

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-Mlv
)
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 DEFENDANTS' MOTION TO COMPEL SEPARATE RESPONSES TO
INTERROGATORY NO. 17 AND INTERROGATORY NO. 16

Before the court is the motion of the defendants Gary K. Michelson, M.D. ("Michelson") and Karlin Technology, Inc. ("KTI"), filed November 10, 2003, pursuant to Rule 37 of the Federal Rules of Civil Procedure, seeking an order compelling the plaintiff, Medtronic Sofamor Danek, Inc. ("Medtronic"), to file separate responses to Michelson's Interrogatory No. 17 and KTI's Interrogatory No. 16. Michelson & KTI contend that Medtronic's responses and its supplementations failed to distinguish its "best efforts" under the Purchase Agreement from its "best efforts" under

the License Agreement. The motion was referred to the United States Magistrate Judge for determination. Medtronic timely responded on December 3, 2003. For the following reasons, the motion to compel is granted.

Interrogatory No. 17 of Michelson's Second Set of Interrogatories has been the subject of three previous orders of this court. Interrogatory No. 17, propounded over a year ago on June 6, 2002, requested Medtronic to "[d]escribe all actions that you contend constitute your use of best efforts to obtain regulatory approval and to actively promote the sale of the Medical Device (as defined in the Purchase Agreement)." In its first order addressing Michelson's Interrogatory No. 17, the court overruled Medtronic's numerosity objections. In its next order addressing this interrogatory, the court found Medtronic's first supplemental response to be deficient and instructed Medtronic to provide a detailed narrative response. In its third order entered September 23, 2003 regarding this interrogatory, the court clarified its earlier ruling and specifically limited the scope of Interrogatory No. 17 and Medtronic's response to non-threaded medical devices covered by the Purchase Agreement and not threaded products covered by the License Agreement. Before the court issued that ruling, however, Medtronic had filed a third supplemental response. Michelson complained, nevertheless, that Medtronic's third supplemental response continued to blur threaded and non-threaded

devices and improperly identified some products as covered by both agreements. In its September 23, 2003 order, the court noted that Medtronic's third supplemental response "distinguishe[d] between threaded and non-threaded implants," and the court concluded that, on the whole, Medtronic had substantially complied with the court's order and declined to impose sanctions.

Thereafter, KTI served its own interrogatories. Interrogatory No 16 of KTI's Fifth Set of Interrogatories, propounded on September 30, 2003, asked Medtronic for similar "best efforts" information with respect to the License Agreement: "[d]escribe all actions that you contend constitute your use of best efforts to obtain regulatory approval and to actively promote the sale of the Medical Device (as defined in the License Agreement)." On November 3, 2003, Medtronic responded to KTI's Interrogatory No. 16 by incorporating in the entirety its previous responses to Michelson's Interrogatory No. 16.

Michelson and KTI now contend that Medtronic's responses which combine its "best efforts" under the Purchase Agreement and under the License Agreement do not adequately address the information sought in the interrogatories as they relate to the separate agreements. Medtronic, in response, continues to insist that it cannot separate its "best efforts" between the two agreements because some devices incorporate technology covered under both agreements and because development of devices covered by the

License Agreement with KTI assisted with promotion and development of devices covered by the Purchase Agreement.

In light of the fact that there are two separate agreements with separate parties to each agreement, a jury or the court could find that Medtronic breached its obligation to use its "best efforts" under one agreement but not necessarily under the other. Thus, Michelson and KTI are entitled to know what specific actions Medtronic contends it took to satisfy its obligations under each separate agreement. Accordingly, Medtronic is ordered to supplement its responses to both Medtronic's Interrogatory No. 17 and KTI's Interrogatory No. 16 within ten days of the date of entry of this order, setting forth in each response the actions it contends constitutes its "best efforts" as related to that particular agreement. If a device incorporates technology from both agreements, then Medtronic should include its "best efforts" as to that particular device in its answers to both Michelson's Interrogatory No.17 and KTI's Interrogatory No. 16. Similarly, if its "best efforts" as to one agreement promoted devices covered by the other agreement, Medtronic should so explain.

IT IS SO ORDERED this 30th day of December, 2003.

DIANE K. VESCOVO
U.S. MAGISTRATE JUDGE

