

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE) COURT FILE
PLAYERS' CONCUSSION INJURY) NO. 14-MD-2551 (SRN/JSM)
LITIGATION)
(ALL ACTIONS)) Courtroom 7B
) Thursday, August 25, 2016
) St. Paul, Minnesota

HEARING ON

PLAINTIFFS' MOTION TO ADD CLASS REPRESENTATIVE

[DOCKET NO. 564]

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT JUDGE

TIMOTHY J. WILLETTE, RDR, CRR, CRC
Official Court Reporter - United States District Court
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* * * *

1 (9:30 a.m.)

2 P R O C E E D I N G S

3 I N O P E N C O U R T

4 THE COURT: Please be seated.

5 Good morning, everybody. We are here today in the
6 matter of the National Hockey League Players' Concussion
7 Injury Litigation. This is 14-MDL-2551.

8 We have a new lead plaintiffs' counsel here today.

9 Good morning. Go ahead.

10 MR. SINCLAIR: Good morning, Your Honor. Bill
11 Sinclair on behalf of Plaintiffs.

12 MR. CASHMAN: Good morning, Your Honor. Michael
13 Cashman for the plaintiffs.

14 MR. GUDMUNDSON: Good morning. Brian Gudmundson
15 on behalf of the plaintiffs.

16 MR. KLOBUCAR: And good morning, Your Honor. Jeff
17 Klobucar on behalf of the plaintiffs. Appearing
18 telephonically today is kind of a short list for the
19 plaintiffs: Tom Byrne from the Namanny Byrne firm, and Mark
20 Bradford from my office.

21 THE COURT: All right.

22 Good morning, Mr. Beisner.

23 MR. BEISNER: Good morning, Your Honor. Same old
24 John Beisner --

25 (Laughter)

1 MR. BEISNER: -- for the defendant, NHL.

2 MR. CONNOLLY: Good morning, Your Honor. Dan
3 Connolly, Faegre Baker Daniels, for the defendants.

4 MS. SVITAK: Good morning, Your Honor. Linda
5 Svitak, Faegre Baker Daniels, for the defendants.

6 THE COURT: Very good.

7 MR. CONNOLLY: And, Your Honor, appearing
8 telephonically for the NHL are David Zimmerman from the NHL,
9 Shep Goldfein and James Keyte from Skadden Arps, and Adam
10 Lupion from Proskauer Rose.

11 THE COURT: Very good.

12 We are here today in an atypical way. We're not
13 having a conference, but we're here for a motion hearing to
14 consider Plaintiffs' motion to add a class representative.

15 Who wishes to be heard?

16 MR. SINCLAIR: I do, your Honor.

17 THE COURT: Mr. Sinclair.

18 MR. SINCLAIR: Thank you.

19 Your Honor, the last time I was here I told you I
20 drew the short stick on this one, and the reason for that
21 was we were somewhat harried and in a rush in putting this
22 together as evidenced by the fact that we did the motion as
23 a letter first and then we did a motion, some other things.
24 So I've already apologized to Mr. Beisner this morning and I
25 wanted to apologize to the Court. I think that the harried

1 nature probably did not present everything as well as it
2 could have and I know that that makes your job a little
3 tougher. Having clerked in a building like this, I
4 understand how that goes.

5 And I did want to particularly point out one error
6 that I saw in our opening motion, which was, we had said
7 that we did not -- that Plaintiffs' counsel did not become
8 aware of the CTE diagnosis for Mr. Zeidel until July 2016.
9 That's not correct. It was February 2015. So, again, I
10 apologized to opposing counsel already, I apologize to the
11 Court. I'm here today to answer any and all questions that
12 may come forward, but obviously having a full and complete
13 record is what's ultimately most important and that's what
14 we're here today to do.

15 Happily, I think counsel are in agreement on the
16 issues and I think they're fairly simple and fairly
17 straightforward as these things go.

18 I think there are two legal issues that we need to
19 address. One is Plaintiffs' diligence and the other is
20 Defendant's prejudice. The diligence is going to be
21 measured by Rule 16 and we'll get into that.

22 The prejudice, I've seen cases addressing it in a
23 Rule 16 standard. I've seen cases addressing it a Rule 15
24 standard. I've even seen one case talking about it in terms
25 of intervention, permissive intervention. I'm not sure that

1 it really matters. I think however you slice it from a
2 legal perspective, we come out with the better side of the
3 argument on prejudice. So those are the two framing issues
4 that I want to talk about today, diligence and prejudice.

5 In terms of diligence, Plaintiffs' view -- and it
6 did not come through as well in our motion as I would have
7 liked and hopefully our reply cleared it up.

8 Plaintiffs' view on diligence focuses from the
9 date that we were retained by the estate through the
10 present, and that date was July 8th, 2016, and opposing
11 counsel has not argued that we have failed to act with
12 diligence during that time frame. I don't think there
13 probably is a good-faith argument that we haven't. That was
14 less than two months ago and we're here already. So that's
15 how we view the world and I can tell you the reason we do.

16 Pennsylvania, like most jurisdictions, the
17 attorney-client relationship terminates upon death. So
18 while Mr. Zeidel himself retained my law firm -- and we work
19 in connection with the Namanny, Byrne & Owens firm;
20 Mr. Byrne is on the phone, so you've seen that in
21 conjunction, but I'm probably just going to say "my firm" --
22 retained my firm in April of 2014. That relationship
23 terminated when Mr. Zeidel died. And from our
24 perspective -- I don't even think "revived" is the right
25 word. A new relationship was entered into when Mr. Bradley,

1 who is now the personal representative, signed the retainer
2 on July 8th.

3 Now, Pennsylvania, like most jurisdictions,
4 recognizes an exception. If the retainer provides that
5 counsel will prosecute or defend the action through final
6 judgment, then counsel can continue to do so even after
7 death. But you've got the affidavit from my partner,
8 Mr. Silverman. I've got the retainer, which I'm happy to
9 provide to the Court. I'm not sure what's the best *in*
10 *camera* way to do so, but we're happy to give it to you if
11 you'd like to review it. But there's no such language like
12 that that would require us or obligate us to continue with
13 this -- continue with that representation past the point
14 where Mr. Zeidel died, and that -- he died in June of 2014.

15 So, from our view, the applicable time frame to
16 look at our diligence is July 8th, 2016 to the present,
17 July 8th being the date we were retained, or backing it up
18 to June 2nd, 2016, which was the date that Mr. Bradley was
19 appointed as the personal representative. And we've
20 provided the letters testamentary to Mr. Beisner, to the
21 NHL, which show that that appointment took place on
22 June 2nd. And I can't remember if it was part of the
23 record, but we can certainly make them so if they're not.

24 And the reason we view those dates as the
25 appropriate dates by which to make this decision about

1 diligence is because diligence can only be measured by what
2 we have control over. We cannot, obviously, force anyone to
3 sign up with us. We cannot force personal representatives,
4 who are the ones who make these decisions, as we all know.

5 At the point after Mr. Zeidel died, we certainly
6 had contact with Karen Zeidel, and we go into that in our
7 reply brief and the affidavits, but that's a red herring.
8 Ms. Zeidel is not the personal representative of the estate.
9 Ms. Zeidel cannot bind the estate to pick new counsel to
10 represent the estate in this litigation or any other
11 litigation.

12 So, you know, what we have done with Ms. Zeidel or
13 what we haven't done with Ms. Zeidel, I'm not sure it really
14 matters to the analysis in front of you. You have to look
15 at what we have done. And what we have done, as in
16 Mr. Byrne's affidavit, is that we did send regular e-mails
17 to all retained clients and the e-mail address we had was
18 for Joan Bradley. Ms. Bradley was the first personal
19 representative appointed for Mr. Zeidel's estate. We have
20 now come to learn -- this is from conversations with
21 Meredith Seigel, who is the court-appointed lawyer in
22 Philadelphia -- that apparently Ms. Bradley absconded with
23 funds from the estate to England, and her husband,
24 Mr. Bradley, was appointed as personal representative on
25 June 2nd. The estate has not even been probated yet. It's

1 two years plus. I think that that speaks to, you know, the
2 issues that they are having in Philadelphia with this
3 estate.

4 So I'm not sure it's fair to look at Plaintiffs'
5 counsel's diligence in terms of forcing people in
6 Philadelphia who were -- there's obviously some issues going
7 on there -- to retain us to have us move forward with the
8 litigation. I think the applicable time frame you should be
9 looking at is from the date that we got retained, what did
10 we do, or backing it up to the date when Mr. Bradley, who's
11 now the personal representative, was appointed in that
12 position, and again, that's June 2nd, 2014.

13 That's really, I think, all I have to say on
14 diligence at this point.

15 With regard to prejudice, we -- Defendants have
16 put forward two arguments. One deals with discovery and the
17 second deals with a motion to dismiss that they anticipate
18 filing on statute of limitations grounds should this motion
19 be granted.

20 With regard to discovery, the **Lutheran Brotherhood**
21 case which we cited in our motion talks about the heavy
22 burden that Defendants have. No mere prejudice will
23 suffice. They need to come forward and satisfy you that
24 they have a heavy burden on prejudice.

25 And we had framed this in terms of claims. That's

1 the cases that we saw -- they're cited in our motion --
2 about whether or not in this case the defendants had notice
3 of the claims, and the defendants don't address those issues
4 at all. They focus instead not on whether they're going to
5 be prejudiced because there's new claims or the claims have
6 changed. And, you know, looking at the second amended
7 complaint, the claims really haven't changed. In fact,
8 we've withdrawn a couple claims. They've focused, again,
9 solely on these issues of discovery and whether or not they
10 would be able to -- the chance of success of a motion to
11 dismiss on these issues.

12 In terms of discovery, they've spent a lot --
13 they've spent a good portion of their brief focused on the
14 amount of discovery they would need, documents and medical
15 records and the time frame it would cover, the years that he
16 played and the different places he played, the fact that he
17 is dead and the information they would need from family,
18 from anyone else who might know him so they could get the
19 kind of information they would want that they would
20 otherwise get from him in a deposition. They spend about
21 eight pages on that. But all of that information isn't
22 really what's at issue. What is at issue is what they need
23 for class certification, because that's where we are right
24 now. The **E*TRADE** case that they cite is distinguishable on
25 a few different grounds.

1 One, in that case, discovery on the named
2 plaintiffs had closed. It's not just that class discovery
3 had closed in that case, but the discovery in the named
4 plaintiffs had closed as well, and obviously that's not the
5 case right now. As they make very clear in their
6 opposition, there is still apparently outstanding discovery
7 for the named plaintiffs. So that's, I think, an important
8 difference between the **E*TRADE** case and ours.

9 And the second one in the **E*TRADE** case is that the
10 court there found that adding that plaintiff would not
11 matter. I may be -- I'm simplifying things a little bit,
12 but that was the essence of what the court had found. It
13 was that adding the new plaintiff was not going to really do
14 anything for the claims. Here, Mr. Zeidel, from our
15 perspective, adds something very new. We actually have
16 somebody who has a CTE diagnosis. We haven't had that to
17 date in terms of a named plaintiff. Now if he's added we
18 do. So that to us is very significant. And I'll get to the
19 **E*TRADE** case a little bit more.

20 Again, going back to this issue of class
21 certification, it's their heavy burden to show you why all
22 of this stuff that they think they need -- and for merits
23 discovery they do, maybe, but I'm not going to get into that
24 right now because I don't have to. I don't need to discuss
25 merits discovery, because as I understand it, merits

1 discovery will continue in this case at some point. They
2 will have the opportunity to get all that information
3 between now and whenever merits discovery closes to be
4 prepared for summary judgment, to be prepared for trial.
5 From my perspective, the sole issue you need to be thinking
6 about right now is whether they've met their heavy burden to
7 show that everything that they say they need, they need for
8 class certification, and with all due respect, I don't think
9 they've met that.

10 A few things. First, you know, I think that
11 there's certainly -- they talk about adequacy and typicality
12 and why they would need these medical records, but they
13 don't really explain why they would need these medical
14 records for adequacy and typicality purposes, and I don't
15 understand it either.

16 Adequacy, Rule 23(a)(4), all it says is that you
17 fairly and adequately protect the interests of the class.
18 I'm not sure why medical records or the information they're
19 requesting would matter on that issue.

20 Typicality, 23(a)(3), claims of the representative
21 parties are typical of claims of the class. The claims are
22 the exact same in the second amended complaint as they are
23 in the first amended complaint. Again, we've actually
24 withdrawn some of those claims.

25 So from those two perspectives, which you do need

1 to analyze, I don't think that they need any of the
2 discovery they say they need to determine whether or not
3 Zeidel's estate would be adequate or whether his claims
4 would be typical.

5 In terms of commonality, we -- I want to make sure
6 I get this right -- we'll be filing our motion in a month or
7 so, and so we're fine. We're sort of previewing for you.
8 He's only going to be a member of the damages class. He's
9 obviously not going to be a member of the medical monitoring
10 class. And in terms of the damages, we are going to be
11 moving for issue certification only on the NHL's duty to NHL
12 players to disclose risks associated with playing in the
13 league and the breach of that duty. That is the limited
14 issue on which we'll be seeking class certification from
15 Mr. Zeidel.

16 So I don't -- I'm not sure how the medical records
17 or any of this information -- I don't think it has anything
18 to do -- it goes to causation and it goes to damages. Those
19 are not issues we're seeking for class certification for
20 Mr. Zeidel's purposes, so I don't think -- you know, the
21 discovery they need, they probably need it for merits, they
22 probably need it for summary judgment, but the opportunity
23 is still there for them.

24 And so that leads to the second issue, which is
25 the likelihood of success of a motion to dismiss, and that's

1 another reason, I think, another difference between here and
2 the **E*TRADE** case.

3 The **E*TRADE** case, the judge found that there was
4 a -- you know, I can't remember the words off the top of my
5 head, but something along the lines of a likelihood of
6 success for a motion to dismiss on statute of limitation
7 grounds. I don't think that that's the case here. We laid
8 this out in our reply brief yesterday and I'm happy to
9 address any questions the Court may have, but I don't want
10 to repeat it all.

11 The simple point is, they have come forward and
12 said that Minnesota's borrowing statute would likely borrow
13 Pennsylvania's statute of limitations. We don't think
14 that's right. We don't think that the Minnesota statute --
15 the Minnesota statute speaks to actions or injuries
16 occurring after August 1st, 2004, which is obviously not
17 Mr. Zeidel's issue. And then you've got the **Fleeger** case,
18 771 N.W.2d 524, dealing with actually Pennsylvania and
19 Minnesota statute of limitations. It's the Supreme Court of
20 Minnesota talking about the fact that the common law applies
21 and Minnesota statute of limitations would apply in that
22 case.

23 None of this is to say that we are absolutely
24 going to win or they're absolutely going to win. All of
25 this is to say that -- I'm not sure the borrowing statute

1 applies. I'm not sure that you can absolutely say the
2 Pennsylvania statute of limitations would apply. He played
3 in a number of different other places. New York, for
4 example, has a three-year statute of limitations. As we
5 talk about in our reply brief, even if we think the
6 Minnesota borrowing statute's going to apply, there's no
7 authority to suggest that the tolling would also apply from
8 Pennsylvania. There's a Minnesota case directly on point
9 talking about the fact that if it was Minnesota law, tolling
10 would not apply. That's the **Bartlett** case, 355 N.W.2d, that
11 we cite.

12 So, again, this is not -- I don't think either
13 Mr. Beisner or I can definitely say to you today who would
14 win on a motion to dismiss for statute of limitations, but
15 what I can say is that I don't think that they have come
16 forward to show you -- to meet their heavy burden of showing
17 you that there is the likelihood of chance of success that
18 they would, or whatever that standard exactly may be, to
19 show you that in fact that it's futile to move for leave,
20 because that's really the issue you have to decide: What's
21 the point of moving for leave if they're just going to file
22 and win on a motion to dismiss. I don't think that they've
23 met that futility standard.

24 So that's all I have for now. Thank you.

25 THE COURT: Thank you very much.

1 Mr. Beisner.

2 MR. BEISNER: Thank you, Your Honor.

3 Your Honor, the standard for permitting this
4 amendment is good cause and we respectfully submit that that
5 just cannot be met here, and I think we're skipping over in
6 this discussion a very important aspect of the history here.

7 The original master complaint in this case did not
8 have a proposed class representative for individuals
9 diagnosed with brain disease, the definition of which has
10 moved around, but there wasn't a class rep. Plaintiffs then
11 added Mr. Ludzik at some point who alleged to be diagnosed
12 with Parkinsonism. When he decided not to proceed, we then
13 had this point at which the Court said we're going to delay
14 to allow you to look among the six class representatives
15 that were on the table at that point to see if any of them
16 could step into that role. That was the deal. That was the
17 delay that the Court ordered at that point.

18 And the whole idea of that was to give Plaintiffs
19 a chance to see if any of those six could step into that
20 role, and we went through the exercise and Plaintiffs found
21 a representative, Mr. Leeman. So that exercise produced
22 what Plaintiffs proposed to do.

23 And I guess the question is why aren't we just
24 moving ahead, because that was the plan, that's what the
25 Court ordered, and out of the blue we have this new class

1 representative, never seen before, never filed a claim in
2 this case, about whom no discovery has been taken, and it's
3 not consistent with the deal that was struck for going
4 forward at that point. And under Plaintiffs' theory, the
5 need there is unclear to us and I think should be unclear to
6 the Court.

7 Counsel said, well, you know, this is a person
8 with CTE. Well, the theory of going forward earlier is we
9 needed a class rep with any brain disease to represent that
10 group. Now, if Plaintiffs are now suggesting, which I think
11 is where you'd have to go in order to credit the argument
12 Plaintiffs made, that you need a separate class
13 representative for each disease in that group, then they're
14 going to have to winnow that proposed brain injury class
15 significantly, because they don't have representatives for
16 the others. So it's either one way or the other. Either
17 the approach that they took earlier suffices for their
18 purposes, but if they're arguing now you've got to have
19 different reps for different diseases, then there's a
20 problem, because -- and maybe they're right. But if that's
21 the approach they're going to take, then they need to narrow
22 that class definition to just the two diseases that they
23 have represented, whatever Mr. Leeman is alleging he has and
24 whatever this class representative or proposed class
25 representative has. They can't have it both ways. Either

1 what they proposed before suffices for whatever theory they
2 want to espouse or it doesn't.

3 You know, Your Honor, I think that when we were
4 having the discussion about how we were proceeding, the deal
5 the Court established for moving forward, for getting an
6 additional class representative, Mr. Davidson had it right.

7 This is from the May 24th status conference where
8 he represented to the Court with respect to getting the
9 medical reports completed for the -- the class
10 representatives they wanted to examine:

11 "[W]e are certain to be asking for leave to amend
12 the Complaint. We are doing this -- well, the entire
13 purpose of this exercise was because of Mr. Ludzik's
14 withdrawal from the case. So, we believe that we are going
15 to be able to substitute in one, if not more, of the current
16 named Plaintiffs. We're not going to add any new Plaintiffs
17 at this very late date, but one of the current Plaintiffs as
18 a Class Two representative."

19 That was -- that was what was said, and then he
20 went on to note in that same statement that:

21 "[I]t seems to me that it would be more beneficial
22 to amend the Complaint now and crystallize the class
23 allegations now as opposed to doing what we have a right to
24 do, which is move to certify whatever class we want with
25 whatever representatives we want at the class certification

1 stage. I don't think that would be appropriate to do in
2 this case. I'd rather tell the NHL now, this is our --
3 these are our class representatives for these classes, this
4 is how the class is defined, and then move on from there."

5 I couldn't say it better, Your Honor. That was
6 the deal. We had people as to whom we had conducted
7 discovery, they wanted to advance one of them in the role,
8 and now they want to change the deal by adding somebody that
9 we've not heard anything about previously, as to whom no
10 discovery has been taken. I think that argument should be
11 dispositive here, Your Honor. That's how we proceeded, that
12 was the deal, that was the basis of the prior delay that we
13 had, and now Plaintiffs are proposing further delay, a clear
14 deviation from the deal we had earlier.

15 But I think as Counsel acknowledged, even if that
16 doesn't -- isn't dispositive. If that case law, the law of
17 the case here, doesn't deal with that, they've got the
18 problem of showing diligence, and, Your Honor, with all due
19 respect, I don't think they have met that burden.

20 I appreciate Counsel's acknowledgment about what
21 was said in the original brief, but, Your Honor, it's
22 mind-boggling, because the original brief was very clear
23 that this claim had not been brought previously because
24 counsel didn't know about the diagnosis. And, you know,
25 just an error was made in that regard.

1 Let me try to refocus this. Thank you,
2 Mr. Connolly.

3 I mean, the original brief said:

4 "[A]fter Mr. Zeidel's death, Silverman/Thompson
5 had no contact with any representatives of his estate and
6 were unaware of the research that his family had arranged."

7 That was the excuse for not bringing the claim
8 earlier, but now we hear in the reply brief and the
9 supporting affidavits:

10 "In February 2015, Mr. Zeidel's daughter, Karen,
11 contacted Mr. Silverman and informed him for the first time
12 that Mr. Zeidel's brain had been donated to Boston
13 University for CTE research."

14 So contrary to what was said in the original
15 brief, this awareness has been there for 18 months, they've
16 known about this potential diagnosis.

17 THE COURT: In February of 2016, was there a
18 diagnosis of CTE in his brain, or when was that?

19 MR. BEISNER: February 2015, Your Honor.

20 THE COURT: I mean 2015.

21 MR. BEISNER: Yeah. The diagnosis occurred in
22 January of 2015, if not earlier, but I think it was at least
23 by then. I think the report came in in January 2015.

24 THE COURT: Because this doesn't say there's been
25 a diagnosis, just that it's been donated --

1 MR. BEISNER: Hold on. I'll get to it.

2 Same statement that is in the complaint, you know,
3 no contact with any representatives of the estate, and, you
4 know, now we see there's an e-mail from Karen Zeidel, who is
5 the decedent's daughter, to Steve Grygiel in September of
6 2015 checking in about the status of the case, so continuing
7 interest at that point.

8 Your Honor, to the question that you just raised,
9 the original brief said:

10 "Silverman/Thompson did not receive any details
11 from his CTE diagnosis until the Estate retained
12 Silverman/Thompson on July 8 [, 2016]."

13 Well, that's just false, because we now have the
14 e-mail from Karen Zeidel to Steve Silverman, February 11th,
15 2015:

16 "Hi, Steve,

17 "I have attached the report for your review."

18 That's the diagnostic report from Boston
19 University, February 11th, 2015, 18 months ago.

20 "I look forward to speaking with you. And yes, it
21 will be very significant."

22 And goes on to say that this is the only way you
23 can diagnose. So February 11th, 2015, counsel are on full
24 notice that there's been a CTE diagnosis.

25 THE COURT: So that's -- the report says that.

1 MR. BEISNER: Yes. And there's more to that
2 story.

3 This kind of goes -- oops. What happened here?
4 There we go.

5 Your Honor, on this point as well, this is sort of
6 the same point, but I'd also note in the original motion it
7 stated that:

8 "In January 2015, without notice to
9 Silverman/Thompson, the BU CTE Center transmitted to the
10 Estate a report determining that Mr. Zeidel had suffered
11 from CTE prior to his death," without notice to counsel.

12 And then you go to that same e-mail I just cited.
13 They were sent the report by Mr. Zeidel's daughter on
14 February 11th, 2015, just shortly after the report was
15 issued.

16 The same statement in the motion that was made:

17 "Silverman/Thompson did not receive any details
18 from his CTE diagnosis until the Estate retained
19 Silverman/Thompson on July 8."

20 Well, here we have an e-mail from Steve Silverman
21 to Karen Zeidel on February 12th acknowledging receipt of
22 the report, and there he says:

23 "We would like to discuss with you what you were
24 told is significant about your father's findings -- other
25 than the obvious. Perhaps we could also arrange to speak

1 with them" -- presumably referencing the BU folks --
2 "assuming there are no HIPAA issues that have not already
3 been waived."

4 So there's investigation going on regarding the
5 claim.

6 Again, to the statement that counsel had no
7 details regarding the CTE diagnosis, we now see an
8 acknowledgment in the reply brief that:

9 "A few days [after September 30, 2015], Ms. Zeidel
10 forwarded Mr. Silverman a request from the BU Brain Bank for
11 a release to provide information they had regarding
12 Mr. Zeidel to the NHL."

13 What this refers to, Your Honor, is, you remember
14 we served a subpoena on BU. Didn't specifically ask for
15 anything about Mr. Zeidel. We had no idea anything was
16 going on with Mr. Zeidel, even though Plaintiffs' counsel
17 did. But one of the things, apparently, they identified as
18 being responsive to the subpoena was the file of information
19 about Mr. Zeidel's diagnosis. So here counsel were alerted
20 by Mr. Zeidel's daughter that this file of information with
21 the diagnosis about Mr. Zeidel was about to be produced.

22 THE COURT: But what's so curious about this is
23 apparently for all this time Mr. Silverman's law firm didn't
24 represent the estate.

25 MR. BEISNER: Well, Your Honor -- but the

1 representation that was made to the Court originally is:
2 "We didn't know," and clearly they did.

3 THE COURT: But you're saying they should have
4 brought the motion to amend back then, and if they didn't
5 represent the estate, how could they do that?

6 MR. BEISNER: Well, Your Honor, here's the
7 problem.

8 First, they're saying -- and the story is all over
9 the place. I don't know what the record shows on this on
10 which the Court would be able to make a finding of
11 diligence. Here they are talking to the estate, to his
12 daughter, so they're clearly aware of it. They're clearly
13 active on this.

14 THE COURT: But she doesn't turn out to be the
15 person who represents --

16 MR. BEISNER: But, Your Honor, here's the issue:
17 Diligence is not only by counsel. It's by the estate. It's
18 by the estate. They are now showing up saying: We want to
19 be -- the estate wants to be a class representative, and
20 this discussion has been all about counsel not knowing,
21 which turns out not to be true. The estate from this -- and
22 part of the reason I'm showing you this is that people who
23 are involved in the estate are fully aware of all this.
24 Where was the estate's diligence? There was a
25 representative, a personal representative appointed, but we

1 have absolutely nothing on the record about what was going
2 on there.

3 We do have -- I mean, here's the issue, Your
4 Honor. I guess I would turn to (indicating) this. We have
5 the statement in the brief that:

6 "In February 2015, Mr. Silverman first learned
7 that neither [Karen Zeidel] nor anyone else from the family
8 was serving as the estate's personal representative," but
9 instead it was Joan Bradley.

10 Now there's an indication here of challenge of her
11 personal representative status, but on July 6th is the next
12 time apparently Mr. Silverman made any contact to find out
13 what was going on. That's the only thing we have in the
14 brief. So we have nothing on the record from which Your
15 Honor can make a determination that there was diligence by
16 the estate. Did anyone move the Court to permit the claim
17 to go forward?

18 THE COURT: Well, it looks like there might have
19 been some kind of a battle about who was going to --

20 MR. BEISNER: Your Honor, there is nothing on the
21 record from which the Court can make that assumption. The
22 only thing on the record is Mr. Zeidel before he died hired
23 counsel, and we don't know -- he was diagnosed with dementia
24 at that time, so somebody else must have been involved in
25 that hiring. We don't know who that is. But he had hired

1 counsel. So the estate had a claim. The estate had a
2 potential asset. We have no idea what happened thereafter
3 from the estate's perspective. There was a representative
4 appointed who presumably had authority to bring the claim.
5 There's no indication here that counsel urged that it be
6 filed, that there was contact. For whatever reason -- and I
7 think I heard Counsel represent that they sent her the
8 client mailings for a significant period of time, but we
9 don't have a record showing diligence. Your Honor has to
10 make a finding of diligence by the estate about finding this
11 claim and counsel have given you nothing, given you no
12 record upon which to make that determination.

13 Your Honor, let me turn to the discovery, the
14 prejudice aspect of this, because the **Kozlowski** case and the
15 **E*TRADE** securities case that we have referenced also
16 indicate that the Court would be obliged to deny this motion
17 if there is substantial prejudice here, and we think that
18 there would be.

19 You know, counsel are saying, well, we're just
20 going to move for an issues class, so the class
21 representatives are irrelevant here. And, Your Honor, I
22 think that the **Blades** case before the Eighth Circuit talks
23 about -- you know, that was sort of the pioneer before **Dukes**
24 brought this up -- that you need full development of the
25 facts to understand what the manageability issues are, what

1 all the representation issues are going to be in the case.
2 And to simply say you don't get that discovery, the same
3 discovery that we've been afforded for class certification
4 purposes as to the other six plaintiffs, is just wrong.

5 And counsel are forgetting -- they're saying,
6 well, we're going to propose an issues class. I mean, look,
7 the Eighth Circuit rejected that twice in **St. Jude**, and a
8 lot of it had to do with is the issues class going to
9 accomplish anything because of all the other issues that
10 would be left to be resolved. That's what we're exploring
11 here.

12 THE COURT: Let me ask a few questions about it.
13 The last time we got together I ordered the plaintiffs to
14 give you authorizations and a pretty good list of medical
15 providers, and what did you get?

16 MR. BEISNER: We got an authorization that turned
17 out to not be filled out properly. We notified Plaintiffs
18 of that. We have that back. We have a few persons
19 identified there as medical custodians and we're beginning
20 that process. But, Your Honor, I wanted to give you a sense
21 of how long that medical records collection takes, because I
22 think that's pretty critical here.

23 We went back to look at two of the named
24 plaintiffs, LaCouture and Nicholls, to figure out how to get
25 those medical -- what the process was for collecting the

1 medical records. Mr. LaCouture gave us three sources that
2 are noted there in the left-hand column, but then when we
3 got those records, we noticed other healthcare providers
4 that were in there that we then were tipped off were
5 possible sources. And when I say "we," I'm referring to the
6 contractor we had, which is a professional records
7 collection agency, and, you know, they ended up finding 13
8 additional sources.

9 THE COURT: Isn't it true the importance of these
10 records to you is primarily relevant to causation, is it
11 not?

12 MR. BEISNER: It's relevant to causation, but I
13 think it also is very critical to the warnings case, because
14 what we're finding is that the personal physicians to a
15 number of the individuals had conversations with them and
16 gave their professional judgment about the risks that were
17 involved that need to be factored into this. Contrary to
18 Plaintiffs' allegation in the complaint that only NHL had
19 any information about anything, players as part of this
20 process were talking to lots of different people. And even
21 with respect to the issues class with respect to the duty
22 consideration, it's going to be a huge issue about how that
23 can be determined in the abstract when you've got so many
24 other sources of information for these players.

25 Your Honor, let me just note here with respect to

1 Nicholls. This is even a more dramatic exercise. I don't
2 think he gave us anybody up front. We got a few clues from
3 some of the other answers and ended up finding 26 sources,
4 some of which didn't emerge until his deposition was taken.

5 And to give you a sense of how this works --

6 THE COURT: Do you have an example of a medical
7 record where it shows that a personal physician had a
8 detailed conversation about warnings?

9 MR. BEISNER: Yes, there are a number of them,
10 Your Honor, which we can supply to you. I'm not bringing
11 any to mind offhand, but yeah. I mean, that's common and,
12 you know, the doctors were giving their assessments. Some
13 of these were instances where -- well, those assessments are
14 out there under a number of different circumstances.

15 Your Honor, just to give you a sense on
16 Mr. Nicholls, we started the collection process for him with
17 the first two up there and those were the dates that we got
18 material back from the first two, Broadway Physical Therapy,
19 the Palo Alto Medical Foundation Radiology Group. And then,
20 you know, as I was describing earlier, we would see in that
21 production others who had treated him and you go on. And
22 this process went on -- sorry -- until July, just a few
23 weeks ago, and we're still looking for more for him.

24 And, you know, Your Honor, I will acknowledge I
25 can't say to you, you know, this is the magic one, but

1 you're going through this exercise to piece this together
2 and it's the way it works. And so here, we were at this for
3 basically a year.

4 THE COURT: But apart from any comment a personal
5 physician may have made in a medical record about concerns
6 about concussion and hockey, what other relevance would
7 those medical records have to class certification?

8 MR. BEISNER: Pre-existing condition with respect
9 to causation. There's a suggestion in what limited
10 information we have so far -- and I'll be a little cryptic
11 about this. No, let me state this as an example.

12 THE COURT: That has to do with causation. I'm
13 talking about --

14 MR. BEISNER: That has to do with causation, yes,
15 but there's -- you also get facts from the medical records
16 to pursue as well. A patient comes in and explains -- I
17 mean, we had some instances here where the concussions that
18 they were treated for were barroom fights. That's pretty
19 significant to know, a major injury. We have another
20 instance with respect to one of our named plaintiffs we've
21 had a dispute about who had a major head injury in a car
22 accident.

23 THE COURT: Well, that may be true, but for class
24 certification purposes, I'm not going to resolve whether the
25 primary cause of the neurological damage has to do with

1 concussions unrelated to hockey as opposed to related to
2 hockey.

3 MR. BEISNER: But the **Blades** case from the Eighth
4 Circuit says that you do need to figure out whether that
5 would be a contested issue before the jury that denies the
6 possibility of class treatment.

7 THE COURT: Well, you can make that argument
8 already, probably.

9 MR. BEISNER: How could we? We don't have his
10 medical reports. He's the class representative. And the
11 argument we would be making to Your Honor is, look at how
12 his trial would go if it were conducted individually. And
13 if they're making an issues class determination, it would
14 be -- you know, that's not going to resolve much of anything
15 in that trial because there are 59 other issues that would
16 need to be addressed in that trial. What good is it to do
17 the issues class. That's basically what the Eighth Circuit
18 said in the heart valve cases. And so that's critical
19 information to have.

20 Your Honor, with respect to -- you know, Counsel
21 talked about adequacy of the class representative. Your
22 Honor, to even have an issues class you've got to get to
23 typicality, and you've got an enormous number of issues with
24 respect to this plaintiff as to which we're entitled to
25 discovery.

1 I mean, among other things, he played the vast
2 majority of his career outside the NHL. He played 1,227
3 games outside the NHL in leagues that had nothing to do with
4 the NHL, only 158 games in the NHL. All right. So what
5 were the policies in those leagues? What was he told there?
6 He's not going to be typical of others who played the vast
7 majority of their career in the NHL, but we need to develop
8 that information through discovery to find out why. He's a
9 very difficult named plaintiff in that regard.

10 He says that he sustained -- one of the
11 allegations in the complaint is that he sustained numerous
12 hits, not properly treated. By whom? Is he talking about
13 the NHL? Is he talking about the other leagues? What's the
14 evidence of that?

15 He said he played his career while hurt and felt
16 he didn't have control of his health. Failure to warn.

17 He's deceased, so we're going to have to go to
18 others to get that information, to explore typicality as to
19 whether he can be a class representative.

20 I mean, even on the diagnosis, Your Honor, when
21 Boston University did the diagnosis, it wasn't based solely
22 on examining slides. They did interviews with a number of
23 people to figure out what experiences he's having. They
24 interviewed his spouse, his daughter, his son, looks like
25 there may have been others, and we have the right to explore

1 those as well, to take those depositions. All we have is
2 some scribbled notes from BU, but apparently they were
3 significant to that.

4 And then the diagnosis in the first place, Your
5 Honor. I mean, as to the other plaintiffs, we have expert
6 reports from Dr. Cantu and those who worked with him that I
7 assume will be part of the class certification process to
8 evaluate. I don't know what Plaintiffs would have in mind
9 with respect to him. The diagnosis has not been done by any
10 expert such as Dr. Cantu named in this case, and so I assume
11 we would have to do fact discovery at BU with respect to the
12 individuals who made this diagnosis.

13 And then you further have to understand this is a
14 very controversial diagnosis system which we would need to
15 understand. What is it they saw? What are the criteria
16 that they're using to diagnosis CTE? You've got to talk to
17 the people about that. This is very new territory and the
18 BU diagnosis system is controversial. So we're going to
19 have a lot of fact discovery just because they kicked the
20 door open to say that we need to look at BU's diagnostic
21 system.

22 But, Your Honor, no matter what class they move
23 for, as Counsel acknowledged, that's all going to be a
24 critical part of whether he is a typical representative.
25 All of that has to be explored, there's no shortcut on that,

1 and it's also going to be critical with respect to whether
2 he is an adequate class representative.

3 Your Honor, I was bemused by Counsel sort of
4 saying, well, you know, we don't need to worry about
5 discovery in this case because you're not going to find
6 anything. He's deceased and he stopped playing in 1969.
7 You're not going to find anything.

8 Well, Your Honor, if that's true, how can he be an
9 adequate class representative, because he's not going to be
10 able to prove anything. He's deceased. And if there are no
11 records there, that's a huge problem for them, but we need
12 to make a record that there are no records if Plaintiffs are
13 right on that. I mean, this fellow lived for 87 years I
14 think it was. It's a huge medical record and his playing
15 time was not in the electronic age. I don't know what we're
16 going to find, but we certainly have the right to look.

17 So, Your Honor, I think that this motion presents
18 the Court with kind of a Hobson's choice.

19 One is, if you allow us to take the discovery to
20 which we're entitled, it's going to substantially delay
21 class certification, we think. That's going to take months.
22 And we have a right to that discovery. I think **Dukes** and
23 the precedents of the Eighth Circuit make clear we can't be
24 denied that inquiry.

25 On the other hand, we also have a right to a

1 prompt, expeditious ruling on class certification under
2 Rule 23(c)(1). It's supposed to happen as soon as
3 practicable. Plaintiffs came to the Court, struck a deal,
4 said let us find a replacement for Ludzik out of the group,
5 the Court agreed, went ahead, they have that person. That's
6 practicable. Whatever this is adds to that and, Your Honor,
7 therefore shouldn't be permitted, because if this plaintiff
8 is added, our due process rights are denied one way or the
9 other. Either we're not getting a prompt determination
10 under (c)(1) for class certification or we're being denied
11 the discovery to which we're entitled.

12 Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Beisner.

14 Mr. Sinclair.

15 MR. SINCLAIR: Thank you, Your Honor.

16 Your Honor, it's always a challenge to follow a
17 seasoned trial lawyer who makes excellent jury arguments,
18 but luckily today we're here on a more simple in some
19 respects legal issue, and I still think that the legal
20 issues I presented to you are the only legal issues you need
21 to decide. I haven't heard anything yet from the other side
22 that would persuade me otherwise.

23 THE COURT: Well, let me ask you this.

24 MR. SINCLAIR: Of course.

25 THE COURT: If I was persuaded that the defense

1 was entitled to do some discovery here, is it the
2 plaintiffs' preference to delay the case and delay class
3 certification by a number of months, or to have Mr. Leeman
4 as your class representative for Class 2?

5 MR. SINCLAIR: Your Honor, it's certainly not our
6 preference to delay, but I have not yet heard good reason
7 why --

8 THE COURT: I understand you disagree with that --

9 MR. SINCLAIR: Sure, sure.

10 THE COURT: -- but my question is different.

11 MR. SINCLAIR: You're right.

12 THE COURT: My question is: If you were faced
13 with that choice -- and maybe you can't answer that without
14 discussing it with your team, but if you were faced with a
15 choice of giving the defense some time to collect these
16 records, which would delay class certification,
17 unfortunately, would you choose to continue with Mr. Leeman,
18 which was of course the plan just a few months ago, if not a
19 month ago, or countenance that delay?

20 MR. SINCLAIR: I would like to talk to my
21 co-counsel on that.

22 Your Honor, Mr. Beisner made a number of points,
23 and so I'm just going to try to address them *seriatim* and
24 hopefully not repeat myself.

25 The first point he made was going to diligence and

1 I think that he talked about Mr. Ludzik and withdrawing and
2 the deal that was struck. You know, we have not had an
3 opportunity -- law of the case has not come up yet and I
4 would just ask that if that is an argument that they are
5 truly advancing, that the law of the case, that there's a
6 deal that was actually struck, that we have an opportunity
7 to address that, because that was --

8 THE COURT: I don't think law of the case applies
9 here.

10 MR. SINCLAIR: Thank you, Your Honor.

11 THE COURT: There wasn't exactly a deal. The
12 Court ruled, so -- but Mr. Beisner's right. There were
13 representations by your --

14 MR. SINCLAIR: There were representations made,
15 Your Honor, and that's absolutely right. You know, in a
16 perfect world, if we only had one client with a general
17 counsel in-house and we could communicate with them on a
18 daily basis and they were sophisticated, we'd probably be in
19 a different position than we are, but we're not in that
20 perfect world. We're several different plaintiffs firms
21 doing our best to communicate amongst each other, doing our
22 best to communicate with several individuals, some of whom
23 have -- you know, this is the reason why we brought the
24 suit -- are not necessarily fully up and sophisticated as
25 Mr. Beisner's clients might be on these issues. So is it a

1 great excuse? No, Your Honor, but it's the way the world
2 is. And I can assure you, just as I know Mr. Beisner is
3 working and his team is working just as hard as they can to
4 push this to a resolution, so are we. And that's why I
5 began my argument by saying my apologies, because I know we
6 could have made this easier on the Court, but we are here
7 today to give you the full record that you need to make this
8 decision.

9 A couple other points. You know, Mr. Beisner
10 spent a fair bit of time on our interactions with Ms. Zeidel
11 and I appreciate his restraint. He probably could have had
12 a little more fun with our briefing, but I think you hit the
13 nail on the head. It's a red herring. Whether or not -- if
14 Ms. Zeidel had authorized us in February of 2015 or in June
15 of 2014, it wouldn't have mattered. We still couldn't have
16 filed anything until the personal representative.

17 And Mr. Beisner says that the estate has to act
18 with diligence. I haven't seen any case law suggesting that
19 that's the case whatsoever. I think that that is putting a
20 lot of responsibility on a personal representative in an
21 estate that we would need some -- we would need any
22 authority for, to suggest that you need -- that the estate
23 needs to move -- an estate that's not a lawyer, doesn't have
24 a lawyer present, would need to act with the same sort of
25 diligence that Plaintiffs' counsel would. So I don't

1 think that the -- I don't think that that is a winning
2 argument.

3 On discovery, Your Honor, I just want to make sure
4 that we have -- you had asked what we provided and so I'm
5 happy to give you copies of this.

6 We on August 1st sent an e-mail, Mr. Cashman sent
7 an e-mail to Mr. Beisner: "I'm writing to provide you some
8 additional medical provider information for Mr. Zeidel," and
9 he listed Boston University, Bryn Mawr Hospital, Cheryl Koch
10 at Bryn Mawr, Medical Arts, Gary Dorshimer at Penn Medicine
11 Washington Square, Harry Gottlieb, Pennsylvania Hospital,
12 Andrew Phillips, and medical records also may be available
13 from Golden Living, Diane Nachamkin, N-A-C-H-A-M-K-I-N.

14 And then on August 2nd we provided 34 pages of
15 information that we had on Mr. Zeidel. So to ensure that
16 you got the answer you want, I wanted to make sure you had
17 that.

18 On discovery, I think --

19 THE COURT: Why don't you make that an exhibit for
20 the record.

21 MR. SINCLAIR: Yes, Your Honor.

22 THE COURT: I mean, you can -- is that your only
23 copy, or --

24 MR. SINCLAIR: It is, but I've got more copies, so
25 I'm happy to make this --

1 THE COURT: All right.

2 MR. SINCLAIR: At the end I'll bring it up or do
3 whatever is appropriate.

4 THE COURT: That's fine.

5 MR. SINCLAIR: On the issue of discovery, Your
6 Honor, you know, I think that you again hit the nail on the
7 head. I think that most if not all of what Mr. Beisner was
8 talking about goes to causation and damages, and I don't
9 think that those are relevant issues to the limited issue
10 class certification we're presenting or the other class
11 issues that you need to take into account.

12 You know, in terms of what the Eighth Circuit has
13 said about issue class certification, I'm not sure that this
14 is the time to be thinking about that. If we want to move
15 for issue class certification and you think that we are able
16 to do so, that can be addressed during the class
17 certification briefing. I guess there's an argument that
18 perhaps there's a futility -- I guess what Mr. Beisner's
19 suggesting is that there's a futility argument, that, you
20 know, we should -- we're going to lose on an issues class
21 certification, but I didn't hear that articulated and I
22 don't see any authority for that. I think that we are
23 absolutely entitled to move on issue class certification and
24 we've made that representation, so there's another deal
25 that's been struck today. I don't expect to back away from

1 it. But, you know, that's the limited issue I think you
2 need to focus on, what discovery is necessary for us to be
3 able to show that he's adequate, it's typical, and this
4 narrow issue of the duty that they owed to our players. In
5 terms of the duty that they owed to our players, I don't
6 think you need anything from our guys.

7 In terms of the adequacy and typicality, again,
8 adequacy is whether you fully and fairly will represent the
9 class, whether he's going to -- whether his estate will, you
10 know, rise to the challenge and make sure that everything
11 that needs to get done will get done. I haven't heard any
12 argument suggesting that that's not the case.

13 And the typicality goes to the claims. These are
14 the same claims that are in the first amended complaint, so
15 I don't see a reason.

16 Mr. Beisner said there's a lot of fact discovery
17 and this is a point they made in their brief, that they need
18 all this fact discovery on claims. And again, I don't doubt
19 that that's the case. We may have some arguments about the
20 totality of it, but I'm sure they're entitled to this on
21 causation issues and damages issues. We just don't see
22 those as the issues you need to face right now, and we don't
23 see them having carried the heavy burden -- and again,
24 that's the language from **Lutheran Brotherhood** -- the heavy
25 burden they need to show that in fact they will be

1 prejudiced if you allow Mr. Zeidel to be added as a class
2 representative.

3 With that I conclude and I'm happy to do whatever
4 is best to add these as exhibits.

5 THE COURT: Why don't we do that right now. And
6 I'd appreciate a letter from Plaintiffs no later than the
7 end of next week advising the Court about whether you prefer
8 to proceed with Mr. Leeman as your class rep, or if the
9 Court believes that the NHL is entitled to some discovery,
10 that you're okay with that delay.

11 MR. SINCLAIR: Of course, Your Honor. Thank you.

12 THE COURT: Mr. Beisner.

13 MR. BEISNER: Your Honor, just briefly on a couple
14 of points.

15 Counsel started out by saying that on the
16 diligence issue, that it really is an issue of counsel
17 diligence and was unaware of any cases where the reference
18 was to the parties' diligence.

19 I would point out that all of the cases on pages 6
20 and 7 that we cited in our brief, pages 6 and 7 of our brief
21 on that issue, was looking at it from the plaintiff -- the
22 potential plaintiff's perspective. The **Barstad** case, Eighth
23 Circuit 2005, the court found a lack of good cause and noted
24 that, quote, the Barstads, the plaintiffs, knew of the
25 claims they sought to add when they filed the original

1 complaint. The *Popoalii* case looks at it from the
2 plaintiffs' perspective. That's another Eighth Circuit
3 case, 2008. All of those cases we cite talk about what
4 should have been known to Plaintiffs.

5 And, you know, the suggestion of, well, they
6 didn't have counsel and so on, you had counsel swarming all
7 over this thing, but we've got nothing on the record to
8 indicate why the Court should conclude that the party here
9 that now seeks to be before the Court and intrude on the
10 process that the Court and everyone had set out in moving
11 forward on class certification, why they should not have
12 come forward previously.

13 Your Honor, the other thing I would note with
14 respect to the relevancy of this evidence, again, it's right
15 at the center of everything on class certification even if
16 it is an issues class. Typicality, you've got to look at
17 the claimant and the claimant's facts, and, you know, are
18 their claims the same.

19 THE COURT: Well, the claims are the same. You're
20 saying the plaintiffs aren't the same.

21 MR. BEISNER: But the plaintiffs' claims, I think
22 the case law is pretty clear, isn't -- you don't just say
23 are they asserting is the complaint the same. You've got to
24 look at whether the facts that go with the claims are the
25 same. You know, are they going to be telling the same story

1 to the jury as the others and are they typical in that
2 sense. That's what that requirement is about. And the
3 Supreme Court in its recent pronouncements, it made clear
4 that you need to look -- it's not a question of whether you
5 just state each of them, for example, states a common issue
6 or so on. That's too literal. You've got to look at the
7 facts underlying those claims.

8 And the same is true with respect to typicality.
9 And Counsel can say, well, you can deal with that later in
10 the class certification process is what I thought I heard
11 him say, but you need the record on that to deal with it
12 now. I'm not quite sure what Counsel meant by that, but it
13 was sort of like, well, we can deal with that when we get to
14 it. No, that's here and now. In their motion they have got
15 to make a record that this person is typical. There's no
16 record. And we as the defendant, likewise, have the right
17 to say that person is not typical and not adequate.

18 And adequacy, I just wanted to note as well in
19 response to Counsel, isn't just a, gee, do we have good
20 enough lawyers on this. It's adequacy in the sense of are
21 their claims consistent with the rest of the class such that
22 you would expect them to be able to argue to the jury in an
23 effective way on behalf of the class. That's why we need
24 the evaluation of the claim. I mean, there are tons of
25 cases out there saying that you can't have as a class

1 representative under (a)(4) someone who has a seriously
2 damaged claim because it's not going to be fair to the class
3 members. That's what we're looking at here.

4 So anyway, with that, Your Honor, I'll conclude.
5 Thank you.

6 MR. GUDMUNDSON: Your Honor, if I may, just a
7 small housekeeping matter in advance of the next status
8 conference.

9 I was a little shocked to hear Mr. Beisner talking
10 about all these very specific warnings that were given by
11 individual physicians in advance. And this is not for
12 resolution today, but I'm pretty familiar with the class
13 reps' depositions and saw no such thing. And so if there's
14 documents that haven't been turned over to us from third
15 parties, I am not familiar with every piece of paper that's
16 been turned over, but we would want to talk about that at
17 the next status conference. I just wanted to make sure that
18 that was on the record because it's not come up in any of
19 the depositions so far.

20 THE COURT: Okay. I think I asked Mr. Beisner
21 earlier in this hearing -- and perhaps I didn't say it out
22 loud what I was thinking, but if you could supplement the
23 record with this evidence, that would be helpful.

24 MR. BEISNER: Yes, Your Honor. We're talking
25 about produced records, produced materials.

1 THE COURT: I hope so, yes. Anything further for
2 today?

3 (No response)

4 THE COURT: Court is adjourned.

5 (Proceedings concluded at 10:35 a.m.)

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10 **C E R T I F I C A T E**

11
12 I, **TIMOTHY J. WILLETTE**, Official Court Reporter
13 for the United States District Court, do hereby
14 certify that the foregoing pages are a true and
15 accurate transcription of my shorthand notes,
16 taken in the aforementioned matter, to the best
17 of my skill and ability.
18

19
20
21 */s/ Timothy J. Willette*

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