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,	)	
and	)	
GARY K. MICHELSON, M.D., Third Party Plaintiff,	)	
vs.	)	
SOFAMOR DANEK HOLDINGS, INC., Third Party Defendant.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR LEAVE TO WITHDRAW ADMISSIONS TO PLAINTIFF'S FOURTH SET OF REQUESTS FOR ADMISSIONS

On November 21, 2003, the defendants, Gary K. Michelson ("Michelson") and Karlin Technology, Inc. ("KTI"), filed a motion pursuant to Federal Rule of Civil Procedure 36(b) to withdraw admissions that were deemed admitted by default pursuant to Rule 36(a) due to Michelson and KTI's untimely responses to plaintiff Medtronic Sofamor Danek, Inc.'s ("Medtronic's") Fourth Set of Requests for Admissions. Michelson and KTI further request that the court deem their November 18, 2003 responses to have been timely served on November 10, 2003. The motion was referred to the United States Magistrate Judge for a determination. Medtronic timely responded on December 8, 2003. For the reasons that follow, the motion for leave to withdraw admissions is granted.

In late September and early October of 2003, Medtronic served Michelson and KTI with eleven sets of written discovery requests. (Mem. in Supp. of Defs.' Mot. for Leave to Withdraw Admis. to Pl.'s Fourth Set of Reqs. for Admis. at 1.) Included in those requests were Medtronic's Fourth Set of Requests for Admissions ("Fourth Set"), which were served on October 8, 2003. (*Id.*) The requests for admissions consisted of six separate requests[1] seeking admissions that the defendants, prior to June 2001, "had not given Medtronic written notice of and the opportunity to cure Medtronic's breaches of certain specific provisions of the parties' License Agreement and Purchase Agreement." (*Id.*) Michelson's and KTI's response to the Fourth Set was due on the discovery cutoff date, November 10, 2003.[2] Because of the rapidly approaching discovery cutoff date and the "blizzard of new written discovery, . . . an intensive period of depositions, document review, motion practice

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[1] The requests at issue are numbered 3480 through 3485. Request Nos. 3480 and 3481 ask Michelson and KTI to "[a]dmit that, prior to June 2001, Defendants did not provide written notice to any Plaintiff of any breach of the proper patent notices provision of the License [or Purchase] Agreement." (Sedor Decl. in Supp. of Defs.' Mot. for Leave to Withdraw Admis. to Pl.'s Fourth Set of Reqs. for Admis., Ex. A at 3 [hereinafter Sedor Decl.].)

Request Nos. 3482 and 3483 request that Michelson and KTI "[a]dmit that, prior to June 2001, [they] did not provide written notice to any Plaintiff of any breach of the best efforts provisions of the License [or Purchase] Agreement." (*Id.* at 3-4.)

Request Nos. 3484 and 3485 state: "Admit that, prior to June 2001, Defendants did not provide written notice to any Plaintiff of any breach of the License Agreement relating to Danek's development of products that 'compete directly with the non-threaded spinal implant products covered by the License [or Purchase] Agreement.'" (*Id.* at 4.)

[2] The parties have stipulated that all papers in this action are to be served by overnight mail, with two days added for service.

and discovery disputes" generated by the impending date, counsel for Michelson and KTI failed to prepare and serve responses to the Fourth Set by the due date. (*Id.*)

Having received no response to the requests for admissions within the thirty day time period allowed by Rule 36, Medtronic's counsel faxed a letter, dated November 13, 2003, to Michelson and KTI's counsel inquiring about the responses and requesting a Local Rule 7.2 consultation. (*Id.* at 7.) In turn, the defendants' counsel informed Medtronic that they had "inadvertently" failed to serve timely responses and would provide responses by November 18, 2003. (*Id.*) Additionally, counsel for Michelson and KTI asked Medtronic to agree that the responses filed on that date would be deemed timely served as of November 10, 2003. (*Id.*) Medtronic's counsel refused. On November 18, 2003, Michelson and KTI served responses to Medtronic's Fourth Set of Requests for Admissions.[3] Michelson and KTI now seek to have the court withdraw its defaulted admissions to Requests Nos. 3480, 3481, 3482, 3483, 3484, and 3485, or, in the alternative, to consider its responses to the requests to be timely served.

Michelson and KTI argue that they have repeatedly and

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[3] As noted in the defendants' memorandum in support of this motion, Michelson and KTI denied Request No. 3483 in their response. (Mem. in Supp. of Defs.' Mot. for Leave to Withdraw Admis. to Pl.'s Fourth Set of Reqs. for Admis. at 7 n.1.) In response to Request Nos. 3480, 3481, 3482, 3484, and 3485, Michelson and KTI referred Medtronic to the defendants' "interrogatory responses and deposition testimony concerning the many communications over the course of the parties' relationship regarding Medtronic's performance or lack of performance of its obligation" under the License Agreement and Purchase Agreement. (*Id.*) Michelson and KTI otherwise admitted that "prior to June 2001 they did not provide formal written notice to Plaintiff of any breach" that was the subject of each request. (*Id.*)

consistently denied the allegations by Medtronic contained in the requests since the inception of this litigation. Specifically, Michelson and KTI state that they denied the allegations in their answer to Medtronic's complaint, in their answers to interrogatories, and in the deposition of Michelson who testified in his individual capacity and as KTI's representative. (*Id.* at 3-4.) Furthermore, Michelson and KTI assert that Medtronic has acknowledged that the parties have communicated about Medtronic's nonperformance of contractual obligations in other papers filed in this case. (*Id.* at 5.)

Rule 36(b) allows a court to "permit withdrawal or amendment [of an admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." FED. R. CIV. P. 36(b). A court, exercising discretion, may grant a party's motion to amend or withdraw defaulted admissions to assist in the "normal, orderly presentation of the case" absent a showing of prejudice by the other party. *St. Regis Paper Co. v. Upgrade Corp.*, 86 F.R.D. 355, 357 (W.D. Mich. 1980).

In determining whether to permit withdrawal of an admission, courts apply a two-prong test: (1) whether the presentation of the merits of the action will be subserved if the admission is not withdrawn; and (2) whether the party who obtained the admission will be prejudiced. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997); *Dynasty Apparel Indus. v. Rentz*, 206 F.R.D. 596, 601-02 (S.D. Ohio 2001); *Herrin v. Blackman*, 89 F.R.D.

622, 624 (W.D. Tenn. 1981). The first prong is satisfied when refusing withdrawal of the admission would practically eliminate any presentation on the merits of the case. *Dynasty*, 206 F.R.D. at 601. Here, Request Nos. 3480 through 3485 seek admissions that Michelson and KTI gave Medtronic no written notices of certain specified breaches of contract prior to June 2001. These admissions would preclude Michelson and KTI from presenting evidence and argument at trial either that they had provided such notice prior to June 2001 or that Medtronic was aware of its nonperformance by virtue of communications between the parties even if the defendants did not provide written notice. Accordingly, the first requirement for withdrawal appears to be satisfied.

Nevertheless, Medtronic, argues that the court should not allow the withdrawal of the admissions because the amended admissions "would not aid in the presentation of the merits of this case" because they are "vague and evasive," thereby failing to satisfy Rule 36(a) of the Federal Rules of Civil Procedure. (Pl.'s Opp'n to Defs.' Mot. for Leave to Withdraw Admis. to Pl.'s Fourth Set of Reqs. for Admis. at 3-6.) Rule 36(a) directs the party answering a request for admission to "specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." FED. R. CIV. P. 36(a). The same rule gives the court the discretion to deem as admitted any answer that fails to comply with the requirement stated above. (*Id.*)

Although Medtronic has asserted that such discretion should be exercised in the present case, the court is not inclined to do so.

Medtronic has failed to demonstrate that Michelson and KTI's belated responses are vague and ambiguous. For instance, Michelson and KTI specifically denied Request No. 3483. As for the remaining five requests, the defendants admitted that they did not provide formal written notice to Medtronic of any breach pertaining to those requests prior to June 2001 and referred Medtronic to Michelson's and KTI's previous discovery responses to preserve their argument that Medtronic had been notified by other means. While the defendants admissions are not phrased as succinctly as "this request is admitted," the amended admissions need not be so under Rule 36(a). Rule 36(a) provides that "when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder."

With regard to the second prong for the proper withdrawal of admissions, the burden is on the party who obtained the admission to satisfy the court that he would be prejudiced if the admission is withdrawn. The prejudice contemplated by Rule 36(b) "relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *Kerry Steel,* 106 F.3d at 154. Medtronic contends that it will be prejudiced if Michelson and KTI are permitted to withdraw their admissions because Medtronic has submitted a motion for summary judgment based in part on the defendants admissions. (Pl.'s Opp'n to Defs.' Mot. for Leave to Withdraw Admis. to Pl.'s Fourth Set of Reqs. for Admis. at 2, 5.) Medtronic, however, has failed to demonstrate to the court exactly how the withdrawal of admissions

would effect their motion for summary judgment, much less prejudice the motion. Medtronic does not identify the motion for summary judgment to which it is referring or indicate whether the motion was filed prior or subsequent to Michelson's and KTI's failure to respond to the requests for admissions. To date, numerous depositions have been taken, voluminous interrogatories and other discovery devices have been propounded, and responses have been filed. Michelson and KTI have repeatedly denied allegations that they failed to notify Medtronic of its nonperformance of contractual obligations and that they did not give Medtronic an opportunity to cure. The fact that Medtronic waited until the last possible day to file its Fourth Set of Requests of Admissions before the discovery cutoff deadline indicates to the court that Medtronic did not expect the answers given in response to the requests to lead to discoverable evidence. Furthermore, Michelson and KTI responded to the requests only five days after the failure to respond was brought to their attention. Accordingly, under the circumstances, Medtronic has not demonstrated that it will be prejudiced by withdrawal of the deemed admissions.

For all of the foregoing reasons, Michelson and KTI's motion for leave to withdraw admissions to Medtronic's Fourth Set of Requests for Admissions is granted. The defendants' responses served on November 18, 2003 are deemed to have been timely served on November 10, 2003. Each party is to bear its own expenses and attorney fees incurred with respect to this motion.

IT IS SO ORDERED this 2nd day of January, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE