

# PRICE ■ OWEN

An Association of Attorneys and Counselors At Law

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June 18, 2007

***Via Facsimile Transmission: 612-766-1600; 816-421-5547***

***Via e-mail: jprice@faegre.com; pratt@shb.com***

***And U.S. Postal Service***

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Mr. Timothy A. Pratt  
SHOOK HARDY & BACON LLP  
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Kansas City, MO 64108

Re: Guidant Corp. Implantable Defibrillators Products Liability Litigation  
United States District Court, District of Minnesota  
MDL No. 05-1708 (DWF/AJB)

*Individual Case No. 06-1571*

Judith King and Estate of Robert King v. Guidant Corporation

Re: Guidant Contak Renewal 3, Model H170

*Individual Case No. 06-3252*

Estate of Luis Esteban Montalva Rodriguez v. Guidant Corporation, et al

Re: Pacemaker Discovery II Model 1284

Almer v. Peanut Corporation of America

Doc. 2148 Att. 3

*Individual Case No. 06-3253*

Wendy Bare and Estate of Ronald Bare v. Guidant Corporation

Re: Contak Renewal 3 Model H177

*Individual Case No. 06-00680*

The Estate of Bernard Garrison and Linda Garrison

vs. Guidant Corporation, et al.

Re: Guidant Ventak PRIZM 2 DR Model 1861

Dear Mssrs. Price and Pratt:

This letter constitutes a 'meet and confer' demand under FRCP 37. (Demand I). It also includes a demand to withdraw Guidant's refusal to allow a certain form of testing of Guidant ICDs. (Demand II).

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**Demand I – Failure to Provide Ordered Information**

As you know, Judge Frank in his Order Modifying Pretrial Order No. 15 handed down on November 17, 2006 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).

On January 9, 2007 data downloading occurred in Minnesota at Guidant facilities on numerous Guidant ICDs. The ICDs downloaded included the King, Montalva and Bare ICDs. Farrah Harris, with the office of our 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 data was eventually turned over in April, 2007.

Our 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 attached Affidavit, Guidant has failed and or refused to provide **all information** downloaded on January 9, 2007, contrary to the Court’s Order of November 17, 2006. The averments in the Affidavit are clear. Dr. Barkalow confirmed from the videotaping of the January 9<sup>th</sup> downloading that certain downloaded information is “missing” from the data actually turned over by Guidant. The missing/unsupplied data is not inconsequential information. Dr. Barkalow swears in his Affidavit that what has not been supplied is necessary to properly “assess the clinical performance of the ICD.” Dr. Barkalow swears that in his professional opinion that the patient data downloaded on January 9, 2007 “has not been supplied to Plaintiffs to date by Guidant.”

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 to mis-function. In order to prepare for any future trial Plaintiff’s expert requires all of the downloaded data. We now know that the data from the King, Montalva and Bare ICDs was downloaded (see “**Exhibit B**” to Affidavit showing pictures of downloading screens) but apparently purposely not turned over to Plaintiffs, in direct violation of the November 17, 2006 Order by Judge Frank.

Mr. Joseph M. Price, Mr. Timothy A. Pratt  
June 18, 2007 – Page 3

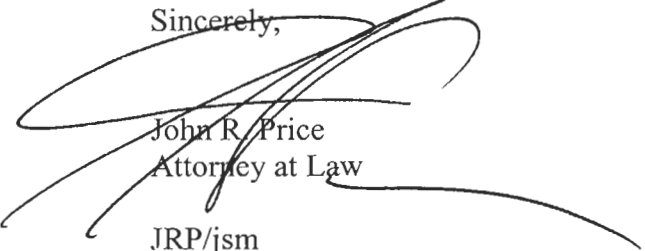
If we have not resolved this matter by July 2, 2007 we will petition the Court for a finding of contempt under FRCP 37 (a)(3), with appropriate sanctions under FRCP 37 (b)(2)(D).

**Demand II – Request to Withdraw Prohibition of Testing**

On May 21, 2007 I wrote to Christopher Gramling in your offices, not only informing him that the supplied downloading data was useless (“nonsensical streams of numbers”), but also requesting authorization for our expert, Dr. Barkalow, to use a Guidant system available to our cardiologist consultant for purposes of interrogating certain Guidant ICDs. (See attached copy of e-mail to Gramling and his response.) With appropriate restrictions on notification and attendance by Guidant observers, this request was granted. We also proposed as a part of the interrogation process “incident simulations”. In Mr. Gramling’s response to this issue he refused to grant Guidant’s consent, opining that the “preservation order” does not authorize such testing.

Before we ask the Court to compel the discovery proposed we are giving Guidant the opportunity to withdraw its prohibition of simulation testing. Nothing in any of the Court’s pretrial Orders would prohibit such a routine testing practice, and is necessary to fully interrogate the Guidant ICDs. Please consider this also as a ‘meet and confer’ demand for prior to the filing of a Motion to Compel Discovery under FRCP 37 (a)(2).

Sincerely,



John R. Price  
Attorney at Law

JRP/jsm

Enclosures

cc: Rhett Klok, Esq.  
Mrs. Judith King  
Sr. Matias Montalva Herreros  
Mrs. Wendy Bare  
Mrs. Linda Garrison