

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

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

vs.)

No. 01-2373-M1V

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

and)

GARY K. MICHELSON, M.D.,)
)
Third Party Plaintiff,.)

vs.)

SOFAMOR DANEK HOLDINGS, INC.)
)
Third Party Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO
COMPEL SUPPLEMENTAL PRODUCTION OF DOCUMENTS AND 2) COMPLETE
PRIVILEGE LOG

Before the court is the March 27, 2003 motion of the defendants, Gary K. Michelson, M.D., and Karlin Technology, Inc., to compel the plaintiff, Medtronic Sofamor Danek, Inc., to supplement its production of documents and its privilege log in compliance with Rule 26(e)(2). (Docket No. 332.) The defendants request that Medtronic be ordered to produce all readily available

responsive documents and a completed privilege log within five days of the court's order and on a rolling bases thereafter no later than ten days after locating or discovering a responsive document. The motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted in part and denied in part.

Thus far, the defendants have served eight sets of requests for production of documents on Medtronic, totaling 1742 separate requests overall. The defendants' first request for production was served in September, 2001. Subsequent requests were served in November of 2001, April of 2002, June of 2002, August of 2002, and December of 2002.

Medtronic made an initial production of documents in February of 2002 through May of 2002. It supplemented its production on April 25 and 26, 2003 with fourteen compact discs containing electronic images of more than 130,000 pages of responsive documents. The production in April of 2003 represented more than half of Medtronic's supplemental production of documents. To date, Medtronic claims that it has produced more than 1.25 million pages of documents. In its response to the defendants' motion, Medtronic indicates that it "expects to produce the remainder of its supplemental production (subject to further supplementation, as necessary) within the next month." (Opp. To Defs.' Mot. to Compel

at 4.) Medtronic expressly acknowledges its continuing duty to seasonably supplement its responses when it learns that its prior responses are incomplete.

In addition, Medtronic provided its first privilege log to the defendants in August of 2002 and subsequent logs on a rolling basis thereafter rather than waiting until the privilege log was finished. It provided a second installment in October of 2002, the third installment in February 2003, the fourth installment in March of 2003, and a fifth installment on April 1, 2003. Medtronic proposes in its response to the motion to compel to provide the sixth and final installment of its privilege log "within two weeks of the completion of the supplemental production." *Id.*

The deadline for discovery in this case is November 10, 2003, with a trial date of January 10, 2004.

Rule 26(e) (2) governs supplementation of discovery responses. It provides as follows:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Fed. R. Civ. P. 26(e) (2). The rule does not define "seasonably." The Advisory Committee Notes explain that "[s]upplementations need

not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches." Fed. R. Civ. P. 26(e) advisory committee notes, 1993 amendment.

After careful consideration of the parties' briefs and exhibits, the court finds that Medtronic as seasonably supplemented its responses to the defendants' request for production of document and its privilege log. To the extent the defendants' motion requests a ruling that Medtronic has not complied with its duty to supplement, the motion is denied. Based on Medtronic's representations that it will produce the remainder of its supplemental production within the next month and its supplemental privilege log two weeks thereafter, Medtronic is accordingly ordered to produce the remainder of its supplemental production on or before May 30, 2003, and a supplemental privilege log on or before June 15, 2003.¹

To avoid any arguments over whether future supplementations are reasonable and in keeping with the spirit of Rule 26(e) (2) to supplement more frequently as the trial date approaches, the court further directs that Medtronic supplement its production of

¹ This order does not apply to electronic discovery except to the extent that electronic documents or mail exist in hard copy. Electronic discovery is the subject of a separate motion and order.

documents again on August 30, 2003 and October 30, 2003, and submit supplemental privilege logs on September 15, 2003 and November 10, 2003.

IT IS SO ORDERED this 12th day of May, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE