

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP. IMPLANTABLE  
DEFIBRILLATORS PRODUCTS  
LIABILITY LITIGATION

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MDL No. 05-1708 (DWF/AJB)

This Document Relates to:

Euretha Crain, Individually and as Trustee for  
the Estate of Lonnie Crain,

Plaintiff,

v. Civil No. 07-1557 (DWF/AJB)

Guidant Corporation; Guidant Sales  
Corporation; Cardiac Pacemakers, Inc.; and  
Boston Scientific Corporation,

Defendants.

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**MEMORANDUM  
OPINION AND ORDER**

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Euretha Crain, *Pro Se*, Plaintiff.

Jane J. Bartley, Esq., Shook, Hardy & Bacon, LLP, and Jennifer Y. Dukart, Esq., and  
Joseph M. Price, Esq., Faegre & Benson, LLP, counsel for Defendants.

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## INTRODUCTION

This matter is before the Court on Guidant's<sup>1</sup> Motion For Judgment on the Pleadings. The Court held a telephonic hearing on Guidant's motion on September 27, 2011. Jane J. Bartley, Esq., appeared on behalf of Guidant. No one appeared on behalf of Ms. Crain. To date, Ms. Crain has not submitted an opposition to Guidant's motion or otherwise made contact with the Court. During the motion hearing, the Court granted Guidant's motion insofar as it also requested dismissal pursuant to Federal Rule of Civil Procedure 41(b).<sup>2</sup> This Memorandum Opinion and Order memorializes that ruling.

## BACKGROUND

On March 16, 2007, Ms. Crain commenced this action by filing a Complaint adopted from certain portions of the Master Complaint in the Guidant MDL, MDL

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<sup>1</sup> For simplicity, the Court will refer to Defendants collectively as Guidant. The Court notes that Guidant Corporation converted to Guidant LLC on February 19, 2010, and Guidant Sales Corporation converted to Guidant Sales LLC on July 31, 2010.

<sup>2</sup> Guidant based its motion on four different grounds, including moving under Federal Rule of Civil Procedure 12(c) on the basis that Plaintiff's claims are preempted by federal law and under Federal Rule of Civil Procedure 8 for failure to state a claim under the standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). For the reasons stated on the record during the hearing, the Court need not reach those grounds; however, it notes that there is little doubt that Ms. Crain's Complaint would fail under *Twombly*. In addition, as explained at the telephonic hearing, given the Court's decision to dismiss this action under Rule 41(b), it does not reach Guidant's summary judgment motion related to Ms. Crain's failure to identify expert witnesses and to timely produce expert reports.

No. 05-1708 (DWF/AJB).<sup>3</sup> Ms. Crain alleges that her husband, Lonnie Crain, suffered damage from the March 21, 2003 implantation of his Guidant VENTAK Prizm DR HE implantable cardioverter defibrillator, Model 1853, serial number 405452.

The parties in the Guidant MDL entered into a settlement in December 2007. Ms. Crain could have participated in the settlement. She ultimately opted not to do so, despite repeated attempts by the Court to assist her with the process. (*See, e.g.*, Doc. Nos. 15 and 27.) As a result, Ms. Crain’s case was separated from the MDL but remained in this Court because she commenced her action here. On February 2, 2011, Chief Magistrate Judge Arthur J. Boylan issued an Amended Pretrial Scheduling Order, instructing Ms. Crain to file and serve “an amended individual complaint in this action on or before April 1, 2011.” (Doc. No. 31 at ¶ 1.) Ms. Crain failed to do so.

### **DISCUSSION**

Rule 41(b) of the Federal Rules of Civil Procedure provides that a district court may dismiss a case for failure to prosecute a claim or comply with court orders. Fed. R. Civ. P. 41(b). Unless otherwise specified, such a dismissal operates as an adjudication on the merits. *Id.*; *Brown v. Frey*, 806 F.2d 801, 803 (8th Cir. 1986). Dismissing an action with prejudice under Rule 41(b) is “an extreme sanction [that] should be used only in cases of willful disobedience of a court order or continued or persistent failure to

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<sup>3</sup> In the Guidant MDL, Guidant filed an Answer to the Master Complaint on April 30, 2007. Guidant bases the Rule 12(c) portion of its motion on Ms. Crain’s Complaint and Guidant’s Answer to the Master Complaint.

prosecute a complaint.” *Smith v. Gold Dust Casino*, 526 F.3d 402, 405 (8th Cir. 2008) (quotation omitted).

Ms. Crain has done little to pursue her claims since March 2007. And, after participating in a hearing to show cause why her case should not be dismissed for failure to comply with a previous Court order, she failed to comply with Chief Magistrate Judge Boylan’s February 2, 2011 Order. Given this failure and the unique time frame involved in this case, the Court finds that dismissal with prejudice under Rule 41(b) is warranted. *See Wood v. Guidant*, Civ. No. 08-1445 (DWF/AJB), 2011 WL 3625062, at \*1 (D. Minn. Aug. 17, 2011) (dismissing action that was formerly part of the Guidant MDL under Rule 41(b) for failure to comply with a court order); *Carlone v. Gagnon, Inc.*, Civ. No. 09-190 (PJS/FLN), 2009 WL 903256, at \*1 (D. Minn. Apr. 1, 2009) (dismissing action under Rule 41(b) after plaintiff did not file amended complaint as directed by the Court); *see also Gaydos v. Guidant Corp.*, Civ. No. 06-32 (DWF/AJB), Doc. No. 7 (dismissing action under Rule 41(b) after plaintiffs failed to file as directed by the Court plaintiffs’ fact sheets in the Guidant MDL). Moreover, Local Rule 7.1(e) further supports the Court’s dismissal of Ms. Crain’s action given that Ms. Crain has failed to respond to Guidant’s motion. *See* D. Minn. LR 7.1(e) (“In the event a party fails to timely deliver and serve a memorandum of law, the Court may . . . proceed in such other manner as the Court deems appropriate.”).

## CONCLUSION

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

1. Guidant's Motion for Judgment on the Pleadings (Doc. No. [32]) is **GRANTED** insofar as it also requests dismissal pursuant to Federal Rule of Civil Procedure 41(b).

2. Guidant's Motion for Summary Judgment (Doc. No. [39]) is **DENIED AS MOOT.**

3. Ms. Crain's Complaint (Doc. No. [1]) is **DISMISSED WITH PREJUDICE.**

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: September 28, 2011

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