



UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK

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 IN RE: EXACTECH POLYETHYLENE :
 ORTHOPEDIC PRODUCTS LIABILITY :
 LITIGATION :
 : 22-MD-3044 (NGG)(MMH)
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 This Document Applies to ALL CASES :
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**FIRST AMENDED DISCOVERY CASE MANAGEMENT ORDER GOVERNING
 MASTER DISCOVERY BETWEEN PERSONAL INJURY
 PLAINTIFFS AND THE EXACTECH DEFENDANTS¹**

This Order Governing Master Discovery (“Discovery Order”) was submitted by stipulation between the Personal Injury Plaintiffs (“Plaintiffs”) and Defendants Exactech, Inc. and Exactech U.S., Inc. (“Defendants”) (together, “the Parties”), with competing proposed discovery deadlines and objections for the Court’s review and decision. (See ECF Nos. 206, 207, 214, 215, 289.)² The parties have jointly proposed amendments to the initial discovery plan. (See Aug. 22, 2023 Minute Entry.) After careful review of the Parties’ submissions, the Court orders the following:

- 1. Electronic Document Depository.** Consistent with Case Management Order No. 1, the MDL Plaintiffs’ Executive Committee (“PEC”) will maintain a single electronic document depository (“MDL Document Depository”) for the use of the Plaintiffs in the MDL and the cases coordinated on the Exactech Master Case Docket (Case No. 01-22-CA-2670) in

¹ As alleged, the Personal Injury Plaintiffs are “individuals who underwent joint replacement surgeries in which they received one or more defective Exactech Hip, Knee, or Ankle Devices that ultimately failed, causing them to suffer” damages. (Am. Master Compl., ECF No. 164 ¶ 17.)

² In two text orders on May 30, 2023, the Court stayed discovery as to: (1) third-party payer issues generally and Plaintiff MSP Recovery Claims, Series LLC specifically; and (2) Defendants’ TPG Inc.; Osteon Holdings, Inc.; Osteon Merger Sub, Inc.; and Osteon Intermediate Holdings II, Inc.

the Eighth Judicial Circuit of Florida, Alachua County (“Florida Coordinated Actions”). (ECF No. 87.) Production to the MDL Document Depository by Defendants shall constitute production to the Plaintiffs in the MDL, the Florida Coordinated Actions, and any other state court actions that agree to coordinate discovery fully and formally with these proceedings.

2. **Service.** 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 the document request(s) to which they are responsive.

3. **Use of Discovery.** All discovery conducted in the MDL, including documents, data, and deposition transcripts, may be used in the MDL Proceeding, the Florida Coordinated Actions, and 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 to and does not supersede applicable discovery or other procedural orders entered in each separate proceeding.

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

5. **Applicable Discovery Rules.** 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.” Therefore, unless otherwise agreed between the 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.

7. **Rolling Production.** Absent compelling circumstances, the Parties shall engage in the rolling production of documents. Exhibit A to this Order 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 may agree to a longer period for production than what is stated in the Federal Rules of Civil Procedure or the Local Civil Rules of this district, without leave of Court, provided that the parties are certain they can still meet the discovery completion deadline. The discovery completion date may be adjourned only with leave of the Court upon a showing of good cause.

8. **Claiming Privilege in Response to Discovery Requests.** If a Party objects to a discovery request based on privilege without providing a 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. Within forty-five (45) days after a production of documents, the Producing Party shall produce a privilege log for any documents withheld from that production based on an assertion of privilege.

9. **Disclosure Forms and Fact Sheets.** Plaintiff Preliminary Disclosure Forms, Plaintiff Sheets, Supplemental Plaintiff Fact Sheets, Defendant Fact Sheets, and Supplemental Fact Sheets are governed by separate order. (*See* ECF Nos. 90, 166, and 168.)

10. **Discovery Schedule.** See Exhibit A attached hereto.

11. **Discovery Disputes.** If the parties cannot resolve disputes arising in the coordinated pretrial discovery conducted in the MDL, including disputes regarding 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.

12. **Admissibility at Trial.** 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 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.

Brooklyn, New York
August 22, 2023

/s/Marcia M. Henry
MARCIA M. HENRY
United States Magistrate Judge

EXHIBIT A – FIRST AMENDED DISCOVERY SCHEDULING ORDER¹

A. Actions Required before the Initial Status Conference

1. Fed. R. 26(f) Conference to be held: June 13, 2023
2. Parties to exchange Fed. R. 26(a)(1)(A)(i), (ii), and (iv) disclosures: June 13, 2023
3. Medical records authorization: March 23, 2023, and on a rolling basis as new cases are filed (ECF Nos. 166, 198)
4. Procedures for producing Electronically Stored Information (ESI) discussed: January 26, 2023 (ECF No. 88)
5. Protective Order to be submitted for Court approval: January 26, 2023 (ECF No. 89)

B. General Deadlines

1. Motion to join new parties or amend master pleadings: December 7, 2023
2. Plaintiffs' preliminary disclosure forms: March 13, 2023; 30 days from filing Short Form Complaint ("SFC"); or 30 days from transfer into MDL (ECF No. 168)
3. Plaintiffs' Fact Sheets: June 6, 2023; 75 days from filing SFC; or 75 days from transfer into MDL (ECF Nos. 166, 198)
4. Defendant Fact Sheets: 15 days of receipt of Plaintiff's substantially complete Plaintiffs' Fact Sheet (ECF Nos. 166, 198)
5. Defendant to produce the document production in the Florida Coordinated Actions: February 27, 2023 and April 20, 2023 (ECF No. 87)
6. Plaintiffs' initial document requests and interrogatories: June 5, 2023

¹ The dates in this Scheduling Order constitute deadlines—i.e., the last day to complete a stated action. The Parties are encouraged to complete the stated actions in advance of the deadlines.

7. Defendants' response to Plaintiffs' initial document requests and interrogatories: June 30, 2023
8. The Parties shall agree upon search terms and, if not agreed, shall request a discovery dispute conference with the Court: June 30, 2023
9. Depositions may commence: July 28, 2023
10. Fed. R. Civ. P. 30(b)(6) deposition on ESI issues to be completed: August 18, 2023
11. Defendants' initial production of 12 agreed upon custodial files: September 22, 2023
 - a. The parties shall agree upon a proposed TAR 2.0 protocol for production of the remaining custodian files: September 22, 2023
12. The Parties shall agree to the final list of Exactech Custodians (in addition to the 12 agreed upon custodial files)²: October 6, 2023
13. Defendants' substantial completion of non-custodial document production: October 3, 2023
14. Defendants to complete production of 12 agreed upon custodial files: November 20, 2023
15. All fact discovery must be completed (including disclosure of medical records for filed cases): August 30, 2024
16. Joint status report certifying close of FACT discovery: September 9, 2024; later filed cases will have later fact discovery deadlines (ECF Nos. 166 and 168).

C. Core Discovery / Bellwether Deadlines

1. The Parties shall submit a proposed Bellwether Trial Plan: August 11, 2023
2. Plaintiffs' supplemental fact sheet due: within 60 days of selection in a bellwether trial pool (ECF No. 166)

² Custodians may only be added after this date upon a showing of good cause.

3. Core discovery depositions must be completed: TBD in Bellwether Trial Plan
4. Plaintiffs' bellwether expert report disclosures and depositions to be completed: TBD in Bellwether Trial Plan
5. Defendants' bellwether expert report disclosures and depositions to be completed: TBD in Bellwether Trial Plan
6. Rebuttal bellwether expert reports due: TBD in Bellwether Trial Plan
7. Joint status report certifying close of ALL DISCOVERY and indicating whether dispositive motion is anticipated: December 20, 2024
8. If any party seeks a dispositive motion, date to file request for pre-motion conference: February 7, 2025