

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK (BROOKLYN)

3
4 IN RE: EXACTECH POLYETHYLENE
5 ORTHOPEDIC PRODUCTS LIABILITY
6 LITIGATION, et al,

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

Brooklyn, New York
June 1, 2023
2:40 p.m.

7 via video

8
9 TRANSCRIPT OF STATUS CONFERENCE HEARING
10 BEFORE THE HONORABLE MARCIA M. HENRY
11 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

11 For the Plaintiffs: N. Kirkland Pope, Esq.
12 Pope McGlamry, P.C.
13 3391 Peachtree Road, NE
Suite 300
Atlanta, GA 30326

14 For the Plaintiffs: Ellen Relkin, Esq.
15 Weitz & Luxenberg, P.C.
16 700 Broadway
New York, NY 10003

17 For the Plaintiffs: Rayna Kessler, Esq.
18 Robins, Kaplan, LLP
1325 Avenue of the Americas
Ste 2601
New York, NY 10019

19 For the Plaintiffs: Joseph H. Saunders, Esq.
20 Saunders & Walker, PA
21 3491 Gandy Blvd North
Suite 200
Pinellas Park, FL 33781

22 For the Plaintiffs: John Nazzaro, Esq.
23 The Reardon Law Firm, P.C.
24 160 Hempstead Street
P.O. Drawer 1430
25 New London, CT 06320

1 APPEARANCES (continued):

2 For the Plaintiffs: Michael Cutler, Esq.
3 Wagstaff & Cartmell
4 4740 Grand Avenue, Suite 300
5 Kansas City, MO 64112

6 For the Plaintiffs: Jerry Wilke, Esq.
7 Redmond Law, PLLC
8 80 Broad Street
9 Ste 1202
10 New York, NY 10004

11 For the Plaintiff: Amanda L Fernandez, Esq.
12 (MSP Recovery Claims Rivero Mestre, LLP
13 Series LLC) 2525 Ponce de Leon Blvd.
14 Suite 1000
15 Miami, FL 33134

16 For the Plaintiffs: Carasusana B. Wallis, Esq.
17 Liaison Zolls & Kranz
18 6620 Central Avenue, Suite 100
19 Toledo, OH 43617

20 For the Defendants: Susan M. Sharko, Esq.
21 (Exactech, Inc. and Faegre Drinker Biddle & Reath,
22 Exactech US, Inc. LLP
23 25 Oak Ridge Avenue
24 Summit, NJ 07901

25 Ruben I. Gonzalez, Esq.
Faegre Drinker Biddle & Reath LLP
320 S. Canal St.
Ste 3300
Chicago, IL 60606

For the Defendants: Christa C. Cottrell, Esq.
(TPG Capital, a foreign Mark W. Premo-Hopkins, Esq.
Corporation, TPG Partners, Kirkland & Ellis, LLP
VII, LP, TPG Genpar, VII 300 North LaSalle
Advisors, LLC) Chicago, IL 60654

22 Clerk: R.C.

23 Court Recorder: Electronic Sound Recording

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Transcription Service: Chris Hwang
Abba Reporting
PO Box 223282
Chantilly, Virginia 20153
(518) 302-6772

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 (Call to order at 2:40 p.m.)

2 THE CLERK: Good afternoon. This is civil cause for
3 a status conference in this multi district litigation matter,
4 22-md-3044, In Re: Exactech Polyethylene Orthopedic Product
5 Liability Litigation.

6 As a reminder, pursuant to Local Civil Rule 1.8, the
7 parties may not independently record any court proceedings. A
8 transcript of this proceeding may be ordered from the Clerk's
9 Office.

10 That being said, starting with counsels for
11 Plaintiff, please unmute your line and each state your
12 appearances for the record?

13 MS. RELKIN: Good afternoon, Your Honor, Ellen Relkin
14 from Weitz & Luxenberg for the Plaintiffs.

15 MR. POPE: Good afternoon, Your Honor, Kirk Pope for
16 counsel for Plaintiffs.

17 MS. KESSLER: Good afternoon, Your Honor, Rayna
18 Kessler on behalf of Plaintiffs MDL liaison counsel.

19 MR. SAUNDERS: Joseph H. Saunders, counsel for the
20 Plaintiff and Florida liaison.

21 MS. WALL: Good afternoon, Your Honor, Cara Wall for
22 Plaintiffs, executive committee, and ESI liaison in the MDL.

23 MR. NAZZARO: Good afternoon, Your Honor, John
24 Nazzaro on behalf of Joe Barnes and myself with the Reardon law
25 firm in Connecticut.

1 THE COURT: All right, Mr. Nazzaro.

2 MR. CUTLER: Good afternoon, Your Honor, Michael
3 Cutler for the Plaintiffs.

4 THE COURT: Good afternoon. Is that everyone? Is
5 that everyone on the Plaintiffs' executive?

6 MR. WILKE: Good afternoon, Your Honor, Jerry Wilke
7 (phonetic) on behalf of Redmond law firm.

8 THE COURT: Hang on. I need to hear from the
9 specially designated Plaintiff's leadership counsel who were
10 appointed by the Court's order. So I just want to make sure
11 that the counsel who have announced themselves are included in
12 that list.

13 MR. WILKE: Yes, ma'am, I'm --

14 MR. NAZZARO: Point of correction, Your Honor, I'm
15 John Nazzaro. I'm not on that committee just to be clear.

16 THE COURT: Okay. If you're not on the committee, I
17 only need to hear committee attorneys. Thank you.

18 THE CLERK: For Defendant Exactech, counsels, please
19 state your appearances?

20 MS. SHARKO: Susan Sharko from Faegre Drinker for the
21 Exactech Defendants.

22 MR. GONZALEZ: Ruben Gonzalez from Faegre Drinker for
23 the Exactech Defendants. And I'll just note for the Court that
24 I have a couple of summer associates sitting with me.

25 THE CLERK: Then for TP -- Defendant TPP (sic),

1 counsel, please state your appearance?

2 MS. COTTRELL: Christa Cottrell with Kirkland & Ellis
3 for TPG.

4 MR. PREMO-HOPKINS: And Mark Premo-Hopkins from
5 Kirkland & Ellis also for TPG.

6 THE COURT: Okay.

7 THE CLERK: And for TPP counsel, please state your
8 appearance?

9 MS. FERNANDEZ: Thank you, Amanda Fernandez on behalf
10 of the TPP Plaintiff.

11 THE COURT: Okay, that is everyone that I should be
12 hearing from. Good afternoon to each of you, assuming we're
13 all in the same time zone.

14 Okay, so there's been a lot that's happened since our
15 last status conference in March. Let me just first remind
16 everyone to please keep your lines muted if you're not
17 speaking.

18 And as a reminder, the only people who should be
19 speaking for Plaintiffs are people on the Plaintiff's executive
20 committee and its subcommittees. Counsel for the Defense have
21 already announced themselves.

22 Otherwise, your line should be mute. I'm not going
23 to repeat this. You're just going to be removed from the
24 conference if you can't abide by that direction. Thank you
25 very much.

1 Okay, so there have been a number of orders entered
2 since the last conference, including an amended fact sheet
3 implementation order at Document 166, an amended case
4 management order regarding Plaintiff's preliminary disclosure
5 forms at Document 168, several practice and procedure orders
6 regarding direct filing, electronic service. Those are at
7 Documents 194 and 195.

8 There was an order governing the adoption of the
9 master, excuse me, amended master personal injury complaint, et
10 cetera, at Document 196.

11 There was an order for Science Day at 197, a second
12 amended fact sheet implementation at 198. And then, more
13 recently in the past few days, there has been a couple of case
14 management orders, specifically orders numbers 3 and 4,
15 regarding pathology in medical device preservation protocol at
16 Document 268 and the amended leadership counsel for Plaintiff
17 at Document 269.

18 Just this week, I entered two text orders regarding
19 specific requests around discovery, one, relating to MSP
20 Recovery claims and third-party payer claims, overruling any
21 objections and denying their request to defer ruling on the
22 proposed discovery order.

23 I also granted the motion to stay discovery for the
24 TPG Defendants. And each of those orders are essentially
25 implementing stays of discovery as to those respective parties

1 pending the motions to dismiss filed by Exactech regarding the
2 third-party payer Plaintiffs and as to TP -- yes, TPG as to
3 their motion to dismiss.

4 Those motions are either fully briefed or are in the
5 process of briefing, but the stays of discovery apply to those
6 parties.

7 And then, finally, the most recent discovery order is
8 at Document 291, which is the overall discovery case management
9 order.

10 Now typically in this status conference, I look to
11 your status report or your most recent status report as to any
12 issues that need to be discussed.

13 And based on my review of that report, including
14 other submissions for the discovery case management order, it
15 appears that many of the issues that were raised in the status
16 report at Document 289 have been resolved by the discovery
17 orders.

18 So why don't I start with counsel for Plaintiffs,
19 whomever is taking the lead today, to discuss what if any
20 additional issues they believe remain outstanding from the
21 status report.

22 MR. POPE: Thank you, Your Honor. It's Kirk Pope for
23 Plaintiffs. Your Honor, it's our position I believe your
24 discovery order that was entered at Document 291 addressed at
25 least all of the issues that we need to discuss today.

1 There are some issues that Plaintiffs and Defendant
2 Exactech are continuing to work through that were mentioned in
3 the joint status conference, but we don't believe today is an
4 appropriate time to take up any of those issues.

5 THE COURT: Okay, all right, that's fine. Anyone
6 else from Plaintiff's counsel before I turn to counsel for
7 Exactech?

8 MS. KESSLER: Your Honor, this is Rayna Kessler on
9 behalf of Plaintiff liaison counsel. I had a few things with
10 counsel on the line that are mostly reminders to counsel.

11 THE COURT: Okay, yes.

12 MS. KESSLER: I can say that again.

13 THE COURT: Yes, please. I will always allow you,
14 Ms. Kessler, at the end of these conferences to handle any
15 administrative or other announcements, but I need to deal with
16 kind of the meat of the issues first.

17 Ms. Relkin, I think you were starting to speak.

18 MS. RELKIN: One minor thing and, you know, we're
19 scheduling a Rule 26 conference with Defendants for next week,
20 but I know it had been debated before and it hasn't been
21 addressed before Your Honor, the number of interrogatories with
22 regard to Rule 33.

23 Plaintiffs believe that in light of this being an MDL
24 involving three different joints with multiple products, that
25 the 25 cap of interrogatories should not be applicable. I hope

1 we'll be able to work it out with Defendants, but I'd hate to
2 not work it out and then have to come back.

3 So whether you want to have briefing scheduled in
4 case we can't work it out, I'm just flagging that issue because
5 it wasn't addressed in our papers.

6 THE COURT: Right, I think that -- and I won't speak
7 for counsel for Exactech. I believe that there was mention of
8 the number of interrogatories that had already been served and
9 it was something like 34, but why don't I hear from counsel
10 from Exactech, whomever's speaking today?

11 MS. SHARKO: Mr. Gonzalez will address that for us.

12 MR. GONZALEZ: Your Honor, we did suggest in our
13 proposed case discovery plan that we would limit the requests
14 for production.

15 And then, what we propose is that we would
16 actually -- that the more common trend in MDL litigation is to
17 move away from written interrogatories.

18 But I do think that perhaps the more appropriate
19 thing to do would be to confer with -- to confer with the
20 Plaintiffs on this and see if we can come to some sort of
21 agreement and raise it separately before the Court.

22 THE COURT: Okay, well, I already included in here
23 that there should be interrogatories, sir. So I don't think
24 this is a discussion about whether or not there will be
25 interrogatories. I think what Ms. Relkin is pointing out is

1 the number of interrogatories.

2 MR. GONZALEZ: Yeah, I think that's right, Your
3 Honor. It wasn't my -- it wasn't our intention to bring up
4 what we had initially proposed, but I think that what we can do
5 is work with the Plaintiffs, and if we can't come to an
6 agreement, then we'll bring that back.

7 THE COURT: Am I correct when I said that there were
8 something like 34 interrogatories served already?

9 MR. GONZALEZ: I believe it's 34 interrogatories and
10 then the requests for production I think were close to 90.

11 THE COURT: Okay. And so, is the current dispute
12 between the 34 and the 25 that is capped in the federal rules?
13 You really want to brief that?

14 MS. SHARKO: No, no, it could be that we will have
15 some additional ones now that, you know, we're learning some
16 more information. So that the 34 would not be our universe of
17 interrogatories. We just need to know what we're working with.

18 THE COURT: Okay, I will say that it was my intention
19 with the discovery order if it wasn't made clear. And I
20 adopted the phrasing that both parties submitted around the
21 request being consistent with the federal rules and the local
22 rules of this Court. So that would mean a 25 interrogatory
23 cap, unless you're able to show cause as to why there should be
24 more.

25 The fact that there is an MDL by itself may not be

1 sufficient because there are a number of other related cases in
2 which discovery has been exchanged.

3 And so, it may be that the interrogatories themselves
4 can be sufficiently narrowed or frankly the answers may be in
5 documents that are going to be provided in response to the
6 document requests, but I will leave it to you all to confer on
7 that issue before addressing it more directly.

8 Okay, all right, so besides those, Ms. Relkin,
9 anything else from the status report that you think needs to be
10 addressed today?

11 MS. RELKIN: No, Your Honor, I think, you know, your
12 order was very helpful in laying out the rules and we have our
13 meeting with Defendants some time next week. So, hopefully,
14 any other remaining issue, we can resolve.

15 THE COURT: Okay. Thank you.

16 And for going back to Exactech, besides responding on
17 the number of interrogatories, anything else that you think
18 needs to be addressed that was raised in the status report?

19 MS. SHARKO: Susan Sharko for Exactech. No, Your
20 Honor. We thought your order was very comprehensive.

21 THE COURT: Okay, I do appreciate all of you
22 providing your respective perspectives on the way in which
23 discovery should unfold.

24 And I realize that there are a number of issues to be
25 teased out in this case. So thank you for assisting me in

1 coming to these decisions.

2 I also wanted to note that Science Day was very
3 helpful, extremely comprehensive and very helpful, so thank you
4 again for your experts' presentations.

5 Let me turn to others that I have not yet heard from.
6 Does TPG have anything to chime in here on?

7 MS. COTTRELL: Christa Cottrell for TPG. We don't,
8 Your Honor. I think our issue for now is settled, but thank
9 you.

10 THE COURT: Okay. And Ms. Fernandez, I'm again
11 realizing that you're here. You're part of the leadership
12 counsel. You are representing the third-party payers, but
13 there is a stay of discovery, so I don't know that there is
14 anything else to be addressed unless you wanted to raise it
15 with the Court?

16 MS. FERNANDEZ: There's nothing to raise, Your Honor.
17 Thank you.

18 THE COURT: Okay. All right, typically, I ask for an
19 update on the number of cases, but does anyone have the latest
20 number as of today? Your status report was last week, but I
21 feel like there are a number of changes by the same we get
22 here.

23 MS. SHARKO: Yes, Susan Sharko, Your Honor, I do. As
24 of today, there are 589 cases in the MDL and they make up 89
25 hips, 491 knees, 7 ankles, and 1 unknown, and 1 is the MSP

1 case.

2 In Florida, we have 192 cases, which are 46 hips, 143
3 knees, and 3 ankles.

4 In other states, we have 25 cases, which are 2 hips,
5 22 knees, and 1 unknown.

6 THE COURT: And the other states would be all the
7 actions filed in other state courts combined?

8 MS. SHARKO: Correct, yes. New York state court,
9 California, and Chicago or Illinois are the main ones. Those
10 are listed in Appendix A or Exhibit A to the report.

11 THE COURT: All right, okay. Thank you.

12 All right, Mr. Saunders, can you provide a status on
13 the Florida coordinated actions?

14 MR. SAUNDERS: Certainly. We have -- there are two
15 motions to compel discovery pending in the independent Frees
16 (phonetic) case, which is the only case in which depositions
17 are going to forward.

18 We took a deposition last week of the designated
19 30(b)(6) rep for regulatory and quality, Michael Crater
20 (phonetic). Next week, we have a deposition of a Mr.
21 Katanzarai (phonetic), who is an engineer with the company.

22 We are in the process of scheduling the depositions
23 of Plaintiffs' experts that have been disclosed. The Defense
24 disclosure is due shortly, so we're in the process of finishing
25 up the employee depositions of the company, as well as

1 scheduling the depositions within the next probably, you know,
2 four, six, eight weeks of the Plaintiff's experts.

3 THE COURT: Thank you very much.

4 Okay, given that most of our issues appear to have
5 been resolved in the most recent orders, Ms. Kessler, before I
6 give you the floor, is there anything else that anyone else
7 wanted to raise?

8 Hearing and seeing nothing -- or Mr. Pope?

9 MR. POPE: No, Your Honor, I was just going to speak
10 up, say we didn't -- so you didn't have to sit there in
11 silence. Nothing from Plaintiffs, Your Honor.

12 THE COURT: Okay, certainly. No problem.

13 All right, Ms. Kessler? And I just wanted to raise
14 one point, which is in one of the short text orders that I
15 issued about the short form complaints. Is that something that
16 you're going to address?

17 MS. KESSLER: Yes, Your Honor, that is one that I was
18 going to address. And thank you for issuing that docket order
19 as well.

20 So I had a few things to update the Court on to let
21 Your Honor know that we are communicating with all counsel that
22 had filed cases very regularly.

23 We've had two webinars since the last status
24 conference with Your Honor. The first webinar was centered on
25 working with all Plaintiffs' counsel to advise them of the case

1 specific discovery deadlines and orders that the Court has now
2 entered, specifically on the Plaintiff fact sheet, deadlines,
3 as well as the Plaintiff preliminary disclosure form deadlines
4 that apply to every single case that's filed in this MDL.

5 A reminder to all counsel that 75 days from the date
6 of that implementation order will be next week on June 6. So
7 will be a major deadline for Plaintiffs to have filed a lot of
8 Plaintiff fact sheets with the Defense fact sheets then due 15
9 days after that that are substantially complete. So there
10 should be a lot of case-specific discovery happening within the
11 next month.

12 In addition, we also covered the short form complaint
13 filing process and implementation order that the Court entered.
14 And the -- Your Honor, we appreciate the docket entry on May 19
15 to remind counsel that all of the short form complaints should
16 only be filed in individual dockets as an amended complaint.

17 None of the individual pleadings should be on the
18 master docket. We understand how busy the master docket is.
19 And we certainly do not want it cluttered out with any
20 individual pleadings. And the orders were very clear on that
21 as well.

22 In addition to filing the short form complaint and
23 the individual dockets, they must also be submitted on MDL
24 Centrality within 14 days of filing a short form complaint.
25 And that process has also been explained in emails from me as

1 liaison counsel to all counsel with filed cases and was also
2 addressed in our webinars.

3 In addition to webinar that we did on case-specific
4 discovery, we held a webinar yesterday again with all
5 Plaintiff's counsel. We reviewed the case-specific discovery
6 deadlines, but we also focused on the preservation order that
7 Your Honor entered on May 19, which is Case Management Order
8 Number 3.

9 That also applies to all file cases and lays out the
10 preservation letter templates and attachments that all counsel
11 need to use for filed cases with either future revision,
12 surgeries, or if preservation letters have not been sent prior
13 to the case being filed.

14 We also have now a Defense contact for all counsel to
15 copy on those preservation letters that are sent pursuant to
16 CML3.

17 That information has been provided to all counsel
18 with filed cases as well, but I will state it here, too, that
19 the Defense contact to copy on all preservation letter
20 correspondence is Blake Lehr. That's B-L-A-K-E.L-E-H-
21 R@faegredrinker.com.

22 We also provided counsel with a potential provider to
23 use to store the devices. That is Steelgate, Incorporated and
24 provided communication and that contact information as well for
25 Steelgate to all counsel.

1 I wanted to also thank the Court for adding Brown
2 Greer to ECF notifications. That has allowed all Plaintiffs'
3 counsel to now automatically receive PDF versions of what's
4 filed on the master docket. And that is going very smoothly.
5 All counsel has the option of opting into that by using their
6 MDL Centrality accounts and that's offered with no cost to any
7 Plaintiffs' counsel to utilize that.

8 In addition, we have been updating our Plaintiff
9 website, which can be found at ExactechMDLfilings.com. That's
10 updated weekly. We include all the key core orders on there
11 for counsel and also for Plaintiffs to have access to it. It's
12 a publicly-available website.

13 We also include all the templates to use for the
14 case-specific discovery and work closely with Brown Greer to
15 make sure those are all fillable PDF formats as well that are
16 easy for counsel to use.

17 In addition, I'm maintaining our master Plaintiff
18 counsel list. We poll new counsel that are listed as counsel
19 of record on Pacer. We poll that weekly, so it's a pretty up-
20 to-date list.

21 If anyone else on this court hearing is not receiving
22 my emails, you can email me at our liaison email address. And
23 that is ExactechMDLliaison@RobinsKaplan.com.

24 It's very important that all Plaintiffs' counsel
25 utilize that email address and not my personal email address,

1 because that will go to a distribution list that can provide a
2 quicker response than my personal email address.

3 So I think that's it for liaison counsel update.
4 Thank you, Your Honor, for the time.

5 THE COURT: All right, thank you, Ms. Kessler.

6 If there is nothing else from anyone else, then I
7 wanted to set a date for our next status conference. And this
8 will be the long-awaited in-person status conference here in
9 our courthouse in New York.

10 Because of the dates in the discovery plan, many of
11 which appear to be coming up in June and July, I thought it
12 would be helpful to have a date in August and specifically
13 Tuesday, August 22nd at 2:00 p.m.

14 Any objections to that date? Hearing none, then the
15 date will be August 22nd, 2023 at 2:00 p.m. That will be in
16 our courthouse in the ceremonial courtroom, which is courtroom
17 2E as in Eric, north. The cases -- the MDL has grown a little
18 bit too large for the courtroom that we were in before.

19 All right, if there is nothing else, of course, your
20 status report would be due the usual 10 days before that. And
21 of course, feel free to bring to my attention any issues that
22 should arise after your meet and confer.

23 All right, thank you all very, very much. With that,
24 we are adjourned. Everyone, enjoy the rest of your summer and
25 see you on August 22nd.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. POPE: Thank you, Your Honor.

MS. KESSLER: -- Your Honor.

(Proceedings concluded at 3:13 p.m.)

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

CH

Chris Hwang
Court Reporter

June 23, 2023
Date