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April 24, 2023

VIA ECF FILING

Honorable Nicholas G. Garaufis, District Judge
Honorable Marcia M. Henry, Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: MDL No. 3044, *In re: Exactech Polyethylene Orthopedic Products Liability Litigation*, 1:22-md-03044-NGG-MMH

Dear Judge Garaufis and Magistrate Judge Henry:

Pursuant to this Court's order of March 23, 2023, the Personal Injury Plaintiffs and the Exactech Defendants have met and conferred on a Joint Proposed Discovery Case Management Order ("Joint Discovery Plan") governing master discovery between the Personal Injury Plaintiffs and the Exactech Defendants. [ECF 165].

Although the Parties have reached agreement on some aspects of a Discovery Plan, the Parties cannot reach complete agreement on a Discovery Plan. Accordingly, the Parties will each propose a Discovery Plan:

- The Personal Injury Plaintiffs' Proposed Discovery Plan is attached hereto as Exhibit A.
- The Exactech Defendants' Proposed Discovery Plan is attached hereto as Exhibit B.

The Parties jointly request until Wednesday April 26, 2023, to file three-page letter briefs in support of their respective Proposed Discovery Plans.

Respectfully submitted,

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Counsel for Defendants Exactech, Inc.

Exactech U.S., Inc.

CC: All ECF Counsel of Record

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

.....X

*IN RE: EXACTECH POLYETHYLENE
ORTHOPEDIC PRODUCTS LIABILITY
LITIGATION*

Case No.: 1:22-md-03044-NGG-MMH

MDL No. 3044

**[Proposed] Discovery Case Management
Order Governing Master Discovery
Between Personal Injury Plaintiffs and the
Exactech Defendants**

Judge Nicholas G. Garaufis

This Document Applies To:

Magistrate Judge Marcia M. Henry

All Cases

.....X

This Discovery Case Management Order Governing Master Discovery (“Discovery Order”) submitted by stipulation between Defendants Exactech, Inc. and Exactech U.S., Inc. (“Defendants”) and the Personal Injury Plaintiffs (together, the “Parties”) pursuant to this Court’s Order of March 23, 2023 (Dkt. 165). Accordingly, it is ORDERED as follows:

1. Consistent with Case Management Order No. 1, the MDL Plaintiffs' Lead Counsel ("PLC") will maintain a single electronic document depository for the use of the Plaintiffs in the MDL and the cases coordinated on the Exactech Master Case docket (Case No. 01-2022-CA-2670) in the Eighth Judicial Circuit of Florida, Alachua County ("Florida Coordinated Actions") ("MDL Document Depository"). (Dkt. 87). Production to the MDL Document Depository by Defendants shall constitute production to the Plaintiffs in the MDL and the Florida Coordinated Actions (Dkt. 87), and any other state court actions that agree to coordinate discovery fully and formally with these proceedings.

2. Production to the MDL Document Depository or service of any other discovery by Defendants will be accomplished by serving and providing a cover letter to the Lead Counsel in the MDL and Florida Coordinated Actions stating what Bates stamped documents are being produced on a given date and identifying which document request(s) they are responsive to.

3. All discovery conducted in the MDL, including documents, data, and deposition transcripts, may be used in the MDL Proceeding, the Florida Coordinated Actions, or any other state court actions that agree to coordinate discovery fully and formally with these proceedings, in accordance with this Order, as if conducted in the proceeding in which the discovery is sought to be used. This provision is not intended and does not supersede applicable discovery or other procedural orders entered in each separate proceeding.

4. All discovery propounded to Defendants and non-party witnesses by Plaintiffs in the MDL shall be undertaken by, or under the direction of, the PLC on behalf of all Plaintiffs with cases in the MDL.

5. Discovery in the MDL shall be conducted in accordance with the Federal Rules of Civil Procedure and the Local Rules and Orders of the MDL Court, including the MDL Discovery Orders, as interpreted by the MDL Court.

6. Production at an Indeterminate Time. Federal Rule of Civil Procedure 34(b)(2)(B) states that a production must be “completed no later than the time for inspection specified in the request or another reasonable time specified in the response.” Hence, unless otherwise agreed between the interested parties, and unless all unobjectionable materials are being produced contemporaneously with the written response, the response must specify a date by which production will be completed; the respondent may adopt the date proposed in the request or may propose its own reasonable time, after consultation with opposing counsel.

Absent compelling circumstances, the Court expects the parties to engage in the rolling production of documents. Proposed Discovery Schedule Exhibit A includes a production schedule, including the order in which categories of documents will be produced, and a good faith estimate of the date by which production will be completed. The parties will be in the best position to assess the timing of discovery. Therefore, the parties may agree to a longer period for production than what is stated in the Federal Rules or Local Rules, without leave of Court.

7. Objections Based upon Privilege - Requests for Production and Interrogatories: If a general objection of privilege is made without providing a proper privilege log, the objection of privilege may be deemed waived. The production of non-privileged materials should not be delayed while a party is preparing a privilege log. The Producing Party shall produce a privilege log within forty-five (45) days after the production of documents from which the documents being logged were withheld based on an assertion of privilege.

8. Plaintiff Preliminary Disclosure Forms, Plaintiff Fact Sheets, Supplemental Plaintiff Fact Sheets, Defendant Fact Sheets, and Supplemental Defendant Fact Sheets are governed by separate Order at Dkt. 90, Dkt. 166, Dkt. 168.

9. Proposed Discovery Schedule: See Exhibit “A” attached hereto.

10. Discovery Disputes. If the parties are not able to resolve disputes arising in the coordinated pretrial discovery conducted in the MDL, including a dispute as to the interpretation of the MDL Discovery Orders, such disputes shall be presented to the MDL Court pursuant to the Court’s Individual Practice Rules. Resolution of such disputes shall be pursuant to the applicable federal or state law, as required, and such resolution may be sought by any party permitted to participate in the discovery in question.

11. Nothing contained herein shall constitute or be deemed to constitute a waiver of any objection of any defendant or plaintiff to the admissibility at trial of any documents, deposition testimony or exhibits, or written discovery responses provided or obtained in accordance with this Order, whether on grounds of relevance, materiality, or any other basis, and all such objections are specifically preserved. The admissibility into evidence of any material provided or obtained in accordance with this Order shall be determined by the Court in which such action is pending.

SO ORDERED.

Date: _____
Brooklyn, New York

NICHOLAS G. GARAUFGIS
United States District Judge

Date: _____
Brooklyn, New York

MARCIA M. HENRY
United States Magistrate Judge

Proposed Discovery Plan/Scheduling Order:

A. ACTIONS REQUIRED BEFORE THE INITIAL STATUS CONFERENCE	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Rule 26(f) Conference held			5/15/2023
2. Defendants' Rule 26(a)(1)(A)(i), (ii), and (iv) disclosures			5/15/2023
3. Requested:			
a. Medical records authorization	X [ECF 166]		3/23/2023 and on a rolling basis as new cases are filed pursuant to ECF 166.
b. CPL §160.50 release for arrest records		X	
c. Identification of John Doe/Jane Doe defendants		X	
4. Procedures for producing Electronically Stored Information (ESI) discussed	X [ECF 88]		1/26/2023
5. Protective Order to be submitted for court approval	X [ECF 89]		1/26/2023
B. SETTLEMENT PLAN	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Plaintiff to make settlement demand			TBD
2. Defendant to make settlement offer			TBD
3. Referral to EDNY mediation program pursuant to Local Rule 83.8 (If yes, enter date for mediation to be completed)		X	
4. Settlement conference (proposed date)			TBD
C. PROPOSED DEADLINES	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Motion to join new parties or amend master pleadings			12/1/2023
2. Plaintiffs' Initial documents requests and interrogatories			4/5/2023
3. Plaintiffs' Preliminary Disclosure Forms			3/13/2023; 30 days from filing SFC; or 30 days from

EXHIBIT A

			transfer into MDL[ECF 168]
4. Plaintiffs' Fact Sheets			6/6/2023; or 75 days from filing SFC; or 75 days from transfer into MDL [ECF 166]
5. Defendant Fact Sheets			15 days of receipt of Plaintiff's substantially complete Plaintiffs' Fact Sheet [ECF 166]
6. Defendants shall produce the document production in the Florida state cases			2/27/2023 [ECF 87]
7. Defendants shall respond to Plaintiffs' initial document requests and interrogatories			5/5/2023
8. The Parties shall agree upon search terms; and if not agreed request a discovery dispute conference with the Court			5/19/2023
9. Defendants initial production of 10 agreed upon custodial files			7/1/2023
10. Defendants to complete production of 10 agreed upon custodial files			10/1/2023
11. The Parties shall agree to the final list of Exactech Custodians (in addition to the 10 agreed upon custodial files) ¹			7/15/2023
12. 30(b)(6) Deposition on ESI issues to be completed			7/1/2023
13. Depositions may commence			6/15/2023
14. Defendants' substantial completion of non-custodial document production			8/31/2023
15. All fact discovery must be completed (including disclosure of medical records for filed cases)			7/31/2024
16. Joint status report certifying close of fact discovery and indicating whether expert discovery is needed			8/2/2024 (Later filed cases would have later fact date cut-offs pursuant to ECF 166 and 168)

¹ Custodians may only be added after that date upon a showing of good cause.

EXHIBIT A

17. Plaintiffs’ experts’ proposed field(s) of expertise:	Orthopedics Biomechanics Pathology Radiology Epidemiology Biostatistics Packaging Regulatory Materials Science Damages ²		
18. Defendants’ experts’ proposed field(s) of expertise:	N/A		
D. CORE DISCOVERY/ BELLWETHER DEADLINES	<u>Done</u>	<u>N/A</u>	<u>Date</u>
19. The Parties shall submit a Bellwether Trial Plan			6/15/2023
20. Plaintiffs’ Supplemental Fact Sheet Due			Within 60 days of selection in a bellwether trial pool [ECF 166]
21. Core Discovery depositions must be completed			TBD in Bellwether Trial Plan
22. Plaintiffs Bellwether expert report disclosures and depositions to be completed			TBD in Bellwether Trial Plan
23. Defendants Bellwether expert report disclosures, and depositions to be completed			TBD in Bellwether Trial Plan
24. Rebuttal expert reports due			TBD in Bellwether Trial Plan
25. Joint status report certifying close of ALL DISCOVERY and indicating whether dispositive motion is anticipated			12/20/2024
26. If any party seeks a dispositive motion, date to a. File request for pre-motion conference (if required), or b. File briefing schedule for the motion			1/12/2025
27. Proposed Joint Pre-Trial Order due (if no dispositive motion filed)		X	

² Additional categories of expert testimony may be necessary depending upon the individual bellwether trials.

EXHIBIT A

D. CONSENT TO MAGISTRATE JUDGE JURISDICTION	
1. All parties consent to Magistrate Judge jurisdiction for dispositive motions?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
2. All parties consent to Magistrate Judge jurisdiction for trial?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No

Exhibit B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

.....X

*IN RE: EXACTECH POLYETHYLENE
ORTHOPEDIC PRODUCTS LIABILITY
LITIGATION*

Case No.: 1:22-md-03044-NGG-MMH

MDL No. 3044

**[Proposed] Discovery Case Management
Order Governing Master Discovery
Between Personal Injury Plaintiffs and the
Exactech Defendants**

Judge Nicholas G. Garaufis

This Document Applies To:

Magistrate Judge Marcia M. Henry

All Cases

.....X

This Discovery Case Management Order Governing Master Discovery (“Discovery Order”) submitted by stipulation between Defendants Exactech, Inc. and Exactech U.S., Inc. (“Defendants”) and the Personal Injury Plaintiffs (together, the “Parties”) pursuant to this Court’s Order of March 23, 2023 (Dkt. 165). Accordingly, it is ORDERED as follows:

1. Consistent with Case Management Order No. 1, the MDL Plaintiffs' Lead Counsel ("PLC") will maintain a single electronic document depository for the use of the Plaintiffs in the MDL and the cases coordinated on the Exactech Master Case docket (Case No. 01-2022-CA-2670) in the Eighth Judicial Circuit of Florida, Alachua County ("Florida Coordinated Actions"), and state court cases in which the parties have agreed to coordinate discovery fully and formally with these proceedings ("MDL Document Depository"). (Dkt. 87). Production to the MDL Document Depository by Defendants shall constitute production to the Plaintiffs in the MDL and the Florida Coordinated Actions (Dkt. 87), and any other state court actions that agree to coordinate discovery fully and formally with these proceedings.

2. Production to the MDL Document Depository or service of any other discovery by Defendants will be accomplished by serving the Lead Counsel in the MDL. All discovery conducted in the MDL, including documents, data, and deposition transcripts, may be used in the MDL Proceeding, the Florida Coordinated Actions, or any other state court actions that agree to coordinate discovery fully and formally with these proceedings, in accordance with this Order, as if conducted in the proceeding in which the discovery is sought to be used.

3. All discovery propounded to Defendants and non-party witnesses by Plaintiffs in the MDL shall be undertaken by, or under the direction of, the PLC on behalf of all Plaintiffs with cases in the MDL.

4. Discovery in the MDL shall be conducted in accordance with the Federal Rules of Civil Procedure and the Local Rules and Orders of the MDL Court, including the MDL Discovery Orders, as interpreted by the MDL Court.

5. Discovery Limitations.

a. The Parties shall agree on a final set of Exactech custodians on or before 5/26/2023. No custodians may be added beyond that date absent a showing of good cause.

b. Master Requests for Production shall be limited to 50 Master Requests for Production per side.

c. No interrogatories may be served until further order of this Court.

6. Document Productions.

a. Absent compelling circumstances, the Court expects the parties to engage in the rolling production of documents. The parties will be in the best position to assess the timing of discovery. Therefore, the parties may agree to a longer period for production than what is stated in the Federal Rules or Local Rules, without leave of Court.

7. Objections Based upon Privilege - Requests for Production. The production of non-privileged materials should not be delayed while a party is preparing a privilege log. The Producing Party shall produce a privilege log within ninety (90) days prior to the close of all fact discovery.

8. Plaintiff Preliminary Disclosure Forms, Plaintiff Fact Sheets, Supplemental Plaintiff Fact Sheets, Defendant Fact Sheets, and Supplemental Defendant Fact Sheets are governed by separate Order at Dkt. 90, Dkt. 166, Dkt. 168.

9. Proposed Discovery Schedule: See Exhibit "A" attached hereto.

10. Discovery Disputes. If the parties are not able to resolve disputes arising in the coordinated pretrial discovery conducted in the MDL, including a dispute as to the interpretation of the MDL Discovery Orders, such disputes shall be presented to the MDL Court pursuant to the Court's Individual Practice Rules. Resolution of such disputes shall be pursuant to the applicable

federal or state law, as required, and such resolution may be sought by any party permitted to participate in the discovery in question.

11. Nothing contained herein shall constitute or be deemed to constitute a waiver of any objection of any defendant or plaintiff to the admissibility at trial of any documents, deposition testimony or exhibits, or written discovery responses provided or obtained in accordance with this Order, whether on grounds of relevance, materiality, or any other basis, and all such objections are specifically preserved. The admissibility into evidence of any material provided or obtained in accordance with this Order shall be determined by the Court in which such action is pending.

SO ORDERED.

Date: _____
Brooklyn, New York

NICHOLAS G. GARAUFGIS
United States District Judge

Date: _____
Brooklyn, New York

MARCIA M. HENRY
United States Magistrate Judge

Exhibit A to Proposed CMO - Exactech Proposed Discovery Plan/Scheduling Order:

A. ACTIONS REQUIRED BEFORE THE INITIAL STATUS CONFERENCE	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Rule 26(f) Conference held			5/15/2023
2. Exactech to produce to MDL documents previously produced in Florida Coordinated proceedings.	X		2/27/2023; 4/20/2023 [ECF 87]
3. Requested:			
a. Medical records authorization	X [ECF 166]		3/23/2023 and on a rolling basis as new cases are filed pursuant to ECF 166.
b. CPL §160.50 release for arrest records		X	
c. Identification of John Doe/Jane Doe defendants		X	
4. Procedures for producing Electronically Stored Information (ESI) discussed	X [ECF 88]		1/26/2023
5. Protective Order to be submitted for court approval	X [ECF 89]		1/26/2023
B. SETTLEMENT PLAN	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Plaintiff to make settlement demand			TBD
2. Defendant to make settlement offer			TBD
3. Referral to EDNY mediation program pursuant to Local Rule 83.8 (If yes, enter date for mediation to be completed)		X	
4. Settlement conference (proposed date)			TBD
C. PROPOSED DEADLINES	<u>Done</u>	<u>N/A</u>	<u>Date</u>
1. Motion to join new parties or amend master pleadings			12/1/2023
2. Plaintiffs to serve Master Requests for Production			6/3/2023
3. Plaintiffs' Preliminary Disclosure Forms			Substantially complete PPD due

			3/13/2023; 30 days from filing SFC; or 30 days from transfer into MDL [ECF 168]
4. Plaintiffs' Fact Sheets			6/6/2023; or 75 days from filing SFC; or 75 days from transfer into MDL [ECF 166]
5. Defendant Fact Sheets			After a substantially complete Plaintiff Preliminary Disclosure Form, 15 days of receipt of Plaintiff's substantially complete Plaintiffs' Fact Sheet [ECF 166]
6. Exactech shall produce the document production in the Florida state cases	X		2/27/2023; 4/20/2023 [ECF 87]
7. Exactech shall respond to Plaintiffs' Master Set of Requests for Production			8/3/2023
8. The Parties shall agree upon search terms; and if not agreed request a discovery dispute conference with the Court			5/26/2023
9. Exactech's initial production of 10 agreed upon custodial files			9/1/2023
10. Exactech to substantially complete production of 10 agreed upon custodial files			12/1/2023
11. The Parties shall agree to the final list of Exactech Custodians (in addition to the 10 agreed upon custodial files) ¹			5/26/2023
12. Defendants' substantial completion of non-custodial document production			8/31/2023
13. All fact discovery must be completed (including disclosure of medical records for filed cases)			7/31/2024

¹ Custodians may only be added after that date upon a showing of good cause.

14. Joint status report certifying close of fact discovery and indicating whether expert discovery is needed			8/2/2024 (Later filed cases would have later fact date cut-offs pursuant to ECF 166 and 168)
15. Plaintiffs' experts' proposed field(s) of expertise:	N/A		
16. Defendants' experts' proposed field(s) of expertise:	N/A		
D. CORE DISCOVERY/ BELLWETHER DEADLINES	<u>Done</u>	<u>N/A</u>	<u>Date</u>
17. The Parties shall submit a Bellwether Trial Plan			5/19/2023
18. Plaintiffs' Supplemental Fact Sheet Due			Within 60 days of selection in a bellwether trial pool [ECF 166]
19. Core Discovery depositions must be completed			TBD in Bellwether Trial Plan
20. Plaintiffs Bellwether expert report disclosures and depositions to be completed			TBD in Bellwether Trial Plan
21. Defendants Bellwether expert report disclosures, and depositions to be completed			TBD in Bellwether Trial Plan
22. Rebuttal expert reports due			TBD in Bellwether Trial Plan
23. Joint status report certifying close of ALL DISCOVERY and indicating whether dispositive motion is anticipated			12/20/2024
24. If any party seeks a dispositive motion, date to a. File request for pre-motion conference (if required), or b. File briefing schedule for the motion			1/12/2025
25. Proposed Joint Pre-Trial Order due (if no dispositive motion filed)		X	
D. CONSENT TO MAGISTRATE JUDGE JURISDICTION			
1. All parties consent to Magistrate Judge jurisdiction for dispositive motions?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
2. All parties consent to Magistrate Judge jurisdiction for trial?	<input type="checkbox"/> Yes		

	<input checked="" type="checkbox"/> No
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