

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

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X  
IN RE: : 22-MD-3044(NGG) (MMH)  
EXACTECH POLYETHYLENE : United States Courthouse  
ORTHOPEDIC PRODUCTS : Brooklyn, New York  
LIABILITY LITIGATION, :  
August 22, 2023  
2:00 p.m.  
----- X

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE MARCIA M. HENRY  
UNITED STATES MAGISTRATE JUDGE.

APPEARANCES:

For the Plaintiffs: POPE McGLAMRY, P.C.  
3391 Peachtree Road, NE  
Atlanta, Georgia 30326  
BY: N. KIRKLAND POPE, ESQ.  
WEITZ & LUXENBERG, P.C.  
700 Broadway  
New York, New York 10003  
BY: ELLEN RELKIN, ESQ.  
SAUNDERS & WALKER, PA  
3491 Gandy Boulevard North  
Pinellas Park, Florida 33781  
BY: JOSEPH H. SAUNDERS, ESQ.  
ROBINS, KAPLAN LLP  
1325 Avenue of the Americas  
New York, New York 10019  
BY: RAYNA KESSLER, ESQ.  
ZOLL & KRANZ, LLC  
6620 West Central Avenue  
Suite 100  
Toledo, OH 43617  
BY: CARASUSANA B. WALL, ESQ.

1 APPEARANCES: (Continued)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

For the Deft. Exactech:

FAEGRE DRINKER BIDDLE  
& REATH LLP  
320 South Canal Street  
Chicago, IL 60606

BY: MICHAEL J. KANUTE, ESQ.  
SUSAN M. SHARKO, ESQ.  
RUBEN I. GONZALEZ, ESQ.  
J. STEPHEN BENNETT, ESQ.

Court Reporter:

Charleane M. Heading  
225 Cadman Plaza East  
Brooklyn, New York  
(718) 613-2643

Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.

\* \* \* \*

THE CLERK: Civil cause for status conference, case  
number 22-MD-3044, In Re: Exactech Polyethylene Orthopedic  
Products Litigation.

Counsels beginning with plaintiff, please state your  
appearances for the record.

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

THE COURT: Good afternoon.

MS. WALL: Good afternoon, Your Honor. Carasusana  
Wall from Zoll & Kranz for plaintiffs.

THE COURT: Afternoon.

MR. POPE: Good afternoon, Your Honor. Kirk Pope of

1 Pope McGlamry for plaintiffs.

2 THE COURT: Good afternoon.

3 MR. SAUNDERS: Joseph Saunders for the plaintiffs.

4 THE COURT: Good afternoon.

5 MS. KESSLER: Good afternoon, Your Honor. Rayna

6 Kessler for the plaintiff.

7 THE COURT: Good afternoon.

8 MR. KANUTE: Good afternoon, Your Honor. Mike

9 Kanute from the Faegre Drinker firm for the Exactech  
10 defendants.

11 THE COURT: Good afternoon.

12 MR. GONZALEZ: Good morning, Your Honor. Ruben

13 Gonzalez from Faegre Drinker also for Exactech.

14 THE COURT: Good afternoon.

15 MS. SHARKO: Susan Sharko, Faegre Drinker, for the

16 Exactech defendants.

17 THE COURT: Good afternoon.

18 MR. BENNETT: Good afternoon, Your Honor. Stephen

19 Bennett, Faegre Drinker, for the Exactech defendants.

20 THE COURT: Good afternoon.

21 All right, everyone. So we are here for a  
22 previously scheduled status conference in this multi-district  
23 litigation. Our last status conference was in June and since  
24 then, there have been a number of filings, some of which will  
25 be addressed in today's session.

1 I just want to start with the most recent status  
2 report and I think a request from the parties to have a joint  
3 conference with Judge Garaufis. Judge Garaufis is not here  
4 today and I think at this point, given the status of the  
5 bellwether plans both here as well as in the Florida cases,  
6 that that request likely would have been declined even if he  
7 were available as premature at this point, but certainly  
8 something that can be revisited later.

9 For now, my plan today is to go over some of the  
10 matters that are discussed in your status report and also to  
11 decide the motion relating to ESI.

12 I will note that I am -- it appears as though your  
13 respective positions may have evolved somewhat from the  
14 initial motion papers from then until today, so part of  
15 today's conference is to get some clarification on what  
16 specifically plaintiffs are seeking and what specific  
17 objections, if any, the Exactech defendants have.

18 I note for the record that, one, the third-party  
19 plaintiffs are no longer parties in this multi-district  
20 litigation pursuant to Judge Garaufis' order dismissing them  
21 from the case and their failure to amend their complaint. I  
22 have also excused the TPG defendants from this conference  
23 because discovery was stayed as to them.

24 All right. So why don't we start with the status  
25 report. It's typically Mr. Kanute who tells me the updated

1 number of cases since those status reports.

2 Why don't you start, Mr. Kanute.

3 MR. KANUTE: Thank you, Your Honor.

4 The numbers have changed just a bit since we filed  
5 the joint status report in the MDL as well as the related  
6 Florida litigation and litigation in other states continues to  
7 grow, but as of this past Friday, there were a total of  
8 838 cases in this MDL of which 679 involve knee products, 148  
9 involve hips, 10 of which were ankle cases.

10 Then in Florida, since Friday, a couple more cases  
11 were filed. We're up to 274 pending in Alachua County before  
12 Judge Keim. And of those, 192 are knee cases and 78 are hip  
13 cases.

14 Then the state court cases, the jurisdiction where  
15 we've seen the most activity is in Illinois, we're up to  
16 14 cases now filed by one plaintiffs' firm with the promise of  
17 more to follow, and then there have been a couple of others  
18 filed in California and other states as well.

19 THE COURT: Okay. All right. Thank you very much.

20 Well, I will say that our rate has slowed down since  
21 our last status. We usually are up at least 50 percent more  
22 at every status conference and so this new number seems a  
23 little bit lower.

24 In any event, let me just ask about the 30(b)(6)  
25 deposition. Did that take place on August 15th?

1 MS. WALL: Your Honor, Cara Wall for the plaintiffs.  
2 Yes, it did. We did that last week.

3 THE COURT: Any issues relating to that that you  
4 wanted to raise?

5 MS. WALL: Not for plaintiffs, Your Honor.

6 MR. GONZALEZ: Not from the Exactech defendants,  
7 Your Honor.

8 THE COURT: All right. Thank you.

9 So let's get to this ESI discovery issue.

10 So I have -- well, I have a few filings related to  
11 same. There have been a few filings since the last  
12 conference. There were the defense, we'll call them  
13 "updates," in air quotes, on July 7th at Documents 347 and  
14 348. 348 dealt with the search terms issue and sort of  
15 flagging it for the court. And then on July 11th,  
16 Document 351 was the plaintiffs' response to the updates from  
17 the defense. The full-blown motion in which plaintiffs are  
18 asking for specific relief was filed on July 21st at  
19 Document 371, with a response filed on July 28th at  
20 Document 377.

21 Frankly, given the nature of the dispute, I didn't  
22 believe that a standalone conference was necessary because I  
23 knew that we would be discussing these issues today.

24 My primary question, and I'm going to start with the  
25 plaintiffs here, in reviewing your letter of July 21st, at

1 371, and then looking at some of the information you provided  
2 in the status report at Document 392 as of August 11th, what  
3 specifically are you asking the court to do?

4           It sounds like one of the most obvious questions but  
5 before I issue any orders, I thought that I would ask what it  
6 is that you want because, and I'll add to this, in the status  
7 report, it seemed as though the meet and confer and,  
8 particularly, the meeting with the E-discovery vendor in this  
9 case, may have addressed some of your initial concerns but I  
10 honestly can't tell so I just wanted to start with what would  
11 you like to have happen.

12           MR. POPE: Thank you, Your Honor. Kirk Pope. I'll  
13 give the short answer and then a little bit of context will  
14 help you.

15           So what the plaintiffs are asking is that there are  
16 specific documents that have been hit on an ESI search of a  
17 group of documents that the defendants had, where the  
18 defendants had used our search terms in order to go through  
19 that process.

20           So as to those ten custodians that were identified  
21 and agreed to, their Outlook folders were used for the basis  
22 upon which to run our search terms and those were identified  
23 and have been, according to the papers now, culled out and  
24 held by defendants. We seek for those to be produced.

25           THE COURT: Okay. Now, when you say "those,"

1 because I'm looking at page 11 of this status report where --  
2 I'll read the quote. It's at the bottom of the page. It  
3 says: "Plaintiffs now understand that the Exactech defendants  
4 have selected approximately 2.1 million documents from the  
5 Outlook mailboxes of 12 custodians. Plaintiffs' search terms  
6 resulted in 123,321 unique documents out of the approximately  
7 460,000 total documents containing search terms when applied  
8 to those 2.1 million documents."

9 So of those different groups and subsets of  
10 documents, which ones do you want me to order the production  
11 of?

12 MR. POPE: 123,321, Your Honor.

13 THE COURT: Okay. Now you can provide some context.

14 MR. POPE: The difficulty, I think, from the  
15 plaintiffs' perspective is we're not getting out of the  
16 blocks. We are many months into this MDL and we have yet to  
17 receive a single document produced in this MDL. We had been  
18 provided documents that were produced as a result of a, of an  
19 order to compel out of Florida, however, we have yet to  
20 receive a document.

21 The concern is that our schedule is such that we're  
22 going to not be able to maintain this schedule that Your Honor  
23 entered May 31st. So, for instance, the first test of this  
24 was a rolling production to start on August the 18th. We have  
25 been told no documents forthcoming and since this pass, no

1 documents were produced as a part of that. That builds on  
2 itself and that's a concern because at this point in time, we  
3 have our next deadline due under your order which is the  
4 completion of the negotiations of identified custodians. We  
5 used the documents that were being produced on the 18th in  
6 order to help us identify for the custodians. Since no  
7 documents were produced, you see how we're starting to already  
8 fall behind with regards to Your Honor's order.

9           The issues as it presents and as we've laid out in  
10 these papers is the idea of switching now from search terms,  
11 which defense had elected to do back in January of this year,  
12 and now they've elected, they want to change some search terms  
13 to go to TAR 2.0.

14           Now, we don't stand as plaintiffs and say we're  
15 opposed. What we want is we spent six months doing search  
16 terms, you've identified responsive documents to our search  
17 terms, it's not a tremendous number of documents in this  
18 context, and so we should be able to work through that and we  
19 haven't been able to work through that and we need to get the  
20 documents that we can then start the rest of our discovery  
21 with mutual requirements.

22           Going forward, we're happy to continue and we are  
23 continuing to discuss TAR 2.0. We had our vendors meet with  
24 their vendors on a conference call. They had those  
25 discussions to help try to bridge the gap and to understand

1 that, however, even the TAR 2.0 has been difficult because,  
2 according to the ESI order, we should be involved in a  
3 protocol.

4           So what's happening now on the TAR 2.0 side of the  
5 house is we're completely blocked from understanding what it  
6 is they're using to build predictive coding. We have no idea,  
7 and so we don't have anything but bare numbers, this is what  
8 this produces, this is what this produces, without  
9 understanding how that platform is being built and that is a  
10 concern to us. But for purposes of today, we need documents  
11 in order to fulfill the obligations under the schedule order  
12 that you entered May 31st.

13           THE COURT: All right. Thank you.

14           So for the Exactech defendants, what objection do  
15 you continue to have, if any, to the production of these  
16 123,321 documents?

17           MR. GONZALEZ: Your Honor, Ruben Gonzalez for the  
18 Exactech defendants.

19           The objection to the 123,000 or so documents, and  
20 really, it's the bigger 400,000 number, is that those  
21 documents were highlighted in a search term report that the  
22 plaintiffs requested to continue negotiations on the search  
23 terms. That search term report was provided sometime in June,  
24 I think it was early June, Your Honor, on twelve custodians,  
25 not ten. We were able to collect two additional custodians

1 before we ran the search term report. But that search term  
2 report, as we understood it, was to be the basis of actually  
3 negotiating search terms.

4 While it's true that we had been meeting and  
5 conferring for six months now, Your Honor, that six month  
6 period was not all on search terms and what happened is that  
7 at some point in April, there was a decision by the plaintiffs  
8 not to negotiate search terms without a search term report.  
9 So we provided the search term report, but that was sort of it  
10 at that point.

11 So really the basis of our objection, Your Honor, is  
12 that there hasn't been a meaningful meet and confer on search  
13 terms and simply agreeing to produce documents responsive to  
14 the plaintiffs' search terms would sort of be unfair given  
15 that the only reason we stopped negotiating on search terms in  
16 mid April was because the plaintiffs really didn't want to  
17 continue negotiating without a search term report.

18 Now, we agree that we would really like to start  
19 producing documents. We think there's a way forward. We  
20 think that way forward is TAR 2.0. I can talk some more about  
21 Tar 2.0 but I want to make sure I'm answering Your Honor's  
22 question.

23 THE COURT: Well, I heard that your objection is to  
24 the process of negotiating search terms. I haven't heard  
25 specifically why producing these 123,321 documents are

1 objectionable on any basis allowable under the Federal Rules  
2 of Civil Procedure, i.e. relevance or proportionality.

3 MR. GONZALEZ: So our objections to the plaintiffs'  
4 search terms, Your Honor, were on the basis that they were  
5 overly broad. They lacked terms and connectors. They weren't  
6 tied to the products at issue in the case. So the terms  
7 themselves are generating documents we think could be over --

8 THE COURT: Relevant?

9 MR. GONZALEZ: -- not relevant to the devices at  
10 issue in the case.

11 We gave an example in some of our briefing,  
12 Your Honor. For example, the term "wear" exists all by  
13 itself, the term "wear" spelled W-E-A-R. Without that term  
14 being either connected through search terms and connections to  
15 a device or really to a relevant time period, that's going to  
16 generate an over-responsive number of documents. So what we  
17 aimed to do with our proposed search terms back in January was  
18 to tie the search terms to the relevant products at issue.

19 So that would be the basis, Your Honor, is that we  
20 would, we would be generating an overly broad set of documents  
21 and we think there's a way to work around that.

22 THE COURT: Okay. So you're objecting on the basis  
23 of the request being overly broad. So I sense that that means  
24 not relevant --

25 MR. GONZALEZ: Yes.

1 THE COURT: -- generating not relevant results.

2 MR. GONZALEZ: Correct.

3 THE COURT: I haven't quite yet heard a  
4 proportionality argument here so I don't think that's the  
5 basis of your objection.

6 MR. GONZALEZ: No. At the time moment, Your Honor,  
7 it's that the search terms themselves are overbroad on their  
8 face, they would lead to the production of documents that are  
9 not relevant to the devices at issue in this case.

10 With respect to proportionality, Judge, the reality  
11 is that we've got 12 custodians, there will likely be more,  
12 but this isn't a proportionality argument at the moment.

13 THE COURT: I'm glad you agree that proportionality  
14 is not an issue. I'm going to come back to that in a second.

15 MR. GONZALEZ: Sure.

16 THE COURT: Let me go to Document 88 which is the  
17 stipulated, let me underline the word "stipulated," protocol  
18 governing the production of ESI, and by stipulated, it's my  
19 understanding that there was an extensive negotiation process  
20 months before January 26th when this order was entered.

21 The sole mention of TAR is on page 5 of this  
22 document and it talks about notification to the opposing party  
23 with ample time to meet and confer in good faith.

24 What it doesn't say is that at the start of the  
25 production of ESI, that TAR will be used. So I'm trying to

1 understand how it is that if you stipulated in this protocol  
2 that search terms were going to be the way to go, there's an  
3 entire protocol set up around search terms, why is it now that  
4 you've identified the documents of twelve custodians and  
5 suddenly, you'd like to shift gears to TAR.

6 I'm quite sure that TAR was in use and something  
7 that you thought was valuable before January when this order  
8 was entered during the months before January when you were  
9 negotiating it. I believe this MDL itself was established in  
10 October of 2022. TAR was in existence then and there was  
11 never anything more than this one paragraph in this entire  
12 stipulated protocol.

13 So talk to me about why, in August, TAR is the way  
14 to go.

15 MR. GONZALEZ: So a couple of things, Your Honor.

16 The order may not reflect it but TAR 2.0 was the  
17 subject of extensive negotiations between myself and the  
18 lawyers for the plaintiffs I was working with at the time  
19 which are different, which are different lawyers than I'm  
20 working with now and I think therein lies some, some of the,  
21 some of the confusion, perhaps, Your Honor. There hasn't  
22 really been a consistent ESI liaison that the Exactech  
23 defendants have been working with on the plaintiffs' side.

24 So TAR 2.0 was extensively negotiated. I can't  
25 speak to what happened prior. We weren't involved in the

1 early discovery, Your Honor, but I can assure you that TAR 2.0  
2 was the subject of extensive discussions. We began discussing  
3 search terms and custodians together at the request of the  
4 plaintiffs. We proposed an initial set of search terms,  
5 Your Honor, but TAR 2.0 did come up in meet and confer  
6 conferences prior to August and prior to June.

7           At this point, I think the TAR 2.0 is the way  
8 forward, Your Honor, mostly because I'm getting to an  
9 agreement on search terms, to actually meet and confer with  
10 the plaintiffs, to come to an agreement on search terms is  
11 going to be tough. TAR 2.0 --

12           THE COURT: I agree.

13           MR. GONZALEZ: It's been difficult, Your Honor. And  
14 for reasons that maybe I'm not aware of but I can -- I will  
15 tell you this, that I think that TAR 2.0 is the most efficient  
16 and effective way to getting to document production. The  
17 statistics that I shared with the plaintiffs already, they  
18 would likely receive more, more documents than their search  
19 terms actually hit on. They would receive more documents,  
20 substantially more and the relevance would be stronger  
21 initially. In other words, they would get the most relevant  
22 documents because we're relying on continuous active learning  
23 and I think that's the goal at this point, Your Honor, it's  
24 just to get to document production for everybody.

25           THE COURT: Okay. So if I understand you correctly,

1 you believe that the results of the TAR review would be more  
2 targeted, more relevant and could lead to a number higher than  
3 123,321 documents?

4 MR. GONZALEZ: Yes. In fact, it's, it's -- if I  
5 may, Your Honor, I would stick to the, if I could, stick to  
6 the 400,000 number. I believe the search terms, search terms  
7 hit on about 460,000. If we project it out, the projected  
8 production using TAR 2.0 would be anywhere from 422,000 to  
9 over 620,000 documents.

10 THE COURT: Okay. So you wouldn't object to a TAR  
11 production of over 600,000 documents, but you do object to a  
12 search terms production of 123,321 documents?

13 MR. GONZALEZ: The objection is not based on the  
14 number of documents, Your Honor. The objection is based on  
15 the types of documents that would be included on, that would  
16 be included as responsive to the plaintiffs' search terms.

17 So it's less about the number and more about the  
18 relevance of the documents themselves.

19 THE COURT: In your assessment?

20 MR. GONZALEZ: That's my assessment, Your Honor.

21 THE COURT: Meaning the relevance assessment, the  
22 Exactech defendant's writ large prevalence assessment.

23 MR. GONZALEZ: Well, on the assessment, but the TAR  
24 2.0, Judge, the initial sampling that we did on prevalence,  
25 it's a pretty strong number on prevalence. Your Honor, if we

1 had received about a 5 percent prevalence rate, that would  
2 have been probably further discussions, but the prevalence  
3 rate was over 20 percent.

4 Those documents, the initial documents were coded by  
5 me and the relevance of those documents, Your Honor, we can  
6 project would be pretty close to what, to what's actually  
7 appropriate in this litigation.

8 THE COURT: Am I correct in that your papers  
9 indicate that there was essentially a manual review --

10 MR. GONZALEZ: That's right.

11 THE COURT: -- of the 400,000 some documents?

12 MR. GONZALEZ: That's right.

13 So there's a difference between TAR 1.0 and TAR 2.0.  
14 There are a few key differences that are really important.

15 In TAR 1.0, TAR 1.0 relies on what's called a seed  
16 set. So you have to train the system based on that initial  
17 seed set.

18 In TAR 2.0, it's continuous active learning. So the  
19 way this system kicks off is there's a prevalence document,  
20 it's called an estimation sample. It's a sample of documents  
21 from the total universe that are reviewed, each document just  
22 on the four corners. So it doesn't -- you don't look at  
23 whether there might be a family document, for example,  
24 Your Honor, that might be relevant. You're just looking at  
25 the four corners of each document. If it's relevant, you move

1 forward and you get that estimation sample and for us, again,  
2 it was, I believe it was 20 or 25 percent. From there, the  
3 system begins generating batches of documents for review.  
4 Each time a reviewer determines the document is relevant, it  
5 trains the system on responsiveness and it's a continuous  
6 system.

7           The other difference between TAR 2.0 and TAR 1.0 is  
8 that validation is happening with each batch and then there's  
9 a final validation at the end. So it's a pretty robust  
10 advancement over TAR 1.0.

11           THE COURT: And all of this was available in January  
12 when this order was entered, this stipulated ESI protocol?

13           MR. GONZALEZ: All of this meaning TAR 2.0?

14           THE COURT: TAR 2.0.

15           MR. GONZALEZ: Yes.

16           THE COURT: Okay. Thank you.

17           MR. GONZALEZ: You're welcome.

18           THE COURT: Any response from the plaintiffs?

19           MR. POPE: Well, Your Honor, I just reiterate that  
20 we're just in the dark here.

21           I mean I listened to the TAR 2.0 and all that  
22 they're, being put together, but the ESI order clearly sets  
23 out that we are to be a part of the protocol that helps  
24 generate whatever the TAR 2.0 is generating. We have no idea.  
25 All we get is a number, this is what it generated. We don't

1 understand how, you know, the search process is going as part  
2 of TAR 2.0.

3           The only piece that I just want to touch on is the  
4 idea behind these search terms and the process and how the ESI  
5 works is that we exchange those search terms and then they run  
6 them, we get metrics to understand what is overly broad and  
7 then we have a negotiation based upon that to narrow the  
8 field, but that requires data in order to do that that and we  
9 were never provided that data. The only thing that happened  
10 in July was we ran a hit report. This is how many hit per  
11 search term. We weren't even provided at that point in time  
12 what the denominator, what the entirety of the actual  
13 documents that had been searched.

14           So it's impossible to just grab out of the air a  
15 term and a connector in order to be able to narrow something  
16 down that has any meaning to it without having some  
17 understanding of what the data means as it's applied to  
18 whatever search terms they're using.

19           So I just wanted that as part of the context,  
20 Your Honor.

21           THE COURT: All right.

22           MR. GONZALEZ: Real quickly.

23           THE COURT: Super quick.

24           MR. GONZALEZ: Okay. Your Honor, if I may, just the  
25 notion that we were going to be providing analysis all along

1 the way between January and June, the custodians weren't, the  
2 initial really twelve custodians weren't agreed upon until  
3 sometime in April and then the documents were collected and  
4 processed. So there wouldn't be a way to provide analysis  
5 without the custodian document file.

6 And just, just to be clear, Your Honor, if I wasn't  
7 so clear before, the reality is that the negotiations, the  
8 meet and confers, on search terms that we've had, they've been  
9 unproductive, and I believe the TAR 2.0 is the right way  
10 forward. It sort of takes away, sort of eliminates some of  
11 the issues that the attorneys may have with the history which  
12 isn't worth getting into, but TAR 2.0 is an efficient,  
13 effective and productive way forward to actual document  
14 production.

15 THE COURT: All right. Thank you very much.

16 For plaintiffs, let me just ask you this. I believe  
17 there was a line in the status report in your portion of the  
18 papers that indicated that you wouldn't object to the use of  
19 TAR 2.0 going forward, meaning not with the documents that  
20 have already been identified for the twelve custodians but for  
21 any additional custodians, you would not object.

22 Is that an accurate statement?

23 MR. POPE: That is correct, Your Honor.

24 THE COURT: Okay. So I want Exactech to produce the  
25 123,321 documents that have been generated by the plaintiffs'

1 search terms.

2 And if I understand correctly, these are the search  
3 terms that are listed in your papers, plaintiffs, at 371-5?

4 MR. POPE: That is correct, Your Honor.

5 THE COURT: Okay. Yes. So Exactech needs to  
6 produce those documents. However, if, in fact, you are not  
7 objecting to the use of TAR going forward, plaintiffs, and if  
8 you, Exactech defendants, believe that TAR 2.0 would help you  
9 in identifying documents from additional custodians, then,  
10 yes, that is the process that -- excuse me -- you are  
11 encouraged to use the TAR process to more quickly get to those  
12 documents.

13 I do think that -- my concern here is that rather  
14 than just producing the documents, the Exactech defendants are  
15 introducing the TAR process sort of after the fact. The  
16 reason why I started off with Rule 26 and those objections is  
17 because it wasn't entirely clear to me from the papers what  
18 your specific objections were to producing the documents. It  
19 seems as though your objections were to the history and nature  
20 of the negotiations, whether or not search terms were  
21 appropriately agreed upon, whether or not there were  
22 reasonable versus unreasonable requests for analytics. I  
23 never heard of and I still haven't yet heard of a firm,  
24 substantive objection to providing the documents.

25 So you are going to produce the documents that I've

1 just identified but I take your point that TAR, yes, can be a  
2 useful tool. Your protocol does allow for the use of TAR. It  
3 just hadn't been used up until this point or it hadn't been  
4 discussed in detail. I think plaintiffs now have a better  
5 understanding of what it can do after the meeting with the  
6 E-discovery vendor, and maybe your conversations will now be  
7 more productive, A, given that you're not, you will have  
8 gotten documents for the first twelve custodians.

9 Just remind me, was there to be an maximum number of  
10 custodians or has that not been decided yet?

11 MR. POPE: That has not been decided yet. That was  
12 the September 1st deadline date, that was the import there.

13 THE COURT: Yes. I'm going to have to get back to  
14 the order because August 18th, I think, was the date for the  
15 initial production.

16 In ordering the production of these 123,321  
17 documents, I also need to talk about a deadline by which that  
18 has to happen.

19 I'm going to ask the plaintiffs what they believe is  
20 a reasonable deadline. Don't say today.

21 MR. POPE: Your Honor, my understanding from the  
22 papers, I mean, again, reading where defendants are, these had  
23 been identified, they've been reviewed, so they should be  
24 fairly close to being able to be produced. I would suggest  
25 that those be produced within 15 days.

1 MR. GONZALEZ: Your Honor, so let me correct that  
2 understanding.

3 Those documents have not been reviewed and so one of  
4 the questions I have is I suspect that your order would not  
5 include documents that are privileged.

6 THE COURT: Of course not. I'm talking about  
7 non-privileged responsive documents.

8 MR. GONZALEZ: So just to be clear, Your Honor, we  
9 would review the documents, we would have to review the  
10 documents for responsiveness or privilege, and then we could  
11 work to get those produced. I would commit to doing a rolling  
12 production.

13 THE COURT: Well, you had previously committed to a  
14 rolling production and we've already missed that date, so I  
15 would like to understand in a finite time period what do you  
16 believe to be a reasonable time period to produce these  
17 documents.

18 MR. GONZALEZ: I would ask Your Honor for at least  
19 30 days.

20 MR. POPE: That's fine, Your Honor, as long as we  
21 address the other issue with regards to the custodians in the  
22 order. We're going to need to be able to review them.

23 THE COURT: Okay. One thing at a time.

24 So you would like 30 days to produce your 123,321  
25 documents.

1 MR. GONZALEZ: To review and produce, that's  
2 correct, Your Honor.

3 THE COURT: And you have that, fine.

4 So I have no calendar in front of me. What is  
5 30 days from today?

6 MR. GONZALEZ: September 21st, Your Honor.

7 THE COURT: Okay. Is that a Friday?

8 MS. KESSLER: Thursday.

9 THE COURT: Okay. I'll give you September 22.

10 MR. GONZALEZ: Thank you.

11 THE COURT: The Friday. Okay. So that's part one.  
12 Part two, let's look at the rest of the discovery  
13 order, at 291.

14 Mr. Pope, were you starting to say that there was a  
15 different issue to be addressed?

16 MR. POPE: Sorry, Your Honor.

17 With regards to kind of the building blocks of the  
18 schedule, the way it had been negotiated for purposes of what  
19 we submitted to Your Honor, that ultimately got entered on  
20 May the 31st, is that we would have an opportunity to receive  
21 rolling production on August the 18th to allow us to review  
22 same for two weeks so that we can have a discussion about  
23 whether or not there are other custodians that needed to be  
24 added to the list. We have no documents so that plan is kind  
25 of by the wayside.

1           Given the fact that we now have an order where there  
2 will be a production September 22nd, we would submit,  
3 Your Honor, for two weeks thereafter to be able to finalize  
4 the custodian list.

5           THE COURT: Any objection?

6           MR. GONZALEZ: I don't have any objection to that,  
7 Your Honor. I think we've got 14 custodians at the moment.  
8 We're prepared to agree to a few more. I suspect that after  
9 that time, if there are additional custodians, there's a way  
10 to work through it that's spelled out in the order. So no  
11 objection.

12          THE COURT: I'm sorry, 12 or 14?

13          MR. GONZALEZ: So we've collected and processed data  
14 on twelve. Since then we've offered two additional custodians  
15 and we have more that we're, that we've agreed to. I think  
16 the initial list, and plaintiff can correct me, I think their  
17 initial list was for 35 custodians so we're at 14.

18          THE COURT: Right. And your initial production was  
19 ten of those?

20          MR. GONZALEZ: It will be twelve.

21          THE COURT: All right. So you have no issue with  
22 two weeks later. Tell me what two weeks after September 22nd  
23 is, please.

24          MS. KESSLER: October 6th.

25          THE COURT: Sure. October 6th.

1 MS. KESSLER: That's Friday.

2 THE COURT: Right.

3 Okay. I mean it is clear that I am going to need to  
4 amend this order. So I just want to make sure that we are  
5 dealing with all the different steps that we need to deal  
6 with.

7 I believe that the September 22nd date is  
8 paragraph 11 on page 6 of the May 31st order at 291 and the  
9 agreement to the final list of Exactech custodians is now  
10 October 6th. Is that consistent with your understanding?

11 MR. POPE: Yes, Your Honor.

12 MR. KANUTE: Yes.

13 MR. GONZALEZ: Yes.

14 MR. KANUTE: That's correct, Your Honor, yes.

15 THE COURT: Thank you.

16 So now the defendant's substantial completion of  
17 non-custodial document production, does that date need to be  
18 amended?

19 MR. POPE: Well, I'll speak to it from the  
20 plaintiffs' side.

21 We have yet to receive any such production. So to  
22 the extent -- and I don't know where they stand on gathering  
23 those documents.

24 THE COURT: Well, it says substantial completion so  
25 I will find out what the status is.

1 MR. POPE: Thank you.

2 MR. GONZALEZ: Yes. So just to note, Your Honor,  
3 many of those documents have been produced in the Florida  
4 coordinated proceeding which have been also produced in the  
5 MDL.

6 At this time, I don't see a need to change that  
7 October 3rd deadline.

8 THE COURT: Okay. Then we won't.

9 Any issues, Mr. Pope?

10 MR. POPE: No, Your Honor.

11 THE COURT: Okay. And we're still then, in light of  
12 the changed dates for this initial production of the twelve  
13 agreed upon custodial files, we're still on track for the  
14 November 20th date to complete that production?

15 MR. GONZALEZ: Yes, Your Honor, I think we can do  
16 that.

17 THE COURT: Okay. All right.

18 Any other changes or slight amendments? I was  
19 concerned that this entire discovery plan needed to be  
20 rewritten. It does not. Any other changes to any of the  
21 dates in the discovery plan, putting aside your concerns about  
22 bellwether? That's slightly different.

23 MR. GONZALEZ: None from a discovery perspective,  
24 no, Your Honor, from the Exactech defendants.

25 THE COURT: Okay.

1 MR. POPE: Your Honor, we would submit that we would  
2 need to include one item, dealing with a date to come to terms  
3 with a protocol dealing with the TAR 2.0 going forward between  
4 the parties, and we would submit that we would need to do that  
5 and notify the Court that we have completed that.

6 THE COURT: Mr. Gonzalez?

7 MR. GONZALEZ: Yes. That would be fine, Your Honor.  
8 So -- let me just look at this.

9 THE COURT: Yes. Your TAR paragraph in Document 88,  
10 your stipulated protocol talks about notification with "ample  
11 time" which is appropriately vague, I guess, to accommodate  
12 things like this, but the vagueness, I think, has been perhaps  
13 the cause of some of the dispute here.

14 So to the extent you can come up with a stipulated  
15 protocol with the use of TAR that's a little more specific, I  
16 think that that would help things going forward.

17 MR. GONZALEZ: I'll tell you that after working with  
18 Ms. Wall, the plaintiffs' ESI liaison, particularly on that  
19 30(b)(6) recently, Your Honor, I'm confident we can do that  
20 and come to an agreement.

21 THE COURT: Okay. Sure. Is there a proposed date  
22 for this agreement?

23 MR. POPE: Your Honor, we would submit  
24 September 22nd, the same time which the production with  
25 regards to the search terms is taking place. Again, it's

1 30 days.

2 THE COURT: Mr. Gonzalez?

3 MR. GONZALEZ: I think that should be fine.

4 THE COURT: All right. So we'll further amend this  
5 order to include that by September 22, 2023, the parties will  
6 come to an agreement on a protocol for the use of TAR 2.0 in  
7 searching for the files for additional custodians after the  
8 initial twelve?

9 MR. GONZALEZ: Twelve.

10 THE COURT: Okay. Any other ESI related issues  
11 before I go back to the rest of the status report?

12 MR. POPE: Not from plaintiffs, Your Honor.

13 MR. GONZALEZ: Nothing, Judge. Thank you.

14 THE COURT: Okay. Now, I guess, generally speaking,  
15 are there any other issues to be covered for any other  
16 disputes that the parties believe that they have? I'll start  
17 with the defense.

18 MS. SHARKO: If we could talk about the bellwether  
19 issues either on or off the record with Your Honor, it's a  
20 real problem for us and we need your help.

21 THE COURT: Understood.

22 MR. POPE: No objection. We're not objecting to  
23 having an off-the-record conversation.

24 THE COURT: Well, we don't have off-the-record  
25 conversations about bellwether trial plans here, but I will

1 say this.

2           The other documents that I forgot to mention mainly  
3 because they were not revolving around this ESI dispute, yes,  
4 the parties proposed a bellwether plan here at 374 which was  
5 ultimately denied by Judge Garaufis in light of Judge Keim's  
6 ruling in Florida, and then I guess just last week, at  
7 Document 396 was your filing informing us about your filing in  
8 Florida asking Judge Keim for additional time to submit a  
9 modified order or a modified agreed upon order.

10           Has she yet ruled on that motion?

11           MS. SHARKO: No, unfortunately. We've been trying  
12 to speak with Judge Keim for a number of weeks now. We  
13 haven't had a case management conference since before Science  
14 Day and we got a notification from her judicial administrator  
15 this morning saying that Judge Keim was away until  
16 September 5th and she wouldn't see our motion until then, and  
17 our motion asks for an extension until September 4th.

18           THE COURT: Sure. I mean I -- there is nothing that  
19 this court can do about Judge Keim's decisionmaking on any  
20 motions that are filed in that court. She, of course, has all  
21 the prerogative to decide the motions as she sees fit. She  
22 did so with the proposed bellwether plan. And Judge Garaufis  
23 as, you saw, essentially said well, let me know what happens  
24 in Florida and then you can peg your proposed plan to that.  
25 Of course, that's not a direct quote but that's essentially

1 what his order said.

2 So it's difficult for me here in this vacuum to talk  
3 about bellwether plans because unless you're telling me that  
4 there's some issue with this discovery order which was sort of  
5 intimated at in the papers, there's not a discussion that I  
6 can have with the parties about that.

7 MS. SHARKO: So here's the problem and I think I  
8 speak for everybody. We're in the unprecedented situation of  
9 all of the plaintiff lawyers and the defense lawyers agreeing  
10 on this bellwether plan which was structured around  
11 Your Honor's discovery order of May 31st. We heard you, you  
12 spoke clearly to us, and you gave us a to-do list and we knew  
13 then what we had to do and when we had to do it.

14 That order came out after the Florida bellwether  
15 motion was argued but before it was ruled upon and so after  
16 Judge Keim issued her ruling on the bellwether motion in  
17 Florida. Do I wish we all had been in agreement and rowing  
18 the same boat before then? Absolutely but, you know, it takes  
19 some people longer than others, I guess, as my mother would  
20 say, but we finally got there, I think, motivated, in part, by  
21 the order that she did submit.

22 So we're all together now with this plan which we  
23 think is really efficient and that's important considering the  
24 status of the company. It's a really small company. And it's  
25 important because the bellwether plan is built around

1 Your Honor's discovery order.

2           So if we go off in two different directions, you and  
3 Judge Garaufis will be ruling on hips and knees, Judge Keim  
4 will be ruling on hips and knees, and if we use the MDL  
5 version of the order here, it will be an orderly process  
6 because we'll complete discovery and then we'll do the  
7 bellwethers but it won't be in Florida because the Florida  
8 order will have us trying cases well before discovery is  
9 completed here which means that -- I don't mean to be doom and  
10 gloom -- it's just going to be discovery chaos which is going  
11 to be really expensive and burdensome for my client and also  
12 for the plaintiffs because the plaintiffs, not that I should  
13 sing their song, but they're going to be in the position of  
14 trying cases long before discovery is completed under your  
15 plan and we just can't do your plan any faster. As you can  
16 see, we're --

17           THE COURT: Well, I was going to ask is the proposal  
18 that we move all of these dates up?

19           MS. SHARKO: No. No. We can't -- that would be  
20 impossible.

21           THE COURT: Right.

22           MS. SHARKO: And so since, I mean my brothers here  
23 would probably say we don't have enough time to do that but  
24 they're working hard, we're all working hard.

25           So given that, we thought this was the best plan and

1 we'd love the opportunity to explain that to Judge Garaufis in  
2 addition to you and Judge Keim. We haven't been able to get a  
3 hearing with Judge Keim. It doesn't look like we'll be able  
4 to until after September 5th. So that's why we thought if all  
5 the Judges could get together and we could explain this and  
6 explain the importance of your order, which I don't think  
7 Judge Keim fully understands because we haven't explained that  
8 to her, in all candor, then we thought maybe we could make  
9 progress.

10 MR. POPE: To address, I guess, where I think your  
11 question was, Your Honor, is there a conflict and our concern  
12 on the plaintiffs' side right now as it stands with  
13 Judge Garaufis's text order is it may be a conflict with your  
14 order because he suggested, and, again, I'm not certain what  
15 he was intimating, but he suggested that we needed to  
16 coordinate our schedule with that of Florida, however, the  
17 Florida current bellwether order puts trial starting February,  
18 May and every month thereafter --

19 THE COURT: Of 2024.

20 MR. POPE: -- starting next year with your order  
21 showing that discovery doesn't end in the MDL until  
22 August 30th. So it's a somewhat of a balancing act here  
23 having trials move forward without the core discovery being  
24 completed if we were are to participate somehow or change the  
25 schedule that's currently in place. That's the only thing --

1 we need real clarification as to that.

2 THE COURT: All right. Well, I can't speak for  
3 either Judge Garaufis or Judge Keim and neither Judge Garaufis  
4 and I could speak for Judge Keim. As a practical matter, that  
5 is a completely different jurisdiction and as I said before,  
6 she has the right to issue orders that she believes are right  
7 for the cases that are before her.

8 With respect to my discovery order, I haven't yet  
9 heard a proposal as to how to change it. You all have soundly  
10 rejected the let's-move-all-the-dates-up proposal that I just  
11 said. Going the opposite way would extend the dates out which  
12 seems counterintuitive based on what you just described for  
13 the bellwether trial schedule.

14 So it seems to me that, yes, there needs to be some  
15 conversation around the bellwether trial plans either here or  
16 more likely than not with Judge Keim because Judge Garaufis  
17 has clearly indicated that he wants to coordinate with  
18 Judge Keim's plans. For now, you have a motion pending to  
19 essentially ask her, again, to modify her bellwether plan  
20 except it appears to be a joint, a strongly worded joint  
21 motion that will maybe explain in further detail how you  
22 believe this discovery order impacts or is impacted by that  
23 trial schedule.

24 I honestly don't know what to say because you  
25 haven't, you haven't asked me to change my schedule and you've

1 rejected my attempts to do the same in a way that seems  
2 impossible as you indicate, Ms. Sharko.

3           So I think for now, this may just continue to be an  
4 open question but you do have a discovery order and you have  
5 productions to be done and you all have agreements to make on  
6 custodians.

7           MS. SHARKO: We understand. We don't want your  
8 order changed. We're working hard with your order. We would  
9 really like to have a hearing across jurisdictions. We  
10 appreciate that we have to ask Judge Keim and Judge Garaufis  
11 for that as well as you, so we've asked you but we know you're  
12 not the only person.

13           THE COURT: Right. And I -- and to be clear, all of  
14 the Judges have seen your requests for a joint conference.  
15 Again, to me, it seemed premature at the start of this  
16 conversation. You've laid out the reasons why you believe it  
17 to be something that needs to happen. There will be a record  
18 of this conversation, of course, that all of the Judges can  
19 review and if it's decided that that will be different, that's  
20 fine. Until that point though, I have to continue on where we  
21 are in the status quo which is making sure you produce the  
22 documents to plaintiffs, they have a basis to select their  
23 additional custodians, and continue moving on unless and until  
24 something changes.

25           It sounds to me like the dates in the discovery

1 order are not being moved up. In other words, none of the  
2 dates will be earlier than they currently are. So perhaps  
3 then the only question is how much further out they would need  
4 to change based on this joint status conference that you  
5 believe will solve all the bellwether concerns that you  
6 phrased.

7 MS. SHARKO: Okay. Thank you.

8 THE COURT: All right. Anything else from  
9 plaintiffs on that point?

10 MR. POPE: No, Your Honor. Thank you.

11 THE COURT: All right. So besides the ESI issues  
12 which we hopefully have resolved for now, and besides the  
13 bellwether issues which are not currently resolvable, is there  
14 anything else that you want wanted to discuss today?

15 MS. RELKIN: I have a very noncontroversial,  
16 actually pleasant issue which is we all made Law Review. May  
17 I present it to the Court and can you provide a copy to  
18 Judge Garaufis?

19 I just happened upon a Law Review about MDLs and  
20 diversity initiatives in Texas Law Review and the Exactech  
21 litigation was featured in the very beginning. So I thought  
22 that was kind of neat. I shared a copy with defendants.

23 THE COURT: I will let Judge Garaufis know and I  
24 appreciate you describing it as noncontroversial as it is.  
25 Thank you.

1 MS. RELKIN: It's good.

2 THE COURT: It is fantastic. Thank you.

3 Anything else from anyone else?

4 MR. KANUTE: Your Honor, if I can raise one issue.

5 We did put in the joint status report a very brief  
6 update on some of the state court litigation and I mentioned  
7 Illinois a bit earlier.

8 THE COURT: You did.

9 MR. KANUTE: So, Your Honor, with the growing number  
10 of cases in Illinois, we do face a challenge that's a little  
11 bit different than some of the issues you've been told about  
12 today and that is the plaintiffs' counsel in Illinois is  
13 intending to move forward with all discovery outside of  
14 whatever, outside of your order and whatever orders are in  
15 place in Florida which will be a huge challenge for Exactech.

16 We have filed -- I just want to make the Court aware  
17 we have filed a motion for discovery coordination and to stay  
18 non-case-specific discovery. That was filed on June 30th.  
19 The plaintiffs have responded and they're opposed to that and  
20 claim that they should be able to manage that litigation  
21 which, so Your Honor knows, is all consolidated in front of a  
22 single Cook County Judge. We do at least have that and we've  
23 got all those cases transferred before Judge Scott McKenna and  
24 then we filed a reply. I actually have a status hearing  
25 before Judge McKenna on Thursday in which this is going to be

1 addressed.

2 To be clear, I'm not suggesting we stay discovery in  
3 Illinois. I made clear to Judge McKenna that we have to take  
4 plaintiffs, we have to take surgeons, but to get discovery on  
5 common issues which was discussed here today, you know, and  
6 having to do that in Illinois for a very small number of  
7 plaintiffs which will, in all candor, probably inhibit our  
8 efforts here in the larger scale, we really would like  
9 coordination there. I'm not sure if Your Honor or  
10 Judge Garaufis is willing to do it, but if there was an  
11 opportunity to reach out to Judge McKenna who did not have  
12 these cases at the time of Science Day, otherwise, we would  
13 have asked Your Honor for leave to invite him to Science Day  
14 as well to apprise him of the magnitude of this litigation,  
15 but whether it's an e-mail or a call or whatever Your Honor  
16 sees fit, it would go a long way toward helping us in the  
17 larger picture to get just a bit of coordination in Illinois.

18 I think, I believe in our recent filings,  
19 Your Honor, we may have sent you the motion that we filed in  
20 Cook County. I'm happy to also provide you with the response  
21 filed by plaintiffs and the reply that we filed. I can get  
22 that done either by the end of today or first thing tomorrow  
23 morning. But we do have this status at which I'm not sure  
24 what Judge McKenna is going to do in Chicago but we --

25 THE COURT: Tell him what happened today.

1 MR. KANUTE: Yes.

2 THE COURT: You can tell him what happened today.

3 MR. KANUTE: I will, Your Honor. I will intend, if  
4 I have the opportunity, to apprise him of everything I can  
5 about what's going on here so he understands the larger  
6 picture. I just wanted to make Your Honor aware of that  
7 challenge that we're facing.

8 THE COURT: Understood.

9 Mr. Gonzalez?

10 MR. GONZALEZ: And, Your Honor, just one brief  
11 update along those same coordination lines, the joint status  
12 report also reflects the Collum-Bradford case that is in  
13 California and we're working with Mr. Pope, the co-lead for  
14 plaintiffs. We're still very hopeful that we can coordinate  
15 discovery on those issues. Your Honor, I think we're before  
16 the Special Master on Thursday.

17 I think the primary dispute there is regarding  
18 *qui tam* documents in the, the *qui tam* in the Wallace  
19 litigation. So we're hopeful that we can continue to work  
20 through those issues and happy to answer any questions on  
21 that.

22 THE COURT: First, let me hear from Mr. Pope who has  
23 been invoked at least in the Collum-Bradford case.

24 MR. POPE: Sure.

25 Your Honor, I think we've laid this out in about

1 every filing that we've had with you from the beginning of  
2 this MDL.

3           The Collum-Bradford case deals with multiple issues  
4 associated with the design. It is a thin tray design which is  
5 the subject of the *qui tam*. Defense has taken the position  
6 that the *qui tam* issues and the thin tray issues are not a  
7 part of this MDL. We don't agree with that, however, that has  
8 yet to be resolved. So the idea that my client is going to  
9 agree to coordinate with this court all of the discovery that  
10 she's entitled to on an issue that very well this court may  
11 decide is not a part of the MDL, it just doesn't make sense.  
12 It's a, you know, it's a square peg in a round hole.

13           So we have briefed it fully. It's -- the briefing  
14 is complete. The referee will make the decision. We have --  
15 the decision will be made by August 31st and hopefully we can  
16 put this particular issue behind us.

17           There is one other issue. We did submit as a part  
18 of the joint report, Your Honor, that -- we requested that  
19 there be another conference hopefully sometime in September.  
20 Given what the Court has done here today and the time frames,  
21 we just submit that October may, we suggest October if the  
22 Court has time to hear us on the conference after the  
23 production dealing with the protocol and the other issues that  
24 the Court outlined.

25           THE COURT: Well, I did think it made sense for us

1 to have another conference. I think we're on, what, every two  
2 months somewhat?

3 MR. POPE: I think that's about right.

4 THE COURT: Yes, which would take us to October, and  
5 I thought it might make sense to do it after some of these  
6 deadlines that we just talked about.

7 For now, that is a conference with just me, just to  
8 be clear. I hear you and the record will reflect your request  
9 for a joint conference but, ultimately, I have to keep the  
10 discovery moving in this case. So whether it's just me or  
11 Judge Garaufis chooses to join, that's not something that I  
12 can speak on. For now, this is to go through and advance the  
13 conversation on the issues that we discussed today with  
14 respect to ESI and other discovery matters.

15 So let me talk to my intrepid team about potential  
16 dates.

17 (Pause.)

18 THE COURT: All right. So the first proposed date I  
19 have is Tuesday, October 17th. Tuesday, October 17th, at  
20 2:00 p.m., and that would be by video for now.

21 Is that date and time acceptable?

22 MS. RELKIN: I'm going to be out of the country on  
23 that day. I mean, if other people can do it --

24 THE COURT: All right. That week or that day?

25 MS. RELKIN: That week. The week before or the week

1 after would work.

2 THE COURT: Well, I want it to be a date that is  
3 after the 6th, right, because that was the date that was  
4 modified in the order. Let's try again.

5 MR. KANUTE: Your Honor, if the week of October 9th,  
6 maybe later that week if there's a possible date in there.

7 MR. POPE: That's good for plaintiffs, Your Honor.

8 THE COURT: Sure. How about Thursday, October 12th,  
9 at 2:00 p.m., by video. Did I say Tuesday? Thursday.

10 MR. KANUTE: That's fine with defendants. Did you  
11 say 2:00 p.m.?

12 THE COURT: 2:00 p.m., yes.

13 MR. POPE: That's fine with plaintiffs, Your Honor.  
14 I assume you need the status report ten days out?

15 THE COURT: Please.

16 So Thursday, October 12 at 2:00 p.m. by video with  
17 the standard status report before that.

18 Any other issues before we adjourn for today?

19 MS. RELKIN: One very minor. Just some personnel  
20 changes on the committees in terms of a couple of people have  
21 left their firms so they've been replaced by other individual  
22 at the firms.

23 So from the Science Committee, Ilana Wolk had left  
24 the firm of the Fuchsberg office and Eli Fuchsberg, who is  
25 here today, we are told that he agreed to be a member of the

1 Science Committee and would like to take that seat.

2 On the Bellwether Committee, Arati Furness has left  
3 her firm, the Forester Haynie firm, and Matthew McConnell, who  
4 is also here today, has been filling in for that seat so we  
5 would like to formalize it.

6 THE COURT: Okay. I think you should submit a joint  
7 proposed order indicating the change in the lineup and  
8 explaining, and also including biographical information about  
9 the proposed members.

10 MS. RELKIN: And not to beat a dead horse, because I  
11 didn't speak up before about the bellwether -- it's not dead.  
12 It's a pending horse. The dilemma we have, I know  
13 Judge Garaufis's docket order said conform to Florida and, you  
14 know, of course, we're waiting to hear when Judge Keim gets  
15 back, but we don't want to get behind on our own bellwether.  
16 We worked out -- Ms. Sharko and I spent a lot of time working  
17 together and all the parties to work out a plan.

18 So just whether there's some way to have a date  
19 where we check in with Judge Garaufis in case we can't -- if  
20 Judge Keim doesn't hear from us on this joint conference,  
21 that -- you know, we submitted a plan in accordance with the  
22 order of submitting it by August 11th, we submitted it earlier  
23 and now it's kind of, it was denied but pending subject to  
24 Florida.

25 I understand how Your Honor can't dictate what

1 Florida does but in a certain way, the MDL, which has far more  
2 cases, is in a little bit limbo because of what's going on in  
3 Florida. So maybe we can have a check-in date with  
4 Judge Garaufis, phone or zoom conference, something.

5 THE COURT: I can't speak for his schedule. I truly  
6 cannot.

7 What I can do is -- as I mentioned, the record  
8 clearly reflects all of your concerns which will also be  
9 reflected in the minute entry here. The transcript will be  
10 available. He and I communicate regularly about this case  
11 anyway. He happens to be away this week. So in the course of  
12 our regular communications, all of this will come up.

13 MS. RELKIN: Okay.

14 THE COURT: Whether that leads him to have a  
15 conference to discuss these issues, I couldn't say, but it is  
16 not as though the Court isn't going to be aware of them.

17 MS. RELKIN: Terrific. Thank you very much,  
18 Your Honor.

19 THE COURT: Anything else from plaintiffs?

20 Ms. Kessler, I don't know if you need to do your  
21 update. I don't know how many people in the audience are  
22 counsel for individual plaintiffs. I know you usually have  
23 your video audience for that.

24 MS. KESSLER: Yes, Your Honor. I'll be extremely  
25 brief.

1           We continue to update our plaintiffs' counsel list  
2 which we believe maintains all counsel of record for cases  
3 that are filed. We do that weekly.

4           If any counsel believes that they have been not part  
5 of that list, they can e-mail  
6 ExactechMDLliaison@RobbinsKaplan.com, and any questions that  
7 counsel have for the plaintiffs' liaison counsel are best  
8 e-mailed to that same address.

9           If there's questions that counsel have about MDL  
10 centrality and submitting their short run complaints, for  
11 example, or the plaintiff fact sheets or the preliminary  
12 disclosure forms, that e-mail address is  
13 Exactech@BrownGreer.com.

14           Thank you, Your Honor.

15           THE COURT: Thank you.

16           Anything else from the Exactech defendants?

17           MR. KANUTE: Nothing else today, Your Honor.

18           THE COURT: All right. It's nice to see everyone in  
19 person. We'll go back to our videos as the colder weather  
20 sets in here in New York and with that, we are adjourned.

21           Thank you, everyone.

22           MR. KANUTE: Thank you, Judge.

23           MR. POPE: Thank you, Your Honor.

24           (Matter concluded.)

25