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CLARENCE FRERE, et al., Petitioners, -against- ORTHOFIX, INC., et al., Respondents. CLARENCE FRERE, et al., Plaintiffs, -against- ORTHOFIX, INC., et al., Defendants.

99 Civ. 4049 (RMB)(MHD), 00 Civ. 1968 (RMB)(MHD)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2000 U.S. Dist. LEXIS 17467

December 4, 2000, Decided

December 6, 2000, Filed

DISPOSITION:
[*1] Petitioner's motion to compel granted only to extent indicated. Respondents' motion for protective order granted.

COUNSEL:
For CLARENCE FRERE, LOUISE FRERE, JOSEPH MOOIBROEK, MARLA B. MOOIBROEK,
petitioners: William F. Johnson, Jr., Johnson, Murphy, Hubner, McKeown, Wubbenhorst & Appelt, P.C., Riverdale, NJ. Kevin D. Allen, Michael A. Vellone,
Gregory W. Johnson, Vinton, Nissler, Allen & Vellone, P.C., Denver, CO.

For ORTHOFIX INTERNATIONAL, N.V., consolidated defendant: Stephen James Marzen,
Shearman & Sterling, Washington, DC.

For CLARENCE FRERE, LOUISE FRERE, JOSEPH MOOIBROEK, MARLA B. MOOIBROEK,
plaintiffs: Patrick D. Vellone, Kevin David Allen, Gregory William Johnson, Vinton, Nissler, Allen & Vellone, P.C., Denver, CO.

For ORTHOFIX, INC., ORTHOFIX INTERNATIONAL, N.V., defendants: Stephen James
Marzen, Shearman & Sterling, Washington, DC. Timothy R. Beyer, Peter John Korneffel, Jr., Brownstein, Hyatt & Farber, P.C., Denver, CO.

JUDGES:
MICHAEL H. DOLINGER, UNITED STATES MAGISTRATE JUDGE.

OPINIONBY:
MICHAEL H. DOLINGER

OPINION:

MEMORANDUM & ORDER

MICHAEL H. DOLINGER UNITED STATES MAGISTRATE JUDGE:

This consolidated lawsuit is a byproduct of a merger agreement, executed in [*2] May 1995, under which an entity known as American Medical Electronics, Inc. ("AME") merged with a corporation known as Othello Acquiring Corporation. The resulting corporation is Orthofix, Inc., which, like Othello, is a subsidiary of Orthofix International, Inc. The petitioners/plaintiffs n1 are former shareholders of AME who claim that they and their fellow shareholders were shortchanged in the determination of certain payments to which they say they are entitled under the merger agreement.

----------Footnotes----------

n1 Because we are focusing on a motion to vacate an arbitration award, we will refer to the parties as petitioners and respondents, respectively.

----------End Footnotes----------

The current lawsuit encompasses two separate proceedings commenced by the AME shareholders and now consolidated in this court. One, filed in Colorado state court and then removed to federal court and finally transferred here, is a class-action suit against the Orthofix entities and a number of individual corporate officials who are said to have been responsible for failing to pay [*3] the AME shareholders the full amounts to which they claim entitlement. The second, and related, proceeding, which was filed in this district, involves an application by the same AME shareholders to vacate an arbitration award entered consensually by an arbitrator to implement the decision previously reached by the individual defendants concerning the amount of money that the AME shareholders were entitled to under the merger agreement. n2

----------Footnotes----------

n2 The motion is styled as an application to intervene (presumably in the arbitration process) and to vacate the award. At the same time, petitioners sought a transfer to the District of Colorado, a request that was overtaken by the Colorado court's transfer of the plenary suit to this district.

----------End Footnotes----------

After the Colorado case was transferred here, petitioners sought and were granted a consolidation of the two proceedings. In so ruling, the District Court also determined that the motion to vacate should be dealt with before considering the plenary suit from Colorado. (Order dated June 7, 2000 at [*4] 2-3). Although the parties had briefed the vacatur motion in mid-1999, at the time that consolidation was being considered the petitioners advised the District Court that they wished to take some unspecified discovery and that respondents were resisting that expressed desire, purportedly on the basis that discovery was not normally permitted in aid of a motion to vacate an arbitral award. (See May 11, 2000 Tr. at 4-7, 13).

Based on argument heard at a conference conducted on May 11, 2000, the District Court specified that petitioners should serve their discovery requests--limited to issues raised by the motion to vacate--and that the resolution of all discovery disputes would await that service. (See id. at 19-20, 25; June 7, 2000 Order at 2-3). The court then referred the case to me to supervise further pretrial proceedings. (June 7, 2000 Order at 3).

After delays resulting from a lack of notice to the parties or to me of the District Court's disposition, we directed that petitioners serve their discovery demands and that the parties confer about them and then present any remaining disputes to the court for resolution. (Amended Order dated Sept. 7, 2000). These steps have [*5] now been taken, and we learn that petitioners have sought broad discovery, including interrogatory answers, document production and depositions, and that respondents resist any discovery. (See Motion to Compel at Exs. A, B). The matter having now been fully briefed in the form of

cross-motions to compel and for a protective order, we grant both motions in part.

A. The Factual Background

The record before us is fairly extensive, encompassing all of the papers previously filed in connection with the motion to vacate, as well as several other motions made and decided in both proceedings prior to the discovery imbroglio. Together with the discovery motion papers, they reflect that many of the events at issue and pertinent to our decision are not in meaningful dispute.

The merger agreement, which was approved by the shareholders of AME, provided that those shareholders would have the option to convert their AME shares into a contingent contractual right to receive so-called Earnout and Bonus payments that, depending upon the performance of Orthofix, Inc. during the years 1995 through 1997, could total as much as $ 18 million plus interest. (Merger Agreement @@ 2.06, 6.18). n3 [*6] Under the merger agreement, the determination of the amounts payable pursuant to the contractually specified formulae (id., @@ 2.06(b) - (f)) was entrusted to a so-called Review Committee composed, at least initially, of four individuals specified in the merger agreement. (Id., @ 6.18(b)).

----------Footnotes----------

n3 A copy of the merger agreement is found, inter alia, as Exhibit 1 to respondents' opposition to the motion to vacate ("Resps' Oppos. to Vacatur").

----------End Footnotes----------

The agreement provided that the decision of the Review Committee would be final and binding on the AME shareholders. (Id., @ 6.18(c)). It further stated that if the Review Committee was unable to agree, by majority decision, on the correct payout, the matter could be submitted by the Committee to binding

arbitration in New York under the auspices of the American Arbitration Association ("AAA"), and in such a case, the Committee members were authorized by the agreement to represent the interests of the AME shareholders at the arbitration. (Id., @@ 6.18(d), [*7] (f)).

On December 4, 1998, the Review Committee met and reached a unanimous decision that the appropriate payout was $ 6 million. (Resps' Oppos. to Vacatur, Ex. 4 at 4-5). As part of its decision, however, the Committee specified, possibly on the advice of counsel for Orthofix, that its payout determination would be conditioned on submission to and approval by an arbitrator. (Id., Ex. 4 at 5). To implement this decision, which was not publicly announced, the Committee and Orthofix arranged to submit the matter to an AAA arbitrator, apparently with the request that she approve their joint proposal for resolution of the matter--that is, an adoption of the calculations approved by the Review Committee. (Id., Exs. 5, 6). Their joint arbitral submissions (id., Exs. 5, 9) resulted in a "Consent Award" by the arbitrator adopting, in its entirety, the jointly proposed "settlement". (Id., Ex. 10).

By the time that this award was issued, the AME shareholders had learned of the decision of the Review Committee and had filed suit in Colorado against the Committee's members and against Orthofix. n4 In that suit, they asserted a variety of claims, including ones for breach of fiduciary [*8] duty and breach of contract. Once the arbitral award was announced, the defendants in that suit apparently asserted the award as a complete defense to some or all of plaintiffs' claims. The shareholders then filed their motion in this court to vacate the award.

----------Footnotes----------

n4 A copy of the First Amended Complaint in the plenary lawsuit is annexed as Exhibit A to petitioners' reply papers in support of their vacatur motion.

----------End Footnotes----------

Following the transfer of the Colorado case to this district, the District Court denied a motion by defendant Orthofix International to dismiss for lack of service and granted petitioner's motion to consolidate. (See Orders dated Feb. 29, 2000 and June 7, 2000). As for the nascent dispute between the parties concerning the propriety of discovery in aid of the motion to vacate the arbitral award, the court directed petitioners to serve their discovery requests, and postponed any determination as to the propriety of those requests until they had been formulated and served. (See June 7, 2000 Order [*9] at 2-3).

As noted, petitioners served interrogatories, document requests and deposition notices. (See Motion to Compel at Exs. A, B). They seek, inter alia, extensive disclosure of information concerning the decision-making process of the Review Committee; all communications between the members of that Committee and all other individuals affiliated with Orthofix, including that company's attorneys; all data pertinent to the substance of the decision as to the proper payout; and all contacts with the arbitrator.

In response, the respondents objected to all of the requests on a variety of grounds. Their broadest objection was that the information sought was irrelevant to the vacatur motion because discovery on such a motion is improper, except perhaps on a clear showing of arbitral misconduct. Respondents also objected to the inquiries as overbroad in any event, because all or virtually all of the factual allegations implicated by the vacatur motion involved facts that were not in real dispute, and that the only arguably pertinent documents--those submitted to the arbitrator--had already been made available to petitioners as exhibits to respondents' papers opposing the motion [*10] to vacate. In addition, respondents objected to the interrogatories as being in violation of Civil Rule 33.3(a) & (b), and challenged as well the use of assertedly improper definitions and instructions in the Rule 33 and 34 requests. They also took

exception to the notice to depose the Chief Executive Officer of Orthofix. Finally, they asserted that some of the requested documents were subject to the attorney-client privilege or work-product immunity, although they failed to identify which documents were assertedly protected in this manner. (See Motion to Compel, Ex. B).

ANALYSIS

A. The Scope of Our Task

Before addressing the merits of the discovery motions, we take note of an argument pressed by petitioners to the effect that the District Court has already determined the propriety of such discovery at its May 11, 2000 hearing and that the only task before us is to assess the adequacy of respondents' compliance with petitioners' requests. This assertion appears to take two forms.

In their more ambitious version, petitioners suggest that the District Court has already blessed, in advance, the full extent of their discovery campaign, and that the only question now before [*11] the court is whether respondents have fully complied. (See, e.g., Oct. 23, 2000 letter to the Court from Patrick D. Vellone, Esq., at 2) ("the only issue now before your Honor is Defendants' compliance, vel non, with the discovery requests already authorized by the Court and served by Plaintiffs"). The more cautious variant of petitioners' argument is that the District Court has already held that they are entitled to at least some discovery, and that therefore the respondents' repeated assertion that no discovery is warranted here has already been rejected. (See, e.g., Motion to Compel at PP4-5, 7).

Neither argument is sustainable. Plainly, the District Court did not endorse discovery requests that had not yet been articulated. Indeed, petitioners' assumption to the contrary is pure wishful thinking. More fundamentally, however, the transcript of the May 11 hearing reflects that the District Court made no ruling at all concerning the propriety of discovery. Rather, it simply concluded--quite reasonably--that the justification for any discovery

request should not be determined in the abstract, and that petitioners' specification of what they were seeking would greatly facilitate [*12] the court's assessment of what discovery, if any, was proper. We therefore turn to that question.

B. Applicable Standards

We start by noting that discovery in a post-arbitration judicial proceeding to confirm or vacate is governed by the Federal Rules of Civil Procedure, but is available only in limited circumstances, where relevant and necessary to the determination of an issue raised by such an application. See, e.g., Lyeth v. Chrysler Corp., 929 F.2d 891, 898-99 (2d Cir. 1991); Sanko Steamship Co. v. Cook Industries, 495 F.2d 1260, 1264-65 (2d Cir. 1973); National Hockey League Players' Assn'n v. Bettman, 1994 U.S. Dist. LEXIS 1160, 1994 WL 38130, at **2, 7 (S.D.N.Y. Feb. 4, 1994) (citing cases); Pollak & Co. v. Shelgem Ltd., 1993 U.S. Dist. LEXIS 8862, 1993 WL 248804, at **1-2 (S.D.N.Y. June 30. 1993); I.A.M. Nat'l Pension Fund Benefit Plan A v. Allied Corp., 97 F.R.D. 34, 36 (D.D.C. 1983). See also Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 702 (2d Cir. 1978), n5 The need for the court to control the process rests principally on the premise that arbitration is intended to be a relatively prompt and [*13] inexpensive procedure. See, e.g., Lyeth, 929 F.2d at 898 (quoting Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 337 (5th Cir. 1974)); National Hockel League Players' Ass's, 1994 WL 38130, at *2; Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1495-96 (S.D.N.Y. 1987). See generally Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983); Legion Ins. Co. v. Insurance Gen'l Agency, Inc., 822 F.2d 541, 543 (5th Cir. 1987). Moreover, in view of the narrowness of the grounds on which an arbitral award may be challenged, the need for discovery is typically not nearly as acute as in other civil lawsuits. See, e.g., id. at 542-43. Necessarily, then, the liberality that normally attends

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discovery in civil litigation is not appropriate in this context. In addition, any inquiry that is targeted at the arbitrator is particularly suspect, since the arbitrator's coerced involvement in post-award litigation will inevitably intrude upon the arbitrator's quasi-judicial function and discourage qualified individuals [*14] from offering their services as arbitrators. E.g., National Hockey League Players' Ass'n, 1994 WL 38130, at *2, 7; Temporary Commission of Investigation v. French, 68 A.D.2d 681, 690-91, 418 N.Y.S.2d 774, 779 (1st Dep't 1979). Cf. Austern v. Chicago Bd. of Options Exchange, 898 F.2d 882, 886 (2d Cir.), cert. denied, 498 U.S. 850, 112 L. Ed. 2d 107, 111 S. Ct. 141 (1990).

----------Footnotes----------

n5 We note that respondents appear to suggest that the arbitration in question was an international arbitration because the Orthofix entity that was a party to it is incorporated under the laws of the Netherlands Antilles. (Resps. Protective Order Memo at 11) (referring to "international commercial arbitration awards"). Their implicit point may be that, if so characterized, the arbitration and subsequent motion to vacate would be governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C. @ 201, and not by the Federal Arbitration Act, 9 U.S.C. @ 1 et seq., and thus the availability of discovery might be still more restricted. Since respondents only hint at an analysis of this point, rather than providing one, we see no basis to explore it in depth, although we have the greatest doubt, in the circumstances of the merger transaction, that the arbitration in question can properly be excluded from the ambit of the FAA merely because one of the Orthofix entities was nominally a foreign corporation. In any event, the application of the Convention would almost certainly not alter the rules applied to this proceeding, which is being conducted in the state

in
which the award was made. See, e.g., Yusuf Ahmed Alghanim & Sons v. Toys "R" Us,
Inc., 126 F.3d 15, 20-23 (2d Cir. 1997), cert. denied, 522 U.S. 1111, 140 L. Ed.
2d 107, 118 S. Ct. 1042 (1998) (if proceeding is in state where arbitral award
was made, Convention permits application of domestic law).

----------End Footnotes----------

[*15]

In judging discovery requests in this context, the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the
party challenging the award and the degree to which those issues implicate factual questions that cannot be reliably resolved without some further disclosure. See, e.g., Sanko S.S. Co., 495 F.2d at 1263; National Hockey League
Players' Ass'n, 1994 WL 38310, at *2-7.

In this respect, we note that respondents misstate the law in seemingly contending that no discovery is permitted absent "clear evidence of impropriety.
" (Defts' Memo at 11 (quoting Andros Compania, 579 F.2d at 703). As is evident
both from Andros and from subsequent court decisions that have interpreted the
cited phrase, that standard applies only to discovery inquiries directed at the
arbitrator and only when the goal is to impugn the validity of the arbitrator's
decision. See id. at 702 (acknowledging applicability of federal civil rules to
post-arbitral [*16] discovery, but observing that "in the special context of
what are in effect post hoc efforts to induce arbitrators to undermine the finality of their own awards, . . . any questioning of the arbitrators should be
handled pursuant to judicial supervision and limited to situations where clear
evidence of impropriety has been presented"). Accord, e.g., National Hockey League Players' Ass'n, 1994 WL 38310, at *7; Sidarma Societa Italiana Armamento,
SPA, Venice v. Holt Marine Inds., Inc., 515 F. Supp. 1302, 1309 (S.D.N.Y. 1981),

aff'd 681 F.2d 802 (2d Cir. 1981). See also Lyeth, 929 F.2d at 899.

C. Discovery Rulings

To assess petitioners' demands, we start by summarizing the arguments that they press in support of their motion to vacate and the responses of their opponents. First, petitioners assert that the Review Committee's decision to seek arbitration violated the terms of the merger agreement, which authorized arbitration only if the Review Committee was unable to reach a majority decision on the amount of the payouts. Since the decision of the Committee as to the amount of the payouts was unanimous, petitioners [*17] contend that the award is invalid because the merger agreement does not reflect an agreement to arbitrate under the circumstances presented here. (Motion to Vacate at 8-9).

Second, petitioners argue that the Committee members could not represent them because of conflicts of interest. Specifically, they contend that the members were conflicted because they were all either current or former officials and directors of Othofix, which stood to profit by minimizing the amount of the payouts to the AME shareholders. They also assert that the independence of the Committee members was compromised by their reliance on the advice of attorneys who were already serving as trial counsel to Orthofix in connection with the AME shareholders' pending lawsuit. In addition, petitioners contend that the participation of the Committee members violated the terms of the merger agreement, which required that two of the members come from AME and not from Orthofix. (Id. at 9-11).

Third, petitioners contend that the award should be invalidated under 9 U.S.C. @@ 10(a)(1) and (3) as having been procured by "corruption, fraud or undue means" or as having involved "misbehavior" that was [*18] prejudicial to a "party" to the arbitration. In effect, they argue that the arbitral process and award were a sham in that they were intended to shield the Committee members' prior decision on the payouts from independent scrutiny. (Id. at 11-12).

In pressing this contention, petitioners argue that the decision on the payout amounts was made before seeking a consented-to arbitral award and that the decision was unanimous, thus precluding any basis for an arbitration. They further note that the arbitral decision was explicitly based on the prior agreement of the Committee and Orthofix as to its terms, which simply embodied the Committee's decision. In support of this "party misconduct" argument, they note that the decision by the Committee and the resort to arbitration were to be kept secret until an award had been obtained, and that the affected AME shareholders were thus not only not participants in the arbitration, but kept in the dark as to its commencement. (Id.).

Fourth, petitioners argue that the award should be vacated under 9 U.S.C. @ 10(a)(4) because the arbitrator so exceeded her powers that she could not render an effective award. The specific [*19] error of the arbitrator that petitioners identify is her failure to pay heed to the limitation in the merger agreement on the authority of the Review Committee to seek arbitration. As noted, petitioners say that such resort was permitted only if the Committee members were unable to reach a majority consensus on the payout, whereas they reached a unanimous agreement. Petitioners further argue that the arbitrator exceeded her powers because the shareholders were effectively unrepresented at the arbitration, and yet the arbitrator issued a decision purporting to determine their economic rights and interests. (Id. at 12-13).

Apart from these arguments for vacatur, petitioners appear to argue, in the alternative and on the basis of some of the same grounds, that even if not vacated, the arbital award should be deemed not to bind them. Thus, they assert that they were not parties to the arbitration, and that the award therefore cannot preclude them from asserting their right to a larger payout, since an arbitrator's decision cannot bind non-parties. (Id. at 13-14). They further argue, citing section 28(5)(e) of the Restatement (Second) of Judgments, that

the award cannot bind [*20] them because the issue of the payouts was not "fully and fairly litigated" since the decision was based solely on a "' settlement' contrived" by respondents and not disclosed to the shareholders until after issuance of the award. Finally, they contend that the award is not binding because the arbitration was by a single arbitrator rather than the three arbitrators contemplated by the merger agreement. (Motion to Vacate at 14-15).

In answering these arguments, respondents do not dispute the specific factual contentions of the petitioners. Rather, they principally rely on the terms of the merger agreement, and assert that their actions complied with those terms in all material respects. In further support of their position, they proffer the pertinent contractual documents; the minutes of the December 4, 1998 meeting of the Review Committee, at which it reached its payout decision; the submission to the AAA of the consented-to request for an arbitral award embodying a specific result; all other documents submitted to the arbitrator; the arbitrator's award; and all pertinent correspondence with the shareholders' counsel.

In light of the parties' framing of the issues on the motion to [*21] vacate, we conclude that very little of the discovery sought by petitioners is justified. As noted, they seek a broad array of discovery, encompassing not only the information already provided in documentary form, but all materials and other information pertinent to the Review Committee's payout decision itself and all advice of counsel received in connection with this matter. Despite the breadth of these requests, on their discovery motion the petitioners offer no explanations as to why they require any of the sought-after discovery in order to support their application to vacate the arbitral award.

In the absence of any effort by petitioners to justify any of their discovery requests, we have chosen not to deny their application out of hand, and instead have reviewed the various requests to determine whether a need for any of them

is so self-evident as to justify honoring it. In view of the nature of the issues presented on the motion to vacate--as distinguished from petitioners' plenary suit against the respondents--we see no basis for far-ranging discovery. The events at issue are documented by the materials previously provided by both sides in connection with prior motion practice, [*22] and the questions posed by the motion to vacate are virtually all purely legal in nature since they rest upon a bedrock of undisputed facts.

There are two areas, however, in which we discern at least some cloudiness that may impact on a resolution of the vacatur motion. The first concerns the circumstances in which the Review Committee members included in their decision the requirement that the payout figures be approved by an arbitrator. As noted, the merger agreement could be read as authorizing arbitration only if the Committee could not reach a majority decision, and it is unclear whether the inclusion of the arbitration provision in the December 4 decision was preceded by an inability on the part of the Committee members to reach a decision on the payout figures or was attributable to some other factor. n6

----------Footnotes----------

n6 We suggest no views as to whether either of these scenarios would prove dispositive of the vacatur motion. Our only point is that the context in which the Committee's decision on this matter was made is not revealed by the documentation provided thus far and may be pertinent to petitioners' contention that the arbitration was invalid ab initio because the only authority for it was the merger agreement, which arguably authorized such a process only on a precondition that may not have existed.

----------End Footnotes----------

[*23]

The second area concerns whether the arbitrator was given any reason to believe that she was authorized to do anything other than approve the " settlement" between the Committee members and Orthofix. Respondents represent that all documents provided to the arbitrator have been produced in this proceeding, apparently as exhibits to the motion papers, but we are unclear as to whether there were any other forms of communication with the arbitrator or the AAA from the time of the original submissions to the issuance of her award. Indeed, exhibits 6 and 7 of respondents' opposition to the vacatur motion indicate that a conference call was held with the AAA to clarify what the arbitrator was expected to do. The substance of such discussions should be disclosed. Although the record appears fairly clear on the point that the Committee and the company were seeking, as petitioners suggest, only a routine approval by the arbitrator of an uncontested Committee decision, any lingering question on that point can and should be resolved.

The foregoing areas define the limits of permissible discovery at present. Thus, petitioners may obtain (1) any non-privileged documents that reflect the Committee's [*24] consideration of whether and why to require arbitration despite its unanimous adoption of a payout result, and (2) a list of the individuals present at any such discussions. They may also depose the Committee members and others privy to the discussion of that issue, with the depositions to be limited to that area. n7

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n7 Petitioners may not inquire at this time into the rationale for the payout decision itself.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

To ensure the prompt completion of these steps, respondents are to advise the plaintiffs as to whether there are any documents that correspond to our description and are to provide petitioners with those documents within one week. If any are deemed privileged, respondents are to provide a privilege log at

the
same time. Any privilege issues that cannot be resolved within one week thereafter are to be presented to the court by a motion for a protective order
by December 21, 2000. Depositions, if any, are not to exceed two hours in length, and are to be completed by January 15, 2001.

With regard to any undisclosed [*25] communications with the arbitrator or
the AAA, respondents are to advise petitioners within one week in writing whether there were any and, if so, whether they were written or oral. If written, the pertinent documents are to be provided at the same time. If oral,
respondents are to identify who participated in the communications, and petitioners may depose them (except for the arbitrator) in accordance with the
foregoing schedule and with the same temporal limitations.

In all other respects, petitioners' motion to compel is denied. In reaching
this conclusion, we recognize that in most civil litigation, the presumption is
that discovery may proceed if it targets information that, judged by a very liberal standard, is relevant to the issues in the case. For reasons noted, that
is not true in the special circumstances of a challenge to an arbitral award,
and in this case we are unable to discern any additional bodies of information
that are both crucial to the resolution of the vacatur motion and not yet available to the petitioners. n8

----------Footnotes----------

n8 We have found it unnecessary to address a variety of other grounds asserted by respondents for objecting to petitioners' discovery requests. We do
note, however, that for the most part petitioners' interrogatories violate Civil
Rule 33.3 and were not–as petitioners contend–approved in advance by the District Court. As for the request by respondents to preclude a deposition of
the Chief Executive Officer of Orthofix, that is denied. If he was a participant
in the deliberations of the Review Committee, his testimony may be taken, subject to the limitations that we have imposed.

----------End Footnotes----------

[*26]

CONCLUSION

For the reasons noted, petitioner's motion to compel is granted only to the extent indicated. In all other respects, we grant respondents' motion for a protective order.

Dated: New York, New York

December 4, 2000

MICHAEL H. DOLINGER

UNITED STATES MAGISTRATE JUDGE