

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: National Hockey League)
Players' Concussion Injury) File No. 14-MD-2551
Litigation) (SRN/JSM)
)
(ALL ACTIONS)) St. Paul, Minnesota
) February 17, 2017
) 2:03 p.m.
)
)
)

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT COURT JUDGE

**(MOTIONS HEARING AND
FORMAL STATUS CONFERENCE)**

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1 Chris Renz, Brian Penny, and William Gibbs.

2 THE COURT: Thank you.

3 MR. KLOBUCAR: Thank you.

4 THE COURT: Mr. Beisner.

5 MR. BEISNER: Good afternoon, Your Honor. John
6 Beisner on behalf of Defendant NHL.

7 MR. CONNOLLY: Good afternoon, Your Honor. Dan
8 Connolly, also on behalf of Defendant NHL.

9 MR. VAN OORT: Good afternoon, Your Honor. Aaron
10 Van Oort for the NHL.

11 MR. PRICE: Hi, Judge Nelson. Joe Price on behalf
12 of the NHL.

13 THE COURT: Very good.

14 MR. CONNOLLY: Your Honor, in addition I believe
15 that from the NHL David Zimmerman and Julie Grand will be
16 listening in on the telephone, Shep Goldfein from Skadden
17 Arps, and our colleague, Linda Svitak, from Faegre, Baker,
18 Daniels.

19 THE COURT: Very good.

20 MR. CONNOLLY: Thank you.

21 THE COURT: And from Boston University?

22 MR. ELSWIT: Good afternoon, Your Honor. I'm
23 Larry Elswit and I represent Boston University.

24 THE COURT: Very good.

25 MR. ELSWIT: And I believe my colleague, Kristin

1 Bittinger, will be on the phone.

2 THE COURT: All right. Well, I just have to point
3 out that you've come to Minnesota when it's 60 degrees out
4 and I think you have a foot and a half of snow in Boston.
5 Am I right about that?

6 MR. ELSWIT: This is not what I was hoping for,
7 but this is really all right.

8 THE COURT: Okay. Well, let's turn our attention,
9 then, to the NHL's motion. Who wishes to be heard?
10 Mr. Beisner.

11 MR. BEISNER: Good afternoon, Your Honor. I just
12 wanted to start by giving Mr. Elswit full disclosure that
13 it's not this way here all the time.

14 THE COURT: Oh, Mr. Beisner is an authority on
15 Minnesota now.

16 (Laughter)

17 MR. BEISNER: Speaking from personal experience.

18 THE COURT: Mr. Connolly, you have to keep him in
19 place.

20 MR. BEISNER: Well, what's before the Court today,
21 Your Honor, is labeled a motion to compel production of
22 documents, but I think it may be best to look at this more
23 as a motion to resolve a threshold issue and I think that
24 threshold issue is must the BU CTE Center produce anything
25 in response to the NHL's subpoena or, put another way, does

1 the Center have, more or less, total immunity from producing
2 anything in this case.

3 We've had significant negotiations with Mr. Elswit
4 and I think they've been constructive and we've looked for
5 ways to resolve some things, but basically we're talking
6 about here a line in the sand where I think BU is taking the
7 position that it should not be obliged to respond to the
8 subpoena to any significant degree.

9 And I think if the Court can provide some guidance
10 on that threshold issue, I have a feeling the parties have a
11 good shot at resolving the details of this. Obviously if
12 the Court agrees with BU that there's essentially an
13 immunity to discovery here, it ends the dispute. And if the
14 Court says, no, there is some obligation to provide
15 production here, as I think the papers indicate, we've
16 already done a lot of exploration about trying to narrow the
17 requests and deal with burdensome and privacy issues here.
18 I do think there's a priority on the Zeidel documents since
19 that is a class representative set of discovery that we need
20 to be sure we have in hand for class certification purposes.
21 But I do think a lot of this would be resolved if we can get
22 some guidance on that threshold issue.

23 THE COURT: Let me interrupt you --

24 MR. BEISNER: Sure.

25 THE COURT: -- and ask a couple of questions. My

1 understanding from the papers is that BU was willing to give
2 you documents related to the Zeidel estate, in fact, there
3 was an authorization and they were in the process of doing
4 that. I also understood that they've studied the brains of
5 five NHL players and that four of those gave authorization
6 for them to provide information to you and they've done that
7 as well. So it turns out BU has agreed to give --

8 MR. BEISNER: Well, Your Honor, we're not sure
9 that's correct because -- and I don't think it is correct
10 that we've gotten full production with respect to Mr. Zeidel
11 or anyone.

12 On page 29 of the briefing that they filed, the
13 opposition brief, in talking about the burden they say that
14 there were several hundred thousand units of information
15 affiliated with each research subject.

16 With respect to Mr. Zeidel, we received I believe
17 fewer than 30 documents, totaling less than 155 pages.
18 We've not received any digitized slides or pathological
19 photographs related to the Zeidel autopsy, and the same is
20 true with respect to the others. So I don't think we've
21 gotten any sort of complete production with respect to any
22 of those.

23 THE COURT: Okay.

24 MR. BEISNER: In any event, let me -- you know, I
25 think we've seen -- well, let me just say in terms of sort

1 of dealing with this threshold issue, I think the Court more
2 or less took that approach in dealing with the plaintiffs'
3 subpoena for the third-party clubs' player data information,
4 which presented a lot of the same issues on relevance,
5 burdensomeness, and privacy. We went through the same
6 process with plaintiffs' subpoena with respect to Chubb for
7 information on workers' compensation materials. Again, a
8 lot of debate about relevancy and burdensomeness and privacy
9 there. And I think the Court gave some basic guidance on
10 those issues and the parties were successful in working out
11 the details.

12 In the briefing on this motion we have seen some
13 somewhat overheated rhetoric, I think, asserting that the
14 NHL has no business asking questions of the scientists, but
15 like it or not, our litigation system allows discovery about
16 opposing parties' assertions.

17 And in the end here I think this really turns out
18 to be familiar questions that are presented to the Court,
19 one being are the materials requested from the CTE relevant
20 to the claims and defenses in this case and would requiring
21 production of those requested materials be unduly
22 burdensome. I think that's what it boils down to here.

23 And I think under the Bombardier case from this
24 district and others, the party resisting discovery in this
25 instance bears the burden of establishing a lack of

1 relevancy or undue burden.

2 Let me start with the relevancy part of the
3 argument. I think that BU's position, if I'm understanding
4 it correctly, that the request of discovery is not really
5 relevant to the claims and defenses in this case, I fear it
6 blinks reality.

7 Even if the Center had never been mentioned
8 otherwise in the briefing or the arguments in this case, it
9 would be uniquely situated as a source of important
10 information. It's widely touted in their own papers as
11 being the preeminent CTE research institution. Drs. McKee
12 and Stern of the Center have written and spoken prolifically
13 on CTE. They tout that they have over 60 peer-reviewed
14 primary research publications. And just by the somewhat
15 dominant role that it's played in developing CTE theories,
16 it's a logical discovery source.

17 But I think the bigger problem BU has in
18 suggesting an irrelevancy of a request here is the very
19 specific manner in which the Center has been injected into
20 this case and you might argue has injected itself into this
21 case. It's not an exaggeration to say that BU and the
22 research it's conducted is the linchpin of plaintiffs'
23 contentions here.

24 Plaintiffs' counsel rely extensively on the
25 Center's research for both merits and class certification

1 arguments. Dr. Cantu and the other plaintiffs' experts do
2 as well. We've noted in our briefing the many instances in
3 which plaintiffs and their experts expressly rely on the
4 Center's research in both their class certification
5 briefing, their complaint, and other materials they've
6 filed.

7 And indeed, the CTE Center is the sole source for
8 the CTE diagnosis of Mr. Zeidel, the proposed class
9 representative for Class 2. The records we've received make
10 quite clear that the Center was aware that any diagnosis
11 that it might make regarding Mr. Zeidel might be used in
12 litigation. Presumably could have prohibited such usage,
13 but it did not.

14 And we also can't ignore that Dr. Cantu, who is
15 plaintiffs' lead medical and science expert, has substantial
16 ties to the Center. He co-founded and served as co-director
17 of the Center until 2014. He's co-authored over 20 articles
18 with the Center's researchers, including Drs. McKee and
19 Stern. In fact, there's a brand-new article out which he's
20 co-authored with multiple BU Center personnel, soon to be
21 published in the *Journal of Neurotrauma*. And he
22 participated in the CTE's diagnosis of named plaintiff Larry
23 Zeidel, although others at the CTE Center were actually the
24 signatories of that diagnosis.

25 And if you look at his website page, which we

1 attached as Exhibit B to the reply brief, he talks in great
2 detail in there himself about co-founding the Center and he
3 uses the term "we" in talking about a lot of discoveries and
4 research with the Center.

5 And so they're not an entity that has no
6 relationship to the case. You know, Dr. Cantu is the lead
7 medical expert and basically that's where he came from.

8 THE COURT: Well, let's talk about this. First of
9 all, on the issue of relevance for the defendant's databases
10 and the Chubb materials, I was persuaded that those
11 materials were relevant to this case in two ways: First of
12 all, they were relevant because some of those materials
13 provided evidence of what the NHL knew and when. Secondly,
14 they were relevant because they pertained to the putative
15 class in this case. They could provide evidence as to
16 causation going forward and they were the sole source of
17 that information. The defendant's databases and the Chubb
18 information didn't end up in peer-reviewed literature.

19 Here the data that you're seeking is not data
20 that the NHL has ever had and so it's clearly not relevant
21 to what the NHL knew and when because they have never
22 known it.

23 And what makes this motion both interesting and
24 challenging is that this data, unlike the data -- the Chubb
25 data or the defendant's databases, has gone through the

1 scientifically-accepted process of becoming peer-reviewed
2 literature and its methodology has been challenged and
3 written about and it's been peer reviewed. And like any
4 other case, experts will banter back and forth about the
5 validity of their peer-reviewed literature. But it makes
6 this very distinct from any motion this Court has
7 entertained in this case so far. So if you could focus on
8 that, I'd appreciate it.

9 MR. BEISNER: Well, Your Honor, I think that it
10 is, though, data that plaintiffs have had access to through
11 Dr. Cantu because of his participation in all of that and
12 it's the linchpin of their case.

13 And fundamentally what plaintiffs are saying here
14 is that they can use that research as a sword in this case,
15 but we have to accept that because it was peer reviewed,
16 it's perfectly okay. We can't challenge it. We can't ask
17 any questions about what lies beneath that.

18 In all of the cases that we have cited,
19 Kellington, PPA, Prempro, all of those cases where this sort
20 of information underlies an article, those were
21 peer-reviewed articles. They're not immune to this. And,
22 Your Honor, I think, for example, I think that probably --

23 THE COURT: I think in one of those cases it
24 wasn't peer reviewed, but I'll go back and look.

25 MR. BEISNER: Yeah, I think if you look at the,

1 you know, Deitchman case where this same sort of argument
2 was involved, there was a peer-reviewed study. This is what
3 the Seventh Circuit said in that case, that there's no such
4 thing as an infallible witness and when discovery has not
5 been tried, "no one can say for sure whether it is going to
6 be futile or not. The expectation that it will be futile
7 is, therefore, not the certainty that justifies cutting off
8 a party's discovery rights without any effort to satisfy
9 them even in the most essential particulars."

10 And I think in that case you had DES research that
11 was relied upon by the plaintiffs in the case and the
12 defendant said we want to see what underlies that research.
13 And the Seventh Circuit said that to prepare properly for a
14 defense on the causation issue you should be able to test
15 the researcher's accuracy, the accuracy and methodology, and
16 that it's "absolutely essential" in the terms that were
17 used. The PPA case is a similar circumstance.

18 THE COURT: I think I would agree with you to the
19 extent that we were talking about causation for a particular
20 hockey player, but this goes so beyond the Deitchman case.
21 You're asking for volumes of data that has to do with
22 entirely different sports.

23 MR. BEISNER: No. This is what we're talking
24 about here. And bear in mind you also have to think about
25 the breadth of the allegations that are being made here.

1 They're talking about attributing knowledge to the NHL based
2 on those other sports. That's why we need that information.

3 THE COURT: What was publicly available. All you
4 could --

5 MR. BEISNER: What's that?

6 THE COURT: -- know is what is publicly available.
7 And, yes, to the extent that they can show that there were
8 peer-reviewed literature or newspaper articles or whatever
9 publicly available that you were aware of, that's fair game,
10 but you're not asking for anything that's publicly
11 available. You're not asking for anything that you ever
12 have seen before.

13 MR. BEISNER: No, we are looking for -- Your
14 Honor, one of the things we've asked for that they have not
15 provided to us is we want copies of materials that had been
16 used publicly in lectures and other events.

17 THE COURT: Okay.

18 MR. BEISNER: And they've said we cannot get that.
19 And I think, Your Honor, that this information is so
20 critical because of -- even with respect to the knowledge
21 here, you know, you're talking about what's available from
22 public literature, but the understanding of that and the way
23 that plaintiffs are spinning that material which is
24 inconsistent with what they're relying upon from BU.

25 Let me give you some examples, and this is why

1 getting to the detail of the analysis that BU has done and
2 the details of what underlies these reports is so important.
3 Excuse me one second.

4 (Pause)

5 Let's look a little bit at some of the statements
6 that have been made here in the case. I want to start with
7 the Cantu declaration. This is the expert report that
8 Dr. Cantu has submitted.

9 And in essence this is plaintiffs' theory now in
10 order to try to work through class certification. It's this
11 theory that the minute that a player steps on the ice that
12 they're, in a professional hockey game, that they're going
13 to experience, through head hits and other jarring,
14 something that gives them a risk of long-term
15 neurodegenerative disease. This is their way of now saying
16 everybody who ever played for the National Hockey League is
17 at risk.

18 Now, this is premised supposedly in some way on
19 the BU research, but then we turn around and see Ann McKee,
20 one of the directors of the CTE Center, in an interview,
21 which we've noted in the briefing here given just within the
22 last couple of weeks, saying a "single concussion is never
23 going to give you CTE. We've never found that.... You
24 shouldn't worry about CTE after a concussion, or even a few
25 that have been well managed."

1 This is why we need the information about other
2 things that the Center has been saying to people, because
3 Dr. Cantu's theory is part of the idea that these
4 disclosures should have been made to players for 20 or 30
5 years, I think, is basically what plaintiffs are saying
6 because enough was known about this and here you have
7 Dr. McKee, who is otherwise the linchpin of their science
8 theories, completely disagreeing with this.

9 And then, Your Honor, talking about just the
10 fundamental thing, you say, well, you know, you can find
11 this out from public literature.

12 So now we get the declaration of Dr. McKee in
13 support of BU's motion that makes this statement that CTE
14 has been around -- first reported in 1928. She talks about
15 the term being used in the 1940s.

16 Then we have Dr. Cantu's website that talks about
17 CTE appearing in the medical literature as early as 1966,
18 now being the preferred term, but he notes that many thought
19 this was a disease exclusive to boxers, notes that CTE
20 remained under the radar until Dr. Omalu began focusing on
21 this in the 2002 and 2005 time range.

22 But, again, what were they saying internally at
23 the BU Center about what was known when? This is why we
24 need to get access to this and also to get access for
25 fundamental reasons to test the research that was done.

1 We then have Dr. Omalu's article. This was done
2 for CNN, which we cited in our papers, in which he basically
3 says, well, I discovered CTE in the 2002 to 2005 time range,
4 asserts here it's something quite distinct from dementia
5 pugilistica, the punch drunk condition in boxers, which
6 Dr. McKee refers to as being the origins of CTE.

7 Finally we have Dr. McKee in this interview on
8 February 1st of this year saying, "We discovered CTE in
9 football players in the mid 2000s.... I was really, really
10 shocked to see that football, a sport that I really loved,
11 could cause long-term damage to the brain. I knew that they
12 were having trouble with their shoulders and their hips and
13 their knees, but I never thought it was a brain disease
14 because they don't have any -- you know, you don't see any
15 damage to their head."

16 Here she's talking about first indications to her,
17 an expert in the field, arising in the mid 2000s. And,
18 again, this assumes you accept the BU position on all of
19 this, which we don't necessarily do, but even by their
20 measure, that's the time frame you're talking about.

21 Then, Your Honor, you have the Stephen Casper
22 declaration, which is part of the class certification
23 motion, that in essence says that we've known for ages, for
24 "many years," I think is the term he uses, enough about
25 blows having -- blows to the head having negative long-term

1 neurological effects, he says here, since the 19th century.
2 You know, he's basically there saying you should have been
3 telling people of this for many, many years as part of their
4 allegations.

5 But then you turn around and you see Dr. Stern's
6 article -- this was published just last year -- in which he
7 says, "In contrast to what may be inferred by the extensive
8 media attention on CTE, the science of CTE remains in its
9 early stages.... It is not yet known whether ice hockey
10 players are at a high risk for developing CTE. Overall
11 repetitive head impact," which he puts in as "RHI" in his
12 article, "Overall repetitive head impact exposure in hockey
13 appears to be substantially lower than in American
14 football."

15 So you've got all of these cross-currents that are
16 there coming out of BU that are contrary to what plaintiffs
17 are saying and doing with their research, but that's why we
18 need that, Your Honor, and that's why in particular the
19 additional public statements that we're not getting are so
20 important.

21 You know, you're right, Your Honor, they're
22 basically saying that the public science speaks for itself,
23 but I don't think that is the law. As I said, the cases
24 that we've cited here are instances of peer-reviewed
25 articles and the underlying information has been ordered.

1 The PPA case was a Yale study peer reviewed. Yale
2 even gave them the material that they had available, but the
3 court went ahead and argued that the hospital medical
4 records that were beneath the information that Yale was
5 given needed to be produced by the hospitals that had that
6 information. And the Kellington case we think falls in that
7 same category.

8 So, Your Honor, we think this information is
9 extremely relevant and, you know, I think unlike some of the
10 cases that plaintiffs cite on this, Cusumano is the primary
11 one, this is a very different situation because this
12 information is relevant and the BU Center I don't think is
13 an entity standing away from that.

14 In Cusumano plaintiffs were not relying on the
15 information the defendants were going after. Defendants
16 were going after that information for other purposes. We
17 weren't talking there about any study or group of studies
18 that the plaintiffs were relying upon.

19 But here BU is at the center of the controversy
20 with a person as the primary expert for plaintiffs who has
21 got a very close -- over the years has had a very close
22 relationship to them and apparently nobody made any effort
23 to stop him from being a paid expert in this case.

24 Your Honor, let me turn to burden issues here and
25 I'll just go through these briefly because I think they've

1 been covered well in our briefing. The main arguments that
2 the Center advances are three.

3 They're concerned about confidentiality
4 protections for the material that was produced there. Your
5 Honor, I think we've been through that exercise here, that
6 the Court has concluded with respect to private information
7 that there is a means to protect it through the protective
8 order that the Court has entered in this case and the
9 commitment of counsel not to seek to reconstruct the
10 identity of players, which we have indicated -- or any
11 individuals who are mentioned in the records, that we have
12 said would be something we would agree to here. And so we
13 think that if the confidentiality protections that the Court
14 put in place with respect to the earlier database is
15 suffice, they should suffice here.

16 The undue burden argument I think that we have
17 addressed under the precedents that we have cited in two
18 ways. We have, as I think is indicated in the briefing,
19 sought to narrow the requests. And as I said, I think if we
20 have a ruling on the basic question about whether we're
21 entitled to something here, that the parties can work
22 through to modify those to avoid overburden for what is
23 needed here.

24 And we've also agreed to pay the costs of the
25 third party to handle the production. To be clear, contrary

1 to what was suggested in Dr. Stern's memo, we're talking
2 about paying for counsel and others BU would retain. We
3 don't have anything to do with that. We're paying bills.
4 That's what we're talking about here. We're not going to
5 have any involvement or any strings attached to counsel. We
6 would want to have agreement on what counsel are used, but
7 that's the commitment we've made, is to pay reasonable
8 expenses to cover that effort.

9 And, Your Honor, I think finally with respect to
10 the argument about chilling effect, as I said, I don't --
11 first of all, the parts of the Cusumano decision that
12 suggest that there should be a special protection of some
13 sort for research of this sort has not been adopted by the
14 Eighth Circuit, as the NCAA case that we cited out of the
15 Eastern District of Missouri noted. So I'm not sure it's
16 appropriate to say that's Eighth Circuit law.

17 But in any event, even if that does exist, it is
18 not a bar. It would be part of the balancing test. And we
19 think here that with BU playing such a central role in the
20 prosecution of this litigation and being the linchpin of the
21 litigation, to allow reasonable inquiry into what underlies
22 the research the Center has done and in particular, you
23 know, what other public statements have been made by the
24 Center with respect to these issues and what the internal
25 analyses have been to arrive at the conclusions that they've

1 reached in these studies is critically important.

2 THE COURT: Thank you, Mr. Beisner.

3 MR. BEISNER: Thank you.

4 THE COURT: Mr. Elswit.

5 MR. ELSWIT: Thank you, Your Honor. Your Honor,
6 as of yesterday afternoon the Boston University Chronic
7 Traumatic Encephalopathy Center had completed the
8 examination of 352 brains and there were another 45 brains
9 in the pipeline ready to be analyzed. Five of these
10 individuals have been identified as hockey players to my
11 knowledge. Fewer than five, and I don't know how many, but
12 two or three of those individuals have been identified as
13 NHL hockey players.

14 What the NHL subpoena seeks, and this phrase is
15 repeated at least 11 times, the raw data for Zeidel, other
16 hockey players, including NHL players, or other athletes.
17 In other words, the subpoena seeks everything that the
18 Chronic Traumatic Encephalopathy Center has ever done. They
19 want tissue slides, photographs, digital photographs,
20 samples, interview notes with donors, interview notes with
21 families, and literally, as the affidavits of Drs. McKee and
22 Stern make clear, tens of millions of units of evidence.

23 In addition the subpoena seeks all the preliminary
24 communications that lead to published articles, the
25 back-and-forth correspondence among scientists as they

1 prepare publications for their research.

2 So this is vastly more information than the
3 cumulative I think it was 39,000 units of information that
4 the NHL clubs and the NHLPA produced in response to their
5 third-party subpoenas.

6 So we can agree, I guess, that the balancing
7 test -- really this case, the analytical framework is to
8 balance need against burden in some general way. And this
9 Court's July 2016 order in the NHL clubs' third-party
10 subpoena found a compelling need, not simply a 51 percent,
11 but a compelling need for the statistical data on players'
12 injuries. And as I believe you said earlier, that is not
13 the same situation that we are facing here.

14 In that case there was a demonstrated factual need
15 for the evidence. The NHL here has not demonstrated a
16 fact-based need for the stuff, and I use "stuff" in the
17 scientific sense, this cumulative information, that they
18 need from Boston University.

19 The University's memorandum and the four
20 affidavits that are attached are completely uncontradicted
21 in terms of real evidence to support the legal grounds on
22 which it relies.

23 And rather than rehash what I wrote, I would like
24 to address some of the arguments contained in the brief that
25 we received Monday evening from the NHL and incorporate a

1 response in my response to Mr. Beisner's remarks just now.

2 I think it would be useful to start with
3 Dr. Robert Cantu because he plays a key role in this case.
4 As Dr. McKee's affidavit described, Dr. Cantu was part of
5 the Sports Legacy Institute, which is now the Concussion
6 Legacy Foundation, which partnered with BU and the VA in
7 2008, nine years ago, to create the CTE Center. He is a
8 distinguished neurosurgeon, but his expertise is in
9 concussions and head trauma. It is not in chronic traumatic
10 encephalopathy.

11 He was given a clinical appointment at Boston
12 University back at that time. And if the Court would like,
13 I would be happy to submit an affidavit from my clients
14 about this next week, but I just didn't get it organized.
15 Anyway, he does not draw a salary from Boston University.
16 He is listed as a clinical professor, but he is not a member
17 of the faculty for purposes of his responsibilities or his
18 rights to the University. In a way, this is an honor. It's
19 acknowledging his contributions to the field.

20 But what matters here and what matters in terms of
21 the slides that Mr. Beisner showed us is that Dr. Cantu
22 participates in clinical discussions. And there is a
23 distinction between the clinical side of these issues and
24 the neuropathological side of these issues.

25 He has never -- and I would be prepared to present

1 an affidavit from Dr. McKee on this. He has never had
2 access to CTE Center primary data, patient records, slides,
3 medical records, pathological slides.

4 And because he's not a neuropathologist, he does
5 not work with a microscope in his medical practice. He has
6 never contributed to a neuropathological diagnosis of
7 chronic traumatic encephalopathy, which is the current gold
8 standard for diagnosing this disease, as described in the
9 2015 and 2016 National Institute of Neurological Disorders
10 and Stroke consensus statements.

11 So Exhibit C to the NHL's brief describes
12 Dr. Cantu's contributions as a clinician, not as a
13 neuropathologist. That's really quite important because
14 what we have here is a disease that is diagnosed
15 neuropathologically and not clinically.

16 I don't want to get too far into the weeds on
17 this, but the point is that Dr. Cantu has every right to
18 serve as an expert in any case that he wants to participate
19 in, but he does not bind Boston University. He is not
20 Boston University.

21 And if the NHL believes that Dr. Cantu's
22 statements are inconsistent with either Dr. McKee's
23 statements or with the Center's published research, that can
24 be tested by comparing his statements to the published
25 research and take his deposition and impeach him on that

1 basis.

2 But that does not give the League the right to go
3 beneath the published information, because Dr. Cantu has no
4 more access to the published information than any of us in
5 this courtroom do -- I mean to the data underlying the
6 published information.

7 I would like to talk about Exhibit D to the NHL's
8 reply brief submitted Monday evening. This is a very
9 interesting exhibit. The NHL in what I would gently call a
10 fit of hyperbole describes the Center's research as highly
11 controversial and refers to Exhibit D.

12 And the interesting thing about Exhibit D is
13 that -- well, a couple of interesting things. One is that
14 if the Court were to do a quick search online on the Web of
15 Science for the impact factors of the papers cited in
16 Exhibit D and compare that to the impact factors for the
17 papers produced by Drs. McKee and Stern and others in the
18 Center for Chronic Traumatic Encephalopathy, I think you
19 would show that the influence of my client's papers is
20 significantly more substantial, to the point that it
21 literally dwarfs the influence of the papers on which the
22 NHL relies to support its claim that my client's work is
23 highly controversial.

24 Be that as it may, the heading of this exhibit is
25 very interesting. It is Peer-Reviewed Articles Expressing

1 Uncertainty About a Causal Link Between Head Impacts and
2 CTE. This is a misrepresentation of the work of the Chronic
3 Traumatic Encephalopathy Center.

4 There is a correlation between multiple impacts
5 and chronic traumatic encephalopathy. That is very clear
6 from the published remarks of Dr. McKee and Dr. Stern and
7 others. Now, there may be people who disagree with the
8 plaintiffs in this case, but that's not Boston University's
9 issue.

10 But you don't need the data that the NHL seeks to
11 rebut Boston University on this particular point. In fact,
12 none of the authors of the articles in Exhibit D had access
13 to that data, yet they still concluded that they didn't like
14 the BU research, which really goes to show that you don't
15 need to get into the granular level of the prepublication
16 material to research conclusions about the quality of the
17 publications.

18 And since Your Honor is clearly familiar with the
19 nature of the peer-review process and is described in detail
20 in Dr. Stern's affidavit, Dr. McKee's affidavit, Dr. Omalu's
21 letter, I don't need to spend a lot of time on that.

22 But unless there is some basis for the NHL to
23 conclude that the Boston University research lacks integrity
24 or is scientifically invalid in some way, there is no need
25 to go beyond what is published in order to make their case

1 and there are no facts to support going beyond what has been
2 published in order to make their case.

3 There's another interesting aspect of Exhibit D
4 before I move on. With one exception, every single article
5 in Exhibit D is a peer-reviewed review of existing work.
6 That is completely different from a peer-reviewed original
7 research manuscript.

8 So Dr. Castellani, for instance, who wants to
9 dissect the Center's work, has not published any original
10 empirical research manuscripts on chronic traumatic
11 encephalopathy. Well, that's fine, but the point is that
12 tossing out Exhibit D and saying we have a bunch of people
13 who disagree with the science here is not the same as saying
14 here's a bunch of peer-reviewed empirical research that
15 shows that your science is not very good.

16 My point is simply that if the NHL disagrees with
17 the science, they should either find research that
18 substantively disagrees with it or conduct their own
19 research. They don't have to get into what a neutral
20 scientist does for the sole purpose of discrediting that
21 scientist's work. And as the Cusumano decision makes clear,
22 courts should be reluctant to allow that kind of discovery
23 if its primary purpose is for impeachment.

24 I don't think we need to spend too much time on
25 the cases that the NHL cited in its brief. On page 4 the

1 University addressed them and page 11 of its original
2 memorandum.

3 The only thing I want to say is that in the Eighth
4 Circuit the Miscellaneous Docket Matter case cited in the BU
5 brief reinforces this notion that the unwanted burden thrust
6 on nonparty researchers is a factor entitled to special
7 weight, and this brings us back to Dr. Cantu.

8 Dr. Cantu has an affiliation with Boston
9 University, but that does not make Boston University a party
10 or a participant in this litigation. I'm delighted to be
11 here, Your Honor, but my clients are not a part of this case
12 and they don't want to be a part of this case.

13 Moving on, Section II of the NHL brief --

14 THE COURT: Is it correct that Dr. Omalu will be
15 an expert in this case?

16 MR. ELSWIT: I defer to the plaintiffs on that,
17 Your Honor.

18 THE COURT: But Dr. Omalu is a part of --

19 MR. ELSWIT: Apparently he is, yes. He is not
20 affiliated with Boston University.

21 THE COURT: Dr. Omalu is not. No, he's in
22 California.

23 MR. ELSWIT: Yes. He was in Pittsburgh.

24 THE COURT: Originally, yes.

25 MR. ELSWIT: Yes. And his point of view appears,

1 from what I just saw, to be different from the point of view
2 of Dr. McKee, but that still does not elevate that
3 conversation to a level of a fact sufficient to burrow down
4 beneath the peer-reviewed publication.

5 THE COURT: Let me just take you off the peer
6 review for a moment and you are welcome to get back on it,
7 but the NHL makes the point that there might be relevance to
8 materials that the BU CTE Center has publicly published, you
9 know, whether they're statements to the press or --

10 MR. ELSWIT: Yes.

11 THE COURT: -- articles. Are you opposed to
12 producing those kinds of --

13 MR. ELSWIT: No, not at all, Your Honor. This
14 was -- if I may, the original subpoenas to Dr. McKee and
15 Dr. Stern were issued in 2015, October, I believe, and we
16 produced certain information, clearly not enough for the
17 NHL. But it did not call for the raw data. It called for
18 documents. Very specifically, it is contained I believe
19 it's tab -- it's one of the earlier exhibits in the Boston
20 University. It's Exhibit 1 to the BU brief.

21 THE COURT: Right.

22 MR. ELSWIT: And in an exchange of letters with
23 Mr. Connolly in the winter of 2016, and I believe that is
24 Exhibit 3 in the Boston University brief, I wrote that they
25 simply don't have a good database of their public

1 statements.

2 I was actually -- I must confess I was surprised
3 to learn this, but the staff of the Chronic Traumatic
4 Encephalopathy Center told me that it would take them
5 something like 15 -- 50, 5-0, hours to cumulatively go
6 through Dr. McKee's files and Dr. Stern's files and there
7 were 20 odd scientists there and pull together a
8 representative slide deck and, you know, figure out where
9 they talked about these issues. And I sent that to
10 Mr. Connolly in March of 2016 and heard no more about it.

11 This, to me, seems like a subject worthy of a meet
12 and confer and I'm happy to do that because that's a big
13 imposition, but it does not require the work of the senior
14 scientists. We can find some people to do that. And it
15 also does not require going into the confidentiality issues.
16 You know, it's pull together a list of the public
17 statements. My guess, and it's only a surmise, is that if
18 we did this, we would come up with quite a few of the same
19 slide decks of talks that these individuals have given.

20 THE COURT: Sure. Okay.

21 MR. ELSWIT: Where was I? Relevance. The NHL I
22 believe misquotes something in our brief talking about the
23 phrase "science speaks for itself." And what that means,
24 and I think it should be clear from the University's brief
25 on page 15 and 16, is that the CTE's peer-reviewed published

1 works speak for themselves because they provide the
2 methodology and data sets that support the scientific
3 conclusions which allows someone like Dr. Castellani, for
4 instance, to evaluate and, you know, attack, as he may elect
5 to do, the published conclusions without the need for the
6 underlying data.

7 Now, if the NHL had said, for instance, based on
8 some of the slides we have seen on your website or that
9 appear in your presentations, this slide does not indicate
10 an overwhelming presence of the tau protein that is an
11 indicator of chronic traumatic encephalopathy yet you relied
12 on this slide to conclude that so-and-so has CTE, that might
13 be a basis for pursuing this issue of, you know, raw data a
14 little more thoroughly.

15 It's interesting, though, that in his affidavit
16 Dr. Castellani makes that claim with regard to Dr. Omalu,
17 who is not a Boston University scientist. He does not say,
18 for instance, I reviewed Dr. McKee's work and I found that
19 she relied on these ten slides to conclude that so-and-so
20 had CTE when, in fact, these slides look normal to me. That
21 might have created a fact, and I keep coming back to this
22 word, "fact," that might have created a fact on which the
23 NHL could rely to say we need to dig deeper. But they don't
24 have any facts to justify that.

25 Now, page 6 of its memo the NHL makes this kind of

1 wild claim about the Daubert case, which stands for a lot of
2 things, and I think what's relevant here is the idea that a
3 party can rely on expert scientific evidence based on valid
4 scientific principles.

5 Here I think the University has shown beyond
6 question, based on the Stern affidavit, the McKee affidavit,
7 that the work that has been published has gone through the
8 crucible of the peer-review process. This is completely
9 what Daubert stands for. This is justifiable science. It
10 cannot be attacked by undermining it by going through the
11 raw data once it's gone through the peer-review process.

12 A little bit more about the cases simply because
13 Mr. Beisner mentioned them, cases they cite. Kellington was
14 not a medical study. I address these in my brief as well.
15 It did not involve issues of privacy.

16 The PPA Products Liability case involved
17 production of documents for a study that had concluded long
18 before the litigation in that case began and that whose
19 patients agreed to the release of their records.

20 And the Prempro Products Liability case ordered
21 de-identification of sensitive material for the reasons I
22 hope are clear from the affidavits of my clients that is
23 both practically impossible and maybe legally impossible as
24 well. We are talking about millions and millions of units
25 of data. Dr. McKee explains why that cannot be done on the

1 slides and the microphotographs. Dr. Stern explains in his
2 affidavit why it is impossible to get anything out of a
3 de-identified interview because there will be nothing left.

4 And, again, the NHL does not have any facts to
5 say, oh, yes, we can use this and here's where we need it.
6 I'm sorry to sound like a broken record, Your Honor, but the
7 issue in this balancing test and the burden question is does
8 the NHL have any facts; and they simply don't.

9 The Deitchman case, the great case of Deitchman
10 against E.R. Squibb, a case that has never been cited by the
11 Eighth Circuit. When I read on page 9 of the NHL's brief
12 that Boston University ignored the Deitchman case, I kind of
13 wondered if the author had noticed that that case is first
14 referenced in the BU brief on page 11 and then discussed in
15 detail on pages 13 and 14. In fact, that case gets more
16 airtime than any case in my brief other than Cusumano. And
17 I think we've covered everything that's relevant about that
18 case, which involved a sole source database, as I believe
19 you observed, and an epidemiological study. We don't do
20 epidemiological studies.

21 If you want another Seventh Circuit case, also
22 never been cited by the Eighth Circuit, that is relevant, I
23 recommend a case that we cited in our brief called Dow
24 Chemical against Allen. It's also a case from the early
25 1980s, about the same time period as the Deitchman case.

1 That case found constitutional protection for university
2 researchers on comparable facts. And simply for the benefit
3 of your clerk, I refer the Court to page -- 672 F.2d at
4 page 1275 and 1276.

5 We are not asking this Court to find
6 constitutional protection for Boston University research.
7 If you are going that direction, we'd be delighted, but
8 that's not what we need for the Court to conclude that this
9 subpoena should be quashed.

10 That case uses the substantial needs standard,
11 which is comparable to this Court's compelling needs
12 standard. I think all you have to do is conclude that the
13 NHL has not shown a substantial need or a compelling need
14 and that would take care of this.

15 I'll talk briefly about the NHL's requests.
16 Requests No. 6 and 7 seek digitized slides. We will work
17 with counsel to provide them for Mr. Zeidel. I would
18 mention in response to Mr. Beisner as why we didn't produce
19 this before, the initial production for Mr. Zeidel took
20 place in response to the 2015 subpoenas which asked only for
21 documents. There was a long gap, I believe it was between
22 March and October 2016, and this issue never really came up
23 and then we had conversations about larger issues, counsel
24 had conversations this fall during our meet and confers.
25 The point is we're prepared to work with counsel to make

1 that happen as for Mr. Zeidel.

2 THE COURT: Let me ask you about the couple of
3 other NHL hockey players.

4 MR. ELSWIT: Yes, Your Honor.

5 THE COURT: Have you produced some documents or
6 are you willing to produce some data or slides related to
7 those players?

8 MR. ELSWIT: We have produced some documents. I
9 would certainly go back to my clients and see if there are
10 more documents. At the time I asked for everything, but --

11 THE COURT: I know that there were authorizations
12 for four of your five hockey players. I don't know whether
13 they were NHL hockey players or not. But if you could go
14 back and check into that.

15 MR. ELSWIT: I'm not sure what's sealed in this
16 court and so I'm not entirely at liberty to say, but at
17 least some were NHL players.

18 But, Your Honor, there's a difference between
19 paper production and slides. We have hundreds of thousands
20 of slides. This is unrebutted. And I think it's important
21 to recognize that this is not simply someone sitting under a
22 microscope with an iPhone and clicking pictures. This is an
23 extremely precise, delicate process. It is in a way
24 Dr. McKee's work product, her colleagues' work product.

25 And I am really troubled by the idea that the

1 League wants all of this material, you know, hundreds of
2 thousands of units of information, for every single case,
3 call it a case, brain that has been worked on so that they
4 can do their own, you know, kind of analysis of it without a
5 showing that there is some defect in the analyses that were
6 conducted by the Chronic Traumatic Encephalopathy Center.

7 There are two issues here. One, of course, is
8 this peer-review process that goes through these materials.
9 They get random samples. If this work wasn't quality work,
10 it would not be published in the leading neurology and
11 neuropathology journals in the world. If this was not
12 quality work, the Boston University CTE Center would not be
13 held in the preeminent position in which it is held.

14 And unless the Center [sic] has a factual basis
15 for concluding that there is something wrong with this work,
16 I do not think that under any legal theory that they can
17 come up with they have a right to go look at this stuff.

18 Now, I understand for Mr. Zeidel, of course, and
19 Dr. McKee is willing to produce that. But these other
20 people are not necessarily members of any class or putative
21 class in this case whatsoever.

22 THE COURT: No. And just to be clear, I was only
23 referencing those who had provided authorizations who were
24 NHL hockey players. But I hear your point loud and clear.

25 MR. ELSWIT: Thank you. Should we talk a little

1 bit about drafts of research materials --

2 THE COURT: Sure.

3 MR. ELSWIT: -- drafts of articles? This is where
4 Cusumano comes in, I think, and I think other cases as well.
5 Boston University is a nonparty to this case. It deserves
6 special protection.

7 In a way, respectfully, Your Honor, this would be
8 something like if someone said I would like to see the
9 Court's draft opinion of something or I would like to see
10 your exchanges with your law clerks.

11 THE COURT: That's curious because draft expert
12 reports, for instance, aren't discoverable, so I'm not
13 sure --

14 MR. ELSWIT: I'm sorry?

15 THE COURT: Draft expert reports are not
16 discoverable, so I'm not sure why draft articles are
17 discoverable.

18 MR. ELSWIT: You know, that actually leads to an
19 interesting issue that I did not mention in my brief, but
20 Rule 26(b)(4) -- (2)(B)(4) protects drafts from disclosure.

21 So let's say that the NHL gets the material that
22 it wants and they give it to their expert, who works on it
23 and does draft stuff. The plaintiffs can't get that
24 material. Now, we don't have a dog in that hunt, but it
25 does not make sense for drafts to be protected under the

1 Federal Rules of Civil Procedure for parties, yet not to be
2 protected for nonparties.

3 We talked about Dr. Castellani in our brief on
4 pages 19 to 20. I don't believe we need to do too much more
5 on that.

6 Your Honor, on pages 19 and 20 of their reply memo
7 the NHL cites several cases in a paragraph beginning,
8 "...courts routinely reject proclamations that the third
9 party faces an undue burden." Every single one of those
10 cases, I've read them all, is based on a fact-driven
11 inquiry. And facts are stubborn things, as President John
12 Adams is reputed to have said.

13 The NHL has not given us any facts and I'm sorry
14 to be a broken record, but really that's what this comes
15 down to. It is not about legal holdings. It is about
16 looking at the facts.

17 If you look at these cases, SEC against
18 Fuhlendorf, a very modest -- these are the cases the NHL
19 cited -- a very modest volume of discovery from a sole
20 source. Ambac Assurance Company against EMC Mortgage, the
21 key players didn't need to participate in the production of
22 the documents that were requested. The Exxon Valdez case
23 was largely about money. No raw research or private
24 health -- private medical information was being requested in
25 those cases.

1 The NHL brief accuses Boston University of using
2 alarmist rhetoric. That's a quote from their brief. But as
3 I said earlier, the context is interesting. The NHL clubs
4 and the NHLPA produced just about 40,000 documents, which is
5 far less than the units of information that are created for
6 simply one brain at the CTE Center and we've got almost 400
7 of them. So we're looking at 40,000 by a factor of a
8 hundred or something like that. So that's not alarmist
9 rhetoric. That is cause for alarm. This would be a real
10 problem.

11 And the Center said -- you know, Mr. Beisner said
12 we can find somebody else to do this anonymization.
13 Dr. McKee explains why that cannot be done in her affidavit.
14 Dr. Ronald Petersen of the Mayo Clinic, who may be the
15 world's foremost researcher on neurodegenerative diseases in
16 the world, says in his affidavit, and it is quoted in the
17 Boston University brief, the principal investigator needs to
18 be involved in this process. You can't simply farm it out
19 and give someone a 20-minute tutorial and say go ahead and
20 apply the Wite-Out. It just doesn't work like that.

21 The NHL says get a third party, but they haven't
22 produced an affidavit from anyone who says the law -- you
23 know, we've done this with a third party in this particular
24 kind of case. It simply does not work like that.

25 Chilling effect. So the NHL's brief touches on

1 chilling effect very briefly, but they don't really argue it
2 very well. It's interesting to me because this week I
3 heard -- and this case has received a little mainstream
4 publicity that you may or may not have seen. This week my
5 clients told me that they are getting calls from potential
6 donors and families of donors and others who want to know if
7 their information is going to be released because of this
8 lawsuit. That is exactly the kind of chilling effect that
9 Dr. McKee fears, that Dr. Stern fears. That is exactly why
10 we are taking such a firm stance here.

11 There are people -- I don't mind telling the Court
12 this. There are people that we spoke with, potential
13 non-Boston University affiliated experts, who said I don't
14 want to become involved in this research because I'm going
15 to be next. That's what we are worried about here and
16 that's why we have real serious concerns about the way this
17 is played out.

18 Your Honor, I could go on, but my sense is I have
19 covered most of the ground. Unless there is more
20 information that you in particular would like to talk about,
21 I just want to close with one thing about privacy and
22 confidentiality.

23 In 2016 some of the material that Boston
24 University produced --

25 THE COURT: Do you have another copy? I

1 honestly --

2 MR. ELSWIT: I have a copy for the Court.

3 THE COURT: I can't read that.

4 MR. ELSWIT: May I approach?

5 THE COURT: Yes, please.

6 (Document handed to the Court)

7 THE COURT: Thank you.

8 MR. ELSWIT: In 2016 this was among the
9 information that Boston University provided about a hockey
10 player who happened to be an NHL player. And the context
11 here, and the League has the entire correspondence, is that
12 people wanted Dr. McKee to issue a press release about this
13 individual and she said no and she writes here, "To put out
14 a press release on unpublished cases compromises not only my
15 credibility and professional integrity as a
16 neuropathologist, but also I believe undermines the
17 reputation and professionalism of our entire team."

18 These people take this very seriously. That's why
19 we have taken -- we have drawn a pretty firm line in the
20 sand about what we are prepared to do. We have made a
21 commitment to the people, as Dr. McKee said, the people who
22 have entrusted their brains and their emotional and physical
23 lives to Boston University, and we do not intend to let that
24 go easily.

25 I'm going to state the obvious. Boston University

1 does not want to be a part of this litigation. I am very
2 grateful to the Court for giving me the time to be here. I
3 am very grateful to counsel on both sides of this courtroom
4 for helping me with some of the mechanical issues and their
5 general courtesies throughout this entire process, but I'd
6 be delighted not to come back here.

7 THE COURT: We won't take offense.

8 MR. ELSWIT: I suspect there's going to be more no
9 matter what happens, but the legal standards that drive the
10 outcome of the NHL's motion to compel are clear. It is a
11 balancing test, it is a fact-driven balancing test, and the
12 NHL has not made a fact-based case that its needs outweigh
13 the burdens that compliance will impose.

14 Your Honor, I don't pretend to know very much
15 about the actual litigation, but I've read the complaint and
16 it does appear that most of the allegations are negligence
17 based, what did the party know, what did the League know and
18 when did they know it and what should they have known. The
19 NHL should not have known what was in unpublished research
20 until it was published. I may not have said this earlier,
21 but Dr. Cantu didn't know any more than the League did
22 because he didn't have access to the raw data.

23 The point is there's nothing in the raw data, the
24 private health information, the interview notes, the slides,
25 or the photographs that the NHL knew or should have known

1 before they were released to the public.

2 One can argue that the NHL perhaps should have
3 known about the published research in the field, but there's
4 no credible argument that they should have known about what
5 is behind the scenes.

6 And for all of the reasons that we have
7 articulated in our legal memoranda with the exhibits and my
8 remarks here today, Boston University respectfully urges
9 this Court to deny plaintiffs' [sic] motion to compel.

10 Thank you very much, Your Honor.

11 THE COURT: Thank you, sir.

12 Mr. Beisner, before you get up, do the plaintiffs
13 wish to be heard?

14 MR ZIMMERMAN: I have something I would like to
15 say, but I will wait until the end, if I could.

16 THE COURT: All right. Thank you, Mr. Elswit.

17 Mr. Beisner.

18 MR. BEISNER: Your Honor, at the outset you asked
19 me about or asked the difference between this and some of
20 the earlier production discussions that we've had with the
21 Court and you noted that the productions that the Court
22 ordered earlier were in part needed to understand a very
23 critical part of the case and that is NHL knowledge at
24 various points along the way.

25 And what concerns me here, Your Honor, is that in

1 this discussion there seems to be no recognition in what BU
2 is arguing here as to how critical this information is in
3 the case. The summary Mr. Elswit just gave I think
4 indicated that.

5 What we're talking here is about plaintiffs'
6 allegations that concussions and subconcussive blows have a
7 causal relationship to CTE and other alleged
8 neurodegenerative conditions and that CTE has a causal
9 relationship to certain clinical symptoms, depression and
10 dementia. The evidence that they are relying on in support
11 of that fundamental argument in the case is the BU research.
12 That's what they're relying on.

13 THE COURT: And it's been published. You have it.

14 MR. BEISNER: Ah, but, Your Honor, there's the
15 problem. Where is there any case that says that
16 published -- peer-reviewed published research is immune to
17 discovery? We've cited numerous cases where it's been
18 permitted.

19 THE COURT: Well, not numerous cases, I would
20 note, and also it seems to me that there's three ways that
21 you would contest those articles.

22 One, they're based on inaccurate data. As
23 Mr. Elswit has argued, there isn't a whit of an argument in
24 anything you've submitted that you have any clue that
25 there's any inaccurate data. It's entirely a fishing

1 expedition. Your hope is to go through millions and
2 millions of data and hopefully find something. So if you
3 come forward with some evidence that their work lacks some
4 factual integrity, we could look at it.

5 Number two, and this is where I think your expert
6 is going, he's going to criticize the methodology. That is
7 all laid out. There's nothing underlying. That is fully
8 described because it's peer reviewed. Everybody looks at
9 that methodology and makes -- renders an opinion about it.

10 And three, the other possibility, I suppose, is
11 that your expert is going to reach his own opinions or
12 conclusions based on the data that contradict that of
13 Dr. Cantu or whomever it is, Dr. McKee. That curiously puts
14 your expert at risk of a Daubert challenge because you've
15 got peer-reviewed literature and then you've got a gentleman
16 who is going to be offering an opinion that's not peer
17 reviewed.

18 So that's all to say that you have the
19 methodology. You're fully free to criticize it. If you
20 think there's a lack of integrity, tell me where it is.

21 MR. BEISNER: Okay. I will.

22 THE COURT: Okay.

23 MR. BEISNER: I will tell you where it is.

24 Consider the slides in the case that were looked at to make
25 the diagnosis. There's no evidence here that the peer

1 reviewers went through those slides to confirm what the BU
2 researchers found.

3 THE COURT: But that's a fishing expedition. You
4 have to tell me you have some evidence --

5 MR. BEISNER: How do you do that, Your Honor,
6 unless we have a chance to look at the material?

7 THE COURT: You might not be able --

8 MR. BEISNER: It's a locked box.

9 THE COURT: But it's a fishing expedition like in
10 any other discovery situation. I hear it all the time.
11 Judge, how can I possibly know until I see it all? It's in
12 their possession. They have it. There has to be some link
13 between this and the extraordinary amount of data you're
14 seeking.

15 MR. BEISNER: Your Honor, from what little we've
16 been able to see, let me give you a concrete example that we
17 have laid out to the Court. When we took the depositions of
18 the Zeidel family members, they disagreed with what the BU
19 folks had written down as the symptomology of Mr. Zeidel.
20 It's laid out in detail in the transcripts that we have
21 here. So we have there a very concrete instance --

22 THE COURT: You're not going to have much argument
23 from me on Zeidel. I am going to require a meet and confer
24 and I am going to expect that it all gets produced.

25 MR. BEISNER: All right. But, Your Honor, that is

1 the same methodology that they used in doing their diagnoses
2 of all the CTE cases as far as we know. And if there's a
3 problem with Zeidel, how do we know there isn't a problem
4 with the others? The Court --

5 THE COURT: We don't know if there's a problem
6 with Zeidel. We know there's a challenge.

7 MR. BEISNER: Your Honor, the Court is setting up
8 a black box here and saying that if there's a peer-reviewed
9 article, you cannot question it, you cannot look inside the
10 box and --

11 THE COURT: No. This is a balancing test. Okay?
12 It's a balancing test with burden over here of a nonparty
13 and relevance. And when you say to the Court we haven't a
14 clue if there's a darn thing wrong with any of the hundreds
15 of millions of thousands of data there, then that's pretty
16 tough to succeed in that balancing test.

17 MR. BEISNER: Well, in the first place, Your
18 Honor, that is plaintiffs' burden. This is clearly
19 relevant. It's the linchpin of the case and to say that --
20 I just don't think there is any case law out there that says
21 that if it's peer reviewed, it's immune to discovery unless
22 somebody has leaked part of what's inside --

23 THE COURT: I can't help --

24 MR. BEISNER: -- to raise a question about it.

25 THE COURT: -- but wonder in the end, though,

1 whether the fact that there may be a slide or two off
2 matters. I think this is fundamentally a question of
3 scientific methodology. I don't think your expert is going
4 to get up there and say I don't agree with these
5 peer-reviewed articles because they relied on an incorrect
6 fact or two.

7 MR. BEISNER: Your Honor --

8 THE COURT: He's going to say I don't believe in
9 the methodology these people use. Right?

10 MR. BEISNER: Your Honor, we gave you a concrete
11 example of this. That's the reason we put the Omalu
12 information before the Court. Omalu looked at slides and
13 reached certain conclusions in peer-reviewed articles.
14 Dr. Castellani, in peer-reviewed articles, looked at his
15 slides because he got access to them or got access to them
16 enough to do the analysis and said I disagree.

17 And what the Court is saying here is, oh, no, it's
18 the BU slides, you can't have access to them to engage in
19 that same exercise. That's the problem here. And the peer
20 reviewers, as far as I know, there's nothing in the record
21 saying they did that.

22 THE COURT: Well, apparently your expert did,
23 though, in his peer-review review.

24 MR. BEISNER: No. Those were Omalu's slides.
25 We're not talking about the slides for the BU studies here.

1 THE COURT: All right. Well, I'll have to go
2 through all the peer-review reviews of the studies here to
3 see if anybody looked at the slides. I don't know. Perhaps
4 you have done that already, but.

5 MR. BEISNER: Well, I mean, there's no evidence in
6 the record anyplace that that peer review involved that sort
7 of review.

8 THE COURT: I would expect it would have, though.

9 MR. BEISNER: Well, then -- but bear in mind they
10 have the burden on this, not us. That's what the Bombardier
11 case says. And now we're engaging in assumptions about what
12 was done in the peer-review process.

13 THE COURT: And presumably some of this data
14 hasn't developed sufficiently into a published article. I
15 don't know. I assume that's the case.

16 MR. BEISNER: Well, I think it depends on what
17 we're talking about here. There are a number of articles
18 that are published for which we would like that information.
19 So in terms of progressing, those are done. What slides
20 were used for those, what the investigative materials are,
21 those are finite materials. Those are done. Looking at
22 those is not going to interfere with those research projects
23 because they're concluded. And those are the linchpins of
24 the case.

25 You know, going back to the Seventh Circuit ruling

1 that I had up there earlier, the Court is basically saying
2 that they are an infallible witness with no evidence of what
3 that peer-review process really looked at. It really is
4 basically just saying whatever those articles say, we're not
5 going to exercise the full Daubert function with respect to
6 those because we're not going to allow any inquiry about how
7 they were done.

8 We don't know what the peer -- I mean, there's
9 nothing in the record indicating what that peer-review
10 process involved. We're just sort of saying, oh, it's peer
11 reviewed. And I just don't think that any court has given
12 that sort of magic immunity to research studies, especially
13 when they are such the linchpin of this case.

14 You know, we've heard repeatedly here about public
15 interest in this case and that has been a big justification
16 for looking at all of the information that the NHL had and
17 so on. Why is the BU part of this any different? What is
18 everybody afraid of looking at the slides? All right. If
19 there's --

20 THE COURT: I don't think they're afraid at all.
21 I think they're very concerned about the chilling effect,
22 which is real, and they're concerned about the extraordinary
23 burden because you just can't bring a third person in and --

24 MR. BEISNER: You know, Your Honor, let's come
25 back to this. I was interested -- and I don't know what

1 happened thereafter, but you were offered this memo, this
2 e-mail here from Ann McKee saying I don't want to release
3 this information about Mr. Probert. Look at the website.
4 March 3, 2011 there is a press release regarding Mr. Probert
5 being diagnosed postmortem on the site. It's there. And BU
6 is out there -- you can look on the site and see slides.

7 THE COURT: A couple of months after this, you're
8 saying?

9 MR. BEISNER: Yeah. I mean, I don't know what
10 happened in the meantime, but the reality is that they went
11 out there and released it.

12 These concerns about chilling effect, if I'm
13 somebody looking at that, the greatest chilling effect would
14 be looking at the website because there's all sorts of
15 information on there about diagnoses, pictures of brain
16 tissue from various places. I think to suggest that this is
17 going to have a chilling effect, I just don't think there's
18 any evidence of that there.

19 So I think, Your Honor, what this boils down to
20 is, you know, this is the linchpin of their causation case,
21 are these studies. What's being articulated here is you
22 can't look at anything, but tell us what's wrong with it is
23 the standard. That can't be right. We're going to honor
24 the peer-review process even though we don't know what they
25 looked at in the peer-review process.

1 This is litigation. As the Seventh Circuit said,
2 litigants get to test things. And this is being completely
3 shut off to us here, and it's a huge issue as to whether the
4 research is appropriate in all respects. What little we've
5 seen suggests that there are problems with it.

6 Thank you.

7 THE COURT: Mr. Zimmerman.

8 MR. ELSWIT: Your Honor, may I have a few moments
9 to respond?

10 THE COURT: You may, of course. I think,
11 Mr. Elswit, one thing that would be helpful to the Court is
12 if you could submit an affidavit that includes all the
13 peer-review reviews of the peer-reviewed literature at issue
14 so that I can see the extent to which those who peer
15 reviewed your literature explored slides and data. That
16 would be helpful.

17 MR. ELSWIT: Let me make sure I get this straight.
18 An affidavit of all the peer reviews of --

19 THE COURT: Of the Boston University's
20 peer-reviewed articles at issue here.

21 MR. ELSWIT: I will do my best.

22 THE COURT: I know that's a big task, but I think
23 that would be useful.

24 MR. ELSWIT: Do you have a sense of timing?

25 THE COURT: Well, I think what you should do is

1 get a handle on how long that's going to take you and advise
2 the parties and we can discuss a reasonable time period.

3 MR. ELSWIT: Okay. I will --

4 THE COURT: While you're doing tasks for me, I'd
5 also ask you to go back and look at underlying data on the
6 Zeidel estate and see where that lands you.

7 MR. ELSWIT: Yes.

8 THE COURT: And to the extent there are
9 authorizations for underlying data on your few NHL players,
10 I think I would also --

11 MR. ELSWIT: I'm sorry. Could you say that again,
12 please?

13 THE COURT: Sure. My understanding is that of the
14 five hockey players for whom you have brains, a couple of
15 them are NHL players. So the first question is whether you
16 have authorizations from those NHL players. The briefing
17 says that you have authorizations for four of the five
18 hockey players. To the extent you have authorizations for
19 NHL players, I'd like you to explore and meet and confer
20 with Mr. Beisner about the production of data with respect
21 to those hockey players, assuming there's an authorization.
22 Okay?

23 MR. ELSWIT: Certainly.

24 THE COURT: Okay. And then while I'm at it, I
25 would like you to meet and confer with Mr. Beisner about

1 those -- searching for those public materials, that is, any
2 time BU has spoken about this publicly that you thought
3 might take about 50 hours. As I understand it, the NHL will
4 reimburse you for the reasonable costs of doing that and I
5 think that's perfectly reasonable as well.

6 MR. ELSWIT: Happy to do that, Your Honor.

7 THE COURT: Okay.

8 MR. ELSWIT: Your Honor, this is not the Court's
9 problem, but Boston University is a pretty unusual
10 institution in that we actually try cases. It has lawyers.
11 I'm a litigator for BU and I start a trial the second week
12 in March or third week in March, I think. So what's your
13 timing on all this?

14 THE COURT: Again, you just confer with counsel.
15 They'll notify me. Hopefully you can agree on some kind of
16 a schedule for this.

17 MR. ELSWIT: Thank you.

18 Just a few quick reactions to what Mr. Beisner
19 just said. He said that the plaintiffs' allegation in this
20 case is that there's a causal relationship between hits and
21 CTE. And if that is an allegation in the case, it seems to
22 me that a way to test that allegation is to test it against
23 the published research, which may or may not support it, but
24 there does not seem to be any need to go beneath the public
25 research.

1 Now, we can talk about the subtleties of what the
2 public research says and Dr. McKee and Dr. Stern have been,
3 I think, completely consistent about the difference between
4 correlation and causation. Be that as it may, it is in the
5 literature. They don't need to go -- the NHL does not need
6 to go beneath that to get what it needs to defend this case.

7 And when they say -- he used the word "lack of
8 integrity" and we have no evidence that the peer reviewers
9 saw slides. I think that the affidavits of Dr. McKee and
10 Dr. Stern and Dr. Omalu's letter and I believe Dr. Cairns'
11 affidavit as well make it quite clear that the peer-review
12 process is quite demanding, particularly when you're dealing
13 with empirical science as opposed to the peer review of a
14 peer-reviewed research article. When these scientists
15 submit something for publication, the data is completely
16 subject to review.

17 THE COURT: Okay. And that's what I want to see.
18 I want to see some -- I want to see whatever form that
19 takes. Is that what these peer-review reviews are, is an
20 analysis of that data?

21 MR. ELSWIT: So what's involved in a peer review?

22 THE COURT: No, I know what's involved in a peer
23 review. Mr. Beisner questions and says, truthfully, that
24 there's no evidence in the record about whether in the
25 course of the peer-review process some of this data has been

1 analyzed by others and that's -- I want to know, I want a
2 record here about with respect to the peer-reviewed articles
3 at issue here, when they went through the peer-review
4 process did what you're telling me happens happen, that is,
5 there was some pretty significantly hard looks at this data.
6 Do you see what I am saying?

7 MR. ELSWIT: I do. I'm happy to produce that.

8 THE COURT: Okay. Thank you.

9 MR. ELSWIT: The fact that -- Mr. Beisner said
10 that there is a disagreement between what was written down
11 and what the Zeidel family remembers. I'm not sure that
12 really -- we're going to produce all that stuff anyway, all
13 the Zeidel stuff, but I'm not sure that that does much more
14 than indicate there's a disagreement and I don't know if
15 it's a red light versus green light type of disagreement or,
16 you know, he was violent, no, he wasn't violent, but that's
17 not enough to say let's open the door to everything else. I
18 think that's all I really need to say about that.

19 Your Honor, I'm afraid I'm going to be redundant.
20 The only thing I want to say about this 2011 e-mail from
21 Dr. McKee, this e-mail was written in January of 2011 and
22 Mr. Beisner said that in March there was a website
23 publication about this particular individual. I have to
24 assume that that was because that data had been published at
25 that point during the two-month period. It isn't really

1 hard for me to imagine that Dr. McKee, who is, you know, the
2 intellectual and spiritual leader here along with Dr. Stern,
3 said don't do it, that they went ahead and did it until it
4 had been published.

5 THE COURT: I'll tell you what. Since you're
6 giving me a new declaration, you can include that on your
7 list too.

8 MR. ELSWIT: We'll do that. Thank you, Your
9 Honor.

10 THE COURT: Thank you.

11 Mr. Zimmerman.

12 MR ZIMMERMAN: It's almost scary to get into this
13 debate because it involves an institution that I respect,
14 Boston University, and an adversary that I am fighting, the
15 National Hockey League.

16 So it's with understanding that I'm not trying to
17 defend Boston University, but I want the Court to know that
18 there's a body of interrelated evidence stemming from
19 research done at Boston University and other institutions
20 that support the conclusion that there's a connection
21 between blows to the head and cognitive problems; and this
22 conclusion the NHL challenges. I think that's what this
23 lawsuit is about. I know what this lawsuit is about.

24 The published science, however, has to speak for
25 itself because it speaks of the process that goes into

1 making scientific peer-reviewed publications important to
2 our understanding. Otherwise we have no foundation to
3 appreciate what scientists are doing if there isn't a
4 process that allows us to believe in it, which is the
5 scientific process.

6 But what this lawsuit is about is not the
7 scientific process because the link between concussive and
8 subconcussive hits and neurocognitive disease is clear in
9 the science. What this lawsuit is about, what is relevant
10 here is what the NHL knew about the published literature or
11 should have known about the published literature such that
12 they should have made more information available and taken
13 more precautions. What Mr. Beisner and the NHL are trying
14 to do now is unravel the science and create an alternative
15 theory that none of this science is to be believed.

16 It's independent research that forms the bedrock
17 of our beliefs in the science of what we do and how we act
18 as human beings and as people. And we are asking the NHL to
19 do what they were supposed to do, be aware of what science
20 is out there, whether it be in football, whether it be in
21 boxing, whether it be in whatever sports or occasions affect
22 a person's brain in contact and as that information comes
23 forward through the scientific process, take appropriate
24 precautions and do the right thing towards their players.

25 What they're trying to do today is give us an

1 alternative theory that there is no such connection or poke
2 holes in these connections, and that is wrong. It's
3 violative of the scientific method. It's violative of the
4 process that we all engage in as human beings, which is we
5 have a duty to be responsible to one another and to rely
6 upon the peer-reviewed science as we take actions in the
7 marketplace or in the workplace or in the games.

8 They, of course, don't want to accept that theory,
9 that there is a connection. They want to come up with
10 denying of the science, delaying the process, defending what
11 I think is the indefensible, and obstruct the truth. I
12 don't think the Court should allow that.

13 And the last thing I would say to you is: What
14 does Dr. Stern and Dr. McKee say? Dr. Stern says the NHL's
15 request will harm all ongoing CTE-related research at BU and
16 at all -- and at institutions that collaborate with BU
17 and/or rely on their research. This may be exactly what
18 deniers want, deniers like Dr. Castellani and deniers like
19 the NHL, but we shouldn't allow that to happen.

20 We should ask ourselves what does Dr. Stern say --
21 excuse me, Mr. McKee say? Dr. McKee says, at the last page
22 of her affidavit, "The existence of CTE is not a question of
23 debate. The consensus findings and those in the published
24 literature have been of tremendous importance to not only
25 professional athletes, but also to child athletes and

1 members of the military and to those tasked with their care.
2 There remains, however, much research and discovery to be
3 made to further advance the CTE discussion. I fear the
4 impact of an intrusive and over-reaching subpoena, possibly
5 aimed at undermining this entire field of discovery, on the
6 integrity of the future research efforts on this critical
7 topic and in turn on any area of research that might impact
8 well-resourced and well-organized litigants. I, along with
9 members of my laboratory, respectfully ask the Court to
10 prevent this very real risk from being recognized" -- or
11 "realized."

12 Your Honor, we must take some perspective here.
13 We can't unravel science because it's good for our defense
14 and will cause delay and more time and more trips to the
15 courthouse and more depositions and more subpoenas and more
16 analysis. The scientific process is the bedrock of what we
17 do as citizens in this country and in this world, and we
18 can't unravel that in the name of a defense of a lawsuit.

19 Thank you.

20 THE COURT: Thank you, Mr. Zimmerman.

21 Mr. Beisner.

22 MR. BEISNER: Your Honor, just a quick reaction to
23 Mr. Zimmerman's comments. I'm struck by the fact that the
24 recurring theme we have here today is, well, we have some
25 peer-reviewed research. Contrary to the notions set forth

1 in the Deitchman case, you shouldn't question it. It should
2 just be accepted even though we don't know what that
3 peer-review process involved.

4 I hear the Court has asked for that information
5 and I think that's gratifying. I think we need that and I
6 think particularly we need to know about what level, if any,
7 of slide review was conducted there in that case because
8 that really lies at the heart of the analysis that they've
9 done.

10 But I think there's a more fundamental issue here
11 and this really goes to Mr. Zimmerman's statements. If you
12 go through the history of MDL proceedings, there are quite a
13 few that started off with peer-reviewed articles that in the
14 end the court concluded were junk science. They were
15 rejected on Daubert grounds once people really got into
16 them, and they got into them because you were able to look
17 at what was really in that research.

18 THE COURT: What's an example of an MDL --

19 MR. BEISNER: Breast implants.

20 THE COURT: Which one?

21 MR. BEISNER: Breast implants.

22 THE COURT: Okay. Another example.

23 MR. BEISNER: Bendectin, Viagra.

24 And we have competing peer-reviewed articles here
25 and, you know, this is the -- plaintiffs are asserting

1 theories of physical causation here. There seems to be a
2 disconnect between what I'm hearing BU's counsel talk about
3 as to sort of the level of the research in terms of
4 causation and Mr. Zimmerman saying you have to embrace this
5 as causation, because I'm not even sure Mr. Elswit is saying
6 those articles that we're talking about rise to any level
7 that would give them Daubert standing in the first place.

8 But in any event, I'm just saying here this notion
9 that we can't litigate these issues because there is a
10 peer-reviewed article out there, that's nonsense. This is
11 litigation.

12 THE COURT: It would be helpful if I could see
13 opinions in the Bendectin, breast implant, and Viagra cases
14 where the underlying data of the peer-reviewed articles was
15 ordered produced by a judge and that led to a successful
16 Daubert challenge. That would be helpful for me to see.

17 MR. BEISNER: Well, again --

18 THE COURT: As opposed to just the methodologies
19 being -- which I'll permit here for certain.

20 MR. BEISNER: Right. But I think, Your Honor, I'm
21 in part responding here more to Mr. Zimmerman, the notion
22 that we can't debate this issue. If we disagree because
23 there's a peer-reviewed article out there, it's somehow
24 irresponsible. It's litigation. There is evidence --
25 considerable evidence to the contrary and I'm not sure that

1 evidence is persuasive under Daubert principles, but that's
2 what we're going to find out.

3 THE COURT: Well, yes. And I think that it's
4 really a question of this balance, as we point out, between
5 relevance and burden and if the peer-review process with
6 respect to this particular set of peer-reviewed studies was
7 very rigorous and all that the NHL has is one anecdotal
8 account about a slide, then that balancing process is going
9 to lean towards burden, you see. That's why I'm interested
10 to know that in MDL cases where there was peer-reviewed
11 literature judges ordered all that underlying data produced,
12 that's what I want to see, as opposed to experts arguing
13 between each other as to competing methodologies in
14 peer-reviewed literature, which will for sure happen here,
15 but this is a whole different question here about the
16 production of this data.

17 MR. BEISNER: And, Your Honor, I think it's also
18 important for precedence because I'm not sure I've seen
19 where courts say that because it's peer reviewed, it's
20 immune to discovery.

21 THE COURT: Well, what I haven't seen, frankly, is
22 parties asking for that level of production of data from
23 third parties. What you typically see, in my experience at
24 least, is competing views on the methodology about how to
25 approach this science that get well debated in front of a

1 jury or a judge. That's wholly different than whether all
2 of the data that a third party has that led to a peer-review
3 process can be produced. Again, as is evidenced from the
4 briefing, there are very few cases. But I'm glad to hear
5 there's some MDL cases.

6 All right. Anything further on this topic? All
7 right. You have your marching orders in terms of what to
8 meet and confer about. With respect to the rest of it, the
9 Court will simply take it under advisement.

10 MR. ELSWIT: Thank you, Your Honor.

11 THE COURT: All right. Mr. Elswit, you are
12 welcome, of course, to stay for the remainder of our status
13 conference, but you're also welcome to leave if you would
14 like.

15 MR. ELSWIT: Thank you, Your Honor. I think I'll
16 stick around. I'm kind of enjoying this case.

17 THE COURT: All right.

18 MR. ZIMMERMAN: Your Honor, I don't want to be
19 rude, but I have a -- I might have to leave at 4:00, but I
20 don't think we have much more on the --

21 THE COURT: I think I can make the next two topics
22 go by quickly. I'm in trial right now and I'm going to be
23 in trial until the end of March. We're working. I know I
24 promised you the order on the de-designation. It's in final
25 form. I'm editing it. I am doing my best. I'll get it to

1 you as soon as I can. Similarly, the annotated bibliography
2 motion, I'm not quite there yet. So I hope very shortly to
3 be getting you those orders. I presume that's on the
4 agenda, so I would give you a status.

5 MR. CONNOLLY: Your Honor, just one further update
6 on the annotated bibliography issue is that Mr. Casper is
7 due to be deposed next week, just informational.

8 THE COURT: Thank you, Mr. Connolly.

9 MR. CONNOLLY: Always want to be helpful, Your
10 Honor.

11 THE COURT: Yes. Mr. Cashman.

12 MR. CASHMAN: Your Honor, in light of your comment
13 about your trial schedule, I just want to clarify with the
14 Court the availability for us to call on Dr. Cantu's first
15 day of his deposition.

16 THE COURT: Remind me about that.

17 MR. CASHMAN: We had a conversation before when we
18 had --

19 THE COURT: Yes.

20 MR. CASHMAN: -- a discussion about how long
21 Dr. Cantu's deposition should go and the Court made the
22 comment at the time that at the end of day one we should
23 meet and confer and if we didn't reach an agreement, we
24 would call the Court.

25 THE COURT: Remind me what day is --

1 MR. CASHMAN: Dr. Cantu's deposition is next
2 Wednesday and so we would be proposing to call towards the
3 end of the day. It's in Naples, Florida, so it will be
4 Eastern Time.

5 THE COURT: Okay. I will make sure that -- I
6 think that's the 22nd, right? I will make sure that my -- I
7 will be in something called Re-Entry Court, but I will have
8 them pull me out of it to talk to you if need be. Okay?

9 MR. CASHMAN: Thank you, Your Honor.

10 THE COURT: It's on the calendar. And when is the
11 Casper deposition again?

12 MR. CONNOLLY: It's also the 22nd.

13 THE COURT: It's also the 22nd.

14 Okay. So do we have any other issues, deposition
15 scheduling issues?

16 MR. GUDMUNDSON: Your Honor, nothing more on
17 deposition scheduling, but I was going to make a remark
18 about the motion to strike if --

19 THE COURT: You're welcome to.

20 MR. GUDMUNDSON: Okay. It's not a major issue
21 compared to some of the things we've heard today and I'm
22 pleased to have it submitted under submission without
23 argument, but if I can make a one-minute argument on it, I
24 would be happy to.

25 Very simply put, Exhibits A and D, they pulled

1 their citations out of the brief and put them in separate
2 exhibits. Okay? That much is clear from the face of these
3 things.

4 Now, it's not a huge matter except for this. They
5 cite the order of Judge Mayeron, who looked at this issue in
6 the context of the privilege briefing, but they didn't give
7 you the whole thing because what Judge Mayeron looked at
8 there was two issues: One, an argument that the table of
9 contents and authorities should be counted toward the word
10 limit. She rejected that, and that's what they gave you.
11 But what they didn't give you is the rest of it where she
12 struck and did not consider attachments that put additional
13 citations in them and that is in her ruling, the order at
14 Docket 582 in Footnote 3. And what she said was, and I will
15 quote, New or additional case law, end quote, should not be
16 put in those attachments and she did not consider them.

17 I think if you look at the brief and Exhibits A
18 and D, you will see that none of that stuff in the
19 Attachments A and D was in the brief and it was simply
20 saying if you want to see our citations, look at those.

21 That's all I really have to say about that.

22 THE COURT: Very good.

23 Mr. Connolly.

24 MR. CONNOLLY: Your Honor, my quick response on
25 that is that, first of all, as far as Judge Mayeron's order,

1 she had asked for single pages to be attached to each one of
2 the documents and there were some citations to cases that
3 she did not include or she said was argument and she did not
4 consider.

5 The Attachments A and D have no substantive
6 argument; are simply lists of materials, other places where
7 plaintiffs have relied on the BU CTE Center. We could have
8 attached all of those documents individually as exhibits,
9 but because this case has quite a bit of paper, we decided
10 just to refer to the prior cases. Similarly with the
11 peer-reviewed articles, we just attached them. We could
12 have individually supplied them to the Court, but just had a
13 list. There's no argument in there. The reason that Judge
14 Mayeron excluded the case citations was because she
15 concluded that there might have been argument. We did not
16 include any argument in those exhibits.

17 THE COURT: Okay.

18 MR. CONNOLLY: And 7.1 doesn't apply to exhibits,
19 so.

20 THE COURT: All right. Anything else we should
21 address today? Mr. Zimmerman.

22 MR ZIMMERMAN: No, Your Honor. I don't think we
23 have anything.

24 MR. BEISNER: He was leaving.

25 (Laughter)

1 THE COURT: I see.

2 MR. BEISNER: I'm sorry.

3 THE COURT: Okay. I think -- I can't remember.

4 The 28th, maybe, is that when we are getting together again?

5 Whatever it is. Okay. We'll see you then.

6 Court is adjourned.

7 COUNSEL: Thank you, Your Honor.

8 (Court adjourned at 3:49 p.m.)

9 * * *

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13 I, Lori A. Simpson, certify that the foregoing is a

14 correct transcript from the record of proceedings in the

15 above-entitled matter.

16

17 Certified by: s/ Lori A. Simpson

18

Lori A. Simpson, RMR-CRR

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