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28***E-FILED 02-25-2011***

NOT FOR CITATION
 IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

SYNTHES USA, LLC (f/k/a SYNTHES
 (U.S.A.)); SYNTHES USA SALES, LLC; and
 SYNTHES, INC.,

Plaintiffs,

v.

SPINAL KINETICS, INC.,

Defendant.

No. C09-01201 RMW (HRL)

**ORDER GRANTING IN PART AND
 DENYING IN PART PLAINTIFFS’
 MOTION TO COMPEL SAMPLES OF
 ACCUSED DEVICES AND
 COMPONENTS THEREOF**

[Re: Docket No. 134]

Plaintiffs Synthes USA, LLC (f/k/a Synthes (U.S.A.)), Synthes USA Sales, LLC, and Synthes, Inc. (collectively Synthes) move for an order compelling defendant to produce samples of the accused devices, as well as complete set of components for each device.¹ Specifically, plaintiffs seek samples and components of defendant’s M6-C (“classic” and “integrated” versions) and M6-L disc devices. Defendant Spinal Kinetics, Inc. (Spinal Kinetics) agrees to produce the requested samples and components. The parties, however, are unable to agree on what compensation, if any, defendant should receive for the requested production. Defendant argues that Synthes should be made to pay the reasonable commercial value for the devices—i.e., \$3,300 per unit. Plaintiffs say that they previously offered to pay \$1,000 per device—a sum that they believe is sufficient to cover defendant’s reasonable costs. But,

¹ The samples and components in question are responsive to plaintiffs’ Request for Production Nos. 86 and 87. (See Olson Decl. Ex. A).

1 because defendant insists on payment of the devices' commercial value, plaintiffs now contend
2 that the court should, as a "minor penalty," order Spinal Kinetics to produce additional samples
3 and components of each device for free. (Mot. at 5).

4 Ordinarily, the responding party bears the expense of complying with discovery
5 requests. *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 476 (N.D. Cal. 2003). Nevertheless, the
6 court retains broad discretion in managing discovery. *See* FED. R. CIV. P. 26(c) & (d). And, for
7 good cause shown, this court may make any order protecting a party from any undue burden or
8 expense, "including orders conditioning discovery on the requesting party's payment of the
9 costs of discovery." *OpenTV*, 219 F.R.D. at 476.

10 The requested samples indisputably are relevant. The parties disagree as to how readily
11 the devices are available from other sources. But, there appears to be no dispute that, aside
12 from defendant, the devices are available only through defendant's European distributors. The
13 costs of production likely are small compared to the total amount in controversy. Defendant
14 says that it is a small start-up company that is not readily able to absorb the cost of essentially
15 giving away free samples of its devices to plaintiffs. It has not, however, provided declarations
16 substantiating its claimed lack of operating profit. Nevertheless, defendant points out that (a)
17 prior to this litigation, plaintiffs managed to acquire a sample of the devices abroad; and
18 (b) defendant previously gave plaintiffs free samples of the M6-L and M6-C "integrated"
19 devices. And, this court appreciates that these are devices which serve a medical need. As
20 such, defendant should not bear the entire cost of production of these devices and components.

21 Synthes' motion to compel is granted in part and denied in part as follows: Defendant
22 shall produce the requested samples and components of its M6-L and M6-C ("classic" and
23 "integrated" versions) within 7 days from the date of this order. Plaintiffs shall, upon receipt of
24 the samples and devices, promptly tender to defendant payment of \$1650 per device. To the
25 extent Synthes wishes to provide supplemental expert reports based on testing and analysis of
26 the produced samples, plaintiffs may need to find themselves seeking appropriate relief from
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Judge Whyte.

SO ORDERED.

Dated: February 25, 2011



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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5:09-cv-01201-RMW Notice has been electronically mailed to:
Allan William Jansen ajansen@orrick.com, ajansen@orrick.com, kjohnson@orrick.com, lfulmer@orrick.com
Andre De La Cruz adelacruz@orrick.com, jdavis@orrick.com
Ehab Monsef Samuel esamuel@orrick.com
James W. Geriak jgeriak@orrick.com, lfulmer@orrick.com, ymeneses@orrick.com
Jeffrey Martin Olson jolson@sidley.com, aprado@sidley.com, ngregg@sidley.com
Kurt Timothy Mulville kmulville@orrick.com, jdavis@orrick.com
Matthew Spencer Jorgenson mjorgenson@sidley.com
Monte M.F. Cooper mcooper@orrick.com, adalton@orrick.com, mortiz@orrick.com
Paul Howard Meier pmeier@sidley.com
Robert W. Dickerson rdickerson@orrick.com
Robert William Dickerson DickersonR@dicksteinshapiro.com, sfischer@orrick.com
Samuel N. Tiu stiu@sidley.com

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