



June 11, 2007

Timothy A. Pratt

The Honorable Donovan W. Frank
United States District Court for the District of Minnesota
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Re: No. 0:05-MD-1708-DWF-AJB, In re: Guidant Corp. Implantable Defibrillators Products Liability Litigation, In the United States District Court, District of Minnesota

Dear Judge Frank:

Pursuant to your letter to counsel dated March 27, 2007, Guidant submits the two following issues to be addressed on an expedited basis:

A. Braund Jurisdictional Issues

On June 8, 2007, the PSC finally answered this Court's request to delineate its position on this Court's jurisdiction over the *Leland Braund* case, the third representative trial scheduled for trial in September 2007. As the parties and the Court stand on the brink of beginning the representative trial process that we have worked toward for nearly 18 months, the PSC for the first time now expresses its doubts as to the "efficacy and value" of the representative trial process. In that same letter, the PSC for the first time states that this Court lacks subject matter jurisdiction to try the *Braund* case, little more than three months from its scheduled representative trial date.

The PSC has apparently changed its mind about the very bellwether trial process it wholeheartedly supported from the beginning of this MDL. But the only thing that has changed over the last few months is that the bellwether trial process has exposed individual, representative PRIZM 2 cases to intense factual and legal scrutiny. As these cases wilted under the bright light of this scrutiny, so too has the PSC's ardor to try them. The parties and the Court have invested far too many resources to allow PSC to change its mind and unilaterally try to sabotage the process at this late date.

Indeed, the parties originally agreed upon a provision preventing either party from dismissing a representative trial case in order to prevent precisely this type of situation. The identity and ratio of representative cases, including the *Braund* case, were carefully selected by the parties jointly according to mutually agreed upon and Court-sanctioned staged procedures. This careful process began with consideration of all cases filed in or transferred to this MDL before March 23, 2006, then narrowed the pool to forty jointly selected potential representative cases. Ex. A, PTO No. 9, May 3, 2006. After a period

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of limited discovery, the parties narrowed the potential representative cases down to twenty. After another stage of limited discovery, the parties jointly selected the five representative cases now set for trial this year through a series of alternating strikes. These cases were selected according to the ratio and process ordered by this Court after considerable briefing and discussion: one explant with complications case (Clasby), two explant without complications cases (Duron and Braund), and two anguish-only cases (Beranek and Valls) and one death case.

The PSC now seeks to derail the entire representative trial process at the eleventh hour. In order to avoid having to try the *Braund* case, the PSC now seeks to take advantage of a jurisdictional defect well-known to them for months. The Court cannot permit this type of manipulation. All parties have known of the *Braund* case's jurisdictional infirmities for well over a year since this Court issued its March 14, 2006 ruling repudiating federal officer removal jurisdiction in the *Wislocki* and *Machalowski* cases. Ex. B, Order, March 14, 2006; Ex. C, Memorandum and Order, April 26, 2006. As early as Summer of 2006, counsel for Guidant repeatedly brought this issue to the PSC's attention during the representative trial selection process, requesting that they dismiss and re-file the Braund case in the United States District Court for the District of Minnesota in order to avoid the precise jurisdictional problem the PSC now seeks to exploit. Each time the PSC promised to consider the issue, but took no action, instead choosing to let the Braund case roll toward its representative trial date with full knowledge of its jurisdictional infirmity.

Guidant objects strenuously to this gamesmanship. Though not originally its idea, Guidant has fully embraced the representative trial process and has expended enormous sums of money and time preparing these five cases for trial this year. The Court has asked Guidant its position as to whether the Court may maintain diversity jurisdiction over the *Braund* case irrespective of federal officer jurisdiction. Guidant does believe that diversity jurisdiction exists, because complete diversity exists between all parties. However, the presence of CPI, a Minnesota corporation, as a defendant in this case also appears to make this case non-removable under 28 U.S.C. 1441, which prevents removal of a case filed in a state court case where a defendant resides in that state. While Mr. Braund could have originally filed this case in this Court, Guidant cannot remove it to this Court through the use of diversity jurisdiction.

Guidant believes the solution is apparent: require the PSC to dismiss the current *Braund* case and re-file the identical case in this Court under diversity jurisdiction. This solution would cure the jurisdictional defect based on its removal pursuant to the now-overruled theory of federal office jurisdiction, and would allow the parties to maintain the September trial date and the integrity of the representative trial process with no prejudice to any party.

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There is no basis for seeking the Court's intervention regarding this issue. Contrary to the PSC's representation, counsel for Guidant has not refused to respond to this issue. Upon receiving Mr. Goldser's June 5 request for accommodation on this issue, Mr. Carpenter immediately forwarded his request to the Guidant counsel responsible for scheduling this IME, and informed Mr. Goldser of that fact the next day, explaining that they would soon be contacting him. See Ex. D, e-mail from A. Carpenter to R. Goldser, June 6, 2007. Guidant has no interest in imposing unnecessary hardship on any plaintiffs, and remains confident in the parties' ability to work out a mutually acceptable solution to this problem.

Sincerely,



Timothy A. Pratt

cc: Seth Lesser
Elizabeth J. Cabraser
Richard J. Arsenault
Charles Zimmerman

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