IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

In re: Guidant Defibrillators Products Liability Litigation	MDL Case No. 1708 (DWF/AJB)
Relates to ALL ACTIONS	**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL RONALD W. DOLLENS'[S] COMPLIANCE WITH SUBPOENA**

Defendants respectfully ask the Court to deny Plaintiffs' Motion to Compel Ronald W. Dollens'[s] Compliance with Subpoena.

I. BACKGROUND

Plaintiffs have deposed over twenty company or third-party witnesses in the MDL as well as numerous sales representatives. They have deposed the Chief Medical Officers of both the parent and manufacturing company as well as the Vice Presidents in charge of regulatory, compliance, quality assurance and other relevant areas. Defendants will produce the former president of the manufacturing company, Fred McCoy, in May. Now, Plaintiffs seek to depose the former CEO of the Indiana parent company, despite being unable to articulate to Defendants the reason for doing so. Defendants had previously provided Plaintiffs with an affidavit from a state-court case in which Mr. Dollens attested that he does not have unique or superior knowledge of the relevant facts. Plaintiffs cannot identify any unique information held by Mr. Dollens justifying the need for his deposition. As such, this Court should deny their Motion to Compel.

II. ARGUMENT

Courts routinely prevent plaintiffs from deposing high-level executives who posses only non-unique knowledge that plaintiffs can obtain from other lower-level employees. *See e.g., Cardenas v. Prudential Insurance Co. of America*, Nos. Civ.99-1421, Civ.99-1422, Civ.99-1736, 2003 WL 21293757 (D. Minn. May 16, 2003).[1] In *Cardenas*, the District of Minnesota upheld a magistrate's ruling to deny plaintiffs' motion to compel the depositions of several company executives. The court noted that "courts frequently restrict efforts to depose senior executives where the party seeking the deposition can obtain the same information through a less intrusive means, or where the party has not established that the executive has some unique knowledge pertinent to the issues in the case." *Id.* at *1.

Mr. Dollens is the former President and Chief Executive Officer of Defendant Guidant Corporation ("Guidant") and has not been an employee of Guidant since November 2005. Guidant, which is headquartered in Indianapolis, was at all relevant times the parent corporation of Cardiac Pacemakers, Inc. ("CPI"), which in turn was the

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[1] *See also Thomas v. I.B.M.*, 48 F.3d 478, 483-84 (10th Cir. 1995) (upholding a lower court's order preventing the deposition of a high-level executive where the executive lacked personal knowledge and other employees were available for depositions); *Salter v. Upjohn Co.*, 593 F.2d 649, 650-51 (5th Cir.1979) (upholding a lower court's order preventing the deposition of a company president until plaintiff deposed other employees and could show that this testimony was unsatisfactory); *Baine v. G.M. Corp.*, 141 F.R.D. 332, 334-35 (M.D.Ala.1991) (holding that deposing a top executive "would be oppressive, inconvenient, and burdensome" where plaintiffs failed to establish that they could not obtain information from other employees or that the executive "has any superior or unique personal knowledge").

parent corporation of Guidant Sales Corporation ("GSC"). CPI, which designed and manufactured the products at issue in this litigation, is headquartered in Minnesota. Mr. Dollens never maintained an office at CPI. In fact, CPI had its own President and Chief Executive Officer, Fred McCoy, whose deposition will take place within weeks.

In considering whether to oppose Plaintiffs' request to take Mr. Dollens's deposition, Defendants inquired why Plaintiffs believed that they needed to take Mr. Dollens's deposition. Plaintiffs failed to articulate any specific reason for deposing Mr. Dollens. Further, in their motion, Plaintiffs have failed to establish that Mr. Dollens has any unique information that Plaintiffs cannot, or have not, obtained from other deponents.[2] That Mr. Dollens may have been *briefed* on compliance matters by someone else (who has already been deposed) only supports the fact that his knowledge is not unique and may be obtained from other employees.

As President and Chief Executive Officer of Guidant – not CPI – Mr. Dollens did not participate in any quality-control system decisions related to the devices at issue in this litigation or in the assessment or review of any trend relating to these devices. 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) (Plaintiff's Exhibit E). Mr. Dollens does not have any unique or superior personal knowledge of the allegations made

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[2] Plaintiffs' argument that Mr. Dollens's status as a *former* executive eliminates any concern is meritless. The fact that Mr. Dollens is no longer with Guidant does not decrease the burden or expense of undergoing an unnecessary deposition; nor does it make his knowledge unique.

by Plaintiffs as a result of the implantation of devices manufactured by CPI and sold by GSC. *Id.* at ¶ 5. Nor does Mr. Dollens have any unique or superior personal knowledge of Plaintiffs, their medical conditions, or the facts surrounding the implantation of their CPI devices. *Id.* at ¶ 6.

Plaintiffs' unfounded allegation that Mr. Dollens's sworn affidavit may be untrue is offensive. Plaintiffs cite to not one shred of evidence that even hints that Mr. Dollens was not truthful in providing sworn testimony. Plaintiffs simply have no evidence upon which to challenge the veracity of Mr. Dollens's affidavit.

Plaintiffs' argument that "even if the statements in Mr. Dollens'[s] 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" is misplaced. *Id.* at 8. The reporting structure within the company and the process for dealing with low-level failures has been the subject of numerous depositions to date. Mr. Dollens has no unique perspective on that.

Plaintiffs have failed to articulate any basis for deposing Mr. Dollens. Further, Mr. Dollens's affidavit establishes that he has no unique personal knowledge regarding the issues at hand. As former President and Chief Executive Officer of Guidant Corporation, a parent corporation that did not design, manufacture, or sell any of the devices at issue, Mr. Dollens was not in a position to obtain any unique or superior personal knowledge regarding these cases. To the extent that Mr. Dollens has relevant

information regarding the devices at issue in this litigation, that same information is obtainable – or has already been obtained – "from some other source that is more convenient, less burdensome, or less expensive." *See* FED. R. CIV. P. 26(b)(2). Indeed, Plaintiffs have, as noted, already deposed several company witnesses involved in regulatory, compliance, quality assurance, and other relevant areas. Plaintiffs have had – and continue to have – ample opportunities to obtain any information that Mr. Dollens could provide secondhand. The burden and expense of deposing Mr. Dollens far outweighs the likely benefit because he simply lacks any unique knowledge of the issues in this MDL.

With respect to Mr. Dollens's documents, to date, Defendants have produced over 28,000 pages of Mr. Dollens's custodial file in four productions. The only documents withheld in these productions – despite numerous valid objections – were withheld on privilege grounds. Defendants have provided Plaintiffs with privilege logs for the first three productions and intend to provide the fourth on March 23, 2007. The volume of this production, however, merely reflects the breadth of Plaintiffs' requests and Defendants' efforts to cooperate, not the level of Mr. Dollens's relevant knowledge. Thus, Plaintiffs already have the documents that they are seeking.

Moreover, Defendants have produced over 13.5 million pages of documents in this MDL. Surely Plaintiffs can prepare for one individual trial with several million pages of documents as well as testimony on every aspect of this litigation from over twenty company or third-party witness depositions, including five 30(b)(6) depositions.

Plaintiffs are not entitled, however, to private, personal information that is unrelated to this litigation simply because Mr. Dollens was a one-time President and Chief Executive Officer of a parent corporation whose wholly-owned subsidiary manufactured the devices at issue here.

Most importantly, discovery from Mr. Dollens is automatically stayed in the ongoing securities putative class action pursuant to 15 U.S.C. Section 78u-4(b)(3)(B) until the court in that action resolves the motion to dismiss. Plaintiffs' attempt to depose and seek discovery from Mr. Dollens in this MDL constitutes an impermissible end-run around Section 78u-4(b)(3)(B).

Discovery is ongoing in this MDL. Plaintiffs should seek discovery through a less intrusive method than issuing a subpoena to Mr. Dollens, who has no unique personal knowledge. Defendants respectfully submit that the PSC's weak rationale for taking Mr. Dollens's deposition is mere camouflage for their real purpose. The PSC wants to depose him not to probe his knowledge, but to pose hypothetical questions regarding areas beyond Mr. Dollens's knowledge and expertise. And they want to explore money issues with him, all in the hope of having the jury focus on issues that are not even remotely related to the cases of Mr. Duron and the other bellwether plaintiffs. Defendants have much to do to prepare the bellwether cases for trial, and they are working hard to accomplish this. There is no time for frolics and detours.

WHEREFORE, Defendants Guidant Corporation, Guidant Sales Corporation, and Cardiac Pacemakers, Inc., respectfully request that the Court:

1. Deny Plaintiffs' Motion to Compel Ronald W. Dollens'[s] Compliance with Subpoena.

2. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

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