
GUIDANT PRODUCTS LITIGATION MDL NO. 1708

**Lead Counsel
Committee**

Richard J. Arsenault
Elizabeth J. Cabraser
Seth R. Lesser
Charles S. Zimmerman

**Plaintiffs' Liaison
Counsel**

Charles S. Zimmerman

651 Nicollet Mall, Suite 501
Minneapolis, Minnesota 55402
Telephone: (612) 341-0400
Facsimile: (612) 341-0844

**Steering Committee
Members**

William A. Audet
Daniel E. Becnel, Jr.
C. Brooks Cutter
Nicholas J. Drakulich
Lance A. Harke
Irwin B. Levin
Richard A. Lockridge
Ramon R. Lopez
Tobias L. Millrood
Stacey L. Mills
Timothy M. O'Brien
Paul J. Pennock
Christopher A. Seeger
Hunter J. Shkolnik
Thomas M. Sobol
Silvija A. Strikis
Teresa C. Toriseva
Sol Weiss
Justin Witkin

April 5, 2007

The Honorable Donovan W. Frank
United States District Court
for the District of Minnesota
316 North Robert Street, Suite 700
St. Paul, MN 55101

Dear Judge Frank:

Pursuant to your letter to counsel dated March 27, 2007, Plaintiffs submit the following issues to be addressed on an expedited basis.

1. Deposition of Dr. Richard N. Fogoros

On February 2, 2007, Plaintiffs noticed the deposition of Dr. Fogoros, the Medical Advisor of Guidant Cardiac Rhythm Management's Research and Development Group. *See Exhibit A.* Defendants' document production to date includes over 6,000 pages where Dr. Fogoros is identified as the custodian of record and also establishes that his deposition would lead to the discovery of admissible evidence concerning many of the central allegations in the complaint. Among other things, Dr. Fogoros:

-
-
-

-
-
-
-

Despite Dr. Fogoros' involvement and knowledge of relevant issues, Defendants have stated that they refuse to produce him for a fact deposition. This position is contrary to both PTO 3 and the Federal Rules of Civil Procedure. *See* Pretrial Order No. 3 at 3 ("PTO") ("Defendants shall make available for deposition all present employees requested by Plaintiffs, subject to the Defendants' right to object to the taking of any particular employee's deposition for good cause shown."); Fed. R. Civ. P. 30(a)(1) ("A party may take the testimony of any person, including a party, by deposition under oral examination without leave of court . . ."); Fed. R. Civ. P. 26(b)(1) (stating that depositions may be taken "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence").¹ Plaintiffs therefore respectfully request that this Court order Defendants to produce Dr. Fogoros for a deposition at a mutually agreed upon time and place, but in no event no later than April 25, 2007.

2. Improper Privilege Redactions in Independent Panel Materials

On March 30, 2007, Defendants produced transcripts of meetings of the Independent Panel of Guidant Corporation, pursuant to PTO 30. Under PTO 30, Defendants were to provide all testimony given to the Panel by certain Guidant employees. Instead of producing all such information, Defendants have redacted portions of their employees' statements to the Panel as privileged.

² Defendants have not provided a basis for any assertion of privilege.

Plaintiffs respectfully submit that PTO 30 did not contemplate that Defendants would redact portions of Defendants' employees' statements to the Independent Panel, and for good reason. Statements given by an employee in response to questions posed by the Independent Panel could not constitute attorney-client communications or attorney work product. *See, e.g., Onwuka v. Federal Express Corp.*, 178 F.R.D. 508 (D. Minn. 1997) (holding that statements given and materials generated

¹ Although Defendants may assert that PTO 3 initially permitted 20 depositions to be taken, Plaintiffs' position is that the limitation was provisional and that the parties have mutually exceeded it. Defendants' attempt to shield Dr. Fogoros from deposition is not based on depositions to date; rather, it is to withhold information from Plaintiffs. In fact, in a discovery call with Defendants' counsel earlier this year, Defendants' counsel informed Plaintiffs that they realized that Dr. Fogoros' deposition is one that Plaintiffs would want to take.

² Plaintiffs are also concerned that Defendants have not produced all documents that they have provided to the Independent Panel, as required by PTO 7, and that some of Defendants' redactions of the transcripts, other than for privilege, are not consistent with PTO 30. Plaintiffs urge this Court to remind Defendants that they have been ordered to produce *a//* documents provided to the Independent Panel. Plaintiffs will attempt to resolve the over-redaction issue with Defendants in a meet and confer, but may bring this issue to the Court if a resolution cannot be reached.

during an internal investigation are not privileged materials). The Independent Panel was not convened in anticipation of litigation, but rather was designed to ensure that "the industry and the public have the opportunity to learn from the experiences that Guidant and its patients have been through."³ In the various related motions presented to this Court, Defendants have never attempted to assert that any Independent Panel materials are protected by any attorney privilege. (The only privilege Defendants have asserted is the self-critical analysis privilege, which was rejected in PTO 7.)

Plaintiffs respectfully request that this Court order Defendants to immediately withdraw their privilege designation in the Independent Panel transcripts, and disclose all material that has been redacted on the basis of privilege.

3. Production of Boston Scientific Documents

On February 9, 2006, Plaintiffs served Boston Scientific Corporation with a subpoena *duces tecum*. See Exhibit D. Subsequently, Boston Scientific was named as a Defendant in the Master Complaint. Plaintiffs have repeatedly raised the issue whether Boston Scientific will produce any documents. Several months ago, Defendants' counsel stated first that Boston Scientific had produced documents; when that turned out to be incorrect, Defendants' counsel stated that Boston Scientific would agree to produce at least some responsive documents. Despite repeated requests, Defendants' counsel has not been able to advise Plaintiffs of what documents Boston Scientific might produce and no such documents appear to have been produced. Plaintiffs respectfully request that this Court order Boston Scientific to immediately notify Plaintiffs what documents will be produced and to produce any such documents by April 15, 2007. Thereafter, Plaintiffs may request further assistance from the Court, should Boston Scientific choose not to produce other responsive documents.

Respectfully submitted,

ZIMMERMAN REED, PLLP

NEBLETT, BEARD & ARSENAULT

/s Charles S. Zimmerman
Charles S. Zimmerman

/s Richard J. Arsenault
Richard J. Arsenault

LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP

LOCKS LAW FIRM, PLLC

/s Elizabeth J. Cabraser
Elizabeth J. Cabraser

/s Seth Lesser
Seth Lesser

³ See Press Release, Guidant Corp., Guidant Requests Independent Panel To Recommend Physician and Patient Communication Guidelines (June 22, 2005) (*available at* http://www.guidant.com/news/500/web_release/nr_000553.shtml).