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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
October 6, 2015
1:30 p.m.

BEFORE THE HONORABLE SUSAN RICHARD NELSON

UNITED STATES DISTRICT COURT JUDGE

STATUS CONFERENCE

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

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

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

3 (Commencing at 1:39 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 file 14-2551. Let's begin with
7 Plaintiffs and have you note your appearances, please.

8 MR. CHARLES ZIMMERMAN: Good afternoon, Your Honor.
9 Charles Zimmerman for the Plaintiffs.

10 MR. MICHAEL CASHMAN: Good afternoon, Your Honor.
11 Michael R. Cashman for the Plaintiffs.

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

14 MR. SCOTT ANDRESEN: Good afternoon, Judge. Scott
15 Andresen also for the Plaintiffs.

16 MR. CHRISTOPHER RENZ: Good afternoon, Your Honor.
17 Chris Renz on behalf of the Plaintiffs.

18 MR. JEFFREY KLOBUCAR: And good afternoon, Your
19 Honor. Jeff Klobucar on behalf of the Plaintiffs. Appearing
20 telephonically today on behalf of the Plaintiffs, we have
21 Brian Gudmundson and Hart Robinovitch from the Zimmerman Reed
22 law firm, Tom Byrne from the Namanny Byrne & Owens law firm,
23 and Bill Gibbs from the Corboy Demetrio firm.

24 THE COURT: Thank you.

25 And the Defense?

1 MR. JOHN BEISNER: Good afternoon, Your Honor. John
2 Beisner on behalf of Defendant, NHL.

3 MR. DANIEL CONNOLLY: Good afternoon, Your Honor.
4 Dan Connolly on behalf of the Defendant, NHL.

5 MR. MATTHEW MARTINO: Good afternoon, Your Honor.
6 Matt Martino for the NHL.

7 MR. MATTHEW STEIN: Good afternoon, Your Honor.
8 Matthew Stein for the NHL.

9 MR. JOSEPH PRICE: May it please the Court, Your
10 Honor -- I thought I'd say something different (laughter).

11 THE COURT: He's always been a trouble maker.

12 MR. JOSEPH PRICE: Joe Price on behalf of the NHL.

13 MR. CHRISTOPHER SCHMIDT: Good afternoon, Your
14 Honor. Chris Schmidt on behalf of the non-party U.S. Clubs.
15 And with me also is Tim Hasken, as well, with Bryan Cave.

16 THE COURT: Very good.

17 MR. JOHN BEISNER: And Your Honor, on the phone on
18 the NHL side are David Zimmerman and Julie Grand from the NHL;
19 and from the Skadden firm, Shep Goldfein, James Keyte, and
20 Jessica Miller.

21 THE COURT: Very good. All right.

22 MR. JOHN BEISNER: Your Honor, if I may -- and I
23 don't want to preempt everything here, but I was going to ask
24 if I might exercise the prerogative Mr. Zimmerman has on
25 several occasions to provide an opening statement of sorts --

1 THE COURT: You certainly may, whoever jumps up
2 first.

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

4 MR. CHARLES ZIMMERMAN: You're quick today, John.

5 MR. JOHN BEISNER: Yeah, I was expecting a
6 collision.

7 Your Honor, I wanted to make a few remarks up front
8 because I think there's a theme that's important to note in
9 today's agenda. And I may sound like an echo here, but I'm
10 afraid that it's going to become apparent in the schedule that
11 we're a little bit of disarray at this point, and I think it's
12 in part, if I may be candid about it, because I think
13 Plaintiffs have been dragging their feet on some critical
14 steps that Your Honor has repeatedly stated that they need to
15 give some attention to. And let me elaborate on that, and I
16 wanted to start with the independent medical exam item on our
17 agenda.

18 We'll discuss the detail of that later, but we
19 started talking with the Plaintiffs about the IMEs back in
20 June. I think we first talked with Your Honor about it in
21 July. And after much commotion on that issue, we finally got
22 Plaintiffs' experts comment on the protocol that we had
23 proposed, and it turned out that Dr. Cantu didn't have as many
24 issues with what we had proposed and we thought Your Honor got
25 it pretty well all resolved and set at the informal discovery

1 conference that we had several weeks ago. As directed by Your
2 Honor, we sent Plaintiffs a detailed protocol that we thought
3 set forth what was produced in the Declarations. And in a
4 call yesterday, Plaintiffs counsel announced that they would
5 oppose proceeding with the IMEs at this time on the ground
6 that they're premature, to which we're saying "premature"?
7 We're almost at the end of the class discovery period; when
8 are we going to do these?

9 Counsel said they're premature because they're going
10 to be amending their Master Complaint and until they do that,
11 how are we going to figure out what's relevant for the IMEs.
12 And when we asked when that amendment is going to happen, then
13 counsel refused to say what the plan was on that. And so in
14 light of that rather stunning development, I think it's
15 important to review where we are. We've been telling
16 Plaintiffs for months -- we started this conversation back in
17 June -- the Master Complaint was fraught with ambiguities and
18 inconsistencies. It's full of questions that counsel are not
19 able to answer. We've had meetings to get clarifications and
20 when we write letters to memorialize that, we're not getting
21 answers. We've had discussions with Your Honor in the
22 informal discovery conferences, and I think have gotten
23 different answers than we've got in the meetings. And the
24 bottom line is we don't know what the claims are in their
25 case, and now there's an acknowledgment of that saying we

1 can't go forward with the IMEs until this clarification is
2 made.

3 We don't know if they're seeking relief for past or
4 present injury, if it's just a risk case, if it's both. And
5 the Court has told counsel repeatedly to get an amendment made
6 so we know what it is we are litigating here and that hasn't
7 happened. We've been trying to get the IMEs arranged since
8 June, and the Court managed to get that resolved, we thought
9 at the last conference, but now we're told all that's out the
10 window because there may be an amendment in the Complaint
11 coming.

12 After much delay, we finally got dates for the named
13 Plaintiff depositions scheduled. We're supposed to start
14 taking those in early December. We have a couple scheduled
15 for November 5th, several for November 12th, but how are we
16 supposed to take those depositions when Plaintiffs are saying
17 that they're going to amend the Master Complaint and if you
18 can't do the IMEs at that point, I don't know how we're
19 supposed to do those depositions.

20 And I don't know when we're supposed to be doing
21 those depositions. At the moment, we don't have a roadmap.
22 Plaintiffs keep saying they want to extend the class
23 certification period. I think Your Honor has now said four or
24 five times, you know, they keep talking about amending the
25 schedule to move for the amendment that they want, and that

1 hasn't happened after a lot of discussion on this. So, the
2 bottom line is we're weeks away from the December 31st
3 deadline for completing class certification discovery that
4 everybody agreed to, but at this eleventh hour, Plaintiffs are
5 saying that we can't proceed basically with getting any of the
6 discovery that we want in this case because 18 months into
7 this litigation, Plaintiffs are still trying to figure out
8 what their claims are. And we don't know whether or not
9 December 31st is a real deadline. We think it potentially is
10 doable, but if we don't know what the claims are, it's a
11 little hard to do our depositions.

12 What's ironic about all this is that even though
13 there's so much uncertainty about Plaintiffs' claims that the
14 NHL can't get the discovery it wants, that doesn't seem to be
15 any impediment for Plaintiffs to be charging ahead on all
16 fronts with the discovery that they want. The NHL and the
17 third-parties in the case have spent millions of dollars
18 locating documents, producing folks for depositions, we've
19 produced millions of documents, reviewed thousands of e-mails
20 and texts. We've given 20 depositions with many more
21 scheduled. Millions and millions of dollars have been spent.
22 But right now the NHL has managed to get no depositions, we
23 have no medical exams, woefully incomplete Fact Sheets, which
24 I won't get into now, but we've not gotten what we are
25 entitled to there; a few hundred documents, and a consistent

1 refusal to answer any discovery. We just got objections.

2 It's totally one-sided in the case, and Plaintiffs
3 are getting everything they want but they're not giving the
4 NHL anything they want. They're basically flaunting the
5 Court's directions to do various things to provide the
6 clarification that's necessary. And, Your Honor, I think it's
7 reached the point that, you know, one of a couple of things
8 need to happen here, and I just give this as an overview on
9 this. Either we should just stop discovery until Plaintiffs
10 decide what their claims are so that everybody knows what they
11 are and until we have a schedule in place. Maybe we need an
12 order to get these things done that you keep telling them to
13 do, 10 days to get their Amended Complaint on file, 10 days to
14 get the schedule in place or move for the schedule that
15 they're talking for. But it seems to us it just doesn't make
16 any sense to keep plowing ahead in this case when Plaintiffs
17 themselves are saying that they don't know what their claims
18 are and therefore we can't take discovery on that basis and we
19 really don't have a scheduling roadmap in place at this point.
20 And I appreciate the Court's indulgence, but I thought we had
21 to get that on the record to start with.

22 THE COURT: You bet. Thank you, Mr. Beisner.

23 Who wishes to be heard to respond?

24 Mr. Zimmerman.

25 MR. CHARLES ZIMMERMAN: Well, I'm a little surprised

1 by that attack. We have meet and confers and actually John
2 and I spoke a week ago by telephone about some confidential
3 matters that we take up in chambers and this topic really
4 didn't come up. But I'm happy to respond.

5 First off, we all know very clearly what this case
6 is about. The only question that we're struggling with that
7 makes very little difference to really the discovery in this
8 case in the main is, are we going to have a personal injury
9 class, or are we going to have only a medical monitoring
10 class, or are we going to have -- I think it's 4(c) -- I mean,
11 a -- a class of liability only coupled with a medical
12 monitoring class? That's the only thing that's really in play
13 with regard to the Plaintiffs' case.

14 And I think the Court probably said it best in the
15 last informal conference when you said to Mr. Beisner,
16 Mr. Beisner, you know what this case is about, it's about the
17 players who are at risk for future injury and disability as a
18 result of getting hit in the head and having traumatic brain
19 injury or concussive injury or brain damage done on the ice
20 during play that will manifest itself later in disability.

21 And the question we're struggling with is that, is
22 that a class of all those people, or is it just the liability
23 side that we're going to decide on a class-wide basis
24 regarding the conduct of the NHL that brought about an
25 unreasonable risk to these players and then have individual

1 cases of damages once the liability is being -- has been
2 decided in a class. Can we do that? We're working on that,
3 and I think we said we'll have that by the October 16th status
4 conference well defined. I think that's what my notes show
5 from the last conference.

6 Okay. At the same time, we know we have a medical
7 monitoring class that's always been discussed and always been
8 out there. Okay? That's what the case is about. Second
9 point, IMEs and depositions of the Plaintiff class
10 representatives to my knowledge -- and I think the schedule
11 shows us -- we have dates for each and every one of the class
12 representatives' depositions. Now, maybe there's been some
13 scheduling adjustments, but certainly we haven't denied them
14 access to these depositions. And I believe they're all
15 scheduled, and I believe they're all laid out in the agenda
16 and the status report that's before Your Honor. Reed Larson,
17 November 5; Dan LaCouture, November 5; Mike Peluso,
18 November 12th, et cetera, et cetera. There's no mystery about
19 that.

20 The third question is the IMEs, and I think the
21 Court has been very clear with us and we've been very clear
22 with the Court, do you really want IMEs now and, if so, are
23 they going to include spinal taps and the kinds of invasive
24 testing that NHL has asked for and sought? Or are we going to
25 try and do a more reasonable IME but, be careful -- these were

1 your words -- you can't do it twice, so do you want to do them
2 now or do you want to do them later? And if you do them now
3 for people who haven't presented with these serious diseases
4 yet but might in the future, do you want to have your IME now
5 and if so, how invasive can it be? And I think we've been
6 exchanging Affidavits and Declarations and credentials of the
7 various doctors and I think we're still wrestling that
8 question to the ground with the Court. And I think we've been
9 discussing that in chambers all in good faith.

10 Now, I must admit I wasn't on the telephone call
11 yesterday where somebody said -- and I wasn't there --

12 MR. MICHAEL CASHMAN: I'll address it.

13 MR. CHARLES ZIMMERMAN: That we think it's premature
14 or we think it's not -- we object to the IMEs generally and
15 maybe we will raise an objection to certain IMEs if we think
16 they're too invasive. But this Honor knows, we've been
17 talking about this in good faith in chambers as to how deep
18 this test can go, what kind of invasive testing can they do,
19 how long will they last, who can observe, and how are they
20 going to be conducted all in good faith, all according to the
21 schedule, all in accordance with what has been supervised
22 before Your Honor in -- both in chambers and in court. So,
23 I'm a little bit surprised that this kind of attack on the
24 good faith prosecution of the case. Plaintiff wants the case
25 to move forward. We want to protect the players, we want to

1 win the case. But we're not going to -- we're not going to
2 allow invasive testing that's unnecessary and that's
3 calculated to scare players away or even potentially put them
4 at risk. We're going to do everything we can to protect them,
5 and that's what we've been talking about with the IME.

6 And if you want to talk about delays, let's talk
7 about that database that we've been -- I was going to say
8 screwing around, that's not appropriate -- that we have been
9 discussing *ad nauseum* in this Court, outside this Court, by
10 letter, by supplemental letter, by new letter, by secondary
11 letter, and we still haven't got the database which is
12 probably some of the most important evidence in the case, by
13 the way, because it's a recording of who got hit and what kind
14 of injuries they have and it would be helpful to tell us what
15 they knew and when they knew it. But we haven't got that yet,
16 and that's, you know, something we still have not wrestled to
17 the ground.

18 So, I'm not here to say that the NFL -- the NHL and
19 all of their lawyers here and on the phone -- and they well
20 out number the Plaintiffs' lawyers -- are not in good faith.
21 I didn't get up here and say they're not in good faith like
22 John did, but there has been a little foot dragging over
23 there, too.

24 Lastly, we have told the Court probably for the last
25 three months, we're never going to make that December

1 deadline. Why are we not going to make that December
2 deadline? Because it's impossible. Because we don't have
3 this database, because the way they backloaded the documents
4 that, you know, we got 60, 70 percent of the documents in the
5 last several months, not at the front end when we thought we
6 were going to get them. And it's just a bigger bundle of
7 information that we've got to go through than we thought we
8 could, and we said we were going to do some work on the
9 Complaint to try and narrow it to get a little bit better
10 handle on what we can really prove and what we can't prove.
11 And we've been in good faith telling the Court that and I've
12 been singing that song before this Court for sometime. And
13 that comes as no surprise.

14 And I even talked to John about we'll probably need
15 eight months, nine months longer for an extended discovery,
16 but I also said we'll have those dates to you by the
17 October 16th, along with our Amended Complaint. Thank you.

18 THE COURT: Okay. I'll let you respond,
19 Mr. Beisner, but it seems to me that, first of all, I think
20 we've moved the conference now to October 21st. Am I right
21 about that? I think that's the date. It sounds like I am
22 hearing a commitment from the Plaintiffs to have a proposed
23 Amended Master Complaint and a schedule for any extension they
24 wish or you all wish with respect to class certification to be
25 presented to the Court in a timely way under the Rules, to be

1 considered at the October 21st informal. So, I think that
2 gives you the deadlines you're looking for.

3 MR. JOHN BEISNER: And that's the progress we were
4 looking for, and I think just to be clear on that, Your Honor,
5 you know, on the call yesterday, what we were told about the
6 IMEs is that we're not going to talk about those because
7 they're premature. We have presented the protocol --

8 THE COURT: Let's talk about the IMEs when we get to
9 it. But we will -- I will take a look at that protocol and I
10 will --

11 MR. JOHN BEISNER: But, Your Honor, I just want to
12 be clear, these commitments, we weren't told this yesterday,
13 and that's the reason I raise the issue. And I don't want to
14 be -- I'm not -- I -- I -- I'm concerned. These deadlines
15 that were referred to as being mentioned earlier. When we
16 asked specifically about them yesterday, we were told they
17 were not there. And the reality is, Your Honor -- and I did
18 want to mention Mr. Zimmerman is correct. We have these named
19 Plaintiff depositions scheduled for early November, but those
20 require a lot of preparation, and now we -- I don't know how
21 we keep those dates. That's what I -- I wasn't saying they
22 weren't scheduled. I'm saying after struggling a long time to
23 get them scheduled, we got to know what the claims are to know
24 what to do to prepare for those depositions. So, I think
25 those dates are going to be in jeopardy because I don't know

1 if we're just seeing on the 21st what they're proposing to
2 take those depositions just a few days later, which is what
3 we're stuck with. And so if the Complaint we're offering is
4 it's been a long time in coming to get both of these things
5 covered. But I appreciate, Your Honor --

6 THE COURT: Yeah.

7 MR. JOHN BEISNER: -- that, you know, that we've got
8 the dates resolved.

9 THE COURT: It looks like what the Plaintiffs are
10 struggling with is not going to really impact the named
11 Plaintiff depositions. It looks like whether they're going to
12 seek class treatment of liability only or whether they're
13 going to add -- let me just finish -- a medical monitoring
14 class or a personal injury class and, you know, you and I have
15 had this discussion about the wisdom of your only shot at an
16 IME for class certification purposes as opposed to before
17 trial. That's up to the NHL if you want to use your one shot
18 now, that's fine. But I don't see that decision really
19 impacting those depositions. Perhaps you can tell me why you
20 think they --

21 MR. JOHN BEISNER: It's a huge impact, Your Honor.

22 THE COURT: Well, tell me why.

23 MR. JOHN BEISNER: Well, I mean Plaintiffs yesterday
24 in the call said, well, we can't evaluate the IMEs until our
25 Complaint is set up. I mean --

1 THE COURT: Well, I suppose if there is no -- if
2 there is no personal injury class, then maybe we take a
3 different look at the IMEs.

4 MR. JOHN BEISNER: Well, you might, Your Honor. I
5 think we will greatly disagree about that because I think that
6 the -- you know, the Circuit precedent makes pretty clear
7 expectations about knowing the representativeness of those
8 Plaintiffs and knowing what their histories are. And I
9 think --

10 THE COURT: For liability only? You'd have to show
11 me some precedent where there was some IMEs --

12 MR. JOHN BEISNER: Absolutely. It's class
13 representatives, Your Honor. This goes back to the Supreme
14 Court precedence on you needing to have typical, adequate
15 class representatives. And I think we have every right to
16 inquire about that. But Your Honor, it's just -- in the same
17 way the IME issue may be different, so is the deposition. The
18 focus of this on past injuries and so on, it's going to be a
19 very different focus in that deposition and we're entitled to
20 know what the focus is. We have limited time in that
21 deposition. I think it's going to make a significant
22 difference.

23 THE COURT: Okay. It looks like by the next status
24 conference, you will know what the pivot is, what -- how the
25 Plaintiffs are going to proceed, and if you need to postpone

1 those Plaintiff depositions accordingly, then that would --
2 that would make sense. And I hope you're going to meet and
3 confer on the schedule because I've told you I'm not going to
4 extend it -- I'm probably not going to extend it eight months,
5 so I think I've said that before, so you need to tell me --
6 give me a reasonable proposal for extending this now.

7 MR. JOHN BEISNER: Yeah, and I think we need to get
8 the proposal from Plaintiffs which we don't have at this
9 point, but we're happy to talk about it once it's made.

10 THE COURT: You need to meet and confer on it, and
11 you need to get that joint proposal to me in a timely way
12 before the next conference.

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

14 THE COURT: Okay. All right.

15 All right.

16 MR. MICHAEL CASHMAN: Your Honor, may I just respond
17 to some comments that Mr. Beisner made about the IMEs and
18 it -- he's made repeated reference to this call yesterday, and
19 I was the individual on the call with Mr. Beisner and
20 Mr. Connolly, along with one of my colleagues, Tom Byrne,
21 who's on the phone. And I disagree strongly with the way that
22 the conference has been characterized. And I know we'll be
23 talking about IMEs in greater detail later on the agenda
24 today, but I think it's important to note that aside from the
25 details in dispute about their proposed protocol, some of

1 which are inconsistent with what I think were specific
2 instructions from the Court before that we had discussions
3 before. But the -- the call centered on we have two
4 Plaintiffs already in the Master Amended Complaint, Dave
5 Christian and Reed Larson, who have never alleged and do not
6 allege any present injury. And I think that we've had
7 multiple conferences before where the Court has stated quite
8 clearly to Mr. Beisner that the Court is not going to allow
9 any IME on somebody who is not claiming a present injury. And
10 so I said, at a bare minimum, they have no right to an IME
11 with respect to Mr. Larson and Mr. Christian.

12 And depending on how the Master Amended Complaint is
13 amended may dispense with the IMEs altogether, which I think
14 the Court just recognized. It doesn't make any sense to be
15 doing IMEs -- and I did use the word prematurely -- given the
16 posture that we're in right now. But I did promise to
17 continue meet and conferring with Mr. Beisner about those IMEs
18 when we -- when we have the right circumstances to discuss
19 exactly who and what. And Mr. Beisner basically is taking the
20 position -- which I think has been rejected through the
21 multiple discussions we've had before with the Court
22 informally and in formal hearings -- but he takes the position
23 now that they're entitled to IMEs regardless of what kind of
24 injury is being alleged by any given individual. And that
25 just doesn't make sense.

1 THE COURT: Okay.

2 MR. MICHAEL CASHMAN: Thank you.

3 THE COURT: We'll get to a more complete discussion
4 of the IME issues.

5 Let's start with Defendants' document production.

6 Mr. Martino.

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

9 So, starting with the NHL document production, I am
10 happy to report that I believe we're finished with the NHL
11 document production. We've made our last production on the
12 1st. That included text messages for the -- for some of the
13 custodians that we were searching for texts, and I think after
14 that we're now complete, other than any documents that get
15 produced as part of the privileged de-designation process --
16 we have a privilege discussion going on with the Plaintiffs
17 and that will be -- that dispute will be brought to Judge
18 Mayeron but they will be -- you know, to the extent there are
19 de-designated documents, those will be produced, obviously.

20 Moving to the Board of Governors, we've produced for
21 all the Governors for which we have documents, for the
22 alternates that we agreed to search, we've produced for all of
23 those, as well, except we've -- we're in the process of
24 collecting for one more Alternate Governor. That's from Los
25 Angeles. And we also are in the process of confirming with

1 Calgary Flames about whether there are any alternates who
2 regularly attended meetings and might have Board of Governors
3 documents.

4 Finally with respect to the Board of Governors, we
5 are in the process of coordinating with the Governors on the
6 text message issue that we talked about at the last
7 conference, whether they are going to provide an Affidavit or
8 provide us with their devices to do searches. And as you can
9 imagine, 30 Governors located all around the country, we're in
10 the process of calling them and setting that up and figuring
11 out how they want to handle that.

12 THE COURT: Okay. Can you tell them that that
13 difficult judge is asking you to get that done in 30 days?

14 MR. MATTHEW MARTINO: Yes. We'll tell them that.

15 THE COURT: Thank you.

16 MR. MATTHEW MARTINO: I imagine to the extent it's
17 an Affidavit, it will be obviously much easier to provide than
18 if we're going to do -- if they decide they'd prefer to search
19 the device, that could take a little longer to do the
20 searching and collecting, reviewing, producing part. But, you
21 know, to the extent we have a list of who's who at the next
22 conference, we can present that to you and --

23 THE COURT: I think that's fine. I just want a
24 pressure point on them so they make a pivot on it.

25 MR. MATTHEW MARTINO: Of course. And that's it for

1 me. Thank you.

2 THE COURT: Very good, Mr. Martino.

3 Yes, Mr. Anderson [sic].

4 MR. SCOTT ANDRESEN: Good afternoon, Judge. A
5 couple of things on the document production. We have received
6 the text from the NHL, their custodians, and for several more
7 we've been told that they searched and don't have any
8 responsive texts. We have not had a chance to go through --
9 there was one particular individual who had more than 1300
10 text messages that were just produced to us. We haven't had a
11 chance to review them all, but we'll certainly meet and confer
12 if we have any concerns about that.

13 There is a -- a concern that we have as it relates
14 to the Board of Governors and Mr. Martino referenced it. And
15 that is on the Board of Governors documents, there was an
16 initial production for all the primary Governors, and yet
17 there's been no documents produced from the Calgary Flames for
18 a primary Governor or an Alternate Governor. And you'll note
19 later we talk about deposition scheduling. One of the
20 depositions that we've requested is Murray Edwards, the
21 primary Governor for the Calgary Flames. There was a date
22 proposed. We have now communicated to the NHL that that isn't
23 going to work because we don't have any documents yet for the
24 Calgary Flames. One, because there's no Board of Governors
25 documents and, two, because they're north of the border,

1 they -- those documents have not been produced by Mr. Schmidt
2 as it relates to the General Managers and the trainers. So,
3 we have no documents at all from the Calgary Flames, and we
4 can't take that deposition until we do.

5 The other point that I would -- I guess I would
6 highlight which Your Honor has done a little bit and that is
7 the fact that we didn't get any text messages from the Board
8 of Governors to begin with. I think that we went through this
9 back with the NHL, the fact that text messages should have
10 been part of the initial ESI and why they weren't inquired of
11 at the time that we got documents from the Board originally.
12 And we had to go back and say, hey, did you produce texts and
13 the answer was, no, but we'll inquire. It's just, again,
14 setting us back a little bit in terms of trying to complete
15 the discovery.

16 The last thing on Alternate Governors, I had a
17 conversation this morning with Mr. Martino. There will be, I
18 think, seven or eight teams for which we request additional
19 Alternate Governors. I'm happy to report that I think we're
20 working cooperatively and we'll get the things that we need
21 and will not request things that are unreasonable.

22 That's all I have. Thank you.

23 THE COURT: Very good. Appreciate that.

24 Mr. Martino?

25 MR. MATTHEW MARTINO: I just wanted to correct for

1 the record one thing, for the Board of Governors, we did
2 request that if they were likely to have documents in their --
3 or responsive information in their text messages that they
4 search those. The -- if you recall, the Board was a different
5 process. It was, we'll produce -- we'll search e-mails and
6 for any other non-e-mail electronic documents, you would
7 search where there's likely to be information, so we did tell
8 them, make sure you look at texts there. And then at the last
9 conference, they -- you had ordered -- you had advised us to
10 get Affidavits from those Governors, so that's where we are.
11 But we did make the original request to the Governors, just
12 wanted to correct that for the record.

13 THE COURT: Okay. Why are you getting some push
14 back from the Calgary Flames? Do you know why or --

15 MR. MATTHEW MARTINO: I do not. But we -- you know,
16 we're working with them. We're going to make sure we get on
17 them this week as far as the -- if they have any Alternate
18 Governors.

19 THE COURT: And apparently there's no production for
20 a Governor either.

21 MR. MATTHEW MARTINO: The Governor we did talk to
22 and he said he did not have any -- he did the search of the
23 e-mail, we did the search, and he did not have any responsive
24 information. So, what we had done for any Governors who had
25 no or very little, by way of production, we went to ask about

1 Alternate Governors.

2 THE COURT: Okay.

3 MR. MATTHEW MARTINO: And so that's where we are
4 with Calgary on Alternate Governors stage.

5 THE COURT: (Coughing) I'm so sorry. Very good.

6 MR. MATTHEW MARTINO: Thank you.

7 THE COURT: All right. It sounds like this is
8 progressing well. I continue to be grateful for the work on
9 both sides of the case on this document production.

10 All right. Should we get to Plaintiff Fact Sheets?

11 MR. JOHN BEISNER: Your Honor, I may be able to
12 simplify this. We sent a deficiency letter to Plaintiffs
13 counsel, to Mr. Cashman in particular. We got a response from
14 him on that a day or so ago. I suspect we'll go through a
15 meet and confer process, and if there's need for any motion
16 activity, we will do it.

17 THE COURT: Okay.

18 Defendant Fact Sheets, Mr. Cashman?

19 MR. MICHAEL CASHMAN: Well, before we get to
20 Defendant Fact Sheets, I'd like to talk about those and
21 Plaintiff Fact Sheets. I anticipate that I'll get a request
22 for a meet and confer on the Plaintiff Fact Sheets, but it's
23 the Plaintiffs' view, as I have expressed to the Court before,
24 that the NHL is abusing this process and is using each of
25 these Plaintiff Fact Sheets and litigating each one of them as

1 if they're individual claims, even though the Plaintiffs
2 agreed in the first instance that these would be tools to
3 gather basic information in the event that class certification
4 was denied or was limited and if this became a mass tort case.
5 But this -- these Plaintiff Fact Sheets are being used as a
6 cudgel by the NHL and they want us to go back all the time to
7 Plaintiffs who have done their best and provided substantial
8 information. And as you've seen with some of the motion
9 practice that occurred, it's being used as a way to discourage
10 people from participating in the case.

11 And the Court saw the motion to dismiss, for
12 example, that was filed by the NHL with respect to a few
13 people who had not provided Plaintiff Fact Sheets. We talked
14 about this at the last informal conference. And that motion
15 was filed publicly, as an effort to discourage participation.

16 During the meet and confer process, we had a
17 discussion about those three and some other individuals, and I
18 explained that those -- that those would be dismissed
19 voluntarily. And yet we have this kind of activity with the
20 motion to dismiss and the repeated table pounding about
21 Plaintiff Fact Sheets even though the Plaintiffs have provided
22 substantial information about their -- their particular
23 situations.

24 And we think this is a real problem, and it's a
25 diversion, and we think we are going to need some guidance

1 from the Court on the proper extent of these Plaintiff Fact
2 Sheets because right now they're being abused by the NHL.

3 THE COURT: Okay. Before -- after the meet and
4 confer process and before any motion is brought, you're going
5 to have to present it informally to the Court. Okay?

6 MR. MICHAEL CASHMAN: Thank you. On Defendant Fact
7 Sheets --

8 THE COURT: Mr. Connolly wants to respond to that.

9 MR. DANIEL CONNOLLY: Your Honor, just quickly on
10 the Plaintiff Fact Sheet issue, I recall the discussion with
11 Mr. Cashman substantially differently. We talked about two
12 issues relative to the Plaintiff Fact Sheets. We had
13 initially talked about them with the Court and there were two
14 issues. One was whether they were complete and then there
15 were others that had never responded. And as to the ones that
16 were not complete, we suspended the timeframe of which we
17 would make any kind of -- and Your Honor said, well, it looks
18 like we just need to make a formal motion. And what we did is
19 we talked to Mr. Cashman. He said he would supplement by
20 September 30th, so we said we would hold off. There were
21 three -- four initially identified players that had not
22 responded at all, and he said he anticipated -- he did not --
23 they were not responding further to his calls and he could not
24 stipulate to their dismissal. So, we were forced just to ask
25 for them to be dismissed.

1 At that point, then, they did dismiss them. So, we
2 directly did exactly what the Court and Counsel said. We
3 didn't try to over step. We didn't try to intimidate.
4 Mr. Cashman specifically told us he could not dismiss those
5 people because they weren't responding to him either at that
6 point. So, we just formally made the motion, and at that
7 point they stipulated to the dismissal. I don't know how they
8 accomplished it, but they did accomplish it.

9 THE COURT: Okay. I'm just saying going forward
10 now, let's have a -- a conference with the Court after you
11 agree to disagree at a meet and confer about the Plaintiff
12 Fact Sheets. Okay?

13 MR. MICHAEL CASHMAN: Thank you, Your Honor. On
14 Defendant Fact Sheets, they have been providing Defendant Fact
15 Sheets, but it's really striking, Your Honor, given all the
16 complaints that we've been hearing about the Plaintiff Fact
17 Sheets when the Defendant Fact Sheets are entirely not
18 responsive, nonresponsive to any of the material questions.
19 You'll recall that we've had conferences about the questions
20 to be asked in the Plaintiff Fact Sheets and we had specific
21 discussions about warnings that the NHL claims were given to
22 individual players. And we had a discussion where I recall
23 the Court said if there weren't warnings given to individual
24 players, just say no.

25 Well, we get the Defendant Fact Sheets, and on all

1 those kind of questions we get nonresponsive answers, where
2 they say, well, the Clubs may have given this kind of thing.
3 Here are some examples. Players were generally told. We
4 didn't get anything that responds to the specific questions on
5 the Defendant Fact Sheets. I'll write a deficiency letter to
6 the NHL, but I wanted to alert the Court to the gamesmanship
7 that's going on here in contrast to the Plaintiff Fact Sheets.

8 THE COURT: Mr. Connolly?

9 MR. DANIEL CONNOLLY: Before I respond on the
10 Defendant Fact Sheets, I just wanted to make clear that the
11 Court's directive that motions to compel not be brought until
12 we've had an informal conference goes in both directions.

13 THE COURT: It does.

14 MR. DANIEL CONNOLLY: Yes. Okay. I just wanted to
15 make sure that that applied both ways.

16 THE COURT: It does. Yes.

17 MR. JOHN BEISNER: Your Honor, if I may on the
18 Defendant Fact Sheets. I think it's going to be important
19 to -- I'm not sure Your Honor has seen the responses of the
20 Plaintiff Fact Sheets versus the Defendant Fact Sheets, and I
21 think at the discovery conference, we should probably do that.
22 The Plaintiff Fact Sheets involve probably a few minutes' time
23 by players sort of throwing down a few things and the
24 Defendant Fact Sheets don't compare in any way. They're
25 boilerplate answers in both. There's no question about that,

1 but I think we should just present those to Your Honor so you
2 can see them in the concrete form.

3 THE COURT: I think it's appropriate for Mr. Cashman
4 to do a deficiency letter and for you to meet and confer and
5 then I'm glad to take a look before there's a formal motion.

6 MR. JOHN BEISNER: Your Honor, one thing I did want
7 to note on this, though, with respect to the Plaintiff Fact
8 Sheets is, and this is a disconnect that I've raised before on
9 this, is that I think Mr. Cashman has taken the position
10 before that, you know, this Plaintiff Fact Sheet process isn't
11 particularly important to class certification because we're
12 not supposed to be looking at those Plaintiffs who are not
13 named in the Master Complaint, that that's somehow secondary
14 importance. But we really have a double standard on this. I
15 mean, we got an e-mail from Mr. Cashman. This is on
16 September 17th: Unlike the information you seek in the PFS
17 which were intended as a time-saving device depending on the
18 outcome of class certification, the medical records for all
19 Plaintiffs is information that needs to be produced very
20 promptly given the depositions of Governors, GMs, and other
21 U.S. Club personnel.

22 So, again, what Plaintiffs want to get with respect
23 to these non-Master Complaint Plaintiffs is of paramount
24 importance so they can be used in depositions. But what we
25 want to get, which is just court-approved questions, you know,

1 we're intimidating people if we raise concerns that we didn't
2 get them. I mean, that's part of litigation. If asking for
3 information is somehow inappropriate under Rule 26, we need to
4 let the Advisory Committee know that because the rule is
5 there. And I think we have a double standard here.

6 We're being pressed very hard, and the Clubs are
7 being pressed hard to produce information specifically about
8 these people who are not in the Master Complaint because there
9 may need to be questioning about them in upcoming depositions,
10 that somehow we're looking for has been relegated to secondary
11 importance. There needs to be an equal balance on that.

12 MR. MICHAEL CASHMAN: Well, Your Honor, I'm glad
13 that Mr. Beisner raised that because what he's done is the
14 bait and switch, mixing apples and oranges, because the Court
15 will recall that on the Plaintiff Fact Sheets, it was the NHL
16 that was adamant that they include medical authorizations from
17 each Plaintiff who is participating in this case where the
18 Plaintiffs provide all the medical care providers that they
19 can recall, which they have done and they provided medical
20 authorizations. And the NHL promised that they would collect
21 those medical records for those individuals and the NHL
22 promised that they would provide those medical authorizations
23 to the U.S. Clubs and that we would be provided promptly with
24 the medical records when it was collected.

25 So, months go by and the question naturally came up,

1 why aren't we getting these records when -- if you've been
2 collecting them? And we learned that Mr. Beisner was holding
3 all the medical authorizations and not providing them to
4 Mr. Schmidt until he had a complete set of medical
5 authorizations.

6 So I wrote and said, let's get that information. If
7 we're going to talk about foot dragging here, that's an
8 example of foot dragging. We don't know what's in the medical
9 records, and it may certainly be important and useful in
10 depositions, particularly since, as the Court well knows from
11 the discussions that we've had before, the positions that have
12 been taken by the NHL and by the Clubs about our ability to
13 ask medical-related questions in the absence of an
14 authorization.

15 Well, we've got them, but they don't want to give us
16 the records. So, it's not a double standard. In fact, we're
17 being entirely consistent. We've given them the ability to
18 collect the documents they said they wanted, so they should
19 produce them promptly. Thank you.

20 THE COURT: Mr. Beisner, who is responsible at your
21 end for collecting those documents?

22 MR. JOHN BEISNER: Well, Your Honor, this is
23 inaccurate. We have provided the authorizations -- these are
24 not medical records the NHL has. And when we've gotten the
25 authorizations -- and you can ask Mr. Schmidt about that --

1 we've sent them onto the Clubs as we said we would in the
2 Defendant Fact Sheets. I'm not sure where this is coming from
3 that I was holding them or anything. We passed them along.

4 THE COURT: So they've all been passed on?

5 MR. JOHN BEISNER: Yeah, they've been passed on, and
6 they will provide them. So I think that's a red herring here.

7 And I think it gets us away from the point that I
8 was trying to make, and that is that we are constantly -- the
9 Plaintiffs are constantly saying that these Fact Sheets are of
10 secondary importance and there's something wrong about trying
11 to get that information. But when it's information that they
12 are looking for, it becomes of paramount importance. That's
13 my only point.

14 THE COURT: All right.

15 MR. JOHN BEISNER: And we're -- they're getting the
16 information, Mr. Schmidt can address that. That's information
17 that's in the Clubs' possession. We don't have those medical
18 records.

19 THE COURT: Fortunately that's next on our agenda,
20 Mr. Schmidt.

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

22 THE COURT: Thank you.

23 MR. CHRISTOPHER SCHMIDT: Thank you very much, Your
24 Honor. Good afternoon. I will address the medical
25 authorization in a moment. Just to start with a big

1 overview -- and this is information that was provided to
2 Plaintiffs' counsel, I believe, about ten days ago. The Clubs
3 have produced a total of over 20,000 documents, over 333,000
4 pages, 82 separate productions for 23 separate entities on
5 seven different dates. It's been a tremendous burden, and the
6 production is substantially complete.

7 There are three issues that we are dealing with.
8 The first that remains to be done is the medical
9 authorizations. I'm really surprised by Mr. Cashman's
10 characterization. This Court will recall the very first time
11 that I came to this Court at the Court's urging was in an
12 informal conference, and the position of the Clubs was provide
13 us medical authorizations, please. That was back in April of
14 this year. We've asked repeatedly, provide us with the
15 medical authorizations, please. Mr. Beisner did provide us
16 authorizations, and he's provided those as those have come in.

17 I've gone to Plaintiffs and said, can you please
18 confirm we have them all? Because this is an incredible
19 burden for 23 separate Clubs to not just look at what's in
20 their electronic system but to go through historical records
21 and look through them. I'm still waiting for confirmation
22 today. I still don't have it, Your Honor, from Plaintiffs'
23 counsel.

24 So, I want the record to be really clear on this
25 point that since the very beginning when we've received these

1 subpoenas, we've asked for these authorizations, we've
2 repeatedly asked and Plaintiffs' counsel owe me a
3 representation that the authorization list is complete so we
4 can get that final, substantial piece of work done.

5 I'd ask if the Court, so there's clarity, could give
6 Plaintiffs' counsel or Plaintiffs' counsel could tell me a
7 date when they would let me know their list so that we can
8 immediately then start that gathering of information and
9 complete it. There's two other brief issues, Your Honor. The
10 second, we did meet and confer with Plaintiffs' counsel
11 regarding our production. We gave them more details stats
12 that broke down by Club about 10 days ago. They had some
13 questions about some of the Clubs. We're going to continue to
14 meet and confer on those issues, and I'm confident that we can
15 reach resolution.

16 The third issue is on Friday, we received a letter
17 related to our PMI privilege log, challenging a little over
18 200 of the documents on our privilege log out of 2500
19 documents. I instructed my team yesterday to print all of
20 those. We're looking at them, and we will set up a meet and
21 confer. I'm also confident that we can work through those
22 issues, as well, Your Honor.

23 Other than the medical authorization issues, our
24 production is substantially complete, and we appreciate your
25 time and attention to these issues. Thank you.

1 THE COURT: Thank you.

2 Mr. Cashman, are there medical authorizations that
3 are -- have not been provided to the Clubs yet?

4 MR. MICHAEL CASHMAN: No, there are not. And, Your
5 Honor, what Mr. Schmidt --

6 THE COURT: Why don't you come on up to the podium.
7 Thank you.

8 MR. MICHAEL CASHMAN: What Mr. Schmidt has neglected
9 to inform the Court is that the NHL has the medical
10 authorizations and it's the NHL's obligation to collect the
11 records, not for the Clubs to come to us for those individual
12 authorizations. And the only -- the only caveat, Your Honor,
13 is we have had some issues with some medical authorizations
14 which were not completely filled out by some individuals. And
15 when that's been brought to our attention, we've provided
16 completed medical authorizations. But everybody who is in the
17 case, those have been provided. The ones that were complete
18 were provided long ago.

19 I just don't think it's justifiable, really, for the
20 Clubs to say we're not going to go and talk to the Blackhawks
21 or whatever team you might pick until we have all of the
22 authorizations for every player, regardless of what team they
23 played on. I just don't think that's reasonable, I would
24 submit.

25 THE COURT: Okay. There's a disconnect here

1 somehow.

2 MR. CHRISTOPHER SCHMIDT: There is. This is the
3 first time Mr. Cashman has been part of this conversation.
4 I've spoken with his co-counsel who have agreed to give me
5 this confirmation, Your Honor. They've been part of the
6 discussions going all the way back to April. So, I'm not
7 really certain why Mr. Cashman is speaking to this issue with
8 respect to the Clubs at this point. If he wants to talk about
9 this or if he disagrees with his co-counsel, that's a
10 different issue. But they -- his co-counsel has agreed to
11 confirm that the authorization list is complete. And that's
12 really important because this is not just a, let's look at the
13 electronic database and plug in a name and try and pull
14 medical records.

15 We have to go through physical documents, as well,
16 where those are available and pull those. This is an
17 expensive, time-consuming process. We've been asking for
18 this, Your Honor, since April. I think that's clear. We
19 would just like confirmation that the list is complete and
20 we're still waiting on that from counsel.

21 THE COURT: Okay. Mr. Penny is jumping out of his
22 chair.

23 MR. MICHAEL CASHMAN: Mr. Penny had those
24 conversations, Your Honor, but there's one point to emphasize
25 and that's that these medical authorizations were provided to

1 the NHL and it was the NHL's obligation to go to every source
2 identified by a player, which included the Clubs. That's
3 where I think the disconnect is with Mr. Schmidt. But it's
4 the NHL's obligation to collect all the records and provide
5 them to us, including records from the Clubs.

6 THE COURT: Okay.

7 Mr. Penny.

8 MR. BRIAN PENNY: Sorry, I didn't want to jump out
9 of the chair but I felt like I was being referred to without
10 my name --

11 THE COURT: I suspect you were, yes.

12 MR. BRIAN PENNY: I think where the breakdown in
13 communication is occurring is between all four of us, perhaps,
14 because the problem is we are providing all the
15 authorizations, or at least we think we're providing all of
16 the authorizations to the NHL, and then Mr. Schmidt is asking,
17 does he have all the authorizations? Well, we don't know what
18 the NHL has given to Mr. Schmidt. And as we mentioned before,
19 some of them came back with some claimed deficiencies and so I
20 understand he wants a, quote-unquote, definitive list. I
21 think what we're telling him now is it's substantially
22 complete.

23 We've provided all the authorizations that we're
24 aware of. Whether they've made their way through all the way
25 to the Clubs yet, I don't know. But as to the burden of

1 having to go back and search for another player's medical
2 record, I don't see that as being such a great additional
3 burden, it's a burden onto itself, it's a separate search of a
4 separate players medical records. Whether it happens at the
5 very same time as another players' medical record, I don't
6 know that there's an incremental burden there --

7 THE COURT: But setting that aside, you're not aware
8 of any players' authorization that's missing. Am I right?

9 MR. BRIAN PENNY: Michael? I don't think so.

10 THE COURT: You need to be at the podium.

11 MR. MICHAEL CASHMAN: The only authorizations which
12 I am aware of which would be forthcoming would be the new --
13 the new lawsuit that was filed by Michel Petit and others.
14 And the Court will recall under the Plaintiff Fact Sheet
15 order, those individuals have 45 days from the date of service
16 is accepted or the case is transferred or filed here in this
17 Court. And so that time has not yet run for the individuals
18 in that lawsuit. Of course, they'll be providing medical
19 authorizations, and I think that really highlights we can't
20 have a process where Mr. Schmidt or the NHL waits until they
21 have all the authorizations before they go collect the records
22 because when players join this lawsuit, what are we going to
23 say, they don't have to -- they don't have to go collect the
24 records until we know that everybody is --

25 THE COURT: Okay. I don't think we're talking about

1 new lawsuits. It sounds like Mr. Beisner is representing to
2 you, Mr. Schmidt, that every authorization he's got has been
3 passed on. It seems to me you've got your representation that
4 you need to proceed. Okay?

5 MR. CHRISTOPHER SCHMIDT: Thank you so much. And
6 that's all I've been asking for literally for weeks, Your
7 Honor, and so I finally receive that representation today.
8 It's the first time I received it. Thank you very much.

9 THE COURT: So if you can report on the 21st about
10 where that stands, I'd appreciate it.

11 Okay, Mr. Schmidt --

12 MR. JOHN BEISNER: I --

13 THE COURT: Hold on, Mr. Beisner.

14 Mr. Schmidt?

15 MR. CHRISTOPHER SCHMIDT: Oh, I'm sorry.

16 THE COURT: Will you report to the Court on the 21st
17 about where that production stands?

18 MR. CHRISTOPHER SCHMIDT: Yes, Your Honor.
19 Absolutely. Thank you very much.

20 THE COURT: All right. Thank you.

21 Mr. Beisner.

22 MR. JOHN BEISNER: Your Honor, just to clarify on
23 this because I'm afraid we may have gotten off track on this
24 medical records issue. In the -- in the Defendant Fact Sheet,
25 what the request is that's in there is, please provide all

1 medical records collected by the NHL with respect to
2 Plaintiff. The NHL in here didn't commit to collect all
3 medical records. We said if you give us the authorizations,
4 we'll do our best to do that because a lot of the lists that
5 we've gotten from the players, former players, are very
6 incomplete and so on. So I want to make clear this was not a
7 commitment to go out and get every request. We've said in the
8 response to the Defendant Fact Sheet that with respect to the
9 Clubs' records, we would pass the authorization onto the Club
10 and let the Clubs respond on that. But to be clear about
11 that, Your Honor, I think the response of the Clubs is
12 pursuant to the subpoena that the Plaintiffs have served on
13 the Clubs for that information. That doesn't derive from --

14 THE COURT: Let me understand this. Are you not
15 searching with the authorizations? Are you not searching?

16 MR. JOHN BEISNER: No, no, no, we are, Your Honor.
17 We have a vendor that's going out and looking for the medical
18 records. But I don't want there to be any statement on the
19 record that we've committed to go find every possible medical
20 record --

21 THE COURT: No, you've committed to do what you
22 commit to do for any document production. You're going to go
23 out and locate these records. Am I right?

24 MR. JOHN BEISNER: But I want to be clear, we're not
25 under a discovery obligation here. We never took that on on

1 the medical records. We have said we would give the
2 authorization to a respected vendor -- the kind of vendor that
3 goes and does this -- and goes and gets the medical records.
4 But it's only as good as the information we get from
5 Plaintiffs, and that's one of the problems we have with the
6 Plaintiff Fact Sheets is that information is very incomplete.

7 I don't think -- we did not undertake -- you know,
8 we will do our best using the vendor to find that, but I
9 don't -- I don't want the record to show that we've taken on
10 the obligation, sort of the discovery burden, to go find every
11 medical record for that person. I mean, first of all, that's
12 normally the burden you ask the Plaintiff to do that. We took
13 this on because of a concern about doing that. Your Honor, we
14 have every incentive to go find those records --

15 THE COURT: I would think so, yes.

16 MR. JOHN BEISNER: -- and we have a vendor doing
17 that. I just want to be clear, we didn't take this on as a
18 discovery burden, just as a convenience of the parties. We
19 said we'd hire a vendor, that vendor is sending those
20 documents to the Plaintiffs at the same time we get them.
21 It's just somebody we're paying to do that.

22 THE COURT: All right. What is the status of that
23 process?

24 MR. JOHN BEISNER: Um, with respect to the six named
25 Plaintiffs, I think that is pretty far along. With respect to

1 the folks who are not the six named Plaintiffs, I don't think
2 it's very far along, but it's in large part because of the
3 weakness of the information that we've gotten with respect to
4 the treaters that the players were able to identify for us.
5 We're finding most of the records by getting a set of -- by
6 getting a set of the initial medical records and then looking
7 at those to find out what other doctors we're talking about
8 here.

9 To be clear, Your Honor, on this -- and maybe we're
10 not communicating fully on this. We're talking about treaters
11 who they -- the players saw after they left the NHL and before
12 they came to the NHL.

13 THE COURT: Okay. So, to the extent that the NHL
14 and its doctors and the like have these medical records, you
15 have always said, give me an authorization and I'll produce
16 it. I've heard it hundreds of times.

17 MR. JOHN BEISNER: No, no -- well, and that's the
18 Clubs who have said that. The NHL --

19 THE COURT: You've said it, too, Mr. Beisner.

20 MR. JOHN BEISNER: We don't have it. We don't have
21 any medical records. We don't maintain medical records for
22 the players. We happenstancially [sic] had a few that we get
23 as a result of grievance processes and disciplinary action in
24 the League. But the League doesn't maintain medical records
25 for the players. The Clubs have the medical records, we

1 don't. Their employers have the records, not us.

2 THE COURT: All right.

3 MR. JOHN BEISNER: And so, you know, all that we,
4 you know, are doing or is going through this voluntary effort
5 of getting a vendor to go get the records that we can find.
6 But I just wanted to make clear that these are not materials
7 in our possession and, you know, we are sharing with
8 Plaintiffs everything we have so we're on an equal playing
9 field. But the key part of finding those records is getting
10 good -- you've got to get the names of the doctors. You don't
11 know whose door to knock on, and that's been one of the
12 problems is those responses have been very weak from most of
13 the Plaintiffs out there. And most of the medical records
14 that we're finding is we get Dr. Smith's records, the one name
15 we got on the Plaintiff form, Dr. Smith mentions, well, I
16 referred this patient to Dr. Jones. We say -- our vendor
17 says, oh, we found another doctor's name, that person goes to
18 Dr. Jones. It's a very labor-intensive process to try to
19 build this library of medical records.

20 THE COURT: Okay.

21 Mr. Cashman.

22 MR. MICHAEL CASHMAN: Your Honor, I just think it's
23 really important to correct the record because Mr. Beisner
24 referred to the Defendant Fact Sheet -- a question in the
25 Defendant Fact Sheet which is misdirection. At their request,

1 the Plaintiff Fact Sheet was entered. That's docket 171.

2 In Section VII.1, they ask specifically, each
3 Plaintiff, to identify each doctor, healthcare provider whom
4 you have seen for medical care and treatment from your 15th
5 birthday to the present.

6 Section VII.2: List each hospital clinic, surgery
7 center, healthcare facility that you have visited since your
8 15th birthday.

9 VII.3: List each facility at which radiographs,
10 et cetera were taken of your head from your 15th birthday.

11 VII.4: List each pharmacy, drugstore, or any other
12 facility where you have received a prescription or medication
13 from your 15th birthdays to the present. And then in the
14 medical authorization that they drafted and insisted upon,
15 this is Exhibit B on docket 171: I, fill in the name, hereby
16 authorize you to release and furnish to Skadden Arps or its
17 designee copies of all the following information. And
18 everything that they collect from any of those sources that
19 were identified by a Plaintiff in these Plaintiff Fact Sheets,
20 they are obligated to provide to us.

21 THE COURT: And they are providing it to you. Yes.
22 Okay. My understanding is they are. All right. And my
23 understanding, as well, is that -- and I don't think I
24 understood that until today -- is that the NHL doesn't have
25 any medical records. Well, that wasn't clear at all to me

1 until today. But Mr. Schmidt, the Clubs do, and now that you
2 have your assurances, you're going to move ahead and you're
3 going to give me a report next time that you're well underway.
4 Right?

5 MR. CHRISTOPHER SCHMIDT: Yes. And this is what
6 we've wanted since April, Your Honor. We're happy to do it,
7 and we're going to commence the process immediately.

8 Thank you.

9 THE COURT: All right.

10 Third-party discovery. Any third-party discovery
11 other than letters rogatory, and then we'll get to that.

12 MR. BRIAN PENNY: I was just going to ask, Your
13 Honor, the only other third-party discovery outstanding is
14 really with regard to Chubb, which I sometimes give you an
15 update on. If you would like an update, I'm happy to give it,
16 if it's not --

17 THE COURT: Sure.

18 MR. BRIAN PENNY: Okay. So, with regard to Chubb,
19 the subpoenas kind of request basically three categories of
20 documents. We're looking for data that Chubb has on
21 concussions for NHL players, we're looking for workers' comp
22 files that Chubb has on those concussion injuries, and we're
23 looking for any actuarial analysis that Chubb may have done on
24 injury rates, for example, in the NHL in setting the rates for
25 the U.S. Clubs policies. The beginning -- and we've not

1 really got much past the starting line on this with Mr. Loney,
2 who is Chubb's counsel, and myself. But we're trying to make
3 sure -- or at least I'm trying to make sure that we don't
4 duplicate efforts, we don't get data --

5 COURT REPORTER: Please slow down.

6 THE COURT: You've got to slow down.

7 MR. BRIAN PENNY: All right. We don't get data or
8 information that we're already collecting from the NHL or from
9 the Clubs. And the first step in doing that is finding out
10 exactly what data Chubb has and comparing it to what data the
11 NHL has and is producing. The first step in that was the NHL
12 has shared with Chubb's counsel Mr. Bernardo's letter to the
13 Court and to me explaining and describing the various data
14 sets that the NHL has, so I have then asked Mr. Loney to come
15 back and provide me with a similar description of what data
16 that Chubb has so that we can see if there's something that
17 wouldn't be duplicative. It would also probably give us an
18 idea of what volume of workers' comp files there might be
19 about some of these injuries, and that would also help
20 determine whether it would be a great burden to Chubb to
21 produce them or not, and then I understand Mr. Loney has a
22 whole least of different privacy objections he would probably
23 raise as to the workers' comp files.

24 THE COURT: And where is he located?

25 MR. BRIAN PENNY: Mr. Loney is located in

1 Philadelphia.

2 THE COURT: And is Chubb headquartered in
3 Philadelphia?

4 MR. BRIAN PENNY: I honestly don't know the answer
5 to that.

6 THE COURT: All right. Well, we could extend
7 Mr. Loney an invitation. Mr. Schmidt has come ever since I
8 extended the invitation. And Mr. Loney --

9 MR. BRIAN PENNY: I was going to suggest at a future
10 date, that would be a very good idea, although I don't think
11 we're quite there yet for the next conference --

12 THE COURT: All right. I'd like to move this along.

13 MR. BRIAN PENNY: Yeah, me too.

14 THE COURT: Let's talk about letters rogatory while
15 you're up there. I have sort of reviewed, since they came in
16 very recently, the proposed letters. I know that you were
17 going to raise this issue at the -- on the 21st, I believe,
18 but I'm wondering whether there's really going to be any
19 objection. I note the NHL really wanted to move ahead on
20 this, and whether you'd be ready for me to sign these letters
21 and get going. So, where are we --

22 MR. DANIEL CONNOLLY: Your Honor, Dan Connolly on
23 behalf of the NHL. We don't have an objection to the process
24 that Mr. Penny has outlined.

25 THE COURT: Okay. Well that's good to hear.

1 Mr. Penny, can I sign the letters and move ahead?

2 MR. BRIAN PENNY: As long as they're in the form
3 that you would approve, then please sign them and we'll get
4 presented in Canada. That would be the next step. And just
5 so you know, I did reach out to Mr. Shamie. I gave him copies
6 of what I've filed with you. Mr. Shamie is the Canadian
7 Clubs' counsel.

8 THE COURT: Right. I remember.

9 MR. BRIAN PENNY: And I've invited him to engage in
10 some dialogue. He's thanked me and politely said "not yet,"
11 but hopefully in the future we'll be discussing those.

12 THE COURT: Okay.

13 Mr. Schmidt?

14 MR. CHRISTOPHER SCHMIDT: Yes, Your Honor. While I
15 don't have standing to raise any objections, I did look at the
16 final letter form, and I'd just note two observations.

17 THE COURT: Okay.

18 MR. CHRISTOPHER SCHMIDT: One, I was a little
19 surprised by allegations of paragraphs 5 through 12 that
20 summarize the lawsuit, they seem to be more of a Plaintiffs
21 advocacy piece rather than something that would typically come
22 from a judge in a letter rogatory. I'd ask the Court to maybe
23 look at that.

24 Second is while there's a reference sort of in
25 passing to this Court's order on the privacy and protections

1 that were afforded by this Court, it's in passing again.
2 There's not the reference that you had in your order that, for
3 example, medical records wouldn't be produced absent an
4 authorization or the anonymization protections that this Court
5 put in place. And the letter rogatory really parrots the
6 subpoena in sort of a broad fashion as it was back in February
7 before going through all of our proceedings and doesn't really
8 incorporate the benefit of your thoughts on that issue. So,
9 something to consider --

10 THE COURT: Would it make sense to attach the order?

11 MR. CHRISTOPHER SCHMIDT: I think it may.

12 Thank you, Your Honor.

13 THE COURT: You bet.

14 MR. BRIAN PENNY: If I may, Your Honor. Your order
15 on that very issue is actually one of the exhibits to the
16 letters --

17 THE COURT: Is it? I didn't get through the pile.

18 MR. BRIAN PENNY: As is the Amended Complaint, and I
19 believe some of the paragraphs that Mr. Schmidt didn't like in
20 the description of the lawsuit are actually, I think, lifted
21 from your order on the motion to dismiss, Your Honor, or at
22 least very similar to those.

23 THE COURT: All right. I'll take a careful look at
24 it, but it sounds like I have the green light to try to get
25 this started finally. Good.

1 Okay. All right. Anything to talk about in terms
2 of deposition scheduling? Nope?

3 MR. SCOTT ANDRESEN: Not really, Your Honor. I
4 think what you have here in the order is correct, other than
5 as noted previously, we have notified the NHL that we're going
6 to have to find a new date for the deposition of Mr. Edwards
7 due to the document production issues. Other than that, I
8 think what you have here is correct.

9 THE COURT: All right.

10 Mr. Beisner?

11 MR. JOHN BEISNER: Your Honor, one thing I just
12 wanted to note that I advised Mr. Grygiel of earlier today is
13 Mr. Savard is currently a member -- he's never been an NHL
14 employee and is currently a member of the Players Union. So,
15 I've advised Mr. Grygiel he will need to speak --

16 THE COURT: Subpoena him --

17 MR. JOHN BEISNER: -- with either the Union or
18 Mr. Savard about the scheduling of that deposition. So just
19 to note that we didn't get that into the report, but did want
20 to note that for the record.

21 THE COURT: Okay.

22 All right. The database information production.
23 All right. I'm not going to really entertain too much further
24 argument on this. I think I know everything, but go -- I even
25 have a ruling, but go ahead.

1 MR. MATTHEW STEIN: Thank you, Your Honor. Matthew
2 Stein for the NHL.

3 Just to update on where things stood in the
4 submission we put in, we've produced the baseline merged and
5 modified merged databases to Plaintiffs. We are on track to
6 get a sample of the Impact Database to Plaintiffs this week
7 for them to look at and say yes or no on the de-identification
8 protocol on that. As the status report said, the
9 de-identification of the data extraction spreadsheet is in
10 process. And on the video spreadsheets and database, we're
11 awaiting the Court's ruling on that.

12 THE COURT: Very good. Thank you.

13 MR. MATTHEW STEIN: Thank you, Your Honor.

14 THE COURT: The Court has given this a lot of
15 thought, gone back through all of the letters for
16 clarification or reconsideration or whatever we want to call
17 them. And here is my ruling on it:

18 The database -- bases at issue including the VAS,
19 the video spreadsheet, are really at the heart and at the core
20 of the NHL's Concussion Program, which is the commitment of
21 the NHL to its players to gather important and complete
22 empirical data regarding concussions and brain injuries
23 sustained so that the NHL has the information it needs with
24 respect to patterns of injury mechanisms in order to inform
25 the shape of any intervention strategies that they have

1 promised, which include education initiatives, the possibility
2 of rule changes, equipment redesign, and the like so that
3 concussion injuries are properly prevented and managed.

4 And it is the integrity of that commitment by the
5 NHL to its players, which is certainly one of the key issues
6 squarely at issue in this case. Faced with the NHL's
7 challenges to the discoverability of that key evidence in this
8 case on the grounds of medical privilege and confidentiality,
9 this Court carefully crafted its July 31st, 2015 order to
10 reach a proper balance of those concerns against the
11 undisputed relevance of the data. That order calls for the
12 de-identification or anonymizing of this data which permits
13 both sides and their experts to use this data in a
14 de-identified form at trial.

15 That balance serves to fully protect this data from
16 public disclosure while allowing full disclosure of the data
17 for purposes of trial. In its briefing and in its oral
18 argument to the Court, its original briefing and oral argument
19 to the Court, the NHL argued that the disclosure of the VAS
20 fields in anonymized form raised the possibility that
21 Plaintiffs' counsel could re-identify or reverse engineer the
22 anonymization of certain of the players, those players
23 identified in the video clips, and link those players with
24 certain fields in other databases.

25 Therefore, originally the NHL requested that those

1 fields be redacted, that is portions of these databases not
2 disclosed at all to the players, to the Plaintiffs. The Court
3 recognized and acknowledged this risk in her order. In that
4 order, the Court stated, and I quote, "This Court orders that
5 any information found to have been reidentified or reverse
6 engineered by any party may not be used in this case in any
7 deposition, motion, or at trial. No proof or defense shall
8 include a reference to a player's identity connected to
9 medical data, with the exception of players who have provided
10 medical releases."

11 The Court emphasized that the combination of the
12 amended protective order and this Court-ordered directive
13 regarding re-identification would fully protect players
14 against the public disclosure of their private medical
15 information and at the same time would allow both sides use of
16 this data at trial. The order is clear that these fields are
17 not to be redacted. In its letters to the Court seeking
18 clarification and reconsideration of the Court's order, the
19 NHL raises the very same issue again, the risk that Plaintiffs
20 counsel will ignore and violate this Court's directive and, in
21 fact, re-identify this information. Again, the NHL seeks
22 permission to redact quantities of essential information
23 contained in VAS fields, in fact, more than originally raised
24 with the Court.

25 For instance, the "mechanism of injury" field, which

1 is an issue at the heart of this litigation were the Court to
2 concede to the position of the NHL, the integrity of the
3 databases would be so irreparably harmed because essential
4 information would be hidden from production. And in that
5 scenario, no party, neither the Plaintiffs nor the Defense,
6 could use the databases at all, the very heart of the NHL's
7 Concussion Program at trial. No expert could rely on the
8 data. And that rather draconian result all to protect against
9 an unfounded fear that Plaintiffs' counsel would boldly
10 violate this Court's order is just unwarranted in this case.

11 This Court's order carefully and methodically
12 reached a balance that permits the jury to get at the heart
13 and the merits of this controversy with virtually no risk of
14 public disclosure of this private medical information. So,
15 the order stands, and the requested relief is denied.

16 I hesitate to say this, but does anyone have any
17 questions about that order?

18 **(None indicated.)**

19 THE COURT: Okay. Let's move onto IMEs.

20 MR. CHARLES ZIMMERMAN: I have one question. Is
21 that a published order, Your Honor?

22 THE COURT: No. That's just going to be on the
23 record.

24 Let's move onto IMEs. Now, I understand that
25 there's a protocol, Mr. Zimmerman, that was recently shared by

1 the defense with the Plaintiffs?

2 MR. CHARLES ZIMMERMAN: I was going to ask if we
3 could take a short break so we could internally discuss the
4 IME and the scheduling. So, can we just take a short break,
5 because there's a disconnect -- and we've had --

6 THE COURT: Okay. Fifteen minutes. We'll resume at
7 3:05. Court is briefly adjourned.

8 **(Short break taken.)**

9 THE COURT: All right. Mr. Zimmerman, I think we're
10 on IMEs.

11 MR. CHARLES ZIMMERMAN: Yes, we are, Your Honor.
12 Mike Cashman will do that.

13 THE COURT: All right. Mr. Cashman.

14 MR. MICHAEL CASHMAN: I'm happy to go first, Your
15 Honor. We have had discussions, as we referenced earlier
16 today, about IMEs proposed by the NHL. We had a meet and
17 confer yesterday morning, as I mentioned, and we did have some
18 discussion about a proposed protocol that was provided by the
19 League last week. And it's our view that the -- that the IME
20 protocol in its entirety would be inapplicable to individuals
21 such as Mr. Christian and Mr. Larson who do not allege any
22 present injury. They are --

23 THE COURT: Setting them aside, does the protocol
24 fairly represent what the intersection was between your expert
25 and the defense expert?

1 MR. MICHAEL CASHMAN: Uh, that's -- even that is
2 premature, Your Honor, because, for example, at the last
3 informal conference, the Court as I recall asked that Mr. --
4 or Dr. Olanow, the NHL's neurologist, provide an Affidavit or
5 a Declaration of his concussion management and concussion
6 treatment experience and we did not receive an Affidavit or a
7 Declaration from Dr. Olanow. Instead, we received a letter
8 that was sent to the Court by Mr. Beisner summarizing Mr. --
9 or Dr. Olanow's experience and as it relates to the discussion
10 about concussions, we think that is quite vague. And so it's
11 hard for us to evaluate Dr. Olanow's concussion management and
12 concussion training experience based on the summary that was
13 provided. So, in that respect, there are issues that we
14 agreed to meet and confer on further. As I understood it,
15 Mr. Beisner was going to provide me with additional
16 information on Dr. Olanow's concussion management and
17 treatment experience. In addition, we discussed the
18 additional doctors who are identified in the proposed
19 protocol --

20 THE COURT: I haven't seen the proposed -- is there
21 an extra copy of the proposed protocol?

22 MR. MICHAEL CASHMAN: I have one. Your Honor, it
23 has a couple of notes but I don't think there's anything
24 propriety here.

25 THE COURT: Well, if that's your only copy, though,

1 maybe you'll get it to me after the hearing. Why don't you
2 get a copy.

3 MR. MICHAEL CASHMAN: It's okay if you'd like it.

4 THE COURT: That's okay. I'm not going to wrestle
5 with it now. I just want to see where things are so that we
6 can wrestle with it at the October 21st informal conference.

7 MR. MICHAEL CASHMAN: There are three other doctors
8 who are referenced in the proposed protocol, and we haven't
9 received the qualifications for any of those individuals. And
10 we have not received, obviously, any Affidavit or Declaration
11 by those individuals regarding their experience in concussion
12 management and concussion treatment experience. So, we
13 discussed that with Mr. Beisner, and he agreed to provide that
14 information, as I understand it. Is that right, John?

15 MR. JOHN BEISNER: We agreed to provide the bios for
16 the other two experts --

17 COURT REPORTER: I couldn't understand that.

18 MR. JOHN BEISNER: I'm sorry. I should have stood
19 up more closely. We -- I did agree to provide the bio
20 information for the other two. I thought we had provided that
21 earlier but understand from Michael that we did not. And I'll
22 comment on the Declaration issue when I speak at that time.

23 MR. MICHAEL CASHMAN: There are other problems which
24 we did not discuss in detail because I informed Mr. Beisner
25 that we had other issues with the protocol. But the

1 overarching issue being the premature nature of it, depending
2 on what the allegations are when we amend our Complaint. But,
3 for example, it's proposed that all of the Plaintiffs travel
4 to New York for the neurological examination by Dr. Olanow,
5 and I don't think that we're agreeable to that. We don't
6 think that the research justifies requiring the players to
7 travel out of their state of residence, for example. And we
8 haven't yet had the opportunity to consult in detail with our
9 experts about what is being proposed in this protocol exactly
10 with respect to the extent and scope of the examination that's
11 being proposed for the neurological examination, a
12 neuropsychological examination, and a psychiatric examination.

13 And some of these are proposed in the locations
14 where the individuals filed suit initially for the psychiatric
15 and the neuropsychological examination, as I understand it. I
16 don't think that the experts who have been proposed are
17 licensed in those particular jurisdictions, so there are -- or
18 there appear to be a number of issues that we need to discuss
19 in further detail with Mr. Beisner.

20 So, to summarize, Your Honor, there are issues with
21 the protocol. We'd be prepared to discuss those at the next
22 conference in further detail to the extent it's necessary
23 after we have the discussion, which I know is going to be
24 upcoming, about amending the Master Amended Complaint.

25 Thank you.

1 THE COURT: Thank you.

2 Mr. Beisner.

3 MR. JOHN BEISNER: Well, Your Honor, the whole point
4 of providing this protocol which I think Your Honor asked that
5 we do over a week or so ago was to have this conversation.
6 But as I advised earlier, what we were basically told on the
7 call was the position that all of this was premature until the
8 Amended Complaint occurred, so we haven't had a meet and
9 confer on any of this. We're happy to get a copy to the
10 Court. I think everyone needs to look at this again. We're
11 proposing that the -- all of this activity except for, were it
12 necessary, the blood testing, which can occur locally and just
13 go to your local doctor for that, but that the IMEs occur
14 at -- all of them -- in the city where Plaintiffs filed the
15 Complaint. And the case law is pretty clear that that's an
16 appropriate location at which to file. If they deem that was
17 a convenient place for them to file, it's an appropriate place
18 for them. Licensing is not an issue. We object on that, and
19 all of them -- I think Your Honor made clear she didn't want
20 to get involved in that issue, but we've confirmed that that
21 is not a problem for this. All of them can obtain temporary
22 proper licensing in these jurisdictions, and that has been
23 secured to do that or they're in the process of doing that.
24 And so -- but I'm not sure it serves any purpose,
25 Your Honor, to go into any more detail. We're happy to

1 provide the protocol to you, and we will do that afterwards.
2 But the fact is and what concerns me is again, we were on
3 path, I thought we were going to have this finished today, go
4 through a meet and confer process, if we had disagreements,
5 present them to you. But we were derailed because of this,
6 well, we don't have the Complaint, we're going to be amending
7 the Complaint. So, I've spoken my piece on that, Your Honor.
8 I'm not going to belabor that further. But that's where we
9 are.

10 THE COURT: Okay. Very good.

11 Briefly, Mr. Cashman. Yeah.

12 MR. MICHAEL CASHMAN: Yeah, if I just may. There
13 are issues, for example we don't know the qualifications of
14 these individuals and it may be that the Plaintiffs are going
15 to propose an alternative and ask the Court to make a
16 selection. So, there are just issues that we do need to meet
17 and confer about. And I think the Court can provide guidance
18 by confirming what we have discussed before, that individuals
19 who have -- who are not alleging any present injury are not
20 going to be subjected to any IME process.

21 THE COURT: Okay. All right.

22 First of all, I agree, obviously, that we do need to
23 have a better, fuller meet and confer on these issues. But
24 there's some additional materials that the Court would like to
25 see and perhaps that can be gathered for the next conference.

1 I would like to see the bios on any physician who is going to
2 be conducting a -- an IME. I don't know why we would have on
3 an IME. We've sort of agreed that these IMEs have to do with
4 allegations with respect to concussive syndrome and the like.
5 And if the Plaintiffs, two of the Plaintiffs, don't allege
6 that syndrome, I'm not sure why we're having an IME. So, I'll
7 need more guidance from the NHL about their position on that.

8 I also don't recall that there was an intersection
9 between the -- the Affidavits with respect to a psychiatric
10 exam. I'm not aware of any mental illness being alleged here.
11 There certainly was provision made for a neuropsychological
12 exam, but I don't recall the psychiatric exam, but I'll go
13 back and look at Plaintiffs' experts' Affidavit and see if
14 that indeed was the case.

15 MR. JOHN BEISNER: Yeah, Your Honor, that was
16 covered in Dr. Olanow's --

17 THE COURT: In Dr. Olanow's. I just don't recall
18 the Plaintiffs' expert believed that was appropriate, so I
19 need to understand why mental health would be an issue here.
20 I don't know why we would have an IME on a mental issue.

21 MR. MICHAEL CASHMAN: Your Honor, Dr. Cantu, in his
22 Declaration, if that's what you're referring to.

23 THE COURT: Yes.

24 MR. MICHAEL CASHMAN: He stated that it would be
25 appropriate with those who have been diagnosed or are claiming

1 post-concussion syndrome or post-traumatic head syndrome that
2 a comprehensive history be taken, a neurological examination
3 by a neurologist with a -- an appropriate background and
4 experience in concussion treatment, blood work, a
5 neuropsychological exam, and an MRI, not a psychological --

6 THE COURT: He didn't call for a psychiatric exam.
7 That was my memory, as well.

8 MR. MICHAEL CASHMAN: Thank you.

9 THE COURT: All right. If the Court could be
10 provided with those bios and any revised protocol after a meet
11 and confer, it will just help me with our discussion at the
12 October 21st conference.

13 All right. And I think we have a schedule for
14 amending the Master Complaint claims allegations. Is there
15 anything more to discuss on -- oops --

16 MR. DANIEL CONNOLLY: Yes, Your Honor, oh --

17 THE COURT: Mr. Connolly, I think you won,
18 Mr. Connolly.

19 MR. DANIEL CONNOLLY: Just barely. I wouldn't win
20 on a tennis court with Mr. Zimmerman. The question I have,
21 Your Honor, is we have the question about you said that they
22 should be prepared to amend by the 21st, and that the normal
23 briefing schedule would apply, so we would -- I would just
24 like some guidance from the Court as to when we can expect to
25 get the proposed Amended Complaint from Plaintiffs so that we

1 can review it prior to the 21st because I don't know if the
2 Court remembers, but we certainly do, that it went into
3 hundreds of paragraphs, and we --

4 THE COURT: I think that's reasonable.
5 Mr. Zimmerman, when -- can you give them --

6 MR. CHARLES ZIMMERMAN: I was going to respond to
7 that. I got a note from John, I thought it was after his
8 argument apologizing for being a jerk to me (laughter) but it
9 wasn't. It was just a -- I appreciated the note. I was
10 hopeful --

11 MR. JOHN BEISNER: For the record, Your Honor,
12 Mr. Connolly made me tear that one up (laughter).

13 THE COURT: You know, Mr. Connolly is always blamed
14 for everything. Have you noticed that?

15 MR. JOHN BEISNER: That was a good guidance, Your
16 Honor (laughter).

17 MR. CHARLES ZIMMERMAN: Yeah. There's some things
18 scratched out here. But -- no. It says, does October work
19 for you -- October 21 work for you on an earlier call I
20 thought you said you had a conflict? And I do on the 21st.
21 And I apologize. I'm going to be in Europe. It's our
22 anniversary and my wife and I are taking a trip. We're
23 leaving on the 17th and if, with the Court's indulgence, if we
24 could move it to November 6th I think was the schedule for the
25 next --

1 THE COURT: Is that the next conference?

2 MR. CHARLES ZIMMERMAN: -- conference. And now, if
3 that would work, then what we would do is -- I realize you
4 need to see it and either stipulate to amending the Complaint
5 or we're going to have a discussion about whether or not we
6 can seek leave of the Court to amend. My team would like us
7 to be able to provide that to them on the 6th, but maybe the
8 Court's view is that it should be before the 6th --

9 THE COURT: You want it to provide it to them on
10 November 6th?

11 MR. CHARLES ZIMMERMAN: Yeah.

12 THE COURT: No, that's not going to work.

13 MR. DANIEL CONNOLLY: The 6th is the next hearing
14 date, by the way --

15 MR. CHARLES ZIMMERMAN: The 5th, I'm sorry --

16 MR. DANIEL CONNOLLY: The 6th would be a little
17 late.

18 MR. CHARLES ZIMMERMAN: The 5th, that's the story of
19 my life. The 5th.

20 THE COURT: They need it a week in advance. Okay?

21 MR. CHARLES ZIMMERMAN: We'll provide it one week in
22 advance. And then if the Court wants to or thinks it's
23 important to have an informal on the 21st, there's plenty of
24 lawyers who are equally as competent as I to preside over
25 that. That's fine, or we could do it -- we could wait and see

1 if it is needed. I just can't be here on the 21st, but we
2 will provide the Complaint --

3 THE COURT: And we can't come to Europe with you.
4 Is that --

5 MR. CHARLES ZIMMERMAN: You could. We could make
6 those arrangements. Skadden --

7 THE COURT: Okay. Why don't you consult with each
8 other about whether you want to proceed without Mr. Zimmerman
9 on the 21st. The other thing we could do on the 5th is we
10 could have part of it on the record and part off the record,
11 as well.

12 MR. CHARLES ZIMMERMAN: Sure.

13 THE COURT: However you want to proceed.

14 MR. CHARLES ZIMMERMAN: Sure. We'll meet and confer
15 on that, and we'll let the Court know well in advance. But in
16 terms of the -- the Complaint, so there's no misunderstanding,
17 we will have a week prior to November 5, our proposed -- if
18 we're going to amend the Complaint, which likely we are -- we
19 will have the proposal in writing with their desire to review
20 it and decide if they want to stipulate, if they want to bring
21 anything up with the Court, we can bring it up on the 5th.

22 THE COURT: And a similar schedule will apply to any
23 proposal to amend the schedule?

24 MR. CHARLES ZIMMERMAN: Yes, yes.

25 THE COURT: As in class certification deadline --

1 MR. CHARLES ZIMMERMAN: I beg your pardon.

2 THE COURT: We need to meet and confer about that
3 before, we need a final proposal to the Court.

4 MR. CHARLES ZIMMERMAN: Yes.

5 THE COURT: One week before November 5th.

6 MR. CHARLES ZIMMERMAN: To the Court and to Counsel
7 one week before the 5th --

8 THE COURT: Well, I'm hoping you're meet and
9 conferring so that is a joint proposal.

10 MR. CHARLES ZIMMERMAN: Okay.

11 THE COURT: Or if it is not, let me understand what
12 the parties' differences are.

13 MR. CHARLES ZIMMERMAN: Understood. So, we will
14 have our work done a week prior to November 5 --

15 THE COURT: On those two issues.

16 MR. CHARLES ZIMMERMAN: Those two issues.

17 THE COURT: Yes. Mr. Connolly.

18 MR. DANIEL CONNOLLY: Yes, Your Honor. I guess I
19 was quick enough to get up here before Mr. Zimmerman but
20 somehow he changed October 21st to November 5. And I'm just
21 wondering, even though he's not going to be here, whether we
22 can't have that amended complaint, which we've been talking
23 about for a considerable period of time, a week before the
24 21st because we have the Plaintiffs' depositions are set to go
25 forward on the 6th, in fact, themselves, and we've been

1 talking about this for a long time and I just would, you know,
2 respectfully propose that we -- we were just at the 21st and I
3 know Mr. Zimmerman is gone, but I -- this is just a guess, but
4 I don't think he's going to do the majority of the drafting.
5 And so -- but I just think it would be -- it's helpful for us
6 to figure out where we are and to do it sooner rather than
7 later. And what we are talking about the deficits that I had
8 as far as what I told Mr. Beisner, I had talked to a
9 psychiatrist for the first 45 years of my life that --

10 THE COURT: Oh, I don't need to know this.

11 MR. JOHN BEISNER: No, no, I'm just talking about my
12 mother.

13 THE COURT: Oh, your mother (laughter). Wasn't your
14 father a psychiatrist, as well?

15 MR. JOHN BEISNER: No, no, no, no, he just was
16 married to one.

17 THE COURT: Oh, okay.

18 MR. JOHN BEISNER: And I just said I hope that I
19 didn't come out the worse for wear.

20 THE COURT: I do know that, yes. Not that you came
21 out the worse for --

22 MR. CHARLES ZIMMERMAN: Maybe we need a second
23 opinion (laughter).

24 I'm going to be gone. I can't do it. Here's our
25 real problem, and I'll just be really frank. We're meeting

1 with the entire PSC on the 14th of October -- 13th of October.
2 And we're -- we've got to get everybody straight on what our
3 amendments are going to be, what's not going to be in, what is
4 going to be in. I'm not going to be able to have -- once we
5 meet and decide the parameters and draft it and have it to
6 them by the 21st. I don't think we're talking about a lot of
7 time. If we get it done earlier, I promise I'll hand deliver
8 it to you, Dan, but I think a week prior to November 1 is
9 probably the 28th or something like that --

10 MR. JOHN BEISNER: Twenty-ninth.

11 MR. CHARLES ZIMMERMAN: Twenty-ninth? We're really
12 talking about trifling here. So, I'll do my best, if I can
13 get it early, fine, but no later than that date.

14 THE COURT: All right. That's fine.

15 MR. CHARLES ZIMMERMAN: I won an argument.

16 THE COURT: Okay. Now -- (Coughing), excuse me --
17 in the schedule there are the two motions to compel, but I
18 think those are noticed for November 5th. I haven't read
19 those yet, and I don't think there's been any reply. Is there
20 anything to say about those, Mr. Connolly, or --

21 MR. DANIEL CONNOLLY: No, Your Honor, just to make a
22 record, I talked to Mr. Cashman before the hearing today, and
23 we've agreed that because we provided them to everybody so far
24 in advance that their response would be on the 22nd. And then
25 a reply, if warranted, by the NHL would come in on the 29th.

1 THE COURT: Okay. All right.

2 Where do we stand with privilege log and
3 confidentiality designations?

4 MR. CHRISTOPHER RENZ: Good afternoon, Your Honor.
5 Chris Renz on behalf of the Plaintiffs. Your Honor, the long
6 and short of it is that the privilege logs were produced by
7 the NHL with approximately 12- to 13,000 documents withheld.
8 We reviewed samples of those logs and have met and conferred
9 with the NHL about using samples as a basis to move forward on
10 that challenge.

11 On the 18th of August, we sent correspondence
12 challenging those. We received responsive correspondence from
13 Mr. Beisner on September 17th. And this last Friday we
14 received revised privilege logs and the promise of more
15 documents to be produced either in redacted form or in whole.

16 We met and conferred last night. We did not get
17 very far. We did get far enough to know that there are likely
18 going to be issues that will need to be addressed by Judge
19 Mayeron. And as to the protocol, I know that there's a
20 protocol that we've been following that you have issued. I
21 know that Magistrate Judge Mayeron has her own protocol that
22 we will perhaps be addressing that with her. I know that her
23 protocol has been addressed by the parties in other
24 subjects --

25 THE COURT: Her protocol will govern for this

1 because she's going to entertain these motions.

2 MR. CHRISTOPHER RENZ: Right.

3 THE COURT: And I think we need to get those
4 scheduled before her really soon.

5 MR. CHRISTOPHER RENZ: Yes, Your Honor.

6 THE COURT: Okay?

7 MR. CHRISTOPHER RENZ: Yes, Your Honor.

8 THE COURT: Okay. Very good. Thank you.

9 Mr. Connolly?

10 MR. DANIEL CONNOLLY: Just quickly, Your Honor.

11 When Mr. Cashman and I met with Judge Mayeron, we talked about
12 the fact that we would be scheduling this and we will meet
13 with her to talk about exactly how we're going to comply with
14 that. So, we're working on that, and we're going to probably
15 do that sometime after she comes back in early November.

16 THE COURT: Okay. Very good.

17 And that's true, the confidentiality designations,
18 or is that a separate issue?

19 Mr. Cashman?

20 MR. MICHAEL CASHMAN: Good afternoon, Your Honor,
21 once again. Yes, Mr. Connolly and I did meet with Judge
22 Mayeron and we did discuss protocol. And as matters presently
23 stand, the parties are each going to be filing motions on the
24 8th and replies, or I should say oppositions, would be due
25 then on the 15th. And Judge Mayeron allowed us to file reply

1 memorandum and that would be on October 19th. And the hearing
2 would be on October 22nd. I do have one question, Your Honor,
3 about this schedule because --

4 THE COURT: And this is just confidentiality, or
5 privilege and confidentiality?

6 MR. MICHAEL CASHMAN: Just confidentiality.

7 THE COURT: Just confidentiality, okay.

8 MR. MICHAEL CASHMAN: And as I informed Mr. Connolly
9 when we were meeting with Judge Mayeron, I received a call
10 that day from Mark Anfinson who informed me that he represents
11 CTV and that they would be intervening in the case because of
12 the great public interest of this matter, and that they are
13 going to seek -- apparently they're going to seek access to
14 documents and seek de-designation of documents, as well. And
15 again, today I received a call from Mr. Anfinson who informed
16 me that he had called your chambers just to advise the Court
17 that he was going to be seeking to intervene. And he was a
18 little expressful [sic] but was surprised that the Court
19 indicated that they wanted to hear his motion to intervene,
20 which would -- rather than Judge Mayeron and was wondering
21 about how those two might intersect. And so I raise the issue
22 with the Court as to whether --

23 THE COURT: Well --

24 MR. MICHAEL CASHMAN: -- his motion should be with
25 Judge Mayeron and we coordinate or we coordinate in front of

1 you, or if it matters at all.

2 THE COURT: I think my staff explained to him that
3 because this is an MDL, I am obviously handling all manner of
4 discovery matters. And I think that's the appropriate role
5 for a District Court Judge in an MDL. The only issues that I
6 have designated or referred to Judge Mayeron are these
7 privilege designations and confidentiality designations.
8 Everything else should be addressed to the Court, including
9 his motion to intervene. I don't know why he's confused about
10 this still, but that's -- I think that's pretty clear.

11 MR. MICHAEL CASHMAN: Perhaps I was the one who was
12 confused, and I apologize.

13 THE COURT: Please pass that on to him that he needs
14 to file the motion. I told him what the hearing dates were
15 and suggested he might want to coordinate the filing of the
16 motion so it could be heard at one of these hearing dates.

17 MR. MICHAEL CASHMAN: Very well, Your Honor. I'm
18 not intending to be in communication with him because they're
19 acting independently, but --

20 THE COURT: All right. Should anybody be in
21 communication with him and if he calls again, that's what
22 we've already advised him of that.

23 MR. MICHAEL CASHMAN: Very well, Your Honor.

24 And then another matter that this relates to the
25 de-designation of confidentiality -- confidential documents,

1 but the Plaintiffs are quite concerned that the NHL is leaking
2 information to the press. And I wanted to bring to the
3 Court's attention, for example, a report that appeared in Puck
4 Daddy, of all places, on the 1st of October. And it
5 references a memo that was distributed to the Board of
6 Governors at their meeting this week in New York and acquired
7 by Yahoo Sports. And then there's a quote from the internal,
8 so-called internal NHL memo which states in part: Despite
9 expensive discovery to date, we have yet to find any document
10 or other evidence that would tend to support the Plaintiffs'
11 theory of the case, close quote. And there are additional
12 assertions that because the NHL doesn't think there are any
13 smoking guns in discovery, that they aren't interested in
14 settlement.

15 And we're quite concerned about this, Your Honor,
16 because we've got -- we've got smoking guns. And I think this
17 is highly relevant for the confidentiality de-designation
18 issue that we're going to present to Judge Mayeron and it may
19 come to the Court's attention. But there are some -- there
20 are some documents which the NHL has now reluctantly
21 de-designated voluntarily which contradict the statements that
22 are being made in the -- or leaked to the press.

23 And for example, I have one in front of me, Your
24 Honor, that's been de-designated, and this is a memo from
25 Julie Grand to Bill Daly and Gary Bettman in 2009 where

1 Ms. Grand is discussing with Daly and Bettman the -- what the
2 Concussion Working Group should be working on. And she says,
3 some possible areas of focus for the Concussion Working Group
4 would be, one that she suggests, is a study on the longterm
5 neuro cognitive and psychological effects of repeated
6 concussions among retired NHL players. Such a study could be
7 retrospective, as in the NFL studies, or prospective since we
8 now have baseline data that dates back over 10 years.

9 And she continues, then, with her opinions, stating:
10 Personally, I am most interested in some other options she
11 suggested, and least interested in studying retired players.
12 She says, quote, this is removed from the current issues we
13 face and that I'd rather focus on the here and now and leave
14 the dementia issues to the NFL. And we have additional
15 de-designated documents like this. Another one from Ms. Grand
16 to Bettman and Daly. This one is in 2011 --

17 THE COURT: Mr. Connolly, let Mr. Cashman make his
18 record, please.

19 MR. MICHAEL CASHMAN: Well, Your Honor, the
20 de-designated documents, we should obviously be entitled to
21 put those up on our website for public consumption, I think,
22 as -- including these documents. And we also have -- you
23 know, I have a sheaf of these smoking guns right here, Your
24 Honor.

25 THE COURT: All right. All right. You know, I'm

1 dealing with really experienced lawyers here. It never works
2 to try a case in the press. It always comes back to bite you,
3 on either side. If the NHL -- and I'm not accusing anybody in
4 the NHL of doing this as leaking documents to suggest there's
5 no merit to this litigation -- that is painful to swallow if
6 indeed there is a settlement or there's a verdict against you.
7 And similarly, if the Plaintiffs put stuff on the Internet and
8 then there is a settlement or there's a loss, similarly, they
9 have a lot to swallow. It never works to try a case in the
10 press, and I would hope that both sides -- I can't do anything
11 about it. But I would hope that both sides are exercising
12 good judgment about this and talking to your clients. It
13 certainly shouldn't be a strategy because it always backfires.
14 Always backfires. And that's all I'll say about it today.

15 MR. MICHAEL CASHMAN: Thank you, Your Honor. And I
16 appreciate that. And these are the kind of documents and
17 issues that will be presented in the motion.

18 THE COURT: Thank you, Mr. Cashman.

19 Mr. Connolly.

20 MR. DANIEL CONNOLLY: Just three observations, Your
21 Honor. This was not discussed with us prior to Mr. Cashman
22 getting up here. There have been no leaks of any documents to
23 my knowledge, and he's never presented it to us to allow us to
24 address it and speak to him about it. And third, if we want
25 to cherrypick documents and read them into the record before

1 the Court, both sides could engage in that, and I agree with
2 you that it's counterproductive. We could read deposition
3 transcripts that the Plaintiffs have previously provided, but
4 that's not what our objective is here.

5 As far as I look at the agenda here, it says,
6 confidentiality designation challenge protocol and status.
7 And where Mr. Cashman started was accurate. We have a
8 briefing schedule, an agreed-upon protocol before Judge
9 Mayeron, the rest of it is irrelevant for these proceedings,
10 with due respect.

11 THE COURT: All right. But I again say that it is
12 counterproductive for the parties to engage in any activity,
13 with or without their counsel, that seeks to try this case in
14 the press.

15 Mr. Zimmerman.

16 MR. CHARLES ZIMMERMAN: I do have to comment
17 through, Your Honor, and we -- I don't think there are any
18 reporters in the courtroom, and this is not about reporters.
19 When the Commissioner goes on the -- into the press and says
20 there's no merits to our case and we started this whole
21 dialogue with, we don't want the League to be suppressing
22 enthusiasm for players to bring forth their concussive
23 injuries, it makes us very, very concerned that our clients
24 are hearing things coming out of the Commissioner that is
25 demeaning or debilitating to their case in an effort to squash

1 enthusiasm for bringing a claim against the League.

2 Our concern -- and it's been our concern from the
3 get-go, not about trying this case in the newspaper, about
4 who's right or who's wrong, but in keeping people away from
5 justifiably having their rights adjudicated here and having
6 them heard here fairly. And when the Commissioner says
7 there's no smoking guns when we believe there are, that has a
8 very negative influence on the merits of the case to the whole
9 community of hockey players who, for their whole career, have
10 listened very closely to the League and to the hockey
11 Commissioner. We think the Court needs to at least be aware
12 of it so that when we bring these kinds of complaints before
13 the Court, that there's this sort of holding back, you
14 understand where we're coming from.

15 THE COURT: I do. I do.

16 Mr. Beisner.

17 MR. JOHN BEISNER: Your Honor, just wanted to
18 comment briefly on that. I think your admonition about trying
19 the case in the press is well taken on that front. I think,
20 though, there needs to be awareness. If the Commissioner or
21 League personnel or in a media setting, they have press
22 conferences, they're going to be asked questions, and they're
23 going to respond to those questions. And look, the Plaintiffs
24 have a retained public relations firm that is out there
25 pressing their side of the case. CLS Solutions, as I

1 understand it, is out there doing the same thing. So, your
2 admonition is well taken. I don't know how to deal with it.

3 If the media asks questions about the litigation,
4 somebody is going to have to answer. Mr. Zimmerman has
5 answered for their side of the case frequently, as well. But
6 your admonition is well taken. I just don't want the
7 suggestion made that there is -- that the Commissioner is out
8 there standing alone on this issue. It's being pressed very
9 hard on Plaintiffs' side with very strong public relations
10 strategy on this, and perhaps we should all be more
11 circumspect about that, that it's not a one-sided event as
12 Mr. Zimmerman suggested.

13 THE COURT: Anything further today for our
14 conference?

15 MR. CHARLES ZIMMERMAN: Not from the Plaintiffs,
16 Your Honor.

17 THE COURT: Very good.

18 From the Defense?

19 MR. JOHN BEISNER: No, Your Honor, thank you.

20 THE COURT: All right.

21 Court is adjourned.

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

23 (Concluded at 3:42 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