United States Court of Appeals

for the

Seventh Circuit

Case No. 17-2355

LEN BOOGAARD and JOANNE BOOGAARD, Personal Representatives of the Estate of DEREK BOOGAARD, Deceased,

Plaintiffs-Appellants,

– v. –

NATIONAL HOCKEY LEAGUE, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, in Case No. 1:13-cv-04846
The Honorable Gary Feinerman, District Court Judge

JURISDICTIONAL MEMORANDUM FOR DEFENDANTS-APPELLEES

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Defendants-Appellants (the "NHL") submit this Memorandum of Law pursuant to the Court's January 11, 2018 Order directing the parties to file memoranda addressing subject matter jurisdiction.

For the reasons set forth below, the district court correctly held that it had federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because the Complaint contained claims for relief that were completely preempted by Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185 ("§ 301"). This Court, therefore, also has subject matter jurisdiction and should affirm the dismissal of the action in its entirety.

PRELIMINARY STATEMENT

This action was commenced against the NHL in May 2013 in an Illinois state court by the personal representative of the estate of Derek Boogaard, a deceased NHL hockey player.[1] The terms and conditions of Boogaard's employment in the NHL had been governed by a collective bargaining agreement between the NHL and the National Hockey League Players' Association (the "2005 CBA"). (R.174 ¶ 27, SA15.)[2]

Counts I and II of the Complaint alleged that the NHL negligently failed to prevent Boogaard from becoming addicted to opioids and sleeping pills during his

[1] Plaintiffs-Appellants are successor personal representatives of the estate of Derek Boogaard. In district court proceedings, the court and the parties used "Boogaard" to refer not only to Derek Boogaard but also to the personal representative of his estate (and the original plaintiff in this action) and later to Plaintiffs-Appellants. The NHL maintains that convention on appeal.

[2] Citations to "R.__:__" refer to the docket number and ECF page number of items filed as part of the district court record. Citations to "A__" refer to the appendix filed with Boogaard's opening brief. Citations to "SA__" refer to the supplemental appendix filed with the NHL's principal brief.

NHL career. (R.1-1 ¶¶ 43-101.) Counts III and IV alleged that through the Substance Abuse and Behavioral Health ("SABH") Program, the NHL voluntarily undertook a duty to curb and monitor Boogaard's drug addiction, which it allegedly breached by deviating from the Program's terms. (*Id.* ¶¶ 102-200.) (As discussed below, the SABH Program is an agreement between the NHL and the National Hockey League Players' Association.) Counts V and VI alleged that the NHL was negligent in failing to protect Boogaard from brain trauma during his career, violating a voluntarily undertaken duty to protect his health. (*Id.* ¶¶ 201-226.) Counts VII and VIII alleged that the NHL breached a voluntarily undertaken duty to protect Boogaard's health by failing to prevent team doctors from injecting him with Toradol. (*Id.* ¶¶ 227-267.)

The NHL timely removed the action to the district court in July 2013. (R.1.) As set forth in the notice of removal, "[f]ederal question jurisdiction exists in this case based on complete preemption of plaintiff's claims under Section 301." (*Id.* ¶ 5.) The district court thereafter:

1. In February 2014, denied Boogaard's motion to remand, holding that at least two of his claims (Counts III and IV of the Complaint) were federal claims governed by § 301 (R.38:12), and asserting supplemental jurisdiction over the remaining claims to the extent they were governed by state law (*id.* at 12-13).[3]

2. In May 2014: (a) converted the NHL's motion to dismiss the Complaint to a summary judgment motion (at Boogaard's request); (b) permitted

[3] A copy of the district court's February 20, 2014 order denying Boogaard's motion to remand is attached to this memorandum as Exhibit 1.

Boogaard to conduct discovery concerning the composition of the CBA in order to respond to the NHL's § 301 preemption arguments; and (c) permitted Boogaard to file a First Amended Complaint.[4]

3. In December 2015, granted the NHL's motion for summary judgment dismissing all claims in the First Amended Complaint on the ground that they were federal claims governed by § 301 and were therefore time-barred. (R.141:20.)[5]

4. In September 2016, granted Boogaard's motion for leave to file a Second Amended Complaint. However, because the Second Amended Complaint included the eight claims previously dismissed as preempted, the district court again dismissed those claims. The district court also held that the four new claims added in the Second Amended Complaint "mix together different kinds of allegations, some completely preempted by the LMRA and some not." (R.169:8, SA08.) The district court directed the NHL to answer or move against the non-preempted portions of those claims on any basis other than § 301 preemption. (R.169:8-9, SA08-SA09.)

5. In June 2017, granted the NHL's motion to dismiss the Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and simultaneously denied Boogaard's renewed motion to remand to state court. (R.209:18, A18.)

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[4] The First Amended Complaint (R.62) substituted Len and Joanne Boogaard as successor personal representatives (*id.* ¶ 42) and added references to the Minnesota wrongful death and survival act statutes in each of the eight claims for relief (*id.* ¶¶ 71, 101, 150, 200, 212, 226, 245, 267), but was otherwise identical to the Complaint.

[5] Boogaard did not appeal from the dismissal of the eight claims held preempted and time-barred. A copy of the district court's December 18, 2015 order granting the NHL's motion for summary judgment as to the First Amended Complaint is attached to this memorandum as Exhibit 2.

The Court's subject matter jurisdiction is secure because complete preemption under § 301 of any one of the claims in the Complaint was sufficient for federal subject matter jurisdiction. Counts III and IV of the Complaint were completely preempted by § 301 because they alleged that the NHL breached an assumed duty of care, the source of which was a collectively-bargained agreement. (R.38:12.) Those are federal claims governed by § 301 under established Supreme Court and Seventh Circuit precedent. Counts III and IV, however, were not the only federal claims. As the district court held, all eight claims contained in the Complaint (and repeated in the First and Second Amended Complaints) were federal claims because they were completely preempted by § 301. The district court's conclusions were correct. This Court thus has subject matter jurisdiction and should affirm the decision below granting the NHL's motion to dismiss.

ARGUMENT

I. The Court Has Subject Matter Jurisdiction Under § 301

A. The Preemptive Effect of § 301

Section 301(a) vests federal district courts with jurisdiction to hear "[s]uits for violation of contracts between an employer and a labor organization representing employees." In *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), the Supreme Court held that § 301 is more than jurisdictional; it authorizes federal courts to fashion a body of federal common law to govern the enforcement of labor contracts. "[T]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal

law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23 (1983).

Section 301 completely preempts two types of claims: "claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (citing *Int'l Bd. of Elec. Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Thus, while a factual overlap between a state law claim and one that may be asserted under a collective bargaining agreement does not alone result in preemption, *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407 (1988), a claim that is "inextricably intertwined" with terms in a collective bargaining agreement is preempted, *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013).

In *Allis-Chalmers*, the Court made clear that § 301 preemption extends to purported state law claims sounding in tort, as well as contract claims, because:

> 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. at 211. The Court considered whether a state law tort claim that the defendant-employer had acted in bad faith in handling the plaintiff's claim for disability benefits provided under a collective bargaining agreement was preempted by § 301. The Court defined its task as determining whether the tort cause of action "confers

nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213. The Court concluded that the claim fell within the latter category and was thus preempted. As it later summarized (in *Hechler)*:

> The Court [in *Allis-Chalmers*] observed that any attempt to assess liability on the part of the employer would inevitably involve interpretation of the underlying collective-bargaining contract. First, the disability plan adopted in the collective-bargaining agreement might itself have included an implied requirement of good faith that the employer breached by its conduct. . . . Second, under the relevant state law, the duty of "good faith" on which the plaintiff relied "intrinsically relate[d] to the nature and existence of the contract" . . . .

Hechler, 481 U.S. at 858.

In *Hechler*, the Court considered a tort claim brought by an employee who alleged that her union had violated a duty of care to ensure a safe workplace. Applying *Allis-Chalmers*, the Court defined the inquiry as determining if the claim "is sufficiently independent of the collective-bargaining agreement to withstand the pre-emptive force of § 301." *Id.* at 859. The Court observed that, under the state's common law, the union had no general duty to provide a safe workplace; that a union could assume a duty of care through a contractual arrangement; and that the breach of such an assumed duty could give rise to either a breach of contract or a tort action. Thus, the "[t]he threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *Id.* at 860. However, because

"'questions of contract interpretation . . . underlie any finding of tort liability," the claim was preempted by § 301. *Id.* at 862.

The Supreme Court again considered the preemptive effect of § 301 on tort claims in *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990), holding that negligence claims brought against a union by survivors of miners who died in an underground fire were preempted by § 301. In that case, the Idaho Supreme Court had held the claims not preempted, distinguishing *Hechler* on the ground that the claims advanced by the *Rawson* plaintiffs relied on a duty of care that 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 371. The Supreme Court rejected that distinction, observing:

> 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 . . . .
>
> . . . . 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. . . . "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. . . ."

Id. (citing *Allis-Chalmers*. 471 U.S. at 211).

B. Removal Jurisdiction of Claims Preempted By § 301

A complaint containing claims whose resolution requires an interpretation of an agreement governed by § 301 may be removed from state court to federal court pursuant to 28 U.S.C. § 1441. That is true "[e]ven where a plaintiff relies on state law in a complaint and makes no mention of § 301" because "the federal statute will

displace the state-law claim to ensure uniform interpretation of collective bargaining agreements." *Baker v. Kingsley*, 387 F.3d 649, 657 (7th Cir. 2004) (claims asserted under Illinois Wage Act preempted).[6] *See also Hechler*, 481 U.S. at 851; *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009); *Gore v. Trans World Airlines*, 210 F.3d 944 (8th Cir. 2000); *Sluder v. United Mine Workers of Am.*, 892 F.2d 549 (7th Cir. 1989); *Tifft v. Commonwealth Edison Co.*, 366 F.3d 513 (7th Cir. 2004).

In *Caterpillar*, 482 U.S. 386, the Court recognized that a completely preempted state law claim may be removed to federal court. It held, however, that the particular claims in that case (breach of individual employment contracts) were not completely preempted because "§ 301 says nothing about the content or validity of [such] contracts" and the plaintiffs' complaint was "not substantially dependent upon interpretation of the collective-bargaining agreement." *Id.* at 394-95. Moreover, the Court held that the federal question raised by the employer (whether an otherwise valid individual employment contract was superseded by a collective bargaining agreement) did not provide the basis for removal because that argument, even if successful, was merely a defense to an otherwise well-pled state

[6] The decision in *Baker* illustrates the difficulty of attempting categorically to segregate particular categories of state law claims as preempted or not preempted; preemption analysis must be done on a case by case basis. *See, e.g., Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513, 2012 WL 1658353, at *3 (N.D. Ill. May 11, 2012). In *Baker*, the Court held the state statutory claim (for unpaid severance benefits) was preempted because the determination of whether they were due and owing required an interpretation of the collective bargaining agreement covering the plaintiffs. 387 F.3d at 658. The Court distinguished *Livadas v. Bradshaw*, 512 U.S. 107 (1994), where the Supreme Court held that a state law wage claim was not preempted where it required nothing more than "the simple need to refer to bargained-for wage rates [in the collective bargaining agreement] in computing the penalty." *Baker*, 387 F.3d at 658 (quoting *Livadas,* 512 U.S. at 125).

law claim, *i.e.*, a claim whose elements would not require resort to a collective bargaining agreement. *Id.* at 398-99.

Caterpillar poses no bar to the application of complete preemption (and removal jurisdiction) with respect to the action at issue here, where analysis of a collective bargaining agreement is required to establish the elements of the state law cause of action pled in the complaint. As in *Hechler* and *Rawson*, where analysis of a collective bargaining agreement would be required to establish whether a duty of care (express or implied) existed—and the nature and extent of such a duty—courts have repeatedly applied complete preemption.

In *Sluder*, 892 F.2d 549, this Court, applying § 301 preemption, affirmed the dismissal of a negligence claim that had been removed from Illinois state court. The defendant-union there had conducted inspections of a mine that subsequently collapsed. The complaint asserted claims of negligence and loss of consortium, alleging that "by undertaking these inspections, [the union] became subject to the state common-law duty to perform these inspections with due care." *Id.* at 551.

This Court in *Sluder* began its analysis with a discussion of Illinois law governing the imposition of liability for a voluntary undertaking, emphasizing that "we have stressed that 'the scope of the duty is limited by the extent of the undertaking,'" and that Illinois courts "require that any duty assumed be limited *strictly* to the scope of the undertaking.'" *Id.* at 554 (emphasis in original, citations omitted). With that as the predicate, the Court found the claims preempted by § 301:

> It is, of course, possible that a third party, such as District 12, might assume this duty. However, before liability could be established, it would be necessary to establish that the union breached a specific duty it had assumed toward the employees. In order to define the scope of the duty assumed by the union, it would be necessary to establish the precise responsibility assumed by the union.
>
> In our view, it would not be possible to define, with the precision demanded by Illinois law, the scope of the union's duty without reference to the collective bargaining agreement that governs the relationship between the company and the union. Indeed, the necessity for such a reference is evident from the complaint itself. One of the specific acts of negligence attributed to District 12 by the Sluders was that the union "[c]arelessly and negligently failed to close said mining facility in light of its unreasonably dangerous condition." The union's authority to close the employer's facility is, of course, not a right granted by law but, if at all, by the collective bargaining agreement. The collective bargaining agreement and the dispute resolution process established under that agreement set forth the circumstances under which such action by the union would be permitted. . . . The collective bargaining agreement outlines not only the union's responsibility with respect to the two mine safety committees but also limits District 12's right to interfere in the operation of the mine.

Id. at 554.

Other courts have taken a similar approach. In *Williams*, 582 F.3d 863, after removal from state court, the Eighth Circuit applied § 301 preemption to affirm the dismissal of state common law claims asserted by NFL players who had been 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 assertion that the NFL had failed to provide "an ingredient-specific warning." They claimed that a duty to warn arose not from the NFL's collective bargaining agreement and collectively bargained substance abuse policy, but rather from "a duty that

Minnesota law imposes on the NFL as a fiduciary, an employer, and as one who voluntarily undertook to act or speak." *Id.* at 881.

The court in *Williams* held that plaintiffs' claims required an interpretation of the applicable collective bargaining agreement and drug policy. "[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." *Id.* Thus, the common law tort claims were "inextricably intertwined" with consideration of the terms of those agreements and preempted by § 301. *Id. (citing Allis-Chalmers*, 471 U.S. at 211); *see also Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170 (11th Cir. 2010); *Gore*, 210 F.3d 944; *Dent v. Nat'l Football League*, No. C 14–02324 WHA, 2014 WL 7205048 (N.D. Cal. Dec. 17, 2014), *appeal docketed,* No. 15-15143 (9th Cir. May 20, 2014); *Duerson*, 2012 WL 1658353; *Stringer v. NFL*, 474 F. Supp. 2d 894 (S.D. Ohio 2007).

C. The District Court Properly Asserted Jurisdiction Under § 301

1. Boogaard's SABH Claims Were Preempted By § 301

Following removal, the district court denied Boogaard's motion to remand "[b]ecause at least some of Boogaard's claims are completely preempted." (R.38:2.) The district court correctly held that Counts III and IV of the Complaint, which alleged that the NHL failed to ensure that Boogaard was properly cared for while enrolled in the SABH Program, were completely preempted by § 301 and provided subject matter jurisdiction over the entire case (even if the remaining counts were not completely preempted). (*Id.* at 12.)

The Complaint expressly and repeatedly invoked the SABH Program as the source of the NHL's "voluntarily assumed duty" to properly care for Boogaard. (R.1-1 ¶¶ 12-13, 20-21, 104-113, 154-163.) Boogaard alleged that the NHL improperly failed to monitor and supervise the Program, failed to enforce the Stage II and Stage III disciplinary steps of the Program; failed to place Boogaard in the proper SABH stages of intervention; failed to ensure diagnosis and treatment after Boogaard's relapse; failed to monitor him to prevent relapse after his discharge from "The Canyon" rehabilitation facility; failed to provide a chaperone when he was permitted to leave the ARC facility; and failed to warn him of an increased risk of fatal overdose. (*Id.* ¶¶ 147, 197.)

The SABH is, by its terms, a "joint NHL/NHLPA substance abuse and behavioral health program" that reflects a "comprehensive effort to address substance abuse among NHL players and their families, to treat those with a substance abuse problem in a confidential, fair and effective way, and to deter such abuse in the future." (R.1-3:3.) As the district court found, the SABH Program itself was an agreement made between the NHL and the NHLPA (in 1996), and it was part of the 2005 CBA. (R.38:11-12.) Indeed, the SABH Program was expressly incorporated in Article 47 of the 2005 CBA. (R.1-2:152.)[7]

Boogaard did not appeal these factual findings. Even if he had, this Court would have had no basis for disturbing them, particularly given the applicable "clearly

[7] The SABH Program was part of the 2005 CBA (R.38:11-12.) Even if it were viewed as a standalone agreement between the NHL and NHLPA, it would still be governed by § 301. *Retail Clerks Int'l Ass'n, Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26 (1962) (preempting a claim based on a strike settlement agreement); *Olson v. Bemis Co.*, 800 F.3d 296, 301-302 (7th Cir. 2015) (preempting a claim based on a grievance settlement).

erroneous" standard of review. *See U.S. ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 707 (7th Cir. 2014) (explaining that "clearly erroneous" standard applies to finding of jurisdictional fact).

The district court aptly commented that Boogaard's allegations—that the NHL voluntarily undertook duties to Boogaard based on the SABH Program—"walk themselves into complete preemption." (R.38:7.) The district court's analysis closely tracked the analysis undertaken by this Court in *Sluder*, observing that Boogaard's reliance on a theory of "voluntary undertaking" by the NHL (in the form of the SABH Program) meant that the scope of any voluntarily assumed duty would depend on the scope of the voluntary undertaking. (R.38:10.) This necessarily required an analysis of the collectively-bargained SABH:

> *Hechler and Sluder* govern this case. The nature and scope of the NHL's voluntarily assumed duties to Boogaard—for example, whether . . . the NHL was obligated to closely monitor Boogaard for compliance with his SABH regime and to strictly enforce the Stage Two and Three progressive disciplinary regimen . . . are governed by the SABH Program agreement.

(*Id.*) Accordingly, "[b]ecause Counts III and IV are completely preempted," they were "federal claims under 28 U.S.C. § 1331 and thus were properly removed under 28 U.S.C. § 1441(a)." (*Id.* at 12.) In addition, "[e]ven if the complaint's other claims are not completely preempted—that is, even if they truly are state law claims—the court has supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(a)." (*Id.* at 12-13, citations omitted.)

Those conclusions were correct. The district court had supplemental jurisdiction over Counts I-II and V-VIII of the Complaint because they "arose out of the same

set of facts" as Counts III and IV, *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 500 (7th Cir. 1999), and were therefore "part of the same case or controversy," 28 U.S.C. § 1367(a). Each of the counts in the Complaint arose from Boogaard's employment as an NHL Player, his alleged role as an "enforcer," the injuries he allegedly suffered as a result, his treatment by Club physicians and the NHL's alleged acts and omissions. *See Houskins v. Sheahan*, 549 F. 3d 480, 495 (7th Cir. 2008) (explaining that a "loose factual connection is generally sufficient" to establish supplemental jurisdiction); *Groce*, 193 F.3d at 500 (holding that supplemental jurisdiction covered state law claims based on employee's report of safety violations, where federal claim was based on disability discrimination).[8]

Counts III and IV of the Complaint remained in the First Amended Complaint following the district court's denial of remand and continued to supply a basis for the district court's subject matter jurisdiction. (R.62 ¶¶ 102-200.) Indeed, the district court continued to be vested with supplemental jurisdiction even after it granted summary judgment as to Counts III and IV and all of the other claims in the First Amended Complaint. *See* Point II, *infra*. Even if that might have marked the dismissal of all federal claims, the Second Amended Complaint realleged Counts III and IV (renumbered as Counts VII and VIII) in substantially unchanged terms. (R.174 ¶¶ 151-216.) The district court again held that they were completely preempted by § 301. (R.169:5, SA05.)

[8] Boogaard did not argue that the district court should decline supplemental jurisdiction over Counts I-II and V-VIII of the Complaint for any of the reasons in 28 U.S.C. § 1367(c). (R.23.) He therefore forfeited any such argument. *See Sullivan v. Conway*, 157 F.3d 1092, 1095 (7th Cir. 1998).

Thus, the district court had subject matter jurisdiction over this case.

2. The Remaining Claims in the Complaint Were Also Preempted By § 301

Although complete preemption of Counts III and IV provided subject matter jurisdiction, the NHL addresses here the remaining counts contained in the First Amended Complaint, which the district court also dismissed in its December 18, 2015 summary judgment decision. Because § 301 completely preempted those counts as well, they were also federal claims that provide an independent basis for subject matter jurisdiction.

Counts V through VIII of the First Amended Complaint alleged, in essence, that the NHL voluntarily assumed a duty to safeguard Boogaard's health and safety. Counts V and VI were based on the claim that the NHL failed to act reasonably to prevent, monitor and treat concussions, citing the NHL's alleged failures to: enact and enforce Playing Rules to limit or eliminate on-ice fighting; ensure rapid and accurate diagnosis of his concussive brain injuries; and establish adequate bench concussion assessment and return to play protocols. (R.62 ¶¶ 201-226.) Counts VII and VIII alleged that the NHL negligently permitted Club physicians to administer Toradol, an intramuscular analgesic, to Boogaard. (*Id.* ¶¶ 227-267.)

The district court began the analysis in its summary judgment decision with a review of the law concerning the voluntary undertaking doctrine, acknowledging the well-established rule that under both Minnesota and Illinois law, "[t]he voluntary undertaking doctrine is narrow" (R.141:8); that "'the scope of the duty that is assumed is limited to the extent of the undertaking'" (*id.* at 9); and that

"[t]he existence and extent of voluntary undertakings are to be analyzed on a case-by-case basis,'" (*id.* at 10, citation omitted).[9]

Counts V through VIII, however, alleged in conclusory fashion that "[t]he NHL voluntarily undertook a duty to Derek Boogaard and all NHL players to keep them reasonably safe . . . and to prevent brain trauma." (R.62 ¶¶ 208, 220, 242, 261.) Boogaard pled not a single fact as to how and when this duty of care was supposedly created, a significant flaw, given that "[t]here is simply no case law that has imposed on a sports league a common law duty to police the health-and-safety treatment of players." *Dent*, 2014 WL 7205048.

As in *Hechler*, *Rawson* and *Sluder*, the district court appropriately turned to the CBA—where "the rights and responsibilities" of the League, Clubs, players and physicians are "set forth in detail,"[10] *Sluder*, 892 F.2d at 554—in order to determine whether it contained provisions plausibly related to Boogaard's claim that the NHL had voluntarily undertaken the duties it had allegedly breached. The district court identified a number of provisions of the 2005 CBA that would require interpretation to determine whether the NHL assumed the duties of care alleged in the Complaint

[9] The district court analyzed Boogaard's claims in the First Amended Complaint under both Illinois and Minnesota law because Boogaard invoked both the Minnesota and Illinois wrongful death statutes in each purported cause of action. (R.62 ¶¶ 71, 101, 150, 200, 212, 226, 245, 267.) When the district court subsequently dismissed the Second Amended Complaint, it held that Minnesota substantive law, not Illinois law, applied to the portions of claims not preempted by § 301. (R.209:9, A09.)

[10] The district court correctly observed that "[t]he NHL spent years bargaining with the NHLPA, and the process produced a document exhaustively detailing each party's specific obligations to the others." (R.141:10.)

(and which the NHL asserted are entirely inconsistent with the notion of a generalized duty of care of the kind posited by Boogaard). Among other things:

- Article 16.11 governed the procedures for Injured Reserve (allowing clubs not to count the injured player against its roster limit) and Article 16.11(e) required the team doctor, applying "the Club's medical standards" to certify the player as eligible for Injured Reserve. "That could plausibly be taken to provide that teams were free to develop their own 'medical standards' for diagnosing injuries, including concussions, without the NHL's interference." (*Id.* at 11.)

- Article 16.11(g) provided that a player on Injured Reserve was eligible to return to play "beginning on the 8th day following the date of injury . . . or any day thereafter that the Player is medically cleared to play by the Club physician," which the district court noted "could plausibly be taken to provide that the NHL could not have additionally required an independent physician's consent before a concussed player was allowed to return." (*Id.*)

- Although Boogaard's complaint alleged that the NHL should have changed the Playing Rules to discourage fighting (R.62 ¶¶ 201, 209(a), 209(c), 213, 221(a), 221(c)), Article 30.3 of the CBA provides that the NHL:

  > shall not . . . amend or modify the provisions (or portions thereof) of the League Rules or any of the League's Playing Rules in existence on the date of this Agreement which affect terms and conditions of employment of any Player, without the prior written consent of the NHLPA which shall not be unreasonably withheld.

  As the district court found, this provision could reasonably be construed as barring the NHL from unilaterally changing the rules concerning fighting, in which case "it is unlikely that the NHL's voluntarily assumed duties included an obligation to change the rules of play to make the game safer . . . ." (R.141:12).

- The CBA incorporated the Prescription Medication Program, "a set of rules extensively regulating when and how team doctors and trainers could administer prescription medications." (*Id.* at 13.) As the district court found, "[t]he Prescription Medication Program, together with Article 30.3's prohibition on unilateral

> amendments to important league rules, arguably implies that the NHL otherwise lacked the authority to direct how teams administered and tracked medications. (*Id.*) That in turn arguably suggests that the NHL's voluntarily assumed duties did not include prohibiting team doctors from administering Toradol."

Any determination here as to "[w]hether the NHL owed Boogaard a duty to take the steps that Counts V through VIII fault it for failing to take depends largely on genuinely contested interpretations of the CBA. Those claims therefore are completely preempted." (R.141:18.) Stated another way, as in *Sluder*, it "would not be possible to define" the NHL's duties to Boogaard without construing the CBA. 892 F.2d 554. *See also*, *Hechler* , 481 U.S. at 862 (state law preempted where "court would have to ascertain . . . whether the collective-bargaining agreement in fact placed an implied duty of care on the Union" and "the nature and scope of that duty"); *accord Dent*, 2014 WL 7205048; *Duerson*, 2012 WL 1658353; *Stringer*, 474 F. Supp. 2d 894.

Finally, the district court correctly found Counts I and II of the First Amended Complaint (later renumbered as Counts V and VI of the Second Amended Complaint) preempted. Boogaard did not allege in those counts that the NHL had assumed a duty of care, but simply that the NHL "owed a duty to [Boogaard] to keep him reasonably safe during his NHL career and to refrain from causing an addiction to controlled substances." (R.62 ¶¶ 68, 97.) The claims alleged "sins of omission," *i.e.*, that the NHL "fail[ed] to take specific, active measures to ward off Boogaard's addiction." (R.141:16) The district court (turning again in the first instance to the elements of a claim for relief under Minnesota and Illinois law) examined the standards for determining whether the NHL and Boogaard had a

"special relationship" (in particular, a "custodian-protectee" relationship) of the kind that could impose on the former a duty to act to protect the latter from harm (*id.* at 16-17).

Emphasizing that an essential element of a custodial relationship is control over the alleged "protectee," the district court found that a determination of whether there was such a relationship would require an interpretation of disputed provisions of the CBA:

> The parties dispute the amount of control that the NHL had over Boogaard's welfare, and the focus of their dispute is on the terms of the 2005 CBA . . ., so to decide whether the NHL was Boogaard's custodian, the court would have to interpret the CBA. For instance, as explained above, the Prescription Medication Program, in conjunction with Article 30.3, arguably could be read to divest the NHL of the authority to control players' medical treatment. . . . In fact, the NHL plausibly asserts that it could not even control the welfare of players enrolled in the SABH Program; the agreement creating the SABH Program provided that "program doctors," selected by both the NHL *and* the NHLPA, would direct and monitor the care of players struggling with substance abuse. . . . And, as also explained above, the parties contest the extent to which the NHL could change the rules of play to further discourage fighting, which bore directly on Boogaard's daily welfare. . . . Accordingly, whether the NHL was Boogaard's custodian for purposes of Counts I and II depends largely on genuinely contested interpretations of the CBA, which means that those counts are completely preempted.

(R.141:17-18, emphasis in original.)

In short, with respect to every one of the eight counts asserted by Boogaard in the First Amended Complaint, "the state-law cause of action is meaningless without reference to the agreements which articulate the [NHL's] obligations" towards him.

Tifft, 366 F.3d at 519.[11] Because Boogaard's claims can be evaluated only in the context of the rights and obligations created by the 2005 CBA (including, but not limited to, the SABH Program), his claims were completely preempted by § 301, and the district court had subject matter jurisdiction over his claims.

II. The District Court Acted Within Its Discretion in Exercising Supplemental Jurisdiction After Dismissing Boogaard's Preempted Federal Claims

A district court has supplemental jurisdiction over state law claims even after dismissing all claims within its original jurisdiction. *See In re Repository Techs., Inc.*, 601 F.3d 710, 724 (7th Cir. 2010). It "may decline" supplemental jurisdiction in those circumstances, 28 U.S.C. § 1367(c)(3), but should retain supplemental jurisdiction when resolution of the supplemental state law claims is clear. *See Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1252 (7th Cir. 1994); *Groce*, 193 F.3d at 502 ("[C]omity is certainly not served by sending back to state court 'doomed litigation' that will only be dismissed once it gets there.").

The eight claims ultimately dismissed as preempted federal claims in Boogaard's First Amended Complaint were set forth in Boogaard's operative pleading for the majority of the case. *See supra* at 15. The district court dismissed those claims when it dismissed the First Amended Complaint in its entirety. (R.141.) The Second Amended Complaint realleged the eight federal claims in substantially similar form, as Counts V-XII. (R.174 ¶¶ 119-256, SA37-SA64.) It also added four new counts, as Counts I-IV. (R.174 ¶¶ 33-118, SA16-SA37.)

[11] The district court correctly held that the cases relied upon by Boogaard in opposing preemption were inapposite. In each of those cases the court held that the plaintiff had stated a claim for relief under state law that did not require resort to a collective bargaining agreement to establish the existence, nature or scope of a duty of care. (R.141:18-20.)

In granting leave to file the Second Amended Complaint, the district court again held that the eight original counts were governed by § 301. (R.169:8, SA08.) The district court held that the four new counts "mix[ed] together different kinds of allegations, some completely preempted by the LMRA and some not." (*Id.*) The district court dismissed the preempted portions of those counts and directed the NHL to "answer," "otherwise plead," or "move to dismiss" the state law portions of those counts on any ground other than § 301 preemption. (R.169:8-9, SA08-SA09.)

In December 2016 (almost a year after the district court dismissed the First Amended Complaint on preemption grounds and after the NHL had already moved to dismiss the state law portions of the Second Amended Complaint), Boogaard moved to remand, arguing that the district court should exercise its discretion to decline supplemental jurisdiction. (R.182-83.) That motion was denied. In granting the NHL's motion to dismiss, which is the subject of this appeal, the district court chose to retain supplemental jurisdiction under 28 U.S.C. § 1367(a) because the resolution of Boogaard's state law claims was clear as a matter of state law—"the court dismissed those claims, on independent grounds, by applying settled law and without confronting complicated state law questions." (R.209:18, A18.)

As the NHL explained in its principal brief (and set forth briefly here, not for repetition, but for the Court's convenience), the district court acted well within its discretion in retaining supplemental jurisdiction. (NHL Brief at 44-45.) The district court held that "there are independent grounds for dismissing those

claims—that Len and Joanne Boogaard have not been named trustees and that Boogaard has failed to respond to the NHL's substantive challenges to his claims," neither of which required application of Illinois law. (R.209:18, A18); *see Groce*, 193 F.3d at 503-504 (holding that resolution of state claim was "clear" where plaintiff failed to meet "statutory requirements"); *Olson*, 800 F.3d at 303-306 (district court properly exercised supplemental jurisdiction to dismiss state law claims after dismissing claim preempted by § 301). Remanding the case to an Illinois state court would not have served any of the "values of judicial economy, convenience, fairness, and comity" that guide district courts in those circumstances. (R.209:18, A18 (quoting *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997).)

Finally, even if the resolution of Boogaard's state law claims had not been sufficiently clear, the district court's retention of supplemental jurisdiction would have been well within its discretion. As the NHL argued in its principal brief (NHL Brief at 45), a district court abuses its discretion by remanding state claims that are entangled with or "inextricably bound to" dismissed federal claims. *In re Repository Techs.*, 601 F.3d at 726. Boogaard's federal claims and state claims were commingled. (R.169:8, SA08 ("Counts I through IV mix together different kinds of allegations, some completely preempted by the LMRA and some not.").) Remand would have been "punting" to an Illinois state court "the tasks of, first, reviewing the ever-expanding record in these proceedings in order to evaluate [Boogaard's] claims, and, second, trying to determine what claims . . . the district court felt remained viable." *In re Repository Techs.*, 601 F.3d at 727. In these circumstances,

the district court's decision to retain jurisdiction was entirely reasonable and not an abuse of its discretion.

CONCLUSION

For the reasons set forth above, the district court had subject matter jurisdiction pursuant to the complete preemption doctrine of § 301 and supplemental jurisdiction over any claims that were not governed by § 301. This Court likewise has subject matter jurisdiction.

Dated: January 25, 2018

Respectfully submitted,

/s/ Joseph Baumgarten

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT D. NELSON, Personal Representative of the Estate of DEREK BOOGAARD, Deceased,	)	
	)	13 C 4846
Plaintiff,	)	
	)	Judge Feinerman
vs.	)	
	)	
NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and COMMISSIONER GARY B. BETTMAN,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The personal representative of Derek Boogaard's estate, who for ease of reference will be called "Boogaard" unless context requires otherwise, brought this suit in the Circuit Court of Cook County, Illinois, against the National Hockey League and its Board of Governors and Commissioner (collectively, "NHL"). Doc. 1-1. The complaint characterizes Boogaard's claims as arising under Illinois law. The NHL removed the case to this court under 28 U.S.C. § 1441, asserting that federal question jurisdiction lies under 28 U.S.C. § 1331 because Boogaard's purported state law claims are completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and thus in fact are federal claims.[*] Doc. 1.

[*] The NHL does not and likely could not argue that diversity jurisdiction lies under 28 U.S.C. § 1332. The personal representative of an estate is a citizen of the State of which the decedent was a citizen at the time of death. *See Hunter v. Amin*, 583 F.3d 486, 491-92 (7th Cir. 2009). Boogaard likely was a Minnesota citizen when he died. Doc. 1-1 at ¶ 42 (alleging that Boogaard's personal representative "was appointed by the State of Minnesota, Fourth Judicial Circuit Court"). The NHL "is an unincorporated association and, therefore, is a citizen of every state in which one of its members is a citizen." *Parker v. Centre Group L.P.*, 1995 WL 709724, at *1 (4th Cir. Dec. 4, 1995) (citable pursuant to 4th Cir. R. 32.1); *see* Doc. 1-1 at ¶ 37 (alleging that the NHL is "an unincorporated association of member teams"). One of the NHL's member

Boogaard has moved to remand the case to state court, arguing that his claims are not completely preempted by the LMRA and thus are true Illinois law claims. Doc. 23. Because at least some of Boogaard's claims are completely preempted, the motion is denied.

Background

The following facts, taken primarily from the complaint, are assumed true at this stage of the proceeding. From 2005 through 2011, Boogaard played in the NHL for the Minnesota Wild and the New York Rangers; his role was that of "an Enforcer/Fighter," meaning "a player that engages in fist-fights with players from the opposing team, on the ice, during a game." Doc. 1-1 at ¶ 2. The National Hockey League Players Association ("NHLPA") represents NHL players and negotiated the 2005 Collective Bargaining Agreement ("2005 CBA") with the NHL, which was in effect during Boogaard's entire career. *Id*. at ¶ 28; Doc. 1 at ¶ 3.

In his 277 regular season games, Boogaard scored three goals, participated in at least 66 fights, and sustained numerous painful physical injuries, for which NHL team physicians, dentists, trainers, and staff provided him "copious amounts of prescription pain medications, sleeping pills, and painkiller injections." Doc. 1-1 at ¶¶ 2-6, 16. Boogaard eventually became addicted to some of those drugs and was enrolled in the NHL's Substance Abuse and Behavioral Health ("SABH") Program. *Id*. at ¶¶ 1, 9-12. The terms of the SABH Program are set forth in a document that takes the form of an agreement signed by the NHL's commissioner and the NHLPA's executive director. Doc. 1-3. The agreement's first paragraph states that the SABH Program "is a comprehensive effort to address substance abuse among NHL players and their

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teams, the Minnesota Wild, is located in Minnesota, Doc. 1-1 at ¶ 38, and thus likely is a Minnesota citizen, making the NHL a Minnesota citizen as well. With Minnesota citizens on both sides of the case, there is no diversity jurisdiction. *See MB Financial, N.A. v. Stevens*, 678 F.3d 497, 500 (7th Cir. 2012) ("A suit with citizens of Illinois on both sides cannot be removed under the diversity jurisdiction.").

families, to treat those with a substance abuse problem in a confidential, fair and effective way, and to deter such abuse in the future," and adds that the Program "has the full support of the League and the Players' Association and will be incorporated into the Collective Bargaining Agreement." *Id*. at 3. Through the SABH Program, Boogaard entered The Canyon, a rehabilitation facility, in September 2009 for in-patient treatment of his opioid and sleeping pill addiction. Doc. 1-1 at ¶ 13.

After his release from The Canyon, Boogaard signed with the New York Rangers and suffered a relapse. *Id*. at ¶¶ 15-19. In early April 2011, the SABH Program directed Boogaard to enter Authentic Rehabilitation Center ("ARC") in California for treatment of his opioid addiction. *Id*. at ¶ 20. Despite knowing that Boogaard was not complying with his treatment regimen, the NHL allowed Boogaard to be temporarily released from ARC without a chaperone on two occasions. *Id*. at ¶¶ 21-23. On the first night of his second release, Boogaard ingested a Percocet and was found dead the next day, on May 13, 2011. *Id*. at ¶¶ 24-25. The cause of death was determined to be an accidental drug overdose. *Id*. at ¶¶ 141-143.

After his death, Boogaard's parents and estate unsuccessfully sued the NHLPA in California for breach its duty of fair representation. *Boogaard v. Nat'l Hockey League Players Ass'n*, 2013 WL 1164301 (C.D. Cal. Mar. 20, 2013). Boogaard's personal representative then filed this suit against the NHL. Counts I and II of the complaint allege the NHL failed to prevent the over-prescription of addictive medications to Boogaard. Doc. 1-1 at ¶¶ 43-101. Counts III and IV allege that the NHL breached its voluntarily undertaken duty to curb and monitor Boogaard's drug addiction during the time he was enrolled in the SABH Program, including by failing to provide Boogaard with a chaperone for his second temporary release from ARC and by failing to warn him of the risks associated with leaving the facility. *Id*. at ¶¶ 102-200. Counts V

and VI allege the NHL was negligent in monitoring Boogaard for brain trauma during his career. *Id*. at ¶¶ 201-226. And Counts VII and VIII allege the NHL was negligent in permitting team doctors to inject Boogaard with Toradol, an intramuscular analgesic. *Id*. at ¶¶ 227-267.

Discussion

As noted above, the NHL premises federal subject matter jurisdiction on the ground that Boogaard's claims, which Boogaard characterizes as arising under Illinois law, are completely preempted by § 301 of the LMRA. The complete preemption doctrine "converts an ordinary state common-law complaint into one stating a federal claim." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1989). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law" for purposes of 28 U.S.C. §§ 1331 and 1441(a). *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) (internal quotation marks omitted); *see also Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 894 (7th Cir. 2013).

Settled precedent holds that § 301 the LMRA completely preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394 (internal quotation marks omitted); *see also Nelson v. Stewart*, 422 F.3d 463, 467-69 (7th Cir. 2005); *In re Bentz Metal Products Co., Inc.*, 253 F.3d 283, 285-86 (7th Cir. 2001) (en banc). Complete preemption under § 301 "covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed 'really' to be a claim under a labor contract." *Crosby*, 725 F.3d at 797. "[T]o determine whether a purported state-law claim 'really' arises under Section 301, a federal court must look beyond the face of the

plaintiff's allegations and the labels used to describe her claims and … evaluate the *substance* of plaintiff's claims." *Id*. at 800 (internal quotation marks omitted). "[A] state-law claim is 'completely preempted' only when it is inextricably intertwined with consideration of the terms of the labor contract." *Ibid*. (internal quotation marks omitted).

The substance of Counts III and IV of the complaint, which allege that the NHL breached its voluntarily undertaken duty to properly care for and address Boogaard's drug addiction during his enrollment in the SABH Program, makes clear that those claims are completely preempted by § 301 of the LMRA. Counts III and IV allege, in relevant part, the following facts:

- Boogaard "was enrolled in the NHL's SABH Program." Doc. 1-1 at ¶ 103.
- The SABH Program "was granted exclusive, unsupervised control of player abuse issues by the NHL." *Id*. at ¶¶ 104-105.
- The SABH Program "is supposed to operate according to a defined regimen," under which players are initially placed in "Stage One" and then are demoted to "Stage Two," "Stage Three," and "Stage Four," with progressively more serious penalties at each stage, if they fail to comply with the Program's requirements. *Id*. at ¶ 111.
- On October 9, 2009, shortly before his release from The Canyon, the SABH Program instructed Boogaard as part of his "Aftercare Program" that "he was to refrain from all opioid and Ambien drug use" and warned that he could be permanently suspended from the NHL if he failed to comply, though Boogaard "would come to learn that this was an idle threat." *Id*. at ¶ 113.
- Despite the instructions imposed by his Aftercare Program, Boogaard received Ambien and other drugs from NHL team physicians, dentists, trainers, and staff. *Id*. at ¶ 120.
- Although from January 2011 through March 2011 Boogaard violated the Aftercare Program and his urine tested positive for prohibited substances on several occasions, Boogaard was not placed in Stage Two or Stage Three of the SABH Program's progressive disciplinary regimen. *Id*. at ¶¶ 121-127.

- After Boogaard was admitted to ARC in early April 2011, the NHL knew or should have known that he was not complying with his treatment regimen. *Id*. at ¶¶ 130-133.

- The SABH Program paid for Boogaard's first temporary release from ARC, but did not provide him with a chaperone, and during his release he purchased $4,000 of opioids on the street in New York. *Id*. at ¶¶ 134-136.

- Boogaard returned to ARC on May 4, 2011, and on May 12, 2011, Boogaard left on his second temporary release from the facility to attend his sister's graduation; the NHL did not provide Boogaard with a chaperone, did not provide him with an Aftercare Program or follow-up care instructions, and did not warn him of the risks of leaving the facility. *Id*. at ¶¶ 137-140.

- On May 12 and 13, 2011, Boogaard ingested Percocet and numerous Oxycondone pills, and he was found dead on May 13, 2011; the cause of death was determined to be an accidental drug overdose. *Id*. at ¶¶ 141-143.

With respect to Boogaard's claim that the foregoing acts and omissions breached the NHL's duties to him, Counts III and IV allege that when Boogaard "was admitted into the SABH Program in 2009, the NHL voluntarily undertook a duty to monitor, treat, and curb [his] drug addiction." *Id*. at ¶ 146. Those counts further allege that the NHL breached its duties by:

a. Failing to monitor and supervise its SABH Program;

b. Failing to place [Boogaard] in the SABH Program defined four stages of intervention;

c. Failing to intervene when necessary to treat [Boogaard] for substance abuse;

d. Failing to appropriately treat [Boogaard] for substance abuse;

e. Failing to ensure rapid, accurate diagnosis and intervention for [Boogaard's] relapse of prescription pain pill abuse;

f. Failing to adequately monitor [Boogaard] for prescription paid pill abuse following his discharge from "The Canyon" rehabilitation facility;

g. Failing to warn [Boogaard] of the increased risk of fatal overdose following his release from the ARC; and

h. Failing to monitor [Boogaard] upon release from the ARC.

Id. at ¶ 147; *see also* Doc. 23 at 9 (in his motion for remand, Boogaard notes that his complaint "alleges [the NHL's] breaches based on the voluntary undertaking the NHL assumed and its SABH Program"); *id*. at 12 (arguing that "[t]he NHL failed to fulfill its self-imposed commitment to … prevent[] … addictions to controlled substances").

By alleging that the NHL voluntarily undertook duties to Boogaard upon his enrollment in the SABH Program, and by further alleging that the NHL breached those voluntarily undertaken duties by failing to comply with the Program's requirements and by otherwise failing to properly treat Boogaard within the confines of the Program, Counts III and IV walk themselves into complete preemption. The voluntary undertaking theory of tort liability provides that "one who undertakes, gratuitously or for consideration, to render services to another is subject to liability for bodily harm caused to the other by one's failure to exercise due care in the performance of the undertaking." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1153 (7th Cir. 2010) (quoting *Wakulich v. Mraz*, 785 N.E.2d 843, 854 (Ill. 2003)); *see also Homer v. Pabst Brewing Co.*, 806 F.2d 119, 121 n.2 (7th Cir. 1986) (same). "[A] voluntary undertaking is just that—voluntary—and as such, the scope of the duty that is assumed is limited to the extent of the undertaking." *LM ex rel. KM v. United States*, 344 F.3d 695, 701 (7th Cir. 2003); *see also Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1435 (7th Cir. 1989) (holding that "any duty [voluntarily] assumed [must] be limited strictly to the scope of the undertaking"). Where, 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," *Crosby*, 725 F.3d at 800 (internal quotation marks omitted), and thus is completely preempted by § 301 of the LMRA. *See Banks v. Alexander*, 294 F. App'x 221, 224-25 (6th Cir. 2008) (holding that a claim against a union

official for failing to properly compensate the plaintiffs for making suggestions was completely preempted because the CBA is where the union official allegedly assumed the duty to provide such compensation and because determining whether the official breached that duty required interpreting the CBA); *England v. Thermo Prods., Inc.*, 956 F. Supp. 1446, 1455-56 (N.D. Ind. 1996) (holding that the employee's claim that the employer breached its voluntarily undertaken duty to disclose results of a chest x-ray was completely preempted because the CBA was alleged to have imposed the duty to take x-rays).

The point is illustrated, and the conclusion is compelled, by *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987). After being injured on the job, the plaintiff, Hechler, brought a tort suit against her union, alleging that by virtue of its collective bargaining agreement with her employer, the union had assumed the "duty of care to provide her with a safe workplace and to monitor her work assignments to ensure that they were commensurate with her skills and experience." *Id*. at 859; *see also id*. at 860. In determining whether Hechler's purported state law tort claim was completely preempted by § 301, and thus whether the suit had been properly removed to federal court, the Supreme Court noted that Hechler's "allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached." *Id*. at 861. The Court proceeded to explain:

> In order to determine the Union's tort liability, … a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, … it is clear that questions of contract interpretation … underlie any finding of tort liability.

Id. at 862 (internal quotation marks omitted) (third ellipses in original). The Court accordingly concluded that the tort claims were completely preempted: "The need for federal uniformity in

the interpretation of contract terms therefore mandates that … [Hechler] is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action." *Ibid*.

The Seventh Circuit reached the same result in *Sluder v. United Mine Workers of America, International Union*, 892 F.2d 549 (7th Cir. 1989). As in *Hechler*, the plaintiff in *Sluder* was injured on the job and sued his union, alleging that the union breached its duty, which it had voluntarily undertaken in its collective bargaining agreement with Sluder's employer, to appropriately inspect the mine where Sluder worked. *Id*. at 551-52. In determining whether Sluder's purported state law tort claims were completely preempted by § 301, the Seventh Circuit noted that "before liability could be established, it would be necessary to establish that the union breached a specific duty it had assumed toward the employees," and that "[i]n order to define the scope of the duty assumed by the union, it would be necessary to establish the precise responsibility assumed by the union." *Id*. at 554. The Seventh Circuit proceeded to observe that "it would not be possible to define, with the precision demanded by Illinois [voluntary undertaking] law, the scope of the union's duty without reference to the collective bargaining agreement that governs the relationship between the company and the union." *Ibid*. That inquiry into the scope of the union's duty, the Seventh Circuit found, would not be mechanical or factual; instead, "the question of duty in this case is one of law and is open to varying interpretations under the collective bargaining agreement." *Id*. at 554-55. The Seventh Circuit concluded that because Sluder's purported state law tort claims "can be resolved only by defining the precise nature of the duty assumed by [the union], and that duty can be defined only by reference to the collective bargaining agreement," the claims were completely preempted. *Id*. at 555-56.

Hechler and *Sluder* govern this case. The nature and scope of the NHL's voluntarily assumed duties to Boogaard—for example, whether the NHL was obligated to provide Boogaard with a chaperone or to otherwise monitor him during his temporary releases from ARC, whether the NHL was obligated to closely monitor Boogaard for compliance with his SABH regime and to strictly enforce the Stage Two and Three progressive disciplinary regimen, and whether the NHL was obligated to warn Boogaard of the increased risk of fatal overdose following his release from ARC—are governed by the SABH Program agreement. Delineating the scope of the NHL's voluntarily assumed duties would not be a mechanical exercise, as the agreement does not explicitly answer the question whether the NHL had voluntarily undertaken the duties that are alleged by Boogaard to have been breached. *See In re Bentz*, 253 F.3d at 285 ("the overriding principle is that for preemption to apply, *interpretation* of the CBA and not simply a reference to it is required"); *cf. Hernandez v. Conriv Realty Assocs.*, 116 F.3d 35, 39-40 (2d Cir. 1997) (rejecting complete preemption where the court would have to consult the CBA only to ascertain the plaintiff's rate of pay). It necessarily follows that resolution of Boogaard's SABH-related claims in Counts III and IV are "substantially dependent on analysis of a collective-bargaining agreement," *Caterpillar*, 482 U.S. at 394 (internal quotation marks omitted), and thus are completely preempted by § 301. *See Atwater v. Nat'l Football League Players Ass'n*, 626 F.3d 1170, 1182 (11th Cir. 2010) (holding that players' claims against the NFL regarding league-approved financial advisors were completely preempted because "any duty the NFL owed Plaintiffs [required the court] to consult the CBA to determine the scope of the legal relationship between Plaintiffs and the NFL and their expectations based upon that relationship"); *Williams v. Nat'l Football League*, 582 F.3d 863, 881 (8th Cir. 2009) (holding completely preempted a common law duty to warn claim because it required "examining the parties' legal relationship

and expectations as established by the CBA"); *Duerson v. Nat'l Football League*, 2012 WL 1658353, at *4 (N.D. Ill. May 11, 2012) (holding that complete preemption applied where resolving the plaintiff's claims required examining whether the decedent's "concussive brain trauma was 'significantly aggravated[]' within the meaning of the CBA"); *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 909-11 (S.D. Ohio 2007) (finding complete preemption because the wrongful death claim "must be considered in light of pre-existing contractual duties imposed by the CBA").

A central premise of the foregoing analysis is that the SABH Program is part of the 2005 CBA. Boogaard strenuously objects to that premise, arguing that the SABH Program is not part of the 2005 CBA. Doc. 1-1 at ¶ 104; Doc. 23 at 9-10; Doc. 31 at 8-9. Boogaard is wrong.

As noted above, the terms of the SABH Program are set forth in an agreement whose first paragraph states that the Program "has the full support of the League and the Players' Association and will be incorporated into the Collective Bargaining Agreement." Doc. 1-3 at 3. The agreement in fact is an agreement, as evidenced by its signature page, where the NHL's commissioner and the NHLPA's executive director affix their signatures on behalf of their respective organizations and under the words "AGREED TO AND ACCEPTED." *Id*. at 9. The SABH Program agreement is dated September 1996. *Id*. at 2. The 2005 CBA's preamble states: "This Collective Bargaining Agreement, together with all Exhibits hereto[,] … supersedes and replaces all prior collective bargaining agreements between the parties." Doc. 1-2 at 20.

Boogaard argues that because the SABH Program agreement predates the 2005 CBA by nine years, and because it is not attached as an exhibit to the 2005 CBA, the agreement is not part of the 2005 CBA. Boogaard's argument cannot be reconciled with the 2005 CBA's plain terms. Article 33 of the 2005 CBA states:

> This Agreement, together with the exhibits and side letters hereto, if any, *and any existing letter agreements between the parties that are not inconsistent with this Agreement*, constitutes the entire understanding between the parties, and all written communications, proposals and counterproposals (including any drafts of this Agreement) between the NHL and the NHLPA, or on behalf of them, are merged into and superseded by this Agreement and shall be of no force or effect.

Id. at 151 (emphasis added). So, while it is true that the SABH Program agreement is not an "exhibit" or "side letter[]" to the 2005 CBA, *see id.* at 263-473, the agreement is among the "existing letter agreements between the parties that are not inconsistent with" the CBA. The SABH Program agreement certainly is an agreement, and it is not inconsistent with any other provision of the 2005 CBA. To the contrary, the 2005 CBA expressly acknowledges the continuing existence and validity of the SABH Program. Specifically, Article 47 addresses performance enhancing substances and creates a Performance Enhancing Substance Program. Article 47.3 states that the Performance Enhancing Substance Program "shall be limited to addressing the testing for and use of prohibited performance enhancing substances," and clarifies that "[a]ll other forms of 'substance abuse' and behavioral and domestic issues requiring employee assistance will continue to be handled through the NHL/NHLPA Program for Substance Abuse and Behavioral Health (the 'SABH Program')." *Id.* at 152. Article 47.3's explicit reference to the SABH Program demonstrates that the 2005 CBA contemplated that the Program was consistent with the CBA, and thus among the existing agreements incorporated by Article 33. To the extent any doubt remains, the SABH Program agreement itself states that it "*will be* [future tense] incorporated into the Collective Bargaining Agreement." Doc. 1-3 at 3.

Because Counts III and IV are completely preempted, those claims are federal claims under 28 U.S.C. § 1331 and thus were properly removed under 28 U.S.C. § 1441(a). Given this conclusion, there is no need to determine whether the complaint's other claims are completely preempted. Even if the complaint's other claims are not completely preempted—that is, even if

they truly are state law claims—the court has supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(a). *See Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 1, 5 (1st Cir. 2012) ("Thus, on a minimum reading of the complete preemption cases, one or more of plaintiffs' claims are removable; any such claim makes the *case* removable, 28 U.S.C. § 1441(c); and even the claims not independently removable come within the supplemental jurisdiction of the district court, 28 U.S.C. § 1367(a).") (citation omitted); *Montefiore Med. Ctr. v. Teamsters Local 272*, 642 F.3d 321, 332-33 (2d Cir. 2011) (same); *Duerson*, 2012 WL 1658353, at *2 (same).

Conclusion

For the foregoing reasons, Boogaard's motion to remand is denied.

February 20, 2014

United States District Judge

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEN BOOGAARD and JOANNE BOOGAARD, Personal Representatives of the Estate of DEREK BOOGAARD, Deceased,	)	13 C 4846
Plaintiff,	)	Judge Feinerman
vs.	)	
NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and GARY B. BETTMAN,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The personal representative of the estate of Derek Boogaard (for ease of exposition, the court will pretend that Boogaard himself is the plaintiff) brought this suit in the Circuit Court of Cook County, Illinois, against the National Hockey League, its Board of Governors, and Commissioner Gary Bettman (collectively, "NHL"), alleging what the complaint took pains to characterize as Illinois tort law claims. Doc. 1-1. The NHL removed the suit to this court on the ground that the claims were completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and thus in fact arose under federal law. Doc. 1. The court denied Boogaard's motion to remand, holding that two of the complaint's eight counts were completely preempted and thus federal; there was no need to address the other six counts because removal is proper even if only one claim is federal. Docs. 37-38 (reported as *Nelson v. Nat'l Hockey League*, 20 F. Supp. 3d 650 (N.D. Ill. 2014)).

An amended complaint named new personal representatives and added references to Minnesota law. Doc. 62. The NHL moved to dismiss under Federal Rule of Civil Procedure

12(b)(6), Docs. 43, 86, and the court invoked Rule 12(d) to convert the motion into a Rule 56 motion for summary judgment, Doc. 58. Over a year of discovery (including extensive motion practice) ensued, after which the summary judgment motion became fully briefed. Because all of Boogaard's claims are completely preempted by § 301 of the LMRA, and because the claims are not viable under the LMRA, the NHL is entitled to summary judgment.

Background

The following facts are stated as favorably to Boogaard, the non-movant, as the record permits. *See Woods v. City of Berwin*, 803 F.3d 865, 867 (7th Cir. 2015). Both sides largely rely on the same factual predicates. The court therefore will draw background facts from the amended complaint, except for when the parties disagree over a particular material fact.

The NHL is a professional ice hockey league. Doc. 62 at ¶ 36. The National Hockey League Players' Association ("NHLPA") represented the NHL's players in negotiating the 2005 Collective Bargaining Agreement ("2005 CBA"), which governed relations between the players, the NHL, and its thirty teams at all relevant times. *Id*. at ¶¶ 28, 36. The NHLPA and the NHL also negotiated a 1996 agreement establishing the Substance Abuse and Behavioral Health Program ("SABH Program"),[*] which was created "to address substance abuse among NHL

[*] Boogaard's brief asserts that it is "unclear" whether the SABH Program resulted from an agreement between the NHL and the NHLPA, Doc. 101 at 7, 11, but there is no genuine dispute over the question. The document establishing the SABH Program ends with a field captioned, "Agreed to and Accepted," followed by Bettman's signature under "National Hockey League," and the signature of Robert W. Goodenow—the NHLPA's Executive Director and General Counsel—under "National Hockey League Players' Association." Doc. 10-3 at 9. The NHL also submitted an unrebutted declaration by Jessica Berman, Senior Counsel in the NHL's Legal Department, averring that the SABH Program Agreement was "negotiated between the NHL and the NHLPA." Doc. 10 at ¶¶ 1, 4. That is exceptionally strong evidence that the SABH Program was created by an agreement between the NHL and the NHLPA, and Boogaard has adduced no evidence to the contrary. *See Carroll v. Lynch*, 698 F.3d 561, 566 (7th Cir. 2012) (holding, where the defendants had offered evidence of a fact and the plaintiff offered no evidence "contradicting or undermining" the fact, that "no genuine dispute of material fact exist[ed]").

players and their families, to treat those with a substance abuse problem in a confidential, fair and effective way, and to deter such abuse in the future." Doc. 10 at ¶ 4; Doc. 10-3 at 3, 9.

Boogaard played in the NHL from 2005 to 2011, first for the Minnesota Wild and then for the New York Rangers. Doc. 62 at ¶¶ 1-2, 15. He was an "Enforcer/Fighter," which meant that his principal job was to get into fistfights with opposing players during games—a task he performed at least 66 times over his career. *Id*. at ¶¶ 2-3. The fights often left Boogaard with painful injuries, which team physicians, dentists, trainers, and staff treated using "copious amounts of prescription pain medications, sleeping pills, and painkiller injections." *Id*. at ¶¶ 4-6.

Boogaard became addicted to opioids, a class of painkillers. *Id*. at ¶ 10. In 2009, the NHL placed him in the SABH Program, whose administrators checked him into an inpatient rehabilitation facility in California called "the Canyon." *Id*. at ¶ 13. Boogaard was discharged from the Canyon and signed with the New York Rangers, but he suffered a relapse. *Id*. at ¶¶ 15-19. The SABH Program's administrators then sent him to a different rehab facility, called Authentic Rehabilitation Center ("ARC"). *Id*. at ¶ 20.

The therapists at ARC reported that Boogaard would not comply with his treatment regimen and that he thought of rehab as a hurdle to clear before he could return to the ice rather than as a necessary medical intervention. *Id*. at ¶ 21. The NHL knew or had reason to know that Boogaard was not complying with his treatment, but it twice allowed ARC to temporarily release him without a chaperone. *Id*. at ¶¶ 22-23. On the first night of his second release, Boogaard took Percocet; the next morning, on May 13, 2011, he was found dead of an accidental drug overdose. *Id*. at ¶¶ 25, 141-43.

Posthumous tests revealed that Boogaard suffered from a progressive neurodegenerative illness known as Chronic Traumatic Encephalopathy, or "CTE." *Id*. at ¶ 26-27. Boogaard's

CTE likely resulted from the dozens of brain injuries that he sustained during his hockey career. *Ibid*. Boogaard's brain had deteriorated particularly in the areas that controlled judgment, inhibition, mood, behavior, and impulse control. *Id*. at ¶ 27.

Boogaard's parents and estate sued the NHLPA in California for breaching its duty of fair representation under federal labor law by failing to file a grievance with the NHL, and the district court dismissed the suit because it was filed after the six-month statute of limitations for such claims had run. *See Boogard v. Nat'l Hockey League Players Ass'n*, 2013 WL 1164301 (C.D. Cal. Mar. 20, 2013) (noting, *id*. at 1 n.1, that the case caption misspelled Boogaard's name). Less than two months after the dismissal, Boogaard filed this suit against the NHL. Doc. 1-1. Counts I and II of the amended complaint allege that the NHL negligently failed to prevent Boogaard from becoming addicted to opioids and sleeping pills. Doc. 62 at ¶¶ 43-101. Counts III and IV allege that the NHL breached its voluntarily undertaken duty to curb and monitor Boogaard's drug addiction while he was enrolled in the SABH Program, including by failing to provide him with a chaperone for his second temporary release from ARC and by failing to warn him of the risks associated with leaving the facility. *Id*. at ¶¶ 102-200. (Those are the counts that the court previously held were completely preempted by the LMRA. 20 F. Supp. 3d at 654-58.) Counts V and VI allege that the NHL was negligent in failing to protect Boogaard from brain trauma during his career, violating its voluntarily undertaken duty to protect his health. *Id*. at ¶¶ 201-26. And Counts VII and VIII allege that the NHL breached its voluntarily undertaken duty to protect Boogaard's health by failing to prevent team doctors from injecting him with Toradol, an intramuscular analgesic that, according to Boogaard, makes concussions more likely and more dangerous. *Id*. at ¶¶ 227-67.

Discussion

The NHL seeks summary judgment on the ground that all of Boogaard's claims are completely preempted by § 301(a) of the LMRA. Doc. 44 at 13-40. The complete preemption doctrine "converts an ordinary state common-law complaint into one stating a federal claim." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (internal quotation marks omitted). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim." *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) (internal quotation marks omitted); *see also Ne. Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n*, 707 F.3d 883, 894 (7th Cir. 2013).

Section 301(a) of the LMRA states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). As interpreted by the Supreme Court, the provision does more than authorize federal courts to hear labor disputes; it also completely preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394 (internal quotation marks omitted); *see also Nelson v. Stewart*, 422 F.3d 463, 467-69 (7th Cir. 2005); *In re Bentz Metal Prods. Co.*, 253 F.3d 283, 285-86 (7th Cir. 2001) (en banc). Preemption under § 301 "covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed 'really' to be a claim under a labor contract." *Crosby*, 725 F.3d at 797.

"[T]o determine whether a purported state-law claim 'really' arises under Section 301, a federal court must look beyond the face of plaintiff's allegations and the labels used to describe her claims and … evaluate the *substance* of plaintiff's claims." *Id*. at 800 (internal quotation marks omitted). "[A] state-law claim is 'completely preempted' only when it is 'inextricably intertwined with consideration of the terms of [a] labor contract.'" *Ibid*. (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985)). Put another way, § 301 preempts any state law claim whose resolution "requires the interpretation of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988); *see also Crosby*, 725 F.3d at 800 ("[O]nly those state-law claims that require 'interpretation' of a CBA are inevitably federal."); *Kimbro v. Pepsico, Inc.*, 215 F.3d 723, 727 (7th Cir. 2000) (holding that § 301 preempted a tortious interference claim because the claim required the plaintiff to prove that his employer breached a collective bargaining agreement).

Section 301 preemption is not boundless. A state law claim is not preempted simply because it "require[s] reference to" a collective bargaining agreement. *In re Bentz Metal Prods.*, 253 F.3d at 285. Thus, "the mere need to 'look to' the collective-bargaining agreement for damages computation is no reason to hold the state-law claim defeated by § 301." *Livadas v. Bradshaw*, 512 U.S. 107, 125 (1994). Moreover, even a state law claim that turns on the meaning of a collective bargaining agreement will escape preemption "when the particular contractual provision is so clear as to preclude all possible dispute over its meaning … [or] if the parties do not dispute the interpretation of the relevant … provisions." *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 758 (7th Cir. 2008) (internal quotation marks, brackets, and citations omitted) (discussing the Railway Labor Act, 45 U.S.C. § 151 *et seq*.); *see Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994) (describing the RLA preemption standard as "virtually

identical to the pre-emption standard the Court employs in cases involving § 301 of the LMRA"). Thus, a state law claim is not completely preempted under circumstances where a defendant contending that a state law claim requires interpretation of a collective bargaining agreement advances a frivolous or insubstantial reading of the agreement; preemption applies only where the parties' respective interpretations of the agreement are arguable or plausible. *See Baker v. Kingsley*, 387 F.3d 649, 659 (7th Cir. 2004) ("Because defendants' interpretation is plausible, and demonstrates a genuine dispute between the parties that can affect liability, it is a sufficient basis for preemption.").

As noted, the court has already held that Counts III and IV are completely preempted. After the NHL removed this case to federal court, Boogaard moved to remand the case to state court, arguing that this court lacked jurisdiction because his claims were true state law claims and thus not preempted by § 301. Doc. 23. The court denied remand on the ground that Counts III and IV, which allege that the NHL voluntarily assumed a duty to monitor and cure Boogaard's addiction according to the terms of the agreement creating the SABH Program, were completely preempted and thus arose under federal law; the court reasoned that the agreement creating the program was collectively bargained and that resolving Counts III and IV would require the court to interpret it. 20 F. Supp. 3d at 656.

Boogaard does not urge a change of tack on Counts III and IV, and the court stands by its analysis. But Boogaard does argue that his other claims are not completely preempted. Doc. 101 at 32 ("As illustrated above, Counts I, II, V, VI, VII, and VIII of the Complaint unequivocally state tort causes of action, without any need for consulting the CBA."). The court now turns to those claims.

Counts V through VIII—which allege that the NHL was negligent in failing to protect Boogaard from brain trauma during his career, violating its voluntarily undertaken duty to protect his health (Counts V-VI), and that the NHL breached its voluntarily undertaken duty to protect Boogaard's health by failing to prevent team doctors from injecting him with Toradol (Counts VII-VIII)—are preempted because they would require the court to interpret the 2005 CBA to determine the scope of any duty that the NHL had actually assumed. State tort law generally does not impose any duty to act to protect others from harm. *See Restatement (Second) of Torts* § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). Illinois and Minnesota law recognize an exception to the general rule, called the voluntary undertaking doctrine, which provides that "liability can arise from the negligent performance of a voluntary undertaking." *Pippin v. Chi. Housing Auth.*, 399 N.E.2d 596, 599 (Ill. 1979); *accord Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570 (Minn. 1979) (holding that the defendant owed the plaintiff a duty to "exercise reasonable care" in providing fire protection services at an airport because the defendant "voluntarily undertook to render fire protection services to airport users"). Simply stated, the doctrine provides that if a person sets out to help someone, she assumes a duty to do so reasonably. (The amended complaint cites both Minnesota and Illinois law, Doc. 62 at ¶¶ 71, 101, 150, 200, 212, 226, 245, 267, but neither side addresses which State's substantive law is pertinent, and the court's analysis does not depend on the answer.)

The voluntary undertaking doctrine is narrow. As the Supreme Court of Illinois explained, courts would risk deterring good deeds if they construed assumed duties too broadly; if people had to help a lot whenever they helped a little, they might hesitate to help at all. *See*

Frye v. Medicare-Glaser Corp., 605 N.E.2d 557, 560 (Ill. 1992) ("[I]f we were to hold that by choosing to place the 'drowsy eye' label on Frye's prescription container defendants were assuming the duty to warn Frye of all of Fiorinal's side effects, we believe that pharmacists would refrain from placing any warning labels on containers. Thus, consumers would be deprived of any warnings which might be beneficial."). Accordingly, "the scope of the duty that is assumed is limited to the extent of the undertaking." *LM ex rel. KM v. United States*, 344 F.3d 695, 701 (7th Cir. 2003) (Illinois law); *accord Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1435 (7th Cir. 1989) (holding under Illinois law that "any duty [voluntarily] assumed [must] be limited strictly to the scope of the undertaking"); *Vesey v. Chi. Housing Auth.*, 583 N.E.2d 538, 544 (Ill. 1991); *Bjerke v. Johnson*, 727 N.W.2d 183, 190 (Minn. App. 2007) ("The extent of the duty [voluntarily assumed] is defined by the extent of the undertaking."); *Castro v. Brown's Chicken and Pasta, Inc.*, 732 N.E.2d 37, 42 (Ill. App. 2000). In *Frye*, for instance, the Supreme Court of Illinois held that a pharmacist was not liable for failing to warn a customer that a certain medication was dangerous in combination with alcohol, even though she voluntarily warned him that the medication caused drowsiness. 605 N.E.2d at 560. By warning about drowsiness, the court held, the pharmacist undertook only to warn about drowsiness; she did not undertake to warn about other side effects, too. *Ibid*.

Counts V through VIII allege that the NHL voluntarily assumed a duty to "keep [players] reasonably safe," especially from brain trauma, by taking steps throughout its history to make hockey a safer sport—"penalizing high-sticking in 1929, penalizing kicking in 1932, penalizing tripping in 1934, prohibiting metal 'armor' in 1937, flooding the ice surface between periods in 1941, prohibiting bench players from joining a brawl in 1959, prohibiting bodily contact during face-offs in 1964, instituting the helmet requirement in 1979, etc." Doc. 62 at ¶¶ 208, 220, 242,

261; Doc. 101 at 13 n.3. As noted, Counts V through VIII claim that the NHL breached that voluntarily assumed duty by failing to protect Boogaard from concussions and CTE (Counts V and VI) and by failing to prevent team doctors from injecting him with Toradol (Counts VII and VIII). Doc. 62 at ¶¶ 208-10, 220-22, 242-44, 261-63.

Resolving those claims would require the court to interpret the 2005 CBA in order to determine the true scope of the NHL's voluntarily assumed duties. "[W]hether a voluntary undertaking has been assumed is necessarily a fact-specific inquiry." *LM*, 344 F.3d at 700; *accord Bourgonje v. Machev*, 841 N.E.2d 96, 114 (Ill. App. 2005) ("[T]he existence and extent of voluntary undertakings are to be analyzed on a case-by-case basis."). Such an inquiry would entail considering all of the NHL's relevant acts to determine whether it undertook to "keep [players] reasonably safe during their NHL careers," as Boogaard contends, or whether it undertook only to protect players from more specific harms, such as high sticking, kicking, and tripping. Doc. 62 at ¶¶ 208, 220, 242, 261; Doc. 101 at 13 n.3. In so doing, the court would have to closely consider the 2005 CBA, the negotiation of which was perhaps the act most relevant to the scope of the NHL's undertaking. The NHL spent years bargaining with the NHLPA, and the process produced a document exhaustively detailing each party's specific obligations to the others. *E.g.*, Doc. 10-2 at 97 ("The Club acquiring a Player through a Trade shall provide the Player a single room hotel accommodation at the Club's expense for a period of up to twenty-one days (21) in the city to which he has been Traded."); *id.* at 114 ("Maximum fining authority for a Player is $2,500.00."); *id.* at 119 ("Each Club shall make available for purchase two (2) tickets per Player of each visiting team, provided, however, that the maximum number of tickets to be made available for any game shall be fifty (50)."). Thus, the specific acts by the NHL that Boogaard insists represent a broader and more generalized commitment to

protect players from harm must be interpreted in context with the hyper-specific commitments that the NHL made in the CBA itself.

Counts V and VI allege that the NHL was negligent for failing to impose a "bench concussion assessment protocol" and for allowing players to return after a concussion without first being cleared by an independent doctor as well as a team doctor. Doc. 62 at ¶¶ 209(f)-(i), 221(f)-(i). The NHL argues that the CBA gave it no control over the procedures that team doctors used to diagnose and manage concussions. Doc. 44 at 28-29. Article 16.11 governed the procedures for Injured Reserve, a status that allowed players to recuperate from injury without counting against the limit on the number of active players a team could deploy at one time. Doc. 10-2 at 104-05. Article 16.11(e) required the team doctor, applying "the Club's medical standards," to certify that a player was eligible for Injured Reserve. *Id*. at 105. That could plausibly be taken to provide that teams were free to develop their own "medical standards" for diagnosing injuries, including concussions, without the NHL's interference. Article 16.11(g) provided that a player on Injured Reserve was eligible to return to play "beginning on the 8th day following the date of injury … or any day thereafter that the Player is medically cleared to play by the Club physician"—which could plausibly be taken to provide that the NHL could not have additionally required an independent physician's consent before a concussed player was allowed to return. *Ibid*.

If the NHL has read Article 16 correctly, and the CBA prevented it from imposing "bench assessment protocols" and from requiring "neuro-physical exams by an independent physician" before concussed players could return to the ice, then the NHL likely could not be found to have voluntarily assumed a duty to take those steps. Indeed, such a reading of Article 16 would counsel against any interpretation of the NHL's assumed duty at a level of generality

higher than "to protect players from high-sticking"; it is unlikely that the NHL would have assumed responsibility for "keeping players reasonably safe" and "preventing brain trauma" while simultaneously adopting a collective bargaining agreement that prohibited them from taking steps necessary to meet those responsibilities. *See Sluder v. United Mine Workers of Am., Int'l Union*, 892 F.2d 549, 554 (7th Cir. 1989) (holding completely preempted a state law claim against a union for breaching an assumed duty to protect workers from a mining accident on the ground that the court would have to interpret a collective bargaining agreement to determine whether the union had the authority to close the mine).

Similarly, while Counts V and VII allege that the NHL should have changed the rules of play to discourage fighting, Doc. 62 at ¶¶ 201, 209(a), 209(c), 213, 221(a), 221(c), the NHL contends that Article 30.3 of the 2005 CBA prevented it from changing the rules of play unilaterally, Doc. 44 at 36. Article 30.3 reads:

> The NHL and its Clubs shall not … amend or modify the provisions (or portions thereof) of the League Rules or any of the League's Playing Rules in existence on the date of this Agreement which affect terms or conditions of employment of any Player, without the prior written consent of the NHLPA which shall not be unreasonably withheld.

Doc. 10-2 at 146. Rules about fighting could reasonably be viewed as "Playing Rules … which affect terms or conditions of employment of any Player"; after all, stricter treatment of fighting, such as mandating ejections or lengthy suspensions, could have dramatically affected the terms and conditions under which Enforcers like Boogaard played, if not put them out of work altogether. And if Article 30.3 meant that the NHL could not have more severely punished fighting without first haggling with the NHLPA, then it is unlikely that the NHL's voluntarily assumed duties included an obligation to change the rules of play to make the game safer by not changing the rules of play to further discourage fighting.

The point here is not to run to ground the question whether the NHL has in fact correctly read Articles 16 and 30 of the 2005 CBA. Rather, the point is that the NHL's reading is, at a minimum, plausible and arguable, which means that ascertaining the scope of the NHL's voluntarily assumed duties would require interpreting the CBA, which in turn means under settled law that Counts V and VI are completely preempted. *See Baker*, 387 F.3d at 659.

Counts VII and VIII, which allege that the NHL breached its voluntarily undertaken duty to protect Boogaard's health by failing to prevent team doctors from injecting him with Toradol, fare no better. The NHL contends that the 2005 CBA prohibited it from interfering with medical decisions regarding players. Doc. 44 at 23-24 & n.10, 37-39. The CBA incorporated the Prescription Medication Program, a set of rules extensively regulating when and how team doctors and trainers could administer prescription medications. Doc. 10-2 at 24, 146; Doc. 101-1 at 13-28. For instance, it required a team's trainers to report the team's inventory of prescription drugs at the beginning of each season (Doc. 101-1 at 15); required teams to maintain four copies of an "Agent of Record Statement" authorizing the trainers to act as the team doctors' agents (*id*. at 16); required teams to adopt written guidelines for complying with the Prescription Medication Program (*id*. at 17); and required teams to store prescription medications separately from other products (*id*. at 18). The Prescription Medication Program also explicitly prohibited team doctors from prescribing or otherwise dispensing drugs "merely to enhance [an employee's] performance or to reduce fatigue," and it barred athletic trainers from "giv[ing] an injection of any kind to any person." *Ibid*. The Prescription Medication Program, together with Article 30.3's prohibition on unilateral amendments to important league rules, arguably implies that the NHL otherwise lacked the authority to direct how teams administered and tracked medications. That in turn arguably suggests that the NHL's voluntarily assumed duties did not

include prohibiting team doctors from administering Toradol. It follows, for the reasons given above as to Counts V and VI, that Counts VII and VIII are completely preempted.

Boogaard argues that the NHL has not identified any concrete interpretive disputes, and therefore that the question of preemption under § 301 is premature. Doc. 101 at 27; *see Wis. Cent.*, 539 F.3d at 758 (holding that the preemption issue was premature because "the parties ha[d] not yet staked out a position for the record as to what [the relevant] CBA provisions mean[t]"). It is true that the NHL's briefs sometimes muddy up its gloss on the CBA. *E.g.*, Doc. 44 at 17-18 n.7 ("To the extent Plaintiff disputes whether the SABH applies to the addiction at issue, this Court will be required to interpret the meaning of Article 47.3 and the SABH, in which case Plaintiff's addiction-related claims are preempted. If, on the other hand, Plaintiff concedes that his addiction-related claims are governed by the SABH, then Counts I and II plainly arise under a collective bargaining agreement and are preempted …."; the brief never asserts whether the addiction claims actually are governed by the agreement creating the SABH Program). But *Wisconsin Central* and like precedents demand only disagreement, not pristine briefing. A reasonably attentive reader can glean the NHL's positions clearly enough—it believes that it has no authority to impose concussion assessment protocols on teams and team doctors, that it cannot prohibit team doctors from administering Toradol, and that it cannot change the rules to further discourage fighting without the NHLPA's consent. Doc. 44 at 28-29, 37-39. And Boogaard takes the opposite positions—he asserts that the NHL overstates the difficulty of changing the rules of play and that it can control the conduct of team doctors. Doc. 101 at 23-25. The court would have to resolve those reasonably debatable issues before adjudicating Boogaard's claims, and would have to interpret the CBA when doing so, which triggers complete preemption.

Citing *Lingle v. Norge Division of Magic Chef, Inc.*, *supra*, Boogaard submits that "[m]ere topical similarity between a claim and a CBA does not justify a finding of preemption." Doc. 101 at 26. In *Lingle*, a unionized employee sued her employer, alleging that it fired her in retaliation for claiming workers' compensation, in violation of an Illinois statute. The employer argued that § 301 preempted the claim because the collective bargaining agreement prohibited the employer from firing employees without just cause. The Supreme Court held that the claim was not preempted, even though "the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether [the employee] was fired for just cause." *Lingle*, 486 U.S. at 408. As the Court explained, because no element of the claim "require[d] a court to interpret any term of a collective-bargaining agreement," the claim could go forward. *Id*. at 407; *see also Crosby*, 725 F.3d at 800 ("Factual overlap between a state-law claim and a claim one could assert under a CBA is not necessarily sufficient[for preemption].").

But an element of the claims in Counts V through VIII *would* require the court to interpret terms of the 2005 CBA. In both Illinois and Minnesota, the "essential elements of the ordinary negligence action" are "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury." *Gradjelick v. Hance*, 646 N.W.2d 225, 230-31 (Minn. 2002); *accord Jane Doe-3 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs.*, 973 N.E.2d 880, 887 (Ill. 2012). Whether the NHL owed Boogaard a duty to take the steps that Counts V through VIII fault it for failing to take depends largely on genuinely contested interpretations of the CBA. Those claims therefore are completely preempted.

Counts I and II differ from Counts III through VIII in that they do not allege that the NHL violated a voluntarily assumed duty; rather, they allege that the NHL "owed a duty to [Boogaard] to keep him reasonably safe during his NHL career and to refrain from causing an

addiction to controlled substances." Doc. 62 at ¶¶ 68, 97. That wrinkle does not allow Counts I and II to escape preemption because to adjudicate those claims, the court would have to interpret the 2005 CBA to determine whether the NHL actually had a duty to protect Boogaard from addiction.

In alleging that the NHL should have done more to avert Boogaard's addiction, Counts I and II at times insinuate that the NHL actively caused his addiction; for instance, they describe the NHL's duty as one "to refrain from causing an addiction to controlled substances." In substance, however, Counts I and II allege sins of omission. They do not contend that the NHL gave Boogaard the addictive painkillers. They instead fault the NHL for failing to take specific, active measures to ward off Boogaard's addiction: tracking his prescriptions and sharing the information with team doctors, Doc. 62 at ¶¶ 69(b), 69(d)-(f), 69(h), 98(b), 98(d)-(f), 98(h); cutting him off from opioids before his intake put him at serious risk of addiction, *id*. at ¶¶ 69(c), 69(g), 98(c), 98(g); and warning him of the "increased risk of substance abuse due to his role as Enforcer/Fighter," *id*. at ¶¶ 69(a), 98(a).

As noted, the voluntary undertaking doctrine is one exception to the general rule that there is no duty to act to protect others from harm. Another exception holds that the defendant has a duty to protect the plaintiff "when the parties are in a special relationship and the harm to the plaintiff is foreseeable." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011); *accord Iseberg v. Gross*, 879 N.E.2d 278, 284 (Ill. 2007) ("Under common law, the universally accepted rule, articulated in section 314 of the Restatement (Second) of Torts, and long adhered to by this court, is that a private person has no duty to act affirmatively to protect another from criminal attack by a third person absent a 'special relationship' between the parties."). "Historically, there have been four 'special relationships' which [the courts] have recognized, namely, common

carrier-passenger, innkeeper-guest, business invitor-invitee, and voluntary custodian-protectee." *Iseberg*, 879 N.E.2d at 284; *accord H.B. by and through Clark v. Whittemore*, 552 N.W.2d 705, 708 (Minn. 1996). Boogaard does not allege that the NHL is a common carrier or an innkeeper, or that it owned or operated any of the buildings in which he suffered injuries. Doc. 62. That leaves "custodian-protectee" as the only category into which the NHL and Boogaard might fit.

Minnesota and Illinois apply similar standards to determine whether one party is another's "custodian." In a typical custodial relationship, "the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the plaintiff's welfare." *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *accord Harper v. Herman*, 499 N.W.2d 472, 474 n.2 (Minn. 1993); *Doe v. Big Brothers Big Sisters of Am.*, 834 N.E.2d 913, 926 (Ill. App. 2005); *Platson v. NSM, Am., Inc.*, 748 N.E.2d 1278, 1287 (Ill. App. 2001) (quoting *Donaldson*, 539 N.W.2d at 792). The defendant's ability to control the plaintiff's behavior and circumstances strongly bears on the question whether a custodial relationship exists. *See Big Brothers Big Sisters*, 834 N.E.2d at 927 (holding that a national mentoring organization did not have custody over a child mentee, in part because "it had no ability to guard or protect [him]; it had no authority over him; and it had no manner in which to dictate any of his activities, how he was cared for, *etc*."); *H.B.*, 552 N.W.2d at 709 (holding that the resident manager of a trailer park lacked custody over children living in the park, in part because "she exercised no control over their daily welfare").

The parties dispute the amount of control that the NHL had over Boogaard's welfare, and the focus of their dispute is on the terms of the 2005 CBA, Doc. 44 at 18, 28-29, 36-39; Doc. 101 at 23-25, so to decide whether the NHL was Boogaard's custodian, the court would have to interpret the CBA. For instance, as explained above, the Prescription Medication Program, in

conjunction with Article 30.3, arguably could be read to divest the NHL of the authority to control players' medical treatment. Doc. 10-2 at 146; Doc. 101-1 at 13-28. In fact, the NHL plausibly asserts that it could not even control the welfare of players enrolled in the SABH Program; the agreement creating the SABH Program provided that "program doctors," selected by both the NHL *and* the NHLPA, would direct and monitor the care of players struggling with substance abuse. Doc. 10-3 at 3-4 ("The [SABH] program will be administered by qualified doctors selected by the League and the NHLPA …."); Doc. 44 at 18. And, as also explained above, the parties contest the extent to which the NHL could change the rules of play to further discourage fighting, which bore directly on Boogaard's daily welfare. Doc. 44 at 36; Doc. 101 at 23-24. Accordingly, whether the NHL was Boogaard's custodian for purposes of Counts I and II depends largely on genuinely contested interpretations of the CBA, which means that those counts are completely preempted. *See Wis. Cent.*, 539 F.3d at 758.

Boogaard cites a raft of decisions ostensibly showing that his claims are not preempted. Those decisions differ from this case in a crucial respect, for in none was it necessary to interpret a collective bargaining agreement to ascertain the scope of the defendant's duty. In *Bentley v. Cleveland Browns Football Co.*, 958 N.E.2d 585 (Ohio App. 2011), the plaintiff was a professional football player who tore a tendon in his knee. While he was rehabilitating in a training facility owned by the team, he contracted a staph infection. He sued the team for fraud and negligent misrepresentation, based the team's statements that the facility was "world class" and had a "strong track record." *Id*. at 587. The state appellate court held that the plaintiff's state law claims were not preempted. *Id*. at 590. As the court reasoned, there was no need to interpret the collective bargaining agreement to determine whether the team had a duty not to tell deliberate and material falsehoods because, as in *Lingle*, Ohio law imposed that particular duty

on everyone, independent of any collective bargaining agreement. *See id*. at 588-89; *see also Jurevicius v. Cleveland Browns Football Co.*, 2010 WL 8461220, at *13 (N.D. Ohio Mar. 31, 2010) (holding, in a similar case involving a suit by a player against the same team arising out of a staph infection, that the negligence claims were not preempted because "Ohio case law provides that an owner or operator of a facility has the duty to warn of certain hazardous conditions," and the plaintiff's claim required the court to determine only whether the team breached that independent duty).

Boogaard also cites *Hendy v. Losse*, 925 F.2d 1470, 1991 WL 17230 (9th Cir. 1991) (unpublished disposition), where a former professional football player sued a team doctor for negligently treating the player's knee injury and the team for negligently hiring the doctor. The Ninth Circuit held that the claim against the team was not preempted. Unlike here, in *Hendy* there was no doubt that the team, as the plaintiff's employer, owed him a duty separate and apart from the collective bargaining agreement, as "[t]he duty to use due care in the hiring and retention of employees arises from state law." *Id*. at *2.

Boogaard next cites *Green v. Arizona Cardinals Football Club LLC*, 21 F. Supp. 3d 1020 (E.D. Mo. 2014), where retired professional football players sued their former team for failing to protect them from concussions and for neglecting to warn them about the long-term health risks posed by concussions. The district court held that § 301 did not preempt the players' state law negligence and failure-to-warn claims, relying, as in *Hendy*, on the team's status as the plaintiffs' employer. The court reasoned that "Plaintiffs' negligence claims [were] premised upon the common law duties to maintain a safe working environment, not to expose employees to unreasonable risks of harm, and to warn employees about the existence of dangers of which they could not reasonably be expected to be aware"; as such, the court would have no need to analyze

the NFL's collective bargaining agreement to determine whether the team had a duty to the players or what the duty required of it. *Id*. at 1027.

The remaining cases that Boogaard cites involve the even less controversial duty not to unreasonably harm other people. *See McPherson v. Tenn. Football Inc.*, 2007 U.S. Dist. LEXIS 39595, at *22 (M.D. Tenn. May 31, 2007) (holding that a claim against an NFL team for injuries the plaintiff suffered when the team's employee hit the plaintiff with a golf cart during a halftime show was not preempted); *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 912 (S.D. Ohio 2007) (holding that a claim against the NFL for mandating the use of dangerous equipment was not preempted); *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002) (remanding a claim against the NFL for injuries the plaintiff suffered when a referee, an NFL employee, hit the plaintiff in the eye with a heavy penalty flag). None of the cited cases involved claims, like Boogaard's, alleging breach of a voluntarily assumed duty (Counts III through VIII) or a free-floating duty to act (Counts I and II) in a manner that would require interpretation of a collective bargaining agreement.

So Boogaard's purported state law claims are completely preempted by § 301 of the LMRA. Completely preempted claims are not automatically dismissed, but rather generally are treated as if they alleged breach of a collective bargaining agreement in violation of § 301. *See Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 863 (1987) (analyzing a completely preempted state law claim as if it were a claim under § 301); *Healy v. Metro. Pier and Exposition Auth.*, 804 F.3d 836, 840 (7th Cir. 2015) ("Here, § 301 preempts the state law tortious interference claim and converts it into a § 301 claim."); *Atchley v. Heritage Cable Vision Assocs.*, 101 F.3d 495, 501 (7th Cir. 1996) (observing that, because a preempted claim actually "arose under § 301, it is considered a suit for breach of the CBA"); *Brazinski v. Amoco*

Petroleum Additives Co., 6 F.3d 1176, 1180 (7th Cir. 1993) ("[I]f the plaintiff's claim, ostensibly based on state law, cannot be adjudicated without interpretation of the collective bargaining agreement, the claim turns into a federal claim that the agreement itself has been violated."); *Douglas v. Am. Info. Techs. Corp.*, 877 F.2d 565, 573-74 (7th Cir. 1989) ("Because we have determined that Ms. Douglas' claim for intentional infliction of emotional distress is preempted by section 301, we must now determine whether the district court correctly dismissed the claim for failure to exhaust grievance and arbitration remedies available under the collective bargaining agreement."). But Boogaard has no viable § 301 claim.

Collective bargaining agreements often provide that the parties must resolve disputes about the agreement through arbitration. When they do, an employee generally may not first bring suit in federal court to enforce the agreement; instead, his union must pursue the claim on his behalf using the agreement's dispute resolution procedures. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress."); *Olson v. Bemis Co.*, 800 F.3d 296, 303 (7th Cir. 2015); *Bell v. DaimlerChrysler Corp.*, 547 F.3d 796, 803-04 (7th Cir. 2008); *Vail v. Raybestos Prods. Co.*, 533 F.3d 904, 908 (7th Cir. 2008); *Fulk v. United Transp. Union*, 108 F.3d 113, 116 (7th Cir. 1997). However, if the union either decides not to pursue a grievance or pursues a grievance and loses, the employee may bring suit in federal court alleging both that the union breached its duty of fair representation and that the employer breached the collective bargaining agreement, in what is called a "hybrid contract/duty-of-fair-representation claim." *Cunningham v. Air Line Pilots*

Ass'n, Int'l, 769 F.3d 539, 541 (7th Cir. 2014); *see also DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163-65 (1983); *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Olson*, 800 F.3d at 303.

Article 17 of the 2005 CBA required all "dispute[s] involving the interpretation or application of, or compliance with, any provision of" the CBA to be resolved through arbitration, Doc. 10-2 at 108, so Boogaard's claims can survive only as hybrid claims. *See Olson*, 800 F.3d at 303 (noting that if a dispute implicating a collective bargaining agreement is subject to mandatory arbitration, the plaintiff "must file a hybrid § 301 suit"). Hybrid claims are subject to a six-month limitations period, beginning either when the arbitrator rules against the union or when the employee reasonably should learn of the union's decision not to pursue a grievance. *See DelCostello*, 462 U.S. at 169-71; *Christiansen v. APV Crepaco, Inc.*, 178 F.3d 910, 914 (7th Cir. 1999); *Bonds v. Coca-Cola Co.*, 806 F.2d 1324, 1326 (7th Cir. 1986); *Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers*, 746 F.2d 1316, 1319 (7th Cir. 1984); *Metz v. Tootsie Roll Indus., Inc.*, 715 F.2d 299, 303 (7th Cir. 1983).

In contending that Boogaard's hybrid claims are untimely, the NHL cites *Boogard v. Nat'l Hockey League Players Ass'n, supra*, the opinion that dismissed Boogaard's earlier suit against the NHLPA. Doc. 44 at 39-40. After Boogaard died, the New York Rangers decided not to pay his estate the amount remaining on his contract. The NHLPA elected not to pursue a grievance, and Boogaard's estate sued the NHLPA in California federal court for breaching its duty of fair representation. *Boogard*, 2013 WL 1164301, at *2. The court held that the claims were untimely because the estate did not file its complaint against the NHLPA until roughly nine months after the NHLPA notified the estate of its decision not to pursue a grievance and because there was no reason to equitably toll the limitations period. *Id*. at *3-5.

The NHL submits that the California federal court's judgment precludes Boogaard from arguing that his hybrid claims against the NHL comply with the statute of limitations. Doc. 44 at 39-40. That is doubtful. A judgment precludes a party from pressing an issue in a later case only if the earlier court necessarily decided the issue. *See Bobby v. Bies*, 556 U.S. 825, 834 (2009) ("If a judgment does not depend on a given determination, relitigation of that determination is not precluded."); *Carter v. AMC, LLC*, 645 F.3d 840, 842 (7th Cir. 2011). The earlier suit dealt with a separate concern—the Rangers' failure to pay on Boogaard's contract, as opposed to the NHL's alleged negligence—and hybrid claims based on different harms can accrue at different times. *See Connor v. Elmhurst Dairy, Inc.*, 2015 WL 5159185, at *5 (E.D.N.Y. Aug. 17, 2015) ("That an employee has multiple underpinnings for his duty of fair representation claims does not mean that all of the claims accrue at the same time or relate backward (or forward) to any one particular point in time.").

Although Boogaard is not *precluded* from arguing that his § 301 claims are timely, he has not actually *made* that argument, either in his response brief or surreply brief. Docs. 101, 118. Boogaard accordingly has forfeited any argument that his claims are timely. *See Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 833 (7th Cir. 2014) ("[A]s the district court found, the musical diversity argument was forfeited because it was perfunctory and underdeveloped."); *G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012) ("We have repeatedly held that a party waives an argument by failing to make it before the district court. That is true whether it is an affirmative argument in support of a motion to dismiss or an argument establishing that dismissal is inappropriate.") (citations omitted); *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 386 (7th Cir. 2012) ("[T]he forfeiture doctrine applies not only to a litigant's failure to raise a general argument … but also to a litigant's failure to advance a

specific point in support of a general argument."); *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010) ("We have made clear in the past that it is not the obligation of this court to research and construct legal arguments open to parties, especially when they are represented by counsel, and we have warned that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived.") (internal quotation marks and alterations omitted); *Salas v. Wis. Dep't of Corrs.*, 493 F.3d 913, 924 (7th Cir. 2007) ("[A] party forfeits any argument it fails to raise in a brief opposing summary judgment.").

Boogaard's claims almost certainly are time barred in any event. The 2005 CBA required the NHLPA to file a grievance within sixty days "from the date on which the facts of the matter became known or reasonably should have been known to the party initiating the Grievance," Doc. 10-2 at 108, and, as explained above, Boogaard's representative would have had to file this suit within six months of learning that the NHLPA would not pursue a grievance. This suit was filed nearly two years after Boogaard's death. Doc. 1-1 at 55. There is no indication in the record that the NHLPA pursued a grievance related to these claims, and it is inconceivable that Boogaard's representatives did not learn about the NHLPA's decision not to pursue a grievance until nearly a year and a half after his death.

Conclusion

For the foregoing reasons, the NHL's summary judgment motion is granted. The NHL is entitled to judgment on all counts (I through VIII) of the amended complaint. The only remaining matter is Boogaard's motion for leave to file a second amended complaint. Doc. 135. Boogaard's brief in support of that motion argues that the amendment is timely and that the proposed amended claims are not completely preempted by § 301 of the LMRA (and thus not

futile). Doc. 132. The NHL shall respond to the motion by January 15, 2016, and Boogaard shall reply by January 29, 2016.

December 18, 2015

United States District Judge

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CERTIFICATE OF SERVICE

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I hereby certify that on January 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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