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	)	PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS MASTER COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) AND 9(b)

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INTRODUCTION

The National Hockey League ("NHL" or "League") has known for years that repeated concussive and subconcussive[1] impacts substantially increase the probability that a player will develop a permanent, degenerative brain disease. Instead of disclosing that information to the players, the NHL swept it cleanly under the rug. The NHL did so while preserving the huge profits of a brand built on a culture of unreasonably and unnecessary violent play and bare-knuckle fighting.

As the NHL took affirmative steps to conceal its knowledge and mislead its players, it fostered a hazardous environment in which countless concussed players were pushed back onto the ice as quickly as possible. This resulted in the accumulation of concussive and subconcussive impacts without sufficient time for the players' brains to heal.

This lawsuit is not about discrete concussions experienced by an individual player during one particular game, as the NHL asks this Court to believe. Rather, this case is about Plaintiffs who have developed symptoms of permanent, degenerative brain diseases such as dementia, Alzheimer's disease, ALS, and CTE ***after*** playing in the League, and Plaintiffs who are substantially more likely than the general population to develop such diseases in the future, as a result of the NHL's misconduct. The injuries also include the

[1] Sub-concussive impacts are characterized by repetitive blows to the head and are the building blocks of the progressive degenerative brain disease known as chronic traumatic encephalopathy ("CTE"). (Master Amended Complaint ("MAC") [Docket No. 28] ¶ 216.) They can be even more dangerous than a diagnosed concussion because they leave the brain just as vulnerable to long-term damage, but often go undiagnosed. (*Id.*)

cellular damage and harmful Tau protein accumulation in the brain over years or decades that heightens the risk of developing degenerative brain disease. The NHL's mischaracterization of Plaintiffs' well-pled allegations of concrete injury is telling, if not disturbing—the NHL has created a classic straw man to knock down.

Plaintiffs in the Master Administrative Long-Form and Class Action Complaint, Docket No. 28 ("MAC"), have alleged the NHL knew that returning them and their brethren to play after suffering a concussive impact without adequate medical treatment or time for the brain to properly heal—and encouraging a style of play that causes myriad subconcussive blows—would lead to the development of degenerative brain disease; that the NHL had a duty to inform Plaintiffs of that fact; that the NHL not only failed to fulfill that duty, but also took direct steps to conceal these risks from Plaintiffs; and that the NHL's conduct has caused tragic, permanent injuries to the Plaintiffs, six of the thousands of players who helped make the NHL a multi-billion dollar enterprise. Accepting those allegations as true, the Court should deny the NHL's Motion to Dismiss because Plaintiffs' claims are sufficiently pled and there are genuine issues of material fact as to all other defenses raised.

STATEMENT OF FACTS

I. Unlike Plaintiffs, the NHL Was Aware that Repeated Concussive and Subconcussive Events Can Lead to Permanent Neurological Injuries.

The medical link between concussive and subconcussive events and long-term neurological injuries following an athletic career has been documented in medical litera-

ture for more than 85 years.[2] The MAC identifies some of the many studies available to the NHL. (MAC ¶¶ 179, 184-86, 188-91, 193-94, 198-99, 204-05, 201, 206, 229).

Contrary to the NHL's naked assertion, Plaintiffs allege that they (and other former NHL players who relied on the League for their safety and well-being) did not know and had no reason to know about these medical studies or any information contained in them. (*Id.* ¶¶ 3, 5, 135, 153.) The NHL, however, which always had and continuously confirmed the duty to keep its players safe (*see*, *e.g.*, *id*. ¶¶ 9, 12, 221, 332, 345, 352.), (*id.* ¶¶ 161, 336-56), solicited advice from medical consultants regarding health risks associated with playing the sport, purported to educate players and teams about health risks, attended various international symposia on concussions and brain damage, and in 1997 established a specific concussion program to study brain injuries affecting its players. (*Id.* ¶¶ 9-12, 222, 353, 367.) Ironically, Deputy Commissioner William Daly stated that the NHL adopted an initiative to inform team personnel so they "clearly understand the *latest science regarding concussions*." (*Id.* ¶ 223 (emphasis added).)

Despite the NHL's knowledge and continuously confirmed duty to protect and warn, the NHL never disclosed to Plaintiffs any of the medical studies firmly establishing the link between concussive and subconcussive events and long-term neurological diseases. It said almost *nothing* about the proven risks of long-term neurological damage

[2] According to published reports, NHL players are five times more likely to suffer a concussion than NFL players, a very telling statistic given the NFL has admitted nearly one of every three players will contract debilitating brain disease. (MAC ¶ 214; *see also id.* ¶ 232 (referencing study showing that, of the eight major contact sports, ice-hockey players have the highest concussion rates).)

from repeated brain trauma. (*Id.* ¶¶ 5, 8, 9, 12, 105, 109, 134, 143, 152, 178, 220, 237.) And it never told Plaintiffs that the permanent effects of concussive and subconcussive events, which the NHL knew its players repeatedly suffered and compiled mountains of data regarding, often do not manifest until long after the accumulated events have ceased. (*Id.* ¶¶ 144, 178.) The MAC expressly alleges:

> For almost a century, while unnecessary violence, including brutal fist-fighting, has permeated NHL games, the NHL has been on notice that multiple blows to the head can lead to long-term brain injury, including, but not limited to, memory loss, dementia, depression, and CTE and its related symptoms. There have been legions of studies throughout the eras proving these negative health consequences. Yet, the NHL said nothing to its players about any of it.

(*Id.* ¶ 178.)

Instead, the NHL steadfastly disclaimed and affirmatively downplayed any link between concussive and subconcussive events and long-term neurological injuries – even as objective, scientific evidence mounted. (*See id.* ¶¶ 9, 14, 106, 107-110, 114-19, 136, 142, 332.) For example, in 2011, NHL Commissioner Gary Bettman stated publicly it was premature to draw a connection between CTE and the fighting the NHL encouraged and promoted, stating, "Maybe it is [dangerous] and maybe it's not. You don't know that for a fact" and "people need to take a deep breath and not overreact" and not "over-conclude when the data isn't there yet." (*Id.* ¶ 335.)

At the 2012 NHL Board of Governors meeting, Bettman addressed concussion evidence, fighting in the NHL, and player deaths by saying, "I think it's unfortunate if people use tragedies to jump to conclusions that probably at this stage aren't supported." (*Id.* ¶ 269.) Statements like these and the NHL's non-disclosures gave Plaintiffs and all other

players an understandable—but patently false—sense of "safety" and a perceived freedom to return to game action following a head injury without risking long-term brain damage.

II. The League Promotes a Profitable Culture of Violence that Exacerbates the Problem.

The League fosters a dangerous environment where bare-knuckle fist-fighting is not only tolerated, but encouraged. (*Id.* ¶¶ 20, 237, 274-289.) There are literally hundreds of fights every season. (*See, e.g.*, *id.* ¶ 289 (discussing statistics).)

For the NHL, this culture was (and is) extremely profitable. The League enjoys billions in annual revenue. (*Id.* ¶¶ 290, 302.) And it has acknowledged that it has capitalized on violence, including fighting. (*Id.* ¶ 306.) In 1989, for example, then NHL President John Ziegler stated that "fighting is an acceptable outlet" and confirmed that the "consumer" (*i.e.*, the fan) wants it. (*Id.* ¶ 310.) And in 2011, Commissioner Bettman stated: "Our fans tell us that they like the level of physicality in our game." (*Id.* ¶ 312.) In fact, if players reported violent head impacts that rendered them unable to play, they were often punished by demotion to the minors, resulting in substantial salary cuts. (*Id.* ¶ 328.) Even today, the NHL promotes violence in the game because it thinks "that's what fans want." (*Id.* ¶ 335.) It continues to feature violent hits and fights in commercials and other advertising, as well as on its website. (*Id.* ¶ 315; *see also id.* ¶¶ 315-24.)

For Plaintiffs and other players, however, the result of the NHL's unnecessarily violent culture has been catastrophic, for both themselves and their families. For decades, NHL players who sustained in-game concussions or who lost consciousness were simply

propped up, given smelling salts, and quickly returned to game-action. (*Id.* ¶¶ 127-28, 136, 247.) And between 1997—when the NHL began its Concussion study—and 2011—when it finally published its findings—NHL players continued to experience increasingly devastating and career-ending concussions that put them at risk for permanent neurological injuries. (*Id.* ¶ 365.) It was not until July 23, 2013, that the NHL changed its concussion protocols to require that a concussed player not return to the same game in which the concussion occurred. (*Id.* ¶ 374.)

The concussive and subconcussive impacts sustained by Plaintiffs and other retired players caused twisting, shearing, and stretching of neuronal cells, and in turn caused the release of harmful Tau protein, which accumulates in the brain over time. (*Id.* ¶ 386.) This long-term accumulation of Tau causes changes and damage in the brain on a cellular level and can lead to degenerative brain disease, including but not limited to CTE, dementia, Alzheimer's disease, and similar cognition-impairing conditions. (*Id.*) Plaintiffs have all alleged with crystalline clarity in the MAC the numerous concussions they suffered while on an active NHL roster, and the concomitant resulting brain damage or substantial likelihood of contracting brain damage due directly to the NHL's misconduct. (*Id.* ¶¶ 26-83).

ARGUMENT

Plaintiffs' claims are not time-barred. Implicitly recognizing the fact-intensive limitations inquiry, almost never proper on a motion to dismiss, the NHL basis its statute-of-limitations argument entirely on its mischaracterization of Plaintiffs' alleged injuries as the discrete concussions they suffered during individual games played during their

NHL careers, as opposed to the degenerative brain diseases and the cellular damage of Tau protein accumulation over years or decades that caused, or heightened the risk of, these serious neurological disorders. At this stage, Plaintiffs' well-founded allegations of injury (not Defendant's mischaracterization of them) are presumed to be true and viewed in the light most favorable to them. Under this proper rubric, Defendant's untimeliness arguments must be rejected.

Moreover, the MAC sufficiently details particularized facts giving rise to the NHL's duty to disclose its knowledge of the link between improper treatment of repeated brain trauma and long-term neurodegenerative disease. And finally, even if the Court were to engage in a fact-intensive choice-of-medical-monitoring-law analysis (which is premature for a motion to dismiss), Plaintiffs have sufficiently pled present injury to satisfy even the most stringent standards.

III. Rule 12 Dismissal Is Not Appropriate Because There Are Factual Issues Regarding When Players' Causes of Action Accrued That Are Not Ripe or Resolution on a Motion to Dismiss.

In asserting that the Plaintiffs' claims are time-barred, the NHL misconstrues the nature of the *pleaded* injuries. Those injuries are not discrete head-blows in particular games, but rather are the increased risk and delayed development of permanent degenerative brain diseases resulting from repeated head traumas experienced while playing in the NHL. Moreover, there is a fundamental dispute between the parties about the NHL and the respective players' knowledge of the long-term risks of brain trauma, and the players' knowledge of causative link between the NHL's wrongdoing and their damages. These fact questions are properly the subject of discovery and resolution by the trier of fact, not

by the Court on a Rule 12 motion. This is particularly true where, as here, Plaintiffs allege in painstaking detail in the MAC that they did *not* know of the risks of long-term brain disease from repeated concussions, and allege that the NHL did actively conceal those risks from Plaintiffs and the players for decades.

A. When a statute of limitation accrues is a fact question not properly resolved on a Rule 12 motion.

Whether the limitations periods applicable to Plaintiffs' claims have run is a fact-specific inquiry not properly resolved at the pleadings stage. *Lee v. Wolfson*, 265 F. Supp. 2d 14, 19 (D.D.C. 2003) (defendant moving to dismiss on statute-of-limitation grounds "bears a heavy burden," as determining when a claim accrues in a particular case is a fact question, and dismissal is only appropriate if "no reasonable person could disagree on the date on which the cause of action accrued."); *Grondahl v. Bulluck*, 318 N.W.2d 240, 243 (Minn. 1982) (disputed questions of material fact regarding whether plaintiff's claim is barred by statute of limitations are to be decided by jury.); *Lindsey v. A.H. Robins Co.*, 458 N.Y.S.2d 602, 608 (N.Y. App. Div. 1983) (trial court erroneously dismissed plaintiff's claims as time-barred; appellate court could not say, as a matter of law, when claim accrued, but noted defendant may still be entitled to dismissal if trial evidence establishes plaintiff's claim is time-barred); *Fleishman v. Eli Lilly & Co.*, 465 N.Y.S.2d 735, 737 (N.Y. App. Div. 1983) (Gibbons, J., dissenting in part) ("The question of when an injury occurs is empirical in nature. If the issue is problematic, as in this case, a trial or hearing, where expert testimony can be presented, is necessary to resolve the matter[.]" (relying on *Lindsey*)).

It is clear that there is a fundamental disagreement as to when the applicable limitations periods began to run. Ignoring the MAC, the NHL contends that the statute-triggering injuries are discrete head-blows on particular dates in order to argue the players' causes of action accrued during their playing days or at the time of their retirement. (Def.'s Memo. of Law in Supp. of Mot. to Dismiss ("Def.'s Memo.") [Doc. 46] at 1, 5-7, 8, 11.) But Plaintiffs are not seeking recovery for acute injuries resulting from the individual hits, blows, or instances of trauma inherent in hockey. Rather, Plaintiffs' compensable injuries—and thus the injuries which trigger the limitations periods—are the permanent degenerative brain diseases, or accumulated brain cell damage increasing the risk of such diseases, which arose and of which Plaintiffs became aware only after Plaintiffs retired from the NHL. (MAC ¶¶ 18, 37, 38, 50, 55-57, 64, 65, 72, 83.) Discovery is plainly necessary to determine precisely when *these* statute-triggering injuries occurred.

The parties also disagree on the factual questions of if and when the other knew or should have known about the long-term cumulative effects of brain trauma. For example, the NHL insists that a "widely published body of science" tying "head injuries to degenerative brain disease" should have put the players on notice of their claims, triggering the limitations periods. (Def.'s Memo. at 14-15.) But, putting aside the absurdity of requiring young ice hockey players, often right out of high school, to be aware of this "body of science," even after the NHL spent 14 years purportedly studying concussions in the NHL, and sent members of its own Concussion Program to attend international symposia concerning the dangers of head and brain trauma in hockey and other sports, the Concussion Program report found only "*potential* adverse effects" associated with playing while

concussed, not reporting symptoms, and not recognizing or evaluating suspected concussions. (MAC ¶¶ 114, 367.) Pushed to comment publicly on the long-term effects of concussions, the NHL still responded that more research was needed. (*Id.* ¶¶ 16, 109, 124, 363.) Again, and as noted *supra*, as late as 2012, NHL Commissioner Gary Bettman flatly rejected the notion that the League-perpetuated culture of violence in hockey is causally related to player deaths and long-term cognitive impairments: "I think it's unfortunate if people use tragedies to jump to conclusions that probably at this stage *aren't supported*. . . . I think people need to take a deep breath and *not overreact*." (*Id.* ¶ 269.) It is beyond hypocritical for the NHL to claim that Plaintiff Dan LaCouture, for instance, should have known when he retired in 2008 that playing through concussion symptoms put him at greater risk for developing permanent brain diseases in the future, while at the same time withholding the results of its own Concussion Report, and years later, telling the public and its players that *no link* exists between such diseases and the head shots the NHL promoted. The NHL is essentially arguing that Plaintiffs should have reached scientific conclusions that the League itself affirmatively labored to undermine.

This fact dispute regarding the NHL's and Plaintiffs' knowledge must be resolved by the trier of fact after completion of fact and expert discovery.

B. The players' claims are not barred by the applicable limitations periods of the District of Columbia, Minnesota, or New York.

1. The District of Columbia filers' claims did not accrue until they knew or should have known of (1) their injuries, (2) the cause of such injuries, and (3) the NHL's wrongdoing.

The District's discovery rule is an exception to the general rule that a cause of action accrues at the time of injury. *Lee*, 265 F. Supp. 2d at 17. The discovery rule provides that plaintiffs' claims do not accrue for statute-of-limitation purposes until they know, or with reasonable diligence should know: (1) that they are injured, (2) the injury's cause in fact, *and* (3) of some evidence of wrongdoing. *Id.* It is meant to avoid the unfairness of a cause of action accruing before a plaintiff can reasonably be expected to know that they have a cause of action. *Dawson v. Eli Lilly & Co.*, 543 F. Supp. 1330, 1334, 1338 (D.D.C. 1982). The rule applies in cases where the fact of the injury is not apparent at the time the injury occurs. *Lee*, 265 F. Supp. 2d at 18. It also applies when a plaintiff knows of the injury but not its cause or the defendant's wrongdoing in relation thereto. *Id.*

In the instant case, Plaintiffs allege they did not have knowledge of (1) their injuries, (2) the cause of their injuries, or (3) the NHL's wrongdoing needed to trigger the applicable limitations periods until recently. As to the first element, the limitations-triggering injuries about which the players complain are not, as the NHL asserts, the acutely experienced concussions or other discrete head traumas suffered during the players' playing days. Rather, they are the delayed development of brain diseases, such as ALS, Alzheimer's, dementia, and CTE, which did not arise until years after Plaintiffs left

the game, as well as cellular injuries caused by the accumulation of Tau *over years* or decades that increase the risk of developing such diseases. Therefore, Plaintiffs' claims did not accrue when they suffered any particular concussion while playing or on their retirement dates, as the NHL claims, but much later. When those limitations-triggering injuries occurred is a fact question not properly resolved on the NHL's Rule 12 motion.

Elements two and three—the injuries' cause and the NHL's wrongdoing—are intertwined and equally fact-intensive. The MAC is filled with detailed examples of the NHL's tortious conduct. The NHL put profits ahead of player safety by promoting and glorifying on-ice fighting and violence unnecessary to game play, while concealing (and outright denying) the direct relationship between head injuries inherent in the game and the delayed development of permanent degenerative brain diseases. (MAC ¶¶ 18-20, 344.) To be sure, the NHL's highly educated managerial, legal, and medical staff ignored or downplayed decades' worth of research studies linking brain trauma and degenerative brain disease. (*Id.* ¶¶ 132-34.) They never warned Plaintiffs about the risks of repeated brain trauma and instead encouraged them to play while concussed. (*Id.*) And during its own 14-year study of concussion data, the NHL withheld from players its own findings regarding the dangers of playing while concussed, not reporting concussion symptoms, and not recognizing suspected concussions. (*Id.* ¶¶ 368-70.)

Moreover, the wrongful nature of the NHL's conduct was not reasonably discoverable by Plaintiffs until they learned the cause of their injuries. Plaintiffs allege that, until recently, they did not know and had no reason to know of the causal link between concussions and subconcussive impacts sustained while playing in the NHL and the perma-

nent neurological injuries that can later result from that trauma. (*Id.* ¶¶ 85-86, 91.) And they allege they relied on the NHL's acts and omissions in continuing to play in games and practices right after suffering discrete head injuries. (*Id.* ¶¶ 87-90.) Accepting Plaintiffs' allegations as true for purposes of the NHL's motion, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), *Paulin v. George Washington Univ.*, 878 F. Supp. 2d 241, 245-46 (D.D.C. 2012), the Court should find that premature issues of fact as to when Plaintiffs reasonably should have known of their injuries compel denial of the NHL's motion.

Similarly, the Court should reject the NHL's contention that Plaintiffs should have been alerted to the cause of their injuries or the NHL's wrongdoing. Expecting ice hockey players to "research technical literature and draw [their] own conclusions therefrom" places on them "far too great a burden of due diligence[.]" *Dawson*, 543 F. Supp. at 1339 (despite evidence that test reports and studies regarding allegedly injurious pharmaceutical were publicly available years before plaintiff became aware of her injury, whether plaintiff exercised due diligence in discovering drug maker's wrongdoing was jury question); *see also Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 945 (D.C. 2003) (when accrual actually occurred in a particular case is a question of fact for the fact finder); *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996) (inquiry in discovery rule context is highly "fact-bound" and requires evaluation of all plaintiff's circumstances). Plaintiffs have alleged that they did not know and had no reason to know there was a connection between concussions and subconcussive impacts sustained while playing in the NHL and the likelihood of developing permanent degenerative brain diseases later in life. (MAC ¶

91). The NHL is entitled to try to prove otherwise through discovery, but it is not entitled to dispute or recraft those allegations on a Rule 12 motion to dismiss.

2. The Minnesota filers' claims did not accrue until they knew or should have known of their injuries.

In Minnesota, a cause of action generally accrues when the accident occurs. *Medalen v. Tiger Drylac U.S.A., Inc.*, 269 F. Supp. 2d 1118, 1122 (D. Minn. 2003). However, a claim cannot accrue until some damage results from the tortfeasor's wrongdoing. *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 584 (Minn. 1968) ("An action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence. . . . Thus, the alleged negligence (or breach of implied warranty as the case may be) coupled with the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues.") (citations omitted). Moreover, "'obvious . . . injustices'" could result if this general rule is applied to a plaintiff who does not discover he is injured until after the limitations period has run. *Medalen*, 269 F. Supp. 2d at 1122 (quoting *Dalton*, 158 N.W.2d at 584). Accordingly, a statute of limitations will not run "'until the plaintiff has in fact discovered that he has suffered injury, or by the exercise of reasonable diligence should have discovered it.'" *Id.* (quoting *Dalton*, 158 N.W.2d at 584); *cf. O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d 221, 223-24 (Minn. Ct. App. 1991) (in case involving latent or progressive damage to insured's home, one-year limitations period in insurance contract did not begin to run until "appreciable damage" occurred, which was a fact question warranting reversal of summary judgment for insurer).

Magistrate Judge Erickson's analysis in *Medalen v. Tiger Drylac U.S.A., Inc.* is instructive. Medalen claimed that exposure to powdered paint manufactured by the defendants caused her to develop skin cancer on the bridge of her nose. 269 F. Supp. 2d at 1121. In moving for summary judgment, the defendants argued that the relevant limitations periods began in 1996, when the plaintiff first developed a sore on the bridge of her nose. *Id.* The plaintiff averred that her claim did not accrue until March 21, 1997, when she was first diagnosed with cancer. *Id.*

Agreeing with the plaintiff and denying the defendants' summary judgment motion, Magistrate Erickson compared the plaintiff's repeated and long-term paint exposure to silicosis and asbestosis cases which, like the plaintiff's case in *Medalen* and here, are not based on a single discrete event:

> Plainly, the Plaintiff's injury was not of a type that accrues when an accident occurs. As in cases dealing with silicosis and asbestosis, the Plaintiff's injury was, assertedly, the consequence of exposure to the Defendants' products over a period of time, rather than at one point in time, and something of a continuing tort. As such, the Plaintiff was "injured" only when the accumulated effects of the allegedly deleterious substance manifested themselves in a way that manifested of a disease process in the nature of basal cell carcinoma.

Id. at 1123-24. Magistrate Erickson concluded that the plaintiff's claim accrued upon diagnosis in March of 1997. *Id.* at 1124.[3]

As in Medalen's case, Plaintiffs were "injured" for purposes of the statute of limitations only when the accumulated effects (in the players' case, the cumulative effects of

[3] Magistrate Erickson nonetheless held that Medalen did not timely commence her action and granted the defendants summary judgment. *Id.* at 1125.

concussive or subconcussive impacts) manifested themselves in a permanent brain disease process and not, as the NHL contends, when the discrete impacts occurred on any given shift in a particular hockey game.

The NHL's reliance on *Klempka* is misplaced, as the facts and claims in that case are distinguishable from those here. Klempka experienced complications with her intrauterine device ("IUD") and had it removed in January of 1977. *Klempka v. G.D. Searle & Co.*, 963 F.2d 168, 169 (8th Cir. 1992). At that time, her doctor diagnosed her with pelvic inflammatory disease ("PID") caused by the IUD. *Id.* Klempka then married and tried to become pregnant. *Id.* In August 1982, Klempka learned she was infertile, perhaps as a result of the IUD. *Id.* Klempka sued the IUD manufacturer in 1986, but the trial court dismissed her case as time-barred. *Id.* at 169-70.

On appeal, Klempka argued that she did not know the full extent of her injuries (i.e., her infertility) until her August 1982 infertility diagnosis, and therefore her "injury" for statute-of-limitations purposes did not manifest itself until then. *Id.* at 170. The Eighth Circuit disagreed and affirmed the dismissal. *Id.* at 171. The Court reasoned that Klempka *knew in January 1977 that she was injured* by the IUD and that the IUD caused her PID. *Id.* at 170. Having both knowledge of the injury and its cause, Klempka could not "circumvent the statute of limitations by waiting for a more serious injury to develop from the same cause." *Id.*

Klempka is distinguishable from Plaintiffs' case in two ways. First, Klempka asked the Court to essentially toll the statute of limitations until she knew the *full extent* of her injuries caused by the IUD. In contrast, Plaintiffs contend that their statutes do not

begin to run until they either develop degenerative brain disease caused by the accumulated effects of hits that are inherent in NHL hockey (which the players contend did not, or will not, occur until long after retiring from the NHL) or, alternatively, when they were or should have been aware that of the cellular damage and Tau protein accumulation over years or decades that heightens the risk of developing degenerative brain disease. Second, Klempka could identify a single incident that caused her PID and infertility—insertion of the IUD. She did not claim that her PID and infertility were the result of exposure to the IUD over time, or that continued use of the IUD set in motion a gradual change in body chemistry that later resulted in her infertility. In comparison, the etiology of Plaintiffs' injuries is more analogous to the repeat-exposure cases like *Medalen*, and those involving asbestos and silica, where the injuries are the manifested accumulated effects of long-term exposure, and the statutes do not run until the effects accumulate to a disease, or so damage the cellular structure of the plaintiff as to create the heightened risk of a disease.

Finally, applying *Klempka*'s statute-triggering standard—knowledge of the injury and the injury's cause—to the Plaintiffs, their causes of action did not accrue until years after retiring from the NHL. Again, their claimed injuries are not single, discrete head trauma, sustained during their playing days, but the delayed development of degenerative brain diseases which did not arise until after the Players left the game, as well as cellular damage from accumulated head blows that later increased the risk of developing such diseases.

3. The New York filers' claims did not accrue until they suffered injuries.

In New York, a personal-injury claim accrues at the time of injury. *Barrell v. Glen Oaks Vill. Owners, Inc.*, 814 N.Y.S.2d 276, 277 (N.Y. App. Div. 2006). As discussed in detail above, the NHL's motion is based on a mischaracterization of Plaintiffs' injuries. The injuries are not discrete head blows or related symptoms experienced by the players during their time in the NHL. Instead, the injuries are the accumulated effects of hits to the head, which did not, or will not, manifest as degenerative brain diseases, or the increased risk of developing them, until long after the players left the NHL. When the statute of limitations accrued on these injuries is a question of fact that should not be resolved on Defendant's motion.

IV. Rule 12 Dismissal Is Inappropriate Because the Players Have Pled Sufficient Facts to Equitably Toll the Limitations Periods.

As the NHL acknowledges, a statute of limitations is tolled if "a defendant took affirmative steps to conceal material facts from the plaintiff to prevent the plaintiff from discovering a potential cause of action or the injury itself is of such a nature as to be self-concealing." (Def.'s Memo. at 11-12) (citing Minnesota, New York, and D.C. law). The policy justification for tolling a limitations period when a defendant has fraudulently concealed is twofold:

> (1) The plaintiff who does not assert his or her right because of the defendant's fraudulent concealment is not within the 'mischief' sought to be remedied by a statute of limitations, and (2) the defendant who fraudulently conceals a cause of action 'should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him.'

Minnesota Laborers Health & Welfare Fund v. Granite Re, Inc., 844 N.W.2d 509, 514 (Minn. 2014) (noting Minnesota follows majority rule that affirmative act of fraudulent concealment tolls limitations period and holding limitations period was tolled for claim against surety company that had fraudulently concealed character of certain benefit payments); *see also Simcuski v. Saeli*, 377 N.E.2d 713, 716 (N.Y. 1978) (holding plaintiff's complaint not time-barred because allegations that plaintiff had relied to her detriment on defendant's concealment of defendant's tortious conduct was sufficient to state claim for equitable tolling); *Hughes v. Abell*, 794 F. Supp. 2d 1, 14 (D.D.C. 2010) (holding allegations that defendant concealed material information that gave rise to his claim was sufficient to state claim for equitable tolling).

Plaintiffs here have made more than a plausible claim that the applicable statutes of limitation have been equitably tolled by the NHL's fraudulent concealment. The MAC alleges detailed facts that establish the League knew or should have known of the long-term effects of brain trauma. First, medical studies concerning the long-term effects of concussive and subconcussive blows were available to the NHL as early as the 1930s. (*Id.* ¶ 6.) A well-organized and well-financed multi-billion dollar business (*id*. ¶¶ 15, 302) that employs physicians and other medical staff, the NHL was in a far superior position than individual players (most of whom had little or no education beyond high school) to acquire, analyze, and understand the applicability of those studies to the risk of long-term injuries from brain trauma in NHL hockey (*id.* ¶¶ 98, 336-37, 339, 341). Second, players were required to wear helmets beginning in 1979. (*Id.* ¶ 9.) Although evidence shows helmets do not protect against the long-term effects of brain trauma, requiring their

use for the first time demonstrated the League's acknowledgement of the risks of brain trauma. (*Id.*) Unfortunately, helmets also signaled (falsely) to players they were now more protected from such risks. (*Id.*) Third, the NHL instituted its Concussion Program in 1997 to study concussions, requiring team physicians to start tracking baseline brain functioning and player concussions. (*Id.* ¶¶ 9-10.) Fourth, the NHL medical staff participated in international symposia on the connection between repeated trauma to the brain and latent neurodegenerative diseases, but remained silent or outright downplayed the very information they knew. (*Id.* ¶¶ 367.) Fifth, as detailed herein, the NHL Commissioners repeatedly rejected, and therefore misrepresented, any correlation between repeated concussive and subconcussive events and latent brain diseases, while knowing the opposite to be true. (*Id.* ¶¶ 16, 114, 335.)

Written discovery and depositions in this litigation will reveal precisely what the NHL knew about the long-term effects of brain trauma and when the NHL possessed this information. As in all cases of fraudulent concealment, complete details about the NHL's knowledge are not available at the pleading stage because, inherently, that information has been concealed. *See Hotel Capital LLC v. Wells Fargo Bank*, 951 N.Y.S.2d 86 (N.Y. Sup. Ct. 2012) (unpublished) ("[W]here the plaintiff has alleged sufficient facts to suggest that the defendant had superior knowledge that was exclusively in the possession of the defendant, and there are issues of fact as to the level of disparity of information that was available to the parties, courts have declined to dismiss fraud causes of action at the pleading stage[.]") This much is certain: despite having knowledge long before this lawsuit that brain trauma posed a danger to the long-term health of players, the League con-

cealed that information and to this day still disclaims any affirmative link between head trauma sustained while playing NHL hockey and neurological disorders that later develop. (MAC ¶¶ 12, 124.)

Despite the NHL's superior knowledge, it concealed this information by publicly downplaying concerns with head trauma and fighting in the NHL; and, in connection with its assumed duty to investigate and monitor the effects of head injuries to protect its players, affirmatively represented to players that there *were no such long-term effects*. (*Id.* ¶¶ *e.g.*, 114, 332-35, 344.)

In 1980, then-NHL President Zeigler stated, in response to proposed legislation to curb NHL violence, that the NHL "didn't need the federal government to interfere" because those "refereeing the sports seem to have done a responsible job." (*Id.* ¶ 333). In 2007, Commissioner Bettman explained that the NHL was "not looking to have a debate on whether fighting is good or bad or should be part of the game." (*Id.* ¶¶ 311, 334.) And in 2011 he stated that it was premature to draw a connection between NHL fighting and CTE and that "[m]aybe it is [dangerous] and maybe it's not. You don't know that for a fact," and "people need to take a deep breath and not overreact" and not "over-conclude when the data isn't there yet." (*Id.* ¶ 335.) (*See also* MAC ¶¶ 312, 269, 335, 380-81.) The NHL further delayed publication of the findings from its own Concussion Program until 2011—***fourteen*** *years after the study was commenced and* ***seven*** *years after the study concluded*. (*Id.* ¶¶ 15, 107.) Even then, the report provided only rote recitation of the number of concussions between 1997 and 2004, and evasive disclaimers that "more study is needed," rather than any conclusive results from the supposedly rigorous study of the

long-term impacts of head injuries that the Concussion Program purported to provide. (*Id.* ¶¶ 15-16.)

On the ice, players experiencing concussions and subconcussive impacts were told by NHL medical directors, supervisors, doctors, and trainers (who Plaintiffs trusted and relied upon) that it was safe to continue playing when it was not. (MAC ¶¶ 100, 127, 136, 342, 344.) These representations and reassurances, together with the NHL's public statements about NHL fighting and head trauma, and the NHL's representations about the findings of its Concussion Program—all which induced the players to continue to play and reasonably believe there was no risk of long-term impairment, much less a basis for legal action against the NHL (MAC ¶¶ 106-109)—are precisely the sort of affirmative actions required to establish fraudulent concealment.

The NHL seeks dismissal of the MAC by distorting both the pleadings and the applicable law. First, the NHL argues there is no allegation that it "concealed information related to [Players] *initial injuries* – i.e., the concussive or sub-concussive head impacts that they incurred." (Def.'s Memo. at 22) (emphasis added). This argument badly mischaracterizes the thrust of Plaintiffs' claims. The issue is not whether the NHL concealed the 'concussive or subconcussive impacts' but whether the NHL concealed that the kind and numbers of impacts inherent in NHL-style hockey would cause permanent brain diseases in the future, or increase the risk of developing those diseases later in life. (*See, e.g.*, MAC ¶ 12 (alleging failure of NHL to warn of "the negative *long-term effects* of sustaining concussions and subconcussive blows to the head, including the risks of repeat concussions and subconcussive blows") (emphasis added).)

Second, the NHL argues the information about the dangers of brain trauma should have put Plaintiffs on notice of their claims and they failed to exercise reasonable diligence in asserting their claims. (Def.'s Memo. at 14-15.) This argument fails first because "reasonable diligence is a question of fact." *Cohen v. Appert*, 463 N.W.2d 787, 791 (Minn. Ct. App. 1990) ("We agree with the trial court that [the plaintiff] has produced enough evidence on the issue of due diligence to withstand [the defendant's] motion for summary judgment."); *see also DLH, Inc. v. Russ*, 544 N.W.2d 326, 331 (Minn. Ct. App. 1996) ("Reasonable diligence is generally a question of fact.") *aff'd*, 566 N.W.2d 60 (Minn. 1997). Nevertheless, Plaintiffs acted reasonably because, as discussed above, the NHL was in a superior position to evaluate the applicability of publicly-available medical studies and literature regarding brain trauma in professional sports, the NHL knew Plaintiffs looked to the League for safety information, represented that it was monitoring and undertaking its own investigation of the effects of head trauma, and represented and reassured Plaintiffs there was no risk of long-term impairment. Plaintiffs, who reasonably relied to their detriment on the NHL's supposed investigation and monitoring on this issue (MAC ¶¶ 15, 98, 178, 336), certainly had no knowledge of (or reason to review) the medical literature Defendant now claims players were derelict in not studying. (*Id*. ¶¶ 85-86, 91, 108, 125, 130-32, 341). Incredibly, this is the very same medical literature that the NHL deemed inconclusive or incomplete (*Id.* ¶¶ 15-16, 109, 114-19, 335, 361-64, 370).

Plaintiffs' allegations on this point are distinguishable from the fraudulent concealment argument made in *In re Wholesale Grocery Products Antitrust Litigation*, 722

F. Supp. 2d 1079, 1085 (D. Minn. 2010), where the plaintiffs—sophisticated grocery chains—alleged they were unaware of anti-trust claims even though they were aware of a price increase that coincided with the defendants' acquisition of competitor wholesalers. The plaintiffs' position in *Wholesale Grocery* was essentially that "Defendants' responses to customer inquiries about being charged higher prices—a relatively routine dialogue in the conduct of business—did not and could not put Plaintiffs on notice of their antitrust claims because Defendants did not explicitly admit the alleged anticompetitive foundation and motive behind the price increases." *Id.* The Court characterized this position as "unrealistic and untenable" because the plaintiffs should not have expected the defendants to admit they had committed antitrust violations. *Id.*

Unlike the antitrust claims in that case, the delayed development of permanent brain disease due to the concussive and post-concussive impacts suffered in a particular game was not self-evident to Plaintiffs, given the NHL's affirmative investigation and repeated assurances that it remained safe to sustain those impacts and continue playing. And unlike the plaintiffs in *Wholesale Grocery*, the players had no reason to question the NHL, nor did the players assume they had no claim simply because the NHL "did not explicitly admit" it was concealing the danger. (MAC ¶¶ 12, 14, 99-102, 126-135.)

Finally, the NHL suggests that Plaintiffs have only alleged the NHL was silent, which Defendant argues is insufficient to establish affirmative conduct supporting fraudulent concealment. (Def.'s Memo. at 27, n.12 (citing *Thunander v. Uponor, Inc.*, 887 F. Supp. 2d 850, 867 (D. Minn. 2012)).) But Plaintiffs have not alleged mere "inaction [] or silence," but rather "affirmative acts of concealment" in the form of affirmative

representations that the NHL was investigating and monitoring the effects of head injuries and that it remained safe to continue to play after suffering a concussion in the meantime, and that "more study was needed" when, it turns out, it wasn't. (MAC ¶¶ 12, 14, 99-102, 126-135); *see also Wild v. Rarig*, 234 N.W.2d 775, 795 (Minn. 1975) ("Although mere silence or failure to disclose may not in itself constitute fraudulent concealment, any statement, word, or act which tends to the suppression of the truth renders the concealment fraudulent."). The NHL will have the ability to dispute Plaintiffs' allegations through discovery and perhaps at summary judgment, but those allegations must be accepted as true for purposes of this motion. At the very least, the Court should find there are issues of fact as to whether any applicable statute of limitations has been equitably tolled and deny the NHL's motion.

V. Plaintiffs' Allegations Provide the NHL with Ample Factual Notice and an Opportunity to Respond to the Omission and Concealment-Based Theories.

A. Because Rule 9(b) does not require minute details, the MAC provides ample factual particularity regarding the existence of the NHL's duties and identification of the circumstances constituting the fraud.

The particularity requirements of Rule 9(b) are interpreted "in harmony with the principles of notice pleading." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). "The purpose of Rule 9(b) is to provide the defendant with notice of and a meaningful opportunity to respond specifically to charges of fraudulent conduct by apprising the defendant of the claims against it and the facts upon which the claims are based." *In re Hardieplank Fiber Cement Siding Litig.*, No. 12-MD-2359, 2013 WL 3717743, at *6 (D. Minn. July 15, 2013) (citing *Commercial Prop. Invs., Inc. v. Quality*

Inns Int'l, Inc., 61 F.3d 639, 644 (8th Cir. 1995)). Mounting specific arguments, the NHL's brief shows the NHL understands exactly what Plaintiffs allege.

"But Rule 9(b) does not require that the exact particulars of every instance of fraud be alleged, so long as the complaint includes enough detail to inform the defendant of the core factual basis for the fraud claims." *Ransom v. VFS, Inc.*, 918 F. Supp. 2d 888, 898 (D. Minn. 2013) (internal quotation omitted). Nor does Rule 9(b) require that a "complaint be suffused with every minute detail of a misrepresentation." *McGregor v. Uponor, Inc.*, Civil No. 09–1136 ADM/JJK, 2010 WL 55985, at *4 (D. Minn. Jan. 4, 2010) (internal citation and quotation omitted). The Court must look to the MAC as a whole in determining the sufficiency of fraud allegations. *Evangelical Lutheran Church in Am. Bd. of Pensions v. Spherion Pac. Workforce LLC*, No. 04-4791 ADM/AJB, 2005 WL 1041487, at *3 (D. Minn. May 4, 2005).

Courts have recognized that legal theories sounding in fraud, but triggering liability through omissions or concealment "[f]urther complicat[e] matters" because liability "consists of non-action and is by its nature very difficult to plead with particularity." *Remmes v. Int'l Flavors & Fragrances, Inc.*, 453 F. Supp. 2d 1058, 1072 (N.D. Iowa 2006). This District and courts across the country recognize that "[r]equiring a plaintiff to identify (or suffer dismissal) the precise time, place, and content of an event that (by definition) did not occur would effectively gut state laws prohibiting fraud-by-omission." *Sanford v. Maid-Rite Corp.*, No. CIV. 13-2250 MJD/LIB, 2014 WL 1608301, at *12 (D. Minn. Apr. 21, 2014) (quoting *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1189 (C.D. Cal. 2010)

(quoting *In re Whirlpool Corp. Front–Loading Washer Prods. Liab. Litig.*, 684 F. Supp. 2d 942, 961 (N.D. Ohio 2009)).[4] Thus, in omissions and concealment cases, Rule 9(b) "is satisfied 'if the omitted information is identified and "how or when" the concealment occurred,'" *In re Target Corp. Customer Data Sec. Breach Litig.*, No. MDL 14-2522 PAM/JJK, 2014 WL 6775314, at *5 (D. Minn. Dec. 2, 2014) (citing *In re Bisphenol–A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 687 F. Supp. 2d 897, 907 (W.D. Mo. 2009), and *Great Plains Trust Co. v. Union Pac. R. Co.*, 492 F.3d 986, 996 (8th Cir. 2007)), or the complaint contains "allegations sufficient to identify the specific circumstances under which the fraud-by-omission took place." *Sanford*, 2014 WL 1608301 at *12.

Plaintiffs have met these standards. For their negligent misrepresentation by omission, fraud by omission, and fraudulent concealment theories, Plaintiffs have identified both the specific circumstances under which the NHL owed a duty to disclose and the factual circumstances regarding the omissions, including identifying the omitted information and how and when the concealment occurred. Similarly, with regard to the fraudulent concealment theory, Plaintiffs have identified what the NHL knew and concealed from players.

[4] *See also, In re Hardieplank Fiber Cement Siding Litig.*, No. 12-MD-2359, 2013 WL 3717743, at *7 (D. Minn. July 15, 2013) ("where" and "when" are not required to be pled with respect to an omission); *Belville v. Ford Motor Co.*, No. CIV.A. 3:13-14207, 2014 WL 6387961, at *4 (S.D.W. Va. Nov. 14, 2014); *Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 451 (D.N.J. 2012).

1. Plaintiffs have adequately pled facts supporting the existence of the NHL's duty to disclose long-term neurological risks.

Although a party generally has no duty to disclose material facts to another party, a duty may be imposed where: "(a) One who speaks must say enough to prevent his words from misleading the other party[; or] (b) One who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party." *Zimmerschied v. JP Morgan Chase Bank, N.A.*, No. CIV. 13-3431 JRT JJK, 2014 WL 4814647, at *8 (D. Minn. Sept. 23, 2014) (quoting *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 650 (Minn. 1976)); *see also* Restatement (Second) Torts § 551 (1976)). In the present case, the MAC alleges that the NHL's duty to disclose arose in exactly these two contexts:

> (1) the NHL had superior special knowledge of material medical information that players did not have access to, and was not readily available to players; and (2) the NHL communicated with players and the public, completely omitting material information about the true risks of head trauma, or providing partial or ambiguous statements regarding safety and head injuries, and the context of those communications shows that the NHL needed to complete or clarify those statements with all material information.

MAC ¶ 429. The NHL argues that (1) Plaintiffs have not adequately pled the "superior special knowledge" element because the information Plaintiffs cite in the MAC was "publicly available," and thus players must be charged with knowledge of it, and (2) Plaintiffs fail to identify the partial or ambiguous communications made by the NHL in which the NHL did not say enough to prevent its words from misleading players.

First, case law is clear that even if some of the information is deemed within the public realm, it does not foreclose Plaintiffs' omission claims. *Diaz v. First Am. Home Buyers Prot. Corp.*, 541 F. App'x 773, 775 (9th Cir. 2013) (quoting *Vega v. Jones, Day, Reavis & Pogue*, 17 Cal. Rptr. 3d 26, 35 (2004)) ("[T]he contention that publicly available information cannot form the basis for a concealment claim is mistaken. The mere fact that information exists somewhere in the public domain is by no means conclusive."); *cf. S.E.C. v. True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1106-1110 (D. Minn. 2012) (concluding in securities fraud case that funds' emphasis on the positives without providing a complete picture of reality created a genuine issue of material fact, despite the information withheld being publically available).

Similarly, in *In re Toyota Motor Corp. Unintended Acceleration*, plaintiffs alleged Toyota was in possession of information, some of which was publicly available with the National Highway & Transportation Safety Board ("NHTSB") or publicly released by Toyota. 754 F. Supp. 2d at 1192. The court found customers were unlikely to have performed such a search, "nor would they have been expected to." *Id.* Accordingly, the *Toyota* plaintiffs had adequately alleged the "exclusive knowledge of material facts" because Toyota was in a "superior position of knowledge." *Id.*; *see also Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088, 1097 (N.D. Cal. 2007) (same).

Plaintiffs expressly allege that the NHL's knowledge was superior to that of players. The MAC alleges not that the information was "public" in the sense that lay members of the public, including players without medical training, would be expected to have knowledge of it, but rather that it was known to the medical community and to the NHL,

including its vast and exceptionally educated legal and medical staff. MAC ¶¶ 160-62; 225-37; 336-40, 347, 352-53 (specifically alleging NHL's superior knowledge). Plaintiffs expressly pled that they had no knowledge of the medical literature, and no understanding of any need to go find it because they relied on the NHL for information about player health and safety. *Id.* ¶¶ 3, 5, 86-87, 125. The MAC also highlights the fact that the NHL has stated that it has engaged in "educational efforts … directed toward … most importantly our players" and have taken "recent educational initiatives" regarding "signs and symptoms of a concussion so that Players will recognize when they, or a teammate, may be at risk," concluding that "[i]t is our strong belief that the Players' health and safety will be enhanced[.]" *Id.* ¶¶ 222-23.

It is incongruous to admit outside of Court that players need education on the risks of brain trauma, then to argue later in Court that Plaintiffs have always been aware of medical research on the subject. It is also disingenuous to claim that the players should have been aware of the body of medical literature linking repeated concussions to long-term brain disease, while the NHL affirmatively told them as recently as 2011 that "more study is needed" and that the public should not rush to judgment about the connection. The heightened pleading standards for claims of fraud do not abrogate the general rule that the MAC be construed in a light most favorable to the players and that the facts asserted be accepted as true. *In re Andor Communications, Inc.*, 22 F. Supp. 2d 999, 1003 (D. Minn. 1998). Whether the NHL's knowledge of long-term neurological risk was actually superior to players is a fact question only discovery will answer.

Much of the NHL's cited authority deals with plaintiffs that were "sophisticated real estate investors" and banks in arms-length negotiations. *Kellogg Square P'ship v. Prudential Ins. Co. of Am.*, 63 F.3d 699, 702 (8th Cir. 1995) (status as "sophisticated real estate investor" put plaintiff in same position as defendant); *Am. Bank of St. Paul v. TD Bank, N.A.*, No. 09-2240 ADM/TNL, 2011 WL 1810643 (D. Minn. May 9, 2011) (bank); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young*, No. 91 CIV. 2923 (CSH), 1994 WL 88129, at *1 (S.D.N.Y. Mar. 15, 1994) (investment bank Merrill Lynch).

Plaintiffs are much more similarly situated to the car buyers in *Toyota* and *Falk* than the sophisticated, independent business entities in the authority cited by the NHL. Just as the car buyers should not be expected to run NHTSB searches before buying a car, Plaintiffs were not required nor were likely to research and understand the accumulated weight of medical research before re-entering a hockey game after a concussion. Like Toyota, the NHL also had superior and exclusive knowledge, specifically alleged by Plaintiffs. MAC ¶¶ 125, 145, 225-31, 330 (NHL was "institutional repository of accumulated knowledge"), ¶ 350 (NHL received and accumulated injury reports), ¶ 353 (NHL had special access to medical consultants).[5]

Lastly, regardless of whether the risk of long term brain damage and other injury was publically available, the NHL affirmatively and fraudulently contradicted the weight

[5] For this reason, *Wolph v. Acer Am. Corp.*, No. C 09-01314 JSW, 2009 WL 2969467, at *4 (N.D. Cal. Sept. 14, 2009), is distinguishable because the plaintiffs in that case had not alleged any information known by the defendant that was unavailable to the public.

of scientific opinion to the Plaintiffs' detriment. Whether players could have accessed information in the public sphere is a red herring. By representing that the NHL was the caretaker of player safety and was responsible for researching concussions, and that after fourteen years there was no conclusion that concussive and subconcussive blows had serious long term health implications, the NHL was telling players *not* to look for or believe what the NHL now says the players should have researched and understood. *Id.* ¶¶ 370-71. The NHL does not even attempt to confront these allegations and points to no authority where a court dismissed fraud claims when the defendant affirmatively told the plaintiff the information in the public sphere was wrong or inconclusive. As a result, the NHL's motion is without merit and the "public knowledge" defense is disingenuous.

Second, Plaintiffs clearly identify the statements by the NHL that gave rise to the NHL's duty to say enough to prevent its words from misleading players. The NHL's deep involvement in player safety and brain trauma reaches back indefinitely in time. The NHL claims to be "completely satisfied with the responsible manner in which the league … ha[s] *managed player safety over time*, including with respect to *head injuries and concussions*. … This is something that we have *always* treated as important[.]" *Id*. ¶ 345 (emphasis added). The MAC notes that the NHL represented that "concussions are just 'dings," or "a little bell ringing' and "it's okay to go right back out on the ice after sustaining one." (*Id.* ¶¶ 100, 136). The NHL conducted a study and published its own Concussion Program report, which downplayed rather than warned of the risks, "induc[ing] players not to perceive any increased risk." (*Id.* ¶¶ 107, 109, 117-18).

The MAC alleges with particularity how the NHL would discredit opponents of fighting as misguided reactionaries. (*Id.* ¶ 333-35; ¶ 269 ("I think it's unfortunate if people *use tragedies to jump to conclusions that probably at this stage aren't supported* . . . . I think people need to take a deep breath and *not overreact*.") (emphasis in original); ¶ 381 ("no need to 'over-legislate' head hits;" rise in concussions was the result of "accident events" and "not from head hits")). Furthermore, the MAC alleges the NHL punished players for reporting head injuries, which evidences the NHL's intent to conceal the dangers of concussive and subconcussive impacts. *Id*. ¶ 328. Thus, assuming Plaintiffs' allegations are true, the NHL not only spoke up about brain trauma, but it spoke loudly and deceptively.

2. The MAC sufficiently pleads the particularities of the NHL's omissions.

Continuing with its pattern, the NHL ignores Plaintiffs' specific fraud-by-omission allegations, or misleadingly focuses on the summary of such allegations in the specific counts, in an attempt to argue that such allegations lack specificity. First, as discussed above, the specificity requirements of omission allegations are less stringent than in the case of affirmative misrepresentations. In any event, Plaintiffs do plead the NHL's omissions with specificity, i.e. "***what***":

> that concussions and subconcussive hits are a big deal, and you should not go back to play or practice until you have been properly evaluated, treated and cleared to play because the risks of permanent damage are enormous.

(MAC ¶ 101; *see also id.* ¶¶ 5, 117-19, 134, 143). Plaintiffs also identify the "***who***" (¶¶ 310, 333 (John Zeigler), 16, 269, 311, 312 (Gary Bettman), 84 (NHL personnel), 120-22

(authors of study), 127 (NHL medical personnel)), "***when***" (¶¶ 345 ("always"), 333 (1980), 15 (through 2011), 95-96 (every time a player was being evaluated to return from player after a concussion, or as a broader warning), and "***how***" ¶¶ 12, 15, 100, 124, 136, 269, 344, 361 (taking no action, equivocating, or messaging return to play, despite knowledge), 96 (the NHL's omissions were misleading because players would have ensured they received appropriate medical treatment and recovery prior to returning to play). *See In re Whirlpool Corp. Front-Loading Washer*, 684 F. Supp. 2d at 961 ("Plaintiffs' fraud-by-omission claims notify [defendant] of the time (never), place (nowhere), and content (nothing) of the alleged misrepresentations ..."); *Hoyt Props., Inc. v. Prod. Res. Grp., L.L.C.*, 736 N.W.2d 313, 319 (Minn. 2007) (holding bare statement "There isn't anything" was actionable fraudulent concealment when plaintiff alleged defendant knew facts to the contrary); *Toyota*, 754 F. Supp. 2d at 1192 (denial of existence of defect was actionable fraudulent concealment). Plaintiffs' allegations are more than sufficient to apprise the NHL of "the claims against it and the factual ground upon which the claims [are] based." *Commercial Prop. Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995).

B. Plaintiffs allegations are particularized as to each element of fraudulent concealment (Count V).

Viewing the MAC as whole as the law requires, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009), Plaintiffs allege more than enough facts to put the NHL on notice of their fraudulent concealment claim. A fraudulent concealment claim requires:

> "(1) Deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak; (2) That the defendant acted with scienter; (3) An intent to induce plaintiff's reliance upon the concealment; (4) Causation; and (5) Damages resulting from the concealment."[6]

In re Temporomandibular Joint (TMJ) Implants Products Liab. Litig., 113 F.3d 1484, 1497 (8th Cir. 1997).

1. The MAC alleges affirmative acts of deliberate concealment and misrepresentation.

Contrary to the NHL's improper recasting of Plaintiffs' allegations as mere "silence," Plaintiffs allege in detail the deliberate concealment of long-term neurodegenerative risks, as reflected in the factual allegations discussed above regarding failure to disclose. The NHL concedes that the duty to disclose and the duty not to conceal parallel one another. Def.'s Memo. at 27 (recognizing duty to disclose material information). The NHL appears to argue that Plaintiff fails to plead deliberateness with particularity in violation of Rule 9(b). However, the Rule expressly states that "intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Plaintiffs' clearly allege that the NHL "knowingly" concealed the information, which indicates a deliberate act. (MAC ¶ 439). This satisfies Rule 9(b).

[6] The NHL only challenges Plaintiffs allegations as to the first element. Although the NHL is barred from challenging the remaining elements on reply, it is worth noting Plaintiffs have alleged extensive detail as to each element: scienter (i.e. that the NHL knew what it was concealing), *e.g.* ¶¶ 105-125, 179-268, 350; intent to induce reliance, *e.g.* ¶¶ 50, 100, 136, 148, 221-22, 335, 338, 344-48, 361; causation, *e.g.* ¶¶ 84-96; and damages, *e.g.* ¶¶ 26-83, 405-417.

Furthermore, whether or not information contrary to the NHL's misrepresentations was available in the public sphere is irrelevant for fraudulent concealment because the Plaintiffs justifiably relied on the NHL's health and safety guidance and the NHL knew they did (*see* MAC ¶¶ 126, 130, 132, 128, 150). *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 991 (D. Minn. 1998) ("a party is justified in relying upon a false representation, even though he or she might have learned of its falsity upon investigation, unless the falsity is obvious."); *Gherity v. Brewer*, No. A06-2198, 2008 WL 763095, at *3 (Minn. Ct. App. Mar. 25, 2008) (quoting *Spiess v. Brandt*, 41 N.W.2d 561, 567 (Minn. 1950)) ("one who deceives another to his prejudice ought not to be heard to say in defense that the other party was negligent in taking him at his word."). In addition to affirmative misrepresentations, actions designed to "avert further inquiry into the matter," such as Defendants' statements downplaying the seriousness of "dings" all the way to its statements regarding the Concussion Program, are actionable regardless of what may be available publicly. *United States v. Steffen*, 687 F.3d 1104, 1115 (8th Cir. 2012); *see also Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 690 (8th Cir. 2001) (fraudulent concealment actionable where plaintiff's opportunities to investigate were hampered by defendant).

2. Plaintiffs need not allege redundant facts to satisfy the pleading standards.

Defendant feebly argues that Plaintiffs failed to plead concealment because the language of duty to disclose expressed in Counts IV and VI did not *reappear* in Plaintiffs' "fraudulent-concealment count." Def.'s Memo. at 27. The NHL's disjunctive read-

ing of the MAC is contrary to Federal Rule of Civil Procedure 10(c). *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252–53 (10th Cir. 1997) (considering allegations incorporated by reference when determining whether the plaintiff pleaded a fraud claim with particularity). Plaintiffs are not required to plead the same thing two or three times, just because there are separate "counts." In Count V: Fraudulent Concealment, "Plaintiffs re-allege the foregoing paragraphs as if fully set forth herein." MAC ¶ 438. Along with the many paragraphs detailing the duty owed by the NHL, paragraph 429 is re-alleged, which summarizes the specific factual allegations of the duty to speak owed by the NHL. Thus, a duty to speak as part of their fraudulent concealment claim is properly alleged.

C. The MAC leaves no need for a more definite statement under Rule 12(e).

Motions for a more definite statement are generally disfavored. *Ransom*, 918 F. Supp. 2d at 901. "When examining whether a more definite statement is required under Rule 12(e), the only question is whether it is possible to frame a response to the pleading." *Id.* "Rule 12(e) provides a remedy for unintelligible pleadings; it is not intended to correct a claimed lack of detail." *Id.* (citation omitted). Plaintiffs are not required to provide details that can be obtained with ordinary discovery. *Radisson Hotels Int'l, Inc. v. Westin Hotel Co.*, 931 F. Supp. 638, 644 (D. Minn. 1996).

As stated section III.A.2, *supra*, the MAC provides exacting detail, including direct quotes from identified NHL employees, with dates. As for omissions, the NHL argues that Plaintiffs do not plead "the precise time, place, and content of an event that (by

definition) did not occur." *Toyota*, 754 F. Supp. 2d at 1189 (quoting *Whirlpool*, 684 F. Supp. 2d at 961). As this District recognizes, the NHL is asking for a level of particularity not required by Rule 9(b) for omissions. *Sanford*, 2014 WL 1608301, at *12.

The NHL also argues it is "critical" Plaintiffs provide more details on the place of injury for choice-of-law purposes.[7] The first step in undertaking a choice-of-law analysis, however, is determining whether a conflict of laws even exists. *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1393 (8th Cir. 1997). The NHL has not identified any conflict between the fraud laws of the various states where plaintiffs suffered injury, nor could they. In fact, the NHL points out the commonality of the questions of law as to what is required to be pled and eventually proven. Def.'s Memo. at 20-21, 25-26. The only possible inconsistency identified by Defendants is that three states do not recognize a negligent misrepresentation by omission.[8] This is no conflict though, because Plaintiffs allege affirmative misrepresentations in addition to omissions.

The authority cited by the NHL demonstrates the practical limitations of an alternative Rule 12(e) motion. In those cases, the court found that Rule 9(b) had not been satisfied and ordered a more definite statement in conjunction with plaintiffs' leave to re-

[7] The NHL has not moved to dismiss the fraud claims based on any conflict of laws. Def.'s Memo at 21, n. 8.

[8] The NHL inaccurately asserts that North Carolina does not recognize a cause of action for negligent misrepresentation. *See, e.g., Trana Discovery, Inc. v. S. Research Inst.*, No. 5:13-CV-848-F, 2014 WL 5460611, at *9 (E.D.N.C. Oct. 27, 2014) (distinguishing between affirmative representations and omissions in deciding negligent misrepresentation); *Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc.*, 243 F. Supp. 2d 386, 415 n.13 (M.D.N.C. 2003) (same).

plead. The NHL cites no authority where Rule 9(b) was satisfied—as it is here—but a more definite statement was ordered. In fact, it is hard to imagine how a complaint could be particular enough to satisfy Rule 9(b), yet not be particular enough such that a Rule 12(e) motion was granted. Accordingly, a more definite statement should only be considered if the Court grants the NHL's motion to dismiss.

VI. Plaintiffs Have Pled Sufficient Facts to Sustain Their Request for Medical Monitoring Relief.

A. The NHL's choice-of-law analysis is premature and inappropriate in the Rule 12 context.

The NHL apportions the bulk of its medical-monitoring argument to discussing application of the choice-of-law rules of the various transferor courts to the Plaintiffs' claims. However, the jurisdictionally-specific intricacies of each such analysis, especially in light of the necessary threshold constitutional due process inquiry, are extremely fact intensive and most properly addressed at class certification. Such an analysis is premature at the pre-discovery phase.

1. The requisite constitutional due process analysis cannot be performed absent substantial factual determinations as to each of Plaintiffs' claims, rendering such analysis premature.

To comply with the requirements of constitutional due process, the court performing any a choice-of-law analysis must make an initial determination that the state whose law is ultimately chosen to be applied to a claim is among those states with "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). The Supreme Court has also explained that the "significant contact" must exist

for each such claim in a class action case. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822-23 (1985). This is a fact-specific inquiry.[9] Accordingly, it is inappropriate to engage in a choice-of-law analysis before parties engage in the discovery necessary to flesh out relevant choice-of-law facts. *See, e.g., Smith v. Questar Capital Corporation, No*. 12-2669, 2014 WL 2560607, at *13 (D. Minn. June 6, 2014) (refusing to analyze choice-of-law at the motion to dismiss stage given the "absence of discovery and a fuller record…"); *see also Cantonis v. Stryker Corp*., Civ. No. 09-3509, 2010 WL 6239354, *3 (D. Minn. Nov. 23, 2010); *Speedmark Transp., Inc., v. Mui*, 778 F. Supp. 2d 439, 444 (S.D.N.Y. 2011).

2. Facts in addition to the domicile of the claimant must be considered as part of any choice of law inquiry.

Plaintiffs' claims—sounding both in negligence and in fraud—stem from the NHL's several common-law duties, including, but not limited to: (1) the duty, voluntarily assumed, to care for player safety related to concussive and subconcussive impacts and their sequelae; (2) the duty to accurately inform players of neurological risks resulting from NHL-style hockey; (3) the duty arising from NHL's superior, special knowledge of

[9] *See Partridge v. Stryker Corp.*, No. CIV. 10-1003 MJD/AJB, 2010 WL 4967845, at *2 (D. Minn. Dec. 1, 2010) (holding that choice-of-law analysis is premature at the motion to dismiss stage because it requires a thorough conflicts of law analysis, and before discovery has occurred, the Court does not have sufficient information to determine which state's law applies); *Graboff v. The Collern Firm,* No. 10–1710, 2010 WL 4456923 at *8 (E.D. Pa. Nov. 8, 2010); *Harper v. LG Electronics USA Inc.*, 595 F. Supp. 2d 486, 490-91 (D.N.J.2009) (same); *Sioux Biochemical, Inc., v. Cargill, Inc.*, 410 F. Supp. 2d 785, 800 (N.D. Iowa 2005); *Broin & Assocs., Inc. v. Genecor Int'l*, 232 F.R.D. 335, 339 (D.S.D. 2005); *Nakell v. Liner Yankelevitz Sunshine & Regenstreif, LLP*, 394 F. Supp. 2d 762, 768 n.2 (M.D.N.C. 2005).

medical information not reasonably known by players to provide players with that information; and (4) the duty to supplement its partial and ambiguous statements regarding head injuries with all material information.

The duties and their breaches involve the discovery of facts essential to the choice-of-law analysis, including, but not limited to the NHL's knowledge of the medical issues, its decisions regarding its marketing of violence in NHL games across the U.S. and Canada, the development of marketing media, its decisions regarding communications with players regarding head trauma, its decisions regarding concussion literature and its own "study," and its decisions regarding its public commentary on that literature and study.

Essential to any choice-of-law inquiry are where and when that knowledge was gained, the marketing materials were conceived and executed, and decisions about communications were made. *Mooney v. Allianz Life Ins. Co., of N. Am.*, 244 F.R.D. 531, 536 (D. Minn. 2007). Contrarily, the NHL asserts that the place where the injury occurred is of questionable relevance in the context of NHL players and medical monitoring, asserting that where Plaintiffs experienced their injuries was a fortuitous result of the schedule of venues imposed by the NHL. However, the NHL then gives short shrift to the remaining balance of the inquiry, *entirely ignoring* the pertinence of its own actions, including where the breaches occurred.

In fact, the NHL (1) fails to analyze *any* fact-specific state contacts except for the state of Plaintiffs' domicile, (2) fails to discuss whether Minnesota or Texas law "conflicts in any material way with any other law which could apply," *Shutts*, 472 U.S. at 816 (opining that no conflict between laws eliminates choice of law inquiry), and (3) although

the NHL recites the bare elements of three jurisdictions' choice of law rules, it cannot provide a full choice-of-law analysis because the facts of this case—and the contacts of each of the possible states—have not yet been established through discovery.

In asking the Court to jump the gun and engage at this preliminary, pre-discovery stage in the fact-intensive choice-of-law analysis, the NHL relies exclusively on abbreviated references to two New York cases and one District of Columbia case in which the law of the parties' domicile applied—none of which discussed choice of law in the context of medical monitoring. In addition, the NHL glosses over the highly involved, fact-specific nature of those courts' respective analyses. For instance, in *In re September 11th Litigation*, plaintiffs sought to have Pennsylvania law of compensatory damages apply, rather than the law of plaintiffs' domicile, where their decedents' airplane crashed in Pennsylvania. 494 F. Supp. 2d 232, 242 (S.D.N.Y. 2007). On a full record, the court specifically cited the defendants' state of mind as relevant to the choice of law question ("Nor did Defendants, even if negligent, intend for this disaster to befall Pennsylvania"), and the existence of a federal statute that recognized certain interests of other states in which defendants did business (considering "whether [application of Pennsylvania law] would impair the interests of the states in which Defendants are headquartered or do business—an effect the Stabilization Act explicitly recognized").

In *Cooney v. Osgood Machinery, Inc.*, the court chose Missouri law not based on the domicile of the plaintiff, as Defendant implies, but on the location of the injury after an exhaustive analysis of the expectations of the parties ("Mueller could hardly have expected to be haled before a New York court to respond in damages for an accident to a

Missouri employee at the Missouri plant") based on facts dating back 35 years ("Osgood's activity in connection with the bending roll occurred in 1958, some 14 years before *Dole* was decided and the principles of full contribution were introduced into our law"). 612 N.E.2d 277, 284 (1993).

Finally, the NHL's statement that *Reed v. Philip Morris Inc.* stands for the proposition that the District of Columbia choice-of-law rules would automatically apply the law of plaintiffs' current residences is highly misleading. The NHL quotes the court's recitation of the *plaintiff's argument*, not the court's actual decision. *Reed v. Philip Morris Inc.*, No. 96-5070, 1997 WL 538921, at *14 (D.C. Super. Ct. Aug. 18, 1997) (beginning the partial sentence NHL quotes with "*Plaintiff argues* that District of Columbia law will apply …."). The court did not adopt plaintiff's choice-of law-argument, and instead held that future analysis would be required "in order to assure that District [of Columbia] law is the proper law to apply." *Id.* at *15. The court also highlighted the factual nature of the choice-of-law inquiry: "This analysis requires the Court to consider and evaluate the governmental policies underlying the applicable laws and to determine which jurisdiction's policy would be most advanced by having its laws applied *to the facts of the case* under review." *Id.* at *14 (emphasis added; internal quotations and citations omitted).

Thus, none of cased cited by the NHL supports (1) deciding the choice of law issue at the motion to dismiss stage or (2) automatically applying the medical monitoring law of the plaintiffs' domicile without regard to the factual contacts this litigation has with each potential jurisdiction.

Plaintiffs provide no opinion at this stage as what law should apply, but note that at least one court has refused to apply the medical-monitoring law of the injured parties' domiciles based on the particular factual contacts at issue the case. *See Guinan v. A.I. duPont Hosp. for Children*, 597 F. Supp. 2d 517, 527-28 (E.D. Pa. 2009), *aff'd sub nom. M.G. ex rel. K.G. v. A.I. Dupont Hosp. for Children*, 393 F. App'x 884 (3d Cir. 2010).

The NHL seeks an untenable shortcut, effectively asking the Court to ignore the factually intensive threshold due process analysis, conclusorily positing instead, that the laws of the domicile of the particular claimant govern his claims—disregarding even the possibility that an alternate conclusion regarding which state's laws apply to such claims could be reached by this (or any) Court. While the NHL is free to make such an argument on summary judgment, because discovery regarding relevant facts necessary to the requisite judicial inquiry has not yet taken place, the NHL's proposed choice-of-law inquiry is wholly inappropriate at this stage of the case.

For these reasons, the choice-of-law question related to the medical-monitoring claims should be deferred until later in the case, as is typical in multidistrict litigation. *See generally, In Re: St. Jude Medical, Inc., Silzone Heart Valves Prods. Liab. Litig.*, No. 01-md-1396, 2006 WL 2943154, *4-6 (D. Minn. Oct. 13, 2006), *rev'd on other grounds*, 522 F.3d 836 (8th Cir. 2008).

B. Plaintiffs' allegations support a claim for medical monitoring relief whether it is considered an independent cause of action or a form of relief attendant to a negligence claim.

Plaintiffs' factual allegations support a claim for medical monitoring relief in any jurisdiction—whether in Minnesota, Texas, or otherwise—under even the most conservative medical-monitoring standards.

Generally speaking, a request for medical monitoring seeks "to recover the quantifiable costs of periodic future medical examinations to detect the onset of physical harm, as distinguished from an enhanced risk claim which seeks compensation for the anticipated harm itself or for increased apprehension of such harm." 17 A.L.R.5th 327 § 2[a] (citation omitted). Under any state-law standard, a plaintiff bears the burden of "establish[ing] the necessity, as a direct consequence of the exposure in issue, for a specific monitoring beyond that which an individual should pursue as a matter of generally good sense and foresight." *Id.* Thus, should a jury determine that the neurocognitive conditions alleged require monitoring to detect the onset of CTE and other associated serious diseases, beyond the monitoring necessary for an ordinary individual, then medical monitoring is an appropriate remedy.[10]

[10] Plaintiffs' request for medical monitoring does not seek damages for fear of something that may or may not happen in the future. A claim to recover damages for fear of future "harm" is conceptually distinct from plaintiffs' theory of medical monitoring recovery, which seeks compensation for early detection procedures necessitated by players' present, cellular damage.

1. Because the MAC's "counts" are not necessarily considered "causes of action," the medical monitoring count is not subject to dismissal even if it were only a form of relief.

The NHL *does not* argue that medical-monitoring relief is unavailable in any particular jurisdiction. In fact, it concedes the contrary. (Def.'s Memo. at 33.) Rather, the NHL seizes on Plaintiffs' pleading "medical monitoring" in a separate count and improperly concludes this must mean Plaintiffs have asserted an independent cause of action. Only on the most pedantic level could the NHL's argument have any appeal. The law of pleading, however, is not so arcane.

"Counts" are not necessarily "causes of action" or "claims." *See Volling v. Antioch Rescue Squad*, 999 F. Supp. 2d 991, 996 (N.D. Ill. 2013) (noting that defendants' attacking of the complaint "count by count" on motion to dismiss "tends to obscure the critical difference between 'claims,' which explain the plaintiff's grievance and demand for relief, and 'counts,' which describe legal theories by which those facts purportedly give rise to liability and damages."). "[I]t is common to draft complaints with multiple counts, each of which specifies a single statute or legal rule[.]" *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992). Thus, Plaintiffs' organization of their request for medical monitoring relief into a separate count does not stand as an assertion that medical monitoring is an independent tort. *See NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992) (counts do not track "claim for relief' but rather organize "how the plaintiff hopes to prevail").

Regardless, Plaintiffs are not required to plead legal theories at all. *See Hatmaker v. Memorial Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010). As long as the facts in the

complaint state a plausible claim under any recognized legal theory, even if that theory is unstated or incorrect, *see Volling*, 999 F. Supp. 2d at 997 (counts are "non-dispositive labels subject to change"), and even if "actual proof of those facts" "strikes a savvy judge" as "improbable," *Twombly*, 550 U.S. at 556, dismissal is still inappropriate. Thus, whether medical monitoring is a moniker used to describe a theory of liability or a theory of recovery is of no consequence when determining whether Plaintiffs have stated a claim.

Through Plaintiffs' request for medical monitoring, and the facts that support it, they seek to recover the reasonable costs of monitoring and evaluation medically necessary for early diagnosis of conditions for which Plaintiffs are at increased risk. Plaintiffs have stated a claim for this relief.

2. Because Plaintiffs plead a present physical injury and seek future resultant damages, the complaint's count for medical monitoring plausibly pleads a claim for relief under Minnesota or Texas law.

Even if it were appropriate at this stage to analyze particular states' laws, state and federal courts in Minnesota have concluded that costs of future medical monitoring are recoverable as tort damages under Minnesota law when a plaintiff establishes a present physical injury and satisfies the elements of future damages. *Palmer v. 3M Co.*, No. C2-04-6309, 2005 WL 5891911 (D. Minn. Apr. 26, 2005); *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 721 (Minn. Ct. App. 1998) (exposure to toxic pesticide);[11] *Werlein v. Unit-*

[11] In *Bryson v. Pillsbury Co.*, the Minnesota Court of Appeals held that a plaintiff with a present injury, even at the subcellular level, may recover medical monitoring damages in connection with that injury. 573 N.W.2d at 720-721.

ed States, 746 F. Supp. 887, 904 (D. Minn. 1990) *vacated in part on other grounds*, 793 F. Supp. 898 (D. Minn. 1992) (exposure to toxic chemical);[12] *see also, In re St. Jude Medical, Inc.*, No. 01-1396, 2004 WL 1630786 at *4-5 and n.4 (D. Minn. July 15, 2004) (defective heart valve implant). These decisions found their support in *Dunshee v. Douglas*, where the Minnesota Supreme Court held that scar formation in an artery, caused by the defendant, could support an award of damages for the increased risk of future stroke or aneurysm. 255 N.W.2d 42, 47 (Minn. 1977).

Similarly, courts in Texas have also recognized that medical monitoring costs are recoverable as an element of monetary relief, provided that the plaintiff can establish a present physical injury. *See Norwood v. Raytheon Co.*, 414 F. Supp. 2d 659, 666 (W.D. Tex. 2006) (noting that "American courts generally allow medical monitoring expenses as a remedy when a present physical injury" is caused by a defendant's tortious conduct); *see also, Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1138 (5th Cir. 1985). In fact, the NHL conceded as much in its brief. (*See* Def.'s Memo. at 33.)

These cases establish that a plaintiff need only allege that he suffers from a present physical injury and that he will incur future damages as a result of that injury. *See Palmer*, 2005 WL 5891911; *Werlein*, 746 F. Supp. at 904-05. At the pleading stage, Plaintiffs' MAC satisfies these requirements.

[12] In *Werlein*, the court allowed plaintiffs to attempt to recover the costs of future medical monitoring as tort damages under the common law. 746 F. Supp. at 904. Relying on "ample authority," the court explained: "Assuming that a given plaintiff can prove that he has present injuries that increases [*sic*] his risk of future harm, medically appropriate monitoring is simply a future medical cost, which is certainly recoverable." *Id.* at 904-05.

i. Subclinical, cellular, and subcellular injuries are considered present physical injuries.

Minnesota courts have recognized that subcellular injuries constitute present physical injuries for which medical monitoring/future damages may be recovered. For example, in *Werlein*, the plaintiffs sought to recover, among other things, the costs of future medical monitoring as a result of exposure to trichloroethylene and other chemical solvents. 746 F. Supp. at 891. The defendants moved for summary judgment on the basis that the plaintiffs were not suffering from any present physical injury. *Id.* at 898-900. The court disagreed and noted that plaintiffs' experts had testified that plaintiffs were suffering from actual, subclinical physical injury in the form of chromosomal breakage, immune system damage, and damage to their cardiovascular systems. The court concluded:

> This court cannot rule as a matter of law that plaintiffs' alleged injuries are not "real" simply because they are subcellular. The effect of volatile organic compounds on the human body is a subtle, complex matter. It is for the trier of fact, aided by expert testimony, to determine whether plaintiffs have suffered present harm.

Id. at 900. *See also Bryson* 573 N.W.2d at 721 (finding that subcellular chromosomal breakage is a "real and present physical and biologic injury.").

Although the Texas Supreme Court has not directly addressed whether subcellular injuries are compensable injuries, courts in Texas have found that a head injury with cerebral contusions meets the physical-injury requirement to establish a product liability claim under Texas law. *Ford Motor Co. v. Bland,* 517 S.W.2d 641, 645 (Tex. Civ. App. 1974). Specifically, in *Bland,* the court upheld a verdict for future physical pain and mental anguish damages where the evidence established that: "plaintiff received physical

injuries … that among them was 'a closed head injury with cerebral contusions' with total disruption of some of the nerve cells which cannot heal[.]" *Id.* at 645; *see also Bailey v. Am. Gen. Ins. Co.*, 154 Tex. 430, 436-37, 279 S.W.2d 315, 319 (1955) ("Damage embraces direct physical injury to a cell, tissue, organ or organ system; 'harm' to the physical structure of the body embraces also impairment of use or control of physical structures, directly caused by the accident.").

Furthermore, the fact that subcellular or subclinical injury is sufficient present harm to trigger recovery is not unique to Minnesota or Texas law. Other courts, including courts in New York, have likewise found subcellular or subclinical injury to satisfy a present harm requirement for tort damages.[13]

ii. Plaintiffs have alleged a present physical injury that increases their risk of suffering from neurodegenerative disorders and diseases beyond that of the average person.

Under the view expressed above, Plaintiffs Christian and Larson,[14] for themselves and the Medical Monitoring Subclass, have more than exceeded notice pleading require-

[13] *See, e.g., Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 448-49 (2013) (New York recognizes that present "physical injury" can occur for purposes of medical monitoring remedy as long as there is a "clinically demonstrable presence" of toxins in the body or evidence of toxin-induced disease); *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1215-27 (D. Mass. 1986) (subcellular injury from being exposed to contaminated water sufficient physical injury under Massachusetts law to support claim for relief); *see also, Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17 (D. Colo. 1984); *Plummer v. United States*, 580 F.2d 72, 76 (3d Cir. 1978); *Day v. NLO*, 851 F. Supp. 869, 878 (S.D. Ohio 1994); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 434 (Tenn. 1982).

[14] The NHL curiously moves to dismiss "the medical-monitoring claims brought by Mr. Christian, Mr. Larson, Mr. Nicholls and Mr. Peluso" in the MAC. However, the MAC only includes Mr. Christian and Mr. Larson in the Medical Monitoring Subclass to whom "Count II: Medical Monitoring" applies. *See* MAC ¶¶ 388. For this reason alone, the

ments in alleging a right to medical-monitoring relief, including an allegation that they have suffered present physical injury that increases their risk of future harm as compared to the average person.

Specifically, Plaintiffs have alleged, among other things:

> (1) that during their respective NHL playing careers, Plaintiffs and members of the Class experienced head injuries, concussions, subconcussive blows, and/or a combination thereof (MAC ¶ 404);
>
> (2) the concussive and subconcussive blows they suffered "caused twisting, shearing, and stretching of neuronal cells, and in turn caused the release of Tau protein, which accumulates in the brain over time, and thus caused changes and damage within their brains on a cellular level," (*id.* ¶ 386);
>
> (3) the release and accumulation of Tau protein constitutes present "cellular injuries" which "have increased Plaintiffs' risk of further neurodegenerative disorders and diseases, including but not limited to CTE, dementia, Alzheimer's disease, and similar cognitive-impairing conditions, beyond the level of risk observed in the average person" (*id.*); and
>
> (4) "[a]s a proximate result of Defendants' misconduct, Plaintiffs and members of the Class have experienced injuries and an increased risk of developing serious, latent, neurodegenerative disorders and diseases including but not limited to CTE, dementia, Alzheimer's disease or similar cognitive-impairing conditions" (*id.* ¶ 415).

The NHL completely ignores Plaintiffs' specific factual allegations of present, cellular injury. The Court of course cannot on a Rule 12 motion.

Court should ignore the NHL's arguments concerning Mr. Nicholls and Mr. Peluso, including consideration of Texas medical monitoring law and New York and the District of Columbia's choice of law rules.

C. Defendant's own cited cases demonstrate the futility of dismissing the medical monitoring Count.

The NHL also takes certain court decisions from Minnesota and Texas courts completely out of context. For example, the NHL cites to *Paulson v. 3M Co*., for the proposition that medical monitoring is not an independent tort, but omits that the District Court specifically recognized that medical monitoring is recoverable as a form of damages when a plaintiff establishes a present physical injury. *See* No. C2-04-6309, 2009 WL 229667 (D. Minn. Jan. 16, 2009) (emphasis added).[15] The NHL also leaves out the statement in *Palmer v. 3M Co.* that "Minnesota courts allow *recovery* for the cost of medical monitoring as tort *damages*[.]" 2005 WL 5891911 (citing *Bryson,* 573 N.W.2d at 721) (emphasis in original).

Likewise, in *Norwood v. Raytheon Co.*, the Western District of Texas merely predicted that the Texas Supreme Court would not recognize medical monitoring as an *independent cause of action absent physical injury*, although, to date, the "Texas Supreme Court has not addressed whether to adopt medical monitoring as a cause of action." 414 F. Supp. 2d at 663-68 (emphasis added). Despite making its prediction, the Western District noted that "American courts generally allow medical monitoring expenses as a *remedy* when a present physical injury" is caused by a defendant's tortious conduct. *Id*. at 666.

[15] The District Court in *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999), simply noted that the Minnesota Supreme Court had yet to recognize medical monitoring as an independent theory of recovery and therefore the court declined "at this time to find that such a *tort* [] exists under Minnesota law." *Id.* at 552 (emphasis added).

Insofar as the NHL asserts that Minnesota and Texas law have yet to recognize a discrete and independent tort entitled "medical monitoring," that is only so where there is no present physical injury. However, both Minnesota and Texas are among the majority of jurisdictions recognizing medical monitoring as an element of relief in negligence, provided that the plaintiff can establish present physical injury. *See Palmer,* 2005 WL 5891911. NHL's concomitant failure to acknowledge Plaintiffs' more-than-plausible pleading of present injury in the form of excess Tau protein release and build-up is also fatal to its motion. Because the MAC does not depend on the existence of medical monitoring as an independent tort in the absence of present injury, the NHL motion should be denied.

CONCLUSION

Based on the foregoing points and authorities, Plaintiffs respectfully request that this Court DENY Defendant's Motion to Dismiss Master Complaint Pursuant to Rules 12(b)(6) and 9(b).

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