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Via CM/ECF Notification:

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Re: Exactech, Inc., et al., (Case No. 24-12441)
Letter Ruling on Further Discovery Disputes

Dear Counsel:

I have reviewed the 56 documents Debtors submitted *in camera* for review after the May 16 discovery conference.

While I do not know who certain identified law firms represent (i.e. Conroy Simberg, Dinsmore & Shohl), I can rule on this matter without that knowledge. Both in-house and outside counsel for Exactech (Peter Meyer, Faegre Drinker, Ropes & Gray) and TPG (Niketh Velamoor, Kirkland & Ellis) are on many if not all emails. Further, Debtors take the position that these communications are protected by common interest, which, by definition means that both

Exactech and TPG (or their respective agents) are among the writers and/or recipients of the communications.

As I have already ruled, Exactech and TPG have a common interest in defending the product liability litigation and or investigations commenced prepetition. Accordingly, communications between Exactech and TPG implicating the defense of the product liability claims (e.g., the artificial knee and hip devices were not defective) need not be produced.

But, as I have also already ruled, Exactech and TPG do not have a common interest in defending against claims of alter ego, veil piercing and the like. Exactech has embraced the position in this bankruptcy case that alter ego and veil piercing claims are property of the estate which Exactech can settle. The natural conclusion from this position is that Exactech and TPG are and always have been adverse as to these types of claims. Indeed, certain of the documents submitted *in camera* evidence recognition of the adversity by Exactech and TPG.¹

Further, I reject the argument that communications addressing alter ego and veil piercing claims are protected because they are included in the broader context of the joint defense of the underlying lawsuit. Common interest concerns are addressed on an issue-by-issue basis. *See Lislewood Corporation v. AT&T Corp.*, No. 13 CV 1418, 2015 WL 1539052 (N.D. Ill. Mar. 31, 2015) (*citing McNally Tunneling Corp. v. City of Evanston*, No. 00 C 6969, 2001 WL 1246630 (N.D. Ill. Oct. 18, 2001)) (requiring production of paragraphs 3 through 7 of document, but not remainder of document). Whether Exactech contemplated pursuing alter ego and veil piercing claims prepetition is not the test. Rather, the question is whether the parties were actually adverse on these claims.

Having reviewed the documents, I conclude that the portions of documents behind tabs 22-26, 28-34, 38-52 and 56 that address or allude to the alter ego or veil piercing claims must be produced.

Very truly yours,



Laurie Selber Silverstein

LSS/cmb

¹ *See e.g.*, Email from Jessica Giulitto to Peter Meyer, Niketh Velamoor (Feb. 27, 2024, 6:45:44 PM) (discussing which law firm should send letter “given the veil-piercing issues and efforts to maintain a wall there”). *See also* Email from Jessica Giulitto to Peter Meyer, Niketh Velamoor (Feb. 27, 2024, 7:11:12 PM) (expressing concerns about providing “evidence of the blurred line between Exactech and TPG”); Email from Christa C. Cottrell to Jessica Giulitto, Niketh Velamoor and Peter Meyer (Feb. 27, 2024, 7:13:07 PM) (“Yeah, that was exactly our concern.”).