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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
April 22, 2015
3:00 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
316 North Robert Street
St. Paul, Minnesota 55101

A P P E A R A N C E S

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

Charles S. Zimmerman, Esq.
1100 IDS Center
80 S. 8th St.
Minneapolis, MN 55402

ZELLE HOFFMAN VOELBEL & MASON, LLP

Michael R. Cashman, Esq.
500 Washington Ave. S., Ste. 4000
Minneapolis, MN 55415

BASSFORD REMELE, P.A.

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

ROBBINS GELLER RUDMAN & DOWD, LLP

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

SILVERMAN, THOMPSON, SLUTKIN & WHITE

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

For the Defendant:**SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP**

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

FAEGRE BAKER DANIELS

Daniel J. Connolly, Esq.
Aaron D. Van Oort, Esq.
2200 Wells Fargo Center
90 S. 7th St.
Minneapolis, MN 55402

**Reporter's Note: Telephonic appearances are not being listed
due to a technology failure during the hearing where the
parties appearing by phone were disconnected.**

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

2 IN OPEN COURT

3 (Commencing at 3:05 p.m.)

4 THE COURT: We are here this afternoon on the matter
5 of the National Hockey League Players' Concussion Injury
6 Litigation. This is MDL 14-2551.

7 Let's begin by having Counsel for the Plaintiffs
8 note your appearance.

9 MR. GRYGIEL: Steve Grygiel for the Plaintiffs, Your
10 Honor.

11 MR. DAVIDSON: Stuart Davidson on behalf of the
12 Plaintiffs.

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

15 MR. CASHMAN: Good afternoon, Your Honor. Michael
16 Cashman for the Plaintiffs.

17 MR. SCOTT ANDRESON: Good afternoon, Judge. Scott
18 Andreson for the Plaintiffs.

19 MR. KLOBUCAR: And good afternoon, Judge. Jeff
20 Klobucar on behalf of the Plaintiffs.

21 As has been our custom, I'll now note the appearance
22 of the 11 other Plaintiffs' attorneys appearing today
23 telephonically with the Court's permission.

24 Bill Gibbs and Caitlyn Geoffrion from the Corboy &
25 Demetrio firm. Brian Penny from the Goldman, Scarlato & Penny

1 firm. Tom Byrne from the Namanny Byrne & Owens firm. Hart
2 Robinovitch from Zimmerman Reed. Bryan Bleichner and Jeff
3 Bores from Chestnut Cambronne. James Anderson from Heins
4 Mills & Olson. Dave Levine from the Levine law firm, and Bill
5 Sinclair and Steve Silverman from the Silverman Thompson law
6 firm.

7 THE COURT: Thank you.

8 And the defense.

9 MR. BEISNER: Good afternoon, Your Honor. John
10 Beisner on behalf of Defendant, National Hockey League.

11 THE COURT: Good afternoon.

12 MR. CONNOLLY: Good afternoon, Your Honor. Dan
13 Connolly on behalf of the National Hockey League. And I'll
14 read the attendees -- but let Aaron go first.

15 MR. VAN OORT: Well, Your Honor, Aaron Van Oort for
16 the National Hockey League.

17 THE COURT: Good afternoon. I saw you there.

18 MR. CONNOLLY: I didn't miss him, (laughter).

19 Your Honor, on the telephone -- or at least I think
20 they're on the telephone -- are David Zimmerman and Julie
21 Grand from the National Hockey League; Shepard Goldfein and
22 Jessica Miller from the Skadden Arps firm; and Adam Lupion
23 from the Proskauer Rose firm.

24 THE COURT: Very good. We have an agenda today.
25 Let's get started.

1 The first agenda item is to argue what we call the
2 apex motion which has to do with the deposition of
3 Mr. Bettman.

4 Mr. Zimmerman.

5 MR. ZIMMERMAN: I'm not going to be arguing that,
6 Your Honor.

7 THE COURT: Okay.

8 MR. ZIMMERMAN: But I am going to be a little bit of
9 a ringmaster as more than an arguer today because there are
10 nine different items and different people from our side are
11 going to be presenting different pieces of it.

12 THE COURT: Okay.

13 MR. ZIMMERMAN: But I just wanted to say that we had
14 expected probably to go by the order of -- starting with the
15 apex which is really a formal argument.

16 THE COURT: Yes.

17 MR. ZIMMERMAN: And then the rest are really updates
18 and scheduling issues. And perhaps some disputes as to --
19 from our side why things aren't happening as quickly as we
20 like. And from their side, why everything is working just
21 fine. But we'll discuss those after the formal argument. I
22 thought it was hopeful that we'd face that first and --

23 THE COURT: Good.

24 MR. ZIMMERMAN: And Steve is going to argue for the
25 Plaintiffs on that.

1 THE COURT: All right. Very good.

2 You may proceed.

3 MR. GRYGIEL: Thank you, Your Honor.

4 May it please the Court, Steve Grygiel again for the
5 Plaintiffs. I'd like to start with what I think is a basic
6 proposition that the NHL's papers ignore. And that is this is
7 not an apex deposition. The properly-reasoned cases, for
8 example the *Mentor* case that we cite, set the definition
9 properly as follows: An apex deposition is a deposition that
10 is being sought to be taken of a senior executive who does not
11 have direct or unique personal knowledge of the facts that are
12 relevant to the issues at hand, which creates, of course, the
13 inference that the apex deposition doctrine was created to
14 protect against the harassment of a senior executive.

15 This is not such a case. What we have done already
16 is to make a plausible *prima facie* showing that Mr. Bettman
17 has unique, non-duplicative, non-repetitive personal knowledge
18 of the issues in this case. We submitted a number of exhibits
19 to my Declaration showing Mr. Bettman's public statements on
20 directly relevant issues to the concussion problem, the
21 sub-concussive impacts, and the sequelae to those injuries
22 that drive this litigation. But, Your Honor, unlike most of
23 the cases and unlike all of the cases that the Defendants rely
24 on, you don't have to take my word on that plausible *prima*
25 *facie* showing here. We do better.

1 We have the Defendant's word for it. What we have
2 here are the Defendant's initial disclosures, not seen in any
3 of the cases on which the Defendants rely. In this case, we
4 have the Defendants themselves telling us in no uncertain
5 terms that Mr. Bettman knows the most and knows it for the
6 longest period about the issues directly at the core of this
7 case. Those initial disclosures, to which the NHL gives scant
8 attention in its papers because they must, changed this case
9 and changed the analysis because what they mean is that
10 Mr. Bettman has direct, unique, personal knowledge in the way
11 of a percipient fact witness and that means he gets deposed.
12 There's no running away from their initial disclosures. One
13 could read their brief, I think quite fairly, as an effort to
14 retrench what they've already said, that Mr. Bettman knows the
15 most and is the best source. That's point one.

16 Point two -- and you can see this, Your Honor, in a
17 case that's very recently decided, it wasn't cited in the
18 papers, it was filed and decided after we briefed. I'll give
19 Your Honor the case. *Hunt versus Continental Casualty*, 2015
20 Westlaw 1518067, Northern District of California, April the
21 3rd, 2015. That case makes it clear that the party seeking to
22 take an apex deposition does not need to prove conclusively in
23 advance that the deponent definitely has unique non-repetitive
24 information, instead, quote, where a corporate officer may
25 have any firsthand knowledge of relevant facts, the deposition

1 should be allowed to -- should be allowed, period, close
2 quote, close double quote. It cites other cases.

3 That case makes very clear, as *Mentor* case makes
4 clear, that there's not only the question of direct personal
5 knowledge when a high-ranking corporate executive may be
6 deposed, which Mr. Bettman has, but in another kind of case,
7 and this case satisfies that category, as well. This is a
8 case that involves the intersection of facts, what the NHL
9 knew about the impact of concussions and when the NHL knew it.
10 The intersection of those facts, Your Honor, with the highest
11 levels of the National Hockey League's decision-making
12 apparatus.

13 It's such a case -- in such a case, a deposition of
14 a high-ranking corporate executive is entirely permissible
15 under the apex doctrine. The cases say so. This is not a
16 case in which the apex doctrine might apply. For example, if
17 I were seeking to represent someone who had a slip and fall in
18 the hallways of the National Hockey League's offices. Hardly
19 can be expected to get the right to depose Mr. Bettman in
20 those circumstances.

21 THE COURT: And I don't think the NHL actually
22 disputes that, and I'll talk to them about it when they get
23 up, but they seem to suggest that you can take his deposition,
24 just not right away.

25 MR. GRYGIEL: Right. And, Your Honor, I'm glad you

1 brought that up. Here's why I think that that position is
2 misguided. For two reasons, number one, the only basis that
3 the NHL has to say that -- because they have not filed a
4 Declaration from Mr. Bettman saying, I don't know important
5 things; and they haven't filed the Declaration from any other
6 witness saying that I know more than Mr. Bettman, or
7 everything Mr. Bettman knows comes from me. Those are two
8 requirements, by the way, to get an apex deposition protected.

9 What the NHL is saying to us here is, Grygiel hasn't
10 satisfied the exhaustion requirement. The exhaustion
11 requirement, Your Honor, is not an independent part of a
12 mandatory binary two-part test in order to take an apex
13 deposition. Yes, I recognize the cases that Mr. Beisner cited
14 in the NHL's brief use the conjunctive "and," that I must
15 show, it says, that Mr. Bettman has personal, direct,
16 noncumulative first-hand knowledge and that I can't get that
17 anywhere else.

18 Logically, that can't be right. If Mr. Bettman has
19 unique knowledge, how can it be that I would be forced to go
20 to ten other sources to get what the NHL who's already told me
21 is unique to Mr. Bettman? I traced that back. I know more
22 about this now than the last time I was before Your Honor.
23 The two seminal cases here, *Century Crown Petroleum* [sic] and
24 *In re Alcatel*, both make it very clear that these are two
25 considerations that a court must look at in terms of balancing

1 the burdens and benefits of the depositions of a senior
2 executive. But they are not properly regarded as a mandatory
3 two-part test. As I just mentioned, not only do these cases
4 not say that, the seminal cases, the logic is inescapably
5 wrong. You can't say, for example, that a deponent -- say
6 you're the Chairman of General Motors, and you have the only
7 unique knowledge of a particular transaction that a
8 shareholder is suing on, you can't then say that with that
9 unique knowledge, the Plaintiff then who wants to get at the
10 core of that transaction to determine its fairness must go
11 depose ten other people who, by definition, don't have that
12 knowledge, that makes no sense at all. Among other things, it
13 violates the mandate of liberal discovery under Rule 16 and
14 26. It violates the language of Rule 38 that everybody is
15 subject to a deposition. It violates the black-letter law in
16 all of the cases the parties cited here that just because
17 you're a corporate executive doesn't mean you get immunized
18 from deposition discovery.

19 It violates, most importantly for our purposes here,
20 Your Honor, Rule 1. Coming back to your question: Why now?
21 Because Mr. Bettman knows, according to the NHL, the most.
22 And we know he knows it for the longest, since 1993. The
23 initial disclosures say that, and Mr. Bettman's numerous
24 public statements, including his discussions which are not in
25 the exhibits but are in the public domain, about potential

1 connections between chronic traumatic encephalopathy and head
2 hits.

3 THE COURT: What is it about the initial disclosures
4 that makes you believe that either he knows the most or that
5 his knowledge is unique and that other witnesses wouldn't be
6 able to so testify about these matters?

7 MR. GRYGIEL: That's a good question, Your Honor,
8 and I think I have the answer. When you look at the
9 description that the NHL gave to those on its initial
10 disclosures, the people with knowledge, there are three
11 descriptions that are identical: Mr. Bettman's, Mr. Daly's,
12 and John Ziegler's. And what they say -- I'll paraphrase here
13 but I can read the language to Your Honor if you'd like it.
14 What they say is that Mr. Bettman is knowledgeable not only
15 about the business of the National Hockey League generally,
16 but about the allegations in the Master Amended Complaint in
17 particular.

18 They don't say that, conspicuously don't say that,
19 with respect to all of the other NHL witnesses there and
20 former NHL personnel that they list. So, that tells me that
21 the NHL made correctly, for which I applaud them, the
22 considered decision to say that Mr. Bettman knows the most.

23 Now, the right question after that, which I have to
24 answer, is, well, what about Mr. Daly? He's lower down in the
25 corporate pecking order. What about Mr. Daly? The answer

1 there, Your Honor, is he has not been there as long, that's
2 number one. And number two is our plausible proffer already
3 makes clear, he has not spoken on the subject of concussions
4 in the detail and for the period of time and with the obvious
5 familiarity, quoting statistics, quoting studies, quoting my
6 personal upon Mr. Bettman viewing of videotapes of concussions
7 that Mr. Bettman has spoken with.

8 Mr. Ziegler predates in his tenure the concussion
9 study that's very important in this case. The concussion
10 study that began in 1997 and went through 2011. Mr. Bettman
11 was the CEO there. So, when you look at those three witnesses
12 and see that they have a much more robust description of their
13 scope of knowledge coming from the NHL themselves, I think I'd
14 be remiss as Counsel for the Plaintiffs not to want to depose
15 one of those three. As to those three, in a case like this
16 where there's not only personal knowledge, percipient
17 fact-witness-type knowledge of the apex deponent, but the case
18 involves his policymaking, we'd be remiss in not picking
19 Mr. Bettman.

20 Mr. Bettman deals with the Board of Governors, he
21 deals with the General Managers, he deals with the teams, he's
22 involved in this issue knee-deep. He's the right person to
23 ask. It seems, Your Honor, in this case, to take the NHL's
24 invitation and to say, well, let Mr. Grygiel depose him
25 sometime later, is essentially to encourage waste. If I can

1 inquire from Mr. Bettman as -- just to take an example about
2 the genesis of the concussion study and about his statements
3 concerning the concussion study and about the data on which he
4 relies when he makes and cites to data in his public
5 statements as opposed to chasing around a lot of other
6 witnesses who can only tell me what Mr. Bettman, speaking for
7 the League, might have known, it seems we're putting the
8 Plaintiffs to a burden here that's unfair under the Rules.
9 That invites exactly the kind of inefficiency that Rule 1 is
10 meant to avoid. It seems to me this is simply the kind of
11 case where it is complete -- not only appropriate, but I think
12 it would be malpractice not to depose Mr. Bettman; and,
13 recognizing they having opposed that, but to depose him early
14 so I know exactly what I'm looking at with other witnesses.
15 The NHL --

16 THE COURT: The --

17 MR. GRYGIEL: I'm sorry, Your Honor.

18 THE COURT: No, that's okay. I know that you've
19 been in discussions with the Defendants about a group of
20 priority witnesses that I believe you want to depose in May
21 and June. Am I right about that?

22 MR. GRYGIEL: That's right, Your Honor.

23 THE COURT: And are Mr. Daly or Mr. Ziegler on that
24 list?

25 MR. GRYGIEL: Neither of them are on that list, Your

1 Honor. Since we're there, I'll address one of the NHL's
2 arguments that comes up perfectly, I think, in sequence with
3 Your Honor's comment. One of the NHL's arguments is,
4 Mr. Grygiel is premature. He wants to depose Mr. Bettman
5 before it's his turn. Well, as I believe the law is very
6 clear, there's no such mandatory order. That's just wrong.
7 He's not an apex dep. deponent; this is not an apex
8 deposition. As to go depose somebody else, well, that would
9 be nice, Your Honor, I would like to someday depose somebody.
10 I started on April the -- we started, Plaintiffs started
11 February 23rd trying to get depositions scheduled in this
12 case. To date, we have one scheduled. It was scheduled
13 April 16th of Dr. Burke. I noticed Dr. Burke with the very
14 first set of notices of deposition we sent out and deposition
15 subpoenas on February the 23rd, 2015.

16 I spoke with John Conti who represents Dr. Burke the
17 very next day. We agreed on a date in early April to
18 accommodate Dr. Burke's surgery and to accommodate his
19 vacation schedule. Mr. Beisner sent a letter on April -- on
20 February the 26th saying that all three notices and the two
21 other subpoenas were null and void. I get a call from
22 Mr. Conti saying the deposition is off. Finally, after all
23 this time, I've got that finally scheduled now for April the
24 16th. As to the numerous other witnesses --

25 THE COURT: Did you take that deposition?

1 MR. GRYGIEL: No, Your Honor, it is scheduled for
2 May 15th. May 15th.

3 THE COURT: May 15th.

4 MR. GRYGIEL: But on April 16th is when we finally
5 got a date picked.

6 THE COURT: I see.

7 MR. GRYGIEL: As to the other witnesses that are the
8 NHL's witnesses -- and that's Mr. Echemendia, Gregory
9 Campbell, and Jim Gregory -- I don't have a single date.
10 Mr. Beisner has told me he represents those witnesses for
11 purposes of deposition, but he hasn't given me dates for those
12 yet.

13 THE COURT: Tell me those three names.

14 MR. GRYGIEL: Sure. Yes, Your Honor, Ruben
15 Echemendia.

16 THE COURT: Got that.

17 MR. GRYGIEL: Gregory Campbell.

18 THE COURT: Okay.

19 MR. GRYGIEL: And Jim Gregory.

20 THE COURT: Okay.

21 MR. GRYGIEL: As to the other witnesses we've
22 identified, Michael Gapski, Jim McCrossin, Paul Holmgren, and
23 Dr. Elliot Pellman, the Bryan Cave firm is representing them.

24 MR. BEISNER: No.

25 MR. GRYGIEL: We have no dates for them. I misspoke

1 as to Dr. Pellman. I just found out yesterday from
2 Mr. Beisner, just yesterday, that Dr. Pellman is being
3 represented someone at (inaudible) and I should speak with
4 them.

5 THE COURT REPORTER: I'm sorry, I missed that.

6 MR. GRYGIEL: Sure, that Dr. Pellman is being
7 represented by a lawyer at the Debevoise & Plimpton firm, and
8 that I should speak with them.

9 As for our remaining deponents, Kerry Fraser and
10 Brendan Shanahan, Kerry Fraser is not represented, as far as
11 Mr. Beisner knows and I know, by anybody, so we are attempting
12 to schedule a talk with him to see whether a deposition is
13 even necessary. And that has been unsuccessful thus far. And
14 as for the deposition of Brendan Shanahan, who wears a number
15 of important hats in this case, as a former employer, as a
16 former Director of player safety, as an *ad hoc* -- in charge of
17 an *ad hoc* committee on the rules in 2004 and 2005, and now as
18 the President of the Toronto Maple Leaves, I've spoken with
19 his lawyer at the Hicks law firm, pursuant to Mr. Beisner's
20 direction, who told me no deposition unless and until you
21 comply with the letters rogatory process and you seek
22 enforcement and succeed on that in a court in Canada. This
23 has all been taking place through February, March, and most
24 recently this week.

25 The point I'm making here, Your Honor, is going at

1 this rate, I don't know that I'll ever get anybody scheduled
2 except for Dr. Burke who I finally got to. The pace just
3 isn't working. And since I'm there, and I'm certainly could
4 say an awful lot more about the apex issue, but since I'm
5 there I'd like to suggest to Your Honor that we do something a
6 little bit differently here, if we could, and something I'm
7 sure the Court will want to talk about and ask Counsel about.
8 And that is whether, at least as to NHL witnesses, and perhaps
9 as to the witnesses represented by Bryan Cave, who I believe a
10 lawyer, Mr. Schmidt, has consented to deal with this Court
11 appropriately on jurisdiction for purposes of their motions to
12 compel and motions to quash, if after we send a request to
13 take a deposition that I get a response with a date, or I
14 suppose an objection that the witness can't be deposed for
15 some reason, within three business days because otherwise I'm
16 met with, we'll get back to you. We haven't even talked to
17 these witnesses yet. With the exception of Mr. McCrossin, I
18 don't believe last time I spoke with Mr. Beisner any witness
19 had been spoken with other than Mr. McCrossin and I believe --
20 I'm sure Dr. Burke.

21 But the witnesses were even aware I was seeking
22 their deposition. I know that is true with respect to the
23 Bryan Cave witnesses because when I talked to their lawyers,
24 said we haven't reached out to any of these people yet except
25 for our initial discussion with Mr. McCrossin back in

1 February.

2 THE COURT: Well, I will talk to the NHL when they
3 get up, but I would suggest that everyone who you've made a
4 request to, who is an NHL witness or a Bryan Cave witness,
5 that they be talked to and there be a response that we can
6 talk about at the informal conference.

7 MR. GRYGIEL: Because I think --

8 THE COURT: So we can get some depositions.
9 Hopefully at the end of the informal conference, we'll have
10 some dates.

11 MR. GRYGIEL: Right. And I'll be perfectly blunt
12 with Your Honor, I suspect John Beisner has heard it before
13 from me -- and certainly if not from me, from Mr. Schmidt -- I
14 told Mr. Schmidt at Bryan Cave that I understood his job was
15 to make it difficult for me to get people under oath, but I
16 thought perhaps we were pushing that a bit too far. It is now
17 April, towards the end of April, and our deadline is
18 December 31st.

19 THE COURT: Okay. Let's go back to apex and see if
20 there's anything else you'd like to say for the record.

21 MR. GRYGIEL: Yes, Your Honor, I mentioned the
22 exhaustion requirement. And really as I mentioned before, the
23 NHL comes down on that and say that I have to do a 30(b)(6) or
24 I should send out interrogatories or I should depose others.
25 Well, first of all, as the *Mentor* case says, if a Plaintiff

1 has identified a senior corporate executive with important
2 unique knowledge, no such exhaustion requirement is necessary.

3 THE COURT: Now I'm going to -- because if I don't
4 ask the question when it comes to my head, I'm going to forget
5 it, so I'm sorry to do this to you.

6 MR. GRYGIEL: That's okay.

7 THE COURT: My memory is that there were three
8 witnesses you identified in that group of folks you wanted to
9 depose and you asked for priority document production on them.
10 Who are they?

11 MR. GRYGIEL: I did. Actually, Your Honor, I asked
12 for -- because John and I talked about this, we had a very
13 cooperative call on April the 2nd, followed up by one, I
14 believe, on April the 9th and John volunteered that --
15 Mr. Beisner volunteered that for witnesses I wanted to depose,
16 that they would, within reason if they could, move those
17 witnesses' document queues to the front of the line.

18 THE COURT: Right. And aren't there already three
19 at the front of the line?

20 MR. GRYGIEL: Well, the very first three we noticed,
21 of course, one of them is Mr. Bettman, and then there's --

22 THE COURT: But I don't -- are those the three? No.
23 Okay. All right. We'll get to it.

24 MR. GRYGIEL: I can give you the list actually here,
25 Your Honor. I'm not sure which exactly three he was talking

1 about. But what we talked about was I gave Mr. Beisner the
2 six after we had the issue with Mr. Bettman. I listed six
3 more for Mr. Beisner, gave him two more orally, and then by
4 e-mail, and he said I think you should give me your entire
5 list so we can deal with that and perhaps deal more
6 efficiently with a single request to move documents to the
7 front of the queue. So, we gave him our additional two names.
8 So, they've all been there. Exactly where that stands, of
9 course, I don't know.

10 THE COURT: All right. I'm sorry.

11 MR. GRYGIEL: No, that's fine, Your Honor.

12 Anyways, as I mentioned, the exhaustion requirement
13 doesn't apply, and there's a wonderful bit of language from
14 the case I cited to Your Honor earlier, the *Hunt versus*
15 *Continental Casualty* case. And it says, nor has formal
16 exhaustion been viewed as an absolute requirement. Instead,
17 exhaustion of other discovery methods is an important, but not
18 dispositive consideration, for the Court to take into account
19 in deciding how to exercise its discretion.

20 The NHL makes it into a hard and fast rule, and it's
21 simply not and it's inapplicable here. In any event, they've
22 already told us who we should be deposing, I've done the
23 initial inquiry, they've told us in their initial disclosures,
24 and I've read Mr. Bettman's statements.

25 THE COURT REPORTER: Mr. Grygiel, please slow down.

1 MR. GRYGIEL: I'm sorry. Fair enough.

2 The NHL has already told us who we should depose
3 there. As to Mr. Bettman's statements, just briefly. These
4 are not like the statements that Steve Jobs made in the *Abarca*
5 case or in the -- these are not like the statements that were
6 attributed to corporate executives in, I believe, the R-E-I-F
7 case or in *Affinity*. These are not the kind of platitudinous
8 generalities that a CEO might utter.

9 For example, we're taking the issue of player safety
10 very seriously. Instead, what we have here is Mr. Bettman
11 speaking specifically to cause and effect about impacts and
12 sequelae from those impacts for player safety. We have him
13 talking about statistics and in at least one case we gave to
14 the Court, saying I'm not going to give you the numbers. We
15 have him saying that he personally went through and
16 interviewed all the members of the Board of Governors to
17 determine if they felt supplemental discipline was necessary
18 for a concussion-producing hit in 2011 that a Bruins player
19 put on a Canadians player; we'll spare the names.

20 We have essentially here a very different order of
21 statement. This isn't, for example, like in the *Affinity* case
22 where the Defendant was essentially saying, Mr. Jobs'
23 statements aren't relevant and the Court found that true.
24 Here, the statements are terrifically relevant. Those cases
25 have nothing to do with this case, and they don't begin to

1 resemble the kinds of statements that show Mr. Bettman's
2 direct and personal involvement here.

3 The NHL's argument that, well, look, you could take
4 a 30(b)(6) and start there, I believe I've already addressed
5 with a point of efficiency in federal Rule 1. It's simply not
6 right that the NHL would get to dictate the pace of discovery
7 when there is no showing other than Mr. Bettman is an
8 appropriate first witness.

9 Finally, Your Honor, I would simply summarize by
10 saying it this way. This is not an apex deposition at all.
11 Everything about the NHL's argument here boils down to a
12 misunderstanding of the apex test, creating an artificial,
13 mandatory two-part test that doesn't apply here, ignoring what
14 the initial disclosures show us, ignoring what Mr. Bettman's
15 numerous public statements have shown us. This is very much
16 like saying, Mr. Bettman knows an awful lot, it would make an
17 awful lot of sense to depose him early so we know exactly what
18 the NHL knew and when it knew it in a case that turns
19 centrally on NHL policymaking and then turning around and
20 saying, but no, nevermind, go depose a bunch of other people
21 and maybe on a scavenger hunt through discovery you can begin
22 to piece together someday what you can get in one-stop
23 shopping from Mr. Bettman.

24 Your Honor, you have broad discretion in these
25 matters, and I would submit here that it would be the

1 appropriate use of the Court's discretion to compel
2 Mr. Bettman's deposition at the earliest convenient date.
3 Thank you.

4 THE COURT: Thank you.
5 Who wishes to respond?

6 Mr. Beisner.

7 MR. BEISNER: Thank you, Your Honor. John Beisner
8 on behalf of the NHL.

9 Your Honor, I recall a conference recently where I
10 think one of the judges mentioned that if you base much of
11 your argument on Rule 1, there may be some problem with the
12 law underlying it. And I think that's the situation that we
13 may have here. Let me start by reinforcing what Your Honor
14 was saying earlier because I think we've gotten a little
15 overblown with burdens and the arguments here.

16 We're not saying Mr. Bettman will not appear. This
17 is a sequencing issue. And we're not -- this is not, as many
18 of the cases Plaintiffs have cited, an instance where we're
19 saying Mr. Bettman should not be deposed. It is a sequencing
20 issue, and it -- you know, there may be arguments that his
21 deposition should be limited in some way down the road, but
22 this is -- this is not an effort to seek a protective order
23 that he would not appear.

24 I think, Your Honor, it's also important to note
25 that there cannot be a debate that he's an apex witness. He's

1 the Commissioner of the League, he is the top person there,
2 and I think that Mr. Grygiel has stretched the apex doctrine
3 all out of proportion. If you look at the cases in this
4 District, the doctrine is conjunctive and it is when you have
5 an apex witness, as we have here, there is a two-part inquiry
6 the Court is supposed to make and the first one is whether the
7 deponent has, quote, unique, firsthand non-repetitive
8 knowledge, and the party seeking the deposition has exhausted
9 other less-intrusive discovery means. That's the *Bombardier*
10 *Recreational Products* case and I'd note it's also the analysis
11 that Judge Boylan went through in the *Dryer* case that many of
12 the same counsel were involved in. It was the same tactic;
13 reached into the NFL witness pool, pulled out a lead person,
14 said, We want to take them first, made much the same
15 arguments: Important witnesses, knows more than anybody, was
16 there at the start. All those arguments were there. This is
17 with respect to Mr. Bornstein in that case. And Judge Boylan
18 said that there's not a showing here that all of this
19 knowledge is unique to him and we haven't done any discovery
20 in the case yet. This deposition should wait, and that was
21 the ruling there.

22 The Plaintiffs rely on the *Mentor* case, and it's
23 interesting to me there's this amazement. Well, there's no
24 discussion there about the exhaustion requirement. Your
25 Honor, I would guide you to Page 5 of the decision. There's a

1 simple reason why that decision, which by the way is not a
2 decision of this District, doesn't mention it, because as the
3 case says, finally, based on the representations of the
4 parties, the depositions of nearly all current and former
5 mentor employees who are to be deposed in this action should
6 have been completed by now, so the parties should be able to
7 narrow the scope of questioning to be directed to Conway and
8 Levine. This was in the late stage in litigation. You didn't
9 have this need to exhaust talking to other witnesses in the
10 case because that was supposed to have happened in the
11 litigation.

12 And so, Your Honor, I think that we don't have any
13 indication of unique knowledge here. I think as Your Honor
14 was suggesting, what's in the disclosures doesn't suggest any
15 unique knowledge on his part. The focus, I suspect, of the
16 inquiry based on the Complaint is going to be very much on the
17 Concussion Committee and the Concussion Report, which were
18 authored and shepherded by a number of other individuals --

19 **(Teleconference noise interruption.)**

20 THE COURT: I'm sorry. This is why my patience with
21 the phone is going to grow light. I'm sorry. Go ahead.

22 MR. BEISNER: Shepherded by a number of other
23 individuals, some of whom are on this initial 10 list. And as
24 the *Affinity Labs* case makes clear, the fact that an executive
25 may have made public pronouncements on the subject isn't

1 reason to run away from the doctrine here. Your Honor, I
2 think when you boil it down and look at the -- at what the
3 briefing indicates, Plaintiffs are really offering two main
4 reasons for trying to push this -- this deposition up to the
5 front. The first is, as they put in the brief, Commissioner
6 Bettman provides one-stop shopping.

7 Well, it's interesting that there's no suggestion
8 anywhere in the briefing that we're going to reduce the number
9 of depositions. They have said to you repeatedly, we're
10 taking 40, we're taking 40, we have to have this 10 up front.
11 There's no suggestion of any real efficiency. I think on this
12 one, the emperor has no clothes because there's no suggestion
13 that they're not going to take any other depositions. And the
14 apex doctrine is that as the chief executive, there's a reason
15 to put that at the end so you don't question that person,
16 whoever it may be, endlessly on issues about whom -- about
17 which you can question someone else.

18 And they clearly intend to question everyone else.
19 There's been no suggestion that they can cut 10 depositions
20 off this list as a result of deposing Commissioner Bettman.
21 The other rationale that was offered in the briefing which
22 really is important to note, too, is that somehow his
23 deposition will provide a roadmap to other depositions. Well,
24 Plaintiffs are out there, and I'll get to them in a minute,
25 the 10 that they already have there, they seem to be having no

1 problem finding witnesses.

2 We gave them a list of 20 individuals with
3 disclosable information. Could do a 30(b)(6) deposition of
4 one of them, or somebody else in the organization if they need
5 to find out who did what. You don't need to use the
6 Commissioner as the roadmap deponent and indeed it's a waste
7 of his time both in terms of what the priority should be, what
8 you're asking about, and his time otherwise.

9 And, Your Honor, I don't think that we can overlook
10 the special burden that exists here because we don't have
11 document production ready for the Commissioner to refer to.
12 If he is such a central witness, you presumably would want to
13 take him at a point when he's had an opportunity to review
14 documents that are out there. Mr. Grygiel is right. He's --
15 he's been Commissioner for a substantial period of time, but
16 that means there's a lot of documents there that he --

17 THE COURT: So, is he not one of the ones you've
18 prioritized?

19 MR. BEISNER: No. No.

20 THE COURT: Okay. Who have you prioritized?

21 MR. BEISNER: Your Honor, let me go through that
22 list for a minute, if I may. And I don't want to detour too
23 long into this.

24 THE COURT: I'll let you come right back.

25 MR. BEISNER: But happy to do it.

1 Your Honor, let me start by noting that this
2 business of, we started this process in February, I think Your
3 Honor recollects that we viewed that initial list as being
4 contrary to the deposition order, and so the suggestion that
5 we've been working on scheduling these depositions since
6 February is just inconsistent with the record. We started
7 this process after Your Honor noted that you might be willing
8 to permit some of these early depositions to occur. We talked
9 about it further at our first discovery conference. I did not
10 get the full list of the individuals, particularly the NHL
11 persons that Mr. Grygiel is talking about, until just before
12 our last discovery conference.

13 But let me go through them individually to give the
14 status. Dr. Burke, as mentioned, has been scheduled. Kerry
15 Fraser --

16 THE COURT: Okay. Okay. We're done with Dr. Burke.

17 MR. BEISNER: Dr. Burke is scheduled.

18 THE COURT: Are we prioritizing documents for
19 Dr. Burke?

20 MR. BEISNER: He's producing his own documents, Your
21 Honor.

22 THE COURT: He's producing his own.

23 MR. BEISNER: So he's got his own set, and those
24 have been produced.

25 THE COURT: Okay.

1 MR. BEISNER: Kerry Fraser is not related to the
2 NHL. Mr. Grygiel is absolutely correct on that. After I did
3 some checking on that, I advised him, he'd need to be in touch
4 with him because he's got no relationship to either clubs or
5 the League itself. Jim McCrossin is affiliated with one of
6 the clubs, and Mr. Grygiel has been speaking with the Bryan
7 Cave persons about scheduling that deposition.

8 THE COURT: Okay.

9 MR. BEISNER: That's also true for Mike Gapski and
10 Paul Holmgren.

11 THE COURT: Can you spell Paul's last name?

12 MR. BEISNER: Paul Holmgren, H-o-l-m-g-r-e-n.

13 THE COURT: Thank you.

14 MR. BEISNER: And I -- Your Honor, I've not been
15 part of those conversations. I want to make clear I have
16 indicated to Mr. Grygiel, as I think we did in the discovery
17 conference, we can get all of these scheduled and taken by
18 July 1. I'm not concerned about that, but we're trying to get
19 documents produced in other things and I believe that
20 Mr. Schmidt, who is at the discovery conference, is working on
21 getting these scheduled, also coping with the fact that, which
22 Mr. Grygiel has been kind enough to note, that you have some
23 of these people in play-offs at the moment. So, their
24 availability for deposition immediately but they will be, I
25 assume, scheduled very soon.

1 Dr. Pellman advised yesterday that he had retained
2 counsel, and so there's been no one to talk to there until
3 yesterday. As Mr. Grygiel indicated, I told him yesterday
4 when I became aware of that, that my understanding is that he
5 will be represented by the Debevoise firm and that scheduling
6 can be handled with them.

7 Brendan Shanahan is being represented by the Hicks
8 firm in Canada. He is the -- affiliated with one of the
9 Canadian clubs. And I did talk to Canadian counsel. They do
10 want to go through the letter rogatory process, but they've
11 assured me if Plaintiffs would simply start that process that
12 they believe that deposition can be taken and those steps
13 completed by July 1. But Plaintiffs need to start that
14 process to get that -- that arranged.

15 And the last three, Your Honor, which I believe --
16 or the last three I was notified of which was just before the
17 discovery -- last discovery conference we had was Colin
18 Campbell, Jim Gregory, and Ruben Echemendia. And those are
19 witnesses that my recollection is, Your Honor, in the
20 discovery session, that it was Plaintiffs' asked if we could
21 accelerate, prioritize the production on those three. We are
22 undertaking to do that. The only reason I haven't gotten back
23 to Mr. Grygiel with respect to those three, which I thought I
24 had made clear, is I'm trying to work through when we will
25 have those documents out there so that we can pick a date that

1 will be consistent with that production.

2 THE COURT: But you have started to prioritize?

3 MR. BEISNER: Oh, we have.

4 MR. CONNOLLY: Yes.

5 MR. BEISNER: And my colleagues will report to you
6 in detail on that.

7 THE COURT: Okay.

8 MR. BEISNER: And those documents will start flowing
9 pretty quickly. But after the last discovery conference when
10 that request was made by Plaintiffs' counsel, we have now
11 shifted to prioritize the production of those materials.

12 THE COURT: Okay.

13 MR. BEISNER: So I -- you know, I think the
14 suggestion -- I understand Mr. Grygiel's frustration
15 completely. I don't think that it's fair to say that we've
16 been working on this from February. Some of these names we
17 just received recently, and then we got the additional request
18 I think that you heard the same time we did, to prioritize
19 discovery. We said we would with respect to those custodians,
20 and we would get those documents out first and that's what
21 we're going to do, and that's some of the next shipment that
22 they will be receiving. But I will let Mr. Connolly explain
23 that, since he's -- he has more detail on that.

24 But, Your Honor, I think that -- so I think the
25 suggestion -- and I don't quite understand what that has to do

1 with the question of when Commissioner Bettman's deposition
2 should be taken. I think Your Honor said probably would work
3 best if we worked on document production during this quarter,
4 take the second two quarters of the year to get depositions
5 finished. Plaintiffs said, well, we want to take these 10
6 early. Fine. We're trying to work to get those done. And
7 I've indicated to Mr. Grygiel that we will, but I don't
8 understand what that has to do with when the Bettman
9 deposition occurs. It's a non-sequitur to me. I understand
10 Mr. Grygiel's frustrations but when you're trying to
11 coordinate schedules -- and as I hope this is clear, these are
12 not individuals all within the League's control and so I think
13 we're doing the best that we can to get that accomplished.

14 But if I can shift back to the apex argument --

15 THE COURT: Do you believe that Bryan Cave will
16 enable their three witnesses to be deposed by July 1? Is that
17 your belief?

18 MR. BEISNER: Oh, that's my understanding, and
19 that's the objective. And I've not heard anything from
20 Mr. Schmidt that will prevent doing that. I think that one of
21 the issues -- and again, I appreciate Steve acknowledging
22 that. I think one of the problems with scheduling a couple of
23 those has been that they're in play-offs and a little bit hard
24 to nail down exactly when they're going to be -- going to be
25 finished. But they're all going to be finished by July 1, and

1 I don't think there's any problem with getting these 10
2 depositions finished. I believe that's what I said to you in
3 the discovery conference, and that has not changed.

4 THE COURT: Okay.

5 MR. BEISNER: Your Honor, I think if I can go back
6 very briefly to the apex issue. I do think that what counsel
7 articulating the Court about the apex doctrine would basically
8 nullify the doctrine. The main element of it is the idea that
9 you shouldn't be putting the chief executive of an
10 organization out there first unless there's a very compelling
11 reason to do so. And that simply has not been offered here.
12 That's what the doctrine is all about, and to suggest that
13 that's not part of the doctrine I think is contrary to the
14 case law of this District that we've cited. And I don't think
15 it's much really held by the cases that Plaintiffs have
16 referenced earlier.

17 I think the main thing to note here is that, as
18 noted in the *Abarca versus Merck* case, which is one of those
19 that we cite. And this is, this quote is in a lot of the
20 decisions that are out there: Virtually every court that has
21 addressed deposition notices directed at an official at the
22 highest level, or apex of corporate management, has observed
23 that such discovery creates a tremendous potential for abuse
24 or harassment. And that's what we're trying to protect
25 against here, the doctrine to say this has got to be the first

1 deponent. The rationale that the Court -- that Plaintiffs are
2 giving to take the deposition first just -- it just doesn't
3 hold water. There's nothing efficient about it, and there's
4 no need to have him served as a roadmap.

5 THE COURT: Well, let me ask you this question. He
6 is listed as one of the three individuals who has the most
7 knowledge about this case, at least that's what your 26-A
8 disclosures show. And if you look at these cases, there tends
9 to be a distinction between cases that involve a particular
10 subject matter that typically the chief executive officer
11 honestly doesn't know anything about, and then there are very
12 few cases -- actually the minority of cases -- where the chief
13 executive officer does know something about. Here, it looks
14 like Mr. Bettman knows a lot about this. So -- but here's my
15 question.

16 MR. BEISNER: Sure.

17 THE COURT: What is the risk of abuse -- and let's
18 suppose he's not taken first, but why last? I mean, why not
19 earlier rather than later? What is the risk here? If we
20 prioritize his documents and I've put into place a system
21 where you would get all the documents that he would be
22 questioned on, what's the risk?

23 MR. BEISNER: Your Honor, I'm not sure we're saying
24 that he necessarily should come last. We're just saying he
25 shouldn't be first. We're saying that he shouldn't be taken

1 until we have sufficient document production out there, and
2 that there probably are some people in the organization that
3 should go before him. But I don't think he necessarily needs
4 to be last. I think all we're saying now is he shouldn't be
5 the first one out of the box, and I don't see any reason why
6 we can't work with Plaintiffs' counsel to work out the
7 appropriate time to take that deposition.

8 THE COURT: Okay.

9 MR. BEISNER: And one of the main concerns, Your
10 Honor, frankly, is having the document production complete and
11 having an opportunity for him to respond to it. And I would
12 think, if they were really interested in taking a discovery
13 deposition, that's what Plaintiffs would want, too. And it
14 concerns me greatly in terms of the abuse and harassment
15 issue, that's not what this is about. So, that's the concern
16 that I think we have. Thank you, Your Honor.

17 THE COURT: You bet.

18 MR. GRYGIEL: Your Honor, let me take the last point
19 first, Mr. Beisner's concern. I'll use his word "overblown"
20 about abuse. Your Honor correctly noted that the NHL's
21 initial disclosures show that he's one of the three people
22 with the very most knowledge. So, by definition, there isn't
23 abuse. It's not abuse to take the person that the Defendant
24 itself says has the most knowledge and take that person first.
25 That's number one.

1 Number two, there is no law, and the NHL has cited
2 none, that says that the NHL, by virtue of its view of how the
3 Plaintiffs ought to run their case, should get to dictate when
4 Mr. Bettman, who knows an awful lot, who's made an awful lot
5 of public statements on which we can examine him, and there
6 are allegations in the Complaint, some 16 paragraphs deal
7 directly with Mr. Bettman sufficing for purposes of examining
8 him, that that deposition should somehow be postponed to the
9 NHL's convenience. There is no law that says that.

10 With respect to Mr. Beisner's point about the 40
11 depositions, we may very well want to take 40. But if I can
12 take 40 meaningful ones, Your Honor, I'll be an awful lot
13 happier than if I have to waste some of those 40 trying to
14 figure out what I can get in one-stop shopping from
15 Mr. Bettman. And I may very well take more intelligent, more
16 well-informed depositions because Mr. Bettman may say, well,
17 Mr. Grygiel, the person I spoke with directly about that
18 issue, directly about how we are organizing the concussion
19 study and the Board of Governors was Mr. Jacobs or it was the
20 owner of the Penguins. That's going to tell me where I should
21 be in discovery.

22 That is real world concern that the Plaintiffs are
23 entitled to decide for themselves when a witness has either
24 first hand, personal, unique knowledge or where the case, as
25 the *Mentor* case says, or where the case involves corporate

1 decision making at the highest level. Again, this is not, as
2 Your Honor correctly noted, the typical apex case. It's
3 nothing like that at all.

4 In terms, Your Honor, finally of the *Bombardier*
5 case, *Bombardier* does use that formulation, as I acknowledged,
6 the "and." All of the cases come from those two Texas cases,
7 *Crown Century* and *In re Alcatel*, and the more recent case that
8 I identified for Your Honor, the one that involved the
9 deposition of Continental Casualties chief executive Tom
10 Motamed. I remember that because I deposed him once, showing
11 once again when a corporate executive's testimony is
12 important, he should be made to testify.

13 The point I'm making there, Your Honor, is that
14 there are two parts to this. Even if Mr. Bettman didn't have
15 the kind of knowledge that we all know he has and that by not
16 filing any Affidavit or Declaration saying otherwise, the NHL
17 concedes, even if we didn't have that, he'd still be an
18 appropriate witness. The difference here is that he has both
19 and satisfies both criteria.

20 In terms of scheduling, Your Honor, I'd like to
21 bring up one point and then finish with one argument about
22 mentor. In terms of scheduling, I could give Your Honor the
23 dates and the responses and my replies to all of my
24 communications that deal with scheduling depositions. I
25 brought them with me. I'm not going to belabor the Court with

1 them, but I've got an e-mail chain here that's about
2 three-quarters-of-an-inch thick, all of which contained an
3 awful lot of entries.

4 I'm not getting much movement. So while I
5 appreciate Mr. Beisner definitely correctly senses my
6 frustration, apart from frustration, what I'd simply like to
7 do is get a schedule that as Your Honor said, we may deal with
8 in our next conference, that allows us to move forward more
9 rapidly. One other suggestion I forgot --

10 THE COURT: And will you be present at the next
11 informal conference?

12 MR. GRYGIEL: I plan to be, Your Honor, yes. One
13 thing I'd like to discuss with Your Honor at that conference
14 is whether we amend, if we need to, or otherwise address PTO 6
15 simply so that as to third-parties, perhaps we can have a more
16 streamlined process so I don't have to put Mr. Beisner in the
17 middle of it and act as the gatekeeper because that adds a
18 layer of complexity both for him and for us that I think
19 perhaps we may prefer to obviate and if Bryan Cave's here, we
20 can probably do it that way.

21 THE COURT: Why don't you meet and confer about that
22 before the discovery conference.

23 MR. GRYGIEL: Certainly, Your Honor.

24 What I'd finally like to say is this. When you take
25 a case like we have here and a witness who knows what this

1 witness knows, it strikes me, I couldn't possibly go to any of
2 my clients who said, why aren't you deposing the guy who has
3 run this organization and talked about these issues and knows
4 about these issues and directs the Department of Player Safety
5 and was intimately involved in the Concussion Report, deals
6 with the Board of Governors and the General Managers, why
7 don't you go to him first? That's the best source. Why don't
8 you figure out where else you needed to go to go to him first.
9 And I still can't come up with an answer to that question. It
10 strikes me that I'm entitled to do it because obviously we've
11 made I think a *prima facie* showing. And that's all the law
12 requires of us to be able to take that deposition.

13 Thank you, Your Honor.

14 THE COURT: Mr. Beisner, anything further on the
15 apex, or can we move ahead?

16 MR. BEISNER: Your Honor, I just wanted to note two
17 quick -- two quick items. I do think that the focus here
18 really ought to be on availability of documents for the
19 witness. I'm a little concerned that I believe Your Honor had
20 a colloquy at an earlier status conference with Mr. Grygiel
21 about what's the purpose of depositions. I think you were
22 saying we need documents there so people can refer to them. I
23 think Mr. Grygiel had a different view. But I think a true
24 discovery deposition, if it's to be meaningful, the witness
25 ought to have documents available. And that's frankly our

1 main concern about trying to move this deposition up front.
2 We're trying to do things to accommodate Plaintiffs on
3 these -- these early depositions as best we can. But I think
4 that there's a limit to what we can do. We can't prioritize
5 all of this. I think we're already achieving the document
6 production here faster than any MDL proceeding that I've been
7 in, and I've been in quite a few of them. And I do think that
8 that's really the main concern here. We're not saying put
9 this off forever. There's just got to be a better time to
10 take his deposition.

11 One other thing, Your Honor, I just want to note for
12 the record that I take a little umbrage at as being referred
13 to as the "gatekeeper" here. I guess I won't do it again, but
14 I was trying to assist Mr. Grygiel in trying to figure out who
15 to go to to talk about these various witnesses. And I guess
16 going forward, just go deal directly. That's fine with me.
17 But I don't know who you'd have called in a lot of instances
18 other than the witness.

19 One other thing, Your Honor, I wanted to correct, if
20 we could go back to the list for the record.

21 THE COURT: Yes. Uh-huh.

22 MR. BEISNER: The -- we have -- there are three
23 witnesses that we have prioritized as custodial personnel, and
24 I told you that Ruben Echemendia was one of them. That is
25 incorrect. The third is Brendan Shanahan. He is no longer

1 with the League. He is now the General Manager of one of the
2 NHL clubs in Canada, but he previously was with the NHL and so
3 that is the third one that we have prioritized.

4 THE COURT: So Mr. Shanahan, Mr. Campbell, and
5 Mr. Gregory are --

6 MR. BEISNER: That's correct. And those are the
7 three I think, Your Honor, that were requested at the last
8 discovery conference.

9 Mr. Echemendia is -- we'll be taking care of
10 scheduling him but we also need to look at document production
11 issues with respect to him, as well, that those will be
12 derivative since he is not an NHL custodian. So, just wanted
13 to clarify that.

14 THE COURT: In terms of the custodian queue, I am
15 going to ask you to put Mr. Bettman up at the top with
16 Mr. Shanahan, Mr. Campbell, and Mr. Gregory, please.

17 MR. BEISNER: Okay.

18 THE COURT: And then perhaps after talking to your
19 folks, you could give me a report at the informal discovery
20 conference about how long you expect that document production
21 of Mr. Bettman's documents to take. Okay?

22 MR. BEISNER: Okay.

23 THE COURT: Very good.

24 MR. BEISNER: Your Honor, one thing I would note on
25 that is that -- and we'll need to look at this, as well -- I

1 think it's important that we have available not only his
2 custodial files but other documents, as well. As the CEO,
3 he's probably been briefed along the way by others who have
4 the materials in their files. So, that's one of the concerns
5 that we have is to make sure, you know, usually the CEO in the
6 organization will not have all the documents that have been
7 the product of briefings that have come along the way.

8 THE COURT: But, again, you're going to have the
9 benefit of the documents from which the Plaintiffs will
10 question him.

11 MR. BEISNER: That's correct, Your Honor. But
12 again, you know, I think that there will be questions about a
13 lot of issues that are not document-based. I mean, Plaintiffs
14 are saying they want to take some -- they're saying we'll take
15 depositions and I think we're saying with respect to
16 Mr. Bettman without any documents, and that's what concerns us
17 is that he not be asked questions without having an
18 opportunity to prepare, whether they present documents or not,
19 is having been able to familiarize himself with the history on
20 some of these issues is what's key here, whether Plaintiffs
21 are using those documents or not.

22 THE COURT: And all I'm saying is let's get started
23 on that.

24 MR. BEISNER: You got it.

25 THE COURT: All right.

1 MR. ZIMMERMAN: Okay. I think the picture is
2 becoming clearer, the frustration on both sides is kind of
3 palpable. I think if we get to specifics, we can get there.
4 But we're feeling a slow dance, and we're trying very hard to
5 get real discovery going. And when you hear the report on
6 where we are with documents because we were told by April 15th
7 we had substantial documents, we don't. I think you'll get
8 the flavor of that, although we're courteous and professional
9 and we're trying -- everybody is trying to be really kind to
10 one another, we're not getting, from the Plaintiffs' point of
11 view, what we need to succeed in moving the litigation.

12 So, I think as we go through the agenda and you hear
13 the reports on where we are with documents, where we are with
14 third-parties, where we are with what was going to be in
15 depositions -- you've now heard the story on depositions -- I
16 think it'll come out that we're still way, way -- we're still
17 in waiting. And the frustration is real. I know we can solve
18 it, so I'm not -- I'm not raising too much ire. I'm just
19 saying we've really got to get to the quick on these things or
20 we'll never finish because you can't finish until you start,
21 and you haven't been able to start.

22 THE COURT: Is there anything more on deposition
23 scheduling that you would like to discuss from the Plaintiffs'
24 standpoint?

25 MR. GRYGIEL: I'm all set, Your Honor. I just want

1 to make one point. John, I apologize for using the
2 "gatekeeper" phrase. The only reason I did was because when I
3 served my first set of notices February 23rd, the letter I got
4 back saying they were null and void as to all the three
5 witnesses, one of whom was Mr. McCrossin, came from
6 Mr. Beisner looking at PTO 6 saying that we should talk to
7 each other about scheduling. I just thought I'd talk to John
8 in the middle of that, and maybe we'll be able to work
9 something that's more efficient out.

10 MR. BEISNER: Well, Your Honor, to be clear, I have
11 been, I wouldn't say "gatekeeper," but trying to be a
12 facilitator to get Mr. Grygiel to the right place. That
13 initial dispute was the fact that we got subpoenas served in
14 several places without any prior consultation about that,
15 contrary to the order. I think that's history. We're beyond
16 that. But I think that to start the discussion saying we've
17 been trying to take depositions from that date I think is a
18 bit of a -- is a mischaracterization.

19 THE COURT: I think the Court will study the Bettman
20 issue. In the meantime, that discovery is prioritized. I'll
21 get a report at the next informal conference about the status
22 of all the document production, but certainly the priority
23 document production. And with respect to the list of ten,
24 although nine since one -- we have one deposition scheduled,
25 I'd like some dates shared with me at the next conference

1 about when these depositions are going to happen.

2 Okay. All right. Anything else about deposition
3 scheduling?

4 Mr. Connolly.

5 MR. CONNOLLY: Your Honor, I was just going to give
6 you an update on where we are as to the document production.
7 Mr. Zimmerman talked about it in vague generalities.

8 THE COURT: Please.

9 MR. ZIMMERMAN: That's my specialty (laughter).

10 MR. CONNOLLY: Stipulated.

11 Your Honor, we have produced, as the Court directed
12 at the first informal discovery conference that we informed
13 the Court of the productions that go forward, we produced --
14 early last week we produced 6,000 documents that totaled
15 16,000 pages. And as we discussed at the informal discovery
16 conference, these were largely from the paper production and
17 so it was more time consuming. We are, in other words,
18 exactly where we said to the Court that we would be, and we
19 are right on target to producing the documents in a timely
20 fashion by the end of this -- by the time period that the
21 Court has directed.

22 We are now into the electronic materials --

23 THE COURT: Let me just stop you there.

24 MR. CONNOLLY: Sure.

25 THE COURT: I believe at the last conference, we

1 weren't quite in sync on the search terms. Are we there now?

2 MR. CONNOLLY: Yes, we are. My understanding is
3 that the search terms have been agreed to by the parties.

4 THE COURT: Okay. All right.

5 MR. CONNOLLY: And that the -- we have prioritized
6 the three witnesses in the electronic materials that will be
7 produced. And they will be several orders of magnitude more
8 than the last production. And among the materials that have
9 been prioritized for production are those from Mr. Shanahan,
10 Mr. Gregory, and Mr. Campbell. So, that is in line with what
11 we indicated to the Court we would do and what the Plaintiffs
12 requested at the last informal conference.

13 THE COURT: When do you expect to make your next
14 production?

15 MR. CONNOLLY: Early next week, Your Honor.

16 THE COURT: And do you have an idea of the volume?

17 MR. CONNOLLY: I don't want to commit exactly.
18 Several orders of magnitude. Three or four times more than
19 the last production.

20 THE COURT: And that is e-discovery?

21 MR. CONNOLLY: That is e-discovery largely. Yes,
22 Your Honor. As well, the Court has asked that we provide a
23 rolling privilege log which will be later this week or early
24 next week.

25 THE COURT: Okay. And are we trying for a

1 production at least every two weeks?

2 MR. CONNOLLY: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. CONNOLLY: We have a large number of people on
5 the first review, as we told Your Honor. The 75-odd who are
6 doing the first review and teams from both the Skadden Arps
7 firm and from the Faegre Baker Daniels firm are involved in
8 reviewing the materials and we're diligently at work getting
9 the materials ready for production. So, we see that we're
10 entirely on target with the direction that the Court gave us
11 as to when we should have substantial completion. And at
12 least as we project it, we're right on target.

13 THE COURT: Okay. Very good.

14 MR. CONNOLLY: Thank you, Your Honor.

15 THE COURT: Plaintiffs wish to respond?

16 MR. SCOTT ANDRESON: Scott Andreson on behalf of the
17 Plaintiffs on this one, Your Honor.

18 It's helpful to have the NHL give its assessment
19 first, which takes a couple of things off of our list because
20 we had asked about when we were going to get the next
21 production and they didn't know as of earlier this week. Only
22 one comment about the document production thus far, and then I
23 want to raise one issue where we may need the Court's help to
24 resolve an issue. And that is that we've been talking about
25 it since February that we had this April 15th deadline and to

1 the NHL's credit, they beat that deadline by two days. In
2 fact, they were early. And we got 6,000 documents.

3 We've got, just like they've got a bunch of
4 reviewers, we've got a whole bunch of people ready to review
5 the documents, a couple dozen of them, sitting by waiting to
6 review documents. And I had thought and maybe we've clarified
7 it now. I had thought at the last informal discovery
8 conference the representation was that there be a weekly
9 rolling production. And my recent conversations with one of
10 Mr. Beisner's associates, that's how things were left. If
11 it's every two weeks, then at least we know that. If it's
12 going to be a two-week deal and not a one-week deal that's --

13 THE COURT: It doesn't much matter to me. It
14 shouldn't matter in terms of the volume, but --

15 MR. SCOTT ANDRESON: It only matters in that we had
16 all generally agreed that the NHL would be substantially
17 complete with its document production, which we've been told
18 is going to be hundreds of thousands of documents by July 1.

19 THE COURT: Right.

20 MR. SCOTT ANDRESON: And at the pace we're on,
21 either we're not going to get there, or we're going to get a
22 few documents and a few documents and then we're going to get
23 200,000 on June 30th. Neither one of them seems to be a
24 good outcome.

25 THE COURT: I thought I'd address it after 30 days

1 and see because I think I said to you folks we can't have
2 end-loading.

3 MR. SCOTT ANDRESON: Right. And we just want to
4 avoid that. We're ready to review documents as fast as they
5 can get them to us.

6 THE COURT: All right. Well, perhaps, Mr. Connolly,
7 is a weekly production feasible or --

8 MR. CONNOLLY: Your Honor, I'll check on that. You
9 know, some of it involves a lot of processing and coding and
10 batching. We will get them a large number of materials that
11 will keep their reviewers busy next week, and then regular
12 thereafter, yes, Your Honor. It'll go much -- as we indicated
13 at the informal conference, it's much faster once we're
14 getting into the electronic materials. And we indicated, and
15 maybe we previewed the concerns here, that there was going to
16 be a smaller batch in the first load because it was paper
17 material. But we're going to -- we'll -- they'll have enough
18 to review.

19 THE COURT: Okay.

20 MR. SCOTT ANDRESON: May I ask, are we done with the
21 paper material?

22 MR. CONNOLLY: We're done with the first part of the
23 paper material. There will be more paper material coming.

24 MR. SCOTT ANDRESON: Sure. Okay.

25 Thank you, Judge. I think it's on everybody's

1 radar. We can talk about it again in May at the informal
2 discovery conference.

3 The other issue that I'd like to raise with the
4 Court is when the NHL served its responses to our original
5 requests for documents. They served, I think they had
6 included 24 general objections and objections to every one of
7 our 63 requests. Not all that surprising, quite frankly. And
8 more than anything, I'd like to report to you that we have
9 worked through and resolved through the meet and confer
10 process essentially all but one dispute. And we started with,
11 you know, 80 objections, and there's been letters and hours
12 and hours and hours spent on the telephone. But there's one
13 area where we have met and conferred several times, and I
14 think we're just at an impasse and we need the Court's
15 assistance.

16 THE COURT: Do you want to brief that issue?

17 MR. SCOTT ANDRESON: I have a suggestion, subject to
18 the NHL's thoughts and Your Honor's thoughts, which is to do
19 it on an expedited basis, letter brief. Maybe we even have
20 you resolve it at the next May 15th informal discovery
21 conference. And we say that because it's a critical issue,
22 and that is we've requested documents related to the NHL Board
23 of Governors. The NHL Board of Governors is the governing
24 body of the NHL. The -- it is comprised generally of the
25 owners of each of the teams and then there are alternates that

1 they designate. All right? These are the people that make
2 and vote on the policies and rule changes of the NHL.

3 And we asked for their documents relevant to
4 concussions, sub-concussive blows, head hits, longterm
5 neurological damage, correspondence related to the same. The
6 Board of Governors holds biannual meetings. We've asked for
7 meeting minutes, we've asked for the notes. We've asked for
8 those documents not only from the NHL, that the agenda maybe
9 that Commissioner Bettman's office sends out, but also from
10 the Governors themselves.

11 And the NHL has taken the position that it will
12 provide any documents that it has from its own custodians,
13 meaning not from the Governors but any documents that maybe
14 Commissioner Bettman has or some of their other custodians,
15 the NHL says, we'll give you those documents relevant to your
16 requests, but we are not going to get the documents in the
17 possession of the Board of Governors themselves.

18 THE COURT: And I'll ask the NHL in a minute why,
19 but what is the -- is the argument that they're not employees
20 or --

21 MR. SCOTT ANDRESON: The argument is you got to go
22 to the teams for that because these guys are the owners of the
23 teams.

24 THE COURT: Okay.

25 MR. SCOTT ANDRESON: And as Your Honor could

1 probably perceive from the last informal discovery conference,
2 the teams aren't overly excited to provide us with any
3 documents, much less documents from the owners of their clubs.
4 And quite frankly, this request is directed and is most
5 appropriately directed to the NHL. This is its governing
6 body. And it is directly nearly tailored, their request three
7 and four, we'll deal with the actual text of them later if we
8 do letter briefs or whatever, but this is related to the very
9 issues in this lawsuit at the highest levels of the NHL. And
10 the NHL is saying, we're not going to go get those documents
11 for you. I'm sure they have -- they will explain to you their
12 reasonings, but thus far, the only reasoning we've been given
13 is that's more appropriately obtained from the teams in the
14 process of third-party discovery.

15 And I'll let Mr. Davidson address how that's being
16 addressed with the teams. At the end of the day, somebody
17 needs to give us these documents and we think it's
18 appropriately the NHL. So, having surfaced the issue, this is
19 what I'd like to propose because it is a critical issue in
20 terms of getting discovery moving in this case, and so I don't
21 really -- I would prefer not to put it on a formal briefing
22 schedule to be argued in June and then decided in July and so
23 on, after the document production is to be over. So, what I
24 would propose is that we -- we start from the premise that the
25 Court will address this issue at the May 15th informal

1 discovery conference and we will do an abbreviated letter
2 brief.

3 We don't need to write a 20-page brief on this
4 subject. It seems very -- very discrete to us. We would
5 submit a letter brief to the Court and serve it on the other
6 parties by May 1. We'd ask the NHL to respond by May 8. Any
7 reply, we would provide by May 12th. And we'd be prepared to
8 discuss it with Your Honor on May 15th. We're open to, if the
9 NHL wants to do different dates or if Your Honor wants to do
10 different dates within that confines, we simply would like to
11 do it on an expedited basis and on a letter brief basis.

12 Thank you.

13 THE COURT: Thank you.

14 Mr. Beisner.

15 MR. BEISNER: Your Honor, if I may. I'm a little
16 surprised that this issue is being raised today. There have
17 been substantial discussions on this, but I was just looking
18 for the last e-mail on this was that everyone was going to go
19 back and think further about this. And that's what I'd
20 suggest we do. I have no objection to the briefing schedule
21 that's being proposed for the next discovery conference if we
22 don't have a resolution of that. But I thought we were going
23 to go back to our corners and think about this a bit further.

24 THE COURT: Well, I vote for all of the above. So,
25 we'll do the briefing schedule, and if you want to resolve it,

1 more power to you. Okay.

2 MR. SCOTT ANDRESON: We'll be happy to talk with
3 Mr. Beisner afterwards, and if we can resolve it without
4 sending you letters, all the better.

5 THE COURT: Okay.

6 MR. BEISNER: Yeah, and I'm probably not the
7 person --

8 MR. SCOTT ANDRESON: I'll talk to --

9 MR. CONNOLLY: We'll set up a call and deal with
10 that.

11 MR. DAVIDSON: Good afternoon, Judge. Stuart
12 Davidson also on behalf of the Plaintiffs to handle a couple
13 of the next items on the agenda.

14 The first one is fairly simple which is that the
15 parties have negotiated an amendment to the Court's protective
16 order to solely address HIPPA. HIPPA has a litigation
17 exception, as the Court may know, that allows for documents to
18 be produced that contain protected health information subject
19 to a qualified protective order. We have slightly amended the
20 Court's protective order and -- to address solely HIPPA. I
21 know that both the teams and the NHL have continued objections
22 that are going to be briefed shortly before the Court
23 regarding other state or statutory or common law privacy
24 rights that may apply or may not apply. But this protective
25 order that we've negotiated and is in final form that we want

1 to bring to the Court's attention, let you know that our
2 intention is to file with the Court is a proposed amended
3 protective order if the Court would accept it.

4 THE COURT: Absolutely. Okay.

5 Mr. Beisner?

6 MR. BEISNER: Your Honor, with respect to the order,
7 I think that we don't have any objections, the League does
8 not, with respect to that order. The one issue that I did
9 want to raise is just sort of timing of entry issues because,
10 as Counsel indicated, I think that's sort of at the center of
11 what's going to be debated in the briefing on the privacy
12 issues. I'm not sure there's a huge harm in entering the
13 order, but I think that without those issues being resolved,
14 I'm not quite sure what purpose that serves. I think there's
15 going to be a debate about whether that order makes any
16 difference and so on, and it was just a suggestion, the Court
17 may want to wait to enter that order. Obviously, there's
18 agreement, we have no objection to entering it, so in terms of
19 the briefing it could be assumed that it will be entered. But
20 I just --

21 THE COURT: I'm not sure it matters either way.

22 MR. BEISNER: I just wanted to note to Your Honor
23 that there is going to be a dispute, I think, about what it
24 means and whether it's a HIPPA-compliant order, but I think
25 you're going to get arguments that these documents are really

1 subject to ADA and other issues. But in any event, I just
2 wanted to note that for the Court, that we may be back doing
3 something else with that order later.

4 THE COURT: Okay. All right.

5 MR. DAVIDSON: And I'm not sure that the issues that
6 the Court is going to be resolving with respect to state
7 statutory or common law privacy rights has anything to do with
8 a protective order. But perhaps it does.

9 THE COURT: But, again, I'll go ahead and enter it,
10 and if it does, it does, and we'll address it at the time.

11 MR. DAVIDSON: Sure. Sounds good, Judge. Thanks.

12 So kind of buttressing what Mr. Andreson was talking
13 about, and let me give you a little bit of an update as to
14 where we are on third-party discovery and most importantly
15 with respect to the U.S. NHL clubs. I had promised
16 Mr. Schmidt, who was before Your Honor at the last informal
17 conference, from Bryan Cave, that I wouldn't go into the
18 substance of any disputes because he would like to be present
19 and, quite frankly, he's right. But I want --

20 THE COURT: And will he be there on May 15th?

21 MR. DAVIDSON: I believe he will, and I have told
22 him about the hearing, so he's -- but I will communicate it
23 again to him.

24 THE COURT: Okay.

25 MR. DAVIDSON: But -- so just so the Court knows

1 where we are, there is that protected health information
2 dispute that we still have that we're briefing, as the Court
3 knows. The teams have lodged a number of other objections, as
4 the Court is aware, and what Mr. Schmidt has proposed to us
5 that instead of the -- in lieu of the objections that we would
6 agree to custodians and search terms and that's what we're
7 trying to do.

8 And just kind of buttressing what Mr. Andreson was
9 saying, one of the things that they may be objecting to is
10 including their Governors and their alternate Governors as
11 custodians, putting us in the catch-22 of where the heck are
12 we going to get these documents from? So, that, however, is
13 still being negotiated with Mr. Schmidt. We've given him our
14 proposed search terms which are much more narrowly -- much
15 more truncated than what we agreed to with the NHL, and I
16 believe we're going to be able to work out other custodians.
17 So, we're getting there with the NHL teams and hopefully we'll
18 have an update on that on May 15th. And if the Governors
19 issue hasn't been resolved with Mr. Schmidt, then that will be
20 also up for discussion on the 15th.

21 The other issue that the Court should be aware of is
22 that the Canadian teams are not going to be cooperative on
23 their own. They're -- they also are asking us to go through
24 the whole letters rogatory process. I am encouraged that
25 Mr. Shanahan is saying that once we start the process, he'll

1 be more cooperative. I haven't heard that from any of the
2 Canadian teams. This process is not a simple, nor a short
3 process. So, I expect that it may take some time to actually
4 start getting documents from --

5 THE COURT: When do you expect to start the letters
6 rogatory process?

7 MR. DAVIDSON: We're in the process, as we speak. I
8 mean, we're starting the process. We are in the process right
9 now of retaining Canadian counsel to assist us with that.

10 THE COURT: Okay. Because we had talked about that
11 at the last conference, and I hope you'll move ahead with
12 that.

13 MR. DAVIDSON: We're trying as fast as we can,
14 Judge. So, that's pretty much where we are. We are getting
15 documents from Dr. Burke, as Mr. Grygiel mentioned. We got
16 documents from Dr. Lovell and ImPACT, which collected the data
17 and analyzed the data for the concussion program. So, things
18 are moving along on the third-party discovery front.

19 And if the Court has any other questions, that's my
20 update.

21 THE COURT: Thank you.

22 MR. DAVIDSON: Thanks.

23 THE COURT: All right. How about Plaintiffs'
24 discovery?

25 MR. BEISNER: Your Honor, on the discovery from

1 Plaintiffs, we've had a number of discussions with Plaintiffs'
2 counsel with respect to the document requests and
3 interrogatories that we served. They've been supplemented
4 once. We've gone back again saying we believe that further
5 supplementation is necessary. I think we can reserve for the
6 discovery conference issues we have there, but I did want to
7 note one significant priority that we have. As it turns out,
8 all six of the Master Complaint named Plaintiffs filed
9 sometime earlier workers' comp claims, many of which involve
10 head injury issues in California. And we think it's critical
11 to get the files with respect to those proceedings from their
12 counsel in the proceeding, in those six proceedings, because
13 for statute of limitations purposes, as well as diagnoses and
14 medical exams and so on in the course of those proceedings,
15 some of which are a number of years old, is going to be pretty
16 critical. So I don't think we need to explore that any
17 further now, but that's going to be a very high priority for
18 us.

19 THE COURT: Okay.

20 Yes.

21 MR. CASHMAN: Good afternoon, Your Honor. Michael
22 Cashman for the Plaintiffs.

23 And I'd like to address Mr. Beisner's point right
24 off. We have had discussions about the workers' comp files
25 that the six named Plaintiffs have, and we have been working

1 with the six named Plaintiffs' lawyers in California to obtain
2 their files. And we have told Mr. Beisner that we will
3 produce the responsive, non-privileged documents from those
4 files. So, we're being proactive about gathering documents
5 from sources where we have some control over it. And I think
6 that is in contrast to the situation we discussed earlier
7 about the Board of Governors. We are being proactive in our
8 gathering and will produce the information. We have gathered
9 it for five of the six, and that's ready to go. We have one
10 more of the six named Plaintiffs where we're gathering those
11 workers' compensation documents. As soon as we get it and as
12 soon as we've had a chance to review it, we're going to
13 produce it. And I hope that will be done in the next week or
14 so.

15 Also on Plaintiffs' discovery, since we're on the
16 subject, Your Honor, we've responded to interrogatories, we've
17 supplemented. The NHL has asked us a few questions to follow
18 up on it, and we're in the process of doing that. We've
19 gathered the information to the extent it exists, and we've
20 promised to supplement all of the questions that have been
21 raised about our interrogatory answers.

22 So I guess that brings us next on the agenda to the
23 Plaintiff Fact Sheets.

24 THE COURT: Yes.

25 MR. CASHMAN: And I've had discussions with

1 Mr. Beisner about those. Pursuant to the Court's direction at
2 the informal conference, we've had discussions about the
3 scope. The NHL has provided me with a revised Plaintiff Fact
4 Sheet. I think we still have some discussions to do over some
5 of the items, and our goal is to make it as a fair and not
6 overly -- overly burdensome process for the people who do fill
7 out those Plaintiff Fact Sheets. We feel it shouldn't be a
8 duplicate, essentially, of all the discovery that has been
9 served in the case on the six named Plaintiffs.

10 But we're continuing to work that through.

11 Mr. Beisner may have some comments on that. And then I expect
12 we'll have a discussion about process. We've been, I think,
13 initially having some discussions about how to make it most
14 efficient for those who do fill out these sheets in a way that
15 the Plaintiffs can use, that works for the NHL, and for the
16 Court. So, I expect we'll have further discussions on that
17 and we'll keep you updated on that as we go forward.

18 THE COURT: Thank you.

19 MR. CASHMAN: Thank you, Your Honor.

20 THE COURT: Mr. Connolly.

21 MR. CONNOLLY: Yes, Your Honor. Just on the
22 Plaintiff Fact Sheet issue, addressing a little bit what
23 Mr. Cashman just talked about, we had, as you know, the
24 informal status -- discovery conference on April 7th. We had
25 a meet and confer with Mr. Cashman and Mr. Zimmerman on

1 April 10th, so on Friday. We then sent them a detailed
2 redline reflecting the comments and questions that they had
3 on -- a week ago, on the 16th, last Thursday. And we haven't
4 heard any response from Plaintiffs on that. And as Your Honor
5 will recall at the informal discovery conference, the idea was
6 to have these Fact Sheets done by today, and that's reflected
7 in the post-conference order that Your Honor issued.

8 We're certainly willing to meet with Plaintiffs and
9 figure out these very last small items, but what Mr. Cashman
10 was talking about there seems a little bit more wholesale than
11 responding to the red line that we gave. And we think that
12 it's important to get these completed post-haste.

13 THE COURT: Okay.

14 Mr. Cashman?

15 MR. CASHMAN: Just one comment, Your Honor. And
16 certainly we've been mindful of the need to move this along
17 and as we discussed at the last conference, this is really
18 being proactive, looking down the road, what we might be
19 looking at in the future. But when I mentioned the burden and
20 the process, that's a critical part of this process because we
21 don't want to set up a situation where there's unnecessary
22 deficiency arguments which will create a whole nother layer of
23 complexity, so I think there is further discussion that's
24 required, and I certainly intend to pick that up with
25 Mr. Beisner and Mr. Connolly.

1 THE COURT: Do you expect that all of that could be
2 finalized by our next informal conference?

3 MR. CASHMAN: Absolutely.

4 THE COURT: Okay.

5 MR. CASHMAN: Thank you, Your Honor.

6 THE COURT: Very good.

7 Mr. Beisner?

8 MR. BEISNER: Yeah, if I may, not to leap into the
9 middle of the stand. I guess I'm a little confused by that
10 response. I think where we ended up at the discovery
11 conference, Mr. Zimmerman I think had talked about some
12 potential computerized process and so on. But I think where
13 we came out on all of this was that we would do the Fact
14 Sheets with respect to the Plaintiffs that we have now, the 59
15 that -- well, taking -- leaving aside the six, the remainder
16 of that, the good old-fashioned way and get them written and
17 turned in. And I think that's the way to do that most
18 efficiently.

19 If there's a discussion about some more elaborate
20 process for future usage someday, I think we can do that, but
21 we don't really need to complete that now. We're happy to
22 engage in that discussion, but I don't think that's necessary
23 for these Fact Sheets that we have now.

24 THE COURT: Okay.

25 MR. CASHMAN: That's right. We are talking about

1 the process as a separate issue. Right now the primary focus
2 is the scope, so I think we're on the same page.

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

4 I'm sorry.

5 MR. ZIMMERMAN: I don't want to complicate it. I
6 think we all know what we're talking about. We're trying to
7 have a process and we're trying to have a Fact Sheet that
8 isn't too burdensome but can be done that we'll agree on.
9 We're working hard on it. We think we'll have it done by
10 the -- we will have it done by the 15th. And if we don't have
11 it done on the 15th, there will be something for you to give
12 us the thumbs up or thumbs down on and then after the 15th, it
13 certainly will be done if we have some disagreements --

14 THE COURT: All right. Okay.

15 MR. ZIMMERMAN: -- because I want it to be finished
16 and available.

17 THE COURT: Before we get to the next item, I think
18 it would help me -- I have another big case like this that's
19 moving along, and I'm starting to confuse deadlines in my head
20 and stuff. It would help me if you would do submissions. I
21 know it's just an added burden to you, but it's nice to have
22 the chronological submissions, too, in writing to me. And so
23 let's start with the informal conference. If you could give
24 me your update in writing two days before the conference, I
25 would appreciate it.

1 MR. ZIMMERMAN: Your Honor, you're not talking about
2 an agenda, you're talking about a systematic --

3 THE COURT: Right, something more than an agenda,
4 sort of a summary, if you will, of where things are from the
5 last conference. It gives me a historical written record. I
6 don't have to rely as much on my memory and my notes, and I'd
7 prefer to do that.

8 All right. Here we go again.

9 Mr. Zimmerman.

10 MR. ZIMMERMAN: I'd like to hand something to Your
11 Honor.

12 THE COURT: Okay.

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

14 MR. ZIMMERMAN: This is the statement that I was
15 asked by Your Honor to write and I did that I am hopeful is
16 accurate. I believe is very accurate with regard to what was
17 said, and that I would plan on putting on our website and
18 publishing -- I don't mean publishing, but I mean allowing to
19 be out for players to understand to be the position on
20 non-retaliation. I believe that we have all heard the Court
21 and we have all heard each other out and that Mr. Beisner and
22 the Plaintiffs see things slightly differently with regard to
23 who should say what or what's public and what's coming from
24 the Court. But I don't think we disagree about anything that
25 is said within the four corners of this.

1 And I would be of the mind that I am free to publish
2 this position. I would like the Court to put that on the
3 Court's website, as well, but that's within the discretion of
4 the Court. I'm not asking the Defendant to do anything with
5 regard to this statement. And so that's the statement that I
6 sent to John on the 15th, after our informal, and that's the
7 statement that the Plaintiffs have vetted and I believe it's
8 the statement that accurately reflects what took place in your
9 chambers.

10 THE COURT: Very good.

11 Mr. Beisner.

12 MR. BEISNER: Your Honor, I -- we understood that
13 this would be something we would be discussing in the informal
14 discovery conference setting, and I think that's where it
15 should remain. We have significant issues with this approach,
16 as we articulated in the session with Your Honor. If there's
17 need for briefing on this issue, I suggest that we do it for
18 the next discovery conference, but this is not -- this is not
19 acceptable to the League.

20 THE COURT: All right. What I would propose then is
21 that you each provide a brief, letter brief, on this issue.
22 Mr. Beisner, I'd like you to respond at least to
23 Mr. Zimmerman's statement to tell me whether you believe it's
24 adequate or inadequate and why. And then we will discuss it
25 on May 15th, and I will make a decision then. Okay?

1 MR. BEISNER: Thank you, Your Honor.

2 THE COURT: All right. Why don't you come up with a
3 schedule. We could use the same schedule that Mr. Anderson
4 [sic] came up with for this. Okay?

5 All right. Did you want to talk about any other
6 items that we should put on the agenda for the next status
7 conference?

8 MR. ZIMMERMAN: This is the one that always scares
9 John when I have -- (laughter) -- but the answer is no, I
10 don't have anything further.

11 MR. DAVIDSON: Your Honor, if I could just make one
12 recommendation --

13 MR. BEISNER: I -- (laughter) -- (multiple inaudible
14 words due to overlapping speakers) --

15 MR. DAVIDSON: It just popped in my head.

16 THE COURT: Okay, go ahead.

17 MR. DAVIDSON: It was perhaps in a minute entry
18 about this status conference, that the Court might invite
19 Mr. Schmidt again to the next informal discovery conference.

20 THE COURT: Yes. Okay. We will do that. But let's
21 not make that the only invitation. Mr. Beisner, if you would
22 contact him, I'd appreciate it.

23 MR. BEISNER: Your Honor, we certainly will do that.
24 And it may not surprise the Court that I agree with
25 Mr. Zimmerman that we don't have anything else this afternoon.

1 THE COURT: Okay. Anything further today from the
2 Plaintiffs?

3 MR. GRYGIEL: One thing, Your Honor, it's a
4 scheduling issue. I misspoke earlier when Your Honor asked me
5 if I would be at the next informal scheduling conference on
6 May 15th. And, of course, I hastily said yes without
7 realizing, I'm looking right at my notes, I'm deposing
8 Dr. Burke that day. I suspect Dr. Burke wouldn't like the
9 pleasure of my company any more than the Court would; but if
10 it's okay with the Court, we'll have two other people on our
11 team who will be fully conversant with all the issues I would
12 have brought up.

13 THE COURT: That's fine. That's fine.

14 MR. GRYGIEL: Thank you, Your Honor.

15 THE COURT: Anything further from the Defense today?

16 MR. BEISNER: No, Your Honor.

17 THE COURT: Very good. Pleasure to see you as
18 always. Court is adjourned.

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

20 (Concluded at 4:36 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

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