UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In re: National Hockey League Players' Concussion Injury Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota
Courtroom 7B
July 2, 2015
9:00 a.m.

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
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Also Present: Dennis Kiker, Granite Legal Systems

I N D E X Page:

P R O C E E D I N G S

IN OPEN COURT

(Commencing at 9:05 a.m.)

THE COURT: We are here this morning in the matter of the National Hockey League Players' Concussion Injury Litigation. This is MDL 14-2551. Let's begin by having notice of appearances, please. We'll start with the Plaintiffs.

MR. STEPHEN GRYGIEL: Morning, Your Honor. Steve Grygiel for the Plaintiffs.

MR. CHARLES ZIMMERMAN: Good morning, Your Honor. Bucky Zimmerman for the Plaintiffs.

MR. MARK DEARMAN: Morning. Mark Dearman for the Plaintiffs.

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

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

MR. BRIAN GUDMUNDSON: Morning, Your Honor. Brian Gudmundson, Zimmerman Reed, on behalf of the Plaintiffs.

MR. SCOTT ANDRESON: Morning, Judge. Scott Andreson on behalf of the Plaintiffs.

MR. JEFFREY KLOBUCAR: Morning, Judge. Jeff Klobucar on behalf of the Plaintiffs. Appearing telephonically this morning with us are Stu Davidson from the

Robbins Geller firm; Hart Robinovitch from Zimmerman Reed; Tom Byrne from the Namanny, Byrne & Owens; Bill Gibbs from Corboy Demetrio; and Bill Sinclair from the Silverman law firm.

THE COURT: Very good. Any other Plaintiffs in the audience?

(None indicated.)

THE COURT: And the defense.

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

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

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

MR. MATTHEW MARTINO: Morning, Your Honor. Matt Martino for the NHL.

MR. RICHARD BERNARDO: Morning, Your Honor. Richard Bernardo on behalf of the NHL.

MR. MATTHEW STEIN: Morning, Your Honor. Matthew Stein on behalf of the NHL.

MS. LINDA SVITAK: Morning, Your Honor. Linda Svitak on behalf of the NHL.

MR. CHRISTOPHER SCHMIDT: Morning, Your Honor. Chris Schmidt on behalf of the U.S. Hockey Clubs.

MR. DANIEL CONNOLLY: Your Honor, in addition we have David Zimmerman and Julie Grand listening by telephone

for the NHL. We have Shep Goldfein from the Skadden Arps firm by telephone, and we have Joe Baumgartner and Adam Lupion also listening by phone from the Proskauer Rose firm.

THE COURT: Very good.

MR. DANIEL CONNOLLY: Thank you.

THE COURT: I thought we would start with a housekeeping matter. I believe the next status conference is scheduled for August 6th. I have a criminal trial that can't be moved for that day, so I have two questions for you. One is can we do it the -- that Friday, which is the 7th, in the morning, and do you want to have another informal status conference in August? The next formal status conference after that would be September 3rd.

Any thoughts about that? Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: Your Honor, yes, I would like to have an informal. August 7th, if I -- I don't have my -- my iPad around. It ran out of juice last night and I forgot to charge it, and so I don't have my calendar in front of me. August 7th, I may or may not have a conflict. I will need to check, if that's okay.

THE COURT: Okay. Sure.

MR. CHARLES ZIMMERMAN: And I could get back to defense and to the Court before the middle -- after we're done today.

THE COURT: Perhaps you all look at your calendars

when you get a chance and then we can -- if it doesn't work for you, you could propose a couple of other dates in August, perhaps.

MR. JOHN BEISNER: Just so you know, August 7th works fine for us, Your Honor, so we'll just wait to hear from Plaintiffs on that.

THE COURT: Okay. All right.

And then as I said, the conference after that is -- the next formal conference is September 3rd. So, the question is whether we want to have something in like the week of the 18th, perhaps, of August by way of an informal conference. And if so, to be honest with you, I'm in Duluth that week. I have two trials in Duluth that week. You could come to Duluth if you wanted, but -- I have time in Duluth.

MR. CHARLES ZIMMERMAN: It's not Minot. It's beautiful (laughter).

MR. JOHN BEISNER: I've spent a lot of time in Duluth.

MR. CHARLES ZIMMERMAN: We'll come to Duluth, Your Honor.

THE COURT: I understand.

MR. JOHN BEISNER: I will comment no further.

THE COURT: Okay. Early the following week, it looks like I could do it on the 24th or the afternoon of the 25th, so those might be the best dates for it.

MR. CHARLES ZIMMERMAN: Those are the informals, Your Honor, or --

THE COURT: Informals, yeah, because again that week of the 17th I'm in Duluth the whole week.

MR. CHARLES ZIMMERMAN: Could you give me those two dates again?

THE COURT: Monday, August 24 and Tuesday, August 25.

MR. CHARLES ZIMMERMAN: Can we get back to you on those?

THE COURT: You can. Mr. Beisner has got his iPad, so he's going to tell me if he's --

MR. JOHN BEISNER: I have a charger, by the way.

MR. CHARLES ZIMMERMAN: That's the second offer I've had from both you guys for a charger. We're getting along too well.

MR. JOHN BEISNER: Either of those dates I think would work fine. Your Honor, I'm sorry, you said the morning of those two or --

THE COURT: Um, the 24th I'm available all day. The 25th I have a motion in the morning, so -- it's actually just a motion. We could start at 11 or we could start at 1:30 or --

MR. JOHN BEISNER: Either of those would be fine, so whatever is acceptable to Plaintiffs would be fine with us.

THE COURT: Okay. Then we'll hear back from Plaintiffs on that.

MR. JOHN BEISNER: And are we planning anything for middle of this month? Have we set a date --

THE COURT: We hadn't.

MR. JOHN BEISNER: And perhaps it isn't necessary, but I just wanted to ask to make sure I hadn't missed something here.

THE COURT: Any thoughts about that?

MR. CHARLES ZIMMERMAN: I think when you see the issues in the agenda, I think you're going to want to have us come back. I think there's a lot of open issues that probably would be helpful. We could probably get them resolved if we have a target date for an informal and then if we can't resolve --

THE COURT: That's fine. I'm going to e-mail my calendar clerk who's not here. I didn't bring my July calendar with --

MR. CHARLES ZIMMERMAN: But do you have a charger (laughter)?

THE COURT: I do, yeah. All right. So, remind me to get back to that July date later on. All right.

Let's move ahead on the agenda, then.

MR. CHARLES ZIMMERMAN: Are you prepared to begin, Your Honor?

THE COURT: Yes, please.

MR. CHARLES ZIMMERMAN: Thank you. Charles Zimmerman for the Plaintiffs.

Just by way of sort of introduction, we're about six months now into the discovery program. I think we really started discovery somewhere around January of this year. And we're almost a year into the assignment of the MDL to this Court, so it's kind of a midterm exam grading time to do -- grade our papers, perhaps, a little bit. So, I'm going to hope to do that today and put some context into everything we're presenting so that the -- everybody in the courtroom and especially the Court gets kind of an overview of how far we're getting and are we, you know, are we on track. And I think the conclusion will be we're going to need a lot more time to do discovery.

I'm just -- I'm putting that out there because I think you'll see where we are with things and what's really going on in the real world. And that we're just going to have to -- we're just going to have to enlarge -- enlarge the timeframes. But the Court -- you'll make that conclusion, of course. But I just want you to know that the context of things will be so that the Court has really an overview of how hard we've been trying and how, really, the cooperation we've had -- I've gotten two offers for chargers today, so I just can't even believe it.

THE COURT: And we had depositions without phone calls to the Court.

MR. CHARLES ZIMMERMAN: We had one phone call.

THE COURT: We did have one phone call, yes.

MR. CHARLES ZIMMERMAN: And then we can have a discussion about that, and if the Court would like formal motion practice with regard to it by -- at the end of the conference, we can kind of wrap up and determine how the Court wants to --

THE COURT: Well, let me ask you this. Have you met and conferred about extending the schedule?

MR. CHARLES ZIMMERMAN: We've talked about it at the last informal status conference, but we have not. So it's not a formal thing I'm asking. I'm just putting it into context in sort of where we are in light of where we need to get.

THE COURT: I think it would be useful to put that on the agenda for the next informal status conference, and so I'd like you to meet and confer about whether extensions are necessary.

MR. CHARLES ZIMMERMAN: Sure. And that's perfectly appropriate and we will certainly -- we will certainly do that.

So, the first issue then, Your Honor, is the document -- the Defendant's document production. And with all -- with all due respect to everybody's professionalism,

there's a lot of open items that are really the items in the rest of the agenda that all relate to discovery issues, many of them are document production issues. But what I think is -- is really very obvious is if you look at the end of May through the end of June production, 1.9 million pages of documents have been produced in that 30-day period, and that's about 90-some percent of the entire production.

I'm not accusing anybody of anything. I'm just being factual that although we tried to prevent back loading, I think we have had to be appreciative of the fact that that's the way it's occurred. And so I just need to point that out and we're working diligently, but there's just so much capacity we have and it is sort of forcing us into where we are today, which is sort of letting the Court know that a lot has happened in the last 30 days with regard to documents. We're not going to be able to catch up as quickly as we had hoped had this been rolled out from the February date. But I'm not -- I just want the Court to be aware of it.

And then there's three other things, or four other things the Court will want to know in a summary fashion, and then we'll talk about them individually, is that that doesn't include the Board of Governors' documents, which are still in play. It doesn't include the text messages issue, which is still in play. It doesn't include the U.S. Clubs' documents, which are still in play, the Canadian Club documents that are

still in play, and the private medical information questions and withhold of documents that is still in play.

So, even though we've got about a million-nine of new documents in the last 30 days, we've still got these other things that have got to get -- got to get filled in. I'm highly confident, Your Honor, we will get them, we'll get to them, we will be able to resolve the issues that are contained within those issues. But it does go to the question of timing.

Having said that, I think Brian Gudmundson of my office or -- I'm sorry, Scott -- Brian Gudmundson is going to tell you a little bit more about the document production, and defense will comment, and then we'll see --

THE COURT: Let me ask you this, Mr. Zimmerman. I think we talked last time at the informal about a protocol for handling privilege log disputes. Have you met and conferred about that yet?

MR. CHARLES ZIMMERMAN: Yes, that's what he's going to talk about.

THE COURT: Okay. Very good.

MR. BRIAN GUDMUNDSON: We have not, and I unfortunately was unable to attend the last informal status conference --

THE COURT: You know, that podium goes up. Right in the front, there's a --

MR. BRIAN GUDMUNDSON: You mean the arrow that goes up, right? Got it. We have not met and conferred. We -- it's on the radar. We received a new privilege log last night just after midnight with an additional approximately 2,000 entries. We're up to about 6,200 entries in the privilege log right now. The issue of the private medical information privilege in that log and the content of that is still in the open. I understand that the volume of that is substantially more than what we've seen already on the -- on the -- what we would call the regular privilege log.

So, our intention is to meet and confer in the very near future, but we're trying to get our arms around, first of all, whether their log in the first place is sufficient. We are analyzing that. But we intend to meet and confer in a process for challenging that. But it's a little difficult, not having seen the privilege log with respect to private medical information, where they all look different or the same.

THE COURT: So you haven't gotten one of those yet, or not?

MR. BRIAN GUDMUNDSON: We have not.

THE COURT: You have not. But you've been told that the number of documents on it exceeds the documents on the privilege logs combined, is that what you're saying?

MR. BRIAN GUDMUNDSON: Well, we've been told that

there's about 15,000 entries approximately in the private medical information. And I'm unclear at this time about whether that's just the NHL's hold back of documents or whether that includes the U.S. Clubs. But the issue of private medical information is being addressed by others that I'm sure can speak to that a little bit better.

I don't have a lot to add to what Mr. Zimmerman said about the privilege -- or I'm sorry, the document production to date. I think he did adequately point out that from February to May, we received about 230 pages of -- 230,000 pages of documents; and in the last month, we've received 1.9 million, while at the same time we've got all these other issues sort of pulling down the production and our ability to sort of analyze it in the context of depositions and pending motion practice.

So, again, I share Mr. Zimmerman's view that this is going to get worked out, it's just taking longer than we anticipated. I'm sure that it's taking longer than everyone anticipated, and there's -- I'm certain there's good faith reasons for all of that, but it's just a matter of time.

THE COURT: Okay. Would it be possible or -- do you think it would be wise to try to meet and confer on these privilege log challenges before the next informal, or is that too quick?

MR. BRIAN GUDMUNDSON: No, I don't think it's too

quick, and we can -- we can talk about that with them. I think we can do that. And it's within the next couple of weeks, I think we can do that for sure.

THE COURT: Okay.

MR. BRIAN GUDMUNDSON: I don't know if we're going to get a private medical information log by then, but we can certainly visit with defense counsel and get that straightened away.

THE COURT: Thank you.

Mr. Connolly.

MR. DANIEL CONNOLLY: Your Honor, just quickly on that topic since you focused in on the privilege logs, we think it would be great if we could focus in on the legal privilege log. The medical privilege log is a different issue, a totally different breed of cat. And what we think we have -- we're ready to talk about this, we've been producing the privilege logs for some time on a rolling basis at the Court's request and Plaintiffs' request, and we haven't engaged on that topic. We think that would be a helpful area because those are the only documents other than the medical ones that we'll discuss later that the parties don't have an agreed-upon access to. So, we think it would be great if we had a process in place by the next informal that we could begin an orderly process of reviewing these with the Court, if necessary.

THE COURT: Mr. Connolly, are you in a position to tell me when you expect to produce this privilege log with the medical entries, and are you doing a different privilege log than Mr. Schmidt is on that?

MR. DANIEL CONNOLLY: Mr. Martino is the one to speak to on the medical -- the privilege log. He has -- I'll let him speak to that. I'm not conversed with that particular topic.

THE COURT: Okay. All right.

Good morning.

MR. MATTHEW MARTINO: Morning, Your Honor. Matt Martino, obviously, for defense. For the -- let's see. The problem with having tall guys before you, I'm going to raise it --

THE COURT: You can put it back down if you want.

MR. MATTHEW MARTINO: For the private medical information, that's a separate log from the attorney-client privilege log. We are in process of reviewing those documents now. There won't be 15,000 entries necessarily. There are 15,000 documents that are in second review for that, that have been marked by some earlier review as potentially containing private medical information, and that review is ongoing. Hopefully we'll be completed within the next couple weeks, and that log -- we'll start rolling those logs, as well. I guess there will probably be a little more -- it won't be like a

slow log roll like it was for the privilege because we're almost completed with that review.

THE COURT: But by mid-July, there should be the production of at least one of those logs?

MR. MATTHEW MARTINO: Yeah, I think we could do that, yes.

THE COURT: Okay. And giving your reviewers guidance about this, I presume you're incorporating some of the thoughts that we discussed at the last informal conference?

MR. MATTHEW MARTINO: Yes. Yes. And we will be -- some of that we'll be redacting and things like that, as well.

THE COURT: Okay.

MR. MATTHEW MARTINO: I think that was it for that issue.

THE COURT: Okay. Yep.

MR. MATTHEW MARTINO: Okay.

THE COURT: Very good.

MR. MATTHEW MARTINO: Oh, and one more thing. On the privilege logs, we anticipate hopefully being completed with the entire privilege log process by the middle of July, as well.

THE COURT: Okay.

MR. MATTHEW MARTINO: So that we sort of -- to the extent -- you know, we have been rolling them, as Mr. Connolly

said, so, you know, we're ready and willing and able to set up that process.

THE COURT: All right. Very good.

MR. MATTHEW MARTINO: Thank you.

THE COURT: Thank you, Mr. Martino.

All right. Anything else on Defendant's document production?

MR. CHARLES ZIMMERMAN: Master Complaint Plaintiffs' document production is Mike Cashman's issue, and so if Mr. Cashman will advise the Court on the status of that.

THE COURT: Thank you.

Good morning, Mr. Cashman.

MR. MICHAEL CASHMAN: Morning, Your Honor. As the Court knows, the Plaintiffs, the six Master Amended Complaint Plaintiffs produced documents sometime ago, and then we've been in the process of collecting ESI for all six of these individuals. And it has taken some effort through third-party sources to get access to some of this ESI. We've accomplished that, we've reviewed it now, and we've produced two of the six this week; and within the next couple days, we hope to get the other four produced, and we should be ready to go.

THE COURT: Okay. You don't have any privilege logs, Mr. Cashman, do you?

MR. MICHAEL CASHMAN: At this time, we don't have a privilege --

THE COURT: But have you withheld for privilege in that review?

MR. MICHAEL CASHMAN: We haven't withheld anything as privileged. We are not -- and I don't think the NHL is doing this -- are not producing documents after the lawsuit was commenced. For example -- and they're not logging those documents, to the extent we have communications which would be privileged.

THE COURT: Okay. I think that's usually the rules, so very good. All right. Thank you.

Did Defense wish to talk about Plaintiffs' production?

MR. DANIEL CONNOLLY: We have nothing further to add. We were satisfied with that -- that summary, Your Honor.

THE COURT: Thank you, Mr. Connolly.

Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: Good. Good. The next item, Your Honor, is the status of the Board of Governors' document production. Scott is going to -- Scott Andreson is going to report on that, but I think a little bit of the history -- and Scott will give it -- is important in the context of this because obviously we find the Governors, Board of Governors' documents to be extremely important, and we don't have any of those yet.

MR. SCOTT ANDRESON: Morning, Judge.

THE COURT: Good morning. It looked like you've reached agreement on search terms.

MR. SCOTT ANDRESON: We have, and I'm happy to do that. There was actually a fairly straightforward process which I think once -- once we got to the point of the agreement to produce these documents, it was a fairly -- very civil and fairly easy process. The problem that we have that relates to the bigger picture here is the fact that we're in July and we haven't seen any yet. And we asked for documents that should have come from the Board and we asked it January 15th. And the initial response was to say, no, the NHL said no, the Board of Governors are third-parties. And so we -- we didn't agree with that. But we subpoenaed the teams and said, well, the NHL says that the teams should give us this information. And then we subpoenaed the teams and then the teams said, well, we're not going to give you that information, you should talk to the NHL.

And we went through this back and forth, and finally I think after we sent quotes from the bylaws saying these are the folks that run the League, the NHL said, we'll produce for the 30, we had a negotiation, and from there it went smooth. But that was May 28th that we finally agreed on search terms. We haven't seen any documents. And we asked for a commitment -- and if you recall I think it was at one of the informals here -- by August 1. The NHL said, look, we can't

do that, considering everything else we're doing on the main production. Understand. But we don't have any commitment. We don't know when -- when it's going to start, we don't know when it's going to end, we don't know what the volume is. And the next wave of depositions which Mr. Grygiel is going to talk about includes Governors. Right? And so we need those documents. And if we aren't going to get them for months on end, it's just going to keep up pushing everything back.

So, quite frankly, we would be thrilled if out of today we came out with a commitment that we will have documents starting on a date and substantially complete by a date.

THE COURT: Well, has there been discussion about prioritizing documents for the depositions that are upcoming?

MR. SCOTT ANDRESON: There has not been any discussion as to which -- what the priority is and how they're going to roll that out. We're not even sure how they're going to collect it or what the process is. Their status report indicates that they've started collecting, but we don't know how they're doing it and we don't know the process, and so it would be great if we could get some update on that.

THE COURT: Thank you.

MR. SCOTT ANDRESON: Thank you, Judge.

THE COURT: Mr. Martino.

MR. MATTHEW MARTINO: Sure, I can speak to that.

So, as we mentioned at some of the previous conferences, the -- the issue with the collection here is that there are 30 different Clubs, 30 different systems. Some of the Governors' e-mails are not on the Club system even, they're on another company's system -- I'm sorry, another third-party's system. And so we have issues, you know, with dealing with the third-party systems, and it is more of a collection issue than a review issue. The document volume is not going to be anywhere near the volume that we've had for the NHL production, the 200,000, 2 million pages that we've had. But we have begun collecting. We've received documents from about 10 of the teams so far, and we're in the process of reviewing those. We hope to start producing documents by the end of next week for some of the Governors.

We did say to the Plaintiffs that we couldn't commit to an August 1st date because, as I said, it's sort of a lot of balls in the air with 30 different Clubs and --

THE COURT: What --

MR. MATTHEW MARTINO: -- it's really the third-party system that does the --

THE COURT: What can you commit to for the 10 teams from which you've collected documents?

MR. MATTHEW MARTINO: For the 10 that we've -- oh, sure, yeah, I think we could -- we could commit to --

THE COURT: Can you commit to July 15th for that?

MR. MATTHEW MARTINO: Could we do the third week of July for those? I'm just concerned about, as we review these, we're including, you know, the third-party --

THE COURT: Okay. By the 21st, how about that?

MR. MATTHEW MARTINO: Yeah, I think that's --

THE COURT: Ten teams by the 21st. But I'd also like you to take a look at the upcoming Governor depositions --

MR. MATTHEW MARTINO: No, I understand.

THE COURT: -- and prioritize those and collect those and keep the Plaintiffs informed about that progress and then me at the informal. Okay?

MR. MATTHEW MARTINO: Sure. Sure. That makes sense.

THE COURT: Now, how many teams again, U.S. teams, are there?

MR. MATTHEW MARTINO: Well, we're collecting both for the U.S. and Canadian Clubs, so there are 30 total Clubs.

THE COURT: Thirty total. And what is your best estimate for, given some of the collection issues, these -- your success in collecting the documents for the remaining 20, not production, but how about just collecting?

MR. MATTHEW MARTINO: By -- when we would have that collected? Uh, I would hope we would have them all collected by the end of July. But, you know, again, hope is -- hope

springs eternal. It's -- there are a lot of conversations ongoing and running search terms and things like that on these systems that we have no control over. So, we are pressing the urgency to the Clubs. And they understand, I think, that we need to start getting this in so we can review it.

THE COURT: Have you received any hard copy?

MR. MATTHEW MARTINO: I think we have received a little hard copy, but we have requested hard copy for all the Clubs, yes. So to the extent they have hard copy, they will be sending that to us, as well.

THE COURT: All right. Good. So it looks like just to sum up here, by the 21st you'll have produced from the 10 teams that you've already collected from --

MR. MATTHEW MARTINO: Yeah, I think it's about 10. It could be nine, but yeah. But from what we've already collected, I think we can --

THE COURT: And you're going to prioritize the Governor depositions coming up so that those get produced in time for the depositions?

MR. MATTHEW MARTINO: Sure. Yeah. And we can work that out with the Plaintiffs on sort of scheduling.

THE COURT: Great. Okay.

MR. MATTHEW MARTINO: All right. Thank you.

THE COURT: Mr. Beisner?

MR. JOHN BEISNER: Your Honor, if I may emulate my

friend Mr. Zimmerman on a context point; I did want to clarify one issue here. I think the statement -- I don't mean to take this literally about not getting any Board of Governor documents yet -- and I'm not sure that's what Counsel meant -- but I want to be clear about what we're talking about here. There has been a huge amount of Board of Governor materials produced, Minutes, you know, books for the meetings and so on, to the extent that they're relevant, have been produced. And to the extent that there is e-mail activity that's been going on between the custodians at the NHL and any members of the Board of Governors that are relevant, those have been produced.

So, really what we're talking about here. And I suspect Plaintiffs would characterize that a little differently, but I want to stress Mr. Martino's point that we're talking here about a fairly, we think, fairly limited collection of material. We're looking at e-mails from these individual Governors that haven't been picked up already from the NHL production. So, those may be e-mails with others and things of that sort. I'm not saying there is nothing there, but we're not talking about, you know, the first time anybody is seeing anything about the Board of Governors, the deliberations. This is sort of icing on the cake.

THE COURT: Are you dedupping? In other words, no, you're not comparing what you're getting from a particular

Governor to the NHL production and --

MR. MATTHEW MARTINO: No, we would not -- to the extent there's the same exact e-mail that's in the Governor's files, that would still be produced.

THE COURT: All right. Thanks.

MR. JOHN BEISNER: And I suspect, you know, there will be differences in the characterization, but I just want to make clear this is not the first time that there's been any dipping into the Board of Governors --

THE COURT: I remember you saying that before.

MR. JOHN BEISNER: We're not debating the entitlement to those, and I understand why counsel want them. I just want to make clear that the volumes and new material we're talking about, I suspect, is limited.

THE COURT: Okay. Very good.

MR. SCOTT ANDRESON: And, Judge, that's -- quite frankly, that's what we're trying to learn. That's why we have the status conferences so we get to learn this information. And I do think that Matt and I can figure out, for instance, I mean if it's nine teams or ten teams, it would be helpful for us to know which of them are we talking about, right, because that might relate to them, the issue of the depositions and what's been collected.

A couple of points that I want to clarify -- and you hit one of them, Judge -- and that is that the hard copy --

that we're not just looking for e-mails. We're looking for hard copy documents that are responsive to our original document requests sent back in July and then related to the search terms that we've provided. The other thing is that Mr. Beisner just referenced this being principally a search of e-mails, and this is going to come up again in the context of NHL documents generally, but we'd also expect that, you know, this would include texts and other sort -- all forms of ESI, whatever they might be. It could be spreadsheets on their computers, not just e-mails. And I just want to clarify that the broader definition of ESI is what you're collecting for the Board of Governors.

THE COURT: Mr. Martino, do you agree that's what you're doing?

MR. MATTHEW MARTINO: We are certainly -- I think we'll need to actually go back to Plaintiffs with that because I think we have a protocol in place about how we're going to search e-mails and search non-e-mail electronic documents from their computers or whatnot. I think that's already in place. And so, you know, if they have any -- we can discuss that again and just to clarify if they have any issue with that. But I think we're doing what we said we were going to do with them, which is basically searching e-mails with search terms and for non-e-mail, we've agreed to manually go through and see if there's anything relevant, not download all of the

e-mail on-- as you would -- as we did for the NHL -- NHL custodians. We downloaded all of their relevant electronic documents and ran search terms. We would not be doing that for the Board of Governors, pursuant to agreement with the Plaintiffs that what we would do instead is have them go through their non-e-mail computer files and see where they would have relevant information and sort of search that like you would hard copy: This is relevant, pull that out; this is relevant, pull that out.

MR. SCOTT ANDRESON: And that is what we understood as it relates to non-e-mail electronic information that might be on their computer systems, the spreadsheet I'm talking about or a Word document or a PowerPoint. But how about texts as it relates to the Board of Governors?

THE COURT: Does your ESI protocol address texts? Do you know?

MR. SCOTT ANDRESON: Our ESI protocol -- I mean, the ESI protocol generally that we have in this case is --

THE COURT: For all ESI?

MR. SCOTT ANDRESON: -- for all ESI, so it isn't limited in any way. And that issue is going to be raised later and discussed in the context of the broader NHL production. And I just want to understand if, you know, if you're going down that road as it relates to the Board of Governors so that we don't end up debating it three months

from now like we're debating the fact that we didn't get them to begin with from the NHL custodians.

THE COURT: All right. I want you to meet and confer on the Board of Governor texts and report to me at the next informal.

MR. SCOTT ANDRESON: Thank you, Judge.

THE COURT: Okay.

MR. CHARLES ZIMMERMAN: Okay. Status of depositions scheduling. Steve Grygiel is going to talk about that with Your Honor. And we're going to talk about the number that we've asked, who we've asked for, the schedule, and the back-up -- and the back-up documents so that you have some -- we also have some context as to this whole process.

THE COURT: Okay.

MR. STEPHEN GRYGIEL: Thank you.

THE COURT: Good morning, Mr. Grygiel.

MR. STEPHEN GRYGIEL: Morning, Your Honor. As you know, Steve Grygiel.

I'd like to talk about depositions in terms of just a couple of categories. One obviously -- and perhaps most easily -- is the scheduling, what we've asked for, what has been completed, and what remains to be done that hasn't yet been scheduled but has been requested. Then I'd like to talk about the timing of these depositions, particularly with respect to the issues you've heard about already, and that is

production of Board of Governors' documents, production of text messages, completion and review of the other document production, and those issues. Because obviously when we pick a deposition, particularly in the first set of depositions, we did it with an eye towards a discovery plan. And as those depositions do not get completed in accordance with our originally-forecasted timetable, that of course pushes our other depositions and the rest of our discovery, including, for example, request for admission, down the road.

Altogether, Your Honor, we have requested, in terms of a summary, 21 deponents to be deposed so far. There's been 21. Seven of those have actually been completed. We have now tentatively scheduled, some are more tentative than others, nine. Of the remaining deponents, which is five for whom we have asked for dates, we have not yet gotten dates. So, essentially we have 21 requested, seven completed, and nine scheduled, some of them more tentatively, so that means about 33 percent of the requested depositions have thus far been taken.

One of the important points here, Your Honor, is to, I suppose, put some factual specificity to the way that Mr. Zimmerman was referring to, and I can give you some examples. And I think what's most relevant for the Court's understanding and for our process going forward is for the Court to understand how long it takes from when we seek a

deposition to when we actually get a date to when they actually get scheduled. One easy example is, for example, we asked for the deposition of Mr. Anschutz. Thirty-nine days later, we received a date. That date is another two months in the future. Essentially, we have, from the date of the request, four months from the date of the request to the actual date. For Brian Burke, an NHL executive and now a team executive, 28 days elapsed between the date we asked for his deposition and the date we got a date for it. And then, of course, the actual date of the deposition is another three weeks later.

In terms of the early depositions -- and there was only one -- that ship sailed with very little cargo. That was Dr. Burke; 53 days elapsed between the date we asked for his deposition and the date we finally got a date for it. A number of other examples: Dr. Audrey, important to the concussion study, 39 days elapsed between the date, Your Honor, we actually said we'd like to depose Dr. Audrey and the date we received a date that we could take his deposition. At that rate, Your Honor, we are never going to complete discovery by December 31st. It just can't be done.

There are some other issues that go along with these scheduling issues. And I don't mean to be unfair. In some cases we asked for depositions and we got dates fairly quickly. I asked for Mr. Cigarran. You remember me

discussing him at the last informal conference, and I got a date 19 days later. And for some others, they were a little more expeditious. But generally speaking, it takes a long time.

Another issue comes up, Your Honor, which is that when we're scheduling these depositions, for example, Mr. Gapski is the trainer of the Blackhawks, obviously has implications for medical issues. Well, that's tentatively scheduled for July 15th, but that most likely is not going to go forward that date for a number of reasons.

Leaving aside Plaintiffs' scheduling issues, we have the issue of personal medical information. And that issue, of course, as Your Honor has already heard in the Holmgren deposition and in the McCrossin deposition, that issue has to be resolved I think before we can meaningfully go forward with remaining depositions. As Your Honor knows, one of the NHL's defenses is we gave the warnings that should have been given. And Plaintiffs then, of course, want to say: To whom, when, where, how, in what form, how often, and what was the response? And we get back to the defense, well, that's personal medical information to the extent it involves a particular Plaintiff and you need to get a release and go through a panoply of protocols to make sure that no private or personal medical information is divulged.

THE COURT: So despite my guidance, we are not

getting any closer to agreeing on these issues, so you need an order from me. Is that what you're --

MR. STEPHEN GRYGIEL: I believe we will, Your Honor. And yesterday we spoke with Mr. Schmidt. We had a fairly -- I think it was 45-minute call, according to my clock. We spoke for 45 minutes about the issue, about what we're going to do about this because it comes up all the time, as Your Honor knows, in this case. And it would. And we decided after going back and forth with, frankly, an awful lot of lawyer pontificating, and I was one of the culprits, about what's privileged, what's not privileged, when is the privilege waived, to whom is it waived, and to what extent is it waived if there's information in the public domain. I think we decided that perhaps the best way to proceed would be for Mr. Schmidt and I or my colleagues to put together a list of issues and questions that are clearly going to come up in these depositions. And each side, I think, to frame this narrowly, would then put their proposal down for what they think the scope of the privilege is and perhaps cite some authority to say why they think they're correct about that and then ask the Court for an order --

THE COURT: I think that's a good idea.

MR. STEPHEN GRYGIEL: That's where we came out in that yesterday after 45 minutes of talking past each other.

THE COURT: Do you think that's something you could

get together by the informal?

MR. STEPHEN GRYGIEL: I believe we can, Your Honor. In fact, we will.

I spoke for you there, Chris, but we will.

MR. CHRISTOPHER SCHMIDT: We will need to follow Mr. Grygiel's lead on that and see the questions that they want to pose.

MR. STEPHEN GRYGIEL: Right. And a number of them, Your Honor, of course, everyone is well aware, nothing is going to come up as a surprise because we had it come up in the McCrossin deposition. Your Honor may remember one of the issues there was -- and it's worth thinking about so that we're all thinking about it the same way, I think, and don't waste more time. Mr. McCrossin had said in the public domain that he couldn't live with himself if he permitted Keith Primo, a former Philadelphia Flyer, to play again. And Mr. Dearman correctly said, "And why did you say that?"

Our view, obviously, is because he knew that there would be longterm neurocognitive impairments and we wanted him to say it, and we couldn't get at that information. We think that's fair game. The Clubs and the Defendants don't, and that's what we're going to sort out.

THE COURT: Mr. Grygiel, I would suggest that you do your set of questions first and try to do that within the next week to ten days and get that to Mr. Schmidt and Mr. Beisner

or who's ever dealing with this on the NHL. And then we'll give them a week to get back to me, and I think that will be a good way to resolve it.

MR. STEPHEN GRYGIEL: Thank you, Your Honor. That makes good sense.

And then finally with respect to document production, we do have a date now for -- just for example Mr. Anschutz. It's September 29 in Denver. And he, of course, is an owner of a team and was an alternate Governor. But until we're sure we do have that entire universe that Mr. Beisner kindly said they're not contesting our right to see, until we have that, it doesn't make much sense for us to agree firmly to dates; I want to pencil them all in because we want to move forward. But until we have a full and fair opportunity to review the documents -- because I don't think at this late date anyone can say, well, Judge, Grygiel was the guy here urging early depositions. The only early deposition at all was Dr. Burke's and that was just taken about a month ago.

THE COURT: Well, the nine scheduled and the five that you're waiting for dates, or whatever the numbers are, who are the Governors?

MR. STEPHEN GRYGIEL: I can give that to Your Honor. Of the ones that are scheduled now, the only Governors or alternate Governors, I believe, are Mr. Cigarran. And that's

August 28th in New York City is what we hope to do, assuming we have all the documents by then, which Mr. Beisner and I have already talked about by e-mail. And Mr. Anschutz is September 29 in Denver. Other than that, we have team executives, doctors, former player, and, of course, Commissioner Bettman is coming up.

THE COURT: Mr. Martino, have you collected documents from Cigarran and Anschutz?

MR. MATTHEW MARTINO: From --

THE COURT REPORTER: You need to come to the mic.

MR. MATTHEW MARTINO: From Mr. Cigarran, yes.

THE COURT: You have.

MR. MATTHEW MARTINO: I believe we have collected for him.

THE COURT: So you expect for him at least you should produce by the 21st of this month?

MR. MATTHEW MARTINO: Okay. Sure. Yeah.

THE COURT: All right. And Mr. Anschutz, are you able to prioritize that, then, given the September 29th date?

MR. MATTHEW MARTINO: Yes, and I -- September 29th is pretty far off. I would think we could have his documents produced in advance of September 29th, yes.

THE COURT: Well in advance.

MR. MATTHEW MARTINO: Yeah, sure.

THE COURT: Okay.

MR. STEPHEN GRYGIEL: And finally, Your Honor, on that point, since Matt's here, of the remaining depositions for which we have asked dates and have not received dates, 41 days on. Three of them are Governors or alternates, and that's Mr. Lemieux, Jeremy Jacobs, and Ted Leonsis. And for those Governors, we have neither dates nor, as I understand it, do we yet have a forecasted completion date for all of their ESI and whatever other documents have not been produced.

THE COURT: Mr. Martino, for those three Governors or alternate Governors, have you collected documents yet for them?

MR. MATTHEW MARTINO: No.

THE COURT: All right. Can you prioritize, then, those, one, two, three, four Governors? That's an Anschutz, Lemieux, Jacobs and Leonsis.

MR. MATTHEW MARTINO: Yeah, we'll make all efforts to prioritize them, yes.

THE COURT: Okay. Great. Thanks.

MR. STEPHEN GRYGIEL: I think with that, Your Honor, I've said what I needed to say. Thank you very much.

THE COURT: Okay. Very good.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, if I may just a couple of points on this from the League's perspective. First of all, on the scheduling, I understand Mr. Grygiel's

frustration on the timing. I do think this, it took X days to schedule a deposition is probably not a very fair measure. As Your Honor is well aware, for example, with respect to the five owners, our understanding initially from Mr. Grygiel's communication was that the focus of those depositions was going to be on Club operations. You heard the concerns expressed by the Clubs at the last informal discovery conference.

On the apex issue, the Court gave your views. And when Mr. Grygiel said, no, the focus is more on the Board of Governors' activities of these individuals, we at the League took over the scheduling process. And we're doing our best to get these scheduled as soon as we can. And these dates are being guided, in part, by what you just discussed with Mr. Martino, and that is getting documents gathered. So, it's not a matter of getting a request in. And we've had to do this with all of these others, as well, is figure out what the document production is, talk to the person, work out dates, and so on.

And so I -- we shouldn't belabor this point, Your Honor, but I just think for the record need to indicate we've not been dragging our feet on this. There have been intervening events that the Court has had to address on some of these. And I think the main thing to look at is, you know, the Plaintiffs asked for ten early depositions before the

completion of -- substantial completion of document production. And, you know, a substantial number of those have been completed.

Those that haven't, you know -- Mr. Fraser retained counsel at some point, so we had to put that off. Mr. Gapski has been delayed primarily -- and I appreciate Counsel's willingness to do it, but he was involved in the play-offs and so we waited to schedule that. So, these are -- and I just want to make clear. I'm not debating the timeframes that he indicates, but I do think that to suggest that there's been some foot dragging on that is inappropriate.

Your Honor, let me -- if I may, I wanted to come back to the objections in the depositions because there's a couple of fundamental things here that I think we all need to be thinking about on this front. And this is just to make sure we're all on the same page here based on some discussions we had earlier. The questions that are being asked in the depositions regard the experiences of former players, for the most part, who are not any of the six named Plaintiffs or the others who have filed lawsuits from whom we will be getting waivers. And I just wanted to make sure we're all on the same page of the scope of discovery that we're supposed to be talking about here, because I have no problem with the questions being asked about individual players who are not named Plaintiffs or in that other group.

But there was a point during our discussion of the Plaintiff fact sheet where I think Plaintiffs were taking the position that, you know, this is all going to be about the six named Plaintiffs. We are permitted to gather information through the Plaintiff fact sheet regarding the 54 others who have filed actions. But during that discussion, the Plaintiffs were saying, well, but you can't use that for class certification. That's not part of it. And I just want to be clear we're on the same page that these inquiries -- and I'm not debating them, I'm not suggesting that these should be shut down in any way -- but that we're all in agreement here that these inquiries about former players who are putative class members and -- but are not the six named Plaintiffs are appropriate because I think both sides are going to want to be making inquiry and producing evidence on the class certification issue that goes beyond the six named Plaintiffs. And I just want to make sure that if we're doing this, the same rules apply to both sides on this.

THE COURT: So, are you saying that to the extent the Plaintiffs inquire about other players, you should get a fact sheet from them? Is that --

MR. JOHN BEISNER: No, no, no, no, Your Honor. I just want to -- and there's really two things here I want to make sure about is that -- that we're likewise able to make inquiry -- I'm not talking about, to be clear, taking

discovery from any of the Plaintiffs, making them be part of the discovery process. But if any are willing to provide information or we otherwise have information about those -- those players that are part of the discovery process, that we have the equal right to talk about those, as well, as part of the class certification process.

THE COURT: Okay. I'm not completely understanding what you're saying. Are you saying that if you have some information about these players, you can use that during the class certification --

MR. JOHN BEISNER: That's fundamentally what I'm saying, Your Honor --

THE COURT: Are you sharing that information you're going to use?

MR. JOHN BEISNER: I'm talking about things that are in the discovery process. Yes, Your Honor. Really what I'm getting at, Your Honor -- just to make sure we're on the same page and I'm remembering -- during the discussion of the Plaintiff Fact Sheets, so these were for the 54 who are not the named Plaintiffs, there was a point at which, if I'm remembering correctly, Plaintiffs were saying you don't need that until next year because that's not relevant to class certification.

Your Honor said, no, we're going to get those done. And I think implicitly in that was saying, yeah, that some of

that information may be relevant, as well, but I just want to make sure we're on the same page because if the rule is we're only focusing on the six, then that's an easy resolution to this. I'm not arguing for that, Your Honor. I just want to make sure we have an equal playing field on this.

THE COURT: Okay. All right.

MR. JOHN BEISNER: Your Honor, the other thing that I did want to raise on this issue that I -- and as I've listened in on these calls, I think there's been some confusion about is the following on this issue. The privileges that are being asserted with respect to these medical record inquiries don't belong to the League, they don't belong to the Clubs. These belong to the former players, the putative class members. And, you know, it's sort of like a situation where I get called as a witness to testify about privileged communications that I had with a client. As an attorney, I would have to decline to answer those questions unless my client waived the privilege.

THE COURT: But, you see, it's very different here because the privilege in the medical setting is a privilege being physician and patient. And I worry, as I said at the informal, that you are extending this way beyond that to any reference to any medical question, whether or not it had anything to do with a communication with a doctor.

MR. JOHN BEISNER: Well, Your Honor, and that's --

that's the scope issue on that, which will resolve through the process. But what is concerning to me is the fact that it's fundamentally the privilege of the patient. The patient can waive it.

THE COURT: The patient privilege has to do with his communications with his doctor.

MR. JOHN BEISNER: Correct.

THE COURT: All right.

MR. JOHN BEISNER: And let's assume we're talking about that. I don't mean to be saying that.

THE COURT: Yeah.

MR. JOHN BEISNER: But it's the patient who needs to waive that. The League can't --

THE COURT: If the question, in fact, inquires about communications between patient and --

MR. JOHN BEISNER: Yeah, and I'm just --

THE COURT: But some of these questions don't do that. That's why we need to drill down on this. Yeah.

MR. JOHN BEISNER: And I'm not disagreeing with that at all, Your Honor. I guess my point is the following, is that we would love to just talk about this. As you said before, we're between a rock and a hard place. We had no concerns about any of these folks talking about those communications, and a very simple solution to this is to ask the player if he has any objection to this.

THE COURT: But only if it, in fact, has to do with privileged communications.

MR. JOHN BEISNER: Your Honor, I have --

THE COURT: And the fact that somebody who is not the physician or the player knows all this stuff makes you wonder whether that's been waived to begin with, you see.

MR. JOHN BEISNER: But, Your Honor, I'm saying that you could cut through all of this by simply asking the player before the deposition if there was any concern about questions being asked of the treating physician on this issue. We could deal with this. And the documents that have been used were disclosed before the deposition. There's no secret about these questions being asked. All that has to happen is for someone to call the player and say, "We want to ask some questions in this deposition about this concussion event. Do you have any objection to the physician answering?" And we're done with this.

THE COURT: All right. Well, we'll keep that in mind, but I want to see these questions, as well, because some of them we don't need to call the player I guess is my point.

MR. JOHN BEISNER: Your Honor, I agree completely with that. But there's this assumption here that -- and again, Your Honor, we need to go through this and I'm not suggesting that there isn't need for clarification on breadth. I thought what Your Honor had said provided clarity. And it's

not clear to me what we're still arguing about on that, but it seems to me that though this suggestion about inquiry about that as though the League or the Clubs are blocking this, it is simply an effort to make sure that privilege line isn't crossed. The Court needs to give some guidance on that.

But again, we're talking here about getting information about putative class members. They're Plaintiffs in this case. All they have to do is say, ask any question you want and we don't -- and we'd love to have that be the outcome because we have no concern about talking about that. But nobody is making an effort to ask these players if they care. They're putative class members here. So, to go back to my example --

THE COURT: I hear you. I understand.

MR. JOHN BEISNER: -- it's like nobody asking my client if it's okay for me to talk about it. That's -- and it seems to me we've missed the boat on the easiest way to deal with this.

THE COURT: Certainly if we're going to take team doctors' depositions, we might want to do that. The question, I think, is when we take others who know about this information because perhaps it was published in an article or -- why we're still implicating privilege in that setting. And that's why we need to determine where the line is.

MR. JOHN BEISNER: Yeah, and I'm not debating it. I

thought we had that resolved from Your Honor's comments, but I'll let Chris address that since he's been in those conversations.

MR. CHRISTOPHER SCHMIDT: Thank you very much, John.

Good morning, Your Honor.

THE COURT: Good morning, Mr. Schmidt.

MR. CHRISTOPHER SCHMIDT: I think that issue is not the issue before the Court, the one that you're raising. From the beginning, the Clubs, if there's publicly-available information, we would always produce that. If somebody -- if there's a public information that somebody knows from a public source, that's fair game.

What we're dealing with in the example Mr. Grygiel gave was Jim McCrossin. Jim McCrossin is an athletic trainer who works hand in glove with the doctor under the doctor's direction. He's the eyes and ears of the doctors, often how an athletic trainer is termed. Involved in his rehab, involved in the confidential medical communications. In those instances, if you want to know why he did something or why a doctor and Mr. McCrossin together reached a medical determination that a player couldn't be cleared to play, for example, and they weren't going to return him to the ice, that implicates a whole host of very confidential, sensitive medical information.

And this is something that the first time we talked

about scheduling the depositions, I raised two concerns. My first concern was I'm concerned about going forward with these before you have the documents. I don't want to put these gentlemen up first. And Counsel said, we understand, that's what we want to do. I said, okay, fine. So, my second concern is this private medical privilege, especially for our team docs and our athletic trainers, because if you want to talk about any player beyond the six -- or the 60, then we're going to have issues. And what I suggested was, hey, we're months in advance of scheduling these, these are -- it's very early, let us know any player you want to talk about and go get the authorization. Let us know in advance, and the trainer or doctor will talk about it.

I think Mr. Beisner said it well: The trainers and doctors would be happy to talk about any care they provided whatsoever, but they need to know that they can do that. And this is ultimately the players' privilege. And so as Clubs, we're in a really difficult position, Your Honor. And the position is it's not our privilege to waive. We can't do that on behalf of the player, and we need to find the right line. And so as a result, you provided very helpful guidance in Mr. Holmgren's deposition: Facts are fair game, what you saw are fair game. If you're the person and you experienced it, what you felt is fair game. Whether someone returned to the ice or not, that's a fact, that's fair game. But the actual

medical diagnosis or treatment or the discussions between the trainer and doctor and the player about their medical treatment are protected. And all of those are fair game if we get an authorization from the player, but without that, that's something that we can't do.

As a result of your guidance, there was -- I wasn't sure if we had actually reached agreement. I thought we had, based on your guidance, and we're prepared to live with that and think it's the right line. Plaintiffs had made some statements to me that made me think we had not reached agreement. I said, can we have a call to discuss these issues? And we finally got it set up for yesterday and did have a long, substantive call where we -- my goal was to try and find common ground. What questions can we ask? All the facts are fair game. Where's the line going to be drawn? And I think the challenge where we got to was, what happens when you have an article where a person or player talks about their medical condition to some extent? How far can we go? Has there been a waiver?

And on that issue, what we've said is, you can ask about what's in the article; you can ask if they recall making that statement. Did they make that statement? But you can't go beyond it. And the case law supports that. And we can brief that, and I can take you through chapter and verse. But essentially -- and I can cite one case from the Colorado

Supreme Court where the Court -- where Plaintiff had actually put his medical condition arguably at issue by claiming emotional distress and mental anguish.

The Defendants wanted to get into that Plaintiffs' medical condition. And the Colorado Supreme Court said, no, you can't. Just because you claim mental anguish and even though you're the Plaintiff, that doesn't operate as a complete waiver.

THE COURT: Well, but what -- I've seen those cases. I've seen that argument made in connection with employment cases.

MR. CHRISTOPHER SCHMIDT: Right.

THE COURT: Where there are claims for emotional distress, that is a very different issue.

MR. CHRISTOPHER SCHMIDT: I agree, but what I think is instructive about that, Your Honor, is that there it was actually the Plaintiff. Here we're dealing with nonparties, parties who have not put their medical conditions at issue. And so when we get to these questions, there's, I think, two solutions. One is the court could -- a court could find that there has been some sort of waiver, and then we'd have to define to what degree; or we could get an authorization or some -- some permission to talk about those conditions and --

THE COURT: I don't disagree with you. I think the first inquiry is, is it seeking privileged information? Is

the question seeking privileged information?

MR. CHRISTOPHER SCHMIDT: Agreed.

THE COURT: And then if it is seeking privileged information, has there been a waiver?

MR. CHRISTOPHER SCHMIDT: Agreed. And then to what extent --

THE COURT: (Inaudible due to overlapping speakers.) And I think frankly from the discussion we had during the deposition, I was concerned that we were talking about some questions that didn't seek privileged information. That's what I'm trying to say.

MR. CHRISTOPHER SCHMIDT: And I understand that, and that's an appropriate distinction. And your guidance was very helpful. What we are focused on and what they're focused on is the doctors and the trainers where it's clearly medical privileged information. They've acknowledged it in their briefs. And there, we -- I can't make that decision, and the trainer can't, and the doctor can't. Only the player can or a Court. If you want to rule on an individual player basis that there's been a waiver, then -- then that seems incredibly cumbersome to me. I think there's a more eloquent solution, a simple solution which is, if you want to get into that, there's only, in any given deposition, going to be two or three players that are nonparties that they really want to talk about.

THE COURT: Okay.

MR. CHRISTOPHER SCHMIDT: They can get those -- and if they can't get those authorizations, then I think the player has spoken, he really doesn't want -- has spoken by silence that the player doesn't want his medical conditions discussed any further.

THE COURT: But you're willing to participate in what Mr. Grygiel said, this briefing to the Court where I actually see the kinds of questions that might be asked and your response to --

MR. CHRISTOPHER SCHMIDT: Absolutely.

THE COURT: -- whether they're privileged in the first instance and the like?

MR. CHRISTOPHER SCHMIDT: Absolutely. Your Honor, thank you very much.

MR. STEPHEN GRYGIEL: Very briefly, Your Honor, Steve Grygiel again.

I'd like to make just a couple of points. I understand Mr. Beisner's approach and Mr. Schmidt echoed it which is, Your Honor, if we could just cut through all, and the pronoun was "this." Well, the "this" is an artificial construct in many cases, as Your Honor points out.

For example, let's make this specific so everyone understands exactly what we're talking about. Apart from the NHL defense I've already mentioned -- that we gave the

warnings, you guys are all wet, we gave the warnings -- there's another one, and that is, we had a Concussion Protocol, and we have modified it, and we gave it to the Clubs, and the Clubs are required to follow it.

But then we get a document that shows Julie Grand, who's on this call, saying, the Clubs aren't following it to the extent of some 36 percent of the time, we see players visibly concussed on the ice. Those are players observed by the Concussion Working Group, not the team doctors, and not the team trainers, who are visibly concussed while they're playing the game. And then there's an e-mail chain saying, that doesn't sound like it's being complied with. I'm paraphrasing, but Your Honor gets the point. Those are certainly things we're going to want to inquire about. How did they measure that? Who were the players? What was the team? And make sure that maybe there is -- maybe there is more players like that.

Very important to us. So, it's not as Mr. Schmidt said. I think in fairness, it's not just doctors and trainers. It's going to be the fact witnesses, as well. And number two, as to the question of the "this," we can just call these forecasted players whose names may or may not come up and ask them, not only is it cumbersome, I think it's completely legally unnecessary and unduly burdensome for the Plaintiffs if there is no privilege in the first place. And

if there is an NHL document that lists the names of the players who have been concussed, where on the ice they were, what their symptoms were, or whatever it was that details this particular concussion and it goes to the Board of Governors and it goes to the General Managers and it goes to the NHL executive offices who are talking about it, I find it hard to see, Your Honor, how anybody could say that is a protected patient privilege. That's just not there, and that's what we're going to be talking about in this upcoming correspondence with the Court.

Two other points. Mr. Beisner made the point that early --

THE COURT REPORTER: Mr. Grygiel.

MR. STEPHEN GRYGIEL: I'm sorry. When I try to get done quickly, you see what happens.

THE COURT: And she appreciates that.

MR. STEPHEN GRYGIEL: I know she does, Your Honor. And I told her I have no shame, you can tell me any time.

In terms of the early depositions, while we scheduled three, we asked for three on February 23rd. Of those three, we have two, and they didn't take place for, I think, two-and-a-half months, and that was Mr. McCrossin and Dr. Burke. They didn't take place for at least two-and-a-half months after we asked. Obviously Mr. Bettman is not going to be until July 31. I think to say that we asked for early

depositions and we got them all is just not right. That's not where we are today. Now these are standard. Lots of documents out there. Since they're there, we're going to use the documents and take these depositions.

And finally, Your Honor, on the question of the owner depositions, I don't think I said at our conference that we were strictly going to focus on the owners' rules as members of the Board of Governors. And Mr. Beisner and I have had an exchange about this. I think we're in agreement, we will obviously ask these folks questions about their Club operations concerning the concussion issues, and if they don't know, they don't know. It will shorten the deposition. But as Your Honor knows, we'd like to do this only once, and it makes sense to ask them since they're going to be there.

Thank you, Your Honor.

THE COURT: Okay. I have a suggestion here. It would apply to both sides of the case, and I think it might help you when you're scheduling your witnesses to say, hey, the Court has a rule on this. And the rule would be that either side would have to respond to a request for a deposition within two weeks. So, if the request is made, there needs to be a response within two weeks with a date, and that date needs to be within the following six weeks. That seems like a reasonable schedule, and I think that will actually assist primarily the defense with their witnesses

saying, hey, I got to get back, the Court has a rule.

So -- okay. I haven't heard from the Plaintiffs on Mr. Beisner's point.

MR. JOHN BEISNER: Your Honor, just a quick point on that because I think it applies to most of these. I do -- I did want to just make sure that if there are issues regarding the deposition, we will raise those --

THE COURT: We'll call it a rebuttable presumption. Okay?

MR. JOHN BEISNER: Just wanted to make sure because that, for a large number of these, we did have some clarification we could --

THE COURT: Good cause will work, yes. Okay.

All right. Mr. Zimmerman, do you want to address Mr. Beisner's question about the scope of briefing on class certification with respect to these non-class folks?

MR. CHARLES ZIMMERMAN: Yeah. Well, what I really wanted to say, Your Honor, on that was I think we should be talking on the agenda going forward, is this whole thing of class certification and preparing for that because this is really what Mr. Beisner is starting to talk about, which is the impact of all this on class certification and how wide this tent of privilege and/or the tent of discovery go with regard to class certification issues. And so even though I wasn't prepared for it today because it wasn't something on

the agenda and I know that John gets crazy if I talk about something that's not on the agenda, it's fair game that we should be a little more free-wheeling here and be able to address it.

I'm not sure what John was really driving at there. We don't have any problem with trying to provide information that -- from Plaintiff Fact Sheets of the 50, of the 54. We don't have a problem with this medical question as much as they do. They -- it seems to continue to bother them, and we're of the mind that we're looking not for individual medical information as between doctor and patient -- doctor and player. I don't know that there's a trainer privilege. I think that's a little broad. I don't think we have trainer privilege. I think there's a doctor privilege. We're not trying to get to that, and we're not using that in any way for our discovery purposes, but we're trying to find out who the protocols were, what the practices were, what things have been put out to the press, as Steve Grygiel has just mentioned.

The impact on class certification, I'm not prepared to address that really particularly today, other than to say I think we should be starting to talk about it and be prepared to have free discussion with the Court on it. But it seems to me what we're really talking about, practice and procedure, policies that were in place, how things were handled in a generic way, used, of course, by example in particular

instances. But we're talking about class issues that are the type of process and procedure and common course of conduct and the way the League handled itself and the way the trainers handled direction from above, that's where the class certification questions come in. And these are not about individual players.

Obviously, the defense, in an effort to perhaps defeat class, will try and talk about, oh, no, no, this is really an individual question, it's really a question of individual -- done to an individual player and you have to get a waiver and you have to get the player to sign on and waive and we just don't think we have to go there.

THE COURT: Mr. Zimmerman, I appreciate that you are going to argue what you're saying now at the time of class certification motion, and I think you appreciate that Mr. Beisner is going to focus probably entirely on the individual folks. I think his question is this: Are you on the same page about absent class members? I mean, we have Plaintiff Fact Sheets from the named Plaintiffs and the 54, but he's talking about absent class members now, and I think you need to talk about that.

MR. CHARLES ZIMMERMAN: Sure.

THE COURT: I don't have the answer to that off the top of my head, but I want you folks to have some understanding about that.

MR. CHARLES ZIMMERMAN: I can tell you this, Your Honor, and we've talked about this in chambers and I think we've talked about it in court. We are setting up a protocol. We're setting up a way to do Plaintiff Fact Sheets that would be easy and available and efficient for the entire group of Plaintiffs or putative class members that are out there when the time comes that that's important and relevant. The whole idea of doing the Plaintiff Fact Sheet came from me, as well, saying let's come up with a Plaintiff Fact Sheet that's ordered, that's reasonable, that's reasonable in scope, and we can do it electronically, and then we can have it done in a 21st century way. And we're putting that in place.

So, in answer to the question, we're preparing to have that rolled out. The question is when: Before class certification, after certification, if class certification is affirmed, if class certification is denied. Those parameters will help us define it, but we're preparing our Plaintiff Fact Sheet and we're preparing our protocols so that we can roll out to all affected retired players.

THE COURT: I think you need to talk about this. I am worried you're not on the same page on this. Yeah.

MR. CHARLES ZIMMERMAN: Okay. And I'm happy to talk about it.

THE COURT: Okay.

Mr. Beisner?

MR. JOHN BEISNER: I don't want to belabor the point, but just while we're here and talking about it, I think what you just said raises the issue. And you're talking about the Plaintiff Fact Sheets, when the time is right and so on, which suggests to me that you're, again, going back to what was said during the meetings with the Court which was, well, nothing -- only information about the six named Plaintiffs can -- is fair game for discussion during class certification, such that these drill-downs we're doing with respect to unnamed class members in these depositions and all these communications with physicians and so on is outside that scope. I love it. I'm happy for this. I love that, you know, to test our defenses, there's got to be exploration of individual Plaintiff circumstances.

And, you know, you can be sure all of this discussion is going to be in our class certification brief. But I just want to be sure that if we're spending time in the depositions drilling down on people who are not class representatives, as has been happening in these depositions, we're not going to turn around and say, but you can't talk about anybody who isn't in -- named in that Master Complaint. You can't talk about their experiences, you can't talk about any other evidence that may be in the record. That's simply a -- and, Your Honor, I'm sorry to belabor this. I just wanted to make sure, agree with you, I think that frames the

issue.

THE COURT: I think it does, and I can tell you need a meet and confer. I'm not sure you've had this discussion so -- with each other. So --

MR. JOHN BEISNER: But again, if the conclusion is we're only talking about the six, that takes care of this because we're not talking about these drill-downs --

THE COURT: Just be on the same page on this. Okay.

MR. JOHN BEISNER: Yes, that's all.

THE COURT: All right.

MR. CHARLES ZIMMERMAN: So, my suggestion that we should have class certification issues on the agenda seems to be a good one, and we will continue to have it and we will meet and confer.

THE COURT: Okay.

MR. CHARLES ZIMMERMAN: The next issue, Your Honor, is third-party discovery update. Third-party discovery update is going to be Brian Penny, and it's going to really touch upon a little bit of what we've just -- of what we just discussed. But I think it's -- I think it's important, and I think this update will again frame -- frame a lot of the questions that we're struggling with right now.

THE COURT: Okay.

Mr. Penny.

Good morning, Mr. Penny.

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

Actually slightly different than the way Bucky just described it, I was going to give you the third-party update and try to be very careful not to let that update bleed into the next agenda item, which is to discuss the motion to compel the subpoenas, responses to subpoenas to the U.S. Clubs which deal with private medical information. So, just on third-party discovery, aside from PMI issues the update is somewhat similar to the Board of Governors update.

As you'll remember, Plaintiff subpoenaed the U.S. Clubs back in the end of January. We finally agreed on custodians and search terms at the end of May. That discussion or that negotiation was actually linked to the Board of Governors' discussion on search terms, and so the search terms for both sets of custodians is essentially the same. And I believe the collection process is also essentially the same. And I think Mr. Schmidt will probably give us an update of where they are because, frankly, we don't really have a good sense of where they are in the collection process, and we certainly don't yet have a commitment date on when the first productions were -- will start rolling out and by when those productions will be substantially complete. So, I'll wait to hear that update from Mr. Schmidt.

As regards to some of the other third-party

discovery, we've been taking a wait-and-see approach a little bit, trying to be very cognizant not to seek duplicative discovery from other third-parties. So, examples of that are Dr. Lovell and ImPACT. If we can get some of the information and databases that Dr. Lovell and ImPACT have collected through their neuropsych testing program from the NHL, we might not have to seek it separately from those two entities. Same goes for Chubb Insurance Corporation that provides some workers' comp insurance for the teams. If we can get certain data and information from the NHL, we may not need to seek all of that or some of that from Chubb.

So, we're taking a little bit of a wait-and-see approach with them. And if there are holes that need to be filled in and those third-parties can fill them in, then we'll resume the negotiations with them. And I can just give you, it's essentially the same update on the Canadian -- the letters rogatory to the Canadian Clubs. We really feel like we're only going to get one shot with each of those Club -- or excuse me, with each of those courts in the various provinces in Canada. And part of our burden will be to show that we are not seeking discovery from those third-parties that we can get from, perhaps, the NHL. So, we need to first see what the Board of Governors are going to give us, see what the NHL database can give us before we actually embark on the letters rogatory process. So, that's the update for third-parties.

THE COURT: You bet.

Mr. Schmidt.

MR. CHRISTOPHER SCHMIDT: Good morning, Your Honor. Our update is similar to Mr. Martino's. We are coordinating with the Clubs to try to get the relevant e-mails. I think we could really follow very similar schedule by July 21st to have roughly about 10 of the Clubs' first production completed. And the goal then, I believe the Court gave the -- to complete all of those was the end of August. Was that the goal on that and that's what we're striving to, as well. And we will continue to pursue it --

THE COURT: And to the extent that the Plaintiffs would like you to prioritize any of that, you should --

MR. CHRISTOPHER SCHMIDT: Happy to do so. And, in fact, we were planning to do that without even them asking. We had scheduled already Mr. Gapski's deposition for July 15th, as soon as the Stanley cup was finished, and we just heard yesterday they may want to postpone it. But we were going to try and get that production out in an expeditious fashion. It looks like that's not an issue right now, but we will do that, of course, Your Honor.

THE COURT: Okay. Sounds good.

MR. CHRISTOPHER SCHMIDT: Thank you.

THE COURT: Mr. Penny? Oh, Mr. Beisner.

MR. JOHN BEISNER: Your Honor, if I may just on one

point, and perhaps Mr. Penny will respond to this. Just in terms of timing issues here, Plaintiffs are perfectly free to proceed as they wish, but consistent with the concern about timing.

At the very first status conference, there was discussion made by one of Plaintiffs' counsel about initiating a letter rogatory process to get the information needed from the Canadian Clubs. And, you know, I think the information that is being -- that we agreed to collect from the Clubs is with respect to the BoG members that had been agreed upon. I just want to make clear that if Plaintiffs are intending to seek the broader collection of discovery that's been sought from the U.S. Clubs, that's not going to be part of that. We're doing the review -- correct me if I'm wrong, Matt -- with respect to the BoG members who have been specified. This isn't a general production from the Clubs.

And, you know, they're separate entities, and that's the decision they've made. We've done the Governors' search because of the purported relationship with the League. So, just in terms of timing, so we're not coming back here later and saying, oh, we've got a big delay, get the train started. You know, this initial issue is raised at the very first status conference, and if those requests are to be made, get them started. The -- my understanding from the Clubs -- Canadian Clubs' counsel is they're not resisting discovery,

they're just saying, go through this process so we can deal with these issues in the Canadian court system. But they're not saying they're not producing. And the delay here is that no one has started that process.

THE COURT: Okay. Mr. Penny makes a good point, though, about concern about whether the courts will order this production. And in Canada, I presume the letters rogatory have to go through the court system there.

MR. BRIAN PENNY: They do, and it's a very detailed process. And like I said, I really believe we'll only get one shot at that. So with all due respect to John's concerns about timing, we really can't proceed until we feel like we've got our best position to put forward to those courts.

THE COURT: But it looks like we'll have substantial completion by the end of August, so you should, early fall, be able to take a look at that.

MR. BRIAN PENNY: I mean, I just heard Mr. Beisner, though, say that the Canadian Clubs are not resisting production, but we have to then go through this very long and detailed process of getting the letters rogatory issued first. If they're really not resisting production, I wish they would just respond to the subpoenas. I'd be happy to send them out, you know, tomorrow, and we could go through the same process we did with the U.S. Clubs. But --

THE COURT: Mr. Beisner, do you think there's any

chance we could avoid this unnecessary process?

MR. JOHN BEISNER: Your Honor, the problem is what we talked about earlier, and it's the medical records issue. They need a Canadian court direction on what they would be doing on those issues, which is based on the request of the U.S. Clubs, a lot of this.

THE COURT: Well, then let's do this. When -- I'll get these questions, I will give you my viewpoint. Perhaps we can then stipulate to an approach to that, and you can give that to the Canadian court.

MR. JOHN BEISNER: And, Brian, I understand your position, but I think just getting this rolling, it may mean it gets winnowed, it may mean there aren't disputes about things, but I'm just not sure that it's wise to be waiting on that. Again, I -- I don't mean to be telling anybody how to litigate the other side of the case, but it -- you know, I think we heard in the first status conference we're going to need a letter rogatory and get this started and it just hasn't happened.

THE COURT: But Mr. Beisner, wouldn't you agree that the Canadian court is going to wonder how this Court has been handling the medical issues with the U.S. Clubs, and so I'm not sure it could have happened any faster.

MR. JOHN BEISNER: I didn't mean to suggest that what you were just suggesting isn't the appropriate way to

proceed. But what I'm saying is, you probably would have had production there by now had the process been started when you did it with the U.S. Clubs.

MR. BRIAN PENNY: Okay. So, this is all new information, again, and this is now the first time I've heard that the only objection that the Canadian Clubs might have is really just a private medical information because the U.S. Clubs are producing other information, apparently, is being collected as Mr. Schmidt just mentioned about e-mails that don't relate to private medical information. So, again, if the process is I send them the subpoena and they start producing non-PMI and we talk about PMI separately with them, I'm happy to start that process --

THE COURT: Is that possible, Mr. Beisner?

MR. JOHN BEISNER: Again, I don't know why there hasn't been a discussion with the Clubs there about what can get started. It just hasn't been pursued --

MR. BRIAN PENNY: Well, the problem --

MR. JOHN BEISNER: And I can't speak for the Clubs, Your Honor. I don't mean to suggest that. But the -- there has been no presentation of -- as far as I know, tell me if I'm wrong -- of a proposed subpoena to them --

MR. BRIAN PENNY: Oh, there has been. In fact, the very first conversation I had with Mr. Shamie, Canadian Clubs' counsel, was I offered -- I gave them an example -- or an

exemplar of one of the subpoenas. I said, here's what I would like to serve on your Clubs; will you accept it? He said, no, you have to go through the letters rogatory process.

It was the same conversation I had with him when we tried to schedule Mr. Shanahan's deposition which was, here's a subpoena for Mr. Shanahan; can we have a date? He said, no, you have to go through the process of serving it through Canadian law. I drafted an 18-page motion. I tried to meet and confer with Mr. Shamie on it for two weeks -- actually, three weeks.

He couldn't get in touch with his counsel -- excuse me, his client. I then filed the motion. A day later we got the date, and Mr. Shanahan told the Toronto press, I never objected to having my deposition taken. Well, if that's true, why did I have to jump through the hoop of writing an 18-page motion to get a date for a deposition?

MR. JOHN BEISNER: Well, I think what's missing here is they are saying that they want you to go through Canadian process. That doesn't mean that they don't agree to produce once you have done that. And that seems to me to be the disconnect here is, if you talked -- and again, I haven't been in these conversations, and I apologize --

MR. BRIAN PENNY: I understand.

MR. JOHN BEISNER: -- because I haven't been there, but it seems to me if I can make a third-party suggestion here

that if you talk to Canadian counsel and say, we're going to go through this process, we're going to do this under Canadian law, but let's talk about what you are going to do once we do that, it seems to me you're not getting past the point of your saying, will you do it without my going through the letter rogatory process? That's where the conversation is ending, and that's what I'm just suggesting. And I should probably stand down now because this is a discussion with the Clubs.

MR. BRIAN PENNY: I will take that suggestion. I will call Mr. Shamie again and see if he's had a change of heart. But what I don't understand is why Mr. Shamie is going -- has told me before, and with Shanahan's deposition scheduling he told me the same thing, you have to go through the process. If going through the process means he's not going to then object to the process once it gets underway, why did I even have to start it to begin with, why didn't you --

THE COURT: Why don't you place a call. Why don't you tell him what Mr. Beisner has suggested. And I mean, Mr. Schmidt, can you be of use here too (laughter) --

MR. CHRISTOPHER SCHMIDT: That may be debatable. So, here is my thought on this process is we went through a pretty extensive, very civil meet and confer process and reached an agreement on the U.S. Clubs. I think Mr. Beisner's point is entirely right, that the Canadian counsel -- Clubs should have the right to the procedural protections of going

through the letters rogatory process. I'm not aware of Plaintiffs, though, going to Canadian counsel and saying, hey, this is the deal we reached with the U.S. Clubs. If we go through this process, would this be acceptable?

I kind of think there might be a middle ground here, but the Canadian Clubs clearly are entitled to the protection of Canadian law and are clearly entitled to go through the letter rogatory process. But as Mr. Beisner said, that doesn't mean they've ever said, hey, we're going to resist this or we're not capable of finding a reasonable solution. So, I think what we have, to quote Cool Hand Luke, is a failure to communicate here. Plaintiffs should start the process; it should call Canadian counsel. We reached a deal in May. Why haven't they done anything? And we're in July on this issue.

THE COURT: Well, maybe what would be useful is if you would be on the phone so you can describe what you've done for the U.S. Clubs.

MR. CHRISTOPHER SCHMIDT: Happy to do so, Your Honor.

THE COURT: Okay. Very good.

MR. BRIAN PENNY: Okay, I'll take those suggestions and I'll make some phone calls to see where we get.

THE COURT: Okay. Sounds good. You'll report to us at the next informal, then.

MR. BRIAN PENNY: Yes, Your Honor.

THE COURT: Okay. Very good.

MR. CHARLES ZIMMERMAN: I saw Cool Hand Luke. I feel like the guy that's been in that box where we had -- that was a result of the failure to communicate.

Really, Your Honor, you know, I listened to this and we're trying to find easier ways, not harder ways. And so anything we can do to cooperate and anything the Court can do to help us reach these points, I mean as Plaintiffs, we're not trying to make it difficult. We're trying to make it easy. We're not trying to wait and delay and make -- give ourselves more work. We're trying to have less. And so it's a little counterintuitive.

But having said that, more communication is better. We'll communicate more. We'll ask more questions, and maybe the Court, with its guidelines on the private medical information question, will help break a little bit of the logjam. But up to now, we've really been told that, you know, you got to go through the Canadian stuff and the Canadian stuff is your only way to get it. And we assumed that what that meant was we have to go through the Canadian stuff. And we didn't want to start doing it until we had the parameters of what we could ask for determined by this Court. So --

THE COURT: Where is Canadian counsel located? Is he in Toronto?

MR. CHRISTOPHER SCHMIDT: Yes, Your Honor.

THE COURT: Okay. All right.

MR. CHARLES ZIMMERMAN: Okay. Motion to enforce subpoenas directed to the U.S. Clubs.

THE COURT: You know what, I think what we'll do is take a break.

MR. CHARLES ZIMMERMAN: Sure.

THE COURT: Where are we here, yeah, we're just on item six. So, we will resume in 15 minutes, at quarter to. Court is briefly adjourned.

(Short break taken.)

MR. DANIEL CONNOLLY: Your Honor, if I may.

THE COURT: Yes, Mr. Connolly.

MR. DANIEL CONNOLLY: When I made the introductions of the people on the phone earlier today, I forgot to point out for the Court that we have brought along Rich Bernardo, Matt Stein, and Dennis Kiker, who is from the Granite Legal System. And they are here to talk to the Court about the database issues you asked during the informal conference that they be present, and I just wanted to let the Court know that that resource was available to you.

THE COURT: Thank you. We appreciate you being here, and we're going to get to you soon.

MR. DANIEL CONNOLLY: Thank you, Your Honor.

THE COURT: All right. Very good.

Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: I think with those introductions, it does tip the balance towards the more populated side being the defense this time.

The next issue, Your Honor, is motion -- motion to enforce the subpoenas directed to the U.S. Clubs. And again, that will be Brian Penny for the Plaintiffs. The good news is, though, Your Honor, number eight, the medical -- personal medical information privilege, I think we've exhausted that issue, so that one can be stricken.

THE COURT: Okay. Very good.

MR. CHARLES ZIMMERMAN: Thank you.

THE COURT: Mr. Penny.

MR. BRIAN PENNY: Morning again, Your Honor. Just by way of an update, we did receive the NHL's letter describing the various databases that they have. I know that the Court is in receipt of that letter, as well. That was very helpful, and I appreciate all the disclosure in that letter.

For one thing, I think it helped confirm a little bit for Plaintiffs that there is a bit of redundancy between the various databases. So, one of the things that we are working on right now is to try to determine, through consultation with some of our experts, both IT experts and other consultants, if gaining access to some but not all of

the databases might give us all the information we need. I don't know if that's going to be practical, but if it is, we'll certainly try to pursue it from that approach.

But one issue that is becoming quite clear, and I think I forecasted this being an issue back on June 4th when we had the discussion -- or excuse me, the argument on the motion, and that is that when we try to de-identify some of these databases, it's becoming very challenging. And I think the challenge stems in large part from the fact that the injuries themselves are very public events, they happen in -- most of them happen in NHL hockey games that are seen, broadcast on T.V. and seen in the arena by thousands of fans. And the players themselves are very public persona.

And so when you try to go about de-identifying fields in the database that discuss these injuries or the players, it becomes very challenging because even a little bit of information might be used by some expeditious person to identify the player. For example, one of the fields that is being claimed as sort of private is the players' native language. And I think the concern there is that for some native languages, there are only so few hockey players that speak some of those languages, that just knowing the player's native language alone might help you identify the player. But yet you'll see in the letter, as well, the description of why knowing the player's native language is important to

interpreting the neuropsych testing results for that player. And so if you take that field out in an attempt to de-identify the database, you're losing critical information that the Plaintiffs need to assess both what the NHL did with that database and what we might do with that data.

Another very acute example of that is the date of injury. Because the injury was so public, if you have the date of the injury, somebody might be able to pull an actual video clip, a very public event, to identify the player from the date of the injury. But, of course, I think you can -- as I think you can imagine, the date of the injury is going to be an important piece of information for us when we try to use this data with some of our experts. It also becomes a major issue when you talk about the database that was created for the video analysis project. And that was a project which attempted to match the video of the injury to some of the medical information about the injury. And so I really can't think of a practical way in which you can de-identify the video itself or disaggregate it from the medical information and still have the same database and same information that the NHL collected.

And so I think part of the problem, again, is because all of this is so public, it's becoming very challenging to try to de-identify it. And so that's where I think the most elegant solution -- and I'll sort of renew my

argument that none of this information is actually private, protected medical information. And I think that becomes quite clear when you look at some of the Defendants' own documents.

In opposition to the motion to compel -- and we cite this in our reply brief -- there was a Daly -- a Declaration from Bill Daly in which he includes -- or attaches several authorizations that were signed by the players in connection with collecting a lot of this information for the Concussion Program. And these authorizations have the same language going all the way back to 2003. And the authorizations explicitly state -- and this is the player who signs this -- "I understand that any of my health information that is disclosed pursuant to this authorization may be redisclosed by the recipient of such information and, upon such redisclosure, may no longer be protected by federal healthcare privacy laws and rules."

That's a clear indication from the player that he knows the information about his concussion is not going to be held confidential. Also on the June 4th argument I showed Your Honor some PowerPoint slides of some of the injury reports that the teams issued, and then some other public media reports and press inquiries that were all collected by CBS Sports about a certain player's concussions. It was all sorts of information there, not just on the diagnosis of the concussion but on the treatment of the concussion, when the --

when he was expected to return to play, et cetera. And all that information, again, going back decades, players understand that that information is going to be made public.

And as Your Honor mentioned at the June 4th hearing, Article 34 of the most recent CBA makes that quite clear. And I'm quoting right from it. The following information is not going to be confidential: The nature of the player's injury, the prognosis and anticipated length of recovery, the treatment and surgical procedures undertaken or anticipated in regard to the injury.

This is essentially all of the information that we're talking about here. The most elegant solution is to just simply acknowledge that this information is not private. And as Your Honor acknowledged in some of the guidance you gave us on June 4th, information that's in the public domain is not protected by a private medical privilege. If we can reach that resolution, there's no need to try to de-identify these databases and remove information that is going to be critical to our analysis.

That's all I have for Your Honor on that.

THE COURT: Thank you.

Response from the NHL?

MR. CHRISTOPHER SCHMIDT: Your Honor, if I may just briefly address the Court -- and, please, please come up, as well -- the consultant and Skadden have taken the lead on the

database analysis, and the only thing that I would say is when we engaged in this process, it was with the Court's guidance and understanding we would do the database search in an anonymized, de-identified way. And there are very important privacy interests that the players have. Plaintiffs acknowledge that in their briefs. And I don't -- I think if we get -- I hope we're not re-arguing those issues. I thought we were talking about how to produce the data in a de-identified way, and that's why we have just turned it over to others who could look at it on a global basis. If we have to revisit these issues, then I would ask for more formal opportunity to brief those issues.

With that, I will step down.

THE COURT: Okay.

MR. RICHARD BERNARDO: Good morning, Your Honor. And for the transcript, this is Richard Bernardo. I will represent the trio of what I will refer to as the Geek Squad from the NHL. And I think we're getting a little bit ahead of ourselves with --

THE COURT: Are you referring to all of these people being the Geek Squad?

MR. RICHARD BERNARDO: I will leave that to the Court to decide (laughter).

THE COURT: Yes, Mr. Bernardo.

MR. RICHARD BERNARDO: There's an equal one from

Plaintiffs' side.

Let's take a little step back, as Mr. Schmidt pointed out. There's already been discussion, and we went into these discussions and had a very productive meeting with Plaintiffs' counsel to discuss de-identification and what we did was, as you know, we provided a letter that set forth all the databases. And as Mr. Penny observed, I think it's become clear that there's a fair degree of overlap from one database to another.

We also, as you probably saw with that letter, provided some preliminary analysis of fields that NHL and the Clubs believe ought to be de-identified. However, as we emphasized to Plaintiffs, that is a concept that we're going to need to continue to discuss because the scope and nature of de-identification is going to depend in large part in what fields Plaintiffs are interested in having information produced from because these databases interrelate. And while within one database, it may not reveal personal, private medical information if you de-identify it, information from that database can be linked to other databases that would then disclose information. And again, I'm not here to re-argue, and I'll defer to my colleagues to make the points about the agreements and waiver and all of that. I'm really here to talk about the practicalities of producing the information.

Mr. Penny referred to a few fields in particular,

and again I think the process needs to work a little bit more. We talked about I think about 24 fields that Plaintiffs identified at our meet and confer. And during that conversation, we talked about different ways in which we could anonymize them. And to be specific, I think de-identification has two components. One is absolute redaction, where we would not provide the information; and then the other is to anonymize it, to create some code that would give them the benefit of the substance of the information that they're trying to work with without actually disclosing the information itself. And we believe that there are ways within some of the fields that we talked about to do that and to accomplish that.

I'm not here to say that there's not going to be any dispute because there may be one or two fields that we need to come back to Your Honor. I'm here simply to say I think it's premature for the Court to really address the specific fields and the specific issues that Mr. Penny raised because I think the Clubs' positions are really largely going to be dependent upon them coming back and telling us, okay, we've digested your 60-page letter and these are the databases we want and these are the fields we want. And in fairness, too, they asked us some questions that we were unable to respond to and we're doing a little bit of due diligence to provide further information.

So, I would suggest, if I may, that the Court permit the parties to continue the dialogue that we've been having, which has been very productive, identify what the database is the Plaintiff wants and see if we can narrow down the issues to ones that are clear and crystallized and, if necessary, submit further papers on that.

THE COURT: Okay. Let me ask one question, and then I'll respond to that. In terms of the anonymizing piece of this, what I had in my head was that the Plaintiffs would be able to -- it would be coded in a way that the Plaintiffs would be able to track a player throughout all the information about that player in the database. In other words, fields and various databases would all be anonymized in the same way so that, although you might not know the name, you would know everything that that database had or those databases had about that player. Do you see what I'm saying?

MR. RICHARD BERNARDO: I certainly do, Your Honor, and that's exactly what we had in mind. And you really honed in on the very issue we had is that there is an interrelationship among these databases so you can't look at, for example, a video analysis database in isolation and say, well, this is public information, because providing that without anonymization is going to link you to other information, in the way that we do this, that would be private. So, we completely agree with Your Honor in terms of

how to anonymize it, but I think that that process may raise other issues.

THE COURT: Well, and I think the issue that Mr. Penny raised is a challenging issue. So much of this is public. And of course you weren't there when they argued about the provision of the CBA and the authorizations that permit redisclosure and the like but -- and so I'm still struggling with that. I'm really sort of hoping you can work this out. But if I have to rule, I have to rule eventually.

MR. RICHARD BERNARDO: Of course, Your Honor. And that's what we're hoping that we can do is that maybe through a process, for example, in date of injury, there may be a way to code that where it doesn't pinpoint the specific date but it provides them with the type of information that they would need for their analysis that we want to get from the date that's something other than date itself. So, we are hopeful as well that we can come to some agreement.

Again, there may be some issues we need to come back, but I think it's just premature for the Court and for the parties to focus on particular fields in isolation and say that they are or they are not worthy of anonymization.

THE COURT: Mr. Penny, do you -- would you find it acceptable to continue the meet and confer process, to invite these folks to our informal and so we can attempt to see if we can reach resolution?

MR. BRIAN PENNY: We can continue the meet and confer process. I'm just not very optimistic that we are going to reach a resolution. And I don't know if you were speaking past each other. I was maybe misinterpreting what the Court said, but I don't think that the Defendants completely agree with your understanding of how one of these databases would be redacted.

What I understood Your Honor to say was that a database would be anonymized in the sense that the player's name would be given an anonymous number. But all the other information including the date of injury, the date of neuropsych testing, et cetera, would remain in the database. And I don't think that the NHL is going to agree to that. If they would, we would be fine.

MR. RICHARD BERNARDO: And to Mr. Penny's point, Your Honor, he's right. I think I understood you to say that one of the things we would do is to anonymize it so you can interpret the data across databases and Player 1 in the first database isn't going to be Player 5 in another database. But that anonymization may not be sufficient to protect medical information, and that's something that we're prepared to address on an individual basis as it arises. And we did address that in the letter by pointing to those fields that we thought gave rise to issue.

MR. BRIAN PENNY: And, again, I'm perfectly willing

to engage in another or some further meet and confers. What I'm really hesitant to do is engage in weeks' worth of meet and confers when we've, months later, decide we are at an impasse and then we need Your Honor's guidance because I think we're careening toward that very quickly. I think there are some critical aspects of the databases that I don't think you will yield to but which we think are incredibly important to our analysis of those databases.

One perfect example is this video analysis project database. The entire idea of that database was to link the videos of the concussive events to the medical records about those concussive events. You can't disaggregate those and say, well, the videos are public, I'll give you those, but I can't connect them for you to the medical records. The whole point of the project was to connect those two together and then analyze --

THE COURT: But why can't you connect them in an anonymous way? In other words, you could connect -- because I guess because the video would --

MR. RICHARD BERNARDO: And this is precisely the issue, Your Honor, I was trying to see if we could avoid in trying to discuss because where we left it in the discussion was Mr. Penny identified, I think the number was 24, fields and I think for a number of them we probably will be able to come to some sort of agreement. What I'd like to do is figure

out which one of those or ones of those we can't agree on and what databases they're interested because I think it will be much easier for both sides to present to Your Honor their positions as to why they should or shouldn't be anonymized, and then Your Honor can decide that. I just think in the abstract, it's very difficult to -- for us to defend the position without knowing exactly what they want.

So I don't think this is something that should take months, and we're certainly committed to work with Mr. Penny to see if we can narrow down and crystallize our issues and then bring them to Your Honor.

MR. BRIAN PENNY: Well, and to be fair, what I tried to do to make the last meet and confer on Friday a little more productive was to put some of the categories of what you were claiming were private fields into categories -- roughly 24 categories that we could try to discuss. But some of those categories, frankly, aren't that important to us, but you were claiming are private, such as the brand of glove the player wears, the type of shoulder pads he wears, the brand of the helmet. I mean, these are things that aren't that important to us. And sure, we can meet and confer and probably come to a resolution on those. But I think we're going to have major issues with things like injury date, date of birth of the player, the video clip being -- the video analysis project database. I really don't see how we're going to come to an

agreement on that.

MR. RICHARD BERNARDO: That may be so, but I don't think we're yet at a specific disagreement that warrants discussion right now.

THE COURT: Okay.

MR. BRIAN PENNY: That's fine, just --

THE COURT: I appreciate the concern that both sides raise here. Mr. Penny, I hear you that this issue has been on the table a while, it needs some resolution. I hear that I asked you folks to come forward and you've done that and made some progress on that. So, I think at our next informal this should be a real focus of it so we can make a pivot on this. I need to do some more thinking about this. I think that what I was thinking last time we talked about this is that the Plaintiffs -- that there was a way for the Plaintiffs to prove their case with respect to each of these folks and the information in the database about them without identifying them. But now I can see that because so many pieces of the database will end up identifying it, all of a sudden that connection won't be made and that's the problem. And I appreciate that, and I don't think I quite appreciated that before I got this letter and heard from you today. So, that's what I need to struggle with. You can help me struggle with that and figure out what the fair outcome is on that.

MR. RICHARD BERNARDO: We'll certainly be willing to

assist.

THE COURT: All right. Great.

MR. RICHARD BERNARDO: Thank you, Your Honor.

MR. CHARLES ZIMMERMAN: The next issue, Your Honor, is the Defendant -- Defendant Fact Sheets. And there are some additional questions that we think need to be added to the Fact Sheets. Mike Cashman is going to discuss them, but I think it's time to come to ground on the Defendant Fact Sheet and get that out.

THE COURT: Okay. Very good.

MR. MICHAEL CASHMAN: Your Honor, we've had some further discussion. I proposed a revision to question -- section 3, sub 4. As you'll recall from our discussion at the last informal conference, I've proposed new language to the NHL. I haven't heard a response to it. And in addition, based on the discussion that we had at the informal conference and the way discovery has been developing in this case, we had three additional, clarifying questions that we've proposed and the NHL has not gotten back to me yet on any of these. Perhaps -- well, we do want to get this resolved no later than the next informal conference because the Plaintiff Fact Sheets will be due in a couple weeks.

And what we had proposed on the Defendant Fact Sheets is they run from the date when the Plaintiff Fact Sheets are provided.

So, Mr. Zimmerman is correct. We'd like to get this resolved. I could go through the language with the Court that we proposed, or we can have some meet and confer. But regardless, we need to get this resolved no later than the next informal conference.

THE COURT: Okay. Let me hear from the Defense first. Yes.

MS. JESSICA MILLER: Good morning, Your Honor. Jessica Miller.

THE COURT: Good morning.

MS. JESSICA MILLER: We received Plaintiffs' proposal on Monday, and due to travel schedules, we haven't had a chance to meet and confer on the additional questions yet. We have a call set with Mr. Cashman on Monday on confidentiality issues, and so we were thinking we could discuss it at that time as well, if that works for you, so that this would be ripe for the informal.

And there's one other issue that I think is going to take a little bit of sensitivity, and that is the fact that there is a little bit of a cross currents going on between the proposals on the Defendant Fact Sheet and what Plaintiffs are asking for with respect to the 54 Plaintiffs on the databases. So, we want to make sure before we have this final, hopefully by the informal, that anything that Plaintiffs are asking for with respect to the 54 from the databases is included so that

it's all in one place.

THE COURT: Okay.

MS. JESSICA MILLER: And so that's a little bit of a slow down, but we should have this ripe for the informal.

THE COURT: With respect to this and the previous issue, it's going to be important for me to get position papers about where things stand from the parties a little bit earlier. Now, we haven't set the informal, so maybe the best thing to do is to do that and then we can come up with some dates here. I now have my July schedule here, and I think we were looking at sometime the week of the 14th. Is that what we were looking at for an informal?

Does July 15th work for folks? Of course, Mr. Zimmerman -- no, Mr. Beisner, you don't -- somebody doesn't have -- Mr. Zimmerman, you don't have your schedule.

MR. CHARLES ZIMMERMAN: I don't have a -- I can --

MS. JESSICA MILLER: That works for us, Your Honor.

THE COURT: Okay. Mr. Zimmerman, let's assume July 15th, which is a Wednesday, works. If it doesn't, maybe you can tweak it with the parties.

MR. CHARLES ZIMMERMAN: Okay. I think it works, Your Honor. I just -- we can set it and if there's a problem, either I won't attend or we'll -- I'll let the Court know.

THE COURT: Okay. I need to put it -- I have a pretrial at 9:30, so would you prefer to do it at 10:30 or at

1:00 or 1:30?

MR. CHARLES ZIMMERMAN: 1:30, then people can fly in -- 10:30, then people who won't fly in.

THE COURT: Mr. Beisner?

MR. JOHN BEISNER: Your Honor, we just discovered we --

THE COURT: Have a problem?

MR. JOHN BEISNER: -- can confer, our true Geek Squad isn't available on the 15th. My apologies. But if we're going to be discussing the data issues, that's not going to work.

THE COURT: Yes. How about the afternoon of the 14th?

MR. CHARLES ZIMMERMAN: I know I'm tied up that day with a matter in another -- another judge in this courtroom [sic]. But we can go -- probably proceed without me or I can come in late, if necessary --

THE COURT: The morning of the 17th would be available. That's Friday. Okay. Guys, something has to work here.

MR. CHARLES ZIMMERMAN: Let's do the 14th --

MS. JESSICA MILLER: Afternoon of the 14th.

THE COURT: Afternoon of the 14th. Okay. Let's make it 1:00, July 14th at 1:00. And that's an informal. Okay.

With that in mind, then, I would like, on the database issue and on the Defendant Fact Sheet issue, give me some time. So, if you can get me final position papers on that no later than Friday the 10th. Okay? And that should be possible because, as I understand it, that gives you a week to meet and confer. Okay.

MR. CHARLES ZIMMERMAN: The next issue -- are you ready for the next -- the next issue is the production of text messages, which I think Brian Gudmundson of my office is going to be discussing. And I think there will be some discussions from the Defendants, as well.

THE COURT: Okay.

MR. BRIAN GUDMUNDSON: Good afternoon, Your Honor. I guess it's still morning. I've been here a while. I thought I'd bring the Court up to speed on where the text messaging issue is, to give you some historical context.

I know you've heard something about this throughout the course of our formal and informal status conferences. We, you know, of course served our requests a long, long time ago, throughout the middle of March and April of this year. Mr. Andreson and I met and conferred with defense counsel about the scope of their collection, got a sense of how they were collecting their electronically-stored information, what type of custodial interviews they were doing and things like that. When we started receiving production, we noticed that

there were no text messages included. And we re-inquired with defense counsel May 28th and said, you know, we haven't seen any text messages, are these forthcoming? The answer was no.

We asked why not. They said, well, we've reasked everybody, and they don't have any text messages, so we're not going to be producing them. We have no reason to doubt their sincerity on that. We did, in fact, however do some rather rudimentarily searching of the database for things like the word "text" and "texting" and "texted" and learned that, in fact, they do text and learned that at least four of the custodians they identified talked about texting members of the media, very key alternate Governors such as Glen Sather, referees, and things like that.

Where we've left it now is that we've exchanged letters on this subject and we've been told they would consider producing text messages for the four people we've identified. But the Plaintiffs, of course, believe there are far more people who text and have offered to -- have offered a list of sample custodians they should also search texts for. We've not gotten a commitment on either the four or the -- or the broader list, which was only a sampling, of course. We always reserve the right to seek more text messages, but --

THE COURT: How many did you propose in the sampling?

MR. BRIAN GUDMUNDSON: We proposed a total of --

well, of course we proposed the four, and then we proposed an additional 10 out of 34 custodians.

THE COURT: Okay.

MR. BRIAN GUDMUNDSON: And so that's where we are. We're sort of awaiting a word on -- obviously we feel we're entitled to the text messages. I think that goes without saying. But we're still awaiting word on whether we'll be receiving those, for at least the four we've identified who have admitted they text on business matters, as well as the others.

THE COURT: Okay. Thank you.

Who wishes to respond?

Mr. Martino.

MR. MATTHEW MARTINO: Morning again. So, the -- what we had explained during our meet and confers was that we had inquired multiple times with the custodians about whether they had used text messaging for NHL business or for any purposes or -- that would be relevant to any topics that would be relevant in litigation, and that was -- we were given the negative for all of the custodians. I think the -- what it really comes down to here is these custodians aren't really using text messaging in their every day business as an ordinary course matter. Maybe they receive a text message from somebody that they -- you know, that they may get without prompting, and they may reply to that. But, you know, you

could understand why when you ask somebody, do you use text messaging for business, that kind of thing does not pop to the mind.

But they did identify four people, and we are following up with those four custodians and, you know, at the moment, I think we're inclined to search for text messages for those four people, but we are following up with them. They also, as they mentioned, requested ten others. That's a total of 14. Actually, of the 19 -- we have 19 custodians that are current NHL employees for whom we had electronic communications. The 34 includes a bunch of former custodians, some of which haven't worked at the League in decades that we looked for paper documents for.

So, of the 19 for which we had electronic communications, they've sought 14 of those. We are -- we're taking that under consideration and we're going to meet and -- continue to meet and confer on those other custodians. I think, as you saw in the agenda, there was a proposal that we could put that on, if there are still disputes, we could put that on the August hearing.

THE COURT: Well, I think we better do it quicker than that. Why don't you meet and confer this week, and let's put it on the informal agenda.

MR. MATTHEW MARTINO: Yep, that's fine.

THE COURT: All right.

MR. MATTHEW MARTINO: To be clear, that was the Plaintiffs' proposal for August. We're happy to discuss at the next --

THE COURT: Okay. Great.

MR. MATTHEW MARTINO: Thank you.

THE COURT: Anything else on this topic?

MR. CHARLES ZIMMERMAN: I believe the next issue, Your Honor, is the confidentiality over-designation issue. Mike Cashman is going to discuss that. But this we began talking about at the last informal, and we want to bring you up to date and see if we can agree on a process that isn't overly burdensome.

THE COURT: Okay.

MR. MICHAEL CASHMAN: Hello, Your Honor. You'll recall we discussed this a little bit at the last informal conference, and it is a significant -- significant issue. The NHL, understandably to get documents produced has designated everything as confidential. We have done, likewise, the same. From the Plaintiffs' point of view, we're going to go back and review our documents and see if there are some that we can voluntarily de-designate, which we think is our burden.

We think the NHL, under the protective order and under the law, has an obligation to do the same. Again, they designated everything as Protected or Protected - Attorneys' Eyes Only. I'm not familiar with any documents that they

produced without a confidentiality designation. We think that they have an affirmative obligation to go back and voluntarily look at their production and see what should be de-designated. I think that's what the protective order contemplates and the law contemplates.

But above and beyond that, Your Honor, we have provided the NHL with a list of documents that we want to discuss as a first tranche of documents that we think should be de-designated. And those are representative of some different categories, e-mail correspondences which we don't see any basis for confidentiality under the protective order or applicable law. And also things such as PowerPoint presentations about fighting analysis or about high-level or sometimes more detailed discussion about concussion analysis or injury analysis. These aren't the kind of things that are confidential in our view. Board of Governor or General Manager meeting Minutes, there may be some information in some of those discussions such as financial discussions. That's really not our focus. But there are discussions about head hits, concussions, fighting, et cetera, that we don't think are confidential under applicable law.

And so we've identified about 100 documents, for starters, that we want to discuss with the NHL. We have a meet and confer set up for next Monday afternoon at which we will -- time we'll discuss some of these documents. And our

contemplation, as we suggested at the last conference, is that perhaps -- and I'm hopeful that we can pick out a few exemplars -- let's say 10, maybe 15 or 20 -- some number of documents that we can present to you and you can take a look at these and we may get some guidance that we can then apply to the broader spectrum to reduce the burden on the Court and make sure that the Court is informed about these kinds of documents.

So, we'd like to tee that up for the next informal conference after this meet and confer. And I think given the position paper deadlines that you set for some of these other issues, we could do the same with respect to a few exemplar documents on the confidentiality front.

THE COURT: Very good.

MR. MICHAEL CASHMAN: Thank you.

THE COURT: Thank you.

Mr. Connolly.

MR. DANIEL CONNOLLY: Yes, Your Honor, I'll try to be quick but not as quick as Mr. Grygiel, as we're all getting close to the end of the day here.

THE COURT: It's only almost noon.

MR. DANIEL CONNOLLY: I know, but it seems -- but all of us are already on the road, Your Honor (laughter).

MR. CHARLES ZIMMERMAN: I want to work at Faegre (laughter).

MR. DANIEL CONNOLLY: Really?

MR. CHARLES ZIMMERMAN: Yeah.

MR. DANIEL CONNOLLY: Well, Your Honor, this is a bilateral issue. Plaintiffs have designated every single document confidential. While we have designated a large majority of the documents confidential, it's not been every document. And part of that has been because the Court has urged us and we've agreed to produce materials on an expedited basis and to try to do the fine-tuning of the designation issue early on would slow down the production process.

And all of that raises the question that we have. We certainly are prepared to engage in this topic. And, in fact, at the last informal discovery conference, the Court urged us to have a meet and confer, and I understand Mr. Cashman has been at a number of these depositions, but the first meet and confer that we've been proposed was Monday, which is following this. So, we're basically revisiting a topic that we've already discussed once in the informal discovery conference.

We think, however, that there are more pressing issues. Mr. Cashman didn't address any prejudice that both sides have somewhat over-designated the documents. Everybody has access to these same documents. All the documents are being discussed in the depositions. There are no pending hearings or trials in which it's critical that these documents

be un-de-designated in a certain way.

So, while we all realize that we have a lot of resources, we suggest that this issue be pushed behind slightly on the list, that is behind resolution of the privilege log which the Court has directed the parties to engage in, behind the issue of the private medical information, both of which relate to access issues. And we've heard, you know, Mr. Grygiel and Mr. Zimmerman speak at length about what the potential prejudice is. And so while we really are prepared to engage in this topic, we suggest that this be one of the topics that be trailing a little bit on the process because we've already added a lot to the plate for the July 14th conference, and suggest that we meet and confer about these topics, try to resolve them in an orderly way as we do all the time in this District, and then figure out that process going forward between the parties and not try to engage the Court on this one.

And as far as the over-designation, as I said, it's been on both sides. We have over-designated some documents just to get them out. They've designated, you know, deposition transcripts that were previously provided and newspaper articles and all kinds of stuff. So, we just need to get into this process. But I suggest that this be pushed off to a later informal conference so that the parties can focus in on the issues that the Court has already put on the

agenda for next time.

THE COURT: Thank you, Mr. Connolly.

Mr. Cashman.

MR. MICHAEL CASHMAN: I respectfully disagree with Mr. Connolly. This is a -- an important issue. So, let me just address a few of his points specifically.

Prejudice. This is prejudicial. For example, if we want to file things with the Court, all the kind of issues that go with that. There's a pressing issue to get nonconfidential information undesignated, and that's really what the law provides. I understand the urgency of the productions and how things happen, that things get designated as confidential. But that doesn't mean that anybody is entitled to maintain confidentiality over something that's not confidential until the very end of the case and put us through the burdens when we make our motions and such to file things under seal and all of the kind of burdens that go with that.

As far as the -- I would call it the burden issue, Mr. Connolly suggested we shouldn't be doing this right now. Well, that's exactly why I suggested to the Court that we present a few exemplars. It's not going to be overly burdensome, but it gives the parties then guidance to perform their affirmative burden to go back and look at what has been produced so that they can de-designate. So, if we do that with a handful of documents, the Court's been great in

providing us guidance that we can apply on a going-forward basis, and there's no reason to push this off and delay everything until the end when we can have a reasonable process to get that done right now.

As far as the bilateral issue, I told the Court and we are going to do this, we're going to go and look at our own production because we wanted to get things out. We're going to go look at our own production and de-designate the documents that we think are not confidential. And if the NHL thinks there are others which should be de-designated, we're going to be happy to listen. And I'm glad that Mr. Connolly mentioned deposition transcripts because this is also something that applies to testimony. What we're running into right now is that the NHL makes a blanket designation for all deposition testimony that's given by a witness. We think it's incumbent upon them, following the deposition in a reasonable amount of time -- and we haven't crossed this bridge yet about what a reasonable amount of time is, but I would suggest within a few weeks after a transcript is delivered, that the party go through that transcript and say specifically what lines they want to maintain as confidential and de-designate the rest, and that should apply to exhibits, as well.

This needs to be an ongoing process, not something we're going to backload later. That would be an undue burden on everybody, including the Court, whereas the process we're

proposing will nip that in the bud, have an affirmative process, we can use some exemplars, and get it under way. Thank you.

THE COURT: Mr. Connolly.

MR. DANIEL CONNOLLY: Thank you, Your Honor. I think I agree largely with Mr. Cashman, that is that the parties should engage in a discussion on this topic. I think it's not the highest priority item among the others that we've talked about. The -- we have designated the depositions as confidential, and we're going to review them. The depositions have been coming in relatively slowly. But that's a process that's set forth in the protective order. And the Court asked the parties already to meet and confer on this. I think that this is just -- it hasn't -- a full meet and confer hasn't happened yet, and I just think that it -- we should follow the process that the Court has set forth and address the other topics for the agenda -- at the -- at the informal discovery conference. And I didn't hear -- as far as I'm aware, Mr. Cashman talked about that there is a prejudice because they have to file something under seal.

First of all, they can, and parties can do it. But I haven't heard of any motion that's pending that's going to be filed at this particular time. In fact, the Court has asked to be informed beforehand and to address whether things can be resolved in the informal process or in the formal

process, and we have no pending formal motions at this time. So, we're just repeating the request that this item be addressed in the normal course with meet and confers and that we don't set it on for the next informal discovery conference because we have so many items on already.

THE COURT: Okay. Well, I think I agree with both of you in many respects, disagree slightly. I have a slightly different view of this. Perhaps that's because I view it from the Court's perspective. We have a very serious problem with over-designation in cases in general, and we're always struggling with it at the court because we always have to file everything -- orders under seal and we get close to trial and there are lots of issues that arise from this problem. This is a -- a big issue to deal with because we have millions of documents that are designated. So, I have what I think is sort of an orderly way to approach this that I would suggest to the parties.

Instead of pinpointing a few sort of more obvious categories to raise with the Court at the next informal, what I would prefer the parties do is categorize all of the documents. This is a big job. You have to put them in categories that can reasonably be judged based on sampling within the categories. And then we need to do random sampling in the categories instead of cherry-picked documents. And then a judge -- it may not be me, it may be Judge Mayeron --

needs to rule on that sampling. And then whatever that ruling is will apply to every document produced under those categories.

So I think you have your work cut out for you. I think step number one is to affirmatively de-designate your own documents. I agree every party has an obligation to make sure they haven't over-designated, so you need to do that first. Then you need to agree on categories, which is a big job. And then you need to agree on a random sampling method within those categories. And then you need to do the random sample, and then you need to brief it before Judge Mayeron. So, those are the steps.

With respect to transcripts, I think the idea -- I mean, we do this with orders of the Court. I will give you a couple weeks to come back to me and tell me why it should remain under seal. I think that's a good idea with transcripts, as well. Perhaps we put a two-week rule into effect that you have to come back and identify what needs to be redacted and what doesn't and then raise it with the Court if you have a disagreement.

But with respect to documents, I'd like to start the process now. It may not have the priority of other items, but it's a big job and so by the informal conference, I want you to have a meet and confer to start this process, that is to brainstorm about categories at least and a random sampling

process and then to report to me at the informal discovery conference about your progress. And then I'm going to have you come up -- and to propose a schedule for when this might be accomplished so I can inform Judge Mayeron and she can prepare herself to rule on these random samples. Okay?

Everybody understand the process?

MR. MICHAEL CASHMAN: Yes, Your Honor.

THE COURT: Any objections?

MR. DANIEL CONNOLLY: Yes, Your Honor [sic].

THE COURT: All right. Very good.

MR. CHARLES ZIMMERMAN: So, Your Honor, as I said at the beginning, we want to kind of have a six-month look-back. I think we can all reach our conclusions. I think everybody is operating in good faith. I think each defines "good faith" differently. As lawyers say: Reasonableness is sometimes in the eye of the beholder. But I think we're all working hard as professionals. But we're not getting everything done in the way we, I think, anticipated we would at the beginning of the case.

I will meet and confer with defense. We'll come back to you with some ideas hopefully by the informal as to how much time we're really going to need to get the job done because we're doing the job on behalf of lots of people who we're representing, and it's an important case in sports and it's an important case that many, many people are watching.

And we want to do it right, and we're not going to get forced to do it on a timeline that we just can't meet. So I think -- I think by playing it out today and letting the Court know exactly where we've gone, what we've done, how hard we've been working, I think we can come to a conclusion as to what is realistic under the circumstances.

I want to add two more things, and then I'll stop. I think at some point, Your Honor, on the agenda, we do have to have the class action questions, and I think John and I will meet and confer on that. I think we also need to put on the agenda endgame discussions. I think at some point, somebody has to start talking about the end. And I think we should have discussions about it, privately, publicly, with others, not with others, suggestions. We need to broach -- approach the issue. I'm always the first one to bring it up because that's the nature of my -- that's my nature. You can't talk about it, you can't get there until you talk about it. And if you can't talk about it, you'll never get there.

So, I think it should be on the agenda, and I think the Court can maybe take us both aside or do whatever you think or we can suggest some ideas, we can write White Papers on it that are confidential, but I think we just start -- it has to start becoming part of our agenda. And I hope we can. And it's a delicate topic, but we need the Court's direction or at least decision on how to begin that process.

Last thing -- and it's not very controversial -- Dan and I were talking while I was in Minot with nothing to do, I was calling Dan all the time because I had nothing to do because -- nevermind -- and --

MR. DANIEL CONNOLLY: So you're aware how I rate, Your Honor (laughter).

MR. CHARLES ZIMMERMAN: But I still would like to work at Faegre if you quit by noon every day.

And we discussed whether or not the agenda and the status report or the agenda and a modified status report should be filed. And I think it should. I think we started that way. But when we got into the informals, we started lodging them with the Court. It's my belief that the agendas are important. People are following it, both lawyers, both nonlawyers, players, we don't know exactly who with the ECF systems that we have today. But I think it's good for people to know what's being discussed, what progress that's being made, progress that's not being made. I think it's important. And so Dan wanted us -- wanted me to bring it up as opposed to just do it or even call you up before today's status --

THE COURT: I have no objection to filing the agendas. That's just fine.

MR. CHARLES ZIMMERMAN: Yeah, I wouldn't have thought so, and I don't think the defense does either. But we just wanted to know because nobody wants to do anything

precipitous or do the wrong thing. So, I think we should file it. I think this one should get filed. I think we should file them in the future. And certainly if there's anything confidential or anything that people want to redact or that, we're open to that. But as we talked before, confidentiality and the over-designation is a big issue with Federal Courts today, and so we want to be consistent.

THE COURT: I would say this. I think the informals, in part, have been so successful because we're not making a record of it. And so I'm not sure I would encourage -- and you'll notice on my -- when I do the Minute orders for them, they're very vague and really don't say much, and that's quite intentional. I'll take guidance from the parties on that. I thought that's sort of what the purpose of that was, and I'd be inclined to continue. But on a monthly basis, to have these agendas filed -- and I will have more specific details in my Minute order, say, from today about what I've ordered in terms of the parties meeting and conferring and the like, does that sound like a good balance for everybody?

MR. CHARLES ZIMMERMAN: It does to me, Your Honor, yes.

THE COURT: Okay.

MR. DANIEL CONNOLLY: Your Honor, if I might just address a slight qualification on that. I think it sounds

excellent that we, as you know, the Court has asked us to go from an agenda to an agenda and a status report. And I agree entirely, or we agree entirely that the agenda and status report for the informal conferences should be e-mailed to the Court. As far as the formal conferences, I think it would be helpful if we just filed the agendas and not the status report. There is, as you -- as we -- there is a lot of back and forth on the status report, and there would be even more if these were filed publicly. So, I think that it would be helpful, as far as the status report, to just send that to the Court and separate the two documents for the formal --

THE COURT: Mr. Zimmerman? I mean, we want to avoid posturing on the status report. The purpose of that is so I'm prepared when I come to the hearing and --

MR. CHARLES ZIMMERMAN: I hate to say this, as the last thing I do is I tend to -- is I agree with Dan. I think that the status -- there would be too much posturing in the status report, and I don't think it's necessary. I think it would take us so long to get it out in words that everybody could be comfortable with. Maybe there will be a little more detail now in the agenda but we'll work it out. But I think I'm comfortable with the agenda and leaving the status report --

THE COURT: I think the combination of the agenda and my order after the hearing would give any follower of the

case a pretty good idea of where we're at.

MR. DANIEL CONNOLLY: Yes, Your Honor. We'll do it that way then.

THE COURT: All right. Very good.

MR. JOHN BEISNER: If I may chime in on one more issue that goes beyond the question of what we file. I do think -- I just wanted to agree with Mr. Zimmerman that it's -- it would probably be a good time for us to sit down here. And I've got some other things that I think we need to have a better understanding of. We're getting together a letter to send to Plaintiffs with some very basic questions about what the claims are here. And I don't want to go into detail here because we haven't talked with Plaintiffs about it. But some of the questioning in the depositions so far have raised questions in our mind about how -- what in the Complaint is being pursued, what isn't, what Plaintiffs are focusing on -- and I don't want to bother the Court with that now. But I think first and foremost, one of the things that we wanted to suggest is engagement of Plaintiffs about some fundamental questions about what claims are being pursued here and the nature of some of those.

We could go through a discovery process with that, but I'm not sure that would be as productive as our sitting down and talking about that. So I think before we get to some of the other things Mr. Zimmerman talked about, I'm having

some difficulties on that and what the class proposal ultimately will be here. We may be getting the cart ahead of the horse, but it's hard to talk about other things that he was raising without that.

Anyway, that's a long-winded way of saying, Your Honor, I think Mr. Zimmerman and I -- maybe we can go to Sioux Falls instead of Minot, but anyway, we'll find a place to sit down and --

THE COURT: You better be careful. My law clerk is from Sioux Falls and she loves it. So --

MR. CHARLES ZIMMERMAN: Just say the word "endgame." Say the word. You can say it (laughter).

MR. JOHN BEISNER: Huh? "Dismissal"? Yeah, we're in favor of that (laughter).

And let me propose Kansas City, because I know I can't get in trouble there because that's my home turf.

THE COURT: Mr. Beisner.

MR. JOHN BEISNER: Yes, Your Honor.

THE COURT: I have another big case going on sort of similar to this, and in that case one big difference is -- and I am sure in that case that there will be -- there are 73 individual cases, and I'm sure that one or more of them will be tried. I don't have any doubt.

Regardless of that, I had a mediation track going on there, separate mediator, sort of a wall so that everyone

feels free to be comfortable with the mediator without it leaking to me, and that's proved to be very useful. I didn't know if it would because I knew in that case, in fact, that some of the bigger cases are just probably going to get tried. And I guess that's something I'd like to hear some feedback from you about, whether it would be appropriate for the Court to appoint a Special Master for mediation purposes, whether you want some input on who that person would be, with the idea, you know, no commitments, just starting the discussion.

And, you know, that discussion can be even more expansive than that. It can talk about what I think you're getting at, which is what does this look like at the time of class certification and if it's not certified, are we doing bellwether trials, or how does this look endgame? And that can be done through me, or it can be done with a Special Master who is focusing on kind of endgame issues. I'm open to any ideas, but I kind of agree with Mr. Zimmerman that we ought to start the dialogue.

MR. JOHN BEISNER: We'll provide some views on that. I have some -- some thoughts along those lines based on a lot of other MDLs and whether the third-party assistance at the outset is useful. But I think it probably makes sense for Mr. Zimmerman and I to go to Kansas City -- no, we'll find a place to do this -- to have a conversation about that. And to be clear, Your Honor, the part I'm focusing on here isn't so

much bellwether trials and so on. I'm really focusing on what are the claims here for which class treatment will be proposed. We've got some questions about that, pretty fundamentally. And I think to understand that is critical before a lot of other things that flow from that. And I think it's time we have a conversation about that.

I think the Court may want to be involved, but I think it's probably best for the parties to be doing that first. And it -- you know, part of it gets to the scope of discovery issue I was raising earlier and so on. We really, I think, need to have an understanding of that. I understand there's work product issues and you don't put everything on the table now. I got that. But there's some fundamentals that I think we're probably not on the same page about, or at least we should find out if we are. And I'm happy to engage in those conversations. And this letter we're preparing was really intended to try to -- not to you, but to Plaintiffs to try to give us a basis for starting to crystallize what some of those -- those considerations are.

THE COURT: Okay. That's fine. I think what I'm trying to get you to think about is even if you genuinely believe that there's going to be a basis to dismiss these claims or -- whatever your view on endgame is here, it's good for me to hear some of this so that I can bring in the necessary folks to get the dialogue started. I don't want it

to wait too long.

MR. JOHN BEISNER: Understood, Your Honor.

THE COURT: Okay. Very good.

Anything else today? Now just to be clear, we have our July 14th at 1:00 p.m. informal. And my understanding is that we're going to try to confirm Friday, August 7th, am I right, for the next formal. But Mr. Zimmerman, you're going to be looking at your calendar about that Friday, August 7th. Is that right?

MR. CHARLES ZIMMERMAN: For the ones in August.

THE COURT: Yes, which would be the formal and then proposing perhaps the 24th or 25th for an informal. And I'll hear back from you.

MR. CHARLES ZIMMERMAN: Yes, you will.

THE COURT: All right.

Anything further we should address today?

Mr. Penny.

MR. BRIAN PENNY: Can I just ask two quick questions. The first, on the final position papers on PMI issues, should that address the PMI issues just in the context of the databases or in the broader context that we've been briefing?

THE COURT: Well, you're welcome to do it in a broader basis, but I already have your briefing, you know, so I guess only to the extent it would bring up new arguments or

issues.

MR. BRIAN PENNY: And should that be filed on the docket or just sent to your chambers, Your Honor?

THE COURT: I think that could be filed on the docket, to be honest with you.

MR. BRIAN PENNY: And then the second question was --

THE COURT: And you'll have to decide whether you want oral argument on that, on the docket. That might be something you want to preserve, so you better talk about that.

MR. BRIAN PENNY: And that's again for the July 14th informal, whether we would maybe come into the courtroom and put some of it on the record?

THE COURT: Right.

MR. BRIAN PENNY: And then the second question was, John Kessler from Epic joined us today at Your Honor's invitation. I don't get the sense that his technical expertise will be called upon in the July 14th informal, but would you like him to attend or would you --

THE COURT: Mr. Epic (sic), which one are you? Oh, from Epic. Yeah, Mr. Kessler. I'm sorry.

MR. BRIAN PENNY: Mr. Epic would be a very cool name (laughter).

THE COURT: You wouldn't mind being called Mr. Epic, I suspect. Thank you for coming today. It was hard for me to

anticipate what -- whether I would need to call on you. You can see what some of the issues are here today. At this point, I don't see a reason for you to come on July 14th, but I'm going to get a better idea when I get the briefing on that issue, and I'll certainly advise you on if I think it would be helpful.

MR. BRIAN PENNY: Thank you, Your Honor.

THE COURT: All right.

Anything further from any of the parties?

(None indicated.)

THE COURT: All right. Very good. Everyone have a nice 4th. Court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluding at 11:56 a.m.)

* * * *

CERTIFICATE

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

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

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