

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN DIVISION

.....X

*IN RE: EXACTECH POLYETHYLENE
ORTHOPEDIC PRODUCTS LIABILITY
LITIGATION*

Case No.: 1:22-md-03044-NGG-MMH
MDL No. 3044

~~Proposed~~ **STIPULATED PROTOCOL
GOVERNING THE
PRODUCTION OF
ELECTRONICALLY STORED
INFORMATION**

Judge Nicholas G. Garaufis
Magistrate Judge Marcia M. Henry

This Document Applies To:

All Cases

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1. **Purpose.** This Electronically Stored Information (“ESI”) protocol governs production of electronically stored information in this matter except that Paragraphs (7), (8), (9), (10), (11), and Appendix A herein, regarding document collection, document processing, and document production, apply only to Defendants. The Parties agree to meet and confer about the content and entry of a separate ESI Protocol that will govern Plaintiffs’ collection, processing, and production of ESI and other things.

Federal Rule of Civil Procedure 34 permits the Parties to specify the form or forms in which ESI is to be produced. Pursuant to Rule 34, this ESI Protocol shall govern the production of hard copy documents and other physical materials and ESI by the Parties in the above captioned matter as a supplement to the Federal Rules of Civil Procedure and any other applicable orders and rules.

The parties each reserve the right to seek exceptions, amendments, or modifications to this Order from the Court for good cause shown.

2. **Privileged Materials.** The Court will enter a separate Protective Order that shall govern the handling of confidential and privileged information. Nothing in this ESI Protocol shall be interpreted to require production of documents or ESI protected from disclosure by the attorney-client privilege, work product doctrine, common interest privilege, or any other legally recognized protection or privilege. The Parties do not waive any objections to the production, discoverability, or confidentiality of documents, ESI, or any other discovery materials, including but not limited to: objections regarding the proportionality of the discovery request or the burden, overbreadth, or relevance of documents, ESI, or any other discovery materials.

3. **Cooperation.** The parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter.

4. **eDiscovery Liaisons.** 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 appointment of the PSC eDiscovery Liaison does not impose any obligation to communicate directly with or be responsible for ESI obligations of any individual Plaintiff who has a case pending in this MDL and who is represented by a law firm other than the law firm of PSC eDiscovery Liaison except that with respect to any common ESI issues applicable to all Plaintiffs, individual Plaintiffs' counsel, or among individual Plaintiffs' firms, the PSC eDiscovery Liaison agrees to coordinate with Defendants' eDiscovery Liaison. Each eDiscovery Liaison will:

- a. be knowledgeable about the party's eDiscovery efforts;

- b. be, or have reasonable access to those who are familiar with the party's electronic systems and capabilities to explain those systems and answer relevant questions;
- c. be, or have reasonable access to those who are knowledgeable about the technical aspects of eDiscovery, including electronic document storage, organization, and format issues, and relevant information retrieval technology, including search methodology;
- d. will notify the other of any changes of its designated eDiscovery Liaison.

5. **Meet and Confer.** The parties will meet-and-confer to discuss and attempt to reach an agreement on the appropriate scope and limitations of ESI to be produced in this MDL. The parties will discuss possible options for ensuring an efficient discovery process, such as the possible use of search terms or technology assisted review, the possible use of testing and sampling, relevant date ranges, possible ESI custodians, any obstacles to accessing and producing ESI, information demonstrative of adequate quality controls, and the timing of productions.

6. **Confidential Information:** For the avoidance of doubt, nothing herein shall contradict the Parties' rights and obligations with respect to any information designated as Confidential under any Protective Order entered in this case.

7. **ESI Search.** Defendants shall produce electronic discovery to the Requesting Party¹ in a commercially reasonable manner or in the manner kept in the Defendants' ordinary course of business, whichever is less burdensome and economical for the Defendants. The Parties will discuss and attempt to reach an agreement on search methodologies with the goal of limiting

¹ Consistent with the Proposed Case Management Order jointly filed by the parties on January 11, 2023 (Dkt. 76), production of ESI to the Plaintiffs' Executive Committee's document depository ("MDL Document Depository") by Defendants shall be deemed sufficient to constitute production to all Plaintiffs in this MDL.

the scope of review for production, minimizing the need for motion practice, and facilitating production in accordance with the deadlines set by the Court or agreed upon by the Parties. No responsive document shall be intentionally withheld from production, solely on the basis that it was not within an agreed-upon custodial or non-custodial data source, or did not contain an agreed-upon search term, or was otherwise not identified as responsive by TAR or any other identification process hereunder.

a. Search Terms:

- a. If search terms are used by a Producing Party to identify responsive documents and information, the Producing Party will provide a list of proposed search terms to the Requesting Party. Within 21 days after receiving the Producing Party's terms, the Requesting Party shall identify in writing any challenges to that list, identifying specific search terms it believes should be searched or not searched, or request a meet and confer for same. If the Requesting Party does not provide such notice within the time specified, no additional search terms will be required for the referenced data sets. The Parties will meet and confer regarding additional terms proposed by the Requesting Party if the Requesting Party provides notice within the 21-day period. No search term will be added to the list if it generates an unreasonable number of nonresponsive documents or creates an undue burden. If the Producing Party claims that a term generates an unreasonable amount of hits or an undue burden, it will share the specific metrics behind their claim, for example sharing the number of documents that hit on a term and the number of hits with families. In

addition, the Producing Party agrees to tell the Requesting Party if any of their suggested hits generate less than 100 hits per term exclusive of family members. The Parties agree to meet and confer regarding the application of additional terms. If the Receiving Party believes the application of additional search terms is warranted, it must timely identify such terms and show that (a) the previous terms were inadequate and (b) the additional search terms are relevant and proportional. If a Party disputes a specific term or terms as being overly broad, the Producing Party may choose to review a statistically valid sample (using a benchmark of 95% confidence level with an error rate of 5%) of documents from that term, or terms, to determine if the term is accurately returning documents. The Producing Party agrees to share the results of that review, which results may be used by the parties to modify the specific term in dispute.

- b. If the parties are unable to resolve disputes over search terms through the meet and confer process, the parties will submit the dispute to the Court.
 - c. The Producing Party agrees to quality check the data that does not hit on any terms (the Null Set). If responsive documents are found during the Null Set review, the Producing Party agrees to produce the responsive documents. The parties agree to continue to meet and confer as to the parameters of such a null set review.
- b. Technology Assisted Review (TAR): Prior 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. This discussion will include:

- a. The vendor being used to manage the application of the technology, if any;
- b. The method(s) used to derive the seed or exemplar set, if a seed set is being used;
- c. The method for validating the computer decisions;

8. **Validation.** The review process should incorporate quality-control and quality-assurance procedures to ensure a reasonable production consistent with the requirements of **Federal Rule of Civil Procedure 26(g)**. Once a Producing Party reasonably believes that it has produced or identified for production substantially all responsive non-privileged documents, it shall conduct validation according to the following sampling protocol. TAR review validation will be achieved by taking a statistical sample of remaining uncoded and unreviewed documents, at a 95% confidence level and 5% confidence interval, to estimate the number of potentially responsive documents not identified during review. Should the recall rate not meet or exceed 75%, the parties will meet and confer. The review will be presumptively adequate and complete when the number of documents coded as responsive during TAR review represents a recall of at least 75% of the total number of responsive documents estimated to be in the collection. Upon request by the Receiving Party, Producing Party will provide final validation statistics identifying: (1) number of unreviewed documents in the collection; (2) uncoded and unreviewed sample size; (3) number of responsive documents in uncoded and unreviewed sample size; (4) estimated number of responsive documents not identified during the review; and (5) recall rate percentage.

9. **Document Families.** All documents shall be produced as a full document family (e.g., a parent email and all its attachments). For any documents that contain an attachment, to the

extent available, the suggested metadata fields shall be produced as part of the metadata load file for both the parent and child documents. To the extent a document is part of a family with a combination of responsive, non-privileged and privileged documents, the privileged document(s) shall be represented in the production with a placeholder TIFF image that bears the legend “Document Withheld as Privileged.” These placeholder TIFF image(s) shall be endorsed with a sequential Bates number.

10. **Readily Segregable Documents.** ESI or categories of ESI that are easily identifiable and segregable shall be collected without the use of search terms or other agreed-upon advanced search methodology (e.g., analytics, predictive coding, technology assisted review). This shall include responsive ESI that is kept together in the normal course of business (e.g., regulatory files, design history files, etc.) The Producing Party will indicate which categories of ESI will be produced with and without the use of search terms or other advanced search methodology.

11. **ESI Production.**

- a. The parties agree that attending to issues relating to form of production at the outset of discovery facilitates the efficient and cost-effective conduct of discovery. Appendix A sets forth technical specifications that the parties propose to govern the form of production of ESI in this litigation, absent other agreement by the parties. Among other things, the proposed technical specifications provide that a party need not produce ESI in more than one form in cases wherein this ESI Protocol is entered, unless otherwise agreed to in limited circumstances (as contemplated in the technical specifications). The parties agree to produce in native format all Excel, Access, csv or other data files and audio/video files and to produce all other file types in TIFF as set forth in Appendix A, unless the file requires

redaction, in which case the TIFF images of the document after the redaction has been applied shall be provided and the native file and full text may be withheld and or manually redacted. If necessary, the parties will meet and confer regarding production of other file types in native format. For any PowerPoint files, or other presentation and slide-based files, the Producing Party must identify, at the time of production, any files containing animations. Plaintiffs may then request such PowerPoint files, or other presentation and slide-based files, in native format. For good cause, a Requesting Party may request the production of specifically identified documents in a format other than as specified in this ESI Protocol. The Parties shall thereafter meet and confer, and the Producing Party shall not unreasonably deny such requests. The Parties agree to use their best efforts not to degrade the searchability of documents as part of the document production process.

a. A Producing Party may deduplicate horizontally (i.e., across different custodians).

1. ESI will be considered duplicative if it has matching MD5 or SHA-1 hash values.

b. A Producing Party may also choose to produce only the most inclusive e-mail threads and eliminate non-inclusive threads where the non-inclusive thread is completely encompassed in the inclusive thread. If a thread has unique documents attached, that thread will be considered non-inclusive.

1. With any such produced e-mails, the metadata for each suppressed e-mail is to be produced in “other” fields, as detailed in the Appendix A.

- b. The Parties recognize that certain, limited ESI may not be amenable to the proposed technical specifications and/or may not be producible in a reasonable TIFF format. The Parties will meet and confer in good faith to reach agreement regarding such documents and the appropriate form of production, and will seek Court intervention if necessary.

12. Redactions.

- a. All redactions shall be clearly marked on the document or slipsheet, ensuring the reason for the redaction is made clear (e.g., “non-responsive material redacted” or “PII redacted” or “GDPR”).

**IT IS SO STIPULATED, THROUGH COUNSEL OF
RECORD. SIGNATURES ON FOLLOWING
PAGE.**

Respectfully submitted,

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

SO ORDERED:



The Honorable Marcia M. Henry
United States Magistrate Judge

Dated: Brooklyn, New York
01-25-2023

Appendix A: Technical Specifications for Production

To the extent it is possible, each production of data should be consistent with earlier productions meaning that the format of images, the bates label format and metadata field order should remain the same.

I. General Provisions

- Media shall be produced preferably through a secure File Transfer Protocol (“FTP”) provided via email or otherwise physical media (“Physical Media”) may be delivered on CDs, DVDs, External USB drives, or other electronic media agreed to by the Parties and sent by UPS or FedEx. Each media volume should have its own unique name and a consistent naming convention (for example ZZZ001 or SMITH001). Deliverable media should be labeled with the name of this action, the identity of the Producing Party, and the following information: Volume name, production range(s), and date of delivery. In the event a Party uses a FTP, the information identified in this section to be provided with Physical Media shall be provided in a written cover letter with the accompanying email providing instructions for accessing documents through the FTP.
- Any media on which documents or electronic files are produced may be encrypted by the Producing Party. In such cases, the Producing Party shall transmit the password to the Requesting Party, under separate cover, separate cover which should be delivered directly after the encrypted media.
- Foreign language text files and metadata should be delivered with the correct encoding to enable the preservation of the documents’ original language. A Producing Party is under no obligation to prepare, provide, or search for English translations of non-English language documents or ESI.

II. Production of Documents Originating as Paper

Paper documents should be produced in such a fashion as to identify the location where the documents were located or stored and, where applicable, the natural person in whose possession they were found.

For documents that have originated in paper format that the producing party chooses to produce in electronic form after scanning, the following specifications should be used for their production. The producing party may also choose to produce paper in paper format. The production of paper in paper format should mimic the physical form that the documents were kept in the normal course of business, including physical bindings, post it notes or other physical specifics.

- Images should be produced as black and white single page TIFF group IV format imaged at 300dpi. Documents containing color may, but need be produced in single-page color JPEG format initially. If an original document contains color necessary to understand the meaning or content of the document, the Party producing documents shall honor reasonable requests for a color image and/or native file of the document. Color images should be produced in single-page JPEG format.
- Each filename must be unique and match the Bates number of the page. The filename should not contain any blank spaces and should be zero padded (for example ABC00000001).
- If documents are stored in a file folder, binder or other container, the cover, spine and/or label should be scanned as the first page of the document.
- If the document has post-it notes or other removable markings or tags, the document should be scanned first with the post-it note or marking in place and then a second time with the post-it note or marking removed.
- Each delivery should be accompanied by an image cross reference file that contains document breaks.
- A delimited text file that contains available fielded data should also be included and at a minimum include Beginning Bates Number, Ending Bates Number, Custodian(s) and Number of Pages. The delimiters for that file should be:
 - Field Separator, ASCII character 020: “¶”
 - Quote Character, ASCII character 254 “þ”
 - Multi-Entry Delimiter, ASCII character 059: “;”
- To the extent that documents have been run through an Optical Character Recognition (OCR) Software in the course of reviewing the documents for production, full text should also be delivered for each document. Text should be delivered on a document level in an appropriately formatted text file (.txt) that is named to match the first bates number of the document.
- A text cross reference load file should also be included with the production delivery that lists the beginning bates number of the document and the relative path to the text file for that document on the production media.

III. Production of Email and Electronic Documents

Electronic documents should be produced in such fashion as to identify the location (i.e., the network file folder, hard drive, back-up tape or other location) where the documents are stored and, where applicable, the natural person in whose possession they were found (or on whose

hardware device they reside or are stored). If the storage location was a file share or work group folder, that should be specified as well.

The Parties will make reasonable efforts to ensure that all Documents and ESI they produce are legible. If a copy is not legible and it is possible to produce a legible copy, such a legible copy will be produced (subject to relevant general and specific objections) within five (5) business days of a request from a receiving Party, or as mutually agreed upon by the Parties. But if no legible copy can be made, then the original will be made available for inspection and copying within ten (10) business days of a request from a receiving Party, or as mutually agreed upon by the Parties.

- Images should be produced as black and white single page TIFF group IV format imaged at 300dpi. Documents containing color may but do not need to be produced in single-page color JPEG format initially. If an original document contains color necessary to understand the meaning or content of the document, the Party producing documents shall honor reasonable requests for a color image and/or native file of the document. Color images should be produced in single-page JPEG format.
- Each filename must be unique and match the Bates number of the page. The filename should not contain any blank spaces and should be zero padded (for example ABC00000001).
- All images of emails shall be produced with the BCC or blind copy field visible on the image.
- Attachments, enclosures, and/or exhibits to any parent documents should also be produced and proximately linked to the respective parent documents containing the attachments, enclosures, and/or exhibits.
- If an attached file is connected or references another file with a hyperlink as opposed to embedded to the original file, the referenced file should be retrieved and included as if the file were directly attached. Links should not be broken, and their referenced files should not be separated for production purposes. To the extent the linked files are part of a standard signature block or other non-substantive, pre-formatted email template, like a company's website, the links do not need to be retrieved or produced.
- Each file should be named with a unique Bates Number and the files confidentiality designation. The filename should not contain any blank spaces and should be zero padded (for example ABC00000001-CONFIDENTIAL).
- If the parties have the ability to redact files natively, then they should do so. If the parties do not have the ability to redact natively, the files should be converted to either TIFF or PDF format, and redacted before production.

- Provide a delimited text file (using the delimiters detailed above) containing the following extracted metadata fields where they exist in the file being produced:

Beginning Production
Number Ending Production Number
Beginning Attachment Range
Ending Attachment Range
Custodian
Duplicate Custodian (custodians who had duplicate copies of the document but were deduplicated using horizontal deduplication)
Duplicate File Path (location path of deduplicated versions of the produced file)
Confidentiality Designation
File Path
Email Folder Path
Document Type
Redacted (the reason a document contains a redaction, i.e., Privileged, HIPAA, PII)
File Name
Duplicate File Name
File Size
Page Count
Title (from the document properties)
Hash Value
Date Last Modified
Date Created
Date Last Accessed
Date Sent
Time Sent
Other Date Sent (Date Sent information from suppressed e-mail chains)
Date Received
Other Date Received (Date Received information from suppressed e-mail chains)
Number of Attachments
Foreign Language
Author (non-emails)
From (emails) (either email or lose file)
Other From (Author information from suppressed e-mail chains)
Recipients
Other Recipients (Recipient information from suppressed e-mail chains)
Copies
Other Copies (Copies information from suppressed e-mail chains)
Blind Copies
Other Blind Copies (Blind Copies information from suppressed e-mail chains)
Email Subject
Email Importance
Path to Native File

Production Volume

- Extracted full text (not OCR text) should also be delivered for each electronic document. The extracted full text should be delivered on a document level according to the specifications above similar to paper documents.

Foreign language text files and metadata should be delivered with the correct encoding to enable the preservation of the documents' original language.

PRODUCTION OF DATABASES AND OTHER STRUCTURED DATA

Where possible, the producing party will produce structured data in Excel format to the extent such format will not decrease the usability of the data. To the extent that the conversion will degrade the usability, or should the limits of Excel cause the data to be truncated, the parties agree to meet and confer regarding an alternative production format.

The production of structured data should also identify the source of the data, and should be formatted so that each column of data has a column header. Explanations of headers should be provided upon request.

--End--