UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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

The National Hockey League ("NHL") brings this motion to enforce the subpoena duces tecum served on the Boston University CTE Center ("BU CTE Center" or the "Center") on October 11, 2016. (Declaration of Daniel J. Connolly ("Connolly Decl.") Ex. A.) The Center has produced only a portion of the requested materials, and although the parties have tried in good faith to reach agreement on the remaining materials, a dispute remains for the Court to resolve. The NHL seeks an Order compelling the BU CTE Center to produce the remaining relevant materials requested in the subpoena.

PRELIMINARY STATEMENT

A major issue in this case is whether valid, scientific evidence has existed throughout the alleged class period showing that concussions or so-called subconcussive blows cause later-in-life neurodegenerative brain diseases or the pathology referred to as chronic traumatic encephalopathy ("CTE"). Not only is this a key factual issue that speaks to the merits of the case, but it also will be fundamental to the determination of

whether individualized issues preclude certification of the class under either the predominance or cohesiveness requirements of Federal Rule of Civil Procedure 23.

There is no question that the requested BU CTE Center materials are highly relevant to the case. Indeed, Plaintiffs have made it quite clear—in their Second Amended Consolidated Class Action Complaint ("SAC"), in their memorandum of law in support of class certification ("Cert. Mem."), and elsewhere—that they believe the BU CTE Center's work will be integral to proving their claims. In turn, the Center's data, studies, methodologies, public assertions, and their scientific bases must all be considered highly relevant.

Given the indisputable relevance of the materials sought from the BU CTE Center, the law is well settled that the NHL is entitled to exactly this type of third-party discovery. There are simply no legitimate reasons to deny this discovery, especially given the NHL's willingness to cooperate with the BU CTE Center to address any purported confidentiality and burden issues. Specifically, in the Eighth Circuit, there is no "scholar privilege" that would protect this information; moreover, courts routinely require the production of such materials (even in jurisdictions that have recognized such a privilege) where the information sought is directly relevant to an issue in the case, including general and specific causation, as here. Additionally, where a third party raises confidentiality concerns, the proper way to address those concerns is not to prohibit discovery but rather to address those concerns through de-identification of confidential information, where necessary, and the use of appropriate protective orders. Indeed, in this litigation, the Court already found that confidentiality concerns can be essentially

eliminated through de-identification and use of a protective order when it compelled third-party Chubb Corporation to produce the results of any independent medical examinations performed on retired NHL hockey players. While acknowledging Chubb's "concerns for privacy and burden," the Court required production given "that these documents could be very highly relevant to this litigation." (Dkt. No. 556, at 4.) Finally, it cannot be either overly costly or unduly burdensome for a third-party to comply with a subpoena where, as here, the defendant is willing to pay for collection and review of relevant materials.

In sum, the balance tips decidedly in favor of production here. The Court should grant the NHL's motion to compel and allow this highly relevant information to be available in the case, including for litigating class certification.

BACKGROUND

I. THE PURPORTED LONG-TERM EFFECTS OF CONCUSSIONS ARE A CENTRAL ISSUE IN THIS LITIGATION

As Plaintiffs acknowledged in ***their memorandum*** in support of their motion to enforce a subpoena to the Chubb Corporation (Dkt. No. 383 ("Chubb Mem.")), their core allegation is that they have suffered "pathological effects of brain injuries caused by concussive and sub-concussive impacts sustained by NHL players during their professional careers." (Chubb Mem. at 1-2, (citing Dkt. No. 351, Plaintiffs' First Amended Consolidated Class Action Complaint ("FAC") ¶ 1.) In that brief, Plaintiffs also "allege that the NHL has known, or should have known, from medical and scientific

research that head trauma sustained by NHL players puts them at a significantly greater risk for developing Brain Disease."[1] (*Id*. at 2, (citing FAC ¶¶ 165-275).)

Likewise, in their Second Amended Complaint, Plaintiffs repeatedly allege that head injuries cause CTE:

- "Long-term effects of brain damage caused by repeated MTBI include Alzheimer's disease, dementia, and ***CTE*** . . ." (SAC ¶ 167 (emphasis added).)

- "CTE is found in athletes (and others) with a history of repetitive concussions. Conclusive studies have shown this condition to be prevalent in retired professional hockey players who have a history of brain injury." (*Id*. ¶ 169.)

- "Put simply, overwhelming evidence shows that CTE is caused by repeated sublethal brain trauma of the sort Plaintiffs repeatedly suffered." (*Id*. ¶ 210.)

Critically, here, Plaintiffs rely on the work of the BU CTE Center to support allegations related to causation:

> In 2008, Boston University's Dr. Ann McKee (who performed the Reggie Fleming autopsy in 2010) stated that the "easiest way to decrease the incidence of CTE [in contact sport athletes] is to decrease the number of concussions." Dr. McKee further noted that "[t]here is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma." (*Id.* ¶ 382 (alterations in original).)

In addition to the issue of causation, Plaintiffs cite the work of doctors at the BU CTE Center as the basis for many of their other allegations, including allegations that four hockey players have been diagnosed with CTE. (*Id*. ¶¶ 172-174, 211.)

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[1] Plaintiffs define "Brain Disease" as "any of the following: Alzheimer's Disease, Parkinson's Disease, amyotrophic lateral sclerosis ('ALS'), post-concussion syndrome, neurological deficit, cognitive impairment, dementia, or chronic traumatic encephalopathy (CTE), among other serious disorders." (Chubb Mem. at 3 n.1.)

Plaintiffs' counsel also have echoed these allegations in the press. For example, Plaintiffs' counsel have questioned Commissioner Gary Bettman's statements about the limitations of current CTE research, asking: "Why is he so willing to go against conventional science which says repeated blows to the head cause damage to the brain?"[2] Counsel also have publicly stated that Plaintiffs' current symptoms can be attributed to those head injuries: "It's because they played the sport. It's because they took a lot of hits and a lot of banging, and now they're paying the price."[3]

More recently, Plaintiffs have argued that this Court should certify a class to address the question of "whether concussive and subconcussive impacts experienced in NHL hockey create a risk of, and can cause, long-term or permanent neurological damage, including the injuries claimed herein." (Cert. Mem. at 34.) In support of their motion, Plaintiffs offer reports from scientific experts who opine on the issue of causation and rely in significant part on the work of the BU CTE Center as the basis for their opinions. For example, Dr. Robert Cantu is a Clinical Professor of Neurology and Neurosurgery at Boston University School of Medicine and is "the Co-Founder, and Clinical Diagnostics and Therapeutics Leader, of the Chronic Traumatic Encephalopathy – Alzheimer's Disease (CTE-AD) Center at Boston University Medical Center." (Dkt.

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[2] Ian McLaren, *Concussion Lawsuit Lawyers Want to Question Bettman over stance on CTE*, the Score (July 29, 2016), http://www.thescore.com/nhl/news/1066957-concussion-lawsuit-lawyers-want-to-question-bettman-over-stance-on-cte.

[3] John Vogl, *16 Ex-Sabres Among 104 Fighting to Force NHL to Pay for Medical Care for Post-Concussion Symptoms*, Buffalo News (June 19, 2016), http://buffalonews.com/2016/06/19/16-ex-sabres-among-104-fighting-to-force-nhl-to-pay-for-medical-care-for-post-concussion-symptoms/.

No. 646, Declaration of Robert C. Cantu ¶¶ 7-8.) He relies on the neuropathological work of his colleagues at the Center to support his opinions related to CTE. (*Id*. ¶¶ 95, 99, 101, 102, 104; *see also* Dkt. No. 645, Declaration of Thomas Blaine Hoshisaki ¶¶ 31, 39, 47 (relying on BU CTE Center publications to support opinions that head impact exposure causes cognitive deficits or neurodegenerative conditions, including CTE).)

Finally, while the discovery sought from the BU CTE Center has always been pertinent to this litigation, its relevance has become even more obvious after Plaintiffs added claims on behalf of the estate of Larry Zeidel. It is undisputed that the BU CTE Center doctors' pathological findings of CTE in Larry Zeidel are the basis for his claim. (SAC ¶ 79.) Thus, how doctors at the BU CTE Center reached that diagnosis is, among other issues, crucial to the NHL's defenses in this litigation. Indeed, the Zeidel autopsy itself is likely to shed light on individualized issues that arise from CTE diagnoses made at the BU CTE Center that will be relevant to class certification.

In sum, the work of the BU CTE Center is at the heart of merits and class issues in this case, and to defend itself at all stages of this litigation, the NHL must respond to Plaintiffs' characterization of that work.

II. THE BU CTE CENTER

The BU CTE Center primarily researches CTE—a pathology which doctors at the Center claim is a purported potential long-term consequence of repetitive head injury. Since the BU CTE Center's inception, doctors at the Center have performed over 100 autopsies looking for pathological findings consistent with CTE. This research focuses

primarily on athletes, in part because on December 21, 2009, the National Football League Players Association announced that it would collaborate with the BU CTE Center to support its study of repetitive brain trauma in athletes. Accordingly, many former athletes—some of whom are football players, but some of whom played other amateur, collegiate, and professional sports—have donated their brains upon death to the Center for research. Under the direction of Dr. Ann McKee, the Center, in conjunction with the Concussion Legacy Foundation and the Veterans Administration, currently maintains what is described as the largest brain repository in the world dedicated to the study of CTE.[4]

Drs. Ann McKee and Robert Stern perform CTE research at the Center and have published numerous articles relating to their work on CTE (many of which are cited in the complaints, motions, and expert reports of Plaintiffs in this litigation). They also have spoken numerous times at conferences and to the press regarding their work. The methodology, among other things, underlying that work is critical in this case. Notably, through that public discourse, doctors at the BU CTE Center have interjected themselves into discussions relevant to this litigation. The BU CTE Center has issued press releases related to CTE diagnoses in hockey players, has posted copies of pathology photos from cases on its website, and routinely has identified pathology photographs and patient

[4] *See* Christopher Nowinski, http://chrisnowinski.com/bu-cte-center/ (noting that "the VA-BU-SLI Brain Bank [is] the world's largest CTE tissue repository housing the brains of over 260 deceased athletes and military veterans, over 160 of which have been diagnosed with CTE").

names, including of NHL players, in public presentations on CTE. Dr. McKee also has publicly discussed CTE diagnoses for unnamed class members in this litigation and opined on the cause of their purported symptoms. For example, in an interview with ESPN's Outside the Lines that was broadcast on January 15, 2017, Dr. McKee stated that "the evidence is overwhelming that contact sports, like football, boxing, hockey . . . can cause CTE in some individuals." The interview then discussed 273 autopsies of athletes performed at the Center, including five NHL players, and Dr. McKee further stated that "it's clear, we have a brain autopsy of an NHL player . . . and their brain shows clear evidence of a distinct disease that you can't get any other way, and that's CTE."[5]

III. THE NHL'S SUBPOENAS CONCERNING BU CTE CENTER RESEARCH

Because of the relevance to this litigation of the work performed by Drs. McKee and Stern at the BU CTE Center, on September 1, 2015, the NHL issued subpoenas to Drs. McKee and Stern seeking materials related to (1) their research conducted on the brains of deceased hockey players, and (2) records related to meetings between the doctors and the NHL. (Connolly Decl. Ex. B.) On October 26, 2015, Drs. McKee and Stern jointly responded and objected, indicating that they would only produce information for a hockey player if the doctors received a signed medical release from the player's family. They did not offer to produce other relevant files in redacted form. (Connolly Decl. Ex. C.)

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

On February 3, 2016, the NHL sent a deficiency letter to Drs. McKee and Stern, indicating that they had not produced certain requested information, including emails responsive to all requests, handwritten notes responsive to all requests, and/or drafts, reviewer comments, or general discussions, emails, or presentations related to the methodology, pathological findings, and/or diagnoses referenced in the doctors' articles. (Connolly Decl. Ex. D.) The NHL continued to meet and confer with the counsel representing Drs. McKee and Stern regarding these requests to determine whether additional relevant materials might exist.

On October 11, 2016, after Plaintiffs moved to add the Zeidel estate as a class representative, the NHL issued a broader subpoena to the BU CTE Center seeking materials relevant to a variety of scientific issues in the case. (Connolly Decl. Ex. A.) Primarily, the NHL sought underlying data and information about the methodology and conclusions drawn in articles published by doctors at the BU CTE Center. After meeting and conferring, the parties came to agreement on many of the requests, but they could not reach agreement with respect to Requests 2, 3, 6, 7, 8, 11, 14, 15, 18 or 19. The BU CTE Center provided a small production on January 11, 2017, along with its Responses and Objections. (Connolly Decl. Ex. E.) While the Center has made clear it will not move to quash the subpoena with respect to the remaining Requests, its Responses and Objections indicate that it is unwilling to produce some additional relevant materials requested by the subpoena. Below is a summary of those requests, as well a description of their relevance:

Information regarding the prevalence of CTE in athletes and non-athletes:

- **Request 2**: Documents sufficient to show what persons were examined by the BU CTE Center and were not diagnosed with CTE, which are relevant to understanding prevalence rates of CTE and the sample size of hockey players examined by the Center compared to other athletes;

- **Request 3**: Documents sufficient to identify all athletes, other than Zeidel, who have donated or who have agreed to donate their brains to You or whose brains have been examined by You, including: (i) the date each athlete agreed to donate his/her brain; (ii) the date(s) on which the brain was examined; (iii) Your finding with regard to CTE pathology; and (iv) the stage of CTE found, if any, which are relevant to understanding (a) prevalence rates and the sample size of hockey players examined by the Center compared to other athletes; (b) the timing of when brains were analyzed at the Center and how hypotheses about CTE developed; (c) the basis for CTE staging and to assess the strength of the Center's research supporting the position that the disease is "progressive."

Information regarding the putative class members in this case:

- **Request 6**: Pathology photographs, including those obtained from autopsy materials, of brains and/or other organs of Zeidel, other hockey players, including NHL Players, and other athletes, examined by You in connection with research related to CTE, which are relevant to allowing NHL experts to confirm the accuracy of published findings, to probe the scientific bases for the publications' conclusions, and to explore potential co-morbidities;

- **Request 7**: Slides, or copies of slides, related to Zeidel, other hockey players, including NHL Players, and other athletes, examined by You in connection with research related to CTE, which are relevant to allowing NHL experts to confirm the accuracy of published findings, to probe the scientific bases for the publications' conclusions, and to explore potential co-morbidities;

- **Request 14**: Death certificates and autopsy reports, including any general autopsy or neuropathology reports of Zeidel, other hockey players, including NHL Players, and other athletes examined by You in connection with research related to CTE, which are relevant to allowing NHL experts to confirm the accuracy of published findings, to probe the scientific bases for conclusions, and to explore potential co-morbidities;

- **Request 15**: Medical records of Zeidel, other hockey players, including NHL Players, and other athletes examined by You and/or other affiliated entities, such as CLF, including: (i) clinical records; (ii) medical histories or

summaries; and (iii) interviews conducted with family members or acquaintances, which are relevant to allowing NHL experts to confirm the accuracy of published findings, to probe the scientific bases for conclusions, and to explore potential co-morbidities.

Information regarding the methodology used by the Center and the conclusions it has drawn regarding any connection between concussions and subconcussive blows on later-in-life neurodegenerative diseases or CTE:

- **Request 8**: Documents and Communications related to any finding or assertion by You that CTE pathology was caused by concussions and/or subconcussive blows sustained while playing contact sports, which are relevant to understanding (a) the scientific basis purportedly linking the CTE pathology found at autopsy to head injury and (b) whether there is any variation between boxing, football, and other sports compared to hockey;

- **Request 11**: Documents and Communications related to any finding or assertion by You that CTE pathology caused any clinical symptoms purportedly experienced by athletes, which are relevant to understanding (a) the scientific basis purportedly linking the CTE pathology found at autopsy to clinical symptoms and (b) whether there is any variation between boxing, football, and other sports compared to hockey;

- **Request 18**: Documents related to publications[6] related to CTE or other long-term neurodegenerative diseases that You prepared for peer-reviewed journals: (i) abstracts; (ii) presentations; (iii) draft publications; and/or (iv) Communications between or among employees, representatives, and/or consultants of the BU CTE Center and/or other affiliated entities, including CLF, about those Documents, including Communications related to the scope, limitations, conclusions, and/or phraseology used in such publications or potential publications, which are relevant to allowing NHL experts to confirm the accuracy of published findings and to probe the scientific bases for the publications' conclusions, as well as to understanding when those conclusions were formed, changed, and/or were publicly shared;

- **Request 19**: Documents related to publications[7] related to CTE or other long-term neurodegenerative diseases You prepared for peer-reviewed journals

[6] The NHL agreed to modify this request to seek materials related only to published publications.

[7] The NHL agreed to modify this request to seek materials related only to published publications.

constituting (i) reviewer comments or questions and (ii) responses to reviewer comments or questions, including Communications related to the scope, limitations, conclusions, and/or phraseology used in such publications, which are relevant to allowing NHL experts to confirm the accuracy of published findings and to probe the scientific bases for the publications' conclusions, as well as to understanding when those conclusions were formed, changed, and/or were publicly shared.

ARGUMENT

I. THE FEDERAL RULES OF CIVIL PROCEDURE ALLOW FOR DISCOVERY OF ALL RELEVANT MATERIALS THAT ARE NOT PRIVILEGED OR UNDULY BURDENSOME

The Federal Rules of Civil Procedure permit broad discovery, allowing a party to "obtain discovery regarding ***any nonprivileged matter that is relevant to any party's claim or defense*** and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1) (emphasis added). Significantly, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id.*

Federal Rule of Civil Procedure 45, which governs discovery of nonparties by subpoena, permits the same scope of discovery as Federal Rule of Civil Procedure 26. *See, e.g.*, *StoneEagle Servs., Inc. v. UMB Bank, N.A.*, No. 4:15-mc-0904-NKL, 2015 WL 2452926, at *3-5 (W.D. Mo. May 22, 2015) (applying Rule 26 standards to a nonparty subpoena issued pursuant to Rule 45); *Heitzman v. Engelstad,* No. 12-2274 MJD/LIB, 2013 WL 4519403, at *3 (D. Minn. July 11, 2013) (internal citations omitted) (holding

that "'[p]ursuant to a subpoena, a non-party can be compelled to produce evidence regarding any matter relevant to the claim or defense of any party, unless a privilege applies'")(citation omitted)), *aff'd*, 2013 WL 4516320 (D. Minn. Aug. 26, 2013).

These discovery rules "'are to be accorded a broad and liberal treatment.'" *Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F. 3d 428, 430 (8th Cir. 1998) (quoting *Hickman v. Taylor,* 329 U.S. 495, 507 (1947)). Because the Federal Rules of Civil Procedure favor production of relevant documents, """[t]he party resisting production bears the burden of establishing lack of relevancy or undue burden."""" *Bombardier Recreational Prods., Inc. v. Arctic Cat, Inc.*, No. 12-cv-2706 (MJD/LIB), 2014 WL 5685463, at *5 (D. Minn. Sept. 24, 2014) (citations omitted), *aff'd*, 2014 WL 5685707 (D. Minn. Nov. 4, 2014).

Here, the materials requested from the BU CTE Center are indisputably relevant both to Plaintiffs' claims and the NHL's defense. The BU CTE Center has unique access to the discovery requested, and if produced, such discovery will impact arguments related to central issues in the case, including general causation and, *inter alia*, understanding what could have been scientifically known about head injuries and CTE at different points in time. As discussed in more detail below, (a) no privilege precludes production of these materials; (b) the requested materials are highly relevant to the NHL's defense; (c) redactions and/or a protective order can protect all sensitive or confidential information contained within the materials; and (d) the NHL is willing to pay costs associated with compliance with the subpoena to avoid imposing any undue burden on the Center. Under these circumstances, the Court should compel the BU CTE Center to produce all relevant materials. *See Satchell v. FedEx Corp.*, No. C 03-02659 SI, 2005

WL 646058, at *1 (N.D. Cal. Mar. 21, 2005) ("A motion to compel a discovery response is appropriate when a party disobeys a proper request by refusing to produce relevant, non-privileged discovery."); *cf.* Fed. R. Civ. P. 37(a)(1), (3).

A. The BU CTE Center Is Not Shielded From Its Discovery Obligations by Any Privilege

During meet-and-confer discussions, the BU CTE Center took the position that the NHL's discovery requests are burdensome because the Center is an disinterested third-party entity that performs academic, scientific research—presumably invoking some form of academic privilege. The Eighth Circuit, however, has not recognized an exemption to the Federal Rules of Civil Procedure for academic researchers. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:12-mc-508 JAR, 2012 WL 4856968, at *2 (E.D. Mo. Oct. 12, 2012) ("[T]he Eighth Circuit has not addressed the existence of an academic or scholar's privilege as a defense to subpoenas calling for the production of research data, and the majority of courts outside this Circuit that have considered the issue have declined to recognize it."); *see also Kellington v. Bayer Healthcare Pharm., Inc.*, No. 5:14-cv-2, 2016 WL 5349801, at *2 (W.D. Va. Sept. 23, 2016) (holding that "there is no blanket prohibition set forth in the discovery rules against discovery directed at third-party academics . . .") (collecting cases). Accordingly, while the NHL is cognizant of the confidentiality concerns inherent in academic research that were raised by the Center, those concerns do not exempt the Center from complying with the subpoena but, as discussed below, instead should be addressed through a protective order.

Even if such a privilege were to apply here, the NHL would still be entitled to the highly relevant discovery it seeks. Even in the minority of circuits where courts have recognized a privilege for academic researchers, those courts nonetheless have required non-party academic entities to produce "relevant" information pursuant to a protective order and/or with confidential information redacted. *See Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563-66 (7th Cir. 1984); *Application of Am. Tobacco Co.*, 880 F.2d 1520, 1526-31 (2d Cir. 1989). For example, in *Deitchman v. E.R. Squibb & Sons, Inc.*, a drug manufacturer defendant in a products liability action sought underlying data from the "first medical researchers [who published a peer-reviewed study suggesting] an association between exposure to DES in the womb and the development of clear cell adenocarcinoma of the vagina or cervix at an early age." *Deitchman*, 740 F.2d at 558. The defendant sought ***every*** document in the Registry for Hormonal Transplacental Carcinogenesis at the University of Chicago, a third party which monitored the incidence of cancers of the genital tract, and a University of Chicago doctor moved to quash the subpoena. *See id*. The district court "in major part" granted the motion to quash. *Id*. On appeal, the Seventh Circuit vacated the district court's order and remanded with instructions to permit discovery with appropriate protective measures. *See id*. at 558, 564-66.

The Seventh Circuit summarized the doctor's "real and deepest objection" as being "that he must be allowed to divulge to the public the results of his studies only in his own time and way. His conclusions [were] still tentative, data [was] still being collected. He [had] not yet submitted his case to 'peer review' as is normal in the

scientific community, despite his many publications." *Id*. at 560. The court recognized that these were legitimate academic concerns, *see id*., but nonetheless highlighted the dangers that could arise if plaintiffs could rely upon the doctor's published opinions without allowing the defendant's experts to investigate the underlying data. *Id*. at 563. The court noted that first, the study "may have a number of different, but inadvertent, biases present" that cannot be identified without looking at the underlying data, and second, "[i]t could easily be that [the defendant] would be hit with large verdicts on the basis of conclusions that are avowedly only tentative[, and a]fter a series of final judgments, [the researcher] might one day announce that new information has led him to abandon his previous conclusions." *Id*.

After weighing the balance of both parties' interests, the court found that the defendants had a compelling need for the underlying data from the doctor's study:

> ***The value of the conclusions [in peer-reviewed studies] turns on the quality of the data and the methods used by the researcher***. . . . So if the conclusions or end product of a research effort is to be fairly tested, ***the underlying data must be available to others equally skilled and perceptive.*** In the eyes of the law, there is no such thing as an infallible witness.

Id. at 562 (emphases added) (citations omitted); *see also Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 521 (D.C. Cir. 1996). Accordingly, the Seventh Circuit remanded to the lower court to fashion an order that would provide the defendant with necessary information for its defense and a protective order to preserve research participants' confidentiality. *See Deitchman*, 740 F.2d at 568.

Similarly, in *In re Phenylpropanolamine (PPA) Products Liability Litigation*, plaintiffs based their allegations on a New England Journal of Medicine article published

by researchers at Yale University that asserted there was a causal link between the use of PPA and hemorrhagic stroke. *See* Order re: Motion to Quash Subpoenas re Yale Study's Hospital Records, *In re: Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. Aug. 19, 2002). The court denied Yale University's motion to quash the defendants' subpoena, finding that the underlying medical records would allow defendants to verify the accuracy of the data and clarify whether confounding factors could explain some of the participants' diagnoses. *Id*.; *see also* Confidentiality Order re WHI Study Data at 1-4, *In re: Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. Feb. 1, 2005), Dkt. No. 509 (ordering researchers to produce underlying data that would allow defendants to adequately prepare their defense); *accord* Order at 1-2, *In re: Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. Mar. 20, 2006), Dkt. No. 1077; Order re: WHI Extension Study Data at 1-3, *In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW (E.D. Ark. July 13, 2009), Dkt. No. 2106.

Together, these and similar cases overwhelmingly demonstrate the importance of allowing a defendant to analyze the underlying data—or other relevant information—related to third-party researchers' relevant publications to assess the strength of the publications' conclusions. Entities like the BU CTE Center are not shielded from producing relevant materials merely because they are researchers or because they are not testifying in the litigation.

B. The Requested Documents Are Relevant To The NHL's Defense

Absent any privilege, courts compel production of ***all*** materials that are "relevant"—i.e., where the requested materials may relate to any key elements, issues, or

defenses in the case. For example, in *Kellington*, the court considered the exact issue before this Court: whether a third-party academic researcher must produce to defendants the underlying data from his or her study, where the researcher is not an expert for the plaintiffs, but where plaintiffs' experts rely upon that research. *See Kellington*, 2016 WL 5349801, at *2. After determining that there was "no privilege or prohibition against disclosure," the *Kellington* court found that the underlying data was relevant because the plaintiffs' experts relied on the researcher's article to opine on the central issue of causation. *Id*. at *2; *see also Deitchman*, 740 F.2d at 563 (opining that for the defendant "to prepare properly a defense on the causation issue, access to the [third-party researcher's underlying] data to analyze its accuracy and methodology is ***absolutely essential***" (emphasis added)).

Similarly, here, to adequately prepare its defense, the NHL is entitled to probe the scientific basis of Plaintiffs' allegations in this case through the highly relevant materials sought in the requests at issue.[8] The NHL is entitled to examine whether the underlying data from articles published by the Center support the conclusions asserted by the scientists themselves and, of course, the allegations made by *Plaintiffs' counsel*—who are not scientists and may be overstating the strength of the BU CTE Center's research.

[8] These requests cannot be limited to hockey-related materials as Plaintiffs' allegations are not limited to studies relating to hockey players. Plaintiffs repeatedly reference studies involving other athletes that allegedly should have put the NHL on notice of a purported causal link between head injuries and CTE. (*See, e.g.*, SAC ¶¶ 121, 130, 200-02, 206-08, 213-14, 344.)

Likewise, the NHL also is entitled to scrutinize the methodology and conclusions of the BU CTE Center's research—again, relating to all athletes and studies. For example, the NHL has requested materials that will provide information regarding how the researchers at the BU CTE Center determined that head injuries—and not other potential causes—caused the pathological findings observed in athletes' brains. This information also will allow the NHL to understand how these conclusions have evolved over time, which is highly relevant to its potential defenses regarding what the medical community understood at different points in time regarding a purported causal link between head injuries and pathological findings consistent with CTE.

The NHL also is entitled to determine whether the autopsies performed at the BU CTE Center reveal alternative diagnoses, confounding diseases, or omit consideration of other potential causes of the observed pathological findings. Indeed, as set forth in the Declaration of Rudy Castellani ("Castellani Decl."), Request 6 (pathology photos) and Request 7 (original or copies of brain slides) are crucial to determine whether the case reports described in the BU CTE Center publications represent cases with pathologically significant amounts of tau. (Castellani Decl. ¶ 13.) Through review of photos from the autopsy of Mike Webster performed by Bennett Omalu, Dr. Castellani reached the conclusion that Webster did not have tau deposits consistent with CTE. (*Id.* ¶ 11.) The NHL should have access to materials from the BU CTE Center to allow Dr. Castellani to perform a similar review of relevant case reports here.

Additionally, the NHL should be allowed to assess the posthumous family interviews to determine whether these histories reveal any methodologic bias, are

accurate, and/or present individualized questions related to causation. Finally, the NHL should be allowed to analyze the underlying data to determine whether the findings for hockey players are consistent with findings for other sports, which will be relevant to the issue of whether and to what extent scientific literature on other sports may be relevant to this case.

Notably, the need for third-party discovery is enhanced when information is uniquely available from the party from whom it is sought. *See, e.g.*, *Kellington*, 2016 WL 5349801, at *2. As described above, the BU CTE Center is the prominent research institution for CTE, and it is the only institution that has diagnosed Zeidel with CTE. The Center therefore is uniquely positioned to provide the NHL with relevant information.

C. Any Confidential Information Can Be Protected Through Redactions And/Or Production Pursuant to a Protective Order

In meet-and-confer discussions, the BU CTE Center repeatedly asserted that it should not have to produce any non-public materials about articles published by its doctors—purportedly because doing so could have a chilling effect on its research if patients believed their confidential information could be disclosed. The Center's objection is particularly baseless given that the NHL has agreed to redactions that will de-identify any confidential medical information in responsive materials and indicated that any production would be subject to the HIPPA-compliant Amended Protective Order in this case. Under these circumstances, there is no basis for the Center to withhold the materials the NHL has requested. *See Goral v. Omron STI Mach. Servs., Inc.*, No. 4:13CV3003, 2013 WL 6075819, at *1-2 (D. Neb. Nov. 18, 2013) (denying motion to

quash under HIPPA where "[t]he court has already entered a protective order for confidential information exchanged in this case"). Indeed, this Court has already acknowledged that production "pursuant to the HIPPA-complaint Amended Protective Order" accompanied by redactions that de-identify personally identifying information "essentially eliminate[s]" any privacy interest in the contents of a document. (*See* Order on Motion to Enforce Chubb Subpoena, Dkt. No 556, at 8 (internal citations omitted).)

The court considered similar arguments in *Murphy v. Philip Morris Inc.*, 1999 WL 33521196 (C.D. Cal. Dec. 28, 1999), a personal injury case where the plaintiff alleged that he contracted lung cancer from exposure to second hand tobacco smoke. *Id*. at *1. The defendant subpoenaed underlying data from a study conducted by the University of Southern California on "Lung Cancer in Nonsmoking Women." *Id*. The University argued that disclosure of the data would violate its agreement to protect the confidentiality of the identities of study participants. *Id*. The court held that the defendant's "interest in disclosure of the redacted raw data outweigh[ed] the interest of the public in non-disclosure of that redacted data." *Id*. at *4. The court accordingly ordered the University to produce the raw data subject to a protective order that (1) required the redaction of actual identifying information and (2) prohibited any person having access to the data from "attempt[ing] in any way, directly or indirectly, to ascertain the identity of any such . . . study participant." *Id.* at *5.

Here, because the BU CTE Center's confidentiality interests—and the interests of any individuals evaluated by the Center—can be safeguarded by redacting highly sensitive information and/or producing materials pursuant to the Amended Protective

Order, compelling the Center to produce the relevant materials requested by the NHL would not undermine any confidentiality interests raised by the Center.

D. The NHL's Willingness to Pay Costs Associated with Compliance with the Subpoena Eliminates Any Purported Undue Burden to the BU CTE Center

Finally, the BU CTE Center has asserted in meet-and-confer discussions that compliance with the subpoena would be costly and unduly burdensome. But the NHL has addressed this issue by offering to pay for an independent third party (agreed upon by the Center and the NHL) to collect and review the materials potentially responsive to the NHL's requests; the BU CTE Center then could review the materials proposed to be produced for any attorney-client or work-product privileges.

As the court noted in *Wright v. Jeep Corp.*, 547 F. Supp. 2d 871, (E.D. Mich. 1982), where a researcher possesses highly relevant information, this type of fee arrangement protects the researcher from undue burden while allowing the defendant to access necessary information to its defense:

> The Professor claims that having to produce his records and give testimony would be burdensome. He claims that to require him to be available in every lawsuit would create an extraordinary hardship on him and that the court should protect him. His claim must be kept in context with the way in which the system of administrating justice affects every citizen. Every person is burdened by having to disclose knowledge he acquires, even though it is acquired purely by accident. . . . A researcher who spends a great deal of time and effort in uncovering information that becomes important in many lawsuits is subject to a heavy burden. The solution is not to cover-up the information or its data base because disclosure is too burdensome but to use the tools available to lessen the burden and to permit the information to become available.

Id. at 877. Numerous other courts have found any undue burden to a third party is eliminated where the party issuing the subpoena bears the reasonable costs of document

production. *See, e.g.*, *Deitchman*, 740 F.2d at 564 ("[I]t surely was possible here . . . to protect [third parties] against any loss of confidential information and unreasonable financial and temporal costs while still giving [defendant] discoverable information ***at its sole expense***. To give [defendant] virtually no information we reluctantly call an abuse of discretion.") (emphasis added); *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 252 (E.D. Pa. 2014) ("Although it is true that compliance with the subpoena will require [a third party] to review and redact numerous reports and investigative files, this burden is not undue because Plaintiffs will compensate [the third party]."). Accordingly, the arrangement proposed by the NHL resolves any burden issues articulated by the BU CTE Center.

CONCLUSION

For the reasons set forth above, the NHL respectfully requests that the Court grant its motion and compel the BU CTE Center to produce relevant materials requested in the subpoena.

Dated: January 19, 2017

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ATTORNEYS FOR DEFENDANT NATIONAL HOCKEY LEAGUE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

L.R. 7.1 WORD COUNT COMPLIANCE CERTIFICATE REGARDING DEFENDANT NATIONAL HOCKEY LEAGUE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM THE BOSTON UNIVERSITY CTE CENTER

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

I further certify that, in preparation of this memorandum, I used Microsoft® Office Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 6,349 words.

Dated: January 19, 2017

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U.S. District of Minnesota

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