

**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 All Actions

PRETRIAL ORDER NO. 30

This matter is before the Court on Plaintiffs' informal request to compel Guidant to produce transcripts from the Independent Panel's executive sessions.

In June 2005, Guidant established an Independent Panel of non-Guidant experts to review issues relating to the same problems that are alleged to give rise to Plaintiffs' claims. In doing so, Guidant assured the Independent Panel that it would indeed be independent of Guidant. On March 20, 2006, the Independent Panel issued its more than 100-page report, detailing its recommendations. Guidant asserts that these recommendations will assist not only Guidant but also the public in dealing with medical device issues.

In February 2006, Plaintiffs brought a motion to compel, seeking an order compelling Guidant to produce documents responsive to Plaintiffs' Request No. 24, which sought "any and all documents and communications that refer, relate or pertain to the Independent Panel that was convened to consider information relating to the Devices, including, but not limited to, all documents provided to the Independent Panel and any minutes of meetings of the Independent Panel." (PTO No. 2.) After considering the

parties' arguments, the Court concluded that "Plaintiffs are entitled to review all of the documents that were presented to the Panel so that the context and substance of the information [Guidant] gave to the [Independent] Panel can be understood by the Plaintiffs." (*Id.* at 7.) Guidant subsequently produced documents responsive to Plaintiffs' Request No. 24 on April 24, 2006, June 8-9, 2006, and October 26, 2006.

On February 21, 2007, Guidant disclosed to Plaintiffs that it has, but did not intend to produce, transcripts from the Independent Panel's interviews with Guidant employees and others, and from the Independent Panel's internal deliberations. On that same day, during a monthly status conference, Plaintiffs informally requested that the Court order Guidant to produce the transcripts.¹

Based on the manner in which Guidant disclosed to Plaintiffs that it had the transcripts—namely, shortly after Plaintiffs served the chair of the Independent Panel with a subpoena and notice of deposition—Plaintiffs are suspicious about the contents of the transcripts. Plaintiffs explain, in part, that they want the transcripts, because they include interviews of some Guidant employees whom Plaintiffs have already deposed.²

¹ Pursuant to the Court's request at the February 21, 2007 status conference, Guidant submitted two opposition letter briefs dated March 2, 2007 and March 9, 2007. Plaintiffs' responded to Guidant's letter briefs in their own letter briefs dated March 5, 2007 and March 12, 2007. In addition, Peter O. Safir, Esq., counsel for the Independent Panel, opposed Plaintiffs' request in a letter dated March 5, 2007.

² Originally, Plaintiffs also wanted the Court to compel Guidant to produce the entire transcript, including the internal deliberations of the Independent Panel. Guidant and the Independent Panel's counsel objected to this request, arguing that the Independent Panel members did not contemplate that their discussions would be made public or used in litigation. They argued that disclosure of the transcripts that include
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Specifically, they assert that they “are clearly entitled to receive the transcripts so that they may determine whether [Guidant’s] witnesses have altered their statements or recollections between the time they spoke with the [Independent] Panel and their depositions.” (Plaintiffs’ March 5, 2007 Letter at 3.)

Guidant objects to the production of any portion of the transcripts and states that it was unaware of the transcripts’ existence until well after PTO No. 7 was entered. It explains that none of the Guidant employees or others who freely appeared before the Independent Panel were placed under oath or prepared, as if their testimony would be used in later litigation. It also points out that the Independent Panel members signed confidentiality/nondisclosure agreements and assumed that their questions and deliberations would be confidential. Guidant explains that the chair of the Independent Panel—not Guidant—wanted transcripts to be taken by a court reporter. Finally, Guidant contends that the transcripts would be redundant to the documents already produced, given that the Independent Panel produced a lengthy and detailed report of its findings.

After reviewing the parties’ arguments, the Court concludes that Plaintiffs are entitled to some portion of the transcripts, namely those portions of the transcript that contain testimony of current or former Guidant employees that have been deposed or will be deposed. Guidant can redact all portions of the transcript that include the Independent Panel’s internal deliberations. It may also redact all portions of the transcript that involve

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internal deliberations would have a chilling effect on future independent panels. Subsequently, Plaintiffs withdrew their request for transcripts of the Independent Panel’s internal deliberations. (Plaintiffs’ March 12, 2007 Letter.)

testimony of non-Guidant employees or current or former Guidant employees who have not and will not be deposed. Finally, in those portions of the transcript that will be produced, Guidant must produce the questions asked or comments made by the panel members, but it may redact the identity of the panel member asking a particular question or making a particular comment. Guidant shall make this production within two weeks from the date of this Order.

The Court believes that these portions of the transcripts are relevant to one or more of Plaintiffs' claims or defenses as they appear reasonably calculated to lead to the discovery of admissible evidence. Whether the transcripts in question will be admissible at trial as prior consistent or inconsistent statements or for some other evidentiary purpose is left for another day. Moreover, production of a portion of the transcripts would not be unduly burdensome for Guidant. Finally, this result balances the interests of the parties and the public.

Dated: March 16, 2007

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