

**LITIGATION PLAN**  
**BERG V. CANADIAN HOCKEY LEAGUE ET AL.**  
**AS AT JUNE 15, 2016**

**DEFINITIONS**

1. The following defined terms apply:

- (a) “**Action**” means this proposed class proceeding, Court File No. CV-14-514423, commenced in the **Court**;
- (b) “**Administrator**” means a person appointed by the **Court** to carry out the functions described in the **Plan**;
- (c) “**Administrator’s Eligibility Decision**” means the **Administrator’s** written decision on eligibility;
- (d) “**Applicable Employment Standards Legislation**” means the legislation governing wages, including: the *Employment Standards Act, 2000*, S.O., 2000, c. 41; Mich. Stat. §408, Pa. *Minimum Wage Act of 1968* Pub. L. No. 11, No. 5, as amended; and their respective regulations.
- (e) “**Chief Referee**” means a person appointed by the **Court** to carry out the functions described in the **Plan**;
- (f) “**Claim Form**” means a claim form, in the form to be approved by the Court, to be completed by the **Class Members** and submitted to the **Administrator** in order for the **Class Members** to participate in the procedure described herein;
- (g) “**Claims Deadline**” means the date by which each **Class Member** must file a **Claim Form**;
- (h) “**Class Counsel**” means the law firm of Charney Lawyers;
- (i) “**Class**” and “**Class Members**” means, collectively:
  - i. all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the Province of Ontario (a “team”), and at some point commencing October 17, 2012 and thereafter, were members of a team, and all players who were members of a team who were under the age of 18 on October 17, 2012 (the “Ontario Class”);
  - ii. all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Michigan, USA (a “team”), or at some point commencing October 17, 2008 and thereafter, were members of a team, and all players who were

members of a team who were under the age of 18 on October 17, 2008 (the “Michigan Class”); and,

- iii. all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Pennsylvania, USA (a “team”), or at some point commencing October 17, 2010 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2010 (the “Pennsylvania Class”);
- (j) “**Clubs**” means the teams participating, or which have participated, in the **OHL** during the class period including the teams who are or were owned and/or operated by the defendants Windsor Spitfires Inc., London Knights Hockey Inc., Barrie Colts Junior Hockey Ltd., Belleville Sports And Entertainment Corp., Erie Hockey Club Limited, Guelph Storm Limited, Kingston Frontenac Hockey Ltd., 2325224 Ontario Inc., Niagara Icedogs Hockey Club Inc., Brampton Battalion Hockey Club Ltd., Generals Hockey Inc., Ottawa 67’s Limited Partnership, The Owen Sound Attack Inc., Peterborough Petes Limited., Compuware Sports Corporation, Saginaw Hockey Club, L.L.C., 649643 Ontario Inc C.O.B. as Sarnia Sting, Soo Greyhounds Inc., Kitchener Ranger Jr A Hockey Club, and Sudbury Wolves Hockey Club Ltd.;
- (k) “**Court**” means the Ontario Superior Court of Justice;
- (l) “**CPA**” means *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (m) “**Notice**” means the notice to the **Class** of the certification of the **Action** as a class proceeding;
- (n) “**Notice Program**” means the method of distributing the **Notice** described in paragraph 23;
- (o) “**OHL**” means the defendant Ontario Major Junior Hockey League operating as the Ontario Hockey League;
- (p) “**QMJHL**” means the Quebec Major Junior Hockey League Inc.;
- (q) “**Plan**” means this litigation plan;
- (r) “**Player(s)**” means all persons who play or have played hockey for one or more of the **Clubs** and are **Class Members**;
- (s) “**Referee**” or “**Referees**” means a person or persons appointed by the Court to carry out the functions described in the **Plan**;
- (t) “**Resolution Notice**” means the notice of resolution of the common issues;
- (u) “**SPA**” means the standard player agreements used in the **OHL**;

- (v) **“Statement of Opposition”** means a defendant’s concise statement of material facts responding to a **Claim Form**;
- (w) **“Website”** means the website developed and maintained by **Class Counsel** at [www.chlclassaction.com](http://www.chlclassaction.com); and,
- (x) **“WHL”** means the defendant Western Hockey League.

## **OVERVIEW**

2. This Plan contemplates a determination of eligibility and an assessment of damages for each Class Member after the determination of the common issues.

## **CLASS COUNSEL**

3. Class Counsel is comprised of the law firm of Charney Lawyers. Class Counsel has the requisite knowledge, skill, experience, personnel and financial resources to prosecute this class action to conclusion.

4. Class Counsel intends to add other lawyers and other professionals to their complement if they consider it necessary. These other professionals may be paid on a contingency basis and Class Counsel intends to seek Court approval to have their usual fees increased by the multiplier, if any, which will be applied to Class Counsel’s base fees.

5. Class Counsel anticipates that prosecuting this action will require:

- (a) reading, organizing, profiling, scanning, managing and analyzing thousands of documents; and,
- (b) expert evidence with respect to sports economics, the sociology of work, labour market surveys, samplings, aggregate damages, and the applicability of U.S. law.

## **CLASS DEFINITION**

6. The plaintiff seeks to represent a Class defined as follows:

- (a) all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the Province of Ontario (a “team”), and at some point commencing October 17, 2012 and thereafter, were members of a team, and all players who were members of a team who were under the age of 18 on October 17, 2012 (the “Ontario Class”);
- (b) all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Michigan, USA (a “team”), or at some point commencing October 17, 2008 and thereafter, were members of a team, and all players who were members of a team who were under the age of 18 on October 17, 2008 (the “Michigan Class”); and,
- (c) all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Pennsylvania, USA (a “team”), or at some point commencing October 17, 2010 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2010 (the “Pennsylvania Class”).

### **Subclasses**

7. In the event there are distinct individual issues for defendants in a state or province, then the issue can be dealt with by way of subclasses where all defendants share a central common issue, thus facilitating judicial economy and improving access to justice. Based on the proposed common issues, there will exist a central commonality linking each of the subclasses.

### **REPORTING TO AND COMMUNICATING WITH THE CLASS MEMBERS**

8. Class Counsel has a confidential database of individuals who were players for teams in the OHL, QMJHL, and the WHL. The rosters of all teams in the OHL, QMJHL, and the WHL

for the past several seasons are located on the websites of the respective leagues. Each player's name, date of birth, and hockey statistics for each game they played in the leagues are also found on the leagues' websites.

9. Class Counsel created the Website, which contains information about the status of the action and explains how a class action operates. Copies of some of the publicly filed Court documents, Court decisions and notices, and other information relating to the action will be posted on or will be accessible from the Website. This will allow Class Counsel to keep the Class Members, wherever resident, informed of the status of the action.

10. Class Counsel created a questionnaire which permits Class Members to register in confidence with, and provide Class Counsel with information about, the damages of the Class. The questionnaire also collects information about the Class Members' history of playing in the OHL.

11. The Website also lists the direct-dial telephone number of some of the lawyers who are prosecuting this action.

12. From time to time, Class Counsel will send email updates reporting on the status of the Action directly to members of the Class who have provided their email addresses. They will also post these updates on the Website.

### **LITIGATION SCHEDULE**

13. Justice Perell has been appointed as the case management judge to oversee the conduct of this Action.

14. Following certification, Class Counsel will ask Justice Perell to set a litigation schedule for:

- (a) a summary judgment motion brought on behalf of the Class

- (b) any other preliminary motions to be brought by any of the parties;
- (c) the examinations for discovery, including the location and length of the examinations;
- (d) the delivery of experts' reports; and,
- (e) the trial of the common issues which will include the representative plaintiff's individual claim for damages.

15. Class Counsel and counsel for the defendants will likely request that the litigation schedule be amended from time to time, as required.

#### **ACCESS TO AND PRESERVATION OF EVIDENCE**

16. The defendants have been, or will be asked to, preserve and protect all relevant information and business documents, whether in electronic or paper form, including all documents relating to the Class Members' game and training schedules, the team rosters, and the corporate structure of the OHL and the affiliated leagues and teams in those leagues.

#### **PRODUCTION FROM NON-PARTIES**

17. If necessary, the plaintiff may pursue motions with respect to the production of documents in the possession and control or power of persons who are not parties to this action.

#### **DOCUMENT EXCHANGE AND MANAGEMENT**

18. The defendants possess most, if not all, of the documents relating to the common issues, such as the documents relating to the decision-making process by the defendants with regard to how they categorize the players. Many of these documents will be produced to Class Counsel through the defendants' affidavits of documents. Additional documents will be produced to Class Counsel through normal production, cross-examination, and examination for discovery

processes. The plaintiff has produced and will continue to produce all documents in his possession.

19. Class Counsel anticipates and is able to handle the intake and organization of the large number of documents that will likely be produced by the defendants. Class Counsel will use data management systems to organize, code and manage the documents.

20. If required, the documents may be maintained on a secure, password-protected website, for the purposes of online access by members of Class Counsel.

21. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiff.

#### **PLAINTIFF'S EXPERTS**

22. The plaintiff may retain other experts as necessary as the Action proceeds.

#### **MEDIATION**

23. The plaintiff will participate in mediation or non-binding alternative dispute resolution efforts if the defendants are prepared to do so.

#### **THE FOLLOWING TERMS OF THIS PLAN PRESUPPOSE THAT THE COURT CERTIFIES THE ACTION AS A CLASS PROCEEDING**

24. As part of the certification order, the Court will be asked to:

- (a) set an opt-out date that is sixty (60) days after the date of the order certifying the Action as a class proceeding, subject to further direction of the court or written agreement of the parties;
- (b) settle the form and content of the Notice in the form agreed upon by the parties;

- (c) require the defendants to identify the size of the Class, and the names and last known residential home addresses for all of the Class Members;
- (d) settle the particulars of the Notice Program as follows:
  - (i) by Class Counsel posting the Notice on the Website and by emailing the Notice to any person who registered with Class Counsel and provided a valid email address;
  - (ii) by Class Counsel sending the Notice to each Class Member whose last known address is in the possession of Class Counsel; and,
  - (iii) by Class Counsel publishing the Notice in one Canadian national English language newspaper, one Canadian national French language newspaper, and one American national English language newspaper;
- (e) approve the following opt-out procedure:
  - i. a person may opt out of the class proceeding by sending a written election to opt-out to a person designated by the Court before a date to be fixed by the Court;
  - ii. no person may opt out after the expiration of the opt-out period unless there is a reasonable explanation for missing the opt-out period which is acceptable to all counsel, or, alternatively, which is approved by the Court; and,
  - iii. Class Counsel will receive the written elections to opt out of the class action and, within thirty (30) days after the expiration of the opt-out period, will deliver to the Court and the counsel for the defendants an

affidavit listing the names and addresses of all persons who have opted out of this class action;

- (f) order that the defendants are restrained from having any communications with the Class Members regarding the within action during the notice period; and,
- (g) specify that the personal information, including the names, dates of birth, the team for whom they played, phone numbers and last known residential addresses, of the Class Members who opt out of this proposed class proceeding be kept confidential.

#### **EXAMINATIONS FOR DISCOVERY**

25. Class Counsel intend to examine for discovery at least one representative of each defendant and estimate that, subject to undertakings and refusals, these examinations may take up to 20 days. Counsel for the defendants may examine the representative plaintiff.

26. The plaintiff may ask the Court for an order allowing him to examine multiple representatives of the corporate defendants, if necessary.

#### **CLARIFICATION OF COMMON ISSUES**

27. From time to time, the plaintiff may ask the Court for an order to amend, clarify and/or redefine the common issues.

28. The plaintiff will ask the Court to set a date for the trial of the common issues within six months after the completion of examinations for discovery, including the delivery of answers to the undertakings and the resolution of any refusals motions.

29. The findings of fact and conclusions on the common issues and the individual claims of the representative plaintiff will permit the judge at the common issues trial to give directions, pursuant to s. 28(3) of the *CPA*, to deal with any remaining individual issues.

**DETERMINING THE COMMON ISSUES AT TRIAL**

30. This section of the litigation plan will describe how the plaintiff intends to establish eligibility for wages across the Class on a common basis.

31. The plaintiff will lead evidence to establish that the SPA constitutes a standard job description which actually reflects what the Players do, how they do it, and how much independence and authority they exercise in the environment in which they work.

32. There will be evidence connecting the SPA to the actual functions of the Players, their obligations, pay and benefits, and the actual roles of the Clubs and the OHL.

33. The plaintiff will prove that the SPA is a standard job description and will prove the factors relevant to determining employment or internship/student athlete status can be established across the class on a common basis, through a survey of the Players on commonality and sample testimony from a range of Players on numerous clubs, as well as OHL player agents, coaches, general managers, owners, and league officials.

34. Representative evidence from a sampling and a survey will suffice in this case because of the standardization of the positions of the Players. The duties and responsibilities of the sampling will be typical of all Players. The Class is homogeneous.

35. Between establishing the existence of a standard job description in the SPA, and common factors relevant to the employment/intern test, through the survey and the sampling, liability can be decided on a Class-wide basis once and for all.

36. If the evidence does not satisfy the trial judge that liability can be decided once and for all, then the trial judge has ample resources to fashion a process to address the remaining liability issues following the common issues trial.

**Two alternate workable plans for trial of the common issues***First alternative*

37. If the SPA is a useful indicator of the Players' actual responsibilities and the evidence establishes that the job description is common amongst the Class Members, then, at the common issues trial, the trial judge could determine whether the Players are presumptively employees.

The trial judge could find that, based on the SPA and those factors that are common amongst the Players, the Players are presumptively employees. The trial judge could find that there are additional factors which may not be common amongst the Class which could impact or rebut the presumptive finding and the judge could identify those factors.

38. There could be a nuanced answer to the common issues which contemplates individual issue trials, to the extent that a club wishes to challenge the employment status of a player because of certain additional factors which may be individualized.

39. It may turn out that, while the vast majority of the relevant factors are common, there is evidence of certain circumstances where certain individual Clubs or Players on certain teams might have specific factors individual to them which could rebut the presumption of employment. Success on the common issues would still mean success for all of the Class, but not to the same extent.

40. For those Players who had some features additional to all of the common features, it would be open to the defendants at the individual trials to challenge the presumption of employment based on those factors.

*Second alternative*

41. Based on the SPA and the evidence at the trial, the trial judge could identify the minimum requirements to be an employee or intern/student athlete of a Club. This would not

provide an answer as to whether all of the Class are or are not employees/interns/student athletes, but it would divide the Class into three groups: those who meet the standard for being employees, those who do not, and those who fall in a grey area.

42. There will be evidence of standardization throughout the class by means of the SPA, a survey and sampling to indicate sufficient commonality to allow for this exercise.

43. Only the grey area group will have to go on to individual trials to have their status determined.

44. All parties would lead evidence about what it is to be an employee, intern, or student athlete. The trial judge could apply a nuanced test based on the evidence, with appropriate factors for the business context of the CHL.

45. Liability would therefore not be determined in its entirety at the trial, but a substantial component would be determined. The trial judge could dismiss the claims of the group who can be determined not to be employees, and could find liability for the claims of the group who are determined to be employees, who would go on to have their damages quantified.

46. The third, grey area group would have to have individual trials to determine if they are employees or not, with the assistance of the factors identified by the trial judge that are relevant to the inquiry.

#### **AFTER THE RESOLUTION OF THE COMMON ISSUES**

47. Assuming that the common issues are resolved by judgment in favour of the Class, it will be necessary for the Court to establish and supervise a claims and assessment procedure. The precise structure of the assessment process will depend upon the conclusions reached by the judge at the common issues trial. The defendant(s) who, as a result of the common issues trial

may be required to pay monies to some or all of the Class Members, may participate in the process described in the following paragraphs.

48. The plaintiff will ask the Court to:

- (a) determine the aggregate damages owing to Class Members for their statutory entitlement to damages pursuant to the Applicable Employment Standards Legislation, based on an assumption of 40 hours worked per week;
- (b) determine the amount of damages owing to the representative plaintiff;
- (c) settle the form and content of the Resolution Notice and the Claim Form, including the Damages Grid referred to below;
- (d) set guidelines to clarify how a Class Member qualifies to be compensated;
- (e) establish and approve a Damages Grid. The Damages Grid will determine the hourly minimum wage applicable under the Applicable Employment Standards Legislation in the jurisdiction in which each Club is domiciled and a formula for overtime pay, statutory holiday pay, and vacation pay. The Damages Grid is to be applied by the Administrator;
- (f) order that the Resolution Notice be disseminated substantially in accordance with the Notice Program set out at paragraph 23(d), except that the Notice of Resolution shall not be mailed to any person who validly opted out in accordance with the procedure set by the certification order;
- (g) set a Claims Deadline by which date Class Members will be required to file their Claim Form;
- (h) appoint an Administrator to hold any monies recovered at the common issues trial and to implement this Plan by, among other things, receiving and evaluating Claim

Forms in accordance with protocols approved by the Court, including deciding how much compensation each individual Class Member will receive under the Damages Grid;

- (i) appoint a Referee to decide any issues not decided at the common issues trial, including quantum of damages for those employees who do not elect, or who are not bound, to participate in the Damages Grid assessment. Depending on the number of Class Members, the Court may decide to appoint more than one Referee. In that event, the Court may decide to designate one Referee as the Chief Referee to oversee the dispute resolution process to ensure uniformity in the process; and,
- (j) appoint a Class Counsel Representative to represent the interests of the Class in dealing with issues of general application relating to the damages assessment process.

#### **THE CLAIMS PROCESS AND THE ADMINISTRATOR'S ROLE**

49. The Claim Form will be equivalent to a statement of claim and affidavit of documents. The Claim Form will be completed in accordance with the Damages Grid.

50. The Damages Grid will set out the amount of compensation for back wages, holiday pay, vacation pay and overtime pay per Class Member.

51. For those with claims exceeding \$10,000, the Claim Form will be reviewed by the Administrator for eligibility only. Once determined that the Class Member has a potential claim exceeding \$10,000, the Claim Form will be provided directly to a Referee. If the claim is actually less than \$10,000, the Administrator will assess it under the Damages Grid with no right of appeal.

52. Before the Claims Deadline, each claimant must deliver to the Administrator a completed Claim Form with the relevant documents in their possession. Class Members will be encouraged to deliver their Claim Forms and relevant documents electronically.

53. The Administrator will be directed to assist the Class Members in filling out the Claim Form, if they require such assistance.

54. In and with the Claim Form, the claimant will, among other things:

- (a) assert the basis of his or her eligibility as a Class Member, namely, that the Claimant was a Player for a Club in the OHL within the applicable limitation period;
- (b) address any issues that are not determined at the common issues trial;
- (c) deliver all relevant documents in his or her possession and under his or her control;
- (d) provide details of all out-of-pocket expenses actually incurred; and
- (e) specify how much compensation the Class Member asserts s/he is entitled to receive, based upon the category they fall into in the Damages Grid, if applicable.

55. Electronically, the Administrator will make a copy of each of the Claim Forms and accompanying materials available to each of the defendants who, as a result of the findings at the common issues trial, have an interest in this process.

56. These defendant(s) shall have 30 days after receipt of the Claim Form and accompanying material to file electronically with the Administrator a written Statement of Opposition (which cannot exceed one page of written submissions) and all relevant documents in their possession or under their control. The Statement of Opposition shall be treated as if it is a statement of defence and affidavit of documents, and shall address both eligibility and damages issues. Electronically, the Administrator will make a copy of the Statement of Opposition and any documents delivered

by the defendant(s) available to the claimant. The claimant, within 10 days of receipt of the Statement of Opposition, may electronically deliver a written Reply to the Administrator who will, electronically, make it available to the defendant(s).

57. Electronically, the Administrator will receive the Claim Form, Statement of Opposition, Reply and all documents unless, in the exercise of its discretion, the Administrator decides to receive documents from a particular Class Member in paper form, because, for example, a Class Member does not have access to a computer with internet capability.

58. Class Counsel will transfer the Website (without privileged material) to the control of the Administrator. Thereafter, the Administrator will operate the Website. A section of the Website will remain public and will be accessible to all Class Members and the general public.

59. The Administrator will establish a secure section of the Website which will require user ID and a password to gain access.

60. Each Class Member will select a user ID and password which will be disclosed only to the Administrator. This will allow each Class Member access to the secure section of a database on the Website which is relevant only to their claim. In this secure section, the Class Member may complete the Claim Form, the Reply, and/or upload documents which have not already been produced to Class Counsel. Or the Administrator may upload the documents that may be transmitted electronically from the Class Member to it.

61. Each defendant will select a user ID and password which will be disclosed only to the Administrator. This will allow each defendant access to the secure section of the database which is relevant only to the claim of a specific Class Member. In this secure section, the defendant(s) may review the Claim Form and documents, complete and deliver their Statement of Opposition, review any Reply and upload their documents.

62. In this secure section, the Administrator and the Referee may communicate with the Class Member and the defendant(s) and post any written decisions.

63. The Administrator will be directed to apply the amounts set out in the Damages Grid to determine how much a Class Member will receive. The Damages Grid is compulsory, so the Administrator cannot depart from the amounts set out therein.

#### **THE ADMINISTRATOR'S ELIGIBILITY DECISION**

64. On the basis of the documents delivered to it, the Administrator shall decide whether or not a claimant is a Class Member who is entitled to claim under this Plan. The Administrator's Eligibility Decision shall be in writing and the Administrator shall, electronically, deliver this decision to the claimants and the defendant(s) by uploading it to the relevant secure section of the Website.

65. Within 15 days of receipt of the Administrator's Eligibility Decision, the claimant or the defendant(s) may in writing deliver to the Administrator a demand that a Referee review the Administrator's Eligibility Decision, failing which the Administrator's Eligibility Decision is final.

#### **REVIEW OF ADMINISTRATOR'S ELIGIBILITY DECISION BY THE REFEREE**

66. The Court will designate a single Referee to deal with all eligibility issues. The eligibility review will be dealt with only on the basis of the written record, without oral evidence, unless the Referee orders otherwise.

67. The review of the Administrator's Eligibility Decision shall proceed in such manner as the Referee directs and the Referee shall have the power to award costs of the review to the successful party.

68. The Referee's decision on eligibility is a report which will be confirmed on the expiration of 15 days after a copy is uploaded to the relevant secure section of the Website, or mailed or faxed to the claimant and the defendant(s), unless a notice of motion to oppose confirmation is served within that time.

69. For greater certainty, the eligibility decisions described in paragraphs 64 to 69 will determine only whether or not a claimant is a Class Member.

#### **CLASS COUNSELS' ONGOING REPRESENTATION OF THE CLASS MEMBERS**

70. Class Counsel may decide to continue to act as the lawyer for a particular Class Member after the common issues trial if requested to do so by the Class Member. The Class Member will be required to pay fees, disbursements and taxes for these services which are not included as part of Class Counsel's contingency fee agreement. If a Class Member retains other lawyers or a representative, the Class Member must pay the fees, disbursements and taxes for their services on whatever basis they privately agree.

#### **THE ASSESSMENT OF AGGREGATE DAMAGES**

71. At the trial of the common issues, or summary judgment, the plaintiff will ask the Court to award some amount of damages in the aggregate. If such an aggregate award is made, the Class Members will have the right to claim their portion of the aggregate damages on the Claim Form. The aggregate damages sought will be determined by using a base number of compensable hours for regular time and overtime for services common to every Club, to be determined by using the itineraries, Player calendars, and game schedules issued by all or most of the Clubs.

72. Alternatively, aggregate damages may be determined by using compensable duties (as found by the trial judge) and determining the average hours spent on the compensable duties across the league, based on a sampling and statistical analysis.

73. Additional hours above the average or the base can be addressed through individual assessments if a Player is willing to pursue recovery.

74. If the trial judge finds that the Clubs are employers then, under the Applicable Employment Standards Legislation, employers are required to maintain records of employment, including hours worked. Aggregate damages may then be determined from the defendant(s)'s own business records without proof from individual Class Members, or the trial judge could order the defendant(s) to create such records.

75. In the event that the defendant(s) have failed to maintain records of employment and cannot reliably recreate them, then individual Class Members should be able to provide evidence by testimony or a sampling, because the defendant(s)'s breach of legislation should not prejudice the Class Members' ability to recover aggregate damages.

76. If the defendant(s) do not have, and cannot generate, accurate business records of Player hours worked, then a reverse onus could be placed on the defendant(s) to demonstrate that the base or averaging conducted by the plaintiff is inaccurate. The defendant(s) could also be required to establish an alternative method of calculating aggregate damages which better reflects the evidence through reasonable inferences, failing which the plaintiff's approach would be accepted.

#### **THE PROCEDURE FOR RESOLUTION OF THE INDIVIDUAL ISSUES**

77. After determining the common issues, the trial judge may be asked to give directions as to the procedure for the determination of the individual issues, which may include holding

separate “mini trials” for each Class Member, or may include having a Referee or Referees appointed to deal with some of the claims. The type of hearing will depend upon the nature and complexity of the claim and the amount of damages claimed by the Class Member.

78. The Court may be asked to authorize a hearing or hearings before the Referee(s) to allow the Class Members and the defendant(s) to adduce general and expert evidence which may be applicable to some or all individual claims.

79. A claimant may appear at the individual stage of the proceedings in person or with counsel or such other representative as he or she may designate in writing. A claimant will be responsible for the cost of such representation. A defendant may appear by counsel or in person.

80. The Court will be asked to approve protocols for the reference process that:

- (a) establish the procedures to be followed;
- (b) direct that the Referee(s) may depart from the Damages Grid in appropriate circumstances;
- (c) direct that there be no examinations for discovery if the claim of the Class Member(s) is less than \$10,000, exclusive of pre-judgment interest;
- (d) limit examinations for discovery of each Class Member to a maximum of two hours and two hours for each defendant if the claim of the Class Member(s) is more than \$10,000 but no more than \$50,000, exclusive of pre-judgment interest;
- (e) direct that the time limits for examinations for discovery may only be exceeded by agreement of the parties or by order of the Referee;
- (f) provide that a Referee should have the power to award pre-judgment interest and costs of each hearing;

- (g) provide that a Referee should have the power to make any order necessary for a fair determination of each hearing; and
- (h) permit the Referee to hear evidence that is generic in nature in an efficient manner to eliminate the need for duplication.

81. Following every hearing, the Referee shall prepare a written report setting out his/her reasons for decision. The Referee will deliver this decision to the Class Member, the defendant(s) and the Administrator by uploading it to the relevant section of the Website, and/or by mailing it and/or by faxing it to the Class Member and filing it with the Court. The Referee's report shall be confirmed upon the expiration of 15 days after it is filed with the Court, unless the defendant(s) or the Class Member serves a notice of motion to oppose confirmation of the report within that 15 day period as required by rule 54.09(1)(b).

#### **THE DISTRIBUTION PROCESS**

82. If an aggregate award is made at the common issues trial, it shall be paid to the Administrator, who shall hold the monies in a segregated trust account as the Court directs. The Administrator will not make any distribution to eligible Class Members until authorized to do so by the Court, but Class Counsel may recover a fee if so ordered.

83. The defendant(s) should be ordered to pay to the Administrator the amount of each assessment immediately after each report becomes final. The Administrator shall hold this money in the segregated trust account and invest it as the Court directs. The Court will decide when the Administrator may make payments to Class Members.

84. As soon as practicable after all of the Referee's hearings are completed, the Administrator shall, by motion on notice to the Class Members, Class Counsel Representative and the defendant(s), report to the Court the proposed distribution for each Class Member,

including his or her prorated share of any punitive damages award and/or pre-judgment interest award.

85. Each eligible Class Member shall sign such documents as the Administrator may require, in accordance with a protocol approved by the Court, as a condition precedent to receiving any distribution.

86. The Administrator will not make any distribution to eligible Class Members until authorized to do so by the Court.

#### **INSUFFICIENT RECOVERED MONIES**

87. In the event that the defendant(s) do not pay all of the assessed damages in full, the Court will be asked to give further directions to determine whether there should be any priorities of payment among eligible Class Members.

#### **CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES**

88. At the conclusion of the common issues trial, the Court will be asked to fix the amount of Class Counsel fees, disbursements and applicable taxes ("Class Counsel Fees"). Class Counsel will ask the Court to direct the Administrator or the defendants to pay the Class Counsel Fees out of any monies recovered. Class Counsel Fees are a first charge on every recovery.

89. The Court will be asked to fix the costs of the persons appointed to implement and oversee the Plan, such as the Administrator, the Referee(s), and Class Counsel Representative, and order the defendant(s) to pay these costs.

**FINAL REPORT**

90. After the Administrator makes the final distribution to Class Members, the Administrator shall make its final report to the Court in such manner as the Court directs and the Court will be asked then to make an order discharging the Administrator.

**REVIEW OF THE LITIGATION PLAN**

91. The Court may revise this Plan before the determination of the certification motion and/or before and/or after the determination of the common issues at the common issues trial or otherwise. The parties reserve the right to seek an amendment of any of the terms of the Plan.

**MOTIONS FOR DIRECTIONS**

92. The Administrator, Class Counsel, and the defendants may apply to the Court for direction.