UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MEDTRONIC VASCULAR, INC., *et al.*,

Plaintiffs,

v.

ABBOTT CARDIOVASCULAR SYSTEMS, INC., *et al.*,

Defendants.
_____/

No. C-06-1066 PHJ (EMC)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' SUPPLEMENTAL REPORT OF DR. EBERHART ON INFRINGEMENT

(Docket No. 773)

Currently pending before the Court is Abbott's motion to strike the supplemental report of Medtronic's expert Dr. Eberhart. Having considered the parties' briefs and accompanying submissions, as well as the oral argument of counsel and all other evidence of record, the Court hereby **GRANTS** in part and **DENIES** in part Abbott's motion.

On April 24, 2009, Medtronic provided Abbott with a supplemental report from Medtronic's expert Dr. Eberhart. Abbott asks the Court to strike the supplemental report in its entirety. In response, Medtronic argues that the supplemental report is justified because only recently, *i.e.*, in February 2009, did Abbott give Medtronic electronic CAD files. According to Medtronic, had Abbott provided these files earlier, then everything in Dr. Eberthart's supplemental report would have been contained in his original May 23, 2008, report.

Federal Rule of Civil Procedure 26(e) governs supplemental disclosures. As the Court stated in its previous order, a party may not rely on the rule "as a way to remedy a deficient expert report or as a means of getting in, in effect, a brand new report." Docket No. 547 (Order at 2).

In the instant case, the Court finds that certain portions of the supplemental report should be stricken because they constitute an attempt by Medtronic to get in, in effect, a brand new report. More specifically, in his original report, Dr. Eberhart made a deliberate decision to analyze a simplified model of a stent, one with a semi-circle shape instead of a U shape -- even though it is obvious, even without the electronic CAD files, that Abbott's stent has a U shape. That this was a deliberate decision is made clear by Dr. Eberhart's deposition testimony. *See*, *e.g.*, Eberhart Depo. at 47 ("I chose to make the U-shaped portion a semicircle because adding the legs to the U-shaped portion would only increase the flexibility of that longitudinal."). Notably, defense counsel pressed Dr. Eberhart on the decision to use a simplified model but Dr. Eberhart never indicated that that decision was anything but deliberate. Nowhere did he even suggest that his decision was informed by, *e.g.*, a lack of access to electronic CAD files or other materials. Because Dr. Eberhart made a deliberate decision to analyze a stent with a semi-circle shape instead of a U shape, Medtronic cannot now have Dr. Eberhart opine in a supplemental report about the U shape. The information provided by the CAD files not previously available was not material to his original report. Thus, the CAD files do not justify the revision.

On the other hand, the Court shall not strike those portions of the supplemental report related to the issue of whether or not there are straight portions in the arms flanking the U shape. While the U shape is obvious, even without the electronic CAD files, it is not obvious without the files whether both arms flanking the U shape are, at least in part, straight (particularly the short arm). Indeed, only with the electronic CAD files was Dr. Eberhart able to see the exact dimensions of Abbott's stent (even if not the final manufactured product).

///

///

///

///

///

///

///

Accordingly, for the foregoing reasons, the Court grants in part and denies in part Abbott's motion to strike the supplemental report of Dr. Eberhart. The Court does not express any opinion on what effect this ruling may have on the trial testimony of Dr. Eberhart; that is a decision for the presiding judge, not this Court.

This order disposes of Docket No. 773.

IT IS SO ORDERED.

Dated: May 21, 2009

EDWARD M. CHEN
United States Magistrate Judge