

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

**In Re: National Hockey League
Players' Concussion Injury
Litigation**

MDL No. 14-2551 (SRN)

This Document Relates to All Actions

PRETRIAL ORDER NO. 14

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SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on the informal motion of Defendant the National Hockey League (“NHL”) for a protective order concerning the deposition of NHL Commissioner Gary Bettman (“Commissioner Bettman”). (Letter of 3/11/15 from J. Beisner to J. Nelson [Doc. No. 150].) For the reasons set forth herein, Defendant’s motion is granted in part and denied in part.

I. BACKGROUND

Citing “the apex doctrine,” the NHL seeks to preclude the deposition of Commissioner Bettman at this time, arguing that other less burdensome discovery should be exhausted before the Commissioner is deposed and that Plaintiffs will suffer no prejudice in being required to first obtain other such discovery. Plaintiffs, however, argue that the apex doctrine – which may be applied in certain circumstances to shield high-ranking executives from harassing or burdensome discovery – is inapplicable to

Commissioner Bettman and that they should be permitted to depose him within the next two months.

II. DISCUSSION

Federal Rule of Civil Procedure 26(c) permits the Court, for good cause shown, to “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .” In order to satisfy the burden of establishing good cause, the moving party must make “a particular and specific demonstration of fact, as distinguished from stereotype and conclusory statements.” Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n.16 (1981) (quoting 8 C. Wright & A. Miller, Federal Practice & Procedure § 2035, p. 265 (1970)). The Court’s determination of good cause must also include consideration of the comparative hardship to the non-moving party should the protective order be granted. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973). In determining whether a protective order is warranted, courts have broad discretion. Roberts v. Shawnee Mission Ford, Inc., 352 F.3d 358, 362 (8th Cir. 2002).

The “apex doctrine” protects “high-level corporate officials from deposition unless (1) the executive has unique or special knowledge of the facts at issue and (2) other less burdensome avenues for obtaining the information sought have been exhausted.” Van Den Eng v. Coleman Co., Inc., No. 05-MC-109-WEB-DWB, 2005 WL 3776352, at *2 (D. Kan. 2005). Although “[t]here is no per se rule barring depositions of top corporate executives,” Cardenas v. Prudential Ins. Co. of Am., No. 99-cv-1421 (JRT/FLN), 2003 WL 21293757, at *1 (D. Minn. May 16, 2003) (citation omitted), and the rules for

depositions and discovery are generally liberally construed, see Credit Lyonnais, S.A. v. SGC, Int'l, Inc., 160 F.3d 428, 430 (8th Cir. 1998), the apex doctrine recognizes that deposition notices directed to officials at the highest level, or “apex,” of corporate management may create potential for harassment. See Celerity, Inc. v. Ultra Clean Holdings, Inc., No. C 05-4374 MMC (JL), 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). Accordingly, many courts have held that before a CEO or similar high-level officer may be deposed, the party seeking the deposition must make a good-faith effort to first pursue less burdensome sources for obtaining the requested information. See, e.g., Bank of the Ozarks v. Capital Mortg. Corp. No. 4:12-mc-00021 KGB, 2012 U.S. Dist. LEXIS 99506, at *3-5 (W.D. Ark. July 18, 2012) (citations omitted); see also Smithfield Bus. Park, LLC v. SLR Int'l Corp., No. 5:12-cv-282-F, 2014 WL 547078, at *2 (E.D. N.C. Feb. 10, 2014).

As Plaintiffs note, in the NHL’s Rule 26 Initial Disclosures, the NHL identified Commissioner Bettman as one of the two most knowledgeable persons about “[a]ll aspects of the game and business of NHL hockey generally and specifically in response to Plaintiffs’ Master Administrative Long-Form and Class Action Complaint.” (Def.’s Initial Disclosures at 2, Ex. A to Grygiel Decl. [Doc. No. 129-1].) In support of Plaintiffs’ argument that Beckman possesses unique knowledge concerning concussion injuries, Plaintiffs submit the following public statements attributed to Commissioner Bettman:

- A March 18, 2015 *Yahoo Sports* article notes that “[d]uring the Stanley Cup last year, commissioner Gary Bettman said concussions had declined by ‘moderate to low double-digits as a percentage’ that season and man-games

lost to concussions had declined by ‘probably about half.’” The article quotes Commissioner Bettman as saying, “Concussions are not on the rise, to the contrary, and the number of man-games lost is down again. I’m not giving you numbers.” (Ex. C to Grygiel Decl. [Doc. No. 129-1].)

- A February 1, 1993 *Newsday* article quotes Commissioner Bettman: “Fighting penalties are down 56 percent from last year in the wake of the new rules that were adopted. What we’re going to do after the season is take a look at the impact the rules had and whether any further adjustments are necessary.” (Ex. D to Grygiel Decl. [Doc. No. 129-1].)

- In an April 7, 2001 *San Jose Mercury News* article concerning injuries to player Gary Suter, Commissioner Bettman stated, “Last year, we analyzed the tapes of all concussions and determined that two-thirds occurred at open ice. . . . There’s no doubting that Mr. Suter’s injury came from seamless glass. . . . But if you look at data, I think you get as many injuries from other types of board and glass. We’re not willing to say there’s a correlation between the glass and injuries. But that doesn’t mean this particular injury was not caused by it.” (Ex. E to Grygiel Decl. [Doc. No. 129-1].)

- Commissioner Bettman was quoted in a March 26, 2007 *ESPN NHL* article, stating, “My view on fighting hasn’t changed. . . . We’ve never taken active steps or considered eliminating fighting from the game. I’ve always taken the view that it’s part of the game and it rises and lowers based on what the game dictates. I think fighting has always reached whatever level is appropriate in the game and has been a part of the game. And I don’t have a problem with that.” (Ex. F to Grygiel Decl. [Doc. No. 129-1].)

- In a November 26, 2014 *AE Edition* article, Commissioner Bettman stated, “[Fighting is] an overblown issue because it’s a small part of the game and to the extent there are concussions it’s a small part of that.” (Ex. G to Grygiel Decl. [Doc. No. 129-1].)

- A March 15, 2011 *AP* article indicates that “Bettman announced the league will adopt a more rigorous protocol for examining players with possible concussions,” and quotes Commissioner Bettman as stating, “There’s no one single thing causing concussions. . . . There is no magic bullet to deal with this. I know that it’s an emotional, intense subject, particularly for our fans. We get it. But dealing with this issue is not something you can do whimsically or emotionally. You really have to understand what’s going on.” (Ex. H to Grygiel Decl. [Doc. No. 129-1].)

- In a March 14, 2011 *NHL Insider* article, Commissioner Bettman announced player safety procedures and revisions in the NHL Protocol for Concussion Evaluation and Management. (Exs. I & J to Grygiel Decl. [Doc. No. 129-1].)

Given Defendant's identification of Commissioner Bettman as a person with knowledge about the matters at issue in this lawsuit and about the business of NHL hockey in general, and Commissioner Bettman's statements noted above, the Court finds that Commissioner Bettman possesses unique or special knowledge relevant to this lawsuit. See Van Den Eng, 2005 WL 3776352, at *2.

As counsel for the NHL noted at the April 22, 2015 status conference, the NHL does not necessarily ask that Commissioner Bettman be deposed last, but objects to him being deposed first. The NHL contends that the Court should instead adopt a "wait and see" approach, requiring Plaintiffs to first seek information about Commissioner Bettman's knowledge via written discovery, or seek similar information from lower-level NHL employees or through Rule 30(b)(6) witnesses. (Def.'s Reply Mem. at 5-6 [Doc. No. 137].) While the apex doctrine also considers whether less burdensome means of discovery have been exhausted, Van Den Eng, 2005 WL 3776352, at *2, some courts view exhaustion as "an important, but not dispositive, consideration." Hunt v. Continental Cas. Co., No. 13-cv-05966-HSG, 2015 WL 1518067, at *2 (N.D. Cal. April 3, 2015) (citing In re Transpacific Passenger Air Transp. Antitrust Litig., No. C 07-05634 CRB, 2014 WL 939287, at *1 (N.D. Cal. Mar. 6, 2014)).

Whether dispositive or not, Defendant makes a valid point that in order to

adequately prepare Commissioner Bettman for his testimony, the NHL should first produce the relevant documents in the Commissioner's custody. To that end, at the April 22, 2015 status conference, the Court directed Defendant to prioritize the production of documents in the custody of Commissioner Bettman, along with three other witnesses' documents. The Court also directed that at the May 15, 2015 informal discovery conference, counsel for the NHL shall advise the Court on the expected length of time for Commissioner Bettman's document production. In addition, by May 15, 2015, the Court ordered the parties to share with the Court the deposition dates of nine other remaining priority fact witnesses identified by Plaintiffs. (Minute Entry of 4/22/15 [Doc. No. 141].) Because this written discovery will be produced in the near future and other priority fact witnesses will be deposed first, Commissioner Bettman may be deposed in July 2015, but no earlier. This should cause no hardship to Plaintiffs, who will have an opportunity to first depose other witnesses. In addition, both parties will have the benefit of the production of relevant discovery from Commissioner Bettman prior to his deposition. Moreover, as a practical matter, even if the Court denied Defendant's motion and ordered Commissioner Bettman's deposition as soon as possible, it would likely not be taken until July or later due to scheduling difficulties. Accordingly, Defendant's motion for a protective order is granted in part and denied in part.

THEREFORE, IT IS HEREBY ORDERED THAT:

The informal motion of Defendant the National Hockey League for a protective order concerning the deposition of NHL Commissioner Gary Bettman [Doc. No. 150] is

GRANTED in part and DENIED in part.

Dated: May 5, 2015

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge