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 28, 2016
9:30 a.m.

---

BEFORE THE HONORABLE:

SUSAN RICHARD NELSON, UNITED STATES DISTRICT COURT JUDGE

JANIE S. MAYERON, UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

**FORMAL STATUS CONFERENCE & MOTION HEARING**

Official Court Reporter: Heather Schuetz, RMR, CRR, CRC
U.S. Courthouse, Ste. 146
316 North Robert Street
St. Paul, Minnesota 55101

Heather A. Schuetz, RMR, CRR, CRC
(651) 848-1223
Heather_Schuetz@mnd.uscourts.gov

**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.
80 S. 8th St., Ste. 1100
Minneapolis, MN 55402

**CHESTNUT CAMBRONNE, P.A.**
Christopher P. Renz, Esq.
17 Washington Ave. N., Ste. 300
Minneapolis, MN 55401-2048

**HELLMUTH & JOHNSON, PLLC**
Michael R. Cashman, Esq.
8050 W. 78th St.
Edina, MN 55439

**BASSFORD REMELE, P.A.**
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**
Steven Silverman, Esq.
201 N. Charles St., Ste. 2600
Baltimore, MD 21201

**GOLDMAN SCARLATO & PENNY, P.C.**
Brian D. Penny, Esq.
101 E. Lancaster Ave., Ste. 204
Wayne, PA 19428

**LARSON KING**
Shawn M. Raiter, Esq.
30 E. 7th St., Ste. 2800
St. Paul, MN 55101

**CUNEO GILBERT & LaDUCA, LLP**
Michael J. Flannery, Esq.
7733 Forsyth Blvd., Ste. 1675
St. Louis, MO 63105

**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**
Matthew M. Martino, Esq.
Four Times Square
New York, NY 10036

**FAEGRE BAKER DANIELS**
Daniel J. Connolly, Esq.
Linda S. Svitak, Esq.
Joseph M. Price, Esq.
Madeline Buck, Summer Associate
2200 Wells Fargo Center
90 S. 7th St.
Minneapolis, MN 55402

**For The Chubb Corporation:** **HOGAN LOVELLS**
David Newmann, Esq.
Stephen A. Loney, Esq.
1835 Market St., 29th Flr.
Philadelphia, PA 19103

**I N D E X** Page:


Additional Plaintiffs' Counsel Added to Case..... 8

Chubb's Motion re Sealed Judicial Records
Argument by Mr. Loney..... 10
Argument by Mr. Penny..... 42

Defendant's Document Production..... 55

Master Complaint Named Plaintiff Discovery..... 56

Medical Records Collection..... 58

Plaintiff Fact Sheets..... 59

U.S. Clubs' Document Production..... 60

Third-Party Discovery..... 60

Letters Rogatory..... 62

Deposition Scheduling..... 63

Dr. Cantu's Deposition..... 66

Plaintiffs' Proposed Amendments to the Master Complaint..... 68

Independent Medical Examinations..... 73

Revised Class Certification Briefing Schedule..... 78

Privilege Log Challenge Protocol/Status..... 92

P R O C E E D I N G S

IN OPEN COURT

(Commencing at 9:34 a.m.)

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

Let's take appearances, and we'll begin with Plaintiffs' counsel.

MR. STUART DAVIDSON: Good morning, Your Honors. Stuart Davidson on behalf of the Plaintiffs.

MR. STEVEN SILVERMAN: Your Honor, good morning. My name is Steve Silverman. I'm standing in for Mr. Grygiel today on behalf of the Plaintiffs.

JUDGE NELSON: Very good.

MR. CHARLES ZIMMERMAN: I told Steve he had to wear a bowtie, but he didn't (laughter). It shows you the power I have.

This is Charles Zimmerman for the Plaintiffs.

MR. BRIAN PENNY: Good morning, Your Honors. Brian Penny for the Plaintiffs.

JUDGE NELSON: Good morning.

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

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

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

MR. SHAWN RAITER: Good morning, Your Honor. Shawn Raiter on behalf of the Plaintiffs. I have not yet noticed my appearance, but I will do so later today.

MR. MICHAEL FLANNERY: Good morning, Your Honors. Michael Flannery with Cuneo Gilbert & LaDuca. And like Mr. Raiter, I have not entered my appearance but will do so today.

JUDGE NELSON: All right.

MR. JEFFREY KLOBUCAR: And good morning, Your Honor. Jeff Klobucar with Bassford Remele. Appearing this after -- or this morning telephonically is James Anderson from Heins Mills & Olson; Tom Byrne from the Namanny, Byrne firm; and Bryan Bleichner from Chestnut Cambronne.

JUDGE NELSON: Thank you, Mr. Klobucar.

Good morning, Mr. Beisner.

MR. JOHN BEISNER: Good morning, Your Honors. John Beisner on behalf of Defendant, NHL.

MR. DANIEL CONNOLLY: Good morning, Your Honors. Dan Connolly, Faegre Baker Daniels, for the NHL. With us today is one of our summer associates, Madeline Buck, from the University of Michigan for the NHL.

JUDGE NELSON: Welcome. That's great.

MR. MATTHEW MARTINO: Good morning. Matt Martino

for the NHL.

MR. JOSEPH PRICE: Morning, Your Honors. Joe Price. Do I get the opportunity to drop the mic now (laughter)?

MS. LINDA SVITAK: Good morning, Your Honors. Linda Svitak from Faegre Baker Daniels for the Defendant.

JUDGE NELSON: Very good.

MR. DANIEL CONNOLLY: And, Your Honors, appearing by phone are David Zimmerman from the NHL, and Shep Goldfein from Skadden Arps.

JUDGE NELSON: Very good.

Perhaps Mr. Loney would like to make an appearance, too.

MR. STEPHEN LONEY: Thank you, Your Honor. Good morning. Stephen Loney, and also with me is David Newmann, on behalf of non-party Chubb Corporation.

JUDGE NELSON: Very good. All right.

We're going to begin this morning with the Chubb-related matters -- oh, Mr. Zimmerman.

MR. CHARLES ZIMMERMAN: I just have one housekeeping matter.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: Your Honors, it wasn't on the agenda. I think it was just an oversight. It should have been. But there's an unopposed motion and really a stipulation to appoint Shawn Raiter and C.J. LaDuca to the

Plaintiffs' Executive Committee and the Plaintiff Steering Committee. Shawn is here, and Mike Flannery of Mr. LaDuca's firm are here today. But we, as a matter of expansion of the reach and the interests of the Plaintiffs have asked the Court to consent to add Mr. Raiter and Mr. LaDuca and his firm, and Mr. Flannery to the Plaintiffs' Executive Committee, and I have papers that are -- we'll provide to the Court.

JUDGE NELSON: Okay. But you haven't provided those yet?

MR. CHARLES ZIMMERMAN: I haven't provided them yet. I was going to provide them at the end of the hearing, but I have them.

JUDGE NELSON: Very good. All right.

Does anybody wish to be heard on that request?

**(None indicated.)**

JUDGE NELSON: All right. The Court welcomes them aboard. Okay.

What I'd like to do is start with the Chubb-related matters and then those who are here just for Chubb-related matters would be free to go. We really, I believe, have a couple of issues to discuss. One is Chubb's argument about notice and then cost-shifting and of course the Court is willing to entertain anything else that you folks would like to address.

Perhaps we'll hear from Chubb first.

Mr. Loney.

MR. STEPHEN LONEY: Thank you, Your Honor. If I can just have the Court's indulgence for a moment, we have a presentation to plug in here.

JUDGE NELSON: Sure.

MR. BRIAN PENNY: Your Honor, as Mr. Loney is setting that up, can I just ask as a matter of presentation, Stephen, are you planning to do notice and then let me talk about notice and then do cost-shifting and let me talk cost-shifting or were you going to do it all at once, and what would the Court prefer?

MR. STEPHEN LONEY: Yeah, we would defer to the Court's preference, but we've got everything set up in the same presentation, so I could run through both issues --

JUDGE NELSON: We might as well do both issues and then both issues.

MR. STEPHEN LONEY: Thank you, Your Honor.

Thank you again, Your Honors. Again, we'd like to start with the notice issues and then move into the cost-shifting issues if that pleases the Court.

Notice is the most sensible method of protecting the injured workers' basic privacy and due process rights. And this isn't just an issue of -- I'm sorry, this isn't just an issue of federal privacy and due process rights, providing notice also comports with the privacy laws of several states.

But whether the source of the privacy right is state or federal, this is an issue of what processes do to the individuals whose rights are affected. That's really the question we're here to answer. The fact that IMEs or any other medical information of an injured worker is entitled to some privacy protection should be a given here, and so we really want to address and focus on whether notice is the best or most sensible method of protecting those privacy rights.

But the Plaintiffs' brief doesn't cite to a single case in their favor that even addresses the due process issues. The only -- they only have one case that has anything to do with notice. And as I'll get to later on, that case is entirely distinguishable and is limited to its unique facts. Ultimately as several State and Federal Courts have held, providing individuals with notice and an opportunity to raise whatever -- whatever concerns they might have about strangers reviewing their medical information is the best approach. It's the right thing to do. There's an issue of basic fairness to people whose private information is about to be poured over by strangers, and they're entitled to a chance to say whatever -- whether that offends their own sense of privacy.

Before we move onto legal arguments supporting that, though, I just want to talk for a moment about whose records are being requested here. These are nonparties. We're

talking about medical information of people who have no connection to this case. They've to date expressed no interest in being involved. They're unrepresented, there's been no class certified here, so the named Plaintiffs and their Counsel do not represent these individuals, and as far as we know, they're not represented by anybody.

They've claimed injuries in separate, unrelated matters. They've adjudicated their workers' comp claims in separate forums or through negotiation, and they did so without any awareness that the examinations they've submitted to would ever be reviewed for any purpose other than adjudicating that workers' comp claim. They certainly haven't consented to their information being disclosed to anybody other than Chubb or anyone else who it needs to be disclosed to in order to be adjudicated for workers' comp claims.

Without notice, they have no idea that I'm standing here talking about whether their information will be shared with somebody they've never met, yet for some unknown reason, the Plaintiffs want to prevent this group of individuals from finding out that their information is being requested. Again, whether there's a privacy right should be a given. But just to orient the discussion, the Court was on solid ground two months ago -- I'm sorry, three months ago when it stated that former players whose records are being requested in the form of IMEs had a privacy right that needs to be accounted for

here.

Almost every court to address the issue has agreed, and we've cited to the Court cases from the Second, Third, Seventh, Ninth, and Tenth Circuit, among others, agreeing that there is a privacy right in medical information and that there's a due process right to notice and an opportunity to assert that privacy concern.

It's worth noting here the Third Circuit case law controls these issues because we're dealing with a subpoena that was issued by the Eastern District of Pennsylvania and served within the Third Circuit. And we've cited to the Court several cases under Third Circuit law supporting our position. The one Circuit that's declined to call the right and privacy of medical records fundamental is the Sixth Circuit in the *Mann versus University of Cincinnati* case which we cited to the Court previously. And we cited it despite the fact that the Court didn't call the privacy fact, quote, "fundamental" because, despite that finding, the Court still required notice to the impacted people so that they could bring to the Court whatever concerns they might have about their own records.

And the Court in that case critically said that this isn't about the -- whether or not the privilege of privacy arguments being advanced by the parties and the subpoena recipient who had the medical records, whether those arguments are correct. What it's really about is the opportunity for

the people who are actually impacted to raise whatever arguments they might have. And I just want to pause here because I keep talking about medical information and medical records. The Plaintiffs at various points have suggested that by limiting their request to IMEs, independent medical evaluations, that they're somehow taking -- taking their request outside of the standards that would normally apply to medical records or medical information, but one only needs to look at a couple of IMEs to see that these are medical records.

They lay out in detail the nature of a person's injuries, how those injuries occurred, that person's medical history, descriptions of past injuries, and often a detailed recitation of other medical records that provide context to the doctor's examination being done in the IME. Again, the basic issue here is whether notice is the appropriate method of protecting a privacy right that I think we agree exists here.

The Third Circuit thought it was the best way to address very similar privacy issues in the *Westinghouse* case that we've cited to the Court several times. The Sixth Circuit in the *Mann* case that I just discussed also emphasized the need to provide affected individuals an opportunity to raise their own privacy interests. In that case, the Court upheld sanctions on a party that obtained their reviewed

medical records without giving notice to the impacted individual, knowing that that individual might have some concerns to raise of their own. The Georgia Supreme Court's decision in *King versus State*, which we've also cited in our papers, provide another good example of requiring notice and an opportunity to be heard before medical information is disclosed. And in that case, the disclosure was to be in redacted form, taking out identifying information, and the Court still decided that notice was the best method to make sure that all privacy and due process concerns were addressed.

In fact, *Westinghouse* and *Mann* were also cases where some form of de-identification was proposed as an alternative, and the Court still decided that de-identification or redaction of patient names or birthdates and the like was not sufficient to adjudicate an individual's privacy rights without their involvement. The bottom line here is that whatever arguments we might make without patients' involvement, they themselves are entitled to an opportunity to step up and say, I don't want anybody seeing my medical information, with or without my name included on the piece of paper.

Again, the Third Circuit's case law we think controls here because of the method of service and the forum from which the subpoena was issued, and *Westinghouse* is very instructive under these circumstances. The Plaintiffs'

attempts to deal with this case miss the point. The Third Circuit directed notice to be given before disclosure of medical records to the requesting party.

Plaintiffs' brief argued that somehow the notice issue had to do with broader disclosure, that the records had already been disclosed to the requesting party, and then the Court had to address whether notice was required before releasing them publicly. Not so, and we just urge the Court to read the case and you'll see that that's not what it's about. The case is actually very close to this one.

We've said before that this is such a rare request that there aren't a lot of, if any, cases that are on all fours as this case, but this is as close as we get and it's out of the Third Circuit. The Court in that case held that medical information was protected by privacy rights even though it wasn't privileged under the circumstances in that case. The Court directed that notice be given and an opportunity be heard to protect privacy even though it also held that the government agents requesting the records needed them. And the Court did what we're asking this Court to do, which was focus on the patient's ability to raise their personal claim of privacy.

Again, Plaintiffs' attempts to distinguish this case are ineffective. First they argue that notice was, quote, only a function of the fact that the patients weren't advised

prior to submitting to a medical examination that the results might be shared to somebody else. But this factor was a minor point in the analysis; it was one of many factors outlined by the Court favoring notice before disclosure of the records to the requesting party.

If you read the case in full, it's clearly about whether notice should be given to the party in connection with the disclosure of the record, not in connection with the actual examination; and whether a person needs to be told before their examination is done that somebody might be reading their records. The suggestion in Plaintiffs' efforts to distinguish on this point is that workers' compensation claimants, by submitting to a workers' compensation process, should know that somebody is going to review their medical records; they know that Chubb is going to review them for the purpose of adjudicating the claim.

But we've already dispensed that the last time we were here on oral argument in March, we've already dispensed with the notion that somebody who submits to workers' compensation proceedings somehow waives all of their privacy rights for all other purposes. It can't be seriously disputed that the individuals who submitted to workers' compensation process in this case haven't given consent to their records being used by the Plaintiffs for the purposes of their class action.

Those IMEs were taken for the purposes of the workers' -- the separate and unrelated workers' compensation issues. And I'll direct the Court's attention back to *In re Xeller* which we cited heavily in our brief in opposition to the Plaintiffs' motion to compel a few months ago. And in that case, the Court held, in response to a similar request for many workers' compensation files, that merely because a person has filed a claim with an insurance company does not necessarily mean the person has consented to making his medical records public. It also means that they haven't consented to giving their medical records to the individuals in this courtroom.

Plaintiffs then assert that the requesting party in *Westinghouse*, again, somehow received the records already without providing notice, and the Court was -- and I want to get the quote right from the Plaintiffs' brief. The issue was whether to remove the names and addresses of individuals in its publicly-released compilation of data. *Westinghouse* doesn't mention public release of any data. The case clearly addresses notice before giving the records to the requesting party. And if you look at the provision -- or the paragraph that we've quoted in our briefs from this case, there are multiple clear indications that the Court is talking about release of the information to the requesting party, not some additional public disclosure.

The Court talks about the agency, NIOSH, being given prior notice -- I'm sorry, giving prior notice to the employees whose medical records it seeks to examine; it hasn't examined them yet. The Court goes on to talk about what the disclosure process should be -- I'm sorry, what the notice process should be prior to disclosure to find out if the patients consent to their records being disclosed to the requesting party. It's right in line with this case, and the Plaintiffs' attempts to distinguish are ineffective.

Another approach that the Plaintiffs have taken is to continue focusing on privilege issues when we're talking about privacy issues. I've called that a strawman, and it's -- I've got a strawman up there. This is a strawman in the sense that the Plaintiffs are responding to an argument that they wish we were taking because they perceive it to be weaker than the argument we are making. But I do want to note that the argument that IMEs could be privileged, which we did -- we have advanced in this case is not as weak as the Plaintiffs would have the Court believe.

And we've cited to the Court *State v. Wilson* which held that there has to be an examination of the circumstances surrounding each IME to determine whether the patient understood at the time that they were submitting to something different than an examination for treatment. It's not something that we can find on a blanket basis is never

privileged.

But for today's purposes, we don't even need to delve into that because we know that privacy rights attach to these documents. And we know that the cases we've relied on are privacy cases, they're not privilege cases. The Florida State Court decision in *Graham v. Dachiekh* -- that's a guess at how to pronounce the Defendant's name -- is an important one here because the Plaintiffs' principle case in their motion to compel was *Amente versus Newman*, a 1995 Florida State Court. *Graham* is a much more recent case that clarifies the limited nature of *Amente*.

Plaintiffs in their briefing here have told the Court that that case hinges on state-specific, physician-patient privilege standards. The case doesn't mention physician-patient privilege. The actual holding is that disclosure with no notice and no opportunity to be heard would do irreparable injury to the privacy rights of nonparties. It's not a privilege case.

Similarly, *Westinghouse* is a privacy case. It expressly -- the Court in -- the Third Circuit in that case expressly distinguished the privilege issues and found that notice was appropriate as a matter of privacy. Now, those are the only two cases that we've cited on this privacy issue that the Plaintiffs -- that the Plaintiffs deal with in any respect in their brief, but I'll go through a couple of others. The

main case that I've also mentioned previously gave patients the opportunity to assert privilege claims -- I'm sorry, privacy claims after noting that the privilege didn't apply in the Sixth Circuit. *King versus State*, the Georgia case, also said that we deal here with the Constitutional right of privacy under the Georgia state Constitution. Again, the Court specifically said it doesn't matter whether the privilege claim is valid, you have a privacy right.

JUDGE NELSON: Let me ask you this question because each of these cases has a slightly different set of facts. Are you aware of any Third Circuit or Eighth Circuit authority that says notice is required in a case in which the disclosure is limited to IMEs and the IMEs are fully anonymized and the identifying information is redacted and the disclosure is made subject to a HIPPA-compliant protective order? Are you aware of any case that holds that notice is necessary given all of those three circumstances because privacy rights are implicated?

MR. STEPHEN LONEY: With all of those points involved, no.

JUDGE NELSON: Yes, because that's the case we have here.

MR. STEPHEN LONEY: The only difference between what you've just described, Your Honor, and *Westinghouse* is limitation to IMEs.

JUDGE NELSON: Well, that's a significant difference.

MR. STEPHEN LONEY: In terms of the privacy right, we submit that it's not significant, Your Honor, and there are other cases involving IMEs where the Court has said -- or various courts around the country have said redaction is not enough to protect the privacy rights --

JUDGE NELSON: But wouldn't you agree that the wealth of authority is that redaction does protect privacy rights?

MR. STEPHEN LONEY: Not of medical records, Your Honor. The wealth of the authority is that when medical records are involved, something that is so private and so sensitive, somebody's medical information, redacting their name and birthday from the document is not sufficient --

JUDGE NELSON: But instead of looking at medical records, we're looking at IMEs. Are you aware of any authority that says that redacting IMEs is insufficient to protect against --

MR. STEPHEN LONEY: *King versus State*, Your Honor, the Georgia Supreme Court opinion dealt with IMEs, and redaction was not enough, the Court ordered that notice and an opportunity to be heard should be given.

JUDGE NELSON: But no controlling authority.

MR. STEPHEN LONEY: That -- that's a fair point,

Your Honor. So if we set up all of these hurdles, right, we set up, it's got to be in the Third Circuit, it's got to be IMEs, it's got to be fully anonymized -- by the way, that's an assumption that I think we need to deal with, whether or not what the Plaintiffs are proposing is full anonymization and subject to a protective order. Four of those five are taken care of in *Westinghouse*. Whether it's an IME or a different type of medical record to me is a distinction without a difference. A different type of medical record is still a record of the patient's condition, their treatment history, their prognosis, their injury history, how their injury occurred, all things that are recited in the IMEs --

JUDGE NELSON: But the big difference is that those patients were made aware that this was an adverse relationship with the insurance company and that most case law suggests that there's no expectation, reasonable expectation, of privacy in that relationship with the adverse insurance company. That's the difference. And I'm sure you are -- make them fully aware when they go through the IME that that's going to be shared with all manner of folks and that they need to be aware of that.

MR. STEPHEN LONEY: Not so, Your Honor, with all due respect. All of the case law that the Plaintiffs have pointed to have to do with privilege. And the expectation being analyzed there is whether there's an expectation that the --

that the examination is being provided for the purposes of treatment because that's one of the elements.

JUDGE NELSON: Yeah, well, we know there's no privilege. There just is -- there's no physician relationship, so there can be no privilege. I think it's a reasonable expectation of privacy, not privilege.

MR. STEPHEN LONEY: There is no case that the Plaintiffs have pointed to where the Court has held that it's not either privilege or private or protected by a right to privacy because of no expectation of privacy in the medical examination. All of the cases that hold that privilege does not apply, all of them have to do with that physician-patient relationship and whether the purpose of the examination is for treatment. That is the element where the privilege claim fails in those cases. All of the cases that deal with whether or not medical information is private regardless of the circumstances under which it's collected still hold that there's a privacy right. And this Court actually said as much in its March 29th order --

JUDGE NELSON: I don't -- I don't disagree with that. What I'm saying is that we are providing three levels of protection here. First of all, we're limiting it to IMEs; secondly, we are producing it pursuant to a HIPPA-compliant protective order; and thirdly, we're fully anonymizing them.

MR. STEPHEN LONEY: I was trying to jump to a slide

that might be instructive here, Your Honor. I do want to address the full anonymization point just briefly because the Plaintiffs in their sealed Declaration and exhibits did submit an example of an IME using yellow highlighting to show what they would redact from an IME to anonymize it. They've redacted the name of the claimant and his birthdate, I think, and the day of the month, not the month or the year, but just the day of the month on which he was injured.

So, myself as a hockey fan, seeing that redacted IME can see that there was a hockey player in a professional game that was hit -- that suffered a head injury in a particular manner, the manner of the injury, the incident is described in there, unredacted, during a certain month of a certain year. I can see month and year during which an accident occurred injuring the head of a hockey player on a particular team. They leave in the team name, so these are not anonymized --

JUDGE NELSON: And you know what, I've heard this argument before. The problem with that argument is that these disclosures are being made to Plaintiffs' counsel. So, what you're saying is that Plaintiffs' counsel will violate the protective order and they will try to reverse engineer this, they'll try to figure out the identity of these folks. I just have no reason to believe they'll do that. They're the only ones who are receiving this information.

MR. STEPHEN LONEY: We are not assuming that the

Plaintiffs will violate a protective order. What we're doing is following the case law that says unauthorized disclosure to one person is an unauthorized disclosure nonetheless. We're not saying that the Plaintiffs will reverse engineer anything. What we're saying is that by producing to them IMEs with 50 pages of description of a person's medical history, redacting only their name and their birthdate and the particular day of the month during which they were injured is a disclosure of who that person is even though we've redacted their name.

And we've cited to the Court several cases. The *Northwestern Memorial* case comes to point where Judge Posner hold that redaction of such basic personal information would not be enough to anonymize the records --

JUDGE NELSON: Well, perhaps we need to discuss, then, what would be enough to anonymize the records. That's a fault in sufficient anonymization, not a question about whether I permit it at all.

MR. STEPHEN LONEY: Any -- any -- leaving any description of the individual's medical description is a violation of their privacy rights, and that is what all the cases that have addressed medical records have held.

I'm jumping to this slide, Your Honor, because we've gone through all of the cases, aside from *Amente* which is addressed in a different slide, that the Plaintiffs cited in their notice brief. And each and every one of them is

distinguishable. A couple of them are actually in favor of protecting the privacy right through notice.

None of them deal with -- let me backtrack for a second, Your Honor. Most of these cases are cited in the Plaintiffs' briefs for exactly the proposition that you're challenging me with here which is, isn't redaction enough? None of these cases deal with redaction of medical information. These cases deal with redaction of things like school work and test grades; e-mails among scout leaders about an accident, not about medical records. The contents of a whistleblower complaint that has nothing to do with medical information. The contents of a juvenile criminal record which has nothing to do with medical information.

All of the cases that they've lined up to give the impression that the weight of authority is redaction is enough have nothing to do with medical information. Whether we call it a record, an examination, independent examination, it's diagnosis, it's description of medical condition, and the cases that deal with that have held redaction is not enough. *Westinghouse* held redaction is not enough, and that's a Third Circuit case. The only distinction with *Westinghouse* is one that, for the purposes of deciding whether an unauthorized disclosure of medical information is being made, is a distinction without a difference.

There's -- there may be no physician-patient

relationship to establish a privilege when the IME is involved. The Court in *Westinghouse* also held the technical requirements of establishing a privilege were not met in that case, nevertheless required notice in order to protect the privacy right and held that removing personal identifying information from the medical records that are describing an individual's condition is not enough to prevent unauthorized disclosure of that individual's medical information.

Going back to *Amente*, Your Honor, that is the main case that the Plaintiff cited in support of their motion to compel. That is -- that is the only case that Plaintiffs have been able to cite involving medical information where the Court ordered redaction but did not order notice. But both the opinion in that case and all of the cases in Florida that have been cited in the 21 years since make very clear that that was a limited set of circumstances. One of the justices wrote separately to emphasize that nothing in that opinion should be read as diminishing the privacy rights of the nonparties, and the -- the majority opinion itself noted that the result grew out of anomaly in the statutory structure that was in place in Florida in 1995.

Now, again, Plaintiffs want to go back to this notion of privilege because they perceive that as a better argument than privacy or than state statutory rights. And I've put up here an excerpt from the brief that they submitted

on the 26th, on May 26th. And here we see that they represent to the Court that *Amente* held the notice requirement in Florida's physician-patient privilege is inapplicable, inapplicable in situations such as these. Where they put the quotation mark is significant here because the Court in *Amente* didn't mention Florida's physician-patient privilege. The actual quote is: The notice requirement of Section 455.241(2) is inapplicable in situations such as this. And "situations such as this" in that case refers to a situation where the statute required a particular type of notice, and under the circumstances of the case, that notice was not possible. The Court tried to come up with a method and couldn't come up with one and called that anomaly created by the terms of the statute.

In the years since that case, Florida statutes have been amended. The *Graham* case was cited under a different Florida statute, holding that a statutory right to privacy required notice. There are several other cases along the same lines, including *Crowley versus Lamming*, which is another 2011 Florida Appeals Court case, 66 So.3d 355 and *USA versus Callery*, 66 So.3d 315. All of them hold that *Amente* is limited to its facts, it's limited to an interpretation of an anomaly in one particular statute, but that Florida has another statute requiring notice and that notice has to be given.

By the way, *Graham* is another case that held the redaction of personal identifying information from the medical records being requested was not sufficient, notice and an opportunity to be heard is the most sensible approach to protecting the privacy and due process rights of the patients. This case aligns much more with *Graham* than it does with *Amente* in that the critical piece of that is that we've tried to discuss with the other side what a notice procedure might look like. And the fact that the Plaintiffs have whittled down what they're asking us for from the large number of claims we were here talking about a couple of months ago to where we are now makes notice much more practicable, and it is possible. So, *Amente* has no application here.

If we're going to look to Florida State Court cases as persuasive, we urge the Court to look at *Graham*, *USAA*, and *Crowley*, not the outdated inapplicable limited case of *Amente*. I don't want to belabor the point here, so I'll just run through this quickly. We've already talked about why redaction has been held to be insufficient in certain cases and notice on top of redaction is a better method. Your Honor also mentioned limiting the disclosure only to the Plaintiffs' counsel. But the same cases that require notice have also noted that disclosure just to the Plaintiffs' counsel would be an unauthorized disclosure. *Mann*, again, is instructive that -- the Sixth Circuit case where, again, despite finding

there was no privilege, despite actually finding that the right to privacy in the Sixth Circuit isn't a fundamental one, sanctioned the requesting party for obtaining and looking at records. Outside counsel only looked at the records; they got sanctioned for doing that without providing the notice to the affected individual.

JUDGE NELSON: In that case, were those anonymized records --

MR. STEPHEN LONEY: Yes, Your Honor.

JUDGE NELSON: -- in the Sixth Circuit case?

MR. STEPHEN LONEY: Yes, Your Honor.

Now, we've talked a bit about Georgia state law, Florida state law, and the Plaintiffs in their briefing have attempted to distinguish several of our cases by saying that's a state-specific privilege standard. As we've pointed out, they're actually wrong about the privilege part of it. To the about the extent that state-specific has something to do with how the Plaintiffs are trying to distinguish our cases, as a practical matter, it doesn't matter. Whether -- whether the source of the right is federal law, State Constitution, or State statute -- and the cases we've cited go across that entire spectrum -- there is still a privacy right that has to be honored in responding to a subpoena.

And the specific states that we've pointed to notably have NHL teams there. Georgia has an NHL team, the

Atlanta Thrashers. Florida has two NHL teams. And going back to one of the arguments that was -- that we talked about more in our argument a few months ago, whether there's a subpoena exception to some of the state privacy laws, we've listed here four cases -- four states in addition to Florida where there's a state privacy law in place that does not have a subpoena exception and where NHL players are residing presumably because that's where they're playing. So, this is just by way of example, we've got 10 NHL teams covered by states where the law requires something more than just a subpoena and redaction, and in the Third Circuit, we've got *Westinghouse* which directed notice as a sensible means on top of redaction to deal with the notice requirement.

And our last point is: What's the reason for not doing this? Conspicuously absent from the Plaintiffs' brief on notice is any reason why this shouldn't be done. They're arguing why it hasn't been required in exactly the same type of case, and they're doing so in a way that actually misreads a lot of the cases that are applicable here. But why not provide the notice to make sure that the individuals' privacy rights are protected?

We've proposed a method of getting notice out to people. If in response to that they say that they're okay with their records being used, we'll produce it without redaction. If they don't respond at all, which is the method

recommended by the Third Circuit in *Westinghouse*, within a certain period of time, we've now given them notice that if you don't respond, your medical records may be -- your IME may be used in this case. And in that event, we would recommend, as the Court did in *Westinghouse*, redacting what we provide in the absence of an actual consent.

The only -- the only justification the Plaintiffs have provided in our meet and confer sessions is that there would be some sort of delay, it's going to gum up the works. Well, we could have been done by now. We could have sent the notice out by now, we could have been waiting for the responses by now, and instead the Plaintiffs are fighting, letting people know that they want to see their medical information. So, the -- the notion that we're going to hold up discovery doesn't hold water. We have no interest in just delaying things before ultimately producing them. We're just trying to give notice to people before their records are disclosed.

We also have no notice [sic] in spending time bickering over, you know, word-smithing -- we have no interest, I'm sorry, in bickering over the word-smithing of a notice document that's going to go out to people. As long as it -- it reasonably puts people on notice of what's about to happen, you know, we look to Plaintiffs to draft something up. If there's a concern about how long we would take fly-speccing

the wording of the document, I don't want to promise too much not seeing a proposed document, but we have no interest in just holding things up by red-lining documents over and over again.

Moving onto the cost allocation issue -- and I'll keep this a lot more brief -- we've -- we've submitted an estimate of costs that is far less than what Chubb has had to spend in this case. We've tried to keep this reasonable, and we've tried to submit what we view as the costs attributable to the Plaintiffs' specific request to Chubb that we produce IMEs. We've not asked for the costs of producing the charts that we produced, we've not asked for the cost of producing the unredacted IME of the one person who fit within the group of individuals that Plaintiffs are looking for and submitted a release.

Our position is that Chubb alone is being asked to produce unreleased medical information, not just in the form of summary reports but actual records. That's a strategy decision by the Plaintiffs. They've not come forward to say why the summary reports that we've produced are insufficient for their purposes. Those summary reports include a loss description column which we submitted to the Court so that you could see for yourself. That does provide some measure of description of what the injury was and what the person's condition is.

That is the same level of information that's available from, in my understanding, through party discovery and from the NHL teams in the form of their summary reports. We've also offered to produce unredacted IMEs from anybody who gives us a release, same level of information that the Plaintiffs are getting from their party opponent and from a more connected third-party, the teams. Now they've asked for something else from us.

And the only thing that we're here asking for is that the Plaintiffs pay their fair share for that extra piece, the IMEs. That is the amount reflected in our briefing, and again that amount falls far short of what Chubb has had to spend negotiating with the Plaintiffs and briefing these issues. We've only asked for what we think is attributable to this specific request that we think is unique to what the Plaintiffs are asking for from Chubb.

Looking at the elements in the case law that both sides from cited, the first element is whether or not the non-party is interested in the outcome of the case. I want to pause here for a moment because the brief that the Plaintiffs submitted yesterday makes an argument that Chubb is interested because one of the companies in the Chubb family of companies issued general liability policies to the NHL. The argument that they make on this front assumes a lot.

But the basic response is that -- to that is that

we're here, we're responding to this subpoena in our capacity as the workers' compensation insurer for the NHL teams. In that capacity, the Chubb entity issuing workers' compensation insurance has no interest in the outcome of this case. The workers' compensation insurance is not at issue here. This element has -- of whether or not the non-party is interested in the outcome of the case is directed at getting discovery from individuals and entities that are tantamount to parties. And just by the fact that they're not that specific entity named in the Complaint as a Defendant shouldn't mean that they get their discovery costs reimbursed.

That's what this element is about. It's about getting at people who are in direct privity with one of the parties and making sure that they can't stand behind Rule 45 and say, I'm not giving you information because we want it paid for first --

JUDGE NELSON: So let me ask you this, and I haven't thought this through, I'm thinking on the spot here. But so should any given hockey player, retired hockey player, get compensation in this case, you as the workers' comp carrier would be asserting no lien even though you've already compensated that player. Is that correct?

MR. STEPHEN LONEY: That is a question we've not looked at. The question is whether we would be seeking, in effect, reimbursement of past payments --

JUDGE NELSON: As health carriers would and other insurers would typically assert a lien in that instance, which would make you a very interested party in this case.

MR. STEPHEN LONEY: That -- that particular question is not one that I've addressed but, again, the element isn't whether we have some -- something to gain financially based on the outcome of the case. If that were the standard, then anybody in a business relationship with any party to a case could be forced into onerous discovery and have to pay for it on their own just upon a showing that if the outcome is one way, they'll make or lose money.

JUDGE NELSON: Well, whether you're interested or disinterested is very much answered by that question, so you might want to think about that and --

MR. STEPHEN LONEY: Well -- we will look at that, Your Honor, at your suggestion. But my only point in response is that the standard here isn't whether they're interested in the colloquial sense that the outcome of a case could impact -- could impact the amount of money in the bank account. The standard is whether there's an actual and direct interest in the outcome of the case. Again, whether the party and the non-party are so intertwined that fairness dictates the same standards for bearing the burdens of discovery you would apply to a party will also apply to the non-party, that there's some -- to the extent that the party is responsible

for some conduct, that the non-party is also -- bears some responsibility.

So, again, this is here so that parties can't hide behind Rule 45 and ask for compensation just by saying this other affiliated entity that you didn't name as a Defendant has the documents so you have to pay for it because that's a third-party. That's the point of this element. It's not any entity or person that has a business relationship, it's not any insurer. I mean, there are all manner of cases where an insurance company has issued insurance to one of the parties. And we're unable to find a single case finding that that opens the door, that business relationship, that potential interest that the insurer has in the outcome of the case because it might effect how much money they pay and where is enough to say that the insurance company should be subject to broad subpoena requests and should have to bear the burden as if it was a party.

The issue here is, is the relationship, is the interest such that the non-party is tantamount to a party and it would be unfair to require the requesting party to pay for something that they should be able to get from their party opponent; and just because of corporate structures, they didn't name that particular entity in their Complaint. This is not a situation where Chubb is accused of any wrongdoing, where there's any notion that Chubb is responsible for any of

the conduct alleged, and that's what this element gets at. So, even if there is something to be gained financially or lost financially for an unrelated third-party, we're still unrelated in the sense that we're unrelated to the underlying conduct.

The next element is the significance of the burden, and the Plaintiffs take issue with our estimates. I don't want to stand here talking too much about why our estimates are better than the Plaintiffs' estimates. The bottom line is that they're estimates. What we're asking for is the Plaintiff to pay their fair share, and we've spent a lot of time and a lot of ink talking about the cost of redacting things.

The cost of redacting things at the end of the day will be what the cost was. We're not asking for an up-front payment of an estimated amount. We're asking for an order that if we're required to sit there redacting IMEs and if we're the only ones to sit there required to redact IMEs that the Plaintiffs pay for whatever the ultimate cost is. If the Plaintiffs are so convinced that redacting these IMEs will cost less than what we've estimated, they should be all the more willing to agree to pay for it because the -- if they're right, the ultimate amount will be less than what we've estimated.

We're not asking for 85 -- an $85,000 check today.

MAGISTRATE JUDGE MAYERON: When you talk about that Plaintiffs paid their fair share, what fair are you suggesting they're going to pay for under your view of cost-shifting?

MR. STEPHEN LONEY: It's the -- what I described before, which is payment for the cost Chubb has had to incur based on this strategy decision to seek unreleased medical information from Chubb --

MAGISTRATE JUDGE MAYERON: You know what, I misstated my question. What's the fair share that you're -- when you asked a question, they should pay for their fair share, it's suggesting that Chubb is going to pick up some portion and the Plaintiffs should pick up their fair share of the burden, as well. So, my question better worded is: What is it that you're saying Chubb is picking up as part of this fair share argument?

MR. STEPHEN LONEY: The vast majority of what Chubb has had to spend in this case responding to the subpoena, reacting to and researching the law about what it's required to do in response to the subpoena, negotiating with the other side to whittle down what were extraordinarily broad requests, searching for information, disclosing information, producing the charts that we've produced, producing the sample insurance policies we've produced, that all -- and this litigation, having to respond to motion practice where we could have just kept negotiating.

All of these things make up the lion's share of what Chubb has had to come out-of-pocket for in this case. And the fair share that we're asking Plaintiffs to pay for is the search for and redaction of IMEs. We -- even then we made a proposal to the other side that would have had them paying for less than that share, a sharing of the share, and we got no counter to that. Plaintiffs have refused even to consider paying Chubb anything for the time it and its lawyers have had to spend dealing with these requests.

And finally just to demonstrate the point that I've already made orally, Chubb is the only party -- I'm sorry, the only entity or non-party being asked to produce this category of information. We've produced at Chubb's own expense the types of information in its possession, custody, and control that the NHL and the teams have had to produce about player injuries. We're asking for payment of that extra piece that Plaintiffs decided last year in arguing their motion to compel against the NHL teams to stop asking for from the NHL teams.

At this point, the Plaintiffs have the same level of information about retired players who submitted workers' comp claims after retirement that they have about players who -- whose injury was reported in the NHL databases. They have summary reports and they have the access to unredacted medical information of anybody that they can submit a release for. It's the extra piece that we're asking for payment for.

Thank you, Your Honors.

JUDGE NELSON: Thank you, Mr. Loney.

Mr. Penny.

MR. BRIAN PENNY: Morning, Your Honors. Brian Penny for the Plaintiffs.

There are many things I would like to say in response to Chubb's argument right now, but I'm going to try to stay focused on what I think are the key issues, and I think the briefs do a pretty good job of walking the Court through some of the case law that was discussed today.

The first point I want to make is that if the Court had ordered unredacted, sort of native IMEs, then we might have been in a position to have a very lively debate here this morning about whether privacy, Constitutional privacy rights are even triggered in the first place by these IMEs. But the Court didn't do that. The Court acknowledged that there was some privacy concerns as Chubb notes in its presentation. But what it doesn't note is that as a result of acknowledging those privacy concerns, the Court ordered the IMEs to produce in redacted form.

That makes the triggering and due process analysis completely academic in this instance, and that's a point that *Amente* actually makes. And I know they took some shots at *Amente*, but if you actually read the holding in *Amente*, it is right in line with this Court's prior ruling in connection

with the motion to compel the U.S. Clubs' PMI. And the *Amente* court said: There may be circumstances under which a person would have a Constitutional privacy right with respect to his or her medical records. However, in this instance, we find that the patient's right of privacy and the confidentiality of the patient's medical records are protected by the trial judge's requirement that all identifying information be redacted from the medical records.

That's exactly what we have here. We don't have anything -- any privacy concerns anymore that even trigger some due process right to notice. And the cases, like *Graham* v. *Dacheikh* -- or however you say that last name -- did deal with specific state statutes. They made the point to X out that I had put in the Florida physician-patient privilege and replaced it with the statute number. That statute is the evidentiary statute recognizing that physician-patient privilege and it has an explicit notice requirement that actually was waived under the circumstances of *Amente*. And the only reason the Court in *Graham* quashed the subpoena is because it couldn't be waived under those circumstances.

The Court has already, prior and today, rightly acknowledged that these privileges, these state statutes, are not implicated by the IMEs at issue here precisely because going into the IMEs, these players understood that it was an adversarial process. That goes right back to the point that

we made in our briefs on *Westinghouse*. And I strongly suspect that this entire notice issue, its genesis, is in Chubb's -- and I say it's Chubb's misreading of the *Westinghouse* case.

Two important points on that: First, the issue that the court had in *Westinghouse* was that the medical records at issue were traditional medical records. They were created in the context of a physician-patient relationship between the *Westinghouse* employees and their doctors. And when they visited these doctors, it was under that traditional physician-patient relationship. And they may have, the Court was concerned, may have disclosed medical information in the course of all those years of treatment that they were not expecting would later be examined by somebody like a government agency.

That is the prior notice that the employees in *Westinghouse* did not get. That is not an issue here for the IMEs because if you look at the sample IME just as an example -- and that's actually attached to my Declaration on the cost-shifting issue -- one of the very first sentences is the IME doctor saying, I explained to the player that this IME is not being conducted as a traditional doctor-patient relationship. He is on notice, and he is doing that IME specifically because he has brought a workers' comp claim over these concussion injuries. It's the same injuries that are at issue in this case.

Again, in *Westinghouse* -- and if you read the language in *Westinghouse*, the real concern is that there is some unknown private medical conditions not related to what the government agency was looking to investigate, that those employees may want to raise issue with and maybe have them redacted or something like that. And that brings us to the second important misreading of *Westinghouse*.

If you go back and look, it is very clear the government agency in *Westinghouse* was getting entire medical files completely unredacted. The only suggestion that something might be sort of redacted or de-identified is the acknowledgment that when that government agency published its data, meaning publicly, that the data would be in aggregate form and would be divorced from the patient's identity and the address or any other identifying information. So, redaction was not at issuing in the *Westinghouse* case. It was at issue in *Amente*, it was at issue in a host of other cases the Plaintiffs cited, all for the same proposition that when you redact the personal information and divorce it from the medical information, there is no more privacy concern.

No privacy concern equals no due process concern equals no notice requirement. The other point I wanted to mention was the *Mann* case that Chubb dealt with a couple of times -- stressed a few times in its argument today, please go back and read the *Mann* case. I don't have it in front of me

now. It's a very short case. You will search in vain for anything that even remotely looks like the way Chubb described it today. The issue in the *Mann* case was that the person who subpoenaed the documents issued the subpoena to the third-party and did not give the Rule 45 notice to the opposing party that it was going to issue the subpoena. And before the time for the opposing party to object to the subpoena, the subpoenaing party had convinced the third-party to just disclose all these medical records. It knew it hadn't even complied with Rule 45, and that's why it was sanctioned by the Court. It's totally inapplicable to the issue in this case.

I think that's really all I wanted to say about the notice issue, unless Your Honors had any other questions on Plaintiffs' position of that.

JUDGE NELSON: Nope, you can move ahead to cost shifting.

MR. BRIAN PENNY: On the cost-shifting issues, I -- so let me deal with the estimates first and then we'll talk about the case law on cost shifting. And I'm not going to rehash this because most of it's in the brief. But Plaintiffs' position is that these estimates are way overblown. Part of the problem is that a component of this estimate is Chubb's Counsel's, quote-unquote, oversight costs.

We have had several meet and confers with Magistrate

Mayeron. We have had several exchanges of letters and information all in an effort to have both sides understand what was going into these estimates. And now by a large degree, the biggest component of that estimate, we have absolutely no information on it. We have one sentence that this is the amount of time Chubb counsel spent overseeing the process. We have no idea what the hourly rates of Chubb Counsel's were and whether they're reasonable. We have no idea what they actually did.

For example, does this oversight cost, is it duplicative of the Chubb employees' cost to search? Are these costs, do they also include the preparation of the letters that were exchanged with Magistrate Mayeron and Plaintiffs' counsel, preparation for the meet and confers, preparation for this hearing? Who knows what kind of costs are baked into this. We also don't know if perhaps some of these oversight costs were sort of setup costs that would not be recurring and shouldn't be then amplified in the estimation of additional searching.

So, we have no information on that. The only information we do have is on the estimate that Chubb gave on redaction costs, and if that is any indication of its estimate of oversight costs, Plaintiffs think that's very overblown. I'm not going to go into all that detail, but I gave you a sample IME that took me about 30 seconds a page to

de-identify. Chubb's estimates is a little more than five minutes a page to de-identify an IME. Right there, you're about 10 times overblown. We're not even talking about the rate that Chubb is assigning. It's -- whoever it is that's doing this task, $180 an hour to redact documents, it might be a little excessive, too.

And so the redaction costs, we think, are overblown. The reason this is important is not just that at the end of the day the costs will be what they will be as Chubb Counsel suggested. But if Plaintiffs were to pay for that, are those costs reasonable? We're not in a client-counsel relationship where we get a chance to oversee the bills, question entries, talk about how much time was spent, was it efficient. There would have to be some sort of mechanism like that built into this situation if there were any sort of cost-sharing to be achieved -- or to be ordered in this case.

Now to the issue of the factors to be considered. Both parties agree there are three main factors you look at: Whether the party is interested, whether the third-party can reasonably pay for the costs, and whether this litigation is of public importance. I'm not going to rehash all these arguments. My one point on this is I heard Chubb counsel create his own element -- or his own take on the interest element, and he said -- he basically raised the burden to such a degree that the non-party be, quote-unquote, tantamount to a

party in order for them to be interested. I'm not aware of a single case in the United States that says anything close to that. All the cases we both cited says you consider whether the party is interested. There could be all different levels of interest.

Here, Chubb's very interested in the outcome of the litigation; by not complying or by complying in certain ways with the subpoena it, may think it has some influence over the outcome of the case. It certainly has an interest in the outcome of the case not only as the workers' compensation carrier but also as the NHL's general -- one of the NHL's general liability insurance carriers for the past 30 years. Chubb's very interested, and there are some confidential things I'm not going to air in court but that are in the briefs that also indicate that they are interested in the litigation and the issue of concussions in the NHL even before the litigation ensued. Chubb is a multi-billion dollar corporation, it's accustomed to dealing with discovery litigation. It would really not have any problem complying with this very targeted request for only a handful of IMEs compared to the vast array of relevant information it likely possesses.

And on the final part: Is this litigation of public importance? Again, there's a lot of that in my Declaration. It is clearly of recognized public importance. The issue of

concussions in sport in the last several decades is a very important issue. It's led to numerous state statutes on regulating concussion management in sports, congressional hearings, other litigation, major motion pictures, and most recently last week very pointed letter from Senator Blumenthal in Connecticut to Gary Bettman asking him to answer nine questions about the link between CTE and playing hockey and the NHL's concussion management practices generally. All of these factors weigh heavily against any cost shifting.

That's all I have.

JUDGE NELSON: Thank you.

MAGISTRATE JUDGE MAYERON: Mr. Penny, I've got a few questions that I wanted to ask, and what it requires is stepping back for a moment to understand why it is that Plaintiffs are seeking the IMEs in the first place. Obviously you've gotten other information from other sources having to do -- that bear on medical records of retirees. But the reason I ask this question is in the course of our conversation with you and Mr. Loney in our various meetings, there were some ideas floated that could possibly lessen the cost and the burden, whoever was going to have to pay for it.

So, for example, instead of seeking the 135 files that covered intervals, as a six-month interval, past a two-year interval, cutting it down to a year; or perhaps for those that fell within the six month or nine-month interval,

only looking for records that were on the claims notice system where they could do the search electronically looking for IMEs and not go searching for the paper files.

So, I'm trying to get an idea -- as I think about the extent of the burden, it goes to why engage in this burden at all, and why not think about lessening it, whoever is going to pay for it, to say the one-year interval; or perhaps a one-year interval, both paper files and claims notice systems files. But for the shorter intervals, which are about half of the claim files, for example only using -- subjecting it to the electronic -- or using the CNS files. So, those were items under discussion by both sides. Obviously the way this has been teed up is it's all or nothing, and so that goes back to my initial question of making sure we understand why you need the IMEs in the first place to understand the extent of the request.

MR. BRIAN PENNY: And this goes to a little bit of the argument on the slideshow I did the last time we talked about the issue, but the primary importance of these IMEs is that what we're looking for are the -- the way we narrowed it down is we're looking for IMEs in which there is a lag, a significant time lag between the injury and the IME because what we're looking for in a cental issue in this case is what are the longterm neurological disorders, what are the longterm injuries that arise from these concussions? And so in these

claim -- these IME reports, we're getting a glimpse into what those claims actually are. We're finding out that months after or years after the injury, the Plaintiffs are suffering from concussions or dementia or depression or whatever it may be. That's what we're trying to find out from these IMEs.

And remember, this is an issue that the NHL at one point had thought about investigating and then -- this is an e-mail we've talked about here before. The NHL's counsel decided, well, let's leave the dementia issues up to the NFL. We need to investigate that, and so these IMEs are giving us a chance to do that. Now, remember -- and we were talking about different tranches of IMEs here.

Some there's a six-month gap, some there's a nine-month gap between the injury and the IME, some there's a year and then two years. And if you'll recall, it was actually Plaintiffs' attempt to compromise during our last meet and confer in which we said we would be willing to take the 77 one-year interval files; if Chubb would just be willing to pay the costs of that, we would drop all the other requests. Chubb then rejected that offer, countered with its own offer, go 77 and we'll split the cost, to which we rejected. That's actually the way that all unfolded, if you'll recall.

MAGISTRATE JUDGE MAYERON: And the reason that's important to me is it does suggest that Plaintiffs, under a

certain set of circumstances, may be able to glean sufficient information from the one-year intervals, regardless of who is paying for it. But it does suggest that that's adequate for the whatever purposes you seek to use these IMEs for.

MR. BRIAN PENNY: Right. And, you know, this is another one of those things that's difficult to project without seeing any actual IMEs. And I'm not the expert who would be analyzing them, and so my job is to get as many as I think are reasonably necessary to his or her analysis. So, the six-month -- the claims going all the way back to the six-month gap is what I was initially trying to get. Now I had to make a decision internally, would it probably be more efficient, worth my while, getting enough information that I need to make that offer of compromise for the one-year document -- or for the one-year tranche, which I did. But obviously ideally I'd be seeking all 135.

Again, we're talking now about a small universe of documents. It's not the thousands that we started out talking about before. We're down to, at the largest, 135. As to the issue that I also heard you ask about, between those that can be identified through the claim notes and those that you might have to go to paper files, again, we're most concerned about the older claim files. And so it doesn't matter whether you have to go to the note to find them or to the hard copies, we really -- the year-old -- or the -- I'm not having a good

language for this. But the ones where there's at least a year interval between injury and IME, those are absolutely necessary, whether you have to go search hard copies or not.

JUDGE NELSON: That's helpful.

MAGISTRATE JUDGE MAYERON: Thank you.

JUDGE NELSON: All right. We are going to take 15 minutes. Court will adjourn now until 11 a.m. Court is briefly adjourned.

MR. STEPHEN LONEY: Sorry to interrupt, but when we come back, can I get time to reply, or are we done?

JUDGE NELSON: I think the Court has heard everybody out today, so thank you.

MR. DAVID NEWMANN: And I'm sorry, Your Honor, are the Chubb folks excused or --

JUDGE NELSON: You are excused, yes.

**(Break taken from 10:46 a.m. to 11:02 a.m.)**

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: Your Honor, I do have the notice of unopposed motion and proposed order, if I could hand it up.

JUDGE NELSON: You may.

**(Document handed to the Court.)**

JUDGE NELSON: Okay. Mr. Zimmerman, you will need to file this on ECF. Okay?

MR. CHARLES ZIMMERMAN: Yes.

JUDGE NELSON: Okay. All right. Great.

Let's begin, then, with -- not much on Defendant's document production today, is there, Mr. Martino?

MR. MATTHEW MARTINO: No, just a quick report on the Plaintiffs' second request for production, which was with respect to videos of certain hockey games. The NHL made its third production last Friday, and we'll be in a position to make the fourth and likely final production within the next week or so.

JUDGE NELSON: Okay.

MR. MATTHEW MARTINO: And that will be it for that.

JUDGE NELSON: Very good.

MR. MATTHEW MARTINO: Thank you very much.

JUDGE NELSON: All right.

Mr. Gudmundson.

MR. BRIAN GUDMUNDSON: Nothing very much from the Plaintiffs, Your Honor. Just to let the Court know that I have raised an issue with Mr. Martino about the Board of Governors production, that we've just started discussing, and it has to do with the amount of production from certain of the Governors themselves as opposed to alternates. And we're working through those, and if there's any issues, we'll bring them promptly to the Court's attention.

JUDGE NELSON: Okay. Very good.

Anything more about NHL or Board of Governors

production?

**(None indicated.)**

JUDGE NELSON: All right.

Master Complaint named Plaintiff discovery?

MR. JOHN BEISNER: Your Honor, we had one issue to raise on this that we have raised with Plaintiffs' counsel but need a response on. And this has, I'm sorry to say, more workers' comp issues, but this is a named Plaintiff, David Christian. Turns out -- and we got through looking at the deposition transcript and so on -- that he had a workers' comp claim that was paid at some point about which we need information, don't have the IME if there was one involved in that. We've received that from the other named Plaintiffs. We've raised it with Plaintiffs' counsel and just wanted to get an assurance on the record that we would be getting that information for Mr. Christian as soon as possible.

MR. BRIAN GUDMUNDSON: We've received a letter and I've raised it with Mr. Christian's workers' comp counsel, and I'm actually not aware of the IME issue --

MR. JOHN BEISNER: I'm sorry. I don't know that there was an IME. I'm sorry. That's what I want to say.

MR. BRIAN GUDMUNDSON: I'll make sure to double back with that, but I'll make sure to include that with the documentation about the settlement amount because he did testify about the case being settled in an amount, so I'll

follow up and get back to you.

MR. JOHN BEISNER: Yeah, maybe we're not being clear on this. The other named Plaintiffs produced the workers' comp file from their counsel; that usually included an IME, if there was one. What we're asking for is that whole file, which is what we got from the other named Plaintiffs which would have a fair amount of medical information in it, including an IME if there was one. So, it's not just the resolution, it's the file.

MR. BRIAN GUDMUNDSON: I've already made contact with his lawyer and I hope to have that resolved very, very quickly.

JUDGE NELSON: Very good. Okay.

All right. Just as a matter of course, it will be helpful -- we've sort of fallen off here on the agenda a little bit. Instead of telling me you're going to raise the issue at the conference or not even telling me you're going to raise an issue at the conference, if you could allude to the issue on the agenda, just something so I have some forewarning. The whole point of the agenda is to give me some information about what I expect to hear at the conference; so if we could kind of get back to that, that would be great. All right. So, for instance, the next agenda item should address under this section the resolution of this issue. Okay? All right.

Medical records collection.

MR. JOHN BEISNER: Your Honor, this is -- is an issue in terms of getting two things from Plaintiffs' counsel to help us complete the collection of medical records. What we do is we send every Monday to Mr. Cashman, copying others, a list of open issues that we have on medical records collection information. These fall in two categories. One is instances where the authorization we have received is insufficient to get the information from the medical entity, sometimes it's because they require a special form or whatever. In other instances, these are requests for follow-up information about the facility.

Sometimes when the searcher goes out, the hospital information, for example, that we were given is vague and it turns out that hospital has no record of that person having ever been there. So we have to go back and say, you said a hospital in East St. Louis, the only one we can find isn't there, can you ask the person what that is? We've gotten some responses on those.

But on -- in the first category, you know, we have about 57 outstanding issues at the moment. In the latter category, 92 that are involving 50 Plaintiffs. And I just wanted to flag that as something that might require a little more intensive attention so that we can get this process completed.

JUDGE NELSON: Mr. Cashman.

MR. MICHAEL CASHMAN: Good morning, Your Honor. We have been following up on these issues, these medical correction -- collection issues, to the extent that the information exists, and we'll continue to do so. If Mr. Beisner thinks there's some more urgency, I'm happy to discuss it with him and get these resolved if the information exists.

JUDGE NELSON: Okay. Let's just make some better progress on that, okay? Very good.

Plaintiff Fact Sheets.

MR. JOHN BEISNER: Your Honor, I wanted to follow up here on a letter that we've sent to Plaintiffs' counsel with respect to Plaintiff Fact Sheets. We have 11 Plaintiffs who had Plaintiff Fact Sheets due on April 1st: Shawn Anderson, Doug Barrie, Gary Dillon, Jack Egers, Robert Flockhart, Link Gaetz, Steve Jensen, Grant Ledyard, Michael Robitaille, Paul Stewart, and Nikos Tselios that we have not received. Those were due on April 1st. Those -- there's 11 of those.

We also have seven for which we were requested extensions on the deadline and gave those extensions, but even those extended deadlines were back in February and we still don't have Fact Sheets for those individuals. And those are Barry Bjugstad, Joe Dziedzic, Dennis Maruk, Lance Pitlick, Darren Quint, Cam Severson, and "Butch" Williams. And we'd

just like to know when we're going to get those and would urge that we get some deadlines sent for getting those Fact Sheets in.

JUDGE NELSON: Thank you, Mr. Beisner.

Mr. Cashman.

MR. MICHAEL CASHMAN: Your Honor, we will work with the NHL to get deadlines and get those Plaintiff Fact Sheets submitted promptly.

JUDGE NELSON: All right. How about 30 days? Will 30 days work?

MR. MICHAEL CASHMAN: I believe so, Your Honor.

JUDGE NELSON: Okay. Thirty days we'll get that caught up.

All right. I don't see Mr. Schmidt today. Anything to report on the U.S. Clubs?

All right. Yes.

MR. CHRISTOPHER RENZ: Your Honor, Chris Renz. There's nothing to report. As you know, there was a stipulation signed by you at the last informal, and the document production in line with that stipulation did end up taking place, so I believe for now we're set and resolved.

JUDGE NELSON: Okay. Very good.

All right. Third-party discovery. What's the update on the NHLPA?

MR. DANIEL CONNOLLY: Your Honor, all is proceeding

at pace (laughter).

JUDGE NELSON: You play a very important role, Mr. Connolly.

MR. DANIEL CONNOLLY: I'm trying to get the train back on time (laughter).

JUDGE NELSON: Yeah. All right.

Anything on Dr. Cantu?

MR. DANIEL CONNOLLY: We're reviewing the documents that he has produced, Your Honor.

JUDGE NELSON: Okay. All right.

MR. DANIEL CONNOLLY: We have a separate issue to talk about his deposition, but we're --

JUDGE NELSON: Right. Okay. Dr. McKee, Dr. Stern?

MR. DANIEL CONNOLLY: Those have been resolved, Your Honor.

JUDGE NELSON: All right. So we can take them off the agenda then, right?

MR. DANIEL CONNOLLY: Okay.

JUDGE NELSON: All right.

How about Nowinski and the Sports Legacy Institute?

MR. DANIEL CONNOLLY: Same there. We'll take --

JUDGE NELSON: All right.

Player agents or Dr. Guskiewicz?

MR. DANIEL CONNOLLY: Same as to the player agents. The Guskiewicz documents are being processed, Your Honor.

JUDGE NELSON: All right. Very good.

And CLS, we will be getting an order out on that. I believe the Plaintiffs have a response due tomorrow on that. Am I right about that?

MR. CHARLES ZIMMERMAN: Yes, Your Honor. We have a three-page-or-less response from the Plaintiffs, and it's due tomorrow. And it's in its final draft, and we will have that to the Court promptly.

JUDGE NELSON: All right. Okay.

NHL Team Physicians Society. No?

Mr. Penny.

MR. BRIAN PENNY: Brian Penny for the Plaintiffs.

The brief update there is that Mr. Schmidt is representing the TPS. He had filed some objections but also promised that he will be producing some documents. I expect them within the next two to three weeks.

JUDGE NELSON: Okay. Why don't you stay right there.

Letters rogatory?

MR. BRIAN PENNY: The Canadian Clubs have produced their documents. They've also produced a rather extensive privilege log. There is a process in which we can deal with challenges to the privilege log, but that process does not include this Court --

JUDGE NELSON: It doesn't?

MR. BRIAN PENNY: It includes a mediator in Canada, and so we're going through the log right now.

JUDGE NELSON: Really, a private mediator in Canada resolves privilege log issues, huh? Yeah.

MR. BRIAN PENNY: They wouldn't even call it a "privilege log," I think. I had to negotiate separately just to get things put on a log that weren't solicitor-client privileged.

JUDGE NELSON: All right. But are you saying the Clubs' production is finished, the Canadian Clubs?

MR. BRIAN PENNY: I believe so. They produced what they are planning to produce, and whether the -- any challenges to the privilege log require an additional production is yet to be seen.

JUDGE NELSON: Okay. Very good.

Any update on letters rogatory from the NHL?

MR. DANIEL CONNOLLY: No, Your Honor.

JUDGE NELSON: All right.

Let's move on to depositions. How about general deposition scheduling? I see that you did update the Court on that. Anything else to --

MR. JOHN BEISNER: Well, I normally get up after Mr. Grygiel and agree with him, but since he and his bowtie are not here (laughter), I will take on that, unless you wish to stand in --

MR. STEVEN SILVERMAN: Go ahead.

MR. JOHN BEISNER: -- on that, as well.

Your Honor, I think that the deposition scheduling list on Pages 13 and 14 of the report is up to date, save one item. We got an e-mail from Mr. Grygiel while we were sitting here this morning confirming the date for Mr. -- or Dr. Meeuwisse' deposition that was offered for June 15th, so that is now confirmed.

So, I think the only outstanding issue on the schedule is that we have asked the NHLPA to find a different date for Dr. Rizos' deposition. PA counsel has indicated that they are working on that, so I think we're in pretty good shape as far as the scheduling is concerned. And I've been speaking frequently with Mr. Grygiel on that, and I think we have those -- have these issues resolved.

The one issue I'd raise, Your Honor, is that we tried to highlight in this report a few instances where we need Your Honor's approval because of --

JUDGE NELSON: Yes.

MR. JOHN BEISNER: -- we found dates, but they're a little bit after the August -- I'm sorry, the July 29th cutoff date. Your Honor, I guess -- I'm sorry, there was one other issue we had.

One of the named Plaintiff depositions -- and I'm looking for it here now -- on our list was offered for a

significantly later date, I think in September --

JUDGE NELSON: Mr. LaCouture?

MR. JOHN BEISNER: Yes. Thank you, Your Honor, for spotting that. And --

JUDGE NELSON: September, did you say?

MR. JOHN BEISNER: Yeah --

JUDGE NELSON: Oh.

MR. JOHN BEISNER: I'm looking to see if it's on here --

JUDGE NELSON: His deposition is set for August 7th --

MR. JOHN BEISNER: Mr. Leeman was offered for a significantly later date, and Mr. Grygiel was looking for an earlier date because we were concerned that that was a little bit beyond what Your Honor had indicated you wanted to see --

JUDGE NELSON: Well, I just want to make sure that there's no reason not to get the class cert briefing, and that's all.

MR. JOHN BEISNER: Right. I think that's probably more our deposition than Plaintiffs', but we were -- we're looking for an earlier date, Your Honor. I forgot that was the one other issue that we had, so --

JUDGE NELSON: Okay. All right. Well, to the extent you've reached agreement on dates in early to mid-August, that's okay.

MR. JOHN BEISNER: Your Honor, my reason for the hesitation, I guess what we included in the report was just the statement that the parties are still seeking a date for Mr. Leeman's deposition --

JUDGE NELSON: I see.

MR. JOHN BEISNER: -- so we'll have to run that by Your Honor when we get that date set.

JUDGE NELSON: All right. Very good.

All right. Should we move to Dr. Cantu's deposition?

MR. STUART DAVIDSON: Good morning, Your Honors. So, this was actually put on the agenda, and the Plaintiffs weren't actually sure why it was put on the agenda but I've since spoken with Mr. Connolly about what their desire is, which I believe but Mr. Connolly can speak for himself, is to incorporate certain, I guess, fact witness-type questioning of Dr. Cantu in the one deposition that Dr. Cantu would give surrounding his expert report.

So I think that's the desire of the parties, to make sure that he only testifies one. They subpoenaed him, as you know, on matters outside of his expertise in connection with his retention by the Plaintiffs, and I think the goal is to make sure that he's only deposed once. And so all of the information that he may have regarding his meetings with the NHL, his seeing certain NHL players over the years which may

be outside of his expert report in this case, would all be subsumed within that one deposition.

JUDGE NELSON: Okay. I'm not sure I'm tracking this, Mr. Connolly.

MR. DANIEL CONNOLLY: Let me see if I can -- Mr. Beisner and I talked with Mr. Zimmerman about this earlier, and essentially this is the issue. Rather than take Dr. Cantu's deposition once as a fact witness and once as an expert witness, we've agreed to have one deposition in the expert time period; and if Plaintiffs don't designate him as an expert, then we can still take a factual deposition from Dr. Cantu at that time. It just prevents him from being deposed twice --

JUDGE NELSON: Oh, I see. Okay.

MR. DANIEL CONNOLLY: And so if that's acceptable to the Court, it's acceptable to Mr. Davidson, it was acceptable to Mr. Zimmerman, and provided it's okay with the Court, we would proceed that way.

JUDGE NELSON: I understand. Okay.

MR. STUART DAVIDSON: My apologies for not communicating that --

JUDGE NELSON: No, that's okay. I get it now. All right.

MR. STUART DAVIDSON: I might as well stay up here for the next one, Your Honor.

JUDGE NELSON: Sounds good.

MR. STUART DAVIDSON: So Plaintiffs have discussed whether we're going to amend the Complaint and, quite frankly, the purpose for amending it initially or thinking we needed to amend it was because we wanted to modify the class definition. But we can do that when we file our motion, and that's what we intend to do is seek certification of the class or classes or subclass that we believe in our best legal judgment we can get certified. However, we understand that the NHL, of course, wants some prior knowledge as to what class we are going to be certifying and, more importantly, I think, which class representatives are going to be representing which class.

So, what we think the best course of action would be is rather than waste time amending the Complaint just to change a class definition which we can do when we file our motion is just to give the NHL some prior heads up as to which Plaintiffs will be representing which class or subclass so that when they depose the remaining Plaintiffs, they have full knowledge of who their --

JUDGE NELSON: And when do you expect to do that?

MR. STUART DAVIDSON: I think the plan is -- and I hate to speak for all my colleagues here -- oh, when will we be notifying the NHL? We'll notify them well in advance of their depositions.

What's the first deposition coming up, is -- do you

know?

MR. JOHN BEISNER: Peluso is the 10th --

MR. STUART DAVIDSON: Okay, so we'll notify them two weeks in advance as to Mr. Peluso's intention of --

JUDGE NELSON: So by the end of July?

MR. STUART DAVIDSON: Yes. And the NHL has the reports from his physician, so they know what he's been diagnosed with and that, quite frankly, is what he'll be representing.

JUDGE NELSON: Okay. All right.

Mr. Beisner?

MR. JOHN BEISNER: Your Honor, I -- I guess I have some concern about this, waiting that long because I think there is some -- some mystery about this here, and we do have the issue of the medical exams that we'll be conducting before then. I mean, we paused this process to allow these examinations of the four named Plaintiffs to occur so that there could be a designation possibly of one of them as a representative of Class Two under the current Complaint. And, you know, I think at the last status conference -- this is on Page 21 of the transcript -- I think Mr. Davidson was indicating at that point we didn't have the reports but that we'd be pretty promptly getting that designation thereafter and was pretty emphatic that there would be an amendment of the Complaint.

And, you know, he said at the conclusion of that: It seems to me it would be more beneficial to amend the Complaint now and crystallize the class allegations now as opposed to doing what we have the right to do, which is to move to certify whatever class we want with whatever representatives we want at the class certification stage. I don't think that would be appropriate to do in this case. I'd rather tell the NHL now, this is our -- these are our class representatives for these classes, this is how the class is defined, and move on from there.

I hear Mr. Davidson saying that, but I don't understand why this needs to wait that much longer. The medical reports are there, so if -- if they want to suggest --

JUDGE NELSON: When is the next IME?

MR. JOHN BEISNER: The IMEs are going to be starting in the next -- I don't have the list in front of me, but in the next week or two. And I think we're entitled to know what -- what we're looking at. How is this class defined? We know at this moment, you know, we're told we're going to get a different -- some kind of different definition. Everyone's been minimizing that; but as I said last time, it's in the eye of the beholder. Part of the exercise here, both in the deposition and the IMEs, is to assess whether this particular person fits in either class. I don't -- I don't know what the wait is on this.

I think we're entitled to know that before we go further. That has always been our understanding about this. And, you know, we're further baffled because, as I think we said to the Court before those exams were conducted, all of those individuals had had medical exams. I don't see that we really learned anything new out of those reports. So, I don't -- there's got to be some juggling of the class definition if the intention is to move one or more of those individuals into Class Two.

So, I think -- I don't see any reason why we should wait on that. I think we need that now so that we don't have to go back and do discovery later based on some change. I don't know why we can't get that in the next week or two.

JUDGE NELSON: Mr. Davidson, I think it's fair for the NHL to know, if you're going to have something other than a medical monitoring class, who is going to represent that class certainly before their IME, so --

MR. STUART DAVIDSON: I'm not sure I necessarily agree since they have the medical reports, so they know what they've been diagnosed with. So, if the whole purpose of the IME is to confirm or not confirm that which they've already been diagnosed, they have the medical record, they have the reports --

JUDGE NELSON: Well, I understand, but we did -- I mean, the NHL is correct about this. We did delay things to

permit these reports and these exams for the purpose of evaluating who would be the Class Two rep. It sounds like now you're going to shift the definitions, but I don't think another month is -- is -- I think that's too much.

MR. STUART DAVIDSON: Whatever the Court will desire, we'll comply with, of course.

JUDGE NELSON: Okay. I think that two weeks.

MR. STUART DAVIDSON: That's fine, Judge.

JUDGE NELSON: All right. Thanks.

MR. JOHN BEISNER: Your Honor, not to belabor that, but just to make sure I understand what's going to happen. I take it it's Plaintiffs' intent now that they will not be amending the Complaint but that what Your Honor is asking is that within two weeks, we will get their redefinition of Class Two, whatever that is going to be, or Class One, for that matter, since they interplay off each other. And that we will at that point get a designation of whichever of the named Plaintiffs will be serving as the proposed class representative for that class. I don't mean to belabor this, but I just want to make sure I understand what's going to happen next.

JUDGE NELSON: That's what I have in mind, yes.

MR. JOHN BEISNER: Okay. Thank you, Your Honor.

JUDGE NELSON: Okay. Anything more about IMEs, Mr. Beisner?

MR. JOHN BEISNER: Your Honor, if I may step back for one second on the prior topic, I did want to note that I think an effort had been underway to handle it, but we still do have the issue to resolve of Mr. Ludzik. And I'm sorry just to be a nerd about the record being straight, but he is still in the Complaint as the proposed representative for that class. I don't think that has been handled, so I just wanted to note at some point that needs to be -- his claim needs to be dealt with. I think there was an effort that Mr. Connolly had started to get that done, but I think Your Honor wanted a further amendment. But I just wanted to note, we'll take care of that but that needs to be handled, as well.

JUDGE NELSON: All right.

Mr. Davidson, can that -- can you work with the NHL on that?

MR. STUART DAVIDSON: Yeah, that's the plan. I think at this point we're ready to proceed with filing what needs to be filed in this Court in the MDL.

JUDGE NELSON: All right. Good.

MR. JOHN BEISNER: Your Honor, on the IMEs, I think as far as our IMEs are concerned, we're moving along on the first phase, the initial testing. I just -- I wanted to appreciate, express appreciation to Mr. Davidson for his patience in working this through. I wish we were doing the medical exams. When you have to work through medical

facilities, things don't always happen exactly the way that you expect, as we've all experienced. But in any event, I think that's moved along. We have a few bumps in the road, but I think we've managed to work that out.

Your Honor, the main issue that I wanted to raise this morning, though, is that before we conduct the actual IMEs, I don't think we have all of the information that was considered by Plaintiffs' experts, their examining folks, in preparing their reports. And we had sent Plaintiffs a -- a letter on this, and I just wanted to raise that issue here this morning. We had an exchange with Your Honor on this when we were before you on the -- on April 26th, and I think the Court at the end of that conference, I think the Court said: I certainly agree with Mr. Beisner; if he is referring to Dr. Cantu relying on medical records that the NHL is not aware of, they ought to be told what they are.

Specifically, what we're concerned about that we have not seen is in the videotapes we have of two of the examinations that Dr. Cantu conducted, there is reference to forms, other documents, histories that the Plaintiffs, the parties being examined, filled out and gave to Dr. Cantu. We don't have those. You know, there's information reflected in his report, but it would be nice to have what they actually filled out to give him so we can see what was contained in there.

We don't have documents related to any of the medical testing that was performed. There are references to MRIs that were performed, but we don't have the records of the outcomes. Dr. Cantu references those in his report. I think some blood testing was done.

As far as the neuropsychological tests are concerned, the report we got from Kerri Lamberty regarding Mike Peluso has the actual test number results in it, so we have those, but we don't have that detail for the others. There's reference to some numbers and some averages, but we don't have the specific testing number results for those. A major concern is our examiners, in looking at the medical records that we have assembled, they're expressing concern that they are not as complete as they would like to see for this sort of review. I don't know whether Dr. Cantu or Dr. Stein had more that they looked at in preparing the reports, but I think the best thing to do is if we could simply get a copy of the stack that Dr. Cantu looked at with respect to each of these players, then we know that we're looking at the same set of material.

I don't think that's an unreasonable thing to ask. And I think I mentioned the raw data, the scoring printouts for any neuropsychological testing, we don't have that. And it would be good to compare those since those seem to be a critical part of that. But we'd like to have the whole stack

that Plaintiffs' experts would have had access to or looked at in conducting their IMEs. That was our understanding when we paused to do that, and I think that would make sure that all the experts are looking at the same data.

JUDGE NELSON: Okay.

MR. BRIAN GUDMUNDSON: Good -- almost "good afternoon," Your Honor. Regarding the medical records, that seems to be the easiest. We gave Cantu and the other doctors all of the things that we gave the NHL. They've already got all that. They don't need that again at all --

JUDGE NELSON: So Dr. Cantu didn't have any medical records you haven't disclosed to the NHL?

MR. BRIAN GUDMUNDSON: Correct. Correct. We just gave them the medical records that Dr. Cantu and Dr. Lamberty and the other doctors reviewed them in connection with their examinations as far as I know, and that's it. So, they've got all that.

As far as the raw data for neuropsychometric testing, it seems to me that we can get that.

I believe you stated, Mr. Beisner, that Dr. Lamberty already produced it in connection with her report, and that's fine.

It seems to me that that's something that -- that is easily accessible, although a visit with the neuropsychologist would determine that.

As far as the MRI and bloodwork documents, it also seems to me that that would be something that could be reasonably gotten in all -- a visit with those doctors, as well, and see what there is in terms of that and how easily it can be obtained and produced.

Apart from that, I think that covers everything --

JUDGE NELSON: Well, there was one more thing. It looks like Dr. Cantu may have had them fill out a form or something?

MR. BRIAN GUDMUNDSON: I'll ask about the forms. That I'm not familiar with because obviously the Minneapolis folks will be in Minneapolis with the IMEs and things like that, and I haven't seen that as part of the process with these folks. But I'll visit with our team and visit with Dr. Cantu and see about an intake form or what that might be and I'll report back to Mr. Beisner.

JUDGE NELSON: Okay.

MR. BRIAN GUDMUNDSON: Okay.

MR. JOHN BEISNER: Your Honor, that's much appreciated, and time is of the essence because we have those coming up quickly. With respect to the interview forms that we mentioned -- and by the way, we sent Plaintiffs' counsel a letter earlier that lists these things so that should all be set forth in there. But the -- Dr. Cantu during the interview and the two that we were able to videotape is reading from

that and asking questions, so it was clearly part of the examination, so that was part of that exercise.

Your Honor, on the medical records, I'm confused, and this is why I think it would be good to make sure we have the stack. Mr. Gudmundson referred to the -- I hope it was nothing I said, Your Honor. I'm sorry (laughter) --

MAGISTRATE JUDGE MAYERON: Give me a moment. Oh, now I know (laughter) --

**(Magistrate Judge Mayeron exits the bench.)**

MR. JOHN BEISNER: Thank you, Your Honor.

I just wanted to be sure that we're on the same page on this. We were never produced -- and Mr. Gudmundson said he looked at the same medical records that we got from Plaintiffs. We never got any medical records from Plaintiffs, save for the materials that were produced to us with respect to a few of the named Plaintiffs' workers' comp proceedings, and so now I'm confused --

JUDGE NELSON: Why don't you talk to each other and sort this out --

MR. JOHN BEISNER: And that's why I think it would be good just to make sure we're looking at the same set of materials on that to make sure nothing was added.

JUDGE NELSON: Okay. Very good.

All right. Revised class certification briefing schedule. What did we come up with?

MR. CHARLES ZIMMERMAN: We have -- we have two options here, Your Honor, and we discussed how to proceed. We gave a proposed schedule in oral exchange last week, I think Wednesday if I'm not mistaken, to the Defense counsel as to what we thought was a schedule that would keep the filing of the class on the same date; and then move everything within about four, four and a half months, if I'm not mistaken, for timeframes.

Sunday night, while I was watching Game of Thrones, which I don't understand --

JUDGE NELSON: That was the finale.

MR. CHARLES ZIMMERMAN: Finale. My wife is into it, and I sit there and am sort of dumbfounded by it, but I keep her company. I got a proposal that was quite different from what we had proposed. We then exchanged a -- e-mails and said we can do one of two things. We can meet and confer on our differences, and they're substantial. And they're, not to a surprise as we've been here for a long time, very weighted towards -- their proposal is very weighted towards the defense.

We can meet and confer and try and bridge the gap, but it would be outside the deadline that you actually set for today. Or we can actually put them up and, you know, make our cuts before you and with you, with your input. It's just a matter of looking at these dates and saying, well, that's

reasonable or that's too much or that's not necessary or that is necessary. We just think that certain of the requirements that they've asked, deadlines that they've asked for just skewed away from us and towards them and --

JUDGE NELSON: Maybe the best thing is for me to hear very briefly from both sides about what matters to you in this schedule and then give me both your proposed schedules and I will come up with a schedule.

MR. CHARLES ZIMMERMAN: Okay.

JUDGE NELSON: Does that sound like a good way to --

MR. CHARLES ZIMMERMAN: Sure.

JUDGE NELSON: Because I'd like to get it set in stone.

MR. CHARLES ZIMMERMAN: Sure.

JUDGE NELSON: All right.

Do you have a copy that I could see?

MR. CHARLES ZIMMERMAN: I don't.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: But I can -- I can probably get one. It's on an e-mail, but I didn't print it.

JUDGE NELSON: Okay. Why don't you get it to me later today, okay?

MR. CHARLES ZIMMERMAN: Okay.

JUDGE NELSON: All right.

MR. CHARLES ZIMMERMAN: Let me start with the -- the

class certification filing. There's really only about five or six categories.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: Okay. Class certification filing, the old date, the original date, was September 9th, 2016. The day we are proposing is September 9th, 2016, and the date Defendants are proposing in their new one is September 9th, 2016.

JUDGE NELSON: So we agree on that.

MR. CHARLES ZIMMERMAN: Okay.

JUDGE NELSON: We'll have a filing on September 9th.

MR. CHARLES ZIMMERMAN: Well, I just want you to know that's the start date.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: The next date is to make experts available for depositions. Plaintiffs will make our experts available for depositions. We gave a period of two months from -- the old date, by the way -- I'll just put this out there -- was starting on September 19th, 2016, to December 22nd, 2016. So, that was three -- over three months, okay? We shortened that to two months, from September 19th, 2016, to October 19th, 2016, a period of one month for those depositions. The Defendants wanted, essentially, the old dates of three -- of -- of three months --

JUDGE NELSON: September 19th to December --

MR. CHARLES ZIMMERMAN: Sixteenth.
JUDGE NELSON: Okay.
MR. CHARLES ZIMMERMAN: Okay?
JUDGE NELSON: Now, how many experts are we talking about here?
MR. CHARLES ZIMMERMAN: My guess is there's going to be five.
JUDGE NELSON: Five experts? Okay.
MR. CHARLES ZIMMERMAN: Yes. They're not going to be overlap. They're going to be in different disciplines.
JUDGE NELSON: And is there any reason we can't be scheduling these depositions now just so people are holding dates?
MR. CHARLES ZIMMERMAN: Just the mystery of who they are, first of all.
JUDGE NELSON: Well, that would be a problem.
MR. CHARLES ZIMMERMAN: But we could designate -- we could -- we could start that dialogue, yes. We can start that.
JUDGE NELSON: I presume you've identified your experts? No?
MR. CHARLES ZIMMERMAN: Not for class certification.
JUDGE NELSON: All right. Okay. Go ahead.
MR. CHARLES ZIMMERMAN: Okay. So, then the next deadline was the NHL's filing in opposition, okay, so their

brief in opposition to class certification. The old date was really far down the line, and it's probably a mistake that we agreed to it, but we had said to February 16th, 2017. So, from that, that's September, October, November, December, January, February, so almost five months, I think. We shortened that in our new proposal to November 16th, 2016, so essentially two months --

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: -- a little more. Okay?

JUDGE NELSON: And the Defendant's proposal for the opposition brief was --

MR. CHARLES ZIMMERMAN: Was 12/27/2017 [sic] --

MR. DANIEL CONNOLLY: 1/27 --

MR. CHARLES ZIMMERMAN: Excuse me. I beg your pardon --

JUDGE NELSON: I was going to say, someone was going to miss the holidays but --

MR. CHARLES ZIMMERMAN: I'm sorry. 1/27, so it's really a long time from our filing in September to January.

JUDGE NELSON: All right.

MR. CHARLES ZIMMERMAN: Okay. So we can think that can be certainly shortened up.

The next was the NHL makes experts available for our -- for us to take their deposition.

JUDGE NELSON: Okay. Does the NHL at this time know

how many experts they're going to have?

MR. JOHN BEISNER: Not -- not really, Your Honor, until we see their list as to what we can deal with.

MR. CHARLES ZIMMERMAN: Oh, I bet you know, John. I bet you've thought this through. I can't believe that --

JUDGE NELSON: All right. Anyway --

MR. CHARLES ZIMMERMAN: The old dates were from February 20th, 2017, to April 20th, 2017. We had suggested from December 1, 2016, to January 9th, 2017, just shy of 40 days, which I think is ambitious but we think we can do it. They had shortened that to -- from January 1 -- January 30th, 2017, to February 28th, 2017, so like 26 or 7 days. We think that's a little short, especially when we were giving them quite a bit more time.

JUDGE NELSON: Well, you gave them a month.

MR. CHARLES ZIMMERMAN: Right. They're giving us 27 days, but we're willing to talk about that. I just think it's good for the goose, good for the gander.

JUDGE NELSON: Hey, yep.

MR. CHARLES ZIMMERMAN: Plaintiffs file reply in support of class certification, the old date was May 19th, 2017.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: And we were looking at 2/28, February 28, 2017. The Defendants had asked that it be

March 10th, 2017. I think a little bit, that will depend upon the deadline for the one above, on the experts --

JUDGE NELSON: Sure.

MR. CHARLES ZIMMERMAN: And we can move that. I don't think that's a terribly -- if you move that two weeks back or later, it probably will give us more time after the close of the discovery of their experts.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: And then the last thing, which is somewhat contentious at least if I read their proposal correct, was we had said no rebuttal, no Plaintiffs' rebuttal experts -- excuse me. We --

JUDGE NELSON: No Defendant's surreply.

MR. CHARLES ZIMMERMAN: Right, surrebuttal. They said -- unless leave of the Court is sought. They said -- and it's written out and I'll read it: Plaintiffs may not submit reports on behalf of rebuttal experts with their reply memorandum unless they obtain prior permission of the Court. We agree with that.

If permission to designate is granted, Plaintiff shall submit such rebuttal experts at the time their reply memorandum is filed, and then the NHL should be allowed to depose any such rebuttal experts within 30 days of the filing of Plaintiffs' memorandum and the NHL should be allowed to file a surreply within 60 days of the filing of Plaintiffs'

memorandum.

JUDGE NELSON: All right. When you submit all this to me in writing today, will you include that language, please?

MR. CHARLES ZIMMERMAN: Of course. If I could do that in the morning, would that be okay, because we're having a meeting at --

JUDGE NELSON: That's fine. The morning is fine --

MR. CHARLES ZIMMERMAN: I'll get it to you by tomorrow.

JUDGE NELSON: Yep.

MR. CHARLES ZIMMERMAN: So that's sort of where things are.

JUDGE NELSON: Okay.

MR. CHARLES ZIMMERMAN: Certainly we've shortened it up. There's some issues that are obviously contained, but I think we're kind of down to not the only -- to crunching. The only thing is we haven't done that final meet and confer that we probably should have had so we could have come a little closer to maybe marching towards a good spot. But that's my understanding of where things are.

JUDGE NELSON: Okay. Very good.

MR. JOHN BEISNER: Can you see that, Your Honor (indicated)?

JUDGE NELSON: Sort of.

MR. JOHN BEISNER: Sorry for the fancy --

JUDGE NELSON: Yeah.

MR. JOHN BEISNER: I wasn't expecting to have to create a slide here. Oops, let me add two things here that may help.

I think that all of this stuff about the -- when we take the depositions may be a little bit of a red herring because obviously we're going to do that once the briefs are filed. So I think the key things to look at here are the dates that are proposed for the motion, the opposition, and the reply brief. And the proposal on the left is what we, the NHL, had offered; and the proposal on the right is what Plaintiffs had proposed.

The overall duration is about the same. The Plaintiffs' proposal runs about 24 weeks, ours runs 26. Plaintiffs are proposing that there be equal time allowed for the preparation of our opposition brief versus their reply brief. Our proposal, consistent with normal tradition, is that you get less time to do the reply brief than you do the opposition brief. So, those are the two proposals side by side, trying to boil that down. And I apologize, Your Honor, for my art work, but I figured that might help.

Your Honor, I think -- here's the main concern that we have on this is that we've had about 81 weeks of discovery in the case so far, but most of that, Your Honor, has been

focused on Plaintiffs' primary interest about facts concerning the League. I don't mean to suggest that it's been exclusively focused on that. We've asked for depositions of the named Plaintiffs, we've asked for information from the Players' Association, but most has been focused on what they've wanted.

The -- so we have that period, and this is not just a briefing schedule, it's also a discovery schedule. The Court has made clear that we really can't ask anything about science issues, which are, after all, probably the most important issue in the case, until we hit September 9th. And so we're going to have, as the Defendant, a very short period to take all of the discovery that we want to take on science issues, and it probably won't be limited to just taking the expert depositions. We're going to have other questions that we want to raise, particularly if there are gaps in what the experts tell us in the depositions.

And so consistent with the Court's concern about having a full record on this, this is what we believe is the minimum time that we need to -- to get this done is the 20-week period because in that time, we're going to have to depose their experts, we know that -- and keep in mind they've had months to get their expert reports ready because they could start whenever they wanted to --

**(Cell phone rings.)**

MR. JOHN BEISNER: I didn't call him (laughter).

The -- and so they've had months to get those reports ready. We suspect that some of those reports are going to involve data analysis of all the data that we produced, which you can't try to replicate and look at overnight. And we've had, you know, other requests for information like that we're going to have to process. So, it's not just a matter of saying, we're meeting the science experts, we're going to have to process those. So, at this point, Your Honor, we don't -- you know, we don't know what areas of expertise Plaintiffs are going to show.

We may have to get experts that we have not anticipated. I don't mean to suggest to the Court we haven't retained any experts, but until we see the reports, we're not going to be able to respond to that. So, we think, fairly, we tried to shorten this up. That's the time we need. If Plaintiffs need additional time than that, you know, we don't have an objection, but we were trying to be mindful of what we need, we think, in fairness to prepare our part of the case which we're really not able to do until we get their expert reports on September 9th.

And we don't think it's an unfair request to ask for that 20-week period, particularly when it spans the holiday period, as Your Honor observed earlier, to have that. And we don't think it's fair to, as Plaintiffs proposed, to have us

jammed into 12 weeks to do what they have spent months -- months doing. We just need more time than that, Your Honor.

So, we tried to find a compromise; and as I said, I -- you know, you may want to send us back to talk further about this. The -- Plaintiffs may complain the six-week period on the reply isn't enough time. We don't -- we were trying to juggle Your Honor's desire to shorten that period with that, but we certainly don't think it's fair to say that the reply period ought to be the same as our opportunity to really prepare our whole case.

So, those are the concerns that we have, Your Honor.

JUDGE NELSON: All right. I think what makes sense is for you to go one more meet and confer and then submit --

MR. JOHN BEISNER: Okay.

JUDGE NELSON: -- to me in writing a clean -- each side a letter that has the schedule they request and the reasons, no more than three pages each.

MR. JOHN BEISNER: Okay.

JUDGE NELSON: And can you do that in the next week or 10 days?

MR. JOHN BEISNER: Sure. I don't think we have a problem with that, and I think it would be worthwhile doing because we really have not -- I think Mr. Zimmerman is correct. We exchanged these proposals, we -- but we did not have a further conversation about it yesterday. And frankly

as to the last thing Mr. Zimmerman raised, we've had no discussion about that. We just included it in what we sent to Plaintiffs' counsel, the same provision that was in the existing order, so I'm not quite sure what the concern is about that. We didn't change anything in that, but that's another thing we should discuss. I wasn't quite sure what Mr. Zimmerman's concerns were about that, but I'm sure if we have a meet and confer, I will hear them.

JUDGE NELSON: All right. So you're going to accomplish that all in the next 7 to 10 days, the meet and confer and the letters to the Court?

MR. JOHN BEISNER: Yes, Your Honor.

JUDGE NELSON: Great.

MR. JOHN BEISNER: Thank you.

JUDGE NELSON: Mr. Zimmerman?

MR. CHARLES ZIMMERMAN: No, I just want confirm that rather than -- you don't want me to then submit --

JUDGE NELSON: Right, instead of (inaudible). This makes sense.

MR. CHARLES ZIMMERMAN: Right. So we will have a meet and confer and submit either a stipulated new schedule for a your approval or our differences set out in three pages.

JUDGE NELSON: Right. Within --

MR. CHARLES ZIMMERMAN: Ten days.

JUDGE NELSON: Right.

MR. CHARLES ZIMMERMAN: Thank you.

JUDGE NELSON: Finally, privilege log issues, are they moving at pace, as you like to say, Mr. Connolly?

MR. DANIEL CONNOLLY: I'm going to have to find a new way to -- it's all been submitted to Judge Mayeron, and she has it under advisement. And she has said she will let us know if she wants oral argument, and she has not let us know that yet.

JUDGE NELSON: Okay. All right.

Anything else that anybody would like to raise today?

MR. CHARLES ZIMMERMAN: Your Honor, we may want to have just a brief chambers conference on something. We can do it real briefly or --

JUDGE NELSON: You're welcome to come back.

MR. CHARLES ZIMMERMAN: I didn't know if you want us to come back --

JUDGE NELSON: That's fine. You're welcome to come back.

MR. CHARLES ZIMMERMAN: Thank you.

JUDGE NELSON: Court is adjourned.

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

(Concluded at 11:55 a.m.)

* * * *

CERTIFICATE

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

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

Heather A. Schuetz, RMR, CRR, CRC
(651) 848-1223
Heather_Schuetz@mnd.uscourts.gov