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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NOT FOR CITATION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.,

No. C09-01201 RMW (HRL)

Plaintiffs,

**ORDER DENYING PLAINTIFFS’
MOTION TO COMPEL RE
INTERROGATORY 16 AND
DOCUMENT REQUEST 103**

v.

[Re: Docket No. 127]

SPINAL KINETICS, INC.,

Defendant.

_____ /
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 Spinal Kinetics,
Inc. (Spinal Kinetics) to answer Interrogatory No. 16 and to produce documents responsive to
Request for Production No. 103. In essence, Synthes wants to know whether Spinal Kinetics
has interviewed or otherwise communicated with third-party witnesses—ten in
particular¹—identified in defendant’s initial disclosures. If so, plaintiffs also seek discovery as
to when, where, and between whom those communications took place; the substance of the

_____ /
¹ The ten witnesses are: (1) Arne Faisst, (2) Horst Hubner, (3) Erwin Locher
(4) Claude Mathieu, (5) Hugo Mathys, (6) Robert Mathys, Jr.; (7) Daniel Muller,
(8) Ulrich Reinbold, (9) Armin Studer, and (10) Neil Vanderlinde. This court is told that,
with the exception of Daniel Muller, all of these individuals are former employees of Mathys
Medizinaltechnik AG. Muller reportedly is a former employee of the RMS Foundation.
Spinal Kinetics disputes whether Robert Mathys, Jr. really belongs in this group of witnesses
because, as discussed in defendant’s separate motion to compel, plaintiffs are opposing
defendant’s attempts to depose him.

1 communications; and the identification and production of any documents exchanged during
2 those contacts or communications. Spinal Kinetics opposes the motion on the ground that the
3 requested information is protected by the attorney work product doctrine. Upon consideration
4 of the moving and responding papers, as well as the arguments of counsel, this court denies the
5 motion.

6 Neither side has identified binding precedent. And, district courts are split on the issue
7 whether the identities of witnesses interviewed by an opposing party are protected work
8 product. Here, the identities of witnesses are already known. Instead, plaintiffs seem to be
9 seeking the fruits of defendant's own investigation (if any) as to these particular individuals.
10 This court finds that the requested information is work product. *See, e.g., Plumbers &*
11 *Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, No. C01-20418JW, 2005 WL 1459555
12 *4 (N.D. Cal., June 21, 2005).

13 While the work product doctrine is only "minimally" implicated here, *see id.* at *5,
14 plaintiffs have not made the requisite showing of substantial need or undue burden to override
15 the doctrine's protection. Plaintiffs argue that, if the instant motion is not granted, then they
16 will bear a tremendous burden to obtain discovery about what these witnesses might know,
17 especially when the witnesses are all located in Europe and the period for fact discovery is
18 drawing to a close. In sum, plaintiffs want to avoid being "sandbagged" at trial. The parties,
19 however, have agreed that any person either side chooses to call at trial will be offered for
20 deposition. Certainly, to the extent defendant intends to present any of these (or any other) non-
21 expert witness at trial, this court expects that defendant should identify any such witnesses and
22 offer them for deposition before the close of fact discovery. Although Synthes expresses
23 concern that Spinal Kinetics might be up to something, plaintiffs have not managed to convince
24 that defendant is withholding information that it is obliged to disclose under the Federal Rules
25 of Civil Procedure. Moreover, plaintiffs acknowledge that they have known about these
26 witnesses since summer 2009 when discovery reportedly opened. And, there is no indication as
27 to what efforts, if any, plaintiffs have made since then to contact these witnesses or to obtain
28 from them directly any substantive information they might have that bears on the issues in

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dispute. Nor is this court persuaded that any attempts to obtain information from these witnesses directly would have been ineffective or unhelpful, as Synthes seemed to suggest at the motion hearing.²

Based on the foregoing, plaintiffs' motion to compel is denied.

SO ORDERED.

Dated: February 25, 2011



HOWARD F. LLOYD
UNITED STATES MAGISTRATE JUDGE

² At oral argument, Synthes expressed concern that, even if it had tried to obtain discovery from these witnesses directly, the witnesses might have been uncooperative, or may not have given Synthes the same level of cooperation that they might have given Spinal Kinetics.

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