UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

DEFENDANT NATIONAL HOCKEY LEAGUE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM THE BOSTON UNIVERSITY CTE CENTER

PRELIMINARY STATEMENT

Notwithstanding the attention and apparent outrage that the NHL's discovery requests to the Boston University CTE Center (the "Center") have generated, the issue before the Court is simple and well-settled. The question is whether the requested materials related to the Center's research are relevant to the claims or defenses in this case and whether the production of those materials would be unduly burdensome. The answer easily favors enforcement of the subpoena.

As to relevance, it is inappropriate to suggest the Center's research is not "relevant." Plaintiffs rely extensively on the Center's research for both merits and class certification arguments.[1] Dr. Robert Cantu[2] as well as Plaintiffs' other class experts also

[1] Exhibit A details instances where Plaintiffs and their experts rely upon the Center's research.

expressly rely on the Center's research to assert opinions in support of class certification. Notably, Dr. Cantu has substantial ties to the Center. He co-founded and served as a co-director of the Center until 2014, co-authored over twenty articles with the Center's researchers (including Drs. McKee and Stern),[3] and REDACTED

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Plaintiffs chose Dr. Cantu (and not the Center's researchers) to support their central premise of their claims that concussions and subconcussive blows have a ***causal relationship*** to CTE (or other alleged neurodegenerative conditions) and that CTE has a ***causal relationship*** to certain clinical symptoms (e.g., depression, dementia). Yet, Dr. Cantu and other class experts act as spokespeople for the Center, overtly touting and relying on the Center's research as the linchpin for their theories. Yet, the Center (in tandem with Plaintiffs) argues that the research cannot be tested (or subject to cross-examination) to assess methodology, bias, accuracy or other defects that are indisputably central to the merits and class certification. But, the Center's research is highly controversial in the scientific community; many respected scientists (including Dr. Castellani) have authored peer-reviewed materials challenging the Center's methodology, findings, and conclusions regarding the purported relationship between CTE and

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[2] Cantu's affiliation with the Center and his intimate involvement with its work are reflected on his website. *See* Exhibit B, attaching selected pages from http://robertccantumd.com/.

[3] *See* Ex. 1 to Dr. Cantu's Declaration in Support of Class Certification.

[4] REDACTED

subconcussive and concussive impacts.[5] This exchange of views in peer-reviewed literature is part of the scientific method, until the medical community reaches a consensus. And the medical community clearly has not reached such a consensus here. In fact, the 2012 Concussion in Sport Consensus Statement—that Dr. Cantu and 27 other experts in the field signed onto—states: "[i]t was further agreed that ***a cause and effect relationship has not as yet been demonstrated between CTE and concussions or exposure to contact sports***."[6] This is precisely the circumstance in which courts require third-party discovery of research institutions, to allow a party such as the NHL, an involuntary litigant, to test such controversial allegations at the core of Plaintiffs' case. *See* case discussion *infra* II.B.

As to burden, the Center's arguments lack support and cannot be the basis to block such critical discovery. This, too, is precisely the circumstance in which courts permit discovery, especially where the requesting party has taken reasonable steps to protect confidentiality and minimize burden.

In short, there is no question that the requested discovery is critically relevant. The Center should not be permitted to stand on its position that its work is unassailable and too important to be subject to the scrutiny that a litigation requires.

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[5] *See* Exhibit D, collecting those materials.

[6] *See* McCrory P, Meeuwisse WH, Aubry M, et al. Consensus statement on concussion in sport: the 4th International Conference on Concussion in Sport held in Zurich, November 2012. *Br J Sports Med.* 2013;47(5):250-258.

ARGUMENT

I. THE CENTER'S OPPOSITION MISSTATES THE STANDARD APPLICABLE TO A THIRD-PARTY SUBPOENA

In the NHL's Memorandum of Law in Support of the Motion to Compel Production of Documents from the CTE Center ("Opening Memorandum" or "Mem."), it explained that Federal Rules of Civil Procedure 26 and 45 permit broad discovery, allowing a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." (Mem. at 12). While the NHL acknowledged that relevance and need must be balanced against undue burden to the subpoenaed party (*id.*), it highlighted that discovery rules "'are to be accorded a broad and liberal treatment.'" (*Id.* (citing *Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F. 3d 428, 430 (8th Cir. 1998))). Accordingly, ""'[t]he party resisting production bears the burden of establishing lack of relevancy or undue burden."'" *Bombardier Recreational Prods., Inc. v. Arctic Cat, Inc.*, No. 12-cv-2706 (MJD/LIB), 2014 WL 5685463, at*5 (D. Minn. Sept. 24, 2014) (citations omitted).

The NHL's Opening Memorandum also emphasized that the Eighth Circuit has ***not*** recognized an exemption to general discovery rules for academic researchers, *see, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:12-mc-508 JAR, 2012 WL 4856968, at *2 (E.D. Mo. Oct. 12, 2012); hence, here, general discovery standards still apply with equal force to academic institutions like the Center.

In its Memorandum in Opposition to the NHL's Motion to Compel ("Opposition" or "Opp'n"), the Center argues 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." (Opp'n at 8.) This, too, misses the point: while the Eighth Circuit does not recognize an exemption for academic researchers (and general discovery principles therefore should apply), the NHL would still be entitled to the requested materials, ***even in a jurisdiction more deferential to academic researchers***. The requested materials are highly relevant and, under any standard, the Center's concerns (as mitigated through the NHL's offers) do not extinguish the NHL's right to the requested discovery.

II. THE REQUESTED MATERIALS ARE HIGHLY RELEVANT

As the NHL extensively detailed in its Opening Memorandum, the requested materials are highly relevant. (*See* Mem. at 3-6.) The Center's position in opposition is not credible, as aptly demonstrated by its arguments regarding Mr. Zeidel. Despite diagnosing Named Plaintiff Zeidel with CTE—and despite the fact that Dr. Cantu (a co-founder of the Center and participant in Zeidel's diagnosis) relies on the Center's work to opine on causation (Cantu Decl. at ¶¶ 95, 99, 101, 102, 104)—the Center maintains that it "defies logic and common sense" that the NHL would seek materials from the Center to investigate those claims. (Opp'n at 16.)

In essence, the Center's argument boils down to a single statement: "[t]he published science speaks for itself." (*Id.*) Yet, if this logic were applied to all subpoenas involving third-party researchers, no subpoena could ever be enforced, and a defendant could never challenge the self-declared reliability of any third-party scientist who

published a peer-reviewed article. This is not the law. "Peer-review" does not mean sacrosanct; competing and disagreeing peer-reviewed scientific articles are commonplace. This dialogue is how scientific hypotheses are advanced and tested. Courts permit discovery of such research to allow parties to assert or scrutinize claims made in litigation and to fulfill the Court's responsibility as a "gatekeeper" to scientific research, as required by *Daubert* and its progeny. *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579 (1993). Thus, in all relevant cases cited in the NHL's Opening Memorandum, the requesting party sought—and received—discovery of data underlying ***peer-reviewed, published*** studies. *See, e.g., Kellington v. Bayer Healthcare Pharm., Inc.*, No. 5:14-cv-2, 2016 WL 5349801 (W.D. Va. Sept. 23, 2016); Order re: Motion to Quash Subpoenas re Yale Study's Hospital Records, *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. Aug. 19, 2002) ("PPA Order"); Confidentiality Order re WHI Study Data, *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. Feb. 1, 2005), (No. 509); Order, *In re: Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. Mar. 20, 2006), (No. 1077); Order re: WHI Extension Study Data, *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. July 13, 2009), (No. 2106).

Accordingly, under settled case law, the Center is an appropriate party from whom relevant materials can be requested.

A. <u>The Center is the Best Source of Relevant Information</u>

The Center suggests the NHL's motion should be denied because the NHL could obtain information about CTE from numerous other sources (none of whom are a party to this litigation). (Opp'n at 15-16.) But there is no legal condition that a subpoenaed third

party be the ***only*** researcher who has opined on a relevant topic. While courts have found that the need for third-party discovery is enhanced when information is uniquely available from that party, these cases do not make this a ***requirement for seeking discovery of academics***. *See, e.g.*, *Kellington*, 2016 WL 5349801, at *2.

More importantly, here, the Center ***is*** uniquely situated to provide relevant materials: the Center is touted as the preeminent CTE research institution and Drs. McKee and Stern have written and spoken prolifically on CTE, including "over 60 peer-reviewed primary research publications." (Opp'n at 15.)[7] Further, Plaintiffs and Dr. Cantu expressly rely on the Center's work, and the Center is the sole source of information about the CTE diagnosis of Zeidel. The Center also is credited with "discover[ing] the first cases of CTE in athletes from ice hockey" and with "being the world leader in CTE research, having identified 70 percent of the proven cases of CTE globally."[8]

Further, doctors at the Center often make public statements that conflict with or undermine contentions about the Center's research made by Plaintiffs and their experts in this litigation. For example, in addition to statements described in the NHL's Opening

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[7] The Center also repeatedly engages in public discourse about CTE and is a party to the "largest brain repository in the world dedicated to the study of CTE." *See* http://chrisnowinski.com/bu-cte-center/ (last visited Feb. 2, 2017).

[8] Concussion Legacy Foundation, http://concussionfoundation.org/national-initiatives/brain-bank (last visited Feb. 2, 2017).

Memorandum,[9] Dr. McKee, on February 1, 2017,[10] publicly asserted that her research is applicable to NHL hockey:

> "We know from our own experience with former hockey players that they can have CTE. We've seen CTE in all five of our five former NHL players and we've seen CTE in some young hockey players."

(McKee Tr. at 11-12.) Oddly, she then directly contradicted statements in the Cantu Declaration,[11] explaining that a single (or a few properly managed) concussions should not cause CTE:

> "***[T]he single concussion is never going to give you CTE.*** We've never found that. In fact, in all of our research over the last eight years, we've found that concussions don't correlate with CTE...***[y]ou shouldn't worry about CTE after a concussion, or even a few that have been well managed.***"

(McKee Tr. at 8, 9 (emphasis added).) Finally, inconsistent with her description of CTE history in her declaration submitted here,[12] Dr. McKee also stated that when she began CTE research in the mid-2000's, she was "shocked to see that football, the sport that I just really loved, could cause long-term damage to the brain." (McKee Tr. at 7.)[13]

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[9] ESPN: Outside the Lines, *Is the NHL in denial about potential CTE link?* (January 16, 2017), http://www.espn.com/video/clip?id=18485639.

[10] *See* Appendix C for a full transcript of Dr. McKee's presentation ("McKee Tr.").

[11] *See, e.g.*, Cantu Decl. ¶ 21.

[12] *See* McKee Decl. ¶ 7-8.

[13] Similarly, contrary to Dr. Omalu's letter submitted to this Court, he authored an article in which he claims to have "discovered" CTE in 2002 and suggests that it was entirely different than dementia pugilistica found in boxers. Dr Bennet Omalu, CNN, *Concussions and NFL: How the name CTE came about*, (December 21, 2015) http://www.cnn.com/2015/12/21/opinions/omalu-discovery-of-cte-football-concussions/.

This research (and related) commentary is directly relevant to Plaintiffs' allegations regarding the "pathological effects of brain injuries caused by concussive and sub-concussive impacts sustained by NHL players," including CTE, as well as Plaintiffs' allegations that publications about dementia pugilistica in boxers should have put the NHL on notice to warn players about CTE. (Dkt. #351 ¶ 1). The Center does not deny that the Second Amended Complaint and materials in support of class certification rely upon their work. Likewise, the Center does not deny (but does ignore) that the Center's co-founder, Dr. Cantu, uses the Center's work as a basis for his opinions. (Cantu Decl. ¶¶ 95, 99, 101, 102, 104.)[14]

Given the Center's central role in CTE research (including with respect to Mr. Zeidel), and that Plaintiffs use Dr. Cantu as a spokesperson for the Center's work, the Center's stance that no litigant may inspect what is happening "behind the curtain" is baseless as a matter of law. The NHL is entitled to test the veracity of Plaintiffs' claims.

B. <u>The Requested Materials Are Indisputably Relevant</u>[15]

In determining whether a request is "relevant," *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984), (which applied a heightened researcher privilege not adopted by the Eighth Circuit) is instructive, (yet all but ignored by the Center). There, a defendant sought every document from a registry used for research published in a peer-reviewed study. *Id.* at 558. The district court "in major part" granted the researcher's

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[14] *See* Exhibit A.

[15] The NHL agreed to limited productions for requests 1, 4, 5, 10, 12, 13, 16 and 17, and to modify requests 18 and 19.

motion to quash, and on appeal, the Seventh Circuit vacated the order. *See id.* at 558, 564-66. In reasoning particularly relevant here, the Seventh Circuit held that academics are not immune from discovery simply find themselves as a third party in the midst of a litigation over science:

> In the eyes of the law there is no such thing as an infallible witness. There are only some who are more likely to be correct than others. We can assume the district judge might, without abuse of discretion, regard Dr. Herbst as one of those who are more rather than less likely to be correct, and to put willful falsification aside in all events. The discovery well may be, perhaps will be, as futile as the judge supposes. ***The trouble is, when discovery has not been tried, no one can say for sure whether it is going to be futile or not. The expectation that it will be futile is, therefore, not the certainty that justifies cutting off a party's discovery rights without any effort to satisfy them even in the most essential particulars.***

Id. at 562-63 (emphasis added). Accordingly, the court held that for a defendant "to prepare properly a defense on the causation issue, access to the [third-party researcher's] data to analyze its accuracy and methodology is ***absolutely essential.***" *Id.* at 563 (emphasis added).

Similarly, in *In re PPA*, the defendant sought "copies of all medical records, reports, and/or documents pertaining to the patients at issue." (PPA Order at 2.) The court held that "to the extent documents were reviewed and/or utilized by the HSP investigators, but not produced by Yale, they are unquestionably relevant." (*Id.* at 4.) Equally pertinent, the *Kellington* court also held that underlying data was relevant where Plaintiffs' experts relied on the researcher's peer-reviewed publication to opine on the issue of causation. *Kellington.*, 2016 WL 5349801, at *2.

These cases aptly show that, contrary to the Center's arguments, the NHL need not prove there are "doubt[s about] the scientific validity" of the Center's work in order to obtain this discovery. (Opp'n at 16.)[16] In response, the Center takes the strained position that Plaintiffs' experts have accurately represented their research and that none of the limitations described in those case series impact the legal arguments made here. Such argument, however, replaces a judicial assessment of relevance with self-serving tautology. Instead, this Court must assess the ***relevance*** of the extant requests, which are quite obvious.

Requests 2 and 3 seek information about brains autopsied by the Center and whether those autopsies resulted in a diagnosis of CTE. Having diagnosed over 70% of CTE cases, the Center's research provides significant information about sample size, prevalence rates, and distribution of cases in the proposed stages of CTE (even if the Center itself has not published on those topics).

Requests 6 and 7—for digitized copies of slides and pathology photos—request underlying data needed to replicate and probe the Center's work and its interpretation of

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[16] To be sure, the NHL's requests explore the extent of methodological problems that even the Center acknowledges in its publications. For example, one of the Center's publications explains the limitations of its work, noting that "the incidence and prevalence of CTE is currently unclear, [and] it likely varies by sport, position, duration of exposure, and age at the time of initial or subsequent head trauma, as well as with additional variables such as genetic predisposition; to date, there have been no randomized neuropathological studies of CTE in deceased athletes, and as such, ***there is a selection bias in the cases that have come to autopsy***." Brandon E. Gavett et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 CLINICS IN SPORTS MEDICINE 179, 180 (2011) (emphasis added).

pathological findings. (Castellani Decl. ¶ 15.)[17] Requests 14 and 15 seek other autopsy materials—e.g., medical records, autopsy reports, and posthumous family interviews that may reveal methodological bias, inaccuracies or inconsistencies, and/or present individualized questions related to causation.[18]

Requests 8 and 9 seek materials related to work the Center has done to show a causal link between concussions and pathology, while Requests 11 and 12 seek materials related work the Center has done to show a causal link between pathology and clinical symptoms, which are central to core causation issues in this case. Incredibly, Plaintiffs' position on the motion simply attempts to assume away these issues, arguing that the NHL's discovery is not relevant because it has long been established that "suffering repetitive brain trauma ***causes*** long-term neurological damage." (Plaintiffs' Brief at 1.) If that were true, Plaintiffs should not object to the requested discovery.

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[17] As discussed below, Dr. Castellani is an eminently well-qualified neuropathologist who has performed academic research about dementias and other pathologies for over twenty-five years, with no affiliation or relationship before this litigation with any sports team or league. The NHL has represented to the Center's counsel that digitized copies of slides (rather than actual tissue samples) are acceptable and that the NHL will pay for the costs of digitizing slides, but the Center refused to provide these materials for any players, including players whose families have signed medical authorizations. Despite their purportedly large volume, the NHL and the Center can meet and confer to identify an appropriate method to gather these materials.

[18] REDACTED

attached as Exhibit E.) While not dispositive, these discrepancies confirm that there are biases and limitations that may be systemic in the type of case reports performed by the Center, which certainly would be relevant to the NHL's defenses.

Finally, Requests 18 and 19 seek materials discussing publications or presentations about CTE. This is particularly important. Indeed, in light of the extensive media engagement undertaken by the Center since its inception, one of the most glaring omissions in the Center's productions to date —which is covered by Request 18—are copies of public presentations given about CTE, which provide crucial information regarding what could have been known about the Center's findings at different points in time.

C. None of the Center's Arguments Undercut the Relevance of These Materials

Rather than show why these materials are irrelevant, the Center attempts to deflect from the withheld materials by highlighting that it has produced ***some*** materials related to Zeidel and three other hockey players (only one of whom played in the NHL). But even as to this, the Center has produced fewer than thirty documents related to Zeidel, totaling less than 155 pages, and it has refused to produce digitized slides or pathological photographs related to Zeidel's autopsy. As for the other NHL players it has autopsied,[19] the Center's productions are critically deficient.

The Center also narrowly construes the issues in this litigation. For example, the Center objects to requests that go "beyond requesting additional information relating to Mr. Zeidel" or other hockey players whose families have signed medical releases. (Opp'n at 6.) But the NHL is entitled to probe whether Zeidel is an adequate and typical representative of the putative class, which involves comparing his case to other purported

[19] We also received no slides or photos for Probert or other hockey players.

cases of CTE. Critically, the Center's publications do not explain whether causation differs for hockey ***compared to other sports***, even when Dr. Stern has conceded that "[it] is not yet known whether ice hockey players are at a high risk for developing CTE."[20] Given that Plaintiffs continue to allege and argue that literature about other sports should have put the NHL "on notice," there is no basis to withhold the Center's materials concerning non-hockey players.[21]

For all of these reasons (including those in the Opening Memorandum), under the applicable legal standards, the NHL is entitled to evaluate materials underpinning work done by the Center to identify and categorize the pathology and causes of CTE.

D. <u>Plaintiffs' Memorandum Highlights the Relevance of the Requested Materials</u>

The NHL's motion to compel is not, as plaintiffs suggest, a "simple denial[]" (Pls. Mem. at 2) about scientific research related to CTE. Rather, the NHL seeks the underlying data related to CTE research[22] that would allow its litigation experts to engage

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[20] Stern, Robert A. "Cerebrospinal fluid biomarkers in postconcussion syndrome: measuring neuronal injury and distinguishing individuals at risk for persistent postconcussion syndrome or chronic traumatic encephalopathy." *JAMA neurology* 73.11 (2016): 1280-1282.

[21] The Center has indicated in meet-and-confer discussions that it has not sought medical authorizations from the families of non-hockey players. It would be inconsistent and prejudicial to allow Plaintiffs to argue that research on CTE in other sports should have put the NHL on notice of a causal link between hockey and CTE, but then to limit the NHL's discovery to materials related to only hockey players.

[22] The Center asserts that the NHL should "conduct independent research" related to the causation of CTE if it "wants to advance an alternative theory" to Plaintiffs' allegations, (Opp'n at 18), but the law certainly does not impose a burden on a defendant to conduct its own research (nor could such research be performed in time to *(cont'd)*

in the very "scientific method" and investigation that Plaintiffs purport to hide behind. (*Id.*) In particular, the NHL and its scientific experts are entitled to assess whether Plaintiffs have a scientific basis, as interpreted by the case law, to argue that the NHL failed to warn players over six decades that they were at risk of suffering from CTE. (Pls. Mem. at 2.)

Yet, rather than address the relevant case law and facts, Plaintiffs and Dr. Bennet Omalu engage in an ad hominem attack on Dr. Rudy Castellani (who has no affiliations outside this litigation with any sports league or team), merely because he has long had a different interpretation of the pathological photographs contained in Dr. Omalu's publications. Dr. Castellani's opinions concerning Dr. Omalu's first case report diagnosing CTE in a football player also are found in peer-reviewed articles, to wit:

> In summary, this case, which was reported as representing CTE, was actually one of a brain of normal size and weight, no atrophy, and a pattern of tau and amyloid plaque found in normal aging in someone of his age.[23]

Dr. Omalu touts the importance of the peer-review process, but he fails to acknowledge that Dr. Castellani's findings regarding Dr. Omalu's work also were peer-reviewed or that Dr. Castellani has authored three other peer-reviewed articles on CTE. In context, then,

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be used in defense of this litigation). This is precisely why third-party discovery of relevant underlying research data is permitted.

[23] Gavin A. Davis et al., *Neurodegeneration and Sport*, 76 Neurosurgery 643, (2015).

Dr. Omalu's hyperbolic and unprofessional accusations are not only unhelpful to the Court, but they also reflect a personal zeal that is patently unscientific.[24]

These differences of scientific interpretation—which have been published in various peer-reviewed articles—evidence a legitimate scientific debate that is incontrovertibly relevant in this litigation. We respectfully submit that, in this litigation, Dr. Castellani should be given the opportunity to analyze the slides and pathological photos from Zeidel's 2014 autopsy to determine whether the Center's findings in this eighty-six year old man could be attributed to normal aging or co-morbidities, rather than to CTE purportedly resulting from his 158-game NHL hockey career that ended in 1969. Dr. Castellani also should be given the opportunity to perform an evaluation of materials related to other hockey players and athletes examined by the Center.

III. THE CTE CENTER FAILS TO SATISFY ITS BURDEN TO ESTABLISH IT FACES AN UNDUE BURDEN

As established above, the requested materials are indisputably relevant. Because federal discovery rules favor production of relevant documents, "'"[t]he party resisting production bears the burden of establishing . . . undue burden."'" *Bombardier Recreational Prods.*, 2014 WL 5685463 at *5 (citation omitted). Here, the Center falls far

[24] For example, Dr. Omalu injects a bizarre attack on all sports leagues in his letter, baldly asserting that "[a] sports league, no matter how rich and famous, should not be meddling in science and setting standards of practice in science and medicine." (Omalu Letter at 8.) While the NHL agrees it is not a research body, the NHL finds itself a defendant here and has every right to defend itself by marshaling evidence regarding claims brought by Plaintiffs. The NHL cannot be accused of attacking science merely because, upon being sued, it hires qualified experts to interpret and explain research cited in support of Plaintiffs' allegations.

short of satisfying its burden. The Center advances three primary arguments regarding burden: first, proffered confidentiality protections are inadequate; second, compliance would be unduly burdensome; and third, compliance will chill scientific research. None of these arguments has merit.

A. Confidentiality Protections Already in Place in this Litigation Resolve Privacy Concerns and If Necessary the Court Can Fashion Additional Protections

As noted in its Opening Memorandum, the NHL agreed to accept de-identified confidential information and indicated that any production would be subject to a HIPAA-compliant Protective Order. (Mem. at 20.) Further, it explained that in its Order on Motion to Enforce Chubb Subpoena (Dkt. No 556 ("Chubb Order")), this Court found that these proffered protections "essentially eliminate" privacy concerns. (*See id.* at 21.) In response, the Center makes two arguments: (1) the Chubb Order is inapplicable, and (2) such protections cannot work here. Both arguments fail.[25]

First, the Center claims the Chubb Order is "inapposite." (Opp'n at 23.) But contrary to the Center's representations, the same issues raised by the Chubb subpoena are present here—namely whether sufficient safeguards exist to protect private information subpoenaed from a third party. (*See* Chubb Order at 10-11.) The Center further argues that factors applied in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980), cited by the Court in the Chubb Order, support their position. Yet in both the

[25] The court fashioned a protective order when ordering the NHL to produce its concussion databases, and cautioned the parties not to attempt to reverse-engineer the de-identified data to discover the identities of the players. During the meet and confer process, NHL offered to undertake the same obligation here.

Chubb Order and here, the following factors all favor disclosure: (i) the relevance of the requested information, (ii) the public interest in the underlying issues, (iii) the presence of a HIPAA-compliant Protective Order, and (iv) the lack of an ongoing physician-patient relationship. (Chubb Order at 9-10.) Any valid privacy concerns for athletes whose families have not provided a medical authorization can be resolved through the same mechanisms set forth in the Chubb Order, or any additional protections the Court deems appropriate.

Second, the Center argues that privacy protections used elsewhere cannot protect its confidential information without its personal supervision of the de-identification process, and that confidentiality would be violated if anyone outside the Center reviews the requested information, even if that person has a legal obligation to maintain confidentiality. (Opp'n at 22-23.) These arguments are nonsensical. In complex litigation, countless confidential and sensitive materials routinely are redacted, de-identified and produced. In this case alone, numerous third parties (including Chubb, the NHLPA, the NHL Clubs and many medical professionals) have produced records that de-identify and/or redact confidential medical information. None of these parties have insisted that the individual who created a document was the only person capable of supervising its de-identification, and all have produced responsive documents.

The Center's assertion that review of relevant materials by ***anyone*** outside the Center inherently violates confidentiality is equally meritless. The Center does not and cannot identify anything unique about its materials that makes protection of their confidentiality impossible. Any third-party reviewer would have legal and professional

obligations to maintain confidentiality of the underlying information. The Center cannot explain why this would be insufficient. For these reasons, the Center fails to demonstrate how compliance with the subpoena undermines confidentiality interests.

B. Any Undue Burden Can Be Minimized Through Standard Discovery Practices

The Center next contends that compliance with the subpoena would subject it to undue burden. (Opp'n at 27.) It correctly states that Fed. R. Civ. P. 45(d) requires a "party issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden." (*Id.*) But as set forth in its Opening Memorandum, the NHL ***has*** proposed several reasonable steps to avoid imposing undue burden, including: (i) narrowing the scope of some requests, and (ii) agreeing to pay costs for an independent third party to assist with compliance with the subpoena. (Mem. at 22-23.) The Center fails to fully acknowledge the steps the NHL has offered, let alone explain why those steps are inadequate.

Under these circumstances, courts routinely reject proclamations that the third party faces an undue burden. *See, e.g.*, *W. Penn Allegheny Health Sys., Inc. v. UPMC*, No. 2:09-cv-00480-JFC, 2013 WL 12134101, at *6 (W.D. Pa. Feb. 15, 2013) ("[T]he fact that material requested from a third party is stored in 'voluminous, unorganized records' is not sufficient reason to deny a discovery request, particularly where the subpoenaing party has offered to shoulder a significant amount of the burden." (citation omitted)); *see also S.E.C. v. Fuhlendorf*, No. 10-cv-01691-MSK-KLM, 2010 WL 3547951, at *2 (D. Colo. Sept. 7, 2010) (holding no undue burden in part because "[d]efendant has offered to pay all reasonable costs of production."); *Ambac Assurance Corp. v. EMC Mortg. Corp.*, No.

10-MC-010 (NGG), 2010 WL 2736893, at *3 (E.D.N.Y. July 9, 2010) (same); *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992) ("If the Court were to decide that the [issuing party] must bear all costs, then [third party] would have no basis for objections based on burden or expense to it.")

Nor does the Center credibly explain why the arrangement proposed by the NHL is inadequate,[26] nor could it. Review vendors and law firms are regularly entrusted with documents presenting confidentiality concerns as great, if not greater, than those requested here, and those documents routinely are handled without incident. Instead, the Center claims compliance will overwhelm them, "bring[ing] the CTE Center to a grinding halt" (Opp'n at 27) and "effectively terminating the Center as a functional research facility." (*Id.* at 30.) This alarmist rhetoric is unfounded. The NHL's subpoena, in fact, is typical of discovery requests in complex litigation, and there is no reason to believe either the volume of documents requested or the time needed to review those documents will create anywhere near the burden the Center alleges.

The Center's representation that the discovery requested is extremely voluminous also stands in stark contrast to the Center's actual productions to date. While the Center claims "[t]here 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"

[26] Dr. Stern misleadingly asserts an independent review group would be an "NHL-hired third party." (Stern Aff. ¶ 10.) The NHL agreed that such independent reviewer would be selected by the Center, and their independence from the NHL could be ensured through a simple conflicts check and engagement letter.

(*id.* at 29 (emphasis in original.), Drs. McKee, Stern, and the Center collectively have produced fewer than 200 documents to the NHL. Further, though the Center's brief indicates that there should be "several hundred thousand units of information" affiliated with Zeidel, the Center and Drs. McKee and Stern have produced fewer than 30 documents concerning Zeidel (with no pathology photos or slides).[27]

The Center also states they are unaware of cases in which a court required a third-party to produce the amount of material the NHL requests here. (*Id.* at 28.) The Center need not have looked beyond this very litigation for examples. The NHL Clubs, all third parties, have collectively produced 27,235 documents. The NHLPA, also a third party, has produced 12,501 documents. All of these third parties (and many others) must uphold important confidentiality obligations, including medical obligations, and none have seen their operations "effectively terminated" as a result of complying with a subpoena. Moreover, unlike the other third-parties, Dr. Cantu made the decision to become involved in this litigation and rely on his work with the Center as a basis for his opinions. Thus, the Center's objections are not well grounded.

Even if the Center possesses voluminous responsive materials, the appropriate relief would not be to quash the subpoena. Instead, the Court could either order cost-shifting (which is moot given the NHL's agreement to pay reasonable costs here), impose

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[27] The Center's burden argument turns on the volume of brain photographs and photomicrographs of brain slides. (*See* Opp'n at 27, citing McKee Aff. ¶¶ 17-23; Cairns Aff. ¶ 6.) As discussed above, the NHL will pay for digitization of these records and is willing to meet and confer to minimize burden.

additional protective order provisions on the parties, or narrow the scope of the subpoena. The NHL should not be deprived of all relevant materials simply because the Center contends it has a large amount of relevant information.

The Center next contends "compliance will require Boston University researchers to do nothing but go through their computer and paper archives for weeks, perhaps longer." (*Id.* at 29.) As discussed above, the Center fails to explain why the researchers must perform this review themselves. Parties regularly and necessarily entrust third parties to collect, process, and review documents. If the creator of each document were the only person who could collect, review and produce that document, ***all*** discovery under the Federal Rules would be unduly burdensome.[28] This result would contravene the Federal Rule's provision for liberal discovery. *See, e.g.*, *Credit Lyonnais*, 160 F. 3d at 430.

Ultimately, the Center's argument is that its researchers want to maintain absolute control over their materials, including by avoiding litigation-related discovery. (*See* McKee Aff. ¶18; Stern Aff. ¶10.) Under Fed. R. Civ. P. 45, they do not have that right. The Center cannot refuse to accept (or propose) an alternative method of review or to even

[28] In footnote 5 to its Opposition, the Center notes "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." (Opp'n at 9 n.5 citing Stern Aff. ¶¶ 10, 13; McKee Aff. ¶¶ 17-22.) But the Center blames the NHL for not solving a problem of its own creation. The NHL has offered to pay for review. It has not offered to pay for researcher time as there is ***no reason*** that individual researchers would be responsible for reviewing their own files. Further, the Center fails to provide a single example of an institution losing grant funding as a result of compliance with a subpoena.

consider a reasonable limitation on the scope of the NHL's subpoena. The Center instead demands the most laborious and burdensome process possible and then complains this self-imposed process is unduly burdensome—a straw man this Court should reject.

C. A Potential Chilling Effect Does Not Outweigh the NHL's Substantial Need

Finally, the possible chilling effect a subpoena carries cannot act as an absolute bar to discovery. *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 561 (7th Cir. 1984). It is merely one factor courts consider when balancing relevance, need, and burden. Where the court deems it necessary, protective orders can temper concerns about chilling effects and minimize any potential harm discovery imposes. *Id.* at 564.

The Center's Opposition advances two principal arguments about how research may be chilled. First, the Center argues that confidential data will be more difficult to obtain if it is subject to discovery. (Opp'n at 31.) Second, the Center argues that "full and honest debate will be stifled" if academics are forced to turn over internal, un-published communications. (Opp'n at 33.) Both arguments fail.

The Center argues that exposing subjects' confidential information will strip the Center of willing research subjects and prevent future research, relying heavily on the First Circuit's *Cusumano* opinion. (Opp'n at 31, *citing Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).) First Circuit law, however, does not control this discovery dispute, despite the Center's naked proclamation that "the governing law in [the Center's] jurisdiction deserves great weight." (Opp'n at 31.); *cf. In re Baycol Prods. Litig.*, MDL No. 1431, 2003 WL 22023449, at *3 (D. Minn. Mar. 21, 2003) (applying the forum state's law to plaintiffs' motion to compel because discovery dispute at issue was procedural).

But even if First Circuit law applied, *Cusumano's* holding does not support this sweeping assertion. *Cusumano* stated that when a subpoena seeks confidential information, courts must apply a balancing test, contemplating the unique facts of the case. *Cusumano*, 162 F.3d at 716. There, Microsoft's interest in third-party materials were diminished because it could obtain the requested information from parties in the case—rather than a third party. *Id.* at 712. Unlike Microsoft, the NHL cannot obtain the requested information through direct discovery. Further, the NHL's willingness to accept de-identified data subject to a protective order mitigates any impact on athletes' willingness to participate in the Center's research in the future. Any chilling effect from this de-identified disclosure is de minimis.

The Center's second argument similarly overlooks balancing of the parties' interests. The Center relies heavily on cases where the requesting party had minimal need for the information. *See In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 249 F.R.D. 8, 12 (D. Mass. 2008) (reasoning that authors of the relevant studies were a less burdensome source of information than the New England Journal of Medicine); *In re Fosamax Prods. Liab. Litig.*, No. 1:06-MD-(JFK)(JCF), 2009 WL 2395899, at *3 (S.D.N.Y. Aug. 4, 2009) (holding that Plaintiffs showed no need for requested discovery where sole motive was to authenticate scientist's public statements through a deposition). By contrast, here, the need is critical, as causation is a central issue.

Nor do these cases support the Center's broad contention that scientific debate will be stifled by this subpoena. On the contrary, there has been a fulsome ongoing debate

about whether a causal link exists between concussion and the CTE pathology for several years, including in 2012, when the international consensus of experts found there was no such evidence. *See supra* fn. 3. Certainly, the Center has been open about publishing individual case reports and, with great confidence, engaging consistently in public debate surrounding CTE. Permitting litigation experts to inspect the basis of that work should hardly deter a group so deeply committed to this research.

CONCLUSION

For these reasons, the NHL respectfully requests that the Court grant its motion.

Dated: February 13, 2017

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ATTORNEYS FOR DEFENDANT NATIONAL HOCKEY LEAGUE

UNITED STATES DISTRICT COURT
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 DEFENDANT NATIONAL HOCKEY LEAGUE'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM THE BOSTON UNIVERSITY CTE CENTER

I, Daniel J. Connolly, certify that the Defendant National Hockey League's Reply Memorandum of Law in Support of Motion to Compel Production of Documents From the Boston University CTE Center complies with Local Rule 7.1(f).

I further certify that, in preparation of this memorandum, I used Microsoft® Office Word 2010, 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 6,650 words, which together with the NHL's opening memoranda comports with the expanded 13,000 word count limit authorized by the Court. (*See* Doc. No. 691).

Dated: February 13, 2017

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