

**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:

Steve Gaydos and Diane Gaydos,
as Husband and Wife,

Plaintiffs,

v. Civil No. 06-32 (DWF/AJB)

Guidant Corporation and
Adventist Health System/Sun Belt, Inc.,
d/b/a Florida Hospital Orlando,

Defendants.

ORDER

Carlos Raul Diez-Arguelles, Esq., Martinez, Manglardi, Diez-Arguelles & Tejedor,
counsel for Plaintiffs.

James B. Murphy, Jr., Esq., Scott W. Anderson, Esq., and Timothy A. Pratt, Esq., Shook
Hardy & Bacon LLP; and Joseph M. Price, Esq., Faegre & Benson LLP, counsel for
Defendants.

Plaintiffs Steve and Diane Gaydos (collectively, Gaydos) request permission from
this Court pursuant to Local Rule 7.1(g) to file a Motion to Reconsider the Court's
September 14, 2006 Order. That Order denied Gaydos's "Motion to Reopen Case and
For Relief from Judgment/Order" pursuant to Rule 60 of the Federal Rules of Civil

Procedure. Through that motion, Gaydos sought relief from the Court's July 3, 2006 Order, which granted Guidant Corporation's (Guidant) Motion to Dismiss for Failure to Comply with the Court's January 31, 2006 Order and dismissed Gaydos's case with prejudice. For the reasons set forth below, the Court denies Gaydos's request.

BACKGROUND

The following timeline is based on the parties' submissions.¹

- | | |
|------------------|--|
| January 6, 2006 | The Court enters Pretrial Order (PTO) No. 2 in the MDL action, which approves a form for plaintiff's fact sheet (PFS) and medical authorization form and requires the parties to file a Notice of Appearance, familiarize themselves with the Local Rules, and obtain a CM/ECF password. PTO No. 2 is posted on the Court's website, (www.mnd.uscourts.gov), as are all the Court's Orders in the MDL action. PTO No. 2 also explains that all orders entered in the MDL action will be deemed filed and docketed in each individual case. |
| January 17, 2006 | Gaydos's case, which was originally filed in Florida state court and removed to federal court, is transferred to this Court. The certified docket sheet from the United States District Court for the Middle District of Florida lists Gaydos's email as attorneytrialsgroup@yahoo.com . ² |
| January 31, 2006 | The Court enters PTO No. 2 in Civ. No. 06-32 and electronically sends it to Gaydos at attorneytrialsgroup@yahoo.com . |

¹ The parties' submissions include all docketed submissions to the Court and Gaydos's letters to the Court dated September 21, 2006, and September 25, 2006, and Guidant's letters to the Court dated September 27, 2006, and October 3, 2006.

² Gaydos claims that this email address was used only by his counsel's former assistant, who did not have authority to set up the email address and who left the law firm in early 2006.

The Court enters PTO No. 5 (or the January 31, 2006 Order) in the MDL action, which requires all plaintiffs to complete their PFS no later than 30 days after the date of PTO No. 5. Therefore, Gaydos's deadline is March 3, 2006.

- April 19, 2006 At MDL Status Conference, Guidant informs the Plaintiffs' Liaison Counsel (PLC) about certain plaintiffs' failure to complete their PFSs.
- April 21, 2006 Guidant sends a letter to the PLC listing plaintiffs, including Gaydos, who had failed to complete their PFSs. In that letter, Guidant requests that these plaintiffs complete their PFSs within one week.
- April 26, 2006 The PLC contacts Gaydos by facsimile and "urgent" email at mmdtlaw@hotmail.com, telling him that his case will be dismissed if his PFS is not timely submitted and providing him a copy of Guidant's April 21 letter.
- April 27, 2006 Gaydos emails the PLC, asking what a PFS is and stating that he has emailed that PLC twice with information on his case.
- The PLC sends Gaydos a copy of the PFS in a Word-document, explaining that it is requesting medical history, and the PLC informs Gaydos that it has never received any information from him.
- Gaydos sends Guidant an unsigned letter, stating "this letter will serve as Plaintiff's completion of Fact Sheet as required by Pretrial Order No. 5." The letter contains the following information about Steve Gaydos: name, date of birth, current age, implant date, implant unit, and a three-sentence "facts" section. It does not provide any completed medical authorization forms. Gaydos sends a copy of this communication to the PLC.
- April 28, 2006 Gaydos emails the PLC stating that his client is coming in to fill out the PFS on May 1, 2006.
- May 4, 2006 Guidant files a motion to dismiss against Gaydos pursuant to Federal Rules of Civil Procedure 37(b)(2)(C) and 41(b) for failure to complete his PFS; Gaydos never opposes the motion.

May 5, 2006 Gaydos sends Guidant and the PLC copies of an incomplete PFS, in which he fails to fill substantial sections of the PFS, and an unsigned medical authorization form.

May 12, 2006 The PLC emails Gaydos telling him that he has not submitted his medical authorization forms but has submitted his PFS.

May 16, 2006 The PLC emails Gaydos telling him that he had not properly filled out his medical authorization form.

May 19, 2006 Guidant emails the PLC, listing those plaintiffs who have not turned in a PFS and those plaintiffs who have not turned in medical authorization forms. Gaydos is listed as a plaintiff who has “subsequently provided a PFS that nonetheless remains deficient, including, for example, the absence of an appropriate authorization.”

May 23, 2006 Guidant sends the PLC a list of plaintiffs who have not completed PFS and medical authorization forms. Gaydos is not on the list.

May 24, 2006 Gaydos sends Guidant a signed but restricted medical authorization form, stating that information could only be requested from 1999 to the present and that no military or combat records could be requested. That form also lacks a second signature, required for the release of information relating to substance abuse, mental health, and HIV.

May 25, 2006 Guidant emails the Court proposed orders for its motion to dismiss. No proposed order is included for Gaydos.

June 6, 2006 Guidant sends Gaydos a 10-page letter, listing all of the questions Gaydos failed to answer and requesting that he provide a fully executed, court-approved medical authorization form.

June 23, 2006 Gaydos provides a few, but by no means all, of the answers Guidant requested and again fails to submit a completed and unrestricted in time and scope medical authorization form.

July 3, 2006 The Court grants Guidant’s motion to dismiss with prejudice.

July 5, 2006	The Court enters judgment in Gaydos’s case.
August 10, 2006	Gaydos contacts Guidant, asking if he has completed the PFS and medical authorization forms.
August 22, 2006	Gaydos asserts that he learns for the first time that his case has been dismissed when he receives an email from the PLC, forwarding a copy of Guidant’s letter dating August 17, 2006. Gaydos contacts Guidant in an attempt to reopen the Gaydos case.
August 24, 2006	Guidant emails Gaydos at attorneystrialgroup@yahoo.com and the PLC, giving Gaydos’s counsel an extension in two other cases and explaining that Guidant would oppose any motion to reopen. Gaydos acknowledges receiving notice of this extension. Gaydos updates his email address with the Court only in the Civ. No. 06-32 (DWF/AJB) case. His new email address is arguelles12001@yahoo.com . Gaydos files a motion to reopen the case, arguing that he used his best efforts to complete the PFS in a timely manner each time he learned that it was deficient.
August 31, 2006	Gaydos files an untimely affidavit, asserting for the first time that the reason he had no notice of the Court’s Orders or of Guidant’s requests for information was because the Court and Guidant were sending emails to the wrong email address.
September 14, 2006	The Court denies Gaydos’s motion to reopen.
September 21, 2006	Gaydos asks the Court for permission to file a Motion to Reconsider pursuant to Local Rule 7.1(g).

DISCUSSION

Pursuant to Local Rule 7.1(g), a request for leave to file a motion for reconsideration will only be granted upon a showing of “compelling circumstances.” A

motion to reconsider should not be employed to relitigate old issues but to “afford an opportunity for relief in extraordinary circumstances.” *Dale & Selby Superette & Deli v. United States Dept. of Agriculture*, 838 F. Supp. 1346, 1348 (D. Minn. 1993).

Guidant brought its motion to dismiss pursuant to Federal Rules of Civil Procedure 37(b)(2)(C) and 41(b). Rule 37 provides, in relevant part:

37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

...

(b) Failure to Comply With Order.

...

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

Fed. R. Civ. P. 37(b)(2)(C). Rule 41 provides, in relevant part:

41. Dismissal of Actions

...

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b). After carefully considering Guidant’s motion and confirming that

Gaydos never opposed the motion, the Court granted Guidant's motion and dismissed Gaydos's case with prejudice. In the July 3, 2006 Order, the Court found that Gaydos's failure to comply with PTO No. 5 prejudiced Guidant's ability to defend itself and that Gaydos's inaction adversely impacted the Court's ability to manage its docket and enforce its orders. Implicit in the Court's finding was that Gaydos acted in bad faith when he repeatedly, deliberately, and willfully disobeyed PTO No. 5. A review of the record confirms these conclusions.

The record shows that Gaydos, even after several personal contacts by both Guidant and the PLC, repeatedly failed to comply with PTO No. 5. On January 31, 2006, Gaydos was informed of the need to file a Notice of Appearance. He failed to do so. At a minimum by his own admission, he knew of PTO Nos. 2 and 5 as of April 27, 2006. But, as of that late date and in direct violation of the Court's Orders, he did not fully complete his PFS or medical authorization forms,³ ask for an extension from Guidant or the Court, or enter a Notice of Appearance updating his email information. Moreover, he never opposed Guidant's motion to dismiss, which specifically gave him notice of the discovery rules he was violating and sanctions available under them. In such situations, dismissal is indeed warranted when a party exhibits a pattern of intentional delay or silence. *See, e.g., Hutchins v. A.G. Edwards & Sons, Inc.*, 116 F.3d 1256, 1260 (8th Cir. 1997); *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983); *Lorin Corp. v. Goto*

³ To this date, as discussed in the Court's September 14, 2006 Order, Gaydos has not completed his PFS and medical authorization form in accordance with the Court's Orders.

& Co., Ltd., 700 F.2d 1202, 1208 (8th Cir. 1983). Gaydos's inaction demonstrates his bad faith. Therefore, the Court's dismissal of Gaydos's case was a proper use of its discretion under Rules 37(b)(2)(C) and 41(b).

In a sincere and eloquent letter, Gaydos seeks reconsideration of the Court's September 14, 2006 Order. In that Order, the Court denied Gaydos's request to grant relief from the July 3, 2006 Order pursuant to Federal Rule of Civil Procedure Rule 60(b)(1) and (6). The Court determined that Gaydos had failed to establish excusable neglect or any other reason justifying relief from operation of the judgment. In his well-written request, Gaydos raises the same argument that he presented in his motion to reopen, namely that he did not act willfully or with bad faith. The Court has already rejected those arguments. A careful review of Gaydos's letters, Guidant's letters, and the PLC's affidavit show that Gaydos has presented no compelling circumstances to warrant reconsideration. Because his request for leave is an attempt to relitigate old issues related to the Court's July 3, 2006 Order, the Court denies Gaydos's request.

CONCLUSION

Contrary to Gaydos's and the PLC's view of this case, this case does not simply involve "difficult communication" or a "simple discovery dispute." Both Gaydos and the PLC assert that Gaydos's actions are excusable because Guidant misled them into believing Gaydos was in compliance with PTO No. 5 because (1) the May 19 communication did not explicitly state that Gaydos's PFS was deficient; (2) the May 23 communication did not list Gaydos as failing to complete his PFS or medical authorization form; and (3) the May 25 proposed orders did not include a proposed order

for Gaydos. Guidant's 10-page, June 6th letter to Gaydos—which explicitly states which portions of Gaydos's PFS and medical authorization forms are insufficient—destroys any argument Gaydos may have about Guidant's May communications with the PLC. After receiving the June 6 letter, Gaydos had nearly a month to comply with PTO No. 5 before the Court entered its July 3 Order. Yet, he submitted an incomplete PFS and a restricted medical release form, both in violation of the Court's Orders. And he never opposed Guidant's motion to dismiss.

Gaydos and the PLC point out that Gaydos's case was considered as a possible bellwether case and that Gaydos had been cooperative in the selection process. For this reason, they assert dismissal is unwarranted. If anything, this argument shows why Gaydos should have been more, not less, responsive because it shows he was or should have been keenly aware of the actions occurring in the MDL.

The Court has repeatedly tried to be sensitive to viewing each plaintiff's arguments separately while also ensuring that this MDL operates efficiently. Gaydos's assertion that his actions are excusable because he is not familiar with MDL proceedings is unpersuasive. A plaintiff is not excused from actively participating in a case simply because his case is part of an MDL action. “[M]ultidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts.” *In re Phenylpropanolamine Products Liability Litigation*, 460 F.3d 1217, 1232 (9th Cir. 2006) (reviewing history of MDL actions and court's dismissal of action for failure to comply with court's pretrial orders). A district court has broad discretion to administer the

proceeding as a whole, and pretrial orders, such as PTO No. 5, are important tools courts need to manage MDL actions. *Id.*

Gaydos was given numerous opportunities to comply with PTO No. 5. He failed to do so. The result of his inaction should, hopefully, deter plaintiffs in the future from ignoring the Court's Orders. And, this Order should again remind both the PLC and Guidant of their important role in communicating in a direct and truthful manner with the individual plaintiffs.

Therefore, for the reasons state above, **IT IS HEREBY ORDERED:**

1. Plaintiffs Steve Gaydos and Diane Gaydos's request pursuant to Local Rule 7.1(g) to file a motion to reconsider is **DENIED**.

Dated: October 10, 2006

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court