UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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In re: National Hockey League Players' Concussion Injury Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota
Courtroom 7B
July 14, 2015
1:30 p.m.

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BEFORE THE HONORABLE SUSAN RICHARD NELSON

UNITED STATES DISTRICT COURT JUDGE

**STATUS CONFERENCE**

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

Heather A. Schuetz, RMR, CRR, CCP
(651) 848-1223
Heather_Schuetz@mnd.uscourts.gov

A P P E A R A N C E S

**For the Plaintiffs:**

**ZIMMERMAN REED, PLLP**
Charles "Bucky" S. Zimmerman, Esq.
Brian C. Gudmundson, Esq.
1100 IDS Center
80 S. 8th St.
Minneapolis, MN 55402

**ZELLE HOFFMAN VOELBEL & MASON, LLP**
Michael R. Cashman, Esq.
500 Washington Ave. S., Ste. 4000
Minneapolis, MN 55415

**BASSFORD REMELE, P.A.**
J. Scott Andresen, Esq.
Jeffrey D. Klobucar, Esq.
33 S. 6th St., Ste. 3800
Minneapolis, MN 55402-3707

**GOLDMAN SCARLATO & KARON, P.C.**
Brian D. Penny, Esq.
101 E. Lancaster Ave., Ste. 204
Wayne, PA 19428

**For the Defendant:**

**SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP**
John H. Beisner, Esq.
Jessica D. Miller, Esq.
1440 New York Ave. NW
Washington, DC 20005

**SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP**
Richard T. Bernardo, Esq.
Matthew M. Martino, Esq.
Four Times Square
New York, NY 10036

**SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP**
Matthew M. K. Stein, Esq.
500 Boylston St.
Boston, MA 02116

**FAEGRE BAKER DANIELS**
Daniel J. Connolly, Esq.
2200 Wells Fargo Center
90 S. 7th St.
Minneapolis, MN 55402

**For U.S. NHL Clubs:**

**BRYAN CAVE LLP**
Christopher J. Schmidt, Esq.
Kenneth Mallin, Esq.
211 N. Broadway, Ste. 3600
St. Louis, MO 63102-2750

I N D E X Page:

Heather A. Schuetz, RMR, CRR, CCP
(651) 848-1223
Heather_Schuetz@mnd.uscourts.gov

P R O C E E D I N G S

IN OPEN COURT

(Commencing at 1:30 p.m.)

THE COURT: I apologize for the slight delay in the starting time. We had a sentencing, as you saw, that had to be rescheduled today. But we'll move along for those of you I know who want to try to catch a flight, I think.

We are here today in the matter of the National Hockey League Players' Concussion Injury Litigation. This is file number 14-2551. Let's begin by having Counsel note your appearances.

MR. BRIAN PENNY: Afternoon, Your Honor. Brian Penny for the Plaintiffs.

MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor. Charles Zimmerman for the Plaintiffs.

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

MR. BRIAN GUDMUNDSON: Good afternoon. Brian Gudmundson on behalf of the Plaintiffs.

MR. SCOTT ANDRESON: Hi, Judge. Scott Andreson for the Plaintiffs.

MR. JEFFREY KLOBUCAR: Good afternoon, Judge. Jeff Klobucar for the Plaintiffs.

THE COURT: Very good.

Mr. Beisner.

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

MR. RICHARD BERNARDO: Good afternoon, Your Honor. Richard Bernardo on behalf of Defendant, NHL.

MR. MATTHEW STEIN: Good afternoon, Your Honor. Matthew Stein on behalf of Defendant, NHL.

MS. JESSICA MILLER: Good afternoon, Your Honor. Jessica Miller on behalf of the NHL.

MR. DANIEL CONNOLLY: Good afternoon, Your Honor. Dan Connolly on behalf of the NHL.

THE COURT: Were you demoted today, Mr. Connolly?

MR. DANIEL CONNOLLY: Yes, Your Honor (laughter). No, no, I'm not in the firing line, Your Honor.

MR. MATTHEW MARTINO: Good afternoon. Matthew Martino for the NHL.

MR. CHRISTOPHER SCHMIDT: Good afternoon, Your Honor. Chris Schmidt on behalf of the nonparty U.S. Clubs.

MR. KENNETH MALLIN: Kenneth Mallin on behalf of the nonparty U.S. Clubs.

THE COURT: Very good. All right. My understanding is the parties would like to handle the first item on this conference agenda for our informal discovery conference today on the record, so we have a record, and that is de-identification issues regarding the databases.

Am I correct?

MR. RICHARD BERNARDO: Your Honor, this is Rich Bernardo for NHL, and first I want to thank you. I am the one that has the flight schedule, so I appreciate you making --

THE COURT: Okay. Are we going to make it or --

MR. RICHARD BERNARDO: I'm hopeful. But actually I propose that, if you'll indulge me for a minute or two, in talking with our colleagues, I thought if I could make some comments up front and perhaps a proposal, that might save the Court from having to address some of the headier legal issues in the privacy of the agreements, I would proceed to do that, if that would be okay.

THE COURT: Have you ever heard a judge say no to that?

MR. RICHARD BERNARDO: I thought I would give you that invitation.

THE COURT: Okay.

MR. RICHARD BERNARDO: And, Your Honor, I want to start by saying that, as a preliminary matter, the NHL recognizes that it is being extremely, extremely careful. And I would acknowledge some might say overly careful with respect to this data. But I think the issue that I feel the papers may be losing sight of is we're not just talking about medical diagnosis of concussion, which in itself is protected medical information; but, in fact, we're talking about over 1,000 fields of data that contain very, very sensitive information

on diagnosis of ADHD, dyslexia, sadness, anxiety, feelings of these players that have been expressed at these various neuropsychological testing that that is the core that we're particularly, particularly interested in making sure special steps get protected.

And there are significant, significant downsides -- which, again, is why we're being so cautious -- if this data were to be released. Just the fact of the players hearing that a Court's ordering this data be disclosed beyond the scope of what they anticipated creates a chilling effect on their participation in what really is a program that's been created for player safety. But we also know that there are just significant, significant risks these days of inadvertent data breaches. I'm actually in another matter trying to pull back data that was inadvertently put on the Internet. We've all seen that.

So, I start by just saying we acknowledge that we're being especially careful, but we're just trying to be mindful of the importance of this information. And where I'm going with this is we noted that in our discussions with Plaintiffs' counsel, they seem to agree to de-identify at least some information. For example, the name and the jersey. Our concern and NHL's concern is that providing other information that could be used to identify these information -- identify these players essentially undercuts de-identifying the player

names. So, if we're to provide information from which a person can deduce who the player; of course that's going to undercut. So, it strikes us in talking about it that there actually is some agreement that it needs to be de-identified and it's just a matter of how.

And Mr. Penny and I had what I think was a fairly productive discussion that went a little bit off insofar as Plaintiffs -- and I'm not being critical here -- are unable to explain what it is they need. And I think they say, rightfully so, we don't know what we need until we see what we don't have. So, our proposal is that what we do to move this along is we will agree, for the databases that have identified -- and I think there are five that are at issue -- we will agree to produce them in de-identified form. We will apply the concepts that we think are an effort to address what Plaintiffs need. For example, intervals of dates so they can figure it out. It may not be perfect, and it may not be exactly what the Plaintiffs want, but we feel as if by doing that, we're taking a broader and more significant, concrete step toward resolving this and bringing an end to it so that once they get that, then they can look and have their analysts and experts say, Mr. Bernardo, you de-identified this in a way that's just not working for us to make this analysis; can we talk about a different way of doing this.

And I've done this successfully in other cases. I

think the concern we have is that there's -- the discussion is still being in the abstract. Plaintiffs still aren't clear as to exactly what they need. Some of these topics come up or some of these fields come up in our discussions; others of them we see on paper. But I think we're not very, very far apart. So, what I'm hoping to do is to see if we can get past the debate over whether or not this is private since Plaintiffs seem to agree, at least to some de-identification, get them the data and then if there are additional disputes -- and hopefully they'll be minimal -- then we certainly don't object to teeing them up. We can do a brief telephone conference and say, Your Honor, we just want to talk about here's this one field now that the Plaintiffs have this data, they can't do X analysis, we don't think this is necessary but we'll propose Y. So that's --

THE COURT: Let's walk through the fields so I understand just what you mean. So, the data would be produced and from it would be de-identified the Plaintiff name -- the player name.

MR. RICHARD BERNARDO: Correct.

THE COURT: But that would be coded in a way that could be followed through.

MR. RICHARD BERNARDO: Also correct. And I believe there's a man number and a name identification. Those would be consistently coded so it can be followed through. Correct.

THE COURT: Okay. Jersey number, just delete it?

MR. RICHARD BERNARDO: Just delete it.

THE COURT: Team identification deleted?

MR. RICHARD BERNARDO: Correct.

THE COURT: All right. Dates, you're saying, would be in a interval?

MR. RICHARD BERNARDO: What -- and we talked about a number of different ideas, and to be fair Plaintiffs were going to come back to us with some intervals they want. What we would propose doing is we would provide a range of -- we would provide the date for the baseline testing, so they have that; then we would provide a -- an age at the injury within a range, again so that you can't pinpoint it to a particular player -- and then from that we would code intervals for other dates.

We're still trying to work this through precisely to see how that works, but that's an effort to address what I think Plaintiffs were raising with respect to the need to understand the difference in time yet protecting NHL's concern about pinpointing a particular player.

THE COURT: Okay. Number of seasons played, what would you do with that field?

MR. RICHARD BERNARDO: The number of seasons played, similarly, what we would do is we would propose ranges, which we actually think is very consistent with what actually the

authorities that Plaintiffs cite, there's that Harvard Law Review or Law and Technology Review that really supports this notion that extremity data, or people at the fringes of ranges, really become identifiable. So, trying to produce things within ranges that the data supports; in other words, you take all the data, you put it together, you break it down into particular ranges, and you provide that. That's how we would deal with that.

And again, if Plaintiffs look at that and their analysts look at that and they say, gee, these ranges don't work, can we slice it instead of from four ranges into five or something, we're certainly willing to talk about that. But we feel as if it will at least bring some clarity and some concreteness to this otherwise abstract discussion.

THE COURT: Now, on the video analysis, it seems to me that the video analysis ought to be produced but not correlated to the player.

MR. RICHARD BERNARDO: We agree with that, Your Honor, with some qualifications. First, the videos themselves, the videos themselves obviously provide face recognition. And face recognition --

THE COURT: But that doesn't matter because these are videos. I mean, there's no medical information there. In other words, the only -- the fact that you would recognize somebody from the video, you're going to recognize everybody

on the videos. But you're not going to be able to correlate that back to the medical information that's privileged. That's your concern about showing the videos is that it could be correlated back to what you view as protected medical information. The videos are videos. There's nothing to protect about a video.

MR. RICHARD BERNARDO: The videos --

THE COURT: Except to the extent it correlates to a particular body of medical data.

MR. RICHARD BERNARDO: One additional piece, Your Honor, it would correlate to is it would identify concussion diagnosis because the whole way that the videos were assembled was to take the concussion diagnosis in the AHMS database and link those through identifying who the players were to that core select group of videos from which further analysis could come. So, by doing that, it would essentially be identifying those players --

THE COURT: In other words, you're saying the fact that there is a video means there's been a concussion diagnosis?

MR. RICHARD BERNARDO: The fact there is a --

THE COURT: That's all we know, you see, and that might be publicly available as you argue many times in your briefing, the fact that there's been a diagnosis of a concussion probably isn't, if it's publicly known, isn't

protected. It's all the medical discussion around it that is protected. So, the fact that there's a video of a guy on the ice suffering a concussion, you're going to have a hard time persuading me, in and of itself, should be protected if it is not correlated to the data that you're protecting.

MR. RICHARD BERNARDO: And it's for that very reason, Your Honor, when I ask my colleague, Mr. Schmidt, if it comes to that to further elaborate on why it's NHL's position that the fact of a medical diagnosis of a concussion, irrespective of whether it's something that can be viewed as protected because the viewers aren't seeing a medical diagnosis. They're seeing --

THE COURT: No, they're not. They're seeing a head hit.

MR. RICHARD BERNARDO: Correct. Correct.

THE COURT: On the ice. They're not seeing anything else.

MR. RICHARD BERNARDO: Correct. And by linking it -- by producing it, it is telling the receiver of that information, this is a person, this is a player who has a medical diagnosis of a concussion from that event.

THE COURT: That's going to be a long road upwards, Mr. --

MR. RICHARD BERNARDO: That's why I have Mr. Schmidt here.

MR. CHRISTOPHER SCHMIDT: I'm happy to address that briefly. Would you like me to do so now or --

THE COURT: Um, well, yes, go ahead. Just --

MR. CHRISTOPHER SCHMIDT: Okay. Just as an overview, so it's clear, my understanding is the NHL is more than happy to produce videos that they have generally. There's also lots of videos that are publicly available of hits to the head that are on the Internet that you can get. What we're talking about is a small subset of videos where these -- the videos at issue are videos where there's a diagnosis of a concussion, and that diagnosis of a concussion --

THE COURT: Meaning that that player from that head hit that's on the video later, and with a doctor, was diagnosed as having a concussion.

MR. CHRISTOPHER SCHMIDT: That's exactly right. A medical -- the team doctor, the only one who makes a diagnosis of a concussion is the team doctor. So, in this limited case, this video project was to take a medical diagnosis of a concussion and then link the video to it and see what happened in the video. There might not have been a hit to the head. In many cases, there wasn't. There might have been an incidental hit. It could have been all sorts of different things that took place, and so it's only in that limited case where you have a medical diagnosis of a concussion and we're

only dealing with these videos that it becomes an issue.

And it's clear that a medical diagnosis itself of a concussion is private medical information. You've raised the issue of whether or not that diagnosis has been disclosed in some way. That's a different issue that would have to be dealt with on a one-on-one basis. Or if there's video linking one of the Plaintiffs in the case who has put their medical condition at issue, that's a different scenario and you'd have to turn it over. Or if they obtained releases from a player, that's a different issue and you'd have to turn it over. But generally, if there hasn't been that sort of release, we're not in a position where we can authorize the disclosure of the video because it would be disclosing a private medical diagnosis in that case.

THE COURT: You know, I'm having a hard time with this. I'll tell you why. Imagine that there was a car accident and somebody suffered a burn injury and you had a video of it. And you say, well, it can't be disclosed because they were diagnosed as having a burn injury.

MR. CHRISTOPHER SCHMIDT: We're not saying that. We'll turn over every video -- and I understand, hopefully I'm not speaking too far, but there's other videos that are generally available. What we're only talking about is this specific project --

THE COURT: No, I understand. Your concern here is

that in each of these cases the player has been diagnosed as having a concussion.

MR. CHRISTOPHER SCHMIDT: Correct.

THE COURT: Just like the person in my example was diagnosed as having a burn injury. You see, it's --

MR. CHRISTOPHER SCHMIDT: But there -- there it's been publicly linked and if there was, you know -- if there's a -- in that instance, if the person came out and indicated that they were burned or burned also -- let me think about this -- something you can see physically. Right? It's not a concussion which requires a diagnosis.

THE COURT: Maybe one approach would be this. Let's take each of those videos and run a search to see whether or not there is any publicly-available information about whether there was a concussion as a result of whatever that game was.

MR. CHRISTOPHER SCHMIDT: Well, a couple --

THE COURT: Because then it clearly, as I've said before, would be --

MR. CHRISTOPHER SCHMIDT: Two thoughts on this issue first. One is backing up for a moment and looking at guidance on de-identification and anonymization. And one of the key regulatory bodies that have looked at this is in the HIPPA context. And there, it's clear that anything that would provide facial recognition with a medical diagnosis should be de-identified and anonymized under the federal regulations

implementing HIPPA looking at these issues. And so I think for --

THE COURT: I agree with you if it was correlated back to the medical data that you're protecting. Here, we're just talking about the video. There is going to be no way for the Plaintiffs to correlate that video with the data you're producing. So the question is -- because I'm telling you, you can protect that. The question is simply whether the video should be produced.

MR. CHRISTOPHER SCHMIDT: Right.

THE COURT: I'm not entirely persuaded that the fact that after whatever happened in this public game there was a concussion diagnosis is enough to protect the video. But what I'm suggesting is, because it was public, perhaps if we find out if there was a public disclosure, either under the public relations provision of the Collective Bargaining Agreement or by a reporter that there was a concussion, then that shouldn't be protected. That's a waiver of that privilege.

MR. CHRISTOPHER SCHMIDT: But potentially there could be a waiver. You're absolutely right, Judge, in certain instances there can be a waiver. And so on that issue, the individuals who we are trying to protect are not before the Court. And it's what makes this whole inquiry very difficult. And the cases that Plaintiffs have cited in their briefs are -- where there's a waiver is where the person holding the

privilege is before the Court. And in those cases, the Court looks at that and in certain circumstances says, yes, there's a limited waiver involved.

This is the challenge we have. How do we make that waiver determination? First --

THE COURT: Well, I make the waiver determination so you're arguing on behalf of your players that it shouldn't be waived; the Court makes a determination, it's not on your shoulders, it's on my shoulders.

MR. CHRISTOPHER SCHMIDT: Correct. And it's Plaintiffs' burden to show that there's the waiver. The party seeking to vitiate that privilege has the burden of coming up. And they can do it in many ways. They can make it easy and provide authorizations for anyone they have and say, we know -- these are the 50 people we really care about and we want to see about your video analysis, and why do we need to look at it for anybody beyond those 50? We should start with that and get that, if we have it, because that will make it really easy. And then Plaintiffs can tell us, they can do the public records searches just as easily as us, who do you think is left? And then we can go back and we can talk about it and see. That's certainly one way to do it.

But the burden is clearly on the party seeking to waive that privilege to establish its waived. And you're right, I mean, this is the challenge we're in is it's a

difficult issue, Judge. And we don't want to be in a position where we can't waive that privilege independently. We don't hold the privilege. The player, who is not before this Court, and -- holds the privilege. And --

THE COURT: You know, it's also hard to understand how this is going to play out down the road because one of the important defenses that the NHL has here has to do with statute of limitations and when the claims should have been brought and you are protecting from disclosure and therefore won't be able to argue that certain hits occurred at certain times because it's all going to be privileged.

So, I don't know how that's going to play out. I mean, I think we need to think through the picture here how that's going to work.

MR. RICHARD BERNARDO: Your Honor, I apologize. And again, in an effort to maybe see if we can cut through. How about -- because again I go back to the comments I made, we might be accused of being overly cautious. But in the phrase of "you can't put the genie back in the bottle," once this stuff is out, it's out. Could we at least do it in a two-step process because if you think about it, the database is observations of the video.

It's the concrete, fielded information that I would think would be the information in which Plaintiffs are interested in, that they could look at and if the production

of the fielded information to your point anonymized so that it doesn't relate back to the other databases isn't sufficient, then it might be appropriate to address the need issue as to why actually watching it versus reading it is necessary, is the only reason for the discrepancy I would think would be is if there's a distrust of the scriveners' or observers' viewing of the data.

Again, I'm not foreclosing the possibility of doing it. I'm trying to do it in a staged way that focuses on need as opposed to jumping right out altogether.

THE COURT: Okay. Let me just go through the rest of the fields with you.

MR. RICHARD BERNARDO: Sure.

THE COURT: So, the players' position would not be disclosed, language would not be disclosed. Have you discussed any other categories between the two of you?

MR. RICHARD BERNARDO: There have been no other categories that I believe we actually had discussion about. Plaintiffs, of course, can correct me if I'm wrong. I think that frankly the big part of our discussion actually hinged on dates. And I think that is one that requires the most elegant solution as far as providing the kind of information they need without disclosing it. And I will also say, just to clarify, NHL isn't going to get this or use this data either. We're not going to provide Plaintiffs with a subset of what --

THE COURT: Well, you couldn't do that.

MR. RICHARD BERNARDO: You know, of what we have. So I just want to make that clear.

THE COURT: You heard my concern about that is someday we're going to have some sort of motion on, I don't know, statute of limitations and you're telling me that you're never going to use dates. So --

MR. RICHARD BERNARDO: I'm not going that far unless my colleagues here would say something. I'm simply saying that with respect to the data on these databases, we're not planning to use for analysis the data on here that we're not providing. If we do or something changes, we can always address that because the easy thing is adding to what has been produced. The difficult thing, of course, is you can't take back what has been produced.

THE COURT: I hear what you're saying, and I'm sensitive to this, too. I'm trying to come up with what's fair, as well. Let's hear from --

MR. RICHARD BERNARDO: Understood. Thank you, Your Honor, for allowing me.

MR. BRIAN PENNY: Taking it a little bit out of order from the way I was going to present it, but I might as well deal with redaction issues in the databases first in response to what we just heard.

First with regard to the video analysis database in

particular, I think Your Honor is right on when you suggest that the diagnosis of a concussion isn't a private event anymore, and it's not even expected to be a private event for the players. As you noted several times, the CBA acknowledges right off the bat that the nature of the injury, the prognosis, the treatment for it can be publicly disclosed at any time by any person in the know and there's no further waivers or anything that need to happen to make that happen.

The video analysis project is important because it takes the videos of the concussions and then it codes them so that the concussions could be placed into certain categories like concussions that came about from fighting, concussions that came about from mid-ice hits, concussions that came about from seamless glass, contact with seamless glass. And so you can't really disaggregate the video part of the database from the coding of the database and still have it useful. And, in fact, one of the reasons we would want to analyze that database is to check the NHL's work.

And Mr. Bernardo said something like, well, the NHL isn't contemplating using some of this data in its defense, but the point of the NHL's defense all along has been that they've been so proactive about analyzing and studying concussions and here's all the data they've collected, here's the video analysis project they conducted. Well, we would like to take a look at that and see if there was bias involved

in that and see what the results actually show when somebody else who is not biased crunches the numbers or does the analysis.

Mr. Bernardo's suggestion that we take it piecemeal is, I think, inefficient in the first instance because if we need more, we have to keep going back and then we have to keep negotiating how we might de-identify or anonymize certain fields, and I don't think that's going to be an efficient way to proceed. I think the more elegant solution is the one that's endorsed by many courts and it was the one that Plaintiffs' suggested. And by the way we're not acknowledging in any way that the databases need to be de-identified to be produced under the protective order. But we were willing to accommodate that and to say, okay, we'll take some modest de-identification, take the player's name out, take the player's jersey number out so that there's no inadvertent re-identification of the player as we go through and analyze the data. And we were willing to offer them, in writing or in some other specific agreement in which we take these databases in native format that we will not attempt to de-identify any player from that data code. And as officers of the Court, I think that's a fair accommodation.

If it ever came to be that we needed or wanted to de-identify a player or if it came to be that we wanted to file some of this data publicly in a pleading or something

along those lines, then we could discuss how to de-identify that data in the context of what we would actually be presenting. This is even more lenient an approach than some of the Courts took in cases cited by the Clubs and the NHL.

For example, in *Wilkinson v. Greater Dayton Regional Transit Authority* cited by the Clubs, they cite that case for the proposition that simply redacting a patient's name does not adequately de-identify the medical information. That case, however, I think perfectly supports our position because in *Wilkinson*, the way it was set up was the protective order at issue actually stated the parties would disclose medical information under the protective order in un-redacted, natural format. And that it would -- if something would then be filed with the Court, it could either be filed under seal pursuant to the protective order or then it would be de-identified. And the whole discussion in *Wilkinson* was about if we're going to have to -- if the Plaintiffs are going to file some of that information not under seal, how much redaction is necessary?

We're not even approaching that. We're saying, we'll take it in de-- excuse me, in native format and we will protect it. And the concern that there are data breaches out there, this information is already in the hands of several third-parties. Having the Plaintiffs protect it -- and we're used to protecting confidential information -- I don't think exposes any greater risk to the Clubs or to the NHL that

somebody is going to access this data or that it will leak out.

The other risk, though, the countervailing risk that we would run if we endorse Mr. Bernardo's proposition is that there is human error. The de-identification he's talking about is very complicated. It's got a lot of moving pieces and if it isn't done 100 percent accurately, then when we crunch those numbers behind the scenes, we could come up with totally false results and not have any way to check whether the results were accurate or whether there was a mistake in the de-identified coding process that led to the result. So I think the better approach is to give us the databases in not slightly redacted format, just taking out the name and the jersey number, and we will deal with the rest if anything needs to be made public after that, because that's really the concern that courts deal with.

And in talking about HIPPA, I notice in the Clubs' brief and in the NHL's brief, they go back and they look at HIPPA for guidance on how deeply you need to redact personal information. But this morning I found three cases -- and there are probably several others that I haven't found in my quick research -- that say when you're turning over documents pursuant to a HIPPA compliant protective order, you don't have to do any redaction. There's no reason for that burden because the information is going to be protected by the

protective order.

On redaction, I don't have anything further, Your Honor.

THE COURT: Thank you.

Mr. Bernardo, a couple questions. This information is being, to the last point, being turned over pursuant to a HIPPA-compliant protective order. Why is further protection needed?

MR. RICHARD BERNARDO: Well, Your Honor, there's case law -- and I believe some of it's cited in our brief -- that there are instances in which a protective order is simply not enough for some types of information. And I --

THE COURT: And you think that the fact that there's a video of a head hit and just the fact that there was a concussion diagnosis is -- it needs to be protected to that degree?

MR. RICHARD BERNARDO: I'm answering your question, Your Honor, with respect to the entirety of the collection of medical information here. As to the video analysis, we haven't considered whether that alone, a protective order would protect. But I would submit that it still could be used to de-identify other information, so I think a protective order wouldn't be sufficient.

Protective orders -- and I've been involved in many MDLs where this is the case, it's typically the case where

even with a protective order, certain information will be redacted. For example, in the medical device arena, there are CFRs that dictate that reporter information has to be redacted even if there is a protective order in the litigation. And it recognizes some of the sensitivity of this and some of the chilling effect that it would have on doctors reporting information.

And I think by analogy, this goes back to a point I made earlier. There really would be a significant chilling effect if players became aware that there's a court order that says, all of this information that I have disclosed about myself, information I might even not have disclosed to my spouse, is getting used in connection with the litigation or, worse yet, can end up getting inadvertently disclosed or be found on -- in a newspaper article. I think it gets to the point that a protective order is --

THE COURT: Well, not without somebody violating the law, you see, so --

MR. RICHARD BERNARDO: Inadvertently, perhaps, and I think that happens all the time and we've seen it, but I --

THE COURT: I don't think that happens all the time at all. I think lawyers are very good at complying with protective orders. I would hesitate to suggest that it happens all the time.

My other concern is this video analysis, as I

understand it, is part of the NHL's defense here. We've proactively studied this, we are taking a look at it, they're not going to use this at all? This is off base now, can't be used as part of the defense in this case? I mean, I just want to make sure everybody is coordinating here because I'm not going to be heard later on that you can cherrypick things for your defense that you've argued can't be disclosed to the Plaintiffs. So --

MR. RICHARD BERNARDO: Understood. Understood, Your Honor.

Do you want to address that point, Chris?

MR. CHRISTOPHER SCHMIDT: Yeah, if I may. And that might be a little bit outside of my realm, Your Honor. Let me briefly address that, and then there's a couple points I was hoping to make, as well, and sort of back up.

On that point, I believe the comment that Rich made was that anything that was going to be produced over to the Plaintiffs would also be produced in the same way to the NHL, that this is how, you know, they'll be sent off to a third-party who will anonymize it or de-identify and what's sauce for the goose is sauce for the gander. So, to the extent that information is shared, either side could use it in whatever form is being shared.

THE COURT: Right. But you understand the proposal is that it not be produced, that the video analysis not at all

be produced?

MR. CHRISTOPHER SCHMIDT: That is not my understanding, actually. My understanding is that the written portion of the analysis be produced, but just the video portion -- so there's a written analysis that is done that describes the results. That's the really key part, what they gleaned from it, whether it was a mid-ice hit, whether it was a hit to seamless glass, the only portion that would be -- the video itself would not be produced because of the facial recognition problems, but the analysis, which is the core of the issue, would be produced.

THE COURT: That's not anywhere in the briefing. That's news to me.

MR. CHRISTOPHER SCHMIDT: I --

MR. RICHARD BERNARDO: I'm sorry, Your Honor. Let me try and clarify. If I didn't do that, I apologize.

So, the video analysis has two components. As I understand it. Once the concussion information from another database is fully realized, that information is provided to somebody who takes the name and the man ID, et cetera, and goes into their library of videotapes and says, okay, this is the one for this player, this is the one for that player. So, now we have all the videos.

Then somebody watches the video, and I believe there are 100 -- ah, I'm sorry, about 60 fields of information that

the person watching the video will record. Some of them are coded information, some of them link the information back to these other databases, which is what I understood Your Honor to be saying we wouldn't do. But there's coded information, mechanics of injury, other types of fields that Mr. Schmidt was talking about. We're willing to produce that written database of data reflecting the observations of the person watching. It's that data --

THE COURT: All 60 fields?

MR. RICHARD BERNARDO: We would propose to redact those that would link it back to the other databases for the reason we --

THE COURT: I clearly don't have enough information here. I don't even -- this is not anywhere in what has been provided to me.

MR. CHRISTOPHER SCHMIDT: And if I could, on that redaction, it would just be identifiers. It would be -- let's say that the video analysis person put down, it's the center for the Minnesota Wild in 2005, the lead center, something like that where it's clear. It would be very limited redactions of identifiers. Here's the thing that is -- impresses me. You look at all these databases, there's 900 fields of private medical information. We're talking about a handful of fields that are being proposed to be redacted. I mean, it's really -- when we're looking at this, it's actually

a very narrow dispute, Your Honor.

THE COURT: But, you see, I can't tell that from the briefing. That's my point. According to the briefing, the proposal is that the entire analysis, that --

MR. RICHARD BERNARDO: Your Honor, if I can --

THE COURT: That (inaudible due to overlapping speakers) the videos would be --

MR. RICHARD BERNARDO: From the briefing, Your Honor, and this is the NHL's submission, it says the NHL has considered whether it's possible for some fields of the video database to be disclosed to Plaintiffs to allow Plaintiff to access the information they seek while still preventing disclosure of identifying information and is determined that it would be feasible to produce the written analysis of the video with identifying information redacted without the video itself.

MR. CHRISTOPHER SCHMIDT: The -- you raise a great point, though, Your Honor, and I think it gets back to Mr. Bernardo's first point which is this is a difficult conversation to have in the abstract. It's difficult to brief. We're dealing with 900 fields, which is why Mr. Bernardo proposed, let's turn it over in de-identified basis and then if we need to add anything else incrementally, that's easy to do. We don't have to start back over. We've done the lion's share of the work and if it comes back and the

date range isn't right or something else isn't right, we can deal with that after the fact and deal with real, real scenarios, real data fields. And we're really talking about just a handful of almost 1,000 data fields dealing with highly sensitive information.

If I can back up for a moment, though, we got to this point because on June 4th, shortly before that, Plaintiffs did an abrupt change in position, acknowledged that the players had an interest in the private medical information.

THE COURT: I don't think that's -- okay -- I think they were willing to talk to you based on my concerns that were expressed. So that's an extreme position. They've taken the position all the time that this has been disclosed and waived. But we're trying to work together here, so --

MR. CHRISTOPHER SCHMIDT: Well, here's my concern, though, is if we have 900 fields of private medical information dealing with ADHD, dealing with multiple concussions, dealing with highly sensitive medical information, it's a summary of their medical history. If we turn that over in a database form and allow identifiers to get in there, as well, we're just allowing all of these medical records to be produced wholesale --

THE COURT: Okay. So understanding what I was saying was I agree with you.

MR. CHRISTOPHER SCHMIDT: Thank you.

THE COURT: I was --

MR. CHRISTOPHER SCHMIDT: (Laughter.)

THE COURT: I was focusing on the video piece here and disagreeing with you about whether the video itself was protected. Okay? That's where this all got started.

MR. CHRISTOPHER SCHMIDT: Okay.

MR. RICHARD BERNARDO: And, Your Honor --

THE COURT: Then I misunderstood this paragraph because it doesn't talk about 900 fields and it says that you've considered the possibility and you could do this or that. It's really unclear to me what it is that you're willing to produce and what you're not willing to produce from this, to be fair to me in reading this paragraph again, it's right in front of me. So -- okay? Let's start from there. All right?

MR. RICHARD BERNARDO: And, Your Honor, and I apologize for the lack of clarity. And I think that actually to Mr. Schmidt's point focuses on the theme that we're trying to communicate. It is very difficult. We're talking about -- and frankly we're learning this information ourselves. We're all talking, the Plaintiffs, we, and Your Honor -- about this data that's -- it's concrete but it's abstract. That's why I got up at the start by saying, if we give them what we propose to give them, then they can come back and talk about need.

And I want to highlight there's one concept that was completely lacking from the comments that Plaintiffs' counsel made which is what they need and why they need it.

And I fully respect that they don't know what they need until they have what they don't have so they can figure out what they need, or whatever the right saying is. And that's all we're trying to do is to take it out of this type of confusing dialogue where we unintentionally are disconnecting and turn it into something more concrete where they can say, Your Honor, look, here's what we have, we have this, this, this, but we don't have this and we need it and they won't give it to us.

THE COURT: Have you provided to the Plaintiffs the list of 900 fields or whatever it is, including the 60 fields that correlate to the video analysis? Have you provided that?

MR. RICHARD BERNARDO: Yes, we have, Your Honor, and that was the attachment -- that was an attachment to that letter we had submitted on June 25th. It probably got buried in the 75 pages of other lists of --

THE COURT: No, I saw it. I couldn't sort out exactly what it was, but -- okay.

MR. RICHARD BERNARDO: That is in there --

THE COURT: I could look at that letter and say these are the 60 fields affiliated with the video analysis. Is that what you're --

MR. RICHARD BERNARDO: May I say a conditional "yes" and just check with my colleague?

Yes. Okay.

THE COURT: Okay. Good work. Okay.

MR. RICHARD BERNARDO: The Geek Squad in perfect action.

THE COURT: Okay.

Let me hear from Mr. Penny, and then we can see if we can reach some resolution here.

MR. RICHARD BERNARDO: Of course.

MR. BRIAN PENNY: I just want to make sure that there's no confusion on what the video analysis data project is and why it's actually useful to anybody who might have access to that database. And I also want to make sure that you understand that the coded fields, these 60 fields for the video analysis project, do not contain what Mr. Schmidt referred to as this highly sensitive information about who has ADHD, who has learning disabilities, who has multiple concussions, that sort of thing. What the video analysis project did was it looked at videos of concussions and it coded them, right, so that they could try to determine how certain concussions happened.

Wouldn't it be interesting for the Plaintiffs to know if the NHL did that analysis in the video analysis project and found that close to 10 percent of concussions

happened from fighting? But what if we went back, looked at the video analysis, found that there was bias in the coding and actually 20 percent were caused by fighting? That, I think, would be relevant to our case. But we can't do that kind of checking of the NHL's work unless we have the videos and the data linked together. And, in fact, I think it's somewhere around 15 to 20 percent of the videos of concussions were marked as inconclusive. They couldn't even decide what the mechanism of the concussion injury was.

Wouldn't it be interesting if we looked at those and we were able to categorize them in a little more specificity.

THE COURT: Now when you say "correlate," you mean the video analysis with the 60 fields --

MR. BRIAN PENNY: Yes.

THE COURT: Not with the 900 fields, am I right?

MR. BRIAN PENNY: Right, Your Honor.

THE COURT: So if I were to rule that you were entitled to the video analysis project in its entirety but that the defense could break the chain, if you will, between any given video of a player and the sensitive fields, the medical fields that are not included in these 60 fields, would that be a fair way of handling this, in your view?

MR. BRIAN PENNY: Sure.

THE COURT: I know Mr. Schmidt disagrees, and he'll tell me why.

MR. BRIAN PENNY: Sure. I think that's the way the database exists already. It sort of stands by itself, it's the 60 coded fields and the videos. That would be one separate production, one database. And I don't think that it's linked to other databases and these more sensitive fields that exist in those databases, so I don't think there's a cross-pollination concern there --

THE COURT: I see. So if I were to look at those 60 fields, would there be any medical data or is it all about where on the field, what caused the concussion? Are facts pertaining to what happened?

MR. BRIAN PENNY: It is Appendix F to that letter, if you want to go back and take some time to look through it. But my quick review is almost all the fields have to do with the categorization of what you see on the video.

Now, I see there is a field "diagnosis," diagnosis 2, 3. Again, we're talking now about the diagnosis of the concussion, I presume, and that, as we've argued over and over again, we don't think is a -- excuse me -- is a private event and it's not protected by medical privileges.

THE COURT: Okay.

MR. BRIAN PENNY: I think for the most part you're not going to see sensitive medical information in these fields.

And just with regard to these other fields, these

more sensitive ones about ADHD or drug abuse or anxiety or depression, those sorts of things probably wouldn't even be interested to us even in de-identified format in the NHL and its doctors haven't brought those into play. The problem is the NHL and its doctors say, well, we don't know exactly what causes the CTE. It could be the concussions and head hits, it could be those in connection with drug abuse, depression, anxiety. So, it is important information to us as part of the medical record, and it's difficult to have the data that the NHL has collected on concussion injuries be useful to us if that kind of information is disaggregated or can't be linked back to a player.

And again, I can say on the record -- I'll put it in writing -- I'm not looking to find out which player that suffered the concussion and later has anxiety or depression -- I don't want to put a name to that player. But statistically, we need to know how old the player was at the time of concussion, for example, what his symptoms were at the time of concussion, what he later experienced because these are all features that factor into whether there's a longterm impairment from the head injuries or not.

So, the best solution I could come up with is we'll keep it all private and protected and de-identified without taking the more industrious step of trying to re-identify something that has, on its face, been de-identified. Oh, and

one last point. To Mr. Bernardo's concern that it will have a chilling effect, the fact that most of this data -- again, players expect that at any moment, the nature of the injury, the prognosis, the treatment, can be released publicly to media sources by anybody who knows this information. It's not going to have a chilling effect when they find out that it's been given over to Plaintiffs' attorneys who again purport to represent their best interest and those of retired players in the protections of a protective order. It's not going to become public.

MR. CHRISTOPHER SCHMIDT: Your Honor, if I can -- I want to back up just for a second and start and make sure we're approaching these issues from the framework of the laws that govern these players.

First we have state law that protects their privacy. Not only the patient/physician common law privilege, but every state at issue has a statutory regime protecting private medical information, including a diagnosis of concussion. The diagnosis itself is private medical information that Plaintiffs will have to show that there's a waiver, if there is one.

Second, ADA covers all of this, and the ADA is really clear that part of that is an employer can do a fitness-to-work exam, or in this case a fitness-to-play exam. It needs to make sure that its workers -- in this case its

players -- can work or go back on the ice. It can employ medical professionals in that, and that information can be shared as part of that process internally. So, the ADA protects it, and the ADA in part probably because that sensitive employee information or player information in this case is being shared internally in accordance with the dictates of the ADA, there's a confidentiality mandate --

THE COURT: And, you know, I agree with that and I agree with the authorization that is so well briefed and the fact that that's designed to provide those sort of external players in the decision making with that information. I have to say, though, that the public relations section of the CBA concerns me. That is not designed to do what you're talking about. That is designed to give the NHL the right at any time to publicly disclose private medical information as a public relations benefit to them.

MR. CHRISTOPHER SCHMIDT: So, first of all, I would back up for a minute and I would -- I would take objection with the characterization that's "a benefit to the NHL." That is collectively bargained for between the Players Association and the NHL itself. There's --

THE COURT: But it's public relations folks.

MR. CHRISTOPHER SCHMIDT: Well, it's public relations but it's also if someone is hit in a game, fans want to know what happened. And the information that's allowed to

be disclosed, talked about is narrow. And it does not contemplate the disclosure of a single medical record. In fact, medical records can't be disclosed --

THE COURT: No, but it does, it does contemplate the disclosure of what this video would show, which is that there was a hit and a concussion diagnosis.

MR. CHRISTOPHER SCHMIDT: Well, not necessarily because if -- if the -- often in the case of hockey, what will happen is there may be a diagnosis like an upper body injury or the diagnosis of a concussion may not have been revealed and often is not. It may be speculation by the media or somebody else, but often it's just X player is out for the next 10 days with an upper body injury.

THE COURT: No, but my point is that the agreement is that if the NHL wants to at any time, they can disclose that any given player suffered a concussion, can't they, under that provision for public relations purposes?

MR. CHRISTOPHER SCHMIDT: I believe -- I believe that to be accurate, that they would be able to, in the -- at least under the terms of the current CBA from 2012 forward, I believe that provision, if that's the diagnosis that a Club doctor makes, that a Club could give that general diagnosis and very little else.

Now -- but if it hasn't been given, that doesn't mean that there's been a waiver in that case, Your Honor. And

so it's a scenario where I think we're getting far afield to say that all players have automatically waived their diagnosis --

THE COURT: No, but it's hard to implicate the ADA because in the ADA -- I mean, the analogy would be an employee saying to their employer when they come in to work and sign their Employment Agreement, you can at any time disclose for public relations purpose any private diagnosis or result of an injury. It's hard to say then that person has preserved their medical privilege as to that diagnosis.

MR. CHRISTOPHER SCHMIDT: Well, except you have to look at it, I believe in looking at the case law, that -- even the cases cited by Plaintiffs, the cases all say this that you're looking at it in context and if there's been a waiver, it's been a limited waiver as to what has actually been said. And, for example, one of the cases that they cited to the Court dealt with a doctor who had wrote about his patient without the patient's authorization to a number of other professionals and third-parties. And the Court found, well, that was a waiver in that case but only as to exactly what was in the letter and nothing else. And then the -- the Court quashed a deposition because the Court said, well, what's -- why could you depose this doctor because you can't ask why he wrote the letter or anything else beyond it.

And so if there's a disclosure, you can diagnose

things in many different ways. The diagnosis of what's been publicly released is fair game, and we've always said that. We've said from a document production perspective, we'll produce publicly-available documents. However, if it's not been publicly disclosed, then how do we draw that line and how do we know where to deal with this issue on whether or not you can disclose a diagnosis or not.

It could be the player revoked his consent and told the doctor, hey, don't disclose it in this case or it could be the doctor has a policy that always says it's upper body injury and that varies Club to Club. There could be a whole host of variable factors that deal with that issue.

Thank you.

THE COURT: Mr. Penny, have you, as your side and this I suppose is a work product question that you don't have to answer, but have you done a Google search to find out all the instances in which we've publicly read about concussions on the ice?

MR. BRIAN PENNY: Well, a Google search of all the hundreds and hundreds of concussions would be difficult to do, but not impossible. But what I cited to the Court and what I showed you some of the other day is just the collection of injury reports that's available publicly, and that was just through one cite, CBS Sports. And as you can see for a number of players, if you go back and look at that website, it says

concussion, concussion, concussion is the diagnosis and then you start reading, there are dozens of articles talking about the concussion.

And it's not speculative articles. Many of them are quoting the player, the coach, the general manager, the doctor talking about the concussion, the symptoms, the treatment for it. As you noted before, what the CBA shows -- and it's just acknowledging the longstanding practice of disclosing the nature of the injury and the prognosis and the treatment for it -- the implication of that I think is almost not even a waiver, it's that there's no privilege that attaches to that information to begin with.

The example of the employee who signs his employment contract is a good one. From that point on, the employee doesn't expect any of that information to remain private. But what I'd like to do also is this ADA issue is something that hasn't been talked about in a while, and I know I heard you say you agreed with Mr. Schmidt, but from my opinion, if I read the cases and I read the ADA, it doesn't apply to this situation. And it certainly doesn't apply to this situation the way the Clubs argue that it do -- it does.

The Clubs claim that the ADA's confidentiality provisions regarding medical information both block Plaintiffs' access to it and at the same time allow all of these third-parties within the umbrella of the same employer

to get access to it but those third-parties are still outside the doctor-patient privilege relationship. And they say this disclosure regime is permitted under the ADA to further the purposes of that Act, which they claim are to, quote, ensure a safe work environment, unquote -- and I'm quoting from Pages 7 and 11 of the Clubs' brief.

But ensuring the safe work environment is not the goal or purpose of the ADA, that might be OSHA's domain, but it is not the purpose of the ADA. The ADA was created to protect against discrimination by employers on the basis of a person's disabilities. And in some instances the ADA has been used to ensure access of disabled persons to certain public facilities and buildings. The Clubs -- if the Clubs were willing to acknowledge that these concussions created disabilities that they needed to accommodate for, then maybe there might be some overlap or applicability there, but that's not what they're saying.

Rather, they're arguing essentially that the ADA specifically contemplates and condones the redisclosure of a hockey player's medical information to third-parties employed by the teams to ensure their safety in the workplace. And this is not at all, like I said, what the ADA was meant to do, nor is workplace safety the justification contemplated by the ADA when it permits these limited disclosures of medical information.

All you have to do is look at the cites in the Clubs' brief. They make the statement, the ADA explicitly authorizes employers to disclose an employee's medical information to managers, supervisors, and medical personnel to ensure a safe work environment for the employee. But then the case that they cite, which is *O'Neil v. City of New Albany* [sic], the quote is, medical information may be given to and used by appropriate decision makers involved in the hiring process so that they can make employment decisions consistent with the ADA. Nothing about safety. And the employment decisions consistent with the ADA, meaning employment decisions that don't discriminate.

As the Court recognized in *Scott v. Leavenworth* -- and that's a case that we cite -- the ADA was enacted to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and to assure equality of opportunity employment, full participation in economic self-sufficiency for individuals with disabilities.

Again, the focus of the ADA and the disclosure regime under the ADA has nothing to do with ensuring employees' safety in the workplace. In fact, the case -- the Court goes on to say, the ADA's confidentiality provisions ensure that in those situations where a medical examination or inquiry is allowed under the ADA, when job related or

consistent with business necessity, the information is disclosed only to those with a legitimate need for the information. In other words, and this is still quoting, the confidentiality provisions further the purpose behind the ADA's goal of ensuring equal employment opportunities for the disabled.

All you have to do is look at these confidentiality and disclosure provisions as they're set out in the act. The provisions are conditioned on the employer. They have nothing to do with the employee, so to speak. The ADA says to the employer, if you're going to collect medical information on your employees pursuant to the reasons of the Act, then you have to keep it confidential. To the extent an employer collecting such information must keep it confidential, this is the employer's obligation. It doesn't create a discovery privilege for the employee. If such a privilege exists, it's separate from the ADA.

As that same case noted, the ADA's prohibitions against disclosure of medical information do not amount to a, quote, unquote, privilege that protects the requested documents from disclosure. We also cited the *McDonald* case which has basically the same holding. There, the Court found that although there was no dispute, the reports at issue contained, quote-unquote, confidential information. Quote, from the case, Defendant has not shown discovery of the

reports is precluded by a recognized privilege, unquote. And in recognizing that confidentiality and privilege are two different things, the Court went on to state: Confidentiality rights of third-parties, standing alone, do not create a privilege precluding discovery under Rule 26.

Even if you look at some of the case law that the Clubs and the NHL cite, they both cite *Bennett v. Potter*, rather prominently, for the proposition that responding to a subpoena is outside the limited discovery permitted by the ADA. *Bennett* is an EEOC decision, and there the EEOC found that discovery -- or excuse me, disclosure of medical information in response to a subpoena did violate the ADA. But the EEOC did not find that a court of competent jurisdiction was prevented by the ADA from ordering the disclosure.

Again, the subpoena was not enough, but there was nothing to say an order requiring disclosure wouldn't be sufficient and, in fact, the *Bennett* court noted, they say, quote, we note that the Privacy Act allows for disclosure of an individual's records, quote, pursuant to the order of the court of competent jurisdiction but this exception does not apply in this case because the state court subpoena signed and issued by the deputy clerk did not qualify as an order for purposes of the Act.

The idea now being advanced by the Clubs that the

ADA protects medical information from disclosure is not supported by the case law. Also, the idea that the Clubs and the NHL and the players got together and created some sort of medical records disclosure regime centered around the ADA is not only nonsensical because the ADA doesn't deal with these workplace health issues but it lacks support in the record and it's notable that none of the authorizations cited in Mr. Daly's Declaration and the CBA, none of it mentions the ADA. So, our position is the ADA just doesn't apply in this instance.

THE COURT: Okay.

I -- Mr. Schmidt -- no, go ahead.

MR. CHRISTOPHER SCHMIDT: Your Honor, I think our briefing speaks for itself on that. Thank you.

THE COURT: This has been very well briefed and argued and maybe I'm a little slow on the uptake. It's just taking me a while to really absorb all of this, and I have to go back and study the letter and the fields more carefully. I think I am going to rule. I'm going to rule in a written order so it's -- there's a good record and it's carefully thought through, and it's going to take me a couple of weeks. I appreciate that I'm holding up depositions now. I'm sorry about that, but this is a big issue, and it ought to be handled correctly.

So, Mr. Bernardo, I'm not going to take you up on

your offer. As nice as it was to make the offer for now, give me a couple weeks and I will make it really clear in an order what needs to happen.

MR. RICHARD BERNARDO: I appreciate that and without beating a dead -- could I just make one small point for you to consider?

THE COURT: You certainly may, yes.

MR. RICHARD BERNARDO: If Your Honor is inclined to rule with respect to the video analysis, we just want to make it clear that there are some fields in the video analysis database that, in addition to man number, we would request that you could consider could get redacted so it doesn't link it back to the other databases.

THE COURT: Okay. I want you to give me a really short letter, okay, that tells me which of those fields you would object to.

MR. RICHARD BERNARDO: We will do that, Your Honor. Thank you very much for the opportunity.

THE COURT: All right.

Mr. Schmidt, you can weigh in on that, as well, okay?

MR. CHRISTOPHER SCHMIDT: I have nothing further. Thank you, Your Honor.

THE COURT: All right.

Anything else on this issue for the record today?

Or should we resume with our informal conference?

Everyone on board? All right. Let's take 15 minutes. We'll be back in the jury room at 20 minutes -- quarter to 3. Court is adjourned.

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

* * * *

CERTIFICATE

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

Certified by: s/ Heather A. Schuetz
Heather A. Schuetz, RMR, CRR, CCP
Official Court Reporter