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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
June 4, 2015
1:30 p.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT COURT JUDGE

STATUS CONFERENCE

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

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1 P R O C E E D I N G S

2 I N O P E N C O U R T

3 (Commencing at 1:30 p.m.)

4 THE COURT: We are here this afternoon in the matter
5 of the National Hockey League Players' Concussion Injury
6 Litigation. This is MDL 14-2551. Let's do our appearances,
7 shall we, beginning with the Plaintiff.

8 MR. BRIAN PENNY: Brian Penny from Goldman,
9 Scarlato & Penny on behalf of the Plaintiff.

10 MR. STUART DAVIDSON: Good afternoon, Judge. Stuart
11 Davidson on behalf of the Plaintiff.

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

14 MR. BRIAN GUDMUNDSON: Good afternoon. Brian
15 Gudmundson of Zimmerman Reed on behalf of the Plaintiffs.

16 MR. WILLIAM SINCLAIR: Bill Sinclair, Silverman,
17 Thompson, Slutkin & White, on behalf of the Plaintiffs.

18 MR. SCOTT ANDRESON: Good afternoon, Judge. Scott
19 Andreson, Bassford Remele, on behalf of the Plaintiffs.

20 MR. DAVID LEVINE: Good afternoon. David Levine of
21 The Levine Law Firm.

22 MR. MICHAEL CASHMAN: Good afternoon, Your Honor.
23 Michael Cashman from the Zelle Hoffman firm for Plaintiffs.

24 MR. DAVID GOODWIN: Good afternoon. David Goodwin,
25 Gustafson Gluek, for the Plaintiffs.

1 MR. DAVID CIALKOWSKI: Good afternoon, Your Honor.
2 Dave Cialkowski for the Plaintiffs.

3 MR. HART ROBINOVITCH: Good afternoon, Your Honor.
4 Hart Robinovitch from Zimmerman Reed on behalf of the
5 Plaintiffs.

6 MR. JEFFREY BORES: Good afternoon, Your Honor.
7 Jeffrey Bores from Chestnut Cambronne.

8 MR. MEL OWENS: Good afternoon. Mel Owens, Namanny,
9 Byrne & Owens, for the Plaintiffs.

10 THE COURT: Mr. Klobucar, did you make your --

11 MR. JEFFREY KLOBUCAR: I didn't, Judge. I was going
12 to do that now. Jeff Klobucar, Bassford Remele, on behalf of
13 the Plaintiffs. And appearing with us today telephonically is
14 Tom Byrne from the Namanny, Byrne & Owens firm in California.
15 Thank you, Judge.

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

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

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

22 MR. JOSEPH PRICE: Joe Price, Your Honor. Good
23 afternoon.

24 THE COURT: Good afternoon.

25 MR. CHRISTOPHER SCHMIDT: Good afternoon, Your

1 Honor. Chris Schmidt with Bryan Cave on behalf of the United
2 States Hockey Clubs, all nonparties.

3 THE COURT: Very good.

4 MR. DANIEL CONNOLLY: In addition, Your Honor, on
5 the telephone for the NHL are David Zimmerman and Julie Grand
6 from the NHL; Mr. Shep Goldfein from the Skadden, Arps firm;
7 and Mr. Joe Baumgartner and Adam Lupion from the Proskauer
8 Rose firm.

9 THE COURT: Very good. Thanks.

10 MR. DANIEL CONNOLLY: Thank you, Your Honor.

11 THE COURT: I have a proposal to make, and that is
12 that I am a little limited in time today. I need to be done
13 at 3:30, so I think we ought to jump right into the motions so
14 that we have plenty of time for the motion. Is it possible
15 for us to cover the other issues at our upcoming June 17th
16 informal conference, or is there some objection to doing that?
17 Or are there some isolated issues that we could address
18 quickly that you would prefer to deal with today?

19 **(Discussion off the record between Mr. Zimmerman and**
20 **Mr. Beisner.)**

21 MR. CHARLES ZIMMERMAN: I think most of the issues
22 on the status agenda are really updates, and there's really
23 nothing big that we have to have you to decide. It's mostly
24 information. There's some nits and nats with it, but I don't
25 think it would hurt to push it off --

1 THE COURT: To the June 17th conference?

2 MR. CHARLES ZIMMERMAN: Yes.

3 THE COURT: Okay. Very good.

4 MR. JOHN BEISNER: We're in agreement, Your Honor.

5 I think most of the information we're going to provide was in
6 the agenda to the Court for those items, anyway. So I
7 think --

8 THE COURT: I have it anyway.

9 MR. JOHN BEISNER: -- you're up to date.

10 THE COURT: Okay.

11 MR. JOHN BEISNER: Thank you.

12 THE COURT: Now, I wondered about -- you have on
13 here scheduling of next formal status conference. Does that
14 mean that there's a request that the July 2nd conference be
15 changed?

16 MR. CHARLES ZIMMERMAN: No. I don't believe so. It
17 just was a confirmation, really, to make sure we're all on the
18 same page with that.

19 THE COURT: Okay.

20 MR. JOHN BEISNER: We're fine with that date, Your
21 Honor.

22 THE COURT: So June 17th for the informal
23 conference, July 2nd for the formal conference.

24 MR. STUART DAVIDSON: Good afternoon, Judge. The
25 only thing I want to bring to the Court's attention if we're

1 going to bypass some of the updates to the Court is I thought
2 it was important to let the Court know that, as we did through
3 the agenda, that Mr. Bettman's deposition has been tentatively
4 scheduled for July 31st and appears to be on schedule as the
5 Court had requested.

6 THE COURT: Very good.

7 MR. CHARLES ZIMMERMAN: And we were going to give
8 the Court the calendar of the depositions because I know it's
9 something that you track. But certainly we just did arrive on
10 the Bettman date for July 31st, and we wanted to make sure
11 that everyone was aware of that and potentially we may have
12 some conversations with the Court if --

13 THE COURT: On July 31st?

14 MR. CHARLES ZIMMERMAN: On July 31st.

15 THE COURT: Okay.

16 MR. CHARLES ZIMMERMAN: Keep your line open
17 (laughter).

18 THE COURT: All right. Mr. Beisner, are you in
19 agreement with that? I'm teasing. That's a rhetorical
20 question.

21 MR. JOHN BEISNER: We know your line is always open,
22 Your Honor (laughter).

23 THE COURT: Good response. Yeah.

24 All right. Well, we will certainly walk through
25 carefully the rest of the updates at the June 17th conference.

1 I appreciate your willingness to move ahead to the motion just
2 to give it a --

3 MR. CHARLES ZIMMERMAN: Can I just confirm the times
4 for June 17th and July 2nd so we're all on the same page?

5 THE COURT: Yes. July 2nd is 1:30. I believe
6 June 17th is 1:30. I'm not sure. What do you folks have? I
7 can confirm that by e-mail today.

8 MR. JOHN BEISNER: Yeah, Your Honor, my recollection
9 was and one thing we should clarify, I think we had talked
10 about a morning time for the informal status conference.

11 THE COURT: That's right.

12 MR. JOHN BEISNER: Because it was suggested to you
13 that we had two motions that might need to be heard in the
14 courtroom on the record. My recollection is that both of
15 those, fortunately, have been resolved. So, that won't be
16 necessary. So, whatever start time we had for the in-court
17 discussion, I guess, could be the start time for the
18 conference.

19 THE COURT: Okay.

20 MR. JOHN BEISNER: I think it was 9 a.m. is what
21 we --

22 THE COURT: Yeah, I just got a note from my --

23 MR. JOHN BEISNER: Well, for the formal it was 9
24 a.m. and --

25 THE COURT: Okay.

1 MR. JOHN BEISNER: Correct me if I'm wrong.

2 THE COURT: Let's stop. The June 17th was going to
3 be informal with the possibility of two motions.

4 MR. JOHN BEISNER: Correct.

5 THE COURT: So now I think it will be our informal
6 conference.

7 MR. JOHN BEISNER: Right.

8 THE COURT: I think you're right, it starts at
9 9 a.m. The next formal conference will be July 2nd at 1:30.

10 MR. JOHN BEISNER: Thank you.

11 MR. CHARLES ZIMMERMAN: Thank you.

12 THE COURT: All right.

13 With that, let's turn our attention, then, to the
14 pending motions and who wishes to be heard.

15 MR. BRIAN PENNY: Good afternoon, Your Honor. Brian
16 Penny on behalf of the Plaintiffs.

17 Let me just see if I can call up my -- I'm planning
18 to use a few PowerPoint slides and I, before the hearing, left
19 a few on your bar there. Most I'm planning to discuss, really
20 just quote from one case that was not cited in our briefs, and
21 so that is the very thick case that you have on your desk, as
22 well.

23 THE COURT: Very good.

24 MR. BRIAN PENNY: I wanted to cover three things in
25 this argument. First, I wanted to address the scope of

1 Plaintiffs' motion to compel, as I proposed, surreplies that
2 were filed Tuesday evening. And I want to see if I can kind
3 of bring a little bit of clarity back to the scope of our
4 motion. Second, after that I want to explain why the
5 information we seek on concussions is not actually protected
6 by any privilege, statutory or at common law, even that
7 information that might be lifted from a medical record because
8 the information really isn't all that private to begin with
9 and the players don't really expect that it will remain
10 private.

11 THE COURT: Can I interrupt you right there? I'm
12 sorry to do that.

13 MR. BRIAN PENNY: Sure.

14 THE COURT: When you folks met and talked about
15 search terms, you must have had a discussion about these
16 compilations or studies. Am I right about that?

17 MR. BRIAN PENNY: Well, not necessarily, Your Honor.
18 No.

19 THE COURT: Okay.

20 MR. BRIAN PENNY: In fact, because the search terms
21 are only going to be applied to the e-mail databases and my
22 understanding -- and Club counsel can correct me if I'm
23 wrong -- the rest of the electronic information that they
24 had -- and we weren't talking about these databases -- were
25 just going to be searched sort of as if you were searching a

1 manual file for responsiveness to our requests.

2 THE COURT: So, the search term might have included
3 the word "concussion" but not the word "medical" or was not
4 designed to get at e-mails or correspondence which you refer
5 to in your motion about these studies?

6 MR. BRIAN PENNY: Well, and that is where I think
7 where this motion to compel intersects with some of the other
8 files that would more traditionally be called medical files or
9 medical records. And I was going to get into that as part of
10 the scope discussion --

11 THE COURT: Okay.

12 MR. BRIAN PENNY: -- because I think that might be
13 where, if there's a miscommunication, it might be on what
14 we're all calling a medical record in the first instance.

15 THE COURT: All right.

16 MR. BRIAN PENNY: So -- and then the third thing I
17 was going to do, Your Honor, this afternoon was try to explain
18 to you why this information is not just relevant to our case
19 but that it's also important. So, let's begin with scope.

20 The first slide that I have for you deals with the
21 scope of Plaintiffs' motion, and these are the eight document
22 requests to which the Clubs have lobbed the private medical
23 objections. And this slide is lifted straight from our
24 opening brief. And as you can see, the first three responses
25 ask for communications such as e-mails between, in the first

1 instance the Clubs and authors or researchers involved in the
2 concussion study; in the second instance, communications with
3 members of the Concussion Program Committee; and in the third
4 instance, with members of the Concussion Working Group.

5 THE COURT: And maybe that answers my question, that
6 these were objected to and so the e-mail search terms now
7 don't include anything about this, even if those search terms
8 would lead to non-privileged material.

9 MR. BRIAN PENNY: Well --

10 MR. CHRISTOPHER SCHMIDT: Your Honor, if I just may.
11 I don't -- I think on these issues, it's more of a narrow
12 issue were respect to our objection. We will be searching for
13 documents responsive to these requests, to the extent they're
14 e-mails or other communications. However, if there's private
15 medical information regarding a specific player that happens
16 to be a part of that communication, in that limited instance,
17 then, there would be a patient/physician privilege. If we
18 have an authorization, we turn it over. If not, then on that
19 limited aspect of responsive information, we would not.

20 MR. BRIAN PENNY: And to -- well, and to that, to
21 jump a little bit ahead in my script, so to speak, that brings
22 us right to one of the examples that I put in our reply brief
23 and it was an example that came out of the meet and confer
24 that we conducted right after the Clubs and the NHL filed
25 their response brief. And the example that I think basically

1 Mr. Schmidt was referring to was a hypothetical e-mail -- and
2 this is the one we talked about in the meet and confer --
3 between a Club owner and the Commissioner in which the Club
4 owner tells the Commissioner, my star player just got another
5 concussion in last night's game. The response from the Clubs
6 and the NHL was, we would withhold -- or they would withhold
7 that document because it established -- or it reflects a
8 medical diagnosis of a concussion for a specific player.

9 That is the type of e-mail that would be responsive
10 to 10, 11, or 12 -- well, not necessarily 10, 11 or 12 but the
11 type of e-mail that we're afraid is being withheld based on
12 medical privileges. It explains exactly why our motion is not
13 focused primarily or even solely on private medical records
14 themselves but all these other communications and databases
15 and data that's been collected by the League and studied for
16 concussion purposes that I would not call a private medical
17 record. I don't know if you wanted to address that or --

18 MR. CHRISTOPHER SCHMIDT: I'll address comments
19 after you're done. I will address that issue.

20 MR. BRIAN PENNY: Fair enough.

21 THE COURT: I think what's important is to draw
22 these lines more carefully. I think -- but -- I'll get to
23 that in a minute. Go ahead.

24 MR. BRIAN PENNY: And just while we're on this
25 topic, one of our greatest concerns that came up in the

1 meet-and-confer process was also -- was not that just Club's
2 counsel and NHL's counsel said they would withhold that type
3 of an e-mail or communication but that it would not even be
4 logged on a privilege log. So we wouldn't even know if a
5 document like that existed and, if it did, if it was being
6 withheld; and if it was being withheld, whether the
7 withholding had any merit to it. And so that was one of the
8 concerns that none of this was actually even being logged even
9 though it was going to be withheld based on privilege.

10 THE COURT: What if -- and did you have these
11 communications with the Clubs, what if the communications had
12 to do with the result of a concussion study that was based on
13 the medical information from the players but didn't personally
14 identify them?

15 MR. BRIAN PENNY: Well, that's actually what I was
16 going to address next.

17 THE COURT: But what was the answer? You didn't
18 really have that discussion. Maybe that was the problem.

19 MR. BRIAN PENNY: We did -- well, go ahead.

20 MR. CHRISTOPHER SCHMIDT: No, go ahead.

21 MR. BRIAN PENNY: We didn't, in part, at least
22 because my understanding of the way the Clubs had maintained
23 their medical records at the time was that the medical records
24 themselves were more in a physical format, and they weren't
25 really -- couldn't really run reports on them without having

1 somebody manually go through all the files and perhaps
2 cult- -- which is still something I think we could do and
3 should do because there's responsive information in even the
4 medical files that deal just with concussions and can be
5 produced and redacted format without any privacy concerns.
6 But what I've only recently come to understand is that my
7 understanding of this Athlete Health Management System, this
8 database that the Clubs have been using to log all their
9 medical information since 2006, is actually a rather powerful
10 database and reports of the nature that you suggested could be
11 run on those and could be run in the identified format. And I
12 actually have a slide on that.

13 This is a slide taken from the web page of the
14 company that hosts the Athlete Health Management System, and
15 this company actually hosts this medical information online
16 for a number of professional sports leagues, including the
17 NHL. And they describe on this website the -- some of the
18 functionality and capability of the Athlete Health Management
19 System. And one of the things they tout that it can do is it
20 does injury trend analysis and research. To me, that means
21 you can run reports on various injuries and use it as a
22 research tool. They also note that a key component of the
23 system is the Injury Surveillance and Analysis System. This
24 system seems to be doing exactly what we want it to do. It
25 first -- it can track deidentified data from injury reports.

1 So, if it wasn't deidentified already, apparently this system
2 can deidentify those injury reports for us. It also uses
3 consistent coding for injuries, which again to me means you
4 can take an injury like a concussion that is apparently
5 consistently coded across the entire database, and run a
6 report that will cull out the records just on concussions, and
7 again can do it in deidentified format.

8 THE COURT: Now, this system is in the possession of
9 whom?

10 MR. BRIAN PENNY: Good question. I would say the
11 Clubs, the NHL has, I think NHL has told us they don't control
12 it. The Clubs -- this is the Club's information -- or excuse
13 me, this is the Club's injury information on their athletes.
14 And Mr. Schmidt, if you'll remember, addressed it in some
15 detail in his report as the resource that has the
16 quote-unquote medical records since 2006.

17 THE COURT: Right, what I wasn't sure of is whether
18 this is kept with the NHL or not.

19 MR. BRIAN PENNY: I will let NHL counsel discuss
20 that, but we've asked that question. I think the answer we've
21 gotten is that they are disclaiming any control over it.

22 THE COURT: That they have no access to it. Okay.

23 MR. BRIAN PENNY: Now -- well, I'll let them address
24 that.

25 THE COURT: Okay.

1 MR. BRIAN PENNY: So, while the Clubs are calling
2 information like this Athlete Health Management Database and
3 all the information within it as protected medical records,
4 Plaintiffs would say, no, you can run reports or extract data
5 or information on concussions from this source and it's no
6 longer a protected medical record worthy of protection. And
7 that's a point we made in our reply brief when we quoted the
8 *Patel* case. This is a distinction -- excuse me -- recall that
9 the Clubs argued that certain states, like Michigan, their
10 physician-patient privilege was absolute and even protected
11 communications that were redacted. And they cited a Michigan
12 appellate court decision, *Meier v. Awaad*. But as previously
13 explained by the same court in *Patel v. Wayandotte*, the case
14 on the screen here, a report that included information derived
15 from, quote, several hundred patient medical records, unquote,
16 was not a communication or medical record in its own right
17 that would be privileged. The report in *Patel* compared
18 information on the complaints presented to doctors with the
19 ultimate diagnosis and treatment that was rendered, but it
20 didn't include any of the patient's personal identifiers.
21 Distinguishing this evidence from that sought in the line of
22 privacy cases relied on in *Meier*, the case cited by the
23 Clubs -- the *Patel* court reiterated that a report created from
24 a review of medical records was different from the medical
25 records themselves and further explained that none of the

1 prior cases, quote, considered the admissibility of evidence
2 that did not reveal the patient's identity or any information
3 from which that identity could be discovered, end quote.

4 The report in *Patel* is very much like the report I
5 think we just discussed about running on the Athlete Health
6 Management Database. And even if the -- and this is something
7 I just harkened to before. Even if the records weren't housed
8 in such a powerful online database, a report could still be
9 created manually by looking through all of the medical
10 records, just as was done in *Patel*, and such a report wouldn't
11 carry with it the same privacy concerns because the
12 information is deidentified and is no longer personal or
13 private. We believe there are other databases like this that
14 would be available to Plaintiffs and that the NHL has used to
15 study, specifically to study concussions, such as the Impact
16 Database and the Sports Injury Monitoring System.

17 So, we think that similar responsive information
18 could be obtained from these databases. So, again, when we're
19 talking about what is or what is not a medical record, perhaps
20 some of the confusion is that Plaintiffs are saying we're not
21 seeking the medical records themselves, we've never asked for
22 wholesale disclosure of the Athlete Health Management System,
23 for example, but we understand that that system houses
24 relevant information, information about concussions and the
25 treatment for concussions that are responsive to our request

1 and we think that the information can be produced without any
2 of the privacy concerns.

3 Before I move on to the next part, which was going
4 to be to discuss why this information really isn't all that
5 private in the first instance -- before I leave this, did you
6 have any questions?

7 THE COURT: No.

8 MR. BRIAN PENNY: Okay. Part of the reason we think
9 that this information isn't really all that private to begin
10 with is because the players are accustomed to this sort of
11 information being in the public realm to begin with. Here,
12 the concussion injuries themselves happen in very public
13 spectacles. They occur in hockey games watched by thousands
14 of spectators in the arena and thousands more at home on T.V.,
15 thus the incidence of the injury of a concussion is not
16 private. Now, following the injury, if the player is going to
17 miss game time as a result, the Club will issue an injury
18 report.

19 And that report can include information on the
20 player's diagnosis and treatment for the injury and how much
21 game time he is expected to miss as a result. And after the
22 reports are issued, the press and the media then mine these
23 reports and other sources for as much information as they can
24 report on the players' injuries and their current status. And
25 I have some examples of just a collection or a compilation of

1 these injury reports.

2 This is a compilation put together by CBS sports.
3 They organize it by team. They have a last update of the
4 injury, the player's name that was injured, and the type of
5 injury. And as you can see, "concussion" is listed several
6 times. Again, the fact that a player sustained a concussion
7 is simply not private information. But there's more
8 information available here on player injuries, too. If you
9 click on one, like Jesse Winchester here, for instance, you'll
10 get a series of updates.

11 Starting in October 2nd, 2014, it was reported that
12 Mr. Winchester sustained a concussion and on that day, his
13 coach, Patrick Roy, noted that he could be out for a while and
14 he'll be subjected to the League's concussion protocols. A
15 week later, the update is he still has a concussion, he has
16 yet to resume skating, if he fails to make any more progress,
17 he'll probably be on the injured reserve list. The following
18 week there's additional information, he has yet to receive
19 clearance for practice and he continues to experience
20 concussion-like symptoms.

21 A week later, there's another update. He's resumed
22 taking part in noncontact drills but he hasn't been cleared
23 for full contact yet. The next update doesn't come until the
24 middle of December, the concussion symptoms here have been
25 bothering him still and he continues to experience vision

1 problems now. Now the end of January, his coach, Patrick Roy,
2 says again he's not doing very well. It turns out at the end
3 of March, he was cleared to travel with the team but then on
4 April 7th, they declared he would be out for the season.

5 So, information like this about a player's injury,
6 the fact that Mr. Winchester suffered a concussion, how he was
7 handling the concussion, how he was recuperating from it, what
8 his return to play guidelines looked like, what his symptoms
9 continue to be are all in the public domain. None of that
10 information is expected by Mr. Winchester or anyone else to
11 remain private. The point of all this information being
12 public is that playing professional hockey is a different type
13 of a profession, one that brings with it a decreased
14 expectation of privacy when it comes to information about
15 one's sports injuries.

16 Now, note I didn't say it brings with it a decreased
17 expectation of privacy to all things medical related. But
18 when it comes to a hockey player's injuries, that information
19 is generally in the public domain. As the California Supreme
20 Court recognized in a case *Hill v. NCAA*, a case that was not
21 cited in our briefs but which held drug testing was not an
22 unconstitutional invasion of privacy, the Court made the
23 following observations of college athletes and their
24 reasonable expectations of privacy that I think applies
25 equally, if not in a stronger sense, to professional hockey

1 players.

2 The Court recognized, by its nature, participation
3 in intercollegiate athletics, particularly in
4 highly-competitive post-season championship events, involves
5 close regulation and scrutiny of the physical fitness and
6 bodily condition of student athletes. Required physical
7 examinations, including urine analysis and special regulation
8 of sleep habits, diet, fitness, and other activities that
9 intrude significantly on privacy interests are routine aspects
10 of a college athlete's life not shared by other students or
11 the population at large.

12 As a result of its unique set of demands, athletic
13 participation carries with it social norms that effectively
14 diminish the athlete's reasonable expectation of personal
15 privacy in his or her bodily condition, both internal and
16 external. You simply can't compare information about a
17 professional hockey player's on-ice injuries to the
18 sensitivity or privacy of medical records of a nonathlete.

19 There isn't the same level of privacy in these
20 records as there are in medical records of women seeking
21 abortions, which was a case that was cited by the Clubs; or
22 someone being treated for substance abuse, or even somebody
23 being treated for high blood pressure who is not a
24 professional athlete. It's important to keep in mind that in
25 the context of these statutory privileges that the Clubs

1 invoke, they are not common law privileges, thus they are to
2 be construed narrowly and in accordance with the justification
3 or basis for those statutory privileges.

4 As the Club stated in their opposition, there are
5 two justifications for these statutes. The first, the
6 individual's right to, quote, conduct their lives free of
7 unwarranted intrusions by strangers into the intimate details
8 of their medical histories, end quote. That is simply not the
9 case here, where the intrusion isn't unwarranted, and it's not
10 intimate details but the information we're seeking is
11 essentially public information about injuries or concussions,
12 the treatment for those concussions, and the return to play
13 guidelines.

14 THE COURT: Let me ask you this. Did this issue
15 come up in the NFL concussion cases or in the NCAA concussion
16 cases?

17 MR. BRIAN PENNY: There are others here who know
18 more about these cases than I do, but I don't think that any
19 of those cases actually reached discovery, so I don't think
20 these issues were addressed.

21 MR. CHARLES ZIMMERMAN: I was involved -- am
22 involved in -- I'm involved in both the NCAA and in the NFL,
23 and they did not come up. In football, we did not reach the
24 discovery stages. In NCAA, we also did not reach it to this
25 level. We reached some statistical understandings, but most

1 of it was done in the context of mediation.

2 THE COURT: Okay. Thank you.

3 MR. BRIAN PENNY: And then that brings me to the
4 second justification offered by the Clubs for these statutes,
5 and that is to ensure open and honest communications between
6 patients and their medical providers. Those concerns are not
7 implicated by the information sought here. Information that
8 does not directly disclose communication from a player to his
9 doctor, nor would its disclosure have a chilling effect on
10 communications between the player and his doctor, or the
11 patient and his doctor. The players themselves expect this
12 information to be disclosed in public injury reports and
13 discussed by the media.

14 And since roughly 1997, they also expect this
15 information to be studied by the NHL and reported on to
16 purportedly better protect them. That is precisely what we're
17 aiming to do here, which is to better protect the players.
18 And information about the incidence of a concussion, the
19 course of treatment given, the amount of game time missed as a
20 result is simply not private, nor is there any privacy
21 interest to be promoted by protecting that information.

22 I want to talk just a moment also about why this
23 information is relevant and important to our case. First, the
24 NHL is relying on collection -- its collection of data and its
25 study of concussions as one of the cornerstones of its

1 defense, its defense in the public media and its defense in
2 this litigation. The NHL has claimed repeatedly that they're
3 the most proactive sports league on concussions, citing
4 heavily this ongoing collection and study. In fact, just a
5 few nights ago, Commissioner Bettman appeared on Fox Business.
6 And contrasting the work that his League has done compared to
7 the NHL, he stated: We were the first sports league to have
8 baseline testing, protocols for diagnosis and return-to-play
9 decisions, a whole host of things that we've done to try to
10 look at the entire issue.

11 The data they've collected on concussions is one of
12 the shields they've deployed in this litigation and now they
13 and the Clubs want to block this information from discovery.
14 It will certainly be difficult for Plaintiffs to challenge the
15 NHL's findings regarding concussions if we're not permitted to
16 examine and analyze the very same data and information on
17 concussions that the NHL studied. It would also be unfair and
18 perhaps prejudicial to allow the NHL to utilize such data and
19 information in its defense without making it equally available
20 to Plaintiffs.

21 Second, Plaintiffs don't just want to know what the
22 NHL studied, but we also want to know what it didn't study,
23 such as perhaps information on concussions that were available
24 to it from the medical records that predate 1997. Again, the
25 Clubs, as I understand it, are shielding this information

1 behind medical privileges. And third, the same data on
2 concussions studied by the NHL and perhaps some additional
3 data that it didn't study can be used by Plaintiffs' experts
4 to model damages. The information and data on concussions is
5 important to Plaintiffs' case. Moreover, as you can see,
6 Plaintiffs are not interested in receiving entire medical
7 files or even un-redacted medical files.

8 We have no interest in matching specific players to
9 specific injuries. Thus, we're perfectly willing to receive
10 information or data on concussions in deidentified or
11 anonymized formats. As we mentioned in our papers, most
12 courts recognize that since such redaction of personal
13 identifiers renders the information no longer private or
14 protected since there is no longer anything personal or
15 private about that information. And it bears emphasizing --
16 and this is where I'm going to end -- that all this
17 information will be received subject to a protective order
18 that's already in place. The protective order is HIPPA
19 compliant and I don't think at this point any of the parties
20 are all that concerned about a HIPPA violation.

21 The protective order will further shield this
22 information from public view. And it's hard to imagine how
23 disclosure of reports, information, or data on concussions in
24 deidentified format pursuant to a staunch protective order
25 will in any way offend the physician-patient privilege or such

1 disclosures will have no chilling effect on future
2 communications between players and doctors and when there is
3 no opportunity for embarrassment or unexpected intrusion into
4 the players' personal lives.

5 Thank you, Your Honor.

6 THE COURT: Thank you.

7 Mr. Schmidt.

8 MR. CHRISTOPHER SCHMIDT: Thank you, Your Honor.

9 Your Honor, on behalf of the U.S. Clubs, what we've
10 heard today and what we heard in the reply brief from
11 Plaintiffs is a remarkable pivot from where we started. When
12 we started down this road, Plaintiffs were asking for the
13 medical files of the non-players and we even -- we had
14 multiple meet-and-confers, we offered to turn over to
15 Plaintiffs any medical file in its entirety if we received a
16 signed medical authorization. We even appeared before this
17 Court on April 7th and at that hearing you asked Plaintiffs to
18 provide us authorizations for the six named Plaintiffs at
19 least, and we immediately, within 10 days, turned over those
20 medical files.

21 A week after receiving those medical files,
22 Plaintiffs proceeded with filing their motion to compel. And
23 in their motion to compel, they repeatedly asked for the
24 medical records and information of non-players. It was the
25 core of their motion. It was what we talked about on multiple

1 meet-and-confers, what we talked about in informals even
2 before this Court. The -- they requested the medical and
3 health records of the Club players from the period of
4 January 1st, 1967, through the present. Your Honor, in
5 response to that, we filed our opposition brief.

6 And we made clear to the Court several overarching
7 arguments that prohibited the Clubs from disclosing private
8 medical information of nonparties to this litigation without
9 their consent. First, the ADA prohibits it. There's EEOC
10 guidance right on point that makes it very clear that an
11 employer cannot release a nonparty's medical information
12 without that party's consent.

13 THE COURT: But this is all moot now. They're not
14 seeking personal identifiers.

15 MR. CHRISTOPHER SCHMIDT: I agree. I agree. And so
16 what we're dealing with, then, is in response to our
17 opposition, Plaintiffs do a remarkable pivot in the reply
18 brief. And for the first time, we began to discuss just some
19 of the issues that Mr. Penny raised on May 22nd, the Friday
20 before Memorial Day weekend, and right after Memorial Day
21 weekend, Plaintiffs filed their reply brief on these issues.
22 I would submit to the Court that on all of these new issues
23 that are being raised, Plaintiffs don't want medical records,
24 they don't want the private medical information of nonparties.
25 We respect that change, we think it's the proper way to

1 proceed. On all these other issues, we need to talk about it.

2 We've had one conversation shortly before they filed
3 their reply brief, Your Honor, and it -- as a result, to many
4 of the questions that they're posing here, we need to sit down
5 and look at these together with Plaintiffs and see if there's
6 an appropriate resolution on these issues. I would propose
7 that we could come back at the next informal and report on our
8 meet and confer progress on these issues themselves.

9 At the same time, we've been working really hard,
10 Your Honor, to deal with all the other subpoena requests. And
11 I stood up briefly during Mr. Penny's argument to make just a
12 point that on all these other requests, we -- the Clubs
13 actually went to Plaintiffs and said, why don't we do e-mail
14 searches and come up with search terms. And we've worked on
15 that over the last two months and have come up with a whole
16 list of search terms for head trainers, GMs for the Clubs, and
17 the League has worked on Governors. We're dealing with, just
18 on the U.S. side, 23 separate Clubs and at least 46
19 custodians, stretching all different e-mail systems. And
20 we're going to go through and search for all sorts of issues
21 that Plaintiffs wanted us to search for: Concussions, head
22 injuries, fighting, and other terms.

23 And in response to that, we will turn over documents
24 that are responsive. And this whole issue of what the Clubs
25 may or may not be able to claim a valid privilege on, that's a

1 question for another day. There's not a single document right
2 now, as we're standing here before this Court, that we are
3 withholding on the grounds of privilege. We're just beginning
4 the collection of e-mails, and it's going to take some time to
5 do that. And as we go forward, we will look at those e-mails.
6 And if we hold back documents, we agreed when we talked about
7 this, we would continue to talk about the appropriate way,
8 whether we need to put those on a privilege log or whether we
9 could talk about those by categories, but that we would
10 continue to meet and confer even on that issue.

11 And my whole point on this is at some point, to
12 shift this entire issue on a reply brief based on one
13 conversation the Friday before Memorial Day is inappropriate.
14 And I'm not even sure if we have a dispute on any of these
15 issues at this point. I don't know. We need to go through a
16 normal meet-and-confer process. I'm trying to represent 23
17 Clubs and do this in good faith before this Court and meet our
18 obligations. I should be given the opportunity to do that in
19 an orderly way and to be surprised at a reply brief or to
20 receive a new PowerPoint presentation with new cases that have
21 not been provided to me at this hearing is not a way to
22 proceed in an orderly way.

23 And, Your Honor, that's all I would ask, is as we
24 move forward, I would ask that we proceed in a way that gives
25 the parties an opportunity to work in good faith. I can

1 assure this Court, I assured you the last time I was up here,
2 we would work through these issues. And our intention is I
3 don't want to have to come before this Court on any issues.
4 And my goal is to resolve these with Plaintiffs in a good
5 faith way. And I would ask that the Court give the parties
6 the opportunity to do that.

7 THE COURT: Thank you.

8 MR. CHRISTOPHER SCHMIDT: Thank you.

9 THE COURT: Does the NHL wish to be heard?

10 Mr. Beisner.

11 MR. JOHN BEISNER: Your Honor, just briefly on these
12 issues. And I would primarily echo what Mr. Schmidt said. I
13 think we've just gotten a little off track on the motion, and
14 there probably is a need for further meet and confer here.
15 You know, I think the initial motion, at least we interpreted
16 as being primarily focused on a request for medical records.
17 Much of that meet and confer was conducted with the Clubs, but
18 that was certainly our sense of the motion and everything that
19 led up to it and the informal discovery conference. Chris
20 mentioned the request to get the medical records that the Club
21 had so they could evaluate those as a basis for the motion and
22 so on, so I think that's what we thought we were talking
23 about.

24 And for whatever reason, the Plaintiffs have decided
25 to step back from that position and look at other documents,

1 which is fine, and frankly I think that's a more productive
2 area to explore. But the problem is we haven't had really an
3 opportunity to meet and confer on those issues. Keep in mind
4 we had a motion and I think it's hard to say -- and I don't
5 mean to be repeating this, Your Honor -- but hard to say it
6 wasn't focused on medical records. The Clubs opposed. We
7 filed a brief on that. And then after all that briefing, we
8 had the first time where we were heard but were not really
9 focused on medical records.

10 But let me note, for example, the AHMS system
11 which --

12 THE COURT: Yes.

13 MR. JOHN BEISNER: -- is worth exploring. That was
14 not mentioned in the opening brief. We, from the NHL's
15 perspective -- and I think Chris was indicating on behalf of
16 the Clubs, they're happy to talk about that. I don't know,
17 Your Honor, because this was really the first time there's
18 been a focus on the AHMS --

19 THE COURT: You don't know whether the NHL has
20 access or control --

21 MR. JOHN BEISNER: We do have access to it, and it's
22 done collaboratively I believe with the Clubs. I mean, I
23 think you have, Your Honor, before you a Declaration that I
24 think the Clubs submitted from Dr. Meeuwisse indicating what's
25 on that system. It's largely medical records, but I think the

1 question that Mr. Penny has raised, you know, can it be
2 queried to extract deidentified information? Let's talk about
3 it.

4 THE COURT: And coded. It appears to say it can.

5 MR. JOHN BEISNER: Yeah, but we have not had a
6 conversation. We haven't --

7 THE COURT: Okay, Mr. Beisner, up here.

8 MR. JOHN BEISNER: Okay. I'm sorry, Your Honor
9 (laughter). This is the frustration that we're having on this
10 is we're sort of having a meet and confer before the Court.
11 And, Your Honor, you know, I think there's been a fair amount
12 of information that has been produced already and will
13 continue to be produced that are the analyzes that the NHL has
14 done and so on. And so I don't think there is this bright
15 line that's there that's being suggested.

16 There's lots of deidentified data, analysis, and so
17 on that is being produced. And if there are specific areas
18 Plaintiffs want to talk about, we're happy to do that and see
19 what can be worked out in that regard. We're going to have to
20 talk to some of our famous IT folks to figure out whether
21 information can be extracted from -- or whether there is
22 information there that is deidentified that can be produced or
23 through some other way we can work through that. But I think
24 we're more than -- more than happy to do that, but we just
25 haven't had that opportunity to do that because of the way

1 this has played out. So, I would suggest, Your Honor, that we
2 have these discussions and if what we can't resolve, we come
3 back to you on the 17th and present.

4 There's one thing, though, that I did want to ask,
5 and Your Honor mentioned something about bright lines earlier,
6 and I think that's it. There was a statement made earlier
7 about, we're not asking for medical records, but then there's
8 still an argument being made that somehow these privacy rights
9 shouldn't be respected. And I think it would be helpful for
10 Plaintiffs to clarify what do they want at the moment? Again,
11 they may ask for something different later. If what they're
12 saying is we want to proceed in discussions here without
13 invading medical records that are entitled to, under the
14 arguments that the Clubs have made, to privacy rights, then we
15 can proceed on that basis.

16 It doesn't mean that, as we go through these
17 discussions, you don't run into some categories of materials
18 where there will be some further discussion on that. But I
19 think that clarification would be important so we know the
20 ground rule that we're dealing with going into those
21 conversations. And I'm not asking Your Honor to rule. I'm
22 just saying --

23 THE COURT: No, I hear you.

24 MR. JOHN BEISNER: -- making the position of
25 Plaintiffs clear because if this continues to be, well, we may

1 want medical records and we may not, then I think these
2 discussions are going to be difficult. So, I think in terms
3 of articulating that bright line without prejudice to going
4 after certain other materials later, it would be helpful to
5 know whether, for purposes of this discussion, if that's the
6 line we're talking about.

7 THE COURT: Okay.

8 MR. JOHN BEISNER: And with that, Your Honor, that's
9 all I have.

10 THE COURT: Okay.

11 Mr. Penny.

12 MR. BRIAN PENNY: So, this is not a great pivot from
13 where we started. And again, as to what Mr. Beisner said at
14 the end, it's not been this moving target that we've
15 presented. We've said all along, we want information on the
16 concussion injuries and the treatment for those injuries and
17 return to play. We have never asked specifically for medical
18 records. We looked at the eight document requests that the
19 objections were lodged against. None of them specifically say
20 "medical records." Sixteen and 17 ask for all information on
21 head trauma, concussion suffered by the Clubs' players, and
22 the other deals with brain disease from the Clubs' players.
23 Yeah, that's probably in some medical files. But like we
24 said, we're not asking for the medical files themselves. We
25 want the data on and the information on the concussion

1 injuries extracted from those files when they can be
2 deidentified and there are no privacy interests that are going
3 to be offended by that.

4 Part of the difficulty in getting to where we are
5 today -- and remember we were here April 8th talking about
6 some of these same issues -- if you read the Club's brief,
7 their opposition brief, and you look at the end discussion
8 about the AHMS system, doesn't it appear to you that that is a
9 static system, nothing better than an online filing cabinet
10 that has to be manually reviewed and redacted? We couldn't
11 have a discussion about running a report on that system
12 because it wasn't clear that that system had that capability.
13 I only went and decided to Google AHMS the other day and found
14 that web page that makes it look like that platform is a lot
15 more powerful than I ever thought it would be. And it could
16 make extracting the relevant information a lot easier and less
17 burdensome. And it can be deidentified if it isn't already
18 with very minimal effort.

19 So, again, this isn't a moving target. We've been
20 looking from day one for the information on concussions that
21 the NHL studied. We've been saying that's relevant since day
22 one. We also want any other concussion information that the
23 NHL decided not to study. That's essentially the collection
24 effort we're aimed at. And again, some of it's in medical
25 records, some of it might not be. We haven't been able to

1 discuss a good way to cull out that relevant information
2 because we haven't been able to engage on that because
3 initially, once these private medical objections came down,
4 that was the end of the conversation until we filed this
5 motion.

6 THE COURT: Okay.

7 MR. BRIAN PENNY: Thank you.

8 THE COURT: I think both sides make good and
9 important points. And as frustrating as it might seem for
10 both sides, I think we are at least progressing towards some
11 articulation of the issues here. So, I am going to order a
12 meet and confer to take place before June 17th. I want a
13 report on June 17th about the status of that meet and confer.

14 I'm going to give you some guidance -- this is not
15 an advisory opinion on rulings, it's just some guidance of my
16 thinking at the moment, to the extent that that will give you
17 some assistance in reaching agreements on some of these
18 issues.

19 In my experience with databases and expert work or
20 the compilation of reports from databases and the like, I have
21 found that incorporating the presence of IT folks who
22 understand these databases in the meet and confer process is
23 useful, even possibly experts could come in for that purpose.
24 So, I strongly encourage you to have present at your meet and
25 confer more than lawyers. I know that lawyers are

1 knowledgeable about everything, but sometimes not about
2 databases (laughter). So, please invite folks who can speak
3 knowledgably about these databases. Including, for instance,
4 their capacities to run reports, but also including
5 information about what reports have been run, what reports
6 have not been run, how long the data has been collected,
7 whether it can be deidentified, whether it can be effectively
8 coded. You can make the same list I can make, but I want you
9 to think in advance of the meet and confer about what you
10 would share with the IT folks so they are prepared to address
11 questions. And I would have them on both sides, frankly, if
12 it were me.

13 Okay. I think that the heart of the issue here is
14 what the NHL knew from the data it collected. And the NHL is
15 going to want to use those studies and that data to defend
16 this case. And so it is fair for the Plaintiffs to be able
17 to, first of all, see what they rely upon; and secondly,
18 understand how it was compiled and what wasn't compiled.

19 Now, there have been other litigations where studies
20 about medical issues are conducted internally within a company
21 or an industry and it's subject to some claims of bias
22 sometimes. And so the Plaintiffs need to have the full
23 opportunity to explore that. So, I think the NHL, for
24 instance, has to anticipate what its experts are going to rely
25 upon in testifying because we don't want data production late

1 in the game. Okay.

2 The Court is not inclined to step ahead of the case
3 law and suggest that these players don't have a privacy
4 interest in this data. So, for now at least, the Court is
5 inclined to require that data be deidentified and coded. It's
6 important that it be coded because you can't assess the
7 efficacy or the accuracy of a study unless the same player is
8 followed throughout with the same code. So -- and hopefully
9 this database will permit you to do that. According to its
10 instructions, it can.

11 Obviously to the extent that the Clubs or the NHL
12 produced -- created any internal reports or studies or
13 analysis from these databases, they should be produced. If
14 there are personal identifiers, they should be deidentified.
15 As between the Clubs and the NHL, to the extent that the NHL
16 has control or access to this information, it's only fair that
17 the NHL bear the burden of that deidentification and coding
18 because, after all, the Clubs are third parties to this
19 litigation.

20 Certainly to the extent that there is correspondence
21 or e-mails among the Clubs and the NHL or any researcher or
22 other professional or any party retained to do these studies
23 or to compile this data, again, that is relevant and
24 discoverable information and it ought to be redacted and
25 produced.

1 Nobody mentioned today Article 34.3 of the
2 Collective Bargaining Agreement. I think anything that was
3 made public pursuant to that section of the Collective
4 Bargaining Agreement is -- should be produced. Along the way,
5 you should come up with a process so that if there is concern
6 on the part of the Clubs or the NHL that, despite
7 deidentification, that the nature of the communication will
8 identify the player, like "our star player," or "our best
9 forward" or whatever it is. That's the sort of thing you can
10 raise on a case by case *in camera* with the Court. I can take
11 a look at the concern *in camera* and decide whether that's a
12 fair risk, which leads me to the next point, which is the only
13 way we can handle these disputes is with some kind of
14 privilege log.

15 Now, if we're talking about huge volumes, I'm not --
16 I wouldn't object to a categories approach or a sampling
17 approach. These are all things that ought to be subject to --
18 categories and sampling can work really well, as long as
19 everybody is agreeable that if I conclude, based on the
20 sampling of a category, that it's to be produced, everything
21 in the category gets produced, so -- okay.

22 I am not persuaded by case law that suggests that
23 communications or, for that matter, records that contain --
24 that are deidentified and cannot otherwise identify a player
25 are a violation of the law. I have a hard time getting to

1 that. I don't see that. So, I think the problem is solved
2 with deidentification, frankly. If it comes -- what I also
3 would suggest is that we do the production in phases. And
4 down the road, it might come to pass that we need to do some
5 statistical sampling of data, perhaps that wasn't studied by
6 the Clubs or the NHL and we could come up with a protocol for
7 that and deidentify it and the like. That might come down the
8 line, so you should continue these meet-and-confers so that
9 we're not faced at expert discovery with opinions that rely on
10 data that hasn't been fairly produced.

11 Certainly as the case progresses, if additional
12 players provide written consent, then anything can be produced
13 once there's consent. To the extent that a player's injury
14 was made public for any purpose or injury reports were issued,
15 all -- anything that's made public, there's no rights, privacy
16 rights that attach to that. I'd recommend that the
17 Plaintiffs, in anticipation of this meet and confer, identify
18 scenarios that you worry about that are close calls so that
19 you can actually meet and confer on those scenarios and
20 present those scenarios to the Court if you can't agree.

21 To the extent that any of this leads to concerns
22 about burden, the way to address that is to provide Affidavits
23 with specifics about burden to the Court so I can assess the
24 burden versus the relevance under the appropriate law, and
25 that would also be as between the Clubs and the NHL as a party

1 and a nonparty.

2 Sometimes it makes sense if, from a meet and confer
3 of this nature, if it just seems overwhelming and you can't
4 really grasp everything, I've seen it happen that there is a
5 limited 30(b)(6) deposition of the knowledgeable IT folks
6 which leads to an orderly way of presenting the evidence on
7 what is possible here to be produced. And I think those are
8 all I have in my notes.

9 Any thoughts about that approach?

10 MR. BRIAN PENNY: Just briefly. First as a
11 clarification, when you ordered the parties to meet and
12 confer, is it the three of us, the NHL, the Clubs --

13 THE COURT: Yes, yes.

14 MR. BRIAN PENNY: Okay. The second is a concern
15 that addresses specifically the Impact Database. In the
16 past -- and I don't want to put words in NHL Counsel's
17 mouth -- they have said that they don't control or have -- I
18 think they said don't have access to that. That's currently
19 being withheld by a third party that we have a separate
20 subpoena to. His attorney -- or Dr. Lovell, an impact -- it's
21 an organization -- are sort of waiting for some guidance from
22 you on whether to produce it. I understand the database can
23 be deidentified very easily and that's what we've talked about
24 receiving it that way. He's a little concerned about
25 producing it though without some guidance from the Court or

1 some approval by the NHL. Can we make that part of our first
2 meet and confer or --

3 MR. JOHN BEISNER: We're happy to talk about that.
4 And I think with this guidance today, I think the concern that
5 we've had has been on deidentification issues because that is
6 a database, fundamentally, of medical records. But again, as
7 with all these things, we're happy to talk about it.

8 THE COURT: Sure. We'll include it in the meet and
9 confer. What about the Sports Injury Monitoring System?

10 MR. BRIAN PENNY: I honestly don't know much about
11 that.

12 THE COURT: I think it's called the Sports Injury
13 Monitoring System.

14 MR. JOHN BEISNER: We -- of course. And, you know,
15 that's the list that I think we should be talking about. And
16 some of these are derivative of each other, as I understand
17 it, but, you know, I think it's the appropriate thing is to go
18 through a checklist. I don't have full information on how
19 those --

20 THE COURT: But you're going to all be bringing your
21 knowledgeable people with, right?

22 MR. JOHN BEISNER: Thank God, Your Honor, we will
23 (laughter). But that's right, and, you know, I think the
24 challenge we have is exactly what you mentioned earlier is
25 that these start off as being medical record information as

1 being fed in. The question is, what can you -- what is there
2 in deidentified form and how can we deal with those issues.
3 But that's what we need to explore.

4 THE COURT: Yes. And there's precedent for this.
5 There's precedent for litigation where folks have looked at
6 medical record data that are in databases, deidentified and
7 coded, for purposes of reaching conclusions that are not
8 personal to any player but about the nature of these injuries.
9 And I think we should be able to get there, too. Yeah.

10 MR. BRIAN PENNY: Thank you.

11 THE COURT: All right.

12 Any other questions from anybody?

13 All right. Well, I have a little bit of time if you
14 want to go back, then, to the...

15 MR. CHARLES ZIMMERMAN: It's a little bit of a
16 sensitive subject but I want to raise it. It's not --

17 THE COURT: It's not the sensitive subject that
18 we're going to talk about in chambers.

19 MR. CHARLES ZIMMERMAN: It's not 7-D, but it --

20 THE COURT: All right.

21 MR. CHARLES ZIMMERMAN: A little historical
22 perspective on where we are and where we're trying to get to,
23 which is the completion of discovery and class certification
24 and an end date in December. You know, we're here in June,
25 and if you look at the production documents we're supposed to

1 have by July, depositions that we wanted to do early are
2 really being -- happening this summer. And just this
3 soliloquy and this discussion we've had over these databases
4 and the meet-and-confer process with experts, we're going to
5 run out of runway.

6 And I'm not here to try and change a date yet. I'm
7 here to alert the Court that from our side, we're getting a
8 little nervous that the months that are left aren't going to
9 be enough to complete. And so I don't want to come in here at
10 the last minute and say we may be running out of runway, but I
11 want the Court to know we're trying really hard. But from
12 what I'm seeing so far, we've lost about -- it's taken longer.

13 THE COURT: Let me ask you this. Has the NHL -- and
14 I'll ask them that -- given you an estimate of the anticipated
15 numbers that will be produced by July 1?

16 MR. CHARLES ZIMMERMAN: Well, that -- I haven't got
17 that number, but that was on the agenda for today as something
18 I was going to ask. So you're talking about the document,
19 number one, right?

20 THE COURT: Document.

21 MR. CHARLES ZIMMERMAN: All we know is that we're
22 getting more documents -- we're getting a privilege log Friday
23 and that they're continuing to roll out documents every two
24 weeks. And they believe they're on schedule for the
25 completion by July 1, but we don't know --

1 THE COURT: I see that. I'd like to see how
2 end-loaded this is. I want to see what the numbers look like.

3 MR. CHARLES ZIMMERMAN: Yeah, and I don't know.

4 THE COURT: Okay.

5 MR. CHARLES ZIMMERMAN: At least on that issue,
6 you're going to have to ask the League. But we do know we've
7 only received 98,000 documents to date.

8 THE COURT: Okay.

9 MR. DANIEL CONNOLLY: Your Honor --

10 THE COURT: Mr. Connolly.

11 MR. DANIEL CONNOLLY: Would you like me to speak to
12 that just --

13 THE COURT: I would love you to speak to that
14 (laughter).

15 MR. DANIEL CONNOLLY: Well, now I'm not so sure I
16 want to (laughter). No, we expect there are going to be two
17 more productions of documents, Your Honor. We don't expect it
18 to be end-loaded. You know, rough numbers, if you look at the
19 number of pages, we were thinking about 750-odd thousand, you
20 know, give or take several hundred thousand. But it's going
21 to be in that range. As you see, the most recent production
22 was the largest. We expect these are going to be tapering
23 off --

24 THE COURT: You think on July 1, the numbers will
25 approximate 750,000 pages?

1 MR. DANIEL CONNOLLY: That's what I recall
2 Mr. Martino saying and he is, fortunately for him, off on
3 vacation. But that's the ballpark that I understand is being
4 currently estimated.

5 THE COURT: Okay.

6 MR. DANIEL CONNOLLY: So, we have two more
7 productions that are approximately the same as these recent
8 productions.

9 THE COURT: And that will include all the custodians
10 we've identified?

11 MR. DANIEL CONNOLLY: All the custodians that we've
12 identified, with some clean up work to be done, but
13 substantial completion is our expectation, Your Honor.

14 THE COURT: Okay.

15 MR. DANIEL CONNOLLY: And if we see major hiccups,
16 we'll keep people informed.

17 THE COURT: And tell me about these privilege logs.
18 What is their size in terms of numbers of documents?

19 MR. DANIEL CONNOLLY: Well, the privilege logs are
20 being -- I don't -- I haven't seen the most recent ones, Your
21 Honor, but we are working diligently. They tend to follow the
22 documents.

23 THE COURT: Right.

24 MR. DANIEL CONNOLLY: And that's going to be later
25 in time than July 1st.

1 THE COURT: No, I understand that. I was wondering
2 about quantity. You've produced three privilege logs, and I'm
3 just wondering how big they are.

4 MR. DANIEL CONNOLLY: I'm not totally familiar with
5 all that, Your Honor.

6 MR. STUART DAVIDSON: I am, Your Honor, and it
7 started out real small. The last one was probably about
8 three-quarters of an inch thick. So, we're still in the
9 process of going through it. It's --

10 THE COURT: Okay.

11 MR. STUART DAVIDSON: It's substantial.

12 THE COURT: Do you have a document number for
13 that --

14 MR. STUART DAVIDSON: I didn't do that --

15 THE COURT: Would you try to figure that out by the
16 June conference?

17 MR. STUART DAVIDSON: Absolutely.

18 MR. BRIAN GUDMUNDSON: Your Honor, if I may, I was
19 going to address one more issue with document production. We
20 did reach an agreement on the Board of Governors' documents
21 with respect to search terms. We do not have yet a time for
22 that to be produced. We had proposed July 1, and it turned
23 out that that was going to be a little bit too tight. We
24 would hope that August 1st might work. But I would ask that
25 some sort of framework be put in place so that we know -- we

1 don't know the volume of it, we don't know how much is going
2 to be privileged and things like that. But we do have an
3 agreement with the NHL that if we get this production and it
4 appears that some of these Governors don't have substantial
5 documents, that alternates -- alternate Governors might be
6 appropriate, that we could in and ask for them. They may
7 oppose that, but we'd like to build in some time for that
8 process, too because we do believe there are several alternate
9 Governors in the NHL who carry a lot of authority and attend a
10 lot of those meetings.

11 THE COURT: Okay.

12 Mr. Connolly.

13 MR. DANIEL CONNOLLY: Yes, Your Honor, there is a
14 report in the materials we've provided you on the Board of
15 Governors. There are some complicating factors there, as we
16 talked about at the last informal discovery conference. We're
17 dealing with multitude of platforms. So I don't know that we
18 can commit at today's date to August 1, but we'll have a
19 better -- we'll have our arms around it better by the next
20 informal --

21 THE COURT: You can give me a report on June 17th?

22 MR. DANIEL CONNOLLY: Yes, Your Honor.

23 THE COURT: All right.

24 MR. CHARLES ZIMMERMAN: Your Honor, I did want to
25 add a dispute that is percolating that hopefully we'll have

1 more clarity in June 17th. But it is the question of text
2 messages.

3 THE COURT: Oh my goodness.

4 MR. CHARLES ZIMMERMAN: Not collecting from the
5 players. We were specific. We're doing the search of
6 players' text messages, as Mr. Cashman and the Court and we
7 all knew from the last informal. But we've now been told that
8 text messages are not -- have not been searched for the search
9 terms from the custodians currently. And so we are trying to
10 drive that into -- more facts about that. But we think
11 there's a dispute bubbling as to whether or not texts have
12 been searched and whether text messages will be created --
13 will be produced under the same guidelines and under the same
14 rigors that you told us had to occur for the players.

15 And I think we all recall what you said. I don't
16 have to repeat that. But you wanted us to go back and make a
17 specific inquiry and do the specific work. We're asking that
18 the League do the same.

19 THE COURT: Okay. Have you reached a final meet and
20 confer on that or not?

21 MR. CHARLES ZIMMERMAN: I don't believe we have. I
22 think what has happened is we've been told that no such text
23 messages exist, but we haven't been given the assurances as to
24 what has really been searched or what inquiries have been made
25 to come to that conclusion, which brings about this uneasiness

1 about text messages --

2 THE COURT: Okay. I'm going to ask you to meet and
3 confer about that before June 17th, as well.

4 Mr. Beisner?

5 MR. JOHN BEISNER: I guess I would like to comment
6 about that because --

7 MR. CHARLES ZIMMERMAN: Do you want to sit down
8 and --

9 MR. JOHN BEISNER: We can go wherever you want to --

10 MR. CHARLES ZIMMERMAN: I didn't know if you want to
11 shake your finger at me (laughter).

12 MR. JOHN BEISNER: We'll talk it out.

13 MR. CHARLES ZIMMERMAN: Could you take a picture of
14 this, Your Honor, (laughter)?

15 MR. JOHN BEISNER: There's a reason why they don't
16 allow photographs in the courtroom, but anyway (laughter).

17 Your Honor, on this issue -- and I would note the
18 issue that we had with the representative Plaintiffs in the
19 case is we got no e-mails, no ESI, no nothing. We raised the
20 issue, and Your Honor said, you need to make inquiry about
21 what they used and search it. That's what we did at the
22 outset of this is talk to the custodians to say, what do you
23 use for business communications? And what they identified, we
24 have searched. And we've gone back after this issue was
25 raised to each of the custodians and said specifically to

1 them, do you use text for your business? And they do not.
2 That's not what they do. Most of them are at an age like me
3 that don't know how to do it, but that's not what they use.
4 We'll doublecheck further and talk further and, you know, it's
5 just not what these folks have used.

6 I assume that is the same inquiry that is being made
7 of Plaintiffs. The difference was that inquiry wasn't even
8 made previously because we got nothing. So I think they're --
9 I think we're doing the same thing that you instructed the
10 Plaintiffs to do --

11 THE COURT: Okay. I think Mr. Zimmerman is just
12 looking for diligence, and I think you're representing to me
13 that you've been diligent. If you want to just be sure of
14 that before June 17th, that would be great.

15 MR. JOHN BEISNER: We'll do that, Your Honor.

16 THE COURT: Okay. Very good.

17 Anything else? Yes. No, we're still good.

18 MR. CHARLES ZIMMERMAN: We have -- we can provide to
19 you the status of the Master Complaint Plaintiffs' document
20 production. That's -- Mr. Cashman has been wrestling with
21 that, and he can give the report.

22 MR. MICHAEL CASHMAN: Your Honor, this should be a
23 fairly easy report. As we reported at the informal
24 conference, we did produce all the documents that the six
25 named Plaintiffs had. And at that time, we had already asked

1 them about whether they had e-mails or other documents that
2 were responsive, and whatever they had at that time had been
3 produced. And just to clarify, we did make those inquiries
4 before, at the very early stages, about whether they had any
5 of this kind of information. And then following the informal
6 conference, we've gone to the extra step of hiring outside
7 consultant who has collected all ESI and we've run the search
8 terms independently of what the custodians represented they
9 may or may not have.

10 We've run the search terms, all that information has
11 been collected, and we're going to be reviewing it. And to
12 the extent there is responsive and non-privileged information,
13 we're going to be producing that and expect it will be done, I
14 hope, within two weeks.

15 THE COURT: So, it sounds like the NHL might get
16 that before the conference even?

17 MR. MICHAEL CASHMAN: Hopefully.

18 THE COURT: All right.

19 MR. MICHAEL CASHMAN: Thank you, Your Honor.

20 MR. CHARLES ZIMMERMAN: The next, Your Honor, will
21 be -- Scott Andreson will do the deposition report.

22 THE COURT: Okay.

23 MR. SCOTT ANDRESON: Good afternoon, Judge. I just
24 wanted to confirm with the Court that one of the
25 representations that was made earlier as it relates to the

1 June 17th, one of the issues that was resolved was
2 Mr. Shanahan's deposition and the Walsh Act and all of that
3 and we're happy to report that's been resolved subsequent to
4 our filing.

5 Mr. Shanahan's deposition is scheduled for
6 July 22nd. You've already been informed Mr. Bettman is
7 July 31st. As of presently, we also have Dr. Echemendia
8 June 22nd; Kerry Fraser, June 17th; Paul Holmgren, June 16th;
9 Jim McCrossin, June 10th; Jim Gregory, June 9th; Dr. Elliot
10 Pellman is tomorrow, June 5th; and Dr. Burke has already been
11 completed.

12 The basic thing that I wanted to note is standing up
13 here, we have also given the NHL a list of our next wave of
14 deponents and, you know, we're hoping to hear back from them
15 soon. We expect that we will. Those folks are listed in the
16 agenda that we provided to Your Honor. We probably will
17 continue to do it as you've suggested. As we come up with new
18 names, we plan to give them to the NHL right away rather than
19 wait, and I suspect that will maybe go a little faster as we
20 take these next depositions.

21 So, it might not be until we get through these next
22 few weeks and take a few depositions, then we'll have another
23 batch of deponents. Thank you.

24 THE COURT: Sounds good. Very good.

25 MR. JOHN BEISNER: Your Honor, one concern I wanted

1 to raise and just want to note it because I have not had an
2 opportunity to speak with Plaintiffs' counsel, Mr. Grygiel,
3 about this. But I did get a rather disturbing e-mail from him
4 last night saying that the deposition of Colin Campbell, which
5 I notice Counsel didn't mention which is on the list as having
6 been scheduled for Tuesday, June 30th, that he just said,
7 without giving any reason, I want to take that off calendar.
8 We'll do that later and ask for a substitution of one of two
9 Club owners on that date, which suggests to me that people are
10 available to take a deposition that day but they're just
11 wanting to do that later.

12 Your Honor, we went through a process of asking
13 specifically for the 10 depositions Plaintiffs wanted to do
14 early. We've moved heaven and earth to produce Mr. Campbell's
15 files early to make that happen. And I think we're quite
16 concerned. I think we should confer on that, but I have not
17 heard any reason why that's being taken off calendar, and I
18 think he's ready, we've moved everything around to make him
19 available that date, and I don't see any reason why that
20 shouldn't go forward at that time. I'll leave it at that.
21 I'm not asking Your Honor to do anything, but I did want to
22 note that fly in the ointment on this schedule and our
23 position would be it should go forward that day.

24 THE COURT: Okay.

25 MR. SCOTT ANDRESON: Briefly on that, Your Honor.

1 Mr. Grygiel is taking Dr. Pellman's deposition in New York
2 tomorrow so that's why he's not here. What I would suggest is
3 he did just send an e-mail to Mr. Beisner. We should probably
4 just meet and confer and talk about it. We can come back and
5 talk on June 17th. You know, I think that the Plaintiffs
6 certainly have, you know, been respectful of providing names
7 early, as you suggested, and the NHL has done a good job of
8 getting back to us with dates relatively promptly. If we need
9 to move a deposition for one reason or the other, it is not
10 going to change the fabric of this case or the deadlines. But
11 nonetheless, we'll meet and confer on that very subject of
12 Mr. Campbell's deposition and we'll be able to report back on
13 June 17th.

14 THE COURT: Well, let me suggest this. I think for
15 the convenience of everybody involved here in streamlining the
16 case, if a deposition is scheduled, there needs to be good
17 cause to change it.

18 MR. SCOTT ANDRESON: Okay.

19 THE COURT: And I think you can either agree on that
20 or raise it with the Court.

21 MR. SCOTT ANDRESON: That's what I figured we'd do.
22 Thanks.

23 MR. CHARLES ZIMMERMAN: Your Honor, the next
24 topic -- and then we'll get through the agenda because there
25 are only two left -- is Defendant fact sheet. But there will

1 also be a report on where we are with Plaintiff fact sheets,
2 as well. Although it's a good report. We're aware we need to
3 get. We're going to be automating that process, but I'll let
4 Mr. Cashman who has been quarterbacking Plaintiff and
5 Defendant fact sheet report to the Court.

6 THE COURT: Okay.

7 MR. MICHAEL CASHMAN: Once again, a very, very easy
8 report, Your Honor. As you know, we've agreed on the
9 Plaintiff fact sheet and we've seen the Court's order on fact
10 sheets. And we're in the progress -- process of getting those
11 completed. We're working with an outside group, the Garretson
12 Group, that we've talked about before to automate the process
13 and make it more accessible for Plaintiffs and hopefully more
14 functionality. Defendant fact sheets, we've had a number of
15 discussions, Mr. Beisner and I, and those are ongoing and we
16 expect to have further meet-and-confers and we'd like to
17 report to the Court on the June 17th informal conference and
18 to the extent we have any disagreements, we can resolve them
19 at that time.

20 THE COURT: Very good. Okay. All right.

21 MR. MICHAEL CASHMAN: Thank you.

22 MR. JOHN BEISNER: I will state officially, I have
23 nothing to add, Your Honor (laughter).

24 MR. CHARLES ZIMMERMAN: I think that's it. The
25 other one was the motion, Your Honor, and what we'd like to do

1 is re-argue it now (laughter).

2 THE COURT: If you do that, I'm sending you to
3 mediation. Very good. Nice to see you. Court is adjourned.

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

5 (Concluding at 2:44 p.m.)

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9 CERTIFICATE

10

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

14

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

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