UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	)	MDL No. 14-2551 (SRN/BRT)
This Document Relates to: ALL ACTIONS	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT NATIONAL HOCKEY LEAGUE'S MOTION TO EXCLUDE THE TESTIMONY OF D'ARCY JENISH

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Plaintiffs respectfully submit this memorandum of law in opposition to the National Hockey League ("NHL" or "League")'s motion to exclude the expert testimony of D'Arcy Jenish (ECF No. 757).[1]

I. INTRODUCTION

Over the past four decades D'Arcy Jenish ("Jenish") has closely followed, studied, and written extensively about the NHL as both a journalist and historian. In addition to countless articles appearing in regional and national Canadian newspapers, Jenish has authored three books comprehensively documenting NHL history dating back more than 100 years. The wealth of knowledge Jenish has acquired during a career devoted primarily to observing, researching, and writing primarily about the NHL distinguishes him as one of the preeminent authorities on the League's history, including its culture of violence.

Because Jenish's store of knowledge about the NHL doubtless lies well beyond the ken of jurors, his testimony will assist them in their fact-finding role. In particular, Jenish will educate the jury with facts and opinions to help them answer central questions in this case, such as whether the NHL could have and should have done more to squelch fighting and head hits and thus reduce the number and severity of player concussions. Because Plaintiffs' claims in this action are predicated on conduct of the NHL spanning decades, a comprehensive and coherent presentation of information in its historical

[1] This proposed testimony is set forth in the Declaration of D'Arcy Jenish, ECF No. 643 ("Jenish Rep.").

context will aid jurors in digesting and understanding decades of relevant history. As Jenish himself phrased it, "I know what I can do. That I can go through large amounts of material and draw out the relevant material and put it into a coherent context." (Dep. of D'Arcy Jenish ("Jenish Dep.") 464:20-465:2.)[2]

In its motion to exclude Jenish's testimony, the NHL implicitly concedes that the courts have consistently recognized the value of a qualified historian's specialized knowledge and so have permitted such testimony at trial. The League also tacitly concedes that Jenish's undeniably impressive credentials qualify him generally to testify. Instead of a frontal assault broadly challenging Jenish's qualifications, the NHL makes three narrower arguments. Each lacks merit.

First, the NHL asks the Court to exclude any testimony that attributes motive, intent, or state of mind to the League. (NHL Br. at 1, 11-12.) This branch of the NHL's motion is moot because Plaintiffs do not intend to elicit any such testimony from Jenish. He has no special knowledge that would qualify him to opine on matters of the mind and to do so would invade the province of the factfinder. Accordingly, *to that limited extent* – and *only* to that extent, Plaintiffs do not oppose the NHL's motion.

Plaintiffs *do* oppose exclusion of any expert testimony by Jenish that would inform, but not usurp, the jury's role in ultimately determining state of mind. Factual testimony and opinions Jenish offers about the nature and culture of NHL hockey;

[2] Excerpts of the deposition transcript of D'Arcy Jenish are attached as Exhibit 1 to the accompanying Declaration of David M. Cialkowski.

statements made by NHL executives, players, and others; the NHL's conduct; and other facts – without attributing any underlying intent or motive – are appropriate because they do not invade the factfinder's role. Examples include Jenish's testimony that the NHL has repeatedly refused to take effective action to eliminate or reduce fighting and other violent head blows during games (*see* Jenish Rep. ¶19), that on-ice violence has fan entertainment value (*see id*. ¶27), and that because attendance at NHL games would suffer if this violence were eliminated, profits would shrink. *Id*. Testimony of this kind assists, not infringes, the jury's role by laying the factual foundation for the jury's decisions about the NHL's state of mind.

Second, the NHL tosses in a red herring by arguing that Jenish may not simply "regurgitate" the content of documents that jurors are equally capable of reading and comprehending themselves. (NHL Br. at 1-2, 12-14.) Jenish will do no such thing. Plaintiffs assuredly did not engage Jenish to read to the jury. Even a cursory look at Jenish's declaration reveals that he will draw on his deep reservoir of special knowledge to present facts in helpful context and opine based on this evidence – precisely the kind of expert assistance permitted by Rule 702. The fact that Jenish will rely on certain documents, or even quote pieces of them, is of no moment; it is precisely what expert witnesses do.

Third, the NHL contends that Jenish's testimony is the product of a flawed methodology that fails to satisfy the *Daubert* reliability standard. (*Id*. at 2, 14-16.) The sole basis for this challenge is the NHL's errant claim that Jenish failed to conduct his own research and instead relies exclusively on documents he received from Plaintiffs'

counsel. (*Id*. at 15.) This argument fails for several reasons. To begin with, Jenish has clearly stated in his declaration and deposition that his testimony is *not* based solely on documents Plaintiffs' attorneys showed him. Rather, it is far more widely based on his decades of research and reporting on the NHL. Further, case law does not require a historian to slavishly adhere to any particular methodology. For obvious reasons, non-scientific expert testimony is not held to the same stringent standard that *Daubert* established for scientific testimony. Rather, the standard is a highly flexible one that does not demand that Jenish conduct new research on a subject he already knows well. Finally, even assuming – falsely – that Jenish were to rely solely on documents he received from counsel, his choice to do so would go only to the weight of his opinions, not their admissibility.

JENISH'S QUALIFICATIONS AND PROFERRED TESTIMONY

Jenish is a journalist and published author who has devoted most of his 40-year career to coverage of ice hockey – much of that to the NHL. (Jenish Rep. ¶¶1-6.) Jenish earned a B.A. in English Literature but does not have a history degree. (*Id*. ¶2; Jenish Dep. 21:9-10.) He began his career as a reporter for a number of local newspapers in southwestern Ontario before becoming a senior editor for the *Alberta Report*, a weekly magazine published in Edmonton, Alberta. (Jenish Rep. ¶¶ 2-4.) Since then he has been a senior writer for *Maclean*'*s*, Canada's national newsmagazine, and a freelance sportswriter whose articles have appeared in national Canadian newspapers such as the *Globe and Mail*, the *National Post*, and the *Toronto Star*, and in numerous general-circulation and trade magazines. (*Id*. ¶¶5-6.) Along the way, Jenish covered the

Edmonton Oilers for the *Alberta Report* during the team's Wayne Gretzky years and has written profiles of numerous NHL greats. (*Id*. ¶7.)

Jenish has authored three comprehensive books on the history of NHL hockey: *The Stanley Cup: 100 Years of Hockey At Its Best*; *The Montreal Canadians*: *100 Years of Glory*; and *The NHL: A Centennial History*. (*Id*. ¶8.) He also edited a history titled *Canada On Ice: Fifty Years of Great Hockey; From the Archives of Maclean*'*s*. (*Id*. ¶9.) Jenish's research has covered 100 years of NHL history, 100 years of Stanley Cup history in particular, and 100 years of history about the Montreal Canadiens NHL franchise. (Jenish Dep. 40:13-15.)

Adding to Jenish's knowledge base and insight into hockey is his own participation in the sport. He played hockey until the age of 19, and was a member of three elite Canadian teams, where he played with and against players who went on to play in the NHL. (Jenish Rep. ¶10.)

For the past 10 years Jenish has been a member of the Society for International Hockey Research, which offers him access to a wide range of detailed historical research about NHL hockey and the game of hockey generally, and to informal "off-the-record" interviews and presentations of former NHL players. (*Id*. ¶11.) In short, Jenish commands an encyclopedic knowledge of hockey, as it is played in the NHL and elsewhere.

Recognizing the value of this special knowledge, Plaintiffs retained Jenish to present relevant and helpful factual information and to express his opinions on matters that bear on important issues in this case. In response, Jenish has furnished a report that does both. Factually, the report summarizes the history and culture of fighting, head hits

and other forceful collisions; the disparity between the NHL game and the less violent style of hockey mandated by every other organized hockey league in the world; the NHL's tolerance and even encouragement of this violent play since the League's inception; the fan appeal of violence on NHL rinks; and the NHL's glorification of violence in the media.

Based on this factual foundation, Jenish opines on crucial subjects in this case, such as the integral role that fighting and head blows play in the NHL's brand of hockey and failure of the NHL – unlike all other organized hockey at all levels – to take timely and effective action to eliminate or reduce this violence on the ice by prohibiting and severely penalizing fights and all head hits. (*Id*. ¶26.)

The Summary of Opinions in Jenish's declaration lists the expert opinions he will offer. Only four of them (italicized below) ascribe motive, intent, or state of mind:

- NHL hockey has always been violent. (*Id*. ¶16.)
- The NHL permits and promotes violence in its sport. (*Id*. ¶17.)
- Fighting has always been an integral part of the NHL game but its purpose and practice has changed over time. (*Id*. ¶18.)
- Despite multiple opportunities to eliminate fighting and reduce violence in the NHL, the League has refused, and continues to refuse, to do so. "*The reason for the NHL's refusal appears to be a fear of changing the sport in a way that might make it less profitable*." (*Id*. ¶19.)
- The NHL benefits monetarily by allowing fighting and hits to the head, *which is a primary reason that both remain legal to this day*. (*Id*. ¶20.)

- The NHL has on numerous occasions considered, but ultimately rejected, proposals to make all player-on-player hits to the head illegal. "*The reason for the NHL's refusal, once again, appears to be a fear of changing the sport in a way that might make it less profitable*." (*Id*. ¶21.)
- The NHL has repeatedly acted reactively instead of proactively when dealing with issues of violence, fighting, hits to the head, and overall player safety in its sport. (*Id*. ¶22.)
- The *NHL prioritizes its profits over its players safety by tolerating and promoting violence in its sport, and it has been doing so since the League's inception*. (*Id*. ¶23.)

In his report, Jenish explains that the basis for his opinions encompasses all of the knowledge and experience he has acquired while covering and writing about the NHL and other organized hockey leagues, plus additional documents he received from Plaintiffs' counsel:

> My opinions are based upon the research I conducted while writing three comprehensive hockey histories, including one specifically about the NHL. My opinions are also based upon my knowledge and understanding of the sport acquired by covering the NHL as a journalist, playing the game of hockey, and closely observing NHL hockey games and professional reporting about the NHL. Finally, my opinions are based upon reading and interpreting various internal NHL documents provided to me by Plaintiffs' counsel.

(Jenish Rep. ¶14. *See also* Jenish Dep. 40:8-10 (testifying that his expertise is "based on my historical knowledge of the game, based on the research I've done.").)

II. ARGUMENT AND AUTHORITIES

A. The Applicable Legal Standard.

1. The *Daubert* Standard Generally.

Rule 702 of the Federal Rules of Evidence provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) The testimony is based on sufficient facts or data;
> (c) The testimony is the product of reliable principles and methods; and
> (d) The expert has reliably applied the principles and methods to the facts of the case.

The U.S. Supreme Court has explained that when determining whether to admit expert testimony under Rule 702, the trial court fulfills a "gatekeeping role." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). When exercising this "gatekeeper" role, the judge's first line of inquiry is to determine whether the expert has sufficient qualifications to testify. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). An expert meets this qualification requirement when he or she "possesses sufficient knowledge gained from practical experience," even though that person "may lack academic qualifications in the particular field of expertise." *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990). Rule 702 "does not rank academic training over demonstrated practical experience." *Circle J. Dairy, Inc. v. A.O. Smith Harvestore Products, Inc.*, 790 F.2d 694, 700 (8th Cir. 1986). Ultimately, the court's main focus in determining competency is assessing "whether the expert's testimony will assist the trier of fact." *Fox*,

906 F.2d at 1256. The weight of the expert's testimony is for the trier of fact, and "challenges to the expert's skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility." *Id.*

Once the court has decided the question of competency, the second inquiry is "whether the proffered testimony has sufficiently reliable foundation." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002). Answering this question requires the court to assess whether the testimony is based on sufficient facts or data; whether the testimony is the product of reliable principles and methods; and whether the expert has reliably applied those principles and methods to the facts of the case. *Id.*; Fed. R. Evid. 702. To determine the reliability of the principles and methods used by the expert, the *Daubert* court encouraged judges to consider the following factors in evaluating scientific testimony:

> (1) Whether the theory or technique can be (and has been) tested, (2) whether the theory has been subject to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory has been generally accepted.

Daubert, 509 U.S. at 593-94.

The court's focus when applying these factors must be "solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. Indeed, "even if the judge believes there are better grounds for some alternative conclusion, and that there are some flaws in the scientist's methods, if there are good grounds for the expert's conclusion, it should be admitted." *Heller v. Shaw Indus.*, 167 F.3d 146, 152-53 (3d Cir. 1999) (quotation omitted). Therefore, "the district court could not exclude the [scientific]

testimony simply because the conclusion was 'novel' if the methodology and the application of the methodology were reliable." *Id.* (quotation omitted). The court must take a "flexible" approach when applying the *Daubert* factors because the "overarching subject" of the analysis is "the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." *Daubert*, 509 U.S. at 594-95.

Courts are *not* required to rigidly apply all four factors; rather, the aim is to ensure that the proffered testimony is reliable and relevant. *Id.* at 593 (recognizing that "many factors will bear on the inquiry, and [courts] do not presume to set out a definitive checklist or test"); *see Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1298 (8th Cir. 1997) ("It is clear the Court did not intend for a trial judge to automatically exclude relevant evidence if one of these conditions was not fully satisfied."); *Unrein v. Timesavers, Inc.*, 394 F.3d 1008, 1011 (8th Cir. 2005) ("There is no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant.").

B. Rule 702's Application to Non-Scientific Testimony.

The flexibility of this approach to determine reliability is particularly appropriate for the court's scrutiny of nonscientific testimony, such as Jenish's, which *Daubert* did not address. For testimony of this nature, "relevant reliability concerns may focus upon personal knowledge or experience" rather than scientific foundations. *United States v. Holmes*, 751 F.3d 846, 850 (8th Cir. 2014) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999) (extending and adapting *Daubert* analysis to nonscientific

expert testimony). For such testimony to be sufficiently reliable, it is necessary that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Additionally, the testimony must have a "valid ... connection to the pertinent inquiry." *Id.* at 149 (quoting *Daubert*, 509 U.S. at 592). The Eighth Circuit has recognized that the reliability of nonscientific testimony is better evaluated "by reference to other standard principles attendant to the particular area of expertise" than to scientific foundations. *Polski v. Quigley Corp*., 538 F.3d 836, 839 (8th Cir. 2008) (quoting Fed. R. Evid. 702 advisory committee note).

C. Any Doubt About Admissibility Is Resolved in Favor of Admitting Expert Testimony.

Any doubts about the usefulness of expert testimony are to be resolved in favor of admissibility. *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011); *Marmo v. Tyson Fresh Meats, Inc*., 457 F.3d 748, 758 (8th Cir. 2006). District courts are not to inquire into the correctness of an expert's opinions. *Johnson v. Mead Johnson & Co., LLC*, 754 F.3d 557, 562 (8th Cir. 2014). As long as the expert's testimony "rests upon 'good grounds, based on what is known' it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset." *Id*. (quoting *Daubert*, 509 U.S. at 596). The Eighth Circuit has instructed that "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the

opinion in cross-examination." *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1036 (D. Minn. 2007) (quoting *Bonner v. ISP Tech., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001)).

Accordingly, "[i]n its role as gatekeeper, the Court should also keep in mind that 'presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'" *Baycol*, 532 F. Supp. 2d at 1036 (quoting *Daubert*, 509 U.S. at 596). *See also*, *Arkwright Mut. Ins. Co. v. Gwinner Oil, Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997) ("'[T]he factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.'") (quoting *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995)); *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir. 1995) ("'Once the trial court has determined that a witness is competent to testify as an expert, challenges to the expert's skill or knowledge go to the weight to be accorded the expert testimony rather than to its admissibility.'") (quoting *Fox*, 906 F.2d at 1256); *Williams v. Pro-Tec, Inc.*, 908 F.2d 345, 348 (8th Cir. 1990) (holding that an expert's self-acknowledged lack of medical expertise went to the weight rather than to the admissibility of his testimony).

These principles were explained and applied in *Quiet Technology DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333 (11th Cir. 2003), a case that the Eighth Circuit relied upon in *Cox v. Zurn Pex, Inc. (In re Zurn Pex Plumbing Prods. Liab. Litig.)*, 644 F.3d 604, 614-15 (8th Cir. 2011) ("*Zurn*"). There, Quiet Technology, a manufacturer of "hush kits" designed to reduce noise from jet engines, sued Hurel-Dubois, a company

that had designed a thrust reverser for the kits, alleging fraud, negligent misrepresentation, breach of contract, and breach of fiduciary duty. *Quiet*, 326 F.3d at 1337. In its defense, Hurel disclosed the testimony of Joel Frank, an aerodynamics expert whose opinions about the performance of Hurel's thrust reverser were based on his computer-based analysis of computational fluid dynamics (CFD), used to measure air flow. *Id.* Quiet opposed Mr. Frank's testimony under *Daubert*, arguing that his methodology was unreliable.

The court began its analysis by noting that "it is important to be mindful of a distinction that appears throughout the parties' arguments: the difference between the reliability of computational fluid dynamics generally and of Frank's application of CFD in this case." *Id.* at 1343. "Although Quiet expressly contests the latter, it does not appear to seriously dispute the former." *Id.* The court ultimately determined that "the identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination." *Id.* Relying on decisions across the federal circuit courts, the Eleventh Circuit emphasized that arguments about alleged deficits in an expert's analysis are more properly attacked through the time-honored adversarial techniques of cross-examination, presentation of contrary evidence, and competing expert testimony. *Id.* The court emphasized that "in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its

admissibility." *Id.* at 1345 (quoting *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002)).[3]

As discussed next, adherence to the liberal admission of expert testimony is particularly important when the issue is raised at the class certification stage, as it is here.

D. At the Class Certification Stage, the Court Conducts Only a Preliminary Analysis That Does Not Entail a Conclusive Determination of Admissibility.

Scrutiny of expert testimony at the class certification stage is limited because, "an exhaustive and conclusive *Daubert* inquiry before the completion of merits discovery cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings." *Id.* "The *Daubert* inquiry at the class certification stage is to guard against certification of a class based on an expert opinion so flawed that it is inadmissible as a matter of law." *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-MD-2090 ADM/AJB, 2012 WL 3031085, at *7 (D. Minn. July 25, 2012), *aff'd*, 752 F.3d 728 (8th Cir. 2014).

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[3] In support of its analysis, the court relied on *Daubert* and its progeny, explaining the role of the jury in determining credibility and weight of testimony. *Id.* at 1345 (citing *Cummings v. Standard Register Co.*, 265 F.3d 56, 65 (1st Cir. 2002) (holding that "whatever shortcomings existed in [the expert's] calculations went to the weight, not the admissibility, of the testimony"); *In re TMI Litig.*, 193 F.3d 613, 692 (3d Cir. 1999) ("'So long as the expert's testimony rests upon "good grounds," it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors['] scrutiny for fear that they will not grasp its complexities or satisfactory [sic] weigh its inadequacies.'" (quoting *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F.3d 77, 85 (1st Cir.1998))); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 920 (8th Cir. 1986) ("Virtually all the inadequacies in the expert's testimony urged here by [the defendant] were brought out forcefully at trial.... [T]hese matters go to the weight of the expert's testimony rather than to its admissibility.").

Any "expert disputes 'concerning the factual setting of the case' should be resolved at the class certification stage only to the extent 'necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true, to make out a prima facie case for the class.'" *Zurn*, 644 F.3d at 611 (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005)). Indeed, the primary purpose of *Daubert* exclusion, to protect juries from being swayed by dubious scientific testimony, is not implicated at the class certification stage where the judge is the decision maker" because "'there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself.'" *Id.* (quoting *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005)). As the Eighth Circuit has noted, "[w]e have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial." *Zurn*, 644 F.3d at 611.

The League's motion fails to recognize both the inherent flexibility of the *Daubert* standard, and the sacrosanct role of the jury in weighing expert testimony and evaluating credibility. Ultimately, the League's motion must be denied because its arguments are based either on an overly stringent—and therefore improper—application of the *Daubert* factors, or on misplaced criticisms of the sort raised in *Quiet Technology* that go to the weight and credibility of expert opinions.

III. THE NHL'S ARGUMENTS FOR EXCLUDING JENISH'S TESTIMONY LACK MERIT

A. The NHL Concedes That Jenish Is Generally Qualified to Testify as an Expert Journalist and Historian.

1. Courts Have Regularly Allowed Expert Testimony by Historians.

Not to be lost in considering the NHL's arguments is what the League does *not* challenge. To begin with, the League does not contend that historians have no place as expert witnesses. This concession is compelled by the healthy body of case law permitting historians to testify as experts. *See*, *e.g.*, *Mille Lacs Band of Chippewa Indians v. State of Minn.*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd on other grounds*, 124 F.3d 904 (8th Cir. 1997), *judgment aff'd on other grounds*, 526 U.S. 172 (1999) (allowing expert testimony by six historians on subjects such as the Chippewa hunting, fishing and gathering practices, an effort to expel the Chippewa from their reservation, and the early settlement and development of Minnesota in a case involving interpretation of a treaty with the United States).[4] One prominent example, analogous to this case, is tobacco litigation, where historians recounted the failure of tobacco companies to limit the detrimental health effects of smoking despite having knowledge of their carcinogenic and

[4] *See also Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 135-36 (2d Cir. 2013), *cert denied*, 135 S. Ct. 42 (2014) ("We have no doubt that a historian's 'specialized knowledge' could potentially aid a trier of fact in some cases. A historian could, for example, help to identify, gauge the reliability of, and interpret evidence that would otherwise elude, mislead, or remain opaque to a layperson.") (citation omitted). In particular, such experts may offer background knowledge or context that illuminates or places in perspective past events. *See, e.g.*, *Int'l Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 440 (2d Cir. 1981) (allowing testimony by "religious expert" about history of faith's cultural tradition).

other pathogenic properties. *See, e.g.*, *Rose v. Am. Tobacco Co.*, No. 101996/2002, 2004 WL 5528811 (N.Y. Super. Ct. Sept. 27, 2004) (allowing historians to offer expert testimony about public knowledge of the health risks of smoking).

2. Jenish Is Qualified to Testify Because He Has Specialized Knowledge That Will Assist the Jury.

Nor does the NHL contend that Jenish is unqualified to testify about its historical policies and practices concerning violence. Jenish's unassailable credentials and expansive hockey preclude that argument. The wealth of specialized knowledge about the NHL Jenish commands is far beyond the ken of an average juror. In particular, this expertise encompasses the League's history of tolerating – and even affirmatively preserving – concussive violence on the ice. Jenish's knowledge also extends to other hockey leagues, which have all acted decisively to protect players by ridding their rinks of fighting, head hunting and other violent conduct that causes concussions. This knowledge distinguishes Jenish from lay people, including NHL fans, who typically have at most a passing knowledge of the relevant facts.

What Jenish will teach the jury falls squarely within the definition of expert testimony as any testimony that assists the trier of fact by providing information outside common knowledge. *Kudabeck v. Kroger Co.*, 338 F.3d 856, 860 (8th Cir. 2003). By presenting and summarizing material facts and placing them in a coherent historical context, Jenish will educate the jury about the evidence bearing on the ultimate factual issues.

Jenish amply satisfies the requirement that an expert "possesses sufficient knowledge gained from practical experience," even though that person "may lack academic qualifications in the particular field of expertise." *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990). Rule 702 "does not rank academic training over demonstrated practical experience." *Circle J. Dairy, Inc. v. A.O. Smith Harvestore Prods., Inc.*, 790 F.2d 694, 700 (8th Cir. 1986). The court's focus for assessing competency to testify is not the source of an expert's specialized knowledge but "whether the expert's testimony will assist the trier of fact." *Fox*, 906 F.2d at 1256.

The League does not argue, because it cannot credibly argue, that Jenish lacks "specialized knowledge" that can be useful to a jury. Instead of broadly challenging Jenish's qualifications, the NHL focuses more narrowly on what it suggests are failings specific to his testimony in this case. As discussed next, with the single exception of the NHL's moot contention that Jenish may not testify as to intent, motive or state of mind, the League's arguments have no merit.

B. While Jenish May Not Testify as to Intent, Motive or State of Mind, He Is Permitted to Testify About Matters the Jury May Consider in Deciding Those Ultimate Issues of Fact.

The NHL's lead argument is that Jenish is precluded from testifying as to anyone's motive, intent, or state of mind. The reasoning behind this rule is that experts are not qualified to assess state of mind, which is an ultimate question of fact reserved for the jury. *United States v. Arenal*, 768 F.2d 263, 269 (8th Cir. 1985) (recognizing rule that expert evidence is not inadmissible if it embraces an ultimate issue to be decided by the jury); *Baycol*, 532 F. Supp. 2d at 1054 (D. Minn. 2007) (excluding expert testimony "as

to [defendants'] motive, intent or state of mind" because "an expert witness' speculation as to the motivation of Defendants is outside the realm of Rule 702"). For this reason, Jenish will not be asked to offer any opinions on those matters. The issue of whether Jenish would be permitted to do so is therefore moot. *See Block v. Woo Young Medical Co. Ltd.*, 937 F. Supp. 2d 1028, 1045 (D. Minn. 2013) (holding that issue of whether expert could testify as to defendant's intent, motives, and state of mind was mooted by his agreement to refrain from any such testimony and allowing testimony about what defendant should have known).

Just as clearly, however, this evidentiary rule and its underlying rationale do *not* extend to expert testimony or opinions regarding factual matters that inform *the jury's own findings* as to motive, intent, or state of mind but do not usurp the jury's role in making those ultimate findings. In particular, Jenish is fully qualified to enlighten the jury about the violent culture that has prevailed in the NHL for decades. This testimony encapsulates Jenish's research, books, and articles that historically chronicle the common attitudes and expectations of NHL players.

Specifically, Jenish's report sets forth the following opinions that do not attribute any motive or intent to the NHL or anyone else:

- NHL hockey has always been violent. (*Id.* ¶ 16.)
- The NHL permits and promotes violence in its sport. (*Id.* ¶ 17.)
- Fighting has always been an integral part of the NHL game but its purpose and practice has changed over time. (*Id.* ¶ 18.)

- Despite multiple opportunities to eliminate fighting and reduce violence in the NHL, the League has refused, and continues to refuse, to do so. The NHL benefits monetarily by allowing fighting and hits to the head. (*Id*. ¶ 20.)

- The NHL has on numerous occasions considered, but ultimately rejected, proposals to make all player-on-player hits to the head illegal. (*Id*. ¶ 21.)

- The NHL has repeatedly acted reactively instead of proactively when dealing with issues of violence, fighting, hits to the head, and overall player safety in its sport. (*Id*. ¶ 22.)

Also admissible is testimony that the NHL mischaracterizes as opinions about players' intent, motive or state of mind. For example, the NHL objects to the following testimony, which synthesizes information about the violent nature of the League's style of hockey (with emphases added by the League):

- "Support for fighting in the NHL is also deeply embedded because so many ***former players*** go on to become coaches, general managers, and executives after they retire." (NHL Br. at 3-4 (quoting Jenish Rep. ¶154).)

- "The ***willingness to respond to violence with violence*** was a core value that was embedded in pre-NHL hockey, preserved by the League's founders, and ***accepted and cultivated*** by succeeding generations of coaches and general managers—***most of who were former players***." (*Id*. at 4 (quoting Jenish Rep. ¶209).)

- "[T]here was and is no place in the NHL for players who shrink in the face of intimidation and violence and both those who ran—and continue to run the game, and also ***those who played the game, know and accept*** that as a prerequisite for participation in the NHL." (*Id*. at 4 n.4 (quoting Jenish Rep. ¶25).)

- "until the 1950s, every player on an NHL roster ***was expected to fend for himself on the ice***" and "players sometimes fought on behalf of their teammates ***out of a sense of loyalty***." (*Id*. at 4 n.4 (quoting Jenish Rep. ¶104).)

This testimony depicts the violent culture long endemic to the NHL, which is a matter of historical record. It doesn't reach into anyone's state of mind more than an

expert traffic engineer's testimony that Americans have long had a love affair with the automobile.

As another illustration, while Jenish should not opine that a profit motive or other intent underlies the NHL's tolerance, or even encouragement, of violence, it is wholly proper for him to educate the jury about the League's glorification of violence. (*See, e.g.*, Jenish Dep. 78:13-16 (the NHL and its teams display "really big, hard monstrous hits" on "the highlight reels that get shown again and again on the jumbotrons."); 79:8-10 (a bell rings in some arenas when a fight breaks out); 80:5-81:1 (dissemination of "Rock'em-Sock'em" videos depicting fighting and violent collisions).)[5]

Because all of this testimony is squarely within Jenish's field of expertise and does not invade the jury's domain, all of it is admissible. So is other testimony the NHL criticizes, as discussed next.

C. The NHL's Other Two Arguments Lack Merit.

1. Jenish's Proffered Testimony Does Not Consist of Simply Reciting the Content of Documents.

The NHL next erroneously contends that Jenish's testimony will consist entirely of reciting NHL documents, which would require no expertise and would not assist the

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[5] Jenish's declaration includes other information that will inform, not infringe, the jury's factfinding. *See, e.g.*, Jenish Rep. ¶26 (the NHL has, since its inception, allowed and promoted certain types of bareknuckle fighting; the NHL is the only major professional sport that does not immediately and automatically expel players who fight; in numerous internal NHL discussions regarding about putting a stop to fighting, "the League's bottom line is always addressed"; ¶27 (fighting has fan entertainment value, "which translates into profits for the teams and the NHL"); ¶¶89-92, 107-110, 130-31 (NHL clubs have recruited players as "enforcers" to violently check and fight with opponents).

jury. NHL Br. at 12. This mischaracterization of Jenish's argument is plainly refuted by his report itself, which consists of a coherent narrative in his own words chronicling the history of violence in the NHL since its inception, all of it culled and condensed from multiple sources other than NHL documents produced in this case.[6] The record is devoid of any suggestion that Jenish will simply read from one or more exhibits. The NHL's contrary contention, cut from whole cloth, should be rejected.

The NHL finds no support from *Fisher v. Ciba Specialty Chemicals Corp.*, 238 F.R.D. 273 (S.D. Ala. 2006), a case the League heavily relies on but is easily distinguished. There, the proffered expert was an administrative law attorney engaged to present so-called "regulatory history" of a chemical manufacturing plant. *Id.* at 281. Despite the fact that the expert's field of expertise was law, not history, her report summarized the plant's history and ventured opinions about its owner's conduct. Notably, she opined that the owner "has failed and refused to take action to remediate its off-site contamination." *Id.* As the court reasonably asked, "how is that conclusion bolstered by her expertise as a 'regulatory expert'?" *Id.* In no way, the court readily answered. *Id.* ("Although she has been couched as a 'regulatory expert,' her conclusions do not appear to relate to, or benefit from, any such expertise.")

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[6] The NHL attempts to make much of the fact that in his report Jenish cites a particular document, marked as Exhibit 4 in his deposition, 35 times to support his testimony and quotes several times from that document. *See* NHL Br. at 6. This microscopic observation loses sight of the broader universe of documents and specialized knowledge Jenish relied on. In any event, Jenish relied heavily on this lengthy document for good reason: it "is about as concise and comprehensive a history as fighting in this league as you can find. … the gold standard." (Jenish Dep. 63:11-15.)

Because of this and other wayward opinions, "the Court d[id] not perceive [the expert's] report as an 'expert report' at all, but rather as written advocacy by a lawyer, akin to a supplemental brief on the facts presented by another attorney representing plaintiffs." *Id*. ("The document reads like the fact section of a brief, not the report of an expert witness.")

Here, in stark contrast, Jenish's testimony is entirely confined to his field of expertise, history.[7]

2. Jenish Did Not Consider Only Documents He Received From Plaintiffs' Counsel.

The NHL's final argument, equally meritless, is that Jenish's testimony is unreliable because he selectively relied on documents furnished to him by Plaintiffs, supposedly to the exclusion of adverse evidence. Again the League distorts the record. As Jenish testified at his deposition, he "use[s] the same methodology as a professional historian" (Jenish Dep. 39:14-15), which entails whatever research is sufficient to support his accounts. About his report, Jenish explained, "I was writing it as objectively as possible, as I do as a popular historian." (*Id*. 41:4-6.)

[7] The other cases the NHL relies on are similarly inapposite. *See Clinton v. Mentor Worldwide LLC*, No. 4:16-CV-00319 (CEJ), 2016 WL 7491861, at *11 (E.D. Mo. Dec. 30, 2016) (excluding expert testimony that was merely "[r]ecitation of defendant's own corporate documents"); *Robinson v. Newell Window Furnishings, Inc.*, No. 4:10CV1176 (JCH), 2012 WL 3043014, at *9 (E.D. Mo. July 25, 2012) (excluding expert testimony that "simply regurgitated information found in deposition testimony and other literature and documentation"); *Pritchett v. I-Flow Corp.*, No. 09-cv-02433-WJM-KLM, 2012 WL 1059948, at *7 (D. Colo. Mar. 28, 2012) (excluding expert testimony that merely summarized documents).

To do that, Jenish did not rely solely on documents furnished to him by Plaintiffs' attorneys. Instead, he also based his testimony on his earlier comprehensive research about the NHL and hockey generally and on knowledge gained from his observation and reporting as a journalist and author. (Jenish Rep. ¶14; Jenish Dep. 40:8-17; 41:21-44:1; 46:6-47:18.)

The NHL ignores (1) Jenish's unambiguous description in his report and deposition testimony of the information he relied on, (2) the more specific list of sources in Exhibit 2 to his report, [8] (3) the numerous footnotes in his report that cite to the full range of sources, and (4) Jenish's deposition testimony explaining that his purpose for examining the NHL documents was limited to "fitting them into a historical context" to ensure he "could present a clear, coherent account." (*Id*. 462:22-463:10. *See also id*. 51:5-14 (explaining that he used the NHL documents only to "fill in" facts he hadn't learned from his previous research and reporting).).

The NHL quibbles that Jenish relied on Plaintiffs' counsel to provide the documents he wanted. There are two answers to this objection. First, Jenish was not, as the NHL suggests, totally passive in obtaining NHL documents he considered relevant to his analysis. In fact, Jenish requested the documents he wanted and that's what exactly Plaintiffs' counsel gave him. (*Id*. 55:7-12; 56:5-8.) As Jenish testified, "that's the material

[8] In addition to the NHL documents, this list includes depositions of witnesses Jenish considered to be "key people" (Jenish Dep. 65:18): the NHL Commissioner, two men who have served as the NHL's Sr. Exec. VP and Director of Hockey Operations, and the NHL's Chief Legal Officer; the three books Jenish wrote; and other books and articles about the NHL, published as long ago as 1956.

I needed and that's the material they provided." (*Id*. 55:5-6.) He received 140 NHL documents spanning decades of the League's history, which he considered sufficiently comprehensive for his analysis. (*Id*. 57:19-22; 464:20-465:2) Of these documents, Jenish specifically relied on 57 of them, which "shed additional detailed light on what one might understand as broad historical trends." (*Id*. 52:21-53:1.)

Second, relying on a party's attorneys to provide relevant documents is what experts, by necessity, do in a case like this one, where the parties have produced, and their attorneys have reviewed and analyzed, a prodigious volume of documents. Surely, neither Jenish nor any other expert can be expected to independently search an enormous database of NHL documents to find the ones he wants. *See id*. 421:10-422:2 ("Well, that was all I could do, short of going to Minnesota and going through their documents.")

The NHL also bootstraps to the conclusion that Jenish unreliably departed from his past research practices by falsely positing that independent research constitutes "the methodology" Jenish invariably uses as a historian and journalist, and then arguing that's not what Jenish did here. In truth, Jenish has never developed a rigid uniform method, as scientists do. Instead, like other historians, he flexibly adapts his approach, doing whatever research he believes is appropriate for the task of hand. (Jenish Dep. 39:14-15.) That is what he did here, doing research that consisted of reviewing deposition transcripts and other sources he listed in his report. In this way, Jenish "employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

In any case, even hypothetically assuming – contrary to the facts – that Jenish would rely only on documents he received from Plaintiffs' counsel, the NHL's objection goes only to the weight of his testimony, not its admissibility, and flies in the face of abundant Eighth Circuit law, cited above, holding that this issue should be tested by cross-examination of the expert.

The NHL raises a quintessential credibility issue. Indeed, there is no clearer example of an issue going to the weight of an expert's testimony than the NHL's quarrel with which facts, in which documents, Jenish considered. The NHL will have every opportunity at trial to point out to the jury any purported shortcomings. This is not a case where "the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury." *Bonner*, 259 F.3d at 929-30.[9]

IV. CONCLUSION

For the reasons presented above, Plaintiffs respectfully request that the Court deny in its entirety the NHL's motion to exclude the expert testimony of Jenish.

[9] Also unavailing is the NHL's argument that Jenish's testimony is unreliable because, so the League asserts, "he erroneously opined that the NHL (i) did not adopt any new rules concerning fighting between 1971 and 1986 and (ii) failed to modify Rule 48 after it was implemented in 2010." NHL Br. at 15 (citing Jenish Dep. 212:8-213:12, 229:19-230:10, 419:5-15). This argument runs afoul of the Eight Circuit's admonitions, discussed above, that questions about a qualified expert's skill or knowledge or about the correctness of an expert's testimony go to credibility, not admissibility. *Mead Johnson*, 754 F.3d at 562.

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s/ Charles S. Zimmerman

Charles S. Zimmerman (MN Lic. #0120054)
Brian C. Gudmundson (MN Lic. #0336695)
David M. Cialkowski (MN Lic. #0306526)
ZIMMERMAN REED, PLLP
1100 IDS Center
80 S. 8th Street
Minneapolis, MN 55402
Telephone: (612) 341-0400
charles.zimmerman@zimmreed.com
brian.gudmundson@zimmreed.com
david.cialkowski@zimmreed.com

Steven D. Silverman (MD Bar #22887)
Stephen G. Grygiel (MD Bar #09169)
William Sinclair (MD Bar #28833)
SILVERMAN, THOMPSON,
SLUTKIN & WHITE, LLC
201 N. Charles Street, Suite 2600
Baltimore, MD 21201
Telephone: (410) 385-2225
ssilverman@mdattorney.com
sgrygiel@mdattorney.com
bsinclair@mdattorney.com

Stuart A. Davidson (FL Bar #84824)
Mark J. Dearman (FL Bar #982407)
Kathleen B. Douglas (FL Bar #43240)
Janine D. Arno (FL Bar #41045)
ROBBINS GELLER RUDMAN
& DOWD LLP
120 E. Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: (561) 750-3000
(561) 750-3364 (fax)
sdavidson@rgrdlaw.com
mdearman@rgrdlaw.com
kdouglas@rgrdlaw.com
jarno@rgrdlaw.com

Hart Robinovitch (MN Lic. #0240515)
ZIMMERMAN REED, PLLP
14646 N. Kierland Boulevard, Suite 145
Scottsdale, AZ 85254
Telephone: (480) 348-6400
hart.robinovitch@zimmreed.com

Plaintiffs' Co-Lead Counsel

Lewis A. Remele (MN Lic. #0090724)
Jeffrey D. Klobucar (MN Lic. #0389368)
J. Scott Andresen (MN Lic. #0292953)
BASSFORD REMELE
100 South 5th Street, Suite 1500
Minneapolis, MN 55402
Telephone: (612) 333-3000
lremele@bassford.com
jklobucar@bassford.com
sandresen@bassford.com

Plaintiffs' Liaison Counsel

Michael R. Cashman (MN Lic. #206945)
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
Telephone: (952) 941-4005
mcashman@hjlawfirm.com

Jeffrey D. Bores (MN Lic. #0227699)
Bryan L. Bleichner (MN Lic. #0326689)
CHESTNUT CAMBRONNE PA
17 Washington Avenue North, Suite 300
Minneapolis, MN 55401
Telephone: (612) 339-7300
jbores@chestnutcambronne.com
bbleichner@chestnutcambronne.com

Thomas Demetrio (ARDC #611506)
William T. Gibbs (ARDC #6282949)
CORBOY & DEMETRIO
33 N Dearborn Street
Chicago, IL 60602
Telephone: (312) 346-3191
tad@corboydemetrio.com
wtg@corboydemetrio.com

Brian D. Penny (PA Bar #86805)
Mark S. Goldman (PA Bar #48049)
GOLDMAN, SCARLATO
& PENNY PC
8 Tower Bridge, Suite 1025
161 Washington Street
Conshohocken, PA 19428
Telephone: (484) 342-0700
penny@gskplaw.com
goldman@gskplaw.com

Vincent J. Esades (MN Lic. #0249361)
James W. Anderson (MN Lic. #0337754)
HEINS MILLS & OLSON, PLC
310 Clifton Ave.
Minneapolis, MN 55403
Telephone: (612) 338-4605
vesades@heinsmills.com
janderson@heinsmills.com

Thomas J. Byrne (CA Bar #179984)
Mel Owens (CA Bar #226146)
NAMANNY, BYRNE, & OWENS, APC
27412 Aliso Creek Road, Suite 210
Aliso Viejo, CA 92756
Telephone: (949) 452-0700
tbyrne@nbolaw.com
mowens@nbolaw.com

Daniel E. Gustafson
David A. Goodwin
Joshua J. Rissman
GUSTAFSON GLUEK, PLLC
120 South Sixth Street, Suite 2600
Minneapolis, MN 55402
Phone: (612) 333-8844
Fax: (612) 339-6622
dgustafson@gustafsongluek.com
dgoodwin@gustafsongluek.com
jrissman@gustafsongluek.com

Robert K. Shelquist (MN Lic. #21310X)
W. Joseph Bruckner (MN Lic. #147758)
Rebecca Peterson (MN Lic. #0392663)
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Ave. S., Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
rkshelquist@locklaw.com
wjbruckner@locklaw.com
rapeterson@locklaw.com

Shawn M. Raiter
Larson King, LLP
30 East Seventh Street
Saint Paul, MN 55101
Telephone: (651) 312-6518
sraiter@larsonking.com

Charles J. LaDuca
Cuneo Gilbert & LaDuca, LLP
4725 Wisconsin Avenue, NW
Suite 200
Washington, DC 20016
Telephone: (202) 789-3960
charles@cuneolaw.com

Plaintiffs' Executive Committee

Michael J. Flannery
CUNEO GILBERT & LADUCA, LLP
7733 Forsyth Boulevard, Suite 1675
St. Louis, MO 63105
Telephone: (314) 226-1015
mflannery@cuneolaw.com

Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: NATIONAL HOCKEY LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION	MDL No. 14-2551 (SRN/JSM)
This Document Relates To: ALL ACTIONS	**LOCAL RULE 7.1(f) WORD COUNT COMPLIANCE CERTIFICATE REGARDING PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT NATIONAL HOCKEY LEAGUE'S MOTION TO EXCLUDE THE TESTIMONY OF D'ARCY JENISH**

I, Charles S. Zimmerman, certify that Plaintiffs' Plaintiffs' Memorandum of Law in Opposition to Defendant National Hockey League's Motion to Exclude D'Arcy Jenish complies with Local Rule 7.1(f).

I further certify that, in preparation of this memorandum, I used Microsoft Office Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 7,291 words in 13-point Times New Roman font.

Dated: February 9, 2018

s/ Charles S. Zimmerman

Charles S. Zimmerman (MN Lic. #0120054)
Brian C. Gudmundson (MN Lic. #0336695)
David M. Cialkowsi (MN Lic. #0306526)
ZIMMERMAN REED LLP
1100 IDS Center
80 South 8th Street

Minneapolis, MN 55402
Telephone: (612) 341-0400
charles.zimmerman@zimmreed.com
brian.gudmundson@zimmreed.com
david.cialkowski@zimmreed.com

Member, Plaintiffs' Co-Lead Counsel

Yolanda Sherman

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Aaron D Van Oort aaron.vanoort@faegrebd.com, deb.schuna@faegrebd.com

Adam M. Lupion alupion@proskauer.com

Andrew G. Slutkin ASlutkin@MdAttorney.com

Andrew T Rees arees@rgrdlaw.com, e_file_fl@rgrdlaw.com, e_file_sd@rgrdlaw.com

Arun S Subramanian asubramanian@susmangodfrey.com

Bradley C Buhrow brad.buhrow@zimmreed.com, stacy.bethea@zimmreed.com

Brian C Gudmundson brian.gudmundson@zimmreed.com, heidi.cuppy@zimmreed.com, leslie.harms@zimmreed.com

Brian D Penny penny@lawgsp.com, mummert@lawgsp.com

Brian P Murray bmurray@glancylaw.com

Bryan L Bleichner bbleichner@chestnutcambronne.com, dproulx@chestnutcambronne.com

Charles J LaDuca charlesl@cuneolaw.com, brendant@cuneolaw.com

Charles S Zimmerman charles.zimmerman@zimmreed.com, Jacqueline.Olson@zimmreed.com, Jenifer.Watson@zimmreed.com, Tina.Olson@zimmreed.com

Christine B Cesare cbcesare@bryancave.com

Christopher John Schmidt cjschmidt@bryancave.com, ekrulo@bryancave.com

Christopher P Renz crenz@chestnutcambronne.com, jheckman@chestnutcambronne.com

Clifford H Pearson cpearson@pswlaw.com

Cullin A O'Brien cobrien@rgrdlaw.com

Daniel E Gustafson dgustafson@gustafsongluek.com, mmorgan@gustafsongluek.com

Daniel J Connolly daniel.connolly@faegrebd.com, darcy.boehme@faegrebd.com

Daniel L Warshaw dwarshaw@pswlaw.com, egrant@pswlaw.com, mwilliams@pswlaw.com

David Newmann david.newmann@hoganlovells.com

David A Goodwin dgoodwin@gustafsongluek.com

David A Rosenfeld drosenfeld@rgrdlaw.com, dmyers@rgrdlaw.com

David I Levine agentdl@bellsouth.net, jcohen@thecohenlawfirm.net

David M Cialkowski david.cialkowski@zimmreed.com, heidi.cuppy@zimmreed.com

Geoffrey M. Wyatt geoffrey.wyatt@skadden.com

Hart L Robinovitch hart.robinovitch@zimmreed.com, sabine.king@zimmreed.com

Howard B Miller hmiller@girardikeese.com

J Scott Andresen scotta@bassford.com, mmooney@bassford.com, receptionist@bassford.com

James A. Keyte james.keyte@skadden.com

James W Anderson janderson@heinsmills.com, ikovarik@heinsmills.com

Janine D Arno jarno@rgrdlaw.com

Jeffrey D Bores jbores@chestnutcambronne.com, dproulx@chestnutcambronne.com

Jeffrey D. Klobucar jklobucar@bassford.com, pcarter@bassford.com

Jessica D Miller jessica.miller@skadden.com

John Zaremba jzaremba@zbblaw.com

John Herbert Beisner john.beisner@skadden.com

Jonathan Barton Potts jonathan.potts@bryancave.com, clbelleville@bryancave.com

Joseph Baumgarten jbaumgarten@proskauer.com

Joseph F. Murphy josephmurphy@mdattorney.com

Joseph M Price joseph.price@faegrebd.com, kathy.olmscheid@faegrebd.com

Joshua J Rissman jrissman@gustafsongluek.com

Katherine C Bischoff kbischoff@zelle.com, agarberson@zelle.com

Kathleen L Douglas kdouglas@rgrdlaw.com, e_file_fl@rgrdlaw.com, e_file_sd@rgrdlaw.com

Kenneth J Mallin kjmallin@bryancave.com

Kristin L. Bittinger kbittin@bu.edu

Lawrence G Scarborough lgscarborough@bryancave.com, mavilla@bryancave.com

Lee Albert lalbert@glancylaw.com

Leonard B. Simon lsimon@rgrdlaw.com, tdevries@rgrdlaw.com

Lewis A Remele , Jr lewr@bassford.com, lremele@bassford.com, docket@bassford.com, mbordian@bassford.com

Linda S Svitak linda.svitak@faegrebd.com, christine.kain@faegrebd.com, darcy.boehme@faegrebd.com, joe.winebrenner@FaegreBD.com

Lionel Z Glancy info@glancylaw.com

Mario Alba , Jr malba@rgrdlaw.com, e_file_sd@rgrdlaw.com

Mark J. Dearman mdearman@rgrdlaw.com, 9825585420@filings.docketbird.com, e_file_fl@rgrdlaw.com, e_file_sd@rgrdlaw.com

Mark R Anfinson mranfinson@lawyersofminnesota.com, debmauer@q.com

Mark S Goldman goldman@gsk-law.com

Matthew Stein matthew.stein@skadden.com

Matthew Michael Martino matthew.martino@skadden.com, alissa.turnipseed@skadden.com, matthew.lisagar@skadden.com, michael.menitove@skadden.com

Michael H Menitove michael.menitove@skadden.com

Michael Harrison Pearson mpearson@pswlaw.com

Michael J Flannery mflannery@cuneolaw.com

Michael R Cashman mcashman@hjlawfirm.com, lharris@hjlawfirm.com

Peter H Walsh peter.walsh@hoganlovells.com, sharon.mcmahon@hoganlovells.com, stephen.loney@hoganlovells.com

Rebecca A. Peterson rapeterson@locklaw.com

Richard M. Hagstrom rhagstrom@hjlawfirm.com, jebensperger@hjlawfirm.com

Richard R Gordon richard.gordon@gordonlawchicago.com

Robert K Shelquist rkshelquist@locklaw.com, aanewfield@locklaw.com, brgilles@locklaw.com, kjleroy@locklaw.com

Robert M Rothman RRothman@lerachlaw.com

Samuel H Rudman srudman@rgrdlaw.com, e_file_ny@rgrdlaw.com, e_file_sd@rgrdlaw.com

Shawn D Stuckey stuckey@allsportslaw.com, Damian@allsportslaw.com, Drice@allsportslaw.com, Pham@allsportslaw.com

Shawn M Raiter sraiter@larsonking.com, lburks@larsonking.com

Shepard Goldfein shepard.goldfein@skadden.com

Stephen Allen Loney , Jr stephen.loney@hoganlovells.com

Stephen G. Grygiel sgrygiel@mdattorney.com, cgoldsmith@mdattorney.com

Steve W Gaskins sgaskins@gaskinsbennett.com, jtakata@gaskinsbennett.com

Steven D. Silverman ssilverman@mdattorney.com

Stuart A Davidson sdavidson@rgrdlaw.com, 5147990420@filings.docketbird.com, e_file_fl@rgrdlaw.com, e_file_sd@rgrdlaw.com, jdennis@rgrdlaw.com

Thomas A Demetrio tad@corboydemetrio.com

Thomas Joseph Byrne tbyrne@nbolaw.com

Timothy J Hasken tim.hasken@bryancave.com, timothy.howard@bryancave.com

Vincent J Esades vesades@heinsmills.com, ikovarik@heinsmills.com, lgehrking@heinsmills.com

W Joseph Bruckner wjbruckner@locklaw.com, ctevans@locklaw.com, emsipe@locklaw.com, hnpotteiger@locklaw.com, sljuell@locklaw.com

William Christopher Carmody bcarmody@susmangodfrey.com

William N. Sinclair bsinclair@mdattorney.com

William T Gibbs wtg@corboydemetrio.com, agonzalez@corboydemetrio.com, mbrophy@corboydemetrio.com, nleftakes@corboydemetrio.com, sdudak@corboydemetrio.com

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