IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BONUTTI SKELETAL INNOVATIONS LLC, Plaintiff, v. ZIMMER HOLDINGS, INC. and ZIMMER, INC., Defendants.	)	C.A. No. 12-1107-GMS JURY TRIAL DEMANDED
BONUTTI SKELETAL INNOVATIONS LLC, Plaintiff, v. WRIGHT MEDICAL GROUP, INC. and WRIGHT MEDICAL TECHNOLOGY, INC., Defendants.	)	C.A. No. 12-1110-GMS JURY TRIAL DEMANDED
BONUTTI SKELETAL INNOVATIONS LLC, Plaintiff, v. MICROPORT ORTHOPEDICS INC., Defendant.	)	C.A. No. 14-1040-GMS JURY TRIAL DEMANDED

PLAINTIFF BONUTTI SKELETAL'S
REPLY IN FURTHER SUPPORT OF ITS MOTION
TO LIFT STAY AND HOLD SCHEDULING CONFERENCE

When the Court stayed these cases pending *inter partes* review, it ordered that "[t]he parties shall promptly notify the court when the stay should be lifted." (D.I. 45, 12-1107; D.I.

43, 12-1110; D.I. 13, 14-1040.) Once the *inter partes* reviews concluded, Bonutti Skeletal expected that the parties would file a simple joint motion asking the Court to lift the stay. The case schedule would be determined—as it typically is—through meet-and-confers, a joint status report, and then a Rule 16 Conference. Defendants have rejected that normal approach. Instead, as a precondition to lifting the stay, Defendants seek to upend the schedule with troubling inversions that would prejudice Bonutti Skeletal without any attendant benefit to the case. The Court should lift the stay and save argument over the schedule to its proper place: the scheduling conference.

Defendants' argument, in a nutshell, is that Bonutti Skeletal should identify the asserted claims now because there is no reason it cannot. But there is a very good reason why Bonutti Skeletal cannot: Defendants have not yet produced a single technical document relating to the accused products. Bonutti Skeletal cannot meaningfully identify which claims it intends to assert against which products with access to limited technique guides but without access to product schematics and design history files, surgeon training materials, or even the accused products themselves. Bonutti Skeletal is more than willing to remedy the "continued uncertainty" Defendants bemoan. But Defendants must first remove the pre-discovery blindfold they have left Bonutti Skeletal wearing for the past 33 months.

This concept is not novel. In fact, it is quite the opposite and is expressly embodied in the Court's Default Standard for Discovery. This standard requires (a) within 30 days after the Rule 16 conference, plaintiff identify the accused products and patents; (b) within 30 days of receipt of the above, defendants produce "the core technical documents related to the accused product(s), including but not limited to operation manuals, product literature, schematics, and specifications"; and (c) within 30 days of receipt of the above, plaintiff produce claim charts

relating the accused products to asserted claims.[1] Notably—and sensibly—plaintiff has to identify asserted claims only 30 days ***after*** defendants produce "the core technical documents related to the accused product(s)."

Defendants provide no good reason for departing from that common sense here. What Defendants characterize as "pervasive uncertainty" in the scope of these cases is an unremarkable corollary of their pre-discovery status. The scope of these cases would not be better defined—nor would "productivity" or "efficiency" be enhanced—by forcing Bonutti Skeletal to fumble at claim identification from behind a pre-discovery veil of ignorance. Moreover, Bonutti Skeletal is willing to do what is reasonably possible to define the scope of these cases at this early pre-discovery stage, *i.e.* identify which patents it no longer intends to assert as a result of the *inter partes* reviews, which should adequately address Defendants' concerns.

By insisting on this unnecessary round of briefing, Defendants will have already delayed these cases' reopening by more than a month. Defendants do not need the further reward of a schedule inversion that would require Bonutti Skeletal to do what it cannot meaningfully do by way of turning common sense, the default standard for discovery, and this Court's typical practice on their heads. Defendants are certainly free to suggest tweaks to the normal order of discovery at the Rule 16 Scheduling Conference—after the parties have had a chance to meaningfully meet and confer and submit a Joint Status Report. Defendants' instant proposal, however, must be rejected. The stays should be lifted and further debate about a schedule reserved for the scheduling conference.

[1] Delaware Default Standard for Discovery, Including Discovery of Electronically Stored Information ("ESI"), § 4 (Initial Discovery in Patent Litigation).

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