

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re: Guidant Corp. Implantable
Defibrillators Products Liability
Litigation

MDL No. 05-1708
(DWF/AJB)

This document relates to all actions.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL RONALD W. DOLLENS' COMPLIANCE WITH SUBPOENA**

A. Introduction

Pursuant to Federal Rules of Civil Procedure 33, 34, 37 and 45, Plaintiffs bring this Motion To Compel Ronald W. Dollens' compliance with a subpoena for documents and attendance at a deposition. Mr. Dollens' key role at Guidant Corporation ("Guidant") during highly relevant time periods supports Plaintiffs' position that Mr. Dollens should be required to produce documents in his possession and appear for a deposition.¹

Mr. Dollens' Background: Ronald W. Dollens was the President and CEO of Guidant until November 15, 2005. In his position as Guidant President and CEO, Mr. Dollens was in charge of the overall operations of Guidant, and has been credited as the leader of Guidant during several points of time relevant in these proceedings (including

¹ Plaintiffs have been led to believe that Defendants will produce responsive documents from Mr. Dollens' files that are in Defendants' possession, custody, or control. Plaintiffs intend to seek such a representation on the record before the Court, in order to ensure that Defendants themselves are not withholding any of Mr. Dollens' documents on grounds other than privilege.

2002, during which changes were made to the Ventak Prizm 2 DR 1861 that are of central concern in the first representative trials and during 2005, when these proceedings commenced). *See, e.g.*, Guidant News Release (Nov. 15, 2005) (quoting Mr. Dollens as saying, “I’ve been privileged to lead Guidant over the last eleven years and build a solid foundation of organic growth from innovation, global sales distribution capabilities, access to key markets and a dedicated leadership team.”), *available at* http://www.guidant.com/news/500/web_release/nr_000597.shtml; Harvard Bus. School 20th Century Leaders Database (“Dollens was vital to the creation and success of Guidant Corporation, a spin-off of Eli Lilly. Through his leadership of Guidant, Dollens introduced several medical breakthrough technologies including the internal defibrillator and produced a 20-fold increase in market capitalization.”), *available at* <http://www.hbs.edu/leadership/database/leaders/220/>.

Plaintiffs’ Attempt To Obtain Discovery from Mr. Dollens: Plaintiffs requested that Defendants make Mr. Dollens available for a deposition in these proceedings and attempted to negotiate a mutually convenient time for this deposition. In response, Defendants’ counsel repeatedly claimed that they had not been able to reach Mr. Dollens. After several weeks of failed attempts to obtain cooperation from Defendants’ counsel regarding Mr. Dollens’ deposition, on January 30, 2007, Plaintiffs provided Defendants’ counsel (who are also acting as Mr. Dollens’ counsel) with a subpoena requesting documents and testimony from Mr. Dollens. A copy of the subpoena is attached as Exhibit A. The subpoena requested that Mr. Dollens produce documents in his possession by February 28, 2007, and that he appear for a deposition on March 15, 2007.

On February 28, 2007, Defendants' counsel served "Ronald Dollens' Objections to Plaintiffs' Subpoena *Duces Tecum*," attached as Exhibit B. Therein, Mr. Dollens does not raise objections to service of the subpoena. Mr. Dollens' objections can be summarized as follows:

- that the terms "referring, relating, or pertaining in any way to" specified topics that are not particular enough, *see, e.g.*, Exhibit B at 4-6;
- that Plaintiffs have requested similar information from Defendants, *see id.*;
- that the volume of documents requested is unmanageable, *see id.*; and
- that the requests are not "narrowly tailored to the underlying deposition," *see id.*

Mr. Dollens raises additional objections that the request for documents relating to his employment at, and resignation from, Guidant "seeks private, personal information that is unrelated to this action." *Id.* at 6. Although Mr. Dollens' objections do not state that he will refuse to show up for deposition, as noticed, on March 15, 2007, Defendants'/Dollens' counsel has verbally advised Plaintiffs that they object to the deposition, as well, on the ground that Mr. Dollens does not know anything about the matters at issue in this litigation.

B. Argument

Mr. Dollens' objections to his subpoena are untimely and meritless. Mr. Dollens should be ordered to produce all documents in his possession that are responsive to the subpoena immediately, and to appear for deposition one week later.

Mr. Dollens' Objections Are Not Timely. Mr. Dollens' counsel, Shook, Hardy & Bacon L.L.P., received a copy of the subpoena and a notice of subpoena on January 30,

2007. *See* Exhibit C. Thereafter, Plaintiffs attempted to serve Mr. Dollens personally, but on February 7, 2007, Plaintiffs were advised by Mr. Dollens' counsel to stop attempting to serve him personally. *See* Exhibit D. On February 28, 2007, Mr. Dollens' counsel served objections on his behalf. *See* Exhibit B. Shook, Hardy & Bacon has thus clearly acknowledged Mr. Dollens' receipt of the subpoena – either on January 30 or February 7. Even under the later date, any objections thereto were due within 14 days, or February 21. *See* Fed. R. Civ. P. 45(c)(2)(B); *see, e.g., Union Pacific R. Co. v. Huxtable*, 2006 WL 2335220, at *1 (D. Neb. Aug. 10, 2006) (“in order to preserve its right to object to a subpoena, a non-party must serve written objection within 14 days after service of the subpoena”) (quoting *McCabe v. Ernst & Young, LLP*, 221 F.R.D. 423, 424-25 (D.N.J. 2004)). By failing to object by February 21, 2007, Mr. Dollens has waived any objections.

Mr. Dollens' Objections Do Not Provide a Basis for Noncompliance with the Subpoena. More important than the timeliness issue, is the fact that Plaintiffs are clearly entitled to discovery, including a deposition, from Mr. Dollens. Notwithstanding the current position of Defendants' counsel, Mr. Dollens' objections to the document requests acknowledge that he will be deposed, by complaining that the document requests are not “narrowly tailored to the underlying deposition” and not mentioning any objection to the request for deposition. *See* Exhibit B at 4-6.

Plaintiffs are entitled to more than just a deposition from Mr. Dollens, however. In addition, Plaintiffs are entitled to discovery of any documents² responsive to the subpoena's requests that Mr. Dollens has in his personal possession – *i.e.*, that he maintained in his personal files during or after his employment with Guidant. Any collection of documents regarding the issues in this litigation that Mr. Dollens chose to retain personally could lead to relevant evidence regarding his role in the matters at issue in this litigation. Documents regarding Mr. Dollens' compensation from Guidant could be relevant to his bias as a witness. Documents concerning Mr. Dollens' departure from Guidant may be highly relevant to issues of the circumstances of his departure, shortly after this litigation commenced.

Counsel's objection to Mr. Dollens' deposition on the ground of purported lack of knowledge actually highlights the need for the requested documents. One of Mr. Dollens' primary arguments is that the requests would require production of an unmanageable amount of documents. *See id.* at 4-6; *see also id.* at 2 (stating that the document requests "seek[] voluminous information"). In fact, the requests served on Mr. Dollens focus on discrete areas: Defendants' marketing efforts; Defendants' communications with the Food and Drug Administration ("FDA"); defects in Defendants' implantable defibrillators and pacemakers; Defendants' medical and patient advisories regarding device defects and malfunctions; the FDA's recall of Defendants'

² This includes electronically stored information. *See* 2006 Amendments to Fed. R. Civ. P. 34.

devices; and documents relating to Mr. Dollens' employment and resignation.³ Plaintiffs respectfully submit that Mr. Dollens' objections that such materials are not relevant in this action are untenable.

Defendants' Claim that Mr. Dollens Lacks Relevant Knowledge Does Not Negate Plaintiffs' Need for His Deposition or Documents. In a related Texas state court action, Mr. Dollens submitted an affidavit stating that he "did not participate in any quality control system decisions related to the Ventak Prizm 2 DR, Model 1861, or in the assessment or review of any Trend relating to the Ventak Prizm 2DR, Model 1861." Affidavit of Ronald W. Dollens ¶ 4, *Hinojosa v. Guidant Corp.*, Case No. 05-03377-C (94th Jud. Dist. Ct., Nueces County, Tex. Jan. 4, 2006) (attached as Exhibit E). In addition Mr. Dollens declared that he has "no unique or superior personal knowledge of allegations made by any plaintiff as a result of the implantation of a Ventak Prizm 2 DR Model 1861 defibrillator, nor of complaints following implantation." *Id.* ¶ 5. Defendants may seek to rely on this affidavit to bar the documents and testimony requested by Plaintiffs' subpoena. This argument must be rejected. First, the fact that Mr. Dollens did not *participate* in quality control decisions or trend analysis related to the Ventak Prizm 2 DR 1861 from 2001 to 2004 does not answer the crucial questions of whether Mr. Dollens was aware of the defects in the Ventak Prizm 2 DR 1861 during this time period,

³ While Plaintiffs would be willing to consider waiving production of particular materials, such as if Mr. Dollens provided a list of publicly available documents he might have in his possession, the stonewalling in response to the subpoena has left Plaintiffs with no choice but to demand production of all responsive documents in Mr. Dollens' possession.

and if so, why such defects were not disclosed to the FDA or the public. Moreover, Mr. Dollens does not disclaim participation in quality control or trend analysis decisions in the crucial 2005 period – when Guidant first disclosed the defects in the Ventak Prizm 2 DR 1861 and when this lawsuit was first filed. Second, Mr. Dollens’ statement that he has “no unique or superior personal knowledge” of allegations raised by the plaintiffs in the Texas lawsuit implies that he has *some* knowledge relevant to those claims. Plaintiffs are entitled to determine the scope of this knowledge through discovery.⁴ Third, Plaintiffs are entitled to depose Mr. Dollens to determine whether the statements in his affidavit are fully accurate. Contrary to the statements in Mr. Dollens’ affidavit, one deponent specifically testified that Mr. Dollens was updated on a regular basis as to compliance matters.⁵ Moreover, Defendants themselves have identified and produced no

⁴ Defendants may attempt to argue that a deposition of Mr. Dollens would be overly intrusive because he was a senior executive of the company. Although Plaintiffs acknowledge that in some limited circumstances, courts have declined to compel depositions of a senior executive when the executive has no personal involvement in the issues relevant to the case, *see, e.g., Baine v. General Motors*, 141 F.R.D. 332 (M.D. Ala. 1991), those circumstances are not present here. Mr. Dollens is a *former* executive of Guidant, and therefore his deposition does not raise any concern of unwarranted intrusion. Moreover, even if Mr. Dollens was a current executive, his deposition would be appropriate because he has knowledge relevant to the issues in this litigation. *See In re Bridgestone/Firestone, Inc. Tires Products Liability Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002) (affirming Magistrate Judge’s order compelling deposition of Chairman of Ford). At the very least, Mr. Dollens was updated on a regular basis on compliance issues. *See infra*. Finally, compelling Mr. Dollens’ deposition would not subject him to repetitive, disruptive depositions. Mr. Dollens would be deposed only once for the thousands of personal injury claims in this MDL. *Id.* (holding that coordinated deposition of Chairman of Ford by MDL plaintiffs “will serve to discourage numerous, repetitive, harassing, or abusive depositions of Mr. Ford”).

⁵ Upon request, Plaintiffs will provide the Court with relevant excerpts from the deposition transcript, under seal.

less than 27,000 pages of responsive documents, for which Mr. Dollens is listed as the custodian. Therefore, Defendants cannot claim that Mr. Dollens has no knowledge of the many issues in this litigation.⁶ Finally, even if the statements in Mr. Dollens' affidavit are taken at face value, Plaintiffs are entitled to documents and deposition testimony from Mr. Dollens regarding the issue of why Mr. Dollens was not informed that a life threatening defect in a Guidant product was hidden from the public and the FDA. The Independent Panel found that Guidant was dysfunctional in many critical respects, despite the fact that Guidant was obligated to ensure compliance with FDA regulations as part of the Corporate Integrity Agreement, which arose from a criminal plea agreement. The fact (if true) that Mr. Dollens isolated himself from what was occurring under his watch could be quite probative and relevant evidence in this proceeding.

C. Summary

For the foregoing reasons, Mr. Dollens should be ordered to produce all documents in his possession that are responsive to the subpoena immediately, and to appear for deposition one week later.

⁶ This concern also illuminates an issue with Mr. Dollens' objection that Defendants might also have and produce the same documents in his possession, custody, or control. The fact that Mr. Dollens has particular documents – as opposed to those documents being somewhere in Defendants' files – is clearly relevant and reasonably calculated to lead to the discovery of admissible evidence.

Respectfully submitted,

Dated: March 13, 2007

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