GUIDANT PRODUCTS LITIGATION
MDL NO. 1708

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

Lead Counsel Committee

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

Plaintiffs' Liaison Counsel
Charles S. Zimmerman

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

May 3, 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

Re: In Re: Guidant Corp. Implantable Defibrillators Products Liability Litigation, MDL 1708

Dear Judge Frank:

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

A. Defendants' Failure To Respond to Plaintiffs' Fifth Set of Interrogatories

As the Court is aware, Dr. Steven L. Higgins is the treating physician for representative plaintiff Leopoldo Duron, Jr., and has been designated as one of Defendants' expert witnesses. As the Court is further aware, the relationship between Dr. Higgins and Defendants is a significant issue for the upcoming *Duron* trial. On March 4, 2007, Plaintiffs served Defendants with interrogatories addressing this relationship. *See* Exhibit A. These interrogatories requested that Defendants identify documents reflecting communications, contracts or other agreements between Defendants and Dr. Higgins, and any payments or other remuneration made by Defendants to Dr. Higgins. *See id.* On April 9, 2007, more than 30 days after Plaintiffs' Interrogatories were served, Defendants served their responses. *See* Exhibit B. These untimely responses consist of nothing more than boilerplate objections. No substantive responses were provided whatsoever. *See id.* Despite numerous meet and confer sessions, Defendants have refused to supplement any of their responses. *See* Exhibit C.

Plaintiffs submit that for the same reasons that Dr. Higgins was ordered to comply with Plaintiffs' subpoena, Defendants should be required to respond to these interrogatories. *See* Order Regarding Plaintiffs' Renewed Motion To Compel Dr. Steven L. Higgins' Compliance with Subpoena *Duces Tecum* at 4 (March 26, 2007). Each of the interrogatories seeks highly relevant information relating to Dr. Higgins' relationship with Defendants and to Dr. Higgins' potential bias. *See, e.g.*, *Spencer v. United States*, No. Civ. A. 02-2106-CM, 2003 WL 23484640, at *11 (D. Kan. Dec. 16, 2003) (holding that evidence regarding bias is "within the scope of discovery"). Among other things, this information is crucial to determining the substance and basis of Dr. Higgins' expert testimony, and is relevant to Defendants' affirmative claims that Dr. Higgins was an independent and objective physician – a central element of the learned intermediary doctrine.

Defendants' objections to the interrogatories are four fold: (1) that the interrogatories "ha[ve] been superseded and made moot by the Court's March 26, 2007 Order"; (2) that the interrogatories are unduly burdensome and "impose obligations

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in addition to those imposed or authorized by the" Federal Rules of Civil Procedure; (3) that the interrogatories "[are] not limited in time and scope to this litigation and Leopoldo Duron's subject device"; and (4) that Plaintiffs have exceeded the 25 interrogatories permitted under Rule 33(a). *See* Exhibit B. All of these objections have been waived. Where, as here, the responding party fails to state timely objections, that party waives its right to object. *See* 8A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2173 (2007) ("failure to object within the time fixed by the rule is a waiver of any objection"); *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977) ("By failing to object, [party] waived any objections it might have had to the giving of a full answer to the interrogatory.").

Even putting the waiver issue aside, the objections are meritless. First, this Court's order requiring Dr. Higgins to comply with the January 5, 2007 subpoena, does not moot these interrogatories. That order merely ordered *Dr. Higgins* to produce documents relating to his relationship with Defendants; it did not consider or address Defendants' separate obligations. Because Defendants are likely to have additional documents and information pertaining to their long-standing relationship with Dr. Higgins, that information must be produced. *See, e.g., In re Control Data Corp. Sec. Litig.*, No. 3-85-1241, 1988 WL 92085, at *6 (D. Minn. Feb. 22, 1988) ("[E]very requested document which is in [a party's] possession must be produced, notwithstanding actual or potential production from another source"). Dr. Higgins has represented that he has deleted or is unable to locate email communications he has had with Defendants. *See* Exhibit D. Thus, much of the information requested by the interrogatories can *only* be obtained from Defendants.

Second, Defendants' unsupported objections that the interrogatories are unduly burdensome must be rejected. *See, e.g., Mead Corp. v. Riverwood Natural Res. Corp.*, 145 F.R.D. 512, 515-16 (D. Minn. 1992) ("party opposing discovery shoulders the burden of showing that discovery request is overly broad and burdensome" and must support objections with specific facts). Defendants have asserted no facts supporting their objections, nor can they. Several courts in this district have required Defendants to respond to interrogatories such as those here, which ask Defendants to identify documents relevant to the asserted causes of action. *See, e.g., Medtronic, Inc. v. Guidant Corp.*, Nos. Civ. 00-1473MJD/JGL, 00-2503MJD/JGL, 2003 WL 23864972, at *3-*4 (D. Minn. Jan. 8, 2003); *In re St. Jude Medical, Inc., Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 1396, 2002 WL 341020, at *1 (D. Minn. Mar. 1, 2002).

Next, Defendants object that the time period of the interrogatories is not limited to the time frame when Dr. Higgins was Mr. Duron's treating physician. As set forth above, these interrogatories seek information regarding Dr. Higgins' long-standing relationship with Defendants. Documents or other information that pre- and post-date Dr. Higgins' treatment of Mr. Duron, are plainly relevant to this inquiry. *See, e.g., In re Control Data*, 1988 WL 92085, at *3 (holding that documents outside class period, which are relevant to "scienter, intent, and knowledge" must be produced).

Finally, Defendants object that Plaintiffs have exceed the 25 interrogatories set forth in Rule 33(a). The parties, however, have treated this number as provisional. For instance, the parties are in the process of meeting and conferring over Plaintiffs' Third Set of Interrogatories. Although Defendants have also objected to those interrogatories on similar grounds, they have expressly represented that they will provide substantive responses to a subset of those interrogatories, notwithstanding their objection. As the Court knows, Plaintiffs have minimized propounded interrogatories. Moreover, the Rules contemplate 25 interrogatories for a single case. When a MDL consists of thousands of coordinated cases, and five separate representative trials, the 25 interrogatory limit should apply to each representative case, not to the entire coordinated action. This is particularly true where, as here, good cause exists for additional discovery requests. Accordingly, Plaintiffs respectfully request that this Court order Defendants to provide substantive responses to these interrogatories.

B. <u>Shook, Hardy & Bacon, LLP's Communications with Dr. Higgins</u>

Defendants' attorney Michael Moeller, and perhaps others, have had several *ex parte* contacts and/or communications with Dr. Higgins, including meeting with Dr. Higgins to draft an affidavit that was submitted in connection with Defendants' summary judgment briefs. *See* Exhibit E. Despite the fact that Shook, Hardy & Bacon, LLP ("Shook Hardy") has explicitly stated that they do not represent Dr. Higgins, Mr. Moeller has refused to produce any e-mails or other documents reflecting such communications or meetings and, as noted, Dr. Higgins says he has retained no such materials. *See id.* These communications are not privileged, and are relevant because among other things they pertain to Dr. Higgins' treatment of Mr. Duron and his

prior relationship with Guidant. Therefore, Plaintiffs respectfully request that this Court order Defendants to produce all communications or documents reflecting communications that their attorneys or other representatives have had with Dr. Higgins.

C. Defendants Failure To Produce "FRED Reports"

At his deposition, Richard Vogel, the CFO of Cardiac Rhythm Management ("CRM"), testified and referenced a monthly report that was prepared by Vice Presidents of various departments and provided to the President of CRM, Frederick McCoy. These "FRED Reports," summarized, among other things, budget and spending trends related to ICD production costs, quality assurance testing, and proposed safety enhancements. On February 14, 2007, Plaintiffs requested that Defendants produce legible and properly formatted copies of all "FRED Reports." *See* Exhibit F at 1. These reports are relevant because they reveal specific information that was received by Guidant executives regarding issues with Guidant devices, and they may demonstrate (as other documents have suggested) that financial concerns influenced Defendants' quality assurance programs and their response to known device defects.[1] In a letter dated April 13, 2007, Defendants refused to produce these reports, claiming that they "do not appear to be relevant to the issues in this litigation." *See* Exhibit G at 3. Defendants reiterated that position during an April 27, 2007 meet and confer and invited Plaintiffs to bring the issue to the Court.[2] Accordingly, Plaintiffs respectfully request that this Court order Defendants to produce unredacted and properly formatted copies of all "FRED Reports," or similar materials.

Respectfully submitted,

ZIMMERMAN REED, PLLP	NEBLETT, BEARD & ARSENAULT
/s Charles S. Zimmerman	/s Richard J. Arsenault
Charles S. Zimmerman	Richard J. Arsenault
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP	LOCKS LAW FIRM, PLLC
/s Elizabeth J. Cabraser	/s Seth Lesser
Elizabeth J. Cabraser	Seth Lesser

1 Defendants cannot claim that production of these reports would be overly burdensome, as Mr. Vogel has testified that all "FRED reports" are stored in a central location.

2 Because the meet and confer on these reports has been ongoing for several months, Plaintiffs feel that the Court's intervention is now needed. Plaintiffs do note that most recently Defendants have stated that they might be willing to produce some subset of the reports if Plaintiffs will identify which ones they want. Plaintiffs do not feel that they should be required to identify particular reports, given that all information regarding the reports is in Defendants', and not Plaintiffs', possession. Should the parties reach agreement on this issue by Monday, May 7, 2007, Plaintiffs will pull down this request. However, we do believe it is necessary to raise this issue now, rather than incur additional delays.