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March 22, 2024

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:

With the number of pending cases in this MDL and in the Florida Coordinated Proceeding and other jurisdictions around the country now exceeding 2,000, the cost of this litigation for Exactech and for Plaintiffs has been substantial and will continue to rapidly increase with company witness depositions set to take place in early April. Additionally, Judge Keim has set the first Florida bellwether trial to commence on October 7, 2024, and this Court has set the first MDL bellwether trial for June 2, 2025. Before both sides incur further litigation expenses, Exactech's counsel believes it is important to be heard in chambers as soon as practicably possible to discuss potential global mediation of this litigation, and also apprise the Court of certain other issues relevant to the bellwether trials in Florida and in this MDL. At the recent MDL status conference on March 13, I advised Magistrate Judge Henry in open court of Exactech's intent to seek this *in camera* conference.

Counsel for Exactech believes that to advance the ultimate goal underlying the bellwether process generally and to maximize the opportunity the parties have now to engage in discussions regarding global resolution of this MDL and the Florida litigation, they need to be heard in chambers as soon as practicably possible to update the Court on the status of the resolution discussions to date as well as certain other issues relevant to the Court's consideration. Due to the confidential and sensitive nature of the information that Exactech wishes to share with the Court, an *in camera* meeting is in the best interests of all parties. An in-chambers conference in a mass tort proceeding such as this is not unusual and is beneficial under the right circumstances. For example, the Manual for Complex Litigation, as well as other authorities, notes that "an informal off-the-record conference can be held in chambers...and can sometimes be more productive." Manual for Complex Litigation, sec. 11.22, 4th Ed. (2004).

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After the Court has had an opportunity to consider the information presented by Exactech's counsel regarding the company, Exactech intends to ask the Court to consider extending certain dates in the Second Amended Discovery Case Management Order (Dkt. 522) and Case Management Order for Bellwether Trials (Dkt. 521), with a temporary moratorium on depositions in the meantime, so that there is an opportunity for the parties to focus intensely on global resolution. Because time is of the essence, this intense focus will be necessary to the potential achievement of a resolution. Exactech's counsel understands that Plaintiffs' leadership has voiced a general objection to pausing or extending deadlines so that the parties can focus on global resolution. Exactech also appreciates the Court's desire to set trial dates and move cases toward trial. However, counsel for Exactech has not yet had an opportunity to be heard *in camera* and present the Court with additional information it believes is important to such a consideration. Plaintiffs' leadership will also have the opportunity at that conference to hear and consider that same information and respond accordingly.

Exactech respectfully suggests that an *in camera* conference itself does not cause any prejudice to any party. Further, it will promote judicial economy and be in the best interests of all parties to conduct an in-person conference in chambers at which counsel can discuss such issues with the Court off the record. Counsel for Exactech further states that this motion is not made for the purposes of delay, but instead is made in the interests of justice and in order to have an opportunity to relay to the Court important information relevant to this litigation.

In the Florida Coordinated Litigation, Exactech has been inquiring with Judge Keim in the hopes of obtaining an *in camera* conference and we intend to continue with that effort. If the Court wishes, we can attempt to coordinate a joint conference at which all three judges can attend.

Respectfully submitted,

/s/ Michael J. Kanute

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