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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

In re: National Hockey League  
Players' Concussion Injury  
Litigation

MDL No. 14-2551 (SRN/JSM)

(ALL ACTIONS)

St. Paul, Minnesota  
Courtroom 7B  
November 5, 2015  
1:30 p.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON  
UNITED STATES DISTRICT COURT JUDGE

**FORMAL STATUS CONFERENCE**

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

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

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

3 (Commencing at 1:32 p.m.)

4 THE COURT: We are here this afternoon in the matter  
5 of the National Hockey League Players' Concussion Injury  
6 Litigation. This is MDL number 14-2551.7 Let's begin by having Counsel note your appearances,  
8 please.9 MR. STEPHEN GRYGIEL: Good afternoon, Your Honor.  
10 Steve Grygiel from Silverman Thompson for the Plaintiffs.11 MR. STUART DAVIDSON: Good afternoon, Judge. Stuart  
12 Davidson, Robbins Geller, on behalf of the Plaintiffs.13 MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor.  
14 Bucky Zimmerman for the Plaintiffs.15 THE COURT: You've been relegated to the back,  
16 Mr. Zimmerman, haven't you (laughter)?

17 MR. CHARLES ZIMMERMAN: Yeah.

18 MR. MICHAEL CASHMAN: Good afternoon, Your Honor.  
19 Michael R. Cashman, for the Plaintiffs.20 MR. BRIAN GUDMUNDSON: Good afternoon, Your Honor.  
21 Brian Gudmundson, Zimmerman Reed, for the Plaintiffs.22 MR. CHRISTOPHER RENZ: Good afternoon, Your Honor.  
23 Chris Renz, Chestnut Cambronne, on behalf of the Plaintiffs.24 MR. JEFFREY KLOBUCAR: Good afternoon, Judge. Jeff  
25 Klobucar, on behalf of the Plaintiffs.

1           Appearing telephonically for the Plaintiffs this  
2 afternoon is Bill Gibbs from the Corboy Demetrio firm; Brian  
3 Penny from the Goldman Scarlato Penny firm; Tom Byrne from  
4 Namanny, Byrne & Owens; Bryan Bleichner from the Chestnut  
5 Cambronne firm; David Levine from the Levine Law Firm; and  
6 James Anderson from Heins Mills & Olson firm.

7           THE COURT: Thank you.

8           And the Defense, Mr. Beisner?

9           MR. JOHN BEISNER: Good afternoon, Your Honor. I'm  
10 John Beisner for Defendant, NHL.

11           MR. JOSEPH BAUMGARTEN: Good afternoon, Your Honor.  
12 Joseph Baumgarten, Proskauer Rose, for the NHL.

13           MR. DANIEL CONNOLLY: Good afternoon, Your Honor.  
14 Dan Connolly on behalf of the NHL.

15           MR. MATTHEW MARTINO: Good afternoon, Your Honor.  
16 Matt Martino from Skadden.

17           MR. JOSEPH PRICE: Joe Price, Your Honor. Good  
18 afternoon.

19           MR. CHRISTOPHER SCHMIDT: Good afternoon, Your  
20 Honor. Chris Schmidt for the non-party U.S. Clubs.

21           MR. DANIEL CONNOLLY: And, Your Honor, on the  
22 telephone for the NHL are David Zimmerman and Julie Grand from  
23 the NHL; Shep Goldfein and James Keyte from the Skadden Arps  
24 firm; and Adam Lupion from the Proskauer Rose firm.

25           THE COURT: Thank you, Mr. Connolly.

1 All right. Let's take a look at the agenda, and  
2 we'll start with the status of Defendant's document  
3 production.

4 MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor.  
5 I'm pleased to say that we are outnumbering the Defendants  
6 today. It gives me a certain sense of power.

7 THE COURT: Mr. Martino, he beat you to it. What  
8 can I say? You'll get your chance.

9 MR. MATTHEW MARTINO: I didn't know if we start with  
10 something else.

11 MR. CHARLES ZIMMERMAN: No, I just jump faster. I'm  
12 younger (laughter).

13 Your Honor, we've got a pretty -- a pretty good  
14 agenda, but I think it's actually pretty well organized  
15 with -- at least on our side with who is going to be talking  
16 about what. And so I think we'll just get right into it. I  
17 think there's a couple arguments back and forth. Formal  
18 arguments will be on the record on pending motions. But we'll  
19 go through all the status, Plaintiffs then Defendants, and  
20 then if there's questions or comments.

21 As the Court knows, you do have before you the  
22 proposed amended scheduling order, and we can talk about that  
23 as it comes up in the agenda. You do have before you the  
24 proposed Amended -- Master Amended Class Action Complaint,  
25 which will be a subject of some discussion, and it's only a

1 proposed Complaint. And you have, I think, before you the  
2 record -- the briefs in the two contested matters.

3 So, unless there are questions from Defense, we can  
4 start with status of Defendant's document production. And my  
5 partner Matt and Brian are going to handle that.

6 THE COURT: Very good. Thank you.

7 MR. MATTHEW MARTINO: Good afternoon, Your Honor.  
8 Matt Martino.

9 I think we'll be brief now. I think we're getting  
10 briefer as we go along, which is great. For the NHL document  
11 production, we are basically complete, as we mentioned last  
12 time, with the exception of some clean-up items with, you  
13 know, priv. log issues, what were produced, documents that are  
14 de-designated and whatnot.

15 For the Board of Governors, there are primarily two  
16 outstanding issues. The first is the text messaging from the  
17 Governors that we talked about last time. We're in the  
18 process of collecting text messages or Declarations if a  
19 Governor wanted to do a Declaration in lieu of collection.  
20 We've collected for a number of those already. We're shooting  
21 to have the collection process completed within the next week  
22 or two.

23 And production of responsive texts, if any, would  
24 begin within a week or two after that. So, I think we're -- I  
25 think they're getting -- getting everything in order and



1 we've -- I think we've collected for maybe a third so far and  
2 I think it's going fairly smoothly so far.

3 THE COURT: So production in about a month. Is that  
4 what you're saying?

5 MR. MATTHEW MARTINO: I think we would begin  
6 production before that. I think we can probably begin within  
7 two or three weeks. Completion, you know, I would say 30 to  
8 45 days. I mean, it sort of depends -- there might be some  
9 outliers at the end. There is one exception that I should  
10 note, and it's in the agenda. The San Jose Sharks' Governor  
11 is not a U.S. citizen, and he comes to the U.S. fairly  
12 infrequently, you know, and he actually will not be in the  
13 U.S. again until January. So, we would do the collection of  
14 his texts when he arrives in January.

15 The second issue, primary issue, is the -- we've  
16 received recently a request for additional Alternates for  
17 eight other Clubs from the Plaintiffs, and we are currently  
18 coordinating with the Clubs to ascertain which of the  
19 Alternate Governors may have responsive material and what the  
20 burden would be associated with collecting that material. And  
21 we anticipate having that information for the Plaintiffs  
22 within the next two weeks, and then we'll meet and confer  
23 again.

24 I think we'll actually be in a position to meet with  
25 them again this week to give them an update. And then we'll

1 go from there on, you know, which of the Alternates are  
2 appropriate to collect from and have a report at the next  
3 conference.

4 THE COURT: Okay.

5 MR. MATTHEW MARTINO: Thank you.

6 THE COURT: Very good. Thanks.

7 MR. BRIAN GUDMUNDSON: And if I may, Your Honor,  
8 just address some of these issues a bit. We have enjoyed a  
9 rather transparent meet and confer process between Mr. Martino  
10 and myself primarily, and we really appreciate that. We  
11 remain concerned, of course, about the timeframe that we're on  
12 here, (inaudible) we're now many, many months beyond what we  
13 originally requested a lot of these things. Again, the meet  
14 and confer process has been very transparent, and I take  
15 Mr. Martino -- I've always taken him at his word. But again I  
16 just wanted to state our concern about the timeframe and look  
17 forward to getting those as soon as possible.

18 THE COURT: Okay. Sounds good.

19 Anything else on the topic of the Defendant's  
20 production?

21 **(None indicated.)**

22 THE COURT: All right. Let's move ahead, then, to  
23 Plaintiff discovery and Fact Sheets.

24 MR. CHARLES ZIMMERMAN: That will be Mike Cashman,  
25 Your Honor.

1 THE COURT: Okay. You have the case-in-chief and  
2 then the cross-examination, Mr. -- (laughter).

3 MR. MICHAEL CASHMAN: Your Honor, thankfully for  
4 this conference, I think that these reports for the Plaintiff  
5 Fact Sheets and the Defendant Fact Sheets are relatively  
6 brief. The Plaintiff discovery, other than the depositions,  
7 is complete. The documents have been produced. With respect  
8 to the Fact Sheets, we have been providing them for new  
9 Plaintiffs as the deadline arises.

10 As far as the Defendant Fact Sheets, I think we  
11 advised the Court at the last hearing that we intend to  
12 provide a deficiency letter to the NHL, and we intend to do  
13 that and that will probably be on the next -- the next  
14 conference agenda.

15 THE COURT: Okay.

16 Mr. Connolly.

17 MR. DANIEL CONNOLLY: Your Honor, I'm a little loath  
18 here because I understood you to say this is the  
19 cross-examination part, and I know it's difficult.

20 THE COURT: I know, you don't have much -- you'll  
21 have future opportunities (laughter).

22 MR. DANIEL CONNOLLY: No, no, that's fine. I agree  
23 largely with Mr. Cashman here. The Plaintiff -- we are  
24 reviewing the Plaintiff Fact Sheets. We think there are some  
25 issues that we need to address, but we have not yet had a meet

1 and confer with them on these. We note that if the Court  
2 approves the new Master Amended Complaint that we think that  
3 there will be a need to supplement the interrogatory answers  
4 in line with that Complaint. We also will need to serve some  
5 new discovery concerning the new Plaintiff, Mr. Ludzik, who  
6 while he was a Plaintiff before had not provided a Fact Sheet  
7 but we will now ask to -- we will now ask, you know -- pose a  
8 interrogatory request relative to him. And we'll anticipate  
9 doing that if and when the Complaint is approved by the Court.

10 As far as the Defendant Fact Sheets go, Mr. Cashman  
11 is right. We have been talking about some of those issues.  
12 We have not received a deficiency letter, and we haven't met  
13 and conferred on that process yet.

14 THE COURT: Very good. Thank you.

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

16 THE COURT: You bet.

17 MR. CHARLES ZIMMERMAN: Your Honor, I just want to  
18 be clear with the Court and with everyone on the process of  
19 Fact Sheets because I don't want to -- I think the idea -- the  
20 whole idea of a Plaintiff Fact Sheet and a Defendant Fact  
21 Sheet is to sort of somewhat informalize the process so we  
22 kind of know what we have to ask, we know what kinds of  
23 questions we're going to be asked of us and what kinds of  
24 information the Plaintiffs have to give and we're getting the  
25 same type of standardized information. And I just want -- the

1 only thing I want to say is that the whole idea of this is  
2 really to make it an informal process so that we can have time  
3 to do the -- a fulsome exchange of information.

4 And I think it's working for the most part, and so I  
5 just want to note that the idea in our mind -- and maybe it's  
6 the -- I think it's the same of Defendants -- is that we have  
7 this standardized information, we make a good faith attempt at  
8 answering them, we give our best answers, they see  
9 deficiencies, we meet and confer, we try and iron out the  
10 deficiencies, and then if we have a genuine dispute with  
11 regard to that meet and confer and those deficiencies, we  
12 bring it -- we bring it to the Court for the Court to make the  
13 call it's okay the way it is or you have to supplement.

14 I just want to make sure we all know the rules of  
15 engagement because it isn't really an interrogatory, it isn't  
16 really a request for -- under formal discovery rules. It's  
17 this informal process, and I want to make sure that at least  
18 the Court understands where we're coming from on the  
19 Plaintiffs' side. I'm pretty sure the Defendants understand.  
20 I think we had a little hiccup back awhile where a motion to  
21 dismiss was made. And it doesn't mean a motion to dismiss may  
22 not be appropriate at some time if there's not compliance, but  
23 I think we want to go through it and make sure we understand  
24 the process before there is such a motion.

25 THE COURT: Mr. Beisner.

1           MR. JOHN BEISNER: I don't think we have any major  
2 disagreement with that. I think the motions we filed before  
3 the motion that was filed was consistent with the Court's  
4 order on that after we were notified those folks were not  
5 going to provide responses. But there was no voluntary  
6 dismissal for that. But in any event, if there was any  
7 misunderstanding about that, it's been worked out on that.  
8 But I don't -- I don't think it was -- I think what we did was  
9 consistent with the order as we understood the facts at the  
10 time.

11           THE COURT: Thank you.

12           MR. CHARLES ZIMMERMAN: And, John, I wasn't -- I  
13 wasn't stating that and I wasn't making that argument at all.  
14 I was just making sure that we understood it so we don't have  
15 any hiccups going forward.

16           THE COURT: Okay.

17           Mr. Schmidt, you're on.

18           MR. CHRISTOPHER SCHMIDT: Good afternoon, Your  
19 Honor. The Clubs are working primarily on the issue of  
20 gathering medical records and workers' comp files for the  
21 other 60 Plaintiffs that are in the suit beyond the six; there  
22 are now seven. We're still in that process. We're starting  
23 to receive documents. We haven't received them from all the  
24 Clubs, but we're following up where we need to. And then we  
25 will process those documents and produce them.

1           Because we have authorizations, the production  
2 should go pretty easily once we have all the documents in  
3 house. So, I don't have an estimate right now because we're  
4 still waiting to get documents from some of the Clubs. And  
5 I'll remind the Court this is actually a more labor-intensive  
6 process because we're going through old documents. We're not  
7 just pulling stuff that happens to be on an electronic  
8 database. So, we're moving with all due speed and hoping to  
9 finish this still within the next 30 to 45 days, but I don't  
10 want to commit firmly to a date yet until I have a little more  
11 information.

12           THE COURT: Okay.

13           MR. STUART DAVIDSON: Mr. Schmidt.

14           MR. CHRISTOPHER SCHMIDT: Thank you.

15           MR. STUART DAVIDSON: On behalf of the Plaintiffs,  
16 Your Honor, Stuart Davidson.

17           Mr. Schmidt is correct that we did send about 60  
18 medical authorizations, and we haven't received any  
19 production. My understanding and I believe Mr. Schmidt's  
20 statements here reflect that they are trying to gather them  
21 all at once. I would point out that another Complaint has  
22 recently been filed on behalf of several other players, so  
23 there's going to be additional requests, as well. And I  
24 expect that that may happen more often over the next couple  
25 months.

1           There are -- there is an issue that is outstanding  
2 with the Clubs with respect to the private medical information  
3 privilege that the Clubs have asserted. I believe that  
4 Mr. Renz from the Chestnut Cambronne firm has been engaged in  
5 some meet and confers with Mr. Schmidt over that that may  
6 result in motion practice, which I assume will be sent to the  
7 Magistrate's court. And if the Court wants to hear more about  
8 that --

9           THE COURT: I don't think that will go to --

10          MR. STUART DAVIDSON: Oh, that will stay here, to  
11 the --

12          THE COURT: That will stay here, yeah.

13          MR. STUART DAVIDSON: I apologize.

14          THE COURT: I am referring very few things to the  
15 Magistrate Judge, and so far only the alleged over-designation  
16 and the privilege documents that are the source of the other  
17 motions. But nothing in the future, at least that I see.

18          MR. STUART DAVIDSON: Great. And so I expect that  
19 that will be a source of a disagreement at the end of the meet  
20 and confer process.

21                 The only other thing I wanted to point out is  
22 Mr. Schmidt had mentioned that he was collecting workers' comp  
23 files. I believe he's referring to the 60 or so people who  
24 have provided medical authorizations. We have -- the  
25 Plaintiffs have asked for workers' comp files for all players,



1 not just those who have provided authorizations. We are  
2 attempting to get that information through the insurer, Chubb,  
3 and I will be discussing the subpoena, the status of the  
4 subpoena to Chubb. We don't want and we don't think we should  
5 be going to two separate places to get the same information;  
6 but at some point if we don't get the information from Chubb,  
7 we're either going to have to raise it with the Clubs or we're  
8 going to have to raise it with Your Honor through motion  
9 practice.

10 But I can give a little bit more of an update on  
11 that when we get to the third-party discovery process.

12 THE COURT: Thank you.

13 MR. STUART DAVIDSON: Thank you, Judge.

14 THE COURT: Okay. I think we've arrived at the  
15 third-party discovery --

16 MR. STUART DAVIDSON: Oh, there we go. I should  
17 have looked ahead (laughter). Everybody laughing at my  
18 expense.

19 So, we sent a -- we served a subpoena on Chubb many,  
20 many months ago, and it has been an arduous process. We have  
21 had a number of meet and confers, and I believe Mr. Penny gave  
22 you a brief update at the last conference. And it appears  
23 that late last night, Counsel for Chubb sent a letter to  
24 Mr. Penny identifying, essentially, the databases that they  
25 have in their possession. But my understanding is that while

1 they are providing us the information that -- they are  
2 providing us the identification of the information in their  
3 possession, the likelihood of Chubb providing that information  
4 or producing that information pursuant to the subpoena is very  
5 small and I believe will likely result in motion practice.

6 I believe that it was suggested at the last  
7 conference with Mr. Penny that perhaps Mr. Loney of Hogan  
8 Lovells who represents Chubb could be invited to the next  
9 conference. I think that now is the appropriate time to do  
10 that. Mr. Stephen Loney of the Philadelphia office of Hogan  
11 Lovells represents Chubb. We do have a formal conference  
12 scheduled for December 1st; we have an informal scheduled for  
13 December 15th.

14 I leave it to Your Honor's discretion which one, or  
15 none, if the Court wants to invite Mr. Loney through a Minute  
16 entry or what have you. But I think that would be appropriate  
17 before we actually take the next step and engage in motion  
18 practice on that.

19 THE COURT: Why don't you e-mail the Court, copying  
20 the parties, with Mr. Loney's -- the spelling of his name and  
21 his law firm and contact information.

22 MR. STUART DAVIDSON: I will do that, Your Honor.

23 THE COURT: Okay.

24 MR. STUART DAVIDSON: The only other third-party  
25 discovery update I have besides the letters rogatory, which is

1 technically third-party discovery, which is the next on the  
2 agenda, is that we did issue subpoenas to several, for lack of  
3 a better term, marketing firms of the NHL that they used to  
4 conduct certain studies and I have been in contact with some  
5 of their counsel. Just as a matter of professional courtesy,  
6 I gave them an extension to respond to the subpoena, so I  
7 expect that there are no issues on the immediate horizon with  
8 respect to those subpoenas.

9 But before I get into the letters rogatory, does  
10 anybody want to --

11 MR. JOHN BEISNER: Your Honor, I can give a brief  
12 update on a few subpoenas that we have served that may be of  
13 interest. The subpoena we served on the Players Union, the  
14 National Hockey League Players Association, our understanding  
15 is that we'll begin receiving some document production from  
16 them within the next -- next few days. And as we've  
17 indicated, we'll share that with Plaintiffs' counsel when  
18 received.

19 We did receive a response to the subpoena and some  
20 documents produced from Dr. Ann McKee and we shared those with  
21 Plaintiffs' counsel, as well. The same is true of Dr. Robert  
22 Stern. We've received a response from Plaintiffs' counsel on  
23 behalf of Dr. Robert Cantu earlier; we have not heard back to  
24 the -- to any awareness I have, from Chris Nowinski who was  
25 another person to whom we had sent the subpoena, and I think

1 that's the report from our side.

2 THE COURT: Thank you.

3 MR. CHARLES ZIMMERMAN: It was Stern, Cantu,  
4 Nowinski --

5 MR. JOHN BEISNER: And McKee.

6 MR. CHARLES ZIMMERMAN: -- McKee. Thank you.

7 THE COURT: Okay.

8 MR. STUART DAVIDSON: I'm back. On the letters  
9 rogatory, first I want to thank Your Honor for your patience.  
10 This is not the simplest of issues, as the Court knows.  
11 Mr. Penny, who is on the phone, I would like to give props to  
12 because he's doing a masterful job trying to navigate through  
13 all the complicated letters rogatory process. The process is  
14 moving, and we have provided our Canadian counsel with the  
15 letters rogatory that the Court has issued. An application is  
16 about to be submitted to the Ontario Superior Court. My  
17 understanding through Mr. Penny is that contact will be --  
18 attempt to be made with certain Senior Justices at the Ontario  
19 Superior Court to try to push this -- put this on a fast  
20 track.

21 Our hope is that we can get an order from the  
22 Ontario Superior Court, which is the easiest, most efficient  
23 way for us to do it because that's where our Canadian counsel  
24 is. We get an order from the Ontario courts which we can then  
25 take to the other provinces in order to obtain similar orders

1 from them. So, that's the status right now. I don't really  
2 think there's anything else to add. I hope the Court  
3 understands the reason why we're going to the Ontario court  
4 first as opposed to trying to get court hearings in front of  
5 the Superior Courts of all the other provinces. We think it  
6 would be easier and more efficient and cost-effective for us  
7 to get an order from the local court where our Canadian  
8 counsel is that I think would be persuasive to many courts in  
9 the other --

10 THE COURT: That makes sense.

11 MR. STUART DAVIDSON: All right. Thank you, Judge.

12 THE COURT: Mr. Connolly.

13 MR. DANIEL CONNOLLY: Your Honor, nothing to add on  
14 this, other than that we're waiting and watching.

15 THE COURT: Boy, he's good, Mr. Beisner (laughter).  
16 Okay. Deposition scheduling.

17 MR. STEPHEN GRYGIEL: Thank you, Your Honor.  
18 Mercifully brief. As Your Honor has observed, we've had a bit  
19 of a hiatus in depositions in this case largely because, as  
20 the Court has already heard today, there have been some  
21 periods of document discovery that needed to get sorted out  
22 first. And we heard today from Mr. Martino and we heard today  
23 from Mr. Schmidt about certain projected dates for their  
24 documents. So, we've been waiting to see how that shakes out  
25 before we go ahead with any more depositions.

1 I can say that the -- of course what's before the  
2 Court is accurate in terms of what we have asked for and what  
3 the Defendants and what third-parties have exceeded to for  
4 dates. We do have a couple of open issues.

5 Number one, we do have a scheduled deposition. I  
6 simply advise the Court now, on November the 20th of  
7 Dr. Willem Meeuwisse, and that's M-e-e-u-w-i-s-s-e. Pretty  
8 good, huh?

9 MR. JOHN BEISNER: Affectionately known as  
10 (inaudible).

11 MR. STEPHEN GRYGIEL: Right. First name officially  
12 Willem, W-i-l-l-e-m.

13 But anyway, that's scheduled for the 20th. If we  
14 can, we'd like to hold that date. As Mr. Beisner and I have  
15 already discussed, the date will be -- will be influenced by  
16 the completion of the ImPACT video database. Those databases  
17 have recently been sorted out. That's in the report to the  
18 Court. If I have that database in sufficient time prior to  
19 the 20th, we would like to go forward. As Mr. Beisner and I  
20 have discussed, if I don't have it in time to understand it  
21 and perhaps use it effectively for the deposition, then we  
22 will have to push that scheduled deposition off.

23 We do have another one currently scheduled for  
24 December 17th. That's for Mr. Mario Lemieux. He's an owner  
25 and current Alternate Governor of the Pittsburgh Penguins.

1 That we'd like to think will go forward. That's still on the  
2 calendar. At this point if discovery unfolds the way we hope  
3 it does, that will go forward.

4 And we had finally one other outstanding date, and  
5 that was for a former player named Marc Savard. It turns out  
6 Mr. Savard is still in the bargaining unit. I spoke the day  
7 before yesterday by e-mail with counsel for the NHLPA, and  
8 they told me that they were working with counsel for  
9 Mr. Savard to try to get a date.

10 So, that's where we are, I think, accurately on  
11 deposition scheduling. Basically waiting for some discovery  
12 to get done, and then we'll start with another round from us  
13 of who we're going to depose with suggested dates. Once the  
14 Court put that order in place, it got us more compressed in  
15 terms of where we respond to when we -- for dates. Things  
16 have worked very well, Your Honor. Thank you.

17 THE COURT: Okay. Very good.

18 Any response?

19 MR. JOHN BEISNER: I don't think we have any  
20 comments on that, Your Honor. Thank you.

21 THE COURT: Okay. You bet.

22 Let's turn then to the database information  
23 production.

24 MR. DANIEL CONNOLLY: Your Honor, I'm just going to  
25 quickly talk about the database. Everything that the Court

1 has ordered has been produced, with the exception of the  
2 ImPACT database which Mr. Davidson just discussed briefly with  
3 the Court. We are working with them. It's a propriety  
4 database to a third-party. We're working with them to get  
5 that produced and expect to have that produced within the next  
6 two weeks.

7 THE COURT: Okay.

8 MR. STUART DAVIDSON: So, after all this time, it  
9 is -- it was welcome to receive all of the other databases  
10 from the NHL, and we appreciate Mr. Bernardo and Mr. Penny's  
11 work on that process. So, we have received those databases,  
12 obviously except for the ImPACT database. We are now in the  
13 process of trying to figure out exactly what we have and to be  
14 able to review it and to determine what they've de-identified  
15 and what they have not de-identified to see if there are  
16 issues that we do need to raise with them to make sure that  
17 it's readable and understandable to everybody who needs to do  
18 so.

19 So, that's the process that's ongoing. It is taking  
20 a little bit of time for our vendor to be able to figure out  
21 how to load that -- those databases into a readable format for  
22 the attorneys. But the process is ongoing, and I appreciate  
23 the update that ImPACT's database will be produced in the next  
24 couple weeks because that will effect a lot of further  
25 discovery, as well.



1 THE COURT: Okay. Very good.

2 The amendment to the Master Class Action Complaint.

3 MR. STUART DAVIDSON: I'm just going to stay here  
4 forever. So -- so on October 29th, per the Court's order, the  
5 Plaintiff sent to defense counsel our proposed -- our draft  
6 proposed Amended Master Complaint. As the Court will recall,  
7 the -- kind of what precipitated the preparation of this  
8 Complaint, which really wasn't something that we thought we  
9 needed to do, was Mr. Beisner had indicated that there was  
10 some lack of clarity in the current Master Complaint,  
11 particularly with respect to the class definition. So, we  
12 agreed we would prepare a proposed Amended Complaint, and I  
13 believe what the process should be now is for the parties to  
14 have a meet and confer process pursuant to the local Rules of  
15 this Court to determine what the next steps should be.

16 It is my understanding from talking with  
17 Mr. Zimmerman that Mr. Beisner raised with Mr. Zimmerman the  
18 possibility that the NHL would file new motions to dismiss,  
19 preemption motions. I don't know the extent of what they  
20 would file. And that's why I honestly believe that the meet  
21 and confer process is the appropriate thing to do now.

22 Before any Amended Master Complaint is actually  
23 filed with the Court, the parties should meet and confer.  
24 They should tell us what they think would be fodder for  
25 another preemption motion or another motion based on statute

1 of limitations, and we should be able to have an opportunity  
2 to fix things if we think they should be fixed or leave things  
3 as they are.

4 My concern is we're taking a step forward and then  
5 we take two steps back because we really didn't think and we  
6 really to this day don't believe we need to amend this  
7 Complaint. We did so because the NHL thought there was some  
8 lack of clarity in the current Complaint, which respectfully  
9 we don't think there is any lack of clarity. But if we are  
10 going to go down this road of filing the Amended Master  
11 Complaint, we should meet and confer first, figure out what  
12 they think would give rise to another motion, we don't want to  
13 have taken all of this -- these steps forward and gone through  
14 all this discovery. And we've really moved very well in a  
15 very, I think, short period of time to get this case towards a  
16 trial or to a class certification and then trial.

17 To take a couple steps back I don't think would  
18 necessarily be efficient for anybody. But that would be my  
19 proposal. Nothing is filed yet, so we might as well meet and  
20 confer and find out what their complaints are about it and  
21 then take it from there. But obviously we'll do whatever  
22 schedule the Court asks us to do. My suggestion is that give  
23 us a week or two to have a meet and confer and then set a date  
24 by which we need to file any Amended Master Complaint.

25 Thank you.

1 THE COURT: Thank you.

2 Mr. Beisner? Who -- oh, okay.

3 MR. JOSEPH BAUMGARTEN: Good afternoon, Your Honor.  
4 Joseph Baumgarten from Proskauer Rose.

5 This actually is the first that I think we've heard  
6 about a proposal for a meet and confer about the proposed  
7 Amended Complaint. We did receive the proposed Amended  
8 Complaint a week ago. We've been through it. I think  
9 Mr. Davidson correctly anticipates that we would intend to  
10 move against the Complaint or renew the motion against the  
11 Complaint based on preemption grounds.

12 THE COURT: So there wouldn't be any new arguments?  
13 There's nothing about the new Complaint that would change your  
14 argument about preemption or anything else. Is that right?

15 MR. JOSEPH BAUMGARTEN: The -- there are things that  
16 have been moved around. There's a lot more text in the  
17 Complaint. There are additional counts. The argument is  
18 essentially the same argument and, as I say, we would position  
19 some of the things a little bit differently. There are a lot  
20 more documents that are referred to in the Complaint that  
21 become part of the Complaint, but the structure is essentially  
22 the same structure --

23 THE COURT: But the Court isn't going to give you a  
24 second shot at a preemption argument unless there is something  
25 substantively different about the Complaint. So, you can file

1 a motion to dismiss -- in other words, to make sure the record  
2 is clear that you've moved to dismiss this current  
3 Complaint -- but I won't entertain argument. I'll take it on  
4 the papers unless there is something distinct about it.

5 MR. JOSEPH BAUMGARTEN: Well, there are new counts  
6 in the Complaint, for example, so we would be addressing the  
7 additional counts that are contained in the Complaint, but the  
8 arguments are the same arguments.

9 THE COURT: All right. Just to be clear, I don't --  
10 I won't permit you to get a second shot at arguing it better,  
11 if you will. In other words, I'll give you a shot at arguing  
12 against anything new, but not a second shot at arguing it  
13 better.

14 MR. JOSEPH BAUMGARTEN: I can always do it better,  
15 Your Honor (laughter).

16 THE COURT: Everybody could, and in that case I'd  
17 get endless motions.

18 MR. JOSEPH BAUMGARTEN: I don't anticipate that that  
19 will be a problem.

20 THE COURT: Okay. Thank you.

21 MR. JOSEPH BAUMGARTEN: Thank you.

22 MR. JOHN BEISNER: Your Honor, if I can just augment  
23 for a moment on that. I think what -- basically what we're  
24 saying is I think once the new Complaint is filed, the old one  
25 is gone, as is the earlier motion. So, we need to reassert

1 that --

2 THE COURT: But you can do just that. You can  
3 reassert the motion without a second chance at briefing and  
4 argument and all that.

5 MR. JOHN BEISNER: That's right. And I think there  
6 are changes -- there are some -- and I don't want to get into  
7 this area, but there are some changes in the Complaint we'll  
8 need to adapt to, but I think that's really what we're talking  
9 about. And for the convenience of the Court, as well, there's  
10 paragraphs of change that moved around and so on, and so to  
11 make sure that it addresses the new -- the current Complaint I  
12 think is --

13 THE COURT: That's fine, as long as it's not the  
14 same argument.

15 MR. JOHN BEISNER: Right. Your Honor, I think  
16 beyond that, there may be -- there are -- leaving aside the  
17 preemption part of this, there are other significant changes  
18 in the Complaint. They've -- Plaintiffs have proposed some  
19 changes here that I think, you know, go beyond just the issues  
20 that -- that we raised. Obviously happy to talk with  
21 Plaintiffs, but I think to sort of expect that we're going to  
22 be able to negotiate a Complaint that's not going to be  
23 subject to motion practice, particularly on preemption, I'm  
24 not sure works.

25 I do have some questions for Plaintiffs about the

1 new Complaint that I'll just share with the Court that I think  
2 remain -- and I think Your Honor, if you had a red line for  
3 the Complaint, it is -- there are a large number of changes in  
4 it. I'm not sure of what significance they are, but there are  
5 a number of changes in it. But all we were talking about was  
6 really the relief section of the Complaint that was unclear to  
7 us. But I think there were four questions that remained a  
8 little unclear to us. I was analogizing this earlier to being  
9 at the optometrist and having the lens turned. It seemed to  
10 be a little clearer, but I'm not sure we were quite at the  
11 optimal level yet.

12 But the four questions that we wanted to raise --  
13 and I'll just note them for the record here so that Plaintiffs  
14 may want to give them some thought is -- the first one is  
15 whether the medical -- is whether medical monitoring, that is  
16 Count 2, the only claim asserted by members of the proposed  
17 Class One, which is a new class definition, which is in short  
18 form those living former players who have not been diagnosed  
19 with a longterm brain disease. Is that the only claim that  
20 they are asserting?

21 As a variant on that question, I think what we're  
22 asking is whether the members of the proposed Class One seek  
23 relief for any current injury, such as post-concussion  
24 syndrome. There remains some inconsistencies in the  
25 Complaint. For example, the negligence claims section I think

1 at the end has some reference to seeking relief for all  
2 available remedies for all class members, and I'm not quite  
3 sure -- members of all classes. I'm not quite sure what that  
4 means, but I think that needs to be clarified from the relief  
5 section at the end of the Complaint. I assume that the intent  
6 of Plaintiffs -- and this is really the question that we've  
7 been asking is that the Class One group is suing for medical  
8 monitoring period, but we need clarity on that going forward.

9 The other questions we had is, is class membership  
10 exclusive? And what I mean by that is if you were a member of  
11 Class One, are you by definition not a member of Class Two,  
12 and vice versa? I think that's the intent of the Complaint,  
13 but we need clarity on that. And the fourth question we had  
14 is on whose behalf is the loss of consortium claim asserted?  
15 Are we talking about spouses or significant others of members  
16 of Class Two only? Or is this claim asserted on behalf of  
17 other -- other persons here, spouses or significant others, of  
18 other persons?

19 I think those are the four questions we have, and I  
20 guess I would just suggest Plaintiffs may want to look at the  
21 clarity of those four sections. I'm not sure what we would be  
22 meeting and conferring about. Those were our questions about  
23 the Complaint, and I appreciate the Court allowing us the  
24 opportunity to put those questions on the record, but I think  
25 those are the four questions we need to have answers to in

1 the -- regarding the Complaint.

2 THE COURT: Mr. Beisner, Mr. Baumgarten mentioned  
3 bringing a preemption motion. Just to make sure the record is  
4 clear that there's a preemption argument pending as to the new  
5 Master Complaint, do you anticipate any other motions to  
6 dismiss?

7 MR. JOHN BEISNER: Your Honor, we are looking at  
8 that, and there may be other motions. These would not be the  
9 motions we brought earlier, but I think the way that the  
10 Complaint is now pleaded, the class structure and so on may  
11 give rise to some other -- other motions that we would want to  
12 assert.

13 THE COURT: Well, it seems to me appropriate, then,  
14 that you meet and confer with the Plaintiffs about those, any  
15 anticipated motions.

16 MR. JOHN BEISNER: Yes, Your Honor. I did want to  
17 clarify -- I'm not sure much -- beyond those questions I was  
18 asking, I'm not sure meeting and conferring about the content  
19 of the Complaint is going to accomplish -- that's Plaintiffs'  
20 job, obviously as the Rules require, with respect to any  
21 motions to dismiss. Obviously we will meet and confer with  
22 Plaintiffs before those are brought.

23 THE COURT: Okay. Thank you.

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

25 MR. CHARLES ZIMMERMAN: I'm slower than some with



1 regard to trying to make sure I understand. When John called  
2 me and it was a good faith call after I gave him the  
3 Complaint, he said they are going to -- they wanted to make  
4 new preemption motion, that I at least interpreted that to  
5 mean he wanted to preserve his right under the preemption  
6 motion that was filed and make sure that applied to the new  
7 Complaint, which I completely agree with. But he said there  
8 was some new things in the Complaint that raised other  
9 preemption concerns. I want to make sure that -- before we  
10 leave court today, I want to make sure I understand if that's  
11 coming, if that's not coming. And I think we should meet and  
12 confer on it to make sure we're not blindsided by it or not  
13 understanding one another.

14 Because let's say there's something in the Complaint  
15 that says, oh, there is a reference to this and that gives us  
16 new grounds to make another preemption motion argument that we  
17 didn't raise before, well, we might want to remove that from  
18 the Complaint. If he tells me what it is, it may be not  
19 germane to what we're trying to do here. I don't want to make  
20 a lot of work. And like Stu said, I don't want three steps  
21 forward and five steps backwards, back to the motion practice  
22 under Rule 12.

23 So, I just want to be clear and maybe I -- my notes  
24 are wrong or maybe John misstated it when he said raise new  
25 preemption issues. But when the Court asked that question, I

1 wasn't -- I didn't clearly hear no, they're not raising new  
2 preemption arguments and motions.

3           Secondly, the other grounds for motions to  
4 dismiss -- John said there are other grounds. I assume that  
5 to be other things like some other Rule 12 motions or statute  
6 of limitations or some other kinds of motions to dismiss. I'd  
7 just like to know what they are. I don't think that's -- we  
8 don't litigate by surprise. We don't have to litigate by  
9 volume of paper. Tell us what they are, maybe we can wrestle  
10 them to the ground, maybe we can discuss them with the Court,  
11 maybe we can change the Complaint. But let's get it on the  
12 table so we know what they are.

13           And I don't think he's -- anybody is not being  
14 genuine about this, but we just need to move forward. We're a  
15 year-plus into the case. We just want to keep it going. Like  
16 Stu said, the reason we amended the Complaint was John's call  
17 for more clarity about the class and who we're representing  
18 and what the class is, and he raised four questions that he  
19 gave to the Court. And I think they're completely legitimate  
20 questions, and I think we'll answer those hopefully to the  
21 best of his satisfaction. If we can't, we'll do it in an  
22 informal with Your Honor. And if that doesn't work, we'll  
23 have a formal hearing on them. That's my hope and  
24 understanding of how this is going to work.

25           THE COURT: Very good.

1 MR. JOSEPH BAUMGARTEN: Hopefully I can clear this  
2 up, Your Honor. Our initial motion to the Court was based on  
3 301, on the grounds that the claims that were asserted in the  
4 Complaint either were based on duties created by an agreement  
5 governed by Section 301 or would require the interpretation or  
6 application of those agreements or are inextricably  
7 intertwined with those agreements. Those are still the bases  
8 for the motion. It's -- from a substantive perspective, we  
9 view the Amended Complaint as same old, same old. There's an  
10 attack on the rules, there's an attack on the interpretation  
11 of the rules, there's an attack on the NHL's alleged failure  
12 to enforce the rules, all of which are collectively bargained.  
13 There's an attack on the supplementary discipline system  
14 collectively bargained.

15 There are allegations that essentially the NHL has  
16 the right -- as I think the Amended Complaint uses the phrase  
17 "controlling organization" -- to control how the game is  
18 played. Essentially, it sets forth a decades' old history of  
19 the NHL and its relationship with the players but remarkably  
20 doesn't address the Collective Bargaining Agreement head on.  
21 But certainly -- it doesn't do that explicitly but does it in  
22 essence, and certainly requires interpretation.

23 THE COURT: And I don't think there's any need for  
24 an additional motion. It sounds like it's purely ministerial,  
25 so if there are certain changes in paragraphs or the like, you

1 can file some kind of a supplemental brief that identifies  
2 those, but I don't want new and better arguments, that's -- I  
3 want to make that point clear -- on the same issues.

4 MR. JOSEPH BAUMGARTEN: Well, the -- to the extent  
5 that there are new arguments, there are certainly additional  
6 documents that are relied on in the Complaint that may be  
7 relevant to the question of preemption. I mean, it's not --  
8 to be clear, the new Complaint is not simply a matter of  
9 referring to paragraph 17 versus paragraph 70.

10 THE COURT: All right. Just -- I think you hear me.  
11 Okay?

12 MR. JOSEPH BAUMGARTEN: Yes. Thank you, Your Honor.

13 THE COURT: All right.

14 MR. JOSEPH BAUMGARTEN: I'll let Mr. Beisner address  
15 the other items.

16 THE COURT: Thank you.

17 MR. JOHN BEISNER: Your Honor, I don't think I have  
18 anything else to add on that. As I said, once we've had a  
19 chance to review the Complaint, we've had it for a few days,  
20 and I think about it, as I said there may be other arguments  
21 we've made. They've made substantial changes to the class  
22 structure and who has -- they've added counts, some of which  
23 we think are potentially subject to dismissal, and I think  
24 we're entitled to make those 12(b)(6) motions since Plaintiffs  
25 have made the decision to add those things to the Complaint.

1           That's not something we did. That's not something  
2 we asked them to do. We were talking about the narrow issue  
3 of what is the claim of the undiagnosed group, and that's all  
4 we were asking for. It's a much more substantial revision  
5 than that with a number of additions, and I think we're  
6 entitled to raise questions as to what's new.

7           THE COURT: Okay. It seems to me appropriate then  
8 that the parties have meet and confer to address the questions  
9 raised by the NHL, to address any additional motions to  
10 dismiss that might arise out of this new Complaint. And to  
11 the extent that any preemption argument is new or is based on  
12 additional documents identified in the Complaint, that would  
13 be the subject of the meet and confer, as well. And then you  
14 can report to me at the December 1 conference about the status  
15 of the affair, and I won't rule on the Complaint until I hear  
16 what the status is as of December 1st.

17           All right. Anything more on the Master Class Action  
18 Complaint?

19           MR. STUART DAVIDSON: No, Your Honor, thank you.

20           THE COURT: All right. We have an amendment  
21 proposed to PTO number 8. Let me hear about that.

22           MR. STEPHEN GRYGIEL: Thank you, Your Honor.

23           THE COURT: I think in my memory, I remember telling  
24 you guys four months, so tell me why seven months.

25           MR. STEPHEN GRYGIEL: I do remember Your Honor

1 saying four months, so it's not without some trepidation that  
2 I approach this particular podium this day.

3 We've looked at the -- having looked at the base of  
4 discovery that brings us here, having had Your Honor already  
5 had the benefit of Mr. Schmidt, Mr. Martino, and my colleagues  
6 talk about what has gone on in discovery, we are now talking  
7 about a set of instances where the parties didn't do  
8 everything they possibly could, and I certainly think the  
9 Plaintiffs did everything they possibly could to move the case  
10 forward. The Defendants have done an awful lot of work.

11 We've got 30 Clubs, we've got the letters rogatory  
12 process, we've got millions of pages of documents. Some  
13 parties are more recalcitrant than others. What I'm really  
14 saying here, Your Honor, is I think, to borrow from Jonathan  
15 Swift, this is a fairly modest proposal even at seven months.  
16 In fact, when I was speaking with Mr. Beisner about this the  
17 other day, I said, you know, John, as someone who spends a  
18 fair bit of time in this case taking depositions, writing  
19 motions, and preparing for court, I think eight would be  
20 reasonable. We both decided that might be asking to really  
21 get shot down.

22 So, we thought that as we talked between six and  
23 eight, that seven was an appropriate compromise, recognizing  
24 what the deadlines are and all that lies before us, and  
25 recognizing that a number of documents and a number of other

1 discovery issues that are in front of us still aren't  
2 resolved.

3           So, seven months seemed reasonable. It's not the  
4 result of dilatory conduct, not the result of any sort of  
5 delay because the parties weren't pressing the case. It's  
6 simply the result of the nature of the case, Your Honor.

7           As you've seen in terms of the mechanics of how the  
8 dates work, essentially it's a seven-month enlargement with a  
9 couple of tweaks. We did fix the Plaintiffs' time to respond  
10 to the Defendant's opposition on class certification because,  
11 perhaps not terribly cleverly on my part, in the first  
12 schedule we only had two weeks. And as I looked at it more  
13 carefully this time, I thought that's not very much. John  
14 said, being the clever negotiator I was, I didn't correct you  
15 on that. And that was clever on his part by remaining silent  
16 because I guess I put myself in a hole there. We have a  
17 little bit more time with Christmas.

18           I do realize, Your Honor, that this is an extra  
19 seven months. I do realize Your Honor's admonition that four  
20 months might seem appropriate, but I don't think in this case,  
21 given all the moving parts we've got all and all the moving  
22 parties, that that would be realistic. And I think I speak  
23 for the other side here when I say I think they agree.

24           MR. STUART DAVIDSON: Your Honor, can I just say  
25 (inaudible due to lack of microphone proximity) --

1 THE COURT: Sure --

2 MR. STUART DAVIDSON: I don't think I --

3 THE COURT: Come on up to the podium.

4 MR. STUART DAVIDSON: I apologize. I don't think I  
5 had given Steve this information before he stood up, which is  
6 that 3 million pages of documents, approximately, have been  
7 produced. We, quite frankly, have not gotten through all of  
8 them yet. We have scores of lawyers reviewing these  
9 documents. My understanding from the manager of this entire  
10 document review, who works for me, is that it will take  
11 another three months to get through these documents with all  
12 the lawyers that we have working on it. So, that should  
13 hopefully affect how this issue gets resolved. Thanks.

14 THE COURT: Thank you.

15 NHL wish to be heard on this?

16 MR. JOHN BEISNER: Your Honor, I don't think we have  
17 much to add on this. Mr. Grygiel and I spent some time  
18 working through this. And if it wasn't clear I just wanted to  
19 make clear that with a couple of tweaks that Mr. Grygiel  
20 mentioned, this is the schedule. It's the sequencing that we  
21 agreed to in the original order except that we've -- the  
22 proposal is to move things out for seven months. As I said in  
23 the discussion with Mr. Grygiel, I mean I think our view is we  
24 probably would be able to get this finished more quickly. But  
25 I think in the spirit of compromise, Your Honor asked us to



1 try to reach a -- an agreed-upon extension on this and so we,  
2 in a spirit of compromise, have done so.

3 The one thing I did want to note, Your Honor -- and  
4 I just wanted to put this in as a footnote -- we're going  
5 along with what the, you know, the Plaintiffs are proposing  
6 here in terms of this additional period. We do have the view  
7 that, you know, that there ought to be a resolution of the  
8 preemption issue before we proceed with discovery. And I just  
9 wanted to note that we've mentioned this during the informal  
10 discovery conference setting. And so at some point, you know,  
11 we may feel it's appropriate to file a stay motion with  
12 respect to discovery until that issue is resolved.

13 But I just -- it's just a -- wanted to make sure our  
14 rights are preserved on that in indicating that this  
15 scheduling order would be acceptable to the NHL.

16 THE COURT: Very good.

17 The -- the Court will grant you the seven-month  
18 extension, but I do so and I want to be clear that it's going  
19 to take a miracle to persuade me to extend it beyond this  
20 seven months.

21 MR. STEPHEN GRYGIEL: I appreciate that very much,  
22 Your Honor, and I'm sure I speak for everyone on my side of  
23 the room who also does. Thank you.

24 THE COURT: Okay. All right.

25 All right. Let's move on to the IMEs.

1           MR. JOHN BEISNER: Your Honor, I would ask the  
2 Court's indulgence on making quick work on this today. When  
3 we got the new Complaint and saw that there was a proposal to  
4 have a representative of the diagnosed class, shall we say,  
5 Group 2, we've gone back to Dr. Olanow to talk about what IME  
6 would be necessary on this. I know Your Honor was expecting  
7 some further information today, but what we're proposing on  
8 this is we will, in short order, file a formal motion on this  
9 as a package addressing the new Complaint.

10           Most of this, the Court has gotten in bits and  
11 pieces earlier. But we thought it would be helpful to put it  
12 all in one place, along with the additional information that  
13 Your Honor asked for. And we'll -- the protocol will change  
14 because we do have Mr. Ludzik in the group now who is alleging  
15 diagnosed Parkinsonism, so that will be presumably a  
16 different -- may have some differences in the IME process.  
17 But we will get that on file promptly --

18           THE COURT: And I presume you will meet and confer  
19 with the Plaintiffs before you file --

20           MR. JOHN BEISNER: Oh, absolutely.

21           THE COURT: -- any formal motion because the Court  
22 is going to want to see some expert Declarations from both  
23 sides, of course.

24           MR. JOHN BEISNER: Right, but I just wanted to note  
25 that even though Your Honor was expecting some things today,

1 that's the reason we didn't present it at this time.

2 THE COURT: That's fine. Thank you, Mr. Beisner.  
3 Mr. Cashman.

4 MR. MICHAEL CASHMAN: Thank you, Your Honor. You  
5 pointed out the first question that came to my mind because we  
6 haven't heard anything from the NHL up until today about what  
7 their thinking was on the proposed medical examinations, and  
8 we would certainly expect to meet and confer thoroughly before  
9 any motion is filed. And I think that is what we discussed  
10 the last time. And as far as it relates to Mr. Ludzik, I  
11 think that's clearly premature until we get all these other  
12 issues worked out that we discussed earlier on the amendment  
13 of the Master Amended Complaint. So, I think this is putting  
14 the cart before the horse right now, but we're happy to talk  
15 with the NHL about it, and we will.

16 THE COURT: Okay.

17 MR. MICHAEL CASHMAN: Thank you.

18 THE COURT: Sounds good.

19 MR. JOHN BEISNER: Yeah, I appreciate what  
20 Mr. Cashman is saying. Obviously until we have the Complaint  
21 in place with respect to that, the motion would come after  
22 that. I was simply saying to the Court we'll move forward on  
23 this but we do have somewhat of a changed script to be dealing  
24 with here, and that's what we need to address.

25 THE COURT: Okay. Very good.

1           I would propose that to the extent you have any  
2 update for me on the privilege log challenge and the  
3 confidentiality designation challenge that we do that first  
4 and leave the motions for last.

5           MR. CHRISTOPHER RENZ: Good afternoon, Your Honor.  
6 Chris Renz, Chestnut Cambronne, on behalf of the Plaintiffs.

7           There are two sets of privilege issues: One  
8 relating to the NHL, and it has two subissues; and one  
9 relating to the Clubs. When we were here last time, we had  
10 just received or recently received some revised privilege logs  
11 and promises of document production of some de-privileged  
12 documents, as well as in redacted or whole form. Those have  
13 subsequently been produced. We've also had a chance to review  
14 the revised logs. Mr. Beisner and I have had some exchanges  
15 in written correspondence, and I anticipate another round of  
16 exchanges to see if the matter can be resolved through a meet  
17 and confer.

18           The second issue in relation to the NHL is that they  
19 have made a clawback request regarding a number of documents.  
20 We have reviewed that clawback request. We've responded to  
21 Plaintiffs' [sic] counsel. I anticipate that there will be  
22 further correspondence or meetings in relation to that  
23 subject. I have not heard back from Mr. Beisner in that  
24 regard. So, that's the status as to the NHL.

25           In terms of the Clubs, I have been conferring with

1 Mr. Schmidt on behalf of the Clubs. We sent correspondence  
2 challenging a number of items in their log. We were able to  
3 get counsel to the table last week for a meet and confer, and  
4 he followed up with a letter which we are reviewing. I  
5 anticipate that that will result in motion practice before  
6 Your Honor.

7 THE COURT: Okay.

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

9 THE COURT: Thank you.

10 Mr. Connolly.

11 MR. DANIEL CONNOLLY: Yes, Your Honor, quickly.

12 Mr. Renz has accurately recounted where the status of the  
13 privilege log issue is. We have yet to go to Judge Mayeron to  
14 work on the protocol that she wants us to follow relative to  
15 that, but the meet and confer process isn't complete yet.

16 And as to their -- and the other issue is the  
17 confidentiality designation issue. We have argued that the  
18 first set of that in front of Judge Mayeron that's -- we have  
19 some additional materials to provide to her pursuant to her  
20 request, but that's been submitted.

21 THE COURT: Okay. Very good.

22 Mr. Cashman.

23 MR. MICHAEL CASHMAN: Your Honor, just an additional  
24 note on the confidentiality issue. As Mr. Connolly mentioned,  
25 yes, we did have argument on the 19th of October before Judge

1 Mayeron, and there's some additional materials to submit to  
2 her for the motion to be ripe, which I expect to be done on  
3 Monday. I also wanted to alert the Court or just advise the  
4 Court that we have provided a list of additional document  
5 designation challenges to the NHL, and I've requested a meet  
6 and confer on those documents.

7 I expect that some of them will be voluntarily  
8 de-designated based on voluntary de-designations that have  
9 been made previously. And perhaps -- perhaps there will be  
10 some that will have to be resolved based on the rulings that  
11 we anticipate to get from Judge Mayeron, and perhaps there  
12 will be a few more that we might need to bring back to her.  
13 Hopefully that won't be the case, but that's in the works, as  
14 well. And then down the road -- and I think there's going to  
15 be an issue, similar issue with respect to deposition  
16 testimony which we think has been over-designated.

17 And just lastly on that point, there's been some  
18 reference to our proposed Amended Complaint, including  
19 documents. Some of them have been de-designated, some of  
20 those documents have been de-designated in part with proposed  
21 redactions that are the subject of the motion in front of  
22 Judge Mayeron. And some of the documents attached or  
23 referenced in the proposed Amended Complaint are still  
24 confidential. And I believe that our current list of  
25 challenges encompasses all of the documents that are

1 referenced in the proposed Master Amended Complaint.

2 So, I would anticipate that whatever happens with  
3 the Amended Complaint in terms of when it gets filed and if  
4 there's any motion practice that's necessary for the  
5 amendment, that we'll have these confidentiality issues worked  
6 out. We'll know where we are before that happens.

7 THE COURT: Okay.

8 Mr. Connolly.

9 MR. DANIEL CONNOLLY: Yes, Your Honor. One quick  
10 supplement on the confidentiality designation process that  
11 Mr. Cashman just discussed. We did get a second -- a request  
12 for a set of documents to be de-designated. That list was  
13 amended yesterday. It is our plan to address all of those,  
14 some 400 documents, once we get the ruling from Judge Mayeron,  
15 to apply her rulings as to all of those materials.

16 THE COURT: Did she give you any idea how long she  
17 would take to rule? I can talk to her --

18 MR. DANIEL CONNOLLY: We did not ask her, Your  
19 Honor. We did not press her on that topic.

20 THE COURT: I thought maybe she volunteered it.

21 MR. DANIEL CONNOLLY: We want her to have a thorough  
22 time to review the materials, Your Honor. And she asked for  
23 sheets that -- to be attached to each document which,  
24 Mr. Cashman is right, that we were going to be supplying to  
25 the Court on Monday. So, I anticipate that it will be

1       sometime after she's had a chance to review those materials.

2               THE COURT:   Okay.

3               MR. DANIEL CONNOLLY:   And then as to the Master  
4 Amended Complaint, what we would anticipate is once the  
5 parties have gone through the process and the Court has  
6 decided whether to approve it or not that we would redact it  
7 consistent with what Judge Mayeron's rulings are.

8               THE COURT:   Okay.   All right.

9               MR. MICHAEL CASHMAN:   Obviously, Your Honor, we  
10 haven't had the chance to talk about this, and I think our  
11 view would be that many of these documents on our current list  
12 of challenges could be voluntarily de-designated without  
13 having to wait for Judge Mayeron to rule.   Similarly, many or  
14 perhaps all of the documents that are referenced in our Master  
15 Amended Complaint, we can talk about those and many of those  
16 could be voluntarily de-designated without having to wait for  
17 Judge Mayeron.   And therefore we've narrowed down the universe  
18 that are actually in dispute, but I'll take that up with  
19 Mr. Connolly.

20              THE COURT:   I think that's a good idea.

21              MR. DANIEL CONNOLLY:   I was just going to say we  
22 stand ready to meet and confer about this, Your Honor, and  
23 he's right that we haven't.

24              MR. MICHAEL CASHMAN:   Thank you.

25              THE COURT:   Okay.   Sounds good.



1 Mr. Schmidt.

2 MR. CHRISTOPHER SCHMIDT: Just very briefly, we are  
3 still meeting and conferring on the PMI issues. We did send a  
4 detailed letter. In addition to that, we went back through  
5 documents and voluntarily produced documents off the log. The  
6 letters have been provided to Plaintiffs' counsel. I'm sure  
7 we'll continue to meet and confer.

8 THE COURT: Okay. Sounds good.

9 All right. Anything else on the agenda before we  
10 get to the motions?

11 MR. CHARLES ZIMMERMAN: Nothing from us.

12 THE COURT: Okay. Let's move on, then.

13 We have two motions to consider today, both by the  
14 NHL: NHL's motion regarding the first set of requests for  
15 admissions, and the NHL's motion regarding the second set of  
16 requests.

17 Who wishes to be heard?

18 Mr. Beisner.

19 MR. JOHN BEISNER: Your Honor, on behalf of the NHL,  
20 I'll be speaking.

21 Your Honor, I think the crux of the arguments are  
22 laid out in the briefing that has been submitted to the Court,  
23 but I just wanted to note a couple of items. I'm speaking now  
24 about our motion with respect to the first set of requests for  
25 admissions. I think, Your Honor, the key thing I wanted to

1 note here is that these requests were really just an effort to  
2 start to put some parameters around what we will be debating  
3 in the science arena. These certainly aren't a deep dive into  
4 the science arena.

5 It's 22 requests, and where these requests came from  
6 were as follows. We looked at the record in the NFL  
7 concussion litigation, and there we found a Declaration by  
8 lead Plaintiffs' counsel in that case -- part of the  
9 leadership team in that case includes some of the counsel in  
10 this case -- laying out what appeared to us to be some  
11 consensus positions about some of the -- the science issues,  
12 some very basic things that were submitted to Judge Brody by  
13 Plaintiffs in support of the proposed settlement in that case.  
14 And so we used those as a source of these requests for  
15 admissions, trying to use the language that were used in that  
16 Declaration, assuming it would be a good way to determine if  
17 we were going to have disputes here on science issues that  
18 appeared not to exist in the NFL litigation.

19 And in response, on several grounds Plaintiffs have  
20 basically taken the position that they need not answer or that  
21 what we view as nonanswers to those questions are sufficient.  
22 Plaintiffs argue -- make several arguments in saying that they  
23 needn't say anything further, that what they've provided us is  
24 sufficient.

25 First, they argue that Rule 26 bars the use of

1 requests for admissions to obtain any admissions that might  
2 require consultation with an expert, but I don't believe  
3 there's any such statement in Rule 26. Rule 36 says that  
4 parties have to make a reasonable inquiry in responding to  
5 RFAs, a duty that many courts have expressly held entails  
6 potentially consulting with an inquiry of retained experts.  
7 The *Drutis* case, *House*, the score of the cases we've cited we  
8 think note that.

9 As Your Honor is aware, Plaintiffs have indicated  
10 that Dr. Cantu who's been retained as an expert in this case  
11 and he's already offered opinions in the context of our IME  
12 discussion on some of the very topics we were inquiring about  
13 here. We're not seeking -- we don't believe -- premature  
14 discovery of expert opinions. We're just trying to figure out  
15 where the disputes are at this point so that we can determine  
16 what experts we need to be looking at on class certification.  
17 And indeed, it's helpful on even issues like the IMEs to  
18 figure out what examinations are necessary. They are based on  
19 what really is in dispute in the science area in the case.

20 We don't think, contrary to what Plaintiffs are  
21 suggesting, that these requests call for legal conclusions.  
22 For example, they were focusing on RFA 12 which asks -- it's a  
23 request for an admission that reliable conclusions about  
24 whether concussions, MTBI caused depression because depression  
25 is not a signature effect of concussions MTBI. That was

1 basically a statement that was asserted by Plaintiffs' counsel  
2 in the NFL litigation, and it was an issue we were asking  
3 about here.

4 I don't think that's a request for a legal  
5 conclusion. That's a science question that we're trying to  
6 ask there. And in any event, Rule 36 does expressly permit  
7 admissions relating to facts, the application of law to fact  
8 or opinions about either. Our view is that Plaintiffs'  
9 responses consistently -- are consistently inconsistent with  
10 requirements of Rule 36 for responding. Rule 36(a)(4) states  
11 that if a matter is not admitted, the party must specifically  
12 deny it or state in detail why the answering party cannot  
13 truthfully admit or deny it, and the denial must fairly  
14 respond to the substance of the matter.

15 And repeatedly in these requests, Plaintiffs gave  
16 the following response: Plaintiffs deny this request and  
17 intend to provide all expert discovery and information in  
18 accordance with the applicable case management orders and  
19 schedules set by the Court. So, the word "deny" is in there.  
20 I acknowledge that, but I don't believe that's a flat denial.  
21 They're simply tossing off a denial for now but saying that a  
22 real answer may come later, and it's really a little more than  
23 a restatement of the objection that they voiced in the first  
24 instance.

25 And this isn't a substantive denial. It doesn't --

1 it doesn't satisfy the requirements of Rule 36, and it's  
2 evidenced by the fact that Plaintiffs deny the first RFA in  
3 the set, which seeks an admission that CTE cannot be diagnosed  
4 in the living. Well, that flatly, their denial there, if it  
5 is supposed to be a flat denial, contradicts the assertion  
6 that Dr. Cantu himself has made in this case on the record in  
7 the context of our discussion about IMEs. There, he gave the  
8 Court a Declaration saying, quote, there currently is no test  
9 available to make a confirmatory diagnosis of CTE in a living  
10 human being.

11           So, if that was intended to be a flat denial, it's  
12 flatly inconsistent with what their expert has already stated  
13 on the record in this case. Even if there is a flat denial,  
14 we think that an explanation of it is required by our  
15 supplemental interrogatory. Plaintiffs say that that  
16 interrogatory that asks for an explanation of why they've  
17 denied the request is inappropriate, but they really don't  
18 offer any cases saying that sort of interrogatory is  
19 inappropriate in and of itself. They say that it may be an  
20 end-run around the limitation on the number of interrogatories  
21 in the case. But, you know, to say that that limit applies in  
22 this case where the discovery has been gargantuan in all  
23 respects, this is not your average single-Plaintiff case.

24           Moreover, I think it's premature to say that the  
25 numerosity objection should apply here because they haven't

1 really answered those -- the questions. We don't know how  
2 many denials there actually are there yet because they  
3 haven't -- they haven't fully answered those questions at this  
4 point. So, Your Honor, I think that, as I said, these were  
5 basically some initial test-the-water questions that we had on  
6 science issues. I will note that we've gotten some questions  
7 back from Plaintiffs, some requests for admissions back on  
8 some of these questions. So, you know, the exchange begins  
9 on -- on this.

10 I've told counsel that we intend to answer those  
11 questions and are in the process of doing so. But I think  
12 this sort of exchange on the science issues and understanding  
13 our positions at least as a threshold matter on some of these  
14 initial inquiries is beneficial and we think is important for  
15 us to get a sense of what the battleground is actually going  
16 to be when we get around to expert designations moving into  
17 the class certification process.

18 THE COURT: Thank you, Mr. Beisner.

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

20 MR. BRIAN GUDMUNDSON: Good afternoon, Your Honor.

21 I'm going to start by expressing the concern that we had on  
22 the Plaintiffs' side in receiving the briefing in this case  
23 and harkening back to our request actually a demand by  
24 Mr. Beisner that the proceedings that take place in the  
25 informal resolution process remain part of the informal

1 resolution process, of which Dr. Cantu's Declaration was a  
2 part. They have now taken that Declaration, put it in the  
3 public record, what he calls the public record, and made a  
4 real meal of it, frankly. Mr. Cantu has -- Dr. Cantu has not  
5 been designated as an expert in this case, as a testifying  
6 expert. There are rules about designating experts, there are  
7 rules about the type of discovery you can obtain from experts,  
8 and there are court orders and schedules that dictate the  
9 timing of that.

10 At the outset, I think there is no dispute  
11 whatsoever that these are 22 requests for admissions styled as  
12 requests for admission that seek expert opinions. There's no  
13 dispute about that. They've added a supplemental  
14 interrogatory in order to try to get the rest of the  
15 information, other than the word "admit" or "deny," clearly  
16 because they're running up against an interrogatory limit.  
17 These could have been easily served as interrogatories. And I  
18 guess we could start at the beginning of Mr. Beisner's  
19 remarks, which is this is a "gotcha" exercise: We went and  
20 found another docket some place where they've made some  
21 similar allegations, some other Plaintiffs that have made some  
22 similar allegations, and we want to see if we can catch these  
23 counsel in contradictory statements and put that on the record  
24 for all to see.

25 Well, I don't think that it takes much imagination

1 or legal scrutiny to understand that different litigations  
2 have different contexts, and different arguments, different  
3 postures. Indeed, no discovery was ever served in that  
4 litigation, the NFL litigation. Mr. Beisner calls those  
5 remarks made in the context of a settlement consensus  
6 positions on the science. We are aware of no such consensus  
7 statements -- positions on the science in that case.

8           What this really is obviously is a chance to get an  
9 early bite at the Plaintiffs' experts. Dr. Cantu has not been  
10 designated. Plaintiffs have had perhaps many more experts in  
11 the hopper. Perhaps Dr. Cantu will opine one day on some of  
12 these 22 areas; maybe he will opine on all of them, in  
13 addition to several other experts. Plaintiffs have the right  
14 under the Rules and under the Court's schedule, which has now  
15 been advanced some months, to provide those scientific answers  
16 that support their case in accordance with the rules. That's  
17 really the heart of their case. If you look at every single  
18 case that's cited really by both the Plaintiffs and the  
19 Defendants, it all says that when an expert is designated as  
20 testifying expert, you can get discovery of them. This is not  
21 a mysterious endeavor here.

22           One case, the *House* case, doesn't talk about whether  
23 the expert was designated or not. But the issues about the  
24 RFA responses came up after trial when there was no chance to  
25 go back and get information from those experts, much different



1 position than we're in today. Rule 26 is quite clear about  
2 what discovery is allowed from these experts. You get a  
3 report, and you get a deposition, and you can do discovery on  
4 certain matters that are related to that expert's opinion.  
5 Those are all things that Plaintiffs obviously fully intend to  
6 comply with and would expect Defendants to comply with, as  
7 well. At this particular time, I want to reiterate that  
8 Dr. Cantu is a consulting expert. They cannot have discovery  
9 of consulting experts, absent exceptional circumstances.  
10 We've seen no such exceptional circumstances.

11 Moving onto the matter of some of these RFAs. First  
12 off, RFAs numbers 12 through 21, they all contain similar  
13 language. They all ask Plaintiffs to, quote: "Admit that  
14 reliable conclusions about" - blank - "cannot be determined" -  
15 blank. Whose job is it to determine whether the evidence is  
16 reliable? Is it a *Daubert* motion where the Court has that  
17 responsibility? Is it the finder of fact at trial? I would  
18 submit it is not up to Plaintiffs to give their opinion about  
19 whether certain evidence is, quote-unquote, reliable to make  
20 certain conclusions. You can look through case law, I  
21 suppose, all you want and learn that causation is not just --  
22 have factual and legal connotations to it, but it's often a  
23 question of law in many contexts.

24 As for this supplemental interrogatory, we've  
25 obviously -- it's obviously our position they put it in here

1 to evade the interrogatory limits. And several courts have  
2 agreed with that and said no, you don't get to do that. We  
3 have decided to -- we have set forth a denial, and we have  
4 decided to give a little bit more information about why we're  
5 denying that. We're denying it because it's premature, but  
6 they're denied. They're all denied.

7 And at the appropriate time they can take whatever  
8 discovery they're allowed under the Rules of Dr. Cantu if he  
9 is a designated expert, or anybody else that's designated, and  
10 they can get the information they seek. I agree with  
11 Mr. Beisner, too, that a lot of this is set forth in the  
12 briefing. And I don't want to belabor it, but I'd be happy to  
13 sit down and let Mr. Beisner respond or move onto the second  
14 motion.

15 THE COURT: Thank you.

16 Let's move onto the second motion.

17 MR. JOHN BEISNER: Happy to do so, Your Honor. Your  
18 Honor, the second set of requests for admission that were --  
19 on which we're moving today concern publications that are at  
20 the centerpiece of Plaintiffs' case. These are the  
21 publications that were cited and discussed in  
22 Plaintiffs' Master Amended Complaint that they contend put the  
23 NHL on notice of the alleged risks of concussions and  
24 sub-concussive impacts. And those documents have already  
25 played a central role in this case in denying the NHL's motion

1 to dismiss.

2           This Court observed that Plaintiffs allege in almost  
3 40 paragraphs-- this was in Your Honor's motion to dismiss  
4 decision -- that, quote: Scientific evidence has for decades  
5 linked head trauma to longterm neurological problems. And it  
6 credited -- the motion to dismiss decision credits  
7 Plaintiffs' allegations that, quote: Medical and scientific  
8 studies and literature dating back to 1928 purportedly firmly  
9 establish -- and that's the key phrase -- that repetitive and  
10 violent jarring of the head or impact to the head can cause  
11 mild traumatic brain injury with a heightened risk of longterm  
12 chronic neuro-cognitive sequelae.

13           But as it turns out, there's a problem with those  
14 allegations. If you actually go read the articles cited in  
15 those paragraphs, they don't say that. Plaintiffs' studies  
16 actually do not conclude that the science regarding a  
17 hypothesized link between head trauma and longterm  
18 neurological problems is firmly established. Far from it.

19           In these requests for admissions, the NHL quotes  
20 limiting language or caveats from virtually all of those  
21 articles, all of which are omitted from being quoted in the  
22 Master Complaint, that undermine the historical picture that  
23 Plaintiffs are trying to paint. All the admission requests  
24 ask is that the Plaintiffs acknowledge that those important  
25 omitted facts -- or I'm sorry -- omitted statements are, in

1 fact, in those articles.

2 And the NHL is entitled to those admissions. These  
3 will be critical in making a summary judgment motion alleging  
4 that Plaintiffs' assertion of a firmly-established risk is  
5 unsupportable. They'll be critical if we get to the point of  
6 showing a jury that the NHL acted responsibly in concussion  
7 issues despite considerable uncertainty in the science in this  
8 area, and these admissions really just show that very little  
9 is firmly established in this sphere.

10 You know, you look through the articles, a 1929  
11 Martland article that espouses the punch drunk theory states  
12 at the end: My, quote, theory, while alluring, is quite  
13 insusceptible of proof at the present time. That doesn't  
14 sound like a firmly-established scientific principle as the  
15 Complaint asserts. And you go through all these, the 2012  
16 Lehman article states, quote: The results of our study do not  
17 establish a cause-effect relationship between football-related  
18 concussion and death from neurodegenerative disorders. That  
19 doesn't sound like a firmly established scientific principle  
20 either.

21 But that's the basic story with all of these  
22 requests. I understand Plaintiffs don't want to make these  
23 admissions. They don't want to acknowledge that their  
24 Complaint doesn't tell the whole story about what's in these  
25 articles, and so they've objected to these requests and

1 typically give the following response, quote: Plaintiffs deny  
2 that the text of the referenced article is limited to the  
3 cherry-picked quotations set forth in the request.

4           So, they deny the request. It's not a proper  
5 response, and it's a little -- more than a little ironic  
6 because it's really Plaintiffs' Complaint that's the exercise  
7 in cherrypicking here. But all that we're asking Plaintiffs  
8 to do in these admissions requests is state that the  
9 additional statements that we're quoting are actually in the  
10 article, as well as whatever they've quoted in the Complaint.  
11 It's a simple "yes" or "no" question. It's not burdensome.  
12 It doesn't require consulting anybody else. It just requires  
13 looking at the articles that they've already cited, quoted in  
14 the Complaint.

15           Briefly, Your Honor, there's the main excuse for not  
16 giving a proper response is that the documents speak for  
17 themselves. In our view and the cases that we cite in the  
18 brief -- *Booth Oil, Miller, Piskura* -- these requests are  
19 appropriate. We didn't go out and find all the scientific  
20 articles we could find and ask them to admit statements that  
21 are in those articles. These are the articles in their  
22 Complaint; that's what we're asking about.

23           They're squarely at issue. It's the linchpin of  
24 their case with respect to what the NHL knew or should have  
25 known based on the literature that's out there. And so, Your

1 Honor, we think that we're entitled to a response. We think  
2 the cases, the several cases that Plaintiff cite, the *Mitchell*  
3 case and *K.C.R.*, really go to the question about whether the  
4 documents in those instances were central to the case. They  
5 are here. They're all over Your Honor's motion to dismiss  
6 decision, they're clearly at issue, and we think we're  
7 entitled to these admissions about these additional statements  
8 that are in these articles.

9 THE COURT: Thank you.

10 MR. BRIAN GUDMUNDSON: Your Honor, we've got 73  
11 request for admission here based on some studies that were put  
12 into our Plaintiffs' Complaint. The NHL has combed through  
13 them and found one sentence in each that was arguably not in  
14 Plaintiffs' favor. I would submit that the balance of those  
15 articles are incredibly damaging to the NHL's credibility on  
16 this issue, incredibly damaging, and it's the tip of the  
17 iceberg. We didn't quote everything, but that's not the  
18 issue.

19 The issue is, what is the purpose of these? What is  
20 the purpose of these RFAs? RFAs are to serve two purposes:  
21 They're to narrow the issues for trial, and they're to  
22 authenticate documents, essentially. Is this how we go about  
23 authenticating documents? We have -- the Plaintiffs have  
24 informed the Defendant that we do not contest the authenticity  
25 of these articles. We are now in a position of perhaps

1 serving 10,000, 25,000, 35,000 RFAs to corroborate every other  
2 single sentence in every one of these documents in order to  
3 say that that sentence is contained, one of hundreds of  
4 sentences in a scientific article?

5 And not only that, in several of these, they cut off  
6 the bad words for the -- that hurt them. They took a quote,  
7 and they cut it off halfway in the sentence or cut off the  
8 rest of the clause. It's silly. It's a silly way to  
9 authenticate documents. And it's designed only to do one of a  
10 couple things, apparently, which is to put us, the Plaintiffs,  
11 and the Court through our paces, to lengthen this process, to  
12 include unnecessary motion practice.

13 And I hope it's not to litigate in the media by  
14 taking decades, and honestly centuries, of scientific  
15 literature, distilling it into six or seven words that are  
16 helpful to them, and give that to people who may not have the  
17 time or interest to read the entire article. I hope that  
18 that's not the case, but clearly this does nothing to advance  
19 or narrow anything when we have already, the Plaintiffs have  
20 already admitted to the germaneness -- or the genuineness of  
21 these articles.

22 The cases that we cite are in the briefs. They all  
23 talk about the purpose of RFAs and the ability of a party  
24 responding to them to interpose the exact objections we have  
25 when the RFAs are abusive and dilatory, as these are. I don't

1 think you'll find a single thing that's inconsistent there.  
2 The one case that they trot out is *Booth Oil*, the breach of  
3 contract case where some people asked to corroborate some  
4 lines from this contract at the center of the dispute. They  
5 correlate that with every single scientific study out there.

6 Well, you can drag that out to its logical  
7 conclusion. There's thousands of documents here, thousands  
8 and thousands of lines of deposition testimony. We're going  
9 to go through each and every document, pick out a word or two  
10 or three and ask Plaintiffs to admit it; and then we're going  
11 to add a supplemental interrogatory to get thousands and  
12 thousands of additional interrogatories. We just simply  
13 submit that Plaintiffs' responses are adequate, that our  
14 objection should stand, and that hopefully we can get some  
15 sort of guidance going forward that these type of RFAs are not  
16 appropriate when we've already admitted the genuineness of  
17 these documents.

18 THE COURT: Thank you.

19 MR. BRIAN GUDMUNDSON: Thank you.

20 THE COURT: Mr. Beisner.

21 MR. JOHN BEISNER: Your Honor, I'll respond very  
22 briefly. I think that Counsel's characterization of our  
23 looking for an isolated -- a single isolated statement, the  
24 one little gem in these articles that's useful is simply not  
25 accurate. Plaintiffs characterize these articles in the



1 Complaint. What we're quoting is often the bottom line in the  
2 article and a significant limitation on what the article is  
3 about. Some of these are just sheer speculative pieces, and  
4 they left out the several lines at the end where the writer  
5 said, here's some thoughts that I have on this, such as the  
6 Martland article. These are key sections. I think we're  
7 entitled to the responses on that.

8 Look, they put these articles in the Complaint. If  
9 we ever get around to answering the Complaint, we have to  
10 admit or deny those, as well. That's apparently perfectly  
11 appropriate to be done. If we have some pieces of the  
12 Complaint, of those articles, that we wish to have answers to,  
13 I think we're entitled to do that, as well. So, I think that  
14 the suggestion that this is a -- an exercise for an improper  
15 purpose, I think, is not the case.

16 There will come a point where we could well be  
17 moving for summary judgment in the case, and these are the  
18 phrases that we will be relying upon to indicate that the  
19 Plaintiffs' reliance on these articles was inappropriate.  
20 That's what we've picked out, and that's what we want the  
21 admission response for.

22 Thank you, Your Honor.

23 THE COURT: Thank you, Mr. Beisner.

24 Well, the Court had an opportunity to read the  
25 briefs carefully and to hear argument today. With respect to

1 these two motions, the Court is prepared to rule from the  
2 bench.

3 As to Defendant's motion to determine the  
4 sufficiency of Plaintiffs' answers and objections to the NHL's  
5 first set of requests for admissions and supplemental  
6 interrogatory, this Court finds that Defendant's requested  
7 discovery clearly prematurely seeks the identity and opinions  
8 of unidentified experts and/or impermissibly seeks legal  
9 conclusions. Dr. Cantu has never been identified formally  
10 under the Rules as an expert in this litigation.

11 Expert opinion discovery is governed by  
12 Rule 26(b)(4). The deadlines for expert disclosures are set  
13 forth in Pretrial Order Number 8. That order has been now  
14 amended at the requests of both sides so that, as the Court  
15 understands it, expert disclosures will take place sometime  
16 next fall, that is the fall of 2016.

17 The first set of requests for admission of the NHL  
18 straightforwardly seek scientific, medical, technical, or  
19 other specialized information that is within the purview of  
20 Plaintiffs' expert witnesses. The NHL cannot circumvent the  
21 rules by directing expert opinion discovery to six fact  
22 witnesses. The NHL will have a full opportunity in advance of  
23 summary judgment to get full and appropriate expert  
24 disclosures as set forth in the rules and set forth in  
25 Pretrial Order Number 8. And this Court will, of course,

1 entertain any concerns the NHL has about the inadequacy of the  
2 disclosures at that time. And all of that will be -- create a  
3 fully-developed record for this Court on summary judgment.

4 The motion is denied.

5 Defendant's second motion also fails. The Court is  
6 persuaded by the authority cited by Plaintiffs that requests  
7 for admission that do no more than ask a party to admit that a  
8 document or deponent stated a quoted sentence are  
9 objectionable on these grounds. And that's citing to the  
10 Central District of California in case *K.C.R. versus County of*  
11 *Los Angeles*. In its order on the motion to dismiss, to be  
12 clear, the Court found that Plaintiffs' Complaint alleging  
13 that the studies firmly establish certain scientific  
14 principles was plausibly alleged. That was the Court's job to  
15 determine whether or not the Complaint plausibly alleged that  
16 statement, and the Court found that it did. Plaintiffs don't  
17 dispute the genuineness of the entire documents at issue.  
18 This exercise is entirely unnecessary and, as Plaintiffs'  
19 counsel points out, could lead to thousands of requests for  
20 admissions about particular sentences in particular articles.

21 The motion is denied.

22 All right. Anything else to cover at this status  
23 conference?

24 MR. CHARLES ZIMMERMAN: Only, Your Honor, I just  
25 think we should maybe make sure we know all the times for the

1 upcoming statuses so we're all on the same page. My  
2 understanding is that we are not going to have an informal in  
3 the month of November and that we're set for I think a formal,  
4 if I'm not mistaken, on December 1.

5 THE COURT: That's correct. And then an informal on  
6 December 15th.

7 MR. CHARLES ZIMMERMAN: Correct.

8 THE COURT: Okay.

9 MR. CHARLES ZIMMERMAN: And the time of the  
10 informal, was that somewhat flexible depending on your --

11 THE COURT: I don't have the -- I don't have my  
12 schedule --

13 MR. CHARLES ZIMMERMAN: We'll just hang out all day,  
14 then.

15 THE COURT: Whatever it says it is; and if there's a  
16 problem, you'll talk to me about it.

17 MR. CHARLES ZIMMERMAN: All right. Thank you.

18 THE COURT: All right. Very good.

19 Court is adjourned.

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

21 (Concluded at 3:03 p.m.)

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CERTIFICATE

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

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