UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

DEFENDANT NATIONAL HOCKEY LEAGUE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS MASTER COMPLAINT BASED ON LABOR LAW PREEMPTION

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PRELIMINARY STATEMENT

Plaintiffs, former NHL Players, purport to assert state law tort claims against the National Hockey League ("NHL" or the "League"). The NHL now moves to dismiss the Master Administrative Complaint ("MAC" or "Complaint") pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that the claims are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301").

For more than forty years, the National Hockey League Players Association ("NHLPA" or the "Union") has been the exclusive collective bargaining representative of all NHL Players. During that time, the League and the Union have reached collectively-bargained agreements concerning virtually every term or condition of employment relating to Player health and safety, including the "helmet requirement," rules concerning removal from and return to work following an injury, neuropsychological testing of Players, Playing Rules on body checking, fighting and hits to the head, and disciplinary procedures. Seventeen years ago, the League and the Union jointly negotiated and created a Concussion Program to address the issue of head injuries specifically.

It is precisely because of this rich history of collective bargaining that Plaintiffs' tort claims for alleged hockey-related injuries are preempted by Section 301. Those claims are based on duties relating to Player health and safety that arise, if at all, out of agreements the parties reached through collective bargaining. Plaintiffs' claims also cannot be resolved without interpreting those agreements. For both reasons, the claims are preempted by Section 301 and must be dismissed.

Although Plaintiffs endeavored to draft a Complaint that elided the role of labor law, they did not and could not succeed because of the Union's pervasive role in negotiating health and safety issues on behalf of the Players it represents. As the Complaint alleges,

> ….NHL Commissioner Gary Bettman recently stated, "We have, on our own, a long history, going back to 1997, of taking concussions very seriously." He added, "We spend a lot of time, money and effort working with the players' association on player safety…." (MAC, ¶ 221)
>
> ….The NHL has admitted that it has "always" assumed the duty to care for player safety. Deputy Commissioner Daly has publicly stated, "[The NHL is] completely satisfied with the responsible manner in which the league and the players' association have ***managed player safety over time, including with respect to head injuries and concussions….***This is something that we have **always** treated as important and will continue to treat as important. (MAC, ¶ 345, emphasis in original)

Labor preemption is properly before the Court on this motion to dismiss. The time to resolve the issue of preemption is now, at the outset of the case, because it is a threshold issue that is dispositive.

BACKGROUND

The NHL is an unincorporated association of thirty Member Clubs that operates the major professional hockey league in North America. (MAC, ¶ 158) Plaintiffs are former Players for one or more Member Clubs. (MAC, ¶¶ 1, 27, 40, 52, 59, 67, 74)

Since 1967, the NHLPA has been the exclusive collective bargaining representative for all Players employed by NHL Clubs. (*See* Declaration of William Daly, Exh. 1, p. 1) The first fully integrated collective bargaining agreement covered the

period September 15, 1975 through September 15, 1980, and the parties thereafter entered into successor agreements ("CBA").[1] The Plaintiffs were employed by one or more NHL Clubs (not the NHL) while at least one CBA was in effect. (MAC, ¶¶ 1, 27, 40, 52, 59, 67, 74)

Every Player who is employed by a Member Club must sign a Standard Player's Contract ("SPC"). The SPC, which has been attached as an exhibit to every CBA, sets forth standardized terms and conditions of employment that have been collectively-bargained between the League and the Union, while allowing the Player and the NHL Club to agree on certain subjects, such as compensation and duration.[2]

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[1] The CBAs from 1975 to the present are attached to the Affidavit of William Daly. The Court can consider the CBAs in deciding this motion. Although the MAC omits any reference to the CBAs, they may be considered on this motion because they are integral to Plaintiffs' claims, their authenticity is not in dispute and they are embraced by the pleadings. *Brodkorb v. Minnesota*, No. Civ. 12-1958, 2013 U.S. Dist. LEXIS 19416, at *9-10 (D. Minn. 2013) (a court may consider documents "necessarily embraced by the pleadings."); *Thunander v. Uponor, Inc.*, 887 F. Supp. 2d 850, 859 (D. Minn. 2012) (citations omitted) ("[w]hen considering a Rule 12 motion, the court generally must ignore materials outside the pleadings, but it may consider 'some materials that are part of the public record or do not contradict the complaint"); *Greenly v. Sara Lee Corp.,* No. Civ. S-06-1775, 2006 U.S. Dist. LEXIS 90868 at *8 (E.D. Cal. Dec. 13, 2006) (rejecting notion that plaintiff can "artfully plead so as to avoid mentioning the [collective bargaining] agreement, thereby avoiding federal preemption issues."); *D'Amato v. Southern Conn.*, No. 3:97 CV 838, 2000 U.S. Dist. LEXIS 18960 at *7 (D. Conn. Sept. 8, 2000) ("it is appropriate to consider the CBA in ruling on a Rule 12(b)(6) motion to dismiss raising issues of LMRA preemption"; "[w]hen a party chooses not to attach to the complaint or incorporate by reference a document upon which it relies and which is integral to the complaint, the Court may take that document into consideration without converting the motion to dismiss into one for summary judgment.")

[2] The SPC is incorporated into the 2012 CBA by Article 11, and is also Exhibit 1 thereto. *See also* 1975 CBA, Art. 9.03, p. 29; 1981 CBA, Art. 9.03, Exh. 2E; 1984 CBA, Art. 9.03, Exh. 8; 1988 CBA, Art. 9.03, Exh. 13; 1995 CBA, Art. 11, Exh. 1; 2005 CBA, Art. 11, Exh. 1.

In addition to the SPCs, the CBA cross-references and incorporates other collectively-bargained agreements between the NHL and the Union, as well as the NHL Constitution and By-Laws ("League Rules") and the League "Playing Rules"[3] that govern the manner in which the game is played.

Taken together, the CBA and these other collectively-bargained agreements comprehensively govern Player health and safety issues, including: (i) the allocation of responsibility among the Clubs, the Clubs' medical staffs, and the Players themselves for diagnosing and treating Player injuries, and making "fitness to play" decisions; (ii) a Player's right to receive a copy of his medical records from his Club and an end of season physical examination that "shall document all injuries that may require future medical or dental treatment either in the near future or post-career" (*see infra* at 22, 35); (iii) a Player's right to compensation and benefits in the event of a hockey-related injury; (iv) how the game is to be played, including what conduct is prohibited (and what penalties

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Both the SPC and CBA are contracts governed by Section 301. *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1177-1178 (1990); *Rudnay v. Kansas City Chiefs Football*, 100 Lab. Cas. (CCH) p. 10,936 (W.D. Mo. 1983); *Dryer v. Los Angeles Rams*, 220 Cal. Rptr. 807 (Cal. 1985).

[3] *See* 1975 CBA, Art. 7.02; 1981 CBA, Art. 7.02; 1984 CBA, Art. 7.02; 1988 CBA, Art. 7.02; 1995 CBA, Art. 30.2-30.3; 2005 CBA, Arts. 30.1-30.3; 2012 CBA, Arts. 30.1-30.3.

In addition, a number of the underlying complaints filed in this action prior to consolidation and the filing of the MAC expressly rely on and quote from the League Playing Rules, specifically Rules 41, 46 and 48. *See*, *e.g.*, *Christian v. NHL*, No. 0:14-cv-01140-SRN-JSM (D. Minn. filed Apr. 15, 2014) at ¶¶ 81-93, 158-66*; Leeman v. NHL*, No. 1:13-cv-01856-KBJ (D.D.C. filed Nov. 25, 2013) at ¶¶ 13, 112-15.

may be assessed for violations of the Playing Rules); and (v) the role of the Union in amending Playing Rules. The CBA and SPC also set forth dispute resolution procedures to be followed in the event of a dispute arising thereunder.

In addition, in 1997, the NHL and Union agreed to launch the NHL-NHLPA Concussion Program in order to improve the diagnosis, management and treatment of Player concussions (the "Concussion Program"). (Daly Dec., Exh. 10) The MAC is replete with allegations concerning the testing, return to play protocols and other aspects of (or supposed deficiencies in) the Concussion Program, the creation of which is alleged to be a source of the duty of care undertaken by the League. (¶¶ 11-15; 357-375; 401(b)) The contents of the Concussion Program are most certainly "embraced by the pleadings" and are, therefore, properly before the Court on this motion to dismiss.[4]

The Concussion Program requires Players to undergo pre-season "baseline" neuropsychological testing. *See* MAC ¶ 11. After a Player is diagnosed with a concussion, he undergoes post-injury neuropsychological testing and his test results are compared to his pre-season "baseline" neuropsychological test results to determine when he returns to that baseline. (MAC ¶¶ 11, 372). In an October 28, 1997 memorandum to Players (issued under NHL and Union logos), Dr. Mark Lovell and Dr. Alan Finlayson (the NHL's and Union's appointed representatives, respectively) noted that while prior attention had focused on bone and soft-tissue injuries, "[r]ecently, attention has focused

[4] *See supra* at fn. 1. *See also Thunander*, 887 F. Supp. 2d at 860, n.1 ("when a complaint quotes from or cites to particular supporting documents, it is good practice to file any such supporting documents as exhibits to the complaint.")

on the less obvious but nevertheless real consequences of 'concussion' or mild brain injury." (Daly Dec., Exh. 10) The parties advised Players that "[t]he NHL and NHLPA have agreed upon a new testing program….By taking baseline measurements now, it will make it easier for you and your health advisors to help you make informed decisions later if you sustain a concussion or mild brain injury." *Id*. The parties further advised Players that

> it is important that this recovery process is complete before engaging in high risk activity otherwise a second injury can be much worse. Also with repeated minor brain injury the risk that the temporary problems become permanent increases. For hockey players this can affect the individuals' ability to perform well and ultimately their safety on the job and can increase the likelihood of further injury.

Id.

Thereafter, agreements between the NHL and the Union on policies and procedures regarding the diagnosis, management and treatment of concussions – including return-to-play considerations – were codified in written protocols. MAC, ¶¶ 372, 374. In January 2010, the NHL/NHLPA Concussion Working Group codified the then-current policies and procedures regarding concussions into a single comprehensive document (the "NHL Concussion Evaluation and Management Protocol"). (Daly Dec., Exh. 11) The MAC also refers expressly to revised protocols in 2011 and 2013 (MAC, ¶¶ 372, 374), both of which were collectively-bargained with the Union. (Daly Dec., Exhs. 12, 13, 14)

ARGUMENT

PLAINTIFFS' CLAIMS ARE PREEMPTED BY SECTION 301 OF THE LMRA

Plaintiffs' state-law tort claims should be dismissed because they are preempted by Section 301, which governs "[s]uits for violation of contracts between an employer and a labor organization representing employees." 29 U.S.C. § 185(a).

A. Section 301 of the LMRA preempts state-law claims that are either founded on rights created by a CBA or that substantially depend on an interpretation of a CBA.

Section 301 preempts two types of claims: "claims founded directly on rights created by [a] collective bargaining agreement[], and also claims 'substantially dependent upon analysis of a collective bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987) (citing *Int'l Bhd. Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985).

The preemption doctrine flows from the principle articulated by the Supreme Court that Section 301 authorizes federal courts to create a "body of federal law for the enforcement of … collective bargaining agreements." *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957). As the Court later observed in *Allis-Chalmers*, 471 U.S. at 210-211 (1985), allowing CBA terms to be given "different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Thus, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to

uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Id*.

Accordingly, Section 301 preempts state law claims that "are premised on duties created by the relevant CBA such that they are 'based on' the agreement." *Williams v. NFL*, 582 F.3d 863, 881 (8th Cir. 2009); *see also United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 369 (1990) ("a state-law tort action against an employer may be pre-empted by § 301 if the duty to the employee of which the tort is a violation is created by a collective-bargaining agreement…."). Section 301 also preempts any claim (even one arising independently of the CBA) that is "substantially dependent upon an analysis" of a CBA or that is "inextricably intertwined" with the terms of a CBA. *Caterpillar*, 482 U.S. at 395, *Williams*, 582 F.3d at 881; *Trs. of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 334 (8th Cir. 2006).

B. Plaintiffs' negligence claims are preempted under both prongs of the Section 301 analysis.

Plaintiffs assert a claim for negligence (Count III), as well as claims for "declaratory relief" and medical monitoring (Counts I and II, respectively), each of which also relies on an underlying negligence theory. (MAC ¶¶ 401, 409) In order to succeed, Plaintiffs must show that the NHL voluntarily assumed a duty of care; and that the NHL breached that duty by failing to keep Plaintiffs safe.[5]

[5] In *Duerson v. NFL, Inc.,* 2012 U.S. Dist. LEXIS 66378 at *8 (N.D. Ill. May 11, 2012) the court observed that preemption analysis requires a "case-by-case analysis of the state-law claim as it relates to the CBA." (internal citation omitted). As in *Duerson*, however, the determination of which state law applies to the negligence-based claims is

Every court that has had occasion to consider negligence claims of the kind asserted in the MAC has held that the claims were preempted under one or both prongs of the Section 301 analysis. *Williams,* 583 F. 3d at 863; *Nelson ex. rel. Boogaard v. Nat'l Hockey League*, 2014 WL 656793 (N.D. Ill. Feb. 20, 2014); *Duerson v. NFL, Inc.*, No. 12 C 2513, 2012 U.S. Dist. LEXIS 66378 at * 16 (N.D. Ill. May 11, 2012); *Maxwell v. Nat'l Football League Mgt. Council*, No. CV 11-08394 (C.D. Cal. Dec. 8, 2011); *Atwater v. NFL Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010); *Stringer v. NFL*, 474 F. Supp. 2d 894 (S.D. Ohio 2007); *Holmes v. NFL*, 939 F. Supp. 517 (N.D. Tex. 1996); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172 (N.D.N.Y. 1990).[6] The same conclusion is mandated in the instant case.

1. All of the duties that Plaintiffs claim the NHL "voluntarily" assumed arise under agreements that were collectively bargained with the Union.

Plaintiffs' claims are preempted because they are "based on" collectively-bargained agreements between the NHL and the Union. Plaintiffs' allege that the NHL ***voluntarily assumed*** a duty to Players to protect them from head injuries and to disclose

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not necessary here "because a negligence claim in all states requires, in some form, the existence of a duty, the breach of that duty, causation, and damages." *Id.* (citation omitted).

[6] In *Green v. Arizona Cardinals Football Club*, No. 4:14CV461, 2014 WL 1920468 at *5 (E.D. Mo. May 14, 2014), the court remanded a negligence claim against the employer, rejecting the assertion that the claim was subject to Section 301 preemption. The complaint in *Green*, however, was not premised on a duty alleged to have been voluntarily undertaken, but rather on an employer's "common law duties [under Missouri law] to maintain a safe working environment" for employees. Thus, even assuming, *arguendo*, that *Green* was decided correctly, it is distinguishable from the instant case because the NHL was never Plaintiffs' employer.

accurate information to them concerning the risks associated with head injuries, and that the NHL was negligent in performing these duties. (MAC ¶¶ 401(b), 408-409, 421)

Every action that Plaintiffs identify as the basis for a voluntary assumption, however, is an action that the NHL took in collective bargaining with the Union, including: (a) instituting helmet requirements alleged to be inadequate (MAC, ¶ 9); (b) undertaking the study of concussions under the Concussion Program and acquiring knowledge that it failed to impart to the Players (MAC ¶¶ 12-13, 15, 102, 336, 401(b)); and (c) the League's supposed "unilateral" authority to promulgate Playing Rules and enforce such Playing Rules via Player discipline and, by doing so, to dictate how NHL hockey will be played. (MAC ¶¶ 331, 345, 354-56, 421) As discussed below, these allegations are all rooted in obligations that arise (if at all) under the League's collectively-bargained agreements with the Union. As such, the claims are preempted under the first prong of the Section 301 analysis, *i.e.*, they are "based on" collectively-bargained agreements.

Indeed, labor law principles virtually dictate that the "voluntary undertaking" of a duty in the context of a unionized environment ***must*** find its roots in the parties' collectively-bargained agreement(s). The health and safety of NHL Players is a "term or condition of employment" and is therefore a mandatory subject of collective bargaining under the National Labor Relations Act (29 U.S.C. § 151, *et seq.*)[7] In the absence of a

[7] *See*, *e.g.*, *NLRB v. Gulf Power Co.*, 384 F.2d 822, 825 (5th Cir. 1967) ("safety rules and practices which are undoubtedly conditions of employment" are mandatory subjects of bargaining); *Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983)

union's waiver of the right to bargain, an employer cannot unilaterally implement changes to terms or conditions of employment (including safety rules) without first negotiating with the union and reaching either agreement or impasse; making a unilateral change is otherwise an unfair labor practice under the NLRA. *NLRB v. Katz*, 369 U.S. 736 (1962).

Because of this, Plaintiffs' claims are preempted.

a. The collectively-bargained helmet requirement.

First, Plaintiffs allege that the NHL "assum[ed] a duty as a guardian against head trauma" when it "instituted the helmet requirement in 1979." (MAC ¶ 9) The helmet requirement was in fact implemented pursuant to a collectively-bargained agreement between the NHL and the Union.[8] (Daly Dec., Exh. 15) Plaintiffs' assertion that the NHL's implementation of the helmet requirement constituted the voluntary assumption of a duty is thus necessarily a claim that is "based on" a collectively-bargained agreement (and is therefore preempted by Section 301).[9]

(noting that "few policies and practices could be considered more central to an employee's working conditions than those relating to job safety and office environment").

[8] The parties agreed in collective bargaining to make helmets mandatory for all Players other than those who had signed contracts prior to June 1, 1979 and provided the NHL and his Club with a release.

[9] Section 301 encompasses agreements other than documents titled "collective bargaining agreements." In *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 27–28 (1962), the Court held that Section 301 governed a negotiated agreement more limited in scope than a traditional CBA because "[i]t is enough that this is clearly an

b. The collectively-bargained Concussion Program.

Second, Plaintiffs allege that the League, "acting in accord with its duty to the players,…created a concussion program…[but] failed to discharge its assumed duty non-negligently." (MAC ¶ 9) However, the Concussion Program, like the "helmet requirement," was created by agreement with the NHLPA, which, in 1997, "joined hands with the NHL in supporting the neuropsychological testing program" and appointed its own representative to the Concussion committee. (Daly Dec., Exh. 9) Indeed, the NHL/NHLPA joint communication to Players announcing the launch of the Concussion Program explained:

> The NHL and NHLPA have agreed upon a new testing program which will evaluate this aspect of your overall health. By taking baseline measurements now, it will make it easier for you and your health advisers to help you make informed decisions later if you sustain a concussion or mild brain injury.

(Daly Dec., Exh. 10)

The other actions that the League has taken with respect to concussions have also been taken jointly with the Union. For example, the so-called 2011 "Concussion Program Report," which the Plaintiffs cite to repeatedly and condemn as supposedly filled with shortcomings (MAC ¶¶ 10, 15-16, 107-123, 358-361, 364-365, 369-71) is on its face an agreed-upon product of the joint "NHL-NHLPA Concussion Program" and recites the fact that "[i]n 1997, the [NHL] and [NHLPA] launched the NHL-NHLPA

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agreement between employers and labor organizations significant to the maintenance of peace between them."

Concussion Program to examine concussion from a scientific perspective and to better understand its natural history and contribute new knowledge to the field." (Daly Dec., Exh. 16) The report was co-authored by the NHLPA's medical consultant, Dr. John Rizos. *Id.* Indeed, the report specifically acknowledges the contributions of the NHL, the NHLPA and the NHL-NHLPA Concussion Working Group. *Id*. at 911.

In addition, the 2009-2010 Concussion Evaluation and Management Protocol was an agreement reached between and among the members of the joint NHL/NHLPA Concussion Working Group. This Protocol defined concussions, required (as in the past) baseline neuropsychological evaluations, set minimum standards for evaluation and management of concussions, and affirmed that responsibility for fitness to play determinations lies with team physicians. (Daly Dec., Exh. 11)

The March 2011 revisions to the Concussion Evaluation and Management Protocol (referred to in MAC ¶ 372) were, as the Union confirmed, the product of "agreement…reached with the League to introduce important clarifications to [the return to play] process." (Daly Dec., Exh. 13) Likewise, the 2013 changes to the Protocol, referred to in MAC ¶ 374, were in fact changes adopted by the NHL/NHLPA Concussion Subcommittee pursuant to the "NHL/NHLPA Concussion Evaluation and Management Protocol." (Daly Dec., Exh. 14)

As is evident from the foregoing, the claim that the NHL "voluntarily undertook" a duty of care "[b]y voluntarily inserting itself into [the concussion] research and public discourse" (MAC ¶ 13), and that the League "voluntarily assumed a duty to investigate,

study, and truthfully report to the NHL players…the medical risks associated with hockey and brain injuries" by creating the Concussion Program (MAC ¶ 15), is a claim that is squarely "based on" collectively-bargained agreements and is therefore preempted by Section 301.

c. The collectively-bargained provisions concerning Playing Rules and discipline.

Third, Plaintiffs claim that the NHL "voluntarily assumed [a] duty of care and power to govern player conduct on and off the ice" because "at all relevant times [it] was in a position to influence and dictate how the game would be played and to define the risks to which players would be exposed." (MAC ¶¶ 354-356) The MAC further alleges that the NHL breached the assumed duty of care by failing to enact and enforce rules covering dangerous body checks and fighting. (MAC ¶¶ 20, 237, 278, 280, 290, 300, 303-305, 329, 344(a), 384, 424(a))

The supposedly deficient Playing Rules and disciplinary procedures that lie at the heart of this claim are part of the collectively-bargained terms and conditions of employment. As set forth in Article 30.2 of the CBA, "[e]ach Player shall be bound by the League's Playing Rules to the extent that such rules are not in conflict with provisions of this Agreement."[10] Under Article 30.3, amendments to the Playing Rules may not be made without the prior written consent of the NHLPA (not to be unreasonably

[10] References to specific CBA articles in the body of the NHL's memorandum are, unless otherwise noted, to the 2012 CBA. Provisions similar to Article 30.2 appear in all predecessor CBAs. *See* 1975 CBA, Art. 7.02; 1981 CBA, Art. 7.02; 1984 CBA, Art. 7.02; 1988 CBA, Art. 7.02(a); 1995 CBA, Art. 30.2; 2005 CBA, Art. 30.2.

withheld).[11] Under Article 22, the Player/Club Competition Committee (consisting of an equal number of NHLPA and Club officials) is vested with authority to "examin[e] and mak[e] recommendations associated with issues affecting the game and the way the game is played," including changes to the Playing Rules.[12]

The CBA governs not only what the Playing Rules are (and how they can be changed), it also governs how they are enforced. Under Article 18 of the CBA, and its predecessors, supplementary discipline (in the form of fines and suspensions) may be imposed in accordance with the procedures and limitations set forth therein.[13]

2. Because the alleged duties that underlie Plaintiffs' negligence claims arise under collectively-bargained agreements, those claims are preempted.

The Supreme Court made clear in *Allis-Chalmers* that "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties are pre-empted by those agreements." 471 U.S. at 213. In *Allis-Chalmers*, the Court held that a tort claim of bad faith handling of a disability insurance claim under a plan included in a collective bargaining agreement was preempted by Section 301. The Court rejected the assertion that the question of bad faith could be evaluated independently of the agreement, stating:

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[11] A similar provision appears in the 1995 and 2005 CBAs, at Article 30.3. The role of the Union with respect to Playing Rules was also enumerated in predecessor CBAs. *See* 1975 CBA, Art. 7.02; 1981 CBA, Art. 7.02; 1984 CBA, Art. 7.02; 1988 CBA, Art. 7.02(a).

[12] *See also* 1995 CBA, Art. 22; 2005 CBA, Art. 22.

[13] *See also* 1975 CBA, Art. 4.09; 1981 CBA, Art. 4.08; 1984 CBA, Art. 4.08; 1988 CBA, Art. 4.08; 1995 CBA, Art. 18, Exh. 8; 2005 CBA, Art. 18, Exh. 8.

> The assumption that the labor contract creates no implied rights is not one that state law may make. Rather, it is a question of federal contract interpretation whether there was an obligation under this labor contract to provide the payments in a timely manner, and, if so, whether Allis-Chalmers' conduct breached that implied contract provision.
>
> * * *
>
> …the Wisconsin court's statement that the tort was independent from a contract claim apparently was intended to mean no more than that the implied duty to act in good faith is different from the explicit contractual duty to pay. Since the extent of either duty ultimately depends upon the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law.
>
> * * *
>
> ….Under Wisconsin law, the tort intrinsically relates to the nature and existence of the contract….Thus the tort exists for breach of a "duty devolve[ed] upon the insurer by reasonable implication from the express terms of the contract, the scope of which, crucially, is "ascertained from a consideration of the contract itself."….
>
> * * *
>
> ***The duties imposed and rights established through the state tort thus derive from the rights and obligations established by the contract….***

471 U.S. at 218 (emphasis added)

The Court's decision in *Rawson*, 495 U.S. 362, applied the same analysis in a negligence claim premised on an alleged voluntarily undertaken duty of care. The Court held that the tort claim against a union (for negligent inspection of a mine) was preempted by Section 301. The Idaho Supreme Court had held that the claim could go forward because the union's duty to perform the inspection reasonably "arose from the fact of the inspection itself rather than the fact that the provision for the Union's participation in mine inspection was contained in the labor contract." *Id.* at 370-371. The Court rejected that conclusion:

> As we see it,…respondents' tort claim cannot be described as independent of the collective-bargaining agreement. This is not a

> situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society…..
>
> Nor do we understand the Supreme Court of Idaho to have held that any casual visitor in the mine would be liable for violating some duty to the miners if the visitor failed to report obvious defects to the appropriate authorities. Indeed, the court did not disavow its previous opinion, where it acknowledged that the Union's representatives were participating in the inspection process pursuant to the provisions of the collective-bargaining agreement, and that the agreement determined the nature and scope of the Union's duty. If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law.

Id. at 371.

It bears emphasis that Plaintiffs do not allege any general duty running from the NHL to Players as a matter of law. Indeed, the duties that are alleged are not those that would be "owed to every person in society." *United Steelworkers v. Rawson*, 495 U.S. 362, 370-71.

Rather, the very essence of Plaintiffs' claims is that the NHL "voluntarily assumed" duties by virtue of agreements governed by Section 301. The claims are, therefore, necessarily preempted. *See Nelson v. NHL,* 2014 WL656793, at *4 (citations omitted) ("[w]here, as here, the extent of a defendant's voluntary undertaking is set forth in a collective bargaining agreement, the voluntary undertaking claim by necessity 'is inextricably intertwined with consideration of the terms of the labor contract,'…and thus is completely preempted by § 301 of the LMRA.")

Had the Union been named as a party (or should it be brought into the case via impleader), it would almost certainly raise Section 301 preemption as a defense, citing both *Rawson* and *Hechler* for the proposition that "a court would have to ascertain first, whether the [CBA] in fact placed an implied duty of care on the Union to ensure a safe workplace, and, second, the nature and scope of that duty." *Hechler,* 481 U.S. at 862. It would make no sense if only one party to the CBA were covered by Section 301 preemption while the other party remained subject to state tort law.

3. Because the collectively-bargained agreements must be interpreted to resolve Plaintiffs' negligence claims, those claims are preempted.

Plaintiffs' negligence claims are in any event preempted under the second prong of the Section 301 analysis because they cannot be resolved without interpreting the collectively-bargained agreements between the NHL and the Union.

Williams governs this case. 582 F.3d at 881. There, two players for an NFL club were suspended after testing positive for bumetanide, a substance banned under the NFL's collectively-bargained drug policy. The players asserted a variety of claims, including negligence, fraud and negligent misrepresentation based on the NFL's alleged failure to advise them that StarCaps (the nutritional supplement they consumed) contained bumetanide. The plaintiffs' common-law claims were remarkably similar to the claims advanced here: that the "NFL had a common duty to the Williamses once it sought and found out the dangerous fact that StarCaps contained Bumetanide" (*i.e.*, that the NFL had superior knowledge) and that Minnesota law imposes a duty on one who voluntarily undertook to act or speak. *Williams,* 582 F.3d at 881.

The Eighth Circuit in *Williams* did not need to resolve whether the NFL's duty "arose under" the CBA or the drug policy because there was no question that the court would have been required to interpret those agreements to resolve plaintiffs' claims. "[W]hether the NFL or the individual defendants owed the Players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the Policy." *Williams*, 582 F. 3d at 881. Thus, the common law tort claims were "inextricably intertwined" with consideration of the terms of those agreements. "Because the claims 'relating to what the parties to a labor agreement agreed…must be resolved by reference to uniform federal law,' they are preempted by section 301." *Id. (citing Allis-Chalmers,* 471 U.S. at 211).

The decision in *Duerson v. National Football League*, 2012 U.S. Dist. LEXIS 66378 at *16, is also instructive. There too, the court held that Section 301 preempted state law negligence claims similar to those presented here, in particular, claims that the NFL had "negligently caused David Duerson's CTE and death by, among other things, failing to educate players about the risks of concussions and the dangers of continuing to play after suffering head trauma, failing to ensure rapid diagnosis and treatment of David Duerson's condition, and failing to implement policies to prevent David Duerson from returning to play with his injuries." *Id.* at 4. The court so held because resolution of the claim would require interpretation of multiple CBA provisions concerning player health and safety that were "directly relevant to the particular duty at issue." *Id*. at *5. The court emphasized that the CBA provisions – which assigned various safety-related

responsibilities to NFL club physicians and trainers – could plausibly lead to an interpretation that "those provisions impose a duty on the NFL's clubs to monitor a player's health and fitness to continue to play football." That interpretation, in turn:

> would tend to show that the NFL could reasonably rely on the clubs to notice and diagnose player health problems arising from playing in the NFL. The NFL could then reasonably exercise a lower standard of care in that area itself. Determining the meaning of the CBA provisions is thus necessary to resolve Duerson's negligence claim.

Id. at 11.

In yet another similar case, *Stringer v. NFL*, the court applied the same logic to dismiss a wrongful death claim arising out of Stringer's death from heatstroke during training camp. The plaintiff in *Stringer* alleged that the NFL had breached a voluntarily assumed duty "to use ordinary care in overseeing, controlling, and regulating practices, policies, procedures, equipment, working conditions and culture of the NFL teams…to minimize the risk of heat-related illness." *Id*. at 899. The court held the claim preempted because the question of whether the NFL had been negligent was "inextricably intertwined with certain key provisions of the CBA." The court noted that the CBA "places primary responsibility" for treating players on the club physicians and that those provisions "must…be taken into account in determining the degree of care owed by the NFL and what was reasonable under the circumstances." *Id*. at 910-11. In other words, "the degree of care owed cannot be considered in a vacuum" but instead "must be considered in light of pre-existing contractual duties imposed by the CBA on the

individual NFL clubs concerning the general health and safety of the NFL players." *Id*. at 910.

The negligence claims here are likewise substantially dependent on an analysis of the CBA and the collectively-bargained agreements that form the Concussion Program. As in *Williams, Duerson* and *Stringer*, even if the Court were to hold that the voluntarily assumed duties alleged in the MAC arose independently of these agreements, "the necessity of interpreting [the agreements] to determine the standard of care still leads to preemption." *Duerson* at *12.

a. Plaintiffs' claims are inextricably intertwined with the CBA provisions concerning Player health and safety.

Every CBA has delineated an allocation of responsibilities for reporting and treating injuries, and for making fitness-to-play determinations. The critical terms are contained in paragraph 5 of the collectively-bargained SPC (and, since 2005, in Article 17.7 of the CBA): it is the Player's responsibility to report an injury and to submit himself for examination and treatment by a Club physician. After the Club physician determines that the Player is fit or unfit to play, the Player may seek a second opinion. If the second opinion physician agrees with the determination of the Club physician, that determination is binding. If they disagree, a third physician is appointed and renders a determination that is binding. *See supra* at fn. 2.

The CBA also addresses the right of Players to receive their medical records. Under Article 23.10:

> At the conclusion of each season, the Club shall provide each Player with a complete copy of his medical records at the time of his annual exit physical (to the extent the Club maintains physical possession of the Player's medical records; otherwise the Club's physician will provide the Player with a complete copy of his medical records upon the Player's direction to do so). ***The exit physical shall document all injuries that may require future medical or dental treatment either in the near future or post-career.*** The Club shall remain responsible for the payment of medical and dental costs associated with treatment of such hockey-related injuries at such future date. (Emphasis added.)[14]

Additional CBA provisions also allocate responsibilities to the Clubs for compensation and benefits in the event of hockey-related injuries. For instance, Clubs are required to fund a medical plan for Players; maintain life and disability insurance for career ending disabilities; and obtain workers' compensation coverage in states where it is not compulsory or required for professional athletes.[15]

Plaintiffs' claim here is that the NHL owed a duty to protect Players' safety by virtue of its voluntary undertaking to do so; that "NHL personnel" and "League medical directors, supervisors, doctors and trainers" failed to satisfy that duty (MAC ¶¶ 84, 127); and that "NHL-approved doctors and trainers" failed to protect Players from a premature return to hockey-related activities following a concussion. (MAC ¶¶ 94-96, 128, 136, 360, 414, 424) As in *Duerson*, in order to determine the accuracy of these allegations

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[14] *See also* 2005 CBA, Art. 23.10.

[15] *See* 1975 CBA, Arts. 12, 14; 1981 CBA, Arts. 12, 14; 1984 CBA, Arts. 12, 14; 1988 CBA, Arts. 12, 14; 1995 CBA, Art. 23; 2005 CBA, Arts. 23, 31.5; 2012 CBA, Arts. 23, 31.5.

Since 2012, moreover, the CBA has expressly stated that "[e]ach Club shall provide its Players with high quality health care appropriate to their needs as elite professional hockey players." *See* 2012 CBA, Art. 34.1(a).

and reasonableness of the NHL's conduct, the Court would have to determine, *inter alia*, whether in light of the express delegation in the CBAs and SPCs of responsibility to the Clubs and Club physicians (as well as second and third opinion physicians), it was reasonable for the NHL to rely on those determinations or whether the NHL had an obligation to question the Clubs' determination, retain its own physicians to monitor practices and games, and/or advise individual injured Players on the potential long-term consequences of concussions.

b. Plaintiffs' claims require interpretation of the collectively-bargained Concussion Program.

Plaintiffs' claims are also substantially dependent on an analysis of the collectively-bargained Concussion Program. Indeed, given the extensive references to the NHL's actions (and alleged inaction) pursuant to the Program, it is apparent from the face of the MAC itself that the negligence claims are "inextricably intertwined" with the Program. The MAC repeatedly purports to find fault with a variety of aspects of the Program, including: the NHL's purported failure to follow the "when in doubt, sit them out" philosophy (MAC ¶ 372); and the absence of a requirement to have a neurosurgeon available at games (MAC ¶ 375). To decide Plaintiffs' claims, the Court would have to determine whether those supposed omissions were reasonable in light of the Program as a whole. In addition, the Court would have to determine whether the collectively-bargained Concussion Program created a unilateral obligation on the NHL to:

(i) "make the game of professional hockey safer for the players and to keep the players informed of safety information, particularly about concussions and head injuries" (MAC ¶ 345);

(ii) publish reports discussing mild traumatic brain injury ("MTBI") and to make "statements of substance on the issues of concussions and post-concussion syndrome" (MAC ¶¶ 366, 368);

(iii) "disclose to its players what [the NHL] learned at [annual international symposia]" concerning concussions (MAC ¶ 367);

(iv) analyze "the causes of concussions, such as fighting and equipment" (MAC ¶ 371);

(v) "educate players on the devastating impact of repeated trauma." (MAC ¶ 364)

The Court would not only have to interpret the Concussion Program to determine whether these obligations were created, the Court would then have to determine whether the League had satisfied any such obligations. For example, the joint NHL/NHLPA memorandum to Players informing them of the new testing program contained the following agreed-upon text:

> Most people recover quickly from a minor brain injury and resume their previous activities shortly after the incident. However, it is important that this recovery process is complete before engaging in high risk activity otherwise a second injury can be much worse. Also with repeated minor brain injury the risk that the temporary problems become permanent increases. For hockey players this can affect the individuals' ability to perform well and ultimately their safety on the job and can increase the likelihood of further injury.

The Court would have to construe whether this text satisfies the NHL's supposed duty to inform Players of the potentially harmful effects of concussions or whether there was in fact a "failure to inform Players of the actual increased risks to long-term brain health" (MAC ¶ 268) from concussions. The Court would also have to construe the following text contained in the same memorandum:

> The results of these tests will form a baseline for later comparison if, and only if, you should suffer a concussion. By comparing the levels of the before injury and after injury examinations, the psychologist can evaluate any change from your previous levels. This information, along with other physical and medical information will help ***those responsible for your health care*** help you to determine if it is safe for you to resume playing.

Daly Dec., Exh.10 (emphasis added). The highlighted language does not identify "those responsible" for the Players' health care but implies that it is somebody other than the NHL and NHLPA. The Court could plausibly interpret this language as placing the Players on notice that the League was not responsible for their safety and health.

In fact, the collectively-bargained January 2010 Concussion Evaluation and Management Protocol – consistent with the CBAs and SPCs – allocated responsibility for making return to play decisions to the Clubs and Club physicians. Indeed, the Protocol stated that "[a] central factor in this protocol is that the diagnosis of concussion and subsequent return to play following a concussion is an individual decision made by the team physician using all information available to him." (Daly Dec., Exh. 11) Thus, the Court would again be required to determine whether this allocation of responsibility to

the Club physician allows the NHL to "reasonably exercise a lower standard of care itself." *Duerson*, at *11.

c. The Court would be required to interpret collectively-bargained provisions concerning Playing Rules and Player discipline.

Preemption is also required because the adjudication of Plaintiffs' claims would be substantially dependent on an analysis of the collectively-bargained provisions covering Playing Rules and Player discipline. The MAC relies extensively on the assertion that fighting and violent body checking should be eliminated. (MAC ¶¶ 265) According to the MAC:

1. "The NHL has long recognized its power to reduce concussions and head injuries through its power to fine and suspend players." (¶ 349);
2. The League "at all relevant times was in a position to influence and dictate how the game would be played and to define the risks to which players would be exposed." (¶ 354);
3. In 2011, the NHL created the Department of Player Safety, which "administers supplemental player discipline." (MAC ¶ 373);
4. The League repeatedly failed to levy appropriate discipline to Players who engaged in fighting or other violent acts. (MAC ¶¶ 284-289);
5. The NHL inadequately punishes fighting compared to other leagues (MAC ¶¶ 290-298), which "[b]y both enforcing their rules and imposing proportional

punishments,….have successfully curbed violent fights from breaking out in their games, and essentially eliminated all fighting in the sport." (MAC ¶ 299)

Again, a decision on Plaintiffs' claims would be substantially dependent on an analysis of the CBA and collectively-bargained Playing Rules (which penalize fighting and other on-ice conduct) and disciplinary procedures. Notwithstanding the assertion that the NHL has the "unilateral" authority to "protect[] players" by disciplining violent conduct (MAC ¶ 331), the CBA imposes limitations on the League's authority and dictates the procedures and standards that apply both to changing Rules and imposing discipline. Because the Court would be required to interpret all of these provisions to adjudicate Plaintiffs' claims, those claims are preempted.

The Playing Rules are incorporated into the CBA by virtue of Article 30.2 (which binds each Player to the Playing Rules) – a provision that appeared in all prior CBAs (*see supra* at fn. 10) – and Article 30.3, which provides that the League may not change Playing Rules without the written consent of the NHLPA, not to be unreasonably withheld. *See supra* at fn. 11. The Playing Rules themselves define a range of conduct denominated as "physical fouls" (*e.g.*, "boarding," "fighting," and "illegal checks to the head"); state that violations may be punished with "major," "minor," "match" or "game misconduct" penalties; and allow for "supplementary discipline" by the Commissioner of the NHL. (Daly Dec., Exh. 17)

Supplementary discipline for violation of Playing Rules (in the form of fines or suspensions) is governed by Article 18 of the 2012 CBA (and Article 18 and Exhibit 8 of

its predecessors). Among other things, Article 18 sets forth the factors to be considered in determining the quantum of supplementary discipline, specifying that the League shall assess: the type of conduct involved, the extent of any injury to the opposing Player, whether the offending Player is a repeat offender, the situation of the game in which the incident occurred, and "such other factors as may be appropriate in the circumstances." *See also supra* at fn. 13.

Article 22 of the CBA establishes a "Player/Club Competition Committee" consisting of an equal number of NHL and NHLPA representatives to address, among other things, "the development, change, and enforcement of Playing Rules" and "Player equipment regulations and standards." The CBA provides that the Competition Committee's role is "to evaluate and make recommendations on matters relating to the game and the way the game is played, including [the matters referred to above] and any other matter that may be brought to the Competition Committee's attention with the consent of the NHL and the NHLPA." *See also supra* at fn. 12.

In short, the collectively-bargained structure establishes: the Rules by which the game is played; the standards used to assess supplementary discipline for violating those Rules; and a mechanism for considering changes to the Rules. A determination of Plaintiffs' claims would be substantially dependent on an analysis of these aspects of the CBA. Among other things, the Court would have to:

1. Apportion the relative responsibilities of the League, the Union and the Competition Committee in the Rule-making and enforcement process in order to determine the nature and scope of the NHL's duty.

2. Interpret the Rules to determine whether the NHL should have imposed discipline (or greater discipline) under the collectively-bargained disciplinary process for a variety of incidents that the MAC alleges should have been penalized (or penalized more harshly). (MAC ¶¶ 251-252, 253-254, 257-259, 284-287)

3. Interpret Article 18 of the CBA to determine supplementary discipline the NHL could have imposed for fighting.

4. Evaluate the sufficiency of the NHL's Playing Rules as measured against the rules of other professional and amateur hockey leagues, as well as the rules in an entirely different sport (the National Basketball Association) in order to determine whether the Rules are reasonable in light of the similarities and differences in the games. (MAC ¶¶ 290-299)

Clearly, the Court would have to do more than simply "consult" the CBA to answer these questions. *Allis Chalmers*, 471 U.S. at 218.

d. Plaintiffs' claims are dependent on an interpretation of the CBA's management rights clause.

Finally, the myriad allegations in the Complaint that the NHL failed to act with respect to Player health and safety issues are also dependent on an interpretation of the management rights clause in the CBA. For instance, Plaintiffs allege, among other

things, that the NHL "took no action to reduce the number and severity of concussions among its players" (MAC ¶ 12); that it failed to "implement procedures requiring players to sit out, and obtain proper evaluations, treatments, clearances and advice before returning to action" (MAC ¶ 94); and that it "unilaterally assumed the role of protecting players and informing players of safety concerns." (MAC ¶ 331) Because there can be no dispute that Player health and safety issues are mandatory subjects of bargaining (*see supra* at pp. 10-11, fn. 7), Plaintiffs' claims that the NHL failed to change Players' terms and conditions of employment will require this Court to interpret the CBA's' management rights clause to determine whether the Union clearly and unmistakably waived its right to bargain over these subjects.[16] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

Indeed, only if the management rights clause allowed the NHL to unilaterally implement policies and procedures affecting the health and safety of Players can the alleged failure to do so be deemed unreasonable – an essential element of Plaintiffs'

[16] The management rights clause states, in pertinent part:

> Each Club, and, where appropriate, the League . . .have the right at any time and from time to time to determine when, where, how and under what circumstances it wishes to operate, suspend, discontinue, sell or move and to determine the manner and the rules by which its team shall play hockey…
>
> A Club, and where appropriate the League, may take any action not in violation of any applicable provision of this Agreement, any SPC, or law in the exercise of its management rights.

2012 CBA, Art. 5. *See also* 1975 CBA, Art. 11.01; 1981 CBA, Art 11.01; 1984 CBA, Art. 11.01; 1988 CBA, Art 11.01; 1995 CBA, Art. 5; 2005 CBA, Art. 5.

negligence claims. *See*, *e.g.*, *Chapple v. National Starch & Chem. Co*., 178 F.3d 501, 508 (7th Cir. 1999) (whether the company acted properly "would require a court to decide if the employer was acting within the scope of the management rights clause of the collective bargaining agreement" and noting that "[t]his circuit has repeatedly held that such claims are preempted by Section 301"); *Panayi v. Northern Ind. Pub. Serv. Co*., 109 F. Supp. 2d 1012, 1016 (N.D. Ind. 2000) (finding preemption and dismissing complaint because "the court will have to decide whether [management rights] clause gives [employer] rights under the collective bargaining agreement allowing them to promulgate and enforce rules.")[17]

C. Plaintiffs' Fraud And Negligent Misrepresentation Claims Are Preempted Under Both Prongs Of The Section 301 Analysis.

Plaintiffs assert claims for negligent misrepresentation by omission (Count IV), fraudulent concealment (Count V) and fraud by omission/failure to warn (Count VI).[18] The negligent misrepresentation claim is premised on a supposed "special relationship" between the NHL and the Plaintiffs created by the League's "superior special

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[17] In *Bogan v. GM*, 500 F.3d 828 (8th Cir. 2007), the court declined to find preemption based on a management rights clause because the employer relied on that clause as a ***defense*** to plaintiff's claim of intentional infliction of emotion distress – *i.e*., that GM's conduct was justified in light of the CBA's management rights clause that allowed it to act in ways that were alleged to be unlawful. *Id*. at 832-33. Here, the opposite is true. The NHL is not relying on the management rights clause to justify its actions as a defense to Plaintiffs' claims. Rather, because Plaintiffs must establish that the NHL unreasonably failed to act with respect to mandatory subjects of bargaining, it must first establish that the NHL had the authority to take the actions that Plaintiffs allege should have been taken.

[18] Plaintiffs' claims for "declaratory relief" and medical monitoring (Counts I and II, respectively), also rely on underlying fraud and misrepresentation theories. (MAC ¶¶ 401, 409)

knowledge" of medical information that it failed to communicate. (MAC ¶ 429) According to the Complaint, the Plaintiffs "justifiably relied on the NHL's negligent misrepresentations by omission to their detriment." (MAC ¶ 432) The fraudulent concealment claim alleges that the NHL knowingly concealed information concerning the risks of head injuries and that the Plaintiffs "reasonably relied" on the League's silence and that, if they had been properly informed, they would have "ensured that they received appropriate medical treatment and ensured that they were completely healthy and their brains had completely healed before returning to play." (MAC ¶¶ 441, 443) The "fraud by omission/failure to warn" claim essentially repeats the same allegations. (MAC ¶¶ 447-454)

Plaintiffs' allegations that the NHL voluntarily assumed a duty to disclose information to Players are inseparable from their allegations concerning the voluntarily assumed duty of care. *See*, *e.g.*, MAC ¶ 153 ("Because the League assumed a duty of care to Plaintiffs, assuming duties of protection and disclosure"); *id*. at ¶ 345 ("The NHL assumed the duty to make the game of professional hockey safer for the players and to keep the players informed of safety information"). For the reasons discussed above, because these alleged voluntarily assumed duties arise under agreements that were collectively bargained with the Union, the fraud and misrepresentation claims are preempted under the first prong of the Section 301 analysis.

In any case, Plaintiffs' fraud and misrepresentation claims are also preempted because they are substantially dependent on interpretations of collectively-bargained agreements.

Williams is dispositive. The plaintiffs there alleged fraud and negligent misrepresentation claims in addition to their negligence and breach of fiduciary duty claims. The Eighth Circuit held that all the tort claims were preempted by Section 301, noting that the fraud claims required proof of justifiable reliance on the defendant's alleged misleading statements. "…[H]ere, the question of whether the Players can show that they reasonably relied on the lack of a warning that StarCaps contained bumetanide cannot be ascertained apart from the terms of the Policy…Because resolving the Players' misrepresentation claims will require interpretation of the Policy, they are preempted by section 301." *Williams*, 582 F.3d at 882.

The *Williams* court relied on *Trs. Of the Twin City Bricklayers Fringe Benefit Funds*, 450 F.3d at 332. There, the Court also held that the plaintiff's fraudulent and negligent misrepresentation claims were preempted by Section 301. In doing so, the Court observed that "[w]hether a plaintiff's reliance was justifiable is determined in light of the specific information and experience it had" and that the trier of fact would have to "examine the provisions" of the CBA to establish whether the plaintiff met its burden of proving justifiable reliance. *Id*. at 332.

Other courts have also routinely dismissed negligent or fraudulent misrepresentation claims as preempted where the claim required analysis of collectively-

bargained agreements to determine the nature and scope of the defendant's alleged duty to disclose and/or whether the plaintiff justifiably relied on the defendant's omissions or misrepresentations. "Section 301's preemptive force extends to fraud claims when resolution of the claims is inextricably intertwined with terms in a labor contract." *Aguilera v. Pirelli Armstrong Tire Corp.,* 223 F.3d 1010, 1016 (9th Cir. 2000); *Sherwin*, 752 F. Supp. at 1177-1179 (holding fraud and negligent misrepresentation claims preempted where the claims could not be resolved without reference to CBA provisions establishing the duties of club physicians, and arguably the club, to inform a player of physical conditions that could adversely affect his health).

Here, Plaintiffs allege that they relied on the NHL – with "its cadre of highly educated…medical personnel" (MAC ¶ 132) – to provide advice concerning safety and health both in the short and long term. (MAC ¶ 12, 89-90, 92-93, 99-100, 125, 135, 151, 339, 352, 360, 441, 451) Plaintiffs assert that they acted reasonably in relying on "League personnel and League-approved medical personnel, trainers and coaches, to provide them with information important to their health and well-being" (MAC ¶ 342) and that they relied on "the NHL's silence concerning concussions, subconcussive impacts and other head injuries to conclude that it was safe to continue playing after such injuries, even if their symptoms had not resolved." (MAC ¶ 90).

The existence of a "special relationship" between the League and the Players cannot be determined without an examination of the collectively-bargained terms and conditions governing health and safety; nor can there be a determination concerning

"justifiable reliance" on the League's statements (or omissions) without interpreting the CBA and SPC. As discussed in detail above, the CBA and SPC (as well as the Concussion Program) allocate responsibilities to the Clubs and Club physicians – not to the NHL – including the obligation to treat Players following injuries and to make fitness-to-play determinations (which are in turn subject to challenge and determination following a second opinion and a third opinion, if necessary); and the obligation of the Club and the physician (but not the League) to supply each Player with his medical records and to provide an exit physical that "shall document all injuries that may require future medical or dental treatment either in the near future or post-career." *See supra* at pp. 13, 21-22, fn. 14.

D. Once Held Preempted, All Claims Must Be Dismissed.

Once a claim is held to be preempted by Section 301, that claim must either be treated as a Section 301 claim, or dismissed. *See Allis-Chalmers Corp.*, 471 U.S. at 220. Plaintiffs' claims here should be dismissed for two separate and independent reasons.

First, the state-law tort claims alleged in the MAC must be dismissed because they are not cognizable Section 301 claims. *See, e.g., Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 311 (2010) ("federal courts' authority to create a federal common law of collective bargaining agreements under section 301 should be confined to a common law of contracts, not a source of independent rights, let alone tort rights; for section 301 is . . . a grant of jurisdiction only to enforce contracts") (citations omitted). The Court should follow the lead of multiple other courts in this Circuit and dismiss

Plaintiffs' tort claims as preempted. *See Trs. of the Twin City Bricklayers Fringe Benefit Funds*, 450 F.3d at 324 (8th Cir. 2006); *Finney v. GDX Auto.*, 135 Fed. App'x. 888 (8th Cir. 2005); *Conrad v. Xcel Energy, Inc.*, No. 12-CV-2819, 2013 U.S. Dist. LEXIS 49840 at * 19 (D. Minn. Apr. 5, 2013).

Second, Plaintiffs have failed to exhaust the mandatory grievance procedures established by the CBA. Before commencing an action alleging a breach of the labor contract, the employee is required to exhaust any contractual grievance and arbitration procedures provided for in the collective bargaining agreement between the employer and the union. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965); *see also Allis-Chalmers,* 471 U.S. at 219-21.

If a party fails to exhaust mandatory grievance procedures, dismissal is required unless it can be said "with positive assurance" that the arbitration provisions are "not susceptible of an interpretation that covers the asserted dispute," with any doubts about arbitrability resolved "in favor of coverage." *See Local Union 453 of IBEW v. Independent Broad. Co.,* 849 F.2d 328, 331 (8th Cir. 1988) (*quoting Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960)). When an agreement includes a broad arbitration clause, only an "express provision excluding" a particular grievance or "the most forceful evidence of a purpose to exclude the claim from arbitration" will overcome the presumption of arbitrability. *Teamsters Local Union No. 688 v. Industrial Wire Prods.*, 186 F.3d 878, 882 (8th Cir. 1999) (internal citation omitted).

Here, Article 17 of the CBA contains a broad arbitration clause requiring the arbitration of any "grievance" – defined as "any dispute involving the interpretation or application of, or compliance with, any provision of [the CBA], including any SPC." Such grievances "will be resolved exclusively in accordance with" the arbitration procedure set forth in Article 17.[19] Because Plaintiffs cannot point to any language in any of the applicable arbitration provisions suggesting that their purported claims are excluded from arbitration, the MAC should be dismissed.

[19] *See also* 1975 CBA, Art. 4; 1981 CBA, Art. 4; 1984 CBA, Art. 4; 1988 CBA, Art. 4; 1995 CBA, Art. 17; 2005 CBA, Art. 17.

CONCLUSION

For the foregoing reasons, the MAC should be dismissed in its entirety with prejudice.

Dated: November 18, 2014

Joseph Baumgarten
Adam M. Lupion
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036-8299
Telephone: (212) 969-3000

John H. Beisner
Jessica D. Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
Telephone: (202) 371-7000

Shepard Goldfein
James A. Keyte
Matthew M. Martino
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000

Respectfully submitted,

s/Daniel J. Connolly
Daniel J. Connolly (#197427)
Joseph M. Price (#88201)
Linda S. Svitak (#178500)
Aaron D. Van Oort (#315539)
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55401
Telephone: (612) 766-7000

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

L.R. 7.1 WORD COUNT COMPLIANCE CERTIFICATE REGARDING DEFENDANT NATIONAL HOCKEY LEAGUE'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS MASTER COMPLAINT BASED ON LABOR LAW PREEMPTION

I, Daniel J. Connolly, certify that National Hockey League's Memorandum of Law in Support of its Motion to Dismiss Master Complaint Based on Labor Law Preemption complies with Local Rule 7.1(f).

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

I further certify that the above referenced memorandum contains 10,032 words.

Dated: November 18, 2014

Respectfully submitted,

John H. Beisner
Jessica D. Miller
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
Telephone: (202) 371-7000

s/Daniel J. Connolly
Daniel J. Connolly (#197427)
Joseph M. Price (#88201)
Linda S. Svitak (#178500)
Aaron D. Van Oort (#315539)
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: (612) 766-7000

Shepard Goldfein
James A. Keyte
Matthew M. Martino
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036-6522
Telephone: (212) 735-3000

Joseph Baumgarten
Adam M. Lupion
PROSKAUER ROSE LLP
Eleven Times Square
New York, New York 10036-8299
Telephone: (212) 969-3000

ATTORNEYS FOR DEFENDANT NATIONAL HOCKEY LEAGUE