

**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:
Deborah J. Schneider, Individually and in
her capacity as successor executor of the
estate of Robert D. Schneider

MEMORANDUM OF LAW

vs. Case No.: 06-01821

Guidant Corp., et al.

**DEFENDANTS GUIDANT CORPORATION AND GUIDANT SALES
CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION TO DISMISS FOR FAILURE TO COMPLY WITH
THIS COURT'S JANUARY 31, 2006 ORDER**

INTRODUCTION

Defendants Guidant Corporation and Guidant Sales Corporation (“Defendants”), pursuant to Fed. R. Civ. P. 37(b)(2)(C) and 41(b) and Pretrial Order No. 5, respectfully request that this Court enter an Order dismissing the entirety of Plaintiff’s complaint against Defendants with prejudice. As more thoroughly explained below, Plaintiff has failed to provide a Plaintiff Fact Sheet (“PFS”) as required by Pretrial Order No. 5, despite this Court’s Order and Defendants’ written notice to Plaintiff’s Liaison Counsel and Plaintiff’s Individual Counsel of such failure.

ARGUMENT

On January 6, 2006, this Court entered Pretrial Order No. 2, which approved the draft of Plaintiff’s Fact Sheet. *See* Pretrial Order No. 2 at ¶ 24. On January 31, 2006, this Court entered Pretrial Order No. 5, which memorialized the issues

presented at the second Status Conference held on January 24, 2006. *See* Pretrial Order No. 5. In Pretrial Order No. 5, this Court held that “Plaintiffs’ fact sheets are to be completed no later than 30 days after the entry of this Order.” *See* Pretrial Order No. 5 at ¶ 12. For any cases not in this Court by January 31, 2006, the date of entry of Pretrial Order No. 5, Plaintiffs had “30 days from their filing or docketing [of the case] in this Court” to submit a PFS. *See* Pretrial Order No. 5 at ¶ 12.

In this matter, Plaintiff’s deadline to submit a PFS was June 26, 2006. Plaintiff missed this deadline. On July 31, 2006, Defendants provided written notice to Plaintiff of the violation, explaining the importance of compliance with this Court’s Order. To date, Plaintiff has not submitted a PFS, thus failing to comply with this Court’s Order.

Federal Rule of Civil Procedure 41(b) permits dismissal of an action for Plaintiff’s failure to comply with any order of the Court. Further, under Federal Rule of Civil Procedure 37(b)(2)(C), if a party “fails to obey an order to provide or permit discovery . . . the court . . . may make such orders in regard to the failure as are just,” including “an order . . . dismissing the action or proceeding.”

In the Eighth Circuit, a trial court has the discretion to dismiss a plaintiff’s lawsuit for failure to provide discovery under Rule 37(b)(2)(c) or to comply with the court’s orders under Rule 41(b). *See e.g., Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1259 (8th Cir. 1997); *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1984). To support dismissal, a trial court “need only find that a litigant acted deliberately rather than accidentally, and need not find bad faith.” *Anderson*, 724 F.2d at 84. In the

context of discovery deficiencies, “deliberateness includes failure to respond to discovery requests, even with extensions, and failure to provide full information after a court order.” *Id.*

Other MDL courts have dismissed cases when plaintiffs fail to submit fact sheets. In the *Phenylpropanolamine (PPA) Products Liability Litigation* (MDL 1407), the defendants moved to dismiss all plaintiffs who never submitted plaintiff fact sheets, in spite of the court-ordered deadline for submission of plaintiff fact sheets and defendants’ follow-up deficiency letter. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 2006 WL 1041822 at *1 (W.D. Wash. April 4, 2006). The court agreed that dismissal was appropriate under those circumstances (which are identical to these here) and specifically noted that defendants were prejudiced by plaintiffs’ failure to timely provide plaintiff fact sheets:

Plaintiff's delay impeded the resolution of this dispute and the ability of the court to manage its docket, problems compounded by the complex nature of the multi-district litigation. Moreover, defendant claims, and the court finds, that defendant has suffered prejudice from plaintiff's failure to comply with CMO 6. The PFS was designed to give each defendant the specific information necessary to defend the case against it. Without that discovery device, a defendant is unable to mount its defense because it has no information about the plaintiff or plaintiff's injuries outside the allegations of the complaint. In this case, plaintiff did not merely submit an incomplete PFS; she submitted no fact sheet at all within the deadline, impairing defendant’s ability to discover evidence before it is lost or forgotten.

Id.

In fact, this Court has already dismissed several cases that were part of MDL-1708 for failure to provide Plaintiff Fact Sheets. In this case, the same concerns warrant dismissal. By failing to provide a PFS, Plaintiff has willfully and knowingly violated Pretrial Order No. 5, adversely impacting Defendants on several levels. First, Defendants are prejudiced in terms of their ability to mount a defense against Plaintiff's claims. For example, without a PFS for Plaintiff, Defendants are unable to make determinations on early motions to dismiss.

In this MDL, the deadline for submitting a PFS has been no secret. The Court's Pretrial Order No. 5 and Defendants' written and oral deficiency advisories have provided substantial notice of the PFS deadline to Plaintiff. Plaintiff's failure to respond to discovery and to follow the Court's order amounts to "deliberate default" and justifies dismissal of this action.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court issue an Order dismissing the claims against Defendants with prejudice, and grant such other relief as the Court may deem just and proper.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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