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
March 22, 2016
9:30 a.m.

BEFORE THE HONORABLE:

SUSAN RICHARD NELSON, UNITED STATES DISTRICT COURT JUDGE

JANIE S. MAYERON, UNITED STATES MAGISTRATE JUDGE

FORMAL STATUS CONFERENCE AND DISCOVERY STATUS REPORT

EXCERPT TRANSCRIPT: NON-SEALED PORTION

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I N D E X Page:

P R O C E E D I N G S

IN OPEN COURT

(Commencing at 9:38 a.m.)

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

Mr. Zimmerman, you may begin.

MR. CHARLES ZIMMERMAN: Good morning, Your Honors. I'm Charles Zimmerman for the Plaintiffs.

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

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

MR. DAVID LEVINE: Good morning. David Levine for the Plaintiffs.

MR. CHRISTOPHER RENZ: Good morning. Chris Renz for the Plaintiffs.

MR. DANE DeKREY: Good morning, Your Honor. Dane DeKrey for the Plaintiffs.

MR. DAVID GOODWIN: Good morning, Your Honors. David Goodwin for the Plaintiffs.

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

MR. JEFFREY KLOBUCAR: Good morning, Your Honors.

Jeffrey Klobucar on behalf of the Plaintiffs.

Appearing telephonically today, we have William Sinclair from the Silverman Thompson firm; William Gibbs from Corboy Demetrio; and James Anderson from Heins Mills & Olson.

JUDGE NELSON: Very good.

Mr. Beisner.

(Papers fell from bench.)

MR. JOHN BEISNER: Good morning, Your Honor. John Beisner on behalf of Defendant, NHL. And as a matter of full disclosure, Your Honor, you woke us up (laughter).

MR. DANIEL CONNOLLY: Good morning, Your Honors. Dan Connolly on behalf of the Defendant, NHL.

MR. MATTHEW MARTINO: Good morning, Your Honors. Matt Martino for the NHL.

MR. JOSEPH PRICE: Hi, Judges. Joe Price on the NHL.

MR. AARON VAN OORT: Morning, Your Honor. Aaron Van Oort for the NHL.

MR. CHRISTOPHER SCHMIDT: Good morning, Your Honor. Chris Schmidt on behalf of the non-party U.S. Clubs.

MR. DANIEL CONNOLLY: Your Honors, appearing telephonically for the NHL are David Zimmerman; Shep Goldfein, and Jessica Miller and James Keyte from the Skadden Arps firm; and Joe Baumgarten from the Proskauer Rose firm.

JUDGE NELSON: Yes.

MR. STEPHEN LONEY: Good morning, Your Honors. Stephen Loney of Hogan Lovells for non-party Chubb Corporation.

MR. DAVID NEWMANN: And Dave Newmann with Hogan Lovells for Chubb.

MR. PETER WALSH: And Peter Walsh. Good morning, Your Honor, also for Chubb.

JUDGE NELSON: Good morning to all of you.

All right. We are going to begin by going through the non-- non-motion portions of the agenda for a while, and then we'll turn to the motions. So, let's begin with Defendant's document production.

Mr. Martino.

MR. MATTHEW MARTINO: Good morning again, Matt Martino for the NHL.

At this point, the only outstanding issues relate to some follow-up requests that the Plaintiffs had made related to a few of the Alternate Governors for a few of the Clubs. For one of those, Ottawa, we made an additional production on March 16th. For two others, Calgary and Los Angeles, we expect to receive documents for review this week, and we will produce shortly thereafter.

With respect to the last Club, Washington, we reported to Plaintiffs that the Club did not have any documents for the three alternates that they've requested as

they were all former alternates who had left the Club. The Clubs' had some turnover over the last couple of years. But we have talked to the Club since then, and they're going to search central files to see if there are any Board of Governor materials they have laying around that they can produce.

JUDGE NELSON: Thank you.

Any response to the Defendant's production?

MR. BRIAN GUDMUNDSON: Nothing further from the Plaintiffs, Your Honor.

JUDGE NELSON: Very good.

Do we want to talk about the New Jersey Devils database issue?

MR. BRIAN PENNY: Morning, Your Honor. Brian Penny for the Plaintiff. Just a quick update on that. We've received a proposal from the NHL yesterday. It might resolve the issues. I just haven't had an opportunity to talk with our entire team on that, so it may be a moot issue at the moment.

JUDGE NELSON: Okay.

MR. JOHN BEISNER: Nothing further to add on that, Your Honor.

JUDGE NELSON: Okay. Very good.

All right. We're going to skip for now the motion to amend Plaintiff Fact Sheets and move to the medical records collection issues.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, I guess I would like to take this opportunity, if I may, to lay out a couple of issues here that may not be strictly limited to that point but I think is going to permeate a lot of our discussion today. And if I may do that, and the reason I wanted to take a few minutes on this is I think that there's some overarching issues here that we touched on in the telephonic conference and some frustrations that were expressed in that -- in that context that we wanted to mention. And there are some factual information that we were not in the position to share with the Court at that time, and so on --

(Papers fell from the bench.)

JUDGE NELSON: It's always a problem when I have Judge Mayeron --

JUDGE MAYERON: For my next act --

MR. JOHN BEISNER: And you woke us up again, Your Honor.

JUDGE MAYERON: Goodbye (laughter).

JUDGE NELSON: Sorry, Mr. Beisner. Go ahead.

MR. JOHN BEISNER: So I just wanted to take a few minutes, if I may, just kind of provide a status on this and some other issues --

JUDGE NELSON: Sure.

MR. JOHN BEISNER: -- and indicate the concerns that

we have on that. Your Honor, I guess I want to just start by just noting that with this very fancy exhibit that I wrote down that there are really several things that when you have a class action that the -- both sides are interested in gathering from the other. For the Plaintiffs, I think that the primary interest is in document production and in getting depositions all to put together their view of common facts in attempt to show predominance and compliance with the other Rule 23 requirements.

And the Defendant has the lower list that I'm showing there. You want interrogatories to get information from the named Plaintiffs; document production from the named Plaintiffs; the medical records of the named Plaintiffs, which is the topic I'm covering here and I will get to that specifically; depositions of named Plaintiffs and others who may have information about named Plaintiffs and may have information about other issues; and then when you have the personal injury case like this one, medical examinations.

And that's -- that's -- that's kind of the list that we're dealing with here. And on Defendant's side, of course, we're all gathering that information in line with the showing that was made to defeat class certification. For example, in the *St. Jude Medical* case, these are the sorts of things that the Court relied upon in making that decision.

You know, I think, Your Honor, on the

Plaintiffs' side of the ledger in this case, it's been a pretty good success story for Plaintiffs. We produced two-and-a-half million pages of documents. Let me put up another chart that kind of gives a sense of the timeline here, if you can read that. And Your Honor, I'm going to be referring to some things as part of this --

JUDGE NELSON: Mr. Connolly, why don't you just give that to Marilyn.

MR. JOHN BEISNER: -- indirectly that remain under protective order, and so I'm going to avoid referencing them specifically but wanted to give you and opposing counsel --

(Document handed to the Court.)

MR. JOHN BEISNER: -- the documents. And I won't be referencing them explicitly, but at least the Court can look at them and see what we're talking about here.

So if you look, this is a timeline of the discovery process and litigation. Your Honor got us rolling on discovery in February and told us and wrote her -- very effectively on us to be substantially complete with document production from the League by July 1, and we met that deadline, producing 2.5 million pages of documents. And later, the issue of the Board of Governors' production came up and we produced 856,000 more pages. There was also production from non-party Clubs and others that has gone on. But in terms of the League, that was our -- our production on that.

And then with respect to depositions, Your Honor will recall that Plaintiffs wanted to get started with depositions before the document production was complete and you see on the left-hand side the timeline of the depositions that Plaintiffs have been able to take pretty regular stream of depositions that they have had out there with the benefit of the document production that was completed by the end of June. And so they've been able to amass their record on this.

Then when you get to the other side of the ledger -- and this is where I'm going to be referring to some of the material that's in the confidential packages -- we've run into some significant issues that we think the Court ought to be aware of. And I'm -- just checked off the first two items on the list because Plaintiffs pretty much have those complete.

With respect to interrogatories, Your Honor, I think you'll recall that we struggled and went through several rounds of interrogatory responses. But the troubling thing that we've run into now, which is reflected in the materials that I've handed up to the Court, is that there is now evidence that at least some -- we don't know how many of the named Plaintiffs -- never reviewed their interrogatory responses and are now saying the information in them is inaccurate. That's in the package that you have there, and there's some slides that identify the locations for that.

So, we don't know what we have, and so we're going

to have to -- the depositions have become more important because the interrogatories received have not, you know -- we have no idea what the reliability of those are because the -- what we have now is evidence that you'll see in the folder indicating they weren't reviewed, people, you know, saying they didn't look -- they've never seen them before and that they're wrong. So, I don't know what we have there, and so on interrogatories, this point, we're not sure what we have but it looks like nothing.

Document production, you know, we've got several thousand pages of documents from Plaintiffs. Your Honor, I'll be the first to say in a case like this, the document production from the Defendant is always going to be larger, but virtually the entire production we have are records from workers' comp proceedings in which these Plaintiffs were involved. But we've gotten precious little of the sort of thing that we've been pressed so hard to produce, e-mails, communications, things that are actually comments and statements by the players. And so, you know, we've gotten relatively little there.

On the medical records front, Your Honor, which I acknowledge was the topic that we were talking about here, we've repeatedly gone back to Plaintiffs to get identification of the medical personnel that treated these individuals so that we can get the medical records gathered. And in your

package there, you will see among the slides there's now evidence that these inquiries have really not been made. When we asked for information in interrogatories, we're told, for example, that a player had no treaters after they retired from the NHL. Then when we asked that question directly: Oh, yeah, I got a personal physician. I mean, we get this information instantly but we weren't given this before and have been unable to collect medical records because we were not -- because we weren't provided this information. There's really just been a total failure on disclosure of treating personnel and raising a real question whether the proper inquiries have been made here on this issue. So, you know, we really don't have what we need at this point on medical records.

Then when you get to the deposition category, I think you'll see a little imbalance there. We've been able to take one deposition so far, and we started talking about taking named Plaintiff depositions back in June and July of last year. We had them fully scheduled once. We had to take them off calendar because of Plaintiffs' decision to amend the Complaint, so we didn't know what we would be talking to the Plaintiffs about and got them back on the schedule to be taken again. And Your Honor, that's the source of the frustration with now having a protective order that takes them off schedule.

Here's the issue that we face now on being able to get our side of the record complete. The Court has said, well, let's do medical examinations in May of the several, and we'll take these named Plaintiff depositions that are being delayed in June --

JUDGE NELSON: And as I understand it, there are a couple of depositions that will proceed before May. Am I correct?

MR. JOHN BEISNER: That's right, Your Honor, but what's left out of this is it's apparent now, particularly because the deficiencies in the interrogatory responses and the fact that we're going to be getting so much new information as a result of that, it's unquestionable that we're going to have to do two or three follow-up depositions for each of these named Plaintiffs. I mean, in my experience, that's not unusual but it's clearly going to be the case here. And we have July to do all of this, plus everything else that has been put off to the last minute on that.

And Your Honor, I think that I just want to make clear the frustration. Your Honor said, well, you can ask for leave to do it after discovery on class certification ends in July, but why should we have to ask to leave -- for leave to take the basic discovery that Plaintiffs have had freedom to take on their own schedule through the entire discovery process? This is really not permitting us an opportunity to

prepare our side of the case, and that's the reason for our frustration on that issue.

We'll get to it later, but as we noted yesterday in the letter to the Court on the protective order issue and our letter requesting reconsideration for that, we -- we're having difficulty, I think, grasping the rationale for that because what Plaintiffs are basically saying is that they want to jamb this schedule for us in order to take medical exams that they were free to take a long time ago, but specifically to obtain a diagnosis of CTE which, as we laid out in the letter for -- asking for reconsideration or for leave to file a reconsideration motion, no one says you can do. Dr. Cantu has said repeatedly in this case you can't do that.

And that's -- and that's what we're totally mixing up the schedule to permit Plaintiffs to do. It's a desperation move on their part. I don't know where all this is going to go, but it really -- the main effect of this is to prevent us from getting -- getting our record assembled. And I think, you know, puts the -- to permit this and to completely change the schedule, I think, really puts the Court in the position of seemingly approving a form of testing that seems to have no record of being available out there and is directly contrary to Judge Brody's decision, for example, in the -- approving the NFL settlement because the linchpin of that ruling and what's being debated before the Third Circuit

is, is there any testing available to do this? She ruled no, flatly no, and that's what Dr. Cantu has said repeatedly here. But that's what we're stopping to take time to do here in this litigation.

The -- so at this point, Your Honor, we have really nothing to show for depositions and I think face a real challenge in getting those completed under the schedule that the -- that the -- that the Court has established. And to be clear, Your Honor, we've been trying desperately to keep that schedule because we think class certification needs to be decided sooner rather than later. But we keep going through these things of, well, let's amend the Complaint, let's go take medical exams that the main effect of which all these proposals by Plaintiffs is to prevent us from getting our record put together.

And finally, Your Honor, on the medical examination part of it that we're trying to get, you know, we first asked for medical examinations, we first started this discussion here in July. We've brought it up at the June 17 conference, and we've gone through this long process of proposals, counterproposals; Plaintiffs taking, if you look through the list of various positions they've taken, they've been all over the place on this, first saying, well, it's too intrusive, then later taking the position that we shouldn't take them at all.

We've gone through a long period, starting at the October 6th conference, Page 61 in the transcript, Plaintiffs said at that point, well, let's put this off because now we're amending the Complaint. That didn't happen until January. Within a few days after the Amended Complaint being in place, we came back and said, let's get the IMEs scheduled.

Then Plaintiffs took the position, we shouldn't get any IMEs of most of the Plaintiffs. As recently as the February 16th status conference, Mr. Cashman stated, and I quote: We have six Class One representatives, and Mr. Ludzik is a representative for Class Two. And since the class -- six Class One representatives do not have a current medical condition in issue, we don't think there's a need for IME on those six. Now we're here today putting off everything that we need to get done, as the Defendant in the case, to have medical examinations conducted even though only weeks ago they said that they were not necessary.

So, Your Honor, I appreciate your indulgence in hearing me lay that out, but I wanted the Court to understand fully why you were hearing the frustrations from us on the call that if you look at the list, where we stand right now, very near the end of the schedule, we don't have interrogatories we can rely upon, we've had minimal document production, we've got no help on collecting medical records from Plaintiffs, we have one deposition out of the 40 we're

permitted, and we don't have any medical exams. And that's where we are, and we're looking pretty close to the end of the discovery process.

And Your Honor, we just think that's not fair.

JUDGE NELSON: Thank you, Mr. Beisner.

Who wishes to respond?

MR. CHARLES ZIMMERMAN: I want a conference with him.

JUDGE NELSON: You bet.

(Discussion off the record.)

JUDGE NELSON: Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: I'm going to -- Mr. Cashman is going to respond to some of the substance in this. I'm a little taken aback by what has just been put before the Court. I talked to Mr. Connolly yesterday about the agenda. He said that number seven was going to go first, which was the question having to do with the Canadian Television and the document and order disclosure. He did not say that they were going to put exhibits up with regard to an argument that got joined yesterday afternoon when they sent a letter to the Court saying they wanted to have a rehearing on a discovery motion pursuant to, I guess it's local Rule 7.1J.

I want to have a fulsome discussion today, so I'm not backing away from that. I want to have this discussion because I think it's important, but I don't think it's right

for me and my team to be put before the Court with a concern about fundamental fairness to the NHL that is not on the record, that was not agenda-ed, that was not discussed with me when I talked to Mr. Connolly yesterday about the agenda. And it's certainly an attempt to try and put disorder into what has been an orderly process.

I know when I talk about things that judge -- that John Beisner sees on the agenda that's not on the agenda, he goes and says that's out of order and that isn't appropriate and he doesn't want to talk about it. But he has now done the same thing, so I want to have a fulsome discussion about it today, Your Honor, because I think the scales of justice are not being tipped in favor of the Plaintiffs and against the Defendants. It's just the opposite.

When Mr. Beisner says CTE cannot be diagnosed, that's in error. It can be diagnosed clearly in pathology upon death, but in the living it can be diagnosed by a differential diagnosis. And when Mr. Beisner says that CTE is not a disease that's caused by hits to the head in sports and his Commissioner goes before the public and says CTE is -- is not a disease when football says it is, we've got a problem. And the problem is that they're playing to an audience that we can't play to.

They're playing -- they're putting things in the press and they're putting things out there that they have not

allowed us to come forward with the documents that we know exist where they say football is dangerous and hockey is dangerous, where concussions occur in football, where brain injuries occur in football, and they're trying to shut it down by going to CTV and saying they can't have access to what has been de-designated documents. I want to have a fulsome discussion about that on the record today. I think it's appropriate.

Now, he started this and we want to finish it, and we want to have a discussion but I don't want to be shut down because we're going to be talking about things that are -- that we -- we've been very careful not to make a public disclosure about but now we're going to have to because their people have gone on the record saying CTE is not a recognized disease. It is. They've gone on the record and says CTE does not occur in hockey. It does.

They've gone on the record and says fighting makes the game safer. It doesn't. We've got the documents to show it, and we can't talk about it. But yet they get up here and tell us that somehow our people, our clients, are not being truthful and honest or we're not giving them discovery. Remember, Your Honor, it's taken us two years being in here every two weeks to get the documents out of the Defendants, and we're still not done. It's taken us how long, how many times did we talk about the database, and we still are having

trouble with databases.

So, it's not us that's dragging our feet. We want justice, we want to be in open court, and we want the truth to come out. But to sandbag us like this and tell us that somehow everything is mish-mashed and they're not getting due process, I'm not -- I'm not going to sit here and stand for it, and I want this record to be complete on that topic. And I'm going to have Mr. Cashman tell the Court exactly why what we're doing is in the best interest of this case and the management of this case, but more importantly in the best interest of our clients who, by definition, by definition, are concussed athletes whose brains have been affected by the sport of hockey, and that's what we're talking about.

JUDGE NELSON: Thank you, Mr. Zimmerman.

Mr. Cashman.

MR. MICHAEL CASHMAN: Your Honor, just to echo some comments by Mr. Zimmerman, on the agenda we have medical record collection issues. Medical collection record issues relates to the collection of medical records for non-class representatives. So, this is entirely out of order, what Mr. Beisner just presented. He went through to try and get a preemptive overall strike on some of these other issues. And I submit that it's improper, totally improper, what was done. And as it relates to the CTE discussion, Mr. Beisner, I think, knowingly is misrepresenting what has been stated.

And let's start with his letter that the -- that he wrote to the Court yesterday, March 21st, where he tries to say that CTE -- that you can't diagnose CTE. It's a word game, Your Honor. If you look at the -- at the letter that he wrote and to go right through it, Judge Brody, the very first comment that he quotes, neuropathological diagnosis, that means a confirmatory diagnosis can't happen until somebody is dead. The next comment by Dr. Cantu that Mr. Beisner misleadingly quotes, confirmatory diagnosis is what Dr. Cantu says. We go down to his litany in the next paragraph where he cites the NHL -- NIH concussion -- or consensus conference, and they say -- note the signature pathologic feature.

Again, the Mayo Clinic, definitive test. All of these things are talking about confirmatory diagnoses where you can say with 100 percent certainty based on an autopsy that somebody had CTE. That is entirely and wholly different from being able to make a differential diagnosis in somebody who is living. And Dr. Cantu, I believe, will testify to that fact. There is enough experience in treating and examining former professional athletes that the symptoms that they exhibit can be diagnosed in a differential diagnosis of CTE.

And so Mr. Zimmerman is absolutely correct that this -- that this is a word game that the Commissioner for the NHL is playing and that their lawyers are playing here. And it's not proper.

Now I want to -- unfortunately some of this may be coming up in relation to some of the motions, but I'm going to have to address some of the contentions that Mr. Beisner made.

First of all, he made the comment that this is a personal injury case. We all know from looking at the First Amended Complaint as it stands right now that this is a class case, and the class defines the two -- the two classes which these named representatives are seeking to represent. And they don't allege a personal injury *per se*. They allege that, for example, Class One, that they are at greater risk of developing a longterm neurodegenerative brain disease from having played in the NHL. So, that fundamental assumption or assertion is in error, and it puts the wrong context on everything that has been discussed.

Mr. Beisner, as he did when we were on the record, I believe it was a week ago when Your Honor was so kind to take time from her day to listen to us by telephone, Mr. Beisner makes the allegation that Mr. Nichols never reviewed his interrogatories. Well, I can resent -- represent to the Court categorically that he did, and just because he forgot may be a -- representative of the very issues that we're talking about here today. But I can tell the Court categorically that Mr. Nichols did review and approve all of his interrogatory answers. So, that's a red herring.

Again, Mr. Beisner represents that he's been unable

to collect medical records. Well, they've collected many, many, many medical records. And I submit, Your Honor, that most of these medical records which they have collected from the named Plaintiffs and absolutely for any of the non-named Plaintiffs are largely irrelevant to the issues that we're talking about. This is about the diagnoses or being at a greater risk of developing a neurodegenerative brain disease. And these medical records which the NHL engages in misdirection and says that somehow they've been prejudiced because they can't collect irrelevant medical records is a misdirection.

So, the medical record collection issue, Your Honor, does relate directly to the Fact Sheet issue. I'm going to address that more thoroughly rather than go off the plan right now, but that does relate to the medical record issue. There simply has been nothing that the Plaintiffs have refused to provide from their clients regarding medical records, in response to the interrogatories or document requests that have been posed. Even if they seek what we think is irrelevant information, we've given them everything that our clients were able to recall. Everything they have, we've given them the authorizations to go and collect from the medical providers that the clients could identify.

And that's entirely reasonable, and that's also the purpose of depositions. If they identify something else in a

deposition, they're free to go -- to go gather it for those named Plaintiffs. That's just not unusual. So, to accuse the Plaintiffs of dragging their feet, I submit, is wholly improper and it's contrary to the record, Your Honor.

And I'll address the issues as they relate to the medical records with the Fact Sheets and with the IMEs more specifically when we get to those. Thank you.

JUDGE NELSON: Thank you, Mr. Cashman.

Very briefly, Mr. Beisner.

MR. JOHN BEISNER: Your Honor, if I may, I think it's telling that -- well, first of all, let me just note, I think everything I addressed is somewhere on the agenda today. And what we were going to say with respect to each of those issues is that we weren't getting what we were entitled to. I just thought that the full picture should be presented on that, and I don't think there should be any surprise about putting forward those issues.

I do think it's interesting that Plaintiffs' first response to this is, oh, we need to go to the media with all of this. That's -- that's not what we're talking about here. We need to go to the press to put these stuff [sic] out there. We've not been going to the media. We've not been giving comments on that.

Indeed, one of the interesting things that you'll find in the package up there, as well, is the discovery that

has now been made and the evidence that one of the named Plaintiffs had an article published in the newspaper; and when asked specifically about it -- this was to recruit Plaintiffs for the litigation -- said he didn't write it, said he didn't see it before it was published, was aware of it after the fact.

I mean, you know, that's what we're -- we're looking at here. But let me get back to the specific points that Mr. Cashman made. And since he specifically addressed Mr. Nichols and his deposition, I will do so, as well, because apparently there's no objection about that.

(Portion of transcript filed under seal.)

MR. JOHN BEISNER: Well, how -- why are we not getting that information?

We don't have complete medical records because of that. And this is not -- we're not talking here about Fact Sheet people. These are the six representative Plaintiffs we don't have that information from, a complete default on that -- on that issue. And I don't -- there's no way to explain it. We need an explanation. And then we say, well, okay, these interrogatory responses, I can't explain what the -- what the -- what the -- what the disconnect is, but the testimony there is he had never seen them before, and they were wrong. He went -- we had to spend time in the deposition going through, making corrections on basic symptoms, timing,

complete disconnect.

And Your Honor, with respect to the CTE issue, you know, I think that -- there is no way to reconcile testing here for CTE or thinking it can be diagnosed. It's Mr. Cashman that is leaving parts out. Judge Brody's decision says, quote, no diagnostic or clinical profile of CTE exists. That's the linchpin of that decision. If she's wrong on that, that settlement fails. And that's what the -- the position that Plaintiffs are taking here apparently is that contrary to her finding. I don't know how you can twist Dr. Cantu. I mean, before he said, you don't need to test them because you can't eliminate, you can't deal with CTE. That's what he says.

Now suddenly, oh, yeah, we can test them for that. Presumably he's going to say there is -- it's some diagnosis. I don't know where that's going to come out, but this is a complete departure from accepted science on that issue, and our schedule is being completely scrambled to pursue this red herring. That's what we're complaining about. And you know, I think when it becomes apparent that that testing is done here, there's just going to be a massive reaction of, what are they talking about? It's not supported by the science.

JUDGE NELSON: Okay. Thank you, Mr. Beisner.

MR. MICHAEL CASHMAN: May I, Your Honor, briefly?

JUDGE NELSON: Very briefly, yes.

MR. MICHAEL CASHMAN: I guess Mr. Beisner can't resist arguing the other motions prematurely, but I think this portion of the transcript where Mr. Beisner is talking about Mr. Nichols' testimony should be sealed because that was designated as confidential under the protective order. I think it's improper for Mr. Beisner to bring it up here --

JUDGE NELSON: We will seal that, and the record should so reflect that.

MR. MICHAEL CASHMAN: And Mr. Beisner fails to account in that regard for the most fundamental explanation Mr. Nichols' problems, which we're going to find out if there are any, that would explain why he forgets what he just signed or what he said before. So, that will be something that will be addressed.

As far as the medical records issue, we've given them the ability to collect everything that we've been made aware of, and so has Mr. Nichols by signing authorizations. Again, this is a red herring because this issue isn't about Mr. Nichols having broken his leg when he was -- when he was 16 years old or anything else, what his diet is now with his current medical provider. Any of those kind of things, if we get down to it, are just clearly irrelevant. What we're talking about here in this case is either that Mr. Nichols is a representative class -- of Class One, that he's at greater risk of developing a neurodegenerative brain disease because

he played in the NHL and was subjected to concussive and sub-concussive hits so his medical records have nothing to do with that, or after he is seen by Dr. Cantu and if he receives a diagnosis of any neurodegenerative brain disease which may be CTE, it may be something else, it may be no diagnosis, but if he receives a diagnosis of a neurodegenerative brain disease such as but not limited to CTE, the only medical records for that which might be relevant would be the examination conducted by Dr. Cantu.

So, all this complaining about medical records is just misdirection and a total red herring. And I submit that Mr. Beisner's entire argument really should be disregarded here and let's stick to what's really the issue. Thank you.

JUDGE NELSON: Thank you.

Well, gentlemen, you know how dedicated the Court has been to this litigation. Unlike most multi-district litigation, I, the District Court judge on this case, have met with you nearly every two weeks since the outset of this case. I have taken everything you have said seriously. We have put into place all manner of rules and protocols about how to proceed, and it's gone very smoothly. And I think having the formal conferences once a month and the informal conferences once a month has worked well. It's given me an opportunity off the record to understand what the source of the frustrations is on both sides, to try to focus in on that, and

come up with the most efficient way to handle your concerns.

And what we've all agreed to is that the parties would do their best to meet and confer on issues and they would tell me when the meet and confer reached an impasse, at which point it was very clear that what was to happen next was to file a formal motion to be presented on the record in court so I could rule. And that is how the case has proceeded, and it's proceeded very successfully in that way.

Now I'm hearing all kinds of discontent which doesn't make a great deal of sense to me. For instance, on the IMEs, this started with the NHL taking the position that highly-invasive IMEs was appropriate. We discussed that at the informal conference last summer. I said I wasn't aware of any precedent in which players would have to be subjected to risky, invasive, and painful spinal taps in order to participate in this case; that that would chill, unnecessarily chill their participation; and I needed to see medical evidence that that was appropriate and necessary. The parties went back to the drawing boards. They met and conferred. The very first time I have seen a motion to compel IMEs is for this hearing today.

The Court hasn't been dilatory. Apparently impasse was not reached until recently and a motion was presented today, and I will, of course, rule quickly on that motion. But there's been no delay. That would be an inappropriate way

to characterize what has happened. On the other hand, nothing is more important to this Court than that each side has a full and fair opportunity to do all the discovery they need, to present every available claim, and to present every available defense to this Court at the time the Court considers class certification.

And if there is any good cause shown on either side that you have not had that full and fair opportunity, I promise you, you will get that full and fair opportunity. I don't want to rule on class certification until I have a complete record, where each side has exhausted the discovery they need to present because I want to get it right. I want to make the right decision in this case.

It is not fair to argue that there's been this gross imbalance in the discovery that's been had on each side of this case because it's comparing apples and oranges. In preparation for class certification, it is not surprising that the Plaintiffs would have received more documents than the Defense would have received by significant multiples of documents. It is not surprising that the Plaintiffs would have taken more depositions.

But I hear the concern of the Defense. The Defense wants to make sure they have the discovery they need to present their case, and there is no ruling this Court has made or no action this Court has taken to prevent that from

occurring. We have four-and-a-half months left in the fact discovery schedule. I said on the phone last week and I'll say it again: If at any time there is good cause to believe -- good cause -- to believe that that schedule needs to be briefly extended to accommodate more discovery, you know this Court is going to grant that opportunity. I am not going to make that decision until both sides have had a full and fair opportunity to do their discovery.

What really triggered all of this was the following: Mr. Ludzik, the representative of Class Two, made the decision recently to step down as a Class Two representative. What is available to the Court is what was available in the press. According to the press, Mr. Ludzik was intimidated into making that decision. That's what -- I'm just telling you what the press says. The press says that Mr. Ludzik concluded that he didn't want to go through radioactive PET scans with invasive dyes because he has been definitively diagnosed with Parkinson's disease for some time and he thought that that was unreasonable given his lack of strength and the progression of his disease. And his son plays in the NHL, and he believes that his son's future is at risk because of his participation in the case.

I don't know if any of that's true, but what I do know is that it wasn't the Plaintiffs' fault that that occurred. Mr. Ludzik made that decision. The Plaintiffs

would prefer that he had not made that decision. At that point in time, Dr. Cantu had not yet -- apparently or not recently -- examined certain, not all, of the Plaintiffs' representatives who are showing significant degeneration in their physical condition. And it's worth talking about that right now.

This is not a straightforward personal injury case. This is a case about an area of medical science that is front and center. It is being heavily funded. It is changing every day. Only recently were there hearings before Congress on this very issue. The train is speeding down the tracks here in terms of the progression of medical science on this issue. And whatever happens between now and trial, we'll have to accommodate because at trial, whatever the condition, the certainty is about medical science, that's what will be presented at trial. It's not going to stop now.

We're not going to stop with what Judge Brody was aware of a year ago or what Dr. Cantu said six months ago because this is changing. We all know it's changing. We're all reading about it. I don't know if Dr. Cantu can stand -- sit in that witness stand and testify to a reasonable degree of medical certainty that it is more likely or not that a hockey player has CTE. I don't know.

But there's nothing that's been said in the record by Dr. -- by Judge Brody -- who I know very well, spoken many

times to about this case -- or Dr. Cantu or the Mayo Clinic for that matter. I don't know. I don't know whether he can testify to that, and I don't know whether he'll ultimately be able to testify to that. But just as I need to give the Defense the full opportunity to present their defenses, if the medical science is changing in such a way that a prominent neurologist in the heart of this research believes that he can credibly give that testimony, he gets a chance to do it.

And in order for him to make that judgment, the request is that these depositions, some of these depositions be moved a matter of weeks, within an already-established factual deposition schedule, not outside the schedule, doesn't involve an extension of time, and leaves the Defense perhaps six weeks to do any follow-up depositions. If that's not enough time, you'll come tell me, and you'll come tell me why, and I'll give you more time. But I need to be fair here. I need to be fair to both sides, and I need to make sure that this case on behalf of both the NHL and the hockey players represents the state of the art and the science.

Again, I am going to make sure before I decide class certification or before we try this case, for that matter, that every side has had a full and fair opportunity to present their case. And I would ask both sides, I would ask the Plaintiffs to make sure that their interrogatory answers are accurate, to make sure that they've talked to the Plaintiffs

about those answers, to make sure that the Plaintiff Fact Sheets -- and we'll talk about that later -- are accurate; to make sure that these Plaintiffs are adequately prepared for their depositions; to make sure that they understand the change between the original Complaint and the new Amended Complaint.

Am I clear that I am here as the fairest judge you can imagine in this case? That is my goal.

All right. Let's get back on track and go through the agenda.

Mr. Schmidt.

MR. CHRISTOPHER SCHMIDT: Good morning, Your Honors. A brief update.

First, on the ongoing production obligations of the Clubs, the Clubs continue to produce medical records as we receive authorizations. I would like to note that the Clubs have produced the medical records in their files for all of the named Plaintiffs in the Master Complaint and dozens of others. But more authorizations as they come in, the Clubs take those authorizations and go through and search for those historic records, and that will continue to take some time and is labor-intensive.

Second is we represented to the Court at the last informal that we were making a supplemental production. We have done that, we're talking with Plaintiffs, and we're

hoping that will resolve the remaining PMI issues. Thank you.

JUDGE NELSON: Thank you.

MR. CHRISTOPHER RENZ: Good morning, Your Honor. Chris Renz on behalf of Plaintiffs.

On the last issue that was raised by Mr. Schmidt, we've -- I've stood before you on a number of these successively. We anticipated bringing a motion to compel on the PMI log issue before Your Honor today. On the eve of filing that motion, we received some supplemental -- or a promise of supplemental production, which we've now received some of. We're waiting on privilege logs. It looks like, based on what we have seen, that we'll be back before Your Honor. But we want to respect the process you've just thoroughly outlined again. We will meet and confer, and perhaps set a motion in the future.

JUDGE NELSON: Very good.

MR. CHRISTOPHER RENZ: Thank you.

JUDGE NELSON: Okay. Let's briefly do some third-party discovery issues, and then we will take a brief break.

The Players Association. Or perhaps sometimes Mr. Beisner you can cover a whole group here at once.

MR. CHARLES ZIMMERMAN: I'm sorry, Your Honor, which argument are we taking?

MR. JOHN BEISNER: Players Association.

JUDGE NELSON: The third-party discovery, so --

MR. JOHN BEISNER: Right. Your Honor, on the Players Association, with respect to the PA's document production, we were advised by their counsel at Sidley that they are near completion. We got notification we were going to get another installment of documents from them today, which, as always, we will immediately share with Plaintiffs' counsel. I think they've said there will be one more set of production thereafter, and then the PA believes that they will be complete. Obviously we need to go through and see what we got to see if there are any other issues, but they're nearing completion of the PA's own production.

And then we have the production from the six consultants to whom we've sent either the letter rogatory process or with respect to the one U.S. consultant, a subpoena. And I believe they are about to finish kind of working out the details of that production. We're advised by the PA that those documents have largely been collected, and so it's a matter of getting the protocol finished so that those documents can be produced. I don't have a clear sense from them yet on a timeline for completing that, but that I think should be a -- our sense is a process that they'll be able to complete in the next 30 to 45 days.

JUDGE NELSON: Okay. Very good.

MR. JOHN BEISNER: So --

JUDGE NELSON: All right.

All right. Mr. Connolly?

MR. DANIEL CONNOLLY: All right. I just didn't want to -- I wanted to see if there was a response from Plaintiffs' side on the --

MR. CHARLES ZIMMERMAN: I think I heard we'll have the NFLPA in 30 to 45 days; is that correct?

MR. DANIEL CONNOLLY: NHL.

JUDGE NELSON: One more production.

MR. CHARLES ZIMMERMAN: Yeah, NHLPA.

MR. JOHN BEISNER: I'm sorry, to be clear, this is the production from the PA itself I think probably will be completed more quickly than that. It's the consultant's documents I was saying would be in -- I'm -- I should be careful saying 30 to 45 days. Obviously we're not doing that production, but the sense I got from the conversation with them is 30 to maybe 60 days they'll be finished with those.

MR. CHARLES ZIMMERMAN: Just trying to keep it so that we know what to expect and when. Thank you.

JUDGE NELSON: So is there anything to discuss in terms of third-party discovery at this point other than Chubb's motion?

MR. DANIEL CONNOLLY: Your Honor, I was just going to give you a quick update on the other items under there if you'd like me to.

JUDGE NELSON: Please, Mr. Connolly.

MR. DANIEL CONNOLLY: As far as Dr. Cantu as a fact witness, last week we sent a -- Plaintiffs' counsel a letter, a deficiency letter. They have not yet responded, but that discussion is ongoing.

Dr. Ann McKee and Dr. Robert Stern, I have talked with -- I've communicated with counsel at Boston University who has asked for a brief extension and thinks that he can respond to the deficiency letter that we provided to him and should get documents forthcoming soon.

Chris Nowinski and the Sports Legacy Institute, similarly I've had discussions with their counsel who have requested that we make some accommodations to them in order to produce about 10,000 pages worth of materials, so they're going to get those materials to us.

The player agent issue has, I think, we've largely gotten most of the materials we've asked for.

As to Dr. Guskiewicz, Plaintiffs gave us an extension to respond. We understand that the Attorney General and the University may be involved in the response process, so this may get a little bit more involved, but that is underway, as well.

JUDGE NELSON: Okay. Very good.

And then I believe, Mr. Beisner, you spoke about the NHL's letters rogatory. Right? Are we done with that or not?

MR. JOHN BEISNER: Yes. That's what I was referencing with the NHLPA consultants. Yes, Your Honor.

JUDGE NELSON: Right. Perfect.

Okay. We're going to take 10 minutes. We will resume -- that's actually an hour behind, so it's really 10:40, about 10:50. Court is briefly adjourned.

(Short break taken.)

JUDGE NELSON: Okay. Let's talk about Plaintiffs' letters rogatory, please.

MR. BRIAN PENNY: I just have a brief update for there. As I told you at the last informal conference, Mr. Shamie and I have reached an agreement on how -- the mechanics of the production from the Canadian Clubs, and he informed me this morning that the production is well underway. He estimated six to eight weeks to complete. I would like to talk to him about that, but it's underway and should be getting some documents soon.

JUDGE NELSON: Okay. Very good.

Okay. What is item number seven? Does this have to do with Canadian Television?

MR. DANIEL CONNOLLY: Yes.

JUDGE NELSON: Okay. Mr. Connolly.

MR. DANIEL CONNOLLY: That was the subject of Mr. Zimmerman and my discussion yesterday. Mr. Afinson was going to attend today. He called me this morning to tell me

he was sick. Just for background, this, as Your Honor likely knows, this matter involves a dispute that the NHL had with Canadian Television and its counsel concerning their obligations to destroy a copy of the Court's March 4 order.

JUDGE NELSON: Right.

MR. DANIEL CONNOLLY: The confidentiality order that was inadvertently forwarded by the Court to Mr. Afinson and subsequently by Mr. Afinson to Canadian Television. Thereafter, Mr. Afinson and I had many, many discussions about their obligations. The Court subsequently sent a letter on March 10 instructing that he destroy any copy of that order and that any person that he forwarded it to also destroy that order and not disclose its contents. As I said, Mr. Afinson planned to be here today because his client was not entirely of the same view about what they ought to do.

Ultimately, however, this morning he told me that his client has agreed to the Court's request and will be destroying all copies of the order, all information contained in that order, as well as not -- agreeing not to disclose the contents of the order. He said that I was free to make this representation on his behalf to the Court and that he would today be providing Court and counsel with an e-mail confirming this. He apologized for not being able to be here --

JUDGE NELSON: I believe he also sent me a letter to that effect, didn't he, saying he was abide by the court

order?

MR. DANIEL CONNOLLY: Well, he sent an e-mail, Your Honor, that said he had conveyed the information to his client.

JUDGE NELSON: Okay.

MR. DANIEL CONNOLLY: His client, however, did not necessarily agree that they were required to destroy all copies of the Court's order that they had inadvertently received, and so that was the source of the discussions. And we asked that he -- and they -- delay any -- any dissemination of that information until we could come and meet with you today because we didn't want to bother you during your vacation. And so we finally got an agreement after a lot of discussion back and forth. And unfortunately he couldn't be here today, but we do think we have the agreement that we asked for.

JUDGE NELSON: Okay. Sounds good. Very good.

Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: I see this a little differently, Your Honor, and I hope you will bear -- hear me out on this.

JUDGE NELSON: Yep.

MR. CHARLES ZIMMERMAN: Counsel made an inadvertent disclosure --

JUDGE NELSON: I think the Court made an

inadvertent --

MR. CHARLES ZIMMERMAN: Right. Based upon a court order, that was inadvertent. The Court wrote to counsel, and counsel wrote back saying, all good. And I'm -- I'm not -- I'm sort of surprised it hasn't ended there. But I asked myself, why are they -- why is the NHL coming into court and once again nailing down this in such a fashion, to reconfirm and reconfirm and reconfirm something that we all know was inadvertent, and there's been apologies back and forth and we're all trying to play by the rules. And I think about this, and I say, you know, the problem -- the problem is that it's a -- there's a bigger context to this, and I alluded to it before. And I'm not trying to play this out in the newspaper. I'm not -- I've heard the Court on this, and I'm not trying to play this out in the press.

But here we have this situation where the League, the NHL, is trying so hard to make sure that nothing gets out -- that, by the way, has been declassified by this Court -- but nothing gets out to Canadian Television who's watching with great interest what's going on in the concussion litigation here in Minnesota with the NHL. They're watching it very carefully.

But yet they send out their Commissioner, Gary Bettman, before reporters to say that football -- that hockey is not football, that was his quote. But yet the documents

that you and Judge Mayeron reviewed and said were declassified are really saying, you know, the injuries are very much the same. The sports really create the same problem. Concussions are really a serious problem. And the documents are there, and the documents will tell the real story of what Bettman isn't telling, which is hockey is the same as football when it comes to what happens to the head.

But now they want to just make sure that gets tapped down so that never sees the light of day. But yet it's unfair for the Commissioner to get out before reporters, it was reported to me that this statement was before reporters that football -- hockey is not football. And then they put an op-ed by a former general manager saying, you know something, fighting would make foot -- would make hockey more dangerous because there would be more concussions. And they cite studies about how many concussions there are in hockey and how dangerous hockey is with the concussions. They talk about all these studies, but then they say that fighting would somehow make it less dangerous when, in fact, the -- we have documents that show the opposite. It would make it -- that fighting is, in fact, causing lots of injuries, and we can't put that out there.

Yet, Bobby Smith -- I think that's his name, Bobby Smith, a former player for the -- a former star player, a former general manager of the Phoenix Coyotes for four years,

puts out an op-ed in the "Globe and Mail," which is Toronto's biggest newspaper saying the opposite. And we have to come into court and find out that we can't even refute that, what the Commissioner says and Bobby Smith says, what we think that are false, with documents that have been declassified.

And at the same time, the NHL comes in here and making sure they're tapping down Canadian Television who wants to cover the truth. They can report both sides, but they shouldn't have their hands tied behind their back and not be able to report on --

JUDGE NELSON: I don't mean to interrupt you, but let's step back a second. This specific issue had to do with the inadvertent disclosure of an order that was filed under seal that upheld some of Judge Mayeron's rulings preserving the confidentiality of some documents, and with respect to a few overruling her. That order should not have gone to Mr. Afinson.

MR. CHARLES ZIMMERMAN: Agreed.

JUDGE NELSON: That has nothing to do really with whether declassified documents now can be shared with anybody, which is one issue, or what we've talked about many times on both sides is whether this case should be tried here in this courtroom or in the press.

MR. CHARLES ZIMMERMAN: I couldn't agree --

JUDGE NELSON: So there's really different -- I just

want to tease out the different issues here, Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: I understand that. And that's where the -- the problem comes because it's a lot about messaging. The Court talked earlier about -- about intimidation, and we talk about messaging and we talk about statements. The problem we have here, Your Honor, is the public is watching. This -- this -- this -- this industry of concussion -- this -- excuse me, not industry, this injury of concussions in sport is changing, and people want to know about it. And all I'm saying is that it needs to be fair to both sides.

If the Commissioner can come out and say what he says and Bobby Smith can come out and write an op-ed and we know differently from the facts that are declassified, why can't at least Canadian Television who wants to know who's intervened in these proceedings have access to that because what we're talking about is declassified documents, which I think the Court has told us they may be declassified but until they're put into the record, they can't be accessed.

And that's what I'm concerned about. And I think what the subtopic here or the subtext of all this is what the League is trying to do is make sure that the press is kept out. And I don't want that to be kept out. I think it -- the light of day is important to the process. That's my point. I think the light of day is important. I don't want to

manipulate them. I don't want the other side to manipulate -- to manipulate them, but I think right now we've been told we can't even tell anything to the press that we know is different than what the Commissioner and what Bobby Smith is telling the press.

JUDGE NELSON: I don't know why you think that. I mean, it would be my preference, of course, that neither side talks to the press, but I haven't ordered that. I haven't required that. I don't think I can do that. That's just my preference. We've talked about that informally, but I'm not aware of anything that would keep either side from going to the press on stuff that's declassified.

MR. CHARLES ZIMMERMAN: Okay. Well, if that's true, that's fine. But I've just been handed a note from Mr. Cashman that says the NHL has refused and has tried to make us promise not to give the declassified documents to Canadian Television or anyone else, and the NHL has said no release and with -- not without a court order.

JUDGE NELSON: Okay. I think there's a disconnect here.

MR. CHARLES ZIMMERMAN: Well -- and that's why I stood up, Your Honor --

JUDGE NELSON: I think de-designated documents can be shared with anybody; although, again, I wish that this case got tried in this courtroom.

MR. CHARLES ZIMMERMAN: I understand.

JUDGE NELSON: But I have no power to prevent that, nor does the NHL have any power to prevent that.

MR. CHARLES ZIMMERMAN: We've been laboring under a different understanding, and now I'm glad we had the discussion because now I understand better the Court's position on that. That has not been the NHL's position as I've understood it.

JUDGE NELSON: All right.

Let me hear from the NHL.

MR. JOHN BEISNER: Your Honor, I just wanted to correct a couple of things in the record. The focus of this conversation is about a fellow named Bobby Smith. He has nothing -- he's a former NHL player. He is a member of the putative class, but he has nothing to do presently with the NHL. So, I don't know, this whole idea that his piece was sponsored, he owns a club, a hockey club, but it's not affiliated with the NHL. So, I don't know where this is coming from.

And Mr. Bettman's comments, it was a press conference. He got asked questions, he answered. This wasn't an effort to go out and publicize anything on that. He's going to be asked questions, and he's going to answer them. But this was not an effort to obtain publicity on this. But I just want to make that clear for the record that we're not out

there publicizing this and so on. And you know, given the number of pieces that have been written by class representatives and so on, I just think that's an odd assertion to be made.

And I don't recall any conversation about declassified documents. I think there was a discussion with you on the record at a status conference about setting up websites and --

JUDGE NELSON: That I would prefer that didn't happen.

MR. JOHN BEISNER: And that's what you said, Your Honor --

JUDGE NELSON: But I haven't forbidden anything, and I can't do that.

MR. JOHN BEISNER: That's the only conversation I remember about that.

JUDGE NELSON: Right.

Mr. Cashman.

MR. MICHAEL CASHMAN: Let me just add one comment, and I think perhaps the Court has answered this. But, of course, CTV, as being an intervenor, believes that they're entitled to all the documents which have been declassified, having intervened for that purpose. And I know they asked the NHL for a copy of all those documents and the NHL refused. And they asked us then for a copy of all those declassified

documents; and given what the NHL told us about its position, we were reluctant to make those available. But just so the record is clear, it's --

JUDGE NELSON: I don't know what would preclude you from doing that.

MR. MICHAEL CASHMAN: Thank you.

JUDGE NELSON: All right.

Anything to discuss on deposition scheduling that we haven't already addressed?

MR. JOHN BEISNER: I don't believe so, Your Honor.

JUDGE NELSON: Okay. All right.

Class certification discovery schedule, is there --

MR. JOHN BEISNER: I think we've covered that, Your Honor.

JUDGE NELSON: Okay. All right.

MR. CHARLES ZIMMERMAN: Your Honor, those are the two I was supposed to argue (laughter).

JUDGE NELSON: Okay.

MR. JOHN BEISNER: Sit down. You won (laughter).

JUDGE NELSON: I presume there's nothing to talk about the motion to dismiss Count 7 and 8? Anything to discuss there? No? Okay.

Anything to discuss on status of Complaints filed by non-class representatives? What is that?

MR. CHARLES ZIMMERMAN: I don't think there's

anything to discuss. As I understand, they just -- they just stay in the MDL until the Court has ruled whether we proceed as a class or not class. And then at that point we will deal with them as they need to be dealt with if it becomes a mass tort under those circumstances.

So, I have nothing further unless, John, you had something.

MR. JOHN BEISNER: Well, Your Honor, this -- just to make sure the record is clear on this -- and I take it maybe this proposal has been withdrawn -- they're -- and we discussed this -- I think we've discussed this previously. This is a question of we now have a number of Complaints that have been filed that are not part of the Master Complaint, that are not consistent with the Master Complaint. So, all of the -- or many, I shouldn't say all, but many of the individuals who have filed their own separate actions are seeking compensation for current injury even though they have not been diagnosed with a longterm disease.

JUDGE NELSON: But those cases are stayed, am I right?

MR. JOHN BEISNER: That's -- they are stayed, Your Honor. But there was a proposal by Plaintiffs that were made to conform those complaints to the Master Complaint; apparently they've dropped that. I just wanted to provide that explanation to the Court.

JUDGE NELSON: Okay. Mr. Cashman?

MR. MICHAEL CASHMAN: Well, really this is a premature issue. The Complaints are all stayed, the underlying Complaints, and there was some discussion about whether some Plaintiffs might conform to the current First Amended Complaint, but that hasn't happened. And unless and until it does happen, the underlying Complaints are stayed, and they are in the status that they have been all along.

JUDGE NELSON: Okay.

MR. MICHAEL CASHMAN: Thank you.

JUDGE NELSON: Anything about privilege log challenge protocol? Is there any progress on that?

MR. CHRISTOPHER RENZ: Your Honor, Mr. Connolly and I have been in touch about a protocol to present to you, Magistrate Judge Mayeron. It looks like we might have something worked out, and we just need to get it to you and to come see you about a schedule.

MR. DANIEL CONNOLLY: That's correct.

JUDGE MAYERON: Okay.

JUDGE NELSON: Sooner rather than later, okay?

MR. DANIEL CONNOLLY: Yes, Your Honor.

MR. CHRISTOPHER RENZ: Yes, Your Honor.

JUDGE NELSON: Okay. Very good.

All right. Let's go back to the beginning, then, and cover the motions. And we'll start with the motion to

amend the Plaintiff Fact Sheets.

MR. JOHN BEISNER: Your Honor, I think this is a fairly straightforward question. Your Honor previously said that those who have filed actions here in this proceeding but who were not part of the Master Complaint should be obliged to file responses to a specified Fact Sheet. And the issue that has arisen now which relates a little bit to what we just talked about was the fact that the Plaintiffs have filed responses to those, but now the one section of the Fact Sheet that deals with their claims doesn't match up with the Complaint as it has been amended.

So, all that we are asking is that the Plaintiffs who have responded respond to an amended Section 4 of the Plaintiff Fact Sheet to make clear what their position is with respect to claims for relief. This goes back to the issue, Your Honor, that we just talked about. And that is: Are they in Class One or Class Two? If they're in Class One, proposed Class One, are they seeking any compensation for medical injury or for current injury because they have filed their own lawsuits in which -- which they control? And we think that we're entitled to a response on that so that it is clear what these others, the -- that have filed in the case are seeking with respect to those claims.

This is a critical issue, Your Honor, because at the moment, many of them have given sworn responses indicating,

yes, I have a current injury, no indication of diagnosis that would put them in Class Two, and I want compensation. It's a huge conflict issue with respect to class certification. If that's the position they maintain, that each of them ought to be able to make that determination, we're not asking for much, just fill out Section 4 and give it to us.

JUDGE NELSON: Well, one concern I have is the detail that you're seeking. You want -- if they're seeking compensation, you want every bill, every x-ray, every -- I mean, this is pretty onerous at this stage of the litigation for the purposes that you're --

MR. JOHN BEISNER: That was in the original Fact Sheet, Your Honor. That's not a new question. And if they're asking for that, they would have already responded to that.

JUDGE NELSON: Okay. I -- I got confused because if I look at your brief, that was one of the questions you wanted them to address. So --

MR. JOHN BEISNER: Well, and the reason we want them to address that is if they're not seeking compensation, then they can just say, we take that back, what we gave you earlier on that. That's the clarification we're seeking. If they've answered the question previously and they're going to maintain their position that they do seek compensation for current injury, they've already answered that question.

JUDGE NELSON: Okay.

MR. JOHN BEISNER: So, we're not -- these are just -- I think that the questions we're asking for, basically what's your position? Are you seeking for current injury? But they have, at the moment, sworn interrogatory answers that say that many of them say they are. And if that's the way it is, that's fine, we're happy to play the record that way. But we're just asking for an update if they want to change that.

And they can stand, you know, if they just want to say -- well, I think they need to respond to Section 4 because the questions are different. We wrote the Fact Sheet that the Court ordered consistent with the original Complaint. Plaintiffs made the choice to change it, and we're just asking for that one set of questions to conform to that.

JUDGE NELSON: How many current Plaintiffs do we have that we're dealing with on that group?

MR. JOHN BEISNER: One hundred and so?

MR. MICHAEL CASHMAN: One hundred and some but -- I don't have the exact number.

MR. CHARLES ZIMMERMAN: It's over 100, Your Honor.

MR. JOHN BEISNER: Ninety-eight Fact Sheets, I am told.

JUDGE NELSON: Okay. Thank you.

Mr. Cashman.

MR. MICHAEL CASHMAN: Good morning, Your Honor.

The fundamental flaw in the NHL's entire argument on

the Fact Sheets, including its motion for an amended Fact Sheet, is that they characterize this as a mass tort. And I think it's important that we, especially with the First Amended Complaint, that we remember that this is a class case and not a mass tort. So, as we've said before, I'm sure the Court will recall that our view of the Fact Sheet is this was initially implemented was to be some preliminary gathering of basic facts in the event that class certification was not granted at that time when there were allegations in the Master Amended Complaint about post-concussion syndrome.

And now with the First Amended Complaint, the situation is different, and unfortunately our view is that the NHL has turned these Fact Sheets into a whole -- a whole other world of satellite litigation that really isn't warranted when we're talking about a class case. They certainly seek much, much, much more than the basic facts.

JUDGE NELSON: But talk to me about how it plays out at class certification. So, if there are Plaintiffs other than named Plaintiffs who continue to seek damages but are Class One Plaintiffs, how does the Court sort that through and the adequacy of class representatives for Class One?

MR. MICHAEL CASHMAN: Well, this is why, Your Honor, in response to the NHL's motion, we toyed with the idea -- and I shouldn't say toyed -- we considered making a cross motion to dispense with the Fact Sheets altogether. But the issue

that you raised is one of the reasons why we did not -- why we did not do that. But at the same time, having amended Fact Sheets is just not necessary.

In the NHL's brief on this motion to compel here, they say that the main purpose of these amended Fact Sheets is to determine who's in Class One and who's in Class Two. Well, that's just one question. All they would have to ask is: Have you been diagnosed with a neurodegenerative brain disease? And their amended Fact Sheet goes far, far, far beyond that. And furthermore, that question is clearly already in the existing Fact Sheet. So, there's really no -- no need for --

JUDGE NELSON: The whole issue has to do with whether there are Class One -- Class One Plaintiffs out there who, unlike the Class One Plaintiffs in the Master Amended Complaint, are seeking compensation for concussive syndrome, I suppose.

MR. MICHAEL CASHMAN: And those questions are already in the existing Fact Sheet. And that's why --

JUDGE NELSON: But the existing Fact Sheet, Mr. Cashman says that they are. So, the Master Amended Complaint says they're not, and the existing Fact Sheet says they are. Don't we have to make that consistent?

MR. MICHAEL CASHMAN: I don't think so. And for purposes of the class case, because these individual

Plaintiffs who are out there, their Complaints are stayed, their Complaints say what they say.

JUDGE NELSON: But they would be members of the class.

MR. MICHAEL CASHMAN: They would be members of the class, but those issues would be sorted out and should be sorted out if and when class certification is granted. I mean, they've got those -- their existing Complaints out there. And by forcing them at this time to say whether they are seeking compensation for some personal injury such as post-concussion syndrome is a --

JUDGE NELSON: I see. What you're saying to me is, they don't want to commit to that because, should I not grant class certification, it might be that Plaintiffs, with the same conditions, some seek damages and some don't. That's what you're saying.

MR. MICHAEL CASHMAN: Precisely, Your Honor.

JUDGE NELSON: Yeah.

MR. MICHAEL CASHMAN: And we don't think that an amended Fact Sheet is necessary. And again, the NHL on their motion to compel an amended Fact Sheet, focused on the First Amended Complaint. Well, the named Plaintiffs, the class Plaintiffs, representative Plaintiffs, they've got the full discovery rights to figure out what -- what -- what those individuals allege through the normal discovery tools. So,

the Fact Sheets don't apply to them. And the amended Fact Sheet cannot apply to the non-class rep Plaintiffs because they've got their individual Complaints out there which are consistent with the existing Fact Sheet. So, it's a misnomer to say that the amended Fact Sheet should be ordered for those individuals.

And importantly, Your Honor, I think if you look at the proposed amended Fact Sheet, what it really is is an attempt to get a second bite at the apple. What the NHL is doing is asking questions that they wish they would have asked the first time around and that they are trying to phrase more artfully now. And you can see that, Your Honor, I think by looking at PTO number 15, docket 171, and look at Section 4 there, which is on Pages 9 and 10 of -- and I'm looking at the -- the -- Plaintiff Fact Sheet that was approved.

That's under "Your Claims in This Lawsuit," that's Section 4 of the Fact Sheet, and compare that, Your Honor, to the proposed amended Fact Sheet that the NHL seeks to have now. And that's docket 397-6, and the ECF page numbers are 10 through 13.

JUDGE NELSON: So give me an example of support for that argument. Tell me in the new Plaintiff Fact Sheet where you believe they're getting a second bite of the apple.

MR. MICHAEL CASHMAN: Well, I think you can see that all the questions are different. So, if you look at the old

Fact Sheet, question number two: Identify all specific diseases or medical conditions that you attribute to your participation in hockey and the NHL for which you are seeking damages or other relief in this lawsuit.

Now look at number 2 in their amended Fact Sheet, docket 397-6, Page 10 of 22, Question 2, Section 4, Question 2: Have you ever been diagnosed with any longterm neurodegenerative diseases or conditions, including but not limited to ALS -- dementia, ALS, Alzheimer's, Parkinson's, or CTE, et cetera, as defined in the First Amended Consolidated Class Action Complaint.

Again, the fact that it references the Amended Consolidated Class Action Complaint doesn't have anything to do with these non-class representative Plaintiffs who have their own Complaint out there.

Identify all specific diseases, illness, medical conditions, or other injuries of any kind that you contend you have experienced -- that you contend was caused by playing professional hockey in the NHL. That's a more specific question.

Number 4: Have you ever been diagnosed with post-concussion syndrome?

That's a specific question that they didn't ask in the original Fact Sheet.

JUDGE NELSON: Okay. Okay. I get your point, but

let's go back to the point I can't quite totally resolve. I need to think about it more.

At the time of class certification, what is your response to the NHL's argument that the current named Plaintiffs, the current representatives of Class One, are inadequate because they are not seeking damages for their post-concussion syndrome?

MR. MICHAEL CASHMAN: Well, I would think that the -- that if class is granted, the other Complaint, the other Plaintiffs could either elect to conform to the First Amended Complaint at that time or they could withdraw their claim for individual --

JUDGE NELSON: Sure.

MR. MICHAEL CASHMAN: -- compensation.

JUDGE NELSON: But does it impact the Court's decision about the adequacy of those representatives or not? I don't know.

MR. MICHAEL CASHMAN: We don't think so. We can talk amongst ourselves, you know, Plaintiffs' counsel, and get back to the Court if you wish. But I don't think that creates a problem.

JUDGE NELSON: All right. That's -- that's the heart of the issue, and I didn't get briefing from you on that, so I would appreciate briefing on that.

MR. MICHAEL CASHMAN: We'll submit briefing on that,

Your Honor.

JUDGE NELSON: All right. Thank you.

MR. MICHAEL CASHMAN: But the -- the relief we request is that the motion for an amended Fact Sheet be denied and that the existing Fact Sheet be deemed sufficient for the present purposes.

JUDGE NELSON: Okay.

MR. MICHAEL CASHMAN: Thank you.

JUDGE NELSON: Mr. Beisner.

You know, really it's the Plaintiffs who put themselves at risk here, right? I mean, I don't know -- I'd have to think this through a little more carefully -- whether or not that plays into your hands. But if it does, why would you be seeking to clarify the record?

MR. JOHN BEISNER: Because we wanted to make a record on this issue. If Plaintiffs don't want to change, that's fine. Fifty-five of them have said, we have no neurodegenerative disease, but we want compensation for our current injuries. So, they want more relief than is being sought by the class. They're all represented by the same counsel who are representing the class. It's a huge problem.

JUDGE NELSON: And you believe I can't certify that class if some of the members seek compensation for, say, post-concussion syndrome and some don't?

MR. JOHN BEISNER: Absolutely, you can't. It's a

huge conflict of interest. These counsel can't be part of the -- that group because they're representing clients -- and keep in mind, they're not opting on this later. They have filed Complaints that say, I want compensation for current injury. They have filed sworn interrogatory answers, 55 of them, saying, even though I don't have any current diagnosed longterm neurodegenerative disease, I want compensation for my current injuries. That is the state of the record. So, all right, if they elect something --

JUDGE NELSON: And you say that creates a conflict of interest in representing --

MR. JOHN BEISNER: Sure.

JUDGE NELSON: -- that class.

MR. JOHN BEISNER: Real simple, because the class counsel are seeking more for their private clients, their people they have filed lawsuits for individually, than they are seeking on behalf of the class. Simple. That -- that's -- we're done. We could make that motion now, Your Honor, and maybe we will do so.

JUDGE NELSON: Okay.

MR. JOHN BEISNER: So I just wanted it clear that Plaintiffs have made that option. There was a suggestion in the record earlier, well, we can pretend the Fact Sheets don't exist. No, they're sworn interrogatory answers that are out there. Plaintiffs are free to do whatever they want. I would

also note, Your Honor, that 25 of those 55 Fact Sheets I was just talking about were submitted with those responses saying, "I want compensation for personal injury" after the First Amended Complaint was on file.

So, these are people who are effectively coming in saying, I don't care what the Amended Complaint says, I'm filing my own lawsuit, and I want more than is being sought for the class.

JUDGE NELSON: Okay. I'm telling you I think this is a problem, so I want the Plaintiffs to really give this some thought and to do some briefing on this. I do think -- class certification in this case is complicated enough, but I agree with Mr. Beisner that this poses a problem. So, just --

MR. CHARLES ZIMMERMAN: And what I want to say, Your Honor, is before we draw hard and fast lines and go on the record stating things that we may be walking back, we'll look at it and we'll brief it. I think that it's -- it's -- it's really a lot of, um -- the -- a lot of form over substance because the question really is going to become: When is that choice effective, and at what point in time do people have to make the ultimate choice of which class or which group or --

JUDGE NELSON: I'm going to need to see some precedent in which that choice is made after a decision on class certification. I'm skeptical of that.

MR. CHARLES ZIMMERMAN: I understand that, and

that's why I don't want to confuse it any further with just a lot of musing off the top of our heads. I think you've asked us for briefing on it, asked us for a -- to put our thinking caps on, and we will.

JUDGE NELSON: Okay. Good. Very good.

Mr. Beisner -- I'm sorry, Mr. Cashman?

MR. MICHAEL CASHMAN: I just wanted to make it clear that I hear Mr. Beisner saying the issue is he thinks there's a conflict that counsel has, not that the Plaintiffs themselves have, and I hear the Court asking us to address a different issue.

JUDGE NELSON: Well, I'm asking you to address any issue that might arise by the state of this record on class certification if these Fact Sheets are not amended. I want to know. And that might include conflicts among the class, it might include conflicts of counsel. Whatever issues I'm going to be struggling with anyways at class certification, I want to know what your position is on this.

MR. MICHAEL CASHMAN: Thank you, Your Honor.

MR. JOHN BEISNER: Your Honor, I was just rising to inquire about timing on the briefing.

JUDGE NELSON: Yes, that's a good idea. Ten days?

MR. DANIEL CONNOLLY: And Your Honor, just to be clear, we get a response on that?

JUDGE NELSON: Um, you know, I wouldn't

ordinarily -- this is really a non-dispositive motion, not -- and you brought the motion. So, ordinarily there wouldn't be. Why don't we see what it looks like, and you can remind me that you'd like a reply. Sometimes I look at it then and decide if that would be useful.

MR. MICHAEL CASHMAN: Your Honor, it seems to me that the NHL is the one that should be filing first since they're contending that there is some conflict and we haven't really seen it, and that we respond. That's the way it seems to me --

JUDGE NELSON: No. I didn't get a brief from you on this, I need a brief from you on this. Okay?

MR. MICHAEL CASHMAN: Thank you.

JUDGE NELSON: You bet. All right.

Chubb is finally up. They've been patiently waiting here. Mr. Penny.

MR. BRIAN PENNY: Good morning. It's still morning. So, I have a PowerPoint that I'm going to be referencing this morning for the Chubb motion. And for those who like to see the roadmap before you embark on the journey, here's what I attempt to cover today. I want to start by talking about the scope of our motion to compel and perhaps clarify exactly what we're looking for, and then talk about relevance of what we're looking for, any privacy concerns or privileges that might attach to that information. I'll then discuss the burdens of

production. I'll have a few comments on cost shifting, and then there's the very cryptically styled "Mr. Beisner issue," which actually I was going to hold you in suspense to try to keep you awake, but that actually deals with some documents that Dr. Cantu has and us trying to make sure that our positions on those documents are in harmony.

JUDGE NELSON: Can I ask you one question though before you get started? Have you agreed -- I understand that there isn't an objection to the production of the aggregate data. Has that been produced or not?

MR. BRIAN PENNY: Not yet. And I think Mr. Loney would -- I'll just tell you my position and he can jump in real quick. As we talked about at the last status conference, Chubb did agree to produce two spreadsheets. They agreed to produce them in -- one of them in de-identified or anonymized format and we wanted to hold off and see how Your Honor dealt with this issue and see if redaction might be necessary, might not be necessary. There are actually a whole host of issues when you get down to the mechanics of how those spreadsheets might be used. We might actually need to have them in the same anonymized format that the NHL produced their documents. But we're kind of -- at least I would like to table that for a little bit until we find out how the Court would like to deal with the rest of the issues.

JUDGE NELSON: All right. That's fair.

MR. STEPHEN LONEY: I would agree that that has been tabled by the Plaintiffs. Chubb has offered to produce those -- those two reports and at least one of them that reveals actual claimants named to produce in de-identified format. There will be some logistical issues if the Plaintiffs will insist on the de-identification lining up with the NHL's data. But that is on the table and I -- I don't want to take it off the table for the moment because it is significant to Chubb's position that what we've offered should be enough in response to the subpoena, especially in light of what has been produced by the parties and other nonparties in the case.

JUDGE NELSON: Okay. Thank you.

MR. BRIAN PENNY: So, to start and just discuss a little bit the scope of what we're searching for, I'll admit that I struggled a little bit to define exactly what these medical exams are that we're looking for. That's part of the reason why I suggested a few conferences ago that maybe we get a sample production because I was hoping to be able to reference certain documents; that didn't happen. And so in lieu of that, the way I crafted it in the motion was to say that we seek all medical examinations of NHL hockey players that Chubb or its agents produced or received in connection with workers' compensation claims for concussion injuries.

And I think that, seeing the way Chubb responded to

some of that, they may have taken a little bit broader perspective of that definition, and I just wanted to make sure that at least for today we're talking about the same things. And I'm going to inject a little new terminology, although it's almost a loaded word now, which is "IME." What we're really looking for are medical examinations that were conducted in -- not in the course of care or treatment of a patient, but rather medical examinations that were performed specifically to substantiate claims made in either a workers' compensation claim or maybe in a subsequent litigation of that claim. So, again, these are not care and treatment type examinations, these are examinations produced essentially for litigation or claim --

JUDGE NELSON: So, let's imagine that a workers' comp file might include, for instance, medical records from the hockey player's personal treating physicians. But in determining whether or not to award compensation, Chubb would retain their own expert physician to conduct a medical exam, and that is what you are looking for?

MR. BRIAN PENNY: Exactly. And I think it will actually be the more normal course of documents in a further subset of information that we're seeking, and that is we're really only after IMEs that are in claim files for concussion-related workers' compensation claims that were filed by NHL hockey players in retirement.

JUDGE NELSON: Right.

MR. BRIAN PENNY: That is where our meet and confer discussions led us. And then so you might ask, well, why in the motion then did you ask for all IMEs, because that is clearly what we asked for in the motion. And that is largely because Chubb told us through the course of the meet and confers that they didn't have any mechanism to tease that out or identify which were the claims that were filed by retired players. So, if there is a mechanism to do that, we are interested only really in the retired players' claim files. And during the course of the meet and confers, Plaintiffs did offer a suggestion of how we might be able to identify this that required some cooperation.

The suggestion was that we could take publicly-available data in the Plaintiffs' possession that shows the player's name and the retirement date and then we could match that to data from Chubb's claim filing spreadsheets that include the player name and the claim filing date. If you had a very small spreadsheet that you created with that information, you could compare the claim filing date and the retirement date. The claim filing date were later than the retirement date, you would have identified a claim filed by a retired player.

JUDGE NELSON: And what was Chubb's response to that?

MR. BRIAN PENNY: Chubb's response to that, in my opinion, was largely that that is only creating additional work for Chubb, which they have no obligation to do, and they did not see that as a way to narrow the production as Plaintiffs were suggesting. And there may be some logistical issues that go along with this, exactly who would do this. If you're going to -- if you would, perhaps, order some of these IMEs for the spreadsheets to be de-identified, how would we -- who has the underlying information that could match them together, there might be some logistical issues there.

But I think those are issues with solutions, and we really are only after the retired players' files. And I'll explain why I think that subset of IMEs in Chubb's possession is actually highly relevant to this litigation. And that actually brings me to the next topic, which is the relevance of this information.

JUDGE MAYERON: I have one question just again focusing on medical exams, and Judge Nelson raised this. So, often an IME, the report by the physician conducting the IME, say, to Chubb will say, I was provided the following medical records, I reviewed them, then I did an independent medical examination, and here's my conclusions. Just so I'm clear, are you just seeking then the IME -- the report of the physician as opposed to the underlying medical records in addition to the report, the underlying medical records that

the IME doctor is referring to in his opinion report, which obviously is a much broader request?

MR. BRIAN PENNY: Right. When you said we were only looking for the report itself, you were absolutely correct. We're not looking for the underlying medical information that goes along with it. And I understand for some of these claim files, there's probably a bit of both, like Judge Nelson just suggested. But I think when you think about what might be in a retired -- a player who has filed a workers' comp case in retirement, what exams and medical information might be in that claim file, what we're really interested in is the medical exam that was done to substantiate that last claim. And --

JUDGE NELSON: Now, in addition to that medical exam, presumably then -- I mean maybe not, I don't know, but possibly, I suppose, there would be communications between Chubb and the NHL or a team about that report. In fact, maybe it's shared with the NHL. I don't know. Are you also looking for those communications?

MR. BRIAN PENNY: No. We're trying to keep this nice and simple. We think these reports are really critical, and so rather than complicate the issue with some of these additional complications, for lack of a better word, we're really just seeking the report itself. And a little bit, I think that -- I'm going to explain why I think that makes your

analysis of any privileges that might attach to these much simpler.

But let me first again try to address why we think these are so critical to the litigation. You know from Chubb's brief and Plaintiffs' brief what the number of concussion-related workers' compensation claims that were filed with Chubb are. The number is not insubstantial, but I can't say that in open court right now. Plaintiffs suspect that a large number of those claims were filed by players in retirement. If that's the case, the fact alone that a large number of former NHL hockey players are claiming current, longterm, neurodegenerative maladies caused by their playing-day concussions, that fact alone may put the NHL on notice of longterm impact of concussions well before our litigation was filed. That goes directly to the knowledge that the NHL has about the claims and the lack of warning for the longterm impacts that we allege in our Complaint.

JUDGE NELSON: If, in fact, the NHL knew of these workers' comp claims.

MR. BRIAN PENNY: And we have some information -- they're confidential documents, so I don't want to address them in too much specificity. But we have information that makes it quite clear that NHL counsel got updates on at least some of the retired players' workers' compensation claims relating to concussions well before we filed our lawsuit.

This is something it appears they were tracking, and certainly they have access to that information. The policies at issue are umbrella policies that the NHL is at the top of.

We might actually be able to learn something about the volume of such claims from the spreadsheets that Chubb is -- has agreed to produce. And that is only if we are able to identify which of those claims were filed by retired players. But what we won't learn from that, aside from the volume of the claims, is really the nature of the claims: What type of injuries, longterm impacts from concussions, are being claimed by these former players? That -- we might learn that those claims have a number of commonalities among them, commonalities that would be familiar to Plaintiffs representing the class and other Plaintiffs here, such injuries such as migraines and memory loss, sleep and irritability issues, loss of impulse control, and other common issues, the same type as experienced by Plaintiffs in this case.

So, for two separate reasons, those IMEs are interesting. They can help paint a better picture for Plaintiffs of the current neurological makeup of our class, and they might also tell us what the NHL knew about that current makeup and the longterm impacts of concussions, like I said, well before we filed our case. And that's where I think these IMEs are highly critical, and that's also why we're only

looking for the IMEs of retired players because, again, those are the ones that are going to show some longterm impact from the concussions. That is at the very heart of our case.

So, that leads us to then to see whether there are any privacy concerns that might block production of this information, and this slide is really just a guidepost to remind us that there are sort of two levels of privacy protection sometimes when we talk about these issues. The one are the physician-patient privileges; they're actually evidentiary privileges, and they're created by state evidentiary statutes. When we talk about privacy rights, though, those are Constitutional rights that are created by state and federal Constitution.

And so let's first talk about the physician-patient privileges; those are the statutory creatures. As Your Honor probably recalls from this -- some of the same issues being discussed with the U.S. Clubs' motion to compel, there are a number of elements that need to be met before the privilege even attaches in the first instance. And some of those include that the communications are made in the course or care of treatment of the patient, and I've alluded already to why I think that's not the case for these IMEs. And it also requires that the communications are intended by both the patient and the physician to be and to remain confidential.

And when you have an IME that's being conducted for

the purposes of substantiating a workers' compensation claim or a subsequent litigation of that claim, not for treatment or care, you don't have that first element that I just put up there. You also have a situation where you don't have an expectation of privacy among the claimant and his doctor because the patient -- or excuse me, the claimant who is going to the medical professional for his IME knows that the report is going to be generated from that meeting and that anything he says to the doctor or she says to the doctor could very well end up in the report, and that that report is then going to be disseminated well outside of the doctor-patient relationship.

In fact, it's going to be sent to his employer, his employer's counsel, his own counsel, probably the carrier, the carrier's counsel, maybe a workers' compensation judge, maybe a judge in civil litigation. It's just well outside the scope. And so we argue that the privilege doesn't even attach in the first instance. And for that reason, several courts have agreed.

For example, the Michigan appellate court in the *Osborn* case held that a communication between a person and a physician which is for the purpose of a lawsuit and not for treatment or advice as to treatment is not protected by the physician-patient privilege. And it's also why the Hawaii Supreme Court in the *Tauese* case held similarly that

statements made to a physician during an IME are not subject to the physician-patient privilege in as much as the purpose of the IME is not to provide medical treatment to the patient, rather is conducted in the context of a litigation.

And why the Arizona appellate court similarly found in the *Turrentine* case that the physician there in question was not the treating physician and therefore Arizona's medical communications privilege did not apply to statements made to that doctor. For this reason, since we are arguing that the privilege doesn't even attach in the first instance, I think that that renders most of Chubb's cases inapplicable here.

I would call *Xeller* probably their lead case. In that case, the real party in interest did not even contest the relator's claim of privilege under the Medical Practice Act there, but that's exactly what we're doing here. We're arguing that the statutory physician-patient privileges don't attach to an IME --

COURT REPORTER: Please, Mr. Penny, please slow down.

MR. BRIAN PENNY: Oh, slow down. I'm so sorry. Especially when I start reading, it just starts rattling.

So, we think that *Xeller* is inapplicable here.

Plaintiffs also, in suggesting that the privilege doesn't even attach, are not relying on implied waivers that often arise in the litigation where a Plaintiff or a claimant

may put their own medical condition at issue. And since again we're saying the privilege never attaches in the first instance, cases cited by Chubb such as *St. John*, *Porter*, *Alatorre*, *Cates*, *Stecher*, and *Capps* are not applicable to these issues.

Now, Chubb also raised the *Graham* case, which they said stood for the proposition that notice is a requirement of many physician-patient privileges and that we were not giving any notice in this instance, and that that therefore should preclude production of nonparties' workers' comp cases where they -- or excuse me, workers' comp IMEs where they have not been given notice. But that's not really what the *Graham* case stands for. The *Graham* case discussed at length a case called *Amente v. Newman* that wrestled with the so-called notice requirement in Florida's statutory physician-patient privilege.

In that case, as here, the Amentes did not know the identity of the various record holders because their identities had been redacted from the records that had been produced to them. The Court found that in applying the requisite notice there, the provision of the statute created an anomaly in that the Amentes could not give the requisite notice because they did not know the patients' names and addresses, yet they could not be given the names and addresses without revealing the patients' identities.

It's that catch-22 that we find ourselves in here, as well. Chubb is not willing to tell us who's filed workers' compensation claims yet claims notice must be given to them. And as a bit of a sidebar, that also relates to the suggestion that we could cure all this if we would only give them authorizations. But we don't know who we need to get authorizations from, and so authorizations are a bit of a red herring. Although we can give them 100 or so authorizations from our Plaintiffs, those are not really the medical records we're after.

JUDGE MAYERON: In your motion, you did say you wanted unredacted medical exams. So, are you still taking that position or not?

MR. BRIAN PENNY: We -- I was going to get to that in a moment but, yes, we would prefer in the first instance that nothing be redacted. But as I'm going to suggest in a little bit, if the Court has any misgivings or any concerns about some privacy concerns or some privileges that might attach, the cure for that is simply to redact them, and I have a slide on that that I'll refer to in a little bit.

JUDGE MAYERON: And -- but if the Court decided that the exams should be produced in an unredacted form, then at that point would you agree that notice could be given and, in fact, notice given by Plaintiffs to each of the individuals whose IMEs are being produced?

MR. BRIAN PENNY: Notice could, under those circumstances, technically be given. But we would argue it's not warranted because, again, the notice provisions are within the state statutory privileges that we allege do not even attach to these communications because they are simply not doctor-patient private communications.

So, having dealt sort of with those privileges, that was the end of the discussion about whether privileges attach, we can turn then to whether there are any Constitutional rights to privacy that would prevent disclosure. And the Constitutional analysis, as most of the analysis seems to be on discovery issues, is another balancing test, and it's one probably well known to lawyers.

State and federal Constitutional privacy protections are analyzed by balancing the need for discovery against the citizen's expectations of privacy. And as we've discussed here, Plaintiffs need for these documents -- sorry, I'm going to slow down -- is quite high. These documents, we think, are critical to the central issues in the case but the expectations of the claimants in their privacy of those records is low for the same reasons that the physician-patient privileges don't attach.

And again, I think it's worth noting that we're not talking about having these documents produced and then disseminating them widely in the public. They'll all be

produced within the confines of the protective order in this litigation. And as I alluded to earlier -- and I might be wrong about this, they can correct me if I am -- but I think the NHL has already had access to a lot of this information. Again, Chubb is sort of its insurance carrier; and for the Clubs, they've written those policies, as well. So, it seems like this is information that is on one side of the V but hasn't yet been leveled out and evened out on the other side, and to that's what we're seeking here.

Even once we pass through the privacy concerns of various Constitutions, we have to then still deal with some state and federal insurance and privacy regulations that we allege don't preclude discovery. Some of those are familiar from the prior motion, and I'm referring to HIPPA and I don't think Chubb takes issue with this. But HIPPA prevents disclosure of health information pursuant to a HIPPA-compliant protective order, and we have one of those in place. The Gramm-Leach-Bliley Act does not prevent disclosure here either. In fact, I don't really think that Chubb cited any specific provision of that Act that purports to block discovery here.

That then leads us to the state insurance regulations. And that, I think, created some confusion in the briefing. If you'll recall, Plaintiffs cited to a Model Act by the NAIC for certain insurance regulations. Chubb said we

cited the wrong act. They actually think they are covered by another act. And so to try to unpack that, I have two slides here.

These are the cover pages of the two acts. On the left side is the act that Plaintiffs cited to. On the right side is the Chubb act, for lack of a better term. And it's worth noting initially that both acts actually have subpoena exceptions that would permit disclosure of otherwise non-protected documents in this litigation.

The one cited by Plaintiff has a very clear one that says, in Subsection H, that an exception to the rule that disclosure not be made of sensitive personal information is that disclosure can be made pursuant to a subpoena or a court order. Chubb's Model Act actually does have a subpoena exception, too, but they say it only relates to when insurers are doing or performing insurance-related functions. But we would argue that complying with legal process is an insurance-related function, whether you're engaging in that function for -- as you're processing a claim or whether you're litigating the claim or whether you're engaged in this litigation in some fashion.

But we don't even really need to argue about whether that exception applies because as states have enacted these two provisions, they do so in a way that harmonizes the two exceptions. And we'll look at California as an example to

sort of ground the discussion. This is the way the California legislature has enacted Chubb's version of the Model Act. In Section 10 -- or excuse me, in Title 10, they have created Section 2.689.11(a) which prevents disclosure of nonpublic information. But then there's a carve-out, almost a savings clause, in subsection (b) that says: This section, however, does not permit or restrict the disclosure of nonpublic personal medical record information as permitted by California insurance code Section 791.13.

That code is actually the California legislature enacting the Model Act that Plaintiffs cited. And so there is that same subpoena exception as made for provision in the California insurance code. And that's what Chubb meant in paragraph -- excuse me, in footnote 6 on Page 20 when they acknowledge that at least two states, California and Minnesota, have adopted a subpoena exception applicable to workers' compensation insurance. And so at least in those two states -- and I haven't had an opportunity to research the others but I suspect it's a relatively similar regime.

Just for good order, here is the Minnesota statute with its exception. So, the state statutory provisions that govern insurance -- insurance carriers or financial institutions generally preclude them from sharing or selling your personal information, each carve out exceptions for subpoenas or to comply with legal process like we have here.

They're not a separate bar to that.

So, as we discussed a little bit before, even if there is some concern that something I've just shown you there in your mind blocks or prevents production of those documents because -- or these IMEs because you have some privacy concerns, those concerns can be cured by redacting. As we cited in our brief, the *Gowan* case stated that, in that instance, given Mr. Gowan's concessions about the personal information that may be redacted from the IME reports, the Court is at a loss to see how the patient's privacy concerns will be impacted.

And in that *Amente* case that we talked about before that I think led to Judge Mayeron's question, *Amente* -- the Court there also recognized that redaction can be the solution to problems such as this where a non-party's privacy rights can be protected by alternative means. And I'll also cite you to Your Honor's opinion from July 31st of last year where you -- I think you were quoting the *Roberts* case stated that privacy interest of a patient in his or her medical records is tied to identity information contained in the records; once identifying information is removed from the record, the patient's privacy interest is essentially eliminated.

To address Judge Mayeron's question even more directly than I did before, we're willing to accept these documents in redacted format because we think that they are so

critical. We will take them in almost any format you order, but we would prefer and think that they should be produced in unredacted format.

Now that we've dealt with the privacy -- or excuse me, the privileges and privacy issues, let's talk a minute about the burdens and whether burdens would preclude production here.

First, part of the balancing test is how relevant or important is the information. As I think I've discussed several times now today, we think this information is highly relevant. It goes to critical issues about Defendants' knowledge and whether there were duties that arose because of it. The request for retired players' IMEs is also very targeted. We already, in answering some questions from the bench, discussed how we are not seeking anything but these IME reports. That kind of a targeted request does not require vast amounts of document review, it will not require a privilege review. It might require some redaction, but it won't require some complicated quality control oversight. And it won't require the production of extension of privilege logs, either.

I mean, if you want to look at it on a whole or on a scale, this is much less burdensome than discovery undertaken by the U.S. Clubs and other nonparties in this case. And just another -- well, that's fine. So, in our opinion, the

burdens -- weighing the -- or balancing the burdens in this case favor production rather than preclude it.

I want to talk a little bit about costs -- Chubb's cost estimates, too, because they in some sense factor into the burden analysis, as well. First, it's unclear how many sample files were revealed by Chubb or how large they were. Chubb said some of them are a hundred pages, some of them are a thousand pages. I'm not sure what the sample looked like and whether it's representative. That may be skewing things. But in any event -- and this also could be due to Chubb taking a little broader perspective of what they thought we were asking them for. Maybe they would come up here and say, well, if I knew they were only looking for IMEs, they might admit that that would be less of an expense to them.

JUDGE NELSON: Let me ask you this, in your discussions with Chubb, could you determine, of the number -- and I won't use the number either -- of such relevant files, what percentage are digital and what percentage are hard copy?

MR. BRIAN PENNY: I got the sense that most were hard copy. I'm going to let Stephen address that though.

JUDGE NELSON: Okay. All right.

MR. BRIAN PENNY: Which -- okay. In any event, even if they are hard copy files, we don't think it would really take three hours to review those files and pull responsive IMEs. Chubb's estimate I think is probably also based on

reviewing all of the claim files, the number that's in both of our briefs, and we're talking about just retired claim files. That's probably a smaller number.

And Chubb's estimate also doesn't take into account efficiencies that come from performing repetitive tasks. The first few times you look at a claim file, it may be a little bit difficult to navigate. But as you're looking at your 20th, your 40th, your 100th, I think that you'll become much more efficient or whoever is pulling these IMEs will become much more efficient in identifying them and producing them. I think the same would go for any redaction that needed to occur.

Once you redact a few IMEs, I think you know pretty much where to look for the personal information, and you'll probably become much more efficient in that. And in any event we don't think it would take 4.67 hours to redact each IME. So, I think the costs are a little bit exaggerated here, and I think Chubb might even admit that now that they understand that there's a smaller scope to what we're requesting.

Finally that brings us to cost shifting. And I'm not going to spend a lot of time on cost shifting but I do have a few just, I think these are pretty standard considerations when thinking about cost shifting.

First, when discovery is ordered against the non-party, the only question before the Court in considering

whether to shift costs is whether the subpoena imposes significant expense on the non-party. And as with many of these things, what constitutes a significant cost is at the discretion of the Court. And some consideration that courts usually take into account in this analysis is: How important is the litigation?

Well, I think we've talked about today how many people are watching this litigation. Concussions in sport are at the forefront of science and sport and injury, and I think a lot of people have been watching this case. And I think it has important implications for the way not only hockey is played but the way concussions are dealt with across the country.

Another consideration that's also taken into account is whether the non-party actually has some stake in the litigation. And I don't know this to be a fact, but I would suspect that the litigation being filed may have already impacted the rate -- excuse me, the premiums on some of these policies and the outcome of this litigation may impact that, as well, and so I don't know that Chubb is a totally uninterested party in this case. Certainly one of their major clients is involved in this litigation.

And so finally, even if the Court finds that the costs are significant, it doesn't need to shift all the costs. It should only shift the amount of cost that would then reduce

the burden to something that is palatable to the producing party.

That brings me to -- well, actually that brings me to the "Mr. Beisner issue," which is very short --

JUDGE NELSON: You kept us all in suspense about the process.

MR. BRIAN PENNY: I'm glad you're all awake still --

MR. JOHN BEISNER: Should I leave the room?

JUDGE NELSON: Apparently you must have played hockey and you apparently were seen by Chubb and they have an IME on you (laughter).

MR. BRIAN PENNY: I call it the "Mr. Beisner issue" because it's a concern that I've heard him express at previous hearings, and it's a concern that then got echoed in Chubb's brief. And that is that there's an apparent inconsistency in the way we might be treating certain IMEs that are in Dr. Cantu's possession from the request for those same IMEs or similar IMEs from Chubb. And I just wanted to make clear that in whatever way Your Honor orders production from Chubb of these IMEs, we will apply those same parameters to Dr. Cantu's files.

For instance, if you order them to be produced -- if you order retired players' IMEs to be produced in redacted form, we'll do the very same, to the extent they exist in Mr. -- or Dr. Cantu's files.

JUDGE NELSON: Okay.

MR. BRIAN PENNY: So, in conclusion, we think the requested exams are highly relevant, privacy concerns do not preclude production, and the burdens do not preclude production either. Thank you.

JUDGE NELSON: Thank you very much.

Mr. Loney.

MR. STEPHEN LONEY: Hello, Your Honors. Thank you for hearing us today. Haven't taken you up on every invite to attend, but we appreciate them all. Happy to be here today.

So, it's a little difficult to shoot at a moving target, but I'll do what I can. I'm now up here arguing a motion that wasn't filed. But again, I'll do what I can because many of the same issues that we briefed in response to the motion that was filed still preclude the discovery that the Plaintiffs are now apparently seeking.

In terms of what target has moved, we've gone from a demand for every medical examination -- and this is a point that I was sure to clarify at our meet and confer sessions. When the Plaintiffs asked for medical examinations, we pushed back and said, what does that mean? They, as Mr. Penny said, struggled to respond. We asked if it meant independent medical examinations, and they said we will not limit it to independent medical examinations.

As they put in their motion, it was every medical

examination taken, received, or sent in relation to these workers' compensation files. The word "independent" appears nowhere in any of the Plaintiffs' moving papers. So, we did shoot at a slightly different target, but I'll explain why limiting this to independent medical examinations still doesn't do away with the problems that we described in our briefs.

In addition to that, the limitation to claimants who filed their claims after they retired is a limitation that was the last -- was part of the last discussion before meet and confers broke down, was not a limitation that the Plaintiffs asked for, but again many of the same problems exist and the discovery that Plaintiffs are now seeking again is still precluded.

And then we have the request to redact, and the Court's point is well taken to Chubb at least which is the Plaintiffs submitted a motion asking for unredacted medical records, which is very different in many ways both from what was discussed during the meet and confer sessions and from what any other party or non-party has been required or asked to do in this case: Unredacted medical records of people who did not authorize the release of their information.

The Plaintiffs are back now, they backed off of that position, are back now to asking for the privacy issues to be resolved through redaction. But again, there are many reasons

why redaction isn't going to solve those problems and is also going to put us on the higher end of our burden estimate and not the lower end which, in either case, is in the seven figures.

I'll get to more on burden at the end, but I do want to address the last couple of points that Mr. Penny made about the burden. I will say that Chubb reviewed three sample claim files. We did a "Goldilocks" approach. We took one that was a couple thousand pages, heavily litigated, one that was on the shorter end, and one that was in between --

JUDGE NELSON: That's the "Goldilocks" approach? I hadn't heard that phrase before.

MR. STEPHEN LONEY: I made it up five minutes ago (laughter). So, that was how we got to what I called in my Declaration a "representative sample." Mr. Penny's off-the-cuff speculation about how that seems a little high isn't evidence. The Plaintiffs haven't gone to the medical records that they have in their possession to try to redact them to figure out if our redaction numbers are a little off. They've offered no evidence other than, it shouldn't take you that long. Well, it did, and that's evidence that's before the Court and it's unrebutted. Speculations of counsel is not sufficient to rebut the competent evidence that we submitted on burden.

Whether limiting this to independent medical

evaluations alleviates the burden at all, in a way it actually exacerbates the burden. In response to the Plaintiffs' motion, we had our staff review the claim -- the sample claim files for medical evaluations as the Plaintiffs had described them, not just independent medical evaluations, but any medical evaluation in the file. If we're now limiting it to independent medical evaluations, we still have to review the same files. They're the same volume. What the Plaintiffs have done by limiting it to independent medical evaluations is just made the needle smaller. We still have to look in the same haystack.

And so the time estimate that it took to process, review, and prepare for production the items that we understood to meet the Plaintiffs' definition of "medical examination" may actually grow. And as I noted in my Declaration and also in our brief, the estimates that we put forth actually were conservative in that they did not account for many other costs that would be necessarily incurred if we were forced to go through the number of claim files that Plaintiffs were proposing, process them and prepare them for production --

JUDGE NELSON: Let me ask you this. Are all of these claim files hard copy, or are some digital?

MR. STEPHEN LONEY: For the -- it is a mixed bag. There's a digital system. And for the purposes of estimating

the costs in this case, we relied on digital claim files.

JUDGE NELSON: So what is the percentage, roughly? We're not going to use this number for the total, but tell me what percentage is hard copy, roughly, I won't hold you to it, but is it 50/50, is it 80/20? What is the ballpark?

MR. STEPHEN LONEY: I would not even hazard a guess. I'm embarrassed to say I haven't asked our client what that percentage is because I didn't regard it as relevant to the analysis --

JUDGE NELSON: See, I think it is, though, because there are things you can do with digital technology to redact that are much more efficient than Whiteout.

MR. STEPHEN LONEY: Well, those are the things that we did with the digital claim files that we reviewed. So, if the assumption is that the digital claim files are going to be less burdensome, more efficient, because they're in digital form, that's what we did when we estimated the cost and extrapolated over the total number.

JUDGE NELSON: So the digital claim file, for instance, did it have a index?

MR. STEPHEN LONEY: No, Your Honor.

JUDGE NELSON: So, it's digital, but there's no index of its contents? You just have to go through the screen and look? Is that what you're telling me?

MR. STEPHEN LONEY: That is my understanding.

JUDGE NELSON: And it's not searchable? So, if you put "independent medical exam" in, would it come up?

MR. STEPHEN LONEY: I don't know if the answer to that is the same for all digital claim files for all times. We're also dealing with a 22-year period here. And so even those that have been converted to digital from earlier in the timeframe, I -- the reason I'm hedging here, Your Honor, is not to be cagey, it's just because I don't want to give you the wrong answer. I don't know whether those were OCR'd when they're scanned in. And again, I don't know the percentage of what is what.

But what we did in estimating our burden was actually to try to be conservative, and what we ended up with was a seven-figure number no matter which way you slice it. And so if there are more -- if there is any volume -- or to the extent that there is any volume of paper files that would be more difficult to deal with than redact than a -- than a, uh, electronic file, using that assumption, the number would be higher on a per-claim file basis.

JUDGE NELSON: And what was the rate per hour that you would pay these people to review these files?

MR. STEPHEN LONEY: Uh, the -- the rate is in our papers. I --

JUDGE NELSON: I think it's $300 an hour? Is that --

MR. STEPHEN LONEY: It's less than that, but it's close.

JUDGE NELSON: So you couldn't get somebody for less than $300 an hour to sift through a file and find an IME?

MR. STEPHEN LONEY: I'm sure there are people looking for jobs who would do it for less. But as Mr. Penny pointed out, this is a significant matter with significant attention being drawn to it, and we're dealing with fundamental privacy rights that we're -- if there's a mistake, then Chubb could be dealing with many bigger problems than just redacting the files. And so we have to rely on people who are qualified --

JUDGE NELSON: But you know as a Judge I deal with this issue frequently, and particularly when I was a Magistrate Judge. And it's very typical to retain staff attorneys or even highly-qualified paralegals --

MR. STEPHEN LONEY: That is actually what we used is highly-qualified paralegals, somebody with 30 years experience --

JUDGE NELSON: Who you would internally pay something like $80 an hour maybe. I mean, there's just an enormous discrepancy I think in this $300 per hour request.

MR. STEPHEN LONEY: So, Your Honor, and -- I don't want to get too bogged down in the weeds here because we only talk about burden once we establish a right -- the Plaintiffs

have a --

JUDGE NELSON: But that's a huge piece of the burden --

MR. STEPHEN LONEY: I do want to answer your question. I just want to note that I want to zoom out a little bit at some point. But even if we assume that the rate is -- or should be half of what is being billed for these individuals' time, so are we down to now only 1.86 million? That -- that's the result of trying -- of trying to see places where we can reduce the number on a per-claim-file basis. But I think the underlying point is, Your Honor, that there's unrebutted evidence about what this would cost, what this would cost Chubb. It's -- and that's the question that we endeavor to answer in the Declaration.

It wasn't what a -- necessarily what a nationwide fair market value would be for the work. But if Chubb is required to do this, having retained experienced counsel with experienced senior paralegals to do this work, it will take 12,000 hours of time no matter how much we charge for each hour, and seven figures of money. And that's what the cost will be to Chubb because that's what they're going to have to pay for it. Now --

JUDGE NELSON: Does Chubb have an internal staff of lawyers?

MR. STEPHEN LONEY: Chubb does have internal

staffing.

JUDGE NELSON: Does it have internal paralegals?

MR. STEPHEN LONEY: I -- I think they do. I -- I don't think that they have a huge, um, staff of internal paralegals. But I think that there are paralegals on the staff who are pretty well staffed up at this point, at least the ones that I've talked to. But again, Your Honor, even if we -- even if we look at ways to adjust the number, we're still left with what is a significant number, and that's the standard. I'll note that all of the cases that the Plaintiffs pointed to, they don't refute that a third-party subpoena recipient is entitled to reimbursement of costs if there's a significant burden or significant cost, which this is even if we look for ways to reduce it.

All of those cases were also decided before the recent amendments to the Federal Rules where, in Rule 26, there's now a specific reference to allocation of costs where appropriate. But again, I'm now getting into the weeds of, now are we talking about costs. But if we zoom out a little bit, we don't get to costs unless there's something that's discoverable. We don't get to anything that's discoverable unless the Plaintiffs establish a right to it.

And the Plaintiffs simply have no right to the medical records, redacted or otherwise, of absent workers who filed workers' compensation claims that have no notice of

what's going on here. They have no idea that somebody is trying to put their personal medical information on the table. They're not represented by anybody in this room, and the Plaintiffs are asking for their records. That's not something that is permitted under the law, either as a matter of privacy law or as a matter of discovery from absent class members.

In taking a second one of those first, as we put forth in our papers, the Plaintiffs have to establish that they have a compelling need for this information.

JUDGE NELSON: But, you know, I've struggled with this issue mightily and written a rather long order about that, trying to find just that balance. How do you disagree -- are you saying you disagree with my order? Is that --

MR. STEPHEN LONEY: I'm not saying I disagree with your order, Your Honor. I'm actually asking for the Court to do exactly what it did with that order. The result of that order was that Your Honor found there was a compelling need for statistical summary data on players' injuries. What the Plaintiffs got as a result of that order was de-identified statistical summary data and unredacted medical records for individuals who submit a release.

JUDGE NELSON: But they got databases, I mean, access to databases in de-identified form. They got a lot more than a spreadsheet.

MR. STEPHEN LONEY: Well, what the spreadsheet that we were offering was something that was generated from the -- from the database to reflect the concussion claims. And what we have offered is to set up some mechanism for that to be de-identified in a way that lines up with the NHL's and the teams' data. And so at the end of the day, what we've offered is statistical summary data in a printed-out form, but it's still statistical summary data, printed out and de-identified.

And we've offered to provide the medical records of those individuals who submit a valid release. Even if -- even with the limitation that Plaintiffs are now proposing, which was not in their motion, to individuals who filed their workers' comp claims after retirement, that still includes people who are not part of this case, are not submitting a release, have no notice of what's going on here, and likely do not want strangers looking at their medical records. The Plaintiffs' motion, even as amended at the podium today, would still result in Chubb being the only party or non-party required to produce medical records, redacted or unredacted, for people who have not authorized their release.

JUDGE NELSON: But you have to make a real clear distinction between medical records and IME reports, and they're very different animals. The IME doctor is not a treating physician. This -- I mean, the -- there's no doubt that the physician-patient privilege doesn't apply at all.

So, it's really a very discrete type of report that we're --

MR. STEPHEN LONEY: Your Honor, just a couple of things there. One is I'll correct my reference to medical records. Even if we're talking about IMEs, I still believe that Chubb is the only party required to produce private medical information, which an IME contains, even if it was not privileged under the Plaintiffs' version of what is and what is not privileged. Even if it's not privileged, that does not address the privacy concerns. And the result of the Plaintiffs' motion would still be that Chubb is the only player here required to hand over any medical information for people who have not authorized its release.

I don't think there's anybody else handing over historical IMEs for people who haven't authorized their release. And if somebody is getting an IME in the context of the litigation -- I don't know everything that's going on and all the background here -- but I would think that that person knows it's happening and is consenting to it. We're the only ones being required to provide that level of information without an authorization. And so looking at the Plaintiffs' motion, their sole basis for distinguishing Chubb's medical information -- or medical information in Chubb's possession from the teams or the NHL's medical information is that those are workers' comp files and so there's no privacy right. They're no longer arguing that. I didn't see that anywhere in

the -- in the reply, in the PowerPoint reply.

JUDGE MAYERON: Can you address -- and Judge Nelson may be much more familiar with this than I am -- but in terms of the summary or aggregate data that you are willing to provide in unredacted form, what's going to be in it? What will that show to Plaintiffs?

MR. STEPHEN LONEY: So, they're -- I want to be careful about how much we say about the data and the database and how it's kept in open court because we did file the brief describing this under seal and the Declaration describing this --

JUDGE NELSON: Well, we can have the transcript be confidential, but you should feel free to --

(Portion of transcript filed under seal.)

MR. STEPHEN LONEY: One other point that I wanted to raise, Your Honor, is that I think you said that there is no doubt that IMEs are not privileged, but --

JUDGE NELSON: What I said is there's no doubt that the IME doctor is not a treating physician. That's what I said.

MR. STEPHEN LONEY: I see. Okay. And the reason I keyed in on that was that there is some case law out there, depending on the state, holding that the -- that IMEs may still be protected from disclosure as private medical information even if they were conducted for the purpose of --

for some purpose other than treatment. And I'll point the Court to -- it's an Arizona appellate court decision, *State v. Wilson*. It's 26 Pr. 3d 1161. That case -- in that case, the Court denied discovery of a non-party's IME for many of the same reasons that we're articulating here and also on another point that's relevant to the Plaintiffs' arguments, clarified as many courts have, that the filing of a workers' compensation claim in and of itself is not a waiver of the privilege or the privacy rights of the patient.

There may be, as we pointed out in our papers, a limited waiver, and that's what all of the cases that the Plaintiffs have pointed to deal with, a limited waiver in the context of adjudicating that insurance claim. And so, of course, if somebody is submitting a workers' comp claim, this is the purpose of the NIAC [sic] exceptions. That's why in the preamble, there's a reference to the performance of insurance functions. And the performance of an insurance function, evaluating the claim, of course a workers' compensation claimant is going to have a hard time holding back their medical records from the insurer who is trying to perform its insurance function. That is not what's going on here, obviously. And --

JUDGE NELSON: Let me ask you this question, was it Chubb's practice ever to share these IME reports with the NHL?

MR. STEPHEN LONEY: That is also a mixed bag. It

depends on the circumstances, is my understanding. It has never been Chubb's practice, as far as I understand, to share all of the IMEs with the NHL.

JUDGE NELSON: But there are IME reports, you're telling me, that were shared between Chubb and the NHL?

MR. STEPHEN LONEY: I'm not sure if that's true, and I'll clarify it in this way: The workers' compensation provider, the employer for the players, is not the NHL.

JUDGE NELSON: I understand that.

MR. STEPHEN LONEY: It's the NHL teams. And so if there's any interaction about the claim, it's under the NHL team's policy. I don't know what the Plaintiffs are referring to when they say that they know some of this information was communicated to the NHL --

JUDGE NELSON: Let me say it differently. Were the IME reports shared with the player's employer, the NHL teams?

MR. STEPHEN LONEY: Under certain circumstances, probably.

JUDGE NELSON: All of them? Some of them? What were those --

MR. STEPHEN LONEY: It is not all of them. It would be some of them. And it would depend on the circumstances. It's --

JUDGE NELSON: What would be a circumstance if the team called up and said, I want to see the IME report? Would

you -- would you submit it?

MR. DAVID NEWMANN: Your Honor, I'm sorry. We haven't looked at this. I don't want to get, you know -- we weren't asked to produce IMEs. We haven't engaged in this inquiry with Chubb. We weren't asked to produce communications with the NHL. So, I don't want to get ahead of what we've determined for purposes of this -- this motion.

JUDGE NELSON: Okay. But you can imagine how important this is to determinations of privacy if indeed these were shared with the teams or shared with the NHL or --

MR. DAVID NEWMANN: Well, Your Honor, if they were shared with the teams or the NHL, the teams and the NHL have them and that's the way to get the records.

JUDGE NELSON: I understand that argument, but I'm --

MR. DAVID NEWMANN: Okay. I -- I simply wanted to interject because I know Mr. Loney wants to provide you with the information, but I just want to make sure we don't make any representations about communications with the NHL that we really don't have a basis for commenting on right now.

JUDGE NELSON: Thank you.

MR. STEPHEN LONEY: And I appreciate Mr. Newmann coming to my rescue because I do want to answer the Court's questions. I sense some frustration with me not being able to drill down in the details that you're asking for --

JUDGE NELSON: No, no, no. No frustration. These are important considerations for me in making this decision. So --

MR. STEPHEN LONEY: I understand, Your Honor. And Mr. Newmann pointed out, to the extent that anything is provided to the NHL, I would refer to Your Honor's opinion in the *General Parts Distribution* case from 2013 where Your Honor stated that it would be appropriate to let the parties provide the information they have before bothering nonparties for the same information --

JUDGE NELSON: And we've done that here, yeah. The NHL, as you heard, has produced a lot of documents.

MR. STEPHEN LONEY: But again, we're not talking about with respect to what the NHL and the Clubs have provided. Again, to the best of my understanding, as somebody on the sidelines here, is not providing IMEs of people who aren't releasing them or who aren't submitting to them --

JUDGE NELSON: I don't know the answer to that. I'll ask the Plaintiffs in a moment.

MR. STEPHEN LONEY: That was not part of what I understood Your Honor to be ordering in the July 2015 order. What they were ordered to produce was the summary statistical data, and what the NHL teams from where I stand have been doing is providing medical records which I assume would include IMEs to the Plaintiffs where they've provided a valid

authorization.

Now, again, in looking at what the principle basis might be to do something different as to Chubb, the only basis provided in the Plaintiffs' motion was, once you filed a workers' comp claim, you no longer have any privacy rights. I think that we've pretty well dealt that in our papers, and the Plaintiffs haven't argued that point coming back here today. In fact, they've argued that the Plaintiffs are not relying on implied waivers. That is an implied waiver point.

If you're arguing that by submitting workers' comp claims to an insurer you no longer have any privacy rights in your medical records, that is the definition of an implied waiver argument. It's an incorrect argument, but it's one that the Plaintiffs have now abandoned. And so now we're left with whether or not the Plaintiffs have a compelling need for information about retired players that they're not getting as to current players, and I'll explain what I mean by that.

The only basis that the Plaintiffs have articulated today for requiring more of Chubb, requiring Chubb to provide independent medical evaluations of individuals who have not released or have not authorized their release is that we need information relating to retired players. Well, the Court already determined as to the subpoena to the NHL Clubs that there was a compelling need to provide summary statistical data as to current and former NHL players. And so what

they've gotten from the parties and other nonparties is the summary statistical data on what they're now saying is only current players, we need information as to the retired players.

Well, if they get summary statistical data from Chubb and the medical records or IMEs or however they want to frame it of individuals, the 120-some odd people who have submitted releases, if they get those and that data and those records include people who submitted workers' comp claims after retiring, they're getting exactly what they're getting for the current players for the retired players. There's no principle basis for asking Chubb to go further just because these individuals submitted claims after retiring.

Now, just a word on how that limitation impacts burden. Mr. Penny is correct and we pointed this out in our papers that Chubb does not have a mechanism for determining, without reviewing each and every file, which claimants filed their -- or submitted their workers' comp claims after retirement. I would expect it to be less than all, but we don't know what the impact on burden will be. So, when we're looking at $300 per file just to open up the file, sift through it, and locate the IMEs, I don't know how much less it will be if we limit it to retired players.

Again, I have to emphasize over and over again that for my own purposes so I don't get caught in the weeds of

burden is you only get to that question if there's a compelling need or if there's no privacy right. There's certainly a privacy right. Plaintiffs have argued that there's no privilege because of the nature of an IME. There are cases that disagree. But they haven't articulated a compelling need to go further than the compelling need that the Court found with respect to the NHL Clubs' records.

The two factors that Plaintiffs have articulated today which they did not articulate in their motion that support relevance in their eyes is, number one, the sheer number of claims. Well, we've offered the summary statistics. Number two, what Your Honor articulated in your July 2015 opinion, to reveal something about what the NHL knew and when the NHL knew it, that presupposes something that is -- that is not in the record which is that the NHL knew about all of these claims before Chubb was subpoenaed. And as we've said, to the extent the NHL knew anything, the Plaintiffs are getting discovery from the NHL.

Thank you, Your Honor.

JUDGE NELSON: Thank you, Mr. Loney.

Brief response Mr. Penny.

MR. BRIAN PENNY: And I will keep it very brief.

Just to respond to where Mr. Loney left off, he thought we offered two justifications for why this is important. There's a third he forgot to mention, which is

this information about retired players' current or post-playing career neurological condition and how it's impacted by their playing-day concussions paints a picture of the current class that we don't yet have a lot of information about, aside from our own Plaintiffs. That is just as critical as any of the other needs we discussed today.

And the reason that Chubb is the only party that is being asked to produce those is because Chubb is the only party that has that unique information. Other parties don't have centrally-located a collection of IMEs from retired players that filed these workers' compensation claims. They're not being singled out for some random reason. They're being singled out because they hold a very important piece of the puzzle.

And to the extent that we didn't seek production of medical information from the Clubs, another non-party of this case, that only shows, I think, that we're being very selective and targeted in what information we are really pushing hard for, and this is information we think is so critical that we are pushing hard for it. I think based on Mr. Loney's description of what is in those spreadsheets, you can see why we need the IMEs in addition to the spreadsheets, as well.

Unless you have any other questions, I think that's all I wanted to address.

JUDGE NELSON: Very good.

JUDGE MAYERON: I have one question. I believe Mr. Loney said that he didn't believe that the IMEs that are in the possession of the teams of the NHL have been produced without authorizations of the Plaintiffs, and therefore what Plaintiffs were seeking was, in fact, beyond what they have sought either from the NHL or from the teams themselves. Is that correct?

MR. BRIAN PENNY: Yeah, and that might be. And let's not lose sight of the fact that the NHL, I don't think, has a complete repository of this information, so they're not --

JUDGE MAYERON: But let's talk about the teams. To the extent that one of their players or retired players makes a workers' comp claim and then ultimately that IME is shared with that team as part of the team's being an insured under the workers' comp policy, have those IMEs been produced without redaction, without authorization of that particular Plaintiff?

MR. BRIAN PENNY: I don't think that they have. I was just going to ask Chris, can you qualify, because I can then address once he answers your concern.

MR. CHRISTOPHER SCHMIDT: Thank you, Your Honors. It's, first of all, interesting to see this being reargued many months later in a different context. I would note that

when we receive authorizations, the Clubs are producing their medical files and any worker comp files. And what you typically see -- I'm not aware of any IMEs even being in there. And that's for named Plaintiffs that have filed cumulative trauma worker comp claims. Typically what the Clubs get is very limited, if anything, and most of it is going out to Chubb. And so this issue of what the Clubs get in that context, I think, it's very, very limited.

I'm not aware of the Clubs getting IMEs, so this is new and it's something I would also need to drill down into further.

JUDGE MAYERON: But to the extent, then, that the Clubs produce medical records, were they produced in a redacted and de-identified form, or were they produced unredacted as to all Plaintiffs, whether they authorized it or not, whether there were authorizations or not?

MR. CHRISTOPHER SCHMIDT: Yeah. So if -- when the Clubs receive these authorizations, we produce it all, de-identified --

JUDGE MAYERON: But if what if there was no authorization --

MR. CHRISTOPHER SCHMIDT: If there's no authorizations, no, and that's consistent with this Court's ruling and balance which basically said, hey, Plaintiffs aren't seeking medical records without an authorization. We

briefed extensively the state privacy laws, and the Court's order did not get into weighing the state privacy laws because it acknowledged Plaintiffs' position.

And one concern just looking at this, it seems like Plaintiffs are trying to get through the back door what they agreed to not even seek through the front door with respect to the Clubs. And it doesn't strike me that trying to define that difference in the context of IMEs saves them because ultimately every IME out there does a detailed medical history, looks at all of the medical records that are in the file. I don't know how you would begin to make that distinction in a meaningful way, which is why I think that Arizona court case which Counsel for Chubb cited would have to be right on point if one were to do a careful analysis of that -- of that new issue being raised here today.

Thank you.

MR. BRIAN PENNY: Just briefly in response, you can take a look at that *State v. Wilson* case. I think you'll see that it's belied by the *Turrentine* case from the same District a couple years later.

I think you just heard Mr. Schmidt in the one instance say that we were trying to do an end-run around a discovery order to get discovery that he doesn't have. So, I think you heard him tell the Court that Chubb has these claim files, certainly has the most complete set of them, and that's

why we're seeking them from Chubb.

I can't remember, did you have another question about that process?

JUDGE NELSON: Okay.

This is how we're going to approach this. Judge Mayeron and I have discussed this. We're going to have the parties submit to -- I don't -- discussions with Magistrate Judge Mayeron about these issues. And I want to reach, in the case of Chubb, the same balance I reached in the case of any third-party in this case, and that is to respect their concerns for privacy and burden but to allow some production in this case because the Court is of the view that these documents could be very highly relevant to this litigation.

Any production would need to be limited to IMEs. Even with that said, there are portions of the IMEs that would have to be redacted. The Court is not persuaded that IMEs enjoy patient-physician privileges, but I do think there are privacy concerns.

With respect to burden, I don't think we know what the burden is, and the reason is that there's too much we don't know. We don't know what percentage of these files are digital. We don't know the digital capabilities of searching. We don't know what percentage of these files are retired players. We don't know how difficult it would be to search a file for an IME digitally for a retired player and how much

that would cost.

The Court is skeptical of assuming a $300 per hour charge for every sophisticated paralegal who does this work. That just is out of line with the kinds of burden Affidavits I get all the time for reviewing documents or reviewing files like this. These documents, of course, would be produced pursuant to a HIPPA-compliant protective order. And if after a careful review of burden given the facts there is some reason to believe that the cost is out of line, there could be a cost-shifting discussion or a cost-sharing discussion at that point.

But I can't even begin to get my arms around what this would take because this assumes $300 per hour for every file identified in the case, and we know that's not going to be the case. And, not Chubb's issue, you're right, you didn't know that they would be limiting it to IMEs and here now they're limiting it to IMEs and retired players. So, we just don't have enough information.

I think the place to start is to figure out how to converge a list of the individuals who -- the hockey players who made these claims with -- and the dates of those claims with the dates of their retirement. That could be done by disclosing just the aggregate spreadsheet that identifies the claims and the dates to the Plaintiffs and put them to the burden of matching those up with the retirement dates, or you

might choose to do that yourself, or you might have a third-party do it.

But in any event, we've got to reduce those number of files down to just retired players' files, and it seems to me that's the first step. Then we need to know more about the digital technology, and sometimes what I do in these situations is I ask an IT person to come to the meet and confer with Judge Mayeron to talk about what the efficiencies -- what efficiencies could be achieved. And if there are hard copy files that haven't been OCR'd, what would that cost to be in, is that searchable, and all those kinds of things that I don't think I have a clear sense of.

I don't think that this ruling will require more of Chubb. I think if you ask Mr. Schmidt what he has done on behalf of the teams, he has attended every hearing and he's produced a great number of documents, so it's hard to say that there's some greater burden to Chubb now here.

So, I think we need to start at the beginning and move through some kind of a principled and logical approach with the good assistance of Magistrate Judge Mayeron, and so I'm going to ask you to schedule a time to get together with her in Minneapolis in the next 30 days that is convenient both for Chubb and the Plaintiffs and Magistrate Judge Mayeron, and we'll proceed from there. If as the discussions proceed, there is some need to reevaluate the state of affairs, I'm

glad to be -- to intervene again. But hopefully that gives you some guidance about how we will proceed for now.

JUDGE MAYERON: I think two other things that will be helpful for that discussion is seeing the -- seeing the aggregate spreadsheets so that we can actually see -- and I think they could be redacted at this point, so that we can see what information is available to compare that against what is being sought by the production of the IMEs. And the second is -- and I think we talked about this, as well, I really need to see some -- a couple exemplars of the files to get a sense of what they look like, how they're compiled by Chubb, whether they're the digital or the hard file, as you say perhaps seeing what the "Goldilocks" analogy is -- a small, medium, and large -- but at least so I can see what's in there and I can get a better sense of what it's going to take in order to delve in and find the IMEs which is the only thing that is being sought by this motion.

JUDGE NELSON: And that could be an *in camera* production.

JUDGE MAYERON: Yes.

JUDGE NELSON: So outside of the scope of the Plaintiffs for now.

MR. DAVID NEWMANN: Your Honor, Dave Newmann.

Just so I can understand this a little bit better, in terms of the aggregate spreadsheet, we, um -- you know,

that has names and identifying information. So, I think what you were suggesting is that all be redacted --

JUDGE NELSON: Well, I have heard you say before you could de-identify it in a way that's consistent with the way the NHL has de-identified.

MR. DAVID NEWMANN: Well, what we have proposed -- and the Plaintiffs elected to defer this -- was that we hand it over to the vendor who has handled de-identification who has the dummy numbers, and they can figure out how to do that. We don't know how to go about doing that, so that was a discussion we were going to have with Plaintiffs' counsel.

JUDGE NELSON: That's okay.

MR. DAVID NEWMANN: And I assume we can figure that out.

In terms of sample files, isn't the solution to get the authorizations that Plaintiffs have so that we're not put in that pickle of having to make a disclosure of people who haven't given an authorization? I mean, if we get their authorization, that solves the privacy problems.

JUDGE NELSON: Well, an *in camera* review wouldn't really be a privacy problem for you. But I suppose if there were a small, medium, and large file for which we somehow knew who they were -- I mean, you have to tell the Plaintiffs who they are to get the authorization, so --

MR. DAVID NEWMANN: Well, no, my understanding is

that the Plaintiffs give us the authorizations that they have, there are some 100 authorizations --

JUDGE NELSON: No, no, no, I can't just give you blanket authorizations. No. If we can match up a sample file with an authorization, I'm fine. But I think an *in camera* review of a file for the purposes of determining what's fair here is not going to run across any privacy issues. If you -- in fact, if you want to redact in advance the identity of the player, fine. I don't even think for an *in camera* review that's necessary, but you're welcome to do that. That's not what we're using --

MR. DAVID NEWMANN: Could I make this pitch, Your Honor? Could we get a list of the players for which they have authorizations? We will compare them to the list of files that we have and select samples corresponding to those individuals to provide for *in camera* review? That avoids our having to do any redaction, it avoids our privacy concerns which are extreme. All we need is their list. And we're not asking for permission to disclose all these. We're just -- we'll come up with, you know, a handful for which we already have authorizations --

JUDGE NELSON: What is your concern about an *in camera* production?

MR. DAVID NEWMANN: It's just the -- the -- you know, the same concern -- concern that we have about releasing

records that we believe we hold under an obligation to maintain --

JUDGE NELSON: I think if you redact the identity of the players -- I mean I don't even think you have to do that for an *in camera* production. But if you redact the identity of the players and you simply produce the files so that we can see how long it takes to get the IME out of the file and redact it, I don't think that's a problem. The Plaintiffs wouldn't see that, just to be clear.

MR. DAVID NEWMANN: Listen, I -- but what is also -- by the same token, why is it so hard for them to give us the release -- the list? The teams have this list. I mean, we could just get that list --

JUDGE NELSON: Why don't you talk to Mr. Penny about this, but the Court is not of the view for an *in camera* production that there's really on issue here.

MR. DAVID NEWMANN: Thank you, Your Honor.

JUDGE NELSON: Let me just ask, if the Court issues a written order ordering an *in camera* production, would that address Chubb's concerns about their obligations to protect privacy rights of the individuals?

MR. DAVID NEWMANN: Your Honor, I think that might indeed do that, but I'd rather see if we can reach an agreement with Plaintiffs that avoids the need for that production, if you would allow us to try to do that.

JUDGE NELSON: Well, I think you should meet and confer with the Plaintiffs in advance of meeting with Judge Mayeron. And I think Judge Mayeron is going to issue an order about what you actually need to discuss during that meet and confer in advance of seeing her. Am I right about that?

JUDGE MAYERON: That's correct. And I'm -- and you could certainly inform me about what agreement you've reached, if any, about how to provide me with just a few exemplars of what these files are so I can get a sense of what it would take a human to go through these and what the -- how long it might take as part of my *in camera* inspection, not for providing to the Plaintiffs.

MR. DAVID NEWMANN: Certainly, we'd be happy to do that. And frankly now that we know what we're being asked to look for, we will go back and do that ourselves.

Thank you, Your Honor.

JUDGE NELSON: Anything further on this motion?

(None indicated.)

JUDGE NELSON: Okay. Let's move ahead then finally to the motion with respect to IMEs.

MR. JOHN BEISNER: Your Honor, given the hour, I'll try to be very brief on this. I think that what has happened now is that with respect to the IME motion, our differences boil down to two issues. If I'm reading Dr. Cantu's last most recent Declaration and Plaintiffs' opposition brief correctly,

I think we're in agreement on the protocol for the IME with one exception. He doesn't talk about the psychiatric exam. We believe that there should be a psychiatric component to this.

If you look at the allegations of the four individuals that we're talking about, they variously allege change of personality as a current indication, severe depression; another says change of personality, mood swings, anxiety; another Plaintiff says disorientation, concentration difficulties; and another one alleges aggression and paranoia as current issues. And we, therefore, think that's within the realm of doing an exam with respect to these four.

I would note that Dr. Cantu gives no reason in here for not doing it. Indeed, there's nothing in his Declaration saying that it shouldn't be performed. It's just by omission that nothing is -- it's not included. But I would note as we've cited in here that in connection with the NCAA programs, he has affirmatively stated that a psychiatric component to these exams would be appropriate, and we've cited that in the briefs.

So, I don't think we've been given a reason not to include those. And given the specific allegations in the Complaint that raise psychiatric issues, we think that would be an appropriate --

JUDGE NELSON: Let me ask you a question that I --

perhaps I just didn't read it as carefully as I should have. I presume this IME will take place in one location. In other words, they're not going between New York and San Diego, are they?

MR. JOHN BEISNER: I think we can figure that out, Your Honor, so that it can be done at a common location.

JUDGE NELSON: Okay. All right.

JUDGE MAYERON: And in terms of the timing, you indicated the protocol contemplates approximately 12 to 14 hours of testing.

MR. JOHN BEISNER: Yes.

JUDGE MAYERON: Which seems like a really long time to put individuals through testing. It's probably in excess of two days, probably two to three days of testing.

MR. JOHN BEISNER: Your Honor, that's consistent with the exam process. I think you'll find it's consistent with what's been proposed as pieces of medical monitoring. I think particularly given the allegations that are being made now about diagnosing CTE in the living, we're entitled to that sort of comprehensive exam. We're examining not only to look at what Plaintiffs' allegations are, but to look for alternative causes for what is being alleged here. And we think we've given Affidavit support for that being quite reasonable in this circumstance.

JUDGE NELSON: And you know, we've had this

discussion before, Mr. Beisner, but it's not really clear to me why the IMEs of the Class One Plaintiffs will impact class certification. So, imagine for a minute that the IME doctor says there's an explanation for all of this, it has nothing to do with concussions, and Dr. Cantu says it has to do with concussions. Well, that might be for trial. I don't know what that has to do with class certification --

MR. JOHN BEISNER: It has a huge amount to do with class certification --

JUDGE NELSON: Why? Tell me why.

MR. JOHN BEISNER: Because the causation dimension in this. If you examine them and they have manifestations of current things that can be traced to other causes --

JUDGE NELSON: So you imagine the Court doing that factual analysis when she has disputed expert testimony on the topic?

MR. JOHN BEISNER: Absolutely. That's what the Supreme Court required in the *Dukes* case. The Court's got to go through that. And if there's different -- if the stories that are being to be told at trial by these Plaintiffs and you look at both sides of the stories at trial -- that's what *Dukes* says the Court has to look at: If they're not going to be similar, if they get off into individualized issues, you can't certify a class.

And that's what the Eighth Circuit said in the

St. Jude case, and we've got to look at that. And you know, I think if we're not permitted to do it, then there's not a record on which the Court can make a decision because the Court's got to know what that trial looks like. And unless you know what the jury would be hearing in each of these cases and you can determine whether it's all alike or it's going to be very individualized, you can't make a determine on class certification. That's what *St. Jude* says --

JUDGE NELSON: Of course, these people are not seeking damages for any of these conditions, so it's just a question of whether or not they are at risk of future neurological --

MR. JOHN BEISNER: Well, but looking at their current status and assessing where different risks may have come from that are currently manifest in a different form is going to be very critical. And that's going to be part of the exam process. It's not going to be uniform.

JUDGE MAYERON: Tell me why you want to do the IME before Dr. Cantu does the examinations at least of the individuals that are going to be taking place in May? On the assumption you're going to get one bite at the apple, you're going to get one opportunity to do an IME, it seems to me that you would like the benefit of whatever it is that Dr. Cantu finds and opines about as to those individuals before the IME occurs.

MR. JOHN BEISNER: We want to get it done, Your Honor, and it's the same with the depositions. We don't think that's going to make a difference. We will look at the person; our folks will make their own diagnosis. That's what it is. And we just want to -- we want to get it done.

JUDGE NELSON: And what if the Plaintiff's -- what if the Plaintiff's medical condition deteriorates between now and trial?

MR. JOHN BEISNER: Well, Your Honor, the issue before the Court is class certification. And as I said, the Court is obliged to have a firm view of what the trial would look like --

JUDGE NELSON: I understand what your view is.

MR. JOHN BEISNER: Right.

JUDGE NELSON: But just to be clear, there's not going to be another IME. Okay?

MR. JOHN BEISNER: It's not my view, Your Honor, it's the view of the Supreme Court. And they've said that we've got to look at what the trial would look like. I can only deal with what the trial would look like right now. At some point the record is frozen, and that's the way it goes.

I mean, I think this notion here, the Court is assuming this notion of deterioration and rapid change and so on. There's no evidence in the record of that. These people have been through -- I mean originally Plaintiffs were saying,

well, gee, you know, you can just look at the records from the workers' comp proceeding of all these -- that most of these folks have been through and you can just look at that, you don't need anything else. Now they're turning around and saying, oh, no, now we've got to look at them now for the first time. We haven't even looked at them previously.

I mean, you know, if they're going to look at them, why wouldn't we -- to do that. And you know, I think that, to be clear on what the issue is, the Court is going to be having to look at what is the evidence that is going to be going in at trial and how the jury would be -- would be weighing this. And if -- if it's not common evidence with respect to each of them, you can't have a class. And that's really what we're getting out there is what are the differences among these -- among these -- these Plaintiffs?

And from the causation part of the case, Your Honor, it's going to be exceedingly complicated. Knowing their own medical histories is going to be very important in assessing what the status is going to be. I mean, keep in mind, you know, Your Honor, for an example, many of these players had long playing careers before they ever got into the NHL. Some of them had a number of concussions there. The liability, if there is any here for the NHL, only involves what happened when they played in the NHL. So, having an understanding of that medical history and examining that is going to be a very

critical part of this, as well, and that -- you need the exams to do that.

Thank you, Your Honor.

JUDGE NELSON: Thank you.

Mr. Cashman.

MR. MICHAEL CASHMAN: I guess it's now "good afternoon" time instead of "good morning."

Well, we have medical examinations that are being scheduled or have been scheduled with Dr. Cantu. They're going to happen within the timeframe that the Court has identified. Importantly in that context, what will happen is conceivably Dr. Cantu could come back and say, there's no -- no diagnosis of a neurodegenerative disease for some of these individuals; or he could come back and say there is a neurodegenerative brain disease diagnosis. For those with no diagnosis, I think Your Honor touched on the point that there would be no justification for an IME by the NHL on somebody who has no diagnosis of a neurodegenerative disease. They're strictly Class One representative who's at risk of developing a neurodegenerative brain disease in the future, a greater risk because they played in the NHL --

JUDGE NELSON: But Mr. Cashman, there seems to be a division among the courts on this, and the NHL has cited the Court to some medical monitoring classes where the Court permitted an IME. Can you talk about that?

MR. MICHAEL CASHMAN: And that is why we say -- we -- we initially said that we didn't think there was a justification for an IME on people who had no current diagnosis. But we have attempted to resolve this issue by saying, yes, we will do that. But then the question becomes: What procedure? And Dr. Cantu has identified the least invasive procedure which is relevant to determining whether there can be any differential diagnosis and --

JUDGE MAYERON: But Mr. Cashman, isn't the only remaining issue about procedure whether there should be a psychiatric examination or not? He agreed on all of the -- I think four out of the five, and he didn't address their need to do a psychiatric interview. So, aren't we talking now, today, solely about the timing of the IME -- because Plaintiffs have agreed, okay, they can have an IME -- and whether a psychiatric interview should be included within it, which doesn't strike me as particularly -- it's certainly not physically invasive.

MR. MICHAEL CASHMAN: A psychiatric examination would be not be physically invasive. But Dr. Cantu looked at the NHL's protocol in detail and he looked at, given his years of experience as a leading expert in this area, what would be reasonably and medically necessary? And he did not think that a psychiatric examination would be reasonably --

JUDGE MAYERON: He didn't even say that. In fact,

he didn't address it.

MR. MICHAEL CASHMAN: Well, he addressed what is reasonably and medically necessary; and by necessity, then, anything that he didn't think was reasonably and medically necessary is excluded. And those things which are excluded are because they don't rule in or out the disease they're most likely to have, which would be CTE I think is how he phrased it in his Declaration. So, the answer to your question is he did not believe, given his years of experience, that a psychiatric examination as part of this protocol would be reasonably or medically necessary.

JUDGE MAYERON: But in the Complaint and, as I understand it, at least what the named Plaintiffs have indicated are symptoms that they are experiencing are included -- included within their mental health issues such as depression or anxiety, which seems to me to bear on at least damages and whether those symptoms that they're currently claiming they're experiencing are due to what happened when they were in the NHL and what they experienced there versus other things in their life. Isn't that appropriate to allow a psychiatric examination to get at that information?

MR. MICHAEL CASHMAN: According to Dr. Cantu, no. And I'd like to back up one step because, again, currently the individuals that we're talking about are Class One representatives. And because they haven't been diagnosed with

a neurodegenerative disease, which may end up being the case after they have their examination with Dr. Cantu -- and I think we have agreement on this, Your Honors, even from the NHL implicitly because they have said they are willing to forego any independent medical examination on Reed Larson and Dave Christian, who are also Class One representatives. Even though the Complaint does not allege that Christian or Larson have depression right now, they're still in the same situation that LaCouture, Peluso, Nichols, and Leeman are, i.e. they are seeking medical monitoring relief as Class One representatives in the First Amended Complaint for the greater risk of a longterm brain disease.

So, again, Plaintiffs rely on Dr. Cantu for what is reasonably and medically necessary. And to the extent it's reasonably and medically necessary for somebody who has not been diagnosed with a longterm brain disease or somebody who has been diagnosed with a longterm brain disease, Dr. Cantu has identified the procedures he think are appropriate. We think the NHL should be limited to the same procedures so that we can achieve what the Court has talked about, a full record where we're talking about the same thing.

And lastly I just want to touch on a few contentions that have been raised here. I think that the Plaintiffs have always opposed IMEs at these early stages of the litigation. That's something that the Court has just referenced. The

Plaintiff have always opposed invasive testing. The Plaintiffs have always opposed testing of the class reps who have not been diagnosed with the post-concussion syndrome even when we were back talking on the Master Administrative Complaint.

The Plaintiffs, after the First Amended Complaint was filed, have always opposed the IMEs for those who have not been diagnosed with a longterm brain disease. So, we've been consistent in our position, I think, on the IMEs. And what we have done is try to take this issue off the table for the Court by agreeing to have these people go through the examination process with Dr. Cantu, and all we ask is that the NHL follow that examination by Dr. Cantu and follow the same protocol that Dr. Cantu is going to be applying to these individuals. That's all that -- that's all that we ask.

And then with respect to the issues about location and the length of those examinations, we believe it should be reasonable. Reasonableness in this regard can be determined by how it's done with Dr. Cantu. I believe all of those examinations are going to be done in Boston. And I think in a much less -- or a smaller period of time than what the NHL is proposing. And so we, again, suggest that be the guideline, that should be the yardstick.

So, we kindly request that the NHL's motion as structured be denied and our alternative be adopted.

Thank you.

JUDGE NELSON: Okay.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, just a few final points. What we're moving for here is an independent medical exam. It shouldn't be dictated by what Dr. Cantu wants to do. I mean, normally whatever the Plaintiffs do for an examination just occurs off on the sideline and you get an expert report later. It doesn't become dictatorial of what the Defendant is entitled to do. And so to say, well, it's got to be exactly what Cantu does, it makes no sense. We're doing this for litigation purposes. We're looking for alternative causation in these examinations for whatever -- whatever may be shown because that's part of what would come up at trial.

And to be clear about -- to be clear about that, Your Honor, I mean, these four we focused on just as a compromise, we said we'll pass on the two that are alleging no current injuries whatsoever. But we know that at trial these four are going to be portraying to the jury, we are having problems and therefore we need medical monitoring. It's -- why would you put it in the Complaint if that weren't it?

I mean, and if there are alternative causes that any of them is -- for whatever problems they're having, if there's drug addiction, if there's a hundred other different things that could be responsible for these symptoms, that makes an

entirely different risk case for them because the jury is going to have to make a determination that whatever risk they face is due to the sub-concussive impacts and the allegations in the case. If there are other causes for this, they don't get medical monitoring, and those are individual determinations.

JUDGE NELSON: But isn't it true that an individual hockey player could have a car accident and fall down the stairs and play hockey and your expert could conclude that every symptom that hockey player is currently suffering is a result of the car accident and the fall down the stairs but nonetheless could get Parkinson's in the future, and even your doctor in the future might then say the Parkinson's is a result or is more likely or not the result of the concussions? You see what I'm saying? I'm not sure that a doctor's opinion about whether the mood swings and the depression now results from the car accident or the concussions is dispositive of whether the Parkinson's in the future is.

MR. JOHN BEISNER: The Court here doesn't have to resolve that question. What the Court is going to look at is if Plaintiff A comes in and he was going to try his case to the jury individually, what would it look like? What would the evidence be in that case?

JUDGE NELSON: Right. And he's going to say, I had concussions, and so I am at risk for future neurological

damage.

MR. JOHN BEISNER: Right.

JUDGE NELSON: Forget my symptoms. The fact that I had constant sub-concussive events is enough, even if every symptom I suffer now is attributable to a car accident and a fall down the stairs.

MR. JOHN BEISNER: Exactly. And our expert on examining may well say you had a car accident, you had severe head trauma, and that increases your risk for these longterm diseases, because Plaintiffs are going to be arguing that as a result of mild traumatic syndrome -- mild traumatic injury and by logic it means the same thing would be true of a severe head trauma injury. And so the jury will have to sit here and say, all right, maybe they have a risk of Alzheimers now, but whose fault is that? It may be the car accident.

JUDGE NELSON: That may be true, but focusing on their current symptoms isn't going to solve the problem --

MR. JOHN BEISNER: Sure it will, because if they --

JUDGE NELSON: No, because they can be asymptomatic and still in the future suffer --

MR. JOHN BEISNER: We're not talking about asymptomatic, though. We're talking about four people who Plaintiffs are alleging have symptoms currently. And we're entitled, before that goes to the jury, to know where those symptoms come from. If it's -- if it's a result of drug

addiction and that's what they're talking about, that's going to be relevant to the jury if they put that information before the jury --

JUDGE NELSON: It might, but it's not dispositive of the question.

MR. JOHN BEISNER: It may not be dispositive, but the question is, Your Honor, not what is dispositive, it's what evidence is going to go before the jury. You know that evidence is going to go before the jury if they've got other issues. And that means these trials are going to be individualized, and that's what the Supreme Court in *Dukes* said: The Court needs to look at is what is the evidence going to be in each of these cases, not who wins, not who loses, but what legitimately gets before the jury?

We know because it's in the Complaint that they're going to stand up and say, look at Mr. X, look at his condition, and that's why he needs medical monitoring.

JUDGE NELSON: I don't think so. I think what they're going to say is, look at the sub-concussive events he suffered as an enforcer at the NHL; he needs medical monitoring despite the fact that he has all these --

MR. JOHN BEISNER: That's going to be their position, Your Honor. You're only looking at Plaintiffs' side of the case. We get to put on a defense here.

JUDGE NELSON: Well, of course you do.

MR. JOHN BEISNER: Well, then we need to have the evidence to say that there's alternative causation. That's what's missing from the analysis you're suggesting, and that's why we need these IMEs to do that.

Thank you.

JUDGE NELSON: Mr. Cashman.

MR. MICHAEL CASHMAN: Just briefly, Your Honor. Psychiatric exams, which is really all we were talking about, don't accomplish anything about what Mr. Beisner said. I just want to correct the record on a couple of items, too. The claim in this case is that these people are exposed to greater risk at any time they were playing under an NHL contract, when they're on an NHL contract, not just playing in the NHL.

Mr. Beisner keeps focusing on what he now calls symptoms that are alleged in a Complaint. And you'll recall we had all these discussions about the use of the word "symptoms" before the Complaint has been amended. What the Complaint says, of course like any Complaint, is for context about the experience that these people are having. But the Complaint doesn't say that these are symptoms of a neurodegenerative brain disease. Rather, they're for context.

But they are representing Class One; and that's basically, as the Court knows and as the Court just correctly pointed out, that the issue is that they are -- were at greater risk and are at greater risk in the future of

developing a longterm brain disease because they were subjected to all these concussive and sub-concussive blows while under an NHL contract. That's a wholly different thing than what Mr. Beisner is addressing.

Thank you.

JUDGE NELSON: Yes?

MR. JOHN BEISNER: Sorry this is so long, but just quickly. We need to read the Complaint. And if you look at Mr. Nichols, for example, says: Due to concussions in his career, he says he currently suffers on a daily basis from dizziness, disorientation, memory loss, tinnitus, post-traumatic headaches, post-traumatic head syndrome, concentration difficulties, sleep disorder, and cognitive deficit. Mr. Nichols has symptoms consistent with CTE.

Why would you put that in the Complaint if you're not going to say to the jury, oh, he needs medical monitoring because he right now has symptoms consistent with that. That's all part of the presentation. We have a right to test that and to talk about whether those -- there are alternative causes for that.

Your Honor, one other thing I forgot to mention earlier, just to note briefly on this. Again, on the psychiatric exams, I don't know how you reconcile Dr. Cantu's apparent position. And I agree with you, Judge Mayeron, I don't see it. There's nothing in his paper saying you

shouldn't, there's a reason not to do it. But again I remind that in the -- and it's cited and attached to our papers -- that in the *NCAA* settlement matter, he is out there saying that he -- there should be, to just monitor people, a mood and behavioral evaluation program. And he says that a psychiatrist should be involved in doing that. I mean, why is that so complicated?

Thank you.

MR. CHARLES ZIMMERMAN: I'm somewhat of an expert on the *NCAA* settlement seeing as I was part of it. *NCAA* settlement was a settlement to try and help players who -- or athletes who may have been subjected to sub-concussive and concussive injury so that they can evaluate their condition going forward and take remedial action if available or get remedies and treatment. If John Beisner and the NHL is generously offering to do that for our players in the NHL case, we are probably very happy to comply.

What they are doing, however, is for advocacy and intimidation. Just as the Court indicated with Mr. Ludzik, to put a seven-hour or a 12-hour IME out there to be talking about drug addiction that they've made no finding that any one of the people we've put up here is subject to a problem of drug addiction or falling down stairs is a -- is trying to create a message of intimidation. If they want to create a message of care, treatment, and benefits to players who need

it, we have a lot to talk about. But if they want to come in here and subject these people to long and involved and arduous examinations which started with spinal taps and started with invasive testing, and now is going today to -- I think what they said 16 hours of tests, all of it -- perhaps all over the country, we are here to try and protect them, protect our clients from that kind of what I call abuse, maybe it's intimidation, but it certainly isn't a reasonable IME, Your Honor.

JUDGE NELSON: Mr. Cashman.

MR. MICHAEL CASHMAN: I echo what Mr. Zimmerman said, Your Honor. And I just think it's interesting that Mr. Beisner chose to quote from Mr. Nichols after attacking him earlier today, and that certainly is a pretty compelling explanation for the answers that Mr. Nichols gave in his deposition. But the bottom line is that these IMEs are being used to intimidate people. We've proposed a reasonable protocol that Dr. Cantu, which by everybody's acknowledgment is the leading expert in this area, and we request that his advice be followed.

Thank you.

JUDGE NELSON: Anything else that we should address in the conference today?

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, I just wanted to note

that in referencing Mr. Nichols, I was not intending to attack him. I simply thought it important for everyone to focus on what the Complaint actually said on that.

And Your Honor, just one final note on this and on this intimidation issue, as Your Honor referenced it earlier, as well, if what we're asking for is intimidation, then somebody ought to go talk to the Advisory Committee of the Civil Rules because the Civil Rules say that if you file a lawsuit, the Defendant gets discovery. All we've asked for here is what you are entitled to get under the Rules of Civil Procedure.

I'm sorry if that's intimidation. That's what happens when you file a lawsuit. And if you don't want to subject yourself to the discovery that Rule 26 and all of the other provisions provide, you shouldn't file the lawsuit. But we shouldn't be subjected to being told that asking for things that we are entitled to get, which Your Honor is going to regulate as you have throughout the case, is intimidation, to ask for these things that you get in every other lawsuit to be intimidation here is just -- it makes no sense.

So, I think Your Honor, we should -- if -- that seems to be the focus of it today is we've asked for discovery because somebody filed a lawsuit, this is intimidating people, I'm sorry. If we're just going to abandon the Civil Rules, fine, but that's what they say, and we are entitled to that

discovery.

JUDGE NELSON: Anything else we should discuss before we adjourn for the day?

(None indicated.)

JUDGE NELSON: Court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluded at 1:21 p.m.)

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CERTIFICATE

I, Heather A. Schuetz, certify that the foregoing is a correct **EXCERPT** 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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