



March 21, 2007

The Honorable Donovan W. Frank  
 Warren E. Berger Federal Building  
 316 N. Robert Street, Room 738  
 St. Paul, Minnesota 55101

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Re: *In re Guidant Corp. Implantable Defibrillators Product Liability Litigation*  
 MDL Docket No. 1708

Dear Judge Frank:

Your Honor, as preparation for the representative trials continues, I would like to seek the Court's guidance on three separate trial preparation issues. Despite efforts to resolve these issues with plaintiffs' counsel, we remain unable to reach agreement on these issues. We are hitting the highlights of these issues to avoid protracted motion practice. We stand willing to discuss in a telephone conference or handle by formal motion practices, in your discretion.

**1. Deposition of Dr. Hauser.**

Plaintiffs have noticed a full trial preservation deposition of Dr. Robert Hauser, a local cardiologist in Minneapolis. Defendants requested the opportunity to conduct a discovery deposition in advance of the noticed trial deposition. Plaintiffs refused citing a strategic need to take the trial deposition on the noticed date.

Despite Defendants' request, Plaintiffs have made no showing that Dr. Hauser will be unavailable to testify at this local trial. Nor have they indicated that Dr. Hauser is completely unavailable between April 6, the noticed date, and July 30, the trial date.

Plaintiffs have essentially insisted that Guidant come prepared to conduct its trial preservation cross-examination of Dr. Hauser spontaneously on April 6 based solely on a limited expert disclosure of Dr. Hauser as their non-retained expert witness. This tactic unnecessarily denies Guidant the opportunity to fully and fairly conduct a meaningful cross examination of this witness without adequate preparation time.

Guidant respectfully requests that this Court require plaintiffs to provide Guidant with a minimum of two weeks between Guidant's discovery deposition of Dr. Hauser and the trial preservation deposition. Guidant will then have a reasonable opportunity to prepare its trial cross examination. Courts both inside and outside the Eighth Circuit permit parties to take entire discovery depositions before preservation depositions. *See e.g., Bonin v. Chardon Comty. Hosp.*, 163 F.R.D. 565, 566-67 (D. Neb. 1995) (ordering that defendants shall make two expert witnesses available for discovery depositions prior

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to their preservation depositions); *In re PPA Prods. Liab. Litig.*, MDL No. 1407 (W.D. Wash. Oct. 26, 2004) (holding that “in the interest of fair and complete presentation at trial, the parties should have the opportunity to take a preservation deposition with sufficient time subsequent to the discovery deposition to allow for adequate preparation, including consulting with other parties or experts”); *Odell v. Burlington N. R.R. Co.*, 151 F.R.D. 661, 664 (D. Colo. 1993) (“Plaintiff is entitled to have a period to talk with witnesses or to conduct a discovery deposition prior to the preservation deposition.”). Here, Guidant merely requests two weeks’ time to prepare its trial cross examination after hearing what he has to say.

## **2. Plaintiffs’ Motion to Show Cause Why Designated Documents Should Remain Confidential.**

On September 29, 2006, Plaintiffs filed a letter objecting to every single confidentiality designation by Guidant of documents attached to plaintiffs’ Opposition to Guidant’s preemption motion. Ex. A. Guidant responded to Plaintiffs’ objections, agreeing to de-designate certain documents but maintaining its confidentiality designations with respect to approximately 70 other documents. Ex. B. On November 7, 2006, Plaintiffs filed a Motion for an Order Compelling Defendants to Show Cause Why Designated Documents Should Remain Confidential. Ex. C. Plaintiffs later deferred that Motion. Last week Plaintiffs requested that the Court rule on this Motion. On March 16 the Court ordered Guidant to respond within ten days, which would require a response by March 30.

As a preliminary matter, it is important to note that the underlying Motion to which these documents pertain has been withdrawn, mooted this issue for the time being. Regardless, Guidant believes that the efforts of the parties would be more effectively directed at preparing for the upcoming representative trials which are scheduled to begin in four months. Guidant is currently devoting tremendous resources to meet the rigorous pretrial schedule set forth by this Court. For Plaintiffs to now demand that Guidant reallocate its resources from its trial preparation and the document-intensive work necessary to that process is troubling.

Further, there is no purpose served by de-confidentializing documents other than to garner pretrial publicity. The PSC can use these documents for any purpose to get these cases ready for trial. Plaintiffs’ Motion offered no basis for Plaintiffs’ claim other than asserting that “while the story about these defects has been well publicized in general, [] the details of the story are not yet publicly known.” Ex. C at para. 3. This purported justification, however, does not warrant dissemination of company documents acquired through the discovery process. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 34 (1984) (holding that “[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes” and that “an order prohibiting dissemination of discovery information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny”). With the

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approaching trial and the history of biased and inflammatory media attention, no purpose would be served other than to potentially poison the jury pool.

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Consequently, Guidant requests that this Court stay Plaintiffs' Motion to Show Cause for the immediate future in order to allow the parties to focus their efforts on representative trial preparation. In the alternative, Guidant requests that this Court allow at least 30 days to respond to Plaintiffs' Motion. Guidant believes 30 days to be the minimum time reasonably necessary to identify the appropriate Guidant personnel and obtain the proper affidavits documenting Guidant's confidentiality designations.

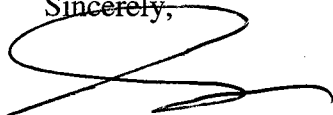
**3. Deposition of Dr. Jewell.**

Guidant asks that this Court require Plaintiffs to produce their expert witness, Dr. Jewell, for timely deposition within the United States. Despite numerous requests, Plaintiffs have refused to produce Dr. Jewell, a California resident, for deposition outside of the United Kingdom. Conversely, Guidant has readily agreed to make its expert witness, Dr. Williams, a resident of the United Kingdom, available to deposition in the United States. Guidant's counsel should not be required to undertake the time to travel to the United Kingdom to depose Plaintiffs' expert witness, and Plaintiffs' insistence that we do so is unreasonable. Although Plaintiffs have agreed to pay for a round trip coach ticket, this is not a reasonable accommodation given the tight deadlines.

**4. Stipulation Regarding Psychiatric Expert Reports.**

Because plaintiffs are seeking to have Mr. Duron evaluated by a psychiatric professional, Guidant's psychiatric/psychological expert witnesses are unable to submit their expert reports until after they have received the results of Mr. Duron's psychiatric evaluation and been given a fair opportunity to analyze those results. Consequently, the parties have agreed that, in order to provide Mr. Duron the opportunity to conduct this evaluation, the parties will stipulate to extend the submission date for Guidant's psychiatric/psychological expert reports to 30 days from the date they receive the results from Mr. Duron's psychiatric/psychological examination. The parties do not anticipate that this agreement will compromise the May 14 submission date for *Daubert* motions.

Sincerely,



Timothy A. Pratt

TAP:pcb

cc: MDL Plaintiffs' Lead Counsel  
Joe Price, Esq. (via e-mail)

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