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COST OF RESTORING BACK-UP TAPES TO BE SHARED BY THE PARTIES

[Medtronic Sofamor Danek, Inc. v. Gary Karlin Michelson and counter actions, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. May 13, 2003).]

This action involved trade secret, patents and trade information in the field of spinal fusion medical technology. The defendant, Dr. Gary Michelson, filed a motion to compel Medtronic to fully respond to discovery requests by producing 996 computer network backup tapes containing electronic mail and an estimated 300 gigabytes of electronic data. Medtronic objected based on the cost involved in extracting data from the back-ups and reviewing the extracted data for relevance and privilege.

Although information is discoverable if it "appears to be reasonably calculated to lead to the discovery of admissible evidence" under F.R.Civ.P. 26(b)(1), there are boundaries. Medtronic at \*7. For example, the court does not need to compel discovery if it determines that the request is "unreasonably cumulative . . ." Id. In this case, the relevance of the information is not at issue. The issue turns on the scope of production as well as which party should bear the costs.

Undue burdens are decided on a case-by-case basis. Courts consider a balancing test of 8 factors: "(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; (8) the resources available to each party." Id. at \*10-11.

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The court noted that Dr. Michelson's requests were very broad and he had done little to narrow the requests for electronic discovery. Further, Michelson rejected an offer from Medtronic that it supply year-end backup tapes in lieu of all 996 back-up tapes.

“ [O]ne judicial rationale that has emerged . . . is that producing backup tapes is a cost of doing business in the computer age. . . . [However,] [m]aking the producing party pay for all the costs of restoration is a cost of its 'choice' to use computers creates a disincentive for the requesting party to demand less than all of the tapes . . . . The converse solution is to make the party seeking the restoration of the backup tapes pay for them, so that the requesting party literally gets what it pays for. . . . A fairer approach borrows . . . from the economic principle of 'marginal utility.' The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense.” Id. at \*20-21, citing McPeck, 202 F.R.D. at 33-34.

The court concluded that because Michelson failed to make the discovery requests more specific, along with his failure to show that the entire spectrum of backup tapes would contain relevant information the court found that it was fair to shift part of the cost of production to Michelson.