

United States District Court
For the Northern District of California

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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 PJH (EMC)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO STRIKE PLAINTIFFS'
DECLARATION OF DR. DAVID KU
(Docket No. 862)**

Currently pending before the Court is Abbott’s motion to strike the declaration of Medtronic’s expert Dr. David Ku. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel and all evidence of record, for the reasons stated in the record and supplemented herein, the Court hereby **GRANTS** in part and **DENIES** in part Abbott’s motion.

On June 9, 2009, Medtronic provided Abbott with a declaration from Medtronic’s expert Dr. Ku. The declaration was submitted in opposition to Abbott’s *Daubert* motion, challenging Dr. Ku, but was also designated a supplemental expert report pursuant to Federal Rule of Civil Procedure 26(e). To the extent the declaration has been submitted as a supplemental expert report, Abbott asks the Court to strike the report its entirety.

This Court has stated in a prior order that a party may not rely on Rule 26(e) “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); Docket No. 804 (Order at 1). A party that violates Rule 26 may be sanctioned

1 under Rule 37(c)(1). Rule 37(c)(1) specifically states that one sanction is that of exclusion. *See*
2 Fed. R. Civ. P. 37(c)(1)(C). The Ninth Circuit considers the following factors when determining
3 whether a sanction under Rule 37(c)(1) is proper: (1) the public’s interest in expenditure of
4 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to [the party seeking
5 sanctions]; (4) the public policy favoring disposition of cases on their merits; [and] (5) the
6 availability of less drastic sanctions.” *Wendt v. Host Intern., Inc.*, 125 F.3d 806, 814 (9th Cir. 1997).

7 Here, the supplemental report was served late (*i.e.*, only a month before the final pretrial
8 conference). Medtronic does not contend the additional information contained in the report was not
9 available when the first report was filed. As noted at the hearing, to the extent the supplemental
10 report cites publications, patents, evidence and other material not expressly discussed in the original
11 report, it clearly constitutes a late-filed supplemental report that does not comply with Rule 26. To
12 the extent, it merely clarifies or amplifies matters expressly referenced in the original report without
13 revising or reversing Dr. Ku’s opinion, these matters more closely conform to Rule 26.

14 Conversely, those parts of the report in which Dr. Ku makes reference to patents,
15 photomicrographs, articles, conversations, and calculations that were never mentioned in his initial
16 report works a substantial prejudice to Abbott. As discussed below and at the hearing, the Court
17 will allow a short supplemental deposition of Dr. Ku, but to permit the supplemental report to
18 include all the newly cited extrinsic evidence would vastly expand the scope and length of such a
19 deposition. On the other hand, the prejudice is markedly less with respect to the portions of the
20 report where Dr. Ku discusses the Goodall, Peacock, Sheth, Tominaga, and Berry articles. Because
21 these articles were previously cited and are used generally in the same context as they were in his
22 initial report, cross-examination of Dr. Ku at a supplemental deposition can be easily contained.

23 The Court concludes that it is proper to strike those parts of the supplemental report that
24 make reference to the patents, photomicrographs, articles, conversations, and calculations that were
25 not mentioned in Dr. Ku’s initial report. The Court, however, shall not strike those parts of the
26 supplemental report that refer to the five articles identified above. As noted above, there is less
27 prejudice to Abbott with respect to these references, and the prejudice may be cured by a lesser
28 sanction. To remedy any prejudice to Abbott, the Court shall require Medtronic to produce Dr. Ku

1 for a continued deposition to last no longer than three hours. In addition, Medtronic will bear the
2 costs of the deposition, excluding attorney's fees.

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

7 This order disposes of Docket No. 862.

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9 Dated: July 13, 2009


EDWARD M. CHEN
United States Magistrate Judge