

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

MEDTRONIC SOFAMOR DANEK, INC.,)
)
Plaintiffs/)
Counterclaim Defendant))

vs.)

No. 01-2373 MLV

GARY K. MICHELSON, M.D.,)
and KARLIN TECHNOLOGY, INC.,)
)
Defendants/)
Counterclaimants,))

consolidated with)

MEDTRONIC SOFAMOR DANEK, INC.,)
and MEDTRONIC, INC.,)
)
Plaintiffs,))

vs.)

No. 03-2055 MLV

GARY K. MICHELSON, M.D.,)
and KARLIN TECHNOLOGY, INC.,)
)
Defendants.)

ORDER OVERRULING PLAINTIFF'S OBJECTIONS TO SPECIAL MASTER
BALARAN'S MARCH 19, 2004 ORDER

On March 26, 2004, the plaintiff, Medtronic Sofamor Danek, Inc. ("Medtronic"), filed a motion objecting to and seeking de novo review of Special Master Alan Balaran's March 19, 2004 order regarding Gary K. Michelson, M.D.'s, ("Michelson") and Karlin Technology, Inc.'s ("KTI") request for *in camera* review of approximately 2,000 documents designated as privileged by Medtronic

that were not challenged by the defendants in the special master's initial review of Medtronic's privilege logs. This matter was referred to the United States Magistrate Judge for determination. For the reasons that follow, Medtronic's objections to the special master's March 19, 2004 order are overruled and review is denied.

On September 29, 2003, the parties in this case entered into a stipulation that they would submit disputed privilege log entries to a special master for *in camera* review to determine whether the disputed documents were discoverable. That stipulation and corresponding court order also provided that the special master's "findings, rulings or orders on the discoverability of disputed documents shall be final." Stipulation and Order Re Review by Special Master of Privilege Logs and Docs. Claimed to be Privileged, *Medtronic Sofamor Danek, Inc. v. Michelson*, Civil No. 01-2373 at 3 (W.D. Tenn. October 8, 2003).

The challenged documents at issue in this matter are documents that were sent or copied to in-house attorneys at Medtronic. Even though these in-house communications were not originally contested, the defendants sought review of the documents by the special master on February 26, 2004, maintaining that Medtronic's privilege log failed to adequately demonstrate whether these 2,000 communications reflected legal as opposed to business communications. In response, Medtronic objected to the review of the documents by the special master on the basis that Michelson and KTI's request exceeded the scope of the special master's authority to which Medtronic agreed in the September 29, 2003 stipulation; that the request was untimely; that the defendants' request was based on

"sheer speculation;" that the additional documents do not contain non-privileged communications; and that the defendants' request is motivated by a desire to obstruct Medtronic's ability to prepare for trial.

After addressing each of Medtronic's objections and the legal standards governing privilege logs, Special Master Balaran ordered Medtronic on March 19, 2004 to produce 1,700 of the 2,000 in-house documents for *in camera* review because Medtronic's privilege log descriptions did not "sufficiently convey the 'legal' character of the communications to permit Defendants an informed objection." *Req. for Review of Additional Category of Docs., Medtronic Sofamor Danek, Inc. v. Michelson*, Civil No. 01-2373 MLV at 4 (W.D. Tenn. March 19, 2004). Additionally, Special Master Balaran found that the defendant's delay in presenting the request did not constitute a waiver given "Plaintiff's repeated requests for reconsideration." *Id.* He also found that the defendants' request would not prejudice Medtronic's ability to prepare for trial and that his authority to review the new category of documents fell "squarely within the scope of the Stipulation Agreement." *Id.*

On March 26, 2004, Medtronic filed its objections with the district court to the special master's March 19, 2004 order. Medtronic contends that the special master's order is clearly erroneous, contrary to law, and exceeds the scope of the authority granted to the special master in the parties' September 29, 2003 Stipulation. Medtronic correctly asserts that Rule 53 of the Federal Rules of Civil Procedure governs objections to a special master's order. Rule 53(g)(3) provides that "[t]he court must

decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that: (A) the master's findings will be reviewed for clear error, or (B) the findings of a master appointed under rule 53(a)(1)(A) or (C) will be final." FED. R. CIV. P. 53(g)(3) (emphasis added). Medtronic contends that Rule 53(g)(3)'s exclusion of mandated de novo review where the parties have agreed that the special master's order will be final does not apply in the instant case because the defendants' request for *in camera* review exceeds the scope of the parties' stipulation and the court's October 8, 2003 order regarding review. Specifically, Medtronic argues that the language of the stipulation provided that the parties would submit all of the challenged privilege log entries as of the date of the stipulation for *in camera* review and that challenges to entries from logs "yet to be produced" would be submitted to the special master on an "expedited schedule to be agreed upon by the parties. (Pl.'s Objections to Special Master Balaran's March 19, 2004 Order at 6.) Taking this language in its literal sense, Medtronic contends that the newly disputed category of documents falls outside of the scope of the stipulation and that the defendants waived their right to challenge the previously unchallenged entries by not requesting review of those items during the special master's initial review or in an expedited fashion thereafter.

This court finds Medtronic's argument to be without merit and not in keeping with the overall spirit of the parties' stipulation. The court's October 8, 2003 order states that the parties had

determined that appointment of a special master was appropriate "[i]n order to resolve their disputes concerning their respective claims of privilege and work product as to documents corresponding to disputed entries on their respective privilege logs." Stipulation and Order Re Review by Special Master of Privilege Logs and Docs. Claimed to be Privileged, *Medtronic Sofamor Danek, Inc. v. Michelson*, Civil No. 01-2373 at 2 (W.D. Tenn. October 8, 2003). The court's order further provides that "[t]he parties also may submit briefing to the Special Master regarding other disputed documents or issues." *Id.* at 5. The aforementioned provisions coupled with the parties' stipulation as to the finality of the special master's rulings indicate that the defendants' request for review of the new category of documents is within the scope of the parties' stipulation. The court also finds it important to note that Medtronic was the party that originally insisted that in the interest of efficiency the special master's rulings should be final and nonappealable. (Decl. of Dan Sedor in Supp. of Def.'s Mem. in Opp'n to Pl.'s Objections to Special Master Balaran's March 19, 2004 Order, Ex. A at 1.)

Medtronic nevertheless argues that even if the new category of documents is subject to the finality provision of the parties' stipulation, the advisory committee notes to the 2003 amendments to Rule 53(g)(3) provide that a court may withdraw its consent to a stipulation for finality and decide a special master's findings of fact de novo. (Pl.'s Objections to Special Master Balaran's March 19, 2004 Order at 5-6.) In light of the discretion provided to the court under the advisory committee notes of Rule 53(g)(3), the

court exercises its discretion and chooses not to review the findings of the special master.

Accordingly, the court finds that the rulings of the special master are final, and no appeal will be allowed. It appears that the 1700 documents at issue have already been provided to the special master. The special master is directed to proceed with his review.

IT IS SO ORDERED this 19th day of April, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE