

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: National Hockey League  
Players' Concussion Injury  
Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota  
Courtroom 7B  
November 29, 2016  
9:30 a.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON  
UNITED STATES DISTRICT COURT JUDGE

**FORMAL STATUS CONFERENCE**

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

**A P P E A R A N C E S**

**For the Plaintiffs:**

**ZIMMERMAN REED, PLLP**

Charles "Bucky" S. Zimmerman, Esq.  
1100 IDS Center  
80 S. 8th St.  
Minneapolis, MN 55402

**HELLMUTH & JOHNSON, PLLC**

Michael R. Cashman, Esq.  
8050 W. 78th St.  
Edina, MN 55439

**ROBBINS GELLER RUDMAN & DOWD, LLP**

Mark J. Dearman, Esq.  
120 E. Palmetto Park Rd., Ste. 500  
Boca Raton, FL 33432

**SILVERMAN, THOMPSON, SLUTKIN & WHITE**

Stephen G. Grygiel, Esq.  
201 N. Charles St., Ste. 2600  
Baltimore, MD 21201

**CUNEO GILBERT & LADUCA, LLP**

Michael J. Flannery, Esq.  
7733 Forsyth Blvd., Ste. 1675  
St. Louis, Missouri 63105

**For the Defendant:**

**SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP**

John H. Beisner, Esq.  
1440 New York Ave. NW  
Washington, DC 20005

**FAEGRE BAKER DANIELS**

Daniel J. Connolly, Esq.  
Linda S. Svitak, Esq.  
2200 Wells Fargo Center  
90 S. 7th St.  
Minneapolis, MN 55402

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I N D E X

Page:

Defendant's Document Production..... 5  
Plaintiff Fact Sheets..... 6  
Deposition Scheduling..... 7  
Zeidel Estate Discovery..... 13  
De-designation Motion..... 21  
Defendant IMEs of the Named Plaintiffs..... 37

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

2 IN OPEN COURT

3 (Commencing at 9:37 a.m.)

4 THE COURT: We are here this morning in the matter  
5 of the National Hockey League Players' Concussion Injury  
6 Litigation. This is 14-MDL-2551.

7 Let's begin with appearances. Mr. Zimmerman?

8 MR. CHARLES ZIMMERMAN: Good morning, Your Honor.  
9 And happy Thanksgiving and holidays. I hope everyone had a  
10 good one. My name is Charles Zimmerman. I'm for the  
11 Plaintiffs.

12 MR. STEPHEN GRYGIEL: Good morning, Your Honor.  
13 Steve Grygiel from Silverman Thompson for the Plaintiffs.

14 MR. MICHAEL CASHMAN: Good morning, Your Honor.  
15 Michael Cashman for the Plaintiffs.

16 MR. MICHAEL FLANNERY: Good morning, Your Honor.  
17 Michael Flannery, Cuneo Gilbert & LaDuca, for the Plaintiffs.

18 MR. MARK DEARMAN: Good morning, Your Honor. Mark  
19 Dearman from Robbins Geller for the Plaintiffs.

20 Also joining on the telephone today are Brian Penny,  
21 Tom Byrne, David Goodwin, Bryan Bleichner, and Chris Renz.

22 THE COURT: Very good.

23 Mr. Beisner?

24 MR. JOHN BEISNER: Good morning, Your Honor. John  
25 Beisner on behalf of Defendant, NHL.

1 MR. DANIEL CONNOLLY: Good morning, Your Honor. Dan  
2 Connolly on behalf of Defendant, NHL.

3 MS. LINDA SVITAK: Good morning, Your Honor. Linda  
4 Svitak on behalf of the NHL.

5 THE COURT: Very good.

6 MR. DANIEL CONNOLLY: In addition, Your Honor, on  
7 the telephone are Julie Grand from the NHL; Shep Goldfein,  
8 James Keyte, and Jessica Miller from Skadden Arps.

9 THE COURT: Very good. All right.

10 Shall we begin with our agenda? Is this anything to  
11 report on document production?

12 Mr. Connolly.

13 MR. DANIEL CONNOLLY: There is nothing to report  
14 other than what's in the agenda and status report. There was  
15 one question, however, that Mr. Gudmundson and I talked about  
16 yesterday. At one point there was a question whether Your  
17 Honor would like us to continue with this -- the information  
18 that we have in the discovery status report about the status  
19 of the Defendant's document production. We're certainly happy  
20 to remove it, or we will retain it, as you please.

21 THE COURT: Well, it's nice to have the historical  
22 record, but I don't think we need to reproduce it at every  
23 conference. So, anything new would be helpful, but keeping --  
24 in other words, anything new should be incorporated in the  
25 historical record so we always have it in one place. I really

1 appreciate that that's taken place here.

2 MR. DANIEL CONNOLLY: Very good. So we will not  
3 report anything other than new information --

4 THE COURT: That would be good, too.

5 MR. DANIEL CONNOLLY: Perfect. Okay.

6 THE COURT: Thank you.

7 Plaintiff Fact Sheets.

8 Mr. Zimmerman.

9 MR. CHARLES ZIMMERMAN: I just have one question,  
10 and I don't know when you want to talk about this, the ongoing  
11 thing with Boston University. I don't know if that's  
12 documents or discovery --

13 MR. JOHN BEISNER: It's on the agenda later on.

14 MR. CHARLES ZIMMERMAN: But kind of to me it's  
15 documents, but we can deal with it in the agenda later on.

16 THE COURT: You know, Mr. Zimmerman, it looks like  
17 there's a whole section on Zeidel Estate discovery, so perhaps  
18 that's when we'll discuss it.

19 All right. Let's talk about Plaintiff Fact Sheets,  
20 Mr. Beisner.

21 MR. JOHN BEISNER: Your Honor, on the Plaintiff Fact  
22 Sheets, we do not have a dismissal yet on Mr. Quint. And I  
23 think where we left that last time was Mr. Cashman was going  
24 to get us something on that, but that's still an open issue.

25 Also at the last status conference, I think

1 Mr. Cashman advised that the seven named Plaintiffs from the  
2 Vietch Complaint for whom we had not received Plaintiff Fact  
3 Sheets would be provided yesterday. We have not seen those as  
4 of yet, so those seven that are listed in the status report  
5 are still outstanding. I won't read the names since I assume  
6 that will just be a problem for the court reporter, but  
7 they're noted in the status report.

8 THE COURT: Very good.

9 Mr. Cashman?

10 MR. MICHAEL CASHMAN: That is -- it is correct that  
11 we have to get that Quint stipulation for dismissal. And it's  
12 also correct that the seven Plaintiffs, counsel for those  
13 seven Plaintiffs was to provide those Fact Sheets, and I will  
14 follow up with that and get those to the Defendant ASAP.

15 THE COURT: All right. The Quint dismissal will be  
16 due by December 5th or the Court will just dismiss him without  
17 a stipulation.

18 MR. MICHAEL CASHMAN: Understood.

19 THE COURT: And the seven named Plaintiffs in the  
20 Vietch Complaint, if there is no Fact Sheet within 10 days,  
21 we'll also dismiss them.

22 MR. MICHAEL CASHMAN: Understood, Your Honor.

23 THE COURT: Okay. All right.

24 Depositions?

25 Mr. Grygiel.

1           MR. STEPHEN GRYGIEL: Thank you, Your Honor. I'm  
2 pleased to report that at long last, last Monday, we completed  
3 the deposition of Gary Leeman, the last of the Plaintiffs'  
4 scheduled depositions. And as we addressed with the Court  
5 last time we were here, we do have a bit of an issue about the  
6 Plaintiffs' request to schedule four additional depositions  
7 that are fact witness depositions. Those are Mark Lovell,  
8 Kris King, Dave Dryden, and Steve Walkom. And from my review  
9 of the records, which I'm not embarrassed to say has been  
10 exhaustive, every one of them has highly-relevant information  
11 going to the facts and the merits of this case. Some of the  
12 statements in their e-mails are, as has been the case  
13 previously here, quite colorful and things on which we want to  
14 examine these witnesses.

15           Back in August, I addressed this with Mr. Beisner,  
16 and I didn't get a response. I didn't particularly press the  
17 matter, and then I raised it again with Mr. Beisner in  
18 November, as he will recall, didn't hear back. And then I had  
19 to somewhat teasingly chide him that I felt like I was on the  
20 proverbial "pay no mind" list. We came here, we talked about  
21 it with the Court, and Mr. Beisner made the point to Your  
22 Honor that he thought class cert discovery should proceed or  
23 precede any further of these fact witness depositions as a  
24 matter of scheduling.

25           Mr. Beisner and I have spoken about that since, and



1 he has confirmed that that is indeed the National Hockey  
2 League's position, that there should be no additional fact  
3 witness depositions scheduled until the expert work relevant  
4 to class cert has been completed. But I look at the Pretrial  
5 Order 21 as amended and one looks at the schedule for the  
6 class cert work, which is now extended all the way into  
7 June 19 of 2017 and possibly later, pursuant to paragraph six  
8 if there is a surreply, and we see an awful lot of time  
9 getting by. As time goes by, memories fade, documents go  
10 missing, and we all have other obligations.

11 And as Your Honor said last year, or earlier this  
12 year, the Court wants to try something in this case in 2017.  
13 I assure you, the Plaintiffs would like to do the same thing.  
14 What I'm saying here, Your Honor, is that it seems to me to  
15 make sense that we schedule these four depositions, emphasis  
16 again at least get them scheduled, so that we can start moving  
17 discovery forward on the fact side of things. There is an  
18 awful lot of lawyers on the other side of the case, as there  
19 are on ours. I'm sure it's a matter of judicial notice that  
20 the Skadden firm has something in the order of 1700 lawyers,  
21 and a whole lot of them seem to be working be this case. The  
22 Proskauer firm has around 700, and the Faegre firm I think has  
23 around 750. There's an awful lot of people power over there,  
24 and we would make the same kind of resources available to do  
25 this on our side.

1           At the last hearing when we discussed this issue,  
2 Your Honor said at Page 10, Line 17, "We'll give everything  
3 priority." And what we are looking at here is simply getting  
4 these depositions scheduled so that we can then plan our own  
5 time and plan our own progress through the rest of the case so  
6 that we would be in a position to get something before Your  
7 Honor in the form of some kind of fact finding by the end of  
8 2017. That seems to be the goal, it seems to be certainly  
9 compliant with Federal Rule of Civil Procedure 1, and it seems  
10 to me as a practical matter relatively doable.

11           With that, Your Honor, I will sit down.

12           THE COURT: Thank you Mr. Grygiel.

13           MR. STEPHEN GRYGIEL: Thank you.

14           THE COURT: Mr. Beisner.

15           MR. JOHN BEISNER: Your Honor, a couple of points of  
16 on this issue. First of all, in terms of engaging on this, I  
17 went back through the e-mail exchanges that Mr. Grygiel and I  
18 have had on this, and this has been kind of a meandering list  
19 of names that have gone on the list and have gone off the  
20 list, so the suggestion that we've not engaged on this, I'm  
21 not -- I'm not sure is completely accurate.

22           But let me set forth what our position is on it  
23 because I don't think Mr. Grygiel has quite accurately stated  
24 that. We're happy to talk about scheduling these depositions.  
25 All I was saying to him during our meet and confer -- and this

1 is what is stated in the status report is where we set forth  
2 our position is we're willing to talk about scheduling these  
3 depositions, but we have the class certification brief coming  
4 in on December 8th, we are going to be under enormous pressure  
5 to get a lot of things scheduled coming out of that. I asked  
6 Mr. Grygiel, how many experts do you have, he wouldn't tell  
7 me. Fine. I mean, I understand that, but we don't know what  
8 we're going to need to be able to schedule -- need to schedule  
9 very quickly in terms of expert depositions. There's a fair  
10 amount of discovery that at Plaintiffs' urging the Court said  
11 needed to be deferred to the expert stage. And all we were  
12 saying is we want to get that discovery scheduled and launched  
13 before we get into taking any additional merits depositions.

14 I think it was interesting, Your Honor, at the last  
15 conference in the transcript on Page 9, Mr. Grygiel said,  
16 well, we didn't press to get these depositions scheduled  
17 earlier because, quote, the class certification deadline had  
18 not been moved and we were both cognizant there would be a  
19 fair bit of work being done there. In other words, they  
20 didn't press for these depositions because they were busy  
21 working on their class certification brief and didn't want to  
22 be distracted by that. It seems to me that is all we're  
23 saying with respect to the Defense responding to the class  
24 certification motion.

25 We're not saying we're not going to take these

1 depositions and we certainly did not say we are, you know,  
2 saying those need to be put off until class certification  
3 briefing is over or anything like that. We just want to get  
4 the brief on the 8th, get things set up, and then we'll engage  
5 on the rest of the scheduling once those priority items on  
6 class certification are handled. You specifically asked  
7 Mr. Grygiel at the last conference whether this -- do you  
8 intend to use those, referring to the depositions, for your  
9 class certification briefing? Mr. Grygiel said: No, we  
10 don't, Your Honor. So, this is not part of the priority on  
11 this.

12           And so I -- you know, with all due respect on this,  
13 Plaintiffs didn't press for these when they were busy working  
14 on their class certification brief. They're going to get that  
15 filed, I understand that. We have a right to focus on the  
16 class certification brief for a bit and not be subjected to  
17 this notion of, well, we got our brief finished so now let's  
18 go see what we can do about putting some pressure on the NHL  
19 to divert from getting what needs to be done in a class  
20 certification motion. So, all we're asking, Your Honor, is  
21 we'll talk about scheduling in this. We just want to defer  
22 this for a month or so until we find out what we actually need  
23 to do on class certification.

24           THE COURT: All right. You know, I think there's a  
25 resolution that can satisfy everybody's needs here. I think

1 we should wait until the class certification brief is filed,  
2 whether it's the 8th or 9th. I've been under the impression  
3 it's the 9th, but if it's the 8th, that's fine. In any event,  
4 when it's filed, I'm going to ask the parties to meet and  
5 confer within a week, so you might at this point in time, even  
6 before the brief is filed, identify a time during that  
7 following busy week to meet and confer. And at that meet and  
8 confer, you're going to talk about a lot of things. You're  
9 going to talk about scheduling depositions that clearly need  
10 to be scheduled after reading the opening brief, but also  
11 these four fact depositions. We can do all of the above.

12 And I will give you some time. So, let's make sure  
13 the fact depositions, because I appreciate that there will be  
14 some priority to the expert depositions, but let's make sure  
15 that fact depositions are scheduled to take place no later  
16 than March 1. That way you can push them into the new year if  
17 you're going to be focusing December and January on the  
18 experts. All right? I think everybody's needs get satisfied  
19 that way.

20 Any questions about that?

21 MR. STEPHEN GRYGIEL: None, Your Honor. Thank you.

22 THE COURT: All right. Very good.

23 Okay. I think we move ahead, then, to the Zeidel  
24 Estate discovery. Who wishes to be heard first on that?

25 Mr. Beisner.

1           MR. JOHN BEISNER: Your Honor, I don't think we have  
2 anything further to present with respect to that discovery.  
3 It's proceeding as indicated in the status report, and we  
4 spent some time talking about the detail of that at our status  
5 conference, I guess it was about two weeks ago, and things are  
6 proceeding there.

7           Taking up the point that Mr. Zimmerman raised  
8 earlier, though, with respect to the document -- excuse me,  
9 document discovery from Boston University, from the CTE Center  
10 there, at the last conference, in looking at the transcript, I  
11 think I reported that we were making some progress working  
12 with Boston University on sorting out the materials that we  
13 wanted to obtain through the third-party subpoena there. And  
14 Mr. Zimmerman at that point interjected that he thought there  
15 were major issues there that we were not hearing in a  
16 discussion with counsel for BU and advised the Court that he  
17 had a conference call scheduled the next day with that  
18 counsel, which was news to us. And we're now, after a couple  
19 of days, were advised by BU of somewhat of a different  
20 position such that I think there probably will be need for  
21 some issues to be presented to the Court on that.

22           And I'm -- will just simply say I'm a little  
23 concerned about that scenario. I think this is all -- the  
24 scenario of we were making some progress with that and now all  
25 of a sudden we seem, after what sounds like it may have been

1 some intervention from Plaintiffs' counsel on this, that we're  
2 having greater difficulty getting that information.

3 THE COURT: Have you asked BU's counsel whether  
4 they're willing to have that motion heard here, or are they  
5 preferring to have it heard in Boston?

6 MR. JOHN BEISNER: We have -- we have had a  
7 discussion about if there were a motion, where that would be  
8 heard, but we have not heard back from them about a  
9 willingness to have that here. And perhaps Mr. Zimmerman can  
10 address that because I think you asked Mr. Zimmerman that  
11 question at the last conference, and he said that he was going  
12 to be discussing that with them. I don't know what the  
13 outcome of that is.

14 I don't want to get into airing the controversy here  
15 because if we do brief it, the Court will get it that way.  
16 But I would just note that we believe this is extremely  
17 important because Mr. Zeidel's diagnosis is reliant on the  
18 research of BU, that is the source of the diagnosis that is at  
19 issue here, and indeed is of enormous importance to the  
20 litigation overall. This is, you know, a highly-controversial  
21 approach to diagnosis of CTE. It is not accepted by everyone,  
22 by any stretch of the imagination. And all we're asking for  
23 now that there is a named Plaintiff in the case who directly  
24 presents these factual issues to obtain from BU the background  
25 information on that.

1           There has been some concern expressed by BU about, I  
2           won't say HIPPA issues, but privacy issues, and we've advised  
3           them of the Court's position that anonymizing documents is a  
4           way to work through that issue. And there's been some concern  
5           about burden has been expressed, but although we haven't  
6           gotten into the details of that, we've made clear to BU that  
7           the NHL would be willing to participate in deferring the costs  
8           of whatever collection or redaction costs would be involved in  
9           obtaining that production. We think it's that important.

10           I don't think there can be any --

11           THE COURT: Mr. Beisner, have you asked for all of  
12           their materials on CTE or --

13           MR. JOHN BEISNER: No, it's not all of the materials  
14           on CTE. And we were in the process of going through a process  
15           of trying to whittle that until we sort of got this much --  
16           "we don't want to talk to you about this at all" sort of  
17           response. That's probably an overstatement, Your Honor, but  
18           it was a much -- the -- there was a much more resistance in  
19           the last call that we had of producing much of anything. So,  
20           that's where that stands. Again, there's nothing for the  
21           Court to resolve today, but I do think that is going to be an  
22           important issue coming down the pipe that probably will be  
23           presented by motion.

24           THE COURT: Okay. Thank you.

25           Mr. Zimmerman?



1           MR. CHARLES ZIMMERMAN: Well, there's two things I'd  
2 need to say. One, I'm not nearly as persuasive as maybe  
3 Mr. Beisner thinks I am. I did talk to the assistant general  
4 counsel at Boston University. He had reached out to me, I had  
5 a call -- call him back. I did call him back, and -- but in  
6 no way did I convince him to do anything he didn't want to do  
7 or convince him that he should dig his heels in, as I seem to  
8 be somewhat accused of doing. That's not how I roll, that's  
9 not how I operate. Interesting, I have another comment about  
10 that but I'll bring that up later on another matter, but let  
11 me continue to focus on BU.

12           I did get a letter, a copy of a letter that Mr. --  
13 his name is Elswit, Lawrence Elswit, wrote to Dan Connolly  
14 where he said to Mr. Connolly -- and I'm not going to read the  
15 whole letter, although it's short -- I'd like to provide it to  
16 the Court if the Court wants it -- but they talk about the  
17 subpoena being extraordinarily broad and burdensome and that  
18 it has a chilling effect on well-established process and  
19 producing these documents risks disruption and uncertainty  
20 within the scientific community. These are not my words.  
21 These are not things I take -- I take seriously, but I have  
22 not generated this.

23           This is their position on this discovery, and I'm  
24 here to tell the Court that they're very concerned. This is  
25 one of the most foremost research hospitals and institutions

1 in our country that's been doing groundbreaking research in  
2 this very important area, and now they find this burdensome  
3 and chilling and unduly burden -- uh, difficult for them. And  
4 I think I need to bring this before the Court, and I need to  
5 tell the -- them that they have to -- they should be able to  
6 at least have this heard here if that's their choice, which is  
7 what I did when I talked to Mr. Elswit. I said if you want to  
8 bring this before the Court, I'll help to arrange it, I will  
9 facilitate it, I will do that.

10 But I'm not taking their position for them. He  
11 wrote this to Dan Connolly. He just sent me a copy of it this  
12 morning when I asked him what was the latest status. So, for  
13 anyone to suggest that this was created by me or I was putting  
14 up walls for this discovery is absolutely absurd and actually  
15 kind of offensive, and I don't think that's proper.

16 It's BU that's concerned. It's BU that's feeling  
17 the pressure. It's BU that doesn't want to have the  
18 discovery, and they want time to have a conversation and try  
19 to work it out and to save costs. It's a very small  
20 department. They don't have a lot of resources within this  
21 department to do legal defense of these things, but they're  
22 concerned.

23 And so I want them to know they can bring their  
24 concerns here; that's all I want them to know. But I think it  
25 is important for counsel for the NHL to know that this -- that

1 they find this burdensome, they find this chilling, they find  
2 this a fishing expedition. These are their words:  
3 Extraordinary, broad, and burdensome. And we have to wrestle  
4 this to the ground, and this isn't manufactured by Charles  
5 Zimmerman or the PSC in any way, shape, or form.

6 Now, if you want -- if we want to go further with  
7 regard to the question of the resolutions that are out there  
8 or the conversations they have, we can have that conversation.  
9 But I don't know that it's ripe yet because I don't think  
10 those issues have been wrestled to the ground between the NHL  
11 who has served the subpoena and BU that is having to respond.  
12 I think there's still issues out there regarding anonymizing  
13 these records and things like that which up to now have not  
14 been able to resolve.

15 But to take the position that this was manufactured  
16 by me I think is inappropriate.

17 THE COURT: You know, I think the parties need to  
18 continue to meet and confer with BU and bring it to the Court  
19 at a time when I can have a full record to evaluate it. It  
20 doesn't surprise me. They know the NHL is hostile to this  
21 research, so I'm sure this is going to be a bumpy road for  
22 both sides, but I have to decide or a judge in Boston will  
23 eventually have to decide the scope of production here, and I  
24 just don't have enough before me to have any idea what that  
25 would be.

1           MR. CHARLES ZIMMERMAN: And -- excuse me, and again,  
2 Your Honor, we're not asking for any resolution today. I'm  
3 just bringing it up as a matter of it's a status conference,  
4 this is a status of the significant matter --

5           THE COURT: No, it's important for me to know this  
6 is going on. That's right. I agree. I agree.

7           All right. Anything more about Zeidel Estate  
8 discovery?

9           Mr. Beisner.

10          MR. JOHN BEISNER: No, Your Honor. I don't -- I  
11 think the status of the discovery is laid out in the report,  
12 and we don't have any other disputes to note.

13          Your Honor, I did just want to note so the record is  
14 clear on this with respect to the BU discovery, the letter  
15 that Mr. Zimmerman was referencing is an October 20th letter  
16 to Mr. Connolly which was BU's objections to the subpoena that  
17 was presented pursuant to the rules. The calls that I was  
18 referencing all occurred after that letter was received, so  
19 you had a preservation of objections and then the beginning of  
20 a meet and confer process that BU made clear it was inviting,  
21 even though it had made plenary objections with respect to the  
22 discovery.

23          THE COURT: Sure. Okay.

24          Mr. Zimmerman?

25          MR. CHARLES ZIMMERMAN: Correct. The letter I was

1 quoting was dated November 21st to Mr. Connolly, so --

2 MR. JOHN BEISNER: Yeah, and that is the letter that  
3 was sent after we had several calls with them, after you had  
4 had the call with them, and then they returned to this other  
5 position, so that's the scenario. I --

6 THE COURT: Okay. All right.

7 MR. JOHN BEISNER: This will be presented to the  
8 Court, Your Honor.

9 THE COURT: Mr. Beisner, do you have scheduled  
10 ongoing meet and confers with BU?

11 MR. JOHN BEISNER: What has happened is that  
12 Mr. Elswit said that he needed to confer with his clients  
13 about this, that he would be unable to do so until after the  
14 Thanksgiving holiday, and so we will re-engage him shortly,  
15 assuming -- I don't think he gave us a specific date for that  
16 meeting, but we'll re-engage with him shortly, presuming that  
17 those conversations have occurred.

18 THE COURT: Okay.

19 Mr. Connolly?

20 **(Discussion off the record between Mr. Beisner and**  
21 **Mr. Connolly.)**

22 MR. JOHN BEISNER: Thank you, Your Honor.

23 THE COURT: All right. Very good.

24 And I think the final issue has to do with the  
25 pending de-designation motion which was filed on

1 November 22nd, right before the holiday, and then I received  
2 some correspondence. The NHL has requested a two-week  
3 extension for responding, and I figured since we were coming  
4 here today, it would make sense to address the issue today.  
5 Perhaps we should start with, I think, the initial request was  
6 by the NHL.

7 Is there anything further to say on that subject,  
8 Mr. Connolly?

9 MR. DANIEL CONNOLLY: I don't think, Your Honor,  
10 that there's anything further to be said. But I just wanted  
11 to emphasize the point we got the papers on November 22 at  
12 10 a.m. -- I mean 10 p.m., and we, in order to follow the  
13 protocol that Judge Mayeron has set forward and that you  
14 indicated we would be continuing to follow, it will take some  
15 time to get the Affidavits and segregate the documents and  
16 segregate the issues. So, we think it would be helpful to  
17 have that additional time in order to present the issue in the  
18 way that the Court has asked that these issues be presented in  
19 the past.

20 At the prior hearing, Mr. Cashman indicated that  
21 this was a discrete legal issue. I wasn't here, but I did  
22 read the transcript. And we think that -- we disagree with  
23 his assertion that this is a discrete legal issue, that all of  
24 these documents are necessarily judicial records. And however  
25 it's resolved by the Court, the Court will need to look at the

1 documents on a document-by-document basis. And if we go  
2 through the protocol, it's going to take the time and that we  
3 ask that the Court provide us with that time in order for us  
4 to present it in a way that the Court has wanted us to present  
5 it.

6 THE COURT: Thank you.

7 Mr. Cashman?

8 MR. MICHAEL CASHMAN: Well, Your Honor, as I  
9 explained in our correspondence on this issue, the first I  
10 heard about a request for an extension was after -- was after  
11 the NHL sent the e-mail to the court. And as I explained in a  
12 letter, if I had been consulted before the request was made to  
13 the Court, I would have been happy to entertain it, and we do  
14 propose that a brief extension would be appropriate. I think  
15 that the letter is misconceived in a -- the sense that they  
16 seem to suggest that our expectation was that there would be a  
17 ruling on our motion before the class certification briefing  
18 is filed, and we talked about that last time. And we  
19 understood that there wasn't going to be any such ruling. We  
20 didn't expect any such ruling.

21 Our hope, of course, as we explained before is to  
22 get this issue resolved sooner rather than later. And in  
23 particular under the NHL's approach that they're going to be  
24 suggesting in their opposition brief, as we've already seen  
25 clearly stated in Mr. Connolly's letter, is that the Court

1 can't decide what judicial records there are until the  
2 decision on class cert is rendered. And obviously the hearing  
3 on class cert isn't until June 29th of 2017, and the decision  
4 will be some time after that, so we're talking about a long,  
5 long, long ways down the road. We don't think that's  
6 appropriate. Those are the kind of legal issues that we've  
7 laid out.

8 I think those kind of legal issues can be addressed  
9 easily by the NHL. They pretty much have done that already in  
10 their letter to the Court. I don't think that this phantom  
11 type of suggestion about mounting the evidence on a  
12 document-by-document basis is any different than has already  
13 been done before. They're going to come up with the same  
14 thing. On that particular issue, as we've pointed out, pretty  
15 much most of the documents they're claiming and they continue  
16 to claim and they told us during the meet and confer, so they  
17 can't change their position now, but most of the documents  
18 they're claiming that there is chilling deliberations or --  
19 basically that's their argument. And as we pointed out in our  
20 briefing, that's not an appropriate suggestion under any  
21 circumstance, under the Eighth Circuit law which has rejected  
22 what is essentially a self-critical analysis-type privilege.

23 So, again, these are legal issues that we can  
24 resolve. There's no reason for this requested long delay.  
25 And therefore we just think that their brief should be due, at



1 a minimum should be due before we file our class cert briefing  
2 and then we can set the hearing afterwards and we can talk  
3 about what the -- what the legal standards should be and how  
4 it applies to this discrete set of documents. So, at a  
5 minimum, Your Honor, we request that the response brief be due  
6 before Plaintiffs file their class certification brief.

7 And on that I'd like to just correct the record  
8 because I think in my e-mail to the Court I said it was due on  
9 December 9th. The scheduling order says December 8th, so --

10 THE COURT: Okay.

11 MR. MICHAEL CASHMAN: -- I apologize for that  
12 oversight.

13 THE COURT: Okay. Thank you, Mr. Cashman.  
14 Mr. Connolly.

15 MR. DANIEL CONNOLLY: Briefly, Your Honor. I did  
16 not understand that Mr. Cashman had agreed that the Court  
17 would make its ruling on the de-designation after the class  
18 certification brief is in. Now that he makes that clear, that  
19 they don't anticipate that this issue will be resolved before  
20 the class certification --

21 THE COURT: I think I made that clear the last time,  
22 that --

23 MR. DANIEL CONNOLLY: I thought you made it clear,  
24 too.

25 THE COURT: -- that nine days was not going to do

1 it.

2 MR. DANIEL CONNOLLY: I thought you made it clear,  
3 too, Your Honor, but I wasn't certain that Mr. Cashman still  
4 didn't have aspirations of some kind of a decision. But in  
5 any event, now that that is clear and particularly since we  
6 think it's important to look at their brief in order to  
7 address this judicial record issue, in my view it makes no  
8 sense for us to respond before their brief is in and see how  
9 these documents are used in their brief to address that topic.  
10 And so since their papers are due on December 8, that would  
11 give us a week to respond to that and address this in one  
12 package rather than two because we may find out that they're  
13 using these documents in different ways or not addressing them  
14 at all, and so that will dispose of that issue.

15 And so we think it would make sense to see their  
16 brief on December 8 and respond at that time, respond on the  
17 December 8 schedule. And then I addressed with your chambers,  
18 I don't know whether you've decided whether you are going to  
19 have the --

20 THE COURT: "Privilege."

21 MR. DANIEL CONNOLLY: The "privilege" -- that's the  
22 word I was looking for (laughter) -- of resolving this issue,  
23 or whether Judge Mayeron was going to receive that privilege,  
24 or some third-party. So we wanted to --

25 THE COURT: "Some third-party" (laughter).

1           MR. DANIEL CONNOLLY: I thought a Special Master or  
2 something.

3           And then finally as to the -- we should discuss a  
4 little bit the protocol issue. The Court had indicated that  
5 we were going to not deviate from the protocol and what we did  
6 the last time when we had this issue in the early part of this  
7 year is Mr. Cashman and I sat down with Judge Mayeron and  
8 talked about exactly how the protocol would be followed so  
9 that the Court would have the materials it wanted to resolve  
10 the issue. And respectfully, that wasn't done in these  
11 opening papers. That process hasn't been started attaching  
12 the documents and identifying them the way that the protocol  
13 suggests.

14           THE COURT: Mr. Cashman.

15           MR. MICHAEL CASHMAN: Well, Your Honor, let me  
16 address the last point first, the phantom protocol argument by  
17 Mr. Connolly because -- obviously the Court can talk with  
18 Magistrate Mayeron about this, but when we met with her she  
19 emphasized that the protocol was -- that would be used in any  
20 given circumstance is flexible and discretionary and was  
21 basically to aid Magistrate Mayeron in identifying specific  
22 issues and specific documents, and that was under the  
23 compelling reasons -- pardon me, under the good cause standard  
24 under Rule 26 for documents produced in discovery. We have a  
25 different circumstance here.

1           We talked about this a little bit last time, and  
2 when we asked the Court to entertain this motion directly  
3 because in our view, we've presented what needs to be  
4 presented to address these legal issues primarily. The Court  
5 the last time asked for the documents to be provided for some  
6 context, which we did, but again it's primarily these legal  
7 issues that we've presented, and I think they're presented  
8 pretty clearly and we can talk about it after the NHL's brief  
9 is in. But this elaborate protocol that Mr. Connolly is  
10 advocating is just designed to unnecessarily increase the  
11 time, the expense, the burden on these issues, and it's really  
12 a pretty, we think, burdensome exercise because these legal  
13 issues, there's no doubt we're going to be back here before  
14 the Court.

15           And so to go to the -- with these legal issues to  
16 Judge Mayeron and go through this elaborate protocol when the  
17 NHL has already told that you say their objections are exactly  
18 the same as they asserted before, this chilling deliberations  
19 issue, it's really a pretty meaningless exercise. That's why  
20 I call it the phantom protocol situation that Mr. Connolly is  
21 trying to erect to delay and hide the ball from the public,  
22 which we think is what is really important here is that the  
23 public, when the brief gets filed, that the documents and the  
24 briefing of any matters that are still under seal, that those  
25 be addressed promptly and that the public and absent class

1 members be allowed to see them, not nine months down the road.

2 That's just contrary to what all the Federal Courts  
3 are saying on unsealing records. It's contrary to all of the  
4 law that is coming out. It's contrary to the rules, even the  
5 rules on the -- the local Rules, the proposed local Rules on  
6 these kind of things. It just makes no sense. So, the  
7 protocol is really something that we don't think should enter  
8 into this consideration.

9 And then the other main point that Mr. Connolly made  
10 is that they still should be able to see our brief after  
11 the -- before they file their response. And not only does  
12 that ignore the local Rules which would typically require them  
13 to respond within seven days on a non-dispositive motion like  
14 this, there's really no explanation of why they should be  
15 deviating from what the local Rule would be. If we'd made  
16 this under any other circumstance, they'd have to follow the  
17 rule. But here, it's clear, as we pointed out in my letter to  
18 the Court, is that the NHL is really just trying to seek an  
19 unfair advantage because they want to see the brief and then  
20 they're going to attack -- and then they'll attack the class  
21 certification evidence and it will be based on records which  
22 are under seal.

23 And to make matters worse, we won't have the  
24 opportunity to respond unless we come back to the Court and  
25 request the opportunity to respond to their briefing on a

1 non-dispositive motion. So, for all those reasons, we think  
2 the NHL should be required to respond, we had suggested by  
3 this Friday, December 2nd, but at a minimum should be required  
4 to respond before December 8th. Thank you.

5 THE COURT: Thank you.

6 Mr. Connolly, briefly.

7 MR. DANIEL CONNOLLY: Very quickly, Your Honor. The  
8 so-called phantom protocol that Mr. Cashman says I generated  
9 was provided to us by Judge Mayeron on the August 25th, 2015,  
10 informal status conference, and she subsequently sent an  
11 e-mail with a very similar one in the privilege protocol.  
12 Judge Mayeron asked the parties to follow that protocol to  
13 meet and confer with her and to follow it. It's not a phantom  
14 protocol that we have put forward. It's a protocol that the  
15 Court has established for resolving these issues, and it's a  
16 protocol that I understood Your Honor wanted us to follow. We  
17 will follow whatever protocol the Court sets forth.

18 And as far as the resolution of the issue, this  
19 Court has already in a number of different circumstances had  
20 the parties file materials under seal and after the fact  
21 produce redacted versions that are in the public record. We  
22 think that that's a very workable way for all of these issues  
23 to be resolved, and it allows the Court and the parties the  
24 time they need to consider the issues to make sure that the  
25 record is appropriate.

1 THE COURT: Thank you.

2 Mr. Beisner, briefly.

3 MR. JOHN BEISNER: Your Honor, if I may just briefly  
4 on this, I just wanted to respond to -- for a moment to  
5 Mr. Cashman's assertion about, well, the local Rule says seven  
6 days and that ought to apply. And we acknowledge that we're  
7 asking for an extension here, but frankly, the problem here  
8 with the seven-day response is that to make the argument that  
9 is at the -- at the -- at the base of what Plaintiffs are  
10 arguing here, the motion is premature. They're saying that  
11 documents should be de-designated here because they are  
12 judicial records. Well, there are no judicial records. None  
13 of these have been filed with the Court in any fashion at this  
14 point.

15 So, the suggestion that this is a stall tactic  
16 doesn't make any sense. The Court couldn't at this point say,  
17 well, these are judicial records -- and I'm not saying that  
18 there's a legal basis for doing that, but even if Plaintiffs'  
19 theory on this is correct, they haven't been filed yet. So,  
20 if they want to proceed with that argument, I don't think it's  
21 unreasonable at all to say we should see them, how they're  
22 used in the document, and be able to analyze that because I  
23 think otherwise, the Court's only recourse is to deny their  
24 motion on the grounds that none of these documents have been  
25 filed with the Court so none of these judicial records

1 arguments even on their face could apply and that they've got  
2 to file once these have been filed. And that's, I guess, is  
3 the alternative. But I think to ask for additional time to  
4 actually have the documents on file, if that's what they're  
5 going to do, and to be able to assess them is not at all  
6 inconsistent with their legal arguments.

7 THE COURT: All right. All right. One more  
8 response here, and then I do know how I'm going to rule, so go  
9 ahead.

10 MR. MICHAEL CASHMAN: (Laughter) yes. I think  
11 it's --

12 MR. CHARLES ZIMMERMAN: I think it would be better  
13 to just sit down.

14 MR. MICHAEL CASHMAN: May I have one --

15 THE COURT: One more hurrah, yes.

16 MR. MICHAEL CASHMAN: I didn't think we were here to  
17 argue the merits, and I'm sorry that the NHL keeps bringing up  
18 what I would call a merits-based issue. But I did want to  
19 respond briefly to the suggestion by Mr. Beisner that this  
20 would be premature. And what makes that a red herring  
21 argument is that we gave the NHL a list of all exhibits which  
22 we are filing with our class cert motion. So, this isn't a  
23 shot in the dark, as Mr. Beisner is trying to suggest. This  
24 is -- we've given them the exact list of the documents which  
25 are currently confidential which are going to be attached to



1 our class certification motion, and therefore the only  
2 question is whether the NHL's position about whether actual  
3 reliance on an exhibit is the standard as opposed to what  
4 we've argued in our briefing that any documents in a class  
5 certification motion which influence the process, or I think  
6 I -- the quote that Judge Mayeron used in the *Krueger*  
7 decision, "play a role in the adjudicative process," and there  
8 are other cases which use the phrase "influence the judicial  
9 decision." Clearly, anything that we have filed as an exhibit  
10 with the class certification motion is going to influence the  
11 decision on class certification, up or down.

12 And that's our position. They've got the exhibits,  
13 they've told us what the objections are, there's no reason  
14 for -- that they have to wait to actually see how they're used  
15 in the brief because their position is that you -- that actual  
16 reliance is required and that actual reliance can't be  
17 determined until you issue your decision. That's a pretty  
18 fundamental disagreement that the Court can address. Thank  
19 you.

20 THE COURT: All right. I think the interest of both  
21 sides can be met here. The Plaintiffs are interested in  
22 getting resolution of this issue as soon as possible, and the  
23 Court is willing to work hard to resolve this issue as soon as  
24 possible. The Defense is concerned that they have the time to  
25 make their record that these documents do or do not play a

1 significant role in the adjudicative decision here under the  
2 law of judicial records, and so it makes perfect sense and  
3 it's prudent for the Court to grant the extension of time  
4 until December 15th to file that brief. I'm not commenting on  
5 what the standard is under the law to determine whether these  
6 are judicial records, but the NHL's input, having received the  
7 Plaintiffs' class certification brief, is going to provide a  
8 better record for the Court to make a judgment on that.

9 With respect to the protocol, I think that the NHL  
10 should do whatever they want to do. After I receive your  
11 brief on the 15th, if there is anything further from either  
12 side that the Court needs, I'll just simply ask you for it.  
13 That is Judge Mayeron's protocol. And she's not going to  
14 decide this motion, I'm going to decide it, so I'm not saying  
15 the protocol necessarily applies. To the extent it's useful  
16 to the Court, you might want to comply with it. You don't  
17 have to comply with it.

18 Most importantly what I need from the NHL is their  
19 views not only on the law on judicial records but having read  
20 the class certification brief, whether or not these exhibits  
21 play that kind of integral role in the argument that the  
22 Plaintiffs are making here.

23 If either side wants oral argument on this motion,  
24 you should tell me that within I'd say within a week's time so  
25 I can schedule it. I think our hearing in December is on the

1 14th or the 16th or something.

2 MR. JOHN BEISNER: 14th.

3 THE COURT: Fourteenth, so we would need to come  
4 back or we would need to postpone the hearing to hear oral  
5 argument that week before Christmas or something if we're  
6 going to do it. So, I'm not sure it's necessary. I think  
7 it's a pretty straightforward issue. I'll have the documents,  
8 I'll have the law, there's a good bit of law on this, but I  
9 wanted to introduce that question to you and ask whether you  
10 wanted oral argument.

11 All right. And Plaintiffs can be reassured,  
12 although nine days was too small of window, the Court will  
13 rule by the -- early in the new year.

14 Yes, Mr. Cashman.

15 MR. MICHAEL CASHMAN: Your Honor, in light of the  
16 Court's ruling, the Plaintiffs respectfully request the  
17 opportunity to provide a reply to the NHL's brief given the  
18 landscape will be different since they're replying after our  
19 class cert is filed.

20 THE COURT: That's a fair request. What I would  
21 suggest is that I either do that and not have oral argument or  
22 we have oral argument, at which point you can make those  
23 arguments, because you're right, there should be a full record  
24 on that.

25 MR. MICHAEL CASHMAN: Is it okay with the Court if I

1 send an e-mail correspondence to the Court with our election  
2 after we see their -- the NHL's brief?

3 THE COURT: Well, what I would prefer to do from a  
4 purely scheduling standpoint, if we're really going to pick a  
5 date right before Christmas, we ought to do that now and we  
6 can -- you can decide you don't need it, but let's have the  
7 date in mind for oral argument. Do you see what I'm saying,  
8 just from a scheduling standpoint?

9 MR. MICHAEL CASHMAN: That's fine.

10 THE COURT: And then you can tell me afterwards you  
11 need it or you don't need it, but I'd like to schedule it.  
12 So, I'll take a look at my calendar. I'm sure Susan will be  
13 in touch with both sides, and we'll try to schedule something  
14 and maybe push the hearing to that date instead of -- although  
15 I don't know I want to do that either. We may have the  
16 hearing on the 14th and then perhaps oral argument later.

17 And the other thing we could possibly do is,  
18 although I really don't like to do this, but given the holiday  
19 we could do oral argument by phone if you wanted. So -- the  
20 court reporter just give me a look. You didn't notice that,  
21 so (laughter)...

22 MR. MICHAEL CASHMAN: We'll let the Court, when  
23 we're contacted --

24 THE COURT: I'll consult my folks, you consult your  
25 folks, okay?

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

2 THE COURT: You bet. All right.

3 Any questions about that ruling?

4 Mr. Zimmerman, anything further?

5 MR. CHARLES ZIMMERMAN: I don't have any questions.  
6 It was just the last item on the agenda.

7 THE COURT: Okay. Yes, please.

8 MR. CHARLES ZIMMERMAN: I think we all understand  
9 the ruling on that, so I don't have any comment on that.

10 The last is the IME of the named Plaintiffs. I  
11 think two statuses ago, maybe three, we raised this and we  
12 were told that the IMEs were not prepared or had not been  
13 released to Defendants of our class representatives. And I  
14 find it extraordinary, but I'd like to know when we can expect  
15 these and why they have been delayed so long, and I guess  
16 we're prepared to discuss it at this conference. So, my  
17 position is they should have been turned over quite some time  
18 ago, and I don't understand why they have not.

19 THE COURT: Mr. Beisner, I share that concern  
20 because I sure wouldn't want to see that show up in the  
21 opposition brief to class certification if the Plaintiffs  
22 didn't have a chance to have it in their case --

23 MR. JOHN BEISNER: Sure, Your Honor. I can make  
24 quick work of this. We have received most of the reports. I  
25 will get those to Counsel today. There is several that are

1 still outstanding. Just so everyone understands, this has  
2 been a three-step process that we asked the experts to  
3 undertake. There are three sets of experts. So, the  
4 neuropsychology report has been completed first because the  
5 other two need to rely on that report. Then there's a report  
6 as to each patient from the psychiatrist. And then the  
7 neurologist report goes on top of that.

8 So, it's because of that *seriatim* approach that  
9 we've taken to do these reports so that there's not any  
10 changes going back and forth is the reason it's gone that way  
11 and has taken a little bit longer. But I, in other words,  
12 will get to Plaintiffs the reports that are completed today  
13 and --

14 THE COURT: How many reports are completed?

15 MR. JOHN BEISNER: We have -- there are nine -- I  
16 believe we have a total of nine reports we're expecting. Six  
17 are done. We're expecting three more, and we'll get those to  
18 them as soon as they're finished.

19 THE COURT: Okay. My concern would be if they  
20 didn't have the reports in time to meaningfully include them  
21 in their class cert briefing, then it wouldn't be fair to  
22 allow you to include it in the opposition brief.

23 MR. BEISNER: Sure. We'll keep that in mind in  
24 getting it done.

25 THE COURT: All right. Good.

1 Anything further today?

2 MR. CHARLES ZIMMERMAN: No, Your Honor. Thank you.

3 THE COURT: All right. We will see you on

4 December 14th. Court is adjourned.

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

6 (Concluded at 10:29 a.m.)

7

8

9

\* \* \* \*

10

11

12

13

CERTIFICATE

14

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

18

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

21

22

23

24

25