UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In re: National Hockey League Players' Concussion Injury Litigation

MDL No. 14-2551 (SRN/BRT)

(ALL ACTIONS)

St. Paul, Minnesota
Courtroom 7B
May 12, 2017
2:00 p.m.

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BEFORE THE:

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

BECKY R. THORSON, U.S. DISTRICT COURT MAGISTRATE JUDGE

**FORMAL STATUS CONFERENCE**

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Proceedings recorded by mechanical stenography; transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

(Commencing at 2:05 p.m.)

JUDGE NELSON: Please be seated. Good afternoon, everybody.

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

Let's begin by having Counsel note your appearances. Mr. Zimmerman, you may begin for the Plaintiffs, please.

MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor. This is -- I'm Charles Zimmerman for the Plaintiffs.

MR. MICHAEL CASHMAN: Good afternoon, Your Honors. Michael R. Cashman for the Plaintiffs.

MR. STEPHEN GRYGIEL: Good afternoon, Your Honors. Steve Grygiel from Baltimore for the Plaintiffs.

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

MR. SCOTT ANDRESEN: Good afternoon, Your Honors. Scott Andresen, also for the Plaintiffs. And on the telephone today we have Jeff Klobucar from Bassford Remele; James Anderson from Heins Mills; Bill Gibbs from Corboy; Brian Penny from Goldman Scarlato & Penny; Alex Kruzyk from Robbins Geller; and Brian Bleichner from the Chestnut firm.

JUDGE NELSON: Very good. Thank you.

Mr. Beisner.

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

MR. DANIEL CONNOLLY: Good afternoon, Your Honors. Dan Connolly also on behalf of Defendant, NHL.

MR. AARON VAN OORT: Good afternoon, Your Honors. Aaron Van Oort from the NHL.

MR. DANIEL CONNOLLY: Your Honors, in addition, on the telephone we have David Zimmerman and Julie Grand from the NHL; Shepard Goldfein,James Keyte, and Jessica Miller from the Skadden Arps firm; Joe Price from our firm; and Isabelle Shammos who is a summer associate with us this summer.

JUDGE NELSON: Very good. Well, for those of you who are local, she needs no introduction; but for those of you on who don't know her, I want you to meet Magistrate Judge Becky Thorson who is a gift to our bench and has kindly agreed to join me in working on this case. So, let's all welcome Judge Thorson to the case.

MAGISTRATE JUDGE THORSON: Thank you.

JUDGE NELSON: Shall we move to the agenda.

Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: Good afternoon, Your Honors. Welcome, Magistrate Thorson. We've filed a agenda, and I think we'll probably just go in order, unless the Court has some other desires, on the status conference agenda.

The deposition scheduling is the first one. And I think, Mr. Grygiel, are you going to handle that one?

MR. STEPHEN GRYGIEL: Sure. Very briefly --

JUDGE NELSON: Mr. Grygiel, before you get into this, and maybe I just didn't dig deep enough, but has the Zeidel case actually been brought in this District? I couldn't find the case for some reason.

MR. STEPHEN GRYGIEL: I believe it had.

MR. CHARLES ZIMMERMAN: The Zeidel case?

JUDGE NELSON: Yes, it was -- there was some discussion, you know, it had originally been brought or he was part of it when he was alive and then he passed away. And -- if you can just identify the case number for me, it's entirely possible it was my problem.

MR. STEPHEN GRYGIEL: I will look up that, Your Honor.

JUDGE NELSON: Yeah, I appreciate that. Okay. Mr. Grygiel, go ahead.

MR. STEPHEN GRYGIEL: Deposition scheduling can be dealt with in short order. We have just completed the deposition of Dave Dryden. We have Mr. Lovell's deposition on the agenda to talk about. We have not pressed for dates on that in the last couple of weeks or the last couple of months, pending the busyness with class certification and other matters. So, at the moment, nothing further to report.

JUDGE NELSON: Very good.

MR. STEPHEN GRYGIEL: At least from the Plaintiffs' side.

JUDGE NELSON: Are you working with the NHL to set a date for Mr. Lovell's deposition?

MR. STEPHEN GRYGIEL: We have not, actually, Your Honor. I haven't spoke with Mr. Beisner about that since we originally talked about it. We talked about some dates and then there was the question of who was going to represent Mr. Lovell. That got sorted out, and frankly I have not pressed the issue because lately we've been busy with some other things in the case, as I'm sure Your Honor has noticed.

JUDGE NELSON: Okay. Very good. Thank you.

MR. BRIAN GUDMUNDSON: Your Honor --

JUDGE NELSON: Yes.

MR. BRIAN GUDMUNDSON: -- just for the record, while we're on the topic, I believe the case number for the Zeidel case was 16-cv-0315 -- I can't remember -- let me get the --

JUDGE NELSON: All right. I'll just make sure that it's somehow not included in the MDL list on the -- on --

MR. BRIAN GUDMUNDSON: That would be 03156.

JUDGE NELSON: Let's. Let's try it again: 16-03156?

MR. BRIAN GUDMUNDSON: Yes, Your Honor.

JUDGE NELSON: Okay. Very good. All right.

Mr. Connolly.

MR. DANIEL CONNOLLY: Yes, Your Honors. We have nothing to add on the deposition scheduling other than we've offered dates for the experts, but we'll be talking about that later.

JUDGE NELSON: Okay. All right.

MR. DANIEL CONNOLLY: I might as well go on with the Boston University issue, Your Honor.

JUDGE NELSON: You might as well.

MR. DANIEL CONNOLLY: As you saw, the -- Boston University filed a motion for fees. I talked to Mr. Elswit yesterday. He agreed to providing us with 14 days to respond to their motion rather than 7 days as would normally be the case in the local Rules.

JUDGE NELSON: Okay. I think there was an order filed at some point -- you probably haven't seen it yet -- and I have no recollection of how many days I gave you. Fourteen is fine.

MR. DANIEL CONNOLLY: Okay.

JUDGE NELSON: So --

MR. DANIEL CONNOLLY: I have not seen the order on the timing to respond, so I will -- I'll look to that, but we'll take 14 days from his filing date. Does that work for Your Honor?

JUDGE NELSON: It does. Let's both check the order,

and we can change it if that's what you'd like.

MR. DANIEL CONNOLLY: Very good.

JUDGE NELSON: I just asked that they issue an order with a briefing schedule. I'll take that under advisement, though, the motion.

MR. DANIEL CONNOLLY: You mean as opposed to having argument?

JUDGE NELSON: Yes.

MR. DANIEL CONNOLLY: Very good. And Your Honor will be hearing it, as opposed to Your Other Honor (laughter)?

JUDGE NELSON: Which Honor here, we'll discuss later. That is unresolved at the moment.

MR. DANIEL CONNOLLY: Very good.

JUDGE NELSON: Okay. All right. All right.

Who wishes to start on class certification issues?

Mr. Cashman.

MR. CHARLES ZIMMERMAN: I think Mr. Cashman is going to handle that one.

JUDGE NELSON: All right.

MR. MICHAEL CASHMAN: Good afternoon, Your Honor.

JUDGE NELSON: Good afternoon.

MR. MICHAEL CASHMAN: As we discussed at least preliminarily on Monday, the Plaintiffs' view is that the number of experts that were filed in connection with the class certification motion are cumulative and duplicative in many

respects, and at the very least are disproportionate in number and creates a severe manageability problem. And it is our submission, Your Honor, that Plaintiffs and Defendants have an equal number of experts. We had five, and we believe the Court should order the NHL to submit five expert reports. They can pick those from amongst the 19 that they have submitted, and at a bare minimum we think this is required under Rule 1. And, Your Honor, we looked through the expert reports and there are at least 13 of those experts, at least, who have cumulative or duplicative opinions. And I'll list them, and then I'm going to discuss them further.

JUDGE NELSON: Actually, what I'm going to have you do is draft something, so I'd like to see -- we ought to have a written record on this and an opportunity for the NHL to respond. So, I'm glad for you to give me some oral argument, but then I'm going to ask for briefing on the question.

MR. MICHAEL CASHMAN: And I anticipated that might be possible, and we're happy to do that. But I want to just put on the record here that Brenner, Cassidy, Castellani, Finkel, Guskiewicz, Hazarati, Iverson, McCrory, Olanow, Panzer, Randolph, Schneider, and Yaffe all have significant and, in some cases, all of their opinions are cumulative or duplicative. And they all go to this one fundamental point which doesn't take 13 or more experts to make, and that's the NHL's view that the science does not establish a 100 percent

causal link between head trauma and long-term neurodegenerative disease and that further study is needed.

And in many cases, these -- their experts use the same language to describe the opinions that they're going to be rendering, and clearly that's not only duplicative but excessive. And so it's going to be our motion, and we'll put it in writing as we just discussed, that there should be some equality here and proportionality in that the number of their experts should be limited to five. And once the Court rules on that, we believe that the -- the schedule for which Plaintiffs will reply in support of their motion for class certification will be keyed off of what we know as the real -- is the real filing to which we are responding.

And I could turn it over here to the NHL, but this is also related to, in part, to the summary judgment motion that the NHL filed, and I think it makes sense for me to address that right now, as well.

And it's our view that the summary judgment motion should be stricken because, first of all, the NHL failed to comply with the local Rules 7.1(c) and also 7.1(i), which make it clear, crystal clear, that permission from the Court has to be obtained before this kind of motion is filed. So, that's the first point. The second point, Your Honor, is I don't think that the NHL has complied with Rule 56(a). And 56(a), of course, is the summary judgment rule, and it applies to

claims or defenses. Claims or defenses.

Here, as the Court knows, the summary judgment motion is directed at specific Plaintiffs, not claims, and that highlights that this is an adequacy challenge. That's all it is. And that adequacy challenge should have been included by the NHL in its opposition to class certification. They didn't do that, or, at best, in a very general way. So, it's our position that those summary judgment -- that summary judgment motion should be stricken and that the NHL has waived the right to go back and mend the hole, to revise their class certification opposition in an attempt to challenge the adequacy of these two individuals. So, once those issues are decided by the Court, then we would like to be in a position to then submit a proposed schedule for responding once we know what the landscape is at that time.

JUDGE NELSON: Okay.

MR. MICHAEL CASHMAN: Thank you.

JUDGE NELSON: Thank you, Mr. Cashman.

Mr. Beisner.

MR. JOHN BEISNER: Thank you, Your Honors. Well, needless to say, I think our view is this proposal is problematic, but I'm glad to hear that this will be made as a motion because I think there's a lot to be discussed on this issue. I have to say, Your Honors, though, that I'm surprised at this because if Plaintiffs are serious about pursuing class

certification -- and I guess I should start with, I think Your Honor, pretty pointedly, asked Plaintiffs on the call on Monday if they were -- to think about whether they were going to persist with the class certification motion. And I guess I would infer from the comments that they have decided to do so.

And if they're serious about wanting to pursue class certification, it's surprising that I think what they're urging now is a course that would invite reversal if they succeed.

The Supreme Court has said repeatedly that in addressing the class certification motion, the Court needs to engage in a rigorous analysis, but now the first thing that Plaintiffs do here is to ask that the Court not apply that approach. Counsel have been standing before this Court for years saying that the NHL has ignored science, that we've had our head in the sand. And now the NHL has advanced an array of the four most widely-respected, worldwide authorities on various elements of the various specific science issues presented by this case, each addressing aspects of Plaintiffs' theories within their respective areas of expertise, and saying that they're unfounded.

The reality here is, Your Honor, the Plaintiffs simply don't want to face the reality that it is they who are ignoring science. The science simply is not on their side. And so to dodge that, they want the Court to make that problem

go away. They want to dodge the rigorous analysis the Supreme Court said has to be applied to their motion. They want the Court arbitrarily to toss out members of the blue-ribbon array of experts that we've assembled.

Now, Plaintiffs say, well, there are just too many experts. Well, I have a feeling, Your Honor, when word gets out of this position, anybody who's been around mass tort MDL proceedings would find that comment laughable. In mass court MDL proceedings, there are often lots of experts. In another MDL proceeding in which I'm involved, I was checking -- we just put in our expert list for trial that's coming up at another MDL proceeding -- Plaintiffs listed 12, we listed 14, and the lists are not complete. The science issues in these cases are such that it is not at all unusual. And the number of science disciplines in this case, Your Honor, I have to say, are far beyond which you would normally find in a lot of other MDL proceedings.

But that seems to be the only rationale that Plaintiffs offer here: Too many experts, too much work. And what's striking here is not the number of experts that the NHL has offered; it's the fact that Plaintiffs have offered so few. And that's, I guess, what's most galling about Plaintiffs' proposal. They're asking the Court to totally ignore the motions that we have filed challenging the qualifications and opinions of their expert because they're

all broadly addressing issues they're not qualified to address and say, you need to whittle your list to our number, that we get to dictate the number here.

Your Honor, in this case, there was never any discussion about limiting the number of experts with the Court, anyone else. This is a highly-prejudicial proposal that is being made here, to limit us to five experts. And frankly, it ignores the breadth of the science issues in this case. You can't do this case with five experts. And if that is their proposal, then the Court just ought to go ahead and deny class certification because it cannot be done with that number. There are too many disciplines at issue here.

We'll brief the issue, so I won't go through it now, Your Honor. But the notion of cumulativeness is not properly considered by the Court at this time. This is not the first time Plaintiffs, in response, or, in fact, in some cases Defendants in response to briefing on class certification have made cumulativeness arguments in this setting. And invariably, the courts have said, no, it's premature. This is not the appropriate time to deal with that.

This is a -- an evidentiary rule concept, and cumulativeness is an issue that you look at in terms of what is to be presented to the jury at trial. At this stage of the proceeding, it's premature to be starting to talk about forcing people to limit the number of experts, especially when

the experts have been designated. And we haven't found any cases in which a court has said, you need to reduce the number of experts, in essence, striking them at this stage. It is not an appropriate stage to be looking at this -- at this issue.

In particular, in the *Piskura* case from 2012, Plaintiffs made this sort of argument that 10 defense experts were nearly identical, making it unduly burdensome and expensive for the Plaintiffs to depose them all. And the Court said, no, the bar on cumulative evidence was, quote, not adopted to reduce costs incurred by counsel during the prosecution of a lawsuit but to avoid duplicative evidence at trial, and it was premature to decide whether experts were duplicative until each party decided which witnesses would actually be presented to a jury.

So, Your Honor, there's just really no basis to consider the motion. I'm not going to belabor the point. It sounds like Plaintiffs will brief this issue and identify what they think is cumulative here, but I think it's a -- it's an exercise that doesn't make much sense because I don't think the Court, with all due respect, has authority to limit the experts in that way, in this very highly-prejudicial way, make us do the class certification all over again with an unreasonably small number of experts. I just don't -- I just don't think that is permitted.

Let me offer just another point on this cumulativeness issue. And, sure, in a case like this, the experts may make some comments on similar issues because they're addressing the same subject matter. But the problem here, again, Your Honor, is not that we had too many experts. It's the ridiculously low number that Plaintiffs have put forward here. It's frankly an indication of a lack of seriousness about class certification in this case.

It's best evidenced, I think, Your Honor, by Professor Hoshizaki who's a human kinetics professor who hired students to evaluate videos of NHL games and try to estimate velocity, then reconstructed head hits in a lab, ran the reconstructions through a very complicated mathematical model known as a Finite Element Model, compare those results to various animal studies that involve very different kinds of testing, and concluded that the average NHL player suffers a head hit once every two games. Then he showed up at the deposition and said, oh, my report's wrong.

He changed it to once every two games. In short, they've offered this one person, Professor Hoshizaki, as a jack-of-all-trades. He's an expert who opines on video analysis, biomechanics reconstructions, Finite Element Modeling, animal studies, white matter loss, tangles in the brain, and neurodegenerative diseases. The truth is he's not qualified to do virtually any of this, which becomes apparent

when you parse the report and look at the deposition and realize how many errors there are. And to respond to all of these far-flung opinions, most of which Hoshizaki himself is not qualified to offer, we had to go the route of actually getting experts on all these subjects.

So, Mr. Neale is a specialist in video analysis. He's a forensic engineer and visualization specialist who explains the significant problems with the video analysis conducted by Hoshizaki's students. Dr. Funk is a biomedical and mechanical engineer with training in accident reconstruction who explains the problems with Hoshizaki's methodology from the perspective of biomechanics, and particularly his reconstruction of head hits using head forms. Dr. Panzer is a professor of Finite Element Modeling, which is a distinct area of expertise for which Hoshizaki is not qualified. He's at the University of Virginia. He explains the serious flaws in the computer modeling done by Hoshizaki. Drs. Randolph and Olanow respond to the neuropsychological and medical opinions in Hoshizaki's report, which far exceed the expertise of a biomechanics professor.

Your Honor, I don't understand what the basis would be for punishing the NHL for using proper reports, proper experts to respond to Plaintiffs' opinions just because they took a shortcut and had this one person opine on a number of issues for which he's not qualified. Your Honor, I can go

through the others, but if we're going to brief this issue, I won't take time with it today. But each of them has a set of specific issues that they're addressing.

Are there overlaps laying a basis for those opinions? Sure, there are. But, Your Honor, the -- the -- the other parts of this are, you know, human factors experts. Plaintiffs don't have one of them, but it's very critical to deal with the warnings issues in the case.

And you go through the other issues, we have several experts who are cited by Plaintiffs, relying on their work, and the reason they're there is to say, Plaintiffs are totally misinterpreting our work. I mean, we ought to have the right to put them on. They may be -- you might argue they're redundant, but they're proper experts in the case. And so these experts have different backgrounds, offer different perspectives on different aspects of Plaintiffs' assertion -- assertions in the case. And we just, I -- I don't understand how Plaintiffs cutting corners on these issues should dictate the range of experts that we should be permitted in this case.

So, you know, I guess the motion will be brought. But it would be, I think, very strange in a mass tort MDL proceeding to say, we're going to limit this to five experts. I don't know of any case in which that's ever been done, and there are large numbers.

Let me note one other thing, Your Honor, about this.

This is a class certification motion saying, oh, we want to deal with all the issues that might arise with any of these Plaintiffs in the case all at once. Well, let's look at this. They make arguments about Alzheimer's. There's a causation with Alzheimer's. Well, that's a different analysis, and we have a different expert for that than Parkinson's, which is another disease that they allege.

CTE is another category. These are all different diseases that are being alleged here who are all lumped into this one motion. Not all of these people would appear at a single trial, but it's Plaintiffs who chose to bring this all to the Court all at once. And even if they have, our number is not dramatically different than what you think in MDL mass tort proceedings.

So, Your Honor, I guess I'll stop there with respect to that issue, but I think that this -- this whole approach is unprecedented. And I think the idea that you limit a mass tort MDL to five experts just because that's all Plaintiffs came up with is, to be blunt, a laughable proposition.

Mr. Connolly will respond on the summary judgment motion issue.

MR. DANIEL CONNOLLY: Your Honors, we -- well, we heard Judge Nelson -- we didn't hear Judge Thorson on Monday -- and your concern regarding our early summary judgment motion. We apologize insofar as we didn't meet the

Court's expectations, but I did want to react to one comment the Judge made, Your Honor made, and that's in -- that you comment that in this District, early summary judgments are not permitted without leave of court.

After the call, I polled a number of my colleagues and, like me, their experience is not uniform, at least in this jurisdiction. And the comment was normally, it's a function of an individual pretrial scheduling order. And sometimes courts, some of the judges are well known to prohibit early summary judgment motions, some not. In fact, Judge Schiltz, not one to overlook infractions of the local Rules, wrote: "There is nothing inherently improper about a Defendant filing a summary judgment motion before the Plaintiff has had an opportunity to take discovery. Indeed, Rule 56(b) specifically authorizes a party to file summary judgment motion 'at any time until 30 days after the close of all discovery.'" Thereafter, Judge Schiltz comments that normally he doesn't entertain those because discovery should proceed, but in that instance, he did grant the summary judgment motion.

That said, all that said, we still apologize to the extent we didn't meet the Court's expectations. Nonetheless, we've looked at the matter from a practical perspective, and we think in the practical setting that we're in here, it makes sense to bring these motions now. As you know, the summary

judgment motion we filed relevant to Plaintiffs Leeman and Nicholls was relative to the fact that they did not comport with the statute of limitations for the cases that they filed. They didn't file their cases within a timely manner, even though they previously brought separate workers' compensation claims concerning the same topic.

This is a clean threshold issue. Plaintiffs have not said that they will oppose this on a Rule 56(d) basis that they need additional discovery. In fact, as Mr. Beisner talked to you about on Monday, there are clear reasons why it's appropriate -- or it would be inappropriate for us to lie in the weeds, let the case go forward on a class basis, then move against these two people, saying that they're inappropriate class representatives.

Finally, on the briefing matter, when I had my meet and confer with Mr. Zimmerman about this topic, I told Mr. Zimmerman that we arbitrarily set the hearing date for the same day as the class certification date. In this case, we have, the parties have normally set hearings on motions for the -- for upcoming status conferences, and I told him that we were not requiring him or the Plaintiffs to respond within 20 days as is normally required under Rule 7.1, but that we could set a briefing schedule. We just wanted to put this matter in front of the Court at an appropriate time and on a briefing schedule that the Court and the parties could work on

together. And it's in at least my practice in this particular case that that's been done a number of times.

So, with that said, I'm free to answer any questions the Court has.

JUDGE NELSON: Okay. Well, you know, I'm not -- I'm not criticizing anybody for doing anything intentionally wrong here, but I would suggest to you that the -- certainly most, if not all, of the judges in this district expect to be approached in advance. It's not inappropriate to bring an early summary judgment motion. Of course it's not. The question is whether you've asked the Court whether it's okay to do so, you know. So -- and for certain, you can't add a motion without calling chambers and asking to do so.

So, those are just basic practices that we all have, and, you know, I'm not suggesting that anybody did anything intentionally here. Believe me. I've worked with you for a long time, with Mr. Van Oort a long time. I have no doubt that it didn't even cross your mind that it would be the appropriate thing to do. But it is the appropriate thing to do in the future. So, let's just set that aside at this point.

MR. DANIEL CONNOLLY: Hence the apology, Your Honor.

JUDGE NELSON: Yes. With respect to why I'm going to ask for briefing on this, the real question is whether or not this is -- really goes to the question of the adequacy of

these Plaintiffs. I allowed a word limit that's larger than any case I've ever had, and it concerns me that this is a way out of the word limit. Now, you're suggesting to me that there is a good faith alternative reason to bring these summary judgment motions that has nothing to do with their adequacy as Plaintiffs, and I'm going to give you a chance to make that argument. But that's really what I'm concerned about here.

So, the cumulative effect of being shocked and surprised by a summary judgment motion nobody mentioned, having it added to a calendar without contacting chambers, and then the concern about whether or not this is bypassing the word limit is enough for me to ask you to brief it so we can take a hard look at what the facts are and make a decision about it.

MR. DANIEL CONNOLLY: So I may ask for clarification, Your Honor? Are you -- is it my understanding, then, now that is going to be added for a status conference, the parties need to contact chambers before it's added? Is that what I'm hearing?

JUDGE NELSON: Yes. My -- I mean, I'll go back and look at what my practice pointers say or what the Magistrate Judge pretrial order say, but I'm quite certain they say that you have to contact chambers to get a hearing date for a motion.

MR. DANIEL CONNOLLY: And I understood that the status conferences were open hearing dates and that's why we proceeded in that -- and then what is the motion that the Court is asking -- is -- you're saying you want a --

JUDGE NELSON: Motion for leave to bring a summary judgment motion.

MR. DANIEL CONNOLLY: Oh, I see. So you want us to bring a motion now for leave to bring the summary judgment motion?

JUDGE NELSON: Yeah, and I'm asking you to explain in there why it needs to be brought now and why it doesn't per contain to adequacy so that it should have been included in the briefing on class certification. That's what you're going to address in that motion. Okay?

MR. DANIEL CONNOLLY: Very well.

JUDGE NELSON: All right. Thank you.

Mr. Cashman.

I'll set a schedule for this at the end of the hearing for all these motions.

MR. MICHAEL CASHMAN: Just by way of clarification, are we to understand, then, that the summary judgment motions are stricken unless they get leave to file it?

JUDGE NELSON: Well, I'll have to take a look at it. You know, I'll have to decide whether they should incorporate it in their brief or whether they should be permitted to bring

the summary judgment motions or not. I can't know the answer to that until I read what they have to say about this. When Mr. Beisner mentioned on the phone on Monday the reason he brought it, that was the first time I ever heard it. So, someone has to explain this to me before I can make a good judgment about it.

And all I'm suggesting to Mr. Connolly -- and I'm not being critical because I said, you know, you folks have practiced before me for a long time and I've ever had any issues -- is that in the future, just raise it with me. That's all.

MR. MICHAEL CASHMAN: Does the same analysis apply to their five *Daubert* motions, Your Honor, which are all --

JUDGE NELSON: No, I haven't gotten that far yet. Do you wish to respond to Mr. Beisner's comments, Mr. Cashman, on the *Daubert* motions before I give my guidance?

MR. MICHAEL CASHMAN: Well, just briefly, Your Honor. To be clear, the Plaintiffs are pursuing class certification to the extent there's any doubt about that. We believe that the experts that we submitted do allow for the rigorous analysis and comply with the applicable case law. Mr. Beisner's reference to some of the cases that he's been in really highlight the point. He identified a specific case where the Plaintiffs had 12 experts and the Defendants had 14 experts. There's proportionality there. And five and 19 is

not proportional.

And Mr. Beisner also wants to lead these proceedings into the weeds by ignoring the simple fact that, as we will point out in our pleadings, that the big picture that all these experts are addressing is largely the same. They don't need 13 experts or 19 experts to make the same point, and they don't need all those experts to respond to the experts that we've provided. And so that's just a misnomer.

Mr. Beisner went to great lengths to use Blaine Hoshizaki as an example. Well, Mr. Hoshizaki's report will stand or fall on its merits under the *Daubert* motion. They filed the *Daubert* motion, and if they don't think he's qualified or there's some other defect, those are all issues that they can raise at that time. So, quite simply, we just think that Mr. Beisner is wrong. We'll put it in writing, but the bottom line is that there has to be some proportionality and what the NHL has done, it clearly doesn't comply with Rule 1, the just, speedy, and inexpensive determination of any action.

It's overkill. It just shouldn't be allowed. It's common practice, I believe, in many cases which I suspect that Your Honor has handled and many of us have been in, when the number of experts are limited. Both parties are required to identify a certain number of experts that can handle issues. This case is no different. And particularly when the issue is

what the NHL's fundamental point is that more study is needed and that there's not a 100 percent scientific proof of a causative connection, that doesn't take all these experts to make that point.

So, this is just piling on to increase the burden on the court and to increase the burden on the Plaintiffs, and it's improper and unnecessary. And we'll put that all in writing.

JUDGE NELSON: Okay. Very good.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, I don't have much to add. I just wanted to make two points on this, though. I think that -- and this is where I think the -- there's a significant problem with class certification. Plaintiffs are -- basically want to have the Court declare that you can carry your burden under Rule 23 with five experts. I don't know how the Court can make that determination at this threshold point of deciding what experts to have there, but that's fundamentally what Plaintiffs are saying. And I think there's a strong argument that there's just no way you could possibly do that, but we'll see what the briefing says.

One other point I wanted to make, though -- just so that we don't get off on a bizarre tangent here -- you know, if Plaintiffs are saying, well, there's overlap in these reports, some of the experts say the same things, that's true

with their reports. Cantu, Casper, and Hoshizaki all talk about some of the same things.

That happens when you have a complex issue like this and experts have to lay the basis. And if that's the criticism of the reports that we've provided, yes, there is overlap. But turnabout is fair play. We got to get rid of some of their experts, too, because there's overlap in the allegation is that some of them talk about the same things in the reports. And so before we go through this motion practice, I just want to know, if that's what we're testing here, this gets us nowhere.

If the issue is, are there distinct elements in these reports that are different, are there focuses that are different, are there opinions that are being offered uniquely by those -- these experts, and there are. That's a different issue, and I think that's what we ought to be focusing on on here. And, you know, the number that it takes to do that shouldn't be dictated by Plaintiffs because their showing on this is just facially inadequate to bear class certification. And to say, well, this is all we wanted to do, so the other side should be limited to that, there's just no precedent for that.

JUDGE NELSON: Mr. Grygiel?

MR. STEPHEN GRYGIEL: Your Honor, if I might. There was one point that Mr. Beisner made that I did not think I

could stand -- let stand unrebutted. And I believe Mr. Beisner -- with whom I have great respect, as he knows -- said that our class certification motion wasn't serious. I assure the Court, it was with deadly seriousness we made that motion. And because I had a feeling that that sort of attack was going to come up today, it was readily predictable, I went and dug up some language.

We have a case here in which we are pleading, very centrally, the medical monitoring that we think our Plaintiffs should be entitled to under a couple of different theories. And I realize that that is not a garden-variety case along the lines of the kind that the NHL might concede is more readily certifiable. Leave that aside for the moment, my point, Your Honor, is more thematic. I'm thinking of the *Klay versus Humana* case with which everyone in the room, I'm sure, is probably familiar. The *Klay* court affirmatively declared that, and now I'm quoting: "There is no basis in Rule 23 for arbitrarily foreclosing Plaintiffs from pursuing innovative theories through the vehicle of a class action lawsuit."

And the Court went on to say something that's very important in this case, as well: "A class action may be the only way that most people can have their rights, even innovative or immature rights, enforced." The *Klay* court went on to say that if you're talking about a novel theory or what the economists call an "immature tort," if that raises

complicated legal questions, that those questions themselves are predominant common questions and can provide the cohesion necessary for class treatment.

And we also haven't discussed today, and it is not the time for it but to some extent the door has been opened, the question of an issue class. And I recognize what the Eighth Circuit has and has not said about that, but we've also paid very close attention to what a number of other well-reasoned Circuit Courts opinions have said about issues classes. My point, Your Honor, not to belabor it any further, is that our motion for class certification wasn't a placeholder. It was a serious motion. And I would hope that the papers we filed reflect that. Thank you, Your Honor.

JUDGE NELSON: Thank you, Mr. Grygiel.

Okay. So, the Court is going to permit the Plaintiffs to bring a motion to strike Defendant's experts as cumulative. The Court will, obviously, permit full briefing and argument on that issue.

I frankly agree and disagree with some of the things you say, Mr. Beisner. First of all, I think it sort of goes without saying that whatever analysis is engaged in by the Court on class certification will be rigorous. I mean, that's obvious. Secondly, the question is whether the expert opinions are relevant to class certification. And the third question is -- rigorousness is actually not a question. So,

the second question is whether the opinions are strictly cumulative or duplicative.

The Court doesn't -- the Court's making the decision on class certification, not a jury. And the Court does not need duplicative, cumulative opinions to make a decision about class certification. The Court needs all the opinions that are unique and relevant to class certification to consider in her rigorous analysis but doesn't need cumulative opinions. Now, I have no idea, sitting here, whether you've provided me with cumulative opinions or not. We've just started the lengthy process that we'll have to engage in to analyze all of these opinions. And it might turn out that there's no duplication, that these opinions are all unique and highly relevant to class certification. I don't know. That's something that I need to get to.

But the Court is not considering striking experts to reduce the cost to Plaintiffs. That's not the test. The test is, one, are they relevant to the issue of class certification that a court is going to determine? And secondly, are they duplicative, are they cumulative? And the Court has every right to strike any Declarations or Affidavits or whatever that accompanies a motion that are strictly cumulative.

Now, there may not be much precedent in the law for this. I don't know if there is or not. But it's certainly within the discretion of the Court in making her decision,

rigorously, of course, about class certification whether or not those opinions are, one, relevant to the issue, and second, cumulative. It's really pretty straightforward.

So, that's what I will be focused on when I read the briefing. That's what you should focus on. I'm not going to arbitrarily say to the Defense, you only get five experts. That doesn't make any sense to me. What makes sense to me is to dig down, as I've said, and make sure that these opinions are relevant and not cumulative, so that's how you should focus your briefing in this case.

Mr. Beisner?

Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: Well, I think it's very clear what you want, and I understand it. And the eloquent legal argument I was going to make will be left for another day on that question. So, I think we can move to the next item on the agenda, I believe, which is why I was standing.

JUDGE NELSON: Okay. Let's do so. All right. Is that Plaintiffs' second set of interrogatories?

MR. CHARLES ZIMMERMAN: Yes.

JUDGE NELSON: Okay.

MR. BRIAN GUDMUNDSON: Your Honor, at a prior status conference you asked that we meet and confer with the other side prior to bringing anything to your attention, which we have done. I've talked to Mr. Martino and his team and

exchanged some letters. And we're in the process of resolving, I think, most or all of those issues, and I don't anticipate at this time that anything will be brought before Your Honor.

JUDGE NELSON: Okay. Very good. Well, keep us posted, will you?

MR. BRIAN GUDMUNDSON: Yes.

JUDGE NELSON: All right.

Filing under seal, unless there's anything more on the discovery. Mr. Connolly? Mr. Beisner?

MR. JOHN BEISNER: Your Honor, there's nothing to present to the Court on this subject today. This is the Plaintiffs' third set of requests for production of documents. We received these on April 27th. Objections haven't been made yet. We've not met and conferred with Plaintiffs' counsel, but I did want to flag them for the Court because they propose to open up a set of new discovery, which we think may be comparable to the first round of discovery that Your Honor presided over which concerns the drug policies of the NHL.

We believe this is a whole different issue. There's *NFL* litigation that is going on in this subject which is entirely separate from the concussion litigation. We don't think this is within the purview of what the MDL Panel assigned to this Court, but I just want to flag, not ripe for discussion, that that's going to be out there.

JUDGE NELSON: Okay.

Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: John is barking up a wrong tree there. We're not bringing another case on abuse of drug policy as a separate tort. It has to do with how drugs were masking concussions and being used to keep players on the ice and keep players going out there while they were injured. So, it's discovery relevant to their condition in this case, having to do with concussion and discussion protocol in this case. I understand he may have thought that's where we were going, but that's not where we're going. But we'll do the meet and confer, we'll get the objections, and we know the process, and we know the drill.

JUDGE NELSON: Okay. Sounds good.

Mr. Connolly?

MR. DANIEL CONNOLLY: I was just going to speak on the filing under seal issue. I had some discussions with Ms. Del Monte briefly before the session today, but we haven't quite resolved it. But we're getting closer to a proposal and will bring it to you through Ms. Del Monte once we figured it out.

JUDGE NELSON: Okay. What she said to me today was that it's the current wisdom of the Clerk's Office that the rule would apply to the extent that you'd file a redacted version of a document. But if the parties agreed otherwise,

you could do an order satisfying both sides' needs. And I don't have strong views on the subject, so --

MR. DANIEL CONNOLLY: I gathered as much, Your Honor, but we will comply with it. This is exactly the proposal we were talking about, and we're getting close.

JUDGE NELSON: Okay. Sounds good. All right.

Anything further today from the Plaintiffs?

MR. CHARLES ZIMMERMAN: Perhaps.

JUDGE NELSON: Of course.

**(Discussion off the record between Counsel.)**

MR. CHARLES ZIMMERMAN: I think we have agreement on this, but until the motion on length and duplicativeness [sic] and relevancy is determined, I trust we're still on a stay of the briefing schedule?

JUDGE NELSON: Yes. And we should set a briefing schedule for these two motions, that is motion to strike expert reports and motion for leave to file the summary judgment motion. What -- do you want to talk to each other about a schedule --

MR. CHARLES ZIMMERMAN: Yeah.

JUDGE NELSON: -- and propose one?

MR. CHARLES ZIMMERMAN: I think that would be best, and we'll make some suggestions to the Court.

JUDGE NELSON: I think that makes sense.

MR. JOHN BEISNER: We agree, Your Honor.

MR. CHARLES ZIMMERMAN: We agree? Wow. Great.

JUDGE NELSON: Very good. Court is adjourned.

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

(Concluded at 2:55 p.m.)

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CERTIFICATE

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

Certified by: s/ Heather A. Schuetz_____
Heather A. Schuetz, RMR, CRR, CRC, RSA
Official Court Reporter