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November 7, 2022

Via ECF

The Honorable Nicholas Garaufis
The Honorable Marcia Henry, Magistrate Judge
United States District Court for the Eastern District of New York
225 Cadman Plaza East, Room 1426 S
Brooklyn, NY 11201

Re: *In Re: Exactech Polyethylene Orthopedic Products Liability Litigation*
MDL No.: 3044, 1:22-md-0344-NGG-MMH

Dear Judge Garaufis and Magistrate Judge Henry:

I write on behalf of myself and my colleague Kirk Pope of the Atlanta firm, Pope McGlamry. Together we represent 23 federally filed Exactech cases as well as many other cases that will be filed in the coming weeks. Our firms were the two Plaintiffs' counsel appearing at the JPML hearing. I also write on behalf of many other Plaintiffs' counsel who also represent numerous individuals with cases filed in federal court which have been transferred or are in route to the MDL. Prior to the formation of the MDL and continuing thereafter, there has been a regular Zoom meeting attended by counsel with cases in Florida state court and federal court to coordinate and discuss the evolving recalls and their import. I have reached out to all counsel I was aware of who have federal filed cases and many such counsel are meeting at my office the day before the status conference to further coordinate so that ideally, we can speak in a united fashion on November 16th. I will

endeavor to address the issues the Court addressed in its October 17, 2022 Docket Order and since this letter is on behalf of numerous law firms, we ask the Court's indulgence since it exceeds three pages.

A. LEADERSHIP COUNSEL AND COMMITTEES

We are endeavoring to put together a consensus slate of individuals seeking leadership positions which we could be prepared to discuss at the conference or submit promptly thereafter, once we learn of Your Honor's position as to the process and size of the committee(s). Because this litigation presently involves both knee and hip prostheses and is likely to include ankles as well, with a recall that dates back to 2004, we believe we need two co-lead counsel who will serve on an Executive Committee with three other attorneys, and a robust Plaintiff Steering Committee and other sub-committees to capably handle these related but separate cases. Because there has been a series of recalled hip implant litigations over recent years, there is a core group of counsel who have focused much of their practice on orthopedic product liability litigation MDLs such that we expect to submit a very qualified group of leadership counsel.

B. STATUS OF DISCOVERY

Kirk Pope and I virtually met with defense counsel, Kim Schmid and Sheryl Bjork, on November 1, 2022 to discuss pending matters. We made suggestions as to an initial simplified discovery process to get the MDL up to date with the Florida state court litigation. The discovery suggestions included:

1. **PROTECTIVE ORDER:** We apprised Defendants we believe we have consensus amongst other Plaintiffs' counsel to accept the Protective Order entered in the consolidated Florida proceedings on September 27, 2022. *See* Dkt. No. 2 at Ex. 4. The Florida Protective Order was the result of months of negotiations and it seems sensible to agree to the same order to avoid additional delays, and it would simplify and streamline Defendants' productions. While we might have negotiated some terms differently, we recognize the value in not re-inventing the wheel and incurring discovery delays. Defense counsel has not agreed to enter the Florida Protective Order in the MDL and we hope that we can address any disagreement they have with the Order at the conference, or if necessary, establish an expedited and streamlined briefing process so the Order can be promptly entered and enable MDL counsel to begin to receive the documents already produced in Florida. Alternatively, we agree to Magistrate Judge Henry's Form Protective Order.
2. **ESI ORDER:** An ESI order was entered on September 20, 2022 in the consolidated Florida proceeding. *See* Dkt. No. 2 at Ex. 3. We apprised defense counsel that the group of attorneys we have coordinated with would be willing to accept the Florida ESI order even though we had some issues with the email threading provision. However, to avoid re-litigating the issue, we are willing to accept the Florida ESI order so that Defendants' productions can be produced in the same manner/format in both litigations with no extra cost or delay. However, as to individual plaintiff discovery, we advised Defendants that we had one issue with the ESI order as it applied to the Plaintiffs' production which involve requiring individual

plaintiffs to have to have an electronic vendor produce metadata of any responsive emails or social media. Our position is that this seems unnecessarily expensive and cumbersome for the anticipated hundreds to thousands of mostly elderly plaintiffs. We can address the Plaintiffs' ESI obligations separately as its resolution will not impact the more time sensitive production of Defendants' documents. Production of the most important documents from Plaintiffs, their medical records, would not be impacted since those are records generated by the hospitals and surgeons.

3. **ELECTRONIC VENDOR:** Our colleagues in the Florida litigation felt it necessary to select an electronic vendor to host their rolling document productions and were unwilling to wait for this Court to select leadership so they urged our consortium working group to agree upon a vendor so we could have cost sharing. We participated in a committee reviewing the attributes of several vendors and their pricing, met with vendors to test run their hosting capabilities, and jointly agreed upon what we believe to be the right choice. While we have no official status until the Court selects leadership counsel, since the Florida counsel needed an answer, and we believed that the process was transparent and there was overwhelming consensus on the vendor selected, we do hope we can continue with that vendor for the MDL once the official committee is appointed.
4. **PRODUCTION OF DOCUMENTS PREVIOUSLY PRODUCED AND PENDING DISCOVERY DISPUTES:** Along the same lines, the easiest way to jump start the litigation is to obtain the documents already produced in the Florida State Court litigation and the few other cases that were in litigation earlier. Very simple document demands seeking three categories of documents: documents previously produced, transcripts of prior depositions, and expert reports/depositions in such prior cases have been made to that effect in two of Weitz & Luxenberg's cases in which Exactech has answered: *Alexander Berger and Rona Berger v. Exactech, Inc., et al.* (1:22-cv-03158) (knee) and *Michael A. Insdorf and Debbie Insdorf v. Exactech, Inc., et al.* (1:22-cv-06100) (hip).¹ Counsel's response today is that this, among other requests, are premature.

We understand a case in this MDL that was filed last year, *Kevin G. Patterson v. Exactech, Inc.*, Case No. 22-cv-6095, had some preliminary production. Disputes set forth in a letter to Judge Schofield in the Southern District of New York before the transfer of the case to the MDL were raised by Mr. O'Kelly, counsel for Mr. Patterson, in a separate status letter to this Court. We share in Mr. O'Kelly's concerns, especially about Defendants' unwillingness to produce exemplar devices (unused devices) that should be produced to Plaintiffs for expert analysis and testing.

Pope McGlamry served document requests on June 17, 2022 in *Wilson v. Exactech, Inc.*, Case No. 1:22-cv-06170, when it was pending in the Eastern District of Arkansas. Plaintiff propounded specifically tailored requests for production that are directly relevant to this litigation. On July 18, 2022, Exactech served its objections and responses. Plaintiff disagrees

¹ Most cases had extensions granted allowing Defendants additional time to file a responsive pleading pending the formation of the MDL and the first status conference.

with the limited scope of discovery Exactech seeks to impose and this will be the subject of future discussions amongst counsel. Exactech otherwise agreed to produce responsive documents including the Design History File, Design History Record, Product Safety Alert, SOPs, Operative Techniques, Instructions for Use, 806 Reports, FDA 483 Reports, and other documents following entry of a protective order.

Further, Pope McGlamry was recently retained as trial counsel in a knee case *Collum-Bradford v. Exactech*, filed in December 2019 in California state court, San Joaquin County. Documents and answers to interrogatories and responses/objections to a corporate representative deposition have been served by Exactech. While Pope McGlamry can now only use those documents in that one case, they should be deemed produced here as well so the MDL discovery committee can get to work as soon as possible.

Finally, there is a related, but slightly different *qui tam* case against Exactech pending in the Northern District of Alabama that is set for trial November 28, 2022 after years of litigation. While the defect at issue involved a particular tibial tray which Exactech will argue is unrelated; in fact, some of the Plaintiffs in the MDL will have received that tibial tray. Additionally, these Plaintiffs all had the polyethylene inserts that were recalled and involved in some of the revision surgeries that Medicare paid for, which is the basis of the *qui tam* action for failing to timely report revision surgeries. Thus, those documents should be produced here as well. *See United States ex. Rel Wallace v. Exactech, Inc.*, Dkt. No. 184, Case No. 2:18-cv-01010.

C. STATUS OF PRIOR MOTIONS

While Defendants sought leave in a few select cases to make motions to dismiss, since the MDL petition was pending, permission had not been granted and motions were not filed. There was, however, a Motion to Dismiss for Failure to State a Claim filed on June 28, 2022 in *Billups v. Exactech, Inc.*, Case No. 1:22-cv-06087 (EDLA). All proceedings were stayed by Judge Vance on August 11, 2022 due to the MDL pendency.

Having briefly reviewed Defendants' letter before this was filed, Defendants reference three other pending motions, including a motion pending in *Brickman*. However, an amended complaint was filed on behalf of *Brickman* and there is no motion currently pending.

D. PLEADINGS

The Plaintiffs believe at the outset certain Orders and agreed upon forms could help advance the litigation.

- 1. DIRECT FILING ORDER:** Plaintiffs believe it is beneficial to have a direct filing order implemented as soon as possible. This will enable counsel to directly file in the MDL Court. This would obviate the need to file in the Plaintiffs' or Defendants' home district and then have the case conditionally transferred to the MDL. As is typical with direct file orders, the plaintiff would indicate in the complaint the court they believe the

case would be appropriate to transfer after completion of the MDL on remand. A draft copy of such an order could be provided to Your Honor in advance of or at the conference, but we do not want to be presumptuous and attach it here.

2. **LONG FORM/SHORT FORM COMPLAINTS:** One of the matters we discussed with defense counsel in our Zoom conference was their desire to implement a process for long and short form complaints. We advised Defendants that we did not see any great need for such form pleadings, but the Plaintiffs' group on whose behalf we were speaking, would be willing to engage in that process if Defendants agreed that discovery could commence right away as opposed to building in the delay of the drafting of the form complaints and then having Defendants answer or move on those pleadings. In that this litigation involves a recall of well more than one-hundred thousand devices that are implanted in many patients, and the device did *not* go through pre-market approval by the FDA, there is no preemption motion that is cross cutting that could dispose of the litigation. Therefore, it would be a disservice to the elderly population to delay discovery for months pending the creation of the form complaints, and service of answers or motions. Instead, if there are to be Long Form and Short Form Complaints, they should occur in parallel with discovery that should commence right away. During the meet and confer, defense counsel indicated they would consider that proposal.

E. CLASS ACTIONS

As to the Court's question about whether there is intent to pursue class actions, as far as we are aware, at this time there is no present intent as these cases involve serious individual injuries not susceptible to class action treatment.

Respectfully Submitted,

/s/ Ellen Relkin, Esq.
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-and-

/s/ Kirk Pope, Esq.
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cc: All Counsel of Record via ECF