

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
(BROOKLYN)**

**IN RE: EXACTECH POLYETHYLENE
ORTHOPEDIC PRODUCTS LIABILITY
LITIGATION**

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

**District Judge Nicholas G. Garaufis
Magistrate Judge Marcia M. Henry**

This Document Relates to All Cases

MDL No. 3044

JOINT STATUS REPORT

Pursuant to the Court’s Minute Entry & Order dated March 23, 2023 (Dkt. # 165), and in anticipation of the June 1, 2023 Status Conference, Plaintiffs’ Co-Lead Counsel for the Personal Injury Plaintiffs (“Personal Injury Plaintiffs”), MSP Recovery Claims Series, LLC (the “TPP Plaintiff”), the Exactech Defendants, and the TPG Defendants (collectively the “Parties”) jointly submit the following report regarding the status of discovery and the litigation generally.

I. Current Federal and State Court Case Count & State Court Coordination

There are currently 571 cases pending in or being transferred to this multidistrict litigation (“MDL”), 481 of which involve knee products, 82 of which involve hip products, 7 of which involve ankle products, and 1 of which is an economic loss class action brought on behalf of Third-Party Payers. There are 185 state court cases pending in the Florida consolidated proceedings in the Eighth Judicial Circuit of Florida, Alachua County, 140 of which involve knee products, 43 of which involve hip products, and 2 of which involve ankle products. The Parties have identified an additional 23 cases pending in other state courts.¹ The Parties continue to believe that discovery across federal and state court actions should be coordinated to the extent feasible and will continue to seek the assistance of the Court in accomplishing that goal.

¹ A list of all state court cases other than the cases pending in Florida is attached as Exhibit A.

II. Discovery Case Management Order

On April 24, 2023, the Personal Injury Plaintiffs and Exactech Defendants filed a joint letter with the Court attaching their respective positions on a Proposed Discovery Case Management Order governing master discovery between the Personal Injury Plaintiffs and Exactech Defendants. (Dkt. # 206.) On April 28, 2023, the Personal Injury Plaintiffs and Exactech Defendants filed three-page letter briefs in support of their respective Proposed Discovery Plans. (Dkts. # 214 & 215.) The Parties await further guidance from the Court on the issues and deadlines in dispute.

III. Discovery from the Exactech Defendants

1. The Personal Injury Plaintiffs' Position.

Discovery is in a state of largely non-productive meet and confers and Court intervention and strict deadlines are needed. While plaintiffs have already provided key medical records and answers in the Preliminary Disclosure Statement for more than four hundred cases, Defendants have not produced any documents independent of the Florida production.² As discussed in turn below, nothing has been produced responsive to the MDL Plaintiffs' discovery requests. Exactech failed to timely collect custodial files. No search term hit reports have been run. Exactech attempts to hide behind the Rule 26 Conference for failing to respond to Plaintiffs' April 5 discovery requests but ignored attempts to set same despite both parties agreeing to a May 15 date. Moreover, Exactech refuses to produce the very salient discovery and depositions produced in related litigation involving the very same Optetrak knee.

2. The Exactech Defendants' Position.

Since January, the Parties have:

- Negotiated and agreed upon a Protective Order;
- Negotiated and agreed upon an order governing Electronically Stored Information;

- Negotiated and agreed upon the process and form of a Plaintiffs' Preliminary Disclosure Form;
- Negotiated and agreed upon the process and form of a Plaintiff Fact Sheet;
- Negotiated and agreed upon the process and form of a Defendant Fact Sheet;
- Begun to serve Plaintiffs' Preliminary Disclosure Forms and Plaintiff Fact Sheets, thus triggering the obligation to prepare Defense Fact Sheets – several hundred of them;
- Negotiated and agreed upon a pathology and medical device preservation order.

Notably, each of the items Exactech outlined above are governed by Court order. For example, while Plaintiffs make much of producing medical records and Preliminary Disclosure Forms, Plaintiffs are under a court order to do so. Notably, although Exactech is currently in receipt of and reviewing over 400 Plaintiff Preliminary Disclosure Forms, dozens of Plaintiff Preliminary Disclosure Forms remaining outstanding. Exactech is also reviewing incoming Plaintiff Fact Sheets and Exactech is preparing to respond with hundreds of Defendant Fact Sheets. Separately, Exactech, in response to this Court's Order, produced documents it had previously produced in the Florida Coordinated Proceedings. Subsequently, and without an order compelling Exactech to do so, Exactech made a supplemental production of documents in the MDL to include *all* documents produced in every Florida case. Moreover, Exactech offered to voluntarily review documents (in the absence of a court order) for potential redactions to remove, and Exactech will provide a supplemental production consistent with that review. The bottom line is simple—Exactech has complied with the orders of this court, and then some.

The Exactech Defendants are disappointed to see Plaintiffs describing “meet and confers” as “largely unproductive.” This Court, the parties, and the judicial process rely on officers of the Court working together, to “meet and confer,” in reasonable attempts to resolve differences. After dozens of meet and confers, the parties have reached agreement on several aspects of this litigation. While it is true that much work remains to be done, meet and confers should be a priority as the parties work together. The Exactech Defendants were surprised to learn Plaintiffs harbored such

contempt for meet and confers, particularly as only recently, Plaintiffs themselves requested *weekly* meet and confers, which the Exactech Defendants agreed to. Nevertheless, the Exactech Defendants want this Court to know that they are willing, ready, prepared, and eager to continue meeting and conferring with Plaintiffs.

Plaintiffs' report mischaracterizes much of the Exactech Defendants' discovery efforts. As discussed in more detail below, it is simply not true that Exactech has not produced documents responsive to Plaintiffs' requests; it is simply not true that the Exactech Defendants refused search terms reports; it is simply not true that the Exactech Defendants are "hiding" behind Rule 26, a rule outlined in the Federal Rules of Civil Procedure; and it is simply not true that Exactech has not timely collected custodial files, particularly because Plaintiffs only recently confirmed a set of agreed upon custodians.

This is a large litigation with Plaintiffs' lawyers (indeed many of the same Plaintiffs' lawyers) demanding the same or variations on the same discovery in multiple fronts in different courts. Good faith cooperation by counsel and oversight by the Court is needed for supervision and coordination of discovery between the MDL (led by Ms. Relkin, Mr. Pope and liaison counsel Mr. Saunders and Mr. Warriner) and Florida (led by Mr. Warriner and Mr. Saunders) and California (led by Mr. Pope) and Chicago (led by Frank Cesarone).

This litigation is significant. With over 400 cases pending, discovery and ESI will take time *and cooperation*.

3. Plaintiffs' Position on Interrogatories & Requests for Production.

On April 26, Exactech claimed the Personal Injury Plaintiffs' discovery requests served on April 5 are improper because they were served prior to a Rule 26 Conference and because there was no stipulation or court order permitting discovery, and that Plaintiffs cannot serve discovery until June 3. (ECF 214 at fn. 4; ECF 206-2 (C)(2)). However, in the Parties Joint Status Report on March 13, the Parties agreed Plaintiffs "will propound master discovery requests on Exactech" without any qualifications. (ECF 151 at pg. 7). Additionally, even though both parties agreed a

Rule 26(f) Conference would be held by May 15, 2023 (ECF 206-1 and 206-2 at A(1)), Exactech's counsel never responded to Plaintiffs' requests to schedule the Rule 26 conference.

Exactech did not timely respond to Plaintiffs initial discovery. (ECF 206-1 (C)(7); Fed. R. Civ. Pro. 34 (b)(2)(A). Notably, the TPG Defendants (Exactech's parent company) timely served objections and responses to Plaintiffs' First Request for Production of Documents to TPG Defendants. Plaintiffs' position is Exactech's discovery is past due and should be responded to immediately.

4. The Exactech Defendants' Position on Interrogatories & Requests for Production.

Plaintiffs failed to follow the rules. First, Rule 26 of the Federal Rules of Civil Procedure is clear—"A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26. Rule 26 is not some nebulous standard; it is a Federal Rule of Civil Procedure. Here, the Parties *have not* had a Rule 26(f) conference. A Rule 26(f) conference would set the framework and a timeline for discovery. Although the parties met and conferred on a Rule 26 report, the parties could not agree on the basics. (Dkt. 206). This issue is now pending review and adjudication by the Court. (Dkts 214-15). When Plaintiffs inquired about a Rule 26 conference, relying on their proposed schedule and their proposed terms, Exactech communicated its position that the Court had not yet ruled on a proposed case management conference. Until then, written discovery in the MDL remains premature.

5. Plaintiffs' Position on ESI.

Despite reaching agreement and the issuance of a stipulated protocol governing the production of electronically stored information on January 26, 2023, discovery is stagnant. Exactech touts that "in the short life of this MDL, Exactech has produced over 40,000 pages of documents." (ECF 214 at pg. 1). However, not one document has been produced, independent of what Exactech has produced in Florida, that is responsive to MDL discovery demands, and

Exactech's Florida production³ of 1,105 unique documents is a cherry-picked production that fails to include rudimentary documents routinely produced in orthopedic device litigations. Furthermore, because Exactech entirely failed to respond to Plaintiffs' discovery demands due on May 5, Exactech's responses to many of the Florida Consolidated Litigation's Requests for Production are relevant for the Court's consideration of the issues here because without Court intervention in this MDL, the Parties will continue to go nowhere.

6. The Exactech Defendants' Position on ESI.

Here again, Plaintiffs are simply wrong.

First, Plaintiffs' written discovery requests in the MDL are plainly premature. But even if Plaintiffs' written discovery requests were timely, the MDL Personal Injury Plaintiffs already have access to documents. The Exactech Defendants prepared the following table illustrating (a) where the MDL written discovery requests overlap with the Florida written discovery requests and (b) identifying documents the Exactech Defendants produced responsive to the Florida written discovery requests, which are also responsive to the MDL's premature written discovery requests:

³ On March 16, 2022, a hip Plaintiff in the now Florida Consolidated Litigation served requests for production on Exactech. (*Freeze vs. Exactech, Inc.*, Alachua County, FL Case No. 01-2021-CA-00155). On June 2, 2022, a knee Plaintiff in the now Florida Consolidated Litigation served requests for production on Exactech. (*Irby v. Exactech Inc.*, Alachua County, FL Case No. 2022-CA-1274). On September 14, 2022, Judge Donna Keim entered an Order coordinating Exactech hip, knee, and ankle implant cases filed in Alachua County, Florida. (Exactech Master Case No. 01-2022-CA-2670). Exactech requested a master set of discovery requests be served on them in the Florida Consolidated Litigation. An ESI Order was entered on September 20, 2022. On December 9, 2022, Plaintiffs served Exactech with "master" discovery requests which were modeled after the same requests in *Freeze* and *Irby*, and required substantively the same production of documents. Exactech served its Objections and Responses to the master discovery on February 8, 2023.

MDL Request for Production	Florida Request for Production	e.g., Exactech Bates Number
No. 3 (e.g., Surgical Techniques, IFU)	No. 31	EXACTECH-HIP22-0001896 – 0001919 EXACTECH-0032249 – 0032268 EXACTECH-0032655 – 0032662 EXACTECH-0030033 - 0030033 EXACTECH-0030034 – 0030040
No. 5 (e.g., Design History Files, Risk Management Files, Letters to File)	Nos. 5, 6, 7	EXACTECH-0029633 – 0029935 EXACTECH-0032701 – 0032722 EXACTECH-0029088 – 0029632 EXACTECH-HIP22-0014250 – 0014254
No. 11 (e.g., Surgeon Training documents)	No. 31	EXACTECH-HIP22-0002478 – 0002478 EXACTECH-HIP22-0002589 – 0002647 EXACTECH-HIP22-0002705 – 0002705 EXACTECH-KNEE22-0007933 – 0007935 EXACTECH-KNEE22-0007936 – 0007936 EXACTECH-KNEE22-0008093 – 0008094
No. 13 (510(k) documents)	No. 14	EXACTECH-HIP22-0000001 – 0000149 EXACTECH-HIP22-0004354 – 0004526 EXACTECH-HIP22-0006216 – 0006245
No. 14 (e.g., FDA communications)	No. 15	EXACTECH-KNEE22-0004289 – 0004297 EXACTECH-KNEE22-0004274 – 0004277
No. 19 (e.g., CAPAs, HHEs)	No. 20	EXACTECH-0036836 – 0036852 EXACTECH-0036853 – 0036874 EXACTECH-0036785 - 0036798
No. 20 (e.g., DHCP letters)	No. 27	EXACTECH-HIP22-0011548 – 0011559 EXACTECH-HIP22-0011560 – 0011565 EXACTECH-HIP22-0011566 – 0011567
No. 36 (e.g., Sales Representative Training)	No. 32	EXACTECH-HIP22-0001602 – 0001670
No. 69 (e.g., SOPs)	No. 2	EXACTECH-KNEE22-0003664 – 0003674 EXACTECH-KNEE22-0003675 – 0003687 EXACTECH-KNEE22-0003744 – 0003751 EXACTECH-KNEE22-0003806 – 0003820 EXACTECH-KNEE22-0003821 – 0003825
No. 71 (Insurance Policy documents)	No. 46	EXACTECH-HIP22-0003262 – 0003400 EXACTECH-KNEE22-0006157 – 0006183

The table above reflects only a sample of the of the MDL Requests, Florida Requests, and corresponding Exactech document productions but is designed to illustrate just how wrong Plaintiffs are on this point.

Second, nothing was “cherry picked.” Since February 2023, Exactech has produced over 2,400 documents totaling over 40,000 pages. The produced documents include Design History Files for hip and knee products, 510(k) applications, Instructions for Use for hip and knee products, sales representative training manuals, marketing and advertising material, Dear Health Care Provider letters, physician training presentations, pre-market research, manufacturing records, sales records, meeting minutes, research and findings related to the recall, records related to Exactech’s 806 Voluntary Report to the FDA, standard operating procedures, risk analysis

documents, operative techniques, correspondence with the FDA, technical memorandums, testing documents, and reports, project design files, letters to file related to the relevant products, risk management files, among others. Each of these are discrete categories of documents routinely produced in product liability medical device litigation. These documents can be collected without engaging in the time-consuming negotiations typical of ESI. Therefore, Exactech has collected and produced those documents, and will continue to supplement those productions as necessary. Indeed, Exactech has responded to follow-up requests for these documents from lawyers in this MDL, in the Florida Coordinated Proceedings, and in the California litigation.

7. Plaintiffs' Position on a 30(b)(6) deposition.

Plaintiffs have discussed with Exactech the need for a 30(b)(6) deposition on ESI issues during meet and confers since March 3, and as addressed to the Court in the March (ECF 151) and April (ECF 213) Joint Status Reports. Exactech's counsel has consistently stated it was "premature at this time" (ECF 151, 213). At the March 23, 2023 Status Conference, Exactech advised the Court its delayed migration of data and metadata overlay would be completed by March 31. Status Conf. Tr. at 23-27, Mar. 23, 2023. The Court heard from the parties regarding a 30(b)(6) witness on ESI issues generally, and was hopeful that Exactech's migration of data was a "material change" that would be helpful to the parties, and if not, the topic would be revisited. *Id.* at 27. Unfortunately, Plaintiffs have not learned anything about Exactech's ESI data sources since the hearing. Frustratingly, on April 14, Exactech said it would provide a date to discuss a 30(b)(6) representative as soon as possible, but certainly by the next week, but it never happened. The Parties fundamentally disagree about what was addressed regarding electronic databases maintained by Exactech but will work together in the next week to exchange information regarding electronic databases.

Plaintiffs maintain we should be able to hear directly from a 30(b)(6) sworn company witness who can pinpoint Exactech's data systems, when they were in place, what data was preserved, and identify where relevant information may be stored. The inadequacy of a third-hand

informal recitation of Exactech's electronic systems is exemplified by Exactech's response to the Florida Consolidated Request for Production regarding document retention and destruction policies, where Exactech highlights the complexity of their data systems:

Exactech maintains many databases, systems, and software, some of which may change over time, and none of which are alleged to be at issue in the coordinated cases, and therefore objects to producing documents related to those databases, systems, and software on the ground of relevant and undue burden. (emphasis added)

Request No. 3. Exactech's lawyers are not a reliable or expeditious source for obtaining technical and historical information about Exactech's ESI. Accordingly, Plaintiffs request the Court order Exactech to produce an ESI 30(b)(6) witness on or before July 1. (ECF 206-1 at (C)(12).

8. The Exactech Defendants' Position on a 30(b)(6) deposition.

The solution here is not to take a lengthy and burdensome deposition as an end run around the meet and confer process with defense counsel. The solution is for the lawyers to engage energetically and in good faith to resolve the open issues.

The Plaintiffs do not need a 30(b)(6) on ESI issues at this stage. The parties, ideally in coordination with three different fronts, need to sit down and talk and hammer out what can be done and what the real disputes are. The search term and custodian process needs to be completed without further distraction, misrepresentations, and mischaracterizations from Plaintiffs.

First, while Plaintiffs have raised a 30(b)(6) deposition on ESI topics, Plaintiffs only served a notice on May 18, 2023, just a week ago. The Exactech Defendants' position has been simple and unchanged—a 30(b)(6) on ESI topics is premature. Nevertheless, Exactech agreed to conference regarding a proposed 30(B)(6) and requested that the conference be scheduled separately from the pre-existing custodian and search term meet and confer conferences. That Plaintiffs never proposed a date for nor scheduled a meet and confer regarding their proposed 30(b)(6) is a decision Plaintiffs made, not Exactech. Plaintiffs are again ignoring the standard discovery process and seek premature court intervention. Exactech believes the Parties should confer regarding this issue as Rule 30 contemplates.

Second, the Exactech Defendants have proposed written interrogatories, to be answered, under oath, regarding Plaintiffs' 30(b)(6) questions and topics.

Third, in March, the Exactech Defendants identified Exactech's electronic databases at Plaintiffs' request. Plaintiffs never asked a single follow-up question regarding Exactech's databases during a single subsequent meet and confer until the last meet and confer when they asked for an update. There has been no "third-hand informal recitation" because databases did not come up during subsequent meet and confer teleconference. If Plaintiffs do not ask or raise questions during meet and confers, Exactech cannot answer them.

Fourth, the MDL Personal Injury Plaintiffs and the Florida Plaintiffs have now both served different corporate representative notices, two in Florida. Together with the equivalent of a corporate representative notice in California, there is some overlap in the topics among the various corporate representative notices and some additional topics, making the need for alignment, coordination, and further discussion on these issues even more important. Exactech looks forward to coordinating responses to both, and perhaps in a written format, and Exactech remains willing to meet and confer.

9. Plaintiffs' Position on Search Terms and Custodians.

On April 24, both parties agreed to finalize search terms this month. Plaintiffs proposed May 19 (ECF 206-1 (C)(7)) and Exactech proposed May 26 (ECF 206-2 (C)(8)) to accomplish this. However, because Exactech waited until approximately April 24 (the same day the proposed discovery schedules were due to the Court) to collect any custodial files, the Parties currently have no custodial files⁴ to run their proposed search terms against, and it appears neither party will be able to comply with their deadlines. A timeline through April 24, 2023 is set forth in Plaintiff's discovery brief (ECF 215). However, since then, alarmingly, Exactech's April 28 discovery letter to the Court claims it needs time to "copy and transfer data (which alone can take several weeks),

⁴ The Florida Consolidated Litigation production of 1,105 documents is not comprised of custodial file productions, therefore any custodial documents are incidental and incomplete. As a result, it would be futile to run the search terms against so few documents.

but this can only be done *after* data sources are identified and confirmed.”⁵ (ECF 214 at pgs. 2-3) (Emphasis added). On May 15, Exactech advised that it did not know when the email collection would be completed but estimated another week and a half. Exactech’s counsel further advised he was not sure what the number or size of the files being collected is, and Exactech did not know when search term hit reports (from Plaintiffs’ February 6 search term list) could be run. Because of Exactech’s unreasonable delay in identifying and collecting custodial files, Exactech is unprepared to meet its own May 26 proposed deadline for finalizing search terms. Accordingly, the Plaintiffs ask the Court to require Exactech to produce responsive non-privileged documents based on Plaintiffs’ February 6 search terms so that discovery is not further sidelined.

Negotiations concerning custodians began in earnest in January 2023. In fact, on February 3, Exactech identified six (6) custodians. At no point in time did the MDL object to any of these custodians. Despite six meet and confers, Exactech has not been prepared (or is unwilling) to discuss the custodians proposed by Plaintiffs on an individual basis, with the exception of the custodians Exactech affirmatively identified, in which the provided information was woefully inadequate. Yet, it inexplicably seeks to finalize custodian lists by May 26, four months before it proposes to produce the first custodial document on September 1. *See* ECF 206-2 (C)(8), (9). In the Florida Consolidated Litigation Exactech refuses to produce its corporate organization information including officers and employees involved with the products at issue, claiming the request is overly broad, unduly burdensome, among other objections. (Request for Production #4). Exactech refers the Florida Plaintiffs to its incomplete document production to go fish for names and hopefully titles. Plaintiffs know Exactech has corporate organization charts. Despite Exactech’s obstruction, Plaintiffs have been able to identify some key individuals through documents produced by Exactech in the *qui tam* litigation as further discussed below.

Following another unproductive meet and confer, on May 17, the Personal Injury Plaintiffs sent a letter to Exactech advising the pace (5 months) of negotiating search terms and custodial

⁵ This statement further highlights the need for an ESI 30(b)(6) deposition.

files is unacceptable and demanded Exactech be prepared to discuss or advise of its position in regarding Plaintiffs' proposed 17 custodians and 2 non-custodial emails in earnest by 1 p.m. eastern on May 22. Plaintiffs further requested Exactech identify the custodian(s) it objects to and the basis for same. Exactech failed to respond to Plaintiffs' May 17 letter.

Plaintiffs believe July 1 is an appropriate deadline for Exactech to make the initial production of the 12 agreed upon custodians and July 15 as the date to agree to the final list of custodians so that Plaintiffs can have two weeks to review Exactech's documents to determine which additional custodians are needed.

10. The Exactech Defendants' Position on Search Terms and Custodians.

On April 24, 2023, the Parties submitted competing proposed discovery case management orders. The Parties did not agree, as Plaintiffs suggest, to finalize search terms this month. The dates Plaintiffs reference were proposed dates in a proposed order to this Court.

Plaintiffs' position must be put into context here. First, Plaintiffs only confirmed agreement to ten custodians on April 4, 2023, the same day Plaintiffs proposed over 20 additional custodians and mailboxes. Since then, Exactech has agreed to two additional custodians and Exactech was prepared to discuss the remainder of Plaintiff's 20 plus custodian requests, but Plaintiffs *declined* to meet and confer with Exactech on Friday May 19th, 2023 stating that it would be "too soon" to meet again.

Second, with respect to search terms, Exactech initially proposed carefully constructed search terms with terms and connectors. Much like their burdensome custodian list, Plaintiffs proposed over 145 search terms, many of which would be duplicative in design. Exactech has repeatedly engaged in good faith efforts with Plaintiffs to negotiate a reasonable limit on search terms. Plaintiffs, however, refused to negotiate without search term hit reports. Indeed, in one meet and confer, even after Exactech believed progress was being made, Plaintiffs abruptly changed their position and stated that they would no longer negotiate search terms in the absence of search term reports. This rigid position was a surprise and counterintuitive since search term reports only

make sense once custodial files are collected. Ultimately, Exactech agreed to produce search term reports once custodial file collections on the 12 agreed upon custodians completes so long as Plaintiffs agreed to prioritize their unruly list of search terms. Not until this joint status report did Plaintiffs present an objection to this process which the Parties only recently agreed to.

Third, Plaintiffs originally proposed an unreasonable and unrealistic list of over 70 custodians. Plaintiffs *still* refuse to discuss a reasonable limit to the number of custodians in this case. Yet, as a result of extensive conferrals, Plaintiffs recently approved twelve custodians for which Exactech has begun the initial collection process. Exactech informed Plaintiffs that its custodial file collection would include the custodian's complete Microsoft 365 mailbox. The amount of data that needs to be transferred will vary by each custodian. At this point it would be pure speculation to try to set a deadline for the complex collection of this ESI. Many, many factors, factors outside the control of the parties, can influence the length of time it takes for data to be collected, transferred, and processed.

Despite Plaintiffs' contentions, and as is evident from the Parties' individual Case Management submissions, the Parties have not reached an agreed day by which to finalize the custodian list. Exactech, however, is prepared to finalize custodians and believes the Parties can accomplish this by June 2, 2023 but Exactech continues to believe the initial list of custodians should be capped and not be limitless. It needs to be proportional to the issues in the case. Exactech is working diligently to collect custodial files and believes its original Case Management proposal is appropriate. Exactech requests sufficient time to identify, collect, copy, process, review, and produce ESI of agreed-upon custodians while also encouraging reasonable limits to ensure discovery can be timely completed (September 1, 2023 for initial production of 10 custodians; December 1, 2023 to complete production of 10 custodians). Exactech is committed to rolling productions, but the production timelines must be attainable and reasonable. Exactech's request for four months, while still very aggressive, is achievable.

11. Plaintiffs' Position on Overlapping Discovery in Other Exactech Litigation.

Plaintiffs want to ensure the Court fully understands and is aware that Exactech has collected and produced in other prior litigation many of the same documents Plaintiffs seek in this MDL. There is no reason for delay. There is no burden to Exactech since it already made these productions, reports, and the deposition transcripts exist and are in the possession of Exactech and/or its prior counsel, Bowman and Brooke. As a condition of settlement in the prior cases, Exactech required Plaintiffs' counsel to return or destroy confidential documents and Plaintiffs' counsel no longer possess these documents.

Similarly, there is a pending *qui tam* case, *U.S. ex rel. Wallace et. al. v. Exactech Inc.*, Case No. 2:18-cv-01010-LSC (N.D. A.L.) filed in 2018 and set for trial shortly where Exactech initially offered to produce custodial files from 35 separate custodians (*Wallace* ECF 87-2 at pg. 5), and at least 20 depositions have been taken, all involving the Exactech Optetrak knee. *See generally Wallace* ECF 184 Order on Exactech's Motion for Summary Judgment, Exactech's Motions to Strike, and Exactech's Motion to Dismiss. It is further worth noting that Plaintiffs are aware of dozens of overlapping factual issues between the litigations because Exactech has filed entire deposition transcripts and affidavits on PACER which outline testimony and exhibits discussing complaints and issues with the Optetrak knee including memorandums titled "Knee Sales Problem" and "Meeting Regarding Optetrak Tibial Loosening", reports called "Optetrak-PS/Optetrak Total Knee Investigation." and product development timelines. *Id.*; *See e.g. Wallace* ECF 145-1 Laurent Angibaud Aff. (VP of Development, Advanced Surgical Technologies) (His custodial file will be produced in this MDL); ECF 145-2 William Petty, M.D. Dep., Dec. 16, 2021 (Founder of Exactech); ECF 145-12 David Petty Dep., Nov. 15, 2021 (Exactech CEO); ECF 145-17 Bruce Thompson, Feb. 9, 2022 (Senior VP Strategic Initiatives; 30(b)(6) representative); ECF 145-33 Luis Alvarez Dep., Feb. 9, 2022 (Director of Engineering and Development; 30(b)(6) representative) (Alvarez's custodial file will be produced in this MDL; ECF 145-38 Charley Rye Dep., Jan. 21, 2022 (former Exactech Director of Marketing of Knees 2001-2011; Principal Clinical Consultant 2011-2014; Product Manager 1996-2001); and ECF 149-14 Joel Conly

Phillips Dep., Jan. 14, 2022 (former Exactech Executive VP Finance and CFO); ECF 232-5 – 7, Jorge A. Ochoa, Ph. D., P.E. Dep., October 12, 2022 (Exactech expert engineer); ECF 232-3, Raymond Robinson, M.D. Dep., June 30, 2022 (longtime Exactech consultant testifying as an expert); ECF 232-12, Theodore M. Thompson, II Dep., June 9, 2022 (medical device reporting specialist).

While the full transcripts are on ECF, they lack the underlying key exhibits discussed in the depositions. The complete transcripts of depositions not on ECF and the exhibits to all depositions should be produced forthwith as there is no burden to Exactech in so doing. Plaintiffs have requested transcripts of Exactech employees, former employees, and third parties; as well as expert reports, documents and discovery be produced in other litigation involving claims for personal injury and fraud.⁶ Through our meet and confers, Exactech has made clear multiple times it will not produce “qui tam documents.” The fact that Exactech has hired different counsel for those litigations is not an excuse for non-production. The present counsel of record here does not have possession, but their client surely does have possession and control.

12. The Exactech Defendants’ Position on Discovery in Unrelated Cases.

The bottom line is simple, documents in other cases were collected by separate defense counsel at separate law firms and presumably in separate eDiscovery platforms and repositories. Current defense counsel does not have access to these repositories. But plaintiffs’ counsel do, and the Exactech Defendants do not object to plaintiffs’ counsel in other litigation providing the documents, to be treated as confidential under the MDL Protective Order, to **both** plaintiffs’ counsel and the Exactech defendants’ counsel.

Additionally, Plaintiffs request documents produced by Exactech in a *qui tam* case, *U.S. ex rel. Wallace et. al. v. Exactech Inc.*, Case No. 2:18-cv-01010-LSC (N.D. A.L). Exactech has made it abundantly clear for several months that the *qui tam* litigation involves significantly

⁶ Plaintiffs submit we are not interested in any documents from the qui tam that deal with billing or the submission of a false or fraudulent claim.

different issues than those relevant to this litigation and the documents were collected, processed, and reviewed for reasons completely different from the issues key in this litigation. For example, the *qui tam* litigation relates to False Claims Act and Anti-Kickback Statute litigation and this MDL has no such claims. Next, the negotiations for custodians and document collection were in response to entirely different sets of requests for production. Exactech has, however, produced some individual documents from this litigation to Plaintiffs' counsel where relevancy was demonstrated, and is willing to consider narrow requests on a request-by-request basis.

13. State Court Discovery.

On May 12, 2023, MDL Liaison Counsel and Plaintiff's counsel in the *Freeze* case (Florida Case No. 01-2021-CA-001555), Joseph Saunders, took the deposition of Luis Alvarez—the Director of Engineering and Development, Knees, at Exactech, Inc. Mr. Saunders has also requested to take three additional depositions in May or June 2023.⁷

Plaintiffs in the *Collum-Bradford* case in California state court have served requests for production and a 30(b)(6) deposition notice on the Exactech Defendants. The parties in that case continue to meet-and-confer on this discovery and Plaintiffs are moving to Compel Discovery on or before May 31, 2023.

Plaintiffs in seven state court cases in Cook County, Illinois have also served requests for production and interrogatories on the Exactech Defendants. The Exactech Defendants responded to that discovery on May 19, 2023. The Exactech Defendants are meeting and conferring with Plaintiffs' counsel in those cases with the goal of coordinating that discovery with the MDL and Florida.

IV. Discovery from the TPP Plaintiff. On March 2, 2023, TPP Plaintiff served the Exactech Defendants with written discovery. On March 23, 2023, “[t]he Court stayed [MSP’s] discovery demands until at least May 3, 2023.” (Minute Entry & Order, Dkt. # 165). Defendants have yet to

⁷ The *Freeze* case is currently set for trial in November 2023, in the Circuit Court of Alachua County, Florida. Plaintiff served his expert disclosures on April 21, 2023.

respond to the TPP Plaintiff's discovery requests.

V. TPP Plaintiff's Claims in the MDL

The Exactech Defendants' Motion to dismiss the TPP Plaintiff's Complaint is fully briefed (Dkt. # 202, 202-1, 202-2, 202-3, and 211) and both sides have requested oral argument . (Dkt. # 202.)

VI. Preservation Protocols and Orders

Pursuant to the Court's Minute Entry & Order dated March 23, 2023 (Dkt. # 165), the Personal Injury Plaintiffs and the Exactech Defendants filed a proposed Case Management Order and Pathology and Medical Device Preservation Protocol on April 17, 2023. (Dkt. # 200.) On May 19, 2023 the Court entered the proposed Case Management Order and Pathology and Medical Device Preservation Protocol at Case Management Order No. 3.

VII. The TPG Defendants

On May 19, 2023, the Court held a pre-motion conference regarding TPG Defendants anticipated motion to dismiss the Personal Injury Plaintiffs' Amended Master Personal Injury Complaint. The Court granted TPG Defendants' request to file a motion to dismiss and set a briefing schedule.

The Personal Injury Plaintiffs served a First Request for Production of Documents on TPG Defendants on April 5, 2023 (Dkt. # 267-2). On May 16, 2023, TPG Defendants and Plaintiffs met and conferred regarding these requests pursuant to Local Rule 37.3(a). On May 17, 2023, Personal Injury Plaintiffs served on TPG Defendants a deposition notice under Rule 30(b)(6) of the Federal Rules of Civil Procedure (Dkt. # 267-4). On May 18, 2023, TPG Defendants filed a letter pursuant to Local Rule 37.3(c) requesting a stay of discovery against TPG Defendants pending disposition of their anticipated motion to dismiss (Dkt. # 267). On May 19, 2023, Judge Garaufis indicated he would refer TPG's Motion to Stay Discovery to Magistrate Henry.

VIII. Bellwether Plan

A. MDL. The Personal Injury Plaintiffs and Exactech Defendants have had a series of

meet and confers on a bellwether plan. They agree that ultimately 12 cases should be presented to the Court with briefs on why the case is/is not suitable as a bellwether, and that the Court should narrow the group to six cases – 3 knee cases and 1 hip case to be the trial cases, and 1 hip and 1 knee case as backup cases. The parties disagree as to how the ultimate group of 12 cases is derived and how to handle the potential *Lexecon* waivers, if any. The parties think it would be beneficial to discuss the issues with the Court and then submit competing plans with briefs in support of their respective plans.

B. Florida.

On April 14, 2023, Plaintiffs' leadership in Florida and the Exactech Defendants had a hearing with Judge Keim on their competing bellwether proposals in Florida after briefing the issues. Judge Keim has not ruled on those proposals as of the date of filing this Joint Status Report.

The Parties look forward to seeing Your Honors at the Status Conference scheduled for June 1, 2023.

Dated: May 26, 2023

Respectfully submitted,

WEITZ & LUXENBERG, P.C.

**FAEGRE DRINKER BIDDLE & REATH
LLP**

/s/ Ellen Relkin

Ellen Relkin
700 Broadway
New York, NY 10003
T: 212-558-5500
F: 212-344-5461
erelkin@weitzlux.com

POPE McGLAMRY, P.C.

/s/ Kirk Pope

N. Kirkland Pope
3391 Peachtree Road, NE
Suite 300
Atlanta, GA 30326
T: 404-523-7706
F: 404-524-1648

/s/ Michael J. Kanute

Michael J. Kanute
Sean J. Powell
320 South Canal Street, Suite 3300
Chicago, IL 60606
T: 312-212-6510
F: 312-569-3000
Mike.kanute@faegredrinker.com
Sean.powell@faegredrinker.com

J. Stephen Bennett
110 West Berry Street, Suite 2400
Fort Wayne, IN 46802
T: 260-424-8000
F: 260-460-1700
Stephen.bennett@faegredrinker.com

Kirkpope@pmkm.com

Plaintiffs' Lead Counsel

Susan M. Sharko
600 Campus Drive
Florham Park, NJ 07932
T: 973-549-7000
F: 973-360-9831
Susan.sharko@faegredrinker.com

***Counsel for Defendants Exactech, Inc.
and Exactech U.S., Inc.***

KIRKLAND & ELLIS LLP

/s/ Jay P. Lefkowitz
Jay P. Lefkowitz
601 Lexington Avenue
New York, NY 10022
Telephone: +1 212 446 4800
Facsimile: +1 212 446 4900
lefkowitz@kirkland.com

Mark Premo-Hopkins
Christa C. Cottrell
Cameron Grinder
300 North LaSalle
Chicago, IL 60654
Telephone: +1 312 862 2000
Facsimile: +1 312 862 2200
mark.premohopkins@kirkland.com
ccottrell@kirkland.com
cameron.grinder@kirkland.com

**Counsel for TPG, Inc.,
Osteon Holdings, Inc., Osteon Merger Sub, Inc., and
Osteon Intermediate Holdings II, Inc**

RIVERO MESTRE LLP

/s/ Amanda L. Fernandez
AMANDA L. FERNANDEZ
Florida Bar No. 106931
2525 Ponce de Leon Blvd., Suite 1000
Miami, Florida 33134
Telephone: (305) 445-2500
Facsimile: (305) 445-2505
E-mail: jmestre@riveromestre.com
E-mail: afernandez@riveromestre.com

Counsel for MSP Recovery Claims, Series LLC

Exhibit A

EXHIBIT A

Louis Aliperta, Jr. v. Exactech, Inc., et al.	152304/2023	Supreme Court of the State of New York, County of New York
Michael Biasotti and Barbara Biasotti v. Exactech, Inc., et al.	153274/2023	Supreme Court of the State of New York, County of New York
Cecelia A. Bonin v. Exactech, Inc., et al.	825-468	24th Judicial District for the Parish of Jefferson, Louisiana
Stewart F. Brownlee v. Exactech, Inc., et al.	151155/2023	Supreme Court of the State of New York, County of New York
William Caldarera and Renee Caldarera v. Exactech, Inc., et al.	152376/2023	Supreme Court of the State of New York, County of New York
David Campbell v. Midway Medical Products, Inc., et al.	2023-L-000081	Circuit Court of Cook County, Illinois, Law Division
Nancy Collum-Bradford, et al. v. Exactech, Inc., et al.	STK-CV-UPI-2019-17097	Superior Court of the State of California, County of San Joaquin
Kenneth Cox v. Exactech, Inc., et al.	CIV SB 2224697	Superior Court of the State of California, County of San Bernardino
Marva Cudjoe v. Exactech, Inc., et al.	153856/2023	Supreme Court of the State of New York, County of New York
Natale Gigliotti v. Stephen Fealy, MD., et al.	805221/2023	Supreme Court of the State of New York, County of New York
Teresa Johnson v. Midway Medical Products, Inc., et al.	2023-L-000089	Circuit Court of Cook County, Illinois, Law Division
Sharon A. Katz and Henry Katz v. Exactech, Inc., et al.	160888/2022	Supreme Court of the State of New York, County of New York
James Keegan and Patricia Keegan v. Exactech, Inc., et al.	152265/2023	Supreme Court of the State of New York, County of New York
Richard Kloepfer v. Midway Medical Products, Oinc., et al.	2022-L-009897	Circuit Court of Cook County, Illinois, Law Division
Daniel R. Kolzow v. Midway Medical Products, Inc., et al.	2022-L-008227	Circuit Court of Cook County, Illinois, Law Division

Richard Kostyra and Lorraine Antoniello v. Exactech, Inc., et al.	151170/2023	Supreme Court of the State of New York, County of New York
Valerie Lawson v. Midway Medical Products, Inc., et al.	2023-L-000096	Circuit Court of Cook County, Illinois, Law Division
Bruce R. Matuszak v. Midway Medical Products, Inc., et al.	2023-L-000095	Circuit Court of Cook County, Illinois, Law Division
Marilyn Nowak v. Castle Stuart Medical, LLC, et al.	2022-L-010093	Circuit Court of Cook County, Illinois, Law Division
Theresa M. Pagnotta, et al. v. Exactech, Inc., et al.	152798/2022	Supreme Court of the State of New York, County of New York
Joyce Schiavone v. Exactech, Inc., et al.	151247/2023	Supreme Court of the State of New York, County of New York
Victor Sohn and Tena Sohn v. Joint Health LLC d/b/a Motion Orthopaedics, et al.	22SL-CC01430	Circuit Court of St. Louis County, Missouri
Delomie Williams v. Exactech, Inc., et al.	N/A	Supreme Court of the State of New York, County of New York