EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ORTHOPHOENIX, LLC,	:	
	:	C.A. No. 13-cv-1628-LPS
Plaintiff,	:	[redacted]
v.	:	
	:	
STRYKER CORPORATION, et al.,	:	
	:	
	:	
Defendants.	:	

Monday, September 26, 2016
9:00 a.m.

Oral Argument
Courtroom of Chief Judge Leonard P. Stark

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE Chief Leonard P. Stark,
United States District Court Judge

APPEARANCES:

SHAW KELLER LLP
BY: JOHN SHAW, ESQ.

-and-

WEIL, GOTSHAL & MANGES LLP
BY: EDWARD REINES, ESQ.

On behalf of Medtronic

APPEARANCES CONTINUED:

BAYARD, P.A.
BY: STEPHEN BRAUERMAN, ESQ.

-and-

RUSS, AUGUST & KABAT
BY: JACOB BUZCKO, ESQ.

On behalf of Orthophoenix LLC

YOUNG CONAWAY STARGATT & TAYLOR, LLP
BY: ANNE GAZA, ESQ.

On behalf of Stryker Corporation

THE COURT: Good morning. Can your put your appearances on the record for us, please?

MR. BRAUERMAN: Good morning, Your Honor. Steve Brauerman from Bayard on behalf of Plaintiff Orthophoenix LLC. I'm joined at counsel table by Jacob Buczko from Russ, August & Kabat in Los Angeles. With Your Honor's permission, Mr. Buczko will address the Court on this presentation.

THE COURT: That's fine. Thank you.

MR. SHAW: Good morning, Your Honor.

THE COURT: Good morning.

MR. SHAW: John Shaw for Medtronic. I'm joined with Edward Reines from Weil Gotshal and Andy Horstman from Medtronic.

MR. REINES: Good morning, Your Honor.

THE COURT: Good morning.

MR. GAZA: Good morning, Your Honor. Anne Gaza from Young Conaway on behalf of Stryker Corporation. Your Honor, Stryker

does not have a part in this motion. However, we are present today. To the extent that the proceedings address the underlying agreements between the parties, we would request that the proceedings be sealed to give the parties an opportunity to review the transcript and redact out anything regarding the underlying agreement.

My understanding is the parties don't object to that and there are no nonparty individuals here that would be asked to step out.

THE COURT: Mr. Reines; is that correct?

MR. REINES: Yes. We don't think it's much in here that would be a problem for being careful. That's fine.

THE COURT: Mr. Buczko?

MR. BUCZKO: Yes, that's fine.

THE COURT: All right. Well, we will treat this proceeding as confidential for the moment but I do want the parties in a very timely manner to review the transcript and propose redactions to it. Okay?

MS. GAZA: Thank you, Your Honor.

We will do so.

THE COURT: We're here on Medtronic's motion. We will hear from Medtronic.

MR. REINES: Thank you, Your Honor. I thought the most useful thing to start with would be the history and frankly the facts because they speak for themselves ultimately. The story starts with April 2013 Medtronic sold patents to what everybody called OP which are the Orthophoenix Parties.

As part of that, Medtronic received [redacted] Two other provisions are associated with this transaction that are background relevant and those are the indemnity provisions. We don't need to go through them in detail at this point, but basically the sale document had an indemnity provision from the Orthophoenix Parties, Medtronic and the license back had an indemnity agreement. A suit was filed in this case in October 2013.

In winter of 2016, so this past

winter, the parties had [redacted] because essentially the Orthophoenix Parties [redacted] was not included whatsoever. I don't know what they were thinking, but they then came to us and said, well, we want you to agree to all of this. And we said, no one has talked to us, we didn't have anything to do with it, and the discussions stopped. They re-emerged in spring and [redacted] because we're not going to get a deal done without them.

THE COURT: Is it your view under that original Purchase Agreement whereby the patents went to the Orthophoenix Parties that Medtronic had a say in whether litigation to enforce those patents could be settled?

MR. REINES: Well, this goes to the motion that is still pending but now moved before the Court --

THE COURT: Right, never resolved because you all settled.

MR. REINES: The exact precise -- the short answer is no. But the exact precise

details of that motion isn't something I'm fluent in right now. But we believe that there was standing. That was our position.

THE COURT: But you're just saying as a practical matter at least your position is that the first set of discussions did not [redacted]

MR. REINES: It was an oversight and everyone was like, wait, we can't do this because we need Medtronic on board and that's what, in fact, happened. Basically, [redacted] because Stryker was taking the position that Medtronic was still the owner of the patents so they felt they couldn't settle and allow that transaction to go forward since they were on record as saying they believe Medtronic was the owner and not OP.

And OP needed Medtronic because, A, they needed to satisfy what Stryker wanted [redacted] and, B, because they needed some

rights to be perfected to them so they can give Stryker everything Stryker wanted, so that's how it went down. And then what happened relevant to this story was the draft included essentially the provision that ultimately was in a document, but there was no statement as to when the OP parties would pay Medtronic back and that was a hard problem because we were still recurring fees as part of the settlement agreements, so we were like, how are we going to do this and when you are going to pay.

So we said we do not include a payment date for you. We don't need to put it in the main agreement. We can agree to that because we were at that point essentially a joint defense or joint offense collegial relationship with them and we suggested 30 days. We noted there's been a bunch of discovery in the last several weeks and we're going to have more statements for you.

And then at the end we said, look, we're good, we're just working with you cooperatively so long as there's an agreement that you're going to pay our fees fully and that

was unambiguous. As we got closer to the actual settlement date, we never really got a response back. And then I wrote Rick Sanchez who was the IP attorney for inhouse for Marathon.

And I said, we need to get that date just so we have an understanding. And I asked him what he proposed, and then we got a response from Doug Croxall and everybody was involved. Ten days after [redacted] I would like a full detail of all invoices, so we're going to pay you back but we would like a detail of all invoices. And Rick Sanchez also responded, 10 days after [redacted] and we want invoices, does this work.

So what we then did two days later -- the effective date of the agreement was May 4th. We sent them the bills we had. We didn't have all of them. We didn't have the Special Master. We noted the Special Master takes some time getting these bills done in the past. And here the OP parties asked Mr. Horstman, can you send us any additional invoices, we want all of the invoices so we can pay you, clearly understanding that they would

have to pay. We were trying to get all of the invoices from Medtronic and make sure we have all of them. This is all on May 4th just as the parties are signing the agreement.

I was on a plane at the time actually and said, look, Mr. Horstman may have better information, but we're trying to get you all of them but I think you have everything except for a small amount of May time and some Special Master notes. Mr. Horstman responded the next day, all of the invoices that have been submitted before, the number at that point was sent within 10 days of the settlement, about $450,000.

The effective date of the Settlement Agreement was May 4th. All the OP parties signed it. Here is Provision 2.7. Sorry, the highlighting doesn't do justice there. But basically if the Court knows anything about this matter, it's all fees and expenses incurred. It's hard to be clearer than this. And it specifically notes the Medtronic party will not pay their own fees, costs and expenses. So you don't need to be an English

major to understand this.

Now, this is relatively important. This is Rick Sanchez from OP which says, we need your second amendment which was an amendment to the original Settlement Agreement [redacted] we need that because we're going to release our signature pages, because even though it was May 5th, the effective date was May 4th. So we did that deal on May 9th and it says, On May 9th the parties exchanged signature pages. All signatures have been received. Please release the signature pages. Mr. Sanchez is kind of running the show, the attorney for the OP parties.

So the key provisions in the Settlement Agreement, we're sort of done with that part of the story, [redacted] The litigation was dismissed. [redacted] Medtronic represented that this was something we were a little reluctant to do but ultimately got talked into because we

represented we believed that OP owned the patents. Normally, you just say we don't own them but, you know, but we went affirmative further and put a representation to that effect, and then the provision that all folks done here today, that they would pay all fees and expenses.

So we wanted to understand when the clock would run because we were obviously not going to be party to [redacted] So we said, when did [redacted] so we know when the 10 days occurred. [redacted] which becomes important because May 21 becomes a significant date.

As though we were still going to pay, the party says, Do we have all of the invoices, you indicated there might be more bills, and it's just the remaining bills are the crumbs we just don't have right now, we will get it to you, please confirm the payment, you will wire it. And then we give them the exact amount which was $563,000; when do you plan to wire

that, May 11th, two days after they had it.

Now, this is critical. It says, Within 10 days as discussed and already agreed to, so it says, When will you send the $563,000, when do you plan to wire that referring to the $563,000, within 10 days it was discussed and already agreed to. They had all of the invoices. They hadn't asked any questions about them and they said that they -- I took the already agreed to meaning stop asking us. We already committed to it.

The 10-day clock expired and we said, when are you going to pay because we wanted to be diligent. I didn't think any of this was going to happen when I was involved in this, no idea. We said that's when we thought the payment would be. And then he said, We need the wire account and he said that he was going to wire the payment to the account identified in the original and sale document so when we originally sold them the patents in 2013, it had the wire information. He said he was going to use that.

Then we got a letter hours later

which must have been already written where they rejected it and said talk to Mr. Spangenberg who's the principal of OP. My guess for the benefit of the Court is that all of these people agreed to all of this unmistakably and Mr. Spangenberg got wind of it and said, we're not paying, have them talk to me and then attempted negotiating down.

THE COURT: Well, is there a scenario under which who should try to confirm your guess? My understanding is a motion like this is sort of like summary judgment. I think there is a general disputed material fact and deny the motion. Maybe we go into discovery and ultimately trial. Is that one way that we might need to consider resolving this dispute?

MR. REINES: I think that any summary judgment standard is met. You probably are not surprised but it seems point blank. If there was a question, I don't know if we can try the issue as lack of consideration, mistake. If the Court thinks there's triable issues of fact on that, I guess we can have an evidentiary hearing, maybe not a trial but an evidentiary

hearing, an enforcement. And --

THE COURT: Well, let's start breaking it down. Your position is that the Settlement Agreement Provision 2.7 could not be clearer. That's as far as I need to go, just construe that, right?

MR. REINES: Yes.

THE COURT: So what is the word or phrase "by contract" doing in there? You said it wouldn't be clearer. Would it be clearer if you didn't have the phrase by contract in there?

MR. REINES: I don't know why that particularly was in there.

THE COURT: Why doesn't it mean pursuant to the Purchase Agreement which has a much more limited indemnification?

MR. REINES: By contract could mean something along the lines -- I think by contract means we're agreeing to that. But let's just take that interpretation. There was a debate about the indemnification and this was resolution of it signed by everybody that said all even. If it was that, it's a resolution of that debate. In other words, we are going to

agree for purposes to get the Settlement Agreement so they can get [redacted] that your indemnity by contract is for the entire amount. Does that make sense?

THE COURT: Well, I guess I'm still concerned with for sake of argument if I don't agree with your interpretation of 2.7 that it's clear and unambiguous and supersedes the more limited indemnification obligation they undertook in the Purchase Agreement, where does that leave me?

MR. REINES: I have this in the presentation of -- so there's four arguments that they make so it depends on which one the Court decides to have a triable issue. If it's a mistake, then I think we need summary judgment. I'm going to argue the merits of the motion which is they didn't put in any declarations from anyone that there is any mistake.

In terms of interpretation, to the extent the Court finds ambiguity by contract, in other words, we're talking about the old indemnity agreements, the fact that parties

agreed and negotiated that those would be understood to include all fees would resolve that.

THE COURT: Am I correct that your position is that the Purchase Agreement and License Agreement indemnification obligation do not extend as far as the Settlement Agreement obligation does?

MR. REINES: No, I think they do.

THE COURT: Well, why don't you go to that.

MR. REINES: Okay.

THE COURT: Your view is if you didn't have 2.7 by contract all and we won't pay anything of our own, you would still have the same position, namely, that the roughly $600,000 or so is owed to you anyway?

MR. REINES: Right, but I think there was a compromise of that position which agreed that they would pay us in full, so I think that's looking for something to tackle and I'm happy to do it. So there are four arguments that is the next slide. Lack of consideration that there was no indemnification, essentially

saying that the old agreements apply which is the one it seems the Court has some interest in. Mistake and then expenses aren't reasonable, the last one is not really a reason to deny responsibility.

I don't know if you want a lack of consideration argument, but that's what their argument is, cannot identify consideration, cannot identify consideration. Do you want me -- the consideration was a mutual release. There was more consideration based on the fact that we represented that the OP parties had the right to do it which is a representation that we made.

By the way, this is the -- I just want to get to this. In the Court's dismissal, the Court recited this agreement. Now, that's got two relevancies. One is that it establishes a jurisdiction for this motion. The other side hasn't seriously contested that. Obviously, they have a duty to bring it to the court -- obligations as early as possible. But in any event, the provision is stated right there, acknowledged a contractual obligation to

indemnify Medtronic for its costs.

Now, the arguments about -- I guess the Court is saying we're reaching back and not abiding by this. At least for the purpose of consideration, lack of consideration, I don't think those arguments are viable for a court order. In other words, the Court has this order, you would have to vacate the order on the theory on the form of unenforceability. That has not happened.

THE COURT: What is being referred to when it says the contractual obligation is acknowledged?

MR. REINES: All I think the by contract and contractual obligation is that this isn't a 285 style fee-shifting stemming from allegations of misconduct or allegations of court behavior. This is just an agreement between the party. A contract means an agreement from one party to the other.

I think investing -- especially with the extrinsic evidence, they agreed to all the money being paid, the use of all, the intent of the parties beforehand, the fact that it's

recited in the Court's dismissal order which was viewed by litigation counsel. All of these things point in the direction that by contract means that it's an agreement between the parties of contractual character, not an acceptance that someone may have had a bad faith argument or that there's ascensions or any of those other things that I would consider to be -- they're not necessarily tortious, but you might consider them equitable or by statutory.

THE COURT: Might Medtronic have had a 284 claim against Stryker? Would that be a part of the consideration that you would see in the Settlement Agreement?

MR. REINES: Now, that you mentioned that I don't know about 284 because the claim they brought against us is antitrust. We always thought that was a meritless claim. So we waived all of our -- we contributed any claim we had. So here what is acknowledged contractual obligation, I don't see how that means we ignore the plain language, the intent to the parties and the surrounding extrinsic evidence and reach back to the indemnity

agreements, but I do want to get to those.

Here is the law about the lack of consideration. And this is actually worth a second on the consideration point. This says even if the consideration exchanged is grossly unequal or of dubious value, the parties are free to make their bargain. Even if you think the indemnity provisions we had from the original Purchase Agreement or License Agreement were weak, let's just say that's what the Court concluded, the parties are entitled to negotiate part of this Settlement Agreement when they're trying to get [redacted] needing us to do that. We're going to all agree that that should be all.

You don't go back and look how strong the position is when the parties have compromised on something. That's what this consideration is and that's essentially what they're trying to do. They're saying, well, that would have been a bad deal for us. Those indemnity agreements were weak, why would we ever agree to pay all. And the answer is because they made a compromise and you don't

relitigate that through the courts. And here is case after case that we have for you on that point. Even though we wouldn't have been found to prevail, it's still enough consideration so it just doesn't work.

So let me -- I'm not going to go through it because the consideration argument doesn't seem to be the focus, but the title-clearing representations were important. Let's talk about the indemnity provision. In the indemnity provision, they were obligated to [redacted] We were brought into the case as a third-party Defendant, antitrust. The Court may remember that notwithstanding your very busy docket because of that and, therefore, the costs that we incurred was as a result of that.

Now, the Special Master -- and the report is in the court files but we didn't belabor it, but the Special Master made the point to me many times that we were to be treated fully as a party. I made the argument

multiple times that there should be more balancing of the burdens in discovery because we had a heavy discovery load because of prior ownership of the patents in the prior litigation, and we would argue we're not parties to the proceeding because of the stay of the antitrust claim. And he said, don't make that argument to me anymore, you're a party. That's a graphic example of how the fact that we became a part of all of those costs that are associated to that.

THE COURT: What if I hadn't allowed the antitrust counterclaim in the case, you still could have been on the hook for discovery. Would it be your view that all of this would still be reimbursable under the original Purchase Agreement?

MR. REINES: Here Section (ii) [redacted] would have been an indemnification to that, so that would have been a different avenue.

THE COURT: So that's not limited

by the directly from or in connection with a third party claim against --

MR. REINES: Right, it's an or before the (ii) and there's another disjunctive between (a) and (b).

THE COURT: So in your view the (ii) is a separate stand-alone reason and you wouldn't have needed the antitrust counterclaim?

MR. REINES: Yes. I mean, maybe my philosophy behind our motion is worth second-guessing but I would just look at their agreement to pay all of our fees and take these contractual arrangements and compromise them for purposes of getting the deal done.

THE COURT: I guess that's where I started with these questions. It may or may not be relevant what the Orthophoenix Parties would have been obligated to pay you in the absence of the Provision 2.7 in Settlement Agreement. It may or may not be relevant. But if it is relevant, I want to understand your view as to whether it would make a difference. I think your view is it makes no difference. They owe us every dollar and penny that we're seeking

even under the original Purchase Agreement?

MR. REINES: Right, and they agreed to that too. We said the amount is $560,000 which is a little bit less than now because of the various motions and they said, yes, we will pay you that in 10 days. So it's not just me saying it. It's the principal of the OP said that after the deal was done.

THE COURT: Well, after the Settlement Agreement had been executed.

MR. REINES: Exactly.

THE COURT: But that's different than whether they agreed to it under the Purchase Agreement.

MR. REINES: Oh, yes. No, they didn't originally agree to that. I don't want any ambiguity about what our position is on that. They originally denied indemnity. But again, trying to be clear about this and maybe I should have briefed it more, so I'm having some regrets here, but under Section 3.5 of the License Agreement I don't know how you get clearer than that, [redacted]

[redacted]

[redacted] So, yes, I think the entire amount of money would be due under this.

I don't think it's relevant because the parties negotiated contractually what the obligation would be under 2.7 of the Settlement Agreement and then ratified it afterwards by saying they would pay us the $560,000 and then reneged. This goes through the different arguments, the antitrust claim which relates to the defense, enforcement or licensing. We were obligated to provide testimonial, documentary evidence. Now, that's the consideration argument.

Keep in mind the way it's cast is they're not saying -- I don't know what they're saying. But in terms of the consideration argument, I think they're saying we didn't have enough right to the indemnity argument that even if they agreed to pay all, it wouldn't be valid because we didn't give them enough because the indemnity obligation was weak.

Their argument -- and this is

where I guess I'm seeing it a little different from Your Honor, and I say that with the greatest respect. Their argument isn't that you can construe 2.7 to be limited by all of these prior agreements in any meaningful way. Their argument was lack of consideration, and I went through that in the slide deck. Theirs is your indemnity position was so weak that even if we agreed to pay all, the law doesn't allow that because you haven't given us anything. And that's just all wrong at so many levels, one reason through the strength of the indemnity provisions.

They argued both -- again, it's fuzzy, mutual mistake and unilateral mistake. They want reformation from the Court. Again, acknowledging that the agreement says what it says. There's not a contractual interpretation debate regarding 2.7. Maybe that's where I might have gotten off on the wrong foot with Your Honor. The argument is lack of consideration and now it's mistake.

The Lemelson case is a good example. Defense counsel played a significant

role in drafting the document, contributing to proper understanding. Mr. Sanchez who's got an impressive resume, which we can go through here, was fully involved, and here is his resume. Croxall and Spangenberg are sophisticated parties too. No one submitted declarations stating they were mistaken. You would think that would be a minimal requirement. Someone says, oh, I didn't realize it said all and then we wouldn't pay it.

And then the fact that afterwards they stated when they would pay. Both before and after they stated when they would pay shows a total lack of mistake. It completely devoids the merit of that argument. This is the last point, Your Honor, and then I welcome any questions.

On the invoices we sent them to them time and again. First of all, we sent them through the case, so some of them they had for a year. We sent them all of them. Let us know if you have questions. We gave some explanation and discovery cut-off, close, all those kinds of things. We largely prevailed on the Special

Master but we're still being charged. We never heard anything from them until the letter that came after he was going to send me the wire.

In that letter they point -- they say, yes, we have some questions on the invoices. It was in the letter that came after they rejected it, not at the point that we liquidated the amount and they agreed to it. And here are the numbers. They had the invoices at the time of the agreement. So the idea that this Pandora's box of saying that all fees is such a problematic thing because who knows what Medtronic or Weil or Shaw Keller was going to run up, that we weren't responsible professionals, because I can understand that concern a little bit.

But the problem with that is we gave them essentially all the invoices $563,000, before they did the deal, before they validated it. They had a full opportunity to look at them and they didn't say you're charging too much, Mr. Reines. They didn't say your billing rates are too high. They didn't say raise any of those questions. So there's really not a

reasonableness and the reasonableness is integrated into the Settlement Agreement.

And after that, it was close to $10,000 for the Special Master and some mop-up for May, and those followed the same billing practices that we followed through the life of the case. So through the life of the case, we had billing rates and levels of detail and efficiencies and we followed those same practices through to the end so it's completely safeguarded. Now, except for maybe the cost of this hearing, it's not like there's a lot more fees. They're going to be in the same amount -- it would be easy. It's consistent what they approved of which was the $563,000.

THE COURT: So your view is for the $563,000 I don't even have to think about whether they're reasonable or not because as part of the compromise leading to the Settlement Agreement they agreed to pay all of it?

MR. REINES: Not only that, when I showed it on the slide, I sent them the amount and they said, yes, we will pay that in 10 days, stop bugging us.

THE COURT: But I suppose you're acknowledging that for the last $100,000 plus, whatever you've run up since August 2016, I do have to assess whether they're reasonable and your view of course is they are reasonable and they're consistent with what you did before, but I need to think through whether I think they're reasonable?

MR. REINES: No, Your Honor. I think the legal analysis would be whether we're violating the good faith and fair dealing that's inherent in the court order and the Settlement Agreement, because the Agreement says all fees and expenses. It doesn't say reasonable. If they hadn't --

THE COURT: That would extend forward.

MR. REINES: If they didn't renege, it wouldn't be an issue. I explained to them we have this Special Master's bill. This circumstance where we have this all where it's reasonable as it relates to fees associated with this enforcement is a product of their own conduct. In other words, it wasn't going to be

a problem because they had everything essentially and we described to them what it was.

So to the extent you view them as an anomaly that would be all fees associated with this Motion to Enforce, that's a product of -- we weren't contemplating the Motion to Enforce. I don't know what they were contemplating on that point. So it's a product of theirs so I'm not very sympathetic to them on that point, A. B, I think we have to act in good faith.

I don't think there's any showing -- I don't think they purport to make a showing that we haven't acted in good faith. Their argument is reasonableness based on something and something that I don't think applies. We have been reasonable. If the Court wants to take a look, then that's what it is. And I don't think the reasonableness test is the right test.

I think it's a covenant of good faith on how we apply to all and whether we engaged in misconduct associated with that which

is the first -- you can imagine the carefulness we had when we knew this was going to be a disputed issue before this court with this level of focus. I'm sure it was more conservative after than before.

On the reneging factor would also -- I think goes into the interest payment. They agreed, we did the deal and now we're having to incur all of these fees and this hassle, things like Mr. Horstman's travel and time, reviewing all of this stuff which we're not seeking reimbursement for because they're just saying they don't owe money that they flatly agreed to.

THE COURT: Under the Purchase Agreement, I think it's Section 4.14 appears to require you to [redacted] Is that a correct interpretation and does the record show asking for representation?

MR. REINES: Very good question. The attorneys that were suggested for us -- there was a discussion, and we saw the indemnity

at the outset. And the attorneys that were offered was OP's party attorneys who at that time were suing Medtronic so Medtronic wasn't open to having a law firm that had been adverse to them and was adverse to them or is going to be adverse to them, represent them. Frankly, it may sound garden variety or whatever to other people, maybe the OP parties, but to Medtronic an antitrust claim based on their leadership in the industry is a complex subject and Weil Gotshal has substantial expertise in the IP and antitrust interface and we have been used previously and --

THE COURT: I don't doubt what you're saying. Do I have a record of it if I need to reach that issue --

MR. REINES: Yes -- well, we can provide you --

THE COURT: That is, that you asked for representation and --

MR. REINES: Yes.

THE COURT: -- asked for indemnification?

MR. REINES: Yes, I think that's

in writing. I'm 80 or 90 percent sure that's in writing and the fact of the adversity of the lawyers that were offered is a record obviously because it's a docket. Whether they responded orally or in writing on that is just not something I'm certain of right here.

THE COURT: Talk about your position on interest and then we will save your time for rebuttal. Prejudgment and post-judgment interest is what you think you're entitled to?

MR. REINES: It's prejudgment until this Court monetizes what the fee award is. That's under Special Devices, the Federal Circuit case which is kind of a nice case which says we will make a bright line and the Federal Circuit likes to do that sometimes. It will be quite helpful, saying until fee awards are monetized and quantified, it's not a final judgment just for appeal purposes.

So it's prejudgment interest before. To the extent the Court says tomorrow you owe whatever the total was that I had up there plus the prejugdment interest for our

letter and if they don't pay it for six months or whatever, that would be post-judgment. The post-judgment numbers are minute but --

THE COURT: Your view with that is for purposes of interest what I would be doing if I grant the motion is entering a judgment even though there's been a judgment in the underlying case already?

MR. REINES: That's the way the law works with fee awards as being separate from the underlying judgment. It's an anomaly. People call them final decisions because it's more comfortable to people so that's what you see, people call them final decisions instead.

THE COURT: Okay. You've answered my questions for now. You can reserve the last remaining minutes for rebuttal and let me hear from Mr. Buczko.

MR. REINES: Thank you.

THE COURT: Good morning.

MR. BUCZKO: Good morning, Your Honor. So Medtronic and the OP parties, so we don't disagree that Orthophoenix should fully comply with any indemnification obligation but

the parties dispute what the scope of that obligation is. The primary point that Medtronic makes is that there's an indemnity obligation that was confirmed by the courts.

Your Honor, this is a stipulation of dismissal which was so ordered by Your Honor on May 12th, and we'll see here that, first of all, this stipulation of dismissal only states that the Court shall retain jurisdiction to enforce the order of dismissal, not any Settlement Agreement or any fee provisions.

THE COURT: Are you challenging the Court's jurisdiction to handle this motion?

MR. BUCZKO: I will say that the basis for jurisdiction as argued in Medtronic's motion is wrong, that there's ancillary jurisdiction pursuant to the Kokkonen case because there's a court order that incorporates the Settlement Agreement or the terms of the Settlement Agreement, which it does not as you see here.

The stipulations of dismissal states only that there's an acknowledgement of some contractual obligation to indemnify

Medtronic for costs, expenses and attorneys' fees and that's really just an exception to the general rule as articulated lower down in the articulation that the parties will bear their own costs.

THE COURT: So the end result of that is you don't challenge the Court's jurisdiction to rule on the Motion to Enforce?

MR. BUCZKO: I think it's Medtronic's burden to establish this sort of ancillary jurisdiction and our argument is Medtronic has not met its burden, and this was talked about in our opening brief.

THE COURT: What would need to be shown to meet its burden?

MR. BUCZKO: It's not completely clear in the case law. Medtronic would have to show in this order of dismissal, for example, that if the Court ordered that, it would retain jurisdiction to enforce the Settlement Agreement and that's pretty clear in the case law, the Supreme Court case law in the Kokkonen case.

Actually, I have some slides prepared here. And this is the Kokkonen Supreme

Court case 1994. This is a seminal case on ancillary jurisdiction to enforce settlement agreements. This is cited in Medtronic's opening brief. And it requires that for a court to have ancillary jurisdiction over enforcement of a settlement agreement, the court would have to retain jurisdiction over the settlement contract, and I underlined contract. That was not underlined by the court, and that is not the case here. The Court did retain jurisdiction to enforce the order of dismissal.

Another way that Medtronic could have shown that this Court has jurisdiction to decide this motion is that there could have been a recognition or the Court could have adopted in terms of the Settlement Agreement in the stipulation of dismissal order. And it really didn't do that. If we read here, it says, Except as set forth specifically in the settlement between the parties, wherein Orthophoenix and IP Navigation Group acknowledged a contractual obligation to indemnify Medtronic for its costs, expenses and attorneys' fees incurred in this matter, the

above-identified parties agree that they will bear their own costs. So the Court just acknowledged and just ordered there was some exception to the general rule that the parties bear their own costs.

THE COURT: Where in your brief did you argue this?

MR. BUCZKO: This is in our -- we mentioned jurisdiction in our opening brief in the first argument section. The point that was made was that if Medtronic's reading of this stipulation of the contract was wrong, then this Court would not have jurisdiction to decide this motion.

THE COURT: You didn't cite Kokkenon in your brief, did you?

MR. BUCZKO: We did not.

THE COURT: But I should have understood that you were challenging the Court's -- you're challenging whether or not Medtronic met its burden to show that the Court has jurisdiction?

MR. BUCZKO: That's correct, Your Honor.

THE COURT: And tell me again where I should have understood that from?

MR. BUCZKO: So this is on Page 10 of Orthophoenix's opposition where we state, Medtronic's motions including its argument regarding jurisdiction relies exclusively on, legally on tenable conclusion, therefore, this motion should be denied in its entirety.

THE COURT: Is that the only reference to jurisdiction in your brief?

MR. BUCZKO: Yes, Your Honor.

THE COURT: And I take it if I agree with their interpretation of 2.7, then you have no argument about jurisdiction?

MR. BUCZKO: That's not exactly true, Your Honor, because the basis for jurisdiction would be what's in the Court's order, not in Section 2.7. And what's written in the contract is not the same as Section 2.7.

THE COURT: Would you at least knowledge that there's no way anyone can read your brief to have some argument about lack of jurisdiction outside of you disagreeing with their interpretation of 2.7?

MR. BUCZKO: That would be difficult for me to do, Your Honor. I take your point, Your Honor, but I think the idea behind this argument really came forth after reading Medtronic's reply brief where its primary point was that the Court ordered full indemnification. So looking at this Court's order and not seeing any basis for that argument, we read and saw what the consequences was of that representation being false. And number one, was that the basis for jurisdiction went away. We didn't have a sur-reply in this case, Your Honor. And this is something that would have been flushed out more completely in that sort of response.

So the Third Circuit has a case that really holds substantially the same as the Supreme Court case in that the dismissal order needs to contain a provision retaining jurisdiction over the Settlement Agreement or incorporate Settlement Agreement terms and that needs to be ordered by the Court to have ancillary jurisdiction.

So given that there's no court-approved allocation of fees, and that's a

quote from Medtronic's reply brief, where are we. We need to look at the contracts. So here is Section 2.7 of the Settlement License Agreement. And as Your Honor previously questioned Medtronic, we will see here that this provision had the language by contract the Orthophoenix Parties and IP Navigation Parties, past tense, have agreed to indemnify and reimburse the Medtronic Parties.

So reading this along with the stipulation, it suggests that and it really proves that this agreement right here points to the past tense agreement for indemnification. Interestingly, the stipulation is Exhibit C to this agreement so it's actually intrinsic record that this is an acknowledgement of a past indemnification obligation and that would be in the PPA.

THE COURT: Well, what about how it describes that obligation? It says that you will reimburse them for all fees and expenses, and then it goes on to say the Medtronic Parties will not pay their own fees, costs and expenses.

MR. BUCZKO: That was something

that was introduced by Medtronic, that language. And it's an inaccurate representation of what the PPA says. I disagree with counsel for Medtronic when Medtronic states that in agreement to pay everything is a compromise. It's not. This isn't a --

THE COURT: They could have required you to litigate, pay litigation fees and maybe they have an argument that they can get more than that.

MR. BUCZKO: Such an argument is not -- we haven't seen that's been made in the papers. I think Medtronic saying, well, if you don't agree to pay everything, we will have to bring you to court, that's not consideration. There are cases that say that's not consideration, and they haven't made that argument either.

THE COURT: Well, is there any evidence that there was a mistake, that what they put in there was inaccurate and/or that you all misunderstood it?

MR. BUCZKO: I think the evidence are the facts of the case. So just going

through the timeline, in early 2015 Mr. Reines contacted litigation counsel of Orthophoenix and asked for indemnification. Litigation counsel refused and then after that time period, counsel for Medtronic actually stopped communicating with litigation counsel who were refusing indemnification and communicated directly with the principals.

THE COURT: You mentioned that in the brief. What is the relevance of that?

MR. BUCZKO: It shows that having been informed that indemnification was refused and there's a dispute that representations were made directly to the principals by passing the attorney who refused indemnification.

THE COURT: It might show that, but again, what is the relevance of that?

MR. BUCZKO: The relevance is that under the law of mutual mistake that there was representations made that Medtronic knew that or tried to create a misapprehension of fact that it was entitled to full indemnity by communicating directly with the Orthophoenix principals.

THE COURT: Other than that January 2015 where your co-counsel denied the indemnification obligation, other than that after that, is there any evidence in my record that anybody on Orthophoenix's side mistakenly thought that the indemnification obligation was anything other than what Medtronic is telling me what it is?

MR. BUCZKO: Well, it's our position that they correctly thought that what Medtronic -- not what Medtronic says it is here, but there are the statements really on May 24th of 2016 that was the letter also from litigation counsel.

THE COURT: What about the emails earlier than May 24th? May 23rd or May 21st and May 11th?

MR. BUCZKO: There were still questions about the invoices on May 24th, and I can show you the emails actually --

THE COURT: Show me other than that letter at the end which evidently came as a complete shock to Mr. Reines where you raised any questions.

MR. BUCZKO: So here is where on May 11th Mr. Croxall represented, I have questions on the bills. I can talk to you. It says absolutely. So the point here is that Orthophoenix never really agreed to pay all of the invoices. It still had in its mind that there was a more limited indemnity obligation.

THE COURT: I'm just failing to see where you get that. If I have questions, can I talk to you, absolutely. How does one reasonably read that as I do have questions, here they are and I disagree that we owe you the $560,000?

MR. BUCZKO: I think the next communication of that came up on May 24th.

THE COURT: Well, this is the letter from the first communication of that, isn't it?

MR. BUCZKO: Well, there was a prior communication in February of 2015, Your Honor, but between those time periods, we don't have statements in the record --

THE COURT: I take it you can agree that I can look at all of this that both

sides have attached in resolving this motion; is that right?

MR. BUCZKO: Not exactly, because counsel for Medtronic brought up some statements about some dealings in winter of 2016 that I don't see any evidence in the record of that.

THE COURT: That was his slides in his representations today. That's what you're referring to?

MR. BUCZKO: Yes, Your Honor.

THE COURT: But the emails and the declarations and what you all submitted in writing before the hearing, does Orthophoenix have any objection to me considering those for purposes of resolving this motion?

MR. BUCZKO: No, Your Honor. For the mutual mistake argument, this is what we submitted and we're not submitting anything else.

THE COURT: Well, in the Settlement Agreement as you noted it does have the phrase by contract. Why would the parties use that phrase if all they meant was the Patent Purchase Agreement and/or the License Agreement

as opposed to the Settlement Agreement?

MR. BUCZKO: It refers to the prior contractual obligations. It confirms that the SLA is not creating a new obligation of indemnification. That's really what I'm trying to find, the language here.

THE COURT: It's 2.7.

MR. BUCZKO: So it shows in the past tense. Now, understandably, Your Honor, it doesn't say that the PPA -- there are other contracts that the PPA controls for indemnification. It just states in the past tense that there's been a contractual agreement about indemnification, which we don't dispute. The dispute is which contract that refers to.

THE COURT: The Settlement Agreement elsewhere does refer expressly to the Patent Purchase Agreement, does it not?

MR. BUCZKO: It does refer to the Patent Purchase Agreement.

THE COURT: If the parties intended to say all we've done here is reiterate what we've already agreed to in the past in the Patent Purchase Agreement, why do they use a

broader phase by contract?

MR. BUCZKO: I think the Settlement Agreement was really a contract between a lot of parties and different parties added language at different times. And that may go into explaining why different language has been used in different parts. This particular provision was added by Medtronic and that's exhibited in our papers.

THE COURT: Why shouldn't I hold Orthophoenix to this contractual language rather than say, well, I guess they couldn't have meant that?

MR. BUCZKO: Well, I think the point is that if Your Honor holds that it does refer -- this is a contractual obligation itself, we made the argument that it's not valid for lack of consideration.

THE COURT: Well, let's talk about lack of consideration. You do recall that the Motion to Dismiss for lack of standing was pending at the time that you settled this case, correct?

MR. BUCZKO: Yes, Your Honor.

THE COURT: You never argued that that motion was frivolous, did you?

MR. BUCZKO: Well, we disputed the motion, Your Honor. We did not do any Rule 11 papers on the motion.

THE COURT: If I thought that there was potentially some merit to that motion, would the Settlement Agreement thereby have some consideration for you all?

MR. BUCZKO: I don't think so, Your Honor. The reason is Medtronic hasn't had an actual claim that it relinquishes to be consideration, and Medtronic represented in the preamble of the SLA that it has no claims, [redacted] So Medtronic relinquished nothing by its own admission.

Furthermore, as far as perfecting title in the patent, Medtronic had that

obligation in the PPA. They had the obligation to execute instruments fully affecting the transfer. So it was Stryker's argument that Medtronic didn't do that in the PPA, but they had the obligation to do that. They had the obligation to execute the second amendment to the PPA. It withheld --

THE COURT: Those are two different things. They say they didn't have an obligation to perfect it in precisely the way and time and manner that you wanted it done. Are they wrong about that?

MR. BUCZKO: As far as qualifying for consideration, I think the umbrella is larger if you're saying that under that umbrella is that they had to perfect title in the patent in executing instruments. That involved signing your name, that involved filling out forms. I think that's a reasonable interpretation of their pre-existing duty, is that it does involve having to fill out forms and perfect titles and sign things and not hold up deals by refusing to signs thing that you have the obligation to do.

THE COURT: Well, the reason I ask

is there's a lot of case law that says I really shouldn't look very closely at whether there was consideration or whether there was enough consideration or whether you got a good deal or bad deal or could have gotten a better deal and it's really pretty hard to not find some sufficient consideration. You're arguing up against all of that, aren't you?

MR. BUCZKO: I disagree, Your Honor. Something needs to qualify first as consideration. Once it qualifies as consideration, then, sure, the poetic explanation is that it could be a peppercorn, but the pre-existing duty rule says that things you have a legal obligation to do, do not qualify as consideration. You don't even weigh it. It doesn't even go on the scale.

THE COURT: So what about the evidence that [redacted]

MR. BUCZKO: I haven't seen that evidence. That was presented as attorney argument in this hearing.

THE COURT: Is that not a

reasonable inference from emails from your side that said, obviously, you need to sign the second amendment before we can finish the Settlement Agreement, something to that effect?

MR. BUCZKO: Yes. Stryker I imagine did want a fully perfected transfer. I think Stryker -- I can't speak for Stryker and there's no evidence in the record what Stryker was thinking, but I think Stryker wanted to make sure that Medtronic wouldn't sue on these Orthophoenix patents.

THE COURT: Well, Stryker is on the record, I think, at that time saying they think Medtronic owned the patents, aren't they?

MR. BUCZKO: Yes, that was their motion, that there was some ownership interest.

THE COURT: Why isn't the only reasonable inference from the record I now have that without Medtronic at the table there was going to be a ruling on the motion which may or may not have been favorable to your side, but in any event, the risk of all of that going away and that was the only way this case was going to get settled, some of that has to constitute

consideration?

MR. BUCZKO: What Medtronic did was fully perfect the transfer and made representative warranties about what interests it retained in the Orthophoenix patents and it had to make those representations pursuant to the PPA. So what it did was a pre-existing duty. And to the extent it refused to do that, it was holding up the deal. And that's the idea behind the pre-existing duty, that someone doesn't drag their feet and heels and say, look, I know I have to do this but I'm not going to do it until you give me something else.

THE COURT: It is true there's no declaration in the record that indicates that anyone on your side actually had a different view of what 2.7 of the indemnification obligation is; isn't that correct?

MR. BUCZKO: There's no declaration from our side on the meaning of 2.7 indemnification. There's also no declarations from the other side of 2.7.

THE COURT: But you're the one arguing that I should find on this record a

mistake, correct?

MR. BUCZKO: Yes, Your Honor. As I discussed we're depending on the papers for that, that are submitted on the statements by litigation counsel from Orthophoenix in early 2015 and May 2016.

THE COURT: Do you think that I can find a genuine dispute of fact on this record?

MR. BUCZKO: Yes, I believe you can, Your Honor.

THE COURT: And if I do, then what?

MR. BUCZKO: Then I think the motion needs to be denied. We've offered to talk about this with Medtronic. They refused. They filed this motion, and just --

THE COURT: But deny the motion and what, then you pay nothing?

MR. BUCZKO: Well, then if this motion is denied, Medtronic would have rights. I would imagine Medtronic could sue the state courts if they wanted to. They could maybe sue in Federal Circuit. They can work up the

jurisdiction for that.

THE COURT: But I shouldn't treat this as akin to a summary judgment motion and if I deny it on the basis of a disputed fact, saying give me your schedules for discovery and how we're going to resolve that dispute of fact?

MR. BUCZKO: If that's something Your Honor chooses to do, if Your Honor sees a dispute of fact, I think that's something that is fair. I do think there are issues of fact here and I do think that there are representations being made even in this oral argument hearing that aren't shown in the record at this time.

THE COURT: So give me some examples of the issues of fact that you think that should cause me to deny the motion?

MR. BUCZKO: On mutual mistake I think is the primary one, Your Honor. On consideration, it's really our position actually that there's no consideration as a matter of law, so I think the actions and the contractual provisions speak for themselves. So I don't think there's a disputed fact there.

Your Honor, if Your Honor holds that Section 2.7 of the SLA is ambiguous or any other provision is ambiguous, then that brings in parol evidence and those would be disputed issues of fact.

THE COURT: There was a representation made that Medtronic did request indemnification perhaps at the outset of the case and what they were offered was representation by your firm which was conflicted and, therefore, they denied or declined that. Do you dispute that that's what occurred?

MR. BUCZKO: I do, Your Honor. The only record I've seen in the papers and that I know of, Your Honor, is Mr. Reines contacted litigation counsel for Orthophoenix about indemnification. Orthophoenix first -- and this was a phone call and this is reflected in Mr. Fenster's Declaration and it's also reflected in one of the exhibits to our opposition.

Mr. Fenster expressed questions about the indemnification obligation and noted that going forward because at that time the

antitrust claim was stayed, there would be a lot of discovery work and Mr. Fenster asked that Russ, August & Kabat, our firm, handle the discovery load. There's no response in the record. I'm not aware of any response from Medtronic. The next communication from Medtronic I'm aware of is communications demanding indemnification later in the year.

THE COURT: Do you dispute there's a conflict between your firm and Medtronic?

MR. BUCZKO: I don't know whether or not there was a conflict. I actually don't think it's relevant. We could have gotten another firm. We could have exercised some oversight of the bills and this gets into the reasonableness of expenses, but it maybe didn't have to be that Russ, August & Kabat, but Medtronic ignored Orthophoenix's request and then elected to use its own counsel and then sought indemnification under the PPA.

THE COURT: Where in Section 2.7 do you see a limitation for reasonable attorneys' fees?

MR. BUCZKO: The basis for the

limit of attorneys' fees is really Delaware law. All indemnification contracts are limited to reasonable attorneys' fees. And that is the policy of Delaware and the case law is cited in our opposition brief. And it makes perfect sense in that an indemnified party would really go spend large sums of money, maybe unnecessary sums of money, there's no oversight there, and would not be careful about controlling costs. So there's really a public policy in Delaware law that indemnity contracts be limited to reasonable expenses.

THE COURT: Are you alleging that the fees here were driven up in bad faith?

MR. BUCZKO: I'm not alleging bad faith. I know nothing about bad faith as far as the attorneys working on the Medtronic discovery matters. I do know that Medtronic admits that the vast bulk of the fees were for discovery, the patent litigation matter after the antitrust claim was stayed and the attorneys who worked on reviewing documents as such billed amounts of $650 to $1100 an hour, and I have a slide on this.

There are entries from timekeepers who weren't even identified billing at $1,000 an hour. There were unnecessary attendance and expenses going to Markman hearing and third-party depositions and hearings that really involved the underlying patent case. So I don't believe that they're reasonable. I don't know if they were done in bad faith. Bad faith is not required. Some expenses can be unreasonable but not incurred in bad faith.

THE COURT: All right. Talk about interest. Did you raise any objection to pre-post-judgment interest in your brief?

MR. BUCZKO: Not in the brief, but in response to Your Honor's letter, the request for a letter that we submitted on Friday. It's our position that, and it's reflected in our letter very briefly, while the damages aren't liquidated, they don't need to be liquidated for prejudgment interest to be attached. Here we need to look at the reasonableness of the expense and get to a number. Once we reach that number and there's a judgment or order, then we can talk about interest.

THE COURT: I think it's argued that you didn't raise any objection to interest which was clearly sought in their opening brief. You didn't raise any objection to that in your answering brief. If that is, in fact, the case, why shouldn't I view any objection to interest as waived?

MR. BUCZKO: Well, we disputed the underlying amounts and there was a request for interest in the brief and we disputed the underlying amount and we responded to Your Honor's letter request. I don't think it's an issue that would be waived. I think it's an issue that can be argued at a later period of time. It doesn't go directly to the merits. It goes to a remedy at judgment of basically an attempt to make Medtronic whole.

THE COURT: I guess I'm still left with trying to understand your interpretation of all of those emails and the back and forth and the time that the Settlement Agreement was being negotiated and then filed. The speculation is that all the lawyers basically agreed to this and you never had any doubts about it, and then

somebody intervened at the very last minute and said let's change course and probably fight about it.

Is there anything in the record that would be inconsistent with that speculation?

MR. BUCZKO: I don't think it was a change of course. I think that different members of the team were involved with -- and I know that different members of the team were involved with the Settlement License Agreement and the negotiation of those provisions. And the members of the team that disputed indemnification and denied indemnification, especially litigation counsel for Orthophoenix became involved later and reminded the parties that there was not indemnification to enter the PPA.

The PPA is a complicated contract. That indemnification provision is kind of -- it's amazing it always ends up in the same place which is there's no indemnity due, but there are a lot of words and a lot of subparts in that provision, so it's understandable that the

Orthophoenix Parties became mistaken or misunderstood the provision.

THE COURT: Is it your view that on this record I should view the Orthophoenix side of the transaction as mistaken until, I think, even the morning of when that May 24th letter came and just at the very last minute in writing that letter now understood what their rights really were all along?

MR. BUCZKO: I think as of the signing of the SLA with the injection of the all language, I think they were mistaken. There were requests for few details of invoices on May 11th as we saw, and there were further communications about details from invoices. The Orthophoenix Parties could have learned during that time period or know during that time period that the indemnification sought by Medtronic was not allowable under the contract at that period of time. We don't have emails in the record to dispute that precise period of time, for instance, May 5th and May 24th.

THE COURT: It's undisputed that the $563,000 or thereabout number was known to

Orthophoenix before they signed the Settlement Agreement, isn't it, or before it became effective?

MR. BUCZKO: Yes, Your Honor. I know at least the $440,000 figure, and that was in an email to the Orthophoenix Parties.

THE COURT: As well as reference to, hey, we've had a lot of discovery costs in the last few weeks, i.e., during the time when the antitrust discovery has been stayed. That was all clearly communicated to Orthophoenix before they signed the Settlement Agreement, wasn't it?

MR. BUCZKO: It was communicated to some members of the Orthophoenix team. Like I explained, the members of the team who denied indemnification and really started the dispute about indemnification were left out of those communications.

THE COURT: Well, there was nothing to prevent the Orthophoenix team to share those communications amongst themselves, were there?

MR. BUCZKO: No, Your Honor.

THE COURT: And nonetheless represented by sophisticated counsel, the Orthophoenix team signed off on the Settlement Agreement, didn't it?

MR. BUCZKO: Well, I think this goes to the pre-existing duty rule because Medtronic was holding up the deal by refusing to move and refusing to execute the instruments it had the obligation to do. So in order to do this and in order to effect that Medtronic performs its duty, Orthophoenix agreed to or signed off on the agreement with that language. But the whole point of the pre-existing duty rule is that that's not an enforceable bargain.

THE COURT: Anything else?

MR. BUCZKO: Just some other points, Your Honor, I can go through quickly. Here we see that Orthophoenix never agreed to pay all of the invoices. They always had questions. There were communications here and there about whether -- yeah, we agree on payment, we agree on payment, but it still had questions about the invoices. So it's not a liquidated amount that --

THE COURT: You're saying throughout but you've shown me one place where Mr. Croxall says, can I ask you questions, and the immediate answer is yes. You haven't shown me anywhere else where they've expressed any doubt that they owe an obligation to pay what looked like all of those fees and expenses.

MR. BUCZKO: There was one on May 11th and May 24th.

THE COURT: But May 24th is well after you signed the agreement and it's hours after you're still suggesting you're going to pay everything, isn't it?

MR. BUCZKO: It is, Your Honor. But there's actually a duty in the PPA for there to be a time period to discuss disputes with regard to indemnification. And here in 7.8 of the PPA, it says, [redacted]

[redacted] That didn't happen here. There was the letter on May 24th, and then Medtronic filed its motion in early June. So just this motion violates the PPA.

THE COURT: Do you cite 7.8 in your brief?

MR. BUCZKO: No, Your Honor. Just one other point. Counsel for Medtronic brought up Section 3.5 of the License Agreement and this is a document that accompanies the PPA, whereby the [redacted] This relates to situations in which Medtronic is added as a necessary third party to effect standing and it would have to -- Medtronic would suffer claim, damage, liability or attorneys' fees.

THE COURT: Where does it say that?

MR. BUCZKO: I can pull out the entire provision and put on the document camera. Here, Your Honor, is Section 3.5 on the slide. Section 3.4 talks about [redacted]

[redacted] And then following on, this is where Orthophoenix agrees [redacted] Don't read this as referring -- as indemnity for attorneys' fees related to discovery that Medtronic would embark on either as an antitrust defendant or basically a third party in a patent case.

THE COURT: First off, you see 3.5 as limited by 3.4?

MR. BUCZKO: I believe it's read with 3.4, Your Honor. It doesn't refer explicitly to 3.4.

THE COURT: Even assuming it does, wasn't it alleged here by a third party that Medtronic is a necessary or indispensable party to the lawsuit brought by Orthophoenix?

MR. BUCZKO: Stryker did allege that Medtronic had interest in the patents, but Medtronic was never added as a Plaintiff in

the --

THE COURT: Because you all resolved the case before I ruled on the motion. But 3.4, talking in terms of allegations, wasn't that specifically part of what was alleged by Stryker, that Medtronic is a necessary or indispensable party to any lawsuit or claim brought by the licensor, i.e., this lawsuit?

MR. BUCZKO: I think Stryker argued that Medtronic's sole interest in the patent -- I don't think Stryker sought to add Medtronic as a party to the patent case.

THE COURT: Wasn't that one possible resolution of that motion?

MR. BUCZKO: It could have been something that was embarked on after resolution of the motion. I don't think it was specifically asked for in the motion adding Medtronic.

THE COURT: All right. Anything else you want to add?

MR. BUCZKO: And just briefly, one more point. So in early 2015 Medtronic and Orthophoenix agreed that disputes regarding

payments to be made for indemnification of Medtronic by Maker, which is Orthophoenix, or shall be governed by and construed as set forth in the PPA. So to the extent there's any question as to what agreement controls the inquiry of indemnification, there was early agreement by Medtronic in 2015 that the PPA would control.

THE COURT: And the parties were not free to modify that in the Settlement Agreement or some other contract?

MR. BUCZKO: I think the parties could have modified it. There would have been consideration. Also, under the principles of Novation, there's no reference to an earlier agreement being superseded in the SLA. This is an important point that I haven't made but, sure, the parties could have entered into a new indemnification contract but it would need to be supported by and bargained for detriment for Medtronic or a benefit for Orthophoenix. And that's all I have. Thank you.

THE COURT: Thank you very much. Mr. Reines, any rebuttal?

MR. REINES: Yes, Your Honor, just a few points. First of all, there was no hold-up in this case. Medtronic was honorable from the beginning to end. There's no document. There's no testimony. There's no substantive argument that somehow we said we're not going to agree to anything. It was an effortless negotiation. There was no resistance. That's what happened.

In terms of whether they had counsel, not only is this incredibly sophisticated people, they have staffs that made outside counsel come in necessary for the settlement negotiations, but they attached the agreement, the stipulation, that the Court signed. It is hard to believe that they wouldn't have outside counsel review those as part of the Settlement Agreement which recited the indemnity obligation and pointed to the Settlement Agreement, and then counsel even submitted that before the repudiation happened. It was submitted to the Court before the repudiation, so the see no evil argument just doesn't work with that.

With respect to consideration, the record is replete complete with consideration that we didn't detail every single point. One point is the provision in the License Agreement for indemnity, that 3.5 says [redacted] so I don't know what -- in the English understanding, you need to understand that we were covered on indemnity without qualification. Because of the approach that we took with this motion which we think was ripe which was the agreement that we're moving on is from this year, we have not sought interest, backed all the invoices that were given to them over the life of the contract and their denial of indemnity, and they were denying indemnity throughout this case. If we didn't seek interest back on that because we've entered into a new agreement in the Settlement Agreement that validated they were going to pass everything as of that date so --

THE COURT: The lack of seeking that earlier interest could be consideration as well.

MR. REINES: In fact, it's

consideration. I don't think it's particularly debatable. And then the argument that we had no claim, with all respect these arguments are below the line that we should be hearing here. In the preamble we stated we had no claim in the case. It's obvious on the docket we're talking about no claim in the case. Obviously, we had an indemnity claim that's compromised as part of the Settlement Agreement ultimately wrapped in and the agreement is what's documented in the agreement. So to say we had no claim going in for indemnity is just absolutely meritless. So the consideration's argument just don't work.

On mutual mistake, and I don't know if unilateral mistake is being waived, I didn't hear any reference to it, no one was mistaken on our side and I don't think there's an allegation of that, which you would need for mutual mistake. But what's really important I think for the Court in taking this and finalizing this matter is the position taken was we've submitted what we've got on this. We're not going to submit anything else. And that's what the transcript will show.

So this idea that there's an evidentiary hearing on mutual mistake, they have given you what they've got and it falls well below any standard for reformation and mistake. And in terms of the extrinsic evidence under the consideration argument, just doubling back to that in terms of what facts might be in dispute, the parol evidence is all that I heard invoked there.

Again, there's no real debate of how that provision could be interpreted. We saw in the plain language basis it says all and that we don't pay any. But even if there were, the only thing they cite as extrinsic evidence oddly enough is the stipulation which as accepted is provided in the agreement to indemnify. It's not extrinsic evidence. I took everyone's time today with the litany of extrinsic evidence that showed what the deal was.

I guess I have a final thought in the subject of -- well, let me address the reasonableness of the fees and all that. There's no case where someone agrees to pay all as part of the end of the litigation-terminating

event where it's largely liquidated and agreed to all and some court doubles back and says we're going to second-guess that agreement to all based on the situation.

And the fact that this motion is proceeding, I mean, there's no punitive damages being sought or anything like that, but there does need to be discouraging people from repudiating an agreement on the theory that people have better things to do and will take a discount on a number just to get rid of the matter. And if there's anything that could be accomplished in this order on that front, I think it would be service to the entire system and profession. But the fees, the interest on it at least one small way, we're foregoing the interest back, but at least from when they agreed to it forward, we would ask for interest. I don't know if the Court has any questions --

THE COURT: No.

MR. REINES: Thank you, Your Honor.

THE COURT: Thank you.

MR. BUCZKO: Your Honor, can I

address a few points quickly?

THE COURT: Go ahead.

MR. BUCZKO: As far as the argument there's no claim in this case, Section 2.3 of the SLA is [redacted]

THE COURT: Are you disputing that prior to the Settlement Agreement Medtronic had an indemnification claim against the Orthophoenix Parties?

MR. BUCZKO: They did claim indemnification. I'm not disputing that.

THE COURT: So to the extent you are arguing, well, none of that is recited in the Settlement Agreement, I shouldn't understand that to be a dispute, that you recognize they had a claim for indemnification and now they don't because they settled it with you in the Settlement Agreement?

MR. BUCZKO: Well, I think the point is that getting all fees is not a compromise. It was --

THE COURT: Well, putting that aside, you are not disputing that they had a claim and now they say they don't have a claim because they settled it with you?

MR. BUCZKO: I'm not disputing that, Your Honor. As far as the release [redacted] and I think that's confirmed by the Settlement Agreement itself. We are arguing unilateral mistake, not just mutual mistake. That wasn't waived. I don't know where counsel from Medtronic got that idea. There were misrepresentations of fact and Medtronic remain silent.

As far as Section 3.5, the indemnification application of PPA, the January 2015 agreement between Medtronic and Orthophoenix agreement which confirms that the indemnification is governed by the PPA, not the License Agreement, so Your Honor, there should be consideration to the Section 3.5 provision. That's all I have.

THE COURT: Mr. Reines, anything else?

MR. REINES: Nothing further.

THE COURT: All right. We will be in recess.

(The proceedings ended at 10:45 a.m.)

C E R T I F I C A T I O N

I, Taneha Carroll, Professional Court Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

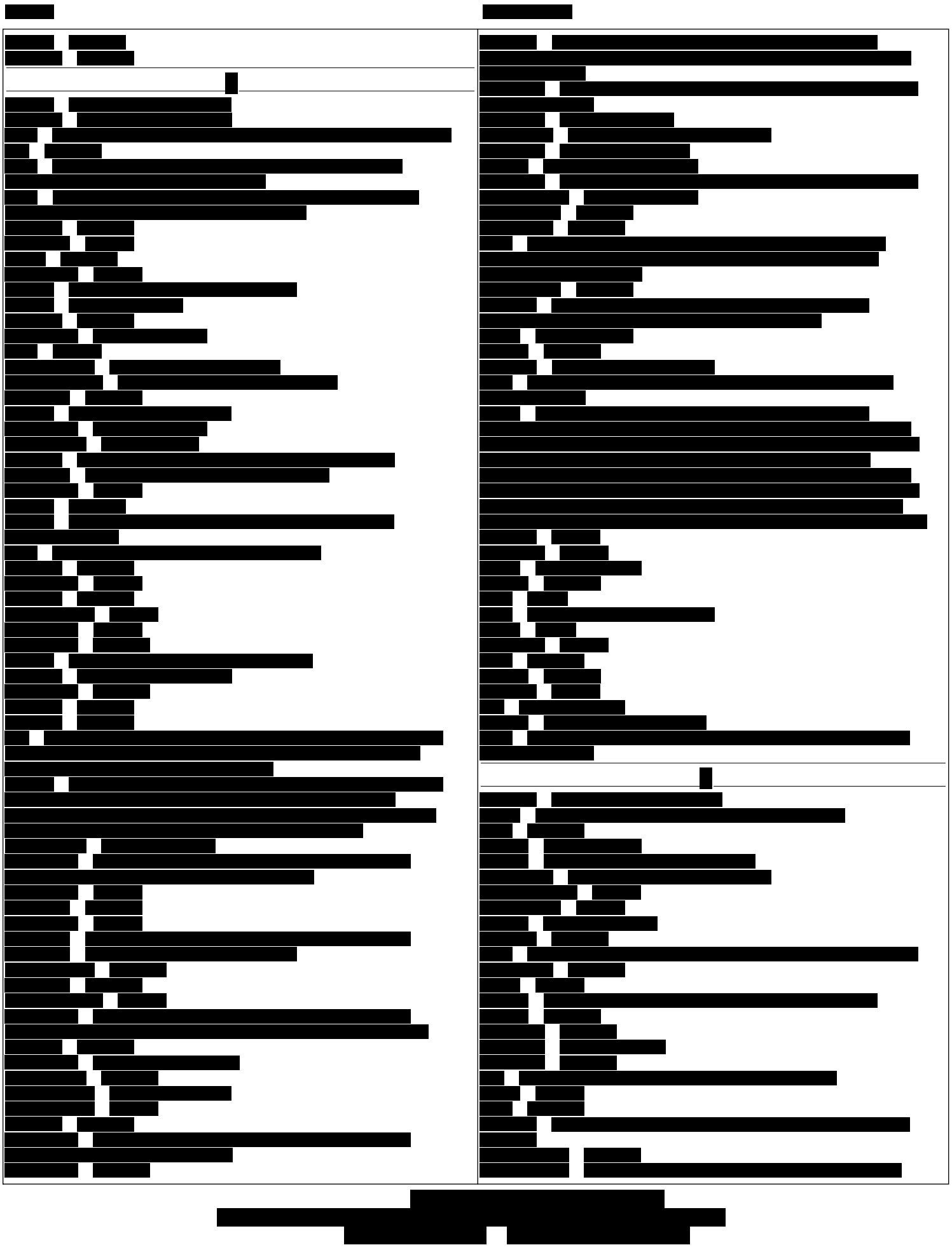
/s/Taneha Carroll
Taneha Carroll

Professional Reporter and Notary Public



[redacted]











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