

United States District Court
For the Northern District of California

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E-FILED on 10/20/2011

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. C-09-1201 RMW

ORDER DENYING SPINAL KINETICS,
INC.'S ADMINISTRATIVE MOTION TO
REOPEN FACT DISCOVERY FOR THE
LIMITED PURPOSE OF COMPLETING THE
DEPOSITION OF GIUSEPPE MOLARO

[Re Docket No. 410]

Spinal Kinetics moves to reopen discovery for the purpose of completing the deposition of
Giuseppe Molaro. For the reasons stated below, the motion is denied.

Molaro is an attorney who was involved in prosecuting the patent in suit on behalf of
Synthes. Spinal Kinetics timely deposed Molaro. During the deposition, Synthes asserted that
communications with Molaro concerning patent prosecution were privileged and that prosecution of
the patent in suit was protected by the work product doctrine. Spinal Kinetics objected that Synthes
improperly instructed Molaro not to answer foundational questions that sought to determine whether
privileged communications existed and the basis of the claimed work product protection.

1 On September 12, 2011, Magistrate Judge Lloyd found that Synthes had been overzealous in
2 instructing Molaro not to answer certain questions, but that because Molaro is not a critical witness
3 to any claim or defense, Spinal Kinetics would be entitled only to depose Molaro for one additional
4 hour for the limited purpose of having Molaro (1) confirm whether the attorney-client privilege
5 existed as to topics or documents generally, (2) identify when litigation was anticipated, and (3)
6 confirm whether his understanding of claim terms is based on his own experience or upon
7 information or instructions communicated by Synthes. Judge Lloyd conditioned his order on this
8 court's determination that fact discovery should be reopened to allow for completion of Molaro's
9 deposition..

10 Spinal Kinetics did not mention this issue in the Joint Pretrial Statement or at the pretrial
11 conference that took place on September 15 and September 22, 2011, after the magistrate judge's
12 order was issued. Nonetheless, apparently in light of the brief continuance of the trial date, Spinal
13 Kinetics now seeks to complete Molaro's deposition. However, Spinal Kinetics has not identified
14 what testimony they hope to gain from Molaro and does not explain how the testimony would be
15 relevant to any issue that will be tried. Reopening fact discovery at this late stage in the litigation
16 for no clear purpose is simply not justified. The motion is denied.

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DATED: 10/20/2011



RONALD M. WHYTE
United States District Judge