

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEDTRONIC SOFAMOR DANEK, INC.,)
SOFAMOR DANEK, L.P., and SOFAMOR)
DANEK HOLDINGS, INC.,)
)
Plaintiffs,)
)
vs.) No. 99-2656-GV
)
OSTEOTECH, INC.,)
)
Defendant.)

ORDER DENYING OSTEOTECH'S MOTION TO COMPEL

Before the court is the December 18, 2001 motion of Osteotech, Inc., to compel Dr. Gary K. Michelson and Karlin Technology, Inc., non-parties, to produce documents responsive to subpoenas served in this case. This matter was referred to the United States Magistrate Judge for determination.

A hearing was held on January 4, 2002, in which this court issued a ruling from the bench denying, *sua sponte*, Osteotech's motion to compel. Attorneys for Osteotech and Medtronic Sofamor Danek were present at the hearing.¹

Dr. Michelson and Karlin Technology, Inc. are residents of California. The subpoenas issued from the Western District of

¹ Dr. Michelson, Karlin Technology, and their attorneys were not present at the hearing.

Tennessee, for the production of documents relating to the above-captioned lawsuit. The subpoenas designated the law offices of Dorsey & Whitney in Minneapolis, Minnesota as the site for production and inspection of the requested documents.

This court denied Osteotech's motion to compel because the subpoenas are invalid and the motion to compel was improperly filed with this court. According to Rule 34(c) of the Federal Rules of Civil Procedure, "a person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45." This particular issue is governed by Federal Rule of Civil Procedure 45(a)(2), which states in pertinent part: "[I]f separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made." According to the Fifth Circuit, "[a] district court cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district." *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993). The subpoenas should have issued from the appropriate district court in Minnesota, the place designated for production, rather than the Western District of Tennessee. Hence, the subpoenas are invalid. See *Echostar Communications Corp. v. The News Corp. Ltd.*, 180 F.R.D. 391, 397 (D. Col.

1998) (stating that subpoenas were invalid as they did not comply with Fed. R. Civ. P. 45(a)(2)); *McNerney v. Archer Daniels Midland Co.*, 164 F.R.D. 584, 588 (W.D.N.Y. 1995) (same).

Further, Federal Rule of Civil Procedure 37(a)(1) states that "[a]n application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken." A motion to compel the production of documents responsive to the subpoena duces tecum must be filed with the appropriate district court in Minnesota rather than with this court.

For the reasons set forth above, Osteotech's motion to compel is denied.

IT IS SO ORDERED this 7th day of January, 2002.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE