

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: EXACTECH POLYETHYLENE:
:
ORTHOPEDIC PRODUCTS : 22-MD-3044 (NGG) (MMH)
:
LIABILITY LITIGATION : January 25, 2023
:
: Brooklyn, New York
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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE MARCIA M. HENRY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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1 THE CLERK: Civil cause for status
2 conference in this multi-district litigation matter,
3 22-MD-3044, In Re: Exactech Polyethylene Orthopedic
4 Products Liability Litigation.

5 As a reminder, pursuant to Local Civil Rule
6 1.8, the parties may not independently record any court
7 proceedings. A transcript of this proceeding may be
8 ordered from the clerk's office. That being said, lead
9 counsel for plaintiff, please state your appearances
10 for the record.

11 MS. RELKIN: Ellen Relkin from Weitz &
12 Luxenberg for the plaintiffs.

13 MR. POPE: Kirk Pope from Pope McGlamry for
14 plaintiffs.

15 MS. KESSLER: Good afternoon. Rayna
16 Kessler, plaintiffs' liaison counsel.

17 MR. SAUNDERS: Joseph Saunders, plaintiffs'
18 Florida liaison counsel.

19 THE COURT: Good afternoon to each of you.

20 THE CLERK: For the defense?

21 MR. KANUTE: Good afternoon, Judge. Mike
22 Kanute from Faegre Drinker for the defendants.

23 MS. SHARKO: Good afternoon. Susan Sharko
24 from Faegre Drinker for the defendants.

25 MR. POWELL: Good afternoon, your Honor.

1 Sean Powell from Faegre Drinker for the defendants.

2 THE COURT: Good afternoon to each of you
3 and good afternoon to all other counsel who are off
4 camera but part of this conference.

5 We have a lot to cover today. Let me first
6 start by recapping all of the happenings since the last
7 conference and then talk a little bit about the areas
8 I'd like to cover today. Before we do that, just as a
9 procedural point, counsel who are lead counsel and
10 speaking do have their cameras on and remain unmuted.
11 I would ask that only those counsel have their cameras
12 on. In addition, counsel, if each of you could state
13 your names. This proceeding is being recorded. It is
14 easier for the transcription if you state your names
15 before speaking.

16 With that, I've received a couple of status
17 reports since the last conference, specifically on
18 November 23rd at documents 42 and 45, and the joint
19 status report that was filed on January 17th at document
20 79. We'll get into that in a little bit more detail.
21 In addition, plaintiffs' motion to appoint counsel has
22 been granted as of December 12th, 2022. There have also
23 been a couple of case management orders that were
24 entered by Judge Garaufis relating to direct filing and
25 others.

1 I have a number of proposed orders that I
2 wanted to go over with you all, including the proposed
3 order for electronic service at document 75, a proposed
4 case management order at document 76, and three orders
5 attached at document 82, I think 1, 2, and 3 would be
6 the attachments, for proposed ESI protocol, protective
7 order, and then order regarding preliminary disclosure.

8 Any other documents that you think I have
9 missed that we need to discuss today? For plaintiffs?

10 MS. RELKIN: I think that's it, your Honor.

11 THE COURT: Thank you.

12 For the defense?

13 MR. KANUTE: This is Mike Kanute, Judge. I
14 think you've covered all of them.

15 THE COURT: All right, thank you.

16 MS. RELKIN: I apologize. For the record,
17 that was Ellen Relkin.

18 THE COURT: Thank you, Ms. Relkin, no
19 problem.

20 There are a number of things that were
21 raised in your status report that relate to the orders
22 so I'm going to start with the status report at
23 document 79, which is the joint status report. In
24 that, you indicated a number of different points.
25 First of all, I think that the number of cases has

1 increased perhaps since this last report on the 17th.
2 So does anyone have an updated number of cases pending
3 in this MDL?

4 MS. RELKIN: This is Ellen Relkin again.
5 Plaintiffs do not -- I apologize. We don't get served
6 with them.

7 MR. KANUTE: Your Honor, this is Mike Kanute
8 for the defendants. We can get you an updated number
9 that's current as of today. We can send that to you
10 after this conference if that meets with the Court's
11 approval.

12 THE COURT: That's fine. I know that on our
13 end, the number increases because we do receive the
14 notifications. I think literally the day after your
15 report was filed, we started receiving them in
16 handfuls, so I was curious as to the total number.

17 With respect to the Florida litigation, are
18 there any additional cases there? I believe, Mr.
19 Saunders, you would have that information.

20 MR. SAUNDERS: I'm not sure I'm totally up
21 to date. I think there are about 90 cases, close to 90
22 at this point.

23 THE COURT: Okay, understood. You all have
24 indicated that there's also 12 cases in additional
25 state courts. Any others since this -- I realize this

1 report was a week ago but any others since then?

2 MR. KANUTE: Your Honor, this is Mike Kanute
3 for the defendants. I believe that list is complete.
4 I'm not aware of any additional state court cases
5 outside of the State of Florida that are not on this
6 list.

7 THE COURT: Okay, thank you very much.

8 Your initial case management order --
9 actually, excuse me. Before we get to that, there is
10 one question I had and it's a statement that is in your
11 joint status report that discusses coordination of the
12 federal and state court actions and discovery therein.
13 I think this might be a good point to ask about the
14 state of discovery in certainly the Florida actions,
15 and I'll turn to first Mr. Saunders for that and then
16 Mr. Kanute for any views that he may have.

17 MR. SAUNDERS: Certainly, thank you, your
18 Honor. This is Joe Saunders speaking. The Florida
19 discovery started in March of last year in an
20 individual case, the Freeze (ph) case, which is set for
21 trial in Florida this coming November. So there was
22 document discovery last summer, motions to compel.
23 Freeze is a hip-implant case. There was also some
24 parallel discovery in the Erby (ph) case, which is a
25 knee case. Some of the early discussions or conflicts

1 between plaintiff and defense about discovery -- and
2 this was with prior counsel. The Faegre firm is
3 relatively new in the litigation and they substituted
4 in for Bowman and Brooke just in the last few months.

5 So last summer, part of the discovery
6 dispute was that the defense objections were that the
7 discovery was too broad because it should be limited
8 only to those specific products in those specific
9 cases. The discovery served was very broad because I
10 served the discovery and I believe that discovery
11 relating to all of the hip liners for example was
12 relevant to the particular sub-model here. There was
13 one design history file, it's my understanding, but
14 there were several variations of the liners for
15 different sizes and different products. So we had a
16 lot of dispute about that.

17 We did work out an ESI protocol and
18 discovery was starting to be produced over the summer
19 and in the fall. Faegre has now recently, this week
20 even, produced followup discovery I believe in the
21 master docket, so they have kind of taken over from
22 Bowman & Brooke, but there is still discovery going on
23 individually in the Freeze hip case. Now there are
24 documents that have been produced in the global Florida
25 litigation. The cases have been coordinated all in

1 front of one judge in Gainesville, and we have a common
2 document depository.

3 So the discovery that's been produced last
4 summer and this fall and recently is available to the
5 MDL committee members. Our protective order in Florida
6 does allow sharing with counsel who have a federal
7 case. So we have been working diligently I'd say with
8 defense counsel, new defense counsel, to try to remedy
9 some of the problems we had before and help them get up
10 to speed. In fact, last week, we had an in-person
11 meeting with Mr. Kanute and some other people to try to
12 work on some of those issues.

13 So that's kind of where the state litigation
14 is at this current status. No depositions have been
15 taken. We do have one deposition of the medical
16 director that is scheduled to take place on February
17 16th, and that's in particular in the Freeze case
18 because discovery will close later in the Freeze case,
19 so that one is a little bit out front of the general
20 discovery.

21 THE COURT: Okay, thank you very much.

22 Mr. Kanute?

23 MR. KANUTE: Yes, thank you, Judge. I
24 essentially agree with the report that Mr. Saunders
25 just provided. I will note for the Court that when he

1 says discovery started in March of last year, I think
2 it's important to note that there were individual cases
3 at that point last year. This was before the cases
4 were all coordinated before Judge Kime (ph). So even
5 before my firm's involvement in this case, it's been a
6 bit of a challenge because discovery was commenced in
7 those two individual cases, Freeze and Erby. Whatever
8 issues may have arisen in that individual discovery, I
9 believe counsel worked through them.

10 But then the plaintiffs moved for
11 coordination in Florida and we have been attempting to
12 set up that coordination, something similar to what we
13 have here before you in this MDL, negotiating certain
14 global orders and certain global procedures that will
15 be in place. We do not yet have a master complaint in
16 that Florida proceeding but plaintiffs' counsel did
17 choose to serve two sets of master production requests
18 before the Christmas holidays. We have produced
19 certain documents in response to that earlier this week
20 and we're continuing to work through that.

21 But as you might imagine, Judge, now that
22 this is a proceeding with almost 100 cases and all of
23 the recalled products are included, that is a
24 significant undertaking and we are doing our best to
25 comply with the obligations imposed upon us in Florida

1 but at the same time to get things in place so that we
2 can respond appropriately here in this MDL. I do agree
3 with Mr. Saunders that the deposition of the medical
4 director of Exactech is set for February 16th. That is
5 in the Freeze case, that one individual case, and the
6 Freeze case is the only case set for trial at this
7 point in November of this year.

8 We do have a number of case management
9 conferences in front of Judge Kime next week and we
10 expect her to set more trial dates, but we are
11 continuing to work with both the leadership in this MDL
12 and the leadership in Florida to coordinate and to try
13 to get through all this discovery as best and most
14 completely and efficiently as we can, despite the fact
15 that there are some competing interests between the
16 time table that the Florida plaintiffs' leadership
17 would like to see.

18 I'll mention one other thing also, Judge, on
19 the ESI issue. There has been an ESI order that has
20 been entered in Florida. As you noted, we have
21 submitted one to the Court here. We did this past
22 weekend circulate our initial set of search terms and
23 custodians to both the MDL leadership and plaintiffs'
24 leadership and invited a meet and confer on that, so
25 we're waiting to hear from them in that regard, too.

1 So I believe progress is being made on both fronts. We
2 just would like to get that parallel and as coordinated
3 as possible as we move forward.

4 THE COURT: Thank you. I understand that
5 there is -- at one point, there was a motion to stay
6 discovery in the Florida case, and that motion has been
7 denied?

8 MR. KANUTE: This is Mike Kanute again, your
9 Honor. We did have a hearing on December 29th, I
10 believe, before Judge Kime, and we had a motion --
11 actually, it wasn't a motion to stay discovery. We had
12 a motion to coordinate, which Judge Kime denied, as
13 well as a motion for a protective order on the Dr.
14 Kazuma (ph) deposition, which was denied as well.

15 THE COURT: Okay.

16 MR. KANUTE: So we worked with Mr. Saunders
17 then to get that deposition on calendar and moving
18 forward in the Freeze case.

19 THE COURT: All right, thank you. Let's
20 move on in your -- some followup items from your joint
21 status report. One thing I wanted to note is that
22 there are a number of points here where it sounds like
23 there are some outstanding items, and I wanted to
24 clarify some things that were said at the last
25 conference.

1 First, when there were deadlines that were
2 set for specific filings, the anticipation is that
3 those deadlines will be met. So these proposed orders
4 for example were due within thirty days of the
5 appointment of plaintiffs' counsel, but they were not
6 submitted within that time frame. I think perhaps to
7 avoid any confusion about deadlines going forward,
8 there will be more dates certain placed in so that
9 everyone is clear what the expectation is, because I
10 need the lead time to review these. I have several
11 questions about all of the proposed orders, and the
12 idea was to get those on the docket so that I would be
13 able to review them and get the questions answered, the
14 get the orders entered, so that discovery can move
15 along. So I just wanted to note that. I think there
16 might have been some confusion at the last conference.

17 In addition, I also wanted to note perhaps
18 some confusion about the discovery schedule in this
19 case. While I did not intend to set my conference
20 schedule for the entire duration of the case at the
21 first conference, that doesn't mean that there
22 shouldn't be an overarching discovery schedule in this
23 case. And the anticipated orders that I requested were
24 designed to cover proposed dates for discovery in total
25 in this case, just as it would if it were a single

1 plaintiff/single defendant case, looking at all the
2 different deadlines that would be applicable under Rule
3 26 and Rule 16. So I just wanted to make sure that
4 there wasn't any confusion about that. We can address
5 these things as we go along today, but I wanted to make
6 that clear for our next conference and any future
7 filings.

8 Any questions about any of that?

9 MS. RELKIN: No, your Honor.

10 MR. KANUTE: No, Judge.

11 MR. SAUNDERS: No, your Honor.

12 THE COURT: Okay. Moving on to the first
13 order, the electronic service order, I don't see any
14 issues with that. I do see that you have Judge
15 Garaufis' signature here. That is something that in
16 this district, magistrate judges handle as a matter of
17 routine case management, but I don't have any questions
18 and I don't have any issues with this order, so this
19 order will be entered as of today and we'll docket this
20 as of today. That's document number 75, the procedural
21 order regarding electronic service.

22 Next is the initial case management order.
23 That's at document 76. So I have a couple of
24 additions, too, and questions regarding this. First,
25 this covers the master and the short-form complaints,

1 and I think you have the master answer to be filed
2 within 45 days of the filing of the master complaint.
3 If your master complaint is being filed by tomorrow,
4 January 26th, if that's the intended date, then we're
5 going to make the master answer due by a date certain,
6 which will be March 13th, 2003, so this proposed order
7 will be amended to reflect that.

8 Then on the next page, with respect to
9 paragraph 4, when the parties state that they will meet
10 and confer on a protocol for preserving specimens and
11 the like, in your next status report, which I will give
12 you a date for after we set this conference date, you
13 should include an update on that meet and confer, and
14 that will be included in this order.

15 Then finally, paragraph 5 is regarding the
16 dates for the master document production. It states
17 that the defendants will produce document productions
18 previously produced in the Florida master case within
19 30 days of entry of the protective order in this case.
20 The protective order is going to be entered no later
21 than tomorrow but I'm making this a date certain, and
22 that document production will be by February 27th, 2023.
23 I'm going to amend this proposed order to reflect that
24 date certain. Then of course the status conference
25 date we'll return to at the end of this conference.

1 Questions about any of those?

2 MS. RELKIN: No, your Honor.

3 MR. KANUTE: No, Judge.

4 THE COURT: Okay, so there's that. Then it
5 says here in your -- the next point is the -- in your
6 document 79 joint status report, the preliminary
7 disclosure form. So while you say that you expect to
8 submit the form, it says that the Florida leadership
9 counsel hasn't yet agreed to that. Does anyone want to
10 inform me about the status of those discussions since
11 this was filed a week ago?

12 MS. RELKIN: This is Ellen Relkin for the
13 plaintiffs. We have submitted the preliminary
14 disclosure form for the MDL. My understanding with the
15 Florida counsel, and Mr. Saunders can supplement, is
16 they were of the belief that there should be a
17 commensurate defense preliminary disclosure form. We
18 had I guess a disagreement. Plaintiffs here in the MDL
19 agreed more with defense counsel that from our
20 experience in managing other orthopedic litigations,
21 it's very useful to have this basic data quickly so
22 both sides can get a handle on what's out there.

23 We obviously want to get a defense
24 disclosure but that would come in the next go-around,
25 which is what many of these MDL's have, which would be

1 a plaintiff fact sheet and then a defense fact sheet.
2 We agreed with defendants in this instance that it made
3 sense to quickly get this going so we all have the
4 benefit of fundamental data of the hips or the knees or
5 the ankles, what years were the implants, you know,
6 just basic data. The forms include attachments of the
7 revision, the operative reports, both the implant and
8 the revision report and pathology, all useful data to
9 assess the cases, and also will help us in getting
10 bellwether cases hopefully going, figuring out which
11 cases make sense. Then next step is plaintiff and
12 defense fact sheets.

13 By virtue of defendants getting this
14 disclosure form now, they will be able to start getting
15 the kind of information we will seek in the defense
16 fact sheet sooner because they will know the lot
17 numbers and the serial numbers and the hospitals, so
18 some of the fundamental data they need to figure out
19 what they will be producing. They won't have to even
20 wait for our plaintiff fact sheet because the core
21 stuff is here. What else will be in the plaintiff fact
22 sheet will be more medical history, family history, you
23 know, other information about the plaintiff, but this
24 is the key information regarding the hip, knee, or
25 ankle.

1 THE COURT: Thank you.

2 Anyone from the defense need to chime in?

3 MS. SHARKO: Yes, Judge, Susan Sharko. I'll
4 speak to that. We have agreed with plaintiffs'
5 leadership to have three disclosure forms in the
6 litigation, in the MDL to start with. The first is the
7 preliminary disclosure form. It's a simple, one-page
8 form so, as Ms. Relkin said, both sides can get an
9 understanding of what the inventory in the Court looks
10 like, how many hips, how many knees, things of that
11 nature. The Florida lawyers, after many sessions,
12 refused to agree to do that.

13 The second disclosure form would be the
14 plaintiff fact sheet, which is akin to traditional
15 interrogatories, and Ms. Relkin and I, and I've also
16 sent the form to the Florida lawyers, will start
17 negotiations on that shortly. I sent them a draft
18 yesterday.

19 In response to the plaintiff fact sheet will
20 be a defense fact sheet, and that will be the defense
21 disclosure. It's predicated on the information that we
22 get from the plaintiffs, both in the preliminary
23 disclosure form and in the defense fact sheets. The
24 Florida plaintiffs have proposed a defense fact sheet
25 and I've asked Ms. Relkin to add the MDL edits so we

1 can negotiate that all in one.

2 The system of having three separate
3 disclosure forms is one that Ms. Relkin and other
4 plaintiffs' lawyers and I and Mr. Kanute have used very
5 successfully in multiple orthopedic court device MDL's.
6 This is something that we've used and it works, so
7 that's why we're bringing it to your Honor.

8 THE COURT: Okay.

9 MR. SAUNDERS: Judge?

10 THE COURT: Hang on just one second.

11 One question about that, Ms. Sharko. I just
12 want to confirm that the document that was submitted to
13 me was -- I think it's 82-3. That's intended to be the
14 first category, the preliminary disclosure form?

15 MS. SHARKO: Yes, your Honor, exactly.

16 THE COURT: All right, thank you.

17 Yes, Mr. Saunders, I see that you want to
18 chime in.

19 MR. SAUNDERS: I just wanted to add a little
20 bit here. In Florida, we feel like we're in a little
21 bit different situation because we're on a tight trial
22 schedule. The judge is in the process of setting 45
23 cases for jury trial starting in 2024. This has been
24 going on for a while, so we're still trying to work out
25 those issues but we're in a little different position

1 down here.

2 THE COURT: Understood. I think that given
3 that the volume of cases here in this MDL, which
4 literally grows by the day, makes the system that Ms.
5 Sharko described and Ms. Relkin described an
6 intelligent one. So we'll work as expeditiously as
7 possible to approve the forms as you submit them so
8 that they can be used and implemented to keep things
9 moving forward.

10 MS. RELKIN: Your Honor, if I can just make
11 one comment since there are a lot of counsel present.
12 On the forms, we asked that the information be
13 submitted by secure transmission. So we do not want
14 anybody's individual disclosure form with attached
15 medical records going by conventional email but
16 instead, there should be something like a drop box or
17 share file or encrypted, just because there's
18 confidential medical information. And in light of New
19 York's new cyber-security CLE requirements, we're very
20 mindful of becoming more careful.

21 THE COURT: Yes. Good point, Ms. Relkin,
22 and yes. I will come back to the forms in a second as
23 well as the format that you mentioned. I don't recall
24 specifically if there was any language regarding secure
25 transfer. I think there is.

1 MS. RELKIN: There is. I just wanted to
2 emphasize it.

3 THE COURT: Yes, absolutely, okay. What
4 else? Since we are up to that preliminary disclosure
5 form, I'm going to so order this form as well. That
6 would be the case management order that's at 82-3 with
7 the disclosure form attached to it.

8 With respect to -- you mentioned the fact
9 sheets and you said that you have a goal of submitting
10 them the Court. Let's just set a date for that as
11 well. That would be February 24th. Then with respect
12 to the authorization forms, this pertains to medical
13 records?

14 MS. RELKIN: Yes.

15 THE COURT: I'm seeing nods, okay. So for
16 the medical records, well, let me ask you this: Have
17 you all started those conversations yet?

18 MS. SHARKO: This is Susan Sharko. The
19 authorizations would be attached as exhibits to the
20 plaintiff fact sheet. I actually don't think that I
21 sent Ms. Relkin sample authorizations, but I don't
22 believe the authorizations will be contentious and I
23 will get her those if I haven't sent them to her.

24 THE COURT: Okay.

25 MR. POPE: This is --

1 THE COURT: Go ahead, Mr. Pope.

2 MR. POPE: This is Kirk Pope. I think we
3 just briefly discussed it preliminarily with Ms.
4 Sharko. I think she sent over a proposal. So to
5 answer your question, Judge, I think we really haven't
6 had substantial discussions about this.

7 THE COURT: Okay. It sounds like the
8 authorizations will be attached to the facts sheets.
9 The fact sheets are going to be submitted to the Court
10 by February 24th, which means that if you're talking
11 about the fact sheets anyway, why don't you confer
12 about the medical authorizations and submit those also
13 on the 24th, since the fact sheet and the authorizations
14 are intended to be a package deal.

15 MS. SHARKO: Will do. Susan Sharko.

16 THE COURT: Okay, thank you.

17 Also, going by your report, you at the time
18 on the 17th indicated that you were submitting your ESI
19 order. You have since submitted it, and that is at 82-
20 1. The order looks fine to me and I just -- the only
21 question I have is that on the first page of your
22 proposed order, at 82-1, it indicates that this is only
23 applicable to the defendants and you're intending to
24 meet and confer regarding an order that applies to
25 plaintiffs. Does anyone want to talk about why there's

1 a demarcation?

2 MS. RELKIN: Certainly, your Honor. Ellen
3 Relkin for the plaintiffs. The type of -- first of
4 all, the plaintiff population are generally in the
5 close to geriatric realm in terms of folks who have hip
6 implants. I'd say the typical age is in the 60's to
7 70's. The type of electronic requirements for the ESI
8 order are more applicable to a corporation and how they
9 maintain records. Plaintiffs are going to be giving
10 the detailed fact sheet, they're going to be giving the
11 requisite authorizations.

12 I guess the kind of electronic stuff a
13 plaintiff might have would be, I don't know, a Facebook
14 posting, you know, social media. Fortunately, we're
15 not dealing with teenagers so it's not going to be a
16 huge deal, but the kind of requirements -- we can't
17 expect our individual clients to hire ESI experts to
18 give metadata for a Facebook posting or that type of
19 thing. So we haven't fully fleshed it out but in
20 negotiating with the defendants, there was a
21 recognition that there's a different need here on the
22 plaintiff.

23 One of the thoughts we had was that there
24 wouldn't be that kind of protocol with metadata and all
25 the technical stuff. For the average plaintiff

1 instead, our proposal would be that when we get to the
2 bellwether phase and we're isolating which of the cases
3 are getting really drilled down upon, that it would be
4 applied to either those nominees or the ones that are
5 going to trial, but it would be extremely burdensome
6 for every individual plaintiff to have to go through
7 that and doesn't really advance the ball. The ball
8 will be advanced by their medical records and their
9 fact sheets.

10 THE COURT: Understood, thank you.

11 Does anyone else want to chime in on this
12 issue?

13 MS. SHARKO: Yes, this is Susan Sharko.
14 There are two issues with the plaintiffs' ESI protocol.
15 One is how they will produce it and the other is when
16 they will produce it. We agreed with the plaintiffs,
17 as Ms. Relkin noted, to defer how they will produce it
18 because an individual plaintiff producing his or her
19 electronic things from their phone and their computer
20 we agree is a little different from the company doing
21 it.

22 The other question is as to when they will
23 produce it. I don't believe that we have had any
24 discussions with the plaintiffs on that so we'll meet
25 and confer on that issue. I kind of think it should be

1 part of the disclosures that are done with the
2 plaintiff fact sheet but we'll talk and hopefully, we
3 can agree. And if not, we'll bring it to your Honor.

4 THE COURT: Yes. I wanted to set a date
5 certain for an update on that as well. If it is -- I
6 mean, it's somewhat related to the fact sheets but I
7 think February 24th is sufficient time for you all to
8 meet and confer and provide an update one way or the
9 other as to how this is going to go. Otherwise,
10 document 82-1 is also so ordered as of today, and we'll
11 get that docketed.

12 The protective order at 82-2. Again,
13 overall, it looks fine. I just have a couple of
14 questions here. The primary questions I have are
15 actually at page -- if you're going by the page number
16 on the bottom of the page, it's 5. If you're going by
17 the ECF pagination, it's page 6 of 18. It has to do
18 with raising disputes regarding the designation of
19 confidential information. So as a general matter, I
20 prefer joint submissions when it comes to disputes
21 because I think it helps the parties clarify their
22 concerns.

23 In addition, our local rules generally in
24 this district require joint -- well, it requires letter
25 motions for discovery disputes, not full-blown motions.

1 That's again with the goal of having the parties
2 synthesize what their dispute is for the Court to
3 decide. I know that this is a very large case that has
4 many issues but at root, it's a discovery dispute.

5 So with that, while I see that you all have
6 a sort of briefing schedule here for notices and
7 motions, first, I would not -- I would not permit
8 replies with any other discovery motion, so I don't
9 think that this discovery dispute would require a
10 reply. So I'm striking paragraph, I think it's 6(d) as
11 in David, which is at the top of document page 6, ECF
12 page 7 of 8.

13 Then in terms of actually submitting the
14 request, I guess I don't understand the difference
15 between the notice of the challenged information and
16 you just telling me what the challenged information is
17 and why you're contesting it. It seems like you're
18 adding extra steps for yourselves. But if you want to
19 convince me otherwise, I'm happy to hear from you.

20 MR. POWELL: Your Honor, this is Sean
21 Powell.

22 THE COURT: Hello.

23 MR. POWELL: This is Sean Powell for the
24 defendants. Recognizing that your Honor prefers joint
25 submissions, I think that that's something that the

1 defense could agree to, as long as that's agreeable to
2 the plaintiffs as well.

3 MS. RELKIN: If it's what the Court wants,
4 we're agreeable. Ellen Relkin for the plaintiffs.

5 THE COURT: I just want to make sure to
6 streamline because by streamlining things, it gets you
7 faster decisions, all right? So let's see. I mean,
8 look, you can file your notice of challenged
9 information, right? That sort of gives me the head's
10 up about what's happening. Then within 14 days, just
11 file a joint submission that explains your respective
12 positions, all right? So then there doesn't need to be
13 paragraph C, which is the opposition, because it's all
14 in one document. Otherwise, as mentioned, the order
15 looks fine to me. And notwithstanding those changes,
16 that's also so ordered as of today.

17 MS. RELKIN: Your Honor, Ellen Relkin. I
18 believe you have a Word version so --

19 THE COURT: Yes.

20 MS. RELKIN: -- you'll work from that.

21 THE COURT: Yes, thank you, and thank you
22 for reminding me about that. So yes, you can send any
23 order -- you can send any Word versions of proposed
24 orders to my chambers' inbox, which is monitored by
25 several people, and we can take care of it from there,

1 so thank you for that.

2 MS. RELKIN: Great.

3 THE COURT: Okay. I took care of 82-3,
4 which was the preliminary disclosure form. Then the
5 only other thing on my agenda before I open it up to
6 anything else that you wanted to raise has to do with
7 discovery disputes generally, which we just touched
8 upon in the context of this particular order relating
9 to confidentiality.

10 I believe at the last conference, I
11 mentioned that a joint submission would be preferred.
12 And to the extent that it comes up and we have a
13 conference coming up, it would be at least -- excuse
14 me, within ten days before the next conference. If at
15 any other time there are discovery issues that come up,
16 of course you are welcome to raise them. You don't
17 have to wait until ten days before the conference but
18 at the very least, you know that within ten days of
19 your letter, that is ten days before the conference,
20 you'll get a decision. I just want to make sure that
21 we're keeping things moving along.

22 I think I gave you a six-page limit on
23 those. My usual limit is three. I think I might have
24 given you all six. I will clarify in the order
25 following this what the page limit is but, again, the

1 point is to help you focus on what the actual issues
2 are. I know that you're all wonderful writers but I
3 want to make sure that you remain focused on the issues
4 at hand.

5 That is everything that I had on my list.
6 I'm now happy to turn to counsel for plaintiffs first
7 to see if there's anything else that you wanted to
8 raise before we set our next conference date, and then
9 turn to counsel for the defense to hear from you.

10 MS. RELKIN: I think Mr. Pope was going to
11 just preview where we are with regard to the
12 complaints.

13 MR. POPE: Sure. This is Kirk Pope for
14 plaintiffs. With regard to the master complaint, we'll
15 be filing that tomorrow so we'll get that completed.
16 Then we wanted to discuss with your Honor the science
17 submission that is due I believe on the 31st. We have
18 been working putting all of this together and frankly,
19 we think we're going to be doing a joint submission
20 instead of the individual submissions that we had
21 discussed at the first conference. I believe the
22 defendants and plaintiffs are asking for a really small
23 extension to February 3rd to get that submission to the
24 Court if at all possible.

25 THE COURT: That's fine, particularly if

1 it's as a result of you having a joint submission, yes.

2 MR. POPE: Thank you, your Honor. And then
3 we wanted to talk about science day and see if there
4 was -- because there will be schedules to actually
5 align with regard to experts and so forth. We would
6 like to try to get something, maybe some proposed
7 dates, availability for the Court, in order to maybe
8 try to start scheduling that so we can put all that
9 together.

10 THE COURT: So you are seeking availability
11 of both myself and Judge Garaufis to essentially attend
12 a science day.

13 MR. POPE: That's correct, your Honor.

14 THE COURT: Okay. I think what would be
15 helpful is an understanding from you of the time frame
16 in which you think you would like to have the science
17 day because I think for example, he might -- I think he
18 still is on trial or just started a trial now, so it
19 would be helpful in speaking with him to coordinate our
20 schedules to know what your time frame is.

21 MR. POPE: Okay. We'll put that together
22 and get you time ranges for everybody and see if we can
23 get that done.

24 THE COURT: Okay. Why don't you include
25 that with the February 3rd submission since that will be

1 part of the educating the Court prong in this case.
2 You'll have your submission on the 3rd. You can include
3 the proposed dates or at least a time frame for us.

4 MS. RELKIN: Your Honor, Ellen Relkin.
5 Another goal is, ideally, if Judge Kime can -- I think
6 Mr. Saunders can state more directly. I think she said
7 she would Zoom in if she's able to, so it would be nice
8 if we could coordinate with her, too. She also has a
9 busy trial schedule and then we have to get the experts
10 in line.

11 THE COURT: Absolutely.

12 MS. RELKIN: It's a lot of juggling.

13 THE COURT: Yes, which makes it even more
14 imperative that we understand what your proposed dates
15 are. But yes, to your point, Judge Kime will be
16 participating and we will be checking each of our
17 schedules to make sure that we're all available for
18 this.

19 MS. RELKIN: Great.

20 THE COURT: Mr. Pope, was there anything
21 else?

22 MR. POPE: No, your Honor.

23 MS. RELKIN: Your Honor, I would like if Ms.
24 Kessler, who is our liaison, could just speak to
25 everyone who is here about the new website and any of

1 the other liaison-type issues that might be useful just
2 to air publicly.

3 THE COURT: Thank you.

4 MS. KESSLER: Thank you, Ms. Relkin.

5 Hello, good afternoon, this is Rayna Kessler
6 for plaintiffs, liaison counsel. We did include in an
7 update on the joint letter that our website is now up
8 and running that the Court has requested. We do
9 believe that's going to be a great resource for
10 plaintiffs as well as plaintiffs' counsel. We plan to
11 include a schedule of upcoming court hearings. We plan
12 to post the court transcripts on there as well, as well
13 as all the key policies and procedure orders that the
14 Court enters, as well as any case management orders.
15 We also plan to put up there a few templates. One of
16 the more important ones will be the direct filing
17 complaint template for counsel to utilize the caption
18 that the Court ordered as well as some pro hac vice
19 templates and instructions that just parallel what the
20 Court has ordered in policies and procedures order 1
21 and the amended policies and procedures order number 2.

22 For the website, we're utilizing a claims
23 administrator that has been willing to provide the
24 service for free to all plaintiffs and plaintiffs'
25 counsel. It's Brown Greer, who we may utilize in the

1 future as well for more specific discovery. The
2 parties are discussing that as well. One of the
3 capabilities that Brown Greer has is that it can
4 actually automatically pull in all the ECF
5 notifications and have a running docket that would
6 become publicly available, that we believe would be
7 very useful for all counsel to have and plaintiffs as
8 well.

9 In order to do that, all that needs to be
10 added to the ECF notifications is a new email address
11 that they can use to then code to post it on the
12 website. So I wanted to see the best way to get the
13 Court that information, if you prefer a quick letter
14 submission on that with that email address or how would
15 be the best way to go about that, if it would be better
16 just to speak with the clerk's office directly.

17 THE COURT: What you're referring to --
18 essentially, it becomes like a party being notified for
19 the purposes of making the information public. I think
20 it would be helpful to have a letter there so that it
21 is part of the public docket that also has the email
22 address, and that would alert the clerk's office.

23 But I do have a question about the
24 transcripts. Typically, the transcripts are ordered
25 immediately after the conferences. There is typically

1 a redaction period to allow any part who wanted to make
2 corrections or redactions or anything to do so. How
3 does this service of posting them work with that time
4 frame? In other words, if it's immediately put on the
5 public -- it's not actually immediately put on the
6 public docket in any case, so how does the service deal
7 with the lag time between the creation of the
8 transcript and it actually being publicly available?

9 MS. KESSLER: Yes, your Honor, very good
10 question. For the transcript that we placed there, we
11 waited more than thirty days to post it, so it's not
12 posted in real time in any way. We can adjust that as
13 the Court prefers or as the notices come through as to
14 that redaction period has fully expired before we post
15 any transcripts.

16 THE COURT: I think that would be beneficial
17 because they wouldn't be otherwise available on the
18 public docket. I don't anticipate us ever having to
19 seal any transcripts in this case but if it were to
20 come up, particularly if we were to get into sticky
21 discovery issues involving particular cases or medical
22 records or the like, and I want to make sure that we
23 have a mechanism to protect the information that needs
24 to be protected.

25 MS. KESSLER: Understood. Will do, your

1 Honor.

2 Then the last thing I wanted to mention is
3 that I'm putting together a master counsel list that
4 will have all plaintiffs that have filed cases, all
5 their counsel listed, to insure that any important
6 notices or orders are received by all counsel. I would
7 probably reach out to the clerk's office on that just
8 to compare lists if that was possible, and also defense
9 counsel as well since they're more aware quickly of new
10 cases that are filed.

11 THE COURT: Sure. Is that for -- the
12 purpose of this master list is for posting on the
13 public website or just for your own internal purposes?

14 MS. KESSLER: No, just to have a list of all
15 counsel that has cases, not for really purposes of the
16 website. On the website, we have posted all of the
17 leadership positions and contact information for all of
18 the PSC (ph) members.

19 THE COURT: Okay. Yeah, I think in terms of
20 getting the master list, certainly working with the
21 defendants makes sense because they certainly have
22 that. Frankly, we don't have master lists until the
23 cases actually get filed here so the defense may
24 actually have them sooner than the Court would.

25 MS. KESSLER: Understood, thank you.

1 THE COURT: Thank you, Ms. Kessler.

2 Anyone else from plaintiffs' side before I
3 turn to defense?

4 MS. RELKIN: Ellen Relkin, just to give
5 everyone the website. It's in the submission but if
6 people want to jot it down, it's
7 exactechmdlfilings.com, nice and simple.

8 THE COURT: Thank you, Ms. Relkin.

9 Anyone else for plaintiffs? Okay.

10 For the defense, any other additional items?

11 MR. KANUTE: Your Honor, Mike Kanute. I
12 will just echo the comments made about science day.
13 Defendants are definitely in favor of having a science
14 day, making that a joint proceeding before your Honor
15 and before Judge Garaufis as well as Judge Kime, so a
16 joint proceeding. So I think we're on the same page
17 there. I think as far as -- we will have to meet and
18 confer with the plaintiffs, though, on what that
19 science day will look like. I only mention that
20 because Ms. Relkin mentioned experts and I don't
21 believe we are on the same page as to whether experts
22 should be involved in science day. I just raised that
23 to let the Court know that we'll be talking to them
24 about that and to see if we can reach an agreement
25 there.

1 THE COURT: Understood. Again, I don't know
2 the nature of your written submission. That may help
3 the Court immensely, and the science day could perhaps
4 be perhaps something a little simpler, but I think it
5 may depend on what's in your submissions and what
6 you're envisioning. But we'll wait to see your
7 submissions before we figure out if the scope of the
8 day itself needs to be narrowed. Again, coordinating
9 schedules will be more than a notion, so we'll also
10 work on that. Anything else, Mr. Kanute?

11 MR. KANUTE: I believe that's it, your
12 Honor.

13 THE COURT: Okay. Anyone else from the
14 defense have anything else? I see shaking heads no.

15 The final thing I wanted to mention is just
16 as a matter of our docket. In terms of the actual
17 docket, I like to try to keep the docket as clean as
18 possible. So to the extent that you are filing things,
19 if you could just please do them using the more precise
20 ECF event, and that's more I'm sure for your staff who
21 is going this and supporting the case, because what
22 ends up happening is that any document that's filed
23 will have the names of every single plaintiff before
24 the name of the actual whatever it is that you're
25 filing is available.

1 So there are a couple of notices on here
2 where I think something like 150 names are listed, and
3 then the final part of the docket entry is what the
4 actual document is. The case is new so I wanted to
5 make sure to put that out there now. It only aids the
6 Court in being able to address any questions or
7 concerns you have if we're able to locate information
8 as quickly as possible. So unless it's a notice of
9 settlement, I would advise not using the notice
10 function on ECF, all right. There's always the letter
11 function, where you can say anything you want after
12 what the letter is about, all right?

13 Anything else from anyone else before we set
14 a date for the next status conference?

15 MR. POWELL: Your Honor, this is Sean Powell
16 for the defendants. In light of your comments about
17 keeping the docket clean, I reached out to our
18 paralegal and as of last night, there were 173 cases in
19 the MDL, so I don't know if that would alleviate the
20 need to file anything after the hearing. We can
21 certainly do so but I thought I'd --

22 THE COURT: No, I appreciate you very much
23 addressing that now and that's fine. Thank you for the
24 update and no need to file a letter thereafter.

25 In terms of a proposed date, I'm looking for

1 a date in March, so let me just check the calendar
2 here. I have Thursday, March 23rd. While I would like
3 to have an in-person conference at some point, we can
4 wait until the conference after that because the
5 weather will be better here. So this one will be
6 another video conference, and that's Thursday, March
7 23rd at 2:30 p.m. Is anyone not available for that
8 date? Hearing no objections, our conference is
9 scheduled for Thursday, March 23rd at 2:30 p.m.

10 In that case, the joint status report that
11 would be due before any status conference is due on
12 Monday, March 13th. If there are any discovery disputes
13 that have not already been raised with the Court, they
14 would be raised in a joint submission as of Monday,
15 March -- did I say 28th? 13th, excuse me, Monday, March
16 13th.

17 Anything else from anyone else before we
18 adjourn for today?

19 MS. RELKIN: No, your Honor.

20 THE COURT: Then thank you all very much.

21 All of the rulings that were mentioned today will be
22 memorialized in the docket order following this, and we
23 will get the amended orders discussed on the record
24 today docketed and they are so ordered as of today.
25 Thank you very much, everyone, and I will see you all

1 soon. Have a great day.

2 MS. RELKIN: Thank you, your Honor.

3 MR. KANUTE: Thank you, your Honor.

4 MR. SAUNDERS: Thank you.

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A rectangular box containing a handwritten signature in black ink. The signature appears to be 'E. Barron' with a long horizontal stroke extending to the right.

ELIZABETH BARRON

February 9, 2023