UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE NATIONAL HOCKEY PLAYERS' CONCUSSION INJURY LITIGATION The Document Relates to: ALL ACTIONS	MDL No. 14-2551 (SRN/JSM) PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE NHL'S MOTION TO DISMISS MASTER COMPLAINT BASED ON LABOR LAW PREEMPTION

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Plaintiffs respectfully submit their Memorandum of Law in Opposition to the National Hockey League's ("NHL" or the "League") Motion to Dismiss Master Complaint[1] Based on Labor Law Preemption (Doc. 39) ("Mem.").

I. INTRODUCTION

Urging preemption of all of Plaintiffs' claims based on §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185 ("LMRA"), the NHL impermissibly rewrites Plaintiffs' MAC showing decades of wrongdoing and ignores fundamental preemption principles compelling denial of the NHL's motion. Many Supreme Court and Eighth Circuit cases belie the NHL's portrayal of preemption here as an automatic, black-and-white matter. Preemption's required analysis, highly fact-dependent, case-by-case, and claim-by-claim, shows Plaintiffs' claims are not preempted.

Wrongly locating all of Plaintiffs' claims exclusively in the NHL's "voluntary assumption" of certain duties, the NHL claims all of those duties arise directly from collective bargaining agreement ("CBA") provisions or cannot be resolved without "interpretation" of those provisions. But no CBA provision appears in the MAC. Plaintiffs' claims are based on the NHL's general duty of reasonable care—a duty repeatedly confirmed and deeply rooted in the NHL-player relationship, as well as on the foreseeability that misconduct by the game's steward, the NHL, would harm Plaintiffs. That common law duty exists independently, and requires no interpretive assistance, from any CBA between the NHL and the NHLPA. ¶87 (NHL controlling organization); ¶95

[1] References to "MAC" or "¶" refer to Plaintiffs' Master Administrative Long-Form and Class Action Complaint (Doc. 28).

(relationship), ¶103 (NHL's duty of care to Plaintiffs), ¶126 (Plaintiffs' reliance on NHL for information foreseeable to NHL), ¶133 (NHL access to information and resources enabling disclosure), ¶358 (historic and continuous duty of care to players), ¶422 (NHL duty of care to act in players' best interests), ¶423 (duty of reasonable care), ¶429 (special relationship imposing disclosure duty).

The NHL's erroneous analysis omits the seminal opinion in *Lingle v. Norge*, 486 U.S. 399 (1988), which teaches that mere "parallelism" between facts that would support a CBA grievance and facts supporting an independent state law claim does not warrant preemption. *Id.* at 409-10. The NHL also omits *Lingle's* offspring, *Livadas v. Bradshaw*, 512 U.S. 107, 122 (1994), which teaches that preemption is a "'sensible acorn'" but it "has not yet become, nor may it, [the] sufficiently 'mighty oak'" the NHL conjures for the Court.

Preemption is proper only to advance the LMRA's goals of promoting the efficient flow of commerce through uniform interpretation of CBAs and orderly resolution of labor law disputes between current employees and their employers. But the NHL ignores Plaintiffs' status as retirees, outside the CBA grievance process and the NHLPA bargaining unit, who cannot strike, threaten to strike, or otherwise disrupt the NHL's commerce in any way. Preemption here advances none of Congress's LMRA aims.

The NHL overlooks the narrow scope of preemption-triggering "interpretation" of CBA provisions. Subject matter correspondence between CBA provisions and state law claims, which is the most the NHL shows, does not suffice.

II. STATEMENT OF FACTS

Plaintiffs bring this action on their own behalf and on behalf of a class of retired NHL players, or their spouses and dependents and the estates of deceased NHL players, who suffered concussive or repeated subconcussive blows while on an active NHL roster. ¶387.[2] Plaintiffs' claims include: Action for Declaratory Relief – Liability, Medical Monitoring, Negligence, Negligent Misrepresentation by Omission, Fraudulent Concealment, and Fraud by Omission/Failure to Warn. ¶¶399-454.

Through decades of glorifying unnecessary violence, including bare-knuckle fighting, the NHL has subjected its players to the devastating and long-term negative effects of these repeated concussive and subconcussive impacts, including serious brain diseases. ¶¶136, 236-237, 383. As a result of the accumulation of multiple brain traumas they suffered while playing in the NHL, Plaintiffs are suffering or are at increased risk of suffering from debilitating brain diseases such as early-onset dementia, amyotrophic lateral sclerosis (ALS), chronic traumatic encephalopathy (CTE), memory loss, headaches, confusion, severe depression, anxiety, and other serious neurological maladies. ¶¶37, 48, 55, 64, 72, 83, 170, 178, 234, 383, 386.

Despite knowing for decades the long-term risks of repeated concussive and subconcussive impacts in professional hockey, the NHL failed to protect its players from

[2] Dan LaCouture played in the NHL from 1998 through his retirement in 2008. ¶27; Michael Peluso played in the NHL from 1989 through his retirement in 1998. ¶40; Gary Leeman played in the NHL from 1983 through his retirement in 1996. ¶¶52-53; Bernie Nicholls played in the NHL from 1982 through his retirement in 1999. ¶59; David Christian played in the NHL from 1979 through his retirement in 1994. ¶¶67-68; Reed Larson played in the NHL from 1977 through his retirement in 1989. ¶¶74-75.

and warn them about these risks and the consequences of the accumulation of head trauma their NHL career entailed. The League failed to provide proper monitoring and treatment. Left to fend for themselves some players, victims of the NHL's neglect, have committed suicide. ¶¶177, 220, 237, 357, 414.[3] Acknowledging its managers are players' "caretakers," the NHL nonetheless has refused to protect its players from incurring or exacerbating conditions caused by the accumulation of concussive or subconcussive impacts, ¶¶346, 372, 380-381, and continues to downplay the risks. ¶16 (NHL Commissioner Gary Bettman in 2011 stating more study is necessary regarding the connection between concussions and long-term neurological problems, including CTE); ¶269 (Bettman in 2012, after successive NHL player suicides, saying not to "jump to conclusions that probably at this stage aren't supported" and "to take a deep breath and not overreact"); ¶335 (Bettman in 2011 refusing to acknowledge that fist fighting and head hits were dangerous, saying linking concussions with CTE was premature: "Maybe it is [dangerous] and maybe it's not. You don't know that for a fact").

Dependent on the players for its fortunes (¶¶15, 21, 301) the NHL's common law duty to protect its players and warn of these risks and the consequences of the accumulations of concussive or subconcussive impacts did not arise from, or require

[3] Suicide by professional athletes and CTE caused by repeated head trauma are directly correlated. *See*, *e.g.*, *Derek Boogaard: A Brain 'Going Bad'*, N.Y. TIMES (Dec. 5, 2011), http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-goingbad.html?pagewanted=all&_r=0; *Duerson brain tissue analyzed: Suicide linked to brain disease*, CNN.COM (May 3, 2011), http://www.cnn.com/2011/HEALTH/05/02/duerson.brain.exam.results/; *Junior Seau had brain disease when he committed suicide*, L.A. TIMES (Jan. 10, 2013), http://articles.latimes.com/2013/jan/10/sports/la-sp-sn-junior-seau-brain-20130110.

interpretation of, any CBA. None of the CBAs address the NHL's duty to warn players of the long-term neurological damage of head trauma. *Id*. Although the NHL references provisions of the CBAs, and various peripheral documents and programs outside the CBAs in their motion, none of these govern or erase the NHL's duty to protect and warn players about the foreseeable risk of brain disease from repeated head impacts.

A cursory "look" at the CBAs illustrates their irrelevance. The CBAs cover only current and future players, *infra* III.D. Specifically, CBA-covered "players" do not include retirees. *Id.* Plaintiffs are not members of the NHLPA's bargaining unit, are not represented by the NHLPA, and cannot bring CBA grievances. *Id.*

Despite the NHL's common law duties to protect and warn players from foreseeable risks, at no time during their NHL career did the NHL advise these players of the long-term effects of sustaining repeated concussive and subconcussive impacts. ¶84. Due to the NHL's silence and misinformation, from the Commissioners on down (¶¶221-223, 269), and contrary to the NHL's disgraceful contention that Plaintiffs (often kids right out of high school) should have done what the NHL with its vastly greater resources (¶¶98, 133) says it could not do (¶¶15, 16, 102-125, 269, 336) and "put two and two together," (Doc. 46 at 12), Plaintiffs did not know and had no reason to know of the negative effects of the accumulations of injuries they were suffering while playing in the NHL. ¶91. Had they known, Plaintiffs would have ensured they received appropriate treatment and that their brains had recovered before returning to play. ¶96. Plaintiffs placed their trust and confidence in the NHL to protect them from unknown harms and

warn them when their health – particularly their brain health – was in danger. ¶¶102, 108, 137-139, 151, 153, 342. The NHL betrayed that trust.

III. ARGUMENT

A. Rule 12(b)(6), Under Which the NHL Has Brought its Preemption Motion, Requires that Plaintiffs Receive the Benefit of All Inferences

For Rule 12(b)(6), a plaintiff's allegations need only "raise a reasonable expectation that discovery will reveal evidence" of the claims' elements, "even if it strikes a savvy judge that actual proof of those facts is improbable." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). At this stage, all the MAC's factual allegations are deemed true and all reasonable inferences drawn in Plaintiffs' favor. *See West-Anderson v. Mo. Gaming Co.*, 557 F. App'x 620, 623 (8th Cir. 2014) (*Twombly* and *Iqbal* "did not abrogate notice pleading standard of [Rule] 8(a)(2)" and "[w]hich inference will prove to be correct is not an issue to be determined by a motion to dismiss");[4] *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("*Twombly* and *Iqbal* did not change [the] fundamental tenet of Rule 12(b)(6) practice" that "inferences are to be drawn in favor of the non-moving party.").[5] Under *Twombly* and *Iqbal*, "[t]he principle…is that a tie goes

[4] Citations, internal quotations, and footnotes omitted, and emphasis added, unless otherwise noted.

[5] Not a single CBA, nor any CBA provision, is attached to or referenced in the MAC, raising the question whether the NHL's use of the CBAs is improper under Rule 12(b)(6). *Hamm v. Rhone-Poulenc Rorer Pharms.*, 187 F.3d 941, 948 (8th Cir. 1999) ("Rule 12(b)(6) itself provides that when matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Our court has interpreted the phrase 'matters outside the pleadings' to include 'any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is

to the plaintiffs when there are multiple plausible theories at the pleadings stage of litigation." *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 999 n.8 (9th Cir. 2014).

B. The NHL's Heavy Burden to Demonstrate Preemption

For preemption, a claim must be based on a CBA-created right, or require CBA "interpretation" for resolution. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987). Both roads are narrow. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("narrow focus" of "case-by-case" preemption ruling; "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a [CBA], or, more generally, to the parties to such an agreement, necessarily is pre-empted…."). Both roads are closed to the NHL, which offers only thin, tangential connections that fail to explain how the CBAs' general terms, applicable to the teams, not the NHL itself, create Plaintiffs' specific claims or require interpretation.

1. Under Supreme Court and Eighth Circuit Precedent, Section 301 Preemption Is Far Narrower Than the NHL Suggests

Contrary to the NHL's broad view, that mere subject matter congruence between CBA and state law claims compels preemption, the Supreme Court has confirmed that §301 requires much more. Unlike Plaintiffs' state law claims, only "state-law rights and obligations that ***do not exist independently of private agreements***, and that as a result can

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said in the pleadings.'"). Even if the CBAs were subject to judicial notice (which the NHL has not sought), or were peripheral materials that could be consulted on a Rule 12(b)(6) motion, the NHL provides no legal basis for the Court's consideration of various internal memoranda and letters. *See, e.g.*, Doc. 40, Exs. 10, 13.

be waived or altered by agreement of private parties, are pre-empted by those agreements." *Allis-Chalmers*, 471 U.S. at 213. Preemption is, therefore, restricted only to circumstances where state law claims arise directly from a CBA or are "***substantially dependent*** upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220.

Eighth Circuit courts narrowly construe §301, requiring a direct foundational overlap between a state law claim's elements and a CBA provision. In another NHL-omitted case, *Meyer v. Schnucks Mkts., Inc.*, the Court endorsed this "narrower approach to LMRA preemption, which asks only whether the claim itself is necessarily grounded in rights established by a CBA," which the Court determined to be more faithful to Supreme Court precedent. 163 F.3d 1048, 1051 (8th Cir. 1998) (vacating the lower court's §301 preemption ruling).[6] This approach precludes preemption "unless the state-law claim itself is ***based on, or dependent on an analysis of***, the relevant CBA." *Id.* at 1050; *see also Bogan v. GMC*, 500 F.3d 828, 832-33 (8th Cir. 2007) (same).

[6] *See also Dunn v. Astaris, LLC*, 292 F. App'x 525, 527 (8th Cir. 2008) (endorsing a "narrower approach to LMRA preemption – asking only whether the claim itself, regardless of probable defenses, is necessarily grounded in rights established by the CBA," and vacating the lower court's §301 preemption ruling on grounds that state law claim turned on purely factual questions about defendants' conduct and motives rather than the scope of contractual authority under a CBA); *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000) (rejecting §301 preemption and noting that "the narrower approach to preemption, as outlined in *Meyer*, is more faithful to Supreme Court precedent").

2. Section 301 Preemption Requires Necessary "Interpretation" of Specific CBA Provisions, a Narrowly Applied Standard Misconstrued by the NHL

Notwithstanding the limited scope of §301, the NHL broadly argues that Plaintiffs' claims are preempted merely because the CBAs, and other peripheral documents, address various general subject matters tangentially related to Plaintiffs' claims. *Lingle* demonstrates the NHL's error. There, the Supreme Court emphasized that preemption is not required even if the plaintiffs could have brought their claims as CBA grievances at some point in the past. *Lingle*, 486 U.S. at 409-10 (no preemption "even if dispute resolution pursuant to a [CBA], on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself"); *see also Caterpillar*, 482 U.S. 394-95, 395 (plaintiffs could have brought suit under §301 but as masters of complaint, permissibly "chose not to do so").

Mere "parallelism" between a "state-law analysis" and a CBA is insufficient for preemption. *Lingle*, 486 U.S. at 408. *Lingle* emphasized that "§ 301 pre-emption merely ensures that federal law will be the basis for ***interpreting*** collective-bargaining agreements…as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is independent of the agreement for §301 pre-emption purposes." *Id*. at 409.

Livadas reveals the NHL's basic error in contending that a CBA provision discussing health means any claim regarding a player's health is preempted. *Livadas* held that preemption analysis requires consideration of "the legal character of a claim, as

independent of rights under the collective-bargaining agreement [and] not whether a grievance arising from precisely the same set of facts could be pursued." 512 U.S. at 123. The Court cautioned that §301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Id.* at 124. Therefore, "when the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be ***consulted*** in the course of state-law litigation plainly does not require the claim to be extinguished." *Id.* (citing *Lingle*, 486 U.S. at 413 n.12); *see also id.* at 125 ("*Lingle* makes plain in so many words that when liability is governed by independent state law, the mere need to '***look to***' the collective bargaining agreement for damages computation is ***no reason*** to hold the state-law claim defeated by § 301.").

In *Meyer*, the Eighth Circuit confirmed the narrowness of the "interpretation" road to preemption: "the claim must require the ***interpretation of some specific provision*** of a CBA; it ***is not enough*** that the events in question took place in the workplace or that a CBA creates rights and duties similar or identical to those on which the state law claim is based." 163 F.3d at 1051. *Meyer* rejected §301 preemption on grounds that "the claims themselves are not ***inherently tied*** to any provision of the relevant CBA…[w]hile certain elements of a claim might require ***reference*** to a CBA, such as to determine if plaintiff has a valid business expectancy, such reference can be made without any analysis." *Id.*; s*ee also id.* at 1050 (citing *Lingle* for proposition that "[a] plaintiff is the master of his or her cause of action, and the fact that a claim could have been laid as a violation of a CBA does not necessarily mean that the LMRA preempts it. We have applied this principle many times.").

Following *Lingle* and *Livadas*, numerous Eighth Circuit cases endorse a much narrower view of preemption than the NHL urges. *See Thomas v. Union Pac. R.R. Co.*, 308 F.3d 891, 893 (8th Cir. 2002) ("Claims that revolve around the ***conduct or motive*** of the parties generally are ***not preempted*** because they do not require interpretation of the collective bargaining agreement."); *Luecke v. Schnucks Mkts., Inc.*, 85 F.3d 356, 359 (8th Cir. 1996) (finding no §301 preemption because, although the CBA might need to be "consulted," "the pertinent factual inquiry in the state [common law claim] did not turn on any term of the [CBA], but rather on the employee's conduct and the employer's conduct and motivation"); *Anderson v. Ford Motor Co.*, 803 F.2d 953, 959, 957 (8th Cir. 1986) (fraudulent and negligent misrepresentation claims not §301 preempted because they "arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a [CBA]" and the "evaluation of these claims will not require extensive interpretation of the terms of the [CBA]").

Applying these principles, district courts in the Eighth Circuit have repeatedly rejected §301 preemption where plaintiffs have alleged independent state common law claims that do not require interpretation of a CBA, including negligence and fraud-based claims like those Plaintiffs allege. *See Green v. Ariz. Cardinals Football Club LLC*, 2014 U.S. Dist. LEXIS 66098, at *12-*21 (E.D. Mo. May 14, 2014) (rejecting NFL team's argument that former players' fraud and negligence-based claims were preempted under §301, because such claims arose independently from the parties' CBAs, including the team's independent common law duty to warn the players of concussion-related health risks, and did not require interpretation of CBA provisions regarding medical care); *id.* at

*18 (distinguishing a defense to liability from a player's claims, and stating that a defense could not give rise to §301 preemption even if it required interpretation of the CBA).[7] The same is true of federal courts outside of the Eighth Circuit.[8]

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[7] *See also Tendick v. Henkel Chem. Corp.*, 2014 U.S. Dist. LEXIS 23959, at *11-*12 (E.D. Mo. Feb. 22, 2014) (rejecting §301 preemption of fraudulent and negligent misrepresentation claims, observing that *Williams* "reiterated that §301 preemption only applies to claims that 'require interpretation or construction of the CBA' as opposed to 'those which only require reference to it' or where 'the CBA need only be consulted during its adjudication.'"); *Taylor v. Cottrell*, 995 F. Supp. 2d 1052, 1056-57 (E.D. Mo. 2014) (denying §301 preemption of negligence claims: "the relation to any provision of the collective bargaining is tentative at best, and the relation to one of the parties is entirely lacking. The adjudication of Plaintiff's claims does not require interpretation of the CBA."); *Thomas v. United Steelworkers Local 1938*, 2012 U.S. Dist. LEXIS 144175, at *16-*17 (D. Minn. Oct. 5, 2012) ("Although the facts underlying [plaintiff's] defamation claim are related to the CBA, it cannot be said that the defamation claim is based on rights established by, or is substantially dependent upon an analysis of, the CBA. Therefore, the Court concludes that [plaintiff's] defamation claim is not preempted by the LMRA."); *Carlson v. Arrowhead Concrete Works*, 375 F. Supp. 2d. 835, 842 (D. Minn. 2005) ("The possibility that [the plaintiff] could have raised claims under the [CBA], but chose not to do so in his Complaint, does not compel a finding that preemption is warranted. Likewise, that the [CBA] may have to be referred to in this case does not compel a finding of preemption.").

[8] *See Kline v. Sec. Guards, Inc.*, 386 F.3d 246, 256 (3d Cir. 2004) ("the essential question is not whether Appellants' claims relate to a subject…contemplated by the CBA…*Caterpillar* and *Lingle* both recognize that a finding of preemption under §301 is not required even if the same set of facts may give rise to a state law claim as well as an action for violation of the CBA. Rather, the dispositive question…is whether Appellants' state claims require any ***interpretation*** of a provision of the CBA") (emphasis in original); *Hendy v. Losse*, 1991 U.S. App. LEXIS 2141 (9th Cir. Feb. 12, 1991) (no preemption of former player's state tort law claims, negligent hiring and misrepresentation related to the player's medical care; team's duties arose from common law not CBA); *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 688, 691-92 (9th Cir. 2001) ("A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient… 'looking to' the CBA merely to discern that none of its terms is reasonably in dispute does not require preemption."); *Foy v. Pratt & Whitney Grp.*, 127 F.3d 229, 235 (2d Cir. 1997) (rejecting §301 preemption of negligent misrepresentation because, although "[r]eference to the CBA may be needed," the claims "depend upon the employer's behavior, motivation, and statements, as well as plaintiffs' conduct, their understanding of the alleged offer made to them, and their reliance on it….

C. The NHL's Duties Do Not Arise from the CBAs and No CBA Provision Must be Interpreted Here

The NHL unilaterally rewrites all of Plaintiffs' duty allegations as "voluntarily undertaken duties" supposedly corresponding to either specific CBA provisions or peripheral documents, to grease the skids for the NHL's preemption argument. But Plaintiffs' MAC specifically alleges the general duty of care the NHL owed Plaintiffs, independent of any CBA or CBA-created duties.

One source of the NHL's general duty of care arises from the NHL's relationship to the players, without whom the NHL would be nothing. ¶¶90, 92, 93, 95, 98, 103, 133, 145-148, 151, 156, 336-337, 353. Another is the foreseeability of harm to the players from the NHL's misconduct. ¶¶95, 126, 130, 132, 135, 139, 148-149, 150-151, 153, 339-345, 422, 433. Another is the NHL's special relationship with players, in which the NHL, on which the players rely and look for information and safety, has superior resources, knowledge, and access to information. ¶¶21, 92-99, 102, 132, 139, 151, 154, 337. Still another is the NHL's assumption of a special duty of care, under and

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State law--not the CBA--is the source of the rights asserted by plaintiffs: the right to be free of economic harm caused by misrepresentation"); *id.* at 234 ("the review of the CBA needed to decide preemption in this case is not in itself 'interpretation' warranting preemption; if it were, the preemption doctrine under § 301 would swallow the rule that employees can assert nonnegotiable state law rights that are independent of their collective bargaining agreements"); *Jurevicius v. Cleveland Browns Football Co. LLC*, 2010 U.S. Dist. LEXIS 144096, at *38 (N.D. Ohio Mar. 31, 2010) (rejecting preemption of certain fraud and negligence-based tort claims resulting from an NFL team's medical treatment of a former player were grounded in common law duties; "[j]ust because Plaintiff entered into a CBA with Browns Defendants does not mean that every suit between the two parties is covered by it").

augmenting the League's general duty of care, in the Concussion Study. ¶¶ 9, 12-13, 15, 358.

Essentially arguing that being once governed by a CBA, Plaintiffs forfeited any non-CBA dependent rights against the NHL, the NHL misapprehends not just preemption law but the law of duty. *See Laska v. Anoka Cty.*, 696 N.W.2d 133, 138 (Minn. Ct. App. 2005) (existence of legal duty depends on two factors: parties' relationship and foreseeability of risk involved); *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011) ("general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff"); *Gylten v. Swalboski*, 246 F.3d 1139, 1141-42 (8th Cir. 2001) (discussing Minnesota duty elements of relationship and foreseeability and stating: "Special relationships can give rise to an affirmative duty to take precautions to protect others from harm…."); *Zosel v. Minn-Dak Farmers' Coop., Inc.*, 463 F. Supp. 2d 960, 963 (D. Minn. 2006) (discussing Minnesota special relationship law; "this special duty exists when the harm to plaintiff is one that the defendant is in a position to protect against, and should be expected to protect against.").

Plaintiffs allege the NHL's superior knowledge of risks, knowledge that Plaintiffs were unaware of those risks, knowledge that Plaintiffs reasonably relied on the NHL for risk information, and the NHL's failure to warn Plaintiffs. RESTATEMENT (THIRD) OF TORTS §7 (2011) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."). Plaintiffs rooted none of their state law claims in the CBAs.

1. Plaintiffs' Claims are Independent of the CBAs' Player Health and Safety Provisions

Relying on the phrase "inextricably intertwined" (Mem. at 21) as an "anodyne[ ] for the pains of reasoning" (*Comm'r. v. Sansome*, 60 F.2d 931, 933 (2d Cir. 1932) (Hand, J.)), the NHL puts the conclusion's cart before the required reasoning's horse. Properly understood, the phrase represents one category of answers to the required rigorous inquiry. Does resolution of a state law claim ***substantially depend*** on ***analysis*** (*Allis-Chalmers*, 471 U.S. at 220), and therefore ***require*** interpretation, of a specific CBA provision? *See Lingle*, 486 U.S. at 407 (resolution of "purely factual questions" of retaliatory discharge claim did not "***require***[ ] a court to interpret" any CBA term).

Reciting supposedly "critical terms" (Mem. at 21) necessitating an inquiry into the scope of the NHL's own duties (Mem. at 22-23), the NHL underscores the point that the NHL's own duties are at issue here. The NHL points to duties of the NHL's ***member clubs***, not the NHL. (Mem. at 21-23). Those provisions—club doctors' fitness to play determinations, players' entitlement to second medical opinions from clubs, players' ability to get their own medical records from clubs (Mem. at 21)—do not compel preemption anyway. They are only tangentially connected to Plaintiffs' claims that the NHL, not the clubs, breached the NHL's own duty to protect and warn players.

What a club's duty to provide a player with his medical records, or to provide club doctors for players (Mem. at 21), or club responsibilities for "compensation and benefits" such as "a medical plan," "life and disability insurance" and "workers compensation" (Mem. at 22) have to do with whether the NHL knew that players were at far greater risk

than the players knew but chose to conceal that crucial information, (¶¶5, 103, 106) the NHL leaves to conjecture.

Asserting (and assuming) that the listed ***club*** duties require "interpretation" because those duties shape the NHL's own duties, the NHL confuses mere "reading" of a CBA with the far more involved "interpretation." *Livadas*, 512 U.S. at 124. A club's duty to provide a game-time doctor does not erase the NHL's duty to tell players what it knows and players do not.

Further, the NHL's recitation of the clubs' duties are only ***defenses*** to liability, not grounds for preemption. *Caterpillar*, 482 U.S. at 398-99 ("[T]he presence of a federal question, even a §301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint…a ***defendant*** cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law"); *Humphrey v. Sequentia*, 58 F.3d 1238, 1244 (8th Cir. 1995) (employer's assertion of CBA-provided "just cause" defense to discharge claim did not create basis for preemption).

Contending, without support, that "Club duties shape NHL's duties" so "interpretation" is necessary, the NHL tramples joint and several liability and joint tortfeasor rules. Plaintiffs have no obligation to sue two potential tortfeasors. *Miller v. Union Pac. R. Co.*, 290 U.S. 227, 236 (1933) ("[t]he rule is settled by innumerable authorities that if injury be caused by the concurring negligence of the defendant and a

third person, the defendant is liable to the same extent as though it had been caused by his negligence alone").

Arguing that remote subject matter congruence between any CBA provision—"life insurance?", "workers' compensation?" (Mem. at 22)—and Plaintiffs' claims triggers preemption, the NHL ignores the rule of *Caterpillar* and *Lingle* while failing the rigorous "substantial dependence" and "required interpretation" test required for preemption. *Meyer*, 163 F.3d at 1051 ("it is not enough that the events in question took place in the workplace or that a CBA creates rights and duties similar or identical to those on which the state-law claim is based"); *Carlson*, 375 F. Supp. 2d at 842 (factual issues resolving whistleblower claims "***require***[ ] no analysis of any provisions or terms of the Agreement" (citing *Lingle*, 486 U.S. at 407).

NLRB v. Gulf Power Co., 384 F.2d 822 (5th Cir. 1967), and *Library of Cong. v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983) (Mem. at 10 n.7, 11), are inapt. Those cases involved disputes between unions and employers about failing to negotiate changes to safety policies specifically addressed in CBAs. Neither case has any bearing on the non-CBA claims of non-bargaining unit Plaintiffs here. Farther afield still is *NLRB v. Katz* (Mem. at 11), which concerned an employer's unilateral changes to wages, sick leave, and other employment conditions for union members. 369 U.S. 736, 740-41 (1962). Mem. at 11. The NHL's argument that it cannot protect and warn players without NHLPA approval or a bargaining impasse is irrelevant to Plaintiffs' claims that the NHL breached its non-CBA duty of care. Pushing *Katz* for the proposition that labor law rules obviated the NHL's duty of care to protect and warn players, the NHL ignores the

dictates of *Caterpillar*, *Lingle* and *Livadas* that mere overlap of a CBA with common law claim elements, does not compel preemption. Otherwise, the "narrow focus" of preemption that *Allis-Chalmers*, described would disappear. Preemption would swallow every conceivable injury claim of any current or former worker, without the required tie to LMRA goals. *Id.* at 210-11.

2. Plaintiffs' Claims Require No "Interpretation" of the CBAs' Management's Rights Clause

The NHL's argument that the CBAs' Management Rights Clause is required to resolve "the myriad allegations in the Complaint that the NHL failed to act with respect to Player health and safety issues" (Mem. at 29), misstates the preemption test and leads to the absurd result that a provision saying only "Management has every right not expressly given up in this CBA" would trigger universal preemption.

Here, the question is whether Plaintiffs' claims—not undefined "myriad allegations" (Mem. at 29)—necessarily require and are substantially dependent on interpretation of any CBA provision to resolve. The inherently factual nature of Plaintiffs' negligence and fraud-based claims controls—not whether some CBA provision, Management Rights or otherwise, might touch on similar subject matter. *Cramer*, 255 F.3d at 691 ("plaintiff's claim is the touchstone …the need to interpret the CBA must inhere in the nature of the plaintiff's claim"). Plaintiffs' purely common law claims depend on no CBA for their existence or content. *Cf. Hanson-Haukoos v. Hormel Foods Corp.*, 2006 U.S. Dist. LEXIS 78302, at *14 (D. Minn. Oct. 26, 2006) (no preemption of state law retaliatory discharge claim where plaintiff did not argue that defendant violated CBA in issuing discharge-mandating "strikes" and where factual

questions of retaliation and employer motive required no necessary resort to or interpretation of CBA). Preemption requires more than the rights-reserving generality of the NHL's Management Rights Clause. For preemption, "the claim must require the interpretation of some specific provision of a CBA." *Meyer*, 163 F.3d at 1051.

Plaintiffs are not claiming that the NHL violated any Management Rights Clause. *See Luecke*, 85 F.3d at 360 (no preemption where state law defamation claim did not attack CBA drug policy but attacked wrongful dissemination of information about employee's failure to take drug test). The NHL's Management Rights preemption argument would impermissibly federalize the entire body of state law control, by statute, regulation, and common law, of employee safety and working conditions. *See Lingle*, 486 U.S. at 410-11 (discussing preemption's "policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpreempted by other federal labor-law statutes"); *see also Phillips v. Selig*, 157 F. Supp. 2d 419, 429 (E.D. Pa. 2001) (preemption "completely inconsistent" with LMRA goals of uniformity in enforcement of CBAs in service of "industrial labor peace" and would "vastly expand the reach of federal labor law past the bounds that Congress intended").

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) (Mem. at 30), decided years before *Lingle* and *Livadas*, shows the NHL's gambit of rewriting Plaintiffs' claims as CBA-based grievances based on mandatory bargaining subjects. Involving judicial enforcement of an NLRB order, *Metropolitan* involved work stoppages violating a CBA's no-strike clause. *Id.* at 695. *Metropolitan*'s question, whether the union had

waived its official's rights, offers no guidance to resolution of retirees' state law claims. Here, the question is not whether the NHLPA waived its right to bargain over certain subjects (Mem. at 30), but whether the NHL violated its duty of care to Plaintiffs. Facts applied to common law principles supply the answer.

Non-binding, *Chapple v. Nat'l Starch & Chem. Co.*, 178 F.3d 501 (7th Cir. 1999) (Mem. at 31), is distinguishable. A summary judgment case, *Chapple* involved workers fired for violating a new drug policy suing their employer and union, alleging wrongful discharge and emotional distress claims "based on the same facts which underlie their claim for breach of the [CBA]." *Id.* at 507. Plaintiffs here, retirees unlike *Chapple*, allege no CBA breaches. *Chapple*'s CBA was clearly intended to cover "wrongful discharge claims based on the new drug policy." *Id.* at 508. Nothing in this case shows any CBA covers retiree common law claims not based on a specific NHL policy. In *Chapple*, the management rights clause authorized the company to fire workers for cause. *Id.* at 503. Nothing in the NHL Management Rights Clause authorizes the NHL to mislead and endanger Plaintiffs. Before filing suit, the *Chapple* plaintiffs filed grievances. *Id.* at 503-04. Plaintiffs here cannot.

Panayi v. N. Ind. Pub. Serv. Co., 109 F. Supp. 2d 1012 (N.D. Ind. 2000) (Mem. at 31), is also inapposite. The plaintiff there was fired for spending company time and using company equipment to access the internet for personal use. *Id.* at 1014-15. The plaintiff sought a state court injunction against his former employer to prevent the use, in a pending discharge arbitration, of records of the employee's private internet account. *Id.* at 1015. The management rights clause included the right to fire workers for "just

cause." *Id.* at 1016. Finding the need to "interpret" such a clause, in such a case, is neither remarkable nor relevant to the retiree Plaintiffs' claims here, which are subject to no such clause.

Metropolitan, *Chapple* and *Panayi* illustrate the vast chasm between the expressly CBA-governed discharge claims of current bargaining unit member terminated employees and the non-preempted, free standing common law claims of the retiree Plaintiffs here, governed neither expressly nor otherwise by any CBA provision.

Struggling to distinguish *Bogan*, 500 F.3d 828 (Mem. at 31 n.17), the NHL simply confirms that the management rights clause here offers no basis for preemption. As in *Bogan*, Plaintiffs' claims here are not "necessarily grounded in rights established by a CBA." *Id*. at 833. Confirming the Eighth Circuit's previous rejections of a "broader approach to LMRA preemption," (*id*. at 833), the *Bogan* panel emphasized the need for a "specific" and coextensive CBA provision requiring interpretation for resolution of a state law claim. *Id*. *Bogan*'s focus on the specific provisions of the management rights clause at issue shows why that clause here does not address Plaintiffs' claims and cannot trigger preemption. *Id*.

3. Plaintiffs' Claims Require No "Interpretation" of the Concussion Program

Misconstruing the Plaintiffs' allegations concerning the Concussion Program, the NHL ignores the MAC's allegations establishing that Program as a specific example confirming the NHL's long-standing common law duty of care toward the Plaintiffs (¶¶9, 12-13, 15, 102, 105-107, 357) and breach of that duty. ¶¶94-96, 416, 424.

The key allegations relating to the Concussion Program are: (1) before 1997 the NHL, which ran the League and used Plaintiffs and their fellow players to make millions, said nothing about concussions (¶¶6-8, 106); (2) the NHL sponsored and controlled the Concussion Program (¶¶9-11, 120-123); (3) during the 14 years during which the Program was supposedly operating, the NHL ***remained dead silent*** about the serious risks about which the NHL already knew and Plaintiffs did not (¶¶88, 91, 101, 105-110 358-359); and (4) the Program's supposed outcome was further to conceal the truths of the risks, especially the long-term neurocognitive risks, to which Plaintiffs continued unwittingly to be subjected, under the pretext of "more study is needed." ¶¶15, 109, 114-229.

NHL Commissioner Bettman confirms the NHL's own duty and its breach here: "We have, ***on our own***, a long history, ***going back to 1997***, of taking concussions very seriously." ¶221; Mem. at 2. This admission shows the NHL did not "tak[e] concussions very seriously" before 1997 and confirms the NHL—"on [its] own"—acknowledges its independent duty to warn and protect players outside of the CBA. Here, too, the NHL relies on CBA duties of the ***clubs***. Those duties are irrelevant to preemption here, at most providing a ***defense*** to the NHL. *Caterpillar*, 482 U.S. at 398-99.

Arguing that the "interpretation" question is whether the Concussion Program "created" obligations of the NHL to protect and warn Plaintiffs (Mem. at 24), the League breezes by the independent, non-CBA sources of those duties. *See supra* III.C.

The NHL argues, for example, that the Court must construe the "joint NHL/NHLPA Memorandum" to resolve Plaintiffs' claims. (Mem. at 24-25).[9] Nothing in that Memorandum requires "interpretation" as opposed to a mere "look to." Repeating general truisms, using conditional language ("most people," "can be" "can affect"), the Memorandum requires no analysis or interpretation to see it does not reveal the serious specific truths the NHL knew about the risks the players were taking.

Assuming for argument's sake the NHL is correct that the "interpretation" of the Concussion Program's deficiencies is necessary (Mem. at 23), preemption ***still*** would not result. *Brown v. Holiday StationStores, Inc.*, 723 F. Supp. 396 (D. Minn. 1989), demonstrates that the NHL's incantation of the supposed necessity of "interpretation" of the CBA cannot trump the inherent state law nature of Plaintiffs' claims.

In *Brown*, Judge MacLaughlin rejected the preemption of a state-law handicap discrimination claim on the grounds that the court would have to interpret the CBA's work assignment, seniority and termination provisions. *Id.* at 405. Reflecting the rule that the inherent "legal character" of the plaintiffs' claims controls preemption analysis, the Court stated:

> This argument…, ignores the Supreme Court's admonition in *Lingle* that claims having their genesis in state law are not preempted merely because their resolution in part requires interpretation of a [CBA].…Thus, the fact that this case, having its origin solely in Minnesota law, might involve an interpretation of the [CBA] concerning work assignment and seniority, does not require that the claim be preempted….

[9] The NHL's reliance on such memoranda create a factual issue, improper for resolution on a Rule 12(b)(6) motion to dismiss, and to which preemption operates only as a defense rather than basis for dismissal. *Caterpillar*, 482 U.S. at 399.

Id. The legal character of Plaintiffs' claims here similarly belie preemption.

4. Plaintiffs' Claims Require No "Interpretation" of the Playing Rules and Player Discipline

Plaintiffs allege facts about helmets (¶9), the Concussion Program (¶¶9-12, 15, 357-364), playing rules (¶354), and disciplinary procedures. ¶¶349, 373. The application of those facts to the elements of Plaintiffs' federal declaratory judgment claim and state law tort claims, none of which arise from the CBA, require no CBA "analysis" or "interpretation."

What the Supreme Court made clear in *Lingle*, the Eighth Circuit has repeatedly confirmed: that facts conceivably relevant to proving a CBA grievance can also be marshaled in support of an independent state law claim does not warrant preemption ***unless*** the defendant can establish that resolution of the state law claim centrally requires interpretation of a CBA term or provision. *See Meyer*, 163 F.3d at 1051; *Luecke*, 85 F.3d at 358-59; *Humphrey*, 59 F.3d at 1244; *see also Dunn, LLC*, 292 F. App'x at 527 ("[W]e find the line of cases that has taken a narrower approach to LMRA preemption – asking only whether the claim itself, regardless of probable defenses, is necessarily grounded in rights established by the CBA – is the better approach."). The NHL's arguments that the Court must "interpret" the League's responsibilities *vis-à-vis* those of the NHLPA and Competition Committee, the Playing Rules, and Art. 18's supplementary discipline provisions (Mem. at 29) misses the dispositive *Lingle* point.

Despite the NHL's general duty of care, helmets came late, the Concussion Program was a whitewash, playing rules went unenforced, and the League's disciplinary procedures were weakly enforced. Nothing in these factual allegations necessarily

implicates the CBA. For example, none of Plaintiffs' claims depend on or require "interpretation" of the helmet requirement (Mem. at 11), which Plaintiffs' simply allege as factually demonstrating the NHL's awareness of the dangers it concealed from Plaintiffs. That the helmet requirement might be relevant to a CBA claim does not mean it cannot be part of proof of a common law claim based on a duty of care existing outside the CBA. *Lingle*, *Livadas* and the many corresponding Eighth Circuit cases demonstrate that Plaintiffs' use of these facts in support of free standing common law claims does not trigger preemption.

Pointing to the "Player/Club Competition Committee" (Mem. at 15, 28), the NHL itself shows why Plaintiffs' allegations about protective equipment, playing rules and discipline do not trigger preemption. With a meaningless function, the Competition Committee can only "recommend" rules changes for "consideration" by Clubs' General Managers. From the NHL General Managers, any such "recommendation" worthy of further attention then goes to the NHL Board of Governors for "review, consideration and potential adoption." But a "[r]ecommendation will become effective only if approved by the NHL Board of Governors in accordance with the NHL Constitution and By-Laws." A vaporous CBA provision concerning the offering up of "recommendations" does not suffice under Supreme Court precedent to destroy the non-bargaining unit Plaintiffs' rights to bring independent state law claims.

Stringer v. NFL, 474 F. Supp. 2d 894 (S.D. Ohio 2007), on which the NHL relies (Mem. at 9, 20, 21), held that a similar NFL CBA provision concerning a "Joint Committee on Player Safety and Welfare" provided no basis for finding that the

plaintiff's wrongful death claim arose from the CBA. There, as here, the NFL provision, could only make recommendations to the league, and the CBA imposed no duty on the league to accept the recommendations. *Id*. at 905-906.

The NHL's argument based on Playing Rules, Player Discipline and Competition Committee essentially says that any subject dealing with the game, its equipment, rules and discipline is within the CBAs' ambit and therefore preempted. Not so. *See Nanstad v. N. States Power Co.*, 2007 WL 474966, at *4 (D. Minn. Feb. 9, 2007) (following "narrower approach to...preemption" endorsed by *Luecke* and *Meyer* to conclude "claims based on state law that are intimately related to events at the workplace and could have been taken through the grievance process are not preempted as long as they involve purely factual questions and are not based on provisions of the CBA"). Nowhere does the NHL explain how preempting the retiree, non-bargaining unit Plaintiffs' claims because of Playing Rules, Disciplinary and other CBA provisions satisfies the rule that pre-emption applies "only to assure that the purposes animating §301"—industrial peace and stability—will be served. *Livadas*, 512 U.S. at 122-23.[10]

[10] Many cases the NHL cites illustrate the distinction between Plaintiffs' claims and the contract claims appropriate for §301 preemption. For example, in *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), cited for the proposition that §301 extends to agreements "more limited in scope than a traditional CBA," (Mem. at 11 n.9.), the Supreme Court held that an action brought by a union to enforce provisions of a "strike settlement agreement" was cognizable under §301 because otherwise "responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult." *Id.* at 27.

5. Plaintiffs' Declaratory Relief and Medical Monitoring Claims Require No Interpretation

Plaintiffs' Declaratory Judgment and Medical Monitoring claims arise, respectively, from federal statutory and state law. Neither claim arises from or was created by a CBA provision. *Caterpillar*, 482 U.S. at 394.

Nor is either claim "substantially dependent upon analysis of the terms" of any CBA. *Allis-Chalmers*, 471 U.S. at 220. Assuming the truth of Plaintiffs' factual allegations for both claims, including the NHL's duty of care and duty to disclose risks to Plaintiffs of which the NHL knew but Plaintiffs did not, and the NHL's breach of those duties, there is no need to resort to a CBA, even for a non-preemption triggering "look to" or "reference." *Lingle*, 486 U.S. at 413 n.12.

The NHL treats these two claims in a footnote, saying only that they "rely on underlying fraud and misrepresentation theories." (Mem. at 31 n.18). For the same reasons Plaintiffs' claims for Negligent Misrepresentation by Omission, Fraudulent Concealment and Fraud by Omission/Failure to Warn are not preempted, neither then by the NHL's admission are the Declaratory Judgment and Medical Monitoring Counts.

The NHL has waived any argument that the Declaratory Judgment and Medical Monitoring claims are preempted by failing to offer the Court any developed argument on the point. *Johnson v. Comm'r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 135495, at *73 (D. Minn. July 11, 2012) ("failure to develop …argument in any meaningful way, results in a waiver"); *Garden v. Cent. Neb. Hous. Corp.*, 719 F.3d 899, 905 n.2 (8th Cir. 2013) (same).

6. Plaintiffs' Negligence Claims Require No Interpretation

The NHL's preemption arguments against Plaintiffs' negligence claims ignore the intensely factual nature of those claims while putting a manifestly overbroad gloss on "interpret." The NHL's argument here runs afoul of the preemption-narrowing rule long ago established in *Caterpillar*, 482 U.S. at 398-99, confirmed in *Lingle*, 486 U.S. at 407-10, and endorsed by the Eighth Circuit in *Meyer*, *Luecke*, and *Hanks v. Gen. Motors Corp.*, 906 F.2d 341 (8th Cir. 1990): preemption does not result simply because the same facts that would support a CBA grievance would also support an independent state law claim, as long as no CBA provision needs interpretation in order to resolve the claim. The inherent nature of the claims, not the existence of a CBA, determines preemption. *Carlson*, 375 F. Supp. 2d at 842 (no preemption of employee's retaliation claims where plaintiff alleged entitlement to rehiring based on seniority even though CBA provision expressly required employer to rehire based on seniority).

Negligence requires allegations of (1) duty, (2) breach, (3) proximate causation, and (4) damages. *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). Plaintiffs allege the NHL's duty based on standard tort principles of relationship and foreseeability. Plaintiffs allege the NHL knew what plaintiffs did not, and that they were at increased risk of long-term neuro-cognitive impairment from repeated concussive and subconcussive impacts. Plaintiffs allege the NHL failed to exercise due care in failing to inform them about, and protect them against, that risk despite having a body of knowledge and scientific literature at its disposal, damaging Plaintiffs. Finally, Plaintiffs allege this failure caused their damages.

These factual elements focus on what the NHL knew, what the NHL did and did not do. No CBA "interpretation" is necessary. *Meyer*, 163 F.3d at 1051-52 (no preemption of employee's claims for slander, intentional and negligent infliction of emotional distress, tortious interference with business relationship and civil conspiracy, finding purely factual questions about another party's conduct and motive did not require interpretation of any CBA provision, even where CBA provision dealt with seniority issue relevant to claims); *Thomas*, 308 F.3d at 893 (no preemption of retaliatory discharge claim of former employees covered by CBA even though "the [CBA] would undoubtedly be referred to during the prosecution of this case"; "[c]laims that revolve around the conduct or motive of the parties generally are not preempted because they do not require interpretation of the [CBA]." (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261-62 (1994)).

Plaintiffs nowhere allege the NHL breached any CBA term or condition. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state law litigation plainly does not require the claim to be extinguished." *Livadas*, 512 U.S. at 124. Not one of the CBA provisions the NHL cites needs more than a mere "look" to see that it does not deal with the NHL's duty to warn players about the neurological dangers of repeated concussive and subconcussive impacts. *See Hanson-Haukoos*, 2006 U.S. Dist. LEXIS 78302, at *9-*10, *13-*14 (employing *Lingle* analysis, finding no preemption of retaliatory discharge and defamation claims where current employee did not allege any violation of CBA and claim elements only required court to analyze factual questions, even though plaintiff did

not dispute CBA authorized termination) (citing *Hanks*, 906 F.2d at 343 (citing *Lingle*, 486 U.S. at 407)); *Green*, 2014 U.S. Dist. LEXIS 66098, at *13 ("Plaintiffs' negligence claims are premised upon the common law duties to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware."); *cf. Holmes v. NFL*, 939 F. Supp. 517 (N.D. Tex. 1996) (Mem. at 9) (state law tort claims based on CBA Drug Program preempted where plaintiff NFLPA member grieved drug suspension under CBA Drug Program and argued CBA issues in appeal to Commissioner).

The NHL relies on distinguishable cases showing by contrast that Plaintiffs' claims are not preempted. (Mem. at 8-9, 18-21). *Stringer*, 474 F. Supp. 2d at 898, decided after argument, subsequent "limited discovery" and "supplemental briefs," was decided on summary judgment. *Id*. *Stringer* also involved a much closer fit between the CBA provisions at issue and the wrongful death claim. The plaintiff's claim, for her husband's death from heatstroke during practice, directly involved the medical care and treatment her husband received. *Id*. at 909. That, in turn, called into question the CBA provisions concerning team doctors and trainers. Plaintiffs' claims here do not turn on Clubs' provision of medical care and treatment. Plaintiffs' case turns on the NHL's superior knowledge of, but failure to protect and warn players against, the risks of concussions and related brain injuries.

Refusing to preempt plaintiff's negligence count against the NFL defendants alleging these defendants breached their duty to ensure the plaintiff had "safe equipment"

(*id*. at 912), *Stringer* shows why none of Plaintiffs' claims here are preempted. Finding no CBA provision imposed a duty on the NFL defendants to ensure players used only safe equipment, *Stringer* said the duty at issue "if it exists, clearly has its source in the common law." *Id*. Because the CBA was "largely silent on the topic of equipment safety," resolution of this negligence claim was not "substantially dependent" on any CBA provision." *Id*. at 912-13. Just like Plaintiffs' negligence claims here.

Duerson v. NFL, Inc., 2012 U.S. Dist. LEXIS 66378 (N.D. Ill. May 11, 2012), is non-precedential and inapposite (Mem. at 8-9, 19-22, 26). *Duerson* disagreed with the Ninth Circuit ruling in *Hendy* and distinguished *Jurevicius*, 2010 U.S. Dist. LEXIS 144096. 2012 U.S. Dist. LEXIS 66378, at *13-*15. The *Duerson* Court said *Jurevicius*'s claims were not preempted because they involved a duty to warn about the condition of training facilities rather than claims about a player's physical condition. *Id*. at *14. Plaintiffs here, as in *Jurevicius*, also centrally allege failure of a duty to warn. Their claims are not preempted under *Duerson*'s own analysis. Anyway, in *Meyer*, *Humphrey* and *Luedtke*, the Eighth Circuit has rejected the expansive view of preemption-triggering "interpretation" that *Duerson* reflects. Finally, *Duerson* ignores the rule that preemption is unwarranted simply because the same facts that supported Duerson's state law claims might also support a labor grievance. *Lingle*, 486 U.S. at 409-10.

The NHL relies on *Duerson*'s musing that interpretation is necessary because clubs' duties under the CBA ***might permit*** the NFL to "exercise a lower standard of care." (Mem. at 20). *Duerson* cited no authority for that conjecture, which ignores the

scope of the NHL's common law duty of care and a plaintiff's right to sue only one tortfeasor. 2012 U.S. Dist. LEXIS 66378, at *11.

In *Nelson v. NHL*, 2014 U.S. Dist. LEXIS 21028 (N.D. Ill. Feb. 20, 2014) (Mem. at 9, 17), the claims were rooted directly in a specific, voluntarily undertaken duty of care under a substance abuse policy ("SABH") specifically incorporated into and governed by the CBA. *Id*. at *16-*17. Plaintiffs here allege a general duty of care as well as specific examples of voluntarily assumed duties within the general duty. Unlike *Nelson*'s SABH, no express CBA provision creates, or governs, the NHL's duty to warn and protect players from long-term risks of concussions.[11]

Devoid of analysis, *Maxwell v. Nat'l Football League Mgt. Council*, No. CV 11-08394 (C.D. Cal. Dec. 8, 2011) (Mem. at 9), a two-page order, never mentions *Caterpillar*, *Lingle*, or *Livadas* and simply followed the non-precedential *Stringer*. *Maxwell* never discusses why and to what extent "[t]he physician provisions of the CBA must be taken into account in determining the degree of care owed by the NFL and how it relates to the NFL's alleged failure to establish guidelines or policies to protect the mental health and safety of its players." *Maxwell* at 2. The court erroneously conflated "taking a provision into account" with the "analysis" that "interpretation" entails. *Allis-Chalmers*, 471 U.S. at 220.

Atwater v. NFLPA, 626 F.3d 1170 (11th Cir. 2010) (Mem. at 9), involved former players' claims against their union and the League for failing to properly investigate

[11] *Nelson* has been converted to a summary judgment proceeding, with discovery underway concerning just what constitutes the CBA.

Ponzi-scheming financial advisors listed "with the NFLPA's Financial Advisors Program" (*id*. at 1174) and specifically addressed in the CBA's "Career Planning Program." *Id*. at 1174-75. No analogous CBA provision deals with the NHL's duty to protect and warn the players of the risks the MAC alleges.

Finally, as discussed *supra*, CBA provisions about the NHL ***clubs'*** duties to the players have no import on the ***NHL's own duty*** of care to Plaintiffs.

7. Plaintiffs' Omission and Concealment Claims Require No Interpretation

Improperly narrowing the basis of Plaintiffs' negligent misrepresentation by omission, fraudulent concealment, and fraud by omission/failure to warn claims to a single source, *i.e.*, the NHL's "special relationship" to Plaintiffs (Mem. at 31-32), the NHL's preemption analysis leaves from the wrong destination and ends up lost.

Plaintiffs' omission and misrepresentation claims necessarily overlap, but far exceed, a single "special relationship" source. Rather, the NHL's duties are rooted in: (1) the NHL's general duty of care to Plaintiffs arising from their relationship and respective status, and the foreseeability of harm to Plaintiffs from the NHL's acts and omissions (¶¶103, 127, 146, 148, 154, 336-338, 345, 353, 355, 421-422, 451); (2) the NHL's special relationship to Plaintiffs (¶¶92-95, 97-99, 102, 126, 135, 139, 151, 153, 429); and (3) the NHL's confirmatory voluntary assumption of its duty of care, and misleading silences and half-truths, specifically concerning the long-term effects of concussive and subconcussive impacts. ¶¶9, 12-13, 15, 345, 356, 447. Viewed in light of this sturdy duty foundation, the NHL's obligation to protect and warn Plaintiffs is clearly visible.

Here, as everywhere else, the NHL bases its "rights arising from CBA" argument on the notion that CBAs are "super-contracts," eternally valid and subsuming all possible claims any person once subject to a CBA might allege. But courts routinely do not preempt state common law concealment and omissions claims. *See Anderson*, 803 F.2d at 959 (no preemption of fraud and negligent misrepresentation claims where they "arise in state common law and are measured by standards of conduct and responsibility completely separate from and independent of a collective bargaining agreement"); *Milne Emps. Ass'n v. Sun Carriers, Inc.*, 960 F.2d 1401, 1409 (9th Cir. 1992) (misrepresentation and fraud claims not based on CBA and therefore not preempted: "The duty to disclose does not stem from the [CBA]; instead, it arises out of state law obligations imposed on a party in a fiduciary relationship, a party actively concealing [un]disclosed matters, or a party to a transaction who is privy to material facts [in]accessible to the plaintiff."); *Foy*, 127 F.3d at 234 (no preemption of state law negligent misrepresentation claim by former employees against employer; state law, not CBA, was source of right on which plaintiff based claim); *Green*, 2014 U.S. Dist. LEXIS 66098, at *22 ("[a]s with their negligence claims, the plaintiffs' negligent misrepresentation and fraudulent concealment actions arise independent of the CBAs as a function of the common law"); *Brown v. NFL*, 219 F. Supp. 2d 372, 380-81 (S.D.N.Y. 2002) (personal injury claim not preempted where duty alleged was not specific to CBA, and harm was foreseeable; citing Prosser & Keeton, TORTS §92, at 655 (5th ed. 1984) for proposition: "tort obligations are imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other

bargaining transaction"; and citing RESTATEMENT (SECOND) OF TORTS §4c (1965) for the proposition that "'[c]ontractual commitments cannot ordinarily serve to shield a defendant from liability caused by a breach of the duty of due care.'").

Plaintiffs' omission and concealment claims require no CBA interpretation. *Lingle*, following the rule of *Caterpillar*, dictates that claims depending on intensely factual issues, such as those that shape and decide misrepresentation claims—What did the Defendant say? What did the Defendant, who had knowledge of the danger, fail to say to the party who was relying on the Defendant for protection and information? Was the Plaintiff's reliance reasonable? Did the Plaintiff's reasonable reliance lead to injury?—are not preempted. *Lingle*, 486 U.S. at 408-10.

Many cases teach that misrepresentation claims arising from the conduct or motive of the parties are not preempted. *See Thomas*, 308 F.3d at 893 ("[c]laims that revolve around the conduct or motive of the parties generally are not preempted because they do not require interpretation of the collective bargaining agreement."); *Milne*, 960 F.2d at 1408-10 (misrepresentation claims not preempted; misrepresentations, knowledge of falsity, intent to defraud, reliance, turned on factual questions of state of mind, conduct and motivations); *Foy*, 127 F.3d at 235 (plaintiff's claim "depend[ed] upon the employer's behavior, motivation and statements," not any CBA terms); *Pearson v. Int'l Union, United Auto., Aerospace & Ag. Implement Workers*, 99 F. App'x 46, 53 (6th Cir. 2004) (reversing district court finding negligent misrepresentation claim preempted, finding no showing why statement, its falsity, defendant's knowledge of falsity, plaintiff's reliance and resulting damages would require any analysis of CBA terms).

No need exists even to look to, let alone "examin[e]" (Mem. at 34), any CBA's terms to determine the existence of the NHL's duty to disclose dangers to the unsuspecting Plaintiffs who relied on the NHL for information and to protect them. The NHL's common law general duty of care arising from its relationship with, and superior knowledge of, Plaintiffs and the corresponding foreseeability that Plaintiffs would be harmed by the NHL's misconduct, the common law duty of care arising from the NHL's special relationship to Plaintiffs, or the NHL's specific, voluntarily assumed duty of care, within the NHL's general duty of care, concerning brain and head trauma, all exist independently from any provisions of the CBAs.

Here the NHL again cites CBA provisions concerning general duties of its member ***clubs***, not the NHL itself. (Mem. at 35). Plaintiffs have sued the NHL. If the NHL wants to implead the individual clubs as third party defendants, that is the NHL's right.[12] If the NHL wants to argue that the ***clubs*** had certain duties to Plaintiffs that modified, or even abrogated, the NHL's duties to Plaintiffs, the NHL can do that, too. But that is a preemption ***defense*** that does not result in re-characterizing Plaintiffs' claims as preempted by §301. *Caterpillar*, 482 U.S. at 397.

The NHL proffers all distinguishable cases here too. *United Steelworkers of Am. v. Rawson*, 495 U.S. 362 (1990) (Mem. at 16-18), addressed a union's voluntarily assumed CBA-expressed duty to inspect mines. *Int'l Bhd. Elec. Workers v. Hechler*, 481 U.S. 851 (1987) (Mem. at 18), concerned a union's voluntarily assumed and CBA-stated

[12] The NHL has, indeed, reserved the right to implead additional parties in the December 4, 2014 Rule 26(f) filing. (Doc. 50 at 3).

duty, to assure the plaintiff a safe workplace. Unlike those CBA-based claims, Plaintiffs' omission and concealment claims arise from the NHL's common law duty of care to disclose to Plaintiffs what the NHL knew about risks of repeated head trauma.

Williams v. NFL, 582 F.3d 863 (8th Cir. 2009) (Mem. at 33), is inapposite for all the reasons stated *infra*. In *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324 (8th Cir. 2006) (Mem. at 33), on which *Williams* relied, the employer's third-party complaint's fraudulent and negligent misrepresentation claims directly implicated CBA terms by asserting reliance on "allegedly fraudulent assurances from the Union which conflicted with the written agreement" governing fringe benefits. *Trs. of the Twin City*, 450 F.3d at 334. Purely CBA-based from its inception, the first-party complaint in *Superior Waterproofing* was brought by trustees of a multiemployer fringe benefit fund against the employer, "for violation of its fringe benefit obligations under Article 23 of the CBA." *Id.*

Unlike this case, *Superior Waterproofing* directly implicated the "policy interest behind §301 preemption," namely "the 'interpretive uniformity and predictability' which Congress intended to foster with its passage of §301.'" *Id.* at 333, 334. (citing *Allis-Chalmers*, 471 U.S. at 211). Plaintiffs' misrepresentation and fraud claims here arise outside the CBA. No specific CBA terms discuss the NHL's duty to warn and protect players from the dangers the MAC specifies. Plaintiffs allege no breach of any CBA term or provision remotely implicating that duty. *See Luecke*, 85 F.3d at 359 (no preemption of statutory whistleblower claims: "[W]hen the meaning of contract terms is

not the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.").

Aguilera v. Pirelli Armstrong Tire Corp., 223 F.3d 1010 (9th Cir. 2000) (Mem. at 34), concerns replacement workers, hired then laid off under CBA terms directly governing layoffs and seniority, who claimed their job prospects and status had been misrepresented to them. However, the plaintiffs "acknowledge[d] that they had expressly acceded to the CBA, which governed their job terms and layoff guidelines." *Id.* at 1015. The Ninth Circuit followed its uncontroversial rule "that where the position in dispute is 'covered by the CBA, the CBA controls and any claims seeking to enforce the terms of [a contrary agreement] are preempted.'" *Id.* No such express, directly applicable CBA provision applies in this case. The NHL's foray into Ninth Circuit preemption jurisprudence confirms the failure of the NHL's arguments.[13]

Sherwin v. Indianapolis Colts, Inc., 752 F. Supp. 1172 (N.D.N.Y. 1990) (Mem. at 34), inappositely involved a former NFL player's claims that his team and team doctors failed to tell him important medical information, wrongly permitted him to keep playing and caused him injury. *Id.* at 1174. Finding that these claims "arise out of" the CBA and standard player agreement, the court found these claims were "substantially dependent"

[13] *See, e.g.*, *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1072 (9th Cir. 2007) ("Our circuit has repeatedly frowned upon defendants who have invoked tangentially related CBA provisions in a strained and transparent effort to extinguish state-law claims via preemption."); *Cramer*, 255 F.3d at 691-92 (rejecting liberal view of preemption-triggering "interpretation" and stating a "hypothetical connection between the claim and the terms of the CBA is not enough to preempt the claim….A creative linkage between the subject matter of the claim and the wording of a CBA provision is insufficient….").

on the CBA (*id.* at 1178, 1179) because, absent the agreements, ***the team*** would not have had a duty to provide medical care to plaintiff.

Unlike *Sherwin*'s plaintiff, Plaintiffs here do not allege any claims against their former teams, nor any NHL duty arising out of any CBA or standard player agreement. *See Meyer*, 163 F.3d at 1051 ("For there to be complete preemption, we believe that the claim must require the interpretation of some specific provision of a CBA"). Under the NHL's view, a CBA with provisions entitled "health care," "benefits" "rights," "duties," and "obligations" would automatically entail preemption of every conceivable state law claim addressing such subjects, even claims against strangers to the provisions and even where no LMRA goals would be served. Supreme Court jurisprudence says that is wrong.

8. *Williams* Is Entirely Distinguishable

The NHL relies heavily on *Williams*, 582 F.3d at 863. (Mem. at 8-9, 18-19, 33). *Williams* differs materially, factually, and legally, from this case and is not controlling. *Williams* arose from starkly different facts and, as explained above, preemption requires a case-by-case, context and fact-specific analysis. *Allis-Chalmers*, 471 U.S. at 220 (case-by-case analysis required).

Unlike here, *Williams* involved ***current*** NFL players, subject to a ***current*** CBA, who were members of a bargaining unit and represented by a union, who were suspended without pay for failing random drug tests. 582 F.3d at 869-70. *Williams's* plaintiffs appealed their suspensions. *Id.* at 870. Unlike Plaintiffs here, the *Williams* plaintiffs were able to—and did—attend an arbitration hearing. *Id.* at 871. A league official as

Hearing Officer upheld plaintiffs' suspensions based on the specific language of a "Policy on Anabolic Steroids and Related Substances" incorporated expressly in the CBA. *Id.* The NFL Management Council had sent a memo to teams' presidents, general managers, and trainers saying the "StarCaps" substance that led to the plaintiffs' suspensions was prohibited. *Id.* at 869-70, 872. The NFLPA's Director of Player Development had sent a similar memo to players' agents. *Id.* at 870.[14]

Williams turned on the expressly prohibitory substance abuse policy specifically incorporated in the CBA, reflecting the Eighth Circuit's consistent view (expressed in *Meyer*, 163 F.3d at 1051, *Luecke*, 85 F.3d at 358-59, and *Humphrey*, 59 F.3d at 1244), that preemption is permitted ***only*** where the state law claim necessarily and centrally requires analysis of a CBA term or provision.

Plaintiffs here, unlike in *Williams*, allege free standing state common law claims not rooted in a specific CBA provision such as the "StarCaps" rule. Plaintiffs are retirees, not "players" within the CBA, not within the NHLPA bargaining unit, and with no grievance rights under the CBA. Plaintiffs cannot do anything to disrupt the labor peace that §301 preemption exists to promote. Even if Plaintiffs could initiate a grievance, their claims would not be cognizable, whereas the *Williams* plaintiffs were active participants in the CBA grievance process.

[14] The prohibitory StarCaps memos from the NFL and NFLPA differ dispositively from the NHL's general missives here. *See* Doc. 40, Exs. 9, 10, 13. Those memos, the first appearing in 1997 long after the majority of the putative class had retired, nowhere reflect the NHL clearly telling Plaintiffs and their fellow players what the MAC factually alleges—that the NHL already knew about the undeniably increased risks to which the NHL had subjected the unwitting players.

Instructively, *Williams* found the plaintiffs' statutory claims were ***not*** preempted, following *Livadas*'*s* rule that "§301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Williams*, 582 F.3d at 878. Just as no CBA deals directly or necessarily with the NHL's duties to protect Plaintiffs from and warn them about the dangers of repeated concussions and their associated risks and diseases, the *Williams* panel found nothing in the CBA at issue "relevant to the terms 'off the premises of the employer' or 'nonworking hours'" concerning the "training camp" period the NFL asserted was at issue. *Id.* at 880. Thus, *Williams* does not support the NHL's preemption arguments here.

D. The CBAs Do Not Apply to Plaintiffs

While the NHL refers to Plaintiffs as "former players," it never mentions that their retiree status excludes them from the NHLPA's collective bargaining unit, incapable of using the CBAs' grievance procedures, and outside of the stated Congressional purposes of LMRA preemption.

1. Plaintiffs Are Non-Bargaining Unit Retirees

As acknowledged by the NHL (Mem. at 2), and as shown by a mere "look" at every CBA that the NHL has raised (Doc. 40, Exs. 1-8), the NHLPA currently, and has always been, recognized as the exclusive bargaining representative of ***only*** "present and future" players in the NHL that were "employed" in the NHL by its clubs.[15]

[15] *See* Doc. 40-8, pp.1, 10; Doc. 40-7, pp.1, 10; Doc. 40-6, pp.1, 7; Doc. 40-5, pp.3, 5; Doc. 40-4, pp.1-2; Doc. 40-3, pp.1-2; Doc. 40-2, pp.1-2; Doc. 40-1, p.1. The definition of "players" in the CBAs includes four categories of players, none of which include retirees. *See, e.g.*, Doc. 40-8, p.6; Doc. 40-7, p.7; Doc. 40-6, p.4.

Both the NHLPA and the NHL have steadfastly argued that the NHLPA ***only*** represents ***current and future*** players. *See* Answer at 2, *Ray v. NHLPA*, No. 1:05-cv-00097-JTE (W.D.N.Y. Mar. 2, 2005) ("the NHLPA is the current exclusive collective bargaining representative of the players on all teams in the NHL" and stating Ray was not member of the NHLPA "after his retirement," when he was "no longer under contract with any NHL team" and "not an active player"), attached to the Declaration of Brian Gudmundson ("Gudmundson Decl."), Ex. A; *Yashin v. Nat'l Hockey League*, 2000 CanLII 22620, at [5] (Can. Ont. Sup. Ct.) ("[t]he NHL recognizes the NHLPA as the exclusive bargaining representative of all present and future players employed as such in the league by the clubs"), Gudmundson Decl. at Ex. B; *Inside NHLPA, Organization, Executive Director*, NHLPA.COM, http://www.nhlpa.com/inside-nhlpa/organization (NHLPA is the union for "active players" in the NHL). Gudmundson Decl., Ex. C. The NHLPA even describes its current CBA as setting "the terms and conditions of employment of all professional hockey players playing in the NHL." *See Inside NHLPA, Collective Bargaining Agreement*, NHLPA.COM, http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement. Gudmundson Decl., Ex. D.

The issue of the NHLPA's representation of retired players was addressed by the Ontario Court (General Division) in *Bathgate v. Nat'l Hockey League Pension Soc'y* (1992), 11 O.R. 3d 449, at *113-*116 (Can. Ont.). Gudmundson Decl., Ex. E. Finding in favor of retired NHL players suing the NHLPA after the NHL and NHLPA negotiated a change in pension distributions, the Ontario Court held: "the NHLPA could speak ***only for active players***, given the limits of its recognition …it clearly had no mandate for or

from inactive players who had contributed to the Society since its inception" (*Id*. at *4) and "[the NHLPA] was representing ***only*** active or present players and the NHL and NHLPA had no power to extend the NHLPA's authority to former players without their consent." *Id*. at *110.

Because Plaintiffs are admittedly all retirees—not present or future players employed by the NHL or its clubs as required in the CBAs—they are not represented by the NHLPA or part of the NHLPA collective bargaining unit. *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plateglass Co.*, 404 U.S. 157 (1971) (finding retirees not members of collective bargaining unit); *Anderson v. Alpha Portland Indus.*, 727 F.2d 177, 181 (8th Cir. 1984) (union owes no duty of fair representation to retirees because they are outside the collective bargaining unit); *Eller v. NFLPA*, 731 F.3d 752, 755 (8th Cir. 2013) ("[NFL] [r]etirees are not 'employees' within the meaning of the National Labor Relations Act. Therefore, they may not be joined with active players as members of the collective bargaining unit"); *Crown Cork & Seal Co. v. United Food & Comm. Workers Int'l Union*, 37 F.3d 1301, 1312 (8th Cir. 1994) (retiree benefit case; neither company nor union "can act on behalf of retirees"); *Commc'ns Workers of Am. & Its Local 7270 v. Frontier Commc'ns of Minn., Inc.*, 2008 U.S. Dist. LEXIS 63675, at *11-*12 (D. Minn. Aug. 19, 2008) (a party to CBA union could seek to enforce retiree benefit provisions without retiree consent, but acknowledging "the Union's grievance would likely not be *res judicata* against … affected retirees who do not agree to be bound by the outcome….There could always be non-consenting retirees who choose to pursue

litigation individually…[and] potential conflicts in a union's contemporaneous representation of current employees and retirees.").

Allied Chemical is particularly instructive. Rejecting a union's claims that retiree plaintiffs were encompassed in and subject to employer's CBA, the Supreme Court looked to the terms of the CBA, which defined its collective bargaining unit as comprised of employees "working" or "who work" at the employer, and held "it would utterly destroy the function of language to read them as embracing those whose work has ceased with no expectation of return." 404 U.S. at 172.

Relying on *Allied Chemical*, the Eighth Circuit in *Anderson* confirmed that retirees are outside the bargaining unit and are owed no duty of fair representation by their union, noting the inherent conflict of interest:

> More resources spent pursuing retiree grievances means less available for grievances of active employees. Further, a victory for a retiree in a contract administration [grievance] matter may ultimately be paid for by the active employees. If a retiree victory reduces the employer's assets, there will be less available for future benefits to active employees.

727 F.2d at 183.

Most recently, in a lawsuit brought on behalf of retired NFL players against the NFL for the illegal and improper providing of painkillers the NFLPA agreed that retired players are excluded from the NFLPA bargaining unit. *See* Letter from the NFLPA ("*Dent* NFLPA Letter"), *Dent v. NFL*, No. 3:14-cv-02324-WHA (N.D. Cal. Nov. 19, 2014), Doc. 92 ("[t]he current CBA defines the bargaining unit in a manner that excludes retired football players, and this is equally true of prior CBAs"). Gudmundson Decl., Ex. F.

Here, Plaintiffs are clearly excluded from the NHLPA bargaining unit, belying any argument that they are represented by a union who can initiate a grievance on their behalf.

2. The CBAs' Grievance Procedures Are Unavailable to Plaintiffs

Ignoring that Plaintiffs are excluded from the NHLPA bargaining unit, the NHL argues that Plaintiffs have failed to exhaust the mandatory grievance procedures of the CBAs. (Mem. at 36). The NHL is wrong because the CBAs' grievance procedures are unavailable to Plaintiffs.

As the CBAs state "[a] Grievance may be initiated ***by the NHL or the NHLPA only.***" *See, e.g.*, Doc. 40-8, p.109; Doc. 40-7, p.89; Doc. 40-6, p.76. This principle has been supported by the NHL outside of this litigation. *See Yashin* at [5], Gudmundson Dec., Ex. B (the NHL recognizes that "a grievance may only be initiated by the NHL or the NHLPA."). Plaintiffs, as retired players and unrepresented by the NHLPA, could not initiate a grievance on their own behalf even if they wanted to. *See Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 375-76 (1984) (where CBAs "permit only the Union or the employer to invoke the arbitration process…there is no basis for assuming that the parties intended to require arbitration of disputes between the trustees and the employer"); *Anderson*, 727 F.2d at 185 ("Indeed, the language 'when an employee has a grievance' suggests that the grievance and arbitration procedure is limited to active employees"); *cf. Wert v. Liberty Life Assurance Co. of Boston, Inc.*, 447 F.3d 1060, 1063 (8th Cir. 2006) (ERISA case, finding *Anderson* "instructive" on exhaustion of contractual remedies question).

The grievance/arbitration process the NHL says applies here (Mem. at 36-37) is, in express terms, open only to the NHL and NHLPA. It is not open to retired players not in the bargaining unit. Plaintiffs could not have grieved their claims during their careers, when, Plaintiffs factually allege, the NHL concealed the claims from them during their playing days. ¶¶5, 8, 19, 104-106, 124, 134, 138, 142, 143,151, 152, 155-157, 237, 332, 344, 356.

In addition, as discussed *supra*, because Plaintiffs are not represented by the NHLPA, and the NHLPA owes Plaintiffs "no duty of fair representation," it would be both impossible and inequitable for the NHLPA to initiate a grievance on Plaintiffs' behalf. *See Anderson*, 727 F.2d at 182 ("forcing a union to represent both active employees and retirees 'would create the potential for severe internal conflicts that would impair the [bargaining] unit's ability to function and would disrupt the process of collective bargaining'") (citing *Allied Chem.*, 404 U.S. at 173); *Robbins v. Prosser's Moving & Storage Co*., 700 F.2d 433, 442 (8th Cir. 1983) (finding union would not adequately represent trustees' interests in contractual grievance and arbitration pursuant to a CBA between union and employees).

Even if the NHLPA were required to initiate a claim on Plaintiffs' behalf, which it is not, Plaintiffs' claims are not even cognizable under the CBA. While there are a limited number of provisions in the CBAs that concern retired players, including Waivers (*see, e.g.*, Doc. 40-8, Art. 13.23, p.82; Doc. 40-7, Art. 13.23, p.77), Insurance Coverages (*see, e.g.*, Doc. 40-8, Art. 23.6, p.151; Doc. 40-7, Art 23.6, p.108; Doc. 40-6, Art. 23.6, p.88), Benefits (*see, e.g.*, Doc. 40-8, Art. 50.3, p.251; Doc. 40-7, Art. 50.3, p.191),

Continuing Education and Career Counseling (*see, e.g.*, Doc. 40-8, Art. 29, p.169); and a Fund for Retired Players (*see, e.g.*, Doc. 40-8, p.494; Doc. 40-7, p.430), none of these provisions have even a remote connection with Plaintiffs' claims based upon the NHL's failure to warn players of the negative and long term effects of repeated head trauma. *See Anderson*, 727 F.2d at 184 ("A party can be required to exhaust [contractual remedies] only if the contractual remedy covers the dispute at issue"); *see also Dent* NFLPA Letter (because no provision of the CBA would cover the specific non-disclosure and failure to warn claims asserted by plaintiffs retirees, plaintiffs' claims are not grievable). It is also worth noting that all former CBAs that were in effect during Plaintiffs' playing time in the NHL have since expired by their own terms. *See, e.g.*, Doc. 40-7, p.11; Doc. 40-6, p.8; Doc. 40-5, p.7; Doc. 40-4, p.2; Doc. 40-3, p.2; Doc. 40-2, p.2; Doc. 40-1, p.2.

In support of its argument that Plaintiffs have failed to exhaust their mandatory grievance procedures, the NHL relies on factually distinguishable authority. (Mem. at 36). *Republic Steel Corp. v Maddox*, 379 U.S. 650 (1965), concerns a laid-off employee's contract-based claims that were based upon the terms of an express severance pay provision in his CBA. *Id.* at 650-51. The CBA provided for a 3-step grievance procedure. *Id.* In finding the employees' claims were preempted by §301, and that he was required to follow the CBA's grievance procedure, the Court held "[employee's] suit in the present case is simply on the contract, and the remedy sought…, did not differ from any that the grievance procedure had power to provide." *Id.* at 657.

In addition, the NHL's reliance on *Local Union 453 of IBEW v. Independent Broad. Co.*, 849 F.2d 328, 331 (8th Cir. 1988), and *Teamsters Local Union No. 688 v.*

Indus. Wire Prods., 186 F.3d 878, 882 (8th Cir. 1999) (Mem. at 36), is misplaced. Both were cases in which unions sought to compel employers to arbitrate grievances under existing CBAs. Contrary to the NHL's proffered authority, Plaintiffs are retirees, their claims are independent of any CBA provision, and the CBAs' grievance procedures are inapplicable to them.

By virtue of Plaintiffs being prevented from initiating a grievance, and their claims not being grievable under the CBAs, Plaintiffs were not required to exhaust the CBAs' grievance procedures.

3. Preemption of Plaintiffs' Claims Does Not Further the Goals of the LMRA

Preempting Plaintiffs' claims under §301 would not only be improper and unfair, but it would not support any of the stated Congressional goals of the LMRA, which are to:

> promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

LMRA, 29 U.S.C. §141(b); 29 U.S.C. §171(a) (stated LMRA "purpose and policy" of "sound and stable industrial peace," "settlement of issues between employers and ***employees***," and providing "full and adequate governmental facilities for furnishing assistance to employers and representatives of their ***employees***"); *see also Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950) (LMRA is a "complex machinery set up by the

Federal Government for the purpose of encouraging the peaceful settlement of labor disputes."); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (underlying purpose of preemption is to develop uniform interpretation of CBAs to promote "industrial peace").

In *Allied Chemical*, 404 U.S. at 166, the Supreme Court analyzed the purpose of the LMRA in the context of retirees, finding that the LMRA "is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of "'workers' – ***not those who have retired from the work force***." The Court continued: "[t]he inequality of bargaining power that Congress sought to remedy was that of the 'working' man, and the labor disputes that it ordered to be subjected to collective bargaining were those of ***employers and their active employees***." *Id*.

As retirees, Plaintiffs are not employees of the NHL or members of the NHLPA collective bargaining unit and therefore any disputes with their former employer, the NHL, will have zero impact on the efficient flow of commerce. Plaintiffs cannot strike, threaten to strike, or have any impact on the current functioning of the NHL, its current employees or their rights. To that end, preempting Plaintiffs' claims, and forcing them to go to arbitration (under an inapplicable CBA) which they cannot even initiate, would run contrary to the foundational purpose of the LMRA. *See Anderson v. Alpha Portland Indus.*, 752 F.2d 1293, 1298 (8th Cir. 1985) (because retirees "have no recourse to economic weapons" a presumption in favor of arbitrability would further the "national labor policy of peaceful resolution of labor disputes only indirectly, if at all."); *Schneider Moving & Storage*, 466 U.S. at 371-72 ("Because the trustees of employee-benefit funds

have no recourse to [strikes and lockouts] requiring them to arbitrate disputes with the employer would promote labor peace only indirectly if at all"); *see also Allis-Chalmers*, 471 U.S. at 212 ("it would be inconsistent with congressional intent under [§301] to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."); *Republic Steel*, 379 U.S. at 656 (preempting laid-off employee's claims, finding claims based in severance pay provision of CBA as a "concern to all employees" that would impact "future relations between the employer and other employees," including potential work stoppages).[16]

4. Preempting Plaintiffs' Claims Would Leave Them Without Any Forum

Preempting Plaintiffs' claims would leave them without any forum to seek redress for the NHL's wrongs. Due to Plaintiffs retiree status, the NHLPA does not represent Plaintiffs, and even if they did, the NHLPA has no duty to represent them fairly. Moreover, Plaintiffs are prohibited from initiating a grievance on their own behalf. Therefore, if the Court found that Plaintiffs' claims were preempted, it would leave them with no place to bring their claims, nor anyone to bring them on their behalf. *See Robbins*, 700 F.2d at 442 ("the national pension policy [of the LMRA]…, and the rights of plan beneficiaries, can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts"); *Harrison v. Springdale Water &*

[16] *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957) (Mem. 7) mandates non-preemption here. Including much legislative history, *Lincoln Mills* anchors preemption deeply in Congress's §301 goal of achieving "industrial peace," by judicial enforcement of "the agreement to arbitrate grievance disputes" as "the quid pro quo for an agreement not to strike." That quid pro quo is irrelevant to the retiree Plaintiffs' claims and the NHL does not even try to show that preempting Plaintiffs' claims will promote labor peace.

Sewer Com., 780 F.2d 1422, 1427 (8th Cir. 1986) (access to courts is a fundamental right of every citizen); *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1375 (D. Minn. 1985) ("when the legislature or the judiciary act to limit access to the courts, they do so at grave peril to our social fabric.").

E. Neither Section 301 Nor the Presumption of Arbitrability Justify Dismissal Because Neither Applies to Plaintiffs' Claims

The NHL's concluding dismissal argument based on §301's non-recognition of tort claims and on the "presumption of arbitrability" is circular, assuming the conclusion that Plaintiffs claims are preempted. As shown above, Plaintiffs' claims are not based on any CBA-specified contractual right. Nor are those claims "substantially dependent" on any CBA provision for resolution. Section 301 does not apply. The NHL's argument that these claims must be dismissed as non-cognizable tort claims under §301 (Mem. at 35-36) therefore fails.

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010) (Mem. at 35), confirms rather than contradicts that point.[17] *Granite Rock*, vastly different from this case, involved a quintessentially collective bargaining question of when a CBA took effect for purposes of determining the legality of a strike by current employees. Plaintiffs in this case are not current employees, not subject to a CBA, and have no ability to strike.

Arguing that Plaintiffs failed to exhaust their CBA grievance remedy (Mem. at 36-37), the NHL ignores that the retiree Plaintiffs have ***no*** grievance remedy. No CBA

[17] *Trs. of the Twin City Bricklayers*, 450 F.3d 324; *Finney v. GDX Auto.*, 135 F. App'x 888 (8th Cir. 2005); and *Conrad v. Xcel Energy, Inc.*, 2013 U.S. Dist. LEXIS 49840, at *19 (D. Minn. Apr. 5, 2013) (Mem. at 36) all stand for the uncontroversial proposition that preempted tort claims are not cognizable under §301.

provision provides for arbitration of retiree tort claims. *Granite Rock* confirms that no "presumption of arbitrability" can compel arbitration where parties have not contractually agreed to arbitrate. 561 U.S. at 311 ("federal courts' authority to create a federal common law of [CBAs] under section 301 should be confined to a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is…a grant of jurisdiction only to enforce contracts."); *see also Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683-84 (2010) (in light of the "contractual nature of arbitration…it follows that a party may not be compelled…to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.").[18]

IV. CONCLUSION

Plaintiffs respectfully request that the Court deny the NHL's Motion to Dismiss Master Complaint Based on Labor Law Preemption.

[18] For similar reasons, the facts here are easily distinguishable from *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (Mem. at 36), creating presumption of arbitrability where no dispute exists that a CBA applies and contains an arbitration clause. Here, the CBAs do not apply to Plaintiffs (as non-bargaining unit retirees) or their claims (based on independent state tort law), and contain arbitration provisions limited to the NHL and the NHLPA (thereby excluding Plaintiffs from the arbitration process).

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By: /s/ Charles S. Zimmerman
Charles S. Zimmerman
Brian C. Gudmundson
Hart L. Robinovitch
David M. Cialkowski
Brad Buhrow
ZIMMERMAN REED, PLLP
1100 IDS Center, 80 S. 8th St.
Minneapolis, MN 55402
Telephone: (612) 341-0400
charles.zimmerman@zimmreed.com
brian.gudmundson@zimmreed.com
hart.robinovitch@zimmreed.com
david.cialkowski@zimmreed.com
brad.buhrow@zimmreed.com

By: /s/ Stuart A. Davidson
Stuart A. Davidson
Mark J. Dearman
Leonard B. Simon
Kathleen B. Douglas
Janine D. Arno
ROBBINS GELLER RUDMAN
& DOWD LLP
120 E. Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
sdavidson@rgrdlaw.com
mdearman@rgrdlaw.com
lens@rgrdlaw.com
kdouglas@rgrdlaw.com
jarno@rgrdlaw.com

By: /s/ Stephen G. Grygiel
Steven D. Silverman
Stephen G. Grygiel
William Sinclair
SILVERMAN, THOMPSON,
SLUTKIN & WHITE, LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
ssilverman@mdattorney.com
sgrygiel@mdattorney.com
bsinclair@mdattorney.com

Plaintiffs' Co-Lead Counsel

Lewis A. Remele
Jeffrey D. Klobucar
BASSFORD REMELE
33 S. 6th Street
Minneapolis, MN 55402
Telephone: (612) 333-3000
lremele@bassford.com
jklobucar@bassford.com
scotta@bassford.com

Plaintiffs' Liaison Counsel

Thomas Demetrio
William T. Gibbs
Katelyn D. Geoffrion
CORBOY & DEMETRIO
33 N. Dearborn Street
Chicago, IL 60602
Telephone: (312) 346-3191
tad@corboydemetrio.com
wtg@corboydemetrio.com
kdg@corboydemetrio.com

Brian D. Penny
Mark S. Goldman
GOLDMAN, SCARLATO & PENNY PC
101 E. Lancaster Ave., Suite 204
Wayne, PA 19087
Telephone: (484) 342-0700
penny@gskplaw.com
goldman@gskplaw.com

Vincent J. Esades
James W. Anderson
HEINS MILLS & OLSON, PLC
310 Clifton Ave.
Minneapolis, MN 55403
Telephone: (612) 338-4605
vesades@heinsmills.com
janderson@heinsmills.com

Thomas J. Byrne
Mel Owens
NAMANNY, BYRNE, & OWENS, APC
2 S. Pointe Dr.
Lake Forest, CA 92630
Telephone: (949) 452-0700
tbyrne@nbolaw.com
mowens@nbolaw.com

David I. Levine
THE LEVINE LAW FIRM P.C.
1804 Intracoastal Drive
Fort Lauderdale, FL 33305
Telephone: (954) 385-1245
agentdl@bellsouth.net

Michael R. Cashman
Richard M. Hagstrom
Shawn Stuckey
ZELLE HOFMANN VOELBEL
& MASON LLP
500 S. Washington Ave., #4000
Minneapolis, MN 55415
Telephone: (800) 899-5291
mcashman@zelle.com
rhagstrom@zelle.com
sstuckey@zelle.com

Daniel E. Gustafson
Daniel C. Hedlund
GUSTAFSON GLUEK PLLC
Canadian Pacific Plaza
120 S. 6th Street, Suite 2600
Minneapolis, MN 55402
Telephone: (612) 333-8844
dgustafson@gustafsongluek.com

Jeffrey D. Bores
Bryan L. Bleichner
CHESTNUT CAMBRONNE PA
17 Washington Ave. North, Suite 300
Minneapolis, MN 55401
Telephone: (612) 339-7300
jbores@chestnutcambronne.com
bbleichner@chestnutcambronne.com

Plaintiffs' Executive Committee