UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In re: National Hockey League Players' Concussion Injury Litigation

MDL No. 14-2551 (SRN/BRT)

(ALL ACTIONS)

St. Paul, Minnesota
Courtroom 7B
July 11, 2017
9:30 p.m.

BEFORE THE:

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

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

FORMAL STATUS CONFERENCE AND MOTION HEARING

Official Court Reporter: Heather Schuetz, RMR, CRR, CRC, RSA
U.S. Courthouse, Ste. 146
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Proceedings recorded by mechanical stenography; transcript produced by computer.

I N D E X Page:

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P R O C E E D I N G S

IN OPEN COURT

(Commencing at 9:36 a.m.)

JUDGE NELSON: We are here this morning in the National Hockey League Players' Concussion Injury Litigation. This is MDL file number 14-2551.

Beginning with Mr. Zimmerman, let's note appearances for the record.

MR. CHARLES ZIMMERMAN: Good morning. I guess we're supposed to use the mic. Good morning, Your Honors. Charles Zimmerman for the Plaintiffs.

MR. STEPHEN GRYGIEL: Good morning, Your Honors. Steve Grygiel for the Plaintiffs.

MR. BRIAN GUDMUNDSON: Good morning, Your Honors. Brian Gudmundson for the Plaintiffs.

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

MR. MARK DEARMAN: Good morning. Mark Dearman for the Plaintiffs.

MR. SHAWN RAITER: Good morning. Shawn Raiter for the Plaintiffs.

MR. JEFFREY KLOBUCAR: Your Honor, good morning. Jeff Klobucar for the Plaintiffs. Appearing telephonically today, we have Jeff Bores, Chris Renz, and Bryan Bleichner from the Chestnut Cambronne firm; Bill Gibbs from Corboy

Demetrio; Brian Penny from the Goldman Scarlato firm; James Anderson from Heins Mills & Olson; and David Goodwin from Gustafson Gluek.

JUDGE NELSON: Thank you.

And Mr. Beisner.

MR. JOHN BEISNER: Good morning to both of you. John Beisner on behalf of Defendant, NHL.

MR. AARON VAN OORT: Good morning, Your Honor. Aaron Van Oort with the NHL. With us by phone today are David Zimmerman and Julie Grand from the NHL; Shep Goldfein from Skadden; and Linda Svitak from Faegre Baker Daniels.

MR. JAMES KEYTE: Good morning, Your Honors. James Keyte from Skadden, Arps for the NHL.

MR. JOSEPH PRICE: Good morning, Your Honors. Joe Price, Faegre Baker Daniels, for the NHL. I guess this is the drop-the-mic spot (laughter).

JUDGE NELSON: All right. Let's turn to the agenda for a moment. I have just a housekeeping matter to start with. We have a informal conference scheduled for July 25th. I'm wondering whether that's necessary and whether we could next meet on August 15th. We could turn that into an informal conference if you wish to have an informal conference, or we could keep that as a formal conference.

Any thoughts about that from either side?

MR. CHARLES ZIMMERMAN: I think that's efficient,

Your Honor. I don't see any immediate issues that will be coming up in the next ten days or so after this, 15. I think an informal would be fine. I don't think we have any motions pending for a formal argument.

JUDGE NELSON: Mr. Beisner?

MR. JOHN BEISNER: I don't see any reason why the July 25th informal can't be canceled, don't know of any issues. And obviously Your Honor is available -- has indicated you would be available if we have any issues. I guess I have a slight preference to keep that as a formal, but don't feel strongly about that.

JUDGE NELSON: All right. You know, it's possible we could come for a formal and if you wanted to break during that and we could meet informally, whatever you'd like to do. Okay. Then we will officially cancel the July 25th conference, and we will see each other again on August 15th.

Just in terms of scheduling, just to know that these two motions that we'll hear today are a priority for the Court and I expect to get rulings out within the next two weeks on each of those motions.

Now, on the agenda there is a reference to the class certification and *Daubert* motions. I didn't know if there was anything else to raise at this point that you wanted to discuss.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, just a quick question about what Your Honor is expecting at the conference -- I'm sorry, the hearing date that's been set on October 11th. And perhaps the Court hasn't given full consideration to that yet, but you had spoken at some point about an evidentiary hearing and just wanted to see if the Court had some thoughts to share on what we would be doing that day.

JUDGE NELSON: Right. That's a fair question. I have some questions I need to ask of the Plaintiffs, and then I'll be able to answer that question for you.

So, Mr. Zimmerman, do you have anything to add to this?

MR. CHARLES ZIMMERMAN: On the question of what's going to transpire on October 11th or --

JUDGE NELSON: Yes.

MR. CHARLES ZIMMERMAN: -- on the question of the two other items on the agenda?

JUDGE NELSON: Let me ask you this question. This is a good time to ask. The next item on the agenda is entitled "expert deposition scheduling," and the Plaintiffs have indicated that they intend to take the depositions of four of the NHL's class certification/*Daubert* experts and that you do not intend, for class certification purposes, to take other depositions.

MR. CHARLES ZIMMERMAN: Well, I think it's not our

intention at this time, but I think we have some window of -- to make those calls.

JUDGE NELSON: Right. Well, let me ask you this question, which is, in part, necessary to answer Mr. Beisner's question. Is it your expectation that you will bring *Daubert* motions against any or all of Defendant's experts in connection with your reply to the class certification motion?

MR. CHARLES ZIMMERMAN: It's -- at this time, I don't believe we're looking at this as a *Daubert*-type of challenge. I think it could change if the depositions show us something that we're not anticipating, but I don't think we have the traditional *Daubert* challenge. I guess I'd like to reserve my right to modify that if we see something that makes that --

JUDGE NELSON: Well, we talked some time ago about this, and we talked about the fact that the Court was willing to allow *Daubert* challenges once.

MR. CHARLES ZIMMERMAN: Correct.

JUDGE NELSON: And it is not unusual for the Defense to bring *Daubert* challenges in connection with class certification. They've chosen to do that, they've done that, you'll respond to that. You can choose to bring *Daubert* challenges also in connection with class certification or you can choose to do it later on; that's your option. It looked like from the decision making that's expressed here that what

you were doing was taking depositions for the purpose of contesting their *Daubert* challenges possibly or to get information to support class certification. But it didn't appear to me that you were looking to bring your own *Daubert* challenges against their experts. But if I'm wrong about that, I'd like to clarify that.

MR. CHARLES ZIMMERMAN: That is our thinking at this time.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: And I don't -- I'm not trying to be cagey, but I don't see our strategy in the class certification to be that of methodology and *Daubert*-type challenges to the experts. I think our discussion in class certification is going to be that there may be differences of opinions. But we still have certifiable issues and we still have common questions that are culled by even -- the questions we raise, even though experts may vary about opinions, about the things that are being stated as part of the class certification motion practice, i.e. they're challenging our -- whether or not the biomechanics are good and they're going to challenge Dr. Hoshizaki. We're not going to challenge their challenging doctor on *Daubert* grounds so much as we're going to say Hoshizaki is a really valid expert and he does make a valid claim that allows this case to proceed to the issue of, "do the hits cause" and "is there a duty to."

JUDGE NELSON: Okay. Then the question about October 11th, really, then, I think, is whether or not, in connection with the Defendant's *Daubert* challenges against the Plaintiffs' experts, whether the Court would like to have testimony from some Defendant's experts and the Plaintiffs' experts. If that's the -- I think that's now the definition of which I have to decide. Am I right about that?

MR. CHARLES ZIMMERMAN: Yes.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: And we have a position on that that we'd like to explore with the Court.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: I'm not prepared today to necessarily have it completely vetted, but I think we've seen this before in this court, not before Your Honor but in other -- with other judges of this Court that oftentimes in the *Daubert* context -- although in class certification, we may have challenges about -- oftentimes they're not resolved through live testimony by both parties. I think that's an extraordinarily elongated process and an expensive process that we think, at least preliminarily, need not be part of these proceedings.

JUDGE NELSON: Well, let me ask you, then, to meet and confer on this issue. Have you had any conversation?

MR. CHARLES ZIMMERMAN: We have not.

JUDGE NELSON: Okay. Meet and confer, and then each side can make a proposal to me or maybe you'll agree, but --

MR. CHARLES ZIMMERMAN: Not --

JUDGE NELSON: Yeah, make a proposal to me, each side, about what you reasonably would present -- I'm not going to entertain 25 experts -- just what you think would aid in terms of decision making. And -- Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: No, on the *Daubert* question of testimony live or not live?

JUDGE NELSON: Right, on October 11th, okay. So, why don't you go ahead and have that meet and confer and get back to me in the next couple weeks.

MR. CHARLES ZIMMERMAN: Okay. And I think also, then, there's the question of the class certification motion practice on October 11th, as well. So, you have the *Daubert* and then you actually have the argument --

JUDGE NELSON: Right. On that day I will entertain the Defendant's motions -- *Daubert* motions and the class certification motion. Yeah.

MR. CHARLES ZIMMERMAN: Right. Okay.

MR. JOHN BEISNER: Thank you, Your Honor. We will confer on that. And again, I didn't mean to spring that issue today but there have been a couple of occasions where you've expressed an intent to have an evidentiary hearing --

JUDGE NELSON: Yeah, and it's often helpful, but it

doesn't need to be on every issue. And I am equally concerned about the expense of this.

MR. JOHN BEISNER: And obviously, Your Honor, if there are issues that, in reviewing the motions -- and again I'm not asking for any guidance today, but you would like --

JUDGE NELSON: Sure.

MR. JOHN BEISNER: -- guidance on, that would be useful.

One other thing I wanted to raise with respect to the October 11th date is the following, and again this may be a moot issue because I have not asked Plaintiffs' counsel about that. But the class certification scheduling order that the Court originally had in place does permit Plaintiffs to file rebuttal expert reports and then says that we would have the right to ask the Court for leave to file surreply or to take additional deposition testimony. That's in the July 13th, 1916 -- I'm sorry, that would be quite awhile ago (laughter).

JUDGE NELSON: I don't think we've been together that long, but yes (laughter).

MR. JOSEPH PRICE: I was at that hearing (laughter).

JUDGE NELSON: I remember that (laughter).

MR. JOHN BEISNER: That order, so that may -- just wanted to note raise an issue. Now, again, if Plaintiffs aren't intending to file any rebuttal expert reports, then

that's a moot issue. But if we do have those, those would be filed literally one business day before the October 11th hearing.

JUDGE NELSON: All right. You're going to need to meet and confer about this because I don't want to extend that date. So, if we're going to add this piece to it -- and I do recall that from the previous order -- we need to bump back some dates so that we can keep that October 11th.

MR. JOHN BEISNER: Okay. And again, this may be a moot issue, but that was there and the deal was that if there were rebuttal reports, there would be a --

JUDGE NELSON: I agree with you, and I remember that, so now you need to talk about it.

MR. JOHN BEISNER: All right.

JUDGE NELSON: Okay. Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: My only point on -- my only -- we will meet and confer on it. But I don't know if the record was clear that the understanding was that we do have the right to file rebuttal and they would have to seek -- Defense would have to seek leave if they were going to file anything in response.

JUDGE NELSON: Okay. But I'd like to know --

MR. CHARLES ZIMMERMAN: But I know it's the date issue that's --

JUDGE NELSON: Yeah, I'd like to know if you intend

to do so so we can address that.

MR. CHARLES ZIMMERMAN: Correct. Thank you.

JUDGE NELSON: Okay. All right.

Any preliminary issues that we should discuss before we jump into the motions?

(None indicated.)

JUDGE NELSON: All right. Then we'll begin with Plaintiffs' motion to exclude Declarations of Defendant's experts. Who will be heard on that?

Mr. Cashman.

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

This is a case of massive overkill, and I emphasize massive overkill, by the Defense with 19 expert reports. It's really a transparent attempt to overwhelm the Court with volume on a simple point of denialism; and it doesn't take 19 experts to deny the obvious: That head trauma increases the risk of long-term neurodegenerative disease. The denialism by volume is a tried and true denialism tactic, and it has no place here. The denialism that's going on is no different than climate change deniers, Holocaust deniers, other kinds of deniers who seek to obscure and give credibility to a simple denial by piling on, and that's what we have here.

The Court at this stage, for class certification purposes, should not be burdened and inconvenienced with the

task of sifting through 19 expert reports to determine what is relevant to class cert and not otherwise cumulative when it's clear that there's a duplication and cumulation. Tellingly, Your Honor, if you look through the NHL's papers, nowhere in the 54 pages that they have provided do they discuss how or why the alleged micro-distinctions that they point out in their response, how or why those micro-distinctions on otherwise-cumulative opinions that were identified by the Plaintiffs in our opening papers are relevant to whether there are common questions which can be answered with common evidence. They don't address that anywhere in their 54 pages.

This again underscores the denialism by volume and the attempt to obfuscate with overkill. The NHL makes the comment in their papers that the primary purpose of submitting 19 experts is to, quote, demonstrate consensus, closed quote, on their alleged absence of, really, liability. They don't address class certification, but it's really a liability question. But the alleged redundant denial of liability through repetition does not address that class certification question, whether there's a -- whether there are common issues which can be answered with common evidence. They just don't address that.

So, let me turn to the more specific arguments that the NHL makes. They argue that this motion is premature and that it shouldn't -- it shouldn't occur until trial. But that

argument ignores the test that the Court itself set out when we discussed this before. And certainly the Court has the discretion and the authority under Rule 403, Federal Rule 1, and its own discretion not to be inconvenienced and burdened with the task of sifting through this massive overkill, massive expert reports, to sift through and try to determine what is relevant and not cumulative on the class certification issues that are presented. So, the prematurity argument is a nonstarter. Clearly the Court has the authority to limit and still do the rigorous analysis and can do and will do, I'm sure, the rigorous analysis of class certification without having to sift through cumulative opinions.

So, that brings me to the second point: Are the opinions cumulative and duplicative? We've pointed out very clearly in our papers that there are several -- there are several issues where there's cumulation. And I'm not going to go through those all again, but it's pretty obvious that there's duplication and cumulation. And try as it might, the NHL in its 54 pages of response never addresses the real issues that Plaintiffs identified as being cumulative and duplicative. The very first issue on causation is an excellent example.

The NHL puts in eight experts who basically have the same fundamental opinion, trying to draw the distinction between the fact that there have not been scientific causation

studies, a prospective longitudinal study to show that a specific cause results in a specific outcome every time versus association. And they use eight experts to say that again and again and again. Eight experts aren't necessary to make that point; that's just an excellent example of the unnecessary cumulative, duplicative way that the NHL has approached this.

This is not a case of overlap. The NHL has argued in some respects that this is incidental overlap or that they're entitled to have overlapping opinions, and they cite some cases, as you have seen, in their brief which purport to support their position. But if you look at all of those cases, it's a situation generally with two experts or an -- or one opinion where there's some overlap, not -- they do not involve the massive overkill that we see here. And that carries right through all of the issues that we identified in our papers.

The NHL, in what I would call a nondefense, says, well, if our reports are duplicative, so are the Plaintiffs'. Well, that's misguided, and here's why. First of all, there's minimal overlap between the Plaintiffs' reports. They fundamentally each address a different issue. But more importantly, Your Honor, the fact that the Plaintiffs have five experts shows a good faith effort to avoid cumulation and duplication, to avoid this very issue. And by contrast, the NHL's approach to this shows exactly the opposite approach.

This is a lack of good faith and a knowing and intentional attempt to duplicate and repeat the same opinions over and over and over again. Again, overkill.

So, let's turn to the contention that the relief sought is impractical. This reminds me of the person who says, just do it and then ask for absolution later, after you've crossed the line. And that just should not be tolerated here. This is a knowing and intentional lack of good faith, using 19 experts to repeat the same opinions as we've outlined. And that's like saying the person who makes a motherload of a mess should be excused from cleaning up the mess of their own doing. And the NHL should not be allowed to engage in that kind of behavior.

This can easily be addressed. We have identified specifically in our papers on each issue the sections of the expert reports which are redundant. The NHL can pick one and resubmit the other reports with the duplicative and cumulative sections redacted. That's a simple Word-processing function that can be done in a matter of days. With respect to their briefs, again, they shouldn't benefit from their lack of good faith, so their briefs, again, should be resubmitted. All they have to do is redact those sections of the brief which cite opinions that -- the offending sections of the reports with the redundant opinions.

Bottom line there, Your Honor, is that the NHL

should be tasked with the burden of cleaning up the mess that it created itself.

So, that's all I have to say, Your Honor. Plaintiffs request that their motion be granted in the relief that I just outlined. Thank you.

JUDGE NELSON: Thank you, Mr. Cashman.

Mr. Beisner.

MR. JOHN BEISNER: Thank you, Your Honor. Let me make a few big-picture comments on this in particular response to what Mr. Cashman has said here. You know, I think what's -- this motion really isn't about cumulativeness, and I wanted to stress at the outset that that seems to be the only ground that Mr. Cashman is offering this morning. And I think what's really going on here is that Plaintiffs are actually asking the Court to bail them out because they clearly failed to muster a thorough slate of qualified candidates, experts and the NHL did.

The "denier" theme that Mr. Cashman repeated numerous times, we've seen Plaintiffs expend a lot of money and resources to be proclaiming in the media, we've heard it in the courtroom; then we presented a full slate of prominent, eminently-qualified experts from around the world. I think those experts, who are very well-recognized in what they do, pretty much dismantle Plaintiffs' science case, what we supposedly are denying, making clear that their theories of

class-wide proof really don't have any proper grounding.

And, you know, I think Mr. Cashman pretty much lays it out. They're just saying, just cut down their number of experts because we don't have that many and we didn't do that, so you should reduce the number that's there. He's made no argument, no grounding for any argument that this has become something that's overly burdensome for Plaintiffs to address. It's a very complex issue. It requires a lot of experts to address the range of things that they have raised in their motion.

And to be frank, Your Honor, I think the only person who's burdened by the full slate of experts is you. But the exercise that Plaintiffs have kicked off here of going through these and trying to sort out redundancies now, frankly, makes no sense. The Court, as I think some of the case law we've cited makes clear, courts, in deciding class certification motions, sometimes conclude that there are some experts that are useful to that exercise and are not. But when you consider the whole context of what Plaintiffs say, what their experts say, what the Defendant's experts say, the Court can set those aside. But to go through that exercise now, particularly when we haven't seen, necessarily, from what I heard earlier, everything that Plaintiffs' experts may say if they file rebuttal reports, it really is premature to do that. And I think our brief amply demonstrates that everything that

our folks have said is relevant to class certification.

I noted that Mr. Cashman only talked about class certification, and I think that's another problem with this here. We have filed *Daubert* motions, as well. And for the Court to consider *Daubert* motions, you do need to get into the detail. And where you're challenging the expertise of their experts, as we are, obviously we're going to be very careful to make sure that everything that our experts challenging them say is being said by individuals who are qualified to say that, and so you need an array of expertise on those issues.

I was bemused by Mr. Cashman's dismissal of the notion that there's any redundancy in their motions -- I mean, their experts reports. They admit there is. On Page 5 of their brief, they concede that Plaintiffs' experts, Drs. Cantu and Comstock, discuss the clinical and epidemiological studies that support their positions that head trauma increases the likelihood of developing an NDDC. He says, well, if you look at them, you know, they really are addressing different things. Well, that's what our brief points out with respect to our witnesses.

I mean, if you back the camera up far enough to determine what's overlap, then everything becomes part of the overlap picture, everything overlaps everything. You've got to look carefully at what each expert says in the reports. And the dismissal that he gives, that Mr. Cashman gives to the

overlap in their reports is probably valid. But that same assessment of overlap ought to be exercised with respect to ours.

In short, I think this assertion of cumulativeness is a red herring. Before anyone declares expert reports to be cumulative, one needs to ask, do the experts talk about the same studies, do they make the same points about those studies from the same expertise perspective? And I think that if our expert reports are examined with those questions in mind, there is not overlap. You know, I think that the real issue here is that Plaintiffs limited their presentation to just five experts, not in an exercise of good faith or limitation of any -- of that sort, but they ask them to cover issues that are well outside their area of expertise. That's the problem here.

Professor Hoshizaki, for example, is trying to cover everything from video analysis to accident reconstruction to neuropathology to Finite Element Modeling. Professor Casper is taking on medical history, the whole field of sports medicine, a broad range of medical matters, including medical ethics, that he has no business addressing. He has no medical training. And just because Plaintiffs cut corners, we should not be required to take the same approach.

Your Honor, I think our prematurity arguments are noted and laid out well in our briefing. I do think it's

interesting that what the Plaintiffs are asking the Court to do here is to consider their exclusion motions out of order. You know, we had a schedule that said we should file exclusion motions when we did. We filed them. And frankly, if those *Daubert* motions were advanced and considered now, we may solve this whole issue because a lot of their experts may not be there and some of these responses that we've put in may be moot. I realize that's not where we are, but they are asking to -- for that to be addressed differently and to be given priority.

You know, with respect to whether the experts' testimony is cumulative, I think we've laid that out in the briefing in detail. I do want to stress that testimony is not cumulative where the experts are coming from different areas of expertise and particularly areas in which they have done specific research, and that's the reason why we have some additional experts even though they may be in the same category of expertise.

Some of the folks we have there, Plaintiffs have relied on their research. And the reason they're here is to explain that Plaintiffs have misinterpreted the research that has been cited. But again, the problem is they have not cited any discernible standard by which cumulativeness can be discerned here because their own reports overlap. Mr. Cashman sort of dismisses that; says, looks closely at them, they're

really addressing different issues. So are our folks.

One thing, Your Honor, that I did want to note here, which I think is very important, Mr. Cashman kept saying, well, this doesn't have anything to do with anything, and I do think that it's important to go back and look at the Supreme Court's analysis in *Wal-Mart* because I think it makes very clear what we are doing here. You know, in *Wal-Mart*, the Court, for the first time as the Supreme Court, really got into the question of, what is the class certification analysis here? And the Court made very clear that the Movant for class certification has the obligation to demonstrate that it has reliable -- and that's where the *Daubert* part comes in -- proof that is class-wide in nature, that it can present to a jury in support of each element of the claims or the issues that it wants the jury to consider.

And that's exactly what the Supreme Court did in *Wal-Mart*. And it went through and it looked at the experts, the testimony, the evidence that was presented. And it said, Plaintiffs, you don't have class-wide, reliable class-wide proof that actually proves what you're obliged to prove to prevail on these claims. That's a complicated process, and it requires a number of experts in this case where you have very complex medical issues involved, many of which have not been explored to any great degree -- (noise over the intercom) construction going on.

And so that is what the mission of the Court is here, and that's what our experts are out there doing in large part. Then, of course, as I mentioned earlier, you've got the *Daubert* dimension of this. And so they are also there directly going after, varying degrees, the validity of the testimony that is being offered or being proposed by their experts. So, Your Honor, I think that all of this is validly before the Court.

It was not our intent ever to overwhelm the Court or overwhelm Plaintiffs, but they put an enormous array of issues at play. They want to simplify all this to say, well, everybody knows since the 1920s that CTE could be caused by head hits. And, okay, that's a nice, very simple way to state the common issue. But the Supreme Court said in *Wal-Mart*, you know, you can come up with a common issue in any Complaint: Is the Defendant liable? That's a common issue, but you've got to dig in and look at the detail of those issues to determine whether there is commonality and predominance in these cases.

And we are not just contesting the merits of what Plaintiffs say. We're also pointing out -- which takes some time and takes the experts to go into some detail on it -- the fact that the evidence that is out there with respect to head hits and their relationships to long-term neurodegenerative disease changes radically over time, a lot of evidence about

the need to look at players individually to determine if they have any risk, what that risk is. Those are all the things that we're laying out there, and so there's no denying this is a complex exercise. And that, I think, explains the volume of what we presented.

On Mr. Cashman's final point, I would simply note the final, this final note with respect to his saying, well, just tell the NHL to figure this out. If Plaintiffs wanted, as they seem to be saying now, that there should be a limit on the number of experts that either side could present, they should have raised that when we were planning the class certification process. But that was never mentioned, never came up, no restriction on that. And so to say that the numbers that we have presented are somehow in bad faith -- because they're not, I think it's a legitimate group.

And they don't even allege -- he kept saying in their argument, all 19 overlap. That isn't even asserted by them. There's a number of the experts that we have presented that they don't even reference in their papers. But that is not fair just to say, oh, well, let the NHL figure that out. You would have to go back, re-do expert reports, re-do briefing. It's not a push-of-the-button exercise as Mr. Cashman talks about. It would disrupt the schedule, and I think the real schedule disruptor has been this motion because it is premature. This is not the time to be talking about

cumulativeness, and there's been no burden that's been demonstrated by Plaintiffs on this issue.

Thank you, Your Honor.

JUDGE NELSON: Thank you, Mr. Beisner.

Mr. Cashman.

MR. MICHAEL CASHMAN: Taking all those arguments into account, Your Honor, we didn't hear anything to justify 19. I've been doing this a long time, and I've never seen a case where somebody proffered 19 experts at trial, let alone at the class certification stage. And I have a suspicion that the Court hasn't seen 19 experts before on the class certification motion either. And I don't think any of my colleagues have ever seen that kind of overkill, and we didn't hear any real justification for why 19 are necessary.

And we certainly didn't hear anything in response to the point that the Plaintiffs have made continually that, in spite of all the micro-distinctions that we've heard from Mr. Beisner and that we see in the papers, we haven't heard anything about why those micro-distinctions matter to identifying common issues which can be answered by common evidence. Still, we haven't heard it.

That's telling. Basically what we heard is the NHL says we should get 19 experts because they come at these, the same opinion, from a different perspective. They have different specialties. Even if we assume that to be true, the

cases that they cite in their own brief show that is a misdirection. One case, for example, Your Honor, that they cite is *Rodriguez versus County of Stanislaus*. That's in their brief, and this is a case where you have two people from widely different backgrounds.

In that case, a civil engineer was one expert and an optometrist was the other expert where there was a question about whether they had duplicative or cumulative opinions. But it was determined that because of those dramatically different perspectives that they -- that the -- it wasn't cumulative. In that same case, there were three railroad operations experts who were allowed because, if you read the case, they had very unique perspectives.

In this -- so this case is kind of illustrative of how dramatically different the cases are where cumulation is not -- is not imposed to strike or disregard portions of expert reports. Here, we've laid out in very clear way, I think, the opinions that are repeated over and over and over again. So, all we need, all the NHL needs is one person to say that. They don't need eight, in the case of causation. And in almost every category we laid out, they have at least four. They don't need that.

So, Mr. Beisner wants to argue that the Plaintiffs want to get bailed out. That is nothing further from the truth. We fully stand behind our experts. Their

qualifications and their opinions are going to be the subject of proceedings, as we know. But that does not justify 19 people. And then Mr. Beisner wants to say, well, we should have talked about a limit on experts at the beginning if we're going to have a limit on experts. But I think it's fair to say, because I was in those hearings, as well, that everybody pretty much assumed that the NHL would operate in good faith and that they would proffer a reasonable number of experts, just like the Plaintiffs are proffering a reasonable number of experts, to address the issues in this case.

Nobody should have expected the NHL to drop 19 expert reports. That is overkill. That is the motherload of a mess, and the NHL should clean it up; the Court shouldn't have to do it. Thank you.

JUDGE NELSON: Thank you.

Mr. Beisner, very briefly.

MR. JOHN BEISNER: Just one brief comment, Your Honor. You know, Mr. Cashman is here saying, well, there weren't nearly as many experts in these cases that both sides have cited on the cumulativeness issue, and so the fact that the Court declined to sort those issues at the stage it did because of cumulativeness, that should be ignored. I think what he's ignoring, though, is that no one is proposing to Federal Courts to do what Plaintiffs are proposing here, and that is to handle a mass tort like this on a class basis.

I think I have shared with the Court previously that when I last looked, there are 50 mass tort MDL proceedings pending in the U.S. at the moment. This is the only one where Plaintiffs are out there saying, we want to handle all of these issues on a class basis. So, when you do that, you are going to bring forward all of these issues that wouldn't be there in an individual case, but that's what Plaintiffs have chosen to do, that's the reason we have to respond that way.

They're asking the Court to determine liability over players that, you know, played 40 years ago. And to sort of say, and the evidence on those claims is the same over that entire period. They're asking the Court to put before a jury on a class basis these issues about head hits and long-term neurodegenerative disease, is the subject of wide debate, as though this has been settled since 1979. Your Honor, we could have just stopped and said, we don't need any experts; just look at Professor Casper, a historian with no medical training, out there declaring that since the '20s, I think he's saying, it would have been a violation of the Hippocratic Oath for a physician not to tell his or her patients that head hits are going to cause long-term neurodegenerative diseases.

Then we turn around and ask Dr. Cantu, who does this all the time, does he warn his patients in the way that Dr. Casper said it would be a violation of the Hippocratic Oath not to do? And Cantu says, no, I exercise individual

judgments. Yeah, we could have stopped there and just said, how the heck could you possibly expect the National Hockey League or anybody else to be giving warnings that players are not being given by their own physicians, notwithstanding what Professor Casper says; but that would not have been prudent on our part. And so I think that the array of experts that you're looking at here is largely a product of the fact that Plaintiffs are attempting to litigate this case on a class basis, which brings in a much wider array of issues.

Thank you.

JUDGE NELSON: Thank you. Very good. Okay.

We will move ahead, then, to the next motion, which is the NHL's motion for leave to file a summary judgment motion.

Mr. Van Oort.

MR. AARON VAN OORT: Good morning, Your Honors.

COURT REPORTER: Could you move up the podium?

MR. AARON VAN OORT: Yes, I will certainly do that. All right. Oh, boy, that's lots better, isn't it?

Okay. Well, Your Honor, we caught you unaware with the summary judgment motion. As Mr. Connolly said, we apologize for doing that. You got us back on track and said, come here and file a motion for leave, address why it should be briefed now. And so we did, and that's why we're here.

The question is summary judgment is going to have to

be decided sometime for Mr. Nicholls and Mr. Leeman because they're among the six that are proposed as the class. They're different from, you know, the masses out there, the ordinary cases that transfer; they're among the six. And so any way this goes, summary judgment is going to have to be decided for them. The question is, does it make sense to brief it now, or should we postpone it? And our view is it makes sense to do it now. That's why we brought it, for a couple of reasons.

Number one, limitations is this clear threshold issue, is distinct from the core merits issues. Number two, nobody is saying that the record isn't complete on this. That's not part of what Plaintiffs have ever said. And they aren't saying, look, if you made us brief this now, it would be really unfair because we don't have the data. That's just not true. The record is complete. And fundamentally, it would make no sense to go forward with a class proceeding without addressing this question of whether these two folks should be part of that at all because this side issue, this timing thing, just makes them improper as a matter of case management.

Now, I want to make it clear, you know, Your Honor ultimately is going to decide when to decide and rule on this motion. You don't have to decide that today. The question now is, does it make it sense to get it briefed up so when you're addressing these class issues, you have it in front of

you and can decide. And so that's what I'm going to address.

I want to start by just clearing away some underbrush, one of the main themes of the Plaintiffs there is that this is unfair by the NHL, we are basically trying to get more pages on class certification. That's just wrong. As we've pointed out and as Plaintiffs actually agree in their opposition, Page 11, we could not have asked for a merits ruling in our class certification opposition; that would have been inappropriate.

The Supreme Court has made that really clear in *Amgen*. Asking to win on the merits, dismiss the claims, is a different relief than asking to deny a class. They're governed by different motions. You can't do them in the same paper. We couldn't, so we didn't. We had one set of papers, class certification addressing Rule 23; we had another one addressing the merits. So, we followed that line.

And I don't think that Plaintiffs get to advise us on litigation strategy, especially when they're giving us bad advice from our standpoint, because basically what they say is, NHL, you really should have raised this limitations issue as an adequacy argument under Rule 23(a)(4). We didn't make it as an adequacy argument because it's actually a pretty lousy adequacy argument. It wouldn't knock out the class as a whole; it would apply only to these two people. And Defendants don't have a great track record of saying that

limitations issues are an adequacy argument, you know, so we didn't make that.

What we did in the class certification papers is pointed out how limitations will turn on individual factual issues: When people played, when their injuries arose, what doctors they took to, all of that. And we said that is one example of the type of individual issues that will come up here that affect the predominance analysis. That was the right way to do it. And we made that in the class certification papers, and we did not make that in the summary judgment papers where we just said, as to Mr. Leeman and Mr. Nicholls, we win. So, those are distinct, and we could not have done them in the same place. And it doesn't go to the page limits.

The other major argument by the Plaintiffs is that they claim that there is some baseline rule, some strong presumption against doing summary judgment now versus at some later point. And that's just wrong on that, Your Honor. And they recognize in their papers a couple of times now that Your Honor obviously has discretion to decide this now, that Your Honor recognized that in the May 12th hearing, the Eighth Circuit has held it, the Advisory Committee notes say so. I don't think there's any dispute about that issue, so you certainly have discretion.

The question still is, is there some nudge one way

or the other, and the cases they cite saying there's a nudge against it are either cases that were decided before the 2003 amendments that changed the timing rule on class certification from the earliest practicable time to an early one. That small thing is the Advisory Committee notes said expressly is we want to give courts discretion because a lot of times it makes sense to do summary judgment first. So, they are old cases they cite.

Or some of the cases they cite are where Plaintiffs are trying to bring a summary judgment motion before class certification, which is really different because it's one-way intervention. Plaintiffs and Defendants both can choose. You can move for summary judgment early, but if you do, you've got to recognize you're going to bind only those individual Plaintiffs. The NHL recognizes that. This motion will bind only Leeman and Nicholls if Your Honor addresses it. And we recognize that limitations, by the way, is going to be individual no matter how we framed it here because Plaintiffs aren't even asking Your Honor to certify that as part of the class, so it will always be individual.

They equally could move for summary judgment, then, but then they would concede that it's only going to be individual and they'd have to give up the class. They don't want to do that, but it's a both-ways rule, so there's nothing unfair about this. The final cases, you know -- so they cite

old, outdated cases. Plaintiffs cite cases, and they cited a couple of cases where the Court waited until after a trial on the merits to address class certification. And, of course, you can't do that, but that has nothing to do with summary judgment.

So, the rule they say is that they have no support for it in here. So, the bottom line is you come back, there isn't a thumb on the scales either way, it's up to Your Honor. The question is, does it make sense? And as we said, the record is here. If we brief this up and Your Honor does it, then it will be sitting there for Your Honor to consider in connection with class certification. If Your Honor denies class certification, then it isn't going to matter a whole lot to anybody because all of these cases will be spread back to wherever they came from and limitations will come up in all of those things, so it won't matter much.

But if Your Honor were to go ahead and certify something, then it would absolutely make sense to decide this before notice goes out and do that because, why involve Plaintiffs there with these threshold defects and put them up as representatives there? I mean, that really wouldn't make sense, as a case management perspective. You know, the Plaintiffs, too, the last thing I hear there is that there's something unfair to them about deciding this early in the process. And I don't see -- I don't see unfairness in the

only sense that matters to the rule, which is being prejudiced by briefing it now instead of later; prejudiced in the sense that the evidence isn't there, prejudiced in the sense that they couldn't put on a full of presentation. I don't see any prejudice there.

It would be prejudicial in the sense that they do want to delay any ruling, the Court from ever getting to some of these merits issue because that is more effective for them in terms of asserting litigation pressure on that and having a longer chance. But that's not the kind of unfairness that Your Honor considers at all in this. You equally wouldn't consider litigation strategy either way. This is about a case management issue, and what I haven't heard at all is any sort of case management issue why this is a problem and we shouldn't brief it up and have it sitting there for Your Honor.

So, from our perspective, our request is let the briefing go forward, it will be ready there, and then Your Honor can decide on when to decide on the motion.

JUDGE NELSON: Thank you, Mr. Van Oort.

You picked the short straw, huh?

MR. SHAWN RAITER: Your Honor, I'm happy to be here. Shawn Raiter on behalf of the Plaintiffs from Larson King.

This is an unusual procedural maneuver that the NHL has made. The case law is very strong and very consistent,

and you and your clerks have read it, I'm sure. And it simply says that the normal process is to decide certification before you consider summary judgment or some dispositive motion brought against either the Defendant or the Plaintiffs.

And what we just heard Mr. Van Oort talk about was a long recitation of why, well, our cases are distinguishable for some reason, they're too old or they involve the Plaintiff seeking summary judgment. But we never really did hear a good explanation of, why do we have to finish this briefing now? What sense does it make? You certainly have discretion. The case law makes it very clear that this is within your discretion for you to decide how to manage your docket and how to manage this litigation. And the case law is incredibly consistent in that in an MDL or a class setting, the Court generally, the general rule is to not consider certification before -- excuse me, not to consider summary judgment before certification.

And there are two great cases that we cited that the Defense has not addressed that come right out of this District. The first was the *Mathers* case where Judge Davis decided certification before he decided the Defendant's summary judgment motion, which included a statute of limitations defense. Judge Frank in the *Beckmann* case also decided certification before he considered the Defendant's summary judgment motions. So, the one-way intervention rule

and the case law behind that certainly is relevant to your analysis here and it usually does arise when the Plaintiffs ask for summary judgment before the Defense -- excuse me, before certification has been decided.

But even in cases in this District where the Defendants have sought summary judgment, the courts have methodically said, no, I'm going to consider certification and decide certification first, then I will take up your summary judgment motion. And you should do the same thing here. There's been no good reason to depart from that process. There's nothing that we heard today, there's nothing in their brief that says, you know, we can't wait a few months to brief this issue.

Where the Defendant has been able to bring a motion for summary judgment before certification, it really arises in an analysis of three things: Is there a prejudice to either party by deciding summary judgment early? Would the summary judgment motion potentially end the litigation? And/or would it significantly narrow the certification issues and save a significant amount of money and time and expense and judicial resources by deciding certification before -- excuse me, I keep getting this mixed up -- deciding summary judgment before you decide certification?

So, here I just want to start with the concession that this won't end the litigation, so that factor that you'll

consider does not support considering summary judgment at this time. We know that it's only two of the named representatives. The litigation will continue regardless of the outcome of that summary judgment decision. It also won't significantly narrow the class certification issues. It won't prevent the need to finish the certification process. It won't prevent the need to send class notice to the same class, the same expense. The same categories of potential class members will receive the same information regardless of the outcome of the summary judgment motions as to these two named representatives.

Those are really the two core issues. They needed to give you something on one of those that says, you know, this will end the litigation or this will significantly narrow the time and expense that will be put into this certification process, and they don't do that. They talk about, well, this isn't an adequacy challenge, it's a predominance issue. It's individualized issues. Those all, of course, scream class certification; and from our perspective, you well understand, we think, this is just a way to continue to argue certification, which is what the NHL does.

Mr. Beisner did it this morning. Mr. Van Oort just did it. They're doing it over and over again, and we really think the summary judgment motion is really a stalking horse for more certification arguments; it's a way around page

limits. But all of that said, you can put that aside. You don't even need to decide that. Have they shown you any reason to depart from the normal practice? And I still haven't heard why do we need to do it now.

We have two representatives. If they're time-barred, then they're time-barred later in the case. What they really said in their brief -- and it was kind of an interesting show of their cards -- it was well, we'd like to get a little preview of how you're going to address limitations issues, and that is exactly the reason that Defendants usually complain about one-way intervention. They don't want the Plaintiffs getting a preview of merits rulings or the Plaintiffs getting an understanding of what the Court may or may not do on the merits because that, according to Defendants in those cases, would be unfair.

It's equally unfair here to allow them to come forward and say, well, we want to get a little look at what you're going to do with limitations and that will help us alter our litigation strategy going forward while at the same time if we were to try that on some of the summary judgment issues that we have, that we think are important to the Plaintiffs, they would be in here screaming, one-way intervention, you can't do that, you can't do that. So, the fundamental fairness and prejudice that we believe exists is that they're in here asking for a sneak-peek. They've said it

in their brief. That's really what they want to know.

They want to see how you're going to address the statute of limitations arguments for these two individual named representatives, but you shouldn't do that until you've decided certification. The case law is very clear about that. So, at the end of this, you will decide, what should I do and what makes sense? And we haven't heard any reason that they need this now. It doesn't end the litigation; it doesn't save any money; it's going to be done at some point, we know that; and it certainly doesn't affect the outcome of the certification; it doesn't affect the breadth of the cases that we are seeking to have certified; it doesn't affect the breadth of the notice that will go out; and therefore the costs are the same.

It should be delayed. You should decide certification and then take up summary judgment in an organized fashion, not in a serial, we're going to file a couple now, then we'll file a couple later, then -- that doesn't make any sense. I'm familiar enough with Your Honors' case management and docket scheduling practice that that doesn't make any sense. We're not going to do this three, four, five times or more. You should do it in a way where there is a single deadline with a briefing schedule and all motions are brought at once. Thank you.

JUDGE NELSON: Thank you, Mr. Raiter.

Mr. Van Oort.

MR. AARON VAN OORT: Well, Mr. Raiter said that I gave no examples of cases in which summary judgment was decided first so, well, let's go. The first three cases in their brief that they cite for the opposite proposition all decided summary judgment first, so you can start with the first three cases in their brief. Then *Hartley*, one of the decisions they rely on most from Judge Tunheim, a recent decision, 2013, is a very good treatment on the issue and he decided summary judgment first.

Judge Magnuson did it in the *Lutheran Brotherhood* litigation where he actually decided partial summary judgment on limitations before sending class notice. And, Your Honor, Judge Nelson, is familiar, within the last two weeks, briefing proceeded simultaneously on summary judgment in class certification in the *American Family* case, and Your Honor decided summary judgment first --

JUDGE NELSON: But the reason for that is that it got rid of the case.

MR. AARON VAN OORT: Yes, Your Honor, and let me make it clear. We have to demonstrate, in terms of discretion, why it makes sense to do it. And the reasons there are different than the reasons here. But just in terms of the general rule, this idea that there's some presumption against it and it's rare is just wrong. And the Advisory

Committee notes to the amendments make it very, very clear that if there's a thumb on the scale at all here, if there's something that matters, one party's preference, it's the Defendant's preference because what they specifically say is a Defendant may prefer to win individual summary judgment rather than go through the expense of class certification on that. That's something that matters.

One last point on the local cases, Mr. Raiter cited decisions from Judges Davis and Judge Frank saying the opposite side. Your Honor will see that in those cases they actually had briefing simultaneously and then they decided class certification and then summary judgment in the very same opinion. So, as it relates to what we're asking today, which is a question, just should you allow the briefing to go forward, should this get briefed up so it's in front of Your Honor, those cases also weigh in favor of what we're saying.

And it's exactly what I was saying to Your Honor: Why put this off? The record is full. Have it sitting there for Your Honor and you can decide when to decide it. The only question now, should we file it and should we get it briefed up? We should. One-way intervention, of course, isn't an issue. There's a difference between a *stare decisis* effect and a *res judicata* effect. Everybody recognizes here there's only going to be *stare decisis*, so that's not an issue.

The last thing is just going to the practicals. It

would not be good case management to send out class notice with two guys on there who have time-barred claims. It would really not be good case management to put them through the ringer, put them on a trial, and have them be part of the evidence when they're time-barred claims. When there's a clear threshold, easy issue, it should be decided as a matter of case management first. If we go down the class certification path, that's -- I think Your Honor would want the option to decide that there and really should do it before the notice goes out.

If you have any questions, I'm happy to address them.

JUDGE NELSON: Thank you.

MR. AARON VAN OORT: Thanks.

JUDGE NELSON: Mr. Raiter?

MR. SHAWN RAITER: Nothing further, Your Honor.

JUDGE NELSON: Okay. Very good.

All right. I will take those motions under advisement, but as I said, we're going to address them very promptly.

Anything else the Plaintiffs have today to raise, Mr. Zimmerman?

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

JUDGE NELSON: Okay. Mr. Beisner?

MR. JOHN BEISNER: Nothing for Defendant, Your

Honor.

JUDGE NELSON: Very good. Court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluded at 10:45 a.m.)

* * * *

CERTIFICATE

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

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