

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

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3 22-MD-3044 (NGG) (MMH)

4 IN RE:

5 EXACTECH POLYETHYLENE United States Courthouse
6 ORTHOPEDIC PRODUCTS LIABILITY Brooklyn, New York
7 LITIGATION

8 November 16, 2022
9 2:30 p.m.

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10 TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
11 BEFORE THE HONORABLE NICHOLAS G. GARAFIS
12 UNITED STATES SENIOR DISTRICT JUDGE

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1 (In open court.)

2 THE COURTROOM DEPUTY: Okay, everyone. This is a
3 status conference in the MDL matter.

4 Beginning with the plaintiffs, please state your
5 appearances for the record.

6 MR. POPE: Kirk Pope, Pope McGlamry, out of
7 Atlanta, Georgia.

8 Good afternoon, Your Honor.

9 MS. RELKIN: Good afternoon, Your Honor.

10 Ellen Relkin from Weitz and Luxenberg of New York.

11 JUDGE GARAUFIS: Joseph H. Saunders, Saunders and
12 Walker, Saint Petersburg, Florida.

13 MR. KENNEDY: Eric Kennedy, Weisman and Kennedy,
14 Cleveland, Ohio.

15 JUDGE GARAUFIS: Welcome.

16 MS. KESSLER: Good afternoon.

17 Rayna Kessler from Robins, Kaplan in New York.

18 MR. MESTRE: Good morning, Your Honor.

19 Jorge Mestre from Rivero Mestre in Miami. We filed
20 a third-party claim last night, I just wanted to make an
21 appearance.

22 JUDGE GARAUFIS: Oh. Welcome.

23 Yes, for the defense.

24 MR. KANUTE: Good afternoon Your Honor.

25 Mike Kanute from Faegre Drinker for the defendants,

1 Exactech.

2 MS. SCHEBEL: Jodi Schebel from Bowman and Brooke in
3 Detroit, also on behalf of the defendants.

4 MS. SHARKO: Susan Sharko, also from Faegre Drinker
5 for the defendants.

6 MR. BENNETT: Steve Bennett, Faegre Drinker for the
7 defendants.

8 MR. POWELL: Sean Powell, Faegre Drinker, for the
9 defendants.

10 MS. SCHMID: Good afternoon, Your Honor.

11 Kim Schmid from Bowman and Brooke in Minneapolis.

12 MS. BJORK: And Sheryl Bjork, Bowman and Brooke
13 Minneapolis.

14 JUDGE GARAUFGIS: Please be seated, everyone, and
15 welcome.

16 First of all, I'd like to introduce Magistrate Judge
17 Marcia Henry. Judge Henry will be primarily handling the
18 discovery issues in this case. In the Eastern District of New
19 York, the district judges and the magistrate judges work
20 together on cases. And while I'll be handling some of the
21 organizational issues and the motion practice, and if there
22 are Bellwether trials, the Bellwether trials. The discovery
23 is expertly handled by the magistrate judges of our district
24 for most of the district judges. There are some district
25 judges who do everything themselves, but they few and far

1 between. And I think it's important to just mention that it's
2 a much more efficient system for us, and it will probably be a
3 much more efficient system for all of you, as well. So I
4 welcome Judge Henry to the case, and I know that you will be
5 helpful to her, and she's going to go over a lot of the
6 discovery issues with you today. And I think we ought to all
7 begin.

8 I was called last month by the chair of the MDL
9 panel. I completed an MDL, an antitrust MDL last year and
10 indicated a willingness to handle another MDL, and they found
11 me. So I'll be handling this MDL and I'm happy to do so.

12 I thank the parties who have sent letters about some
13 of the initial issues, because that helped the Court to get,
14 at least, a sense of what we need to do at the initial stages
15 of the MDL. And I think that what I'd like to know to start
16 is from the plaintiff's side, what has been done to coordinate
17 the leadership for the MDL? Yes.

18 You don't have to stand up. You can do everything
19 seated, just make sure you speak into a microphone, please.

20 MS. RELKIN: So prior to the formation of the MDL, a
21 number of us, a lot of the folks in the room have had these
22 cases, and one counsel, he's not here today, created a, kind
23 of a periodic Zoom meeting where we would all talk. Some of
24 our colleagues in Florida. Mr. Saunders' co-lead in Florida.
25 We've communicated with them. A lot of us know each other,

1 not just from MDL world, but there's been a series of hip
2 implant and knee litigations over the years, so we're kind of
3 the orthopedic wonks, so we kind of know each other. So there
4 have been these periodic phone calls, Zoom calls, and we've
5 communicated, and then once I filed a petition for the MDL, we
6 held a meeting with -- invited counsel we knew who had cases,
7 to a meeting the day before the MDL hearing in Saint Louis,
8 and there were probably about 30 to 40 lawyers there, talked
9 substance, organizational structure, and then we have been
10 speaking since then, and we had another meeting yesterday at
11 my office, and I believe we have consensus on a proposed
12 slate, if that's something Your Honor would be agreeable to.

13 JUDGE GARAUFIS: Well, there are two portions to
14 that structure, correct. There would be co-lead counsel which
15 was what was in your letter, I think, and that would be two
16 law firms, right?

17 MS. RELKIN: Correct.

18 JUDGE GARAUFIS: And then there would be a steering
19 committee?

20 MS. RELKIN: Yes. But a little -- two other, kind
21 of, intermediate layers, a little more nuanced. We thought an
22 executive committee. We've done that before in a few hip
23 litigation --

24 JUDGE GARAUFIS: What is an executive committee?

25 MS. RELKIN: So it's a little larger. So the

1 proposal is Mr. Pope from Atlanta and myself as co-lead. Then
2 the executive committee would be the two of us, plus three
3 other individuals, and then the plaintiff's steering
4 committee.

5 JUDGE GARAUFGIS: And how large would that be?

6 MS. RELKIN: The plaintiff's steering committee
7 would be 12.

8 JUDGE GARAUFGIS: In addition to the five?

9 MS. RELKIN: Yes. And then we also thought there
10 should be some subcommittees. Many of the folks on all
11 these -- the PSC and the PEC would also, of course, be working
12 on in different substance, but some subcommittee members --
13 and I think we have the proposed Bellwether committee with
14 three individuals, discovery --

15 JUDGE GARAUFGIS: Go slowly, please.

16 MS. RELKIN: Bellwether committee to help go through
17 cases to suggest nominees. That's usually how this works for
18 the Bellwether committee. And then we have three individuals
19 for discovery committee, and two individuals for science slash
20 expert committee. And there -- certainly many of the people
21 in the PSC will be working on the same subject matter. But in
22 terms of how, you know, why do you have these subcommittees as
23 well as the PSC, financially, just to, you know, generally to
24 fund a litigation like this, it's going to be very expert
25 intensive, firms participate and make financial contribution

1 and folks on the co-leads pay more into it than the -- you
2 know, it's a sliding scale, so to speak. So this is a way to
3 have --

4 JUDGE GARAUFIS: That's something within your
5 internal activity, right?

6 MS. RELKIN: Right. The idea is just to have more
7 involvement to have people who have cases and have an
8 interest, work on it and we need a lot of people because we
9 have knees, hips and a few ankles.

10 JUDGE GARAUFIS: And a few ankles, okay.

11 And I would just point out before we go further,
12 that the MDL panel has indicated a preference for being
13 inclusive on these committees and subcommittees of younger or
14 newer lawyers who are learning the trade, so to speak, and
15 persons of diverse backgrounds, persons of diverse parts of
16 the country, I would add. We already have plenty of
17 diversity, at least east coast diversity here. But, you know,
18 to be more sensitive to those objectives, as we train lawyers
19 to take on these kinds of massive cases, and this case is not
20 that large yet. It may never be that large, but you would
21 have a better sense of that, you and your colleagues. Even
22 so, I think it's very important that whatever you propose
23 reflect those kinds of objectives.

24 MS. RELKIN: Yes, Your Honor, and we are very
25 mindful of that and appreciate that and have endeavored to do

1 that. I mean, I could discuss the backgrounds of the
2 different individuals or we could do that in a submission.
3 But we're mindful that we have several younger lawyers, a few
4 of the more senior lawyers we know from firms that have my
5 younger associate serve in lieu of me. We were looking for,
6 you know, racial and ethnic diversity and we have some. We
7 would have liked to have gotten more, but that's the universe
8 of who has these cases right now. But if you want, I could
9 give you a break down.

10 JUDGE GARAUFGIS: It would be useful for us to get a
11 written submission on that. And I'm not going to make any
12 decision this instant, but I would like to have the leadership
13 and the committee and the subcommittees in place before the
14 Christmas holiday.

15 MS. RELKIN: Yes. We would hope as soon as, you
16 know, possible just because we do want to catch up with
17 Florida. And I've spoken with defense counsel, who I know
18 well from other litigations, and while they're prepared to
19 chat, they won't negotiate until we have some authority to do
20 that.

21 JUDGE GARAUFGIS: I understand that.

22 MR. MESTRE: Your Honor, I think it's important to
23 add -- this is George Mestre from Rivero Mestre. We represent
24 the third-party payers.

25 The submissions that are being made right now don't

1 include the third-party payers. The representations that were
2 made to this Court were correct when they were made. We just
3 filed our complaint yesterday. But it's a class action for
4 third-party payers, and we don't have to do this now, but we
5 want to make sure that the interest of the third-party payers
6 are represented in this MDL and we'll coordinate with
7 plaintiff's counsel.

8 JUDGE GARAUFIS: Yeah. And how would they
9 represented? They would be separate and apart from these two
10 sides; is that it?

11 MR. MESTRE: Well, there are different interests for
12 the -- the third-party payers have, as opposed to the
13 individuals, and how ever this litigation is to proceed which
14 is going to be up to Your Honor to coordinate, I just want to
15 make sure those interests of the third-party payers are, in
16 fact, represented. And we are also, being in Miami, keenly
17 aware of the need for diversity and think that we can be
18 helpful with that, as well.

19 Thank you, Your Honor.

20 JUDGE GARAUFIS: Thank you very much. Appreciate
21 it.

22 Let me -- yes. Go ahead, ma'am.

23 MS. RELKIN: I was going to ask for a little
24 clarification on the process for submission since we feel like
25 we've -- you know, do have a consensus.

1 Do want us to submit, everybody submits a two-page
2 submission, résumé?

3 JUDGE GARAUFIS: Well, I think what I would like to
4 have is I would like to have a coordinated submission with
5 attachments of the qualifications of each of the people who
6 are part of the coordinated submission.

7 And when I say, coordinated submission, you know,
8 the submission should basically say what the -- how this --
9 how each of the members of these entities complement the
10 overall picture, and so we have a record before we make a
11 discussion here.

12 MS. RELKIN: Of course.

13 JUDGE GARAUFIS: And you seem to have a pretty good
14 understanding of where the Court is and where the MDL panel is
15 on the importance of diversity, inclusion, and bringing people
16 into -- bringing lawyers, newer lawyers into the process. So
17 all of that should be delineated in your submission, and we
18 will have -- we'll be able to look at the CVs or résumés of
19 the individuals.

20 MS. RELKIN: Okay. Great.

21 JUDGE GARAUFIS: How soon can we do this?

22 MS. RELKIN: We can do this very soon. Can we do it
23 by next Monday or Tuesday.

24 JUDGE GARAUFIS: That would be fine. Let's do it
25 by -- I'll give you until the 30th of November. And we can

1 resolve this very quickly once we have the paperwork in. If
2 you get it in before that, we can deal with it before that.

3 MS. RELKIN: Perfect. Thank you, Your Honor.

4 JUDGE GARAUFIS: All right. I'd very much like to
5 have you off and running with this process, okay.

6 I would also like to mention that I've reached out
7 to Florida circuit judge Donna Keim -- is it Keim? And I
8 haven't heard back yet. But there's a premium on a
9 coordination of the discovery and other activities in the
10 intrastate litigation.

11 Is Exactech a Florida corporation?

12 MR. KANUTE: It is, Your Honor.

13 JUDGE GARAUFIS: So the cases brought in Florida
14 again Exactech are not subject to diversity of jurisdiction of
15 this Court.

16 MR. KANUTE: This is Mike Kanute for Exactech.

17 That's correct, Your Honor. Those cases are filed
18 in Alachua County which is where Exactech is located.

19 JUDGE GARAUFIS: Gainesville?

20 MR. KANUTE: Yes, sir.

21 JUDGE GARAUFIS: Well, I'm not that familiar with
22 Gainesville. I'm a South Florida kind of guy when I'm there.
23 But I'm looking forward to some coordination which would
24 benefit everyone especially once Judge Henry begins with the
25 discovery process. But some of you are obviously involved in

1 the Florida litigation. I know you were, but also on the
2 other side, so I'm hoping that we can be efficient in that
3 sense, as well.

4 MR. KANUTE: Your Honor, if I might. Mike Kanute
5 for Exactech.

6 I'm very encouraged to hear that you are being on
7 proactive on coordination. We feel that's very important and
8 there are a few other state court cases as well and other
9 jurisdictions that, at some point, we would appreciate your
10 assistance in coordination of those, as well.

11 JUDGE GARAUFGIS: Yes, I think you submitted some
12 information in your letter to the Court, and I appreciate
13 that, as well.

14 And as we go along at the early stage of this
15 litigation, if you will advise the Court of all of those
16 proceedings and who they're before, and the Court will reach
17 out to the judges who are handling those cases in those other
18 state courts to see how we can establish some efficiencies in
19 handling the litigation in other states.

20 MR. KANUTE: We will be happy to get you that
21 information, Judge and, in fact, from the time that you
22 received these initial letters, there be have been a handful
23 other cases filed, so we'll get you up-to-date information on
24 those other state court cases, where they are and who the
25 judges are.

1 JUDGE GARAUFGIS: Can I ask just a broad question
2 here as to what the potential size of this MDL is. I guess I
3 should ask the plaintiffs at this point. I'm not going to
4 hold you to a number, but I'd like to get a sense, because as
5 we go along -- and there may be more cases -- it's going to
6 effect our ability to handle discovery motion practice and so
7 forth.

8 MS. RELKIN: Sure. With a certain degree of a
9 guesstimate, we know that there's a couple hundred thousand
10 recalled devices. That does not mean that there's going to be
11 that many plaintiffs by any means because, of course, not
12 everyone needs a revision surgery just because they have the
13 device.

14 Right now we're at 100 in the MDL. Mr. Saunders'
15 report in Florida, a little bit less. But I would expect,
16 once there's a direct file order and the form complaint, that
17 we will see a good number of other cases. So I would think
18 we're going to be high hundreds, if not low thousands. So
19 whether it's 700 or 1300, I may be off. But what we do know
20 is since the recall, the medical facilities, the doctors, or
21 the hospitals were supposed to send letters to their patients
22 saying, please be advised.

23 There's been --

24 JUDGE GARAUFGIS: When did those letters go out?

25 MS. RELKIN: Well, it varies based on the

1 institution. So for example, HSS, New York Hospital of
2 Special Surgery, the recall was February. My understanding is
3 they had to hire a vendor to go through every medical record
4 to figure out who got that device because they didn't track in
5 it in that way. Those letters didn't go out until April. And
6 then I understand it wasn't that -- then there was, you know,
7 I know my clients, you know, had to, kind of, get on a wait
8 list to be seen because they've been swamped with bringing in
9 the patients, x-rays, MRIs, aspirations to check the fluid.
10 So it's -- there's a lot of -- I have clients who are still
11 waiting for appointments or for revision surgery.

12 Some surgeons, I think, have passed away and it's
13 not clear whether those patients were advised. I learned
14 about one hospital where they've recently started sending out
15 letters. So I think it's going to be staggered, and if
16 someone has moved and they never got the letter, they might
17 not know they have a case until their knee or hip starts
18 hurting them and they go for follow up and then it's
19 discovered that they have this presentation of Polyethylene
20 wear. So I think it's -- we have the initial burst, but there
21 will be, kind of, a steady flow of cases.

22 Also, some people, if they had the device put in two
23 years ago, if they go for a checkup now, their x-ray may not
24 show any bone loss, hopefully, for them. So the doctor's,
25 like, okay, you're good, but come back in six months. Next

1 six months, they may have the problem, you know, and they got
2 followed. So we've seen this history with some other recalled
3 orthopedic products where there's the initial large number,
4 but the later implants fail over time, and some doctors are
5 conservative understandably and say, let's not take it out
6 because it's okay now. Whether that's the conservative
7 treatment, as opposed to, uh oh, you've got a problem here,
8 let's get it out before you lose bone, is a medical judgment I
9 think the surgeons are grappling with. So I think we're going
10 to see cases for a while.

11 Does that help?

12 JUDGE GARAUFGIS: Thank you.

13 Mr. Kanute, do you have anything to add?

14 MR. KANUTE: Yes, I do Your Honor. I think it's
15 important to note that this MDL was formed because of the
16 issue of premature wear of some of these polyethylene
17 components. Really, the recall that Ms. Relkin is talking
18 about relate to a packaging nonconformity, that's packaging
19 that's been used by Exactech since 2004. And it's very
20 important to note that overall, as a family of products, these
21 products have had an excellent clinical history, they've been
22 used successfully by surgeons in patients with very low
23 revision rates. So just because a particular polyethylene
24 component is subject to this voluntary recall that was done
25 because of the packaging nonconformity, it does not

1 necessarily mean, and in most cases it does not mean that
2 there is wear or more specifically, premature wear of the
3 component or any patient symptoms, for that matter. So I
4 don't have anything to add as far as the number of cases you
5 might see. But I do think it does highlight an issue which is
6 we are going to have to look at these cases as they come in,
7 because wear of these polyethylene components is a known risk,
8 no matter who makes them or whether it's a hip or knee or
9 ankle or any other orthopedic implant. It is always a
10 potential risk for cause of revision surgery. So just because
11 there is wear does not necessarily mean that the case may fit
12 into this MDL. We have to examine these cases for premature
13 wear, and wear can be caused by a number of reasons, as well,
14 not an alleged defect but can be due to surgical factors like
15 positioning of the implants or surgical approach or patient
16 characteristics, like, body mass index and activity level, and
17 things like that. So every case is different, and that's why
18 I think we need to try to get some screening mechanism in
19 place here too, and we can talk to Ms. Relkin or whoever the
20 leadership is about that at the appropriate time.

21 JUDGE GARAUFIS: Right. You can meet and confer
22 about that.

23 MR. KANUTE: Yes.

24 JUDGE GARAUFIS: All right. At the appropriate
25 time.

1 Which raises a question that Judge Henry and I had
2 in our initial review of your submissions and the assignment
3 of the MDL. And that is, neither of us have graduated from
4 medical school and done a 12-year residency in orthopedic
5 surgery, so we're not exactly an expert on these types of
6 issues that have you delineated in your comments. And so it
7 would be useful to us -- and I don't know how other MDLs have
8 done this or whether they've done it -- for us to receive some
9 technical information that doesn't go to liability or to reach
10 conclusions as to whether there's premature wear of a
11 particular device, but what are these devices and what are
12 they advertised for or intended to do.

13 Now, this can be done -- you can provide this to us
14 in one of two ways. Either can you agree to provide us
15 jointly with certain information, or if you can't agree, you
16 can separately provide us with that kind of information in a
17 submission that is not evidence, that will not be used at
18 trial, that we will only use to get some basic information
19 about what the subject matter is of this MDL. And if you
20 object to that, let me know, but I think it would be useful
21 since especially for Judge Henry, in the initial stages, so
22 that she has, you know, a certain amount of information about
23 what we're dealing with here.

24 So you can meet ask confer about that and we'd
25 appreciate whatever you can to in that regard, because we want

1 to know more. You have had, I'm sure, a lot of experience
2 dealing with these technical matters as lawyers, but we have
3 not. So that's our request, and let us know. Okay. And we
4 look forward to seeing whatever you have to say.

5 So I think we're in a position now where we should
6 go over since there is -- we haven't -- I haven't had a
7 conversation yet with Judge Keim about coordination of the
8 discovery, the state discovery with the MDL, that we talk
9 about a few things.

10 One of the issues that was raised in your
11 submissions was on the question of master pleadings. And I
12 think that it was the defense that asked that we arrange for a
13 master long form complaint and answer, along with short-form
14 pleadings.

15 Can you explain why you believe that is useful in
16 this MDL?

17 MR. KANUTE: Yes, Your Honor. Mike Kanute for
18 Exactech.

19 A master long-form complaint will be useful because
20 it will serve as the operative pleading on behalf of the
21 plaintiffs in these cases, allowing other plaintiffs to simply
22 file the short-form complaint, that way we get a multitude of
23 different complaints with different counts filed by different
24 plaintiffs' lawyers. In prior MDLs, we found that provides
25 for very orderly procedure, rather than just having no master

1 complaint in place.

2 JUDGE GARAUFIS: And let me hear from plaintiff,
3 because I think there's a difference of opinion here.

4 MS. RELKIN: Yes. We do not oppose doing that. Our
5 only concern is we don't want it to delay discovery. So we're
6 fine working on a long form and short-form complaint, but you
7 know, that can take when, all said and done, 45 days, and then
8 they have time to answer. So what we would -- we're amenable
9 to doing it if we can, in parallel, catch up with Florida and
10 the other state courts --

11 JUDGE GARAUFIS: Well, they're not really that far
12 ahead, are they?

13 MS. RELKIN: Mr. Saunders will speak to that. They
14 actually are, you know, reasonably further ahead, yes. So we
15 want to, at minimum, get the documents that they've been
16 produced, some of these structure type of orders, the ESI, the
17 kind of issues we'll deal with the magistrate. Those take
18 time and, you know, we can jumpstart if we adopt --

19 JUDGE GARAUFIS: Well, I'm more than happy to
20 operate on two tracks here. So why don't you get started on
21 getting it put together. In the meantime, you'll be working
22 with Judge Henry on discovery.

23 MS. RELKIN: Terrific. And we are fine with doing
24 the long form and short form. It's very commonplace in MDLs.
25 I think defendants, they don't have to waste money answering

1 individual complaints which doesn't get us very far, and we're
2 hoping -- and I've had some preliminary discussions -- that,
3 you know, we're not going to get bogged down in global motions
4 to dismiss at this juncture. Unlike some litigations which
5 may have an issue with could arguably take out a litigation, a
6 preemption issue, we don't have that in these devices. You
7 know, there's different FDA regulatory processes and in sum
8 that go through this premarket approval, defendants may have
9 an argument on preemption Which could theoretically wipe out a
10 litigation, that was not in through process. So we don't have
11 any global issues that warrant initial motion practice. So my
12 hope is, we do the long form and short form, it makes
13 everyone's life simpler, and we proceed with discovery, and
14 when they're ready to make whatever other motions down the
15 road, that would be appropriate.

16 MR. KANUTE: Mike Kanute, again.

17 Your Honor, I can represent to the Court that if we
18 pursue that process, we're certainly not interested in
19 dragging things out with motions like that. In fact, as we
20 proceed, we can probably suggest to the Court a procedure
21 where, as long as we can table, for example, 12(b)(6) motions
22 until Bellwethers are selected at some point down the road, we
23 don't have to address that then in the master complaint, and
24 that I think that will be efficient and not slow things down
25 for the Court.

1 JUDGE GARAUFIS: I'm delighted to hear that, so
2 let's proceed with that in mind. All right.

3 MR. KANUTE: Yes. Thank you, Your Honor.

4 JUDGE GARAUFIS: At this point, I think we ought to
5 move to the issue of discovery, and I'm going to ask Judge
6 Henry to lead that discussion.

7 JUDGE HENRY: Thank you.

8 Thank you, Judge Garaufis. And so I do appreciate
9 the updates on discovery that were provided in the various
10 letters, including flagging, not only the progress that has
11 been made in the Florida action, but also potential issues
12 that may have already arisen as part of the, sort of, initial
13 discussions that counsel have been having.

14 One of the things that I wanted to address which I
15 think Judge Garaufis has helped along, was the fact that we
16 need lead plaintiffs' counsel in order to start negotiating
17 the sorts of discovery orders that need to be in place in this
18 case. And I know that there is a very comprehensive case
19 management order in the Florida action, with all of the status
20 conferences scheduled out for the remainder of 2023. What I
21 would need to do is once lead plaintiffs' counsel is in place
22 or whomever the lead is for plaintiffs that's going to
23 negotiate these sorts of orders, I would like to receive
24 proposed orders from the parties that you all have negotiated
25 amongst themselves, and then submit them to the Court for

1 review. I think we can then have a separate conference and it
2 would be a remote conference via Zoom for the purposes of
3 discussing those orders, confirming that there are no issues,
4 and then implementing those orders right away. So that would
5 be the primary case management order, including deadlines for
6 various, sorts of, discovery-related actions. The ESI
7 protocols, because I understand that there may have been
8 consensus for the purposes of moving the case along, but if
9 there are other issues that need to be discussed, we can
10 discuss them, as well as a protective order, which I
11 understand is something that Judge Keim may have ruled on
12 based on some disagreement with the parties in Florida action.

13 To the extent that you all can meet and confer about
14 these issues and submit for me, orders for review, that would
15 be most helpful. And I think the deadline for those proposed
16 orders, so case management, ESI, and protective would be
17 pegged to the date on which lead plaintiffs' counsel is
18 appointed. So let's say within 30 days after that, you are
19 submitting proposed orders for the Court to review. What I
20 would like to do is schedule a conference for early January
21 for us to be able to review them and we can get 2023 off to a
22 good start in terms of getting discovery.

23 I don't think that the master pleadings process will
24 interfere with that. I think we have a scope of what the
25 claims are, actually, in most of the cases, but we just need

1 to put the orders in place.

2 I was very happy to hear, Ms. Relkin, from you, and
3 as well, Mr. Kanute, that you are working together very well.
4 I think it bears saying that that is a very important
5 component of discovery for me. To the extent that you all can
6 meet and confer and propose jointly, issues to the Court,
7 that's actually much easier in terms of getting decisions to
8 you as quickly as possible, that we don't delay the discovery
9 in this case.

10 I know that my individual rules indicate a procedure
11 for raising discovery motions with the Court. I'm actually
12 overriding those provisions for the purposes of this case
13 only, because I think it's more beneficial for you to jointly
14 submit discovery disputes to me for review, and that, A,
15 forces you to meet and confer, even if you aren't, but also
16 helps you to synthesize what the issues are in order for me to
17 make a decision quickly.

18 Now, again, my practice is typically to have
19 conferences every six to eight weeks in a case like this. I
20 would like to set the date for the discovery conference in
21 this case for early January today while counsel are here,
22 keeping in mind that the likely lead plaintiffs' counsel are
23 present and would be able to schedule that. But I'm not going
24 to set a schedule for the remainder of 2023. I think it's
25 important that we take the case as it comes. I know that

1 we'll be talking regularly, and we will certainly never end
2 one conference without setting a next one.

3 With respect to the discovery disputes that were
4 alluded to, I think in plaintiff's status report, the most
5 recent one at ECF 19, to the extent that you believe that
6 those issues are ripe for consideration, we'll implement the
7 new discovery dispute mechanism which is that joint letter is
8 filed 10 days in advance of the status conference that we're
9 going to set now.

10 Any questions about anything that I've described to
11 so far?

12 MR. POPE: No, Your Honor.

13 MR. KANUTE: No, Your Honor.

14 JUDGE GARAUFIS: Okay. I'm going to ask my deputy
15 who's sitting here to pass me a Post-it note with the proposed
16 conference. He has all the scheduling.

17 So Wednesday, January 25th at 2:30 p.m., and again,
18 this would be a video conference.

19 Does that work for the defense?

20 MS. SCHEBEL: Yes, Your Honor. Jodi Schebel.

21 JUDGE GARAUFIS: And for plaintiffs?

22 MS. RELKIN: Yes, Your Honor.

23 Did you say 2:30?

24 JUDGE GARAUFIS: 2:30 p.m. Eastern Time.

25 MR. MESTRE: Your Honor, just for clarification, is

1 the way that the Court wants to manage the third-party payer
2 claim part of this proceeding? Would these orders also apply
3 to the third-party payers, because if so, we'd want to be
4 involved in this process which is part of what I meant about
5 having our interest protected.

6 JUDGE HENRY: Certainly. I think it would be
7 helpful to coordinate with, yes, counsel for plaintiffs and
8 defendants, because I don't want to have a separate separate
9 discovery track.

10 MR. MESTRE: Thank you, Your Honor.

11 JUDGE HENRY: Yes. Ms. Relkin.

12 MS. RELKIN: That's fine. I mean, I think there may
13 be some distinct issues. There will be certainly overlapping.
14 We're all trying to prove liability and defendants --

15 JUDGE HENRY: I think it maybe the case that
16 co-counsel may need to move back a bit.

17 JUDGE GARAUFGIS: And speak directly -- turn the
18 microphone around a little.

19 MS. RELKIN: Maybe this microphone is -- the light
20 is on.

21 Sorry. So there will be different damage, entirely
22 different damage issues if those claims are third-party
23 payers. So they may have their own discovery track with
24 defendants on that and whatever motion practice that does not
25 involve the personal injury plaintiffs. But certainly, on the

1 overall liability as to defendants, there's overlap.

2 JUDGE HENRY: Okay. Thank you for clarifying,
3 Ms. Relkin. And so as to Mr. Mestre's point, yes, you should
4 come to that conference, as well, and you should talk with
5 counsel in advance of that, and we can perhaps deal with that
6 in more detail at the next conference.

7 MR. MESTRE: Thank you, Your Honor.

8 JUDGE HENRY: All right. And the order that will be
9 issued after this conference will clarify the dates for the
10 proposed order, et cetera, that I would like counsel to submit
11 in advance. All right.

12 Any or questions regarding the overall discovery
13 process? All right.

14 MS. RELKIN: No, Your Honor.

15 JUDGE HENRY: All right. Thank you.

16 JUDGE GARAUFGIS: Now, there are several 12(b)
17 motions that are extant that have been identified by the
18 defense, and I assume that those would be stayed while we
19 engage in the immediate organization of the case.

20 MR. KANUTE: Yes. Mike Kanute, Your Honor.

21 Absolutely, we would agree to that and, in fact,
22 Your Honor, since you mentioned that, one thing I forgot to
23 mention previously, while we're working out the process for a
24 master complaint, there are these individual cases that have
25 been transferred to the MDL. The defendants would ask for a

1 stay of those so that we don't have to answer all of the
2 complaints that are currently in the MDL in which the time is
3 running on that. I don't think that's a controversial request
4 in connection with the claims.

5 MS. RELKIN: We've discussed and that's fine with
6 the plaintiffs.

7 JUDGE GARAUFGIS: The application for a stay of all
8 answers is granted.

9 MR. KANUTE: Thank you, Your Honor.

10 JUDGE GARAUFGIS: All right. Okay. Go on.

11 MS. RELKIN: A few other infrastructure issues, if I
12 may.

13 Direct file order, I think that goes to your
14 question of how many cases. I think once we have a direct
15 file order, we'll have a better handle on how many cases will
16 be coming and the rapidity in which they come. So we would
17 like to, once we have the authority appointed to negotiate,
18 and I have no doubt that we'll be able to reach orders on
19 direct file order with the defendants.

20 MR. KANUTE: We foresee no problem with that, Judge.

21 JUDGE GARAUFGIS: All right. And the Court sees no
22 problem with that. Just submit it.

23 MS. RELKIN: Terrific. And then one other question
24 that was raised about pro hac. We read your order and your
25 rules. And our understanding just for really clarification is

1 if someone had a case already that got CTOed before the MDL --
2 had a case before the MDL was created, they're in.

3 JUDGE GARAUFIS: Had a case, you mean in the Eastern
4 District of New York?

5 MS. RELKIN: My understanding was -- or made maybe I
6 read it wrong, is if someone had filed one of these cases in
7 federal court --

8 JUDGE GARAUFIS: Anywhere?

9 MS. RELKIN: Anywhere, and then the MDL is created,
10 they do not need to do pro hac?

11 JUDGE GARAUFIS: If they were admitted or did pro
12 hac in the other jurisdiction, that's correct.

13 MS. RELKIN: So the question then becomes, for later
14 cases, if someone did not have a case before and now they want
15 to file a cases, do they need to do the pro hac?

16 I think I read it that they do. But what that would
17 mean is that particular individual, if they're not admitted
18 which I guess they're not because that's why they would need
19 to do pro hac, would have to get local counsel first to get an
20 ECF so that it can be filed on ECF, unless we assigned sign
21 that to a liaison counsel who could file pro hac motions in
22 the general docket. So either --

23 JUDGE GARAUFIS: Well, I think that it would be
24 preferable to assign that to a liaison counsel.

25 You can identify a liaison counsel who is a member

1 of the bar of the Court here, and we can do it that way.

2 MS. RELKIN: Terrific. And Ms. Kessler, Rayna
3 Kessler from Robins Kessler, our consensus group if it passes
4 the Court's approval --

5 JUDGE GARAUFIS: I think that works. And it's more
6 efficient than looking around for local counsel.

7 MS. RELKIN: Great.

8 JUDGE GARAUFIS: You're pretty local.

9 MS. RELKIN: Thanks.

10 JUDGE GARAUFIS: Okay. What else do you have for
11 us?

12 MS. RELKIN: Do you want an update from Mr. Saunders
13 on the little more granularity about Florida discovery where
14 they are?

15 JUDGE GARAUFIS: Yes. Absolutely.

16 MR. SAUNDERS: This is Joseph H. Saunders for the
17 plaintiffs.

18 Judge, the first Florida case was filed about a year
19 and a half ago, a little bit before the recall. Like this
20 summer, we got a coordination order from Judge Keim, and there
21 are now about 75 cases in her court, and in Florida, the
22 coordination rules only allow coordination within one county.
23 But I don't know that there are many, if any, other cases in
24 other counties in Florida. If there are, there are not very
25 many. So there are about 75 cases now before Judge Keim in

1 Gainesville. The company is based there. It's where
2 University of Florida is, the basketball arena is the Exactech
3 arena, and so the courthouse is maybe five miles from the
4 company. A lot of doctors in that area were friends or
5 related to the founders, so that's why there are a lot of
6 cases in Florida that, of course, don't have federal
7 jurisdiction.

8 We've worked out --

9 JUDGE GARAUFIS: Well, there are a lot of retirees
10 in Florida too.

11 MR. SAUNDERS: A lot of people who need hip implants
12 and Florida.

13 JUDGE GARAUFIS: I'm happy to report that thus far,
14 I'm not a member of that fraternity.

15 MR. SAUNDERS: Then you wouldn't have a conflict of
16 interest here.

17 JUDGE GARAUFIS: That's right. Go ahead.

18 But I think the defense would know about the number
19 of cases in Florida and how they're being handled outside of
20 that county, and so I would ask -- I would ask the defense to
21 provide the Court with the information that I think we all
22 ought to have on that.

23 MR. KANUTE: Mike Kanute, Your Honor.

24 According to our numbers, there are 74 cases that
25 are part of the coordinated proceeding, and no other cases in

1 other state courts in Florida, although I -- is that right?

2 I'm sorry, Judge, I misspoke. My colleague here
3 told me there's one other case outside of Alachua County that
4 is in state court.

5 JUDGE GARAUFIS: All right. Thank you very much.
6 That answers the question -- that question.

7 I don't know how we would coordinate with a single
8 case, but certainly, if we're advised of the court and the
9 judge and the name of the case, I would reach out to that
10 judge and indicate that the MDL exists and that we're
11 attempting to coordinate discovery.

12 MR. KANUTE: Mike Kanute, Your Honor.

13 I'm told also that we are working with the counsel
14 in that stray Florida case to try to get that moved into
15 Alachua County so that it can be part of the coordinated
16 proceeding, as well.

17 JUDGE GARAUFIS: Okay. Thank you very much.

18 Well, Alachua County is where the defendant is
19 located, so I assume there's jurisdiction --

20 MR. KANUTE: Yes.

21 JUDGE GARAUFIS: -- of the case in Alachua County.
22 But that's a problem that you can deal with.

23 MR. KANUTE: Correct.

24 JUDGE GARAUFIS: Thank you.

25 MR. SAUNDERS: Joe Saunders here again.

1 Discovery has been ongoing since March of this year,
2 so we've had rolling discovery, we've had regular meet and
3 confers, there have been a few disputes that we've had before
4 the judge, but overall, there's been a significant amount of
5 discovery produced in the knees and the hip cases. We have a
6 protective order we've agreed to that allows for sharing. So
7 it allows for sharing with lawyers with federal cases, and so
8 we're in the processes of establishing a depository that can
9 be accessed for the purposes of this proceeding and lawyers in
10 the federal courts as well. That initial case filed in
11 Florida is now set for trial for November 2023, and so we --
12 the plaintiffs and the defense counsel, as well, have been
13 working towards, kind of, morphing the discovery going on in
14 the individual cases that preceded the formation of the
15 coordination, to morph that into more general discovery
16 applicable to all of the cases.

17 So there has been rolling discovery going on that is
18 taking place. So that's where we are in the state court.

19 JUDGE GARAUFGIS: Thank you very much.

20 JUDGE HENRY: Yes. Thank you.

21 And I think that can be one of the things that you
22 include in your submissions with the proposed orders, and we
23 can talk about it further at the conference as to the best way
24 to coordinate the orders here with what's been going on in the
25 Florida cases.

1 JUDGE GARAUFGIS: All right. Thank you.

2 Ms. Relkin, another concept has come up in terms of
3 the MDL process. And that is a way of keeping the plaintiffs
4 themselves advised of developments along the way. And one
5 system is to set up a website that will provide that kind of
6 information.

7 Is this something that you've used in the past?

8 MS. RELKIN: Yes. We've seen be it where the
9 plaintiffs group does it and we've seen it where some courts
10 actually, if they have a good webmaster, the courts actually
11 have all the orders available easily. We could do it either
12 way.

13 JUDGE GARAUFGIS: I think that what I'd like to do is
14 that I will check with our IT department as to how we could do
15 it. But if plaintiffs are willing to do it, it would
16 facilitate having it done, and I'm just -- what I'm concerned
17 about is not who does it, but that there be a repository of
18 information that plaintiffs can access along the way so that
19 they're fully informed about proceedings that are going on and
20 outcomes.

21 MS. RELKIN: Certainly. We can do that. That would
22 be come probably within the role of liaison counsel and we can
23 certainly do it.

24 JUDGE GARAUFGIS: All right. Thank you very much.

25 I'm going to deputize liaison counsel to handle

1 that, unless you advise the Court that it doesn't work for
2 this case, in which case, I'll follow up with the Court's IT
3 director. All right.

4 MS. RELKIN: Certainly. Thank you.

5 JUDGE GARAUFIS: Good. So do the plaintiffs have
6 anything more for the Court today?

7 MS. RELKIN: No, Your Honor. I think we've covered
8 the basics.

9 JUDGE GARAUFIS: Okay. Mr. Kanute, does the defense
10 have anything else to raise?

11 MR. KANUTE: No, Your Honor. This is very
12 productive. Thank you.

13 JUDGE GARAUFIS: Okay. I'd like to thank everyone
14 for their attention, for their preparation, and for getting
15 the ball rolling in this litigation.

16 Have a nice day.

17 (Whereupon, the matter was concluded.)

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22 I certify that the foregoing is a correct transcript from the
23 record of proceedings in the above-entitled matter.

23

24

25 s/ Avery N. Armstrong
AVERY N. ARMSTRONG

November 21, 2022
DATE