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
February 16, 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

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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 9:33 a.m.)

THE COURT: We are here this morning in the matter of the National Hockey League Players' Concussion Injury Litigation. This is MDL file 14-2551.

Let's begin with having counsel for the Plaintiff identify themselves for the record. Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: Good morning, Your Honor. This is Charles Zimmerman for the Plaintiffs.

MR. MARK DEARMAN: Morning, Your Honors. Mark Dearman, Robbins Geller Rudman & Dowd, for the Plaintiffs.

MR. STEPHEN GRYGIEL: Morning, Your Honors. Steve Grygiel from Silverman Thompson for the Plaintiffs.

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

MR. MICHAEL CASHMAN: Morning, Your Honors. Michael R. Cashman. As the Court may be aware, I've changed law firms to Hellmuth & Johnson law firm. Thank you.

MR. CHRISTOPHER RENZ: Your Honor, Chris Renz, Chestnut Cambronne law firm, for the Plaintiffs.

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

MR. DAVID CIALKOWSKI: Good morning. Dave Cialkowski for the Plaintiffs.

MR. SCOTT ANDRESEN: Good morning, Your Honors. Scott Andresen, also for the Plaintiffs.

And by telephone this morning, we have Tom Byrne, Bill Gibbs, James Anderson, Steve Silverman, Jeff Klobucar, and Brian Penny.

THE COURT: Very good.

Mr. Beisner.

MR. JOHN BEISNER: Good morning, Your Honors. John Beisner for Defendant, NFL -- NHL.

MR. CHARLES ZIMMERMAN: What was that?

MR. JOHN BEISNER: I should explain, Your Honor. Due to weather circumstances, my plane landed here last night at 2:30 a.m. --

THE COURT: So he was dreaming that he was representing the NFL apparently.

MR. JOHN BEISNER: That's probably not going to be the first time you hear something like that (laughter).

MR. DANIEL CONNOLLY: Good morning, Your Honors. Dan Connolly on behalf of Defendant, National Hockey League.

MR. JOSEPH BAUMGARTEN: Good morning, Your Honors. Joseph Baumgarten on behalf of the Defendant.

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

MR. JOSEPH PRICE: Joe Price, Your Honor, for the NHL.

MS. LINDA SVITAK: Good morning. Linda Svitak for the NHL.

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

THE COURT: Very good.

MR. DANIEL CONNOLLY: And Your Honor, for the NHL, listening by telephone, are David Zimmerman and Julie Grand from the NHL; and also Shep Goldfein, James Keyte, and Jessica Miller from Skadden Arps firm.

THE COURT: Very good. All right.

Shall we proceed with the agenda, beginning with Defendant's document production.

Mr. Martino.

MR. MATTHEW MARTINO: Good morning again, Your Honors. On the NHL document production, as we've been reporting, we have completed that production, aside from any documents that come out of the priv process, you know, de-privileged documents.

Previously we had two items on the Board of Governors production. The first was the text messaging for the Governors, and the second was a Plaintiffs' request for documents from additional Alternate Governors. All the documents related to those two issues have now been produced. We're completed with that process. About a week ago, the Plaintiffs made a few follow-up requests which we are

considering, and we should be in a position to get back to them on that pretty shortly.

THE COURT: All right.

MR. MATTHEW MARTINO: Other than that, I think we're good.

THE COURT: All right. It says that the -- on Page 8 that you expected to produce documents from the Toronto Maple Leafs from February 12th --

MR. MATTHEW MARTINO: Those were produced, yes.

THE COURT: Okay. All right. And then there was some additional discussion about Alternate Governors. Is there anything more to report on that?

MR. MATTHEW MARTINO: No. Those are the follow-up requests -- about a week ago, the Plaintiffs addressed those with us and we're still considering those and we should be able to get back to them to continue the meet and confer hopefully this week or next.

THE COURT: Okay. Very good. Thank you.

MR. MATTHEW MARTINO: Thank you.

THE COURT: Any response to the NHL productions?

MR. BRIAN GUDMUNDSON: Yes, Your Honor. Good morning. Just to sort of put a little bit more meat on the bone with what the issues are, there's just a few teams that have produced very low numbers or what Plaintiffs, I guess, consider to be very low numbers and so we've asked for

certifications from the Governor. We have three different teams -- Calgary, Ottawa, and Los Angeles Kings -- just certifying that the litigation hold letter was received, that it was honored, and that all documents were made available to Counsel. We also sent requests, as Mr. Martino indicated, for the Washington Capitals that they look into a few other alternates because the volume was low there, but the process continues to play out in the meet and confer style at this time. There's nothing to put before Your Honor.

THE COURT: Okay.

MR. BRIAN GUDMUNDSON: We did have, under -- under this heading in the agenda, not in the master agenda but in the discussion section, a matter that's popped up regarding the New Jersey Devils. And I'm not sure if we want to address that now. It has to do with the databases, which I know is everybody's favorite topic --

THE COURT: Is that our least favorite topic (laughter)?

MR. BRIAN GUDMUNDSON: I'm not sure in what order to address it. It is under the -- in the agenda under the NHL's document production and --

THE COURT: Why don't we go ahead and address it now.

MR. BRIAN GUDMUNDSON: Okay. Well, what's happened is -- and I feel a little sheepish because a lot of what needs

to be discussed here probably cannot because it's all subject to a protective order and here we are in open court. But it's a little difficult, but --

THE COURT: Is this something that might be better for discussion at an informal conference, or do you need some action on it?

MR. BRIAN GUDMUNDSON: No, you know what, I don't think that we -- it's -- it hasn't been briefed, and I don't think we've discussed with NHL counsel how they want to put that of before Your Honor. And so maybe that would be a better idea to talk about it informally. Would you like --

MR. JOHN BEISNER: I think it's right, Your Honor. The issue will involve, I think -- correct me, Brian, if you think this is wrong -- but it's probably going to -- it's really request to modify the Court's order identifying what is to be divulged in the databases and what's to be de-identified, and it's a request for a identification of a part of the database which has been identified -- or has been de-identified. So, that's the issue that's before the Court. I think in the end, it's probably something we'll need to brief before the Court so that may be the better -- and we haven't completed the meet and confer process on that, so I -- I think that's --

THE COURT: That's probably adequate notice to the Court. And when you're ready to present it, that will be --

MR. BRIAN GUDMUNDSON: Okay. Yeah, I guess I don't know if I would style it as a modification request of your order. We think it's eminently reasonable to comply with what's in your order, but we'll follow the process that we just discussed and an informal setting would probably be better for it.

THE COURT: Okay.

MR. CHARLES ZIMMERMAN: Give me one second.

THE COURT: You bet.

(Discussion off the record.)

THE COURT: Okay. Very good.

Are we ready to move on to Plaintiff Fact Sheets then? Mr. Cashman.

MR. CHARLES ZIMMERMAN: May I proceed just on it -- on the -- on Mr. Cashman, as he said to you, he has switched law firms and I would just like to inform the -- inform the Court or perhaps move the Court to have his appointment moved with him to the Hellmuth Johnson firm. I think we've always understood these appointments to be personal, but if you'd like a formal motion or if it would just be possible to make a motion on the record either now or at the end of the hearing, whatever the Court desires.

THE COURT: Sure. Mr. Cashman, there's no objection by the Zelle law firm. Is that true?

MR. MICHAEL CASHMAN: I do not believe so, Your

Honor.

THE COURT: Okay. All right. I am happy, then, unless there's an objection from the NFL -- NHL -- sorry, Mr. Beisner --

MR. JOHN BEISNER: There's no objection, Your Honor, but I did want to note that I think there probably needs to be something formal on the record because my recollection is the point of information that these designations in the order you proposed are specific to firms, not individuals. So, there -- some change will be needed. That's my only comment, neutral --

THE COURT: Okay. Then why don't you submit a formal proposed order in line with what the previous order said so we have a clean record on it, okay? But I will have no objection to signing it.

MR. CHARLES ZIMMERMAN: Thank you, Your Honor.

THE COURT: Okay.

MR. MICHAEL CASHMAN: Thank you, Your Honor. On Plaintiff Fact Sheets, the parties have been meeting and conferring and they're continuing to meet and confer, Your Honor, on some proposed amendments that the NHL has made on the Plaintiff Fact Sheet in relation to the First Amended Complaint. The Plaintiffs, at this time, are not sure that any amendments are needed to the Plaintiff Fact Sheet because, as we mentioned in a prior conference, we are planning to

further discuss with the NHL and proposed to the Court a process for conforming the constituent Complaints to the First Amended Complaint. And we think that may eliminate the need for -- certainly for amended Fact Sheets and may eliminate the need for Fact Sheets altogether, but that's an ongoing process.

THE COURT: Very good.

Mr. Beisner?

MR. JOHN BEISNER: Your Honor, I don't think that what Mr. Cashman mentioned addresses the problem that we have here, and it's really two-fold. One is that the questions that are in the Plaintiff Fact Sheet were designed to address the allegations in the original Complaint, not the Amended Complaint, and so I think that the NHL ought to be able to present and get responses to questions that are consistent with the new Complaint, and that's part of what we've been talking about.

The other concern, though, that we have is that regardless of what is done with the Complaints, we have sworn statements, sworn interrogatory answers because that's what the Court has designated these as being, that say a number of things that are inconsistent with the new Complaint. Most notably, I believe it's around 54 -- 55 of the Plaintiffs who have responded to these Fact Sheets, and so that's the vast majority have said that in their responses that they don't

presently have any diagnosis of any longterm brain disease but that they are asserting claims for compensation for present injury, which as we know from prior discussions, is inconsistent with the current Class Action Complaint.

That's got to be cleared up in some way. Counsel just can't say, well, ignore those answers. Those are sworn interrogatory responses, and what we're proposing is that we propose new questions that are consistent with the -- the new Complaint, making inquiry about what of the two classes they're in and so on so that we can get those -- those -- those responses. So, we do think that -- that there is a need to -- to clear that up.

It's not an insignificant issue, Your Honor, because many of those Fact Sheets were signed and presented to us after the new Complaint was filed, after the Amended Complaint was out there. So, the record the Court has before it is pretty confused on that issue. And it is an issue because in terms of adequacy of representation because what you have on the record is a class Complaint in which class counsel have said they are not seeking any compensation for current injury unless there is a diagnosis of a longterm brain disease; but then they have what are assessed, in essence, private clients that they have signed up separately that they're representing in which the record, the sworn statements from these individuals say that, yes, I am seeking current compensation

for this.

So, you have class counsel who, on the one hand, are not seeking for the class compensation for those injuries, but the record says that they are seeking that for the private clients they've signed up. That's a conflict. You can't have both. That may not be the intent of Counsel. I'm not saying it is. But you can't just wave a wand and make that disappear because we have sworn statements on the record to that effect. So, that's what we're trying to work through and we've --

THE COURT: Do you think you've completed that? Have you reached impasse, or do you need some more time to work on that?

MR. MICHAEL CASHMAN: Your Honor, if I may, I think that Mr. Beisner is -- has given substantive argument on the Plaintiff Fact Sheet, and I think it's all quite premature because the meeting and conferring process is ongoing. And the Notice to Conform process that I mentioned a moment ago, in a proposed order that we're going to discuss with the NHL and that we've proposed the Court would take care of the issue to make sure that all these constituent Complaints conform to the now First Amended Complaint.

And it will address this, amongst other issues, but specifically will take care of the issue that Mr. Beisner just mentioned about some of these Plaintiff Fact Sheets which were based on the earlier Complaint regarding whether they were

seeking damages for certain personal injuries, and so that's going to be resolved. And I anticipate that we'll need to discuss this with the Court at the next conference because by then I think it -- the issue will be ripe. And by limiting my comments to that point, I don't mean to agree with anything that Mr. Beisner has said other than that we're working on it.

MR. JOHN BEISNER: And I just want to make clear, these are two distinct issues. There are two problems here. One is that all of the constituent Complaints in the action here are inconsistent now with the class Complaint. There may be some administrative ways to deal with that since those are lawyer documents making the allegations, so there may be a way to deal with that. But the last response that we got from Plaintiffs on this is that they would make no amendments to the Fact Sheets, they have to stand as they are, and they reserve the right to move that there not be Fact Sheets in the case to dispense with that. And so that's the reason we're raising the issue, as we have proposed now an alternative to Plaintiffs, after getting that response. Hopefully we'll work that through, but we have been at an impasse on this issue.

MR. MICHAEL CASHMAN: Your Honor, we are not at an impasse. And just to put a little bit more -- this is a -- obviously a little bit of a high-level treatment of the issue. But we have had discussions -- I've had discussions with Mr. Connolly about the Notice to Conform process, and that

we'll be presenting the Court with a proposed order on this --

THE COURT: How does that solve the problem of the sworn interrogatory answers, though?

MR. MICHAEL CASHMAN: Well, if I understand the question, the Plaintiffs will sign a Notice to Conform that will, in effect, amend their -- their individual Complaints to conform to the First Amended Complaint.

THE COURT: What about their interrogatory answers? Why not amend the Fact Sheets?

MR. MICHAEL CASHMAN: Uh, well, Your Honor, we may end up doing that, but I think it's a simpler and more direct process to follow the conforming process. And what we're proposing to do and will be proposing to do and my understanding is the NHL had agreed to this, as the Court may be familiar with the *Syngenta* MDL, at least somewhat familiar with it, and they followed a Notice to Conform process in that case where it was a -- the First Amended Complaint in that case was treated as a substantive amendment whereby the constituent Plaintiffs filed Notices to Conform to that First Amended Complaint in that case.

And what we are proposing to do is follow the same process, we had --

THE COURT: And I could see how that would work to eliminate the inconsistencies between the Complaints --

MR. MICHAEL CASHMAN: That's exactly what we're --

THE COURT: I got to get to the Fact Sheets, though. How do we solve the Fact Sheet problem? Why don't you work on this. I'm not sure that solves the Fact Sheet problem, so why don't you determine whether you can come up with a way to solve it. Let's talk about it at the next informal conference. And if we can't resolve it that way and you want to present it formally to the Court, we can do it at the following formal conference. Okay?

MR. JOHN BEISNER: Thank you, Your Honor.

MR. MICHAEL CASHMAN: That's fine with Plaintiffs. Thank you, Your Honor.

THE COURT: Okay. Very good.

Let's talk about the next informal conference. It's currently scheduled for March 1st which is, I think, a Tuesday, if I'm correct. I am starting a trial this afternoon that will last four weeks, and I'm going to have to take bits and pieces out of my day from that trial for various things. But I believe it's currently scheduled in the morning on March 1st, and that's just not going to work.

So, what I am hoping is that, although I know this is not so great for those of you from out of town, but I'm hoping we could do a late Friday informal conference, which is March 4th. I just don't have any choice here.

MR. CHARLES ZIMMERMAN: Just -- I'm just looking at my calendar. I'm at -- participating in a symposium at the

law school on March 4th. But if it's late enough in the day, I'm sure I can get over -- get away from that. It's starting in the morning. So, if you're --

THE COURT: Would 4:00 work for you?

MR. CHARLES ZIMMERMAN: Yeah, I think that would be no problem at all for me, but I just know that the morning and mid-afternoon is filled up at the university.

THE COURT: Okay. All right.

Mr. Beisner?

MR. JOHN BEISNER: We're fine on March 4th in the afternoon, Your Honor.

THE COURT: Okay. Great. We'll change the informal conference to March 4th at 4 p.m.

MR. CHARLES ZIMMERMAN: Your Honor, if I might make a comment on the Plaintiff Fact Sheet issue.

THE COURT: Sure.

MR. CHARLES ZIMMERMAN: I think it is a good discussion item for the informal. I think the whole thing is sort of -- become -- it's almost somewhat lost its purpose a little bit. And so I hope that -- I'm not going to argue it today. I don't want to put up argument on it. I just hope we can have a real discussion about what we're trying to achieve with the Plaintiff Fact Sheets, whether or not we're hitting the mark with it, whether or not it's working right in this litigation as it's currently unfolding.

I think we need -- and I just don't want to be out of order next time when we talk about it. I want to have a fulsome discussion about the Plaintiff Fact Sheet process because I think it's kind of become something that is probably not serving us very well for at least how I had intended or envisioned it, so I hope we can just have a fulsome informal discussion about that.

THE COURT: Mr. Beisner?

MR. JOHN BEISNER: Your Honor, if I may comment briefly on that, I think that that is appropriate, but I think that in our view, we may be going the other direction on this because I think that there is presently, in the last message that I got from Mr. Cashman on this was basically suggesting maybe we should do away with Fact Sheets. When the Court originally addressed this issue, it basically said that we shouldn't have full-blown discovery with respect to the Plaintiffs who were not in the Master Complaint. That was the Court's order.

However, the order said if Plaintiffs seek discovery of the NHL regarding a broader class of Plaintiffs, that, you know, in the interest of parity, then that barrier would be lifted because if Plaintiffs are going to be taking discovery with respect to persons, class members not named in the Master Complaint, obviously we should be allowed to, as well. I'm not suggesting we want to get into full-blown discovery, but I

think this notion of, well, we need to cut back on the Fact Sheets is the wrong direction. Plaintiffs are taking an enormous amount of discovery with respect to unnamed class members; that's what the databases are all about.

We've now been -- spent, you know, hundreds of thousands of dollars producing information about individual players who are not in that Master Complaint, detailed information about medical information that was gathered from them, so Plaintiffs are getting that. You're going to hear later today about a motion -- and I'll address it when we get there -- with respect to Chubb where they're trying to get medical records from Chubb and other information on people, players, former players who are not in that Master Complaint. And we think, frankly, there ought to be fulsome discovery with respect to -- to persons who are not in the Master Complaint. But it's got to be equal. If that door has been kicked open, as Your Honor said in that order in -- back on March 16th, a year ago, if Plaintiffs open that door, it's open to us, as well. I think we've hit that point.

And so I think we do need to have that discussion, but I just wanted to alert the Court that I think it's going the other direction, that this can't be one-sided discovery with respect to unnamed class members, and that's what I think Plaintiffs are arguing for here.

THE COURT: Okay.

Mr. Cashman, and then we'll continue the discussion at the informal.

MR. MICHAEL CASHMAN: Unfortunately, this point is being belabored, I think, Your Honor. But our -- our understanding of the Plaintiff Fact Sheet process initially wasn't bilateral discovery type of concept, as Mr. Beisner is now casting it. But rather it was to get a jump-start on some really basic fact gathering for some of these other Plaintiffs in the event that class was not certified in some respect. Obviously, the definition of the classes in our First Amended Complaint is now different, and so it changes the circumstance. And as I've said to the Court before, and I think as Mr. Zimmerman just pointed out, this process has become incredibly burdensome and unnecessarily so.

The database discovery and all the other discovery that's gone on has nothing to do with any of the individual Plaintiffs who are not -- who have constituent Complaints and are not the putative class representatives. So, that's really a misnomer, and I think this all really highlights the need to set aside some time at the next conference to really discuss this. Thank you.

THE COURT: All right. Okay.

Let's move on to the U.S. Clubs' document production.

MR. CHRISTOPHER SCHMIDT: Good morning, Your Honors.

There's really two outstanding matters. One, the Clubs are continuing to receive medical authorizations and when we receive those, the Clubs will do a diligent search and produce medical records. That often requires going through historic records, and so it takes a little bit of time to do it and they're coming in on a rolling basis. So, we anticipate that being an ongoing obligation throughout discovery.

The second issue is we do have a PMI dispute. We are still conferring with Counsel. We may get to, ultimately, Your Honor, an impasse on that issue, though we've recently exchanged proposals. To use a line from Mr. Cashman, I think it's a little premature to raise it now, but I think we may be able to address that soon.

THE COURT: Okay.

Good morning.

MR. CHRISTOPHER RENZ: Good morning, Your Honor. Chris Renz, Chestnut Cambronne, on behalf of the Plaintiffs. What the U.S. Clubs' counsel has indicated is largely accurate. The Plaintiffs are continuing to try and get this to a position where we either get the documents that are -- that we think should not be withheld from the PMI log or bring it to Your Honor's attention for resolution. When we were here the last time, I informed the Court that there had been a letter that set out issues so that we could be on the same

page and our request for information. The Clubs said they'd produce it. They haven't.

I asked them to please produce it, they said they would by February 5th. I only -- I did not get all the information. I got a very small portion, and instead I got what has now been termed a Lawyers Proposal from the Clubs' counsel. We made an immediate counterproposal because we want to get this moving and get this part done so it's not on your agenda anymore. I was informed last night that it's unlikely that proposal will be accepted, and so the -- the Plaintiffs, on the PMI issue, Your Honor, are fairly ready to go and get this --

THE COURT: Well, let's queue it up for the next formal conference. Let's do some briefing.

MR. CHRISTOPHER RENZ: That sounds perfect. Thanks. We'll be in touch with Your Honor.

THE COURT: Okay.

Third-party discovery, Players Association, Mr. Beisner?

MR. JOHN BEISNER: Your Honor, this item is merely a point of information since we haven't brought the Court up to speed on all of these third-party requests. But we do have subpoena outstanding to the Players Association. We have been getting production from them, as they -- on a rolling basis, which is being provided both to Plaintiffs' counsel and to us

simultaneously. Don't have any issues to present right now, although we're continuing to have negotiations with the PA about the scope of that production.

There's also requests to -- some of their consultants who are in Canada, but I will save that for the letter rogatory discussion a little bit later.

THE COURT: Okay. All right.

All right. Let's hear about Chubb. Mr. Loney called right before I went on the bench, so --

MR. MARK DEARMAN: Mark Dearman, Your Honor, for the Plaintiffs. I guess as far as the motion to compel is concerned, it's more as a bit of information. As you're aware, the Plaintiffs filed their motion to compel last week against Chubb. Chubb's response is due the end of this week. Plaintiffs would like to file a brief reply, if the Court will allow, and we need a hearing date.

THE COURT: Okay. Have you talked to Mr. Loney about when Chubb's reply is due? He seems to think that he disagrees with your briefing schedule.

MR. MARK DEARMAN: You mean his response?

THE COURT: His response, yes.

MR. MARK DEARMAN: My understanding is he had seven days, and his -- we filed it last Friday, so his response would be due this Friday.

THE COURT: All right. Do me a favor, call him

right after the hearing. If you have some dispute, I'm going to be picking a jury today, but I'd like you to get on the phone with me so we can resolve the schedule for the briefing.

MR. MARK DEARMAN: Okay. And as far as a reply is concerned? It will be brief.

THE COURT: You know, typically I'd just let you argue whatever would be on the reply. I don't want to start a precedent for motions to compel having a reply, so I'd prefer not to permit that. Would you like -- it's going to be an awful lot to do at 4:00 on a Friday. Talk to Mr. Loney about the 3rd at 4:00 for that hearing.

MR. MARK DEARMAN: All right.

THE COURT: And so you're going to talk to him about the 3rd at 4:00 and about the briefing schedule and find out what the issue is and then get on the phone together with me. Okay?

MR. MARK DEARMAN: Thank you, Your Honor.

THE COURT: All right.

MR. JOHN BEISNER: Your Honor, if I could just ask, you referenced the 3rd, did you mean the 3rd or the 4th? Were you intending to have a different date than our informal?

THE COURT: I'm worried that if I have a motion and we have a full agenda at 4:00 on a Friday, I --

MR. JOHN BEISNER: That's understandable. We just want to make sure we had the right dates.

THE COURT: Okay. So I'm considering just having the motion heard at 4:00 on the 3rd. That's acceptable to everybody. All right. Very good. All right.

Dr. Robert Cantu.

MR. JOHN BEISNER: Your Honor, I just -- this is a, again, a point of information. We have served a subpoena on Dr. Cantu. This is in his role as a fact witness in this case. I think as Your Honor is aware, he saw, treated, and did examinations of a number of NHL players long before this litigation was filed; was a consultant to some of the Clubs; I think we noted met with League personnel from time to time. So, this is an effort to gather information from him in his role as a fact witness. We have had some disputes on this, but a second round of production we've now received from Plaintiffs, so I don't think there's anything ripe to present to the Court on that. We're looking at it.

I did want to note, Your Honor, though, an interesting point, which is that one of the issues that we have is a request for examination records that Dr. Cantu performed regarding players, particularly at the request of Clubs or the PA along the way. And so what Plaintiffs' counsel have indicated is, well, those are private, privacy rules present access to those. But they've also acknowledged in the letter that most of those were done in connection with workers' comp claims.

And so we have the irony here that Plaintiffs are seeking those files from Chubb, arguing that they're not subject to privacy restrictions, while the request to get them from Dr. Cantu is being resisted by Plaintiffs on the ground that privacy rules prevent access to them. I just wanted to note the connection between the two because we're talking about the same documents, by and large, and opposite arguments are being made on the privacy issue with respect to those.

MR. BRIAN GUDMUNDSON: Your Honor, as Mr. Beisner pointed out, they purported to subpoena Dr. Cantu as a fact witness, but he is also our expert in this case which has put us in the position of responding to their subpoena. Now, there is some irony going on here; I agree with Mr. Beisner. They've sought the medical records from Mr. Cantu -- or Dr. Cantu for hundreds and thousands of people he's seen since 2004, many hockey players at different levels. He's seen maybe over a dozen, roughly a dozen, NHL players, primarily workers' comp cases.

Those teams possess -- almost certainly possess those records. And the irony is that these two gentlemen are sitting within feet of each other and can't find a way to get those documents without going to a third-party, our expert, and attempting to get private medical information, which they have stood up and argued is sacrosanct throughout these proceedings. Mr. Beisner is right, I don't think there is

anything for presentation to the Court for resolution at this time. But we take it very seriously that our -- one of our primary experts has received a subpoena in this case trying to get all the information in his office.

And he's a very busy neurosurgeon. And while he is working with us in the case, he also has a very busy neurosurgery practice and many, many files he would have to go through and redact and take care of to comply with this request. So --

THE COURT: Where is he located?

MR. BRIAN GUDMUNDSON: He's outside of Boston, Massachusetts at a hospital, Emerson Hospital.

THE COURT: All right.

MR. JOHN BEISNER: Your Honor, one thing I wanted to clarify on this issue, we're not asking for all patients that he's seen. We're talking about hockey players, many of which were seen by him in his role as a consultant to Clubs. He was under retainer to some Clubs to provide these examinations, and this is --

THE COURT: Do the Clubs have those records then?

MR. JOHN BEISNER: No, they don't, Your Honor. And this is one of -- in some of those they do; and to the extent they have, they've been produced or out there. The biggest issue, though, is with respect to the workers' comp claims. The Clubs don't get that information. Chubb gets those

materials, but my understanding is that they typically do not share those with the Club because of what we're going to hear about or the privacy restrictions that the insurance industry has, which I'm not going to purport to go into.

But the fact is the suggestion that we're not working together to get that information, the Clubs don't have that. What we're primarily looking for, those workers' comp examinations reside with either Chubb or Dr. Cantu, and that's why I was pointing out we have an inconsistent position on that because, on the one hand, Plaintiffs are demanding that Chubb produce those but refusing to produce those from Dr. Cantu. There also may be materials Dr. Cantu has that, with respect to those examinations, that didn't get into the workers' comp process. And in -- nothing for the Court to resolve this morning, but I did want to clarify that issue because they're going to be coming up on different tracks but that connection needs to be highlighted.

THE COURT: Okay.

Dr. Ann McKee and Dr. Robert Stern.

MR. JOHN BEISNER: Your Honor, I can probably go through these last three quickly. Just wanted to note that Dr. McKee and Dr. Stern have been -- have received subpoenas. And Mr. Connolly has been working with their counsel to deal with some issues that we had, some concerns we had about the initial productions there.

The same is true of Chris Nowinski at the Sports Legacy Institute.

Player agents, that's in progress, as well. We've subpoenaed some of the player agents for information, and we've been working through those responses with them. So, I just wanted to make sure those were on the Court's radar screen, but nothing for the Court to resolve or address on those this morning.

THE COURT: Okay.

Do you want to talk about letters rogatory? Or should we hear from the Plaintiffs first, perhaps?

MR. MARK DEARMAN: Thank you, Your Honor. Mark Dearman.

I'm happy to report that I think as we speak, we're expecting some final language for the agreement that we've reached with counsel for the Canadian Clubs. We've gotten search terms and custodians worked out. We expect production to begin in the next couple of weeks, and so absent something that we don't expect, we believe we're going to be able to proceed with the production or receive it.

THE COURT: Very good.

Mr. Connolly?

MR. DANIEL CONNOLLY: I'm in agreement with the summary provided there, Your Honor.

THE COURT: Very good. Okay.

MR. DANIEL CONNOLLY: I didn't want to shock you, Your Honor, but it's true.

MR. CHARLES ZIMMERMAN: I am shocked (laughter).

THE COURT: Mr. Beisner, did you want to address something in connection with letters rogatory?

MR. JOHN BEISNER: No, Your Honor, nothing else. I was just noting -- perhaps you want to talk about ours. Is that --

MR. DANIEL CONNOLLY: Oh --

MR. JOHN BEISNER: -- we hadn't talked about that yet, so (inaudible discussion amongst attorneys) --

MR. DANIEL CONNOLLY: Your Honor, we have also provided some letters rogatory out there. We are -- those are proceeding at pace, and we expect to collect those in time.

THE COURT: Very good. Okay.

Are we ready to move to depositions then?

All right. Let's hear from the Plaintiffs, yes.

MR. STEPHEN GRYGIEL: Morning, Your Honors. Very little to report here. As the summary that Your Honors have received shows, we've made progress getting Plaintiffs' deposition scheduled. Mr. Beisner and I have spoken about a date for Mr. Ludzik's deposition. That shouldn't be problematic. We have discussed the letters rogatory process in connection with getting a deposition date for Dr. Meeuwisse, and that's in process.

And I told Mr. Beisner this morning that we would have to him a list of a couple further deponents, none of whom were a surprise to Mr. Beisner, by the end of this week. So, all things are working as they should be there, Your Honors.

THE COURT: Very good. That's good news.

Any response to that?

MR. DANIEL CONNOLLY: We agree that the scheduling -- we agree that the scheduling process is going properly there.

THE COURT: Thank you, Mr. Connolly.

MR. DANIEL CONNOLLY: We've recently scheduled some of the Plaintiff depositions and we're working with Counsel to get appropriate dates.

THE COURT: I see that. Yeah. You're going to get a bunch done in March.

MR. DANIEL CONNOLLY: That's the hope, yes, Your Honor.

THE COURT: Okay. Good.

All right. Should we talk about IMEs?

MR. JOHN BEISNER: Your Honor, there's nothing for the Court to resolve on this this morning, but I did want to advise the Court that I think we're at an impasse on this issue, and so we will present a motion on this. The last communication that we received from Plaintiffs on this is basically saying they didn't think any IMEs are appropriate

except for a limited IME with respect to Mr. Ludzik who is the one of the seven named Plaintiffs in the Complaint who alleges a longterm neurological disorder.

And basically, Plaintiffs' position -- and I assume Mr. Cashman will speak to this -- is that we have enough information regarding these Plaintiffs from other sources. I think the bone of contention here is going to be that the whole point of Rule 35 is we don't have to accept other -- their own physicians' examinations. We have the right to do an independent examination.

And I think, Your Honor, it's necessary here because the Complaint with respect to at least some of the others -- and that's who we're focusing on -- do make specific allegations about present injuries and make an allegation in the Complaint that these are consistent with them presently having CTE.

I think if that allegation is in the Complaint, we've got to have the right to take a look at those individuals because I can see down the road this being an argument of, well, medical monitoring is needed here because look at their present conditions. And I think we have the right to take a look at those. What I find ironic about this, Your Honor, is Plaintiffs are basically saying it's too burdensome and intrusive.

And I should make clear, Your Honor, we're not

talking about -- with respect to those other than Mr. Ludzik -- anything of -- spinal fluid examinations or anything like that; all that is off the table. These are basically the exams that they are asking for as medical monitoring relief. And I find it -- I don't know what we're doing here if they're saying, well, these named Plaintiffs shouldn't be subjected to those exams. That's the relief they're asking for. What are we doing here if this is too burdensome or too intrusive such that the named Plaintiffs representing the class don't want to do it?

In any event, we'll debate that later, Your Honor, but that's -- that's the -- that's where we are and we'll be filing our motion in the next few days.

THE COURT: Very good.

Mr. Cashman?

MR. MICHAEL CASHMAN: I think it is correct that we're likely to be at an impasse, so we'll respond to the NHL's motion. But since Mr. Beisner previewed some of his arguments, I have some preview of our responses. He didn't really distinguish between the Class One and Class Two Plaintiffs. We have six Class One representatives, and Mr. Ludzik is a representative for Class Two. And since the six Class One representatives do not have a current medical condition in issue, we don't think that there's a need for IME on those six, and we'll obviously respond to the NHL's

arguments as they're presented.

Some of the arguments that I heard this morning are a little bit different than what I've heard before. So, we'll respond to those when the motion is made. As far as Mr. Ludzik goes, we have agreed to an IME, but we have a disagreement over the scope of the IME. And our position is based on our conversations with Dr. Cantu who has looked at the NHL's proposed protocol for Mr. Ludzik and it's his position that, as we understand it and we'll present his position in response to the NHL's motion if this occurs, but many of these tests just aren't reasonably or medically necessary given the diagnosis and the fact that they've already got access to all the medical records.

But we'll respond to these arguments in writing, and I do think that the motion process will have to occur on this issue.

THE COURT: Thank you.

All right. Let's move beyond the motion to stay and the preemption motion, supplemental filings, just to finish up the agenda and we'll conclude with the motion to stay.

(Coughing.) Excuse me.

My understanding is the NHL intends to bring a motion to dismiss Counts VII and VIII to be heard at the formal conference in March. Am I correct about that, Mr. Connolly?

MR. DANIEL CONNOLLY: Yes, you are, Your Honor. We filed our brief on February 8th consistent with the Court's order. We anticipate the Plaintiffs' response on that would be due on February 23, and our reply would then be due on March 8th, with argument on the 22nd.

THE COURT: Very good.

Any response to that briefing schedule?

MR. BRIAN GUDMUNDSON: No, Your Honor.

THE COURT: Okay.

All right. Anything further on privilege log challenge issues?

MR. CHRISTOPHER RENZ: Your Honor, the -- both sides have continued meeting and conferring primarily through an exchange of correspondence. And I think we're getting pretty close to having some issues for resolution that are kind of related to the clawback claim. I had recent correspondence from Plaintiffs to try and set out what is and is not at issue. I think we're largely in agreement. They also provided some additional information concerning their consultants, which was helpful, and we'll get back to them. And then I anticipate we'll be discussing with Magistrate Judge Mayeron a schedule for resolving anything that's not resolved.

MR. DANIEL CONNOLLY: Right. I think that the plan is that we would meet with Magistrate Judge Mayeron at an

appropriate time and make sure that we are complying with the protocol that you have and figure out a briefing schedule and how you'd like all these issues --

THE COURT: Are you ready to have that meeting with Magistrate Judge Mayeron?

MR. CHRISTOPHER RENZ: I think we're very close.

THE COURT: Okay.

MR. DANIEL CONNOLLY: We're waiting for the call, Your Honor.

THE COURT: Okay. All right.

MR. CHRISTOPHER RENZ: We'll be back to them within the week.

THE COURT: Okay. Very good. You should go ahead and schedule with her then, yes.

MR. CHRISTOPHER RENZ: Yes, Your Honor. Thank you.

THE COURT: All right.

Confidentiality designation challenges.

MR. MICHAEL CASHMAN: Well, this is probably a pretty easy one to address, Your Honor. As the Court knows, Plaintiffs filed an appeal on certain documents, and we've had communication with chambers on that matter. Plaintiffs obviously think it would be helpful if we had the opportunity to present argument at the appropriate time. I think the NHL takes the opposite position, that there's no argument needed.

As far as other challenges, the Plaintiffs have made

other challenges that they presented to the NHL. I just last week received the response on the most recent challenges. And when we get the appeal resolved, it will help us address those additional challenges and will inform us as to whether additional motion practice is necessary in front of Magistrate Mayeron and which to present and how to present those. So, that's the current status. And of course we do have other challenges in the pipeline related to deposition testimony and such, but all of this is a little bit dependent upon the guidance that we get out of the appeal.

THE COURT: Okay. And my -- I hope this message got to you, but if it didn't, my expectation is to study the appeal first and then make a judgment about whether it will be helpful to me to hear oral argument. So -- and I haven't had a chance to do that yet, but I -- it's right at the top of the list. So --

MR. MICHAEL CASHMAN: That is the message that was conveyed, and that is what we understood.

THE COURT: All right. Very good.

MR. DANIEL CONNOLLY: Your Honor, just to clarify what the discussion from our point of view was, was that typically -- or in this District, appeals are not -- there is no oral argument on an appeal, and we didn't want to presume that the Court wanted to hear from us in oral argument on this issue if the Court didn't want to. And so we just wanted to

address with the Deputy the issue about whether it was properly on the agenda.

THE COURT: You're absolutely right. Typically we don't have argument. Occasionally we do if it would be helpful to the Court, so let me take a look at that and I'll get back to you.

MR. DANIEL CONNOLLY: We'll wait to hear from you.

MR. MICHAEL CASHMAN: Thank you, Your Honor.

THE COURT: Very good.

All right. Before we get into the motion to stay, is there anything else that we ought to deal with today?

(None indicated.)

THE COURT: All right.

Mr. Beisner.

MR. JOHN BEISNER: Your Honor, on the motion to stay, I'll be brief because I think our position is laid out in the papers and there's not much to add to those. I think the argument we're making basically boils down to this: That if you look at other cases involving professional sports organizations where there has been this threshold issue of preemption raised, courts have typically taken one of three approaches to this. They've either stayed discovery; that's what Judge Brody did in the *NFL Concussion Litigation*.

THE COURT: But just to be fair there, she stayed discovery because there were settlement discussions. Am I

right?

MR. JOHN BEISNER: Your Honor, if you look at the order, there's no reference to settlement discussions.

THE COURT: No, no reference in the order. I'm just talking about what happened --

MR. JOHN BEISNER: And so if that's the case, I'm not -- I'm not -- I'm not -- I'm not sure of that being the case. There was a motion made by the League, and it was granted. And I think consistent with the other -- other cases I'm mentioning said that discovery should be stayed until there's a ruling on this. I can only go by what the record in the case says.

In other cases' discovery, such as in the *Boogaard* case, has been limited precisely to the -- whatever the issue is with respect to the preemption argument. All other discovery has been stayed, and in other cases such as the *Dent* case, there has not been a stay but there has been a rapid ruling on the pending motion. In that case, it was a matter of several months. And I think what we're arguing here, Your Honor, is that that's -- those precedents, we are urging, should be observed here.

Contrary to what Plaintiffs have been saying, this is not meant to be any sort of criticism of the Court on this issue. Your Honor has been very clear with us that you're looking at these issues and that have found some of them

difficult and need time to work through them. And I think that's perfectly appropriate. What we are concerned about, though, is that the millions of dollars that we're spending on discovery in the meantime when that threshold issue in the case has gone unresolved.

And as we argue in the brief, at some point I think this does become a due process issue because this is a fundamental question of whether the Court ought to be involved in this controversy at all. Meanwhile, without any determination of liability or a determination on this issue, we're being required by the Court to, in essence, give Plaintiffs millions of dollars of free discovery which we will have no opportunity to get paid back for in this. And so it's just the Court, arguably, I think, making a -- taking and providing that to Plaintiffs on a free basis.

Plaintiffs in their briefing have argued, well, this is too late; you should have raised this earlier. I think as we laid out in the brief, though, Your Honor, I think the Court was clear of its intentions early on that it wanted discovery to commence and -- and do that pending what it hoped to be a relatively expedited ruling on the motion, took that at face value, and saw no reason to move the Court for something that it had made clear that it wasn't going to be entertaining.

And you know, there's also a criticism in

Plaintiffs' paper that, well, you asked for discovery in this case and so therefore you've sort of waived the right to ask for a stay. Well, the Court has set a rigorous schedule, and the fact that we have asked for discovery consistent with that schedule to make sure that we're able to prepare our case isn't inconsistent with that. The question might be asked, well, why now? Why are we making the motion now? And I think the game changer here that has -- and Your Honor knows we have raised this -- this issue previously, as both sides have acknowledged in the paper, but I think the reason for the motion now is *Boogaard*.

This isn't just a new precedent that is out there. This is a claim that is in the purported class that Plaintiffs have brought here. And so we have a Federal District Court that has ruled as to a member, a claim that is part of this class action, that claims that -- that have been asserted there, which are like those that have been asserted here, should not be countenance by a Federal Court. That's the major issue.

It's the one Federal Court ruling on a claim in this case that we have. It so happens it's from a different Federal Court. But it seems to me that is a game changer, that we've got to stop at this point and say, if a Federal Court has made that ruling with respect to a member of this class on the claims that are at issue in this case, it's the

only ruling out there. And I think it raises a serious question about whether, if it wasn't there already, it seems to me that there's a serious question now about whether -- whether we should be proceeding with discovery here. There is a suggestion in Plaintiffs' paper that delay on this would be harmful to the class. Again, I go back to the comment I made earlier. With respect to Class One, the relief that's being sought is medical monitoring, yet the named Plaintiffs in this case supposedly representative of the class are saying, oh, we don't need that, you don't need to do that because we already have had examinations that everybody can go look at, and that's the position that they're asserting here.

So, Your Honor, I think that for all of those -- those reasons, we've spent millions of dollars responding to Plaintiffs' request and -- but that doesn't mean we should continue to spend more and we're simply asking that until this issue is resolved by this Court that discovery in the case should be suspended.

THE COURT: Thank you.

MR. JOHN BEISNER: Thank you, Your Honor.

MR. CHARLES ZIMMERMAN: Your Honor, Mr. Grygiel is going to argue the substance of the motion for the Plaintiffs. But I think it -- the record needs to be made clear -- and I was -- am a member of the Plaintiffs Steering Committee in the *National Football League* case. And I have been party to many

informal conferences and discussions regarding the stay that was issued by Judge Brody in the *National Football League* case. I think it's clear on the record and a matter of probably judicial notice that everyone knew that at the time the stay was issued, it was because of and in enforcement of an agenda to resolve the case and to into -- and to continue with mediated settlement discussions. So, to somehow claim that that wasn't part of the record or wasn't known, um, I think we should ignore that and recognize the reality that we all know, that that's why that case was handled the way it was. And I don't think there should be any mistake about that.

THE COURT: Thank you, Mr. Zimmerman.

Mr. Grygiel.

MR. STEPHEN GRYGIEL: Thank you, Your Honor. I knew this was coming. I knew I would hear that *Boogaard* is a showstopper. Your Honor has already received briefing on why *Boogaard* is not only a showstopper, it is readily distinguishable from our case. But before we talk about that and because the stay motion here is directly related to the question of preemption that is now pending before the Court, it seems to me we should talk a little bit about just what the nature of our case is and why this stay, not just as belated as it is, not just after-the-fact as it is, is contrary to the courts coming to a proper ruling on preemption.

And if Your Honor will indulge me for a moment, I think I can show why. And that is because of this: The NHL fundamentally presses the question of duty. They say that the CBA created the duty on which the Plaintiffs bring their claims. And then they say something else, as they're inclined to do. They say the Court has to, quote, interpret, closed quote, particular terms of the Collective Bargaining Agreement in order to understand fully the source and the scope of that duty. So, it's clear the NHL puts duty centrally at issue, and a review of the transcript of the hearing January 8th, 2015, makes that abundantly clear.

Well, Minnesota law is very clear. To take an example, and it is representative of courts all over this country, and that is -- and I'm quoting the *Domagala* case: Foreseeability of injury is a threshold issue related to duty that is ordinarily properly decided by the Court prior to submitting the case to the jury. In close cases, as Your Honor said the preemption call was here, the issue of foreseeability should be submitted to the jury. *Banovetz versus King*, citing numerous cases: While the existence of a legal duty is generally a question of law, where the existence of duty turns on particular disputed facts, they may be submitted to the jury for resolution.

Numerous other cases in Minnesota make the point. I won't belabor it. But the point I'm making here is that

because duty is central and because the facts of the creation and the nature and scope of that duty are central, we should get a record on that. But Your Honor doesn't need me to tell you that because the Eighth Circuit has already told us that. Let's take a look at what the Supreme Court -- the Eighth Circuit Court of Appeals said in *Hanks*. There, the Court said -- and this is at 859 F.2d 70: The factual background of the entire case must be examined against an analysis of the state tort claim and a determination made whether the provisions of the CBA come into play.

Let's look at a subsequent case, ten years later: *Oberkramer versus IBEW*, 151 F.3d 752 at 757. That's the Eighth Circuit in 1998. This, too, shows the preemption requires a factual record. It's an important issue. It should be developed. The Court said there, and I quote: To determine whether such a claim is preempted, the factual background of the entire case must be examined against an analysis of the state tort claim to determine whether the provisions of the CBA come into play, closed quote, obviously following the ruling in *Hanks*.

And that makes perfect sense because the Eighth Circuit has told us in many other cases -- *Bogan*, *Meyer*, *Dunn versus Astaris*, *Graham*, and *Luecke* -- that when factual questions of the conduct and motivation of a party are centrally at issue, when they are what is centrally at issue,

we are not focused on the particular terms of a CBA but on the facts. In this case, we're talking about, did the NHL know that players were at an increased risk, when did they know it, or should they have known it? Those are all questions of fact, and that is why developing a factual record in this case is abundantly sensible.

It was on September the 16th when Mr. Beisner first raised this issue, as I recall it, with the Court in an informal conference and said we may be moving for a stay. And Your Honor said, in what I thought was forecasting what would happen: You're free to move, Mr. Beisner, and the Court may find that preemption is a factual matter. Well, given the nature of the claims that are brought here, which are essentially negligence and misrepresentation claims, and given the factually-intensive nature of those claims and given the *Hanks* doctrine that you must develop a factual record for a full explication before you would rule on those issues, it makes abundant sense for discovery to continue.

Now, the NHL comes in and says, well, Judge, that all may be true, but we've got now this showstopper, this game changer. What we have is *Boogaard*. We've already talked about *Boogaard*, but there are a couple of other points there, Your Honor, that are extremely important, I think, to bear in mind. One of them is this: Judge Feinerman, in *Boogaard*, said -- and the transcript is before the Court -- that the

Plaintiff had not asked for factual discovery on the merits of the preemption issue. Judge Feinerman said, and I quote: It's too late now to be making those arguments when we're more than a year into this exercise, closed quote. Sounds pretty familiar with what's going on here.

But let's talk a little bit more about *Boogaard* in particular and why it's no basis for this Court to issue a stay. In *Boogaard*, which I've now read for the 14th time, the Court said, a reasonably attentive reader can glean the NHL's positions clearly enough. It believes that it has no authority to impose concussion assessment protocols on teams and team doctors, that it cannot prohibit team doctors from administering Toradol, and that it cannot change the rules to further discourage fighting without the NHLPA's consent.

And we're in open court, Your Honor, and I'm going to be respectful of that, but I have a binder of documents that show that every one of those statements, at best, is factually contestable and in the case, for example, as to fighting, simply untrue. Your Honor has seen the documents. I will simply refer to them generically as the Brian Burke letter to Mike Liut, and the Bill Daly statements about the Board of Governors' authority concerning rule making.

The NHL and in *Boogaard* raises the issue of Section 30.3 of the CBA. We have the NHL itself saying that it means something different from what the Court in *Boogaard*

said it meant. That is why continuing discovery, getting a full record is enormously important. Another point about *Boogaard*, Your Honor, that I think is very important. There, the Court said -- and it struck me only on a third or fourth read-through, I wish it had struck me when we were filing our brief -- the Court said there that the NHL need only plausibly assert that the CBA is either a source of duty or requires interpretation in order for the preemption inquiry to begin.

But I stopped and thought about that. That can't be right because what that means is the Plaintiff is no longer the master of the Complaint, which is precisely what the Supreme Court of the United States in the *Caterpillar* case said must still be the case in the preemption context. It violates the rules of *Lingle* and *Livadas* where a Plaintiff, the Court has made very clear, are able, if they so choose, to plead claims that, even if they would give rise to a grievance, are still State Court claims because they don't depend in any substantial way, they don't require in any substantial way, any interpretation of a disputed CBA term.

What you have in *Boogaard* is exactly what the NHL is doing here. They are starting from a flawed departure point, which is that a defense -- we can't do what the Plaintiffs say we should do because the CBA says otherwise -- becomes a basis for preemption. That is not the law. The Eighth Circuit in articulating what has repeatedly called the quote, narrower

approach, closed quote, to preemption has made clear that part of what makes that narrower approach narrower and more faithful to *Caterpillar*, as the Court has said, is that a defense that a Defendant may raise that it is barred from doing something because of an obligation under a CBA is no basis for preemption. That is simply the law, and that is something that *Boogaard* gets entirely wrong.

When the *Boogaard* case comes out and says the NHL would not, makes no sense that it would, have entered a CBA that precludes it from doing certain things, it can't then be held for failing to do those things. The point I'm making here, Your Honor, is that the documents that Judge Feinerman most abundantly clearly did not have in front of him make it very clear that the NHL says something very differently internally: That all of the things the NHL says it can't do, for example, in changing the rules, the NHL can do.

At the very worst, it requires a factual record fully developed, as *Hanks* and the *Oberkramer* case has made clear. So, *Boogaard* is in no way, shape, or form a reason for anything to happen here.

Another point about that. NHL has been, and understandably so, at pains in this court to tell us that *Williams* is controlling in the Eighth Circuit. We've distinguished *Williams* on the briefs. I won't make a *sortie* into that particular set of distinctions. *Boogaard* is out of

the jurisdiction. I do understand it's a class member. But if the NHL were going to move for a stay as the courts say in the patent context, as the courts say in the injunctive relief context, you should do it early. If they were going to move for a stay, they had all the grounds they needed legally and the basis of *Williams* to come to the Court and say, Judge, we've got this *Williams* case in the Eighth Circuit, we think it favors us, we think we ought to have a stay of discovery. But they did no such thing.

Where have they been? Good cause is a heavy burden. As Your Honor knows from the briefing -- no point belaboring it here -- they have to show good cause. I don't have to show anything else. It's their burden to show good cause. *Boogaard* is not good cause. Eighth Circuit preemption rules make it abundantly clear that a factual record here is warranted, particularly in a close case that turns centrally on duty as Your Honor has said.

Next they cite this due process proposition, and I was really happy about that. You can't make a period of time for a ruling into a deprivation of due process without saying that every time there's a lag between summary judgment and a trial date and the parties are preparing frenetically, as I have had occasion to do, that that somehow mounts up into a due process violation. But I was really glad to re-read the NHL's case on -- it was *Fuentes versus Shevin* and they cited

Matthews versus Eldridge.

And what those cases say is something that's familiar to all students of Civil Procedure. *Matthews*, quote: The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it, closed quote. Well, here the serious loss was the risk of litigation expense. They had notice of that. They had notice of that no later than October 2014. They've had notice of it at the 16 formal status conferences and almost the same number of informal status conferences. They've had notice of it all along.

One might ask colloquially: Where have they been? But they've had an opportunity to meet it, and they've never moved. And at this point the NHL says, well, there's no prejudice; Grygiel's clients aren't really terribly interested in the very kind of procedures that we think that medical monitoring is actually designed to do. That's just not right, Your Honor, and I'll tell you why --

COURT REPORTER: Mr. Grygiel, please slow down a little bit.

MR. STEPHEN GRYGIEL: Fair enough. When I try to finish, I go more quickly and that doesn't help anybody. I'm sorry, Heather.

The Plaintiffs need medical monitoring now. Every Plaintiff in Federal Court and a couple of the cases that were

cited to Your Honor say this, say the Plaintiffs are entitled to their day in court and to the just and the speedy and the efficient resolution of the reactions. The earlier Plaintiffs get medical monitoring here. The earlier they know if they have a controllable comorbidity, for example if they're taking a certain medication or if they drank or if they smoke that they should modify that behavior to reduce the concomitant case of that comorbidity, the better.

The prejudice to the Plaintiffs here would be very clear. We have been in front of this Court now for many, many months and many, many hearings. And frankly, for the NHL to come in at this stage of the game with discovery developing at odds to what they have alleged is the basis for preemption strikes me, Your Honor, is what the *Kaavo* case said, K-a-a-v-o, was somewhat smacking of gamesmanship. We understand litigants don't like to spend when they don't have to spend, but the time to make that point was a very long time ago.

The Plaintiffs have similarly invested, the Court has similarly invested an awful lot in this. Now is not the time to stop this train when it's very nearly approaching the station.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Grygiel.

Mr. Beisner, any response? Oh --

MR. DANIEL CONNOLLY: I'm going to yield to Mr. Baumgarten on this if the Court permits.

THE COURT: All right. That's fine.

MR. JOSEPH BAUMGARTEN: Good morning, Your Honor. I'll just try to respond to some of Mr. Grygiel's comments about the *Boogaard* decision and about where we stand with preemption generally.

And I'll dial it back just a bit without doing a reprise of what you've heard previously. There are, as you know, two prongs to the preemption doctrine that require that a claim, whether it's stated in contract or in tort, be deemed preempted by Section 301. And the first prong which is relevant here, which is that preemption applies where a claim arises out of duties or obligations created by the Collective Bargaining Agreement, I do think Mr. Grygiel's first comment that the NHL has taken the position that the Collective Bargaining Agreement created the duty here is not quite right. I don't think the NHL has argued that there was a duty that was created by the Collective Bargaining Agreement.

What we have argued in our papers and what I've pointed out to Your Honor previously when I've been at the podium is actually the first prong of preemption applies here to this Complaint because it is the Plaintiffs who have argued in their Complaint and made allegations of duties that arise by virtue of the playing rules, by virtue of the Concussion

Program, by virtue of the helmet requirement that was instituted in 1979, that it's the Plaintiffs who have argued that that is what constitutes the voluntarily-undertaken duty of care.

And they did so, I think, initially at least without apprehending that each of those was collectively bargained. The Concussion Program was the subject of agreement with the Union. The playing rules are embodied in the Collective Bargaining Agreement which also governs how they are enforced and how they can be changed. And the helmet requirement was also collectively bargained, and we put that before the Court. And I don't think that there's been any dispute about that since then. So, the only thing that's really changed in that regard is that the Plaintiffs have had an opportunity to amend the Complaint in the interim, and they continue to rely on those same allegations to create the voluntarily-undertaken duty of care argument that is really at the heart of what they -- of what they argue.

The issue about the existence or creation of a duty is a -- a question of law. And I think when I was re-reading the transcript of the oral argument of our motion, I think Your Honor challenged Mr. Grygiel on that when we argued the motion, and I think you were very clearly correct on that. That is a question of the duty -- a question of law. We're not here to argue about foreseeability. This is not that kind

of motion. We're not talking about Mrs. Palsgraf here, and we're not talking about conduct and motivation either.

We're talking about a situation in which it's undisputed that the allegation here does not rest on the violation of a duty that is owed to every person in society. There is no allegation that the NHL as such went out and hurt a player. This is not like the *Brown versus NFL* case which involved vicarious liability to the NFL by virtue of the referee who was a League employee who had thrown a penalty flag and that hit a player in the eye, and therefore there was some direct conduct that created the injury.

The issue here is trying to identify the source of the duty in the first instance, and that's about as threshold as you can possibly get. So, it doesn't involve a question of foreseeability. It doesn't involve a question of conduct or motivation. It doesn't involve a question of what did the NHL know and when did they know it or what should they have known. It really involves a question of what's the source of the duty in the first instance, was it voluntarily undertaken.

And if you read Judge Feinerman's decision, Judge Feinerman says you can't really tell the voluntary undertaking theory is a narrow one; and you can't tell without looking at that Collective Bargaining Agreement, which is hundreds of pages long and defines the parties' duties in minute detail, you can't define what duty the NFL might have had without

looking at that. And that makes sense, by the way, because you're talking about a collective bargaining relationship that has been in existence with Collective Bargaining Agreements for decades.

So, to pretend that you can determine, define the obligations of the League without reference to a Collective Bargaining Agreement that expressly addresses the obligations that players themselves have, that their physicians have, that the Clubs have, that addresses medical examinations, challenges to those medical examinations, end-of-season physicals, disclosure of players by Clubs of what their medical conditions might be is really just a fiction.

So, this case could be dismissed based on the first prong alone. I would have guessed that if the Court had dismissed it on that basis at that point, there might have been -- might have been relief to re-plead to see if they could find a duty that was created elsewhere. There was subsequently an application to amend the Complaint, and the new Complaint doesn't address that. It doesn't change anything.

If you look at Paragraph 10, refers to the helmet requirement. Paragraph 12, Paragraph 13, 14, it's expanded in 15 and 16. It continues later on at Paragraph 296 and the paragraphs that follow talking about the rules. It's repeated again at Paragraph 434. It talks about this

voluntarily-undertaken duty of care by virtue, again, of the League's authority with respect to playing rules and the League's entering into the Concussion Program, as well.

I will say --

THE COURT: Can I ask you a question? Let's assume -- and I'm not sure I agree with everything you're saying, but let's assume for a moment that what you're saying is true. Isn't the point of labor law preemption to protect the collective bargaining process? It's to provide players, in this case, with access to arbitration, to a forum in which an arbitrator can evaluate whether there has been some sort of breach of duty under the collective bargaining system. Isn't that right?

I mean, it's not to preclude -- it's not to preclude any forum to a player --

MR. JOSEPH BAUMGARTEN: Not at all, Your Honor. If you go back and read the seminal decisions in this area, in *Lincoln Mills* -- the original Supreme Court decision is the seminal decision -- what the Supreme Court said is that preemption is designed to protect the collective bargaining process, not individuals, and for that matter not employers or unions --

THE COURT: That and -- part of the essence of the collective bargaining process is the opportunity to resolve those disputes in arbitration. Is that not true?

MR. JOSEPH BAUMGARTEN: I -- I will address that, Your Honor, but let me take it from the beginning and move it forward, if I may.

What the Supreme Court said in *Lincoln Mills* is that when Congress passed 301 and gave the Federal Courts jurisdiction to hear contract disputes, which they wouldn't otherwise have under Article III, it was with a mandate to create a body of federal common law. And here's what really the punchline is, is that the idea was that there should be a uniform body of law so that employers and unions will have certainty that the same contract provision will be applied the same way in various states --

THE COURT: We're not talking at cross-purposes. There still has to be a forum to resolve disputes, doesn't there?

MR. JOSEPH BAUMGARTEN: There have been -- there have been cases -- Judge, if you look at *Covenant Coal*, which was a Fourth Circuit decision that I think was cited in our papers, there was no remedy there. So, that isn't -- that isn't -- that isn't always the case, and it's not what 301 -- what 301 preemption was designed to do. You won't -- you won't see that in *Lincoln Mills*.

Now, having said that, there is a corollary to that point which I think Your Honor has picked up on, which is that once we realize that you have to interpret part of the

Collective Bargaining Agreement -- and when I say interpret the Collective Bargaining Agreement, I mean look at the entirety of this agreement and say, well, who does have a duty here? What's the nature of that duty? And what inferences can we draw from the fact that duties are allocated one way and not another way?

And this is what -- this is what the Supreme Court did in the *Rawson* case. *Rawson versus United Mine Workers* [sic] was a case in which the individuals, the -- the -- they sued on behalf of the Plaintiffs, they sued on behalf of the decedents, and the decedents there had died in a mine fire. And there was no right against the employers in that case because if you look at the lower court decision of, I think it was the Supreme Court of Idaho, said there was a workers' comp bar and there was no right or remedy against the employer. And so they sued the Union for failing to -- well, for negligence.

And the Supreme Court held that claim preempted, and there was no right of arbitration. There was no right of arbitration against the Union in that case, and those Plaintiffs were left without a remedy. So, that -- that does sometimes happen. Now, here -- here and in many cases -- there is the potential for a remedy --

THE COURT: And what is that for a retired player? What is the remedy?

MR. JOSEPH BAUMGARTEN: The remedy for a now-retired player is to bring a grievance through their Union. It happens. There is absolutely no bar to it. We discussed this the last time around when we were before Your Honor. There is no reason why a player who was a member of the bargaining unit and had rights that were allegedly violated --

THE COURT: But that assumes that the cause of action arose when they were an active player, and you're arguing to the Union, you should have enforced those rights at that time. What if the cause of action arose when they were a retired player? The Union had no obligation.

MR. JOSEPH BAUMGARTEN: I -- I believe that the claims here all would involve claims that the NHL owed a duty of care to players while they were active players.

THE COURT: No, the question is -- and it's a fact-based question when the cause of action arose. You only can bring an action when you know you have a claim. And if the record plays out in such a way to determine that that cause of action did not arise until they were retired, they have no claim against the Union for failing to bring an action when they were active.

MR. JOSEPH BAUMGARTEN: I -- I -- I don't think that's right, Your Honor, and I --

THE COURT: Why?

MR. JOSEPH BAUMGARTEN: Well, because I think the

claims still involve interpretation or application of the Collective Bargaining Agreement --

THE COURT: But it leaves them without a forum. How can that be the law? That's certainly not what labor law preemption is about.

MR. JOSEPH BAUMGARTEN: I -- as I said, Your Honor, I don't think labor law preemption addresses the issue -- the labor law preemption addresses the issue of the uniformity of federal law that's required. That's -- that's all -- that's all it addresses. And the -- the -- the Plaintiffs in *Rawson* were Plaintiffs who were left without a remedy. The Plaintiffs in the *Covenant Coal* case were Plaintiffs who had sued -- were strangers to the Collective Bargaining Agreement, wanted to sue for intentional interference with that Collective Bargaining Agreement, their claims were preempted, and they were held to have no cause of action under Section 301.

THE COURT: So your position is no -- I just want to know the NHL's position. The NHL takes the position that no retired player whose cause of action arose while they were retired has any recourse against the NHL? Is that what you're saying?

MR. JOSEPH BAUMGARTEN: No, no -- our position is they can bring a grievance against the NHL.

THE COURT: Not if the claim arose after they became

retired --

MR. JOSEPH BAUMGARTEN: I still -- I'm sorry, I didn't mean to cut you off, Your Honor.

THE COURT: I mean, you show me something that would -- that would persuade me that a player could sue, arguing that the Union should have enforced a claim that arose when they were retired?

MR. JOSEPH BAUMGARTEN: In each of these cases, you would have to determine from the Collective Bargaining Agreement whether there was a duty. I think that's the -- I think that's the --

THE COURT: Doesn't that require a record here?

MR. JOSEPH BAUMGARTEN: I -- I don't think it does, Your Honor, because --

THE COURT: I'm going to do that on the face of the pleadings?

MR. JOSEPH BAUMGARTEN: This is -- on the face of this pleading, for absolutely certain on the face of this pleading.

THE COURT: I don't think you've answered my question about retired players. I think what you're saying is that they are out of luck.

MR. JOSEPH BAUMGARTEN: Uh, that was not our position, that was not our position when we argued the motion --

THE COURT: The only position I ever heard from you was that they -- they could file a grievance with the Union that their rights weren't enforced when they were active players.

MR. JOSEPH BAUMGARTEN: I think that's right, Your Honor. And I think that that is part -- at least part or if not the substantial part because this Complaint is rife with allegations about what the NHL, what warnings should have been given, what steps should have been taken to protect the players while they were still active and were not acted upon.

THE COURT: I think that when the cause of -- you might be right, and it might be that the causes of action arose when they were active, but I need a record to know the answer to that.

MR. JOSEPH BAUMGARTEN: I don't think it's so much about when the causes of action arose for statute of limitations purposes --

THE COURT: No, when they could bring a claim. You can't argue that the Union should have enforced a claim they didn't have until they were retired.

MR. JOSEPH BAUMGARTEN: What I'm looking at, Judge, is a Complaint that says the NHL knew or should have known and withheld evidence from players while they were active and did not disclose or protect them. I don't think that that's any different from -- from the run-of-the-mill claim that gets

preempted or that could get arbitrated.

THE COURT: But there's a distinction there. That is what the Complaint argues, but the question is when did the players know they had that claim to bring.

MR. JOSEPH BAUMGARTEN: Well, for statute of limitations purposes, they can bring their claim under the Collective Bargaining Agreement. The Collective Bargaining Agreement has a clause, the timeliness clause, in the grievance and arbitration provision that says they have a time period to bring it from when they knew or reasonably should have known.

THE COURT: If when they're active players, sure.

MR. JOSEPH BAUMGARTEN: Doesn't matter. Doesn't distinguish. If somebody knows after they've been retired that they had a claim or discovers it or knew or should have known at a later point in time, they absolutely can bring a grievance.

THE COURT: All right. Thank you.

MR. JOSEPH BAUMGARTEN: Thank you, Your Honor.

THE COURT: Mr. Grygiel.

MR. STEPHEN GRYGIEL: I'm almost loathe to undertake any further discussion of this. I didn't mean to open such a can of worms. Let me say a couple things, Your Honor.

In a preemption case, just like in every other case, the Plaintiffs' Complaint controls. We don't allege only a

voluntary duty of care; we allege three sources of the duty of care. And one of them, most important for today's purposes, is the standard tort law duty of care that the Court in *Domagala* made abundantly clear. And that is when a person -- I'm quoting it -- acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others. You can find those allegations in the Complaint. They are there.

And what we say is this: The National Hockey League had the power through the Board of Governors, Section 30.3 notwithstanding, to enact playing rules that didn't create the risks that they did, in fact, create. We are saying that the National Hockey League controlled the playing environment. We know, for example, there was no collective bargaining when the NHL unilaterally imposed a requirement that teams move from fan-friendly seamless glass, to the CheckFlex system, to a fully Plexiglass system.

We know that when the NHL decided that it wanted to have Rule 48 in place, Commissioner Bettman -- quite correctly, I might add, as a matter of doing the right thing -- said it happens today -- I'm paraphrasing e-mails -- with or without the PA. We know that Mr. Burke, who was a longtime senior executive of the National Hockey League director of player safety wrote a letter to the NHLPA and

said: We don't even have to consult with you about the concussion protocols; all you bargain -- that's one point. All you bargain for with respect to the playing rules was input.

And he said, unless a change so radically changes the terms and conditions of employment, you, at the PA, have no right over this at all. All this goes to show the NH [sic] has the power to act outside the CBA; and on numerous occasions, that is exactly what they did.

Finally, Your Honor, in terms of your broader point about what the Section 301 preemption is meant to do, you are exactly right. I would invite everyone in this room to go back and read the preamble to Section 301 and read what it says. And then you read the *Steelworkers* trilogy, *Warrior & Gulf* and its two related cases, which says that the grievance process is the beating heart of the collective bargaining process. What we are talking about is congressional intent in preemption and the idea that these retirees' common law claims discovered and brought long after they had retired were somehow within the scope of congressional intent for purposes of preemption strikes me, Your Honor, as a matter of *juris prudence* so far-fetched, I can only explain it by the idea that Defendants want to have dockets cleared and not have to address valid claims on their merits.

Hence -- and I don't like to quote dissents, particularly in closing, when Chief Justice Renquist said in *Golden State Transit*: We keep making these preemption rules that have nothing to do with congressional intent. What we are doing is turning the sensible acorn of Section 301 preemption, which was meant to protect the collective bargaining process so that we had standard interpretation in both state and federal law regimes of disputed terms of Collective Bargaining Agreements to promote labor peace, and therefore to promote the smooth functioning of the economy.

If that is the touchstone of congressional intent, the kind of argument the NHL is making today is not just a bridge too far, it's a continent too far. Factual record will be developed and it will show, peradvent beyond peradventure, these claims are not preempted claims. They're common law claims, particularly the negligence and fraud claims rooted in the common standards of a standard common law tort claim, and they have nothing to do with making sure that Federal and State Courts interpret the same phrase, "You shall provide a doctor," in the same way. That's not where we are.

Thank you, Your Honor.

THE COURT: One more. You'll have the last say, and then we'll be done since we're theoretically not arguing about preemption today (laughter).

MR. JOSEPH BAUMGARTEN: I can come back another time

and pick it up, Judge (laughter).

THE COURT: That's okay. You're up there. Go ahead. You have your piece.

MR. JOSEPH BAUMGARTEN: Okay. I do think that Mr. Grygiel in some ways has -- has reinforced some of the points that I tried to make which is that the gravamen of much of his claim is -- that the NHL should have changed the playing rules, that the NHL has the authority to change the playing rules in ways that would have prevented head hits, that would have changed fighting, that would have made players generally more -- more safe, that they should have changed the glass, they should have changed equipment, they should have operated the game in a different way -- those are all claims that -- those are all allegations that run against the way the League behaved vis-à-vis players while they were active players.

Those -- those claims all involve things about an interpretation or application of the agreement. The idea behind preemption -- and I keep hearing we need to develop a -- a fuller factual record. Well, we don't. Preemption doesn't require that Your Honor resolve the disputes about 30.3 or about Article 23 or about Paragraph 5 of the SPC. Preemption requires that Your Honor not resolve those disputes, preemption requires that Your Honor stay your hand with respect to those disputes.

Now this is where arbitration comes in. It's because the Collective Bargaining Agreement allows the arbitrator to decide questions concerning interpretation or application of the agreement that that goes to the arbitrator, so the question of whether the Collective Bargaining Agreement, writ large, is conclusive of the Concussion Program and so forth, the question about whether the Collective Bargaining Agreement created obligations to those players to change the playing rules so that they were safer while they played, to institute concussion protocols or more robust concussion protocols while they played are all issues for the arbitrator. And the arbitrator can resolve that. This is a -- a very well-thought out Collective Bargaining Agreement that --

THE COURT: But apparently not in this case. These folks are going to be out of luck. They will not have the chance to have an arbitrator resolve those disputes.

MR. JOSEPH BAUMGARTEN: There just is no showing of that, Your Honor. And if you look at Article 17 of the Collective Bargaining Agreement which is in the record, and I think this is, Article 17 has not been changed materially in many years. Article 17 provides that the claims should be brought, I think it's within 60 days of the time that a player knew or should have known. So, it provides for knowledge or constructive knowledge, and we haven't reached that point yet.

I think I made clear when we argued this case on the -- on the original motion that while we are confident that the grievance would be denied, there is no question that somebody could bring a grievance under this Collective Bargaining Agreement. Nobody has ever suggested otherwise.

THE COURT: Okay. Very good.

MR. JOSEPH BAUMGARTEN: Thank you, Your Honor.

THE COURT: The Court will continue to study this matter and take this motion under advisement.

Anything further today?

Yes.

MR. BRIAN GUDMUNDSON: Yes, Your Honors, just a brief housekeeping matter. When Mr. Connolly stood up to recite his understanding of the briefing schedule on the NHL's recent motion to dismiss, I think we've gotten some wires crossed here.

THE COURT: Okay.

MR. BRIAN GUDMUNDSON: Maybe Mr. Connolly and I can visit about that, but I had our opposition due March 9th, per the January 7th order and briefing schedule entered by the Court. And in doing the arithmetic, their reply under that order would be due 15 days after that, which puts it off the hearing date that it was scheduled. So, we may have to visit a little bit to work that out.

THE COURT: Why don't you study it and figure out

what you'd like to do about it.

MR. BRIAN GUDMUNDSON: We will.

MR. DANIEL CONNOLLY: We can work out a date, Your Honor.

THE COURT: Okay. That would be good. All right. Court is adjourned.

(WHEREUPON, the matter was adjourned.)

(Concluded at 11:10 a.m.)

* * * *

CERTIFICATE

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

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