

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: GUIDANT CORP. IMPLANTABLE)
DEFIBRILLATORS PRODUCTS)
LIABILITY LITIGATION)

MDL No. 05-1708 (DWF/AJB)

This Document Relates to:)

JUDITH E. KING, Individually,)
and as Personal Representative)
of the Estate of Decedent)

ROBERT L. KING,)

Plaintiff,)

vs.)

Civil No. 06-1571 (DFW/AJB)

GUIDANT CORPORATION and)
GUIDANT SALES CORPORATION,)

Defendants.)

WENDY BARE, Individually)
and as Personal Representative)
of the Estate of Decedent)

RONALD BARE,)

Plaintiff,)

vs.)

Civil No. 06-3253 (DFW/AJB)

GUIDANT CORPORATION and)
GUIDANT SALES CORPORATION,)

Defendants.)

MARIA GLORIA HERREROS FREIRE,)
LUIS IGNACIO MONTALVA HERREROS,)
MATIAS MONTALVA HERREROS,)
JOSE' TOMAS MONTALVA HERREROS,)
JUAN ESTEBAN MONTALVA HERREROS,)
 and)
MARIA GLORIA MONTALVA HERREROS,)
 Individually and on Behalf of the Estate of)
 Decedent **LUIS ESTEBAN**)
MONTALVA RODRIGUEZ,)
)
)
)
 Plaintiff,)
)
 vs.)
)
GUIDANT CORPORATION and)
GUIDANT SALES CORPORATION,)
)
)
 Defendants.)

Civil No. 06-3252 (DFW/AJB)

PLAINTIFFS' FRCP 37 (a)(2)(A) MOTION FOR
ORDER COMPELLING DISCOVERY/DISCLOSURE,
FRCP 37 (b)(2)(D) MOTION FOR CONTEMPT
FOR FAILURE TO OBEY PRETRIAL ORDER NO. 15 AND
FRCP 37 (b)(2) MOTION FOR SANCTIONS

Come now the Plaintiffs, Wendy Bare, Individually and as Personal Representative of the Estate of Decedent Ronald Bare, Judith E. King, Individually and as Personal Representative of the Estate of Decedent Robert L. King, and Maria Gloria Herreros Freire, Luis Igancio Montalva Herreros, Matias Montalva Herreros, Jose' Tomas Montalva Herreros, Juan Estaban Montalva Herreros and Maria Gloria Montalva Herreros, Individually and as Personal Representatives of the Estate of Decedent Luis Estaban Montalva Rodriguez, by Counsel, and for their pleading herein, allege and say as follows:

1. In this Court's Order Modifying Pretrial Order No. 15 handed down on November 17, 2006 the Court herein ordered Guidant to comply with its "continuing obligation" to produce data gathered from ICDs. The Order required Guidant to "provide **all information** recorded before, during, and after testing of the device, in **all forms in which data is obtained**, and **all information extracted** in the performance of "Save to Disk" and "Hex Dump" download functions, in paper and electronic form." (emphasis added).

2. On January 9, 2007 data downloading occurred in Minnesota at Guidant facilities on numerous Guidant ICDs. The ICDs downloaded included, among others, the King, Montalva and Bare ICDs. Farrah Harris, with the office of Plaintiffs' expert, Dr. Bruce Barkalow, was present and witnessed the downloading of said ICDs. In addition, the downloading was videotaped. After several weeks of delay, the downloaded data was eventually turned over in April, 2007.

3. Plaintiff's expert, Dr. Bruce Barkalow then proceeded to analyze the data allegedly downloaded by Guidant from the King, Montalva and Bare ICDs. As may be seen in detail from Dr. Barkalow's Affidavit (attached hereto as **Exhibit A**", along with Dr. Barkalow's *Curriculum Vitae*), Guidant failed and or refused to provide **all information** downloaded on January 9, 2007, contrary to this Court's Order of November 17, 2006.

4. The averments in Dr. Barkalow's Affidavit are clear. Dr. Barkalow confirms therein that he concluded from viewing the videotape of the January 9th downloading that certain downloaded information is "missing" from the data actually turned over by Guidant (see "**Exhibit B**" showing pictures of downloading screens). The missing/unsupplied data is not inconsequential information. Dr. Barkalow swears in his Affidavit that what has not been

supplied by Guidant is necessary to properly “assess the clinical performance of the ICD.” Dr. Barkalow swore that in his professional opinion that the patient data downloaded on January 9, 2007 “has not been supplied to Plaintiffs to date by Guidant.”

5. It would be difficult to over-emphasize the importance of this egregious failure of Guidant to comply with the Court’s November 17, 2006 Order. These death cases allege failure of Guidant ICDs to perform properly and/or that the ICDs mis-functioned. In order to properly evaluate the evidence in these death cases and to prepare for any future trial Plaintiff’s expert requires *all* of the downloaded data.

6. It is troubling that with Dr. Barkalow’s Affidavit and the videotape that it is clear that the data from the King, Montalva and Bare ICDs was downloaded, but apparently purposely not turned over to Plaintiffs, in direct violation of this Court’s November 17, 2006 Order, and thus of FRCP 37 (a)(2)(B)(3).

7. Plaintiffs respectfully assert that Guidant’s apparently purposeful disobedience of this Court’s November 17, 2006 Order subjects it to:

- a.) the entry of an Order by this Court under FRCP 37 compelling disclosure/discovery of the missing and as yet unproduced, though downloaded, data from said ICDs;
- b.) the entry of an Order by this Court under FRCP 37(b)(2)(D) finding Guidant’s failure to comply with Pretrial Order No. 15 as in contempt of Court; and
- c.) the entry of an Order by this Court under FRCP 37 (b)(2) imposing sanctions against Guidant and awarding attorney’s fees, in an amount as may be determined by the Court.

8. The Plaintiffs represent to the Court that they have in good faith conferred with

Counsel for Guidant on this matter in an effort to secure disclosure without action by the Court. A copy of the Plaintiffs' 'meet and confer' correspondence of June 18, 2007 is attached hereto as **"Exhibit C"**.

WHEREFORE, the Plaintiffs, Wendy Bare, Individually and as Personal Representative of the Estate of Decedent Ronald Bare, Judith E. King, Individually and as Personal Representative of the Estate of Decedent Robert L. King, and Maria Gloria Herreros Freire, Luis Igancio Montalva Herreros, Matias Montalva Herreros, Jose' Tomas Montalva Herreros, Juan Estaban Montalva Herreros and Maria Gloria Montalva Herreros, Individually and as Personal Representatives of the Estate of Decedent Luis Estaban Montalva Rodriguez, by Counsel, respectfully move the Court to: a.) enter an Order under FRCP 37 compelling disclosure/discovery of the missing and as yet unproduced, though downloaded, data from said ICDs; b.) enter an Order under FRCP 37(b)(2)(D) finding Guidant's failure to comply with Pretrial Order No. 15 as in contempt of this Court; and c.) enter an Order under FRCP 37 (b)(2) imposing sanctions against Guidant and awarding attorney's fees, in an amount as may be determined by the Court; and all other relief appropriate in the premises.

DATED at Indianapolis, Indiana on this 5th day of July, 2007.

Respectfully submitted,

s/ John R. Price

John R. Price, Attorney #5828-49
JOHN PRICE & ASSOCIATES
9000 Keystone Crossing
Suite 150, Indianapolis, IN, 46240
Telephone: (317) 844-8822
Facsimile: (317)-844-7766
john@johnpricelaw.com

Respectfully submitted
(On behalf of Judith L. King, as
Co-Counsel)

s/ Rhett D. Klok

Rhett D. Klok, Esq.
Motley Rice, LLC
28 Bridgeside Blvd.
Mt. Pleasant, SC 29466
(843) 216-9218
(843) 216-9430 – Fax
Rklok@motleyrice.com

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