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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
March 4, 2015
1:00 p.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT COURT JUDGE

STATUS CONFERENCE & NHL'S MOTION TO COMPEL

Official Court Reporter: Heather Schuetz, RMR, CRR, CCP
NCRA Realtime Systems Administrator
U.S. Courthouse, Ste. 146
316 North Robert Street
St. Paul, Minnesota 55101

A P P E A R A N C E S

For the Plaintiffs:**ZIMMERMAN REED, PLLP**

Charles "Bucky" S. Zimmerman, Esq.
Brian C. Gudmundson, Esq.
1100 IDS Center
80 S. 8th St.
Minneapolis, MN 55402

CHESTNUT CAMBRONNE, P.A.

Bryan L. Bleichner, Esq.
17 Washington Ave. N., Ste. 300
Minneapolis, MN 55401-2048

HEINS MILLS & OLSON, PLC

James W. Anderson (*appearing telephonically*)
310 Clifton Ave.
Minneapolis, MN 55403

ZELLE HOFFMAN VOELBEL & MASON, LLP

Michael R. Cashman, Esq. (*appearing telephonically*)
Shawn D. Stuckey, Esq. (*appearing telephonically*)
500 Washington Ave. S., Ste. 4000
Minneapolis, MN 55415

BASSFORD REMELE, P.A.

J. Scott Andresen, Esq.
Jeffrey D. Klobucar, Esq.
33 S. 6th St., Ste. 3800
Minneapolis, MN 55402-3707

ROBBINS GELLER RUDMAN & DOWD, LLP

Stuart A. Davidson, Esq.
120 E. Palmetto Park Rd., Ste. 500
Boca Raton, FL 33432

SILVERMAN, THOMPSON, SLUTKIN & WHITE

Stephen G. Grygiel, Esq.
201 N. Charles St., Ste. 2600
Baltimore, MD 21201

NAMANNY BYRNE OWENS

Thomas J. Byrne, Esq. (*appearing telephonically*)
Mel T. Owens, Esq. (*appearing telephonically*)
2 S. Pointe Dr.
Lake Forest, CA 92630

CORBOY & DEMETRIO

Katelyn D. Geoffrion, Esq. (*appearing telephonically*)
William T. Gibbs, Esq. (*appearing telephonically*)
33 N. Dearborn St., 21st Floor
Chicago, IL 60602

GUSTAFSON GLUEK

David A. Goodwin, Esq.
120 S. 6th St., Ste. 2600
Minneapolis, MN 55402

Also Appearing: Robert K. Shelquist, Esq.

LOCKRIDGE GRINDAL NAUEN, PLLP

100 Washington Ave. S., Ste. 2200
Minneapolis, MN 55401

(*Appearing on the Adams/Goring Complaint*)

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For the Defendant:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

John H. Beisner, Esq.
1440 New York Ave. NW
Washington, DC 20005

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP

Shepard Goldfein, Esq.
Four Times Square
New York, NY 10036

FAEGRE BAKER DANIELS

Linda S. Svitak, Esq.
Joseph M. Price, Esq.
2200 Wells Fargo Center
90 S. 7th St.
Minneapolis, MN 55402

PROSKAUER ROSE, LLP

Joseph Baumgarten, Esq. (*appearing telephonically*)
Adam M. Lupion, Esq. (*appearing telephonically*)
Eleven Times Square
New York, NY 10036-6522

Also Present: Julie Grand (*appearing telephonically*),
In-House Counsel for the National Hockey League

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 1:00 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 civil file, MDL file 14-2551. I
7 understand that there are some folks on the phone here, and I
8 believe you were advised that you're welcome to be on the
9 phone, but just because of the mechanics of the phone we can't
10 have you enter your appearance. But I understand that when
11 each side enters their appearance, they will identify the
12 folks on the phone. So, let's begin with the Plaintiffs.

13 MR. ZIMMERMAN: Good afternoon, Your Honor. First
14 of all, I want to thank you for changing the date to
15 accommodate a personal convenience of mine, and I appreciate
16 that very much, and everybody, thank you. I understand
17 there's a trial going on that --

18 THE COURT: A murder trial. Yes.

19 MR. ZIMMERMAN: Yes, so I understand that's in
20 recess. Thank you.

21 I want to sort of give an overview. I think it's
22 maybe time to do a little reflection.

23 THE COURT: But let's enter appearances first.

24 MR. ZIMMERMAN: I beg your pardon. I'm Charles
25 Zimmerman, Your Honor. I'm here for the Plaintiffs.

1 THE COURT: Okay. And I'll let you get back up in a
2 minute, but let's make sure we have a record of who's here
3 today.

4 MR. DAVIDSON: Good afternoon, Your Honor. Stuart
5 Davidson from Robbins Geller on behalf of the Plaintiffs.

6 MR. GRYGIEL: Good afternoon, Your Honor. Steve
7 Grygiel on behalf of the Plaintiffs.

8 MR. GUDMUNDSON: Good afternoon, Your Honor. Brian
9 Gudmundson of Zimmerman Reed on behalf of the Plaintiffs.

10 MR. BLEICHNER: Good afternoon, Your Honor. Bryan
11 Bleichner from Chestnut Cambronne on behalf of the Plaintiffs.

12 MR. SCOTT ANDRESON: Good afternoon, Judge. Scott
13 Andreson, Bassford Remele, for the Plaintiffs.

14 MR. GOODWIN: Good afternoon, Your Honor. David
15 Goodwin, Gustafson Gluek, for the Plaintiffs.

16 MR. KLOBUCAR: Good afternoon, Judge. Jeff Klobucar
17 with Bassford Remele appearing on behalf of the Plaintiffs.
18 Also, in accordance with what the Court just said, appearing
19 with us telephonically today are six attorneys. From the
20 Corboy firm in Chicago, Caitlyn Geoffrion and William Gibbs.
21 From the Zelle Hoffman firm, Michael Cashman and Shawn
22 Stuckey. Thomas Byrne from the Namanny Byrne firm, as well as
23 James Anderson from the Heins Mills law firm.

24 THE COURT: Very good. Anybody else for the
25 Plaintiffs?

1 MR. OWENS (Telephonically): And also Mel Owens from
2 Namanny Byrne & Owens. Thank you.

3 MR. KLOBUCAR: Did you catch that, Judge? That was
4 Mel Owens also appearing from the Namanny Byrnes law firm.

5 THE COURT: Okay. Very good.

6 And for the defense.

7 MR. BEISNER: Good afternoon, Your Honor. John
8 Beisner on behalf of Defendant, NHL.

9 MR. GOLDFEIN: Good afternoon, Your Honor. Shep
10 Goldfein on behalf of the National Hockey League.

11 MS. SVITAK: Good afternoon, Your Honor. Linda
12 Svitak from Faegre Baker Daniels on behalf of the NHL. And we
13 also have three additional attorneys who are appearing by
14 telephone: Julie Grand from the NHL, and Joseph Baumgarten
15 and Adam Lupion from Proskauer Rose.

16 THE COURT: Very good.

17 MR. PRICE: Hi, Judge, Joe Price on behalf of the
18 NHL.

19 THE COURT: Good afternoon, everyone.

20 Okay, Mr. Zimmerman, now is your chance.

21 MR. ZIMMERMAN: Thank you, Your Honor. Before we
22 start, I want to express to -- and I did to Joe -- Dan
23 Connolly's father, I understand, has passed away.

24 THE COURT: Oh, I'm sorry to hear that.

25 MR. ZIMMERMAN: And I just wanted to express my

1 condolences. Joe and I go back to law school together, and I
2 just wanted to express my condolences today and to his family.

3 MR. PRICE: I'll convey it to Mr. Connolly.

4 THE COURT: And the Court's condolences, as well.
5 Thank you.

6 MR. ZIMMERMAN: If I could, I'd like to start with a
7 couple of observations from maybe 10,000 feet, a little bit of
8 reflection, and a request or two from the Plaintiffs.

9 THE COURT: Okay.

10 MR. ZIMMERMAN: Your Honor, we've been at this a
11 while. And it's becoming very clear to me, at least to me,
12 that there's a great spirit of cooperation and professionalism
13 that is wonderful and I hope is making everything easier for
14 the Court and better for the litigation. I think it always
15 does. But it's certainly been an effort, and I think we've
16 had nothing but extreme professionalism.

17 I think, however, that it's time for us to sort
18 of -- for me to sort of reflect on, can we -- are we going to
19 get to the end on time. And are we getting what we need to
20 move this litigation? And I don't think -- I don't think we
21 are for this -- with regard to the discovery. I think it's --
22 we're really getting a little quagmired. And I'm going to put
23 a suggestion before the Court and to defense counsel, as well,
24 that perhaps we do, like many MDLs have done, and maybe meet
25 informally with the Court in chambers, either before is

1 probably best, but even after conferences to see if we can
2 really narrow some of the issues.

3 As I reflect on some of the disputes we've had,
4 although they've seemed kind of major at the time, they're
5 pretty minor, you know, how many -- today we're going to talk
6 about how many interrogatories we can have; or we're going to
7 talk about is a deposition going to go forward; or we talked
8 about is discovery relevant for parties that are not parties
9 because they're not in the Master Amended Consolidated
10 Complaint. We briefed these things and we argue them and the
11 Court has to resolve them. And I'm just wondering if, in the
12 spirit of sort of the MDL and what's been written in the
13 manual about it, if we wouldn't be able to do a better job for
14 our clients and an easier -- and make it easier for the Court
15 and for all parties concerned if we had a mechanism where we
16 could really talk out about these issues with the Court
17 informally and just sort of see if you could help us reach an
18 agreeable resolution by talking to us informally; or we can
19 come to our own resolution; or the Court can say, listen, you
20 know, you just -- this isn't necessary, let's just do it this
21 way.

22 And everyone will go, yeah, she's probably right
23 about that, and there's no need to brief it and to argue
24 because with these 30-day spans between conferences -- we're
25 now into March -- we have a class action, we have a deadline

1 for discovery eight months from now, and we've got nothing yet
2 in way of discovery. We've gotten a bunch of pages of
3 documents, but they're all insurance policies. And we've
4 really been not able to get to the quick of the factual
5 predicates that are going to need to be understood better and
6 discovered in order for us to properly support our claims and
7 to properly support the class.

8 THE COURT: Let me ask you a question about that.
9 When I was a Magistrate Judge -- and I think you folks
10 appeared before me, as well, back then -- we had what we call
11 an IDR process here, an informal dispute resolution process,
12 and that involved both sides agreeing that you wanted to
13 approach me informally, submitting something that was pretty
14 quick and dirty, and usually we got on the phone, although
15 you're certainly welcome to come to chambers. And my view of
16 that was that it worked pretty effectively because I could
17 address the issues as they arose in your meet-and-confers
18 instead of waiting an artificial amount of time; and that I
19 would reserve the right to continue to do it or not, depending
20 on how much it was abused, of course. Some people did, some
21 people didn't.

22 I'd be willing to do a process like that. It might
23 be more useful to have those meetings more often than to do a
24 formal conference and then an informal conference every 30
25 days; rather, to have a formal conference every 30 days and

1 those sort of informal meetings in the interim.

2 Does that make sense to you, Mr. Zimmerman?

3 MR. ZIMMERMAN: It makes complete sense to me, Your
4 Honor. I mean, Plaintiffs always have the burden of proof,
5 and we're the ones that are carrying the burden of proving our
6 case. And we're just finding that if we have to wait to
7 decide, are we going to be able to take Mr. Bettman's
8 deposition, or are we able to going to get these documents
9 that we requested beyond the objections, that if we just have
10 to wait it out and brief it and have it heard formally that
11 we're just not going to get there. We're going to be coming
12 back to you and say, hey, we just can't make these deadlines,
13 and then we're going to be kind of on our heels.

14 And so I'm trying to be proactive in saying,
15 whatever the Court might feel to be the best mechanism, if
16 it's that two-week interval with, you know, limited letter
17 briefing and conversations, I think it's time that we give
18 that serious thought and consideration. We spoke about it in
19 a meeting of the leadership this morning. We convened in my
20 office, and it's our strong belief that it would be very, very
21 helpful. And it's really going to be the only way we're going
22 to get there.

23 And I -- and I -- and I -- I don't know what John
24 and his -- and his colleagues feel about it. I'm sure they
25 probably have a point of view and they'll be able to express

1 it. But I think that it's time that we really give that
2 serious thought and consideration for going forward because
3 we're now into March. Discovery was supposed to start in
4 January, and we're just not getting anywhere yet.

5 THE COURT: Okay. Do you want to focus on some of
6 your frustrations with discovery, and then I'll hear from
7 Mr. Beisner and his thoughts about it?

8 MR. ZIMMERMAN: Sure. And these are all on the
9 agenda, so --

10 THE COURT: Although, do we have two different
11 agendas, is that --

12 MR. BEISNER: Yes, Your Honor.

13 THE COURT: Okay. All right. You know, in the
14 future, you can just make one agenda and then make a note that
15 somebody agrees or disagrees, because it's a little hard to go
16 back and forth, but okay.

17 MR. ZIMMERMAN: If we look at the agenda items, the
18 first one, which is on the Plaintiffs' finalized proposed
19 agenda, which is what I'm looking at right now, the first two
20 are not a subject of really any dispute at all. It's just a
21 matter of information. So, let me just skip that for a
22 second.

23 THE COURT: Okay.

24 MR. ZIMMERMAN: And then the last two, the Notice of
25 Interest update and the non-retaliation letter, honestly I

1 would like to have that not on the record at the present time.
2 I would like to be able to take that up with you in chambers
3 just because I think it is sensitive. And I think it would be
4 something that at least I'd like to request we talk about
5 confidentiality. But if the Court wants to do it in court, we
6 can. We're prepared to do so, but I think it's a matter of
7 some sensitivity, and I want to be sensitive about it.

8 THE COURT: Okay.

9 MR. ZIMMERMAN: But the stuff in between the
10 interrogatory limits, I mean we're going back and forth. Did
11 we agree to a limit of interrogatories, do we go by the limits
12 that's in the rules, are we going to agree to 50, are we going
13 to agree to 60, or are there no limits at all? Honestly,
14 interrogatories to me in a case like this are of such limited
15 value because the question is if you're talking about the
16 Plaintiffs' medical condition or the Plaintiffs' medical, that
17 should be done by a Plaintiffs' fact sheet. It always is, and
18 it's something we agreed to, something we work out. The Court
19 agrees it's an abbreviated form, and we have a -- kind of a
20 way to do it that's pretty much become standard fare.

21 THE COURT: What has triggered this dispute? There
22 are a set of lengthy interrogatories, is that what triggered
23 it, or a discussion, or what happened?

24 MR. ZIMMERMAN: I haven't been party to all the
25 discussions, so I think I'm going to let the people who have

1 been party to it because if I repeat it inappropriately,
2 someone is going to jump down my back. But I know the nature
3 of it, but I'm going to let the people that have been fighting
4 this one out talk to the Court about it. But I'm just giving
5 you the overview. It's about how many.

6 THE COURT: Okay.

7 MR. ZIMMERMAN: And then the question of should we
8 just do Plaintiff fact sheets and limit interrogatories, or
9 should we phase them in some way. But we'll talk about that.
10 It's just a matter of introduction.

11 The second one has to do with three depositions that
12 we're trying -- that we want to take of Commissioner Bettman;
13 Dr. Charles Burke who is the head of the NHL physician
14 society, and on the concussion study; and Gary McCrossin who
15 is a head trainer. We think these are very important. We can
16 tell you why. And the -- what's going to be discussed today
17 is, do we have to have a formal motion, does it have to be a
18 motion to quash, or can we just resolve it by telling us what
19 each party's side of the story is and you decide, can they go
20 forward, should they go forward, or should they be deferred as
21 Defendants I think are asking until document productions are
22 completed. But we can talk about that, and people more --
23 with more hands-on knowledge of those are going to be
24 discussed. Those are the two issues of discovery that are now
25 before you as per this agenda.

1 There's the motion to compel, which is item number
2 three, which I think is before the Court. And that has to do
3 with, can you do discovery of people who are -- had filed
4 Complaints but they're not part of the Master Consolidated --

5 THE COURT: Right, and you've all supplemented the
6 record on that and I'll rule, unless you want to be heard for
7 some reason.

8 MR. ZIMMERMAN: No, it wasn't to be heard further
9 and to argue it further. It was just a matter of
10 housekeeping, and that's what's out there.

11 THE COURT: Okay.

12 MR. ZIMMERMAN: Then the Notice of Interest update
13 and the non-retaliation issues are things I think should be
14 discussed privately, if we can.

15 THE COURT: Okay.

16 MR. ZIMMERMAN: Okay?

17 THE COURT: All right. Do you want to just bring me
18 up to date on the new Adams/Goring Complaint --

19 MR. ZIMMERMAN: Yes.

20 THE COURT: -- and we'll have that finished --

21 MR. ZIMMERMAN: Yes.

22 THE COURT: -- and then we can move on.

23 MR. ZIMMERMAN: Yes. Rob Shelquist is here. His
24 group -- and he can introduce it -- has filed another
25 complaint with, I believe, 29 Plaintiffs. And the question

1 for that is, how are they going to be woven into the
2 litigation in terms of leadership structure and where they
3 fit; do they have to answer; is there an Answer due, or how --
4 are they going to be melded into the Amended Consolidated
5 Complaint. I can say this. I've met with Rob. I know Rob
6 very well from other cases. We had lunch actually yesterday
7 to talk about it, and we're working on an understanding.
8 We're not finished, but we're working on it. And I think
9 we're close --

10 THE COURT: So it's premature for the Court --

11 MR. ZIMMERMAN: It is premature. It's just a matter
12 of update for the Court. But I think we will come to a
13 resolution, a very easy resolution. But he's got a
14 constituent group, I've got a constituent group. Once we get
15 everyone to say yes, we're probably where we need to be. But
16 we're not here to announce that we've come to final agreement
17 on that. But Rob can -- Mr. -- Rob Shelquist can give you an
18 update of his case if you'd like it, but it just has to do
19 with how does his case work within the MDL and how does his
20 group weave its way into the leadership.

21 THE COURT: Okay. Very good.

22 MR. ZIMMERMAN: Okay.

23 THE COURT: All right.

24 MR. ZIMMERMAN: So then what we're really -- if
25 you -- unless the Court wants to hear more about --

1 THE COURT: Well, Mr. Shelquist, do you wish to be
2 heard, or do you want to wait until you've reached some
3 arrangement with Mr. Zimmerman and the leadership committee?

4 MR. ROBERT SHELQUIST: Good afternoon, Your Honor.
5 Uh, I just wanted to add that our Complaint has not yet been
6 formally served. I understood there was some sort of
7 mechanism that might be in place to do that informally. I
8 intend to talk to the defense counsel here and hopefully get
9 that taken care of yet this week.

10 THE COURT: Okay.

11 MR. ROBERT SHELQUIST: Thank you.

12 THE COURT: All right. Very good.

13 All right. Mr. Beisner, do you want to give some
14 preliminary thoughts or comments before we get into what
15 appear to be the disputes?

16 MR. BEISNER: Yes, Your Honor. I think it may be
17 best just to get into the disputes, but I did want to just
18 make an observation about the overview since I'm taken a
19 little bit back on this "we are behind" issue which isn't on
20 the agenda. I just wanted to note that in terms of document
21 production, there was a schedule that was agreed upon and is
22 in the order. And we're on schedule under that order of the
23 designation of search terms, we're supposed to come back under
24 that schedule. And this has not been raised with us so far as
25 being a source of concern. But the Court did establish a

1 schedule on this, so I guess I'm quite uncertain as to what
2 the issue is there, and perhaps the parties should have a
3 discussion about that.

4 But Your Honor entered an order, there's a schedule
5 for getting things done. This is an ESI production process.
6 You've got to agree on search terms and so on. It's a pretty
7 standard order. But that doesn't produce documents overnight,
8 and I think once those agreements are reached on what the
9 search terms ought to be, the paper flow will commence pretty
10 quickly.

11 But I think that we've had a couple of week
12 extensions on interrogatory and document request responses on
13 both sides, but those have been mutual. But the ESI schedule
14 is really what drives this, and we're on schedule on that. I
15 understand there may be frustration and we have frustration,
16 too. Most of the disputes we have before the Court today are
17 our efforts to get materials. And I'll wait until we -- to
18 get to those specific disputes when we get on them. But I am
19 a little bit taken aback about the concern on the document
20 production schedule because we're on target.

21 THE COURT: Let me ask you this. It is not uncommon
22 to have some sort of informal dispute resolution process. We
23 do it a lot in this District, at least. As long as it's done
24 properly, do you have any objection? You're welcome to use it
25 as much as the Plaintiffs, so --

1 MR. BEISNER: No, Your Honor, not at all. In fact,
2 that was one of the things -- we had not spoken about that,
3 but was one of the things that I was intending to raise today,
4 as well. So, I will chop that up to great minds think alike
5 on this issue. But I do think that there are issues that
6 could be resolved in the interim on an informal basis. I also
7 think, Your Honor, when we come here for these conferences --
8 and again it depends on what you're comfortable with, but I
9 know in a number of MDLs, there's often a brief meeting with
10 the Court in advance in chambers in case there are issues of
11 the sort of some of the things we had on the agenda today that
12 might be best taken up with the Court in that setting and
13 allowing the Court to make a decision about what would be
14 appropriate to -- to air in court, as well.

15 THE COURT: I'm glad to do both. I don't know that
16 my chambers can -- I don't think you can all fit in my
17 chambers, but certainly a group of folks on both sides could
18 come in.

19 MR. BEISNER: I should have clarified, Your Honor.
20 Yes. I suspect you don't have a stadium seating arrangement
21 there.

22 THE COURT: I don't have a stadium, no.

23 MR. BEISNER: No, it's usually a couple of counsel
24 from each side meet with the Court and perhaps give some
25 advance indication of things on the agenda and any other

1 matters that need to be discussed.

2 THE COURT: That's a nice idea, and I think I
3 will -- I think what I'll do is I'll do an order that
4 incorporates that thought, as well as sort of enumerates what
5 I would expect from some informal dispute resolution process.

6 MR. BEISNER: Your Honor, thank you.

7 THE COURT: You bet. All right. So, dispute number
8 one, does that have to do with interrogatory limits? No?
9 Yes?

10 MR. DAVIDSON: It does, but if I could just raise
11 one point.

12 THE COURT: Sure.

13 MR. DAVIDSON: And I'm sorry, Mr. Beisner.

14 MR. BEISNER: Sure.

15 MR. DAVIDSON: Stuart Davidson on behalf of the
16 Plaintiffs. I just wanted to kind of address Mr. Beisner's
17 point about that we're on schedule. The concern that the
18 Plaintiffs have is not that we're not moving pursuant to the
19 schedule, it's that we have a December 31st deadline to file
20 to complete discovery and we have asked for depositions, which
21 we'll talk about -- Mr. Grygiel will talk about that -- and
22 they've said, no, document production first -- we can't be in
23 a position from the Plaintiffs' side of waiting for the
24 Defendants to tell us when they're ready to produce documents
25 or to produce a witness for deposition. We have, upon our

1 review based upon their initial disclosures, about 40
2 depositions that we need to complete through the end of the
3 year. That equals about one deposition a week if we start
4 next week.

5 THE COURT: Have you provided the defense with a
6 list of those depositions?

7 MR. DAVIDSON: We've provided a list of three, and
8 we've told Mr. Beisner -- and Mr. Grygiel can talk more about
9 this, but we did provide a list of our first three deponents
10 that we believed we needed now to kind of guide us throughout
11 the rest of the discovery process. And we actually served a
12 notice of deposition, but we said we're going to do and agree
13 with the schedule that the Defendants will agree to. We
14 actually have one of the deponents, a third-party, Dr. Burke,
15 tell us he'd be available for deposition in April but then
16 once his counsel spoke with NHL's counsel, he said, I
17 understand we're not -- we don't have to sit for a deposition
18 until the NHL's argument about the documents first gets heard
19 by the Court, so --

20 THE COURT: Would you have any opposition to
21 providing the NHL with a list of at least half of those
22 depositions so that they could work with folks to find
23 convenient dates, and we could actually put a chart together
24 and everyone can plan and --

25 MR. DAVIDSON: And I think that's what the intent

1 was behind pretrial order number six, the deposition schedule.
2 There is, you know, a list of 40 or more deponents. But I
3 think it would be in our best interests to take the initial
4 set of depositions to figure out who has the information that
5 we need. We haven't received any documents. We're willing to
6 take these depositions before we receive any documents because
7 we believe we can do so and we want to get the ball moving.

8 THE COURT: If I should agree to allow you to
9 proceed with these three depositions, would you then be
10 agreeable to identifying again perhaps the remainder of the
11 depositions or at least the majority of the remainder of the
12 depositions you anticipate so, again, we could come up with a
13 reasonable schedule on them?

14 MR. DAVIDSON: I think we could absolutely do our
15 level best to do so based -- of course, a lot depends on the
16 documents that we do end up receiving as far as --

17 THE COURT: Well, you could reserve the right and
18 have a good cause standard and all that good stuff.

19 MR. DAVIDSON: Of course.

20 THE COURT: But the point is so everybody can plan.

21 MR. DAVIDSON: The answer is absolutely yes.

22 THE COURT: All right.

23 MR. DAVIDSON: So I just wanted to kind of respond
24 to the question of we're on a schedule. We want to meet this
25 Court's schedule, but we're -- we need to be on a little bit

1 faster pace.

2 THE COURT: Let me ask you this. When -- I'd have
3 to go back and look specifically at the order. I don't recall
4 that the order anticipated documents first, depositions next.
5 It's true that that happens sometimes, but when is the end
6 date for document production? Or is it the end of December?

7 MR. DAVIDSON: There isn't an end date. That may be
8 a problem because what I've seen in too many cases is we get
9 to December 1st, let's say, we're a month away, and document
10 production is not complete, we still have depositions to take,
11 and then we as the Plaintiffs are left scrambling to come
12 before the Court and say, we don't have anything we need;
13 please, can you push the class certification deadline out
14 three more months? And then we come in two more months later
15 and we say, we still don't have everything, Judge, so we need
16 a little bit more time. I would love to be able to make this
17 the exception to that rule and so we don't have to be in that
18 position. But we do have to move and move at a relatively
19 rapid base, which we're willing to do.

20 THE COURT: One alternative I've seen is where you
21 have a substantial completion date which then triggers the
22 beginning of depositions. We move it way up. We make it in a
23 couple months from now --

24 MR. DAVIDSON: Sure.

25 THE COURT: -- so that there's plenty of time to get

1 those depositions noticed in the summer and the fall then.

2 MR. DAVIDSON: We would have no objection to that,
3 Judge, and I appreciate the time and Mr. Zimmerman yielding
4 the floor.

5 THE COURT: All right.

6 Mr. Beisner.

7 MR. BEISNER: Your Honor, I don't know if I should
8 address that issue first or what is your --

9 THE COURT: Well, I think we're just trying to get
10 an -- these are issues we commonly deal with in these types of
11 cases. What we can't have, of course, is sort of no deadline
12 for substantial completion and then end-loading of documents
13 and depositions squeezed into the holidays and then a request
14 for an extension. So, right now I'm a big believer in
15 planning. Let's plan in a way that's manageable for
16 everybody.

17 MR. BEISNER: And, Your Honor, that's really I think
18 all we were saying. I think I made very clear in the
19 conversations I had with the other side that we're not
20 talking -- we're not proposing that depositions wait until
21 document production is complete. In PTO number six -- and we
22 had a lot of discussion about this -- we adopted a plan that I
23 think has worked well in other MDL proceedings, and that is --
24 I was very specific as to who should do it -- that
25 Mr. Zimmerman and I were supposed to get together and compare

1 lists of depositions and work toward building a schedule.

2 Part of that purpose of that is -- and the -- and
3 the order is very specific in saying that it should be with an
4 eye to making sure that you've got documents available for the
5 deposition. It specifically says that it should reflect
6 sequencing consistent with the objective of avoiding the need
7 to subject any person to repeated depositions. That's very
8 specific in there.

9 But part of the reason for that discussion, Your
10 Honor, is so that we can figure out prioritizing, to the
11 extent we can, the production of certain documents. The
12 approach that we've taken is a document custodian approach.
13 If you've got a custodian on the list, then you know those are
14 documents you need to move up in the queue to get produced.
15 They're not all going to arrive at the same time.

16 THE COURT: So tell me where we stand. Where do we
17 stand on search terms? Have we identified custodians? What's
18 going on?

19 MR. BEISNER: The search terms, under the schedule,
20 Plaintiffs have proposed theirs to us. We have a date under
21 the schedule to get our response to those search terms back,
22 and then there's supposed to be a discussion process after
23 that, and then the search will begin. So, again --

24 THE COURT: Okay. Am I to presume that will happen
25 in the next 30 days?

1 MR. BEISNER: Oh, yes, that's what this schedule
2 provides.

3 THE COURT: So let's imagine for a minute that we
4 have our search terms and custodians identified by the end of
5 March. What would you propose for a substantial completion
6 date that would still enable the taking of 40 depositions by
7 the end of the year?

8 MR. BEISNER: Your Honor, I don't know if I know
9 that date now, but what I'd suggest is the following. We have
10 not had -- and this was our main objection to getting these
11 three deposition notices without any prior discussion on this.
12 We have not had a discussion about what depositions Plaintiffs
13 want. We've got a list, as well. And I think we should get
14 together, have a conference; it's what the order provides, and
15 we can set a schedule and I think Your Honor is right. You
16 don't have to have document production complete, but if we
17 sort of have placeholders for dates for those depositions and
18 we have targets to work for --

19 THE COURT: And we have the notion that it's
20 substantially complete so that everyone tries to make it
21 complete by that date.

22 MR. BEISNER: Right. And I think we need to make
23 clear, there's a lot of third-party depositions at issue here.
24 And so both sides need to be comfortable that we have document
25 production complete because Plaintiffs may say, well, we don't

1 need documents for this deposition, but we may want to have
2 the documents available. They're not our witnesses either.
3 And so we have both sides, and that's why I think building
4 that schedule is important. But no one has approached us with
5 the list to do that. I think that's less of an issue that we
6 need to be meeting with you about; we need to have the meeting
7 with each other about that. And I've said before --

8 THE COURT: But, you know, in part I adopted your
9 request -- meaning your side's request -- that the exhibits be
10 identified in advance so that you would have them.

11 MR. BEISNER: Right.

12 THE COURT: So that plays against the notion that
13 they shouldn't be permitted to take some early depositions if
14 they want to explore the landscape and see whether they're
15 selecting their depositions wisely, you see. You're going to
16 get the documents they're going to use, right? I mean, is
17 there some reason I shouldn't let them go forward with these
18 depositions early?

19 MR. BEISNER: Well, there are additional reasons for
20 that. Two of the three witnesses are not NHL witnesses,
21 they're third-parties. We're going to have a right to depose
22 those witnesses, as well. We'd like to have documents before
23 going into that deposition, as well. The third person that
24 they have noted is the Commissioner of the NHL, the grand apex
25 witness. And this is the same approach that was taken by

1 Counsel in the *Dryer* case, in the NHL [sic] films case in this
2 District. And, you know, that was rejected on apex deposition
3 grounds and, you know, that is not one that needs to come
4 first. And under that law, which we would like to brief if
5 that's before the Court, that that should be there.

6 But I think, Your Honor, these depositions, all of
7 these, we -- the parties should meet, figure out what that
8 schedule to be, placeholder dates going out. First half of
9 the list or whatever, you know, Plaintiffs want to do, but
10 consistent with Your Honor's suggestion, and put these dates
11 in. But I think that, consistent with the order we agreed
12 upon, we ought to have some documents out there before these
13 depositions are taken for the benefit of both sides,
14 especially with respect to third-party witnesses that we have
15 a right to examine, as well; but if we don't have documents,
16 it's a somewhat pointless exercise.

17 MR. DAVIDSON: Judge, could I just say one thing
18 about third-parties, just so we have the full picture?

19 THE COURT: Sure. Sure.

20 MR. DAVIDSON: We subpoenaed all the member clubs,
21 we subpoenaed the trainers society, and they all issued
22 blanket, wholesale objections to producing a single document
23 to us. So, in one of their grounds that they both said was
24 this Court has a motion to dismiss under advisement, we're not
25 going to produce anything until that's ruled upon, which is

1 obviously contrary to what we're all discussing here today.
2 So, even though they're not the NHL's witnesses, they're
3 taking the position that they're not producing any documents.
4 So, we're coming towards the same problem of timing --

5 THE COURT: Well, I can't tell third-parties what to
6 do, but third-parties can file a -- an objection in the
7 District in which the subpoena is issued. They can go to the
8 Court. The Court can decide whether to hear it or to send it
9 to me, and I guess that's the process we need to follow. I
10 can't order otherwise.

11 But it is true that the fact that there is a motion
12 to dismiss pending will not keep discovery from going forward.
13 I think both sides of this case agree on that. So --

14 MR. DAVIDSON: I just wanted to give the Court a
15 full picture.

16 THE COURT: But in terms of whether you want to wait
17 until that process is resolved before you take those
18 depositions, perhaps you want to consider that. I don't know.

19 MR. DAVIDSON: Well, and we will, but if we decide
20 to go forward, I think we should have that ability.

21 Mr. Beisner is saying we have the right to take their
22 deposition as well as third-parties, and we want documents
23 first. But now we're stuck in a catch-22 because they're --

24 THE COURT: I think he's saying he wants documents
25 from you.

1 MR. DAVIDSON: I think he's saying he wants
2 documents from the third-parties.

3 THE COURT: Or from them. I see.

4 MR. DAVIDSON: Because that's who they would
5 question the witnesses regarding.

6 THE COURT: Have you subpoenaed the third-parties
7 for documents, Mr. Beisner?

8 MR. BEISNER: No, Your Honor, but we want to see the
9 documents that they have requested from them before these
10 depositions are taken and, you know, may have additional
11 requests. But I think that's -- that's the main concern we
12 have is those documents are not present.

13 Your Honor, you know, I want to note, as well, back
14 on your question about process here. Our response on the
15 search terms is due shortly, as I mentioned. I think we're a
16 week away from our search terms coming back. And I think once
17 we get that straightened out, we'll be able to give the Court
18 an estimate. But we're talking about over 40 years of
19 documents that we're going to have to look for on those search
20 terms. And so depending on what that -- those -- the search
21 term agreement is, we'll be able to provide I think everyone a
22 better estimate on that. But it's a lot of material over a
23 long period of time, and a lot of that will depend on what
24 those search terms turn out to be in the end.

25 THE COURT: And have you agreed on a number of

1 custodians who will be searched?

2 MR. BEISNER: The custodians, yes, we have -- we've
3 exchanged the list, but I think we're basically in agreement
4 on what those are.

5 THE COURT: Can you give me a ballpark of how many
6 custodians we're talking about?

7 MR. BEISNER: We have the -- I'm not sure, Your
8 Honor, but we'll get you that information. It's a fairly
9 significant number, and then we've got some other locations to
10 look for materials, as well, on that.

11 THE COURT: Okay. All right.

12 MR. BEISNER: Your Honor, if I may turn to the
13 dispute list -- and we've sort of covered part of that but
14 wanted to turn to two of these. And the -- and I think this
15 blends it a little bit, Your Honor, so I don't mean to go back
16 to it because I know it's fully briefed. But our motion to
17 compel with respect to the first set of interrogatories that
18 we had, Counsel, on the interrogatory limits, what has
19 happened is that we served on Plaintiffs interrogatories that
20 are a fact sheet. That's what we served was basically this
21 set of questions of the sorts that we submitted to your
22 court -- to the Court as part of the motion to compel on the
23 first set of interrogatories. We did it that way because of
24 Plaintiffs' position that we could not present fact sheets or
25 get any information except from the six named Plaintiffs in

1 the class action Complaint. So to keep the process going from
2 our perspective, we simply served those as interrogatories.

3 I don't see any reason to go back to negotiate those
4 as fact sheets. If Plaintiffs have objections to some of
5 those, they can be made and we'll work that out in the same
6 way we would negotiate a fact sheet. But that's basically
7 what we have served on all of the Plaintiffs who have filed a
8 Complaint in the action, not just the six but we served it on
9 all of them. After we served those, we got the call saying,
10 well, these are improper because it's more than 25 subparts in
11 violation of Rule 32(a) setting a 25-subpart limit -- or
12 25-interrogatory limit. We understood and I think we talked
13 explicitly during the negotiation process, the 26(f) process,
14 that we would not have limits on the number of interrogatories
15 just for this precise reason, there's always a dispute about
16 subparts. And it seemed to us in an MDL proceeding of this
17 size that those limitations would be inappropriate.

18 And so on the 26(f) report, we included the
19 statement, "The parties do not propose that the Court limit
20 the use and numbers of interrogatories and requests for
21 admission." That's consistent if you go to form three of the
22 Court's local forms for doing 26(f) reports that has the
23 statement, "The parties propose that the Court limit the use
24 and number of discovery procedures as follows." It lists them
25 all, and there's a blank where you fill in the number.

1 We think that the number that was filled in was zero
2 and that we were not limiting those. And instead, we got the
3 objection that this should be limited to 25. We think, Your
4 Honor, that that limitation shouldn't be imposed here. We
5 think that's what was agreed to. We believe that's what the
6 Court said it was approving in approving our 26(f) report. We
7 think that was explicit in there and was worded consistent
8 with the way Form 3 of the local rules is set forth. In any
9 event, we've basically have served the fact sheet and we think
10 that as the briefing on the motion to compel indicates, that's
11 standard operating procedure in MDL proceedings.

12 All people who file claims answer those, whether
13 they're part of a class action Complaint or not. We, I think,
14 made clear that if you look at the track record in this
15 District, that's been the consistent practice. And if you
16 look at *Baycol* and the *St. Jude* case where there were class
17 actions present, everybody answered those. So, we think that
18 these are the fact sheets. I don't think any purpose is
19 served to go back and try to negotiate those. We can work
20 that out in the process consistent with Plaintiffs' statement
21 about let's keep things moving. I think that's the right way
22 to do it, and if there are objections to -- specific
23 objections to the content of those interrogatories, we can
24 work those out in the same way we'd negotiate a fact sheet.

25 So, Your Honor, we're just asking the Court to say,

1 let's get the objections and answers to those raised and get
2 on with it.

3 THE COURT: Thank you.

4 MR. GRYGIEL: Your Honor, if I might just briefly,
5 Steve Grygiel for the Plaintiffs.

6 THE COURT: Sure.

7 MR. GRYGIEL: I was involved with Mr. Beisner and
8 with Mr. Cashman from our side, excuse me, as we discussed the
9 question of interrogatories. And so the record is clear, we
10 did offer that we would go up to 50 interrogatories, a
11 100 percent increase over Rule 33(a)(1). And that offer,
12 obviously, was not accepted or we would not be here today. We
13 do agree with Mr. Beisner, of course, that this is a big case
14 and that discovery is important in this case, and we do want
15 to see it move forward. But we thought that 50 was a
16 reasonable number given the nature and posture of the case,
17 recognizing the parties, with good cause, always may come back
18 later and ask the Court for more. But I didn't want it to
19 appear that we ourselves were stuck on the number of 25
20 because we are not. Thank you, Your Honor.

21 THE COURT: Okay. But Mr. Beisner says that when
22 you met and conferred before there was an agreement on no
23 limitations. Was that in the context of interrogatories
24 directed at the Plaintiffs at that time, or how is it that
25 that agreement has changed?

1 MR. GRYGIEL: Your Honor, that's the problem. I
2 don't remember us having an agreement on that. In all candor,
3 in honoring my duty of candor to the Court and certainly to
4 Mr. Beisner and my defense counsel friends, I don't remember
5 ever agreeing that the number of interrogatories would be
6 unlimited. I know I took away from the process -- and it was
7 a somewhat mushy process, there were a number of calls and a
8 number of e-mails and a number of parties involved -- I took
9 away that we were at 25. I know I took that away. This may
10 simply be me -- because I loathe interrogatories. I don't
11 like answering them, I don't like writing them. And I
12 remember telling my group, well, let's stick with 25 and if we
13 have to give more, that will probably end up happening anyway.
14 That's why I got to 50 when we talked. But I don't remember
15 the agreement being as Mr. Beisner does. And that's not to
16 say he's wrong; I just don't remember it that way, Your Honor.

17 THE COURT: Given the subparts in the
18 interrogatories that the Defendants had propounded against the
19 Plaintiffs, do they exceed 50?

20 MR. GRYGIEL: Not yet, Your Honor. I think we ended
21 up saying that they had room for, I think, six or seven more.
22 We had e-mail correspondence to that point, and I'd understood
23 that perhaps those would be used for contention
24 interrogatories.

25 THE COURT: Mr. Beisner?

1 MR. BEISNER: Yeah.

2 THE COURT: If the Court had a limit of 50 but you
3 could come forward for good cause and it excluded contention
4 interrogatories, does it matter?

5 MR. BEISNER: Well, it gets us over the hump on
6 this, Your Honor. And we paused on that when it was made.
7 The problem is that I think the original offer was 45, that we
8 would get one more, and it just -- it seems to me that -- and
9 I think we're having some questions now about the subparts of
10 the interrogatories that Plaintiffs have posed to us. We
11 hadn't thought about that, but now we've gone back to check.
12 I'm not sure that they don't exceed 50 in the interrogatories
13 they've posed to us that we have to deal with on Monday. The
14 subpart exercise, Your Honor, just seems to be you're -- we're
15 just going to get into a morass about what's a subpart, how
16 many there are. I think that's what I articulated as a reason
17 to not have the limit when we had the discussions.

18 And frankly, that's normally something a Defendant
19 wants, not the Plaintiff in the case because the -- there's
20 not a whole lot more beyond the fact sheets that we're going
21 to want. We're going to want some contention
22 interrogatories --

23 THE COURT: You know, for both sides, if you'd just
24 think if you were sitting up here what you'd be thinking, what
25 you'd be thinking is you're going to allow interrogatories.

1 That makes sense. And to the extent they're excessive, you're
2 not going to allow them. So, counting subparts is really not
3 necessary. I expect each side to be reasonable about this,
4 but there is some hesitation to saying no limits here. So, I
5 want to accommodate everybody's opportunity to ask the
6 questions they need to ask. So, I think we can resolve this
7 comfortably.

8 MR. BEISNER: Okay.

9 MR. GOLDFEIN: Your Honor, in answer to your
10 question -- Shep Goldfein. In answer to your question about
11 the number of custodians --

12 THE COURT: Yes.

13 MR. GOLDFEIN: -- we identified 21 custodians to the
14 Plaintiffs. But what that does is, those are living beings
15 because they go back to 1967. And the number of deceased
16 people, like a Clarence Campbell that's pled in the Complaint
17 and the like are the -- the NHL is the custodian of whatever
18 files they left behind. We have offices in New York,
19 Montreal, Toronto, and we have a very massive search that will
20 have to be done for hard copy documents before the days of
21 ESI. And we're also going to have a massive search for ESI
22 materials. And on March 13th, our ESI counterproposal is due.
23 We have as much interest in fetching responsive documents that
24 support our defenses in the case as they have in trying to
25 search for documents that support their allegations.

1 So, we -- we are -- have undertaken quite an amount
2 of work over the last several weeks since we got their
3 document request, not just simply focusing on the objections
4 to their requests where we feel they're overbroad or whatever.
5 And we have to meet and confer with them to try to resolve
6 those objections, but in looking in trying to assess what it
7 is we have to do in order to make a responsible, substantial
8 production of documents to them, we haven't finished that
9 analysis in part because we have to have an agreement on ESI.
10 The protocol provides for a test run of the terms so that we
11 see if they're working and to do this in a responsible way.

12 I really don't quite understand the -- Counsel's
13 suggestion that things are not working or that they're
14 frustrated. I understand that they're frustrated, that they
15 would like to start discovery. But we have interests in our
16 own cross-examination of our own witnesses and of
17 third-parties, not simply based on the documents that the
18 third-parties produce but what turns out to be in our files
19 that can go back quite a ways and asking those witnesses,
20 whoever they are, about those issues in building our own
21 defense and our own record in anticipation of a summary
22 judgment motion.

23 So, it's not just a one-way street. And we need to
24 have a schedule where we sit down with them as contemplated by
25 Your Honor's orders and say, this is the list of the

1 deponents, these are the materials. We need to have a
2 rational dialogue with them about what documents you need or
3 you don't need. We're not going to produce, unless Your Honor
4 orders us to, Commissioner Bettman more than once in this
5 case. And for them to suggest they're ready to take his
6 deposition without documents so later they can come back after
7 they see the document production and they've taken some of the
8 staff and the other people who have actually implemented the
9 policies regarding concussions and return-to-play decisions
10 and then say, well, now they need the Commissioner back again,
11 that -- that's just the wrong order.

12 And we need to have that conversation with them
13 privately before we take it to Your Honor. And then Your
14 Honor will decide if we can agree. But we haven't even had
15 that discussion with them. They just noticed subpoenas and
16 notice that they subpoenaed the Commissioner. The
17 Commissioner is an employee of the League. He doesn't gets
18 subpoenaed as a third-party. He's a party witness. They
19 never had a meet and confer, Mr. Zimmerman and Mr. Beisner, to
20 follow your court -- the Court's order which provided that
21 they sit, meet and confer, that we try to work out a schedule.

22 If we cannot agree for a schedule for the case, I
23 know we'll be back here and Your Honor will make that
24 decision. But we haven't even gotten that far in the case.
25 So, this all comes as a -- somewhat of a surprise to us in a

1 case in which they're expecting us to go back to look for
2 documents at least back to 1967. The League was formed in
3 1918. Clarence Campbell, who they -- the way they've written
4 their document requests, if there are documents that are
5 referred to in an earlier period, they want those documents,
6 as well. We have to go back and look. And they're asking for
7 all documents regarding fighting in the NHL, any form of rule
8 changes, any -- the entire business. Believe me, Your Honor,
9 the entire business of hockey, the way the game is played, the
10 way it's organized, the financials over time of the League,
11 every aspect of the League. And they're saying, oh, well, you
12 know, we can just do this overnight.

13 THE COURT: Okay.

14 MR. GOLDFEIN: Thank you, Your Honor.

15 THE COURT: Wait, wait, wait, I have a question for
16 you.

17 MR. GOLDFEIN: Oh, I'm sorry.

18 THE COURT: Tell me how the NHL archives their
19 documents. What have you learned about whether there are -- I
20 mean, I grew up in the day of boxes, too, so do they have
21 lists and organizations and --

22 MR. GOLDFEIN: There are lists, there are some lists
23 with document box titles on them. We've had some people go
24 and go into the basements in the various places and start to
25 pull documents based upon the very broad allegations that are

1 in the Complaint and that have been raised --

2 THE COURT: And what volume of documents --

3 MR. GOLDFEIN: -- so, it's hundreds of boxes of
4 documents.

5 THE COURT: Okay.

6 MR. GOLDFEIN: Whether what's in those boxes and
7 whether they are responsive -- I mean to give you an example,
8 Your Honor, there are -- there are, over time, for instance,
9 there are many documents that would relate to rule changes.
10 Some of them are rules regarding physical contact on the ice.
11 Let's call it that for the moment. Some of them are about
12 rules regarding the blue line, the red lines, and other issues
13 that don't relate to the allegations in this Complaint.

14 THE COURT: Well, let me suggest something that we
15 see done in many big cases, and that is that you set up a
16 repository with these documents, you let the Plaintiffs do the
17 searching and tab the documents, you review the documents for
18 what you view are relevance and privilege considerations, or
19 you can exclude boxes that might clearly contain privileged
20 documents, you put the onus on them to do the search. I've
21 seen that done a lot. Is that something that might help you
22 with your hard copy while you're focusing on your ESI?

23 MR. GOLDFEIN: Candidly, I don't think our client is
24 prepared to open its files routinely to --

25 THE COURT: Nobody ever is, so you have to have a

1 bunch of rules --

2 MR. GOLDFEIN: -- a sort of wholesale review.

3 THE COURT: Yeah.

4 MR. GOLDFEIN: I do think and we are prepared to do
5 a very expedited review of the materials. We've got scores of
6 lawyers literally in place to do it.

7 THE COURT: Okay.

8 MR. GOLDFEIN: And we intend to move expeditiously,
9 Your Honor.

10 THE COURT: All right.

11 MR. GOLDFEIN: But what we are concerned about,
12 frankly, is there's a lot of over-breadth. Some of these
13 issues will get resolved in the meet and confer about what it
14 is exactly that they need for their case. You know, there
15 are -- there are many examples that I could probably, if I
16 think about it a little bit, I can give to Your Honor where
17 clearly the -- I don't really think they're interested in
18 getting that type of information. The trouble is, the way the
19 materials are kept, things are intermixed.

20 THE COURT: Sure.

21 MR. GOLDFEIN: They didn't have a file system where
22 they said, we're going to put a -- we're going to put this
23 over here about changing the rule on helmets and you're going
24 to find a file that is -- that's clear on when helmets were
25 collectively bargained and how they were agreed upon and when

1 the rules were implemented. It exists over a span of time in
2 a variety of different boxes. I understand the relevance of
3 that to the case. It's relevant, frankly, to our defenses in
4 the case, as well. So, we have every interest in making sure
5 that those documents get produced and that we make a very
6 substantial and as complete of production as we're able to
7 with a reasonable search.

8 THE COURT: And the way you have it set up, you can
9 do a rolling production.

10 MR. GOLDFEIN: And we're more than prepared to do a
11 rolling production with the Plaintiffs. The problem here is
12 we really need, as Mr. Beisner said -- and I hate -- I don't
13 mean to be repetitive here -- we need to have the
14 meet-and-confers that were contemplated by Your Honor's orders
15 to set up and decide when things can get done. If we cannot
16 reach agreement during that process, then we should be back
17 either informally through the process you were describing or
18 formally if it needs that to resolve those issues. But we're
19 not -- we're not there. I mean, I understand their
20 frustration, and I understand the deadlines as they were set,
21 and we all agreed upon them.

22 But we can meet those deadlines. I mean, candidly,
23 when we got their Rule 26(f) disclosure, they listed 1500
24 people as having potential knowledge of the facts in this
25 case. Fifteen hundred. Who were they? It was every owner,

1 every President of every club, every General Manager of every
2 club, every team doctor, every trainer, every coach. They
3 went -- they must have gone through the record and fact books
4 of the NHL which are published each season and they just
5 listed every name they could find, plus some friends and
6 family of the named Plaintiffs, and 1500 people. It's a
7 useless disclosure.

8 We need to meet and confer with them and find out
9 who really has the facts. We served an interrogatory, got an
10 answer the other day. Who has facts? Where are the facts
11 supporting your allegations in the Complaint? Tell us where
12 they are now. What do you have? The answer was: See the
13 list of the 1500 we gave to you. That's not an answer.
14 That's not a -- we need to meet and confer, and then we'll
15 come back to Your Honor. If we can't get an agreement with
16 them, we'll come back to Your Honor.

17 THE COURT: Okay. Thank you.

18 Yes.

19 MR. GRYGIEL: Your Honor, if I might, and I will be
20 brief, Steve Grygiel for the Plaintiffs. I'm glad we turned
21 to initial disclosures because on Mr. Bettman's deposition,
22 he's listed as a person with knowledge in the National Hockey
23 League disclosures and, in fact, if Your Honor were to look at
24 what was said about Mr. Bettman's knowledge, it is the
25 following: "All aspects of the game and business of hockey

1 generally and specifically in response to the Master Amended
2 Complaint." The only other person that they disclosed in the
3 initial disclosures whose knowledge is as capacious as
4 Mr. Bettman's is Mr. Daly's, the Assistant Commissioner.

5 So, this is not an apex deposition. This is not
6 someone coming in and seeking to depose the GM or the CEO of
7 General Motors about a problem with the brake plant in
8 Poughkeepsie about which the CEO has no knowledge and as to
9 which the CEO has no relevant information. This is a
10 deposition of someone who has been the Commissioner since
11 1993; who has overseen three of the longest term Collective
12 Bargaining Agreements in the League's history; who has, since
13 2010, filled seven pages with quotes that I've had pulled
14 concerning the concussion situation, the League's position on
15 concussions, what the League is doing about it, what the
16 League knows about it, and what the League thinks ought to be
17 done. This is a person who has more knowledge about
18 concussions, as far as we can tell, than anyone else in the
19 National Hockey League. And the initial disclosures confirm
20 that. This is not --

21 THE COURT: Now, you know you're only going to get
22 to do it once, and are you sure you don't want to wait until
23 you've had a substantial completion of their document
24 requests?

25 MR. GRYGIEL: I was coming to that, Your Honor, and

1 the answer is affirmatively yes for two reasons -- maybe
2 three. One, Mr. Bettman, apart from his personal knowledge
3 which is clearly demonstrably extensive and he's been very
4 public about it, he can direct -- so that's personal knowledge
5 from him that's highly relevant to all of our claims. Second,
6 he can direct us to other sources of people with whom he has
7 worked in the clubs, among medical personnel, among executive
8 personnel, and the concussion study who would have knowledge.
9 So he will be a very good roadmap that way, much in the way
10 that a 30(b)(6) would be.

11 And third, I am absolutely happy to take
12 Mr. Bettman's deposition using his public statements. One
13 hour of the deposition pursuant to protocol -- or pretrial
14 order number six can go to the defense counsel. If they want
15 to ask questions, I doubt they'll be prejudiced because he's
16 their witness. It's not like they need Mr. Bettman's
17 documents to prepare him. If documents come up later in the
18 case and they want to seek to -- leave to depose him for a
19 longer period of time, terrific. I guess I'll get my hour.
20 But yes, Your Honor, I'm willing to take that chance.

21 And in terms of the question of documents for these
22 other witnesses, Mr. McCrossin is a trainer for the
23 Philadelphia Flyers and has been for 18 years. He has two
24 master of science degrees. He's working on his PhD. I
25 believe he was the head of the National Hockey League Trainers

1 Association at one time --

2 THE COURT: But let me stop you on the
3 third-parties. On the third-parties, I can't order them here.
4 There's a process; we have to follow the process.

5 MR. GRYGIEL: I understand, Your Honor.

6 THE COURT: They have a certain amount of time to
7 object to the subpoena. You can certainly bring it to my
8 attention if they fail to do that, but --

9 MR. GRYGIEL: The point there, Your Honor -- and I
10 was losing it. The point I want to make there is, they are
11 really under the National Hockey League's control. I spoke
12 with Mr. Brooks' lawyer, John Conti, from the Dickie McCamey
13 Chilcote firm in Pittsburgh. I've had work with them before.
14 We had agreed that that deposition would go forward in early
15 April. And I said if documents can be produced before that,
16 so much the better. But if they can't, I'll take my chances
17 and cross-examine the old-fashioned way, the way I used to do
18 in criminal court. He said, fine, what does the NHL have to
19 say about this? And I said they have something to say about
20 it. They have to agree to the schedule. That's part of our
21 pretrial order and we're -- you know, we're going to rope in
22 Mr. Beisner to work on the schedule.

23 But nowhere -- and finally, Your Honor, I'll sit
24 down after this -- nowhere in the PTO does it say that the
25 parties have to meet and confer about every single deposition

1 that someone wants to take. What it says is the parties --
2 and this is the spirit of it, as well as the letter -- the
3 parties shall work to develop a mutually-agreeable schedule.
4 I thought -- and I take responsibility for it -- when I sent
5 the letter out with those deposition notices that that's what
6 I was doing. Whether it's a phone call, a meeting in an
7 office, I said here's what we'd like to do. If these dates
8 work, we would like to stick with them. If they don't work,
9 please tell me what does work.

10 And what I fully expected to come back was, you
11 don't get to take three in a row, Grygiel. You'll take one,
12 we'll take one of ours, you'll take one, we'll take one of
13 ours. But they simply took the position that, no, we have to
14 have more of a schedule developed. Now, I don't want to
15 misrepresent what the defense counsel has told me. They've
16 agreed that scheduling can go in tranches. And in a case like
17 this with *seriatim* document production and third-parties, that
18 makes sense because it's very difficult to develop all at once
19 a list of everybody you want to depose.

20 But we figured these three gateway depositions would
21 be important for personal knowledge, and they would be
22 important for framing the rest of that schedule, as well. And
23 that's, Your Honor, why I served those notices like I did. It
24 wasn't to preempt anybody. I left the door open to work out
25 the schedule; that's what I was hoping to do. But I did want

1 to get started because I will also take the blame or the
2 credit, depending on which way things come out, for doing the
3 arithmetic the other day. Each side got 40 depositions
4 pursuant to the PTO number six. And we have some idea, of
5 course, of who they are in terms of categories and some in
6 terms of names.

7 But I did the arithmetic and said, guys, this is one
8 every week from now until December 31st. We're already into
9 March. I've had the unpleasant experience of being on my
10 knees and genuflecting in humble obeisance to a Federal Court
11 asking for more time. I don't want to be there this time,
12 Your Honor. Thank you.

13 THE COURT: Very good.

14 Mr. Beisner.

15 MR. BEISNER: Well, Your Honor, I don't think that
16 there is any way that you can square sending a subpoena for a
17 party witness in the way that it was done here and subpoenas
18 for these others with no prior discussion with the pretrial
19 order on depositions. This was supposed to be -- and it's
20 very clear in there -- a collaborative process to talk about
21 setting up schedules, conferring about this with specific
22 reference to the objective of avoiding repeated depositions.
23 I just don't think there's any way you can say, well, here's
24 some depositions and some dates and not engage in that. It
25 specifically talks about Plaintiffs' lead counsel and defense

1 lead counsel having a conversation. That never happened. So,
2 I just think this is premature.

3 Your Honor, with respect to Commissioner Bettman's
4 deposition, I hate to say this, this happens in most MDL
5 proceedings. And right out of the box, they say, we want the
6 President. We want the CEO. We want to take that deposition.

7 THE COURT: But it's true under apex, it depends, it
8 depends on what the CEO knows and doesn't know. So --

9 MR. BEISNER: Your Honor, that's right. But if you
10 talk about Concussion Policy and knowledge, there are a number
11 of other people in the organization that are much more
12 directly involved in that. Of course he has commented on the
13 topic. If you plug in any corporation or organization, the
14 CEO is going to have commented on you-name-the-topic if it's
15 in the public media, more often than others. But that doesn't
16 make him the most knowledgeable or her the most knowledgeable
17 person in the organization. That's the person that part of
18 their job is to speak for the organization.

19 But -- and, you know, where this has happened in
20 MDLs even where the CEO is taken later; it's invariable to
21 come back when there's more documents produced, oh, we need
22 the person back again. It's a point of pressure. That's what
23 this is about. This isn't where you would start if you were
24 logically doing the deposition. You'd follow the apex
25 procedure and talk to some people who were involved most

1 directly in dealing with the development of Concussion
2 Policy within the organization, people who worked directly
3 with personnel who were brought on to provided advice to the
4 League on that issue. That's how the apex process works.

5 And so, Your Honor, I think the right solution here
6 is to tell us to do what should have happened in the first
7 place is go confer about these things. I think if the focus
8 is on Commissioner Bettman, there should be briefing on that.
9 I don't -- I think that's the case, but I think the first
10 thing we ought to be doing is following the order that we
11 agreed to and that the Court entered to build a schedule that
12 takes account of trying to get documents out there on the
13 record, not all of them but sufficient amounts to make these
14 depositions make sense. And I don't know where it's written
15 we're going to have one deposition a week. I assume when we
16 get rolling on this, we'll have more depositions than that and
17 our staff to deal with that issue. But we've got to get the
18 foundation laid here first, both in terms of getting documents
19 so we've got something to actually talk with witnesses about
20 and make these about factual discovery. You really wonder if
21 these depositions are about that at all if you're taking them
22 at this stage. We should be doing these for discovery
23 purposes. And that was the purpose of this order, and I think
24 we should be following it. Thank you.

25 THE COURT: You bet.

1 MR. GRYGIEL: I guess briefly, Your Honor, two
2 things came to me. One is, given that our ESI protocol
3 doesn't require the National Hockey League to turn over terms
4 to us or comment on our terms until the 13th of March, given
5 that there's another deadline of March 27th concerning
6 document production, I start to see the month of March
7 slipping away without any depositions. What I'd really like
8 to hear is whether or not we could get an agreement that we
9 can start taking depositions in some way this month.

10 Now, I, for the reasons I've already said, will not
11 restate that Mr. Bettman is absolutely the right first
12 deponent. And as I said to my friend, Mr. Beisner, on the
13 phone the other day, John, if we were being intellectually
14 honest or rigorous, I think he would have to be a 30(b)(6)
15 deponent if you were going to name one. John says, no, he
16 wouldn't, but -- I understand their point of view on that, but
17 I don't think there's anybody more knowledgeable who can
18 better direct our focus.

19 Number two, in terms of the Concussion Report,
20 that's Dr. Burke. He was a participant in the Concussion
21 Report, not to mention he was the lead doctor for the
22 Penguins, for the Pittsburgh Penguins, for a long time. He
23 treated Sidney Crosby's concussion. And he's a well-known
24 doctor in the sports medicine field, as well as being, I
25 believe he was the head of the National Hockey League

1 Physicians Organization. No better fact witness than him.
2 And of course we found out, no, you can't take him yet; we
3 think it's premature.

4 Again, I guess we just disagree about the PTO number
5 six. I don't think triumphal formulism is the best way to
6 make an MDL work. And I did think that our meet and confer
7 was functionally the exact equivalent of sending a letter
8 saying, here are dates we'd like to depose these folks on;
9 tell me what works for you. I don't see it makes a difference
10 whether I sit down or do it in a conference room or do it by
11 letter. That is what I was trying to achieve. I wasn't
12 trying to do anything other than get the ball rolling.

13 THE COURT: Okay.

14 Mr. Zimmerman.

15 MR. ZIMMERMAN: I think the point I was trying to
16 make at the beginning of the status conference today is
17 playing out in real time. We're respectful, we're not there
18 where we need to be in honing in on how we each view where
19 we're supposed to be and what we're supposed to be doing.
20 We're in a little bit of a disconnect, and I think I'm really
21 saying to the Court, we need some help with this. And I say
22 that somewhat timidly because it shouldn't -- it doesn't
23 always have to be this way. But the case is now coming to
24 this apex of sensitive stuff, sensitive discovery, and we're
25 going to need some guidance.

1 And I can't really put it any other way because you
2 kind of hear it in real time, and there's not a lot of
3 agreement here as to how this should go. But maybe through
4 some mediated process or some coordinated process with Your
5 Honor or someone of Your Honor's appointment, we can get there
6 because we do have to start getting there. And I know it
7 sounds frustrating to hear all this and it's frustrating for
8 me to listen to it, but we all want to get to the end. It's
9 just a question of whose method is going to work, and someone
10 is going to help us have to agree on that.

11 THE COURT: Well, I think the kinds of frustrations
12 I'm hearing today are, frankly, typical. This is not unusual
13 for big litigation. It's trying to get started, trying to get
14 started on the right track. So I think I agree with both
15 sides in many respects. But I also agree that perhaps the
16 best way to approach this is this way.

17 First of all, let me give you, in my mind, an
18 overview of sort of how this is going to play out. And then
19 I'll tell you what I think we ought to do in the month of
20 March. We're going to finish discovery by the end of the
21 year. By the end of March, we have three-quarters of the year
22 left. I see the document production taking one quarter and
23 the depositions taking two quarters. That is not to say that
24 I won't permit some depositions to be taken during document
25 discovery. But generally speaking, I anticipate about 90 days

1 for substantial completion.

2 I presume the NHL is working your way right now to
3 locate documents so you have time. And then we start in
4 earnest with a schedule that's reasonable, that's published to
5 the Court, in which parties have met and conferred both about
6 third-party witnesses and about employees and made it
7 manageable for everybody. I don't want documents end-loaded.
8 I don't want to hear at the holidays that we are backed up on
9 depositions. I want to see it all play out as smoothly as
10 possible.

11 That's easier said than done, isn't it? So I think
12 I agree with Mr. Zimmerman that I should put on my Magistrate
13 Judge robe and meet with a group of you that can fit in my
14 chambers and we ought to hammer this out. But before we do
15 that, I'm going to ask you folks to meet and confer and hammer
16 it out. Try to see what you can agree on and what you
17 disagree on. Let's be reasonable on both sides about this.
18 Again, the focus of this MDL is on the common discovery, not
19 the individual discovery, but the common discovery, and that's
20 what I so much want to accomplish by the end of the year.

21 So I think the way to do that is for you to meet and
22 confer in the next 10 days; for me to identify a date mid to
23 two-thirds of the way through March where I will invite you
24 in; for you to give me a submission before our joint meeting
25 so I can see where you're at; and also to publish for you a

1 protocol for approaching the Court informally so that I can
2 see monthly conferences at least now is not going to be often
3 enough, so that you can approach me, I can resolve things so
4 we can get this moving. I agree that we're hung up on both
5 sides, and I would like to see it move.

6 Any questions about that?

7 **(None indicated.)**

8 THE COURT: I will get back to you with a date. It
9 will probably not be next week but the week after that I can
10 get together with you, so I'd really encourage you to come up
11 with a date next week for you to get together with a meet and
12 confer. All right.

13 Now, with respect to the third-parties, again, if
14 the NHL is in touch with their counsel, they need to preserve
15 their objections to those subpoenas. It's not enough for that
16 lawyer -- and I've seen this before -- to say, well, NHL
17 counsel told me just sit on this, you know. That doesn't
18 work. They're third-parties. I'm sure that's not what's
19 happened. They have to go to court. If there's a motion to
20 enforce a subpoena and that judge can send it to me, I'd
21 encourage them to do that. I've done that with other judges
22 before. But that process needs to play out with
23 third-parties.

24 MR. DAVIDSON: And just for the record, Your Honor,
25 we do have a meet and confer with their counsel on Monday, so

1 that will work well.

2 THE COURT: Good. Good. Good. Good. All right.

3 And I think the rules that apply to third-parties,
4 as you know, are slightly different. So, keep those in mind,
5 too.

6 All right. Anything else we should talk about
7 discovery at this point? I think that's a process that will
8 hopefully lead to resolution by the end of March.

9 MR. BEISNER: Your Honor, I don't know what your
10 plans were on this, but we've talked about Plaintiffs'
11 requests on this. We have -- we had the several issues we had
12 to on responses that we need in order to be able to talk about
13 the depositions that we want to take --

14 THE COURT: Are you talking about the pending motion
15 to compel?

16 MR. BEISNER: Yes.

17 THE COURT: Okay. I will be ruling on that. I just
18 got the supplemental submissions in the last week.

19 MR. BEISNER: No, no, Your Honor, I was just going
20 to say we had -- you were asking if there are other issues,
21 and if there's anything you want to hear on that, that's fine.
22 But we have that, and then the -- I think you indicated on the
23 deposition limits we -- or I'm sorry, the interrogatory number
24 limits, we should just proceed there.

25 THE COURT: I will issue a ruling. I will think

1 about it once more. It's likely to say that 50 is the number,
2 good cause for more, contention interrogatories excluded.

3 MR. BEISNER: But to be clear, Your Honor, I think
4 what I hear the Court saying is Counsel should go ahead and
5 respond to all of those that --

6 THE COURT: To the extent that you have 50, yes.
7 The answer is yes. And to the extent it's not subject to the
8 motion to compel so -- until I rule, right?

9 MR. BEISNER: Yes, Your Honor.

10 THE COURT: Okay. All right.

11 Anything else on discovery issues?

12 **(None indicated.)**

13 THE COURT: All right. On the Defendant's agenda,
14 there's something about communications with putative class
15 members that you wanted to talk about.

16 MR. BEISNER: Your Honor, that is a parallel to
17 the -- one of the items on the agenda that Mr. Zimmerman
18 thought we should discuss with you separately, so I think we
19 can take that off the agenda.

20 THE COURT: I see. All right. All right.

21 How should we approach the sensitive issues? I'm
22 glad to talk about them off the agenda. I have to be in
23 Minneapolis in an hour. Would it make sense to schedule a
24 telephone conference, or what would make sense?

25 MR. ZIMMERMAN: I think -- I think so, Your Honor.

1 I think they're sensitive, I think we need to talk them out, I
2 think we need to hear the Court's view, and I don't want you
3 to be pressed against something. So, we're going to be before
4 you shortly. We can do it at that point. I think doing it
5 informally will give you a good flavor for it, and then you
6 can tell us how you want us to proceed.

7 THE COURT: So maybe we should add it to the agenda
8 when we all get together in a few weeks. Yeah.

9 MR. BEISNER: I think that makes the most sense,
10 Your Honor.

11 THE COURT: Okay. All right. Good. Very good.
12 All right. We'll get through this hump, don't worry.

13 Anything else we should talk about today?

14 MR. ZIMMERMAN: No, Your Honor. And thanks for your
15 patience on this. We appreciate it.

16 THE COURT: Sure. Yep. It's a pleasure.

17 MR. BEISNER: Yes, Your Honor, most appreciated, as
18 well, and we don't want to detain you any longer.

19 THE COURT: All right. Then we will hear from you
20 about your meet and confer. In the meantime, I'll have my JA
21 schedule a hearing that must be the third week of March. And
22 we'll move ahead.

23 MR. GOLDFEIN: Your Honor?

24 THE COURT: Yes.

25 MR. GOLDFEIN: I have an evidentiary hearing in

1 Federal Court in New York the 17th through the 19th, so --

2 THE COURT: I wish I had a calendar in front of me.
3 Okay. I'll try to avoid those dates.

4 MR. GOLDFEIN: If it's possible, I'd appreciate it.
5 Thank you.

6 THE COURT: Okay. I'm going to be in Florida on the
7 23rd. Anyone want to do it down there (laughter)?

8 MR. DAVIDSON: I'll cook you lunch if you want to
9 stop by.

10 MR. BEISNER: As they say, now you're talking, Your
11 Honor.

12 MR. DAVIDSON: It's 83° today, Judge.

13 THE COURT: Court is adjourned.

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

15 (Concluding at 2:17 p.m.)

16 * * * *

17

18 CERTIFICATE

19

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

23

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