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The Honorable Donovan W. Frank
United States District Court for the District of Minnesota
180 East Fifth Street
7th Floor
St. Paul, Minnesota 55101

Re: ***In re Guidant Corp. Implantable Defibrillator Products Liability Litigation***

Dear Judge Frank:

Defendants respectfully submit this letter in response to plaintiffs' letter dated May 24, 2007, regarding the production of emails from backup tapes.

Defendants have produced an unprecedented volume of documents in this litigation. Apparently not satisfied with the production of nearly 14 million pages of documents from active data sources, plaintiffs are now complaining about the rate of production of documents from inactive data sources. Plaintiffs' letter further evidences their desire to use discovery as a weapon rather than to litigate the merits of the claims to be addressed in the imminent representative trials.

Plaintiffs' letter relies on the following basic premises: 1) that defendants provided a completion date for the production of documents from inactive data sources; 2) that defendants have unlimited resources to devote to plaintiffs' boundless and unending discovery requests, and 3) that the process for the restoration and production of documents from inactive data sources is simple. For the reasons identified below, each of those premises is false and the Court should deny the relief requested in plaintiffs' letter.

Contrary to plaintiffs' unsupported claim, defendants have never provided a completion date for the production of all documents from restored backup tapes, much less a completion date in April or May. Given the timing and scope of the efforts involved in this complicated process, defendants could not commit to a completion date so soon after the parties reached agreement on the protocol. Indeed, Plaintiffs did not agree to the backup tape protocol until March 7, 2007, and only after they had significantly expanded the number of custodians and search terms to be included in the production of materials from inactive data sources. Moreover, defendants have made it clear from the outset that productions of backup tape emails would be made in a rolling manner. Plaintiffs' own communication confirming their agreement to the backup tape protocol demonstrates their understanding that productions would be rolling. It also contains no commitment from defendants to a specific completion date. The recency of the plaintiffs' agreement to the protocol, plaintiffs' late enlargement of the number of custodians and search terms

involved, and the massive volume of resulting documents to be restored, reviewed and produced, all explain why defendants have not provided a specific completion date.[1]

Moreover, plaintiffs' letter utterly ignores the discovery efforts by defendants in this litigation. Though those efforts have been extraordinary and the volume of document productions is unprecedented, defendants do not have unlimited resources to devote to plaintiffs' persistent and insatiable demands for the immediate production of all documents from countless sources of data, both active and inactive. To date, defendants have produced nearly 14 million pages of documents from active data sources. Since plaintiffs agreed to the backup tape protocol on March 7, 2007, defendants have produced nearly 1.4 million pages of documents, over 100,000 pages of which are from backup tapes. The drain on defendants' resources, human and financial, occasioned by such productions has been staggering and likely unparalleled in other MDLs.

Plaintiffs' letter likewise disregards the known challenges presented by the production of documents from inactive data sources. The process is burdensome and time consuming, a fact defendants conveyed quite clearly to plaintiffs and the Court many months ago in our Opposition to Plaintiffs' Motion to Compel Production of Materials from Backup Tapes. The entire process requires many steps, including media intake, preservation, data extraction, data culling, data processing and loading, document review, and the production of responsive documents, all of which steps were explained before plaintiffs expanded the scope of this endeavor by increasing the number of custodians and search terms involved. As predicted, this has proven to be an extremely expensive and burdensome endeavor for defendants, the costs and demands of which should not be compounded by the arbitrary and unreasonable June 15, 2007, deadline for completion suggested by plaintiffs.[2]

As plaintiffs well know, the production of documents from active data sources have not stopped since plaintiffs' recent agreement to the backup tape protocol. The production of documents in response to plaintiffs' requests related to Dr. Higgins alone exceeded

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1 Apparently, plaintiffs are confusing an estimated completion date with the estimated initiation date of the rolling production provided by defendants. Defendants did estimate that the rolling production would likely begin in the latter part of April. Defendants' first production of documents from inactive data sources occurred on May 4, 2007. As of this date, defendants have produced over 100,000 pages of materials from the backup tapes.

2 As an alternative to the June 15 completion date, plaintiffs make the astounding proposal that they be provided access to and permitted to search through the restored documents before defendants review them for privilege and responsiveness. Not surprisingly, plaintiffs offer no support, in law or in common sense, for such unfettered access to documents that have not been reviewed for privilege by the opposing party. This request should be denied outright.

300,000 pages and required a significant interruption in the review and production of backup tape documents. Contrary to plaintiffs' suggestion though, the Higgins production does not alone account for the need for at least 10-12 weeks for the production of all documents from inactive data sources to be completed. Due in part to the expansion of the number of custodians and search terms involved, the number of restored documents to be reviewed is massive, approaching nearly 2.5 million pages. The restoration, review and production of such a volume by necessity will take many weeks even if all resources available are devoted to that effort. With the trial of the representative cases just weeks a way, however, the reality is that not all possible resources can be devoted to the review and production of data from inactive sources.

With the representative trials approaching, the focus of the parties and the Court should be on trial preparation issues, not on issues related to the production of documents from inactive data sources, especially when plaintiffs have received nearly 14 million pages of documents from active data sources before the first trial. Given the 2.5 million page volume of restored documents and trial preparation requirements, defendants believe the estimated completion in 10-12 weeks of the backup tapes production is an aggressive deadline and one that assumes the absence of new and shifting priorities imposed by plaintiffs. Nonetheless, it is a deadline defendants will work earnestly to meet and, as with documents in this litigation from active data sources, defendants are committed to producing these documents from inactive data sources as soon as is practically possible. However, the June 15 deadline proposed by plaintiffs is arbitrary and plainly ignores the massive volume of documents at issue.

For these reasons, the Court should not require the production of backup tape documents to be completed by June 15, and should deny any other relief requested in plaintiffs' letter.

Sincerely,

Timothy A. Pratt
Partner

TAP:jcd