

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 DEFENDANTS' OBJECTIONS TO SPECIAL MASTER
BALARAN'S MARCH 26, 2004 ORDER

On March 30, 2004, the defendants, Gary K. Michelson, M.D., ("Michelson") and Karlin Technology, Inc. ("KTI"), filed a motion objecting to Special Master Alan Balaran's March 26, 2004 order regarding Medtronic's production of electronic "deleted" files and requesting expedited resolution of the matter. Michelson and KTI contend that Medtronic has failed to produce its deleted files as

required by the court's May 13, 2004 order and assert that Medtronic should be required to do so despite the special master's ruling to the contrary. Michelson and KTI also request that Medtronic be ordered to bear all costs associated with the production of deleted files responsive to their discovery requests. This matter was referred to the United States Magistrate Judge for determination. For the reasons that follow, Michelson's and KTI's objections to Special Master Balaran's March 26, 2004 order are overruled.

BACKGROUND

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. In the course of this litigation, the parties' have had numerous disputes over discovery requests -- one being the production of Medtronic's electronic mail messages and data. On January 31, 2003, Michelson filed a motion with the court seeking to compel Medtronic to produce approximately 996 network backup tapes and an estimated 300 gigabytes of other electronic data that was not in a backed-up format. Michelson also argued that Medtronic, as the producing party, should bear the cost of the electronic production and asked the court to appoint a special master to review the production of the electronic material and to establish discovery protocol.

In an order dated May 13, 2004, the court granted in part and denied in part Michelson's motion. While the court agreed that a portion of the requested electronic data was relevant and reasonably calculated to lead to the discovery of admissible

evidence otherwise unavailable in hard copy format, the court determined that the cost of producing the electronic data should not fall on Medtronic alone and ordered Michelson to bear part of the production costs. Order Granting in Part and Den. in Part Michelson's Mot. to Compel Electronic Mail Messages and Data and Req. for Appointment of Special Master, *Medtronic Sofamor Danek v. Michelson*, Civil No. 01-2373-MlV (W.D. Tenn. May 13, 2003). Additionally, the court ordered the appointment of a special master and directed the parties to comply with a detailed discovery plan regarding the production of electronic materials. The discovery plan, however, never specifically addressed the inclusion of deleted electronic files.

On May 30, 2003, the court appointed Special Master Alan Balaran to oversee the electronic discovery. The discovery plan established by the court essentially called for a two-phased production to occur on a rolling basis. The last portion of electronic files were produced by Medtronic on October 30, 2003. (Defs.' Mem. of P. & A. in Supp. of Defs.'s Objections to March 26, 2004 Special Master Ruling and Req. for Expedited Resolution at 8.) The discovery deadline in this case passed a little more than week later on November 10, 2003. According to Michelson and KTI, over 42 million pages of information were produced for inspection. (*Id.*) Michelson and KTI contend that at the close of discovery, they did not have enough time "to determine conclusively whether the production did or did not contain 'deleted' files." (*Id.*) In early December of 2003, Michelson's experts conducted a forensic analysis of the hard drives produced by Medtronic and determined

that the hard drives did not contain any responsive deleted files. As a result, Michelson petitioned the special master to require Medtronic to produce "any responsive electronic files (including e-mails) that have been deleted from Medtronic's computer systems." (Sedor Decl. in Supp. of Defs.' Objections to March 26, 2004 Special Master Ruling and Req. for Expedited Resolution, Ex. 19 at 1.) Medtronic objected to the production of the "deleted" electronic files on the basis that the files were outside the scope of the court's May 13, 2003 order, outside the scope of Michelson's document requests, and too burdensome to produce.

On March 26, 2004, Special Master Balaran denied Michelson and KTI's request for the deleted files without a detailed explanation for his finding. In response, Michelson and KTI filed the motion presently before the court seeking an expedited resolution of the matter in light of the upcoming trial date of June 1, 2004.

ANALYSIS

According to Rule 53 of the Federal Rules of Civil Procedure, any party may file objections to a special master's ruling. FED. R. CIV. P. 53. The parties have suggested that Rule 53(g)(3) further provides that the district court must decide de novo all objections to a special master's findings of fact or conclusions of law. Although the language of Rule 53(g)(3) does provide for de novo review in those circumstances, the advisory committee notes to Rule 53(g)(3) indicate that when a special master makes determinations "that, when made by a trial court, would be treated as matters of procedural discretion," the proper standard of review if not otherwise established in the order of appointment is for

abuse of discretion. FED. R. CIV. P. 53(g) advisory committee's note.

In the May 13, 2003 order, the court established that the duties of the special master as they related to electronic discovery would include "making decisions with regard to search terms; overseeing the design of searches and the scheduling of searches and production; coordinating deliveries between the parties and their vendors; and advising both parties, at either's request, on cost estimates and technical issues." Order Granting in Part and Den. in Part Michelson's Mot. to Compel Electronic Mail Messages and Data and Req. for Appointment of Special Master, *Medtronic Sofamor Danek v. Michelson*, Civil No. 01-2373-MlV (W.D. Tenn. May 13, 2003). The special master was never assigned the duty of making determinations as to whether Medtronic could be compelled to produce deleted electronic files and e-mails. As such, the special master's March 26, 2004 order went beyond the scope of his authority to make such a ruling. Therefore, the special master's order will be reviewed de novo despite the discretionary procedural nature of his decision.

In what is essentially a motion to compel, the defendants now contend that they are entitled to the production of deleted electronic files and e-mails because those files were included within the scope of the court's May 13, 2003 order directing Medtronic to produce electronic data. Two threshold issues are before the court: (1) whether the scope of the court's May 13, 2003 order included the production of all of Medtronic's responsive deleted files and if so, (2) whether the production of responsive

deleted files can be compelled at this late stage of litigation.

A detailed analysis of whether Medtronic's production of deleted electronic files and e-mails was required under the court's May 13, 2003 order is unnecessary at this time because the court finds that Michelson and KTI have been dilatory in their efforts to compel the production of the deleted files. Discovery in this case closed in November of 2003, which was nearly five months before the defendants filed their objections to the special master's order. Granted Michelson and KTI sought relief from the special master in December of 2003. Regardless, the trial date in this case is a little over a month away, and both parties are preparing for trial. As this court has stated very recently,

the judges in this district as a general rule require motions to compel to be filed by the discovery deadline. The only exception arises when discovery responses are received on the discovery deadline or immediately before. In that event, the courts will entertain motions to compel filed within thirty days of receipt of the discovery responses but no later than thirty days after the discovery deadline. The purpose of placing a deadline for the filing of motions to compel is to bring an end to the discovery phase and to prevent discovery from continuing up until the trial date.

Order Den. Defs.' Mot. for Leave to Serve Dep. Subpoena and Take Dep. of Third Party Kevin T. Foley, *Medtronic Sofamor Danek, Inc. v. Michelson*, Civil No. 01-2373-MlV at 4 (W.D. Tenn. April 12, 2004). It bears repeating that "discovery must have an end." (*Id.*)

The court finds that the defendants' request for the production of deleted electronic material, which is akin to a motion to compel, is untimely. Moreover, the process of recovering

deleted files at this late stage of litigation would be an undue burden on Medtronic and is based, the court's opinion, on mere speculation that relevant deleted files could be recovered.

CONCLUSION

In conclusion, the court finds that the defendants' objections to the special master's March 26, 2004 ruling are overruled. The defendants' request for the production of deleted electronic files and e-mails is untimely as filed nearly five months after the close of discovery and unduly burdensome in light of the quickly approaching trial date.

IT IS SO ORDERED this 3rd day of May, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE