

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA**

Chambers of
DONOVAN W. FRANK
DISTRICT JUDGE

Warren E. Burger Federal Building
316 North Robert Street, Room 738
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April 20, 2007

BY ECF ONLY

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**Re: In re: GUIDANT CORP. IMPLANTABLE DEFIBRILLATORS
PRODUCTS LIABILITY LITIGATION
MDL No. 05-1708 (DWF/AJB)
April 25, 2007 Status Conference**

Dear Counsel:

This letter addresses three issues in advance of our next status conference: (1) procedural issues relating to trial counsel and letter briefs; (2) Mr. Clasby's motion for a Protective Order (*see* MDL No. 05-1708 (DWF/AJB), Doc. No. 1602; Civ. No. 05-2596 (DWF/AJB), Doc. 4); and (3) Guidant's claims of attorney/client privilege in the Independent Panel Transcripts.

Procedural Issues

I have asked that the PSC file notices of appearance in the five bellwether trials numerous times to ensure that the bellwether plaintiffs' counsel and the PSC were on the same page regarding representation and that there would be no confusion regarding which attorneys were representing the bellwether plaintiffs. In response, the PSC has repeatedly assured me that they were in contact with the individual plaintiffs' lawyers and that, with the exception of a few instances, everyone was in agreement concerning which attorneys were

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representing the bellwether plaintiffs. Based on Mr. Clasby's recent filings, I fear that there is no coordination or communication between the PSC and the individual bellwether plaintiffs' counsel.

Therefore, notices of plaintiffs trial counsel shall be filed in all of the bellwether trials no later than Tuesday, April 24, 2007. If later substitutions or additions to trial counsel need to be made, they can be, but at least I will be assured that the bellwether plaintiffs' counsel and the PSC are in communication regarding the bellwether trials.

In my March 27, 2007 letter, I announced two procedures—motions and letter briefs—to address issues as they arise regarding the bellwether trials. The intent of that letter was that each side, meaning the PSC, acting as a clearinghouse for plaintiffs, and Guidant, could submit one letter brief each on any Thursday for issues that need the Court's immediate attention. It was not my intent to allow more than two letter briefs a week, nor was it my intent to receive letter briefs from anyone other than the PSC or Guidant, unless permission was given in advance. The March 27 letter also set forth a procedure for motion briefing and stated that there would be no oral argument, unless requested by the Court. Yesterday, the PSC filed a letter brief, and Mr. Clasby's attorney filed a motion concerning a deposition scheduled for Tuesday, April 24, 2007. Mr. Clasby noticed the hearing on the motion for our next status conference. I am assuming that these multiple filings by plaintiffs is a case of miscommunication, not an attempt to get around my letter.

Based on recent calls to the Court from the Independent Panel's attorney and on Mr. Clasby's motion, it is apparent that the parties are treating the Court's March 27, 2007 letter as an invitation for anyone to submit a letter brief to the Court. I apologize if my letter was unclear, but I do not intend to accept letters from multiple sources. With respect to future letter briefs under my March 27, 2007 letter, there shall be no more than one per side. This will require communication on the part of the PLC and plaintiffs' individual counsel and on the part of Guidant and Guidant-related witnesses, but I am confident that such communication will not be a problem. If either side has a letter from an interested party (for example, Mr. Safir or an attorney representing a witness), that side may attach such a letter to their letter brief. If this procedure is not clear, please contact my chambers for clarification. Also, if a third-party wishes to file a letter brief independent of the PSC's or Guidant's letters, they shall contact my chambers to ask for permission. Finally, as I stated before, the letter briefs are only for issues that need the Court's immediate attention. The procedures outlined in my letter for motions should be used for all other issues that arise.

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Mr. Clasby's Motion

With respect to Mr. Clasby's motion, I will make an exception and treat it as a letter brief under my March 27 letter, and Guidant shall respond to the motion in its Monday, April 23, 2007, letter brief. I am extremely hopeful, based on the timeline involved with Dr. Maradie's treatment of Mr. Clasby and my prior Order, that the parties will work to resolve this issue before the status conference.

Attorney/Client Privilege

On March 16, 2007, the Court ordered Guidant to produce a copy of the transcript from the Independent Panel that was redacted according to the requirements set forth in PTO No. 30. On March 30, 2007, Guidant produced a redacted copy of the transcript to Plaintiffs. In certain places, Guidant redacted portions of the transcript based on attorney/client privilege. Plaintiffs objected to the attorney/client redactions in a April 5, 2007 letter. On April 10, 2007, the Court ordered Guidant to provide an unredacted copy of the transcript to the Court for an *in-camera* review.

Guidant and Mr. Safir have both represented to the Court that the Panel is truly independent of Guidant and that Mr. Safir was counsel to the Independent Panel only. (*See* Guidant's March 2, 2007 letter and Mr. Safir's March 5, 2007 letter.) Despite this, Guidant now appears to be asserting that there was an attorney/client relationship between it and the Panel's lawyer and between Guidant's FDA counsel and the Panel. Guidant also appears to be asserting that any time the Panel's lawyer speaks, even in the presence of third-parties, those statements are somehow privileged. The juxtaposition of Guidant's claim that the Panel is completely independent and its claims of attorney/client privilege is perplexing. Given this, the Court respectfully directs Guidant to explain its position in its Monday letter brief. If Mr. Safir wishes to respond to this issue, Guidant may attach his response to its Monday letter.¹

Finally, in reviewing the unredacted transcript, it is apparent that Guidant interpreted PTO No. 30 in a way that the Court did not intend. PTO No. 30 provides:

¹ I will also make an exception and allow a response by Dr. Myerberg's attorney, who appears to be the same as the attorney for the Independent Panel or at least from the same law firm, on the issue on his deposition. Based on the parties' letters and calls to my chambers, it appears that the parties have already discussed such a response.

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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 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.

(PTO No. 30 at 3-4 (emphasis added).)

Mr. Safir and Guidant represented to the Court that the Panel had "executive sessions" that "did not involve company employees" and that "represent confidential deliberations of the [P]anel." (Guidant's March 2, 2007 letter at 4; *see also* Mr. Safir's March 5, 2007 letter at 1.) Based on these representations, it was the Court's intention that the only portions of the Independent Panel's comments that could be redacted in their entirety were those deliberations that occurred in the Panel's executive, closed-door sessions. If a Panel member made comments while a witness was present, related to the witness's comments, or were eventually responded to by the witness, the Court intended for Guidant to redact only the identity of the Panel members making the comments, not the comments themselves.

Obviously, PTO No. 30 was not a model of clarity because Guidant redacted in its entirety, although not consistently, comments made by Panel members during a witness's testimony if those comments were first responded to by another Panel member before a witness could answer or if the comments by the Panel member were long. And Guidant redacted the entire portions of its "closed" sessions, even though Dr. Lorell and possibly Vic

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Runowicz were present during most of them. These redactions were not consistent with the spirit and intent of PTO No. 30 and must be changed at a date and time to be decided after the Court rules on the attorney-client privilege issues.

Very truly yours,

s/Donovan W. Frank

DONOVAN W. FRANK
Judge of United States District Court

DWF:rlb

c: Honorable Arthur J. Boylan