No. 18 -

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and GARY R. BETTMAN, Commissioner,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

William T. Gibbs
Counsel of Record
CORBOY & DEMETRIO, P.C.
Attorney for Plaintiffs
33 North Dearborn Street, Suite 2100
Chicago, Illinois 60602
(312) 346-3191
wtg@corboydemetrio.com
Counsel for Petitioners

QUESTION PRESENTED

Whether the federal courts abused their discretion in usurping a states' power to adjudicate common law tort claims originally filed in state court, where the district court denied remand and dismissed Plaintiffs' state law claims based on interpretation of another state's pleading requirements and found forfeiture of Plaintiffs' claims even though the Court had previously found them viable.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioners, LEN BOOGAARD and JOANNE BOOGAARD, Personal Representatives of the Estate of DEREK BOOGAARD, respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit which affirmed Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, filed on June 5, 2017.

OPINION BELOW

The Opinion of the United States District Court for the Northern District of Illinois, Eastern Division was issued on June 5, 2017 and is attached as Appendix A. A previous Opinion of the United States District Court for the Northern District of Illinois, Eastern Division was issued on Sept. 29, 2016 and is attached as Exhibit B. The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on May 25, 2018 and is attached as Appendix C. The Order of the United States Court of Appeals for the Seventh Circuit denying Plaintiffs' Petition for Rehearing was issued on June 25, 2018 and is attached as Appendix D.

JURISDICTION

This Court is vested with jurisdiction, pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Seventh Circuit Order was issued on May 25, 2018. On June 25, 2018, Plaintiffs' Petition for Rehearing was denied. This petition is filed within ninety (90) days of the United States Court of Appeals for the Seventh Circuit's denial of rehearing, pursuant to Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 7 provides, in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The statutory provisions that are relevant to this petition, 28 U.S.C. 1447(c) and 28 U.S.C. 1367(c) are reprinted in relevant part:

> 28 U.S.C.A. § 1447(c) Procedure After Removal Generally
>
> > **(c)** A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C.A. § 1367 Supplemental Jurisdiction

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

STATEMENT OF THE CASE

Derek Boogaard, a professional hockey player, died, tragically, at age twenty-eight due to an accidental overdose of prescription pain pills. In 2013, a Complaint at Law was filed in the Circuit Court of Cook County on behalf of the Estate of Derek Boogaard against the National Hockey League, National Hockey League Board of Governors, and Commissioner Gary R. Bettman, (Collectively "NHL"). The Original Complaint alleged eight counts arising under Illinois law:

- The NHL was negligent in failing to prevent over-prescription of addictive medications to Derek and this negligence caused pain and suffering, loss of normal life, and wrongful death (Counts I and II);
- The NHL, by and through its actual and apparent agents, breached its assumed duty to curb, cure and monitor Derek's drug addiction causing wrongful death, pain and suffering and loss of normal life **(**Counts III and IV);
- The NHL was negligent in monitoring Derek for brain trauma during his NHL playing career and this negligence caused CTE and pain and suffering, loss of a normal life, and wrongful death (Counts V and VI); and
- The NHL was negligent in using Toradol during Derek's career and this negligence caused CTE and pain and

suffering, loss of normal life and wrongful death (Counts VII and VIII).

Soon after the complaint was filed, the NHL removed the case to federal court, arguing that Plaintiffs' claims were preempted by federal law—Section 301 of the Labor Management Relations Act ("LMRA"), 28 U.S.C. § 185—because, according to the NHL, the rights Plaintiffs seek to vindicate are created by and based upon a provision of the Collective Bargaining Agreement ("CBA") between the NHL and the National Hockey League Players' Association ("Union"). Plaintiffs' timely motion to remand, pursuant to 28 U.S.C. 1447(c), was denied.

The NHL then moved for substantive dismissal based upon perceived § 301 preemption. The NHL was eventually granted summary judgment on all eight counts contained in Plaintiffs' complaint, premised upon the NHL's preemption defense.

While the substantive preemption dismissal motion was pending, Plaintiffs moved for leave to file a Second Amended Complaint, based upon information that Plaintiffs' Counsel was privy to due to a role on the Plaintiff's Executive Committee in an MDL case against the NHL in Minnesota. *In Re Nat'l Hockey League Players' Injury Litig.*, 120 F. Supp. 3d 942 (D. Minn. 2015). The NHL argued against permitting Plaintiffs leave to amend, averring that such an amendment would be futile.

Plaintiffs' Second Amended Complaint contained allegations based upon (1) relevant admissions regarding the NHL's duties to keep players safe and provide them with accurate information regarding the risks they would be exposed to by participating in the NHL, (2) the

NHL's historical indifference towards the welfare of players thrust into the barbaric role of Enforcer (i.e., Fighter), (3) the NHL's marketing of violence in order to increase profit while destroying the brains and bodies of its players, and (4) the NHL's misleading and misguided pronouncements, inferences and insinuation that permanent brain damage does not stem from repetitive brain traumas sustained in NHL hockey.

The district court granted Plaintiffs leave to file the Second Amended Complaint, finding that Plaintiffs "allege that the NHL took several active and unreasonable steps that ultimately harmed Boogaard . . . [and] cultivated a 'culture of violence' in the NHL, which caused Boogaard to get into fights, which in turn caused him to develop CTE and an addiction to opioids, which in turn caused his death." (*See* District Ct. Op., ECF 169 at p. 7; APP B at p. A29). The district court ruled, "That theory of tort - that the NHL unreasonably harmed Boogaard - is viable under Illinois and Minnesota law and not preempted by the LMRA." (*Id.*) Further, the district court held that Plaintiffs' other claims "also contain the seed of a viable, non-preempted claim: that the NHL actively and unreasonably harmed Boogaard by implicitly communicating that head trauma is not dangerous." (*Id.*)

The NHL moved to reconsider. In a hybrid motion, the NHL also moved to dismiss on numerous alternative grounds, including an argument that it had previously advanced, but was never ruled upon–that Minnesota procedural law applied to the necessity of naming a Minnesota Trustee prior to filing a case in Illinois. (*See* Defs.' Mot. to Recons., ECF 177.) It argued that since a Trustee was not

named within three years of Plaintiffs' Decedent's death, the case (that had been pending since 2013) was a nullity. (*Id.* ¶5.) It also advanced Frist Amendment arguments, workers compensation exclusive remedy arguments and a failure to state a claim argument. (*Id.*)

Understanding that the Defendants and the district court were homing in on the Minnesota Trustee issue, Plaintiffs focused their response brief on that issue. But, Plaintiffs did not only respond to that primary argument. In addition, Plaintiffs' Response Brief responded to the NHL's other, alternative, bases for dismissal in their twenty-two-page response brief. (*See* Pl.'s Response to Defs.' Mot. to Recons., ECF 185.)

Even though the only remaining claims were state law claims, the district court denied Plaintiffs' motion to remand, pursuant to 28 U.S.C. § 1367(c)(l) and (c)(3). (*See* District Ct. Op., ECF 209 at p. 19; APP A at p. A21). In denying remand, the district court admitted "True, all of Boogaard's federal claims have been dismissed, and only state law claims among non-diverse parties remain." (*See* District Ct. Op., ECF 209 at p. 17; APP A at p. A19).

The district court then dismissed the remainder of Plaintiffs' case, with prejudice, based upon a finding that the Minnesota Trustee issue barred the Boogaards claims and, "for good measure" that the Boogaards had forfeited their claims. (*Id.* at p. 18; APP A at p. A20-21).

Plaintiffs appealed.

The Seventh Circuit affirmed dismissal. (*See* Seventh Circuit Op., ECF 242; APP C). The Seventh Circuit held that the district court correctly exercised

jurisdiction over the claims asserting that the NHL breached its obligations under the substance abuse agreement and that, therefore, the district court properly exercised supplemental jurisdiction over the rest of Plaintiffs' claims. (*Id*. at p. 10; APP C at p. A39). Dismissal of "state law claims among non-diverse parties" was affirmed.

Plaintiffs' Petition for Rehearing was denied.

REASONS FOR GRANTING THE PETITION

Plaintiffs' state law claims should be decided on the merits, in the state court where the case was filed. This Honorable Court should grant certiorari to reinforce its long-standing doctrine of abstention and cure the lower courts' abuse of discretion in wrongly deciding issues of state law.

I. Plaintiffs' Claims Should Have Been Remanded

The Federal Courts had no jurisdiction to dismiss Plaintiffs' state tort causes of action. Usurping the state's right, the lower courts inappropriately exerted jurisdiction over Plaintiffs' claims and snuffed them out.

As Justice Frankfurter wrote many years ago, "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies… These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion," restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary. *R.R. Com. of Tex. v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

This case should not have been removed to federal court. *Dent v. Nat'l Football League*, No. 15-15143, 2018 WL 4224431 (9th Cir. Sept. 6, 2018). But even if removal of the Complaint was initially appropriate (which Plaintiffs consistently argued it was not), the district court should have comported

with the doctrine of abstention and granted Plaintiffs' Motion to Remand pursuant to 28 U.S.C § 1367(c) once it had determined that only "state law claims amongst non-diverse parties remained."

28 U.S.C. § 1367 explicitly states that a district court "may decline to exercise supplemental jurisdiction over a claim…if…the district court has dismissed all claims over which it has original jurisdiction…" 28 U.S.C. § 1367(c)(3).

This Honorable Court has long recognized that when a court has dismissed all federal claims before trial, the court should relinquish jurisdiction over any remaining state law claims and remand those claims back to state court. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640 (2009). Since the district court undisputedly found that the remaining viable claims all arise under state law, it should have relinquished jurisdiction at that point rather than endeavor to interpret Minnesota and/or Illinois procedural laws.

This case stands in opposition to prior Seventh Circuit pronouncements that "when the federal claims are dismissed before trial, there is a presumption that the court will relinquish jurisdiction over any remaining state law claims." *Dietchweiler by Dietchweiler v. Lucas*, 827 F.3d 622, 631 (7th Cir. 2016); *see also Williams Elecs. Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007) (where "the federal claims drop out before trial, the district court should relinquish jurisdiction over the state-law claims."); *see also Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999) ("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental

claims whenever all federal claims have been dismissed prior to trial."). This presumption "should not be lightly abandoned, as it is based on a legitimate and substantial concern with minimizing federal intrusion into areas of purely state law." *RWJ Mgmt. Co., Inc. v. BP Products N. Am., Inc.*, 672, F.3d 476, 482 (7th Cir. 2012) (citation and internal quotation marks omitted) (affirming district court's decision to remand state claims and finding defendants did not overcome presumption of relinquishing jurisdiction).

Yet, here, the lower courts did not "jealously guard" their jurisdiction – they abandoned this Court's guidance and rebuffed prior Seventh Circuit precedent by exercising jurisdiction of claims that were not appropriate for adjudication in the federal court system.

Justice Kennedy had it right:

> Abstention doctrines are a significant contribution to the theory of federalism and to the preservation of the federal system in practice. They allow federal courts to give appropriate and necessary recognition to the role and authority of the States. The duty to take these considerations into account must inform the exercise of federal jurisdiction.

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 733-34 (1996).

Yet, clearly, Justice Ginsburg's assessment that "lower courts have found our abstention pronouncements 'less than pellucid'" is accurate. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 189

(1997) (quoting R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1251 (4th ed. 1996). This Honorable Court should grant certiorari in this case to provide translucently clear guidance.

II. Plaintiffs' Right to Trial by Jury

Cases should be heard on the merits, not dismissed on technicalities. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

If Plaintiffs' case had been remanded, Plaintiffs' case would have proceeded to trial on the merits in Illinois. Even in the unlikely event that the Defendants' Minnesota Trustee requirement argument were accepted by an Illinois state court, that court must permit amendment and relation back to cure any defect. *See Boatmen's Nat'l Bank v. Direct Lines*, 167 Ill. 2d 88, 102 (1995) ("The purpose of the relation back provision has been construed as the preservation of causes of action, including those brought under the Act, against loss by reason of technical rules of pleading.") As such, Defendants' nonsensical argument in support of dismissal based upon Minnesota procedural law that the district court relied upon in dismissing Plaintiffs' case would have ultimately failed in state court.

Further, the lower courts here compounded their error by imposing a draconian sanction upon Plaintiffs by finding that they forfeited their claims.

First, there was no forfeiture. Plaintiffs diligently pursued their claims throughout the nearly five (5) year litigation. While the Boogaards reasonably believed that the NHL's throw in

dismissal arguments "were impliedly foreclosed" by the district court granting Plaintiffs' leave to file their Second Amended Complaint, the Boogaards did "respond to these arguments anyway." (*See* Pls.' Br. in Resp. to Defs.' Mot. to Recons., ECF 185 at pp. 4, 21, 22) ("Counts I-IV are well-pled in accordance with state tort laws"; "These counts do state facially plausible claims"; "The actions of the NHL fostered a culture of violence that caused Derek Boogaard damage… This type of tort claim is viable under New York's tort laws."; "Plaintiffs allege more than just the absence of a warning – that the NHL purposefully concealed the information from Derek Boogaard… This is clearly actionable under all applicable states' tort laws.") Indeed, Section II(C) of the Boogaards brief is labeled "The Claims in Counts I-IV are Well-Pled in Accordance with State Tort Law and Not Barred by the First Amendment." (*See* Pls.' Br. in Resp. to Defs.' Mot. to Recons., ECF 185 at p. 20-23.)

While admittedly pithy, the Boogaards did not "remain [] silent." (*See* Seventh Circuit Op., ECF at p. 13; APP C at p. A41-42). They did not "[take] the risk that the district court would hold their claims forfeited." (*Id*.) The Boogaards responded (in an over-sized brief) to the myriad arguments thrown against them by the NHL. (*See* Pls.' Br. in Resp. to Defs.' Mot. to Recons., ECF 185.) These submissions, coupled with the detailed analyses that the Plaintiffs had previously provided in advocating for the filing of their Second Amended Complaint (and the district court's obvious reliance upon those arguments in determining the viability of claims in the PSAC under Minnesota and Illinois law), adequately addressed the ill-conceived notion that Plaintiffs'

allegations failed to state a claim. (*See* Pls.' Br. in Resp. to Defs.' Mot. to Recons., ECF 185; *see* District Court Order, ECF 169; APP B; *see* Pls.' Mot. for Leave to File, ECF 143; *see* Pls.' Mem. in Supp. of Mot. for Leave to File, ECF 144; *see* Pls.' Reply to Defs.' Resp. to Mot. for Leave to File, ECF 158.)

Second, it was the law of the case that the Plaintiffs' claims sufficiently stated causes of action pursuant to Minnesota and Illinois law. Plaintiffs' response brief also contained only argument and citation to New York law on the viability of the surviving counts:

> The NHL's insistence on maintaining the most violent professional hockey league on Earth and its concomitant failure to act reasonably with regard to informing players that participating in such a league substantially increased their risk of developing irreversible neurodegenerative diseases, resulted in Derek Boogaard's exposure to repetitive head trauma.... "under general tort rules, a person may be negligent because he or she fails to warn another of known dangers or, in some cases, of those dangers [of] which he [or she] had reason to know." *Chambers v. Evans*, 104 A.D.3d 1301, 1301 (N.Y. App. Div. 2013). Here, Plaintiffs allege more than just the absence of a warning – that the NHL purposefully concealed the information from Derek Boogaard. This is clearly actionable under all applicable states' tort laws.

(*See* Pls.' Resp. Br. to Defs.' Mot. to Recons., ECF 185

at p. 18-21).

But, the Seventh Circuit affirmed dismissal, eviscerating Plaintiffs' Seventh Amendment rights to trial by jury.

This Honorable Court should grant certiorari so that Plaintiffs' right to trial by jury is preserved.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

William T. Gibbs
Counsel of Record

CORBOY & DEMETRIO, P.C.
Attorneys for Plaintiffs
33 North Dearborn Street, Suite 2100
Chicago, Illinois 60602
(312) 346-3191
wtg@corboydemetrio.com
Counsel for Petitioners

No. 18

IN THE SUPREME COURT OF THE UNITED STATES

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

Petitioners,

v.

NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and GARY R. BETTMAN, Commissioner

Respondents,

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

William T. Gibbs
Counsel of Record

CORBOY & DEMETRIO, P.C.
Attorneys for Plaintiffs
33 North Dearborn Street, Suite 2100
Chicago, Illinois 60601
(312) 346-3191
wtg@corboydemetrio.com
Counsel for Petitioners

APPENDIX A

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

No. 13 CV 4846

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

Plaintiffs,

v.

NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and GARY R. BETTMAN, Commissioner,

Defendants.

MEMORANDUM OPINION AND ORDER

Len and Joanne Boogaard, the personal representatives of the estate of Derek Boogaard, bring this suit against the National Hockey League and its Board of Governors and Commissioner (collectively, "NHL"), alleging tort claims connected with Boogaard's death. Docs. 1-1, 62, 174. (For ease

of reference, and except where context requires otherwise, the court will refer to Plaintiffs as "Boogaard.") As matters now stand, Counts V-XII of the second amended complaint have been dismissed, and Counts I-IV remain in the case. Docs. 168-169, 174. The NHL has moved to dismiss the remaining claims, Doc. 177, while Boogaard has moved to remand the case to state court, Doc 182. The NHL's motion is granted, and Boogaard's motion is denied.

BACKGROUND

The previous personal representative of Boogaard' s estate, Robert Nelson, filed this suit in the Circuit Court of Cook County, Illinois. Doc. 1-1. The NHL removed the case to this court under 28 U.S.C. § 1441 on the ground that the original complaint's claims, which purportedly rested on state law, were completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U .S.C. § 185, and thus in fact were federal claims. Doc. 1; *see Caterpillar Inc. v. Williams,* 482 U.S. 386,393 (1987). The court denied Boogaard's motion to remand, holding that at least some of his claims were completely preempted. Docs. 37-38 (reported at 20 F. Supp. 3d 650 (N.D. Ill. 2014)). Boogaard then filed an amended complaint, which set forth eight counts. Doc. 62. After discovery, the court granted summary judgment to the NHL on all eight counts, holding that they were completely preempted by § 301 of the LMRA and that the § 301 claims- which is how the preempted claims had to be characterized- were barred by the applicable statute of limitations. Docs. 140-141 (reported at 126 F. Supp. 3d 1010 (N.D. Ill. 2015)).

Boogaard moved for leave to file a second amended complaint, which set forth twelve counts. Docs. 135, 143. The NHL opposed that motion on the ground that the second amended complaint's claims, like those of the first amended complaint, were completely preempted by § 301 of the LMRA and, as § 301 claims, were time-barred. Docs. 151-152. The court granted in part and denied in part the motion for leave to amend. Docs. 168-169 (reported at 211 F. Supp. 3d 1107 (N.D. Ill. 2016)). Specifically, the court held that eight of the second amended complaint's counts, Counts V-XII, were "essentially identical to the first amended complaint's eight counts ... and are therefore completely preempted and time-barred for the reasons set forth in the court's earlier opinions." 211 F. Supp. 3d at 1111. But the court held that portions of the other four counts, Counts I-IV, stated non-preempted–and thus true state law–claims. *Id.* Accordingly, the court dismissed with prejudice Counts V -XII and the completely preempted portions of Counts I-IV; ordered the NHL to answer or otherwise plead to the surviving portions of the complaint; and stated that if the NHL "move[s] to dismiss any of the surviving claims, [it] should not do so on preemption grounds." Doc. 168.

Now before the court are the NHL's motion to dismiss the second amended complaint's surviving claims, Doc. 1 77, and Boogaard's motion to remand the case to state court, Doc. 182.

Discussion

I. The NHL's Motion to Dismiss

In moving to dismiss, the NHL contends that the second amended complaint's state law claims–the NHL actually continues to argue that Counts I-IV include no true state law claims, Doc. 178 at 11-17, but proceeds to assume for the sake of argument that they do–are governed and defeated by Minnesota law. *Id.* at 18-27. The NHL argues in the alternative that, regardless of which State's law applies, Boogaard has no viable claim. *Id.* at 27-40.

In resolving the NHL's Rule 12(b)(6) motion, the court assumes the truth of the operative complaint's well-pleaded factual allegations, though not its legal conclusions. *See Zahn v. N. Am. Power & Gas, LLC,* 815 F.3d 1082, 1087 (7th Cir. 2016). The court must also consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice," along with additional facts set forth in Boogaard's brief opposing dismissal, so long as those additional facts "are consistent with the pleadings." *Phillips v. Prudential Ins. Co. of Am.,* 714 F .3d 1017, 1019-20 (7th Cir. 2013). The facts are set forth as favorably to Boogaard as those materials allow. *See Pierce v. Zoetis, Inc.,* 818 F.3d 274, 277 (7th Cir. 2016). In setting forth those facts at the pleading stage, the court does not vouch for their accuracy. *See Jay E. Hayden Found. v. First Neighbor Bank, N.A.,* 610 F.3d 382, 384 (7th Cir. 2010).

Boogaard played hockey for the NHL for six years–five for the Minnesota Wild, and one for the New York Rangers. Doc. 174 at 2, 11. As an "Enforcer/Fighter," Boogaard's principal job during games was to fight opposing players. *Id.* at 2-3. As a result of the fights, he suffered brain injuries, which eventually developed into chronic traumatic encephalopathy, or "CTE," a brain disorder characterized by deteriorating judgment, inhibition, mood, reasoning, behavior, and impulse control. *Id.* at 4-7. Boogaard routinely suffered other painful injuries as well, and team doctors treated his symptoms with opioids, a class of highly addictive pain medications. *Id.* at 4, 119-122, 127-13 7. Boogaard became addicted to opioids, went to rehab, relapsed, and returned to rehab. *Id.* at 138, 140, 156-160. In May 2011, while on weekend release in Minnesota from his second stay in rehab, he accidentally overdosed on Percocet and died. *Id.* at 164-165, 206. He was 28 years old. *Id.* at ¶ 1.

Counts I-II–a survival claim and wrongful death claim, respectively–rest on the following allegations. During Boogaard's career, the NHL cultivated a "culture of gratuitous violence," which caused him to get into fights, which in turn caused him to develop CTE and become addicted to opioids, which in turn caused his death. *Id.* at ¶¶ 44, 75, 78. The NHL encouraged violence by, among other things, promoting an HBO documentary glorifying the "Broad Street Bullies," a Philadelphia Flyers team known for fighting; creating promotional films "that focus on the hardest hits that take place on the ice"; displaying on its website stories about enforcers and on-ice fights "on a nightly basis"; producing on an affiliated television

network "a weekly program segment called 'Top 10 Hits of the Week'"; and sponsoring video games that "include[ed] fighting and vicious body checking." *Id.* at ¶ 57.

Counts III-IV–also a survival claim and wrongful death claim, respectively–allege that the NHL actively and unreasonably harmed Boogaard by implicitly communicating that head trauma is not dangerous. The NHL communicated this message by suggesting that it was "study[ing] ... repetitive concussive and/or sub- concussive brain traumas amidst its player population," which caused NHL players to "reasonably believe[] that the NHL's findings would apprise them of any and all long-term risks" of playing professional hockey. *Id.* at 81, 83. It was not until after Boogaard's death that the NHL reported its findings. *Id.* at 90. By publicizing the fact that it was studying the effects of brain trauma, the NHL's silence on the issue during Boogaard's career implicitly conveyed that it had found that those effects were minor. *Id.* at 89, 94. Boogaard relied on that implied message when he continued playing in a way that would give him concussions. *Id.* at 108.

A. Minnesota Law Governs Boogaard's Non-Preempted Claims

In pleading Counts I-IV, Boogaard expressly invokes Illinois and Minnesota law. *Id.* at 77, 80, 115, 118. Counts I and III–the survival claims–are brought "pursuant to Minn. Stat.§ 573.02 and 755 ILCS 5/27-6, commonly known as the Survival Acts of the States of Minnesota and Illinois." *Id.* at 77,

115. Counts II and IV–the wrongful death claims–are brought "pursuant to the Minnesota Wrongful Death Statute, Minn. Stat.§ 573.02, and the Illinois Wrongful Death Statute, 740 ILCS 180/1, *et seq.," Id.* at 80, 118. Despite invoking Illinois and Minnesota law in the operative complaint, and despite having nearly three years to think about his claims before moving for leave to file that complaint, Boogaard asserts for the first time in his opposition brief that *New York* law applies. Doc. 185 at 13-15, 20-21. In poker, that would be called a "tell"; as will soon become clear, the NHL's motion to dismiss advanced compelling arguments for dismissing Boogaard's claims under Illinois law and particularly Minnesota law, and Boogaard's extraordinarily belated retreat to New York law is an obvious signal that his lawyers no longer think much of his prospects under Minnesota or Illinois law.

Because this case was filed in Illinois, Illinois choice-of-law rules guide the inquiry into which state law applies. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487,496 (1941) ("[T]he prohibition declared in *Erie Railroad v. Tompkins* ... extends to the field of conflict of laws."); *McCoy v. Iberdrola Renewables, Inc.,* 760 F.3d 674, 684 (7th Cir. 2014) ("Federal courts hearing state law claims under diversity or supplemental jurisdiction apply the forum state's choice of law rules to select the applicable state substantive law."). "Illinois has adopted the approach found in the Second Restatement of Conflict of Laws." *Barbara's Sales, Inc. v. Intel Corp.,* 879 N.E.2d 910, 919 (Ill. 2007). Under the Second Restatement, the law of the State that "has the most significant relationship to the occurrence and the parties" applies. *Restatement (Second) of Conflict of*

Laws§ 145(1) (1971); *see also Kamelgard v. Macura,* 585 F.3d 334, 341 (7th Cir. 2009) (observing that "most states, including Illinois, nowadays apply the law of the state that has the 'most significant relationship' to the claim"). In tort cases, the "most significant relationship" analysis turns on: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil[*sic*], residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Restatement (Second) of Conflict of Laws§* 145(2); *see also Townsend v. Sears, Roebuck & Co.,* 879 N.E.2d 893, 901 (Ill. 2007) (same). "Under this test, the law of the place of injury controls unless Illinois has a more significant relationship with the occurrence and with the parties." *Tanner v. Jupiter Realty Corp.,* 433 F.3d 913, 916 (7th Cir. 2006). As the Seventh Circuit has explained: "[I]n the absence of unusual circumstances, the highest scorer on the 'most significant relationship' test is–the place where the tort occurred .... Victim location and injurer location are valid considerations. But when they point to two different jurisdictions they cancel out, leaving the place where the injury (and hence the tort) occurred as the presumptive source of the law governing the accident." *Abad v. Bayer Corp.,* 563 F.3d 663, 669-70 (7th Cir. 2009).

Minnesota has the most significant relationship to the occurrence and the parties by a wide margin. The first and most important consideration, where the injury occurred, is Minnesota, which is the place of Boogaard's death and where he spent the bulk of his NHL career. Doc.

174 at 2, 11, 164-165. This makes Minnesota the "presumptive source" of governing law. *Abad,* 563 F.3d at 670.

As to the second factor, Minnesota is the primary location where the conduct causing Boogaard's injury occurred. Minnesota is where Boogaard spent the bulk of his career, Doc. 174 at 2, 11; where replays of his fights were routinely shown, *Id.* at 65; where doctors prescribed and administered pain medications, *Id.* at 127, 130-131, 242-244; where he purchased drugs, *Id.* at 184; where he transported drugs that he had purchased elsewhere, *Id.* at 199; and where the drugs that ended his life were ingested, *Id.* at 164-165. Boogaard occasionally got into on-ice fights, was given pain medications, and purchased drugs in other States, *Id.* at 143, 156, 199, 242-244, 246, but those isolated instances do not outweigh the far more substantial Minnesota contacts. The operative complaint's allegations do not support Boogaard's argument in his opposition brief that the conduct causing his injuries occurred "most notably" in the NHL's New York office. Doc. 185 at 13.

The third consideration, the location of the parties, does not weigh strongly in any State's favor. The NHL is based in New York but has member teams in many States, including Minnesota and Illinois. Doc. 174 at 11-12; Doc. 185 at 13. Boogaard lived primarily in Minnesota and for a short time in New York during his NHL career, and his domicile when he died remains somewhat uncertain but probably was Minnesota. Doc. 17 4 at 2, 11; Doc. 185 at 13 (admitting that, during the year he played for the New York Rangers, Boogaard "maintained property in Minnesota"); 20 F. Supp. 3d at 652 n. *

("Boogaard likely was a Minnesota citizen when he died."). Finally, the fourth factor, the place where the parties' relationship was centered, favors Minnesota because Boogaard spent the vast majority of his career as a member of the NHL' s Minnesota team. Doc. 17 4 at 2, 11.

Illinois law requires the court to consider those contacts, which point very strongly toward Minnesota, "in light of the general principles embodied in § 6" of the Restatement. *Townsend,* 879 N .E.2d at 906. Those principles are:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6.

Those principles provide no basis to supplant Minnesota law. The NHL contends, reasonably, that the § 6 factors favor Minnesota law. Doc. 178 at 23; Doc. 195 at 16-19. In his opposition brief, Boogaard states that those factors favor Illinois or New York law, Doc. 185 at 14-15, but he fails to make a legal argument or cite any legal authority to support his position, thus forfeiting the point. *See G&S Holdings LLCv. 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).

For all of these reasons, Minnesota law governs Boogaard's non-preempted claims.

. B. Boogaard Fails to State a Claim Under Minnesota Law

As the operative complaint acknowledges, Doc. 174 at 77, 80, 115, 118, the Minnesota statute that governs Boogaard's survival and wrongful death claims is Minn Stat.§ 573.02. That statute provides, in relevant part:

> **Subd. 1.** Death action. When death is caused by the wrongful act or omission of any person or corporation, *the trustee appointed as provided in*
> *subdivision 3* may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission .... An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission ....

> **Subd. 2.** Injury action. When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, *the trustee appointed in subdivision 3* may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.
>
> **Subd 3.** Trustee for Action. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

Minn. Stat. § 573.02 (emphases added). Section 573.02(1) is the wrongful death provision, § 573.02(2) is the survival provision, and § 573.02(3) concerns trustees. The NHL argues, correctly, that Boogaard's claims founder on the trustee requirement.

The emphasized statutory text makes clear that § 573.02 claims must be brought by a court-appointed trustee. Consistent with the text, the Minnesota Supreme Court has held that "[a] plaintiffs failure to commence a wrongful death action as a court-appointed trustee ... precludes her from maintaining the action." *Ortiz v. Gavenda,* 590 N.W.2d 119, 120 (Minn. 1999) (affirming the

dismissal of a widow's § 573.02 claim on behalf of her deceased husband because she had not been appointed as a trustee); *Sheeley v. City of Austin,* 2015 WL 506293, at *3 (D. Minn. Feb. 6, 20 15) ("Maintaining an action under subdivision 1 or 2 of Minn. Stat. § 573.02 requires a trustee be appointed to sustain the decedent's action.").

The two plaintiffs here, Len and Joanne Boogaard, are Boogaard's "personal representatives," not "trustees." Doc. 174 at 26 ("LEN BOOGAARD and JOANNE
BOOGAARD were appointed ... as Successor Personal Representatives of the Estate of DEREK BOOGAARD .... "); Doc. 185 at 5, 18 (Boogaard acknowledging that Len and Joanne Boogaard were appointed "Personal Representatives" and not trustees). (The same was true for the previous plaintiff, Robert Nelson. Doc. 1-1 at 2.) Therefore, Boogaard's claims, which arise under § 573.02, are not viable under Minnesota law. *See Ortiz,* 590 N.W.2d at 123-24 ("The appointment of a trustee under Minn. Stat.§ 573.02 is an exercise of the fundamental legal principle that those entitled to recovery as a result of the wrongful death shall be represented by the trustee without compromise."); *Regie de l'assurance Auto. du Quebec v. Jensen,* 399 N.W.2d 85, 92 (Minn. 1987) (holding that a § 573.02 suit without appointment of a trustee is a "legal nullity"); *Stein/age v. Mayo Clinic Rochester,* 435 F.3d 913, 915 (8th Cir. 2006) ("[U]pon death, the right to ... institute new actions based on personal injury[] belong[s] to the wrongful death trustee."); *Sheeley,* 2015 WL 506293, at *3 ("[E]state representatives are not the equivalent to a wrongful death trustee.").

In Boogaard' s view, the question whether Len and Joanne can bring this suit is governed by Rule 17(b). Doc. 185 at 15-16. Rule 17(b) states, in relevant part, that "[c]apacity to sue or be sued is determined ... by the law of the state where the court is located." Fed. R. Civ. P. 17(b). This court is located in Illinois, and from that premise, Boogaard concludes that Illinois law governs whether Len and Joanne Boogaard can bring this suit. That argument misunderstands the scope of Rule 17(b).

The capacity to sue or be sued under Rule 17(b) is a question of a party's "legal existence"−whether it may act as a party in *any* type of litigation−and not whether it has a right of action under a *particular statute. DeGenova v. SheriffofDuPage Cnty.,* 209 F.3d 973,976 n.2 (7th Cir. 2000) (applying Rule 17(b) to determine whether the defendant was "a suable entity"); *see also Teamsters Local Union No. 727 Health & Welfare Fund v. L & R Grp. of Cos.,* 844 F.3d 649, 651 (7th Cir. 2016) ("Rule 17(b) says that only persons or entities with the capacity to sue or be sued may be litigants."). Len and Joanne's status as personal representatives does not deprive them of the "capacity to sue" under Rule 17(b). *See Smith v. United States,* 702 F.2d 741, 742-43 (8th Cir. 1983) (affirming the district court's judgment in a suit brought by a personal representative seeking a refund of tax penalties assessed against the decedent's estate); *Prof'l Fiduciary, Inc. v. Silverman,* 713 N.W.2d 67, 68 (Minn. App. 2006) (holding that a "personal representative can assert a malpractice claim against the decedent's former attorney"). But notwithstanding their legal capacity to sue or be sued, Len and Joanne quite clearly lack

a viable claim under § 573.02. *See Ortiz,* 590 N.W.2d at 123-24; *Jensen,* 399 N.W.2d at 92; *Sheeley,* 2015 WL 506293, at *3.

It is too late for Boogaard to cure this defect by having Len and Joanne appointed as trustees. A wrongful death action under § 573.02(1) "requires the *appointment* of a trustee prior to the expiration of the 3-year statute of limitations," which begins to run on the date of the decedent's death. *Ortiz,* 590 N.W.2d at 123. "Unless a cause of action has been legally asserted by a duly appointed trustee prior to the expiration of the three year commencement of suit limitation . . . , any subsequent attempted amendment after the expiration of the limitation period to cure the defect will not 'relate back' so as to revive the action." *Jensen,* 399 N.W.2d at 86; *see also Ortiz,* 590 N. W .2d at 123 (discussing Minnesota courts' "consistent interpretation of Minn. Stat. § 573.02's time limit as a strict condition precedent to maintaining a wrongful death action."); *Bonhiver v. Fugelso, Porter, Simich & Whiteman, Inc.,* 355 N.W.2d 138, 142 (Minn. 1984) ("Satisfaction of the limitation period is an absolute prerequisite to bringing suit."); *Berghuis v. Korthius,* 37 N.W.2d 809, 810 (Minn. 1949) {"This period fixing the time within which the right of action for wrongful death may be exercised is not an ordinary statute of limitations. It is considered a condition precedent to the right to maintaining the action, and the lapse of such period is an absolute bar."); *Ariola v. City of Stillwater,* 889 N.W.2d 340, 348 (Minn. App. 20 17) (observing that the three-year limitations period "is jurisdictional, requiring dismissal for failure to comply and does not have flexible parameters permitting it to be ignored if its application is too

technical") (internal quotation marks and alterations omitted). Boogaard died in May 20 11, Doc. 17 4 at 1f165, and no trustee was appointed in the three years that followed. That necessarily means that Boogaard's § 573.02(1) wrongful death claims can no longer be pursued, even if Len and Joanne were to be appointed as trustees in the future. *See Miklas v. Parrott,* 684 N.W.2d 458,464 (Minn. 2004) ("Because a trustee was not appointed within the 3-year time limit of Minn. Stat. § 573.02, appellant cannot show a viable underlying claim of wrongful death."); *Ortiz,* 590 N.W.2d 119, 120, 123 (holding that "an amendment to the pleadings to bring the[§ 573.02(1)] action as trustee after the statutory filing period had expired could not relate back to the original filing," because "no matter how compelling the circumstances for equitable intervention, equity cannot breathe life into a claim that has never been anything more than a 'nullity,); *Sheeley,* 2015 WL 506293, at *4 ("Minn. Stat. § 573.02 ... requires the *appointment* of a trustee prior to the expiration of the 3-year statute of limitations, not the mere filing of a petition therefor within the statutory period."); *Block v. Toyota Motor Corp., 5* F. Supp. 3d 1047, 1056, 1059 (D. Minn. 2014) (noting that "courts must strictly construe the wrongful death statute's requirements," which "include[] the wrongful death statute of limitations," and applying the three-year statute of limitations set forth in § 573.02(1)).

Section 573.02(2) does not expressly impose a three-year statute of limitations on survival actions. That said, Len and Joanne's inexcusable and inexplicable delay in seeking appointment as trustees has forfeited their ability to do so for purposes of saving Boogaard's survival claims in this

suit. Len and Joanne substituted in as party plaintiffs in May 2014, Doc. 62, and were alerted to the trustee issue *three years* ago, in June 2014, when the NHL first argued that Boogaard had no claim because they had not been appointed as trustees, Doc. 64 at 3-7. Boogaard's survival claims are currently a "legal nullity" under Minnesota law, *Jensen,* 399 N.W.2d at 92, and now, more than six years after his death and three years after the NHL raised the trustee problem, it is too late for Len and Joanne to start afresh.

Even if Boogaard's survival claims were not barred by Len and Joanne's failure to seek and obtain appointment as trustees, they would be defeated on a separate ground. Section § 573.02(2) provides for a survival action based on injuries to the decedent only where "the person thereafter dies from a cause *unrelated* to those injuries." Minn. Stat.§ 573.02(2) (emphasis added). The NHL contends that Boogaard's survival claims cannot proceed because the operative complaint alleges that the NHL's wrongful acts affirmatively caused Boogaard's death, which means that those acts are the antithesis of acts that are "unrelated" to his injuries. Doc. 178 at 27. The NHL is correct. *See Kenna v. So-Fro Fabrics, Inc.,* 18 F.3d 623, 630 (8th Cir. 1994) ("The district court found, as a matter of law, that So-Fro's alleged negligence was not causally connected to Ms. Kenna's death. In light of this finding, the district court should have allowed Mr. Kenna to proceed with the survival action, because Minnesota allows a personal injury action to survive an individual's death if the person dies from a cause unrelated to those injuries.") (internal quotation marks omitted); *Sheeley,* 2015 WL 506293, at *3 ("[Section 573.02(2)]

allows the appointed trustee to recover special damages when an individual suffers injury by a wrongful act or omission, but later dies from unrelated causes."). In any event, Boogaard offers no response to the NHL's argument, thereby forfeiting the point and, along with it, the survival claims in Counts I and III. *See G&S Holdings, 691* F.3d at 538; *Alioto v. Town of Lisbon,* 651 F.3d 715,721 (7th Cir. 2010) ("We apply [the forfeiture] rule where a party fails to develop arguments related to a discrete issue, and we also apply that rule where a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss.").

C. Boogaard Fails to State a Claim Under Any State Law

The court adds for good measure that dismissal is warranted no matter which state law applies. As noted, Counts I and II are based on the NHL's alleged promotion of violence, while Counts III and IV are based on the NHL's alleged negligent misrepresentations regarding the risks of head trauma. Doc. 174 at ¶¶ 33-118. According to the NHL, Counts I and II sound in negligence, whose elements are: "(1) the existence of a legal duty, (2) a breach of that duty, (3) causation, and (4) injury." *Moorhead Econ. Dev. Auth. v. Anda,* 789 N.W.2d 860, 888 (Minn. 2010); *see also Krywin v. Chi. Transit Auth.,* 938 N.E.2d 440,446 (Ill. 2010) (same); *Pasternack v. Lab. Corp. of Am. Holdings,* 59 N.E.3d 485,490 (N.Y. 2016) (same). Also according to the NHL, Counts III and IV sound in negligent misrepresentation, whose elements include: (1) a duty owed to the plaintiff by the defendant; (2) the

defendant's breach of that duty by communicating false information; and (3) the plaintiffs reliance on the incorrect information. *See Williams v. Smith,* 820 N.W.2d 807, 815 (Minn. 2012); *Jane Doe-3 v. McLean Cnty. Unit Dist. No. 5 Bd. of Dirs.,* 973 N .E.2d 880, 889 (Ill. 20 12); *Mandarin Trading Ltd. v. Wildenstein,* 944 N.E.2d 1104, 1109 (N.Y. 2011).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The NHL's initial brief argued that Boogaard failed to allege facts that satisfy the elements of negligence and negligent misrepresentation. Doc. 178 at 27-40. Specifically, the NHL contended that Boogaard's promotion of violence claims in Counts 1-11 do not plausibly allege (1) that the NHL had a legal duty not to promote violence or (2) that the NHL's conduct proximately caused Boogaard's injuries. *Id.* at 30-34. The NHL further contended that Boogaard's negligent representation claims in Counts III-IV do not plausibly allege (1) that the NHL had a duty to study or disclose the long-term effects of concussions, (2) that the NHL breached that duty by communicating false information, or (3) that Boogaard relied on that information. *Id.* at 35-40. Those arguments were eminently reasonable, yet Boogaard utterly and inexplicably failed to address them, thereby forfeiting both sets of claims. *See G&S Holdings, 691* F.3d at 538; *Alioto,* 651 F.3d at 721 ("Our system of justice is adversarial, and our judges are busy people. If they are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether

there might be something to say against the defendants' reasoning.") (internal quotation marks omitted); *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); *Lekas v. Briley,* 405 F.3d 602, 614-15 (7th Cir. 2005) ("While Lekas alleged in his complaint that his segregation was in retaliation for his filing of grievances, he did not present legal arguments or cite relevant authority to substantiate that claim in responding to defendants' motion to dismiss," and "[a]ccordingly, [his] retaliation claim has been waived.").

II. Boogaard's Motion to Remand

Shortly after the NHL filed the present motion to dismiss, Boogaard filed a motion to remand this case to state court pursuant to 28 U.S.C. § 1367(c)(l) and (c)(3). Docs. 182-183. Those provisions state: "The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... (1) the claim raises a novel or complex issue of State law, ... [or] (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(1), (3). According to the Seventh Circuit:

> While a district court *may* relinquish its supplemental jurisdiction if one of the conditions of § 1367(c) is satisfied, it is not required to do so. A district court deciding whether to retain jurisdiction pursuant to the factors set forth in § 1367(c) should consider and weigh in each case, and at every state of the litigation, the values of judicial economy, convenience, fairness, and comity. That the jurisdictional hook is eliminated before trial at best only preliminarily informs the balance; the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources can and should make the difference in a particular case.

Hansen v. Bd. ofTrs. of Hamilton Se. Sch. Corp., 551 F.3d 599,608 (7th Cir. 2008) (internal quotation marks and citations omitted).

Remand is not justified under subsection (c)(l) because Boogaard's state law claims do not raise any state law issue that is "novel or complex." Rather than point to any particular state law issue, Boogaard contends that "[t]he NHL's utilization of twenty-five (25) pages in explaining its seemingly complex arguments tellingly previews for this Court the myriad 'complex issues' it intends to raise to defend against Plaintiffs' state law claims." Doc. 183 at 3. Boogaard greatly overstates the novelty or complexity of the state law principles that defeat his claims. In fact, the court dismissed those claims, on independent grounds, by applying settled law and without confronting complicated state law questions. *See Ervin v. OS Rest. Servs.,* 632 F.3d 971, 980 (7th

Cir. 2011) ("The plaintiffs' claims ... do not present any complex state-law issues, and so subsection (c)(1) should not be a problem."). And even if the state law claims were complex, the claims arise under Minnesota law, and for purposes of § 1367(c)(1), Illinois state courts have no advantage over this court in interpreting the law of a different State. *See David v. Signal Int'l, LLC,* 37 F. Supp. 3d 822, 830 (E.D. La. 2014) (rejecting the applicability of § 1367(c)(l) where the "state law claims [were] pled under Indian law, Texas law, and Mississippi law"); *Shovah v. Mercure,* 879 F. Supp. 2d 416,422 & n.3 (D. Vt. 2012) (same, where the court assumed that the claims were governed by New York law).

Nor is remand justified under § 1367(c)(3). True, all of Boogaard's federal claims have been dismissed, and only state law claims among non-diverse parties remain. 20 F. Supp. 3d at 652 n. * ("With Minnesota citizens on both sides of the case, there is no diversity jurisdiction."). Under § 1367(c)(3), "[a]s a general matter, when all federal claims have been dismissed prior to trial, the federal court should relinquish jurisdiction over the remaining pendent state claims." *Williams v. Rodriguez,* 509 F.3d 392,404 (7th Cir. 2007); *see also Dietchweiler by Dietchweiler v. Lucas,* 827 F.3d 622,631 (7th Cir. 2016) ("[W]hen the federal claims are dismissed before trial, there is a presumption that the court will relinquish jurisdiction over any remaining state law claims."). The general rule has three exceptions: "when the refiling of the state claims is barred by the statute of limitations; where substantial judicial resources have already been expended on the state claims; and when it is clearly

apparent how the state claim is to be decided." *Williams,* 509 F.3d at 404; *see also RWJ Mgmt. Co. v. BP Prods. N. Am., Inc.,* 672 F.3d 476, 480 (7th Cir. 2012); *Williams Elecs. Games, Inc. v. Garrity,* 479 F.3d 904, 907 (7th Cir. 2007).

The third exception applies here because the resolution of Boogaard's state law claims is "clearly apparent." *Williams,* 509 F.3d at 404. As noted, 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. That neither ground requires the application of Illinois law−the second ground implicated Illinois law, but the court's rejection of Boogaard's Illinois claims (assuming they were, in fact, Illinois claims) turned on forfeiture, not a detailed analysis of Illinois law−eliminates the "paramount concerns" of "respect for the state's interest in applying its own law, along with the state court's greater expertise in applying state law." *Huffman v. Hains,* 865 F.2d 920, 923 (7th Cir. 1989). In the end, this is a case where "the values of judicial economy, convenience, fairness, and comity" are best served by retaining supplemental jurisdiction, *City of Chicago v. Int'l Coli. of Surgeons,* 522 U.S. 156, 173 (1997), which the court has elected to do in its "broad discretion," *Hansen,* 551 F.3d at 608 (affirming the district court's decision to retain jurisdiction where "the correct disposition of the state claims against HSSC is clear and does not entangle the federal courts in difficult issues of state law"); *see also Wright v. Associated Ins. Cos.,* 29 F.3d 1244, 1252 (7th Cir. 1994) ("[R]etention of a state-law claim is appropriate when the correct disposition of the claim

is so clear as a matter of state law that it can be determined without further trial proceedings and without entanglement with any difficult issues of state law.") (internal quotation marks omitted).

Conclusion

The NHL's motion to dismiss is granted, and Boogaard's motion to remand is denied. The dismissal of Boogaard's claims is with prejudice. Boogaard has had three opportunities to plead his claims, with one coming after the NHL was granted summary judgment, and those three are enough. *See Agnew v. NCAA,* 683 F.3d 328, 347-48 (7th Cir. 2012) ("By our count, plaintiffs had three opportunities to identify a relevant market in which the NCAA allegedly committed violations of the Sherman Act. ... We therefore cannot find that the district court abused its discretion in dismissing plaintiffs' claims with prejudice."); *Stanard v. Nygren,* 658 F.3d 792, 800 (7th Cir. 2011) ("The court's decision to dismiss the case with prejudice was also eminently reasonable. Again, this was Maksym's third attempt to plead properly, and he was still far from doing so."); *Bausch v. Stryker Corp.,* 630 F.3d 546, 562 (7th Cir. 2010) ("Generally, if a district court dismisses for failure to state a claim, the court should give the party *one* opportunity to try to cure the problem, even if the court is skeptical about the prospects for success.") (emphasis added). Moreover, by failing to respond on the merits to the NHL's argument that the second amended complaint did not plead viable state law negligence and misrepresentation claims,

Boogaard forfeited his claims, and a plaintiff who forfeits his claims does not get a chance to replead. *See Baker v. Chisom,* 501 F.3d 920, 926 (8th Cir. 2007) (affirming the dismissal with prejudice of a claim where the plaintiff "failed to defend that claim or to urge that it be dismissed without prejudice"). Finally, in his opposition brief, Boogaard did not request a chance to replead in the event the court dismissed his claims. *See Johnson v. Wallich,* 578 F. App'x 601, 603 (7th Cir. 2014) ("Johnson also argues that the district court should have allowed him to amend his complaint to correct any deficiencies. But Johnson did not request leave to amend his complaint, and the district court cannot abuse its discretion by denying leave to amend if Johnson never sought it."); *James Cape & Sons Co. v. PCC Constr.*
Co., 453 F.3d 396, 400-01 (7th Cir. 2006) (rejecting the plaintiff's argument that the district court erred in dismissing its complaint with prejudice, rather than without prejudice and with leave to amend, where the plaintiff did not properly request leave to amend).

Judgment will be entered in favor of the NHL and against Boogaard. Although judgment is entered in the NHL's favor, this opinion should not be read to commend how the NHL handled Boogaard's particular circumstances-or the circumstances of other NHL players who over the years have suffered injuries from on-ice play. *Cf In re NHL Players' Concussion Injury Litig.,* MDL 2551 (D. Minn.) (considering claims similar to Boogaard's claims in this case).

June 5, 2017

United States District Judge

APPENDIX B

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

No. 13 CV 4846 Judge Gary Feinerman

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

Plaintiffs,

v.

NATIONAL HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE BOARD OF GOVERNORS, and GARY R. BETTMAN, Commissioner,

Defendants.

MEMORANDUM OPINION AND ORDER

The personal representatives of Derek Boogaard's estate (for ease of exposition, the court will treat Boogaard himself as the plaintiff) brought this suit against the National Hockey League and its Board of Governors and Commissioner (collectively, "NHL"), alleging tort claims connected with Boogaard's death. Docs. 1-1, 62. Earlier in the case, the court denied

Boogaard's motion to remand the suit to state court. Docs. 37-38 (reported at 20 F. Supp. 3d 650 (N.D. Ill. 2014)). After discovery, the court granted summary judgment against Boogaard on all claims set forth in the first amended complaint. Docs. 140-41 (reported at 126 F. Supp. 3d 1010
(N.D. Ill. 2015)). Now before the court is Boogaard's motion for leave to file a second amended complaint. Doc. 143. The motion is granted.

According to the proposed second amended complaint, Boogaard played for two NHL teams as an "Enforcer/Fighter," which means that his principal job was to fight opposing players during games. Doc. 145-1 at ¶¶ 2-3. During the fights he suffered brain injuries, which eventually developed into chronic traumatic encephalopathy, or "CTE," a brain disorder characterized by deteriorating judgment, inhibition, mood, reasoning, behavior, and impulse control. *Id.* at ¶¶ 4-7. Boogaard routinely suffered other painful injuries as well, and team doctors treated his symptoms with opioids, a class of highly addictive pain medications. *Id.* at ¶¶ 4, 119-122, 127-137. Boogaard became addicted to opioids, went to rehab, relapsed, and went to rehab again. *Id.* at ¶¶ 138, 140, 156-160. When he was on weekend release from his second stay in rehab, he took Percocet, accidentally overdosed, and died. *Id.* at ¶¶ 164-165, 206. He was 28 years old. *Id.* at ¶ 1.

The first amended complaint set forth eight claims. Counts I and II alleged that the NHL breached a duty to keep Boogaard safe when it allowed team doctors to get him addicted to opioids. Doc. 62 at ¶¶ 43-101. Counts III and IV alleged that the NHL injured Boogaard by failing to manage his addiction according to the terms of the NHL's

collectively bargained Substance Abuse and Behavioral Health Program. *Id.* at ¶¶ 102-200; *see* 20 F. Supp. 3d at 658 (holding that the Program was part of a 2005 collective bargaining agreement). Counts V and VI alleged that the NHL breached a voluntarily assumed duty to protect Boogaard from brain trauma. Doc. 62 at ¶¶ 201-226. And Counts VII and VIII alleged that the NHL breached a voluntarily assumed duty to keep Boogaard safe when it allowed team doctors to inject him with Toradol, an intramuscular analgesic that makes concussions more likely and more dangerous. I*d.* at ¶¶ 227-267.

The NHL moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the first amended complaint on the ground that its claims were completely preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, in light of the fact that a collective bargaining agreement ("CBA") governed the relationship between Boogaard and the NHL at all relevant times. Doc. 43. The court applied Rule 12(d) to convert the NHL's Rule 12(b)(6) motion into a Rule 56 summary judgment motion. Doc. 58. Boogaard moved for leave to file a second amended complaint while the summary judgment motion remained pending. Doc. 130. The court granted summary judgment on the ground that the first amended complaint's claims were completely preempted by§ 301 of the LMRA and that Boogaard § 301 claims–which is how his claims, having been completely preempted, had to be characterized–were barred by the applicable statute of limitations. 126 F. Supp. 3d at 1016-27. Boogaard then renewed his

motion for leave to file a second amended complaint. Doc. 143.

Under Rule 15(a)(2), leave to amend "shall be freely given when justice so requires," but "leave is inappropriate where there is undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment." *Villa v. City of Chicago,* 924 F.2d 629, 632 (7th Cir. 1991); *see also Gen. Elec. Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074, 1085 (7th Cir. 1997) ("Even though Rule 15(a) provides that 'leave shall be freely given when justice so requires,' a district court may deny leave to amend for ... futility. The opportunity to amend a complaint is futile if the complaint, as amended, would fail to state a claim upon which relief could be granted.") (citation and some internal quotation marks omitted). The NHL argues that the proposed second amended complaint would be futile because its claims, like the first amended complaint's claims, are all completely preempted by the LMRA and, as LMRA claims, are barred on limitations grounds; the NHL makes no other futility argument. Doc. 152.

Under the complete preemption doctrine, "the pre-emptive force of [a federal] statute ... 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 of 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 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.

As the court explained in earlier opinions, 20 F. Supp. 3d at 653-58; 126 F. Supp. 3d at 1016-25, the first amended complaint's claims were completely preempted because resolving them would have required the court to interpret the CBA. Counts III through VIII alleged that the NHL voluntarily assumed a duty to protect Boogaard and that it had breached that duty. The scope of one person's voluntarily assumed duty to protect another depends on the totality of the circumstances, which in this case would have included contested interpretations of the CBA. *See LM ex rei. KM v. United States,* 344 F.3d 695, 700 (7th Cir. 2003) ("[W]hether a voluntary undertaking has been assumed is necessarily a fact-specific inquiry."); *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."). In particular, the scope of the NHL's voluntarily assumed duty to Boogaard

depends on reasonable disputes concerning whether the CBA allowed the NHL to unilaterally prohibit fighting, to prohibit team doctors from administering Toradol, or to require team doctors to follow certain procedures for diagnosing concussions-rendering Counts III through VIII completely preempted. 20 F. Supp. 3d at 653-58; 126 F. Supp. 3d at 1018-22. Counts I and II, meanwhile, alleged that the NHL had breached a freestanding duty to protect Boogaard from addiction. Ordinarily, people are under no obligation to protect others from harm unless they have a "special relationship." *Domagala v. Rolland,* 805 N.W.2d 14, 23 (Minn. 2011); *accord lseberg v. Gross,* 879 N.E.2d 278, 284 (Ill. 2007). But whether the NHL had a special relationship with Boogaard depends on the extent to which the NHL exercised control over Boogaard's behavior and safety, which in tum depends on contested interpretations of the CBA-rendering Counts I and II completely preempted as well. 126 F. Supp. 3d at 1022-24.

The proposed second amended complaint has twelve counts. Counts V through XII are essentially identical to the first amended complaint's eight counts, *compare* Doc. 145-1 at ¶¶ 119-256, *with* Doc. 62 at ¶¶ 43-267, and are therefore completely preempted and time-barred for the reasons set forth in the court's earlier opinions. But Counts I through IV of the proposed second amended complaint are new, and unlike the other eight counts, they allege that the NHL *actively* harmed Boogaard. Doc. 145-1 at ¶¶ 33-118. Every person has a duty not to act unreasonably in a way that injures others; the court need not interpret the CBA to determine the existence or scope of that duty, and so claims based

on the breach of that duty are not preempted. 126 F. Supp. 3d at 1024-25 (distinguishing three other decisions that "involve[d) the [uncontroversial] duty not to unreasonably harm other people" and that therefore did not find LMRA preemption); *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 completely preempted); *Stringer v. Nat'l Football League,* 474 F. Supp. 2d 894, 912-13 (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, 390 (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).

The NHL does not attempt to explain how claims alleging active misdeeds would require interpretation of the CBA. Doc. 152 at 21-30. Instead, it argues that Counts I through IV of the proposed second amended complaint are merely "repackaged" versions of the other, preempted claims. *Id.* at 21, 25. But that is not so. Counts I and II allege that the NHL *both* failed to eliminate violence in professional hockey *and* actively promoted violence. The NHL is correct that those counts are preempted to the extent they are based on allegations that the NHL failed to eliminate violence, for the same reasons that Counts V through XII are preempted. The court would need to interpret the CBA to determine whether the NHL had a duty to

eliminate violence; for instance, it would be unlikely that the NHL had such a duty if the CBA prohibited it from eliminating violence. 126 F. Supp. 3d at 1020-21. The NHL is also correct that Counts I and II cannot proceed on a theory that, once the NHL had put Boogaard at risk, it had a duty to protect him from the risk. Doc. 152 at 24. Courts in both Illinois and Minnesota have rejected the existence of such a duty. *See Domagala,* 805 N.W.2d at 25-26 (noting that the theory has "received heavy criticism from multiple jurisdictions" and "declin[ing] at this time to adopt" it "as a basis for imposing a duty of care in a negligence claim"); *Brewster v. Rush-PresbyterianSt. Luke's Med. Ctr.,* 836 N.E.2d 635, 639 (Ill. App. 2005) (rejecting the plaintiffs request to apply Restatement (Second) of Torts§ 321, which codifies the discussed theory, on the grounds that it "has been criticized for its vagueness and seemingly limitless scope" and that the Supreme Court of Illinois "has not adopted section 321 as an exception to the general rule that one will not be liable to a third party absent a special relationship").

But Counts I and II also allege that the NHL took several active and unreasonable steps that ultimately harmed Boogaard. Specifically, they allege that the NHL promoted on an affiliated website an HBO documentary glorifying the "Broad Street Bullies," a Philadelphia Flyers team known for fighting; that it created promotional films "that focus on the hardest hits that take place on the ice"; that it displayed stories about enforcers and on-ice fights on its website "on a nightly basis"; that it produced on an affiliated TV network "a weekly program segment called 'Top 10 Hits of the Week'"; and that it sponsored video games that "includ[ed]

fighting and vicious body checking." Doc. 145-1 at ¶ 57. Those actions, Counts I and II allege, cultivated a "culture of violence" in the NHL, which caused Boogaard to get into fights, which in turn caused him to develop CTE and an addiction to opioids, which in turn caused his death. *Id.* at ¶¶ 35, 69, 78. That theory of tort-that the NHL unreasonably harmed Boogaard-is viable under Illinois and Minnesota law and not preempted by the LMRA.

Counts III and IV are similar. True, those counts include allegations that the NHL failed to warn Boogaard of the risks of concussions, and they would be preempted if they relied only on those allegations. *Id.* at ¶¶ 89, 94, 97. But Counts III and IV also contain the seed of a viable, non-preempted claim: that the NHL actively and unreasonably harmed Boogaard by implicitly communicating that head trauma is not dangerous. In particular, Counts III and IV allege that the NHL made a show of "study[ing] ... repetitive concussive and/or sub-concussive brain traumas amidst its player population," which caused NHL players t "reasonably believe[] that the NHL's findings would apprise them of any and all long-term risks" of playing professional hockey. *Id.* at ¶¶ 81, 83, 86. It was not until after Boogaard's death that the NHL reported its findings. *Id.* at ¶ 90. Because the NHL had publicized that it was studying the effects of brain trauma, Counts III and IV allege, its silence on the issue implied that it had found that the effects were minor. *Id.* at ¶ 89 ("By gratuitously conducting scientific research and engaging in discussion of the long-term effects of brain injuries sustained by NHL players, and by publicly maintaining that its Concussion Program was thoroughly analyzing

concussion data, the NHL gave its players the false impression that it was working on their behalf to keep them informed and up-to-date on all medical and scientific advancements related to repetitive head trauma."). Players, including Boogaard, allegedly relied on that implication when they continued playing in a way that would give them concussions. *Id.* at ¶ 95.

The proposed second amended complaint is imperfect. Counts V through XII reiterate claims that the court has already dismissed, and Counts I through IV mix together different kinds of allegations, some completely preempted by the LMRA and some not. But federal courts use notice pleading, not code pleading; the way a plaintiff separates allegations into counts can be a useful organizational tool, but in the end what matters is whether the complaint includes allegations that, taken together, entitle the plaintiff to relief. *See Maddox v. Love,* 655 F.3d 709, 719 (7th Cir. 2011) ("The problem, as we see it, is trying to separate Maddox's claim for religious fellowship (the subject of his grievance) into separate counts (Counts 2, 3, and 4). The better approach is to examine the facts in the aggregate .... ").

So, while most of the claims in Boogaard's proposed second amended complaint are preempted by the LMRA and time-barred, a few are not, and the amendment accordingly is not futile. Boogaard's motion for leave to amend is granted. Counts V through XII are dismissed as completely preempted and barred on limitations grounds, as are the above-referenced portions of Counts I through IV. Defendants shall answer or otherwise plead to the second amended complaint (other than the dismissed

claims) by October 20, 2016. If Defendants move to dismiss any of the surviving claims, they should not do so on preemption grounds.

September 29, 2016

_____

United States District Judge

Appendix C

Case:17-2355 Document:40 Filed:5/25/18 Pages:13

In The
United States Court of Appeals
For the Seventh Circuit
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.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 1:13-cv-04846 – **Gary Feinerman**, *Judge.*

AGRUGED JANUARY 11, 2018 – DECIDED MAY 25, 2018

Before EASTERBROOK and BARRETT, *Circuit Judges*, and STADTMUELLER, *District Judge*.*

BARRETT, *Circuit Judge*. Len and Joanne Boogaard appeal the dismissal of the wrongful-death action they brought as the personal representatives of the estate of their son, Derek Boogaard. They devote their appeal almost entirely to arguments that would spark excitement–or fear–in the heart of a civil procedure student. There is a *Hanna v. Plumer* problem–whether Federal Rule of Civil Procedure 17(b)(3) controls the Boogaards' ability to bring this suit. 380 U.S. 460 (1965). There is an *Erie Railroad Co. v. Tompkins* question whether federal or state law applies if Rule 17(b)(3) does not control. 304 U.S. 64 (1938). There is a choice-of-law problem–whether Illinois, Minnesota, or New York law applies if this is a matter of state law. And there is even a relation back issue–whether, if Minnesota law applies, Federal Rule of Civil Procedure 17(a)(3)'s relation-back provision can save the Boogaards from an error that it is otherwise too late to correct.

At the end of the day, however, it is an argument to which the Boogaards give short shrift that disposes of their case: forfeiture. For the reasons that follow, we agree with the district court that by failing to respond to the National Hockey League's argument that their complaint fails to state a claim, the Boogaards forfeited any argument that it does. Their suit thus fails regardless of whether they can run the procedural gantlet of showing that they are the proper parties to bring it.

I.

Because we are reviewing a dismissal under Rule 12(b)(6), we treat the allegations contained in the Boogaards' complaint as true. That does not mean, however, that we vouch for their accuracy. It means only that at this stage of the case, the Boogaards are entitled to have every factual inference drawn in their favor. In what follows, then, we recount the facts as the Boogaards tell them in the complaint they filed against the National Hockey League.

Derek Boogaard ("Derek") was a professional hockey player with the National Hockey League ("NHL").[1] He joined the NHL in 2005 as a member of the Minnesota Wild, where he remained until the summer of 2010. During his time with the Wild, team doctors repeatedly prescribed Derek with pain pills relating to various injuries and procedures. He became addicted to those pills by 2009.

In September of that year, the NHL placed Derek into its Substance Abuse and Behavioral Health Program. The Program is the product of a 1996 agreement (which we'll call the "substance abuse agreement") between the NHL and its players' union to create a comprehensive system for addressing substance abuse among NHL players. When a player enters the Program, he is initially permitted to receive his full NHL salary without penalty so long as he complies with the Program. If the player violates the Program's rules, however, he receives penalties of increasing severity.

Pursuant to the Program, Derek was checked into a California rehabilitation facility for in-patient treatment of his opioid and sleeping-pill addictions. Upon leaving that facility, he was subject to the NHL's mandatory "Aftercare Program," which

required him to refrain from using opioids and Ambien and to submit to random drug testing. The NHL told Derek that his failure to follow the Aftercare Program conditions could result in his permanent suspension.

Derek signed a contract with the New York Rangers in the summer of 2010. Before long, he began asking trainers for Ambien, leading an NHL doctor to remind him that he could not use Ambien or opioids. But Derek still relapsed. And over the following months, NHL doctors made Derek's situation worse by violating various conditions of the Aftercare Program. They prescribed him Ambien and pain medication. They failed to impose penalties when Derek reported that he had purchased pain medications off the street over Christmas break. They again failed to impose penalties when Derek failed urine tests in January and March. And when Derek was admitted to a recovery center in California to treat opioid dependence, they allowed him to leave the facility without a chaperone. While on one such trip, Derek purchased thousands of dollars of opioids off the street; on another, he overdosed on pills and died.

The NHL removed the case to federal court. It argued that federal jurisdiction existed under the doctrine of complete preemption, which applies when the scope of a federal law is so broad that it essentially replaces state-law claims. The district court agreed and denied the estate's motion to remand. It held that at least two of the claims were founded directly on rights created under the parties' collective bargaining agreement–the claims that the NHL had breached its duties under the Program to care for Derek and address his drug addiction–and

were therefore preempted by the Labor Management Relations Act. It had supplemental jurisdiction over any remaining state claims.

The NHL then moved to dismiss the whole complaint for preemption and failure to state a claim. At that point, Len and Joanne Boogaard filed a first amended complaint naming themselves as the successor personal representatives of Derek's estate. (Someone else had initially represented it.) The amended complaint invoked Minnesota's wrongful death and survival statute, although it also kept its references to Illinois law, choosing to characterize the claims as arising under both states' statutes.

The district court deemed the NHL's still-pending motion to dismiss to be directed at the Boogaards' first amended complaint, and the court ordered the NHL to file a supplemental memorandum in support of the motion. The NHL added a new argument for dismissal: Wrongful-death and survival actions can only be brought by a court-appointed trustee under Minnesota law, and the Boogaards were not court-appointed trustees.[2] And since the time during which a Minnesota court could appoint a trustee for Derek's estate had run, this was not a problem that the Boogaards could fix. In response, the Boogaards argued that the law of Illinois, not Minnesota, determined who is entitled to bring this wrongful-death and survival action. The district court did not reach this choice-of-law problem. Instead, it granted summary judgment to the NHL on the ground that all of the Boogaards' claims were preempted.

After summary judgment, the Boogaards moved to file a second amended complaint, which added claims–still under Minnesota and Illinois

wrongful-death and survival laws–that the Boogaards said were not preempted. The NHL disputed that contention, but the district court concluded that two of the new counts put forward a "theory of tort-that the NHL unreasonably harmed Boogaard-[that] is viable . . . and not preempted by the [Labor Management Relations Act]" and the other two "contain the seed of a viable, non-preempted claim ... that the NHL actively and unreasonably harmed Boogaard by implicitly communicating that head trauma is not dangerous." It allowed the Boogaards to file the new complaint and told the NHL that it could still move to dismiss the complaint–so long as it did so on grounds other than preemption.

The NHL took the district court's suggestion. It renewed its argument, which the district court had not yet addressed, that the Boogaards' claims could only be brought by a trustee appointed pursuant to Minnesota law. In the alternative, it argued that the new complaint did not state a claim no matter which state's law applied. The Boogaards focused on the NHL's argument about the Minnesota trustee requirement.[3] In addition to the choice-of-law points they had made before, they contended that Federal Rule of Civil Procedure 17(b), which governs the choice-of-law analysis in determining a party's capacity to sue, required the court to apply Illinois law regarding who can bring a wrongful-death or survival action. The Boogaards said nothing in response to the NHL's alternative argument that their allegations, even if true, would not entitle them to relief.

The district court granted the motion to dismiss on both grounds pressed by the NHL. It held

that Minnesota law applied to the action and thus required a wrongful-death or survival action to be brought by a court-appointed trustee. In the alternative, it held that the Boogaards had forfeited their claims by failing to respond to the NHL's argument that the complaint failed to state a claim under the law of any state. This appeal followed.

II.

Before we reach the merits, we have some housekeeping to do. Every brief filed by an appellant in our court must contain a "jurisdictional statement" explaining why we have authority to decide the appeal. The Boogaards hedge in theirs. Their jurisdictional statement consists of the observation that the NHL removed the case to federal court on a theory of complete preemption. In other words, rather than assuring us that jurisdiction exists, the Boogaards essentially say "the NHL says that jurisdiction exists." The statement does not endorse (or indeed, even acknowledge) the district court's jurisdictional ruling, presumably because the Boogaards continue to disagree with it. Despite the Boogaards' evident belief that jurisdiction is lacking, their brief goes on to ask us to review the merits of the district court's decision.

This is insufficient. If a party believes that we lack jurisdiction, it has an obligation to say so. We thus ordered the parties to file supplemental briefs on the jurisdictional issue so that we could discharge our obligation to determine whether we have the authority to decide this appeal.

The Boogaards come clean in their supplemental brief. They argue that the Labor Management Relations Act does not completely preempt their state-law claims and that there is thus no basis for federal jurisdiction.[4] The NHL, on the other hand, maintains that the district court got the jurisdictional issue right.

The district court did get it right. The doctrine of complete preemption "confers exclusive federal jurisdiction in certain instances where Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim." *Franciscan Skemp Healthcare, Inc. v. Central States Joint Bd. Health & Welfare Tr. Fund,* 538 F.3d 594, 596 (7th Cir. 2008). In this case, § 301(a) of the Labor Management Relations Act "displace[s] entirely any state cause of action" for violation of a collective bargaining agreement. *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr.,* 463 U.S. 1, 23 (1983). It does not matter that the lawsuit styles itself as something other than a breach-of-contract action. If the suit's claims are "founded directly on rights created by collective-bargaining agreements" or are "substantially dependent on analysis of a collective-bargaining agreement," then § 301 governs those claims. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 394 (1987) (citation omitted).

The Boogaards' complaint makes plain that at least two of their initial claims were based on a duty allegedly contained within the substance abuse agreement. It alleges that by administering the Program established by the substance abuse agreement, the NHL assumed the duty to curb, cure, and monitor Derek's drug addiction. And it contends that the NHL breached that duty when it violated

the procedures it had agreed to use in administering the Program. For example, the Boogaards allege that NHL doctors provided Derek with prescriptions for pain medication even though the rules of the Program forbade Derek to take any opioids and that the NHL allegedly failed to penalize Derek in accordance with the Program rules when urine tests came back positive for prohibited drugs. The complaint frequently couches its accusations of duty and breach in terms of obligations and violations of the Program, leading unavoidably to the conclusion that the Boogaards' claims rely on applying and interpreting the substance abuse agreement, which dictated the Program's terms.

Now, this only matters for purposes of § 301 of the Labor Management Relations Act if the substance abuse agreement is part of the collective bargaining agreement between the NHL and the NHL Players' Association. The Boogaards say it's not. But the collective bargaining agreement had an integration clause stating that this agreement "and any existing letter agreements between the parties that are not inconsistent with this Agreement" were the "entire understanding between the parties." The substance abuse agreement was an existing letter agreement between the parties, and the Boogaards have pointed to no inconsistency between it and the collective bargaining agreement. Moreover, the collective bargaining agreement states that the Program will still handle certain categories of substance abuse. This reference would not make sense if the parties intended the collective bargaining agreement to supersede the substance abuse agreement.

In sum, the district court correctly concluded that it had subject-matter jurisdiction over the claims asserting that the NHL breached its obligations under the substance abuse agreement. And even if that created federal question jurisdiction over only some of the claims in the complaint, the district court had supplemental jurisdiction over the rest. *See* 28 U.S.C. § 1367(a) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III ... L."). The Boogaards' late-coming jurisdictional challenge therefore fails.

III.

This appeal presents a curious situation. The Boogaards devote almost their entire brief to attacking the district court's ruling that the Minnesota trustee requirement bars their suit. But that was not the only ground on which the district court dismissed the case–it held in the alternative that the Boogaards had forfeited their claims by failing to respond to the NHL's argument that they failed to state a claim under the law of either Minnesota or Illinois. Thus, even if the Boogaards are right about the trustee requirement, they still lose if the district court's alternative holding stands.

It is hard to fault the Boogaards for lodging a weak challenge to the district court's forfeiture holding, because there are no strong arguments available against it. Their opener is hardly a knockout: they assert that alternative holdings

should be disregarded as "mere dictum." That contention is meritless. As an initial matter, it is well settled that we will affirm a district court's judgment if any of several alternative holdings supports it. *See, e.g., Maher v. City of Chicago,* 547 F.3d 817, 821 (7th Cir. 2008). More fundamentally, the Boogaards are wrong to characterize alternative holdings as "dictum." The rule is the exact opposite: "It is blackletter law that 'where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.'" BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 122 (2016) (citations omitted). If alternative holdings have precedential force as a matter of stare decisis, one can hardly argue that they are not independently sufficient grounds on which to affirm the judgment they support.

The Boogaards' second argument is not much better. They do not–and cannotdeny that a district court may hold a claim forfeited if a plaintiff fails to respond to the substance of the defendant's motion to dismiss. *See, e.g., Kirksey v. R.J. Reynolds Tobacco Co.,* 168 F.3d 1039, 1043 (7th Cir. 1999); *Stransky v. Cummins Engine Co.,* 51 F.3d 1329, 1335 (7th Cir. 1995). They argue, however, that the district court was wrong to do so in this instance. According to the Boogaards, the district court implicitly rejected a Rule 12(b)(6) argument when it permitted them to file an amended complaint adding the new claims. They insist that they were thus justified in believing that the NHL was simply regurgitating an argument that it had already lost.

The record belies that contention. The district court entered summary judgment on the Boogaards' first amended complaint solely on preemption

grounds. When the NHL opposed the Boogaards' request to file a second amended complaint, it insisted that amendment would be futile because the proposed second amended complaint likewise contained only preempted claims. That preemption point was the NHL's only futility argument against amendment; it did not argue that the new claims also failed to state a claim under state law. The district court held that § 301 did not preempt the new claims in the proposed complaint and granted the Boogaards' motion for leave to amend. It then invited the NHL to either answer the complaint or move to dismiss it, but the court cautioned that if the defendants chose to move to dismiss any surviving claims, "they should not do so on preemption grounds."

The Boogaards place great emphasis on the district court's use of the word "viable" to describe the new counts No. 17-2355 13 in the second amended complaint. But in context, it is plain that the court was merely communicating its view that these counts could survive the only challenge then lodged against them: the NHL's argument that they were preempted. The question whether the Boogaards' allegations, if true, would entitle them to relief under state law was not before the court. And lest there be any doubt about the breadth of the court's ruling, its express instruction that the NHL could move to dismiss on non-preemption grounds makes it even clearer that the court was not purporting to anticipatorily resolve other grounds for dismissal.

If the Boogaards misunderstood the district court, the NHL's motion to dismiss under Rule 12(b)(6) should have been a wake-up call. When the

NHL moved to dismiss on grounds the Boogaards claim to believe were impliedly foreclosed, the prudent course was to clarify matters with the district court or respond to those arguments anyway. By remaining silent, the Boogaards took the risk that the district court would hold their claims forfeited. The court acted well within its authority when it did.

We will not entertain the Boogaards' alternative request that we remand to allow them to file an amended complaint. Their complaint was dismissed in the alternative for forfeiture, and amending the underlying complaint does not cure their forfeiture. Furthermore, the Boogaards have not explained in any detail what amendments they would make, which is itself reason to deny the request. *Gonzalez-Koeneke v. West,* 791 F.3d 801, 808-09 (7th Cir. 2015). The judgment of the district court is AFFIRMED.

[*] Of the Eastern District of Wisconsin, sitting by designation.

[1] We call him "Derek" to distinguish him from his parents, Len and Joanne Boogaard, who represent Derek's estate in this appeal.

[2] Minnesota law has a special statutory regime for appointing a trustee to prosecute wrongful-death and survival actions on behalf of the decedent's living spouse and next of kin. Being appointed as such a trustee is different from being appointed personal representative of the decedent or estate. *Steinlage ex rel. Smith v. Mayo Clinic Rochester*, 435 F.3d 913, 915-17 (8th Cir. 2006). *Ortiz v. Gavenda,* 590 N.W.2d 119, 124 (Minn. 1999) (stating that the appointment

of a wrongful-death trustee is an exercise of the principle that "those entitled to recovery as a result of the wrongful death shall be represented by the trustee without compromise11). The Boogaards were appointed as the personal representatives of Derek's estate, but they were never appointed as trustees for wrongful-death and survival actions.

[3] They also responded to the NHL's contention that the First Amendment protected it from the Boogaard's claim that the NHL promoted violence. The parties' arguments on that issue are not relevant to this appeal.

[4] Diversity jurisdiction does not exist, because the parties cannot satisfy the complete diversity of citizenship requirement.

APPENDIX D

Case: 17-2355 Document: 44 File: 06/25/2018
Pages: 1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 25, 2018
Before

FRANK H. EASTERBROOK, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*
JOSEPH P. STADTMUELLER, *District Judge*

No. 17-2355
LEN BOOGAARD AND JOANNE
BOOGAARD, Personal Representatives
of the Estate of Derek Boogaard,
Deceased,
Plaintiffs/Appellants,

v.
NATIONAL HOCKEY LEAGUE,
NATIONAL HOCKEY LEAGUE BOARD OF
GOVERNORS, AND GARY AND GARY
R. BETTMAN, Commissioner
Defendants/Appellees.

Appeal from the United States

District Court for the Northern District
of Illinois, Eastern Division

No. 1:13-cv-04846

Gary Feinerman,
Judge.

O R D E R

Plaintiff-Appellant filed a petition for rehearing on June 8, 2018. All members of the original panel have voted to deny rehearing.

Accordingly, **IT IS ORDERED** that the petition for rehearing is **DENIED**.