

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 DENYING WITHOUT PREJUDICE DEFENDANTS' MOTION TO COMPEL
DEPOSITION OF PERSON MOST KNOWLEDGEABLE CONCERNING AUTHORSHIP OF
DOCUMENTS PREVIOUSLY WITHHELD AS PRIVILEGED

Before the court is the March 30, 2004 motion of the defendants, Gary K. Michelson, M.D., ("Michelson") and Karlin Technology, Inc. ("KTI"), for an order compelling the plaintiff, Medtronic Sofamor Danek, Inc. ("Medtronic"), to produce for deposition a witness to testify as to the names of the authors and recipients of ten documents previously withheld by Medtronic as

privileged but subsequently produced pursuant to an order of Special Master Alan Balaran following *in camera* review. The motion was referred to the United States Magistrate Judge for determination. Medtronic timely responded on April 15, 2004, opposing such a deposition. In the alternative, Medtronic requests that ruling on the motion be stayed pending Special Master Balaran's determination of Medtronic's pending motion, filed April 13, 2004, which asks the special master to reconsider the privileged status of these ten documents. For the reasons that follow, the defendants' motion is denied without prejudice at this time.

It is unclear when the ten documents at issue were actually produced to Michelson and KTI. According to Michelson and KTI, "Medtronic began to produce documents previously designated as privileged between September 2, 2003, and October 23, 2003." (Mem. of Points and Authorities in Supp. of Defs.' Mot. to Compel Dep. of Person Most Knowledgeable Concerning Authorship of Docs. Previously Withheld as Privileged at 9.) "Medtronic produced approximately 15 boxes of documents on December 3 and 4, 2003, and over 35 boxes of documents on January 13 and 14, 2004." (*Id.* at 10.) Michelson and KTI further state that more such documents were produced as late as early March 2004. (*Id.*)

In any event, in earlier March of 2004, Michelson and KTI requested Medtronic to provide the names of the authors and recipients of the ten documents at issue. Without giving a reason, Medtronic advised that it was currently unable to provide the information. (*Id.*) This motion to compel a deposition followed.

It appears to the court that if the special master determines that these ten documents are entitled to privilege protection, then the requested deposition would be unnecessary and the motion to compel would be moot. In addition, without knowing when the ten documents were actually received by Michelson and KTI, the court is unable to tell if Michelson and KTI timely sought relief. Moreover, the court fails to understand why Medtronic cannot ascertain, at a minimum, the authors of most, if not all, the documents in question. If indeed these documents were generated by in-house counsel or an employee who met with in-house counsel, and given that fact that three or four documents bear the same handwriting, it would seem that Medtronic could poll its in-house counsel and determine which counsel met with which employees.

Based on these factors, Michelson and KTI's motion to compel a deposition to determine the authors and recipients of the ten documents in question is denied at this time. In the event that the special master reaffirms his earlier decision and determines that any of these ten documents are not entitled to privileged status, then Medtronic is ordered to provide the names and recipients of the documents to Michelson and KTI within five days of service of the special master's order. If Medtronic fails to supply the information, then Michelson and KTI can renew their motion but must indicate when the documents in question were actually received.

IT IS SO ORDERED this 21st day of April, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

