

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

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MEDTRONIC SOFAMOR DANEK, INC., )  
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 Plaintiffs/ )  
 Counterclaim Defendant )  
 vs. ) No. 01-2373 MIV  
 )  
 GARY K. 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.)

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ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO RESPOND  
FULLY TO INTERROGATORY NO. 12 AS MOOT

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Before the court is the September 12, 2003 motion of the plaintiff Medtronic Sofamor Danek, Inc. ("Medtronic"), seeking to compel defendants Gary K. Michelson ("Michelson") and Karlin Technology, Inc. ("KTI") to fully respond to Interrogatory No. 12 of Medtronic's amended first set of interrogatories. The motion was referred to the United States Magistrate Judge for a determination. Michelson and KTI timely responded on October 6, 2003. For the reasons that follow, this court denies Medtronic's motion to compel Michelson and KTI to respond fully to interrogatory No. 12 as moot.

Briefly, this case involves a dispute between the parties over Medtronic's rights to intellectual property invented by Michelson

in the field of spinal fusion technology. The motion presently before this court involves Michelson's and KTI's alleged failure to provide Medtronic with the details underlying Michelson's and KTI's contentions that Medtronic has failed to comply with or has breached the parties' agreements.

On February 20, 2002, Medtronic served its amended first set of interrogatories on Michelson and KTI. Included in that set of interrogatories was Interrogatory No. 12 which requested that Michelson and KTI "[s]tate all facts relating to Your assertion that [Medtronic] has failed to comply with or has breached any of the Parties' Agreements." (Mem. in Supp. of Pl.'s Mot. to Compel Defs. to Resp. Fully to Interrog. No. 12, Ex. 1 at 11.) Michelson and KTI served its initial responses on April 8, 2002. Medtronic expressed its dissatisfaction with Michelson's and KTI's response to Interrogatory No. 12 in two letters dated June 4, 2003 and July 5, 2002. (*Id.*, Ex. 3 at 11; *id.*, Ex. 4 at 7.) Subsequently, Michelson and KTI agreed to supplement their response to provide additional facts. (*Id.*, Ex. 6 at 5.) They served their supplemental responses on September 6, 2002 and a third supplemental response on June 27, 2003. (*Id.*, Ex. 7 at 155; *id.*, Ex. 8 at 171.)

On July 27, 2003, Medtronic contacted Michelson and KTI by letter and indicated that their responses were still deficient. (*Id.*, Ex. 9 at 1-2.) Michelson and KTI agreed to supplement their responses again to provide additional factual information related to Medtronic's alleged breaches; however, they would not agree to supplement their response to provide detail "regarding whether

[Michelson and KTI] have provided [Medtronic] notice of each purported breach and an opportunity to cure each purported breach." (*Id.* at 4.)

Before Michelson and KTI filed their fourth supplemental response, Medtronic filed the motion to compel that is presently at issue. Medtronic asserts that Michelson and KTI "refuse to set forth with specificity all facts that support their claims of breach." (*Id.* at 2.) Specifically, Medtronic asserts that Michelson and KTI refuse to do the following:

(a) identify products that they contend are royalty-bearing to Defendants, and explain how [Medtronic] purportedly breached the Parties' Agreements by failing to pay royalties to Defendants on each identified product; (b) provide detail regarding when and how [Medtronic] purportedly breached the "Best Efforts" provision of the License and Purchase Agreements; (c) identify all contractually-covered products or literature that Defendants contend are not marked or properly designated, and explain how each contractually-covered product or literature fails to provide proper patent marking and name recognition; (d) provide detail regarding how [Medtronic] purportedly breached confidentiality agreements including the identification of specific technology that was disclosed pursuant to each confidentiality agreement, and names of participants, dates, and locations of meetings where technology was purportedly disclosed to [Medtronic] pursuant to each confidentiality agreement; (e) provide detail regarding when and how [Medtronic] purportedly breached the covenant of good faith and fair dealing with respect to the Parties' Agreements and the "allocation agreements;" and (f) provide detail regarding whether Defendants have provided [Medtronic] notice of and an opportunity to cure each purported breach.

(*Id.*)

Shortly after Medtronic filed its motion to compel, Michelson and KTI filed its fourth supplemental response to Interrogatory No.

12 on September 19, 2003 with the caveat that they would continue to supplement as necessary as additional information became available. (Defns.' Opp'n to Pl.'s Mot. to Compel Resp. to Interrog. No. 12 at 6; *id.*, Ex. 2 at 2.) In light of their supplementation, Michelson and KTI requested that Medtronic withdraw its motion. (*Id.*) Medtronic declined without any comment on the substantive deficiencies of the fourth supplemental response. (*Id.*, Ext. 4 at 1.) In turn, Michelson and KTI filed their fifth supplemental response on October 6, 2003 and reiterated their commitment to supplement as additional information became available. (*Id.*, Ex. 6 at 2.) However, Michelson and KTI continued to refuse to state facts in response to Interrogatory No. 12 regarding whether they provided Medtronic with notice of Medtronic's breaches and an opportunity to cure.

#### ANALYSIS

Michelson and KTI oppose Medtronic's motion on two grounds: (1) that Medtronic's motion to compel is moot in light of Michelson and KTI's fourth and fifth supplemental responses to Interrogatory No. 12 and (2) that they are not required to provide Medtronic with facts regarding whether they provided Medtronic with notice of its breaches and an opportunity to cure because such facts are beyond the scope of Interrogatory No. 12. This court agrees on both counts.

First, it appears to the court as though Medtronic and KTI have answered and continue to answer Interrogatory No. 12. They have supplemented their initial response five times and have represented to the court that no other information is available at

the present time. Moreover, Michelson and KTI have promised to continue to supplement their response as more information becomes available. Accordingly, the motion to compel is now moot and is denied as such.

Secondly, the wording of Interrogatory No. 12 requires Michelson and KTI to state all facts relating to their assertion that *Medtronic* breached the parties' agreements. The interrogatory does not make inquiry of facts relating to Michelson's and KTI's own compliance with the contracts. Therefore, any information relating to the notice Michelson and KTI provided to *Medtronic* about *Medtronic*'s breaches and opportunity to cure is beyond the scope of Interrogatory No. 12.

#### CONCLUSION

For all of the foregoing reasons, *Medtronic*'s motion to compel as to Interrogatory No. 12 is moot and denied as such. Each party is to bear the cost of its own attorney fees.

IT IS SO ORDERED this 28th day of October, 2003.

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DIANE K. VESCOVO  
UNITED STATES MAGISTRATE JUDGE