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The Honorable Donovan W. Frank
United States District Court
District of Minnesota
Warren D. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101

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:

Defendants respectfully submit the following sur-reply regarding their Opposition to Plaintiffs' Motion to Compel Discovery of Material Redacted by Defendants. The work product doctrine was designed to prevent unwarranted inquiries into the files and mental impressions of an attorney. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir. 1987) (*citing Hickman v. Taylor*, 329 U.S. 495, 510 (1947)). Plaintiffs' Motion to Compel is just such an unwarranted inquiry.

The 10 documents withheld from the Ernst & Young ("E&Y") production contain reserve information about individual cases and certain categories of cases.[1] It is uncontroverted that "individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product." *Simon*, 816 F.2d at 401-402. Similarly, aggregate case reserve figures that distinguish cases by category reflect counsel's professional opinion about the value of each category of case. Consequently, these 10 documents constitute opinion work product and as such, are afforded virtually absolute protection from discovery. *See Baker v. Gen. Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000).

What is more, Plaintiffs provide no explanation why they want these 10 documents. The amount of Defendants' litigation reserves is wholly irrelevant to any element of Plaintiffs' claims. Plaintiffs simply want to know how much Defendants think their cases are worth. Plaintiffs have no right to this information. It would be completely antithetical to the work product doctrine for this Court to compel Defendants to produce this information.

Plaintiffs continue to misstate the standard for waiver. Work product protection is only waived when disclosure substantially increases the opportunity for an adversary to obtain information. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 2209 F.R.D. 441, 445-446 (S.D.N.Y. 2004). To avoid waiver, parties need only share a common interest, not a litigation interest. *Id.* at 447. Under *Merrill Lynch*, the question before this Court is whether E&Y was

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[1] These documents have already been submitted to the Court for *in camera* and *ex parte* review.

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an adversary or a conduit to an adversary. Despite Sarbanes-Oxley and any dicta in *Arthur Young*,[2] E&Y was neither an adversary nor a conduit to an adversary.

Plaintiffs' weak attempt to distinguish *Merrill Lynch* is untenable. Here, E&Y was not required to publicly disclose the information in these 10 documents. In fact, Sarbanes-Oxley contains no obligation of public disclosure. It simply requires reporting-up within the company. And even though the retention agreement Defendants mistakenly attached to their opposition did not pertain to E&Y's audit work, E&Y had an obligation to disclose nothing. AICPA Rule of Professional Conduct 301 mandates, "A member in public practice shall not disclose any confidential client information without the specific consent of the client." Moreover, just as in *Merrill Lynch*, Defendants' interests and E&Y's interests were aligned—to ensure the accuracy of Defendants' financial statements. *Merrill Lynch*, 229 F.R.D. at 448-449.

Before Sarbanes-Oxley, there was little doubt that disclosure of work product to an auditor does not waive work product protection.[3] Contrary to Plaintiffs' assertions, Sarbanes-Oxley changed nothing. In fact, finding waiver in this situation would be diametrically opposed to the goals of Sarbanes-Oxley. Sarbanes-Oxley was meant to prevent corporate fraud by providing more independence for auditors and eliminating conflicts of interest. *Id.* at 447. This goal is best served by full disclosure between a company and its auditors. *Id.* at 449. Finding waiver in this circumstance would force companies to withhold vital information from their auditors. And although Plaintiffs disingenuously allege that there is no "clear" majority view, the greater weight of post-Sarbanes-Oxley authority indicates that disclosure to auditors *does not* waive work product protection.[4] *Medinol*, the only post-Sarbanes-Oxley case supporting Plaintiffs' argument, has been called into question as being in direct conflict with prevailing circuit court authority. *See Alcoa*, 2006 WL 278131 at *2. And the only other case upon which Plaintiffs rely, *Diasonics*, is a 1986 case that provides scant analysis and relies exclusively on the same dicta from *Arthur Young*. *See In re Diasonics Securities Litig.*, No. C-83-4584-RFP, 1986 WL 53402 at *1 (N.D. Cal. June 15, 1986).

The court in *International Design Concepts* concluded that "the report [in question] is protected because it contains the attorney's mental impressions and professional judgments concerning the magnitude, scope and/or likely merits of the claims, was prepared in contemplation of actual and potential litigations or claims, was created in reliance upon the

[2] Plaintiffs' continued reliance on *Arthur Young* is inappropriate. *Arthur Young* holds that there is no such thing as "accountant work product." *Arthur Young* has absolutely no relevance to the issue of whether attorney opinion work product protection is waived by disclosure to an auditor.

[3] *See Samuels v. Mitchell*, 155 F.R.D. 195, 201 (N.D. Cal. 1994); *Gutter v. E.I. duPont de Nemours & Co.*, 1998 WL 2017926 at *1 (S.D. Fla. May 18, 1998); *In re Pfizer Inc. Sec. Litig.*, 1993 WL 561125 at *6 (S.D.N.Y. Dec. 23, 1993); *In re Pfizer Inc. Sec. Litig.*, 1994 WL 263610 at *3 (S.D.N.Y. June 6, 1994); *Gramm v. Horsehead Indus., Inc.*, 1990 WL 142404 at *5 (S.D.N.Y. Jan 25, 1990).

[4] *Compare Merrill Lynch*, 229 F.R.D. at 449; *Frank Betz Assocs., Inc. v. Jim Walter Homes, Inc.*, 226 F.R.D. 533, 535 (D.S.C. 2005); *Int'l Design Concepts, Inc. v. Saks Inc.*, 2006 WL 1564684 at *2-3 (S.D.N.Y. June 6, 2006); *Am. S.S. Owners Mut. Prot. And Indem. Assoc., Inc. v. Alcoa S.S. Co., Inc.*, 2006 WL 278131 at *2 (S.D.N.Y. February 2, 2006) *with Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002).

attorney work product protection and was communicated to the client's auditor under a strict pledge of confidentiality for a valid purpose that serves the interest of the client." *International Design Concepts*, 2006 WL 1564684 at *3. For these exact same reasons, this Court should deny Plaintiffs' Motion to Compel. Any other result would undermine the very goals of Sarbanes-Oxley by penalizing companies for providing their auditors with full financial disclosure of their litigation reserves.

Sincerely,

/s/ Timothy A. Pratt

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TP/sf
Enclosures

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