

In re: Medtronic, Inc. Sprint Fidelis Leads Product Liability Litigation
MDL No. 08-1905 (RHK/JSM)

March 27, 2009

Honorable Richard H. Kyle
772 Federal Building
316 N. Robert Street
St. Paul, MN 55101

RE: Recusal Order dated March 9, 2009

Dear Judge Kyle:

On March 2, 2009, the Court issued an order setting a deadline of March 6, 2009, for Medtronic's opposition to Plaintiffs' Motion for Recusal and precluded Plaintiffs from filing any "reply – whether by memoranda, affidavit, letter, or otherwise – absent further order of the Court." *See* Order, dated March 2, 2009. In its opposition, Medtronic argued that Plaintiffs' motion was untimely because counsel knew that Richard Kyle, Jr. worked at Fredrikson. *See* Medtronic's Memo at p. 2. One business day after Medtronic filed its opposition, and before Plaintiffs could even seek leave to file a reply, the Court denied Plaintiffs' motion. In that order, the Court accepted Medtronic's version of the facts, concluding that because Plaintiffs' counsel knew that Richard Kyle, Jr. was a Fredrikson shareholder, they also knew (or should have known) about the relationship between Fredrikson and Medtronic.

Subsequent to that order, Medtronic, in its memoranda opposing Plaintiffs' motion to amend the protective order, suggested that Plaintiffs waived their right to bring a motion by failing to seek reconsideration of the Court's Order dated February 5, 2009, denying Plaintiffs' request for discovery. *See* Defendants' Memo in Opposition to Plaintiffs' Motion to Amend the Protective Order at p. 1.

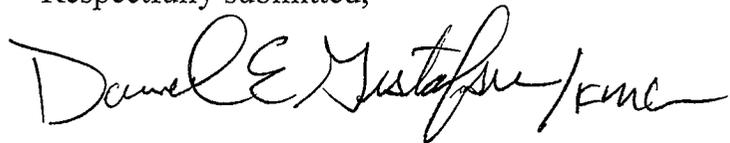
Because of the Court's order precluding a reply to Medtronic's unsupported allegations, and because of its latest argument suggesting that failure to seek reconsideration might be a waiver, Plaintiffs hereby request permission to move for reconsideration of the Court's March 9, 2009 Order.

There is no support in the record for the conclusion that Plaintiffs knew about the potential recusal issues earlier but decided not to raise them until they became unhappy with the Court's order. *See* March 9, 2009 Order at pp. 17, 19 (stating that "the timing of Plaintiffs' Motion speaks volumes" and that "the timing of Plaintiffs' Motion – coming not long after the Court issued a major ruling adverse to Plaintiffs – suggests, to be charitable, that it is an exercise in judge shopping."). To the contrary, Plaintiffs stated in their motion that "[a]pproximately two weeks ago, the PSC discovered facts" that underlie their motion for recusal. *See* Plaintiffs' Memo at p. 1. In challenging this statement, Medtronic offered no facts to support its assertions.

Although certain of Plaintiffs' counsel knew of Richard Kyle, Jr.'s employment at Fredrikson (and his white collar criminal defense practice), they did not know of – and had no reason to investigate – Fredrikson's relationship with Medtronic. Rather, that relationship only came to light in early February after the PSC learned about an investigation into payments from other medical device makers to a Dr. Richard Kyle. Certain members of the PSC then asked whether there was a relationship between Dr. Kyle and the Court. Minnesota counsel said that they did not know of any such relationship, but that the Court did have a son, also named Richard Kyle, who worked at Fredrikson. Shortly thereafter, members of the PSC uncovered the significant, ongoing relationship between Medtronic and Fredrikson that ultimately resulted in the recusal motion. Because the Court prevented any reply papers, Plaintiffs could not rebut Medtronic's suggestion to the contrary. Plaintiffs respectfully request that they be permitted to file papers to establish these facts in the record.

Furthermore, Plaintiffs strongly disagree that the law imposes on Plaintiffs the burden to investigate described by the Court. *See* Order, March 9, 2009 at p. 19 (stating that Plaintiffs “could have – and in the Court’s view, should have – investigated the extent of the purported ‘close, continuing’ relationship between the firms and Medtronic long ago.”). In keeping with the *Manual for Complex Litigation*, the Court ordered the parties to make disclosures, *see* PTO No. 1, and itself made disclosures on the record at the first status conference. But none of these disclosures made any mention of Richard Kyle, Jr. or Fredrikson’s relationship with Medtronic. In fact, the Court subsequently made clear on the record that it was unaware of the relationship between Fredrikson and Medtronic. In denying Plaintiffs’ motion for recusal, the Court never addressed the fact that Medtronic’s opposition dances around, but never directly answers, the full nature of that relationship. For example, Medtronic never clearly states whether Fredrikson or its shareholders were actually involved in the development of or regulatory aspects related to the Sprint Fidelis Leads. If they were, they are potential witnesses and therefore would provide a direct link between Fredrikson and this litigation. Such full disclosure was the intent of PTO No. 1 – to determine whether recusal was appropriate. By its March 9 Order, the Court shifted the burden of discovery to Plaintiffs – a burden that it did not impose on itself or Medtronic. Because that discovery standard is not the law, and Plaintiffs do not want to be accused later of waiving that argument, Plaintiffs respectfully request that the Court require Medtronic to comply with PTO No. 1.

Respectfully submitted,



Daniel E. Gustafson

Lead Counsel & For Plaintiffs' Steering Committee

cc: Counsel of Record (Via E-Mail)