Order at 9-10 (quoting Westinghouse, 638 F.2d at 578). Although the University cannot evaluate the fifth factor (adequacy of safeguards), all of the others strongly favor non-disclosure of de-identified data.

As the affidavits of Dr. McKee (at ¶¶ 14-16) and Dr. Stern (at ¶¶ 10, 13, 15-16) make clear, the records at issue (particularly interview notes with participants/donors and their families) contain extremely confidential information that, if improperly disclosed, can cause lasting damage. Many of the records are covered by Certificates of Confidentiality (CoC) issued by the National Institutes of Health, which prohibit the production of identifiable information as part of legal proceeding.¹⁴ Decl. Ex. 8. In addition, the harm to a donor’s posthumous reputation cannot be overstated.

¹⁴ See fn. 13, supra pp. 23.

Mr. Zeidel's Estate has authorized disclosure, and the Center has produced documents and will continue to cooperate with the NHL regarding access to more information. McKee Aff. 29. But if the Center violates its pledge of confidentiality to other donors, its integrity is placed in jeopardy. Given the highly public nature of both this lawsuit and the individuals whose brains have been evaluated by the Center, unauthorized disclosure will undoubtedly lead potential donors to reconsider involvement with the Center's research. Cairns Aff. ¶ 8, Peterson Aff. ¶ 5.

The University's opposition to the NHL subpoena does not require the Court to address the unresolved question of whether health records enjoy a constitutionally protected right to privacy. (Order at 8, n.6) All parties agree that medical information is entitled to a significant level of protection. The seventh Westinghouse factor should be answered in the negative – there is a strong, “recognizable public interest” *discouraging* access. Order at 10.

This Court, in this case, authorized the production of an electronic database containing player-specific information in a de-identified form under the protection of a HIPAA-compliant protective order. But the facts presented to the Court in that discovery dispute are distinguishable, as that was, as the Court observed, “a very unique situation.” In Re: National Hockey League Players' Concussion Injury Litigation, 120 F. Supp. 3d 942, 955 (D.Minn. 2015). First, the databases plaintiffs sought were “primarily in the custody and control of the NHL.” Id. at 948. Further, the burden to anonymize a significant but nonetheless limited amount of information was not nearly as onerous as what has been asked of the Center. It does not appear that either the NHL or the US

Clubs asserted that production of de-identified information would be unduly burdensome, and the collective bargaining agreement apparently authorized release of certain medical information. Here, however, it is virtually impossible to anonymize the vast amount of information the League demands, and the privacy protections this Court provided there will simply not work here. (McKee Aff., ¶¶ ; Stern Aff., ¶¶ ----).

The NHL cites Goral v. Omron STI Mach. Svces, Inc., 2013 WL 6075819 (D. Nebr. Nov. 18, 2013) (Memorandum at 20-21) to support its argument that a protective order will ensure research subjects' confidentiality. But Goral involved a single decedent's medical information in a wrongful death claim, the plaintiff's family did not object to the release of the medical information, and HIPAA regulations allow for the release under such circumstances. Id. at *1. Goral in no way supports the proposition that a HIPAA protective order negates any privacy concerns relating to confidential medical research. And Murphy v. Philip Morris Inc., 1999 WL 33521196, at *3 (C.D. Cal. Dec. 28, 1999) (Memorandum at 21) does not support the NHL's argument, because it requires a court to apply a balancing test to determine "(1) whether it is feasible to disclose the raw data in a form such that the identities of the study participants would not be compromised; and 2) whether the public interest in non-disclosure outweighs [the defendant's] need for the raw data to defend itself . . ." These cases stand for the proposition that protective orders are not a solution unto themselves, but merely part of a broader test for determining whether certain information can be released.

B. Courts Are Sensitive to the Burdens Imposed By Massive Discovery Requests

Ultimately the privacy issue is absorbed by the “mechanical” question of whether it is even possible to anonymize the vast amounts of data – paper files, electronically stored information, and three-dimensional objects, including slides and photographs – without placing an insurmountable burden on the work of the Boston University Chronic Traumatic Encephalopathy Center. The affidavits of Dr. McKee (at ¶¶ 17-23), Dr. Stern (at ¶ 13), and Dr. Cairns (at ¶ 6) describe in detail why it is impossible, and the law favors protection.

Fed. R. Civ. P. 45(d) details the protections afforded to witnesses who are subject either to a subpoena for the purpose of taking their deposition or a subpoena duces tecum requiring the production of documentary evidence. That Rule requires that “[a] party . . . issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden,” and a court “*must* quash or modify a subpoena” that “subjects a person to undue burden.” Fed. R. Civ. P. 45(d)(3)(A)(iv) (emphasis added).

The affidavits of Drs. McKee and Stern are unequivocal: production of the materials request by the NHL will bring the CTE Center to a grinding halt. Moreover, for the reasons cited in this brief, the probative value of such information to the NHL defense is speculative at best. Standard science does not involve a neutral researcher hosting a retained expert whose goal is to support a legal position that – coincidentally – appears to be inconsistent with the current thinking on a particular medical issue. Cairns Aff. ¶¶ 5, 6; Peterson Aff. ¶ 3; Stern Aff. ¶ 18.

The University has been unable to find any case in which a court has required a non-party, asserting a Rule 45(d) challenge to a subpoena, to produce the amount of material the NHL requests here. Mannington Mills, Inc. v. Armstrong World Indus., Inc., 206 F.R.D. 525, 529 (D. Del. 2002) (“[E]ven if the information sought is relevant, discovery is not allowed where no need is shown, or where compliance is unduly burdensome, or where the potential harm caused by production outweighs the benefit.”). A court should be “particularly sensitive to weighing the probative value of the information sought against the burden of production on [a] nonparty.” Fears v. Wilhelmina Model Agency, Inc., 2004 WL 719185, at *1 (S.D.N.Y. Apr. 1, 2004). *See also American Federation of Musicians v. Skoddam Films, LLC*, 313 F.R.D. 39, 53 (N.D. Texas 2015) (subpoena duces tecum requiring nonparty movie company to produce all documents that it had ever created or received relating to a particular matter in dispute was overbroad on its face and imposed undue burden on nonparty).

The fact that Boston University scientists conduct research that happens to be relevant to this lawsuit does not justify imposing the extraordinary discovery burden that would be required if the subpoena is enforced. The burden that enforcing the subpoena would impose on the CTE Center may be best appreciated by considering two sets of information: first, the breadth and scope of publications authored by scientists affiliated with the CTE Center; and second, the time and effort it will take to de-identify information about individual research subjects.

Dr. McKee, Dr. Stern and their CTE Center colleagues are prolific researchers who have secured or participated in major grant-funded research projects. *See, e.g., Stern*

Aff. ¶6, and Ex. B at 10 ff; McKee Aff. Ex. B at 6 ff. Although the NHL has narrowed certain of its requests to information relating to “published publications” (NHL Memorandum, p. 11 n. 6, 7), it still seeks ALL data, published or unpublished, that shows link between concussions/pathologies and clinical symptoms/pathologies. The subpoena’s boilerplate Definitions and Instructions make clear that the NHL seeks “any” and “all” items included in the broad definition of “Document.”

Setting aside for now Requests 6 – 15, which are pertinent to individual athletes, a brief review of Requests 4, 5, 18, and 19 make clear that if enforced, compliance will require Boston University researchers to do nothing but go through their computer and paper archives for weeks, perhaps longer. Furthermore, releasing another scientist’s communications would require Drs. McKee and Stern to contact that person and secure permission to share what was said or written about an idea in progress. This two-pronged assault on scientific progress would be unbearably burdensome and would absolutely chill others from communicating about a peer’s work for fear of disclosure or being dragged into an adversary proceeding in which a neutral scientist, a non-party, has no stake. Cairns Aff. ¶¶ 4-6; Peterson Aff. ¶ 6.

Furthermore, anonymizing CTE Center data is not as simple as redacting a few pages of notes. Rather, there are several hundred thousand units of information affiliated with each research subject, and each must be de-identified in order to comply with the subpoena. McKee Aff. ¶¶ 19, 20; Stern Aff. ¶ 13. The NHL is unwilling to limit its inquiry to materials relating to plaintiffs, of whom only one has been identified (the Center has already provided information about Mr. Zeidel to the NHL). Nor is the League

willing to limit its inquiry to information about former NHL players. *See* pp. 3 – 4, *supra*. Instead, the subpoena (Requests 2, 3, 6 -15) seeks detailed information about the entire population of CTE research subjects, the vast majority of whom did not play professional hockey. Anonymizing the information about individuals who did not consent to disclosure could take years, which would effectively terminate the Center as a functional research facility, and ultimately leave the NHL with little to nothing of value for its defense in this case. McKee Aff. ¶¶ 17 – 20.

Whether a subpoena imposes an undue burden ultimately requires a balancing test between the interests demanding compliance and the interest furthered by quashing it. Northwestern Mem. Hosp. v. Ashcroft, 362 F.3d 923, 927-28 (7th Cir. 2004); Positive Black Talk Inc. v. Cash Money Records, 394 F.3d 357, 377 (5th Cir. 2004). Here, the NHL can retain its own experts to advance its own theories of the link between concussions and neurodegenerative brain diseases. But the League has largely stood firm on its demands, leaving little room for flexibility. Yet those demands would, if enforced, create an insurmountable burden that Rule 45 was designed to prevent. Because the subpoena “subjects [the CTE Center] to undue burden,” it cannot be honored and, in the words of Rule 45 “must” be quashed or modified. Fed. R. Civ. P. 45(d)(3)(A)(iv).

C. Compliance with the Subpoena Will Impose a Chilling Effect on the Center’s Work and Scientific Research Generally.

This Court must balance the NHL’s claim of need for unpublished research data and communications among researchers against the substantial harm disclosure would

cause to the CTE Center, its scientists, the medical research profession and society. Particularly in light of what the Center has already produced, that balance tilts heavily in favor of denying the NHL's motion to compel.

Since this dispute involves materials located in Massachusetts, the governing law in that jurisdiction deserves great weight. The Eighth Circuit does not appear to have directly addressed the issue before this Court, described in the first sentence of this memorandum. But the First Circuit confronted a similar problem eighteen years ago, and its decision remains the standard for analyzing a challenge to a subpoena of the sort at issue in this case.

In Cusumano v. Microsoft Corp., the First Circuit upheld the denial of a motion to compel two academic researchers to disclose interviews, research material and correspondence pursuant to a civil subpoena. The court held that there was no “dispositive difference” between journalists and academic researchers “in whether a special protection vests. . . . Just as a journalist, stripped of sources, would write fewer, less cogent articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses.” 162 F.3d at 714.

The Cusumano court endorsed the special protection afforded academic researchers and balanced such factors as the need for the relevant information, the subpoenaed party's desire to preserve confidentiality, and the intrusiveness of the inquiry. The court, like the Eighth Circuit in Miscellaneous Docket Matter #1, 197 F.3d at 927, observed that “concern for the unwanted burden thrust upon non-parties is *a factor*

entitled to special weight in evaluating the balance of competing needs.” Id. at 717 (emphasis added).

This is not strictly a First Amendment case, but certain legal arguments from that context apply here. Courts have relied on constitutional doctrine to analyze issues of the sort presented by the NHL subpoena to the CTE Center. In order to “enable the members of society to cope with the exigencies of their period,” the First Amendment provides protections for all of the activities needed to gather and disseminate information to the public. See Thornhill v. Alabama, 310 U.S. 88, 102 (1940); see also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (“Without some protection for seeking out the news, freedom of the press could be eviscerated.”) (quoting Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring)). Those who gather information for dissemination to the public must be protected from the needless disclosure of sources of information, internal deliberations and unpublished work product. Branzburg, 408 U.S. at 710. The Supreme Court has long recognized the importance of unfettered academic research:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.

Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957). See also University of California Regents v. Bakke, 438 U.S. 265, 312 (1978) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”). The Cusumano court made this precise point when it declined to compel two professors to produce their raw research materials:

The respondents ... are academic researchers and commentators, not professional newsmen. We do not think that this makes a dispositive difference in whether special protection vests. Academicians engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists.

162 F.3d at 714.

Numerous courts have expressly recognized that scientific researchers who, like their journalistic counterparts, gather information for the purpose of disseminating it to the public, are entitled to exactly the same protection against unwarranted disclosure. *See, e.g., Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1275 (7th Cir. 1982) (denying motion to compel university researchers to disclose documents and data related to ongoing, incomplete studies: “[w]hatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom.” (citation omitted)); *McMillan v. Department of Veteran’s Affairs*, 294 F. Supp. 2d 305, 317 (E.D.N.Y. 2003) (“Scientists should not have to conduct their studies defensively, looking over their shoulders at unnecessary costly litigations.”); *Richards of Rockford, Inc.*, 71 F.R.D. at 390 (“[S]ociety has a profound interest in the research of its scholars, work which has the unique potential to facilitate change through knowledge. . . . Compelled disclosure of confidential information would without question severely stifle research into questions of public policy, the very subjects in which the public interest is greatest.”).

In addition to the special protection afforded to research work product, courts also recognize that if researchers’ prepublication debates, drafts and internal discussions are subject to subpoena, full and honest debate will be stifled. Relying on *Cusumano*, the

court in In re: Bextra and Celebrex Marketing Sales Practices and Product Liability Litig., 249 F.R.D. 8 (D. Mass. 2008) (“In re: Bextra”) denied a motion by a drug company to compel production of peer review notes related to articles published in the New England Journal of Medicine. The court explained:

The Plaintiffs' claims focus on what Pfizer knew, or should have known, via published articles in the scholarly literature. The peer reviewers' confidential comments — which Pfizer even now has yet to discover—hardly speak to that issue. Moreover, Pfizer's own experts are equally able to review and analyze the articles for flaws in methodology or otherwise

249 F.R.D. at 12-13. *See also* In re: Fosamax Prod. Liab. Litig., 2009 WL 2395899, at *5 (S.D.N.Y. Aug. 4, 2009) (“The Academy is a public, non-profit corporation dedicated to furthering science, the general welfare, and public health. . . . [C]ompelling testimony about internal committee matters would chill the crucial atmosphere of candor.”).

Academic freedom has particular importance in medical research. *See, e.g., In re: Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prod. Liab. Litig.*, 2011 WL 5547133, at *3 (S.D. Ill. Nov. 15, 2011) (“ . . . Bayer's request for peer review materials imposes a significant burden on the scientific and academic communities. . . . [P]ublic disclosure will discourage a candid peer review process. This is particularly troubling where, as here, medical research is in issue . . . [d]amage to the peer review process can also undermine efforts to improve public health and safety.”).

Courts across the country have explicitly recognized the potential harm to academicians, and broader society, if subpoenas are used to force the disclosure of communications among scientists, who must remain free to communicate among

themselves, and with other researchers, in the manner that best advances medical science, without concern that their correspondence and decisions will lead to sweeping demands for unrelated information in products liability litigation. Rosa v. City of Seaside, 2009 WL 2382760 (N.D. Cal., July 29, 2009) (“The reliance of the opposing party on a study does not entitle the moving party to a fishing expedition in order to attack a report that it dislikes.”); GlaxoSmithKline Consumer Health Care L.P. v. Merix Pharmaceutical Corp., 2007 WL 1051759 (D. Utah, April 2, 2007); Friedland v. TIC—The Industrial Company, 2006 WL 2583113 (D. Col., September 5, 2006).

This is particularly apposite where, as here, the CTE Center, its scientists, and their collaborators at other institutions are not parties to the dispute before this Court. Rule 45(d)(3)(B)(ii) permits a court to quash a subpoena that requires “disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party.” In short, Rule 45(d) functions “as a means of protecting a witness from misuse of the subpoena power.” Fed. R. Civ. P. 45 Advisory Committee notes, 1991 amend.¹⁵ The In re: Bextra court also noted that “a growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts.” 249 F.R.D. at 13.

The NHL has narrowed the scope of its subpoenas slightly by limiting the broad sweep of Requests 18 and 19 to “materials related only to published publications.” NHL

¹⁵ In 1991, the provisions contained in the current version of Fed. R. Civ. P. 45(d) were part of Rule 45(c). In 2013 the current version of Rule 45(c) was added to the text, and the protections described above were moved to the current Rule 45(d).

Memorandum at 11, n. 6 and 7. But that ignores the chilling effect such a request will impose on the pre-publication vetting process, one that could reduce the overall quality of future publications. In addition, it ignores the impact of the NHL's request for research materials and information that may be a part of published studies, but that also remain valuable to ongoing and future secondary studies that have not yet been published.

Fewer people would participate in sensitive research programs if they feared the risk of disclosure of personal information, and fewer colleagues would collaborate if they knew that their random musings, emails, and unformed ideas might be taken out of context or used to undermine their work. Peterson Aff. ¶¶ 3, 5; Cairns Aff. ¶8.

Universities are particularly sensitive to the chilling effect of enforcing all-encompassing subpoenas to third parties. Researchers and journalists share similarities of concern and function. Rule 45, case law across the country, and the practical effect of subpoenas of the sort issued by the NHL militate in favor of a similar level of protection for journalists and academic researchers. Cusumano, 162 F.3d at 714.

Although “the Eighth Circuit has not addressed the existence of an academic or scholar’s privilege as a defense to a subpoena calling for research data . . .” (NHL Memorandum at 14 (citing cases)), that is a red herring and certainly is not dispositive. *See, e.g., In re: Bextra*, 249 F.R.D. at 12 n.3 (“The First Circuit has cautioned against engaging in semantic discussions about whether or not the protection to be afforded to information compiled pre-publication constitutes a ‘privilege’ . . .”). The NHL cites In re NCAA Student-Athlete Name and Likeness Licensing Litig., 2012 WL 4856968 (E.D. Mo. Oct. 12, 2012), but that case, like almost every other, acknowledges the need to

balance the demands of the party seeking information with the burden imposed on a non-party.¹⁶ Whether the special protection afforded to non-party academic researchers' work and communications is labelled a "privilege" or not is ultimately irrelevant.

In short, the communications the NHL seeks are, and should be, granted the privacy of nondisclosure in order to assure that freewheeling conversations about emerging ideas in science are not short-circuited by concern that they may become participants in a high-visibility lawsuit in which the scientist has no interest in the outcome.

The University has met its burden of showing that releasing "unfiltered" communications, pre-publication research notes and emails, and related work product that has not yet been published, would deprive (and potentially misappropriate) researchers of the ability to determine how and when to publish their findings, would diminish honest debate and inquiry, thereby damaging public health research. it would breach the confidentiality of both participants in the research and scholars collaborating on that research. The net chilling effect of the NHL subpoena on researchers and research subjects alike compels the application of Rule 45(d)(3)(A) – this Court "must quash or modify the subpoena."

¹⁶ That court also acknowledged that premature disclosure of an article in the midst of peer review can have a chilling effect on scholarship. *Id.* at *3.

CONCLUSION

Viewed in the larger context, the NHL's motion to compel, and Boston University's opposition, reflect a conflict between competing interests. One is a fair system of evaluating and publishing a nation's scientific work while protecting the privacy of participants – both researchers and research subjects. That system offers a high confidence in, though not an absolute guaranty of, the quality of the product. The NHL seems to dismiss the integrity of this process by their explanations of relevance and their expert's desire to revisit the work that has already been subject to rigorous peer review – without any claim (much less any concrete evidence) that the CTE Center's research has been compromised, reflects bias, or is in any way flawed.

On the other hand, there is a legitimate private interest in allowing a large corporate entity – here, the NHL – to secure the information it needs to defend a lawsuit. In the ordinary course such information could be had by developing a research protocol that may support the conclusions that corporation wishes to advance, and perhaps the NHL has or is in the process of doing so. But regardless, and without questioning the legitimacy of the private interest, it is fair to ask whether fulfilling that need should trump the obvious public interest in protecting the work of independent scientists from the intrusions of the legal process in which they have no part.

The term “fishing expedition” is overused, but in the absence of any specific, scientifically reasonable showing of why the NHL needs the massive amount of incredibly intrusive information it seeks, the term certainly applies here. The case law is unequivocal: courts follow the guidance of Fed. R. Civ. P. 45 and balance the need for

information against the reasons the subpoenaed party resists disclosure. Here, that balancing test strongly favors the CTE Center.

For the reasons set forth herein, Boston University, on behalf of its Chronic Traumatic Encephalopathy Center, respectfully requests this Court to quash the October 12, 2016 subpoena issued by the Defendant, National Hockey League.

Respectfully submitted,

/s/ Lawrence S. Elswit

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DATED: February 6, 2017

The authors gratefully acknowledge the work of Benjamin M. Greene, Esq. (BBO no. 696850), a Legal Fellow in Boston University's Office of the General Counsel.

CERTIFICATE OF SERVICE

I, Lawrence S. Elswit, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

I hereby certify that a true copy of the above document was also served upon Daniel J. Connolly, Esq., Faegre Baker Daniels LLP, 2200 Wells Fargo Center 90 South Seventh Street, Minneapolis, Minnesota, 55402, John H. Beisner, Esq., Skadden, Arps, Slate, Meagher & Flom LLP, 1440 New York Avenue, N.W., Washington, DC, 20005, and to Charles S. Zimmerman, Esq. and Brian C. Gudmundson, Esq., Zimmerman Reed LLP, 1100 IDS Center 80 South Eighth Street, Minneapolis, Minnesota, 55402 by FedEx, and by electronic mail on this 6th day of February, 2017.

/s/ Lawrence S. Elswit

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

IN RE: NATIONAL HOCKEY LEAGUE
PLAYERS' CONCUSSION INJURY
LITIGATION

MDL No. 14-2551 (SRN/JSM)

This Document Relates to: ALL ACTIONS

**L.R. 7.1 WORD COUNT COMPLIANCE CERTIFICATE REGARDING RESPONDENT
TRUSTEES OF BOSTON UNIVERSITY'S MEMORANDUM IN OPPOSITION TO
NATIONAL HOCKEY LEAGUE'S MOTION TO COMPEL**

I, Lawrence S. Elswit, certify that the Respondent Trustees of Boston University's Memorandum in Opposition to National Hockey League's Motion to Compel complies with Local Rule 7.1(f).

I further certify that, in preparation of this memorandum, I used Microsoft® Office Word 2013, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 9,958 words.

Respectfully submitted,

TRUSTEES OF BOSTON UNIVERSITY,
By its attorney,

/s/ Lawrence S. Elswit

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Dated: February 6, 2017

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/s/ Lawrence S. Elswit

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U.S. District of Minnesota

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Document Number: [680](#)

Docket Text:

MEMORANDUM in Opposition re [666] MOTION to Compel *Production of Documents from the Boston University CTE Center* filed by Trustees of Boston University/CTE Center.

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