UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

MICHAEL PELUSO, an individual, Plaintiff, v. New Jersey Devils, LLC; St. Louis Blues Hockey Club, L.P.; Chubb Group Holdings, Inc., a/k/a Chubb Group, a/k/a Chubb Group of Insurance Companies, a/k/a Chubb Insurance Group, a/k/a Chubb Group Los Angeles, and Federal Insurance Company. Defendants.	Case No. 17-cv-1299 **PLAINTIFF MICHAEL PELUSO'S OPPOSITION TO DEFENDANTS NEW JERSEY DEVILS LLC AND ST. LOUIS BLUES HOCKEY CLUB, L.P.'S MOTION TO DISMISS**

Plaintiff Michael "Mike" Peluso ("Peluso"), through his undersigned counsel, submits his opposition to New Jersey Devils LLC ("Devils") and St. Louis Blues Hockey Club, L.P.'s ("Blues") (collectively "Defendants") Motion to Dismiss. Peluso also concurrently, and separately, submits his opposition to Chubb Group Holdings, Inc., a/k/a Chubb Group, a/k/a Chubb Group of Insurance Companies, a/k/a Chubb Insurance Group, a/k/a Chubb Group Los Angeles (collectively "Chubb") and Federal Insurance Company's ("Federal"), collectively "Worker's Compensation Defendants" Motion to Dismiss. This Court has not consolidated the respective motions so each motion will be addressed as though independently filed:

I. INTRODUCTION

Defendants, member clubs of the National Hockey League ("NHL"), have long profited from the sale of violence in the sport of hockey. The very foundation of their sport is built upon explosive hits, physical play, and bare-knuckle fighting. Unfortunately, Defendants have also long known that their product would unquestionably result in players, including and specifically Michael Peluso, sustaining repeated concussive and subconcussive trauma. Defendants have also known that such trauma would result in degenerative brain injuries.

Peluso was employed by Defendants to play the role of a team "enforcer". An enforcer is the equivalent to the position of "linebacker" in football – known by many familiar with the sport as the position that takes – *and gives* – the most hits to the head and unfortunately has some of the highest rates of concussions and brain damage. Although Peluso was a skill player and known for his agility and scoring in college and his early days in the NHL, Defendants predicated his long–term employment and livelihood on his ability to hit, protect, intimate, fight opposing players, and absorb blows to the head so long as he could come back the next day and do it all over again – no matter the cost. A necessary job requirement for Peluso was to remove his gloves and engage frequently in bare-knuckle fights with the understanding that the more blows he absorbed and gave, the more his value and worth as an enforcer and teammate would increase.

On 2/20/94, while Peluso's brain was still severely injured – to the point that the latest barrage of head injuries and concussions resulted in a deadly grand mal seizure 6 days earlier, how did Defendants respond? By placing Peluso on medical leave? By

immediately protecting him from further head injuries? No, Defendants responded by immediately announcing to the New York Times and other media outlets that Peluso was cleared to return to play. See PC ¶ 30 (New York Times Article stating: "MIKE PELUSO, who went into a [grand mal] seizure last Monday … returned to the lineup after receiving clearance from the Devils' doctors…."). Later that night Peluso was forced back in action – taking and absorbing head hits and bare-knuckled blows to his head.

On 2/21/94, when Defendants – including their general manager – Lou Lamoriello were advised by their own board-certified team neurologist that Peluso's brain was injured – to the point that it was conclusively determined that his grand mal seizure was a result of blows to his head, and as a consequence Peluso was at immediate and extreme risk for irreparable neurological injury if he were to sustain more blows to the head. How did Defendants respond? By placing Peluso on medical leave? By immediately protecting him from further head injuries? No, again, Peluso was placed back in action the very next game – only to sustain more head injuries.

More egregious than the above is that Defendants made a strategic decision to intentionally conceal this information, fraudulently misrepresent Peluso's actual condition and, most shockingly, direct him to engage in conduct knowing that his brain was already injured and more head hits would certainly result in a chronic seizure disorder or worse.

Sadly, Defendants' malicious conduct caused Peluso's fated, disabling, conditions. Peluso developed a severe and chronic epileptic seizure disorder, significant neurocognitive and psychiatric impairment, and early onset dementia, among other injuries.

Only recently did Peluso discover that Defendants intentionally concealed the true nature of his injury and filed the instant action. In response, Defendants have filed their motion to dismiss. However, Defendants' motion should be denied for numerous reasons.

First, Defendants are subject to personal jurisdiction of this Court because they fraudulently induced a citizen of Minnesota into singing more than one employment contract while in Minnesota. And, they fraudulently induced him to continue playing by withholding critical information regarding his physical condition and dangers of the game. Following his career, Defendants continued to misrepresent the nature of Peluso's injuries to him resulting in the denial of proper medical care. Subsequently, Defendants fraudulently induced Peluso into signing an agreement, while in the state of Minnesota, in connection to the injuries he suffered. Simply put, Defendants' cannot be surprised that they are subject to jurisdiction in a Minnesota court after they fraudulently executed an employment contract with a lifelong Minnesota resident, intentionally caused injury during the course of that employment, and fraudulently induced Peluso into signing a waiver relating to his injuries while he was in Minnesota.

Second, despite Defendants' assertion, a choice-of-law analysis is improper at this stage because it requires a fact intensive inquiry. Even if this Court were to entertain Defendants' choice-of-law analysis, it is nevertheless a meaningless exercise because the facts alleged in the complaint demonstrate that Peluso's claims fall outside the exclusivity of the workers' compensation framework of California, New Jersey, as well as Missouri. Defendants' intentional and outrageous conduct goes outside the "proper role" of an employer and what was contemplated in the workers' compensation bargain, no matter the

jurisdiction.

Third, Defendants' various arguments for abstention all fail because Peluso's claims are all independent and separate from his workers' compensation claims due to judicial and statutory creation. As a result, *Burford* abstention and the primary jurisdiction doctrine are inapplicable. Moreover, *Colorado River* is inapplicable because the two proceedings are not parallel and, even if they were, no extraordinary circumstances exist.

Finally, Defendants accusation that Peluso is improperly "splitting" his workers' compensation claim is meritless because California, as well as New Jersey and Missouri law, expressly created these separate claims which are explicitly outside the workers' compensation framework. Accordingly, Defendants' motion to dismiss should be denied.

a. BRIEF STATEMENT OF FACTS

Peluso is a lifelong Minnesota resident and former professional hockey player in the National Hockey League ("NHL") and played in the NHL from 1989 to 1998. During his career, he was employed with the Chicago Blackhawks (1989-1992), the Ottawa Senators (1992-1993), New Jersey Devils (1993-1996), St. Louis Blues (1996-1997), and Calgary Flames (1997). Plaintiff's Complaint ("PC") at ¶ 7. Each of these teams has a duty to protect the health and safety of their players. PC at ¶ 93-95.

Peluso was known as a fierce "enforcer" throughout his career and, at the instruction and encouragement of his employers, engaged in approximately 240 bare-knuckled fist fights which resulted in significant brain damage, a chronic seizure disorder, dementia at

the young age of 50, and significant psychological and neurological issues. PC at ¶ 8-10.

The Devils, while fraudulently concealing the true extent of his injuries and the connection between head trauma and brain injuries, negotiated and executed Peluso's contract of employment while he was a Minnesota citizen. Stuckey Declaration ("Decl") at ¶ 11, Ex. J. The contract itself shows that the Devils knew they were hiring a Minnesota citizen. *Id*. Despite hiring Peluso to primarily fight other players, the Devils fraudulently hid the fact that fighting, and associated head trauma, would lead to severe neurological injuries. PC at ¶ 97.

On December 18, 1993, while a member of the New Jersey Devils, Peluso played a game against the Quebec Nordiques. At the instruction of the team, Peluso engaged in a fist fight against an opposing player who knocked Peluso unconscious, causing his head to slam against the ice. Peluso had to be carried off the ice and, as a result of his injury, hospitalized for two days. PC at ¶ 22. The workers' compensation policy was issued by Federal and at all times has been administered by Chubb. Declaration of Liam Ryan ("Ryan Decl.") at ¶ 4(g); PC at ¶ 17 & 48.

Shockingly, although still unconscious, hospitalized, and far from recovered, Peluso was actually cleared by the team doctor to return to play. PC at ¶ 25. Peluso was prevented from taking time off and sustained multiple additional head injuries – including 10 documented bare-knuckle fists to his brain - from 7 fights between his 12/18/93 concussion and being "cleared" again to return on 12/20/94. *Id*. at 28(f). Three newspaper outlets – including the New York Times – announced that Peluso had been cleared by team doctors and allowed to continue sustaining further head injury. *Id*. at 29(g).

On February 14, 1994, Peluso suffered a grand mal seizure while working out with the team. Peluso was again hospitalized. Despite multiple requests no records were ever provided to Peluso concerning this event.

On February 20, 1994, Peluso was subsequently sent to the Devils' team board certified neurologist Dr. Marvin Ruderman. Following the examination, Dr. Ruderman prepared a report dated February 21, 1994 ("Ruderman Report" "Report"). In what appears to be an extreme effort to ensure the team was aware of this, Dr. Ruderman did not simply send his report to one team official. Instead, Dr. Ruderman immediately sent his report to: 1) the New Jersey Devils General Manager, Lou Lamoriello, 2) the New Jersey Devils Team Doctor, Dr. Barry Fisher, and 3) the New Jersey Devils Orthopedic Surgeon, Dr. Leonard Jaffe. Notably, Peluso was not copied on the Report unlike Lamoriello, Fisher, and Jaffe. And, Peluso was not informed of the contents nor was the Report was ever sent or provided to Peluso or advised of the critical information it contained. PC at ¶ 32-43.

Instead, the Devils intentionally misrepresented the cause of Peluso's seizure, concealed the true nature of his injuries, and told him he was medically cleared to play. Throughout the course of his career, Defendants continued to inform Peluso he was totally fit to play despite knowing that the head trauma he was sustaining would lead to irreparable brain injuries. PC at ¶ 36-42.

In order to continue profiting from the violence of hockey, Defendants purposefully and intentionally caused Peluso to sustain hundreds of additional blows to the head by instructing him to engage in approximately 105 additional bare-knuckle fights. PC at ¶ 44. Defendants, with knowledge that Peluso sustained head trauma in virtually every

practice and game, continued to instruct Peluso to violently check and physically punish opposing players.

Upon his retirement, Peluso returned to Minnesota. Defendants, at that time, knew that the head trauma they caused Peluso to sustain certainly would have resulted in degenerative brain injuries. With assistance from the NHL, Defendants again fraudulently concealed the true nature of Peluso's injuries and intentionally misrepresented what his injuries were in order to induce him into signing a waiver relating to those injuries. Stuckey Decl. ¶ 12, Ex. K.

Throughout this entire period, Peluso's physical and psychological condition continued to deteriorate because Defendants improperly, and intentionally, withheld critical medical information regarding the cause and extent of Peluso's injuries. Also, by suppressing the report and information contained therein, Peluso and his other medical treaters lacked crucial knowledge needed to adequately treat his injuries. PC at ¶ 49-55; 57;73; 88.

In order to obtain medical treatment and benefits he badly needed, Peluso filed a workers' compensation claim in California. See Peluso's Opposition to Chubb/Federal Motion to Dismiss, 9/15/17, pgs. 5–6. Knowing that the production of the Ruderman report and other medical records would reveal their fraudulent behavior, Defendants' wrongfully withheld the report and other important documents in his workers' compensation action in contravention of discovery obligations. It was upon actual receipt of suppressed medical documents that Peluso became aware of the Defendants' fraudulent and malicious conduct, as well as the true nature of his injuries. PC at ¶ 74-83.

The California Workers Compensation Appeals Board agreed. They found: ***"Due to defendant New Jersey Devils' dereliction of its discovery obligations…. The New Jersey Devils 'wrongfully withheld'" key medical records.*** *Id*. at ¶ 82. On 11/15/16, the California Workers Compensation Appeals Board held that Defendants: 1) engaged in serious discovery violations and 2) "wrongfully withheld" documents. The Court stated:

> The New Jersey Devils Records are essential to this analysis. These documents were responsive to valid discovery requests propounded in this case but were inexplicably not produced by defendant New Jersey Devils…. Due to defendant New Jersey Devils' dereliction of its discovery obligations, these documents clearly 'were not available' to[Mr. Peluso] prior to the close of discovery.[T]he New Jersey Devils wrongfully withheld … [medical documents]….

Id. at ¶ 83.

In September 2017, more medical records never before produced were uncovered.

Stuckey Decl. ¶ 2, Ex. A.

As a result of these actions, this case was filed.

II. ARGUMENT

a. Peluso is Required to Receive the Benefit of All Inferences and All Allegations Are Presumed True

For claims that the Defendants seek dismissal under Rule 12(b)(6), Peluso's allegations need only "raise a reasonable expectation that discovery will reveal evidence" of the claims' elements "even if it strikes a savvy judge that actual proof of those facts is improbable. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). At this preliminary stage, the pleadings are to be construed in light most favorable to Peluso and the facts alleged in the complaint must be taken as true. *See In re Operation of Mo. River Sys. Litg.*,

418 F.3d 915, 917 (8th Cir. 2005). Under this standard, "the court must resolve any ambiguities concerning the sufficiency of plaintiffs' claims in favor of the plaintiffs, and give the plaintiffs the benefit of every reasonable inference drawn from well-pleaded facts and allegations in their complaint." *Ossman v. Diana Corp.*, 825 F.Supp 870, 880 (D.Minn. 1993).

Thus, as more fully detailed herein, the factual allegations contained in Peluso's complaint are clearly sufficient to proceed against Defendants. The allegations contained in the complaint show that Devils and Blues' conduct was so extreme and outrageous that it removes this action from the workers' compensation framework. Further, Defendants' factual assertions and arguments are improper at this stage of proceedings.

b. Personal Jurisdiction Exists Defendants Because Directed Their Fraudulent Conduct at Peluso in Minnesota and Fraudulently Induced Peluso into Signing Two Minnesota Contracts

Defendants' assertion that this court does not have personal jurisdiction over them fails because: 1) Defendants fraudulently induced a Minnesota Citizen into a contract of employment; 2) the injuries Peluso suffered arose from the fraudulently induced Minnesota contract; 3) Defendants continued to fraudulent conceal this information while Peluso was in this forum, 4) Defendants made intentional misrepresentations to Peluso regarding the true nature of his claims, in Minnesota, in order to induce him to sign a waiver; and 5) Defendants entered into a second fraudulently induced agreement in Minnesota.

Where jurisdiction is challenged on a motion to dismiss, "the nonmoving party need

only make a prima facie showing of jurisdiction." *Pangaea, Inc. v. Flying Burrito LLC,* 647 F.3d 741, 745 (8th Cir. 2014). If jurisdiction is challenged, the plaintiff carries the burden of proof and the prima facie showing may be tested with affidavits and exhibits presented with the motion and opposition. *Fastpath v. Arbela Techs.,* 760 F.3d 816, 820 (8th Cir. 2014). However, Peluso is only required to make a ***minimal*** prima facie showing. *See. K-V Pharm Co. v. J. Uriach & CIA, S.A.,* 648 F.3d 588, 592 (8th Cir.2011). Furthermore, the Court must view the evidence in light most favorable to the plaintiff. *See Pecoraro v. Sky Ranch for Boys, Inc.,* 340 F.3d 558, 560 (8th Cir.2003).

In determining whether personal jurisdiction exists in a diversity case, the Court "must determine if the exercise of jurisdiction is appropriate under Minnesota's long-arm statute and whether the exercise of personal jurisdiction complies with the requirements of due process." *Westley v. Mann*, 896 F. Supp.2d 775, 788 (D.Minn.2012). In order to have personal jurisdiction, a defendant's contacts with the forum state must be more than "random," "fortuitous," or "attenuated." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). This analysis requires that there must be "some act by which the defendant purposefully avails itself to the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id* at 475.

As detailed below, this Court has personal jurisdiction over Defendants because the entered into two fraudulently induced contracts with a Minnesota citizen and their fraudulent concealment was directed at this forum and Peluso.

c. Specific Jurisdiction Exists Over Defendants Because of Their Directed Actions at Peluso in Minnesota

This Court has personal jurisdiction over Defendants because purposefully directed their fraudulent behavior at Peluso, who is a resident of Minnesota, resulting in significant harm. A finding of specific jurisdiction is appropriate where the injury occurred within the forum state, or had some connection to the forum state because the defendant purposefully directed its activities at the forum and the lawsuit arose from those actions. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 (1985).

The Eighth Circuit has established a five-part test for measuring a defendant's contacts with the forum state: (1) the nature and qualify of the contacts with the forum state, (2) the quantity of those contacts, (3) the relationship of the cause of action to the contacts, (4) the interest of the forum state in providing a forum for its residents, and (5) the convenience of the parties. *Dairy Farmers*, 702 F.3d at 477. The first three are primary factors, and the remaining two are secondary. *Id.*

Jurisdiction is proper where the contacts proximately result from actions by the defendant itself that create a substantial connection with the forum state. *Stanton v. St. Jude Med., Inc.,* 340 F.3d 690, 693 (8th Cir.2003). Also, a finding of specific jurisdiction is warranted where a defendant directs its actions at the forum state and the lawsuit "results from the injuries relating to [the defendant's] activities [in the forum state]." *Steinbuch v. Cutler*, 518 F.3d 580, 586 (8th Cir. 2008).

In *Patterson Dental Supply*, the Court found that personal jurisdiction was proper where an out-of-state employee entered into an employment contract with a Minnesota

company despite not performing duties within the state and was no longer an employee. *Patterson Dental Supply Inc. v. Vlamis*, 2016 WL 4596881 (Minn.Ct.App. Nov. 15, 2016). The Court reasoned that because the defendant contracted with a Minnesota company, performed his wrongful acts during his few visits to Minnesota, and he knew his conduct would result in harm in Minnesota, the defendant should have reasonably anticipated being sued in the forum. *Id.* at * 4-5.

Further, the court in *Custom Conveyer v. Hyde* came to the same conclusion, finding a substantial nexus between defendant's contacts and plaintiff's claims where the defendant entered into a multi-year employment contract with a Minnesota party and, after his employment ended, misappropriated/stole from the Minnesota plaintiff resulting in harm. *Custom Conveyer Corporation v. Hyde*, 2017 WL 708713, at *4 (D.Minn. Feb. 2, 2017). The court opined, "the touchstone of the due-process inquiry is whether defendant's forum contacts put him on notice that he might be sued in the forum state." *Id.* at *5. Thus, where a party that enters into an employment contract with a Minnesota party, commits wrongful acts through the course of that employment, and causes additional harm after his employment ends within that forum, that party "should not be surprised that he might be sued in, and subject to the jurisdiction of, the state which his employer is located." *Id.*

Similarly, Defendants fraudulently induced Peluso, a lifelong Minnesota citizen, into a multi-year contract for employment. Stuckey Decl. ¶ 11, Ex. J. Had Defendants' informed him that the head trauma he sustained would almost certainly lead to degenerative brain diseases, he would not have continued to play. Also, the contract itself requires Peluso to "participate in any and all reasonable promotional activities" for the team as well

as the League. This would include promotional activities directed at and within Minnesota during seasons and while Peluso was in Minnesota during the offseason. *Id*.

Following their receipt of the Ruderman report, Defendants' intentionally concealed the true nature of Peluso's injuries and caused him to sustain further head trauma. Consequently, Defendants never provided treatment for his true injuries, nor was Peluso able to obtain such care on his own during his off seasons in Minnesota.

Following Peluso's retirement, Defendants' continued to intentionally misrepresent the true nature his injuries *while he was in Minnesota*, resulting in further neurological degeneration. In one particular instance, Defendants, while concealing the actual extent of Peluso's injuries, fraudulently induced him into executing a waiver relating to his hockey injuries, which was signed in Minnesota. Stuckey Decl. ¶ 12, ex. K.

Moreover, once Peluso sought workers' compensation benefits, Defendants continued to suppress the Ruderman report, as well as other important medical documents, despite their legal obligation to produce them. Defendants' blatant attempt to hide their fraud has prevented Peluso from receiving required medical care through workers' compensation and well as denied his self-produced treating doctors crucial information needed for his care. Defendants had no doubt that their continued intentional concealment would result in more harm to Peluso and felt within this forum.

Defendants also attempt to blur the line between where and to whom their conduct was directed (Peluso and Minnesota) and the location where this fraudulent conduct was discovered (California). Peluso likely would never have discovered that Defendants' fraudulently induced him into signing a waiver and hid his injuries from him if it had not

been uncovered in his California workers' compensation claim. However, Defendants already had an obligation disclose the information and provide care to Peluso.

Finally, although a secondary factor, weight should be given to this Court's interest in providing a forum for its resident. As result direct result of Defendants' conduct, Peluso has been diagnosed with, among other injuries, a severe epileptic seizure disorder, significant neurocognitive impairment, and early onset dementia. Peluso has already suffered from at least nine (9) grand mal seizures. Thus, several medical evaluators have recommended that he be precluded from flying. Stuckey Decl. ¶ 7, ex. F. If he is required to litigate his claims in a foreign jurisdiction, he may unable to do so without risking serous physical harm or death. In fact, the risk that Peluso could suffer severe harm if he had to travel was even previously discussed before this Court in a separate case. Stuckey Decl. ¶ 5, ex. G. Additionally, one judge was so concerned with Peluso's ability to travel that she ordered that a competency evaluation be conducted. Stuckey Decl. ¶ 3, ex. B. On the other hand, there is no indication that proceeding in this forum is inconvenient for Defendants.

For all the foregoing reasons, Defendants' motion for dismissal based on lack of personal jurisdiction should be denied.

d. Choice-of-Law Analysis in the Context of a Rule 12 Motion is Premature and Ultimately Fruitless

Defendants, in their motion, argue that this court should undertake a choice-of-law analysis and find that California law does not apply. Defendants offer such an argument in hopes that the court will apply a more restrictive exception to the exclusivity doctrine. However, factual determinations are required prior to determining which State's law

applies and thus it is premature and improper in the context of a motion to dismiss. *See Broin and Associates, Inc. v. Genencor Intern., Inc.,* 232 F.R.D. 335, 339 (D.S.D. 2005).

In *Sioux Biochemical, Inc. v. Cargill Inc.,* the court denied the defendant's motion to dismiss because it determined that a choice-of-law analysis could not be resolved without improperly considering factors which were outside the pleadings. *Sioux Biochemical, Inc. v. Cargill Inc.,* 410 F. Supp. 2d 785, 800 (N.D. Iowa 2005). Other courts in this jurisdiction have found that, because a choice-of-law analysis is a fact-specific inquiry, it is inappropriate to proceed with such analysis at the motion to dismiss phase. *See Smith v. Questar Capital Corporation*, 2014 WL 4697845, at *2 (D. Minn. Nov. 23, 2010); *Partridge v. Stryker Corp.*, 2010 WL 4967845, at *2 (D. Minn. Dec. 1, 2010).

Therefore, a choice-of-law analysis in this case should be deferred until after discovery has taken place. But, in addition to being premature, a choice-of-law analysis at this juncture is an entirely worthless exercise because the complaint has alleged sufficient facts to state claims which are outside the exclusivity of workers' compensation in all three jurisdictions discussed by Defendants.

e. Peluso's Claims Are Independent and Outside the Context of his Workers' Compensation Action Under California Law

Defendants' assertion that Peluso's claims would be barred under California law is entirely without merit. Defendants' extreme and outrageous conduct and fraudulent concealment of the true nature of Peluso's injuries removes this suit from the exclusivity of workers' compensation. In *Johns-Manville,* the California Supreme

Court held that a plaintiff may bring a separate suit, outside of the Workers' Compensation Act, where the defendant fraudulently conceals from the plaintiff, as from his treating doctors, his true injuries, and induced him to continue working in the hazardous condition. *John-Mansville Prods. Corp. v. Superior Court*, 27 Cal. 3d. 465, 477 (Cal. 1980).

The Supreme Court has created additional exceptions for actions that is so extreme and outrageous it falls outside of the conduct contemplated in the workers' compensation bargain. In *Unruh v. Truck Ins. Exchange*, the California Supreme Court held that where the insurer's (who shares in the employer's exclusivity protection) conduct goes "beyond the normal role of an insurer in a compensation scheme intended to protect the worker" the insurer is no longer protected by workers' compensation exclusivity and a plaintiff may bring separate claims. *Unruh v. Truck Ins. Exchange,* 7 Cal. 3d 616, 630 (1972). Although *Unruh* was overruled by statutory amendment on other grounds which are inapplicable to this case, the exception carved out by the California Supreme Court is still applied. *See Gomes v. Michaels Stores. Inc.* 2006 WL 33482205, at *3 (E.D. Cal. Nov. 16, 2006).

Further, in *Jablonski v. Royal Globe Ins. Co.*, concealment of medical records was found to be sufficient to provide the plaintiff with a civil cause of action. *Jablonski v. Royal Globe Ins. Co.*, 204 Cal. App.3d 379, 391 (1998). In *Jablonski*, the defendant denied the plaintiff's workers compensation benefits and denied the existence of a workers' compensation policy. *Id*. Defendant then suppressed evidence of the policy's existence. *Id*. As the court explained, suppressing documents for its own financial self-

interest is conduct that exceeds the normal roles contemplated in the workers compensation framework. *Id.* Therefore, the plaintiff could bring a separate claim for damages based on those fraudulent bad faith actions.

These exceptions provide for "injurious employer misconduct" that remain outside the workers' compensation bargain. *Fermino v. Fedco, Inc.,* 7 Cal.4th 701, 708 (1994). In *Fermino*, the court held that Plaintiff could bring a separate claim for false imprisonment because it was an intentional tort against the employee's person, fell outside the workers' compensation bargain. *Id* at 721-722.

Similar to the defendant in *Johns-Manville,* Defendants' conspired and collectively suppressed critical medical reports and medical records and information in order to further their own financial interests. As demonstrated by the Ruderman Report itself, Defendants received it. Despite having this information, Defendants suppressed it in order to induce Peluso into employment and performance as an enforcer – a role which would *require* receiving blows to the face and head.

Additionally, when their own team doctor informed them that Peluso's seizure was caused by a concussion and he was at severe risk if he were to sustain head trauma, not only did they conceal the information, they very publicity lied. PC at ¶ 28-30. In fact, the lawyer for Defendants actually blamed Peluso himself for his own brain damage. PC at ¶ 86. Although they were certain that Peluso would sustain head trauma that would lead to injury, Defendants continued to conceal Peluso's true injury from him in order to profit.

Clearly, the workers' compensation bargain did not contemplate an employer

using fraud to hire an employee knowing, and intending, the employee sustain serious harm, as well as concealing the true consequences of employment and the employee's actual injuries. This is the type of intentional, outrageous conduct that falls outside the workers' compensation framework. Accordingly, Defendants cannot hide behind the exclusivity of workers' compensation.

f. Peluso's Claims Are Also Statutorily Exempt from Exclusivity

Contrary to Defendants' flimsy assertions, Peluso's claims also fall outside the workers' compensation framework because they are statutorily exempt under Cal. Lab. Code §3602(b). Pursuant to §3602(b), a party may bring a separate action at law where:

> (1) Where the employee's injury or death is proximately caused by a willful physical assault by the employer.
>
> (2) Where the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment, in which case the employer's liability shall be limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation thereof is upon the employer.
>
> (3) Where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employees use by a third person.

Cal. Lab. Code §3602(b).

i. Defendants' Intentionally Caused Physical Batteries to Occur

First, Defendants falsely claims that the complaint fails to allege a willful physical assault by the employer. A willful a physical assault occurs when someone engages in conduct that a reasonable person would perceive to be a real, present and apparent threat to bodily harm. *Herrick v. Quality Hotels, Inns, & Resorts, Inc.,* 19 Cal.App.4th 1608, 1617

(1993). Also, an employee can bring a separate claim outside of workers' compensation where the employer intentionally assaults the employee. *See Magluilo v. Superior Court,* 47 Cal. App.3d 760, 779 (1975).

In this case, had Defendants not fraudulently concealed the likelihood neurological injury from head trauma and Peluso's extreme risk, he would not have consented to any of the physical trauma he sustained. PC at ¶ 39. Defendants fraudulently induced Peluso into employment and, knowing they could fire or trade Peluso if he refused to engage in fights at their direction, continued to intentionally cause Peluso physical batteries in games and practices. PC at ¶ 43-47.

This application of this exception should apply where the employer caused a physical assault to occur. As an example, if an employer instructs a coworker to strike another, and the injured employee did not consent (or gave consent due to fraud), then a battery under this exception clearly occurred. Accordingly, Peluso's battery claim should be permitted to proceed.

Additionally, Defendants' intentional actions in concealing Peluso's medical records resulted in harmful contact because, Defendant was provided the Ruderman Report and other medical records. Defendant, had the affirmative obligation of protecting him and providing a safe work place by providing him with his medical report and not allowing him to go back onto the ice. Or, at a minimum, giving him the choice through informed consent. By not providing this aid, Defendants allowed Peluso to sustain multiple head injuries which led to immediate damage and to the long–term, chronic seizure condition warned of in the Ruderman Report.

When Defendant had knowledge of Peluso's vulnerable physical state and susceptibility to long–term brain damage, and it intentionally concealed the very medical Report that would have stopped Peluso from continuing to sustain head injuries, Defendants in effect caused Peluso to sustain further head injuries. PC at ¶ 39. Instead, Peluso continued his career at severe risk of further injury and did, in fact, sustain blows to the head that would have avoided. PC at ¶ 39-40; 43. Simply put, Defendants intentionally took actions which they knew would cause further harmful contact to Peluso. Accordingly, Defendants' request to dismiss Peluso's battery claim should be denied.

ii. Defendants' Fraudulently Concealed Peluso's Actual Injury

The unlawful conduct of Defendants easily falls under the fraudulent concealment of injury exception to California's workers' compensation scheme. In order for this exception to apply, a plaintiff must show "(1) the employer must have concealed 'the existence of the injury'; (2) the employer must have concealed the connection between the injury and the employment; and (3) the injury must have been aggravated following the concealment." *Jensen v. Amgen Inc.,* 129 Cal.Rptr.3d 889, 901(App.Ct.-2d 2003).

Defendants should not avoid liability under this exception by blatantly mischaracterizing Peluso's injuries. An Eighth Circuit District Court recently encountered the same erroneous argument in *Linton v. Owens-Illinois, Inc.* where the defendant similarly attempted dismiss the plaintiff's fraudulent concealment exception claim by arguing that the "injury" sustained by plaintiff were known "skin problems" which the defendant could not actually conceal. *Linton v. Owens-Illinois, Inc.*, 2012 WL 5207504,

at* 2 (E.D.Mo. Oct. 22, 2012). However, the court, applying California law, denied defendant's motion because the plaintiff alleged that defendants "knew that the skin problems were a precursor to the development of specific types of cancer, including AML, and concealed this knowledge." *Id.*

Here, Defendants similarly base their argument on a narrow and incorrect understanding of Peluso's injury. The complaint does not allege that Defendants concealed his specific concussion, but instead that Defendants knew that Peluso's employment resulted in him being at extreme risk of neurological injuries, that concussions and head trauma lead to degenerative brain diseases, concealed his actual condition while informing him he was fit to play.

Defendants also knew that Peluso would certainly suffer more head trauma. Furthermore, as in *Linton*, the complaint also alleges that Defendants knew that such head trauma would lead to more insidious diseases but concealed that information. Additionally, at issue is not only the medical reports and records that have been concealed, but also Peluso's ensuing seizure disorder that is progressively getting worse, but his progressively deteriorating brain damage, and the hidden risks of associated with both and the still unknown extent of the increased risk and development of his brain disease from the repeated risk of the head contact warned against in the Ruderman Report. As stated earlier, Peluso only became aware of this risk, the connection to his seizure disorder and concussions (as demonstrated in the Ruderman Report), and Defendant's actions of concealment, only when the Reports and records came to light in 2016 and 2017.

As this Court recently found: Although, "[a]s a general rule, the cause of action

accrues when the accident occurs," the Minnesota Supreme Court has held that "[a]n action for negligence cannot be maintained, nor does the statute of limitations begin to run, until damage has resulted from the alleged negligence." *In re: National Hockey League Players' Concussion Injury Litigation,* MDL No. 14-2551, 13 (SRN) (D. Minn. Mar. 25, 2015) (Order Denying Motion to Dismiss) (citing *Dalton v. Dow Chem. Co.*, 158 N.W.2d 580, 583–84 (Minn. 1968) (citations omitted). "For relief on the ground of fraud, . . . the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." *Id*. (citing Minn. Stat. § 541.05, Subd. 1(6)).

Throughout this entire period, Peluso's physical and psychological condition continued to deteriorate because Defendants recklessly, callously, and intentionally, withheld necessary medical benefits. Also, by suppressing the report and information contained therein, Peluso and his other medical treaters lacked crucial knowledge needed to adequately treat his injuries. Thus, Peluso's medical condition worsened, deteriorated, and became aggravated through Defendants efforts. PC at ¶ 49-55; 57;73; 88.

As further proof of aggravation, Peluso's condition grows worse every time he is reminded that not only could his condition have been entirely prevented, it could have been substantially mitigated had Defendants simply not withheld his medical records. As a result of these actions, his condition became so perilous that he was ordered to undergo a competency evaluation. Stuckey Decl. ¶ C, ex. B. Thus, Defendants' actions directly exacerbate and aggravate Peluso's condition every day.

Accordingly, Defendants' request for dismissal as to Peluso's claim for fraudulent concealment should be denied.

g. The Products Liability Exception Should Apply to Defendants as a Result of Their Fraud

The third statutory exception from the exclusivity of California's workers' compensation is applicable where an injured worker's injury is "caused by a defective product manufactured and sold, lease, otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person." Lab. Code §3602(b). Further, the exception applies when the plaintiff has come into contract with the allegedly-defective device as a consumer. *Behrens v. Fayette Mfg. Co.*, 4 Cal. App. 4th 1567, 1575 (1992).

Here, Peluso was fraudulently induced into signing his player's contracts and continued playing because Defendants concealed true nature of his injuries as well as the almost certain neurological injuries that he would sustain from head trauma. Because his employment contracts were induced by fraud, they should be considered void and thus Peluso was a consumer when he came into contact with Defendants' woefully designed product. A product that they designed and built knowing that it would lead to certain harm. Accordingly, Defendants' motion to dismiss Peluso's strict products liability claim should be denied.

h. Peluso's Claims Are Also Exempt from The Workers' Compensation Framework of Missouri and New Jersey

The claims alleged by Peluso in the complaint clearly fall within the exceptions to workers compensation exclusivity in both New Jersey and Missouri. Both states have adopted similar exceptions for "intentional wrongs" for New Jersey and "non-accidental injury" in Missouri. *N.J.S.A.* 34:15-8; Mo.Rev.Stat Sec. 287.120.1. Defendants

erroneously claim that they did not act with "virtual certainty."

However, under Missouri law, an employee has met the intent requirement for a "non-accidental" injury where he can show the employer acted "intentionally and is substantially certain that injury to an employee will result." *Speck v. Union Electric Company*, 741 S.W.2d. 280, 283 (Mo.App.1987). In *Ceollo v. Tug,* the court found that the employer acted with substantial certainty where it removed safety system from a tow tractor. *Coello v. Tug Mfg. Corp.* 756 F.Supp.1258, 1265 (W.D. Mo. 1991).

Under New Jersey's exception, a plaintiff must show that the employer intentionally acted with substantial certainty that the worker would suffer injury. *Mull v. Zeta Consumer Prods.*, 176 823 A.2d 782, 785 (N.J. 2003). Similar to *Ceollo*, in *Mull*, the court found the employer acted with substantial certainty where it removed a safety device from a winder, resulting in harm. *Id.* at 786. The court noted plaintiff's expert opinion, which stated that the defendant's conduct "made harm to defendant's employees predictable." *Id.*

In this case, the complaint alleges that Defendants have known that the repetitive head trauma sustained by hockey players leads to brain damage. PC at ¶ 100. Defendants were also explicitly made aware that Peluso was at excessive risk of neurological injury if he were to sustain any additional hits to the head. PC at ¶ 33. Also, as an enforcer, Peluso would certainly sustain head trauma. PC at ¶ 43-46. Simply, it is now disingenuous for Defendants to claim that it was not substantially certain such injury would occur.

Defendants attempt to stretch the meaning of "substantial certainly" by claiming Dr. Ruderman's use of the word "risk" alone bar this claim. Although "substantial certainty" is a high standard, it does not mean that *any* uncertainty would bar a claim brought under

these exceptions. Moreover, Defendants arguments are undermined by the fact that the teams *knew* that the type of head trauma Peluso sustained would certainly lead to degenerative brain diseases for all of their players. The Ruderman report provided Defendants' notice that Peluso was at even *greater* risk to the virtual certainty they had already known. Accordingly, Peluso's claims would be exempt under both New Jersey and Missouri law.

i. *Burford* Abstention is Inappropriate Because Peluso's Claims Fall Outside the Workers' Compensation Regulatory Scheme

Defendants contend that this Court should abstain from asserting jurisdiction over Peluso's claim based on *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). *Burford* is entirely inapplicable to the facts at hand. "*Burford* abstention applies when a state has established a complex regulatory scheme and serving important state interests, and when resolution of the case demands specialized knowledge and the application of complicated state laws." *Melahn v. Pennock Ins.,* 965 F.2d 1497, 1506 (8th Cir. 1992).

However, the Eighth Circuit "demands a narrow view of the abstention issue." *Id*. at 1505. In fact, it is clear that abstention from exercising jurisdiction is "the exception and not the rule, and should be used 'only in extraordinary and narrow circumstances where it would clearly serve an important countervailing interest." *Id* at 1506 (citing *Bilden v. United Equitable Inc. Co.,* 921 F.2d 822, 826 (8th Cir. 1990)).

Here, Peluso's claims clearly fall outside the workers' compensation framework. As a result, proceeding with the instant action would not be duplicative or in any way disrupt Peluso's workers compensation claims in California. In fact, Peluso's claims are explicitly

exempt from workers' compensation and, as discussed above, California, New Jersey, and Missouri expressly permit him to file a separate civil action. Accordingly, Defendants' request that this court abstain under *Burford* should be denied.

j. *Colorado River* Abstention is Inappropriate Because Peluso's Actions Are Not Parallel

Defendants further suggest that this Court decline to exercise jurisdiction under *Colorado River*. However, federal courts have "a *virtually unflagging obligation to exercise jurisdiction* given them, which does not evaporate simply because there is a pending state court action involving the same subject matter." *Spectra Commc'ns Grp., LLC v. City of Cameron, Mo.,* 806 F.3d 1113, 1121 (8th Cir. 2015)(emphasis added). As the court stated in *Spectra*, abstention under *Colorado River* is only appropriate "in exceptional circumstances where the surrender of federal jurisdiction is supported by the clearest of justifications." *Id.*

Colorado River "permits federal courts to decline to exercise jurisdiction over cases where parallel state court litigation is pending, meaning that there is a *substantial likelihood* that the state proceeding will *fully dispose* of the claims presented in federal court." *Spectra,* 806 F.3d 1113, at 1121(emphasis added). "Determining whether parallel proceedings exist involves comparing the sources of law, required evidentiary showings, measures of damages, and treatment on appeal for reach claim." *Robinson v. Bridgeport Education Association,* 2017 WL 2963378, at *3 (D. Neb. Sept. 11, 2017) citing *Cottrell v. Duke*, 737 F.3d 1238, 1245 (8th Cir. 2013). Additionally, if "*any doubt"* exists as to the

parallel nature of the concurrent state and federal litigation, "the district court *cannot* utilize *Colorado River* to refuse jurisdiction." *Id.*

Assuming *arguendo* that the two actions are parallel, exceptional circumstances do not exist in this case to warrant abstention. Six factors are used to determine whether exceptional circumstances exist to warrant abstention:

> (1) whether there is a res over which one court has established jurisdiction, (2) the inconvenience of the federal forum, (3) whether maintaining separate actions result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal court issue is easily severed, (4) which case has priority – not necessarily which case was filed first but a greater emphasis on the relative progress in the case, (5) whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls, and (6) the adequacy of the state forum to protect the federal plaintiff's rights."

Spectra, at 1121.

As a preliminary matter, Defendants erroneously assume that this action and Peluso's workers' compensation claims are parallel. Defendants are incorrect in their assumption because the claims brought in this action are expressly exempt from workers' compensation. Also, a final determination of the court in Peluso's workers compensation case will not fully dispose of his claims in the instant action. To the contrary, a judicial resolution of his workers compensation case as will not dispose of any claims at all because California has statutorily created separate claims that are expressly outside its workers' compensation framework.

Finally, even if the two actions are parallel, exceptional circumstances are lacking.

As detailed above, the claims brought in this case are distinct and expressly outside the scope of Peluso's workers' compensation case and therefore the that forum will not protect his rights as alleged in the complaint. Defendants do not even suggest that they will suffer any inconvenience by litigating in this forum. On the other hand, due to the severe neurological injuries that resulted from Defendants' conduct, the inconvenience for Peluso's to litigate in any other forum is extraordinary. Also, this action proceeding would not result in piecemeal litigation because the claims brought in this action are independent of his workers' compensation claim.

Accordingly, because the actions are not parallel and exceptional circumstances do not exist to invoke *Colorado River*, Defendants' request for abstention should be denied.

k. Primary Jurisdiction Doctrine Is Inapplicable Because This Case is Outside the Scope of Peluso's Workers' Compensation Action

Defendants' next argument that this Court should decline jurisdiction based on the primary jurisdiction doctrine is equally flawed. The primary jurisdiction doctrine requires that resolution of one claim be necessary for the other. The doctrine is applicable where the court "requires the resolution of [an] issue which, under a regulatory scheme, have been placed within the special competence of an administrative body." *U.S. v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956). "Under the doctrine of primary jurisdiction, a court may leave an issue for agency determination when it involves the special expertise of the agency and would impact uniformity of the regulated field." *DeBruce Grain Inc. v. Union Pacific R. Co.,* 149 F.3d 787, 789 (8th Cir.1998). Here, as discussed earlier, resolution of Peluso's

workers' compensation claims are not necessary for the resolution of this case.

Also, "[t]here is no fixed formula for apply[ing] the doctrine of primary jurisdiction, and reasons for referring a matter to an agency include uniformity in statutory and regulatory construction, utilization of the agency's specialized knowledge, and policy considerations." *Miller v. WD-40 Company*, 29 F.Supp.2d 1040, 1042 (D.Minn. 1988). In *Miller*, the court rejected the defendant's primary jurisdiction arguments because, importantly, the facts and claims alleged by the plaintiff did not involve the specific purpose of the administrative body. *Id* at 1045.

In this case, California, New Jersey, and Missouri, all *statutorily exempted* these claims from their workers' compensation systems. The case cited by Defendants, *Lagler v. Zurich,* is inapplicable because, in *Zurich*, the plaintiff's claims were contingent upon whether she was in fact entitled to those benefits. The opposite is true here because Peluso's claims have been created, judicially and by statute, to exist as separate claims.

Additionally, Peluso's claims before this Court are distinct from the worker's compensation proceeding in that the claims before this Court are related to directly to Defendants' actions that remove it from immunity under the exclusive remedy of worker's compensation. *Johns-Manville Prods. Corp. v. Superior Court*, 27 Cal. 3d 465, 476 (Cal. 1980). "However, we held that the immunity from common law liability was lost insofar as the insurer did not 'remain in its proper role' but, rather, acted deceitfully in investigating the claim. A separate cause of action was allowed against the insurer for aggravation of the initial industrial injury, for which the plaintiff had already received compensation." *Id.*

Because the primary jurisdiction doctrine is inapplicable to the specific facts of this

case, the Court should retain jurisdiction. However, in the event this Court finds that the primary jurisdiction doctrine does apply, staying the action pending resolution of Peluso's workers' compensation case would be the appropriate course of action over dismissal.

l. Defendants Spoliation of Evidence Needed for Peluso's Workers' Compensation Proceedings Give Raise to a Valid Claim

Defendants' motion to dismiss Peluso's spoliation based claims are predicated on a mischaracterization of the allegations and mischaracterizations of law. In *Jablonski,* the court held that while the simple mishandling of a workers' compensation claim would be barred, a civil action for spoliation exists where "when the intentionally destroyed evidence relates to a cause of action outside of the sphere of the workers' compensation system… by virtue of the carrier's reprehensible conduct." *Jablonski,* 204 Cal. App.3d 379 at 394.

Also, in *Coca-Cola Bottling Co. v. Superior Court*, the plaintiff was injured in an automobile crash during the course of his employment and subsequently filed a lawsuit against the truck manufacturer. *Coca-Cola Bottling Co. v. Superior Court,* 233 Cal.App.3d 1273 (1998). During the course plaintiff's lawsuit, he discovered that his employer had removed various truck components that were needed for his case which caused him to bring a claim for spoliation of evidence against his employer. *Id.* The employer sought judgment on the pleadings based on exclusivity, however, the court permitted the spoliation claim stating that "a cause of action by an employee against his or her employer for negligent spoliation of evidence needed by the employee in his or her civil action against third parties is *not* barred as a matter of law by the exclusive remedy of the [workers' compensation] Act." *Id* at 1292.

In this case, Defendants' were in possession of numerous medical records and reports that were critical to Peluso's claims within his workers' compensation claim, this instant lawsuit against Chubb, and the certain lawsuit against themselves if their conduct was discovered. Defendants clearly understood that the medical documents in their possession would be critical in Peluso's workers' compensation claim, as well as in any lawsuit relating the concealment of critical information regarding concussions and head trauma by the NHL and its teams (such as the MDL litigation currently pending before this court.) Instead, Defendants attempted to suppress this information and, to this day, "new" medical records from decades past continue to be uncovered. Stuckey Decl. ¶ 2, Ex. A.

Defendants should not benefit from their intentional malfeasance. Accordingly, Defendants' motion to dismiss Peluso's spoliation claim should be denied.

m. Peluso Cannot Split Claims That Are Expressly Separate by Law

Defendants' allegation that Peluso is improperly "claim splitting" his workers' compensation action is entirely without merit because the California legislature, as well as the California Supreme Court, have exempted these claims from the state's workers' compensation framework and explicitly permit Peluso to bring a separate action at law. Defendants have no right to complain where their wrongful conduct results in an expressly permitted second action.

Defendants' reliance of *Mycogen* is misplaced. Res judicata and its application operates to preclude "piecemeal litigation by splitting *a single cause of action* or relitigation of the *same cause of action* on a different legal theory or for different relief."

Mycrogen Corp. v. Monsanto Co., 28 Cal. 4th 888, 897 (2002) (citing *Weikel v. TCW Realty Fund II Holding Co.,* 55 Cal.App.4th 1234, 1245 (1997)) (emphasis added). In *Mycrogen*, the court held that the plaintiff, after an earlier suit was fully decided on the merits, was barred from bringing the second suit because the claims were based on the same primary rights as the first. *Id at* 903. Here, as a preliminary matter, Peluso's suit is based on separate judicially and statutorily created rights than his workers' compensation action and therefore do not involve the same primary rights. Furthermore, there has been no determination on the merits in his workers' compensation action.

In *Le Park Community Assn. v. WCAB*, the plaintiff filed both a workers' compensation claim as well as a separate civil action against a impermissibly uninsured defendant. *Le Park Community Assn. v. WCAB*, 1100 Cal.App.4th 1161 (2003). The civil action was dismissed with prejudice. However, the California Court of Appeal held that res judicata was inapplicable to the plaintiff's workers' compensation action because the statutorily created cause of action against uninsured employers implicate separate primary rights. *Id.* at 1171-1172. Importantly, the California legislature expressly permitted the plaintiff to file a civil action that was independent of his workers' compensation claim. *Id.*

The exact same reasoning is applicable in this case where the California Supreme Court as well as the California legislature, by virtue of Cal. Lab. Code §3602(b), explicitly affords Peluso the right to file a separate action for conduct that is outside/exempt from what was contemplated in the workers' compensation bargain. Accordingly, Defendants' motion should be denied.

n. LEAVE TO AMEND

Defendants' motion to dismiss should be denied. However, if this Court rules in favor of Defendants' motion, Plaintiff respectfully requests leave to amend. Whether to grant leave to amend is left to the sound discretion of the district courts. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 91 S.Ct. 795, 802 (1971). Additionally, "leave shall be freely given when justice so requires." Fed.R.Civ.P. 15. Thus, if this Court decides the factual allegations in the complaint are deficient, Peluso should have an opportunity to cure those deficiencies.

III. CONCLUSION

For all the aforementioned reasons, Plaintiff respectfully requests Defendants' motion to dismiss be denied. In the alternative, Plaintiff respectfully requests he be allowed to proceed with discovery to more fully address the issues above, leave to amend his complaint to address any concerns, or that this action be stayed, instead of dismissed.

Dated: September 15, 2017

Respectfully Submitted,

s/ Shawn D. Stuckey

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