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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: National Hockey League  
Players' Concussion Injury  
Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota  
Courtroom 7B  
November 15, 2016  
3:00 p.m.

BEFORE THE:

HON. SUSAN RICHARD NELSON, U.S. DISTRICT COURT JUDGE

**FORMAL STATUS CONFERENCE**

Official Court Reporter: Heather Schuetz, RMR, CRR, CRC, RSA  
U.S. Courthouse, Ste. 146  
316 North Robert Street  
St. Paul, Minnesota 55101

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## 1 P R O C E E D I N G S

## 2 I N O P E N C O U R T

3 (Commencing at 3:04 p.m.)

4 THE COURT: Well, I have to admit that the Defendant  
5 did plead on Monday morning, but I figured you already had  
6 your airfare purchased and all that, so anyways, it was  
7 another example of a 3:00 that we could have had at 9:30, but  
8 he decided on Monday morning to plead, not any earlier.

9 We are here today in the matter of the National  
10 Hockey League Players' Concussion Injury Litigation. This is  
11 14-MDL-2551.

12 Let's begin with the Plaintiffs.

13 Mr. Zimmerman.

14 MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor.  
15 Charles Zimmerman for the Plaintiffs.

16 MR. STEPHEN GRYGIEL: Good afternoon, Your Honor.  
17 Steve Grygiel for the Plaintiffs.

18 MR. MARK DEARMAN: Mark Dearman for the Plaintiffs.  
19 Good afternoon.

20 MR. BRIAN GUDMUNDSON: Good afternoon, Your Honor.  
21 Brian Gudmundson for the Plaintiffs.

22 MR. MICHAEL CASHMAN: Good afternoon, Your Honor.  
23 Michael Cashman for the Plaintiffs.

24 MR. SCOTT ANDRESEN: Good afternoon, Judge. Scott  
25 Andresen also for the Plaintiffs.

1           And on the phone today we have Jeff Klobucar, James  
2 Anderson, Tom Byrne, Bryan Bleichner, Bill Gibbs, Michael  
3 Flannery, and David Goodwin.

4           THE COURT: Very good.

5           Mr. Beisner?

6           MR. JOHN BEISNER: Good afternoon, Your Honor. John  
7 Beisner on behalf of Defendant, NHL.

8           MS. LINDA SVITAK: Good afternoon, Your Honor.  
9 Linda Svitak on behalf of the NHL.

10          MR. MATTHEW MARTINO: Good afternoon, Your Honor.  
11 Matt Martino for the NHL.

12          MR. JOSEPH PRICE: Good afternoon, Your Honor. Joe  
13 Price on behalf of the NHL.

14          And on the phone for the NHL, we have Mr. David  
15 Zimmerman and Ms. Julie Grand from the NHL; Mr. Shepard  
16 Goldfein, James Keyte, and Ms. Jessica Miller from Skadden.

17          THE COURT: Very good. Thank you.

18          I also have one other scheduling issue to raise with  
19 you. We currently have a conference, I believe it's informal,  
20 scheduled for January 31st, and I'm wondering if we could back  
21 that up to January 26th. So, why don't you discuss it -- you  
22 don't have to decide this moment -- and see if that works for  
23 you.

24          MR. CHARLES ZIMMERMAN: So the date the Court  
25 prefers is the 26th?

1 THE COURT: It is, yes.

2 MR. CHARLES ZIMMERMAN: In the morning or afternoon?

3 THE COURT: Well, what would your schedule permit?

4 MR. CHARLES ZIMMERMAN: My schedule is pretty open  
5 (laughter).

6 THE COURT: Okay.

7 Mr. Beisner?

8 MR. CHARLES ZIMMERMAN: I have a dentist appointment  
9 at 8 (laughter).

10 THE COURT: This is way too much information.

11 MR. JOHN BEISNER: May we all go with you  
12 (laughter)?

13 MR. CHARLES ZIMMERMAN: Absolutely, John.

14 MR. JOHN BEISNER: Either would work fine, Your  
15 Honor.

16 THE COURT: Okay. All right. I will take a look,  
17 then, at the 26th, and I'll schedule -- reschedule it for the  
18 26th. So, we will not have a conference on the 31st of  
19 January. Okay.

20 Let's take a look at the agenda, then, and we'll  
21 begin with document production if there's anything really to  
22 talk about.

23 Mr. Martino.

24 MR. MATTHEW MARTINO: Nothing from us, Your Honor.

25 THE COURT: Very good. Okay.

1 MR. BRIAN GUDMUNDSON: I feel compelled to walk up  
2 to say there's nothing from us further either, Your Honor.

3 THE COURT: Okay. Very good. Wow.

4 All right. Let's talk about Fact Sheets, then. Who  
5 wishes to be heard on the Fact Sheets?

6 Mr. Beisner.

7 MR. JOHN BEISNER: Your Honor, I think this is also  
8 a brief item, as well. We conferred with Mr. Cashman about  
9 seven Fact Sheets that we had previously given extensions on  
10 and were at that point overdue. He's assured us that those  
11 seven, we will see on Monday, November 28th, so I think we  
12 have a due date in place on those. I will not read the names  
13 into the records since that will -- but we know which ones  
14 they are.

15 THE COURT: Okay. Very good.

16 Mr. Cashman?

17 MR. MICHAEL CASHMAN: That's correct. We've  
18 cooperated on those, and we are going to be working out a  
19 stipulation for the dismissal of Deron Quint as we previously  
20 discussed before.

21 THE COURT: Okay. Is that one of the seven, or are  
22 there seven others?

23 MR. MICHAEL CASHMAN: This is seven others. Deron  
24 Quint is the only one who is -- who has not provided a Fact  
25 Sheet. And as I've explained to the Court before, Mr. Quint

1 has been in Russia, we've been unable to reach him and get the  
2 Fact Sheet from him, so we'll stipulate to dismissal without  
3 prejudice for Mr. Quint.

4 THE COURT: Okay. But there are seven other Fact  
5 Sheets that will be turned over to the NHL on November 28th.  
6 Is that correct?

7 MR. MICHAEL CASHMAN: That's correct. And that  
8 would be all the Fact Sheets, then, that are outstanding.

9 THE COURT: Okay. Thank you, Mr. Cashman.

10 MR. MICHAEL CASHMAN: Thank you.

11 THE COURT: All right.

12 Updates on deposition scheduling?

13 Mr. Grygiel.

14 MR. STEPHEN GRYGIEL: Thank you, Your Honor. We are  
15 going to complete the deposition of Gary Leeman, one of the  
16 named Plaintiffs, on November the 21st, starting at 8:30 in  
17 the morning. Half his deposition has already been complete.  
18 We trust we'll be done in the four hours or three-and-half  
19 that are remaining. That is Monday.

20 I have asked Mr. Beisner to consider a couple of  
21 other depositions we'd like to take. Under Pretrial Order  
22 No. 6, paragraph five, each side is allotted 40 fact  
23 witnesses. By my count, I believe the Plaintiffs have taken  
24 27 and shared in depositions with the NHL of another seven  
25 where we have split the time up, so we certainly have room for



1 additional depositions.

2 I believe it was back towards the end of -- or  
3 beginning -- sometime in the beginning of August, I proposed a  
4 couple of names to Mr. Beisner -- Mark Lovell, Dave Dryden,  
5 and Kris King, I think, were the three -- and we haven't come  
6 to ground on whether and when we would take those. At the  
7 time, of course, the class certification deadline had not been  
8 moved and we were both cognizant that there would be a fair  
9 bit of work being done there. Now with that date, of course,  
10 having been extended until December and with some openings in  
11 the schedule and the fact discovery period starting to loom  
12 closer, we'd like to get these depositions scheduled, as well  
13 as the fourth one, Mr. Walkom, W-a-l-k-o-m.

14 I trust I'll be able to work these out with  
15 Mr. Beisner and get those scheduled sometime in the near  
16 future. Other than that, Your Honor, I think on deposition  
17 scheduling, we are there.

18 THE COURT: Okay. Very good. Thank you.

19 Mr. Beisner?

20 MR. JOHN BEISNER: Thank you, Your Honor. We will  
21 confer with Mr. Grygiel on those dates. I think the one  
22 concern I would raise is that we will be getting shortly  
23 Plaintiffs' class certification motion, and I think the  
24 priority at that point will be to get the expert depositions  
25 completed so we're on the schedule with that. But we'll talk

1 to him about these, as well, but I think that needs to have  
2 priority. If these are needed for class certification, they  
3 should have been taken on the earlier schedule. I think these  
4 are on merits issues, so -- but we'll -- we'll discuss this  
5 with Mr. Grygiel.

6 THE COURT: Okay. Very good.

7 Mr. Grygiel, are these four depositions, do you  
8 intend to use those for your class certification briefing  
9 or --

10 MR. STEPHEN GRYGIEL: No, we don't, Your Honor.

11 THE COURT: These are on the merits?

12 MR. STEPHEN GRYGIEL: These are on the merits, Your  
13 Honor. But we do want to get them scheduled. And I would,  
14 with respect, point out they have an awful lot of lawyers on  
15 their side, and I'm sure they can get them covered in due  
16 course, as we will.

17 THE COURT: We'll give everything priority.

18 MR. STEPHEN GRYGIEL: Thank you, Your Honor.

19 THE COURT: All right. Anything more about  
20 depositions?

21 **(None indicated.)**

22 THE COURT: Okay. Let's turn our attention, then,  
23 to the Zeidel Estate discovery.

24 MR. JOHN BEISNER: Your Honor, I believe this is  
25 mostly by way of update, and I think most of the information

1 about the status of this discovery is laid out in the report.  
2 I just wanted to highlight several items. One is we're  
3 working through with Mr. Sinclair some issues on Mr. Bradley's  
4 responses. And I don't think there's an issue here for the  
5 Court to resolve, but we've got some questions about the scope  
6 of what he is providing as class representative. The  
7 responses seem to say, I'm going to tell you what I know about  
8 these issues, and with Mr. Bradley -- Mr. Zeidel being  
9 deceased, we were hoping there would be some collection of  
10 information, although some of that is coming from the family  
11 members and others who we will be getting discovery from and  
12 depose.

13 So, I don't think that there's need to address that  
14 issue now. I just wanted to flag that, for example, the  
15 interrogatory responses indicate that they're -- he --  
16 Mr. Zeidel had no e-mail account. The production we've gotten  
17 from some of his children indicate there is an e-mail account  
18 because we have e-mails. So, those are the sorts of things  
19 we'll need to work out, but I don't think they need the  
20 Court's attention right now.

21 Just going down the list, on third-party subpoenas,  
22 we have those out and they're in process. The only thing I  
23 wanted to note there is that the subpoena to the CTE Center in  
24 Boston, we're working through with Counsel for Boston  
25 University, and that may take a little while to be completed.

1 But just -- we'll get the documents from them as soon as we  
2 can and obviously share them with Plaintiffs' counsel when  
3 received. But just wanted to flag that that's taking a little  
4 longer to work through, but we'll share those as soon as we  
5 get them.

6 And I think the only other issue is we've not  
7 received any documents yet from Joan Bradley. Her deposition  
8 is scheduled for November 28th, but as of yet we have no  
9 discovery. Now again, we have no formal subpoena outstanding  
10 to her, and I think Mr. Sinclair has been working on getting  
11 those materials that we've requested from her. But we don't  
12 have those as of yet.

13 But I think beyond that, Your Honor, the deposition  
14 dates that we worked out are all laid out in the reports. I  
15 don't think we need to belabor that any longer, but just  
16 wanted to highlight those several issues.

17 THE COURT: Thank you.

18 Any response, Mr. Zimmerman?

19 MR. CHARLES ZIMMERMAN: I think the Zeidel discovery  
20 is definitely taking place and there's lots of it and, um,  
21 maybe more than need be. But we'll leave that to lay itself  
22 out as it does. But there is an issue with Boston University  
23 that I think the Court needs to be aware of, and they're  
24 objecting quite vigorously now to all the CTE studies and the  
25 research and the -- the -- the very, very voluminous

1 deposition subpoena *duces tecum* requests. I believe that's  
2 what they are, requests for production. I think they were  
3 subpoena *duces tecum*.

4           And that is going to get before this Court, I think.  
5 I just got a letter today -- I'm not going to read it to  
6 you -- but from Boston University's Counsel objecting,  
7 continuing to object, and now they -- just got an e-mail this  
8 morning -- this afternoon as I was sitting down saying they  
9 want to have a conference call. So, this is going to come  
10 before the Court, and so I just want the Court to be aware of  
11 it. I'm not trying to have you prejudge it in any way. I  
12 don't think we have to argue it. But the question of the  
13 scope of what Boston University must turn over in this  
14 particularized issue of Mr. Zeidel and his being seen at  
15 Boston or his tissues or his slides, that's going to get  
16 before the Court. I don't think it will push anything off. I  
17 hope it doesn't. It won't push off our filing, but it's  
18 percolating, and it's percolating pretty firmly at the --

19           THE COURT: Have you talked to Counsel about their  
20 intention of bringing the motion here or have they thought  
21 about bringing it in Boston? What is their idea?

22           MR. CHARLES ZIMMERMAN: That's the purpose of the  
23 conference call that we're setting up, and I think we're going  
24 to have it tomorrow with their Counsel, and we're going to  
25 find out what the logistics are with regard to how to bring

1 that to head. We're going to, of course, suggest that it be  
2 done here. I'm going to suggest that they even be able to  
3 maybe perhaps do it telephonically if possible. That would be  
4 with the Court's consent, but, you know, the -- we're  
5 having -- there's been a number of exchanges of letters that  
6 have now been exchanged, of objections, and the scope is large  
7 and somebody is going to have to call the parameters on this.

8 THE COURT: Okay. All right.

9 Mr. Beisner?

10 MR. JOHN BEISNER: Your Honor, I have to admit to  
11 some bafflement on this issue. We received back in October,  
12 on October 20th, a letter from Mr. Elswit who is the associate  
13 general counsel of Boston University who has been dealing with  
14 this. But with Mr. Connolly in the lead, we've now had  
15 several calls with Mr. Elswit and one other member of his  
16 legal staff. And I thought we were making considerable  
17 progress in reaching some conclusions on that.

18 I think there were some concerns about burden that  
19 he raised to us, but we've indicated to him that we need to  
20 understand a little better what we're talking about, but that  
21 the League would be willing to entertain assisting, not  
22 itself, but financing assistance to deal with those issues.  
23 So, I'm a little concerned about that because that is not the  
24 impression that we've gotten from the calls with Mr. Elswit  
25 that we've got some major bottle brewing. And indeed I think

1 at the conclusion of a call we had with him this morning I  
2 think that we both expressed the hope we could work that out.

3 I would hope that there's not some lobbying going on  
4 here to limit the production. I mean, this is the basis --  
5 what we're asking questions about are the basis for the  
6 postmortem diagnosis that was given here and how Boston  
7 University's CTE Center goes about doing that. And we're  
8 going to need that information, everybody will. And so I'm  
9 hopeful that we're not -- there's not some lobbying going on  
10 here to restrict that production because I think we've made  
11 significant progress with Mr. Elswit on reaching an agreement  
12 on what should be produced.

13 THE COURT: Mr. Zimmerman?

14 MR. CHARLES ZIMMERMAN: I don't know who your  
15 lobbyists are, John, but we're not lobbying anybody. I just  
16 got the letter to say they vigorously oppose and object, and  
17 I'm not lobbying anybody to do anything other than the last  
18 e-mail I had was how do we handle matters to get before the  
19 Court. So, I'm not lobbying anybody. I'm earmarking a  
20 problem that I think is percolating. If it becomes no problem  
21 at all, so be it, but I think it is going to be a problem for  
22 Boston University given the scope of what their objections in  
23 writing are, but we'll take them as they come.

24 THE COURT: All right. Well, the Court will wait  
25 and see, I guess.

1 MR. STEPHEN GRYGIEL: Your Honor, if I might?

2 THE COURT: Yes, Mr. Grygiel.

3 MR. STEPHEN GRYGIEL: I just wanted to be sure that  
4 the record was clear, famous last words, on the Zeidel  
5 discovery. I have a mission from Mr. Sinclair to make sure  
6 the Court is aware of what's been done there, and I'm sure  
7 Mr. Beisner will correct me if I'm wrong.

8 With respect to interrogatories, the Estate timely  
9 responded on October 25. Mr. Beisner raised two issues in  
10 response. Mr. Sinclair addressed those issues, and I believe  
11 that is where that stands. There hasn't been anything  
12 further. On the request for documents, the Estate timely  
13 responded on October 25 and hadn't heard anything in response  
14 there. The report that's before the Court, the status report,  
15 I think was a little incomplete.

16 As to document productions, Jay Zeidel has nothing  
17 to produce. Sandy Zeidel has made a production in response to  
18 a subpoena. Karen Zeidel has made a production in response to  
19 a subpoena. Marie Zeidel has made a production in response to  
20 a subpoena. The lawyer for the Estate, Meredith Seigle, has  
21 made a production. And my understanding is that the executor  
22 for the Estate, Mr. Bradley, has also made a production.

23 THE COURT: Okay.

24 MR. STEPHEN GRYGIEL: And the deposition dates, I  
25 understand, have all been agreed to, and that's five of them.



1 THE COURT: Mr. Beisner comments that perhaps  
2 Mr. Zeidel did have an e-mail account. Have you explored that  
3 or do you want to raise that with Mr. Sinclair?

4 MR. STEPHEN GRYGIEL: I would have to raise that  
5 with Mr. Sinclair. That's news to me.

6 THE COURT: Okay.

7 MR. STEPHEN GRYGIEL: Thank you, Your Honor.

8 THE COURT: You bet.

9 Mr. Beisner?

10 MR. JOHN BEISNER: Yes, Your Honor. The -- that's  
11 one of the two issues that was in the letter that I sent to  
12 Mr. Sinclair on November 4th was the e-mail -- was the e-mail  
13 issue, so that is one of the issues that was raised. Again,  
14 I'm not sure there's anything to be brought before the Court,  
15 and I didn't mean to suggest that these other productions  
16 hadn't occurred. We just have that issue, I think, with  
17 Mr. Bradley and the scope of his responses.

18 THE COURT: Okay. All right.

19 All right. Anything else about the Zeidel Estate  
20 discovery?

21 **(None indicated.)**

22 THE COURT: All right. I understand we have an  
23 issue with exhibits that Plaintiffs intend to use with their  
24 class certification motion.

25 MR. CHARLES ZIMMERMAN: I think what we really want

1 to put forth is some understanding of how the Court believes  
2 we should be dealing with the declassification of the  
3 documents that are going to be filed in support of the motion  
4 on December 9th. We're trying -- we want to know the rules of  
5 engagement, and we want to do it expeditiously so it doesn't  
6 become such an elongated process that it just burns up  
7 resources and time of the Court. We know there's a change in  
8 the Magistrate of this -- of -- of the Judge assigned to these  
9 proceedings, and so what we thought we'd do is just have some  
10 informed discussion with the Court as to what the Court  
11 perceives is the proper way for us to seek the appropriate  
12 de-designation of legitimately-filed documents in support.

13 THE COURT: What is the volume we're talking about?

14 MR. CHARLES ZIMMERMAN: It's -- there are lots --  
15 what's the volume?

16 THE COURT: That you wish to attach to your briefing  
17 on December 9th, I guess, is the question.

18 MR. MICHAEL CASHMAN: Well, Your Honor, the  
19 objections that the NHL is raising and would be raising are  
20 the same objections that have been previously asserted. And  
21 let me just step back for a moment, if I may.

22 MR. CHARLES ZIMMERMAN: She asked the volume of the  
23 documents.

24 MR. MICHAEL CASHMAN: Right. And the total volume  
25 of documents that are potentially in dispute right now are

1 about -- about 35 to 40 documents, many of which the Court has  
2 seen before. And that's why I wanted to take a step back for  
3 a second here on this because I provided a list of all the  
4 documents or most of the documents, anyway, that we intend to  
5 attach as exhibits to our class certification motion.

6 So, I provided a list of 120-some-odd documents to  
7 the NHL, and then after we got some issues straightened out  
8 about the Bates stamp numbers and such, we did have some  
9 dialogue, and the NHL de-designated some that were still  
10 confidential. Some of those on our list were already  
11 de-designated. We had a little bit of dialogue again last  
12 Friday about the remaining documents, some of which are  
13 redactions are being proposed and some for which the NHL  
14 suggests de-designation -- or that confidentiality be  
15 maintained in total.

16 And what we've suggested, because we wish to avoid  
17 the burden of filing under seal for exhibits which are clearly  
18 going to be relevant to the -- our class certification motion,  
19 we want to get this resolved if possible before the filing on  
20 December 9th so that the brief and the exhibits could be filed  
21 publicly. And what I've suggested to the NHL, if it's okay  
22 with the Court, given the limited volume of documents and the  
23 Court is familiar with the issues and really we're going to be  
24 addressing about four objections that have been applied across  
25 these documents, and what I'd suggested to the NHL is that if

1 the Court is agreeable, that the parties submit simultaneous  
2 briefs by next Tuesday, November 22nd, and then that the  
3 parties submit simultaneous responsive briefs on the 29th of  
4 November. That's a week later.

5 And that we think the responsive pleading doesn't  
6 have to be very long, no more than 10 pages, really. And the  
7 reason I think that the Court can address this proactively is  
8 the objections that the NHL raised were commercially and  
9 competitive, sensitive documents; and then they had the  
10 chilling of deliberations objection the Court may recall; and  
11 then chilling of the processes for supplemental discipline and  
12 rules. Those are essentially the three -- the three main  
13 areas into which most of these documents would fall. And it's  
14 our view that under the heightened burden that the NHL would  
15 have to meet with respect to a substantive motion such as a  
16 class certification motion, that these documents will be  
17 public records, will be judicial records under the law, and we  
18 can address those affirmatively and hopefully get it resolved  
19 before the filing date of December 9th.

20 So, that's our proposal.

21 THE COURT: Okay.

22 Mr. Martino.

23 MR. MATTHEW MARTINO: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. MATTHEW MARTINO: So, first we -- this is the

1 first time we heard about this was this morning on the  
2 potential expedited schedule, and as an initial matter, we  
3 question the need to expedite the process. As in the past,  
4 the Plaintiffs can file their motion under seal and we can  
5 deal with the motion to de-designate in a more orderly,  
6 reasonable schedule by which the Court can take time to make a  
7 reasoned analysis. The Plaintiffs haven't articulated any  
8 reason for the expedited schedule other than, we don't want to  
9 file the motion publicly, which they may be able to do down  
10 the road at least for those particular documents, should they  
11 be de-designated.

12 If there was any reason, I think that the motion  
13 needed to be filed prior to class briefing, the Plaintiffs  
14 could have made this months ago. They've had these documents  
15 for a long time, they've been working on this class cert brief  
16 presumably for many months now. It was originally due in  
17 September. It's kind of surprising to hear about this very  
18 close to the class certification briefing.

19 Furthermore, we need to marshal Declarations. While  
20 there may be discrete issues with these 40 or so documents out  
21 of the 124 that we're maintaining or redacting, we'll still  
22 need to marshal our evidence, and the schedule doesn't really  
23 provide us with sufficient time to do so. One week or even  
24 two weeks with the Thanksgiving holiday is not a lot of time  
25 to get the Declarations we would need.

1           On the issue of whether these are judicial records,  
2 just filing documents with a motion for class certification  
3 does not transform those documents into judicial records. In  
4 fact, on the prior motion from last year, you'll recall that  
5 Judge Mayeron found with respect to those documents that they  
6 were not judicial records, they were just normal discovery  
7 documents, and that a good cause standard applied. And then  
8 she further continued that if and when the documents are used  
9 by the parties and, quote, relied upon by the Court in  
10 merits-based motions or at trial, Plaintiffs may then seek to  
11 de-designate the documents based on the standards applicable  
12 to judicial records.

13           Now, that is also consistent with Judge Mayeron's  
14 ruling in the *Krueger* case which you also heard on appeal  
15 where Judge Mayeron found that as in other courts, not all  
16 documents filed by parties are judicial records; only those  
17 documents that are relevant to and integrally involved in the  
18 resolution of the merits of a case are judicial records. So,  
19 just by saying, we're going to file these so they become  
20 judicial records or even just by filing them, they do not  
21 become judicial records. And I think it would be hard to make  
22 this decision, this de-designation decision, in the abstract  
23 without actually seeing the motion and seeing for which  
24 propositions they're relying upon the documents.

25           In fact, one could argue you shouldn't be dealing

1 with the de-designation until the decision on class  
2 certification is made because then we would find whether the  
3 Court was relying upon them on a motion. In fact, as Judge  
4 Mayeron found in that *Krueger* decision, class certification,  
5 the Eighth Circuit hasn't even ruled yet about whether class  
6 certification is considered a merits-based motion. So, that  
7 would be another argument we would have at our disposal. I  
8 just think that doing this on an expedited schedule by which  
9 we have to rush through our Declarations and doing it in the  
10 abstract without knowing upon which theories they're using to  
11 rely on these documents, whether they actually are  
12 merits-based and thus may become judicial records at some time  
13 in the future seems futile when they could file their brief  
14 under seal or at least these portions, these documents under  
15 seal, and then we can deal with that on a more orderly basis.

16 THE COURT: Mr. Cashman?

17 I have to say, Mr. Martino makes a good point. I  
18 mean, you're certainly welcome to bring a motion, but why it  
19 needs to be expedited, I mean if there was a -- you knew about  
20 this long ago. I mean, why the last minute like this?

21 MR. MICHAEL CASHMAN: Well, of course we had to  
22 decide which exhibits that we wanted to use, and we went  
23 through the meet and confer --

24 THE COURT: But you thought you were going to file  
25 the motion in September. I mean, this process must have

1 started a long time ago. I don't know why I would put the  
2 Defense to that prejudice because you made these decisions so  
3 close to the filing date, you see. And I also don't think it  
4 really matters whether on the date you file everything is --  
5 every decision has been made about a document. We'll do this  
6 in the orderly course. And if they're de-designated, then the  
7 record will so reflect and you can refile with the,  
8 de-designated document. But I'm not sure why we have to rush  
9 like this. I'm not sure that's fair.

10 MR. MICHAEL CASHMAN: Well, that's why I propose  
11 simultaneous briefing, Your Honor, and I think it would be  
12 fair. Mr. Martino is really -- I think is making this a much  
13 more complicated process than it would be. And if the briefs  
14 came in and the Court determined that it needed more or needed  
15 to actually see the class cert brief, obviously that would be  
16 one possibility. But these issues, the issues on the  
17 objections that the NHL has raised are the same that they've  
18 raised before.

19 THE COURT: But you're giving the Court less than  
20 nine days to rule, you know. It -- that's not going to work.  
21 I have to tell you right now. You know, Judge Mayeron is  
22 trying to finish up, and I just can't ask her to do something  
23 that quickly. I know that the first time around for  
24 de-designations, it took much longer. And I think she has a  
25 protocol where you have to include an explanation with each



1 document, and I don't know why we would vary from that  
2 protocol. I'm not -- I just don't feel it's right to ask her  
3 to do something on an urgent basis because it took until now  
4 to reach this impasse.

5 MR. MICHAEL CASHMAN: Well, that's fine, Your Honor.  
6 We'll proceed that way. We had hoped to present the issue  
7 directly to the Court to at least get that process moving more  
8 quickly because this isn't going to be a voluminous project  
9 like it was before. And I'd like to just touch on a couple of  
10 the points that Mr. Martino raised, and I raise these in the  
11 context that this is going to be a simpler process, I think.

12 Mr. Martino suggested, for example, that we have to  
13 wait until -- we have to wait until the class cert motion is  
14 decided, for example, so that we could determine what  
15 documents are actually relied upon. And that's -- that  
16 question about whether there has to be actual reliance, for  
17 example, is a legal question that is ultimately, I think,  
18 going to be directed to the Court. We suggest it should be  
19 decided by the Court, and it's a pretty simple,  
20 straightforward issue.

21 We think that the Plaintiff -- or pardon me, that  
22 the Defendant is incorrect about the actual reliance standard.  
23 We know, for example, in the *Target* case that the  
24 declassification of the class certification exhibits were  
25 decided before the -- before the class cert motion was

1 resolved and that a more expansive definition of what  
2 constitutes a judicial record was applied in the *Target* case.  
3 We have other authority that we would like to present directly  
4 to the Court that the actual reliance standard isn't the --  
5 isn't the standard for a substantive motion. Mr. Martino made  
6 a -- several comments about the prior process that we went  
7 through and about the *Krueger* decision. But the prior process  
8 that we went through was under a different standard because we  
9 are talking about documents that were produced in discovery,  
10 so we are looking at the good cause standard under Rule 26(c);  
11 that's not going to be the standard here.

12 So, there's -- there are a couple of legal issues  
13 that when we have the framework and if the Court decides them,  
14 I don't think the Court is even going to have to look at the  
15 individual documents for the most part, which makes the  
16 protocol that we followed the last time before Judge Mayeron  
17 is going to unnecessarily increase the expense, it's going to  
18 unnecessarily drag out the process.

19 THE COURT: Well, do you want to present the legal  
20 issue first? Is that how you propose to do this?

21 MR. MICHAEL CASHMAN: In the context of --

22 THE COURT: Or do you want to bring the whole  
23 motion?

24 MR. MICHAEL CASHMAN: -- the legal standard, why  
25 these objections that the NHL has raised are not going to

1 prevent these documents from becoming judicial records. And  
2 like I say, there are only about 30 documents. If the Court  
3 wanted to actually consult the documents, I think that would  
4 be easy to do. But once the framework is established. And I  
5 think it's a pretty straightforward issue, a couple of issues  
6 that could be decided, and then it may -- the parties would  
7 have further framework under which to operate.

8           And we can get this done quickly, and certainly if  
9 it's not done before the class cert brief is filed, it can be  
10 done very quickly, I think, afterwards, even taking into  
11 account your comments about the Court's schedule and such.  
12 And that way, as we all know, that there's been a big push in  
13 this District and throughout the Federal Courts that judicial  
14 records be public, and there's no reason why these should be  
15 kept under seal for months and months and months.

16           THE COURT: All right. I mean, I am willing to  
17 entertain the motion, and I'm also willing to discuss this  
18 with Judge Mayeron and see whether, perhaps, I'll consider the  
19 motion as opposed to going to her first and then the filing of  
20 an appeal, but I won't do it on an expedited basis. I think  
21 the NHL is entitled to the time under the Rules. But it's a  
22 non-dispositive motion, so if you were to file your brief by  
23 November 22nd, the NHL would follow the Rules and file their  
24 response. And then I just can't promise you exactly when the  
25 ruling would come out at that point.

1 MR. MICHAEL CASHMAN: Thank you, Your Honor.

2 THE COURT: All right. Does that work for  
3 everybody?

4 Yeah. Mr. Martino.

5 MR. MATTHEW MARTINO: Yeah, that should be fine,  
6 Your Honor. Thanks.

7 Just to -- just one point which just to kind of  
8 correct something that Mr. Cashman said, I don't think you can  
9 entertain the legal question without seeing the documents  
10 because they're inextricably intertwined. The whole point is  
11 that the documents don't become judicial records just by being  
12 filed with the motion. You have to look at the documents and  
13 see how they --

14 THE COURT: I suspect that Mr. Cashman is going to  
15 show me the documents when he files the motion.

16 MR. MATTHEW MARTINO: Oh, no, of course, of course.  
17 I just kind of wanted to address that.

18 THE COURT: Trust me, I'll look at the documents.

19 MR. MATTHEW MARTINO: Thank you very much, Your  
20 Honor.

21 THE COURT: All right. All right.

22 Then I'll expect that motion to be filed by the  
23 22nd, Mr. Cashman?

24 MR. MICHAEL CASHMAN: Yes, Your Honor, or sooner.

25 THE COURT: Or sooner. Okay. All right. Very

1 good. And of course the Court will do her best. What else  
2 can I say?

3 Anything else to raise with the Court today?

4 MR. CHARLES ZIMMERMAN: Nothing for the Plaintiffs,  
5 Your Honor.

6 MR. JOHN BEISNER: Nothing further, Your Honor.

7 THE COURT: Very good. Court is adjourned.

8 **(WHEREUPON, the matter was adjourned.)**

9 (Concluded at 3:40 p.m.)

10  
11 \* \* \* \*

12  
13 CERTIFICATE

14  
15 I, Heather A. Schuetz, certify that the foregoing is  
16 a correct transcript from the record of the proceedings in the  
17 above-entitled matter.

18  
19 Certified by: s/ Heather A. Schuetz  
20 Heather A. Schuetz, RMR, CRR, CRC, RSA  
21 Official Court Reporter  
22  
23  
24  
25