

**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:

UFCW Local 1776 and Participating
Employers Health and Welfare Fund, on
behalf of themselves and all others similarly
situated,

Plaintiff,

v. Civil No. 05-2859 (DWF/AJB)

Guidant Corporation; *et al.*,

Defendants.

and

City of Bethlehem, Pennsylvania, individually
and on behalf of all others similarly situated,

Plaintiff,

v. Civil No. 05-2883 (DWF/AJB)

Guidant Corporation; *et al.*,

Defendants.

**ORDER REGARDING
NAMED TPPS**

INTRODUCTION

This matter is before the Court pursuant to a motion brought by Plaintiffs UFCW Local 1776 and Participating Employers Health and Welfare Fund (the “UFCW Fund”) and the City of Bethlehem (the “City,” collectively with the UFCW Fund, the “named TPP Plaintiffs”). The named TPP Plaintiffs seek an order vacating consolidation of their individual actions with the Guidant MDL and dismissing their individual pending claims against Guidant so that they can appeal this Court’s May 9, 2007 Order to the United States Court of Appeals for the Eighth Circuit. For the reasons set forth below, the Court grants in part the named TPP Plaintiffs’ motion.

BACKGROUND

The procedural history associated with the named TPP Plaintiffs’ cases is, to say the least, convoluted. On December 9, 2005, the UFCW Fund filed a class action complaint against Guidant directly in this Court. When it filed the case, the UFCW Fund noted on its civil cover sheet that the case was related to the Guidant MDL. The case was originally assigned to then-Chief Judge James M. Rosenbaum and Magistrate Judge Jeanne J. Graham and later assigned to the undersigned and Magistrate Judge Arthur J. Boylan pursuant to an Order for Reassignment of Related Cases. (Civ. No. 05-2859 (DWF/AJB), Doc. No. 6.) In its Complaint, the UFCW Fund alleged five claims against Guidant for (1) Subrogation Liability Determination; (2) Violation of Consumer Protection Statutes; (3) Products Liability; (4) Common Law Fraud; and (5) Unjust Enrichment.

On December 13, 2005, the City directly filed in this Court a one-count class action complaint against Guidant for violations of unfair and deceptive trade practices under state law. The case was originally assigned to Judge Richard H. Kyle and Magistrate Judge Janie S. Mayeron. Judge Kyle later recused himself, and the case was assigned to the undersigned and Magistrate Judge Susan Richard Nelson. On January 23, 2006, Guidant sent a letter to this Court, stating that the City's case was "related" to the Guidant MDL and requesting that the Court "consolidate" the City's case with the Guidant MDL because "consolidating . . . will assist in the timely and efficient management of all of these cases and [] there is no reason for this case to proceed independently." (Civ. No. 05-2883 (DWF/AJB), Doc. No. 10.) The case was then assigned to the undersigned and Magistrate Judge Arthur J. Boylan pursuant to an Order for Reassignment of Related Cases on January 25, 2006. (Civ. No. 05-2883 (DWF/AJB), Doc. No. 11.)

On April 24, 2006, Plaintiffs' Lead Counsel Committee ("PLCC") filed a Master Complaint in MDL 05-1708 (DWF/AJB). (Doc. No. 132.¹) The Master Complaint was later amended to add a claim for punitive damages. (Doc. No. 1195.) The PLCC filed the Master Complaint "to serve the administrative functions of efficiency and economy of presenting certain common claims and common questions of fact and law for appropriate action by this Court, including trial, in the context of this multidistrict proceeding."

¹ Unless otherwise noted, all docket references will be to MDL No. 05-1708 (DWF/AJB).

(Doc. No. 132, ¶ 2.) The Master Complaint included claims of “third party payors . . . all of whom bear the ultimate economic risk of health care payments . . . against Guidant, for its sale and distribution of defective heart devices, and for its otherwise wrongful marketing, promotion, advertising and sale of these devices.” (*Id.*, ¶ 9.)

In the Master Complaint pursuant to Federal Rule of Civil Procedure 23, the UFCW Fund and the City, both residents of Pennsylvania, were the named third-party payors, and together they brought their TPP claims on behalf of themselves and all others similarly situated:

[A]ll third party payors . . . in the United States (or its Territories) who (i) have been issuers or sponsors of a contract, policy or plan that provides medical coverage to natural persons, and (ii) have incurred, pursuant to such contract, policy, or plan, full or partial costs of any of the [pacemakers and ICDs] and related medical costs including implantation surgery, replacement surgery, medical monitoring and/or hospital costs.

(*Id.*, ¶ 254.) The named TPP Plaintiffs asserted that, for the purposes of the TPP class definition, “third party entities ‘purchased’ the Guidant Devices if they paid some or the entire purchase price.” (*Id.*) In addition, they asserted that as a direct and proximate cause of Guidant’s conduct, “[p]ublic and private payors of health insurance have had to shoulder, wrongfully, an enormous economic impact of Guidant’s conduct, [in] an amount that is in the hundreds of millions of dollars.” (*Id.*, ¶ 9.)

In the Master Complaint, the named TPP Plaintiffs sought “non-monetary relief including disclosure . . . of registrant list(s) maintained by Guidant to enable appropriate effectuation of the recall and the proper allocation of the economic burden of that recall” and “monetary relief including payment for the wrongful burden placed on TPPs for the

costs of replacement and/or corrective surgeries.” (*Id.*, ¶ 29). They alleged nine counts against Guidant in the Master Complaint: (1) Violation of the Minnesota Deceptive Trade Practice Act; (2) Violation of the Minnesota Prevention of Consumer Fraud Act; (3) Violation of Minnesota False Statements in Advertising Statute; (4) Unfair and Deceptive Trade Practices Under State Law; (5) Subrogation Liability Determination; (6) Unjust Enrichment; (7) Breach of Implied Warranty; (8) Breach of Assumed Contractual Warranty Obligations; and (9) Misrepresentation by Omission.

In the Spring of 2007, Guidant moved to file a Motion to Dismiss the Medicare Secondary Payor Claims and the Third-Party Payor Claims in the Master Complaint. With respect to the named TPP Plaintiffs’ claims, Guidant moved to dismiss the claims for subrogation liability determination and unjust enrichment for failure to state a claim. Guidant also moved to dismiss the other seven claims² made by the named TPP Plaintiffs, arguing in part that the named TPP Plaintiffs did not have Article III standing to assert seven of their claims, specifically those involving state consumer protection statutes, warranties, and misrepresentation by omission.³

² The seven claims-at-issue are: (1) violation of the Minnesota Deceptive Trade Practices Act; (2) violation of the Minnesota Prevention of Consumer Fraud Act; (3) violation of the Minnesota False Statements in Advertising Statute; (4) unfair and deceptive trade practices under state law; (5) breach of implied warranty; (6) breach of assumed contractual warranty obligations; and (7) misrepresentation by omission.

³ It should be noted that in their briefs and at oral argument, both Guidant and the named TPP Plaintiffs downplayed the importance of the federal standing requirements and instead concentrated on whether Minnesota and Pennsylvania law applies to the TPP’s claims and whether the named TPP Plaintiffs have standing under either state’s consumer protection statutes and common law. But standing under state law is not
(Footnote Continued on Next Page)

Specifically, Guidant asserted that the named TPP Plaintiffs had suffered no injuries-in-fact because their insureds, not the TPPs, were the persons who suffered injuries, if any. Guidant also contended that there was no causal connection between the alleged injury and Guidant's conduct because the devices at issue in this litigation were only available through a doctor. The named TPP Plaintiffs responded to Guidant's standing argument in just four sentences, asserting only that they had suffered a "direct injury" because they had incurred "economic injuries by paying wholly unnecessary costs and medical expenses directly attributable and allocable to that conduct." (Doc. 1743 at 14.) The parties' arguments assumed that the named TPP Plaintiffs were asserting claims related to insureds whom had made claims against Guidant in the MDL.

On May 9, 2007, the Court agreed with Guidant and dismissed without prejudice⁴ seven of the named TPP Plaintiffs' claims against Guidant after concluding that the named TPP Plaintiffs lack standing to pursue those claims and noting that such claims

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equivalent to standing under federal law. Rather, regardless of a plaintiff's ability to sue in state court, a plaintiff in a federal court must meet federal standing requirements in order to assert a claim in federal court. *See Metropolitan Express Servs., Inc. v. City of Kansas City*, 23 F.3d 1367, 1369 (8th Cir. 1994) (recognizing that a court sitting in diversity may not address a plaintiff's claim until the plaintiff has standing to sue under Article III and state law); *Group Health Plan, Inc. v. Philip Morris Inc.*, 86 F. Supp. 2d 912, 917 n.2 (D. Minn. 2000) (explaining that Article III standing requirements are a "wholly separate determination" from state standing).

⁴ The Court originally dismissed the remaining seven claims with prejudice in its April 16, 2007 Order. (Doc. No. 1591.) In response to a request by the named TPP Plaintiffs, the Court, in an Order dated May 9, 2007, amended the April 16, 2007 Order to dismiss the seven claims without prejudice. (Doc. No. 1743.)

were not ripe. (*Id.*) In a second Order dated May 9, 2007, the Court also denied the named TPP Plaintiffs' request to amend the seven claims in the Master Complaint considering that any amendment would be futile because the claims were not ripe, given that they were dependent on finding that Guidant was first liable to the named TPP Plaintiffs' insureds. (Doc. No. 1739.)

Shortly thereafter, the named TPP Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit, which the Eighth Circuit dismissed for lack of jurisdiction on August 17, 2007. (Doc. No. 2339.) The named TPP Plaintiffs also filed a Motion for Entry of Judgment Under Fed. R. Civ. P. 54(b) or, in the Alternative, for Certification Under 28 U.S.C. § 1292(b). (Doc. No. 2200.) The Court denied that Motion on November 16, 2007, finding that the named Plaintiffs' TPP claims were not separate or distinct from the other claims in the Master Complaint and that the claims at issue did not involve controlling questions of law and would not materially advance the ultimate termination of the litigation. (Doc. No. 2497.)

In December 2007, a global settlement concerning the individual plaintiffs was reached. Fourteen months after the global settlement was reached, the named TPP Plaintiffs contacted the Court asking for a telephone conference to discuss the status of their cases. (Doc. No. 3785.) On March 30, 2009, with the Court's permission, the named TPP Plaintiffs filed a Motion for Reconsideration of the Court's May 9, 2007 Orders and/or its November 16, 2007 Order. (Doc. No. 3821.) In that Motion, the named TPP Plaintiffs raised for the first time the argument that their claims are in no way limited to instances where the named TPP Plaintiffs' insureds also have an underlying personal

injury claim against Guidant in the MDL. On July 1, 2009, the Court denied the named TPP Plaintiffs' Motion for Reconsideration, suggesting that they may wish to voluntarily dismiss their individual complaints under Federal Rule of Civil Procedure 41, given that the May 9, 2007 Orders and the November 16, 2007 Order were only directed at allegations contained in the Master Complaint. (Doc. No. 3992). After the Court's Order, the named TPP Plaintiffs approached Guidant seeking a stipulation for dismissal under Rule 41(a)(1)(A)(ii). Guidant declined such a stipulation because it believed that "the process would not materially advance the litigation and would improperly circumvent the final judgment rule." (Doc. No. 4165 at 4.)

Four months later and after new counsel was added, the named TPP Plaintiffs filed the current motion, seeking an order vacating consolidation of their individual actions with the Guidant MDL and dismissing their individual pending claims against Guidant so that they can appeal this Court's May 9, 2007 Order to the United States Court of Appeals for the Eighth Circuit.

DISCUSSION

I. Separating the Named TPP Plaintiffs' Cases from the MDL

The individual cases of the UFCW Fund and the City were made part of the MDL through the District's Revised Order for Assignment of Cases dated December 19, 2008. The assignment plan is an administrative, not a legal or jurisdictional, doctrine. It provides, in relevant part:

6. Rules Governing Reassignment of Related or Companion Civil Cases

...

b. For the purposes of this Order, a new civil case will be deemed to be “related” to another open civil case, if it appears (1) that the two cases share common issues of law or fact, common parties or other common factors, and (b) that the interests of justice or judicial economy would be best served if the two actions were handled by a single judge, even though the resolution of one case might not effectively resolve substantially all of the issues in the other case.

...

e. If the judge to whom a related case . . . is reassigned *determines* at any time prior to the commencement of trial that the reassigned case requires a separate trial, that judge *may* sign an order directing the Clerk to reassign the case back to the judge to whom the case had been originally assigned

(emphasis added). In other words, at this stage, the undersigned has discretion to separate the UFCW Fund’s and the City’s cases from the MDL.

The Court has carefully considered the named TPP Plaintiffs’ arguments concerning separating their claims from the MDL and notes that Guidant did not specifically oppose separation from the MDL. Given this and under its discretion, the Court determines that the UFCW Fund’s case and the City’s case should be separated from MDL No. 05-1708 (DWF/AJB) because they both require a separate trial. The undersigned will remain assigned to both cases pursuant to the District’s assignment plan.

II. Dismissing the Named TPP Plaintiffs’ Claims

The named TPP Plaintiffs concede that the Court has not been asked to decide and has not decided whether to dismiss the claims set out in the UFCW Fund’s or the City’s individual complaints. (Doc. No. 4152 at 2.) Nevertheless, they seek an order under Federal Rule of Civil Procedure 41 dismissing their individual actions by “(i) applying the Court’s decision to dismiss all claims in the UFCW Complaint and the [City’s]

Complaint that parallel those claims asserted in the Master Complaint; and (ii) issuing separate orders voluntarily dismissing all other pending claims.” (*Id.* at 8-9.) The named TPP Plaintiffs appear to be proceeding under Rule 41(a)(2), although they offer little discussion about the mechanics of the rule. They seek such an order so that they will have final decisions from which to appeal to the Eighth Circuit.

As expected, Guidant opposes the named TPP Plaintiffs’ request. It provides a detailed discussion concerning the expedited review doctrine and why it would be improper for the Court to grant the named TPP Plaintiffs’ request and apply its previous ruling to the allegations contained in the UFCW Fund’s and the City’s individual complaints. Recognizing that the Court’s May 9, 2007 Order was directed at allegations in the Master Complaint, Guidant states that “unless and until Guidant seeks to have the original, individual complaints dismissed or they are otherwise resolved, those complaints should remain.” (Doc. No. 4165 at 12.)

The named TPP Plaintiffs respond to this argument by stating that they “would not object to the Court vacating consolidation with the MDL and then, rather than dismissing the claims as alleged in the original complaints, simply letting the individual cases move forward.” (Doc. No. 4199 at 8.) Given this concession, the Court need not reach the issue of whether the named TPP Plaintiffs’ requested relief of applying its May 9, 2007

Order to the individual actions is permissible under Rule 41. Instead, the Court concludes that the now-separated cases should move forward individually.⁵

However, considering (1) the named TPP Plaintiffs' delay in bringing this motion after the settlement, (2) the fact that the named TPP Plaintiffs offered only four sentences in opposition to Guidant's Article III standing argument, (3) that the named TPP Plaintiffs now have additional counsel, and (4) as noted in the July 1, 2009 Order, that the named TPP Plaintiffs appear to have new arguments related to whether their claims involve claims related to insureds who do not have or had cases in the MDL, the Court finds it prudent to set some scheduling deadlines in this matter.

First, the named TPP Plaintiffs will be given one week in which to file a notice of voluntarily dismissal under Rule 41(a)(1)(A)(i). Because Guidant has not yet filed an answer or a motion for summary judgment in the individual actions, a dismissal by the UFCW Fund or the City will be a dismissal without prejudice pursuant to 41(a)(1)(A)(i). Second, Guidant will be given thirty days in which to bring a motion to dismiss in either or both of the individual cases.

⁵ This result is consistent with the procedural posture in the Medtronic MDL. *See Kinetic Co. v. Medtronic, Inc.*, Civ. No. 08-6062 (JMR/AJB), --- F. Supp. 2d ---, 2009 WL 4547624 (D. Minn. Dec. 4, 2009) (after orally denying a motion to dismiss third-party payor claims in the Master Complaint, the court issued an order ruling on third-party payor claims in an individual action).

CONCLUSION

Much has changed since the Court's May 9, 2007 Order, including new arguments presented by the named TPP Plaintiffs, new decisions announced in cases involving other third-party payors, and new settlements announced between the Department of Justice and Guidant. Given these developments and the procedural posture of the individual cases after this Order, while the May 9, 2007 Order may have persuasive value going forward, this Order should not be viewed as implying that the May 9, 2007 Order will have any precedential value in the individual cases.

Accordingly, **IT IS HEREBY ORDERED** that:

1. The UFCW Fund's Motion to Sever and Dismiss (Civ. No. 05-2859 (DWF/AJB), Doc. No. 15) is **GRANTED IN PART**.
2. The City's Motion to Sever and Dismiss (Civ. No. 05-2883 (DWF/AJB), Doc. No. 20) is **GRANTED IN PART**.
3. The Clerk of Court is directed to sever Civ. No. 05-2859 (DWF/AJB) and Civ. No. 05-2883 (DWF/AJB) from MDL No. 05-1708 (DWF/AJB). Pursuant to the Revised Order for Assignment of Cases dated December 19, 2008, the undersigned will continue to be assigned to Civ. No. 05-2859 (DWF/AJB) and Civ. No. 05-2883 (DWF/AJB).
4. If the UFCW Fund or the City wish to have their now-separated claims voluntarily dismissed without prejudice under Rule 41(a)(1)(A)(i), they must file a notice of dismissal within one week from the date of this Order.

5. If Guidant intends to file a Motion to Dismiss in either or both Civ. No. 05-2859 (DWF/AJB) and Civ. No. 05-2883 (DWF/AJB), it shall do so no later than 30 days from the date of this Order. Briefing shall be submitted consistent with District of Minnesota Local Rule 7.1, as amended December 1, 2009.

6. If no voluntary dismissal notices or motions to dismiss are filed, the parties are directed to contact Kathy Thobe, Calendar Clerk to Magistrate Judge Arthur J. Boylan, at 651-848-1210, to set dates for individual scheduling conferences.

Dated: January 15, 2010

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