

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

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**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**

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**JOINT STATUS REPORT**

Pursuant to the Court’s Minute Entry & Order dated June 1, 2023 (Dkt. 298), and in anticipation of the August 22, 2023, Status Conference, Plaintiffs’ Co-Lead Counsel for the Plaintiffs (“Plaintiffs”), 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 822 cases pending in or being transferred to this multidistrict litigation (“MDL”), 665 of which involve knee products, 146 of which involve hip products, and 10 of which involve ankle products. There are 272 state court cases pending in the Florida consolidated proceedings in the Eighth Judicial Circuit of Florida, Alachua County (“Florida MCL”), 191 of which involve knee products, 77 of which involve hip products, and 4 of which involve ankle products. There are 14 cases pending in state court in Illinois which are the subject of a pending motion for coordination. The Parties have identified an additional 23 cases pending in other state courts.<sup>1</sup> The Parties continue to believe that discovery across federal and state court actions should

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

be coordinated to the extent feasible and will continue to seek the assistance of the Court in accomplishing that goal.

On July 28, 2023, the Parties submitted a novel joint bellwether plan to this Court (Dkt. 374) and to Hon. Donna Keim for the coordinated proceedings in Florida. The Parties have received the Orders from this Court and Judge Keim rejecting the plans. The Parties will be prepared to discuss the Proposed Plan with the Court at the status conference and believe that a joint conference with the MDL Court, Judge Keim, and the parties would be of great benefit. There has yet to be a hearing on the Joint Plan in either Court.

## **II. Discovery from the Exactech Defendants**

### **A. The Plaintiffs' Position.**

Plaintiffs continue to devote substantial effort to ensure this litigation progresses, avoids stagnation and delay, and complies with this Court's orders. As such, there are numerous open issues and discussion topics that have been raised during the multitude of meet and confers and other communications with the Exactech Defendants. To ensure these items are adequately addressed, Plaintiffs sent a letter to the Exactech Defendants on August 9, 2023, which identified the following open topics:

1. Search term negotiations
2. Search term results as compared to estimated TAR results
3. Technology-Assisted Review (TAR) protocol
4. Plaintiffs' First Request for Production ("RFP")
5. Plaintiffs' Second Request for Production of Exemplar Devices
6. Plaintiffs' First Set of Interrogatories ("ROGs")
7. Custodian negotiations
8. Custodial file collection outside of Outlook
9. Exactech's Incomplete Initial Disclosures
10. Defendant Fact Sheet deficiencies
11. Production of Easily-Segregable Documents
12. The lack of document family metadata to allow the association of emails with their attachments.

13. Missing production cover letters
14. Production issues related to corrupted or overly large files.

The current statuses of the above-listed topics vary, with many currently the subject of ongoing discussions among the Parties. As such, Plaintiffs provide additional detail below for the select outstanding issues Plaintiffs believe warrant this Court's attention. Notwithstanding this selective approach, Plaintiffs must note that they continue to face unnecessary delays throughout the discovery process that raise concerns about the Exactech Defendants' future compliance with this Court's orders, particularly the Discovery CMO (Dkt. 291) and its impending deadlines.

Plaintiffs will take the 30(B)(6) deposition of Exactech as to ESI topics on August 15, 2023, in Gainesville, FL. The Florida Plaintiffs will cross-notice the deposition, and, as agreed, will receive time after the MDL Plaintiffs to ask additional questions.

#### **B. The Exactech Defendants' Position**

Since the onset of this litigation, the Exactech Defendants have invested substantial time, energy, and resources into meeting discovery obligations and negotiating, in good faith, with Plaintiffs. Since the onset of this litigation, the Exactech Defendants advanced discovery by, for example, preparing the first draft of the ESI order, the first draft of the Confidentiality Order, and it was the Exactech Defendants that proposed the first set of proposed custodians and the first set of proposed search terms. Since then, the Exactech Defendants have produced over 40,000 pages of documents, the Exactech Defendants have confirmed 14 custodians (and collected and processed custodial files on 12 of those custodians), and the Exactech Defendants have answered extensive written discovery requests not just in this MDL, but in the Florida Coordinated Proceedings, California, and now Illinois. Now, the Exactech Defendants are preparing to produce a 30(b)(6) corporate representative on ESI issues and the Exactech Defendants continue to stand ready to produce documents once Plaintiffs settle on search terms and an organized process led by

a liaison to negotiate with Defendants. To borrow a line from co-lead counsel, “the ball is in their court.”

A letter writing campaign is not a “substantial effort” to avoid “delay” as Plaintiffs claim. The parties need to get to the end of the road on search terms/TAR so that documents can be produced, notwithstanding the Plaintiffs’ unilateral suspension of negotiations for nearly three months and the musical chairs of forcing Exactech’s ESI Liaison to negotiate with at least five different ESI Liaisons since December.

Plaintiffs’ latest letter, received on August 9<sup>th</sup> (two days before this joint status report) and attached here as Exhibit B is nothing more than a hastily composed general shopping list of alleged “open items”—including “missing production cover letters”—some which are being raised for the first time and some too general to respond to.

The Exactech Defendants agree with one thing—Plaintiffs’ tactics deserve this Court’s attention. While Plaintiffs continue to invest their time and energy into drafting letters, the Exactech Defendants are busy preparing for a 30(b)(6) deposition, investing time into encouraging adoption of Technology-Assisted Review 2.0, and preparing responses to even more of Plaintiffs’ letters. Discovery will not and cannot advance on letter writing. Court intervention and the designation of an ESI Liaison for the Plaintiffs who is empowered to negotiate in person and make decisions are required.

## **C. Written Discovery**

### **1. Plaintiffs’ Position**

On June 5, 2023, Plaintiffs propounded three sets of discovery requests on the Exactech Defendants: First Request for Production (“RFP”), Second Request for Production of Exemplar Devices and First Set of Interrogatories (“ROGs”). The Exactech Defendants provided objections

and responses to the 112 RFPs on June 30, 2023, provided objections and responses to the five (5) Exemplar Device Requests for Production on July 5, 2023, and provided objections and responses to the ROGs on July 21, 2023. Meet and confers are now ongoing on all three sets of discovery requests.

The responses and objections provided by the Exactech Defendants to the 112 RFPs were woefully inadequate. Of the 112 RFPs, the Exactech Defendants refused to produce documents for almost half and cited a host of non-substantive objections. In connection with the remainder, Defendants either provided a boilerplate objection with a representation that documents may be forthcoming or claimed that the production to the Florida MCL was adequate.

In a July 18, 2023, letter to the Exactech Defendants, Plaintiffs provided a detailed outline for a subsequent meet and confer, highlighting “general issues” ranging from ESI to relevancy “to start the meet and confer process.” Furthermore, in the spirit of cooperation, Plaintiffs acquiesced on a host of RFPs, thus enabling Defendants and Plaintiffs to streamline their conversations. The letter also invited the Exactech Defendants to participate in a meet and confer that same week. Plaintiffs are cognizant of the Court imposed discovery deadlines and are working diligently to meet those deadlines. It is for this singular reason that Plaintiffs requested the meet and confers with Defendants in short order. Plaintiffs assume the Exactech Defendants are also working to meet the Court’s discovery deadlines. The meet and confer ultimately took place on July 24, 2023.

During the July 24 meet and confer, Plaintiffs notified Defendants that a more fulsome response was forthcoming, addressing specific RFP answers and/or objections. On July 28, 2023, a deficiency letter was transmitted to the Exactech Defendants regarding Defendants’ responses and objections. Beyond highlighting specific RFP response deficiencies (and further acquiescing

on additional RFPs to streamline production), Plaintiffs also requested a follow-up conference the week of August 1, 2023, with the looming August 18 Court imposed deadline fast approaching. To date, the Exactech Defendants have not responded to Plaintiffs' July 28, 2023 letter and request for a meet and confer.

Separately, during the July 24 meet and confer, Plaintiffs inquired about Exactech's position refusing to produce documents in connection with RFPs 29-51, regarding Defendants Exactech and TPG. Exactech's counsel invited Plaintiffs to separately explain why each RFP regarding TPG was relevant. On August 3, 2023, at Plaintiffs' request, Exactech confirmed that its position remained unchanged and again invited Plaintiffs to discuss the TPG RFPs one by one. The parties will continue to meet and discuss the TPG related RFPs.

In an August 9, 2023, letter to the Exactech Defendants, Plaintiffs provided a detailed deficiency letter to the Exactech Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories served on July 21, 2023. In addition to addressing specific objections and answers provided by the Exactech Defendants, Plaintiffs' letter also requests an immediate meet and confer to discuss Answer Nos. 1-25. Plaintiff's offered availability on August 14, 2023 through August 16, 2023.

**a. Exemplars**

The Parties have engaged in numerous meet and confers regarding Plaintiffs' requests for exemplar devices. On July 8, 2023, the Defendants provided an inventory of exemplar devices by model and size. Plaintiffs have requested information as to the date of manufacture and/or shelf life of the various components and the Defendants have committed to providing same. Should the Parties be unable to reach an agreement, they will seek assistance from the Court.

## 2. The Exactech Defendants' Position

Plaintiffs served two sets of written discovery requests comprised of 117 requests to produce. The Exactech Defendants answered Plaintiffs' written discovery requests and the parties are now meeting and conferring regarding isolated disputes. The Exactech Defendants answered Plaintiffs' Requests to Produce on June 30<sup>th</sup>, 2023, and July 5, 2023, respectively.

On July 18, 2023, Plaintiffs served their first discovery letter regarding alleged deficiencies and the Exactech Defendants agreed to meet and confer regarding the alleged deficiencies the very next week on July 24, 2023. During the July 24, 2023, meet and confer, while true Plaintiffs acquiesced on some of their Requests to Produce, these were largely Requests to Produce *duplicative* of other Requests to Produce. Also, to suggest that the Exactech Defendants' objections were "non-substantive" is dubious particularly because the very first "boiler plate" or "non-substantive" objection Plaintiffs raised was regarding Exactech's objection to Plaintiffs' definition of "Orthopedic Products." Notably, Plaintiffs later clarified and narrowed the definition of Orthopedic Devices. Plaintiffs are also correct that the Exactech Defendants objected to several other Requests to Produce. Many of Plaintiffs' Request to Produce, however, demand production of documents with absolutely no relevance to the claims and defenses in this matter. But, because the Exactech Defendants believe in cooperation, the Exactech Defendants agreed to discuss their objections to each Request to Produce on a case-by-case basis with Plaintiffs. But Plaintiffs refused this invitation to discuss each Request *unless* the Exactech Defendants would promise to produce something in response to the otherwise wildly irrelevant Request. That is not how good faith negotiations are supposed to proceed.

During the July 24, 2023, meet and confer, Plaintiffs advised they would soon send a subsequent discovery letter, which Plaintiffs served on July 28, 2023 (nearly an entire month after

the Exactech Defendants answered the written discovery requests). The very next business day, Plaintiffs demanded a subsequent meet and confer for the next business day. The trend of Plaintiffs' demanding meet and confers and responses within 24 and 48 hours is plainly unreasonable (particularly when Plaintiffs had weeks to prepare their letters) and this is a trend the Exactech Defendants would like to see end. And to describe these otherwise unreasonable demands for urgent turnarounds as Plaintiffs being "cognizant of the court-imposed discovery deadlines" seems to leave unexplained just why Plaintiffs would wait weeks before sending their deficiency letter? Nevertheless, the Exactech Defendants are evaluating Plaintiffs' subsequent discovery letter and will meet and confer regarding Plaintiffs' alleged deficiencies.

### **3. ESI Discovery**

#### **a. Plaintiffs' Position**

##### **1. Search Terms and Custodians**

This Court's Discovery Case Management Order (Dkt. 291) at (B) (7) required that by June 30, 2023 "the Parties shall agree upon search terms and, if not agreed, shall request a discovery dispute conference with the Court." The history of negotiations regarding search terms through July 21, 2023, is set forth in Plaintiffs' request for a discovery dispute conference (Dkt. 371), Plaintiffs' position regarding search terms in the May 26, 2023, Joint Status Report (Dkt. 289 at p. 10-12), and Plaintiffs' discovery brief (Dkt. 215 at p. 2).

In Plaintiffs' letter of July 21, 2023, the Plaintiffs made only one request to the Court: that the Court order Exactech to produce non-privileged documents that are responsive to Plaintiffs' search terms. (Dkt. 371). Defendants have requested the Court deny this request but provide no basis in fact or law as to why Plaintiffs' request should be denied. (Dkt. 377).



Defendants assert multiple times that “none of Exactech’s objections claimed a proposed search term ‘generates an unreasonable amount of hits or an undue burden.’”<sup>2</sup> If that is indeed the case, this would seem to negate the veracity of any remaining objections to Plaintiffs’ search terms, and any objections to the Court ordering production of non-privileged documents that are responsive to those terms.

Indeed, the Exactech Defendants’ most recent objections of June 30, 2023, still assert boilerplate objections to every single one of Plaintiffs’ proposed terms. E.g.:

“The Exactech Defendants object to this proposed search term on grounds the search term is overbroad and seeks information neither relevant nor proportional to the needs of this case particularly as the term lacks terms and connectors specific to the parties, claims, and defenses in this case, and would likely lead to the identification of documents completely unrelated to the litigation.”

If this boilerplate objection is not asserting that any of the proposed terms are unreasonable or create an undue burden, it is unclear to Plaintiffs as to what valid objections remain, and why production should not immediately proceed using those terms.

In sum, it appears the Exactech Defendants have now waived any valid objections to the search terms in their correspondence to the Court. The time for the Exactech Defendants to assert new objections has passed. The time to provide specific metrics to support any objections has passed. As there are no remaining objections, the Court should order that production using the Plaintiffs’ proposed terms move forward immediately. Plaintiffs remain open to the possibility of using TAR to facilitate the production of documents from custodians outside the first ten and desire to continue conferring with the Exactech Defendants about a potential TAR process and written protocol.

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<sup>2</sup> Defendants also assert that: “Exactech has not yet made the prerequisite claim of unreasonable amount of hits or undue burden” Dkt. 377 p.2, “...the ESI Order only requires the Producing Party to share specific metrics *if* the Producing Party (Exactech) “claims that a term generates an unreasonable amount of hits or an undue burden.”

## 2. Technology-Assisted Review (TAR)

In their letter of July 28, 2023, the Defendants make a request of their own: “that this Court [instead] urge the Parties to consider an efficient and expedient way forward- Technology Assisted review (“TAR”).” In January of this year, rather than providing a proposed TAR protocol, or otherwise discussing such technologies or alternatives, Defendants instead provided their proposed search terms, which Plaintiffs responded to. Plaintiffs then labored with meet and confers regarding search terms, with zero mention from either party about using TAR or alternative technologies for five months. Plaintiffs have met all of their obligations under the ESI Order. Now, at the eleventh hour, the Exactech Defendants are proposing to use TAR instead of search terms.

Using TAR for the custodial documents from the first ten custodians at this late juncture would only result in delay and prevent the Exactech Defendants’ compliance with this Court’s deadline to begin production of documents by August 18, 2023.

First, Defendants’ request to use TAR at this point is untimely. The extensive process for negotiating the protocol and performing the necessary sampling, review, and validation of the system should have started back in February rather than the search term negotiations. Indeed, the ESI Order states that “[p]rior to using predictive coding/technology assisted-review, the Producing Party will notify the opposing party with ample time to meet and confer in good faith regarding a mutually agreeable protocol for the use of such technologies or alternatives. (Dkt. 88 at p. 5-6). TAR protocols are typically technically dense, lengthy documents which require substantial negotiations between the parties, and eventually are entered as an Order by the Court. Once the protocol is agreed upon and entered with the Court, TAR still requires significant set up, planning, manual review, and statistical validation before it can be used.

Second, search terms and TAR are merely methods for identifying potentially responsive documents. Regardless of the method used to identify the corpus of potentially responsive documents, the Exactech Defendants must still review those documents prior to production. As the Exactech Defendants state, discovery from twelve custodians has been collected and is waiting to be reviewed and produced. Defendants identified the approximately 460,000 documents in that discovery which contained search terms six weeks ago. Rather than use the past six weeks to review documents, the Exactech Defendants have instead let those documents remain waiting for review while they advocated changing the methodology to TAR and using the technology to identify a *different* subset of the collected discovery to then begin reviewing and producing.

The Parties engaged in a meet and confer on August 8, 2023, which included participation by the Parties' respective technology consultants and vendors. Plaintiffs' ESI Liaison was present with the Senior Vice President of eDiscovery Analytics and Strategy for their vendor. For Plaintiffs, this conference had two agenda items: 1) to allow Plaintiffs to better understand the sampling process regarding the search term negotiations and 2) to allow Plaintiffs to gain a detailed understanding of Defendants' desired approach to utilizing TAR 2.0.<sup>3</sup> This was a helpful endeavor that answered many of the Plaintiffs' questions regarding the search term hit report and sampling process that had been pending for multiple weeks. Plaintiffs now understand that the Exactech Defendants have collected approximately 2.1 million documents from the Outlook mailboxes of twelve custodians. Plaintiffs' search terms resulted in 123,321 unique documents, out of the approximately 460,000 total documents containing search terms, when applied to those 2.1 million documents.

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<sup>3</sup> TAR 2.0 refers to a type of protocol involving continuous active learning but is not uniform across all platforms. As such, it is necessary for Plaintiffs to understand the specifics of how the Defendants' platform, DISCO, integrates TAR 2.0.

Plaintiffs also understand that the Exactech Defendants' sampling process did not include the actual use of TAR to identify responsive documents. Instead, Exactech used manual attorney review of 385 documents selected from the approximately 2.1 million Outlook documents. Defendants determined that 93 of the 385 documents were "responsive" as defined unilaterally by the Exactech Defendants. The percentage of responsive documents in this sample, 24.2%, speaks to the richness or prevalence. The Exactech Defendants then calculated an estimated range of the number of documents that might be identified by TAR by applying that percentage to the collection of 2.1 million documents.

To better understand the potential relative success of the two approaches in this specific litigation, Plaintiffs have requested a comparison of the documents returned by Plaintiffs' search terms against the documents that would be identified by TAR. This understanding is a necessary factor in Plaintiffs' consideration of TAR for use with subsequent custodial files. The Parties continue to confer regarding this comparison and the other details of a potential TAR protocol going forward.

### **3. ESI Liaison**

Contrary to the Exactech Defendants' position, Plaintiffs have in fact had a designated ESI Liaison for over five months. A member of the Plaintiffs' Executive Committee identified herself as the ESI Liaison in a February 14, 2023, email. It is true that a small number of the Plaintiffs' leadership have engaged with the Exactech Defendants on various issues regarding both electronic and written discovery. Defendants seem to conflate the Plaintiffs' division of labor with a lack of coordination or consistency.

Given the large volume of issues that must be addressed in this litigation to continue moving forward, the effort must be shared among a small group of individuals. In fact, Exactech's

reliance on one primary individual to address the multitude of open issues appears to be one of the causes of delay Plaintiffs are encountering. No matter how productive an individual may be, time is a finite resource and there remains an extensive amount of work to be done in these initial stages of the litigation to comply with the Court's orders.

Furthermore, one of the individuals communicating with the Exactech Defendants has been Co-Lead Counsel. Co-Lead Counsel's involvement became necessary given the depth of the discovery disputes, coordination with Florida consolidated leadership, and the degree to which these disputes endangered the Parties' continued compliance with the Discovery CMO schedule. That said, Plaintiffs have clarified the streamlined communication channels with the Exactech Defendants, even while continuing to work collaboratively among Plaintiffs' leadership.

#### **D. The Exactech Defendants' Position.**

##### **1. Search Terms**

This Court's Discovery Case Management Order (Dkt. 291) at (B)(7) required that by June 30, 2023, "the Parties shall agree upon search terms and, if not agreed, shall request a discovery dispute conference with the court." Because the Parties could not agree on search terms, on July 7, 2023, the Exactech Defendants wrote this Court advising of the need for a discovery conference without further cooperation from Plaintiffs. As this Court knows well, in April, it was the Plaintiffs that unilaterally decided to stop negotiating search terms with the Exactech Defendants until Plaintiffs received a search term report. Although the Parties were still negotiating custodians, the Plaintiffs (not the Exactech Defendants) made a choice to stop negotiating search terms. In June, after the 12 custodians' information had been collected and processed, Exactech provided Plaintiffs with a search term report (i.e., metrics). But that still was not enough for Plaintiffs. The

actual history of how these negotiations played out can be found in Exactech's letters (and Exhibits) of July 7, 2023 (Dkt. 348), July 28, 2023 (Dkt. 377),

The Exactech Defendants have invested substantial time, energy, and resources in moving forward with investigating the most efficient and effective way towards actual document productions. Plaintiffs, on the other hand, remain hyper focused on objections. Plaintiffs' position really is confounding. And Plaintiffs' position again ignores that the Exactech Defendants served objections *months ago*, in April, but Plaintiffs waited until nearly July to say anything. The Exactech Defendants have not waived anything and besides, the ESI Order is *silent* on objections. Despite the ESI Order's silence on objections, Plaintiffs position in this Joint Status Report appears to demand a **third set of objections** and **more metrics** (in addition to the metrics Exactech already provided). Plaintiffs have effectively illustrated their own obstruction and delay. And if that is not enough, demand that this Court Order the Exactech Defendants to produce all non-privileged documents responsive to Plaintiffs' search terms. But doing so would reward the Plaintiffs for their decision to halt search term negotiations for months in favor of an all or nothing approach. There is no basis in law for Plaintiffs' demand.

## **2. Technology-Assisted Review (TAR) 2.0**

TAR 2.0 has been a fundamental focus of the Exactech Defendants since the Parties intensely negotiated TAR 2.0 as early as the ESI Protocol. TAR 2.0 is the most efficient and effective way to actual document productions. Plaintiffs' argument that using TAR 2.0 "at this late juncture would only result in delay and prevent the Exactech Defendants' compliance with this Court's deadline" is so plainly wrong and disingenuous, it cannot be taken seriously. **To be clear, the delay here was caused by Plaintiffs unilateral decision to stop negotiating search terms for nearly three months.** And for the last two months, while the Exactech Defendants have been

working towards a reasonable way forward to actual document productions, the Plaintiffs have made endless demands for rounds of objections and engaged in an endless letter writing campaign.

That Plaintiffs now say they will consider TAR 2.0 for the *next* round of custodians, but not this one, makes no sense.

First, nothing is untimely about the Exactech Defendants' desire to start producing documents after TAR 2.0. In fact, given that the Plaintiffs are still reviewing objections to search terms from April, at that rate, search terms will never be agreed upon and documents will never be produced. So, to quell Plaintiffs' unfounded concerns regarding TAR 2.0 and in a good faith attempt to meet and confer on TAR 2.0, the Exactech Defendants presented their eDiscovery vendor for a meet and confer on August 7<sup>th</sup>, 2023 with Plaintiffs and their eDiscovery vendor. At great expense to the Exactech Defendants, Exactech's vendor included two data engineers and two project managers to answer Plaintiffs' questions. To be clear, Exactech and its eDiscovery vendor approached this meet and confer with every good faith intention to move the Parties closer to review and production. We were entirely disappointed that Plaintiffs' approach to the meet and confer was anything but an attempt to learn about TAR 2.0. Instead, Plaintiffs' counsel and her vendor spent an hour attempting to cross-examine Exactech's vendor and try (poorly) to poke holes in a proven, court-approved, review tool. Their misguided approach to Exactech's offer also explains why many of Plaintiffs' details above regarding TAR 2.0 seriously miss the point (and show a lack of understanding of TAR 2.0 and its utility).

Second, there is no need for an extensive TAR 2.0 protocol, as Plaintiffs suggest. Plaintiffs and apparently Plaintiffs' vendor are still failing to distinguish the differences between TAR 1.0 and TAR 2.0. The initial sampling for *prevalence* **is already complete** and indeed, this prevalence sample projects that the Exactech Defendants will produce *more* documents than Plaintiffs' poorly

constructed search terms. Plaintiffs also seem to misunderstand the sampling process (which provides prevalence, not relevance), even though Exactech’s vendor walked through this otherwise simple concept, step by step. Separately, there is no “validation of the system.” Validation of the *review*, however, is an ongoing process, as Exactech’s vendor explained on August 7<sup>th</sup>.

Third, the Exactech Defendants agree that TAR 2.0 is a method for identifying potentially responsive documents, but TAR 2.0 is a significantly more robust, more effective, and more efficient mechanism of pushing the most relevant documents for review and production, first. While the Exactech Defendants still review documents prior to production, the documents batched first for review through TAR 2.0 are generally the more relevant document sets.

The bottom line is that no additional analysis is needed here. This is yet another of Plaintiffs’ patterns—demand information from Exactech, receive information from Exactech, and demand more and more analysis. Then, blame Exactech for delay. The time to move forward on TAR 2.0 is now.

### **3. ESI Liaison**

The ESI Protocol (Dkt. 88) in this litigation requires that:

Each party will identify an eDiscovery Liaison who will be primarily responsible for meeting and conferring on issues concerning ESI. The appointment of a PSC eDiscovery Liaison entails acting as the PSC’s representative in communicating with the Defendants’ eDiscovery Liaison, other Plaintiffs’ Counsel with cases in this MDL, and the Court.

The ESI Protocol also states that the ESI Liaison will “notify the other of any changes of its designated eDiscovery Liaison.” While Ms. Wall may have identified herself as the ESI Liaison in February, Mr. Seth Katz did so in January while he was negotiating the ESI Protocol with the Exactech Defendants. In late January, Ms. Ellen Relkin sent emails regarding search terms and custodians. In February, Ms. Relkin suggested Ms. Danielle Gold or Ms. Cara Wall would be best



to speak to regarding ESI. Later, Exactech received ESI related demands from Ms. Emily Acosta, from Mr. Michael Cutler, Ms. Wall, and yes, Mr. Pope. All of these individuals have engaged with the Exactech Defendants on ESI. And now, while Plaintiffs purport to designate Ms. Wall as their ESI Liaison, they also discuss Mr. Pope's involvement. The Defendants need a designated person or persons who can negotiate, speak for and bind the Plaintiffs. That still has not happened.

As just a single, but very important and expensive example of the lack of coordination and consistency among the Plaintiffs, the Exactech Defendants have had to re-produce previously produced documents multiple times **even though the MDL Plaintiffs and the Florida Plaintiffs share a document repository.**

The Exactech Defendants agree that discovery in MDLs is complicated and extensive and that discovery teams require shared responsibilities. But the ESI Order in this case demands a single ESI Liaison, and, regardless of the "large volume of issues that must be addressed in this litigation" even Plaintiffs should be expected to comply with the ESI Order and identify a single ESI Liaison.

#### **E. State Court Discovery Update.**

In California, the Exactech Defendants continued to meet and confer with Plaintiffs in the *Collum-Bradford* case pending in California state court. Kirk Pope, the co-lead counsel for the MDL is lead counsel in *Collum-Bradford*. It is Plaintiffs' position that the *Collum-Bradford* case involves matters that Defendants have disputed are at issue in this MDL. (Dkt. 351 at p. 2). As a result of a multitude of discovery issues and after many discovery conferences, Plaintiffs filed a Motion to Compel on June 1, 2023. The motion is now fully briefed. On July 11, 2023, the presiding judge in *Collum-Bradford*, Hon. Erin Guy Castillo, appointed a Special Discovery Master to hear Plaintiffs' motion. Judge Brian Van Camp has been assigned as the discovery

referee and the first meeting with the Special Discovery Master will be on August 24, 2023. He may be contacted at (916) 515-8442. The Exactech Defendants have no objections to this Court being in touch with the Special Master as the need for coordination of discovery is part of the Exactech Defendants' opposition to Plaintiffs' Motion to Compel and coordination of discovery is especially important, particularly where co-Lead counsel for the MDL Plaintiffs is leading the litigation in this California case. Plaintiffs submit that there is no need for this Court to intervene where Defendants have posited that the issues in *Collum-Bradford* are unrelated to those present here.

Plaintiffs in more than a dozen Cook County, Illinois cases have also served requests for production, interrogatories, and now discovery dispute letters on the Exactech Defendants. The most recent request was a "Consolidated Request to Produce Documents," requests which are largely duplicative of discovery requests served in this MDL, Florida, and California. MDL Plaintiffs are not privy to the positions being taken by the Illinois Plaintiffs and Defendant's representations are being made unilaterally.

### **III. The TPG Defendants**

**Motion To Dismiss:** TPG Defendants served Plaintiffs with their motion to dismiss Plaintiffs' veil piercing and successor liability claims on June 9, 2023. Plaintiffs served their opposition on July 14, 2023. TPG Defendants filed their reply and all other briefing with the Court on July 28, 2023. Plaintiffs moved for leave to file a sur-reply on August 3, 2023. TPG Defendants opposed on August 8, 2023. TPG Defendants' motion is fully briefed.

**Discovery:** Magistrate Judge Henry granted TPG Defendants' motion to stay discovery on May 30, 2023 pending resolution of TPG Defendants' motion to dismiss.

**IV. Next Status Conference**

If the Court's schedule permits, Plaintiffs request that the next Status Conference be set for September to ensure critical discovery deadlines are met and any discovery disputes are quickly addressed.

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The Parties look forward to seeing Your Honors at the Status Conference scheduled for August 22, 2023.

Dated: August 11, 2023

Respectfully submitted,

**WEITZ & LUXENBERG, P.C.**

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

# Exhibit A

Case	Case No.	Court
Louis Aliperta, Jr. v. Exactech, Inc., et al.	152304/2023	Supreme Court of the State of New York, County of New York
Danielle L. Arvanitakis v. Midway Medical Products, Inc., et al.	2023-L-007155	Circuit Court of Cook County, Illinois, Law Division
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
Jasmine Connelly v. Exactech, Inc., et al.	CV-14134	Circuit Court of Tennessee, 17th Judicial District, County Bedford
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
Dan Delph v. Exactech, Inc., et al.	29D03-2307-CT006598	Superior Court of Indiana, County of Hamilton
Debra L. Fox v. Midway Medical Products, Inc., et al.	2023-L-007160	Circuit Court of Cook County, Illinois, Law Division
Natale Gigliotti v. Stephen Fealy, MD., et al.	805221/2023	Supreme Court of the State of New York, County of New York
Jackie R. Harding v. Midway Medical Products, Inc., et al.	2023-L-007170	Circuit Court of Cook County, Illinois, Law Division
Stephanie Hashim v. Exactech, U.S., Inc., et al.	23STCV10912	Superior Court of the State of California, County of Los Angeles, Central District
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
Michael Kelly v. Exactech, U.S., Inc., et al.	23CV415475	Superior Court of the State of California, County of Santa Clara
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 Antonello v. Exactech, Inc., et al.	151170/2023	Supreme Court of the State of New York, County of New York
Marvin Langford v. Exactech, U.S., Inc., et al.	STK-CV-UPL-2023-0005811	Superior Court of California, County of San Joaquin
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
Karen Nelson 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
Dominic Ruettiger v. Midway Medical Products, Inc., et al.	2023-L-006924	Circuit Court of Cook County, Illinois, Law Division
Jane Sabesan v. Exactech, Inc., et al.	TBD	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
Phyllis Schnitzer v. Exactech, Inc., et al.	157476/2023	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
Judy C. Thornton v. Midway Medical Products, Inc., et al.	2023-L-007849	Circuit Court of Cook County, Illinois, Law Division
Linda I. White v. Midway Medical Products, Inc., et al.	2023-L-006803	Circuit Court of Cook County, Illinois, Law Division
Delomie Williams v. Exactech, Inc., et al.	TBD	Supreme Court of the State of New York, County of New York

# Exhibit B

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August 9, 2023

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### **IN RE: Exactech Polyethylene Orthopedic Products Liability Litigation**

Counsel:

As we briefly discussed during our other recent meet and confers, there are a number of open issues and discussion topics that have been raised during various conferences, phone calls, and other communications over the past several months. In an effort to ensure we do not overlook any outstanding topics, Plaintiffs have compiled the following list of the topics and issues that have been raised but have yet to be entirely resolved:

1. Search term negotiations
2. Search term results as compared to estimated TAR results
3. Technology-Assisted Review (TAR) protocol
4. Plaintiffs' First Request for Production
5. Plaintiffs' Second Request for Production of Exemplar Devices
6. Plaintiffs' First Set of Interrogatories
7. Custodian negotiations
8. Custodial file collection outside of Outlook
9. Exactech's incomplete Initial Disclosures
10. Defendant Fact Sheet deficiencies
11. Production of Easily-Segregable Documents
12. The lack of document family metadata to allow the association of emails with their attachments.
13. Missing production cover letters
14. Production issues related to corrupted or overly large files

Of course, the status of each of the above-listed items varies. I believe your suggestion to meet and confer to review the list is the best approach. We can 1) ensure we have not overlooked any items



and 2) establish the next steps for each topic. To that end, please let me know your availability during the next two weeks to confer on these topics.

Please let me know if you have any questions or comments. I look forward to our continued productive discussions.

Sincerely,



Carasusana B. Wall  
ZOLL & KRANZ, LLC  
Plaintiffs' ESI Liaison

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